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Inside

Message from the Chair . . . 3
Michael T. Kelly

Message from the Editor . . . 4
Spiros A. Tsimbinos

Feature Articles

Eyewitness Identification Expert Testimony After *People v. Lee* . . . 5
Peter Dunne

The Promise of *Gideon* . . . 8
Steven C. Davidson

New York Court of Appeals Revisits Death Penalty Issue . . . 10
Paul Shechtman

New York Court of Appeals

New York Court of Appeals Review . . . 13

Profile of Robert S. Smith, New York Court of Appeals Judge . . . 15

For Your Information

A Divided U.S. Second Circuit Finds that President Does Not Have Authority to Detain as an Enemy Combatant an American Citizen Seized on U.S. Soil Outside the Zone of Combat . . . 18

A Report on New York's Drug Courts . . . 18

Governor's Criminal Law Legislative Proposals . . . 18

Newsletter Prediction Comes True . . . 19

Recent U.S. Supreme Court Decisions Dealing with Criminal Law . . . 20

Possible Constitutional Challenges to Persistent Felony Offender Statute . . . 22
By Spiros A. Tsimbinos

Cases of Interest in the Appellate Divisions . . . 23

Criminal Law Case Notes . . . 24

About Our Criminal Justice Section and Members

Our Criminal Justice Section . . . 26

Vincent Doyle III Participates in New York State Indigent Defense Summit . . . 26

A Report on Our Fall Section Meeting . . . 26
By Roger Bennet Adler

A Report on Our Annual Winter Meeting . . . 27

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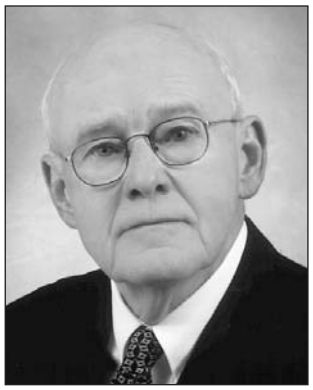
Message from the Chair



As we head into the New Year there is more than enough to keep the Criminal Justice Section very busy. In this message I would like to touch upon four issues that the Section will be discussing and commenting on in the next few months.

First we will be pushing for reform of the Rockefeller drug laws and hoping that the legislators and Governor can come to some sort of agreement this year. It seems to me that all agree the laws as they stand now are archaic and, in many situations, unjust, yet they would rather have the injustice continue than give any ground to the other side.

Secondly, we will have to weigh in on the use of the 18b funds. When the state raised the rates for the 18b lawyers more counties felt that they could save money by setting up a county-wide Public Defenders Office rather than an Assigned Counsel Program, while others claim that the various counties would cut the Public Defenders budget first when cuts are needed. The point is also being made that many fine attorneys worked for years doing assigned counsel work for almost nothing, and now that the rates have been increased, those pushing for the Public Defender System just want to underbid them. It does seem that both sides agree that there should be statewide oversight of training and standards for whatever is finally agreed upon. Our President, Tom Levin, is taking the matter very seriously and set up a special committee to study the various issues. At my request he has appointed Vince Doyle III and Norm Effman to serve on the committee. Please let us know your feelings on this matter.

A third subject that has arisen and will have to be discussed, despite its tenderness, is accountability of prosecutors for misconduct. The *New York Times* recently did an article on egregious misconduct by prosecutors that went unpunished. Tom Levin has asked that our Section look into this matter. The argument is made that the judge and the Appellate Division should know what "prosecutorial misconduct" is and if it occurs should swiftly handle it at the trial or appeal level and, if it is that serious, refer it to the Attorney Grievance Committee. An interesting point here is that the *New York Times* article notes that "A review of appellate decisions showed that judges had cited prosecutors for misconduct in 72 cases over a 21-year period . . ." One wonders about the 72 trial court judges who allowed such egregious conduct to result in a conviction rather than a mistrial. If an experienced trial court judge didn't recognize it, should a young, inexperienced prosecutor recognize it? Obviously something must be done to make prosecutors more accountable for intentionally and knowingly violating their discovery, Brady and other ethical duties that really could be criminal in nature. There will be much discussion on this matter in the year ahead.

The fourth issue that will be a "hot spot" this year will be an attempt by the Section to take a position on the electronic taping of police interrogations. It seems that this is something that would benefit both prosecutors and defense attorneys (not to mention judges and juries). However, prosecutors do worry about the costs, training, feasibility and the obvious new litigation spawned by enacting laws demanding electronic taping.

In closing I would like to thank the members of the Executive Committee of the Criminal Justice Section for their attendance at the meetings over the past year and the very hard work they have done.

Sincerely,

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

Message from the Editor

I am pleased that we have been receiving many complimentary remarks about our first two issues of our *Criminal Law Newsletter*. I am also happy that we have been receiving a steady stream of interesting articles for publication, covering a wide variety of areas in criminal law. Keep your comments and articles coming.

In this issue, we have an interesting article on the evolving issue of expert testimony in the area of eyewitness identification, as well as an in-depth analysis of the death penalty cases, which are now beginning to come down from the New York Court of Appeals. As a reminder of the importance of the right to counsel, we also present a celebratory article on the promises of the *Gideon* decision.

I would like to thank the authors for their contributions to the Spring issue. Our Summer issue, which we intend to have available for our readers sometime in July, will feature a detailed analysis of any legislative changes which have been enacted by the state legislature. As of this date, there still appears to be no definitive action on efforts to modify the Rockefeller drug laws. We will keep our eye on developments in this area and on any other substantive changes which will affect the practice of criminal law. We will report any of these changes to our readers as quickly as possible.

We look forward to your continued support for our *Newsletter*. Mention our Criminal Justice Section to a colleague and let's try to increase our Section membership and activities throughout the coming year.

Spiros A. Tsimbinos

Eyewitness Identification Expert Testimony After *People v. Lee*

By Peter Dunne

On May 8, 2003, the Court of Appeals in *People v. Lee*[1] held that expert testimony on the issue of the reliability of eyewitness identification is not inadmissible per se. In the 18 months since, there has been remarkably little consensus on resolving the unanswered questions posed by this leading case in eyewitness identification expert testimony. This article intends to trace the historical roots of *Lee*, examine its unanswered questions and survey the lower court litigation following this seminal decision.

Eyewitness expert testimony focuses on the ability of an eyewitness to observe and recall the characteristics of a perpetrator. Among the topics which might be addressed by such an expert would be: weapon focus (the attention which a witness gives to the weapon used during the course of the incident as opposed to attention to the facial characteristics of the suspect); the confidence/accuracy studies (according to some studies, the accuracy of an identification has no correlation to the confidence which a witness has in the identification); and post-event assimilation of information (after an identification, the witness may be exposed to intentional and unintentional reinforcements of the initial identification).[2]

Prior to *Lee*, this type of testimony was routinely ruled inadmissible, based upon the proposition that it would infringe upon the jury's power to determine the reliability of the People's evidence.[3] This principle was not limited to identification cases. In many other areas, expert testimony was and is barred because it "invaded the province of the jury." For example, it is error for a fire marshal to testify that a fire was intentionally set.[4] Similarly, it is error for a medical examiner to testify that the victim's death was a homicide.[5]

In the years since *Valentine*, the Court of Appeals began to question this reasoning. The first crack in the wall was *People v. Cronin*,[6] which addressed not eyewitness testimony, but the testimony of an expert in drug abuse. The defendant had been loitering in front of a Radio Shack store with some friends and entered the store by the unusual method of "running through the plate glass window." He was tried for burglary and during the trial, witnesses testified that the defendant had consumed "a case of beer, smoked several marijuana cigarettes, and ingested five to ten Valium tablets." Defense counsel moved to call an expert on the effects of drug use. The trial court permitted the expert to testify, but prohibited questions about the defendant's state of mind, his intent or his ability to have intent, stating "those are questions to be decided by the jury." The Court of Appeals reversed and held that expert testimony was admissible if the subject matter was not within the knowledge of the typical juror and the jury would benefit by the specialized knowledge. This case represented a shift in focus away from "invading the province of the jury" to an analysis of whether the testimony would be helpful.

In 1990, in *People v. Mooney*,[7] where a defendant sought to call an eyewitness expert, the trial court excluded the testimony. Although the Court of Appeals affirmed the conviction in a 5-2 decision, Judges Kaye and Alexander strongly dissented, stating that the trial court erroneously excluded this evidence because it invaded the province of the jury, and noted that this standard had been changed by *Cronin*.

Throughout this period, an expanding list of psychological explanations for behavior that might seem unusual to a jury became admissible. Among these are "rape trauma syndrome,"[8] the reactions of sexually abused children,[9] "the battered child syndrome,"[10] and "the stresses confronting immigrant groups trying to adapt to American society."[11] All of these examples would require a supplemental jury instruction by the court to the effect that this testimony may be received to explain an individual's conduct, but not as evidence that the event that could produce such conduct did in fact occur.[12]

The wall crumbled in 2001. The defendant Lee was arrested in Nassau County driving a stolen car. The car had been stolen at gunpoint two months earlier in Manhattan. The car had been taken from the complainant, who stood four or five feet away from the perpetrator in a well-lit area. Six months after this arrest, a photo spread was shown to the complainant, who identified the defendant. Ten days later, the defendant was placed in a lineup and was identified by the complainant. At the trial, the defense attempted to introduce eyewitness expert testimony at both the pre-trial hearings and at trial, and was precluded from both.

The Court of Appeals held that "Eyewitness expert testimony is not inadmissible per se, [but] the decision whether to admit it rests in the sound discretion of the trial court." The Court went on to say that the trial

court properly exercised its discretion to exclude such expert testimony because there was corroborating evidence in the case, i.e., that the defendant was in possession of the car which had been stolen during the robbery.

There are three main questions which are left open by this decision. The first is what must a defense counsel allege in his or her moving papers to be entitled to call such an expert?

The first case to address this question was *People v. Radcliffe.*[13] In this case, the defendant was charged with the attempted murder of a livery cab driver, who identified the defendant in a photo spread and in a lineup. He was the only eyewitness to the incident. Defense counsel moved to call an expert in eyewitness identification. The court, in denying the motion, stated that:

> An application to admit expert identification testimony should: (1) to the extent known set forth the pertinent alleged facts of the identification and any corroborative evidence; (2) set forth the name and qualifications of the witness and the "proffered" testimony; (3) correlate the proffered testimony with the facts of the case to demonstrate the relevance of the expert testimony; (4) explain whether the testimony involves "novel scientific theories and techniques" and if it does, include an offer of proof as to its general acceptance by the relevant scientific community; and (5) explain why the testimony is warranted if an existing standard jury instruction . . . would appear to cover the area of the proffered expert testimony.[14]

The court found that the application failed to allege sufficient facts about the circumstances of the crime, had not provided his expert's qualifications, had not provided details of the expert testimony and had not made representations about the general acceptance by the relevant scientific community. Defense counsel was given leave to renew this application.

One month later, *People v. Smith*[15] specifically rejected the pleading requirements of *Radcliffe*, and permitted an expert to testify upon the representation that there was only one eyewitness and there was no corroborating evidence. Interestingly, when defense counsel in *Radcliffe* renewed his application, it was heard by a different justice, who admitted the testimony without mention of the pleading requirements of the previous court.[16]

In analyzing these pleading requirements, an analogy here might be drawn from the Criminal Procedure Law (CPL) requirements for pleading suppression issues. When making a motion to suppress physical evidence, counsel must allege specific facts, not conclusions, and the facts must relate to the criminal acts of which the defendant is accused.[17] However, there is no such requirement of specificity for motions to suppress identification testimony. It is specifically excluded by the CPL.[18] The likely reason for not requiring the same degree of specificity lies in the nature of the evidence sought to be excluded. In the case of physical evidence, it would be expected for the defendant to know the circumstances surrounding the search of his person, or area under his control. However, in the case of identification issues, "in many instances a defendant simply does not know the facts surrounding a pre-trial identification procedure and thus cannot make specific factual allegations."[19]

Similarly, in these expert cases, it would seem onerous to require defense counsel to comply with the pleading requirements of the first *Radcliffe* case.

The second question left open by *Lee* is whether this type of expert testimony meets the standards for expert testimony in *Frye v. United States*.[20] The *Frye* test requires an examination of four factors: (a) the procedure is generally accepted in the scientific community; (b) the procedure is reliable as performed in the present case; (c) it is a proper subject for expert testimony; and (d) the proposed witness is an expert. Now, notice that *Lee* addressed only the third factor. The Court did not hold that eyewitness expert testimony was generally accepted in the scientific community.

Two courts have addressed this question. First, in *People v. Smith*,[21] the court held that there was no need to hold a *Frye* hearing and cited a number of pre-*Lee* cases which held that such testimony was admissible. However, four months later, in *People v. LeGrand*,[22] Justice Fried held that the Court in *Smith* should not have relied on pre-*Lee* cases because the issue of general acceptance in the scientific community had not been addressed. He held a *Frye* hearing and determined that there was no general acceptance in the scientific community for this type of testimony and denied the motion to call such an expert.

Both of these courts have acknowledged that as of this date, New York continues to hold to the *Frye* standard.[23] *Frye* has been superseded in federal jurisdictions by the Federal Rules of Evidence, which allows the court to permit testimony concerning scientific or technical evidence which will aid the fact finder in understanding the evidence or determining a fact in issue.[24] The federal standard of *Daubert v. Merrill Dow Pharma-*

ceuticals, Inc.[25] is generally more flexible and presumably would allow the admission of this type of evidence. Whether this line of cases presents the Court of Appeals with another opportunity to revisit the *Frye* standard remains to be seen. As of this date, *LeGrand*[26] is the only court to hold a *Frye* hearing and which has held that eyewitness identification expert testimony is not generally accepted in the scientific community, and therefore inadmissible.

Finally, the last question posed by *Lee* is in what types of cases is expert testimony proper? Specifically, what level of corroboration is required to prevent the testimony of such an expert? In *Lee*, the Court of Appeals held that the trial court properly exercised its discretion in excluding expert testimony because the defendant was found in possession of the car stolen from the complainant. However, this possession was two months later, and in a different county.

This is a rather curious aspect of the case. No other area of expert testimony requires a lack of corroboration. For example, a DNA expert would not be barred because the accused made a statement to the police. A ballistics expert would not be barred because there existed other proof that a firearm was operable. Furthermore, the level of corroboration in *Lee* is extremely minimal. Exactly how minimal can be seen by examining the line of cases addressing "recent exclusive possession" of stolen property. Where the accused is charged with possession of stolen property, the prosecutor is, under certain circumstances, entitled to prove that the defendant possessed the property a short time after the theft, as circumstantial proof of the defendant's knowledge that the property was stolen. Under these circumstances, the People are also entitled to a jury instruction that where possession is recent and exclusive, the defendant is presumed to have knowledge that the property was stolen.[27] However, there are broad limits to the term "recent." In fact, the possession of the car two months following the theft may not even qualify for presumption.[28]

Ultimately, the court may be hinting that whenever there is any evidence beyond eyewitness testimony, the evaluation of such testimony is not beyond the knowledge of a lay juror. Expert testimony becomes useful to the jury, and admissible only when the case consists exclusively of eyewitness testimony.

As can be seen, this is an area of law which is currently a work in progress. We await further developments.

Endnotes

1. 96 N.Y.2d 157, 726 N.Y.S.2d 361, 750 N.E.2d 63.
2. For an excellent review of the social science literature, see *People v. LeGrand*, 196 Misc. 2d 179, 747 N.Y.S.2d 733.
3. *People v. Valentine*, 53 A.D.2d 832, 385 N.Y.S.2d 545 (1976).
4. *People v. Champion*, 247 A.D.2d 901, 668 N.Y.S.2d 857.
5. *People v. Burse*, 234 A.D.2d 950, 652 N.Y.S.2d 439.
6. 60 N.Y.2d 430, 470 N.Y.S.2d 110, 458 N.E.2d 351.
7. 76 N.Y.2d 827, 560 N.Y.S.2d 115, 559 N.E.2d 1274.
8. *People v. Taylor*, 75 N.Y.2d 277, 552 N.Y.S.2d 883, 552 N.E.2d 131.
9. *People v. Carroll*, 95 N.Y.2d 375, 718 N.Y.S.2d 10, 740 N.E.2d 1084.
10. *People v. Henson*, 33 N.Y.2d 63, 349 N.Y.S.2d 657, 304 N.E.2d 358.
11. *People v. Aphaylath*, 68 N.Y.2d 945, 510 N.Y.S.2d 83, 502 N.E.2d 998.
12. *See* 2 CJI, Rape Trauma Syndrome.
13. 191 Misc. 2d 545, 743 N.Y.S.2d 229 (Apr. 5, 2002).
14. *Id.* at 548, 743 N.Y.S.2d 229, 232.
15. 191 Misc. 2d 765, 743 N.Y.S.2d 246 (May 15, 2002).
16. *People v. Radcliffe*, 196 Misc. 2d 381, 764 N.Y.S.2d 773 (Apr. 8, 2003).
17. CPL § 710.20. See *People v. Mendoza* for a virtual primer on pleading suppression issues.
18. CPL § 710.60(3)(b).
19. *People v. Rodriguez*, 79 N.Y.2d 445, 453, 583 N.Y.S.2d 814, 818, 593 N.E.2d 268, 273.
20. 293 F. 1013 (1928).
21. 191 Misc. 2d 765, 743 N.Y.S.2d 246 (May 15, 2002).
22. 196 Misc. 2d 179, 747 N.Y.S.2d 733 (Sept. 10, 2002).
23. *People v. Wesley*, 83 N.Y.2d 417, 611 N.Y.S.2d 97, 633 N.E.2d 451 (1994).
24. Fed. R. Evid. 702.
25. 509 U.S. 570, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1994).
26. 196 Misc. 2d 179.
27. *See* 2 CJI, Recent Exclusive Possession.
28. *See People v. Schillaci*, 68 A.D.2d 124, 416 N.Y.S.2d 300 (where a two-month gap between the day of the theft and possession precluded the application of the recent exclusive possession presumption). *See also People v. Rolland*, 128 A.D.2d 650, 512 N.Y.S.2d 650 (six months).

Mr. Dunne is presently serving as the Principal Law Clerk to Acting Supreme Court Justice Robert McGann, presently sitting in Queens County. He also previously served as an Assistant District Attorney in Queens County. He is a graduate of Boston University School of Law, where he served as the Editor of the *Boston University Law Review*. His article is based upon a recent lecture given at the Queens County Bar Association.

The Promise of *Gideon*

As We Celebrate the 41st Anniversary of the *Gideon* Decision, We Present a Retrospective Article on Its Historical Importance

By Steven C. Davidson

Clarence Earl Gideon is a name that probably few people outside the legal community recognize. This man, and the case he pursued to the United States Supreme Court in 1963, however, have come to personify one of the most basic and important pillars of American democracy: legal representation for all people accused of a crime.[1] Thanks to Mr. Gideon, a group of talented attorneys, law students and a brave and progressive United States Supreme Court, led by Chief Justice Earl Warren, a rule of law now exists whereby the rights of the accused in a criminal proceeding are protected.[2]

On March 18, 2004, we celebrate the 41st anniversary of the *Gideon* Supreme Court decision. Before *Gideon*, an accused person could be sentenced to prison without the assistance of counsel. But *Gideon* established the right to an attorney at all stages of the criminal process. It took a brave group of people to establish what some of us now take for granted. As former Attorney General of the United States Robert F. Kennedy is quoted as saying, "A poor man charged with a crime has no lobby."

Many of us are familiar with the so-called "*Miranda*"[3] warnings from television or movies. But these crucial rights were not always recognized or enforced. Even today, as we celebrate the 41st anniversary of the landmark *Gideon* decision, its full promise has not been reached due to inadequate budgeting for private and institutional defense of the accused caused by political in-fighting.[4]

Nonetheless, it can be argued that the right to counsel is the single-most fundamental constitutional right. An attorney is necessary to properly protect the rights of the accused person at each stage of a criminal prosecution. Without a defense attorney, the government can proceed unchecked, and its evidence remain unchallenged. Abe Fortas knew this, and was Mr. Gideon's appointed counsel in the Supreme Court.[5]

Mr. Fortas, who was later appointed to the United States Supreme Court bench himself, argued persuasively that defendants who were denied the "guiding hand of counsel" could not be assured a fair trial. Fortas simply argued that without a lawyer, a person could not effectively represent himself. Justice Hugo Black, who wrote for the Court in *Gideon*, concluded ". . . that average citizens lack the legal skill to protect themselves when brought before a court with the power to take their life or liberty."

Thus, the constitutional basis for the *Gideon* decision is derived from the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the assistance of counsel for his defense*.[6]

Today, perhaps even more than in 1963, indigent defendants require "the guiding hand of counsel," and the protections granted by the *Gideon* decision. Laws and statutes have become increasingly complex. Sentencing guidelines at the state and federal levels can be drastic and difficult to comprehend. Therefore, even for "lower" or "petty" crimes that carry with them a minimal exposure to jail time or other loss of liberty, representation is essential.

The principles established by *Gideon* had an unassuming factual start at state court in Florida. Mr. Gideon was charged with breaking and entering. On the day he appeared before the Florida trial court, court records show the following exchange occurred:

"The Court:	The next case on the docket is the case of *The State of Florida v. Clarence Earl Gideon, Defendant*. What says the state? Are you ready to go to trial in this case?
The State:	The state is ready, your Honor.
The Court:	What says the Defendant? Are you ready to go to trial?
The Defendant:	I am not ready, your Honor.
The Court:	Did you plead not guilty to this charge by reason of insanity?

The Defendant: No sir.

The Court: Why aren't you ready?

The Defendant: I have no counsel.

The Court: Why do you have no counsel? Did you not know that your case was set for trial today.

The Defendant: Yes, Sir. I knew that it was set for trial today.

The Court: Why, then, did you not secure counsel and be prepared to go to trial?

The Defendant answered the Court's question, but spoke in such low tones that it was not audible.

The Court: Come closer up, Mr. Gideon. I can't understand you. I don't know what you said, and the reporter didn't understand you either.

At this point, the Defendant rose from his chair where he was seated at the Counsel Table and walked up and stood directly in front of the Bench, facing his Honor, Judge McCrary.

The Court: Now tell us what you said again, so we can understand you, please.

The Defendant: Your Honor, I said: I request this Court to appoint counsel to represent me in this trial.

The Court: Mr. Gideon, I am sorry, but I cannot appoint counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint counsel to defend you in this case.

The Defendant: The United States Supreme Court says that I am entitled to be represented by counsel.

The Court: Let the record show that the Defendant has asked the Court to appoint counsel to represent him in this trial and the Court denied the request and informed the Defendant that the only time the Court could appoint counsel to represent a defendant was in cases where the defendant was charged with a capital offense. The Defendant stated to the Court that the United States Supreme Court said he was entitled to it."[6]

Mr. Gideon faced overwhelming obstacles. With great tenacity and determination, he had his case reviewed by the United States Supreme Court in order to test the theory he argued in Panama City, Florida: whether he was indeed entitled to assigned counsel. As we now know, Mr. Gideon was right. And thousands of indigent criminal defendants are now provided with the "guiding hand of counsel" in order to protect their constitutional rights.

Endnotes

1. *Gideon v. Wainwright*, 372 U.S. 335 (Mar. 18, 1963).
2. Today, some jurisdictions and individual courts deny representation unless the allegations are a "misdemeanor" or "felony" level, even if "lower" charges could result in incarceration and a loss of liberty.
3. *Miranda v. Arizona*, 384 U.S. 436 (1966).
4. Court-appointed attorneys in New York State, for example, had been receiving, since 1986, $40 an hour for court time and $25 an hour for out-of-court time. Finally, however, effective as of Jan. 1, 2004, the rates have been increased to $75 an hour with no distinction for in- or out-of-court work.
5. Mr. Fortas was assisted by, among others, John Hart Ely, who was, at the time, a law student at Yale School of Law. Mr. Ely has since gone on to become the Dean of Stanford Law School, a constitutional authority and well-known author. He also taught me one semester of constitutional law while he was a visiting professor at New York Law School.
6. Anthony Lewis, Gideon's Trumpet, pp. 9–11.

Mr. Davidson is a solo practitioner in White Plains, New York, specializing in the representation of criminal defendants. He is a member of the U.S. Supreme Court Bar, the New York State Bar, and the Commonwealth of Massachusetts. He is active with local bar associations, as well as the National Association of Criminal Defense Lawyers, in Washington, D.C. Mr. Davidson's article is an updated version of the article on the subject, which originally appeared in the Spring 2003 issue of the *Westchester County Bar Association Journal*.

New York Court of Appeals Revisits Death Penalty Issue

By Paul Shechtman

In *People v. Cahill*, a sharply divided New York Court of Appeals vacated the death sentence of James Cahill, who had murdered his wife in Onondaga County.[1] *Cahill* provides an opportunity to reflect on the emerging jurisprudence of capital punishment in New York State.

A.

In April 1998, James Cahill struck his wife, Jill, repeatedly on the head with a baseball bat during a heated argument. She was rushed to the hospital with life-threatening injuries. Gradually, Jill began to recover, moving from intensive care to the general rehabilitation unit and regaining some limited ability to speak.

In October 1998, Cahill, disguised as a maintenance worker, snuck into the hospital and administered potassium cyanide to Jill through her mouth or feeding tube. She died the next morning. The proof that Cahill had committed the crime was overwhelming: a search of his computer revealed evidence that he had ordered potassium cyanide, and a search of a shed on his property uncovered a bottle of the poison, as well as a wig that had been part of his disguise in entering the hospital.

A jury convicted Cahill of two counts of first-degree murder—murder in furtherance of a second-degree burglary and murder to eliminate a witness—and sentenced him to death. Cahill then appealed directly to the Court of Appeals, raising 38 claims.

This past November, in a decision that garnered statewide headlines, the Court vacated Cahill's death sentence. The majority opinion, authored by Judge Rosenblatt, held principally (i) that the evidence was legally insufficient to support a conviction for first-degree murder based upon burglary, and (ii) that the first-degree murder conviction premised on witness elimination was against the weight of the evidence in that the proof showed that Cahill "wanted to kill Jill . . . for reasons that had virtually nothing to do with her ability to testify against him."[2]

Judge Smith and Judge Ciparick concurred in the judgment but would have gone further and held that the very structure of the New York death penalty statute is unconstitutional. Their concern arises from the fact that in the sentencing phase in New York, the jury is instructed that if it cannot unanimously agree upon one of the two sentences available to it, death or life without parole, then the judge will impose a sentence that will result in the defendant's being eligible for parole after 20 to 25 years. For Judges Smith and Ciparick, this "deadlock instruction" creates an appreciable risk that a juror might be coerced into voting for death, rather than holding out for life without parole, to keep the defendant from being eligible for parole as a result of a non-unanimous verdict.[3]

Judge Graffeo and Judge Read, the Court's two newest members, dissented. Judge Read's dissent was especially pointed: She criticized the majority opinion as a "remarkable piece of judicial legerdemain, shot through with after-the-fact analysis."

B.

Cahill marks the second time that the Court of Appeals has reviewed a death sentence imposed under the 1995 statute, and the second time that the Court has vacated the defendant's sentence.[4] *Cahill* raises many questions—Did the majority properly apply the "against the weight of the evidence" standard in vacating Cahill's conviction for witness elimination murder? Are Judges Smith and Ciparick correct that the deadlock instruction is unconstitutional and, if so, must the statute be invalidated? But this article focuses on only one issue: Was the Court correct in holding that the evidence was legally insufficient to support a conviction for intentional murder in furtherance of a second-degree burglary? To understand that issue requires a brief excursion into the jurisprudence of the death penalty.

The United States Supreme Court has made clear that a capital sentencing scheme must narrow the class of offenders eligible for the death penalty and "make a principal distinction between those who deserve the death penalty and those who do not."[5] In enacting the death penalty statute, the New York legislature sought to heed this admonition: it limited the class of death-eligible defendants to those who commit intentional murders and required at least one of 12 aggravating factors. Five of the aggravating factors relate to the status of the victim of the murder (police officer, peace officer, corrections employee, witness, or judge); two factors address characteristics of the defendant (serving a life sentence or previously convicted of murder); and five factors speak to the heinousness of the crime (torture murder, contract killing, serial murders, multiple murders in the same criminal transaction, or murder committed in furtherance of certain enumerated felonies).[6]

In September 2001, a thirteenth aggravating factor was added to the statute—murder associated with terrorism.

At issue in *Cahill* was the first-degree felony murder provision, which provides, in relevant part, that a defendant is guilty of a capital murder when he intentionally causes the death of another "and the victim was killed in the course of committing . . . and in furtherance of robbery, burglary in the first or second degree, kidnapping in the first degree, arson in the first degree, rape in the first degree, [certain other sex crimes], or escape in the first degree." A typical fact pattern for first-degree felony murder is one in which a defendant intentionally kills a grocery store owner while robbing his store.

Cahill is not a typical first-degree felony murder case. The prosecution charged that Cahill had unlawfully entered the hospital with intent to kill his wife (a second-degree burglary) and had killed her in the course of and in furtherance of the burglary. Unlike the typical robbery case, Cahill's burglary, to use Judge Rosenblatt's words, had "no objective apart from the intentional murder and . . . was merely an act that enabled the murder, one of many anticipatory steps along the way."

The question for the Court was whether this distinction was of consequence under the death penalty statute. The majority concluded that it was—that a burglar is a candidate for the death penalty only if he "unlawfully enters a dwelling to steal or rob or rape and *in addition* kills someone intentionally, in the course of and furtherance of the burglary." Only such a "doubtful crime"—what Judge Rosenblatt called "murder plus"—renders an offender eligible for the death penalty. Because Cahill did not have a felonious intent independent of the murder itself, the majority found that his act was not a death-eligible crime.

Undoubtedly, the legislature could have opted for a "murder plus" formulation to separate those who deserve to face a death sentence from those who do not. But did it? It is here that the majority opinion is weakest. First, nothing in the language or history of the death penalty statute suggests that the legislature drew the distinction that the *Cahill* majority found dispositive. The words "murder plus" or "independent felonious intent" or their like appear nowhere in the legislative debates or bill jacket. Second, what the legislature did in drafting the death penalty law was to borrow language directly from the second-degree felony murder statute, which imposes a heightened sentence (but not death) for non-intentional killings committed in furtherance of certain felonies.[7] As Justice Read observed in her dissent, when "words have a . . . well-established legal meaning in the jurisprudence of the state, they are understood in such sense when used in statutes, unless a different meaning is plainly intended."[8]

That familiar canon of statutory construction leads one to examine the second-degree felony murder statute to shed light on Cahill's crime. Consider first a hypothetical case. D surreptitiously enters V's home, intending to poison her, a fight ensues, and D accidentally pushes V down the steps, killing her. Is D guilty of second-degree felony murder? The 1973 decision of the Court of Appeals in *People v. Miller* strongly suggests that the answer is "yes."[9] There, the Court held that a burglary premised on intent to assault could support a felony murder conviction. It observed that "[w]hen the assault takes place within the domicile, the victim may be more likely to resist the assault; the victim is also less likely to be able to avoid the consequences of the assault, since his paths of retreat and escape may be barred or severely restricted." If a burglary with intent to assault can support a felony murder conviction, one is hard-pressed to understand why a burglary with intent to murder cannot.

But can it fairly be said that the murder of Jill was "in furtherance of" Cahill's second-degree burglary? As the majority notes, it seems easier to find that the burglary facilitated the murder than that the murder facilitated the burglary. In the context of applying the second-degree felony murder statute, however, New York courts have interpreted the "in furtherance" requirement broadly. All that is required, it seems, is a logical nexus between the death and the underlying felony, not proof that the death advanced or facilitated the felony.[10] For example, a defendant may be guilty of second-degree felony murder if he commits arson and a firefighter dies seeking to extinguish the blaze.[11] If a logical nexus is the test, it is no stretch to conclude that the murder of Jill furthered the unlawful entry into her hospital room.

In sum, if the legislature intended to import second-degree felony murder principles into the first-degree statute, then it follows that Cahill committed a death-eligible crime: he killed his wife in the course of and in furtherance of a second-degree burglary.

C.

Both the majority and dissent in *Cahill* argue that their approach best comports with the goal of defining a class of murderers who are most deserving of the death penalty. Thus, for the majority, the defendant who breaks into a home with intent to steal and then intentionally kills the occupant is more deserving of death than one who breaks in only to murder and does so. In Justice Rosenblatt's words, this distinction "is neither arbitrary nor unjust, and is more faithful to the Legislature's language and design."

In her dissent, Judge Graffeo argued that the majority's approach leads to an "irrational delineation" between capital—and noncapital—eligible defendants:

> Under the majority's interpretation, an intruder who unlawfully enters a dwelling with the intent to steal—a television, for instance—and intentionally kills an occupant in furtherance of that burglary may be indicted on a capital murder charge. In sharp contrast, an intruder who unlawfully enters a dwelling with the intent to murder—someone like defendant who obtained a toxic chemical known for its ability to kill, violated an order of protection by surreptitiously entering his wife's hospital room, wore a disguise to avoid detection and, in a face-to-face encounter, poured cyanide down her throat, inducing a particularly painful death—confronts a parole-eligible prison sentence.

The truth is that no death penalty statute delineates perfectly between those who deserve death and those who do not. Consider these three defendants: A breaks into the hospital to kill V and does so; B breaks into the hospital to steal a television set from V's room and intentionally kills her in furtherance of the theft; and C lawfully enters V's hospital room and intentionally kills her during visiting hours. For the majority, only B is death-eligible. For the dissent, A and B are death-eligible, but C is not, even if C has administered poison through a feeding tube.

The hypotheticals highlight what Justice Harlan once called "the intractable nature of the problem of 'standards' which the history of capital punishment has from the beginning reflected."[12] With five more death penalty cases on its docket, the Court of Appeals will continue to grapple with that problem in the months to come.

Endnotes

1. *People v. Cahill*, 2003 WL 22770167 (N.Y., Nov. 25, 2003).
2. The majority also held that the trial judge had erred in ruling on challenges "for cause" to two prospective jurors.
3. *See* CPL 400.27(10); Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2119 n.215 (2000) ("[t]he only possible reason for having this cockeyed sentencing scheme—and for insisting that capital jurors be informed of it—is to put pressure on minority jurors holding out for life to switch to death so that the defendant is not made eligible for parole as a result of a non-unanimous verdict").
4. The first case was *People v. Harris*, 749 N.Y.S.2d 766 (2002).
5. *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990).
6. Penal Law § 125.27(1)(a).
7. Penal Law § 125.25(3). Notably, the legislature limited the felonies upon which first-degree felony murder can be predicated. For example, third-degree burglary (unlawful entry into a building) can support a second-degree felony murder charge, but not a first-degree felony murder charge.
8. McKinney's Statutes § 233.
9. *People v. Miller*, 32 N.Y.2d 157 (1973); *People v. Lewis*, 111 Misc. 2d 682, 686 (Sup. Ct., N.Y. Co. 1981) ("'in furtherance' places a relation requirement between the felony and the homicide . . . the nexus must be one of logic or plan").
10. *People v. Wood*, 8 N.Y.2d 48 (1960).
11. *People v. Zane*, 152 A.D.2d 976 (4th Dep't 1989).
12. *McGautha v. California*, 402 U.S. 183, 207 (1971).

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New York Court of Appeals Review

Listed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from October 28, 2003 to January 12, 2004.

Defense Request to Charge on Lesser Included Offense Forfeits Any Subsequent Statute of Limitations Claim

***People v. Mills*, decided October 28, 2003 (N.Y.L.J., Oct. 29, 2003, p. 19), 2003 WL 22435253, 750 N.Y.S.2d 230**

In a 5-1 decision, the New York Court of Appeals adopted a new rule which holds that a criminal defendant who requests a charge on a lesser included offense automatically forfeits any subsequent statute of limitations claim, but only if the evidence is legally sufficient to support a higher charge that is not barred by the limitations statute.

In the case at bar, the defendant had been charged with a 22-year-old homicide and had proceeded to trial on the charge of second-degree murder, which carries no statute of limitations. After requesting a charge to the lesser included offense of criminally negligent homicide, the defendant was convicted by the jury of that lesser charge. In affirming the conviction, the Court of Appeals held that the evidence was legally sufficient before the grand jury to support the second-degree murder charge and that therefore, by requesting the charge to the lesser included offense, the defendant waived his statute of limitations defense with respect to the lesser charge. The Court of Appeals issued its ruling despite the fact that defense counsel during the trial had stated that the defendant reserved his right to appeal a conviction with respect to the criminally negligent homicide charge.

In a vigorous dissent, Judge George Bundy Smith pointed to defense counsel's explicit reservation of his right to appeal and claimed that since there was no specific waiver, he would vote to vacate the defendant's conviction.

In a secondary issue decided by the Court, the defendant's statements to his wife regarding the incident while he was engaged in an argument with her were deemed to be admissible and not barred by the marital confidentiality privilege. The Court found that under CPLR section 4502(b), the privilege is prompted by the affection, confidence, and loyalty engendered by the marital relationship. In the case at bar, however, the statements were made in a time of violent confrontation between husband and wife and were not made in the context contemplated by the privilege.

Ultimate Sentencing Authority Rests upon Last Judge in the Sentencing Chain

***Murray v. Goord, &c, et al.*, decided October 28, 2003 (N.Y.L.J., Oct. 29, 2003, p. 19), 747 N.Y.S.2d 492**

In a unanimous decision, the Court of Appeals held that the sentence imposed by the last judge who sits on a case is the sentence which must be followed by correctional authorities.

In the case at bar, a defendant had been convicted and sentenced to 7.5 to 15 years on two matters and the sentences had been made to run consecutively. Following a reversal on appeal, he had plea-bargained for a term of 4.5 to 9 years and for concurrent sentences. The Department of Corrections, relying upon a Fourth Department Appellate Division case, *In re Muntaquim*, 277 A.D.2d 976, continued to compute the cases consecutively. The Court of Appeals stated that the *Muntaquim* case was no longer good law and was not to be followed. It thereafter summarized the issue as follows:

> The dispute here boils down to the question of whether, when there is a vacated judgment of conviction and subsequent resentencing of someone subject to an undischarged term of imprisonment, the prerogative to decide whether the sentences should run consecutively or concurrently always remains with the second judge who acts in the sentencing sequence.

The Court thereafter succinctly concluded that it agreed with the Appellate Division below that the sentencing discretion afforded by Penal Law section 70.25(1) fell upon the last judge of the sentencing chain.

Deprivation of a Fair Trial

***People v. Stiggins*, decided December 20, 2003 (N.Y.L.J., Dec. 21, 2003, p. 21), 2003 WL 22725282, 99 N.Y.2d 585, 755 N.Y.S.2d 721**

In a memorandum decision, the Court of Appeals reversed a conviction and ordered a new trial where it was apparent from the record that the presiding town justice was unfamiliar with the mechanics of a jury trial. Defense counsel had repeatedly objected and the judge had to be guided by the prosecutor through every aspect of jury selection. The trial court was unfamiliar

with the voir dire procedure and with the issuance of preliminary instructions to the jury. The Court of Appeals concluded that the trial judge's lack of understanding and proper supervision made it evident that he failed to satisfy his obligation to maintain the integrity of the proceedings.

Plea Bargain Agreement Vacated After Earlier Conviction Is Reversed

***People v. Pichardo*, decided December 2, 2003 (N.Y.L.J., Dec. 3, 2003. p. 18), 2003 WL 22844443**

In a 4-2 decision, the Court of Appeals vacated a drug defendant's guilty plea because the plea bargain was tied to a conviction that was later overturned. The majority opinion held that the promise made to the defendant that the sentence for the drug conviction would run concurrently with the time he was sentenced for the murder case could not be kept after the murder conviction was reversed and he was acquitted at the retrial.

The dissenting opinions of Judges Graffeo and Smith expressed the view that there was no showing in the record that the defendant would not have pleaded guilty to the drug charge and accepted the People's lenient offer if he had not been convicted of the murder charge.

Violation of Double Jeopardy Clause

***People v. Biggs*, decided December 2, 2003 (N.Y.L.J., Dec. 3, 2003, p. 19), 2003 WL 22844430**

In a unanimous decision, the Court of Appeals held that the Double Jeopardy Clause was violated when a defendant was convicted of the lesser included offense of intentional manslaughter following the dismissal of the intentional murder count for lack of evidence. The Court concluded that under the facts of the case, the first-degree murder count was the same offense as the second-degree murder charge and that the acquittal of the murder charge prohibited prosecution on the manslaughter count.

Failure to Advise Alien Defendants of Possible Deportation

***People v. McDonald*, decided November 24, 2003 (N.Y.L.J., Nov. 25, 2003, p. 28)**

In a unanimous decision, the Court of Appeals ruled that erroneous advice as to the possibility of the defendant's deportation was not sufficient to overturn a guilty plea because the defendant had failed to show that had the inaccurate advice not been given, he would not have pleaded guilty. Although the Court of Appeals upheld the conviction under the facts of the instant case, the Court did state that under certain circumstances, erroneous advice on a deportation situation could be grounds for reversal on "ineffective assistance of counsel" grounds.

In our Winter issue, we had apprised our readers that the Court of Appeals was considering this important issue and, as predicted, the Court's decision came down after the printing of our Winter issue. As promised, we are reporting the results in this issue. The companion case of *People v. Huang*, which was also discussed in our Winter issue, was dismissed by the Court of Appeals on the technical grounds that the judgment had not been entered in that case and that no appeal would lie from an unappealable order. The matter was thus remitted to the Appellate Division with the direction to dismiss the People's appeal.

Death Penalty Vacated Because Penalty Phase Was Conducted Without Proper Legal Foundation

***People v. Cahill*, decided November 25, 2003 (N.Y.L.J., Nov. 26, 2003, p. 18), 2003 WL 22770167**

In this important decision involving the death penalty, the Court of Appeals sharply divided in determining that the death penalty was improperly imposed. This 4-2 decision involved a 178-page ruling. Because of the complexity and importance of this case, Paul Shechtman has written a separate article explaining and analyzing the case. Mr. Shechtman's article appears on page 10 of this issue.

Evidence at Suppression Hearing Insufficient to Establish a Valid Inventory Search

***People v. Johnson*, decided December 22, 2003 (N.Y.L.J., Dec. 23, 2003, p. 19), 20003 WL 22989705**

In a unanimous decision, the Court of Appeals dismissed weapons possession charges because of an improper inventory search. Although the police had claimed that the discovery of a gun in the defendant's glove compartment was the result of an inventory search, the Court of Appeals concluded that the evidence was insufficient to establish a valid inventory search rather than an illegal search and seizure. The Court of Appeals pointed to the failure to complete any inventory forms and the fact that the officer had observed the gun in the glove compartment prior to alleging that the property was vouched for the purposes of an inventory accounting. The Court of Appeals concluded that if police intend to search vehicles in order to inventory contents and protect the department against claims of lost or stolen property and then use the fruits of those searches for a criminal prosecution, they must follow and establish a strict protocol which will be carefully reviewed by the courts.

Error in Admitting Excited Utterance Held to Be Harmless

***People v. Johnson*, decided December 22, 2003 (N.Y.L.J., Dec. 23, 2003, p. 18), 2003 WL 22989706**

In a 5-1 decision, the Court of Appeals upheld a defendant's assault conviction, which was partially based on hearsay statements of a homeless victim who was not available to testify. The alleged statements of the victim were made some 80 minutes after the alleged attack. Although the Court of Appeals found that some of the utterances did not strictly comply with the rules of admissibility, the majority found that any error which occurred was harmless beyond a reasonable doubt in light of the strong evidence of the guilt.

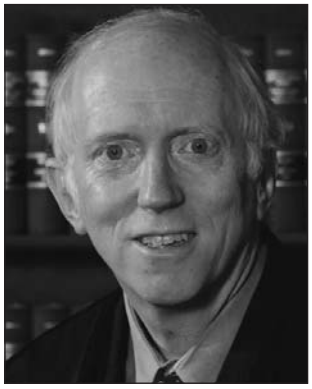
Justice Smith dissented, arguing that the defendant was denied a serious right of confrontation and cross-examination, and therefore his fundamental right to a fair trial had been violated.

Claim of Ineffective Assistance of Counsel Rejected

***People v. Taylor*, decided December 23, 2003 (N.Y.L.J., Dec. 24, 2003, p. 19), 2003 WL 22998488**

In a unanimous decision, the Court of Appeals rejected a defendant's claim of ineffective assistance of counsel. The defendant had claimed ineffective assistance of counsel because his attorney had failed to object to certain questions that the prosecutor had asked when cross-examining an alibi witness and also failed to object to parts of the prosecutor's summation. Although finding that the prosecutor's comments during summation were improper, the Court concluded that trial counsel's actions could have been based on a reasonable and legitimate strategy and that the strict standard for establishing ineffective assistance of counsel had not been reached. The Court therefore concluded "that the constitutional standard has been met because in light of the circumstances of this particular case, defense counsel's actions were within the reasonably objective range of performance and she provided defendant with meaningful representation" (citing *Strickland v. Washington*, 466 U.S. 668, 687–688 (1994) and *People v. Baldi*, 54 N.Y.2d 137, 147 (1981)).

Profile of Robert S. Smith, New York Court of Appeals Judge



On November 4, 2003, Governor George Pataki named Robert S. Smith as his selection from a group of seven nominees to serve on the New York Court of Appeals. Robert S. Smith is 59 years of age and has been a longtime resident of Manhattan. He is a graduate of Stanford University and Columbia Law School. During his 35-year career, he has largely served as a corporate attorney. In the area of criminal law, he has had occasion to handle two death penalty cases and has argued before the United State Supreme Court. He spent many years with the firm of Paul, Weiss, Rifkind & Garrison and had only recently created a new firm where he served as Special Counsel. He also served as a full-time visiting professor at Columbia Law School, teaching contracts, civil procedure, and complex litigation. Judge Smith is married to Dian G. Smith and they have three children.

Although Judge Smith's appointment was a surprise to legal scholars who had anticipated that Judge Pigott, presiding Justice of the Fourth Department, was the leading candidate for the appointment, comments regarding Judge Smith were to the effect that he is eminently qualified for the position and that he is a scholarly individual.

Judge Smith is a registered Republican and is now the fifth judge to be appointed by Governor Pataki. The state Senate confirmed Judge Smith's appointment in January and Judge Smith began hearing cases in the Court of Appeals shortly thereafter.

Attorney General Eliot Spitzer speaks at the Criminal Justice Section Luncheon

Attorney General Eliot Spitzer and NYSBA President A. Thomas Levin

Scenes f

Criminal Jus
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and Award

New York Ma
January,

The "Outstanding Public Defense Practitioner" Award is presented to Michele Maxian (left) by Jean Walsh

John Ryan (left) presents the "Outstanding Prosecutor" Award to Howard Relin

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FROM THE

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RRIOTT MARQUIS 29, 2004

Hon. Richard Wesley (left) receives the "Outstanding Jurist" Award from Hon. Mark Dadd

Terence Kindlon (left) received the "David S. Michaels Memorial Award for Courageous Efforts in Promoting Integrity in the Criminal Justice System" from Roger Adler

ft) receives the imi Memorial tanding Private titioner" from oldman

Thomas Liotti presents the "Outstanding Contribution to the Bar and Community" Award to Malvina Nathanson

For Your Information

A Divided U.S. Second Circuit Finds that President Does Not Have Authority to Detain as an Enemy Combatant an American Citizen Seized on U.S. Soil Outside the Zone of Combat

In an important ruling relating to the extent of presidential authority, under the recently enacted Patriot Act's legislation, the Second Circuit Court of Appeals on December 18, 2003 held that the President did not have inherent authority under Article II of the U.S. Constitution to detain a combatant in this country, nor does he have the required approval of Congress under the recently enacted Patriot Act legislation.

The ruling by the Second Circuit in *Padilla v. Rumsfeld*, 2003 WL 22965085, was a 2-1 decision, with Judges Rosemary Pooler and Barrington D. Parker, Jr. in the majority. According to the majority opinion, the central issue presented by the case was the lack of inherent constitutional authority of the President to detain American citizens on American soil outside the zone of combat.

A dissenting opinion was issued by Judge Richard Wesley, who recently left the New York Court of Appeals for a seat on the Second Circuit. Judge Wesley argued that President Bush had received the authority to detain Mr. Padilla under the joint resolution passed by Congress after September 11, 2001, and declared that, "The President's authority to detain an enemy combatant during war time is undiminished by the individual's U.S. citizenship."

It was reported after the decision that President Bush had directed the U.S. Department of Justice to seek a stay of the Second Circuit ruling and for a judicial review of the court's actions. It is unclear whether the Second Circuit will be asked to review the decision *en banc*. In either event, a review by the U.S. Supreme Court will in all likelihood be necessary to finally resolve the issue.

The importance of the anti-terrorism legislation and its impact on civil liberties was in fact the topic of a special presidential summit meeting organized by New York State Bar Association President A. Thomas Levin and co-sponsored by the Criminal Justice Section. The meeting took place on Wednesday, January 28, 2004, from 2 to 5 p.m. as part of the state Bar's Annual Meeting. The symposium examined the Patriot Act legislation and the First and Fourth Amendment implications for both the public and profession.

* * *

A Report on New York's Drug Courts

A recent report issued by the Center for Court Innovation, which was funded by the U.S. Department of Justice, concludes that the New York State Drug Courts have reduced recidivism and have saved approximately $254 million. The study examined 11 courts in the state, which processed more than 18,000 people since the state started the program in 1995. The study found that defendants going through the program return to crime 32% less frequently than similar defendants who receive no treatment. In one county, Queens, the drug court actually cut re-offending in half, with only 12% of the drug court participants being convicted of new crimes compared with 25% of regular offenders. Chief Judge Judith Kaye, who has been a strong advocate of the drug courts, stated that the "study proves with hard fast numbers what we have known all along—that the drug courts work."

Chief Administrative Judge Jonathan Lippman, in a recent article, also commented on the findings of the drug court report and stated: "The real-life implications of New York's drug courts are far reaching. Thousands of individuals have moved from addiction to sobriety—and from crime to law-abiding behavior. Families and communities are stronger."

Judge Lippman called for increased funding of the drug-court program, both at the federal and state levels, and emphasized that "drug courts are a rare government investment that actually demonstrate consistent returns."

For those requiring more details, the 350-page study can be found on the Web site at www.nycourts.gov/whatsnew/pdf/NYSAdultDrugCourtEvaluation.pdf

* * *

Governor's Criminal Law Legislative Proposals

Governor Pataki in his annual State of the State speech presented to the legislature on January 7, 2004, included several comments and proposals related to the

criminal justice system. Some of the comments touched upon prior initiatives such as changes in the Rockefeller drug laws and some of his remarks related to new proposals dealing with new anti-terrorism laws. The Governor also reiterated his call for a repeal of the statute of limitations for Class B felonies such as rape.

Proposals to modify the Rockefeller drug laws have been pending for years and both the Governor and legislative leaders have expressed support for modifications. However, they have continually deadlocked on the manner in which such changes should be made and have been unable to agree on the details of any modifications. The Governor again this year reminded the legislature of the need for change. However, whether all sides can agree to the form of any changes continues to be an open question.

The Governor subsequently in his annual budget address also raised questions regarding the size of the budget for the state judiciary. The Governor, who in the past has basically supported the judiciary's budget request, this year stated that the judiciary budget has increased while the executive branch has cut its budget by 1.2 percent. The Governor suggested that the recent request for the judiciary budget submitted by Judge Kaye and Judge Lippman was out of line and he suggested a cutback on both expenditures and staff. Governor Pataki's remarks appear to have the support of the state Senate Judiciary Committee, whose chairman, John A. DeFrancisco, stated that the "court system, like every other component of state government, must exercise fiscal prudence." Governor Pataki's remarks and proposals indicate a continued emphasis on "being tough on criminal justice issues and, due to the state's fiscal crisis, a return to a call for fiscal austerity."

We will keep an eye on all of the Governor's proposal as they proceed through the state legislature and we will promptly report to our readers in our future issues the passage of any relevant legislation affecting the criminal law area.

* * *

Newsletter Prediction Comes True

In our Fall 2003 issue, with respect to the article entitled, "Appellate Courts Grapple With Failure to Advise on Post-Release Supervision Term," we predicted that the differing positions taken by the Appellate Departments would eventually be headed for a resolution by the New York Court of Appeals. As proof that our *Newsletter* is right on top of current issues, the Court of Appeals on October 29, 2003, granted leave to appeal in the case of *People v. Ammarito*, 306 A.D.2d 99 (1st Dep't 2003), in order to decide whether a harmless error doctrine applies to the issue presented. Leave to appeal was granted by Judge Rosenblatt from the order of the Appellate Division, First Department, dated June 12, 2003. The issue as framed for consideration by the Court of Appeals is:

> Whether Court must inform defendant taking plea that post-release supervision automatically follows a promised sentence of incarceration; Whether, absent such disclosure, a Court may deny defendant's motion to withdraw plea on ground that defendant would have pleaded guilty even if informed of post-release supervision.

Briefs in the matter are expected to be filed by February 2004 and oral argument is expected to be held sometime in the early spring. We will report on a decision by the Court of Appeals in our Summer issue.

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

In November 2003, the United States Supreme Court decided in *U.S. v. Banks,* 124 S. Ct. 486 (2003) that police officers did not violate the defendant's Fourth Amendment rights when they entered his apartment by breaking down his door after waiting only 15 to 20 seconds to receive a response. The Court in a unanimous decision held that the police need flexibility to respond to potential physical danger or the risk that the suspect may destroy evidence. After the police had broken into the defendant's house, they found him dripping wet outside his shower; after conducting a search pursuant to a warrant, they discovered crack cocaine and several firearms.

Justice Souter, writing for the Court, stated: "We think that after 15 or 20 seconds without a response, police could fairly suspect that cocaine would be gone if they were reticent any longer."

Earlier in the year, the United States Supreme Court had also decided two interesting criminal law cases, which were the subject of case notes prepared by students at St. John's Law School. Published below are these case notes, followed by the name of the student involved in their preparation.

DOUBLE JEOPARDY PROTECTION—There exists no protection for a defendant from a death penalty sentence on retrial where he had previously succeeded in having the conviction overturned.

***Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732 (2003)**

Petitioner and an accomplice waited outside a restaurant with the intent to rob the manager. When the manager came out of the restaurant, petitioner and his accomplice approached him with guns drawn and demanded that he turn over the bag with the day's receipts. The manager threw the bag into the air and tried to run away. Both men opened fire, killing the manager.

The petitioner was charged and convicted of first-, second-, and third-degree murder. In the sentencing phase, the jury was deadlocked 9-3 on the issue of applying the death penalty, favoring instead a life sentence. According to Pennsylvania law, the jury must be unanimous in order to impose the death penalty. When it is the opinion of the court that further deliberation will not result in unanimity, the court may discharge the jury and impose a life sentence. Upon motion by the petitioner the court entered a life sentence. Petitioner later appealed to the Pennsylvania Superior Court. The court determined that the judge erred in his instructions to the jury in the initial trial and reversed the conviction and ordered a new trial. The Commonwealth then tried the case again and the petitioner was again convicted. This time, however, the jury imposed the death penalty. On appeal, the Pennsylvania Supreme Court affirmed the verdict as well as the death sentence, and rejected petitioner's claims that the Double Jeopardy Clause and Due Process Clause barred the imposition of a death sentence on retrial. The United States Supreme Court in a 5-4 decision affirmed the Pennsylvania Supreme Court decision.

The Court noted that the Double Jeopardy Clause applies to capital sentencing proceedings where the proceedings "have the hallmarks of a trial on guilt or innocence." *Bullington v. Missouri,* 451 U.S. 430, 439 (1981). The key fact the Court looks at when considering double jeopardy protections in capital sentencing is whether there has been an "acquittal." If a jury returns a unanimous finding that the state has not proved certain aggravating circumstances, double jeopardy protection attaches to that murder acquittal plus the aggravating circumstances. This "acquittal" would give rise to double jeopardy protections. Here, however, there was no acquittal. The jury was deadlocked on the issue of whether petitioner should receive the death sentence; they also did not make any findings as to the defendant's guilt or innocence in connection with the aggravating circumstances. Thus, the result cannot be called an acquittal. At the same time, neither can the court-imposed life sentence be deemed an acquittal. Under Pennsylvania law, the judge has no discretion on what sentence to impose when the jury is deadlocked and he must enter a life sentence. The judgment was not based on any finding of fact, but was statutorily directed and cannot serve as an acquittal. The dissent argues that the holding presents defendants with a perilous choice that the Court has never imposed before—whether to pursue an appeal and face a possible death sentence on retrial, or accept a sentence of life in prison.

By Greg Stofko

TERMINATION OF CONSPIRACY—Conspiracy does not end when governmental intervention prevents the achievement of its goal.

***United States v. Jiminez Recio*, 537 U.S. 270, 123 S. Ct. 819, 154 L. Ed. 2d 744 (2003)**

While traveling in Nevada on November 18, 1997, a truck was stopped by the Nevada police. The police discovered and seized illegal drugs, and with the assistance of the two truck drivers, arranged a sting. The government drove the truck to its intended destination and the drivers paged a contact to update him on the whereabouts of the truck. The contact informed the drivers that he would have someone meet the truck and three hours later, the two defendants arrived. Defendant Francisco Jiminez Recio drove the truck away while defendant Adrian Lopez-Meza drove a car behind the truck. Soon after, the police stopped both the truck and the car and arrested the defendants. The defendants and the two truck drivers were indicted, charged with conspiracy to possess and distribute illegal drugs and convicted by a jury. The trial judge later decided that the instructions to the jury were flawed with respect to the two defendants. Based on the Ninth Circuit's ruling in *United States v. Cruz,* 127 F.3d 791, 795–796 (CA9 1997), the judge believed that the defendants could not be convicted unless the jury thought that they entered the conspiracy before the government intercepted the truck and drugs, because the interception prevented the goal of the conspiracy from being achieved. A new trial was ordered and the jury convicted the defendants.

The defendants appealed, claiming that there was no evidence that they belonged to the conspiracy before the government seizure. The Ninth Circuit ruled in their favor in a 2-1 vote. On a writ of *certiorari*, in which the government requested an assessment of the rule in *Cruz*, the Supreme Court reversed the Ninth Circuit's ruling.

The Supreme Court held that a conspiracy does not end when government intervention prevents the accomplishment of its goal. The Court determined that the rule in *Cruz* contradicted the basic principle of conspiracy law, which is that the heart of conspiracy is the promise to perform an illegal act rather than the commission of the act itself. For that reason, punishment for conspiracy is allowed despite the commission of the act. The Court pointed out that conspiracy greatly endangers the public, since involved parties can become engaged in other activities and they find it hard to turn away from the criminal plan. These dangers are not eliminated once the goal of the conspiracy is terminated since the people who intended to be involved at a later point still possess the intention to commit a crime. In addition, the Court asserted that this view is one that is widely accepted by other courts. Furthermore, the Court noted that the rule in *Cruz* was devised from an unexplained change in the words of a previous holding. It pointed out that the Ninth Circuit originally ruled that a conspiracy ends when the defendant defeats a goal of the conspiracy. The Ninth Circuit later changed this without any explanation to say that a conspiracy terminates when anyone stops a conspiracy's objective from being fulfilled. The Court stated that since there is no reasoning behind the establishment of the rule in *Cruz*, it is hard to justify its existence.

By Stephanie Tabone

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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Phone: (718) 849-3599

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.

Possible Constitutional Challenges to Persistent Felony Offender Statute

By Spiros A. Tsimbinos

As a follow-up to my article on the sentencing of persistent felony offenders in our last issue, the *New York Law Journal* recently reported on some lower court decisions, which appear to be challenging the constitutionality of Penal Law section 70.10, which allows for the discretionary imposition of a life sentence on a persistent felony offender. I reported in my article that, based upon both New York appellate rulings and recent decisions in the Supreme Court, the constitutionality of the New York statutes appears to be settled. However, a few weeks after my article, the *Law Journal*[1] reported that in a decision by New York County Supreme Court Justice John Bradley in *People v. West*, the constitutionality of Penal Law section 70.10 was questioned based upon the United States Supreme Court decisions in *Apprendi. v. New Jersey*[2] and *Ring v. Arizona*.[3]

Thereafter on December 1, 2003, the *Law Journal*[4] also reported that federal Magistrate Andrew J. Peck had also reached a similar conclusion in a report and recommendation to federal Judge Kaplan regarding a habeas corpus decision. Other federal courts have also begun making a similar analysis and it appears that the U.S. Court of Appeals for the Second Circuit may be deciding on the issue sometime within the next several months.

The basis of the lower court decisions arises from the Supreme Court language in *Apprendi*, which stated that juries and not judges must make factual findings that could subject criminal defendants to sentences more harsh than those generally allowed for a crime. In *Ring v. Arizona*, the Supreme Court also invalidated Arizona's death penalty scheme because it allowed judges to decide whether the death penalty was warranted. Using the *Apprendi* and *Ring*[5] holdings, Judge Bradley and Magistrate Peck have concluded that since under section 70.10, a judge is given discretionary authority to impose a life sentence on factors that were not submitted to a jury and proven beyond a reasonable doubt, the statutes are unconstitutional.

In my opinion, the views of Judge Bradley and Magistrate Peck fail to take into account that the prerequisite for the discretionary authority is the commission of prior felonies. In *Apprendi*, the United States Supreme Court did uphold the use of a prior conviction as a valid reason for the enhancement of a sentence. In the recent decisions of *Lockyer v. Andrade*[6] and *Ewing v. California*[7] upholding California's three-strike laws, the United States Supreme Court reiterated in strong language the constitutionality of enhanced punishment for repeat offenders.

Similarly, in *People v. Rosen*,[8] our Court of Appeals specifically reviewed the persistent felony offender provisions in light of the *Apprendi* decisions and unanimously found that they pass constitutional muster. The Court of Appeals found that the sole determining factor in imposing enhanced sentencing was the fact of prior convictions. In making the secondary discretionary determination, the sentencing court was only performing the traditional role in fixing the precise sentence within the given statutory range.

Whatever the final outcome on this interesting development, the sentencing of persistent felony offenders remains an important and ever-evolving area in criminal law. We urge our readers to stay tuned for continuing developments.

Endnotes

1. *See* N.Y.L.J., Nov. 17, 2003, pp. 1 & 18.
2. 530 U.S. 466 (2000).
3. 536 US 584 (2002).
4. *See* N.Y.L.J., Dec. 1, 2003, p. 1.
5. For a detailed analysis of the *Ring* decision, see the case note prepared by St. John's law student Adam Guttell at page 24.
6. 538 U.S. 63, 123 S. Ct. 1166 (2003).
7. 538 U.S. 11, 123 S. Ct. 1179 (2003).
8. 96 N.Y.2d 329 (1991).

Cases of Interest in the Appellate Divisions

During the months of November and December, there were several decisions from the various Appellate Divisions which should be of interest to criminal law practitioners. Summaries of these cases are printed below.

People v. Ulloa, (N.Y.L.J., Nov. 14, 2003, pp. 1 & 6), 766 N.Y.S.2d 699

The Second Department reversed a defendant's burglary conviction where the lower court denied an indigent defendant his constitutional right to free transcripts of his criminal proceedings. The defendant had originally been represented by appointed counsel but his family had later hired a private attorney for the trial. The trial judge had denied the request for free transcripts on the grounds that the family had a private attorney. The Second Department ruled, however, that since the defendant's family and friends had retained private counsel, the defendant did not lose his status as an indigent and since the family was unable to pay the $3,000 transcript cost, reversible error had been committed by denying the request for free transcripts.

People v. Fezza, (N.Y.L.J., Nov. 28, 2003, pp. 1–2)

The Appellate Division, Third Department, reinstated an indictment in a case that involved the authority of the state Organized Crime Task Force. The issue was whether an indictment could proceed against the sister of a defendant who had been named in a drug probe. The task force had received the authority to proceed against the brother, but no mention of the defendant's sister was made in the Governor's authorizing documents. The trial court had dismissed the indictment but the Third Department unanimously reversed and reinstated the case, holding that the grant of authority to the Organized Crime Task Force was sufficiently broad to include an individual not specifically named in the authorizing letters, but who allegedly assaulted a person who had cooperated with the police regarding one of the named targets of the investigation.

People v. Darrett, (N.Y.L.J., Dec. 10, 2003, p. 18)

In a unanimous decision, the Appellate Division, First Department, ordered a new suppression hearing holding that the defendant may have been denied the effective assistance of counsel because his attorney advised the court that she believed that the defendant was about to perjure himself during the suppression hearing. The Appeals Court stated that the attorney's actions, standing alone, did not necessarily prejudice the defendant, but that subsequently comments by the trial judge raised concerns that she had been influenced by the attorney's revelations. The Appellate Division indicated that the course of conduct which should have been followed was the one outlined by the Court of Appeals in *People v. DePallo*, 96 N.Y.2d 437 (2000).

Justice George Marlow, writing for the court, stated that the attorney should first try to convince a client to testify truthfully and failing that, should make every reasonable effort to limit the amount of information he or she conveys to a judge.

People v. Mitchell, (N.Y.L.J., Dec. 8, 2003, p. 26), 768 N.Y.S.2d 204

In a unanimous decision, the Appellate Division, First Department, overturned a drug conviction and dismissed an indictment because of an illegal strip search. Relying upon the Court of Appeals decision in *People v. More*, 97 N.Y.2d 209 (2002), the First Department stated:

> We have no difficulty in holding that a strip search, conducted in a public place, regardless of whether it includes a search of the arrested person's body cavities, is not justified or reasonable absent the most compelling circumstances, that is, circumstances, that pose potentially serious risks to the arresting officer or others in the vicinity.

People v. Degondea, (N.Y.L.J., Dec. 15, 2003, p. 18), 2003 WL 22900913

In a unanimous decision, the First Department affirmed a defendant's murder conviction even though the record indicated that the trial judge had actually fallen asleep during jury selection or at least appeared to be "sluggish." The First Department based its ruling on the fact that the defendant and his attorney had failed to object to the judge's alleged behavior at the time of the occurrence and only raised the issue years later by way of a post-conviction motion. The First Department concluded that the "defendant's silence and delay precluded the attack he now makes."

People v. Taylor, (N.Y.L.J., Nov. 26, 2003, p. 1), 2003 WL 22998488

In a unanimous decision, the Appellate Division, Second Department, vacated a first-degree felony murder conviction. The court determined that the trial judge had committed reversible error in its jury charge concerning the defendant's accomplice liability. The Appellate Division determined that the trial court "had not instructed the jury that accomplice liability as it pertained to first-degree felony murder required a finding that the defendant commanded another person to cause a victim's death."

Criminal Law Case Notes

For the last few years, St. John's Law School has been running an interesting competition for its students involving the writing of a case note analysis of recent important U.S. Supreme Court or New York Court of Appeals cases. The competition is run by the Frank S. Polestino Trial Advocacy Institute. Each year the school selects several winners and the winning entries are submitted to our criminal law newsletter for possible publication. In this section, we are happy to present two of these well-written case notes, one dealing with the United States Supreme Court case of *Ring v. Arizona*, which is currently relevant to our discussion of possible constitutional challenges to New York's Persistent Felony Offender Statute as discussed on page 22. The other case note deals with a New York Court of Appeals case which emphasizes the importance of a justification charge. The notes were prepared by St. John's law students Adam Guttell and Trazana Phillip. We thank these St. John's law students for their contributions and look forward to publishing additional case notes in the future.

SENTENCING INCREASE—Judge may not determine aggravating factors for the imposition of the death penalty

In order to uphold a defendant's Sixth Amendment right to a jury trial, a judge in a jury trial may not determine aggravating factors that increase a defendant's sentence or punish him to death.

***Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002)**

The trial court found the defendant, Timothy Ring, guilty of shooting and killing a courier of a Wells Fargo armored van. Ring, along with accomplices, robbed the van of "$562,000 in cash" and "$271,000 in checks." The jury found Ring guilty of felony murder. Arizona law provides for the trial judge, alone, to conduct a separate sentencing hearing to determine whether necessary circumstances exist to impose the death penalty. (Ariz. Rev. State. Ann. § 13-703). The trial judge sentenced Ring to death based on a determination of two aggravating factors. First, Ring committed the crime for the benefit of gaining something of "pecuniary value." Second, the crime was committed "in an especially heinous, cruel or depraved manner." At issue is whether a judge, in a jury trial, may rule on the facts necessary to impose the death penalty. The two preceding cases on this topic contradict each other. In *Walton v. Arizona*, 497 U.S. 639 (1990), the Supreme Court held that "additional facts found by the judge qualified as sentencing considerations." In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that a defendant could not be "exposed . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone."

On appeal, the Arizona Supreme Court rejected the defendant's argument that the trial court violated his Sixth Amendment right to a jury trial. Furthermore, the court determined that a judge's factual finding was appropriate in the defendant's sentencing hearing. The Arizona Supreme Court upheld the trial court's (judge's) decision and maintained the defendant's sentence. The United States Supreme Court granted the defendant's petition for a writ of *certiorari*, reversed, and remanded the Arizona Supreme Court decision.

The United States Supreme Court held that *Walton* and *Apprendi* are "irreconcilable." The Court found that the Sixth Amendment requires that aggravating factors necessary to sentence a defendant to the death penalty, or merely increase his sentence, must be found by a jury. Therefore, Ring's Sixth Amendment rights were violated. Confirming that the Sixth Amendment is paramount to a defendant's rights at trial, the Court reinforced the intent of the Founding Fathers: that it is a defendant's prerogative to choose a jury or a judge to decide his fate. In practice, the *Walton* decision prohibited a defendant from making such a choice.

By Adam Guttell

The Need for a Justification Charge

By assessing the totality of the circumstances as presented, the jury should have been charged as to the defense of the justifiable use of deadly physical force to prevent or terminate a burglary.

***People v. Deis*, 97 N.Y.2d 717 (2002)**

This case involves the degree to which a defendant's belief justifies the use of deadly force and the applicable jury instructions that should have been made at the ensuing trial. In *People v. Deis*, the deceased, while intoxicated, entered the convenience store where the defendant and his brother worked. While there, the deceased harassed some of the customers, including "grabbing" a woman's waist and "verbally abusing" her as she walked away. The deceased also physically threatened the defendant's brother. The defendant asked the deceased to leave the store and led him outside. At this point, the deceased "initiated a fight" with the defendant but to no avail. The deceased re-entered

the store, again threatening the defendant and his brother. Subsequently, the deceased punched the defendant in the back of his head. At this point, the defendant picked up a knife to defend himself but as he spun around, the deceased was fatally struck in the neck.

The defendant sought an appeal of his conviction for criminally negligent homicide based on the trial judge's refusal to instruct the jury on the use of deadly physical force to prevent or terminate a burglary pursuant to Penal Law § 35.20. A divided Appellate Division, Fourth Department, affirmed the conviction on the basis that the evidence did not warrant a finding that the deceased was committing a burglary and that the use of deadly physical force was necessary. At the time of the appeal, the defendant had served his sentence. The Court of Appeals dismissed the indictment without prejudice, granting the People leave to resubmit the charge.

The Court of Appeals held that by looking at the totality of the circumstances, the jury should have been charged as to the use of deadly physical force to prevent or terminate a burglary. The Court found that the deceased's behavior of harassing the customers and the repeated threats to harm the defendant and his brother shows the reasonableness of the defendant's fear for his safety. Furthermore, the defense was not lost when the deceased re-entered the store, because the law provides that a person initially permitted on a public premise loses the right of being considered a licensee when "he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person." (Penal Law § 140.00[5]). The Court believed that the evidence clearly established that the deceased's presence in the store after being removed was unlawful and the jury should have been given the opportunity to apply all the relevant law to the case before convicting the defendant.

By Trazana Phillip

About Our Criminal Justice Section and Members

Our Criminal Justice Section

I thought it would be interesting for our Section members to know a little bit more about the makeup of our Section and the various programs we conduct throughout the year. The Criminal Justice Section of the New York State Bar Association was created in 1969. The Section was established as a successor to the Committee on Penal Law and Criminal Procedure. Its purpose was listed as providing a forum for prosecutors, defense counsels, judges, and other members of the profession involved in criminal justice to share perspectives, provide professional education, and work to shape laws and procedures to meet the issues of the day. Our membership, as of September 30, 2003, was 1,445 members of the Section. The New York State Bar Association itself, as of September 30, 2003, lists a total membership of 68,318. In terms of gender, approximately 77% of the Section is male and 23% female. Approximately 40% are in private practice, which comprises the largest grouping of the Section, with approximately 6% holding positions with government agencies. We also have 66 members of the judiciary, who comprise about 5% of the total membership.

With respect to representation throughout the state, the largest number of Section members come from the First Judicial District, comprised of Manhattan and the Bronx, to wit, 301 members. The second largest group, 202 members, comes from the Ninth Judicial District, consisting of the counties of Dutchess, Orange, Putnam, and Westchester. Approximately 66% of the members of the Section have also been practicing for more than 10 years. Currently, we also have 124 student members, who comprise about 8.5% of the Section.

* * *

Vincent Doyle III Participates in New York State Indigent Defense Summit

Vincent Doyle III, former Chair of the Section, recently participated in an all-day session sponsored by the New York State Unified Court System on the question of providing adequate counsel to indigent defendants. The program was held on November 5, 2003 at the Pace University Law School in White Plains, N.Y. Opening remarks were presented by Judith S. Kaye, Chief Judge of the New York Court of Appeals, and numerous workshops were held throughout the day. Vince spoke at a panel discussion, "Ensuring Justice Through Quality Counsel." Another workshop dealt with financing a criminal defense system for the poor and featured speakers from New York City, Albany, and Washington, D.C.

A Report on Our Fall Section Meeting

By Roger Bennet Adler

The Section held its combined Fall Executive Committee meeting and CLE offering on November 8th on the beautiful campus of Cornell University in Ithaca, New York. The weekend meeting was a joint effort of Section Delegate and Ithaca-based attorney Bill Sullivan, with assistance from Section Vice-Chair Roger Bennet Adler.

The weekend festivities commenced with a cocktail reception and dinner at the historic Taughannock Farms Inn, located adjacent to the Taughannock Falls State Park. On Saturday morning the Executive Committee held a breakfast meeting, and then adjourned for the CLE Program assembled by Bill Sullivan. Ed J. Nowak, the longtime Monroe County Public Defender, and highly respected appellate counsel, presented an exceedingly thorough, well-organized, and lively survey of the Court of Appeals' last term. The presentation was made even more meaningful by the presence and participation of our featured guest, now Circuit Court of Appeals Judge Richard C. Wesley, and formerly an Associate Judge on the New York Court of Appeals. Judge Wesley's comments, reacting to some of Ed Nowak's comments concerning particular cases, made for a lively presentation.

Following the mid-morning coffee break, the panel discussion began. Moderator Roger Bennet Adler had each of the four panelists—Howard R. Relin, Monroe County District Attorney; Robert S. Dean, a defense appellate lawyer from the Manhattan-based Center for Appellate Litigation; Tompkins County Judge John C. Rowley; and Albany Law School Professor Vincent M. Bonventre—present their initial opinions about the Court's decisions, and the philosophical positions of the judges serving on the Court. The moderator then posed a number of provocative questions to each of the panelists, seeking to uncover both areas of disagreement and those where consensus emerged. The audience again benefitted by Judge Wesley's comments and observations.

Following the program, the Section adjourned for a sit-down luncheon at the Statler Hotel Restaurant, with Judge Wesley serving as luncheon speaker. The Judge's comments were exceedingly well-received. The clear emerging consensus was that Judge Wesley was an exceedingly able jurist, whose perceived right-of-center judicial philosophy was not, however, of the doctrinaire variety. Rather, not unlike the late Judge Domenic Gabrielli, his was a decisional style, driven by the facts,

respecting *stare decisis*, but unwilling to overturn convictions based upon what he views as technical errors which did not substantially impact upon the verdict.

It was clear that the services of Judge Wesley, a real "people person"—on the New York Court of Appeals, prior to that on the Appellate Division, Fourth Department, and as a collegial colleague—have earned the respect of his judicial colleagues and both sides of the criminal justice bar.

Judge Wesley's decision to move to the Second Circuit of Appeals adds a superb independent and hard-working judge to one of the nation's great appellate tribunals. Sadly, his departure from the New York Court of Appeals represents a significant loss to the New York judicial system.

* * *

A Report on Our Annual Winter Meeting

The Criminal Justice Section held its annual reception and luncheon on Thursday, January 29, 2004 at the New York Marriott Marquis. We were pleased to have as our luncheon speaker Eliot Spitzer, the Attorney General of our state. The luncheon was followed by the CLE meeting, featuring a discussion on media in the criminal law. Speakers for that meeting included Barry C. Scheck and Jack T. Litman.

Earlier in the day, the Executive Committee of the Section met at its annual breakfast meeting and during the Section's luncheon program, several awards were presented to outstanding members of the bench and bar who have performed exceptional service during the last year. The award winners are as follows:

Outstanding Public Defense Practitioner:

Michele S. Maxian, Esq.
The Legal Aid Society
49 Thomas Street
New York, New York 10013

Outstanding Prosecutor:

Howard R. Relin, Esq.
Monroe County District Attorney
201 Hall of Justice
Rochester, New York 14614-2188

The Charles F. Crimi Memorial Award as Outstanding Private Defense Practitioner:

Ira D. London, Esq.
245 Fifth Avenue, Suite 1900
New York, New York 10016

Outstanding Jurist:

Hon. Richard C. Wesley
United States Circuit Court Judge
United States Second Circuit
Livingston County Government Center
6 Court Street
Geneseo, New York 14454-1030

The David S. Michaels Memorial Award for Courageous Efforts in Promoting Integrity in the Criminal Justice System

Terence L. Kindlon, Esq.
Kindlon & Shanks
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Albany, New York 12207-1801

Outstanding Contribution to the Bar and Community

Malvina Nathanson, Esq.
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Congratulations to all the award winners. The Section's activities for our Annual Meetings were well-attended and well-received. A big thank you to the Section's officers and members who participated in making this year's Annual Meeting a big success.

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

Publication Policy: All articles should be submitted to:

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

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

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

NEW YORK CRIMINAL LAW NEWSLETTER

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