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New York Criminal Law Newsletter

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

Inside

NYSBA

Message from the Chair

The traditional June change of Section officers brings a new slate of officers whose commitment is to both lead and steer the Section during the upcoming two-year period. It is my hope that my background as both a former state prosecutor, and long-term private practitioner for the last three decades, will prove useful as we work to improve the criminal justice system with a balanced focus and consensus management style.

During the summer months, I intend to meet with Section Vice-Chair Jean T. Walsh, Section Secretary James Subjack, and the District Delegates, to select Committee Chairs and identify issues and projects where the Section can likely impact positively. Operating in the belief that we need to have greater involvement from, and dialogue with Section members, I have prepared a Committee request form, which is included with this newsletter issue and I wish to encourage each Section member to complete and return it by July 30th. It is my hope that Committee assignments can be made by mid-September and, as a consequence, Section projects and initiatives will have the benefit of the knowledge, experience, and participation for a greater cross-section of Section members.

We are presently planning an Autumn Section meeting/CLE Program for the mid-Hudson Valley to be held in conveniently located Poughkeepsie. The program's focus will be upon the important decisions handed down by the New York Court of Appeals from 9/1/04 through 7/30/05. We will have a particular panel discussion focusing upon the powerful role played by Judge Albert Rosenblatt, and feature a Saturday luncheon address by him to those attending.

Socially, we plan to have a Friday dinner at the famed Culinary Institute of America (CIA) located in nearby Hyde Park, and a post-luncheon tour of the Franklin D. Roosevelt home, and Eleanor Roosevelt's Vall Kill "hideaway." I urge you to "hold the date" for this exciting and informative Autumn event in the beautiful Hudson Valley.

Finally, at the "end of the day" the Section is only as useful as you, the members, feel we are at meeting your needs and fulfilling your professional expectations. We are "all in this together" and I welcome the opportunity which service as Section Chair will provide to better serve the state's criminal justice community in the years ahead. Join the journey for, as the late Brooklyn political leader, Meade Esposito, once noted, "power is perception," and we will be as powerful an interest group as we are perceived by those who make, shape, and implement criminal justice policy.

Roger B. Adler

Message from the Editor

In this issue we continue to provide detailed information regarding the major changes which occurred by the passage of the recently enacted felony law drug legislation. Thus our first feature article deals with the new possible sentences which can be imposed on felony drug offenders. We also include a detailed chart which should be of great help to criminal law practitioners. Our second feature article deals with the imposition of a term of post-release supervision as part of the determinate term. The article compares the required periods for felony drug offenders with those which must be imposed for first violent felony offenders and second violent offenders. Interestingly while this post-release supervision article was being prepared, the New York Court of Appeals came down with an important decision on this issue. The Court's decision in *People v. Catu* is incorporated in our article and is also discussed in detail in our New York Court of Appeals Section.

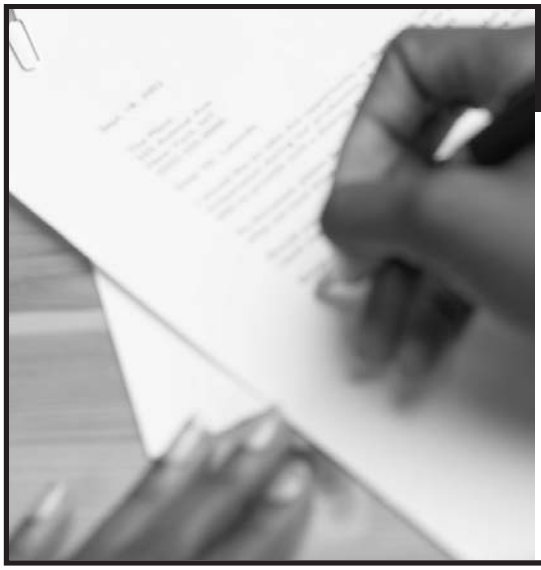
Our third feature article also presents the unique subject of compelled statements of government employees. This article is written by Michael F. Dailey, who has had a long career in law enforcement and his article provides valuable insights based upon his long experience.

In the sections dealing with recent decisions from the New York Court of Appeals and the United States Supreme Court, we present several cases of great importance and interest which were recently decided by those Courts. Included within these cases is the recent decision of the United States Supreme Court nullifying the death penalty for juvenile offenders under the age of 18.

Further, in our "For Your Information" column, which has become immensely popular with our readers, we continue to provide useful and informative news regarding the restoration of voting rights for convicted felons, recent security concerns of judges and prosecutors and other interesting statistical studies.

We also present in this issue the first message from our newly elected Chair of the Criminal Justice Section Roger Adler. We congratulate Roger on his election and we look forward to including his message in future issues of our publication. At this time I would also like to thank our outgoing Chair Michael Kelly for his hard work and service during the last two years. Michael was instrumental in beginning the publication of our *New York Criminal Law Newsletter* and we are deeply indebted to him for his enormous efforts.

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.

New Possible Sentences for Felony Drug Offenders

By Spiros A. Tsimbinos

The key feature of the recently enacted new drug law legislation is the switch from indeterminate terms, including lifetime maximums, to determinate terms with shorter maximum periods. Although having received little public attention the new legislation also provides for the possibility of probation or other non-incarcertory sentences for first time lower felony drug offenders, both sellers and possessors. To assist criminal law practitioners to easily deal with the new legislation we have prepared a comprehensive chart depicting all of the possible sentences for felony drug offenders. The sentences apply to all felony drug crimes committed on or after January 13, 2005. We hope our readers find this chart helpful. Following the chart is also a detailed discussion of post-release supervision, which is a mandated part of the determinate term and which now has also been made applicable to almost all felony drug offenders. With these two feature articles we continue to provide our readers with important details regarding the recently passed drug law legislation.

Possible Sentences for Felony Drug Offenders

Felony Class	Determinate Term of Imprisonment Including Period of Supervision	Definite Term	Probation	Cond. & Uncond. Discharges	Other Alternative Sentences
Class A-I.					
First time felony drug offender	8-20 years plus 5 years supervision	N/A	N/A	N/A	N/A
Second felony drug offender	12-24 years plus 5 years supervision	N/A	N/A	N/A	N/A
Second felony drug offender with prior violent felony	15-30 years plus 5 years supervision	N/A	N/A	N/A	N/A
Class A-II.					
First time felony drug offender	3-10 years plus 5 years supervision	N/A	Only life-time if cooperation rendered	N/A	N/A
Second felony drug offender	6-14 years plus 5 years supervision	N/A	N/A	N/A	N/A
Second felony drug offender with prior violent felony	8-17 years plus 5 years supervision	N/A	N/A	N/A	N/A
Class B.					
First time felony drug offender	1-9 years (2-9 years if near a school) plus 1-2 years supervision	N/A	25 years if cooperation rendered	N/A	N/A
Second felony drug offender	3½-12 years plus 1½-3 years supervision	N/A	N/A	N/A	N/A
Second felony drug offender with prior violent felony	6-15 years plus 2½-5 years supervision	N/A	N/A	N/A	N/A

Felony Class	Determinate Term of Imprisonment Including Period of Supervision	Definite Term	Probation	Cond. & Uncond. Discharges	Other Alternative Sentences
Class C.					
First time felony drug offender	1-5½ years plus 1-2 years supervision	Up to 1 year if special circum-stances found	5 years probation possible	Possible	N/A
Second felony drug offender	2-8 years plus 1½-3 years supervision	N/A	N/A	N/A	N/A
Second felony drug offender with prior violent felony	3½-9 years plus 2½-5 years supervision	N/A	N/A	N/A	N/A
Class D.					
First time felony drug offender	1-2½ years plus one year supervision	Up to 1 year if special circum-stances found	5 years probation possible	Possible	N/A
Second felony drug offender	1½-4 years plus 1-2 years supervision	N/A	N/A	N/A	Drug treatment camp plus parole supervision per PL § 70.06(7), CPL § 410.91
Second felony drug offender with prior violent felony	2½-4½ years plus 1½-3 years supervision	N/A	N/A	N/A	N/A
Class E.					
First time felony drug offender	1-1½ years plus 1 year supervision	Up to 1 year if special circum-stances found	5 years probation possible	Possible	N/A
Second felony drug offender	1½-2 years plus 1-2 years supervision	N/A	N/A	N/A	Drug treatment camp plus parole supervision per PL § 70.06(7), CPL § 410.91
Second felony drug offender with prior violent felony	2-2½ years plus 1½-3 years supervision	N/A	N/A	N/A	N/A

NOTE: *Fines may also be imposed as part of a term of imprisonment or other types of sentence but a sentence cannot consist solely of a fine for an Article 220 felony. See Penal Law § 60.01(3).*

Also please note that the designation N/A means Not Available.

Post-Release Supervision as Part of the Determinate Sentence

By Spiros A. Tsimbinos

With the passage of the recently enacted felony drug law legislation the concept of post-release supervision as part of a determinative sentence has once again emerged as an important part of New York's sentencing structure. Under the new legislation, which became effective for crimes committed on or after January 13, 2005, determinate terms which are now mandated for most felony drug offenders must contain as part of that sentence a period of post-release supervision. The length of the post-release supervision period is dependent upon the category of felony for which the defendant is convicted and any prior felony history. The post-release supervision period applicable for felony drug offenders are now specified in Penal Law § 70.45(2) as follows:

Periods of Post-Release Supervision for Felony Drug Offenders

Crimes Involved	Max. Term	Min. Term
Class A-I and Class A-II Offender	5 years	5 years
Class B or C First Offender	2 years	1 year
Class D or E First Offender	1 year	1 year
Class B or C Second Offender	3 years	1½ years
Class D or E Second Offender	2 years	1 year
Class B or C Violent Felony Offender	5 years	2½ years
Class D or E Violent Felony Offender	3 years	1½ years

The concept of post-release supervision for felony drug offenders was adopted from Jenna's Law, which was effective as of September 1, 1998, and which was made applicable to violent felony offenders. As part of Jenna's Law a new penal law § 70.45 was enacted which established the term of post-release supervision. Under the 1998 provision the maximum term of post-release supervision was set at five years for class B and C violent felony offenses and three years for class D and E violent felony offenses. The sentencing court, however, was allowed to impose a lesser term of supervision at the time that the determinate term is issued. Thus with respect to first time violent felony offenders, a post-release supervision term can be as low as two and one half years for first time class B and C violent felony offenders and one and a half years for first time class D and E violent felony offenders.[1]

The period of post-release supervision for all second time violent felony offenders was mandated to be five years with no discretionary authority for a lesser term. Summarized below are the periods of post-release supervision for violent felony offenders and second violent felony offenders.

Periods of Post-Release Supervision for First Time Violent Felony Offenders

Crimes Involved	Max. Term	Min. Term
Class B Violent Felonies	5 years	2½ years
Class C Violent Felonies	5 years	2½ years
Class D Violent Felonies	3 years	1½ years
Class E Violent Felonies	3 years	1½ years

Periods of Post-Release Supervision for Second Violent Felony Offenders

Crime Involved	Max. Term	Min. Term
Class B	5 years	5 years
Class C	5 years	5 years
Class D	5 years	5 years
Class E	5 years	5 years

As can be seen from the above charts the periods of post-release supervision for felony drug offenders have been set at a range which is comparable to violent felony offenders for the most serious drug crimes and at lesser periods for Class D and E drug felonies. The A-I and A-II drug offenders have the same post-release supervision period of 5 years as do second violent felony offenders while Class D and E first time offenders can serve a post-release supervision period of as low as 1 year.

It must be strongly emphasized that the period of post-release supervision is considered part of the determinate term and as such the defendant must be specifically informed of the post-release supervision period as

part of any plea bargain arrangement, and at the time of the sentence. It also must be recorded as part of the sentencing judgment. The failure to do so will create issues on appeal and may lead to the vacating of the sentence and the undoing of any plea bargain arrangement.

Appellate Courts, while recognizing that the failure to include the post-release supervision period within the sentence constitutes error, had split however on whether a motion to withdraw a plea must be granted or whether a harmless error analysis can be applied.[2] The New York Court of Appeals has recently decided this issue and has concluded that the post-release supervision period is a significant consequence of a guilty plea and as a result no harmless analysis can be applied.

Thus in *People v. Catu* decided on March 24, 2005 and reported on within this newsletter on page 17, Chief Judge Kaye, speaking for a unanimous court, pointed out that post-release supervision is a significant and mandated part of a determinate term. As a result a defendant pleading guilty must be aware of the post-release supervision component in order to knowingly, voluntarily and intelligently choose among alternative courses of action. The failure to advise of post-release supervision thus requires a reversal of the conviction and a harmless error analysis cannot be applied.

Once a defendant completes the term of imprisonment of his determinate term and begins his period of post-release supervision, certain procedures come into play. First of all upon release from the underlying term of imprisonment, a defendant must be furnished with a written statement setting forth the conditions of post-release supervision in sufficient detail to provide for the person's conduct and supervision.

The Board of Parole is charged with establishing and imposing the conditions of post-release supervision in the same manner and to the same extent that it may establish and impose conditions pursuant to the Executive Law upon persons who are granted parole or conditional release.

If a defendant violates any of the conditions of post-release supervision, he or she may be subject to an additional period of imprisonment of at least six months and up to the balance of the remaining period of post-release supervision not to exceed five years. Alleged violations of post-release supervision trigger a hearing and determination procedure as specified in subdivisions 3 and 4 of 259-I of the Executive Law.

The period of post-release supervision commences upon the defendant's release from imprisonment to supervision. Such release interrupts the running of any determinate term, with the remaining portion to be held in abeyance until the successful completion of the period of post-release supervision.[3]

It is important that criminal law practitioners be fully familiar with the concept of post-release supervision since it is now a key part of the determinate sentence which applies to a large number of defendants who fall within the categories of violent felony offenders and felony drug offenders. We hope that this article with prove helpful.

Endnotes

1. For a detailed analysis of the original post-release supervision term, see *New York's Jenna's Law* by Spiros A. Tsimbinos, a pamphlet published by Matthew Bender (1998).
2. *See People v. Goss*, 286 A.D.2d 180 (3d Dep't 2001); *People v. Melio*, 304 A.D.2d 247 (2d Dep't 2003).
3. Details on all of the above-mentioned procedures are found in Penal Law § 70.45.

Spiros A. Tsimbinos has been a criminal law and appellate practitioner in New York for 37 years. A graduate of New York University School of Law, he served as Legal Counsel and Chief of Appeals of the Queens County District Attorney's Office in 1990 and 1991. He is a past president of the Queens County Bar Association and has been a frequent lecturer on legal topics. Mr. Tsimbinos has authored many articles that have appeared in the *New York Law Journal*, the New York State Bar *Journal*, the *Queens Bar Bulletin* and other legal publications.

Compelled Statements of Government Employees

By Michael F. Dailey

As a means of investigating and addressing workplace misconduct, government employees may be compelled to answer questions "specifically, directly and narrowly related to the performance of (their) official duties,"[1] and may be terminated for failure to comply. In return, the employee is immunized from the "use of his answers or the fruits thereof in a criminal prosecution of himself."[2] As employment misconduct often overlaps criminal misconduct, it is important to understand how the resulting immunity from compelled statements may impact a criminal prosecution.

Development of the Law

The United States Constitution allows government employers ample authority for the establishment of "reasonable qualifications and standards of conduct" for employees.[3] Included within this ambit is the right of a government employer to "insist that its employees furnish . . . information pertinent to their employment," and to "require its employees to assist in the prevention and detection of unlawful activities by [other government employees]."[4] The Fifth Amendment to the United States Constitution provides, "No person shall be . . . compelled in any criminal case to be a witness against himself."[5] An obvious dilemma arises when an employer seeks to compel a self-incriminating statement from its employee.

Prior to 1967, a government employee could be ordered to waive immunity from criminal prosecution, and then be compelled to answer questions pertaining to his official duties. If he refused, by law, he forfeited his employment.[6] If he complied, his responses could be used to incriminate him. This changed in 1967. In a case involving New Jersey police officers, the Supreme Court of the United States held that the Constitution "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from [government] office."[7]

Over a series of cases that followed, a compromise emerged which balanced the concerns of the government employer regarding control of the workplace, against the rights of the employee as provided by the Fifth Amendment. "Given adequate immunity [from criminal prosecution], the state may plainly insist that its employees either answer questions under oath about the performance of their job, or suffer the loss of employment."[8] Adequate immunity consists of "immunity from federal and state use of the compelled testimony, or its fruits, in connection with a criminal prosecution against the person testifying."[9]

Scope of Immunity

A government employee who is compelled to give statements pertaining to his employment receives *use* and *derivative use immunity. Use immunity* means the actual statements made by the person compelled cannot be used in a criminal prosecution against him. *Derivative use immunity* means any evidence that is derived from, or the "fruit of," compelled statements cannot be used in a criminal prosecution against the person compelled. The scope of this immunity is intended to be broad, a "sweeping proscription of any use, direct or indirect."[10]

"As employment misconduct often overlaps criminal misconduct, it is important to understand how the resulting immunity from compelled statements may impact a criminal prosecution."

Compelled statements, under the doctrines of use and derivative use immunity, are treated differently than statements taken in violation of *Miranda v. Arizona*. Statements taken under custodial interrogation, but in the absence of *Miranda* warnings, cannot be used as direct evidence against the declarant in a criminal action, but *can* be used to impeach him if he takes the stand.[11] Similarly, compelled statements cannot be used as direct evidence against the declarant in a criminal action. However, compelled statements also *cannot* be used to impeach the declarant, even if he takes the stand and testifies inconsistently with his compelled statement.[12]

The difference stems from the fact that statements violating *Miranda* are not coerced or involuntary. They are voluntary statements merely taken in the absence of notice of the right to remain silent. Compelled statements, by contrast, are statements taken under duress. In the eyes of the law, they are treated no differently then a confession extracted via torture. "The Fifth and Fourteenth Amendments provide that no person shall be *compelled* in any criminal case to be a witness against himself. A defendant's compelled statements, as

opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatever against him in a criminal trial. The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled."[13]

When Does Immunity Attach?

Immunity attaches immediately, whenever the government employer, in any way, communicates to its employee that refusal to answer questions will result in disciplinary action, regardless of whether the employee invokes his right to remain silent.

As a general rule, a person who is questioned must assert his Fifth Amendment privilege against self-incrimination, and refuse to answer. If such person answers questions without asserting the privilege, "his choice is considered to be voluntary,"[14] and any answers given may be used to incriminate him. There is no obligation to advise a person of the right to refuse to answer questions—"an individual may lose the benefit of the privilege without making a knowing and intelligent waiver."[15]

There are certain well-defined exceptions to this general rule. However, in each there exists some "identifiable factor" which has the effect of denying "the individual a free choice to admit, to deny, or to refuse to answer."[16] The most well known exception is police custody, under which "inherently compelling pressures work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely."[17] A second exception, which is the essence of this discussion, exists where "the assertion of the [Fifth Amendment] privilege is penalized so as to foreclose a free choice to remain silent."[18] This is what happens when the employer directs its employee to answer questions or suffer the consequences. "If the state, either expressly or by implication, asserts that invocation of the privilege would lead to [negative ramifications, it creates] the classic penalty situation, the failure to assert the privilege [is] excused, and the [answers of the person questioned are] deemed compelled and inadmissible in a criminal prosecution."[19]

Under both exceptions, because the individual's "free choice to admit, to deny, or to refuse to answer" has been compromised, the immunity attaches immediately and automatically. "When a public employee is compelled to answer questions or face removal upon refusing to do so, the responses are cloaked with immunity automatically, and neither the compelled statements nor their fruits may thereafter be used against the employee in a subsequent criminal prosecution. The resulting immunity that attaches when a witness is ordered to answer such questions . . . flows directly from the [federal] constitution, attaches by operation of law, and is not subject to the discretion of the employer."[20]

Thus, immunity is not something which the employer bestows upon its employee. It is the product of the employer's actions. If the government employer uses its power to coerce its employee to answer questions, the employee has been compelled, his answers and their fruits are automatically immunized, and cannot be used against the employee in a criminal action. The employer has no choice here, immunity is the employee's side of the compromise crafted by the courts.

Verification of Immunity

Of utmost importance to employees of the government is the means by which they may ensure that their immunity is recognized and honored. As stated above, compelled statements, and evidence derived therefrom, cannot be used in a criminal proceeding against the declarant. To enforce this immunity, the declarant need only show that he gave a compelled statement. The burden then shifts to the government to "prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." This process is referred to as a "Kastigar Hearing."[21]

Although the burden shifts to the government to show independent sources, it is not necessary for the court to hold an actual hearing. The court can determine whether a "Kastigar Violation" occurred simply by reviewing the trial record.[22] The government may also meet its burden with "affidavits that are non-conclusory in form and do not simply ask the court to rely on the government's good faith."[23]

Limitations of Immunity

Although advertised as a "sweeping proscription of any use, direct or indirect," there are limitations to the protection afforded the person who gives a compelled statement.

I. Perjury

"The Fifth Amendment does not endow the person who testifies with a license to commit perjury."[24] A person who is compelled to give statements, and does so falsely while under oath, may be prosecuted for perjury, and both his false immunized testimony, plus any truthful testimony necessary to prove that he knowingly made the alleged false statements, may be used against him.[25] This narrow exception to the immunity that attaches to compelled statements requires that the

statements be made under an oath attesting to their truthfulness.

II. Use and Derivative Use Immunity vs. Transactional Immunity

A person who is compelled to give statements does not receive *transactional immunity*. Transactional immunity, familiar to grand jury proceedings, accords the declarant full immunity from prosecution for the offense to which his testimony relates. The Supreme Court, however, expressly held that compelled testimony is not a bar to criminal prosecution. "Immunity from use and derivative use is coextensive with the scope of the (Fifth Amendment) privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity . . . affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted."[26] Thus, a person who has given a compelled statement is placed in the position he would have been in had he never spoken at all. He can still be prosecuted for the underlying criminal misconduct, but his compelled statements, and anything derived from them, cannot be used against him.

III. Self-Reporting Statutes

Information derived from a person pursuant to a "self-reporting statute" may be used against that person in a criminal prosecution without infringing upon that person's Fifth Amendment privilege. This issue was decided by the United States Supreme Court in the case of *California v. Byers*,[27] and adopted by the New York State Court of Appeals in the case of *People v. Samuel*.[28] Both cases involved statutes requiring motorists involved in motor vehicle accidents to remain at the scene, identify themselves, and report the accident to police. The courts held that these "self-reporting statutes" do not violate motorists' Fifth Amendment privilege when they are designed "only to regulate lawful activities and channel such activities into lawful behavior, despite incidental risk of inculpation."[29] "If the purpose of the statute is to incriminate, it is no good. If its purpose is important in the regulation of lawful activity, to protect the public from significant harm . . . and only the incidental effect is occasionally to inculpate, then the statute is good within constitutional limitations."[30]

The holdings in *Byers* and *Samuels* were applied to a procedure of the New York City Police Department which requires a police officer, whether on or off duty, to notify his employer whenever his or her firearm is discharged.[31] The holdings were also applied to "Use of Force Reports" utilized by the New York Department of Correction, which are required to be prepared by any correction officer "involved either as a participant or a witness in a use of force incident against an inmate."[32] Thus, any time a government employee is required to prepare a report as part of his regular duties, and provided the purpose of the report is not to inculpate the employee who prepares it, the statements in the report are considered voluntary, and are admissible as evidence against the employee in a criminal court of law.

IV. Use vs. Mere Access or Exposure

Use, prohibited under *Kastigar*, was distinguished from mere access or exposure by the New York State Court of Appeals in the case of *People v. Corrigan*.[33] In *Corrigan*, a police officer, who had given a compelled statement pursuant to an internal police investigation, testified before a grand jury which was investigating his misconduct. During the examination, the prosecutor had a copy of the officer's compelled statement in his possession, which he reviewed while the officer was testifying.

The court held, based on the record (*i.e.*, without conducting an evidentiary hearing), that the prosecutor had not *used* the officer's compelled statement. There was nothing indicating that the statement had been used as a source of information for questioning the officer. Rather, all of the information possessed by the prosecutor, as revealed in the questions asked by the prosecutor, could be attributed to sources independent of the compelled statement. Further, there was nothing to indicate that the prosecutor used the compelled statement as a means of controlling the witness or affecting his answers or demeanor. "Defendant was never confronted with the statement, and . . . there is no showing that he was even aware that the prosecutor had it."[34]

The court further held that there was no *derivative use* of the compelled statement. "No suggestion is made, and . . . defendant does not claim, that the People made any use of defendant's statement as a source of information leading to the discovery of other information in the investigation."[35]

The court also stated, in *dicta*, that the mere possession and viewing of an immunized statement, without more, is not use. "Defendant argues . . . that the prosecutor's mere possession and viewing of defendant's immunized statement, without more, constituted a 'use' prohibited by State and Federal Constitutions. Defendant cites no authority, nor have we found any, to support his contention."[36]

The Second Circuit similarly distinguished use from mere access or exposure in the case of *Pirozzi v. City of*

New York, where it was held that "mere access of the prosecution to a defendant's immunized statements does not violate the Fifth Amendment."[37]

V. Harmless Error

In *Corrigan,* again in *dicta*, the court stated that the use of immunized testimony will not result in the dismissal of criminal charges if there is adequate evidence from independent sources to support the charges. "Where the People have submitted evidence obtained directly or indirectly from use of an immunized statement, the charge may be sustained only if supported by admissible evidence derived from an independent source."[38]

The Second Circuit decided a similar matter in *U.S. v. Rivieccio,*[39] in which the court stated, "because the real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to inhere in using a man's compelled testimony to punish him, a violation of . . . the privilege against self-incrimination . . . requires only the suppression at trial of a defendant's compelled testimony."[40] In other words, if immunized evidence comes into a trial, the jury will be instructed to disregard it. If there is enough evidence, aside from that which was immunized, to support a finding of guilt, the finding of guilt should be affirmed.

VI. "Thought Process"

Criminal charges will not be dismissed upon speculation that exposure to immunized testimony may have affected a prosecutor's thought process.[41] This issue arose in the case of *U.S. v. McDaniel*,[42] in which the Eighth Circuit found that the government failed to show independent sources. According to the court, the government was unable to prove that immunized testimony was not used by the prosecutor "in some significant way short of introducing tainted evidence."[43] The court suggested that the prosecutor's thought process may have been affected because he read the defendant's immunized statement. Examples, offered by the court, of how the immunized testimony could have been impermissibly used included "focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy."[44]

In New York, in the case of *U.S. v. Mariani*,[45] the lower court vacated defendant's conviction and dismissed his indictment, finding that the prosecutor had impermissibly used defendant's immunized testimony in several "non-evidentiary" respects, similar to those described in *McDaniel*. The Second Circuit reversed, however, stating, "to the extent that *McDaniel* can be read to foreclose the prosecution of an immunized witness where his immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial, we decline to follow that reasoning."[46]

Taking the decisions of *Corrigan* and *Mariani* together, it would appear that in New York State, the prosecutor can read a compelled statement of a defendant prior to trial, and still prosecute the case, provided he does not actually *use* it.

Practical Considerations in View of *Corrigan* and *Mariani*

It would be a mistake to read the decisions of *Corrigan* and *Mariani* as a license for disregarding the immunity accorded those who give compelled statements. This was made clear by the court in *Corrigan*, "We conclude with a word of caution. Although we hold that a dismissal of the information was not warranted, we by no means approve the practice followed by the prosecutor here. A defendant's guarantee of immunity . . . must be scrupulously protected."[47] It is not uncommon for a government employee to be compelled to give statements regarding matters for which criminal charges are pending against him. In those situations, it is the imperative, and fortunately the practice, that the criminal and employment matters are kept entirely separate. This is accomplished by employing a "firewall," an imaginary device which stands between those who prosecute the criminal matter and those who prosecute the employment matter. Specifically, nothing gleaned from the compulsory interview of the employee is shared with anyone even tangentially involved with the criminal matter. In the case of *People v. Feerick,* for example, where a Kastigar violation was alleged, the New York State Appellate Division for the First Department cited investigators' awareness of the need to keep the criminal and employment matters separate, and credited the steps they undertook to accomplish this separation, in support of its finding that no Kastigar violation had occurred.[48]

Other Considerations

Non-Testimonial Evidence

In an employment matter, a person may be compelled to provide non-testimonial evidence, which may then be used against him in a criminal trial. "The Fifth Amendment privilege . . . protects an accused . . . from being compelled to testify against himself, or otherwise provide the State with evidence of a *testimonial* or *communicative* nature. A defendant, however, may be compelled to provide evidence such as fingerprints, a photograph, physical measurements, handwriting or voice exemplars, or be required to participate in a lineup,

stand, walk, assume a position or make a gesture, without invoking this privilege inasmuch as such evidence has been deemed not to be testimonial or communicative in nature."[49]

Conclusion

Provided the immunity which attaches to compelled statements is recognized and honored, disciplinary proceedings against government employees may be resolved, either preemptively or simultaneously, alongside parallel criminal proceedings.

Endnotes

1. *Gardner v. Broderick*, 392 U.S. 273, 278 (1968).
2. *Id*. at 276.
3. See dissent, *Garrity v. New Jersey*, 385 U.S. 493, 507 (1967).
4. *Garrity*, 385 U.S. at 507 (dissent).
5. U.S. CONST. amend. V.
6. This provision lingers anachronistically at N.Y. Const. art. 1, § 6.
7. *Garrity,* 385 U.S. at 500.
8. *Lefkowitz v. Turley*, 414 U.S. 70, 84 (1973).
9. *Gardner v. Broderick*, 392 U.S. 273, 276 (1968).
10. *Kastigar v. United States*, 406 U.S. 441, 460 (1972).
11. *Harris v. New York*, 401 U.S. 222, 226 (1971).
12. *New Jersey v. Portash*, 440 U.S. 450, 459 (1979).
13. *Portash*, 440 U.S. at 459 (italics in original).
14. *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984).
15. *Garner v. United States*, 424 U.S. 648, 655 n.9 (1976).
16. *Murphy*, 465 U.S. at 429, quoting *Garner*, 424 U.S. at 657, which quotes *Lisenba v. California*, 314 U.S. 219, at 241 (1941).
17. *Miranda v. Arizona*, 384 US 436, 467 (1966).
18. *Murphy*, 465 U.S. at 434, quoting *Garner*, 424 U.S. at 661.
19. *Murphy*, 465 U.S. 420 at 435.
20. *Matt v. Larocca*, 71 N.Y.2d 154, 159, 524 N.Y.S.2d 180 (1987).
21. *Kastigar v. United States*, 406 U.S. 441, 460 (1972).
22. *U.S. v. Biaggi*, 909 F.2d 662, 690 (2d Cir. 1990).
23. *U.S. v. Harloff*, 807 F. Supp. 270, 282 (W.D.N.Y.1992).
24. *U.S. v. Apfelbaum*, 445 U.S. 115, 127 (1980), quoting *Glickstein v. U.S.*, 222 U.S. 139, 142 (1911).
25. *Id.*
26. *Id*. at 453.
27. *California v. Byers*, 402 U.S. 424 (1971).
28. *People v. Samuel*, 29 N.Y.2d 252, 327 N.Y.S.2d 321 (1971).
29. *Id.* at 261.
30. *Id*. at 262.
31. *People v. Patterson*, 169 Misc. 2d 787, 646 N.Y.S.2d 762 (Sup. Ct., Kings Co. 1996).
32. *Seabrook v. Johnson*, 173 Misc. 2d 15, 660 N.Y.S.2d 311 (Sup. Ct., Bronx Co. 1997).
33. *People v. Corrigan*, 80 N.Y.2d 326, 590 N.Y.S.2d 174 (1992).
34. *Id*. at 331.
35. *Id*. at 330.
36. *Id*. at 331.
37. *Pirozzi v. City of New York,* 950 F. Supp. 90, 93 (S.D.N.Y.1996).
38. *People v. Corrigan*, 80 N.Y.2d 326, 329, 590 N.Y.S.2d 174 (1992).
39. *U.S. v.* Rivieccio, 919 F.2d 812 (2d Cir. 1990).
40. *Id*. at 816.
41. *U.S. v. Mariani*, 851 F.2d 595 (2d Cir. 1988).
42. *U.S. v. McDaniel*, 482 F.2d 305 (8th Cir. 1973).
43. *Id*. at 311.
44. *Id*. at 311.
45. *U.S. v. Mariani*, 851 F.2d 595 (2d Cir. 1988).
46. *Id*. at 600.
47. *People v. Corrigan*, 80 N.Y.2d 326, 332, 590 N.Y.S.2d 174 (1992).
48 *People v. Feerick*, 241 A.D.2d 126, 134, 671 N.Y.S.2d 13 (1st Dep't 1998), *aff'd*, 93 N.Y.2d 433, 692 N.Y.S.2d 638 (1999).
49. *People v. Berg*, 239 A.D.2d 97, 670 N.Y.S.2d 57 (3d Dep't 1998), citing *Schmerber v. California*, 384 U.S. 757 (1966), and *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

Mr. Dailey was formerly a Lieutenant with the New York City Police Department. He obtained his law degree from Fordham University Law School. He also served as an Assistant District Attorney for the Bronx District Attorney's Office and subsequently became a Special Prosecutor and Supervisory Attorney for the New York Police Department, prosecuting serious cases of police corruption and misconduct. His article is based upon the work he performed for the New York Police Department.

DNA Evidence and a Book Review on the Subject

By Herald Price Fahringer and Erica T. Dubno

Introduction

Because of DNA's growing sovereignty in criminal investigations, it has become a source of considerable concern among defense lawyers, prosecutors and judges. A recent treatise covers the subject of DNA in great detail and provides criminal law practitioners with a valuable tool to assist them in utilizing and dealing with DNA evidence. The book dispels the mysteries of DNA with remarkable clarity and vigor. Thus, it makes an exceedingly difficult subject surprisingly accessible. We hope that this brief article on DNA and a review of a recent treatise on the subject will prove helpful and interesting to our readers.

"It is harrowing to learn that, to date, there are 144 officially recorded cases throughout the United States, where convictions have been overturned through the use of DNA."

Breaking the DNA Code

In the early days of World War II, American cryptographers believed they had cracked the daunting Japanese code. However, to be certain, they arranged to have an urgent message sent from Midway Island, indicating that their fresh water supply was almost exhausted. As anticipated the communication was intercepted by the Japanese. Imagine the Americans' exhilaration when, moments later, they picked up a Japanese transmission, which, after deciphering it with their new method of decoding, read: Midway "is short of water"!

Many believe that the science of DNA is encrypted in a similarly secret code, consisting of words and terms alien to most of us. Well, that code has now been broken. The code-breakers are Lawrence Kobilinksy, Thomas F. Liotti, and Jamel Oeser-Sweat. Their "codebook" is *DNA: Forensic and Legal Applications* (John Wiley & Sons, Inc., New York, N.Y., 2005) (364 pages). Every lawyer should have it.

The book reveals, with alarming clarity, the ruthless fallibility of our criminal justice system by pointing to cases where people have spent 10, 15, 20 years in prison, only to be finally cleared by DNA evidence. It is harrowing to learn that, to date, there are 144 officially recorded cases throughout the United States, where convictions have been overturned through the use of DNA. Certainly, these harsh revelations inspire a humbling deference for DNA's power to exonerate the innocent and to convict the guilty.

In fact, the science of DNA is becoming one of the most heavily mobilized weapons in the hands of law enforcement. Thus, it is imperative that lawyers facing trials, in which they will be staring down the barrel of DNA evidence, grasp the underlying science, as well as the technology utilized to exploit it. Too many lawyers experience a paralyzing paranoia when confronted with DNA, because of its intimidating, foreign nature. However, the authors have made these abstract concepts seem amiable.

Written without awe, the authors lead us through the difficult terrain of DNA without fatigue or exhaustion. Some of the territories covered are genetics, the replication of DNA, crime scene investigations, methods used to analyze DNA, and its presentation in court. Unlike so many books where the writing merely seems dutiful, here, the words have the force of authority and a grand confidence. The book is animated by actual cases that dramatize and galvanize the text. The authors avoid coddling highly technical details and, instead, write with a canny toughness that is direct and liquid clear.

As *DNA: Forensic and Legal Applications* progresses, the text becomes even more practical. Much of the book's considerable power is centered on the fifth chapter, "Litigating a DNA Case," where the authors' "hands-on" approach offers advice on how to deal persuasively with DNA issues during various phases of a trial. For example, the authors discuss ways of introducing the subject of DNA during jury selection. They also provide keen insights into how to exploit DNA evidence to strengthen an opening statement.

Regarding the perilous task of cross-examining an expert, the authors point to hidden routes for striking at some of DNA's most vulnerable soft spots, such as contesting the sufficiency of the DNA statistical database, checking the correctness of the protocols used by the laboratories that analyze the DNA, and investigating the ever-present risk of contamination that can topple the entire body of scientific proof. The primacy of DNA experts, and their bewitching testimony, must be overcome by a diligent cross-examination. Recognizing the heavy weight of this task, the book provides counsel with specific questions designed to fortify an effective

cross-examination. In this section, you have the authentic feel of the authors' speaking voice.

Earlier in the book, the rivalry between the two competing rules governing the admissibility of scientific evidence—the "*Frye* rule" (*Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923)) and the newer "*Daubert*" approach (*Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S. Ct. 2786 (1993))— are thoroughly discussed. However, the authors conscientiously avoid favoring one rule over the other in this simmering debate.

A scrupulous bibliography catalogs a wide range of sources, which enables the reader to further explore some of the more remote aspects of DNA. No less than six appendices provide a large amount of statistical data, including documentation of the rapid growth of "Innocence Projects," as well as the New York legislature's action mandating DNA testing for certain identified crimes. One appendix also contains a comprehensive portfolio of decisions gathered from all over the country bearing on the admissibility of DNA evidence. And, finally, an exhaustive glossary translates the arcane language of DNA into plain English.

By the time we reach the end, we come to see the elegance of DNA and the beauty of its symmetry, as well as the rectitude of its mathematical certainty. In fact, we leave the book unwillingly wanting more. That is quite an achievement for a book that tackles such a complex subject. This remarkable work is an indispensable source for all practitioners because it is written for prosecutors, defense lawyers, judges and even civil litigators.

And so, we end as we began. The DNA code has been broken. Because of that breakthrough, those of us engaged in the confined warfare of the courtroom now have a significant advantage when faced with DNA evidence. This valuable codebook will go a long way toward helping us win the "DNA battle," which, in turn, may prove decisive in winning the war of the overall trial. For that, we owe the authors a great debt of gratitude.

Herald Price Fahringer and Erica T. Dubno are criminal defense lawyers who have had experience in cases involving DNA issues. Mr. Fahringer is also considered one of the leading criminal law practitioners in the country, having argued numerous cases in the United States Supreme Court and the New York Court of Appeals. Throughout his years of practice he has also written and lectured widely on various criminal law subjects. This article is based upon excerpts from a review which recently appeared in the *New York Law Journal*.

New York Court of Appeals Review

Discussed below are significant decisions in the field of Criminal Law issued by the New York Court of Appeals from February 10, 2005 to May 2, 2005.

CLOSURE OF COURTROOM

***People v. Nazario*, decided February 10, 2005 (N.Y.L.J., February 14, 2005, pp. 1 and 21)**

In a unanimous decision the Court of Appeals reversed a conviction and ordered a new trial because the Trial Judge had improperly excluded the defendant's drug counselor from the courtroom. The Court considered the question of whether and when people who had a close relationship with the defendant but are not family members should be included within the exceptions to an order excluding the general public. In the case at bar the defendant had been convicted of selling two bags of heroin to an undercover officer. The prosecution had moved to close the courtroom during the testimony of the officers on the grounds that closure was necessary to protect their safety. The defendant had asked, however, that the defendant's brother and his drug counselor be allowed to attend. The Court allowed the brother's attendance but excluded the drug counselor.

In rendering its decision the Court of Appeals concluded that where the defendant has shown that there is a special relationship between a proposed spectator and the defendant of a kind that enables the proposed spectator to give the defendant the kind of moral and emotional support that might be expected from a family member, the trial court should admit the spectator to an otherwise closed courtroom unless the prosecution shows a specific reason for his or her exclusion. Applying this rule the Court concluded that it was reversible error to exclude the drug counselor since the defendant had met his burden of showing that an exception existed to the closure order.

FOLLOWING *CRAWFORD*, ERROR TO ADMIT PLEA ALLOCUTION BUT HARMLESS ERROR ANALYSIS APPLIES

***People v. Hardy*, decided February 17, 2005 (N.Y.L.J., February 18, 2005, p. 1, 2 and 19)**

In a unanimous decision the New York Court of Appeals held that in light of the United States Supreme Court decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), it was obligated to overrule its prior decision in *People v. Thomas*, 68 N.Y.2d 194 (1986), which had upheld the use of a co-defendant's plea allocutions. The Court held that in light of the *Crawford* decision, the trial court had committed error in admitting the plea allocution. The Court further concluded that in determining whether a reversal of a conviction was required a harmless error analysis would be applied. Using such a test the Court concluded that in the case at bar the plea allocution testimony was a major part of the prosecution's case, therefore there was a reasonable possibility that its admission and subsequent exploitation by the prosecutor contributed to the verdict. A new trial was therefore required.

***People v. Douglas*, decided February 17, 2005 (N.Y.L.J., February 18, 2005, pp. 1, 2 and 21).**

Utilizing its rule of harmless error analysis the Court upheld the defendant's conviction even though it determined that it was error under the *Crawford* determination to admit evidence of the co-defendants' plea allocution. In the case at bar the victim's testimony at the trial described in great detail the sequence of events involved in the robbery. In addition the defendant was identified by the victim and the victim's stolen property was recovered. The Court thus concluded that in light of the victim's testimony and the independent corroboration by other evidence presented at trial, there was no reasonable possibility that the trial court's erroneous admission of the plea allocution influenced the jury's verdict. The error was therefore harmless beyond a reasonable doubt and a new trial was not required.

FELONY MURDER

***People v. Seeber*, decided February 18, 2005 (N.Y.L.J., February 18, 2005, p. 18)**

In a 5-2 decision the Court of Appeals upheld a felony murder conviction of a woman who had entered a plea to such a charge as a result of plea negotiations. The case involved the murder of the defendant's 91 year-old step-grandmother while jewelry was being stolen from her home. As part of the plea negotiation the defendant had pleaded guilty to second degree murder and had agreed to testify against her boyfriend in exchange for a twenty-to-life sentence.

The boyfriend, however, was subsequently acquitted and the defendant then attempted to withdraw her guilty plea, arguing that the plea allocution failed to establish a crucial element, namely that she had committed an underlying felony. The five-judge majority upheld the conviction finding that there was nothing that the defendant said or failed to say in her allocution which negated any element of the offense to which she

pleaded. The Court further stressed that when considering a motion to withdraw a guilty plea the Trial Judge should be entitled to rely on the record before him and should be given substantial discretion in making the determination.

Judges Robert S. Smith and George Bundy Smith dissented, arguing that the parties had compromised by agreeing on a plea to a felony murder but an analysis of the record indicated that the defendant did not commit the crime of felony murder. The dissenters pointed out that the critical flaw in the plea allocution was that the defendant failed to admit to either a robbery or a murder which would establish a felony necessary to support the underlying murder conviction. The dissenters voted to reverse the felony murder conviction though recognizing that the defendant may very well have committed intentional murder rather than the felony murder charge to which she pled.

DNA TESTING

***People v. Barnwell*, decided February 15, 2005 (N.Y.L.J. February 16, 2005, p. 19)**

***People v. Pitts*, decided February 15, 2005 (N.Y.L.J., February 16, 2005, p. 19)**

In two unanimous decisions the Court of Appeals determined that no time limit existed under the CPL § 440.30(1-a) in which a defendant had to move in order to request DNA testing. The Court further determined that a defendant who brings such a motion does not bear the burden of establishing that the specified DNA evidence exists and is available for testing. The Court thus overturned a Fourth Department ruling in *People v. Barnwell* and remitted the matter back to the Supreme Court in Monroe County for an enquiry as to whether the DNA evidence was available. In *People v. Pitts* however, the Court of Appeals upheld the defendant's conviction despite its ruling on DNA testing because "no reasonable probability existed that the verdict would have been more favorable had the results of the DNA testing been introduced at trial." The Court of Appeals ruling thus sets forth important principles regarding a defendant's right pursuant to CPL § 440.30(1-a) to pursue a post-conviction motion requesting DNA testing.

SUBSEQUENT FILING OF NEW INFORMATION CHARGING NEW OFFENSES

***People v. Thomas*, decided February 15, 2005 (N.Y.L.J., February 16, 2005, p. 20)**

In a unanimous decision the Court of Appeals held that CPL § 100.50 permits the People in a misdemeanor matter to file a new information that alleges additional facts or charges offenses that were not included in the previously filed information but which stem from the same original transaction. In the case at bar the defendant had been arrested in Nassau County on an assault charge. After the charges were dismissed, prosecutors replaced the original accusatory instrument with a new one which alleged additional facts and offenses. The Court in its ruling unanimously determined that CPL § 100.50 allowed the prosecution to so act since the new offenses were part of the original incident.

MEDIA ORGANIZATION MUST PROVIDE DEFENDANT WITH FILM TAPES

***People v. Combest*, decided February 22, 2005 (N.Y.L.J., February 23, 2005, p. 18)**

In a ruling regarding the confidentiality privileges of news-gathering organizations versus the rights of criminal defendants, the New York Court of Appeals 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 matter 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 the Civil Rights Law § 79-8, 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. Under these circumstances the defendant was denied a fair trial and his manslaughter conviction was reversed. The case illustrates the fine balance that must be sought between a defendant's right to obtain evidence relevant to his or her defense and New York's desire to protect journalistic autonomy and freedom of the press. In rendering its determination the Court of Appeals declined to set any broad guidelines for the proper use of the confidentiality privilege but restricted its determination to the facts of the instant case.

POST-RELEASE SUPERVISION

***People v. Catu*, decided March 24, 2005 (N.Y.L.J., March 25, 2005, p. 18)**

In a unanimous decision the Court of Appeals settled an issue regarding post-release supervision which had resulted in conflicting Appellate Division determinations. The Court of Appeals held that a defendant

must be informed at the time of plea or sentence of the post-release supervision period which is mandated as part of a determinate term. The Court of Appeals held that post-release supervision is a direct consequence of a criminal conviction and that as a result a trial court has a constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences. Thus the failure to advise the defendant of the post-release supervision period requires the vacation of a plea and a harmless error analysis cannot be applied as was held by some of the Appellate Division Departments. In rendering its determination in the case at bar the Court of Appeals overturned the Appellate Division First Department which along with the Second Department had adopted a harmless error analysis. The Appellate Division Third Department had previously ruled that when the post-release supervision period had not been mentioned a reversal and a vacation of the plea was required, the position that the Court of Appeals reached in the instant matter.

CPL § 210.30 MOTION NOT SUBJECT TO APPELLATE REVIEW FOLLOWING CONVICTION BASED ON LEGALLY SUFFICIENT TRIAL EVIDENCE

***People v. Smith*, decided March 24, 2005 (N.Y.L.J., March 25, 2005, p. 20)**

In a unanimous decision the Court of Appeals upheld a conviction where the defendant argued that the trial court should have dismissed the indictment for legal insufficiency based upon his original CPL § 210.30 motion. A jury subsequently convicted the defendant after the presentation of trial evidence. The Court of Appeals specifically ruled that the defendant had not presented the Court with a reviewable issue. In making its determination the Court of Appeals stated "specifically, CPL § 210.30(6) provides that the validity of an order denying any motion made pursuant to this section is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence."

INEFFECTIVE ASSISTANCE OF COUNSEL

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

In a unanimous decision the Court of Appeals found that an attorney had not committed ineffective assistance when he inferred to the Court during a bench trial that his client intended to commit perjury upon taking the stand. Following up on its prior decision in *People v. DePallo*, 96 N.Y.2d 437, the Court found that defense counsel had properly balanced the duties he owed to his client and the duties he owed to the Court and the criminal justice system.

In the case at bar, without revealing that his client intended to commit perjury, defense counsel had told the Court that an ethical problem had arisen and he wished to be relieved. Thereafter when the defendant testified defense counsel largely allowed him to testify in narrative form. Under the circumstances the Court found that defense counsel had properly discharged his ethical obligations and had adequately represented the defendant.

NECESSITY OF IN CAMERA REVIEW

***People v. Bedros Yavru-Sakuk*, decided March 29, 2005 (N.Y.L.J., March 30, 2005, p. 21).**

In a unanimous decision the Court of Appeals remitted a matter to the criminal court for further proceedings with respect to whether proper disclosure had been made to defense counsel regarding a diary which had become relevant during the trial. The Court of Appeals determined that an in camera inspection should have been conducted by the trial court to determine whether the diary contained any additional *Rosario* material which should have been turned over to the defense. The Court of Appeals remitted the matter back to the criminal court with the direction that if some additional relevant portions were discovered the Court should also determine whether the admission of that portion of the diary would lead to the conclusion that the non-disclosure materially contributed to the result of the trial. If so, the relevant portions of the diary should be turned over to the defense and a new trial ordered.

DUTY TO RETREAT

***People v. Aiken*, decided March 31, 2005 (N.Y.L.J., April 1, 2005, pp. 1 and 18)**

In a unanimous decision, the New York Court of Appeals affirmed a manslaughter conviction and held that the defendant had a duty to retreat from an adversary who was at his doorstep before using deadly physical force. The incident had occurred as a result of a dispute between two Bronx apartment neighbors. The victim who lived in an adjoining apartment apparently threatened the defendant while standing at Mr. Aiken's door. The issue before the Court of Appeals was whether the defendant had a duty to retreat into his apartment before hitting the victim on the head with a pipe. The Court of Appeals, in ruling that the defendant did have a duty to retreat, concluded that the defendant

needed only to have closed the door to have secured his home and to protect himself. The Court's decision was a further interpretation of the duty to retreat under Penal Law § 35.15 and reflects a further refinement of the delicate balance between protecting life by requiring retreat and protecting the sanctity of the home by not requiring retreat.

ORDER OF PROTECTION

***People v. McClemore*, decided March 31, 2005 (N.Y.L.J., April 1, 2005, p. 21)**

In a unanimous decision, the Court of Appeals upheld the issuance of a 100-year order of protection. The order had been issued on a defendant who had pleaded guilty to first degree kidnapping and had received a prison term of 15 years to life. CPL § 530.15(4) provides the court with discretion to enter an order of protection which shall not exceed the greater of five years from the date of such conviction or three years from the date of expiration of the maximum term of an indeterminate sentence. The Court of Appeals held that under this provision, the court was within its discretion to impose an order of protection for a 100-year period. In issuing its ruling, the Court of Appeals observed that the purpose of orders of protection is to provide certainty for defendants, the protected victims, and law enforcement authorities who may be called to enforce the orders. The expiration date established by the county court in the instant matter adequately fulfilled that purpose.

LACK OF STATUTORY PREDICATE PRECLUDES PROSECUTION APPEAL

***People v. Dunn*, decided April 28, 2005 (N.Y.L.J., April 29, 2005, p. 19)**

In a unanimous decision, the Court of Appeals held that the People were unable to appeal from a *sua sponte* order of a trial court setting aside a verdict which was issued pursuant to Judiciary Law § 2-b(3). In an unusual case, the trial court had set aside a defendant's murder conviction relying upon the Judiciary Law rather than Criminal Procedure Law § 330.30.

The Judiciary Law section grants a court of record general powers while the Criminal Procedure Law sets forth specific requirements for setting aside a verdict. While utilizing the general powers sections of the Judiciary Law, the trial court indicated that it was setting aside the verdict on the ground that defense counsel had failed to meaningfully represent the defendant.

Although so phrased, the Court of Appeals concluded that since only the Criminal Procedure Law delineates the orders that may be appealed by the People and that no provision is made for appealing a Judiciary Law determination, the People's appeal was not authorized and could not proceed. In rendering its determination, the Court of Appeals indicated that the more proper challenge should have been made in the form of a CPLR Article 78 proceeding.

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

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

During the last few months the United States Supreme Court has continued to come down with several decisions which have an important impact on the field of criminal law. On March 1, 2005, the Court issued an important ruling in *Roper v. Simmons* which outlawed the death penalty for youthful offenders who are below the age of 18 at the time of the commission of the crime. As in many of its prior controversial rulings on criminal law matters, the high court split 5-4 in ruling that executing juvenile defenders violates the Eighth Amendment ban on cruel and unusual punishment.

The controversy over the death penalty for youthful offenders split not only the members of the Supreme Court but the attorney generals from the various states. Many of the Southern and Western states allowed the death penalty for offenders as young as 16 and the attorney generals from many of those states had filed amicus briefs in opposition to the proposed ban. Many of the Northeastern and New England states including New York had requested the court to find the death penalty for juvenile offenders unconstitutional. New York Attorney General Spitzer had specifically filed a brief supporting the death penalty ban. The Court's most recent decision directly affects 18 states that permitted the execution of juveniles as young as 16 or 17. It also specifically affected 73 juvenile offenders who were on death row.

In other rulings the Court also split 5-4 in finding that it was unconstitutional double jeopardy for a judge in the middle of trial to dismiss a gun possession charge and then to change her mind and reinstate the charge later on in the proceedings. The court also issued an important ruling with respect to drug-sniffing dogs. These decisions are discussed in detail in the case notes printed below, prepared by students from St. John's Law School.

JUVENILE CAPITAL PUNISHMENT—U.S. Constitution bars execution for crimes committed before age 18. The Eighth Amendment prohibits states from imposing the death penalty on offenders who were under the age of 18 when their crimes were committed.

***Roper v. Simmons*, 125 S. Ct. 1183, 73 U.S.L.W. 4153, 2005 U.S. LEXIS 2200 (2005)**

Respondent committed murder at age 17 when he entered a woman's home, drove her to a park, and drowned her. Following arrest, Respondent confessed to the murder. Respondent was tried as an adult on counts of burglary, kidnapping, stealing, and murder in the first degree. The jury rendered a verdict of guilty. At sentencing, prosecution sought the death penalty, which the jury approved and the trial judge imposed. After failed challenges to his conviction and sentence, Respondent filed a petition for post-conviction relief on the basis of the Supreme Court's rationale in *Atkins v. Virginia*, which held that the Eighth Amendment prohibits execution of the mentally retarded. The Missouri State Court agreed and set aside respondent's death sentence. The Supreme Court granted *certiorari* and affirmed.

The Supreme Court held that the Constitution bars capital punishment for crimes committed before age 18 because such executions violate the Eighth Amendment's prohibition on cruel and unusual punishment. Writing for a slim 5-4 majority, Justice Kennedy reviewed the issue under a two-step inquiry, and concluded that the Eight Amendment calls for a categorical rule that draws the line at age 18, thus overruling *Stanford v. Kentucky* on this issue.

Consistent with its precedent, the Court first examined whether objective indicia of society's evolving standards of decency, as expressed by legislative enactments, reveals a national consensus against juvenile execution. The Court found that 12 states reject the death penalty altogether, 18 states permit it but exempt juveniles, and the remaining 20 still apply it but very rarely to juveniles. The Court also emphasized the consistency with which states have abolished capital punishment for juveniles. The Court deemed this sufficient evidence of "our society['s] view [of] juveniles . . . as 'categorically less culpable than the average criminal.'" *Simmons*, 2005 U.S. LEXIS 2200, at *30 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).

Second, the Court employed its independent judgment to determine whether the death penalty constitutes disproportionate punishment for juveniles. To illustrate the diminished culpability of juveniles among the class of worst offenders, the Court provided three general differences between juveniles under age 18 and adults. Youth are less mature and responsible than adults, less able to resist negative influences, and their moral character is less fixed. Hence, the death penalty's twin aims of deterrence and retribution "apply to them with lesser force." *Id.* at *36. The Court also noted sub-

stantial international consensus against the juvenile death penalty.

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented due to the Court's misplaced moral elitism, *inter alia*. In her separate dissent, Justice O'Connor found wanting evidence of national consensus, and objected to the majority's categorical approach.

By Yakov Pyetranker

MIDTRIAL ACQUITTAL AND DOUBLE JEOPARDY—A midtrial acquittal of one count, from which the trial continues, is final under double-jeopardy principles unless there is some rule, precedent, or judicial reservation to the contrary.

Smith v. Massachusetts, 125 S. Ct. 1129, 73 U.S.L.W. 4125 (2005)

Petitioner was charged with assault with intent to murder, assault and battery by means of a dangerous weapon, and unlawful possession of a firearm. At the close of the prosecution's case-in-chief, the defense motioned to have the third count dismissed for insufficient evidence. *See* MASS. R. CRIM. P. 25(a). The motion was granted; the trial proceeded to the defendant's case-in-chief. Before closing arguments, the prosecution brought to the judge's attention a precedent establishing the sufficiency of its evidence on the third count and motioned to have the earlier dismissal deferred until after the verdict. The judge agreed and all three counts went to the jury, which convicted the Petitioner on all counts. The Appeals Court of Massachusetts affirmed the conviction, holding that the judge's initial ruling was not final and the reconsidered ruling did not subject the petitioner to a second prosecution in violation of the Double Jeopardy Clause. The Supreme Court granted *certiorari* and reversed.

In this 5-4 decision, the Court held that an "unqualified midtrial dismissal of one count" from which the trial proceeds to the defendant's introduction of evidence on the remaining counts is an acquittal and final under double-jeopardy principles unless there is some rule, precedent, or instruction to the contrary. *Smith*, at 1138. The Court drew from, and expanded, its prior holding in *Smalis v. Pennsylvania* in which a defendant cannot be subject to any post-acquittal fact-finding proceedings. 476 U.S. 140 (1986). The Court reasoned that a "false assurance of acquittal on one count may induce the defendant to present defenses to the remaining counts that are inadvisable" thus prejudicially ensnare a defendant relying upon the Double Jeopardy Clause. *Smith*, at 1138.

Here, a midtrial dismissal under MASS. R. CRIM. P. 25(a) required the judge "to make a substantive determination that the prosecution has failed to carry its burden." *Smith*, at 1135. The Court had previously stated, "a resolution . . . of some or all of the factual elements of the offense charged" is an acquittal. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). It is irrelevant under double jeopardy principles whether the judge or jury makes the resolution. The defendant's successful motion met the Court's definition of acquittal. *Smith*, at 1135.

To trigger double jeopardy however, the mid-trial acquittal must be final. The Court found this acquittal to be final under Massachusetts' rules of procedure because the motion must be ruled on immediately, MASS. R. CRIM. P. 25(a), and only clerical or scrivener's errors were subject to correction at any time. MASS. R. CRIM. P. 42. Furthermore, Massachusetts had not adopted any "rule of nonfinality" and nothing in the ruling put the defendant on notice that the mid-trial acquittal was anything but final. *Smith*, at 1137.

In a dissenting opinion, Justice Ginsburg, joined by the Chief Justice, Justice Kennedy and Justice Breyer, distinguished appellate review of a trial court acquittal from that of a trial court revisiting an erroneous decision. Trial judges constantly reconsider mid-trial rulings. As long as the defendant is provided an opportunity to counter the prosecution's case, the defendant suffers no prejudice in a trial court reversing its previous erroneous ruling.

By Jacob Zahniser

SEARCHES WITHOUT REASONABLE ARTICULABLE SUSPICION—The Fourth Amendment does not require a reasonable, articulable suspicion to justify the use of a narcotics-detection dog to sniff the exterior of a vehicle during a legitimate traffic stop.

Illinois v. Caballes, 125 S. Ct. 834, 160 L. Ed. 2d 842, 2005 U.S. LEXIS 769, 73 U.S.L.W. 4111 (2005)

Illinois State Trooper Daniel Gillette pulled over the respondent for speeding. After stopping the respondent's vehicle, Gillette radioed the police dispatcher to report the stop. State Trooper Craig Graham, a member of the Illinois State Police Drug Interdiction Team, was also on duty at the time with a narcotics-detection dog. When Graham overheard the radio transmission, he set out for the location. Graham arrived at the location as Gillette was issuing the respondent, who was seated in Gillette's vehicle, a warning ticket. Graham walked the narcotics-detection dog around the respondent's vehicle

on the shoulder of the road. The dog was alerted at the trunk of vehicle. The officers then searched the trunk, recovered marijuana, and placed the respondent under arrest. The entire event transpired within 10 minutes.

At trial, the respondent moved to suppress the evidence and quash the arrest. The trial judge denied the motion, holding that the stop was not unnecessarily prolonged, and that the dog's alert provided probable cause for the officers to search the trunk. The respondent was convicted of a narcotics-related offense. The Appellate Court affirmed, but the Illinois State Supreme Court reversed due to the lack of specific and articulable facts indicative of drug activity. The Illinois State Supreme Court concluded that, in walking the dog around the respondent's vehicle, a routine traffic stop was unjustifiably enlarged into a narcotics investigation. The State of Illinois appealed to The United States Supreme Court.

The Supreme Court held that, based upon the facts of this case, the Fourth Amendment did not require a reasonable, articulable suspicion to justify the use of the narcotics-detection dog. In its analysis, the Court reaffirmed the holding from *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), that there is no legitimate expectation of privacy with regard to illegal contraband. In addition, the court reasoned that a dog sniff only reveals contraband in which an individual can have no legitimate expectation of privacy. That reasoning was supported by the decision in *United States v. Place*, 462 U.S. 696, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983), which regarded a dog sniff as *sui generis* in that a narcotics-detection dog detects only illegal contraband. Based upon the *sui generis* status of the narcotics-detection dog, there was no possibility that any of respondent's legitimate private information would have been revealed. Furthermore, the respondent was being lawfully detained when the sniff was conducted. Accordingly, the court concluded that the dog sniff and subsequent recovery of marijuana did not violate the Fourth Amendment.

Troubled by the *sui generis* classification of the dog sniff, the dissent agreed with the Illinois State Supreme Court and opined that the majority holding violated *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), because the presence of a drug-detection dog at the scene was intimidating and not reasonably related in scope to a routine traffic stop. The dissent also argued that the majority holding would lead to the indiscriminate and unwarranted use of narcotics-detection dogs.

By Richard Washington

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided between February 25, 2005 and April 28, 2005.

People v. Bloomfield **(N.Y.L.J., February 25, 2005, pp. 1 and 2, and February 28, 2005, p. 18)**

In a unanimous decision the Appellate Division, First Department reversed the convictions of two foreign attorneys who had been found guilty of conspiracy and falsifying business records. The defendants had been convicted under Penal Law § 175.00(2) which defined business records as records that are "kept or maintained by an enterprise as evidence of its condition." The Appellate Panel determined that the defendants did not in fact keep or maintain the fraudulent records. Rather, a partner at the London law firm maintained the fourteen letters which formed the basis of the charges. The Appellate Division thus concluded that a conviction could not be sustained since the records in question did not fit within the statutory definition.

People v. Serkiz **(N.Y.L.J., March 1, 2005, pp. 1 and 2)**

In a unanimous decision the Appellate Division Third Department reversed a County Court's dismissal of an indictment which was granted in "the interest of justice." The matter had involved a third degree grand larceny charge arising from a dispute between the defendant's union and an upstate town in which the defendant was a public employee. The defendant had been accused of calling in sick and collecting sick leave pay when he was not ill. The Appellate Division Third Department in issuing its ruling stated that interest of justice discretion should be exercised "only under extraordinary and compelling circumstances" and that in the instant matter the granting of such relief was not warranted. The Court further noted that interest of justice relief should only be granted in circumstances which cry out for fundamental justice and that the instant matter did not meet that test. A key factor in the Appellate Court's ruling was its feeling that the defendant's conduct had harmed the taxpaying community and that the prosecution was within their rights to bring the indictment in question.

People v. Ryan **(N.Y.L.J., March 7, 2005, pp. 1 and 8, and March 16, 2005, p. 18)**

In a unanimous decision the Appellate Division Third Department ruled that the Supreme Court's recent decision in *Crawford v. Washington* must be applied retroactively to cover all cases which are still in the appellate process. The United States Supreme Court ruling in *Crawford* held that the confrontation clause barred the admission of an out of court statement against a defendant if the statement was testimonial in nature and was made by someone unavailable to testify at trial. Based upon the Appellate Division ruling a new trial was ordered for the defendant even though he was convicted prior to the *Crawford* ruling. The Appellate Division in issuing its decision stated "to the extent that *Crawford* enunciated a new rule for the conduct of criminal prosecutions it applies retroactively to all cases, State or Federal pending on direct review or not yet final."

The retroactivity issue has split the various Appellate Courts and to date the U.S. Court of Appeals for the Second, Fourth and Tenth Circuits have found that *Crawford* is not retroactive, while the Ninth Circuit has ruled otherwise. Within New York State the ruling by the Appellate Division Third Department is the first appellate decision to address the issue. Based upon the importance of the matter it is clear that further rulings will be coming from the other Appellate Divisions with an eventual determination to be made by the New York Court of Appeals.

People v. Colon **(N.Y.L.J., March 9, 2005, p. 18)**

In a unanimous decision the Appellate Division Third Department upheld a dismissal of a charge of criminal possession of a weapon in the second degree. The police had testified that the gun found in the defendant's car had been tested with State Police ammunition rather than with any ammunition found in the weapon. The Appellate Court found that under the definition of a loaded firearm as specified in Penal Law § 265.00(15), the People had failed to present the Grand Jury with a necessary element required for the conviction of a loaded firearm. In reaching its determination the Appellate Division Third Department cited the New York Court of Appeals decision *People v. Shaffer*, 66 N.Y.2d 663 (1985).

People v. Russell **(N.Y.L.J., March 21, 2005, p. 18)**

In a unanimous decision the Appellate Division Third Department reversed a murder conviction because the trial judge improperly failed to grant a challenge for cause with respect to a juror who stated that the defendant's failure to testify might influence the decision. The Appellate Division in rendering its determination stated that while the review of the record indicated that the evidence of the defendant's guilt was substantial, an improper denial of a challenge for cause is not subject to harmless error analysis and that therefore the error which occurred required a reversal and a new trial.

People v. Coleman **(N.Y.L.J., March 24, 2005, pp. 1 and 24)**

In a unanimous decision the Appellate Division First Department issued a ruling interpreting the recent United States Supreme Court decision in *Crawford v. Washington* as it applies to 911 tapes. The First Department concluded that the reports of criminal activity to 911 operators should almost never be viewed as testimonial statements and that therefore they could still be admitted in court under hearsay exceptions even if the witness is not available for cross-examination. In the case at bar jurors had been allowed to hear a tape of a 911 call in which an unidentified caller described an attack against a man and a woman. The 911 operator had requested a description of the assailant but otherwise had only asked the caller to repeat the information he had already volunteered. The First Department held that under these circumstances the tape constituted excited utterance and present sense impression exceptions to the hearsay rule and were not barred as a result of *Crawford*.

People v. Simpkins **(N.Y.L.J., March 23, 2005, p. 1, and March 28, 2005, p. 18)**

In a unanimous decision the Appellate Division Second Department reversed a conviction and ordered a new trial on the grounds that a juror who repeatedly fell asleep during a criminal trial should have been disqualified. After both sides had rested one of the jurors had informed the court that a fellow juror had been repeatedly falling asleep during the trial. When the sleepy juror was questioned he admitted that he had frequently closed his eyes from time to time during the trial. The court itself had observed the juror sleeping during a readback and a reviewing of a video tape in evidence. Under these circumstances the Appellate Division held that the juror should have been disqualified and a new trial was required.

People v. Gudz **(N.Y.L.J., April 8, 2005, pp. 1 and 5, and April 22, 2005, p. 18)**

In a unanimous decision, the Appellate Division Third Department reversed a kidnapping conviction on the grounds that the trial court had wrongfully told the jury that reasonableness is an element of the defense regarding mistake of fact. The Court stated that under Penal Law § 15.20, the Legislature provided that a person can be relieved of criminal liability if his or her factual mistake negates the culpable mental state required for the commission of an offense. Nothing is provided in the statute regarding reasonableness and the Third Department concluded that the trial court had committed reversible error by adding in such a requirement to the statute.

People v. Straniero **(N.Y.L.J., April 15, 2005 , pp. 1 and 6)**

In a unanimous decision, the Appellate Division First Department upheld a conviction despite the fact that the trial record indicated a great deal of hostility between the trial court and defense counsel. Despite the fact that the trial court had exhibited instances of hostility to defense counsel and had asked more than 500 questions during the trial, the Appellate Court found that the judge's actions were the direct result of defense counsel's constant baiting and disrespect to the Court. Under these circumstances, the Appellate Court found that the trial judge's actions did not rise to the level of warranting a reversal.

People v. Monroe **(N.Y.L.J., April 25, 2005, pp. 1 and 6)**

In a unanimous decision, the Appellate Division Third Department upheld a defendant's conviction despite a claimed *Brady* violation. The Court held that the defendant was not entitled to a reversal on a *Brady* violation where she had an opportunity to make use of the exculpatory information that should have been but was not turned over by the prosecution. The Appellate Division concluded that when the trial court permitted the defense to reopen its case and cross-examine the victim after learning of the prosecution's failure to turn over a relevant police report, this action was sufficient to cure the *Brady* problem. The Appellate Court concluded that based upon the record, there was no reasonable probability that earlier disclosure of the police report would have affected the verdict.

People v. Covington **(N.Y.L.J., April 28, 2005, p. 18)**

In a unanimous decision, the Appellate Division Third Department unanimously upheld a defendant's conviction of obstructing governmental administration in the second degree. The defendant had yelled out warnings of police activity during a drug raid. The Court concluded that such activity constituted legally sufficient evidence to sustain the conviction and did not involve protected elements of free speech. In making its ruling, the Appellate Division relied upon the Court of Appeals decision in *In re Davan L*, 91 N.Y.2d 88 (1997).

For Your Information

Legal Challenge Raised with Respect to Bronx Court Merger

The recent court merger of the Bronx Criminal Court with the Bronx Supreme Court effectuated by the Office of Court Administration has led to the filing of numerous defense motions challenging the jurisdiction of Supreme Court Judges to hear misdemeanor cases. To date three rulings which have been issued by Supreme Court Judges in the Bronx have resulted in a difference of opinion over the legality of the newly merged court system. At issue is CPL § 210.05 which appears to limit Supreme Court Judges to handling for trial purposes only cases where the accusations against a defendant are contained in an indictment or Superior Court information.

In January Justice John A. Barone ruled that the CPL provision barred Court Administrators from assigning misdemeanor cases to Supreme Court Justices for trial purposes. Other judges, however, have reached the opposite conclusion. Judge Barone's decision was issued in the case of *People v. Barrow*. *See* N.Y.L.J., March 28, 2005, pp. 1 and 22. The controversy and disagreement engendered by the Court Merger Plan appears to be headed to the Appellate Courts with the Appellate Division First Department probably issuing a decision within the next few months.

Effective Date of New Drug Law Sentences

Despite the fact that the recently enacted New Felony Drug Law specifically states that the imposition of the new determinate sentences is to apply to crimes committed on or after January 13, 2005, several judges have indicated that they believe its provisions should be applied to defendants convicted under the old statutes but who face sentencing after the effective date of the new enactments. These judges appear to be relying upon the Court of Appeals decision in *People v. Behlog*, 74 N.Y.2d 237 (1990), which indicated that when the legislature passes an ameliorative amendment that reduces the punishment for a particular crime, that lesser penalty applies to all cases decided after the effective date even though the underlying act may have been committed before that date. The leading decision advocating a retroactive application of the new drug laws is the opinion of Brooklyn Supreme Court Justice Abraham Gerges in *People v. Denton* reported in the *New York Law Journal* on February 7th 2005, pp. 1 and 23. Other judges who have supported Judge Gerges' opinion are Queens Supreme Court Justice Rotker in *People v. Martinez* and Manhattan Supreme Court Justice Cataldo in *People v. Murray* (*See* N.Y.L.J., March 15, 2005, pp. 1 and 6; March 18, 2005, p. 20).

Prosecutors throughout the state have strongly opposed the extension of the new sentences to defendants currently awaiting sentence. Prosecutors have pointed to the clear expression in the legislation that the new statute "shall apply to crimes committed on or after the effective date." It must also be pointed out that the new legislation did provide for retroactive sentencing of Class A-I felony offenders so that the legislature clearly indicated its wishes on any retroactive application of the new law.

To date while a few judges have applied the new law to pending sentences the vast majority have abided by the specific expression of the statute and have supported the prosecution position on the issue. *See* N.Y.L.J., March 24, 2005, p. 1. It appears that the position of the prosecutors is a sound one, but the matter may eventually have to be determined by our Appellate Courts.

Capital Defenders Office Faces Loss of Funding

It appears that the success of the Capital Defenders Office in seeking the nullification of the death penalty may eventually lead to its own demise. In the recent budget submitted by Governor Pataki the funding for the Capital Defenders Office will expire by June 30, 2005 unless the State Legislature passes legislation to comply with the Court of Appeals ruling in *People v. Lavalle*, 3 N.Y.3d 88 (2004). The Capital Defenders Office has been receiving a budget of $12.3 million dollars for the employment of some 60 attorneys.

Although the State Senate has quickly passed legislation designed to reinstate the death penalty the State Assembly has balked at any quick action and has instead conducted lengthy public hearings to determine whether in the current public climate the death penalty should be reimposed. Following these public hearings, the Assembly Codes Committee recently refused by an 11-7 vote to allow the full Assembly to consider the reinstatement of the death penalty. It thus appears that at the present time, although the death penalty remains on the books, its reinstatement will not occur in New

York. We will report any contrary developments on this issue to our readers.

Federal Circuit Courts Begin to Interpret *Booker* and *FanFan*

The U.S. Court of Appeals Second Circuit in early February issued a decision seeking to provide guidance to Federal District Court Judges with respect to the sentencing of federal defendants following the United States Supreme Court decision in *U.S. v. Booker* and *U.S. v. FanFan*. While the Court ruled that the sentencing guidelines can only be advisory the Second Circuit stated that District Court Judges "will be expected to apply their newly restored discretion in sentencing with a strong measure of consideration for the structure of the guidelines."

The Second Circuit decision was issued in the matter of *U.S. v. Crosby* and consisted of a panel of judges—Newman, Kearse and Cabranes. The Second Circuit's ruling may be the first of several emanating from the Federal Appellate Courts as they seek to deal with the controversy and confusion resulting from the recent Supreme Court decisions.

Restoration of Voting Rights for Convicted Felons

Since many states currently deny voting privileges to persons convicted of felony crimes, recent attention has been focused on the question of whether this automatic exclusion should be eliminated and ex-felony offenders immediately restored to the voting roles upon the completion of their sentence. A recent study estimated that as a result of the automatic exclusion in various states some 1.5 million former convicts are presently unable to vote.

The question whether and how former convicts should be allowed to vote has generated a growing nationwide debate arising out of the most recent presidential election. The United States Supreme Court last year declined to consider differing interpretations from two Appellate Courts on the power of the states to deny felons the right to vote. It thus appears that at least for the immediate future any changes with respect to the voting rights of felons will be left up to the individual state legislatures. Most of the states that have automatic exclusions are located within the southern part of the country. Within our own state of New York the Judiciary Law and the Election Law also bars convicted felons from voting and from sitting as jurors. At the present time there does not appear to be any major movement to change the current procedure with respect to our own state of New York. However, some convicted felons in New York have begun to raise constitutional challenges to the automatic bar and the U.S. Court of Appeals for the Second Circuit has recently agreed to review the issue in a lawsuit that has been commenced based upon a claim that the New York situation violates the 1965 Federal Voting Rights Act. We will report any new developments on this issue to our readers as they occur.

Office of Court Administration Initiatives

Chief Judge Judith S. Kaye in early February formally announced several initiatives affecting the judicial system. As part of her presentation to the legislature, Judge Kaye called for an increase in the salaries for New York State judges. Judge Kaye suggested that the judicial salaries in New York be set at the level utilized in the federal system. Under her proposal the salaries of New York Supreme Court judges who presently make $136,700 per year would rise to $162,000. Appellate Division judges who currently make $144,000 would make $171,000 and judges of the New York Court of Appeals who are currently paid $156,000 would be paid about $200,000.

In early April, it was announced that legislative leaders had agreed to support Judge Kaye's request for salary increases with some slight modifications in the salary levels proposed and with a reduction in the gaps between the salaries paid to Supreme Court judges and judges in other courts. It is thus widely expected that some form of judicial salary increase will pass at this year's legislative session and we will report any definitive action to our readers in our next issue.

Judge Kaye also called for legislation to establish independent screening panels for the nomination of judges for elective positions. The Court of Appeals has recently proposed an administrative order which would establish such a screening process, but opposition from certain bar associations and members of the judiciary have questioned whether an administrative order is beyond the legal authority of the courts and would serve to usurp legislative authority. Based upon the announced criticism Chief Judge Kaye informed the legislature that she would far prefer a legislative solution. A bill has already been introduced in the Assembly which would statutorily enact many of the provisions of the proposed administrative order but the ultimate passage of any legislative bill remains to be seen.

In recent months, the Office of Court Administration has also revealed that it has been working on a project to provide attorneys with computer access to court records within the New York City Criminal Court System. The project would involve the five boroughs within the city and would eventually be expanded to include Nassau, Suffolk, Westchester, and Erie Counties. The new system would operate through the use of

the attorneys' "secure pass" which would allow them to use computers to look up details on criminal cases, including upcoming court dates, a history of the proceedings, and details of the charges. The new system would allow attorneys to avoid having to personally visit the clerk's office in the various counties. It is anticipated that the new computerized system would be operational within the next few months and it will be yet another step in utilizing modern technology to bring greater efficiency to the criminal justice system.

Prosecuting the Illegal Practice of Law

The Senate Judiciary Committee has proposed a measure which would permit the Attorney General to pursue both criminal and civil actions for the unlawful practice of law. As a result of the 1998 Court of Appeals decision in *People v. Romero*, 91 N.Y.2d 750, the Attorney General is granted only civil authority pursuant to Section 476-a of the Judiciary Law. Under the proposed bill the Attorney General would have the authority to coordinate the efforts of the various District Attorneys and share responsibility for the enforcement of the Judiciary Law through the use of criminal prosecutions. The bill has already gained substantial support in both Houses of the Legislature.

A bill has also been introduced to increase the jail time penalty for persons who impersonate attorneys. The bill, which has been introduced in both the Assembly and the Senate, would increase the maximum penalty to 4 years in prison rather than the maximum one year term currently in effect. It is expected that both bills regarding the illegal practice of law will be passed by the Legislature within the next few weeks and we will report on any final determination regarding the measure.

Cameras in the Courtroom

The long-standing controversy regarding cameras in the courtroom is again moving to center stage. A unanimous panel of the Appellate Division Third Department in *Heckstall v. McGrath* recently ordered a County Court Judge to bar cameras from his courtroom during the trial of a first degree murder case (decided February 24, 2005, N.Y.L.J., March 8, 2005, p. 18.) Last year the Appellate Division First Department also upheld a ban of TV cameras in the courtroom with respect to a criminal matter. The Court of Appeals granted leave to appeal in the First Department case and oral argument and a decision from the Court of Appeals is expected within the next several months.

The New York State Bar Association recently determined that it would file an *amicus curiae* brief in the New York Court of Appeals supporting the effort to overturn the current state law banning cameras in the courtroom. The decision of the State Bar has itself been controversial with many members holding the view that a ban on televised coverage of criminal trials is necessary for the protection of defendants and the maintenance of the proper functioning of a trial. We await the ultimate ruling of the Court of Appeals on the long-standing controversy involving cameras in the courtroom.

Judges and Prosecutors Voice Security Concerns

In recent months as a result of two high-profile attacks on judges and their families, security concerns have been expressed by both judges and prosecutors. Federal authorities have recently reported that there have been some 700 threats during the last year against federal judicial officials and they suggested that there may have been a greater number of threats against state and local officials including prosecutors.

Members of the federal judiciary recently discussed the security issue and requested additional measures to ensure the safety of the judiciary, court personnel and litigants within the federal system. The judicial conference of the United States, which recently met, in fact formally asked congressional leaders and President Bush for $12 million to provide additional funding for improved safety measures. The conference also called for increased staffing for the United States Marshall Service.

State of New York Supreme Court Justice Abraham Gerges, current President of the Supreme Court Justices Association, stated that he was relaying concerns of the state judiciary to Chief Administrative Judge Jonathan Lippman. With respect to the New York State system it was reported that New York courts are among the nation's safest with almost three thousand corrections officers screening some one hundred thousand visitors on a daily basis.

On a national level, Dan Alsobrooks, District Attorney in Charlotte, Tennessee and past President of the National District Attorneys Association reported a high number of threats against prosecutors. He stated that a survey conducted in 2001 found that 81% of large state prosecutor's offices reported work-related threats or assaults that year.

With respect to the New York judicial system Justice Gerges further remarked that the work of the courts will continue unbowed: "[W]e can't be frightened by these things. You can't permit thugs or terrorists or anybody to take away our democracy." Following Judge Gerges' request and in response to the recent events which highlighted concern over court security, Chief Administrative Judge Jonathan Lippman announced in

late March the formation of a task force to review the court security issues. The task force will consist of nine members and has been requested to issue its report by July, 2005. In creating the task force Judge Lippman stated: "[W]e think we have a good solid system in place but we want to make doubly sure."

The safety of judges and prosecutors and all who participate within our judicial system is of great concern to all of us and all necessary steps should be taken to provide the security required to keep our judicial system functioning in a proper manner.

Legal Community Calls for Statewide Defense Agency and State Bar Urges Uniform Standards for Indigent Representation

As part of its Gideon Day activities sections of the defense bar called for legislation which would establish a statewide agency to oversee indigent defense programs and to set standards for effective and quality representation. Proposals regarding indigent representation have been advanced by the New York State Defenders Association and the New York County Lawyers Association as well as various committees of our own New York State Bar Association.

The various bar groups have also pointed to the difficulties of obtaining adequate funding for indigent defense and have pointed to the differing modes of representation in the various counties throughout the state. Although the state legislature increased assigned-counsel rates in 2003, a system of adequate funding for the increases has not been established and many counties are attempting to establish public defender systems to replace assigned counsel programs. The lack of adequate funding and statewide uniformity has prompted calls from various segments of the legal community for corrective legislative action. Johnathan Gradess, Executive Director of the New York State Defenders Association, recently stated that the situation regarding indigent defense has been growing worse and that roughly half of the counties in New York State have been seeking ways to change the method by which indigent legal services are provided. Norman Reimer, current President of the New York County Lawyers Association, also recently called for a statewide board to provide oversight of indigent defense services.

Vincent Doyle, past Chair of our Section, has also been heading a special committee on the question of indigent legal services, and the State Bar House of Delegates in April approved proposals issued by Doyle's committee to adopt statewide standards for indigent defense and to establish an independent oversight process to ensure consistent and quality representation in every part of the state.

After being adopted by the State Bar, the proposal has been transmitted to the Administrative Board of the courts for review. Vince Doyle's "Committee to Ensure Quality of Mandated Representation" was comprised of 24 members and has been working on its recommendations for over a year. As the proposal is being reviewed by the court system, we will provide additional details on the recommendations and their possible adoption in future issues of our newsletter.

International Law Affects State Criminal Proceedings

In an unusual development provisions of an International Treaty which was signed by the United States in 1963 has led to a possible stay of some scheduled 51 executions of foreign nationals who are convicted under state law. Under the Vienna Convention to which the United States is a signatory, "a detained foreign national in any of the 166 participating countries is entitled to contact his or her consular officials without delay and must be told of that right." As a result of this foreign treaty some 51 Mexican nationals in California, Texas and several other states have attacked their death row sentences and are seeking to re-open their cases. The World Court at the Hague has recently ruled in favor of the Mexican nationals who claimed that state officials did not comply with the Convention's provisions and have requested U.S. officials to review and reconsider the sentences imposed. As a result the United States Supreme Court has been considering the cases in question. Recently however, President Bush issued an order asking Texas and the other states involved to comply with the Court ruling. It is thus unclear at the present time whether the Supreme Court will decide the issue after hearing oral argument in March or whether it will defer any decision until the states have had an opportunity to review the convictions in light of President Bush's order. We will report any further details on this issue in future editions of our newsletter.

Federal Court Suspends Upstate Strip Search Practices

Federal District Judge David M. Hurd of the Northern District recently ordered a suspension of a policy which was being utilized in several upstate counties in which persons arrested, including those on misdemeanor and traffic offenses were required to strip naked in front of a corrections officer. Judge Hurd temporarily enjoined Monroe County from utilizing this policy and also granted class action status to several plaintiffs who have alleged violations of their Fourth Amendment rights. Judge Hurd found the strip search practice inconsistent with recent Second Circuit rulings. The certification of class action status and Judge Hurd's indication that the plaintiffs had demonstrated a sub-

stantial likelihood of success in their lawsuit is a significant development that should have a substantial impact on a practice that has been utilized in several counties in upstate New York.

Judges' Role in Plea Negotiations

The *New York Law Journal* reported in April that the State Commission on Judicial Conduct may be opening an investigation to establish new rules regarding how far and in what manner judges can involve themselves in the plea bargain process. Evidently, some judges as part of plea negotiations have been warning defendants that if they do not accept the prosecutor's early and allegedly more lenient sentence, they will face increased punishment if they went to trial and were found guilty. Some defense lawyers have argued that these actions have amounted to coercing guilty pleas and constituted improper judicial conduct. Joshua L. Dratel, President of the New York State Association of Criminal Defense Lawyers, was quoted in the *New York Law Journal* article as stating that the commission's examination of a judge's role in plea bargaining would be a positive development and that hopefully the commission could delineate some standards so judges would know how to conduct themselves in plea discussions.

John L. Pollack, Chair of the Criminal Courts Committee of the Association of the Bar of the City of New York, also supported the commission's examination of the issue. Richard P. Swanson, of the Committee of the Supreme Court of the New York County Lawyer's Association, was quoted however as stating "the right way to review the judge's handling of plea negotiations is through the appellate process rather than an investigation, if there is one."

The plea process accounts for the overwhelming number of dispositions in the criminal justice system. As such, all practitioners have an important interest in developments which affect the process. In New York, judges have long played a more active role in the process than in the federal courts and any major changes which may be forthcoming in this area will be quickly reported to our readers.

2004 Prison Population Increases

The prison population within the United States in the year 2004 grew to 2.1 million according to a recent statistical report from the Bureau of Justice Statistics. This represents a 2.3% increase from 2003. The new figure means that 1 in every 138 people in the United States is serving prison time.

Further, according to the report, U.S. prisons took in nearly 900 new inmates per week for a total of 48,000 more for the year. The number of persons entering prison now surpasses the number released. The number of female prisoners also went up by 2.9% over last year, constituting 103 inmates for every 100,000 women in the United States. Men, however, are still approximately 11 times more likely to be incarcerated than women.

The continued rise in the prison population is credited to mandatory sentencing for repeat offenders and drug crimes and the limitation in many areas on early release.

DWI Penalties Increased

In May, the Legislature passed and the Governor signed new legislation which increases the penalties for drunken drivers who cause injury or death. The new legislation also removes the requirement for having to prove a traffic violation such as speeding in addition to drunken driving in order to sustain prosecutions for vehicular assault or manslaughter. In addition to now making it easier to obtain convictions for serious felonies arising out of drunken driving, the new law also increases penalties to up to 4 years for drivers who cause injury and up to 7 years for drivers who kill someone in the course of the incident.

About Our Section and Members

Section Chair Roger Adler has announced that a special fall seminar featuring New York Court of Appeals Judge Albert Rosenblatt and a discussion of recent New York Court of Appeals decisions will be held November 4-5, 2005 in Poughkeepsie, NY. In addition the CLE section of the New York State Bar Association will be holding a special session on September 23, 2005 in New York City and on October 14, 2005 in Buffalo, which will provide a discussion on the effects of the recent United States Supreme Court decisions in *Booker* and *FanFan* with respect to the federal sentencing guidelines. Details regarding these programs will be distributed to our members shortly. We urge our members to attend these events.

We also wish to report that the recommendation of our Section regarding the videotaping of custodial interrogations, which was subsequently adopted by the House of Delegates, has now been formally introduced as a legislative bill in both the State Assembly and Senate. The Bill S.3354 was introduced into the Senate by Erie County Senator Dale Volker. The Assembly Bill A.6541 has been introduced by Assemblyman Joseph Lentol of Brooklyn. The bill appears to have support within both parties and we will keep our members and readers advised of developments regarding its passage.

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CRIMINAL JUSTICE SECTION

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Publication and Editorial Policy

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

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

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

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

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