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New York Criminal Law Newsletter

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Inside

NYSBA

Message from the Chair

The final Chair's message is penned in late January for scheduled publication in the Spring. Not unlike a summation, this quarterly column has provided me with a pulpit from which to share information, amplify Section activities, and add personal commentary which has hopefully sparked evaluation and discussion.

The state's criminal justice system is in transition. As long serving as the city's District Attorneys have been, on the state level the "winds of change" are swirling around the state capitol. Governor Spitzer has selected his new Director of Criminal Justice Services—Denise O'Donnell of Buffalo. A former U.S. Attorney for the Western District of New York during the Clinton Administration, we anticipate a normal transition period before the outlines of emerging executive department decisions become clear. We hope to have met with Commissioner O'Donnell, before this piece will have been published, to share with her our thoughts concerning the focus of the Spitzer Administration's criminal justice initiatives.

In the courts, Judge Albert Rosenblatt has completed his service on the Court of Appeals, and Justice Theodore T. Jones, Jr., the former Administrative Justice for the Civil Term of the Second Judicial District, has been tapped to serve as his successor. Since Justice Jones has not served in Criminal term for many years, it remains unclear what his philosophy is on the prime criminal justice and constitutional issues likely to find their way to New York's highest Court.

Turning to the federal courts, the electoral "thumping" administered at the November 2006 elections resulting in a shift in congressional leadership back to the Democrats will likely serve as a break upon the frequently ideologically driven judicial appointments by the Bush Administration. With New York's Senator Chuck Schumer a senior/powerful member of the Senate Judiciary Committee, it will be interesting to see how the "judicial pie" is sliced, when vacancies occur at the District and Circuit Court levels. However, the Second Circuit has a new Chief Judge, Dennis Jacobs, and only time will tell if having a New York City-based Chief Judge has any impact upon a court previously led by Connecticut Chambered Chief Judges (Winter, Walker).

Turning inwardly toward our Section's priorities and initiatives, I was pleased by our programs over the last 1½ years. Our Fall 2005 Poughkeepsie Program focused upon the significant jurisprudential impact of Judge Albert Rosenblatt. This past Fall we met in Buffalo and had a series of spectacular presentations by Deputy Corrections Commissioner Tony Annucci, post-conviction specialist, and Ed Hammock, Esq. Our own Paul Cambria did a "bang up" survey of the New York Court of Appeals Criminal Justice decisions, and Richard Ware Leavitt presently similarly on the Second Circuit Court of Appeals. Additionally, we had the opportunity to meet Judge Eugene F. Pigott, Jr.—Governor Pataki's final appointment to New York's highest court.

This year's Annual Meeting, featuring an exciting (and sold out) Annual Awards Luncheon, was highlighted by luncheon remarks by noted author Tom Wolfe, and a "five star" roster of honorees selected by Norm Effman's Committee. This was followed by a "gold list" cast of practitioners at Marvin Schechter's CLE Program—"Criminal Law—The Essentials."

As I look toward the final months of my term I hope to see the Criminal Justice Section play a useful role in the debate over sought civil confinement of convicted sexual predators, and the re-examination of the Justice Court System.

I extend best wishes to the new officers scheduled to take office on June 1st. The role of Section Chair is as exhilarating as it can be exhausting. "At the end of the day" it was a wonderful opportunity and, I hope, that more often than not, you believed I understood the "vision thing," and was up to the task at hand.

I extend best wishes to my successor, Jean T. Walsh, and to her fellow officers, Jim Subjack of Chautauqua County, and Marvin Schechter of Manhattan. Working with the District Representatives there is a leadership team on the cusp of office ready to continue, and exceed, where we are today. I urge more involvement from the general membership on the emerging issues of the day. We can (and should) have a powerful voice—which is both heard and respected.

Roger Bennet Adler

Message from the Editor

This issue reports in detail on the activities of our Section during the State Bar's Annual Meeting at the Marriott Marquis Hotel in New York City. The names and subjects of our CLE speakers are discussed and the names of this year's award winners are presented to recognize these individuals for their outstanding contributions. A centerfold photo spread is also included to visually depict the highlights of the Annual Meeting.

With respect to our feature articles, we present a very interesting and informative article on the aspects of the Son of Sam Law which seeks to compensate crime victims. Our second feature article also deals with the recent personnel changes in our Appellate Courts, including the selection of Justice Theodore T. Jones, Jr. as the newest member of the New York Court of Appeals. Important new changes with respect to presiding Judges in the various federal courts are also discussed.

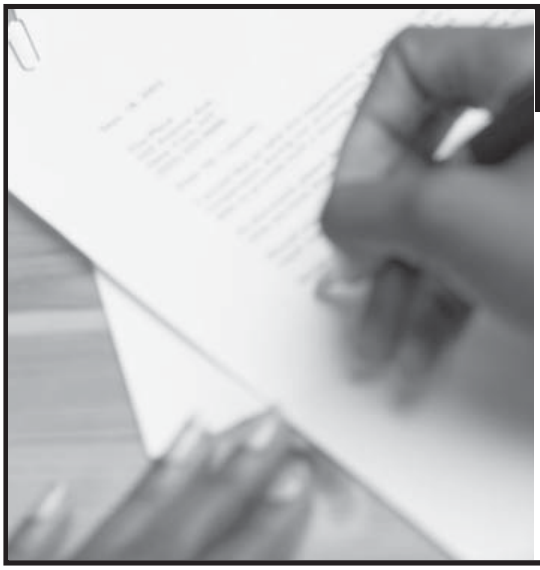
The New York Court of Appeals in the last several months has issued a variety of opinions in the criminal law area and these decisions are discussed in detail in our New York Court of Appeals section.

Our Section was saddened to learn of the recent death of the Honorable Vincent Doyle from upstate New York. Judge Doyle was a long-time and valuable member of our Section, having previously served as Chair. We express condolences to the members of his family and our Section is considering an appropriate manner in which to honor the Judge's memory.

The United States Supreme Court has also continued upon the resumption of its term in October to issue a variety of important issues on criminal law matters, including further clarification of *Apprendi* principles relating to sentencing. These cases are summarized in our United States Supreme Court section.

I continue to request our members to submit articles for possible publication and thank them for their continuing comments and support of our *Newsletter*. I can hardly believe that we are in our 4th year of publication but it is good to know that we have grown and expanded and that our *Newsletter* is appreciated.

Spiros A. Tsimbinos



Request for Articles

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

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Articles should be submitted on a 3½" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

42 Million Dollar Baby: How the Newly Amended Son of Sam Law Combats the Felon's Attempts to Stymie Victim Compensation and Ensures Victims' Rights

By Gregory M. Longworth

In 2001, the New York Son of Sam Law was amended to suspend the statute of limitations for a civil suit brought by the victim of a felony against the perpetrator to encompass all funds that the criminal may come into. This amended law was a tremendous boon to victims' rights, as victims of felonies had beforehand been privy to only those funds the convicted felon attained pursuant to the crime. This unfairly left many victims penniless, while allowing the perpetrators of even the most heinous crimes to collect funds otherwise earmarked for the victims were it not for the expiration of the statute of limitations. The legislature, to its credit, recognized this travesty and remedied it with the 2001 amendments. The recently decided *Scarangella v. Laborde* is a prime example of the amended law's significant role in furthering victims' rights by ensuring their due compensation.

Introduction

On April 16, 1981, New York City Police Officers John Scarangella—husband to Vivian Scarangella and the father of four—and Richard Rainey—a thirteen-year veteran of the force—in uniform while driving in their marked police car, were performing their routine patrol in the St. Albans section of Queens. Upon observing a white van that they suspected had been used in a number of burglaries, they followed it for several blocks before the van abruptly stopped in the middle of the street. Before the two officers were able to get out of the police car, the driver of the van, James Dixon York, and the passenger, Anthony Laborde a/k/a Abdul Majid, ran toward their vehicle, guns drawn. Bullets poured in through the windshield of the police car. When the firing ceased Rainey, who had ducked behind the dashboard, looked up to see York standing by his door. York proceeded to resume firing, as bullets were concurrently fired from the other side of the car. The two shooters fled, leaving Officer Scarangella mortally wounded. Rainey, shot eight times, survived. The officers' two families were left in shambles. Both shooters were convicted of the murder of Officer Scarangella and the attempted murder of Officer Rainey. On July 2, 1986, James York and Anthony Laborde were sentenced to two 25-years-to-life consecutive prison terms.

In 2002, Laborde received $15,000 dollars from a suit he had filed in 1999 against the New York State Department of Corrections for alleged violations of his civil rights. Upon notice of the settlement, the New York State Crime Victims Board ("CVB") notified the victims, who brought suit on July 10, 2002 pursuant to Executive Law 632(a) for damages for the wrongful death of Officer Scarangella and the injuries sustained by Officer Rainey. On May 4, 2006, almost 25 years to the date of the death of Officer Scarangella and the attempted murder of Officer Rainey, Laborde's victims were awarded $42,104,413 after a jury trial. Laborde has already appealed the court's decision, challenging the applicability and constitutionality of Executive Law 632(a), a regulation more popularly known as the "Son of Sam Law."

The "Son of Sam Law": Its Purpose and Functions

New York's Son of Sam Law enables victims of felony crimes to sue the perpetrators of the crimes for any assets they may come into after being convicted. The law provides that after all relevant statutes of limitations have expired, the victim is accorded an additional three years to sue a convicted criminal for civil damages. This new statute of limitations runs from the date that a victim either discovers that the felon obtained or generated "profits from a crime" or received "funds of a convicted person," in line with the new provision.[1]

A new statute of limitations can be triggered, firstly, for "profits from a crime." Such assets are generated from "the commission of a crime of which the defendant was convicted" or assets obtained or generated as a result of the criminal having perpetuated the felony or those obtained with the proceeds of the felony.[2] For instance, a criminal writing the memoirs of his criminal rampage would fall within the scope of this provision. Another recent form of such profiting is "murderabilia," or merchandise directly related to the criminal activity, which is marketed and sold over the internet. Such merchandise encompasses weapons, "killer art," victim autopsy reports and even items as outrageous as the criminal's toe clippings.[3]

The "funds of a convicted person," on the other hand, are defined as those funds, including property, that are "received from any source by a person convicted of a specified crime . . . excluding child support and earned income, where such person" (1) is an inmate (2) is on parole or under other supervision, or (3) has been in prison or under other supervision within the last three years.[4] This

provision, only just added to the statute in 2001, differs in three ways from the "profits from a crime" provision. For one, the money triggering the reopening of the statute of limitations includes money from any source totaling ten thousand dollars or more, other than earned income or child support.[5] Secondly, it only applies to convicted felons under the watch of the criminal justice system, or if the money was accrued while the person was in the system and he/she has been released for no more than three years. Finally, the provision only applies to felons convicted of particular "specified crimes."[6]

The Son of Sam Law, as amended in 2001, provides a notification scheme for both the "profits from the crime" and "funds of a convicted person" provisions. Notification to the CVB is mandatory when assets are received by a convicted person, or else the relevant parties are subject to civil sanction.[7] After receiving notice or otherwise discovering funds of a convicted person, the victim may evince to the CVB his/her intent to sue, and the CVB shall "apply for any appropriate provisional remedies to restrain the funds."[8]

The Evolution of the Son of Sam Law

The Son of Sam Law has evolved over the years, culminating in the 2001 amendments which implemented the broader "funds of a convicted person" provision. The law's origin can be traced back to the Summer of 1977, when David Berkowitz conducted a famous string of violence throughout New York City, leaving six dead and seven others injured. The case grabbed worldwide attention as the at-large criminal left a series of letters for the police and media, signed "the Son of Sam." After Berkowitz was apprehended, the New York State legislature, spurred on by public outcry, sought to prevent him from translating his newfound notoriety into literary success, as his story was in heavy demand by publishers. Executive Law 632(a) was quickly passed, designed to "ensure that monies received by a criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering."[9] In its original form, the Son of Sam law required any entity contracting with an accused or convicted person for their story to submit a copy of the contract between the criminal and publisher, and deposit any proceeds earmarked for the accused or convicted party to the CVB in an escrow account. The victims were then privy to this money as long as they brought a civil action within five years of the establishment of the escrow account.[10] The law triggered a wave of similar legislation throughout the country.[11] This incarnation of the New York law, however, did not last for long.

Simon and Schuster: The Law Changes

In 1981, Henry Hill—who later earned greater notoriety from the movie *Goodfellas*—contracted with Simon and Schuster for the right to publish his book, *Wiseguy: Life in a Mafia Family*.[12] Despite the book's success, or perhaps spurred on by it, the CVB determined that the proceeds owed Hill by virtue of the publishing contract were subject to the Son of Sam Law. The law was subsequently challenged by the publishing company on First Amendment grounds.

The law was declared unconstitutional by the U.S. Supreme Court as it "singled out speech on a particular subject for a financial burden that it places on no other speech or income."[13] Because it was a First Amendment issue, the Court applied a strict scrutiny review. They held that while the regulation had a compelling governmental interest in victim compensation and ensuring that criminals did not profit from their crimes, it was not narrowly tailored to achieve that interest in that its broad approach was overly inclusive.[14] The Court was especially concerned that the statute's wide-ranging reach for "works in any subject" by a "person convicted of any crime" would have potentially disastrous effects. A particularly powerful argument was set forth by Justice O'Connor, who expressed concern that the law could have affected such literary classics as *The Autobiography of Malcolm X* or *Civil Disobedience* had it existed prior to 1980.[15] The New York legislature sought to remedy this defect in 1992, passing new legislation that did not target speech, but rather focused on "profits of crime"—any property obtained or income generated from the crime. The new regulation moreover held that the statute applied only to those convicted of a felony.[16] The statute differed from the original in two other ways, as the targeted assets were no longer immediately placed in escrow and the victim was given three years from the date of *discovering* the relevant assets to bring suit.

The most famous challenge to the new legislation came in 2000 when Salvatore "Sammy the Bull" Gravano was sued by the CVB for money made in conjunction with his book *The Underboss*, which depicted his work as a murderer for the Gambino crime family.[17] Gravano prevailed, as the court held that the Board could not bring suit under the revised law because the word "crime" applied to only state felonies, and additionally because none of Gravano's victims brought suit as was required under the statute.[18]

The 2001 Amendments

Another notorious crime spurred further change to the Son of Sam Law by the New York legislature. In 1988, David McClary was convicted of the murder of rookie New York City Police Officer Edward Byrne and sentenced to 25 years to life. In 1990, McClary commenced an independent civil rights lawsuit and in 1999 was awarded $237,500.[19] By this time, the seven-year statute of limitations for Byrne's family to bring a tort claim had expired. The 1992 Son of Sam law provided no recourse, as the

judgment did not constitute profits from the crime. The New York legislature thus amended the Son of Sam Law in 2001 to cure this obvious shortcoming by including the "funds of a convicted person" provision, thereby providing a means for restitution to those victims unfairly left without compensation for their suffering merely because the criminal had come into money after the seven year statute of limitations to bring a tort claim had run.[20] The amended law thus allowed the Byrne family to revive their claim based on McClary's newly found assets, and they were able to collect by virtue of a default judgment.

The Son of Sam Law, as it presently stands, thus provides an expanded opportunity for victims to receive compensation for their suffering despite long lapses in time between the commission of the crime and the commencement of the suit and irrespective of the means by which the convict collected his/her assets (either "funds of a convicted person" or "profits from the crime"). The practical necessities of the law are apparent. There is little incentive for one to commence a civil suit against a party at a juncture during which such party has no ability to pay. At the same time, equity is clearly offended when a victim is not compensated merely because the convict has the good fortune to come into money after the statute of limitations has run its course.

Recent Constitutional Challenges: Upholding Son of Sam

Anthony Laborde sought dismissal of the suit brought by Officer Rainey and the estate of Officer Scarangella, arguing that Executive Law 632(a) constituted an unconstitutional *ex post facto* law. Laborde's challenge is one of several such arguments recently voiced, attacking the 2001 amended version of the law as having departed from its initial concern with dutifully compensating victims and having entered the realm of criminal punishment. Despite contentions to the contrary, however, recent court decisions suggest that the law remains an ardent safeguard for victims who are left without compensation despite their clear pain and suffering. If anything, the revisions made in 2001 have seemingly expanded such safeguards, ensuring that victims are not left empty handed while those who perpetrated the crimes against them are, as far as their civil liability goes, let off the hook.

Due Process and Equal Protection Claims

Due Process and Equal Protection claims with respect to the statute have been found as unavailing. The U.S. Supreme Court has acknowledged that there is a compelling interest in both compensating victims and preventing criminals from profiting from crime.[21] Furthermore, convicted felons are not a protected class, so that only a rational basis review, and not a strict scrutiny standard (as was applied in *Simon and Schuster)*, exists for any claimed equal protection violation. This is a very difficult standard for one challenging the Son of Sam Law on a constitutional basis to overcome. This has been evidenced in recent challenges to the constitutionality of the law, all of which have been easily dismissed by the courts.

Anthony Laborde, for one, advanced a number of constitutional arguments, each of which were found unavailing by the court. The court found that there was a "reasonable connection between the subdivision permitting the Board to apply for provisional remedies (the statute)" and New York's "compelling interest in ensuring that victims of crime are compensated by those who harm them."[22] An equal protection claim was likewise dismissed as the court found that both plaintiff and defendant had the same right to apply for provisional remedies (injunction, attachment, etc.).[23] Other recent decisions have likewise found the state's prevailing interest as too compelling to overcome on an equal protection basis.[24]

Ex Post Facto Challenges: Is the Son of Sam Law a Punitive Measure?

A popular argument also advanced by those challenging the force of the Son of Sam Law—and advanced by Laborde as his primary argument—has been the contention that the law is punitive in nature, and thus facilitates a type of restitution normally reserved for the punishment of criminals, and as such is violative of the *ex post facto* clause of the United States Constitution. This argument is underscored by the prevailing rhetoric of the law's opponents—that the 2001 amendments have transformed the legislation into a tool meant to punish before it recompenses the victims.

In *Ciafone v. Kenyatta*,[25] Salvatore Ciafone shot a New York City Transit Police Officer, was incarcerated, and more than 25 years later settled an unrelated medical malpractice suit for more than $600,000. He claimed that the Son of Sam Law was violative of the *ex post facto* clause of the Constitution. The Second Department, in deciding this question, examined whether the law was either punitive in effect or evinced an intent to punish.[26]

The court, citing the statute's "Declaration of Policy and Intent," recognized that the statute's intent was "aid, care, and support" for crime victims.[27] The court further noted that though a statute may have a "detrimental" effect on a particular group, it by no means establishes that a civil remedy has any punitive intent.

In determining whether the statute had a punitive effect, the court looked at seven indicators, among which most notably included the statute's effect from a historic perspective and whether the statute promoted the traditionally punitive aims of retribution and deterrence.[28] The court found that the law had not been historically regarded as punishment and that the initiation of a civil claim pursuant to the statute is far too remote a remedy

to serve any deterrent purpose. Thus, the court easily dismissed the notion that the Son of Sam Law was punitive in nature.

Anthony Laborde proffered the same argument against the CVB in its effort to restrain the funds in Laborde's inmate account,[29] and again as a defense to the victims' civil suit. The argument stood as unavailing in both instances.[30] In the CVB's action for provisional relief, the Albany County court noted that a civil remedy cannot amount to an *ex post facto* violation. As the court found that authorization to apply for provisional relief (which the CVB sought) falls below the threshold of even a civil remedy, there was clearly no constitutional infirmity.[31]

The Legislative History: A Victim-Centered Approach

The argument that the Son of Sam Law serves as a punitive measure is best countered by evidence of the New York legislature's intent. The legislative history of the 2001 amendments clearly display a primary concern with victim compensation. The law was introduced to the State Senate as one that "expands the Son of Sam Law, [that] expands victims' rights to recover funds received by convicted criminals," and as "a major victory for the crime victims of the state."[32] The sponsor went on to state that the statute allows the victim to "seek redress, to obtain monetary compensation from the perpetrator of their crime." There is no mention in the Bill's introduction of any incentive to further punish the criminal. The legislation, rather, focuses squarely on victim compensation.

This focus didn't shift during the course of the Bill's hearing. In response to questioning, the legislation's sponsor continually put forth recompensing the victim as of primary concern. The Senator stated, in response to a particular query that, "any prisoner who reaps an economic windfall behind bars should first and foremost make compensation in some part, if not whole restitution, to the victim of the crime that put them behind bars in the first place."[33] This comment is particularly telling, as implicit in framing the response around the prisoner's windfall would be the notion of punishment, were the statute to intend a punitive remedy. As no such intention exists however, the response remained one concerned with victim restitution.

The recent case law, in conjunction with the tenor of the legislation's history, makes clear that the Son of Sam Law is primarily concerned with victim compensation. It is with this noble purpose in mind that the law has expanded and evolved over the years. It is this noble purpose that Anthony Laborde now challenges.

Conclusion: Revisiting the Anthony Laborde Case

As a result of Laborde's crimes, it was conclusively demonstrated that Officer Rainey lost over 13 million dollars in damages as a result of the shooting. It was likewise determined that Officer Scarangella's family suffered over 3 million dollars in losses. Officer Scarangella, moreover, left behind a wife and four children—two daughters and two sons. Officer Rainey lost the ability to perform the job he loved so much, the job he had hoped he would continue to perform for many more years. There were medical and funeral expenses. There was extensive pain and suffering experienced by both parties. Most of the aforementioned losses can never really be fully compensated. The losses are far too extensive in their reach and intangible in their effect. Nevertheless, whatever compensation can be afforded must be and will be.

This sentiment was echoed by an emotional jury following the civil trial, the first such jury trial conducted under the Son of Sam Law. Although a $42,104,413 verdict was rendered, jurors were disappointed that they could not award further money to the Scarangella family. The jury foreperson remarked, subsequent to the trial that, "we just wish the law had allowed us to award punitive damages to the (Scarangella family)."[34]

Had this litigation been pursued prior to the 2001 amendments to the Son of Sam Law, Anthony Laborde would have had full access to his $15,000 civil settlement. He could have day-traded it. Or invested it in some money-making venture. Jurors would have been in no position to lament the less than desirable reach of the law to compensate wrongful death victims. Taking this money away from Anthony Laborde is by no means punitive. It is the rightful hand of justice reallocating the money to those parties who can have no real compensation, but are entitled to at least some form to the extent that the law is able to provide it. While this compensation may come at the expense of the man who wrecked countless lives, it does not come as a form of punishment. The expense is a necessary byproduct of the Son of Sam Law's clear and very worthy goal—a goal greatly enhanced by the 2001 amendments—victim compensation.

Endnotes

1. *See* Executive Law § 632(a)(3).
2. *See* Executive Law § 632(a)(1)(b).
3. Suna Chang, *The Prodigal "Son" Returns: An Assessment of Current "Son of Sam" Laws and the Reality of the Online Murderabilia Marketplace*, 31 Rutgers Computer and Tech. L.J. 430 (2005).
4. Executive Law § 632(a)(1)(c).
5. The first $1,000 in the inmate's account is protected from recovery pursuant to this provision; moreover, if said "funds" were obtained by way of a civil action, the first 10% of compensatory damages may not be executed against. *See* N.Y. Exec. Law § 632(a)(3).

6. These include violent felonies, like murder, manslaughter and other serious crimes. *See* N.Y. Exec. Law § 632(a)(1)(e).
7. The Legislature created the CVB in 1966 under Executive Law § 622 to aid innocent persons who "suffer personal physical injury or death as a result of criminal acts."
8. Executive Law § 632(a)(4).
9. Assembly Bill Mem. Re: A9019 (July 22, 1977), *reprinted* in Bill Jacket for ch. 823.
10. N.Y. Exec. Law § 632-a(1)(ii) (McKinney 1982).
11. *Id.*
12. *Simon & Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991).
13. *Id.* at 116.
14. *Id.* at 120.
15. *Id.* at 121-123.
16. *McClary v. Coughlin*, 87 F. Supp. 2d 205 (W.D.N.Y. 2000).
17. *See NYS Crimes Victims Bd. v. T.J. M. Prods., Inc.*, 705 N.Y.S.2d 320 (2000). Jessica Yager, *Investigating NY's 2001 Son of Sam Law: Problems with the Recent Extension of Tort Liability for People Convicted of Crimes*, 48 N.Y.L. Sch. L. Rev. 443 (2003).
18. *Id.* at 325.
19. *McClary v. Coughlin*, 87 F. Supp. 2d 205 (W.D.N.Y 2000).
20. Jessica Yager, *Investigating NY's 2001 Son of Sam Law: Problems with the Recent Extension of Tort Liability for People Convicted of Crimes*, 48 N.Y.L. Sch. L. Rev. 443 (2003).
21. *Simon & Schuster,* 52 U.S. at 118-119.
22. *New York State Crime Victims Board v. Abdul Majid*, 749 N.Y.S.2d 837 (Supreme Court of N.Y. Albany County, 2002).
23. *Id.* at 841.
24. *See Sunszki v. Wright*, 193 Misc. 2d 490 (N.Y. Sup. Niagara Co. 2002).
25. 27 A.D.3d 143 (2d Dep't 2005).
26. *Ciafone*, 27 A.D.3d at 146, citing *Smith v. Doe*, 538 U.S. 84.
27. *Id.* at 147.
28. *See Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963) for full list of factors: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it has come into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it rationally may be connected is assignable to it, and (7) whether it appears excessive in relation to the alternative purpose assigned.
29. *Majid*, 749 N.Y.S.2d 837 at 840.
30. Pursuant to the application of memos in the civil suit against Majid, the New York Attorney General put forth an intervenor memorandum refuting the contention that the Son of Sam Law serves as an *ex post facto* law. The memo echoed the court's decision in *Ciafone*, positing the statute neither evinced an intent to punish nor was punitive in effect. Noting that only the "clearest proof will suffice to override the legislative intent and transform what has been denominated a civil remedy into a criminal penalty," the AG forcefully argues that there is little evidence of the statute's punitive effect, much less "clear proof."
31. *Id*.
32. Assembly Mem. In Support of Legislation (June 22, 2001), *reprinted in* Bill Jacket for ch. 62 (2001).
33. *Id.*
34. Larry Fisher, *Shooter Must Pay 42 Million*, Poughkeepsie Journal (May 5, 2006).

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Appellate Courts Undergo Recent Significant Personnel Changes

By Spiros A. Tsimbinos

During the last year the most significant development in the appellate area has been the various changes in the personnel of both the New York Court of Appeals and the various Appellate Divisions.

New York Court of Appeals

With respect to the New York Court of Appeals, Judge George Bundy Smith retired on October 23, 2006 and Governor Pataki appointed Judge Eugene F. Pigott, Jr. to fill that seat. In addition, only a few months later Judge Albert Rosenblatt reached the mandatory retirement age and retired from the court on December 31, 2006. On January 15, 2007 our newly elected Governor, Eliot Spitzer, announced the selection of Judge Theodore T. Jones, Jr. to fill Judge Rosenblatt's position. Judge Jones was selected from a group of seven nominees who had been submitted by a special commission.

The nominees in addition to Judge Jones were: Richard T. Andrias, George F. Carpinello, Steven W. Fisher, Thomas E. Mercure, Juanita Bing Newton and James A. Yates. Justices Andrias, Fisher and Mercure presently sit in the Appellate Division. Justice Yates is from the Manhattan Supreme Court. Judge Juanita Bing Newton is the Deputy Chief Administrative Judge for the State of New York. In a somewhat rare situation, George Carpinello is not a sitting judge but is a partner at an Albany law firm.

Judge Jones is presently 62 years of age and is a graduate of Hampton University and St. John's School of Law. He previously worked as an attorney for the Legal Aid Society and was an Army Captain in Vietnam from 1968-1969. His prior judicial service includes a term as a Criminal Court Judge and for the last several years as a Justice of the Supreme Court in Brooklyn. Judge Jones is most recently known for being assigned to handle the highly contentious transit union strike matter. In that case the Judge was forced to impose a 2.5 million dollar fine on the union and a jail sentence for the union's leader.

Judge Jones is highly regarded, having been found well qualified by several bar associations who reviewed his credentials for the Court of Appeals. In hearing of the Judge's selection Barry Kamins, presently the President of the New York City Bar Association and former head of the Brooklyn Bar Association, stated that Judge Jones has excellent temperament and a devotion to fairness. Judge Jones was confirmed by the New York State Senate in early February and began hearing cases later that month.

Almost immediately after filling Judge Rosenblatt's seat, the Governor was also faced with the task of selecting a new Chief Judge of the Court of Appeals since the term of Judith S. Kaye expires at the end of March. In late November, Chief Judge Kaye announced that she was seeking reappointment and wished to serve for an additional 20 months when she would reach the mandatory retirement age of 70. In fact, Judge Kaye was the leading candidate for the Chief Judge's position when the list of 7 was announced by the Commission on Judicial Selection in late January. Judge Kaye was in fact reappointed on February 7th. The term of Judge Ciparick will also be drawing to a close in January of 2008. It is widely believed that Judge Ciparick will also be seeking reappointment to the Court of Appeals when her term expires and her reappointment is widely expected.

Thus, as we look to the future and attempt to analyze trends in the New York Court of Appeals for the next two years, it appears that although the Court publicly states that it seeks unanimity and consensus, the realities of the situation appear to be that the Court during the next few years will be sharply divided with several 4-3 decisions and many dissenting opinions. One core voting group within the Court appears to consist of Judges Kaye and Ciparick who almost always vote together. On the other side there exists a core group of Judges Read and Graffeo. Judge Pigott, who recently joined the Court, also appears to be close to the Read and Graffeo group. Thus, it appears that during the next few years the swing votes on the Court will consist of Judge Robert S. Smith and newly appointed Judge Jones. Judge Smith, although viewed as a Conservative, has exhibited an independent streak and he has often issued concurring opinions even though he has agreed with the majority result. Judge Smith also seems less bound by preservation and precedent and has questioned some of the traditional principles of the Court. Judge Theodore Jones is characterized as a moderate Democrat and he may take positions just somewhat more middle-of-the-road than his more liberal colleagues. Those who observe and analyze the New York Court of Appeals should have an interesting year as the effects of the new personnel changes begin to unfold.

Appellate Division Vacancies

During the last several months, and just prior to leaving office, Governor Pataki moved to fill several vacancies which existed in the various Appellate Divisions. Governor Pataki appointed Justice Daniel D. Angiolillo to fill one of five vacancies in the Appellate Division Second Department. Justice Angiolillo is from Westchester County and had served in the Supreme Court in Westchester since 1999. In addition, in late December, he appointed four additional justices to the Second Department. The appointments were Justices Ruth C. Balkin, Edward D. Carni, Thomas A. Dickerson and William E. McCarthy. Justice Balkin previously served as supervising judge of the Nassau County Family Court. Justice Carni served in the Supreme Court in the Fifth Judicial District and comes from Syracuse. Justice Dickerson previously served in the Westchester Supreme Court and Justice McCarthy served as a Supreme Court Justice in Albany County. The Appellate Division Second Department has an allocation of 22 judges. One of these vacancies occurred unexpectedly when Justice Thomas A. Adams from Long Island failed to win reelection.

With respect to the Appellate Division First Department, Governor Pataki in late November filled the last remaining vacancy in that department with the appointment of Supreme Court Justice E. Michael Kavanagh. Justice Kavanagh had sat in Ulster County and had previously served as Ulster County's District Attorney for 20 years prior to his election to the Supreme Court in 1998. Justice Kavanagh's appointment continues to fuel the recent criticism of Governor Pataki's appointments to the First and Second Departments with Justices who reside outside of those respective Departments. Article VI, Section 4(f) of the New York State Constitution requires that a majority of the Justices sitting within the Appellate Department be residents of that Department. Justice Kavanagh's appointment will bring to seven the number of the Court's 16 judges who reside outside the two counties which the First Department covers, to wit: Manhattan and the Bronx.

Also, in late November, Governor Pataki named Justice Henry J. Scudder as Presiding Justice of the 11 member Appellate Division Fourth Department. Justice Scudder replaces Judge Eugene F. Pigott who was recently named by the Governor to the New York Court of Appeals. Also in late December, Governor Pataki announced two additional appointments to the Appellate Division, Fourth Department. They were Justices Eugene M. Fahey and Erwin M. Peradotto. Justice Fahey previously served in the Erie County Supreme Court and Justice Peradotto served in the Supreme Court in Buffalo. The two additional appointments to the Appellate Division, Fourth Department, brings that Court up to its full complement of 11 justices.

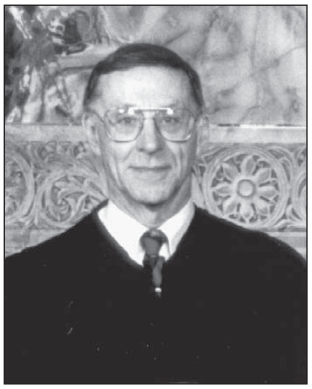
The appointment of so many Appellate Division Justices in the last remaining days of his administration has also generated criticism of former Governor Pataki and some have viewed his actions as being reminiscent of the midnight judicial appointments which led to the famous decision in *Marbury v. Madison*.

The personnel landscape of the various Appellate Courts has changed significantly in the last year. Appellate practitioners should be aware of these changes and I hope that this article will provide a valuable update for attorneys who deal with appellate matters.

Spiros A. Tsimbinos is a former President of the Queens County Bar Association and is currently the Editor of the *Criminal Law Newsletter* for the New York State Bar Association.

A Tribute to the Honorable Albert M. Rosenblatt

By Spiros A. Tsimbinos



Judge Albert M. Rosenblatt

Judge Albert M. Rosenblatt, who retired from the New York Court of Appeals on Jan. 1, 2007, had served on that court for 8 years. He was nominated by Governor Pataki and was confirmed by the Senate on December 17, 1998. Judge Rosenblatt was the critical fourth vote in many recent controversial decisions and during the last few years, he came to be known as the swing vote which could make a controversial decision go either way. Although appointed by Governor Pataki and considered to be a moderate conservative, Judge Rosenblatt disappointed the Governor when in 2004 he cast the critical fourth vote to declare the death penalty statute unconstitutional. Judge Rosenblatt was also very instrumental in causing the New York Court of Appeals to change its view on depraved indifference murder and to render its landmark decision in *People v. Payne*, 3 N.Y.3d 266 (2004), which has largely restricted prosecutors from charging both intentional murder and depraved indifference murder within the same indictment.

Judge Rosenblatt was a graduate of Harvard Law School and received a B.A. degree from the University of Pennsylvania. Prior to his ascendancy to the New York Court of Appeals, he served as an Associate Justice of the Appellate Division, Second Department. He also served as the State's Chief Administrative Judge from 1987 to 1989. He also served for many years as the District Attorney of Dutchess County having been in that office from 1969 to 1975. Judge Rosenblatt was highly regarded by both his colleagues on the court and members of the legal community at large. He was known as a hard worker and an outstanding legal intellect, while at the same time being most cordial and congenial. One of his treasured hobbies is playing squash and he is a nationally ranked player. He was born in New York City to immigrant parents from Eastern Europe. Judge Rosenblatt has been married to Dr. Julia (Carlson) Rosenblatt, a writer and former Vassar college professor. They reside in LaGrange, New York and have one daughter, Betsy, also an attorney.

Because for several years Judge Rosenblatt emerged as the critical swing vote, he was often compared to Justice Sandra Day O'Connor who recently retired from the Court. In fact, in the Fall of 2005, our Criminal Justice Section held a specific CLE program to consider "Judge Rosenblatt's critical role on the Court of Appeals." I have had the pleasure of appearing before Judge Rosenblatt in the Court of Appeals and also meeting him personally on several occasions, including during the Fall 2005 CLE program where he appeared as the Section's luncheon speaker. The Judge was always congenial and considerate and has long been held in high esteem by judges and lawyers alike.

Chief Judge Judith Kaye, in commenting on Judge Rosenblatt's departure from the Court, stated that Judge Rosenblatt always commanded respect at the conference table because he was always well prepared and was a great contributor to the Court's discussions. She further added, "He is relentless in his search for the correct, just, practical resolution. . . . He loves plumbing the depths of the law, pulling books off the shelves, talking endlessly about the issues before us. I think his writing is exemplary—clear and lucid and sometimes lyrical."

In addition to his service on the Court, Judge Rosenblatt also was a founding member of the Historical Society of the Courts of the State of New York and still serves as its President. If one is to expect that Judge Rosenblatt's retirement will cause him to have more leisure time, one should note that he is currently finishing a 1,200 page history of the New York Court of Appeals. We thank Judge Rosenblatt for his many years of distinguished judicial service and wish him all the best in his future endeavors.

New York Court of Appeals Review

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from November 6, 2006 to February 1, 2007.

DEPRAVED INDIFFERENCE MURDER

***Policano v. Herbert*, decided November 16, 2006 (N.Y.L.J., Nov. 17, 2006, pp. 1, 5 and 23)**

In a 5-2 decision, the New York Court of Appeals held that its recent decisions on depraved indifference murder changed the state of the law in New York and thus those rulings cannot provide relief retroactively to defendants convicted under the old case law.

The Court rendered its determination in a habeas corpus proceeding that had been referred to it from the Second Circuit Court of Appeals and wherein the Federal Court had posed three certified questions. The Court's decision was made necessary by its recent rulings in *People v. Payne,* 3 N.Y.3d 266 (2004) and *People v. Feingold*, 7 N.Y.3d 288 (2006), which overturned the Court's earlier analysis regarding depraved indifference in *People v. Register*, 60 N.Y.2d 270 (1983).

The defendant in the case at bar had brought a habeas corpus petition in the Federal Courts regarding his 2001 conviction for depraved indifference murder. His conviction had been affirmed in the New York courts based upon the *Register* decision. The U.S. Circuit Court of Appeals for the Second Circuit had voted 8-5 to certify three questions to the State Court of Appeals with respect to a retroactive application following Register's demise. The New York Court of Appeals in responding to the Federal request held that a retroactive application would potentially flood the criminal justice system with motions to vacate convictions of culpable intentional murder who were properly charged and convicted of depraved indifference murder under the law as it existed at the time of their convictions. The majority opinion was written by Judge Read, Chief Judge Kaye and Judge Ciparick dissented.

SELECTION OF JURORS

***Oglesby v. McKinney*, decided November 16, 2006 (N.Y.L.J., Nov. 17, 2006, pp. 1, 6 and 25)**

In a unanimous decision, the New York Court of Appeals held that criminal trial jurors in a case before a City Court need not be selected exclusively from among city residents. In the case at bar, a Syracuse City Court Judge had ruled that a defendant had a right to a trial selected only from residents of Syracuse rather than all of Onondaga County. The defendant in question was black and the black population in Syracuse was approximately 20%, while in Onondaga County it was less than 8%. Applying Judiciary Law Section 500, the court held that selection from among the County residents was all that was required and that there was no authority to suggest that the community from which a jury is selected must be identical to the area over which the court has jurisdiction. Judge Robert Smith wrote the opinion for the Court and Chief Judge Kaye and Judge Pigott took no part.

JUSTIFICATION CHARGE

***People v. Bowling*, decided November 16, 2006 (N.Y.L.J., Nov. 17, 2006, p. 25)**

In a unanimous decision, the New York Court of Appeals upheld a manslaughter conviction and rejected the defendant's claim that he was entitled to a new trial because the Court had provided the jury with an incorrect justification charge. The Court of Appeals found that although the defense of justification was submitted to the jury without objection from the People, no reasonable view of the evidence supported such a defense. Under these circumstances, no justification charge at all was necessary and any error in the charge that was given would be deemed harmless. In issuing its ruling, the Court cited to its recent decision in *People v. Jones*, 3 N.Y.3d 491 (2004).

FAILURE TO PRESERVE ISSUE

***People v. Carter*, decided November 16, 2006 (N.Y.L.J., Nov. 17, 2006, p. 25)**

In a unanimous decision, the Court of Appeals affirmed a defendant's conviction for two separate counts of assault. The defendant claimed on appeal that the counts were inconsistent and that he could not be convicted of both charges. The Court of Appeals found, however, that the defendant had failed to preserve this argument at trial and that the issue was not one which it could consider even in the absence of objection. In rendering its determination, the Court cited to its leading case on the issue of preservation with respect to inconsistent or repugnant verdicts, to wit: *People v. Alfaro*, 66 N.Y.2d 985 (1985).

SECOND FELONY OFFENDER STATUS

***People v. Cagle*, decided November 20, 2006 (N.Y.L.J., Nov. 21, 2006, pp. 1, 5 and 22)**

In a 5-1 decision, the New York Court Appeals held that the defendant could be sentenced as a second felony

offender because his period of time spent in a day reporting program constituted incarceration under Penal Law Section 70.06 and thus this period of time was excluded from the calculation of the 10-year period required for the commission of a prior felony. The defendant had claimed that the time he spent in a day reporting program could not act to extend the 10-year period required for the prior felony conviction. The Court concluded, however, that a reading of Penal Law Section 70.06(1)(b) constituted confinement since he was serving out his original sentence of imprisonment and was under the custody and control of the Department of Correction Services. Under the Penal Law provision, the statute specifically states that in calculating the 10-year period, in which the prior felony must have been committed, any period of time during which the person was incarcerated shall be excluded and such 10-year period shall be extended by a period or periods equal to the time served under such incarceration.

In finding that the defendant's day reporting requirement constituted incarceration, the Court found that the tolling provisions in the Penal Law were applicable and that therefore the defendant was properly sentenced as a second felony offender. The Court of Appeals ruling resolved a dispute between the Appellate Division Fourth Department and the Appellate Division Second Department. In reaching its determination, the Court of Appeals adopted the view previously expressed by the Fourth Department and rejected the reasoning of the Appellate Division Second Department. Judge Pigott, who had previously ruled on the matter when he was the Presiding Justice of the Appellate Division, Fourth Department, took no part in the decision and Judge Robert S. Smith dissented, arguing that the word "incarceration" means locked up in prison and that the defendant's day reporting situation did not constitute incarceration as was intended in the Statute.

SUBSTITUTION OF COUNSEL

***People v. Nelson*, decided November 20, 2006 (N.Y.L.J., Nov. 21, 2006, p. 23)**

In a unanimous decision, the New York Court of Appeals upheld a trial court's denial of a defendant's request to substitute counsel just before jury selection. The Court held that this was a proper exercise of the Trial Court's discretion. The Court further noted that although the Trial Judge initially rejected the defendant's request without inquiry he thereafter allowed the defendant to voice his concern about defense counsel and also heard defense counsel's comments regarding the request. Under these circumstances, there was no abuse of discretion so as to warrant appellate action.

FAILURE TO PRESERVE ISSUE

***People v. Harper*, decided November 20, 2006 (N.Y.L.J., Nov. 21, 2006, p. 23)**

In a unanimous decision, the Court held that the defendant's claim regarding the Trial Court's preliminary instructions to the jury was an unpreserved error and could not be reviewed by the Court. The preliminary instructions in question related to outlining the elements of each of the three robbery counts with which the defendant was charged. The defendant failed to object to these instructions when given and the Court of Appeals applying its traditional rules of preservation refused to consider the issue.

NO FUNDAMENTAL ERROR OCCURRED BECAUSE OF TRIAL JUDGE'S INSTRUCTIONS AND THEREFORE PRESERVATION RULES APPLY

***People v. Brown*, decided November 20, 2006 (N.Y.L.J., Nov. 21, 2006, p. 23)**

In a unanimous decision, the New York Court of Appeals affirmed a defendant's conviction of robbery in the third degree. The Trial Court had provided the potential jurors during the *voir dire* with instructions on the elements of the crimes for which the defendant was on trial. Although these instructions were premature, the defendant failed to object before the Trial Court and the Court of Appeals held that his claim was unpreserved for their review, citing *People v. Gray*, 86 N.Y.2d 10 (1985). In reviewing the defendant's contention, the Court of Appeals found that contrary to the defendant's claim, the Trial Court, by instructing the jury at the outset as to the elements of the crime, did not commit a "mode of proceedings" error that went to the essential validity of the process and was thus so fundamental that the entire trial was irreparably tainted.

CIVIL COMMITMENT OF SEX OFFENDERS

***State of New York ex. Rel. Harkavy on behalf of John Does 1 through 12, Appellants v. Consilvio*, decided November 21, 2006 (N.Y.L.J., Nov. 22, 2006, pp. 7, 22)**

The New York Court of Appeals issued a long-awaited decision with respect to Governor Pataki's program of civilly confining sex offenders after their release from prison. The Court of Appeals held that in seeking such civil commitments, the protections and procedures applicable under Correction Law, Section 402, rather than the Mental Hygiene Law, should govern. All seven judges of the Court of Appeals agreed that because the Petitioner inmates involved in the case were still in prison, they were subject to the provisions and protections of the

Correction Law which require that determinations be made by independent court-appointed physicians, that notice be given to the inmates and that inmates be afforded a pre-transfer hearing.

Judge Ciparick wrote the majority opinion for the Court and suggested that although some inmates may require further hospitalization, proper procedures must be followed in accordance with applicable law. Judge Robert S. Smith issued a separate concurring opinion in which he strongly emphasized the need for hearings to be conducted before any civil commitment occurs.

The Court of Appeals decision overturned a ruling of the Appellate Division, First Department which had basically supported Governor Pataki's program. Following the Court of Appeals decision, the Governor stated that he was disappointed by the ruling and called for a special session of the Legislature to act on a civil commitment bill.

WEIGHT OF EVIDENCE CLAIM

People v. Romero, decided November 21, 2006 (N.Y.L.J., Nov. 22, 2006, pp. 1, 22)

In a unanimous decision, the New York Court of Appeals upheld a long-time practice which has been applied by appellate courts in determining a weight of the evidence analysis. Historically, New York's Appellate Divisions have continually struggled with how much deference to afford the jury's credibility determinations. The intermediate appellate courts have the authority to take a fresh look at evidence presented during criminal trials and to reverse convictions where they believe the jury has accorded the evidence improper weight. The Court of Appeals relied on its 1903 ruling in *People v. Gaimari*, 176 N.Y. 84, where a strong policy preference for deference to the jury's view of conflicting evidence was expressed. The Court of Appeals adhered to its prior 1903 decision reaffirming that it was still good law but also cautioned that appellate courts must make absolutely clear that a defendant has received the proper appellate scrutiny in reviewing a conviction.

The 20-page majority opinion was written by Judge Graffeo and summarized its holding as follows: ". . . the general standard of review set forth in *Gaimari*, and the 'delicately nuanced' deference the judiciary owes the jury, remains applicable." But she also stressed that courts would be wise to seek more modern rulings as progression of rulings over the last century suggest weight of the evidence analysis remains an ever evolving project.

PROPER WEIGHT OF EVIDENCE STANDARD APPLIED BY THE APPELLATE DIVISION

People v. Vega, decided November 21, 2006 (N.Y.L.J., Nov. 22, 2006, p. 24)

Applying its decision in *People v. Romero*, the New York Court of Appeals affirmed a defendant's conviction for criminal sale of a controlled substance in the third degree. The Court found that the Appellate Division had applied the correct standard for determining the weight of the evidence utilizing the principles enunciated in *People v. Romero* and *People v. Gaimari*, 176 N.Y. 84 (1903). The Court of Appeals found that the Appellate Division had properly rejected the defendant's argument and had correctly concluded that there was no basis for disturbing the jury's determination since the jury had considered issues of credibility and had resolved inconsistencies in the various testimonies.

WAIVER OF APPEAL

People v. Moyett, decided November 21, 2006 (N.Y.L.J., Nov. 22, 2006, p. 24)

Continuing the long line of recent decisions concerning the proper application of a waiver of appeal, the New York Court of Appeals unanimously determined that in the instant matter, the defendant's appeal waiver was invalid. During the plea colloquy, the court had advised the defendant that by pleading guilty, you give up your right to appeal the conviction. The Court of Appeals found that based on this statement, the defendant may have erroneously believed that the right to appeal is automatically extinguished upon the entry of a guilty plea. In the case at bar, there was no written waiver of appeal on file and no other indication in the record that the defendant understood the distinction between the right to appeal and the knowing and intelligent waiver of such a right. The Court, in rendering its decision, cited to its recent ruling in *People v. Billingslea*, 6 N.Y.3d 248 (2006).

FAILURE TO PRESERVE CLAIMED ERROR

People v. Lane, decided November 21, 2006 (N.Y.L.J., Nov. 22, 2006, p. 24)

In a unanimous decision, the New York Court of Appeals affirmed a defendant's conviction and rejected the defendant's claim that the evidence to support his conviction was insufficient as a matter of law. The Court of Appeals found that the defendant's claim as to the sufficiency of evidence was not properly preserved and it would therefore not review the issue.

The defendant also raised the issues that the trial court's evidentiary rulings had violated his constitutional rights to a fair trial. The Court of Appeals also noted that these claims had not been preserved and that therefore, they could not review the claims raised.

SENTENCING AS PREDICATE FELONY OFFENDER

***People v. Ross*, decided December 14, 2006 (N.Y.L.J., Dec. 15, 2006, p. 24)**

In a unanimous decision, the New York Court of Appeals held that a defendant's agreement at the time of his plea to be sentenced as a second felony offender constituted a valid waiver of any claim on appeal that he had been improperly sentenced. In the case at bar, the defendant at the time of his plea allocution agreed to be sentenced as a second felony offender. Further, when the People failed to file a predicate felony statement, the defendant told the judge that he was waiving receipt of such a statement and when further questioned, indicated he was declining to contest his predicate felony. He was then sentenced as a second felony offender to a term of 1½ to 3 years. On appeal, he raised the issue that his sentence was illegally imposed and indicated that his prior conviction was outside of the 10 year parameter. The New York Court of Appeals stated that a valid waiver of the issue had occurred and that in addition because information before the sentencing court established that the defendant had been convicted of a known and identified felony within the time required by the statute, his claim even if reviewed on the merits would not be upheld.

FAILURE TO PRESERVE

***People v. Parker*, decided December 14, 2006 (N.Y.L.J., Dec. 15, 2006, p. 24)**

The Court of Appeals determined that the defendant's claim on appeal that the evidence was legally insufficient to support the verdict was unpreserved during the trial and that therefore the Court would not reach the issue. The defendant's conviction was therefore affirmed.

FAIR TRIAL

***People v. Romero*, decided December 19, 2006 (N.Y.L.J., Dec. 20, 2006, p. 25)**

In a unanimous decision, the Court of Appeals affirmed the defendant's conviction and found that the defendant's argument that comments by the prosecutor during the summation were improper and deprived him of a fair trial were not sufficient to overturn the conviction in question. The Court of Appeals found that some of the claimed prejudicial remarks were not objected to and were therefore unpreserved and that others were followed by curative instructions by the Court which cured any possible prejudice. Under the totality of the circumstances, the defendant was not deprived of a fair trial.

INEFFECTIVE ASSISTANCE OF COUNSEL

***People v. Ocuna*, decided December 19, 2006 (N.Y.L.J., Dec. 20, 2006, p. 25)**

In a unanimous decision, the New York Court of Appeals affirmed the defendant's conviction of first degree criminal contempt. The defendant claimed on appeal that his trial counsel had been ineffective because he had failed to properly investigate certain claims and had failed to call the defendant's father as an essential witness. Following a post-trial CPL 440 motion, the trial court below determined there was no reasonable possibility the verdict would have been different and denied the ineffective assistance of counsel claim. The Appellate Division had upheld the defendant's conviction but by a split vote of 3-2.

The New York Court of Appeals determined that the trial court did not abuse its discretion when it concluded the defendant failed to establish the threshold issue of ineffective assistance of counsel. It further noted that the motion papers did not contain sworn allegations substantiating or tending to substantiate all the essential facts. In addition, no affidavit was submitted from the father to show that he was an essential witness and that he would have corroborated the defendant's testimony. Under these circumstances, the defendant's conviction was upheld.

RIGHT OF CONFRONTATION

***People v. Bradley*, decided December 19, 2006 (N.Y.L.J., Dec. 20, 2006, pp. 22–23)**

In a unanimous decision, the New York Court of Appeals held that the defendant's right of confrontation was not violated by the admission into evidence of a statement made in response to a question from a police officer where the officer's reason for asking the question was to deal with an emergency. In deciding this *Crawford* issue, the New York of Appeals made specific reference to the recent decision of the United States Supreme Court, *Davis v. Washington*, 126 S. Ct. 2266 (2006). The defendant was charged with criminal contempt and assault in the third degree based upon a claim of physical attack on his girlfriend. At the trial, the People's only witness was a police officer who had arrived on the scene following a 911 call. The officer found the girlfriend visibly shaken with blood on her face and clothing. After the officer asked what happened, she stated that her boyfriend threw her through a glass door. At the trial, the girlfriend was not available to testify. The trial court therefore allowed the officer to testify about the statement on the grounds that it was an "excited utterance." Faced with a classic *Crawford* issue, the New York Court of Appeals, on the basis of the

recent decision of the Supreme Court in *Davis*, found that admissibility of the statement was clearly justified since the officer was responding to an emergency. The statement was therefore not for the primary purpose of interrogation and not testimonial so as to warrant the invocation of the confrontation clause.

The Court in analyzing the facts in the case at bar with the legal principles set down by the United States Supreme Court concluded as follows:

> When Mayfield, responding to a 911 call, arrived at Dixon's door and was met by an emotionally upset woman smeared with blood, his first concern could only be for her safety. His immediate task was to find out what had caused the injuries so that he could decide what, if any, action was necessary to prevent further harm. Asking Dixon "what happened" was a normal and appropriate way to begin that task, and the officer promptly entered the apartment, as an officer dealing with an emergency would be expected to do.

RIGHT TO PROCEED *PRO SE*

***People v. Gillian*, decided December 21, 2006 (N.Y.L.J., Dec. 22, 2006 p. 23)**

In the case at bar, the defendant claimed on appeal that he had been deprived of his Sixth Amendment right to represent himself. During the course of the litigation, the defendant had moved to discharge his assigned counsel claiming a conflict of interest in the differences in strategy. The trial court had denied this request. Subsequently, the defendant requested to proceed *pro se*, claiming that assigned counsel had done nothing and failed to make certain applications. The trial court again denied this request. Several days later, the defendant again moved to remove his assigned counsel and in a written request, stated that he wanted a re-assignment of counsel or in the alternative the opportunity to proceed *pro se*. Based upon the defendant's written request and further developments, the trial court subsequently assigned a new attorney to represent him. When this was done, the defendant did not object to the appointment of the new counsel nor did he reassert his desire to proceed *pro se*. Following the defendant's conviction, he re-raised the issue on appeal that he should have been allowed on his initial request to proceed *pro se*. The New York Court of Appeals affirmed the defendant's conviction and rejected his appellate claim. The Court found that when the defendant conditioned his last request for self representation with an alternate request for new counsel, his request to represent himself was not clear and unequivocal and that it appeared that he was using the request to proceed *pro se* as a way of obtaining the dismissal of his first assigned counsel. Further, the defendant voiced no dissatisfaction with the appointment of his new counsel and remained silent thereafter. Under these circumstances, the Sixth Amendment had not been violated. The Court of Appeals' determination was unanimous with Judge Smith filing a concurring opinion.

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Recent United States Supreme Court Decisions Dealing with Criminal Law

During the last several weeks, the United States Supreme Court has begun issuing a series of important decisions in the area of criminal law as follows:

Lopez v. Gonzalez, 549 U.S. __, 2006, 127 S. Ct. 625 (Dec. 5, 2006)

In *Lopez v. Gonzalez*, 549 U.S. __, 2006, 127 S. Ct. 625 (Dec. 5, 2006), the United States Supreme Court ruled in a 8-1 decision, that a non-citizen is not subject to mandatory deportation for a simple drug crime which although a felony in a State court, is only a misdemeanor under Federal law. Due to the expansion of the Immigration and Nationality Act, non-citizens are subject to automatic deportation where convictions of certain specified crimes are involved. In the *Lopez* matter, the defendant had pleaded guilty to a cocaine possession charge which was a felony under South Dakota law. On the Federal level, however, the crime constituted only a misdemeanor. In rendering the majority opinion, Justice Souter argued that deportation must only be based upon an interpretation of Federal law on the seriousness of an offense and could not depend on varying state criminal classifications. When dealing with drug crimes, the majority opinion concluded that a State offense constitutes a felony punishable under the Controlled Substance Act only if it proscribes conduct punishable as a felony under that Federal law.

In addition to the ruling itself, the recent decision of the United States Supreme Court in *Lopez* reemphasizes the importance of criminal lawyers to consider the possible immigration consequences of guilty pleas or criminal convictions on their non-citizen clients.

Carey v. Musladin, 127 S. Ct. 649 (Dec. 11, 2006)

Also in early December, the United States Supreme Court in *Carey v. Musladin*, 127 S. Ct. 649, unanimously held that there was no reason to reverse the defendant's conviction because the victim's family wore buttons bearing a photo of the victim during the trial. The defendant's attorney had asked the trial judge to order the buttons removed claiming they would greatly prejudice the jury against the defendant. The Trial Court denied the motion and the United States Supreme Court held that the situation in the case at bar was not so inherently prejudicial that it deprived the defendant of a fair trial. The decision was written by Justice Thomas.

Although refusing to reverse the conviction, some of the Justices of the Court appeared somewhat troubled by the situation. Justice Souter, for example, indicated in a separate decision that "spectators wearing buttons can raise a risk of improper considerations. Justice Kennedy also stated that he could envision a general rule against wearing buttons "to preserve the calm and dignity of the court."

Ayers v. Belmontes, 127 S. Ct. 469 (Nov. 13, 2006)

In a case decided on November 13, 2006, the United States Supreme Court had occasion to discuss the provisions of the death penalty sentencing phase in the State of California. In a 5-4 decision, the Court upheld a challenged procedure of the California scheme. The Court held that:

> . . . there was no reasonable likelihood that jurors in the penalty phase interpreted trial court's California catch-all instruction, which directed jurors to consider any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, to preclude consideration of petitioner's forward-looking mitigation evidence, namely, that he would lead a constructive life if incarcerated rather than executed, and so the instruction was consistent with the constitutional right to present mitigating evidence in capital sentencing proceedings.

The majority opinion was written by Justice Kennedy who increasingly appears to be assuming the critical fifth pivotal vote which was once held by former Supreme Court Justice Sandra Day O'Connor. Justice Stevens issued a dissenting opinion in which Justices Souter, Ginsburg and Breyer joined.

Cunningham v. California, 549 U.S. 127 S. Ct. 856 (Jan. 22, 2007)

In a 6-3 decision the United States Supreme Court continued to strictly apply its *Apprendi* line of cases with respect to the imposition of sentence based upon factors which have not been considered by a jury. On January 22, 2007, the Supreme Court struck down a provision of California's sentencing law because it gave judges too much power to increase sentences based on facts not found by the jury. The majority opinion which was written by Justice Ginsburg declared that because the California law authorized the judge not the jury to find the facts permitting an upper-term sentence, the system violated Sixth Amendment precedents. Justice Roberts voted with the majority as did Justices Scalia, Souter,

Stevens and Thomas. The three Justices in dissent were Justices Alito, Kennedy and Breyer. Law enforcement officials in California have estimated that approximately 40,000 offenders may face re-sentencing as a result of the Supreme Court's decision and the California Legislature is examining ways in which to modify its sentencing procedures.

Certiorari Granted in Two Sentencing Guideline Cases

Criminal law practitioners should be alerted to the fact that the United States Supreme Court is continuing to refine and review its position on the Federal sentencing guidelines following its landmark ruling in *United States v. Booker*. In early November, the Court granted *certiorari* in two cases and agreed to consider the issues concerning the reasonableness of below guidelines and within guidelines sentences which were imposed in light of *U.S. v. Booker*, 543 US 220, 125 S. Ct. 738 (2005). *Booker* held that the federal Sentencing Guidelines are subject to the jury trial requirements of the Sixth Amendment, and made the Guidelines "effectively advisory." *Booker* directed that "appellate review of sentencing decisions be done on the basis of reasonableness."

The two cases to be reviewed by the High Court are *Clayborne v. U.S.*, where the Eighth Circuit Court of Appeals held that a 15-month sentence for possessing and distributing cocaine was an unreasonable departure from the advisory guidelines of 37–46 months. The second case is *Rita v. U.S*. from the Fourth Circuit Court of Appeals, which held that a 33-month sentence for perjury which was within the guideline range was, in fact, reasonable. Decisions on these cases are not expected until sometime toward the end of the Court's current term. We will report on any decisions to our readers as soon as they occur.

Assignment of United States Supreme Court Justices to Federal Circuits

At the beginning of its current term, the United States Supreme Court announced its assignment of judges to the various Federal circuits. The assignments are as follows:

District of Columbia Circuit (Washington, D.C.)	Chief Justice John G. Roberts, Jr.
First Circuit (Maine, Massachusetts, New Hampshire, Rhode Island and Puerto Rico)	Justice David H. Souter
Second Circuit (Connecticut, New York and Vermont)	Justice Ruth Bader Ginsburg
Third Circuit (Delaware, New Jersey, Pennsylvania and Virgin Islands)	Justice David H. Souter
Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia and West Virginia)	Chief Justice John G. Roberts, Jr.
Fifth Circuit (Louisiana, Mississippi and Texas)	Justice Antonin Scalia
Sixth Circuit (Kentucky, Michigan, Ohio and Tennessee)	Justice John Paul Stevens
Seventh Circuit (Illinois, Indiana and Wisconsin)	Justice John Paul Stevens
Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota)	Justice Samuel A. Alito, Jr.
Ninth Circuit (Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington and Northern Mariana Islands)	Justice Anthony M. Kennedy
Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming)	Justice Stephen G. Breyer
Eleventh Circuit (Alabama, Florida and Georgia)	Justice Clarence Thomas
Federal Circuit (Washington, D.C.)	Chief Justice John G. Roberts, Jr.

Cases of Interest in the Appellate Division

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from November 6, 2006 to February 1, 2007.

People v. Coon (N.Y.L.J., Nov. 6, 2006, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Third Department, reduced a defendant's conviction of assault in the first degree to assault in the second degree on the grounds that the defendant's voluntary intoxication rendered him incapable of forming the *mens rea* which is now necessary to sustain a depraved indifference crime. The Appellate Division based its ruling on the recent decisions from the New York Court of Appeals which changed the law on depraved indifference crimes and which adopted a procedure of reducing depraved indifference convictions to those which required only reckless conduct. The court specifically cited to the recent ruling of the New York Court of Appeals in *People v. Feingold*, 7 N.Y.3d 288 (2006), which overturned their prior decision in *People v. Register*, 60 N.Y.2d 270 (1983).

People v. Alford (N.Y.L.J., Nov. 9, 2006, pp. 1 and 7)

In a unanimous decision, the Appellate Division, Second Department, reversed a defendant's rape conviction and ordered a new trial because of a serious error committed by his 18-B attorney which amounted to the ineffective assistance of counsel. The error consisted of the attorney's failure to seek redaction of a laboratory report in the rape case which contained information that the trial judge had ruled should not come before the jury. In rendering its determination, the Appellate panel stated:

> This single failure of the defense counsel constituted an error so serious, and resulted in such prejudice to the defendant, that he was denied a fair trial thereby. . . . Moreover, in light of the prejudicial nature of the evidence, and the fact that it was noticed initially by the jury, which brought it to the attention of the court, the Supreme Court's attempts to remedy the situation with a curative instruction were insufficient to obviate the prejudice to the defendant.

People v. Goldberg (N.Y.L.J., Nov. 9, 2006, pp. 1 and 7)

In a unanimous decision, the Appellate Division, Second Department, ordered a trial court to hold a hearing on whether an attorney neglected to inform his client of a plea deal which was offered after an initial trial had ended in a hung jury. The defendant had argued on appeal that his attorney did not inform him that the prosecutors had agreed to a 7-year sentence in exchange for a Class C robbery plea. The files of the District Attorney's Office indicated that the attorney had rejected the offer out of hand. Although the trial court had denied the defendant's motion to vacate his conviction, the Appellate panel concluded that there were questions of fact as to whether the attorney had conveyed the plea offer to his client and whether the defendant would have accepted the plea. Under these circumstances, a further hearing was required.

People v. Long (N.Y.L.J., Nov. 22, 2006, p. 22)

In a 3-2 decision, the Appellate Division, First Department, upheld a trial court's summary denial of the defendant's suppression motion. The majority opinion found that the defendant had failed to address the claims underlying his arrest and that therefore the summary denial of the motion without the holding of any hearing was appropriate. The majority view emphasized that the defendant had ample access to relevant information concerning the facts of the case; however, the motion merely set forth general denials which failed to raise a factual dispute requiring a hearing. The majority opinion was written by Judge Nardelli. In a dissenting opinion, Judge Catterson expressed the view that a suppression hearing should have been granted because there was no evidence in the record which indicated the basis for the stop of the defendant's vehicle and whether the police had established reasonable suspicion for the stop. Judge Mazzarelli joined Judge Catterson in dissent. Due to the sharp split within the Appellate Division on this case and recent rulings of the New York Court of Appeals on this type of issue, it appears clear that this case will eventually be determined by the New York Court of Appeals.

People v. Cumberbatch (N.Y.L.J., Nov. 30, 2006, p. 22)

In a unanimous decision, the Appellate Division, First Department, held that a defendant's claim challenging the portion of the sentence which imposed post-release supervision must be preserved for appellate review. The court stated that it did not believe that the failure to be advised of a statutorily mandated sentencing scheme was so fundamental as to obviate the need for preservation. In the case at bar, the defendant argued that his guilty plea should have been vacated because the trial court failed to advise him that the sentence under mandated law would include a period of post-release supervision. Despite the

fact that the New York Court of Appeals in *People v. Catu*, 4 N.Y.3d 242 (2005), has ruled that the post-release supervision period is a part of the sentence and that trial courts have an obligation to advise the defendant that such a sentence will be included, the Appellate Division in the instant matter seems to be charting a different course.

The Appellate Division ruling in the instant matter is contrary to 3 prior rulings from the First Department itself which reached different results. See *People v. Armstrong*, 31 A.D.3d 291 (2006), *People v. Evans*, 30 A.D.3d 1130 (2006) and *People v. Bracey*, 24 A.D.3d 363 (2005). Because of the instant situation, it appears highly likely that this decision may eventually be reviewed by the New York Court of Appeals.

People v. Wright (N.Y.L.J. Dec. 7, 2006, pp. 1, 4, and 29)

In a unanimous decision, the Appellate Division, First Department, upheld a defendant's drug conviction and found that no error had occurred when the trial judge denied a defendant's request to conduct an inquiry of a juror. In the case at bar, it was reported to the court that during deliberations, a juror had become emotionally upset and had locked herself in a bathroom for approximately 75 minutes. The defendant had argued that the failure of the trial judge to conduct an inquiry and to investigate whether the juror's emotional situation had rendered her unqualified to continue, constituted reversible error.

The Appellate Division found that after the alleged incident, the juror had resumed her duties without further incident and that therefore the trial court was within its discretion to determine that no inquiry was required. In rendering its ruling, the Appellate Court noted that during jury deliberations, intense feelings are often manifested and jurors often become emotional. In the case at bar, there was no reason to believe that the juror in question had become unqualified to continue and that the matter was properly within the trial court's discretion.

In re Standley (N.Y.L.J., Dec. 8, 2006, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Third Department, directed the State Parole Board to conduct a new hearing regarding the denial of a defendant's parole application and ordered the Parole Board to specifically examine the sentencing and to take into consideration the trial court's comments and sentence. In the case at bar, the defendant had been sentenced to a 20-to-life term in 1983. When he appeared before the Parole Board in 2005, the Board had refused to consider the sentencing minutes and the sentencing course recommendation. The Appellate Division, Third Department, found that this refusal violated provisions of Executive Law § 259-I, which mandates consideration of sentencing minutes and recommendations of the sentencing court. This latest Appellate Division ruling seems to indicate a greater degree of appellate review regarding Parole Board determinations.

People v. Horvath (N.Y.L.J., Dec. 18, 2006, pp. 1 and 2, and Dec. 21, 2006, p. 22)

In a unanimous decision, the Appellate Division, Second Department, held that a defendant could not be sentenced to additional time on a probation violation because the Probation Department had waited too long to file its probation violation. In the case at bar, the defendant was brought into court on a probation violation following her conviction on another matter, some 31 months after the violation of probation occurred. The court's decision written by Justice Fisher, pointed to CPL §§ 410.30, 410.40 and 410.70, which specified that probationer must be produced in court on violations promptly and without unnecessary delay after a court has filed a Declaration of Delinquency. The court indicated that a defendant need not demonstrate prejudice and that the Probation Department had an obligation to promptly bring a defendant before a court. The Appellate Division stated: "The Legislature, in clear statutory language, requires the reasonably prompt production of a probationer once a Declaration of Delinquency is filed, and does not demand a showing of prejudice as a sine qua non for relief."

In rendering its decision, the court specifically declared that a prior holding, *People v. Douglas*, 254 A.D.2d 300 (2d Dep't 1998), which appeared to indicate that a showing of demonstrable prejudice was required was no longer to be followed.

People v. Williams (N.Y.L.J., Dec. 29, 2006, pp.1 and 2, and Jan. 4, 2007, p. 22)

In a unanimous decision, the Appellate Division, Third Department, ordered a new hearing to explore the defendant's claim that his attorney may have provided an ineffective assistance of counsel because of a claimed failure of the attorney to inform the defendant about some potentially exculpatory evidence. The Appellate panel held that this possible failure could have caused the defendant to improperly enter a guilty plea. The Appellate Court vacated the plea in question and ordered a new hearing to be held along with the appointment of new counsel.

The Appellate Division, Third Department, in issuing its ruling stated that the issues of whether exculpatory evidence existed and whether defense counsel misinformed the defendant as to the contents of the victim's taped statement were never explored. In this light, the court felt that given the defendant's concrete sworn allegations regarding exculpatory evidence and the existence of a taped

statement of the victim, sufficient questions were raised so as to require a full evidentiary hearing.

People v. Anderson (N.Y.L.J., Jan. 2, 2007, pp. 1, 4 and 39)

In a unanimous decision, the Appellate Division, Second Department, ordered a new trial because of improper prejudicial remarks made by the prosecutor. The court held that the prosecutor during his summation improperly referred to uncharged crimes and made unqualified statements regarding the defendant's guilt. The court also pointed out that the prosecutor committed serious error when he also remarked that the defendant did not ask for an attorney when he was arrested because he knew he was guilty. The Appellate Division, Second Department, viewed the errors committed as being sufficiently egregious to have deprived the defendant of a fair trial so that it invoked its interest of justice jurisdiction to order a new trial even though defense counsel had not objected to all of the improper statements.

People v. Nicholson (N.Y.L.J., Jan. 5, 2007, pp. 1 and 2, and Jan. 2, 2007, p. 18)

In a unanimous decision, the Appellate Division, Second Department, reversed a defendant's robbery conviction. In the instant matter, the trial court had offered the defendant a last-minute deal while the jury's verdict was pending. The trial judge told the defendant after the jury reported itself deadlocked that he could have the jury continue to deliberate or he could waive his right to a jury and accept a guilty verdict on a lesser included offense. He was further informed that by accepting the judge's verdict on the lesser included offense, he would receive one year whereas he faced significantly more time if the jury came in with a guilty verdict. The defendant chose to accept the judge's offer and subsequently the defendant's trial attorney learned that the jury was about to acquit the defendant.

After the defendant received the one-year sentence, he was promised, he appealed to the Appellate Division and on appeal, the Second Department found that the trial court had exceeded its authority in making the offer from the judge. The Appellate Division stated that while the trial court was authorized to promise to impose a minimum sentence, if the defendant opted for a non-jury trial, no authority existed for the trial court to prematurely determine guilt and the sentence as a condition of the waiver by the defendant of a jury verdict. The Appellate Division further concluded that the trial judge had, in effect, frightened the defendant into waiving a jury trial. The conviction was reversed in the interest of justice.

People v. Boyce (N.Y.L.J., Jan. 22, 2007, pp. 1 and 36)

In a unanimous decision, the Appellate Division, Second Department, continuing to apply the Court of Appeals ruling in *People v. Payne*, 3 N.Y.3d 266 (2004), dismissed a depraved indifference murder conviction. The court found that the evidence demonstrated a manifest intent to kill rather than a depraved indifference to human life. The court, again following the recent pattern of disposition enunciated by the New York Court of Appeals, determined that the proper conviction should have been for the lesser included offense of manslaughter in the 2nd degree based on a finding of recklessness rather than wanton conduct. The court therefore remanded the matter to the trial level for re-sentencing in accordance with the reduced conviction.

People v. Gajadhar (N.Y.L.J., Jan. 24, 2007, p. 4, and Jan. 29, 2007, p. 22)

In a unanimous decision, the Appellate Division, First Department, upheld a defendant's murder conviction even though the jury verdict had been rendered by 11 jurors. When a juror was removed from the panel because of needed hospitalization, the defendant agreed to have the jury continue with 11 jurors and executed a written waiver of a 12-person jury. Following his conviction, he argued that his waiver was invalid and that a conviction by an 11-person jury was a nullity. The Appellate Court in upholding the conviction stated, "Defendant has failed to demonstrate that New York law precludes the trial of a criminal defendant by a jury of less than 12 persons. We conclude that earlier authority to the effect that a defendant cannot consent to trial before fewer than 12 jurors . . . has been implicitly overruled."

For Your Information

New Chief Judges for New York Federal Courts

During the last few months, several changes have occurred with respect to the various federal courts within our jurisdiction with regard to Chief Judge positions. Listed below are the newly announced changes:

- **Hon. Dennis Jacobs**, incoming Chief U.S. Circuit Judge, U.S. Court of Appeals for the 2nd Circuit.
- **Hon. Kimba M. Wood**, Chief U.S. District Judge, Southern District of New York.
- **Hon. Norman A. Mordue**, Chief U.S. District Judge, Northern District of New York.
- **Hon. Lisa Margaret Smith**, Chief U.S. Magistrate Judge, Southern District of New York.
- **Hon. Melanie Cyganowski**, Chief U.S. Bankruptcy Judge, U.S. Bankruptcy Court, Eastern District of New York.

Legislature Struggles with Replacement of Judicial Conventions

Following the decision of the United States Court of Appeals, Second Circuit, which overturned the system of selecting Supreme Court Judges by judicial conventions, the Legislature has been considering a variety of proposals to serve as a replacement of the now constitutionally defective system. While many have pushed for the adoption of an appointed system based upon merit, others have advocated continuing the election process and allowing for primaries. Based upon the Feerick Commission, suggestions have also been made for the creation of independent screening panels to pre-screen candidates before their eventual nomination by the political parties. Various plans and proposals are presently pending within the State Legislature and the Senate Judiciary Committee has been holding a series of hearings on the issue throughout the state. We will advise our readers of any definitive action. Since this year's Supreme Court candidates must be selected by a procedure other than judicial conventions, some new method will have to be created within the next six months.

Although the Legislature is considering new procedures to deal with the *Lopez-Torres* decision, that litigation may not yet be over. In late November, attorneys defending the State's convention system requested the United States Supreme Court to grant review of the Second Circuit decision. On February 20, 2007, the Supreme Court in fact granted *cert* and the matter is expected to be argued in October. We will notify our members on any further action on this matter by the United States Supreme Court.

Appellate Divisions Issue Statistics Regarding Disposition Times

In recent reports, the various Appellate Divisions issued statistics for the year 2006 indicating the average time to render decisions following oral argument. During the first six months of 2006, the First Department took an average of 49 days to issue a decision following oral argument. The Appellate Division, Third Department, also averaged 49 days and the Fourth Department had the shortest decision time with 28 days. The Appellate Division, Second Department, took the longest time to render decisions with the average time being 67 days after oral argument.

The new statistics show that the time to make decisions has increased by almost 37% in the Second Department since 2001. The average decision time for the Third and Fourth Departments has basically stayed the same since 2001 and for the First Department, it has increased slightly. Presiding Justice A. Gail Prudenti of the Second Department attributed the increased decision time in her Court to an increase in the Court's case load and the existence of several Court vacancies. The Second Department, in fact, in 2005, handled 42% of all the appeals in the Appellate Divisions and its case load per judge was the highest of any Appellate Division. The Court currently has 22 authorized judges but vacancies had existed throughout the past year.

A comparison between criminal and civil appeals also reveals that in the Second Department, it took 66 days to decide a criminal case after oral argument, while in the First Department it took only 32 days. In addition to the decision time, it is estimated that it takes approximately 6 months to have a case calendared for argument in the Second Department from the date the last brief is filed. Due to the heavier case load, the Appellate Division, Second Department, has also been operating for many years with 4-judge panels while the other Appellate Divisions have adhered to the traditional 5-judge panels.

Increase in Violent Crime

It appears that the long period of dramatic and steady decreases in violent crime in the United States is coming to an end. In fact, recent FBI statistics reveal that violent crimes are again on the upswing, both on a national and local level. For the first six months of 2006, the FBI reported that murders and robberies have increased over the same period last year. Murders are up by 1.4% and robberies have gone up by 9.7%. In 2005, the total number of violent crimes rose by 2.2% on a national basis. The FBI reports also reveal that burglaries have increased by 1.2% and arsons rose by 6.8%. The increase in violent crime is taking place not only in our own city and state but even small towns with populations of less than 10,000 people are witnessing dramatic increases. Specifically, with respect to New York City, homicides for the year 2006 amounted to 590, a nearly 10% increase from the year before. Other cities which had reported significant increases in the homicide totals are Cincinnati, Ohio and Oakland, California which reported a more than 50% increase over last year. Taking the 20 largest cities in the United States as a whole, murders in the year 2006 amount to 4,152, up from 3,919 in 2005, representing an increase of 5.9%. Some of the reasons given for the sudden increases in homicides and other violent crimes are the increasing amounts of gang activity in certain areas and an increase in the number of available firearms. Although the total amount of violent crime is still substantially down from the peak years of a decade ago, this recent spike in violent crime statistics bears watching.

Death Penalty Executions Continue to Decline

The number of executions taking place in the United States as a result of death penalty sentences has continued to decline. During 2006, 53 executions took place. This is down from 60 in 2005 and down from 98 in 1999. Support for the death penalty appears to be declining in the United States with Americans now nearly split between support for the death penalty and support for life in prison without parole as an alternative to the death penalty. Support for the death penalty appears to have been eroded by the continued use of DNA evidence and the revelations that some individuals are sentenced to death and have been later found to be innocent. It appears that increasingly, the American public is favoring the imposition of sentences involving life without parole rather than death sentences.

The method of imposing a death sentence has also become more controversial with constitutional challenges being made to those states which employ lethal injection. Lawsuits have been commenced in several states where the use of lethal injections has been employed, including California and Florida. These lawsuits have alleged that often errors in administering the injections have caused the infliction of cruel and unusual punishment which is violative of the Eighth Amendment. Only recently in Florida a moratorium on the use of lethal injections was ordered by the Governor following a situation in which it took an inmate almost one half hour to expire following the use of a lethal injection. We will advise our readers of any further developments in the death penalty area.

New York State Continues to Lose Population

The United States Census Bureau recently reported that from July 2005 to July 2006, New York State was one of four states that lost population. Although New York still has 19.3 million people, and is the third most populous state in the country, it may soon lose its population ranking to the State of Florida, which continues to gain significant population increases each year. According to the Census report, Florida gained 321,697 people from July 2005 to July 2006, making its current population 18.1 million. California continues to remain as the most populous state with 36.5 million, followed by Texas which has 23.5 million. The State of Illinois continues to remain in 5th place with 12.8 million.

Over all, the South and West continue to be the areas of the country experiencing the fastest population growth. The South, as a group, had a net gain of over half a million people, while the Northeast, on the other hand, had a net loss of 375,000 people and the Midwest lost 184,000 people. The five fastest growing states in population for the period of July 2005 to July 2006 were Texas with 580,000, Florida with 321,000, California with 303,000, Georgia with 231,000 and Arizona with 213,000.

United States Among the Most Stressful Countries

The Associated Press recently revealed that a poll it conducted in various countries found that the United States and several of the most industrialized nations were at the top of the list with regard to reported stress. The people reporting indicated that their stressful feelings were often connected to having too much to do, too many bills to pay or not having enough time for leisure activities. About 3/4 of the people in the United States, Australia, Canada, France, Germany, Italy, the United Kingdom and South Korea, stated that they experienced stress on a daily basis. People living in Spain and in some parts of Latin America, on the other hand, had a much lower stress level. In the United States, 26% of those polled reported that their stress level was largely due to their job situation and 34% stated that it was caused by concern over their finances. Clinical psychologists have attributed the level of stress to fast-paced technological societies and an increasing emphasis on wealth and the accumulation of materialistic objects.

Gender Salary Gap

During the 1980s and early 1990s, women in all economic brackets made steady gains on their male counterparts with respect to salaries earned. By the mid-1990s, women earned more than $.75 for every dollar in hourly pay that men did. This was up from $.65 just 15 years earlier. Recently, however, it appears that the gains in salary increases by women have stopped, especially with respect to one significant group of women. Those women having a 4 year college degree, according to a recent study have actually lost ground to their male counterparts. Last year, college-educated women in the age group of 36-45 earned $.747 in hourly pay for every dollar that men in the same group did. This was down from $.757 a decade earlier. The statistics were compiled by a Labor Department study. The report attributed the recent decline in salary earned by college-educated women to several factors. These included the continuing vestiges of discrimination, but also the women's own choices. The number of women staying home with young children has risen recently according to the Labor Department. The increase has been sharpest among highly educated mothers, who otherwise might be earning high salaries. The pace at which women are also entering highly paid fields also appears to have slowed.

With respect to women who are among the top wage earners, the Labor Department study revealed that a woman making more than 95% of all other women earned the equivalent of $36 per hour or about $90,000 a year in 2006 and had to work approximately 50 hours per week to earn this amount. A man making more than 95% of all other men earned approximately $115,000 a year or $44 per hour working the same number of hours. This constituted a difference of approximately 28%. Thus, while narrowing, the gender salary gap continues to exist.

Duke Case Prosecutor Charged with Ethical Violations

The North Carolina Bar Association announced in late December 2006, that it had filed ethics charges against Michael Nifong, the prosecutor in the Duke Lacrosse rape case.

The charges were based upon numerous comments that Nifong had made to the press during the course of the proceedings. The charges in effect accused the prosecutor of making misleading and inflammatory statements to the media about the lacrosse players who were charged in the indictment.

Among the four rules of professional misconduct that the prosecutor was accused of violating was a prohibition against making comments that have a substantial likelihood of heightening public condemnation of the accused. Among the comments cited by the Bar Association as being improper were that the lacrosse players "were a bunch of hooligans" and personally stating that he was convinced that a rape had occurred. Nifong was also charged with breaking the rule against dishonesty, fraud, deceit and misrepresentation based upon the fact that when DNA testing failed to find any evidence a lacrosse player raped the accused, Nifong told a reporter that the players might have used a condom. According to the allegations, Nifong knew that this assertion was misleading since he had received a report from the emergency room nurse in which the accuser said that her attackers did not use a condom. It will probably take several months for the charges to be heard and a determination made by the North Carolina Bar. Punishment for the violations charged can range from an admonition to disbarment.

In the meantime, rape charges against the three lacrosse players were recently dropped by Nifong but he has indicated that the charges of kidnapping and sexual offense will continue to proceed. Based upon the ethical violations filed and the fact that Nifong's case appears to be quickly disintegrating, we await further developments on this matter. In fact, in early January, after the ethical charges were filed, the North Carolina Attorney General took over the prosecution of the case after Nifong indicated that he wished to be removed. We will advise our readers of any further action on this matter.

New Treatise on Juvenile Justice System

A new treatise on the juvenile justice system written by Judge Michael A. Corriero has received some significant attention in the criminal law field. A recent book review on the treatise written by Linda D. Fakhoury appeared in the December 2006 issue of the *New York County Lawyer*. The review is as follows:

> "*Judging Children as Children* was written by Judge Michael A. Corriero who has served as a Judge of the Court of Claims and an Acting Supreme Court Justice in New York County since 1990 and since September, 1992, has presided over the Youth Part. The Judge's point of view regarding the juvenile justice system is, of course, different from other parties because he is a non-biased party who has to take in views from all sides and make a decision.
>
> The issues and scenarios summarized in the book help to paint a picture of what is really happening in the system. I am a prosecutor of juvenile delinquents and reading some of the situations and the judge's insights made me stop and think. I have seen some similar situations

(i.e. robberies of senior citizens, assaults involving the use of dangerous weapons) but when you are in the courtroom, things happen at such breakneck speed that you often do not have an opportunity to take in what is being said because you are concentrating on what the next case is going to be.

Anyone involved in the juvenile justice system should read this book, even if only to get a different viewpoint about what goes on there. Justice Corriero is able to balance society's interest and safety with that of the juvenile's need for services, his ultimate goal is to come up with a system that helps the juvenile change his or her life around instead of stepping into the world of a career criminal. As Justice Corriero puts it, "The model juvenile justice system that I propose would accomplish this in a framework that recognizes the vulnerability and malleability of adolescents, without compromising public safety." Justice Corriero is able to show how law has evolved over time, providing background information and previous legislation and then wrapping it all up by showing the use of the new law in society today.

This book can work well either for general knowledge or use in a classroom setting. Justice Corriero calls on people to form a unified consortium to implement a comprehensive strategy for dealing with youth in today's society. He emphasizes the importance of having the juvenile see the seriousness and long-term effects of what has been done. Justice Corriero speaks of accomplishing this by implementing a step by step process – 1) postpone a sentence after the plea, 2) condition the nature of probation so the juvenile can 'earn' probation and youthful offender treatment, and 3) validate the juvenile's progress by closely monitoring his or her performance in the program."

Pay Increases for Federal Judges

Congress recently approved a cost-of-living increase for members of the Federal Judiciary. The increase amounted to 1.7% and became effective as of January 1, 2007. The increase raises the pay of Chief Justice Roberts to $212,000. The other Associate Justices of the United States Supreme Court will be receiving salaries of $203,000. United States District Court Judges will be receiving annual salaries of $165,200. In his recent report on the State of the Federal Judiciary, Chief Justice Roberts called for significant increases in the salaries of Federal Judges over and above the cost-of-living adjustments. The Chief Justice noticed that the salaries of the Judiciary have not kept up with similar increases for attorneys in the private sector.

Governor Spitzer Appoints New Criminal Justice Coordinator

On January 12, 2007, newly elected Governor Eliot Spitzer announced that he was naming Denise O'Donnell as the new Statewide Criminal Justice Coordinator. Denise O'Donnell is a former U.S. attorney from the Buffalo area. She will be replacing Chauncey Parker who served for several years under Governor Pataki. We congratulate Ms. O'Donnell for her appointment and look forward to a close working relationship between her office and our Criminal Justice Section. We also thank Chauncey Parker for his assistance to our section during the last few years and wish him well in his new endeavors.

About Our Section and Members

Membership Composition

Recent statistics released by the Membership Department of our Bar Association reveal some interesting information about the profile of our Criminal Justice Section. The Section as of January 10th, 2007 has 1,562 members. This was an increase of 8 members over the same period in 2006. In terms of gender statistics, the Section is 77% male and 23% female. The largest group of attorneys in the Section are in private practice comprising roughly 40% of the total. Solo practitioners make up 36% of the Section and over 65% of the Section practice in law offices which have 5 or less attorneys. The Section is pleased that we are experiencing a steady increase in younger members and presently 21% of the Section is less than 35 years of age. Members of the Judiciary who are also part of the Section comprise 4% of the total. The Criminal Justice Section is one of 23 sections which comprise the NYS Bar Association. As of December 31, 2006, the NYS Bar Association had a total membership of over 72,000. We are also pleased that within the last several months we have obtained several new members. A list of our new Section members appears on p. 32.

Our Annual Meeting

Our Annual Meeting, luncheon, awards program and CLE seminar were held on January 25, 2007 at the New York Marriott Marquis. We were pleased to have had as our guest speaker at the luncheon the noted reporter and author, Tom Wolfe. Mr. Wolfe is best known to the legal community for his novel, *The Bonfire of the Vanities* which he wrote in 1985. That novel was on the *New York Times* bestseller list for two months and sold over two million copies. Mr. Wolfe provided some amusing and interesting remarks which were appreciated by those attending our luncheon. Welcoming remarks at the luncheon were provided by Roger B. Adler, our Section Chair.

Following the luncheon, awards were also presented to outstanding practitioners and members of the Judiciary for exemplary service during the last year. The awards were presented as follows:

The Michele S. Maxian Award for Outstanding Public Defense Practitioner
Seymour W. James, Jr., Esq.
Attorney in Charge of Criminal Practice
The Legal Aid Society, New York City

Charles F. Crimi Memorial Award for Outstanding Private Defense Practitioner
Gerald L. Shargel, Esq.
New York City

Outstanding Contribution to Police Work
Wayne E. Bennett, Superintendent
New York State Police

David S. Michaels Memorial Award for Courageous Efforts in Promoting Integrity in the Criminal Justice System
Norman L. Reimer, Esq.
Executive Director
National Association of Criminal
Defense Lawyers, Washington, D.C.

Outstanding Contribution to the Bar and Community (jointly)
Vanessa C. Potkin, Esq., Staff Attorney
The Innocence Project
Benjamin N. Cardozo School of Law
New York City
and
Elisa S. Koenderman, Esq.
Assistant District Attorney
Bronx County

Outstanding Prosecutor
Frank J. Clark, Esq.
District Attorney
Erie County

The Vincent E. Doyle, Jr. Award for Outstanding Jurist
Hon. William C. Donnino
Supervising Judge, Criminal Courts
N.Y. State Supreme Court
Nassau County

Outstanding Appellate Practitioner
Mark R. Dwyer, Esq.
District Attorney's Office
New York County

This year's luncheon was well attended and was an enjoyable event filled with camaraderie and good fellowship. We were also pleased that several District Attorneys both in the City of New York and upstate attended the luncheon. In the late afternoon, following the luncheon, our Section also presented an interesting and informative CLE Program on "Criminal Law—The Essentials." The speakers included Roland G. Riopelle, Esq., Murray Richman, Esq., Martin B. Adelman, Esq., Jay Goldberg, Esq., Bruce Cutler, Esq., Robert L. Schwartz, Esq. and Herald Price Fahringer, Esq. Some of the topics covered included earning a living, cross-examination and the presentation of a summation. The program was moderated by Marvin E. Schechter, Esq. who also arranged for the program.

Photos regarding our various events during our annual meeting appear within the centerfold (pp.18-19) of this issue.

Further, at our Annual Meeting, officers and district representatives of the Criminal Justice Section were elected as follows:

Chair:	Jean T. Walsh
Vice-Chair:	Jim Subjack
Secretary:	Marvin Schechter

District Representatives:

1st	Mark Dwyer
2d	David M. Schwartz
3rd	Dennis Schlenker
4th	Hon. Richard Giardino
5th	Edwin Z. Menkin
6th	Hon. John Rowley
7th	Jon P. Getz
8th	Paul J. Cambria, Jr.
9th	Gerard M. Damiani
10th	Joseph Conway
11th	Spiros Tsimbinos
12th	Hon. Michael Sonberg

State Bar Mourns Loss of Supreme Court Justice Vincent E. Doyle, Jr.

Buffalo Supreme Court Judge Vincent E. Doyle, Jr. died on October 3, 2006. Judge Doyle served as a member of the Judiciary for nearly 25 years after gaining a reputation as one of Buffalo's leading defense attorneys. He was a 1956 graduate of the University of Buffalo Law School and then established his own firm in the City of Buffalo. Judge Doyle, over many years, was extremely active with our Criminal Justice Section and in 2002, he received the Section's award for Outstanding Judicial Contribution to the criminal justice system. His son, Vincent E. Doyle, III, is also an active member of our Criminal Justice Section and serves on the Executive Committee of the New York State Bar Association. We express our sympathies to Judge Doyle's family for their loss.

State Bar Criminal Law Reference Books

The New York State Bar Association has several publications which should be of interest and practical use to criminal law practitioners. These titles, along with a brief description, are listed below:

Criminal and Civil Contempt by Lawrence N. Gray, Esq.

This new book explores a number of aspects of criminal and civil contempt under New York's Judiciary and Penal Laws, with substantial focus on contempt arising out of grand jury and trial proceedings. 2006. 248 pp. Member Price: $40

Criminal Law and Practice by Lawrence N. Gray, Esq.; Hon. Leslie Crocker Snyder; Hon. Alex M. Calabrese

Written by experienced prosecutors, criminal defense attorneys and judges, this book provides an excellent text of first reference for general practitioners. With its many useful forms and charts, this book will be an invaluable part of your library. 2006–2007. 202 pp.
Member Price: $72

Evidentiary Privileges, Grand Jury, Criminal and Civil Trials, Fourth Edition by Lawrence N. Gray, Esq.

A valuable text of first reference for any attorney whose clients are called to testify. This book covers the evidentiary, constitutional and purported privileges which may be asserted at the grand jury and at trial. 2003. 326 pp. Member Price: $45

New York Criminal Practice by Lawrence N. Gray, Esq.

This in-depth work covers all aspects of the criminal case, including numerous practice tips, sample lines of questioning and advice on plea bargaining and jury selection. Reviewed and revised by experienced attorneys and judges, the 2006 Supplement brings this comprehensive text up-to-date. 1998 with 2006 supplement. 1,234 pp. Member Price: $120

To order any of the above texts, call the New York State Bar Association at 1-800-582-2452, or order online at www.nysba.org/pubs.

The Criminal Justice Section Welcomes New Members

We are happy to report that in the last few months, our Section has obtained many new members. We welcome these new members and in keeping with our recent established practice, we are listing the names of the new members who have joined within the last three months.

Michael Joshua Alef
Tamiko Anissa Amaker
Gary Wayne Anderson
Kimberly Baker
Scott A. Brenneck
Rachel Bronstein
Van Brown
Aaron Dean Carr
Kristine Ciganek
Erik Claudio
Elizabeth M. Corrado
Adam Cortez
La-Keshia Dandy
Susan J. Deith
Savvas S. Diacosavvas
David M. Dore
Richard Drum
Angela M. Elacqua
Andrew M. Engel
Michael Joseph Ficchi
Chad William Flansburg
Israel Fried
Nicholas Gaus
Louis J. Gioia
Kevin Lamont Goodwin
Kenneth Elliot Graber
Jonathan N. Halpern
Maria K. Haymandou
Davim L. Horowitz
Robert Henry Hotz
Michael H. Hughes
Deidre Jackson
La Marr J. Jackson
Richard A. Jacoby
Daniel Wendel Johnson
Nadine C. Johnson
Barry J. Jones
Daniel Michael Kerwin
Edward J. Kiley
Daniel S. Kirschbaum
Scott H. Klein
Daniel Zvi Kobrinski
Se-In Lee
Jared M. Lefkowitz
Benjamin J. Lieberman
Tasha N. Lloyd
Abbe David Lowell
Gavin A. J. MacFadyen
Liam J. McLaughlin
Arthur L. Miller
Adam Moncure
Andrew M. Mulrain
James Booth Fajardo Oliphant
Daniel Austin Petroskey
David M. Primo
John F. Queenan
Mark L. Rappaport
Michael S. Ross
Michael J. Ryan
Edward V. Sapone
Jorge Alfredo Sastoque
Ellen C. Schell
Gregory Sheindlin
Daniel Chia Shih
Andrew Short
Tracy Ellen Sivitz
Matthew Richard Smalls
Richard Alexander Stenberg
Priscilla Israel Steward
Valerie Paul Stote
Jorge Gerardo Tenreiro
Kathryn H. Thiesenhusen
Therese A. Tomlinson
Yaniris Urraca
Michael Uvaydov
Oren Varnai
Mary Grace Weisgerber
Charles O. Wolff
Howard L. Yood
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Publication and Editorial Policy

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

Publication Policy: All articles should be submitted to:

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857 Cambridge Court
Dunedin, FL 34698
(718) 849-3599

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

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

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

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