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New York Criminal Law Newsletter

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

The New York Court of Appeals

The new official photo of the New York Court of Appeals includes its two newest members, Judges Jenny Rivera and Sheila Abdus-Salaam. Judges Rivera and Abdus-Salaam, according to tradition, are both seated at the two end seats of the appellate panel.

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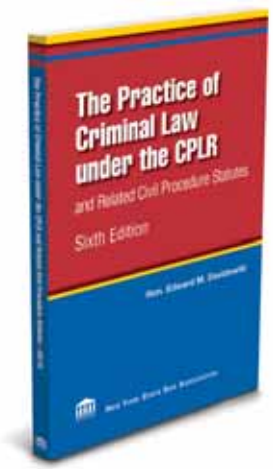
The Practice of Criminal Law under the CPLR and Related Civil Procedure Statutes

Sixth Edition



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Many attorneys whose practices consist solely of criminal matters are unfamiliar with the precise rules that apply to civil actions. Moreover, many of those rules are scattered throughout New York's Penal Law, Criminal Procedure Law and other statutes, and are difficult to find without the aid of an organizational reference.

The Practice of Criminal Law under the CPLR and Related Civil Procedure Statutes, Sixth Edition, written by Judge Edward Davidowitz, solves this problem. This book pulls together in an orderly, logical way the rules and provisions of law concerning jurisdiction, evidence, motion practice, contempt proceedings and article 78 and habeas corpus applications—none of which is covered in the CPL or the Penal Law.

The sixth edition of *The Practice of Criminal Law under the CPLR* provides amendments, additional relevant case and statutory law in almost every chapter. The chapter on "Rules of Evidence" has been completely revised, expanding its discussions of privileges and new provisions in civil case and statutory law relevant to rules of evidence in criminal trials and proceedings.

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What Do Judges Think?

I spent over 33 years presenting cases to judges—almost always, appellate judges. I am sure that not a litigator among you will fail to understand that, while I had enormous respect for my judges, sometimes they drove me crazy.

Time marches on, and for over three years now I have been a Judge in the Brooklyn felony trial court. The scales have fallen from my eyes: now suddenly it is the litigators who drive me crazy! As they say, it is important to walk a mile in the other guy's shoes. But I am not here to argue about which perspective is "correct"; both are. Still, I thought I might note what my job change has taught me about judges.

I have learned how funny judges are. When I was a prosecutor, and tried to make a joke in court, my effort most often fell somewhat flat. I guess my delivery has now improved. The attorneys who appear in front of me love my witticisms. I don't know; maybe Brooklyn lawyers just have a better sense of humor than those First Department judges had. In any event, my Brooklyn jurors keep me humble. They never laugh at my jokes.

I hope this is not too controversial; I love the attorneys on the 18-b trial panel. That is not to say I have a problem with the admirable attorneys in the Brooklyn District Attorney's Office, their admirable counterparts in the institutional defender offices, or the admirable retained attorneys. And maybe it is just an age and gender thing, but I have very much enjoyed the time I have spent with the 18-b attorneys, and I have especially appreciated their under-compensated skill. I hope they will always remain with us, in force.

My pet peeve? From all the lawyers, a little more familiarity with the law wouldn't hurt. These days it is incredibly easy to access the appellate case law on the Internet, on the same day the cases are decided. And of course, we have CLEs for you.

Enough about me—at least for today. Over the next two years the Criminal Justice Section will continue its highly regarded Fall Forensic CLE programs. The attendance at our major "upstate" CLEs and Executive Committee meetings has been disappointing, and we will have to assess whether smaller programs with A local focus would provide better service to our "upstate" members. In any event, we will continue to present our Evidently Evidence CLE sessions each spring, in one venue or another. We will soon announce the dates for the major programs and Executive Committee meetings to be held over the next 18 months.

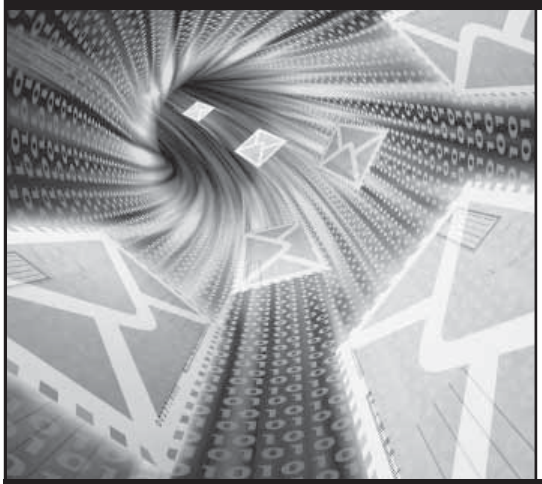
As I was writing this message I was told that the Evidently Evidence Program held in Albany in May was a success in that over 50 lawyers attended. That showing will ensure the program will held in Albany again next year. I want to thank our Albany area representatives who really went to bat to publicize the program and are due the credit for its success.

I look forward to working with our membership during the coming year.

Mark R. Dwyer

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

Request for Articles



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

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Articles should be submittted in electronic document format (pdfs are NOT acceptable), and include biographical information.

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Message from the Editor

In this issue we present a biographical sketch of Justice Sheila Abdus-Salaam, who was recently appointed to the New York Court of Appeals by Governor Cuomo and approved by the State Senate in early May. She began sitting on the Court in the beginning of May, and her appointment now brings the Court of Appeals to its full complement of Appellate Judges. We also present a feature article with detailed information regarding a new evidentiary ruling adopted by the New York Court of Appeals with regard to lost or destroyed evidence. This new ruling provides for the giving of an adverse inference charge under certain circumstances.

With regard to the New York Court of Appeals, we also present a summary of recent decisions issued by that Court with respect to criminal law issues. During the last several months, the United States Supreme Court has been busy issuing some significant decisions in the criminal law area. These include a decision regarding the retroactively of the *Padilla* ruling, the requirement of a search warrant before the taking of blood tests for drunken driving suspects, and the use of dog-sniffing to detect narcotic substances. These decisions are discussed in detail in our United States Supreme Court section. As in the past, we also provide brief summaries of significant decisions from the various Appellate Divisions.

With the beginning of June, our Criminal Justice Section welcomes four new officers. We therefore provide a brief biographical sketch and an accompanying photo for our incoming Section Chair, Vice-Chair, Treasurer and Secretary. We welcome these new officers and look forward to working with them during the coming year. Also in our "About Our Section" portion, we provide information regarding upcoming events and programs.

In our "For Your Information" section we provide a variety of articles covering economic issues and recent statistics regarding the status of both the State and Federal Courts. For example, we discuss new procedures which have reduced arraignment time within New York City, the number of filings in the New York Federal Courts, and the tough job market which still faces law school graduates.

This *Newsletter* serves as the lines of communication between our Criminal Justice Section and its members, and we encourage comments and suggestions from the membership. As in the past, I also appreciate receiving articles for possible inclusion in the *Newsletter*, and encourage the submission of such articles by our members. Since this is our Summer issue, I wish all of our readers a happy and enjoyable Summer, and I hope you continue to find our *Newsletter* both interesting and informative.

Spiros A. Tsimbinos

Judge Sheila Abdus–Salaam Appointed to the New York Court of Appeals

By Spiros A. Tsimbinos

On April 5, 2013, Governor Cuomo announced that he was appointing Judge Sheila Abdus-Salaam to the New York Court of Appeals. Judge Abdus-Salaam has been sitting in the Appellate Division, First Department, since 2009. She was elected as a Supreme Court Justice in 1993 and was re-elected in 2007. She also previously served as a Civil Court Judge from 1992 to 1993. She has held a variety of public service positions including General Counsel to the New York City Office of Labor Services and Assistant State Attorney General from 1980 to 1988. From 1977 to 1980, she was a Staff Attorney for the Brooklyn Legal Services.

Judge Abdus-Salaam is 61 years of age and is a graduate of Barnard College and Columbia Law School. She resides in Manhattan and is a registered Democrat. Judge Abdus-Salaam was highly rated by various bar associations to fill the vacancy in the Court of Appeals which was created by the untimely death of Judge Theodore Jones. She received the highest possible rating from our own New York State Bar Association. Her name was submitted along with six other candidates by the Commission on Judicial Nominations. Judge Abdus-Salaam was widely viewed as the leading candidate for selection to the New York Court of Appeals. In announcing his selection, Governor Cuomo stated "As one of our State's most respected and experienced jurists, Judge Abdus-Salaam will bring a wealth of judicial and legal expertise to the New York State Court of Appeals."

Her selection retains the racial and ethnic balance which the Court had previously. The Court now consists of Judge Abdus-Salaam who is black, Judge Rivera who is Hispanic, and five white members. Judge Abdus-Salaam's selection, however, changes the gender balance of the Court, and the Court will once again have a majority of women, to wit: Judge Abdus-Salaam, Judge Rivera, Judge Read and Judge Graffeo. The Court previously had four women members when Judge Kaye served as Chief Judge and Judges Ciparick, Read and Graffeo served as Associate Judges.

Judge Abdus-Salaam will be the first black woman to serve on the Court.

Unlike Judge Rivera, who was recently selected to serve on the Court and who had no prior judicial experience, Judge Abdus-Salaam comes to the Court with an abundance of judicial experience, slightly over 20 years. Some criticism had been made regarding Judge Rivera's lack of prior judicial experience, and with the selection of Judge Abdus-Salaam, Governor Cuomo will clearly avoid any controversy on this issue. Some commentators have classified Judge Abdus-Salaam as being moderately liberal, especially in criminal cases, but also in civil matters, where she has often ruled in favor of low income plaintiffs over corporate defendants.

The selection of Judge Abdus-Salaam has been greeted very favorably by both members of the judiciary and the organized bar associations. Chief Judge Lippman recently commented that Judge Abdus-Salaam is extremely well regarded as an Appellate Judge and a person, and that he couldn't be more delighted by the appointment. Our own New York State Bar Association President Seymour James called the Governor's appointment an ideal choice, and cited the Judge's vast experience in numerous matters, including corporate issues, personal injury cases and criminal matters.

Following the Governor's selection, the New York State Senate approved Judge Abdus-Salaam's nomination, and she began sitting on the Court in early May. After many months, the Court has now regained its full complement of seven Judges. A photo of the new panel of New York Court of Appeals Judges is presented on our cover page.

New York Court of Appeals Adopts New Rule Regarding Lost or Destroyed Evidence

By Spiros A. Tsimbinos

On March 28, 2013, the New York Court of Appeals, in the case of *People v. Handy*, unanimously ruled that when a Defendant in a criminal case acting with due diligence demands evidence that is reasonably likely to be of material importance, and that evidence has been destroyed by the State, the Defendant is entitled to an adverse inference charge. The Court's new evidentiary ruling places additional responsibilities and burdens on prosecutors, defense attorneys and trial courts. It is therefore important that the various segments of the Criminal Justice System become familiar with the new Court of Appeals pronouncement.

The Facts of the Case

The Defendant was charged with assault on three different Deputy Sheriffs, to-wit: Deputies Savea, Schliff and a Deputy unidentified in the opinion, following altercations that occurred while the Defendant was an inmate at the Monroe County Jail. Counts 1 and 2 referred to alleged assaults on November 8, 2006 involving Deputies Savea and Schliff, and Count 3 to an event on January 8, 2007. The Defendant testified at trial and denied committing any of the assaults. After trial, the Defendant was acquitted on the first and third Counts involving Savea and the unidentified Deputy, but was convicted on the second Count involving Schliff.

With regard to the second Count, involving Schliff on November 8, 2006, the defense believed that a video camera located in the cell block had recorded the incident in question. In an omnibus motion, made before trial, defense counsel asked, among other things, to be told whether any electronic surveillance in any form was utilized in the case and the location of such tapes. The People responded in general terms that they had provided all the discoverable material in their possession and that to the extent there may be any videotapes, Defendant would be permitted to inspect them. On the first day of trial, however, the prosecutor made a statement that it was jailhouse policy to record over images after 30 days and that time had elapsed while the Defendant was being held on a felony complaint relating to the November 8 incident but before he was indicted. It was thus undisputed that the video images were destroyed before trial.

At trial, the Court agreed to give an adverse inference charge with respect to any video of the January incident, because Defendant had asked for the preservation of that video before it was destroyed. Defendant, arguing that "[we] made our request for preservation of the [November] video as soon as we could," asked that the same charge be given as to Counts 1 and 2, but the Court refused because those tapes had been destroyed prior to any defense request.

The language of the charge given as to Count 3, but rejected as to Counts 1 and 2, was:

> You may consider the failure of the People to preserve that material in determining the weight to be given to the testimony of the People's witnesses regarding this specific incident. The law permits, but does not require you to infer, if you believe it proper to do so, that had the material been preserved its contents would not support or be inconsistent with the witnesses[']testimony as to this incident.

Following the Defendant's conviction and his sentence to five years in prison, the Defendant began his series of appeals. In an initial ruling by the Appellate Division, Fourth Department, 83 AD 3d, 1454 (2011), the Defendant's conviction was upheld. The Appellate Division concluded that there was no support for Handy's position that the tape, if it had been preserved, would have been exculpatory, and that it was merely speculative.

The Court of Appeals Ruling

In the Court of Appeals, however, in a decision written by Judge Robert Smith, a unanimous Court determined that it would adopt a new rule requiring an adverse inference charge whenever the People destroy or lose significant evidence, despite the defense's best efforts to request that it be preserved. The New York Court of Appeals indicated that it was adopting the rule which was first enunciated by the Maryland Court of Appeals in *Cost v. State*, 417 MD 360 (2010), 10A3d 184 (2010). Judge Smith stated in his written opinion that the rule which the Court was adopting should put authorities on notice not to destroy what could be evidence in criminal cases, and raises the consciousness of state employees on the subject. Pointing to the facts of the instant case, Judge Smith further noted, "In cases like the one before us, that arise out of events in jails or prisons, the authorities in charge should, when something that will foreseeably lead to criminal prosecution occurs, take whatever steps are necessary to insure that the video will not be erased—whether by simply taking a tape or disc out of a machine, or by instructing a computer not to delete the material. The rule

that we adopt today increases the chance that the staff of these institutions will act accordingly."

With respect to the type of charge which would be required, Judge Smith indicated that New York trial courts could adopt the terminology used by the Maryland Court in *Cost*, and that the charge in question would be similar to a missing witness instruction that is given when a party fails to call a witness who is under the party's control and is expected to give favorable testimony to that party. The Maryland Court in *Cost* basically approved the charge which was sought by the defense to the effect that "If this evidence was peculiarly within the power of the State, but was not produced and the absence was not sufficiently accounted for or explained, then you may decide that the evidence would have been favorable to the defense." In indicating his support for the charge given in *Cost*, Judge Smith further stated that the adverse inference instruction neither establishes a legal presumption nor furnishes substantive proof. In concluding his decision, the Court, in advancing the reasons for its determination, stated, "Our rule is unlikely, we think, to increase greatly the risk that a good faith error by the State will lead to a guilty defendant's acquittal. We hold only that the jury should be told it *may* draw an inference in the Defendant's favor."

Additional Responsibilities on Prosecutors, Defense Counsel and Trial Judges

The new rule mandating an adverse inference charge now places a new burden and responsibility on prosecutors, defense attorneys, and trial judges alike. Defense counsel must be aware that they must make a request for the evidence in question with due diligence and in a timely manner. In *Handy*, the Court repeatedly stressed that defense counsel had made his request for preservation as soon as he could. The defense should also be prepared to show that the evidence is reasonably likely to be of material importance. Prosecutors should also become immediately aware that they are subject to the new ruling and be prepared to deal with it. Prosecutors can initially attack any defense request on the ground that it was not timely made or that there is no reasonable likelihood that it would be of material importance.

Trial judges are also now faced with the responsibility of determining whether to provide the adverse inference charge in question. The materiality issue may present the most difficulty for judges under the new rule, since it may be impossible to initially show the material importance of the evidence and its possible effect on the jury. It thus appears that trial courts should and will defer to a defense request if there is any basis to believe that the evidence would be material. The Court of Appeals indicated that trial judges should more often agree to provide an adverse inference instruction than was required in the past, thus leaving the final determination to the jury.

In this regard, the Court noted that although the Appellate Division characterized Defendant's request "as merely speculative," it was the State agents who, by destroying the video, created the need to speculate about its contents. An adverse inference charge mitigates the harm done to the Defendant by the loss of the evidence without terminating the prosecution." With respect to the facts of the case, the Court further observed, "A video showing that Defendant either was or was not a violent aggressor in the Savea incident would be helpful to a jury trying to decide whether Schliffs or Defendant's account of the later incident was true." Another factor which the Court of Appeals seemed to have considered is that with respect to Count 3, where an adverse inference charge was provided, the jury decided to acquit the Defendant, thereby indicating that such a charge could have had a dispositive effect on the jury's determination.

Another issue which trial judges will have to deal with is what exact language should be used. Without setting forth the specific language of the new missing evidence charge, the Court of Appeals decision provides a basic framework that an adverse inference charge should be similar to New York's missing witness instruction. In this regard, it makes reference to the charge provided in Maryland's *Cost* case and the instruction discussed by the New York Court of Appeals in *People v. Savinon*, 100 NY 2d 192 (2003), which makes reference to New York's model CJI charge at Section 8.55. The Court also reiterates the requested charge by Handy's attorney, and while not saying so, appears to view it as acceptable.

Thus while not expressly dictating the language to be used in any adverse inference charge, the New York Court of Appeals provides adequate guidance for the proper charge to be given. It may also be helpful for trial judges to include within the charge the holding of the Court of Appeals, to wit: that the Defendant acted with due diligence in seeking the evidence, that it has a reasonable likelihood it would be of material importance, and that it was destroyed by the State.

The new evidentiary rule adopted by the New York Court of Appeals places new responsibilities on prosecutors, defense attorneys and trial judges. I hope that this article is helpful in alerting the various parts of the criminal justice system to their new responsibilities and obligations regarding the issue of lost and destroyed evidence.

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, 2013 to May 1, 2013.

Disorderly Conduct

People v. Baker, decided February 7, 2013 (N.Y.L.J., February 8, 2013, p. 22)

In a unanimous decision, the New York Court of Appeals held that under the facts of the case at bar, the Defendant's conduct did not rise to the level of disorderly conduct and that that charge should have been dismissed. The incident involved a verbal exchange between the Defendant and a police officer on a Rochester Street. At about 6:30 p.m., two officers were parked in police vehicles. The officers observed a woman, who turned out to be the Defendant's girlfriend, standing in front of a house. The woman was video-taping the activities in the area. The officers became suspicious about the girlfriend's activities and ran her license plate. It was determined that the plate number had been issued for a Toyota and not a Cadillac, which the girlfriend had been driving. Officer Johnson stepped out of his vehicle and began conducting an inquiry of the woman, who stated that it was her grandfather's vehicle. A few minutes later, Defendant Baker approached the officer's car and inquired why his girlfriend's license plate had been checked. The Defendant then also started swearing at the officer, using profanity. The incident attracted bystanders and the Defendant was subsequently arrested and charged with disorderly conduct, as well as possession of cocaine which was subsequently found on his person.

The Defendant had moved to suppress the drugs found on his person, claiming that the arrest for disorderly conduct was illegal, rendering the contraband fruit of the poisonous tree. The Court of Appeals concluded that the actions which led to the Defendant's arrest for disorderly conduct did not comply with the statutory definition and subsequent case law. The Court of Appeals, in issuing its ruling, stated that isolated statements using coarse language to criticize the actions of a police officer unaccompanied by provocative acts or more aggravating circumstances will rarely afford a sufficient basis to infer the presence of the public harm mens rea, which is necessary to support a disorderly conduct charge. Since the disorderly conduct arrest was invalid, the subsequent search and seizure was also improper, since it was unsupported by probable cause, and the Defendant's convictions for both charges should have been dismissed.

Justification

People v. Watson, decided February 7, 2013 (N.Y.L.J., February 8, 2013, p. 25)

In a unanimous decision, the New York Court of Appeals upheld a Defendant's homicide conviction and rejected the Defendant's claim that the Defendant should have been allowed to obtain disclosure regarding the victim's criminal record and specific acts of violence. At trial, the Defendant interposed the defense of justification and testified that he panicked and shot the victim when he saw the victim reach for his waist. There was no evidence at the trial that the deceased had a weapon at the time of the incident. The Defendant sought to prove that the victim was the initial aggressor and requested that the District Attorney make disclosure as to the victim's criminal record and specific acts of violence, and that the acts of violence requested should not be limited only to acts known to Defendant.

The trial court ruled that evidence of acts not known to Defendant would be inadmissible in accordance with prior Court of Appeals determinations. (See *Matter of Robert S*. 52 NY 2d 1046 (1981) and *People v. Miller*, 39 NY 2d 543). Although the Defendant attempted on appeal to have the New York Court of Appeals reexamine the holdings in *Robert S*., and *People v. Miller*, the Court concluded that the instant case did not squarely present that issue before the Court. Rather, the Court of Appeals found that there was no way a jury could conclude on the record before it that the victim was the initial aggressor, no matter how great his propensity for violence. This was particularly clear from the simple reason that the victim did not have a gun.

Consecutive Sentence

People v. Abreu, decided February 14, 2013 (N.Y.L.J., February 15, 2013, p. 24)

In a unanimous decision, the New York Court of Appeals held that sentences could be run consecutively with respect to a Defendant who completed the offense of second degree weapons possession with the requisite intent before committing the act constituting first degree felony murder. The Court cited its prior decision in *People v. Salcedo*, 92 NY 2d 1019 (1998). In addition, the Court held that any evidentiary errors which occurred would not have affected the verdict in light of the overwhelming evidence of the Defendant's guilt, and that any such errors would be harmless.

Sex Registration

People v. Palmer

People v. Long, decided February 12, 2013 (N.Y.L.J., February 14, 2013, pp. 1, 2 and 22)

In unanimous rulings, the New York Court of Appeals held that a one-time or occasional use of alcohol or drugs by a sex offender does not constitute a history of substance abuse for assessing the risk posed by the

offender. Chief Judge Lippman issued a decision of the Court which held that although alcohol undoubtedly plays a pernicious role in various domestic violence disputes and sexual assaults, the increased level was not warranted in the circumstances of the two instant cases. He also pointed out that the assessment system developed by the Sex Offender Registration Board advised that neither occasional social drinking nor periodic moderate drinking qualifies as the reason to increase the risk factor.

Consecutive Sentences

People v. Belliard, decided February 12, 2013 (N.Y.L.J., February 14, 2013, pp. 2 and 22)

In a 4-1 decision, the New York Court of Appeals determined that an additional term of incarceration is a collateral consequence of the Defendant's allocution to a second felony, not a direct consequence. As a result, a sentencing judge is under no obligation to tell defendants prior to their plea allocutions that their conviction for a second felony offense would mean they have to serve time consecutively for any uncharged sentence from their first conviction. In an opinion written by Judge Graffeo, the majority determined that nothing in a state statute requires a trial court to categorize a term of imprisonment as consecutive and that in some cases Judges may not even know that various laws require mandatory consecutive sentences in some instances. When a court is required by statute to impose a consecutive sentence but does not address the matter, it is deemed to have imposed the consecutive sentence. Judge Graffeo further noted that it would be unfeasible for a court to advise a defendant of all possible ramifications of a guilty plea, and cases have drawn a distinction between the direct and collateral consequences of a plea. Chief Judge Lippman dissented.

Fair Trial

People v. Warren, decided February 12, 2013 (N.Y.L.J., February 14, 2013, p. 23)

After three Defendants were indicted jointly, one proceeded to trial with a jury, and another proceeded with a bench trial, with both trials proceeding simultaneously. During the proceedings the Warren jury was allowed to hear testimony from a witness who testified at the co-Defendant's bench trial. After his conviction Defendant Warren appealed on the ground that the judge improperly refused to direct the witness to testify outside the jury's presence, and that in so doing, he was deprived of his right to a fair trial. The New York Court of Appeals unanimously agreed, and concluded that the Judge's failure to prevent the jury from hearing the witness in question was not harmless and, as a result, the Defendant was denied a fair trial.

Ineffective Assistance of Counsel

People v. LaSalle, decided February 12, 2013 (N.Y.L.J., February 14, 2013, p. 24)

In a unanimous decision, the New York Court of Appeals held that the Defendant did not show that there was no strategic or other legitimate basis for appellate counsel's failure to raise an issue regarding the inclusion of a term of post-release supervision. At the time of the Defendant's plea he was not advised that his sentence included five years of post-release supervision. The Court concluded that for all that appears in the record, counsel did not make the argument because Defendant did not want to withdraw his plea if the other ground for his appeal proved unsuccessful.

Ineffective Assistance of Counsel

People v. Vasquez, decided February 19, 2013 (N.Y.L.J., February 20, 2013, p. 24)

In a unanimous decision, the New York Court of Appeals held that a Defendant's trial attorney was not ineffective for failing to object under CPL 710.30 to testimony about a victim's out-of-court identification. The Defendant had been convicted of attempted robbery after he approached a man in the street, pointed a knife at him and asked for money. The victim then ran to a nearby store and called 911. The Defendant was arrested shortly thereafter. Before going to the station house, the victim pointed out the Defendant as the one who had robbed him. Prior to trial, the People had filed a notice of intention to offer identification testimony. At trial, the People offered testimony of the victim's identification which went somewhat beyond the information contained in the notice. Defense counsel failed to object to the additional testimony. The New York Court of Appeals determined that any mistake which may have occurred on defense counsel's part was not so egregious and prejudicial as to deprive Defendant of a fair trial. In addition, it was not likely that defense counsel would have been successful if an objection was made, and that an argument for preclusion which could have been made was not so compelling that a failure to make it amounted to ineffective assistance of counsel.

Admissibility of Breathalyzer Data

People v. Pealer, decided February 19, 2013 (N.Y.L.J., February 20, 2013, pp. 1, 9 and 22)

In a 4-1 decision, the New York Court of Appeals held that the inspection and calibration of the breathalyzers used to determine if drivers are drunk are non-testimonial and defendants do not have a constitutional right to cross-examine the technicians who service them. In a decision written by Judge Graffeo, the Court rejected the contention of a driver that his constitutional right to confront witnesses as spelled out in the 2004 ruling of the Supreme Court in *Crawford v. Washington*, 541 US 36, was violated when a Judge refused to produce at trial the ex-

perts who maintained the devices. The majority ruled that breathalyzer records sought by the Defendant are similar to business records as described in CPL R4518(a), which are generally deemed to be non-testimonial. In a separate opinion, Judge Pigott agreed with the majority's determination on the confrontation clause analysis, but stated he had a problem with the reasonableness of the traffic stop which led to the Defendant's arrest. As a result, any evidence discovered as a result of the stop should have been suppressed.

Ineffective Assistance of Counsel

People v. McGee, decided March 21, 2013 (N.Y.L.J., March 22, 2013, p. 22)

In a unanimous decision, the New York Court of Appeals determined that defense counsel was not ineffective for failing to raise legal sufficiency arguments identified on appeal because they are not fairly characterized and clear cut and dispositive in Defendant's favor. With respect to some of the claimed errors by defense counsel, the Court concluded that there may have been a strategic reason for counsel's actions. The Court concluded its decision by noting that a reviewing Court must avoid confusing true ineffectiveness with mere losing tactics and according undue significance to retroactive analysis. The Defendant's conviction was therefore affirmed.

Resentencing

People v. Norris, decided March 21, 2013 (N.Y.L.J., March 22, 2013, p. 24)

People v. Rodriguez

In a unanimous decision, the New York Court of Appeals upheld the resentencing of drug Defendants which involved changing concurrent terms to consecutive sentences after the Defendants were resentenced pursuant to the Drug Reform Act of 2009. The Defendants had argued that upon resentencing, they could not be subject to consecutive terms. The New York Court of Appeals held that when resentencing a Defendant under CPL 440.46, a Court is not authorized to alter multiple drug felony convictions that were originally imposed to run consecutively so that they now run concurrently. In issuing its decision, the Court relied upon its prior case of *People v. Acevedo*, 14 NY 3d 828 (2010).

Expert Testimony

People v. Diaz

People v. Williams, decided March 26, 2013 (N.Y.L.J., March 27, 2013, pp. 2 and 23)

In two unanimous decisions, the Court of Appeals concluded that expert testimony on child sexual abuse was useful in one case but in another was prejudicial to the Defendant because of improper questioning by the prosecution. In a decision written by Judge Pigott, the Court stated that expert testimony on rape trauma syndrome, abused child syndrome or similar conditions is admissible if it can clarify an issue calling for professional or technical knowledge possessed by the expert and beyond the ken of the typical juror. Using this standard the Court held that testimony in *Diaz* was permissible as being helpful to the jurors. Based upon a secondary issue involving the trial court's refusal to hear testimony that the victim had previously accused another man of sexual abuse, the Court, after discussing the expert testimony issue, ordered a new trial in the *Diaz* case.

In the *Williams* matter, the Court concluded that the prosecutor improperly utilized the expert testimony so that impermissible and prejudicial inferences were drawn. The Court, however, applied the harmless error doctrine due to the overwhelming evidence of Williams' guilt, and refused to order a new trial.

Ineffective Assistance of Counsel

People v. Nesbitt, decided March 26, 2013 (N.Y.L.J., March 27, 2013, p. 24)

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction and ordered a new trial on the grounds that defense counsel had committed several errors, which had resulted in the ineffective assistance of counsel. First of all, defense counsel had informed the Court on the record that he believed his client had no defense to the charge of assault in the first degree. As a result he made no serious effort to contest this issue. In his closing argument, he virtually invited the jury to convict the Defendant of assault. In reviewing the record, the Court concluded that counsel's belief that his client was without a defense was mistake. The record indicated a good faith basis for an argument that the injuries the victim received did not result in serious and protracted or serious and permanent disfigurement as required by the Penal Law Statute. Under these circumstances, counsel's representation was ineffective and a new trial is warranted.

Search and Seizure

People v. DeProspero, decided March 26, 2013 (N.Y.L.J., March 27, 2013, p. 22)

In a unanimous decision, the New York Court of Appeals upheld the denial of a Defendant's motion to suppress, which he claimed was the result of an illegal search. The items seized had been taken pursuant to a warrant issued on May 4, 2009. The Defendant eventually entered a plea of guilty to predatory sexual assault in the first degree. It was later discovered that a forensic examination of some of the items which were seized was not conducted until January 2010. The Defendant thus claimed that the forensic examination yielding the inculpatory still frame images had occurred after the warrant had lapsed, and in the absence of fresh judicial authorization, the January 2010 search was illegal. The Court of Appeals denied the Defendant's claim and noted that neither the Fourth

Amendment nor the New York State Constitution specifically limited the length of time property may be held following a lawful seizure.

Lost Evidence Charge

***People v. Handy*, decided March 28, 2013 (N.Y.L.J., March 29, 2013, pp. 2 and 23)**

In a unanimous decision, the New York Court of Appeals directed that trial judges provide juries with an adverse inference charge whenever the police or the prosecution lose or destroy evidence that is reasonably likely to be of material importance to the defense in a criminal case. In the opinion written by Judge Robert Smith, the Court of Appeals stated that its directive would give the State an incentive to avoid the destruction of evidence without greatly increasing the risk that a good faith error will result in the acquittal of a guilty defendant. In issuing its decision, the Court of Appeals in effect adopted a rule first promulgated by the Maryland Court of Appeals. The *Handy* decision is discussed in detail in our second feature article at page 7.

Appearance of Impropriety

***People v. Adams*, decided March 28, 2013 (N.Y.L.J., March 29, 3013, pp. 2 and 23)**

In a unanimous decision, the New York Court of Appeals stated that the appearance of impropriety can be enough to warrant the disqualification of a prosecutor from a case even when no actual impropriety is involved. The Court held that the Monroe County District Attorney's Office should have been disqualified from prosecuting Keith Adams for aggravated harassment. Adams had sent vulgar e-mails to Rochester City Court Judge Maija Dixon after their brief intimate relationship broke up in 2009. A Judge who had been brought in from a neighboring County denied a request from the defense that a special prosecutor be appointed because the Monroe County District Attorney was handling the prosecution harshly at the alleged behest of Judge Dixon. The New York Court of Appeals found that the District Attorney's Office did not adequately explain why it did not offer a plea agreement to Adams while similarly situated Defendants were allowed to plead to reduced charges. The Court concluded that while it did not find that any actual impropriety occurred there was an unacceptably great appearance of impropriety—the appearance that the District Attorney's office refused to accept a reduced charge because the complainant was a sitting judge who demanded that the matter go to trial, rather than because a trial was in its own disinterested judgment appropriate.

Right of Confrontation—Harmless Error

***People v. Cornelius*, decided March 28, 2013 (N.Y.L.J., March 29, 2013, p. 24)**

In a unanimous decision, the New York Court of Appeals upheld a Defendant's conviction for burglary in the second degree. During the trial, the Court allowed into evidence notices from 2004 containing statements by the Defendant indicating his knowledge that he was not allowed to enter into the store premises. The Court held that assuming without deciding that the notices were testimonial, their admission in the case at bar was harmless beyond a reasonable doubt. The People's main witness testified that he had personally issued Defendant a trespass notice in July 2008, just seven months before the incident in question, and had told the Defendant that his privilege to enter all Duane Reede stores had been revoked, and that Defendant could be arrested should he re-enter. In light of this proof, the Court was satisfied beyond a reasonable doubt that the admission of the 2004 notices did not influence the jury's verdict.

Preservation

***People v. Hanley*, decided March 28, 2013 (N.Y.L.J., March 29, 2013, p. 22)**

In a unanimous decision, the New York Court of Appeals held that a Defendant charged with kidnapping and another offense must preserve his argument that the kidnapping count merged with the other crime. The Court concluded that preservation is required because the mode of proceedings exception is not applicable to such a claim. The decision was written by Judge Graffeo, and was joined in by the rest of the members of the Court.

Right to Counsel

***People v. Griffin*, decided April 2, 2013 (N.Y.L.J., April 3, 2013, pp. 1, 9 and 24)**

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction and ordered a new trial because the trial Judge had improperly removed a Legal Aid Attorney who had requested an adjournment. The Court firmly stated that the Defendant had been denied his right to counsel which eventually resulted in the Defendant taking a guilty plea. In issuing its decision, the Court rejected the prosecution's arguments that the Defendant forfeited his claim when he eventually pleaded guilty. In her first written opinion since she joined the Court, Judge Rivera stated, "The right to counsel is so deeply intertwined with the integrity of the process that Defendant's guilty plea is no bar to appellate review." In issuing its decision, the Court noted that the trial Judge had improperly removed the Legal Aid Attorney for requesting an adjournment after he had accommodated the prosecution's multiple requests for delay in proceeding to trial.

Inducement of Plea

***People v. Monroe*, decided April 2, 2013 (N.Y.L.J., April 3, 2013, pp. 1, 9 and 24)**

In a unanimous decision, the New York Court of Appeals reversed an Appellate Division order and remanded

the matter to the Supreme Court for further proceedings. In the case at bar, the Defendant had argued that a plea to a non-drug case was induced by the promise of a sentence concurrent to a term which was later reduced. The Court found that the Court's action was erroneous and that the Defendant's plea to a conspiracy count was induced by the Judge's specific representation to him that he would thereby extend his minimum incarceratory term by a year and a half only. The Court concluded that on the record before it, it could not be said that the Defendant, who was clearly working toward achieving the earliest release date possible, would have pleaded guilty absent the assurance in question. The Court noted that generally, "When a guilty plea has been induced by an unfulfilled promise, either the plea must be vacated or the promise honored, but that the choice rests in the discretion of the sentencing court." (See *People v. McConnell*, 49 NY 2d 340, 346 (1980)).

Forgery

***People v. Ippolito*, decided April 2, 2013 (N.Y.L.J. April 3, 2013, pp. 1, 9 and 22)**

In a unanimous decision, the New York Court of Appeals held that an accountant who signed a client's name on 40 checks without making any notation that he was acting under a power of attorney did not commit the crime of forgery. In the case at bar, the Defendant, who was an accountant, was assisting an elderly person with certain tax issues. The woman had given the Defendant a full power of attorney. She later revoked the power, when it was learned that the Defendant has stolen nearly $700,000 from her. The Court affirmed the Appellate Division ruling on the issue, which found legally insufficient evidence to sustain the forgery counts, since at the time he signed the checks, the power of attorney in question was still in effect. The Appellate Division, whose reasoning was adopted by the Court of Appeals, had concluded, "The ostensible maker of the checks, i.e., the victim, authorized the actual maker of the checks, i.e., Defendant, to make the checks, 'which purporte[]to be (the) authentic creation(s)' of the victim. Thus, it cannot be said that the checks in question were falsely made, although 'recitals in the instrument may be false' or Defendant may have exceeded the scope of authority delegated to him by the victim" (id. At 1369-1370).

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.

Clapper v. Amnesty International, 133 S. Ct. 1138 (Feb. 26, 2013)

On October 29, 2012, the United States Supreme Court heard oral argument on the narrow issue of whether a lawsuit can proceed with respect to a constitutional challenge to amendments to the Foreign Intelligence Surveillance Act, which expanded the government's authority to use electronic surveillance. The parties who commenced the lawsuit have argued that although the statute targets foreign non-U.S. persons, their communications might get swept up as well in the surveillance of foreign targets. The lawsuit, which was filed by the American Civil Liberties Union, alleged violations of privacy and free speech rights, as well as the separation of powers. The lawsuit was originally rejected by the federal District Court based upon lack of standing, but the U.S. Court of Appeals for the Second Circuit found that the Plaintiffs had established injury in fact because of additional burdens and expenses they had incurred to preserve the confidentiality of their communications. The issue before the United States Supreme Court was thus narrowly restricted as to whether the Plaintiffs had standing and the matter could proceed. On February 26, 2013, the Court, in a 5-4 decision, held that none of the Plaintiffs had standing to sue because they could not prove that their messages were intercepted. The majority opinion was written by Justice Alito, who found the Plaintiff's claim too speculative and barred by the fundamental principles of the standing requirement. Justices Breyer, Ginsburg, Sotomayor and Kagan dissented. As a result of the Court's ruling and several other earlier court decisions, the government's anti-terrorism programs continue to be somewhat shielded from judicial review.

Florida v. Jardines, 133 S. Ct. 1409 (March 26, 2013)

Florida v. Harris, 133 S. Ct. 1050 (Feb. 19, 2013)

On October 31, 2012, the Court heard oral argument on two Florida cases which it could not reach during its last term. The two cases involved search and seizure issues regarding the use of specially trained dogs to sniff out narcotic substances. In *Jardines*, the Court considered whether probable cause is needed to conduct a front-door sniff outside a private home. In *Harris*, the Court considered whether to establish probable cause for a vehicle search following a dog's alert, the prosecution must present complete field records for the dog, not just its training and certification records. During oral argument, several of the Justices appeared troubled by the use of the drug sniffing dogs and whether in the instant cases the Defendant's constitutional rights were violated. In particular Justices Kennedy and Ginsburg asked several questions which appeared to indicate their concerns. On February 19, 2013, however, the Court issued a unanimous ruling upholding Florida's position that the police do not have to extensively document the work of drug sniffing dogs in the field in order to be able to use the results of their work in the Court. In *Florida v. Harris*, Justice Kagan wrote, in a unanimous decision, that courts should apply the same test to dog sniffs that they do when they look at other issues of whether police have probable cause for action. Justice Kagan, in her opinion, specifically noted, "The question, similar to every inquiry into probable cause, is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test."

In *Florida v. Jardines*, the Court, in a 5-4 decision, held that police cannot bring drug sniffing police dogs onto a suspect's property to look for evidence without first getting a warrant for a search. The majority opinion was written by Justice Scalia, who stated that a person has the Fourth Amendment right to be free from the government's gaze inside his or her home and in the area surrounding it. He was joined in his opinion by Justices Thomas, Ginsburg, Sotomayor and Kagan. The five majority grouping was somewhat unusual in that two of the Court's most conservative members joined three of the Court's most liberal members to form a unique majority. Chief Justice Roberts and Justices Breyer, Kennedy and Alito dissented.

Editor's note: In our last issues, it was erroneously reported that the *Jardine*s case was decided in February, and that the Court's decision was in favor of the prosecution. *Jardines* was decided in late March as indicated above. *Florida v. Harris*, however, was decided in late February and was the case where the prosecution was successful.

*Chaidez v. United State*s, 133 S. Ct. 1103 (Feb. 20, 2013)

On October 30, the Court heard arguments in *Chaidez v. United States* involving the issue of whether the Court's recent decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) should be applied retroactively. In *Padilla*, the Court had ruled that a lawyer's failure to advise an alien client of

the deportation consequences of a guilty plea amounted to ineffective assistance of counsel. On February 20, 2013 the Court decided the issue by holding that the *Padilla* decision was not to be applied retroactively. Justice Kagan wrote the decision for the 7-2 majority, and stated that the Court's 2010 decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 announced a new rule and under the Court's retroactivity analysis a person whose conviction was final before the 2010 decision cannot benefit from a new rule of criminal procedure on collateral review. Justices Sotomayor and Ginsburg dissented, arguing that *Padilla* did nothing more than apply the existing rule of *Strickland v. Washington*, and that the *Padilla* ruling should be given retroactive application. The *Padilla* decision has caused great alarm in the state courts because of the many cases that could have been affected by retroactive application. The issue still remains somewhat undetermined in New York, since some Appellate Courts have ruled that it has retroactive application, and the New York Court of Appeals could consider the same ruling by reliance upon the State Constitution. In fact it is expected that the issue will be taken up shortly by the New York Court of Appeals. The Supreme Court's decision in *Chaidez*, however, deals a severe blow to those who are relying upon a retroactive application of *Padilla.* An informative article on the *Chaidez* decision on the issue of retroactivity as it applies to the New York Courts recently appeared in the *New York Law Journal* of April 17, 2013 at pages 4 and 8. The article is written by the Honorable John H. Wilson, who is a Judge in the Bronx Criminal Court. He had previously served as both a prosecutor and a criminal defense attorney.

Bailey v. United States, 133 S. Ct. 1031 (Feb. 19, 2013)

In a sharply divided 6-3 decision, the United States Supreme Court limited the power of law enforcement authorities to detain people who were not at home when their residence was to be searched. In the case at bar, while police were preparing to execute a warrant to search a basement apartment for a handgun, detectives conducting surveillance in an unmarked car outside the apartment saw the Defendant leave the gated area around the apartment get in the car and drive away. The detectives then followed the car for approximately a mile before stopping it. Keys were found on the Defendant and it was later discovered that one of Bailey's keys unlocked the apartment's door. The majority opinion, written by Justice Kennedy, held that the authority of police to detain persons is limited to the immediate vicinity of the premises which is to be searched, pursuant to the execution of a search warrant. A Defendant cannot be detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question. Justices Breyer, Alito and Thomas dissented and voted to uphold the action of the police in the case at bar.

Missouri v. McNeely, 133 S. Ct. 1552 (April 17, 2013)

In early January, the United States Supreme Court heard oral argument on the issue of whether police can routinely order blood tests for unwilling drunken driving suspects without at least trying to obtain a search warrant from a judge. Based upon the oral argument, commentators had concluded that the Court seemed reluctant to allow police to routinely order such tests. On the other hand, the Court also appeared concerned about the enormous problem of drunken driving incidents and the numerous numbers of deaths resulting therefrom. During oral argument and in the briefs, the Court was informed that there is a serious national problem involving more than 10,000 deaths from crashes regarding alcohol impaired drivers. Currently, about half of the States already prohibit warrantless blood tests in all or most suspected drunk driving cases. These state statutes are based on the belief that blood tests violated the Constitution's prohibition against unreasonable searches and seizures and that police should obtain a warrant whenever necessary except where a test could threaten a life or destroy potential evidence. On April 17, 2013, the Court, reflecting the sharp division among the Justices, issued a 5-4 decision in the case. The majority ruling held that the inevitable dissipation of alcohol from a suspect's blood could not be regarded per se as an exigency that would justify a blood draw without a warrant under the Fourth Amendment. The Court thus struck down the Missouri law that allowed police routinely to force drunken-driving suspects to give blood samples without a warrant and without consent.

Justice Sotomayor issued the decision for the majority of the Court. She was joined by Justices Kagan, Scalia, Ginsburg and Kennedy, who issued a concurring opinion. Chief Justice Roberts, Justices Alito, Breyer and Thomas dissented. Justice Thomas issued his own dissenting opinion, and the manner in which the case was decided indicated that the Judges were somewhat split on how the new ruling should be applied, with some of them indicating future clarification might be necessary on a possible exception about when the police might be able to dispense with a warrant.

Maryland v. King, 133 S. Ct. __ (June 3, 2013)

Oral argument was heard by the Court in this matter on February 26, 2013. The issue involved a Fourth Amendment challenge to the collection of DNA samples from persons arrested for violent crime. During oral argument, the Justices seemed somewhat split on the issue, with Justice Alito arguing that the swab process utilized by Maryland was similar to fingerprinting. Justice Scalia, however, indicated that sticking a swab in someone's mouth was more like a search which required adherence to the Fourth Amendment. State Attorneys from all 50

States and the Obama administration urged the Court to approve DNA testing of people who are arrested but not convicted of serious crimes. Twenty-eight States now permit taking samples from arrestees with the results forwarded to a database. New York is not among them. It forwards DNA samples only from people convicted of felonies and misdemeanors.

On June 3, 2013 the Court in a 5-4 decision upheld the Maryland practice. Justice Kennedy issued the decision for the majority and Justice Scalia wrote a vigorous dissent. Details on the decision will be covered in our next issue.

Arizona v. United States, 133 S. Ct __ (June 17, 2013)

On March 18, 2013, the United States Supreme Court also heard oral argument in another case involving the issue of voting rights. At issue is an Arizona law that demands that all state residents show documents proving their U.S. citizenship before registering to vote in national elections. Several other states have similar provisions, and the Justices of the Supreme Court must decide whether the State Law conflicts with the National Voter Registration Act of 1993 which allows voters to register using a federal form that asks, "Are you a citizen of the United States?" Prospective voters must check a box to answer yes or no, and they must sign the form swearing that they are citizens under penalties of perjury. The federal Ninth Circuit Court of Appeals has ruled the Arizona law to be unconstitutional and a decision from the U.S. Supreme Court on June 17, 2013, as we were going to press, upheld the Circuit Court ruling that the Arizona Statute conflicts with federal law. Details regarding the Court's determination will appear in our next issue.

PENDING CASES….

Fisher v. University of Texas at Austin, 133 S. Ct. ___

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

Shelby County, *Alabama v. Holder*

In early November, the United States Supreme Court agreed to hear an important voting rights case which may involve striking down part of the landmark Voting Rights Act, which still requires many Southern states and some specific counties in other parts of the Country to get advance approval from Washington before making changes in election laws or voting rules. Several years ago, the Supreme Court indicated that it may be time to end the preclearance rules of the Voting Rights Act, and the instant case will once again allow the entire Supreme Court to review the issue. Since Congress recently extended the Voting Rights Act and its preclearance rules for another 25 years, any Supreme Court ruling could also involve the issue of judicial authority to overturn or modify legislative acts. Oral argument was heard on the matter on February 27, 2013. During the questioning, it appeared that the Justices were sharply divided on the issue and most commentators are expecting a close vote when a decision is reached. The ruling by the Court is expected sometime within the next few months.

Hollingsworth v. Perry

United States v. Windsor—The Gay Marriage Cases

In late November, the United States Supreme Court agreed to hear two cases involving the legality of gay marriage. The cases will have an impact on state laws in several states, including New York, and the dispute over whether California's Proposition 8, which the voters adopted in 2008, and which banned gay marriage, was constitutional. The Supreme Court, by granting certiorari in the cases in question, could allow the justices to decide whether the United States Constitution's guarantee of equal protection means that the right to marriage cannot be limited to heterosexuals. Briefs on both sides have been filed in the case, and the Court announced in early January that it will hear two days of arguments on the cases in question. Oral argument on the *Hollingsworth* case was heard on March 26 and the Windsor matter was before the Court on March 27. A great deal of public interest has centered on these cases, and the Court allowed extensive argument on the matters. From questioning during oral argument, it appeared that the Court was divided, and somewhat conflicted as to what way to vote on the issues. The Court's decision on these matters is not expected until the end of the Court's current term in June. We will provide details in our next issue.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from January 30, 2013 to May 1, 2013.

People v. Dunbar

People v. Lloyd-Douglas

People v. Polhill (N.Y.L.J., January 31, 2013, pp. 1 and 6)

In a series of cases, the Appellate Division, Second Department, in unanimous decisions, held that a script that Queens law enforcement officials read to a Defendant in a pre-arraignment interview rendered subsequent Miranda warnings ineffective and stripped the Defendant of his constitutional right against self-incrimination. Statements obtained as a result of this long-time program initiated by the Queens District Attorney's Office were held to be inadmissible and if utilized by the prosecution to obtain a conviction, required a new trial. In a decision written by Judge Skelos in the *Dunbar* case, the Court ruled that when the clear and unequivocal warnings devised in *Miranda* are combined with the information and suggestion contained in the preamble initiated by the prosecutors, the message conveyed to suspects is muddled and ambiguous. Correspondingly, when the warnings are combined with the preamble, it could not be said with assurance that the suspects clearly understood their rights.

The pre-arraignment interview, which was the subject of the instant cases, has been a controversial one and has involved a serious dispute between the Queens District Attorney and some members of the Queens judiciary, who have even questioned the ethical propriety of prosecutors engaging in the pre-arraignment interview process. The Queens office has indicated that it may attempt to appeal the Appellate Division rulings, and it appears that the matter may eventually be heard by the New York Court of Appeals since leave to appeal was recently granted by Judge Smith. The effect of the Appellate Division ruling on numerous cases where the interview procedure has been utilized is currently unclear and we will keep our readers advised of developments on this matter.

People v. Cady (N.Y.L.J., February 11, 2013, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Fourth Department, reversed a Defendant's conviction on the grounds that a handgun which was discarded by the Defendant during a police pursuit should have been suppressed. The Court determined that although police had a valid basis for the initial encounter with the Defendant, they overstepped the proper bounds by tackling him and resorting to the use of force. The Court noted that simply fleeing from police does not automatically give authorities the right to pursue. A reversal of the Defendant's conviction was therefore warranted.

People v. Carr (N.Y.L.J., February 14, 2013, pp. 1 and 6)

In a unanimous decision, the Appellate Division, Fourth Department, concluded that a police officer who asked the occupant of an illegally parked vehicle if there was anything in the car that he should be aware of lacked the requisite founded suspicion to make the inquiry, and the handgun discovered after the motorist agreed to a search should have been suppressed. The Court's decision appears to extend the New York Court of Appeals ruling in *People v. Debour*, and more recently in *People v. Garcia*.

People v. Agina (N.Y.L.J., February 15, 2013, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's conviction and ordered a new trial. The Court found that the trial court had wrongfully admitted evidence of a similar attack on the Defendant's wife just 15 months prior to the incident resulting in the instant conviction. The Court concluded that this evidence of uncharged crime was wrongfully admitted, and denied the Defendant a fair trial. The Court, in reaching its decision, utilized its "interest of justice" authority.

Morris v. Livote (N.Y.L.J., February 22, 2013, pp. 1 and 2)

In an Article 78 proceeding, the Appellate Division, First Department, barred a second trial for a Defendant, holding that his attorney's questioning of a police officer about an unrelated wrongful arrest settlement did not constitute a manifest necessity for calling a halt to his first trial. The appellate panel unanimously held that since there was no compelling reason to cut the first trial short, another trial for the Defendant would be double jeopardy. Therefore, the Court issued a Writ of Prohibition, effectively ending the case against him. The Court's opinion was written by Justice Freedman, and was joined in by Justices Saxe, Manzanet-Daniels and Gische.

People v. Izzo (N.Y.L.J., March 11, 2013, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Third Department, unanimously held that the failure of a defense lawyer to aggressively question a 9-year old sex abuse victim about inconsistencies in her testimony did not deprive the Defendant of the effective assistance of counsel. The appellate panel concluded that the alleged inconsistencies concerned only immaterial aspects of her

testimony, and that the girl plausibly explained that she could not remember some precise details of her ordeal. In an opinion written by Justice Spain, the Court concluded, "We find that the decision not to badger a child victim of sexual abuse—about largely immaterial inconsistent statements that she professes not to remember—to be a sound trial strategy, especially in light of the delicate and often difficult task of cross-examining a child who claimed to have been the victim of a sexual assault."

People v. Gaston (N.Y.L.J., March 21, 2013, pp. 1 and 3)

The Appellate Division, Fourth Department, in a unanimous decision, upheld a Defendant's murder conviction after finding that the prosecution met its burden of establishing a good-faith basis for a 17-year delay. The Defendant was convicted in 2010 for the 1992 murder of his estranged wife. The prosecution proceeded with the case in 2009, when DNA was obtained from the Defendant and it linked him to the knife and hammer, which were the weapons used in the murder. The appellate panel ruled that although the delay may have caused some degree of prejudice, the determination to delay the prosecution for sufficient reasons was made in good faith, and the Defendant was not denied due process.

People v. Morris (N.Y.L.J., April 5, 2013, pp. 1 and 7)

In a unanimous decision, the Appellate Division, Third Department, refused to suppress a handgun discarded by a Defendant following a police pursuit. In the case at bar, Albany police received a call about a group of individuals congregating on the steps of a residence and behaving suspiciously, which the caller thought was indicative of drug trafficking. Officers were dispatched to the location, and when they arrived the Defendant Morris abruptly stood up and attempted to enter the building, which was locked. The officer asked the Defendant why he was in a hurry and the Defendant responded that he was past curfew. He then shoved the officer and fled. Police pursued and observed the Defendant reaching to his waistband to discard something that turned out to be a gun. In conducting a *DeBour* analysis, the Court stated that the Defendant had a constitutional right to ignore the initial inquiry from the officer and did not need to respond when the officer asked why he was in a hurry. But by volunteering that he was past his curfew, the Defendant elevated the encounter. The Court concluded, "This information—which suggested the possibility that Defendant was a parole violator—coupled with the escalation of Defendant's conduct, in which he became physical with at least one of the officers before the took off running down the street, escalated the *DeBour L*evel of inquiry." Utilizing this analysis, the Court concluded "It was during this justified pursuit—and not as a result of any search of Defendant—that the weapon was abandoned by Defendant and ultimately recovered by the police."

People v. Lin (N.Y.L.J., April 4, 2013, pp. 1 and 2)

In a 3-1 decision, the Appellate Division, First Department, upheld a Defendant's homicide conviction, despite the fact that there was an undue delay in having the Defendant arraigned. The Defendant had made statements to police over a 28-hour period during which the police had lied to the Defendant regarding certain facts in the case. The Defendant was not arraigned until some 28 hours after his arrest. The majority opinion indicated that while an undue delay in arraignment is a consideration in determining whether a statement was voluntary, it is only one factor and not a dispositive one. The Court then concluded that the record in the case at bar did not support the Defendant's claim that the police unnecessarily delayed his arraignment. The majority opinion consisted of Justices Rivera, Dickerson and Cohen. Justice Hall dissented, indicating that the police had strategically delayed the Defendant's arraignment so they could question the Defendant without the interference of an attorney. Given the interesting issue in the case, and the somewhat divided Court, it appears possible that this case may be reviewed by the New York Court of Appeals.

People v. Washington (N.Y.L.J., April 18, 2013, pp. 1 and 3)

In a 3-1 decision, the Appellate Division, Second Department, ordered the suppression of a breath test which was taken from a motorist. The Court determined that the police must make reasonable efforts to notify a motorist about to be given a breath test if they are aware that an attorney has entered the case. In the case at bar, the Defendant had consented to a breathalyzer test, but her Attorney had called the police about ten minutes before the test was administered and had demanded a halt on all testing in question. The trial court had suppressed the results of the test in question, and the Appellate Division majority agreed with that ruling. The Appellate Division majority, consisting of Justices Leventhal, Dickerson and Miller, held that the Defendant's right to counsel was compromised inasmuch as the People were aware that the Defendant's counsel had called, and the People failed to adduce any evidence to show that it was not reasonable to notify the Defendant that her Attorney had appeared. Justice Angiolillo dissented, arguing that the Defendant had already consented to the test prior to counsel's telephone call.

Smith v. Brown (N.Y.L.J., April 19, 2013, pp. 1 and 2)

In an Article 78 proceeding, the Appellate Division, Second Department, ruled that a Judge's faulty mistrial declaration resulted in barring prosecutors from retry-

ing a Defendant on weapons charges based upon double jeopardy principles. The mistrial in question was granted by the trial court based upon problems which had arisen with a juror during deliberations. Apparently one of the jurors became angry and upset with respect to another sitting juror, but had informed the Court upon inquiry that she could continue with deliberations because she had pretty much made up her mind. Prosecutors indicated that they would not consent to proceeding under the circumstances in question. The trial court thereafter declared a mistrial over defense objections. Through an Article 78 proceeding, the defense argued that the Defendant could not be tried again based upon double jeopardy principles because the prosecution had not established a manifest necessity for a mistrial declaration. The Second Department Panel, consisting of Justices Skelos, Angiolillo, Roman and Cohen, agreed and ruled that a retrial was precluded.

People v. Bartholomew **(N.Y.L.J., April 25, 2013, pp. 1 and 2)**

In a 3-2 decision, the Appellate Division, First Department, reversed a Defendant's conviction and ordered a new trial on the grounds that the prosecutor was allowed to introduce irrelevant and inflammatory considerations regarding the criminal record of the Defendant's boyfriend. The Defendant had been accused of smuggling a knife to her inmate boyfriend. The 3-Judge majority found that the prosecutor's tactics were irrelevant to the charges but had prejudiced the jury. They concluded that the inflammatory remarks introduced by the prosecutor had no legitimate bearing on the Defendant's credibility or any other issue in the case. The 3-Judge majority consisted of Justices Moskowitz, Freedman and Daniels. Justices Friedman and Andrias dissented, arguing that even if errors had been committed they were harmless, in view of the overwhelming evidence of the Defendant's guilt. Because of the sharp split in the Court, this matter may be headed for the New York Court of Appeals.

For Your Information

Office of Court Administration Anticipates Some Cutbacks Due to Hold-the-Line Judicial Budget

By requesting a judiciary budget which will be almost exactly the same as last year, the Office of Court Administration expects to effectuate cuts in certain non-essential programs. Chief Administrative Judge Prudenti recently indicated that her top priority will be to keep the trial courts up and running, and provide them with the necessary resources to do their work. If cutbacks are required, the Office of Court Administration will look to reductions in programs and areas which are deemed non-essential and will primarily be felt at the Office of Court Administration itself, where certain layoffs and administrative changes are anticipated. Judge Prudenti stated that the requested budget totaling, $1.97 billion, would include a slight increase for employee benefits and a cost of judicial pay raises. The Office of Court Administration presented its hold the line budget several weeks ago, and Governor Cuomo and leading legislators have already indicated that they would support the request which was made. It is expected that official adoption of the judicial budget will occur shortly, and that the judiciary's budget as presented would be accepted by both the Governor and the Legislature.

New York Court of Appeals Resumes Operation With a Full Complement of Judges

Hon. Sheila Abdus-Salaam

Hon. Jenny Rivera

After operating for several months with five or six Judges rather than the full complement of seven, the New York Court of Appeals, in May, resumed hearing cases with a full bench. The retirement of Judge Ciparick and the death of Judge Jones had left the Court in a position for several months of operating with only five Judges. This situation created some difficulty for the Court, and a few cases had to be rescheduled for oral argument so that a full Court would be able to participate in decisions. Judge Rivera, who was appointed to replace Judge Ciparick, took her seat on the Court in the middle of February, and Judge Sheila Abdus-Salaam was appointed by Governor Cuomo in early April and confirmed by the Senate in May. She began sitting on the Court in early May. Judge Sheila Abdus-Salaam was selected from a list of seven candidates presented to the Governor by the Commission on Judicial Nominations. The list submitted involved Justices Sheila Abdus-Salaam and Dianne Renwick, from the Appellate Division, First Department, Rowan Wilson, a litigation partner at Cravath, Swaine Moore, Justice Eugene Fahey from the Appellate Division, Fourth Department, Justice John Leventhal from the Appellate Division, Second Department, Maria Vullo, a partner at Paul, Weiss, Rifkind, Wharton & Garrison, and David Schulz, a partner at Levine Sullivan Koch & Schulz. The list submitted to the Governor included three black candidates and three women, as well as candidates from various parts of the State.

Veteran District Attorneys

Currently in New York State, there are five District Attorneys who have held their respective offices for more than 24 years. The longest serving District Attorney in the State is William Grady, from Dutchess County, who took office in 1984. He is followed by Orange County District Attorney Frank Phillips II, who has held office since 1986. Broome County District Attorney Gerald Mollen has served since 1987, and Steuben County District Attorney John Tunney has held his office since 1988. Rounding out the top five veterans is Bronx District Attorney Robert Johnson, who has been in office since 1989.

D.A. Phillips recently announced that he would not seek an eighth term, and would retire from public service at the end of 2013. He anticipated that he would engage in some private practice in the coming years. D.A. Phillips is 63 years of age, and operated an office of 42 prosecutors. The County he represented prosecutes about 20,000 crimes annually and has a population of approximately 375,000. In the past he served as President of the New York State District Attorneys Association. In early March, Phillips stated that he had changed his mind about retirement and would run for an eighth term. In April, however, he reiterated his prior decision to retire. Both the Democratic and Republican parties have selected their

candidates to replace D.A. Phillips, and the general election regarding the office will also be held in November.

Fewer Law Enforcement Officers Killed in Line of Duty

A recent report indicated that 127 law enforcement officers died in 2012 while they were performing their duties. This represented a decline of 20% from the prior year. The report was issued by the National Law Enforcement Officers Memorial Fund and covered federal, state and local offices. The report indicated that the majority of the deaths involved either gunshots or traffic accidents. The two prior years—2010 and 2011—had seen an unfortunate rise in officer deaths and the significant decline for the year 2012 is heartening after two straight alarming years. The significant decline is attributed to a greater emphasis on officer safety, better training procedures and the wider use of bullet-proof vests and other protective clothing. The State with the highest number of law enforcement fatalities was Texas, which had 10, followed by Georgia, which had 8, and Colorado and Maryland, which had 6 each. Florida rounded out the top five with 5 officers killed.

New Procedures Reduce Arraignment Times Within New York City

During the last several months, procedures instituted by the Office of Court Administration, such as the restoration of weekend hours and the assignment of a judge to monitor arraignments, have resulted in significant reduction in arraignment times within New York City. Recent statistics issued by the Office of Court Administration covering the period January to June 2012, as compared to July to December 2012, reveal a significant reduction in arraignment times. The reductions in question are as follows:

	Jan–June 2012	July–Dec 2012
Bronx	27.6	23.4
Brooklyn	28.5	22.5
Manhattan	23	21.6
Queens	22	19.2
Staten Island	21.2	20.7
Citywide	24.5	21.5

Due to the new procedures, all Courts within New York City appear to be in compliance with the New York Court of Appeals' 24-hour arraignment rule.

Level of Education and Jobless Rate

Despite recent articles that have questioned the value of a college education because of rising costs, a recent survey by the Bureau of Labor Statistics still reveals that people with higher levels of education have a better chance of obtaining and maintaining a job. The statistical study revealed that people with a higher level of education have a lower level of unemployment. Persons with a Bachelor's Degree or higher, for example, had a jobless rate in January 2013 of 3.7%. Those with some college or a 2-year Associate Degree had a jobless rate of 7.0%. High school graduates had a jobless rate of 8.1%, and those with less than a high school degree had a jobless rate of 12.1%. It does appear that a greater amount of education also leads to a better economic situation.

Organized Crime Article

New York State has had an Organized Crime Control Act in the Penal Law for more than 25 years. A history of the Act and its various provisions was the subject of an interesting article by Michael S. Scotto, which appeared in a special edition of the *New York Law Journal* on February 11, 2013 at page S-4. The article was included in a special section dealing with white collar crime. The author, Michael Scotto, is currently counsel to Meyer, Suozzi, English & Klein. He is a former Deputy Chief of the Investigations Division, Chief of the Rackets Bureau, and Chief of the Labor Racketeering Unit at the New York County District Attorney's Office. His article is both interesting and informative, and is recommended to criminal law attorneys who might have cases dealing with the Organized Crime Statute.

Hispanic and Asian Populations Continue to Show Dramatic Rise in U.S.

Recent statistics and studies clearly indicate that the Hispanic and Asian populations are undergoing dramatic increases in the Unites States. A recent national study conducted by the PEW Research Center indicated that the Hispanic population in the United States rose 47% from 2000 to 2011, growing from 35.2 million to 51.9 million. As of 2011, the Hispanic population comprised approximately 16.7% of the U.S. population. This compared to only 12.5% in 2000. The greatest concentration of the Hispanic population is in California, Texas and Florida. 14.4 million Hispanics are believed to reside in California. Texas has 9.8 million and Florida has 4.35 million. While the largest group of Hispanics in California and Texas are Mexican, the largest Hispanic group in Florida remains Cuban.

With respect to the Asian population, figures based upon the 2012 U.S. Census place the Asian population at 5% of the U.S. total. According to the U.S. Census Bureau, the U.S. population in 2012 amounted to 314 million. Whites accounted for 63.4% of the total, Hispanics 16.7%, blacks 13.1% and Asians 5%. Among the Asian population, the 3 largest groups broken down by country of origin indicate that the Chinese comprise 23.2%, with slightly over 4 million people; the Filipino population is just under 20%, with 3.5 million people, and the Indian group is listed at 18.4%, with just over 3 million. The re-

ports indicate that the Asian population is slowly increasing its political influence in the United States and now has 2 members who are serving as Governors, to wit: Bobby Jindal from Louisiana and Nikki Haley from South Carolina. It was also recently estimated that Asian voters, who comprise about 6% of the population in Virginia, played a key role in that State in re-electing President Obama.

Appellate Division Suspends Taking of 18-B Applications

Stating that there were already more than enough attorneys to work on 18-B assignments, and anticipating a further decrease in the number of cases assigned to 18-B in the future, the Appellate Division, Second Department, announced in late February that it had stopped taking applications for its trial level 18-B panels. The Court's decision comes within a few months of the New York Court of Appeals decision which upheld the right of New York City to enlarge its use of institutional providers. In making its announcement the Appellate Division indicated that it expects that New York City's new assigned counsel program, which involves greater reliance on institutional providers, will result in a decrease in the demand for 18-B attorneys. In addition to the use of several institutional providers, the City has a current contract with the Legal Aid Society to handle approximately 211,000 cases during the current fiscal year throughout the five burroughs. The suspension of 18-B applications is an unusual occurrence which does not appear to have occurred since the inception of the program. Usually in the past, there has been a shortage of 18-B attorneys rather than a surplus. Following the Second Department's announcement, the First Department stated that it will still accept 18-B applications, at least for the immediate future.

U.S. Home Prices Rise as Economy Improves and U.S. Wealth Increases

As spring arrived, numerous signs pointed to a growing economic recovery. Particularly encouraging was the news at the end of January 2013 that U.S. home prices had risen 9.7% from a year ago. This was up from an 8.3% increase in December, and is the biggest annual gain since 2006. February figures also showed continuing improvement, with home prices jumping by the largest amount in 7 years, to wit: 10.2% compared with a year earlier. A realtors' group reported that the median price for a home sold in February was $173,600. This was up 11.6% from a year ago. By region, sales of previously owned homes were up 2.6% in both the South and the West. Sales fell, however, by 3.1% in the Northeast and 1.7% in the Midwest. The slight drop in home sales in both the Northeast and the Midwest was attributed in large part to adverse weather which those regions experienced during the months of January and February.

In addition, a recent report indicated that Americans have regained most of the $16 trillion in wealth that was lost during the last five years of the economic recession. Household wealth at the end of 2012 amounted to $66.1 trillion and has reached 98% of the pre-recession peak. In addition to the increase in home prices, the stock market has made some substantial recent gains, and according to the report from the Federal Reserve, this combination has allowed most Americans to regain a substantial portion of their previous losses.

Several new studies have also equated wealth with a longer life expectancy. Persons living in prosperous communities have been found to have a life expectancy seven years higher than those living in poorer neighborhoods. A recent Social Security Administration report concluded that there are widening differences in life expectancy for people on opposite ends of the income scale. The relationship between wealth and longevity may affect younger generations in the future, since another study by the Urban Institute found that younger persons in the age category of 20 to 28 are way behind older individuals in accumulating income. The report found that in 2010, the average person of 20 to 28 had a net worth of $37,223, just slightly more than the average person of the same age in 1983. In contrast, the average person of 56 to 64 in 2010 had more than twice the wealth that someone the same age would have had 30 years ago. The author of the Urban Institute Study concluded, "In this country, the expectation is that every generation does better than the previous generation. This is no longer the case. This generation might have less."

New York State Receives Fair Portion of Federal Dollars

In a recent report covering the total share of federal dollars received by the various states for the year 2010, it was revealed that the State of New York was the recipient of $3,170 in federal aid per capita for that year. Since the U.S. average was $2,010, New York received more than $1,000 above the national average. The report also indicated that many of the small states continued to receive a disproportionate share of federal monies. This was attributed to the fact that Senate representation is allocated on the basis of two for each state, rather than taking into consideration a state's population. Thus Wyoming, which has a very small population, received the highest level of federal aid, to wit: $4,180. Among the heavily populated states, only New York received favorable treatment. California, Texas, and Florida all were below the national average.

U.S. Continues to Have Poor Health and Mortality Record

According to a recent report by the National Institutes of Health, Americans are in poor health and are dying sooner than the rest of the industrialized world. A 2011

study of 17 industrialized countries, 13 in Western Europe, plus the U.S., Australia, Japan and Canada, found that American men whose life expectancy is 75.6 years, ranked last, and U.S. women at 80.7 years, ranked 16th. The report also concluded that the gap has been widening during the last three decades.

Although the United States spends nearly twice as much on health care as other countries, Americans continue to have a pervasive pattern of shorter lives and poor health. Some individual factors were listed as eating too much, relying too much on cars and engaging in various other stressful and unhealthy activities. The study concluded by stating, "The tragedy is not that the United States is losing a contest with other countries, but that Americans are dying and suffering from illness and injury at rates that are demonstrably unnecessary. Superior health outcomes in other nations show that Americans also can enjoy better health."

Gideon and *Miranda* Cases Celebrate 50th Anniversaries

The landmark case of *Arizona v. Miranda*, which established the requirement that police must supply people arrested for a crime with a series of warnings before any police questioning can occur, celebrates its 50th anniversary. The famous warnings consisting of a right to remain silent, anything you say can be used against you, and the right to have an attorney, were mandated by the United States Supreme Court in 1963. The famous case which brought forth major changes in criminal procedure is now 50 years old. Ernesto Miranda, who was the subject of the landmark decision, was eventually convicted of raping and kidnapping an 18-year old with regard to another case which he was involved in. After spending several years in jail he was paroled and eventually in 1976, was fatally stabbed in a dispute involving a card game which occurred at a bar in downtown Phoenix. Phoenix Police Chief Daniel Garcia, who was involved in the *Miranda* case, was recently quoted as saying that the Supreme Court's *Miranda* decision totally changed law enforcement.

Another landmark criminal law decision which has also reached its 50th anniversary on March 18, 1963, is the case of *Gideon v. Wainwright*. That famous decision established the absolute right to counsel in criminal cases. In issuing the Court's decision in 1963, Justice Hugo Black wrote, "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." It is expected that the landmark decisions will be the subject of various programs and articles as they reach their 50th anniversaries. In fact, the *Gideon* decision was the subject of an informative article by Paul Shechtman in the *New York Law Journal* of March 18, 2013, at page 4. An additional detailed article on the landmark cases was also presented in the March 22, 2013 issue of the *New York Law Journal*, beginning at page 5.

Former Supreme Court Justice Sandra Day O'Connor Issues New Book

A new book involving stories from the history of the Supreme Court and written by former Justice Sandra Day O'Connor was recently published by Random House. The book, entitled *Out of Order* provides a perspective about the life of a Supreme Court Justice with highlights regarding some of the myriad personalities in the history of the Court. Justice O'Connor continues to remain active in the legal system, offering comments and lectures on different matters, and now providing us with an interesting and informative inside view of the Supreme Court.

New York Law Schools Suffer Ranking Decrease in Recent Study

The annual survey conducted by *U.S. News and World Report* regarding the Nation's law schools resulted in rankings which saw many of the State's law schools reduced in status. Of the 15 law schools within the State, 3 of them, Columbia, New York University and Syracuse, maintained their previous rankings as number 4, 6 and 96 in the national ratings. Nine of the State's law schools, however, experienced a drop in ratings. Touro Law School was unable to make the list of 150 ranked schools, and continued in the same status as last year. New York Law School, however, which was rated number 135 last year, was dropped from this year's list, also failing to be included within the top 150. The ratings of all of the schools, as reported by *U.S. News and World Report*, are listed below.

New Rank	Law School	Rank Last Year
4	Columbia	4
6	NYU	6
13	Cornell	14
38	Fordham	29
58	Cardozo	56
80	Brooklyn	65
86	SUNY Buffalo	82
96	Syracuse	96
98	St. John's	79
113	Hofstra	89
132	Albany	113
132	CUNY	113
134	Pace	142
*	NYLS	135
*	Touro	*

*A numerical rank is calculated but not published.

Filings in New York Federal Courts

The Administrative Office of the U.S. Courts recently reported that new filings in New York's Federal Trial Courts increased 4% in the year ending September 30, 2012. While increasing in other federal trial courts, filings declined 3% in the Eastern District. With respect to criminal matters, the median time from filing to disposition of criminal felony cases increased to 16.6 months from 15.4 in the Eastern District, and to 14.9 from 14.3 in the Southern. In the U.S. Court of Appeals for the Second Circuit the number of new filings pending appeals and the average time to handle appeals all remained at the same level as last year. Detailed statistics regarding the filings in the Federal Courts were reported in the *New York Law Journal* of March 1, 2013.

New York City Stop-and-Frisk Policies Head for Trial

Despite efforts to resolve the matter, a trial regarding the propriety of New York City's stop-and-frisk anti-crime policies began in late March before Federal District Judge Shira Scheindlin. The Plaintiffs claim that the City's police policies have violated Fourth Amendment rights, and a bench trial commenced in the Southern District of New York. The Plaintiffs in a case known as *Floyd v. City of New York* have stated that they will show that the New York City Police Department has laid siege to black and Latino neighborhoods by the wholesale stopping and frisking of minority youths. The New York City Corporation Counsel has indicated that it will vigorously contest the Plaintiffs' claim and it is expected that a lengthy 3-month trial will take place, with a decision not expected to be forthcoming for several months. As part of their case, the Plaintiffs have alleged that in 2012, 553,042 police stops were made, 55% of the people stopped were black, 32% were Hispanic, and 10% were white. The police have denied that any of the stops in question resulted from racial profiling, and several top officials from the New York City Police Department testified during the trial. We will report on the results of the controversial and contentious litigation in our next issue.

Lawyers Fund Reports Drop in Claims

The Lawyers Fund for Client Protection recently reported that claims against dishonest lawyers in payouts during the year 2012 dramatically dropped by 22%. Payouts in 2012 to reimburse victims of dishonest attorneys were the smallest amount paid in 8 years. The Fund paid out a total of $5.4 million in 2012, which was a decrease of 22% from 2011, and the lowest amount since 2004, when $5.1 million was paid.

The number of awards paid in 2012 amounted to 187, representing a 26% drop from 2011, when 253 awards were made. As in the past, the largest payouts resulted within the Second Department, where $3.7 million was paid to cover 145 awards. $987,018 in awards were made within the First Department. The Fourth Department had 15 awards, totaling $500,512. The Third Department had 9 awards, and a total payout of $166,093.

Since 1982, 40% of all money paid out has involved realty escrow thefts. Last year, 60 of the 187 awards and $2.6 million of the $5.4 million paid resulted solely from the pilfering of real estate accounts. More than half of this amount occurred in Nassau and Suffolk Counties.

The Lawyers Fund for Client Protection is a state agency supported primarily by attorney registration fees. It receives $60 of the $375 biennial fee required of the state's nearly 300,000 attorneys and uses the money to reimburse clients who have suffered a financial loss because of the conduct of a dishonest lawyer. The Fund is not supported by tax dollars, nor does it receive any revenue from the interest on Lawyer Accounts from the IOLA program. It is administered by an unpaid 7-member board appointed by the Court of Appeals. Since 1981, the Board has been composed of 5 members of the Bar and 2 business and community leaders.

OCA Trims Administrative Staff to Beef Up Trial Courts

In late March, Chief Administrative Judge A. Gail Prudenti announced that 32 staff members had been moved from the Office of Court Administration to trial courts as part of a major restructuring that includes closing an upstate facility and possibly subletting the New York State Judicial Institute in White Plains, New York. Judge Prudenti stated that the economic climate, coupled with the financial impact of Hurricane Sandy, forced the court system to work harder and smarter in order to stay within the State's limited fiscal budget. In announcing the changes, the Chief Administrative Judge indicated that "No position was off limits, no idea was off limits. We went back to our core functions in each and every office." The New York State Court system currently has approximately 15,000 non-judicial personnel, with roughly 400 based in the Office of Court Administration. Judge Prudenti, in a series of new initiatives over the last several months, has clearly indicated that her priority has been to insure that the trial courts are adequately supported.

Cuts in Federal Budget Force Furloughs for Federal Defenders

Recent budget cuts in the federal judicial budget have led to a situation where federal defenders within the State of New York have been informed that they will have to take several days of unpaid leave beginning on March 25 and ending on September 30. The number of days involved in the anticipated furloughs will be 27 days for federal defenders in the Southern and Eastern Districts,

32 days for those in the Northern District, and 22 days for the Western District of New York. The anticipated furloughs will affect approximately 100 attorneys in the various federal offices.

Excessive Delays in Death Row Cases

It was recently reported that with respect to cases involving the imposition of the death penalty, it has been taking an average of 13 years from the time of sentence to the point of execution. The long period of delay is attributed to an exhaustive legal process which involves numerous appeals and post-conviction motions. The lengthy delay involved in death penalty cases has also caused actual executions to drop to a 20-year low and has caused some states to reconsider the utilization of the death penalty. Currently the number of death penalty executions is concentrated in 9 States—Texas, Arizona., Oklahoma, Mississippi, Ohio, Florida, South Dakota, Delaware and Idaho. Currently, California has some 724 inmates on death row, followed by Florida with 405 inmates facing the death penalty.

High Taxes a Cause of New York Migration

In our last issue, we reported that a recent survey has placed New York as the highest taxed state in the Nation. Another recent study has determined that a correlation exists between high-tax states and migration out of those states. New York was recently included among the top 20 states for out migration, and ranked number two in this category, behind Michigan. Five states also had a strong connection between high in-migration and low tax burdens. Alaska, Texas, and South Carolina topped this list. The study, conducted by Politfact, concluded "Overall, there is some correlation between a low tax burden and in-migration (or, conversely, between a high tax burden and out-migration)."

Baby Boomers Back Legalization of Marijuana

A recent survey by the Pew Research Center has concluded that a majority of Americans now support legalizing marijuana, with the change largely driven by a huge shift in how the baby boom generation feels about the drug. By 52% to 45%, adult Americans back legalization. The shift in attitude has already begun to affect legislation in various states. Currently some 24 States and the District of Columbia have decriminalized the personal use of marijuana, and the State of Colorado recently voted to legalize marijuana for recreational use. In the 1960s, and for many years thereafter, the use of drugs including marijuana involved the possible imposition of severe penalties. Today, at least with respect to marijuana usage, attitudes appear to be changing. What a difference a decade makes.

Persistent Misdemeanor Offenders

A detailed article in the March 25, 2013 issue of the *New York Law Journal*, at pages 1 and 7, discussed the problem within New York State of almost 10,000 misdemeanor offenders who commit crime after crime but receive very little if any jail time. Using statistics from the Division of Criminal Justice Services, the article stated that of the nearly 10,000 persistent misdemeanor offenders, 33%, or slightly over 3,000, were in Manhattan, 19% were in Brooklyn, and 17% were in the Bronx. Within the City of New York, Queens and Staten Island had the lowest number, with Queens at approximately 800 and Staten Island at slightly below 200. The rest of the State comprised the balance of 20%, or some 2,000 offenders.

With respect to the most frequent offenses which were committed by the misdemeanor repeaters, drug use topped the list, with 36% occurring within New York City. Various forms of larceny and petit theft also amounted to some 33% of the offenses committed within New York City, and about 37% for the rest of the State. The chronic problem of misdemeanor offenders who keep coming back has led to calls for the establishment of a new category where persistent misdemeanor offenders would be subject to felony sentencing. For example, legislation has been introduced in the State legislature on several occasions that would create an offense known as aggravated criminal conduct. This would make it an automatic felony when a person with 3 prior convictions in a 10-year period commits a Class-A misdemeanor. Whether any action is taken on this legislation at the next legislative session will be reported on in future issues of our *Newsletter*.

U.S. Supreme Court Declines to Accept New York Gun Case

In early April, the United States Supreme Court refused to grant certiorari in a gun rights challenge to a New York State law that strictly limits who can legally carry a weapon when they are on the streets. Under the legislation, in order to obtain a concealed carry permit, residents must convince a county official that they have a special need for protection that goes beyond living or working in a high crime area. Several gun owners who were denied a concealed carry permit sued the State and argued that they had a Second Amendment right to carry a gun for self-defense. The gun owners had relied upon the Supreme Court's recent decision in the *Heller* case. By refusing to accept the case, a ruling by the Second Circuit Court of Appeals that held that states have broad authority to regulate guns in public will remain in place.

The 2013 gun legislation which was passed recently is also under attack, with several lawsuits pending against the Bill. The new law, known as the New York Safe Act, became effective on March 16, 2013, but many of its provisions have been criticized for containing both substantive

and procedural defects which place into doubt its legality. An interesting article on the 2013 gun legislation written by Judge Barry Kamins appeared in the *New York Law Journal* of April 15, 2012 at page 4.

Law School Graduates Still Face Tough Job Market

Recent statistics released by the American Bar Association indicate that students who graduated last year from New York's 15 Law Schools were still facing difficulties in obtaining adequate job opportunities. The report indicated that just 6 in 10 of the 4,967 students who graduated last year were able to find full-time permanent work. The number of students finding full-time employment was 59.8%, a slight improvement from 2011, and just slightly higher than the national figure of 56.2%. Two New York Law schools, however, were able to place more than 90% of their 2012 graduates in full-time, permanent positions. These schools were Columbia Law School, at 93.4%, and New York University School of Law, at 91.1%. Most of the New York Schools placed about half of their graduates in full-time employment, with 3 schools showing a significant improvement over 2011. These law schools were City University of New York, Pace Law School, and Hofstra University. The study also reported that an increasing number of law school graduates are obtaining positions in government and public interest areas; for example CUNY Law School sent 43.3% of its graduates into those areas, and NYU sent 21.6% into those fields. As the overall economy improves, it is hoped that the job opportunities for law school graduates will increase, and we will report on any future statistics in our upcoming issues.

Justice Breyer Injured in Fall

It was recently reported that Supreme Court Associate Justice Stephen Breyer suffered a fall from his bicycle, which resulted in a broken shoulder. He underwent surgery for the injury and spent several days at Georgetown University Hospital. Justice Breyer returned to work a few days after his surgery, and it was not expected that his injury would cause any disruption in the workload of the Court.

Chief Judge Lippman Reworks Juvenile Justice Bill and Urges Its Adoption

In late April, Chief Judge Lippman forwarded to the State Legislature a revised Bill regarding juvenile justice issues which had failed to obtain passage last year. The Chief Judge is urging support for legislation that would raise the age of criminal responsibility to 18 from 16 for non-violent crimes. In the new modified Bill, Chief Judge Lippman addresses financial concerns that prevented a prior Bill from gaining support. The new Bill provides for the court system to reimburse local probation departments for adjusting cases of 16- and 17-year-olds. In making this change, Judge Lippman stated that reimbursement from the Courts would relieve local government of any new financial burden. The Chief Judge has indicated that he would strongly push for the juvenile justice reform Bill, and stated, "The Bill that I propose is politically doable and is good public policy that recognizes the latest scientific advances and best practices in juvenile justice reform." We will keep our readers advised on the progress of Judge Lippman's proposed legislation.

Backlog of Felony Cases

In our last issue, we reported that the Office of Court Administration was seeking to reduce the felony backlog within New York City. More recent statistics issued by the Unified Court System indicate that as of the end of 2012, some progress has been achieved in reducing the felony backlog but a serious situation still exists. The latest figures indicate that as of the end of 2012, 1,366 felony cases were pending for over 2 years within the City of New York. This was an increase from the 1,261 cases pending at the end of 2011. The worst situation appears to exist in the Bronx, where 930 felony cases are more than 2 years old. Statistics also revealed that the median pending age in the Bronx was 340 days for all felony cases, as compared to 333 days in 2011. Manhattan and Brooklyn also have backlog problems, with 217 felony cases pending over 2 years in Manhattan, and 139 cases pending in Brooklyn. Both Manhattan and Brooklyn have managed to achieve a slight reduction in cases pending over 2 years from 2011. The Counties with the least number of cases which are pending over 2 years are Queens, which currently has 80, and Staten Island, which has none. Chief Administrative Judge A. Gail Prudenti has stated that they are "chipping away at a bloated inventory of older cases," and that she hopes that significant progress will be made in the coming months.

About Our Section and Members

Section Elects New Officers Effective June 1, 2013

At its recent Annual Meeting held in New York City, the Section elected its new officers for the coming year. Enclosed below are a brief biographical sketches and photos of the new officers. They took office on June 1, 2013.

Section Chair Mark R. Dwyer

Mark Dwyer graduated from Princeton University in 1972 and from Yale Law School in 1975. He then worked for one year as a law clerk of the Honorable Thomas C. Platt in the Eastern District of New York and for one year as a writing instructor at the NYU School of Law. In 1977 he was sworn in as an Assistant District Attorney in Manhattan. Dwyer worked in the Appeals Bureau of the District Attorney's Office until May 2009, becoming a Deputy Bureau Chief in 1980 and the Chief of the Bureau in 1985. In the last years of that period he was also counsel to District Attorney Robert M. Morgenthau. During the final months of Mr. Morgenthau's tenure, Dwyer served as the Chief Assistant District Attorney. In February, 2010, he was named by Governor Paterson to the New York Court of Claims, and he has since sat in Supreme Court, Criminal Term, in Kings County.

Dwyer is currently the Chair of the ABA Criminal Justice Standards Committee and the Chair of the New York State Bar Association's Criminal Justice Section. He is one of the five authors of West's New York Pretrial Criminal Procedure and is the Treasurer of the Eastern District Civil Litigation Fund, a non-profit group which arranges for pro bono representation for indigents in federal civil litigation. During the last year, he served as Vice-Chair of our Section.

Vice-Chair Sherry Levin Wallach

Sherry Levin Wallach is a principal and partner with the law firm of Wallach & Rendo, LLP of Mount Kisco, New York. Ms. Wallach founded the law practice with her partner in 2003. Ms. Wallach has been extremely active in both our Criminal Justice Section and in the New York State Bar Association. She is serving her second term as a member-at-large of the Executive Committee of the New York State Bar Association and previously served as Secretary of our Criminal Justice Section. She has also served on numerous State Bar Association Committees, and has made numerous presentations at various programs of the State Bar during the last several years. She has served as a former Assistant District Attorney in Bronx County, and as a Staff Attorney at the National Institute of Trial Advocacy. She received her law degree from Hofstra University School of Law and also graduated from George Washington University in Washington D.C. She is admitted to practice in New York State and in the U.S. District Courts for the Southern and Eastern Districts as well as the United States Supreme Court. She has also published several articles which have appeared in various New York State Bar Association publications.

Treasurer Tucker C. Stanclift

Tucker C. Stanclift of Glens Falls is the principal of Stanclift Ludemann & McMorris, PC. His practice areas include criminal law, civil litigation, personal injury, vehicle and traffic law, real estate, family law, wills and estates, contracts, landlord / tenant and business / corporate. He previously worked for Sylvestri and Stanclift, LLP and Bartlett, Pontiff, Stewart & Rhodes PC. He served as Washington County Assistant Public Defender in 2005. A former member of the State Bar's House of Delegates, Stanclift chaired the Young Lawyers Section and co-chaired the Task Force on Family-Friendly Meetings. He was Program Co-Chair of the Trial Academy from 2010-2011. He is Treasurer of the Criminal Justice Section and a member of the Trial Lawyers Section and Committee to Ensure Quality of Mandated Representation. Stanclift is a member of the Warren County Bar Association Board of Directors, Glens Falls Community Theater and Hudson River Shakespeare Company. He received his undergraduate degree from St. Bonaventure University and earned his law degree from State University of New York at Buffalo School of Law.

Secretary Robert J. Masters

After graduating from St. John's University and St. John's University School of Law, Bob Masters worked as a law clerk for various Judges of the Criminal Term of the Supreme Court in both Queens and Kings Counties. He thereafter served as an Assistant District Attorney in Queens County, and has worked primarily on homicide cases since 1992. Since 1993, Bob has also held various administrative posts within the District Attorney's Office, was the Deputy Executive Assistant District Attorney for the Trial

Division from 2005 through September of 2012 and was recently promoted to Executive Assistant District Attorney. As EADA, Bob is currently designated as the acting Chief of the Legal Affairs Division. Bob is also the official liaison to the NYPD and other law enforcement agencies.

During his tenure, Bob has handled dozens of homicide cases, as well as long-term investigations into narcotics enterprises and their related murders. Additionally, Bob has specialized in handling homicides in which psychiatric defenses are interposed.

Among the high-profile cases handled by Bob was the trial of Patrick Bannon for the murder of Police Officer Paulo Heidelberger, the trial of serial-killer Heriberto Seda, the "Zodiac Killer" of the 1990s, as well as the prosecutions of the infamous "Wendy's Massacre," in which five fast-food employees were murdered, and the capital trial of John Taylor that resulted in the imposition of the death penalty. The prior prosecution of Taylor's mentally retarded accomplice, Craig Godineaux, resulted in the imposition of five consecutive life sentences. Bob has also been designated a Special Assistant District Attorney in both Franklin County and Suffolk County to assist those offices in handling complex litigation. He is also a founding member of the New York State District Attorneys Association's Best Practices Committee.

Bob is currently an adjunct faculty member at St. John's University School of Law and has lectured frequently throughout the State on various trial and ethical issues. He is the newest officer of our Section.

Larry Gray Issues New Edition on Grand Jury Procedures

The New York State Bar Association recently published a new edition on evidentiary privileges involved in the grand jury, written by Lawrence N. Gray, a Section member. The publication deals with procedures in both criminal and civil trials. It is comprised of some 22 chapters, and deals with such subjects as "The Role of Counsel at the Grand Jury," "The Privilege Against Self-Incrimination," and "The Fourth Amendment as Applied to Grand Juries." The publication is comprised of over 400 pages and even includes a transcript of a mock grand jury session. Lawrence Gray is a former Special Assistant Attorney General in the Appellate Section of the Attorney General's Medicaid Fraud Control Unit. He is a graduate of St. John's University School of Law where he was an Associate Editor of the *St. John's Law Review*. He has written extensively on criminal law subjects, and is the author of several publications issued by the New York State Bar Association. He has also been a frequent contributor to our *Newsletter*. In a foreword to his publication, Judge Barry Kamins remarks "Once again, Larry Gray has done a great service to the bar. He has provided attorneys and judges with a reference work that can be used in both the criminal and civil fields. It is well researched, well written and will be the model by which all works on the subject are judged."

Spring CLE Program

Our Spring CLE program, which was held in early May in Albany, New York, dealt with various evidentiary issues, and was well attended, with approximately 50 participants.

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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.

Omar Almanzar-Paramio
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Ryan W. Anderson
Renée L. Behrens
Kathryn S. Berry
Ronny Beshay
Richard J. Bohorfoush
Albert Michael Braccini
Candace C. Brooks
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Mirline Cearc
Keith Joseph Clarke
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Nicholas Paul DiFonzo
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Elena Giannattasio
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Sandra H. Irby
Carmela Daley Jackson
Traci Jones
Stephen Jung
Philip E. Karasyk
Anna Victoria Kristel
Peter Laumann
James M. Lenihan
Zoe Pokempner Levine
Christopher X. Maher
Michael Marley
Sophie Jennifer Marmor
Beverly McQueary Smith
Lisabeth A. Mendola-D'Andrea
Alison Sue Mitchell
Charles Moschoudis
Sarah Nadeau
Karen Nazaire
Max M.L. Nowak
Tammy Toni O'Hara
Jay Panchal
Deanna Michelle Paul
Christopher Quinlan
Erin L. Sanger
Jonathan Scott Scheine
Patrick Alexander Sheldon
Maria Shteysel
Denise M. Shukoff
Takira Smith
Enet Clover Somers-Dehaney
Maryann J. Sung
Leslie Renee Thomas
Joseph Robert Thompson
Vinoo P. Varghese
Jason Michael Whittle
Edward D. Wilford
Raji Sayel Zeidan

Publication and Editorial Policy

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

Publication Policy: All articles should be submitted to:

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1588 Brandywine Way
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Submitted articles must include a cover letter giving permission for publication in this *Newsletter.* We will assume your submission is for the exclusive use of this *Newsletter* unless you advise to the contrary in your letter. Authors will be notified only if articles are rejected. Authors are encouraged to include a brief biography with their submissions.

For ease of publication, articles should be submitted on a CD preferably in WordPerfect. Please also submit one hard copy on 8½" x 11" paper, double spaced.

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

Accommodations for Persons with Disabilities: NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

NEW YORK CRIMINAL LAW NEWSLETTER

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