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New York Criminal Law Newsletter

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NYSBA

Message from the Chair

This message is written during the winter for publication in the spring issue. Its focus, in keeping with the ethos of spring, is upon renewal and rebirth.

The baseball players are now in the midst of spring training, readying themselves for the upcoming baseball season. Each 162-game season is a long journey which each team takes on the road to the October World Series. Veterans recognize that the season is long, and that not every game can be a winner. The goal is frequently simply not to beat yourself up, and the rest will fall into place. There are, I submit, more than a few passing similarities between baseball games and the criminal justice system.

The current focus is upon the work of the state legislature. Mindful that 2006 is a major election year, all legislative seats are "in play" in a year when both the governorship and attorney general represent "open seats." Although the primaries will not be held until September, it appears that these electoral opportunities have attracted strong candidates. Over the next few months we will learn more of the candidates' vision as the state continues to seek new direction as Governor Pataki's term draws to a close.

The Criminal Justice Section is focused upon undertaking an appropriate role in the process of addressing the proposed post-sentence civil confinement treatment of sexual predators. The long-term effects upon vulnerable victims of a sexual attack require a focused sensitivity to meeting society's insistent cry for protection from predatory attacks.

The tragic death of Brooklyn's Nixzmary Brown has focused renewed attention upon families in crisis. Whether the abuse and neglect protocols of the Agency for Childrens' Services (ACS) have unwisely sought to keep children with dysfunctionally abusive and neglectful parents for too long, requires a clear-eyed re-focus. The ability to propagate doesn't carry with it the requisite ability to parent. Whether the proper balance can be struck remains to be seen. The fate of young children hangs in the balance.

On April 11th we will be active participants in Gideon Day observances. The continuing struggle to make effective and competent counsel available is the Section's mission, and the purpose of the journey. Like all major initiatives, the battle is a continuing one requiring constant vigilance and focused energy. Chief Judge Judith S. Kaye has invested significant time and resources in the struggle to strengthen the quality of court-appointed counsel by seeking creation of a statewide board to establish and monitor standards for representation.

Additionally, the CJS has again drafted a bill addressed to the mandatory videotaping of confessions. Not unlike the Miranda rule, we believe that it will foster the conviction of the guilty, and acquittal of those not-guilty. It is driven by a respect for the value of transparency and fear that the imperatives of crime solving sometimes result in psychologically coercive interrogation tactics which can result in false, and inaccurate, elicited suspect statements. We hope that the legislature will have the courage to recognize that transparency in the interrogation room in no way unfairly "handcuffs the police" anymore than the giving of the Miranda warnings hampers the F.B.I., which uses similar admonitions as an integral component part of its interrogation protocols.

Finally, we are currently exploring a late summer meeting at beautiful Niagara on the Lake. I welcome your thoughts concerning such a meeting venue, combined with a relevant and useful CLE program focused upon the jurisprudential contribution of one of our Senior Court of Appeals Judges. As always, I hope to receive your thoughts and suggestions as how to best serve you!

Roger B. Adler

Message from the Editor

In this issue we detail the activities and significant events which occurred during our Section's Annual Meeting held in late January at the New York Marriott Marquis. Our centerfold also includes various photos depicting the events which occurred. During the last several months, several important decisions in the criminal law area were also issued by our New York Court of Appeals including a major development involving depraved indifference murder. These decisions are reviewed in our New York Court of Appeals section.

After many months of confusion and controversy, the United States Supreme Court also received its newest member in the person of Justice Samuel A. Alito, Jr., who was confirmed by the Senate in late January and took his seat on the High Court on February 1, 2006. Judge Alito was selected by President Bush after the President's prior nominee, Harriett Miers, withdrew her name from consideration. A detailed biographical sketch of Justice Alito is included in this issue for the benefit of our readers. The United States Supreme Court during the last several months also issued several important decisions in the criminal law area and these cases are reviewed in our Supreme Court Section.

Several of our feature articles in this issue deal with impressions and observations by defense lawyers in various fields of criminal law practice. For the benefit of our readers, these articles provide insights into how things are in certain specialized areas of criminal law. Another of our feature articles deals with the important issue of waiver of the right to appeal. In light of the fact that during the last several months the nation's attention has been focused upon the selection of two new members of the United States Supreme Court, we also offer an interesting book review by our former Section Chair, Tom Liotti, with respect to a newly issued treatise "On the Politics of Judicial Appointments."

The "For Your Information" section contains several interesting articles dealing with important issues of concern to the community-at-large as well as to criminal law practitioners. These include statistics regarding the continued use of the death penalty as well as the extent of lifetime sentences being served by teenage offenders. Information is also provided on Governor Pataki's new criminal law initiatives as well as the up-to-date developments regarding the renewal of the Federal Patriot Act.

I would like to thank the various contributors to our *Newsletter* as well as our many readers who have expressed support and positive comments for our publication which is now in its third year of operation.

Spiros A. Tsimbinos

Request for Articles

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

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

A Criminal Defense Attorney in a Murder Case Defends His Position

By Dave Blackstone

In January 2005, I tried a murder case in Manhattan Supreme Court before Justice James Yates and a jury; the jury acquitted the defendant of all the charges. A few moments later the defendant emerged from the courthouse on to 100 Centre Street free and liberated and accompanied by his ecstatic family. He had been incarcerated on Rikers Island on the murder indictment awaiting trial for over two years.

I am not new to defending mostly indigent defendants on murder charges and have been a member of the New York County Homicide Panel for about 30 years. Panel members are private practitioners who are contracted by the city on a rotation basis to handle murder cases at so-called semi "Pro Bono" rates. Over these 30 years I have tried about 45 such cases to conclusion—a likely record. Therefore, the reaction I subsequently received after that trial from almost all the people with whom I am acquainted (and who are unfamiliar with our criminal justice system) was predictable.

When I entered the lobby of my Manhattan Upper East Side apartment building, I met a neighbor, a wealthy civil lawyer specializing in trusts and estates, and told him of my victory. He asked me with a straight face, "Dave, tell me, was your client guilty?" I was impatient and replied, "How the hell do I know? I only try the freaking case."

For inexplicable reasons, it appears that many believe that "ultimate truth" exists and is ascertainable in every murder indictment; that for every count of a murder indictment, guilt has already been divined. That is, either the prosecutor already knows the truth that the defendant is guilty, that truth is ascertained at a trial in which the defendant is found guilty, or that truth of the defendant's guilt is determined when the defendant pleads guilty.

Conventional wisdom is that the defendant confidentially tells the lawyer, at first, that he or she is guilty of the murder. Then the lawyer and client map out artificial defenses to "beat the rap." This scenario is a misconception. When a defendant recognizes that he or she has been "nailed" on a murder charge, and the defendant's lawyer, after presumably studied evaluation and investigation, agrees that the guilt to a high degree of certainty may be established before a jury based on his analysis of the People's evidence, then the defendant frequently pleads guilty to the best deal available. The guilty plea happens "later" rather than "sooner," as zero hour for trial approaches about two years after indictment when the prosecutor's "final" plea offer is conveyed. Usually though there is not much really known about the People's case because under New York's discovery rules (CPL Art. 240), the prosecution is entitled to withhold production of much of its evidence—the weak and/or the strong—until the trial starts. (*See* CPL Sec. 240.45(1)).

"Those observing from the outside frequently believe that it is morally reprehensible for defense attorneys to remain on a case knowing that the defendant's position is false, and that guilt is as clear as a ringing bell."

However, truth is not a property of a defendant's guilty plea. When a defendant receives a much lighter sentence by pleading guilty to a lesser charge—such as Manslaughter with 10 years flat—than he or she would receive upon conviction of murder after trial—life with or without parole for Murder in the First Degree or life with a minimum of 25 years for Murder in the Second Degree—the guilty pleas merely reflect, irrespective of guilt or innocence, that the defendant has been checkmated by a system of criminal justice that drastically punishes those defendants who will not risk (with "Monte Carlo" calculations) having their murder case brought to trial, and then losing it.

Conversely, defendants, irrespective of truth or falsity, may present their attorney with an intractable defense, staking out a "position" with respect to the allegations. Under these circumstances many individuals, peering into our criminal justice system from the outside, believe that defense counsel really "knows" whether the defendant's "position" is true or false. Those observing from the outside frequently believe that it is morally reprehensible for defense attorneys to remain on a case knowing that the defendant's position is false, and that guilt is as clear as a ringing bell.

Here are some elementary questions for individuals who are so self-righteous. Under what conditions does defense counsel know that a represented client's position is false and that the defendant is guilty? Does defense counsel know whether the prosecution's wit-

nesses are lying or mistaken? Does defense counsel know that the defendant's signed confession was voluntary? Does defense counsel know that the defendant was sane or acted under a form of diminished capacity at the time of the murder or that the defendant's defense or alibi importunations are false? Should defense counsel not proceed further when DNA evidence incriminates his or her client without consulting a DNA expert retained by the defense? When a Medical Examiner determines that a baby's cause of death was "Shaken Baby Syndrome" perpetrated by the father who last held the child, should defense counsel not investigate to determine whether some other care provider previously mishandled the child? What about the many problems that exist in a murder indictment, which are elusive and present hard, even abstruse, answers or nothing definitive at all? For instance, was the defendant in a murder indictment "reckless" and "depraved" in the vehicular accident which caused death, or did the prosecutor indict from the spacious latitude afforded by the definitional language of the Penal Law, or the amorphous standards, if there are any, set by the District Attorney's office?

"[T]here are enormous existing flaws and injustices in even the fairest systems, including our own, in which truth may not be easily divined or defined at all."

I wonder whether the well-heeled trust and estates lawyer I met in the lobby of my apartment building following my acquittal knows a prosecutor who convicted someone of murder and sent that defendant away to a penitentiary for life, and whether that well-heeled lawyer would ask the prosecutor if that convicted defendant was innocent, or would he just congratulate the DA on his public service?

Does that trust and estates lawyer actually think that the only inmates wrongfully confined for life for murder in a New York State penitentiary are those who are subsequently exonerated by Barry Scheck and Peter Neufeld's DNA Innocents Project? Or realistically, are there many convicted defendants serving life in prison for murder who are divinely innocent and have been convicted on shabby, flimsy and false evidence that will probably never be acknowledged?

Under the United States Constitution everybody—except the government's designated "terrorists" and "unlawful combatants"—has an inalienable constitutional right to effective, zealous legal counsel though every stage of the litigation including the trial in which the prosecution has the burden of proving the defendant guilty beyond a reasonable doubt. Otherwise the defendant supposedly should be found not guilty. Our system of criminal justice will come to a screeching halt if defense attorneys engage in a Talmudic exegesis about the "truth" and relieve themselves from their constitutional obligations to represent their client whenever they arrogate to divine the "truth" for themselves.

The legal intelligencia in the USA tell us that our system of criminal justice is one of the best in the world, and I personally would not swap it in a thousand years for the perverse so-called justice of Hitler, Stalin, Sadam and every other ruthless and lawless regime that haS existed throughout the ages and permeate throughout the globe today. However, there are enormous existing flaws and injustices in even the fairest systems, including our own, in which truth may not be easily divined or defined at all.

So do not be condescending and so skeptical of your local criminal defense attorney. Someday, perhaps, you, a member of your family or a close friend may need that attorney to protect your position, whatever it is, as a defendant in a criminal indictment, possibly even one which is murder.

Dave Blackstone is a criminal law practitioner with offices in Manhattan.

Reaching Through the Prison Walls: Social Work in an Appellate Defender Office

By Melissa Rothstein

I. Introduction

Holistic public defense and forensic social work have been complementary developing fields for a number of years. Collaboration between social workers and lawyers in criminal defense offices is considered helpful for the legal practice and for the client.[1] Social worker-lawyer collaborations are best equipped to "respond to the myriad needs of those who are poor or marginalized by their social, medical or psychological circumstances."[2] The criminally accused commonly have a host of concerns that, if not directly related to arrest, are nonetheless exacerbated by it. Issues such as substance abuse, unstable housing, limited economic opportunities, and medical and mental illnesses are common concerns that may contribute to criminal behavior and limit the options available in plea negotiations. These issues may also persist after sentencing and complicate incarceration and/or release.

At the trial level, social workers collaborate with public defenders both to assist with the legal case and to provide additional services to clients in need. Innovative trial offices, such as Neighborhood Defender Service of Harlem, The Bronx Defenders, and the Georgia Justice Project, have created models for holistic trial representation that include substantial input from social workers.[3] The need for holistic representation does not end at sentencing, however.

The criminal justice system, and particularly the defense function within it, has been described as "the catch-basin for the breakdown of social services inside communities."[4] In this context, the appellate defender office is best equipped to assess how this "catch-basin" ultimately responds. Once an individual is sentenced, and leaves the local detention facility, the difficulty in communicating and the expense of visits and telephone calls commonly result in family and friends losing contact with their incarcerated loved one, particularly if a lengthy sentence was imposed. An appellate defender is most likely to have a relationship with his or her client during incarceration, and may be the only one to advocate on the prisoner's behalf.

II. Social Work Needs in an Appellate Defender Office

The assistance that social workers can provide in an appellate office is similar to that provided in a trial office. Among the roles that a social worker can have in an appellate defender office are (1) assisting with the legal representation through investigation, mitigation, and counseling; (2) providing institutional advocacy on behalf of clients; and (3) providing case management, support and necessary referrals for clients preparing for release.

A. Assistance with Legal Representation

The value of social workers to assist in the interview, evaluation, crisis response, short-term casework, negotiation and referrals in trial offices is already known.[5] For criminal defense offices, social worker involvement in the legal practice generally focuses on investigations and mitigation, particularly at the sentencing level.[6]

A critical role in an appellate office is to review the effectiveness of trial counsel's representation. The United States Supreme Court has recognized the importance of presenting mitigation, and has held that an attorney's failure to present this information, at least in a capital case, can amount to ineffective assistance of counsel.[7] To develop such a claim of ineffective assistance of counsel, an appellate attorney must obtain, assess and evaluate what mitigation information was available and whether it could have been presented in a manner to impact the sentence. Not surprisingly, some capital appellate offices regularly use social workers, or other qualified mitigation specialists, to assist with the review. As a social worker is best equipped to obtain this information for the trial attorney, she or he also has the expertise to best obtain this information for the appeal or post-conviction review.

Non-capital appellate offices can (and should) also provide zealous sentencing review. In many jurisdictions, including New York, the appellate courts have the power to independently review sentences.[8] In exceptional circumstances, an attorney may want to seek to expand the record to include information relevant to reviewing the sentence. A social worker can obtain and compile this information in a credible, comprehensive manner.

While not directly related to the court proceedings, an important part of appellate advocacy is communicating with clients and, often, family members. While rarely discussed, this is often one of the most challenging aspects of appellate work. A client who has been convicted after trial or has pleaded guilty on advice of trial counsel will often have negative feelings about the criminal justice system and criminal defense lawyers (including their own), have unrealistic expectations of

the appellate process, and/or have anxiety about the appeal. The disproportionate presence of mental illness among criminal defendants[9]—which is often exacerbated by incarceration[10]—adds further challenges. A social worker can work with a client about his feelings towards the process and the system to better prepare the client for remaining involved in and contributing to the appellate process. As the majority of appeals are ultimately unsuccessful, a social worker can also work with clients and family members to prepare them for this possibility and to respond to the disappointment or devastation that may come when the conviction becomes final.

B. Institutional Advocacy

The vast array of issues that arise for prisoners is well documented. Individuals in prison may be subject to inhumane conditions, physical and/or sexual violence, insufficient medical and/or psychiatric care, and an inability to access legal resources, religious services and/or rehabilitative programs.[11] Remedying these concerns generally requires an advocate who is able to contact the appropriate corrections staff and respond to a prisoner who may have nowhere else to turn (or nowhere else he feels comfortable turning) other than his appellate lawyer.

For an appellate defender who is concerned about his or her client's well-being, and wants the client to be able to comprehend and communicate about the legal proceedings, addressing the pressing concerns of prison issues is mutually beneficial. However, the appellate lawyer, acting alone, may not be comfortable or well equipped to respond to a prison concern. Prisoners rights offices that have managed to survive, despite the Prisoners Legal Reform Act[12] and other defunding attempts, cannot respond to every prisoner's need and often limit services by focusing exclusively on litigation and/or specific issues.

A persistent social worker who is adept at navigating complex bureaucracies can be as effective as a prisoners' rights lawyer in providing non-litigation advocacy within the corrections system. A critical first step in prison advocacy is obtaining and communicating information with correction officials and with the client. A social worker, who is generally viewed as a "helping professional" and not associated with litigation, can sometimes obtain information more readily from corrections staff and negotiate with correction authorities where litigation is not needed.

Assistance with medical and mental health concerns is particularly enhanced by the involvement of a social worker. As part of the treatment community, a prison health professional may be more comfortable speaking with a social worker than with a lawyer—and the social worker may be better able to compile the relevant information, assess the options available, and communicate with high-need clients.

While it is undisputed that connection to family can be a cornerstone to effective rehabilitation during and after incarceration,[13] the ability to maintain contact with family members—particularly for defendants with long prison sentences—is extraordinarily difficult.[14] Maintaining contact with minor children may be particularly difficult if the custodial parent or guardian is unable or unwilling to coordinate visitation. A social worker can help coordinate visits and ensure that an incarcerated parent is able to be a part of his or her child's life.

Institutional advocacy can also go hand in hand with reentry assistance. As discussed below, few offices are better equipped to provide the early intervention needed for effective reentry than an appellate defender office. The best reentry preparation begins while the individual is incarcerated—and incorporates the programs available to the client while in prison.[15] A social worker can counsel a client about the value of programming (and begin to engage the client in long-term reentry planning) and advocate on the client's behalf for programming access.

C. Reentry Advocacy and Assistance

More attention is being paid to the importance and value of reentry services. Government agencies, social service providers, and trial-level public defender offices have begun to focus on the need for these services.[16] Appellate defender offices are uniquely situated to assist with this work. Through its legal representation, the appellate defender office has an established connection with clients and an avenue of communication already in place.

It is generally acknowledged that reentry planning should begin early in a prisoner's sentence.[17] Engaging an individual in life planning and treatment services is most effective while the person is incarcerated—the individual is already in a highly structured environment and many of the temptations of street life are not immediately present. Likewise, important release preparation, such as obtaining critical forms of identification, can and should occur while the person is incarcerated to minimize delay in the individual's ability to obtain employment and receive needed services.[18] However, service providers in the community generally do not begin working with individuals until release or near their release date.

Most inmates have an appellate defender well before reentry services are available. A social worker in an appellate defender office can provide comprehensive reentry work that begins early in a client's incarcera-

tion, and continues through the transition of release and until the person is firmly settled in the community.

A social worker at an appellate defender office can engage a client in reentry in a manner similar to the mitigation work at sentencing.[19] Where a client has an indeterminate sentence (such that he or she will be eligible for parole or other discretionary release), advocacy to the parole board (or other institution determining release) can convey an individual's institutional achievements, explain disciplinary problems and establish community support for release. It is also an opportunity to begin speaking with the client about life planning and decision making, and assessing what needs he or she will have upon release.

Whether with advocacy upon discretionary release or upon full completion of an imposed term, most individuals sentenced to prison will, at some point, return home—and the problems facing them prior to incarceration will often likely increase. Housing options are limited by the ban on public housing for many criminal convictions;[20] the lack of employable skills will be further hampered by a substantial gap in work history and the inability to obtain student loans for education;[21] the temptations of drug addiction may return; public assistance may be denied;[22] and the lack of comprehensive health care may cause medical and mental health needs to go ignored. A social worker can identify the appropriate resources to respond to these concerns, and help a client navigate the requirements and/or waiting lists for government agencies and private organizations. In jurisdictions that offer documentation of rehabilitation,[23] a social worker can also assist with this application.

Finally, the social worker in an appellate defender office can provide continuing support through the stressful period of release and reintegration. Life change, even when positive, is incredibly stressful. Learning how to respond to stress, without reoffending, is sometimes the biggest challenge for someone with a drug addiction. In a study of the first 30 days after release for 49 people returning to New York City, those who relapsed lacked ties to family or friends and/or did not consistently attend drug treatment programs.[24] Providing support and guidance during this period can help avoid relapses and encourage clients to learn healthier ways of responding that can continue even beyond their association with the appellate office and its social worker.

III. Conclusion

As trial defender offices have discovered, a social worker on staff can be an invaluable resource for attorneys and clients. Appellate offices have yet to fully realize the potential for social worker collaborations after conviction. Case assistance, institutional advocacy, and reentry services are three significant ways in which a social worker can enhance the legal representation of a criminal defendant and provide tangible assistance.

Endnotes

1. While this article focuses on the presence of social workers in criminal defense offices, the value of social workers in civil legal services has also been noted, particularly in the areas of geriatric law, HIV law, family law and public assistance. *See, e.g.,* Stacy L. Brustin, *Legal Services Provision through Multidisciplinary Practice—Encouraging Holistical Advocacy While Protecting Ethical Interests*, 73 U. Colo. L. Rev. 787, 792 (2002); Christina T. Pierce, Patricia Gleason-Wynn, Marilyn G. Miller, *Social Work and Law: A Model for Implementing Social Services in a Law Office*, 34 J. Gerontological Studies 61 (2001); Karen Bassuk & Janet Lessem, *Collaborations of Social Workers and Attorneys in Geriatric Community Based Organizations*, 34 J. Gerontological Studies 93 (2001); Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 Fordham L. Rev. 2123 (1999).
2. Brustin, *supra* note 1, at 792. *See also* Galowitz, *supra* note 1, at 2130.
3. For a discussion of these programs and problem-solving and community-based public defense generally, *see* Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 Geo. J. of Legal Ethics 401 (Winter 2001).
4. Clarke, *supra* note 3, at 425.
5. Galowitz, *supra* note 1, at 2126; Lisa A. Stanger, *Conflicts Between Attorneys and Social Workers Representing Children in Delinquency Proceedings*, 65 Fordham L. Rev. 1123, 1142–43 (1996).
6. Mark S. Silver, *Forensic Social Work Reports Can Play Crucial Role in Mitigating Criminal and Immigration Cases*, 76 N.Y.S. Bar J. 32 (March/April 2004). Federal District Judge Jack B. Weinstein, of the U.S. District Court for the Eastern District of New York, has further discussed the value of social worker involvement in criminal cases, although he focuses on social workers as part of the probation department rather than as advocates. Hon. Jack B. Weinstein, *Legal Ethics: When Is a Social Worker as well as a Lawyer Needed?*, 2 J. Inst. Stud. Leg. Eth. 391, 391-95 (1999).
7. *See Rompilla v. Beard*, __ U.S. __, 125 S. Ct. 2546 (2005); *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003).
8. *See, e.g.*, N.Y. Crim. Proc. Law § 470.15(6)(b).
9. In 1999, the Bureau of Justice Statistics, drawing on a survey in 1997 of adult prisoners, identified 16 percent of state and federal adult prisoners as mentally ill based on inmates reporting that they had a current mental or emotional condition, or that they had an overnight stay in a mental hospital or treatment program. *See* Paula M. Ditton, *Mental Health and Treatment of Inmates and Probationers* at 3 (U.S. Department of Justice, Bureau of Justice Statistics, July 1999) (*available at* <http://www.ojp.usdoj.gov/bjs/abstract/mhtip.htm>).
10 *See* Heather Barr, *Prisons and Jails: Hospitals of Last Resort*, at 26–29 (Correctional Association of New York and the Urban Justice Center, 1999).
11. In light of the "compelling evidence of abuse and safety failures inside prisons and jails," a one-year Commission on Safety and Abuse in Prisons was launched this year. *See* Jennifer Trone, *National Commission to Examine U.S. Prison Conditions,* News Release (March 1, 2005) (*available at* <http://www.prison

commission.org/pdfs/commission_on_safety_abuse_press_kit.pdf>.

12. Pub. L. No. 104-134, Stat. 1321 §§ 801–810 (April 24, 1996), amended, Pub. L. No. 105-119, 111 Stat. 240 (November 26, 1997).

13. *See, e.g.*, Norman Holt & Donald Miller, *Explorations in Inmate-family Relationships* (California Department of Corrections, Research Division, 1972) (*available at* <http://www.fcnetwork.org/reading/holt-miller/holt-millersum.html>); *see also* Marta Nelson, Perry Dees & Charlotte Allen, *The First Month Out: Post-Incarceration Experiences in New York City*, at 8-11 (Vera Inst. of Justice Sept. 1999) (*available at* <http://www.vera.org/publication_pdf/first_month_out.pdf>) (discussing importance of family assistance upon reentry).

14. A Bureau of Justice Statistics study found that, in 1997, nearly twenty percent of state inmates with children had no contact with their children, and less than forty percent had ever had a personal visit with their children. *See* Christopher J. Mumola, *Incarcerated Parents and Their Children* at 5 (U.S. Department of Justice, Bureau of Justice Statistics, August 2000) (*available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>). Federal prisoners, on average, had more familial contact. *Id.*

15. *See* Nelson, et al., *supra* note 13, at 29–30.

16. *See* Clarke, *supra* note 3, at 433–35.

17. *See, e.g.*, Allan Rosenthal & Elaine Wolf, *Unlocking the Potential of Reentry and Reintegration* (Center for Community Alternatives, Oct. 2004) (*available at* <http://www.communityalternatives.org/pdfs/unlocking_potential.pdf>).

18. *See* Nelson, et al., *supra* note 13, at 29–30.

19. For a discussion of mitigation in non-capital cases, *see* Mark S. Silver, *Forensic Social Work Reports Can Play Crucial Role in Mitigating Criminal and Immigration Cases*, 76 N.Y.S. Bar Ass'n Journal at 32 (March/April 2004).

20. *See, e.g.*, 42 U.S.C. § 1437d(l)(6) (requiring leases for federally subsidized housing to "provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy"); *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230 (2002) (upholding § 1437d(l)(6)).

21. *See, e.g.*, 20 U.S.C. § 1091(r)(1) (rendering individuals with drug convictions ineligible for federal student financial aid for at least one year).

22. *See, e.g.*, 21 U.S.C. § 862 (denying federal benefits to individuals convicted of a drug offense).

23. In New York, for example, individuals can apply for a Certificate of Relief from Disabilities, N.Y. Corr. L. §§ 701-703, if they have only one felony conviction, or a Certificate of Good Conduct, N.Y. Corr. L. § 703, if they have multiple felony convictions. Both certificates can remove certain statutory bars imposed based on criminal history and provide a "presumption of rehabilitation."

24. Nelson, et al., *supra* note 13, at 19–20.

Melissa Rothstein is the Director of Social Work and a Senior Staff Attorney at the Office of the Appellate Defender in New York. She has both a J.D. and an M.S.W. from Columbia University.

Waiver of the Right to Appeal

By Andrew J. Schatkin

It is established law that, provided the certain elements are present, a defendant may effectively waive his right to appeal. The leading case establishing the proper criteria for an effective waiver of the right to appeal is *People v. Seaberg*.[1] In *Seaberg*, one defendant pled guilty to Attempted Criminal Possession of a Weapon in the Second Degree and Robbery in the First Degree and agreed to waive his right to appeal as part of the bargain. He was sentenced and then appealed. The Appellate Division dismissed the appeal. A second defendant was convicted of Driving While Impaired and Driving While Intoxicated and agreed to waive his right to appeal in exchange for a particular sentence and then appealed. The Appellate Division dismissed that appeal.

The Court of Appeals engaged in an extensive analysis of what was necessary for a defendant to effectively waive his right to appeal and concluded that for a waiver to be enforceable it must be voluntary, knowing, and intelligent. The Court of Appeals went on to state that the trial court determines if those requirements are met by considering all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement, and the age, experience, and background of the accused. The Court of Appeals also stated that the court must consider, in overseeing this process, the reasonableness and appropriateness of the bargain and its effect on "the integrity of the Criminal Justice System" before accepting it. The Court finally noted that, as with plea and sentence bargains generally, the terms and conditions of the agreement and the defendant's understanding of them should be placed on the record to facilitate Appellate Review. The Court concluded, in the case before it, that, despite the fact that defendant Seaberg did not personally enter into the Court's discussion with his lawyer when the details of the bargain were stated, there was ample evidence in the record. The Court concluded that the defendant agreed to the bargain and did so voluntarily with an "appreciation of the consequences."

Seaberg is the landmark case establishing the validity of waivers of appeal and what is necessary for them to pass legal muster. Cases following this have reiterated the factors that must be considered by the Appellate Court to determine if a waiver is legally valid.[2]

There have been many cases interpreting and applying the criteria of *Seaberg. People v. Robinson*[3] is relevant. In *Robinson*, the Court specifically asked defense counsel if he had spoken to the defendant about the appeal issue, i.e., the waiver of the right to appeal as part of the plea agreement, and the defense counsel replied that it was not a problem. Later the defendant acknowledged that he had had ample time to consult with this attorney before deciding to plead guilty and that he discussed all aspects of the case with his attorney. In the course of the plea allocution the Court asked the defendant if he was willing to sign a waiver of the right to appeal and the defendant answered yes to this question. Thereafter, the defense counsel expressly stated that he had advised the defendant of his right to appeal and the defendant told him that he did not want to appeal. The Court also read the waiver of the right to appeal form aloud to the defendant and the defendant and his attorney executed the waiver form in the presence of the Court. Under these circumstances and facts, the Court held that it was clear that the defendant's waiver of his right to appeal was knowing, intelligent, and voluntary.

"The Court of Appeals engaged in an extensive analysis of what was necessary for a defendant to effectively waive his right to appeal and concluded that for a waiver to be enforceable it must be voluntary, knowing, and intelligent."

Robinson is an excellent example of an exhaustive waiver process. The defendant stated that he had consulted with his attorney about it; defense counsel expressly stated he had advised the defendant of his right to appeal and the defendant told him he did not want to appeal; and, most significant, the Court read the waiver form aloud to the defendant, and the defendant and his attorney executed the waiver form in the presence of the Court.[4]

The cases are legion that interpret and explain what may constitute a valid waiver. For example, in *People v. Moissett*,[5] counsel for the defendant made it clear there that his client was waiving his right to appeal and the Court thereafter questioned the defendant as to his understanding of his lawyer's statements and whether he had any questions concerning the statements.[6]

Another excellent case interpreting the waiver criteria is *People v. DeLuna*,[7] where the Appellate Division

First Department found an appeal waiver knowing and voluntary where the Court informed the defendant of the waiver and the defendant was given time to discuss this condition with his lawyer and said he understood the waiver.

Again, *People v. Ciatto*[8] is an excellent example of what has been held to be an effective waiver. In that case, it is significant that the defendant was given a waiver to execute and defense counsel determined that it was appropriate to sign the waiver. In addition, the Court stated that the client could read it as well as sign it and asked the defendant if he did sign the waiver of right to appeal to which the defendant answered, "Yes Sir." Defense counsel, the record showed, discussed the waiver with his client. The Court concluded that these facts and circumstances and specifically the colloquy on the record supported the enforcement of the defendant's waiver of his right to appeal as knowing, voluntary, and intelligent.[9]

There can be no doubt as to the state of the law on this matter, namely that a waiver is valid if found by the Court to be knowing, intelligent, and voluntary. The question arises, however, whether a waiver forecloses all chance of appeal. It is clear under *Seaberg* that it does not waive, for example, speedy trial claims or the issue of the defendant's competency to stand trial. Nor, *Seaberg* held, does the waiver interfere with the interest of justice jurisdiction of the Appellate Division. More important, however, *Seaberg* states that a defendant may not waive the right to challenge the legality of his sentence. This article proposes to examine what is encompassed and meant by the inability or unacceptability, legally, of waiving the issue of the legality of a sentence.

It does not include the excessiveness of the sentence, that much is clear from *Seaberg*, and that is not what is meant by the legality of the sentence. *People v. Mack*[10] is relevant on what is meant by the legality of a sentence. In that case, the defendant contended that the sentences imposed must run concurrently and were therefore illegal. The Appellate Division Second Department held that this claim survived the defendant's waiver to his right to appeal citing *People v. Callahan*[11] and *People v. Seaberg*.[12.]

Again, *People v. Frazier*[13] is of import. In *Frazier*, the Supreme Court, New York County, convicted the defendant, upon his plea of guilty, of Manslaughter in the First Degree and Criminal Possession of a Weapon in the Third Degree and sentenced him to consecutive terms of 8 1/3 to 25 years and 2 1/3 to 7 years respectively. The Appellate Division First Department specifically stated that the defendant's challenge to the legality of his sentences survived his guilty plea and his waiver of right to appeal, but found that the consecutive sentences were lawful. The Court noted that it was clear that the defendant's possession of a weapon, which was complete several hours prior to the shooting and in subsequent use, were separate, successive acts. It is interesting to note that the Appellate Division First Department specifically stated that the defendant's waiver of his right to appeal barred his challenge to the sentences on the grounds of excessiveness.

People v. Rozo[14] bears careful examination. In *Rozo*, the defendant was convicted of Attempted Criminal Possession of a Controlled Substance upon a plea of guilt and she appealed. As part of the negotiated plea it was agreed that the defendant would plead guilty to a class A-II felony and receive an indeterminate term of 4 years to life imprisonment. The defendant, however, pled guilty to the crime of Attempted Criminal Possession of a Controlled Substance in the First Degree, a class A-I felony. The Court noted that the sentence of an indeterminate term of 4 years to life imprisonment constituted an illegally low sentence for an A-I felony. The Court went on to state that, at the plea proceeding, the parties were under the mistaken impression that the crime of Attempted Criminal Possession of a Controlled Substance in the First Degree was a class A-II felony, which would permit the imposition of the agreed upon sentence. On appeal, defendant argued that her conviction should be reduced to a class A-II felony and that the people consent to that reduction. Under these circumstances, the Court concluded that the conviction of attempted Criminal Possession of a Controlled Substance in the First Degree should be reduced to the lesser included offense of Attempted Criminal Possession of a Controlled Substance in the Second Degree to better effectuate the clear purpose and intent of the plea agreement.[15]

People v. Bourne[16] represents another aspect or play on what constitutes a valid waiver and whether an appeal may be had despite a waiver. In *Bourne*, the Appellate Division First Department held that the defendant's waiver of his right to appeal a criminal conviction entered as a condition to a negotiated plea, did not bar the defendant from invoking the unique, historically recognized, and constitutionalized power of the Appellate Division to review his sentence as a matter of discretion and in the interest of justice.[17]

Conclusion

This brief review of the law of appellate waiver and its exceptions reveal that the waiver will be upheld as long as in the totality of the circumstances given, the nature of the case, the terms of the agreement, and the age and background of the accused, along with the reasonableness and appropriateness of the bargain, the

waiver is knowing, intelligent, and voluntary. The case law following *Seaberg* and *Callahan* show that the defendants preferably should be included in the discussion about the waiver; be given an opportunity to express assent or views to the Court and the lawyer; the lawyer should discuss the matter with the client; and preferably a written waiver should be executed on the record and read out and explained to the defendant.

This analysis also shows that there are exceptions to the total effectiveness of the waiver. *Seaberg* and the cases following it establish that where there is an issue about the legality of the sentence, that is to say that the sentence is somehow legally improper under statute or case law, that issue is appealable and survives the waiver as does the issues of competency of the defendant and speedy trial. Finally, as an afterthought and addition, the Appellate Division always retains its interest of justice jurisdiction to review the sentence and even the plea.

Endnotes

1. 74 N.Y.2d 1, 543 N.Y.S.2d 968 (1989).
2. *See People v. Stack*, 140 A.D.2d 389, 527 N.Y.S.2d 569 (2d Dep't 1988); *People v. De Long*, 134 A.D.2d 199 (1st Dep't 1987); *People v. Allen*, 82 N.Y.S.2d 761, 603 N.Y.S.2d 820 (1993). *See also People v. Veaudry*, 133 A.D.2d 524, 519 N.Y.S.2d 895 (4th Dep't 1987).
3. 188 A.D.2d 622, 591 N.Y.S.2d 74 (2d Dep't 1992).
4. *Compare People v. Cance*, 155 A.D.2d 764, 547 N.Y.S.2d 702 (3d Dep't 1989), where the Appellate Division, Third Department, found the defendant's waiver of appeal invalid where there was no indication that the County Court had specifically discussed the waiver of a right to appeal with him or that he understood the nature, terms and effect upon him. On this *see also People v. Simmons*, 167 A.D.2d 924, 562 N.Y.S.2d 593 (4th Dep't 1990), where the Court held that "understanding and acceptance" of the purported waiver had not been demonstrated.
5. 76 N.Y.2d 909, 563 N.Y.S.2d 43 (1990).
6. *People v. Callahan*, 80 N.Y.2d 273, 590 N.Y.S.2d 46 (1992), explains fully what is required for an effective waiver in light of the decision of the Court of Appeals in *Seaberg*.
7. 193 A.D.2d 466, 597 N.Y.S.2d 691 (1st Dep't 1993).
8. 290 A.D.2d 560, 737 N.Y.S.2d 104 (2d Dep't 2002).
9. On this *see also People v. Scott*, 215 A.D.2d 787, 627 N.Y.S.2d 718 (2d Dep't 1995).
10. 242 A.D.2d 543, 661 N.Y.S.2d 674 (2d Dep't 1997).
11. *Id.*
12. *Id.*
13. 228 A.D.2d 171, 644 N.Y.S.2d 172 (1st Dep't 1996).
14. 196 A.D.2d 514, 600 N.Y.S.2d 752 (2d Dep't 1993).
15. On this *see also People v. Dukes*, 14 AD 3d 732, 788 N.Y.2d 229 (3d Dep't 2005), where the Third Department held that the issue of whether the defendant was improperly sentenced as a second felony offender was a challenge to the legality of the sentence and survived despite a waiver of the right to appeal.
16. 139 A.D.2d 210, 531 N.Y.S.2d 899 (1st Dep't 1988).
17. On this *see also People v. Meredith*, 256 A.D.2d 641, 682 N.Y.S.2d 250 (3d Dept. 1998); *People v. Marziale*, 182 A.D.2d 1035, 583 N.Y.S.2d 36 (3d Dep't 1992) (Held: Waiver of a criminal defendant's right to appeal operates to foreclose all appellate review except in instances involving the legality of the sentence.); *People v. Taylor*, 242 A.D.2d 925, 662 N.Y.S.2d 894 (4th Dep't 1997) (Held: Defendant's waiver of right to appeal did not encompass challenge to the legality of the Court imposed sentence.).

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Book Review: *Advice and Consent, The Politics of Judicial Appointments*

By Lee Epstein and Jeffrey A. Segal

Review by Thomas F. Liotti

The American public is brought up to believe that there are three equal branches of government and that in selecting Supreme Court Justices we aspire to appoint on the basis of merit rather than politics. Unfortunately, as the authors of this worthy book point out, that is not the case. Lee Epstein, who is the Edward Mallinckrodt Distinguished University Professor of Political Science and Professor of Law at Washington University, and Jeffrey A. Segal, who is a Distinguished Professor and Chair of Political Science at Stony Brook University, have traced the history of federal judicial nominations and determined that in all instances the process is political first, foremost and always, whereas merit is a distant coincidence. The first requirement for the federal bench is to know the president and your United States senators. Healthy campaign contributions to them or their political Party are also prerequisites. Only a "babe in the woods" would be astonished by these hard truths. Generally these requirements have occurred within the state courts' judiciary since before the days of Tammany Hall, but what is illuminating in this book is that the abuses that we have seen in the political process in places like Brooklyn, New York, where the political machine has been on trial for, among other things, the sale of judgeships, is that the federal judiciary has thus far at least been immune from the same inquiry. With the knowledge that Professors Epstein and Segal have given us in this short volume, it clearly should not be. An independent commission should be appointed to review the entire federal nomination and confirmation process perhaps recommending Constitutional changes. Elected presidents and senators concerned about re-election and their political party's standing are not interested in judges who will be too vigorous about the deployment of judicial review in declaring laws unconstitutional. Thus, they want like-minded judges who will preserve their conservative ideology for generations to come. For example, one item asked by screening committees of judicial candidates is:

Please discuss your views on the following criticism involving "judicial activism."

> The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:
>
> a. A tendency by the judiciary toward problem solution rather than grievance resolution;
>
> b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
>
> c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
>
> d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
>
> e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Judges then are required to go through senatorial screening committees, the White House and the F.B.I. Judges who are problem solvers are weeded out in favor of bland, nondescript candidates threatened with impeachment if they deviate from the party line.

The authors have drawn liberally upon their own research but have over 200 additional sources supporting their opinions that judges are political and that the Justices of the Supreme Court typically follow the ideology of the president nominating them. Presidents do complain about their nominees. For example, Teddy Roosevelt joked about Oliver Wendell Homes saying that he could "carve out of a banana a Judge with more backbone." President Truman described his nominee, Justice Tom Clark, as "my biggest mistake." Based upon their votes, Justices Marshall, Brennan and Fortas are depicted as being most liberal. After them are Justice Harlan followed by Justices Warren, Goldberg and Stewart. On the conservative side, Justice Scalia is in first place with Chief Justice Rehnquist not far behind, then Justices Burger, Thomas and Powell. Perhaps one of the saddest anecdotes is President Johnson's successful efforts to force Kennedy's nominee off the Court in favor of Abe Fortes. Goldberg, a former Secretary of Labor, became Ambassador to the United Nations and made an unsuccessful attempt to run for governor in New York against Nelson Rockefeller. His legal history as a justice after just

three years in Court is unfortunately negligible. Certainly it would have eclipsed that of his successor whose time on the Court was also short-lived but dubious due to business activities which proved problematic.

The book reminds us of how presidents will prefer to pick judges who will carry their legislative and political programs forward for years to come. When President Franklin D. Roosevelt threatened to pack the Court, he did so in order to rescue the country from the Great Depression, but also to carry his campaign of social welfare and security forward. Justice William O. Douglas was his star nominee who remained on the Court for 36 years. By the time Nixon was in the White House, Douglas was at the tail end of his proactive, judicial career. He was threatened with impeachment three times and finally succumbed to a stroke, allowing his nemesis, President Gerald Ford, to appoint his replacement, the more moderate Justice Paul Stevens. Douglas did not want to give Ford that pejorative saying that Ford would appoint "some bastard."

Similarly Republican President Eisenhower showed his gratitude to California Governor Earl Warren for not running for the Presidency by nominating him. Eisenhower also acquiesced to the entreaties of New York's Cardinal Spellman in appointing the liberal Catholic, William J. Brennan, to the Bench. Remarkably though he was not the first Catholic appointed to the Supreme Court. Roger B. Taney, the author of the infamous *Dred Scott* decision, was appointed in 1835. Warren and Brennan—during his 30 years on the Court—promoted a liberal unorthodoxy which gave strength to the Bill of Rights and applied it again and again to the states through the Fourteenth Amendment.

In the section of the book on qualification, there is a significant lacuna, namely there are still judges in this land who have never tried a case, any kind of a case, and yet they are now presiding in the United States Courts. Similarly, there are judges who have never argued an appeal or even represented a client. These judges reprimand lawyers, impose sanctions or penalties, and yet they have never, ever conducted a direct or cross examination, prepared a case for trial or made an opening or closing statement. How is this shocking fact possible? Politics, politics. If there is one litmus test that should be considered by the United States Senate when it weighs the qualifications of judges, it should be whether candidates have tried cases or made appellate arguments. This would seem to be much more important for the future of our judiciary than whether they have contributed to political campaigns or that they have a political rabbi who will nominate them even without that experience.

In the October, 2005 issue of the *ABA Journal* a high-profile legal panel debated the independence of the federal judiciary providing a philosophical perspective that the book, otherwise laden with meaningful data, lacks. Michael Tiger, noted trial and appellate counsel as well as professor, together with Representative Tom Feeney, crystalized the national debate that is unfolding with nominations for the Supreme Court. Feeney was the sponsor of the 2003 Feeney Amendment which limited downward departures and most recently he co-sponsored legislation that would prevent Supreme Court Justices from citing foreign law in their opinions.

> **Rep. Tom Feeney:** I'll define how I understand judicial independence. I believe judges should be independent from undue coercion by the executive branch and the legislative branch. And judges actually do have a great deal of independence that is set out in the Constitution. For example, we can't remove them during a lifetime of good tenure. We can't reduce their salaries. We don't have the ability to overturn their judgments. I mean that's an extraordinary amount of independence.
>
> On the other hand, if you mean that judges ought to be either free from criticism or independent from the language of the Constitution and the text of the law itself, that's the sort of independence that can create a group of philosopher-kings, a government by a oligarchy of the wise and elite. The biggest threat to judicial independence, in my view, is the overreaching of the courts in either modifying or amending the original text of the Constitution, or substituting their biases and judgments for those of elected legislators.
>
> **Michael Tiger, Esq.:** Judges, especially when engaged in protecting human rights, are engaged in a countermajoritarian exercise. And we depend vitally upon voluntary compliance with judicial rulings because otherwise we'd be a totalitarian state. There is a difference between social scientists and newspapers debating judicial decisions and attacks by majoritarian institutions on the right of judges to make such decisions. I think majoritarian institutions ought, in our system, to be careful about how they go after this countermajoritarian institution that has neither the power of the purse nor the sword.

Advice and Consent is a worthy read for all proactive and patriotic Americans who wish to learn more about the politics of the judiciary, the unfortunate underbelly of our justice system.

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New York Court of Appeals Review

Discussed below are significant decisions in the field of Criminal Law issued by the New York Court of Appeals from November 2, 2005 to February 6, 2006.

STATUTE OF LIMITATIONS

***People v. Turner*, decided November 17, 2005 (N.Y.L.J., November 18, 2005, p. 18)**

In a unanimous decision the Court of Appeals reversed a defendant's conviction for manslaughter in the second degree because the Statute of Limitations on that crime had already expired. The defendant in the case at bar had originally been charged with murder in the second degree. During the trial the prosecutor had requested a charge on the lesser included offense of manslaughter in the second degree. Defense Counsel objected to the charge and the Court of Appeals held that after the defendant was acquitted of the murder count, a dismissal was required with respect to the manslaughter charge because the Statute of Limitations had already expired with respect to that offense.

The Court of Appeals reversed the conviction in question even though trial and appellate counsel had not raised the Statute of Limitations issue. The Court of Appeals viewed this failure as constituting ineffective assistance of counsel and proceeded to dismiss the manslaughter charge.

CLAIM OF RIGHT DEFENSE

***People v. Green*, decided November 21, 2005 (N.Y.L.J., November 22, p. 18)**

In a unanimous decision the Court of Appeals held that a robbery suspect who claimed that he simply stole back property which was stolen from him was entitled to raise his claim of right defense as a means of refuting the charges in question. Complicating and confusing this determination, however, the Court of Appeals then determined that the defendant was not entitled to a jury instruction regarding the claim-of-right defense. The Court indicated that the legislature had limited the availability of a statutory claim-of-right defense with respect to prosecutions for larceny by trespass or embezzlement (Penal Law Section 155.15(1)) and public policy considerations militated against encouraging the use of forcible self-help to recover property.

The Court of Appeals stated that because the prosecution must prove beyond a reasonable doubt that the defendant intended to take property from someone with a superior right to possession, a good faith but mistaken claim of right might defeat a robbery prosecution and thus the defendant was entitled to raise the issue. However, simply because a jury might be convinced by a claim of right argument, it did not follow that a claim of right charge derived from a statutory defense limited to certain types of larceny is also available to defendants in robbery prosecutions. The Court of Appeals thus rejected the defendant's argument that a jury charge was required and affirmed his conviction for robbery in the second degree.

VIOLATION OF ORDER OF PROTECTION

***People v. Lewis*, decided November 21, 2005 (N.Y.L.J., November 22, 2005, p. 19)**

In a 5-2 decision the Court of Appeals upheld a defendant's conviction for burglary in the second degree resulting from a violation of an order of protection when the defendant broke into his girlfriend's apartment. The majority opinion held that in certain situations a violation of an order of protection can serve as the crime underlying a burglary conviction. The Court held that the "intent to commit a crime therein" element of burglary may be established by a defendant's intent to engage in conduct prohibited by an order of protection while the defendant is in the banned premises. Although an unlawful entry alone cannot raise a trespass into a burglary in the case at bar, the Court found that there was ample evidence that when the defendant entered the girlfriend's apartment he intended to harass or intimidate the victim in violation of the terms of the orders of protection. It was these elements separate and distinct from the do not enter order which conform the basis for a burglary prosecution. In rendering its ruling, the majority opinion also rejected the defendant's claim that the trial court had improperly instructed the jury with respect to the intent requirement of the burglary charge and found that in any event defense counsel had failed to adequately preserve this issue for appellate review.

The dissenting opinion issued by Judges R.S. Smith and G.B. Smith expressed the view that a new trial was required because the trial judges' instructions were inadequate to inform the jury that the People were required to show more than an unlawful entry in order to sustain the burglary conviction.

JURISDICTION

***People v. Carvajal*, decided November 22, 2005 (N.Y.L.J., November 23, 2005, p. 22)**

In a 6-1 decision the New York Court of Appeals upheld a defendant's drug possession conviction even though neither the defendant nor his drugs were in New York at the time of the offense. The defendant was a coast-to-coast drug dealer who operated out of San Francisco whose drug activity had consequences in New York. The defendant was part of the Columbian Cali Cartel who ran the West Coast operation. The defendant resided in California and the cocaine which was seized was also in California. The Court of Appeals concluded, however, that pursuant to the authority granted by CPL Section 20.20(1)(c)) New York was vested with jurisdiction to prosecute the case. Under that statute criminal jurisdiction can be obtained if the consequences of the defendant's actions occurred within this state. The Court noted that the defendant was also charged and convicted of conspiracy and that with respect to the possessory crime a defendant may constructively possess drugs by exercising dominion and control over them through his authority over the person who physically possesses them or through his access to or control over the place where they are kept.

Using this criteria the Court found that the defendant was physically present in New York for some of the conspiratorial conduct on which jurisdiction was predicated. Further the drugs in question were to be shipped to New York. The defendant also made several telephone calls from California to New York regarding the efforts to transport the cocaine. Viewing the totality of the circumstances in the case at bar the Court of Appeals majority found that proper jurisdiction existed in New York to sustain the defendant's conviction for both possession and conspiracy.

Justice George Bundy Smith dissented, arguing that under both the Federal and State constitution, conviction of a drug possession charge could not be sustained when both the defendant and the narcotics were in a jurisdiction outside the State of New York.

DETERMINATION OF DISTANCE INVOLVING DRUG-FREE ZONE AROUND SCHOOLS

***People v. Robbins*, decided November 22, 2005 (N.Y.L.J., November 23, 2005, p. 24)**

In a unanimous decision the Court of Appeals determined that in computing the 1,000 feet buffer around schools with respect to establishing drug-free zones, the 1,000 feet distance is measured in a straight line radius around the school. Under New York law selling drugs within 1,000 feet of the school subjects the defendant to an elevation of the drug crime to a B felony with increased jail time. The defendant in the case at bar argued that the 1,000 feet distance should be measured by counting the distance of city streets, which in his situation would have put him just past the 1,000-foot zone.

The Court of Appeals rejected this claim stating that the measurement is determined by a radius around the school measured in a straight line. Chief Judge Kaye writing for the unanimous court pointed out that the intent of the statute was to circumscribe a fixed geographical area without regard to whether that area might contain obstacles around which people may have to detour. Noting that the school grounds law was enacted to create a drug-free buffer zone of protection and a corridor of safety for children coming to and from school, the Court found the public policy considerations dictated that in measuring the distance the radius straight line system best complied with the legislative intent.

LEGAL REPRESENTATION BY NON-LICENSED INDIVIDUAL

***People v. Jacobs*, decided December 15, 2005 (N.Y.L.J., December 16, 2005, p. 18)**

In a 6-1 decision the New York Court of Appeals refused to reverse a conviction where a non-lawyer participated in a defendant's trial as co-counsel with an admitted attorney. In the case at bar the defendant who was convicted of grand larceny charges was represented by a duly licensed and admitted attorney. The defendant's co-counsel, however, had never been licensed to practice law even though she held herself out for six years as an admitted attorney. Although the Court of Appeals had held in the leading case of *People v. Felder* 47 N.Y.2d 287 (1979) that a conviction had to be set aside without regard to whether an individual was prejudiced when the defendant is unwittingly represented by a lay person masquerading as an attorney, the Court of Appeals distinguished the situation at bar because of the fact that the defendant did have the benefit of a licensed attorney who was also on the case. The Court of Appeals stated, "when, as here, a defendant has been at all times represented by an admitted attorney, mere participation of a non-lawyer in the defense does not, without more, mandate reversal." Although the non-lawyer delivered the opening statement and conducted a brief direct examination of a defense witness, the Court of Appeals found that the licensed co-counsel was present during these occurrences and was available to ensure that the defendant received the effective assistance of counsel. Under these circumstances the Court of Appeals refused to extend the rule enunciated in *People v. Felder* and upheld the conviction.

Judge George Bundy Smith dissented, arguing that the non-attorney co-counsel had participated fully in the trial by performing various tasks. Judge Smith viewed the role played by the non-lawyer as being significant and thus expressed the view that the defendant had been deprived of the right of counsel under both the Federal and New York Constitutions. Judge Smith argued that in light of the *Felder* ruling a reversal was required and a new trial should be held.

FAILURE TO CHARGE TRESPASS AS LESSER INCLUDED OFFENSE

***People v. Defonish*, decided December 15, 2005 (N.Y.L.J., December 16, 2005, p. 22)**

In a unanimous decision the New York Court of Appeals reversed a conviction for burglary in the third degree and ordered a new trial because the trial court had failed to charge the jury with the lesser included offense of criminal trespass in the second degree. In the case at bar the defendant had been found inside a locked church building with a bag containing tools commonly used by burglars. A witness for the People, however, who was a general contractor, had testified that he stored his tools in the church basement and that one of the tools found in the defendant's possession was his. Under these circumstances the Court of Appeals determined that the jury was entitled to infer that the defendant did not bring the tools with him to the church and thus that the evidence failed to show that he had criminal intent at the time of entry. Under these facts it was thus error to refuse the defendant's request that the jury be charged with the lesser included offense of criminal trespass in the second degree as required by CPL Section 300.50. In rendering its decision the New York Court of Appeals relied upon its prior determinations in *People v. Discala,* 45 N.Y.2d 38 (1978) and *People v. Scarborough,* 49 N.Y.2d 364 (1980).

RIGHT TO BE PRESENT

***People v. Buonincontri*, decided December 15, 2005 (N.Y.L.J., December 16, 2005, p. 22)**

In a unanimous decision the Court of Appeals affirmed a defendant's conviction and rejected the claim that she was not adequately informed about her right to be present. The Court of Appeals found that the defendant was informed on the record that she had the right to be present during questioning of a prospective juror concerning the ability to be fair and impartial. Under these circumstances a presumption of regularity existed pursuant to *People v. Velasquez*, 1 N.Y.3d 44 (2003) and the defendant had failed to present an adequate appellate record to overcome this presumption.

DEPRAVED INDIFFERENCE MURDER

***People v. Suarez* and *People v. McPherson*, decided December 22, 2005 (N.Y.L.J., December 23, pp. 26 and 19)**

In an important decision further clarifying recent determinations regarding the limited use of depraved indifference homicide as part of murder indictments, the New York Court of Appeals greatly restricted the scope of the depraved indifference murder statute. The Court emphasized that prosecutors should no longer routinely pursue alternate and mutually exclusive theories of intentional and depraved indifference murder. The Court made clear that the statute which permits a conviction for second degree murder when a killing results from depraved indifference rather than intentional conduct must be used sparingly and never as a fallback for a jury unwilling or a prosecutor unable to establish an intentional act of murder. The Court of Appeals determination which emanated from its landmark decision in 2004 in *People v. Payne*, 3 N.Y. 3d 266, reversed two depraved indifference convictions which involved one-on-one knifings.

In a lengthy decision which also involved several concurring opinions, the Court of Appeals set forth several standards involving depraved indifference murder in an effort to clarify any confusion created by its prior rulings and as a guide to prosecutors in their future use of the depraved indifference statute. The standards enunciated by the Court can be summarized as follows:

a. "Depraved indifference murder is not a lesser degree of intentional murder."

b. "Someone who intends to cause serious physical injury does not commit depraved indifference murder because the intended victim dies" and "one who acts with the conscious intent to cause serious injury, and who succeeds in doing so, is guilty only of manslaughter."

c. A depraved indifference murder is one committed in "utter disregard for the value of human life" and one that reflects "wickedness, evil or inhumanity, as manifested by brutal, heinous and despicable acts." Examples include firing into a crowd, racing an automobile on a crowded sidewalk, opening a lion's cage at the zoo, placing a time bomb in a public area, poisoning a drinking well, opening a drawbridge when a train is about to pass and dropping stones from a highway overpass onto vehicles below.

d. Depraved indifference homicide can also occur when a defendant, acting with the intent not to kill but to harm, "engages in torture or a brutal, prolonged and ultimately fatal course of conduct

against a particularly vulnerable victim." For instance, when a defendant's conduct "serve(s) to intensify or prolong a victim's suffering (it) bespeak(s) a level of cruelty that establishes the depravity mandated by statute."

e. A one-on-one shooting or knifing resulting in death is virtually never a depraved indifference murder.

f. So-called "twin-count" indictments where both intentional and depraved murder is charged should be rare, and twin-count submissions to the jury should be even rarer. In other words, prosecutors should generally make a choice at the outset whether to pursue intentional or depraved indifference murder, and when they do not, the judge should act as a gatekeeper and generally permit only one of the counts to go to the jury.

Utilizing the enunciated standards, the Court of Appeals voted unanimously to overturn the conviction in *McPherson* and 6-1 to reverse the conviction in *Suarez* with Judge Graffeo dissenting. The Court of Appeals presently has on its docket another depraved indifference case, to wit *People v. Atkinson* where the Second Department upheld a depraved indifference conviction. In light of the Court of Appeals determination in the instant matters it appears unlikely that the Second Department decision in *Atkinson* will be upheld.

RIGHT TO CONFRONTATION

People v. Corby, decided December 22, 2005 (N.Y.L.J., December 23, 2005, p. 18)

In a 6-1 decision the Court of Appeals upheld a conviction for murder in the second degree and denied the defendant's claim that he had been denied his constitutional right to confront his accuser. In the case at bar the trial court had precluded the defendant from cross-examining the People's main witness concerning the specific circumstances which led her to inculpate the defendant in the crimes. The main witness had initially denied any knowledge of the crime and had implicated the defendant only after she was told that the defendant had implicated her. The defendant argued that he was entitled to pursue the line of enquiry because it was the only way to show why the witness was testifying the way she did. The trial court precluded the cross-examination sought, stating that it would introduce evidence that would confuse the jury and cause speculation. The Appellate Division had affirmed the defendant's conviction by a divided vote and the Court of Appeals upheld the Appellate Division ruling. The Court of Appeals found that the trial court's ruling was not an abuse of discretion as a matter of law and that the trial court had properly weighed the probative value of the evidence against the possibility that it would confuse the main issue and mislead the jury. The Court of Appeals further found that based upon other occurrences during the trial, the jury was already well aware that the witness had a motive to lie and a bias against the defendant and that the precluded line of enquiry would have been merely accumulative and of little probative value to the defendant's case.

Judge George Bundy Smith dissented and argued that the limitation placed upon defense counsel deprived the defendant of his constitutional right to confront his accuser and to present a full defense. Judge Smith further concluded that under these circumstances the error which occurred was not harmless beyond a reasonable doubt.

FAILURE TO OBJECT TO JURY CHARGE

People v. Echevarria, decided December 22, 2005 (N.Y.L.J., December 23, 2005, p. 19)

In a unanimous decision the Court of Appeals affirmed a defendant's conviction for murder in the first degree. During deliberations the jury had notified the court that it had reached a partial verdict. Defense counsel advocated accepting the partial verdict. The jury then announced that it had found the defendant guilty of two counts of murder in the second degree but had not reached a verdict on the charge of first degree murder. After accepting the partial verdict the court directed the jurors to continue deliberating and the next day they also found the defendant guilty of first degree murder. The defendant contended on appeal that once the jury rendered its partial verdict further deliberations were impermissible and the first degree murder conviction must be vacated.

The Court of Appeals determined that although the trial court in its charge to the jury had not followed the proper procedure set forth in *People v. Boettcher*, 69 N.Y.2d 174 (1987) which required that a court should submit lesser included counts to a jury in the alternative with an instruction that the jury must unanimously acquit the defendant of a greater offense before considering a lesser included count defense counsel in the case at bar had not objected to the charge as given. Further defense counsel had urged the court to take the partial verdict and had not objected to the jury continuing its deliberations after having rendered its partial verdict. Under these circumstances the Court of Appeals deemed that the defendant had waived any right to complain about the situation which developed.

(Continued on page 22)

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RIGHT TO CONFRONTATION

***People v. Goldstein*, decided December 20, 2005 (N.Y.L.J., December 21, 2005, pp. 1 and 8 and 18)**

In a 6-1 decision the New York Court of Appeals reversed a murder conviction on the grounds that the defendant's right to confrontation was violated on the basis of the recent United States Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36 (2004). In the case at bar a psychiatric expert for the prosecution told the jury of hearsay conversations she had with witnesses who were not subject to cross-examination. The Court of Appeals determination means that the defendant who was charged with the brutal subway murder of Kendra Webdale must be retried. The brutal slaying by the mentally ill defendant led to the enactment of Kendra's Law which permits compulsory treatment of the mentally ill.

In rendering its determination the Court of Appeals acknowledged the unwelcome consequences of their decision but noted that the constitutional rules that guarantee defendants a fair trial must be enforced and that in light of the Crawford ruling it had no choice but to order a new trial. Judge Read dissented in a lengthy opinion and argued that while a Crawford violation had occurred in the case at bar it should be viewed as harmless. Judge Read summarized her position within the dissent by stating: "In short, I see no possibility that the four hearsay comments caused the jurors to reject defendant's affirmative defense. Rather, his defense was subverted by the incredible nature of his psychiatric theory coupled with his uncontested actions, which contradicted any "transient" loss of control or comprehension."

JUROR DISQUALIFICATION

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

In a unanimous decision the Court of Appeals affirmed a defendant's conviction for rape in the first degree and refused to find that the trial court had acted improperly in refusing to remove a juror from the panel. In the case at bar the trial judge received a note from the jury during their deliberations to the effect that one of the jurors had stated that she had once been forcibly raped and that there was concern as to whether the juror should continue to serve. The trial court then queried the juror and the juror denied being the victim of a crime. The trial court then concluded that the juror was not grossly unqualified and declined the defendant's request for a mistrial.

The Court of Appeals found that the juror had unequivocally declared that she had never been raped and stated that she could render an impartial verdict. The Court of Appeals dismissed the defendant's claim that the trial court should have conducted a more detailed enquiry and also noted that at the time of the enquiry defense counsel made no claim that the court's questioning of the juror was insufficient. Under these circumstances the order of the Appellate Division which affirmed the defendant's conviction was upheld.

Judge Samuel A. Alito, Jr. Assumes Seat on United States Supreme Court Replacing Justice O'Connor

Following his nomination to fill the seat being vacated by Justice Sandra Day O'Connor, Judge Samuel A. Alito, Jr., was confirmed by the Unites States Senate after several weeks of hearings and controversy within the Senate. The American Bar Association had found Judge Alito well qualified, the highest rating possible, and the Bar Association's recommendation played an important role in the Senate's eventual determination of the issue. Judge Alito, who was appointed by President Bush following the withdrawal of Harriet Miers, began his Senate hearings on January 9, 2006. The Judiciary Committee approved his appointment on January 24, 2006 by a 10-8 vote following weeks of discussion and the full Senate voted to confirm his nomination on January 31, 2006 by a vote of 58-42. Unfortunately, the vote within the Senate was largely influenced by partisan political considerations with only one Republican Senator voting against his nomination and only four Democrats voting in favor.

Judge Alito had served for 15 years as a member of the Federal Third Circuit Court of Appeals. He is 55 years old and resides in New Jersey with his wife and 2 children. Judge Alito was educated at Princeton University and Yale Law School and served in the Army reserves from 1972 to 1980 where he reached the rank of Captain. Prior to his elevation to the bench, he had served as Assistant to the United States Solicitor General, and as Deputy Assistant Attorney General under President Reagan from 1985 to 1987. From 1987 to 1990 he served as United States Attorney in New Jersey.

Judge Alito comes to the United States Court with significant judicial and legal experience. He also has argued several cases before the High Court which he is now joining. Judge Alito has gained a reputation of being a hard-working legal scholar with good judicial temperament who is well regarded by his judicial colleagues and members of the bar.

Judge Alito becomes the 110th Supreme Court Justice and replaces Justice Sandra Day O'Connor who announced her retirement several months ago. President Bush, in both his State of the Union address and during the swearing in ceremonies for Judge Alito, thanked Justice O'Connor for her 24 years of distinguished service on the Court.

We congratulate Judge Alito on his appointment and thank Justice O'Connor for her many years of distinguished service to the nation. We wish them both well in their future endeavors.

Recent United States Supreme Court Decision Dealing with Criminal Law

When the United States Supreme Court opened its 2005–2006 term on October 3, 2005, it began to issue some decisions of importance to criminal law practitioners. In a 5–4 decision the Supreme Court in early January 2006 reinstated a California inmate's death sentence overturning a lower court appellate ruling that the sentence was unconstitutional. In one of his first major decisions in the criminal law area, newly appointed Chief Justice John Roberts voted in the majority agreeing with an opinion written by Justice Scalia. The Supreme Court also rejected an appeal from a death penalty defendant who sought a stay of execution from the court. The 76-year-old who was convicted of murder in California raised the argument that he was too old and feeble to be executed. The Supreme Court—by a 6–1 vote—rejected the defendant's claim and the defendant Clarence Ray Allen was executed on January 16, 2006, following the Supreme Court's action. The Supreme Court in late November also issued an interesting decision dealing with the theory of transferred intent when dealing with felony murder and the role of the federal courts when considering a habeas corpus petition. This case *Bradshaw v. Richey* is discussed in a law note prepared by a student from St. John's Law School. The name of the contributing student is at the end of the case note.

APPLICATION OF TRANSFERRED INTENT—theory of transferred intent is applicable to aggravated felony murder under Ohio law

Sixth Circuit erred in disregarding the Ohio Supreme Court's interpretation of Ohio law, which is binding on federal courts sitting habeas corpus.

***Bradshaw v. Richey*, 126 S. Ct. 602, 163 L. Ed. 2d 407, 2005 U.S. LEXIS 9033, 74 U.S.L.W. 3320 (November 28, 2005)**

Respondent set his neighbor's apartment on fire in an attempt to kill his ex-girlfriend and her new boyfriend, who were spending the night there. The two intended victims escaped, but the neighbor's 2-year-old daughter died in the fire.

Respondent was convicted of aggravated felony murder based on the doctrine of transferred intent. His conviction was affirmed on direct appeal. Respondent then sought post-conviction relief in state court, where his requests for an evidentiary hearing and relief on all claims were denied. The state appellate court affirmed. The District Court next denied respondent's petition for federal habeas relief. The Sixth Circuit reversed on two grounds, declaring transferred intent was not a permissible theory for aggravated felony murder under Ohio law, and that the evidence of direct intent was constitutionally insufficient to support a conviction. Also, the Sixth Circuit held the respondent's trial attorney had been constitutionally deficient under *Strickland v. Washington*, 466 U.S. 668 (1984). The Supreme Court granted the state's petition for writ of certiorari. The Supreme Court vacated the Second Circuit's judgment and remanded for further proceedings.

The Supreme Court held that the Sixth Circuit erred in holding that the doctrine of transferred intent was inapplicable to aggravated felony murder in Ohio. The Supreme Court held that the Ohio Supreme Court's interpretation of state law, although announced on direct appeal of the challenged conviction, was binding on the Sixth Circuit. The Ohio Supreme Court stated, "the doctrine of transferred intent is firmly rooted in Ohio law . . . . the calculated decision to kill is not altered by the fact that the scheme is directed at someone other than the actual victim." *State v. Richey*, 595 N.E.2d 915, 925 (1992). The Supreme Court held that the Sixth Circuit's ruling on sufficiency of evidence was erroneous because it disregarded the Ohio Supreme Court's interpretation of Ohio law. With respect to the *Strickland* claim, the Supreme Court held that the Sixth Circuit erred in relying on evidence not properly presented to the state habeas courts when it disregarded the state habeas court's conclusion that the expert was a properly qualified expert, and by relying on grounds that were not raised on direct appeal. Respondent contended that the state failed to preserve its objection to the court's reliance on this evidence by failing to make the argument before the Sixth Circuit. The Supreme Court held that because the relevant errors had not yet occurred, the Sixth Circuit did not have the opportunity to address the argument that the State failed to preserve its objection.

By Shanise O'Neill

Cases of Interest in the Appellate Division

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from October 31, 2005 to February 15, 2006.

People v. J. F. Montgomery (N.Y.L.J., October 31, 2005, pp.1 and 6)

The Appellate Division Third Department in a unanimous decision reversed a sodomy conviction and ordered a new trial because the trial judge had neglected to issue cautionary instructions with respect to the testimony of a witness. In the case at bar a girlfriend of the defendant had been called to testify with respect to the defendant's actions against the alleged victim. The girlfriend had given police two contradictory statements, one of them incriminating the defendant and the other claiming that nothing happened. The prosecution was permitted to impeach the girlfriend's testimony with the prior written statement which incriminated the defendant. Defense counsel failed to object to the admission of this testimony and failed to request any limiting instructions when the testimony was first elicited. The prosecutor also quoted the testimony in her summation. The Appellate Division noted that a prior inconsistent statement can be used only for impeachment purposes and not as evidence of guilt and that the jury must be informed of this fact, citing *People v. Carroll*, 37 A.D.2d 1015 (1971).

The Appellate Division Third Department exercised its interest of justice jurisdiction in ordering the new trial. The Court stated, "Even though defense counsel failed to request cautionary instructions, County Court should have advised the jury of the limited purpose for which such testimony was being received, in order to minimize the prejudice to defendant."

People v. Lazartes (N.Y.L.J., November 14, 2005, pp. 1 and 8 and November 15, 2005, p. 18)

In a 3–2 decision the Appellate Division Second Department vacated a murder and first degree assault conviction of a defendant who had caused the death of an individual during an automobile accident. The three judge majority found that the trial evidence was insufficient to sustain a conviction for depraved indifference murder or first degree assault. The defendant had not been accused of driving his vehicle while drunk but instead the basis of the prosecution's claim was that he was driving his Mercedes Benz at 102 miles per hour when he crashed into the rear of another vehicle, killing two people. The Appellate Division majority found that excessive speed alone was not sufficient to constitute the depravity requirement contemplated by Penal Law Section 125.25(2). The Appellate Division majority dismissed the charges in question in the interest of justice since defense counsel had not properly preserved the issue at trial. In issuing its ruling the majority opinion stated:

> Significantly, the unrefuted evidence indicated that, notwithstanding occasionally achieving excessive rates of speed, the defendant repeatedly slowed his vehicle where the traffic conditions so warranted. This is the antithesis of a depraved, as opposed to a reckless, state of mind.

The Appellate Division remanded the matter back to the trial court so that the defendant could receive a new trial on several lesser charges for which he was convicted. The new trial was ordered because of errors by the trial judge which could have affected the verdict on the lesser charges. The more serious murder and first degree assault counts were ordered dismissed however based upon the majorities finding of legal insufficiency.

A dissenting opinion was issued by Justices Gloria Goldstein and Anita Florio who objected to granting interest of justice relief when there was a failure to preserve the issue.

The dissent argued that in the case at bar there was no grave risk of convicting an innocent defendant. The dissenters voted to grant a new trial based on the legal errors which occurred but preferred to have the jury consider all the charges rather than directing a dismissal on the murder and first degree assault counts. Because of the sharp split in the instant matter it appears that an appeal may be taken to the New York Court of Appeals.

People v. Donnelly (N.Y.L.J., November 30, 2005, pp. 1 and 2, and December 5, 2005, p. 20)

In a unanimous decision the Appellate Division, Third Department, vacated a guilty plea on the grounds that it was jurisdictionally defective where the defendant orally waived indictment in open court and later signed a written waiver. The written waiver was not signed in the presence of his attorney as was constitutionally required and the Appellate Division, Third Department, held this defect to be fatal to the entry of the guilty plea. The Court specifically ruled: "Compliance with this unequivocal dictate is indispensable to a

knowing and intelligent waiver and failure to adhere to this strict procedure is a jurisdictional defect which survives a guilty plea and appeal waiver." The Court relied upon specific dictates of Article I Section 6 of the New York State Constitution which specifically requires a waiver of indictment to be signed by the defendant in open court in the presence of counsel.

With respect to a secondary issue the Court also noted that it was improper for the trial court to impose an enhanced sentence upon the defendant after he was released from a treatment program for misconduct. The Appellate Court stated that the imposition of an enhanced sentence without affording the defendant an opportunity to withdraw his guilty plea was inappropriate since the defendant's participation in a treatment program was never made a specific condition of the plea agreement. The defendant had only been advised during the plea colloquy that successful treatment in the program could result in a lesser sentence.

People v. Hendrie (N.Y.L.J., December 13, 2005, pp. 1 and 2)

In a unanimous decision the Appellate Division Third Department found a defendant's admissions to be voluntary even though his I.Q. was only 55. The Court held that although an I.Q. of 55 may indicate subnormal intelligence a defendant is still capable of comprehending his Miranda rights and voluntarily providing oral and written statements to the police. In the case at bar the defendant's statements resulted in the seizure of physical evidence and ultimately the defendant's conviction on charges of murder and other felonies. In the case at bar although the defense produced a psychologist who testified that the defendant lacked the capacity to fully appreciate his right to remain silent and his right to counsel the prosecution produced witnesses who described the defendant as relaxed and composed during the interrogation and who said there was no indication that the defendant was confused. The Appellate Division stated that where the evidence—as in the case at bar—is mixed the trial court's analysis is entitled to great weight and would not be overruled by the Appellate Court.

People v. Sanford (N.Y.L.J., December 19, 2005, pp. 1, 2 and 37)

In a unanimous decision the Appellate Division Second Department reinstated a manslaughter indictment against a female defendant who watched her 87-year-old mother fall down the stairs and left her there for 5 hours. The defendant had an argument with her mother and during the argument the mother fell down the stairs. According to the defendant she tried to help her mother but was told to get out of the house. The defendant then left the house and returned 5 hours later to find her mother dead at the bottom of the stairs. The evidence indicated that the mother had been suffering from the early stages of Alzheimer's disease and had a heart condition. The trial court had dismissed the manslaughter indictment determining that the defendant had been guilty of poor judgment but not manslaughter. The Appellate Division Second Department however determined that the evidence against the defendant could support a guilty verdict involving manslaughter in the second degree if unexplained and uncontradicted at a trial. Thus the indictment should not have been dismissed and the matter been allowed to proceed to trial.

Ciafone v. Kenyatta (N.Y.L.J., December 27, 2005, pp. 1 and 2, and December 29, 2005, p. 18)

In a unanimous decision the Appellate Division Second Department upheld the constitutionality of New York's Son of Sam Law which gives crime victims the opportunity to recover damages from convicted perpetrators. The Appellate ruling upheld the validity of Executive Law Section 632-a which permits crime victims to bring a civil action within three years of the discovery of any funds received from any source in the possession of a person convicted of a crime involving the victim. The constitutionality of the New York Statute had been attacked as being an ex post facto law and that it impinged on a defendant's rights under the contract laws of the United States Constitution. The Appellate Division found that the law was not intended as punishment but rather was in the nature of restitution so that the ex post facto clause was not violated. The court further concluded that rather than interfering with the contract the law merely exposes a malpractice recovery to the plaintiff if he or she proves a right to recover damages from the defendant. The courts decision was written by Justice Miller. We will advise our readers whether this issue will eventually reach the New York Court of Appeals and will keep them advised of any additional developments on this issue.

People v. Madera (N.Y.L.J., December 29, 2005, pp. 1 and 2)

In a unanimous decision the Appellate Division First Department reversed a burglary conviction because the trial court had improperly refused to allow a defendant to present expert testimony regarding drug-induced delusional states. In the case at bar the defendant had pushed his way into an apartment occupied by an 88-year-old victim. When the defendant was arrested after a neighbor had called police a small plastic bag containing cocaine residue was found in his

pocket. At the trial the defendant claimed that he had used alcohol and cocaine in the hours preceding his arrest and that he was acting erratically and crazy and had sought refuge because he believed he was being chased by a killer. The defense then sought to present expert testimony to testify that cocaine had the ability to produce a psychotic state which could cause a man to erroneously believe that he was being chased by a killer.

The Appellate Division ordered a new trial finding that "the ability of narcotics, specifically cocaine, to produce a psychotic, delusional and paranoid state in which defendant could truly believe his life was in danger, despite minimal, if any, evidence of such danger, would not be within the knowledge of the average juror."

People v. Taylor (N.Y.L.J., December 28, 2005, pp. 1 and 2)

In a unanimous decision the Appellate Division Fourth Department upheld a warrantless search of a defendant's home finding that the police action constituted an emergency exception to the Fourth Amendment requirement. In the case at bar a police officer had entered the home of the defendant who shared the house with his 87-year-old father. The officer had entered after smelling what he believed the scent of a dead body through an open window. After entering the officer discovered the father's body in the bathroom lying in a pool of blood. The defendant son was eventually arrested and convicted for murder in the second degree. The Fourth Department concluded that under the circumstances the emergency exception to the Fourth Amendment warrant exception applied and the trial court properly refused to suppress evidence which was seized from the defendant's home. The Appellate Division stated that the police officer's investigation was similar to a street encounter where it might start out as one thing but then continued and evolved. Smelling the dead body was only part of a chain of events which made the officer's actions justified.

People v. Wallis (N.Y.L.J., December 28, 2005, pp. 1 and 4)

In a unanimous decision the Appellate Division Third Department upheld a defendant's rape conviction and rejected his claim that the trial court should have recused himself because he had previously indicated prejudice against the defendant. The defendant claimed that the judge who he appeared before had previously called him a scum and a predator during a prior family court proceeding. The trial court stated that he had no recollection of berating the defendant during the claimed prior family court proceeding. A transcript subsequently shown to the judge did indicate that the court had made these comments during the prior family court proceeding.

The Appellate Division ruled however that since the trial judge had no recollection of the prior matter and did not indicate any hostility toward the defendant with respect to the new charges there was no basis to mandate a recusal in this case. The Appellate Division observed that the defendant's claim did not constitute a legal disqualification pursuant to Judiciary Law Section 14 and that a trial court's discretionary decision to refuse to recuse himself will only be disturbed in circumstances which indicate clear abuse. In the case at bar there was no such record to support an abuse of discretion claim and the defendant convictions were upheld.

People v. McLean (N.Y.L.J., December 30, 2005, pp. 1 and 2, and January 5, p. 18)

In a unanimous decision the Appellate Division, Third Department, reversed a second degree murder conviction of a teenage defendant accused of killing his parents**.** The court found that the trial judge had failed to allow the defense to excuse a prospective juror for cause when the juror said that media coverage had influenced his opinion on the case. The Appellate Panel found that the prospective jurors' statements clearly raised serious doubts concerning his ability to be impartial. Relying upon the New York Court of Appeals decision in *People v. Johnson,* 94 N.Y.2d 600, the Appellate Division expressly stated:

> If a potential juror's knowledge or opinions preclude his or her impartial service, he or she 'must' in some form give unequivocal assurance that he or she can set aside any bias and render an impartial verdict based on the evidence**.**

The Appellate Division ordered a new trial even though it found that there was overwhelming evidence of guilt in the case at bar. The Appellate Panel found that when the prospective juror stated that media coverage prejudiced his feeling towards the defendant and that he had difficulty putting these feeling aside the trial court was obligated to either excuse him or to conduct an additional inquiry. In overturning the conviction the Third Department specifically noted: "When potential jurors themselves say they question or doubt they can be fair in the case, Trial Judges should either elicit some unequivocal assurance of their ability to be impartial when that is appropriate, or excuse the juror when that is appropriate."

People v. White (N.Y.L.J., January 3, 2006, p. 1, and January, 4, 2006, p. 18)

In a unanimous decision the Appellate Division, Second Department, reversed a conviction and ordered a new trial because a Sixth Amendment confrontation right had been violated pursuant to the recent United States Supreme Court ruling in *Crawford v. Washington* 541 U.S. 36 (2004). In the case at bar the prosecution had used plea allocutions of alleged co-defendants as part of their direct case. Since in *Crawford* the United States Supreme Court had ruled that such statements were testimonial and therefore subject to cross-examination the Second Department ruled that the use of the statements in question constituted reversible error requiring a new trial.

Gorghan v. DeAngelis (N.Y.L.J., January 9, 2006, pp. 1 and 7)

In a unanimous decision the Appellate Division Third Department refused to bar a re-prosecution of a rape charge where the defendant claimed a violation of his double jeopardy constitutional rights. In December of 2004, the Third Department had ordered a new trial in the case at bar after finding that the prosecutor had committed egregious errors in the handling of the trial. Before the new trial could be held the defendant had brought an article 78 petition seeking a writ of prohibition against any new re-trial claiming that his double jeopardy rights would be violated.

After the article 78 petition was denied by the trial court and the matter was again heard by the Appellate Division, the Third Department held that while some instances of prosecutorial misconduct irreparably infect the judicial process this was not the case in the matter at hand and the re-trial would not be halted. In making its determination the Appellate Division referred to the New York Court of Appeals decision in *People v. Adames*, 83 N.Y.2d 89 (1993).

People v. Salgado (N.Y.L.J., January 17, 2006, pp. 1 and 5, and January 18, 2006, p. 18)

In a unanimous decision, the Appellate Division First Department upheld the dismissal of a second degree murder charge on the prosecution's failure to comply with the speedy trial rules pursuant to CPL Section 30.30. In rendering its determination, the Appellate Division ruled that it had the authority to review the entire period at issue from the filing of the accusatory instrument to the defendant's motion to dismiss. The prosecution which had taken a People's appeal had requested the court to review only certain days of contested computation and argued that to the extent the motion court had incorrectly failed to charge certain periods of delay to the People, those rulings would be unreviewable on the appeal.

The Appellate Division rejected the claim that mistakes that worked in favor of the prosecution should not be at issue in the appeal. In reaching its determination, the Appellate Division stated:

> The issue raised on an appeal of a decision on a CPL 30.30 motion is whether the delay violated the six month limit imposed by that statute, which permits—indeed, it requires—review of the entire time between the filing of the accusatory instrument and the date of the motion.
>
> It is the obligation of the Appellate Division to review all information, allegations, and calculations presented to the motion court on the motion and to decide whether the court's calculations and determinations were correct.

People v. Smith (N.Y.L.J., January 18, 2006, pp. 1 and 2, and January 17, 2006, p. 18)

In a unanimous decision, the Appellate Division Second Department vacated a sentence of a defendant convicted of burglary claiming that the trial court should have further investigated a complaint that the defendant had made against his attorney. In the case at bar, the defendant had complained to the court at the time of sentencing that his lawyer had been ineffective during the trial. The defense counsel then informed the court that the defendant had filed a complaint against him and stated that since he had every intention of defending himself against the complaint, his advocacy role may have been breached and the defendant was asking him to be relieved. The trial court however merely adjourned the case without conducting an inquiry. On the adjourned date, the defendant again raised the issue of his complaint against the attorney, but the sentencing court made no further inquiry.

Under these circumstances, the Appellate Division held that it was incumbent upon the court to make some further inquiry to determine whether counsel should be substituted. In making its determination, the court stated: "The court twice had been apprised that there were seemingly serious conflicts between the defendant and his attorney, but at neither time did the court make any inquiry into the nature of the grievance that the defendant apparently had filed. This was error."

For Your Information

Use of Death Penalty Continues

A recent report has indicated that as of February 2006 approximately 1,000 executions have taken place since 1977. Just prior to that year the United States Supreme Court had upheld the constitutionality of state laws which allowed for the use of the death penalty thus ending a 10-year moratorium which had existed on the death penalty. The report also indicated that in the last 29 years 58% of those executed in the United States were white while 34% were black and 6% Latino. Death sentences have dropped by 50% since the late 1990s and executions actually carried out have fallen by 40% since the late 1990s. In recent years the public's view regarding the use of the death penalty has shifted somewhat, with 64% currently favoring its use, which is down from a high of 80% which was reported in 1994. The drop in public support for the use of the death penalty appears to be influenced by several high profile cases where death row inmates have been released following the discovery of DNA evidence which has indicated their innocence. Since 1973, 122 prisoners have been freed from death row with the vast majority of these cases occurring during the last 15 years since the use of DNA evidence has become widespread.

Currently 12 states do not have the death penalty and two states, Illinois and New Jersey, have formal moratoriums on capital punishment while the issue is being reviewed. According to the study the states with the highest execution rate per one million population are Oklahoma, Texas and Virginia. In New York the death penalty statute has recently been declared unconstitutional and legislative efforts to correct the declared constitutional defect have been stymied with the Governor and the State Senate on one side and the Assembly refusing to take any action until a detailed review of the death penalty issue is undertaken. It appears that the re-institution of the death penalty will again become an important and divisive issue in the upcoming statewide elections. Governor Pataki and the State Senate leadership have already repeatedly attacked the Democratic Assembly for its failure to immediately correct the statute's constitutional defect and State Attorney General Eliot Spitzer, the likely Democratic candidate for Governor, has been under extreme pressure from both sides of the issue to clarify his position on the death penalty issue. The Attorney General in a recent speech indicated that the death penalty should be available for terrorists and many of his Democratic supporters who oppose the death penalty are seeking a clarification of his position on the issue. A recent New York poll indicated that 46% of New Yorkers currently oppose the re-institution of the death penalty while 42% were in favor. Twelve percent indicated no strong view on the issue. Among New York Democrats 58% opposed capital punishment. We will continue to alert our readers to any new developments regarding the death penalty in New York.

New District Attorneys in Two Large Counties

As a result of the recent elections two new District Attorneys have assumed office as of January 1, 2006 in two of the state's most populous counties. In Nassau County Kathleen M. Rice, a 40-year-old former Federal Prosecutor and Brooklyn Assistant District Attorney began her term as Nassau County District Attorney after she defeated veteran prosecutor Dennis Dillon. D.A. Rice has stated that her priorities are to streamline the office and to create specific units to deal with cybercrime gangs and corruption. She has also indicated that she will place a greater emphasis on trying cases rather than plea bargaining. D.A. Rice has also announced that she will be conducting a review of the current District Attorney's staff in order to decide who will be retained. It is widely expected that the new District Attorney will be bringing in new personnel to fill some of the high-level positions within the office. In fact, in January following her swearing-in, District Attorney Rice announced several new high-level appointments to her office. In making her new appointments Rice appears to be drawing heavily from her former contacts in the Brooklyn District Attorney's Office and close associates that she has worked with in the past.

Westchester County also has a new District Attorney effective January 1, 2006. Janet DiFiore was elected to replace Jeanne Pirro, who gave up the District Attorney's seat in order to run for the United States Senate against Hillary Clinton. Jeanne Pirro subsequently announced that she had dropped her campaign against Hillary Clinton and instead would be running for State Attorney General at the request of State Republican leaders. Janet DiFiore, prior to her election as Westchester District Attorney, served as a State Supreme Court Justice in Westchester County. Janet DiFiore won the District Attorneys seat in a close election, receiving 51% of the vote. D.A DiFiore is a Republican while newly elected Kathleen Rice is a Democrat.

Child Offenders Serving Life-time Sentences

According to a recent report by Amnesty International and Human Rights Watch there are currently 2,225 child offenders in the United States who have been in prison for life without any possibility of parole. These child offenders have committed various degrees of homicide. Sixteen percent of these child offenders serving life in prison without parole were between the ages of 13 and 15 when they committed their crime, 59% were imprisoned for their first criminal offense and 27% were sentenced for felony murder where they were involved in a crime during which a murder took place but which they did not directly commit. The report also indicates that in terms of racial breakdown 60% of the current population of child offenders serving life without parole were black.

In contrast to the figures regarding the United States the report also pointed out that in the rest of the world very few child offenders were incarcerated with lifetime sentences. The debate regarding lifetime sentences for child offenders has been renewed as a result of the recent United States Supreme Court decision outlawing the death penalty for juvenile offenders. Implicit in that decision is the view that children possess a lack of maturity and a lack of responsibility which is often corrected by later brain development. Based upon this view is the feeling that even a child who has committed the heinous crime of murder should be offered the opportunity of rehabilitation and a return to society after a reasonable period of incarceration.

Misleading Deportation Information May Doom Guilty Plea

In past issues we have alerted criminal law practitioners to the dangers of failing to advise alien defendants of possible deportation. Although the New York Court of Appeals in *People v. McDonald*, 1 N.Y.3d 109 (2003), ruled that erroneous advice as to the possibility of the defendant's deportation was not sufficient to overturn a guilty plea because the defendant had failed to show that, had the inaccurate advice not been given he would not have pleaded guilty, the Court did state that under certain circumstances erroneous advice on a deportation situation could be grounds for reversal on ineffective assistance of counsel grounds. In a recent Federal District Court ruling Judge Arthur Spatt vacated a guilty plea when the defendant had been misinformed about his impending deportation. In *Zhang v. United States* (N.Y.L.J., November 22, 2005, pp. 1, 2 and 23), the defendant was told by prosecutors, his own attorney and the magistrate judge that he faced "possible" deportation by pleading guilty to mail fraud. Judge Spatt found that in fact a conviction of mail fraud requires deportation. Judge Spatt thus found that although the misleading information provided to the defendant was not made intentionally he was nevertheless required to vacate the guilty plea.

This latest Federal decision again emphasizes that criminal law practitioners must be extremely careful when dealing with alien defendants and should be aware of the possible deportation consequences of any negotiated guilty plea. Since 1995, New York's CPL Section 220.50 requires that prior to accepting a plea of guilty to a felony offense the Court must advise the defendant of the possible deportation consequences of a conviction if the defendant is not a United States citizen. Although the effects of the statutory provision are somewhat nullified by a further specific proviso that the failure to so advise does not affect the voluntariness of the plea or the validity of the conviction, courts are increasingly questioning guilty pleas which result in undisclosed deportation consequences to the defendant.

Expansion of DNA Data Bank

The State Commission on Forensic Science, on December 14, 2005, voted by a 9–3 vote to expand the State's DNA Data Bank to include samples collected from defendants as a condition of release from parole, probation, a plea bargain or a temporary release program. The Commission took the action at the request of Governor Pataki, who called for an expansion of the DNA Data Bank to include all felonies and misdemeanors. The new action by the State Commission is expected to add as many as 40,000 defendants to the Data Base system. The Commission approved the Governor's plan despite objections raised from several quarters including the Innocence Project a group founded by Attorneys Barry Scheck and Peter Neufeld who are well known with respect to DNA testing**.** The opponents of the DNA Data Bank expansion raised the argument that the Governor's plan would now encroach on the privacy of too many people and would usurp the Legislature's authority. The Governor and the State Commission had in fact acted after expanded data base legislation had been stalled in the New York State Assembly. It is possible that the actions of the Governor and the State Commission in expanding the data base on their own is subject to legal challenge and a judicial resolution to the issue may be required.

Federal Second Circuit Upholds New York's DNA Database Statute

In early December 2005 the Federal Second Circuit Court of Appeals upheld the constitutionality of New York's Statute which authorizes a collection of DNA samples from certain classes of convicted felons. The Second Circuit in *Nicholas v. Goord* found that the Statute does not violate the Fourth Amendment prohibition against unreasonable searches and seizures. The

Court of Appeals, utilizing a special needs approach, held that New York had a significant interest in having information readily available to aid criminal investigations and that this special interest outweighed the plaintiff's minimal interest in not having to contribute their DNA to the database. The Court further rejected expectations of privacy concerns and held that the State had a strong interest in obtaining from defendants the uniquely effective identifying information that DNA provides for future investigatory purposes. The Second Circuit opinion written by Judge Walker specifically concluded that: "Given that the state likely already has a plethora of information about plaintiffs, in light of their status as convicted felons . . . the additional intrusion effected by the DNA statute is insufficient to outweigh the state's strong interest in maintaining a DNA index." The lengthy Second Circuit decision in *Nicholas v. Goord* was reported in the *New York Law Journal* of November 30, 2005, pp. 1 and 2, and can be found in its entirety in the *New York Law Journal* of December 5, 2005, pp. 20–23.

New York's DNA Database Statute was first enacted in 1994 and applied only to individuals convicted of felonies after January 1, 1996. It has since been amended to apply retroactively to defendants still serving their sentences and has been repeatedly expanded to include additional classes of offenders. Additional judicial decisions regarding the legality and constitutionality of the expansion of DNA databases within our State are expected and we will report on any new developments in the DNA area to our readers.

Rise in Murder Rate

In a reversal from recent trends the FBI reported in December 2005 that statistics for the first 6 months of 2005 revealed that the nation's murder rate increased by 2%. Interestingly the biggest increase incurred not in the large cities but within small towns with populations of less than 10,000 people and primarily in the Midwest. In 2004 the murder rate had declined by 5.7% but the initial figures for the first 6 months of 2005 indicates that the murder rate for 2005 will probably rise reversing several years of declines. We will report the full 2005 figures as they are issued.

OCA Moves to Include Judicial Pay Raises in a Proposed Judicial Budget and Federal Judges Also Seek Salary Increases

Obviously frustrated by the failure to obtain legislative increases for members of the judiciary Chief Judith S. Kaye, in December of 2005, submitted on behalf of the Office of Court Administration a budget request for the coming 2006–2007 fiscal year which totals $1.96 billion**.** The budget request includes $69.5 million to provide New York State Judges with retroactive pay hikes. Using her prior legislative requests salaries of state judges would be proportionally linked to Federal District Court Judges. New York Supreme Justices would receive an 18.6% increase to $162,100, up from $136,700. Judge Kaye's salary would rise from $156,000 to $178,310. Other members of the New York Court of Appeals would also receive similar increases and the salaries of Appellate Division Justices would also be increased.

Following OCA's submission of its proposal for judicial increases, Governor Pataki in late January also called upon the Legislature to boost judicial salaries. The Governor's proposal differed however from the OCA recommendations in several aspects. Rather than seeking different percentage increases for the different categories of judges, the Governor's proposal would basically provide a 19% increase for all judges. There would be no automatic cost of living increases and the increases would not be retroactive as sought in the OCA proposal, but would be effective upon the passage of any legislation. The overall cost of the Governor's plan would also be somewhat less than the proposal advanced by OCA. The Governor's plan is estimated at an annual cost of $28 million, while the OCA plan would amount to $69.5 million if it includes retroactive increases and $32.6 million without a retroactive application. Either through OCA's budget request or pending legislative action as sought by the Governor, it appears likely that some form of judicial salary increases will be forthcoming in the near future and we will report on any new developments to our readers.

Overall this year's judiciary budget request represents a $130 million increase separate and apart from the additional monies sought for judicial raises. A 3.5% increase is requested for the New York Court of Appeals budget which would total $14.5 million. Appellate Division budgets would increase by 5.7%. The proposed budget also includes a request for a 2.7% increase to operate the drug treatment courts. The requested increase would bring the budget for those courts to $17.8 million. According to the OCA nearly 11,000 defendants have successfully graduated from the drug treatment courts since 1995.

Judge Kaye, in seeking pay increases for State Judges, has attempted to index the salaries paid to that of the Federal Judiciary. Interestingly in early January, 2006 newly appointed Chief Justice John Roberts also called for additional salary increases for Federal Judges. In his first annual report Judge Roberts stated that there was a direct threat to judicial independence and the quality of the Federal Bench because of the gap between what judges earned and what they could earn as lawyers in the private sector. The 2006 Federal judicial budget contains a 5.4% increase for judicial salaries.

Current salaries of Federal District Judges is $165,200. Circuit Court of Appeals Judges are paid $175,100 per year and members of the United States Supreme Court receive $203,000. By virtue of being Chief, Justice Roberts receives $212,100. Although Federal Judges have received periodic increases over the last several years, Justice Roberts reported that the increases have not kept up with the inflation rate. He further noted that 92 judges have left the Federal Bench since 1990 with 9 judges leaving during the past year. Justice Roberts attributed one of the reasons for the increasing departure of Federal Judges to inadequate judicial salaries.

Governor Pataki Pushes New Criminal Law Initiatives

Chauncey G. Parker, Governor Pataki's Criminal Justice Commissioner, stated in an interview reported by the *New York Law Journal* on December 7, 2005 that the Governor intends to undertake additional criminal law initiatives before he leaves the Governor's Office. These initiatives include the issuance of executive orders to expand the DNA data base, thereby bypassing the legislature where the State Assembly has been reluctant to make such changes. The Governor will also seek a civil commitment law and additional penalties for gun trafficking. The Governor's call for a civil commitment law was heightened as a result of a November judicial ruling which declared improper the Governor's efforts to arbitrarily commit released sex offenders to mental hospitals.

The Governor's call for a civil commitment law has resulted in various bills being introduced in both the Senate and the Assembly. Recently, the New York City Bar Association expressed concern regarding the rush to enact a civil commitment law and stated that legislative leaders should not take "knee-jerk action" without carefully considering the various consequences of the bills. The City Bar Association report indicated that while recognizing that dangerous predators should be locked up, some of the measures presently pending in Albany would place an unnecessary stigma on the mentally ill and threaten basic civil rights. The report also pointed out that under some pending current proposals, a 22-year-old who had consensual sex with a 16-year-old could also be subject to civil commitment penalties—a result which seems unduly harsh. Overall, the City Bar Association report stated that the Assembly Bill offered greater balance and protection than its Senate counterpart, but stressed that any legislation should be carefully reviewed and considered before final approval.

The Governor's gun trafficking proposal would add up the sales of guns by a defendant over a one year period and would lower the threshold from 10 guns to 5 before an offense is elevated to a higher level felony. Currently the sale of less than 10 guns in one transaction constitutes a D felony where probation is possible. Under the Governor's proposal a C felony would come into play where a prison sentence is required. The Governor would also classify a single gun sale as a violent offense which would require a State prison sentence of at least 2 years. Commissioner Parker, during his interview, criticized the State Assembly for failing to act on these measures and said: "The Administration is 'absolutely' confident that if any of the initiatives were afforded a floor vote, they would easily pass. However, Assembly Speaker Sheldon Silver, D-Manhattan, has blocked the measures repeatedly." The Governor has in fact called for a special session of the Legislature to act on his gun control initiatives.

Following his call for a special legislative session, legislature leaders and the Governor reached some agreement on the passage of two bills which would strengthen gun control laws and increase penalties for violence toward police officers. The bills grouped together under the title Crimes Against Police Acts increase penalties for those who injure or kill police officers and also significantly increase penalties for illegal gun trafficking and make it easier to convict those who sell illegal guns with respect to felony gun crimes. In calling for support of his criminal law initiatives the Governor, in his recent State of the State message to the Legislature, stated: "On behalf of families all across New York state, let's waste no time in our efforts to keep violent predators off our streets and away from our children, let's take up and pass these important measures as quickly as possible." The legislature passed the agreed upon legislation and the Governor signed the enacted legislation. The legislation became effective as of December 21, 2005. In order to win Assembly approval for the new legislation the Governor was forced to drop his request for the re-institution of the death penalty with respect to killers of police officers. It thus appears likely that the death penalty will not be revived during the Governor's last year in office. We will keep our readers advised, however, of any developments in this area.

Extension of Patriot Act

After months of debate and controversy Congress finally acted with respect to an interim extension of the Patriot Act which went into effect almost immediately following the September 11, 2001 World Trade Center attacks. Under a compromise agreement the Patriot Act had been extended until March 10, 2006. During the month of December the House of Representatives passed legislation extending the Patriot Act for a four-year period. The Senate however, because of the threat of a filibuster refused to follow the House's action and instead opted for a six-month extension. The House

leadership responded by refusing to accept the Senate's proposal and instead altered its original extension to apply only until February 3, 2006. On that date, both Houses of Congress agreed to another five-week extension until March 10, 2006 so that additional modifications and changes could be considered.

A long-term extension of the Patriot Act had led to a deep controversy between those who wanted the Act extended in its original form and others who felt that greater civil liberties protections were required. Following some compromises the Act was finally permanently renewed on March 9, 2006. We will advise our readers in our next publication regarding the final Congressional action on this important piece of legislation.

New York State Population Stays Static But Divide Between Rich and Poor Increases

A recent population report indicates that the population of New York State has stayed relatively level for the past few years and as of July 2005 stands at a little over 19 million people. New York is now the third most populous state in the nation behind California, which has slightly over 36 million and Texas, which has nearly 23 million. It appears likely that Florida, which is currently right behind New York State in fourth place with nearly 18 million, will soon bypass New York State since the "Sunshine State" is currently growing at the rate of 1,000 people per day or approximately 400,000 per year. According to the report, from July 2004 to July 2005, Florida has in fact gained 404,000 people. Florida is currently the fastest growing state in the United States followed by Texas, California, Arizona and Georgia. Illinois—with nearly 13 million people—continues to be the fifth most populous state in the country.

In a separate report conducted by the Center on Budget and Policy Priorities and the Economic Policy Institute, it was also reported that while New York's population has stayed relatively level during the last few years, the economic divide between the rich and poor in the State has grown dramatically in the last two decades so that today the gap between the rich and the poor in New York State is the largest in the country. Average income for the top fifth of wage earners is now eight times greater than that of the bottom fifth. The richest top fifth currently earn an average of $130,431 while the poorest fifth earn an average of $16,076. The average gain of income by the top one-fifth in New York State in the last 20 years has amounted to an average of $51,204 while the bottom one-fifth has only gained $1,109 in the last 20 years. Following New York in terms of states with large disparities between rich and poor are Texas, Tennessee, Arizona, and Florida. Thus, three of the fastest growing states in population, Texas, Arizona, and Florida, are also in the top five which have significant differences in income level between rich and poor.

Legal Aid Society Report Calls Drug Reform Legislation Inadequate

In a recently released report the Legal Aid Society has stated that the recent legislation designed to modify the Rockefeller Drug Laws has resulted in the release of only about half of the defendants who are eligible for resentencing. Under the modified statute 473 people were eligible to be re-sentenced under the terms of the new determinate sentences. According to the Legal Aid Society's report 270 were re-sentenced but only 142 were immediately released. This was approximately 25% of the inmates who were serving A-1 felony sentences. The Legal Aid Society stated that prosecution opposition was the main reason why more eligible prisoners had not been released. According to the survey Brooklyn had the highest rate of eligible defendants released, to wit 50% while in Manhattan and Rochester only about 30% were released.

The report also claimed that inadequate monies have been provided for treatment programs and called for additional legislation with respect to sentencing for drug crimes. Chauncey G. Parker, Governor Pataki's Criminal Justice Commissioner, disputed the report's claims regarding inadequate funding for treatment programs and stated that New York spends more per capita on drug treatment than any state in the nation. Commissioner Parker also disputed the report's claims that not enough inmates are being released. Mr. Parker stated that the process which has been established is a good one and that those defendants being denied immediate release are in all likelihood major drug dealers who deserve continued incarceration. Additional details regarding the Legal Aid Society's report and Commissioner Parker's comments are summarized in a *New York Law Journal* article reported in the *New York Law Journal* of December 19, 2005, pp. 1 and 2.

Fifty-five Percent of Current Federal Judiciary Appointed by Republican Presidents

In a recent study conducted by the U.S. Courts Alliance for Justice it was reported that at the present time slightly more than 55% of sitting Federal Judges, including Supreme Court Justices, were appointed by Republican Presidents. According to the report, currently 10 of the 11 judicial circuits have a majority of members who were appointed by Republican Presidents. The major exception is our own Second Circuit which continues to have a significant majority who were appointed by Democratic Presidents. With President Bush being able to make Federal Judicial appointments within the last two years of his term it appears likely

that the number of judges on the Federal Bench who owe their appointments to Republican Presidents will continue to increase during the next two years.

DNA Study

A recent report by the American Society of Law Medicine and Ethics along with the Innocence Project from New York has highlighted the growing importance of DNA evidence in the criminal justice system. Since DNA was introduced in 1990, some 16 years ago 173 defendants have been exonerated for wrongfully being convicted as a result of DNA evidence. Currently 38 states and the District of Columbia allow post-conviction DNA tests and a 2004 Federal Law also gives prisoners access to DNA testing. Illinois has seen the greatest number of exonerations due to DNA testing with 25 such cases, followed by Texas with 19. In our own State of New York 17 exonerations have taken place since 1990.

DNA, or deoxyribonucleic acid, taken from human blood, semen, hair or saliva, can be used to identify an individual with near perfect accuracy. Once considered a fringe science, DNA testing is rapidly redefining guilt and innocence. Peter Neufeld, co-founder of the Innocence Project which was involved in this study, stated that: "In the last 15 years, DNA has caused, literally, a revolution in the criminal justice system."

The growing use of DNA evidence is causing many courts to reconsider traditional rules and procedures and the United States Supreme Court is presently considering an important case where the defendant is arguing that new DNA evidence should cause him to receive a re-trial even though his conviction occurred in 1986 and all of his appeals and other traditional remedies have been exhausted. Due to the importance of DNA evidence we will continue to advise our readers of any new developments in this area.

Violent Felons Commence Legal Action With Regard to Rejection of Parole

In late January, 2006 a group of nine defendants incarcerated for violent felony crimes filed a federal class action lawsuit in the Southern District of New York claiming that the Pataki Administration had forced the Parole Board to follow a systematic policy of denying release to violent felons solely because of the nature of their offense. The lawsuit contends that the Parole Board requirements for release articulate several factors upon which parole decisions must be made. The suit alleges that despite the presence of other factors, the Parole Board has routinely and systematically denied early release to any inmate who is classified as a violent felon. The suit further alleges that this policy is due to a political agenda fostered upon the Parole Board by the Pataki Administration. An exhibit attached to the lawsuit indicates State statistics which reveal a dramatic decline in the parole release rate for violent felons during the last few years. Details regarding the lawsuit were published in the January 24 issue of the *New York Law Journal* at pages 1 and 5 and the *Law Journal* published its own report on an investigation of the parole system in its January 31 issue.

Federal Decision Nullifies Judicial Conventions for New York Supreme Court Justices and Orders Institution of Primary System

In a detailed 77-page decision, which may have a profound impact on the selection of New York State Supreme Court Justices, Eastern District Judge John Gleeson nullified the State's system of selecting candidates for Supreme Court Judgeships by judicial conventions. Judge Gleeson found the current procedures were constitutionally defective in that the control of the judicial conventions were in the hands of party leaders who in effect determined the candidates, rather than the voters. Judge Gleeson issued an injunction against the continued use of the convention system and stated that the Justices should be nominated by primary elections until the State Legislature enacts a new statutory scheme. An appeal of Judge Gleeson's ruling has been filed and a stay of his ruling issued. Further action by the State Legislature is also expected. We will keep our readers advised of developments.

Movement Toward Statewide Plan for Indigent Representation

The movement toward a statewide system of representation for indigent defendants took two important steps in recent weeks. First of all, the New York State Bar Association House of Delegates, at its annual meeting in January, 2006, unanimously adopted a resolution which called for statewide oversight over the various plans which are now utilized to provide counsel to indigent defendants. The resolution essentially adopted the report of the Special Committee to Ensure Quality of Mandated Representation which was headed by Vincent D. Doyle.

Following the action of the New York State Bar Association, Chief Judge Judith S. Kaye also reported that a special commission which she had appointed had recommended that a publicly funded statewide indigent criminal defense system be established. These two important developments appear to be moving the concept of a statewide system rather than individual county efforts quickly forward. We will stay on top of this matter and report to our readers accordingly.

About Our Section and Members

2005 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. As of the end of December, 2005 our Section comprised 1,557 members, an increase of 9 from the figure of 1,548 in December of 2004. The membership comprises 78% male members and 22% female. The largest category of members come from the private practice of law, which comprises approximately 40%. Sole practitioners make up 22% of the membership, with 6% holding government positions and law students making up 7%. The Section has 54 members of the judiciary, or 3.5% of the membership total.

The largest group of members consists of attorneys admitted to practice for more than 20 years with 684 members or 44% of the membership within this category. Roughly 20% of the membership is admitted 5 years or less. With respect to age the largest group—consisting of 356 members—is between the ages of 46–55, followed by 353 members, or 22% of the Section, who are between 56–65 years of age. The Section also has 372 members or 23% of the Section who are under the age of 35. We are pleased that the number of younger attorneys within our Section as well as the overall membership appears to be growing. We will continue to report on the membership status of our Section as our Executive Committee makes every effort to both enlarge and better serve our membership. A list of our new Section members appears on the following page.

Our Annual Meeting

Our Annual Meeting, luncheon, awards program and CLE seminar were held on January 26, 2006 at the New York Marriott Marquis. We were pleased to have as our guest speaker at the luncheon the recently appointed United States Attorney for the Southern District of New York Michael J. Garcia. Welcoming remarks were also 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:

Outstanding Public Defense Practitioner	Federal Public Defender's Office Western District (Buffalo)
Outstanding Prosecutor	George M. Dentes, Tompkins County, Ithaca
Outstanding Private Defense Practitioner	Donald M. Thompson, Rochester
Outstanding Jurist	Honorable Thomas J. McAvoy, Senior United States District Judge, Northern District of New York
Courageous Efforts in Promoting Integrity in the Criminal Justice System	Gary A. Horton, Genesee County Public Defender
Outstanding Contribution to Police Work	James H. Lawrence, Commissioner of Police Nassau County Police Department
Outstanding Contributions to the Bar and Community	Cynthia Feathers, Director of Pro Bono Affairs New York State Bar Association
Outstanding Contribution to Public Information	Jerry Capeci, Reporter, Columnist & Author New York City
Outstanding Contribution to Criminal Law Education	Monroe H. Freedman, Professor of Law Hofstra University

This year's luncheon was well attended and was an enjoyable event filled with camaraderie and good fellowship.

In the late afternoon following the luncheon, our Section also presented an interesting and informative CLE Program on "The Developing Role of the Monitor in Criminal, Civil and Corporate Practice." The speakers included Robert F. Roach, Esq. Chief of Staff, New York City Department of Investigation, Daniel R. Alonso, Professor James B. Jacobs, Bart M. Schwartz, Neil V. Getnick, Steven M. Cohen and representatives from FEMA. The program was moderated by Joseph Jaffe and organized by our Section Vice-chair Jean T. Walsh. Photos regarding our various events during our Annual Meeting appear within the centerfold of this issue.

The Criminal Justice Section Welcomes New Members

Bruce Alderman
Frank P. Allegretti
Linda Anne Amato
Aaron Anthony Arzu
Omar L. Beer
Richard W. Benson
David Birnbaum
Sharon M. Blaskey
Christopher Bokelman
Anthony A. Ciaccio
Richard D. Collins
Peter A. Crusco
John Cucci
Carmela Ann Daley
Denise Delillo
Anthony DiFilippo
Paul W. Elkan
Sandra Maja Fabula
Danielle Samantha Fenn
George P. Ferro
Robin S. Flicker
Theresa A. Foudy
Thomas Keenan Frederick
Pooja S. Gehi
Maria Grace Giordano
Kristina J. Holm
Michael Douglas Horn
Richard P. James
Jeffrey J. Jowdy
Dorothy Catherine Kaldi
Elliot Shawn Kay
Imelda Brid Kelly
Tanya R. Kennedy
Peter J. Koulikourdis
Richard Michael Langone
Svetlana V. Lissai
Jason L. Lopez
Loretta E. Lynch
Henry A. Martuscello
Gabriel McKeen
Lena M. McMahon
Thomas Joseph Melanson
Venessa Deneen Melly
Michelle Lynn Merola
Edward P. Moran
Mark E. Moskovitz
John M. Muehl
Peter G. Neiman
Vanesa Wynter O-Blanquet
Paul N. Ornstein
Damjan Panovski
George Joseph Parisi
Seth J. Peacock
James M. Perry
Robert Thomas Perry
Verena C. Powell
David Bruce Rankin
Laura Anne Reeds
Norman L. Reimer
Steven J. Rothenberg
Shaakirrah Rafeea Sanders
Jose G. Santiago
Stephen P. Scaring
James Shalley
Kimberly Shalvey
Lois J. Shapiro-Canter
Helene Y. Sherman
Natan T. Shmueli
Kenneth F. Smith
Betsy Sochar
Gregory Michael Starner
Yevgeny Strupinsky
Donnell Ehren Suares
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Hon. Robert C. Noonan
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NEW YORK CRIMINAL LAW NEWSLETTER

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