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New York Criminal Law Newsletter

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

- Retroactivity of *Padilla*
- Taking of DNA Samples
- Right to Remain Silent

Supreme Court Tackles Difficult Criminal Law Issues

See U.S. Supreme Court Section Beginning at Page 6

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Message from the Chair
What Do Prosecutors Think?

In the last issue, I opined about what judges think. Though I am now a judge, I am actually better qualified to speak to this issue's topic. I've been a judge for just over three years, but I was a prosecutor for ten times as long. I know these guys.

There are exceptions to every rule. One important rule is that prosecutors want defendants to be treated fairly, and when there are trials, to get a fair trial. Another rule is that prosecutors would rather have guilty defendants be convicted at trial than acquitted. Yet another rule is that prosecutors, being human, would prefer to win rather than lose, all else being equal. A corollary of this third rule is that if you have too much work to do, getting information for your opponent may well not occur to you to be your first priority.

I remember "vectors" from high school classes I didn't enjoy. Vectors are arrows representing forces that move in various directions—and often collide at angles, pushing each other off course. The rules I have just noted can, in many cases, operate like colliding vectors, leading to a drift from the straight and narrow path. As a result, sometimes a prosecutor's intent that a defendant be fairly treated is pushed some degrees off course. The New York State Bar Association itself, and this Criminal Justice Section as well, are now considering in the *Brady* context whether reforms of the law can help ensure that the prosecutor stays on the path toward disclosure.

I happen to disagree with some of my friends on the defense side who think that willful disregard of *Brady* rights is endemic in New York prosecutions. In my view, willful disregard of disclosure rules is extremely rare. But no one can deny that *Brady* violations do occur, and have led to unjust convictions that we all deplore. Concomitantly, I must repeat that there are exceptions to general rules: doubtless a very few law enforcement officials are unconcerned when defendants are not treated fairly and are indifferent to wrongful convictions. The indifferent must be prevented from doing harm, but the measures to prevent the harm should not be written as if those few are the many.

I have now expressed views about what judges think, and what prosecutors think. Let me end my editorial by promising you that, next time, I will not pretend that I can tell you what defense lawyers think. One year out of law school, and just before becoming a prosecutor, I had my only defense client ever. I did some grunt work on a U.S. Supreme Court brief on behalf of an alleged burglar from Guam. We, um, "got him off on a technicality." And, as the Shake 'n Bake twins testified, "I halped." Not many defense attorneys can boast, as I can, that I helped win every client's case in the Supreme Court. But don't worry. I know my limitations, and will not address how my (less successful) fellow defense attorneys view matters. (Though I might welcome a guest columnist who would undertake that task.)

For the benefit of our members, I also include a list of our upcoming events as follows:

The Executive Committee of the Section will meet at the New York County Lawyers building at 5:30 p.m. on October 24, and December 2. All Section members are welcome to attend.

The fall forensics CLE will be held at NYU School of Law on October 25 and 26. Registration information was sent out in August.

The Annual Meeting will be held at the end of January, 2014. Our winter CLE, our Awards Lunch, and our annual Section Meeting are scheduled for January 30. The CLE will focus on "basics" —search and seizure law, right to counsel law, and the confrontation clause. Forms for award nominations were mailed out to all Section members in August.

The Section's District Representatives are each being asked to plan one local event, perhaps a free CLE and reception, and perhaps in conjunction with a local bar association. Details on those events will be e-mailed to those concerned as they develop.

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.

Message from the Editor

In this issue we present our annual review of developments in the United States Supreme Court. The Court, during the past term, issued a series of very significant decisions in the areas of criminal and constitutional law, including warrantless searches, the taking of DNA samples, and the retroactivity of the *Padilla* ruling. It also issued major decisions on some of the important social and political issues facing the nation, including voting rights, affirmative action and gay marriage. All of these cases are summarized in our Supreme Court section.

The New York Court of Appeals also issued some important decisions in the criminal law area involving new evidentiary rulings and ineffective assistance of counsel. We review these matters in the New York Court of Appeals Section. As in the past, we also include a summary of the 2012 Annual Report of the Clerk of the Court of Appeals, which provides a detailed review of the Court's activity during the past year. We also present several cases of significance from the various Appellate Divisions.

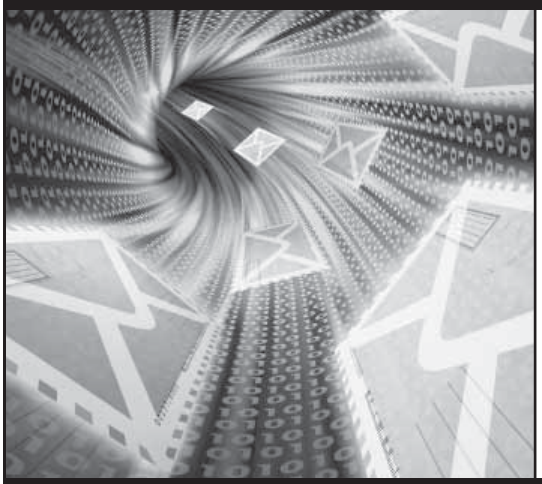
In our Feature Articles section, we also present an interesting and informative article on the unforeseen consequences of an ACD adjudication. The article is written by Douglas H. Wigdor and Matthew Pisciotta, first-time contributors to our publication. As in the past, we also present a review of developments in the United States Supreme Court during the last year. In light of the controversial George Zimmerman case recently completed in Florida, we also present an analysis on an interesting aspect of the case involving the composition of the jury.

We also provide detailed information on upcoming programs and activities of the Criminal Justice Section, as well as its individual members. A Fall CLE event is planned for October 25th and 26th and further details will be provided in separate mailings.

We view our *Newsletter* as the line of communication between our Section and our members. We appreciate comments and suggestions regarding the Section's activities and policies. Please provide us with your views through Letters to the Editor, and of course continue to send articles for possible publication. We are now in our eleventh year of publication and thank our readers for their continued support.

Spiros A. Tsimbinos

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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A Review of the 2012-2013 Term of the United States Supreme Court

By Spiros A. Tsimbinos

The United States Supreme Court concluded its most recent term on June 26, 2013. It ended by issuing a series of decisions on highly controversial issues, such as gay marriage, voting rights and affirmative action. The Court, in its final days of the term, once again revealed a sharp split among the Justices, which was indicative of their philosophies, backgrounds and political leanings. The Court is recessed for the summer, and will begin its new term on October 7, 2013. It is thus a good time to review developments in the Court which occurred during the past year and to summarize some of the highlights of the Court's recent activities.

The Court's Work Product

The Court, during its past term, handled approximately 80 cases in which full decisions and significant issues were discussed. This total is roughly equivalent to the Court's volume during the last two years. Although the Court's decisions were again highlighted with a significant number of 5-4 decisions, the Court did issue unanimous decisions in about one-half of its cases. The Court's decisions also comprise about 70% of civil cases and 30% of criminal law matters.

The Continuation of 5-4 Decisions

During this term, the Court had approximately 20% of its decisions which were decided by a narrow 5-4 vote. Among its controversial sharply split decisions which involved major political or social issues, the Court divided 5-4 in the Defense of Marriage Act, *United States v. Windsor,* and the 1965 Voting Rights Act, *Shelby County Alabama v. Holder.* In the Criminal Law area, the Judges split 5-4 in *Maryland v. King*, which involved a Fourth Amendment challenge to the collection of DNA samples from persons arrested for violent crime.

Justice Kennedy Continues as the Critical Swing Vote

Justice Kennedy continued to be in the majority in approximately 90% of the decisions rendered. He thus surpassed Chief Justice Roberts, and retained his reputation as the critical swing vote. Justice Kennedy cast the critical fifth deciding vote in the Defense of Marriage Act, the Voting Rights case, and the DNA decision.

Criminal Law Decisions

The past term can be viewed as a mixed situation for criminal defense attorneys, with certain decisions advancing or continuing important defense issues. In some cases, however, the Court issued pro prosecution decisions. In the search and seizure area, for example, in the case of *Florida v. Harris*, the Court issued a unanimous ruling upholding the 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 a companion case, however, *Florida v. Jardines*, the Court 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. Also in the search area, the Court, in another 5-4 decision, ruled 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 (*Missouri v. McNeeley*). In *Chaidez v. United States*, the Court also issued a ruling that should prove to be highly beneficial to the prosecution. By a 7-2 vote, the Court stated that its 2010 decision in *Padilla v. Kentucky* was not to be applied retroactively.

A review of the major criminal law decisions covered in our *Newsletter* for the Court's most recent term indicates that the most pro-defense Justices are Justices Sotomayor, Ginsburg, and Kagan, who voted in favor of the defense nearly 90% of the time. The most pro-prosecution Justice is Justice Alito, followed by Chief Justice Roberts, who voted for the prosecution between 80 and 90% of the time. Justice Breyer, who in past years was strongly pro-defense, this term voted for the prosecution about 60% of the time.

The Various Groupings and Alliances

The voting patterns of the various Justices during the past term continues to reveal sharp splits within the Court with various groups of Justices who usually vote together or against one another. The major highlight which emerged this term was that three of the Justices, to wit: Ginsburg, Sotomayor and Kagan, voted together almost all of the time and now constitute a formidable bloc within the Court. Justice Ginsburg voted with Justice Kagan 92% of the time, and with Justice Sotomayor 87% of the time. Justice Kagan voted together with Justices

Ginsburg and Sotomayor 92% of the time, and Justice Sotomayor voted with Justice Ginsburg 87% of the time and with Justice Kagan 92% of the time. These three Judges now constitute the core of the so-called liberal bloc within the Court, and their determinations are often of great importance in the ultimate resolution of the case.

The various members of the so-called conservative bloc, although continuing to vote together in many cases, were somewhat less cohesive during the past term. Thus Chief Judge Roberts and Justice Alito, who during the past two terms voted together more than 90% of the time, this year only voted together 79% of the time. Also, Justices Scalia and Thomas, who also voted together quite often in the past, had a lesser degree of cohesiveness during the past term. Thus while voting together over 90% of the time during the last term, they only voted together 73% of the time during the past term. An interesting development during the past term was that Justices Kennedy and Kagan, who in the previous term had voted together about 83% of the time, were in sync on only 45% of the decisions. Justice Breyer, who during the last term was in the majority in the least number of cases, this term appears to have moved closer to the view of Chief Justice Roberts and voted together with the Chief Justice almost 50% of the time. Justice Kennedy also voted with the Chief Justice 70% of the time.

It appears that Chief Justice Roberts, although continuing to vote often with the conservative bloc of the Court, has on some occasions moved toward the middle and has been able to gain the support of Justices Breyer and Kennedy in reaching a more middle of the road, or narrowly focused viewpoint.

A Look Toward Next Term

During the last several years the United States Supreme Court has become the focus of public attention as major social and political issues of a highly controversial nature have reached the Court's docket. Thus, last year's health care case and this year's gay marriage and voting rights issues have dominated the Court's calendar. In its new term, which begins in October, the Court will continue to deal with controversial issues, and the sharp split among the Court's members will continue to be reflected in many 5-4 decisions and vigorous majority and dissenting decisions. Although Chief Justice Roberts has made a major effort to achieve greater unanimity among the Court, many of the cases reaching the Court are reflective of the sharp divisions within the nation. We are fortunate, however, that the framers of our Constitution and the founding fathers provided for a separation of powers, with three distinct branches of government. Thus the United States Supreme Court continues to be the vehicle to finally determine controversial matters in a peaceful manner under the rule of law. We look forward to continuing to apprise our readers of annual developments within the Court.

Florida Jury of *Six* Acquits George Zimmerman

By Spiros A. Tsimbinos

During the month of June, 2013, the nation was fixated on the George Zimmerman trial in Florida, which involved the unfortunate killing of a 17-year-old black teenager. Following the jury verdict of acquittal, the controversial case drew enormous media attention and differing points of view on the jury's verdict. The controversy swirled around the application of the legal principles of self-defense and the presence of Florida's "stand-your-ground law." Little attention was given, however, to another peculiarity in the Florida system, which may have been a major factor in determining the outcome; to wit: the use of a six-person jury.

In the Winter 2013 issue I discussed some of the differences between Florida's Stand Your Ground and self-defense principles, and the New York law, and their application to the George Zimmerman case. When the case was about to go to trial I became aware that there was an additional key difference in how felony jury trials are conducted in Florida. This vital difference involves the fact that in Florida the Zimmerman case was tried by a jury of six, rather than a jury of twelve, which is used in New York and in most of the rest of the nation with regard to criminal defendants accused of a felony.

When I first learned that the Florida trial, which involved a possible penalty of life imprisonment, was to be tried by six members of the jury, I was taken aback and wondered whether such a situation had passed constitutional muster. After conducting some research, I first learned that the Florida Statute, Title XLVII, involving Criminal Procedure and Corrections at Section 913.10, provides that twelve persons shall constitute a jury to try all capital cases and six persons shall constitute a jury to try all other criminal cases. The Florida situation apparently reached the United States Supreme Court in the case of *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893 (1970). In that case, a Defendant who had been convicted of robbery argued that the refusal to impanel more than six members for the jury violated the Sixth Amendment as applied to the states through the Fourteenth Amendment.

After rejecting in earlier cases the concept of an automatic incorporation of all of the Bill of Rights into the due process clause of the Fourteenth Amendment, the Court, in *Williams*, conducted a historical approach and attempted to ascertain the intent of the framers of the Constitution. The majority of the Court concluded that there was no constitutional requirement for a jury of twelve. In a decision written by Justice White, the Court found that the purpose of a jury trial is to prevent oppression by the Government and that by providing an accused with the right to be tried by a jury of his peers, it gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. The Court emphasized that given the purpose in question, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen and in the community participation and shared responsibly that results from that group's determination of guilt or innocence. "The purpose of this role is not a function of the particular number of the body that makes up the jury."

In issuing its decision, the Court's majority basically sidestepped the earlier case of *Thompson v. Utah*, 170 U.S. 343 (1898), and some subsequent decisions which in dicta appeared to support the concept that the jury referred to in the Sixth Amendment was a jury "constituted as it was at common law or twelve persons, neither more nor less."

The Court's majority in *Williams* indicated that the number of jurors should probably be large enough to promote group deliberation and to provide a fair possibility for obtaining a representative cross-section of the community. The Court attempted to directly answer the suggestion that a twelve-person jury gives a defendant a greater advantage, since he has more chances of finding a juror who will insist on acquittal, and thus prevent conviction. The Court basically brushed aside this contention by stating that such an advantage might just as easily belong to the state, which also needs only one juror of twelve insisting on guilt to prevent acquittal. The majority opinion then summarized its conclusion by stating that currently available evidence does not suggest that a twelve-person jury is necessarily more advantageous to the defendant than a jury composed of fewer members.

The majority acknowledged that most of the states, as well as the federal courts, provide for juries of twelve with regard to felony matters, and that at the time of their decision only five states, to wit: Florida, Louisiana, South Carolina, Texas and Utah, used juries of fewer than twelve in felony cases. This appears to be the same situation today. The Court also acknowledged that throughout the nation, all capital cases were tried by juries of twelve. They felt, however, that the states should be unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury.

Justice Marshall dissented in the *Williams* case and stated that he was convinced that the requirement of twelve jurors for any felony matter should be applied to the states. Justice Marshall relied on the Court's earlier decision in *Thompson v. Utah*, 170 U.S. 343, 349 (1898), wherein the Court had stated that the jury guaranteed by the Sixth Amendment consisted of twelve persons.

The acquittal of George Zimmerman has caused some people who were dissatisfied with the verdict to call for

changes in Florida's Stand Your Ground law. It appears that based upon several recent surveys and the history of the Stand Your Ground law in Florida there is very little chance of changing the Stand Your Ground statute. In fact, a task force appointed by the Governor after the Zimmerman incident arose concluded that they were recommending no significant changes in the statute.

An alternative approach, and one that may have a better chance of success, is to have Florida reconsider its use of six-person juries in all felony cases other than capital crimes. Viewing the outcome of the Zimmerman matter, the reasoning of the majority in *Williams* does not stand up to critical analysis. As today we seek diversity in a variety of areas, the six-person rule in Florida led in the Zimmerman case to a jury of six women. One side criticized the fact that if we seek a jury of one's peers for the Defendant, there were no men represented on the jury. Since there were also no blacks on the jury, another group complained that the jury selected was not fair to the victim. The use of a twelve-person jury would first of all bring Florida into compliance with most of the rest of the nation. It would also increase the chances for a greater representation of different groups and interests in the community. It is highly unlikely that if a jury of twelve had been chosen, it would not have included some male jurors and some black members. For those concerned and interested in the rights of defendants, it would also increase the possibility of more acquittals and hung juries in the absence of strong evidence regarding the defendant's guilt. Today the number of capital crimes is sharply diminishing, and there is no basis to limit twelve-member juries to these few cases when other serious felonies carry the possibility of severe punishment, including, as in the George Zimmerman case, life imprisonment.

Due to the George Zimmerman trial there should now be a renewed interest in making twelve-person juries mandatory for all felony matters throughout the nation. The change can be accomplished in Florida or any other state by legislative action or by defense counsel revisiting the issue and raising the matter in future criminal trials. The United States Supreme Court decided the *Williams* case in 1970, more than 43 years ago, during the Burger Court at a time where more conservative views regarding criminal law matters dominated the Court in the face of rising crime rates. Further, the Court was in a period of deference to and expansion of state's rights. It should also be noted that the actual determination in the case was made by seven Justices, since Justice Marshall dissented and Justice Blackmun did not participate. Today, with a strong group of Justices who appear to be more conducive to the expansion of defendant's rights in criminal law matters, it is possible that the Court could reconsider its *Williams* decision and take a different position on the issue. The effort should be undertaken, and developments on this important and interesting matter should be carefully monitored in the future.

A Summary of the 2012 Annual Report of the Clerk of the New York Court of Appeals

By Spiros A. Tsimbinos

The New York Court of Appeals recently issued its Clerk's Report for the year 2012. The Report, which is prepared on an annual basis by the Clerk of the Court of Appeals, provides a yearly summary of the workload of the Court and any new procedures or rule changes which have been adopted. This year's report was prepared by Andrew W. Klein, the Clerk of the Court, and is divided into four parts. The first section is a narrative, statistical and graphic overview of matters filed with and decided by the Court during the year. The second describes various functions of the Clerk's Office and summarizes administrative accomplishments in 2012. The third section highlights selected decisions of 2012. The fourth part consists of appendices with detailed statistics and other information.

This year's Report indicates that in 2012 the New York Court of Appeals decided 240 cases, 149 of which involved civil matters, and 91 which dealt with criminal law issues. This compared with 242 decisions in 2011, of which 130 were civil matters and 112 involved criminal law. Thus the year 2012 saw a somewhat significant decrease in the number of criminal law decisions. Of the appeals decided, 102 were decided unanimously, which was a drop from the 129 unanimous decisions in 2011.

With respect to motions, the Court decided 999 motions for leave to appeal in civil cases. This was 108 fewer than in 2011. Of these, the Court granted 6.4%, which was down from 7.4% in 2011. With respect to criminal leave applications, the Judges of the Court granted 99 of the 2,096 applications which were made. The number of criminal leave applications granted was just under 4%, and represented a very slight increase over the 91 applications which were granted in 2011. With respect to People's appeals, it must be noted that 10 of the 50 applications filed by the People were granted by the Court. Thus, prosecutors were successful in having leave to appeal granted in 20% of the People's applications. Overall, the Court of Appeals and its Judges disposed of 3,666 matters, including 240 appeals, 1,330 motions, and 2,096 criminal leave applications.

The Court of Appeals continues to maintain a prompt and efficient method of handling its caseload. The average time from argument or submission to disposition of an appeal decided in the normal course was 40 days; for all appeals, the average time from argument or submission to disposition was 39 days. The average period from filing a notice of appeal or an order granting leave to appeal to calendaring for oral argument was approximately 11 months. The average period from readiness (papers served and filed) to calendaring for oral argument was approximately five months. The average length of time from the filing of a notice of appeal or order granting leave to appeal to the release to the public of a decision in normal-coursed appeals decided in 2012 was 368 days, slightly longer than in 2011.

With respect to budget matters, the Court, in response to the State's continuing fiscal crisis, requested a total budget for the fiscal year 2013–2014 of $14,751,698, a decrease of $4,289 from the budget allocation for the fiscal year 2012–2013. The 2013–2014 budget allocation is almost a million dollars less than the budget request for 2011–2012. The Court's budget for 2013–2014 will cover the operation of the Court and its ancillary services.

This year's annual report also includes an introduction from Chief Judge Jonathan Lippman. In his introductory letter, Judge Lippman pays special tribute to two colleagues who have recently left the Court, to wit: Judge Ciparick and Judge Jones. Judge Ciparick retired from the Court at the end of 2012, and Judge Jones unexpectedly passed away in November as a result of a sudden heart attack. Judge Lippman also thanked the Judges of the Court of Appeals and the staff of the Court for the high quality of their work product. Judge Lippman concluded by stating that he is grateful for the special privilege and opportunity to serve as Chief Judge of the New York State Court of Appeals. He further stated that the Court looks forward to the coming year and will continue to serve the public and meet the challenges that lie ahead.

The annual report issued by the Clerk of the Court provides a wealth of information regarding the activity of the New York Court of Appeals. It provides valuable and interesting reading, and criminal law practitioners should be aware of its highlights. Our *Newsletter* has had a long tradition of summarizing the annual report of the Clerk of the Court. We thank Mr. Klein, the Clerk of the Court, and Mr. Gary Spencer, Public Information Officer of the Court, and the staff of the New York Court of Appeals for their work in preparing this important document and for expeditiously providing us with a copy, so that we could summarize its highlights for our members.

Unforeseen Practical Ramifications of Accepting an Adjournment in Contemplation of Dismissal

By Douglas H. Wigdor and Matthew Pisciotta

The vast majority of criminal defense attorneys believe that Adjournments in Contemplation of Dismissal ("ACD") are a victory for their clients. Lurking behind the acceptance of an ACD, however, is the very real possibility that by accepting an ACD your client may be prevented from ever holding a position at a Federal Deposit Insurance Corporation ("FDIC") insured bank. Most attorneys believe that ACDs are sealed records that cannot be used in any way against their clients, but this belief is sorely misguided. This article sheds light on the practical and very real ramifications of accepting an ACD for criminal defense attorneys and their clients.

Under New York law, the ACD program is designed to nullify the arrest that is ultimately dismissed, returning the defendant "to the status he occupied before arrest and prosecution." *See* NYCPL §170.55 (8). The nullification of the arrest serves to protect the professional standing of the Defendant and NYCPL §160.60 explicitly states that an ACD shall not "operate as a disqualification of any person from any occupation or profession." *See* NYCPL §160.60. Following these guidelines, the New York Human Rights law ("NYHRL") makes it unlawful to discriminate against an individual on the basis of a termination of criminal proceedings favorable to that individual, stating that:

> It shall be unlawful discriminatory practice unless specifically required or permitted by a statute for any corporation to act upon, adversely to the individual involved, any arrest or criminal accusation of such individual not then pending, against the individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the Criminal Procedure Law. (Emphasis added).

See NYHRL §296(16). An ACD is defined as a termination of criminal proceedings in favor of the accused,[1] and therefore the above section makes it unlawful to discriminate against an individual on the basis of an ACD. See NYCPL §160.50(2). However, the NYHRL contains one extremely important qualification to this protection: a corporation may be specifically required or permitted to consider a past ACD by statute. So while there is evidence that New York lawmakers intended for an ACD to leave an individual with a clean slate, they did leave open the possibility of a statutory basis under which some individuals who accepted an ACD may not be covered by the NYHRL's prohibition against hiring discrimination.

Unfortunately for those who have accepted an ACD, this type of statutory provision exists in the Federal Deposit Insurance Act ("FDIA"). Section 19 (a) of the FDIA (Section 19") prevents the hiring of "any person who has been convicted of any criminal offense involving dishonesty or a breach of trust or money laundering, or has agreed to enter into a *pretrial diversion or similar program* in connection with prosecution for such offense" (emphasis added). *See* 12 U.S.C. §1829(a)(1). This raises the question of whether an ACD fits the definition of a "pretrial diversion or similar program" within the meaning of Section 19.

Strong evidence that an ACD *should* be considered a "pretrial diversion or similar program" can be found in the FDIC's Section 19 Statement of Policy, which defines a "pretrial diversion or similar program" as being "characterized by a suspension or eventual dismissal of charges or criminal prosecution upon agreement by the accused to treatment, rehabilitation, restitution, or other noncriminal or nonpunitive alternatives." *See* 63 Fed. Reg. at 66, 184-85. Similarly, ACDs are an agreement that must be voluntarily consented to by the Defendant, and are characterized by a "suspension or eventual dismissal of charges or criminal prosecution." Under New York law, charges in an ACD are initially suspended with "a view to" ultimate dismissal provided the Defendant complies with certain conditions for a set period of time. See NYCPL §170.55(2). Furthermore, dismissal in an ACD is based on "noncriminal or nonpunitive" conditions being fulfilled. These conditions may include the Defendant participating in dispute resolution or performing public service, and generally involve the Defendant not being re-arrested for any crime. See NYCPL §170.55(5), (6). Thus, the characteristics of the ACD program appear consistent with the FDIC's definition of a covered program.

The first definitive step towards a decision on whether the New York ACD program falls under Section 19 came in a May 13, 2009 opinion letter from the FDIC. In that letter, the FDIC officially agreed that an ACD falls within the meaning of Section 19 of the FDIA, stating that "the granting of an ACD constitutes entry into a pretrial diversion or similar program within the meaning of Section 19." In coming to this conclusion, the FDIC acknowledged that the ACD program has "characteristics of a pretrial diversion program," including its nonpunitive alternatives to punishment and the fact that an ACD comes prior to entry of a plea and is "not deemed to be a convic-

tion or admission of guilt." See Opinion Letter, Federal Deposit Insurance Corporation (May 13, 2009).

Two Courts have weighed in on this issue. Both cases involved commercial banks that claimed to be barred under Section 19 from hiring an individual who had previously consented to an ACD. In *HSBC v. NYC Commission on Human Rights*, the Court ruled that it was "unclear whether New York's ACD is a pretrial diversion program within the meaning of the [FDIA]," and dismissed an injunction against the New York City Commission on Human Rights barring enforcement of the NYHRL. *See HSBC v. NYC Commission on Human Rights*, 673 F. Supp. 2d 210, 217 (S.D.N.Y. 2009). However, in *Smith v. Bank of America*, the Court endorsed the decision of the FDIC in its Opinion Letter, stating that New York's ACD program does constitute a pre-trial diversion program because it imposes non-punitive conditions, and is not deemed a conviction or admission of guilt. The court in *Smith* allowed Section 19 to serve as justification for not hiring a woman who had an ACD on her record. *See Smith v. Bank of America*, 865 F. Supp.2d 298, 306 (E.D.N.Y. 2012).

Including ACD as a "pretrial diversion or similar program" pursuant to Section 19 has potentially wide-ranging implications. As of March 31, 2013 the FDIC insured over 7,000 banks nationwide,[2] meaning that broad swaths of the public are now subject to exclusion from consideration for employment across much of the banking industry, traditionally one of the largest employers in the country. This will undoubtedly have a disparate impact on minorities, who are charged with crimes at greater rates, and therefore are more likely to have accepted an ACD.

Those accused of crimes involving dishonesty who may wish to work at an FDIC-insured institution in the future are left with two options, apply for a waiver from the FDIC or reject an ACD and risk a criminal conviction. Defendants seeking an individual waiver must fill out an application with the FDIC. The instructions to the application make clear that waivers are subject to a heavy burden, advising that an "individual waiver will be granted on an infrequent basis, and only in truly meritorious cases and upon good cause shown."[3] This presents a high threshold for plaintiffs to meet, not to mention the time cost of going through the waiver process. Defendants unwilling or unable to obtain a waiver are forced to reject an ACD and proceed with the criminal process. This will clog the court system with relatively minor cases that the ACD program had previously disposed of, making the judicial process longer and potentially more expensive for all defendants, as well as exposing more defendants to criminal liability.

Faced with these alarming effects on the ACD program, it is clear that the best remedy to these issues would be an amendment to Section 19 of the FDIA. Given the type of service that banks provide there is undoubtedly a policy reason for attempting to regulate the employment of individuals with a history of dishonesty. However, the prohibitive language in Section 19 is too broad as currently written. In short, the benefit of excluding people who have committed minor crimes of dishonesty from the floors of banks is *greatly* outweighed by the burdens that the regulation imposes on people's rights, as well as the smooth operation of the judicial system.

Looking to other sections of federal law provides a clear roadmap for how to structure a potential amendment to Section 19. For example, 49 U.S.C. §44936 makes a background check mandatory for individuals who are granted unescorted access to a "secured area of an airport." See 49 U.S.C. §44936. Employers are then allowed to exclude from consideration potential employees who have committed certain enumerated felonies. *Id.* The benefit here is obvious, as protecting airports and airline passengers is of paramount importance. However, the regulation is tailored so that exclusion is only permitted in the case of extremely serious felonies. Section 19 could potentially adopt this same form, limiting its exclusion to the hiring of individuals who have committed only serious crimes of dishonesty, such as embezzlement or other financial crimes.

In conclusion, the need to reform Section 19 of the FDIA is apparent in light of the recent support for including the New York ACD program as a "pretrial diversion program," as this prevents FDIC-insured banks from hiring individuals who have gone through the ACD process. However, until Congress amends Section 19, criminal defense lawyers would be well served to inform clients that an ACD could very well carry serious professional consequences for their client.

Endnotes

1. It should be noted that an ACD is not considered a favorable outcome in every context, such as Section 1983 malicious prosecution and false arrest claims (see, e.g., *Singleton v. City of New York*, 632 F. 2d 185, 193 (2d Cir. 1980)). This distinction is based on the definition of favorable outcome at common law, while ACDs are specifically included favorable terminations under NYCPL §160.50. New York law confirms an ACD is a favorable outcome under the NYHRL (see, e.g., *Johnson v. New York City Comm'n on Human Rights*, 270 A.D. 2d 186 (1st Dep't 2000)) (conviction under Maryland statute was analogous to New York ACD and therefore was "terminated in [plaintiff's] favor").
2. Federal Deposit Insurance Corporation, Industry Analysis-Statistics at a Glance, at http://www.fdic.gov/bank/statistical/stats/2013mar/industry.html.
3. Federal Deposit Insurance Corporation, Application Pursuant to Section 19 of the Federal Deposit Insurance Act, at http://www.fdic.gov/formsdocuments/6710-07.pdf.

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New York Court of Appeals Review

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from April 25, 2013 to August 1, 2013.

Right to a Public Trial

People v. Floyd, decided April 25, 2013 (N.Y.L.J., April 26, 2013, pp. 2 and 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 the trial judge had improperly precluded the Defendant's mother from entering the courtroom before jury selection. In the case at bar, the defense counsel informed the trial judge that the Defendant's mother was waiting outside but was unable to find a seat in the crowded courtroom. The Court informed defense counsel that the Defendant's mother would need to wait outside until there was sufficient room to accommodate her in the courtroom. The New York Court of Appeals concluded that the Defendant had a constitutional right to a public trial and that the trial judge's determination constituted reversible error. The New York Court of Appeals concluded, "Mere courtroom overcrowding is not an over-riding interest justifying courtroom closure, and the trial judge failed to consider reasonable alternatives before excluding Defendant's mother from the courtroom." The Court then determined that the violation which occurred was per se prejudicial, which required a new trial, and that defense counsel had adequately preserved the issue when he informed the judge of his request.

Harmless Error

People v. Byer, decided April 25, 2013 (N.Y.L.J., April 26, 2013, p. 24)

In a unanimous decision, the New York Court of Appeals concluded that any error which occurred by the admission into evidence of certain statements attributed to the Defendant were harmless, in light of the overwhelming evidence of the Defendant's guilt. During the trial involving a murder charge, the victim's nephew testified that the Defendant had told him that this was not the first body and there were nine others. At another point the nephew also stated that the Defendant had told him he had threatened to cut up the victim. In addition, a social worker testified that the Defendant's live-in girlfriend had told her about the Defendant's history of domestic violence. The Court stated that even though there may have been some grounds for excluding the evidence in question, there was not a significant probability that the jury would have acquitted the Defendant had it not been for the error. In the case at bar, the jury heard overwhelming evidence of the Defendant's guilt, and there was no probability of an acquittal. The Defendant's conviction was therefore upheld.

Closure of Criminal Trials

People v. Echevarria

People v. Moss

People v. Johnson, all decided April 30, 2013 (N.Y.L.J., May 1, 2013, pp. 1, 2 and 24)

In 4-2 decisions, the New York Court of Appeals held that before determining that the public may be barred from a criminal courtroom, trial judges must consider less reasonable alternatives but are not required to articulate those options on the record. Rather, the reasons for closing the trials may be implied from the existing circumstances. In the cases at bar, the Defendants were convicted of selling cocaine in unrelated buy and busts in Manhattan. In each case, the trial judge closed the courtroom during the testimony of undercover officers who expressed concern for their safety. The New York Court of Appeals had addressed the issue on several prior occasions, and in *People v. Hinton*, 31 NY 2d 71 (1972), had established a procedure for hearings to determine the issue. The issue in the cases at bar was whether the recent decision by the United States Supreme Court in *Presley v. Georgia*, 558 US 209 (2010), affected the prior decisions of the Court of Appeals. The four-Judge majority determined that the recent Supreme Court decision did not affect established New York procedure, and that the limited closures of the courtroom in the three cases at hand did not violate Sixth Amendment principles regarding a public trial. The majority consisted of Judges Graffeo, Read, Smith and Pigott. Chief Judge Lippman and Judge Rivera dissented. In the *Echevarria* case, however, the Court found that an erroneous jury charge had occurred on an agency defense, and a new trial was required.

Plea Allocutions

People v. Monk, decided April 30, 2013 (N.Y.L.J., May 1, 2013, pp. 2 and 23)

In a 5-1 decision, the New York Court of Appeals determined that judges are not obligated to explain during plea bargain allocutions the collateral ramifications of violating the conditions of post-release supervision, even if the defendant could be facing many more years in prison. The five-Judge majority stated that while judges must advise defendants that they will be under post-release supervision once they are released, they need not explain the consequences, partially because those consequences are established by the Board of Parole on a case-by-case basis. The five-Judge majority consisted of Judges Read, Graffeo, Smith, Pigott and Chief Judge Lippman. Judge Rivera dissented.

Ineffective Assistance of Counsel

***People v. Oathout*, decided May 2, 2013 (N.Y.L.J., May 3, 2013, pp. 1, 6 and 22)**

In a 5-1 decision, the New York Court of Appeals ordered a new trial for a Defendant who was convicted of second degree murder. The Court concluded that the Defendant had received ineffective assistance of counsel. The majority decision based its holding on a variety of errors which defense counsel had committed and which had a cumulative effect on the quality of the representation. Judge Pigott, writing for the majority, indicated that defense counsel's actions throughout the case showed unfamiliarity with, or a disregard, for basic criminal procedural and evidentiary law. Among the errors listed by the Court were the attorney's failure to object to the presentation of uncharged crimes and the failure to request pretrial hearings on the admissibility of certain evidence. The majority concluded in ordering a new trial that "at the very least, a defendant is entitled to representation by counsel that has such basic knowledge, particularly so when that defendant is facing a major felony with significant liberty implications." Judge Robert Smith dissented, stating that while the Defendant's representation may have been at times unorthodox, it was not, when viewing the record as a whole, ineffective.

Depraved Indifference Murder

***People v. Bell, Jr.*, decided May 2, 2013 (N.Y.L.J., May 3, 2013, p. 24)**

In a unanimous decision, the New York Court of Appeals held that the Defendant's conviction for depraved indifference murder was insufficient as a matter of law and ordered a reduction to manslaughter in the second degree. The matter was thereafter remitted to the county court for re-sentencing.

Inquiry of Juror

People v. Mejias

***People v. Rodriguez*, decided May 7, 2013 (N.Y.L.J., May 8, 2013, pp. 1, 7 and 22)**

In a 4-2 decision, the New York Court of Appeals held that a trial judge's decision not to directly question a juror about a note she wrote implying that two or more jurors had been discussing the case among themselves before deliberations began did not constitute reversible error. Judge Pigott, writing for the majority, indicated that on the record before the Court, the trial judge was not obligated to conduct a further inquiry. In the case at bar, at the close of evidence but before summation, one juror sent a note to the trial judge which was written by another juror, which indicated that the juror had been discussing the case with others in violation of the Judge's warnings. The trial Judge issued an additional instruction to the jurors reminding them that they were not to deliberate prior to being charged, and further asked if anyone had started discussing the evidence, to which no juror responded. Under these circumstances, the Court of Appeals held that the trial Judge was not bound by the prior decision in *People v. Buford*, 69 NY 2d, 290 (1987), which called for a probing and tactful inquiry to ascertain whether jurors could deliberate fairly and render an impartial verdict. Chief Judge Lippman and Judge Rivera dissented, and indicated that a further individualized inquiry should have been conducted by the trial court.

Jurisdictional Defect

***People v. Milton*, decided May 7, 2013 (N.Y.L.J., May 8, 2013, p. 22)**

In a unanimous decision, the New York Court of Appeals concluded that a Superior Court information was not jurisdictionally defective, even though the named victims were not identified in the felony complaint. The Defendant had been charged with grand larceny involving four mortgage loan applications. The felony complaint, however, did not list the names of the banks from which the Defendant procured the loans. With respect to the Defendant's claim regarding a jurisdictional defect, the Court of Appeals concluded that the offense to which the Defendant pleaded guilty was the same offense for which he was charged in the felony complaint and adding the names of the victims in the Superior Court Information did not render the offense a different one. Though the felony complaint did not name the banks that had provided the loans, the complaint identified the specific properties in Queens and Brooklyn on which the Defendant took out mortgages. The complaint also listed the sales price of the properties and their exact addresses, adequately specifying the facts of the crime. Under these circumstances, the Superior Court Information should be reinstated.

Ineffective Assistance of Counsel

***People v. Prescott*, decided May 7, 2013 (N.Y.L.J., May 8, 2013, pp. 7 and 22)**

In a unanimous decision, the New York Court of Appeals granted the Defendant's application for a Writ of Error *coran nobis* and ordered the Appellate Division, Fourth Department, to reexamine the issues in the case at bar. The Defendant claimed that he was denied the effective assistance of counsel because his attorney on appeal had also represented the Defendant's co-defendant at a prior proceeding. In issuing its ruling the New York Court of Appeals stated that "an attorney may not simultaneously represent a criminal defendant and a codefendant or prosecution witness whose interests actually conflict unless the conflict is validly waived." In discussing the facts in

the case at bar, the unanimous court concluded, "Appellate counsel's arguments at the sentencing hearing, where counsel argued for leniency based on the co-defendant's cooperation with the prosecution and testimony against Defendant, were in direct conflict with his strategy on Defendant's appeal, which depended on discrediting the testimony of the co-defendant. Thus, the interests of Defendant and co-Defendant Martin were conflicting."

Removal of Interpreter

People v. Lee, decided May 30, 2013 (N.Y.L.J., May 31, 2013, pp. 1, 10 and 23)

In a 4-2 decision, the New York Court of Appeals held that a trial Judge did not commit reversible error by refusing a defense request to remove a court interpreter in a Manhattan burglary trial because the interpreter was acquainted with the complainants. In a decision written by Judge Pigott, the four-Judge majority concluded that it did not create the possibility of bias that the interpreter who translated for a Cantonese-speaking complainant knew both her and her husband. The trial Judge in the matter had permitted defense counsel to voir dire the interpreter on the issue and the interpreter had indicated he was a friend of the victim. The interpreter denied, however, that he had any business or social relationships with the complainant and stated he knew nothing about the case. The interpreter had further taken an oath to translate testimony verbatim and had given no indication that he would not do so. The Court's majority, which consisted of Judges Read, Smith, Graffeo and Pigott, thus concluded that on the facts of the case, the trial court could have reasonably found that the danger the interpreter would distort the complainant's wife's testimony was remote, particularly because he possessed no knowledge concerning the facts of the case. Judge Rivera and Chief Judge Lippman dissented.

Agency Charge

People v. Williams, decided May 30, 2013 (N.Y.L.J., May 31, 2013, p. 24)

The Defendant was arrested as a result of a buy-and-bust operation. He argued that he should have been entitled to an agency charge, and that the trial court had committed reversible error by failing to do so. The New York Court of Appeals, however, in a unanimous decision, rejected the Defendant's claim and found that there was no reasonable view of the evidence to support an agency charge. The trial court had found that the Defendant claimed as his defense that he was not involved in a drug deal—not that he had bought drugs on behalf of buyers. There was thus no reasonable view of the evidence that the Defendant acted as a mere instrumentality of the buyers so as to warrant an agency charge.

Ineffective Assistance of Counsel

People v. Diggins, decided May 30, 2013 (N.Y.L.J., May 31, 2013, p. 24)

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction and remitted the case back to the Supreme Court for further proceedings. In the case at bar, the Defendant had absconded during his trial. Before doing so he had cooperated with his attorney and evidence presented indicated that there was a reasonable basis for an active defense. Defense counsel, however, failed to participate during the completion of the jury trial, and the Defendant was ultimately convicted. The Court found that although a Defendant's willful absence from trial surely hampers an attorney's ability to represent the client adequately, under the circumstances of the instant case, counsel's lack of participation amounted to the ineffective assistance of counsel.

Confessions

People v. Guilford, decided June 4, 2013 (N.Y.L.J., June 5, 2013, pp. 1, 2 and 23)

In a unanimous decision, written by Chief Judge Lippman, the New York Court of Appeals reversed a Defendant's murder conviction and ordered a new trial on the grounds that the police had improperly conducted a 49½ hour interrogation of the Defendant. The Court further held that an 8-hour break between the lengthy grilling and a subsequent confession failed to restore the Defendant to the point where he could have made a reasoned decision on whether to respond to police questioning. In issuing its decision, the Court of Appeals rejected the prosecution's claim that the 8-hour gap in questioning, along with the fact that the Defendant was represented by assigned counsel by the time he confessed, eliminated the taint of any improper interrogation. At the suppression hearing, the Defendant had testified that he was so tired and confused that he would have confessed to anything. Based upon all the circumstances, the Court of Appeals concluded that any statements made by the Defendant amounted to a coerced confession, which should have been suppressed.

Legal Insufficiency

People v. Hampton, decided June 4, 2013 (N.Y.L.J., June 5, 2013, pp. 2 and 24)

In a unanimous decision, the New York Court of Appeals held that Judiciary Law Section 21 does not bar a substitute judge from deciding a question of law presented in a motion argued orally before another judge, so long as a transcript or recording of the prior argument is available for review. The Court concluded that the substitute judge should indicate on the record the requisite familiarity with the proceedings and that no undue

prejudice occurred to the Defendant or the People. Judiciary Law Section 21 does not mandate a mistrial but that the pending motion be reargued orally in front of the substitute judge. In the case at bar, defense counsel had made a motion to dismiss the case at the conclusion of the People's evidence. The trial judge expressed concerns about the prosecution's case but reserved decision on the motion. The trial court subsequently learned that a friend of his was the victim's uncle and recused himself from any further proceedings. The case was then reassigned to another judge, who denied the initial motion as well as a mistrial under Judiciary Law Section 21, which bars a judge from deciding a question argued in his absence. The New York Court of Appeals rejected the Defendant's argument and concluded that under the circumstances herein, Section 21 does not mandate a mistrial or that the pending motion be reargued orally in front of the substitute judge. Since in the case at bar the issue of legal sufficiency presented a pure question of law, a reversal was not required.

Ineffective Assistance of Counsel

***People v. Sanchez*, decided June 4, 2013 (N.Y.L.J., June 5, 2013, pp. 2 and 24)**

In a unanimous decision, the New York Court of Appeals held that the Defendant had not sustained his burden of establishing that he had received the ineffective assistance of counsel. In the case at bar, the Defendant was represented by a defense counsel from the Legal Aid Society. During the trial, the prosecutor informed defense counsel that a fingerprint recovered from the scene matched another individual and that a man named Franklin DeJesus had been investigated regarding the case. Defense counsel advised the Court that his office had represented DeJesus in an unrelated robbery and had privileged information of a connection between DeJesus and Montaro. He further stated that there was no actual conflict of interest and that he did not intend to suggest that DeJesus was the perpetrator. The New York Court of Appeals concluded that the record did not establish as a matter of law that the potential conflict of interest actually affected the presentation of the defense or impaired counsel's performance. Under these circumstances a claim of ineffective assistance of counsel had not been established.

Missing Witness Charge

***People v. Thomas*, decided June 4, 2013 (N.Y.L.J., June 5, 2013, p. 25)**

In a unanimous decision, the New York Court of Appeals concluded that the trial court had committed error in prohibiting the Defendant from making a missing witness argument but that the error was harmless. It therefore affirmed the Defendant's conviction. In the case at bar, the Complainant had stated during her testimony that she had made certain statements to a police officer. The police officer was never called to testify. In summation, defense counsel raised the issue that the police officer had not been called, and attempted to make a missing witness argument. The trial court, however, sustained an objection by the prosecution and directed the jury to disregard defense counsel's comments. The Court of Appeals concluded that the trial court was in error in precluding the missing witness argument which was attempted by defense counsel but that any error which occurred was harmless. The Court found that there was strong evidence which corroborated the Complainant's testimony and found it highly unlikely that any missing witness argument would have affected the jury's verdict.

Search and Seizure

***People v. Padilla*, decided June 6, 2013 (N.Y.L.J., June 7, 2013, p. 24)**

In a 5-1 decision, the Court of Appeals held that the People met their burden of establishing a valid inventory search of the Defendant's vehicle and that the Defendant's suppression motion to suppress a weapon which was discovered was properly denied. In the case at bar, the Defendant was arrested for driving a vehicle while under the influence of alcohol. Pursuant to police protocol the vehicle was taken to a police precinct and an inventory search conducted from which a loaded revolver was recovered. The Defendant argued that the police officer had not properly conducted the inventory search and had failed to follow certain required procedures. The Court's majority found that although the officer did not follow all of the written police procedures, there was no basis to conclude that his actions invalidated the search. The Court held that the officer's intentions for the search was to inventory the items of the vehicle and that it was reasonable for the officer to thoroughly check the car including the seat panels and other areas. Judge Jenny Rivera dissented, arguing that the majority holding had the potential to encourage police officers to ignore established written police protocols.

Ineffective Assistance of Counsel

***People v. Oliveras*, decided June 6, 2013 (N.Y.L.J., June 7, 2013, p. 25)**

In a 5-1 decision, the New York Court of Appeals rejected a People's appeal and upheld a finding that the Defendant had been deprived of the effective assistance of counsel. The Court concluded that defense counsel had failed to conduct an appropriate investigation of records which were critical to the defense. In the case at bar, the Defendant, who was accused of committing a homicide, had a history of psychiatric problems. In the beginning of the case, defense counsel had moved for a psychiatric examination pursuant to CPL article 730. Defense counsel had indicated that he would present his client's psychi-

atric records to an expert in order to challenge the voluntariness of any admissions. Many months later, defense counsel had not obtained the records in question and he belatedly moved for permission to serve and file a notice of intent to proffer psychiatric evidence. After the Defendant's conviction, a 440 motion was filed by new counsel, raising trial counsel's failures and requesting a new trial. The Court of Appeals concluded that based upon trial counsel's focus on the Defendant's mental abilities, he chose to forgo any investigation of the critical documents concerning the Defendant's mental condition. Under these circumstances, defense counsel failed to pursue even the minimal investigation required. Defense counsel's failure seriously compromised the Defendant's right to a fair trial and a reversal is required. Judge Robert S. Smith dissented, finding that although defense counsel's performance was deficient, the records in question would not have assisted the defense, and that therefore defense counsel's errors did not prejudice the Defendant.

Right to Counsel

People v. Augustine, decided June 6, 2013 (N.Y.L.J., June 7, 2013, p. 26)

In a unanimous decision, the New York Court of Appeals concluded that any right to counsel error which had occurred in the case at bar was harmless and did not require a new trial. In the case at bar, the Defendant, while in jail for a violation of probation, was questioned on two occasions by police officers. Although the Defendant was represented by counsel on the violation of probation, counsel was not present when the officers questioned the Defendant regarding his involvement in a murder situation. The Court of Appeals concluded that there was no reasonable possibility that the introduction of two challenged statements affected the Defendant's conviction in view of the other evidence which was presented during the trial. The evidence included two counseled statements which were given to police and the testimony of numerous witnesses that overwhelmingly established the Defendant's guilt. Under these circumstances the harmless error doctrine was applicable, and no new trial is required.

Depraved Indifference

People v. Barboni, decided June 11, 2013 (N.Y.L.J., June 12, 2013, pp. 1, 9 and 24)

In a unanimous decision, the New York Court of Appeals upheld a conviction for depraved indifference murder. The case involved the death of a 15-month-old who sustained four skull fractures inflicted by a blunt instrument while under the care of the mother's boyfriend, Jay Barboni. In a decision written by Judge Pigott, the Court concluded that the evidence revealed that the Defendant did not care whether the victim lived or died, and that the Defendant exhibited an utter disregard for the value of human life. The Court concluded that in the case at bar the People met the required standard of proof because the horrific nature of the Defendant's assault of the child was clearly intended to be encompassed within the depraved indifference murder of a child statute and the jury could properly find the Defendant guilty of that crime, even if the murderous acts did not occur over an extended duration. The Court's ruling was the first time in eleven years that it had upheld a depraved indifference murder conviction.

Post-Release Supervision

People v. Brinson

People v. Blankymsee, both decided June 26, 2013 (N.Y.L.J., June 27, 2013, pp. 9 and 23)

In a unanimous decision, the New York Court of Appeals upheld the resentencing of two Defendants because the trial court had neglected to impose a term of post-release supervision. The Defendants had argued that by the time they were resentenced they had already completed the determinate portion of their sentence, and therefore the resentencing violated the Double Jeopardy Clause. The Defendants, however, had been sentenced to both determinate and indeterminate terms for various offenses. The Court of Appeals held that neither Defendant had a legitimate expectation of finality in his determinate sentence because he had not completed the aggregate sentence before the resentencing. In a decision written by Judge Rivera, the Court stated, "A legitimate expectation of finality turns on the completion of a sentence. Where multiple sentences are properly aggregated into a single sentence, that expectation arises upon completion of that sentence. Defendants Brinson and Blankymsee will have a legitimate expectation of finality upon completion of their respective aggregated sentences. Until then, resentencing for purposes of correcting their illegal determinate sentences does not run afoul of the Double Jeopardy Clause and the prohibition against 'multiple punishments.'" The Court therefore upheld the resentencing and concluded that the Double Jeopardy Clause and the prohibition against multiple punishments had not been violated.

Sufficiency of Evidence

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

In a unanimous decision, the New York Court of Appeals upheld a Defendant's conviction of rape in the first degree, and the issue of whether the victim was physically helpless. The Court noted that the case turned largely upon the credibility of the victim and the jury evidently believed the victim's testimony that the incident could have happened while she was asleep. The Court declined to substitute its credibility determination for the jury's and held that the verdict was not against the weight of the evidence. With respect to a secondary issue, the Court also concluded that the trial judge did not abuse its dis-

cretion in allowing the prosecutor to admit several photographs taken of the victim at the hospital. The Court concluded that the photographs could have been relevant to the People's theory of being physically helpless. Under these circumstances, the Defendant's conviction was affirmed.

Youthful Offender Treatment

***People v. Rudolph*, decided June 27, 2013 (N.Y.L.J., June 28, 2013, p. 22)**

In a 5-2 decision, the New York Court of Appeals held that the sentencing court itself must determine whether a Defendant is to be treated as a youthful offender. In a decision written by Judge Smith, the Court stated "CPL 720.20(1) says that, where a defendant is eligible to be treated as a youthful offender, the sentencing court 'must' determine whether he or she is to be so treated. We hold that compliance with this statutory command cannot be dispensed with, even where defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request." In reaching its decision the Court expressly overruled its prior decision in *People v. McGowen*, 42 NY 2d 905 (1977). Judge Smith was joined in the majority by Chief Judge Lippman and Judges Rivera and Abdus-Salaam. Judge Graffeo concurred in the result but disagreed with the majority to the extent that she felt that a defendant should be allowed to expressly waive youthful offender status. Judges Read and Pigott dissented. The dissent argued that the Court's previous decision in *McGowen* was correct and that nothing had changed except the composition of the Court.

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 last few months of the current term. These cases are summarized below. The Court, as it was concluding its June session before heading toward the summer recess, also issued decisions in several cases which involved controversial national issues such as voting rights, affirmative action and gay marriage. These cases are also briefly summarized for our readers.

McQuiggin v. Perkins, 133 S. Ct. 1924 (May 28, 2013)

In a 5-4 decision, the United States Supreme Court held that a prisoner who presents credible evidence of his innocence may overcome a procedural barrier that he waited too long. The federal statutes involving habeas corpus petitions by state prisoners dictate that a petition to the federal courts must be brought within one year from the time he is convicted. The five-Judge majority, in an opinion written by Justice Ginsburg, held however that barring someone who has a credible claim of innocence from filing a habeas petition would be a miscarriage of justice. The miscarriage of justice exception adopted by the Court applies to a severely confined category, to wit: cases in which new evidence shows that it is more likely than not that no reasonable juror would have convicted the petitioner. In the case at bar, a Michigan prisoner serving a life term for murder came forward with sworn statements from three witnesses who said another man was the murderer. Joining Justice Ginsburg in the majority ruling were Justices Kennedy, Sotomayor, Breyer and Kagan. Justice Scalia issued a vigorous dissent, in which he was joined by Chief Judge Roberts and Justices Thomas and Alito. The dissenters argued that Congress was specific in writing a one year limitation into the Statute and that the Court's exception was a flagrant breach of the principle of separation of powers.

Maryland v. King, 133 S. Ct. 1958 (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 decided the issue in a 5-4 vote which reflected the apparent division which appeared during oral argument. The five-Judge majority, in a decision written by Justice Kennedy, held that taking and analyzing a cheek swab of the arrestee DNA is like fingerprinting and photographing, and is a legitimate police booking procedure that is reasonable under the Fourth Amendment. The ruling therefore upheld the Maryland law allowing DNA swabbing of police arrested for serious crimes. Justice Kennedy was joined in his opinion by Chief Justice Roberts and Justices Thomas, Alito and Breyer. Justice Scalia issued a vigorous dissent which was joined in by Justices Kagan, Sotomayor and Ginsburg. The division in the Court reflected an unusual 5-4 split, with Justice Breyer, traditionally a member of the liberal bloc, joining the conservative grouping. Justice Scalia, on the other hand, a usual member of the conservative wing, sided with the Court's more liberal members.

Peugh v. United States, 133 S. Ct. 2072 (June 10, 2013)

In a 5-4 decision, the United States Supreme Court determined that sentences imposed under current guidelines violate the Ex-Post Facto Clause if they lead to a higher range than guidelines which are in effect at the time of the offense. The majority opinion was written by Justice Sotomayor and was joined in by Justices Kagan, Ginsburg, Breyer and Kennedy. Justices Thomas, Scalia, Alito and Chief Justice Roberts dissented.

Arizona v. Inter Tribal Council of Arizona, 133 S. Ct. 2247 (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 was 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 had to decide whether the state law conflicted 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 had ruled the Arizona law to be unconstitutional, and on June 17, 2013, the United States Supreme Court issued its ruling, upholding the Circuit Court determination. In a 7-2 ruling, the majority, in a decision written by Justice Scalia, held that the federal law requiring states to accept and use a voter form displaced the 2004 Arizona law which required various kinds of proof of citizenship. Arizona thus may not require documentary proof of citizenship from people seeking to vote in federal elections. The Court concluded that the federal government has the dominant role when it comes to national issues, such as how federal elections are conducted, and a state statute cannot conflict with the federal pronouncement. Justices Thomas and Alito dissented.

Editor's note: In our last issue, the above case was mis-cited as* Arizona v. United States. *The correct title is as indicated above.

Salinas v. Texas, 133 S. Ct. 2151 (June 17, 2013)

In a 5-4 decision, the United States Supreme Court held that crime suspects need to speak up if they want to invoke their legal right to remain silent during an investigation. The five-Judge majority ruled that silence is not sufficient and that a Defendant must affirmatively indicate his refusal to answer any further questions. In the case at bar, the Defendant was brought to the police station and questioned. He answered police questions in the interview until they asked him whether his shotgun at home would match the shells at the scene. At that point the Defendant became silent. At the trial the prosecutor told the jury that an innocent man wouldn't have remained silent. He could have said, "What are you talking about, I didn't do that, I wasn't there." The Supreme Court majority found that the prosecutor had committed no constitutional violation. The majority ruling was written by Justice Alito, and was joined by Justices Kennedy, Scalia, Thomas and Chief Judge Roberts. The dissenters consisted of Justices Breyer, Kagan, Ginsburg and Sotomayor.

The Supreme Court ruling appears to be contrary to settled New York law that the prosecution cannot comment upon the Defendant's exercise of his right to remain silent, and it is unclear whether the new Supreme Court ruling will have any effect on New York trials.

Alleyne v. United States, 133 S. Ct. 2151 (June 17, 2013)

In a 5-4 decision, the United States Supreme Court held that Judges may not increase a mandatory prison term when sentencing defendants unless the facts justifying the increase have been found by a jury. In an opinion by Justice Thomas, the majority held that any fact that increases mandatory minimum sentences for a crime is an element of the crime and not a sentencing factor, and thus it must be submitted to a jury. The Court's decision overruled the case of *Harris v. United States*, 536 U.S. 545. In the case at bar, the finding of the sentencing court as to whether the Defendant had brandished, as opposed to merely carrying, a firearm in connection with a crime of violence was an element of a separate aggravated offense that had to be found by the jury. As a result of the sentencing court's action, the Defendant's mandatory minimum term was raised from 5 to 7 years. In a surprising move, Justice Thomas joined the liberal members of the Court in issuing the Court's ruling. Justices Roberts, Alito, Kennedy and Scalia dissented.

Fisher v. University of Texas at Austin, 133 S. Ct. 2411 (June 24, 2013)

In another case which is of significance to the legal profession, as well as the public at large, the Court heard oral argument on October 10th in *Fisher v. University of Texas at Austin*. This case involved 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 were 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 was rendered on June 24, 2013, at the end of the Court's June session. The Court, in a 7-1 decision, sent the case back for further judicial review and told the lower Court to apply strict scrutiny, the toughest judicial evaluation of whether a government's action is allowed. The Court in effect postponed any definitive determination on the question of whether all types of affirmative action programs should be terminated. The Court in recent years has indicated it was moving in that direction and many observers felt that the Court would issue some type of clearer decision in the *Fisher* case. Justice Kennedy issued the majority ruling and stated, "A university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context; the benefits of a student body diversity that encompasses a…broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Justice Ginsburg dissented and indicated that the lower courts in Texas had already performed the tasks the Supreme Court outlined and that remitting the matter back for further

review was merely avoiding a final determination on the issue. Justice Kagan took no part in the decision.

Shelby County, Alabama v. Holder, 133 S. Ct. 2612 (June 25, 2013)

In early November, the United States Supreme Court agreed to hear an important voting rights case which involved striking down part of the landmark Voting Rights Act which still required 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 allowed the entire Supreme Court to once again review the issue. Since Congress recently extended the Voting Rights Act and its pre-clearance rules for another 25 years, any Supreme Court ruling involved 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 were expecting a close vote when a decision was reached. In fact, when the Court issued its final determination on June 25, 2013, the ruling involved a 5-4 vote. The majority held that a key part of the Voting Rights Act was invalid, and that various states and counties could no longer be subject to federal oversight of election law changes. The Court held that the criteria which Congress used to support the Act dealt with the situation as it existed between 1965 and 1975, and did not reflect the racial progress which has occurred in the nation since that time.

The majority decision was written by Chief Judge Roberts, who stated, "In 1965, the states could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were." Judge Roberts was joined in the majority by Justices Scalia, Kennedy, Thomas and Alito. Justices Ginsburg, Breyer, Sotomayor and Kagan dissented. Although the Voting Rights Act had primarily applied to the southern states, there are several counties throughout the country, including in New York, which were covered by its provisions. In New York, unknown to many New Yorkers, Brooklyn and some other parts of the State were covered by the pre-clearance requirements. The Court's decision was highly controversial and was immediately attacked by several civil rights organizations. Whether Congress will be in a position to resurrect the requirements of the Voting Rights Act, given the current legislative stalemate, remains to be seen.

Hollingsworth v. Perry, 133 S. Ct. 2652 (June 26, 2013)

United States v. Windsor, 133 S. Ct. 2675 (June 26, 2013)

In late November, the United States Supreme Court agreed to hear two cases involving aspects of gay marriage. One case involved the issue of whether the federal government could withhold benefits from someone who has been married in a state where gay marriage became lawful or whether such benefits were barred under the federal Defense of Marriage act. The second case involved a dispute over whether California's Proposition 8, which the voters adopted in 2008, and which banned gay marriage, was constitutional. Briefs on both sides were filed in the case, and the Court announced in early January that it would 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 which way to vote on the issues. On June 26, 2013, toward the very end of the Court's June session beginning the summer recess, the Court issued its rulings in both controversial cases.

In *United States v. Windsor*, the Supreme Court, in a 5-4 decision written by Justice Kennedy, found that the Federal Defense of Marriage Act was unconstitutional. Justice Kennedy in his decision declared that under the DOMA Statute, same-sex married couples had their lives burdened by reason of government decree and were denied the equal protection of the law. The ruling has now made it possible for couples in 12 States that allow gay marriage to receive a host of federal benefits that they were previously denied. Justice Kennedy was joined in his decision by Justices Ginsburg, Breyer, Sotomayor and Kagan. Chief Judge Roberts and Justices Alito, Scalia and Thomas dissented.

In the California case, *Hollingsworth v. Perry*, the Supreme Court majority, in another 5-4 ruling, did not specifically address the merits of the case, but held that on procedural grounds the defenders of the State's gay marriage ban did not have the right to appeal lower court rulings, striking the ban that was passed in 2008. The Court's procedural ruling basically left in effect the federal district court determination that the passage of Proposition 8 was unconstitutional. The procedural course taken by the Court in *Hollingsworth* resulted in some unusual groupings within the Court. Thus, the majority five consisted of Chief Justice Roberts and Justices Scalia, Ginsburg, Breyer and Kagan. The dissenters, who apparently wished to

reach the merits of the issue even though they may have been on different sides of the matter, consisted of Justices Kennedy, Thomas, Alito and Sotomayor. The issue of gay marriage continues to be a controversial one and it appears that future litigation will emerge as a result of the most recent Supreme Court decisions.

PENDING CASES

Greece v. New York

In late May, 2013, the Supreme Court granted certiorari in a case involving the issue of Church-State separation. The case in fact involves the town of Greece in upstate New York, near the City of Rochester. In that town, the town council begins its monthly meeting with a prayer from a Christian Pastor. The U.S. Circuit Court of Appeals last year ruled that the town had violated the issue of church and state by this practice, because the town favored Christianity to the exclusion of other faiths. In the past, the Supreme Court has upheld a state legislature's practice of beginning its session with a non-denominational prayer. The Court, to date, has ruled that "to invoke divine guidance on a public body entrusted with making laws did not violate the First Amendment's prohibition on an establishment of religion." In the case at bar, the narrow issue presented is whether the town's practice has improperly favored one religion over others. Lawyers for the town of Greece had appealed the Second Circuit ruling and the Supreme Court has now ruled that it will hear the case in the Fall at the start of its next term.

Cases of Interest in the Appellate Divisions

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

People v. Sims (N.Y.L.J., May 7, 2013, pp. 1 and 6)

In a 3-2 decision, the Appellate Division, Fourth Department, reversed a suppression of a gun seized from the Defendant and reinstated the use of the evidence. In the case at bar, the Defendant had been observed by a police officer emerging from an alleyway riding a bicycle. The Defendant stared at the officer and eventually crashed his bicycle into a porch. The police approached the Defendant, requested identification and asked him if he lived in the area. The Defendant stated that he did not have any identification but reached into his pocket at least 3 times despite the officers request not to do so. At some point when the Defendant again put his hand into his pocket, the officer grabbed the Defendant's hand from the outside of the pocket and felt an object he thought was a small gun. The Defendant was subsequently searched and the gun recovered. The majority of the Appellate Division, consisting of Presiding Justice Scudder and Justices Valentino and Martoche, found that the arresting officer had reasonable suspicion to believe that the Defendant posed a threat to his safety at the time he grabbed the Defendant's hand. Justices Fahey and Sconiers dissented, stating that the police action violated the principles set forth in *People v. DeBour*, 40 NY 2d 210 (1976). The sharp division in the Appellate Division on the issue makes it highly likely that the issue will eventually be decided by the New York Court of Appeals.

People v. Garrett (N.Y.L.J., May 16, 2013, pp. 1 and 10)

In a unanimous decision, the Appellate Division, Second Department, ordered a hearing to determine whether prosecutors knew that a Detective who took a confession from a murder suspect faced a civil suit at the same time for coercing a confession from another Defendant in an unrelated case. The Appellate panel ordered the new hearing so that the trial judge could decide whether prosecutors at the Defendant's murder trial violated their obligations under *Brady v. Maryland*. The Appellate Court determined that in the case at bar, the credibility of the Detective who obtained the Defendant's confession was of central importance in the case, and non-disclosure regarding the civil suit could have been of material importance.

People v. Johnson (N.Y.L.J., May 20, 2013, pp. 1 and 6)

In a unanimous ruling the Appellate Division, Third Department, held that a Detective violated the Defendant's right to remain silent by continuing to question him about a killing after the suspect repeatedly stated he was through answering questions. The panel stated that a Defendant's invocation of the right to silence must be scrupulously honored once it is stated in an unequivocal and unqualified manner. Despite its ruling on the right to remain silent and its determination that portions of a videotaped interrogation should have been suppressed, the Appellate Division nonetheless affirmed the Defendant's conviction utilizing the harmless error doctrine. The panel concluded that there was overwhelming evidence of the Defendant's guilt, and that the errors which occurred would not require a new trial.

People v. Blackwood (N.Y.L.J., May 24, 2013, pp. 1 and 6)

In a unanimous decision, the Appellate Division, First Department affirmed the rape conviction of a Defendant who was accused of putting drugs in the victim's drink. The Court upheld the conviction, even though it found that the trial judge had improperly allowed some testimony about the man's similar conduct on related occasions. The appellate panel concluded that even leaving aside the improper testimony, there was overwhelming justification for the jury's verdict of guilty of rape in the second degree.

Gorman v. Rice (N.Y.L.J., May 28, 2013, p. 4)

In an Article 78 proceeding, the Appellate Division, Second Department, unanimously reversed a lower court's order barring a re-trial for a woman facing drunken driving charges. In the case at bar, a Nassau County Judge had declared a mistrial but had later rescinded his action. The Defendant claimed that double jeopardy had attached and had moved for dismissal. The Appellate Division, however, determined that the Defendant's right against double jeopardy was not violated by the scheduling of a second trial. The Court ruled that the mere declaration of a mistrial does not terminate a criminal trial and thereby divests the trial court of the authority to rescind the declaration.

People v. Sheehan (N.Y.L.J., May 30, 2013, p. 1)

In a 4-1 decision, the Appellate Division, Second Department, upheld the conviction and sentence of a woman who killed her husband and claimed that she had been violently abused throughout her 21-year marriage. The trial became a test of the battered woman syndrome, with the Defendant being acquitted of second degree murder charges but being found guilty of gun possession. The appellate panel determined that the verdict was not con-

trary to the weight of the evidence and that the sentence of five years in prison was appropriate and not excessive. Justice Balkin dissented to the extent that he would have reduced the sentence imposed in the interest of justice.

People v. Barnes (N.Y.L.J., May 31, 2013, p. 5)

In a unanimous decision, the Appellate Division, First Department, concluded that a Defendant was denied the effective assistance of counsel and ordered a new trial. The Defendant was convicted of selling drugs after his attorney falsely told the jury that bags of drugs found on his person did not match the bags bought by an undercover officer. Defense counsel, after allegedly inspecting the bags, had told the Defendant that the bags did not match and the Defendant made such a claim during his testimony. Defense counsel also advanced this argument during his summation. In fact, the bag in which the drugs had been sold was folded up into another bag and when the jury requested to view the bag in question the sold bag did in fact look like the recovered bags. Defense counsel, an 18-B attorney, then advised the Court that he was seeing the bag for the very first time, and stated he would not have made the argument to the jury if he had known that the bags matched. The appellate panel concluded that defense counsel's actions in the case at bar amounted to ineffective assistance. It concluded that defense counsel acted unreasonably when arguing during his summation that the evidence bags containing the drugs which the People alleged were purchased from Defendant were not the same or similar to those recovered from the Defendant. The panel said that defense counsel "without taking any steps to confirm his theory, cavalierly declared that the purchased drugs and the recovered drugs did not match."

People v. Turner (N.Y.L.J., June 18, 2013, p. 4)

In a 3-2 decision, the Appellate Division, Fourth Department, upheld a guilty plea where the Defendant was not apprised during the plea allocution that the sentence would include post-release supervision. In the case at bar, there was no mention of post-release supervision when the Defendant pleaded guilty to attempted murder in the second degree. The issue arose for the first time at sentencing when the Judge explained to the Defendant that she also faced five years of supervised release after completing her 15-year prison sentence. The three-Judge majority held that the Defendant's rights were not violated because she did not request a withdrawal of her plea at the sentencing and her failure to do so constituted a waiver. The three-Judge majority consisted of presiding Justice Scudder and Justices Peradotto and Valentino. Justices Sconiers and Martoche dissented. Based upon the numerous cases which have arisen regarding the issue of post-release supervision, it appears almost certain that this case will eventually be determined by the New York Court of Appeals.

People v. Sheppard (N.Y.L.J., June 28, 2013, p. 4)

In a unanimous decision, the Appellate Division, Third Department, remanded the matter to the County Court for resentencing. The appellate panel concluded that the trial judge had committed error by allowing the mother of the victim of a fatal shooting to address the Court before the sentencing of a Defendant who had been acquitted by a jury of manslaughter but convicted of third degree criminal possession of a weapon. The Appellate Court concluded that there was no victim in the crime for which the Defendant was convicted, and that the mother did not represent a crime victim entitled to address the Court. During her comments, the mother had described the Defendant as a killer who got away with murder. Under the circumstances, the appellate panel concluded that allowing the statement of the mother was improper and could have influenced the Court in imposing the 3½ to 7 year maximum prison term for weapons possession. Under the circumstances a resentencing was required.

People v. Bush (N.Y.L.J., July 2, 2013, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Third Department, reversed a defendant's conviction and ordered a new trial. The Court found that the Public Defender who represented the Defendant had failed to provide effective assistance of counsel. The Court noted that defense counsel had not provided an opening statement, conducted cursory cross-examination, called no defense witnesses, and offered only a short summation. The panel concluded that although the Public Defender was presented with a difficult case to defend, the cumulative effects of his errors deprived the Defendant of meaningful representation.

People v. Morales (N.Y.L.J., July 9, 2013, pp. 1 and 8)

In a unanimous decision, the Appellate Division, Second Department, granted a Defendant's writ of error *coram nobis* and dismissed the indictment on the grounds that both trial and appellate counsel had failed to challenge numerous serious errors by the trial Judge and that therefore the Defendant had been denied the effective assistance of counsel. The appellate panel pointed to serious errors committed by the trial Judge including the failure to provide adequate instructions on major issues of the law such as the burden of proof and the reasonable doubt standard. Trial counsel had evidently failed to raise these issues, and appellate counsel also failed to raise several issues on appeal. After the Defendant had served 13 years in prison, the Second Department, in its second look at the Defendant's conviction, determined that the seriousness of the errors required a dismissal of the conviction in question.

***People v. Webb* (N.Y.L.J., July 10, 2013, pp. 1 and 9)**

In a 3-2 decision, the Appellate Division, Fourth Department, determined that a Defendant was improperly convicted of first degree criminal contempt. The three-Judge majority concluded that the evidence did not establish that the Defendant made the calls intending to harass the woman, nor did it establish that the calls had no legitimate purpose. The Defendant had violated an order of protection and had repeatedly telephoned his ex-girlfriend, cursing her on numerous occasions. The majority concluded that the evidence only supported a misdemeanor charge of second-degree contempt. The majority opinion consisted of Justices Lindley, Sconiers and Whalen. Justices Scudder and Peradotto dissented and voted to uphold the conviction.

***People v. Tohom* (N.Y.L.J., July 11, 2013, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Second Department, upheld a Defendant's conviction and determined that a trial court had not abused its discretion when it allowed a comfort dog to accompany a testifying crime victim. The panel concluded that the victim needed emotional support, and that the Court was within its discretion to allow the dog in the Courtroom. The issue was apparently one of first impression. The appellate panel relied upon Executive Law Section 642-a, which provides that judges should be sensitive to the psychological and emotional stress a child witness may undergo while testifying. Under the circumstances, the presence of the comfort dog in the Courtroom was acceptable.

***People v. DeLee* (N.Y.L.J., July 23, 2013, pp. 1 and 7)**

In a 4-1 decision, the Appellate Division, Fourth Department, reversed a Defendant's conviction and dismissed a manslaughter charge on the grounds that the jury verdict convicting him of manslaughter as a hate crime but acquitting him of plain manslaughter was legally inconsistent. The four-Judge majority stated that since all of the elements of basic first-degree manslaughter are included in first-degree manslaughter as a hate crime, a not guilty verdict on the former precludes a guilty verdict on the latter. The majority opinion consisted of Justices Scudder, Lindley, Valentino and Martoche. Justice Peradotto dissented, and argued that the jury must have obviously found the Defendant committed the acts necessary to sustain the hate crime conviction but apparently thought that the two manslaughter counts were mutually exclusive. Judge Peradotto argued that the jury's verdict made perfect sense in light of the Court's instructions and complied with the letter and spirit of the law. The split in the Court and the interesting nature of this case provides for a reasonable possibility that it will eventually be decided by the New York Court of Appeals. The District Attorney in Onondaga County has already indicated that he will see leave to appeal.

For Your Information

New Regulations Regarding Pro Bono Service

In early May, it was reported that new regulations are now in effect regarding the obligation of New York attorneys with respect to pro bono services. New York attorneys will now be required to disclose on their biennial registration forms how many pro bono hours they provided and the amount of financial contributions they made to pro bono programs during the two previous years. The new reporting requirements were approved by Chief Judge Lippman and the four presiding Justices of the Appellate Division's four departments and are effective as of May 1, 2013. The new requirements are included in part 118 and rule 6.1 of the Rules of Professional Conduct. Judge Lippman indicated that the new reporting requirements were designed to have lawyers improve their pro bono contributions either through direct service or financial payments. The new rules were evidently instituted without much prior knowledge or input from members of the legal community, and some Bar Association Presidents expressed concern that the input and collective ideas of the state attorneys were not obtained before the reporting requirements were implemented. In late June, newly elected New York State Bar Association President Schraver forwarded a letter to Chief Judge Lippman strongly opposing the mandatory reporting requirement. As a result of the letter, a meeting was held in late July between Chief Judge Lippman, President Schraver and other representatives from the NYSBA. It was reported that there was a frank exchange of views and concerns, and an agreement was reached to continue to discuss the matter and to meet again at a future occasion. We will report on any new developments regarding this issue.

New Monetary Awards Made Available to Criminal Legal Services

In early May, Chief Judge Lippman announced that the State's Indigent Legal Services Board will be making $12 million in awards for some 25 counties to provide representation to poor criminal defendants during their first court appearances. Chief Judge Lippman declared that the grants to be awarded will move New York closer to compliance with the U.S. Supreme Court's mandate in *Gideon v. Wainwright*. The counties to receive the grants were recently announced and most of them involve upstate and rural counties.

Law Day Activities

Law Day activities were held by local Bar Associations and the Court system throughout the State in early May. This year's Law Day theme was "Realizing the Dream: Equality for All." The *New York Law Journal*, as in the past, published its Law Day specials featuring messages from various court officials and Bar Association leaders. The Law Day messages were printed in the May 1, 2013 edition of the *Law Journal*. Heading the various messages was an article by Chief Judge Lippman "Marking 50 years of *Gideon*." The message from Chief Administrative Judge A. Gail Prudenti dealt with the topic, "The Pursuit of Justice: A Constant Striving."

Census Bureau Releases Voter Turnout Trends During 2012 Presidential Election

A recent analysis conducted by the U.S. Census Bureau regarding voter turnout in the 2012 election indicated some significant trends in voting patterns. First of all, it was revealed that African-Americans increased their voter turnout so that 66.2% of eligible black voters cast their ballots in 2012, which was up from 64.7% in 2008. Thus in 2012, the number of blacks who voted increased by 1.7 million. The increase in black voters was most significant in the Midwest and Southeastern portions of the country. The number of black voters has increased dramatically over the last 15 years, since as recently as 1966, black voter turnout was significantly lower than that of other ethnic groups. The large increase in the number of black voters is listed as a key factor in securing the reelection of President Obama.

White voters, on the other hand, had a lower turnout than in 2008. Thus, white turnout in 2012 was 64.1%, which dropped from 66.1% four years earlier. The number of white voters in 2012 dropped by 2 million. The number of Hispanic voters also dropped somewhat from 2008. Latino turnout in 2012 amounted to 48% of the eligible Hispanic voters, which was down from 49.9% in 2008. Despite the nationwide drop in Hispanic voters in 2012, Hispanic voters in Florida increased and more than 62% of Hispanic citizens in Florida voted in the 2012 Presidential election. The turnout by Asian-American voters was basically unchanged from 2008, and remained at approximately 47%. The new census statistics reveal important voter trends which are occurring in the nation, and provide guidance for future elections.

New Statistics Indicate Dramatic Drop in Gun Homicides

A recent study by the Pew Research Center indicates that gun homicides have dropped dramatically in the United States since their peak in 1993. A study released by the U.S. Bureau of Justice Statistics also confirmed that gun-related homicides dropped from 18,253 in 1993 to 11,101 in 2011. The Pew Center report found that the number of gun homicides per 100,000 people in the United States fell from 7 in 1993 to 3.6 in 2010. Both studies indicated that despite the dramatic decrease in gun homicides, about 70% of all homicides are committed with firearms, mainly handguns.

Home Prices Continue to Rise

New statistics indicate that U.S. home prices as of the end of March had risen 10.5% over the same period last year. Annual home prices have now increased for 13 straight months, with prices increasing in 46 States over the last year. The greatest price gain has been in Nevada, which has experienced a 22% gain, followed by California and Arizona. As of the end of April, the median price of a home was listed at $192,800, a jump of 11% from last year, and the highest price in five years. Home prices experienced their peak in April 2006, and during the next five years experienced substantial declines, in some areas losing 42% of their value. The steady increase over the last several months has indicated that home prices may be on the rebound and that the real estate market may be a major factor in the next several months in reviving the U.S. economy. As of the end of April, it was also revealed that sales of U.S. homes have reached their highest level in 3½ years, to a seasonally adjusted annual rate of 4.97 million. Additional statistics provided for May indicate that U.S. home prices jumped 12.2% in May from a year ago, the most in 7 years. Home sales have risen 9.7% in the past 12 months, and the housing market is still improving. June figures for sales of new homes also showed an 8.3% increase, with the median sales price up 7.4% from a year ago.

Federal Judiciary Requests Emergency Funds

At the end of May, the U.S. Judicial Conference sent an emergency communication to the White House Office of Management and Budget and requested emergency funding in order to avoid pending furloughs and reduction in services. The letter indicated that the federal Judiciary does not have the budget flexibility to absorb the large mandatory budget cuts that have been ordered with respect to the court system and federal public defender organizations. An emergency appropriation of $73 million was requested. The emergency funding is being requested in order to replace part of the $350 million overall cut which the federal courts were asked to absorb as part of last year's sequestration order. The Administrative Office of the U.S. Courts clearly stated that "The judiciary is confronting an unprecedented financial crisis that could seriously compromise the constitutional mission of the United States Courts." Whether the requested emergency aid is provided remains to be seen.

Poverty in Suburbs Continues to Rise

Although there has been a longstanding view that the nation's poor reside in the city rather than the affluent suburbs, recent statistics indicate that poverty in the suburbs has now exceeded poverty in the Cities. A survey by the Brookings Institution indicates that during the past decade, the number of poor people living in the suburbs has surged 67%. Although the suburbs still have a smaller percentage living in poverty than do cities, the sheer number of poor people scattered in the suburbs has jumped beyond that of the cities. Currently, the percentage of poor people living in the suburbs is estimated to be about 12%, while the urban average is placed at 22%. The Brookings study defined poverty using the federal figure of $22,350 for a family of four. The large increase of poverty in the suburbs is attributed to several years of economic recession and a severe drop in housing values.

Raising the Age of Criminal Responsibility

Chief Judge Jonathan Lippman has been on a major campaign to increase the age of criminal responsibility and is pushing legislation to accomplish that purpose. In the recent issue of the *State Bar News*, Mark Mahoney, the Associate Director of Media Services for the New York State Bar Association, published a detailed and information article regarding the issue. The article appeared in the May / June 2013 issue at page 26. The article is recommended for reading by our Section members.

Raising the Retirement Age for Members of the Judiciary

During the last several years, there has been a strong movement in New York to raise the retirement age for members of the judiciary. The current retirement age is 70 for most Judges, with the possibility of extensions up to the age of 76 for some. Recent legislation which has been passed by the State Legislature may allow for a constitutional amendment to appear on a statewide ballot. Somewhat differing bills had been filed in the State Legislature regarding the retirement age, and it was unclear whether the voters would have a chance to decide the issue this year or in the 2015 election. At the end of the legislative session, however, the legislature passed a bill raising the retirement age for Supreme Court and Court of Appeals Judges from 70 to 80, with the item to be on the November ballot.

Working Mothers Now Top Earners in 40% of Households

A recent study released by the Pew Research Center reveals that a record number of American women are now the sole or primary breadwinners in their families. Mothers now keep finances afloat in 40% of households with children, up from just 11% in 1960. While most of these families are now headed by single mothers, a growing number are married mothers who bring in more income than their husbands. The trend is being driven by long-term demographic changes, including higher rates of education and labor force participation. Today, women are more likely than men to hold bachelor's degrees and they make up nearly half of the American workforce. In all, 13.7 million U.S. households with children under age 18 now include mothers who are the main breadwinners. In issuing the new study, the report concludes that the changes which have occurred are just another milestone in the dramatic transformation we have seen in family structure and family dynamics over the past 50 years.

Prisoners Continue to Receive Improper Government Payments

In another example of governmental monies being improperly spent on convicted felons, the State of New Jersey recently revealed that more than $23 million had been paid to 13 incarcerated State employees who improperly received sick leave payments. One inmate had also received nearly $40,000 in unemployment payments for more than a year while he was incarcerated in a drug-related offense. The audit released by the Office of the State Controller in New Jersey concluded that more than 20,000 incarcerated individuals had received some type of improper payment during the audit period. Improper payments to incarcerated individuals have included food stamps, welfare payments and Medicaid coverage. The latest revelation involving New Jersey is just another example of improper governmental payments being made to ineligible persons, and highlights the lack of proper oversight in many governmental agencies.

CEO Payments Continue to Rise While Pay for U.S. Workers Stagnates

A recent analysis by the Associated Press indicates that during the last three years, payments to various corporate executives have continued to rise. The head of a typical large public company made $9.7 million in 2012, a 6.5% increase from a year earlier. The increases in CEO pay occurred while the pay for all U.S. workers rose only about 1.5%, not even enough to keep up with inflation. The median wage in the United States is now placed at about $39,900 as of the end of 2012. Average wages have stagnated across the entire national economy, and according to recent Bureau of Labor Statistics, average weekly wages have even declined in some industries. The continued large increases in CEO pay while worker wages have fallen have led to the call for reform and for shareholders to take a more active role in limiting unjust compensation.

Acting Supreme Court Justices

The Office of Court Administration recently announced that it may institute tighter controls over which Judges are appointed as Acting Supreme Court Justices. Over the last few years there has been a dramatic increase in the number of lower court Judges who have been designated as Acting Supreme Court Justices. Currently, there are nearly 300 Judges who are listed in that category, and last year some $3.76 million was allocated to cover the higher judicial pay for these positions. Judges who are designated Acting Supreme Court Justices are entitled to a salary of a Supreme Court Judge, $167,000 annually, and their law clerks and secretaries are also entitled to higher pay.

A committee appointed by Chief Administrative Judge A. Gail Prudenti recently called for tighter controls over which judges are offered the Acting Supreme Court Justice position, and that the court system should adopt long-term goals of reducing the number of Acting Supreme Court Justices and more efficiently utilizing those who are designated to the higher position. The report further concluded that the selection process has grown sloppy, that the acting Justices are not necessarily deployed where needed, and that with the routine appointments the supply has often outstripped demand in certain regions of the State.

More Sports and Physical Activity Recommended for Kids

A recent report by the Institute of Medicine is recommending that schools provide for at least 60 minutes of physical activity each day for students, and that physical education become a course subject. The report indicates that currently only about one-half of the nation's youngsters are getting at least an hour of vigorous or moderate-intensity physical activity each day. The report expressed concern that in recent years many school administrators have reported sharp cutbacks in the time allowed for physical education and sports programs. The rise of childhood obesity has led to concern that the need for physical activity has been ignored. Childhood obesity currently involves about 17% of children between the ages of 2 and 19, and the recent report emphasizes that physical activity should be placed among those programs with a priority listing and that physical education should be adopted as a course subject. The report concludes that state and local officials should find ways to give children more physical activity in the school environment.

Federal Prosecutors to Retry Former State Senator Joseph Bruno

Although former State Senate Majority Leader Joseph Bruno is now 84 years of age and his original conviction was in 2009, federal prosecutors have determined that they will seek to retry him following the overturning of his original conviction by the Appellate Courts. Prosecutors have decided to proceed with a second trial based on a theft of honest services theory which is different from that ruled invalid by the U.S. Supreme Court in *United States v. Skilling*, 430 S. Ct. 2896. Defense attorneys are disputing the prosecution efforts for a retrial in the Appellate Courts, and oral argument on Bruno's claim of double jeopardy was recently heard before the U.S. Court of Appeals for the Second Circuit. That Court in late August ruled that a new trial could proceed.

Increase in U.S. Violent Crime

Recent statistics released by the FBI indicate that violent crime in 2012 rose in the United States for the first time in 6 years. The increase was led by major crimes in large cities. Overall, the nation's violent crime rate was up by 1.2% in 2012. The largest increases in 2012 took place in cities with populations of between 500,000 and 1 million people, with violent crime rising by 3.7% in those areas. Murder rates went up dramatically in those same cities, with a 12.5% spike over last year. The nation's largest cities, those with more than 1 million people, also saw an increase in violent crimes, although at a more modest rate. The largest cities had a 1.4% increase in violent crime, including 1.5% for murders and 3.2% for rapes. The last year in which violent crime had risen nationally was in 2006, and it is hoped that the increases in 2012 are not an indication of things to come.

New Statistics on Population Demographics

New figures released by the U.S. Census Bureau as a result of the 2012 census reveal some major shifts in population demographics in the United States. For example, it was recently revealed that according to recent trends, whites younger than five years of age are now a minority in the nation. In addition, non-Hispanic whites last year recorded more deaths than births. These results clearly indicate that the total white population will be a minority in the United States approximately by the year 2043. The census figures also indicated that rural counties in the U.S. are losing population for the first time ever because of waning interest among baby boomers in moving to far-flung locations for retirement and recreation. The census indicates that retirees are opting to stay put in urban areas. Currently about 46.2 million people, or 15% of the U.S. population, reside in rural counties which spread across 72% of the nation's land area.

In a related development, the United Nations recently reported that the world's population, which is currently estimated at 7.2 billion, is expected to surpass 8 billion by the year 2025. Most of the growth is occurring in developing countries, and more than half is occurring in Africa. An interesting indication is that India's population is expected to surpass that of China's sometime around 2028, when both countries are expected to have populations of about 1.45 billion. India's population is expected to continue to grow in the coming years, while China's is expected to start decreasing after 2030.

Governor Cuomo Appoints Commission to Investigate Public Corruption in State Government

Due to the rash of criminal actions committed by public officials, now numbering over 30, Governor Cuomo announced in June that he is establishing a special commission to investigate public corruption. The Commission will be chaired by District Attorneys Katherine Rice from Nassau County and William Fitzpatrick from Onondaga County. The commission will also include some 30 members and special advisors from various areas of the Criminal Justice system. Included as a member is Seymour James, Jr., who is the Attorney in charge of criminal matters for the Legal Aid Society and is the Past President of the New York State Bar Association. The commission will work with Attorney General Schneiderman, and will have authority to investigate the different branches of State Government and refer misconduct cases for prosecution. It will also recommend changes in the law and ethics rules.

Consequences of Drug Law Reform

A recent report issued by Bridget Brennan, New York's Special Narcotics District Attorney, indicates that there has been a sharp decline in the number of defendants referred to treatment as part of diversion programs. The report indicated that four years after the legislature eliminated the last vestiges of the Rockefeller Drug Laws and opted for a less punitive and more rehabilitative approach to addiction, there has been a steady decrease in the percentage of defendants ending up in treatment. According to recent statistics only 6% of defendants sentenced last year were diverted to treatment compared to 12% in 2008. The number of drug offenders in state prison has also dramatically dropped during the last 17 years. In 1996, for example, the number of drug offenders in state prison amounted to 23,511. In 2012, this number had dropped to 6,811. The substance of the recent report was highlighted in an article in the *New York Law Journal* of July 8, 2013, at pages 1 and 7. Those of our readers wish-

ing to obtain further details on this issue are referred to that article.

Appellate Division Departments Face Shortage of Judges

The Appellate Division, Third Department, is down 33% of its allotment of Justices, and has been operating with four-judge panels rather than five-judge panels. The Court is currently operating with eight Judges out of a complement of twelve. In addition to the several openings currently existing in the Third Department, the other Appellate Divisions are also operating with judicial shortages. There have been repeated calls for the Governor to fill the existing vacancies in a more expeditious manner. One of the spots open in the Third Department has been vacant since the end of 2011. The First Department currently has three vacancies, the Second Department has four, and the Fourth Department is short two judges. It is hoped that the vacancies in the various Appellate Divisions will be filled before the Appellate Divisions conclude their summer recess and begin hearing cases again in the Fall.

Legislation Adopted to Give Judges Discretion Over Length of Probation Terms

At the end of the legislative session, a Bill passed which would give discretion to judges to establish the length of probation terms. Under the new legislation, judges would be permitted to impose probation terms of 3, 4 or 5 years for felonies, and of 2 or 3 years for misdemeanors. Under current law, probation for felonies must be at least 5 years, and for Class A misdemeanors at least 3 years. The new legislation is supported by the court system, and the District Attorneys Association, and it is expected that the Governor will sign the Bill sometime during the summer. Currently within the City of New York more than 15,000 persons are undergoing probation for felonies. It is hoped that the new legislation provides greater flexibility and a reduction in the number of probationers.

New Gun Law Survives Constitutional Challenge

The Appellate Division, Third Department, recently upheld the new gun law legislation which was passed last year. Several groups have mounted a constitutional challenge to the new law with regard to the procedures that were used to effectuate its passage. There are several legal challenges which have been raised regarding the new gun legislation, and it appears that further litigation on various aspects of the law will be forthcoming. We will keep our readers advised of developments.

U.S. Auto Production Falls to Second Place

Although the U.S. auto industry has seen a big improvement in its sales and auto production, recent figures released in a survey for the year 2012 reveal that the United States has fallen to second place and that the number one auto producer in the world is now China. China reported total production of automobiles of 19.2 million as more and more Chinese and members of other Asian nations enter the middle class and begin to buy automobiles. The U.S. is now in second place with auto production in 2012 of 10.2 million. Japan continues to occupy third place at 9.9 million. One nation which has made great strides in the last few years is Mexico, which in 2012 produced 3 million vehicles.

New Grants Available for Videotaping of Interrogations

In late July, Governor Cuomo announced that his administration, through the Division of Criminal Justice Services, is making available $1 million in video recording grants to various law enforcement agencies in order to expand the number of agencies that routinely record interrogations of suspects in major crimes. Currently, some sort of videotaping is being conducted by 345 law enforcement agencies in 58 of the state's 62 counties. The additional grant will allow additional enforcement agencies, particularly in several rural counties, to also participate in the videotaping program.

About Our Section and Members

Spring CLE Program

The Spring CLE Program entitled "Evidently Evidence III" was held on Saturday, May 4, 2013, at the State Bar Center in Albany, New York. The program covered such topics as "Dealing with Expert Witnesses," "Electronic Media Evidence," "Character Evidence," and "The Confrontation Clause." Panelists included Matthew J. Bova, Professor Michael J. Hutter, Robert S. Dean, and Alfred A. O'Connor. Some 50 members attended the program, and the event provided 4.5 CLE credits.

Section Chair Mark Dwyer Has Decision Published in *New York Law Journal*

Our Section Chair, Mark Dwyer, who is serving as an Acting Supreme Court Justice in Brooklyn, recently had a decision which he wrote discussed in the *New York Law Journal*. The decision was issued in the case of *People v. Santana*, and involved the matter of an unduly suggestive lineup. Judge Dwyer's decision was discussed in the June 10th issue of the *New York Law Journal* at pages 1 and 7.

Judge Kamins Discusses Search Warrants and Computers in *New York Law Journal* Article

Supreme Court Justice Barry Kamins, who is a longtime active member of our Criminal Justice Section and a frequent contributor to our *Newsletter*, recently had an article published in the *New York Law Journal*. Judge Kamins' article appeared in the *Law Journal* of June 3, 2013 at pages 3 and 8, and covered recent efforts by the New York Court of Appeals to deal with search warrants and computers in the age of modern technology. We recommend the article to our readers.

Upcoming Fall CLE Program

The Fall CLE Program, which will cover forensics, has been scheduled for October 25 and 26, with the meeting to be held at New York University Law School. Details regarding the program have been mailed to members.

The Criminal Justice Section Welcomes New Members

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

Irving Anolik
Simone N. Archer
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Daniel Berman
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Mehtab Kaur Brar
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J. Blake Byrd
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Persons interested in writing for this *Newsletter* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *Newsletter* are appreciated as are letters to the Editor.

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

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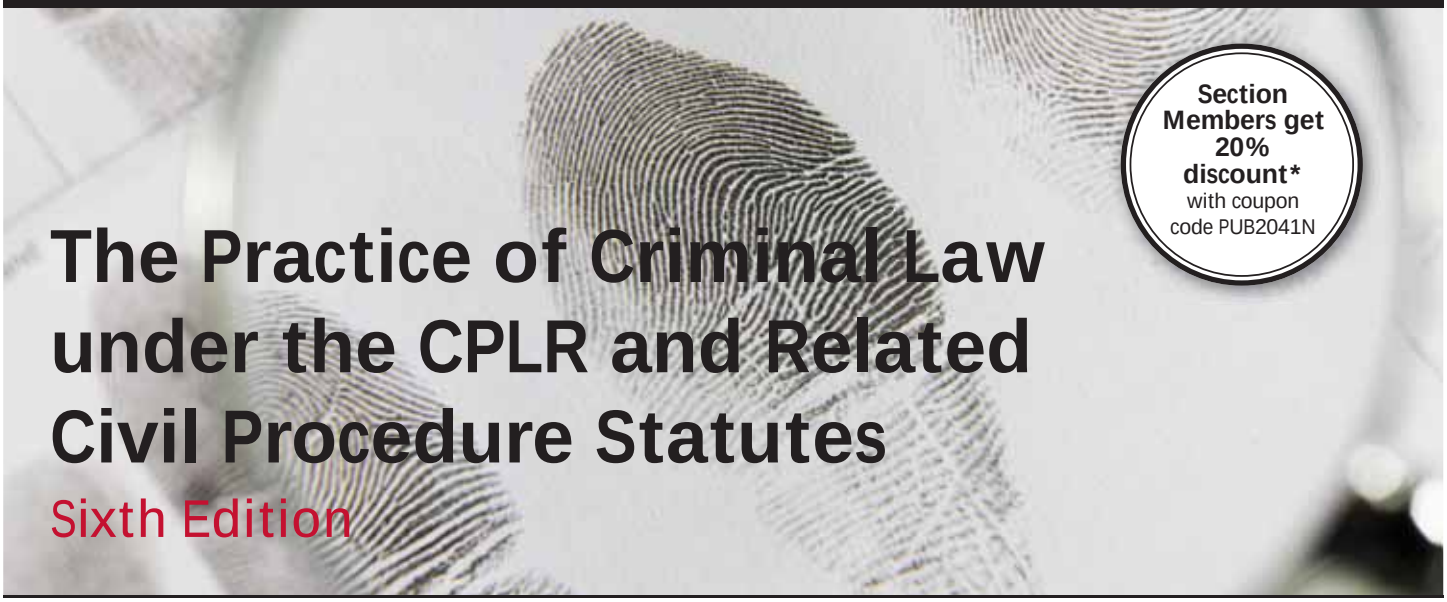

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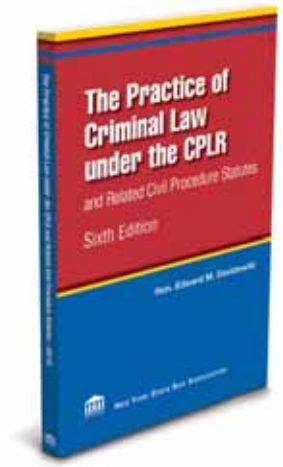

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