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Criminal Justice Section Annual Meeting

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Sealing

As I see it, sentencing defendants is a judge's toughest assignment. Not always, to be sure; most sentences are imposed after the parties agree to them in plea bargains, and judges rarely lose sleep over what term to impose in those cases. And occasionally a defendant convicted after trial for a serious crime spree will plainly deserve consecutive terms of incarceration even longer than the statutory sentencing caps will permit. No judge loses sleep in that kind of case, either.

But the sentencing of many defendants convicted after trial is much more difficult. What do you do, for example, with a seventeen-year-old from the proverbial wrong side of the tracks who teamed up with a buddy to push down a schoolmate and steal his cell phone? The defendant is guilty of Robbery in the Second Degree, a class C violent felony, and even as a first offender faces between three and one-half and fifteen years in prison. The kid appears before you on sentencing day, five feet nine inches tall, weighing 160 pounds, and scared to death—with his grandmother crying in the back row. Do you send him to state prison for years? Really? To what purpose?

There is, however, an "out." The defendant, remember, is seventeen. So you have the option of adjudicating him a youthful offender. And under the Y.O. rules, you can sentence him as if he were a class E felony offender. Maybe you give him thirty days at Rikers Island concurrent with five years' probation, with educational and vocational training mandates.

The bonus: the kid has no "conviction" and can enter the adult world with hopes for decent employment. And in the real world, judges do grant youthful offender status precisely to keep the defendant's employment options open. It simply makes no sense to saddle young defendants with a legal disability that will prevent them from getting work.

So the judge can sleep soundly again—but only until the next case. Our next defendant committed his class C violent felony at age nineteen, and is ineligible for Y.O. status. The prosecutor may offer a plea to a lesser felony or a misdemeanor, but such a plea will leave the defendant with a criminal record. Whatever the sentence, the defendant will have a demonstrably harder time finding a job in the years ahead. And as a result he may very well offend again. There is nothing the judge can do about it.

But there is much that the Legislature can do. Right now, New York is as backward as any state in the union about expunging the convictions of rehabilitated convicts so that, having paid their debt, they can rejoin society and contribute to it. Which is to say, New York has no provision for sealing prior convictions, no matter how worthy the individual and how long it has been since his offense.

The Expungement Subcommittee of this Section's Executive Committee did yeoman-like work over the last two years to change that. The Section approved the subcommittee's recommendations for reform. The Bar Association endorsed the Section's position, and then-President Seymour James helped make a sealing bill one of the Association's legislative priorities.

Then, nothing much happened. Politics is, of course, involved; what legislator wants to do anything for convicted individuals and be labeled "soft on crime"? Ah, but a few legislators listened, and a few bills were written. The best of them fell far short of the Association's recommendations, and none of the bills has gone anywhere. Politics: the state District Attorneys Association complains that sealing would leave employers unaware of a job applicant's prior conviction! Well, yes, that is the whole point. But the legislators hear opposition, and they leave the *status quo* alone.

We will try again this year. The nation is awake to the realization that we have over-criminalized and over-imprisoned. Two states have even legalized the medical use of marijuana, as urged by my late colleague Gus Reichbach. Perhaps we can also begin to recognize that rehabilitated convicts will have a better shot at avoiding recidivism if the records of minor convictions can be sealed. We will try again.

Otherwise, by the time you read this our annual Forensics CLE will be past, and I am sure a past success. Next up as a regular program will be our Annual Meeting in January. The lunch speaker will be United States Deputy Attorney General James Cole, who I know from prior collaboration to be a very sensible man with far too many interesting things to say about Mr. Holder's Justice Department than we can possibly have time for. The CLE presenters will be three guys from Brooklyn—John Leventhal, Barry Kamins, and me—to do some meat-and-potatoes talking about the Fourth and Sixth Amendments. I hope to see you.

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 newly enacted criminal law legislation which has been prepared by Judge Barry Kamins. Judge Kamins has been preparing this annual update almost from the inception of our *Newsletter*, some eleven years ago. We thank him for his continued service to our *Newsletter* and our Section. We also present an interesting article by Edward Fiandach, a prior contributor to our *Newsletter*, who discusses the issue of whether intoxication negates depraved indifference in alcohol based motor vehicle fatalities. As a follow-up to our previous article regarding the George Zimmerman trial in Florida, we also present an additional update regarding the issue of Florida's use of six-person juries to try serious felony cases, including those carrying the possibility of life imprisonment.

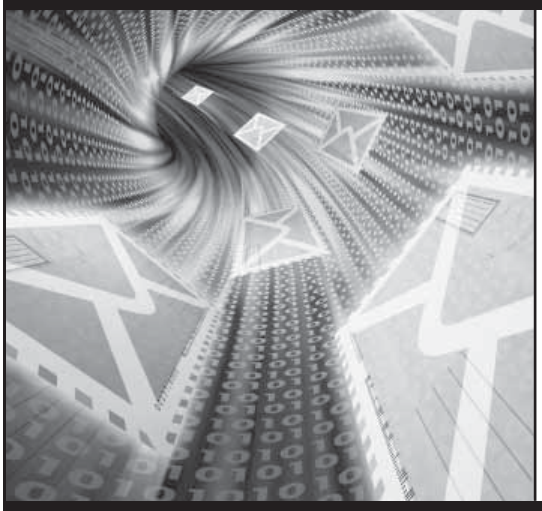
The United States Supreme Court commenced its new term on October 7, 2013, and to date, very few decisions in the criminal law area have been issued. The Court, however, has several important cases pending and these matters are discussed in our U.S. Supreme Court section. The New York Court of Appeals commenced hearing cases in early September, following its summer recess, and some of its decisions to date are summarized in our New York Court of Appeals section. During the summer, several of the Appellate Division Departments continued to issue decisions in the criminal law area, and these matters are summarized in our Appellate Division section.

In our For Your Information section, we provide various articles regarding the state of the U.S. economy, new federal sentencing initiatives, issues affecting the court system, the election of a new District Attorney in Kings County, and other items of general interest.

As in the past, the New York State Bar Association and our Criminal Justice Section will be holding their Annual Meeting in New York City. This year's meeting will again be held at the New York Hilton Midtown located at 1335 Avenue of the Americas (6th Avenue). The date for the Section meeting, CLE program and luncheon has been scheduled for Thursday, January 30th. As in the past, our Section will be presenting several awards to distinguished members of the legal profession who have exhibited exemplary legal skills or service of the community. Details regarding these events have been forwarded in a separate mailing. We hope that many of our members will be able to attend.

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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New Criminal Justice Legislation

By Hon. Barry Kamins

This article will discuss new criminal justice legislation signed into law by Governor Andrew Cuomo, amending the Penal Law, Criminal Procedure Law and other related statutes. While, in total, the Legislature passed the third lowest number of bills since 1915, there was no dearth of criminal justice measures. It is recommended that the reader review the legislation for specific details as the following discussion will primarily highlight key provisions of the new laws. In some instances, where indicated, legislation enacted by both houses was awaiting the Governor's signature at the time the article was published.

The major piece of criminal justice legislation in the past session was the Secure Ammunition and Firearms Enforcement Act, discussed in my *New York Law Journal* column (April 8, 2013). Since enacting that law, the Legislature has passed an amendment that would exempt certain retired law enforcement officers from the ban on possessing assault weapons and large capacity ammunition feeding devices. The exemption would only apply to retired New York or federal law enforcement officers who have retired in good standing after having served for at least 5 years at the time of retirement, and who were trained to use these weapons within 12 months of retirement. In addition, the retired officers must re-qualify every 3 years in the use of large ammunition feeding devices and they must register the assault weapons within 6 days of retirement.[1]

There were a number of significant procedural changes enacted in the past legislative session. One new law addresses the problem of "paper terrorism" that has increasingly plagued judges and other public servants. Members of separatist groups asserting sovereign status—frequently inmates who believe they are victims of unjust action—attempt to use the court system to retaliate against government officials who are merely performing their official duties.

They do this by filing fraudulent financing statements against those officials—usually judges—hoping to create personal financial problems for them. These individuals may file either a false filing statement alleging a claim that does not exist, or a statement asserting a frivolous claim of copyright infringement of one's name when it is used without their permission in a public proceeding. The former is more common and the filings, although fraudulent, must be accepted by the Secretary of State for recording and made available for public viewing, no matter their validity. This can affect the target's credit status.

To combat this abuse, a number of measures have been taken. First, the Uniform Commercial Code has been amended to create a special proceeding to summarily invalidate fraudulent liens; the proceeding may be brought by the target—either the public servant or the criminal defense attorney who represented the individual who filed the false lien. The petitioner must establish that the financing statement was filed to retaliate for the petitioner's performance of his or her official duties or, in the case of a defense attorney, for the duties as an attorney representing the filer. Upon sufficient proof, the court may expunge the financing statement and must cause its order to be filed with the Secretary of State. Second, the filing of a fraudulent UCC financing statement against a public servant in retaliation for the performance of the official's duties now constitutes a Class E felony.[2]

A new law affords judges the discretion to choose the length of probation in both felony and misdemeanor cases. In felony cases, the court can now impose a probation term of 3, 4 or 5 years except for any felony involving a sexual assault, a Class A-II drug felony and certain Class B felony drug convictions. For a Class A misdemeanor, the court can impose a probation term of 2 or 3 years except for a sexual assault. For an unclassified misdemeanor, the court can impose a probation term of 2 or 3 years where the sentence of imprisonment is greater than 3 months. A court will now be able to choose a probation term based upon a defendant's prior criminal history, the degree of culpability and the actuarially determined risk of re-offense. This will permit the sentence of probation to be tied to the offender rather that the conviction. In addition, the new law eliminates the costly requirement of pre-sentence investigation reports in cities with a population of one million or more, where there is a negotiated sentence of imprisonment of 365 days or less.[3]

The Legislature has expanded the jury selection process for Criminal Court to permit judges to fill the jury box in the same manner as in Supreme Court. The parties can now select more than six prospective jurors for *voir dire*; previously, the parties were limited to no more than six individuals at a time.[4] In prosecutions for arson, a sentencing court can now order that restitution be made to a volunteer fire company.[5]

In another procedural change, when sixteen and seventeen year olds are arrested for prostitution charges, a judge can convert the matter into a PINS proceeding under the Family Court Act.[6] Thus, a court can offer the defendants the same services that younger children arrested on prostitution-related charges currently receive in Family Court proceedings. In another procedural change, when a final order of observation is issued involving an incapacitated person, the prosecutor will now be required to

transmit the names of any persons who may reasonably be expected to be a victim of an assault or violent felony offense to the Commissioner of Mental Health. This will enable the Commissioner to fulfill his or her responsibility of notifying the victims that the defendant has been discharged from custody.[7]

In addition to the above procedural changes, the Penal Law has been amended to expand the definition of certain crimes and increase the penalties for others. For example, the Legislature has closed a loophole in the current law by prohibiting the sale of "bath salts," which are drug-like products that can cause serious and dangerous health problems. While an earlier law had added a group of these compounds to the list of Schedule I controlled substances, drug dealers made minor alterations to produce newer compounds to skirt the law. The new law adds to the list a category of bath salts called substituted cathinones.[8]

The Legislature has increased protection for children who are assaulted by the same person over a period of time. Previously, a person over eighteen years of age could be convicted of Aggravated Assault, a Class E felony, if he or she assaulted a child and had previously been convicted of assault within the past three years. The new bill expands the look-back period for the prior conviction to ten years.[9] A new law also increases protection for prosecutors who are assaulted. The law elevates assault on a prosecutor to the crime of Assault in the Second Degree, by adding prosecutors to the list of service professionals, which includes police officers and firefighters, against whom an assault is elevated to a Class D felony.[10] The legislation was proposed after the assassination of an assistant district attorney in Texas earlier this year.

Correctional officers have also been given additional protection by a new law that expands the definition of Aggravated Harassment of an Employee by an Inmate. Inmates can now be prosecuted for throwing the contents of a toilet bowl at a corrections officer.[11] Finally, a person can now be prosecuted for Illegal Possession of a Vehicle Identification Number by manufacturing or producing the number as well as possessing it.[12]

Each year the Legislature enacts a number of new crimes and this year was no exception. A new law was enacted to address the growing proliferation of counterfeit automobile parts arriving in the United States. Of particular concern is the distribution and installation of counterfeit airbags in automobiles; recent testing of these bags has shown substantial malfunctioning, which has raised a concern for the safety of drives and passengers. It is now a Class A misdemeanor for an individual to traffic knowingly in or install a counterfeit or non-functioning airbag. In addition, the law establishes a civil penalty of up to $1,000 per violation.[13]

Another new law creates the crime of killing a Police Work Dog or Police Work Horse. Law enforcement agencies have increasingly relied on the use of animals to solve crimes and it is now a Class E felony if a person kills a police work dog or horse while the animal is in the performance of its duties.[14] Finally, the Penal Law sections dealing with the possession and sale of fireworks have been rewritten to provide clearer definitions of "fireworks," "dangerous fireworks" and "novelty devices." In the past a number of courts have dismissed indictments because of ambiguities in the definition of these items.[15]

This past legislative session produced a number of new laws designed to protect crime victims. One law clarifies that in domestic violence cases, the protected party in whose favor an order of protection is issued may not be arrested for violating the order if he or she chooses to have contact with his or her abuser. This amendment responds to the concern that victims of family offenses have been charged criminally for violating their own orders of protection; this is contrary to the intent and purpose of orders of protection. In addition, orders will now include a notice that makes clear that the order will remain in effect even if the protected party contacts or communicates with the restrained party.[16]

A second new law addresses the economic abuse that frequently accompanies other forms of domestic abuse. As a result, Family Court and Criminal Court will now have concurrent jurisdiction over certain crimes that cause such abuse, e.g., identity theft and grand larceny, and domestic abuse victims will now be able to obtain orders of protection in Family Court for these offenses. In addition, when an order of protection is issued, either in Family Court or Criminal Court, a judge will now be able to direct the defendant to return certain identification and financial documents as a condition of the order.[17]

Another new law grants employees of the Department of Corrections and local correctional facilities access to the statewide computerized registry of orders of protection. These employees need this information to make programming assignments as well as decisions concerning temporary release and re-entry that could impact the safety of victims.[18]

Victims of domestic violence who have an order of protection or a temporary order of protection will now be able to get a new telephone number within 15 days of the request; this will provide them greater privacy from their abusers.[19] Crime victims in general have been given two new benefits. First, when an award is made by the Office of Victim Services for relocation expenses, the award is made by the Office of Victim Services for relocation expenses; the award will now include reasonable costs of moving and transporting the victim's spouse and dependents.[20] Second, an award will now be made in homicide cases to the victim's family to cover the costs of cleaning up the crime scene.[21]

A number of changes have been made in driver-related offenses under the Vehicle and Traffic Law. One new law serves to address several issues that have surfaced in the three years since "Leandra's Law" has been in effect. Under that law, a person can be charged with a felony if a person is operating a vehicle while intoxicated and a person 15 years of age or younger is in the vehicle. The law also introduced the concept of ignition interlock devices that must be installed when a person is convicted of driving while intoxicated.

In the past legislative session, a number of measures were enacted to strengthen the law and clarify some ambiguities. First, the new law tightens a loophole that was addressed by the Court of Appeals in *People v. Rivera*, 16 NY3d 654 (2011). A person operating a vehicle with a conditional license while intoxicated or impaired will now be subject to a charge of Aggravated Operation of a Motor Vehicle in the First Degree, a Class E felony.

Second, Leandra's Law now applies to defendants adjudicated as youthful offenders. Third, the minimum period of interlock installation will be increased to 12 months but reduced to six months upon submission of proof that the defendant installed and maintained an interlock device for at least six months. The interlock period will commence either from the date of sentencing or the date the device was installed in advance of sentencing, whichever is earlier. Previously, if the device was installed before sentencing, no credit was given.

Finally, the original law gave a driver the option of selling his car and not driving for a period of time. To avoid installing the interlock device, many defendants chose that option and then drove a different vehicle. The amendment attempts to close that loophole by requiring a defendant to swear under oath that he has sold the vehicle and is not the owner of a vehicle, and that he will not operate any vehicle during the period of interlock restriction. Under those conditions, a court can now find good cause to excuse the failure to install an interlock device.[22] In addition, the law clarifies that "the owner of a vehicle" includes the person possessing the title.

The legislature has also taken a number of measures to protect motorists from new or youthful drivers who use their cell phones or text while operating a vehicle. A new law has increased penalties for these offenses when they are committed by drivers with probationary and junior licenses. The penalties will now be the same as the penalties for speeding and reckless driving: 60-day suspensions for first convictions and revocations of 6 days (for junior licenses) or 6 months (for probationary licenses) for subsequent convictions within 6 months of the time a license is restored after suspension.[23]

Another new law increases the fines for all motorists who text or use cell phones while operating a vehicle. A first offense now carries a fine of $50.00 to $150.00 (previously not more than $100.00). A second offense in 18 months carries a fine of $50.00 to $200.00. A third or subsequent offense in 18 months carries a fine of $50.00 to $400.00.[24] Governor Cuomo also directed the Department of Motor Vehicles to increase, from three to five, the number of points imposed for these violations.

In the area of sentencing, the Legislature has enacted a bill to protect inmates under the age of eighteen who do not have parents or a legal guardian or where these individuals cannot be located. Correctional facilities must receive consent from parents or guardians before they can provide routine medical care to inmates who are minors. Thus, the new law gives minors the ability to consent to necessary medical treatment. The law does not preclude parents from objecting to this treatment.[25]

Each year the Legislature enacts laws that either extend or repeal existing statutes. This year the Legislature extended a number of laws set to expire on September 1, 2013 dealing with programs in correctional facilities, e.g., certain prisoner furloughs, work release programs, and electronic court appearances in certain counties. The sunset date was extended to September 1, 2015.[26] Another law extends the sunset provisions for the program that notifies parents paying child support that their licenses will be suspended unless they begin to make their child support payments. The sunset date was extended until June 30, 2015.[27]

The conduct of attorneys was the subject of two bills passed in the recent session. First, attorneys will now be required to report convictions for a crime even if they arise in courts other than courts of record, i.e. justice, town and village courts.[28] Second, a new law clarifies that two categories of professionals do not come within the definition of the unauthorized practice of law: legal consultants who comply with the rules of the court and those out-of-state attorneys who are admitted *pro hoc vice*.[29]

The City Council of New York City has enacted several measures that will impact the lives of those living within the City. One bill requires the Commissioner of the Department of Investigation to appoint an individual, acting as an inspector general with subpoena power, to study and make policy recommendations to the Police Department (No. 2013/070, effective January 1, 2014). A second measure creates a new private right of action against individual police officers and the Police Department for "bias-based profiling." The lawsuits can be brought in state court but would be limited to injunctive and declaratory relief (No. 2013/071, effective November 20, 2013). The law expands the definition of profiling to categories that include age, gender, gender identity, sexual orientation, immigration status, disability and housing status. A third bill precludes the Police Department and Department of Corrections from honoring civil immigration detainers in certain classes of cases (Local Laws 2013/021 and 2013/022, effective July 16, 2013).

In various miscellaneous laws, one new measure addresses the problem that occurs after a prosecution for animal cruelty or animal fighting is brought. As a result of the arrest, the victimized animal is seized and cared for by various agencies including humane societies. A new law permits a prosecutor, on behalf of the impounding organization, to petition a court to require the animal's owner to post a security for the reasonable expenses incurred by the agency.[30] Another law permits the manufacturers of gambling devices to transport them into New York State for the purpose of exhibition and marketing.[31]

Finally, a new law prohibits smoking at a playground during the hours between sunrise and sunset, when one or more persons under the age of 12 is present. However, the law also provides that no law enforcement officers can arrest, ticket, stop or question any person based upon a violation of this law, nor can they conduct a frisk or search.[32]

Endnotes

1. 2013 NY Laws, Ch 98 (amending PL 265.00; 265.20; 400.00, effective July 5, 2013).
2. A. 08013, not yet signed by the Governor.
3. S. 4664, not yet signed by the Governor.
4. 2013 NY Laws, Ch 287 (amending CPL 360.20, effective July 31, 2013).
5. 2013 NY Laws, Ch 356 (amending PL 60.27(10), effective September 27, 2013).
6. A. 8071, not yet signed by the Governor.
7. 2013 NY Laws, Ch 7 (amending CPL 730.40(1), effective March 15, 2013).
8. 2013 NY Laws, Ch 346 (amending PHL 3306(9)(10), effective December 11, 2013).
9. 2013 NY Laws, Ch 72 (amending PL §120.12, effective July 29, 2013).
10. 2013 NY Laws, Ch 259 (amending PL §120.05, effective January 27, 2014).
11. 2013 NY Laws, Ch 180 (amending PL §240.32, effective November 1, 2013).
12. 2013 NY Laws, Ch 186 (adding PL§170.65(4), effective November 1, 2013).
13. 2013 NY Laws, Ch 201 (adding GBL §349, effective November 1, 2013).
14. 2013 NY Laws, Ch 162 (adding PL §195.06-a, effective November 1, 2013).
15. S. 4718-a, not yet signed by the Governor.
16. A.6547, not yet signed by the Governor.
17. A.7400, not yet signed by the Governor.
18. 2013 NY Laws, Ch 368 (amending Exec Law 221-a(4), effective October 27, 2013).
19. 2013 NY Laws, Ch 202 (amending PSL §91(7), effective July 31, 2013).
20. 2013 NY Laws, Ch 261 (amending Exec Law §621(23), effective August 30, 2013).
21. 2013 NY Laws, Ch 119 (amending Exec Law §631, effective August 11, 2013).
22. 2013 NY Laws, Ch 169 (amending VTL §511(3)(a)(iii); 1193(1)(b)(c); 1198(4)(a), effective November 1, 2013).
23. 2013 NY Laws, Ch 91 (amending VTL §1225-c(4); 1225-d(6), effective July 1, 2013).
24. 2013 NY Laws, Ch 55 (amending VTL §510-b(1); 510-c(2), effective July 26, 2013).
25. A. 5008, not yet signed by the Governor.
26. 2013 NY Laws, Ch 55 (amending PL §205.16-205.19; Corr Law §72; 851–856; 201; 500-b,c,g,n; CPL 65.00–65.30; 182.10–182.40; Exec Law 261–267; 259-m, 259-mm).
27. 2013 NY Laws, Ch 87 (amending VTL §510, 530; Social Service Law §111-b, effective January 30, 2013).
28. 2013 NY Laws, Ch 283 (amending Jud Law §90(4)(c), effective July 31, 2013).
29. 2013 NY Laws, Ch 22 (amending Jud Law §484, effective May 2, 2013).
30. S. 02665-B, not yet signed by the Governor.
31. 2013 NY Laws, Ch 47 (amending PL §225.30, effective June 4, 2013).
32. 2013 NY Laws, Ch 102 (adding PHL §1399-o-1, effective October 10, 2013).

Hon. Barry Kamins is Administrative Judge for the New York City Criminal Court and Administrative Judge for Criminal Matters in the 2d Judicial District. He serves as a Supreme Court Justice in Kings County. He is also the author of *New York Search and Seizure* and a former Vice President of the New York State Bar Association. He has been a longtime contributor to the *Newsletter*, and has over the last several years provided annual legislative updates.

Florida's Six-Person Juries—Part 2

By Spiros A. Tsimbinos

In my feature article involving Florida's use of six-person juries for all serious criminal cases except capital crimes, which appeared in our last issue, I discussed the fact that the recent high profile George Zimmerman trial had brought to national attention the fact that Florida is unique in failing to utilize traditional twelve-person juries for serious criminal cases. Following the case of *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893 (1970), in which the United States Supreme Court upheld the constitutionality of Florida's six person juries, rising criticism of Florida's practice has occurred and new empirical studies have cast doubt on the logic and wisdom of the Supreme Court decision.

The wisdom of the *Williams* decision has been increasingly questioned by both legal scholars and most recently by some of the Florida Courts. In a law journal article entitled "Florida's Six-member criminal juries: Constitutional, but are they fair?" 23 U. Fla. L. Rev. 402 (1971), the author uses a statistical analysis to indicate that a jury of six would be inequitable to black defendants who would more than likely be judged by all-white juries.

Further, in the case of *Gonzalez v. State*, 982 So. 2d 77 (Fla.-App.2 District 2008), the Court issued a scholarly decision covering the history of the six-person jury and indicating that the concept should be re-evaluated. The Court discussed the new studies which had emerged since the *Williams* decision, and pointed out at page 83 that the American Bar Association House of Delegates in 2005 had also called for the use of twelve-person juries in any criminal case that could result in a penalty of confinement of over six months. The Court also referred, at page 83, to a note from a federal committee which stated:

> Much has been learned since 1973 about the advantages of twelve-member juries. Twelve-member juries substantially increase the representative quality of most juries, greatly improving the probability that most juries will include members of minority groups. The sociological and psychological dynamics of jury deliberation also are strongly influenced by jury size. Members of a twelve-person jury are less easily dominated by an aggressive juror, better able to recall the evidence, more likely to rise above the biases and prejudices of individual members, and enriched by a broader base of community experience. The wisdom enshrined in the twelve-member tradition is increasingly demonstrated by contemporary social science.

The Court then concluded its decision by stating at page 86, "Whether a six person jury meets the minimum standard necessary under the federal constitution is a different question than whether such a jury is desirable in our system of justice to decide cases where the defendant faces mandatory life imprisonment. The continued concerns regarding juries with as few as six members merits debate within this state as to whether this long-standing practice—a practice at direct odds with the common law and the practice in the majority of jurisdictions—remains defensible in a time when there is little difficulty gathering a jury of twelve to consider cases in which a defendant faces such a severe sentence." See also *Adaway v. State*, 902 So. 2d 746, 755 (Fla. 2005) (Pariente, J., concurring); *Palazzolo v. State*, 754 So. 2d 731, 737 (Fla. 2d DCA 2000).

The Court, in *Gonzalez*, discussed the new studies which had been conducted since 1970 at page 83 of its decision, and although indicating a desire for a change, refused, however, to take any affirmative action and deferred any changes to either the Florida legislature or federal law.

For those concerned and interested in providing greater protection for the rights of defendants, the use of twelve-person juries would also increase the possibility of more acquittals and hung juries in the absence of strong evidence regarding the defendant's guilt. Given the apparent sharp public split in the Zimmerman case, a twelve-person jury could have led to a hung jury instead of an acquittal or a compromise verdict regarding a lesser charge. 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. Florida today is also the fourth most populous state in the nation, with over 19 million residents, and is an economic power with an annual budget of $74 billion. It thus clearly has an ample jury pool supply and any additional cost would be negligible.

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 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.

Since the Court's decision in *Williams*, its reliance on the view that there was no appreciable difference between six-person and twelve-person juries has largely been discredited, and even the Court itself subsequently recognized the error of its earlier thinking. Thus in *Ballew v. Georgia*, 435 U.S. 223, 239 (1978), the Court stated:

> While we adhere to, and reaffirm our holding in *Williams v. Florida*, these studies, most of which have been made since *Williams* was decided in 1970, lead us to conclude that the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members. We readily admit that we do not pretend to discern a clear line between six members and five, but the assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six.

The Supreme Court had an opportunity to reconsider its decision in the *Williams* case when the Florida case of *Gonzalez v. State*, cited above, reached the Court through an application for a Writ of Certiorari. The Court, however, in 2008, refused to grant the application. See 129 S. Ct. 647 (December 1, 2008).

Today, however, with the issue of a six-person jury once again coming to the forefront, and with a strong group of Justices who appear to be more conducive to the expansion of defendants' rights in criminal law matters, it is possible that the Court could reconsider its *Williams* decision and take a different position on the issue. Since 2008, Justices Sotomayor and Kagan have been added to the Court. The effort to have Florida adopt the use of twelve-person juries in serious criminal cases should be undertaken within the near future. Whether through legislative action or Supreme Court reconsideration of its earlier decision, Florida should be brought into line with the rest of the nation, and it should afford its citizens jury trials in serious criminal law matters which are viewed as being fairer, more in line with historical common law principles, and more conducive to achieving a just result. Developments on this important and interesting matter should be carefully monitored in the future.

Will Intoxication Negate Depraved Indifference in Alcohol-Based Motor Vehicle Fatalities?

By Edward L. Fiandach

Assume a fatal motor vehicle accident. Further assume that the defendant, who was highly intoxicated at the time of the accident, is charged with Murder in the Second Degree under a depraved indifference theory.[1] Can that very same intoxication work as a defense to the homicide charge? The answer may surprise you.

Depraved indifference to human life, simply put, has been viewed as reckless conduct that is imminently dangerous and presents a grave risk of serious physical injury or death.[2] It had been described as including both a mental element (recklessness) and a voluntary act (engaging in conduct which creates a grave risk of death).[3] The *mens rea*, recklessness, was delineated by statute while the *actus reus*, "the risk creating conduct," was seemingly defined by the degree of danger presented.[4] The assessment of the objective circumstances evincing a defendant's depraved indifference to human life was a qualitative judgment to be made by the trier of fact.[5]

Although depraved indifference to human life has a long historical basis,[6] it took *People v. Register*,[7] a 1977 bar shooting in Rochester, for the Court of Appeals to determine that a defendant's intoxication could not be considered as a defense since it did not negate an element of the offense. Decided primarily on the issue of intoxication, for almost thirty years *Register* and its progeny nonetheless stood firmly for the proposition that actions falling under this rubric did not require a culpable mental state.

While not germane to the issue of intoxication, *Register* began to lead to boilerplate usage of two-count indictments charging both intentional and depraved murder. Commencing in 2002, the Court, in a series of cases,[8] commenced a process of slowly edging away from this practice and year by year began to sound the death knell for depraved indifference as it had stood for more than a century.

In 2006, with *People v. Feingold*,[9] the bell was finally struck. A 4-to-3 Court overruled *People v. Register* by holding that "depraved indifference to human life is a culpable mental state."[10] In doing so, the Court stated:

> We say today explicitly what the Court in *Suarez* stopped short of saying: depraved indifference to human life is a culpable mental state. Our dissenting colleagues contend that this final step in the overruling of *Register* is unwarranted and unnecessary. Perhaps we would agree with that were it not for the setting in which the present case comes to us. In earlier cases (*People v. Hafeez*, 100 N.Y.2d 253, 762 N.Y.S.2d 572, 792 N.E.2d 1060 [2003], *People v. Gonzalez*, 1 N.Y.3d 464, 775 N.Y.S.2d 224, 807 N.E.2d 273 [2004], *People v. Payne*, 3 N.Y.3d 266, 786 N.Y.S.2d 116, 819 N.E.2d 634 [2004], *People v. Suarez*, 6 N.Y.3d 202, 811 N.Y.S.2d 267, 844 N.E.2d 721 [2005], we reversed depraved indifference murder convictions without having to discuss explicitly the question of *mens rea*. It was enough to say—and we said it repeatedly—that those defendants did not commit depraved indifference murder because depravity or indifference was lacking.[11]

Feingold is best understood by viewing its rather unique facts. In *Feingold*, the 52-year-old defendant, an attorney working as an Administrative Law Judge, attempted suicide in his 12th floor Manhattan apartment. Sealing the apartment door with tape, he blew out the pilot lights of his stove, turned on the gas, took tranquilizers and fell asleep in front of the oven expecting the gas to kill him. Several hours later a spark, apparently from the refrigerator compressor, ignited the gas, causing an explosion that wrecked the walls of his apartment and heavily damaged a number of neighboring apartments. No one else was seriously injured and the defendant himself survived. As a result of the explosion, he was charged with First Degree Reckless Endangerment,[12] which provides that a person violates the statute "when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person." The Supreme Court, in a non-jury trial, found that defendant's state of mind was not one of depraved indifference but nevertheless, relying upon *People v. Register*, *supra*, found him guilty and sentenced him to five years probation. Thereafter, the defendant appealed and his conviction was upheld by the Appellate Division.

The difficulty created by *Feingold* is this. The court specifically found that the defendant did not act with depraved indifference to a human life beyond his own. Hence, what was missing is *any* form of *mens rea* directed toward another. Feingold had no intention to kill anyone but himself. On the other hand, opening the gas valves and closing the windows in a New York City apartment building factually presents a situation not unlike that found in *Register*, firing shots in a crowded bar, or for that matter, the classic Penal Law description of opening the door of the lion's cage in the zoo. For the majority, the ab-

solute lack of any intention to harm another crossed the line and demonstrated the need for intent.

When I lectured on fatal accidents several years ago at the New York State Bar Association's Big Apple XI Seminar, I opined, incorrectly it seems, that the *Feingold* decision would pretty much bring an end to the use of depraved indifference in cases involving alcohol-influenced operating offenses. By and large, my confidence was based upon two cases, *People v. S. E-W*,[13] and *People v. Valencia*.[14]

In *People v. S. E-W*, the defendant was at a golf club outdoor café / bar with friends and drinking alcohol. Adjacent to the café was a paved area divided into four aisles of parking. At the end of each of the two center aisles was a concrete and grass "U" turn area which permitted access to all parking. The café was at the non-entrance end of the two middle aisles and abutted the parking lot. At approximately 2:30 a.m., an altercation occurred between the defendant and another café patron. At the time, the defendant was escorted out of the bar to the parking area by S.B., one of the bouncers, and M.G., a patron. S.B. was restraining the defendant who was cursing and threatened to "kill all you guys."

The bar's patrons came out to the parking lot to observe the altercation and were milling around as the defendant finally walked to his car. He pulled out of the parking area, but upon reaching the exit end of the lot suddenly made a "U" turn and accelerated toward the crowd at a high rate of speed. He struck two bystanders, M.H. and S.M., causing physical injury. He then continued to drive directly at S.B. and M.G. whom he also hit, tossing them into the air with resultant serious physical injuries. As a result of these actions, the defendant was charged, *inter alia*, with Assault in the First Degree, which mandates depraved indifference.

Following indictment, the defendant moved for discovery and inspection of the Grand Jury minutes. Following inspection, the court (Calabrese, J.) found the same to be sufficient. Clearly, the fact that the defendant was heard to utter an intention to ""kill all you guys" served to move the case beyond *Feingold*.

Three years later, in *People v. Valencia*,[15] the defendant appealed from a judgment convicting him of, *inter alia*, Assault in the First Degree, which likewise mandates depraved indifference.

His primary contention was that the evidence at trial, viewed in the light most favorable to the prosecution, was legally insufficient to establish that he acted with the culpable mental state of depraved indifference to human life at the time he collided with the complainants' vehicles and, thus, did not support the conviction of Assault in the First Degree. The Second Department agreed and found unpersuasive the prosecution's contention that the *mens rea* component of depraved indifference assault may be satisfied by considering the defendant's state of mind at a point much earlier than the accident, that being when the defendant allegedly made a conscious decision to consume an excessive amount of alcohol with the awareness that he subsequently would be operating a motor vehicle. Phrased differently, the court concluded, over a dissent, that the defendant's state of mind at the time he consumed the alcohol was too temporally remote from his operation of the vehicle to support a conviction for Depraved Indifference Assault, a determination that was subsequently affirmed by the Court of Appeals.[16]

A thorough reading of the briefs filed by counsel before the Court of Appeals in *Valencia* establishes that the defendant was drunk, *very* drunk. Nevertheless, since the prosecution unsuccessfully argued that depraved indifference entered the case through the defendant's conscious decision to become intoxicated, *Valencia* never reached the essential issue of whether the defendant's intoxication would block the formation of a culpable mental state through the operation of Penal Law § 15.25.[17]

While the Second Department has since affirmed two alcohol / motor vehicle cases of depraved indifference homicide, both of those matters involved proof that the depravity was not intoxication but rather the wanton, callous *and knowing* means in which each of these defendants operated their motor vehicles in the wrong direction on limited access highways. For instance, in *People v. McPherson*[18] the evidence was that:

> the defendant helped Taylor leave the nightclub. In addition, McCalla testified that when the defendant left the nightclub, the defendant "looked okay to [him]," "didn't look like intoxicated to me [sic]," and that the defendant "seemed like he could handle himself."[19]

Accordingly, the court observed:

> The evidence did not establish that the defendant was too intoxicated to form the culpable mental state necessary to prove depraved indifference [internal citation omitted]. Thus, the record supports a view of the evidence that the defendant was coherent and able to form the requisite *mens rea* prior to leaving the parking lot.[20]

Noting that the devil is indeed in the details, the court stressed the need for the nature of the proof:

> We do not believe that *Prindle* and *Valencia* stand for the proposition that a defendant who is *per se* intoxicated (*internal citation omitted*), and drives into oncoming traffic resulting in a fatality, can never be found guilty of depraved

> indifference murder or assault because such a defendant is incapable of forming the requisite *mens rea* of depraved indifference to human life. Rather than supporting the defendant's position, the above-cited cases merely illustrate that, in situations where a defendant is alleged to have acted with depraved indifference to human life while operating a motor vehicle, the nature of the evidence presented is crucial.[21]

Then there is *People v. Heidgen*,[22] Like *McPherson*, *Heidgen* involved a head-on collision on a limited access highway. *Heidgen* also involved an excessively high BAC. In affirming a conviction for depraved indifference murder,[23] the *Heidgen* majority observed that *Valencia* "[did] not foreclose a finding of depraved indifference under the particular facts of this case, notwithstanding that the defendant's blood alcohol concentration registered .28%."[24] In so doing, the majority strongly emphasized those indications in the proof that the defendant was at least cognizant of his actions. It observed that 15 to 30 minutes before the collision, the defendant, although intoxicated, remained steady on his feet and held conversations without slurring his speech; that other drivers who observed the pickup truck traveling on the Meadowbrook State Parkway testified that the pickup truck maintained a steady speed, successfully negotiated the curves of the parkway and stayed within one lane of travel. Further, they stressed those factors of which the defendant was clearly aware: "wrong way" signs, the back side of highway signs, at least five sets of headlights shining directly at him, at least one set of headlights suddenly veering to one side, and tail lights on the other side of the guide rail. In addition, the court observed that he was confronted with a horn blaring three times and the noise of a loud motorcycle on the other side of the median strip keeping pace with him in the same direction. Finally, the court noted that testimony from the People's expert was that a blood alcohol concentration of .28% would not prevent a person, such as the defendant, from reacting to the aforementioned stimuli. The expert also stated that a person's response to stimuli would be completely shut down only if the person were rendered unconscious. In view of these factors, the majority concluded:

> [g]iven all of the foregoing evidence, it was reasonable for the jury to conclude that the defendant was aware that he was driving the wrong way and deliberately chose to continue to proceed in the northbound direction, against traffic, without regard for the grave danger to himself and others traveling on the parkway that night.[25]

Most interesting in *Heidgen* is the discussion regarding the defendant's extremely high BAC. Inasmuch as the court chose to heavily rely upon the manner in which the defendant operated his vehicle, doesn't the apparent need to hinge culpability upon the defendant's knowing responses to his surroundings evince an awareness on the part of the majority that extreme intoxication may nonetheless bar a finding of the necessary *mens rea*?

All this leads to *People v. Andrew Lessey*.[26] In *Lessey*, the defendant was charged with one count of Assault in the First Degree.[27] It was alleged that, under circumstances evincing a depraved indifference to human life, he recklessly engaged in conduct which created a grave risk of death to another person and thereby caused serious physical injury to that person. The People charged that the defendant pushed a 63-year-old man, who was previously unknown to him, onto the subway tracks of the Times Square Subway Station at approximately 4:55 a.m. on a Saturday morning. The victim was not hit by a train but suffered significant injuries including a badly broken kneecap, a broken nose, a broken elbow and a concussion. The incident followed a night which Mr. Lessey had spent at a nightclub where he consumed alcohol. Multiple witnesses and videotape from the subway station showed that the defendant was acting in an highly belligerent and intoxicated manner prior to the assault and that he had verbally and physically abused other train passengers immediately prior to the crime. Testifying on his own behalf, Mr. Lessey testified that he had blacked out and could not remember the incident. The defense also maintained that Mr. Lessey may have been involuntarily intoxicated by a drug of some kind, which the defense claimed may have been slipped into his drink by a man he had met at the nightclub who accompanied him to the train station.

At the close of the evidence, the defense asked that the Court instruct the jury that it could consider whether the defendant's mind was affected by intoxicants to such a degree that he was incapable of forming a culpable mental state. The defense asked for the optional standard pattern jury charge on that issue.[28] The People, citing *People v. Register*,[29] argued that no such instruction was authorized and instead urged the Court to instruct the jury that voluntary intoxication could not negate depraved indifference. The Court thereafter granted the defendant's application. The defense also moved, and the People consented, to charge the jury on the lesser included offense of Assault in the 3rd Degree.[30] That crime occurs when a defendant recklessly causes physical injury to another person. After a full day of deliberations and multiple read-backs of the legal definitions of the crime elements, including the effect of intoxication on a defendant's liability for depraved indifference, the jury found the defendant not guilty of Assault in the First Degree but guilty of Assault in the Third Degree.

In a decision apparently written after the verdict, the Court (Conviser, J.) began with a discussion of *People v. Register* (*supra*) and observed that in *Register*, "[t]he Court held that the term 'depraved indifference to human life'

did not refer either to the mental state required for the crime or the acts constituting it."[31] Thereafter it acknowledged that in *Feingold* the Court held that "depraved indifference to human life is a culpable mental state" but "did not rule on whether this new conception of depraved indifference modified the *Register* court's holding that intoxication could not be used to negative depraved indifference."[32]

Turning to the Penal Law, the court found resolution of this essential issue to be contained in Penal Law § 15.25, which declares in no uncertain terms:

> Intoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged.

Noting that under *Register* depraved indifference to human life was not a culpable mental state and accordingly Penal Law § 15.25 was of no significance, it likewise observed that *Feingold* changed all this by rendering depraved indifference to human life a culpable mental state and accordingly such culpable mental state becomes an element of any offense specifying depraved indifference to human life. Hence, if Penal Law § 15.25 declares that "evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged[,]" intoxication may be proven to negate the existence of depraved indifference. As set forth by the Court:

> When depraved indifference to human life was not a mental state, an act or a true crime element, the Court's conclusion in Register made perfect sense. When depraved indifference was considered to be an objective circumstance in which a crime occurred, then, obviously, that objective circumstance could not possibly vary with the defendant's level of intoxication. Now that depraved indifference is a culpable mental state, however, there is no basis to treat it differently than other mental states when considering the impact of intoxication.[33]

Indeed, simple statutory construction leads one to this point. Penal Law § 15.25 has been consistently read to include the *mens rea* as an element of the offense, thus permitting intoxication to mitigate such an element when present.[34] Moreover, as observed by the court in *Lessey*, when the Legislature is of the mind to exclude intoxication as a defense to a particular culpable mental state, it has specifically done so.[35]

As a point in fact, the defense in *Valencia* may have received far more than they bargained, or for that matter, hoped for. If the deliberate and conscious decision *to become* intoxicated cannot constitute depraved indifference, how can *the involuntary* state produced as a result of that excluded act be deemed to constitute the necessary *mens rea*? Phrased differently, if you cannot consider *the conscious act* of becoming intoxicated, then you cannot consider *being* intoxicated since the same requires no culpable conduct whatsoever on the part of the defendant. Thus, if depraved indifference is to be found, it must be found in *an act* separate and remote from the state of intoxication. Accordingly, the intoxication is therefore free to negate the required culpable mental state. As phrased by the *Lessey* court:

> If a court cannot consider a defendant's "conscious decision to consume an excessive amount of alcohol" (*Valencia*, 58 AD3d at 880) at a much earlier time than a depraved indifference crime as part of the depraved indifference calculus it is obvious that voluntarily intoxication can negative depraved indifference. A court considering a defendant who is, in fact, unable to form the mental state of depraved indifference at the moment of a crime due to intoxication and cannot look back to the defendant's culpable mental state at the time of his alcohol consumption would seem to have implicitly adopted such a rule.[36]

Support for this argument may be found in Judge Jones' *Valencia* concurrence:

> it is a basic premise of Anglo–American criminal law that the physical conduct and the state of mind must concur. Although it is sometimes assumed that there cannot be such concurrence unless the mental and physical aspects exist at precisely the same moment of time, the better view is that there is concurrence when the defendant's mental state actuates the physical conduct.[37]

Then there is the issue of legislative intent. Penal Law § 15.25 has a long and illustrious history with roots as far back as 1881.[38] Now that the Court has reversed itself and placed depraved indifference squarely within the confines of Penal Law § 15.25, one may now legitimately ask if application of this section to depraved indifference alcohol-based vehicular homicides comports with the Legislative intent. At the present time, it may. Both Judge Graffeo, in her *Valencia* concurrence, as well as the *Lessey* decision, point to the creation of Aggravated Vehicular Assault[39] and Aggravated Vehicular Homicide[40] as a probable Legislative response to *Feingold*.[41] Each section added the concept of recklessness by the introduction of Reckless Driving.[42] Arguably, these amendments may serve to in-

sulate each and every aberrant act in the operation of the motor vehicle from mitigation by operation of Penal Law § 15.25 since intoxication is precluded as a mitigating factor when recklessness is charged by operation of the last clause of Penal Law § 15.05(3).[43] Further evidence of the probable Legislative intent may be seen in the punishment meted out for these offenses. Aggravated Vehicular Assault is a Class C Felony and accordingly carries a maximum term of imprisonment of five to fifteen years, while Aggravated Vehicular Homicide is a Class B Felony carrying a term of eight and one-third to twenty-five years. While these new offenses fall below their depraved indifference equivalents,[44] the potential sentences are stiff indeed.

So will intoxication bar a finding of depraved indifference? Yes, but with an exception that has the capacity to swallow the rule. *Heidgen* and *McPherson* clearly demonstrate that in this post-*Feingold* world the defendant must be truly intoxicated; intoxicated to the point where he or she is unable to comprehend the nature of what he or she is doing. Treat it as though it is a rebuttable presumption. Even though the defendant establishes *prima facie* intoxication, that showing can be rebutted by evidence that the defendant was otherwise of a state of mind to form the requisite culpable mental state.

It all boils down to four "shoulds." First, intoxication should not be charged as the sole basis for depraved indifference to human life in an alcohol-related operating offense since that very same intoxication may be negated by Penal Law § 15.25. Second, when the charge is one of depraved indifference murder or assault, defense counsel should, by means of a demand for a Bill of Particulars, force the prosecution to declare precisely those actions which it will attempt to prove were depraved.[45] Third, where both depraved *and* aggravated charges are filed, defense counsel should move against the indictment alleging that a probable defense to the depraved indifference charge may implicate the defendant on the aggravated charge. Fourth, the Legislature should directly address the rather strange anomaly of being able to plead as a defense what in many cases is the cause of the accident and determine if, post-*Feingold*, the state of the law is really what it intends it to be.

Endnotes

1. Penal Law § 125.25[2].
2. *People v. Roe*, 74 NY2d 20, 544 NYS2d 297, 542 NE2d 610 [1989].
3. *See Penal Law*, § 125.25, subd 2; §§ 15.05, 15.10; *see also*, Fiandach, New York Driving While Intoxicated 2ed., § 6:6.
4. *Id*.
5. *People v. Roe*, *supra* at 25; *see*, *People v. Jack*, 199 A.D.2d 980, 606 N.Y.S.2d 471, 4th Dept. [1993]; *People v. Gonzalez*, 1 N.Y.3d 464, 807 N.E.2d 273, 775 N.Y.S.2d 224 [2004]; *People v. Payne*, 3 N.Y.3d 266, 819 N.E.2d 634, 786 N.Y.S.2d 116 [2004].
6. *See*, Rev Stat of NY [1829], part IV, ch I, tit I, § 5, subd 2,"[w]hen perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual"; *and see People v. Jernatowski*, 238 N.Y. 188, 144 N.E. 497 [1924]. The archetypical "shots into a house" case.
7. 60 N.Y.2d 270, 274-275, 457 N.E.2d 704, 469 N.Y.S.2d 599 [1983], *cert. denied, Register v. New York*, 466 U.S. 953, 104 S.Ct. 2159, 80 L.Ed.2d 544.
8. *People v. Sanchez*, 98 N.Y.2d 373, 748 N.Y.S.2d 312 [2002]; *People v. Hafeez*, 100 N.Y.2d 253, 762 N.Y.S.2d 572 [2003]; *People v. Gonzalez*, 1 N.Y.3d 464, 775 N.Y.S.2d 224 [2004]; *People v. Payne*, 3 N.Y.3d 266, 786 N.Y.S.2d 116 [2004]; *People v. Saurez*, 6 N.Y.3d 202, 811 N.Y.S.2d 267 [2005].
9. 7 N.Y.3d 288, 852 N.E.2d 1163, 819 N.Y.S.2d 691 [2006].
10. *Id.* at 294.
11. *Id.*
12. Penal Law §120.25.
13. 13 Misc.3d 1050, 827 N.Y.S.2d 557 [N.Y. Sup., 2006].
14. 58 A.D.3d 879, 873 N.Y.S.2d 97 [2nd Dept., 2009], aff'd, 14 N.Y.3d 927, 932 N.E.2d 871 [2010].
15. *Supra.*
16. 14 N.Y.3d 927, 906 N.Y.S.2d 515, 932 N.E.2d 871 [2010].
17. Penal Law 15.25 states:

    > Intoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged.

18. 89 A.D.3d 752, 932 N.Y.S.2d 85 [2nd Dept., 2011], *leave to app. granted*, 19 N.Y.3d 969 [2012].
19. *McPherson* at 754.
20. *McPherson* at 755.
21. *McPherson* at 757. Disturbing in the context of this factual assessment is *People v. Pindle*, 16 N.Y.3d 768, 944 N.E.2d 1130 [2011]. *Prindle* had no BAC since the defendant fled the scene and was arrested several days later. Nevertheless, the actions which preceded and constituted the fatal accident can reasonably be characterized as callous beyond description.
22. 87 A.D.3d 1016, 930 N.Y.S.2d 199 [2011].
23. Penal Law § 125.25[2].
24. *Heidgen*, at 1020.
25. *Heidgen*, at 1021.
26. 40 Misc.3d 530, 966 N.Y.S.2d 848 [Sup. Ct., NY County, May 29, 2013].
27. Penal Law § 120.10(3).
28. *See*, Penal Law § 15.25; Criminal Pattern Jury Instructions ("CJI"), PL § 120.10(3).
29. *Supra.*
30. Penal Law § 120.00(2).
31. *Lessey*, at 532.
32. *Lessey*, at 533.
33. *Id.*
34. *See, e.g., People v. Rodriguez*, 76 N.Y.2d 918, 563 N.Y.S.2d 48, 564 N.E.2d 658 [1990]; *People v. Perry*, 61 N.Y.2d 849, 473 N.Y.S.2d 966, 462 N.E.2d 143 [1984]; *People v. McCray*, 56 A.D.3d 359, 867 N.Y.S.2d 440 [1st Dept. 2008], *lv. denied*, 12 N.Y.3d 760, 876 N.Y.S.2d 712, 904 N.E.2d 849 [2009]; *People v. Raffaele*, 41 A.D.3d 869, 841 N.Y.S.2d 311 [2d Dept. 2007], *lv. denied*, 9 N.Y.3d 925, 844 N.Y.S.2d 180, 875 N.E.2d 899; *People v. Stewart*, 296 A.D.2d 587, 744 N.Y.S.2d 569 [3d Dept. 2002].

35. *See* Penal Law § 15.05(3). In defining "reckless" the statute declares: "[a] person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto."

36. It is unfortunate that the *Lessey* Court was not clearer in this portion of what is otherwise an exceptionally written decision. Nevertheless, from the context of the discussion, it is clear that what the court was attempting to say was that if you cannot include the act of becoming intoxicated as depraved indifference, then all you are left with is the intoxication which, as noted above, falls clearly within the purview of Penal Law § 15.25.

37. 14 N.Y.3d 927 at 933–934, quoting, LaFave, Substantive Criminal Law § 6.3[a], at 451 [2d ed.].

38. *See*, Penal Code of 1881, § 22.

39. Penal Law § 120.04-a.

40. Penal Law § 125.14.

41. "After enactment of the 2006 legislation, and apparently as a result of our revision of depraved indifference jurisprudence, it became more difficult to prove depraved indifference in vehicular crimes where assault in the first degree or murder in the second degree was charged—a drunk driver accused of acting with depraved indifference to human life could '[p]erversely' try 'to defend such a charge by using a claim of extreme intoxication' (Letter of Michael E. Bongiorno, President of New York State District Attorneys Association, to Governor Spitzer, June 15, 2007, Bill Jacket, L 2007, ch 345, at 16) to negate the requisite state of mind requirement. Consequently, in 2007, the Legislature created the new crime of aggravated vehicular assault (see L 2007, ch 345)[.] * * * In addition, another provision was added to article 125 of the Penal Law enacting the offense of aggravated vehicular homicide[.] * * * The stated purpose of this 2007 legislative package was to 'repair th[e] apparent anomaly' (Bongiorno Letter, Bill Jacket, L 2007, ch 345, at 16) caused by *Feingold* in cases where an inebriated driver who maimed or killed another person could rely on his intoxication to mitigate criminal responsibility" (*Velancia*, 14 N.Y.3d 927 at 930-931).

42. *See* Vehicle and Traffic Law §1212.

43. "A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto."

44. Depraved indifference assault (Assault in the First Degree, Penal Law 120.10) is a class B felony and carries a potential sentence of eight and one-third years to twenty-five. Depraved indifference murder (Murder in the Second Degree, Penal Law 125.25) is an A-1 felony and carries a maximum term of fifteen years to life.

45. *See*, Fiandach, New York Driving While Intoxicated, 2ed., § 30:9.

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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 August 1, 2013 to October 15, 2013.

Preservation of Appellate Issue

People v. Rodriguez, decided August 27, 2013 (N.Y.L.J., August 28, 2013, p. 22)

In a unanimous memorandum decision, the New York Court of Appeals affirmed the Appellate Division ruling and failed to consider a Defendant's appellate claim on the grounds that he failed to preserve the issue that he did not receive twenty days' notice prior to his sex offender designation proceeding as required by the Correction Law. The Court cited Correction Law Section 168-n(3), and also rejected as unreviewable the Defendant's argument that an adjournment of unspecified duration was required as a matter of due process. The Court issued its determination in the case at bar through its submission procedure during the summer months when the Court only hears cases on a limited basis.

Search and Seizure

People v. McFarlan, decided August 29, 2013 (N.Y.L.J., August 30, 2013, p. 22)

In a unanimous memorandum decision, the Court refused to reverse an Appellate Division ruling dealing with the issue of a consent search. The Court held that the determination as to whether a Defendant has consented to a search involves a mixed question of law and fact, citing *People v. Valerio*, 95 NY 2d 924, 925 (2000). The Court indicated that in the case at bar, there exists support for the Appellate Division's ruling of the issue and the matter was beyond the Court's further review. This case was also determined on the basis of the Court's submission procedure, and without oral argument.

Term Limits for District Attorneys

In re Hoerger v. Spota, decided August 22, 2013 (N.Y.L.J., August 23, 2013, pp. 1, 2 and 22)

In a 6-1 decision, the New York Court of Appeals held that a 1993 law passed in Suffolk County that limited the term of the District Attorney to three consecutive 4-year terms was invalid. The Court concluded that District Attorneys are constitutional officers whose term and qualifications are set by the State Legislature, not the counties that pay the District Attorney's salaries. A lawsuit had been commenced by an opponent of District Attorney Spota, who was attempting to bar him from running in the GOP primary, claiming that he was ineligible for re-election because of the County's law relating to term limits. The Court of Appeals, however, held that the Office of District Attorney clearly implicates state concerns and that the officer is governed by the state Constitution and state provisions and that therefore the County's attempt to impose term limits was invalid. The majority opinion was joined in by Chief Judge Lippman and Judges Graffeo, Read, Pigott, Rivera and Abdus-Salaam. Judge Robert S. Smith dissented.

Denial of a Fair Trial

People v. Alcide, decided October 10, 2013 (N.Y.L.J., October 11, 2013, pp. 9 and 23)

In a unanimous decision, the New York Court of Appeals held that the Defendant's right to a fair trial was not violated when the Judge at his murder trial took part in reading back testimony as requested by the jury. In the case at bar, the Judge read the questions as they were asked by the prosecutor while the court reporter read the witness's testimony. They then reversed roles, with the court reporter reading the prosecutor's questions, and the trial judge reciting the responses of the witness. The Court of Appeals held that the Judge's participation was designed to move matters along and make what was going to be a lengthy reading easier for the jury to follow by supplying two readers. The Court concluded that the situation which occurred did not prejudice the jury against the Defendant.The Court of Appeals however did issue a cautionary warning that the situation should not be repeated in the future.

Ineffective Assistance of Counsel

People v. Thompson, Jr., decided October 10, 2013 (N.Y.L.J., October 11, 2013, p. 24)

In a unanimous decision, the New York Court of Appeals affirmed a Defendant's conviction and held that a failure to exercise a peremptory challenge against a juror who was a longtime friend of the prosecuting attorney did not amount to ineffective assistance of counsel. The Court of Appeals concluded that although defense counsel may have made an error, it was not the kind of egregious and prejudicial error that amounted to a deprivation of the constitutional right to counsel. While defense counsel's decision not to use a peremptory challenge was questionable, it could not be said that it rendered the attorney's representation of the Defendant wholly ineffective.

Evidentiary Trial Rulings

People v. Daryl H., decided October 10, 2013 (N.Y.L.J., October 11, 2013, p. 24)

The Defendant was a patient in a psychiatric ward and was accused of assaulting and severely injuring another patient. During the trial, the People asked a psychiatrist who had written a discharge report regarding the Defendant to testify about her assessment of the Defendant's mental condition. The prosecution also presented testimony of the Defendant's father, who testified as to his son's injuries. On appeal, the Defendant argued that the trial court's rulings limited his examination of the psychiatrist and the father, and thereby denied him his constitutional rights to present a defense and to confront witnesses. The Court of Appeals concluded, however, that the Defendant's challenges to the Court's various rulings were without merit, and the judgment of conviction for assault was affirmed.

Uncharged Crimes

People v. Morris, decided October 15, 2013 (N.Y.L.J., October 16, 2013, pp. 13 and 23)

In a 4-3 decision, the New York Court of Appeals upheld a Defendant's conviction for possession of a weapon, and held that the trial Judge did not commit reversible error when he admitted evidence that the police stopped the Defendant because he fit the description of the assailant in a gunpoint robbery. The majority opinion, which was written by Judge Abdus-Salaam, concluded that the evidence presented gave the jurors the necessary background to understand why he was arrested and charged with weapons possession and that the usefulness of that evidence was not outweighed by its prejudicial effect on the jury. The majority opinion stressed that the trial court gave strong instructions to the jury to minimize the chances that it would infer the Defendant's guilt from the fact that the police had sought him for a robbery. Judge Abdus-Salaam was joined in the majority opinion by Judges Graffeo, Read and Pigott. Judges Rivera, Lippman and Smith dissented, and argued that the information which was imparted to the jury was highly prejudicial and could have denied the Defendant a fair trial.

Miranda Warnings

People v. Doll, decided October 17, 2013 (N.Y.L.J., October 18, 2013, pp. 6 and 23)

In a unanimous decision, the Court of Appeals upheld the murder conviction of a Defendant who was charged with killing his friend and business partner. The Defendant had made certain statements, and the prosecution argued that the statements were admissible because they were gathered in response to a serious and ongoing exigent situation under the Emergency Doctrine. The Defendant had been found by police with wet blood on his clothing and shoes, and carrying a car jack. The Court concluded that the police did not know if the Defendant had injured someone who was in dire need of medical care, and therefore any statements that he had given were admissible, despite the fact that he had not been given his Miranda warnings. In an opinion written by Judge Graffeo, the Court concluded that the police had acted in a reasonable manner, and that the suppression of the contested statements was not warranted.

Denial of a Fair Trial

People v. Glynn, decided October 17, 2013 (N.Y.L.J., October 18, 2013, pp. 6 and 24)

In a 5-2 decision, the Court concluded that the Defendant was not denied a fair trial when the trial Judge refused to recuse himself, even though he acknowledged having once represented or prosecuted the Defendant. Judge Pigott, writing for the majority, indicated that a review of the record established that the Judge exhibited no actual bias or prejudice against the Defendant during the conduct of the trial, and that the Judge himself had voluntarily brought up the possible connection to the Defendant, and that the Defendant did not firmly seek the Judge's recusal. Judge Pigott was joined in the majority by Judges Read, Graffeo and Smith, as well as Chief Judge Lippman. The Court also discussed a claim of ineffective assistance of counsel regarding the manner in which he tried the case and comments which were made regarding the Defendant's demeanor. The majority rejected the ineffective assistance of counsel claim, but two Judges in dissent concluded that there was considerable friction between defense counsel and the trial Judge, and the manner in which defense counsel conducted himself, denied the Defendant a fair trial and constituted ineffective assistance. Judges Rivera and Abdus-Salaam were the two dissenting Judges.

U.S. Supreme Court Announces Assignment of Justices During the October 2013 Term

With the opening of the Court's new term, Chief Justice Roberts announced the allotment of the Justices assigned to the various federal circuits throughout the Nation. The names of the individual Justices are printed below, along with the date of their appointment to the United States Supreme Court and the name of the President who appointed them.

DISTRICT OF COLUMBIA AND FEDERAL CIRCUITS

Chief Justice JOHN G. ROBERTS, JR., of Washington, D.C.

Appointed Chief Justice by President George W. Bush September 29, 2005; took office October 3, 2005

FIRST CIRCUIT

Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico

Justice STEPHEN BREYER, of Massachusetts

Appointed by President Clinton August 2, 1994; took office September 30, 1994

SECOND CIRCUIT

Connecticut, New York, and Vermont

Justice RUTH BADER GINSBURG, of New York

Appointed by President Clinton August 3, 1993; took office August 10, 1993

THIRD CIRCUIT

Delaware, New Jersey, Pennsylvania and Virgin Islands

Justice SAMUEL A. ALITO, JR., of New Jersey

Appointed by President George W. Bush January 31, 2006; took office January 31, 2006

FOURTH CIRCUIT

Maryland, North Carolina, South Carolina, Virginia, and West Virginia

Chief Justice JOHN G. ROBERTS, JR., of Washington, D.C.

Appointed Chief Justice by President George W. Bush September 29, 2005; took office October 3, 2005

FIFTH CIRCUIT

Louisiana, Mississippi and Texas

Justice ANTONIN SCALIA, of Washington, D.C.

Appointed by President Reagan September 25, 1986; took office September 26, 1986

SIXTH CIRCUIT

Kentucky, Michigan, Ohio, and Tennessee

Justice ELENA KAGAN, of Massachusetts

Appointed by President Obama May 10, 2010, took office August 7, 2010

SEVENTH CIRCUIT

Illinois, Indiana, and Wisconsin

Justice ELENA KAGAN, of Massachusetts

Appointed by President Obama May 10, 2010; took office August 7, 2010

EIGHTH CIRCUIT

Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota

Justice SAMUEL A. ALITO, JR., of New Jersey

Appointed by President George W. Bush January 31, 2006; took office January 31, 2006

NINTH CIRCUIT

Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington and Northern Mariana Islands

Justice ANTHONY M. KENNEDY, of California

Appointed by President Reagan February 11, 1988; took office February 18, 1988

TENTH CIRCUIT

Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming

Justice SONIA SOTOMAYOR, of New York

Appointed by President Obama May 26, 2009; took office August 8, 2009

ELEVENTH CIRCUIT

Alabama, Florida and Georgia

Justice CLARENCE THOMAS, of Georgia

Appointed by President George H.W. Bush October 16, 1991; took office October 23, 1991

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

The Court opened its new term on October 7, 2013, and began hearing oral argument on a variety of matters. With respect to Criminal Law issues, the Court, at the end of its last session, and in the beginning of the new term, granted certiorari in a few cases which involve criminal and constitutional law. These pending cases are listed below. The difficulty in obtaining a Writ of Certiorari to the Supreme Court is illustrated by the fact that on the opening day of the new term, the Court denied more than 2,000 petitions. Each term, the Court rejects approximately 9,000 petitions for review and agrees to hear only about 75.

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 had ruled that it would hear the case in the fall at the start of its next term. Oral argument has in fact already been heard by the Court and a decision is expected shortly.

Navarette v. California

At the opening of its new term, the Supreme Court determined that it would consider a case emanating from California which involved the issue of whether a motorist's anonymous tip about reckless driving is enough for police to pull over a car without an officer's corroboration of the alleged dangerous driving. The issue has divided several state and federal courts, and the Supreme Court only four years ago declined to address the issue. In the California case, two brothers who pleaded guilty to transporting marijuana were stopped by California Highway Patrol officers after they had received a report of reckless driving, based upon a 911 call. The anonymous call had identified the Defendants' vehicle by color and license plate. The Defendants have challenged their conviction based upon earlier high court rulings that anonymous tips by themselves ordinarily are not sufficient for police to detain or search someone. It appears that since the Court has agreed to hear the instant case, it may be ready to further clarify or modify its earlier rulings. It is expected that the case will probably be argued sometime in January, with a decision forthcoming in late spring.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from August 1, 2013 to October 15, 2013.

People v. Waite (N.Y.L.J., July 31, 2013, pp. 1 and 4)

In a unanimous decision, the Appellate Division, Third Department, restored a depraved indifference murder charge against a Defendant who was accused of causing the death of his 15-month-old son due to a head injury. The Court concluded that the necessary elements to establish depraved indifference murder were adequately demonstrated by the prosecution when it secured a depraved indifference murder indictment, and that the matter should proceed to trial.

People v. Coleman (N.Y.L.J., Aug. 6, 2013, pp. 1 and 2)

In a 3-1 decision, the Appellate Division, Third Department, held that a narcotics dealer who was sentenced to a 15-year to life state prison term as a persistent felon, is eligible for re-sentencing under the reformed drug law enactments. The majority opinion determined that while the sentence imposed on the Defendant would exclude him for consideration for re-sentencing, the offense he committed would not. The issue in the case centered on a provision in the Drug Law Reform Act of 2009, which allows offenders serving an indeterminate term for a Class B drug felony to apply for re-sentencing under new lower sentencing ranges. Drug felons who committed an exclusion offense, which is defined in the statute as a violent crime, or one for which the Defendant cannot obtain merit time, were ineligible for re-sentencing. In the case at bar, the Defendant was sentenced as a persistent offender and was therefore not eligible for merit time, and therefore the County Court Judge determined that he was not eligible for re-sentencing. The majority decision, however, issued by Presiding Justice Peters, distinguished the sentence the Defendant was serving from the offense he was convicted of, which did not preclude merit time. The Third Department decision is contrary to a recent determination of the Appellate Division, Second Department, and it appears that this matter will have to eventually be clarified by the New York Court of Appeals.

People v. Moise (N.Y.L.J., Aug. 7, 2013, pp. 1 and 2)

In a unanimous decision, the Appellate Division, First Department, held that the Defendant's right to a public trial was violated when a court officer barred entrance to a defense attorney's colleague. The Court had limited access into the courtroom during an undercover officer's testimony, and the court officer prevented entrance by the defense attorney's colleague during this period of time. The Appellate Division reversed the Defendant's conviction and ordered a new trial. The Court stated, in issuing its determination, "Excluding defense counsel's experienced colleague, who was familiar with the case, deprived defendant of his right to have this person present to assess the undercover's testimony, and enabled the People to present the undercover's testimony without the salutary effects of extra scrutiny."

People v. McLean (N.Y.L.J., Aug. 9, 2013, pp. 1 and 2)

In a 3-1 decision, the Appellate Division, Third Department, rejected a Defendant's claim that his right to counsel had attached and that incriminating statements that he made years later when his original attorney was not present should have been suppressed. In the case at bar, the Appellate Division majority held that the police had adequately established that an attorney who represented the Defendant in a robbery case in 2000 was no longer his attorney before they questioned the Defendant in 2006 regarding an unrelated murder. The majority opinion pointed out that the police had made an effort to determine whether the original attorney still represented the Defendant and were told by that counsel that he no longer represented McLean and that the original robbery case was over. The majority opinion consisted of Justices Rose, Spain and Egan. Justice McCarthy dissented.

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

In a unanimous decision, the Appellate Division, Second Department, upheld the use of a seven-year-old testimony of sex abuse by an adult relative which was conducted by a live two-way closed-circuit TV hookup. The Defendant had argued that the procedure in question had deprived him of his constitutional right to confront his accuser. The Appellate Division relied upon case law from both the U.S. Supreme Court and the New York Court of Appeals in issuing its ruling. The appellate panel concluded that the trial court had properly conducted an inquiry before ordering the closed-circuit testimony and declaring, pursuant to CPL Article 65, that the child was a vulnerable witness. The Supreme Court case relied upon by the Court was the 1990 decision in *Maryland v. Craig*, 497 U.S. 836, and the Court of Appeals decision was *People v. Wrotten*, 14 NY 3d, 33 (2009).

People v. Thompson (N.Y.L.J., Aug. 22, 2013, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's burglary conviction on the ground that both the trial Judge and the prosecutor had committed reversible error. In the case at bar, the defense was prevented from offering evidence that the elderly victim, who may have been suffering from dementia, had repeatedly identified someone else as

her assailant, and never implicated the Defendant. The appellate panel concluded that the trial court's actions and other errors which were committed deprived the Defendant of his right to present a defense. With respect to the prosecution, the panel emphasized that one of the prosecution's errors occurred in summation when the prosecutor told the jury that the Defendant's ex-girlfriend left him because she knew what he did. Based upon all of the circumstances, the Appellate division concluded that the Defendant was entitled to a new trial.

People v. Johnson (N.Y.L.J., Aug. 28, 2013, pp. 1 and 6)

In a 3-2 decision, the Appellate Division, First Department, reversed a Defendant's conviction for gun possession, and held that the Court below had committed error in failing to grant a Defendant's suppression motion. In the case at bar, police officers who were patrolling within a Bronx Housing Authority building encountered the Defendant while he was descending the stairs. He froze when he saw the officers and then jerked back as if he was going to go back upstairs. The officers asked the Defendant to come downstairs and they began asking him questions as to whether he lived in the building.

During the initial questioning, the Defendant began moving his hands and one of the officers grabbed his arm, causing his jacket to open and revealing a gun. The majority of the appellate panel determined that the presence of a suspicious looking man in a crime-ridden public housing building did not give the police a right to stop and question the Defendant. The majority determined that the police action in question failed to meet the *Debour* standard adopted by the New York Court of Appeals. The majority ruling consisted of Justices Maskowitz, Freedman, and Manscanet-Daniel. The majority, in their decision, emphasized "the right of police to patrol inside NYCHA buildings does not eliminate the requirement that each level of intrusion be supported by the corresponding level of suspicion."

Justice Andrias and Feinman dissented, and argued in their opinion that the New York Police Department is the lawful custodian of Housing Authority buildings, and its duties include keeping the buildings free of trespassers. When the officers viewed the Defendant in a drug-prone building and saw him freeze, jerk back and begin to retreat, they reasonably suspected him of trespassing—giving rise to a *Debour* Level 1 inquiry and justifying their subsequent actions. Due to the sharp division within the Appellate Division and the current controversy involving police stop and frisk procedures, it appears almost certain that this case will make its way to the New York Court of Appeals.

People v. Marcial (N.Y.L.J, September 24, 2013, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Second Department, held that items seized which were found when detectives accompanied a parole officer on a visit to a parolee should have been suppressed because the People had failed to show that the police officers had consent to enter the Defendant's apartment. The appellate panel ruled that they agreed with the Defendant that the People failed to prove that his consent to the entry into his home was voluntary. The Court found that the detectives who entered the premises along with the parole officer misrepresented facts regarding their presence, and that therefore any purported consent was not voluntary.

People v. Sepe (N.Y.L.J., September 26, 2013, pp. 1 and 8)

In a 3-2 decision, the Appellate Division, Second Department, overturned a jury's murder verdict, holding that it was against the weight of the evidence, and substituted instead a manslaughter conviction. The case involved a situation where the Defendant beat his fiancée to death with a baseball bat. The three-Judge majority consisting of Justices Cohen, Dickerson and Austin found that the Defendant had no prior criminal record and no history of domestic violence, and that for several years prior to the incident had been suffering declining mental health. Psychiatric experts who testified at the trial confirmed that the Defendant suffered from mental illness, but could not clearly establish whether his actions evinced the loss of control that was necessary to establish the emotional disturbance defense. Justices Angiolillo and Balkin dissented, arguing that the majority ruling improperly encroached on the jury's function and that there was sufficient evidence to sustain the murder conviction.

People v. Gonzales (N.Y.L.J., October 3, 2013, pp. 1 and 8)

In a 3-2 decision, the Appellate Division, Second Department, reversed a Defendant's conviction and ordered a new trial on the grounds that the police had conducted a warrantless arrest which led to an inculpatory statement. In the case at bar, the Defendant tried to close his apartment door on the police, who were investigating a report of possible sexual abuse. The police pushed their way in and handcuffed the Defendant, and he eventually made an inculpatory statement. The three-Judge decision, which was written by Justice Balkin, held that the arrest violated the Defendant's Fourth Amendment rights, and that therefore a suppression motion should have been granted. The majority opinion concluded that the Defendant's attempt to close his door was not an indication that he was attempting to flee. He was in the constitutionally protected interior of his house, which he never left. Judge Balkin, in her conclusion that the police action was unwarranted, relied upon the leading Supreme Court Decision in *Payton v. New York*, 445 U.S. 573 (1980), and the Court of Appeals decision in *People v. Levan*, 62 NY 2d, 139. Justices Lott and Austin joined Justice Balkin in issuing the majority opinion. Justices Angiolillo and Roman dissented and argued that the officers acted lawfully, and that the majority was

applying a literal interpretation of the term threshold, which defines the constitutionally protected area precisely according to the line within the door frame which separates the outside from the inside. Based upon the sharp decision in the case, it appears that the matter will eventually reach the New York Court of Appeals, and the District Attorney's Office has already indicated it would seek leave to appeal.

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

In a unanimous decision, the Appellate Division, First Department, reversed a murder conviction of a Defendant who claimed he was paid by a motivational speaker to help him commit suicide and make it look like a murder. The Court concluded that the jury was given improper instructions about the assisted suicide defense and ordered a new trial. The appellate panel found that the trial Judge went beyond the statutory language in explaining assisted suicide, and that her instructions misstated the law and were confusing and conveyed the wrong standard to be applied. The trial Judge in question was identified as Judge Carol Berkman, who in recent years has been reversed by the Appellate Division on a number of questions. The opinion was written by Judge Richter, and was joined in by Justices Gonzalez, Sweeney and Clark.

People v. Canales (N.Y.L.J., October 7, 2013, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's conviction on the grounds of ineffective assistance of counsel. The Court applied the higher New York standard in reaching its result. After reviewing the record, the Court recited a litany of failures by defense counsel, including the failure to examine a relevant video and making misleading and improper concessions during summation. The Defendant's conviction had involved the crime of murder and criminal possession of a weapon during an altercation between rival gangs in Brooklyn. His defense attorney had been court-assigned counsel.

People v. Puesan (N.Y.L.J., October 10, 2013, p.1)

In a unanimous decision, the Appellate Division, First Department, upheld a Defendant's conviction with respect to several charges involving computer crimes under Article 156 of the Penal Law. The Defendant, who was a Time Warner employee, had improperly installed a computer program on three computers, allowing him to learn the password to several customer accounts. The Defendant argued that his actions did not meet the definitions of any of the computer crimes in Article 156. The Court disagreed and upheld the conviction and sentence imposed. This case is one of the few Appellate decisions dealing with computer crimes.

For Your Information

Federal Prosecutors to Retry Former State Senator Joseph Bruno

Although former State 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. In early August, the Second Circuit cleared the way for a retrial, and a tentative trial date has been set for December 2, 2013. The Court found that Bruno could be tried on two counts of mail fraud, since the jury had originally found that Bruno possessed the requisite intent to devise a scheme to defraud. Due to the defendant's illness the trial was subsequently adjourned to sometime in late January 2014.

Holder Announces New Policy Regarding Low Level Non-Violent Drug Offenders

In early August, Attorney General Holder announced that he has ordered the various U.S. Attorneys throughout the Nation to no longer charge low level non-violent drug offenders with offenses that impose severe mandatory sentences. The Attorney General indicated that the most severe penalties for drug offenses should be reserved for serious high level or violent drug traffickers. He declared that too many Americans go to too many prisons for far too long, and for no good law enforcement reason. The Attorney General at the same time also announced that he was looking at a policy which would reduce sentences for elderly non-violent inmates, and was seeking to find alternatives to prison for non-violent criminals.

The Attorney General issued his proposals at an address given to the American Bar Association, which was holding its annual meeting in San Francisco. The Attorney General's announcement has set into motion a major policy change regarding federal crimes and is being viewed as part of a major debate in the Nation regarding appropriate sentences and alternatives to incarceration. Some states, in response to recent decisions from the United States Supreme Court which declared unconstitutional mandatory life imprisonment sentences for juvenile offenders, are already moving to resentence many defendants who fall within this category. It is estimated that some 2,100 juvenile offenders will have to be resentenced, and some 10 states have already changed their sentencing statutes to comply with the Supreme Court ruling. Only recently, Wyoming's Governor signed a Bill specifying that juveniles convicted of murder would be eligible for parole after serving 25 years in prison.

New York City Stop and Frisk Decision

After a lengthy nine-month trial involving the New York City Police Department's policy of stop and frisk, a federal Judge has determined that the policy which has been in place had violated the rights of minority groups. In her decision, Southern District Judge Shira Scheindlin stated, "Whether through the use of a facially neutral policy applied in a discriminatory manner, or through express racial profiling, targeting young black or Hispanic men for stops based on the alleged criminal conduct of other young black or Hispanic men violates bedrock principles of equality." Judge Scheindlin's order issued a preliminary injunction against stop and frisk encounters that violate the U.S. Constitution, ordered reforms of police policies and appointed a monitor to oversee changes in the New York City Police Department. The Judge issued her ruling in two related cases involving police practices, to wit: *Floyd v. City of New York* and *Ligon v. City of New York.* She also immediately appointed Peter Zimroth, a former corporation counsel, to serve as the monitor of the Police Department. Since the New York City council has recently voted to create an Inspector General for the N.Y.P.D., it is possible that in the coming months, the Department may be under review by two separate watchdogs.

Both Mayor Bloomberg and Police Commissioner Kelly have disputed the Judge's conclusions, and the Mayor announced that the City will be appealing the ruling to the U.S. Circuit Court of Appeals. The City actually filed Notices of Appeal on August 15, 2013, and requested a stay while the appeal is pending. After Judge Scheindlin denied the City's request for a stay, the Corporation Counsel's Office renewed its request for a stay in the U.S. Circuit Second Court of Appeals, which heard oral argument in the matter on October 22, 2013 and granted a stay. In early September, various police unions also petitioned Judge Scheindlin to allow their organizations to participate in any future proceedings regarding the case. The police unions, in their legal papers, stated that they had a right to intervene because their members are directly affected by the Judge's ruling. The Court of Appeals also or-

dered the removal of Judge Scheindlin from the case. The police petition and the full appeal are currently pending with decision expected shortly. We will continue to monitor this case and will report on any new developments to our members.

New Law Increases Penalty for Assault on Prosecutors

In early August, Governor Cuomo signed recently enacted legislation which increases the penalty for an assault on prosecutors. The Bill covers any assault on a prosecutor with the intent of interfering with the official's public duties by causing a physical injury. The new legislation makes such an act a Class D felony, punishable by up to 7 years, rather than a Class A misdemeanor, which is the current level for that conduct. The new legislation is to take effect in February 2014.

Child Obesity Rates

Efforts to reduce obesity in the United States received some possible good news when a recent study involving preschoolers ages 2 to 4 concluded that the obesity rate among these children had dropped in several states for the first time in several years. Currently about 1 in 8 preschoolers is considered to be obese in the United States. The decline in obesity among this group, although small, is considered to be meaningful because it reverses a long-standing upward climb of obesity rates going back to 1998. The States which reported the most significant reduction in obesity among preschoolers were Florida, Georgia, Missouri, New Jersey and South Dakota. It is hoped that the current trend continues, and that the risk of heart disease, diabetes and other health problems will decline as the obesity rates among children fall.

Home Prices and Sales Continue to Rise

A recent report from the Standard and Poor's/Case-Shiller 20-city home price index indicated that at the end of the six-month period for 2013, home prices had reached a 7-year high. U.S. home prices at the end of June had risen an average of 12.1% from a year earlier. All 20 cities included in the index posted gains. Home prices rose most dramatically in areas that had previously suffered the greatest decline, to wit: areas such as Las Vegas and sections of California. New York City saw more modest gains with home prices rising about 3% from a year ago. Currently it appears that housing inventory is not meeting demand and that continued improvement in the housing market is expected in the near future. The only causes for concern appear to be rising mortgage rates or some unexpected reversal in the economy.

Young Adults Facing Hard Times

A recent study conducted by the Pew Research Center, which was based largely on statistics provided by the U.S. Census Bureau, reveals that young adults between the ages of 18 to 21 are facing a more difficult situation than in the past with regard to several situations. First of all, in 2012 it was reported that 36% of the Nation's young adults ages 18 to 31 were living in their parent's home. This is the highest percentage in at least four decades, and represents a slow but steady increase from the 32% who were living at home before the Great Recession in 2007. Thus, in 2012, 21.6 million young adults in this age category were living in their parents' home, as compared to 18.5 million in 2007.

The study also reported that employment in 2012 for 18- to 31-year-olds had dropped to 63%, down from 70% in 2007. The 18- to 31-year-olds also faced a situation of declining marriages. In 2012, just 25% of the 18- to 31-year-olds were married, which was a drop from 30% in 2007. It was always expected that the next generation of Americans would be better off than the last, but in recent years it appears that the Nation has been sliding backwards and the current group of 18- to 31-year-olds appear to be facing tougher times.

A recent report involving teenage employment also confirmed that hard times exist for young adults between the ages of 14 and 18. This summer and for the three prior summers, employment of teenagers during the summer months has remained at record low. In 1999, slightly more than 52% of teenagers 16 to 19 worked at a summer job. This past summer, however, that number had plunged to 32.25%. The problem of teenage unemployment has not been addressed to any significant degree, and the problem appears to be worsening with each passing year.

Budget Cuts Impact on Operation of Federal Courts

Recent budget cuts are beginning to have a serious impact on the operation of the Federal Courts. Only recently it was announced that the Chief Judges from 86 federal districts appealed directly to Congress to reinstate some of the cuts that have already been instituted. The letter, which was joined in by both the Chief Judges for the Southern and Eastern Districts, as well as the Northern and Western Districts of New York, expressed grave concern about the judiciary's ability to carry out its mission. Chief Judge Loretta Preska, from the Southern District of New York, recently stated in a law journal interview, "Going into the next fiscal year, if we don't get some relief, we might as well close our doors."

The federal budget cuts have also caused the layoff or furlough of many public defenders. Recently, discussions were held regarding the possibility of reducing the amount paid to CJA attorneys and using some of those funds to supplement the budgets of the federal public defenders. We will report on any concrete developments in this area as they occur.

Education Costs

Despite the rising costs of attending colleges and universities, the National Center for Education estimated

that some 21.8 million students will be enrolled in higher education facilities during the coming year. The Census Bureau has also reported that despite the rising costs and some current concern as to whether going to college is worth it, those adults with a Bachelor's Degree or higher earned an average salary of $81,761 in 2011. Those with high school degrees or a GED have earned an average of $40,634, and those workers who had an education of ninth grade or less earned an average of $26,545.

New Study on Welfare Payments

A recent study by the Cato Institute found that in many states it pays better to be on welfare than it does to work in low-paying jobs. Adding together the monies received from a variety of benefit programs, the report concluded that in ten states including New York, a mother with two young children receives an annual benefit of more than $35,000 a year. This would be better than someone who is working and receiving about $20 an hour. The report indicates that there is a wide disparity among the states regarding the amount and quality of benefits provided, and the study will no doubt lead to further discussion on the matter.

Women Doing Better in Jobs Recovery

A report issued in early September by the Institute for Women's Policy Research revealed that women in the United States had recovered all of the jobs they had lost during the 5-year recession. The August 2013 unemployment rate for women was 6.8% and in August, 68 million women were employed, surpassing the more than 67.97 million who had jobs when the recession began in December. Men, however, did not fare as well. The unemployment rate for men in August 2013 was listed at 7.7%, with 76.2 million men employed, down from 78.3% employed in December 2007. Thus at the present time, men have experienced a 2.1 million job loss. The study indicated that the biggest factor in the figures released was that men dominate construction and manufacturing industries that haven't recovered millions of jobs which were lost in the downturn. Conversely, women make up a disproportionate share of the workers in areas that have been hiring: retail, education, health care, restaurant and hotels. The study also revealed that with regard to both men and women, the percentage seeking work has been dropping.

Part-time Employment Continues to Surge

According to Labor Department statistics which were issued through July 2013, part-time employment has surged in recent months. The number of people working part-time in the United States grew 4½ times as fast as the number of full time workers. The share of all workers who hold mainly part-time jobs is at a level not seen since the early 1980s. Economists have accounted for the change in part-time employment because of shifting demographics, technological changes and uncertainty caused by the onset of the Affordable Health Care Act. What is becoming increasingly apparent is that many large employers have been shifting to part-time employment in order to remove themselves from the requirement of the Affordable Health Care Act, which mandates health insurance for employees who work 30 or more hours. The Labor Department estimated that in August 2013, 7.9 million Americans were working part-time, almost twice as many as in 2006.

New Statistics Reveal Growing Income Disparity

A recent report issued by economists at the University of California at Berkeley in conjunction with the Paris School of Economics and Oxford University reveals that the income gap between the richest 1% in the United States and the rest of the Country has reached the widest point since the 1920s. According to the report in 2012, the top 1% of U.S. earners received 19.3% of the nation's household income, the largest share since 1928. The share held by the top 10% of earners reached a record 48.2%. The study was based upon an analysis of IRS figures. The current rising disparity is largely attributed to gains in the stock market and the increasing recovery in home values. Income disparity has been growing in the United States for the last three decades, and based upon the most recent report, it appears that it is continuing in the same direction.

When compared with the rest of the world, the United States ranks number five when compared with twenty other Countries. A recent report from the Organization for Economic Cooperation and Development indicated that only four nations—Mexico, Chile, Israel and Turkey—had higher income disparity levels than the United States.

The world report also indicated that among ten selected nations, the United States ranked ninth with regard to changes in median disposable income from the years 2000 to 2010. The listing was as follows:

Australia	+40%
Sweden	+27
Canada	+20
Britain	+14
Mexico	+12
France	+11
Italy	+4
Germany	+2
United States	-4
Japan	-8

Anti-Corruption Commission

The State Commission to Investigate Public Corruption, which was recently established by Governor Cuomo, announced that it will begin a series of public hearings. The first hearing was held at Pace University in New York City and featured various prosecutors who testified on

the issue. Among those appearing before the Commission were Pfreet Bharara, the U.S. Attorney for the Southern District; Loretta Lynch, Eastern District U.S. Attorney, Manhattan District Attorney Cyrus Vance, Jr., and Daniel Alonso, his chief assistant. The prosecutors basically argued for the need for stronger anti-corruption laws, and Southern District U.S. Attorney Bharara, in particular, called for strong measures to correct the situation. He specifically stated that the number of convicted state officials has swelled to absolutely unacceptable numbers, and he advocated a policy which would prevent convicted state officials from drawing publicly funded pensions even after they had been convicted of crimes. The Commission is holding a series of hearings throughout the State, and will be making recommendations to the Governor. The Commission was created by Governor Cuomo in July 2013.

Judicial Retirement Amendment

The voters, in November, had an opportunity to determine whether the required retirement age for Supreme Court and Court of Appeals Judges would be raised. The amendment that was proposed would have allowed Supreme Court Justices to extend their time for retirement from 76 to 80 through a recertification process, and would have extended the mandatory retirement age for Court of Appeals judges to 80 from 70. A strenuous effort was made by the Judges themselves and various segments of the legal community to achieve passage of the Bill. Early polls indicated that the Amendment was failing to achieve a majority of voter approval. The voters in November rejected the amendment by a wide margin.

An ad hoc group of various attorneys from large firms had joined together to support the proposed amendment, both financially and through public education, and the judges themselves, through their associations, had hired an advisor to provide professional advice and to promote the passage of the proposed legislation. The ad hoc group of prominent attorneys operated under the name of "Justice for All 2013," and included Judges Judith Kaye and Carmen Beauchamp Ciparick, both of whom were forced to retire from the Court of Appeals when they reached the age of 70. Certain Bar Associations such as the New York County Lawyers Association and the New York State Academy of Trial Lawyers had also issued public statements in support of the amendment. The Fund for Modern Courts also announced its support of the retirement amendment in the middle of September.

Pro Bono Information to Remain Confidential

Following criticism by many attorneys, as well as the New York State Bar Association, regarding the recent requirement by the Office of Court Administration that attorneys provide information about the number of pro bono hours and the amount of money they donate annually, Chief Administrative Judge A. Gail Prudenti announced that such information would remain confidential, at least during the next two years. The new requirement, which went into effect on May 1, 2013, has been a source of contention, and the OCA stated that the courts had not released any of this data since the requirement went into effect. It appears that the two-year hiatus for public disclosure may allow for further discussions and possible modifications on the issue. We will keep our readers advised.

Poverty Rate Remains the Same

According to a recent Census Bureau Report, the U.S. poverty rate remained at 15% last year, without any prior improvement from the year before. Some 46.5 million Americans are listed in the poverty category, more than one in seven Americans. The actual number rose from 46.2 million in 2011, but the percentage remained the same. Among the 50 states, New Hampshire had the lowest poverty rate at 8.1%, and Mississippi had the highest, at 22%. The rate in New York State is close to the national average. The most recent report has lead commentators to remark that the lack of improvement in the poverty figures was disappointing and discouraging.

Kings County Elects New District Attorney

Based upon results in the Democratic primary which was held in September and the general election which took place in November, Brooklyn voters selected a new District Attorney for their County. After 25 years as Kings County District Attorney, Charles Hynes, who has reached the age of 78, was defeated in the September Democratic primary by Kenneth Thompson, age 47. Mr. Hynes continued in the race as the candidate of the Republican and Conservative parties, but he was easily defeated in the November election in the heavily Democratic Borough. D.A. Hynes lost the September primary by an approximate vote of 55% to 45%, and in the November election, he was overwhelmed by a 75% to 25% vote.

The new District Attorney, Kenneth Thompson, who takes office on January 1, 2014, is a federal prosecutor who served in the U.S. Attorney's Office for the Eastern District of New York for 5 years. Prior to his election, he was a founding partner at Thompson and Wigdor, where he was engaged in the private practice of law. Mr. Thompson has already been engaged in selecting his new staff, as many of Mr. Hynes's assistants have already left or will be leaving the office. During the election, Mr. Thompson ran on the theme that it was time for a new D.A., and that after many years of service, Mr. Hynes had lost touch and control of the office. In taking office, Mr. Thompson stated that he would strive to do justice and to be fair during his tenure as District Attorney.

Household Net Worth Rises

A recent report issued in late September by the Federal Reserve indicated that household net worth in the United States jumped $1.3 trillion during the Spring, based upon substantial gains in home and stock values.

The report stated that net worth rose to $74.8 trillion in the April/June quarter, up 1.8% from the first quarter. The most recent increase indicates that Americans have gained back almost all of the losses which were suffered as a result of the recent recession. Household net worth had fallen to $57.2 trillion in 2008. It has since risen by $17.6 trillion during the last five years.

Florida Population Set to Surpass New York by 2015

A report by the University of Florida and an analysis of recent census figures indicates that by 2015, Florida could surpass New York and become the Nation's third most populous State. As of April 2013, a preliminary estimate of Florida's population was placed at 19, 258,700. Over the last three years, Florida's population has grown by 2.4% and is now adding about 185,000 people per year. According to the 2012 census, Florida and New York were separated in population figures by approximately 600,000. Based upon current projections, Florida's population is expected to reach 19,750,577 by 2015. By comparison, New York's population in 2015 is expected to reach 19,546,904, giving Florida a 200,000 advantage over New York. We must await the actual figures to be released in 2015 to determine whether current estimates prove to be correct.

Attorneys Engaged in Overrated Jobs While Legal Assistants Are Underrated

A new employment survey conducted by Careercast reveals that attorneys are included in a list of the 12 most overrated jobs. The overrated list was based upon people who worked in high-stress positions and were required to work long hours. On the other hand, legal assistants who work in law offices were included in the list of the twelve most underrated jobs. Those listed in underrated positions were said to have the benefit of working directly with others who had overall supervision and responsibility for a matter, and were found to be under less stress and anxiety.

Task Force Makes Recommendations to Combat White Collar Crime

The New York State White-Collar Crime Task Force, an initiative of the District Attorneys Association of the State of New York, issued a report in late September detailing proposals to improve prosecution of cybercrime, identity theft, money laundering and other crimes involving fraud and corruption. The report stated that New York State's Fraud and Corruption laws have been far outpaced by an explosion in technical innovation and criminal deviousness. New York County District Attorney Cyrus Vance, Jr., who formed the task force in October 2012, stated that the proposals offered a road map for comprehensive and sensible reform to our criminal laws and procedures. District Attorney Vance also noted that the last comprehensive revision of the State's criminal laws occurred in 1965, almost fifty years ago.

Illegal Immigration Begins to Grow

After several years when the number of immigrants illegally entering the United States had dropped, the first signs are beginning to appear regarding a renewed rise in the number of illegal immigrants. During the major part of the recent economic recession which had occurred between 2006 and 2009, the number of illegal immigrants had dropped from a record number of 12.2 million to approximately 11.3 million. In 2009 to the present, as the U.S. economy has improved, the number has begun to edge up, with an estimated figure at the end of 2012 of 11.7 million. The largest illegal immigrant group continues to come from Mexico, with some 6 million illegally entering from that Country in 2012. Mexicans now make up 52% of the illegal immigrants entering the United States, which is down from 57% in 2007.

Starting Salaries for New Associates

According to a recent report by the National Association for Law Placement, the starting salaries for new associates have basically stayed at the same level since 2007. The median salary for new associates at large firms which had 700 or more attorneys was $160,000 in 2013. This has basically stayed the same during the last 5 years. 56% of new associates at these large firms were receiving $160,000, while 44% were making less. The high point for starting associate salaries was placed by the survey at 2009. With respect to smaller firms, the report indicated that the median salary for new associates was approximately $125,000 in 2013.

Circuit Court Reversals in U.S. Supreme Court

An interesting analysis which was published in the *New York Law Journal* on September 25th at page 3 reveals that several of the Circuit Court of Appeals have high reversal rates with respect to cases that reach the United States Supreme Court. The Second Circuit, for example, during the past term had 10 cases heard in the Supreme Court in which 6 were reversed, for a reversal rate of 60%. The Third Circuit had only 1 case affirmed out of 7 and had a reversal rate of over 83%. The Fifth Circuit had a similar reversal rate of 6 out of 7, and the Sixth Circuit had all of its 3 decisions overturned, for a reversal rate of 100%. The Ninth Circuit, which had the most decisions reviewed, to wit 13, had 11 reversed, for a reversal rate of 84%, and the Eleventh Circuit had only 1 case affirmed out of 6 decisions, for a reversal rate of 83%. This interesting analysis was conducted by Attorneys Flumenbaum & Carp, who are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison. Their interesting article is recommended reading.

Appellate Division Vacancies

During the last several years, several vacancies have occurred within the various Appellate Divisions. At the present time, there are 3 vacancies within the First Department, which has an authorized complement of 20. The Second Department, with an authorized complement of 22, has 4 vacancies, and the Third and Fourth Departments, with authorized complements of 12, have 4 vacancies in the Third Department and 2 vacancies in the Fourth. Three judges presently sitting in the Appellate Divisions are Republicans who faced stiff opposition from Democratic candidates in the November election. In face Judge Angiolillo lost his election causing an additional vacancy in the Second Department. The vacancy situation has increasingly alarmed various Bar Associations, including the New York State Bar, and they have called upon the Governor to begin making appointments as quickly as possible. The Governor has not issued an Appellate Division appointment in more than a year, and the Appellate Divisions as a whole are nearly 20% depleted. A spokesman for the Governor recently stated that appointments are expected in the near future and that the delay has been caused by a deliberative process which is utilized by the Governor's Screening Committee, and that sometimes the process is quite time-consuming.

Worldwide Aging Population

A recent report issued by the United Nations indicates that the world is aging so fast that most countries are not prepared to support their swelling numbers of elderly people. It is expected that by the year 2050, for the first time in history seniors over the age of 60 will outnumber children under the age of 15. The report ranked the economic well-being of elders in 91 countries and concluded that Sweden provided the best care, while Afghanistan was at the bottom of the list.

About Our Section and Members

Fall CLE Programs

A local CLE Program on "Police Encounters with the Public" was held on October 4th at the New York State Bar Association in Albany. The program was conducted by Michael S. Barone, who in addition to being an Attorney is a lieutenant with the Albany Police Department. The program was well received and was attended by approximately 80 participants.

The regular Fall CLE Program on Forensics and the Law was held at the New York University School of Law in New York City on October 25th and 26th. The program covered such topics as fingerprinting, DNA and ballistic evidence. Several speakers participated in the program. A cocktail reception was held following the panel discussions. The program was well attended with approximately 180 Section members participating.

Annual Meeting, Luncheon and CLE Program

The Section's Annual Meeting, luncheon and CLE program will be held on Thursday, January 30, 2014 at the New York Hilton Midtown in New York City, at 1335 Avenue of the Americas (6th Avenue at 55th Street). The CLE Program at the Annual Meeting will be held this year at 9:00 a.m. This year's topic will cover search and seizure law, right to counsel law and the confrontation clause. A distinguished panel consisting of Justice Barry Kamins, Justice John M. Leventhal and Justice Mark Dwyer will discuss these various issues.

Our annual luncheon will again be held at 12:00 p.m., and will include James Cole, United States Deputy Attorney General, as guest speaker, and the presentation of several awards to deserving individuals. Detailed information regarding all the events at the Annual Meeting will be forwarded under separate cover. We urge all of our members to participate in the Annual Meeting programs.

Bar Association Announces Several New Criminal Law Publications

In separate mailings to our Section members, the State Bar Association announced the availability of several criminal law publications which should be of interest and assistance to criminal law practitioners. One such publication is *Criminal Law and Practice*, which is a practical guide for attorneys representing clients charged with violations, misdemeanors or felonies. Written by Lawrence N. Gray, Esq., the Honorable Leslie Crocker Snyder and the Honorable Alex M. Calabrese, this book provides an excellent text of first reference and focuses on the types of offenses that the general practitioner is most likely to encounter. It is available to members at a price of $95.

A second publication is *New York Criminal Practice*, the third edition. This publication is written by dozens of criminal law attorneys and judges with decades of practical experience. The book is intended to guide both inexperienced and veteran attorneys. The third edition includes updated case law and statutes. The member price is $120. A third publication is *Foundation Evidence, Questions and Courtroom Protocols*. In this fourth edition, written by the Honorable Edward M. Davidowitz and Robert L. Dreher, Esq. forms and protocols are supplied that provide the necessary predicate for foundation questions for the introduction of common forms of evidence—such as business records, photos or contraband. The member price is listed at $60.

All of these publications can be ordered through the State Bar Service Center at One Elk Street, Albany, NY 12207, or by calling 1-800-582-2452.

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.

Rither Alabre
Matthew Wayne Alpern
Amanda Amendola
Derek Scott Andrews
Amanda Jean Brillantes Bernardo
Norman P. Bock
Richard Buck
William T. Burke
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Kimberly Gitlin
Sean Glendening
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Valerie Alice Gotlib
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Victoria Graf
Naima Estelle Gregory
James B. Gross
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Stephanie Mendelsohn
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James W. Neilson
Grainne Elizabeth O'Neill
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Michael Papson
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Nemanja Pavlovic
Jessica Pepe
Michael Pietruszka
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Marsha King Purdue
Pietrina J. Reda
Thomas Rizzuti
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Publication and Editorial Policy

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

Publication Policy: All articles should be submitted to:

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(727) 733-0989 (FL)

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

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

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NEW YORK CRIMINAL LAW NEWSLETTER

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