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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

This is a significant time for the Criminal Justice Section both in issues presently confronting it, as well as planning for future events.

Of special import is proposed legislation regarding the taking of a DNA sample from accused criminals. Separate legislation has been introduced that would require providing DNA at felony arrests for all Penal Law arrests and whether those who are either mandatory or discretionary youthful offenders would be included. The discussion was long and spirited over the internet, and the final vote of the Executive Committee at its September 21, 2010 meeting supported providing DNA for all felony arrests in a close vote and to oppose the requirement to provide DNA in all other proposed circumstances. This topic will receive further discussion in the future and is sure to be hotly debated, not only in our Section but also with NYSBA and the state legislature.

The Section Vice Chair, Marvin Schechter, has graciously agreed to organize an extensive CLE on the issue of evidence with some very prominent speakers to be held sometime in May, 2011 in the Capital Region. As of this writing, the exact date and location have yet to be selected, but it is sure to be in an attractive venue and a convenient time, as well as deliver an informative and useful program with the added benefit of CLE credits. Keep watching for the announcement of the programs and be sure to register early.

We are always looking for ways to increase our membership. If you have any ideas that you believe would be of special interest to our Section regarding services that we can provide or benefits that we can offer, we certainly invite your input. Please feel free to e-mail me at the address provided with any suggestions or concerns that you may have.

Hopefully, all your holidays were happy and healthy and I wish all the best for 2011.

**James P. Subjack**

# Message from the Editor

With this issue, we begin our ninth year of publishing the *New York Criminal Law Newsletter*. We have endeavored to make our issues both interesting and informative. Over the years, we have covered a variety of issues affecting the practice of criminal law, and have tried to keep up to date with any new statutory and case law developments. We have provided this information to criminal law practitioners on an expeditious basis. I thank our members for their continued support and continue to request articles for possible publication and comments regarding our publication.

In this issue, our first feature article deals with the ever-evolving concept of depraved indifference as discussed by the New York Court of Appeals during the last several years. Paul Shechtman, a leading criminal law practitioner and a regular contributor to our *Newsletter,* discusses the latest case by the Court of Appeals in the area and reviews the development of the concept during the last eight years. In our second feature article, we present an informative discussion of the rape shield law written by Gary Muldoon, a first time contributor to our *Newsletter*. In our third feature article we discuss the recent election for New York State Attorney General, and provide a biographical sketch of the winner of the November election, who assumed office on January 1, 2011. In our final feature we are again pleased to present an annual review of recently enacted criminal law legislation written by Justice Barry Kamins. Judge Kamins has been a regular contributor to our *Newsletter*, and his annual update is always one of the highlights of our issue.

The New York Court of Appeals commenced hearing cases in early September, following its summer recess, and several significant cases in the criminal law area have been decided during the last few months. The United States Supreme Court also opened its new term on October 4, 2010, with newly appointed Justice Elena Kagan assuming her place on the Court. Significant decisions from both the New York Court of Appeals and the United States Supreme Court are discussed in the appropriate sections in this *Newsletter*.

As in the past, the New York State Bar Association and our Criminal Justice Section will be holding their Annual Meeting in New York City. This year the meeting will be held at the Hilton Hotel, located at 1335 Avenue of the Americas (6th Avenue). The date for the meeting, CLE program and luncheon has been scheduled for Thursday, January 27, 2011. Details regarding these events have been forwarded in separate mailings, and we hope that many of our members are able to attend.

**Spiros A. Tsimbinos**

## Request for Articles

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

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

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

**www.nysba.org/CriminalLawNewsletter**

# New York Court of Appeals Continues to Deal with Issue of "Depraved Indifference"

By Paul Shechtman

For the last eight years, the New York Court of Appeals has struggled to give content to the words "depraved indifference."[1] This past June, the Court decided *People v. Valencia*, in which the issue was presented yet again.[2] The Court, however, said little (it resolved the appeal in two sentences) and left hard questions for another day.

### A.

On the evening of November 17, 2005, Alberto Valencia got drunk at a friend's house in Nassau County. When he left to drive home to Queens, his blood-alcohol level was above .21. Driving 60 miles per hour, he traveled northbound in a southbound lane of the Wantagh State Parkway. He passed five wrong-way signs; seven overhead exit signs, which he could not read because he was approaching them from behind; and the backs of 60 other signs. Several drivers swerved to avoid a collision, and some flashed their lights. Four miles down the parkway, Valencia smashed into another vehicle, seriously injuring its driver. Asked by a medical technician whether he knew he had driven the wrong way and hurt someone, Valencia responded "I don't know and I don't care."

Valencia was indicted for assault in the first degree (reckless depraved indifference assault) and other charges, and opted for a bench trial. At the conclusion of the proof, the trial court found that "a reasonable doubt exists as to [whether] the Defendant's…actions were of a depraved nature at the time of the incident or moments before." That finding rested on the Court's belief that Valencia "was simply oblivious" to the warnings and the danger. Nevertheless, the Court found Valencia guilty of the depraved indifference charge: his conduct prior to his state of oblivion—his drinking knowing that he would be driving—evidenced his depravity and set in motion the chain of events that led to the victim's injuries.

On appeal, a divided Second Department reversed the assault in the first degree conviction.[3] It rejected "the prosecution's contention that the *mens rea* component of depraved indifference assault may be satisfied by considering the Defendant's state of mind at a point much earlier in time than the accident." Valencia's state of mind when he was drinking, the majority wrote, was "too temporally remote from his operation of the vehicle." Justice Mark Dillon dissented on the issue and granted the People leave to appeal.

### B.

In their brief to the Court of Appeals, the People spent considerable time explaining what they were *not* arguing. First, they were not arguing that "Defendant was aware of what he was doing while he was driving, and that with depraved indifference to human life…continued on his course of conduct until the precise moment of the collision." Second, they were not contending that a person can never escape liability for depraved indifference when his unawareness of grave risk results from his voluntary intoxication. Third, they were not disputing that "the *mens rea* of depraved indifference to human life had to exist simultaneously with the *actus reus*."[4]

What then were the People arguing? Their argument was that the *actus reus* of the crime was Valencia's "conscious decision to drink, and to continue drinking to a state of dangerous intoxication—at a time when he…had reason to know he would soon be driving himself home—[and] this conduct evinced his grave indifference to human life, and it was…one of the causes of the ultimate harm inflicted on the victim." That is to say, it was Valencia's "sober decision" to keep drinking that "demonstrated a depraved indifference to foreseeable lethal consequences."

The Court of Appeals rejected the People's argument in a two-sentence memorandum:

> There is insufficient evidence to support a conviction for depraved indifference assault. The trial evidence established only that Defendant was extremely intoxicated and did not establish that he acted with the culpable mental state of depraved indifference.

Judge Victoria Graffeo concurred, writing separately to emphasize that the Court was not deciding whether "the voluntary consumption of alcohol to the point of extreme inebriation precluded[s] the formation of a depravedly indifferent state of mind." And she encouraged the Legislature to resolve "this perplexing question." Judge Theodore Jones also concurred to "express [his] position on the necessity of a temporal connection between *mens rea* and *actus reus* in the context of depraved indifference offenses."

### C.

Is *Valencia* rightly decided? Consider this hypothetical. D gets drunk at a bar and refuses all offers to drive him home. He tells his friends that they drive too slowly. When reminded that he narrowly missed getting into a serious accident the last time he drove drunk, he scoffs and says "who cares." He then speeds off, so drunk that he is "oblivious." He runs five red lights before colliding

with another vehicle, causing serious injury to its driver. Depraved indifference assault? One would think that if a jury returned a guilty verdict, an appellate court should sustain it. That D was "oblivious" underscores his moral depravity; it does not negate it.

If D is guilty of depraved indifference assault in our hypothetical, then why not in *Valencia*? There are two answers to that question. First, the People chose not to argue that Valencia's course of conduct supported a finding of depraved indifference at the time of the collision. Instead, they asked the Court of Appeals to look back to the time of drinking and argued that getting drunk knowing that one was about to drive was sufficient to prove actus reus, recklessness, and depravity. But as Judge Robert Smith observed at oral argument, that proves too much. It would mean that any person who gets drunk at a bar, drives home, and causes serious injury is guilty of a depraved indifference crime, even if he was trying to drive safely.

Second, what makes D's conduct depraved in our hypothetical is the totality of the circumstances, including his decision not to take a ride from his friends; his intention to speed even though drunk and his "who cares" attitude when alerted to the risk he would be creating. As Chief Judge Jonathan Lippman noted at oral argument, there was no similar proof in *Valencia*. All we know is that Valencia got very drunk and still drove. He was surely reckless, but to conclude that he manifested "wickedness" or "inhumanity" (the touchstones of depraved indifference) is a stretch.[5]

All of which is to say that *Valencia* reached the Court of Appeals in a peculiar posture. The trial Judge had found that Valencia was not depraved at the time of the collision. Believing themselves bound by that finding, the People advance the novel theory of depravity at the time of drinking. And because the record was devoid of aggravating facts at the time of drinking (other than that Valencia drank far too much), the People's theory required the Court to equate drinking-with-intent-to-drive with depraved indifference. For a Court that has spent almost a decade narrowing the meaning of depraved indifference, adopting the People's theory would have meant traveling the wrong way.

### D.

Which leaves Judge Graffeo's question about the relationship between voluntary intoxication and depravity. In 1983, in *People v. Register*, the Court of Appeals held that the "defense of intoxication" was unavailable in a depraved indifference prosecution because depraved indifference was not "a mental element" but related to the objective circumstances under which the crime occurred.[6] Beginning in 2003, the Court "gradually and perceptibly" changed the meaning of depraved indifference from "an objectively determined degree-of-risk standard to a mens rea" element.[7] A defendant must act with "utter disregard for the value of human life" to be guilty of a depraved indifference crime.[8]

But the law could not be otherwise. Consider two more hypotheticals. Assume that A is intoxicated and shoots through an open window intending to kill X, whom he sees seated inside. The bullet strikes X and kills him. Under Penal Law §15.25, A may introduce evidence of intoxication to seek to reduce intentional murder to a lesser crime.[9] Next, assume that B is intoxicated and shoots through an open window aware of a high risk that Y and Z are in the room. The bullet strikes Y and kills him. If depraved indifference murder is the moral equivalent of intentional killing, then there is no sound reason to allow A to introduce evidence of intoxication but deny B the opportunity.

In short, the relationship between intoxication and depravity is not perplexing. In some cases, a defendant may be able to show that intoxication rendered him less morally culpable—i.e., that he was drunk and not evil. In other cases intoxication may *support* a depraved indifference charge, as when someone drinks to get up the nerve to shoot wildly into a crowd. Intoxication is simply evidence that a jury may consider in assessing whether a defendant acted with utter disregard for life.

## Endnotes

1. See, e.g. *People v. Sanchez*, 98 N.Y. 2d 373 (2002); *People v. Suarez*, 6 N.Y. 3d 202 (2005); *People v. Feingold*, 7 N.Y. 3d 288 (2006).
2. *People v. Valencia*, 2010 WL 2399561.
3. *People v. Valencia*, 58 A.D. 3d 879 (2d Dept. 2009).
4. The People's brief can be found at 2009 WL 6616030; Valencia's brief is at 2010 WL 2585055.
5. See *People v. Suarez*, 6 N.Y. 3d at 214; *see also* Penal Law §15.05(3) ("a person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto").
6. *People v. Register*, 60 N.Y. 2d 270 (1983).
7. *Policano v. Herbert*, 7 N.Y. 3d 588 (2006).
8. *People v. Feingold*, 7 N.Y. 3d at 296.
9. Penal Law §15.25 provides that "[i] intoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged."

**Paul Shechtman is a partner in the firm of Stillman, Friedman & Shechtman, P.C. He is a leading criminal law practitioner who has lectured widely and has written numerous articles in the field of criminal law and procedure. He also serves as a professor at Columbia Law School, and has been a frequent contributor to our *Newsletter*. He also was recently appointed by Chief Justice John Roberts to a special advisory committee dealing with the Federal Rules of Evidence.**

# Five Exceptions to the Rape Shield Law

By Gary Muldoon

## The Rape Shield Law

In the last three decades, the New York State Legislature, largely from the pressure of public opinion, enacted several Statutes which made it easier for prosecutors to obtain convictions in sex crime cases, and made it more difficult for defense lawyers to defend persons charged with those crimes. One of these Statutes was the Rape Shield Law, which was codified in CPL § 60.42. CPL § 60.42 is a rule of evidence and provides that evidence of a victim's sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article 130 of the Penal Law, unless such evidence is classified as a specific exception.

CPL § 60.42, by its very terms, applies to Penal Law Article 130 crimes. A related Statute, CPL § 60.43, applies to prosecutions under other sections of the Penal Law. A Rape Shield Law for juvenile delinquency cases is also contained in the Family Court Act at Section 344.4. The Statute's premise is based upon the belief that a claimant's chastity, or lack thereof, is typically of little relevance with a sex offense charge; thus the Complainant's prior sexual history is normally inadmissible. Case law has established that the evidentiary bar also applies where a victim is deceased. See *People v. Setless,* 213 A.D.2d 900 (3d Dept 1995). The Statute, however, specifically provides five exceptions where evidence of the Complainant's prior history may be ruled to be admissible. See CPL § 60.42 (1 to 5); 35A and NY Jur 2d, Criminal Law: Substantive Principals and Offenses, §§ 724 et seq.

## The Five Exceptions

The first listed exception involves proof of the victim's prior sexual conduct with the Defendant. Case law which has discussed this exception are *People v. Badine*, 301 A.D.2d 178 (2d Dept 2002); *People v. Westfall*, 95 A.D.2d 581 (3d Dept 1983); *People v. Goodwin*, 179 A.D.2d 1046 (4th Dept 1992). In *People v. Goodwin*, the Appellate Court ruled that the Trial Judge had properly precluded the questioning of the Complainant regarding an incident in which he supposedly engaged in oral sex with another person while the Defendant was present. The Court found that the exception was not applicable since the incident did not involve her prior relationship with the accused.

The second exception involves a victim's previous prostitution conviction within three years of the charged offense. Case law regarding this exception can be found in *People v. Curry*, 11 A.D.3d 150 (1st Dept 2004). The third exception involves rebutting evidence by the prosecution of the victim's failure to engage in sexual activity during a particular period of time. See *People v. James*, 98 A.D.2d 863 (3d Dept 1983).

The fourth exception involves the ability to rebut medical evidence that the Defendant is the cause of pregnancy or disease or source of semen in the victim, including injuries allegedly caused by the Defendant. See *People v. Labenski*, 134 A.D.2d 907 (4th Dept 1987); *People v. Jovanovic*, 263 A.D.2d 182 (1st Dept 1999).

The fifth exception involves the interests of justice. This broader exception vests considerable discretion in the trial judge. An offer of proof or other hearing should be allowed, with the Court making findings on the record whether the evidence is ruled admissible or inadmissible. See *People v. Williams*, 81 NY2d 303 (1993). While a judge may exclude proffered evidence under the rape shield law, the failure to exercise discretion in determining admissibility under an exception is error. See *People v. Becraft*, 198 A.D.2d 868 (4th Dept 1993).

The *Jovanovic* case, supra, is a well known decision which deals with several of the exceptions discussed above. In J*ovanovic*, e-mail messages were sent between the Complainant and the Defendant, in which the Complainant describes consensual sado-masochistic sexual encounters with a third party. The messages in question were redacted at trial. On appeal, this was found to be error for several reasons, and the Defendant's conviction was reversed. The messages amounted to prior statements of the Complainant, rather than her prior sexual encounters, and thus was not within the rape shield law. The statements were not offered for their truth. Further, the intimate nature of the statements in *Jovanovic* amounted to prior sexual conduct with the Defendant, and thus admissible under the rape shield law's first exception. The statements were also admissible under the second exception: the prosecution had contended that Defendant caused Complainant's bruising, and the messages indicated that the Complainant and Defendant were engaged in a sado-masochistic relationship with another. Under the fourth exception, the term "disease" in the Statute extends to injuries allegedly caused by a defendant.

Finally, the messages were relevant under the "interests of justice" exception for several reasons: to establish that Complainant conveyed her interest in engaging in sexual practices with him; to establish Defendant's understanding and beliefs of Complainant's willingness, and to establish the Complainant's possible motive to fabricate. The testimony was relevant to the state of mind of both the Complainant (as to her consent) and Defendant (as to his reasonable beliefs of Complainant's intentions), and was central to the defense.

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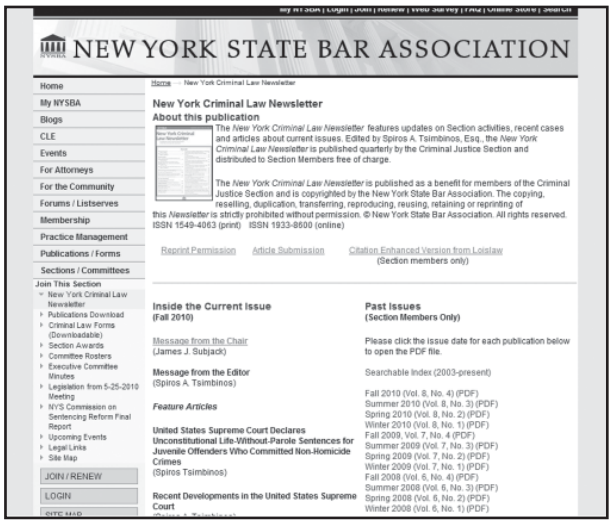


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The Trial Judge's ruling in *Jovanovic*, to redact the e-mail messages, "essentially gutted" the Defendant's right to testify in his own defense, as it prevented him from offering any evidence justifying an asserted belief that the Complainant had indicated a desire to participate in sado-masochism with Defendant. While the rape shield law does not violate the constitutional right of confrontation and to present a defense, *People v. Williams*, supra; *People v. Segarra*, 46 A.D.3d 363 (1st Dept 2007); *People v. Baldwin*, 211 A.D.2d 638 (2d Dept 1995), the trial ruling violated the right of confrontation. "Where the precluded evidence is highly relevant, however, the deprivation of fundamental constitutional rights cannot be justified merely by the protection of the Complainant from an attack on her chastity."

### Beyond the Exceptions

Separate from the five statutory exceptions, there are also other areas where the Rape Shield Law does not apply. The Second Department in *Jovanovic* differentiated "between evidence of prior sexual conduct (to which the Statute expressly applies) and evidence of statements concerning prior sexual conduct…" (emphasis in original), *People v. Curry*, 11 A.D.3d 150 (1st Dept 2004) (Complainant's statement inadmissible).

The preclusion of evidence under the rape shield law does not necessarily bar the defense from exploring related issues. Where a Defendant was barred from questioning the Complainant's sexual relationship with a boyfriend, the ruling did not bar exploring other aspects of that relationship. *People v. Halberd*, 175 A.D.2d 88 (1st Dept 1991), aff'd, 80 NY 2d 865 (1992).

Additionally, previous false sexual accusations by the Complainant against the Defendant are admissible to impeach the Complainant and show bias. *People v. Harris*, 151 A.D.2d 981 (4th Dept 1989). See also, *People v. Hunter*, 11 NY3d 1 (2008) (*Brady* violation).

In handling criminal law matters, both the prosecution and the defense should be intimately familiar with the Rape Shield Law and its various exceptions. I hope that this article will contribute to a better understanding of that Statute and its implications.

**Gary Muldoon is a graduate of Skidmore College and State University of New York at Buffalo Law School and a partner in the firm of Muldoon & Getz in Rochester. He is the author of books on criminal law, including *Handling a Criminal Case in New York* (Thomson Reuters).**

# New York State Elects New Attorney General

By Spiros A. Tsimbinos

As a result of the September primary election, after a hotly contested race, Eric T. Schneiderman, who had served in the State Senate for several years, emerged as the winner of the Democratic nomination for New York State Attorney General. He narrowly defeated Kathleen Rice, the Nassau County District Attorney, who had been perceived to be the front-runner.

Mr. Schneiderman faced Daniel Donovan, the Richmond County District Attorney, in the general election, which was held on November 2, 2010. District Attorney Donovan was viewed as the Republican candidate with the best chance of winning statewide office in New York, and it was predicted that the Attorney General's race would be closely contested. At the general election, however, although Mr. Donovan polled the highest Republican total of any statewide candidates, and received approximately 44% of the vote, the election was won by Mr. Schneiderman, who received about 55% of the total vote cast. Mr. Schneiderman won the election by receiving heavy majorities within New York City, while Mr. Donovan received substantial votes upstate and in Nassau County.

Thus, on January 1, 2011, Mr. Schneiderman took the oath of office as New York's next Attorney General, replacing Andrew Cuomo, who moves on to the governorship. Mr. Schneiderman is 55 years of age, has resided in Manhattan, and is divorced with one child. He was first elected to the State Senate in 1998, and recently held the important post of Chair of the Senate Codes Committee. In that position, Mr. Schneiderman was quite active in achieving the reform of the Rockefeller Drug Laws. He is basically viewed as being quite liberal in his philosophy and largely pro-defense in his views. From 1984 to 2001, he was a partner in the law firm of Kirkpatrick and Lockhart. From 1982 to 1984, he also served as a Law Clerk to U.S. District Court Judge Richard Owen. He is a graduate of Harvard Law School and Amherst College.

Immediately after his election, Mr. Schneiderman announced that he would begin selecting the key personnel to staff his office, and he stressed that he would attempt to achieve reforms in Albany, and would place the matter of public corruption at the top of his priorities. He also stated that he would have a deep commitment to progressive causes, such as civil rights and colorblind justice. We congratulate Mr. Schneiderman on his election and wish him well in his new office.

# Newly Enacted Criminal Law Legislation

By Barry Kamins

This article will discuss new criminal justice legislation signed into law by the Governor that contains amendments to the Penal Law, Criminal Procedure Law, Vehicle and Traffic Law and other related statutes. It is recommended that the reader review the legislation for specific details, as the following discussion will highlight key provisions of the new laws.

In the past legislative session, three new laws attracted significant publicity and garnered a great deal of attention in the legal community. First, the Governor signed a bill that prohibits the New York City Police Department (and any police department in a city with a population of one million or more) from electronically storing the names and addresses of individuals stopped on the street but found to have done nothing wrong.[1] Since 2001, the Police Department has been required to disclose to the City Council statistics on the number and race of those stopped by the police pursuant to Criminal Procedure Law 140.50. Since 2005, the police have conducted two-and-a-half million stops and last year alone, they stopped over a half a million people. Of that group, ninety percent were people of color and nine out of ten persons stopped were released without any further legal action taken against them. While the new law prohibits the police from entering into its electronic database the name, address and social security number of those released, the law does not prohibit the police from entering generic identifiers such as gender, race, location and reason for the stop.

Proponents of the bill argued that the racial disparity in the stops resulted in an unconstitutional inventory of primarily young black and Hispanic males who had not been arrested. In addition, critics of the database argued that the practice raised significant privacy issues and suggested the possibility that innocent people will more likely be targeted in future criminal investigations.

Law enforcement officials argued that the new law will deprive them of an investigative tool and that the database had been used in the past to solve crimes. The New York City Police Commissioner warned that the bill will lead to an increase in crime. Although the new law prohibits the collection of names in an electronic database, police officers have been instructed that they can continue to record the information manually on worksheets and paper files that can be stored in individual precincts.

A second new law that will have significant consequences for New Yorkers is the New York State Child Passenger Protection Act, commonly referred to as Leandra's Law.[2] This law was enacted in response to the October 2009 death of eleven-year-old Leandra Rosado, who was thrown from a car being driven on the West Side Highway by a drunk driver. The law has two main components: child safety provisions and ignition interlock provisions. The former went into effect on December 18, 2009, while the latter took effect on August 15, 2010.

Pursuant to the child safety provisions, any driver convicted of the misdemeanor offense of Driving While Intoxicated by alcohol or impaired by drugs will be guilty of an E felony offense if a child under the age of sixteen was present in the vehicle. As of July 2010, 311 individuals in the state have faced felony charges as a result of the new law. In addition, certain Penal Law crimes are elevated to the next higher felony level if, during the commission of the crime, the defendant drives while intoxicated and causes injury or death to a child under the age of sixteen: Vehicular Assault in the Second Degree and Vehicular Manslaughter in the Second Degree.

The second component of Leandra's Law went into effect August 15, 2010 and will affect any driver who is merely convicted of Driving While Intoxicated as a misdemeanor or felony (whether a child is present or not) pursuant to Vehicle and Traffic Law 1192(20), (2-a) or (3). The new law requires anyone who is sentenced for a DWI offense that was committed on or after December 18, 2009 to install and maintain an ignition interlock device, for a minimum of six months, in any vehicle he or she owns or operates. The device prevents the car from starting if the operator is not sober. New York becomes the tenth state to utilize these devices on a mandatory basis.

Each year, approximately 25,000 individuals are convicted of DWI charges in this state. Under the new law, such individuals must receive, in addition to the imposition of any fine or imprisonment, a sentence of probation or conditional discharge, a condition of which is the installation of the ignition interlock device. In New York City, the Probation Department will monitor the compliance of motorists sentenced to probation, while the Queens District Attorney's office will be responsible for monitoring compliance by persons sentenced to conditional discharges. Each of the five District Attorneys in New York City will designate a liaison to the monitor; the monitor will be responsible for informing the courts in each county when a defendant is not in compliance with the regulation.

Once installed, the driver will be required to blow into the device before starting the car. The car will not start if the device registers a blood alcohol level of.025 percent or higher. In addition, drivers will be required to blow into the device at regular intervals while driving. If the device registers in excess of .025 percent or higher while the vehicle is being operated, the lights in the car

will begin to flash and a harsh sound will be emitted, rendering the car incapable of being driven.

The regulations require a defendant, at his own expense, to install the device within ten business days of sentence. If a defendant is financially unable to afford the device, the court can waive the costs. Once a month, the defendant will be required to report to a location where the data recorded by the device can be analyzed to determine how often the driver exceeded the blood alcohol limit. It will now be a Class A misdemeanor if a defendant allows another person to blow into the device for the purpose of starting the vehicle or a defendant operates a vehicle without an interlock device when he has been required to do so by the court. If a defendant drives a vehicle as part of his employment, the requirement for a device can be waived if the employer has been notified of the defendant's driving restrictions and the defendant provides a letter from the employer granting the defendant permission to drive the employer's vehicle.

Seven manufacturers have been approved to provide the device to defendants, and they have contracted with installers at various locations around the state. Each of the manufacturers produces devices of varying technological sophistication. Some of the devices have cameras to record who is blowing into it—this will deter a defendant from having another individual start the vehicle.

The third piece of legislation that garnered substantial publicity was the creation of a Statewide Office of Indigent Services.[3] This entity will study and make recommendations for improvement in the current indigent defense system. A nine-member Indigent Legal Services Board was created to oversee the new agency. It will be chaired by Chief Judge Jonathan Lippman.

The legislature has enacted a new crime: Strangulation.[4] This conduct, which involves the intentional blocking of a victim's breathing or circulation, is one of the most lethal forms of domestic abuse. However, in a majority of cases involving strangulation, there are no visible injuries and, therefore, prosecution under the assault statutes has been difficult, if not impossible.

The legislature reacted to numerous reports that strangulation is frequently used in a domestic relationship to silence a victim of abuse without any concern by the abuser that there will be any prosecution. The victim of the abuse suffers the torment of near asphyxiation rather than any actual pain or injury.

Strangulation is defined in the new statute as impairing or impeding, for any period of time, the normal breathing or blood circulation of the victim by intentionally applying pressure on the throat or neck of the victim or by intentionally blocking the victim's nose or mouth. The conduct constitutes an A misdemeanor and may be elevated to a Class E or Class C felony, depending on certain aggravating factors.

Mayor Bloomberg signed into law an amendment to New York City's Administrative Code that creates the crime of Criminal Street Gang Initiation Activity, a Class A misdemeanor.[5] The new law criminalizes initiation activities in which a person engages for the purpose of joining a gang. Although such activity can constitute one of a number of underlying crimes (assault, burglary, etc.), an individual can now also be charged with Gang Initiation Activity in addition to the underlying crime.

In addition to the new crimes mentioned above, the Penal Law has been amended to expand the definition of certain existing crimes. For example, a person can now be guilty of the crime of Defrauding the Government, when a public servant uses government property or resources for private business purposes and the services or resources have a value in excess of one thousand dollars.[6] In addition, the definition of "sexual contact" has been expanded to include the emission of ejaculate.[7] This will allow for the prosecution of individuals who ejaculate on women but who make no physical contact. Previously, such offenders could only have been charged, at the most, with Public Lewdness; they now can be charged with sexual abuse.

The assault statutes have been amended to increase the penalties for assaults on registered nurses, licensed practical nurses and sanitation enforcement agents.[8] Previously, assaults on these classes of individuals constituted only a Class A misdemeanor; they now constitute a Class C felony.

The Penal Law has also been amended to provide greater protection to individuals who are incapable of taking care of themselves. Previously, a caretaker of a person over the age of sixty could be charged with endangering that person's welfare. Under an amendment, a caregiver can also be charged with endangering the welfare of *any* person who is unable to care for himself or herself because of a physical disability, mental disease or defect.[9] Other new legislation expands the laws dealing with the abandonment of a child. Previously, the Penal Law created an affirmative defense where a person leaves an infant not more than five days old with an appropriate person and notifies the authorities of the child's location. That affirmative defense has been repealed and the new legislation eliminates criminal liability where a person leaves an infant who is not more than 30 days old with an appropriate person.[10] This will provide parents with more time to make their decision and not subject them to criminal prosecution should they choose to abandon their child in a responsible manner.

The larceny statutes have also been amended. The theft of or from an ATM machine has been criminalized and now constitutes a class D felony.[11] The definition of Grand Larceny in the Fourth degree now includes religious items displayed *outside* places of worship.[12]

The Penal Law has been amended to promote programs that provide access to clean needles and syringes and reduce the transmission of blood-borne diseases such as HIV. Although the Public Health Law was amended years ago to permit the possession of needles and syringes as part of a needle exchange program, participants in these programs continue to be arrested and charged with possession of lawfully acquired syringes and residual amounts of controlled substances present on these syringes. To address this problem, the Legislature amended the crime of Criminal Possession of a Controlled Substance in the Seventh Degree to make it clear that it is not a violation of the statute when an individual possesses only a residual amount of a controlled substance on a needle or syringe that he or she is lawfully entitled to possess under the Public Health Law. Similarly, possession of the needle or syringe is not illegal.[13]

Finally, the Legislature created an affirmative defense to Unlawfully Dealing with a Child (providing alcohol to minors) that the defendant complete an alcohol training awareness program.[14] In addition, gun manufacturers can now transport firearm silencers into the state and the transportation of slot machines for the purpose of repairing or assembling them is also lawful.[15]

A number of *procedural* changes have been enacted by the Legislature. While most police agencies around the state, as a matter of custom, had permitted arrested persons to make "one phone call," the Legislature has now codified that right.[16] In the past, some law enforcement agencies have restricted a free phone call to the local area code of the specific agency. The new law permits a call to any telephone number in the United States or Puerto Rico for the purpose of obtaining counsel or informing a relative or friend of the arrest. Another new law expands the ability of uniformed court officers to execute bench warrants in counties around the state.[17]

Finally, a new procedural change will benefit victims of sex trafficking who have been convicted of prostitution offenses. The new law adds an additional ground to CPL 440.10, that will now permit a defendant to move to vacate a conviction when the underlying charge was prostitution-related and the defendant's participation in the offense was a result of having been a victim of sex trafficking.[18]

Each year the Legislature enacts legislation to assist victims of a crime and 2010 was no exception. Two new laws cloak certain victim-related information with an added degree of confidentiality. First, voter registration records of domestic violence victims will remain confidential.[19] Second, victims of domestic violence, including family or household members, are now permitted to cast their votes at the Board of Election by paper ballot instead of a polling place.[20] Each of these laws affords domestic violence victims the security they deserve.

Several new laws will affect individuals who must register as sex offenders. First, a level 2 or 3 sex offender will now be guilty of Criminal Trespass in the Second Degree if he or she enters a school attended or formerly attended by the victim of the crime. The Chief Administrator of the school, e.g., Superintendent, can authorize certain exceptions including permission to enter for the purpose of voting.[21] In addition, the Division of Criminal Justice Services is now required to make sex offender registry information regarding level 2 and 3 offenders available to municipal housing authorities.[22] This law was a reaction to a report that 126 sex offenders were found to be living in New York City public housing facilities.

The Legislature enacted a number of laws relating to sentencing. First, a probation report will no longer be necessary in misdemeanor cases when a judge does not impose a jail sentence in excess of 180 days.[23] Previously, a report was required when the jail sentence was in excess of 90 days. The new law eliminates the needless delay and expense for a pre-sentence investigation on sentences of short duration. However, a court still retains the discretion to order a report in any case.

A second new law allows a court to require, as part of a sentence for a hate crime, that the defendant complete a program, training session or counseling session, directed at hate crime prevention and education.[24] Finally, the Drug Law Reform Act of 2004 was amended to clarify that a sentence of parole supervision can be either an indeterminate sentence of imprisonment or a determinate sentence of imprisonment imposed upon an "eligible defendant."[25]

Certain new laws will have an impact on sentenced prisoners. Initially, the Legislature significantly expanded eligibility for the SHOCK Incarceration Program.[26] New York State has the largest SHOCK Incarceration Program for sentenced prisoners in the nation. The program is an intensive "boot camp" operation available for male and female inmates convicted of non-violent offenses. It began in 1987 and, each year, supervised crews of shock inmates perform thousands of hours of community service. The new law permits individuals with prior non-violent felony convictions that resulted in a state prison sentence to be eligible for the SHOCK program, when the current felony conviction is a SHOCK eligible offense.

In addition, a new law grants the State Department of Corrections the authority to place anyone who has received a parole supervision sentence into an institution other than the Willard facility in Seneca County.[27] Previously, inmates had challenged the authority of DOCS to do so, claiming that once an eligible offender received a parole supervision sentence, that person had to be transferred to Willard even though, in some cases, Willard did not have the capability of delivering the requisite level of mental health services. Finally, prison inmates may now

perform work for non-profit organizations, in addition to working for the state and public institutions.[28]

The Vehicle and Traffic Law has been amended to remove a conflict between current medical practice and the statutory requirement that only a physician can supervise the drawing of blood which can then be tested for any blood alcohol content.[29] The medical community permits trained medical personnel to routinely withdraw blood from individuals without the direction and supervision of a doctor. However, the Vehicle and Traffic Law mandates that a licensed physician supervise this procedure. As a result, a number of courts have suppressed evidence of blood alcohol content.[30] The law has been amended to permit the procedure to be supervised by a registered professional nurse, a physician assistant, or a certified nurse practitioner. The blood may now be drawn by a clinical laboratory technician, a phlebotomist, or a medical laboratory technician.

Two other new VTL laws impose tougher penalties on sober but unsafe drivers who fail to exercise due care while operating a car and who injure pedestrians.[31] Under one law, a motorist who causes physical injury to a pedestrian or bicyclist while failing to exercise due care shall be guilty of a traffic infraction with a possible sanction of 15 days in jail; a motorist who causes *serious* physical injury shall be guilty of a traffic infraction with a higher monetary penalty. A second conviction within five years will constitute a Class B misdemeanor. A second law mandates that an unsafe driver who causes serious physical injury shall have his license suspended for six months. When a driver is guilty of this offense a second time within five years, the driver will have his license suspended for a period of one year.

Each year the Legislature enacts laws that either extend or repeal existing statutes. In 2010 the Legislature repealed three sections of the loitering statute that had been declared unconstitutional decades ago.[32] Although various courts had struck down these offenses, they remained "on the books" and Police Officers continued to make arrests. Thus, the new law repealed loitering for the purpose of begging,[33] loitering for the purpose of engaging in certain sexual acts;[34] and loitering for the purpose of sleeping in a transportation facility.[35]

The Legislature also extended the sunset date of Kendra's Law until June 30, 2015.[36] The law establishes a procedure for obtaining court orders to require individuals with certain types of mental illness to receive and accept outpatient treatment.

A number of new laws defining criminal conduct involve statutes other than the Penal Law, Criminal Procedure Law and Vehicle and Traffic Law. For example, a recent investigation in Brooklyn revealed the illegal harvesting of bones, tissues and organs from more than one thousand bodies which were then sold to processing companies to be used in unlawful transplant procedures. No precautions were taken to ensure that these transplants were free of disease. A new law, amending the Public Health Law, establishes penalties for unlawfully dissecting, stealing or receiving a dead human body or any tissue from the body for the purpose of selling it.[37]

A second law amends the [38]Judiciary Law to authorize the Attorney General to bring a criminal action for the unlawful practice of law. Previously, the New York Court of Appeals had rendered a decision limiting the Attorney General's jurisdiction to civil proceedings against those practicing law without a license.[39]

The Legislature amended New York's Arts and Cultural Law, dealing with the sale of tickets to places of entertainment, and reinstated a number of provisions that had expired earlier in the year.[40] One of the provisions reinstated criminal penalties for those convicted of various resale violations. The new law increases the fines that may be imposed upon a "firm, corporation or other entity that is not a single person."

Finally, the Judiciary Law was amended to require the Commissioner of Jurors in each county to collect demographic data on jury pools.[41] This law was a reaction to a report in 2006 that minorities are under-represented in civil jury pools in New York County. The new law requires the commissioners to collect and report demographic data on jury pool participation based on race and/or ethnicity, age, and sex and to report such data each year to the Governor, legislative leaders and the Chief Judge.

## Endnotes

1. Ch. 176; CPL 140.50, eff. 7/16/10. A new law also prohibits the creation of any quotas for stops pursuant to CPL 140.50; Ch. 460, Labor Law 215-a, eff. 8/30/10.
2. Ch. 496; VTL 1192, 1193, 1198, 1198-a eff. 11/18/09.
3. Ch. 56; Exec. Law 30, eff. 6/22/10.
4. Ch. 405; Penal Law 120.71, eff. 2/9/11.
5. Law 2010/001; Admin.Code 10-170, eff. 5/31/10.
6. Ch. 1; Penal Law 195.20, eff. 2/12/10.
7. Ch. 193; Penal Law 130.00, eff. 10/14/10.
8. Ch. 318 and 345; Penal 120.05, eff. 11/1/10 and 9/12/10.
9. Ch. 14; Penal law 260.32, eff. 5/22/10.
10. Ch. 447; Penal Law 260.00, eff. 8/30/10.
11. Ch. 464; Penal Law 155.35, eff. 11/1/10.
12. Ch. 479; Penal Law 155.30(9); eff. 8/30/10.
13. Ch. 284; Penal Law 220.03 and 220.45, eff. 10/28/10.
14. Ch. 435; Penal Law 260.20, eff. 9/29/10.
15. Ch. 61; Penal Law 265.20(8), eff. 4/28/10, Ch. 321; Penal Law 225.30, eff. 8/13/10.
16. Ch. 94 and 96; Criminal Procedure Law 120.90(8), eff. 8/24/10.
17. Ch. 10; Criminal Procedure Law 530.70(2), eff. 5/22/10.
18. Ch. 332; Criminal Procedure Law 440.10(h), eff. 8/13/10.
19. Ch. 73; Election Law 5-508, eff. 5/5/10.
20. Ch. 38; Election Law 11-306, eff. 4/4/10.

21. Ch. 315; Penal Law 140.15, eff. 11/1/10.
22. Ch. 278; Correction Law 168-b, eff. 9/28/10.
23. Ch. 179; Criminal Procedure Law 390.20(2), eff. 7/15/10.
24. Ch. 158; Penal Law 485.10(5), eff. 11/1/10.
25. Ch. 121; Criminal Procedure Law 410.91, eff. 6/15/10.
26. Ch. 377; Correction Law 865(1), eff. 8/13/10.
27. Ch. 82; Correction Law 2(20), eff. 5/18/10.
28. Ch. 256; Correction Law 72(2-a), 170(3) and 500-d, eff. 7/30/10.
29. Ch. 169; Vehicle and Traffic Law 1194(4)(a)(1), eff. 7/13/10.
30. *People v. Reynolds*, 307 A.D. 2d 391 (3d Dept. 2003); *People v. Ebner*, 195 A.D. 2d 1006 (4th Dept. 1993); *People v. Olmstead*, 233 A.D. 2d 837 (4th Dept. 1996).
31. Ch. 333 and 409; Vehicle and Traffic Law 1146(b) and 510(2)(b)(xiv), eff. 10/12/10 and 8/13/10.
32. Ch. 232; Penal Law 240.35, eff. 7/30/10.
33. Penal Law 240.35(1); See *Lopez v. N.Y.C., Police Dept*., 999 F. 2d 699 (1933).
34. Penal Law 240.35(3); See *People v. Uplinger*, 58 N.Y.2d 936 (1983).
35. Penal Law 240.35(7); See *People v. Bright*, 71 N.Y.2d 376 (1988).
36. Ch. 139; Mental Hygiene Law 9.61, eff. 6/29/10.
37. Ch. 382; Public Health Law 4216, *et seq*., eff. 11/1/10.
38. Ch. 91; Judiciary Law 476-a(1), eff. 5/25/10.
39. *People v. Romero*, 91 N.Y.2d 95 (1998).
40. Ch. 151; Arts and Cultural Law 25.03, *et seq*. eff. 7/2/10.
41. Ch. 112; Judiciary Law 528, eff. 9/13/10.

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# New York Court of Appeals Review

The New York Court of Appeals began hearing cases again, following its summer recess on September 7, 2010. Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from September 2, 2010 to November 1, 2010.

## Ineffective Assistance of Counsel

***People v. Moore*, decided September 2, 2010 (N.Y.L.J., September 3, 2010, p. 26)**

In a unanimous decision, the New York Court of Appeals affirmed a Defendant's conviction and rejected his claim that he had received ineffective assistance of counsel. The Court held that the Defendant had failed to establish that his Attorney was ineffective because of the failure to request a justification charge. The Court, after reviewing the record, concluded that there were sound strategic reasons for defense counsel's decision, and that, in addition, a showing could not be made that under any favorable interpretation of the testimony presented at trial, a justification charge was justified.

***People v. Mack*, decided September 21, 2010 (N.Y.L.J., September 22, 2010, p. 26)**

In another opinion relating to the claim of ineffective assistance of counsel, the New York Court of Appeals also affirmed the Defendant's conviction and denied the Defendant's claim that he had been denied the effective assistance of appellate counsel. The Court found that a review of the record indicated that the Defendant had failed to establish such a claim.

## Possession of a Weapon

***People v. Riveri*, decided September 23, 2010 (N.Y.L.J., September 24, 2010, p. 26)**

In a unanimous decision, the New York Court of Appeals reversed an order of the Appellate Division and ordered a new trial. The Court concluded that there was a reasonable basis in the evidence viewed in the light most favorable to the Defendant for finding the Defendant not guilty of criminal possession of a weapon in the second degree, and yet guilty of criminal possession of a weapon in the fourth degree. Therefore, the Defendant's request for a lesser included charge should have been granted. In making its decision, the Court reviewed the provisions of Penal Law Section 265.03(1), involving possessing a loaded firearm with intent to use the same unlawfully against another, and Penal Law Section 265.01(1) involving the simple possession of any firearm.

## Dismissal of Appeal

***People v. Brabham*, decided September 23, 2010 (N.Y.L.J., September 24, 2010, p. 26)**

In a 5-2 decision, the New York Court of Appeals dismissed a Defendant's appeal after concluding that the modification which was instituted by the Appellate Division was not on the law alone or upon the law on such facts which but for the determination of law would not have led to reversal or modification. The majority consisted of Chief Judge Lippman and Judges Ciparick, Graffeo, Read and Jones. Judges Pigott and Smith dissented, arguing that although the Appellate Division reduced the Defendant's sentence as a matter of discretion and in the interests of justice by directing that they be served concurrently rather than consecutively, the Court failed to indicate in its decision the mitigating circumstances which led to the reduction.

The dissenters pointed out that under Penal Law Section 70.25(2-c), when a defendant is convicted of bail jumping, that sentence shall run consecutively unless the Court finds mitigating circumstances to warrant a concurrent sentence. Thus, under the clear language of the Statute, the Appellate Division's interest of justice jurisdiction in ordering concurrent sentences is limited to finding mitigating factors and making an explanatory statement of those factors on the record. In the instant case, the Appellate Division, although exercising its interest of justice jurisdiction, failed to comply with the clear mandate of the Statute. In the absence of an explanation of the mitigation circumstances, the Appellate Division was required to run the sentences consecutively. The dissenters thus concluded that because the Appellate Division made an erroneous determination on the law, the appeal should not have been dismissed and the majority was incorrect in its ruling.

## Legally Sufficient Evidence

***People v. Ramirez*, decided September 17, 2010 (N.Y.L.J., September 20, 2010, p. 26)**

In a unanimous decision, the New York Court of Appeals affirmed a Defendant's conviction and determined that the Appellate Division had properly concluded that the verdict was supported by legally sufficient evidence. The Court stated that in viewing the evidence in the light most favorable to the prosecution, a reasonable jury could have inferred that the Defendant constructively possessed the drugs and drug paraphernalia located in an apartment in which the Defendant himself was found. On a related issue, the Court also concluded that the Defendant's claim was unpreserved for review because of failure to raise a proper objection. This issue involved the claim that the trial court should have shown a jury note to counsel. The Court found that defense counsel had notice of the contents of the note and the Court's response, and had failed to raise any objection at the time.

## Sufficiency of Evidence

***People v. McKinnon*, decided October 14, 2010 (N.Y.L.J., October 15, 2010, p. 27)**

In a 6-1 decision, the New York Court of Appeals held that the evidence was insufficient to support the Defendant's conviction for first degree assault, because it did not show that the victim of the assault was seriously disfigured. Noting that the term "disfigure seriously" is not defined in the penal law, the Court turned to prior case law in an effort to determine whether under the facts of the instant case, the requirement for assault in the first degree involving an intent to disfigure another person seriously, was established in the instant situation. The six-judge majority, in reviewing the evidence, concluded that even though the victim in the case at bar had suffered bite marks and had sustained various scars and black and blue marks, the injuries did not reach the level of serious disfigurement, as was required by statute. Judge Pigott dissented, arguing that the facts placed before the jury were sufficient to support the conviction in question, and that the majority was simply substituting its own conclusion for that of the jury.

## Suppression of Confession

***People v. Bradford*, decided October 19, 2010 (N.Y.L.J., October 20, 2010, p. 27)**

In a unanimous decision, the New York Court of Appeals upheld the use of a confession at a Defendant's trial, and found that the confession was sufficiently attenuated from the Defendant's initial detention by the police. The Court thus affirmed the Appellate Division ruling that the exclusionary rule did not require the suppression of the Defendant's confession. In the case at bar, the Defendant was initially detained by police at approximately 10:30 p.m., and was given the Miranda warnings about 30 minutes later. The Court also concluded that there was no proof in the record that the initial detention of the Defendant was motivated by bad faith or nefarious police purpose.

## Timely Filing of Notice of Appeal

***People v. Syville*, decided October 14, 2010 (N.Y.L.J., October 15, 2010, p. 26)**

In a unanimous decision, the New York Court of Appeals determined that the coram nobis procedure is available to defendants to obtain further relief on the grounds that they were unaware that their attorneys had not complied with their requests to file notices of appeal. The Court determined that such applications could be entertained, despite the provision of CPL Section 460.30, which permits the Appellate Division to excuse a Defendant's failure to file a timely notice of appeal from a criminal conviction only if the application is made within one year of the date the notice was due. The New York Court of Appeals rejected the Appellate Division position that it was limited from considering relief by the one year statutory bar indicated in CPL 460.30. The Court of Appeals thus remitted the case back to the Appellate Division to reconsider the issue.

## Admissibility of Confession

***Matter of Jimmy D.*, decided October 26, 2010 (N.Y.L.J., October 27, 2010, pp. 1, 2 and 26)**

In a 4-3 decision, the New York Court of Appeals refused to suppress a confession which was written by a 13-year-old boy who was charged with a criminal act heard in the Family Court. The Defendant contended that the Detective who solicited a statement from him violated his Miranda rights because he encouraged the mother to leave the room and suggested that the juvenile needed to say what happened in order to get some help. The four-judge majority concluded that although a parent cannot be denied the opportunity to attend the custodial interrogation of her child, it did not follow as a matter of law that a child's confession obtained in the absence of a parent is not voluntary. The majority opinion was written by Judge Pigott and was joined by Judges Smith, Read and Graffeo. Judge Pigott, writing for the majority, concluded that whether a confession was beyond a reasonable doubt voluntary is a mixed question of law and fact and is to be determined from the totality of circumstances. In the case at bar, there was sufficient evidence to support the findings of the lower courts that the statement was voluntarily made. Chief Judge Lippman and Judges Jones and Ciparick dissented, arguing that the Detective had used improper tactics in obtaining the confession, and emphasizing that "where children are concerned, we scrupulously adhere to Miranda's requirement that there be a demonstrably valid waiver of rights, unaffected by threats, trickery, or cajolement, to support the admission of a custodial confession."

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

## The New Term

The United States Supreme Court opened its new term on Monday, October 4, 2010, with a new Sitting Justice on the Court. Justice Elena Kagan was confirmed by the United States Senate on August 5, 2010 by a vote of 63 to 37, and was sworn in shortly thereafter. She replaces Justice Stevens, who retired at the age of 90, and her assumption of a seat on the United States Supreme Court has created a series of firsts. She is the fourth woman to serve on the Court, and the Court presently has more female members than it ever had before. She is also the first appointee in many years who comes to the Court without prior judicial experience. Her selection also creates a situation where there are four New Yorkers presently on the Court.

With the opening of its new term, the Court has already begun hearing a series of controversial cases, which it appears will continue to sharply divide the Court. On October 6, 2010, it heard oral arguments in a case involving protests by anti-gay activists at military funerals. The father of a dead Marine whose son's funeral was disrupted by the protesters instituted a lawsuit against the organization involved. The case has generated into a First Amendment matter and involves a clash between what many consider to be highly offensive conduct and the right of free speech. The Court is not expected to reach a decision in that case until the Spring. In coming months, the Court will also be dealing with illegal immigration issues and the relationship between Church and State, as well as other First and Fourth Amendment matters. As we have done in the past, we will monitor developments in the United States Supreme Court, and will provide a yearly assessment on the Court's activities, including Justice Kagan's first year in office, in one of our future issues.

## Decisions from the Court

Since the Court has just been in session for a few weeks, it has only issued a few decisions in the criminal law area. There were, however, two decisions which were issued at the end of the Court's past term, which we were unable to discuss in our Fall issue. These decisions are summarized below.

### *Dillon v. United States*, 130 S. Ct. 2683, (June 17, 2010)

In a 7-1 decision, the United States Supreme Court held that sentence modification proceedings based upon a retroactive amendment to the sentencing guidelines did not implicate the Sixth Amendment, and the District Court properly declined to address challenges to aspects of the original sentence, which were unaffected by the Amendment. The majority determined that the Defendant's Sixth Amendment rights were not violated when the District Court considered a reduction only within the amended guidelines ranges and reiterated that the remedial aspects of *United States v. Booker* did not apply to sentence modification proceedings. Justice Sotomayor issued the opinion for the Court. Justice Stevens dissented and Justice Alito took no part in the decision.

### *Sears v. Upton*, 130 S. Ct. 3259, (June 29, 2010)

In a per curiam opinion, the United States Supreme Court granted certiori and vacated the Judgment of the Georgia Supreme Court which had summarily denied review of a post-conviction decision. The Supreme Court noted that defense counsel, at the original hearing regarding the imposition of the death penalty, had failed to produce relevant factors regarding the Defendant's mental problems and his abuse as a child. In light of the new mitigation evidence, the State Post-Conviction Court failed to apply a proper prejudice inquiry in determining that counsel's facially inadequate mitigation investigation did not prejudice the Defendant. Under the *Strickland* rule, the Supreme Court concluded that a proper prejudice inquiry would have taken into account the newly uncovered evidence of the Defendant's significant mental and psychological impairments, so as to assess whether there was a reasonable possibility that the Defendant would have received a different sentence. The matter was thus remanded to the State Court to conduct a further inquiry on the issue. Justices Scalia and Thomas dissented, and Justices Roberts and Alito indicated that they would have denied the Petition for Certiori in the first place.

### *Weise v. Bush*, 131 S. Ct. __, (October 12, 2010)

In one of its first actions during the new term, the United States Supreme Court, by a 7-2 vote, refused to hear an appeal from a Colorado woman who was ejected from a speech by aides to President George W. Bush because her car had a bumper sticker that read "No more blood for oil." In refusing to grant certiori, the Supreme Court let stand a lower court decision that held that a President and his aides are free to screen audiences during his public speeches, and to remove those who may disagree with him. Justices Ginsburg and Sotomayor dissented in the Court's determination and voted to hear the case. The dissenters argued that the Constitution does not permit public officials to punish people simply for holding discordant views. The dissenters viewed the issue as one of freedom of speech and felt that the case should be heard by the entire Court.

# Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from August 3, 2010 to November 1, 2010.

### *People v. Strawbridge* (N.Y.L.J., August 3, 2010, p. 28)

In a unanimous decision, the Appellate Division, Third Department, upheld a Defendant's conviction in 2000 for depraved indifference murder for killing her newborn child. The Court held that changes in the law regarding depraved indifference murder which resulted from recent Court of Appeals rulings did not apply to the Defendant's conviction. Following the New York Court of Appeals decisions in *People v. Feingold*, the Defendant had moved to vacate the conviction in question. The Appellate Division, however, relying upon the New York Court of Appeals decision in *Policano v. Herbert*, ruled that the Trial Court had acted correctly, since the new depraved indifference standards could not be applied retroactively to the benefit of the Defendant.

### *New York v. Christensen* (N.Y.L.J., August 9, 2010, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Second Department, held that a Trial Court judge may not allow a defendant to plead guilty to a reduced charge over the objection of the prosecution. The matter involved the practice of an upstate Town Justice who allowed a woman to plead guilty to a lesser offense with respect to a traffic matter, even though the State Police, acting as the prosecution, had opposed the reduction. The Appellate Panel ruled that although the Trial Court's actions were based on an attempt to ease a backlog of cases, the Trial Court had exceeded its authority. The Appellate Division specifically noted, "While we are sympathetic to the inordinate burden placed on the Courts by any blanket policy against plea bargaining a particular class of cases, nothing in the statutory scheme grants the Town Justice the flexibility he wishes to exercise.… We are constrained by Statute to find that the Town Justice exceeded his authorized powers." The case at bar involved a three-year dispute between the Town Judge and the State Police, and arose because several upstate County prosecutors delegated the prosecution of traffic cases to police agencies that issue the individual tickets.

### *People v, Gibian* (N.Y.L.J., August 13, 2010, pp. 1 and 7)

In a 3-2 decision, the Appellate Division, Second Department, reversed a murder conviction of a Defendant who was accused of killing his abusive stepfather with a samurai sword. The three-judge majority found that a series of errors committed by the Trial Judge denied the Defendant a fair trial, and may have led to a faulty verdict. The committed errors included precluding the Defendant from testifying in detail about his mother's alleged confession to the murder, as well as failing to sufficiently investigate several instances of jury misconduct. The majority also noted that the Trial Judge acted improperly when he imposed a time limit midway through the defense's summation without ever providing a prior warning. The three-judge majority was composed of Justices Skelos, Austin and Roman. Justice Eng dissented. The District Attorney's Office in Suffolk County has already indicated that it would seek a further appeal to the New York Court of Appeals.

### *People v. Pagan* (N.Y.L.J., August 12, 2010, p. 1)

In a 3-2 decision, the Appellate Division, First Department, held that a Sentencing Court did not exceed its authority when it expanded the conditions of a Defendant's parole to allow for the warrantless search of his home. In the case at bar, the Sentencing Judge had granted a request by the Bronx Probation Department to allow for sporadic searches of the Defendant's home. The three judge majority concluded that a Sentencing Court is not precluded from imposing search conditions in a sentence of probation without a Defendant's consent. The majority opinion was joined in by Justices Saxe, DeGrasse, and Abdus-Salaam. Dissenting opinions were issued by Justices Moskowitz and Catterson, who argued that the conditions imposed totally viserated the Defendant's Fourth Amendment rights and subjected him to warrantless home searches without any suggestion that he had violated the conditions of his parole. Based upon the sharp split and the interesting issue involved, it appears that this matter will eventually be determined by the New York Court of Appeals.

### *People v. Bradshaw* (N.Y.L.J., August 16, 2010, p. 22 and August 17, 2010, pp. 1 and 2)

In a 3-2 decision, the Appellate Division, Second Department, determined that a Defendant's waiver of appeal was not valid, since the plea colloquy indicated that the waiver was not knowingly, voluntarily and intelligently made. The Appellate Panel also vacated the Defendant's plea and remitted the matter for further proceedings after also determining that the police lacked probable cause for the Defendant's arrest, and that as a result, identification testimony regarding a lineup had to be sup-

pressed as being the fruit of a poisonous tree. In the case at bar, although the Trial Judge had asked the Defendant if he understood that he was waiving his right to appeal, the Defendant failed to provide an affirmative response, and the Court simply proceeded with the allocution without returning to the issue of the waiver. The three-judge majority held that a written waiver is not a complete substitute for an on-the-record explanation of the nature of the right to appeal, and some acknowledgment that the Defendant is voluntarily giving up that right. The majority referred to recent New York Court of Appeals decisions on the issue. The majority opinion was concurred by Justices Eng, Hall and Austin. Justices Fisher and Miller dissented, indicating that under the overall circumstances of the case, an effective waiver had taken place.

### *People v. Rodriguez* (N.Y.L.J., September 2, 2010, p. 1)

In a unanimous decision, the Appellate Division, Second Department, reversed a Trial Court's determination to suppress weapons and drugs which were found in a Queens apartment. Officers had conducted a warrantless search of the apartment after they discovered blood on the door handle. The Trial Court had held that the officers' entry was not justified. The Appellate Division, however, applying the three-prong Mitchell test, concluded that the search fell within the Emergency Doctrine exception. The Appellate Panel specifically reiterated, "We note that the police officers could reasonably have concluded that, had they left to apply for a search warrant without first entering apartment 31, they may have been derelict in their duty, for the police do not just fight crime, but perform varied public service roles, including protecting citizens from harm and rendering medical assistance to those already harmed. Where the preservation of human life is concerned, it is paramount to the right of privacy."

### *People v. Leggett* (N.Y.L.J., September 15, 2010, pp. 1 and 2)

In a unanimous decision, the Appellate Division, First Department, reversed a Defendant's conviction and ordered a new trial. The Appellate Court concluded that the Trial Judge had denied the Defendant a fair trial by a series of improper remarks to defense counsel. The Trial Court had told defense counsel in front of the jury that he was acting like a clown, and that his arguments were silly, outrageous and a comedy, and had made other similar disparaging remarks which diminished the Attorney in the eyes of the jury. The Appellate Panel concluded that even if defense counsel had acted in a zealous manner on some occasions, the Trial Court's injudicious remarks in the presence of the jury were unjustified. The Appellate Panel concluded that the cumulative effect of the Judge's remarks required a new trial.

### *People v. Mack* (N.Y.L.J., September 23, 2010, pp. 1 and 2)

In a 3-2 decision, the Appellate Division, First Department, concluded that a first degree sexual assault charge could not be sustained against a teenager who in a crowded subway had rubbed against a female passenger and had committed a lewd act. The majority found that a conviction for first degree sexual assault required the element of physical force and that the facts in the case did not warrant the charge in question. Although the Appellate Panel found the Defendant's actions reprehensible, the evidence was legally insufficient to establish the charge in question. The three-Judge majority pointed out that the Defendant still faced misdemeanor charges of sexual assault in the third degree. The majority consisted of Justices Renwick, DeGrasse and Manzanet-Daniels.

Justices Catterson and Andrias dissented, and argued that although mere touching does not rise to the level of physical force contemplated by the Penal Law, an act has been held to be forcible if it limits the victim's freedom of movement. In the instant case, the dissenters found that the Defendant had pushed himself into the subway behind the victim and had trapped her in the throng of riders, thus preventing her from moving in the subway car. On this basis, on the evidence viewed in the light most favorable to the prosecution, it was demonstrated that the charge of sexual assault in the first degree could be sustained. Based upon the sharp split in the Appellate Division and the interesting nature of the issue, this case may eventually make its way to the New York Court of Appeals.

### *People v. Slide* (N.Y.L.J., October 5, 2010, pp. 1 and 6)

In a unanimous decision, the Appellate Division, Second Department, found that a Defendant had been denied a fair trial, and that a new trial was warranted. The Appellate Court found that the Trial Judge had made a series of errors, including allowing improper cross-examination by the prosecutor of the Defendant regarding his mother's imprisonment and prior arrests for shoplifting and possessing marijuana. Although the Trial Court had instructed the jury to disregard some of the questions relating to the mother's past, no limiting instructions were given to the jury with respect to the evidence of the Defendant's prior arrests or bad acts despite defense counsel's vigorous objections. Under the circumstances in question, the Appellate Court concluded that the cumulative effect of the errors could have affected the jury's verdict, and that therefore a new trial was required.

***People v. Chatt* (N.Y.L.J., October 7, 2010, p. 1)**

In a unanimous decision, the Appellate Division, Fourth Department, upheld a Defendant's rape conviction based upon a 1974 incident. The Defendant had claimed that the 33-year delay in bringing the case violated the Defendant's rights. In the case at bar, the prosecution had only proceeded when a DNA match was made in 2007. The Appellate Panel concluded that although the delay was substantial, and may have caused some degree of prejudice to the Defendant, the People satisfied their burden of demonstrating that they made a good faith determination not to proceed with the prosecution in 1974 to what was at the time insufficient evidence. It was only in 2007, based upon the DNA evidence, that there was sufficient justification to proceed with the case.

***People v. Batjier* (N.Y.L.J., October 7, 2010, p. 1)**

In a unanimous decision, the Appellate Division, Fourth Department, upheld a conviction under the Public Health Law for selling body parts. The Defendant was a funeral director who had raised a good faith defense to the charges in question. The Panel found, however, that there was no good faith exception listed in the Statute, and that there was sufficient evidence to sustain the conviction in question.

***People v. Williams* (N.Y.L.J., October 8, 2010, p. 1)**

In a unanimous decision, the Appellate Division, First Department, upheld a Defendant's rape conviction. During the trial of the case, a *New York Times* article had appeared which linked the Defendant to dozens of rapes on the east coast. The Defendant claimed that the Trial Judge was required to ask the jurors whether they were aware or had read the article in question. The Appellate Panel concluded, however, that the Trial Judge was under no such requirement, and that he had already admonished jurors in general to avoid reading newspapers. The Defendant's conviction was therefore upheld.

***People v. Colville* (N.Y.L.J., October 12, 2010, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Second Department, upheld a Defendant's conviction for second degree murder, and rejected his claim that he was entitled to a new trial, based upon ineffective assistance of counsel. The Court found that the Defendant fully consulted with his Attorney, and had made the decision not to seek the submission of lesser included offenses to the jury. The Appellate Division found that during a charge conference, the Defendant's trial attorney had requested a charge of manslaughter in the first and second degree. However, subsequently he informed the Court that after discussing the issue with his client, the Defendant did not want the lesser charges included. Under these circumstances, the Court determined that the Defendant himself had opted for an "all or nothing" strategy, and could not, on appeal, claim ineffective assistance of counsel.

# For Your Information

## New York City and 18-B Attorneys Move Toward Possible Settlement of Their Dispute

As was reported in our previous issue, five Bar groups within the City of New York commenced both a state and a federal lawsuit against the City of New York over its plans to shift many of the cases presently handled by private attorneys under the 18-B assignment plan to contract providers. Conferences were held in Manhattan Supreme Court in late July and early August regarding a possible settlement of the matter. Under the proposed settlement, the Bar Associations would agree to abandon their lawsuits, and the City would assure that the Bar Associations would continue to retain oversight responsibilities under a new indigent criminal defense plan which would be negotiated by the parties. Some of the private attorneys handling 18-B matters have already raised concerns regarding the proposed settlement. They have in fact criticized the five Bar Associations regarding their handling of the issue, and have petitioned the Judge handling the matter in the Manhattan Supreme Court not to approve any settlement and to allow a period of time for 18-B lawyers themselves to intervene in the matter, and to also confer with the attorneys handling the Bar Association cases. In early September, the New York Criminal Bar Association also requested the right to intervene in the 18-B lawsuit, claiming that the five County Bar Associations had mishandled the suit. The 18-B lawyers complaining about the proposed settlement have stated that the agreement being discussed would substantially, if not completely, demolish the role of the private Bar. The 18-B lawyers are also claiming that a recently passed State law requires Bar Association approval for any change in the way conflict cases are handled, and that therefore there is no reason to settle with the City under the proposed agreement. The cited legislation is the new language that was added to Section 722(3) of the County law by a June 2010 Amendment.

In 2009, Legal Aid handled 229,000 cases, while 18-B lawyers handled 44,000. The City paid Legal Aid $79.2 million for its work in 2009 and $45 million in billings submitted by 18-B lawyers. Assigned lawyers are paid at a rate of $75 an hour for felonies and $60 an hour for misdemeanors. Since 1965, the City has had a hybrid plan under which the Legal Aid Society, and later six other groups, have been primarily responsible for taking on new cases at arraignments, with private lawyers taking any conflict cases such as might arise in multi-defendant prosecutions.

Based upon the apparent dispute between the City, the Bar Associations, and now a separate group of 18-B attorneys, it remains very unclear as to whether a resolution can be reached in the near future. In fact, as of late October, the Judge handling the case had indicated that additional arguments and hearings would be required before the issue could be resolved. In October, the Judge had granted permission for the private 18-B groups to intervene in the case, as well as allowing the five defender contractor groups to file amicus briefs supporting the City's position. This matter has grown increasingly complex and contentious and it is hoped that some amicable resolution can be reached in the future. Since this issue directly affects the Criminal Justice System and many of our Section members, we will carefully monitor developments.

## Former Chief Judge Judith Kaye Issues Report Regarding Governor Paterson's Role in a Domestic Violence Dispute and Integrity Commission Holds Hearing on Related Issues

In October of 2009, a Chief Aide of Governor Paterson was involved in a domestic violence dispute, and the Governor apparently contacted the Complainant regarding the matter. The incident led to an investigation involving the conduct of the State Police and the Governor. Attorney General Andrew Cuomo appointed former Chief Judge Judith Kaye as a special counsel to investigate the matter. At the end of July, Judge Kaye reported that the Governor had shown a lack of judgment in his actions, but had committed no crimes, and had not engaged in witness tampering. The Judge's report also found no interference by the State Police. The report did conclude that the evidence warranted consideration of possible charges against David Johnson, who was the Governor's aide involved in the incident, and the matter is still being investigated by the Office of the Bronx District Attorney. The actions of the Governor served to undermine his position, and were one of the factors which led to his eventual decision not to seek reelection. The incident also resulted in the resignation of Denise O'Donnell, the Commissioner of Criminal Justice Services, who reported that the State Police had failed to properly advise her of the actions that had been taken.

In August, Judge Kaye issued an additional portion of her report involving the claim that Governor Paterson had violated ethics laws by soliciting World Series tickets from the New York Yankees last year. Judge Kaye found that

improprieties had occurred with respect to this incident, and that the Governor had falsely attempted to backdate checks allegedly showing payment for the tickets and had also made false statements regarding the incident. Judge Kaye referred any further action to the State's Public Integrity Commission and also requested that the Albany District Attorney look into the situation. In late August, the Public Integrity Commission began to hold an administrative hearing on the issue involving the World Series tickets. Testimony was taken at the hearing, and a decision was issued fining the Governor $62,000.

### U.S. Supreme Court Decision Regarding Deportation Information Creates Confusion in New York Courts

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the United States Supreme Court recently held that an attorney's failure to inform a client of the possible consequences of deportation as a result of a guilty plea constituted ineffective assistance of counsel. Left for the lower courts to determine was the issue of whether prejudice had occurred, and whether the Supreme Court ruling should be given retroactive effect. Several Courts in New York who have begun dealing with the issue of retroactivity have already reached contrary opinions. No appellate cases have yet been decided on the issue, and it appears that some definitive ruling in the future by either the New York Court of Appeals or the United States Supreme Court will be required, in order to provide some degree of certainty to trial judges on the proper application of the *Padilla* ruling.

### Prosecutor and Courts Urge Governor to Veto Bill Involving Unsealing Penalties, and Governor Paterson Vetoes Proposed Legislation

The Legislature recently passed a Bill that would criminalize the intentional, unauthorized disclosure of sealed court records. District Attorneys had argued that the legislation was fraught with potential unintended consequences, and could hinder future prosecutions. Prosecutors had also stated that it could subject them to criminal charges, and that the legislation was ill-considered and ill-advised. The Court system had also opposed the Bill. The two groups had joined forces and had urged Governor Paterson to veto the Bill, and to draft a more restrictive Bill which would better protect law enforcement and court personnel from prosecution. Memos urging a Governor's veto had been forwarded by Derek P. Champagne, District Attorney of Franklin County, who is also serving as President of the District Attorney's Association, and Mark C. Bluestein, Legislative Counsel to the Office of Court Administration. After considering the issue, the Governor, in late August, vetoed the Bill, on the grounds that it was so broadly written that it could result in criminal liability for public officials and others for inadvertent or good faith disclosures. Whether efforts will be undertaken at the next legislative session to revise and reconsider the Bill in question, remains to be seen.

### New Legislation Reduces Need for Pre-Sentence Reports

In late July, 2010, Governor Paterson signed into law legislation which reduces the need for pre-sentence reports in certain types of misdemeanor cases. Reports will no longer be necessary for defendants who face terms of no more than 180 days for misdemeanor convictions. Previously, pre-sentence reports had to be filed in any case where the defendants faced more than 90 days. The legislation was introduced at the request of the Office of Court Administration, and is an effort to expedite sentences and reduce administration costs. The new legislation is effective immediately.

### Social Security System Overwhelmed by New Retirees

In a recent report from the Social Security Administration, it was reported that in the last year, many more people have opted for early social security, and that as a result, the financial security of the system is being strained. In 2009, 2.74 million people filed for social security, more than any other year in the system's history. The reasons for the sharp increase are attributed to the high unemployment rate and the fact that older workers who have been laid off have opted to enter the social security system. It is expected that as a result of the bad economy and the growing number of social security recipients, this year the system will be facing a shortfall, paying out more than it receives. The report projects that for every year after 2015, social security will be paying out more than it receives in tax collections. In 2015 it is expected that many of the 78 million baby boomers will begin retiring, placing an additional strain on the system.

### Warrantless Use of GPS Tracking Systems Heads for United States Supreme Court

Both the Federal Courts and State Courts throughout the Country have been divided over whether the use of a GPS tracking device by law enforcement officials can be constitutionally conducted without a judicial warrant. Federal Courts in the District of Columbia, New York and California have issued conflicting views on the matter, and so have half a dozen State Courts. In New York, the New York Court of Appeals recently ruled in a 4-3 decision that a warrant is required with respect to the use of a GPS device. The conflicting decisions throughout the Country make it likely that the United States Supreme Court will shortly have to address the issue. We will keep our readers advised of developments.

## Client Protection Fund Reports Rise in Claims

The New York Lawyers Fund for Client Protection issued its report for the first six months of 2010, and reported that the number of claims had risen significantly. In the first six months of this year, 349 claims were filed, a 44.2% increase from the 249 which were received in the same period last year. As of July 1, 2010, a total of 762 claims were pending. The Fund estimated that if all of these claims were paid out at the maximum eligible rate, the Fund would be liable for almost $35 million. The report attributed the increase in claims to a faltering economy, which had put a greater pressure on attorneys, leading them into improper actions. The number of claims was also attributed primarily to the actions of three attorneys, who accounted for about ¾ of the increase in claims. The major source of claims continues to involve the taking of money from real property escrow accounts. In the year 2009, the Fund made awards of $5.6 million for attorney misconduct, 3.6 million of which involved real estate escrow accounts. The Fund also issued a review of the number of reimbursement claims that have been filed for the years 2000 to the present. In 2000, the number filed was 492. In 2005, it had reached a record 729, and in 2009, the total was 489. Since 349 claims have already been filed in 2010, in a six month period, the year 2010 closed with another record number of claims.

## Counting of Inmates for Census Purposes

The Legislature approved a Bill in early August that requires that inmates be counted as residents of their home county, rather than of the areas where they are imprisoned, for the purposes of establishing voting districts, pursuant to census statistics. The Bill was signed by Governor Paterson in September. In the past, upstate Counties benefited by having inmates counted as part of their local population. Under the new legislation, they would be counted as part of the population in their home County. The Department of Correctional Services recently reported that the prison population now stands at 56,989, with the four Counties in New York City accounting for the largest number of inmates. New York County, for example, is the home County of 9,879 inmates, followed by Kings County at 7,623 inmates, and Queens at 4,743 inmates. The new measure would apply to the reapportionment of districts in the state Legislature, starting with the 2012 elections.

## Voided Laws Finally Repealed

In early August, Governor Paterson signed legislation which formally removed from the New York State Penal Law provisions that had been declared unconstitutional by the Courts in recent years. Provisions of the State Loitering Law, specifically Penal Law Section 240.35, involving panhandling and sleeping in a transportation facility, were declared unconstitutional by the Second Circuit. Actually repealing the voided laws eliminates any unintended consequences and removes the possibility of a defendant being charged with a Statute which was still on the books, but which had been declared unconstitutional. The New York City Police Department had favored the Bill so as to remove any confusion, and to protect officers from any liability for enforcing invalid laws.

## Number of Americans Receiving Governmental Aid Rapidly Increasing

A nationwide study conducted by *USA Today* indicates that currently, one in six Americans is receiving some sort of government assistance. The report found that more than 50 million Americans are currently on Medicaid, an increase of at least 17% since December of 2007. More than 40 million people are receiving food stamps, an increase of nearly 50% from 2007. Ten million people are also currently receiving unemployment insurance, nearly four times the number who were receiving benefits in 2007. 4.4 million people are also on welfare, an increase of 18% over the last three years. The report attributed the situation to the serious economic downturn which has occurred over the last several years, and the willingness of both Federal and State governments to expand various types of assistance programs. The cost to the government of the various program increases has soared during the last three years. The cost of Medicaid is currently estimated at $273 billion. Unemployment benefits are now costing $160 billion, the food stamp program is up to $70 billion, and the cost of welfare is estimated at $22 billion. The increase in costs has contributed to a growing controversy in the Nation between those who claim that government spending must be cut, and others who say that in times of bad economic situations, the government has a responsibility to assist its citizens.

## Pay for New Law Graduates Holds Steady

A recent report by the National Association for Law Placement indicates that although the number of available positions for law graduates fell in 2009, the starting salary for those who did obtain employment was virtually identical to 2008 figures. The national median starting salary was $72,000. The report also indicated that 88% of the graduates in 2009 were able to obtain employment within a nine-month period. However, a larger percentage than in the past were forced to accept temporary jobs or positions that were not totally law related. The report also indicated that a large number of positions appeared to be clustered around two salary ranges. One cluster is between $40,000 to $60,000, which includes many starting salaries in public interest or government positions, or as associates in small firms. The other cluster involves salaries between $100,000 and $150,000, which are still going to graduates who obtain employment with large New York firms.

## Recession Leads to Lower Birthrate

The National Center for Health Statistics reported that the birthrate for the year 2009 dropped for a second year in a row. Births fell by 2.6% in 2009, even as the population grew. The decline was attributed to the economic recession and to the fact that there has been a decrease in the amount of immigration into the United States. The current situation is a striking turnaround from 2007, when more babies were born in the United States than any other year in the nation's history. The report concluded, "When the economy is bad and people are uncomfortable about their financial future, they tend to postpone having children. We saw that in the Great Depression in the 1930s and we're seeing that in the great recession today."

## New York State Begins Overhaul of Youth Prisons

After agreeing to improve conditions at four of its upstate youth prisons in a resolution of the matter with the Federal government, New York State is moving to make further changes in its treatment of juvenile offenders by discussing a further settlement with the Legal Aid Society, which currently has a pending lawsuit in the Southern District of New York. Judge Crotty has granted the parties additional time to discuss a possible settlement, and the issues involve the amount of disciplinary force that can be used against juvenile offenders, greater rehabilitation and educational services, and changes in procedures by which the facilities are operated. It is estimated that any settlement reached will affect approximately 1,000 juveniles who are currently incarcerated in youth prisons.

## *Law Journal* Article on New York Court of Appeals Reveals Increasing Number of Dissenting Opinions and a Larger Number of Criminal Appeals

Based upon recent New York Court of Appeals Statistics, the *New York Law Journal*, in an article published on August 16, 2010, at pages 1 and 7, indicated that during the 17 months of Chief Judge Lippman's tenure, the number of dissents issued by the Court's Judges has increased, and the number of criminal appeals has grown to a larger share of the Court's docket. Judge Lippman in fact was listed as the chief dissenter, having dissented in 25 cases.

Judge Kaye, on the other hand, wrote only 65 dissents during a several year period.

Judge Lippman is followed by Judge Ciparick, who dissented in 23 matters. Judges Smith and Jones each dissented in 22 cases. Judge Graffeo has the lowest number of dissents, having dissented in only 3 cases. Judge Pigott dissented in 13, and Judge Read dissented in 10.

The results of the report indicate that although serving as Chief Judge, Judge Lippman is having some difficulty in having the rest of the Court join in his opinions. This appears to be the situation because the three Judges on the Court who were appointed by former Governor Pataki appear to hold a more conservative viewpoint on many issues, and often vote as a bloc. A review of the Court's decisions over the last year and a half indicates that Judges Read and Graffeo often vote together, while Judges Lippman and Ciparick often vote together. Thus the three swing votes who sometimes move from one side to the other are Judges Smith, Jones and Pigott.

Upon taking office as Chief Judge, Judge Lippman announced that he would have the Court review the procedure by which leave is granted in criminal matters. This year, the number of leave applications granted rose to more than 3%, an increase over the less than 2% rate which was prevalent in past years. In fact, the number of criminal appeals which were heard during the last year doubled from the previous session. The *Law Journal* article is an interesting review of the recent developments in the New York Court of Appeals. The article, along with the annual report issued by the Clerk of the Court, includes interesting and significant information for appellate practitioners.

## Illegal Immigration Undergoes Sharp Drop and Reduces Impact on Job Situation

A recent report by the Pew Hispanic Center reported that illegal immigration into the United States has dropped dramatically in the past several years. The report estimated that as a result, the U.S. illegal immigration population has fallen 8% from the period 2007-2009. The number of illegal immigrants, which had peaked in 2007 at 12 million, is now estimated to amount to 11.1 million. The study also found that illegal immigration is basically concentrated in a small number of states. 2.5 million are said to live in California, 1.6 million in Texas, and 675,000 in Florida. Florida has experienced the most dramatic decrease in illegal immigration, falling 27% from 2005.

The sharp decline in illegal immigration was directly attributed to two factors—the worsening economic situation in the United States, which has made it more difficult for illegal immigrants to find work, and tighter law enforcement measures. The issue of whether illegal immigrants are taking jobs away from U.S. citizens was also analyzed by a recent survey conducted by the Associated Press. The survey found that very few jobs are being denied U.S. citizens as a result of illegal immigration. This conclusion was reached on the grounds that many of the illegal immigrants perform farm work and other types of low-paying services which American citizens refuse to accept. The Associated Press analysis showed, for example, that from January to June of 2010, California farmers posted ads for 1,160 positions that were made available to U.S. citizens and legal residents. Even though the unemployment rate in California is hovering around 12%, only 233 people applied for the positions. The survey further found that few Americans applied for farm type work, and even those that do often quit after a few weeks.

Adding some fuel to the recent controversy over the question of birthright citizenship under the Fourteenth Amendment, the Pew study reported that the number of U.S.-born children of illegal immigrants nearly doubled from 2000-20009. It was estimated that during that nine-year period, some 4 million children of illegal immigrants were born in the United States, and thus automatically became U.S. citizens. The question of illegal immigration continues to be a controversial one which will generate additional litigation in the future. The Pew Center Report and the Associated Press study provide some important facts regarding the scope of the problem and the situation as it currently exists.

## Poverty Rate Soars to New Heights, Personal Income Drops and Student Default on Loans Rises

A recent report by the Associated Press revealed that the poverty rate in the United States has skyrocketed to a new record, with one of seven Americans considered poor as of the end of 2009. The report was based upon census figures and other information. Approximately 45 million people, or about 15% of the population, were placed in the category below the poverty line. This represents an increase of 1.8% in one year. The federal poverty level is established at just over $22,000 a year for a family of four. The survey also reported that the working age population and teenagers were particularly hard hit by the economic downturn.

The economic crisis also appears to have affected college students. A report from the U.S. Department of Education recently revealed that the number of college students defaulting on federal loans has dramatically increased. Seven percent of federal student loans were found to be in default, an increase of 6.5% over last year. The default in student loans has increased both at colleges which are private for-profit institutions and the public or non-private universities. The amount of accumulated student debt continues to grow, and represents another growing problem within the U.S. economy.

In another recent report issued by the New York State Comptroller's Office, and based upon federal statistics, it was also reported that for the first time since the great Depression, personal income in New York State dropped in 2009. The unemployment rate in New York City is estimated at 9.6% and statewide at 8.3%. Private sector employees appear to have suffered the greatest income decline, with a decrease of 6.8%. It is only public sector employees who continue to see any increases in pay, and their personal income was up by 2.5%. We are thus now witnessing a situation where private sector employment is no longer more lucrative than government service, and where employment has greatly declined in the private sector, it has increased throughout the various levels of government.

## New York Highest Unionized State

A report recently issued by a group of scholars at the City University of New York reveals that New York leads the Nation in union membership, with 25% of the labor force in New York being unionized. This percentage is more than double the national average. The high percentage of union membership in the State is largely attributed to the fact that almost all of the public employees in the State belong to unions. Nearly 70% of the public sector workers in the City, and 71% of State public employees, belong to a union. This compares with 37% of public workers who are unionized throughout the nation. Union membership among public workers has risen steadily over the last few years, while the number of union workers in private sector positions has dropped slightly. The report estimated that just about 14% in the private sector are unionized statewide. The number of union members in the private sector nationwide is just over 7%.

## Stuart M. Cohen, Clerk of the New York Court of Appeals, Announces Retirement

Stuart M. Cohen, who has served as Clerk of the New York Court of Appeals since November of 1996, recently announced that he would be retiring from the Court effective November 24, 2010. Mr. Cohen managed the day-to-day operation of the State's highest Court and has a long and distinguished history of service to the judicial system. He is a graduate of New York University School of Law and was admitted to the New York State Bar in 1980. Prior to his elevation as Clerk of the Court, he served as Deputy Clerk of the Court of Appeals from 1987 to 1996. He also served at various times as a law clerk to some of the Judges on the Court of Appeals and previously served in the Appellate Division, Second Department, in a variety of positions.

Mr. Cohen is 57 years of age, and after providing some 25 years of service to the New York Court of Appeals in various capacities, he decided to participate in the early retirement program which is being offered to State Court employees. The early retirement package credits employees with additional time and therefore raises the value of their pensions. All told, it is estimated that some 1,800 State employees have accepted the early retirement package. The drawback might be that the loss of experienced court employees such as Mr. Cohen may cause future difficulties in the operation of the Court system.

Each year, Mr. Cohen and his staff prepare and issue a report summarizing the work and activity of the New York Court of Appeals during the preceding year. In our last issue, we published the 2009 summary. Mr. Cohen and the staff at the New York Court of Appeals have been kind enough to provide our *Newsletter* with the yearly report over the course of many years, and our readers have con-

tinually found the summaries, based upon the reports, to be both informative and interesting. Upon the announcement of his retirement, several of the Judges from the New York Court of Appeals issued complimentary statements regarding Mr. Cohen's service to the Court over the many years. Our *Newsletter* also thanks Mr. Cohen for his assistance to our publication and we wish him all the best in his retirement.

The Court of Appeals announced that Andrew W. Klein, who has served with the Court since 1990 as a consultation clerk, will replace Mr. Cohen as the new Clerk of the Court. Mr. Klein is a graduate of St. John's University School of Law.

## Early Retirement Package Leads to Critical Loss of Key Court Employees

The recent early retirement package which was offered by the court system to non-judicial court employees has resulted in nearly 1,800 accepting the program and retiring by November 24, 2010. The loss of this large number of experienced court personnel, many of them holding high executive positions, will inevitably lead to some disorganization and loss of efficiency, at least in the coming months. Some 2,500 employees were eligible for the program, and the large number who accepted the package is expected to result in significant savings of approximately $10 million according to the Office of Court Administration. The initial problem that will be faced is that among the employees who will be retiring are 97 executives and senior managers, including the head clerks in the New York Court of Appeals and the Appellate Division, First Department, as well as many top managers in various trial courts. According to the Office of Court Administration, some of the positions which have become vacant will be filled almost immediately, others will be reviewed, and a determination made as to whether any consolidation or merger of positions is possible. Those involved in the legal and judicial system hope that the loss of so many key court personnel in a single period of time will not cause any major disruption in the operation of the court system.

## Despite Bad Economy, Crime Rate Continues to Drop

A recent study issued by the United States Justice Department Bureau of Statistics reported that violent and property crime in 2009 reached the lowest level ever recorded in the survey since it was published in 1973. The survey estimated that violent crime dropped by 11.2%, and property crimes by 5.5%, from 2008 levels. The latest report bolsters a similar finding made by the FBI's annual crime report last month, which showed a similar decrease in violent crime and property crimes. The decreases in the crime rate have occurred at a time when the nation's economy has been in a recession period, and the results have surprised many experts who have found that the crime rate usually rises during times of a bad economy.

## Chief Judge Lippman Creates New Sentencing Commission

In the middle of October, Chief Judge Lippman announced that he had formed a permanent Sentencing Commission to examine New York's complex and sometimes contradictory sentencing statutes. The Commission is apparently a follow-up to the Sentencing Commission which was initially formed by former Governor Spitzer and continued by Governor Paterson, and whose report was issued in early 2009. Although that Commission made several recommendations, including simplifying the various sentencing Statutes, the only legislative action that was taken involved the reform of the Rockefeller Drug Laws.

The new Commission created by Judge Lippman is meant to serve on a permanent basis, and to make periodic recommendations. It was stated that the new Commission "will create a permanent resource for Judges and the legal community so there will be a place where these issues can be debated, and where recommendations can be developed for the Legislature." It is interesting to note that in our last issue, we discussed the need for further simplification of the sentencing Statutes, and urged our Section members to be actively involved in this area. It is heartening to note that the Co-Chair of the new Lippman Commission will be Judge Barry Kamins, a longtime active member of our Criminal Justice Section, and that Paul Shechtman, who has been an active contributor to our *Newsletter*, has also been named as a member of that Commission.

## Full Panel of Second Circuit Court of Appeals Upholds New York's Persistent Felony Offender Statute

Several months ago, a three-judge panel of the U.S. Court of Appeals for the Second Circuit issued a decision finding that New York Penal Law Section 70.10 was unconstitutional, in that it improperly allowed judges to impose increased sentences on factors which had not been considered by the jury. That ruling was in direct conflict with New York Court of Appeals decisions which had upheld the constitutionality of the Statute. Based upon the confusion which arose, the Second Circuit Court of Appeals agreed to re-hear the matter en banc. On October 18, 2010, the full panel of the Second Circuit reversed the original determination, and upheld the constitutionality of the New York Statute. In an opinion written by Judge Wesley, the majority of the Court concluded that "judicial fact finding that is undertaken to select an appropriate sentence within an authorized range—up to and including the *Apprendi* maximum, does not affect the Sixth Amendment." Judge Wesley's opinion was supported by eight other Judges, and only three members of the entire panel dissented. It is expected that a Writ of Certiorari will be filed in the case, and the United States Supreme Court may have to render a final ruling on the issue. We will keep our readers advised of developments.

# About Our Section and Members

### Annual Meeting, Luncheon and CLE Program

The Sections' annual meeting, luncheon and CLE Program will be held on Thursday, January 27, 2011 at the Hilton Hotel in New York City, at 1335 Avenue of the Americas (6th Avenue at 55th Street). The CLE Program at the annual meeting will be held this year at 9:00 a.m., rather than in the afternoon, and will involve a discussion of identification from photographs. The program, entitled "Identification from Photographs: What's Working and What's Not?," addresses a significant issue that arises in criminal investigations and trials involving the reliability of photo identifications. The program will consist of two panel discussions of 75 minutes each. The first panel will deal with such matters as how do photo identification procedures lead to misidentifications? Can the risk of misidentification be reduced? How will New York's new law enforcement guidelines work? Will they sufficiently reduce the risk of misidentification? The panelists for the first panel will be Prof. Steven Penrod, Ezekiel Edwards, Esq., Hon. Kathleen B. Hogan, Robert J. Masters, Esq., and Margaret Ryan, President of the New York State Association of Chiefs of Police.

The second panel will deal with additional ways to protect against misidentification in photo identification procedures. What courts can do, and what does the example of New Jersey teach us? The speakers for the second panel will be Prof. Sandra Guerra Thompson, Hon. Gustin Reichbach, Miriam Hibel, Esq., and Hon. Edward DeFazio.

Our annual luncheon will again be held at 12:00 p.m., and will include a guest speaker and the presentation of several awards to deserving individuals. Detailed information regarding all the events at the annual meeting will be forwarded under separate cover. We urge all of our members to participate in the annual meeting programs.

### Spring CLE Program

The officers of our Section are presently working on arrangements to hold a CLE Program in the spring, which will deal with the issue of evidence. The program is planned for some time in May 2011, to be held in the Albany region. The program will provide CLE credits, and will feature several prominent speakers. Full details will be provided in separate mailings.

### Paul Shechtman Appointed to Federal Advisory Committee on Rules of Evidence

Paul Shechtman, a leading criminal law practitioner and a regular contributor to our *Newsletter*, recently received the distinct honor of being appointed by United States Supreme Court Chief Justice John Roberts, Jr., to a 3-year term on the Federal Judicial Conference Advisory Committee on Rules of Evidence. The Committee has 12 members, and consists of eight Federal Judges, one lawyer from the Department of Justice, one academic, and two private practitioners. Mr. Shechtman is currently a partner with Stillman, Friedman and Shechtman in Manhattan, and also serves as a professor of law at Columbia Law School. He is also a former Chief of the Criminal Division of the U.S. Attorney's Office for the Southern District, and a former Chair of the State Ethics Commission. Several years ago, he also served as a Director of the Division of Criminal Justice Services under former Governor Pataki. We have been fortunate to have Mr. Shechtman provide our *Newsletter* with periodic commentaries on important legal issues. In fact, our first feature article in this issue is authored by Mr. Shechtman. We thank him for his support of our *Newsletter* and congratulate him in this significant, most recent appointment.

# The Criminal Justice Section Welcomes New Members

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

Tracy Anne Almazan
Timothy P. Alnwick
Gerard V. Amedio
Keith Anderson
Roy Michael Anderson
Stefan Howard Atkinson
Phylis S. Bamberger
Melissa Rose Barrella
David Beekman
Matthew J. Bennett
Stephen Leonard Bero
Brian Harris Bieber
Julie A. Block
Eric W. Bosen
Alan J. Bozer
William Joseph Bratton
Angela A. Capri
Jordan L. Christiansen
Amy P. Ciota
Triciah Claxton
Robert J. Clune
Melissa Ann Cole
John J. Coleman
Kelly Muller Condon
Richard F. Corrao
William F. Coughlin
Michael T. D'Ambrosio
Anne Joy D'Elia
Melissa Joy De Jesus
Michael Scott Decesare
James Richard Dillon
Jeffrey P. DiPalma
Vanessa Orat Domdom
Holly A. Erick
Gregory Esposito
John Michael Faris
Richard Andrew Fasano
John P. Fazzio
Michael A. Ferraro
Craig S. Fine
Elsa M. Forbes
Steven K. Frankel
Francis Franze-Nakamura
Meagan Elizabeth T. Garland
Kenneth M. Gazzaway
Andrew M. Genser
Adam Scott Gershenson
Elan Gerstmann
Anamika D. Ghista
Ariel Samuel Glasner
Michael Gomez
Edward J. Graber
Raymond R. Granger
Stuart Greenberg
Kenneth Gribetz
Kristin Gumaer
Patrick J. Gunn
Richard Inad Haddad
Juliette-Noor Haji
Andrew D. Heath
C. Randall Hinrichs
Dorothy Myung-soo Hong
Daniel J. Horwitz
Jalina Joy Hudson
Bryan Hutchinson
Emily E. Huters
Corrine Anetra Irish
Holleh Javidan
Yan Katsnelson
Lisa Ann Kechijian
Amber L. Kerling
Gregory Alan Kilburn
Brian P. King
William C. Komaroff
Pery D. Krinsky
Michael Young Kwon
Shanon Nicholas LaCorte
Michael Leigh Lambert
James D. LaPiana
Lawrence G. Lee
Louis Levithan
John J. Lindsey
James E. Lonano
Terry D. Loretto
Abbe David Lowell
Kathryn Elizabeth Malizia
Deborah Pauline Mantell
Andrew B. Margolis
Gerard Xavier McCarthy
Martin John McGuinness
M. Kathryn Meng
Robert Arthur Mintz
Laura M. Miranda
Victoria Wolfe Moore
Beth Moretti
LaToya Morris-Stewart
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Terence B. Newcomb
Rachel T. Newman
Kevin D. O'Connell
Anna M. Pacca
Will A. Page
Courtney E. Pettit
Emil Fidel Piedra
Rex M. Pietrobono
Arturo G. Quintana
Steven M. Rabinowitz
Casey Raskob
Nicole Renee Redmond
Carolyn Barth Renzin
Fred S. Rosenberg
William M. Roth
Fares Rumi
Mindy Birman Sanchez
Sanford Scharf
Kenneth J. Schreiber
Thomas J. Seigel
Eric S. Shiller
Evan J. Shusterhoff
Zahava F. Silverman
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Jane S. Thies
Joseph J. Tock
Gabrielle Venito
Kristen Anne Verrino
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For ease of publication, articles should be submitted on a 3½" floppy disk or CD preferably in WordPerfect. Please also submit one hard copy on 8½" x 11" paper, double spaced.

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