NYSBA SPRING 2008 | VOL. 6 | NO. 2

New York Criminal Law Newsletter

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

Inside

NYSBA

Message from the Chair

A Review of the Section's Recent Activity on Criminal Justice Issues

The Executive Committee of the Criminal Justice Section ("CJS Executive Committee") has had two meetings since the last *Newsletter*. We met on November 30, 2007, in New York City and on January 31, 2008, at our Annual Meeting in New York City. Both meetings were very productive. It is clear from the discussions at both meetings that the CJS Executive Committee has a great deal of work ahead as the criminal justice system is poised for change in the coming years. We hope to influence this change and help to create a criminal justice system that best serves all citizens of our state.

November 30th Meeting—DCJS Initiatives

The November 30th meeting included presentations by Commissioner Denise O'Donnell, NYS Division of Criminal Justice Services ("DCJS"); John P. Amodeo, Chief Counsel, NYS Sentencing Commission; and Kenneth Franzblau, DCJS, on several significant criminal justice initiatives. Commissioner O'Donnell gave a broad overview of those criminal justice initiatives that have received a great deal of attention from her staff. She noted that among the DCJS core functions, the Division would concentrate on sentencing reform, effective re-entry of prisoners into the community upon completion of their sentences, DNA databases, forensic science commissions and training police officers in the reduction of crime.

Sentencing: Commissioner O'Donnell and John Amodeo explained that the reason for creating the NYS Commission on Sentencing Reform ("Sentencing Commission") was to review New York's sentencing laws, which have not been reviewed in over 40 years. They believe that a case must be made to simplify the state's sentencing laws.

Prisoner Re-entry: Commissioner O'Donnell reported that the DCJS would concentrate on re-entry issues, and will, among other things, undertake the following projects: 1) coordinate re-entry plans with the NYS Department of Corrections; 2) coordinate parole efforts; 3) reduce recidivism rates; 4) coordinate 14 state agencies currently addressing the problems of re-entry, and 5) establish local re-entry task forces.

DNA Databases: According to the Commissioner, efforts are being made to end the backlog in the collection and analysis of DNA material by early 2008.

NYS Human Trafficking Laws: Kenneth Franzblau addressed the committee regarding the new NYS human trafficking law, which became effective November 1, 2007. Mr. Franzblau described how the new law impacted other penal laws.

The Report by the New York State Bar Association's Task Force on Town and Village Justice Courts ("the Report")

The CJS Executive Committee reviewed and discussed the Report, which strongly recommends that all justices presiding over town and village justice courts be attorneys. We also reviewed a report by the Association of the Bar of the City of New York ("City Bar") on the same topic, which recommended reform of several additional aspects of the town and village justice courts system. The City Bar report complemented the report by the NYSBA Task Force. Because the CJS Executive Committee believes that the town and village justice court system is in need of reform on many levels, the CJS Executive Committee overwhelmingly voted to combine the NYSBA Task Force report and the City Bar report and support the recommendations of both task forces.

CJS Annual Meeting, January 31, 2008

The CJS Annual Meeting on January 31, 2008, was very successful. You will learn more about the Annual Meeting from Spiros Tsimbinos' "Message from the Editor." At the meeting, the CJS Executive Committee decided to review newly proposed legislation that impacts Governor Spitzer's proposed budget. These new bills provide for reform of the criminal justice system and include the following: 1) creation of a victim/witness protection statute; 2) creation of an Office of Indigent Services in the Department of State and 3) revision of the state medical parole statute.

CJS Committee on Sentencing Reform: At the Annual Meeting we announced the formulation of the CJS Committee on Sentencing Reform ("Sentencing Committee"). The Sentencing Committee was formed in response to the "Preliminary Proposal for Reform" by the NYS Commission on Sentencing Reform. The Sentencing Committee will respond to recommendations of the NYS Commission on Sentencing Reform, consider the viability of the current sentencing laws and make recommendations for sentencing reform to the CJS Executive Committee.

Best regards,
Jean Walsh

Message from the Editor

Our recent Annual CLE Program, which was held at the New York Marriott Marquis, focused on the topic of sentencing and proposals for reform. In this issue, we continue to address the issue of sentencing with articles focusing on the State's Persistent Felony Offender Statute, which involves the concept of long-term imprisonment and alternatives to imprisonment, such as drug rehabilitation programs. The Sentencing Commission is expected to reveal its final recommendations for reform of the sentencing structure in New York within the next few months and possible legislative action is expected by the end of this year's legislative session or at next year's session.

We were fortunate to have as part of our annual CLE Program the participation of Commissioner Denise O'Donnell and Chief Counsel John Amodeo, from the Sentencing Commission, as well as Paul Shechtman and other leading criminal law practitioners, both from the defense and the prosecution, to discuss the important and timely topic of sentencing. Our Annual CLE Program, for which I had the privilege of acting as Program Chair, proved to be highly successful and I thank all of our participants as well as the many Program attendees. We will continue to highlight any changes in the sentencing laws as they develop.

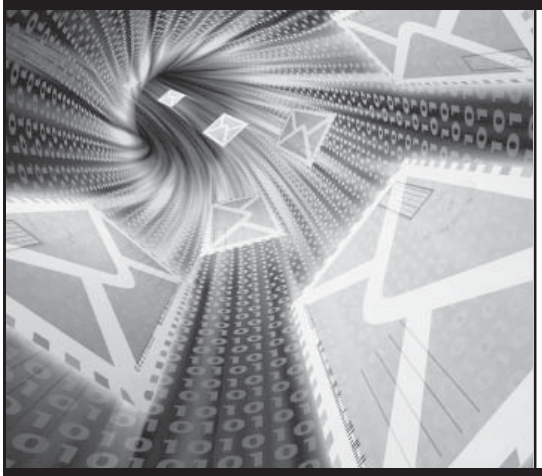
This issue also contains very important information relating to decisions from the United States Supreme Court with respect to the imposition of the death penalty and the utilization of the Federal Sentencing Guidelines. With respect to the federal sentencing system, Judge John Gleeson's lecture at our recent CLE Program was highly illuminating and interesting, and we thank him for being with us as part of the Program.

Several awards were distributed at our Annual Luncheon, and we congratulate the recipients of awards in the various categories. These individuals have contributed to the integrity of the criminal justice system and it was a pleasure to recognize them for their outstanding work and service during the past year. The names of this year's award winners are published in our "About Our Members" section.

As usual, our "For Your Information" section contains a variety of noteworthy columns which should be of interest and assistance to our readers. They range from pointing out the dangers of stress on members of our profession to charting the future impact of population changes in our country. I hope you enjoy this issue and continue to support our publication.

Spiros A. Tsimbinos

Request for Articles



If you have written an article and would like to have it considered for publication in the *New York Criminal Law Newsletter*, please send it in electronic document format (pdfs are NOT acceptable), along with biographical information, to its Editor:

Spiros A. Tsimbinos
1588 Brandywine Way
Dunedin, FL 34698
(718) 849-3599

www.nysba.org/CriminalLawNewsletter

Diagnosing the Residential Drug Assistance Program: An Addiction for Uncertainty

By Paul A. Montuori

I. Introduction

Congress has long sought to curb recidivism and to combat drug dependency. In 1994, Congress advanced these goals by amending the Violent Crime Control and Law Enforcement Act ("VCCLEA").[1] The amendment required the Bureau of Prisons ("BOP") to provide "residential substance abuse treatment" to "all eligible prisoners."[2] The Residential Drug Abuse Program ("RDAP") was meant to supplement the myriad of non-residential drug treatment options the BOP has utilized. As an incentive to apply, Congress authorized a sentence reduction of up to one year for inmates who successfully complete the rigorous RDAP.[3]

The incentive has worked. "Droves of inmates who were convicted of non-violent offenses . . . have applied to be accepted into qualifying programs such as the RDAP so as to be eligible for early release."[4] Yet, competing policy concerns have pulled the RDAP admission process in different directions. While the BOP seeks to provide a meaningful rehabilitative program, it is aware that a mechanism embedded in the enabling legislation—early release—increases the means by which inmates can manipulate the system.

Access to the RDAP is limited to inmates presenting a "substance abuse problem."[5] The selection of which criteria determine whether an inmate has a "substance abuse problem" is left to the BOP.[6] The BOP has crafted a series of administrative promulgations designed to identify the eligible prisoner.

While the bulk of VCCLEA litigation has involved inmate challenges to early-release determinations, the more complicated VCCLEA litigation has attacked the soundness of the BOP's RDAP-eligibility standards. As this litigation has unfolded, several issues have been pressed, including whether the BOP's admission requirements are too narrow, whether they exceed the statutory authorization, whether they fail to adhere to regulatory standards, and whether they are too easily manipulated in case-by-case determinations. A split of authority now exists at the federal district court level as to what circumstances the BOP must find dispositive to identify an inmate substance abuser in need of RDAP treatment. Currently, there is scant guidance from the courts of appeals.

Because the statutory prerequisites for RDAP admission require inmates to be housed at a facility with an appropriate security level and carry an offense of a non-violent nature,[7] the arguments concerning admission criteria are of particular importance to white-collar criminals. Such inmates generally find themselves meeting these classifications and, therefore, are appropriately situated to press litigation in this arena.[8] At stake is whether admittance to the RDAP will be subject to whimsical decisions exalting the form of paper documentation in a central file over an inmate's genuine need. Nothing short of the debate over how and when inmates ought to re-enter society underpins this regulatory contest.

II. The Mechanics of RDAP Eligibility—Defining the Definitions

In a sort of regulatory "paint by numbers," the BOP has plugged techniques and models into pre-conceived outlines of substance abuse in an attempt to achieve a coherent RDAP admittance policy. The agency regulations turn the process into a type of mathematical equation. Yet, effective diagnosis of substance abuse requires the input of medical physicians, sociologists, psychologists, and other trained professionals evaluating candidates on an individual basis. Litigation has exposed the tenuous balance between the need for established administrative procedures and the imprecise nature of identifying substance addictions.

Under the enabling statute, a prisoner is "eligible" for the RDAP if he or she is (i) determined by the BOP to have a substance-abuse problem and (ii) willing to participate in a residential substance-abuse program.[9] While the BOP must administer a sound drug-rehabilitation program that fosters education and halts the cycle of addiction, it must also be constantly vigilant for inmates who seek to cheat the system and gain a one-year sentence reduction. Saddled with these often-at-odds purposes, and given an almost unfettered grant of congressional authority, the BOP, in 1994, promulgated regulations implementing the VCCLEA.[10] An inmate must now satisfy a five-part eligibility test by meeting the following criteria:

(1) the inmate must have a verifiable documented drug abuse problem;

(2) the inmate must have no serious mental impairment which would substantially interfere with or preclude full participation in the program;

(3) the inmate must sign an agreement acknowledging his/her program responsibility;

(4) the inmate must ordinarily be within thirty-six months of release; and

(5) the security level of the residential program institution must be appropriate for the inmate.[11]

Instead of providing a clear regulatory blueprint, the BOP's regulations created another amorphous concept: verifiable drug abuse. A body of RDAP-eligibility litigation has focused on the fluid criterion that the inmate have a "verifiable documented drug abuse problem."[12] One can think up a host of practical ways to define a "verifiable documented drug abuse problem" that would rest on a sound clinical footing. The BOP's quest for a uniform, bright-line rule has not simplified the process. The BOP has called upon a multitude of outside sources to determine when an inmate presents a "verifiable documented drug abuse problem." The breadth of these sources calls into question whether the BOP's policy can pragmatically and functionally identify those inmates in true need. Moreover, the system has been subject to challenge on *Chevron* grounds.[13] Such argument contends that the agency has exceeded its statutory authority and failed to carry out its congressional mandate.

The BOP turns to a "program statement" to interpret the term "verifiable documented drug abuse problem."[14] This itself is a point of administrative-law concern. The program statement is not a regulation promulgated within the standard confines of the notice-and-comment procedures attendant to the customary promulgation of administrative law. Instead, it is nothing more than an agency-created document, subject to change at will. The program statement's interpretation of "verifiable documented drug abuse problem" is the linchpin for the regulation; the regulation is given life only by reference to the program statement.

One would expect to find the substantive comments in the program statement within the language of the regulation itself. Yet, the program statement fleshes out, in a manner we do not see in the statute or regulation, the definition of a documented substance abuser.

The BOP's use of extra-regulatory material does not end with the program statement. The program statement further provides:

> Drug abuse program staff shall determine if the inmate has a substance abuse disorder by first conducting the *Residential Drug Abuse Program Eligibility Interview* followed by a review of all pertinent documents in the inmate's central file to corroborate self-reported information. The inmate must meet the diagnostic criteria for substance abuse or dependence indicated in the *Diagnostic and Statistical Manual of the* [*sic*] *Mental Disorders, Fourth Edition, (DSM - IV)*. This diagnostic impression must be reviewed and signed by a drug abuse treatment program coordinator. Additionally, there must be verification in the Presentence Investigation (PSI) report or other similar documents in the central file which supports the diagnosis. Any written documentation in the inmate's central file which indicates that the inmate *used* the *same substance*, for which a diagnosis of abuse or dependence was made via the interview, shall be accepted as verification of a drug abuse problem.[15]

Within the program statement is citation to the *DSM-IV*, another source not subject to the scrutiny of the Administrative Procedures Act.[16] The BOP has made these sources the focal points for determining eligibility to the RDAP. Thus, an entrusted regulatory determination is made by reference to a wordy diagnostic manual, embedded within an *ad hoc* agency mission statement, implementing a vague definition. This structure represents an unmistakable shift away from the duly promulgated regulatory language.

On its face, the program statement requires a two-step process to determine if an inmate has a "verifiable documented drug abuse problem." First, the inmate must self-report the abuse during an eligibility interview.[17] Second, BOP personnel must review all pertinent documentation in the inmate's central file to determine if a positive diagnosis is warranted.[18] The abuse must meet the criteria of the *DSM-IV*.[19] Following this step, the PSI, or other documentation in the central file, must indicate that the inmate used the same substance for which a diagnosis was made after the interview.[20] The *DSM-IV* defines a substance abuser as one who experiences a cluster of symptoms within a twelve-month period.[21]

At first glance, these standards seem to meld into each other, making the eligibility interview and central file review cumulative steps. Yet, as an analysis of the litigation bears out, the *DSM-IV* is not the final outside source the BOP turns to in support of its regulatory enactments.

III. Unsettled Litigation—A Question of What and When

The divergent district court decisions considering challenges to RDAP admission requirements raise two primary questions: (i) what documentation is sufficient to prove a substance abuse problem? and (ii) when must the inmate have abused the substance? Different courts have focused on different aspects of the process in reaching their conclusions, itself an indication of divergent standards. As if parsing the BOP's regulatory framework was not task enough, litigation in this area has also provided fodder for several unique and unsettled procedural issues customarily associated with prisoner litigation.

A. Procedural Hurdles—Habeas Relief and Exhaustion

Before weighing in on whether the BOP's policy of RDAP admittance is sound, a court must resolve a panoply

of procedural issues to ascertain if the claim is properly brought in the first place. This includes evaluating the mechanism an inmate uses to bring the claim. Answering this question impacts the entire life of the case.

Aside from the debate on the merits, courts have differed over whether there is relief available under the general habeas corpus statute, 28 U.S.C. § 2241. Bringing a case under this statute, as opposed to the post-conviction relief statute for federal inmates, 28 U.S.C. § 2255, or the federal due process clause, affords the petitioner a host of procedural, and ultimately substantive, advantages.[22]

Because the denial of an application to the RDAP relates to the execution of a sentence, and a condition of confinement, a case brought under § 2241 would seem to be appropriate.[23] As articulated in *Sullivan v. United States*, requests for review of BOP decisions regarding forms of medical treatment, of which the RDAP is classified, are properly cognizable under the federal habeas corpus statute.[24]

Despite this, at least one court has found § 2241 relief unavailable in this context.[25] Some petitioners have bypassed § 2241 altogether in favor of a due process challenge.[26] However, an inmate's lack of placement in the RDAP has been found not to implicate a liberty interest protected under the due process clause.[27] Notwithstanding the BOP's attempts to litigate against the exercise of § 2241 relief,[28] the weight of recent authority has indicated that a court will consider this type of suit under the habeas corpus statute.[29] Because RDAP treatment relates to conditions of imprisonment, this conclusion seems on firm footing.[30]

Whether a petitioner satisfies § 2241 exhaustion requirements has also proved contentious. A prisoner must exhaust his or her administrative remedies before habeas corpus relief will be granted.[31] The typical path for an administrative appeal of an RDAP denial is to the facility warden, then to the regional director, and finally to the BOP's national general counsel.[32] BOP regulations state that an "[a]ppeal to the General Counsel is the final administrative appeal."[33] Yet, the inmate often desires to avail himself or herself of the courts earlier. This is often the case because further administrative reviews would be futile and because of the time delay of additional administrative reviews. If the initial RDAP decision is delayed after the interview process or if an inmate has to wait to obtain an initial interview, a case may become moot when it reaches the courts.[34] More importantly, an inmate may suffer severe harm because of delayed treatment.

While the general rule is to require administrative remedies to be exhausted first, some courts have held that the exhaustion requirement may be dispensed with if further administrative remedies would be futile, time-consuming, and irreparably damaging.[35] Courts have found that "exhaustion in a [§] 2241 proceeding is prudential, not statutory."[36] In that vein, ripe habeas claims without exhaustion to the BOP national level have begun to appear in cases.[37] The exigency of determining a course of treatment for a substance abuser has been considered.[38] Therefore, if the inmate is diligent in following administrative avenues and shows that further resort to the administrative chain of command would be a meaningless, procedural exercise, precedent exists for a court to proceed to the merits.[39]

B. *Mitchell* and *Laws*—The Diverging Paths Toward Abuse Verification

Mitchell v. Andrews and *Laws v. Barron*, two district court decisions, show the differing judicial interpretations of RDAP admission standards.[40] The split is fueled by a divergence of opinion about what documentation is sufficient to demonstrate an addiction and when such documentation should have been created.

In *Mitchell*, the BOP acknowledged that the petitioner would have been eligible for the RDAP but for satisfactory documentation of a drug-abuse problem for the twelve-month period prior to his incarceration.[41] The court pointed out that the *DSM-IV* does not require a showing of abuse or dependence in the twelve months prior to arrest or incarceration.[42] Accordingly, the court found that

> [t]he "practice" of the BOP in requiring such documentation as a pre-requisite for eligibility to enter the RDAP would, therefore, appear to be contrary to P.S. 5330.10 and an impermissible requirement under the statute, or, at the very least, an unreasonable exercise of the BOP's discretion. . . .[43]

Mitchell was also the first opportunity for a court to assess the proper weight to be given an October 21, 1996 memorandum from Regional Drug Abuse Coordinator Beth Weinman (the "Weinman Memo").[44] The Weinman Memo states that documentation of substance abuse or dependence includes both an eligibility interview finding of a substance-abuse problem during the twelve months prior to arrest or incarceration and evidence of such abuse in the central file or other formal documentation.[45] This pronouncement was the genesis of the BOP's twelve-month "look-back" period.[46] The *Mitchell* court pointed out that the Weinman Memo further states that "acceptable indicators may include formal admission/acknowledgment of a 'problem.'"[47] Seizing upon this directive, the court found adequate for RDAP admission the results of the petitioner's eligibility interview, his formal acknowledgment, and previous reports of his drug abuse to BOP physiological services.[48] Particularly noteworthy is the considerable weight the court gave certain declarations and affidavits from the inmate's relatives and friends attesting to his drug-abuse problem prior to his incarceration.[49] All of these documents were created not only after the petitioner's arrest, but after his initial RDAP eligibility interview.[50]

Following *Mitchell*, it appeared that the judicial norm would become a strict focus on whether actual evidence showed an inmate's substance abuse. The case of *Kuna v.*

Daniels hinged its decision on such recounting, perceiving itself as following the straightforward command found in the statutory language, the regulation, and the program statement.[51] The petitioner in that case mentioned in a presentence interview that he socially drank alcohol.[52] This information was included in his PSI report.[53] A subsequent eligibility interview revealed a *DSM-IV* diagnosis for alcohol abuse.[54] Finding this documentation sufficient, the court noted:

> Use, not self-reporting of abuse, provides sufficient documentation given that many individuals with dependencies minimize the extent of their substance abuse. By its own terms, the program statement requires only written documentation that the inmate *used* the substance for which he or she now seeks treatment. . . . According to the program statement, this documentation of use "shall" be accepted, and no additional verification in the file is required.[55]

The court held that the BOP was "without discretion to go beyond the terms of its unambiguous program statement" when evaluating RDAP entry.[56]

In *Mitchell* and *Kuna*, considerable deference was paid to the inmates' own admissions.[57] The formal, written documentation that showed substance abuse, whatever its form, was given a confirmatory role.[58] Another federal district court case, *Laws v. Barron*, represented a stark change from the reasoning of *Mitchell* and *Kuna*.[59] Under *Laws*, the nuances of what documentation demonstrated the addiction, and how such documentation came to exist, became of paramount importance.[60] The consistency by which the BOP has (allegedly) applied these regulations across the nation has now been offered as a justification for their acceptance.[61]

In *Laws*, the petitioner was denied access to the RDAP when the BOP determined that he failed to meet the second prong of the eligibility determination, i.e., substantiation in the PSI or central file of abuse.[62] The petitioner claimed that the BOP's requirement of documentation of abuse, rather than mere use, of legal substances (such as alcohol) is not consistent with the underlying regulatory sources.[63] The petitioner argued further that the BOP's twelve-month look-back period also lacked foundation in the enabling authority.[64] According to the petitioner, these requirements were more stringent than the clearly articulated standards of the regulation itself.[65]

The court in *Laws* agreed that the twelve-month look-back period is not found in any statute, regulation, or program statement.[66] The court further acknowledged that no binding precedent existed challenging the BOP's interpretation, with *Mitchell* and *Kuna* being the only non-binding precedents to address the issue squarely.[67] Nevertheless, the court did not give much weight to the petitioner's documentation, which consisted of a DUI offense of more than a decade prior and a judicial recommendation added to his judgment urging that he receive RDAP treatment and post-release substance-abuse treatment because of his two prior DUI offenses.[68] The court contrasted the timeliness and scope of this documentation to the documentation that was presented in *Mitchell*.[69] The court further credited the BOP's policy explanation for imposing such extra-textual requirements, adopting the argument that such prerequisites are both consistent with the stated goals of the RDAP and underlie each layer of the administrative directives.[70] Despite having no direct authority, the court concluded that the BOP should be granted expansive discretion in RDAP admissions, similar to the broad discretion already afforded the BOP in the realm of violent-offense and sentence-reduction determinations.[71]

The court in *Laws* further agreed that proving use and requiring documents showing the addiction in the twelve-month look-back period were not creatures of the regulation and essentially invited the BOP to amend the actual regulations to include these requirements.[72]

The reasoning of *Laws* has since become the norm. Courts now routinely deny admittance to the RDAP because of a lack of verifiable documentation during the twelve-month look-back period.[73] Satisfying this time requirement has become paramount, even in the face of evidence of substance abuse from other periods.[74] Adherence to such a standard creates the potential for inmates with severe substance abuse addictions to be left untreated on account of administrative formalities that exist without due promulgation. Yet, post-*Laws*, at least one district court, the Southern District of Georgia in *Smith v. Vazquez*, followed the principles of *Mitchell* and found the BOP's standards to be invalid, holding that "[t]he application of such additional unwritten, unpublished, and inconsistent agency interpretation cannot be given controlling weight by [the] Court."[75]

Despite *Smith*, it appears from the cases following *Laws* that documents merely referencing an addiction during the look-back period will be insufficient. Rather, the document must be created during the twelve-month period itself. Even a BOP physician's medical and clinical diagnosis of an inmate's drug dependency upon admission into the penal system has not been found persuasive enough to demonstrate a verifiable addiction.[76] A physician's evaluation upon an inmate's entry into prison would seem to reflect the inmate's condition; yet, such diagnoses have, by themselves, been found insufficient, especially when they do not comport to the stylized catchphrase definitions found in the *DSM-IV*.[77] Courts have seemed unwilling to place confidence in such diagnoses, believing that they can be manipulated by inmates.[78] This is so even when the diagnoses compel inmates to undergo certain other substance-abuse treatment programs or to cause a change in their confinement classification.[79] Adhering to such a stance casts the BOP's physicians as mere data-collection agents, unable to

make independent judgments in the face of inmate self-reporting. It also leads to the odd conclusion that if an inmate self-reported a substance-abuse problem during his PSI interview, such documentation would carry more weight than the observations of a medical doctor examining the inmate upon entry into a facility. Such an intake examination, by definition, accurately reflects the current condition of an inmate and any history of substance abuse present during earlier periods, including that covered by the PSI.[80] A system allowing this result invites capriciousness.

IV. Conclusion—What to Expect from Future Litigation

The decisions since *Laws* have trended toward a narrow view of what constitutes sufficient evidence supporting an addiction. This stance creates complications in that (i) actual addiction may be ignored in favor of artificial constructs and (ii) the BOP drifts from its authority. A practical problem begins to emerge: inmates truly in need of acute attention begin to slip through the cracks.

Scant authority exists from the courts of appeals concerning the BOP's gate-keeping of the RDAP. The timing correlation between the admission process and inmates' sentences promotes the evasion of appellate review. *Gibson v. Federal Bureau of Prisons*, an unpublished decision from the U.S. Court of Appeals for the Fifth Circuit, dealt with the issue by simply adhering to the long-standing deference paid to BOP regulatory interpretations, affirming the BOP's denial.[81]

Yet, the validity of the BOP's policy must be placed in a larger context—the constant fight against recidivism. Courts, and the BOP itself, must be vigilant against allowing the perception of—if not the actual—denial of necessary treatment to inmates as retribution in the face of the opportunity for a one-year sentence reduction. Future litigants should stress the need to adopt an integrated approach in identifying an addiction diagnosis, consistent with the promulgated regulations and the congressional purpose behind the VCCLEA. Moreover, the defense attorney representing a white collar defendant, or other similarly oriented defendant potentially eligible for the RDAP, would be prudent to make certain that his or her client's history of any substance abuse is thoroughly explored initially, and made part of the record early on. Given the direction of some courts, establishing that substance abuse is present as a threshold matter in a prosecution may well lend credence to a claim of addiction, paying dividends to an inmate in a subsequent contest over RDAP admission.

No matter the gloss one may put on the issue, a positive finding of abuse cannot simply be ignored because it does not comport to a particular bureaucratic structure. The risk to the goal of successful rehabilitation is too great. Recognizing the constructive analysis raised by *Mitchell* and *Kuna*, courts faced with these difficulties should be mindful of the fact that the subject matter at stake is bound to, and reflective of, how we view our inmate rehabilitation policy. Judicial outcomes should be guided accordingly.

Endnotes

1. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 32001(2), 108 Stat. 1796, 1896-98 (codified as amended at 18 U.S.C. § 3621(e) (2006)).
2. 18 U.S.C. § 3621(e)(1), (e)(1)(C).
3. *See id.* at § 3621(e)(2)(B).
4. *Laws v. Barron*, 348 F. Supp. 2d 795, 800 (E.D. Ky. 2004).
5. 18 U.S.C. § 3621(e)(5)(B)(i).
6. *See Laws*, 348 F. Supp. 2d at 800 ("Congress has clearly authorized the BOP to select those prisoners who will be best served by participation in such a program.").
7. 28 C.F.R. §§ 550.56, 550.58 (2007).
8. A subset of litigation also exists as to the definition of violent offense. *See, e.g., Lopez v. Davis*, 531 U.S. 230, 232-33 (2000).
9. *See* 18 U.S.C. § 3621(e)(5)(B).
10. *See generally* 28 C.F.R. §§ 550.50-58 (2007).
11. 28 C.F.R. § 550.56(a) (2007).
12. *See, e.g., Goren v. Apker*, No. 05 Civ. 9006 (PKC), 2006 WL 1062904 (S.D.N.Y. Apr. 20, 2006); *Pacheo v. Lappin*, No. 05-C-141-C, 2005 WL 752269 (W.D. Wis. Mar. 30, 2005), *aff'd in part and vacated in part*, 167 F. App'x 562 (7th Cir. 2006); *Laws*, 348 F. Supp. 2d. 795; *Kuna v. Daniels*, 234 F. Supp. 2d 1168 (D. Or. 2002); *Mitchell v. Andrews*, 235 F. Supp. 2d 1085 (E.D. Cal. 2001).
13. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984) (explaining the authority of executive agencies to interpret statutes and prescribing the circumstances under which courts must defer to agency interpretations).
14. *See* Fed. Bureau of Prisons, Program Statement 5330.10, Drug Abuse Programs Manual, Inmate, ¶ 5.4.1(1) (1997) [hereinafter Program Statement], *available at* http://www.bop.gov/policy/progstat/5330_010.pdf.
15. *Id.* (citing Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) [hereinafter *DSM-IV*]).
16. *See* Administrative Procedures Act, 5 U.S.C. §§ 551-59 (2006).
17. *See* Program Statement, *supra* note 14, at ¶ 5.4.1(1).
18. *Id.*
19. *Id.*
20. *Id.*
21. *DSM-IV*, *supra* note 15, at 182-83.
22. The advantages inherent in a § 2241 action include the possibility of assignment of a different judge other than the sentencing one and the ability to directly appeal without further leave from the court. *Compare* 28 U.S.C. § 2255 (2006) (allowing a prisoner only to "move the court which imposed the sentence" and to appeal the ruling on the motion only "on application for a writ of habeas corpus" to a court of appeals) *with* 28 U.S.C. § 2241 (2006) (authorizing any federal court to grant a writ of habeas corpus within its jurisdiction and containing no limitation on a prisoner's ability to take a direct appeal).
23. *See Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 632 (2d Cir. 2001) (holding that habeas corpus relief under § 2241 is the appropriate remedy when a prisoner challenges not the legality of a sentence but the execution of a sentence subsequent to conviction).
24. *See* No. 02 CV 4947 SJ, 2002 WL 32096584, at *1 (E.D.N.Y. Dec. 6, 2002).
25. *See Pacheo*, 2005 WL 752269, at *3.

26. *See, e.g.*, *Gibson v. Fed. Bureau of Prisons*, 121 F. App'x 549 (5th Cir. 2004); *Miller v. United States*, 964 F. Supp. 15 (D.D.C. 1997), *vacated as moot*, 159 F.3d 636 (D.C. Cir. 1998).
27. *See Gibson*, 121 F. App'x at 551 (citing *Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976), and *Bulger v. U.S. Bureau of Prisons*, 65 F.3d 48, 49 (5th Cir. 1995)).
28. *See, e.g.*, *Pacheo*, 2005 WL 752269, at *3.
29. *See Goren*, 2006 WL 1062904, at *4-5; *Kuna*, 234 F. Supp. 2d at 1168-70; *Mitchell*, 235 F. Supp. 2d at 1086-92.
30. *See Carmona*, 243 F.3d at 632.
31. *See id.* at 634; *Guida v. Nelson*, 603 F.2d 261, 262 (2d Cir. 1979); *Carmel v. Thomas*, 510 F. Supp. 784, 788 (S.D.N.Y. 1981).
32. *See* 28 C.F.R. § 542.15(a) (2007).
33. *Id.*
34. The timing sequence of RDAP review already presses tightly against the conclusion of an inmate's sentence. The RDAP process cannot begin until an inmate is within thirty-six months of his release. *See* 28 C.F.R. § 550.56(a)(4) (2007). The shortness of this timing likely contributes to the fact that no court of appeals has squarely reconciled the split of authority in the RDAP line of cases. By the time a case weaves through administrative channels and the district court and is ripe for disposition by a court of appeals, the practical disputes have been mooted because the inmate has been released.
35. *See Monahan v. Winn*, 276 F. Supp. 2d 196, 204-05 (D. Mass. 2003); *Howard v. Ashcroft*, 248 F. Supp. 2d 518, 533 (M.D. La. 2003); *Goren*, 2006 WL 1062904, at *4-5.
36. *Zucker v. Menifee*, No. 03 Civ. 10077(RJH), 2004 WL 102779, at *4 (S.D.N.Y. Jan. 21, 2004) (*citing Arango Marquez v. INS*, 346 F.3d 892, 897 (9th Cir. 2003)).
37. *See Goren*, 2006 WL 1062904, at *4-5; *Mitchell*, 235 F. Supp. 2d at 1087.
38. *See Goren*, 2006 WL 1062904, at *5.
39. *See Goren*, 2006 WL 1062904, at *4-5; *Mitchell*, 235 F. Supp. 2d at 1087. The petitioners in both *Goren* and *Mitchell* made considerable efforts to pursue remedies on the administrative front. *Goren*, 2006 WL 1062904, at *5; *Mitchell*, 235 F. Supp. 2d at 1087. Both petitioners reached the level of the regional director. *Goren*, 2006 WL 1062904, at *5; *Mitchell*, 235 F. Supp. 2d at 1087.
40. *See Laws*, 348 F. Supp. 2d 795; *Mitchell*, 235 F. Supp. 2d 1085.
41. 235 F. Supp. 2d at 1091.
42. *Id.* at 1090.
43. *Id.* at 1090-91.
44. *See id.* at 1089, 1091.
45. *Id.* at 1089.
46. *See id.* at 1088-89.
47. *Id.* at 1089.
48. *See id.* at 1091-92.
49. *See id.*
50. *See id.* at 1087, 1091-92.
51. *See* 234 F. Supp. 2d at 1169.
52. *See id.*
53. *See id.*
54. *Id.*
55. *Id.* (internal citation omitted); *see also Snider v. Daniels*, 445 F. Supp. 2d 1233, 1235 (D. Or. 2006) (citing *id.* and noting that the BOP lacked discretion to go beyond the unambiguous terms of its program statement in determining whether an inmate's completion of a 240-hour literacy program entitled him to good-time credit).
56. *Kuna*, 234 F. Supp. 2d at 1169 (*citing Bowen v. Hood*, 202 F.3d 1211, 1221-22 (9th Cir. 2000)).
57. *See id.*; *Mitchell*, 235 F. Supp. 2d at 1092.
58. *See Kuna*, 234 F. Supp. 2d at 1169; *Mitchell*, 235 F. Supp. 2d at 1092.
59. *See* 348 F. Supp. 2d 795.
60. *See id.* at 805-06.
61. *See Rea v. Sniezek*, No. 4:06 CV 2424 , 2007 WL 427038, at *5 (N.D. Ohio Feb. 2, 2007).
62. *Laws*, 348 F. Supp. 2d at 797; s*ee* Program Statement, *supra* note 14, at ¶ 5.4.1(1).
63. *Laws*, 348 F. Supp. 2d at 798.
64. *Id.*
65. *Id.*
66. *Id.* at 804.
67. *See id.* at 803.
68. *See id.* at 805-06.
69. *See id.*
70. *See id.*
71. *See id.* at 803, 806-07 (*citing Lopez*, 531 U.S. 230; and *Davis v. Beeler*, 966 F. Supp. 483 (E.D. Ky. 1997)).
72. *Id.* at 804.
73. *See, e.g.*, *Hasan v. Eichenlaub*, Civil No. 06-13637, 2006 WL 3511551, at *2 (E.D. Mich. Dec. 5, 2006).
74. *See Montilla v. Nash*, No. CIVA 05-2474(FLW), 2006 WL 1806414, at *3-4 (D.N.J. June 28, 2006). In *Montilla*, documentation of the inmate's prior alcohol abuse and cocaine use existed in the form of an "OHA Psychiatric Review Technique Form"; however, because the form referenced drug abuse only on unspecified dates, and was prepared more than twelve months before the inmate's arrest, the court afforded the document no weight. *See id.*
75. 491 F. Supp. 2d 1165, 1171 (S.D. Ga. 2007).
76. *See Goren*, 2006 WL 1062904, at *6-8.
77. *See, e.g.*, *Montilla*, 2006 WL 1806414, at *3 (rejecting findings of the inmate's substance abuse by two BOP psychologists and the recommendation by one that the inmate be admitted into the RDAP because "neither diagnosed [the inmate] under the DSM-IV [*sic*]").
78. *See id.*
79. *See Conrod v. Sanders*, No. 2:05-CV-1915, 2006 WL 1789554, at *1-2 (W.D. La. May 16, 2006). In *Conrod*, a case manager had changed the inmate's "drug abuse score" to reflect a history of drug abuse, in response to statements made by the inmate during his "Psychology Services Intake Screening." *See id.* at *1. Despite the fact that this change resulted in a change in the inmate's custody classification, the court affirmed the BOP's decision to deny the inmate's admittance to RDAP. *See id.* at *1-2.
80. Just as probation officials can conduct certain investigations to verify certain claims made during a PSI interview, so too can BOP examining physicians. No regulation requires such physicians to adopt blindly an inmate's pronouncements of substance abuse. If, for example, an inmate self-reported a liver problem, and BOP treating physicians dictated a course of care based on this self-reporting alone, without the judgment of their own independent professional corroboration, the results could be dire.
81. *See* 121 F. App'x at 551.

Paul A. Montuori is an attorney practicing in the areas of post-conviction and appellate litigation. He serves as Secretary of the New York City Bar Association's Committee on Corrections. Mr. Montuori has previously served on the ABA's Indigent Defense Advisory Group and on the ABA task force that revised the standards for civil provision of legal services to the indigent.

Proposals to Reform New York's Persistent Felony Offender Statutes

By Spiros A. Tsimbinos

For several years, I have been writing articles pointing out deficiencies in New York's Persistent Felony Offender statutes, and recommending that the Legislature make needed changes. See, for example, my article in the *New York Criminal Law Newsletter*, Winter 2004, Vol. 2, No. 1 at page 7. I was, therefore, pleased to learn that the new Sentencing Commission, in its recent report, recommending proposals for reform, has seen fit in a separate section to recommend that the Legislature address the current existing problems with respect to the Persistent Felony Offender statutes under Penal Law §§ 70.08 and 70.10. The Commission, at page 71 of its Preliminary Proposals dated October 15, 2007, makes the following statement, which is reproduced below for the benefit of our members:

The Commission has reviewed the following anomalies in the Penal Law and Criminal Procedure Law and recommends that the Legislature address them. The Commission recognizes that the following is by no means an exhaustive or exclusive list and intends to continue its review in this area.

1. The Persistent Violent Felony Offender Statute[1] Fails to Specify the Minimum Period of Incarceration for a Persistent Offender Convicted of a Class E Violent Felony

Following the Legislature's (presumably inadvertent) failure to set the minimum period of imprisonment for a Class E persistent violent felony offender under Penal Law § 70.08 (3), the Court of Appeals determined, in *People v. Green* (68 N.Y.2d 151 [1986]), that the minimum would be two years:

> The rationale for that conclusion was that the minimum period of imprisonment of the indeterminate sentence to be imposed on a "second" violent felony offender convicted of a class E felony was, at the time *Green* was decided, two years, and thus the legislative intent for the "persistent"—a third—violent felony offender should be no less. In the words of the Court: "The *minimum* set forth in [the then governing second felony offender statute] should logically apply to persistent offenders. . . . (*id*. at 153 [emphasis supplied])[2]

In 1995, the Legislature changed the sentence for a second violent felony offender from an indeterminate to a determinate sentence. "In the same legislation, the minimum periods of the indeterminate term of imprisonment for a persistent violent felony offender of a Class B, C and D felony were amended to double the low end of the required minimum period, but the Legislature chose not to amend the statute to specify any minimum for the Class E felony."[3]

Subsequently, in *People v. Tolbert* (93 N.Y.2d 86, 88 [1999]), the Court of Appeals followed the rationale of *Green* and held that "the amended determinate sentence for Class E second violent felony offenders should also be applied as the minimum sentence for Class E persistent violent felony offenders."[4]

It is hoped that the Legislature, now that the issue has again been highlighted, finally enacts the necessary modifications.

2. The Persistent Felony Offender (A-1 Felony) Sentencing Provision Is Imprecisely Written and Should Be Clarified

The persistent felony offender statute[5] applies to defendants who are convicted of a felony and who have "two prior judgments of conviction for a felony or for a foreign jurisdiction crime for which a sentence to a term of imprisonment in excess of one year or a sentence to death was imposed."[6] Unlike the persistent violent felony offender and other Penal Law multiple felony statutes, pursuant to Penal Law § 70.10:

> The court is not required to find that the defendant is a persistent felony offender simply on the basis of the crime presently convicted of and the crimes previously committed. Those facts are the threshold determinations for persistent felony offender consideration. To impose the sentence mandated for a persistent felony offender, the court must also be of the "opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest."[7]

The plain language of Penal Law § 70.10 (2) provides that where the court has found that the defendant is a "persistent felony offender" and is of the opinion that "extended incarceration and life-time supervision will best serve the public interest," the court may, in lieu of imposing a sentence authorized by Penal Law § 70.00 (sentence of imprisonment for a felony), § 70.02 (violent felony offender), § 70.04 (second violent offender) or § 70.0-6 (second felony offender), impose "the sentence of imprisonment *authorized by that section* for a Class A-1 felony."[8]

The problem is that there is no sentence of imprisonment for a Class A-1 felony authorized by Penal Law §§ 70.02 or 70.04 or 70.06, since those sections generally refer to only Class B through E felonies. While Penal Law §§ 70.00 *does* contain language relating to the sentence of imprisonment for a Class A-1 felony, due to fairly recent amendments to subdivision (3)(a) of § 70.00, there are actually three different A-1 felony sentences referred to in that section. Stated simply, the aforementioned language of Penal Law § 70.10 is inexplicably imprecise and, in view of the fact that implementation of this language can result in a sentence of life imprisonment, should be clarified.

The Commission is also aware that Penal Law § 70.10 has been challenged on constitutional grounds in a series of recent state and federal cases. In *Washington v. Poole*, 2007 WL 2435166 (S.D.N.Y. 2007), for example, the court found that the statute's enhanced sentencing scheme violated the Sixth Amendment right to a jury trial because under the evolving case law of the U.S. Supreme Court following *Apprendi v. New Jersey* (530 U.S. 455 [2000]) (*see Ring v. Arizona*, 536 U.S. 534 [2002]; *Blakely v. Washington*, 542 U.S. 296 [2004]; *United States v. Booker*, 543 U.S. 220 [2005]), a jury is required to find the facts that Penal Law § 70.10 leaves to the judge. Two other cases decided by the United States District Court for the Southern District of New York determined that Penal Law § 70.10 was not unconstitutional (*see Phillips v. Artus*, 2006 WOL 1867386 [S.D.N.Y. 2006] and *Morris v. Artus*, 2007 WL 2200699 [S.D.N.Y. 2007]. However, the United States District Court for the Eastern District of New York determined that New York's persistent felony sentencing scheme violated the defendant's Sixth Amendment right to a jury trial (*see Portalatin v. Graham*, 478 F. Supp. 2d 385 [2007]). *Phillips v. Artus* is pending in the U.S. Court of Appeals for the Second Circuit. The New York Court of Appeals upheld the persistent felony offender statute in *People v. Rosen* (96 N.Y.2d 329 [2001]) and, more recently, in *People v. Rivera* (5 N.Y.3d 61 [2005]), holding, in both cases, that it did not violate the rule of *Apprendi, supra*.

In addition to some of the problems and deficiencies in the persistent felony offender statutes highlighted by the Sentencing Commission Reports mentioned above, in my past articles I have also pointed out other deficiencies and have indicated possible solutions to the problems. For example, an examination of Penal Law § 70.08 relating to sentences of imprisonment for persistent violent felony offenders and Penal Law § 70.10 relating to sentences of imprisonment for persistent felony offenders in fact reveals an interesting and perhaps an illogical situation with respect to the minimum sentences to be imposed under the various categories of felony offenses. Under Penal Law § 70.08 specific mandatory terms are listed for violent felony offenders to accompany the maximum of life imprisonment. When it comes to Penal Law § 70.10, however, with respect to persistent felony offenders, the authorized sentence for all categories of felonies is 15 years to life, that which is authorized for an A-1 felony. Even though the sentence is discretionary, with respect to persistent felony offenders rather than the mandatory terms required by Penal Law § 70.08 for persistent violent felony offenders, it appears illogical why the same or a lesser minimum sentence is not available for persistent felony offenders than for the more serious persistent violent felony offenders.

Under current law, for example, a person being sentenced as a persistent violent felony offender for a class D felony sentence can receive a minimum sentence of 12 years to life. A person being sentenced as a persistent violent felony offender for a class E felony can receive a minimum of 3 to life. A person being sentenced as a persistent felony offender for a similar class D felony would be subject, however, to a minimum of 15 years to life, as would a person being sentenced on an E felony. This possible scenario seems inconsistent with the concept of providing greater punishment for those committing violent felony offenses over non-violent offenses. Lower courts have recognized the unfairness of the situation and have specifically urged legislative action. Thus Judge Kleinman in *People v. Velez*, 163 Misc. 2d, 571 (Sup. Ct., N.Y. County 1994) specifically stated:

> This court recommends to the Legislature that consideration be given to amending Penal Law § 70.10 giving the court more discretion in fixing the minimum sentence for nonviolent persistent felons. Given that discretion, this court has no doubt that more criminals who engage in a continuous life of crime would be sentenced as persistent felony offenders.

A legislative change could easily bring about a fairer and more balanced approach to the situation by simply inserting at the end of subdivision 2 of § 70.10 the language "may impose the sentence of imprisonment authorized by § 70.08" in place of the current provision,

which reads "may impose the sentence of imprisonment authorized by that section for a class A-1 Felony." A more complicated, but perhaps fairer solution would also be to set specific terms as currently exist for persistent violent felony offenders, but to use lower ranges taking into consideration the non-violent nature of the felony conviction. The possible constitutional problems arising from the *Apprendi* cases can also be solved by removing the discretionary process and replacing it with a mandatory situation, but with the lower ranges imposed.

It is hoped that this year the Legislature after more than 28 years of inaction finally proceeds to statutorily set an appropriate minimum sentence for the Class E felony offender being sentenced as a persistent violent felony offender and that it further corrects the anomalies that exist as pointed out above as well as the lurking constitutional problems which have been raised. The time for these corrective actions is long overdue.

Endnotes

1. Penal Law § 70.08(3).
2. Donnino, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 39, Penal Law, Art. 70, at 72.
3. *Id.*
4. *Id.*
5. Penal Law § 70.10.
6. Donnino, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 39, Penal Law, Art. 70, at 68.
7. *Id.*
8. Penal Law § 7010(2) (emphasis supplied).

Spiros A. Tsimbinos has been a criminal law and appellate practitioner in New York for 40 years. A graduate of New York University School of Law, he served as Legal Counsel and Chief of Appeals of the Queens County District Attorney's Office in 1990 and 1991. He is a past president of the Queens County Bar Association and is the editor of the *Criminal Law Newsletter*.

NEW YORK STATE BAR ASSOCIATION

Lawyer Referral and Information Service

Interested in expanding your client base?

Join the Lawyer Referral & Information Service

Why Join?
> Expand your client base
> Benefit from our marketing strategies
> Increase your bottom line

Overview of the Program
The New York State Bar Association Lawyer Referral and Information Service (LRIS) has been in existence since 1981. Our service provides referrals to attorneys like you in 41 counties (check our Web site for a list of the eligible counties). Lawyers who are members of LRIS pay an annual fee of $75 ($125 for non-NYSBA members). Proof of malpractice insurance in the minimum amount of $100,000 is required of all participants. If you are retained by a referred client, you are required to pay LRIS a referral fee of 10% for any case fee of $500 or more. For additional information, visit **www.nysba.org/joinlr**.

Sign me up
Download the LRIS application at **www.nysba.org/joinlr** or call **1.800.342.3661** or e-mail **lr@nysba.org** to have an application sent to you.

Give us a call!
800.342.3661

NYSBA

MEETS ABA STANDARDS FOR LAWYER REFERRAL
AMERICAN BAR ASSOCIATION
THE RIGHT CALL FOR THE RIGHT LAWYER

Chances of Reversing Criminal Convictions on Appeal Extremely Small

By Spiros Tsimbinos

A recent article by former Appellate Division Justice Bentley Kassal, which appeared in the November-December 2007 issue of the *New York State Bar Association Journal*, Vol. 79, No. 9, illustrates how difficult it has become for criminal defense attorneys to obtain reversals of criminal convictions within our State Appellate Courts. Reviewing statistics from the four Appellate Departments for the years 2002 to 2006, it was reported that the First Department reversed only 3% of the criminal cases in 2006, the same as in 2002. The Second Department reversed 5% in 2006, down from 7% in 2002. The Third Department reported a reversal rate of 6%, unchanged from 2002 and the Fourth Department reversed 5% of the criminal cases in 2006, the same as in 2002.

Thus, considering all Appellate Division Departments, the reversal rate for criminal convictions was less than 5%. Taking all of the Appellate Divisions as a whole, a criminal law appellate practitioner is faced with the daunting conclusion that he or she generally has less than a 1-in-20 chance of reversing a criminal conviction. From my personal observation, as an appellate attorney for 40 years, it appears that the Appellate Divisions have become increasingly reluctant in recent years to overturn criminal convictions. Utilizing such principles as harmless error and failure to preserve, they have affirmed convictions even when serious errors have occurred. Even though Appellate Divisions are specifically granted by statute, CPL § 470.15, with "interest of justice discretion," they have been extremely reluctant to exercise this discretion and as a result, serious and prejudicial errors often have gone uncorrected.

The situation has become especially acute during the last 12 years, when Governor Pataki saw fit to appoint more conservative and more law-enforcement-minded judges to the various Appellate Divisions. The Appellate Divisions appear to have basically adopted the Court of Appeals philosophy, which strongly relies upon the harmless error and lack of preservation principles. What the Appellate Divisions apparently have failed to fully comprehend is that by constitutional and statutory authority, the Court of Appeals can only determine issues of law and has no "interest of justice discretion." The Appellate Divisions, on the other hand, have specifically been granted interest of justice jurisdiction but have simply failed to exercise it to any significant degree.

The small reversal rate of criminal convictions in the Appellate Divisions is further compounded by the fact that affirmances in the Appellate Division usually mean the end of the appellate route within the state courts. Even if a criminal defense lawyer attempts to take any further appeal to the New York Court of Appeals, he or she faces the daunting statistic that for the last several years, the rate of leave to appeal applications being granted in criminal cases has been fewer than 2%, or 1 chance in 50. In 2006, for example, only 62 applications were granted out of a total of 2,150 requests.

In addition to the small number of criminal convictions which are reversed, thousands of defendants never even get a chance to have an appeal heard. This is because aggressive waiver of appeal policies as part of any plea deal has greatly limited the number of criminal appeals which have been filed. Thus, in 1992, before the waiver of appeal policies were fully in effect, 4,625 criminal appeals were filed in the four Appellate Divisions. This number has consistently dropped so that in 2006, the number of criminal appeals filed in all of the four Appellate Divisions was less than 2,000. The volume of criminal appeals has declined not only in raw numbers but also as a percentage of the total number of appeals filed. Thus, in 1992, criminal appeals amounted to 41.3% of the total, while in the year 2006, criminal appeals dropped to less than 25% of the total filed.

I hope that this article has made appellate attorneys processing a criminal appeal aware of the difficult task that they face. However, despite the odds against them, a good appellate defense counsel should continue to fight the good fight with high hopes that he or she may be one of the lucky 1 in 20 to succeed.

Spiros A. Tsimbinos has been a criminal law and appellate practitioner in New York for 40 years. A graduate of New York University School of Law, he served as Legal Counsel and Chief of Appeals of the Queens County District Attorney's Office in 1990 and 1991. He is a past president of the Queens County Bar Association and is the editor of the *Criminal Law Newsletter*.

New York Court of Appeals Review

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from November 3, 2007 to February 1, 2008.

Post-Release Supervision

***People v. Hill*, decided November 15, 2007 (N.Y.L.J., November 16, 2007, pp. 1, 5 and 26)**

In a 4-3 decision, the New York Court of Appeals held that guilty pleas must be vacated for defendants who had not been notified by sentencing judges that the plea bargain agreements they have entered into include a period of post-release supervision. Dealing once again with an issue which has plagued the appellate courts for the last several years, the majority opinion held that defendants' due process rights are violated when they are unaware of the post-release supervision requirements. The majority further concluded that even a re-sentencing which appears beneficial to the defendant is not sufficient to cure the error in question. In the case at bar, the defendant had been sentenced to 15 years on a first degree rape conviction after pleading guilty. He subsequently challenged his conviction after learning that he would also be faced with a 5-year post-release supervision period which had not been mentioned in the plea agreement.

The Trial Court attempted to rectify the situation by re-sentencing the defendant to 12 ½ years in prison and 2 ½ years of post-release supervision. The Appellate Division, First Department, affirmed the modified sentence in a 3-2 decision, finding that the defendant had actually benefited from the re-sentencing situation. The Court of Appeals majority however, relying upon its recent decisions in *People v. Catu*, 4 N.Y.3d, 242 (2005); *People v. Van Deusen*, 7 N.Y.3d, 744 (2006); and *People v. Louree*, 8 N.Y.3d, 541 (2007), held that the constitutional defect which occurred in the case at bar was rooted in the plea itself and not in the resulting sentence and that, therefore, vacatur of the plea was the appropriate remedy. In this way, the defendant can be returned to his or her status before the constitutional infirmity occurred.

The majority opinion was written by Chief Judge Kaye and was joined in by Judges Ciparick, Graffeo, and Jones. Judge Pigott wrote the dissenting opinion, arguing that the sentencing court should have discretion to correct the error in question and that the defendant in actuality received the full benefit of his bargain plus a windfall. Judge Pigott was joined in dissent by Judges Read and Smith.

Physician-Patient Privilege Not Sufficient to Bar Admissibility of Evidence

***People v. Greene*, decided November 20, 2007 (N.Y.L.J., November 21, 2007, pp. 1 and 8 and 27)**

In a unanimous decision, the Court of Appeals concluded that suppression of evidence obtained in violation of the physician-patient privilege was not required in the criminal trial at bar. The defendant had argued that the police had largely made their case against him from information improperly given to them by personnel at the hospital. Detectives had been investigating a shooting death, and when detectives visited the nearby hospital, they were given the defendant's name and address as a person who had recently been treated for injuries sustained in a slashing incident. After detectives had obtained the information from the hospital, they proceeded to generate a photograph and found a witness who identified the defendant as being involved in the incident which resulted in the homicide. During the trial, defense counsel had sought to suppress the evidence in question.

The Court of Appeals, however, in a decision written by Judge Smith, concluded that the physician-patient privilege is based on a statute and is not a constitutional right. The Court further noted that in the instant matter, no constitutional right had been implicated and that suppression was not required. The Court relied upon its earlier decision in *People v. Patterson*, 78 N.Y.2d, 711 (1991). The Court further noted that in the case at bar, the situation did not fall under any of the recognized exceptions where a constitutional right is involved, so that suppression may be required. The Court noted that the defendant's case was nothing like the exception cases and that in the case at bar, suppression of the evidence was not required for the violation of a non-constitutional privilege.

Disorderly Conduct

***People v. Jones*, decided November 20, 2007 (N.Y.L.J., November 21, 2007, pp. 8 and 26)**

In a unanimous decision, the Court dismissed a disorderly conduct charge against a defendant because the information utilized in his case was facially insufficient to support the charge in question. The defendant

had been arrested in Times Square and according to the information, a police officer had observed him standing around at the above location, not moving and causing numerous pedestrians in the area to walk around him. In a decision written by Judge Ciparick, the Court held that nothing in the information described how the defendant had caused "public inconvenience, annoyance or alarm" as is required for a disorderly conduct conviction under Penal Law § 240.20(5). Judge Ciparick noted that something more than a mere inconvenience of pedestrians is required to support a disorderly conduct charge. "Otherwise any person who happens to stop on a sidewalk, whether to greet another, to seek directions or simply to regain one's bearings, would be subject to prosecution under this statute."

Weight of the Evidence

***People v. Olson*, decided November 15, 2007 (N.Y.L.J., November 16, 2007, p. 28)**

In a unanimous decision, the Court of Appeals affirmed a conviction for assault in the first degree and criminal possession of a weapon in the fourth degree. The verdict had been issued after a bench trial. The Court held that the Appellate Division had correctly applied the legal standard in determining that the verdict was not against the weight of the evidence. The Court found that the Appellate Division properly rejected the defendant's arguments that the verdict was against the weight of the evidence, concluding after exercising its factual review power that the Trial Court's determination concerning credibility and the weight to be accorded to the evidence was adequately supported by the record. The Court of Appeals also concluded that the Trial Court had properly considered defendant's justification defense and had applied the proper burden of proof in reaching its determination.

Suppression of Confession

***People v. Porter*, decided November 15, 2007 (N.Y.L.J., November 16, 2007, p. 28)**

In a unanimous decision, the New York Court of Appeals reversed an Appellate Division order and granted suppression of a defendant's statements. In the case at bar, the defendant, during questioning by the police, had stated, "I think I need an attorney," and one of the interviewing officers made a notation in his records that the defendant was "asking for an attorney." The Court of Appeals concluded that under these circumstances, the record revealed an unequivocal invocation of the defendant's right to counsel. On the record before the Court, there were no additional facts from which a contrary inference could be drawn that the defendant's request for counsel was equivocal. The defendant's confession was therefore subject to suppression.

Perjured Testimony in Another Jurisdiction

***People v. Zimmerman*, decided December 13, 2007 (N.Y.L.J., December 14, 2007, pp. 2, 6 and 25)**

In a 4-3 decision, the New York Court of Appeals held that a former chief executive of the Federated Department Stores could not be prosecuted in Manhattan for the alleged perjured testimony that he gave to the New York Attorney General's office from the company's headquarters in Ohio. The 4-judge majority found that CPL § 20.40(2)(c), which gives counties jurisdiction when prosecutors can show that a defendant knew his conduct had or was likely to have a particular effect upon the governmental processes or the community welfare of a particular county was vague, confusing and unworkable and called upon the Legislature to correct the problem. In the case at bar, the majority concluded that prosecutors had failed to show that the defendant, in allegedly making perjured statements to New York investigators, knew that the statements would have a materially harmful impact on New York County. Under these circumstances, the conviction for first degree perjury could not stand and a dismissal of the indictment was required. Judge Ciparick wrote the majority opinion, in which Chief Judge Kaye and Judges Smith and Jones concurred.

Judge Susan Read issued a dissenting opinion, calling the majority ruling irrational and finding that there was sufficient evidence to support the conviction. Judge Read was joined in dissent by Judges Graffeo and Pigott.

Weight of Evidence Review

People v. Danielson

***People v. Pasley*, both decided December 13, 2007 (N.Y.L.J. December 14, 2007, pp. 2, 6 and 26)**

In one decision covering two separate cases, the New York Court of Appeals set forth the principle that the Appellate Division's weight-of-the-evidence test requires review of the elements of the crime for which a defendant has been convicted where the defendant has failed to preserve a separate challenge to the legal sufficiency of the evidence. Applying this rule to *People v. Danielson*, the Court upheld the depraved indifference murder conviction of the defendant. The Court found that in *Danielson*, although the Appellate Division majority incorrectly concluded that it was unnecessary to conduct element-based review, it did alternatively consider the credible evidence, conflicting testimony and inferences that could be drawn from the evidence. Under these circumstances, because the majority did conduct a weight-of-the-evidence review, the Court of Appeals found that an affirmance was required.

In *People v. Pasley*, however, the Court of Appeals found that the Appellate Division had considered only credibility issues and not conflicting testimony and conflicting inferences. Under these circumstances, the matter had to be remitted back to the Appellate Division for a further review applying the correct standard to be utilized. The Court's rulings with respect to both cases were unanimous, with Chief Judge Kaye writing the opinion.

Verdict by 11-Person Jury

***People v. Gajadhar*, decided December 18, 2007 (N.Y.L.J., December 19, 2007, pp. 1, 9 and 26)**

In a 5-2 decision, the New York Court of Appeals upheld as a valid verdict a determination made by 11 members of the jury. In the case at bar, the 12th juror had been hospitalized three days into deliberations and the defendant requested the Trial Court to allow the 11 remaining jurors to decide the case. On appeal, however, the defendant raised statutory and constitutional challenges, claiming that a jury trial by 12 was required in order to sustain a criminal conviction. Judge Graffeo, writing for the majority, held that constitutional amendments which occurred in 1938 allowed defendants in non-capital cases to consent to having juries smaller than 12 members decide their cases. The majority concluded that regardless of how and why the defendant now claimed his decision was wrong, he knowingly and voluntarily made his decision and he must accept the consequences thereof.

The majority ruling for all practical purposes overturns the Court of Appeals ruling in *Cancemi v. People*, which was decided in 1858. Judge Ciparick and Chief Judge Kaye dissented in the above matter, arguing that a defendant's right to a 12-member jury should remain inviolate and that *Cancemi* remains good law. The dissenters also argued that the waiver provisions which occurred in the 1938 amendments to the State Constitution provided only for a waiver of a jury trial in favor of a bench trial and not a waiver of a 12-person jury.

Failure to Preserve

***People v. Cuadrado*, decided December 18, 2007 (N.Y.L.J., December 19, 2007, p. 28)**

In a unanimous decision, the Court of Appeals upheld the denial of a defendant's CPL § 440.10 motion. The defendant had waived indictment and had pleaded guilty to a charge which was contained in Superior Court information. It was conceded that the waiver of indictment and the subsequent plea were invalid. The defendant, however, in appealing from his conviction, never complained of the fact that the waiver of indictment was invalid. The only issue he raised in the Appellate Division was one of excessiveness of sentence. Under these circumstances, the Court of Appeals held that the defendant was barred from raising the issue in a 440 motion and that he had delayed for an inordinate time to present the issues he was now raising. Under these circumstances, the denial of the defendant's motion to vacate his plea and sentence was proper.

Search and Seizure

***People v. Allen*, decided January 10, 2008 (N.Y.L.J., January 11, 2008, p. 34)**

In a unanimous decision the New York Court of Appeals affirmed an Appellate Division determination upholding the denial of a motion to suppress. The Court reiterated that a determination as to whether the police possessed the common law right to inquire is a mixed question of law and fact, subject to only limited review by the New York Court of Appeals. In the case at bar the record supported the lower court's determination regarding both reasonable suspicion and the common law right to inquire, applying the principles of *People v. DeBour*, 40 N.Y.2d 210 (1976). Under these circumstances the Appellate Division determination will not be disturbed.

Catch Us on the Web at
WWW.NYSBA.ORG/CRIMINAL

Recent United States Supreme Court Decisions Dealing with Criminal Law

During the last several months, the United States Supreme Court has begun issuing a series of important decisions in the area of criminal law and has accepted a new death penalty case. Information regarding these matters is listed below:

Decided Cases

Kimbrough v. United States, 128 S. Ct. 558 (Dec. 10, 2007)

In a 7-2 decision, the United States Supreme Court voted to allow federal trial judges greater latitude in deviating from federal sentencing guidelines. In the case at bar, the Trial Court sentenced a defendant to 15 years with respect to a crack cocaine conviction, 4 years less than the minimum prison term provided for in the guidelines. The U.S. Court of Appeals for the Fourth Circuit had vacated the sentence, finding that the sentence had unreasonably been set outside the guideline level.

Justice Ginsburg, writing for the 7-judge majority, stated that the crack cocaine sentences established by the guidelines were not untouchable by sentencing courts and that deviating from the guidelines was not an abuse of judicial discretion. Justices Thomas and Alito dissented, arguing that the guidelines deserved more consideration than the majority had given them.

Significantly, within days of the Supreme Court's decision, the U.S. Sentencing Commission had voted unanimously to reduce the disparity between sentences for crack and powder cocaine. The Sentencing Commission's decision took effect on March 3, 2008. The Commission estimates that the average sentence reduction under the new guidelines will be 27 months. The Commission also indicated that its changes could apply retroactively, and it is estimated that some 19,500 inmates could petition the courts for resentencing.

Immediately following the pronouncement of the Supreme Court and the Sentencing Commission's rulings regarding the resentencing of crack cocaine defendants, the various federal courts have expressed alarm and concern as to how the new procedures are to be implemented. Within the Second Circuit, questions have been raised as to whether inmates seeking to shorten their time will have to apply for a modification of their sentences or whether some automatic resentencing procedure will be established. The Second Circuit, as a whole, has some 1,000 defendants eligible to seek resentencing as the result of the recent rulings, and the chief judges of both the Eastern and Southern Districts have indicated that careful consideration will have to be given as to how to administratively deal with the new regulations.

Gall v. United States, 128 S. Ct. 586 (Dec. 10, 2007)

In another case involving the issue of sentencing, the Supreme Court, in a 7-2 decision, held that trial judges may deviate from the sentencing guidelines without having to demonstrate that extraordinary circumstances require sentencing outside the guidelines. In an opinion written by Justice John Paul Stevens, the majority ruled that sentencing judges must give serious consideration to deviations and must explain their reasoning. But in doing so, they need not presume the guidelines are reasonable and instead must make an individualized assessment based on the facts presented to them. The decision in effect represents a significant relaxation of the guidelines mission to eliminate disparity in federal sentencing and provides federal district judges with greater judicial discretion. Just as in *Kimbrough* above, Justices Thomas and Alito dissented.

In *Gall*, a university student who had briefly helped a group to sell the drug Ecstasy had withdrawn from the group and had rehabilitated himself. Four years after his involvement with the group, he was arrested by federal agents and charged with a drug conspiracy. After pleading guilty, he was granted probation by the Sentencing Court, although the guidelines called for a 3-year sentence. The Eighth Circuit Court of Appeals reversed the sentence, claiming that the judge's deviation had to be justified by extraordinary circumstances. The Supreme Court's majority opinion reversed the Eighth Circuit's holding and admonished that it is not for Appeals judges to decide de novo whether the trial judge's reasoned and reasonable sentence should be altered.

New York State Board of Elections v. Lopez Torres, 128 S. Ct. __ (January 16, 2008)

In a unanimous decision, the United States Supreme Court upheld the constitutionality of New York State's convention system for the selection of Supreme Court judges. The lower federal courts had previously ruled that the system by which Supreme Court Justices are selected by judicial nominating conventions, usually controlled by political party bosses, was unconstitutional since it denied voters a chance to fully participate in the process. The lower court decisions had created substantial confusion in New York State and had led to numerous calls for a complete overhaul of the method of judicial selection.

The Supreme Court, however, ruled unanimously that the system was not unconstitutional and that the political parties were within their rights to select the candidates through a system of judicial conventions. Justice Scalia, who wrote the Court's opinion, stated that the fact that the party leadership effectively determines the nominees at the nominating conventions says nothing more than the party leadership has more widespread support than the candidate not supported by the leadership. Justice Scalia also pointed out that party conventions have long been an accepted manner of selecting party candidates.

Although the Court's decision was unanimous, several of the Justices did criticize the convention process but felt that any changes had to be adopted by the Legislature. Justices Stevens, Kennedy and Breyer issued concurring opinions in order to express their feelings that the convention system should be corrected. During the last two years, as a result of the *Lopez* case, there has been an increased call for changes in the judicial selection process. The focus will now turn on the Legislature as a means of securing judicial reform. Shortly after the Court's decision, Frederick A. O. Schwarz, Jr., senior counsel at the Brennan Center, who argued the case for the plaintiffs in the Supreme Court, was quoted as stating that additional options for judicial reform are being considered, "as well as legislation that will end the closed process which has for too long undermined public confidence in New York's courts." We will report on any future developments.

Cases Pending Decision

United States v. Williams, 128 S. Ct. __ (Dec. 2007)

In late October, the United States Supreme Court heard oral arguments on a matter involving the constitutionality of a provision of the Internet pornography law which was enacted in 2003. The statute has been attacked as being overbroad and violating First Amendment guarantees of free speech and expression.

Boumedieme v. Bush, 128 S. Ct. __ (Dec. 2007)

On December 5, 2007, the United States Supreme Court heard oral argument on the highly controversial case involving the detention of the Guantanamo Bay inmates. The issue squarely presented to the Court involves whether the United States Constitution extends habeus corpus rights to the Guantanamo Bay prisoners who are not United States citizens. It is estimated that over 300 inmates presently held at Guantanamo would be affected by the eventual ruling of the High Court. Some of the enemy combatants held since 2001 have claimed that they are entitled to the traditional legal rights afforded to U.S. citizens, and the Supreme Court has been faced with the issue of whether and how to decide the question. During the last two years, the Court has refused to grant certification and it was only on the last day of the last term that it suddenly decided that it would consider the matter and issue a ruling.

Based upon the questioning during the oral argument, it appeared that the Court was sharply divided on the issue and many Supreme Court watchers predict another 5-4 decision.

Moore v. Virginia, 128 S. Ct. __ (Feb. 2008)

In the case at bar, a motorist was stopped in Virginia for driving with a suspended license. Instead of simply writing up a summons, the Virginia police proceeded to arrest the defendant and after searching him, found crack cocaine in his pocket. The Virginia Supreme Court overturned the defendant's conviction, finding the search to be unconstitutional because Virginia law did not give the police authority to arrest drivers for minor violations.

In the United States Supreme Court, the State of Virginia raised the issue that the Court should adopt a uniform rule relating to Fourth Amendment searches and should not allow the different states to have differing constitutional rules based upon their individual state constitutions. The State of Virginia argued that the U.S. Constitution, based upon prior Court rulings, allows police to arrest people they believe are engaged in wrongdoing no matter how trivial. Further, the Fourth Amendment, which protects against unreasonable searches and seizures, requires only that officers have probable cause to believe a crime is being committed before an arrest and search.

The entire Supreme Court heard oral argument on this matter on January 14, 2008, and during oral argument, based upon the questions asked, it appeared that Justice Kennedy, who is often a decisive vote on criminal issues, was somewhat convinced by Virginia's argument. During the questioning, Justice Kennedy remarked, "I think it is much easier to administer, to have a uniform federal standard, rather than whether or not an officer can arrest in one county for something and not in another county."

Stays of Execution Issued Pending Supreme Court Decision on Use of Lethal Injections

Shortly after the United States Supreme Court determined that it would decide the constitutionality of the use of lethal injections as a means of implementing a death penalty sentence, the Court also began issuing a series of stays of pending executions until such time as the Supreme Court case is decided. The case which is awaiting decision by the United States Supreme Court is *Baze v. Rees*, from the State of Kentucky. The defendant in that case has mounted an argument involving cruel and unusual punishment with respect to the use of lethal injections.

Continued on page 22

Scenes from the Criminal Justice Section

Annual Meeting

Thursday, January 31, 2008

New York Marriott Marquis

CLE speakers Judge John Gleeson and Appellate Division Justice Steven Fisher

CLE speakers Spiros Tsimbinos, John Castellano and Madeline Singas

Chief Judge Kaye with Section Chair Jean Walsh and CLE Program Chair Spiros Tsimbinos

Attendees at awards luncheon

Norm Effman presents award to Det. Dennis Delano

Queens D.A. Richard Brown and CLE speaker John Castellano

CLE speaker Peter Dunne

Denise O'Donnell, Commissioner, New York State Division of Criminal Justice Services

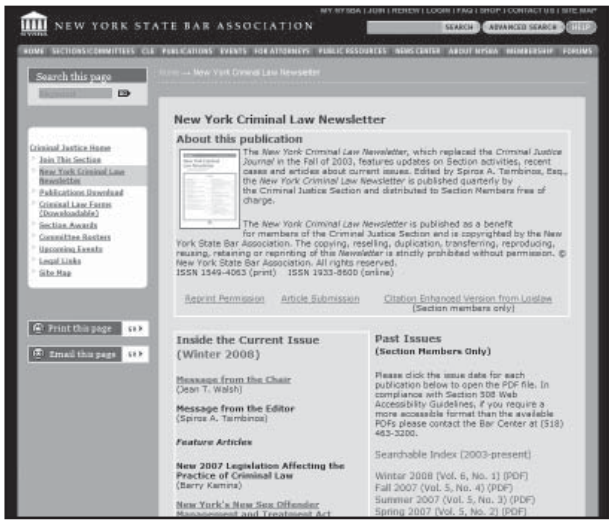
Jean Walsh and Vincent Doyle present award to Chief Judge Kaye

CLE Program Chair Spiros Tsimbinos with CLE speakers Judge John Gleeson and Paul Shechtman

Chief Judge Kaye with award winners Stephen Scaring and Patrick McCormack and CLE speakers John Amodeo and John Castellano

Jean Walsh congratulates additional award winners

The *New York Criminal Law Newsletter* has a new online look!



Go to www.nysba.org/CriminalLawNewsletter to access:

- Past Issues (2003-present) of the *New York Criminal Law Newsletter**
- *New York Criminal Law Newsletter* Searchable Index (2003-present)
- Searchable articles from the *New York Criminal Law Newsletter* that include links to cites and statutes. This service is provided by Loislaw and is an exclusive Section member benefit*

*You must be a Criminal Justice Section member and logged in to access.

Need password assistance? Visit our Web site at www.nysba.org/pwhelp. For questions or log-in help, call (518) 463-3200.

Continued from page 19

The highest courts in various states have also followed the lead of the United States Supreme Court and have stayed executions until such time as the lethal injection issue is decided. The United States Supreme Court recently heard oral argument in the Kentucky matter and a decision is expected within the next few weeks. We will report on any new developments as soon as they occur.

Supreme Court to Review District of Columbia's Gun Control Law

On November 20, 2007 the United States Supreme Court agreed to hear the District of Columbia's appeal of a Federal Court ruling that overturned the District's gun ban. This matter will be the first time in many years that the Court will review the applicability of the Second Amendment to the Constitution, which grants citizens the right to bear arms. It has been argued that the Second Amendment does not grant individuals the individual right to possess guns but protects only the rights of states to arm their militias. The Court will also be asked to review the question of whether the Second Amendment applies to the states. In granting review, the Court has decided to hear a highly controversial matter and we will keep readers advised of developments as they occur. It is not expected that any ruling will be issued on this case for at least six months.

Supreme Court Accepts Another Death Penalty Case

On January 4, 2008, the United States Supreme Court agreed to hear another matter involving the imposition of the death penalty. In *Kennedy v. Louisiana*, a defendant was sentenced to death following a conviction of a brutal rape of his 8-year-old stepdaughter. The Court had previously indicated that the death penalty should be imposed only in homicide cases, and the new case raises the issue as to whether the states are free to impose the death penalty for other violent non-homicide offenses. In addition to Louisiana, four other states, South Carolina, Oklahoma, Montana and Texas, currently permit capital punishment for a repeat child rapist. To date, no one has been executed under these laws. Proponents of the Louisiana statute have noted that Congress has authorized the death penalty for such offenses as treason, espionage, or air piracy, which may not result in death. This latest case gives the Supreme Court another opportunity to comment on the imposition of the death penalty. It is expected that a ruling on the matter may be forthcoming in late June. The Court also currently has on its docket the death penalty case involving the use of lethal injections. The injection case was argued on January 7, 2008 and a decision in that matter is expected within the next few months. We will keep our readers advised of both cases as soon as they are decided.

Cases of Interest in the Appellate Division

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from November 3, 2007 to February 2, 2008:

People v. Romano (N.Y.L.J., November 6, 2007, pp. 1 and 7, and November 9, 2007, p. 26)

In a 4-1 decision, the Appellate Division, Third Department, held that a defendant who waives his right to appeal as part of a plea bargain is prohibited from seeking review of his sentence for excessive harshness. The majority opinion, written by Justice Mercure, held that taking such a position was consistent with recent decisions from the New York Court of Appeals and was necessary in order to serve the public interest by assuring the certainty of plea bargain agreements between prosecutors and defendants. Justice Cardona issued a vigorous dissent, arguing that the majority's position violated the Appellate Division's constitutional discretion to review sentences in the interest of justice. The issue in question has troubled appellate courts over the last few years and the vigorous nature of Justice Cardona's dissent may cause this matter to eventually be reviewed by the New York Court of Appeals.

People v. Austin (N.Y.L.J., November 23, 2007, pp. 1, 5 and 26)

In a unanimous decision, the Appellate Division, First Department, held that a trial judge did not abuse his discretion in denying expert testimony on eyewitness identification factors. The Appellate Division issued its ruling and distinguished the recent Court of Appeals decision in *People v. LeGrand*, 8 N.Y.3d 449 (2007) which ruled that expert eyewitness identification testimony should be allowed in certain instances. The First Department stated that the Court of Appeals decision should be given a narrow application and that under the facts of the instant case, the trial court was well within its discretion to deny the defense application. The Appellate Division, in the case at bar, found the strength of the eyewitness identification distinguished the circumstances from *LeGrand* and that therefore a reversal of the defendant's conviction was not required.

People v. Giles (N.Y.L.J., November 26, 2007, pp. 1 and 2, and November 28, 2007, p. 26)

In a 3-2 decision, the Appellate Division, First Department, upheld the use at trial by the prosecution of two prior burglaries, in which the defendant was allegedly involved. In the instant matter, the defendant was charged with committing a burglary of a medical office and thereafter utilizing stolen credit cards which were taken from the premises. Evidence of the two prior burglaries included the fact that credit cards in those situations were also stolen. The three-judge majority relying upon the *Molineux* theory ruled that evidence of the two burglaries at issue was relevant to show that the property the defendant possessed at the time of his arrest was stolen and that he knew it was stolen. Justice Sullivan, writing for the majority, concluded:

> Proof connecting a defendant to the commission of an uncharged crime is admissible under *Molineux* when it is relevant to an element of a charged crime and its probative value outweighs its potential for causing unfair prejudice. . . . Here, evidence of the theft of property is admissible, even where defendant is not charged with the theft, to prove defendant's knowledge that the cards were stolen and thus his guilt of criminal possession of stolen property.

In a vigorous dissent, Justices Kavanagh and Saxe vehemently disagreed with the majority's conclusion. The dissenting opinion stated:

> If defendant did not commit these crimes, or perhaps more appropriately, if it cannot be proven that he was the perpetrator, it is incomprehensible that the specific details of how either of these burglaries were committed could, in any way, be relevant in determining whether defendant, when arrested, knew he was carrying stolen property, or was intent on committing a burglary. . . . [B]ecause there can be no denying the prejudicial impact of the admission of this evidence on defendant's right to a fair trial, I believe his conviction should be reversed and a new trial ordered.

Because of the sharp disagreement within the Appellate Division on this matter, it appears highly likely that the case will eventually be decided by the New York Court of Appeals.

People v. Massey (N.Y.L.J., November 27, 2007, p. 26)

In a unanimous decision, the Appellate Division, Third Department, upheld a defendant's convictions for burglary and assault. On appeal, the defendant raised the claim that he could not be held responsible for the crimes in question because he had been suffering from insulin

shock and intoxication. The Appellate Division, however, in reviewing the record, determined that the defendant's claims were not credible and that the jury's verdict was supported by legally sufficient evidence. The jury's first-hand assessment of the witnesses' credibility was entitled to great deference, and there was nothing in the record to justify overturning the jury's verdict.

People v. Buskey (N.Y.L.J., December 4, 2007, pp. 2, 9 and 26)

In a unanimous decision, the Appellate Division, Third Department, reversed a defendant's conviction and ordered a new trial, holding that a jury should not have been allowed to hear evidence that a defendant who was charged with a specific sexual abuse crime had also committed the uncharged crimes of kissing and fondling young girls, other than the victim of the charged crime. In the case at bar, prosecutors had been allowed in the sex abuse trial to present, as part of their direct case, evidence that the defendant had made sexual advances toward three young teenage girls, other than the 13-year-old victim who was the subject of the charged crime. Prosecutors based their argument on the claim that this would establish a common scheme or plan as defined under *People v. Molineux*.

The Appellate Division, Third Department, however held that although uncharged crimes can be admitted in limited circumstances, under *Molineux,* their probative value has to be carefully weighed against the potential for prejudice and surprise. In the defendant's case, the uncharged crimes showed only a repetitive pattern of behavior and not a common scheme or plan as required by *Molineux.* The fact that the defendant may have kissed other young teens did not establish that he committed the sexual abuse charge against the victim. Further, any limited probative value was outweighed by the obvious prejudice to the defendant and the real danger that the jury would use the evidence to draw impermissible inferences.

People v. Thomson (N.Y.L.J., December 13, 2007, p. 29)

In a unanimous decision, the Appellate Division, Third Department, upheld a defendant's conviction for attempted murder in the first degree, despite its finding that the defendant's counsel may have been ineffective. In the case at bar, counsel had failed to ascertain that a prior New Jersey conviction did not constitute a predicate felony. Defendant thus claimed that the prosecutor in offering a plea deal had improperly considered him as a second felony offender and that therefore he would have received a better sentencing situation if the true facts had been known. The defendant had been offered a plea of 8 to l6 years and after rejecting it had gone to trial, been convicted and then received a sentence of 16 years to life.

The Appellate Division found that there was an insufficient showing to establish that the defendant would in fact have been granted a more favorable plea disposition under the true facts of the situation. The Appellate Division stated they were unpersuaded that the defendant would have received a more favorable plea offer considering the serious nature of the charges and that he also failed to present evidence that he would have accepted a more favorable plea offer. Under these circumstances, the Appellate Division concluded it could not find that counsel's misconception during the plea negotiations caused any prejudice to the defendant.

People v. Bowman (N.Y.L.J., December 19, 2007, pp. 26 and 35)

In a unanimous decision, the Appellate Division, First Department, upheld a defendant's conviction for depraved indifference murder, finding that the evidence presented was legally sufficient to sustain the conviction. In the case at bar, the defendant had been accused of causing the death of his infant daughter. Despite the recent Court of Appeals decisions in *People v. Suarez*, 6 N.Y.3d 202, and *People v. Payne*, 3 N.Y.3d 266, the Appellate Division found the jury could have logically determined that the defendant committed depraved indifference murder rather than intentional homicide. The Court concluded that the jury could have rationally found the defendant acted recklessly by callously disregarding the potential harm his blows would have had on the tiny victim and that he prevented prompt medical help from reaching the infant by his subsequent actions.

People v. Cyrus (N.Y.L.J., December 26, 2007, pp. 1 and 8, and December 27, 2007, p. 26)

In a unanimous decision, the Appellate Division, First Department, reversed a defendant's conviction and ordered a new trial after finding that defense counsel had committed several serious errors and had thus been ineffective as defense counsel. The Appellate Court found that the defendant's attorney had clearly failed to adequately prepare for the trial, which led to the admission of highly prejudicial testimony without defense objection. Defense counsel also failed to challenge an alleged confession made by the defendant.

People v. Tankleff (N.Y.L.J., December 31, 2007, pp. 26, 30 and 31)

In a unanimous decision, the Appellate Division, Second Department, ordered a new trial finding that the trial court had improperly refused to consider new evi-

dence which had been offered by the defense. This high-profile case which involved the claim that the defendant had murdered his parents has involved years of litigation. The Appellate Division, Second Department, in the instant appeal found that the Suffolk County Court should not have denied the defendant's CPL § 440 motion which was based upon substantial allegations of newly discovered evidence. The Appellate Panel concluded, "A review of the record on appeal reveals that the County Court's determination amounted to a misapplication of its gatekeeper function relative to the evaluation and admissibility of the proffered 'new evidence.'"

Shortly after the announcement of the Appellate Division's decision which ordered a new trial for the defendant, the Suffolk County District Attorney Thomas Spota announced his office would formally drop the indictment against the defendant, stating it was no longer possible to reasonably assert that a re-trial would result in a successful conviction. The defendant, who has been imprisoned for more than 17 years, has been released.

People v. Van Patten (N.Y.L.J., December 31, 2007, p. 1)

In a unanimous decision, the Appellate Division, Third Department, ordered a new trial for a defendant who was convicted under the state's anti-terrorism statute for threatening a district attorney who was prosecuting the defendant's father. The defense, on appeal, had raised among its several issues a direct attack upon the use of the terrorist threat statute as applied to the facts in the case at bar. They basically argued that Penal Law § 490.20, which was enacted shortly after the September 11th attack, has never been applied against international terrorists but is rather being used by prosecutors against people who have arguments against a governmental official or agency.

The Appellate Division, in ordering a new trial for the defendant, did not rule on the attack against the terrorist statute, but instead based its ruling on the fact that statements which were made by the defendant to a police investigator should have been suppressed because the suspect had not been given his Miranda warnings. It appears that we may have to await further Appellate case law in order to determine the full and correct parameters of the anti-terrorism statute.

People v. Garcia (N.Y.L.J., January 4, 2008, p. 1 and 6)

In a unanimous decision, the Appellate Division, First Department, reversed a defendant's conviction and ordered a new trial after finding that the prosecutor had committed flagrant violations of a defendant's constitutional rights involving the turning over of *Brady* material, rejecting the prosecution's claim that the failure to disclose evidence which contradicted the victim's claim was a harmless lapse of preferred factors. The Appellate panel instead found that a flagrant violation of the *Brady* principles had occurred and that the suppressed testimony could have had a substantial impact on the jury's verdict. Further compounding the error was the prosecutor's insinuation at the trial that the defense had offered no conflicting or contradictory evidence.

People v. Kozlow (N.Y.L.J., January 4, 2008, pp. 1, 2 and 42)

In a 3-1 decision, the Appellate Division, Second Department, upheld a bench trial verdict which convicted a defendant for sending sexually implicit instant messages to someone he believed was a minor. The defense had argued that the prosecutor had violated the defendant's rights by urging the trial court to convict the defendant under a theory not charged in the indictment. Although the sentencing judge accepted the defense argument, the majority of the panel concluded that a judge conducting a bench trial is presumed to have considered only competent evidence, and that therefore the conviction should be upheld.

This case has had a long history in the Appellate Courts. The Appellate Division had originally reversed the defendant's conviction, ruling that mere words did not fit the definition of "depicts" in legislation which targeted the dissemination of sexually explicit material to minors. Subsequently, the Court of Appeals reversed and the matter was remitted to the Appellate Division for reconsideration on other issues. In March 2007, the Legislature approved and the Governor signed a bill specifically stating that the crime in question could be committed through the use of both words and pictures. With the most recent Appellate Division ruling, this long Appellate litigation may finally be at an end.

People v. Thomas (N.Y.L.J., January 7, 2008, pp. 1 and 29)

In a unanimous decision, the Appellate Division, First Department, reversed a defendant's conviction and ordered a new trial because the trial court had not afforded the defendant a reasonable opportunity to hire a new attorney after his former counsel had been relieved by the court. The Appellate Division found that the trial judge had committed reversible error in selecting an attorney for the defendant, despite the defendant's repeated request to choose his own lawyer.

People v. Shemesh (N.Y.L.J., January 17, 2008, p. 4, and January 23, p. 26)

In a 3-2 decision the Appellate Division, First Department, upheld the dismissal of an indictment be-

cause prosecutors had denied the defendant a reasonable or meaningful opportunity to testify in the grand jury after he had received a notice to appear. The grand jury proceedings fell during the Passover holidays and the defendant, who was an observant Jew, notified the prosecutors that he could not testify on the dates requested because of the holidays and requested a new appearance date. The prosecutors refused to extend the time period in order to testify beyond the Passover season. The Appellate Division majority agreed with the trial court, which had dismissed the indictment. The majority concluded that the people failed to show a compelling state interest in insisting on the scheduled date and in failing to accommodate the defendant's religious obligations. The two dissenting justices in the Appellate Division argued that the defendant had actually received 12 days' notices of three separate dates on which he could have testified and that he was not entitled to any additional adjournments. Based upon the sharp split in the Appellate Panel in this case, it is unclear whether the matter will be appealed to the Court of Appeals or whether the prosecutor will simply choose to represent the matter to another grand jury.

People v. Hackett (N.Y.L.J, January 28, 2008, pp. 2 and 7, and January 30, 2008, p. 28)

In a unanimous decision, the Appellate Division, Third Department, reversed a defendant's conviction and ordered a new trial after holding that a gun which was found underneath a seat in the defendant's vehicle had to be suppressed. In the case at bar the defendant had already been handcuffed and confined in a state trooper's vehicle when the police who had stopped him conducted a search of his car and discovered a loaded handgun underneath the seat. The Appellate Division held that the troopers lacked probable cause for the search of the vehicle, relying on the Court of Appeals decision in *People v. Torres*, 74 N.Y.2d 224 (1989). The Appellate Court noted in reaching its determination that "once an individual exits a vehicle, if there is no 'actual and specific' threat to the safety of the officer, or any further justification to search the vehicle, such a search is unlawful."

People v. Packer (N.Y.L.J., January 30, 2008, pp. 1 and 2, and February 4, 2008, p. 18)

In a 3-2 decision, the Appellate Division, First Department, reversed a defendant's conviction and ordered the suppression of a knife which was found in the defendant's backpack. The majority found that the knife was seized after an improper stop and frisk. The People had sought to sustain the search based upon a claim that the defendant had actually consented to the search. The majority found, however, that the defendant's alleged consent was the "coercive product" of highly intrusive police conduct. Presiding Justice Lippman wrote the majority opinion. He was joined by Justices Tom and Gonzales. Justices Malone, Jr. and Marlow dissented, finding that the police conduct was justified under the circumstances in question. Given the sharp division in the Appellate Division in this case, it appears likely that the matter will eventually be decided by the New York Court of Appeals.

In Re Elvin G. (N.Y.L.J., January 31, 2008, pp. 1, 4 and 33)

In another 3-2 decision, the Appellate Division, First Department, upheld a Dean's search of a disruptive student which had occurred after a cell phone had sounded in the classroom. A teacher had called the Dean to inform him that a noise resembling a ringing cell phone was disrupting her class. The Dean then had the students in the class stand up and started checking their pockets for something that was making musical sounds. After searching Elvin G., a fifteen-year-old student, the Dean found and seized a six-inch hunting knife. The student was charged with criminal possession of a weapon and the matter was heard in the Family Court.

At the suppression hearing and on appeal the student claimed that the search had occurred in violation of state law and the Fourth Amendment right against unlawful searches and seizures. The Appellate Division majority upheld the search in question, finding that the Dean's actions in making the students empty their pockets was reasonably related to his goal to restoring order in a classroom which was disrupted by a ringing bell. The majority of the Appellate panel consisted of Justices Andrias, Marlow and Buckley. Justices Catterson and Lippman dissented, holding that a substantial intrusion had occurred and that the search did not strike a proper balance between the student's right to privacy and the Dean's right to maintain order. The issue of student searches has long been a controversial one and this case also appears likely to eventually be decided by the New York Court of Appeals.

People v. Romeo (N.Y.L.J., February 1, 2008, p. 1, and February 4, 2008, p 26)

In a unanimous decision, the Appellate Division, Second Department, ordered the dismissal of a murder indictment on constitutional speedy trial grounds. Suffolk County prosecutors had chosen in 1987 to defer to a Canadian prosecution for the same defendant. As a result there was an extensive delay in bringing the defendant to trial in Long Island. The Appellate Court found that the Suffolk indictment had to be dismissed on speedy trial grounds because the Suffolk prosecutors had improperly allowed the defendant to be extradited to Canada in 1987 to face charges there and he was not returned to Suffolk County to face the Long Island murder charge until 2005.

For Your Information

New Study Reveals Serious Hazards of Stress

In a recent study that was reported on by the American Psychological Association, it was revealed that a third of Americans are extremely stressed and about half believe that the stresses of life have gotten worse in the last five years. The study further revealed that 77% of Americans suffer physically from stress: 48% lie awake at night and have difficulty sleeping; 44% reported headaches; and 34% get upset stomachs.

Two of the main factors people listed as contributing to stress were dissatisfaction with the work they perform and heavy workloads; 53% cited this reason as a key factor for their stress. Fifty-two percent also reported that they worry about money and were stressed out about what they consider to be low salaries. The physical environment where people reside also appears to play a role in the level of stress. The East and West Coasts appear to be more stressful than other parts of the country. Big cities, as opposed to smaller communities, also appear to contribute to more stress. Of interest to New Yorkers and as might be expected, the City of New York is listed as one of the most stressful places in the country.

Stress has become of increasing concern to psychologists and health officials during the last several years. In our increasingly complex and active society, it is important to find time to relax and to come up with solutions to handle stressful situations. This is especially true for members of the legal profession, who deal with stressful situations and busy schedules on a regular basis.

In fact, with respect to the issue of the impact of stress directly on the legal profession, it has recently been reported that there has been a significant decrease in the number of people applying to law schools. In 2006, the number of law school applicants in the United States dropped 6.7% from the year 2004. In addition, many of the large law firms have reported substantial turnovers in the number of their associates in any given year, with some firms reporting that approximately 20% of their associates leave every year. One of the most often cited reasons for the discontent of new attorneys and the decline in the number of persons who wish to enter the legal profession is the stressful nature of the system, particularly long hours and tedious and routine workloads. In one recent study, a young attorney was quoted as saying, "When we watched 'LA Law' or 'Ally McBeal,' we viewed the legal profession as being glamorous and exciting. However, when I joined a large law firm, one of my first assignments was to sit in a conference room for a two-week period, every day for 12 hours going through 50 boxes of documents and fastening Post Notes to relevant papers."

Hopefully, the members of the legal profession will be able to deal with the issues raised and make our profession rewarding and fulfilling for those who enter it.

New York City Experiences Continued Drop in Homicide Rates but Increase in Assaults

Although there have been some indications in the last two years that certain categories of violent crime are increasing throughout the nation and state, it appears that in New York City, at least with respect to homicides, the year of 2007 concluded with the lowest homicide rate since police department statistics became available in 1963. The homicide rate for 2007 was just under 500, a decline of approximately 15% from 2006 and the lowest in 40 years. In 1990, New York City experienced its greatest number of killings in a single year, 2,245, and this year's figure of just under 500 dramatically illustrates the great improvement in the City during the last 18 years. The year end report by the New York City Police Department also indicated that almost all the homicides now occurring are the result of disputes between friends, relatives or romantic partners and very few involve murders committed by strangers. In fact, in 2007, fewer than 50 homicides were the result of a victim suffering death at the hands of a stranger. The police have attributed the great decrease in homicides to the sharp reduction in the City's drug epidemic and the reduction in gang wars and killings from semi-automatic weapons when rival gangs fought over turf. It is hoped that the homicide rate continues to fall and that there will be no return to the violence of the 1980s and 1990s.

While the drop in homicides was good news, the bad news is that the police department also reported that assaults city-wide have risen. Over 15,000 assaults have been committed in the City during the year 2007, representing a slight percentage increase over 2006. The increase in assaults, although a small one, has raised concern among police officials who recall that during the years of New York's crime surge, assaults were usually related to mugging crimes committed by many who were on drugs and who were seeking money for their drug habits.

On a national scale, recent statistics from the FBI regarding the first six months of the year 2007 reveal that overall all violent crime dropped by 1.8%. Murder was down by 1.1%, forcible rape was down by 6.7% and robbery was down by 1.2%. The FBI national report also revealed that while big cities continue to experience slight declines in the violent crime rate, cities with populations between 50,000 and 100,000 have recently experienced increases averaging about 3%. We will continue to monitor crime statistics in the city, state and nation in our future issues.

New York City Population Continues to Grow

The Census Bureau has officially set New York City's population at 8,250,567 as of the end of July, 2006. This represents a 3% increase from six years ago. The biggest increase in population has occurred in Staten Island, which now has almost 500,000 people, an 8% increase since 2002. Manhattan has grown by nearly 5% and now has 1,612,630 people. The most populous borough in the City continues to be Brooklyn, with a population of 2,523,047.

New York's New Sex Offender Civil Commitment Law Found to Violate Due Process Requirements by Federal Judge

In late November, Judge Gerard Lynch, from the Federal Southern District, found portions of New York's Civil Confinement Law to be unconstitutional. He thus issued injunctions against two sections of the new mental hygiene law which became effective on April 13, 2007. The judge's decision was issued in the case of *Mental Hygiene Legal Service v. Spitzer*. Judge Lynch found fault with the provisions of the new law, which require automatic detention pending a determination of civil commitment. The State Attorney General's office has indicated they are reviewing the judge's decision, and it is likely that a further appeal will be taken. The issue of civil commitment has been a controversial one during the last several years and we will keep our readers advised regarding further developments on litigation affecting New York's new statute.

Additional Appellate Division Judgeships Created

It was recently announced in early November that two additional judgeships have been created in the Appellate Division, Third Department, and one additional seat has been created in the First Department. Justice Cardona, the Presiding Justice in the Third Department, expressed his gratitude to Governor Spitzer for certifying the two additional seats in the Third Department. The Third Department has experienced a continued increase in their volume. The Third Department's roster of judges will go from 10 judges to 12 judges.

The one addition in the First Department will bring that Court's total to 18 judges. The Appellate Division, Second Department, will continue to operate with 22 judges and the Fourth Department has 11 assigned to that Court. One possible development which could occur in the next few months is that some of the upstate judges currently sitting in the First and Second Departments would choose to accept the new Third Department seats and therefore allow more downstate judges to fill positions in the First and Second Departments. In fact, in late November, it was announced that Justices Bernard J. Malone, Jr. and E. Michael Kavanagh, who had been sitting in the Appellate Division, First Department, were being transferred to the Third Department. These two Justices began their new assignments on November 26, 2007.

It is expected that more re-assignments will occur, and as additional seats open up in the First and Second Departments, the vacancies will be filled by justices of the Supreme Court presently sitting within the City's five boroughs. In fact, on January 2, 2008, Governor Spitzer began the process of filling the additional vacancies in the Appellate Division, First Department. He announced that Justices Karla Moskowitz and Rolando T. Acosta, who have been sitting in the Manhattan Supreme Court, would be designated to now sit on the Appellate Division, First Department. On January 7, 2008, Governor Spitzer also announced that he has designated Justice Anthony J. Carpinello to serve as a constitutionally designated Associate Justice of the Third Department. Justice Carpinello had been serving as an additional justice in the Third Department since 1996. Additional justices to the Third Department are expected to be named shortly, since that Court recently had an increase in its allotted membership.

With respect to the Appellate Division, Second Department, four vacancies are presently available and it was announced in January that Governor Spitzer is reviewing candidates for those positions. Several judicial districts are seeking additional representation on the Appellate Division and it appears that the Governor will consider geography as one of the factors in making his determination. The counties of Queens and Nassau are particularly making an argument that they are underrepresented with respect to appointments in the Appellate Division, Second Department, based upon the fact that their large populations make up a significant portion of the geographical area served by the Second Department. On January 16, 2008, Governor Spitzer did, in fact, announce that he was making four additional selections to fill vacancies in the Appellate Division, Second Department. Three of the Governor's choices are from Brooklyn, to wit, Justice Ariel E. Belen, Justice Cheryl E. Chambers and Justice John M. Leventhal. Justice Randall T. Eng, who has been serving as Administrative Judge in

charge of criminal cases in Queens Supreme Court, was named to fill the fourth seat. We will report on any future appointments to the Second Department as they are announced.

Garcias Catching Up to Jones

An interesting development was recently reported by the U.S. Census Bureau: Although Smith continues to remain the most common surname in the U.S., the continuing increase in the Hispanic population in the United States has now boosted the names Garcia and Rodriguez into the top ten most common surnames in the United States. The report stated that the number of Hispanics living in the United States grew by 58% during the 1990s and now constitutes nearly 13% of the total population in the U.S. As a result, the surname Garcia is now number 8 and Rodriguez is now number 9.

New York State and Manhattan Rank First in Wage Increases

In a recent report issued by the U.S. Department of Labor, New York State was ranked first nationally in terms of wage increases. The state as a whole experienced an 11.8% increase over 2006, with its residents earning an average weekly salary of $1,397. Within the state, people living in Manhattan were found to be the richest by far, earning an average salary of $147,000 per year, an increase of 16% over 2006. Manhattanites are currently said to be earning an average weekly salary of $2,821. None of the other boroughs within the City are anywhere close to Manhattan. The average salary for U.S. workers as a whole was found to be $855 per week or about $45,000 per year. Within the City, residents of Queens County were found to be closest to the national average, with residents there averaging $43,000 per year.

Litigation Over Denial of Parole Continues

During former Governor Pataki's administration, the number of inmates granted parole drastically declined. As a result, a lawsuit was initiated claiming that the Governor had pressured the Parole Board to automatically deny early release on parole to certain inmates, especially those having committed violent felony offenses. In early November, it appeared that an agreement to resolve the litigation was near as a result of negotiations with Governor Spitzer's administration and various personnel changes made on the Parole Board. The tentative proposed agreement would have granted new hearings to numerous inmates who had previously been denied parole. Under the terms of the proposed settlement, the parole commissioners would have been required to take into consideration the strong rehabilitative component in addition to the prisoner's past history. Another portion of the proposal would have allowed inmates to choose the parole commissioners who would conduct new hearings.

On November 15, 2007, however, Governor Spitzer announced that after reviewing the proposed settlement agreement, his administration had decided not to resolve the class action suit and to continue the litigation in the court system. The litigation is currently in the Federal District Court for the Southern District of New York.

Although the litigation is continuing, it appears that in recent months there has been a significant rise in the number of violent felons who are indeed being released on parole. Recent statistics from the New York State Division of Parole indicate that in 2007, 24.8% of violent A-1 offenders who have applied for release have been granted release by the Parole Board. The 2007 rate is substantially higher than for the last four years. In 2006, 14.7% of A-1 violent felony offenders were granted parole. In 2005, the rate was 5.6%; in 2004, the figure was 2.9%; and in 2003, only 1.2% were granted parole. Overall in 2006 only 12% of violent felons were granted parole while in 2007, the figure jumped to 18%.

The recent sharp increase in the release rate has prompted the New York State Senate to hold public hearings to determine whether the Parole Board has improperly and greatly "softened its attitude" toward violent felony offenders, perhaps based upon the initiation of the civil litigation and the changing personnel of the Parole Board, reflecting new appointments made by Governor Spitzer. We will keep our readers advised of developments on the entire issue of parole of violent felons as developments occur.

New Judge Appointed to U.S. Court of Appeals, Second Circuit

On November 14, 2007, Debra Ann Livingston formally assumed her seat on the U.S. Court of Appeals for the Second Circuit. Judge Livingston is a former law professor at Columbia Law School and had also previously worked at the law firm of Paul, Weiss, Rifkind, Wharton and Garrison. She also served for several years as the Deputy Chief of Appeals at the U.S. Attorney's Office for the Southern District. Judge Harrison is 48 years of age, married and has a 7-year-old son. Her appointment brings the Court's complement to its full number of 13 active judges.

Civil Liberties Lawsuit Commenced to Reform Indigent Defense System

In early November, 2007, the New York Civil Liberties Union commenced a class action lawsuit in Albany County Supreme Court seeking the immediate creation of a statewide public defender's office and the assumption

by the state of all expenses required to provide legal services for indigents accused of crimes in New York State. During the last several years, several committees have studied the problem of poor quality services to indigent defendants in many areas of the state and recommendations have been proposed for reform. The New York State Bar Association itself has been extremely active in calling for required reforms. The lawsuit alleges that the present system deprives or threatens to deprive defendants of their rights under the Sixth and Fourteenth Amendments of the U.S. Constitution and Article I, Section 6 of the State Constitution. The action is being brought on behalf of 20 plaintiffs and alleges inadequacies in various parts of the state. We will continue to follow the progress of the lawsuit as it develops.

Sentencing Commission Continues to Formulate Proposals

Although the Sentencing Commission recently established by Governor Spitzer issued its preliminary proposals in October, it has continued to hold public hearings throughout the state as it seeks to finalize its recommendations. The Commission has recently examined the question of further modification of sentences required for defendants convicted of drug crimes. Although significant reforms have taken place in the last several years to modify the Rockefeller Drug Laws, many speakers who have appeared at the Commission's hearings have urged additional reductions in the length of imprisonment terms and have stressed the need for greater rehabilitation programs. Many law enforcement officials, however, have warned against any further reduction in the sentences provided for drug crimes and have expressed the fear that any further reductions could place the state back in the days when drug crimes and related violence were rampant. One of the speakers who recently appeared before the Commission was Bridget G. Brennan, the New York City Special Narcotics Prosecutor. Ms. Brennan called the link between drugs and violence "indisputable" and urged harsher penalties for large-scale drug dealers and people who possess guns while committing controlled-substance crimes. The Sentencing Commission appears to be working diligently and expeditiously and its final report is due in the next several months. We will keep our readers advised of its various recommendations. We were pleased that representatives from the Sentencing Commission participated in our Annual Meeting CLE program on the overall topic of sentencing, and we thank them for their participation and cooperation with our Criminal Justice Section.

NYU Law Study Reveals Numerous Teenage Defendants Sentenced to Life in Prison

A recent study conducted by the Equal Justice Initiative at the New York University School of Law revealed that at the present time, 73 teenage defendants have been tried as adults and sentenced to life imprisonment without any chance of parole, despite the fact that they were only 13 or 14 at the time of the commission of the crime. The study revealed that mandatory sentencing schemes forced judges in most of these cases to impose the harshest available sentence without consideration for the child's age, background or circumstances of the offense. Professor Brian Stevenson, who supervised the study, reported that sentences imposed upon teenage defendants in the United States are much harsher than other industrialized nations and the study is being used to support efforts to provide for greater judicial discretion in the sentencing of young offenders. Professor Stevenson, in announcing the issuance of the report, stated that:

> Condemning 13 and 14 year olds to die in prison ignores new research on early adolescence which reveals that kids this age tend to be impulsive and less able to gauge consequences and resist peer pressure. . . . It also ignores a child's capacity for change.

United States Prison Population Increases

In a report issued by the United States Department of Justice in November, 2007, it was revealed that an estimated 2.38 million people were incarcerated in state and federal facilities, representing an increase of 2.8% over 2005. In addition, a record 5 million people were on parole or probation, an increase of 1.8% over 2005. A huge increase was also noted in the number of persons held in immigration detention facilities. In 2006, 14,482 people were held in Immigration and Customs Enforcement detention facilities, an increase of 43% from the 10,104 people so incarcerated in 2004.

The Justice Department report also continued to reflect serious racial disparities in the nation's correctional institutions. A record number of 905,600 black inmates were incarcerated in state and local facilities. Several states reported that the incarceration rate for black inmates was more than ten times the rate of whites. Overall, however, on a national level, the percentage of black men sentenced to state and federal prisons in 2006 fell to 38% from 43% in 2000. The incarceration rate for black women also declined, while the incarceration rate for white women increased slightly.

New Judicial District Established

In early December, Governor Spitzer signed recently passed legislation creating a new judicial district for the Borough of Staten Island. Richmond County will now become the Thirteenth Judicial District. Six new permanent Supreme Court judgeships have been established for the new judicial district. The six new judgeships still require final approval by the Legislature at its 2008 legislative session, and therefore Staten Island will remain

in the Second Judicial District with Brooklyn until Jan. 1, 2009, when it will obtain its total independence. Staten Island will be the smallest judicial district in the State, with 480,000 as its current population. The rapid growth of Richmond County is expected to continue however and the creation of the new judicial district was clearly warranted.

New Jersey Abolishes Death Penalty

In early December, New Jersey became the first state to abolish the death penalty in more than 40 years. The State Senate approved the measure to replace the death sentence with life without parole, and Governor Corzine signed the necessary legislation creating the change. Although New Jersey had reinstated the death penalty in 1982, no executions have been carried out in that state since 1963. The move by New Jersey indicates a possible new trend against the death penalty.

Judicial Pay Increases

At a special one-day session held by the State Senate in early December, the Senate voted to approve an average 20% pay increase for judges, which would be retroactive to January 1, 2007. The Assembly has not yet acted on the Bill and Assembly Speaker Sheldon Silver has, as yet, given no indication when the Assembly might consider the measure. Salaries for New York judges have consistently fallen behind the pay granted to members of the federal judiciary. This disparity may increase further if no action is taken on state salary increases since the House Judiciary Committee has recently approved a further pay raise for federal judges. Under the proposed legislation, Federal District judges would see a salary increase to $218,000, Federal Appeals judges would receive $231,000, and Supreme Court Associate Justices' salaries would be increased to $267,900. The salary of the Chief Justice would go up to $279,900. The Senate Judiciary Committee will also consider the measure and any final result on the proposed federal pay increases or increases in the New York salaries will be reported in our next issue.

2007 Census Report on National Population Trends

A recent report by the United States Census Bureau that covered population trends in the United States from July 1, 2006 to July 1, 2007 revealed some interesting population trends occurring in our nation. Significant population growth is still being experienced by California, Texas, Georgia and Florida. The rapid growth rate in Florida has greatly diminished, with an increase in population of only 194,000 from July 1, 2006 to July 1, 2007. This is substantially less than the 400,000-person increase that the state had during the last few years. Florida, with 18 million people, is currently the fourth largest state in population in the United States, still behind New York State, which is ranked third and which has 19.3 million people. The report also clearly indicated that the South and West are still the fastest growing regions in the country with the Midwest and Northeast lagging far behind. The South now has 110 million people and the West has 70 million people. The Northeast currently has 54.7 million and the Midwest has 66.4 million. Overall, as of July 1, 2007, the United States had a total population of 301.6 million residents.

Shifts in U.S. Population to Impact Political Power

As we approach the 2010 Census, it has become obvious the population trends that have occurred in the United States within the last ten years will significantly impact the political situation in the United States. This is because the fast growing Southern and Western states will almost invariably gain new congressional seats, while states in the Midwest and Northeast will lose some of their political clout. Recent projections indicate that New York State and Ohio could each lose two congressional seats as well as electoral votes. Massachusetts, New Jersey, Pennsylvania, Michigan, Illinois and Minnesota are also likely to lose one congressional seat. The big gains appear to be in Texas, which is set to have its congressional delegation as well as its electoral votes increase by four. Florida and Arizona are expected to gain an additional two seats each. Most significantly, even California which has experienced tremendous growth in the past, may actually lose one congressional seat when the new census is complete.

New Interim U.S. Attorney for the Eastern District

Following Roslynn Mauskopf's elevation to the federal bench, Benton C. Campbell was appointed in late October to serve as the interim U.S. Attorney for the Eastern District of New York. Mr. Campbell has served as a Prosecutor in the Eastern District for the last 13 years and also served in the Washington office of the Justice Department for 4 ½ years. He has worked on several high-profile task-force matters, including the Violent Criminal Enterprise Section and the Enron task force. He is a graduate of Chicago Law School and is married with one child. We congratulate Mr. Campbell on his appointment and will report to our readers when an announcement of a permanent appointment to the Eastern District has been made.

Governor Spitzer Proposed Budget Includes Some Judicial and Criminal Justice Items

In the annual state budget, submitted to the Legislature by Governor Spitzer in late January, the Governor included budgetary items to cover possible raises for members of the judiciary as well as monies for

certain other items which relate to either the judicial system or the criminal justice system. With respect to judicial salaries, the Governor included sufficient funds to cover a possible one time salary increase of approximately 21% which would be retroactive to 2006. Since the Legislature has continued to fail to act on the issue of judicial increases, any final decision on increases in judicial salaries still remains to be seen.

In addition to the budgetary allotment for judicial salaries, Governor Spitzer also included in his proposed executive budget monies to cover the following items:

- $17 million to improve training, technology and security for town and village courts.
- $3 million to create a statewide office to oversee and coordinate criminal defense services for the poor. A task force appointed by Chief Judge Kaye recommended the formulation of such an office (N.Y.L.J., June 29, 2006).
- $3 million to counties to help pay for salary increases for district attorneys should the judges get their increase. District attorneys' salaries are tied to the pay levels of Supreme Court or County Court judges.
- $2.1 million to add 29 parole officers who will focus exclusively on securing employment, addiction treatment, housing and other services for parolees.
- $500,000 to create a statewide witness protection program.

The Governor's budget also takes into account the demise of the death penalty and the closing of the Capital Defender Office, expected to close its doors in July. The $1.3 million allocated for the Capital Defender Program in the past has thus been reduced to $368,000.

Are you feeling overwhelmed?

The New York State Bar Association's Lawyer Assistance Program can help.

We understand the competition, constant stress, and high expectations you face as a lawyer, judge or law student. Sometimes the most difficult trials happen outside the court. Unmanaged stress can lead to problems such as substance abuse and depression.

NYSBA's LAP offers free, confidential help. All LAP services are confidential and protected under section 499 of the Judiciary Law.

Call 1.800.255.0569

NYSBA NEW YORK STATE BAR ASSOCIATION LAWYER ASSISTANCE PROGRAM

About Our Section and Members

Membership Composition

Recent statistics released by the Membership Department of our Bar Association reveal some interesting information about the profile of our Criminal Justice Section. The section as of January 23, 2008 has 1,577 members. This is an increase of 15 members over the same period in 2007. In terms of gender statistics, the section is 78% male and 22% female. The largest group of attorneys in the section are in private practice, constituting roughly 48% of the total. Within the group of private practitioners, solo practice represents the largest group of members. In terms of age groups, slightly over 20% of the section is below 35 years of age. The largest age group in the section is members 56 to 65, who comprise almost one-quarter of the section's membership. Members of the judiciary comprise about 3.6% of the section, a slight decrease from last year.

The Criminal Justice Section is 1 of 23 sections which comprise the New York State Bar Association. As of January 23, 2008, the New York State Bar Association had a total membership of 74,437, an increase of approximately 2,000 members over the same period last year. We are pleased that membership in both the Bar Association and our section has increased during the last year, and we look forward to an even greater increase during the current year. We welcome new members. A list of our new section members appears on page 35.

Our Annual Meeting

Our Annual Meeting, luncheon, awards program and CLE seminar were held on January 31, 2008 at the New York Marriott Marquis Hotel. We were pleased to have as our guest speaker at the luncheon Chief Judge of the New York State Court of Appeals, Judith Kaye. Following the luncheon, awards were also presented to outstanding practitioners and members of law enforcement for exemplary service. The awards are as follows:

The Michele S. Maxian Award for Outstanding Public Defense Practitioner

- **Lisa Schreibersdorf**
  Brooklyn Defender Services, Brooklyn

Charles F. Crimi Memorial Award for Outstanding Private Defense Practitioner

- **Stephen Scaring**
  Garden City

The Vincent E. Doyle Jr. Award for Outstanding Jurist

- **Hon. Judith S. Kaye**
  Chief Judge of the State of New York,
  New York City

Outstanding Contribution to Police Work

- **Robert Addolorato**
  Ret., New York City Police Department,
  Kings Park
- **John Schwartz**
  Ret., New York City Police Department,
  Berea, Kentucky
- **Steven M. Cohen, Esq.**
  Counselor and Chief of Staff,
  N.Y. State Office of the Attorney General,
  New York City
- **Det. Dennis Delano and the Bike Path Rapist Investigation Team**
  Buffalo Police Department,
  Homicide Cold Case Unit, Buffalo

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

- **James B. Comey, Esq.**
  Sr. Vice President and General Counsel, Lockheed Martin Corp., Bethesda, Maryland

Outstanding Prosecutor

- **Patrick J. McCormack, Jr., Esq.**
  Nassau County District Attorney, Mineola

This year's luncheon was well attended and was a most enjoyable event. We were pleased that many government officials, including several district attorneys, attended the luncheon. In the late afternoon, following the luncheon, our section also presented an interesting and informative CLE program on sentencing. This program was highly practical and most appropriate at this time since the Sentencing Commission is considering changes and modifications in New York's sentencing scheme. We were pleased that both Denise O'Donnell and John Amodeo from the Sentencing Commission were among our speakers. Other speakers who dealt with a variety of topics on sentencing were Paul Shechtman, John Castellano, Spiros Tsimbinos, Madeline Singas, Peter Dunne, Judge John Gleeson from the Federal District Court and Justice Steven Fisher from the Appellate Division, Second Department. We thank our speakers for their valuable contributions to the CLE program. Attendees at the program were also provided detailed and lengthy material on the sentencing structure in New York, as well as a copy of the Sentencing Commission Report.

Photos of our various events during our annual meeting appear on pages 20-21 of this issue.

Further, at our Annual Meeting, officers and district representatives of the Criminal Justice Section were elected as follows:

Chair:	Jean T. Walsh
Vice-Chair:	Jim Subjack
Secretary:	Marvin Schechter
Treasurer:	Malvina Nathanson

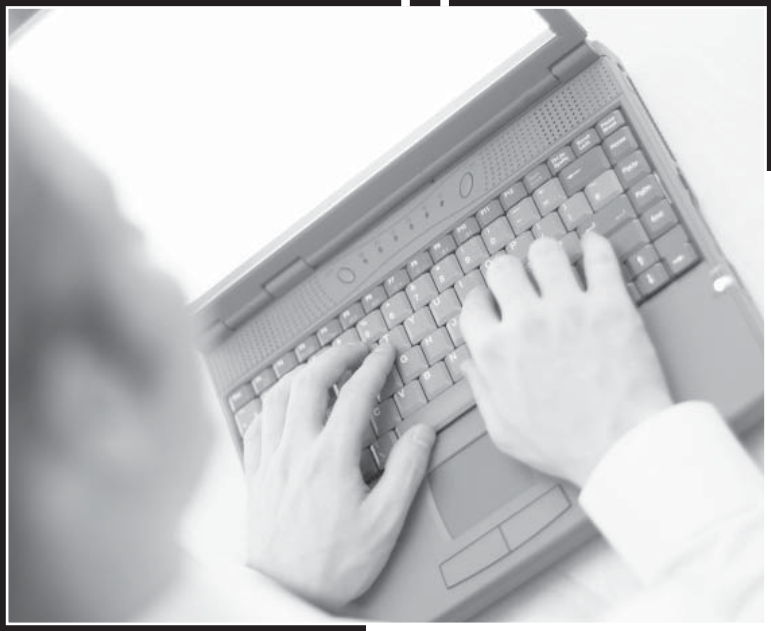
District Representatives

1st	Mark R. Dwyer
2nd	David M. Schwartz
3rd	Dennis Schlenker
4th	Donald R. Kinsella
5th	Erin P. Gall
6th	Betsy C. Sterling
7th	Honorable John C. Tunney
8th	Paul T. Cambria
9th	Gerard M. Damiani
10th	Joseph R. Conway
11th	Spiros A. Tsimbinos
12th	Honorable Michael R. Sonberg

Spring CLE Programs

Our Section is planning to hold a CLE Program in several upstate cities during the month of May. The program will deal with criminal law motion practice. Erin P. Gall, our Membership Chairperson, is coordinating the program. We hope that these programs will provide not only practical and important information to everyday practitioners but will also result in increased membership for our section. Additional information will be forwarded by separate mailing once all of the details are finalized.

A Pro Bono Opportunities Guide For Lawyers in New York State *Now Online!*



Looking to volunteer? This easy-to-use guide will help you find the right opportunity. You can search by county, by subject area, and by population served. A collaborative project of the Association of the Bar of the City of New York Fund, New York State Bar Association, Pro Bono Net, and Volunteers of Legal Service.

powered by probono.net

NYSBA
NEW YORK STATE BAR ASSOCIATION

You can find the Opportunities Guide on the Pro Bono Net Web site at **www.probono.net/NY/volunteer**, through the New York State Bar Association Web site at **www.nysba.org/volunteer**, through the Association of the Bar of the City of New York Web site at **www.abcny.org/volunteer**, and through the Volunteers of Legal Service Web site at **www.volsprobono.org/volunteer**.

VOLS
Volunteers of Legal Service

The Criminal Justice Section Welcomes New Members

We are pleased that during the last several months, many new members have joined the Criminal Justice Section. We welcome these new members and list their names below.

S. Blake Adams
Hanna Antonsson
Wallace V. Auser
Joseph Abraham Bahgat
Lauren Bell
John P. Bermingham
Brad K. Bettridge
Erin C. Birmingham
John Patrick Brennan
John T. Brophy
Victor Manuel Brown
John W. Burns
Sarah L. Caragiulo
Derek P. Champagne
Xiumin Chen
Joseph Cianflone
Julie A. Clark
Paul V. Crapsi
Margaret M. Crowley
Kelly A. Damm
Salvatore P. DaVi
Christian Dominique Defrancqueville
Jacqueline DeLorbe
Steven M. Donsky
Keliann Marie Elniski
Gordon Eng
Gregory Esposito
Mark J. Fitzmaurice
Claryse Flores
Marie Anne Freret
Robert Geoffrey Gandler
Erika Garcia
Mina E. Ghaly
Dawn L. Goldberg
Kenneth V. Gomez
Alyssa Blair Greenwald
Karly Grosz
James Benjamin Gwynne
Lisa E. Hartley
Meghan Morrison Hast
Joseph H. Johnson
Julian C. Johnson
Alexander A. Kalkines
Anna Grazyna Kaminska
Gregory W. Kehoe
Melissa M. Kerr
Francisco Armando Knipping
Channing Kury
Benjamin Stephen Litman
Harmony Iris Loube
Kevin S. Mahoney
Nicholas Mauro
William J. McCallig
Michael D. McCartney
William J. McDonald
Charles Christopher McGann
Liam McGarry
Rita Maria Mella
Michael William Miles
Neil Z. Miller
Barbara Lynne Morgan
Holly L. Mosher
Joseph William Murray
Danielle Marguerite Muscatello
Jonathan Gregory Neal
Barbara F. Newman
Julia Donna Paylor
Christine E. Polychroniades
James J. Radez
M. Suzette Rivera
David C. Rizzo
Yolanda L. Rudich
Barry D. Sack
Joseph V. Sedita
Marc Adam Sherman
Adam J. Spence
Margaret Ellen Strickler
Joseph P. Villanueva
Laura A. Vogel
Robert Marc Wallack
Baruch Weiss
John Brendan Whelan
Omer Wiczyk
David C. Wilkes
Daniel M. Williamson
Andrea L. Zellan
Mirza Imada Zulfhieqar

Catch Us on the Web at
WWW.NYSBA.ORG/CRIMINAL

Section Committees and Chairs

Appellate Practice
Mark M. Baker
Brafman & Associates, P.C.
767 Third Avenue, 26th Floor
New York, NY 10017
mmbcrimlaw@aol.com

Mark R. Dwyer
New York County District Attorney's Office
One Hogan Place
New York, NY 10013-4311
dwyerm@dany.nyc.gov

Awards
Norman P. Effman
Attica Legal Aid Society
14 Main Street
Attica, NY 14011
attlegal@iinc.com

Capital Crimes
Barry I. Slotnick
Buchanan Ingersoll & Rooney PC
1 Chase Manhattan Plaza, 35th Floor
New York, NY 10005
barry.slotnick@bipc.com

Comparative Law
Renee Feldman Singer
211-53 18th Avenue
Bayside, NY 11360
rfsinger@aol.com

Continuing Legal Education
Paul J. Cambria Jr.
Lipsitz Green Scime Cambria LLP
42 Delaware Avenue, Suite 300
Buffalo, NY 14202
pcambria@lglaw.com

Correctional System
Mark H. Dadd
County Judge-Wyoming County
147 N. Main Street
Warsaw, NY 14569

Norman P. Effman
Attica Legal Aid Society
14 Main Street
Attica, NY 14011
attlegal@iinc.com

Defense
Jack S. Hoffinger
Hoffinger Stern & Ross, LLP
150 East 58th Street, 19th Floor
New York, NY 10155
sburris@hsrlaw.com

Drug Law and Policy
Malvina Nathanson
30 Vesey Street, 4th Floor
New York, NY 10007-2914
malvinanathanson@nysbar.com

Barry A. Weinstein
Goldstein & Weinstein
888 Grand Concourse
Bronx, NY 10451
bweinstein22@optonline.net

Ethics and Professional Responsibility
Lawrence S. Goldman
Law Offices of Lawrence S. Goldman
500 5th Avenue, 29th Floor
New York, NY 10110
lsg@lsgoldmanlaw.com

Leon B. Polsky
667 Madison Avenue
New York, NY 10021
anopac1@aol.com

James H. Mellion
McCormack Damiani Lowe Mellion
499 Route 304
P.O. Box 1135
New City, NY 10956
jmellion@mdlmlaw.com

Evidence
John M. Castellano
Queens Cty. DA's Office
125-01 Queens Blvd.
Kew Gardens, NY 11415
jmcastellano@queensda.org

Edward M. Davidowitz
Supreme Court, Bronx County
851 Grand Concourse
Bronx, NY 10451
edavidow@courts.state.ny.us

Federal Criminal Practice
H. Elliot Wales
52 Riverside Drive
New York, NY 10024
elliotwales@aol.com

Judiciary
Cheryl E. Chambers
New York State Supreme Court of Kings County
Second Judicial District
320 Jay Street 25.49
Brooklyn, NY 11201
cchamber@courts.state.ny.us

Juvenile and Family Justice
Eric Warner
MTA
347 Madison Avenue
9th Floor, Legal Dept.
New York, NY 10017
warners5@aol.com

Legal Representation of Indigents in the Criminal Process
Malvina Nathanson
30 Vesey Street, 4th Floor
New York, NY 10007-2914
malvinanathanson@nysbar.com

David Werber
85 First Place
Brooklyn, NY 11231

Legislation
Hillel Joseph Hoffman
350 Jay St., 19th Floor
Brooklyn, NY 11201-2908
hillelhoffman@verizon.net

Membership
Erin P. Gall
1 Elizabeth Street
Utica, NY 13501-2209
egall@courts.state.ny.us

Marvin E. Schechter
Marvin E. Schechter Attorney At Law
152 West 57th Street, 24th Floor
New York, NY 10019
marvin@schelaw.com

Newsletter
Spiros A. Tsimbinos
1588 Brandywine Way
Dunedin, FL 34698-6102

Nominating
Roger B. Adler
225 Broadway, Suite 1804
New York, NY 10007
rbalaw1@verizon.net

Michael T. Kelly
Law Office of Michael T. Kelly, Esq.
207 Admirals Walk
Buffalo, NY 14202
mkelly1005@aol.com

Prosecution
John M. Ryan
Queens District Attorney
125-01 Queens Blvd.
Kew Gardens, NY 11415
jmryan@queensda.org

Sentencing and Sentencing Alternatives
Susan M. Betzjitomir
507 Fish Hill Road
Beaver Dams, NY 14812
lawyer@betzjitomir.com

Ira D. London
Law Offices of Ira D. London
245 Fifth Avenue, Suite 1900
New York, NY 10016
iradlondon@aol.com

Traffic Safety
Peter Gerstenzang
Gerstenzang O'Hern Hickey & Gerstenzang
210 Great Oaks Boulevard
Albany, NY 12203
pgerstenz@aol.com

Rachel M. Kranitz
LoTempio & Brown, P.C.
181 Franklin Street
Buffalo, NY 14202
rkranitz@lotempioandbrown.com

Transition from Prison to Community
Anthony J. Colleluori
The Law Offices of Anthony J. Colleluori & Associates PLLC
180 Froehlich Farm Blvd.
Woodbury, NY 11797
catlaw1@yahoo.com

Arnold N. Kriss
Law Offices of Arnold N. Kriss
123 Williams Street, 22nd Floor
New York, NY 10038
lawkriss@aol.com

Victims' Rights
James P. Subjack
2 West Main Street
Fredonia, NY 14063
jsubjack@netsync.net

NEW YORK STATE BAR ASSOCIATION CRIMINAL JUSTICE SECTION

I wish to become a member of the committee(s) checked below:

Name:_____

Daytime phone: _____Fax: _____

E-mail: _____

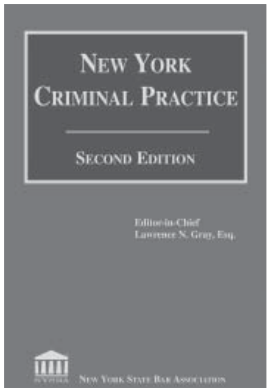
Select up to three and rank them by placing the appropriate number by each.

____ Appellate Practice
____ Awards
____ Capital Crimes
____ Comparative Law
____ Continuing Legal Education
____ Correctional System
____ Defense
____ Drug Law and Policy
____ Ethics and Professional Responsibility
____ Evidence
____ Federal Criminal Practice
____ Judiciary
____ Juvenile and Family Justice
____ Legal Representation of Indigents in the Criminal Process
____ Legislation
____ Membership
____ Nominating
____ Prosecution
____ Sentencing and Sentencing Alternatives
____ Traffic Safety
____ Transition from Prison to Community
____ Victims' Rights

Please return this application to:
Membership Department, New York State Bar Association,
One Elk Street, Albany, New York 12207
Telephone: (518) 487-5577 • Fax: (518) 487-5579 • www.nysba.org

From the NYSBA Bookstore

New York Criminal Practice — Second Edition



Editor-in-Chief
Lawrence N. Gray, Esq.
Former Special Assistant Attorney General
NYS Office of the Attorney General

New York Criminal Practice, Second Edition, expands, updates and replaces the extremely popular *New York Criminal Practice Handbook*.

New York Criminal Practice covers all aspects of the criminal case, from the initial identification and questioning by law enforcement officials through the trial and appeals. Numerous practice tips are provided, as well as sample lines of questioning and advice on plea bargaining and jury selection. The detailed table of contents, table of authorities and index make this book even more valuable.

". . . an 'easy read,' with a lot of practical insights and advice—written by people who obviously are involved in their subject matter . . . The book seems to be an excellent alternative . . .

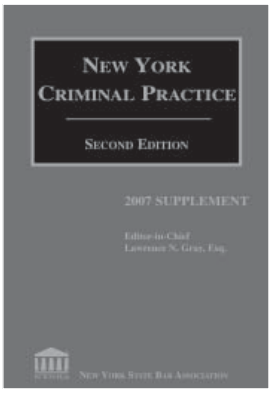
Honorable Michael F. Mullen
Justice of the Supreme Court,
Riverhead, NY

Book Prices*

1998 • 892 pp., hardbound • PN: 4146

(Prices includes 2006 supplement)

NYSBA Members	**$120**
Non-Members	$140



About the 2007 Supplement

Prepared by experienced prosecutors, defense attorneys and judges, the 2007 Supplement brings this comprehensive text up-to-date, including substantial changes to the chapters on sentencing and appeals.

Supplement Prices*

2007 • 342 pp., softbound • PN: 51467

NYSBA Members	**$60**
Non-Members	$70

*Prices include shipping and handling but not applicable sales tax.

Get the Information Edge

NEW YORK STATE BAR ASSOCIATION

1.800.582.2452 www.nysba.org/pubs Mention Code: PUB0240

NYSBA

Publication and Editorial Policy

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:

Spiros A. Tsimbinos
1588 Brandywine Way
Dunedin, FL 34698
(718) 849-3599

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

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

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

NEW YORK CRIMINAL LAW NEWSLETTER

Editor
Spiros A. Tsimbinos
1588 Brandywine Way
Dunedin, FL 34698
(718) 849-3599

Section Officers

Chair
Jean T. Walsh
New York Stock Exchange, Inc.
Market Surveillance Division
20 Broad Street
New York, NY 10005
JWalsh@nyx.com

Vice-Chair
James P. Subjack
2 West Main Street
Fredonia, NY 14063
jsubjack@netsync.net

Secretary
Marvin E. Schechter
152 West 57th Street, 24th Floor
New York, NY 10019
marvin@schelaw.com

Treasurer
Malvina Nathanson
30 Vesey Street, 4th Floor
New York, NY 10007-2914
mnathanson@pipeline.com

Copyright 2008 by the New York State Bar Association.
ISSN 1549-4063 (print) ISSN 1933-8600 (online)

NEW YORK STATE BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155