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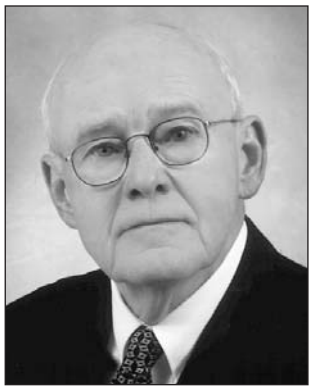
New York Criminal Law Newsletter

A publication of the Criminal Justice Section
of the New York State Bar Association

Inside

NYSBA

Message from the Chair



At the Annual Meeting of the Section in January, it was my great honor to be elected Chair of the Criminal Justice Section. It was especially satisfying to me that I was chosen by defense attorneys, judges and prosecutors while finishing up a 30-year career as a prosecutor. In February of this year I moved to the defense side and have found it interesting and rewarding.

I would like to mention two close friends who were elected along with me and who will be outstanding Section Officers: Roger Adler, a noted defense counsel, as Vice-Chair, and Jean Walsh, an attorney in the Office of the New York State Inspector General, as Secretary. Both Roger and Jean are tireless workers and guarantee the success of our Section in the future.

I would certainly be remiss if I did not thank Tom Liotti for the wonderful job he did as Chair over the past two years. He will be a tough act to follow, having continued the work of Vince Doyle III on 18b rates and having a successful raise in the rates while on Tom's watch. All of us in the Criminal Justice field owe Tom a great deal of credit for his work.

Our Section is currently working on various legislative proposals to change the Rockefeller Drug Laws, to liberalize the various Discovery Statutes, to straighten out the problems associated with the sealing of records, to propose legislation to mandate in certain situations the taping of police questioning when practical, and many other issues too voluminous to mention. In mentioning these proposals I do wish to stress that we must keep in mind that our Section is composed of judges, prosecutors and defense attorneys and that we try to come to compromises which will bring about justice to defendants and victims alike, while trying to keep an open mind about what we do.

As you are all aware we will be meeting and having a Section CLE program in Ithaca on November 7th and 8th, 2003. I hope to see and meet many of you there.

I look forward to serving as your Chair and representative over the next two years and hope you will feel free to contact me if you have any suggestions or problems that any of you feel we should address.

Sincerely,

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

From 1981 until February of this year, Mike Kelly was the Regional Director of the Attorney General's Medicaid Fraud Bureau, covering the Buffalo region (composed of eight counties). Prior to that, he was Chief of the Organized Crime Bureau in the Erie County District Attorney's Office. Mike is a 1973 graduate of Albany Law School and received his undergraduate degree from Canisius College. He has lectured throughout the country for the National College of District Attorneys, the Police Foundation and various bar associations on Trial Tactics, Investigations and Forensic Evidence. In 1986, Mike was elected Chairman of the Jurisprudence Section of the American Academy of Forensic Sciences and was elected a Fellow of the Academy in 1988. In 1989, Mike was honored by the Criminal Justice Alumni Association of the State University College at Buffalo, receiving their annual award for "Performance Exemplifying Professionalism in Criminal Justice."

Message from the Editor

With this issue, we inaugurate the publication of our *New York Criminal Law Newsletter*, which will be published four times a year, during the months of October, January, April, and July. The *Newsletter* will replace our annual *Journal*. With our new publication, we seek to provide important and relevant information on appellate cases and new legislation to our Section members in a speedy and expeditious matter. We will also be featuring articles of interest written by leading criminal law practitioners. As you can see from our first issue, we have provided important information on recent Court of Appeals decisions, legislation, and current topics in the area of New York criminal law. We urge our members to submit articles for publication and to provide us with comments and suggestions regarding future issues. Articles and comments can be mailed to me at 120-12 85th Avenue, Kew Gardens, NY 11415. I would like to thank Barry Kamins and Paul Shechtman for their articles and assistance in the preparation of our first issue. I hope that you will enjoy our first issue and that you will become a regular reader of the *New York Criminal Law Newsletter*.

Spiros A. Tsimbinos

Whatever Happened to the Sentencing Commission?

By Spiros A. Tsimbinos

As the expiration period of the 1995 Sentencing Reform Act approaches, one must ask what happened to the Sentencing Commission and will we receive its report and recommendations on December 1, 2003, as required by the enabling legislation?

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

The passage of both the 1995 and the 1998 legislation specifically contemplated that after a period of application the effects of the legislation would be reviewed and the Legislature would revisit the issue to ascertain whether any changes or modifications were necessary. In fact, within the 1995 enabling legislation is a specific sunset proviso through which many of the provisions are deemed to be automatically repealed as of September 30, 2005 unless specifically renewed. Thus, at the present time, we are within less than a two-year period when the Legislature must determine whether to keep the present sentencing structure or allow a reversion back to the old system of indeterminate sentencing.

The following chart provides a striking example of the differences involved in the sentences that could be imposed under the present Sentencing Reform Act provisions and a reversion back to the old indeterminate system.

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

The Commission was to have assumed its duties as of April 1, 1996 and is to dissolve as of November 1, 2003. An interim report was required to be issued on or about December 1, 1999 and a final report on or about December 1, 2003. The current mystery, however, is whatever happened to this Commission? Despite the great fanfare which surrounded the passage of the Sentencing Reform Act and Jenna's Law and the importance of receiving a detailed and comprehensive analysis of the effects of these laws, prior to the effective date of the sunset provisions, no public pronouncement was ever issued indicating whether the appointments of the Commission were made, and, if so, who was appointed to the Commission. And as far as can be determined, no interim report was issued by December 1999 as required. My own inquiries directly to the Governor's office have received no response. Thus, I am concerned that, through some bureaucratic failure, the Commis-

FIRST-TIME VIOLENT FELONY OFFENDERS[1]

Crimes Involved	Present Determinate Terms	Previous and Possible Future Indeterminate Terms
Class B Violent Felonies	5 to 25	2 to 6 to 8⅓ to 25
Class C Violent Felonies	3½ to 15	1½ to 4½ to 5 to 15
Class D Violent Felonies	2 to 7	1 to 3 to 2½ to 7
Class E Violent Felonies	1½ to 4	1 to 3 to 1⅓ to 4

sion may never have been formed and the requirements of the enabling legislation have not yet been totally fulfilled. Thus, I must ask the question, whatever happened to the Sentencing Commission? Since the Commission is to dissolve and its final report is due within the next few months, attention must be focused on the question of whether the Commission has in fact studied in detail the various ramifications of the Sentencing Reform Act and what recommendations it has for either the continuance or the termination of its provisions. Since less than two years remain before the Legislature will be called upon to re-evaluate the issue, it is incumbent upon members of the criminal justice system to inquire about the Sentencing Commission's work and to look forward to some appropriate and timely response.

Endnote

1. See Penal Law secs. 70.00 and 70.02.

Spiros A. Tsimbinos has been a criminal law and appellate practitioner in New York for 35 years. A graduate of New York University School of Law, he served as Legal Counsel and Chief of Appeals of the Queens County District Attorney's Office in 1990 and 1991. He is a past president of the Queens County Bar Association and has been a frequent lecturer on legal topics. Mr. Tsimbinos has authored many articles that have appeared in the *New York Law Journal*, the New York State Bar *Journal*, the *Queens Bar Bulletin* and other legal publications.

Appellate Courts Grapple with Failure to Advise on Post-Release Supervision Term

By Spiros A. Tsimbinos

As a result of the mandatory imposition of a term of post-release supervision, as part of the institution of a determinate term for violent felony offenses, appellate courts have recently had to grapple with the issue of what to do when a defendant was not advised with respect to the post-release term as part of a plea agreement. Interestingly, the Third and Second Departments have treated the issue in somewhat different ways and it may very well be that a Court of Appeals determination will have to eventually settle the differences among the Departments. The initial problem stems from the imposition, effective as of September 1, 1998,[1] of a mandatory term of post-release supervision in addition to any determinate term imposed by the passage of Penal Law section 70.45.

Under that legislation, commonly referred to as "Jenna's Law," the maximum term of post-release supervision was set at 5 years for Class B and C violent felony offenses and 3 years for Class D and E felony offenses. However, the sentencing court may impose a lesser term of supervision at the time the determinate sentence is issued. For instance, a post-release supervision term can be set as low as 2.5 years for first-time Class B and C violent felony offenders and 1.5 years for first-time Class D and E violent felony offenders. In all cases of a determinate term, however, a period of post-release supervision is also mandated.

"In all cases of a determinate term. . .a period of post-release supervision is also mandated. "

As a result of this legislative scenario, the Appellate Division, Third Department, in *People v. Goss*, 286 A.D.2d 180 (3d Dep't 2001), specifically held that the failure of the trial court to advise the defendant during a plea colloquy that a period of post-release supervision would automatically be imposed entitled the defendant to withdraw his guilty plea and a waiver of the right to appeal could not be utilized to deny the defendant appellate relief. The Third Department pointed out that a defendant always retains the right to challenge the legality of the sentence or the voluntariness of the plea. In a unanimous ruling, the Third Department found that the trial judge was obligated to advise the defendant during a guilty plea of the direct consequences of such an action and that, since the term of post-release supervision was mandated by statute, the failure to so advise had a direct and significant impact upon the defendant. The court thus stated at page 184:

> In our view, the five year period of post release supervision which—as a matter of statutory law—is included as part of defendant's 12-year determinate sentence clearly is a consequence "which has a definite, immediate and largely automatic effect on defendant's punishment" (*People v. Ford*, 86 N.Y.2d 397, at 403; *see also*, Senate Mem in Support, 1998 McKinney's Session Laws of NY, at 1489 [describing post release supervision as "a distinct but integral part of the determinate sentence"]). Given the fact that a violation of the conditions of post release supervision results in a significant period of re-incarceration and given that the legislative purpose underlying the post release supervision requirement is protecting the community, we conclude that post release supervision is a significant, punitive component of defendant's sentence. Thus, we hold that post release supervision in this context is a direct consequence of defendant's plea (*see*, *People v. Alcock*, 188 Misc. 2d 284, 287-289). Since defendant was not advised of it prior to entering the plea, he should have been permitted to withdraw his guilty plea (*see*, *People v. Esposito*, 32 N.Y.2d 921, 923; *People v. Bryant*, 180 A.D.2d 874, 875-876).

The Third Department, thereafter, concluded that since the defendant never knowingly agreed to the term of post-release supervision, the error in not disclosing this portion of the sentence could not be deemed as harmless and that the defendant's motion to withdraw his guilty plea should have been automatically granted. Following the *Goss* decision, the Third Department has continued to adhere to its automatic rule. *See People v. Jaworski*, 296 A.D.2d 597 (3d Dep't 2002); *People v. Jachimowicz*, 292 A.D.2d 688 (2d Dep't 2002).

The Third Department, in future cases, made clear, however, that the only remedy it would consider would be the vacation of the guilty plea and has specifically affirmed a defendant's conviction when the only request by the defendant was to eliminate the post-release portion of the sentence. *See People v. Rawdon*, 296 A.D.2d 597 (3d Dep't 2002).

Recently, in *People v. Melio*, 304 A.D.2d 247 (2d Dep't 2003), the Appellate Division, Second Department, also had occasion to address the same issue. The court agreed specifically with the Third Department that the trial court had a duty to inform the defendant of the statutory mandate of post-release supervision and that the right to raise this issue on appeal survived the waiver of the right to appeal. The Second Department, however, differed with the Third Department on the issue of whether a harmless error doctrine could apply before a plea is vacated. Justice Altman, speaking for the court and relying on some federal decisions, concluded that a bare allegation regarding lack of knowledge of the post-release supervision term does not necessarily entitle the defendant to vacatur of the plea. Thus, the court remitted the matter to the trial venue for a hearing to determine whether defendant would not in fact have pleaded guilty had he been informed that he was subject to post-release supervision and whether the defendant was so informed by his attorney before the plea of guilty or the date of sentence.

The differing positions taken by the two Appellate Departments on the question of whether the failure to advise regarding the post-release supervision term could constitute harmless error appears to be eventually headed for a resolution by the Court of Appeals. In the meantime, criminal law practitioners, both on the defense and on the prosecution, are reminded to avoid the potential problem by specifically seeing to it that the defendant is advised of the post-release supervision term both at the time of his plea and sentence. In this regard, I thus repeat the same admonition as I did in my article regarding post-release supervision when the enactment first went into effect.[2]

"The differing positions taken by the two Appellate Departments on the question of whether the failure to advise regarding the post-release supervision term could constitute harmless error appears to be eventually headed for a resolution by the Court of Appeals."

Endnotes

1. The Appellate Courts have specifically determined that there can be no retroactive application of the post-release supervision term to crimes committed before the effective date of the statute. *See People v. Sumpter*, 286 A.D.2d 450 (2d Dep't 2001), *lv. to appeal denied*, 97 N.Y.2d 658 (2001); *People v. Copeland*, 281 A.D.2d 985 (4th Dep't 2001), *lv. to appeal denied*, 96 N.Y.2d 861 (2001).
2. *See New York Criminal Law News*, Issue No. 31, September-October 1998, pp. 3–5.

New York Court of Appeals Review

By Paul Shechtman

The 2002-2003 term of the New York Court of Appeals produced no fireworks in criminal law but several noteworthy precedents in a variety of areas. Enclosed below is a summary of the leading criminal law cases[1] as well as some personal commentary.

Distinction Between Intentional and Depraved Indifference Murder

In *People v. Hafeez*, 2003 WL 21321403 (June 10, 2003), the Court sought, once again, to distinguish between intentional and depraved indifference murder. *Hafeez* arose out of a confrontation in a local bar, in which the victim threw a pool ball at Hafeez's friend. Two months later, the friend and Hafeez lured the victim to the same bar, where Hafeez, knowing that his friend had a 9-inch steak knife, pushed the victim against a wall. In the ensuing melee, the friend administered a fatal knife wound to the victim's heart. The friend pleaded guilty to manslaughter, and Hafeez was convicted by a jury of depraved indifference murder (but acquitted of intentional murder) as an accessory to the crime.

The Court of Appeals held that the conviction could not stand. In an opinion by Judge Ciparick, the Court found that what had occurred was a "quintessentially intentional attack directed solely at the victim," and that "no valid line of reasoning could support the conclusion that the defendant possessed the mental culpability for depraved indifference murder."

Judge Read, the Court's newest member, dissented. She reasoned that the jury could have credited the defendant's testimony that he and his friend lacked homicidal intent, but found that they (i) ignored the risk that a struggle would occur while [the friend] was wielding the knife, "which . . . might result in a misdirected or wild fatal thrust" or (ii) "intended 'only' to wound [but] paid no heed whether the wound might result in death." Either way, in Judge Read's view, the jury could have found that, although the attack was intentional, their state of mind with respect to the homicide was "extremely reckless."

This is the second successive term in which the Court has wrestled with the distinction between the two theories of second-degree murder. Last term, in *People v. Sanchez*, 98 N.Y.2d 373 (2002), by a 4-3 vote, the Court upheld a conviction for depraved indifference murder where the proof showed that the defendant, who felt he had been insulted, spontaneously fired a loaded gun from 18 inches away into the victim's chest. The majority in *Hafeez* distinguished *Sanchez* by describing it as a case involving "the sudden shooting of a victim by a defendant who reached around from behind a door and fired into an area where children were playing, presenting a heightened risk of unintended injury." The presence of children, however, was mentioned only in passing (the majority observed that "two grandchildren were playing in the foyer, away from [the victim]"), and the potential for unintended injury was not relied upon in the decision. The true distinction between *Sanchez* and *Hafeez*, it seems, is that three judges—Chief Judge Kaye, Judge Wesley, and Judge Graffeo—who voted to uphold Sanchez's conviction changed their view of the matter over the course of a year.

What was not noted in *Sanchez* or *Hafeez* is that a defendant who intends to cause serious physical injury to another but causes his death is guilty of manslaughter in the first degree. Thus, shooting to disable or stabbing to wound is egregious conduct, but if it results in death, the crime would seem to be manslaughter, and not murder, under New York law. To allow a jury to convict for depraved indifference murder for such conduct is to distort the statutory scheme.

Protection of Witnesses

The second case is *People v. Frost*, 2003 WL 21057414 (May 13, 2003), in which the Court approved extraordinary procedures to protect fearful witnesses so that they would testify in a homicide trial. Most notable among the protections afforded the prosecution's witnesses (which included closure of the courtroom during three witnesses' testimony) was the trial court's decision to allow one witness to testify under the fictitious name, "Steven Knight." Emphasizing that "the prosecutor represented that Knight had no criminal record, and that all *Rosario* and *Brady* material had been turned over to [the] defense," Judge Ciparick rejected the defendant's claim that he was denied an effective opportunity to cross-examine "Knight." Rather, the trial court had properly determined that the witness's concern for safety outweighed the defendant's interest "in obtaining information concerning Knight's true identity for purely collateral impeachment purposes."

Frost follows several federal cases (none in the Second Circuit) that allow a witness to testify under a

pseudonym to protect him from retaliation. If the decision can be faulted, it is for giving short shrift to the role of defense investigation. *Brady*, after all, requires the prosecution only to produce exculpatory evidence in its possession, and not to search for evidence that may discredit its own witness. One hopes that the procedure approved in *Frost* will be used sparingly and as a last resort.

Attorney Conflict of Interest

The third noteworthy case is *People v. Abar*, 99 N.Y.2d 406 (2003). In October 1999, Abar pleaded guilty to a felony and two misdemeanors in satisfaction of charges pending against him in St. Lawrence County, and was sentenced to probation. What made the matter unusual was that the public defender who represented him at the plea had previously been an Assistant District Attorney and had participated in the prosecution of some of the charges to which Abar pleaded. A year later, Abar violated the terms of his probation and was sentenced 1 to 3 years' imprisonment. He then moved *pro se* to vacate his plea, claiming that his counsel had labored under an irreconcilable conflict of interest due to her roles in his case.

The Court of Appeals rejected the claim, holding that "even assuming . . . that [defense counsel's] representation . . . pose[d] a conflict," the conflict "did not operate on the defense." Abar, the record showed, had conferred with his counsel about her prior employment and had told her that he was "comfortable with her as his attorney." Moreover, as the Court saw it, counsel had represented him effectively: she had negotiated a favorable plea agreement under which he had received probation for multiple felony charges.

In dissent, Judge Smith was far less charitable to Abar's counsel. Her conduct, he noted, ran afoul of the ABA Standards for defense attorneys and the Code of Professional Responsibility and may well have been criminal under a Judiciary Law provision. *See* Judiciary Law 493. For Judge Smith, there was an "inherent conflict of interest [when a lawyer is] in a position of having to undo charges that . . . as a prosecutor [she] felt were appropriate and just."

In recent years, the Court of Appeals has eschewed *per se* rules and required a showing of prejudice before reversing a defendant's conviction. Abar, however, may have been a rare occasion for an automatic reversal rule. For a lawyer to switch allegiances and zealously defend a client against charges for which she has previously advocated is asking too much of any person. That a defendant may foolishly choose to proceed with such representation, perhaps believing that he will benefit if his former foe is now his defender, is no reason to countenance the arrangement. Nor is an appellate court well-situated to assess whether a plea bargain is "favorable" to a defendant. In short, limiting a lawyer to working one side of a case would seem a bedrock principle of a criminal justice system.

Anti-Stalking Statute

Fourth is *People v. Stuart*, which considered a vagueness challenge to New York's anti-stalking statute, Penal Law section 120.45. *People v. Stuart*, 2003 WL 21512235 (July 2, 2003). The defendant in *Stuart* had fixated on a 22-year-old woman, who he had not previously known, and shadowed her relentlessly for almost two months. Wherever she went, he followed, first offering her candy and inviting her to dinner and later leering at her or standing nearby and smirking. After receiving repeated warnings that his attention was unwanted, the defendant was arrested for stalking and harassment crimes.

The Court unanimously agreed that the stalking statute was constitutional as applied to the defendant and on its face, but divided on the approach for resolving vagueness challenges. Writing for the majority, Judge Rosenblatt opined that when a court is presented with both facial and as-applied claims, it should first decide whether the challenged statute is impermissibly vague as applied to the defendant. If it is not "and the statute provides the defendant with adequate notice [that his conduct is criminal] and the police with clear criteria [for enforcing it], that is the end of the matter." That is, because, for Judge Rosenblatt, a statute is not facially vague unless it is unconstitutional "in *all* of its applications," and in rejecting the defendant's as-applied challenge, "the court will have necessarily concluded that there is at least one person—the defendant—to whom the statute may be applied constitutionally."

Chief Judge Kaye, joined by Judge Ciparick, filed a separate concurring opinion, arguing that Judge Rosenblatt's approach left no independent role for facial challenges: "either a statute will be found constitutional as applied and a facial challenge thereby fails on the merits . . . or a statute will be found unconstitutional as applied and the Court . . . does not need to reach the facial challenge." In Chief Judge Kaye's view, a statute is facially invalid if it covers situations properly criminalized, including the defendant's conduct, but reaches "a substantial amount of innocent conduct" as well.

Judge Rosenblatt's opinion includes one of the longest footnotes in Court of Appeals history—a 147-line response to what he termed Chief Judge Kaye's "cogent and important" observations. Notably, much of the same debate played itself out in the United States

Supreme Court in its 1999 decision in *Chicago v. Morales*, 527 U.S. 41 (1999), which invalidated a gang loitering statute on vagueness grounds. Justice Stevens, writing for the plurality, espoused the position embraced by Chief Judge Kaye in *Stuart*, and Justice Scalia, in dissent urged the position adopted by Judge Rosenblatt. The difference between the two approaches, however, may be overstated. To ask whether a statute provides a clear criteria for enforcement (a central component of vagueness review) seems to call for a facial inquiry of sorts under either approach. Only future cases will tell whether the two approaches produce divergent results, which in *Stuart* they did not.

Search and Seizure

Fifth is *People v. Mundo*, 99 N.Y.2d 55 (2002), in which the Court considered the propriety of a limited protective search of a lawfully stopped vehicle. In *Mundo*, the officers had attempted to pull over a vehicle after observing it run a red light. Twice the vehicle came to a stop only to speed away as the officers approached it. During the third pursuit, the officers saw the defendant, a backseat passenger, turn and face them and "make a movement as if he were hiding something." After finally stopping the vehicle, the officers removed the occupants and patted them down. Fearful that the defendant may have secreted a weapon in the backseat, an officer searched it. He pulled down an armrest, observed an access panel leading to the trunk, recognized the strong odor of a compound used to "cut" cocaine, and followed the odor to the trunk, where he discovered almost a kilogram of cocaine.

The Court of Appeals upheld the search of the vehicle in an opinion by Judge Wesley from which Judge Ciparick and Chief Judge Kaye dissented. As both the majority and dissent recognized, *Mundo* was a sequella of the Court's 1989 decision in *People v. Torres*, 74 N.Y.2d 224 (1989). There, the Court had declined to follow the United States Supreme Court's decision in *Michigan v. Long*, which permits a protective search by a police officer whenever a vehicle has been lawfully stopped and its occupants removed and frisked. *Michigan v. Long*, 463 U.S. 1032 (1983). Relying on the New York State Constitution, the *Torres* Court required more to justify an entry into the vehicle: "facts . . . lead[ing] to the conclusion that a weapon located within the vehicle presents an actual and specific danger to the officer's safety."

As Judge Ciparick noted in her dissent, *Mundo* purports to follow *Torres* but undercuts it. Now, an occupant's furtive movements coupled with disregard for an officer's directions will justify a limited intrusion into the vehicle for the officer's safety. That may not be the automatic rule of *Michigan v. Long*, but it is a good distance from the standard enunciated in *Torres*.

Right to Counsel

Sixth is *People v. Grice*, 2003 WL 21468201 (June 26, 2003). There, the defendant was arrested for participating in a shooting and taken to the police station, where he was advised of his Miranda rights, waived those rights, and admitted his role in the crime. The admissions came at about 1:45 p.m., more than an hour after the defendant's father had arrived at the station and requested the interrogation cease because his son had an attorney. At 2:10 p.m., an attorney contacted the lead detective and identified himself as the defendant's lawyer, and questioning was stopped.

The issue for the Court was whether the defendant's indelible New York right to counsel attached at the time his father mentioned an attorney. In an opinion by Judge Graffeo, the Court opted for a "bright-line rule" that a "[d]irect communication by an attorney or a professional associate of the attorney" (or invocation by the defendant himself) is necessary to trigger the right to counsel and require questioning to cease. Any other rule would require "the police to cease a criminal investigation and begin a separate inquiry to verify whether the defendant is actually represented by counsel." Put differentially, *Grice* requires a lawyer's clear statement, and not what might be a father's wishful thinking, to establish counsel's entry into a case.

Larceny

In *People v. Thompson*, 99 N.Y.2d 38 (2002), the Court unanimously held that a "dummy" credit card—one which American Express had provided to the New York Police Department to be used in undercover sting operations—was a "credit card, for the purposes of the larceny law." (Under Penal Law section 155.00(7), a person commits grand larceny in the fourth degree, an E felony, if he steals property and the property is a credit card.) Thompson stole a pocketbook from an undercover officer in the cosmetics department of Macy's, and inside the pocketbook was the dummy card. At trial, a representative of American Express testified that the name on the card was fictitious, but that someone purporting to be that person could have charged up to $100 on it and left American Express liable for the bill.

Writing for the Court, Judge Levine concluded that the dummy card satisfied the "liberal terms" of the statute which defined "credit card": it was issued by a person (American Express) to another (the New York Police Department) and was capable of "be[ing] used . . . to purchase . . . property or services" on the credit of the issuer. *See* General Business Law section 511(1).

Grand Jury Subpoenas and the Doctor-Patient Privilege

In *In re Grand Jury Investigation in New York County*, 98 N.Y.2d 525 (2002), the Court quashed a grand jury subpoena issued to 23 hospitals seeking the names and other identifying information of persons "who sought treatment [during a two-day period in 1998] for a laceration . . . possibly caused by a cutting instrument . . . said injury being plainly observable to a lay person." The subpoena was designed to ferret out the identity of the person who had stabbed a man to death and who may himself have been wounded in the incident. Although the subpoena disclaimed any interest in information acquired "to enable [a] doctor and/or nurse to act in [his or her] professional capacity," the Court concluded that it trenched on the physician-patient privilege. The disclosure of identifying information "would discourage critical emergency care . . . and undermine patients' reasonable expectations of privacy."

DNA

In *Kellogg v. Travis*, 2003 WL 21497508 (July 1, 2003), the Court ruled that the 1999 amendment to the DNA identification law, which expanded the crimes for which a convicted felon must submit a DNA sample for inclusion in the state database, could be applied to persons convicted before the effective date of the amendment. Because "the DNA index is to be used in *future* investigations, not as punishment for past crimes," the retroactive application of the amendment did not violate the *Ex Post Facto* Clause.

Ineffective Assistance of Counsel

In *People v. Berroa*, 99 N.Y.2d 134 (2002), the Court found that a defense counsel rendered ineffective assistance when he stipulated that, if called to testify, he would contradict the testimony of two critical defense witnesses as to what they had told him in pre-trial interviews. By pitting his credibility against theirs, counsel had prejudiced his client's cause.

Previous Identification

In *People v. Gee*, 99 N.Y.2d 158 (2003), the Court concluded that a robbery victim's viewing of a surveillance tape of the crime was not a previous identification of the defendant and therefore did not trigger the notice requirement of Criminal Procedure Law section 710.30.

Identification Procedures

In *People v. Brisco*, 99 N.Y.2d 596 (2003), over a forceful dissent by Judge Smith, the Court determined that a showup conducted 55 minutes after a burglary at which the defendant was surrounded by three uniformed officers and required to hold at his hip maroon shorts like those the perpetrator had supposedly worn was neither untimely nor unduly suggestive.

Juror Misconduct

For human interest, the term's most memorable decision was *People v. Rodriguez*, 100 N.Y.2d 30 (2003). There, during voir dire in a Manhattan trial, a juror had intentionally concealed that he knew an Assistant District Attorney ("ADA") in the Manhattan office. After the defendant was found guilty, the juror called the ADA to report the verdict and mentioned his concealment of their relationship. The ADA immediately alerted the prosecutor in the case, who disclosed the conversation to the court. A post-trial hearing ensued at which the trial court found that the undisclosed relationship had not influenced the jury's deliberations, and the Court of Appeals upheld that determination.

Endnotes

1. The synopsis of the enclosed cases is taken from excerpts of Mr. Shechtman's article in the *New York Law Journal* of Sept. 2, 2003, on p. S5 of the Court of Appeals supplement.

Mr. Shechtman is a partner at Stillman & Friedman and an adjunct professor in criminal procedure and evidence at Columbia Law School.

Legislature Finally Increases Assigned Counsel Rates

By Barry Kamins

With regard to criminal defense attorneys, the legislature raised assigned counsel rates for the first time in seventeen years. This measure was one of a number of new laws enacted when the legislature overrode Governor Pataki's veto of the budget in May. As of January 1, 2004, attorneys handling felony cases will be paid $75 per hour for both in-court and out-of-court work. Attorneys handling misdemeanor matters will be paid $60 per hour for in-court and out-of-court work. The statutory cap has been raised to $4,400 in felony cases while the misdemeanor and violation ceiling has been raised to $2,400. Courts will still have the authority to award greater compensation in extraordinary circumstances. Courts will also now be authorized to compensate attorneys who represent defendants challenging the effectiveness of appellate counsel. In addition, experts and investigators can now be paid fees up to $1,000 per retainer. Finally, a seven-member task force was created to report by January 15, 2006 on the sufficiency of the new rates. The increase in assigned counsel rates is largely being funded from an increase in attorney registration fees and raises in a variety of court fees. For further details on these fee increases, see my article on 2003 legislation which follows.

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Review of Recently Enacted Legislation

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.

These changes involve the following areas of the criminal law:

Sexual Assault Reform Act of 2000

The legislature enacted several changes in the Penal Law provisions relating to sexual assault. The legislation contains substantive changes and drafting corrections of the Sexual Assault Reform Act of 2000 (SARA). One of the revisions is the elimination of certain nomenclature in Article 130 of the Penal Law that has offended sexual assault victims and gay groups for many years. The terms "sodomy" and "deviate sexual intercourse" will no longer depict crimes of a sexual nature in New York. "Sodomy" will be replaced by "criminal sexual act" and "deviate sexual intercourse" will be replaced by "oral sexual conduct." The use of the new terms does not affect the criminal penalties for these acts but it responds to advocates who have argued for years that the terms are archaic and imprecise. For example, it has been argued that while the term "sodomy" is often associated with anal sex, most sodomy charges in New York involve oral sexual assaults by men against women.

A second revision in SARA changes the definition of Persistent Sexual Abuse.[1] Under the definition adopted in the original version in 2000, a person could have been convicted of Persistent Sexual Abuse when "he or she stands convicted" of sexual abuse and has two prior convictions for sexual abuse within the past ten years." This would seem to require a finding of guilt of the present crime of sexual abuse before one could be charged with Persistent Sexual Abuse. The new definition corrects this drafting error. In addition, the predicate prior convictions for Persistent Sexual Abuse can now include any felony offense under Article 130 as well as Forcible Touching as an A misdemeanor. Pursuant to another revision of SARA, it will be easier for prosecutors to obtain a conviction for Forcible Touching because they will now be able to use *circumstantial* evidence of lack of consent.[2] Previously, such evidence could only be used to infer guilt when a defendant was accused of Sexual Abuse.

In revising SARA, the legislature also enacted several measures that will benefit defendants who are under the age of 18. When SARA was enacted, a court could not order bail or ROR when a defendant was convicted of a class B or C felony sex offense committed against a victim who was less than 18 years old. That provision has been revised to give a court the discretion to grant bail or ROR when a defendant was less than 18 years of age at the time the crime was committed.[3] In addition, when a defendant has a prior conviction for sexual assault against a child but was under the age of 18 at the time of the commission of the crime, upon a second conviction for the same crime, courts will now also have the discretion not to sentence the defendant as a "second child sexual assault offender."[4] The court may choose instead, to sentence the defendant as either a second felony offender or a second violent felony offender.

Another revision to SARA reinstates the defense of marriage for certain crimes. Under the original law, the marriage exemption was eliminated for all sex offenses including those based on the age or mental capacity of the victim. The legislature has restored marriage as a defense in those cases where the victim's lack of consent is based solely on his or her capacity to consent because he or she was less than 17 years old.[5] Thus, this defense will apply to a defendant who is 14, 15 or 16 and who is legally married.

When SARA was first enacted in 2000, it created the class D felony of Facilitating a Sex Offense with a Controlled Substance. The law has been amended to add to the list of substances covered by the statute, a dangerous "date rape" drug known as Gamma Hydroxybutryic acid (GHB).[6]

Finally, two sentencing features of SARA have been revised. In each of these changes, the legislature has eliminated the crime of Persistent Sexual Abuse (Penal Law § 130.53) as a predicate conviction for enhanced sentencing purposes. First, it cannot be used as a predicate conviction in determining that a defendant is a second child sexual assault offender.[7] In addition, it cannot serve as a predicate conviction within the meaning of the discretionary persistent felony offender law.[8]

Juvenile Offenders

The legislature also increased the *minimum* portion of sentences imposed upon juveniles who are convicted of certain types of murder.

Under the old law, juveniles (13 to 15 years of age) who were convicted of murder could be sentenced to life imprisonment with a minimum of 5 to 9 years.

Under the new law, juveniles who are convicted of intentional or depraved indifference murder must be sentenced to a minimum of 7.5 years to 15 years.[9] For juveniles convicted of felony murder, the minimum remains 5 to 9 years.

New Voyeurism Statute

As a result of the public outcry over numerous privacy violations involving secret videotaping the legislature created two new felony offenses: Unlawful Surveillance and Dissemination of an Unlawful Image.[10] Unlawful Surveillance in the Second Degree (a class E felony) is committed when a person surreptitiously views, broadcasts or records another person's undressing or the intimate parts of such other person for the purpose of sexual arousal or gratification. In addition, the crime can be committed by someone who places any recording device in a motel, hotel, or inn without another person's knowledge or consent. The crime is elevated to the first degree (a class D felony) if an individual has a prior conviction for the same offense within the prior ten years. The crime does not apply to law enforcement personnel engaged in surveillance nor does it apply to any video surveillance system that conspicuously notifies individuals of its presence.

Although New York has taken a big step forward in protecting individuals by enacting this legislation, some have criticized the law as too narrow.[11] It is argued that the law only protects privacy in private premises and that individuals also need protection from these devices in public places. For example, the law does not punish certain forms of voyeurism conducted in public such as "up-skirt voyeurism." This conduct is engaged in by individuals who slip a bag with a camera under a woman's skirt in a public shopping area. The individual then sells the images to pornography Web sites. Thus, it is argued that individuals need to have their privacy protected on public property as well as in private dwellings.

Procedural Changes and Fee Increases

The legislation has enacted several significant procedural changes that will result in the creation of new fees as well as an increase of existing fees and surcharges that will be required in all criminal cases. A number of these fees will provide a source of revenue for the increase in assigned counsel compensation.[12] As of May 15, 2003, a court must impose a new $50 fee for anyone convicted of a sex offender registration offense.[13] In addition, a person convicted of a designated offense under the Executive Law must now pay a new $50 fee for the DNA databank registration.[14] As of September 12, 2003, before a court vacates a suspension of an individual's driver's license, the individual must now pay a $35 fee.[15] As of November 11, 2003, when a defendant is convicted of any offense under section 1192 of the Vehicle and Traffic Law, there is a new $25 surcharge in addition to any fines provided by law.[16]

In addition to the new fines outlined above, the legislature has increased existing fines. The mandatory surcharge and criminal victim assistance fee will be increased for all felonies, misdemeanors and violations under the Penal Law, as well as alcohol-related offenses under section 1192 of the Vehicle and Traffic Law. Fines and penalties have also been increased for numerous other violations of the Vehicle and Traffic Law as well as the Environmental Conservation Law.[17]

Correction Law Amendments—Earlier Release of Prisoners

The past legislative session produced two amendments that will greatly benefit prisoners: the legislation affects both release dates and the method of release. First, the legislation amended the Correction Law to permit any person serving an A-1 felony drug sentence to earn a *merit time* allowance.[18] Under prior law, A-1 drug prisoners were ineligible for a merit time allowance. Under the new law, prisoners in this category will now be eligible for a 1/3 reduction in the minimum portion of their sentence. Thus a prisoner serving a 15-year-to-life sentence could be eligible for parole after 10 years. It should be noted that a merit time allowance for prisoners convicted of crimes other than A-1 drug offenses only provides a 1/6 reduction of their minimum sentences. Under the new law, merit time can be denied to any A-1 drug prisoner who is guilty of any serious disciplinary infraction or who has accumulated a number of minor disciplinary infractions. Merit time can also be withheld from an inmate who has filed a civil lawsuit that is deemed to be frivolous by the court in which it is filed.

A second amendment to the Correction Law creates a new form of release for all prisoners, i.e., *presumptive release*.[19] Under this new provision, inmates serving indeterminate sentences for non-violent felonies, who have a minimum term of eight years or less may be paroled *without* the prior approval of the Parole Board. Prisoners are eligible for presumptive release if they obtain a certificate of earned eligibility and reach their parole eligibility or merit eligibility date. A prisoner earns a certificate of earned eligibility by participating in treatment programs and assigned work programs. Presumptive release is not automatic and the Commissioner of the Department of Corrections can deny such release. In that event, the prisoner is still eligible to appear before the Parole Board for the normal discretionary parole release determination. A prisoner is not eligible for presumptive release if he is guilty of any

serious disciplinary infraction or if he has filed a civil lawsuit that is deemed to be frivolous by the court in which it is filed.

Increase in Penalties

Certain crimes have had their penalties elevated under legislation signed by the Governor. First, Criminal Contempt in the Second Degree (Penal Law § 215.50), a class A misdemeanor, will now be elevated to Criminal Contempt in the First Degree (Penal Law § 215.51) when the defendant has a prior conviction for first-degree contempt within the preceding five years.[20] Under current law, the only predicate for the enhanced penalty of first-degree contempt is the commission of second-degree (misdemeanor) contempt. The amendment would correct the anomaly by allowing the first-degree (felony) contempt to also serve as a predicate for an enhanced penalty when the defendant subsequently commits another act of criminal contempt involving an order of protection. The Governor has also signed a new law that elevates Criminal Mischief in the Fourth Degree (a class A misdemeanor) to Criminal Mischief in the Third Degree (a class E felony) when a person damages a car and has three prior convictions for criminal mischief in any degree within the prior ten years.[21]

In the area of alcohol-related offenses, the legislature significantly changed the intoxicated driving statute. Pursuant to Chapter 3 of the 2002 Session Laws, the legislature lowered the predicate blood alcohol level for DWI from .10 to .08%. The original effective date of the change was November 1, 2003. The legislature later changed the effective date to July 1, 2003.[22] In addition, the legislature has amended the statute with respect to blood alcohol readings for impaired driving prosecutions. As of July 1, 2003, a blood alcohol content between .07% and .08% is *prima facie* evidence that the driver was impaired.[23] A blood alcohol content of .05% but less than .07% is *relevant evidence* that the driver was impaired. As of September 30, 2003, any person who is convicted of DWI and has a prior DWI conviction within the preceding five years must receive a jail sentence of 5 days or, in the alternative, a 30-day community service sentence.[24] A person who has *two* prior DWI convictions within the preceding five years must receive a jail sentence of 10 days or, in the alternative, a 60-day community service sentence. Finally, to conform to the reduced threshold for intoxicated driving, a new law also reduces the threshold for boating while intoxicated.[25] To conform to the recently reduced threshold blood alcohol content for intoxicated driving (.08%), one legislative measure would also reduce the threshold for snowmobiling while intoxicated.[26] In addition, another new bill would significantly strengthen the laws pertaining to boating accidents and the responsibilities of boaters to report accidents.[27] The law amends the reporting provisions of the Navigation Law and brings them in line with the reporting provisions of the Vehicle and Traffic Law. As a result, boating accidents must be reported as soon as possible and a boater faces a class E felony if he or she leaves the scene of a serious boating accident.

Sex Offender Registration Act (SORA)

Other new laws will impact on the SORA. Under one new law, a class 3 level offender must report his or her place of employment to the Division of Criminal Justice Services.[28] A second new law creates a new class A misdemeanor that makes it a crime to falsely accuse someone of being a sex offender.[29] Finally, a new law requires the police to issue a photograph and description of a level 2 or 3 sex offender when the police are required to notify a community about the offender.[30]

Extension of "Sunset Provisions"

In each session of the legislature, certain laws which are scheduled to expire under "sunset provisions" are extended for further periods. This session was no exception. The following laws were extended for the periods indicated: the law permitting closed-circuit testimony of certain child witnesses (until 9/1/05)[31]; the Family Protection and Domestic Violence Intervention Act of 1994 (until 9/1/05)[32]; the law suspending a driver's license for six months following a conviction for a misdemeanor or felony drug crime (until 10/1/05)[33]; the SHOCK incarceration program (until 9/1/05)[34]; the law that regulates the sale and possession of hypodermic needles (until 9/1/07)[35]; the ignition interlock program (until 9/1/05)[36]; conditional release from a definite sentence (until 9/1/05)[37]; earned eligibility programs in state prison[38]; and temporary release programs in state prison (until 9/1/05).[39]

Legislation Passed But Awaiting Governor's Signature

A number of new laws awaiting the Governor's signature involve changes in the Penal Law. As usual, the legislature enacted a number of new crimes. First, a new class A misdemeanor, Obstructing Emergency Medical Services would make it unlawful to intentionally obstruct any personnel who are providing emergency medical services.[40] Second, in response to a fatal rock concert fire in Rhode Island in February 2003, the legislature enacted four new offenses that relate to indoor pyrotechnic displays. The offenses range from a class A misdemeanor to a class E felony and would make it unlawful to ignite pyrotechnic displays without a permit or recklessly cause physical injury or serious physical injury by the use of indoor pyrotechnics, for which no permit had been issued.[41]

Other legislation relating to the Penal Law would expand the definition of existing crimes. Under one change, the definition of Assault in the Second Degree, with respect to assaults on employees would be expanded to include a "station agent."[42] In addition, Stalking in the Second Degree (a class E felony) would be expanded to include a situation in which an individual commits third-degree stalking but does so against ten or more people in ten or more separate transactions.[43] This amendment is in response to an incident on Long Island in which a man telephoned 72 women in Nassau County and threatened to rape their female relatives unless the women receiving the call engaged in certain sexual behavior and described the acts to the caller.

Another new law would apply to defendants who are found not responsible by reason of mental disease or defect and who are then released after treatment in the mental health system. The new law would restrict their contact with the victims of their acts; the court would have the authority to issue an order of protection.[44] Another new measure would permit criminal courts to accept credit cards and other similar devices as payment for fines and surcharges for *any* offense.[45] Under current law credit cards can only be used to pay a traffic infraction.

Practitioners and prosecutors should ascertain whether a specific bill has been signed by the Governor before citing it as the law.

Endnotes

1. Penal Law § 130.53; ch. 264, effective Nov. 1, 2003.
2. Penal Law § 130.05(2); ch. 264, effective Nov. 1, 2003. *See People v. Parbhu*, 191 Misc. 2d 473 (N.Y. Crim. Ct., 2002).
3. Criminal Procedure Law §§ 530.40, 530.45; ch. 264, effective Nov. 1, 2003.
4. Penal Law § 70.07; ch. 264, effective Nov. 1, 2003.
5. Penal Law § 130.10(4); ch. 264, effective Nov. 1, 2003.
6. Penal Law §§ 130.90, 220.06, 220.09; ch. 264, effective Nov. 1, 2003.
7. Penal Law § 70.07; ch. 264, effective Nov. 1, 2003.
8. Penal Law § 70.10(1)(b)(iv); ch. 264, effective Nov. 1, 2003.
9. Penal Law § 70.05(a); ch. 174, effective Nov. 1, 2003.
10. Penal Law § 250.45, 250.50; chs. 69, 157, effective Aug. 11, 2003.
11. See "Keeping Tom From Peeping," Valetk, N.Y.L.J. 8/5/03.
12. A portion of the funds will be derived from an increase in mandatory surcharges for parking violations; a $35 fee for the lifting of a driver's license suspension; a portion of the $52 fee to be charged by OCA for criminal history searches; and a $50 increase in the biennial attorney registration fee.
13. Penal Law § 60.35; ch. 62, effective May 15, 2003.
14. Penal Law § 60.35; ch. 62, effective May 15, 2003.
15. Vehicle and Traffic Law § 503(2)(j); ch. 62, sect. (J)(8), effective Sept. 12, 2003.
16. Vehicle and Traffic Law § 1809-C; ch. 62, sect. (J)(37), effective Nov. 11, 2003.
17. See Part C, ch. 62, effective May 15, 2003.
18. Correction Law § 803(1)(d); ch. 62, effective April 2003.
19. Correction Law § 806; ch. 62, effective April 2003.
20. Penal Law § 215.51; ch. 331, effective Nov. 1, 2003.
21. Penal Law § 145.05; ch. 276, effective Nov. 1, 2003.
22. Vehicle and Traffic Law § 1192; ch. 62, effective Nov. 1, 2003.
23. Vehicle and Traffic Law § 1195(2); ch. 153, effective July 1, 2003.
24. Vehicle and Traffic Law §§ 1193(1-a), 1193(1-b); ch. 691 (2002), effective Sept. 30, 2003.
25. Navigation Law § 49-a(2)(b); ch. 458, effective Nov. 1, 2003.
26. Parks, Recreation and Historic Preservation Law § 25.24; S.4991, effective Nov. 1, 2003, upon the signature of the Governor.
27. Navigation Law § 47; A.7050, effective Nov. 1, 2003, upon the signature of the Governor.
28. Correction Law § 168-b(1)(e); ch. 10, effective July 5, 2003.
29. Correction Law § 168-v; ch. 200, effective Nov. 1, 2003.
30. Correction Law § 168-1; ch. 316, effective Nov. 1, 2003.
31. Criminal Procedure Law Article 65; ch. 388.
32. Criminal Procedure Law § 140.10(4); ch. 303.
33. Vehicle and Traffic Law § 510(2)(b)(v).
34. Correction Law § 805; ch. 16.
35. Public Health Law § 3381; ch. 16.
36. Vehicle and Traffic Law § 1809; ch. 16.
37. Correction Law Article 22-A; ch. 16.
38. Correction Law § 805; ch. 16.
39. Correction Law Article 26; ch. 16.
40. Penal Law § 195.16; S.1235, effective Nov. 1, 2003, upon the Governor's signature.
41. Penal Law §§ 405.10, 405.12, 405.14, 405.18; A.6893, effective Nov. 1, 2003, upon the Governor's signature.
42. Penal Law § 120.55(5); S.3479, effective Nov. 1, 2003, upon the Governor's signature.
43. Penal Law § 120.55(5); S.519, effective Nov. 1, 2003, upon the Governor's signature.
44. Criminal Procedure Law § 330.20(1)(o); S.2970, effective immediately upon the Governor's signature.
45. Criminal Procedure Law § 420.05; S.5414, effective immediately upon the Governor's signature.

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Saturday, November 8, 2003

CLE program as part of meeting approved for 4.5 credit hours
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9:00 a.m.–11:30 a.m.	Court of Appeals Update September 17, 2002 to July 2, 2003	
	Speaker:	Edward J. Nowak, Esq. Monroe County Public Defender
11:30 a.m.–1:00 p.m.	"The Court of Appeals: Where It Has Been, Where It Is Now, and Where It Is Going"	
	Moderator:	Roger B. Adler, Esq.
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1:30 p.m.–3:00 p.m.	Seminar Luncheon	
	Speaker:	Honorable Richard C. Wesley U.S. Circuit Court of Appeals, Second Circuit Former Judge of the New York Court of Appeals

For further information and reservations contact:

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

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