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New York Criminal Law Newsletter

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

The United States Supreme Court as It Begins Its New Term

**(See feature article
A Personal Look at the United States Supreme Court on page 15)**

The Collection of the Supreme Court of the United States

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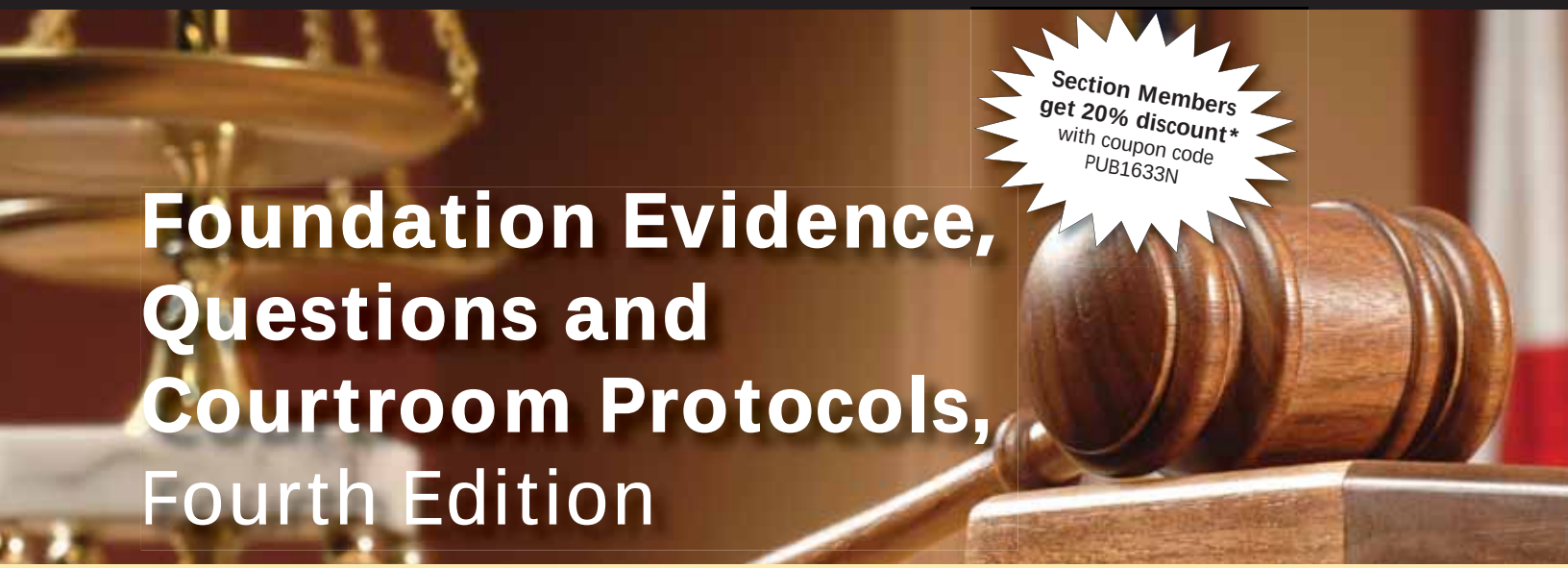

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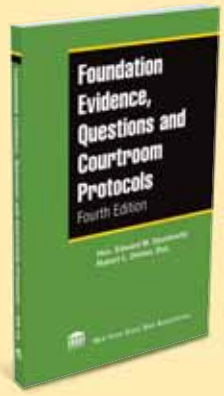

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Foundation Evidence, Questions and Courtroom Protocols, Fourth Edition aids litigators in preparing appropriate foundation testimony for the introduction of evidence and the examination of witnesses.

This manual contains a collection of forms and protocols that provide the necessary predicate or foundation questions for the introduction of common forms of evidence—such as business records, photos or contraband. It includes basic questions that should be answered before a document or item can be received in evidence or a witness qualified as an expert. The questions can be modified or changed to fit specific problems, issues or an individual judge's rulings.

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False Confessions: Justice Undone

Guilty people only confess to crimes they have committed. This bedrock principle of law enforcement is wrong at least some of the time. False confessions account for 25% of wrongful DNA exonerations, according to the Innocence Project. The percentage of overall wrongful convictions caused by false confessions is not known but the National Exoneration registry currently lists 996 nationwide exonerations dating back to 1989. Just as the National Academy of Sciences Report "Strengthening Forensic Science in the United States: A Path Forward" concluded in February, 2009, that many so-called forensic disciplines, including fingerprints and tool-mark analysis, had never been scientifically validated and similarly the decision of the New Jersey Supreme Court in *New Jersey v. Henderson* concluded that decades of scientific research now revealed that the possibility of mistaken identification is real and requires a complete reassessment of the criteria by which juries should weigh eyewitness identification evidence, so too is the criminal justice beginning to re-evaluate the role of police conduct, particularly trickery and deception, in obtaining confessions from suspects.

This is not a new problem suddenly discovered. In 1964, two New York women—Janice Wylie and Emily Hoffert—were brutally murdered in their Upper East Side New York City apartment. Police officers were then interrogating a 19-year-old African American man, George Whitmore, for an attempted rape in Brooklyn the night before. After hours of questioning, Whitmore "confessed" to three murders, including the Wylie-Hoffert slayings, and the attempted rape. A Brooklyn jury convicted Whitmore of the attempted rape, but this verdict was later overturned when it was discovered that jurors had been reading newspaper accounts naming Whitmore as a suspect in, the Wylie-Hoffert killings dubbed by the media as the "Career Girl Murders." By 1965, prosecutors had found evidence that Whitmore did not kill Wylie and Hoffert, but the indictment remained in place because Whitmore was about to be tried for the murder of Minnie Edmonds based almost entirely on his confession. To have dismissed the Wylie-Hoffert murder indictment would have permitted Whitmore's defense attorneys to claim that his confession in the Edmonds case, obtained during the same interrogation as the Wylie-Hoffert investigation, was also false.

Whitmore's confession in the "Career Girls Murder" case was 61 pages long and highly detailed. Brooklyn Assemblyman Bertram L. Podell noted that Whitmore's confession was "manufactured and force-fed to this accused." Fortunately for Whitmore, he was aided by Selwyn Raab, then a reporter for *The New York World Telegram and Sun* (and in later years for the *New York Times*). Raab discovered dozens of witnesses who had seen Whitmore in Wildwood, New Jersey on the day Wylie and Hoffert were murdered. They remembered him because it was the same day that Rev. Martin Luther King gave his "I Have A Dream" speech in Washington, D.C. (Raab would go on to write a book about Whitmore's case called "Justice in the Backroom").

In 1965 Governor Rockefeller signed a bill abolishing capital punishment and in 1966, the United States Supreme Court, in issuing its ruling in *Miranda v. Arizona*, called Whitmore's case "the most conspicuous example of police coercion." In the meantime, Whitmore was tried several times for the Edmonds murder, each trial ending in a hung jury. Finally on April 10, 1973, nine years after his arrest for the Wylie-Hoffert murders, Brooklyn District Attorney Eugene Gold dismissed the attempted rape charges after new evidence surfaced which exonerated Whitmore.

Twenty-five years after Whitmore's arrest, in 1989, five teenage suspects "confessed" to the brutal rape of a Central Park jogger. The five defendants all completed prison sentences ranging from 7½ to 13½ years. On December 20, 2002, upon the application of the New York County District Attorney Robert Morgenthau, all the convictions were overturned when DNA evidence proved another individual had committed the crime.

George Whitmore went home to Wildwood, New Jersey, where he was mostly unemployed and battled both alcoholism and depression. On January 17, 2012, Chicago prosecutors indicated that they would not retry Harold Richardson after his murder conviction was set aside based upon DNA evidence. Richardson falsely confessed and served 14 years in jail for a crime he did not commit.

George Whitmore died on October 12, 2012, at the age of 68. May He Rest in Peace.

Marvin Schechter

***The views reflected in this column are those of the Section Chair and are not the policies of the Criminal Justice Section or the New York State Bar Association.**

Message from the Editor

In this issue we present our annual review of newly enacted criminal law legislation which has been prepared by Judge Barry Kamins. Judge Kamins has been preparing this annual update almost from the inception of our *Newsletter*, some 10 years ago, and we thank him for his continued service to our *Newsletter* and our Section. Since the most recent session of the United States Supreme Court thrust the Court into the public limelight, we also present an article providing a brief biographical review of each of the current nine Supreme Court Justices who comprise the current Court. Although the Court acts as one body, it is comprised of nine distinct individuals who have varied backgrounds, characteristics and judicial philosophies. We attempt in this second feature article to provide our readers with a look at the individuals behind the decisions.

Judge Carmen Beauchamp Ciparick has reached the mandatory retirement age and left her seat on the New York Court of Appeals as of December 31, 2012. Judge Ciparick was the Senior Associate Judge of the Court, and served on the Court for nineteen years. She has a long record of distinguished service, and we also provide in this issue a special tribute to the Judge, and wish her well in her new endeavors.

The United States Supreme Court commenced its new term on October 1, 2012, and to date very few decisions in the Criminal Law area have been issued. The Court, however, has heard oral argument in several important criminal law matters, and these pending cases are discussed in our U.S. Supreme Court section. The New York Court of Appeals commenced hearing cases in early September, following its summer recess, and some of its decisions to date involving criminal law issues are summarized in our New York Court of Appeals section.

During the summer, several of the Appellate Division Departments continued to issue decisions on criminal law matters, and these are summarized in our Appellate Division section.

In our For Your Information section, we provide various articles regarding the state of the U.S. economy, and the effects of the recent economic recession on the court system and the income of attorneys and law firms. We also provide an update on developments within the various Appellate Divisions regarding personnel changes and the issuance of some recent controversial decisions.

As in the past, the New York State Bar Association and our Criminal Justice Section will be holding their Annual Meeting in New York City. This year the meeting will be held at the Hilton New York, located at 1335 Avenue of the Americas (6th Avenue). The date for the Section meeting, CLE program and luncheon has been scheduled for Thursday, January 24, 2013. As in the past, our Section will also be presenting several awards to distinguished members of the legal profession who have exhibited exemplary legal skills or service to the community. Details regarding these events have been forwarded in a separate mailing, and we hope that many of our members are able to attend.

Spiros A. Tsimbinos

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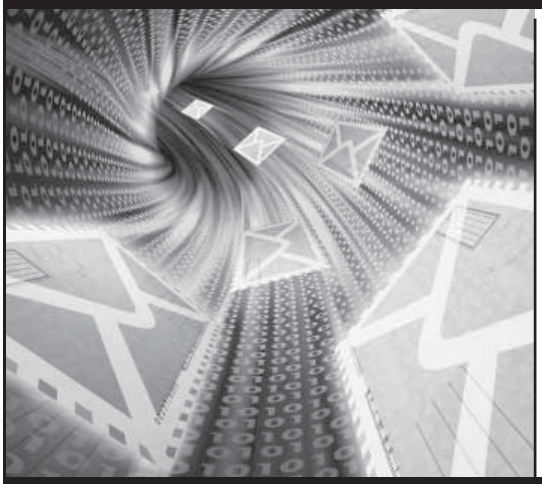

If you have written an article and would like to have it considered for publication in *New York Criminal Law Newsletter*, please send it to the Editor-in-Chief:

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Newly Enacted Criminal Law Legislation

By Hon. Barry Kamins

This column contains an annual review of new criminal justice legislation signed into law by Governor Andrew Cuomo, amending the Penal Law, Criminal Procedure Law and other related statutes. While, in total, the legislature passed the lowest number of bills since 1914, there was no dearth of criminal justice measures. It is recommended that the reader review the legislation for specific details as the following discussion will primarily highlight key provisions of the new laws. In some instances, where indicated, legislation enacted by both houses has not yet been sent to the Governor for his signature.

Procedural Changes

There were a number of significant procedural changes enacted in the past legislative session. One new law expands the sixteen-year-old state DNA databank. Beginning August 1, 2012, for the first time in this state and in the country, DNA samples are now collected from defendants convicted of all felonies, both within and outside the Penal Law, and all Penal Law misdemeanors.[1]

In all, 250 felonies were added to the 400 Penal Law felonies already in the databank and 180 Penal Law misdemeanors were added to the 35 Penal Law misdemeanors in the databank, which was last expanded in 2006. The only exception precludes the taking of a sample from individuals convicted of the Class B misdemeanor of marijuana possession when they have no prior convictions.

Since its inception in 1996, there have been 10,000 "hits" or matches against the databank resulting in over 2,900 convictions. At the same time, 27 individuals were exonerated in New York through the use of DNA evidence as well as numerous suspects who were excluded and cleared at early stages of an investigation.

From a practical standpoint, if the defendant is sentenced to a term of imprisonment, the sample is taken by prison or jail officials. If the defendant is sentenced to a term of probation, the sample is taken by the Probation Department. When a defendant is not sentenced to a period of imprisonment or probation, the sample is taken by the sheriff's office (outside New York City) and a court officer (inside New York City).

The new law also contains several provisions increasing a defendant's access to DNA evidence both before trial and after conviction in an effort to establish his or her innocence. For the first time, post-conviction DNA testing is now permitted where a defendant pleads guilty, but this only applies to guilty pleas entered on or after August 1, 2012. In addition, the testing is only permitted when there is a "substantial probability" that, had DNA been tested prior to the entry of the guilty plea, the evidence would have established "actual innocence" of the offense that is subject to the defendant's motion. In addition, the testing is restricted to homicides, sex crimes pursuant to Article 130 of the Penal Law and Class B violent felony offenses. Finally, there is a five-year statute of limitations, with exceptions in the interest of justice or because of extenuating circumstances.

In addition, where a defendant has been convicted of a felony and a court has ordered a hearing pursuant to CPL 440.10, and the defendant has asserted his actual innocence, the court may order production of property in the control or possession of the prosecutor that was secured in connection with the investigation or prosecution of the defendant. The court may deny the request for property based on a number of factors enumerated in the statute. There is a five-year statute of limitations for making the request which is tolled for five years if the defendant has been in custody in connection with the conviction that is the subject of the motion.

Finally, the new law adds an additional ground for vacating a conviction after trial or the entry of a guilty plea, based upon DNA testing. After a trial, the defendant must establish that there is a "reasonable probability" that a "more favorable verdict" would have been rendered. After a guilty plea, the defendant must establish a "substantial probability" that the defendant was "actually innocent" of the offense for which he was convicted.

Other significant procedural changes were enacted in the last legislative session. When setting bail in domestic violence cases, where a defendant is charged with offenses against a family member or household member, judges are now required to consider certain risk factors, i.e. whether the defendant has previously violated an order of protection, whether or not the order is still in effect, and the defendant's prior history of use of a firearm (S.7638, signed by Governor).

Another bail-related statute creates charitable bail organizations that can now post up to $2,000 for indigent defendants charged with misdemeanors.[2] The organizations will have fewer requirements than for-profit entities and will operate under the oversight of the Department of Insurance.

A new law allows the Chief Administrative Judge to implement mandatory efiling in up to six counties with the approval of the local district attorney and defense bar.[3] The three-year program will only be implemented in post-indictment matters and exempts certain sealed documents, e.g., search warrants. Another new law permits a judge to impose, as a condition of an adjournment in contemplation of dismissal, that a defendant participate in an educational program on cyberbullying or texting messag-

es of a sexual nature.[4] Finally, defendants who have been committed pursuant to a temporary order of observation pursuant to Article 730 of the Criminal Procedure Law, may be sent to outpatient treatment with the consent of the prosecutor.[5]

New Crimes and Penalties

In addition to the above procedural changes, the Penal Law has been amended to expand the definition of certain crimes and increase the penalties for others. Earlier this year, the New York Court of Appeals for the first time examined the statutory construction of two child pornography-related statutes as applied to the increasing amount of pornography consumed over the Internet. In *People v. Kent*,[6] the Court analyzed the elements of two crimes: Promoting a Sexual Performance by a Child (PL §263.15) and Possessing a Sexual Performance by a Child (PL §263.16). The Court held that an individual is not guilty of either crime when the individual merely accesses a website containing child pornography but does not engage in some affirmative act (printing, saving, downloading) to demonstrate that the individual exercised "dominion and control" over illegal images.

In response to *Kent*, the Legislature amended each statute to include "knowingly access[ing]" child pornography with the intent to view it.[7] An exemption has been added for defense attorneys who access such material solely in the course of their representation of clients charged with possession of child pornography.

The Legislature has increased the penalty for impersonating an attorney and elevated the offense from a misdemeanor to a Class E felony.[8] This makes the penalty consistent with the penalties for the practice of numerous other professions.

The assault statutes have been amended to increase the penalties for assaults on sanitation workers and employees of local social services districts while they are performing their duties.[9] Previously, assaults on these classes of individuals constituted only a Class A misdemeanor; they now constitute a Class D felony. In an effort to promote the safe and effective use of prescription drugs, the Legislature has classified a number of substances as "narcotic preparations," including oxycodone and hydrocodone.[10]

The Legislature has amended the statute dealing with incompetent or physically disabled persons. The crime of Endangering the Welfare of an Incompetent or Physically Disabled Person has been divided into two crimes. The current crime, a Class A misdemeanor, has been elevated to a Class E felony and is committed when a person "knowingly" acts in a manner that is injurious to a person who cannot care for himself or herself. A new crime, a Class A misdemeanor, has been enacted; it is committed when a person "recklessly" engages in conduct which is likely to be injurious.[11] Finally, the crime of Falsely Reporting an Incident in the Third Degree has been amended to include making false reports of abuse or neglect of a vulnerable person.[12]

Each year the Legislature enacts a number of new crimes and this year was no exception. Two new crimes were enacted to enhance protection for victims of domestic violence. First, a new Class E felony—Aggravated Family Offense—was enacted to provide that a defendant with a history of domestic violence who repeatedly commits misdemeanor offenses can be prosecuted as a felon.[13] An individual can be charged with this crime when he or she commits one of fifty "specified offenses" against a member of the same family or household after having been convicted of one or more specified offenses within the preceding five years. The person against whom the current specified offense is committed may be different from the person against whom the previous specified offense was committed and such persons do not need to be members of the same family or household.

The second new crime, Aggravated Harassment in the Second Degree, is a Class A misdemeanor.[14] A person is guilty of this crime when, with the intent to harass, a person strikes, shoves, kicks or otherwise subjects another person to physical contact thereby causing physical injury to such person or to a family or household member of such person.

Other new crimes include owning, possessing or manufacturing animal fighting paraphernalia, with the intent to engage in animal fighting, a Class B misdemeanor.[15] Although "animal fighting" has been illegal for some time, this legislation closes a loophole by making illegal, items used to promote or facilitate animal fighting. A new, unclassified misdemeanor makes it unlawful for a funeral director to knowingly give or sell embalming fluid to another person who is not authorized to perform embalming activities.[16] This legislation is an effort to prevent the increased use of embalming fluid with illegal drugs. A new law also bans the sale of electronic cigarettes to individuals under the age of 18.[17]

Finally, a new law establishes a Justice Center for the Protection of People with Special Needs that will investigate reports of abuse and neglect. The agency will be staffed with a prosecutor who has concurrent jurisdiction with local prosecutors to prosecute abuse and neglect crimes. Under the new law, if a human service professional fails to report to the central agency incidents of suspected abuse against vulnerable persons, that will constitute a Class A misdemeanor.[18]

New Protection for Crime Victims

This past legislative session produced a large number of new laws designed to protect crime victims. One new law provides several protections to victims of domestic violence. For example, a person who is the subject of an order of protection protecting an individual who is now

deceased, or a person who has been charged with causing the death of such deceased person, will no longer be eligible to exercise control of the disposition of the deceased's remains.[19] An Address Confidentiality Program (ACP) has been enhanced by enabling victims to keep their whereabouts secret by using a substitute mailing address maintained by the Department of State and requiring state and local governments to recognize the substitute address.[20] A domestic violence fatality review team has been created within the Office for the Prevention of Domestic Violence. The team will examine ways to reduce domestic violence homicides and suicides.[21] Finally, domestic violence victims have been given an additional ninety day period within which to remain in residential shelters; the maximum length of stay is now 180 days.[22]

Other victim-related legislation was enacted. The Crime Victims Board is now authorized to make awards to guardians, siblings, stepbrothers and stepsisters of a person who died as a direct result of a crime.[23] When a defendant is convicted of a crime where the defendant files a financial statement under the UCC falsely alleging that an individual is indebted to the defendant, the court must file with the Secretary of State a Certificate of Conviction. The court must certify that a judgment of conviction was entered against the defendant who was listed as the secured party in the false statement. This will assist victims in proving that the financing statement was false.[24]

Victims of sexual assaults who are at risk for contracting HIV / AIDS will now receive additional medical treatment. They will be provided a seven-day starter pack of HIV post-exposure prophylaxis treatment.[25] A new law expands the universe of victims who must be notified when a criminal prosecution is terminated after a defendant has been committed to the custody of the Commissioner of Mental Hygiene. Previously, notification had to be sent only in cases where the defendant was committed in a felony prosecution. Notification must now be sent where charges are dismissed in a misdemeanor prosecution as well. In addition, in both felony and misdemeanor prosecutions, all victims of family offense crimes must be notified regardless of the victim's relationship to the perpetrator.[26] A new law codifies the right of prosecutors to employ licensed practitioners to provide mental health services to people who are impacted by crime and the criminal justice system.[27]

Finally, the Legislature has increased protection for patients who are under the care of a health care provider. Currently, there is only a mechanism for reporting sexual acts committed by a psychiatrist. A new law requires that law enforcement officials be notified when there is an alleged act of sexual misconduct by other licensed professionals, e.g., a psychotherapist or a social worker.[28]

Changes in Sentencing and Parole

A number of changes have taken place in the area of sentencing and parole. Courts are now permitted to transfer supervision of defendants serving *interim* probation to the probationer's county of residence in the same manner currently in place for individuals serving *regular* probation.[29] This will allow courts to offer defendants, when appropriate, the same plea options whether or not they reside in the same county as the court. The sentencing court shall retain jurisdiction during the period of interim probation but the probation department in the receiving jurisdiction will assume the powers and duties of the original probation department.

Parole officers are no longer required to collect fees from parolees who are on community supervision; this removes a conflict of interest that has strained the relationship between parole officers and parolees.[30] Two new laws will impact on inmates in correctional facilities. First, inmates will no longer be assigned to duties that involve access to social security numbers of other individuals.[31] Second, the State Commission of Correction now has the authority to review hospital records of inmates in order to conduct post-mortem investigations of people who have died while in the custody of corrections officials.[32]

Finally, in New York City, the Department of Corrections is now prohibited from honoring civil immigration detainers by holding an individual beyond the time when such person would otherwise be released from custody or notifying federal immigration authorities of such person's release.[33] However, this only applies where a defendant's case is dismissed, results in an adjournment of contemplation of dismissal, or where the defendant is only charged with or convicted of a violation. In addition, Corrections will honor the detainer if the defendant has an outstanding warrant, or is identified as a known gang member or a possible match in a terrorist screening database.

Several new laws relate to sexual offenders. First, law enforcement officials are now authorized to update the photographs of level three offenders every 90 days or if the offender's appearance has changed, depending on which comes sooner.[34] Second, Parole Boards are now required to make a verbatim record of parole release interviews when the inmate is a sex offender. These records are then provided to the Office of Mental Health and the Attorney General's office for use in determining whether to seek civil confinement for an offender.[35] Finally, several changes were enacted to the Sex Offender Management and Treatment Act (SOMTA). Courts now have the authority to permit psychiatric examiners, upon good cause shown, to testify via two-way closed circuit television at probable cause hearings. In addition, a respondent can now be sent back to the custody of the Department of Corrections if he has not reached his maximum expiration on his sentence and it is determined, after an administrative hearing, that he was significantly disruptive of the treatment program at the secure treatment facility.[36]

Changes in Related Statutes

A number of changes have been made in statutes other than the Penal Law and Criminal Procedure Law. The Department of Health has issued new regulations to deter the increasingly widespread use of synthetic drugs that are marketed and sold as bath salts. The new regulations will affect small business owners who sell these products containing "designer drugs" that are manufactured with a modified structure as a means of avoiding existing drug laws. Criminal penalties for a first offense include a penalty of a $250 fine and up to 15 days in jail. Each subsequent offense carries a penalty of a $500 fine and up to 15 days in jail.[37]

In an effort to speed up criminal investigations, the Legislature has created a voluntary surveillance access database (VSAD). This permits residential homeowners and business owners who maintain video surveillance systems to register voluntarily their contact information in the database. This will eliminate many hours of investigation by law enforcement.[38]

In an effort to curb sex trafficking in New York City, the City Council has enacted a law that penalizes a taxi driver for knowingly using his vehicle to facilitate sex trafficking. There is a $10,000 civil penalty and it will result in the revocation of the driver's license.[39]

Endnotes

1. 2012 NY Laws, Ch. 19 (amending Executive Law §995(7) and CPL §240.40 and adding CPL §440.30(1)(b), §440.30(1-a)(2) and 440.10(g-1), eff. October 1, 2012); 2012 N.Y. Laws, Ch. 55 (changing effective date to August 1, 2012).
2. 2012 NY Laws, Ch. 181 (amending Insurance Law §1108, eff. October 16, 2012).
3. 2012 NY Laws, Ch. 184 (adding Judiciary Law §6-a, §6-b and §6-c, eff. July 18, 2012).
4. 2012 NY Laws, Ch. 55 (amending CPL §170.55, eff. November 26, 2012).
5. 2012 NY Laws, Ch. 56 (amending CPL §730.40, eff. March 30, 2012).
6. *People v. Kent*, 19 NY3d 290 (2012).
7. 2012 NY Laws, Ch. 456 (amending PL §263.11 and 263.15, eff. September 7, 2012).
8. S.1998-A (adding Judiciary Law §485-a, not yet sent to the Governor for his signature).
9. 2012 NY Laws, Ch. 377 (amending PL §120.05, eff. September 17, 2012) (sanitation workers); 2012 NY Laws, Ch. 434 (amending PL §120.05, eff. November 1, 2012 (social service workers).
10. 2012 NY Laws, Ch. 447 (amending Public Health Law 3306(II)(b)(1), eff. August 27, 2012).
11. S.7749 (adding PL §260.24, not yet sent to Governor for his signature).
12. S.7749 (amending PL §240.05, not yet sent to the Governor for his signature).
13. S.7638 (adding PL §240.75, not yet sent to the Governor for his signature).
14. S.7638 (adding PL §240.30, not yet sent to the Governor for signature).
15. 2012 NY Laws, Ch. 144 (adding Agricultural Markets Law §6(a), eff. October 16, 2012).
16. 2012 NY Laws, Ch. 29 (amending Public Health Law §3455, eff. November 14, 2012).
17. 2012 NY Laws, Ch. 448 (amending Public Health Law 1399-aa, eff. January 1, 2013).
18. S.7749 (adding Social Services Law §489, not yet sent to the Governor for signature).
19. S.7638 (amending Public Health Law §4201, not yet sent to the Governor for signature).
20. S.7638 (amending Executive Law §108, not yet sent to the Governor for signature).
21. S.7638 (adding Executive Law §575(10), not yet sent to the Governor for his signature).
22. 2012 NY Laws, Ch. 459 (amending Social Services Law §459-b, eff. April 1, 2013).
23. 2012 NY Laws, Ch. 233 (amending Executive Law §624, eff. July 18, 2012).
24. 2012 NY Laws, Ch. 113 (adding CPL §440.70, eff. July 18, 2012).
25. 2012 NY Laws, Ch. 39 (amending Executive Law §631, eff. November 27, 2012).
26. 2012 NY Laws, Ch. 476 (amending CPL §§730.40 and 730.60, eff. October 3, 2012).
27. 2012 NY Laws, Ch. 358 (amending County Law §700, eff. August 1, 2012).
28. 2012 NY Laws, Ch. 365 (amending Education Law §6510, eff. August 1, 2012).
29. 2012 NY Laws, Ch. 347 (amending CPL §410.80, eff. August 1, 2012).
30. 2012 NY Laws, Ch. 201 (amending Correction Law §201, eff. July 18, 2012).
31. 2012 NY Laws, Ch. 371 (amending Correction Law §170, eff. November 12, 2012).
32. 2012 NY Laws, Ch. 232 (amending Correction Law §46, eff. July 18, 2012). See also *New York City Health & Hosps. Corp. v. New York State Comm. of Correction*, 19 NY3d 239 (2012).
33. Local Law 62-2011, eff. March 21, 2012).
34. 2012 NY Laws, Ch. 364 (amending Correction Law §168, eff. August 31, 2012).
35. 2012 NY Laws, Ch. 363 (amending Executive Law §259-i, eff. August 31, 2012).
36. 2012 NY Laws, Ch. 56 (amending MHL §10.06 and §10.08, eff. March 30, 2012).
37. Public Health Law, Part 9; eff. August 7, 2012.
38. 2012 NY Laws, Ch. 287 (adding Executive Law §718, eff. January 28, 2013).
39. Local Law 36-2012, eff. September 20, 2012.

Barry Kamins (bkamins@courts.state.ny.us) is Administrative Judge for the New York City Criminal Courts and Administrative Judge for Criminal Matters in the 2d Judicial District. He was also recently elected as a Supreme Court Justice in Kings County.

He is also the author of *New York Search and Seizure* and a former Vice President of the New York State Bar Association. He has been a longtime contributor to our *Newsletter*, and has over the last several years provided us with annual legislative updates.

Comparison Between Florida's Stand Your Ground Law and New York's Duty to Retreat and Their Application to the George Zimmerman Case

By Spiros A. Tsimbinos

Introduction

The recent unfortunate incident involving the shooting death of Trayvon Martin by George Zimmerman has renewed the controversy over whether individuals who utilize deadly force can avail themselves of a justification defense based upon the stand your ground principles, or whether it is wiser to impose a strict duty to retreat as an alternative to the use of deadly force.

When I practiced criminal law for many years in New York, I had several occasions to utilize and to write upon New York's justification statute and its treatment of the duty to retreat. I have retired and have lived in Florida for the last several years, but I continue to be interested in, and to write upon, criminal law subjects. Thus, when the events involving the Trayvon Martin incident began to unfold, I became interested in how the Florida statute might differ from New York law. I conducted some substantial research with respect to both statutes and considered how they would apply to the facts of the case which have to date been made public. This article is the result of my research and analysis.

Florida Law vs. New York Law

A review of the statutory schemes of both States with respect to the right of a private person to use deadly force indicates that they are based upon differing philosophies. The New York statutes went into effect in 1965, at a time of relatively low crime rates, and were based upon the rule regarding a duty to retreat when attacked before using force, including deadly force, in self-defense or defense of others. The New York view basically adopted a policy that a human life was sacrosanct, and that a private person should do everything possible to avoid the use of deadly force, even if he was attacked or his property endangered. Thus, New York's main justification provision, which is found in Penal Law Section 35.15 (2)(a), clearly states that deadly force may not be used unless:

> The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such cases, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others, he or she may avoid the necessity of so doing by retreating.

With respect to the concept of what constitutes a reasonable belief, the New York courts have established a two-prong test which is both subjective and objective. Thus, juries must consider the circumstances under which the Defendant acted, and whether the Defendant's conduct was that of a reasonable person in the Defendant's situation.[1]

The New York provision then provides a private person with some limited exceptions to the duty to retreat, to wit:

(a) If the actor is in his or her dwelling and not the initial aggressor.

(b) He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sexual act or robbery, or

(c) He or she reasonably believes that such other person is committing or attempting to commit a burglary, and the circumstances are such that the use of deadly physical force is authorized under subdivision 3 of Penal Law Section 35.20.

Subdivision 3 of Penal Law Section 35.20 forgoes the duty to retreat with respect to preventing a burglary only for a person in possession or control or who has a license or privilege to be in a dwelling or occupied building. Deadly force can also be used to prevent the commission of arson.

New York courts have tended to limit the exceptions to the duty to retreat and affirmed homicide convictions where the evidence established that the defendant could have safely retreated but chose to use deadly force.[2] Even with respect to the defense of one's dwelling, New York courts have taken a restrictive view of the concept of one's dwelling, and have limited its application to one's actual home and not to outside areas such as a porch (see *People v. Bennett*, 212 AD 2d 1028 (4th Dept. 1995)).

Florida, on the other hand, in 2005, after a period of high crime rates, adopted what is commonly known as the "Stand Your Ground Law," and its justification provisions regarding the use of deadly force are based upon the view that a private person should be able to protect himself and his property without being subject to unwarranted prosecution and litigation. Its statutory scheme thus provides a broader protection to the citizen who has

used deadly force than that which exists in New York. Florida's provisions, in effect, make it easier to claim self-defense and to excuse the use of deadly force under a wider range of circumstances.[3] Many other states have followed Florida's lead in enacting similar Stand Your Ground Statutes.

Florida's current statutes are found in Chapter 776 of the Florida statutes relating to the Justifiable Use of Force. Companion legislation is also found in Chapter 782 dealing with homicide, specifically, in s. 782.02, entitled "The Justifiable Use of Deadly Force." Florida's main provision, 776.012, specifically states:

> A person is justified in the use of deadly force and does not have a duty to retreat if
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or
>
> (2) Under those circumstances permitted pursuant to s. 776-013.

Subdivision (3) of s. 776.013 clearly reiterates the basic Florida stand-your-ground policy by stating:

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another, or to prevent the commission of a forcible felony.

The concept of what constitutes a reasonable belief is treated in Florida in a similar manner to that in New York, also utilizing a two-prong test. The standard Florida jury instruction on the issue thus reads:

> In deciding whether defendant was justified in the use of deadly force, you must judge [him][her] by the circumstances by which [he][she] was surrounded at the time the force was used. The danger facing the defendant need not have been actual; however, to justify the use of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, the defendant must have actually believed that the danger was real.

The Florida statute, under Subdivision (1) of s. 776-013, also creates a home protection presumption which provides that a person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another. The presumption applies with respect to the protection of a dwelling, residence or occupied vehicle.

Thus, while the New York provisions provide only a limited defense involving the protection of one's actual home, Florida's home protection is broader and includes an unlawful entry into a vehicle. Florida also goes beyond the view of the New York courts regarding what constitutes a dwelling. Florida provides, in s. 776.013 (5)(a), a definition of dwelling as including any attached porch, or whether the building or conveyance is temporary, or permanent, mobile or immobile, which has a roof over it, including a tent, and designed to be occupied by people lodging therein at night.[4]

Even though New York law makes the claim of justification a defense which must be disproved by the People beyond a reasonable doubt (see Penal Law Section 25.00), Florida goes further with respect to home and vehicle protection by creating a presumption that the defendant's actions were justified. It also appears from developing Florida case law that the presumption is considered to be conclusive and not even rebuttable.[5]

As stated, in Penal Law Section 35.15 (2)(b), New York also provides a limited exception to the duty to retreat with regard to the prevention of five specified violent felonies. Florida, on the other hand, excuses the duty to retreat with respect to the prevention of the commission of any forcible felony. Under Florida s. 776.08, forcible felony includes over 25 crimes, including aggravated assault and battery, and any other felony which involves the threat of physical force or violence against any individual.

In another significant difference from New York law, Florida, in addition to the creation of a presumption, also provides, under s. 776.032, immunity with only some specific limitations from both criminal prosecution and civil actions. S. 776.032 specifically provides:

> A person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031, is justified in using such force and is immune from criminal prosecution and civil action for the use of such force.

The immunity provision further restricts any law enforcement agency from arresting the person who used deadly force unless it determines that there is probable cause that the force that was used was unlawful. See 776.032(2).

Applying the Law to the Publicly Known Facts

The factual situation involving the Trayvon Martin incident, which has been publicly revealed to date, indicates that George Zimmerman was a member of a security patrol in the gated housing complex where he resided. It appears that the area had experienced some recent burglaries and criminal activity. On the night of February 26, 2012, while on patrol and armed with a licensed revolver, he evidently saw Trayvon Martin, a 17-year-old black teenager wearing a hoodie, on the premises, who he apparently suspected may have been involved in some criminal activity. Martin was actually visiting someone in the complex, and was returning from a store. Recorded messages made from cellphones indicate that Trayvon Martin initially called his girlfriend and expressed some concern that he was being followed. George Zimmerman also evidently called police to report a possible crime in progress, and was told by police not to follow the suspect and to wait until police arrived.

Evidently, at some point a confrontation erupted between the two individuals, and during the incident George Zimmerman discharged his revolver and fatally killed the teenager. Statements made by George Zimmerman to police, in public interviews, and a video which has been released in the case, indicate that Zimmerman claims that as he was going back to his truck Trayvon Martin attacked him. According to Zimmerman he was being punched in the face and his head was being bashed against the concrete when he reached for the gun in his waistband before Martin could get it, and that he shot in self-defense. He stated that Martin had said "You're going to die" before he shot, hitting the teenager one time in the chest. Zimmerman also claimed he had yelled for help. Recently released DNA evidence indicated that George Zimmerman's was the only DNA that could be identified on the grip of the gun. The results apparently rule out Martin's DNA from being on the gun's grip. Zimmerman's DNA also was identified on the gun's holster, but no determination could be made as to whether Martin's DNA was on the gun's holster.

Several witnesses in the housing complex stated that they had heard cries for help and the shot, but were unable to state who was calling for help. A voice crying for help on a recorded message as of this date has not been identified, with Martin's family claiming it sounded like their son, and Zimmerman's father stating it was George's voice. The video and medical reports revealed that George Zimmerman had scalp wounds on his head, a broken nose, and other facial injuries.

Applying the legal provisions in effect in Florida and New York to the publicly known facts of the Trayvon Martin incident could lead to the following conclusions.

Although the Sanford, Florida Police Department received a lot of criticism regarding its handling of the case, it appears that the provision under s. 776.032 prohibiting law enforcement from arresting him unless it determined that probable cause existed, explains the reasons for its actions. The Florida Stand Your Ground Law is in effect more of a bar to prosecution rather than a trial defense. Since Zimmerman was the only one who could recite the facts of the incident, and he presented some evidence that he was physically injured, the Sanford Police apparently exercised their discretion, after using standard procedures for investigating the situation,[6] not to make an arrest. Although in hindsight, and based upon the eventual initiation of a legal proceeding by a specially appointed prosecutor, who has now charged Zimmerman with second degree murder, the initial decision not to arrest may be criticized, it is at least understandable, due to the specific provision of the Florida statutes.

In New York, it is unlikely that, based upon the situation which occurred, that an arrest would not have occurred immediately, and the matter referred to the local prosecutor and a grand jury to make an actual determination as to whether a trial was required. The Florida statute imposes an unwarranted burden upon the local police forces, and easily leads to a wide disparity throughout Florida as to whether an arrest is made and a prosecution initiated. A recent special report by the *Tampa Bay Times*, one of Florida's leading newspapers, indicates that approximately 70% of the cases where the stand your ground issue has been involved have resulted in the lack of any prosecution. Florida Lieutenant Governor Carroll, who is heading a special task force which was appointed by Florida Governor Scott to review the stand your ground statute, recently acknowledged that there appears to be widespread confusion and disparities in the way the law is being implemented.[7]

One problem with the Florida situation which has been repeatedly pointed out is that local police departments should not be placed in the position that they are in. Significantly, when the Florida statute was passed in 2005, its passage was strongly opposed by many prosecutors and law enforcement officials. The additional burden placed upon local police forces was one of the areas of key concern.

Another major difference between the Florida situation and New York law is that even if the police have made an arrest, the defendant is entitled to request an immunity hearing, pursuant to s. 776.032, which was previously discussed. A Florida judge, under this statute, can, if the circumstances warrant, dismiss any charges against the defendant without the necessity of a trial. The closest procedure which New York has in this regard is a motion

to inspect the grand jury minutes, and after inspection, to dismiss the charges as legally insufficient. Both under New York law and the Florida statute, it appears that a defendant, once having been charged by the police and prosecutors, will have a difficult time in succeeding under either Florida's immunity procedure or New York's motion to dismiss. Most courts in Florida have rejected Stand Your Ground motions to dismiss, and have allowed the cases to go to a jury.[8] A recent analysis by the *Tampa Bay Times* found that statewide, only about one-third of the immunity hearings resulted in a positive result for the defendant. Thus, with respect to the George Zimmerman situation, it appears that he would not be successful if he sought an immunity hearing. It must be noted that the Judge who was previously assigned to Zimmerman's case had expressed some doubts regarding Zimmerman's credibility during bail hearings. A Motion to Recuse, which was recently filed, was granted by the Appellate court, and a new Judge has now been assigned to his case. With the assignment of a new judge defense counsel has recently announced that he will seek an immunity hearing to be held sometime in April.

Once the Trayvon Martin matter proceeds to a jury trial, what perhaps can be expected as a result either under Florida statutes or New York law? The first relevant issue which must be considered, based upon published reports, is whether the fact that Zimmerman was apparently told by police when he made his call to them not to follow Martin, and whether by continuing to do so he can be classified as the initial aggressor, which under certain circumstances would prohibit his utilization of deadly physical force. Even under New York's more restrictive provisions, a jury may be asked to consider whether Zimmerman withdrew from the encounter and communicated his withdrawal to Martin, and whether Martin continued the incident by following Zimmerman as he was retreating. The New York statute limits any duty to retreat unless it can be accomplished with complete personal safety (see Penal Law statute 35.15). Zimmerman's claim and his apparent injuries allow him to argue, even under New York law, that at the time he drew his gun and fired, Trayvon Martin was beating his head into a concrete ground, and he thus thought he was going to be killed. In the Zimmerman video, he in fact claimed that Martin said, "You're going to die," and that Martin was reaching for Zimmerman's gun just before the actual shooting.

Zimmerman's best defense under New York law would thus be to invoke Penal Law Section 35.15(a) in that he had a reasonable belief that Martin was about to use deadly force against him, and that he could not safely retreat at that time. Utilizing the Florida statute, Zimmerman could invoke s. 776.012 in that he had a reasonable belief that deadly force was necessary to prevent imminent death or great bodily harm to himself. In both xtates, he would also have to claim that he acted as a reasonable person would have under the circumstances which he faced. Zimmerman, in Florida, could also argue that he was preventing a forcible felony against him which involved the threat of physical force or violence against him, a claim that could not be asserted by the New York statute.

Further, under Florida law, the Zimmerman defense would not have to concern itself with any applied duty to retreat, since s. 776.13 (3) provides that:

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

Since Zimmerman, as a security patrol member and a resident of the housing complex, had every right to be where he was, unlike in New York, he was under no duty to retreat in Florida. However, since Zimmerman was not in his home or within his vehicle[9] at the time of the shooting, he would not be able to avail himself of the presumption established by Florida law under s. 776.013. Thus, at trial, he would need to establish that the prosecution failed to establish beyond a reasonable doubt that he did not act in self-defense in accordance with the provisions of the Florida statutes. Of course, Zimmerman's defense of justification rests almost exclusively on his own credibility, and if the prosecution is able to shake his testimony on cross-examination or to contradict it by other evidence, he could be found guilty in either of the two states.

At any trial which is held in Florida regarding Zimmerman's case, the trial judge would have to supply to the jury instructions regarding the legal principles applicable to the justification defense. In both New York and Florida, these principles are incorporated into standard jury charges. Failure to provide the correct required instructions could result in a conviction being overturned on appeal.

Another situation which may help Zimmerman's defense in any forthcoming Florida trial is that despite the initial critical publicity regarding Florida's Stand Your Ground statute, among Floridians it continues to be quite popular. It was originally passed unanimously in the Florida Senate and by an overwhelming vote in the Florida House of Representatives. A recent survey conducted by two Florida newspapers[10] indicates that 65% of likely voters in Florida continue to support the Stand Your Ground Law[11] and that based upon the facts heard to date, 44% felt that Zimmerman was legally defending himself, while 40% stated he was not, with 16% not sure.[12]

What may also help Zimmerman is that the special state prosecutor chose to charge him with murder in the second degree. Based on the facts as they are emerging, this may have been an error, since many jurors are reluctant to equate a situation based on a claim of self-defense with an intentional shooting homicide. Even in States such as New York which maintain a strict duty to retreat, juries have acquitted defendants in several high-profile justification cases.

The concept upon which the Stand Your Ground Law is imbedded comes from something deep in the American character. As far back as the colonial slogan of "Don't Tread on Me" to the Old West culture of self-protection, Americans have felt justified in protecting themselves and not retreating in the face of danger. Florida's Stand Your Ground Law clearly offers Zimmerman greater protection in his use of deadly force than New York would. However, under both statutory schemes, it is possible he would be found to be legally justified in acting as he did.[13] Before a Florida jury, however, his chances would be much better than in New York, since Zimmerman can rely on a combination of traditional self-defense and aspects of Florida's Stand Your Ground provisions. Whether in Florida he will be acquitted, we may in due time know. In New York, we will never know and can only guess.

Endnotes

1. See *People v. Goetz*, 68 N.Y. 2d 96 (1986).
2. See *People v. Russell*, 91 N.Y. 2d 280 (1998); *People v. Estrada*, 1 AD 3d 928 (4th Dept, 2008).
3. Florida's enabling legislation, in fact, included several Whereas clauses which stated:

   > The Legislature finds that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.
   >
   > Section 8 of Article 1 of the State Constitution guarantees the right of the people to bear arms in defense of themselves.
   >
   > The persons residing in or visiting the State have a right to expect to remain unmolested within their homes and vehicles.
   >
   > No person or victim of crime should be required to surrender his or her personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack. (See 2005 Florida laws 199, 200)

4. Compare with New York Penal Law definition of dwelling at Penal Law Section 140.00 (3).
5. An interesting discussion on this development is found in a Law Note in the University of Miami Law Review volume 63, page 395 (October 2008 at pages 403 and 404).
6. Contrary to initial reports, subsequent information indicates that the police investigation was extensive.
7. See Tampa Bay Times, June 5, 2012 issue, page 1.
8. See law note by Zachary L. Weaver, *Florida's Stand Your Ground Law*, 63 U. Miami Law Review 395, p. 423; Tampa Bay Times, July 12, 2012, p. 1.
9. Zimmerman claimed the incident happened after he got out of his truck. If he had been in his truck and was being pulled out by Martin, he could assert the presumption and would have a stronger defense.
10. Tampa Bay Times and Miami Herald of July 16, 2012, p. 1.
11. Although it appears likely that some modification of the Florida Stand Your Ground Law may occur, it appears unlikely that the basic concept will be changed. In fact, recently several members of the Governor's Task Force indicated support for the statute's core provisions, and appear ready to recommend only minor changes, if any. See Tampa Bay Times, September 13, 2012, p. 4, and Tampa Tribune, September 13, 2012, p. 4.
12. Unfortunately, those polled indicated a racial divide, with 50% of whites and 52% of Hispanics supporting Zimmerman's claim, while 82% of blacks rejected his self-defense position.
13. Despite New York's more restrictive statute regarding the use of deadly force and possibly a more negative attitude among New Yorkers regarding the stand your ground concept, several high-profile justification trials in recent years have resulted in acquittals in New York. For example, see the case of Bernard Goetz, a New York City subway rider who was exonerated after using deadly force against three teenagers who he claimed were menacing him and were about to rob him. Also, the case involving the shooting death of Amadou Diallo by Bronx police officers.

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A Personal Look at the United States Supreme Court

By Spiros Tsimbinos

Introduction

About a year ago, I wrote an article entitled "A Personal Look at the New York Court of Appeals." The article proved to be quite popular, and was reproduced in several journals. This year, because of several high-profile cases, the members of the United States Supreme Court were thrust into the public spotlight. I therefore thought that it would be interesting and informative to also take a personal look at the members who comprise the Court and who are behind the Court's decisions. I begin with a look at the Chief Justice and continue with the eight Associate Justices of the Court listed in the order of seniority.

Chief Justice John G. Roberts, Jr.

Chief Justice Roberts was appointed to his present position by President George W. Bush and began his service on the Court on September 29, 2005. With the opening of the October 2012-2013 term he will be commencing his 7th year as Chief Justice. Chief Justice Roberts was born in Buffalo, New York on January 27, 1955 and is now 57 years of age. He is married and has two children. He is a graduate of Harvard College and Harvard Law School. He began his legal career as a law clerk for Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit and then served as a law clerk for Justice William H. Rehnquist in the United States Supreme Court. He also held numerous positions in the United States Justice Department, and engaged in the private practice of law in Washington, D.C. from 1993 to 2003. Prior to his appointment to the United States Supreme Court, he served in the United States Court of Appeals for the District of Columbia.

During his tenure as Chief Justice, Justice Roberts has made an effort to obtain a greater consensus among the Justices, but the Court has continued to split in a 5-4 manner in many major decisions. Justice Roberts has managed to be on the winning side in most of these 5-4 splits, and during the past term he was in the majority 92% of the time. The Chief Justice is basically considered to be part of the conservative wing of the Court, and he often votes in the same manner as Justice Alito. During the last term, he and Justice Alito voted together slightly more than 90% of the time. During the past term, however, he split off from the conservative group in the highly controversial Obama Healthcare case, as well as in some criminal law matters. Whether he will continue to move toward the position of the more liberal grouping or will return firmly to the conservative bloc is something to watch as the Court begins its new term. In a recent interview reported in *Parade Magazine* of September 30, 2012, Former Supreme Court Justice Sandra Day O'Connor commented upon Chief Justice Robert's tenure, and stated "I felt that he made a remarkable effort to try to keep the Court on course, carefully considering and deciding these major issues." She also indicated that although the health care decision may have angered some conservatives, Justice Roberts' vote could prove to be good for the Court's reputation, since it shows that the Court is not acting on political instincts but is trying to resolve bona fide and tough legal issues.

Associate Justice Antonin Scalia

Justice Scalia was appointed to the Supreme Court by President Reagan and he took his seat on the Court on September 26, 1986. He is thus presently the Senior Associate Justice on the Court, having served for 26 years. Justice Scalia was born in Trenton, New Jersey, in 1936 and is now 76 years of age. He is married and has nine children. He is a graduate of Georgetown University and Harvard Law School. Justice Scalia has had a varied career, participating both in private practice, the academic world, and government service. He served as Professor of Law at the University of Virginia and the University of Chicago. His governmental positions include General Counsel of the Office of Telecommunications Policy and Assistant Attorney General for the Office of Legal Counsel. Prior to his appointment to the Supreme Court, he served as a Judge of the United States Court of Appeals for the District of Columbia. Justice Scalia is viewed as being a member of the conservative bloc of the Court, but on certain criminal law issues he has authored decisions which have been favorable to the defense. These include the *Apprendi* line of cases involving sentencing and the *Crawford* ruling involving the right of confrontation. He often votes together with Justice Thomas and they did so more than 90% of the time during the past term. Justice Scalia has written several books, and has been more forthcoming in granting interviews regarding the workings of the Court and his personal viewpoint than other members of the Court.

Associate Justice Anthony M. Kennedy

Justice Kennedy assumed his seat on the Court on February 18, 1988, pursuant to a nomination by President Reagan. He has now been on the Court for 24 years. Justice Kennedy was born in California in 1936, and is presently 76 years of age. He is married and has three children. He is a graduate of Stanford University and Harvard Law School. Prior to his elevation to the United States Supreme Court, he served for many years as a Judge in the United States Court of Appeals for the Ninth Circuit. During his legal career, he also was engaged in the private practice of the law for a period of time, and also served for several years as a Professor of Constitu-

tional Law at the McGeorge School of Law, University of the Pacific.

During the last several years, Justice Kennedy has assumed the role of the critical swing vote, and during the past term he was in the majority 93% of the time. With respect to criminal law matters, Justice Kennedy's critical vote has resulted in significant changes in juvenile sentencing, with the death penalty and mandatory life without parole for juvenile offenders being struck down by the Court as constituting cruel and unusual punishment under the Eighth Amendment. Although initially considered to be part of a conservative grouping, during the past term Justice Kennedy voted 25 times with the liberal wing of the Court, or as often as he did with the conservative group. During the past term, he also voted together with Justice Kagan 83% of the time. His middle position and his influence on the Court make him a key factor on any important case.

Associate Justice Clarence Thomas

Justice Thomas was nominated to serve on the Court by President George H. W. Bush, and he began serving on the Court on October 23, 1991. Thus at the present time he has 21 years of service on the Court. Justice Thomas was born in Georgia in 1948 and is presently 64 years of age. He is married and has one child. He attended Conception Seminary and received an A.B. cum laude from Holy Cross College, and a J.D. from Yale Law School. He served as an Attorney General of Missouri from 1974 to 1977 and as Legislative Assistant to Senator John Danforth from 1979 to 1981. He also served as Chairman of the U.S. Equal Employment Opportunity Commission from 1982 to 1990. Prior to his elevation to the United States Supreme Court, he served as a Judge of the U.S. Court of Appeals for the District of Columbia.

Justice Thomas is viewed as a strong member of the conservative group and often votes together with Justice Scalia. Unlike some of his colleagues, Justice Thomas does not engage in much questioning during oral argument, and prefers to allow the attorneys to make their presentation.

Associate Justice Ruth Bader Ginsburg

Justice Ginsburg was nominated to the Court by President Clinton and began serving on the Court on August 10, 1993. She was the second woman to serve on the Court following Justice Sandra Day O'Connor. Justice Ginsburg was born in Brooklyn, New York in 1933, and is presently 79 years of age. She is married and has two children. She is a graduate of Cornell University and Columbia Law School. She began her legal career by serving as a law clerk to the Honorable Edmund L. Palmieri, Judge of the United States District Court for the Southern District of New York. She also served as Associate Director of the Columbia Law School Project on International Procedure and was a Professor of Law at both Rutgers University School of Law and Columbia Law School. In 1971, she was instrumental in launching the Women's Rights Project of the American Civil Liberties Union, and served as the ACLU's General Counsel from 1973 to 1980, and on the National Board of Directors from 1974 to 1980. Prior to her appointment to the Supreme Court, she served as a Judge of the United States Court of Appeals for the District of Columbia.

Justice Ginsburg is known as an aggressive questioner during oral argument, and as a leader of the liberal bloc. Although vigorously advancing her position, Justice Ginsburg has often found herself in the minority, and during the last term she was one of the Justices who were in the majority in the least number of cases. During recent years, Justice Ginsburg has experienced some health issues, and although she was able to vigorously return to her duties, there has been some speculation that she may be retiring in the near future.

Associate Justice Stephen G. Breyer

Justice Breyer was born in San Francisco, California in 1938 and is presently 74. He is married and has three children. He is a graduate of Stanford University and Harvard Law School. In the beginning of his legal career, he served as a law clerk to U.S. Supreme Court Justice Arthur Goldberg. He also served in several governmental positions, including the U.S. Attorney's Office, and Special Counsel of the U.S. Senate Judiciary Committee. For several years, he also lectured on legal subjects as a Professor at the Harvard University Kennedy School of Government, and as a Visiting Professor at the College of Law in Sydney, Australia. Before his elevation to the United States Supreme Court, he served for several years as Chief Judge of the United States Court of Appeals for the First Circuit. He was nominated to the Supreme Court by President Clinton, and took his seat on the Court on August 3, 1994. He has currently served on the Court for 18 years.

Justice Breyer is considered to be firmly entrenched in the so-called liberal bloc of the Court, and he often votes together with Justice Ginsburg. Along with Justice Ginsburg, he was in the majority in the least number of cases during the Court's past term.

Associate Justice Samuel Anthony Alito, Jr.

Justice Alito was born in Trenton, New Jersey, in 1950. He is married and has two children. Most of his legal career has been spent in government service, including serving as an Assistant U.S. Attorney in the District of New Jersey, Assistant to the Solicitor General and Deputy Assistant Attorney General in the U.S. Department of Justice. From 1987 to 1990, he served as the U.S. Attorney for the District of New Jersey. Prior to his elevation to the Supreme Court, he had served as a Judge of the United

States Court of Appeals for the Third Circuit. He was nominated to the United States Supreme Court by President George W. Bush, and assumed his seat on the Court on January 31, 2006, and has now served on the Court for six years.

Justice Alito has consistently voted with the conservative bloc of the Court, and is generally viewed as one of its most conservative members. He often votes together with Chief Justice Roberts, and did so over 90% of the time during the Court's last term.

Associate Justice Sonia Sotomayor

Justice Sotomayor was born in New York City, on June 25, 1954, and is now 58 years old. She is a graduate of Princeton University and Yale Law School, where she served as Editor of the *Yale Law Journal*. Early in her legal career, she served as an Assistant District Attorney in the New York County District Attorney's Office. From 1984 to 1992, she was engaged in the private practice of law, primarily dealing with international commercial matters. In 1991, she was appointed to the U.S. District Court for the Southern District of New York and she served on that Court from 1992 to 1998. She was elevated to the United States Court of Appeals for the Second Circuit in 1998, and served on that Court until 2009. In May of 2009, President Barack Obama nominated her as an Associate Justice of the Supreme Court, and she assumed her seat on the Court on August 8, 2009. She is now in her third year of service on the Court.

Although it was initially expected by some observers, due to her prosecutorial background and her record on the U.S. Court of Appeals, that Justice Sotomayor would occupy a middle position on the Court, somewhere between the conservative and liberal groupings, her voting record, since she has served on the Court, reveals that she is firmly included in the liberal voting bloc. She has basically sided with the defense on several major criminal law cases, and usually votes together with Justices Ginsburg and Breyer.

Associate Justice Elena Kagan

Justice Kagan, the newest member of the Court, was also born in New York City. She was born on April 28, 1960 and is presently 53 years of age. She is a graduate of Princeton University and Harvard Law School. At Harvard, she served as the Supervising Editor of the *Harvard Law Review*. Justice Kagan has also had an extensive career in government service. She served as a law clerk to Supreme Court Justice Thurgood Marshall, and from 1995 to 1999 she was Associate Counsel to President Clinton, and also served as the Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Counsel. When President Obama was elected, he appointed her as Solicitor General of the United States, and she served in that capacity until her elevation to the United States Supreme Court.

Justice Kagan also spent two years in the private practice of law as an associate in a Washington, D.C. law firm. She also has extensive teaching experience, having served as an Assistant Professor at the University of Chicago Law school and as a Professor of Law at Harvard Law School. She was nominated to serve on the U.S. Supreme Court by President Obama, and she joined the Court on April 7, 2010. She is now on her second year of service on the Court. Because of her service as Solicitor General, Justice Kagan had to recuse herself on many matters which were decided by the Court, and her number of written decisions has been somewhat limited. However, commentators place her within the liberal grouping of the Court and she has often voted together with Justices Ginsburg and Sotomayor. Interestingly, however, during the last term, she seemed to have formed an interesting alliance with Justice Kennedy and they voted together 83% of the time. In fact, one of the major decisions written by Justice Kagan was in the case of *Miller v. Alabama*, 132 S. Ct. 2455, issued on June 25, 2010, in which the Supreme Court declared that it was unconstitutional to impose mandatory life imprisonment without parole for juvenile offenders, even in cases where juveniles have committed homicides. Along with Justice Kagan, Justice Kennedy cast the critical vote in this 5-4 decision.

The Court as a Whole

The United States Supreme Court was created in 1789 by Article III of the United States Constitution. It is the only constitutionally established Federal Court, with all of the others being created by legislative statute. Throughout its history, the Court has not always had its current nine members. In fact, for many years, the Court served with six Justices. In 1869, Congress set the Court's size to nine members, where it has remained since. With the appointment of Justice Kagan, 112 Justices have now served on the Court. The Justices are nominated by the President of the United States and appointed after confirmation by the United States Senate. Justices of the Supreme Court have life tenure. During its history, the average length of service on the Court has been slightly less than 15 years. Since 1970, however, the average length of service has increased to about 26 years, and recent appointees to the Court have tended to be younger, and have averaged about 53 years of age. Currently, the salary received by members of the Supreme Court is $223,500 per year for the Chief Justice, and $213,900 per year for each of the Associate Justices.

During most of its history, members appointed to the United States Supreme Court have been white males of the Protestant religion. The first Jewish member, Justice Brandeis, did not join the Court until 1916; the first black member, Justice Marshall, was appointed in 1967, and the first female member, Justice O'Connor, was appointed in

1981. Today, however, six members of the Court are of the Catholic faith (Roberts, Alito, Kennedy, Scalia, Thomas and Sotomayor), and three are Jewish (Breyer, Ginsburg and Kagan). There are currently no Protestant members of the Court. Three members of the Court are also women, the highest number to date. Justice Thomas is the only black member of the Court, and Justice Sotomayor is the only Hispanic.

Because of the sharp philosophical split in the Court during the last several years which has resulted in several 5-4 decisions in controversial matters, a recent survey has revealed that the public's approval rating for Supreme Court Justices has fallen to 44%, down from 66% in the late 1980s.

Although the Court is comprised of nine distinct individuals having varied backgrounds and differing philosophies, all the members of the Court continue to assert that despite their differences, they all remain on the most cordial of terms and have a great deal of respect for one another. Justice Kagan, in a recent appearance at St. John's University Law School, was quoted as stressing that although the Justices may have different views on cases, they really like each other and respect each other greatly. Justice Thomas also, in fact, was recently quoted in a public interview, when speaking of his colleagues "these are good people." I hope that this article has provided a brief look at the good people behind the important decisions rendered by our nation's highest Court.

A Tribute to the Honorable Carmen Beauchamp Ciparick

After 19 years of service as a Judge of the New York Court of Appeals, Judge Carmen Beauchamp Ciparick reached the mandatory retirement age and left the Court as of December 31, 2012. Judge Ciparick was originally appointed to the Court on December 1, 1993 by Governor Mario M. Cuomo. She was reappointed by Governor Eliot Spitzer in November 2007. Judge Ciparick was the Senior Associate Judge of the Court, and served with distinction for 19 years. Judge Ciparick was born in New York City in 1942, and grew up in Washington Heights. She graduated from Hunter College in 1963 and received her J.D. from St. John's University School of Law in 1967.

She began her legal career as a staff attorney with the Legal Aid Society in New York City from 1967 to 1969. She thereafter served as an assistant counsel for the Judicial Conference of the State of New York. She held subsequent positions as the Chief Law Assistant of the Criminal Court of the City of New York and as counsel in the Office of the New York City Administrative Judge. In 1978, she was appointed as a Judge of the Criminal Court of the City of New York, and in 1982 she was elected to the New York State Supreme Court, serving in the Bronx. In 1993, she was one of several Judges who were recommended to Governor Cuomo for appointment to the Court of Appeals, and she was designated by Governor Cuomo to replace Judge Bellacosa. With her appointment to the New York Court of Appeals, Judge Ciparick became the second woman to serve on that Court, and the first Hispanic appointed to that body.

During her career on the Court, Judge Ciparick was generally considered to be a member of the liberal bloc within the Court and to be somewhat more favorable to defense concerns in criminal law cases. She often voted together with Chief Judge Kaye, and in most recent times has usually voted together with Chief Judge Lippman and Judge Jones.

In addition to her legal scholarship, Judge Ciparick is known for her gracious and pleasant judicial temperament, and she is highly regarded by both her colleagues and the members of the Bar. As an indication of the high regard in which Judge Ciparick has been held, she has already been the recipient of several presentations and honors bestowed by various Bar Associations, including the New York City Bar Association, the Queens County Bar Association and the New Rochelle Bar Association. In recent years, Judge Ciparick also received a special award from our Criminal Justice Section in recognition of her outstanding judicial service.

In a farewell message to her colleagues on the New York Court of Appeals, Justice Ciparick issued gracious and heartfelt comments regarding her tenure on the Court. This message was summarized in the report of the Clerk for the year 2011, and was reproduced in our Fall issue. Justice Ciparick has served the judicial system in our State for many years with great distinction. She clearly deserves all of the accolades she is receiving, and she has earned the appreciation and thanks of her colleagues and all of the members of the Bar. It is expected that Judge Ciparick will be entering the private practice of law, and will join a major law firm in Manhattan. We wish her all the best as she begins a new adventure in her legal career. We wish her all the best in her new endeavors.

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 August 1, 2012 to October 23, 2012.

Criminal Enterprise

People v. Western Express International, decided October 18, 2012 (N.Y.L.J., October 19, 2012, pp. 1, 10 and 22)

In a 6-1 decision, the New York Court of Appeals dismissed an enterprise corruption indictment against four Defendants, finding that their alleged involvement in a cybercrime group did not qualify as a criminal enterprise under the State's Organized Crime Control Act. In a decision written by Chief Judge Lippman, the Court concluded that the Defendants were all acting in their own interests and not as part of a concerted criminal enterprise. Justice Pigott dissented, arguing that law enforcement authorities are encountering criminal enterprises in many different forms, and that the parties in the instant matter were acting in an organized way which was sufficient to sustain their conviction under the state statute.

Denial of Fair Trial

People v. Harris, decided October 18, 2012 (N.Y.L.J., October 19, 2012, pp. 1, 10 and 24)

In a unanimous decision, the New York Court of Appeals reversed a Defendant's murder conviction and ordered a new trial after finding that the trial court had committed two critical errors. First of all, the panel concluded that the trial court had failed to properly question a prospective juror who said that she had a pre-existing opinion about the Defendant's guilt or innocence, but it would only play a slight part in her consideration of the evidence. In an opinion written by Justice Pigott, the Court concluded that the trial Judge should have conducted a much more detailed inquiry, and that his failure to do so and his denial of the Defendant's challenge for cause constituted reversible error. The appellate panel also concluded that the trial Judge failed to give proper instructions to the jury on their consideration of certain hearsay statements which were admitted into evidence.

Defense Counsel Obligations

People v. Coleville, decided October 23, 2012 (N.Y.L.J., October 24, 2012, pp. 1 and 22)

In a 4-3 decision, the New York Court of Appeals determined that the decision to request lesser included charges rested with defense counsel as part of trial strategy and was not a fundamental right of the Defendant. In the case at bar, defense counsel had initially requested lesser included offenses during a homicide trial, but the Defendant had subsequently stated that he did not want them included. After an inquiry by the Court, the Judge submitted only the count contained in the indictment. The Court of Appeals concluded that this constituted reversible error, and that the decision to request lesser included offenses rested with defense counsel. Judges Jones, Smith and Pigott dissented, arguing that in their opinion such a decision constituted a fundamental right which belonged to the Defendant.

Recent United States Supreme Court Decisions Dealing With Criminal Law and Recent Supreme Court News

Although no new significant cases in the area of criminal law were rendered by the Court as of the time our *Newsletter* went to press, the Court did take action on some criminal law matters based upon last term's decisions, and did hear oral argument on some important criminal law issues which we will be reporting on in future issues.

Supreme Court Vacates Judgments and Remands Several Cases Based Upon Decisions Issued in June 2012

On July 20, 2012, at the very end of its 2011-2012 term, the Court vacated several pending cases based upon decisions it had issued in late June of 2012. The Court first of all granted certiorari, vacated the judgments and remanded cases in nine matters based upon reconsideration in light of *Williams v. Illinois*, 132 S. Ct. 2221 (2012). In that case, the Supreme Court held that a government expert's testimony about a report from a diagnostic laboratory on the male DNA profile derived from vaginal swabs taken from the victim of a sexual assault, during which testimony the expert opined that the DNA profile in that report matched the defendant's DNA profile in a state database, did not violate the defendant's rights under the Confrontation Clause.

The Court also granted certiorari, vacated the judgment and remanded the matters in two cases for reconsideration in light of *Miller v. Alabama*, 132 S. Ct. 2455 (2012). In that case, the Supreme Court held that a mandatory sentence of life without the possibility of parole for a juvenile convicted of homicide violates the Eighth Amendment's prohibition of cruel and unusual punishment by failing to allow individualized sentencing that takes into account the youth of the offender and the nature of the crime.

In addition, the Court granted certiorari, vacated the judgments and remanded 42 cases for consideration in light of *Dorsey v. U.S. 132 S. Ct*, 2321 (2012). In that case, the Supreme Court held that the more lenient penalties of the Fair Sentencing Act which reduced the crack-to-powder cocaine disparity could be applied retroactively to cover those offenders whose acts preceded the effective date of the Act but who were sentenced after that date.

Pending Cases

The U.S. Supreme Court opened its 2012-2013 term on Monday, October 1st, and during its sessions in the following weeks heard oral argument on two Florida cases which it could not reach during its last term. The two cases involve search and seizure issues regarding the use of specially trained dogs to sniff out narcotic substances. These cases are *Florida v. Jardines* and *Florida v. Harris*. In *Jardines*, the Court will consider whether probable cause is needed to conduct a front-door sniff outside a private home. In *Harris*, the Court will consider whether to establish probable cause for a vehicle search following a dog's alert, the prosecution must present complete field records for the dog , not just its training and certification records.

On October 30, the Court also heard arguments in *Chaidez v. United States* involving the issue of whether the Court's recent decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), should be applied retroactively. In *Padilla*, the Court had ruled that a lawyer's failure to advise an alien client of the deportation consequences of a guilty plea amounted to ineffective assistance of counsel. Sometime during the Fall term, the Court is also scheduled to hear oral argument in *Ryan v. Gonzales*, another matter relating to the adequacy of counsel in criminal cases.

In another case which is of significance to the legal profession, as well as the public at large, the Court heard oral argument on October 10th in *Fisher v. University of Texas at Austin*. This case involves the issue of affirmative action where the Plaintiff complained that she was denied a place at the University of Texas because of an affirmative action program at the University. Abigail Fisher, who has since graduated from Louisiana State University, contended that she was discriminated against when the Texas university denied her a spot in the entering class in 2008. The United States Supreme Court, while still upholding the concept of affirmative action, has sharply limited its application in recent decisions. During oral argument on the instant matter, it appeared that the Justices were sharply divided on the issue, and observers are awaiting the outcome of this decision to see whether the Supreme Court will further limit or end affirmative action programs at public universities. A decision on this case is expected sometime during the Spring of 2013.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from July 26, 2012 to October 20, 2012.

People v. Carter (N.Y.L.J., July 26, 2012, pp. 1 and 8)

In a unanimous decision, the Appellate Division, First Department, reversed a Defendant's conviction for welfare fraud and ordered a new trial. The appellate panel concluded that the trial Judge should have granted a Defendant's request to provide a circumstantial evidence charge because the prosecution presented no direct evidence that the Defendant was the person who committed the fraud and not someone else with the same name. The Defendant was accused of collecting welfare checks while she was employed by the postal service. The Appellate Division concluded that although the evidence presented by the prosecution was sufficient to support a conviction, the trial court should have granted the Defendant's request for a circumstantial evidence charge, since there was no direct evidence presented in the case.

People v. Jasmin (N.Y.L.J., August 2, 2012, p. 4)

In a unanimous decision, the Appellate Division, Second Department, reinstated a misdemeanor marijuana conviction, and held that marijuana found in a car on a public highway constituted a public place which allowed for a misdemeanor-level conviction. The Court also upheld the admissibility of a gun which was found in the car and statements which were made by the Defendant during the incident.

People v. Smith (N.Y.L.J., August 10, 2012, p. 1)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's conviction for weapons possession and ruled that a police officer who smelled marijuana on a man, but not in the man's vehicle, lacked probable cause to search his car which turned up a handgun. The officer had testified that he detected the odor of marijuana coming from the Defendant's person after he exited his vehicle. The officer, however, did not detect any such odors coming from inside the vehicle. The appellate panel ruled that the car search was in error and that the weapon which was discovered should have been suppressed.

People v. Villegas (N.Y.L.J., August 15, 2012, pp. 1 and 8)

In a unanimous decision, the Appellate Division, First Department, ordered a new suppression hearing for a Defendant who was convicted of weapons possession because his Attorney failed to use evidence showing that two police officers falsely testified that they were acting on more than an anonymous tip. The Defendant claimed that based upon the actions of his Attorney, he was deprived of the effective assistance of counsel. The trial court had denied his motion to vacate his conviction without holding any hearing on the issue. The Appellate Division ruled, however, that a hearing was required to explore the issue, and the matter was remitted to the trial court for additional proceedings. In reaching its determination, the appellate panel found that the lower court ruling, finding that defense counsel might have had a good reason for not using the evidence in question, defied logic. Based upon the purported evidence, the appellate panel concluded that there was no reasonable strategy that would have justified counsel's failure to challenge the officer's testimony. The Defendant's conviction and sentence were ordered held in abeyance pending the results of the new suppression hearing.

People v. McCune (N.Y.L.J., August 17, 2012, pp. 1 and 6)

The Appellate Division, Second Department, in a unanimous opinion, reversed a Defendant's conviction and ordered a new trial because the Defendant was not present for a hearing which was held to determine whether a witness who refused to testify because of intimidation could be considered unavailable. The appellate panel ruled that the Defendant was unable to confront the witness about the alleged threats and intimidation that kept the witness from identifying the Defendant as the shooter. The appellate panel concluded that the trial Judge had committed reversible error in excluding the Defendant from a portion of the hearing, and that therefore a new trial was required. The Second Department stated in its decision that it has long been held that a Defendant is guaranteed to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. The appellate panel concluded that the type of hearing, known as a Sirois hearing, was indeed a critical phase of the proceedings, and the exclusion of the Defendant constituted reversible error.

People v. Hernandez (N.Y.L.J., August 23, 2012, pp. 1 and 3)

In a 3-2 decision, the Appellate Division, First Department, upheld a Defendant's conviction, despite a Defendant's claim that he was not advised of the immigration consequences of his guilty plea to sexual abuse. The three-Judge majority rejected the Defendant's claim that he had received ineffective assistance of counsel, pursuant to the

recent United States Supreme Court decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). Although the Justices faulted the Attorney's performance, the three-Judge majority concluded that the Defendant had not shown he had been prejudiced, and that he would not have pleaded guilty if he had received the correct advice. The majority opinion was joined in by Justices Saxe, Sweeney, Jr., and Manzanet-Daniels. Justices Friedman and Moskowitz dissented, and argued that the record demonstrated a reasonable possibility that the ineffective assistance of counsel affected the Defendant's decision to plead guilty. This case is one of the first Appellate Division decisions dealing with the situation that has occurred since *Padilla*. Trial courts are presently dealing with many motions regarding the situation, and additional appellate decisions, including ultimate review by the New York Court of Appeal, are expected. In fact, the 3-2 split in the instant case may lead to its ultimate decision by the New York Court of Appeals.

People v. Goldblatt (N.Y.L.J., August 31, 2012, pp. 1 and 6)

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's conviction for vehicular homicide and ordered a new trial on the grounds that the trial court had neglected to provide the jury with proper instruction. The appellate panel faulted the trial court for failing to explain to the jury that intoxication alone does not constitute reckless driving. In the case at bar, the Defendant was driving shortly before midnight and was traveling 55 miles per hour in a 40-mile zone when his vehicle left the road and struck two individuals who subsequently died. A blood test revealed an alcohol content of .11. The appellate panel observed that since the jury had asked several question regarding the proper standard for reckless driving, the Court should have instructed the jury that intoxication, absent more, does not establish reckless driving.

People v. Russell (N.Y.L.J., September 5, 2012, pp. 1 and 2)

In a 3-2 decision, the Appellate Division, First Department, reversed a Defendant's robbery conviction and dismissed the indictment, finding that the verdict was against the weight of the evidence. The case involved a single witness identification, and the majority concluded that the victim who made the identification was psychologically incapable of making an accurate identification. The victim made the alleged identification 15 days after the incident when she claimed she saw the Defendant as she was passing by in her car. The court found that the victim was under a great deal of stress when the incident happened and that her testimony had several inconsistencies, and that her identification appeared unreliable.

The majority opinion was written by Justice Friedman, and was joined in by Justices Saxe and Moskowitz. The majority opinion concluded that "while no single factor warrants reversal, a combination of factors require reversal on weight-of-the-evidence grounds. Those factors included the lack of corroboration, lack of any apparent financial motive, the length of time between the robbery and the identification, discrepancies in the victim's description of the robbers and the thieves depicted in the surveillance video "and the high degree of stress aggravated by the presence of a seemingly lethal weapon." Justices Manzarelli and Manzanet-Daniels dissented, arguing that the majority should have deferred to the jury's determination regarding the credibility of the complainant, and that there was enough in the record to support the jury's verdict.

People v. Shelton (N.Y.L.J., September 18, 2012, pp. 1 and 6)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's conviction and ordered a new trial on the grounds that the trial court had committed two significant errors. The panel concluded that the jury should have been instructed regarding an accomplice corroboration charge, and that in addition, the trial judge impermissibly allowed the prosecutor to cross-examine the Defendant's alibi witness without having first laid the proper foundation about her failure to come forward at an earlier time. Despite the fact that defense counsel had not objected with respect to the two cited errors, the Appellate Division exercised its interest of justice discretion after concluding that proof of the Defendant's guilt was not overwhelming. The appellate panel consisted of Justices Skelos, Florio, Belen and Sgroi.

People v. Baret (N.Y.L.J., October 3, 2012, p. 1)

In a unanimous decision, the Appellate Division, First Department, held that the recent United States Supreme Court decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), should be applied retroactively. The Supreme Court decision held that a lawyer failing to advise a client that he would be deported if he pleaded guilty to a certain crime constituted ineffective assistance of counsel. The appellate panel determined that *Padilla* should be applied retroactively because it merely applied an existing constitutional principle rather than creating a new one. Appellate Courts throughout the Nation have expressed different views on the retroactivity of *Padilla*, and the United States Supreme Court will be considering the issue in *Chaidez v. United States*, where oral argument was heard in October.

People v. Sergio (N.Y.L.J., October 4, 2012, p. 1)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's manslaughter conviction, and dismissed the indictment on the grounds that the jury's verdict was against the weight of the evidence. The Defendant had been accused of smothering

her baby with a towel after it was born in her Brooklyn home. The appellate panel ruled that since the Defendant's parents and two adult sisters were in the home the night the baby died, the prosecution had failed to adequately prove that the Defendant alone was responsible for the baby's death. The appellate panel consisted of Justices Rivera, Leventhal, Belen and Roman.

People v. Marino (N.Y.L.J., October 4, 2012, pp. 1 and 8)

In a unanimous decision, the Appellate Division, Second Department, reversed a trial court's ruling which granted a Defendant a new trial on the grounds that errors may have occurred at the Nassau County Lab with respect to testing procedures. The appellate panel reinstated the Defendant's guilty verdict and concluded that disclosure of problems at the Nassau Lab would not have made a difference if the Defendant was retried. Based upon the CPL 330 hearing, which was held regarding the Defendant's claim of newly discovered evidence regarding failures at the Nassau Lab, the appellate panel concluded that the Defendant failed to meet her burden of establishing that the new evidence cast doubt on the accuracy of the results of her blood alcohol testing such that the result would probably be different at a retrial. The Defendant had been involved in a car accident and it had been claimed that she was severely intoxicated while driving. Several persons had been injured as a result of the accident in question.

People v. Urbina (N.Y.L.J., October 12, 2012, p. 1)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's conviction and ordered a new trial, holding that the trial court had committed reversible error in failing to submit a lesser included count with respect to the Defendant's conviction of attempted rape. Based upon the evidence presented, the panel concluded that in addition to the charge of attempted rape in the first degree, the Court should have submitted the charge of attempted sexual abuse in the first degree.

People v. Castor (N.Y.L.J., October 12, 2012, p. 2)

In a unanimous decision, the Appellate Division, Fourth Department, ordered a new hearing to determine whether the Defendant's right to counsel had attached when she gave a statement to police following her second husband's death. The appellate panel concluded that the record was unclear on whether an attorney was representing the Defendant at the time in a criminal capacity or in a civil capacity involving the second husband's estate. The Court therefore remitted the matter back to the Onondaga County Court for further proceedings.

For Your Information

Appellate Division, First Department, Criticized for Recent Stop and Frisk Decisions

As a result of some recent decisions striking down stop and frisk actions taken by police, the Appellate Division, First Department, was subjected to sharp criticism from some of the public media and certain public officials. The *New York Daily News*, for example, issued an editorial stating that "the courts are going to get people killed. Judges are risking New Yorkers' lives by barring police from taking even the most reasonable actions to prevent crimes." New York City Mayor Michael Bloomberg also criticized the recent decisions, stating, "I don't know what these Judges were thinking. You cannot have safe streets if we're going to let everybody out." Chief Judge Lippman responded to the criticism in a letter to the *Daily News*, and argued that "Personal attacks against judges and distortions of the nature and context of judicial decisions damage the integrity of the judiciary and threaten the principle of judicial independence."

The recent decisions have reignited the controversy over police practices involving stop and frisk, and efforts are currently under way to reach an appropriate accommodation between the protection of civil liberties and the protection of the public at large. Police Commissioner Kelly recently announced that stop and frisk procedures are being re-evaluated, and the numbers of stop and frisks which have recently occurred have sharply declined. The number of complaints regarding such actions has also diminished in recent months. Litigation commenced by several civil rights organizations in a case known as *Floyd v. NYC*, involving claims that the New York City Police Department is committing widespread violations of the Fourth Amendment, is presently pending in the Federal District Court, and a trial date has presently been set for March 18, 2013. Whether any settlement of the issue will be reached before trial is uncertain at the present time.

Bridget Brennan Interviewed by *New York Law Journal*

An interesting interview was conducted by the *New York Law Journal* with Bridget Brennan, who is the New York City Special Narcotics Prosecutor. Bridget Brennan has served in her current position since 1998, and is the first woman to serve in that capacity. During the interview, it was revealed that her office has a staff of approximately 60 Assistant District Attorneys and 100 support staff, and receives a budget of approximately $16.2 million from the City. Brennan indicated that she has spent much of her 30-year career on the front lines of the war on drugs. She stated that her office has established units focusing on the criminal distribution of prescription drugs, narcotics gangs and money laundering. She has also expanded programs offering treatment over prison for some addicted defendants. The full interview with Bridget Brennan can be found in the *New York Law Journal* of August 10, 2012, beginning at page 5.

Law Revenue Declines

A recent study reported in the *National Law Journal*, which was conducted by ALM Legal Intelligence, indicated that average revenues at United States law firms have sharply declined in recent years. Revenue in 2011 fell more than in any year since 1995. In 2011, revenue per partner fell 4.2%. The larger firms appear to have suffered the greatest decline, with firms having 150 or more lawyers experiencing a drop of 9%, and those having 76 to 150 lawyers experiencing a decline of 10%. Although large firms have experienced a decline in revenue, partners in those firms still command significant incomes, with the average partner in 2011 receiving $432,000. Despite the recent decline, law firms appear optimistic as they look forward to the future, and the Editor-in Chief of the *National Law Journal* reported that most firms "still see plenty of sunlight ahead."

U.S. Middle Class Suffers Decline

A recent study conducted by the Pew Research Center indicates that the middle class is receiving less of America's total income, and that middle class wages and wealth have stagnated during the last few years. Median household income after inflation, in 2011, fell to $50,054—8% lower than in 2007. The study defined middle class as households having incomes from $39,000 to $118,000. Eighty-five percent of this group indicated that it was more difficult today to maintain a standard of living than it was ten years ago. The middle class group in recent years has been hard-hit by rising health care and education costs and reduced values of homes. On the other hand, wages have basically stayed the same or have increased only modestly. The study reviewed 2010 data from the Census Bureau and Federal Reserve and also concluded that the defined middle class constituted 51% of U.S. adults, which was a decline from 61% in 1971.

The study also found that in 1970 the share of U.S. income that went to the middle class was 62%, while wealthier Americans received 29%. By 2010, however, the middle class received 45% of the nation's income, while upper income Americans received a 46% share. Since 2000, the middle class median income has also fallen from $72,956 to $69,487.

U.S. Poverty Rate Stabilizes and Home Prices Begin to Rise

A Census Bureau report issued in September revealed that the overall poverty rate in the Nation remained the same in 2011 over the previous year. The overall poverty rate is at 15% of the population, or approximately 46 million people, with the official poverty line being set at an annual income of $23,021 for a family of four. The 15% poverty rate is about the same as existed in 1993, and is the highest since 1983. A bit of good news which was also released during the last month was that there are about 600,000 fewer homeowners who were under water on their mortgages as of the end of July, 2012. There currently are still about 10.8 million residential properties with mortgages that exceed home values, or 22.3% of all mortgaged homes. However, rising home values during 2012 have moved about 1.3 million homes from under water into positive equity.

Federal Courts Report That Budget Cuts Threaten Civil Jury Trials

The Federal Judicial Conference, which is the policy making arm of the Federal Courts, recently concluded at a meeting which was chaired by Chief Justice Roberts that pending cuts of approximately $500 million in the budget of the federal judiciary could result in many civil jury trials being suspended or delayed. The conference reported that some court facilities may have to be closed, and that the budget cuts would also impact on the workings of the Probation Department and other related services. The possible cuts affecting the Federal Judiciary are affected by the overall congressional stalemate in resolving tax and budget issues.

Legislation Introduced to Restore Stolen Valor Act

Following the recent United States Supreme Court decision in *United States v. Alvarez*, 132 S. Ct., 2537 (2012), which invalidated the Stolen Valor Act on the grounds that it violated the First Amendment, the House of Representatives on September 12, 2012, passed new legislation to get around the Supreme Court ruling. The legislation, which was passed by a vote of 210 to 3, makes it a crime to lie about military service or try to benefit by making false claims about receiving military medals. The change in the new legislation from the older vision is that now it is made clear that that it becomes a crime only when someone lies about a military record in order to receive a payment or other benefit. The sponsor of the new legislation stated that defining the intent helps insure that the law will pass constitutional scrutiny. The Bill provides for a penalty of up to one year in jail. The legislation has also been introduced in the United States Senate, and action on the Bill is pending. Whether final passage of the legislation is achieved and signed by the President remains to be seen. Whether the new version will pass constitutional muster is also unclear.

Justice Ariel Belen Resigns from Appellate Division—Governor Cuomo Makes New Appointments Including Randall Eng as Second Department Presiding Justice

It was recently announced, in late August, that Justice Ariel Belen, who has been sitting in the Appellate Division, Second Department, since 2008, resigned his position in order to accept a post with a private alternative dispute resolution company. Justice Belen cited financial considerations as the prime motive for his movement into the private sector. Justice Belen is 55 years of age and he indicated that although he appreciated the recent salary boost given to Judges, it was insufficient to dissuade him from taking a "too good to turn down offer" in the private sector. Justice Belen indicated that he loved serving on the Appellate Division, Second Department, and that he would miss his colleagues and the work of the Court. Justice Belen left his Appellate Division position in mid-October, and his departure created four vacancies in the Second Department from its total allotment of twenty-two.

In early October, Governor Cuomo announced several new appointments to the Appellate Divisions. He selected Randall Eng, who has been serving on the Appellate Division, Second Department since 2008, to head that Court as its new Presiding Justice. Justice Eng previously served as the Administrative Judge of the Queens Supreme Court, and early in his legal career was an Assistant District Attorney in the Queens County Office. He is a graduate of St. John's University School of Law, and is married with two children. Justice Eng will be the first Asian-American to serve as a Presiding Justice in the Appellate Divisions. Justice Eng has also served in the New York Army National Guard and as a Colonel in the Judge Advocate General's Corps.

Governor Cuomo also announced that he was appointing Justice Sylvia Hinds-Radix to fill an existing Associate Justice vacancy on the Appellate Division, Second Department. Judge Hinds-Radix has served on the Supreme Court, Kings County, and was named Administrative Judge for civil matters in 2009. She is a graduate of Howard University School of Law. The Governor also announced three appointments to the Appellate Division, First Department. The three Judges selected were Justices

Judith Gische, Darcel Clark and Paul Feinman. Justice Gische has served as a Supreme Court Justice for three years, Justice Clark was elected to the Supreme Court in the Bronx in 2006, and Justice Feinman was elected to the New York County Supreme Court in 2007. The Governor also made two appointments to the Fourth Department. These appointments were Justice Joseph Valentino, who is from the Rochester area, and Justice Gerald Whalen, who is from Buffalo. Both have served for several years in the Supreme Court in their respective Counties. Justice Valentino is a graduate of St. John's University School of Law, and Justice Whalen graduated from the University of Buffalo School of Law. With his most recent appointments, the Governor has filled several vacancies which existed in the Appellate Divisions. Some vacancies still exist within the four Departments, and it is expected that the Governor will be making additional appointments in the near future.

Rising College Costs and Student Debt

A recent report issued by Sallie Mae indicated that students and parents were subject to increasing college costs during the 2011-2012 school year. The report found that students shouldered 30% of the total costs of a college education, which was up from 24% four years ago. The study indicated that students made payments for a college education by a combination of income savings, borrowing and grants and scholarships. Parents also contributed a significant amount from their income savings and also borrowed from various sources. The report highlighted the fact that parents and students together are now borrowing more than 25% of the total cost of a college education.

An additional report issued by the Pew Research Center concluded that student debt has now stretched to a record number of households, nearly 1 in 5. The Pew study found that 22.4 million households, or 19%, had some sort of college debt in 2010. This is double the number of households in 1989, and up from 15% in 2007.

State Unemployment Rates

A recent report from the U.S. Bureau of Labor Statistics reviewing unemployment rates in the various 50 States revealed a wide disparity within the country, with some States having rates well below the national average, and other States continuing to experience high unemployment. The national average as of the end of August, 2012 was 7.8%. The report revealed the following breakdown.

Lowest Rates		Highest Rates	
North Dakota	3.0%	Nevada	11.6%
Nebraska	3.9%	Rhode Island	11.0%
South Dakota	4.3%	California	10.8%
Vermont	4.6%	North Carolina	9.4%
Oklahoma	4.8%	New Jersey	9.3%
		District of Columbia	9.3%

New York City Assigned Counsel Case Reaches New York Court of Appeals

Litigation commenced by five County Bar Associations in the City of New York regarding a New York City plan to utilize more institutional legal service providers to represent indigent criminal defendants reached the New York Court of Appeals in early September. Oral argument was heard in the case known as *Matter of the New York County Lawyers' Association v. Bloomberg*, on September 5, 2012, with the members of the Court engaging in strenuous questioning. The Appellate Division, First Department, had previously issued a 3-2 decision in the case, and the Bar Associations had filed an appeal with the New York Court of Appeals as a matter of right. A decision in the matter by the State's highest Court was issued in late October and by a 4-3 vote the City's position was upheld.

United States Facing Obesity Disaster

A recent report issued by the Trust for America's Health indicates that the problem of obesity in the United States is already severe, and may grow to tragic proportions within the next 15 years. The report predicts that by the year 2030, more than half of the people in the vast majority of states within the Country will be obese. The study utilized a definition of obesity as being a body mass index of 30 or more, a measure of weight for height. The report found that several states already have significant obesity levels, and that within those states, by the year 2030, the levels will all be over 50%. The report provided a specific list of states with the highest obesity level and the projections for the year 2030. These details are provided as follows:

Listed are 2011 obesity levels followed by the Trust for America's Health projections for 2030. States are listed in order, showing the highest 18 projections for 2030:

	%	%		%	%
State	**2011**	**2030**	**State**	**2011**	**2030**
Mississippi	35	67	Arkansas	31	61
Oklahoma	31	66	South Dakota	28	60
Delaware	29	65	West Virginia	32	60
Tennessee	29	63	Kentucky	30	60
S. Carolina	31	63	Ohio	30	60
Alabama	32	63	Michigan	31	59
Kansas	30	62	Arizona	25	59
Louisiana	33	62	Maryland	28	59
Missouri	30	62	Florida	27	59

Seniors Working More—Young Adults Working Less

A recent report based upon Labor Department statistics indicates that more and more seniors are returning to the labor market, either on a full time or part time basis. The report found that nearly 1 in 5 Americans ages 65 and older are working or looking for jobs. That is the largest percentage in almost 50 years. Senior employment has jumped 27% in the past five years, and now comprises over 7 million. While older Americans have returned to work or are seeking employment, the number of younger adults in the labor force has diminished, and among the 18-to-25-year-old population, the unemployment level has risen to new heights. The unemployment level for the younger group has been estimated to be almost 25% in several states within the nation.

Large Law Firms Experience Increasing Expenses and Reduced Profits

A recent survey conducted by the Wells Fargo Legal Specialty Group found that expenses are rising faster than revenue at the nation's largest law firms. The survey gathered input from 115 firms. The survey indicated that although collectively revenue among the firms had risen approximately 3% in the first half of 2012, due to rising expenses profits actually decreased by slightly less than 1%. The survey's forecast for the entire current year was labeled a question mark, with current indicators pointing to a slight decrease in profits. The survey concluded by stating that the overall 2012 outcome depends on how firms manage expenses and how successful they are in collecting on overdue accounts.

Chief Judge Lippman Provides Details for Mandatory Pro Bono Bar Admission Rule

In late September, Chief Judge Lippman unveiled the details of the new 50-hour pro bono requirement for applicants to the New York Bar. Starting January 1, 2015, every applicant to the Bar will be required to fulfill the requirement. The requirement is established under Rule 22 NYCRR Section 520.16. The Chief Judge announced the details of the program to law school officials, bar association officers and other public interest groups at a press conference which was held at New York University School of Law. The new requirements will apply to thousands of new lawyers who are admitted in New York each year. Details regarding the Chief Judge's program were reported in the *New York Law Journal* of September 20, 2012 at pages 1 and 2. The *Law Journal* article also pointed out that about 1/3 of the 10,000 new lawyers admitted in New York each year are educated in one of the State's 15 law schools. Another 1/3 are educated at law schools outside the State, and 1/3 come from outside the United States.

New York City Police Department Expands Use of Videotaping of Interrogations

In late September, New York City Police Commissioner Raymond Kelly announced a plan to expand the videotaping of interrogations to all 76 precincts within the City. Our Criminal Justice Section and the New York State Bar Association have long advocated the expansion of the videotaping process. The New York City initiative was labeled as a major breakthrough by Chief Judge Lippman on the issue, and it may provide impetus for statewide action on the matter. Seymour James, President of our State Bar Association, was reported as commenting in a *New York Law Journal* article of September 21, 2012, that videotaping should be mandatory. Mr. James was quoted as stating, "We believe that interrogations for all felonies should be recorded and should apply throughout the State, and the only way to ensure they are recorded is legislation."

About Our Section and Members

Executive Committee Adopts Resolution Regarding *Brady* Issue

Following a controversy which was generated by remarks contained in a message from the Chair by Marvin Schechter in the Summer 2012 issue of our *Newsletter*, the Executive Committee, on September 13, 2012, adopted a resolution which hopefully resolved the dispute and misunderstanding which had arisen. The resolution, adopted by more than 40 members of the Section's Executive Committee, reads as follows: "It is not the position of the Criminal Justice Section that the District Attorneys of New York State intentionally teach their assistant district attorneys to commit *Brady* violations." The Section's action regarding the resolution was also reported on in the *New York Law Journal* of September 18, 2012, which had previously published several articles regarding the controversy.

Fall CLE Program

The Fall CLE Program on Forensics and the Law was held in New York City on October 12, 2012. The program covered such topics as false identification, false confessions and latent print examinations. Several speakers participated in the program. A cocktail reception was held following the panel discussions. The program was well attended, with approximately 100 Section members participating.

Annual Meeting, Luncheon and CLE Program

The Section's Annual Meeting, luncheon and CLE program will be held on Thursday, January 24, 2013 at the Hilton New York in New York City, at 1335 Avenue of the Americas (6th Avenue at 55th Street). The CLE Program at the Annual Meeting will be held this year at 9:00 a.m. This year's topic will cover the issue of ineffective assistance of counsel. A distinguished panel will discuss the recent United States Supreme Court decisions in *Lafler v. Cooper,* 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, U.S. 132 S. Ct. 1399 (2012), which held that plea negotiations were a critical stage of the criminal proceedings requiring effective assistance of counsel and their effect upon the practice of criminal law.

Our annual luncheon will again be held at 12:00 pm., and will include a guest speaker and the presentation of several awards to deserving individuals. Detailed information regarding all the events at the Annual Meeting will be forwarded under separate cover. We urge all of our members to participate in the Annual Meeting programs.

Barry Kamins Elected to Kings County Supreme Court

Barry Kamins, who has been a long time active member of our Section and its Executive Committee, was recently elected as a Justice of the Supreme Court, Kings County. Justice Kamins received the endorsement of all major political parties, and ran unopposed. Prior to his election, Judge Kamins had served as an acting Supreme Court Justice. He also serves as the Administrative Judge for the New York City Criminal Courts, and with respect to criminal matters for the Second Judicial District. Judge Kamins has been a long time contributor to our *Newsletter*, and his annual legislative update is one of the feature articles in this issue. We congratulate Barry on his recent election.

Larry Gray Authors New Criminal Law Publication

The New York State Bar Association recently announced that a new criminal law publication, *Criminal and Civil Contempt*, Second Edition, which was written by Section member Lawrence N. Gray, will be available to members beginning in the Fall. The new publication contains sections such as "The Nature of Legislative Inherent Contempt Power," "A Civil Contempt Contemnor Holds the Keys to his Own Jail Cell," "Duress," "Contempt and Court Jurisdiction," "Corporations and Contempt," "Corporate Officers and Contempt" and "Contempt by Publication."

Larry Gray has written numerous publications and articles dealing with criminal law issues, and he has over thirty years of courtroom, research and writing experience. His latest publication can be obtained by writing or calling the book department of the State Bar Association at telephone number 800-582-2452. The list price of the second edition is $55, but members can receive a $20 discount. Larry Gray has also been a regular contributor to our *Newsletter*, and members should look forward to reading his latest publication.

The Criminal Justice Section Welcomes New Members

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

Mae Ackerman-Brimberg
Daniel R. Alonso
Andres M. Aranda
Pierre Bazile
Andrew M.J. Bernstein
Rita Nanda Bettis
Adam Jude Bevelacqua
Denise Arlene Biderman
Barry M. Bloom
Alexander Bopp
James Brady
Matthew Brew
Damon Akhi Brown
Charles L. Brussel
Andrew William Buder
Arthur Burkle
Angela Marie Calia
Cesar Callan
Bianca Cappellini
Phil James Caraballo-Garrison
Dawn M. Cardi
Laurie J. Cartwright
Jennifer Cassandra
Alex Cherednichenko
Jordan Choy
Laura Michelle Ciccone
Jestina Danielle Collins
Casey Siobhan Conzatti
Matthew G. Coogan
Misha Aguilar Coulson
Barry Crane
Chantee Dempsey
Darren Deurso
Aubrey Dillon
Anthony DiPietro
Richard J. Doe
Brian Doyle
Andrew Lorenz Dressler
Nicholas Quinn Elton
Kathryn Ann Falasca
Christina J. Falcone
Modeline Fenelon
John Ferrara
Christine Ferraro
Amanda Fix
Anthony Ford
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Israel Fried
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Daniella Henry
Jeannie Henry
Kelvin Henry
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Mary T. Northrup
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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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(727) 733-0989 (FL)

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 or CD preferably in WordPerfect. Please also submit one hard copy on 8½" x 11" paper, double spaced.

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NEW YORK CRIMINAL LAW NEWSLETTER

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Criminal Justice Section Meeting

Thursday
January 24, 2013

NYSBA

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New York City
January 21-26, 2013