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NYSBA

Message from the Chair

It has been a tumultuous summer. As this message is being drafted, the State Legislature has begun its traditional annual summer recess but not without demonstrating that it is a leadership-driven body ("three men in a room") largely resistant to the sound criticisms voiced by the Brennan Institute.

The increasing concern over the monitoring and release of convicted sexual predators remains a significant subject of legislative attention. It appears that the consideration of post-release civil commitment is a "deal breaker" in the Assembly's Democratic Conference. Only time will tell whether a compromise will emerge. One sound voice of reason is the ever thoughtful Schenectady County District Attorney Bob Carney, who has focused attention on stricter conditions for supervised release as a favored control and monitoring device over these parolees.

The Court of Appeals has continued to reveal deep ideological decisional fault lines as Pataki appointees exercise continuing influence in criminal justice cases. Judge Rosenblatt, who will be the subject of a CLE program in Poughkeepsie on November 4th and 5th (details to follow), continues to be the powerful centrist jurist and swing vote able to carry colleagues at court decisional conferences.

The focus in the trial courts has increasingly been in the area of "white collar" corporate fraud crime. The convictions of two former Tyco executives in Manhattan Supreme Court, and the double-digit sentences imposed in the Southern District by Judge Sand in the Rigas case, and Judge Jones in the Ebbers/WorldCom case, mark dramatic sentences for first-time non-violent offenders. While some may question the real need to exceed the 15-year range, these sentences will clearly be felt and considered by other defendants who are awaiting trial, both here in New York and in other parts of the country. Whether they will affect corporate decision-making day-to-day "on the ground," only time will tell. There can, however, be no doubt that the price for "crossing the line" has now reached potentially draconian proportions.

Turning to the state courts, the Legislature has understandably continued its ratcheting up of penalties and sanctions for those who speed, drink, and drive recklessly on the state thoroughfare. The use of the draconian "depraved mind" murder statute for the "worst of the worst" remains an increasingly attractive prosecutorial charging tool, and more felony level "leaving the scene" cases will likely be brought.

The announced resignation of U.S. Supreme Court Justice Sandra Day O'Connor and the recent death of Chief Justice Rehnquist remove two moderate conservative jurists from service on the high court. Only time will tell whether the selection of Justice John Roberts to succeed Judge Rehnquist will continue a moderate conservative jurist in the Rehnquist-O'Connor mode.

Finally, and closer to home, Vice Chair Jean T. Walsh, Secretary Jim Subjack and I are consulting periodically over such traditional Section housekeeping items as the new Section budget, committee assignments, and CLE programs of interest to you, our "customer base"—the members. In this connection, I note that our CLE "guru," Paul Cambria of Buffalo, has been working with Manhattan's Chuck Clayman, and Albany's Dennis Schlenker, to present a first-rate Federal Sentencing Advocacy Program this fall, featuring distinguished law professor Douglas Berman of the Ohio State University School of Law (website http://www.nysba.org/cle/fall2005, "Federal Sentencing Advocacy after *Booker*, *Fanfan* and Their Progeny: Update and Strategic Advice from Experts and Key Figures").

Simply put, the lazy, hazy days of summer may describe the weather, but not the activity level as we prepare for an interesting and vital autumn. I look forward to meeting with and hearing from you to insure that we are both serving your needs and hearing your voices. As the late Brooklyn Meade Esposito noted, "*power is perception*," and we will be as influenced as the leaders in state criminal justice circles perceive us to be.

Roger B. Adler

Message from the Editor

This issue contains some interesting and important feature articles dealing with the subjects of criminal appeals, fingerprint evidence, and expert testimony in sexual assault cases. As usual we also provide up-to-date information on significant decisions from the New York Court of Appeals and the United States Supreme Court, and also present some interesting statistics from the 2004 Annual Report from the Clerk of the New York Court of Appeals.

The past months have also seen some dramatic news affecting the United States Supreme Court, with the announced retirement of Justice Sandra Day O'Connor and the recent death of Chief Justice William Rehnquist. President Bush has selected Judge John Roberts to fill the Rehnquist vacancy. Some brief biographical material regarding Judge Roberts is provided for the benefit of our readers.

Our "For Your Information" section also contains numerous items of interest to criminal law practitioners, including information regarding the Section's upcoming programs and events. We continue to receive numerous articles for publication in our *Newsletter* and encourage our readers to submit items of interest for possible publication. Our newsletter has continued to grow in size, covering a wide variety of items of interest within the criminal justice system. We thank our readers for their interest and continued support.

Spiros A. Tsimbinos

REQUEST FOR ARTICLES

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

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

The Dramatic Decline in the Number of Criminal Appeals

By Spiros A. Tsimbinos

Between 1985 and 1990 the various Appellate Divisions were burdened with a huge appellate caseload to such an extent that the situation was viewed as a crisis and the Governor had appointed a special taskforce to seek solutions to the problem. The major factor for the huge Appellate Division caseloads was the large number of criminal appeals. In fact between 1985 and 1990, criminal appeals each year amounted to approximately 40% to 45% of the total and in 1989 the criminal Appellate Division caseload in the Second and Fourth Departments exceeded the number of civil appeals.

Beginning in 1992, however, the number of criminal appeals began to drop. This decline has continued to the present day so that a review of statistics covering the twelve-year period from 1992 to 2004 reveals a dramatic and largely unpredicted decline in the total number of criminal appeals filed within the various Appellate Divisions. Selecting the years 1992, 1996, 1998 and 2004, the steady decline in the number of criminal appeals filed is revealed in the charts below:

Total Number of Criminal Appeals Filed in the Appellate Divisions

Year	1st Dep't	2nd Dep't	3rd Dep't	4th Dep't	Total
1992	1,623	1,887	356	759	4,625
1996	1,361	1,232	353	838	3,784
1998	1,256	1,197	353	657	3,463
2004	974	762	573	466	2,775

The volume of criminal appeals has been declining not only in raw numbers but 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 2004 they dropped significantly to only 26.8% of the total. This dramatic percentage decline is illustrated by the following chart:

Criminal Appeals as a Percentage of Total Appeals Filed in the Appellate Divisions

Year	Criminal Appeals Filed	Total Appeals	Criminal Appeals as a Percentage of Total
1992	4,625	11,187	41.34%
1996	3,784	11,450	33.05%
1998	3,463	11,761	29.44%
2004	2,775	10,371	26.85%

A look at the individual figures within each Appellate Division reveals that there has been a dramatic decline in the number of criminal appeals filed in all Appellate Divisions with the exception of the Third Department, which has experienced a significant increase. The First and Second Departments which had the heaviest criminal appeals caseload, have seen their numbers drop dramatically with the Second Department experiencing a nearly 60% decline between 1992 and 2004. The chart reproduced below indicates the criminal appeals volume in each of the Appellate Divisions between 1992 and 2004 and the percent change in the criminal appeals volume.

Criminal Appeals Filed in Appellate Division Departments

Year	1st Dep't	2nd Dep't	3rd Dep't	4th Dep't	Total
1992	1,623	1,887	356	759	4,625
2004	974	762	573	466	2,775

Percentage Change in Criminal Appeals Between 1992 and 2004 in Each Appellate Division Department

1st Dep't	40% decline
2nd Dep't	59.6% decline
3rd Dep't	62.1% increase
4th Dep't	41.2% decline
Total of all Departments	40% decline since 1992

When one seeks to find reasons for the dramatic decline in criminal appeals over the last twelve years, two factors predominate. First, the dramatic decrease in the crime rate within various areas of New York State has led to a sharp decline in criminal indictments, thereby leading to a decline in criminal appeals. Second, the increasing use by prosecutors throughout New York State of the waiver of appeal as part of plea negotiations has greatly contributed to the decrease in criminal appeals. In 1989 the Court of Appeals in *People v. Seaburg*, 74 N.Y.2d 1 (1989), upheld the waiver of appeal as a legally enforceable condition of a plea bargain or sentence agreement. As a result of the *Seaburg* decision, prosecutors began to vigorously advance the utilization of the waiver of appeal as a means of cutting down on frivolous criminal appeals. Over the last twelve years the most vigorous use of the waiver of appeal procedure has been within the Second Department, and as can be seen in the above figures, the criminal appeals

volume in the Second Department has dropped by over 1,100 from 1,887 to just 762 in 2004.

The dramatic decrease in criminal appeals in the Second Department has been so great that over the last twelve years various judges from that Court have seen fit to comment on the decline. In 1997 when criminal appeals were beginning to significantly decline, then Appellate Justice William C. Thomson commented in a *New York Law Journal* article published on July 9, 1997 at page 2:

> For the last two years, the number of criminal cases has materially decreased, to the extent that civil cases now comprise 80% of the matters appearing on our daily calendars. Each Justice on our Court participates in approximately 25 cases per week, which means at the present, only about 5 or 6 cases are criminal. The balance is overwhelmingly civil.

A review of the current Appellate division calendars reveals that the daily calendar of the Second Department now amounts to approximately 18 cases per sitting with only two or three involving criminal appeals, clearly reflecting the continued decline in criminal appellate volume.

The anomaly of the increase in criminal appeals in the Third Department appears to be due to the general population increase within that Department, resulting in an increase in criminal indictments. It also appears to be due to a failure to aggressively utilize the waiver of appeal procedure which prosecutors have adopted within the other Appellate Departments.

The fact that the total number of appeals filed in the Appellate Divisions has declined since 1992 from 11,187 to 10,371 is totally the result of the dramatic decline in criminal appeals, since the number of civil appeals has in fact increased. The dramatic decline in the number of criminal appeals has enabled the Appellate Divisions to basically remain current in handling their caseloads and in deciding appeals within six months after they have been filed. The appellate crisis existing in 1990 and projected to continue in ensuing years thus today has been largely averted due solely to the fact of the dramatic decline in criminal appeals, enabling the various Appellate Divisions to efficiently handle their caseloads.

Reflecting the decline in criminal appeals emanating from the various Appellate Divisions, the number of criminal appeals filed in the New York Court of Appeals has also seen a dramatic decline. Thus as can be seen from the chart below, the number of criminal appeals decided in the New York Court of Appeals from 1995 to 2004 has dropped from 147 to 49—a decline of 66.6%.

Number of Criminal Appeals Decided by the New York Court of Appeals

1995	147	out of	340	or	43%
1996	121	out of	295	or	41%
2004	49	out of	185	or	26.5%

The decline in criminal appeals has been a dramatic and significant development in our appellate process. It is important that criminal law practitioners be aware of its occurrence and the reasons why it has occurred. I hope that this article has served to provide the necessary information on this interesting situation.

The figures regarding the Appellate Division caseloads were obtained from the Office of Court Administration and the author would like to thank Lissette Lopez-Gellys for her assistance in obtaining these statistics. The figures regarding the Court of Appeals were obtained from the 2004 Annual Report of the Court prepared by Stuart M. Cohen, Clerk of the Court.

Spiros A. Tsimbinos has been a criminal law and appellate practitioner in New York for 36 years. He has authored many articles that have appeared in the *New York Law Journal*, the New York State Bar Association *Journal*, and is the editor of this newsletter. He is a graduate of New York University School of Law.

Is There a Smudge on Fingerprint Evidence?

By Peter Dunne

For one hundred years, fingerprint testimony has been accepted without question by both the bar and laypersons. Fingerprint analysis is assumed to be infallible; it is rarely challenged and sometimes stipulated to by defense counsel. Furthermore, the general public believes that there is no other proof which is more reliable. However, in recent years, fingerprint examination has come under scrutiny and has been challenged in federal courts.

A striking example of the fallibility of fingerprint evidence and its consequences occurred in Scotland recently. A police detective named Shirley McKie was indicted and tried for perjury. She had been assigned to investigate a murder in the small coastal town of Strathclyde of an old woman who had been stabbed through the right eye with a pair of sewing scissors. Forensic investigators found numerous latent prints in the woman's house, including two of the woman's handyman, found on a tin of Christmas cookies. The handyman was tried and convicted of murder. The sole physical evidence against him was the two latent prints.

Investigators also found a print that apparently matched the left thumb of Detective McKie. However, at the murder trial, McKie swore that she had never entered the house. She was accused of perjury and at her trial, she enlisted the aid of a senior forensic official at New Scotland Yard named Allan Bayle. He testified that the latent print was not only not the thumbprint of Detective McKie, but it was not even a thumbprint. McKie was acquitted, but Bayle's testimony led to a reexamination of the Scotland Yard method of fingerprint analysis.[1]

This article will briefly discuss the history of fingerprint examination, the history of its acceptance in courts, the main points of the challenge in federal court and lastly, the impact that all of this might have in New York State courts.

Fingerprints are the impressions of the ridged skin surface of the fingers. These impressions are revealed by inked prints or latent prints. Inked prints occur when the entire surface of all ten fingers is inked and rolled onto a sheet of paper. Modern methods of digitally scanning these fingerprints are beginning to become more widespread. An inked or digitally scanned print contains 75 to 175 "ridge characteristics," which are identifiable discrete patterns in the inked print. These characteristics are sometimes called "Galton points," "points of comparison," or simply "points."[2]

Forensic use of fingerprints increased in the late 19th century when penologists advanced the idea that sentences should reflect the defendant's prior criminal history, as well as the present crime. As the defendant's identity thus became of paramount importance, a method of determining certain identity was needed to combat changes of name or appearance. Fingerprints were used to verify identity; indeed this use is with us today, as fingerprints generate an accused's "rap sheet."

At the turn of the twentieth century, fingerprints began to be used to solve crimes as well. The latent print, a print inadvertently left at a crime scene, became an investigative tool. The latent print is usually just a portion of the fingerprint. It has been estimated that a latent print averages about 20% the size of an inked print. Additionally, the accidental nature of the deposition of a latent print means that such a print is often

"[I]n recent years, fingerprint examination has come under scrutiny and has been challenged in federal courts."

distorted by pressure, by residue on the finger itself or by the nature and shape of the surface receiving the latent print. The process of matching a latent print with an inked print from a known suspect began at this time.

Use of fingerprints for investigative purposes assumes not only that a person's ten inked prints are unique in all the world, but also that a partial latent print, despite its smaller size and distortion, is also unique to a particular person. Courts, when confronted with latent fingerprint evidence, initially adopted these assumptions without any real examination of its underlying theoretical underpinnings.

The first recorded case of fingerprint evidence in the United States occurred in Illinois.[3] During the night of September 19, 1910, Clarence Hiller was shot and killed by an intruder in his Chicago home. Near the assumed point of entry was a newly painted porch railing. The fresh paint bore the imprint of four fingers of someone's left hand. At the trial of Thomas Jennings for this murder, photographs of the impressions found on the railing, and photographs of his inked prints were admitted into evidence. Four witnesses gave their opinion that the prints from the railing and the prints taken from Jennings' fingers were made by the same person.

The Supreme Court of Illinois conceded that this was a case of first impression: "[W]e find no statutes or decisions touching the point in this country."[4] Relying upon the fact that evidence of this sort was admissible in Great Britain, the Court admitted the evidence, stating, "[T]here is a scientific basis for the system of fingerprint identification and that the courts are justified in admitting this class of evidence. . . ."[5] What exactly the scientific basis was, was left unsaid.

"There has been remarkably little scientific support for the fundamental assumption of fingerprint evidence: that a person's fingerprints are unique in all the world."

Fingerprint analysis has been accepted in New York State since 1915.[6] On the evening of December 20, 1913, a farmer named John Barrett was beaten and shot to death in the storage room of his house in the town of Palatine in upstate New York. Suspicion focused on a laborer named Lewis Roach, who was employed by the farmer living next door. There had been a dispute between the parties. The neighbor had wanted to purchase the Barrett farm and set up the defendant on it. On the clapboards of the Barrett house were five marks, which were alleged to be the bloody fingerprints of Lewis Roach. Testimony identifying the fingerprints contained in the bloody handprint as Roach's was admitted at the trial.

In admitting this evidence, the Court of Appeals stated, "In view of the progress that has been made by scientific students and those challenged with the detection of crime in police departments of the larger cities of the world, in effecting identification by means of fingerprint impressions, we cannot rule as a matter of law that such evidence is incompetent."[7] In so deciding, the Court cited the acceptance of fingerprint testimony in the *Jennings* case, as well as cases in England. Notice that the emphasis is on "general acceptance" and less on the reliability and scientific validity of the process. Interestingly, the Court noted that "the fact that error may sometimes result in effecting identification by this means affords no reason for the exclusion of such evidence."[8]

Traditionally, New York State has evaluated the admissibility of expert testimony by the so-called *Frye* standard.[9] The test is whether: (a) the procedure is generally accepted in the scientific community; (b) the procedure is reliable as performed in the present case; (c) it is a proper subject for expert testimony; and (d) the proposed witness is an expert. The Court of Appeals has affirmed the *Frye* standard in New York as recently as 1994.[10] *Frye* was decided after *Roach*, and to date, there has never been a *Frye* hearing in New York State to test the admissibility of fingerprint evidence.

In the federal system, *Daubert v. Merrell Dow Pharmaceuticals*[11] changed the way that trial courts evaluate the admission of expert testimony. Rather than relying on the *Frye* test of general acceptance, trial judges were to act more as gatekeepers to exclude expert opinions that lack sufficient reliability. *Daubert* makes admission dependent on five factors: (1) whether the "theory or technique" can be (and has been) tested; (2) the court should consider "known or potential rate of error"; (3) the existence and maintenance of standards controlling the technique's operation; (4) whether the technique has general acceptance; and (5) whether the theory or technique has been subjected to peer review and publication. The recent challenges to fingerprint testimony has focused on these five factors.

Has the Technique Been Tested?

There has been remarkably little scientific support for the fundamental assumption of fingerprint evidence: that a person's fingerprints are unique in all the world. Supporters point to a single study conducted by the Lockheed Corporation which compared 50,000 inked prints with each other, and concluded that because none of these prints matched, the likelihood that two inked prints would match would be an astronomical number.[12] In essence, the argument is that since we have never found two people to have identical inked prints, such a match can never exist.

Even less scientific support exists for the proposition that a partial latent print is unique in the world. In fact, an Israeli study found fingerprints from two different people that contained seven matching ridge characteristics.[13] More to the point, there has been no study conducted to determine the probability that two people will share a varying number of ridge characteristics. No one has studied the likelihood that any two people might share one, two, five or even ten ridge characteristics.[14]

To refute such attacks, the government argued that fingerprint examination has been tested by having another examiner subsequently examine the same fingerprints. Further, the process has been "tested in adversarial proceedings."[15] However, whether this is the type of testing envisaged by *Daubert* has not been decided.

Significantly, the Department of Justice has recently solicited fingerprint examination validation studies. It

stated that "the theoretical basis for fingerprint individuality has had limited study and needs additional work to demonstrate the statistical basis for identifications." Moreover, "the fingerprint field needs to develop standardized procedures for comparing fingerprints and . . . these procedures must then be tested statistically in order to demonstrate that following stated procedures allows analysts to produce correct results with acceptable error rates."[16]

Rate of Error

The International Association of Identification is the professional association of latent fingerprint examiners. The Association sponsored a proficiency test of examiners beginning in 1995. The Association sent a dozen or more latent prints, either selected from actual cases, or constructed to resemble typical latent prints, along with a number of ten-print inked cards, again selected to be typical, to 156 fingerprint laboratories. The examiner was asked to judge each latent print and decide whether it had value, and if so, whether an identification could be made. In 1995, fully 20% of the tested examiners made an erroneous identification; they wrongly stated that the latent print was made by the person who had made one of the inked cards. In subsequent years, the error rate decreased, but in no year was there ever an absence of erroneous identification.[17]

Existence of Standards

In comparing a latent print with an inked print, a fingerprint examiner compares the ridge characteristics of the prints. These so-called "points" of comparison become the basis of the identification. The question becomes: How many points of comparison are necessary to make an identification? Until very recently, Scotland Yard required 16 points of comparison for an identification. Australia requires 12, France and Italy 16, and Brazil and Argentina require 30.[18] The FBI has no minimum number of points, but rather relies upon the judgment of the examiner.

In the United States, there are no nationwide testing standards in the field and no licensing requirements. Fingerprint training has centered around an apprenticeship or on-the-job training. Fingerprint examiners are not required to take any kind of objective test before they start giving expert opinions in court. Nor is there any type of licensing requirement in the field.[19]

In 2002, Justice Louis Pollak of the Eastern District of Pennsylvania held a *Daubert* hearing on the admissibility of fingerprint evidence. He found that fingerprint examination did not satisfy the *Daubert* standards. Specifically, adversarial testing in court did not satisfy the testing factor and fingerprint techniques lacked scientific testing. Fingerprint techniques had not been subjected to peer review, the rate of practitioner error was potentially high and uniform standards did not exist. Finally, he stated general acceptance could not by itself sustain the government's burden in making the case for the admissibility of fingerprint testimony.[20]

His ruling permitted the fingerprint examiner to testify about how rolled inked prints were obtained, how latent fingerprints were deposited and obtained, permitted the introduction of both inked and latent prints into evidence, and permitted the examiner to point out similarities. The examiner was not permitted to present evaluation testimony as to their opinion that a particular latent print is in fact the print of a particular person.

This remarkable decision was short-lived. Two months later Justice Pollak "changed his mind" and permitted the examiner to testify as to the identification. According to the opinion, Justice Pollak became convinced, following a further hearing, that the training requirements of the FBI were sufficiently rigorous to be relied upon. He further stated that he was persuaded that the acceptance of fingerprint evidence in Great Britain, using the same standards as the FBI, was also a factor in his mind.[21]

Defense counsel, when faced with a fingerprint case, should consider these three issues.

To date, there has never been a *Frye* hearing held in New York State with regard to fingerprint evidence. The difficulty facing defense counsel in even procuring a *Frye* hearing is of course the "generally accepted" factor in *Frye.* In a case in Brooklyn, defense counsel wished to call an expert to testify as to the lack of "scientific underpinning" for the acceptance of fingerprint evidence. In precluding his testimony, and arguably turning the burden of proof on its head, the Court stated that the expert "offered . . . junk science." It went on to state, "To take the crown away from the heavyweight champ you must decisively . . . knock him out," and held that "the field of fingerprint analysis [was] a generally accepted scientific discipline."[22] Of course, if New York State ever moves to the *Daubert* standard, the time may then be ripe to test the scientific reliability of fingerprint evidence.

Second, a motion *in limine* governing the form of the fingerprint technician's testimony may be in order. From the beginning, fingerprint experts attempted to distinguish their knowledge from other forms of expert testimony. According to them, they offered not opinion but fact. In fact, fingerprint examiners routinely testify in court that they have "absolute certainty" about a match. Indeed, it is a violation of their professional

norms to testify about a match in probabilistic terms. In point of fact, even the FBI's foremost fingerprint expert admits that the process is entirely subjective. Therefore, it would seem appropriate to have the expert testify that it is his or her opinion that the latent print matches the inked print.

Finally, a request to charge should be submitted to the Court expanding on the boilerplate charge to the jury dealing with expert witnesses, highlighting the fact that this testimony is opinion and not fact, and that the jury is free to disregard this opinion if they find that the opinion is based upon faulty facts.

Even if all of these suggestions are unsuccessful, a practitioner faced with a fingerprint case may find the materials cited in this article helpful in preparing a cogent cross-examination of the prosecution witness.

Endnotes

1. For a more detailed account of this interesting case, see "The New Yorker," May, 27, 2002.
2. There are a number of reference books on fingerprint examination. For a useful summary for lawyers, see, *Fingerprints Meet* Daubert: *The Myth of Fingerprint "Science" is Revealed*, 75 So. Cal. L. Rev. 605 (hereinafter cited as *Fingerprints*).
3. *People v. Jennings*, 252 Ill. 534, 96 N.E. 1077.
4. *Id*. at 546.
5. *Id*. at 549.
6. *People v. Roach*, 215 N.Y. 592, 109 N.E. 618.
7. *Id*. at 604.
8. *Id*. at 605.
9. *Frye v. United States*, 293 F. 1013.
10. *People v. Wesley*, 83 N.Y.2d 417, 633 N.E.2d 451, 611 N.Y.S.2d 97.
11. 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469.
12. *Fingerprints*, *supra* note 2, at 630.
13. *Id*. at 611.
14. *Id*.
15. *United States v. Plaza*, 179 F. Supp. 2d 492, 504.
16. *Id*. at 506.
17. *Fingerprints*, *supra* note 2, at 634.
18. *Plaza, supra* at 515.
19. *Id.* at 514.
20. *Id*. at 515.
21. *United States v. Plaza*, 188 F. Supp. 2d 549.
22. *People v. Hyatt*, 2001 N.Y. Misc. Lexis 994.

Mr. Dunne is presently serving as the Principal Law Clerk to Acting Supreme Court Justice Robert McGann, presently sitting in Queens County. He also previously served as an Assistant District Attorney in Queens County. He is a graduate of Boston University School of Law, where he served as the Editor of the *Boston University Law Review*. He has also been a past contributor to our newsletter.

When a Sexual Assault Nurse Examiner Offers an Opinion that Injuries Observed After a Reported Sexual Assault Is Consistent with Non-Consensual Intercourse: How Does the *Frye* Standard Apply?

By Anne L. Von Fricken Coonrad

I. Introduction

In the thirteenth century, a virgin who had been raped was required to file a civil suit "while the deed was newly done." The victim was required to show her injuries and blood to good men and her clothing would be examined. If the rapist protested his innocence, the victim was required to submit to an examination "by four law-abiding women" to ascertain if she was indeed violated. The women were sworn to tell the truth.

Societal attitudes have not changed much over the past few centuries. Society continues to expect a victim of sexual violence to report the incident promptly.[1] Also, the victim must submit to an examination of her[2] body if she wishes to pursue legal action against the accused. The exam is done to collect evidence and attempt to ascertain whether the victim has been assaulted.[3] Will the examiner be able to give an opinion that an assault has occurred with any degree of certainty? If able to give an opinion, how will the examiner base her opinion? Can a Sexual Assault Nurse Examiner (SANE) provide an opinion with a reasonable degree of certainty that a rape has occurred?[4]

Recently, the Third Department of the New York State Supreme Court Appellate Division held that it is within the court's discretion whether to qualify a SANE provider as an expert.[5] Under New York law, the court will evaluate the witness's qualifications and the subject matter of the proposed testimony. If the witness is qualified based on her knowledge or experience, the court will further ask if the subject matter of the proposed testimony is beyond the ordinary knowledge or experience of the typical juror. If it is, the testimony is needed to assist the jury with its verdict. Lastly, the prosecutor must establish a proper foundation that the proposed testimony is generally accepted as reliable in the relevant scientific community to meet the *Frye* standard.[6] If the defense fails to inquire into the basis of the witness's opinion, an objection on appeal will be deemed waived.[7]

The People's case is supported when the witness can form an opinion that injuries observed during the exam were consistent with the reported sexual assault. This opinion gives added credibility to the victim's assertions that she has been assaulted. However, there are many variables involved in the degree of injury observed in reported cases of sexual assault. Some of these variables include age, sexual experience, consent versus lack of consent, the human sexual response, and degree and duration of penetration. Here lie the reasons a defense attorney may seek to exclude this testimony from being entered into evidence. The case will no longer be a "he said she said" case, but an accusation corroborated by an opinion that the injuries observed are consistent with non-consensual intercourse.

Whether a SANE provider should be able to give an opinion regarding causation of injury, after an allegation of sexual assault, should be carefully analyzed by the court. The analysis should include the proposed expert's qualification and basis for her opinion. If the defense objects, the court will need to evaluate whether the proposed testimony is generally accepted by the relevant scientific community[8] or based on facts reasonably relied upon by the profession.[9]

New York State SANE providers were surveyed regarding expert testimony. The survey sought to identify the SANE's opinion whether she could give an opinion regarding injury and consistency with allegation of sexual assault. The nurses generally agreed that an opinion may be given that the injuries observed following an allegation of sexual assault were consistent with the history given by the patient, but most SANE providers were uncomfortable giving the opinion that injuries observed resulted from non-consensual intercourse. I submit SANE providers are hesitant to offer this opinion because studies have shown injury following consensual sexual activity[10] as well as injuries following reported sexual assault.[11] SANE providers may not be aware that an opinion may be based on their personal experience. When an opinion is based on personal experience, the *Frye* analysis need not be applied by the court because a proper basis for the opinion has been established from the witness's own personal experience.[12]

If SANE providers have based their opinions on studies, then the *Frye* standard is not met under New York law because there is no general consensus among

the nurses that this type of opinion is generally accepted. If SANE providers base their opinion on personal experience, then the *Frye* standard is not applicable because the opinion is derived from a proper basis.[13]

In neither reported case did the court discuss the general acceptance standard before allowing the SANE provider's opinion testimony. Should SANE providers be able to form an opinion that causation of injuries are consistent with non-consensual intercourse when based on her knowledge and experience but not supported by a general consensus in the SANE community? I submit that she can as long as the opinion is based on her own personal experience. But if not, then the defense should ask the question, on what basis has the witness arrived at her opinion? If the opinion is not based on personal experience but on studies, a *Frye* inquiry should be done because injuries have been identified in both reported sexual assault as well as after consensual sexual activity.

II. Background

A. What Is the SANE Model?

Historically, victims of sexual assault were required to wait long hours in busy emergency rooms for treatment after a reported sexual assault.[14] During the 1970s, SANE programs were established in Memphis, Tennessee (1976), Minneapolis, Minnesota (1977) and Amarillo, Texas (1978)[15] that provide care for and examination of victims of sexual assault by nurses who were specially trained in the forensic exam.[16]

The SANE model encourages a team effort between health care providers, law enforcement, rape crisis advocates, and prosecutors.[17] SANE programs strive to provide immediate, ideally within one hour,[18] care and quality evidence collection to the victim of sexual violence, and to provide expert testimony as needed.[19]

B. Who Are SANE Providers?

The SANE provider is either a Registered Professional Nurse, Nurse Practitioner, or a physician who has been specially trained on evidence collection and forensic techniques. The SANE model affords the victim of sexual violence comprehensive evidence collection and compassionate care from an unhurried health care provider.[20]

Before the SANE is able to perform the forensic exam, she is required to attend a training program.[21] The SANE training typically consists of a 40-hour classroom requirement and a clinical component which is required to establish competency in the physical exam of a patient who has reported a sexual assault. After attending the training, the nurse will have attained a basic understanding of forensic nursing.

The SANE training is intensive and includes many topics. Dynamics of sexual assault is one topic covered in a SANE training which includes defining rape, the historical views regarding rape, and rape trauma syndrome. Additional topics include the roles and responsibilities of a SANE provider, a rape crisis advocate, law enforcement and the district attorney. Because sex crimes are so difficult to prosecute successfully,[22] the partnership between the legal and the health community is essential to assure that justice has been served.

SANE providers need additional skills which are not taught in their basic nursing program. These skills include crisis intervention, injury detection/documentation, sexually transmitted disease detection/treatment, pregnancy prevention, the pelvic exam,[23] the forensic exam, forensic photography, judicial process, and testifying techniques.[24] A review of anatomy and physiology will be completed to assure the SANE is familiar with the female and male genital anatomy. This knowledge is needed to assure proper documentation of injuries observed after a reported sexual assault.

Lastly, the SANE is required to pass a written examination. This will demonstrate that the nurse has attained a basic understanding of the principles covered in the course.[25]

III. Statement of the Case

Recently, the Third Department of the New York State Appellate Division held that a SANE provider may be qualified as an expert. Additionally, the court held the SANE provider may render an opinion regarding causation of injury, as long as a proper foundation has been established by the prosecutor.[26] The standard of review is abuse of discretion by the trial court.[27] The following is a review of the reported cases.

In *Morehouse,* the defendant was convicted of sexually assaulting a 15-year-old victim.[28] The SANE provider testified she observed obvious injuries to the "victim's vaginal area" which were "consistent with forcible compulsion."[29] The defendant argued the trial court erred when it allowed a SANE provider to testify as an expert witness.[30] In *Morehouse,* the court held the prosecutor had established the proper foundation required to show the SANE was qualified to testify as an expert based on her training and experience.[31] The People had elicited that this particular SANE had attended a 40-hour training program, had treated 41 victims, assisted in the examination of 13 victims, and consulted in the examination of 8 pediatric cases.[32] The court held that based on her "formal training and actual experience," the trial court did not abuse its discretion by allowing her to testify as an expert witness.[33] Further, the court held that the trial court did not abuse its

discretion when it allowed the SANE provider to opine that the injuries observed "were consistent with forcible compulsion."[34] However, there was no discussion regarding the generally accepted standard required under *Frye*.

In *Rogers*, the defendant was convicted of sexual assault while the victim was physically helpless.[35] This case was remanded due to a violation of the defendant's Sixth Amendment right to confrontation; however, the appellate court discussed briefly, in contemplation of argument on remand, that the SANE provider was properly offered as an expert.[36] The *Rogers* court held that the "Supreme Court did not abuse its discretion in permitting this witness's testimony, based on her training and experience, that the victim's injuries were consistent with a forcible sexual encounter and not consistent with consensual sex."[37] The court did not discuss the SANE provider's qualification or experience, just that she was qualified based on her "training and experience" to testify as an expert.[38] The injuries observed in this case were not discussed in the opinion.[39]

Virginia has struggled with this very issue.[40] In *Velazquez*, the court held the SANE provider was qualified as an expert based on her education and experience. Also, the court held it was proper when the proposed testimony is beyond the ordinary knowledge of a layperson, for the SANE provider to give an opinion.[41] The court allowed the SANE to give an opinion regarding causation in that the injuries observed were "consistent with non-consensual intercourse."[42] The court cited to other cases where the courts allowed such testimony.[43]

In 2002, the Supreme Court of Virginia reversed this holding. The court held that the SANE's testimony invaded the jury's role as fact finder.[44] The court held, "We consistently have held that the admission of expert opinion upon an ultimate issue of fact in a criminal case is impermissible because it invades the providence of the jury."[45] Essentially, the court held the SANE's opinion allowed for no further explanation for the injuries, other than that the patient had been raped.[46] The court held this is an ultimate question before the jury, and the court abused its discretion by allowing the testimony.[47] If the jury accepts the SANE's opinion as fact, the expert is not assisting the jury with its decision regarding guilt but instructing the jury on an outcome.[48] Contrast this with the New York rule which allows a witness to give an opinion which is related to the ultimate issue before the jury as long as the jury will benefit from the expert's specialized knowledge.[49]

IV. Expert Testimony Under New York Law

A. Expert Witness's Qualifications and the Subject Matter of Her Testimony

Before the court will allow an expert to testify, it will evaluate whether the witness is qualified to give an opinion. The threshold question is whether the subject matter is beyond the ordinary knowledge and experience of a typical juror.[50] If it is, then the second inquiry is whether the expert possesses "the adequate skill, training, education, knowledge or experience" from which it can be assumed that the information imparted or the opinion rendered is reliable.[51] The expert may base his or her opinion upon either studying the subject or from "long observation" and actual experience in the field.[52] Neither study nor experience is preferred over the other; the jury will determine the "weight to be given to his testimony."[53]

New York adheres to the common law view that expert testimony should be one of necessity.[54] If the proposed testimony is beyond the ordinary experience of the common layperson, the expert witness will be allowed to give an opinion because the jury will need it to better understand the evidence.[55] However, when the juror is able to draw, from his or her own experiences or knowledge, an inference regarding the evidence, then an expert is not needed to assist the jury in reaching its verdict.[56]

B. Appropriate Basis Needed to Give Expert Opinion

The expert's opinion must be based on facts[57] which are ordinarily relied upon within the profession[58] or within the personal knowledge of the witness.[59] The facts may include hearsay evidence so long as it is only a "link in the chain of data upon which that witness relied," not the principal basis for the opinion.[60]

C. Principles and Methodologies, the *Frye* Analysis

In New York, the court will apply *Frye* for novel scientific principles before the evidence will be allowed into evidence.[61] If the proposed evidence is not based on a scientific principle, then the *Daubert*[62] standard will be applied.[63]

The court's role is to determine if the proposed evidence is generally accepted as reliable in the relevant scientific community.[64] The reasons given for the *Frye* analysis include:

- Ensure that a minimal reserve of experts exist who can critically examine the validity of scientific determination in a particular case;
- Promote a degree of uniformity of decision;

- Avoid the interjection of time-consuming and often misleading determination of the reliability of a scientific technique into the litigation;
- Assure that scientific evidence introduced will be reliable and thus relevant;
- Provide a preliminary screening to protect against the natural inclination of the jury to assign significant weight to scientific techniques presented under circumstances where the trier of fact is in a poor position to place an accurate evaluation upon reliability;
- Impose a threshold standard of reliability, in light of cross-examination by opposing counsel being unlikely to bring inaccuracies to the attention of the jury.[65]

V. Analysis

A. Expert Witness's Qualifications and Subject Matter of Her Testimony

SANE providers are required to attend a training program prior to providing services to victims of sexual violence. The training program is comprehensive and affords the nurse greater knowledge than that of the ordinary citizen.[66] Often the SANE provider has extensive work experience which she brings to her role as a SANE. Many providers are certified through either the International Association of Forensic Nurses or the New York State Department of Health. Therefore, it is fair to say the typical SANE provider will meet the first prong of the test.

B. Appropriate Basis Needed to Give an Expert Opinion

The second prong of the test involves the witness's ability to give a reliable opinion. The real question is whether the opinion that injuries observed are consistent with non-consensual intercourse is based on reliable information.

Generally, the SANE provider will base her opinion on her own personal experience examining patients, the initial training received, and/or studies she has reviewed.

1. Actual Experience

SANE providers have actual experience interviewing, examining and collecting evidence from patients who have reported sexual assault. During the sexual assault exam, the SANE will use various methods to identify injury.[67] Until about the 1970s, the only method used was direct visualization of the genital area.[68] [69] Examiners then started to use stains, Lugol's solution or Toluidine blue, to help identify injury following sexual assault. The use of stains has improved identification of injury after a reported sexual assault.[70] [71] During the 1990s, the use of a Colposcope in the examination of victims of sexual assault has become commonplace.[72] The Colposcope allows the examiner to identify injuries more easily because it magnifies the genital area.[73] [74] The SANE provider may base her opinion on the cumulative experience of examining victims of sexual assault. As the examiner becomes more and more experienced, she will be able to form opinions based on the pattern of injuries observed in patients she has examined who have reported sexual assault. Over time, the same pattern of injury may be identified by the examiner. An opinion based on personal experience will not be scrutinized under *Frye*.

2. Knowledge Attained from a SANE Training

During the training program, the SANE will be taught that injuries may occur when there is a lack of the human sexual response.[75] The human sexual response occurs in four phases: excitement, plateau, orgasm, and resolution.[76] This response leads to physical changes in the vaginal area without which, some believe, leads to "bruising, laceration, tears, or microscopic injury in most sexual assault survivors."[77] However, this is a theory unsupported by definitive study.[78]

3. Reported Studies

SANE providers may review published studies which have discussed injury patterns after reported sexual assault.[79] However, studies have shown that injuries can occur after a reported sexual assault[80] as well as after consensual intercourse.[81] [82] [83] [84] Studies have shown an increase in identification of injury after a reported sexual assault with the use of advanced forensic techniques. Since studies have shown injury after reported sexual violence as well as after reported consensual sex, a *Frye* inquiry is required.

C. Principles and Methodologies: *Frye* Analysis

A survey was sent via e-mail to SANE providers practicing in New York State.[85] The purpose of the survey was to identify their views regarding reliability of testimony which asserts that injuries are consistent with non-consensual intercourse. The following question was posted for response:

> Is it generally accepted by yourself and your peers that injuries observed are consistent with non-consensual intercourse? How often have you been able to give this opinion while testifying? Has the court ever denied you the ability to give this opinion?[86]

After a few e-mail replies, I further clarified my question as follows:

> My interest is sparked from a court's holding the following: "A Sexual Assault Nurse Examiner conducted a physical examination of the victim. Supreme Court did not abuse its discretion in permitting this witness's testimony, based on her training and experience, that the victim's injuries were consistent with a forcible sexual encounter and not consistent with consensual sex."[87] My question to you all is whether you generally agree or accept that a SANE can give this kind of opinion, when the injuries observed are consistent with the victim's history. Or that you generally don't believe, based on experience or studies you have read or done, that a SANE can give this type of opinion.[88]

Ten SANE providers replied to my questions. The majority of providers were comfortable with giving an opinion that injuries observed were consistent with the history given by the patient. None of the providers was comfortable with giving the outright opinion that the injuries were consistent with non-consensual intercourse.

The following comments tend to support my assertion that SANE providers are hesitant to give the opinion that injuries are consistent with non-consensual intercourse because studies have not definitively found that an injury observed is consistent with non-consensual intercourse. Some providers were comfortable with stating the injuries observed were consistent with "trauma,"[89] "penetrating blunt force trauma,"[90] "consistent with penetration."[91] Some providers were uncomfortable with definitively equating injury with non-consensual intercourse—"I have never testified that injuries are consistent with non-consensual intercourse IN AN ADULT."[92] "My understanding is that I am not able to testify as to whether intercourse was forcible or consensual by looking at the genitalia."[93] One provider asked, "How exactly do the SANEs know what is a consensual injury versus a non-consensual injury?"[94]

Some providers did form an opinion based on their experience. One provider wrote she answers this question in the following manner ". . . that the injuries that I have documented are consistent with injuries that I have seen when examining patients that have stated that they have been raped or sexually assaulted."[95] Another SANE agreed with this provider and stated, "I will say it is consistent with the patients (sic) history."[96]

VI. Conclusion

It is clear that SANE providers possess specialized knowledge and/or experience which is greater than the average person. The SANE undergoes a training program, is often certified, and performs forensic examinations on patients which are not completed by the typical health care provider. The dynamics of sexual violence is often beyond the ken of the typical juror, therefore, the subject matter is one not within the jury's ordinary experience or knowledge. It would seem the first two prongs of the test are met. However, is the testimony reliable under *Frye*?

It is clear there is no general consensus among SANE providers regarding their ability to give such an opinion. The question is why are they hesitant? This unfortunately was not asked or anticipated when the survey was formed. The survey is also limited due to its size—only ten providers responded out of an estimated few hundred in New York. Perhaps a more extensive study should be completed to test the validity of my findings and ascertain the reasons for the hesitancy of the nurses' opinions.

"Since sexual violence is often committed behind closed doors, society may never know for sure if there was a rape."

In *Morehouse* and *Rogers*, the court did not discuss the general acceptance standard. It is not clear why the *Frye* analysis was not done. It could be because the victims in both of these cases sustained visible injury, the SANE providers based their opinions on personal experience that the injuries could not be consistent with consensual intercourse. Or it may be that the defense did not raise an objection as to the basis of the SANE's opinion. In any event, I think the question that needs to be asked is, *what basis is used by the SANE to arrive at her opinion?*

Time has not changed society's desire to know for sure whether a rape has occurred. Since sexual violence is often committed behind closed doors, society may never know for sure if there was a rape. It is up to the jury to evaluate the evidence and come to a verdict. If SANE providers are going to give an expert opinion regarding causation of injury, the very least that can be expected is that the basis of their opinion be proper. But without asking the question, the scales of justice may be unbalanced.

Endnotes

1. Robert R. Hazelwood & Ann Wolbert Burgess, Practical Aspects of Rape Investigation: A Multi-disciplinary Approach 9 (Robert R. Hazelwood & Ann Wolbert Burgess ed., CRC Press 1995).
2. Based on the personal experiences as an examiner, the author believes most victims of sexual violence are women, but men can be victimized as well.
3. Victims of sexual violence should be examined for health reasons. The above statement is in no way meant to give the impression that victims are examined only in contemplation of prosecution.
4. The SANE model is a relatively new concept in New York State. Alleged victims of sexual violence are examined by specially trained examiners. The SANE provider collects and documents evidence after the incident and is later available to testify as to her findings at trial.
5. *People v. Morehouse*, 8 A.D.3d 888, 774 N.Y.S.2d 100 (3d Dep't 2004); *People v. Rogers*, 5 A.D. 925, 780 N.Y.S.2d 393 (3d Dep't 2004).
6. Interview with Michael J. Hutter, Professor of Law at Albany Law School, in Albany, NY. (November 21, 2004).
7. *Velazquez v. Commonwealth*, 543 S.E.2d 631 (Va. 2001) (noting the defendant failed to object to the expert's basis for the opinion and whether it was "one reasonably relied upon by experts in the field." Therefore, the objection was waived on the appeal).
8. *Frye v. US*, 293 F. 1013, 1014 (D.C. Cir. 1923).
9. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 595 (1993).
10. Alison A. Lauber, MD & Micki L. Souma, MD, *Use of Toluidine Blue for Documentation of Traumatic Intercourse*, 60 Obstetrics and Gynecology, 644, 645 (1982) (finding minor injuries such as redness or abrasions may be noted after consensual sexual activity).
11. *Id.* (finding after reported sexual assault, there may be no injury observed to severe trauma to the genital and non-genital areas).
12. Interview with Michael J. Hutter, Professor of Law at Albany Law School, in Albany, NY. (November 21, 2004).
13. *Id.*
14. Patricia A. Forci, *The Sexual Assault Nurse Examiner: Should the Scope of the Patient Privilege Extend That Far?* 5 Quinnipiac Health L.J. 229, 229 (2002).
15. Linda Ledray & Sherry Arndt, *Examining the Sexual Assault Victim: A New Model for Nursing Care*, 32 J. of Psychosocial Nursing 7, 7 (1994).
16. *Id.*
17. *Id.* at 8.
18. Anne Coonrad, *SANE/SAFE Organizing Manual: A Guide for Community Collaboration in Developing Sexual Assault Nurse Examiner & Sexual Assault Forensic Examiner Programs*, 1, 33 (Martha Schultz ed., New York State Coalition Against Sexual Assault 1998).
19. *Id.* at 2.
20. Linda Ledrey, Diana Faugno & Pat Speck, SANE: Advocate, Forensic Technician, Nurse? 27 J. of Emergency Nursing 91, 92 (2001).
21. Coonrad, *supra* note 18, at 33.
22. Teri Breuer, Note, *The End of Frye is the Beginning of Successful Sexual Assault Prosecution*, S. Cal. Rev. L. & Women's Stud. 333, 335 (1992).
23. A Registered Nurse typically does not perform pelvic exams in her everyday practice. This is a skill generally performed by physicians and nurse practitioners. This skill must be learned by the SANE before she can complete the forensic exam. Practice, after the training program, is required to attain proficiency with the pelvic exam.
24. Anne Coonrad & Rena Rovere, *Forensic Nurse Examiner of the Northeast Core Curriculum*, 1998 (unpublished manuscript, on file with author).
25. *Id.*
26. *Morehouse*, 5 A.D.3d at 928; *Rogers*, 780 N.Y.S.2d at 397.
27. *Morehouse*, 5 A.D.3d at 929; *Rogers*, 8 A.D.3d at 892.
28. *Morehouse*, 5 A.D.3d at 926.
29. *Id.* at 928.
30. *Id.*
31. *Id.* at 929.
32. *Id.* at 928.
33. *Morehouse*, 5 A.D.3d at 929.
34. *Id.*
35. *Rogers*, 8 A.D.3d at 889.
36. *Id.* 891.
37. *Id.* at 892.
38. The SANE provider in the *Rogers* case was Rena Rovere FNP-C SANE. Ms. Rovere has been a nurse for over 20 years, is a Clinical Nurse Specialist (masters prepared) in the emergency room at Albany Medical Center Hospital, as well as a Family Nurse Practitioner (post graduate certificate). Ms. Rovere has lectured extensively on trauma nursing as well as forensic nursing. She has been a SANE since 1996. Ms. Rovere has examined hundreds of victims of sexual violence.
39. See *Rogers* decision.
40. *Velazquez v. Commonwealth*, 543 S.E.2d 631 (Va. 2001); *see also Velazquez v. Commonwealth*, 557 S.E.2d 213 (Va. 2002).
41. *Velazquez*, 543 S.E.2d at 635.
42. *Id.* at 636.
43. *See also Chevez v. State*, 2000 WL 1618459 (holding the trial court did not abuse its discretion when it admitted testimony of sexual assault nurse examiner); *State v. Shipley*, 1997 WL 21190 (Tenn. Crim. App. 1997) (holding the trial court did not abuse its discretion when it limited the scope of the expert's testimony to that which the examiner stated she had knowledge of. The defense attempted to elicit expert testimony from sexual assault nurse examiner regarding percentage of false reports in children. The examiner testified she did not know the answer to that question, the state objected and the court sustained the objection as being outside the scope of her expertise); *Gonzales v. State*, 1991 WL 67061 (Tex. CT. App. 1991) (holding the trial court did not abuse its discretion when the sexual assault nurse examiner testified as to her findings. The defendant failed to object and on appeal was arguing ineffective assistance of counsel. The court held, based on the testimony given, the witness was qualified to give an expert opinion even though the witness was not formally qualified as an expert).
44. *Velazquez*, 557 S.E.2d at 219.
45. *Id.*
46. *Id.*
47. *Id.*

48. *Id.*

49. *Dufel v. Green*, 84 N.Y.2d 795, 798, 647 N.E.2d 105, 107, 622 N.Y.S.2d 900 (N.Y. 1995).

50. *Meiselman v. Crown Heights Hospital*, Inc., 285 N.Y. 389, 396, 34 N.E.2d 367, 370 (N.Y. 1941).

51. *People v. Munroe*, 307 A.D.2d 588, 591, 763 N.Y.S2d 691, 695 (3d Dep't 2003).

52. *Meiselman*, 285 N.Y. at 398. *See also People v. Munroe*, 307 A.D.2d at 591, 763 N.Y.S.2d 691, 695 (3d Dep't 2003).

53. *Meiselman*, 285 N.Y. at 398, 34 N.E.2d at 371.

54. *Dougherty*, 163 N.Y. 527, 536, 57 N.E. 757, 760 (N.Y. 1900); *Dufel*, 84 N.Y.2d at 798, 647 N.E.2d at 107.

55. *People v. Brown*, 97 N.Y.2d 500, 505, 769 N.E.2d 1266, 1269 (N.Y. 2002).

56. *Meiselman*, 285 N.Y. at 396, 34 N.E.2d at 370.

57. Fed. R. Evid. 703 (discussing factors the court will evaluate when proposed expert testimony is proffered: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect).

58. *People v. Sugden*, 35 N.Y.2d 453, 456, 323 N.E.2d 169, 173, 363 N.Y.2d 923, 929 (N.Y. 1974).

59. *Cassano v. Hagstrom*, 5 N.Y.2d 643, 646, 159 N.E.2d 348, 349, 187 N.Y.S.2d 1, 3 (N.Y. 1959).

60. *Borden v. Brady*, 92 A.D.2d 983, 984, 461 N.Y.S.2d 497, 498 (3d Dep't 1983).

61. *People v. Wesley*, 83 N.Y.2d 417, 422, 633 N.E.2d 451, 454, 611 N.Y.2d 97, 100 (N.Y. 1994).

62. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) (on remand, the court set out a two-part test: "[W]e must determine nothing less than whether the experts' testimony reflects scientific knowledge, whether their findings are derived by the scientific method, and whether their work product amounts to good science. . . . Second, we must ensure that the proposed expert testimony is relevant to the task at hand.").

63. *Wahl v. American Honda Motor Company*, 181 Misc. 2d 396, 398-399, 693 N.Y.S.2d 875, 877-878 (N.Y. Sup. Ct. 1999).

64. *People v. Guerra*, 690 P.2d 635, 656 (Cal. 1984).

65. Graham, *Relevancy and the Exclusion of Relevant Evidence: Admissibility of Evidence of a Scientific Principle or Technique—Application of the* Frye *Test*, 19 Crim. L. Bull. 51, 52 (1983).

66. Anne Coonrad, *SANE/SAFE Organizing Manual: A Guide for Community Collaboration in Developing Sexual Assault Nurse Examiner & Sexual Assault Forensic Examiner Programs*, 1, 26 (Martha Schultz ed., New York State Coalition Against Sexual Assault (1998).

67. Marilyn Sawyer Sommers, John Schafer, Therese Zink, Linda Hutson & Paula Hillard, *Injury Patterns in Women Resulting From Sexual Assault*, 2 Trauma, Violence & Abuse 240, 242 (2001).

68. *Id.*

69. Sawyer, *supra* note 67 at 243 (finding early use of this method yielded poor identification of injuries, about five to ten percent, following sexual assault because of "inexperience, poor examination technique, or a low index of suspicion on the part of the examiner").

70. *Id*.

71. Sawyer, *supra* note 67 at 243 (discussing a study which used Toluidine blue on 22 women who reported sexual assault and a control group of 22 women following consensual intercourse. Forty percent of the group which reported sexual assault had injury identifiable at the posterior fourchette); *See also* Alison A. Lauber, MD & Micki L. Souma, MD, *Use of Toluidine Blue for Documentation of Traumatic Intercourse*, 60 Obstetrics and Gynecology, 644, 645 (1982).

72. Sawyer, *supra* note 67 at 251.

73. *Id.*

74. Laura Slaughter, MD & Carl R.V. Brown, PhD, *Colposcopy to Establish Physical Finding in Rape Victims*, 166 Obstetrics and Gynecology, 83, 84 (1992) (identifying the use of Colposcope by trained forensic examiners increased injury identification to 87 percent).

75. Sawyer, *supra* note 67 at 242.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Sawyer, *supra* note 67 at 242.

82. Lauber, *supra* note 14 at 645 (finding in a consensual group that five percent were reported to have injury, but the participants reported "dry or painful intercourse").

83. Sawyer, *supra* note 67 at 242 (discussing a study by McCauley which reported injury in 58 percent of the participants who reported being sexually assaulted. However, among the control group of women reporting consensual intercourse, within the last 48 hours, only 10 percent had injury. It should be noted that the control group consisted of multiparious women who gave a history of "dry or painful intercourse.") *Citing*, J. McCauley, G. Guzinski, R. Welch, R, Gorman, & F, Osmers, *Toluidine Blue in the Corroboration of Rape in the Adult Victim*, 5 American J. of Emergency Medicine, 105 (1987).

84. Sawyer, *supra* note 67 at 251 (discussing a later study done by Slaughter that identified 68 percent of injuries in those who reported sexual assault and only 11 percent in the control group); Sawyer, *supra* note 67 at 254 (however, Sawyer is critical of Slaughter's study because the control group included those who first reported sexual assault then later recanted—48 of 75. Additionally, the consensual group was examined within 24 hours of intercourse, as compared to the participants who reported sexual assault where they could be examined up to 72 hours after the assault. Lastly, the investigators in the Slaughter study both "performed the exams and evaluated the data." Despite the limitations, this study did provide the first "large scale evaluation of Colposcope as a diagnostic means to determine consensual versus non-consensual sex.") *See also* Laura Slaughter, MD, Carl R.V. Brown, PhD, Sharon Crowley, MN & Roxy Peck, PhD, *Patterns of Genital Injury in Female Sexual Assault Victims*, 175 American J. of Obstetric and Gynecology, 609, 610 (1997).

85. The New York State Division of Justice Services maintains a listserve for SANE providers and other interested parties.

86. Posting of Anne Coonrad, ALCSANERN@aol.com, to NYS Div. Of Criminal Justice Svcs., Sexual Assault Examiners L@PEACH.EASE.LSOFT.com (on file with author).

87. *Rogers*, 780 N.Y.S.2d at 397.

88. Posting of Anne Coonrad, ALCSANERN@aol.com, to NYS Div. Of Criminal Justice Svcs., Sexual Assault Examiners L@PEACH.EASE.LSOFT.com (on file with author).

89. E-mail from Rena Rovere FNP-C SANE, Director of SANE Program at Albany Medical Center Hospital, to NYS Div. Of Criminal Justice Svcs., Sexual Assault Examiners L@PEACH.EASE.LSOFT.com (Oct. 12, 2004, 12:26 am) (on file with author).

90. E-mail from Tina Bagley RN SANE-A, Saratoga County, to Anne Coonrad (Oct. 6, 2004, 10:44 am) (on file with author).

91. E-mail from Jennifer Nerone, SANE, Ulster County, to NYS Div. Of Criminal Justice Svcs., Sexual Assault Examiners L@PEACH.EASE.LSOFT.com (Sept. 30, 2004, 08:49 am) (on file with author).

92. E-mail from Judy Specht, RN SANE, Suffolk County, to NYS Div. Of Criminal Justice Svcs., Sexual Assault Examiners L@PEACH.EASE.LSOFT.com (Sept. 29, 2004, 10:32 am) (on file with author).

93. E-mail from Jennifer Clark, RN SANE-A, SANE Coordinator of Columbia/Greene County SANE Program, to NYS Div. Of Criminal Justice Svcs., Sexual Assault Examiners L@PEACH.EASE.LSOFT.com (Oct. 6, 2004, 10:20 pm) (on file with author).

94. E-mail from Tina Bagley, RN SANE, Saratoga County, to Anne Coonrad (Oct. 6, 2004, 10:44 am) (on file with author).

95. E-mail from Karen Carroll-Coleman, RN SANE-A, SANE Coordinator Westchester County SANE Program, to NYS Div. Of Criminal Justice Svcs., Sexual Assault Examiners L@PEACH.EASE.LSOFT.com (Sept. 29, 2004, 08:23 am) (on file with author).

96. E-mail from Nancy Harris, RN SANE-A, SANE Coordinator of Rensselaer County SANE Program, to Anne Coonrad, (Oct. 3, 2004, 7:21 pm) (on file with author).

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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 May 3rd, 2005 to August 30th, 2005. Following its summer recess the New York Court of Appeals resumed hearing oral arguments on September 6, 2005.

SELF-INCRIMINATION PRIVILEGE NOT AVAILABLE FOR PARTNERSHIP

***In re Nassau County Grand Jury Subpoena et al v. Spitzer*, decided May 3, 2005 (N.Y.L.J., May 4, 2005, pp. 1, 2 and 18)**

In a unanimous decision the New York Court of Appeals held that attorneys and other professionals working in a partnership cannot invoke the right against self-incrimination to avoid revealing partnership information. The Court relied upon federal law which has established that the constitutional privilege against self-incrimination is a personal one and cannot be utilized by an organization such as a corporation or a partnership. The Court of Appeals refused to expand the federal rulings by utilizing New York State constitutional principles. In issuing its ruling the Court of Appeals relied upon the United States Supreme Court ruling in *Bellis v. United States*, 417 U.S. 85, 1974. In the case at bar the matter arose from a subpoena duces tecum which was issued against a small Manhattan law firm from which Attorney General Eliot Spitzer was seeking information with respect to auto insurance fraud and personal injury attorneys.

NON-PARTY CANNOT INTERVENE IN CRIMINAL MATTER

***People v. Combest*, decided May 3, 2005 (N.Y.L.J., May 4, 2005, p. 19)**

In a unanimous decision the Court of Appeals denied a motion by a non-party film company to intervene in an appeal in a criminal action which was pending before the Court. The party had argued that it had a direct interest in the outcome of the case and had sought to intervene in the matter. The Court of Appeals noted that the Criminal Procedure Law provides no mechanism for a non-party to intervene or be joined in a criminal case. The only procedure available to a non-party was to file an application for leave to appeal as amicus curiae. The Court further noted that in the instant matter the People had already included the arguments sought to be advanced by the non-party and that in addition some affidavits and other documents from the non-party were contained in the original court file which was submitted to the Court.

The New York Court of Appeals had previously unanimously reversed a defendant's conviction and ordered a new trial because a defendant had been prevented from subpoenaing a film crew's videotape. The videotape had been taken by the Hybrid Films Inc., which was seeking to re-argue and intervene in the Court's prior decision. The matter had involved a homicide case where the defendant claimed that he had acted in self-defense. The defendant had provided a statement to police which had been filmed by a media organization which was working on a court TV project. The defendant had sought the tapes in order to show that his confession was the product of police coercion and trickery. The media organization had invoked the Shield Law and after a hearing was held under Civil Rights Law Section 79-8(c), the Court determined that the tapes did not have to be produced. The Court of Appeals determined, however, that the tapes could have helped the defendant's justification defense as well as his claim that the confession was involuntary.

THIRD-PARTY CULPABILITY EVIDENCE AND LEGAL SUFFICIENCY OF EVIDENCE

***People v. Schulz*, decided May 5, 2005 (N.Y.L.J., May 6, 2005, pp. 1, 2, 18 and 19)**

In a 6-1 decision the New York Court of Appeals determined that the trial court did not abuse its discretion in denying third-party culpability evidence that could have shown that someone other than the defendant committed the robbery. The Court further found no merit to the defendant's claim that the People had failed to prove his guilt of the robbery beyond a reasonable doubt. With respect to the first issue the Court of Appeals relied upon its recent decision *People v. Primo*, 96 N.Y.2d 351 (2001), where it held that before permitting evidence that another party committed the crime for which a defendant is on trial the Court must balance the probity of the evidence against the prejudicial effect to the People.

In the case at bar the defendant had offered a photograph into evidence of a person he alleged was the actual robber. After hearing the defense the trial court determined that there was not a sufficient nexus between the person in the photograph and the crime in question. The Court of Appeals determined that the

trial court was correct in concluding that there was no evidence linking the person in the photograph to the crime in question. In issuing its ruling the Court of Appeals specifically noted, "While evidence tending to show that another party might have committed the crime would be admissible, before such testimony can be received there must be such proof of connection with it, such a train of facts or circumstances as tend clearly to point out someone besides the prisoner as the guilty party."

With respect to the second issue dealing with the sufficiency of evidence the Court found that the People had met the required standard to uphold the conviction in question. The Court noted that a witness had testified to seeing the defendant in the restaurant and the witness had selected the defendant from a police lineup. In a dissenting opinion Judge Rosenblatt felt that the trial court should not have automatically denied a CPL section 440.10 motion without a hearing. Judge Rosenblatt expressed concern that the failure to allow the evidence which was proffered by the defense and certain inconsistencies in the People's case raised a possible concern regarding the defendant's innocence. Judge Rosenblatt, as he had done on a prior occasion, requested prosecutors to re-examine the case. In commenting on the decision however, a representative of the Suffolk County District Attorney's Office stated that they had no doubt that they had convicted the right man.

DEP WATER SUPPLY POLICE HAVE BROAD ENFORCEMENT AUTHORITY

***People v. Van Buren*, decided May 10, 2005 (N.Y.L.J., May 11, 2005, pp. 1, 6, 18 and 19)**

***People v. Geanniton*, decided May 10, 2005 (N.Y.L.J., May 11, 2005, pp. 1, 6, 18 and 19)**

In a 4-3 decision the New York Court of Appeals held that law enforcement officers who were charged with protecting New York City's water supply had broad authority to also ticket motorists who were speeding in various upstate communities. In a majority opinion written by Judge Graffeo, the Court held that a DEP officer who observed the motorist traveling at high speeds in excess of the posted restrictions is justifiably concerned that the driver poses a danger to the watershed because of the increased possibility that an accident could cause oil or other pollutants to seep into the water supply. The majority noted that although the issuance of speeding tickets was not a core function of the DEP police force, the authority granted to them by the Legislature in 1983 was broad enough to cover the activity in question.

The dissenting opinion expressed the view that the DEP officers had no authority to act as police officers outside the limits of New York City and they had exceeded their powers in ticketing upstate citizens.

INVALID TRAFFIC STOP

***People v. Jason Williams*, decided May 10, 2005 (N.Y.L.J., May 11, 2005, p. 19)**

In a unanimous decision the Court of Appeals held that a traffic stop and subsequent search and seizure were invalid because a Buffalo Municipal Housing Officer had exceeded his authority to detain the defendant. The People had conceded that the alleged traffic infractions committed by the defendant and his subsequent seizure had occurred outside the geographical jurisdiction of the Buffalo Municipal Housing Authority offices. They argue, however, that the seizure of the defendant was the equivalent of a citizen's arrest after the defendant had been observed driving without a seatbelt and had been ordered to step out of the car after he told the officers that he did not have a valid driver's license. The Court of Appeals, however, rejected the People's "citizen's arrest argument" and stated:

> We therefore conclude that the traffic stop in this case cannot be validated using the citizen's arrest provisions of the Criminal Procedure Law because the housing authority peace officers were not acting other than as a police officer or a peace officer (CPL 140.35, 140.40 . . .). This, of course, is not to say that an individual employed as a peace officer may never under any circumstances effect a citizen's arrest. We hold only that a peace officer who acts under color of law and with all the accouterments of official authority cannot.

FAILURE TO PROVIDE TIMELY NOTICE BARS INSANITY DEFENSE

***People v. Hill*, decided May 10, 2005 (N.Y.L.J., May 11, 2005, p. 20)**

In a unanimous decision the Court of Appeals affirmed a defendant's conviction for murder in the second degree and held that the trial court's failure to allow a defendant's expert to conduct a psychiatric examination in support of the defendant's insanity defense was properly within the trial judge's discretion since the defendant did not make a timely application regarding his intention to introduce an insanity defense.

In the case at bar the defendant did not request the examination or announce his intention to pursue an insanity defense until the start of jury selection. The Court of Appeals noted that under CPL section 250.10(2) the insanity defense is barred unless timely notice is given to prevent an unfair surprise to the prosecution (citing *People v. Almonor*, 93 N.Y.2d 571 (1999).

CONCURRENT SENTENCES REQUIRED

***People v. Hamilton*, decided June 7, 2005 (N.Y.L.J., June 8, 2005, p. 19)**

In a unanimous decision, the Court of Appeals modified the imposition of consecutive sentences so as to make them run concurrently. The trial court had made a defendant's weapons possession sentence to run consecutively with his sentence for manslaughter and assault. However, the Court of Appeals found that the possession of the weapon was specifically related to the manslaughter conviction and was thus part of a single act, which pursuant to Penal Law section 70.25 required the imposition of concurrent rather than consecutive terms. In rendering its determination, the Court of Appeals relied upon its prior decision in *People v. Sturkey*, 77 N.Y.2d 979 (1991). In its opinion, the Court of Appeals again reiterated that when the provisions of Penal Law section 70.25 apply, the sentencing court has no discretion and concurrent sentences are mandated.

JURISDICTIONALLY DEFECTIVE INFORMATION

***People v. Moore*, decided June 7, 2005 (N.Y.L.J., June 8, 2005, p. 20)**

In a unanimous decision, the Court of Appeals affirmed the dismissal of an information on the grounds that it was jurisdictionally defective since it did not set forth every element of the crime charged. In the case at bar, the defendant had been charged with criminal trespass in the third degree under Penal Law Section 140.10. The Court of Appeals found that the information and supporting deposition failed to allege facts establishing that the campus building defendant entered was in any way fenced or otherwise enclosed in a manner designed to exclude intruders, which was a required element of Penal Law section 140.10. The information was thus legally insufficient and was properly dismissed.

NEW YORK'S PERSISTENT FELONY OFFENDER STATUTE UPHELD

***People v. Rivera*, decided June 9, 2005 (N.Y.L.J., June 10, 2005, pp. 1, 10 and 18)**

In an important and long-awaited decision, the New York Court of Appeals in a 5-2 decision upheld the constitutionality of New York's Persistent Felony Offender Statute under Penal Law section 70.10. The constitutionality of the statute had been attacked because of recent Supreme Court decisions holding that a sentencing judge could not provide an increased sentence unless a jury finding had occurred on the factors in question. Under New York's sentencing structure, once a defendant has been found to be a persistent felony offender based upon his prior criminal history, a sentencing judge may provide an enhanced sentencing if he is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct require extended incarceration and lifetime supervision. Based upon the United States Supreme Court rulings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakeley v. Washington*, 545 U.S. ____, 124 S.Ct. 2531 (2004), defendants had argued that this second discretionary condition violated the United States Supreme Court rulings.

The five judge majority, however, determined that eligibility for persistent felony offender sentencing is based exclusively on whether a defendant had at least two prior felony convictions and that the second prong of the statute simply asked judges to exercise discretion within their traditional role of sentencing. The Court's majority opinion was written by Judge Rosenblatt and dissenting opinions were issued by Chief Judge Kaye and Judge Ciparick. The dissenting opinions concluded that the statute in question considered factors beyond recidivism which were never proven to the jury and that the statute thus runs counter to recent United States Supreme Court interpretations of the Sixth Amendment.

The New York Court of Appeals ruling comes within days of a similar ruling by the United States Court of Appeals, Second Circuit, which reached a similar conclusion to the majority view in the New York Court of Appeals upholding the statute. The Second Circuit rulings were issued in *Brown v. Greiner* and *Rosen v. Walsh* (decided June 3, 2005, N.Y.L.J., June 9, 2005). Although the New York Court of Appeals and the Second Circuit Court of Appeals have upheld New York's Persistent Felony Offender Statute, an ultimate ruling from the United States Supreme Court may still be required before the issue is finally settled.

BASED UPON *RIVERA*, CONSTITUTIONAL ATTACK ON PERSISTENT FELONY OFFENDER STATUTE IS DENIED

***People v. Daniels, People v. Robinson*, decided June 14, 2005 (N.Y.L.J., June 15, 2005, p. 20)**

In a unanimous decision, the New York Court of Appeals dismissed the defendant's *Apprendi* arguments

regarding the constitutionality of New York's Persistent Felony Offender Statute and cited its recent decision in *People v. Rivera* upholding the constitutionality of Penal Law section 70.10.

***People v. West*, decided June 14, 2005 (N.Y.L.J., June 15, 2005, p. 20)**

In a memorandum decision, the Court of Appeals dismissed the defendant's appeal challenging the constitutionality of the Persistent Felony Offender Statute based upon its June 9 decision in *People v. Rivera* discussed above.

NON-APPEARING WITNESS CHARGE

***People v. Williams*, decided June 9, 2005 (N.Y.L.J., June 10, 2005, p. 21)**

In a unanimous decision, the New York Court of Appeals ruled that a trial court had committed reversible error with regard to an instruction involving a missing witness. The People had failed to produce a police officer witness involving a buy and bust operation. Defense counsel had argued during the case that no testimony had been produced from this witness. The Court had instructed the jury that they were not to speculate regarding people who were not called as witnesses and further told them "no one is required to come to court and testify. Don't speculate on their non-appearance or what they might have said if they would have come."

The Court of Appeals concluded that in the context of the case, this instruction constituted reversible error since the central theme of the defense at trial was that the one witness identification was entirely uncorroborated and therefore unreliable. The effect of the Court's charge was essentially to instruct the jury not to consider the defense.

ADMISSIBILITY OF NON-HEARSAY EVIDENCE IN A CONSPIRACY CASE

***People v. Caban*, decided June 14, 2005 (N.Y.L.J., June 15, 2005, pp. 1, 8 and 18)**

In a unanimous decision, the New York Court of Appeals specifically rejected defense claims that hearsay statements of co-conspirators are admissible only when a prima facie case of conspiracy is established independent of the statements. Instead, the Court stated that while the prima facie case of conspiracy must be made without recourse to the declarations sought to be introduced, the testimony of other witnesses or participants may establish a prima facie case. Further, in the case at bar, the Court determined that many of the complained-of statements were in fact non-hearsay with respect to the conspiracy charge and that therefore the People had no obligation to establish a prima facie case of conspiracy in order for the statements to be admissible.

In a secondary issue, the Court also failed to accept the claim of ineffective assistance of counsel regarding the failure to request a charge that a witness was an accomplice as a matter of law. The Court of Appeals therefore affirmed the defendant's conviction of conspiracy to commit murder.

WAIVER OF INDICTMENT

***People v. Lopez*, decided June 16, 2005 (N.Y.L.J., June 17, 2005, p. 19)**

In a unanimous decision, the New York Court of Appeals upheld a waiver of indictment as part of a plea negotiation even though the indictment had been dismissed as being legally defective. In the case at bar, the defendant had waived indictment and pleaded guilty to a Superior Court Information. It was later discovered that the Court had dismissed the original indictment covering the same charges as being defective and the People had not been granted leave to represent. The Court of Appeals, in examining the circumstances of the situation, concluded that the defect in the indictment was a clerical error by which defendant's name was omitted and that the case would have been represented to another grand jury even though the Court did not formally order it. Considering that both sides agreed to dispose of the case by use of a Superior Court Information, the Court of Appeals concluded that the defendant had properly waived indictment, that no further magic words were required and that the defendant's subsequent guilty plea was valid.

PRE-MIRANDA QUESTIONING NOT VIOLATIVE OF DEFENDANT'S CONSTITUTIONAL RIGHTS

***People v. Paulman*, decided June 29, 2005 (N.Y.L.J., June 30, 2005, pp. 1, 2 and 19)**

In a unanimous decision the Court of Appeals affirmed a defendant's conviction where the defendant had made incriminating statements prior to receiving *Miranda* warnings and then made similar admissions after being apprised of his rights. The Court of Appeals in reaching its decision considered the recent Supreme Court ruling in *Missouri v. Seibert*, 124 S. Ct. 2601 (2003). Although the Supreme Court in *Seibert* had suppressed a confession, the Court of Appeals in the case at bar found that the New York situation differed substantially from *Siebert*. The Court noted that the pre-Miranda statement was not elicited through a process of coercive questioning and that there was a break in questioning between the pre-*Miranda* and post-*Miranda* statements.

After framing the issue as whether the two statements the defendant made after he was given *Miranda* warnings and waived his right to remain silent should have been suppressed due to the prior unwarned statement, the Court concluded that the Mirandized statements were admissible under state and federal constitutional standards. In reaching its conclusion the Court of Appeals also relied upon a harmless error analysis.

DEFENDANT'S RIGHT TO IMPEACH PROSECUTION WITNESSES

***People v. Hanley*, decided June 29, 2005 (N.Y.L.J., June 30, 2005, p. 18)**

In a unanimous decision the Court of Appeals reversed a robbery conviction because the trial court had refused to permit testimony by a defense witness who was expected to impugn the credibility of some of the prosecution witnesses. Two bartenders had testified against the defendant and the defense wished to call another bartender who was expected to testify that the two robbery victims were considered dishonest and had bad reputations in the community. The Court of Appeals held that a defendant has a right to present a witness with personal knowledge of complainant's bad reputation for truthfulness and veracity. The trial court's refusal to allow the testimony in question was highly prejudicial and deprived the defendant of a fair trial.

COURT OFFICER'S ACTIONS DID NOT USURP TRIAL COURT'S AUTHORITY

***People v. Kelly*, decided June 29, 2005 (N.Y.L.J., June 30, 2005, p. 18)**

In a unanimous decision the Court of Appeals held that a Court Officer's unauthorized actions did not violate a defendant's constitutional right to trial by jury and supervision by a trial judge. In the case at bar a Court Officer, while alone with the jury during deliberations, conducted an unauthorized demonstration on the weapon involved in the murder trial. The defendant claimed that the Court Officer's actions amounted to a "mode of proceedings" error which could be considered on appeal even though not preserved. In making his argument the defendant relied upon the 1985 Court of Appeals decision in *People v. Ahmed*, 66 N.Y.2d 307.

The Court of Appeals, however, distinguished the instant matter from *People v. Ahmed*, finding that there was no "mode of proceedings" error in the case at bar. The trial judge had delegated no authority to the Court Officer and his actions were strictly unauthorized. Further, when the trial judge learned of the incident he immediately summoned the attorneys and discussed the situation. None of the attorneys raised a specific objection to the Court Officer's actions and they were satisfied with the Court's curative instructions to the jury. In conclusion the Court of Appeals found that the impropriety that occurred was protestable but unprotested, curable and cured.

CPL SECTION 180.50 INQUIRY

***People v. Hunter*, decided June 30, 2005 (N.Y.L.J., July 1, 2005, p. 19)**

In a unanimous decision the Court of Appeals affirmed a defendant's guilty plea to assault in the third degree. The People had originally reduced felony charges to misdemeanor charges and the Trial Court had failed to make the required CPL reduction inquiry under section 180.50. That section requires the Court to determine whether the facts in evidence provide a basis for reduction to a non-felony offense. The Court of Appeals concluded, however, that by his guilty plea the defendant forfeited and waived any claim that the criminal court should have conducted the inquiry in question, citing *People v. Hansen*, 95 N.Y.2d 227 (2000).

***People v. Johnson*, decided June 30, 2005 (N.Y.L.J., July 1, 2005, p. 20)**

In another case involving the CPL section 180.50 inquiry, the Court of Appeals affirmed a defendant's guilty plea to the misdemeanor charge of criminal contempt in the second degree. The defendant had also originally been charged with a felony count of intimidating a victim or witness in the third degree. Before taking the misdemeanor plea, the Court had dismissed the felony charge upon the prosecutor's motion. On appeal the defendant had argued that the trial court had failed to make the required CPL section 180.50 inquiry to determine whether the available facts and evidence provide a basis for charging a non-felony offense. The Court of Appeals, however, ruled that CPL section 180.50 was not applicable to the circumstances herein since the felony charge was not reduced but was dismissed altogether. The defendant had pleaded guilty to a separately charged misdemeanor so that no CPL 180.50 inquiry was required.

DENIAL OF *MAPP/DUNAWAY* MOTION WITHOUT A HEARING

***People v. Lopez*, decided June 30, 2005 (N.Y.L.J., July 1, 2005, p. 20)**

In a unanimous decision the Court of Appeals found that no reversible error had been committed in denying the *Mapp/Dunaway* portion of a defendant's suppression motion without a hearing. The Court of Appeals found that based upon the face of the pleadings and the context of the defendant's motion, the alle-

gations in support of his motions were too conclusory to warrant a hearing. In the case at bar the defendant had given a written post-arrest statement that described events very close in time and place to one of the charged crimes. The statement on its face showed probable cause for the defendant's arrest, and the defendant had failed to controvert it in his motion papers. Under these circumstances the Court of Appeals found that the trial court was within its discretion to decide the issue without a hearing.

UNSEALING OF CRIMINAL RECORDS

***Katherine B. v. Cataldo*, decided July 6, 2005 (N.Y.L.J., July 7, 2005, pp. 1, 8 and 19)**

In a unanimous decision the Court of Appeals held that CPL section 160.50 did not authorize a trial court to make sealed records available to a prosecutor for purposes of making sentencing recommendations. In a case arising from the arrest of protesters at a midtown Manhattan rally, the Court held that CPL section 160.50, which authorized the sealing of criminal records, was to be strictly construed and the records could only be unsealed pursuant to the few narrow exceptions specified in the statute. In the case at bar the issue was whether the trial court could rely upon the law enforcement exception which is specified in CPL section 160.50(1)(d)(ii). The Court of Appeals, in analyzing the history of the sealing statute, concluded that an effort was made to balance the rights of former defendants to restrict access to official records and papers in favorably terminated criminal proceedings, against interests of various law enforcement agencies and representatives in the same materials.

The Court found that the law enforcement exception had as its primary focus the unsealing of records for investigative purposes. Granting the prosecutor's request to unseal criminal records for the purpose of making sentencing recommendations was not within the investigatory purpose of the law enforcement exception and thus the trial court had exceeded its authority in the case at bar.

MISLEADING INFORMATION SUPPLIED TO GRAND JURY

***People v. Hill*, decided July 6, 2005 (N.Y.L.J., July 7, 2005, p. 20)**

In a 5-2 decision the Court of Appeals dismissed an indictment where the prosecutor had provided a misleading answer to the Grand Jury. In the case at bar the defendant had furnished the prosecutor with a list of alibi witnesses seeking to have them testify before the Grand Jury. The prosecutor then told the Grand Jury that he had received a request from the defense asking that the Grand Jurors consider and vote as to whether they wanted to hear from the witnesses. The prosecutor provided only the names of the witnesses without revealing that they were alibi witnesses. Further, when the foreman of the Grand Jury asked the prosecutor whether they could ask anything about the witnesses, the prosecutor replied, "I can't tell you anything. I don't know."

The Court of Appeals majority concluded that under the circumstances of the case, the prosecutor gave an inaccurate and misleading answer to the Grand Jury's legitimate inquiry, thus substantially undermining the integrity of the Grand Jury proceeding and potentially prejudicing the defendant. The indictment was thus properly dismissed with leave to re-present. Judges Robert Smith and Read dissented, arguing that although the prosecutor had committed error it was not sufficient to impair the integrity of the proceeding and to require dismissal of the indictment.

INDEPENDENT SOURCE HEARING REQUIRED

***People v. Wilson*, decided July 6, 2005 (N.Y.L.J., July 7, 2005, p. 20)**

In a unanimous decision the Court of Appeals ordered a new trial to be proceeded by an independent source hearing. The People's eyewitness identified the defendant in a pre-trial line-up which occurred almost immediately after a police officer had shown him the defendant's photograph. The defendant had moved to suppress the eyewitness's identification as well as his prospective in-court identification. The trial court, however, denied the defendant's motion, finding that the line-up identification testimony was untainted by the revealing of the photograph. The trial court did not consider whether there was an independent basis for any in-court identification. The Court of Appeals held that the trial court had committed reversible error in failing to determine whether there was an independent basis for any in court identification. The Court of Appeals relied upon its prior decisions in *People v. Burts*, 79 N.Y.2d 20 (1991) and *People v. James*, 67 N.Y.2d 662 (1986) in reaching its determination. The matter was thus remanded so that an independent source hearing could be conducted prior to the re-trial.

Sandra Day O'Connor Retires from the United States Supreme Court and Judge John Roberts Appointed to Fill Chief Justice Vacancy

In early July, Justice Sandra Day O'Connor announced her retirement from the United States Supreme Court. Justice O'Connor, who was the first woman to serve on the U.S. Supreme Court, served on the court for 24 years and had gained a reputation of being the critical swing vote in many of the 5-4 decisions rendered by the Court. Justice O'Connor, who had reached the age of 75, had rendered long and distinguished service on the Court and her announced retirement immediately set into motion the process for the filling of her vacancy.

At the end of July, President Bush announced the selection of Judge John Roberts to fill the seat in question. Following the recent death of Chief Justice Rehnquist, Judge Roberts was redesignated by President Bush to fill the position of Chief Justice.

Judge Roberts had been sitting on the U.S. Circuit Court of Appeals for the District of Columbia for the last two years. He had previously served as a Deputy Solicitor General in the U.S. Department of Justice and as an Associate Counsel to President Reagan. A graduate of Harvard Law School, he served from 1981-1982 as a law clerk to Chief Justice William Rehnquist. Judge Roberts is 50 years of age and he and his wife Jane have two young children.

Judge Roberts appears to have an outstanding legal background, having argued some 39 cases before the U.S. Supreme Court and commentators have placed him as being in the moderate-conservative grouping of judges. Hearings on his confirmation commenced before the United States Senate in early September and he is expected to join the Court when it resumes its activities in early October.

We thank and congratulate Justice O'Connor on her years of distinguished service and wish Judge Roberts well in his new endeavors.

Recent United States Supreme Court Decisions Dealing with Criminal Law

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

Within the last few months the United States Supreme Court has continued to issue important rulings in the area of criminal law. In late May by a 5-4 vote it refused to intervene in state proceedings which had imposed the death penalty upon some 50 Mexican nationals who had argued that they were improperly denied their legal rights and assistance from their Mexican consulates in violation of international treaties. Also in late May by a 7-2 vote the Court did find that it was unconstitutional to force capital murder defendants to appear before juries in chains and shackles.

On June 1, 2005, it was also announced that the Supreme Court had upheld a federal law which required state prisons that were receiving federal monies to accommodate the various religious affiliations of inmates. The case involved three Ohio prisoners who sued under a 2000 federal law, claiming they were denied access to religious literature and ceremonial items. The Court's unanimous ruling decided only the narrow issue of whether the federal law as written was an unconstitutional government promotion of religion. The Court held it was not and that the states must accommodate prisoners' religious beliefs regarding such matters as special haircuts and meals unless wardens can show that the government has a compelling reason not to do so. Also on June 1, the Supreme Court granted permission to consider a death penalty case from Kansas. The issue to be considered is whether a death penalty law that requires juries to sentence a defendant to death rather than life imprisonment when the evidence for and against imposing death is about equal is constitutional. The highest court in Kansas found the law unconstitutional and the United States Supreme Court has now agreed to hear the matter with a decision expected sometime next year.

Also on June 1, 2005, the Supreme Court overturned the Arthur Andersen conviction involving accounting fraud. The Court held that the jury had been improperly instructed with respect to a crime which involves "knowingly and corruptly persuading others to withhold documents from an official proceeding." The Court found that a crime could not be established from the fact that an accounting firm advised a client to withhold documents requested by the government.

On June 6, 2005, the High Court also issued an important ruling on the use of marijuana for medical purposes. The Supreme Court ruled in a 6-3 decision that the federal law which prohibited the use of marijuana was supreme over any state regulation that attempted to authorize its use. The majority ruled that the federal government could force its total ban on marijuana in the 11 states which have passed legislation legalizing marijuana for medical purposes. The Court's majority opinion was written by Justice John Paul Stevens and the dissent was composed of Justices O'Connor, Rehnquist and Thomas.

On June 20, 2005, the United States Supreme Court also expanded the obligations of defense counsel in criminal cases setting aside a death penalty verdict for a defendant because lawyers failed to search files on his past conviction for mitigating evidence. The 5-4 decision in effect expanded the doctrine of Ineffective Assistance of Counsel, and has placed additional burdens on defense attorneys. This ruling was issued in the case of *Rompilla v. Beard.*

The decisions issued by the United States Supreme Court are discussed in detail in the student case notes prepared by students from St. John's Law School.

U.S. COMPLIANCE WITH INTERNATIONAL COURT OF JUSTICE (ICJ) DECISIONS—With respect to Mexican nationals on death row in Texas, a memorandum by President George W. Bush, as well as the ICJ decision in *Case Concerning Avena and other Mexican Nationals*, create new opportunities for this case in state courts, therefore the writ of certiorari is dismissed.

***Jose Ernesto Medellin v. Doug Dretke, Dir., Texas Dep't of Criminal Justice, Corr. Inst. Div.*, 125 S. Ct. 2088, No. 04-5928, 2005 U.S. LEXIS 4344 (2005)**

Petitioner, a Mexican national, confessed to, and was convicted of the gang rape and murder of two girls in 1993. He was subsequently sentenced to death. After the Texas Court of Criminal Appeals affirmed the conviction, Medellin filed a habeas corpus action alleging that he was not notified of his right to consular access pursuant to the Vienna Convention. This claim was rejected by both the state trial court and the Texas Court of Criminal Appeals. Medellin then filed a federal habeas corpus petition. While this petition was awaiting a certificate of appealability (COA) for the Court of Appeals for the Fifth Circuit, the ICJ issued its decision in the *Case Concerning Avena and other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J 128 (Mar. 31). The ICJ insisted

that the U.S. must reexamine the convictions of the affected Mexican nationals to determine whether the violations of the consular access provisions of the Vienna Convention caused actual prejudice. *Id.* at 121-122, 153. The Fifth Circuit denied Medellin's COA without giving effect to the ICJ judgment.

After certiorari was granted by the Supreme Court, President George W. Bush issued a memorandum which dismissed international obligations under the *Avena* judgment by "having State courts give effect to the decision in accordance with general principles of comity." George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005). Medellin filed another state habeas corpus claim after this memorandum was issued, days before the oral arguments in the Supreme Court. Taking into consideration the President's memorandum and the *Avena* decision, the Supreme Court dismissed the writ of certiorari.

The Supreme Court held that while there were several issues that could preclude federal habeas corpus relief for Medellin, it would be most prudent to dismiss the writ of certiorari and allow the newly filed case to be adjudicated in the state courts. The Court acknowledged, however, that Medellin must establish that he suffered actual prejudice as a result of not being informed of his consular rights. Given that he confessed to the crimes, there is no indication that he would not have waived his right, had he been informed of his right to consular access. In order to obtain a COA, Medellin must establish that a treaty violation could satisfy the standard of the denial of a constitutional right. *Medellin v. Dretke*, 125 S. Ct. at 2091. These issues, as well as whether the Vienna Convention creates individual rights, should be decided by the state habeas court before they are debated in the Supreme Court.

It is well established that a petitioner must exhaust all possible remedies in state court before filing for federal habeas relief. Here, given the *Avena* judgment and the President's memorandum, there is the possibility that the Texas courts will provide the relief sought by Medellin. *Id.* at 2092. Justice Ginsburg in her concurring opinion agrees that it is not necessary for the Court to consider the several threshold issues presented by this case at this time, and raises the point that doing so would likely interfere with the state court proceedings that were filed after the President issued his memorandum. *Id.* at 2093. The dissent, however, insists that issues including whether the U.S. should give effect to the ICJ decision and whether an individual is entitled to invoke a treaty as law should be decided at this time.

By Kate McGauley

INEFFECTIVE ASSISTANCE OF COUNSEL—A defense attorney has a duty to make a reasonable effort to obtain and review material on which that attorney knows the prosecution will be likely to rely as evidence of aggravation during the sentencing phase of the trial.

***Rompilla v. Beard*, 125 S. Ct. 2456; 73 U.S.L.W. 4522; 2005 U.S. LEXIS 4846**

Petitioner was convicted of murder and related offenses for repeatedly stabbing the victim and setting him on fire. Two public defenders represented him. At the indictment stage, the prosecutors informed the court of their intent to request the death penalty. After obtaining a conviction, the prosecution sought to prove three "aggravating factors" to warrant the death penalty: (1) that the murder occurred while committing another felony; (2) that the murder was committed by torture; and (3) that petitioner had a history of violent felony convictions. Defense counsel presented a case consisting of the testimony of the defendant's family that demonstrated his character and rehabilitation. Petitioner was subsequently sentenced to death.

Petitioner appealed under the Pennsylvania Post Conviction Relief Act, claiming ineffective assistance of counsel. The post conviction court found that the trial attorneys were not ineffective, and the Supreme Court of Pennsylvania affirmed. Petitioner then petitioned for habeas corpus under 28 U.S.C. § 2254 in Federal District Court, asserting ineffective counsel. The District Court found the Pennsylvania Supreme Court had unreasonably applied *Strickland v. Washington*, 466 U.S. 688 (1998), and held that the defense attorneys were in fact ineffective counsel. The Third Circuit reversed and denied a rehearing en banc. The Supreme Court granted certiorari and reversed.

The Supreme Court held that the state court's decision to apply the rule of *Strickland* was not only incorrect, but "objectively unreasonable." *Wiggins v. Smith*, 539 U.S. 510, 528 (2003). The Supreme Court stated the performance of an attorney should be measured with an "objective standard of reasonableness" under prevailing norms. *Strickland,* 466 U.S. at 707. According to the Court, an attorney is ineffective or deficient when, during the course of representing a client, the attorney fails to adhere to this standard.

The District Court stated that although defense counsel did not discover relevant information that would be effective at trial, he did make efforts seeking mitigation material. The District emphasized the Supreme Court's similar decision in *Wiggins.* The Supreme Court distinguished these facts from that of *Wiggins*, and stated "looking at a file the prosecution

says it will use is a sure bet: whatever may be in that file is going to tell defense counsel something about what the prosecution can produce." *Rompilla*, 125 S. Ct. at 2467. The defense attorneys failed to review reports that the prosecution informed them would be used at sentencing. This demonstrated that defense counsel failed to prepare properly to effectively present a rebuttal.

The Supreme Court held the Petitioner was prejudiced by the errors of the defense counsel. The Supreme Court determined the file contained "a range of mitigation leads that no other source had opened up." *Id.* at 2459. The Supreme Court concluded that it would be possible that this information would have influenced the jury and the "likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." *Rompilla*, 125 S. Ct. at 2459 (citing *Strickland*, 466 U.S. at 694).

By Jamie Begley

PROHIBITION OF MEDICAL MARIJUANA—The U.S. Congress has the authority, under the Commerce Clause, to regulate and prohibit the use of marijuana that is cultivated locally for medicinal purposes and any contrary local regulation must give way to federal legislation.

Gonzales v. Raich, 125 S. Ct. 2195, 73 U.S.L.W. 4407 (2005)

Respondents, Angel Raich and Diane Monson, were two California residents who had used marijuana to treat their serious medical conditions pursuant to their doctors' recommendations for several years. Respondents used the marijuana in accordance with California's Compassionate Use Act, which allows seriously ill patients to cultivate marijuana for medicinal purposes with the approval of a physician. Cal. Health & Safety Code § 11362.5 (2005). In 2002, federal Drug Enforcement Administration (DEA) agents destroyed Respondent-Monson's cannabis plants. The agents contended that her use of marijuana was unlawful under the federal Controlled Substances Act (CSA), which prevents the production, distribution, and use of marijuana for which there is an interstate market. 21 U.S.C. § 801 (2005).

Respondents sought injunctive and declaratory relief against the enforcement of the CSA. The District Court for the Northern District of California denied Respondents' motion for an injunction, holding that the application of the CSA to the noncommercial possession and use of medicinal marijuana exceeded Congress' power under the Commerce Clause. The Court of Appeals for the Ninth Circuit reversed and ordered the District Court to issue a preliminary injunction. The Supreme Court granted certiorari and vacated the judgment of the Court of Appeals.

The Supreme Court held that Congress' power under the Commerce Clause includes the authority to prohibit local cultivation and possession of marijuana. Respondents argued that the application of the CSA to their intrastate, non-commercial use of marijuana for medical purposes was an unconstitutional exercise of Congress's Commerce Clause authority. Furthermore, respondents contended that they would suffer irreparable harm resulting from their deprivation of marijuana's therapeutic value.

The Supreme Court emphasized that "even if [respondents'] activity [is] local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). The Court reasoned that Congress had a rational basis for concluding that the exclusion of homegrown marijuana from the CSA's federal regulatory scheme would impact the commercial market for illegal marijuana. The "likelihood that the high demand in the interstate market [would] draw . . . marijuana [which is cultivated locally for medicinal purposes] into that market" served as an adequate justification for Congress's regulation. *Raich,* 125 S. Ct. at 2207. In light of the "enforcement difficulties [in] distinguishing between marijuana cultivated locally and marijuana grown elsewhere and concerns about diversion into illicit channels," the Supreme Court determined that failing to regulate medicinal marijuana "would leave a gaping hole in the CSA." *Id.* at 2209. The Court concluded that although the application of the CSA "ensnares some purely intrastate activity," such regulation is necessary to the maintenance of the larger regulatory scheme aimed at eliminating illegal commercial transactions of drug traffickers in the interstate market for marijuana. *Id.* at 2209.

By Ariana Gambella

RACIALLY DISCRIMINATORY JURY SELECTION—Capital murder conviction overturned where prosecution used race to eliminate potential jurors.

Thomas Joe Miller-El v. Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 125 S. Ct. 2317, 162 L. Ed. 2d 196, 2005 U.S. LEXIS 4658, 73 U.S.L.W. 4479 (2005)

Petitioner Miller-El, an African-American, was convicted of a 1985 murder in a Texas state court and was

sentenced to death. He objected to the prosecution's peremptory strikes of ten otherwise qualified African-American potential jurors, claiming that the strikes had been improperly based on race. In fact, the government eliminated 91% of the qualified African-Americans from the jury, and only 12% of the non-African Americans. The government proffered race-neutral rationales for each of its peremptory strikes, arguing that its decision to strike the ten was based on the prosecutors' impressions of those potential jurors' attitudes about the death penalty.

At the time of Miller-El's initial objection, the Texas trial court denied his request for a new jury. Miller-El sought habeas corpus relief under 28 U.S.C. § 2254, but was denied by the U.S. District Court for the Northern District of Texas and the Fifth Circuit Court of Appeals. When the Fifth Circuit denied Miller-El a certificate of appealability, the U.S. Supreme Court granted certiorari, and ultimately granted the certificate. Upon appeal, the Fifth Circuit rejected the *Batson* claim on its merits. The Supreme Court granted certiorari once more, and here reversed the Fifth Circuit's ruling.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254, allows a petitioner to obtain relief only by showing that the state court's factual determination was "an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." *Miller-El,* 125 S. Ct. at 2325. The Supreme Court found that Miller-El met that substantial burden of proof. The Court held that the government's actions in using its peremptory challenges to strike 10 of 11 qualified African-American potential jurors constituted clear racial discrimination which deprived Miller-El of his right to a fair trial. The Court reversed his conviction and ordered a new trial.

The Court pointed to several factors behind its conclusion that the government's actions were based on race, and not on concerns about potential jurors' views on the death penalty, noting, "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Id*. at 2325. Further, the prosecution targeted African-Americans with graphic and misleading voir dire questions, calculated to evoke particular reactions that would provide prosecutors with seemingly legitimate reason to strike those potential jurors. The Court also cited the prosecution's decision at certain moments to shuffle the order in which potential jurors were called so that consideration of black panelists was delayed or avoided altogether. Finally, the Court found that the District Attorney's Office had a documented history of systematically excluding blacks from juries.

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented, objecting to the majority's consideration of juror questionnaires, jury shuffling, and other evidence and theories that were never presented to the state courts. The AEDPA, the dissent asserted, limits the Court's factual review to the evidence considered below, and "does not permit habeas petitioners to engage in this sort of sandbagging of state courts." *Id*. at 2347. The dissenters argue that Miller-El could not have prevailed on his *Batson* claim based on the evidence presented to the state courts.

By Elizabeth Brown

FEDERAL LAW WHICH REQUIRES STATE PRISONS THAT ARE RECEIVING FEDERAL MONIES TO ACCOMMODATE THE VARIOUS RELIGIOUS AFFILIATIONS OF INMATES IS CONSTITUTIONAL—Section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA) does not violate the Establishment Clause of the First Amendment.

***Cutter v. Wilkinson*, 125 S. Ct. 2113; 161 L. Ed. 2d 1020; 2005 U.S. LEXIS 4346; 73 U.S.L.W. 4397**

Section 3 of RLUIPA provides that "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the burden can survive strict scrutiny review. 42 U.S.C. § 2000cc-1(a) (2005). Petitioners, current and former inmates of Ohio correctional facilities, complained that prison officials violated RLUIPA by failing to accommodate their religious exercise. Petitioners were adherents of non-traditional religions, including Satanism, Wicca, Asatru, and Church of Jesus Christ Christian. Specifically, petitioners claimed, *inter alia,* that respondents barred religious ceremonial items, failed to provide chaplains trained in petitioners' faiths, and denied them access to religious literature. Respondents commenced a facial challenge against RLUIPA, claiming that the law violated the Establishment Clause of the First Amendment.

The United States District Court for the Southern District of Ohio rejected respondents' facial challenge, holding that RLUIPA did not violate the Establishment Clause and that the compelling interests of safety and security would outweigh requests for religious accommodations. On appeal, the Court of Appeals for the Sixth Circuit reversed, holding that RLUIPA violated the Establishment Clause by advancing religion. There, the court reasoned that RLUIPA gave greater protection to religion than other constitutionally protected rights and that RLUIPA would encourage inmates to become religious in order to enjoy rights superior to those of non-religious prisoners. The Supreme Court granted certiorari and reversed.

The Supreme Court held that on its face, RLIUPA was consistent with the Establishment Clause because it qualified as a permissible legislative accommodation of religion. In the past, the Court has stated that removing government-imposed barriers to religious exercise does not create an unconstitutional endorsement of religion, but rather a permissible "accommodation of the exercise of religion." *Corporation of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 349 (1987) (O'Connor, J., concurring in judgment). RLIUPA qualifies as a permissible accommodation for religion because it "alleviates exceptional government-created burdens on private religious exercise" encountered by institutionalized persons. *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 705 (1994). The Court was careful to note that in order to properly apply RLUIPA, courts must neutrally administer the law among different faiths and take into account the potential burden of an accommodation on non-beneficiaries. *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2121 (2005) (Thomas, J., concurring in judgment).

The Court disagreed with the Sixth Circuit, explaining that RLIUPA did not elevate religious accommodations above institutional requirements of safety and security. The legislative history of RLIUPA shows that the heightened scrutiny standard should be considered with "due deference to the expertise of prison and jail administrators." *Cutter,* 125 S. Ct. at 2123 (citing S. REP. NO. 103-111, at 10 (1993)). Furthermore, the Court explicitly stated that prison security is a compelling interest. *Id.* at 2124, n.13. The Court pointed out that for over a decade, the federal Bureau of Prisons has been subject to the same level of scrutiny required by RLIUPA, and under that standard it has not faced an unreasonable burden. *Id*. at 2124-25. Finally, the Court noted that the Prison Litigation Reform Act of 1995 would limit the potential for frivolous litigation. *Id.* at 2124-25.

By Andrew Kepple

JURY INSTRUCTIONS—Juries must be instructed on the nexus between intent and obstruction of justice and that defendants must intend to obstruct justice to be found guilty.

Arthur Andersen LLP v. United States, 125 S. Ct. 2129; 161 L. Ed. 2d 1008, 2005 U.S. LEXIS 4348, 73 U.S.L.W. 4393 (2005).

Petitioner provided accounting services, including auditing publicly filed financial statements for Enron Corp. during the 1990s. During that time, petitioner had a formal document retention policy in place which called for keeping only information relevant to petitioner's work. The policy further stated that no documents should be destroyed if petitioner was notified of pending litigation. Evidence showed that at least one member of petitioner's in-house counsel was aware that an SEC investigation into work done for Enron was highly likely. The SEC later requested certain information and documents from Enron, who forwarded a copy of the request to the petitioner. Over the following days, petitioner's management instructed staff to follow the document retention policy with regard to Enron. Document destruction commenced and continued for several days despite growing evidence that litigation against petitioner was imminent. After petitioner received a subpoena from the SEC, document destruction ceased.

In early March 2002, petitioner was indicted for "knowingly, intentionally and corruptly persuad[ing]" employees to destroy and withhold documents to be used in regulatory and criminal proceedings. Instead of using the standard jury pattern instruction for the term "corruptly," which was defined as "knowingly and dishonestly" subverting a proceeding, the District Court instructed the jury to convict if the petitioner intended to "subvert, undermine or impede" government fact finding. On these instructions, the jury found petitioner guilty. The District Court denied petitioner's motion for an acquittal, and the Court of Appeals for the Fifth Circuit affirmed. The Supreme Court granted certiorari and reversed.

The Supreme Court reversed the Fifth Circuit on two grounds. The first was that the jury instructions communicate the consciousness of wrongdoing. In reversing the Fifth Circuit, the Supreme Court held that the plain English meaning of the statute required a person's consciousness of the criminality of their acts. *Arthur Andersen*, 125 S. Ct. at 2135. The Court reasoned that persuading someone to not cooperate with authorities was not criminal per se, and that the jury instructions could not allow a conviction for actions the petitioner believed to be innocent. *Id.* at 2135.

The second reason for overturning the Fifth Circuit was that the jury instructions did not require a nexus between the persuasion and a specific judicial proceeding. *Id.* at 2136. The Supreme Court had previously held that "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *United States v. Aguilar*, 515 U.S. 593, 599 (1995). The reasoning behind the Court's holding was that defendants should have known that their actions would impede an actual proceeding.

The Court concluded that defendants should not be foreclosed from acting by the possibility of a "hypothetical future proceeding." *Arthur Andersen*, 125 S. Ct. at 2137 n.10.

By Robert Graham

SHACKLING OF DEFENDANT—Use of visible shackles was unconstitutional because it created a presumption of guilt and no valid explanation for their use was presented.

***Carman Deck v. United States*, 125 S. Ct. 2007, 161 L. Ed. 2d 953, 2005 U.S. LEXIS 4180, 73 U.S.L.W. 4370 (2005)**

Appellant was convicted of capital murder after he robbed, shot and killed an elderly couple in 1996. At the penalty phase of his trial, the appellant was shackled with leg irons, handcuffs and a belly chain. As a result of his conviction, he was sentenced to death.

The trial court for the state of Missouri overruled the defense counsel's motion to remove the shackles during the penalty phase of the trial. The Appellant appealed to the Supreme Court of Missouri who rejected his claim that shackling violated both the U.S. and Missouri constitutions. The petitioner was granted a writ of certiorari to the U.S. Supreme Court which reversed the decision.

The Supreme Court held that the Constitution forbids the use of shackles during the penalty phase of the trial. Although there are constitutional exceptions to the general rule, such as in an extreme case where security is an issue, the courts must use discretion when shackling a defendant during any phase of trial. The Appellant contended this was not an exceptional case and that the visible shackles made the jury think that he was violent on that day. He further argued that as a result, the jury was likely to recommend a more serious penalty.

The rule that prisoners must not be visibly shackled has its roots in the common law. Blackstone wrote, "[I]t is laid down in our ancient books, that, though under an indictment of the highest nature, a defendant must be brought to the bar without irons, or any manner of shackles or bonds unless there be an imminent danger of escape." *Deck*, 125 S. Ct. at 2010 (quoting 4 William Blackstone, Commentaries on the Law of England 317 (1769)). The Supreme Court has also held that "the sort of prejudicial practice, . . . like shackling, should be permitted only where justified by an essential state interest specific to each trial." *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986). The Supreme Court applied the same test here.

In reversing the Supreme Court of Missouri, the Supreme Court found that courts "cannot routinely place defendants in shackles or any other physical restraints during the penalty phase of a capital proceeding." *Deck*, 125 S. Ct. at 2014. The sight of a defendant in shackles almost "inevitably implies to a jury as a matter of common sense that court authorities consider the offender a danger to the community." *Id*. at 2014. Each court must assess whether the constitutional exception to the rule is applicable and necessary. If the court is not justified in ordering the defendant to wear shackles, "the defendant need not demonstrate actual prejudice to make out a due process violation." *Id*. at 2015. Because the court did not adequately justify its orders that the defendant wear shackles, the judgment of the Supreme Court of Missouri was reversed.

By Peter Doyle

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from May 4th, 2005 to August 4th, 2005.

People v. Gorham (N.Y.L.J., May 13, 2005, p. 18)

In a unanimous decision the Appellate Division Third Department held that the trial court did not commit reversible error in allowing the prosecution to elicit testimony regarding the defendant's prior abuse of his wife. The defendant had been convicted after a jury trial for assaulting his wife at their apartment. The People had been permitted to bring out on their direct case testimony concerning the defendant's prior abuse conduct toward his wife. The trial court had held a pre-trial *Molineux/Ventimiglia* hearing and had issued a detailed ruling regarding the extent to which the prosecution could bring out the prior abusive conduct and had ruled the prior conduct was relevant to the proof of intent and state of mind. The trial court had weighed the probative value against the prejudicial effect and had explained the reasons for its decision. Under such circumstances the Third Department found that the trial court had acted within its discretion and that no reversible error had occurred.

People v. Hal Karen (N.Y.L.J., May 17, 2005, p. 18)

In a unanimous decision the Appellate Division Third Department affirmed a defendant's murder conviction and rejected a claim that one of the jurors had been coerced into a compromised verdict. Following the defendant's conviction defense counsel had moved pursuant to CPL section 330.30 to set aside the verdict on the grounds that juror misconduct had occurred during the jury's deliberation. The claim was made that one of the jurors had told other jury members that she had made her mind up from day one. The trial court held a hearing on the matter in which the juror testified that although she had made the statements in question she had not in fact determined the question of guilt or innocence until deliberations had occurred.

The Appellate Division, relying upon the fact that the trial court is vested with a great deal of discretion to ascertain whether a verdict should be set aside, deferred to the trial court's determination and held that no new trial was required. In rendering its decision the Appellate Division relied upon the New York Court of Appeals decisions in *People v. Maragh,* 94 N.Y.2d 569 (2000) and *People v. Testa*, 61 N.Y.2d 1,008 (1984).

People v. Randolph (N.Y.L.J., May 20, 2005, pp. 1 and 2)

A unanimous panel of the Appellate Division Third Department reversed a defendant's conviction for burglary and ordered a new trial. The Appellate Court found that the defendant was denied a fair trial because of the cumulative impact of errors committed by the trial judge and the prosecution. The prosecutor had made repeated references to the fact that the defendant was incarcerated pending trial and the trial judge permitted a witness to testify during the trial that she had received threatening phone calls, although there was no proof that the defendant had anything to do with such calls. The trial court had also failed to provide any curative instructions to the jury in order to mitigate the errors committed. The Appellate Division concluded that the cumulative effect of the errors denied the defendant a fair trial and could not be classified as harmless error. A new trial was thus ordered.

People v. Garcia (N.Y.L.J., May 20, 2005, pp. 1 and 6, and May 25, p. 18)

In a unanimous decision the Appellate Division First Department ordered a hearing to determine the impact on the choice that the defendant made regarding a plea decision since the information he had received regarding his prior felony status was incorrect. The Appellate Panel found that the trial attorney had failed to ascertain that the defendant had been incorrectly classified as a persistent violent offender and that therefore prosecutors had mistakenly offered him a plea and sentence deal involving 16 years to life. In reality the defendant could only be classified as a second violent felony offender which meant that under the plea offer he would have faced between 7 and 15 years. The defendant had rejected the plea offered based upon the erroneous information and claimed in the Appellate Court that he would have strongly considered the plea offer if the sentence was 10 years or less.

Under these circumstances the Appellate Division found that defense counsel representation fell below the requirements of reasonably effective assistance and that an evidentiary hearing would have to be held to determine whether it is reasonably probable that an acceptable plea bargain would have been reached but for defense counsel's failure.

People v. Williams (N.Y.L.J., June 2, 2005, p. 18)

In a unanimous decision, the Appellate Division First Department ordered the reinstatement of an indictment which had been dismissed for legal insufficiency. The Appellate Court held that with respect to the crime of hindering prosecution, the defendant's failure to disclose the identity of a robber to police immediately after

witnessing the robbery was prima facie evidence of deception for the purpose of preventing the discovery or apprehension of a known felon within the meaning of Penal Law section 205.50(4). The robber was in fact the defendant's boyfriend and her failure to disclose his identity constituted "criminal assistance" under the hindering prosecution statute. The Appellate Division therefore ordered the reinstatement of the indictment in question.

People v. Ordenana (N.Y.L.J., June 8, 2005, p. 18)

The Appellate Division First Department reversed the defendant's sodomy conviction and ordered a new trial on the ground that the trial court had failed to conduct an inquiry into allegations that the jury had begun deliberating while the trial was proceeding. In the case at bar, defense counsel received information from one of the discharged alternates that some of the jurors had been discussing the case prior to being charged to begin their deliberations. Defense counsel had then requested the court to inquire into the allegations of jury misconduct, but the trial judge refused. The Appellate Division held that the court was required to conduct an inquiry to determine whether premature deliberations had occurred and that the failure to do so constituted reversible error. In rendering its determination, the Appellate Court relied upon and referred to CPL sections 270.35 and 270.40 relating to the conduct of a jury. The Appellate Division ruling was unanimous.

People v. Torres (N.Y.L.J., June 13, 2005, pp. 1 and 8)

In a 4-1 decision, the Third Department affirmed a drug conviction where the trial judge had permitted the prosecution to introduce evidence of a second uncharged transaction in order to establish defendant's identity. The four-judge majority held that the evidence was appropriate since mistaken identity was the sole defense. The Court found that the trial judge had also carefully instructed and charged the jury on the scope of the evidence admitted and that the probative value had been properly weighed against the prejudicial effect. A dissenting opinion was issued arguing that the dictates of *People v. Molineux* had been violated.

People v. Reilly (N.Y.L.J., June 13, 2005, pp. 1 and 8)

In a sexual abuse case, the Appellate Division Third Department by a 4-1 decision reversed the defendant's conviction, finding that evidence of a prior uncharged criminal act had been improperly admitted. The trial court had allowed the prosecution to admit evidence of a subsequent incident in which the defendant was found standing on a cinder block and peeking into another woman's bedroom. The evidence was offered by the prosecution and accepted by the court to show modis operandi. The four-judge majority found, however, that the evidence had been introduced for the improper purposes of indicating a propensity of the defendant to engage in sexual misconduct and that the evidence, while not highly probative of intent, was extremely prejudicial. Justice Carpinello dissented and felt that under *People v. Molineux*, the evidence was properly admitted.

People v. Sims (N.Y.L.J., May 31, 2005, p. 28, and June 14, 2005, pp. 1 and 5)

In a unanimous decision, the Appellate Division First Department modified the imposition of consecutive sentences so as to make the terms run concurrently. The Court had imposed a term of 25 years for a robbery conviction and then imposed an additional 15 years to run consecutively for gun possession. The trial court had concluded that the defendant had pointed his gun at the police after the robbery was over, making it an independent and separate crime. The Appellate Court found, however, that the record did not support this conclusion, pointing out that despite multiple questions of the police officer during the trial, the officer never directly testified that the gun had been pointed at him after the robbery was over. The Appellate panel also pointed out that the sentencing judge had been informed by both the defense and prosecution that consecutive sentences were not proper. Thus finding that the gun possession was not separate and distinct from the robbery, the First Department modified the sentences to make them run concurrently, thereby reducing the term imposed from 40 to 25 years.

People v. Diaz (N.Y.L.J., June 29, 2005, pp. 1 and 2, and July 5, 2005, p. 18)

In a unanimous decision the Appellate Division First Department upheld the admissibility of identification evidence of an attack by a victim as an excited utterance exception to the hearsay rule. The Appellate Division found that the introduction of a statement "that's them" by a victim who was lying in an ambulance after the attack but did not appear at trial to testify did not violate the dictates of the recent Supreme Court ruling in *Crawford v. Washington,* 541 U.S. 36 (2004). The Appellate Division found that the admissions in question fell outside of the *Crawford* ruling since it was not testimonial but rather a spontaneous and excited utterance.

People v. Hilliard (N.Y.L.J., July 20, 2005, pp. 1 and 2)

In a unanimous decision the Appellate Division Third Department held that the defendant's right to counsel attached when a probation violation petition was filed and that everything the defendant told the police afterwards had to be suppressed because of a violation of

the defendant's constitutional rights. Although recognizing that probation officers drafted and filed the violation of probation petition, the defendant's right to counsel indelibly attached on all the VOP allegations when the petition was filed and the arrest warrant issued. The police were thereafter precluded from questioning the defendant on the related homicide matters and suppression of any and all statements to the police after the right to counsel had attached was required.

People v. Hansen (N.Y.L.J., July 21, 2005, p. 18)

In a unanimous decision the Appellate Division First Department reversed the trial court's suppression of evidence which was recovered from a passenger after the routine traffic stop of a livery cab. The police, while driving in an unmarked vehicle in a high-crime area in Manhattan, observed a livery cab proceed through a red light. The officer stopped the vehicle and they observed the defendant, who was in the rear passenger seat, making excessive movements with his hands. The defendant was asked to step out. The defendant continued to act suspiciously and a subsequent search of his person revealed nine vials of crack cocaine. Although the trial court had concluded that the police officer should not have proceeded to search the defendant's person, the Appellate Division disagreed and reversed the suppression order. The Appellate Division found that in the case at bar, under the totality of circumstances, the police officer's actions were reasonable. The Appellate Court observed that the type of encounter in question was fraught with potential danger to police officers and that the police took appropriate action based upon the suspicious nature of the defendant's actions.

People v. Atkinson (N.Y.L.J., July 25, 2005, pp. 1 and 7, and July 26, 2005, pp. 18 and 25)

In a unanimous decision the Appellate Division Second Department upheld a depraved indifference murder verdict which involved a point-blank shooting. The Second Department issued its ruling despite the recent New York Court of Appeals ruling in *People v. Payne,* 3 N.Y.3d 266 (2004), which greatly narrowed and limited the applicability of such charges. The Appellate Division found that despite the *Payne* decision the case at bar constituted one of the rare exceptions which required the upholding of the depraved indifference verdict. The Appellate Division determined that the jury had concluded that although the defendant did not harbor the conscious objective of killing the deceased, he committed a reckless act that was imminently dangerous to the deceased and created a very high risk that he would die. The Court further found that the jury could have concluded that the defendant's acts were so wanton, so deficient in a moral sense, and so devoid of regard for the deceased's life as to make out a conviction for depraved indifference. The Appellate Division determined that as a matter of law, despite the Court of Appeals' *Payne* ruling, it could not conclude that the evidence was legally insufficient to support the jury's findings.

Because of the recent Court of Appeals decision in *People v. Payne* and the current controversy regarding the propriety of submitting both intentional murder and depraved indifference counts to the jury, it appears likely that leave to appeal to the Court of Appeals may be granted in the *Atkins* case and that a further ruling on the issue may be coming from the Court of Appeals. We will keep our readers up to date on any new developments on this issue.

People v. Burchard (N.Y.L.J., August 1, 2005, pp. 1 and 2)

In a unanimous decision, the Appellate Division Third Department upheld a murder conviction of a defendant who claimed that admissions he had made to his girlfriend violated his constitutional rights. In the case at bar, the defendant had made admissions to a girlfriend who had helped police obtain a tape-recorded statement from the defendant. The Appellate Division found that the girlfriend had initiated the contacts with police and had acted independently of the prosecution and was not an agent of the state. Thus, the fact that the defendant had been represented by counsel prior to the time of admissions did not preclude their admissibility.

People v. Bradley (N.Y.L.J., July 29, 2005, pp. 1 and 2, and August 4, 2005, p. 18)

In a unanimous decision, the Appellate Division First Department upheld the admissibility of hearsay statements made during a 911 call. The Court in interpreting the recent United States Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36 (2004), held the statements to be more in the nature of an excited utterance rather than a testimonial statement. The Court so ruled even though a police operator had asked what happened during the conversation. The Appellate Division found that the officer's general question was to gain familiarity with the situation and not to gather incriminating evidence against a particular individual. Since the officer's inquiry at the time was only a preliminary investigation and he was not advancing a potential prosecution, the response obtained did not take on a testimonial character.

For Your Information

2004 Annual Report from the Lawyers' Fund for Client Protection

The Lawyers' Fund for Client Protection recently issued its annual report for 2004. It reported that in 2004 it had made 196 awards totaling $5.1 million. The losses in 2004 were caused by 53 attorneys who had been suspended or disbarred. At the end of 2004 the funds still had 340 pending claims involving an additional $15.1 million. The Fund again reported that there was a recurring problem of attorney theft of real estate escrow funds from 1999 through 2003—75% of all the awards from the Fund relating to real property losses were within the Second Judicial Department. Of the $13.7 million in reimbursement for real property losses for this five-year period, $7.9 million arose from awards involving lawyers within the Second Judicial Department. The losses within the Second Department were actually concentrated in the Tenth Judicial District which comprises Nassau and Suffolk County. The Tenth Judicial District was responsible for 41% of all awards and 50% of the total amount of reimbursements from the Fund involving real property losses in the Second Judicial Department during the last five-year period.

The Lawyers' Fund was created in 1981 and serves to reimburse clients for losses sustained as a result of actions by dishonest lawyers. The Fund's maximum award of $300,000 per individual loss is the highest award limit among the nation's 50 client protection funds. Since its inception the Fund has awarded $108 million to 5,789 eligible clients. The Fund is administered by a Board of Trustees appointed by the New York Court of Appeals. The Trustees serve for a three-year term and receive no compensation for their services. The Fund's office is located in Albany, New York.

New York Court of Appeals Adopts New Rules of Practice

Following months of study and review of public comments, the Court of Appeals announced in May that it was rescinding in its entirety 22 N.Y.C.R.R. part 500 and has promulgated a new part 500 entitled, "The Rules of Practice of the Court of Appeals." The new rules will be effective as of September 1, 2005. With respect to criminal appeals, the new rules will affect criminal leave applications and the preparation of briefs and appendices. The time to perfect appeals has also been reduced from 80 to 60 days, unless an extension is granted. The prior automatic 20-day extension for filing dates for appeals has also been eliminated. Court of Appeals practitioners are urged to become familiar with the new rules and if any particular questions arise, the questions can be directed to the Court of Appeals Clerk's Office at 518-455-7700.

Federal Sex Offender Registration List

The federal government has been moving on two fronts with respect to the establishment of a national sex offender database. In May Attorney General Alberto Gonzales announced that the Justice Department is establishing a new Internet site run by the federal government which will include state-by-state information on sex offenders. State participation will be voluntary and the Justice Department expects to have the website operational by the end of July. Every state except Oregon publishes the names, photos and backgrounds of at least some defendants convicted of a variety of sex crimes, particularly those involving children. The purpose of the federal data bank would be to consolidate all of the state information and to make it available across the country.

Congress is also currently considering a wide-ranging bill which would institute nationwide registration requirements for sex offenders and would also require sex offenders to wear monitoring devices. It is estimated that there are more than 500,000 registered sex offenders across the country who are no longer in prison and the aim of the proposed legislation would be to better keep track of persons who have been designated as dangerous offenders. We will track the progress of this proposed federal legislation and report any developments to our readers.

2004 GOP Convention Arrests Lead to Few Convictions

At last year's Presidential Republican Convention in New York, more than 1,800 protestors were arrested for a variety of disorderly conduct and resisting arrest offenses. More than a year later the New York County District Attorney's Office issued a report regarding the outcome of these 1,800 arrests. 64% resulted in adjournment in contemplation of dismissal adjudications, 24% were dismissed outright, 9% resulted in guilty pleas to violation offenses, 1% were convicted of misdemeanors,

none were convicted of felonies and 2% were acquitted after trial.

The City of New York, although not admitting wrongdoing, agreed to a $230,000 settlement involving more than 100 protestors who were incarcerated longer than 24 hours before being arraigned in violation of state law. Each of the 100 protestors is to receive a $150.00 payment and the balance of the settlement is to pay for attorney fees and other legal costs.

Improvement of Indigent Defense System

Several groups are presently exploring ways to improve the system of indigent criminal defense throughout the state. The Commission on the Future of Indigent Defense Services created by Chief Judge Kaye has been holding hearings throughout the state on the issue and will surely be making recommendations. Our own New York State Bar Association recently urged the court system to adopt uniform standards and provide independent oversight to ensure consistent and quality representation. The New York State Bar Association recommendations have been presented to both Judge Kaye's Commission and directly to the Administrative Board of the Courts. A recent new proposal regarding a statewide indigent criminal defense agency involves the utilization of the Capital Defender's Office which is now due to close because of the death of the death penalty. The two basic problems which must be met in the area of indigent defense services appears to be uniform standards of quality throughout the state and adequate funding for the various programs in question. We will continue to advise our readers of developments.

New York State Leads Nation in Utilization of Wire Taps

In an annual report issued by the Administrative Office of the U.S. Courts it was noted that in the year 2004, New York State reported the use of 440 wire taps throughout the state. Within New York State almost half of the total were utilized in one County, to wit, Queens. The Queen's District Attorney's Office reported using 216 wire taps. It was reported that most of the wire taps in Queens were for narcotics and gambling investigations. Within New York State after Queens the largest number of wire taps were used by the New York City Special Narcotics Prosecutor's Office which reported 76 wire taps. The Manhattan District Attorney's Office was third in the state with 15 wire taps. Following New York State was California with 233 wire taps, slightly more than half of the New York total.

U.S. Second Circuit Court of Appeals Handles Heavy Case Load

The Second Circuit Court of Appeals is now one of the busiest appellate courts in the country. In 2004, 7,008 appeals were filed with the Court, representing a 55% increase from 2001. The Court currently has 13 judges who handle federal appeals from the states of New York, Connecticut and Vermont. Former U.S. Supreme Court Justices John M. Harlan and Thurgood Marshall served as judges of the Second Circuit.

250th Anniversary of the Birth of Chief Justice John Marshall Celebrated with Silver Dollar

To commemorate the 250th anniversary of the birth of Chief Justice John Marshall, the U.S. Mint announced designs for the issuance of a 2005 silver dollar containing the Chief Justice's portrait. The dollar is the first U.S. coin to honor the United States Supreme Court or a Supreme Court Justice. John Marshall was sworn in as the fourth Chief Justice of the United States in 1801 and held the position for more than 34 years. His tenure is marked by numerous famous opinions which established the authority of the Court and its relationships with the other branches of government.

Before his recent death, Chief Justice William A. Rehnquist had commented on the Marshall coin and had stated:

> While people all over the country are familiar with the likes of George Washington, Thomas Jefferson and Benjamin Franklin, significantly fewer know about the remarkable contributions of the fourth Chief Justice. A commemorative coin could provide an opportunity to educate all Americans about the man known as "the Great Chief Justice."

Judicial Pay Raises

The initiative for judicial pay increases, which was set forth by the Office of Court Administration several months ago, advanced rapidly through the legislative process, but failed to reach final passage. The Assembly Judiciary Committee unanimously passed a bill granting increases for judges. Under the proposed legislation Supreme Court Judges were to receive an increase of approximately 20%, which would raise their salaries to $162,000. Other judges throughout the state would also receive significant increases. The proposed pay raises were the first for judges within the state in six years. Governor Pataki in late May announced his support for judicial pay increases but indicated that his proposal differed slightly from the legislative bill. The Gover-

nor's proposal would in fact provide a uniform percentage increase for all trial judges rather than varying percentages suggested in the legislative bill. Also, the Governor's proposal would contain no indexing provision to ensure that judges receive regular cost of living increases. In issuing his statement Governor Pataki stated that a judicial pay increase this year was necessary because it was important "to continue to attract and retrain highly qualified and experienced attorneys to serve in our state's judiciary." Although the Legislature adjourned during the summer without having enacted judicial increases, it is possible that the issue may again be reviewed at a special legislation session to be held in the fall. Any further developments on judicial pay increases will be immediately announced to our readers.

New York City District Attorneys Seek Budget Increases

Arguing that their budgets were substantially reduced following the September 11th World Trade Center attacks, the five New York City District Attorneys had petitioned the City Counsel to increase their budgets by approximately $40 million. In previous years Mayor Bloomburg's proposals have involved modest increases in the District Attorneys' budgets and the City Counsel has usually negotiated additional amounts at the District Attorneys' request. This year the Mayor's budget proposes to add $8.5 million to the $204 million budget for the various District Attorneys' Offices. As in the past it appears that some compromise will be reached and that the actual sum allocated for the coming year will involve an increase of somewhere between $10 and $20 million.

Westchester District Attorney Pirro to Run for Statewide Office

It was announced in late May that Westchester District Attorney Jeanine Pirro, who has served in that office for 12 years, is giving up that post and will be seeking statewide office in the coming November election. District Attorney Pirro, who was widely viewed as becoming a candidate for New York State Attorney General, instead, announced in August, that she would be seeking a United States Senatorial seat running against Hillary Clinton. Jeanine Pirro is seen as a strong candidate who will have substantial support from the Republican Party.

Current Attorney General Eliot Spitzer is seeking the governorship and although D.A. Pirro has decided not to run for Attorney General, numerous other candidates have announced their intention to run for that office. Both Republican and Democratic candidates have also announced their intentions to seek the Westchester District Attorney seat vacated by Jeanine Pirro, and we will keep our readers informed of developments with regard to statewide races and Jeanine Pirro's replacement as Westchester District Attorney.

Following Recent Court of Appeals Decisions, the Number of Depraved Indifference Indictments Drops Substantially

Following last year's New York Court of Appeals decision in *People v. Payne*, 3 N.Y.3d 266 (2004), which overturned a depraved indifference murder conviction and severely criticized prosecutors for presenting indictments which contained both intentional murder and depraved indifference counts, the number of indictments for depraved indifference murder has dropped substantially from 468 in 2001 to 256 in 2004. The recent survey conducted by The Division of Criminal Justice Services found a substantial drop in depraved indifference indictments in almost every county throughout the state. The *Payne* decision, which was the third in a series of Court of Appeals decisions, made it clear that depraved indifference murder may not be properly charged in the overwhelming majority of homicides that are prosecuted in New York. As a result prosecutors throughout the state have reconsidered their murder indictments and have dramatically limited their use of depraved indifference charges. A recent Appellate Division Second Department decision, however, has offered some hope that some depraved indifference convictions will be upheld. See *People v. Atkinson*, reported on at page 34.

Additional Drug Law Reforms

Less than a year after the passage of the Felony Drug Law, which modified the Rockefeller Sentencing provisions, the State Assembly has passed additional legislation seeking further changes in the sentencing of low level non-violent drug offenders and increasing the possession thresholds for certain categories of felony offenses. The new proposed legislation also seeks to extend the drug court initiatives to every county in the state. Although the Assembly is seeking these additional changes, it is unclear whether the State Senate and the Governor will support the new initiatives. We will keep our readers informed of any new developments.

Division of Criminal Justice Services Issues 2004 Statistics

Chauncey Parker IV, Director of the Division of Criminal Justice Services, in a recent report issued to the New York State Legislature, reported that the crime rate in New York State in 2004 was the lowest in 40

years. The violent crime rate decreased by 52% over the past 10 years. During the last 10 years, murder is also down by 56%, robbery is down by 61% and motor vehicle theft has declined by 67%. The overall crime rate has dropped for the 11th consecutive year. Mr. Parker also pointed out that the state prison population has continued to drop and now amounts to approximately 65,000.

New York Court of Appeals Refuses to Order Reinstitution of Cameras in the Courtroom

In a long-awaited decision, the New York Court of Appeals unanimously upheld New York State's 53-year-old ban on cameras in the courtroom. The Court found that the 1952 legislative enactment prohibiting cameras in the trial courts complies with both federal and state constitutional standards. In issuing its opinion, which was written by Judge George Bundy Smith, the Court stressed that the right to a fair trial outweighs any right of access afforded to either the public or the press. The Court stressed that any changes must come from the State Legislature and not the courts. Judge Smith, writing for a unanimous court, specifically declared:

> In New York State, the decision whether or not to permit cameras in the courtroom is a legislative prerogative. We will not circumscribe the authority constitutionally delegated to the Legislature to determine whether audiovisual coverage of courtroom proceedings is in the best interest of the citizens of this state.

The issue of cameras in the courtroom has been a controversial one which has sharply divided segments of the legal and judicial community. Although the New York State Bar Association submitted an amicus brief supporting cameras in the courtroom, the issue has been sharply debated within our own Bar Association and within our Criminal Justice Section.

Lerner Appointed Chair of State Commission of Investigation

In mid-June, Governor Pataki announced the appointment of Alfred D. Lerner, former Presiding Justice of the Appellate Division First Department, as Chairman of the New York State Temporary Commission of Investigation. Justice Lerner's judicial career spanned 32 years during which time he also served as Chief Administrative Judge in Queens County. He also served for 14 years as a New York State Assemblyman from Queens. The Commission of Investigation consists of six members and has subpoena power to investigate organized crime, public corruption, and mismanagement. After leaving the Appellate Division, Justice Lerner had been serving as counsel to the law firm of Phillips-Nizer.

Lawsuit Filed Against New York Prohibition on Voting Rights for Felons

As a follow-up to an article which appeared in our last issue, the Circuit Court of Appeals for the Second Circuit in late June heard oral arguments on a case involving an attack upon New York's Election Law section 5-106, which prohibits felony prisoners and felons on parole from voting. Sitting *en banc*, the Second Circuit heard the case of *Muntagim v. Coombe*, in which the plaintiffs have claimed that New York's Election Law prohibitions restricting the rights of felons violates section 2 of the Voting Rights Act of 1965. The New York case is part of a nationwide movement to restore voting rights to convicted felons.

Currently, 48 states prohibit inmates from voting while incarcerated. Thirty-five states, including New York, also prohibit felons from voting while they are on parole. Five states deny the right to vote to all felony ex-offenders. It is estimated that if the current lawsuit is successful, some additional 120,000 persons will be added to the voters rolls in New York. We will report on the eventual decision by the Court of Appeals as soon as it is rendered.

New Judgeships Created

In the last days of the Legislative Session both the Assembly and Senate approved a bill creating 21 new judgeships throughout the State. The 21 new positions involve four Supreme Court Justices, two of which will be in the Ninth District and one each in Queens and the Bronx. Fourteen new Court of Claims Judgeships were also established. In addition a new Surrogate's Court position has been established in Brooklyn and a new County Court Judge will be appointed in Rensselaer as well as an additional Family Court position for Orange County.

The new judgeships are effective as of August 1, 2005, following the Governor's approval of the legislation on July 20, 2005. Although the Office of Court Administration has been asking for more judgeships in recent years, the actual passage of the legislative bill came as somewhat of a surprise. The creation of the two new Supreme Court seats within the Ninth District will likely set off a political battle between the Republicans and Democrats since the Ninth District has been evenly divided between the two parties in recent years.

Women on the Federal Bench

With the recent resignation of the United States Supreme Court Justice Sandra Day O'Connor, the role of women on the federal judiciary has again been brought to the forefront. When Justice O'Connor was first appointed to the Court in 1981, only 48 of the 700 federal judges were women. Today according to a recent survey by the Federal Judicial Center, there are 201 women among the 622 members of the federal judiciary. The first woman to serve on the federal bench was appointed in 1934. Justice O'Connor was one of five women in a class of 102 who graduated from Stanford Law School in 1952. In 1981 when she was appointed to the Supreme Court, the number of women in law school had risen to 36%. In 2004 women comprised 48% of the students in law school. With the ever-increasing presence of women in the legal profession, it is clear that the number of women within the federal judiciary will continue to rise in the coming years.

Doyle Committee Report Receives ABA Award

In August the New York State Bar Association received a special award from the American Bar Association at the annual meeting held in Chicago. The special award recognized the work of the New York State Bar Association's Special Committee to Ensure Quality of Mandated Representation. The Special Committee developed comprehensive standards to guarantee that indigent criminal defendants receive meaningful representation. The recommendations made by the Special Committee had been presented to the Office of Court Administration and are presently being reviewed for possible implementation. The Special Committee, which labored long and hard, was Chaired by Vincent E. Doyle III, who also served as past Chair of our Criminal Justice Section. Vince continues to be an active member of our Section and his efforts and those of his Committee are greatly appreciated by our membership.

Governor Pataki Decides Not to Seek Additional Term

On July 27, 2005, Governor George E. Pataki announced that he would not seek a fourth term and would be leaving the Governor's Office at the end of 2006. During his 12 years in office, the Governor has had a substantial impact on the criminal justice system and the personnel of the state's judiciary. During his tenure major pieces of criminal law legislation have been enacted, including the Sentencing Reform Act of 1995, Jenna's Law in 1998 and modifications in the Rockefeller Drug Laws in 2004. The Governor's criminal justice program has basically been designed to increase jail terms for violent felony offenses while providing increased rehabilitation options for offenders who could benefit from such programs and who did not pose a danger to the community. During his 12 years in office the crime rate in New York State has dropped significantly and the prison population has also declined.

The Governor has also greatly influenced the make-up of the state's judiciary, primarily within the Appellate Courts. He has appointed four of the currently sitting Court of Appeals Judges and is expected to make a fifth appointment when Judge George Bundy Smith retires in September of 2006. The Governor has also appointed three of the currently presiding justices of the Appellate Divisions, Justice Buckley of the First Department, Justice Prudenti of the Second Department and Justice Piggott, Jr., from the Fourth Department.

It is currently rumored that Governor Pataki may seek the Republican nomination for President in the year 2008. His announcement that he will be departing from the Governor's Office has also opened the door for several candidates in both parties to seek the Governor's Office. We wish Governor Pataki well in his future endeavors and will keep our readers advised of developments in the upcoming race for his replacement.

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

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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.

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