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New York Criminal Law Newsletter

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NYSBA

Message from the Chair

"When More Is Less"

It is sometimes observed that the "devil is in the details." In that vein, there are times when significant court decisions, which initially appear to provide powerful constitutional protection in subsequent court practice, actually work to undermine, and significantly diminish, former accepted protections. I primarily have in mind the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 1364 (2004).

In *Crawford*, the U.S. Supreme Court, in an opinion by Justice Scalia held that the Sixth Amendment right of confrontation was violated when testimonial evidence was elicited at Crawford's trial on charges of felonious assault and attempted murder. The Court overturned the conviction but left open defining what constituted "testimonial evidence," requiring a "face-to-face" confrontational opportunity.

Those with active federal court practices quickly observed, and were pleased, that the admission of co-defendant plea allocutions were barred from admission on the government's direct case. However, the admission of a variety of statements and information, which had traditionally been viewed as "testimonial" by active trial lawyers, now began to be proffered as "non-testimonial" in nature and held admissible in evidence (*see, e.g.*, *United States v. Saget*, 377 F.3d 223, 226–231 (2d Cir. 2004).

The New York Court of Appeals, by contrast, has recently articulated a more limited and nuanced view of testimonial statements in *People v. Pacer*, __ N.Y.3d __(2005), holding that an affidavit prepared by a Department of Motor Vehicles (DMV) employee relating to the Department's notification of license suspension revocation was a "testimonial" statement within the scope of the confrontation clause, its admission into evidence constituting evidentiary error.

It appears, at least to this writer, that as the evidentiary voyage continues, the judicial temptation to declare "non-testimonial" evidence which trial attorneys certainly, and not illogically, view as a component part of the prosecution's case, is continuous.

The sought admission into evidence of complaints by reported victims of domestic violence, excited utterances, and present sense expression ("911" calls), provide tempting areas for evidentiary gatekeepers to green light the out-of-court statements. Testimonial need frequently prompts judicial sympathy, lest a defendant elude conviction due to an evidentiary deficiency.

Perhaps a prime response is a revived interest in the hearsay rule (Federal Rules of Evidence, Rule 801, 802). Clearly, the preferences that fact finders observe and searchingly evaluate the credibility and motives of the actual declarant, are significantly undermined when so-called "non-testimonial" utterances gain admission into evidence and become component portions of the calculus of conviction through non-declarant witnesses.

Simply put, it now appears that for many of us "*Crawford*" seemingly promised more than it delivered, or too many read too much into a court decision which has been "testimonially hijacked" down a path which places a premium upon testimonial categorization, and less attention to the palpable loss of confrontation. The question is have the courts' quest for the saving of the confrontation clause, in actuality, contributed toward its trivialization and destruction? Thus, has the promise of more for the defense become less?

Roger B. Adler

Editor's Note—As our Section Chair Roger Adler was offering these interesting comments on the *Crawford* decision, the United States Supreme Court was deciding two important cases on the admissibility of 911 calls following *Crawford*. The impact of *Crawford* on the admissibility of 911 calls and the new Supreme Court decisions on the issue are the subject of our second feature article, which dovetails nicely with some of the concerns raised by Roger.

Message from the Editor

During the last several months, both the United States Supreme Court and the New York Court of Appeals continued to deal with the effects of the Supreme Court's 2004 decision in *Crawford v. Washington* (541 U.S. 36) regarding a defendant's right of confrontation. The Supreme Court in late March heard two cases—to wit *Davis v. Washington* and *Hammon v. Indiana*—involving the use of 911 calls, and the New York Court of Appeals recently reversed a conviction in *People v. Pacer* where a Department of Motor Vehicles employee was permitted to submit an affidavit as a business record exception rather than a testimonial statement. The effects of the *Crawford* decision are commented upon in Roger Adler's message, and a detailed feature article is also included summarizing the latest developments on this important issue.

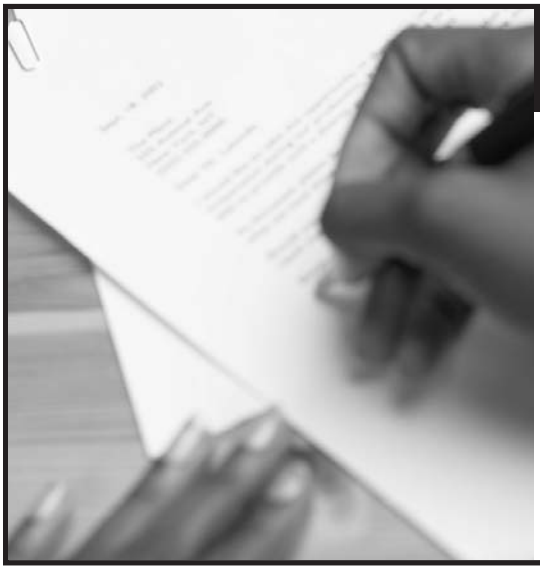
The Supreme Court also issued an important decision in *Georgia v. Randolph* (limiting police searches) in a 5–3 decision where Chief Justice Roberts issued a vigorous dissent. The New York Court of Appeals also had a busy season issuing several important criminal law decisions. These matters are discussed in detail within the United States Supreme Court section and the New York Court of Appeals Review.

Another one of our feature articles also deals with the interesting situation of how federal civil discovery by the government can sometimes be used to set up a federal prosecution. Our "For Your Information" section also continues to provide interesting statistical information on population changes within the United States, which in the future will affect law practices, and the decline in juvenile crime during the last few years. The latest information on the passage of the Patriot Act and the effect of the *Booker* and *FanFan* decisions on the Federal sentences imposed during the last year is also examined.

In our "Section and Members" column we report on upcoming activities and also discuss the role of our section Vice President Jean T. Walsh with regard to the Bar Association Task Force on Attorney-Client Privilege, which studied the policy currently utilized by the Federal District Courts where corporate criminal defendants are encouraged to waive attorney-client and work-product privileges in order to obtain more lenient sentences.

This issue is our twelfth issue, comprising a full three years of publication. We thank our members and readers for their comments and support and we look forward to even bigger and better issues in the future.

Spiros A. Tsimbinos



REQUEST FOR ARTICLES

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

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

Federal Civil Discovery by the Government in Forfeiture Proceedings; Sometimes a Set Up for a Federal Prosecution

By Thomas F. Liotti and Joan Alexander

Unsuspecting civil law practitioners who receive notices from the Government to take oral depositions of non-parties in civil forfeiture proceedings should check their legal malpractice insurance policies to make sure that they are paid in full.[1] A Government searching for ill-gotten gains may attempt to use non-party depositions to threaten criminal defendants and their families with criminal prosecution.[2] Rule 26 of the Federal Rules of Civil Procedure presents the broadest format for a deposition. Civil practitioners need to realize that if their client is not truthful, or lies under oath, that an innocuous appearance for a simple examination before trial may quickly turn into criminal charges against the client for perjury, obstruction of justice or the making of a false statement.

The perjury statute, 18 U.S.C. § 1621, contains five (5) elements of proof. A key element is that any alleged false statement must be material. Courts have generally held that materiality is demonstrated if the question posed is such that a truthful answer would help the inquiry or a false response hinder it, and these effects are weighted in terms of potentiality rather than probability.[3]

The notice to take the deposition and any demand or subpoenas calling for the production of documents must be carefully examined for potential motions for protective relief. A fishing expedition by the Government may be cut short even before the examination. Counsel should consider whether any privileges apply such as spousal or attorney-client. If so, then they must be asserted particularly if it is the attorney's testimony which is sought.

Rule 226 (b)(1) provides that: (i) the discovery sought should not be unreasonably cumulative or duplicative, or obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) that the Government has not already had an opportunity to obtain discovery; and (iii) that the discovery is not unduly burdensome or expensive. Motions to preclude, to quash or for other protective relief must consider each of these categories. The practitioner's job is to limit or even avoid the examination of the client.

Perhaps the single most important problem for the practitioner to consider is whether the client is the target of an investigation. What documents does the client have? The scope of the examination must be clearly defined. Practitioners must negotiate the subject matters' understanding that their objections at the time of the depositions may be limited to the form of the questions posed.[4] If a notice is overbroad, then it must be addressed with a judge and curtailed.

But by far the most dangerous testimony for the practitioner to surmount are questions relating to immunity. First on the list of questions is does the client need immunity and what are the consequences to the client, if requested? Second, does the request for immunity compromise the client's legal position as a witness or as a potential civil or criminal defendant? Third, notwithstanding those negatives, should immunity still be sought? In this regard, lessons on immunity are in order while recognizing that the granting of immunity must be co-extensive with the Fifth Amendment privilege against self-incrimination.[5] If the client's testimony is compelled, then he or she is entitled to immunity.[6]

In a forfeiture proceeding following a plea or conviction, the Government may not pursue testimony of non-parties in order to locate assets or if their investigation has revealed that assets are lost, missing or were improperly used. If that be the case, then counsel for the non-parties should do several things to protect their clients. They should ask the Government for a letter giving the witness immunity and assurance that they are not a target. The immunity must include "use" and "derivative use." Ideally, clients would like to be in position where they have the option of receiving immunity without requesting it or asserting the Fifth Amendment and then receiving it. In the final analysis, if the client must ultimately defend against a prosecution or a civil action, they may put themselves into a bad light if they have sought or received immunity. Thus, while immunity sounds like a bullet-proof protection for the client, it is not.

The granting of immunity by the Government in a civil case or during a civil deposition is identical to what the Government offers to "cooperating witnesses." If a client is compelled to testify, then they are entitled to immunity.[7]

The witness may request transactional immunity but the Government is not required to give it.[8] Once immunity is given, the witness must answer all ques-

tions put to him or her. If they do not answer questions after being given immunity, then they may be subject to penalties for contempt. Derivative use immunity requires that evidence that the Government may propose to use in any subsequent criminal proceeding must be derived from a wholly independent source, untainted by immunized testimony.[9]

Conclusion

A subpoena to take a deposition in a forfeiture case may be a "booby trap" for the unwary. All attorneys who enter this dangerous mine field, must do so with considerable caution.

Endnotes

1. *See* Stephen R. LaCheen, Esq., *Depositions Are For Discovery*, Verdict (April 2002) at 33.
2. Thomas F. Liotti and Christopher Zeh, *Uneven Playing Field: Ethical Disparities Between the Prosecution and Defense Functions in Criminal Cases*, Touro Law Review, Vol. 17, No. 2, Winter 2001 at pp. 467–501.
3. *See U.S. v. Berardi*, 629 F.2d 723, 728 (2nd Cir.), *denied*, 449 U.S. 995 (1980) and *U.S. v. Ostertag*, 671 F.2d 262 (8th Cir. 1982).
4. Thomas F. Liotti, "The Art of Objecting, Practice Tip I," *The Mouthpiece* (a publication of the New York State Association of Criminal Defense Lawyers) Vol. II, No. 1, January/February 1998 at 17 and 18. Thomas F. Liotti., "Helpful Practice Hints—The Art of Objecting," *New York State Bar Journal*, July/August 1998, Vol. 70, No. 5.
5. *See Kastigar v. U.S.*, 92 S. Ct. 1653, 406 U.S. 441, 32 L.Ed.2d 212, *rehearing denied*, 92 Sup. Ct. 2478, 408 U.S. 931, 336 L.Ed.2d 345. *See also* 18 U.S.C. §§ 6002 and 6003.
6. *See Gardner v. Broderick*, 88 S. Ct. 1913, 392 U.S. 273, 20 L.Ed.2d 1082 (1968).
7. *See Gardner, supra* note 6.
8. *U.S. v. Brimberry*, 744 F. 2d 580 (1984).
9. *S.E.C. v. Willis*, 142 F.R.D. 100 (1992).

Thomas F. Liotti is an attorney in Garden City and a Village Justice in Westbury, Long Island, New York. He is co-author of a *Practice Guide: Village, Town and District Courts* (WestGroup 1995–present) and *DNA: Forensic and Legal Applications* (John Wiley and Sons 2004).

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The Impact of the *Crawford* Decision on the Admissibility of 911 Calls—Part I

By Spiros A. Tsimbinos

On March 8, 2004, the United States Supreme Court in *Crawford v. Washington* (541 U.S. 36, 124 S. Ct 1354) announced a significant new holding regarding a defendant's constitutional right to confrontation, which has had a dramatic impact on our criminal justice system. In the landmark 7–2 decision, the court ruled that an out-of-court testimonial statement of a witness is per se inadmissible unless a witness is unavailable and the defendant has had a prior opportunity to cross-examine him. The Supreme Court's decision effectively overruled its prior holding in *Ohio v. Roberts* (448 U.S. 56 (1980)) and immediately sent shock waves through the offices of prosecutors around the nation.

In rendering its determination in an opinion which was written by Justice Scalia, the Court emphasized that the Sixth Amendment confrontation clause is a "bedrock procedural guarantee which applied to both State and Federal prosecutions." After outlining a detailed historical analysis, Justice Scalia in his opinion stated at 124 S. Ct. 1363 and 1364:

> First the principal evil at which the confrontation clause was directed was the civil-law mode of criminal procedure and particularly its use of ex parte examinations as evidence against the accused.
>
> * * *
>
> The text of the confrontation clause reflects that it applies to witnesses against the accused—in other words those who bear testimony. The testimony in turn is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact.

Although the *Crawford* decision itself specified certain types of out-of-court statements which were testimonial and therefore inadmissible (such as plea allocutions), it failed to clarify and fully define the category of "testimonial" statements which were subject to its holding. Thus the majority opinion stated at 124 S. Ct. on page 1365 in footnote 4:

> We use the term interrogation in its colloquial rather than any technical legal sense. Just as various definitions of testimonial exist one can imagine various definitions of interrogation and we need not select among them in this case.

The court further observed on page 1374 "we leave for another day any effort to spell out a comprehensive definition of testimonial." The majority opinion in a footnote specifically responded to the concerns expressed by then-Chief Justice Rehnquist and Justice O'Connor, who issued their own separate opinions dissenting from the Court's overruling of *Ohio v. Roberts* and its adoption of the new per se exclusionary rule. Chief Justice Rehnquist in his opinion specifically stated at page 1374 that the majority decision cast a mantel of uncertainty over future criminal trials in both federal and state courts. In addition, at page 1378 he in fact vigorously chastised the majority and stated:

> The Court grandly declares that we leave for another day any effort to spell out a comprehensive definition of "testimonial," *Ante*, at 1374. But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of testimony the Court lists, *see ibid*, is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

Justice Scalia, in acknowledging the Chief Justice's objection at page 1378 and his concern regarding the uncertainty that the majority decision would create, nonetheless concluded in footnote 10 "but it can hardly be any worse than the status quo."

Thus during the last two years a cloud of uncertainty has loomed over certain classes of statements which have strongly been relied upon by prosecutors and which prior to *Crawford* had been routinely admitted under certain recognized hearsay exceptions such as "excited utterances."

One of the major hearsay exceptions long utilized by prosecutors—especially in the domestic violence area—has been the use of 911 calls wherein the complainant has called an emergency police telephone number to initially report the incident. Upon failing or refusing to appear in court to testify, prosecutors have regularly utilized the 911 call to proceed with the case. Following *Crawford* the issue arose as to whether that decision effectively barred the use of such 911 calls and the police officer's testimony as to what information was relayed to him or her by the complainant.

It is clear from the *Crawford* decision that statements taken by police officers are testimonial even as the Court stated "under a narrow standard." The Court further

observed that even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object and interrogation by law enforcement officers falls squarely within that class.

In interpreting and applying *Crawford*, New York trial courts during the two years have resorted to a procedure of examining the contents of the 911 calls to see whether they were spontaneously made and not the product of structured police questioning or interrogation. If spontaneous and in the nature of an excited utterance, New York courts have routinely continued to hold that the statements in question were not "testimonial" and therefore outside of *Crawford*. If substantial interrogation was present, then the *Crawford* principles were found applicable and the testimony was excludible.

Several recent Appellate decisions have reviewed the current state of the law in New York following the *Crawford* rule. Thus, in *People v. Bradley* (22 A.D.3d 33 (1st Dep't 2005)), the Court noted at page 40:

> Finally, defendant notes that the courts of this state have drawn differing conclusions as to the application of *Crawford* to 911 calls. However, whether a call initiated by or on behalf of a victim in immediate danger (see *People v. Moscat*, 3 Misc. 3d 739, 777 N.Y.S.2d 875 [2004]; *People v. Conyers*, 4 Misc. 3d 346, 777 N.Y.S.2d 274 [2004]) should be distinguished from a call placed by an unendangered witness who reported seeing a man firing a gun (see *People v. Cortes*, 4 Misc. 3d 575, 781 N.Y.S.2d 401 [2004]) is not an issue before this Court. For the purpose of this appeal, it suffices to say that the answer by a victim of a crime asked "What happened?" by a police officer responding to the scene does not take place in the context of structured interrogation and, thus, does not implicate the proscription against the use of a testimonial statement at trial on the ground that it violates a defendant's right to confront the witness against him.

See also People v. Coleman (16 A.D.3d 254 (1st Dep't 2005)).

Further, in *People v. Diaz* (21 A.D.3d 58 (1st Dep't 2005)), where the victim had stated to a police officer when two suspects were shown to him as he was being taken to a hospital, "that's them," the Court issued the following analysis of the 911 issue at page 65:

> Courts have considered various factors in determining whether a statement constitutes an "excited utterance" and is thus spontaneous and trustworthy. These include: (1) the nature of the startling or traumatic event; (2) the amount of time between the event and the statement (see *People v. Vasquez*, 88 N.Y.2d 561, 579, 647 N.Y.S.2d 697, 670 N.E.2d 1328 [1996] ["The time for reflection is not measured in minutes or seconds, but rather is measured by facts"]); (3) the activities of the declarant between the event and the statement; (4) whether the declarant had an opportunity to deliberate and thus deviate from the truth; and (5) whether the circumstances indicate that the statement was not made "under the impetus of studied reflection" (*People v. Edwards*, 47 N.Y.2d at 497, 419 N.Y.S.2d 45, 392 N.E.2d 1229).

Using these factors, the Court in *People v. Diaz* then concluded at page 67 with respect to the statement in question:

> As Carillo's statement from the ambulance was a visceral response to the presence of his attackers, and his statement was volunteered, rather than the result of structured police questioning, there was no *Crawford* violation in this case (see *Coleman*, 16 A.D.3d at 254, 791 N.Y.S.2d 112 [excited utterance in 911 call not "testimonial" under *Crawford*]; *People v. Newland*, 6 A.D.3d 330 (2004).

New York Appellate Courts in reviewing claims of improper admissibility of 911 calls have also resorted to a harmless error doctrine. *See People v. Hardy*, 4 N.Y.3d 192 (2005); *People v. Douglas*, 4 N.Y.3d 777 (2005), *People v. Coleman*, 16 A.D.3d 254 (1st Dep't 2005). The use of the harmless error doctrine is based upon the Supreme Court's implicit recognition in *Crawford* that the new confrontation rule would be subject to a harmless error analysis (see Rehnquist decision at 124 S. Ct. 1378 and footnote 1 at page 1359.) The precise parameters applicable to the admissibility of 911 calls, however, have continued to be surrounded by controversy and confusion, and New York Courts have looked forward to further clarification from the United States Supreme Court. In late June 2006, the U.S. Supreme Court provided further guidance on the 911 issue in its decision in the two companion cases of *Davis v. Washington* and *Hammon v. Indiana*. Those cases will be discussed in detail in Part II of this article which will appear in our next issue.

Spiros A. Tsimbinos has been a criminal law and appellate practitioner in New York for 37 years. He has authored many articles that have appeared in the *New York Law Journal*, the *New York State Bar Association Journal*, and is the editor of this newsletter. He is a graduate of New York University School of Law.

New York Court of Appeals Review

Discussed below are significant decisions in the field of Criminal Law issued by the New York Court of Appeals from February 9, 2006 to May 8, 2006.

SECURE FACILITY CHALLENGE

***In re Jamie R. V. Consilvio*, decided February 9, 2006 (N.Y.L.J., February 10, 2006, pp. 1, 6 and 19)**

In a unanimous decision the Court of Appeals concluded that an insanity acquittee subsequently found to suffer from a dangerous mental condition and placed in a secure facility cannot challenge that placement a second time through the re-hearing and review process. Rather than seeking a review and re-hearing a patient seeking to challenge secure placement should pursue an appeal. The court's ruling is a follow-up to its recent decision in *In re Norman D.* 3, N.Y.3d 150 (2004).

RIGHT TO COUNSEL

***People v. Suarrcy*, decided February 9, 2006 (N.Y.L.J., February 10, 2006, p. 20)**

In a unanimous decision the Court of Appeals upheld the denial of a suppression motion involving a claim that a defendant's admission violated his right to counsel. During a polygraph interrogation of a defendant by State Police in Kingston in 1998, an attorney had called the Kingston State Police Barracks and had spoken to a police investigator. Following the attorney's call, the defendant made a statement in 2001 to police in Kingston regarding her involvement in the 1990 murder of her husband. The defendant claimed on appeal that the admission of the incriminating statements she made in 2001 violated her right to counsel. The Court of Appeals held that even assuming that by virtue of the attorney's call in 1998 the defendant's indelible right to counsel attached, the right was not violated by her 2001 interrogation. The Court concluded that based upon prior Court of Appeals decisions where a police officer does not know and cannot be charged with knowledge that the suspect has a lawyer, the officer has no obligation to refrain from asking questions (citing *People v. Carranza*, 3 N.Y.3d 729 (2004)). The court stated that in assessing whether the police can be charged with knowledge of counsel's entry a number of factors should be considered, including the length of the passage of time. In the case at bar, since 3 years had passed and none of the original investigators were involved in the defendant's 2001 interrogation, there was no reasonable basis to assume that the police had knowledge of the attorney's entry. Thus any right to counsel which might have attached in 1998 did not prevent the defendant from waiving counsel and speaking to the police in 2001.

WAIVER OF APPEAL

***People v. Lopez*, *People v. Billingslea* and *People v. Nicholson*, decided February 16, 2006 (N.Y.L.J., February 17, 2006, pp. 1, 7 and 18)**

In a trilogy of cases the New York Court of Appeals continued to express strong support for the concept of the waiver of the right to appeal. The court made clear that a defendant who waives the right to appeal pursuant to a negotiated plea or sentence agreement has no interest of justice remedy in the Appellate Division with respect to a claim of excessive sentence. In a decision written by Chief Justice Kaye the court declared that when a defendant agrees to end the matter through a negotiated plea and to accept as reasonable the sentence imposed, he or she may not thereafter attempt to avoid the bargain by asking an Appellate Court to reduce the sentence through the exercise of its "interest of justice" discretion. The court concluded that a defendant's valid waiver of the right to appeal includes waiver of the right to invoke the Appellate Division's interest of justice jurisdiction to reduce the sentence.

In rendering its determination the Court of Appeals reiterated its earlier pronouncements that the trial court must be vigilant to explain the consequences of the relinquishment of the right to appeal and to ascertain that the defendant is voluntarily and knowingly exercising such a waiver. Applying the standards discussed, the Court of Appeals affirmed the determinations of the Appellate Divisions in *People v. Lopez* and *People v. Nicholson* upholding the pleas and sentences. In *People v. Billingslea* it remitted the matter back to the Appellate Division to consider the plaintiff's excessive sentence claim because a review of the court's colloquy indicated that the trial court had mistakenly advised the defendant that his guilty plea automatically resulted in a waiver of his right to appeal.

In a separate concurring opinion Judge George Bundy Smith expressed the view that a defendant's waiver of appeal cannot divest the Appellate Division of its power to exercise interest of justice jurisdiction since the Appellate Divisions derived this authority from the New York State Constitution. Within his opinion Judge Smith cited extensively from various sections of the New York State Constitution and relied upon past decisions of the Court of Appeals, including *People v. Seaberg*, 74 N.Y.2d 1 (1989) and *People v. Pollenz*, 67, N.Y.2d 264 (1986).

FELONY MURDER

***People v. Miller* and *People v. Rodriguez*, decided February 16, 2006 (N.Y.L.J., February 17, 2006, p. 20)**

In a unanimous decision the Court of Appeals held that felony murder is a lesser included offense of first degree murder and is therefore an inclusory concurrent count which is dismissible upon conviction of the higher charge. The Court of Appeals ruling resolves a split which had developed between the Appellate Division First Department and the Appellate Division Second Department. The Second Department had ruled in *People v. Rodriguez* that since it was impossible to commit first degree murder without also committing second degree murder, a defendant cannot be convicted of both in connection with the same crime. The Court of Appeals unanimously agreed with the Second Department determination holding that second degree intentional and felony murder are lesser included offenses to first degree murder. The Court of Appeals thus affirmed the ruling in *People v. Rodriguez* and modified the Appellate Division's determination in *People v. Miller*. The Court of Appeals unanimous ruling was written by Judge Rosenblatt.

RECKLESS MANSLAUGHTER

***People v. DaCosta*, decided February 16, 2006 (N.Y.L.J., February 17, 2006, p. 20)**

In a unanimous decision the Court of Appeals upheld the legal sufficiency of a conviction for manslaughter in the second degree. In the case at bar a police officer was struck and killed by a vehicle when he fell from a fence into oncoming traffic while he was chasing the defendant. The Court of Appeals held that had the defendant not fled, the officer would not have faced the circumstances which resulted in his death and that therefore the evidence was legally sufficient to establish that the defendant acted in a reckless manner and that it was foreseeable that someone might fall while in hot pursuit. The Court's opinion was written by Judge Graffeo.

SPEEDY TRIAL

***People v. Waldron*, decided February 14, 2006 (N.Y.L.J., February 15, 2006, p. 18)**

In a unanimous decision the Court of Appeals upheld a defendant's sodomy conviction and denied his claim that he had been denied his constitutional rights to a speedy trial. In the case at bar the defendant claimed that the People should have been charged with a pre-indictment delay of over 4 months. In reviewing the circumstances of this delay the Court concluded however that it was properly excluded as time charged against the People pursuant to CPL § 30.30, because during this time defense counsel had been actively engaged in plea negotiations with the People and had provided a letter expressly waiving the defendant's speedy trial rights. After reviewing the various factors which should be considered when a constitutional claim of denial to a speedy trial is raised, the court concluded that under the circumstances in the case and balancing all the factors involved the defendant was not deprived of either his constitutional or statutory right to a speedy trial.

FALSIFYING BUSINESS RECORDS

***People v. Bloomfield*, decided February 14, 2006 (N.Y.L.J., February 15, 2006, pp. 18 and 19)**

In a unanimous decision the Court of Appeals reversed an order of the Appellate Division First Department which had dismissed various counts of falsifying business records in the first degree under Penal Law § 175.10. In the case at bar fraudulent letters which were the subject of the indictment had been kept in the files of a business enterprise's legal counsel rather than at the company headquarters. The Appellate Division had held that since the letters were not held by the management company or in the records of the 16 individual companies, they were not kept or maintained by these offshore corporations and thus they did not fit into the legal definition of business records under the Penal Law Article. The Court of Appeals however determined that the location where a document is maintained is merely a factor and not determinative of its status as a business record under the statute. In examining all of the factors present in the case the Court of Appeals concluded that the People presented legally sufficient evidence to support the jury's verdict and that the convictions for falsifying business records should be reinstated.

ADMISSIBILITY OF STATEMENT

***People v. Burns*, decided February 14, 2006 (N.Y.L.J., February 15, 2006, p. 21)**

In a unanimous decision the Court of Appeals upheld a defendant's homicide conviction and denied his claim that he was denied a fair trial by the trial court's refusal to admit a purported statement by an out-of-court declarant. In the case at bar the defendant had taken part in a shootout and had given various accounts of what had happened, including the claim that he and the victim had been shot by a gang of Hispanic men. The People had disclosed to defense counsel prior to the trial that a declarant had given a statement to police to the effect that he had seen several armed Hispanic men in the vicinity of the shootout and one of

them had told him to leave the area because they were going to do something that night. According to the declarant, the next day one of the men he had seen told him that everything was taken care of last night. The defense sought to admit this allegedly exculpatory statement. But the trial court denied this request.

The Court of Appeals found that the admission of this hearsay statement did not fall under any of the recognized exceptions and that the court had acted within its discretion in denying the defendant's claim. The Court of Appeals found that the offered statement had no relevance to the issues at trial and that there had been no violation of the defendant's constitutional right to present a defense. The court further concluded that the hearsay statement lacked any indicia of reliability. The court reiterated its prior ruling in *People v. Robinson* (89 N.Y.2d 648 (1997)), where it was established that a "defendant's constitutional right to due process requires admission of hearsay evidence when declarant has become unavailable to testify and the hearsay testimony is material, exculpatory and has sufficient indicia of reliability." In reaching its ruling the Court of Appeals also noted that the trial court had offered to provide a so-ordered subpoena for declarant to testify and if the declarant was produced a further opportunity to make an offer of proof.

SEARCH AND SEIZURE

People v. Moore, decided February 21, 2006 (N.Y.L.J., February 22, 2006, p. 18)

In a 5–2 decision the Court of Appeals reversed a defendant's conviction for criminal possession of a weapon and ordered the suppression of evidence obtained as a result of an improper search and seizure. In the case at bar the defendant had been stopped by police officers who were riding in their marked police vehicle while on a routine patrol. They had received an anonymous report of a dispute involving a black male, approximately 18 years of age, who was wearing a gray jacket and red hat and who had a gun. When the officers arrived at the scene of the alleged dispute they saw a lone black male on the corner wearing a gray jacket and a red hat. The officers with their guns drawn ordered the black male to stop and identified themselves as police officers. The defendant continued to walk for a short distance before the officers caught up with him and while they were approaching he made a movement toward his waistband. The officer subsequently patted down the defendant, felt a hard object in his left jacket pocket and recovered a gun.

The five-judge majority, in determining that the defendant's motion to suppress should have been granted, held that the police officers exceeded their common law right of inquiry and violated the defendant's rights when he was ordered at gun point to remain where he was and was forcibly stopped. The majority opinion written by Chief Judge Kaye stated: "Because the officers did not possess reasonable suspicion until after defendant reached for his waistband, however by which time defendant had already been unlawfully stopped, the gun should have been suppressed. Defendant's later conduct cannot validate an encounter that was not justified at its inception" (citing *People v. De Bour*, 40 N.Y.2d 210, 215 (1976); *People v. William II*, 98 N.Y.2d 93, 98 (2002)). The majority opinion further noted that an anonymous tip cannot provide reasonable suspicion to justify a seizure, except where that tip contains predicted information so that the police can test the reliability of the tip.

In a dissenting opinion written by Judge Robert Smith, the dissenters argued that the motion to suppress should have been denied and the ruling of the Appellate Division First Department affirmed. Judge Smith stated in his dissent that the majority ruling "limits too strictly the ability of police officers to make the common sense, spur-of-the-moment judgments that street encounters demand and that are essential to achieving a proper balance between individual rights and law enforcement." Judge Rosenblatt concurred with Judge Smith in dissent.

RIGHT OF CONFRONTATION—*CRAWFORD* VIOLATION

People v. Pacer, decided March 28, 2006 (N.Y.L.J., March 29, 2006, pp. 1, 12 and 18)

In a unanimous decision the New York Court of Appeals reversed a conviction for aggravated unlicensed operation of a vehicle in the first degree where a Department of Motor Vehicle employee was allowed to introduce at trial an affidavit suggesting that a defendant knew or should have known he was driving with a revoked license. The Court held that under the Supreme Court's decision in *Crawford v. Washington* (541 U.S. 36 (2004)), the defendant's Sixth Amendment rights were violated. The court found that the affidavit in question was testimonial in nature and not as argued by the prosecution a business record which would constitute an exception to the *Crawford* ruling. Writing for a unanimous court Judge Rosenblatt stated "The lack of a live witness to confront eliminated defendant's opportunity to contest a decisive piece of evidence against him. This is exactly the evil the Confrontation Clause was designed to prevent."

CONFIRMATORY IDENTIFICATION

***People v. Boyer*, decided March 28, 2006 (N.Y.L.J., March 29, 2006, pp. 1, 12 and 18)**

In a 6–1 decision the New York Court of Appeals refused to extend the confirmatory identification exception to the notice requirement of CPL § 710.30. In the case at bar police officers responded to a call involving a burglary and when they arrived at the scene they spoke to one of the tenants in the Manhattan apartment building who directed them to a fire escape, where they saw a person crouching on the fire escape several floors up. The man on the fire escape ran away and was subsequently apprehended several blocks from the building by other officers. One of the officers who responded to the initial call subsequently observed the defendant following his arrest and identified him as the man he had seen on the fire escape. However, prior to trial, the prosecution had failed to serve any notice pursuant to CPL § 710.30 and the defendant then moved to preclude any identification based on the lack of notice. The trial court however found that no notice was required and permitted the officer to testify at trial about his out of court identification and to identify the defendant at the trial.

The Court of Appeals majority ruled however that notice was required under CPL § 710.30 and that a reversal was required and a new trial was necessary. Chief Judge Kaye writing for the majority stated:

> The People ask us to extend the confirmatory identification exception derived from *People v. Wharton* (74 N.Y.2d 921, 1989) to situations where a police officer's initial encounter with a suspect and subsequent identification of that suspect are temporally related, such that the two might be considered part of a single police procedure. To do so, however, would run afoul of CPL 710.30. Moreover, such an exception would eliminate the protections offered by a Wade hearing even when the initial police viewing—albeit part of a single police procedure—was fleeting, unreliable and susceptible of misidentification.

Judge Robert S. Smith dissented, arguing that in the case at bar the requirement of the Wade hearing would be a waste of time. He stated that where a police officer observes a crime and a suspect is arrested shortly thereafter, getting the officer to look at the suspect as soon as possible is not only constitutionally permissible but a very good idea. Judge Smith emphasized that where a police officer is involved and the defendant's appearance is fresh in the officer's mind the risk of suggestiveness is small and a Wade hearing is unnecessary.

CRIMINAL PROSECUTION FOR VIOLATION OF RULES OF JUDICIAL CONDUCT

***People v. Garson*, decided March 30, 2006 (N.Y.L.J., March 31, 2006, pp. 1, 5 and 19)**

In a 6–1 decision the New York Court of Appeals ruled that judges can face criminal prosecution for acts that started with a violation of the rules of judicial conduct. The Court of Appeals thus reinstated six felony counts against former Supreme Court Justice Gerald P. Garson, who is facing criminal prosecution in Brooklyn. The counts in question had previously been dismissed on the basis of the Court of Appeals decision in *People v. LaCarrubba* (46 N.Y.2d 658 (1979)), which held that rules of judicial conduct were not intended to support a criminal prosecution. In the instant case however the Court of Appeals found that the Judge had not only violated the ethics code by partaking in *ex parte* communications and by improperly lending the prestige of his office, but had gone a step further by taking payment for his misconduct. This the Court held transported the defendant's case from the sole jurisdiction of a disciplinary agency to the criminal jurisdiction of the District Attorney's Office. On this basis the evidence of bribery and receiving a reward for official misconduct in the second degree was legally sufficient to support the indictment and the counts in question should proceed to trial.

In rendering the Court's decision Judge Ciparick, who wrote the majority opinion, stated:

> we conclude that the People may rely on the rules governing judicial conduct to prove the element of a judge's duty as a public servant within the meaning of the Penal Law. Since the rules are designed to ensure the integrity of the judiciary and the resultant confidence and impartiality, then any other construction runs afoul of these goals. To hold otherwise would lead to the incongruous result of insulating judges from criminal liability—because they have a formal body of rules governing their conduct while subjecting other public servants to criminal liability for similar conduct.

Judge George Bundy Smith was the sole dissenter in the matter, arguing that neither the State Constitution nor the Rules of Judicial Conduct nor the Penal Law authorize a prosecutor to charge a judge with crimes by alleging violation of the judicial rules. Judge Smith stat-

ed that he could find no cases or statutes giving any authority to hold a judge criminally liable for failing to abide by the ethics rules. As a result of the Court of Appeals decision, former Judge Garson will be facing a variety of felony charges and his high-profile trial is expected to begin within the next few months.

JURY TRIAL WAIVER

***People v. Smith*, decided March 30, 2006 (N.Y.L.J., March 3, 2006, p. 31)**

In a unanimous decision the Court of Appeals affirmed a defendant's conviction for rape in the first degree following a bench trial and rejected his claim that he did not properly waive his right to a jury trial. In the case at bar the record indicated that the defendant had executed a written waiver of a jury trial in open court, which was approved by the trial judge. The defendant claimed on appeal that his waiver was ineffective since the trial court did not inquire as to his understanding regarding the waiver and that therefore the waiver was not knowingly and voluntarily made.

After reviewing the record, the Court of Appeals found that in the case at bar the trial court in the defendant's presence had inquired of defendant's counsel concerning his client's understanding of the rights waived. The Court stressed that although an allocution by the trial judge eliciting the defendant's full understanding of the waiver would have been better practice, no particular catechism is required to establish the validity of a jury trial waiver. In the case at bar the enquiry, though limited, was sufficient to establish that the defendant understood the ramifications of the waiver. The Court of Appeals cited its previous decision in *People v. Page* (88 N.Y.2d 1 (1996)), in support of its determination.

RIGHT TO COUNSEL

***People v. Wardwardlay*, decided April 4, 2006 (N.Y.L.J, April 5, 2006, pp. 1, 9 and 19)**

In a 4–3 decision a sharply divided Court of Appeals affirmed a defendant's rape conviction and held that a harmless error analysis applies to a violation of the right to counsel at a pre-trial hearing. The four-judge majority in a decision written by Judge Robert S. Smith refused to adopt a bright-line rule that would result in a new trial any time the right to counsel was violated at a suppression hearing. In the case at bar the defendant at the suppression hearing had requested that his lawyer be dismissed and that he be allowed to proceed pro se. The trial court allowed him to do so without making a searching inquiry to establish that the defendant knew and understood the perils of being unrepresented by counsel. The People had conceded on appeal that the trial court had committed error but argued that a harmless analysis should be applied to the case and that the error which occurred did not affect the outcome of the matter. The majority opinion in the Court of Appeals accepted the prosecution's argument and held that under the circumstances which occurred in the case at bar the error was harmless and that it was clear beyond a reasonable doubt that the outcome of the suppression hearing at which the right to counsel was violated could not have affected the outcome of the trial.

The dissenting opinion which was written by Judge Ciparick argued that the majority ruling was the first time the Court had ever subjected a violation of the right to counsel to a harmless error analysis. Judge Ciparick further stated that the courts have repeatedly recognized the fundamental importance of legal representation to protect the balance between an accused and the prosecutorial power of the State. The dissent further observed that it was a sad day when the Court of Appeals deviated from its heretofore robust protection of the right to counsel. Joining Judge Ciparick in dissent were Judge Kaye and Judge George Bundy Smith.

ADMISSIBILITY OF GRAND JURY TESTIMONY

***People v. Bosier*, decided April 4, 2006 (N.Y.L.J., April 5, 2006, pp. 9 and 18)**

In a unanimous decision the Court of Appeals held that the Grand Jury testimony of a witness could be used against the defendant at the trial where the defendant had engaged in threats to prevent the witness from testifying at the trial. After learning of the threats the trial court had allowed the prosecution to introduce the complaining witness's testimony at a grand jury proceeding. Thereafter the trial court refused defense counsel's request to introduce the witness's testimony before another grand jury proceeding. The defense argued that the excluded testimony would have cast doubt on the credibility of the witness as to her testimony which had been introduced.

In making its decision the Court of Appeals stated that the trial judge had discretion to make the rulings which he issued in the case at bar. The Court of Appeals indicated that when impeachment is permitted, as was sought herein by the excluded testimony, a defendant who threatens a witness may benefit from his or her own wrongful conduct because the prosecution will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent testimony proffered by the defendant. In rendering its decision the Court of Appeals relied upon its prior rulings in *People v. Geraci* (85 N.Y.2d 359 (1995)) and *People v. Cotto* (92 N.Y.2d 68 (1998)).

STANDING TO OBTAIN A SUPPRESSION HEARING

***People v. Burton*, decided May 2, 2006 (N.Y.L.J., May 3, 2006, pp. 9 and 23)**

In a unanimous decision the Court of Appeals made clear that a defendant does not have to admit possessing contraband in order to have standing to request a suppression hearing. In rendering its decision, the Court of Appeals rejected the position previously taken by the First Department and several trial judges that in order to have standing to request suppression, a defendant charged with possessing drugs or other contraband must admit possession in order to obtain a hearing.

In the case at bar the defense counsel vigorously challenged the propriety of the search in his supporting affirmation and there were sufficient factual allegations to support that contention. The defendant's refusal to admit possessing the cocaine allegedly seized by police was not fatal to his suppression motion.

In rendering its determination, the Court reiterated that its decision did not alter the existing evidentiary requirements for suppression motions and no automatic standing was conferred on defendants seeking suppression. The Court's opinion was written by Judge Graffeo.

LEGAL SUFFICIENCY

***People v. Conway*, decided May 4, 2006 (N.Y.L.J., May 5, 2006, pp. 6, 20, and 21)**

In a 6–1 decision the Court of Appeals reinstated an indictment for criminally negligent assault against a police officer which had been dismissed by the Appellate Division. The officer chased a suspect and while simultaneously pointing a gun at the suspect and trying to drive, he lost control of the weapon and it discharged, seriously wounding the defendant. The Court of Appeals found that a valid line of reasoning and permissible inferences could support the trial court's determination that the defendant acted with criminal negligence. The Court concluded that it could not determine as a matter of law that the trial court erred in its conclusion. The matter was remitted to the Appellate Division for a factual review which is within the Appellate Division's authority.

Judge Robert S. Smith dissented from the majority opinion and stated that he would dismiss the appeal because he believed the Appellate Division's decision already rested upon a factual determination which was beyond the power of the Court of Appeals to review. He also expressed the view that the evidence was insufficient as a matter of law to sustain the defendant's conviction.

A Brief Profile of the Current Members of the United States Supreme Court

In early February 2006 the Justices of the United States Supreme Court posed for a new official photograph depicting the present composition of the Court including the two most recent appointees. The highest court in the land is now comprised of 8 men and 1 woman, 7 Justices who have been appointed by Republican Presidents and 2 who have been appointed by a Democratic President. The age of the Justices ranges from 85 to 51. Listed below in order of rank and seniority are brief profiles of each of the Justices currently sitting on the Court.

Chief Justice

John G. Roberts. Jr.
Age 51
Nominated by President George W. Bush
Assumed office on September 29, 2005

Associate Justices

John Paul Stevens
Age 85
Nominated by President Gerald Ford
Assumed office on December 19, 1975
On the Court 31 years

Antonin Scalia
Age 69
Nominated by President Ronald Reagan
Assumed office on September 26, 1986
On the Court for 19 years

Anthony M. Kennedy
Age 69
Nominated by President Ronald Reagan
Assumed office on February 18, 1988
On the Court for 18 years.

David H. Souter
Age 66
Nominated by President George Bush
Assumed office on October 9, 1990
On the Court for 15 years

Clarence Thomas
Age 57
Nominated by President George Bush
Assumed office on October 23, 1991
On the Court for 14 years

Ruth Bader Ginsburg
Age 72
Nominated by President Bill Clinton
Assumed office on August 10, 1993
On the Court for 12 years

Stephen G. Breyer
Age 67
Nominated by President Bill Clinton
Assumed office on August 3, 1994
On the Court for 11 years

Samuel Alito, Jr.
Age 55
Nominated by President George W. Bush
Assumed office on January 31, 2006
On the Court for less than a year

Recent United States Supreme Court Decisions Dealing With Criminal Law

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

During the last few months the United States Supreme Court has issued several important decisions in the field of criminal law.

In late March, in a 5–3 decision in the case of *Georgia v. Randolph*, the Court limited police searches without a warrant where at least one resident objects to the search of a home. Chief Judge Roberts issued a vigorous dissent which was joined in by Justices Scalia and Thomas. The five-judge majority was written by Justice Souter. Recently appointed Judge Alito took no part in the decision since he was not on the court when the matter was argued.

In two companion cases—to wit *Davis v. Washington* and *Hammon v. Indiana*—the court also dealt with the issue of whether a crime victim's emergency call to 911 could be introduced at trials in light of the Court's 2004 right to confrontation ruling in *Crawford v. Washington* (541 U.S. 36).

In the case of *Jose Padilla*, the Court also refused to act on the issue of Presidential authority to detain enemy combatants for military tribunals. Since Padilla was recently transferred from military to civil authorities pursuant to the Supreme Court's prior rulings, the court viewed the present case before it as constituting a "hypothetical" question and not subject to judicial review at this time. The Court's decision not to review the Padilla matter was a close vote with three Justices, Ginsburg, Souter and Breyer indicating they would have granted review, one short of the required number. Justice Kennedy in issuing the Court's denial of review stated that strong prudential considerations argued against the Court taking up the case at this time. He stated however that if Padilla is reclassified as an enemy combatant, he could challenge his detention again and the government was put on notice that the courts would be open to further appeals if Padilla's status changes again.

The following case notes, prepared by students at St. John's Law School, covers these and other matters in further detail.

Invalid Eligibility Factors Considered in Death Penalty Sentencing in Non-Weighing States Do Not Make the Sentence Itself Unconstitutional When Alternative Valid Grounds for the Death Penalty Remain Available

***Brown v. Sanders*, 126 S. Ct. 884, 163 L. Ed. 2d 723, 2006 U.S. Lexis 769, 74 U.S.L.W. 4059 (2006).**

Respondent, Ronald Sanders, broke into a home with an accomplice while the owner and his girlfriend were present. Respondent bound, blindfolded and struck the owner and girlfriend on the head, killing the girlfriend. Respondent was subsequently convicted of first degree murder, attempted murder, robbery and burglary.

During the sentencing phase, the jury considered the eligibility factors for the application of the death penalty under California Penal Code Ann. § 190.2, including (1) "[t]he murder was committed while the defendant was engaged in . . . Robbery," § 190.2(a)(17)(A); (2) the murder was "committed while the defendant was engaged in . . . Burglary in the first or second degree," § 190.2(a)(17)(G); (3) "[t]he victim was a witness to a crime who was intentionally killed for the purpose of preventing . . . her testimony in any criminal . . . proceeding," § 190.2(a)(10); and (4) "[t]he murder was especially heinous, atrocious, or cruel," § 190.2(a)(14).

On appeal, the California Supreme Court invalidated the second and fourth factors. The second factor, that the murder occurred during the course of a burglary, was held invalid under the state merger law because it would allow the jury to find that there was a burglary based only upon the assault itself. The fourth factor, read to the jury as part of California Penal Code Ann. § 1 90.2, that the murder was particularly heinous, had been previously held invalid by the State Supreme Court on the ground of vagueness.

The Supreme Court upheld the two remaining special circumstances, murder during the course of a

robbery and murder to prevent witness testimony, as valid support for a death sentence under California law. The validity of these two circumstances are constitutional under the narrowing requirement, in which special, aggravating circumstances must be enumerated in statutes imposing the death penalty in accordance with *Furman v. Georgia*, 408 U.S. 238 (1972).

The Supreme Court identified two separate schemes that states engage in to meet the *Furman* narrowing requirement: "weighing" and "non-weighing" analyses. A weighing state uses eligibility factors (which are required for application of the death penalty) in conjunction with aggravating factors (which increase the severity of the crime) when deciding on a sentence. This combination makes it impossible for a jury to separate the objective elements of a capital crime from subjective additional factors that may prejudice the jury. A non-weighing state separates eligibility factors from aggravating factors. If an eligibility factor in a weighing state becomes invalid, the sentence must be overturned because the jury could have been tainted by both probative invalid eligibility factor and its accompanying, prejudicial aggravating factor. However, in a non-weighing state, the separation of the two factors allows the sentence to stand untainted by the prejudice of aggravating factors when an eligibility factor is invalid.

The Supreme Court identified California as a non-weighing state. The existence of two valid eligibility factors and the consideration of aggravating factors separate from eligibility factors made the sentence constitutional.

By Matthew N. Thomas

Warrantless Searches of Private Residences Prohibited Where One Co-Inhabitant Refuses to Consent

***Georgia v. Randolph*, 126 S. Ct. 1515, 164 L. Ed. 2d 208, 2006 U.S. LEXIS 2498, 74 U.S.L.W. 4176 (2006).**

Respondent and his wife were involved in a domestic dispute in respondent's home. The wife called the police and told officers that respondent was a cocaine user and that evidence existed within the house. An officer asked respondent for consent to search the home and was unequivocally denied. The officer then asked respondent's wife and she agreed. Both inhabitants were present at the time consent was requested. Respondent's room was searched and evidence of cocaine use was found.

Respondent was indicted for possession of cocaine. Respondent moved to suppress the evidence on grounds of lack of consent. The trial court denied the motion, ruling that respondent's wife had authority to consent. The Georgia Court of Appeals reversed the trial court's decision and the Georgia Supreme Court affirmed. The U.S. Supreme Court granted *certiorari* and affirmed.

In a 5–3 decision, the Supreme Court held that in the absence of exigent circumstances, the explicit denial of consent to a warrantless search by a present co-inhabitant renders a search based solely on the consent of a fellow co-inhabitant unreasonable against the objector.

The majority relied on "widely shared social expectations," analogizing to a situation in which a social caller attempts to enter a home where one inhabitant invites the caller inside and another says "stay out." The Court found that "no sensible person would go inside under those conditions," and that the inviting co-inhabitant has "no recognized authority in law or social practice to prevail over a present and objecting co-tenant." *Randolph,* 126 S. Ct. at 1517, 1523. Similarly, a police officer would have "no better claim to reasonableness in entering" under those conditions "than the officer would have in the absence of any consent at all." 126 S. Ct. at 1517.

The Court then distinguished this case from *United States v. Matlock* (415 U.S. 164 (1974)). In *Matlock*, the Court found a warrantless search on the basis of a co-inhabitant's consent reasonable when the defendant was not present at the time consent was given. By focusing on the physical presence of respondent and the timeliness of his objection, the Court fashioned a bright-line rule that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Randolph* at 1528. Finally, under the circumstances of the case, and in light of the Fourth Amendment, the Court concluded by affirming the Georgia Supreme Court's decision.

Justices Roberts, Scalia and Thomas filed dissents. Roberts and Scalia criticized the decision as overly formalistic and dangerous for victims of domestic violence, and random in its protection of privacy. *Randolph,* 126 S. Ct. at 1531–39. Thomas argued that because respondent's wife was not acting as an agent of the government, the Fourth Amendment was not implicated by the search. 126 S. Ct. at 1541–43.

By Michael Namikas

Race-Neutral Explanations Survive *Batson* Challenge

***Rice v. Collins*, 126 S. Ct. 969, 163 L. Ed. 2d 824; 2006 U.S. LEXIS 913; 74 U.S.L.W. 4095.**

Respondent Steven Martell Collins was tried and convicted in California state court on one count of possession of cocaine with the intent to distribute. This conviction subjected him to California's "three strikes rule" for sentencing. Collins challenged the preemptory strike of Juror 16, a young, African-American woman, on the basis of racial discrimination under *Batson v. Kentucky* (476 U.S. 79). The prosecutor's race-neutral explanations for the strike was that Juror 16 had rolled her eyes in response to a question, and that she was young and single with no ties to the community, perhaps indicating her tolerance of a drug crime. The trial court accepted the prosecutor's explanations and rejected the challenge.

The California Court of Appeals upheld the conviction and the trial court's ruling on the preemptory challenge, and the Supreme Court of California denied respondent's petition for review. The United States District Court for the Central District of California dismissed Collins's petition for a writ of *habeas corpus*, but the United States Court of Appeals for the Ninth Circuit reversed and remanded. On remand, the court found that the trial court's acceptance of the prosecutor's race-neutral explanations was unreasonable, and the Court of Appeals declined an *en banc* rehearing. *Certiorari* was granted and the United States Supreme Court unanimously reversed the Ninth Circuit's decision and remanded the case.

The Supreme Court held that the trial court's factual determination regarding the credibility of the prosecutor's race-neutral reasons for striking Juror 16 was not unreasonable. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governed Collins's petition for *habeas corpus*, which requires that a federal court must find "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" in order to upset the trial court's findings. 28 U.S.C. § 2254(d)(2). Although it did not see the eye-rolling that the prosecutor complained of, the trial court gave prosecutor the benefit of the doubt. The Supreme Court recognized that "[r]easonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination." *Collins,* 126 S. Ct. at 976.

Cases of Interest in the Appellate Division

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from February 3, 2006 to May 8, 2006.

People v. Odell (N.Y.L.J., February 3, 2006, pp. 1 and 4)

In a unanimous decision the Appellate Division Third Department held that the allowance of cameras in a criminal trial without the consent of the defendant and in violation of the statutory authorization does not automatically require a reversal of a defendant's murder conviction. The court held that only actual prejudice resulting from the presence of the cameras would entitle a defendant to a new trial.

People v. Douglas (N.Y.L.J., February 13, 2006, p. 18)

In a unanimous decision the Appellate Division First Department reversed an attempted murder conviction and ordered a new trial on the grounds that the trial court had improperly precluded the submission of defense evidence. The defendant teenager had claimed that his shooting of a fellow high school student was justified because he feared the victim was about to use deadly force. The defense had attempted to introduce details of an incident from the previous day in which gang members allegedly kidnapped the defendant and told him he would be killed if he did not bring them money and jewelry. The Appellate Division First Department held that the trial court's rulings seriously impaired the defendant's right to present a complete justification defense and that this error was not harmless. The trial court's ruling had caused the jury to have insufficient information to evaluate the reasonableness of the defendant's belief that the victim was about to use deadly physical force against him. The Appellate panel also noted that the victim appeared to be a member of the Bloods gang and that he and 7 or 8 others had surrounded the defendant demanding money and brandishing box cutters.

People v. Penny J. Walcott aka Penny Laurey (N.Y.L.J., March 3, 2006, pp. 1 and 5)

In a unanimous decision the Appellate Division Third Department reversed a conviction for perjury and robbery based upon a guilty plea because the trial court had failed to conduct an adequate inquiry after the defendant had indicated that she may have acted under duress. During the plea colloquy the female defendant told the court she had committed perjury during her husband's trial because he was an abusive husband and she feared him. She also indicated that her husband had beaten her and had threatened to kill her in the past. Under these circumstances the Appellate Division stated that the defendant was in fact raising the affirmative defense of duress and that the trial court should have conducted a further inquiry to determine the defendant's awareness of this possible defense and whether she desired to knowingly waive the defense and proceed with the plea. The Appellate Court remitted the matter to the trial court for further proceedings.

People v. Grunwald (N.Y.L.J., March 6, 2006, pp. 1 and 8)

In a unanimous decision the Appellate Division First Department upheld the denial of a suppression motion in which police officers had retrieved a knife from the defendant. The police officers had testified that they were patrolling on 115th Street in Manhattan and in a area known to police for drug activity. The defendant was observed walking on the sidewalk smoking what the officers believed was a marijuana cigarette. The officers yelled to the defendant to come over to the car, but instead he turned around and started walking away. As the officers followed the defendant threw the object which was in his hand and turned toward the officers holding a gravity knife in his hand. The officers drew their guns and ordered the defendant to drop the knife. Subsequently officers knocked the knife from the defendant's hand, handcuffed and placed him under arrest.

The defense argued that the officers' initial observation of the defendant was equally susceptible of an innocent explanation and therefore did not give them the right to make an inquiry much less order the defendant to stop. In upholding the hearing court's denial of the motion to suppress, the Appellate Division found that the standards set forth in *People v. DeBour* (40 N.Y.2d 210 (1976)) had been followed and that the police actions were justified and in response to the unfolding situation as it developed. The court found that the officers had made a limited inquiry in the beginning and that when the defendant threw the object and brandished the knife the circumstances changed dramatically which thereafter gave the police probable cause to make the arrest. Thus while the encounter began at the level one stage discussed in *DeBour* in which the police merely sought to make an inquiry of the defendant, it escalated to a higher level when the defendant displayed the knife. Since the Appellate Division found the denial of the suppression

motion to be correct it affirmed the defendant's conviction of criminal possession of a weapon and the sentence of 1½–3 years.

People v. Breedlove (N.Y.L.J., February 23, 2006, pp. 1 and 16)

In a unanimous decision the Appellate Division Third Department reversed a depraved indifference murder conviction where the defendant shot the victim five times. The Appellate Division decision was based upon the recent Court of Appeals decision in *People v. Suarez* (6 N.Y.3d 202 (2005)) where the high court similarly restricted the prosecutor's strategy of charging both intentional murder and depraved indifference murder. In the case at bar the jury had rejected the intentional murder count but had convicted the defendant of depraved indifference. The Appellate Division in reviewing the evidence presented determined that the defendant's conduct could not be considered reckless in a situation where he repeatedly shot the victim at point-blank range. Based upon the Appellate Divisions ruling the defendant was ordered to be re-sentenced with respect to the only two remaining counts for which he was convicted, to wit assault and possession of a weapon.

People v. Butler (N.Y.L.J., March 30 2006, pp. 1, 9 and 26)

In a unanimous decision the Appellate Division First Department reversed a trial court's suppression ruling and reinstated the charges against the defendant relating to drug possession. The defendant, an admitted drug seller, claimed at the suppression hearing that the two police officers who arrested him for possessing cocaine in a housing project made up the specific transaction that led to his arrest with respect to the instant matter. A Manhattan Supreme Court Judge credited his testimony and dismissed the charges. The Appellate Division First Department however found that the trial court's evaluation of the officer's testimony was speculative and unsupported by the record. The trial court had found the officer's testimony to be implausible and tailored to meet constitutional requirements. In reaching this conclusion the trial judge had also relied upon his own knowledge and experience regarding illegal narcotics transactions. The unanimous Appellate Panel however found that the officers' account of the sequence of events was straightforward and credible and that in making its determination the trial court had totally ignored or downplayed the defendant's obvious motivation to tailor his testimony and his substantial criminal record.

For Your Information

Patriot Act Renewed

After months of discussion and controversy the United States Patriot Act, which was passed in the weeks following the September 11, 2001 terrorist attacks and which expired at the end of last year, was renewed by Congress. The act had received two short temporary extensions and was again set to expire on March 10, 2006 when Congress finally reached a consensus on a compromise bill which allowed most of the major provisions of the act to be permanently extended. For months there had been a sharp dispute between those who sought a greater protection for civil liberties and those who felt that it was imperative to provide strong measures to guard against possible future acts of terrorism. Although Congress finally reached a compromise consensus in order to provide for the extension of the Patriot Act, it appears that in the future additional pieces of legislation will be introduced to deal with the issue of warrantless wire taps and other law enforcement measures which have become a concern to civil libertarian groups. We will keep our readers advised of any future action on the Federal level regarding this issue. The final renewal of the Patriot Act, which was approved by the House and Senate in early March and then signed by President Bush on March 9, 2006, contains various provisions and actually encompasses two separate bills. The highlights of the Patriot Act as renewed and as reported by the Associated Press are summarized as follows:

- Renews 16 Patriot Act provisions scheduled to expire March 10
- Gives recipients of court-approved subpoenas for information in terrorist investigations the right to challenge a requirement that they refrain from telling anyone
- Eliminates a requirement that an individual provide the FBI with the name of a lawyer consulted about a National Security Letter, which is a demand for records issued by investigators
- Clarifies that most libraries are not subject to demands in those letters for information about suspected terrorists
- Puts a four-year expiration on Sections 206 and 215, which authorize roving wiretaps and permit secret warrants for books, records and other items from businesses, hospitals and organizations such as libraries
- Puts a new four-year expiration on the power to wiretap "lone wolf" terrorists who may operate on their own, without control from a foreign agent or power
- Increases penalties for attacks against railroad and mass transit systems
- Increases penalties for crime and terrorism at U.S. seaports
- Tightens restrictions on cold medications that can be cooked into methamphetamine and increases penalties on methamphetamine production and trafficking
- Places the Homeland Security secretary at No. 18 in the presidential line of succession, last on the list after the Veterans Affairs secretary
- Makes the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives a presidential appointment with Senate confirmation

In signing the renewal legislation President Bush stated "The Patriot Act has accomplished exactly what it was designed to do, it has helped us detect terrorist cells, disrupt terrorist plots and save American lives."

Warrantless Eavesdropping Compromise

Although in the future Congress may consider additional legislation to deal with the issue of warrantless eavesdropping conducted by federal authorities with respect to their anti-terrorism procedures, the Bush Administration appears to have reached at least a temporary resolution with congressional leaders whereby a special sub-committee of the Senate Intelligence Committee will be granted greater access and wider oversight of future wiretapping situations. In return present procedures in effect would allow for wiretapping without warrants for up to 45 days. Under an agreement negotiated by Vice President Cheney and Republican Congressional leaders, a 7-member terrorist surveillance sub-committee would obtain greater details and information regarding the use of warrantless wiretapping. Final approval of the negotiated compromise was reached when Senators Hagel of Nebraska and Olympia Snowe of Maine indicated their support. Sena-

tor Snowe in indicating her support stated: "We are reasserting congressional responsibility of oversight with respect to this program."

Eastern and Southern District Federal Judges Exercise Greater Discretion in Applying Sentencing Guidelines Following *Booker and FanFan*

In a recent statistical report published by the United States Sentencing Commission, it was reported that during the thirteen-month period following the United States Supreme Court decision in *United States v. Booker and FanFan* (543 U.S. 220 (2005)) (making the Federal sentencing guidelines advisory rather than mandatory), the Federal judges who have departed the most from the sentencing guidelines are centered in the Northeast including those within the Eastern and Southern districts of New York. The survey reported that overall the Federal Courts within the Second Circuit issued sentences within the guideline range 49.6% of the time subsequent to *Booker*, down from 63.8% prior to the *Booker* decision. Nationwide compliance with the sentencing guidelines fell from 72.2% pre-*Booker* to 61.9% following the decision. The Eastern district of New York following *Booker* has experienced 32% of the sentences falling below the Federal guidelines and the Southern district of New York had 24% falling below the guidelines. The District of Massachusetts had the highest national rate of sentences falling below the Federal guidelines following *Booker* with 33.2% in that category.

The Federal District courts in the Western and Northern districts of New York appear to be departing from the Federal guidelines to a much lesser extent than the judges in the Eastern and Southern districts. According to the Sentencing Commission Report 13.8% of the sentences issued by judges in the Northern district were outside the guideline range and for the Western district only 9.8% departed from the guideline specifications.

A detailed summary of the report was provided in the February 27, 2006 issue of the *New York Law Journal*, pages 1 and 8, and a full report can also be obtained directly from the United States Sentencing Commission. The report covered the period from January 12, 2005 through February 1, 2006 and reviewed some 64,000 Federal cases throughout the country and approximately 3,800 cases within the Second Circuit.

Decline in Juvenile Crime

In a surprising but pleasant development a recent study has reported that during the last several years there had been a dramatic decline in crimes committed by juveniles between the ages of 10 and 18. The study which was conducted by the United States Justice Department reveals that homicide arrests involving juvenile offenders are down from 3,800 in 1980 to just under 1,000 in 2005. Arrest rates for robbery, rape and aggravated assault are also off by nearly one-third since 1980. The report also indicates that criminal activity occurring in schools has also dropped significantly. According to the report the level of violence and property crimes has dropped the most with a smaller decline in drug crimes. Bucking the downward trend is the fact that simple assaults especially among girls are up. Overall however juvenile crime is at its lowest level in 36 years.

Experts contribute the decline to several factors, the decreased use of crack cocaine among teenagers, improvement in the living conditions in many of the large inner cities, increased security in the schools, and improved economic conditions. The report also highlighted tougher sentences for career criminal adults who often utilized juveniles in their criminal endeavors. The report also revealed a sharp drop in crimes committed by black male teenagers. Of interest to New Yorkers is the reassuring news that in New York the decline in crimes committed by juvenile offenders was almost double the decline for the rest of the country.

The pleasant news regarding the decline in teenage crime comes as a welcome surprise since more than 10 years ago leading experts were predicting a juvenile crime wave. We are thus happy to report the good news. The statistics indicated are mentioned in the United States Justice Department's 2006 National Report on Juvenile Offenders and Victims which was released in March 2006.

High Percentage of Justices Sitting in Appellate Division, First Department, Come From Outside of the First Department

In late February 2006 in a detailed statistical survey the *New York Law Journal* reported that during his term in office Governor Pataki has aggressively imported into the Appellate Division, First Department, justices who were elected elsewhere. This has occurred to such an extent that in the slightly more than ten years which he has been in office 75% of the justices named to the First Department by the Governor have been elected outside of Manhattan and the Bronx. The *Law Journal* reported that the Governor has appointed 9 outsiders to the First Department and 4 to the Second Department. By contrast, he has not appointed a single outsider to either the upstate Third or Fourth Departments.

In a historical look at Appellate Division appointments since their formation in 1896 the *Law Journal* also reported that of the 102 total appointments in the First

Department, 29 or 28% involved justices who came from other Departments. Nine of these 29 were Governor Pataki's appointments and occurred within the last 10 years. According to the *Law Journal* article the Governor has received some criticism regarding his outside appointments and the fact that they do not appear to represent the cultural diversity of the First Department. All 9 of the outside appointments were white males. Of the 12 total appointments made to the First Department by the Governor, only 1 was Hispanic and none were female or black. The Governor still has 1 vacancy to fill within the First Department and several groups are calling for an appointment from within the First Department which would better reflect the diversity of that Appellate Department.

The Governor's critics have also pointed out that the appointments of justices outside the First Department has amounted to several hundred thousand dollars in additional costs to provide these outside judges with living and travel expenses. Full details regarding the *Law Journal* article can be found in the February 28, 2006 issue on pages 1 and 7.

Federal District Court Decision Invalidating Nomination Process for New York Supreme Court Justices Heard by Second Circuit Court of Appeals in June

Judge Gleeson's recent ruling voiding New York's System for nominating Supreme Court Justices has been appealed to the United States Court of Appeals for the Second Circuit and was argued during the week of June 5, 2006 in an expedited proceeding. Judge Gleeson himself recently issued a stay of his order and a decision is expected from the Court of Appeals sometime in July. Attorneys for both sides had requested an expedited appeal so that the judicial candidates in 2007 would adequately be apprised of any major changes in the nominating process. In response to Judge Gleeson's ruling the O.C.A. recently adopted its own court rules for the establishment of screening committees with respect to the selection of judicial candidates and the New York State Legislature is itself considering legislative proposals with respect to altering the current nomination process.

Controversy Regarding Expansion of DNA Data Bank Continues

In a 39-page detailed report issued by the New York State Investigation Commission in late March the agency recommended the increased expansion of the DNA Data Bank program so that anyone convicted of a felony or misdemeanor would be required to provide a DNA sample. The Investigation Commission, which is comprised of 6 members, voted unanimously to recommend the proposed expansion. The Commission is headed by former Appellate Division Justice Alfred D. Lerner and the report was issued after extensive research and public hearings were held on the matter. In issuing the report the Commission stated that the benefits to society of additional DNA samples outweighed the infringement upon the criminals' constitutional rights.

Governor Pataki immediately hailed the recommendations of the Commission, which closely follow the Governor's own program for expanding the DNA Data Bank. Governor Pataki in commenting on the Commission's report stated:

> DNA is the fingerprint of the 21st century. Experience has shown that criminals convicted of lower or mid-level crimes have committed, or will be committing, more serious and violent crimes.

In May, Mayor Bloomberg of New York City and the five City District Attorneys also formally called for an expansion of the DNA Data Bank.

The Governor on his own through Executive Order had moved to increase the DNA Data Bank by requiring samples from anyone offered parole, probation, plea bargaining or temporary release. Presently by statute DNA samples are required only for certain designated crimes, primarily felonies. Recently it was reported that the Governor's December 2005 Executive Order has already placed a severe burden on government agencies to collect the additional samples required. In light of the further recommendation of the State Investigation Commission several defender organizations have raised concerns regarding the State's ability to perform the additional tests sought as well as privacy and civil liberties considerations. The New York Civil Liberties Union through its Legislative Director Robert A. Perry recently stated that:

> The race to expand the database rests on the faulty assumption that DNA evidence is flawless. The fact is that human error enters into every factor of DNA collection, analysis and reporting. Our existing regulatory scheme is simply not up to the task of ensuring the accuracy and integrity of the process. There are rogue databases operating outside the state's regulatory scheme. We don't have provisions for the certification of labs or lab technicians. We don't provide for timely collection and analysis, which is critical.

Due to the Governor's efforts and the recent Investigation Commission report it is highly likely that some legislative action regarding the expansion of the DNA Data Bank will occur within this year's legislative session. Assemblyman Joseph R. Lentol, who is Chairman of the Assembly Codes Committee which has jurisdiction over criminal law issues, recently stated that he thought the two legislative chambers would be able to reach a successful compromise on the DNA issue this year. Earlier in the year the Senate passed a DNA expansion bill by a 60–1 vote, but the matter has been stalled in the Democratic-controlled Assembly where concerns have been expressed that the bill does not contain adequate civil liberties protections. In late May, Assembly leaders further announced that they reached an agreement on a compromise bill which contain many of the features sought by the Governor's proposal. It thus appears likely that some form of DNA expansion bill will be adopted by the Legislature shortly.

Presently the DNA Data Bank contains some 150,000 samples. In addition to its call for the expansion of the DNA Data Bank, the State Investigation report also recommended the elimination of the statute of limitations in cases were DNA evidence is found even when a suspect has not been identified so that such cases can remain open. Other recommendations include expunging DNA records for people whose convictions are overturned; bolstering penalties for tampering with DNA evidence or disclosing it without authorization; and creating an organization to help exonerate people who have been wrongly convicted. Given the increased importance of DNA evidence we will keep our readers apprised of any final determinations made by the Legislature with respect to the expansion of the DNA Data Bank.

New York City Mayor's Budget for DA's Offices Decline While Defender Groups Receive Increases

In a statistical analysis of Mayor Bloomburg's proposed budgets for the six years he has been in office the *New York Law Journal* recently concluded that the monies allocated to the five county District Attorney Offices and the Special Narcotics Prosecutor have declined by about 7.4% since the Mayor took office in January 2002. In 2002 the prosecutors were receiving $227 million while the proposed budget for 2007 is listed at $210 million. By contrast, funding for the Legal Aid Society has risen to $67.6 million from $57.6 million, a 20% increase.

During the Mayor's six-year period the Legal Aid Society has also handled an increased percentage of indigent defendants, now representing 61%, an increase of 10% from 2002. The case load handled by assigned 18-B counsel has dropped from 28% in 2002 to 17% at the present time.

The decline in the Mayor's proposed budgets for prosecutors during the last several years has been largely offset by a new program that allows them to keep a portion of funds which they recover from forfeiture and other revenue-generating prosecutions. In the past the City Council has also added additional funds to their budgets during the final budget process. In fact, in late May the City Council Speaker announced that she would press for an additional $20 million for the DA's budgets, and the Mayor's Office itself increased its original request by an additional $11 million. Final budget approvals are expected in late June or early July.

Attorneys Should be Aware of Significant Population Changes Occurring in the United States

A recent report from the United States Census Bureau highlighted significant changes which have occurred and which will be occurring in the United States population. Primarily, the report highlights the fact that the country's population is increasingly aging with a larger percentage in the over-65 year category and a smaller percentage in the number of people under the age of 20. In 1980 when the Nation had a population of 226.5 million the number of persons younger than 20 was 72.5 million or approximately one third. In the year 2000 when the country had a total population of 281.4 million 80.5 were younger than 20, constituting just over 28%. By the year 2030 when the population is expected to reach 363.6 million the age group under 20 is expected to comprise 95.1 million or just under 25%.

The population over 65 in 1980 was 25.5 million or just over 10%. In 2000 it was 35 million or slightly over 12% and by the year 2030 the population over 65 is expected to amount to 71.5 million or just under 20%. Thus in the course of a 50-year period the population over 65 will nearly double as a percentage of the entire population. The group under 20 on the other hand has declined significantly as a percentage of the whole. Attorneys should be aware of these dramatic population shifts as they have an impact not only on governmental actions and social consequences but also on the daily practice of law since they influence the types of cases and clients which will be served in the coming years.

New York Court of Appeals Vacancies

By the end of 2006 two additional vacancies will occur on the New York Court of Appeals. The 14-year term of Judge George Bundy Smith will expire on Sep-

tember 23, 2006 and Judge Albert M. Rosenblatt will have to retire from the court at the end of the year because he reaches the mandatory retirement age of 70. The State Commission on Judicial Nominations has been accepting applications to fill Judge Smith's seat. The application deadline to fill Judge Smith's seat expired on May 22, 2006 and the deadline for applications to fill Judge Rosenblatt's seat has not yet been set. The Nomination Commission is comprised of 12 members who recommend 7 candidates for the Governors selection. The Commission's Counsel is Stuart A. Summit, whose offices are at 666 Fifth Avenue, New York, NY. Interestingly, with respect to Judge Smith's vacancy, he is eligible to continue to serve for another year since he has not reached the retirement age of 70 and he in fact has indicated that he may apply to the Commission to continue to serve for at least another year. We will advise our readers of the Commission's selections and the eventual appointments made by the Governor.

Appellate Division Rules on Civil Commitment of Sex Offenders

At the end of March 2006 the Appellate Division First Department issued an important decision with respect to the civil commitment of sex offenders. In a unanimous decision the Court overturned a prior decision by Judge Jacqueline W. Silbermann which had declared Governor Pataki's plan for the civil commitment of sex offenders to be unconstitutional. The Governor had devised a plan of maintaining custody of violent sexual offenders after their prison terms had expired by forcibly committing them to mental health facilities. In overturning Judge Silbermann's rulings the Appellate Division First Department stated "based upon the facts presented we believe that the Supreme Court's holding that Correction Law Section 402 governs petitioners' commitments is inconsistent with its plain meaning and legislative intent."

A second ruling, which Judge Silbermann had issued ordering hearings on the civil detainment of ten prisoners, is still pending before the First Department and a ruling in that case is expected soon. The issue of civil commitment of sex offenders continues to be a controversial one with additional developments expected from the Legislature and the Appellate Courts. We will keep our readers advised of future events.

New York Court of Appeals to Consider Retroactivity of Reduced Drug Crime Sentences

The New York Court of Appeals currently has on its docket two cases which involve the issue of whether the reduced sentences authorized by the 2004 and 2005 drug law amendments can be applied retroactively to people whose cases were pending on appeal at the time that the modifications became effective. The two cases are *People v. Utsey* from the First Department and *People v. Bautista*, also from the First Department. Appellate Courts to date have refused to apply any retroactive application of the drug law modifications citing the specific effective date stated in the statute. Several trial courts however, relying upon *People v. Behlog* (74 NY. 2nd 237 (1989)), have applied the reduced sentences to persons committing crimes before the effective date of the new statutes under the amelioration doctrine of that case. It is unclear at the present time however whether the Court of Appeals will be coming down with a decision on the pending cases involving the retroactivity issue before its summer recess. We will keep our readers advised of developments.

Lawyers' Fund for Client Protection Issues 2005 Report

The Lawyers' Fund For Client Protection, which administers reimbursements to clients who have been victimized by attorneys, recently issued its report for the year 2005. The Fund reported that it paid $8.1 million in 2005, a five-year high, and that some 19 attorneys were responsible for $5.3 million in payouts or over 60% of the total. One disbarred Long Island practitioner, who was convicted of a felony, alone cost the Fund $2.4 million in required payouts. The individual is currently serving 2–6 years in prison for stealing real estate escrow funds which had been left in his trust by clients. The largest number of awards involve losses relating to real estate transactions. In 2005, 116 awards were related to real estate matters totaling $5.3 million or 65% of the total disbursements.

The Fund also reported that 729 claims were filed and 227 approved in 2005. This represents an increase over 2004 and the total reimbursement of $8.1 million was $3 million more than that paid out in 2004 representing a 59% increase. The $8.1 million paid out in 2005 represented the third-highest payout since the Fund was established in 1982. In 2000 the Fund paid out $10.5 million in losses and in 1996 it paid out $9.9 million. Since 1982 a total of $116 million was paid out with over 6,000 claims approved.

The monies received by the Fund to make the reimbursements in question come from a $60 share of each lawyer's $350 registration fee. The Fund is administered by a 7-member board of trustees which serve without compensation. The Fund in issuing its report emphasized that only a tiny percentage of attorneys are responsible for losses incurred by clients, but unfortunately these few tarnish the reputation of the entire bar and cost the Fund millions of dollars each year in required reimbursements. From 1982 to 2005, only 806 former members of the bar have been responsible for

the over 6,000 awards granted by the Fund. This represents less than 1/3 of 1% of New York's current 221,000 registered attorneys.

New York City Utilizes Increased Camera Patrols

The New York City Police Department recently reported that it is expanding its practice of placing surveillance cameras throughout the city streets. The city currently has about 1,000 cameras in the subways with an additional 2,000 scheduled to be placed in the subways by the year 2008. In addition, under its new initiative, thousands of cameras are expected to be placed throughout the city with an emphasis on Lower Manhattan and parts of the midtown area. The city recently received a $9 million grant to place 500 cameras throughout the city and an additional $81 million is expected in federal grants.

The Police Department recently announced that it has formed a four-member legal advisory committee to give legal and policy advice on the camera situation as well as on a variety of matters including police demonstrations and intelligence gathering. The four members selected are partners in some of the large law firms in Manhattan. Police Commissioner Kelly in announcing the new police initiatives stated: "The Police Department must be flexible to meet an ever-changing threat. We also have to ensure whatever measures we take are reasonable as the Constitution requires. That's the only way to retain public support and preserve individual freedoms."

Ranks of Millionaires Grow

A survey by the Spectrem Group, a Chicago-based consulting firm specializing in retirement markets revealed that a record 8.3 million U.S. households had a net worth of $1 million or more in 2005, representing an increase of over 800,000 from 2004. Of this group approximately 930,000 households had a net worth of $5 million or more. Hopefully some of our readers were in this group.

New York City Loses Population

According to a recent census report New York City and other large metropolitan areas have steadily been losing population during the last 15 years. According to the report, from 1990 to 2000 New York City lost approximately 190,000 residents each year and from 2000 to 2004 it lost an additional 211,000 residents each year. Similar declines in population were experienced by other large cities such as Chicago, Detroit, Los Angeles and San Francisco. According to the report the Northeast and Midwest are generally losing population while the South and Southwest are undergoing dramatic increases. The States that have attracted the most new residents have been Florida, Arizona and Nevada and the States that have lost the most are New York, California and Illinois.

Nation's Death Rate Declines

The United States Center for Disease Control and Prevention reported in a recent study that the number of deaths within the United States had dropped by 50,000 in 2004, reflecting the steepest decline since 1938. In 2004 the total number of deaths in the United States was 2.45 million. It was also reported that the life expectancy has increased with those born in 2004 expected to have an average life expectancy of 77.9 years. Women can expect to live more than 5 years longer than men with a life expectancy of 80.4 years. The life expectancy for men is 75.2 years.

Second Circuit Upholds Constitutionality of New York's Bar on Voting by Convicted Felons

In early May, the Second Circuit Court of Appeals rejected an attack on the constitutionality of New York's law barring prisoners and convicted felons on parole from voting. By an 8–5 majority, the Second Circuit sitting *en banc* ruled that Congress did not intend to allow challenges to the felony disenfranchisement law under the Voting Rights Act. The Court rendered its decision in *Hayden v. Pataki*, and a related case in *Muntaqim v. Coombe.*

Currently, 48 states prohibit inmates from voting while incarcerated. Thirty-five states, including New York, also prohibit felons from voting while they are on parole. Five states deny the right to vote to all felony offenders.

It is unknown at the present time whether an attempt will be made to have the issue of voting rights for felons decided by the United States Supreme Court. We will keep our readers advised of any further developments.

New York Again Leads Nation in Wiretapping

In an annual report issued by the Administrative Office of the U.S. Courts, it was noted that in 2005 New York State reported the use of 391 wiretaps. This was down from 449 wiretaps which were utilized in New York in 2004. Within New York State, the Queens District Attorney's Office reported the use of 118 wiretaps comprising almost one-third of the statewide total. The use of wiretaps in Queens however was also somewhat lower than the total in 2004. Following New York State was California with 235 wiretaps, New Jersey with 218, and Florida with 72.

About Our Section and Members

Task Force on Attorney-Client Privilege

Our Section Vice-President, Jean T. Walsh, has been deeply involved with respect to the issue of obtaining waivers of the attorney-client relationship from corporate criminal defendants as part of Federal plea agreements in efforts to obtain more lenient Federal sentences. Jean has been a member of the Task Force on Attorney-Client Privilege established by the New York State Bar Association. The Task Force report was adopted as official policy by the New York Bar Association and the Bar Association in late March called upon the U.S. Sentencing Commission to abandon a policy that encourages corporate criminal defendants to waive the attorney-client and work-product privileges in order to obtain more lenient sentences. The Bar Association also urged the Sentencing Commission to remove a 2004 amendment encouraging waivers and requested that it issue an express statement that waiver of the attorney-client and work-product protections is not to be considered in evaluating the level of cooperation of the defendant and its culpability score.

In late April in response to the urging of our Bar Association and other groups, the Sentencing Commission voted unanimously to delete language in the sentencing guidelines that encouraged government prosecutors to require waivers of the attorney-client privilege and work-product protections in order for corporations to qualify for leniency in sentencing. The Commission however stopped short of recommending a specific bar against prosecutors from implicitly or explicitly demanding waivers as part of a plea bargain.

The action of the Task Force and the Bar Association occurred after increasing complaints from defense attorneys that Federal and State prosecutors were routinely requiring privilege waivers as part of a plea bargain. Last year the American Bar Association also opposed the routine practice of demanding waivers and the issue has been a hot topic of discussion during the last several months.

Appointment of New Executive Committee Members

Section Chair Roger B. Adler recently announced that effective as of June 1, the following new district representatives will assume office.

(1) Hon. Richard Giardino (Judge, Fulton County Court)—4th District

(2) John P. Getz, Esq. (Rochester, New York)—7th District

(3) Marvin Raskin, Esq.—12th District

We welcome these new members to the Executive Committee of our Section and thank those members who are leaving for their past service.

Congratulations to Paul Shechtman

It was recently announced that Paul Shechtman, who has been a partner at Stillman and Friedman for the last several years, will formally have his name added to the partnership so that the firm will be known as Stillman, Friedman, and Shechtman. Paul Shechtman is a leading criminal law practitioner, having handled several high-profile and difficult cases during the last several years. He also previously served as a New York State Director of Criminal Justice and is an adjunct professor of law at Colombia Law School. Paul has also been a frequent contributor of articles to our *Newsletter*. We congratulate him on this latest recognition of his many talents and outstanding ability.

Article in *Criminal Law Newsletter* cited in Court of Appeals Decision

We are happy to note that the reputation and prestige of our *Newsletter* seems to be growing. It was recently pointed out to us that an article which appeared in our *Newsletter* was recently cited in a leading Court of Appeals decision. The article "Is There Life Left in Depraved Indifference Murder?" written by Peter Dunne, currently a Law Secretary to Queens Supreme Court Justice Robert McGann, was cited in the case of *People v. Suarez*, 6 N.Y.3d 202 at page 207, footnote 2. The cited article appeared in our *Criminal Law Newsletter* of the Fall 2004, Volume 2, Number 4. In late June, the Court of Appeals issued its most recent decision on depraved indifference murder in the case of *People v. Atkinson.* Mr. Dunne has graciously agreed to provide an update of his article on depraved indifference murder and this article will appear in the next issue of our *Newsletter*. We congratulate Peter Dunne on his well-written article and look forward to his update.

The Criminal Justice Section Welcomes New Members

With our last issue we began the practice of formerly welcoming new members of the Criminal Justice Section by listing their names in our newsletter. Below are the names of the new members who have joined within the last four months. We welcome them to our Section and to our *Newsletter*.

Vicki Fotiny Andreadis
Harold Edward Bahr
Rebecca Jayne Ballas
Amy L. Berlin
David A. Bernstein
Catherine Ladson Bonventre
Allen Seth Brenner
Mark H. Brenner
David E. Cahn
Daniel Joseph Cain
Angelo Capalbo
Gaspar M. Castillo
Anthony Cecutti
David M. Cohen
Steven M. Cohen
Sharon L. Davies
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Heather Anne Dona
Marianna Drut
Lisa Marie Dudzinski
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Marceau Jude Edouard
Moriah M. Eskow Niblack
Nicole Marie Fantigrossi
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Erin Michele Reese
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Oliver A. Smith
Ronald J. Snyder
Charles T. Spada
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