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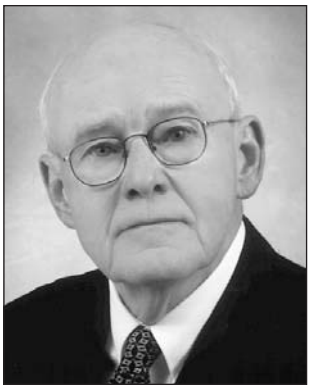
NYSBA

Message from the Chair



The Executive Committee of the Criminal Justice Section met in New York City on Friday, October 1, 2004. Among the topics discussed were the impasse on reforming the Rockefeller Drug Laws and where to go from here. It seems as though no one wants to budge an inch from his or her respective positions. Some members argued that the best way to proceed may be to take the tack that some reform is better than no reform at all and come to an agreement with our prosecution and defense members to back some sort of reform (small that it may be) and move on from there to the next year. I would like to hear from Section members as to their feelings on this issue.

Also discussed was the audio-visual taping of police interrogation and putting the issue on the fast track of our NYSBA Legislative Committee. Several of our members are now working on a draft bill to submit to the Legislative Committee.

The January meeting was discussed, and Jim Subjack, the Chautauqua County District Attorney, agreed to be Program Chair and will put together a CLE program on the Art of Cross–Examination that should prove to be very interesting.

As usual, I again thank the members of the Executive Committee of our Section for sacrificing their time and work in attending our meetings and doing the work of the Section.

I hope to see you all in January.

Michael T. Kelly, Esq.
Chair, Criminal Justice Section
New York State Bar Association

Message from the Editor

This issue contains important information for criminal law practitioners with respect to recently enacted legislation dealing with the criminal law area. As in the past, a leading commentator, Barry Kamins, has provided us with a detailed article on the latest legislative developments. We are also pleased to present a very thoughtful article by Paul Shechtman, a former prosecutor and current defense attorney, on a prosecutor's special responsibilities and obligations.

We also continue to provide you with the most recent information on important decisions from the United States Supreme Court and the Court of Appeals. To round out our issue, there are also numerous items in our "For Your Information" column to keep criminal law practitioners up-to-date on important pending issues and special activities being conducted by our Criminal Justice Section. Section members are alerted to our upcoming Annual Meeting on January 27, 2005. We hope as many members as possible can participate in this year's luncheon, award ceremony, and CLE program.

I continue to receive positive feedback from our members regarding our *Criminal Law Newsletter*. As we go into our second year of publication, I continue to look forward to the support and comments of our readers.

Spiros A. Tsimbinos

New 2004 Legislation Affecting the Practice of Criminal Law

By Barry Kamins

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

To say that the 2004 legislative session was uneventful would be an understatement. The legislature missed its budget deadline for the 20th year in a row and it could not resolve the school funding issue by a court-imposed deadline. To make matters worse, the Brennan Center for Justice at New York University Law School released a report, highly critical of the New York process, in which it compared the legislative bodies of all fifty states. It concluded that the New York State legislature is, on many levels, the most dysfunctional legislative body in the United States.

Against that backdrop, it is not surprising that few substantive pieces of criminal justice legislation were enacted this year.

New Anti-Terrorism Statute

One significant bill that was enacted, which the Governor has already signed, is a comprehensive anti-terrorism law.[2] Three years ago, the legislature enacted an anti-terrorism law six days after the tragedy of September 11, 2001. Based upon everything we have learned about the terrorists since then, and the methods they employ, the legislature passed a second anti-terrorist statute that addresses many issues that arose well after September 11th.

Initially, the new law creates new terrorist-related felony offenses, some of which are designated violent felony offenses, that involve a "chemical weapon" or a "biological weapon." A chemical weapon is defined as a toxic chemical, ammunition device designed to harm others through the toxic properties of a toxic chemical, or any device that is designed to release radiation or radioactivity at a dangerous level.[3] A biological weapon is defined as any biological agent, toxin or biological product, e.g., micro-organism, virus or infectious substance.[4]

With respect to these weapons, the new bill creates two new crimes: Criminal Possession of a Chemical Weapon or Biological Weapon, and Criminal Use of a Chemical Weapon or Biological Weapon. The possession crimes range from the third degree (a class C violent felony)[5] to the first degree (a class A-1 felony).[6] The severity of the crime increases depending upon the intent of the person possessing the weapon. The first degree crime is committed when a person possesses a "select chemical agent"[7] with the intent of using such agent to cause serious physical injury or death to another and to intimidate or coerce a civilian population, a unit of government or affect the unit of government by murder, assassination or kidnapping.

"To say that the 2004 legislative session was uneventful would be an understatement."

The new crime of Criminal Use of a Chemical Weapon or Biological Weapon ranges from the third degree[8] (a class B violent offense) to the first degree[9] (a class A-1 felony). The first degree offense is committed when a person uses or releases any select chemical agent and causes serious physical injury or death with the intent of intimidating or coercing a civilian population, influencing the policy of a unit of government by coercion or affecting the conduct of a unit of government by murder, assassination or kidnapping.

The new anti-terrorism law also creates four new money-laundering crimes that specifically punish laundering for terrorist purposes. The new crimes of Money Laundering in Support of Terrorism ranges from the fourth degree[10] (a class E felony) to the first degree[11] (a class B felony), and the severity of the crime depends upon the value of the property being laundered. The fourth degree crime is committed when the value of the property exceeds one thousand dollars, while the first degree crime is committed when the value exceeds seventy-five thousand dollars. Thus, it is clear that the new law lowers the current threshold for committing money laundering when the purpose of the laundering relates

to terrorism. Current money-laundering crimes have a much higher threshold level.

Under the new anti-terrorism law, penalties have also been increased for individuals who cause alarm by using a substance that appears to be *hazardous* when in fact it is harmless. Thus the various current crimes involving the placement of a false bomb in public areas have been amended to penalize the placement of a hazardous substance.[12] Thus, for example, someone would be guilty of this crime if he or she placed a powdery substance that appears to be anthrax in a public place.

From a procedural perspective, the new anti-terrorism law provides a number of significant changes. For example, the current 5-year statute of limitations for a felony is extended to eight years for any felony committed under article 490 of the Penal Law (terrorism).[13] If such a terrorist crime creates a foreseeable risk of death or serious physical injury, there is no statute of limitations. In addition, the eavesdropping and wiretapping laws have been amended to permit warrants to be issued when the crimes being investigated are possession or use of chemical or biological weapons.[14] Similarly, those individuals who are convicted of any terrorism crime under article 490 of the Penal Law must submit a body fluid sample for DNA analysis. The results of this analysis will be added to the state's DNA databank.[15] Finally, a person *must* be sentenced to life imprisonment without parole when he or she is convicted of terrorism and the specified offense is an A-1 felony, or the person is convicted of possession or use of a chemical or biological weapon in the first degree.[16] If, during the same crime, the person is convicted of murder in the first degree, the sentence shall be death.

Expansion of DNA Database

Aside from the new anti-terrorism law, the legislature enacted several other significant changes in the past session. In 1999, the legislature dramatically expanded New York State's DNA database by requiring a DNA sample from all individuals who are convicted of violent felonies and certain drug felonies. The database has now been expanded even further. Under the proposed new law, DNA samples must be given for individuals convicted of *misdemeanor* sex offenses that are enumerated in the sex offender registration act.[17] In addition, DNA samples must also be given by individuals convicted of an additional fifty enumerated felonies, many of which are non-violent felonies.[18]

As part of the new DNA legislation, a defendant's ability to file a CPL § 440 application has been expanded. Under a 1999 law, a defendant can obtain an order for DNA testing in support of a 440 application, if the conviction occurred prior to January 1, 1996. Under the proposed new law, the "look back" date has now been eliminated; thus the order could be obtained for any conviction.[19] In addition, in conjunction with the application for a DNA testing order, the prosecution may be required to inform the defendant of the current location of the evidence to be tested, whether the evidence still exists, and the last known physical location of the evidence.[20]

Dismissal of Felony Complaint

In the past session, the legislature enacted a significant change in procedure, not yet signed by the Governor, that creates a new basis for the dismissal of a felony complaint.[21] The new law addresses an old problem that has existed for over thirty years but has not, until now, been solved. When a felony complaint has been held for the action of a grand jury but not been presented by a prosecutor, the complaint can become stale when a prosecutor takes no action for months or even years. The serious nature of this problem was the subject of a September 2003 report of the New York State Commission of Investigation. The Commission examined the pendency of thousands of stale felony complaints in Monroe County and the ongoing efforts of the prosecutor to deal with the tremendous backlog of those complaints.

The issue is not an academic one because fingerprint checks have become a frequent condition of employment. If a prosecutor does not take any action on a felony complaint held for the action of the grand jury, a fingerprint check will reveal an open felony charge. This places the burden upon the applicant to obtain a letter from the prosecutor's office stating that the matter is closed. A prosecutor may be reluctant to supply such a letter even if he or she has no present intention to present the case to the grand jury.

The new statute permits a local criminal court or superior court, after a defendant's arraignment on a felony complaint (other than a felony complaint charging one or more enumerated homicide offenses) to enter an order terminating the prosecution on the written motion of either party or on its own motion on *consent* of the parties. This "consent termination" process is not intended to resemble traditional "motion practice" and is designed to be a simplified procedure without the need for formal motion papers or memoranda of law. It is intended that there will be a simple one-page form, approved by the Office of Court Administration, in which the moving party (or the court) would identify the case name and docket number and effectively put the other party or parties on notice that a consent termination is sought in the action.

Under the new procedure, the parties would be required to be given at least 30 days written notice of the motion and such motion could be brought no earlier than twelve months following the date of arraignment on the felony complaint. A party will be "deemed" to have consented to the termination unless, prior to the expiration of the 30-day period, the non-moving party files a written "notice of opposition" with the court. With one exception, the court would be required to deny the motion whenever a timely "notice of opposition" is filed.

The exception would allow the court, in its discretion, to postpone action on the motion to terminate to a period of 45 days from the filing of a "notice of opposition" by the People. When the charges still have not been presented to a grand jury or otherwise been disposed of by the expiration of the 45-day period, the court would be required to grant the motion to terminate unless the prosecution, within that 45-day period and on at least 5 days written notice to the defendant, provides "good cause" for its failure to present the charges or dispose of the case. Thus, this 45-day postponement provision would allow the court, in effect, to override a prosecutor's "notice of opposition" when, for example, the prosecution follows a practice of filing a "pro forma" notice on every motion for termination or files a notice even though he or she has failed to present a case to the grand jury despite the availability of his or her witnesses. A prosecutor will have the right to appeal from a termination order.[22]

Under the new procedure, the filing of a termination motion would not stop the speedy trial clock from running[23] and the granting of a termination motion would not preclude the prosecution from subsequently filing an indictment if it believes that the six-month speedy trial period has, in fact, not elapsed. Once a termination motion is denied, the moving party would have to wait at least six months before filing another motion. Finally, a consent termination would cause the matter to be sealed.[24] However, if the prosecution has opposed a termination order and indicates its intention to seek an indictment, the court would be required to stay sealing for up to 30 days to allow the People to have access to those records that may be needed to pursue the indictment.

Definition of Child Witness

Another significant measure enacted by the legislature, not yet signed by the Governor, would change the definition of a "child witness." Pursuant to Criminal Procedure Law § 65.00, if a child under the age of 12 is found to be "vulnerable," depending upon a number of factors taken into account by the court, the child is able to testify in a criminal proceeding (other than a grand jury) by means of two-way closed circuit television. Because of the high incidence of children in their early teens who are victims of sexual crimes, the legislature determined that the statute's protection should be afforded to a wider group of young victims. Therefore, the age of a "child witness" would be raised to anyone below the age of 14.[25]

Correction Law Changes

Notwithstanding the unusual level of inactivity by the legislature in the area of criminal justice, it did manage to enact a number of other new laws. In the past session, the legislature, as it has in each session, enacted new crimes or amended existing ones. Last year, a new section was added to the Correction Law that enacted a class A misdemeanor that made it a crime to knowingly simulate or cause to be disseminated any notice pursuant to the Sex Offender Registration Act (SORA) which falsely suggests that an individual is a registered sex offender.[26] That section has been repealed and, in its place, a new class A misdemeanor has been added to the Penal Law: Disseminating a False Registered Sex Offender Notice.[27] The Correction Law section was repealed because, as written, it raised questions about the elements of the offense and the scope of its coverage. It was not clear whether a specific state of mind was necessary to commit the offense or whether it was a strict liability offense. This, in turn, might have deterred entities such as schools and day care providers from providing such information about a sex offender. In addition, it was unclear whether the notice had to purport to be an official notice.

Under the new Penal Law section, the notice must appear to be an official notice from a government or law enforcement agency. It also is clear that a person must know that the information disseminated is false. Finally, the crime is not restricted, as was the Correction Law section, to a notice authorized by SORA. The new crime also encompasses the dissemination of false notices purportedly issued in other states.

Leaving the Scene of an Accident

The legislature also amended several statutes dealing with leaving the scene of an accident. It increased the penalty for individuals who are involved in an accident with a guide dog, hearing dog or a service dog and then leave the scene.[28] It also clarified what vessel operators must do after being involved in boating accidents.[29]

Animal Cruelty

To strengthen laws prohibiting animal cruelty, the legislature has enacted a new class E felony that would prohibit the breeding or sale of animals used for animal fighting.[30]

Sale of Nicotine Water

Finally, a new enactment prohibits the sale of nicotine water to individuals under the age of 18; a bottle of nicotine water contains a quantity of nicotine that is equivalent to two cigarettes.[31]

Defense of Justification

The Penal Law was also amended to expand the defense of justification. Pursuant to Penal Law § 35.20 certain individuals may use physical or deadly force to prevent a burglary or arson of a premises. The legislature has now included in that group security personnel or employees of nuclear-powered facilities.[32] The section was enacted to provide these personnel with the necessary authority to protect vital facilities at a time when security is of paramount importance.

Sentencing

A number of proposed new laws would affect the sentencing of defendants. One law addresses the murder of young children during the commission of a sex crime. Under the proposed law, a defendant must be sentenced to life imprisonment without the possibility of being paroled when the defendant is over 18, the victim is less than 14 and the victim is murdered during the course of certain enumerated sex crimes.[33] The measure is called Joan's Law, named for Joan D'Alessandro, who was kidnapped while selling Girl Scout cookies near her home and then murdered. Currently, life without parole is not mandatory for defendants convicted of other types of Murder in the First Degree pursuant to Penal Law § 125.27; the sentence under Joan's Law would be mandatory.

Public Lewdness

Another proposed law would expand the period of probation for the crime of Public Lewdness, a class B misdemeanor. Currently, the period of probation is one year. However experts who have studied sex offenders point out that a significant number of sex offenders admit to having committed acts of public lewdness early in their lives. It is also understood that therapy and treatment of sex offenders is the best known method of reducing recidivism. However, most offenders will only remain in treatment when mandated by the court to do so. Therefore, an extended period of probation appears to be the best method of insuring that treatment will be successful. Thus, the new law extends the period of probation up to three years.[34]

Merit Time Allowances

The legislature also corrected a drafting oversight in the Correction Law that prevented certain inmates from obtaining the benefit of a "merit time allowance." In 1997 the legislature created merit time allowances for inmates serving indeterminate sentences for non-violent felonies. This permits an inmate to reduce the time he or she must wait before being eligible for parole; the inmate receives a one-sixth reduction of the minimum term of his indeterminate sentence. When the earlier statute was drafted it stated that, to be eligible, an inmate must be serving an indeterminate sentence with a minimum term "in excess of one year." However, this excluded from eligibility inmates who receive one year minimum terms which are sentences generally imposed for the least serious felonies. Since this was probably an oversight, the proposed law would amend the statute to permit merit time allowances for inmates serving an indeterminate sentence of imprisonment with a "minimum period of one year or more."[35]

Criminal Procedure Changes

A number of new laws in the past session will produce changes in criminal procedure. Under a new enactment, residents of cities with a population of over one million or more will now be able to do what other residents of the state have been able to do—plead guilty to all traffic infractions (including speeding, red lights and jaywalking) by mail.[36] The only exception would be a third or subsequent speeding violation committed within eighteen months. The requirement that a desk appearance ticket (DAT) be served personally has been eliminated in cases when the DAT is issued for a violation of a local building code, sanitation code or zoning ordinance.[37] In such cases it can be served by "substituted service" pursuant to CPLR 308. A new law will add Warren County to the list of 21 counties (including all counties of New York City) authorized to participate in the use of audio-visual technology by which incarcerated defendants appear in court proceedings through the use of closed-circuit television.[38] A "sunset" law has extended this electronic appearance process until December 31, 2006.[39]

Another procedural change strengthens legislation that was enacted last year to protect victims of defendants found not responsible by reason of mental disease or defect. The prior law authorized a court to issue an order of protection prohibiting the defendant from having any contact with a victim or witness. The new law

requires the Commissioner of the Office of Mental Health to notify a witness that such a special order of conditions was issued; previously only the victim had to be notified.[40] In addition, the special order of conditions must be filed with the appropriate police department. When a police officer is called to respond to an alleged violation of an order that involves an allegation of domestic violence, the officer shall not attempt to achieve a reconciliation between the parties but must take the defendant into custody. In addition, the officer may transport the defendant to a psychiatric hospital.[41]

Sex Offenders Registration Act

Several new proposed laws will affect the Sex Offenders Registration Act (SORA). One law would help New York officials learn about sex offenders who relocate to New York after having been convicted in other states. Thus, the Division of Criminal Justice Services (DCJS) would be required to notify relevant out-of-state officials that they must notify New York officials when a person convicted of a qualifying offense relocates to this state.[42] Conversely, DCJS must advise New York registrants of their duty to comply with out-of-state laws upon relocating to another state. In addition, a proposed amendment would eliminate the fee-based "900" telephone number for the sex-offender registry and would create a toll-free telephone number.[43]

Court Fees

When the Governor signed the budget bill on August 20, 2004, he approved a number of measures that will create or increase court fees. A new fee, the Supplemental Sex Offender Victim Fee, in the amount of $1,000, is to be imposed by a court upon each person convicted of a felony or misdemeanor under Penal Law article 130.[44] This fee is mandatory and must be paid in addition to the mandatory surcharge and any other fees. In addition, a person who is adjudicated a youthful offender will now be subject to the mandatory surcharge and all fees, including the crime victim assistance fee, the sex offender registration fee, the DNA databank fee and the supplemental sex offender victim fee.[45] The crime victim assistance fee may be waived if the imposition of the fee would work an unreasonable hardship on the individual, his immediate family or any other person who is dependent upon the individual for financial support.

Other Changes

Several new laws affect statutes other than the Penal Law or Criminal Procedure Law. An amendment to the Judiciary Law will make jury service less burdensome. An individual who commenced jury service on or after July 27, 2004, either in state court or federal court, will not have to serve—either as a trial juror or grand juror—for a period of six years.[46] Previously, the period was four years. If the service was for more than ten days, the period of disqualification is for eight years. It is anticipated that with the foreknowledge that jury service will be a more infrequent event for most citizens, those who are called to service will approach it with greater energy and enthusiasm.

Another new law would strengthen legislation enacted last year that created the Interstate Compact for Adult Offender Supervision. This interstate agreement will facilitate cooperation among law enforcement agencies of the various states regarding the supervision and return of offenders under parole or probation supervision. Currently more than thirty-five states, including New York, have adopted the agreement.[47] First, it makes clear that the New York administrator of the compact shall be appointed by the Governor. Second, unless extended in further legislation, New York's version of the compact would expire on September 1, 2007.

Finally, several bills would eliminate the requirement that pre-arraigned detainees in certain upstate counties must be monitored by sheriff's deputies while awaiting arraignment; the responsibility would be shifted to trained correction officers. As a result, the county jails in Putnam and Warren counties can now be used to detain individuals awaiting arraignment.[48]

Each year the legislature grants peace officer status to additional groups of individuals and the past session was no exception. Peace officer status has already been signed into law for the following: members of the arson investigation bureau and fire inspection bureau of the Department of State's Office of Fire Prevention and Control,[49] Syracuse University peace officer,[50] community college peace officers,[51] federal police officers and police supervisors assigned to the United States Merchant Marine Academy,[52] and court security officers employed by the Wayne County Sheriff's office.[53] Legislation, not yet signed by the Governor, would grant such status to the following: fire marshals in the town of East Hampton,[54] special agents of the Coast Guard Investigative Service,[55] and watershed protection and enforcement officers in the city of Peekskill.[56] Finally, a proposed law would give police officer status to warrant and transfer officers of the Division of Parole.[57]

Endnotes

1. Last year the legislature eliminated the terms "sodomy" and "deviate sexual intercourse" from Article 130 of the Penal Law (PL) and replaced them with "criminal sexual act" and "oral

sexual conduct." Through an oversight one of those terms was not changed in PL § 130.05, which discusses the subject of lack of consent. A new law makes that change (Chap. 40, eff. 4/20/04). A proposed law would make it clear that in order to be convicted of the crime of Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree, the driver must operate a vehicle with knowledge that there are ten or more outstanding suspensions (Vehicle & Traffic Law § 511(3)(a)(ii) (VTL)); S.426, eff. 11/1/04, upon signature of the Governor.

2. Chapter 1, effective July 23, 2004.
3. PL § 490.05(10); Chapter 1, effective July 23, 2004.
4. PL § 490.05(a); Chapter 1, effective July 23, 2004.
5. PL § 490.37; Chapter 1, effective July 23, 2004.
6. PL § 490.45; Chapter 1, effective July 23, 2004.
7. A "select chemical agent" is defined as a chemical weapon which has been identified in regulations promulgated pursuant to section 206(20) of the Public Health Law (PHL). PL § 490.05(15); Chapter 1, effective July 23, 2004.
8. PL § 490.47; Chapter 1, effective July 23, 2004.
9. PL § 490.55; Chapter 1, effective July 23, 2004.
10. PL § 470.21; Chapter 1, effective July 23, 2004.
11. PL § 470.24; Chapter 1, effective July 23, 2004.
12. PL § 240.61, 240.62; 240.63; Chapter 1, effective 7/23/04.
13. Criminal Procedure Law § 30.10(3)(g) (CPL); Chapter 1, effective 7/23/04.
14. CPL § 700.05(8)(q); Chapter 1, effective 7/23/04.
15. Executive Law § 995(7)(a); Chapter 1, effective 7/23/04.
16. PL § 70.00(5); Chapter 1, effective 7/23/04.
17. Executive Law § 995(7); Chapter 138, effective 7/13/04.
18. *Id.*
19. CPL § 440.30(1-a); Chapter 138, effective July 13, 2004.
20. CPL § 440.30(1-a)(b); Chapter 138, effective July 13, 2004.
21. CPL § 180.85; A.10803, effective 11/1/04, upon signature of the Governor.
22. CPL § 450.20(1); A.10803 effective 11/1/04, upon signature of the Governor.
23. CPL § 180.85(5); A.10803, effective 11/1/04, upon signature of the Governor.
24. CPL § 160.50(3)(b); A.10803, effective 11/1/04, upon signature of the Governor.
25. CPL § 65.00(1); Chapter 362; effective 11/01/04.
26. Correction Law § 168-v.
27. PL § 240.48; Chapter 106, effective 8/2/04.
28. VTL § 601; S.173, effective upon signature of the Governor.
29. Navigation Law § 47(2)(a); Chapter 197, effective 7/20/04.
30. Agriculture and Markets Law § 351(2)(c); Chapter _____; signed and effective on 7/20/04.
31. PHL § 1399-aa(5); Chapter 152, effective 1/1/05.
32. PL § 35.20(4)(b)(ii); Chapter 393, effective 8/17/04.
33. PL § 125.25(5); Chapter ____ , signed 9/16/04, effective 11/01/04. The enumerated crimes are Rape in the First, Second or Third Degree; Sexual Abuse in the First Degree; Aggravated Sexual Abuse in the First, Second, Third or Fourth Degree; Incest.
34. PL § 65.00(3)(c); S.6649, effective 11/1/04 upon signature of the Governor.
35. Correction Law § 803(1)(d); S.5408, effective immediately upon signature of the Governor.
36. VTL § 1805; Chapter 182, effective 7/20/04.
37. CPL § 150.40(2); Chapter 415, effective 8/24/04.
38. CPL § 182.20(1); Chapter 167, effective 7/20/04.
39. Chapter 172, effective 7/20/04.
40. CPL § 330.20(7-a); Chapter 107, effective 6/8/04.
41. CPL § 140.10(4); Chapter 107, effective. 6/8/04.
42. Correction Law § 168-c(4); Chapter ____; signed 8/17/04, effective 11/15/04.
43. Correction Law § 168-p; Chapter _____, signed 8/10/04, effective 9/9/04.
44. PL § 60.35(1)(b); Chapter 56, effective 4/1/04.
45. PL § 60.35(10); Chapter 56, effective 2/16/05.
46. Judiciary Law § 524(c)(a)(i); Chapter 240, effective 7/27/04.
47. Executive Law § 259-mm, Article IV; Chapter 368; effective 8/17/04.
48. Correction Law § 500-a (2-d) and (2-i); S.6065 and S.5873, effective upon the signature of the Governor.
49. CPL § 2.10(79); Chapter 241, effective 7/27/04.
50. CPL § 2.10 (77); Chapter 17, effective 3/23/04.
51. CPL § 2.10(78); Chapter 24, effective 4/6/04.
52. CPL § 2.15(24); Chapter 178, effective. 6/15/04 and Chapter 110, effective 6/15/04.
53. CPL § 2.10(79); Chapter 235, effective 7/27/04.
54. CPL § 2.10 (77); Chapter 367; effective 8/17/04.
55. CPL § 2.10(24); S.6733, effective upon signature of the Governor.
56. CPL § 2.16; A.10015, effective upon signature of the Governor.
57. CPL § 1.20(34)(u); S.6519, effective upon the signature of the Governor.

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Two Recent Cases Remind Us of the Awesome Power and Responsibility of Prosecutors in Our Criminal Justice System

By Paul Shechtman

More than 60 years ago, then-Attorney General Robert H. Jackson remarked that "[a] citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims . . . and who approaches his task with humility."[1] Two recent cases—one from the United States Supreme Court and the other from our New York Court of Appeals—give modern meaning to those words, and remind us of the awesome power and responsibility of prosecutors in our criminal justice system.

"'A citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims . . . and who approaches his task with humility.'"

The first case is *Dretke v. Haley*, decided this May, which could serve as a primer on the intricacies of federal *habeas* law.[2] In 1997, Michael Haley was arrested for stealing a calculator from a Wal-Mart in Texas. It was not Haley's first brush with the law: he had two prior felony convictions—on October 18, 1991, he was convicted for distributing amphetamines and on September 9, 1992, he was convicted of attempted robbery—and at least one prior misdemeanor conviction for a theft crime. Because Haley had two prior theft convictions, he was charged with a "state jail felony" punishable by a maximum of two years' imprisonment. And because he had two prior felony convictions, he was also charged under the Texas habitual offender statute—a three-strikes-and-you're-out provision, carrying a maximum sentence of 20 years in prison.

Haley was convicted of the theft offense and of being a habitual offender (both verdicts were decided by the jury in a bifurcated trial) and was sentenced to 16½ years. He appealed to the state Court of Appeals, which affirmed his conviction, and to the Texas Court of Criminal Appeals, which denied his petition for discretionary relief.

Thereafter, Haley sought state post-conviction review, and for the first time challenged the sufficiency of the evidence supporting the habitual offender determination. His claim was one that had eluded the prosecutor, his defense counsel, the judge, and the jury at his trial. To qualify for habitual offender status in Texas, a defendant's first felony conviction must become final before the *commission* of his second. Although Haley had been convicted of attempted robbery in September 1992, he had committed the crime on October 15, 1991, three days *before* his drug sale conviction. Put simply, Haley was not a habitual offender by 72 hours.

The state never challenged Haley's mathematics but opposed his post-conviction petition on the ground that he had waived the sufficiency claim by not raising it, either at trial or on direct appeal. The state post-conviction court agreed that the claim was procedurally barred. It also rejected a related ineffective assistance of counsel claim, stating only that "counsel was not ineffective" for failing to object to the sentencing enhancement. After the Texas Court of Criminal Appeals summarily denied review, Haley filed a timely *pro se* application for a federal writ of *habeas corpus*, renewing his sufficiency and ineffective assistance claims.

On federal *habeas*, the state, once again, conceded that Haley was correct on the merits, but argued procedural default. This time its argument was rejected: the District Court excused the procedural default and granted the sufficiency claim because Haley was "actually innocent" of the habitual offender charge. It ordered him to be released from custody and resentenced "without improper enhancement." After the Fifth Circuit affirmed the order, the state petitioned successfully to the Supreme Court to hear the case.

The question before the Supreme Court was one on which the federal circuits are divided: whether the actual innocence exception to the procedural default rule should be extended to non-capital sentencing errors. Only a truly devoted student of *habeas* jurisprudence can appreciate the path that brought *Haley* to the Supreme Court. Landmarks on the path include *Brown v. Allen* (federal courts will not disturb state court judgments that are based on adequate and independent state law procedural grounds);[3] *Wainwright v. Sykes* (recognizing an equitable exception to the procedural bar rule when petitioner can demonstrate "cause" and "prejudice" for the default);[4] *Murray v. Carrier* (recognizing exception to cause requirement where constitutional violation has "probably resulted" in the conviction of one who is "actually innocent" of the substantive offense);[5] and *Sawyer v. Whitley* (extending

actual innocence exception to claims of capital sentencing error).[6]

What is noteworthy here is not the tangled web that is federal *habeas* jurisprudence, but the fact that neither Texas nor the United States Justice Department, which filed an *amicus* brief in support of the state, seemed terribly concerned that Haley was *not* a habitual offender and would serve 14½ more years in prison than was lawful if relief was not granted. Not surprisingly, perhaps, the oral argument in *Haley* began poorly for the state. Justice Kennedy asked this pointed question: "I don't want to derail the argument [but] you've conceded that this sentence is unlawful [so] then why are you here? . . . [I]s there some rule that you can't confess error in your state?" All that the state could say in response was that it was "concerned about the impact on the procedural default rule [of] the Fifth Circuit's decision." To which Justice Kennedy responded: "[S]o a man does 15 years so you can vindicate your legal point."

Nor was the lawyer for the Justice Department spared a similar exchange:

Question:	Forget cause and prejudice. Suppose the term is unlawful and it's conceded to be unlawful. Are you taking the position the Department of Justice says he has to be held anyway?
Mr. Roberts:	I . . . I . . .
Question:	I'm astounded by that.

The state's unwillingness to confess error in *Haley* (and the Solicitor General's decision to weigh in on the state's side) are indeed astounding. No one, it seems, had read or remembered Attorney General Jackson's admonition. Confessing error, after all, is not an ignoble course for a public prosecutor. At least three times this past year, the New York County District Attorney's Office conceded error on sentencing issues in the First Department.[7] Indeed, the state's tenacity in *Haley* recalls Edmund Burke's observation about certain 19th century British bureaucrats who defended their errors as if they were defending their inheritances.

In fairness to the state, its position in the Supreme Court was more nuanced than Justice Kennedy's questions might suggest. Although it urged the Court not to reach the merits of Haley's sufficiency claim, it was prepared to concede that he had a "significant" ineffective assistance claim and to promise that it would not assert any procedural impediment to consideration of *that* claim if the Fifth Circuit's decision were vacated and the case remanded for further proceeding. It also assured the Supreme Court that it would not seek to reincarcerate Haley while the ineffective assistance claim was litigated. And the state was not wrong in its concern that an expanded actual innocence exception would open federal courts to claims by state prisoners who belatedly conclude that their sentences are too long.

Still none of this federal litigation would have been necessary if the state had simply admitted that Haley was wrongfully incarcerated when he first raised his claim in his state post-conviction petition.

Writing for the majority, Justice O'Connor took the state up on its promises. Her opinion declined to reach the actual innocence question and remanded the case for a determination as to whether Haley was denied effective assistance of counsel and whether counsel's ineffectiveness excused the procedural default of the sufficiency claim. In dissent, Justice Stevens, joined by Justices Kennedy and Souter, argued that Haley was the victim of a miscarriage of justice and therefore was entitled to immediate release. Most powerful was a separate dissent filed by Justice Kennedy. He expressed his continued astonishment that Texas had "not exercise[d] its power and perform[ed] its duty to vindicate [Haley's liberty] interest in the first place."

* * *

The second case is *People v. Calabria*, decided by the New York Court of Appeals this June.[8] The proof in *Calabria* consisted almost entirely of the testimony of "a religious school teacher . . . that she was able to see the perpetrator's face, albeit briefly, and that she was certain that defendant was the man who had robbed her at gunpoint." Writing for the majority, Judge Ciparick concluded that the jury's determination was "rational" and therefore should not be disturbed. In a separate concurring opinion, Judge Rosenblatt agreed that it would not be "a good idea" to create a new rule "by which a very brief encounter—resulting in an unwavering eye-witness identification—is declared insufficient as a matter of law." Judge Rosenblatt, however, took the unusual step of urging the Kings County District Attorney to undertake "a new and fastidious layer of review" to make certain that an innocent man had not been convicted.

Judge George Smith, joined by Judge Robert Smith, dissented. They emphasized these facts (many of which were *not* before the jury): (i) that the victim had originally described the perpetrator as being of slight build while defendant weighed 225 pounds and was 5 feet 7 inches tall; (ii) that a fingerprint and a palm print from a cabinet "admittedly handled by the perpetrator" did not match the defendant's; (iii) that this was the defendant's second trial, and after the first guilty verdict was

reversed (by the Court of Appeals in 2000 for prosecutorial misconduct), he had rejected a guilty plea for time served; (iv) that the defendant's parents, who testified at the first trial that he was home at the time of the robbery, were unable to testify at the second trial for health reasons; and (v) that the defendant had twice passed a lie detector test.[9]

"[T]he response of Brooklyn in Calabria *is far more encouraging than that of Texas in* Haley, *which is one more reason that I love New York."*

The *Calabria* Court's decision not to create a new and ill-defined rule for reviewing sufficiency claims in one-witness identification cases seems sound. Nonetheless, as Justice Brennan observed more than 35 years ago, "the annals of criminal law are rife with instances of mistaken identification."[10] Judge Rosenblatt's desire for the District Attorney's Office to conduct a new review of Calabria's case is therefore understandable.

Notably, District Attorney Charles Hynes has accepted Judge Rosenblatt's invitation, and his office is now reviewing the *Calabria* case. As First Assistant District Attorney Amy Feinstein recently told me: "When a judge of the Court of Appeals asks a prosecutor to review a case, it would be irresponsible not to do so."

Suffice it to say that the response of Brooklyn in *Calabria* is far more encouraging than that of Texas in *Haley*, which is one more reason that I love New York.

Endnotes

1. United States Attorney Gen. Robert H. Jackson, Address at the Second Annual Conference of United States Attorneys 4-5 (Apr. 1, 1940).
2. 124 S. Ct. 1847 (May 3, 2004).
3. 344 U.S. 443 (1953).
4. 433 U.S. 72 (1977).
5. 477 U.S. 478 (1986).
6. 505 U.S. 333 (1992).
7. *People v. Lewis*, 776 N.Y.S.2d 808 (1st Dep't 2004); *People v. Logan*, 775 N.Y.S.2d 848 (1st Dep't 2004); and *People v. Reeves*, 774 N.Y.S.2d 326 (1st Dep't 2004).
8. WL 1243369 N.Y. (June 8, 2004).
9. For the first *Calabria* decision, see 94 N.Y.2d 519 (2000).
10. *United States v. Wade*, 388 U.S. 218, 228 (1967).

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New York Court of Appeals Review

After submitting our Fall issue for printing, the New York Court of Appeals came down with one additional decision in the area of criminal law prior to taking its summer recess. This case, *Taub v. Altman*, is summarized below. Also, shortly before going to press, the Court of Appeals also issued its first decision since resuming operation in September. This decision, *People v. Valencia*, is also summarized below.

Further, in order to provide Court of Appeals decisions to our readers as quickly as possible, we previously cited to the *New York Law Journal* for all of the decisions for the 2003–2004 term, which were published in our last three issues. We are now providing as listed below the official New York Report citations to cover the Court of Appeals decisions from October 28, 2003 to August 31, 2004. The cases are listed in chronological order as they appeared in our last three issues, to wit, Spring, Summer, and Fall of 2004.

Also, please note that the New York Reports has now begun its third series and that the citations reported are included in 1 N.Y.3d, 2 N.Y.3d, or 3 N.Y.3d.

A review of the criminal law cases for the 2003–2004 term reveals some interesting observations. First of all, the prosecution prevailed in just over 70% of the decisions. In just about 25% of the decisions, one or more dissenting opinions were issued. Over the last few years, the Court of Appeals appears to have made a determined effort to provide unanimity and a consensus in issuing its decisions, and, unlike the United States Supreme Court, there were rarely sharp splits among the judges and very few dissenting opinions. This year the trend appears to be changing somewhat with the number of dissenting opinions increasing and the divisions among the judges become sharper.

The most evident decision revealing sharp differences of opinion among the judges was the recent death penalty case in *People v. Lavalle*, 1 N.Y.3d 1 (2004), a 4-3 decision. That case also appears to reflect the two developing camps of Judges Kaye, Ciparick, and Bundy Smith on one side and Reed, Graffeo, and Robert Smith on the other. Judge Rosenblatt is now beginning to assume the role of the swing vote, similar to that occupied by Justice O'Connor in the United States Supreme Court. Our readers should look forward with interest to the criminal law decisions emanating from the New York Court of Appeals during the current term and we will continue to track trends and developments as they occur.

Jurisdiction

***Taub v. Altman*, decided July 1, 2004, 3 N.Y.3d 30 (2004)**

In a 5-2 decision, the Court of Appeals held that New York County did not have "particular effect jurisdiction" under CPL section 20.40(2C) to prosecute a Queens resident for filing false New York State and City tax returns. The majority opinion stated that although the defendant's alleged conduct had a materially harmful impact on the governmental process of New York City as a whole, there was insufficient evidence of a concrete and identifiable injury suffered specifically by New York County. The Court rejected the People's argument that the processing of New York City tax returns in Manhattan was enough to confer jurisdiction on New York County. The Court observed that were it to accept this position, a Bronx tolltaker who embezzled funds or a person who steals from a city agency in Kings County or vandalizes city property in Queens or Richmond could be hauled into Manhattan to face criminal charges.

Violations of Plea Agreement

***People v. Valencia*, decided October 14, 2004 (N.Y.L.J., Oct. 15, 2004, p. 22)**

In a unanimous decision, the Court of Appeals upheld an enhanced sentence based upon allegations that defendant violated a plea agreement. As a result of the plea, it was understood that the defendant would enter a drug treatment program. He was advised, however, that if he failed to comply with the program rules, he would be sentenced to an indeterminate term of 5–10 years.

At the time of sentencing, the court determined that the defendant had violated the plea agreement because he had left the drug treatment program, and sentenced him to the jail term. On appeal, the defendant claimed that the court had failed to conduct an adequate inquiry pursuant to the dictates of *People v. Outley*, 80 N.Y.2d 702 (1993). The defendant had also argued that a recent Second Circuit decision required that the sentencing court conduct a full evidentiary hearing on the claimed violations.

The Court of Appeals determined that in the instant matter, a full evidentiary hearing was not required because the defendant had not disputed the committed acts that constituted violations of the plea agreement. Under the circumstances, the Court of Appeals found that the sentencing judge had conducted a sufficient inquiry as required by *Outley*.

Official Citations to Criminal Law Decisions from the Court of Appeals for the 2003–2004 Term

(Listed in Chronological Order)

Case	Citation	Issue Involved
People v. Mills	1 N.Y.3d 269 (2003)	Statute of Limitations Claims
Murray v. Goord & C et al.	1 N.Y.3d 29 (2003)	Sentencing
People v. Stiggins	1 N.Y.3d 529 (2003)	Deprivation of Fair Trial
People v. Pichardo	1 N.Y.3d 126 (2003)	Vacating Plea Agreement
People v. Biggs	1 N.Y.3d 225 (2003)	Double Jeopardy
People v. McDonald	1 N.Y.3d 109 (2003)	Deportation of Alien Defendants
People v. Cahill	2 N.Y.3d 14 (2003)	Death Penalty
People v. Johnson	1 N.Y.3d 252 (2003)	Search and Seizure
People v. Johnson	1 N.Y.3d 302 (2003)	Excited Utterances
People v. Taylor	1 N.Y.3d 174 (2003)	Ineffective Assistance of Counsel
People v. Celaj	1 N.Y.3d 588 (2004)	Mixed Question of Law and Fact
People v. Slavin	1 N.Y.3d 392 (2004)	Self-Incrimination
People v. Smith	1 N.Y.3d 610 (2004)	Extreme Emotional Disturbance
People v. Shelton	1 N.Y.3d 614 (2004)	Prompt Outcry Exception
People v. Mateo	2 N.Y.3d 786 (2004)	Death Penalty
People v. Gonzalez	1 N.Y.3d 464 (2004)	Legal Insufficiency
People v. Williams	2 N.Y.3d 725 (2004)	Jury Selection Procedures
People v. Hemmings	2 N.Y.3d 1 (2004)	Sentencing
People v. Tyler	2 N.Y.3d 747 (2004)	Defendant's Request for Deposition
People v. Hicks	2 N.Y.3d 750 (2004)	Police Expert Testimony
People v. Smith	2 N.Y.3d 8 (2004)	Expert Testimony on Narcotics
People v. Lewis	2 N.Y.3d 224 (2004)	Ineffective Assistance of Counsel
People v. Jones	2 N.Y.3d 235 (2004)	Identification Evidence
People v. Massie	2 N.Y.3d 179 (2004)	Opening of Door by Defendant
People v. Stultz	2 N.Y.3d 277 (2004)	Ineffective Assistance of Counsel
People v. Mitchell	2 N.Y.3d 272 (2004)	Right to Counsel
People v. Nieves	2 N.Y.3d 310 (2004)	Orders of Protection
People v. Aponte	2 N.Y.3d 304 (2004)	Defective Allen Charge
People v. Wheeler	2 N.Y.3d 370 (2004)	Search and Seizure
People v. Linares	2 N.Y.3d 507 (2004)	Request for New Counsel
People v. Aarons	2 N.Y.3d 547 (2004)	Prosecutor's Authority in Grand Jury
People v. Calabria	2 N.Y.3d 80 (2004)	Sufficiency of Evidence
People v. Cunningham	2 N.Y.3d 593 (2004)	Forgery
People v. Konieczny	2 N.Y.3d 569 (2004)	Contempt Conviction
People v. Reynoso	2 N.Y.3d 820 (2004)	Warrantless Arrest
People v. LaValle	1 N.Y.3d 1 (2004)	Death Penalty
People v. Providence	2 N.Y.3d 579 (2004)	Waiver of Right to Counsel
New York Civil Liberties Union v. City of Schenectady	2 N.Y.3d 657 (2004)	Records Subject to FOIL Request
Taub v. Altman	3 N.Y.3d 30 (2004)	Jurisdiction

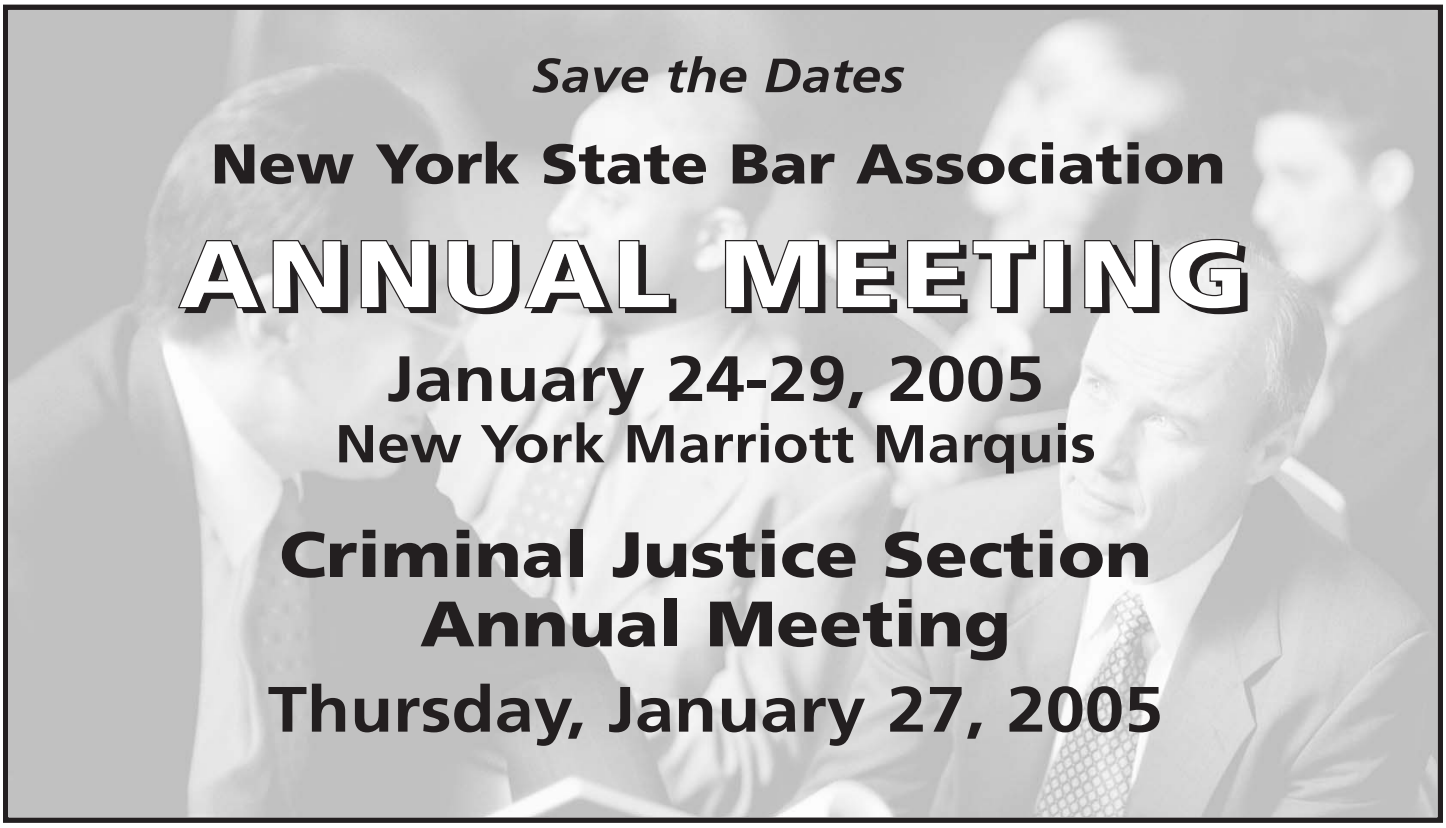
Pending Supreme Court Decisions to Determine Controversial Issues

The United States Supreme Court, in the very beginning of its new 2004–2005 term, will render decisions in two very important cases in the field of criminal law.

In the case of *Roper v. Simmons*, the Court faces the issue of whether the death penalty for teen-age killers violates the dictates of the Eighth Amendment's prohibition on cruel and unusual punishment. The issue had been sharply debated, with *amicus curiae* briefs being filed by the attorney generals of several states on both sides of the issue. In New York, Attorney General Spitzer had filed an *amicus curiae* brief arguing that such executions should be banned with respect to teen-age defendants. After holding oral arguments on the matter on October 12, the Court is expected to render its decision within the next few months.

On October 4, the United States Supreme Court also heard arguments on two cases involving the issue of whether the federal sentencing guidelines are now unconstitutional based on the Court's recent decision in *Blakely v. Washington*. The 5-4 decision in the *Blakely* matter has created havoc among the federal courts, with many federal judges refusing to apply the presently existing federal sentencing guidelines. The confusion has arisen because in *Blakely*, the logic of the court's decision seems to compel a conclusion that the federal sentencing guidelines are constitutionally defective. The majority opinion, however, specifically stated that the issue of the federal sentencing guidelines was not before the court, since the *Blakely* case only involved a state statute. Based upon the confusion created by the *Blakely* decision, the Supreme Court quickly agreed to specifically address the federal sentencing guideline issue. After hearing oral arguments in the two cases before it, to wit, *United States v. Booker* and *United States v. Fanfan*, the Court is expected to issue its determination by the end of December.

We will discuss in detail the Supreme Court decisions with respect to these very important cases in our next issue.



Recent U.S. Supreme Court Decisions Dealing with Criminal Law

Case Notes by Students from St. John's Law School

Toward the end of its last term, the Supreme Court also issued some important decisions in the area of criminal law, which have not yet been included in our newsletter. These cases were the subject of case notes by students at St. John's Law School. These case notes are printed below along with the name of the contributing law student.

Lack of Particularity Invalidates Search Warrant

***Groh v. Ramirez*, 124 S. Ct. 1284, 540 U.S. 551, 157 L. Ed. 2d 1068, 2004 U.S. LEXIS 1624 (2004)**

Petitioner, an ATF agent, received information that the respondents had a "stockpile" of weapons, including a rocket launcher, automatic rifle, grenades and grenade launcher. Based on this information, petitioner completed an affidavit and search warrant application and obtained a search warrant from a magistrate. Petitioner included a description of the weapons planned for seizure in both the affidavit and warrant application. However, on the search warrant itself, under items to be seized, petitioner gave only a description of the location to be searched. The information included in the warrant application and the affidavit was not incorporated into the search warrant, and was sealed by the magistrate upon granting the warrant. Respondents' home was searched and petitioner found none of the items sought. Petitioner provided the respondents with a copy of the warrant, not realizing that the warrant was incomplete until the following day, when respondents' attorney pointed out the deficiency.

Respondents claimed violation of their Fourth Amendment rights and the District Court granted summary judgment for all defendants, analogizing the instant warrant to one in which an officer had an erroneous address on the warrant but searched the correct premises nonetheless. Additionally, the District Court determined that all of the defendants were entitled to qualified immunity for any possible Fourth Amendment violation. The Court of Appeals for the Ninth Circuit affirmed the District Court's decision with the exception of the Fourth Amendment claim against the petitioner. The Supreme Court affirmed the decision of the Court of Appeals.

The Supreme Court, in a 5-4 decision, held that the warrant was invalid due to its lack of particularity. Though a warrant was issued in fact, the Court held that this lack of particularity on its face was tantamount to a warrantless search. The Court further noted that petitioner *should* have noticed that the warrant was defective. Because of this, the Court held that petitioner was not entitled to a defense of qualified immunity. The Court further noted that the Fourth Amendment has been consistently interpreted to require particularity in all warrants at penalty of invalidity. Thus, the Court held petitioner's conduct, waging a search under a facially invalid warrant, was such that he knew it would subject him to liability.

The dissent argued that the crux of the analysis should be whether the search that was actually conducted was reasonable, despite the failure of the warrant. They concluded that the search was reasonable and therefore constitutionally valid, and, in the alternative, that petitioner is entitled to qualified immunity because he made a mistake in fact, and not in law, in conducting the search.

By Jessica Duffy

The Question-First Interrogation Tactic Undermines the Miranda Safeguards Which Prevent the Admission of a Coerced Confession

***Missouri v. Seibert*, 124 S. Ct. 2601, 159 L. Ed. 2d 643, 2004 U.S. LEXIS 4578, 72 U.S.L.W. 4634**

Respondent Patrice Seibert's 12-year-old son Jonathan, who suffered from cerebral palsy and bed sores, died in his sleep. To evade charges of neglect, Seibert allowed her two sons and their friends to torch her home with Jonathan's body inside. They left 18-year-old Donald, a mentally-ill child living with the family, inside the home during the fire to avoid the appearance that Jonathan was left alone. The plan was executed and Donald died in the fire. Five days later, Seibert was arrested and taken to the police station without being read the Miranda warnings. The arresting officer, Officer Hanrahan, also failed to read Seibert her Miranda rights before questioning her for 30–40 minutes, during which she confessed that Donald was to die in the fire. After Seibert's confession and a 20-

minute break, Officer Hanrahan read Seibert the Miranda warnings and obtained a signed waiver of rights. He then continued questioning Seibert, bringing up her prior statements to again elicit a confession. Seibert was charged with first-degree murder. Despite Seibert's objection and Officer Hanrahan's statement that he deliberately withheld the Miranda warnings based on an interrogation technique, the trial court excluded the pre-warning statement but admitted the post-warning statement. Seibert was convicted of second-degree murder.

Seibert appealed her conviction. The Missouri Court of Appeals upheld her conviction but the State Supreme Court reversed, holding that because the Miranda warnings were intentionally withheld and because Seibert was continuously questioned, the post-warning statement should have been suppressed. On a writ of certiorari, the Supreme Court affirmed.

In a 5-4 decision, the Supreme Court held that the question-first tactic undercuts Miranda's goal to prevent the admission of a coerced confession, since it is used to obtain a confession that a defendant would not give if he had been aware of his rights. The Court stated that a Miranda warning cannot function properly when the following conditions exist: when the same police personnel question a defendant twice in the same place within a short time, when the first interrogation is complete, and when the two interrogations have similar contents so that it could be inferred that the "interrogator's questions treated the second round as continuous with the first." Since Officer Hanrahan thoroughly questioned Seibert before her warnings and resumed the same line of questioning in the same place within 20 minutes, the warnings did not satisfy Miranda's constitutional standards. Thus, her post-warning statement was inadmissible.

The dissent criticized the plurality's analysis. According to the dissent, the proper inquiry was whether the suspect's statement is voluntary, and this should be determined by looking at the manner in which the suspect experienced interrogation. The dissent asserted that a police officer's personal thoughts do not impact a suspect's ability to understand and voluntarily renounce his right to remain silent, and therefore, they are irrelevant when determining the admissibility of a statement. Thus, the dissent stated that Seibert's case should be remanded to the Missouri courts for reexamination consistent with these principles.

By Stephanie Tabone

Forcibly Entering After a 15 to 20 Second Delay Is Reasonable After Knocking and Announcing Where Exigent Circumstances Exist

***United States v. Banks*, 540 U.S. 31, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003)**

Relying upon information that the defendant was selling cocaine from his apartment, North Las Vegas Police Department officers and FBI agents got a warrant to search his apartment. At about 2 o'clock on a Wednesday afternoon, officers called out "police search warrant" and knocked on the door loud enough so officers at the back door could hear the pounding. After 15 to 20 seconds without a response from defendant, the officers broke open the front door and discovered defendant in the shower. Their search produced weapons, crack cocaine, and other evidence of drug dealing.

The defendant moved to suppress the evidence of drugs and firearms on the basis that the officers "waited an unreasonably short time before entry," thus violating the Fourth Amendment and 18 U.S.C. § 3109. After the District Court denied defendant's motion, he pleaded guilty, reserving his right to challenge the search on appeal. The Ninth Circuit concluded no exigent circumstances existed and held the 15 to 20-second delay was too short "to satisfy the constitutional safeguards." The Supreme Court granted certiorari to determine how to apply the reasonableness standard to the length of time an officer with a warrant must wait before entering forcibly after knocking and announcing their intent in a felony case.

In holding that 15 to 20 seconds was a reasonable period of time to wait in this case, the Court stressed its policy of treating "reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case." Relying upon *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1415, 137 L. Ed. 2d 615 (1997), and *United States v. Ramirez*, 523 U.S. 65, 70-71, S. Ct. 992 (1998), 140 L. Ed. 2d 191, 118, the Court concluded that "this case turns on the significance of exigency revealed by circumstances known to officers." When making a reasonableness determination, the only facts relevant are those known to the officers. Because the officers did not know defendant was in the shower when they arrived, that fact has no bearing on the reasonableness analysis. Similarly, because the police claim there was an exigent need to enter in this case, the "crucial fact in examining their actions is not time to reach the door but the particular exigency claimed." Here, the exigency claimed was "imminent disposal" of evidence.

The Court stated the significant facts were that the police arrived during the day, indicating defendant was awake, and also that cocaine is easily disposable. The Court reasoned that 20 seconds is ample time to flush "easily disposable cocaine" down the toilet or pour it down the sink drain and concluded "police could fairly suspect that cocaine would be gone if they were reticent any longer." Even though the forced entry caused some property damage, the officers could lawfully enter once the exigency matured. Defendant's section 3109 argument failed because section 3109 is subject to "an exigent circumstances exception."

By Jamie Eichinger

Government Has Authority to Conduct Suspicionless Inspections at the U.S. Border

***United States v. Manuel Flores-Montano*, 124 S. Ct. 1582, 158 L. Ed. 2d 311, 2004 U.S. LEXIS 2548, 72 U.S.L.W. 4263 (2003)**

Respondent attempted to enter the United States at the Otay Mesa Port of Entry in California. A customs inspector conducted an inspection of his station wagon and requested that he leave the vehicle. The vehicle was then taken to a secondary inspection station. A second customs inspector inspected the gas tank by tapping it, noting that it sounded solid. After having a mechanic remove the gas tank, the inspector opened an access plate on the tank and found 81 pounds of marijuana inside.

A grand jury for the Southern District of California indicted respondent on one count of unlawfully importing marijuana, in violation of U.S.C. § 952, and one count of possession of marijuana with intent to distribute, in violation of U.S.C. § 841(a)(1). Respondent filed a motion to suppress the marijuana recovered from the gas tank. The District Court granted respondent's motion to suppress, holding that the reasonable suspicion required to justify the search was lacking. The Court of Appeals for the Ninth Circuit affirmed. The Supreme Court granted certiorari and reversed.

The Supreme Court held that a customs inspector need not have reasonable suspicion to justify the removal of a vehicle's gas tank in order to search it. Respondent contended that he had a privacy interest in his fuel tank, and that the *suspicionless* disassembly of his tank was an invasion of his privacy. He further argued that the Fourth Amendment protects property as well as privacy, and that the disassembly and reassembly of his gas tank was a significant deprivation of his property interest because it may have damaged the vehicle.

The Supreme Court has stated, "routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). The Court of Appeals for the Ninth Circuit took this use of term "routine," fashioned a new balancing test, and extended it to the searches of vehicles to hold that the Fourth Amendment forbade the fuel tank search absent reasonable suspicion. *United States v. Molina-Torazon*, 279 F.3d 709 (2002). They applied this same test here and excluded the evidence.

In reversing the Ninth Circuit, the Supreme Court found the "reasons to support a requirement of some level of suspicion in searches of the person—dignity and privacy—simply do not carry over into searches of vehicles." *Flores-Montano* at 1585. Smugglers frequently attempt to penetrate our borders with contraband secreted in their vehicle's fuel tanks. A gas tank search involves a brief procedure that can be reversed without damaging the safety or operation of the vehicle. They concluded by stating "while the interference with a motorist's possessory interest is not insignificant when the government removes, disassembles, and reassembles his gas tank, it nevertheless is justified by the Government's paramount interest in protecting the border." *Flores-Montano* at 1587.

By Gerard Hanshe

Physical Fruits of an Unwarned Statement Admissible

***United States v. Patane*, 124 S. Ct. 2620, 159 L. Ed. 2d 667, 2004 U.S. LEXIS 4577 (2004)**

Respondent, a convicted felon, had apparently violated a restraining order against him. This prompted an officer to investigate the matter, while another detective was informed that the respondent illegally possessed a .40 Glock pistol. Both arrived at respondent's residence, where he was arrested for violating the restraining order. The detective attempted to advise respondent of his Miranda rights, but respondent interrupted him. After inquiries about the weapon, respondent eventually gave the detective permission to retrieve the pistol. Respondent was subsequently indicted for possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

Respondent moved to suppress the firearm evidence, arguing a lack of probable cause, and alternatively, that the gun should be suppressed as the fruit of an unwarned statement. The District Court granted the motion solely on lack of probable cause grounds. The Tenth Circuit reversed the ruling with respect to the District Court's reasoning, but affirmed the order based

on the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States*, 371 U.S. 471, 488, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963), relying on the Supreme Court's statements in *Dickerson v. United States*, 530 U.S. 428, 444, 147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000), "that Miranda announced a constitutional rule." The Supreme Court, in a 5-4 plurality decision, reversed, holding that a failure to give a suspect his Miranda warnings does not require the suppression of the physical fruits of the suspect's unwarned but voluntary statements. The Tenth Circuit misconstrued the Court's statement in *Dickerson*, equating it to mean that the Miranda rule had become a constitutional right.

The Court reasoned that the Miranda rule is not a constitutional right in itself, but rather a prophylactic rule designed to help protect against violations of the Self-Incrimination Clause of the Fifth Amendment. The Fifth Amendment's exclusionary rule targets compelled self-incriminating statements, and by allowing the respondent's gun in as evidence, it in no way put him at risk that his statements would be used against him at trial. The Court stated the Miranda rule is not a police restraint, and violations of it occur when unwarned statements are admitted into evidence. The proper remedy is to exclude the testimonial evidence, and nothing of this nature occurred here that would implicate the "fruit of the poisonous tree" doctrine. As a policy reason, there would be no deterrent effect to exclude the evidence since the statements were given voluntarily. Finally, the dissent asserted there was a presumption of coercion in statements made without Miranda warnings, and the derivative evidence obtained should be excluded.

By Allen Levine

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions, which were decided between August 3 and November 1, 2004.

People v. Williams, (N.Y.L.J., August 5, 2004, pp. 18 and 24)

In a 3-2 decision, the Appellate Decision, First Department, reversed a conviction and ordered a new trial based upon the claim that the trial court had issued an improper jury instruction. The issue arose because during trial, the police officer's testimony established that the undercover team included a "ghost" who had been assigned to observe the transaction. The People did not call the "ghost" to testify. During his summation, defense counsel had brought to the jury's attention the fact that the People did not call the "ghost." The court then charged the jury that they were not to speculate on the whereabouts of people whose names had been mentioned but who had not been called as witnesses. Defense counsel objected, but the court refused to give further instructions to clarify the issue.

The three-justice majority concluded that the court's charge may well have misled the jury to believe that they were not permitted to draw any inference from the People's failure to call the witness. Justices Tom and Ellerin dissented and expressed a view that there was no serious problem with the judge's instruction and that in any event, any error was harmless since there was overwhelming evidence of the defendant's guilt. Based upon the sharp split in the court's determination, it appears that this case is headed for review by the New York Court of Appeals.

People v. Stein, (N.Y.L.J., August 10, 2004, p. 1)

The Appellate Division, Second Department, unanimously reversed a female teacher's conviction of rape and sodomy for allegedly abusing three male students. The court determined that the prosecution had committed reversible error when they failed to disclose to the defense that two of the boys intended to file civil suits. The appellate court concluded that "evidence that two of the complainants were seeking damages based on the defendant's conduct, which only they had witnessed, was highly relevant to the issue of their credibility." The court further pointed out that the prosecution's conduct was even more egregious in light of their argument during summation "that there was no evidence that the complainants were bringing civil law suits as a result of the defendant's conduct." Based upon its determination, the Appellate Division ordered a new trial.

People v. Vitiello, (N.Y.L.J., August 6, 2004, p. 1)

The Appellate Division, Second Department, reversed a manslaughter conviction and ordered a new trial, holding that the police had improperly manipulated the defendant's girlfriend to make him reveal the whereabouts of a weapon. The defendant had claimed that a weapon had accidentally discharged during a dispute with the deceased. He thereafter fled the scene and the gun could not be found. The defendant then turned himself in to police. He subsequently told his girlfriend, who was in the police interview room with him, and he also requested an attorney. Although the police stopped questioning him, one of the officers told the girlfriend that she could ask him about the gun. After the two were alone in the interview room, the girlfriend came out and revealed to police the whereabouts of the gun.

The Appellate Division concluded that the police had acted improperly since they had attempted to use the facade of a private citizen to illicit incriminating evidence in violation of the defendant's right to counsel.

People v. Kelly, (N.Y.L.J., August 26, 2004, pp. 18, 26 and 27)

In a unanimous decision, the Appellate Division, First Department, affirmed a murder conviction and denied the defendant's request for a new trial. The defendant had argued that reversible error had occurred because a court officer had performed a demonstration for the jurors with the alleged murder weapon. The Appellate Court found that the demonstration was not an error which was so fundamental so as to exempt it from preservation and waiver rules. Since the defendant had not objected when the trial court instructed the jury to disregard the demonstration, the defendant's claim was not preserved for appellate review. Further, the court found that the demonstration did not influence the jury and was ministerial in nature and did not amount to a usurpation of the judicial function. The court's unanimous decision was issued by Justice Sullivan.

People v. Espinal, (N.Y.L.J., September 1, 2004, p. 1; August 30, 2004, p. 26)

In a unanimous decision, the Appellate Division, First Department, held that reversible error had been committed when the trial judge disqualified the attorney who had represented the defendant for a two-year period. The attorney who had been assigned to represent the defendant failed to appear for an established trial date. When he appeared the next day before the trial judge and informed him he was not ready to proceed, the court relieved him and engaged in a heated argument in which the attorney was directed "not to come back to this part again." The attorney subsequently made a motion to be

reinstated to the case based upon his long relationship with the client, but again the trial court refused.

The Appellate Court ruled that the trial judge had failed to adequately justify his decision to disqualify the attorney in question and a new trial was warranted.

People v. Turner, (N.Y.L.J., September 1, 2004, pp. 1 and 2)

The Appellate Division, Second Department, reversed a manslaughter conviction on the grounds that the defendant had received ineffective assistance of counsel both at the trial and appellate level.

The lesser charge of manslaughter had been submitted to the jury shortly after closing arguments and both trial counsel and appellate counsel had failed to notice that the manslaughter charge was barred by the statute of limitation. The Second Department, in its determination, stated: "Appellate Counsel was ineffective for failing to assert that his trial counsel was ineffective for failure to object to the submission of the lesser-included offense of manslaughter in the first degree on the ground that it was barred by the statute of limitations."

The Court held that the facts of the instant case were consistent with its prior decision in *People v. DiPasquale*, 161 App. Div. 196 (3d Dep't 1914). Unfortunately, due to the errors which occurred, the defendant was incarcerated for four years before the Appellate Division reversed its decision.

People v. Maldonado, (N.Y.L.J., September 14, 2004, p. 18)

In a unanimous decision, the Appellate Division, First Department, affirmed a defendant's robbery conviction and rejected a defendant's claim that the verdict was repugnant to the co-defendant's acquittal of the same charges. The appellate court found that although the defendant had preserved the issue, by raising the matter with the trial court, he failed to object when the court discharged the jury without asking them to reconsider its defective verdict. The appellate panel found, "by failing to object, defendant allowed the court to foreclose any possibility of remedying the claimed repugnancy and thus waived his right to assert the claim on appeal."

Further, the appellate panel observed that by failing to request a re-submission of the case to the jury, the defendant was making a strategic decision to avoid the possibility of conviction of a more serious crime since both defendants had been acquitted of robbery in the first degree. The Second Department stated, "a defendant should not be permitted to benefit from such a strategy."

People v. Claudio, (N.Y.L.J., September 22, 2004, pp. 1 and 8)

In a unanimous decision, the Appellate Division, First Department, reversed a defendant's conviction for attempted murder and remanded the case for a new trial. The Appellate Court found that the trial judge had committed reversible error in failing to properly follow the three-step procedure laid out in the *Batson* case with respect to improper peremptory challenges.

The prosecutor, after exercising three peremptory challenges, stated that two women were excluded because they were secretaries and that another man was removed because he did not have strong roots in the community. Defense counsel pointed out that a non-Hispanic secretary had already been seated on the jury and that all three of the challenged jurors lived in the community for a significant amount of years. The trial court then accepted the prosecutor's position and made no further inquiry nor a factual determination as to the credibility as to the prosecutor's explanations.

The appellate panel determined that the trial court should have conducted a more meaningful inquiry and failed to make a proper factual finding as required by the *Batson* procedure.

People v. Curry, (N.Y.L.J., October 5, 2004, p. 18)

In a unanimous decision, the Appellate Division, First Department, held that the trial court had properly applied the Rape Shield Law under CPL section 60.42. The defendant had sought to cross-examine the complainant with respect to a statement she had allegedly made to the defendant that her injuries were inflicted by one of her past "tricks." The trial court precluded such evidence and the appellate panel found that the statement would have played only a peripheral role and was not highly relevant to the issues at hand. Under such circumstances, the court determined that the defendant's right to a fair trial had not been abridged.

People v. Johnson, (N.Y.L.J., October 8, 2004, p. 1; October 12, 2004, p. 18)

The Appellate Division, First Department, reversed a robbery conviction and ordered a new trial because of a charge which could have confused the jury as to the principles to be applied in determining the defendant's guilt. The trial court had provided an explanation of preponderance of evidence with respect to a matter that had arisen during the trial. The appellate panel found that this instruction could have confused the jury as to their consideration of the elements of the crime which require the concepts of proof of guilt beyond a reasonable doubt. The appellate court concluded that due to the judge's charge, the jurors could have convicted the defendant if they simply believed he was more likely guilty than not guilty.

For Your Information

State Senate Passes Legislation to Correct Death Penalty Law Defect

As reported in our last issue, the legislature has moved to correct recent invalidation of a key section of New York's death penalty statute. The State Senate in late August amended the statute so that judges will tell juries that if they are deadlocked in choosing the death penalty or life without parole, the judge would hand down a life without parole sentence instead of the 20 to 25-year sentence with the possibility of parole. The State Senate's action was in response to a recent Court of Appeals decision in *People v. LaValle*, which found the existing jury instruction provision unconstitutional. The State Assembly to date has failed to adopt the State Senate's measure and the issue of correcting the death penalty statute will again be before the state legislature when they reconvene in January.

Crimes of Violence and Against Property Continue to Decrease

In the most recent FBI report, it was reported that the rate of property crime and violent crime other than homicides in the year 2003 hit a 30-year low. The number of victims of violent crimes for the year 2000 was 22.6 per 1,000 people, down from 49.9 in 1993. The rate of property crimes in 2003 was 163.2 per 1,000 people, down almost 49% from 1993. The rates for 2003 were the lowest since the statistical reporting was first undertaken in 1973.

The dramatic decrease in the crime rates in question are attributable to several factors. First of all, increases in jail sentences for violent felony offenders have put many recidivist offenders behind bars. Secondly, increase in technology has played a role in driving down crime rates because police agencies are now better able to communicate with one another. A third factor may also be due to the change in demographics, with an increasing older population and a reduction in the teen-age and young adult group.

The Justice Department's nationwide statistics also reported that homicides were at their lowest levels since 1960 and that violent incidences involving a firearm declined to 7% from the 11% total in 1993.

New Anti-Terrorism Statute Increases Number of Violent Felony Offenses

In our last issue, I presented an article entitled *Is It Time to Limit the Number of Violent Felony Offenses?* After the article had been submitted for publication, it was announced that Governor Pataki had signed a new anti-terrorism statute. Under that statute, three of the newly created offenses were specifically designated as violent felony offenses. In addition, a new Class D violent felony offense had been added in November 2003, which was inadvertently left out in the listing provided. The overall number of such offenses in New York's Penal Law is now 58 rather than the 54 reported in the article. These new violent felony offenses are: Criminal Possession of a Chemical or Biological Weapon in the Second Degree (a Class B violent felony), Criminal Possession of a Chemical Weapon or Biological Weapon in the Third Degree (a Class C violent felony), and Criminal Use of a Criminal Weapon or Biological Weapon in the Third Degree (a Class B violent felony). The Class D violent felony offense, which was added effective November 1, 2003, is Aggravated Unpermitted Use of Indoor Pyrotechnics in the First Degree, as defined in PL § 405.18.

The trend toward increasing the number of violent felony offenses thus continues to the present day, and the need to re-evaluate this trend, as pointed out in the article, also continues to exist.

The Historical Society of the Courts of the State of New York

Many lawyers may not be aware that several years ago a not-for-profit organization was formed to promote the history of the New York State court system and to seek to preserve historical documents regarding the state's judicial system. The Historical Society of the Courts of the State of New York specifically lists its purpose as being "to preserve the legal history of the State of New York and to foster the scholarly understanding and public appreciation of the history of the courts of the State of New York and the contributions of the judicial branch of the government to the state and nation." The Historical Society, whose existence was initiated by Chief Judge Judith S. Kaye, lists as its mission to accomplish the following activities:

1) publishing a scholarly journal and periodic newsletters;

2) conducting oral histories of judges and lawyers;

3) supporting historical research on the New York State courts;

4) collecting photographs, papers, and other materials related to court history;

5) sponsoring lectures;

6) displaying exhibits at courthouses;

7) creating outreach lessons for school groups;

8) holding an annual dinner;

9) establishing a permanent exhibit and administrative center at the Judicial Institute/Pace University.

The Society, which has a distinguished group of officers and trustees, is currently headed by Judge Rosenblatt of the Court of Appeals. The Society is headquartered at the New York State Judicial Institute, 84 North Broadway, White Plains, New York 10603. The Society's website address is www.courts.state.ny.us/history.

Categories of membership include individual, contributing, institutional and sustaining members. The annual membership fees for the categories are $50 for the first year and $75 thereafter for the individual membership, $500 for a contributing membership, $1,000 for an institutional membership, and $5,000 for a sustaining membership. Those interested in obtaining more information about the Historical Society or in joining the organization can visit the society's website or can call Joann Dean at (914) 682-3222.

Supreme Court Judges Oppose Judge Kaye's Bronx Court Merger Plan

The controversy over Chief Judge Judith Kaye's plan to merge the Bronx Criminal and Supreme Court parts with respect to the handling of criminal cases continues. The Association of Supreme Court Judges of the State of New York adopted a resolution on September 11, 2004 criticizing the plan and publicly stating its opposition. The resolution states that "although the felony caseload has fallen in recent years while misdemeanors have 'ballooned,' the merger calls for the elevation of Criminal Court judges and their staffs to more expensive Supreme Court positions. The solution to the shifting case load is to increase Criminal Court parts and decrease Supreme Court parts—not the other way around." Despite opposition from many quarters, the merger plan was implemented this fall.

About Our Section and Members

The Criminal Justice Section Annual Luncheon meeting has been scheduled for January 27, 2005. The program, as in the past, will included the presentation of awards to distinguished criminal law practitioners and the presentation of an interesting CLE program. The topic of this year's CLE program will be the "examination of witnesses." We hope that all members make every effort to attend our Annual Meeting. Further details regarding the program will be forwarded directly by the New York State Bar Association.

REQUEST FOR ARTICLES

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

Spiros A. Tsimbinos
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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.

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

Publication Policy: All articles should be submitted to:

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

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

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

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