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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 issues several significant decisions in the field of criminal law.

(See Supreme Court Section beginning at page 23, and first feature article beginning at page 7.)

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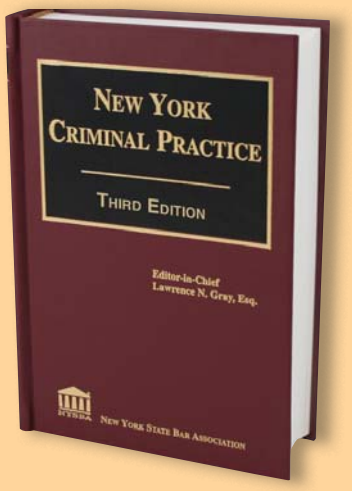

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Table of Contents

Message from the Chair

The *Brady* Dilemma

Of the myriad problems facing criminal defense attorneys preparing for trial, none is more vexing than the non-disclosure of *Brady* material. *Brady v. Maryland*, 373 U.S. 83. From its inception, case history shows that *Brady* has been continually violated, thus undermining the popular, though quaint, notion of fair play based on the prosecutor's dual obligation to the public, as well as the accused, to be fair and honest in the presentation of evidence and in revealing material which is favorable to the defendant. Any *Brady* discussion is usually presaged by the *de rigueur* disclaimer that such violations by some are not representative of all prosecutors any more than unethical behavior by some defense attorneys can be attributed to the entire defense bar. Of late, however, the slow trickle of uncovered *Brady* violations spawned by DNA exonerations has become a steady, flowing stream of egregious cases where *Brady* violations have occurred with impunity.

There are different types of *Brady* violations. Sometimes the favorable information is not known to the prosecutor, the source of the *Brady* material being a police officer who simply didn't record the information or attach proper significance to the evidence, or a witness who is found late in the pre-trial process. Sometimes the context of the case and how the evidence appears from the prosecutor's vantage point lead to a reasonable *Brady* analysis error—perhaps one emanating from a cognitive bias—in which the information once viewed in the proper light clearly is revealed as *Brady* and disclosure is quickly accomplished. This column is not about these kinds of *Brady* errors. Instead, the focus here is on the appearance of deliberate *Brady* non-disclosures which require a well-thought-out strategy of withholding, of strained reasoning aimed at justifying the offending behavior and a course of conduct in which the ends justifies the means.

On April 11, 2012, the NYLJ reported a decision by Judge Edgar G. Walker, Bronx Supreme Court, in *People v. Waters* (571/2007). Briefly the facts: in 2007, Carolyn Vargas was stabbed to death in a Bronx apartment, her body discovered by one Ronald Baker (Baker) who heard a thump from another room, went to investigate, saw Ms. Vargas on the floor in a pool of blood and saw the Defendant fleeing the apartment. Baker would repeat this account several times to the defense attorney, the grand jury, to his probation officer and the investigating detective. The trial began on October 4, 2011, at which time the parties made their opening statements, and then at the defense attorney's request, the prosecutor handed over a record of Baker's prior convictions, including one for manslaughter in Virginia, although the prosecutor averred he could not discover the underlying facts because the record was sealed. On the second day of the trial a dispute arose over the introduction of 911 recordings, necessitating a hearing out of the jury's presence where Baker, who had not testified yet at the trial, took the stand and for the first time stated that he actually saw the Defendant stab Ms. Vargas. When asked to explain the change in his previous statements, he offered that the Defendant had to take responsibility for what he had done. In the colloquy which followed, the prosecutor admitted that he had known for several weeks about the changed testimony. The Defendant's motion for mistrial was granted, followed later by the Defendant's motion for dismissal of the indictment based on the *Brady* violation. The People, in opposing dismissal, responded that (1) the changed story was not a *Brady* violation because it was not exculpatory and (2) there was no prosecutorial misconduct because the People's motivation was not to cause a mistrial but instead "to secure the Defendant's conviction."

The Court noted that *Brady* requires (1) disclosure of evidence favorable to the accused, (2) that it be revealed in a timely manner so as to permit the defense to use the information effectively, and (3) that such evidence is not limited solely to evidence which supports the defendant's trial theory but includes evidence which bears on the trial strategy. Finally the Court opined that when the reliability of a witness may be dispositive of guilt or innocence, material evidence affecting the witness's credibility constitutes exculpatory evidence. *Giglio v. U.S.*, 405 U.S. 150. Judge Walker concluded that the prosecutor had attempted to deliberately mislead the Defendant and stated that his conduct "constitutes more than a mere failure to disclose; it amounts to an affirmative act of deceit." The Court stated that the prosecutor's "trial by ambush" tactic resulted in unfairness and inefficiency, but even more troubling was the fact that the prosecutor had reason to believe that Baker would commit perjury at trial, since his new version of events was at odds with his sworn grand jury testimony, and indeed the Court emphasized that the prosecutor now admitted that Baker's proffered trial version testimony contradicted the grand jury testimony. Judge Walker went on to state that this behavior was antithetical to the prosecutor's role in the criminal justice system, namely that of a sovereignty with the obligation to be impartial, to prosecute with earnestness and vigor and to strike hard blows but not "foul ones."

The Court denied the dismissal motion but issued sanctions. The DA was required to turn over as soon as possible all police reports, all DA write-ups, accusatory instruments and prison records for all of Baker's convictions, even though "technically" these documents are not discoverable under Article 240. Further, because of the prosecutor's "egregious conduct" the Court ordered a pre-trial deposition of Baker to include an inquiry into all of his prior convictions and his involvement in the death of Ms. Vargas. In doing so, the Court also noted that *the prosecutor had given Baker immunity from prosecution for perjury*, "something heretofore unheard of by this Court."

Even more remarkable than what occurred at trial was a quotation from a Bronx District Attorney's Office spokesman and reported by the NYLJ:

> We argued that *Brady*, which is usually said to require disclosure of evidence which is exculpatory or impeaches a witness, does not apply to evidence which is more inculpatory. We did acknowledge that to avoid surprising the defense attorney, we should have disclosed this. The ADA is, of course, now aware of the office position that notwithstanding whether it was or was not *Brady* material, it should have been disclosed.

If the above statement was correctly reported, then it reveals precisely how this kind of *Brady* violation occurred. Assistant district attorneys do not emerge from law school with a genetic disposition to hiding *Brady* material. Instead this is something which is learned and taught. There is nothing so complicated about the *Brady* decision that an assistant district attorney in the circumstances of this case could have misunderstood that the changed star witness's testimony was something that should have been revealed. The Bronx District Attorney offers now a new two-prong test for evaluating *Brady* evidence, specifically (1) it must be evidence which "surprises" the defense attorney and (2) the proffered testimony must be subjected to a parsing/balancing test in which it is determined—by the prosecutor—that if there is more of an inculpatory slant than an exculpatory one, then it is not *Brady* material. Precisely what the basis is for such an analysis or the guidelines involved in making such a decision is unknown. While the Bronx DA's statement incorrectly notes that Brady requires revelation of exculpatory evidence (it requires disclosure of *favorable* evidence), it is noteworthy for its refusal to even admit that the changed story in this case was *Brady* evidence, nor does it explain how the evidence was not turned over as impeaching material.

Why do *Brady* violations of this magnitude occur? What happens to assistant district attorneys who engage in these practices? Is there a punishment system in place which could discourage others from these tactics? Are penal laws violated by such conduct, specifically Obstruction of Governmental Administration and/or Official Misconduct? And what responsibility is shouldered by the trial supervisors of the assistants? Are the District Attorneys in New York State trying to deal with *Brady* problems? These and other recent *Brady* violations will be discussed in our next issue. In the meantime, discovery reforms remain stymied in New York, and wrongful convictions continue to be uncovered nationwide.

Marvin Schechter

Message from the Editor

In this issue we present four feature articles which criminal law practitioners should find both interesting and valuable. In our first feature article we present a detailed discussion of the recent United States Supreme Court decision involving the necessity of a search warrant when police are utilizing GPS tracking devices. The recent Supreme Court ruling in *United States v. Jones* determined that a warrant was required, but several of the Justices reached the same conclusion through different reasoning. Peter Dunne, who has previously written several scholarly articles for our *Newsletter*, carefully analyzes the different opinions in the Supreme Court ruling, and provides a detailed analysis as to where the law may be heading with respect to the utilization of GPS devices.

In our second feature article, Justice John J. Brunetti raises an interesting issue regarding a perceived defect in the *Miranda* protocol published by the New York State Division of Criminal Justices Services. Judge Brunetti has also been a previous contributor to our *Newsletter*, and his interesting article offers both a warning and an insight which criminal law practitioners should be aware of. In our third presentation, we present an interesting and informative article on the standards for probable cause and reasonable suspicion. The article is written by Edward L. Fiandach, a prominent attorney in Rochester who has previously written several legal articles. Mr. Fiandach is a first time contributor to our *Newsletter*, and we welcome his article and look forward to many more. Finally, in our feature article section, we present an interesting presentation by two students from Columbia Law School regarding a free online tool that provides an analysis of immigration and public housing eligibility consequences which result from criminal convictions.

In the last several months, both the United States Supreme Court and the New York Court of Appeals have issued several decisions which deal with important aspects of the criminal law. The Supreme Court, in particular, recently rendered a determination applying the effective assistance of counsel requirement to the plea negotiation process. In a highly controversial 5-4 decision, the Supreme Court indicated that the right to counsel means the right to effective counsel, and that criminal defense lawyers have a responsibility to properly advise defendants during plea negotiations. This case is expected to have wide ramifications in the criminal justice system, and the defense lawyers should become aware of their new responsibilities. In another controversial 5-4 decision, the United States Supreme Court also upheld the right of Correction Department employees to utilize strip searches, even with respect to defendants charged with minor crimes. This Supreme Court decision, as well as several other cases, is summarized in the appropriate sections of our *Newsletter*, and practitioners are urged to become acquainted with these new rulings.

In our For Your Information section, we present various articles of general interest to our members, including the recent appointment by Governor Cuomo of several members of the various Appellate Divisions, including new Presiding Justices of the Appellate Division's Second and Third Departments. We also report on the recent legislative enactment of the expansion of the DNA database to now cover all misdemeanor crimes as well as felonies.

In the portion of the *Newsletter* dealing with our Section's activities, we also report on the adoption of a Section recommendation regarding the sealing of certain criminal convictions, which was recently passed by the House of Delegates, and the work of our member Richard Collins, who issued the report on behalf of the Section.

Spiros A. Tsimbinos

GPS Tracking and the Fourth Amendment

By Peter Dunne

United States v. Jones, __ U.S. __, 132 S. Ct. 945, (2012) is a fascinating case which provides a glimpse into the future contours of the Fourth Amendment in these times of changing expectations of privacy and technological advances.

The facts of the case are quite simple. Antoine Jones came under suspicion for narcotics trafficking. The government began to watch a night club owned by Jones, installed a camera which monitored the entrance to the club, and applied for and obtained a pen register and a wiretap on his cell phone. Based upon information received from this investigation, the government obtained a warrant to place a GPS device on his automobile, which was registered to his wife, but concededly operated by the defendant. The warrant specified that the device was to be placed on the vehicle within the District of Columbia within 10 days of the warrant. On the eleventh day, and in Maryland, the police placed the device on the undercarriage of the car while it was parked in a public parking lot.

For twenty-eight days, the position of the car was monitored. Jones was indicted and a portion of the information obtained from the GPS device was used against him in the trial. The government conceded that the placement of the device did not comply with the conditions of the warrant, but argued that no warrant was required to place the device on the car. The trial court had held that the monitoring information was admissible, despite the violation of the conditions of the warrant, because "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *United States v. Jones*, 451 F. Supp 2d 71, 88 (2006).

After an initial hung jury, the defendant was subsequently retried, convicted and sentenced to life imprisonment.

The issue in this case is whether the placement of the GPS device on the car constituted a search within the meaning of the Fourth Amendment. The thorny problem is that the placement of the device is not really a search in that the government was not really looking for anything specific, and it was not really a seizure because the placement of the device did not actually interfere with the defendant's use of the car. Furthermore, and what the trial court ultimately based its decision on, the installation of the device was essentially the functional equivalent to a full-time surveillance operation by the police.

The Supreme Court ruled unanimously that the installation of the GPS device on the car constituted a search within the meaning of the Fourth Amendment. However, what is intriguing is that the Court split 5-4 on the reasoning.

The majority opinion, written by Justice Scalia, based its decision on the notion that the placement of the device constituted a "trespass" within the meaning of the Fourth Amendment in the 18th century. "We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Jones*, at 949.

This holding was based upon the view that at the time of the adoption of the Bill of Rights, Fourth Amendment jurisprudence was tied to common law trespass. The court cites a pre-Revolutionary War English common law case which held that "Our law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close without his leave; If he does he is a trespasser, though he does not damage at all; if he will tread upon his neighbor's ground, he must justify it by law." *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765).

With regard to the expectation of privacy, the majority stated that *Katz v. United States*, 389 U.S. 347 (1967), established that property rights are not the sole measure of Fourth Amendment violations, but did not "snuff out the previously recognized protection of property." "Our task, at a minimum, is to decide whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment." *Jones*, at 951.

The minority opinion by Justice Alito rejects the trespass basis of the majority opinion. Instead, the minority opinion bases its opinion strictly on the *Katz* ground of expectation of privacy. According to the minority, the only issue is "whether respondent's reasonable expectation of privacy [was] violated by the long-term monitoring of the movements of the vehicle he drove." *Jones*, at 958.

Justice Alito was of the view that "the attachment of the GPS device was not itself a search" and it was not a seizure because nothing was taken and the use of the automobile was not compromised. Rather, the minority opinion took the view that it was the gathering of information from the placement of the device which violated the Fourth Amendment. "Relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable, but the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *Jones*, at 964.

The New York Court of Appeals reached the same conclusion in *People v. Weaver*, 12 N.Y.3d 433 (2009). In 2005, the New York State Police placed a GPS device

inside the bumper of the defendant's car, without a warrant, and monitored it for 65 days. In a 4-3 decision, Chief Justice Lippman held that "The massive invasion of privacy entailed by the prolonged use of the GPS device was inconsistent with even the slightest reasonable expectation of privacy."

Chief Justice Lippman began his analysis by examining an eloquent dissent by Justice Brandeis in 1928. In *Olmstead v. United States*, 277 U.S. 438 (1928), the government placed a wiretap on the telephone line of the defendant in the public street. The majority held that because the wiretap involved no trespass into the houses or offices of the defendants, no violation of the Fourth Amendment occurred. In dissent Justice Brandeis stated,

> The protection guaranteed by the Amendments is much broader in scope [than the protection of property]. The makers of the Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead, at 478-479.

Olmstead was eventually overturned by *Katz*. In *Katz*, a listening device was placed on the outside of a telephone booth, and the voice of the defendant was listened to. "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth, and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Katz*, at 353.

Katz was significant because it established the rule that a search can entail more than a physical intrusion. Even though the phone booth was accessible to the public, while the defendant was in the booth and using it for its intended purpose, his expectation that his conversation would be private was reasonable.

From then on, Fourth Amendment jurisprudence was concerned primarily with the expectation of privacy. Thus, in an early electronic tracking case, the Government placed a primitive tracking device referred to as a "beeper" inside a container which was subsequently delivered to the suspect, and the government tracked the movements of the container on public roads. The Supreme Court held that this monitoring did not constitute a search because it merely substituted for or supplemented visual surveillance that would have revealed the same facts. *United States v. Knotts*, 460 U.S. 276 (1983). Under this holding, because GPS tracking mirrored visual surveillance, it would appear that no violation of the Fourth Amendment occurred in *Weaver*.

However, the Court of Appeals in *Weaver* found a difference in degree between the use of a "beeper" and the GPS monitor. "Disclosed in the data retrieved…will be trips the indisputedly private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on. What the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations.…" *Weaver*, at 441-442.

Therefore, according to the minority opinion in *Jones*, and the Court of Appeals decision in *Weaver*, it is not the placement of the device on the car which constituted a search, but rather the long-term monitoring which violated the Fourth Amendment. GPS monitoring constitutes a violation of the Fourth Amendment and a warrant based upon probable cause is required. However, a number of questions remain. First, Justice Alito concedes that a shorter time period of monitoring may not constitute a search. "We need not identify with precision the point at which the tracking of the vehicle became a search, for the line was surely crossed before the 4-week period." *Jones*, at 964. Therefore, is tracking for a week without a warrant permissible? Under *Weaver* there is no question. All routine GPS tracking requires a warrant.

Second, both *Jones* and *Weaver* recognize that there may be exigent circumstances where GPS monitoring will be permitted without a warrant. "We also need not consider whether prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere of privacy." *Jones* at 964. Similarly in *Weaver*, "Under our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause." *Weaver*, at 447. What constitutes extraordinary offenses or exigent circumstances under these cases? If the police were investigating kidnaping, would

they be permitted to place a device on a car without a warrant? What about a murder case? What about a terrorist threat?

A further problem is that as a result of these cases there is a disjunction in the warrant requirement for long-term monitoring. Most people today carry with them a GPS device, known as a cell phone. Telecommunications companies retain a record of where the cell phone was when a call was made. These records are available to the government pursuant to a court order. 18 U.S.C. §2703. Under this law, the government is not required to establish probable cause. Rather, the government need only show "specific and articulable facts showing that there are reasonable grounds to believe that the [cell phone records] are relevant and material to an ongoing criminal investigation." 18 U.S.C. §2703(d).

A further problem is by basing these opinions on the notion that long-term monitoring violates the Fourth Amendment, the use of visual surveillance may now be questionable. For example, although a GPS device can transmit its location, visual surveillance not only pinpoints the target's location, but also identifies what a person is doing and to whom he or she is talking. This seems to be much more intrusive than just the location.

Lastly, technology is changing rapidly and in ways that implicate expectations of privacy. One need look no further than the facts of *Katz*. That holding was based on the view it was reasonable to expect that conversations had within the booth were private. However, when was the last time you saw a phone booth? Would *Katz* have been decided differently if instead of inside a phone booth the conversation was held while walking down Fifth Avenue? It does not appear to be reasonable to expect privacy in such a conversation. Would a police officer who was following a suspect on the street be permitted to listen to a suspect's cell phone conversation? This, of course, is the problem of outlining the contours of the Fourth Amendment according to an expectation of privacy. For example, the proliferation of surveillance cameras on the streets makes it unreasonable to expect privacy when we walk down the street.

In conclusion, the holdings in *Jones* and *Weaver* clearly require the government to obtain a warrant to place a GPS device on a car and monitor its position. However, it is certain that new technologies will develop and new devices will be invented which will further test the boundaries of the Fourth Amendment.

Peter Dunne is presently serving as the law secretary to Queens Supreme Court Justice Robert McGann. While at Boston University School of Law, he served as the Editor of the Law Review, and has written several articles for our publication over the last few years. In fact, one of his earlier articles on the issue of expert identification testimony was cited in one of the New York Court of Appeals' decisions on the issue.

What May Be Missing from the *Miranda* Warning in Your Next Case

By John J. Brunetti

The 2010 United States Supreme Court decision in *Florida v. Powell*[1] is a reminder that adequate *Miranda* warnings must include an advisement that the suspect has a right to invoke the rights to silence and counsel, not only at the outset of the interrogation, but also during the interrogation. As the Supreme Court held in *Miranda* itself: "An individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today."[2] Since the warnings in *Florida v. Powell*[3] concluded with "you have the right to use any of these rights at any time you want during this interview," the Court found them to be adequate because they "reasonably conveyed Powell's right to have an attorney present, not only at the outset of interrogation, but at all times."[4] The absence of the word "during" by no means renders warnings fatally defective. To the contrary, case law shows that phrases such as "at any time" are adequate substitutes. What is key is that the warnings make clear that both the right to silence and the right to counsel, including free counsel, may be invoked at any time[5] during the interrogation.

Not surprisingly, the Court of Appeals has left "no doubt that the [Miranda] right to counsel extends to representation during any interrogation by the police and that the defendant is entitled to advice to such effect."[6] Moreover, the Court has held warnings fatally defective due to their failure to include an advisement to the suspect that he "was entitled to the assistance of counsel during his questioning by the officer, an aspect of the warnings to which [the suspect] concededly was entitled."[7] Naturally, Appellate Division decisions echo these pronouncements,[8] as does the C.J.I.2nd instruction on voluntariness.[9] However, the *Miranda* warning published by the New York State Division of Criminal Justice Services (DCJS) does not.

The D.C.J.S. *Miranda* protocol is comprised of a five-part rights advisement and two questions designed to extract an express waiver of those rights. It reads as follows:

DCJS Form 3652-September 2002

1. You have a right to remain silent **and refuse to answer any questions**.
2. Anything you do say **may** be used against you in a court of law.
3. As we discuss this matter you **have a right to stop answering** my questions at **any time** that you desire.
4. You have a right to a lawyer **before speaking to me**, to remain silent until you can talk to a lawyer, and to have that lawyer present when you are being questioned.
5. If you desire a lawyer but you cannot afford one, one will be provided to you **before questioning** without cost to you.

1. Do you understand each of these rights I have explained to you?
2. Now that I have advised you of your rights are you willing to answer my questions?

Examination of the highlighted words exposes how the right to silence advisement satisfies *Miranda's* requirement that the suspect be advised of the right to remain silent during the interrogation, while the counsel advisement does not. Not only does the right to counsel advisement fail to inform the suspect that he has the right to request a lawyer at any time during the interrogation, but it expressly limits the defendant's right to counsel to the outset of the interrogation, with the words, "You have a right to a lawyer **before** speaking to me, to remain silent until you can talk to a lawyer, and to have that lawyer present when you are being questioned." The advisement compounds the error by adding "If you desire a lawyer but you cannot afford one, one will be provided to you **before questioning** without cost to you."

The deficiency in the DCJS charge should be corrected. Until it is, defense attorneys should not hesitate to raise the issue if the circumstances warrant.

Endnotes

1. __ U.S. __, 130 S. Ct. 1195, 1205 (2010).
2. *Miranda v. Arizona*, 384 U.S. at 471-72.
3. __ U.S. __, 130 S. Ct. 1195, 1205 (2010). The warnings in *Powell* read: "You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any question. You have the right to use any of these rights at any time you want during this interview."
4. *Id*. at 1205.
5. *See, e.g. People v. Bartlett*, 191 A.D.2d 574, 595 N.Y.S.2d 89 (2d Dep't 1993*), lv. den*., 81 N.Y.2d 1010, 600 N.Y.S.2d 198 (1993) (warnings adequate where they included "you have the right to talk to a

lawyer before answering any questions or to have a lawyer present at any time"); *People v. Congilaro*, 60 A.D.2d 442, 400 N.Y.S.2d 409 (4th Dep't 1977) (wrap-up advisement that informed the suspect of "the right to an attorney at any time while in custody" was sufficient to satisfy *Miranda's* dictate that the suspect "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation."); *People v. Bowers*, 45 A.D.2d 241, 357 N.Y.S.2d 563 (4th Dep't 1974) ("[T]he warnings which police gave to defendant were inadequate, for they failed to advise him that he was entitled to have his attorney present during the time when the police were questioning the defendant and that he was entitled to stop talking at any time in the course of making a statement.").

6. *People v. Tutt*, 38 N.Y. 2d 1011, 1013, 384 N.Y.S.2d 444 (1976) ("[There is] no doubt that the right to counsel extends to representation during any interrogation by the police and that the defendant is entitled to advice to such effect.").

7. *See People v. Hutchinson*, 59 N.Y.2d 923, 466 N.Y.S.2d 294 (1983), where the Court found the warnings fatally defective due to the officer's failure to advise suspect that he "was entitled to the assistance of counsel during his questioning by the officer, an aspect of the warnings to which appellant concededly was entitled." The Record on Appeal in *Hutchinson* reveals that the warnings were: "You have the right to remain silent until you have consulted with an attorney. Anything you do say might and will be used against you in a court of law. You have the right to remain silent until you have consulted with one" [Rec. on App., Transcript of Suppression Hearing, p. 6]. Noticeably absent is an advisement of the right to counsel free of charge, yet the Court of Appeals apparently ignored that additional flaw in the warnings.

8. See, *e.g. People v. Bracero*, 117 A.D.2d 740, 498 N.Y.S.2d 467 (2d Dep't 1986) ("Since the defendant was never explicitly advised, after being arrested, that he had the right to consult with counsel prior to and during the course of police questioning, the hearing court properly granted his motion to suppress oral statements made to the police."); *People v. DiLucca*, 133 A.D.2d 779, 520 N.Y.S.2d 171 (2d Dep't 1987) ("As the People concede, the *Miranda* warnings administered to the defendant by Officer Simon were insufficient because the defendant was not advised that he had the right to consult with an attorney prior to and during the course of any police questioning"); *People v. Betancourt*, 153 A.D.2d 750, 545 N.Y.S.2d 207 (2d Dep't 1989) *lv. den*., 75 N.Y.2d 767, 551 N.Y.S.2d 910 (1989) ("The arresting officer's failure to have advised the defendant that he was entitled to the assistance of counsel during the course of questioning by the officer, an aspect of the warnings to which he was clearly entitled, required suppression of the subsequently elicited statements"); *People v. Gomez*, 192 A.D.2d 549, 596 N.Y.S.2d 439 (2d Dep't*), lv. den*., 82 N.Y.2d 806, 604 N.Y.S.2d 942 (1993) (Court found that the detective's failure "to advise the defendant that he had the right to have counsel present during the interrogation" was a fatal defect).

9. C.J.I.2d Voluntariness: While there are no particular words that the police [or assistant district attorney] are required to use in advising a defendant, in sum and substance, the defendant must be advised: 1. That he/she has the right to remain silent; 2. That anything he/she says may be used against him/her in a court of law; 3. That he/she has the right to consult with a lawyer before answering any questions; and the right to the presence of a lawyer during any questioning; and 4. That if he/she cannot afford a lawyer, one will be provided for him/her prior to any questioning if he/she so desires.

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Probable Cause or Reasonable Suspicion: What in the World Is the Standard?

By Edward L. Fiandach

One may not seriously question the assertion that stopping a moving vehicle represents the most common example of Fourth Amendment implementation. While most believe that the standard has been relatively static since the decision of the Court of Appeals in *People v. Ingle*, 36 NY2d 413, 420, 369 NYS2d 67 (1975) and the corresponding decision of the United States Supreme Court in *Delaware* v. *Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 LEd2d 660 (1979), such is not the case. In *Whren v. United States*, 517 US 806, 116 S.Ct 1769, 135 LEd2d 89 (1996), the United States Supreme Court, without announcing that a substantive change had occurred, mysteriously advanced "probable cause" as the constitutionally mandated level of suspicion necessary to stop an automobile. In *People v. Robinson*, 97 NY2d 341, 767 NE2d 638, 741 NYS2d 147 (2001), we again see an apparent elevation of the standard as the Court of Appeals necessitated "probable cause" for the stop of an automobile.

As we have noted on previous occasions (*see*, 16 NYDWI *Bulletin* 12, 9 NYDWI *Bulletin* 1, 8 NYDWI *Bulletin* 6, 8 NYDWI *Bulletin* 18), *Whren* and *Robinson* were abundantly clear in setting forth that the stop of an automobile is valid only when founded upon *probable cause* that the motorist has committed or is committing a traffic violation. This is critical inasmuch as the prior standard, that which was announced in *People v. Ingle*, *supra*, clearly called for reasonable suspicion.[1] Be there any doubt on that score, it should be noted that the *Ingle* court concluded by declaring that "an actual violation of the Vehicle and Traffic Law need not be detectable" (*Ingle* at 420). This is not to minimize what the court did in *Ingle.* When viewed in the historical perspective of traffic stops in New York, *Ingle*, as Professor Frank Anderson pointed out to a bewildered law school freshman 37 years ago, represented a watershed by rendering to antiquity the concept of a "routine check" that had dominated auto stops in this state.

To understand the foundations of this change, one must understand *Robinson* where the issue confronting the court was whether an existing pretextual basis would invalidate an otherwise valid stop. Tracking *Whren,* the Court of Appeals held it would not and adopted *Whren.* In so doing, it imposed probable cause that a traffic violation has occurred as *the* basis for the stop of an automobile in the State of New York and had nothing to say about "reasonable suspicion." Witness the holding:

> We hold that where a police officer has *probable cause* to believe that the driver of an automobile has committed a traffic violation, a stop does not violate article I, § 12 of the New York State Constitution. In making that determination of probable cause, neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant.

Robinson, at 349.

Despite the foregoing, it may safely be said that what has emerged in practice is a dual standard. That standard requires *probable cause* to stop for a *traffic violation* or *reasonable suspicion* that the motorist has committed or is committing *a crime*. In 2006, for instance, the Fourth Department decided *People v. White,* 27 AD3d 1181, 812 NYS2d 208, which declared;

> The police may lawfully stop a vehicle when they have "probable cause to believe that the driver of [a vehicle] has committed a traffic violation" (*People v. Robinson*, 97 NY2d 341, 349, 741 NYS2d 147, 767 NE2d 638; see *People v. Washburn*, 309 AD2d 1270, 1271, 765 NYS2d 76), and they may lawfully stop a vehicle "*when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime*" (*People v. Spencer*, 84 NY2d 749, 753, 622 NYS2d 483, 646 NE2d 785, cert. denied 516 US 905, 116 SCt 271, 133 LEd2d 192) 27 AD3d 1181, 812 NYS2d 208 (4th Dept. 2006).

White, supra, (*emphasis* supplied herein).

Returning to this theme in 2009, the Fourth Department decided what is perhaps the clearest declaration of the shift, recognized the abrogation of *Ingle* and neatly denominated the new rule:

> In support of their contention that the stop was valid, the People mistakenly rely on *People v. Ingle*, 36 NY2d 413, 369 NYS2d 67, 330 NE2d 39, in which the Court of Appeals held that the stop of a vehicle is lawful provided that it is "not the product of mere whim, caprice, or idle curiosity…[and is] based upon 'specific and articulable facts'" (*id.* at 420, 369 NYS2d 67, 330 NE2d 39, quoting *Terry v. Ohio,* 392 US 1, 21, 88 S.Ct. 1868, 20 LEd2d 889). As defendant correctly contends, however, in the time since

> *Ingle* "the Court of Appeals has made it 'abundantly clear'…that 'police stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or where there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime'… *or where the police have 'probable cause to believe that the driver…has committed a traffic violation'* (*People v. Washburn,* 309 AD2d 1270, 1271, 765 NYS2d 76; *see People v. Robinson,* 97 NY2d 341, 348-349, 741 NYS2d 147, 767 NE2d 638; *People v. Spencer,* 84 NY2d 749, 752-753, 622 NYS2d 483, 646 NE2d 785, *cert. denied,* 791 516 US 905, 116 SCt 271, 133 LEd2d 192; *People v. White,* 27 AD3d 1181, 812 NYS2d 208).

People v. Rose, 67 AD3d 1447, 1448, 889 NYS2d 789, 790 (4th Dept. 2009) (*emphasis* supplied herein).

Recognizing that the Fourth Amendment interest to be protected is singular in nature, we must now ask, from where did this dual standard spring? The answer to this question seems to be *People v. Spencer*, 84 NY2d 749, 753, 622 NYS2d 483, 646 NE2d 785 (1995), *cert. denied,* 516 US 905, 116 SCt 271, 133 LEd2d 192 (1995).

Spencer is an interesting case, although factually one can read the opinion and question how it got as far as it did. In *Spencer*, the police were seeking the perpetrator of an assault. Some 43 hours after the purported attack they happened to spot what the victim described as the vehicle of the suspect's friend double parked[2] with the friend in the driver's seat. Upon spotting the police cruiser, the parked vehicle began to move. At this point, the police activated their turret and what the decision described as the horn. This caused the vehicle to stop and the officers thereafter approached. Drawing near, they observed what the decision described as a "green vegetable like substance" that proved to be marijuana. Following the removal of the defendant from the vehicle, they observed the butt of a gun under the seat. The gun proved to be loaded and the defendant was subsequently charged with Criminal Possession of a Weapon in the Third Degree and Criminal Possession of Marijuana in the Fourth Degree.

The defendant's motion to suppress was denied by the trial court, which denial was affirmed by the Appellate Division (193 AD2d 90, 602 NYS2d 412 (1993)).

At issue was whether the stop of the defendant's vehicle for "informational" purposes was valid. The Court of Appeals held that it was not. While the court found that a police officer can always stop a citizen who is on foot to request information, it acknowledged that the same will not hold true for a motorist in a vehicle. Citing the significant differences that exist between the informational stop of an individual on the street (*see*, *People v. Holmes*, 81 NY2d 1056, 601 NYS2d 459 (1993)) and the stop of an automobile, the Court reaffirmed *People v. May* (81 NY2d 725, 593 NYS 760 (1992)), where it held that "the police officers' premise for that order—the common-law right of inquiry—did not satisfy Fourth Amendment standards: 'the stop was proper only if the officers had a reasonable suspicion of criminal activity' *(id.*, at 727)." Finding the stop invalid, the court once again drove home the standard that had controlled the area of automobile stops since *Ingle*:

> "[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers" *(Brown v. Texas,* 443 US 47, 51; *see, People v. Scott,* 63 NY2d 518, at 525). We need not and do not hold today that police officers may never stop a vehicle in order to request information of its occupants. We merely hold that the specific, objective facts of *this case* did not justify defendant's seizure.

Spencer at 757.

However, *Spencer* said more. Much more. In laying the constitutional basis for the stop of a motor vehicle, *Spencer* recognized the requisite Fourth Amendment imperative:

> We have stated, time and again, that the stop of an automobile is a seizure implicating constitutional limitations *(People v. May,* 81 NY2d 725; *Sobotker,* 43 NY2d 559, *supra; Ingle,* 36 NY2d 413, *supra; see, Delaware v. Prouse,* 440 US 648, 653 ["stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of (the Fourth Amendment), even though the purpose of the stop is limited and the resulting detention quite brief"]).

Spencer at 752.

Since *Ingle* and *Prouse* supplied the standard that the court subsequently applied, we must now ask, "What was the standard?" The answer to that question is that in 1995 the standard which was uniformly applied in analyzing the constitutionality of all traffic stops was reasonable suspicion (*see*, *People v. Ingle, supra* ["specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion" (citing *Terry v. Ohio*, 392 U.S. 1)] *and see, Delaware v. Prouse*,

supra ["articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law"]).

As we said, *Spencer* said much more. In what was perceived by some to be a condemnation of so-called pretextual stops, the court declared:

> [P]olice stops of automobiles in this State are legal only pursuant to routine, non-pretextual traffic checks to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime[.]

Spencer at 753, citations omitted.

Use of the term "non-pretextual" would lead many to believe that New York was rejecting otherwise valid traffic stops that were executed for pretextual reasons which were otherwise not supported by probable cause. Therefore, adoption of the *Whren* standard in *Robinson* required the court to sweep aside a major impediment which was apparently created by *Spencer*. The court did so when it defended interjection of the term "non-pretextual" by explaining that it was merely eschewing the use of an unstandardized discretionary standard:

> We noted that "police stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*id.*, at 753). However, we explained what we meant by pretextual when we further noted that "there were no objective safeguards circumscribing the exercise of police discretion" and that if such stops "were permissible and motorists could in fact be pulled over at an individual police officer's discretion based upon the mere right to request information, a Pandora's box of pretextual police stops would be opened" (*id.*, at 758, 759). Central to *Spencer*'s holding was the absence of an objective standard for stopping a vehicle. Thus, a police officer could contrive a reason to stop a vehicle merely to make an inquiry. However, an objective standard is present here—the Vehicle and Traffic Law.

Robinson at 351.

Lost in the shuffle is that the reasonable suspicion which was referred to in the discussion of *Spencer* was in serious jeopardy as a result of the very case which the court was in the process of adopting, *Whren v. United States*, 517 US 806, 116 SCt 1769, 135 LEd2d 89 (1996).[3] While *Ingle*, *supra*, and *Prouse*, *supra,* had adopted a reasonable suspicion standard for the stop of a motor vehicle, that standard was succinctly and completely turned aside by the Court in *Whren*:

> An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have *probable cause* to believe that a traffic violation has occurred.

Whren, at 810 (emphasis supplied herein); *compare, Delaware v. Prouse*, at 663.

The question that remains is does "reasonable suspicion," which was clearly valid when *Spencer* was decided, still apply when there *is* "reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime?"

The answer to this question calls for an examination of how the reasonable suspicion standard came to be. The first clause of the Fourth Amendment to the United States Constitution inveighs against "unreasonable" searches and seizures. This term gains definition in the second clause of the Fourth Amendment which bars the issuance of warrants founded upon less than probable cause. Prior to the landmark decision of the Court in *Terry v. Ohio*, 392 US 1, 88 S.Ct 1868, 20 LEd2d 889 (1968), there existed a constitutional no man's land between a full blown search founded upon probable cause, and those without "probable cause" but which could objectively be classified as reasonable (*see*, *People v. Rivera*, 14 NY2d 441, 252 NYS2d 458, 201 NE2d 32 (1964), *cert. denied*, 379 US 978, 85 SCt 679, 13 LEd2d 568 (1965), *People v. Taggart*, 20 NY2d 335, 342, 283 NYS2d 1, 8, 229 NE2d 581, 586, (1967); *People v. Pugach*, 15 NY2d 65, 255 NYS2d 833, 204 NE2d 176 (1964), *cert. denied*, 380 US 936, 85 SCt 946, 13 LEd2d 823 (1965) (cited by *Terry* at footnote 15)). With the decision in *Terry*, the Warren Court, in one of Earl Warren's last decisions, found itself positioned squarely between the Fourth Amendment and an ever increasing demand for law and order. In an environment that included vengeful fire laid bare by Richard Nixon and the impending 1968 presidential campaign—as well as the knowledge of his imminent resignation[4]—Warren confronted one of the most volatile issues of the day, officer safety. The result was an anguished, heartfelt and brutally consistent attempt to balance the Fourth Amendment against very real concerns for the safety of police officers. Rejecting the assertion that the act of frisking Terry did not constitute a search so as

to be fully excluded by the Fourth Amendment, Warren took great pains to isolate the constitutionally legitimate procedure to which he was lending the Court's imprimatur from the judicially created remedy of the exclusionary rule. Without referencing the term "reasonable suspicion" (in *Terry* it appeared solely in Justice White's concurrence) Warren coupled a well-founded and articulable suspicion that criminal activity was at hand with an immediate concern for officer safety. Importantly, diminution of the threshold required for a seizure carried with it a concomitant limitation in the scope of the examination that would be permitted.

In reaching this point, Warren early on set out the crucial and often overlooked difference between the first and second clauses of the Fourth Amendment. The first clause protects the right of persons to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. Unlike the second clause, it does not mandate the presence of "probable cause" to establish the reasonableness of the conduct. The use of "reasonable" and the absence of a requirement for "probable cause" in the opening clause would prove dispositive. As explained by the court:

> If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case.
> * * * [W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

Terry, at 20 (footnote omitted).

In sum, the so-called *Terry* stop-frisk, firmly rooted as it is in officer safety, may be seen as *the* rare instance when the term "unreasonable" does not denote "probable cause."

Since the decision in *Terry*, reasonable suspicion, as a basis for seizure, has seen relatively limited expansion. Most notable areas of inclusion are the stop of a motor vehicle (*Ingle*, *supra*; *Prouse*, *supra*) and transportation to the scene of a show-up identification (*see, People v. Hicks*, 68 NY2d 234, 508 NYS2d 163, 500 NE2d 861 (1986)). So far as we can discern, with the exception of these arguably *Terry*-type situations, reasonable suspicion has seen no further expansion.

Whren however, changed the landscape. While one may argue that use by the High Court of the term "probable cause," where one would ordinarily have expected to see the designation "reasonable suspicion," was merely a slip of the judicial pen,[5] an analysis of subsequent cases will not bear this out. In a litany of decisions which have followed (*Ohio v. Robinette*, 519 US 33, 117 SCt 417 136 LEd2d 347 (1996); *City of Indianapolis v. Edmonds*, 531 US 32, 121 SCt 447, 148 LEd2d 333(2000); *Atwater v. City of Lago Vista*, 532 US 318, 121 SCt 1536, 149 LEd2d 549 (2001) (dissent per O'Connor, Stevens, Ginsburg, and Justice Breyer)), the standard is most decidedly probable cause[6] which, as a matter of Federal Law, is binding upon the states.

Whren and *Robinson*, standing on their own, should have ended the matter. Making no provision for reasonable suspicion, a single standard should have been imposed to regulate the stop of a motor vehicle. Such, however, has not been the case. Virtually every term there has emerged a decision wherein an Appellate Division makes reference to a dual reasonable suspicion/probable cause standard (*see*, *People v. Houghtalen*, 89 AD3d 1163, 931 NYS2d 922 (3d Dept., 2011); *People v. Cash J.Y*, 60 AD3d 1487, 876 NYS2d 289 (4th Dept., 2009); *People v. Stock*, 57 AD3d 1424; 871 NYS2d 545 (4th Dept., 2008); *People v. Rose*, *supra; People v. Phillips,* 46 AD3d 1021, 847 NYS2d 688 (3d Dept., 2007); *People v. Long*, 36 AD3d 132, 824 NYS2d 249 (1st Dept., 2006)).

What all these cases have in common is citation to *People v. Spencer*, *supra Spencer*, of course, did not emerge from a vacuum. *Spencer's* reliance upon reasonable suspicion finds its basis in *People v. Sobotker*, 43 NY2d 559, 402 NYS2d 993 (1978), which in turn implemented the recently coined rule of *Ingle.* Likewise, it turned to Judge Wachtler's 1982 ruling in *People v. Harrison*, 57 NY2d 470, 457 NYS2d 199, which applied *Ingle* as it voided a stop based upon the excessively dirty nature of a vehicle.

Typical of this reliance upon *Spencer,* and to a lesser degree, *Sobotker* and *Harrison,* to support reasonable suspicion is the recent decision of the Third Department in *People v. Houghtalen*, 89 AD3d 1163, 931 NYS2d 922 (3d Dept., 2011). In *Houghtalen*, the police were seeking the perpetrator of a purported domestic assault. They eventually encountered a vehicle driven by the defendant in which the perpetrator was believed to be riding. Following a stop of the vehicle, the officers noted that the operator displayed the classic indicia of intoxication. Following the failure of a field sobriety test, the defendant was placed under arrest.

At the trial level, the defendant contested the stop of his vehicle and after the stop was upheld, he pled guilty to Driving While Intoxicated as a Felony while specifically reserving the right to contest the basis for the stop. On appeal, the Third Department affirmed. In doing so, and with citation to *Spencer* it observed that:

> A traffic stop by police is lawful "when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime."

As though to further illustrate the poisonous tree from which the fruit of reasonable suspicion is being plucked, the *Houghtalen* court cited *People v. Brisson*, 68 AD3d 1544, 892 NYS.2d 618 (2009). *Brisson*, in upholding a finding of reasonable suspicion, relied upon none other than *Sobotker.* Likewise, the *Houghtalen* court cited *People v. Booker,* 64 AD3d 899, 900, 881 NYS2d 735, as authority for reasonable suspicion. Although *Booker*, decided in 2009, postdates *Robinson* and *Whren* by eight years and thirteen years respectively, it nevertheless cites as *its* authority *Sobotker*. Additionally, the circular nature which permeates the reasonable suspicion line of reasoning can be seen in citation by the *Booker* court of *Spencer*.

The sum of all this is simple. *Ingle, Sobotker* and reasonable suspicion as the basis for the stop of an automobile are dead. With the decisions in *Whren* and *Robinson* reasonable suspicion was returned to the realm of officer safety and the *Terry* stop where, looking back, it seems that a tired and beleaguered Earl Warren intended for it to stay all along.

Endnotes

1. While some may argue that the *Ingle* court used the terms "probable cause" and "reasonable suspicion" analogously (*see*, *Ingle* at p. 20) such is not the case. In fact, while commenting favorably about the position taken by California and Pennsylvania in 1975, the *Ingle* court took great pains to indicate that the level imposed in both instances was reasonable suspicion ("The position there taken, however, took the form of requiring as a basis for a 'routine' traffic stop what was characterized as probable cause, *but which may be no different than the reasonable suspicion suggested earlier as the basis for a 'routine' traffic stop what was characterized as probable cause*" (*Ingle,* at 20, *emphasis* supplied herein)]. Further evidence of the futility of this position can be seen in the fact that in discussing these jurisdictions, the court, with citation to *Terry,* made specific reference to balancing ("The analogies are many and provide, in the case of pedestrian stops and in at least one instance of a vehicle statute, dramatic demonstration of the balancing of competing interests presented by the need for legitimate and effective law enforcement, and the control of intrusions on personal freedom of movement" (*Ingle, supra*)]. Additionally, such an assertion is inherently inconsistent with the example given by the court as to the manner in which the new rule should be applied ("It should be emphasized that the factual basis required to support a stop for a 'routine traffic check' is minimal. An actual violation of the Vehicle and Traffic Law need not be detectable. For example, an automobile in a general state of dilapidation might properly arouse suspicion of equipment violations. All that is required is that the stop be not the product of mere whim, caprice, or idle curiosity (*Ingle*, *supra*)]. Finally, this position is not borne out by later cases such as *Sobotker* and *Harrison (infra*).
2. Oddly, the fact that the vehicle was double parked played no role in the resolution.
3. In fairness to the *Robinson* court, it appears that this passage was quoted solely to limit the court's earlier use of the term "nonpretextual." It does not appear that the balance was in any manner intended to somehow become the holding of that case. Indeed, this point seems clear in that, as discussed below, *Spencer* and not *Robinson* continues to be cited for the proposition that reasonable suspicion and not probable cause is the standard for a stop when criminal activity is suspected.
4. Warren submitted two "contingent" letters of resignation to President Johnson on June 13th, 1968, just three days after *Terry* was announced.
5. *Pringle v. Wolf* (88 NY2d 426, 430, 646 NYS2d 82, 668 NE2d 1376 (1996), *cert. denied,* 519 US 1009, 117 SCt 513, 136 LEd2d 402 (1996) provides a rather infamous example of just such a slip where Judge Ciparick wrote that Vehicle and Traffic Law § 1193(2)(e)(7) applied to those situations where the motorist had "in excess of .10 percent" of alcohol in the bloodstream.
6. But why would the Court in *Whren* quietly change the half-century-old standard? As we noted back in 2001 (*see*, 8 NYDWI *Bulletin* 6) and giving the Court the benefit of the doubt, there may be a reason. In *Whren*, the Court was faced with a difficult and problematic decision; whether pretextual automobile stops would be permitted. Remember that when *Carroll v. United States* was decided, an automobile was an infinitely more elusive creature than it is today. The Motorola police radio was thirty years off and the mobile data terminal was comic book fantasy. Data basing of items such as warrants and the like was a virtual and practical impossibility. Once a 1927 Ford got away, as Clyde Barrow proved on all but one occasion, it may never be found. Not so today. It is truly difficult for a motorist to escape prosecution. With the onset of checkpoints, much of the rationale underlying *Carroll* ceased to have any real meaning. Couple this with a ruling that says a burned out tail lamp may be utilized as a sufficient basis to stop a "known" drug dealer, and some additional level of Fourth Amendment protection seems to be required. Indeed, a close reading of Justice Ginsburg's recent dissent in *Arkansas v. Sullivan*, 532 US 769, 121 SCt 1876 (2001), seems to bear out this concern. It appears, to our eye at least, that the Court may have quietly determined that the "additional level" of protection is "probable cause." In short, *Whren*, by abolishing "reasonable suspicion" as a basis for a stop, may have given back more than anyone originally thought.

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Understanding the Consequences of Criminal Charges: An Innovative Tool, Now Even Better

By April Navarro and Hanzhe Wu

The Collateral Consequences Calculator is a free online tool that provides an "at-a-glance" analysis of immigration and public housing eligibility consequences. (See URL, http://calculator.law.columbia.edu/.) The Calculator was designed for use by attorneys and judges in fast-paced environments such as arraignments. The immigration consequences are now analyzed for 200 crimes. The public housing eligibility consequences are analyzed for all crimes listed in the Penal Law, but apply only to public housing in New York City.

Designed in collaboration with former Chief Judge Judith S. Kaye and current Chief Judge Jonathan Lippman, the Calculator is part of an effort to keep New York's jurists and attorneys at the forefront of efforts to improve understanding of important consequences of criminal charges that go beyond imprisonment, fines and parole. The Calculator's results provide a user-friendly launchpad for case-specific substantive research and analysis. Although the information provided cannot replace the advice of competent legal counsel, the Calculator places information and analysis from legal experts in the hands of end-users.

Knowledge of these consequences has always been important to thoughtful charging and sentencing, appropriate plea bargaining and competent counseling. In recognition of this, beginning in 2005, then-Chief Judge Judith S. Kaye sponsored two rounds of colloquia aimed generally at addressing the core problems that flow from siloed information that rests exclusively with a few experts. More specifically, these colloquia focused on the issue of collateral consequences as an example of how the profession suffers when expertise needed by many is shared by only a few.

To raise awareness among lawyers, judges and academics about these important consequences, the Columbia Law School Lawyering in the Digital Age Clinic, under the supervision of Professors Conrad Johnson, Mary Marsh Zulack and Director of Educational Technology Brian Donnelly, worked in collaboration with former Chief Judge Kaye and the New York State Judicial Institute to develop the precursor to the Calculator, the 4Cs (Collateral Consequences of Criminal Charges) website which contains "best of" legal resources assembled by experts in each of the substantive areas where significant consequences typically occur. It also features a "Judges' Chambers" section managed by Hon. Laura A. Ward, where you can find a uniquely useful compilation of New York state court opinions on this topic. The site is available at http://www2.law.columbia.edu/fourcs/ and is among the most frequently used resources for information in this area.

The importance of taking these consequences into account during plea bargaining was highlighted in 2010 when the Supreme Court decided *Kentucky v. Padilla*. In *Padilla*, the Court found that due to the severity of deportation and the reality that immigration consequences of criminal convictions are inextricably linked to criminal proceedings, the Sixth Amendment requires defense counsel to provide affirmative, competent advice to non-citizen defendants regarding the deportation consequences of a guilty plea.

To meet the challenge of providing attorneys and judges with help in quickly analyzing consequences, the Clinic launched the Collateral Consequences Calculator. This innovative, online tool was created with the help of immigration law expert Manuel D. Vargas, Senior Counsel, Immigrant Defense Project and the Columbia Center for New Media Teaching and Learning. The Calculator is easy to use. Simply choose a crime you want to analyze and you will see instantly displayed the likelihood that each consequence will attach, on a continuum from "yes" to "probably" to "maybe." You can also compare the consequences of two crimes simultaneously to aid in thinking through whether better alternatives exist. Notably, to provide users an expansive picture of possible consequences, the Calculator includes even remote consequences of a potential conviction. Users should be aware of this conservative approach, particularly when advising a client regarding the immigration consequences of her specific case.

The Calculator is up and running now and additional features are on the way. Among these features is a "Tips and Strategies" section which provides suggestions about how to minimize unintended and unwarranted consequences. This feature seeks to facilitate the negotiation process that the Supreme Court urges upon prosecutors and defense counsel in *Padilla*. As with other information provided by the tool, these strategic tips are meant to be a starting point for lawyers in their preparations of more comprehensive strategies. Beyond that, an iPhone app is in development so that judges and lawyers can literally have important expertise in their hands wherever and whenever it is needed. By bringing expert knowledge into the hands of attorneys and judges, the Calculator provides an innovative approach to managing knowledge to address complex legal problems.

April Navarro, Class of 2012, and Hanzhe Wu, Class of 2012, are members of the Lawyering in the Digital Age Clinic, at Columbia University School of Law, Morningside Heights Legal Services, working under the supervision of Prof. Conrad A. Johnson.

New York Court of Appeals Review

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from February 1, 2012 to May 1, 2012.

Resentencing for Drug Crimes

***People v. Sosa*, decided February 14, 2012 (N.Y.L.J., February 15, 2012, pp. 1, 6 and 22)**

In a 4-3 decision, the New York Court of Appeals held that defendants who are being resentenced following the repeal of the Rockefeller Drug Laws may be eligible for resentencing if they have no violent felony convictions in the ten years before applying for resentencing, rather than within the ten years preceding the conviction of the drug crime. The cases in question arose as a result of a dispute between defendants and prosecutors over the proper time period to be applied regarding the application of the resentencing Statute. The 2009 law excludes people convicted of violent felonies in the preceding ten years. Judge Lippman, writing for the 4-Judge majority, rejected the prosecutor's position, and stated that there was no textual ground for the People's position in the Statute. He stated that the Statute describes the look-back provision simply as the preceding ten years—a period that would ordinarily be understood to extend backwards from the present or from the time the resentence application is before the Court.

In addition to Chief Judge Lippman, the majority position was supported by Judges Ciparick, Graffeo and Jones. Judge Pigott issued a dissenting opinion in which Judges Read and Smith concurred. The dissenters argued that the phrase "within the preceding ten years" refers to the ten years preceding the drug felony for which resentencing is sought and that, therefore, defendants in that category were not entitled to resentencing.

Resentencing for Drug Crimes

People v. Steward

***People v. Wright*, decided February 14, 2012 (N.Y.L.J., February 15, 2012, p. 24)**

In a unanimous decision also involving resentencing pursuant to the Drug Law Reform Act of 2009, the New York Court of Appeals rejected claims by the Defendants that they were entitled to resentencing. With respect to Defendant Steward, he had been arraigned as a predicate felon on the basis of a 1992 conviction for a non-violent crime. With respect to Defendant Wright, he had been adjudicated a predicate felon based upon the non-violent felony of attempted sale of a controlled substance. Both Defendants, however, also had prior convictions for violent felony offenses. The New York Court of Appeals, in making its determination, affirmed the Appellate Division finding and concluded that the reference to a predicate felony conviction did not require that the Defendant be so adjudicated. Therefore, both Defendants were ineligible for resentencing since they in fact had prior violent felony convictions.

Substitution of Assigned Counsel

***People v. Smith*, decided February 14, 2012 (N.Y.L.J., February 15, 2012, p. 25)**

In a unanimous decision, the New York Court of Appeals held that the trial court did not abuse its discretion in denying Defendant's requests for the substitution of assigned counsel. The Court found that after reviewing the record, the Defendant had failed to demonstrate good cause for the substitution of counsel, and the trial court had determined that counsel was competent and had fully prepared for trial. The Court further found, in a related issue, that the Defendant had not been denied a fair trial because of the trial court's ruling which permitted the prosecutor to refer to a defendant's prior drug-related felony convictions by naming the specific crimes in the event the defendant chose to testify.

Health Care Fraud

***People v. Khan*, decided February 9, 2012 (N.Y.L.J., February 10, 2012, pp. 7 and 26)**

In unanimous decision, the New York Court of Appeals upheld a Defendant's conviction under a health care fraud Statute which was enacted by the Legislature in 2006. The convictions involved the validity of Penal Law Sections 177.05 and 177.10, which created five new offenses related to the improper dispensing of prescription drugs by those allegedly seeking to defraud the Medicaid system. The Court found that there was a sufficient legal basis to uphold the Defendant's conviction. The Defendant was a pharmacist who was charged with the unauthorized dispensing of pills to an undercover agent who was not named on the prescription forms filled at the pharmacy. The Court found that the prosecution had presented sufficient evidence that the pills dispensed to the government agent were different than the ones called for in the prescriptions presented to the pharmacist. The Defendant further knowingly and willfully presented bills for reimbursement to Medicaid that contained false information.

Proof of Uncharged Crimes

People v. Gamble, decided February 9, 2012 (N.Y.L.J., February 10, 2012, p. 22)

In a unanimous decision, the New York Court of Appeals affirmed a Defendant's conviction and rejected his claim that the trial court abused its discretion when it permitted the People, under *Molineux*, to introduce certain evidence of Defendant's uncharged crimes and whether the People's evidence elicited at trial exceeded the scope of such ruling. The Court found that the trial court's determination that the testimony that Defendant had previously threatened to kill certain witnesses was relevant to establish a motive for the murders and the identity of the perpetrator. The testimony received was thus within the scope of the *Molineux* ruling.

In a secondary issue, the Court also rejected the Defendant's claim that the Courtroom seating arrangements wherein court officers station themselves directly behind the Defendant deprived the Defendant of his constitutional right to communicate confidentially with his attorney and prejudicially conveyed to the jury that he was dangerous. The Court of Appeals found that the positioning of the court officers was within the sound discretion of the trial courts to retain control of their courtrooms and trial proceedings. It also concluded that the Defendant had not sustained his burden of showing that the positioning of the court officers impeded his ability to converse privately with his attorney.

Sex Crimes—Statute of Limitation

People v. Quinto, decided February 9, 2012 (N.Y.L.J., February 10, 2012, p. 23)

Certain felony sex crimes are covered by a 5-year Statute of Limitation. Misdemeanor sex crimes have a 2-year statutory period, and violations must be prosecuted within one year. In the case at bar, the Court of Appeals was faced with the issue of what type of information qualifies as a report of a sex crime against a child, which triggers the commencement of the Statute of Limitations. In the case at bar, the alleged victim had claimed that she had been raped in August 2002 at school by a classmate, and provided police with this information in November 2002. She subsequently provided police with a written retraction, and the case was closed. In 2007, when she was 19 years old, she again informed police that she had been sexually assaulted years earlier by the Defendant, Quinto. Based on this information, the Defendant was charged in a felony complaint with rape and related offenses. The Defendant had moved to dismiss the charge, claiming that the victim had reported the crimes to police in November 2002, and that the Statute of Limitation had run by December 2007. In a 6-1 decision, with Judge Read dissenting in part, the New York Court of Appeals affirmed the determination of the Appellate Division which modified the trial court's ruling by reinstating certain of the felony and misdemeanor sex offenses. The Court determined that the victim had not made a report as required by the Statute which related to the Defendant's alleged sex crimes in November 2002. This meant that the limitation periods for the sex crime offenses did not begin to run until the victim turned 18 in January 2006, and that therefore the tolling provisions of CPL 30.10(3)(f) were applicable. With respect to the non-sexual misdemeanors and other petty offenses which were also charged, the Appellate Division had properly ordered their dismissal.

Proof of Uncharged Crimes

People v. Cass, decided February 16, 2012 (N.Y.L.J., February 17, 2012, pp. 1, 9 and 25)

In a unanimous decision, the New York Court of Appeals held that under the *Molineux* ruling, the trial court had properly allowed testimony about a prior uncharged killing against a Defendant who was pursuing an extreme emotional disturbance defense in an unrelated slaying. The Court concluded that by asserting the defense of extreme emotional disturbance, the Defendant necessarily put his state of mind at the time of the killing an issue. Under the *Molineux* case, evidence of other uncharged crimes or prior bad acts may be admitted to rebut such a fact. Prosecutors had argued that the Defendant had a propensity toward violence, and that the testimony of a prior uncharged killing was highly probative and directly relevant to the Defendant's defense. The Court's decision was written by Judge Jones, and was joined in the rest of the Court.

Proof of Uncharged Crimes

People v. Agina, decided February 16, 2012 (NY.L.J., February 17, 2012, p. 24)

In a 5-2 decision, the New York Court of Appeals concluded that proof of an uncharged crime which was admitted under the *Molineux* rule was not inadmissible, and that the Appellate Division had committed reversible error in so ruling. Under the identity or modus operandi exception to the *Molineux* rule, evidence of an uncharged crime that has distinctive characteristics in common with the crime for which the Defendant is on trial may be admissible, unless the Defendant's identify as the person who committed the act in question is conclusively established by other evidence. In the case at bar, the New York Court of Appeals found that facts regarding the Defendant's identify were not so conclusively established as to render evidence of a prior crime inadmissible. The 5-Judge majority thus disagreed with the Appellate Division ruling and remitted the matter back to that Court for consideration of facts and issues which were raised but not determined on the appeal. The Court's majority opinion was written by Judge Smith, and Judges Ciparick and Jones dissented, voting to uphold the Appellate Division determination.

Consciousness of Guilt

***People v. Smith*, decided February 16, 2012 (N.Y.L.J., February 17, 2012, p. 22)**

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction for driving while impaired, and remitted the matter back for a new trial. The Court found that the trial court committed reversible error in permitting the People to introduce proof of consciousness of guilt evidence that the Defendant refused to take a chemical breath test to determine his blood alcohol content when requested to do so. The Court found that under the circumstances of the case, the Defendant had indicated that he was waiting to make a decision until he could consult with his attorney. Since a reasonable motorist in Defendant's position would not have understood that the further request to speak to an attorney would be interpreted by the troopers as a binding refusal to submit to a chemical test, defendant was not adequately warned that his conduct would constitute a refusal. Therefore the evidence of that claimed refusal was received in error at trial.

Verdict Sheet

***People v. Miller*, decided March 22, 2012 (N.Y.L.J., March 23, 2012, pp. 1, 2 and 22)**

In a 5-2 decision, the New York Court of Appeals reversed a Defendant's murder conviction after determining that the trial court committed reversible error by providing the jury with a verdict sheet which contained notations which were not authorized under the Criminal Procedure Law. The majority opinion affirmed previous rulings by the New York Court of Appeals and rejected the claim that a memorandum issued by former Governor Pataki indicated that a harmless error analysis should be applied when considering verdict sheet issues. The majority specifically concluded that no matter what Governor Pataki said about his own bill, it remains reversible error not subject to harmless error analysis to provide a jury with a verdict sheet containing notations not authorized by the criminal procedure law. The majority opinion was written by Judge Smith, and was joined in by Chief Judge Lippman and Judges Ciparick, Graffeo and Jones. Judges Read and Pigott dissented. The dissenters argued that the outcome in the instant case was precisely the kind of "hyper technical result" that the Governor and Legislature were attempting to prevent.

Granting of Bail

***People v. Horn*, decided March 22, 2012 (N.Y.L.J., March 23, 2012, pp. 2 and 22)**

In a unanimous decision, the New York Court of Appeals determined that CPL Section 520.10(2)(b) prohibits a court from fixing only one form of bail. The Court determined that in reading the provisions of the relevant statute and considering the overall statutory structure, a trial court was not authorized to consider only one form of bail, and that the trial courts should have discretion in choosing different options for the fixing of bail.

Resentencing

***People v. Rodriguez*, decided March 22, 2012 (N.Y.L.J., March 23, 2012, p. 24)**

In a 4-3 decision, the New York Court of Appeals determined that CPL Section 430.10 does not preclude the Appellate Division from remitting a case for resentencing after concluding that the trial court imposed unlawful consecutive sentences on two of the counts. The Defendant had argued that once the Appellate Division concluded that the imposition of the consecutive counts was illegal, its only authority was to make the two counts concurrent; it had no authority to remand the matter to the trial court. The Court of Appeals majority rejected this argument, and determined that the Appellate Division, after finding that the trial court had imposed an illegal sentence, had the power to choose to remit the matter back to the trial court and to allow that court to utilize its discretion in determining the proper resentence. The majority opinion was written by Judge Pigott, and was joined in by Judges Graffeo, Read and Smith. Chief Judge Lippman and Judges Ciparick and Jones dissented.

Ineffective Assistance of Counsel

***People v. Keating*, decided March 22, 2012 (N.Y.L.J., March 23, 2012, p. 25)**

In a unanimous decision, the New York Court of Appeals rejected the Defendant's claim that he was denied the effective assistance of appellate counsel. The Defendant claimed that appellate counsel had failed to raise on a direct appeal the issue of the trial court's admission of videotape. The Court concluded that the error of appellate counsel, even if it had occurred, was unlikely to have been prejudicial, and that the issue regarding the admission of the tape was basically a matter of discretion for the trial court. Under these circumstances, there was no basis to conclude that the Defendant had been denied the effective assistance of appellate counsel.

People's Appeal

***People v. Mack*, decided March 22, 2012 (N.Y.L.J., March 23, 2012, p. 25)**

In a unanimous decision, the New York Court of Appeals affirmed the Appellate Division determination to dismiss a People's appeal. In the case at bar, the trial judge had reduced counts of first degree sexual abuse to third degree sexual abuse, on the grounds that there was

insufficient evidence of forcible compulsion. The Appellate Division, in a 3-2 decision, had upheld the trial court's determination. The Court of Appeals affirmed the Appellate Division majority, finding that the evidence presented to the grand jury was not sufficient to establish that sexual contact was compelled by use of physical force.

Definition of "Public Place" in Marijuana Possession Case

***People v. Jackson*, decided March 27, 2012 (N.Y.L.J., March 28, 2012, pp. 1, 6 and 22)**

In a 5-2 decision, the New York Court of Appeals held that a private vehicle on a public street constitutes a "public place" for purposes of enforcing New York's Penal Law Statute relating to the possession of certain narcotics. Under the Marijuana Reform Act of 1977, possession of less than 25 grams of marijuana was reduced from a misdemeanor to a violation, unless the Defendant was found with the drug in a "public place" and the drug was open to public view. In the case at bar, the Court of Appeals determined that possession within a private vehicle on a public street satisfies the definition of a public place, pursuant to Penal Law Section 240.00(1). Judge Graffeo, writing for the majority, stated, "Insofar as the public place element is concerned, the Defendant's situation is no different than if he were riding a bicycle on a highway or walking on a public street." Judge Graffeo was joined in the majority by Judges Ciparick, Read, Smith and Pigott. Chief Judge Lippman and Judge Jones dissented.

Dismissal of Indictment

***People v. Extale*, decided March 27, 2012 (N.Y.L.J., March 28, 2012, pp. 6 and 25)**

In a unanimous decision, the New York Court of Appeals held that a prosecutor does not have the authority to unilaterally dismiss a count of the grand jury indictment over the objections of the defendant. In the case at bar, the Defendant had originally been indicted on a count of first degree vehicular assault and first degree assault. Prior to trial, the prosecutor had moved to dismiss the lesser charge and the trial judge allowed the dismissal over the objections of the defense. The Court of Appeals observed that although normally a defendant would be happy to have a count dismissed, in the case at bar it might have been to the Defendant's advantage if the jury was able to consider the lesser charge in addition to the higher one. The Court therefore determined that it is a judge who has the power to dismiss indictments, and that a prosecutor has no right to unilaterally refuse to proceed on a count of a grand jury indictment. The Court reiterated that the authority to dismiss a count of the grand jury belongs to the judge and not to the prosecutor.

Refusal to Hear Confession Expert

***People v. Bedessie*, decided March 29, 2012 (N.Y.L.J., March 30, 2012, pp. 1, 8 and 23)**

In a 5-4 decision, the New York Court of Appeals held that trial judges are not required in all cases to let jurors hear expert testimony about the reliability of a defendant's confession. In the case at bar, the trial judge had refused to conduct a *Frye* hearing into whether to admit an expert's testimony about admissions which had been made by the Defendant. The Defendant contended that she had given the statements in question after becoming worn out from prolonged police questioning, and did not fully read the confession she signed. At her trial, defense counsel sought to call an expert in false confessions. The New York Court of Appeals majority determined that in the case at bar, the testimony in question would not have been germane, and was properly excluded. Further, the jurors, based on their own life experiences, were competent to assess the reliability of the defendant's confession without the use of expert testimony. The majority opinion was written by Judge Read, and was joined in by Judges Ciparick, Graffeo, Smith and Pigott. Judge Jones and Chief Judge Lippman dissented. The dissenters argued that in the case at bar, there was little corroborating evidence to connect the Defendant to the commission of the crimes charged, and that the use of expert testimony regarding the confession could have been beneficial to the Defendant, and considered by the jurors in making their determination.

Perjury Conviction

***People v. Perino*, decided March 29, 2012 (N.Y.L.J., March 30, 2012, pp. 8 and 26)**

In a unanimous decision, the New York Court of Appeals upheld a Defendant's conviction for perjury. The case involved a former New York City police detective who was found guilty of perjury for denying that he had not interrogated an attempted murder suspect. The Appellate Division, First Department, had reduced some counts of the perjury convictions from first to third degree. The Court of Appeals upheld the Appellate Division action, concluding that the evidence pointed to misstatements that the Detective made under oath while describing his interview with the Defendant. In the New York Court of Appeals, the defense argued that all of the perjury counts should be dismissed, and the prosecution had sought to reinstate the higher perjury counts which had been reduced. The Court of Appeals, however, upheld the determination of the Appellate Division, and rejected both the claims of the Defendant and the prosecution.

Remittal to Trial Court

***People v. Ingram*, decided March 29, 2012 (N.Y.L.J., March 30, 2012, p. 26)**

In a 5-2 decision, the New York Court of Appeals remitted a case back to the trial court for further proceedings. The majority opinion concluded that CPL Section 470.15(1) precludes the Appellate Division from reviewing an issue that was either decided in an appellant's favor or was not decided by the trial court. CPL Section 470.35(1) grants the Court of Appeals no broader review power than that possessed by the Appellate Division. In the case at bar, without addressing the validity of the trial court's rationale, the Appellate Division resolved the Defendant's suppression application on a theory which was not reached by the suppression court. Under such circumstances, the order of the Appellate Division should be reversed, and the matter remitted to the Supreme Court for further proceedings. The majority opinion was joined in by Chief Judge Lippman and Judges Ciparick, Graffeo, Read and Jones. Judge Pigott and Judge Smith dissented, and argued that the Appellate Division's ruling was consistent with the provisions of CPL Section 470.15(1).

Ineffective Assistance of Counsel

***People v. Fisher*, decided April 3, 2012 (N.Y.L.J., April 4, 2012, pp. 1, 2 and 26)**

In a 6-1 decision, the New York Court of Appeals reversed a Defendant's conviction on the grounds that the Defendant had received the ineffective assistance of counsel. In the case at bar, the Court found that the prosecutor improperly encouraged inferences of guilt based on facts which were not in evidence, and that the defense attorney merely sat silent while all of this was occurring. The Court found that any competent defense counsel would have objected to the prosecutor's egregiously improper summation and comments. The majority opinion was joined in by Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Pigott and Jones. Judge Smith dissented, and argued that neither the conduct of the prosecutor nor the inaction of defense counsel was anywhere near serious enough to warrant reversal.

Possession of Weapon with Intent to Use

***People v. Perry*, decided April 3, 2012 (N.Y.L.J., April 4, 2012, p. 24)**

In a unanimous decision, the New York Court of Appeals concluded that there was no reasonable view of the evidence to find that the Defendant possessed a weapon without any intention to use it unlawfully. In the case at bar, the Defendant admitted that he displayed a gun to a man in order to frighten him. The Appellate Division had concluded that the Defendant was entitled to a charge on a lesser count not involving an intention to use. The New York Court of Appeals reversed this finding and reinstated the conviction for criminal possession of a weapon in the second degree, and remitted the matter back to the Appellate Division for consideration of other issues.

Claim of Right and Mistake of Fact Defenses

***People v. Pagan*, decided April 3, 2012 (N.Y.L.J., April 4, 2012, p. 24)**

In a unanimous decision, the New York Court of Appeals determined that in the context of a second degree robbery case, a claim of right defense and a mistake of fact defense were equivalent, and that the Judge's charge on the issue was sufficient for the jury to consider the matter. Considering the facts of the case in the light most favorable to the People, the jury, based upon the charge which was given, could have rationally concluded that the Defendant had no good faith belief that the bills she tried to take were hers, but instead she tried to take money she knew belonged to another. The People were found to have met their burden of disproving the proferred defense.

Wiretap Evidence

***People v. Rodriguez*, decided April 26, 2012 (N.Y.L.J., April 27, 2012, pp. 1, 2 and 24)**

In a 5-2 decision, the New York Court of Appeals upheld a Defendant's conviction and ruled that suppression of wiretap evidence is not required when there is no showing of prejudice when the Defendant does not receive timely notice of the eavesdropping warrant. The majority opinion, which was written by Judge Pigott, held that suppression is not necessary when the Defendant independently learns of the warrant within the prescribed time, and that prejudice must be shown in order for a Defendant to prevail on a suppression motion, pursuant to CPL Section 70.50(3). Chief Judge Lippman and Judge Ciparick dissented.

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

The Court issued several important decisions in the area of criminal law during the first few months of the current year. These cases are summarized below.

***Smith v. Cain*, 132 S. Ct. 627 (January 10, 2012)**

In a 6-1 decision, the United States Supreme Court held that a witness's statement to police made on the night of the murder and five days after the murder were material for purposes of *Brady* discovery, and should have been turned over to the defense. In the case at bar, the Defendant was convicted of first degree murder based on the testimony of the single eyewitness. It was subsequently discovered that there were police files containing statements by the eyewitness which contradicted his testimony. The prosecution had failed to disclose these statements to defense counsel during the trial. Chief Judge Roberts, writing for the majority, concluded that a *Brady* due process violation had occurred, and that the Defendant's conviction had to be reversed. The matter was then remitted to the Louisiana courts for additional proceedings. Justice Thomas dissented and argued that there was no reasonable probability that the evidence in question would have resulted in a different verdict.

***Missouri v. Frye*, 132 S. Ct. 1399 (March 21, 2012)**
***Lafler v. Cooper*, 132 S. Ct. 1376 (March 21, 2012)**

In an expansion of the concept of ineffective assistance of counsel, the United States Supreme Court held, in two controversial 5-4 decisions, that convictions can be overturned if defense attorneys do not adequately assist clients in deciding whether to accept plea offers. Since across the United States approximately 90% of criminal cases are disposed of through the concept of plea bargaining, it is expected that this decision will greatly affect the operation of the criminal justice system throughout the Nation. In the majority opinions, which were written by the traditional swing vote, Justice Kennedy held that criminal defense lawyers are now required to inform their clients of plea bargain offers regardless of whether they think the client should accept them, and must give their clients good advice on whether to accept a plea bargain at all stages of the prosecution. If they fail in this regard, it can be considered a violation of the Sixth Amendment guarantee that provides criminal defendants with the right to assistance of counsel. Justice Kennedy remarked in the majority opinion "The right to counsel is the right to effective assistance of counsel." The majority opinion was joined in by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

In a strong dissenting opinion, Justice Scalia attacked the majority opinion and stated that it "upends decades of Supreme Court cases and now opens a whole new boutique of constitutional jurisprudence even though there is no legal right to be offered a plea bargain." Today the Supreme Court elevates plea bargaining from a necessary evil to a constitutional entitlement. Judge Scalia was joined in dissent by Chief Judge Roberts and Justices Alito and Thomas. There undoubtedly will be much discussion about these cases in the coming months, and their ramifications will be felt throughout the criminal justice system.

***Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510 (April 2, 2012)**

On October 12, 2011, shortly after it began its new term, the United States Supreme Court heard argument on the issue of whether jail officials may conduct intrusive strip searches of all arrestees, even of those detained for minor offenses, or whether the United States Constitution places some limitations on these actions by prison officials. In the case at bar, Albert Florence, a resident of New Jersey, was arrested after a traffic stop on a bench warrant for failure to pay a fine. Although he produced a receipt showing payment of the fine, the officer still proceeded to arrest him, and took him to the county jail. At that facility, he was forced to undergo a thorough strip search, and underwent what he alleged were numerous personal indignities. The charges were subsequently dismissed, and he was released after several days. Mr. Florence then sued the County and various officials with respect to the situation. A Federal District Court granted summary judgment in favor of Mr. Florence. The United States Court of Appeals for the Third Circuit reversed, holding that prison officials should be accorded wide-ranging deference in enforcing policies necessary to maintain security and order in their prisons.

Mr. Florence's attorneys argued in the United States Supreme Court that the Fourth Amendment requires reasonable suspicion for strip searches of all arrestees in order to protect individual integrity and dignity. They claimed that what is not subject to a reasonable suspicion standard is anything other than close inspection of a person at arm's length. Government attorneys argued in the Supreme Court that reasonable suspicion should not be required when an arrestee is going to be put into

the general prison or jail population. They argued that a blanket policy of strip searching is designed to insure not just that no contraband comes into the prison, but for the protection of the arrestee as well.

New York Federal Courts have long disfavored routine suspicion less strip searches under the rule enunciated by the United States Court of Appeals for the Second Circuit in *Weber v. Dell*, 804 F 2d 796 (1986). Other federal jurisdictions have been somewhat split on this issue, and it was hoped that the Supreme Court ruling would be determinative of a number of strip search cases which have been pending, both in New York and across the Country.

During oral argument, the various Justices asked numerous questions, and appeared to be somewhat divided and troubled on the issue. In fact, on April 2, 2012, the Court issued its 5-4 ruling in the matter. The Court determined that jailers may perform invasive strip searches on people arrested even for minor offenses. The Courts' majority declared that security interest trumps privacy in an often dangerous environment. The majority opinion stated, "Courts must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security." The Court's majority opinion was written by Justice Kennedy, as he once again provided the critical swing vote. He was joined in the majority by Justices Scalia, Alito, Thomas, and Chief Judge Roberts. Justice Breyer issued a dissenting opinion in which Justices Sotomayor, Ginsburg and Kagan joined.

Pending Cases

United States v. Alvarez, 132 S. Ct. __

On February 22, 2012, the United States Supreme Court heard oral argument in a highly controversial case involving First Amendment free speech issues. The case, *United States v. Alvarez*, involved a Defendant's conviction under the federal Stolen Valor Act, which was passed in 2006. Under the provisions of the legislation, a person is guilty of a crime when he falsely claims that he has received a top military award. The Defendant had risen at a public meeting and had claimed that he was a wounded war veteran who had received the Medal of Honor. When it was discovered that these claims were false, he was prosecuted under the federal Statute. In the Supreme Court, the Defendant argued that all that was involved was a speech, and that criminal prosecution under the federal Statute improperly involved what a person said and not what a person does.

During oral argument, it appears that the Justices were sharply split over the issue. Justice Sotomayor in particular seemed concerned regarding the limitation on free speech, and appeared to rely on prior Supreme Court decisions which protected that right, even when the speech was found to be highly offensive. Justice Scalia, on the other hand, appeared to be supportive of the legislation, indicating that Congress had a right to protect the value of the awards in question, and seeing to it that they were not demeaned by persons making false claims. Chief Judge Roberts appeared to be somewhat in the middle, and expressed concern regarding both sides of the issue. From the oral argument it appeared likely that the Court would once again split in rendering its decision.

Fisher v. University of Texas, 132 S. Ct. __

In late February, the United States Supreme Court granted certiorari in a case involving the issue of affirmative action programs at a Texas university. In the case at bar, the University of Texas was operating a program in which racial preferences were utilized regarding the admission of students. Abigail Fisher sued the University, along with another student, claiming that they were improperly denied admission at the University, while other students with lesser qualifications were accepted because of racial factors. This case is the latest in a series of cases in which the United States Supreme Court appears to be limiting the use of affirmative action programs, and some have speculated that the Court has taken this latest case as a vehicle to possibly strike down all types of affirmative action initiatives. This latest case will allow the Court to revisit its earlier decision in 2003 in *Grutter v. Bollinger*, where it upheld the use of racial considerations in university admissions at the Michigan Law School based on narrow grounds. A decision in this case is not expected for several months, and we will keep our readers advised of developments.

Miller v. Alabama, 132 S. Ct. __
Jackson v. Hobbs, 132 S. Ct __

On March 20, 2012, the United States Supreme Court heard oral argument in two companion cases where the issue involved was whether very young defendants who commit even the most brutal crimes should not be punished as severely as adult offenders. The two cases involved two 14-year olds who were convicted of murder and given life sentences without parole. In previous decisions, the United States Supreme Court has steadily expressed the view that young offenders should be treated differently than adult offenders. In 2005, the Court issued its decision in *Roper v. Simmons*, 543 U.S. 551, in which the Court held by a 5-4 decision that the death penalty for juvenile offenders was unconstitutional. In 2010, in *Graham v. Florida*, 130 S. Ct. 2011, the Court further held that the cruel and unusual punishment clause of the Eighth Amendment does not permit a juvenile offender to be sentenced to life imprisonment without parole for a non-homicide crime. In the cases now before the Court, defendants are seeking a further extension of the Court's prior rulings to cover instances where juvenile offenders have committed homicide crimes.

During oral argument, Justice Kennedy, who provided one of the key votes in the earlier decisions, indicated concern about the lack of flexibility in sentencing young offenders who have committed homicides. Justice Kennedy seemed to indicate that he might favor a ruling that gives judges a role in determining an appropriate sentence. Justice Kennedy's approach seemed to indicate that he would favor forcing states to consider parole at some point for anyone with a life sentence who was convicted before turning 18. In addition to the State of Alabama, some 37 other States might be affected by the ultimate decision of the Supreme Court in this case.

***Arizona v. United States*, 132 S. Ct. __**

On April 25, 2012, the United States Supreme Court heard oral argument in the case involving the validity of Arizona's immigration law. The case involves the issue of whether the federal government has preempted the field regarding immigration issues and whether Arizona's recently passed state law conflicts with federal legislation. It appeared during oral argument that some or all of the Arizona statute might be upheld, and a decision in the case is expected in late June, toward the end of the Court's current session. The case will be decided by eight of the Supreme Court Justices, since Justice Elena Kagan has recused herself as she apparently worked on the matter while she was serving as U.S. Solicitor General. We will report on the decision in our Fall issue.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from February 1 to May 1, 2012.

People v. Snyder **(N.Y.L.J., January 30, 2012, pp. 1 and 3)**

In a 3-2 decision, the Appellate Division, Third Department, upheld the Defendant's conviction for depraved indifference murder but concluded that the applicable principles of law to be applied involved the law on depraved mind homicide as it currently exits, and not at the time of trial. The split in the Court reflects the change in the Court of Appeals' position on depraved indifference murder as a result of the decision in *People v. Feingold*, 7 NY 3d 288 (2006). Three of the Appellate Division Judges stated that the Defendant was entitled to review under the law as it now exists, and two others argued that the law as it existed at the time of trial should apply, adding that if their colleagues are correct, the Defendant would be entitled to a new trial, since the jury was obviously not charged under the evolved legal standard. The instant opinion continues to illustrate how courts have continued to wrestle with the application of the depraved indifferent statute, and the recent Court of Appeals rulings on the subject. It appears almost certain that this case is headed for the New York Court of Appeals.

People v. Spence **(N.Y.L.J., February 27, 2012, pp. 1 and 10)**

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's conviction because the prosecutor had made numerous comments which the Court found went beyond fair comment and prejudiced the Defendant's trial. One of the offensive remarks involved suggesting to the jurors that the tattoos on the Defendant's arm reflected his violent past. The prosecutor also made himself an unsworn witness by praising a witness and indicating that he supported the witness's veracity. The Court found that under the circumstances, the Defendant was prejudiced by the prosecutor's inflammatory and unwarranted insinuations, and was thus denied a fair trial. The Defendant's conviction for weapons possession was therefore reversed.

People v. Dixon **(N.Y.L.J., March 5, 2012, pp. 1 and 6)**

In a 4-1 decision, the Appellate Division, Third Department, upheld the validity of a plea agreement in which each Defendant promised not to testify against the other. The 4-Judge majority consisted of Justices McCarthy, Rose, Stein and Malone. Justice Eagan dissented, stating that he had serious misgivings about the propriety of such a plea agreement.

People v. Green **(N.Y.L.J., March 7, 2012, p. 1)**

In a unanimous decision, the Appellate Division, Second Department, upheld the admission of a rap song performed by the Defendant which contained statements about the crime he and his friends were going to commit. The Court ruled that this evidence was relevant as consciousness of guilt and to show knowledge and intent, and that the probative value outweighed any prejudicial effect.

People v. LeGrand **(N.Y.L.J., March 9, 2012, p. 1)**

In a unanimous decision, the Appellate Division, First Department, upheld a Defendant's conviction and ruled that the Defendant was not entitled to a new trial because the trial court had refused to allow expert testimony regarding the effect of "weapon focus" on a witness's identification. The Court noted that there were seven identification witnesses in the case, and that under the circumstances this was not the type of situation where expert testimony regarding identification was warranted. The *LeGrand* case, in fact, has been through the appellate process during the last eleven years, and has resulted in two other Appellate Division decisions and one decision from the New York Court of Appeals.

People v. Ryan **(N.Y.L.J., March 20, 2012, pp. 1 and 2)**

In a 4-1 decision, the Appellate Division, Fourth Department, held that it was excessive and unreasonable for police to tase a suspect with an electroshock weapon and to forcibly take a second DNA sample after authorities mishandled the first attempt. The DNA which was taken from the suspect convicted him of a misdemeanor assault, and linked him to three separate armed robberies. The Fourth Department, as a result of its reasoning, reversed the Defendant's conviction, ordered the suppression of the DNA evidence and ordered a new trial. The majority opinion was written by Justice Peradotto, and was joined in by Justices Centra, Lindley and Martoche. Justice Scudder dissented.

People v. Thomas **(N.Y.L.J., March 23, 2012, pp. 1 and 8)**

In a unanimous decision, the Appellate Division, Third Department, upheld a Defendant's conviction despite the fact that police authorities had questioned him for a period of more than nine hours, and had repeatedly lied to the Defendant in order to elicit a confession. The

Court, reviewing a video of the confession proceedings, concluded that the police tactics were not unlawful or coercive, and that the recorded interview did not support the conclusion that the Defendant was unduly fatigued, or physically and psychologically overwhelmed. Legislation requiring police to videotape interrogations is pending before the State Legislature, and the instant appeal provides an example of where such taping can be useful to both the prosecution and the court system, as well as to defense counsel.

People v. Keith R. **(N.Y.L.J., March 28, 2012, pp. 1 and 6)**

In a unanimous decision, the Appellate Division, First Department, reversed a determination of a Supreme Court Justice which dismissed a case against the Defendant who was accused of a misdemeanor assault. In the case at bar, the trial court dismissed the case because the Defendant had already spent two months more in jail than he would have faced if convicted. The dismissal motion was granted in the interest of justice and on the grounds that continuing the case would be unduly wasteful. The Appellate Division found, however, that the trial court had overstepped its authority, and that there were no legal grounds to dismiss in the interest of justice. The Court concluded that it was the District Attorney's prerogative to discontinue the criminal proceedings and that any dismissal should have been done on the prosecution's motion, and not from the actions of the Court. The Court's opinion was written by Justice Tom.

People v. Sanchez **(N.Y.L.J., April 11, 2012, pp. 1 and 2)**

In a 4-1 decision, the Appellate Division, First Department, upheld a Defendant's robbery conviction and rejected his claim that he had received ineffective assistance of counsel. The Defendant claimed that his counsel, the Legal Aid Society, also represented another man who was investigated but not charged in connection with the crime. The majority opinion, written by Justice DeGrasse, rejected the contention that there was an improper conflict of interest, and concluded that the other individual who the Legal Aid Society had represented had no relevance to the Defendant's case, and therefore there was no basis to establish an ineffective assistance of counsel claim. The majority opinion was joined in by Justices Tom, Saxe and Roman. Justice Freedman dissented, finding that the Legal Aid Society should have looked more closely into the possibility of a defense targeting the other investigated individual, and that therefore a possible conflict was present.

People v. Simonetta **(N.Y.L.J., April 17, 2012, p. 2)**

In a unanimous decision, the Appellate Division, Third Department, upheld a Defendant's rape conviction, determining that although it found some of the evidence troublesome, it was deferring to the jury's determination based upon their review of the witnesses' credibility. In the case at bar, it was acknowledged that the 17-year-old victim seduced the Defendant on Facebook and told him "I'm yours for as long as you want." She then took off her shirt, unzipped her pants and performed a provocative dance. The Appellate Division, although acknowledging that portions of the victim's testimony were troublesome and that there were numerous inconsistencies in her various statements, nonetheless concluded that she steadfastly maintained that she never consented to the sexual acts with the Defendant. The Court also found that the trial judge had properly applied the Rape Shield Law to bar testimony regarding other damaging testimony concerning the victim. Defense counsel has indicated that he will seek leave to appeal to the Court of Appeals in this matter.

People v. Morillo **(N.Y.L.J., April 18, 2012, p. 2)**

In a unanimous decision, the Appellate Division, Second Department, vacated a Defendant's conviction and ordered the Defendant's release. The appellate panel concluded that the sentencing court had lost jurisdiction because prosecutors made no effort for more than six years to secure the Defendant's presence although they had been notified that he was in federal prison. In the case at bar, the Defendant had pleaded guilty and had agreed to accept a three- to six-year sentence. Before sentencing, however, he was arrested in Pennsylvania on federal charges and was eventually sentenced to 140 months in federal prison. The Federal Bureau of Prisons had sent three letters to the Queens District Attorney's Office inquiring whether a detainer should be placed on the Defendant. The Queens Office took no action for six years, and suddenly moved, in 2009, to return the Defendant to Queens for sentencing. He thereafter received a state sentence of five to ten years. Pursuant to a post-conviction judgment motion, the Appellate Division concluded that the Criminal Procedure Law requires that sentencing be pronounced without unreasonable delay. The Court concluded that in the case at bar, the prosecution had been negligent in failing to promptly proceed in the matter, and that the Defendant's conviction had to be vacated. Queens' prosecutors have indicated that they would seek to appeal to the New York Court of Appeals with respect to the instant ruling.

People v. Souffrance **(N.Y.L.J., April 23, 2012, p. 4)**

In a unanimous decision, the Appellate Division, Second Department, ordered that further proceedings be held to determine whether the Defendant had violated conditions of probation and was therefore subject to an enhanced sentence. In the case at bar, the Defendant was originally given a six-month prison sentence and a probationary term of ten years. It was thereafter alleged that the Defendant had failed to pay weekly fees of $55 which were required for a mandated sex offender and substance abuse program. Based upon these allegations, the Defendant's probation was revoked and he was re-sentenced

to a term to 2 1/3 to 7 years. The Appellate Division concluded, however, that there was an insufficient finding that the Defendant's lack of payments was willful, and not due to some inability to pay. It therefore ordered that further proceedings be held on the matter.

People v. Anonymous **(N.Y.L.J., April 25, 2012, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, First Department, held that Manhattan Supreme Court Justice Carol Berkman had overstepped her authority when she refused to go along with a plea agreement in a drug case in which she did not find the Defendant worthy of sympathy. The panel found that the Judge's actions in failing to follow the prosecution's recommendations constituted a gross miscarriage of justice. In the case at bar, an agreement had been reached which would have allowed an eventual reduction in a drug conviction, and a non-incarceratory term. Despite the fact that the Defendant helped prosecutors make several drug-related arrests, and her cooperation had put her at substantial risk in her neighborhood, Judge Berkman sentenced the Defendant to a three-year term, contrary to the prosecution's recommendation. The appellate panel, after criticizing the trial judge for her actions, reduced the Defendant's sentence to one of time served.

People v. Lebovits **(N.Y.L.J., April 26, 2012, pp. 1 and 9)**

The Appellate Division, Second Department, in a unanimous decision, reversed a Defendant's conviction and ordered a new trial because the prosecution had failed to timely disclose a detective's notes, which contained allegations by the Complainant against a key defense witness. The appellate panel found that the untimely disclosure of the interview notes precluded the defense from fully and adequately preparing for cross-examination, and set a trap for the Defendant which had already sprung at the time the notes were finally furnished. The case involved allegations that the Defendant had sexually abused a teenage boy. The appellate panel found that the prosecution's actions violated *Rosario* principles, which denied the Defendant a fair trial, and that the trial court should have granted a defense motion for a mistrial.

For Your Information

Legislature Approves Governor Cuomo's Proposed Extension of DNA Database to Cover All Crimes, but Postpones Any Action on Forfeiture Proposal

During his recent state address, Governor Cuomo proposed as his criminal justice initiative that defendants convicted of any Penal Law offense would be required to submit a genetic fingerprint, which would be included in the DNA database. Currently, this is required only for felony crimes and certain specified misdemeanors. Extending the requirement to hundreds of misdemeanor offenses has proven controversial, and although the proposal appears to be backed by those in law enforcement, various defender groups have raised civil liberties objections and questions on whether the current system will be overburdened by the addition of thousands of samples, based upon lower-level crimes. On January 31, 2012, the State Senate passed the Governor's bill, giving the proposal a strong push toward final enactment.

Chief Judge Jonathan Lippman also supported the concept of an expanded DNA data bank in his recent State of the Judiciary address. The Chief Judge, however, included certain additional protections which he felt could assist in preventing wrongful convictions. The State Assembly, in March, after including some of the additional protections mentioned by the Chief Judge, also voted to approve the Governor's proposal. The DNA expansion then became part of an overall package including an agreement on budget items and pension reform, and the Governor signed the enacted legislation in late March. Many opponents of the DNA database expansion continue to argue that it will overburden the criminal justice system and impose improper restrictions on civil liberties. According to recently issued statistics, there are currently approximately 390,000 profiles in the State's database, and it is estimated that under the new expansion plan, an additional 3,500 may be added each month. We will continue to monitor this issue for the benefit of our readers.

Although the Legislature approved the Governor's DNA proposal, it postponed any action on the Governor's request to shift forfeiture matters from the civil to the criminal court. The Governor's proposal regarding forfeiture was met with substantial opposition in the State Assembly, and several groups and individuals raised the question as to whether the overburdened criminal courts could handle the additional procedures required for forfeiture, and whether the Governor's proposal would violate due process concerns. The forfeiture proposal continues to have the support of many prosecutors, and it appears certain that the proposal will again be advanced next year for consideration by the Legislature.

Governor and Legislature Adopt New Plan for Treatment of Juvenile Delinquents

Under a new initiative proposed by Governor Cuomo, juvenile delinquents from New York City who are now placed by the Family Court in facilities far away from their families and community would be housed and receive services close to home. The proposal would shift jurisdiction for delinquents housed in state-run, non-secure and limited secure facilities and in privately run programs, to City agencies. New York City has long advocated for such a change, which would involve approximately 350 juveniles who range in ages of between 14 and 15. Currently there is approximately an 81% recidivism rate in the State Juvenile Justice System, and it is hoped that the new proposal would offer juvenile delinquents a better chance for rehabilitation. Youths who commit serious crimes would still be sent to state-run secure centers. The Governor's new initiative was adopted by the State Legislature on March 30th. New York City officials have expressed optimism that the proposed changes can soon be put into effect. City officials who will be involved in administering the new program have commented that with the new arrangement, "We can work with young people in the community to turn their lives around."

New York and New Jersey Highest Taxed States

A recent survey by the Tax Foundation, a 75-year-old think tank, ranked New York and New Jersey as the States with the highest taxes in the United States. New Jersey ranked as the worst State with respect to high taxes, followed by New York. The survey considered various taxes which are imposed by the States, including income, sales, corporate, property and unemployment insurance. In all of these categories, New York and New Jersey topped the list of the States with the highest taxes. The recent study has added further fuel to the effort by various business groups, and even the Governor and some members of the State Legislature, to reduce the overall tax burden on New York citizens.

Interracial Marriages Hit New High

A recent study by the Pew Research Center revealed that interracial marriages in the United States by the year 2010 had climbed to 4.8 million. This represents approximately one in every twelve marriages. The study found that approximately 8.4% of all marriages are interracial, up from 3.2% in 1980. More than 15% of new marriages in 2010 were interracial. The rise in interracial marriages indicates an increasing diversity in the United States, and an overall improvement in race relations. Following the Pew Center study, the U.S. Census Bureau, in late April, provided updated figures on the issue for the year 2011. The Census Bureau reported that at the end of 2011, 5.4 million couples in the United States were classified as interracial, or 1 in 10. This represented a 28% jump since 2000. The Census Bureau also reported that currently, 26.7% of the households in the U.S. include just one person.

Proposal to Create Youth Courts Pushed by Chief Judge

In his State of the Judiciary address, which was delivered on February 14, 2012, Chief Judge Jonathan Lippman advocated the creation of a new Youth Court to deal with non-violent 16- and 17-year-old offenders. In recent years, the concept of a Youth Court has been pushed by various individuals and organizations, and most recently obtained the support of former Chief Judge Judith Kaye, who discussed the issue at a Criminal Justice Section Meeting during our Annual Meeting in New York City. The concept of a Youth Court is seen as offering better opportunities to rehabilitate young people who have committed non-violent minor crimes and to try to stem the tide of criminal activity at an early stage. The concept of a Youth Court has been gaining a great deal of attention and support during the last few months. It was recently discussed in detail in two articles in the *New York Law Journal* of March 2, 2012, including an interesting interview with Judge Michael A. Corriero, who has spent many years presiding over the Youth Court in Manhattan Supreme Court. We will keep our readers advised of developments in this area.

Judicial Conduct Commission Issues Report

A recent report from the Judicial Conduct Commission noted that there has been a drop in the number of complaints against state judges during the last year. In 2011, 1,818 complaints were received by the Commission. This was nearly 400 less than the 2,205 which were filed in 2010. In terms of disciplinary action taken by the Commission, two recommendations were for removal, six for censure, four for admonition, and two involved stipulations of resignation.

Governor Continues to Fill Appellate Division Vacancies

Governor Cuomo recently announced some additional appointments to the various Appellate Divisions. On April 5, 2012, he announced that he had appointed Justice Karen Peters as Presiding Justice of the Appellate Division, Third Department. Justice Peters replaces Justice Cardona, who died several months ago. Justice Peters is 64 years of age and is a graduate of New York University School of Law. She has served in the Appellate Division Third Department since 1994 when she was appointed by former Governor Mario Cuomo. Justice Peters previously also served as a Justice of the Supreme Court and as an Ulster County Family Court Judge. Justice Peters is highly regarded and will be making a salary of $172,800 in her new position.

Before the Governor began making his appointments, ten vacancies existed in the various Appellate Divisions. Three vacancies each were in the First, Second and Fourth Departments and one vacancy existed in the Third Department. Included in these vacancies were the positions of Presiding Justice in both the Second Department and the Third Department. As we were going to press, the Governor was still in the process of naming his choice for the Second Department.

Fewer Students Taking LSAT Exam

It was recently reported that there has been a sharp decline in the number of college graduates taking the LSAT exams, which are required for admission to law school. The recent report indicated that during the period covering 2011 to 2012, 129,000 students took the exam. This reflected a 16% decline from the 155,000 students who took the exam during the period 2010 to 2011. The decline reflects concerns by students that job opportunities in the legal field are declining, while the expense of attending law school is growing. The report also indicated that some 45,000 students are expected to graduate from law schools throughout the country in each of the next 3 years. This also reflects a decline from graduating classes during the past decade.

Disparity in Federal Sentencing

A new analysis of hundreds of thousands of cases in federal courts has found vast disparities in the prison sentences handed down by judges presiding over similar cases. The data raise questions about the extent to which federal sentences are influenced by the particular judges rather than by the specific circumstances of the cases. The data was obtained under the Freedom of Information Act and analyzed by the Transactional Records Access Clearinghouse, an organization based at Syracuse University that gathers data on the federal government. The issue of disparity in sentencing both in the federal and state courts

has been a controversial one over the years. Initially, it was felt that judges should have a great deal of discretion in fashioning a sentence which would be appropriate to the offender and the crime. In more recent years, especially with respect to violent crimes and repeat offenders, the feeling has been to limit court discretion in imposing sentence, and to make the sentences more uniform among defendants. It appears that we continue to swing from one viewpoint to the other, and the controversy will continue into the future.

Recent Hate Crime Conviction Reopens Hate Crime Debate

The recent conviction of former Rutgers University student Dharun Ravi, who was convicted of anti-gay intimidation for using a Webcam to spy on his gay roommate's love life, has once again reopened the controversy as to whether various hate crime laws are overbroad, and punish thought and opinions rather than criminal action. The Ravi case involved his 18-year-old roommate, Tyler Clementi, who threw himself off a bridge after he realized that people had been watching him during his gay encounter. Under the various convictions which were involved in the Ravi case, he faces a possible sentence of 10 years under the hate crime laws presently in effect in New Jersey. In comments from various members of the legal profession following the Ravi conviction, opinions were expressed that the hate crime laws which are now on the books in 45 States should perhaps be re-examined. James Jacobs, a law professor at New York University, stated in an article by the Associated Press, "It illustrates why hate crime laws are not a good idea. They were passed to be admired and not to be used." Bill Dobbs, a long-time gay activist in New York, also appeared troubled by the verdict in the Ravi case. He was reported as commenting, "As hate crime prosecutions mount, the problems with these laws are becoming more obvious…how they compromise cherished constitutional principles. Now a person gets tried not just for misdeeds, but for who they are, what they believe, what their character is."

According to FBI statistics, 1,528 people were targeted by anti-gay hate crimes in 2010, accounting for almost 19% of all reported hate crimes. Although the original enactment of hate crimes statutes was seen as a legitimate way to deal with the threat of hate crimes, some now feel that prosecutors have extended their borders beyond their original purposes, and that the utilization of these statutes should be re-examined. In the past, certain questions, including constitutional concerns, have also been expressed regarding New York's own hate crimes law.

OCA Declares End to Bronx County Criminal Courts Merger

In early April, the Office of Court Administration announced that it was terminating the existing situation in Bronx County, where criminal parts in both the Supreme Court and the Criminal Court had been merged. Administrative officials acknowledged that the practice, which was instituted in 2004, had not worked well. They stated that the situation in the Bronx would now revert to a separate Supreme Court felony part and a Criminal Court section which would handle arraignments and misdemeanors. This would reinstitute the practice in the Bronx which is followed in the rest of the City. The OCA acted after it became clear that the merger system had resulted in huge felony backlogs, and thousands of cases which were pending for more than six months. The decision to again separate the two courts was made by Chief Administrative Judge A. Gail Prudenti after consultation with various court administrators.

OCA Expands Arraignment Hours in New York City

Following disastrous effects as a result of last year's budget cuts which resulted in reduced arraignment hours within the various criminal courts in New York City, the Office of Court Administration announced that it will be restoring many of the regular arraignment procedures as of the end of April. New Saturday and Sunday hours have been added to the weekend arraignment sessions within all five Boroughs of New York City, and Judge Barry Kamins, the citywide administrator for the criminal courts, indicated that additional hours will be forthcoming if necessary to comply with the required arrest-to-arraignment time in compliance with New York Court of Appeals' standards.

Court Administrators Face Growing Backlogs Within State Court System

Chief Administrative Judge A. Gail Prudenti recently stated that the backlog of cases in the state court system has increased significantly and is far from where it should be. Recent statistics indicate that felony matters in the New York City Supreme Court amounted to 13,676 as of the end of 2011, of which 59% were over standards and goals. In the Supreme Court's Civil Division, pending cases as of the end of 2011 were 146,327, an increase of nearly 30,000 from 2008, and of which 33% were over standards and goals. The Family Court within the City also had a similar situation, with 81,861 pending cases as of the end of 2011, an increase of over 5,000 from 2008, and of which 19% were over standards and goals.

A similar situation exists with respect to courts outside of New York City. Felony matters in the rest of the State amounted to 6,071, of which 18% were over standards and goals. With respect to Supreme Court civil matters, there were 131,033 cases pending at the end of 2011, of which 33% were over standards and goals. This also represents an increase of more than 30,000 since 2008. With respect to Family Court matters, there were a total of 107,121 pending cases outside of New York City, an in-

crease of more than 10,000 since 2008. Six percent of these Family Court matters were over standards and goals as of the end of 2011.

Justice Prudenti and her various administrative deputies have been holding meetings during the last few weeks to address the situation and to find new ways to handle court matters so as to substantially reduce the current backlog. Judge Prudenti also indicated that administrative judges would be seeking the input and cooperation of local bar associations and other government agencies in the effort to alleviate the situation.

Bar Associations Appeal Ruling Regarding New York City 18-B Proposal

On March 19, 2012, the Appellate Division, First Department, upheld a New York City plan regarding the assignment of defense counsel under the 18-B provisions. The Appellate Division, First Department, in a 3-2 decision, had determined that New York City can decide without the consent of various bar associations, to contract with institutional legal service providers to represent poor criminal defendants in conflict cases instead of assigning them to private practitioners under article 18-B of the county law. Under long established procedures, the 18-B program has been operated with the direct participation of the five County Bar Associations in the City of New York. Beginning in 1965, the City began contracting with institutional legal service providers. In a recent decision, the City decided to enlarge the contractor program and the various bar associations commenced legal action against the City, claiming that bar association consent was required with respect to procedures involving the 18-B program. The litigation, known as *New York County Lawyers Association v. Bloomberg*, is now headed to the New York Court of Appeals, since the various bar groups were entitled to an appeal as a right following the split decision in the Appellate Division. This litigation is of important concern to many criminal defense lawyers, and we will continue to monitor this situation as the case makes its way through the New York Court of Appeals.

City Prosecutors Seek Increases in D.A. Budgets

In early May, Mayor Bloomberg submitted his proposed budgets for the fiscal year beginning July 1, 2012, involving the five District Attorney's Offices in the City of New York, as well as the Special Narcotics Prosecutor. The Mayor's budget called for decreases in all of the District Attorney budgets ranging from 3½ to 14%. The largest decrease was scheduled for the Office of the Manhattan District Attorney, where a nearly 15% decrease was proposed. The smallest decrease, of approximately 3.5%, was targeted for Brooklyn, and the other three offices, as well as the Special Narcotics Prosecutor, were requested to accept decreases of approximately 6%.

Representatives of the various District Attorneys have turned to the City Council to increase the Mayor's proposed budget, and it is expected that there will be some movement in this direction when the final city budget is adopted in late June. All of the City prosecutors have indicated that increased funding is necessary to continue to fund crime prevention programs and to keep the City safe from anticipated rising crime rates.

The 2011 Annual Report from the Lawyers Fund for Client Protection

The Lawyers Fund issued its annual report for the year 2011. In 2011, 253 awards were approved for payment, reimbursing a total of $6.9 million. In 2011, as in past years, a small number of attorneys were responsible for the dishonest conduct which resulted in the Fund's award. In 2011, 46 individuals who have now been suspended, disbarred or are deceased, were responsible for the client losses. The total amount of the awards distributed in 2011 was less than the total of $8.5 million awarded in 2010. Of the 253 awards in 2011, unearned legal fees were the largest category of awards in number (101) followed by losses in real estate transactions (95). Awards in real estate transactions, however, as in the past, accounted for the largest dollar amount paid ($3.6 million). The Fund reiterated that there are presently over 271,000 registered lawyers in New York State, and that only a tiny fraction of that number were responsible for any wrongdoing.

ABA Releases Employment Data for 2010 Law School Graduates

The American Bar Association recently released statistics regarding employment information for the graduating class of 2010. The report found that nearly 88% of the 4,819 students who graduated from New York's 15 law schools in 2010 were employed 9 months after graduation. Nearly 20% of these students were employed by firms with 50 or fewer attorneys; 19% were hired by firms with 501 or more lawyers. Graduates from highly rated national schools, such as Columbia, New York University and Cornell, tended to be placed with the very large firms having more than 501 attorneys, and these three schools sent between 50% and 60% of their 2010 graduates to such firms. Six law schools in New York, which tend to be more local and more focused on New York law, sent more than 25% of their graduates to small firms. Statistics are currently being prepared with respect to the 2011 graduates, and hopefully they will indicate that the job prospects for law graduates is steadily improving.

About Our Section and Members

House Delegates Adopts Section Proposal to Seal Criminal Records

On January 27, 2012, at the Bar Association's Annual Meeting in New York City, the House of Delegates overwhelmingly approved a resolution supporting the passage of legislation to authorize sealing of criminal records of reformed offenders in certain situations.

The report was submitted as a project of the Criminal Justice Section, and the proposal was presented to the House of Delegates by Richard D. Collins. The sealing situation would be limited to misdemeanors and certain low-level felonies, and would require a five-year waiting period. The substance of the sealing proposal is included in an Assembly bill, and we will keep our members advised of developments as the sealing Statute makes its way through the upcoming legislative session.

Spring CLE Program

The Criminal Justice Section held its Spring Meeting and CLE program during the weekend running from May 4th to May 6th, 2012. The meeting was held at the Gideon Putnam Resort Hotel in Saratoga Springs, New York. The Saturday CLE program discussed various aspects regarding the presentation of evidence, including appellate evidence rulings, GPS devices and forensic discipline issues. The speakers included Professor Richard T. Farrell from the Brooklyn Law School, Attorney Jay Shapiro, and Section Chair Marvin E. Schechter. The Sunday session included additional discussion of troublesome evidence rules and discovery issues. These topics were discussed by Justice Mark R. Dwyer and Assistant District Attorney Robert Masters from the Queens District Attorney's Office.

The three-day session also included some social aspects, with a Friday night reception and dinner, and two breakfast sessions. The Spring program was attended by approximately 40 members.

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.

Marta Alfonso
Philip Vincent Apruzzese
Gil Auslander
Marie B. Beckford
Adele Bernhard
Alyssa Bombard
Ashley Carter
Michael Cataliotti
Catherine A. Christian
Stanley Lewis Cohen
Andrew Benjamin Deluca
Brian Joseph Desesa
Elizabeth B. Di Stefano
Christina Mary Dieckmann
Kieran Michael Dowling
Amy Rachel Dunayevich
Yasmin Dwedar
John S. Edwards
Kathleen M. Evers
Michael P. FiggsGanter
Edward Albert Flood
Ebette M. Fortune
Colette B. Foster-Franck
Gligoric Castor Garupa
Nona Gillan
Gerd Saul Godoy
Dov Gibor Gold-Medina
Jeffrey Louis Greco
Michael C. Green
Ernest F. Hart
Jalila Latifa Haughton
Vincent A. Hemming
Brad Henry
Meghan Alice Horton
Albert C. Hrdlicka
David Carl Hymen
Mikhail Izrailev
Kate Elizabeth Janukowicz
Benjamin G. Johns
Marshall A. Kelly
Inara F. Khashmati
Robert Gilmore Lamb
Tasha LaSpina
Scott E. Leemon
David Lehman
Adam B. Levy
David Gordon Lowry
Cara Elizabeth Manz
Carolyn Annadell Mutrux
William A. Neri
Ramon W. Pagan
William Pham
Scott Michael Pirrello
Ian Anderson Rennie
Alejandro Eduardo Rodriguez
Rita Anne Romani
Estelle J. Roond
Ariel Jennie Ruttenberg
Gregory J. Ryan
Stephen Brett Sandover
Jarrod Ryan Sanford
Joseph Blaise Sayad
Julie Schaul
Peter Justin Scutero
Paul Lewis Shechtman
Jacob B. Sherman
Natalie Socorro
Marc Aaron Stepper
Bess Louise Stiffelman
Karen Ann Studders
Oliver Edward Twaddell
Anna Claire Ulrich
Tyrone Leslie Valentine
Thomas E. Waldron
Cori Weston
Joseph F. Wierschem
Alison Wilkey
Alison Jill Wininger
Richard R. Wissler
Dina Zloczower

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