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New York Criminal Law Newsletter

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

Judge Jenny Rivera for the Defense

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Clemency Initiative

Modern presidents have lost their touch. Through most of the 20th century our chief executives utilized their Article II power to extend pardons and to commute sentences at a relatively brisk clip. Warren Harding, not known as a bleeding heart liberal, pardoned 300 people in two years, and commuted 386 sentences. In six years, Calvin Coolidge pardoned 773 people and commuted 843 sentences—quietly, of course. "Give 'em Hell" Harry Truman gave away 1,913 pardons and commuted 118 sentences in his 93 months in the White House. Eisenhower's numbers were 1,110 and 47 in eight years, which was a higher total than even the number of his golf games. Gerald Ford granted pardons or commutations to 404 individuals, including his predecessor Richard Nixon, who had himself granted 923.

Lately? Not so much. Between them the Presidents Bush helped 277 people in twelve years. President Clinton was good to 200 people in eight years. And in over five years, our coolest President, Barrack Obama, has granted pardons or commutations to only 61 people. And it's not as if we have suddenly run short of federal prisoners.

But the times, they are a-changing. On January 30th the Deputy Attorney General, James M. Cole, honored the Criminal Justice Section by speaking at our annual lunch. He took that opportunity to announce a new administration initiative that will seek out deserving clemency candidates. More particularly, the administration is willing to extend clemency to longtime federal inmates whose sentences are more severe than those they would receive today, so long as the inmates meet certain criteria. Many prisoners convicted of narcotics offenses would seem prime candidates, but inmates serving time for other types of crimes could qualify as well.

But there are many federal prisoners, and not that many Justice Department employees available to find the inmates who are most deserving of consideration. The Department will therefore ask the organized bar to step up and help. Volunteers will be trained to work with Department attorneys to screen inmates and identify those who meet the program's criteria. And these individuals will be assigned counsel to prepare and submit their clemency applications.

The clemency initiative took a major step forward on April 23rd, when the Justice Department specified the criteria which will be used. An application will receive priority if the inmate:

- is serving a prison sentence that "likely" would be "substantially lower" if the conviction occurred today;
- is a non-violent and "low level" offender without ties to organized crime or gangs;
- has served at least 10 years in prison;
- does not have a significant criminal history;
- has demonstrated "good conduct" while in prison;
- has no history of violence before or during his current prison term.

Notably, the Department's position is reported to be that an inmate can receive favorable consideration even if he does not perfectly match these criteria.

A number of national bar groups, and in particular the NACDL, are working with the Justice Department on training, and will soon be soliciting volunteers. When the call comes our Section members will receive word of it from the Section officers. In the meantime, the Department has begun a campaign to notify inmates of the clemency program and advise them about the governing criteria.

Of course, not everyone will be equally pleased to see an organized clemency program take shape. My view, however, is that exactly the right people are being targeted here. It makes perfect sense to reduce the punishment of non-violent offenders who, given current norms, would not today receive lengthy prison terms. And even those who do not find that consideration compelling will at least have to concede that a reduction in the numbers of non-violent prisoners will free up resources that can be profitably used elsewhere.

I write these notes on the eve of our Spring Meeting and our annual Evidently Evidence CLE session in Albany. Planning is under way as well for the annual fall Forensics CLE in Manhattan.

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 several feature articles which should be of interest to Criminal Law attorneys. The first article is written by our longtime Section member, Lawrence S. Goldman and his partner Elizabeth M. Johnson. Their article involves the speedy trial, Penal Law 30.30 computation as viewed by the Appellate Division, First Department. This is a practical and informative article dealing with a subject that is of everyday concern to practicing attorneys. A second feature article deals with an analysis of decisions issued by Judge Jenny Rivera of the Court of Appeals in 82 criminal law cases during the last year. The article concludes that Judge Rivera has now surpassed Chief Judge Lippman as the most pro-defense judge on the Court of Appeals. It is hoped that the article provides some informative and interesting reading.

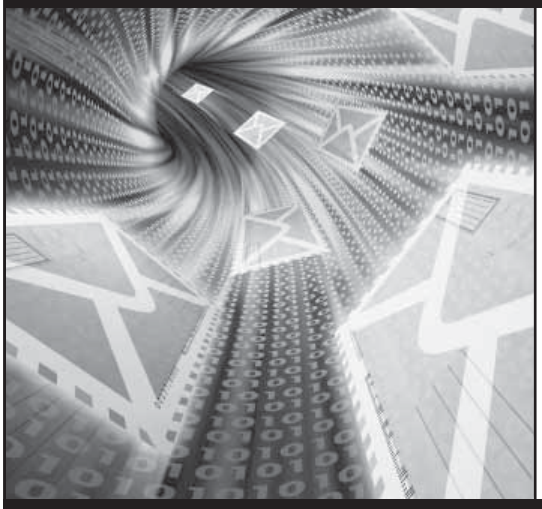
Both the United States Supreme Court and the New York Court of Appeals have issued some important decisions during the last few months in the Criminal Law and Constitutional areas. The Supreme Court has dealt with some important search and seizure issues, questions of affirmative action, and concerns regarding ineffective assistance of counsel. The New York Court of Appeals has addressed issues involving confessions and appropriate charges to the jury. We discuss these developments in the appropriate sections in this issue.

In our For Your Information section, we provide a variety of articles covering economic issues, government matters and other developments which should be of interest and concern to the legal profession. We provide an update on the status of the stop and frisk situation in New York City, as well as some good news regarding the improving economy and the increase in net worth for Americans during the last year.

In our About Our Section portion we provide information regarding the status of our Section, as well as activities involving some of our Section members. In his Message from the Chair, Mark Dwyer reminds members regarding upcoming programs, and also presents some detailed information regarding the recently announced clemency initiative. Our *Newsletter* is published four times a year, and we hope that our members continue to read and support our publication. We encourage the submission of articles and comments from our readers.

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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First Department's Addition of "Trial Preparation" Exclusion to 30.30 Computation Improperly Broadens the Statute

By Lawrence S. Goldman and Elizabeth M. Johnson

1. Introduction

As anyone who toils in the New York State criminal justice system in Manhattan or the Bronx knows, the so-called speedy trial rules, Criminal Procedure Law § 30.30, to the extent they were designed to ensure trials of criminal cases without undue delay, simply do not work, as amply demonstrated by the four-part series of articles by William Glaberson in the *New York Times* in April 2013 about the Bronx criminal justice system.

One, but far from the only, reason that the speedy trial rules do not lead to speedy trials is the First Department's gloss on the speedy trial statute which has effectively broadened the statutory time limits within which the prosecution must be "ready" for trial to include an additional period for "trial preparation."

The basic idea of the speedy trial rules, enacted in 1972 at the behest of prosecutors to overrule an edict by the Judicial Conference Administrative Board that required that criminal cases actually be *tried* within set time periods, was to substitute a "ready rule."[1] Thus, under the current speedy trial rule a case need not be tried within the statutory period as long as the prosecution is "ready" to try the case within that period. This rule thus obviously contemplated that the prosecution, to avoid a dismissal, should be ready *within* the allotted period (six months for felonies, for instance[2]), and thus prepare its case *within* that period.

The First Department extension of the speedy trial act, however, allows an additional period for trial preparation. Not only is this judge-made exception in seeming violation of CPL § 30.30 by giving prosecutors extra time (often about 30 days) to prepare beyond the apparent mandated statutory period, perhaps even more importantly it reinforces a culture whereby prosecutors generally pay scant attention to a case until the date on which a CPL § 30.30 dismissal should be granted is fast approaching. The result of that culture is that realistic plea offers are delayed, necessary witnesses and evidence are no longer available, defendants whose cases are ultimately dismissed or pleaded down are kept in jail longer than they should have, and court calendars are clogged.

2. New York's Speedy Trial Provisions

The Criminal Procedure Law's speedy trial provision, CPL § 30.30, provides that if the prosecution is not ready for trial within a certain period, the court must grant a motion to dismiss on the ground that the defendant has been denied his right to a speedy trial.[3] Those periods are generally six months for felonies,[4] 90 days for class A misdemeanors, 60 days for class B misdemeanors, and 30 days for violations.[5] CPL § 30.30(4) sets forth eleven time periods which must be excluded from speedy trial calculations, among them "delay resulting from other proceedings concerning the defendant," including pretrial motions, CPL § 30.30(4)(a), and "delay occasioned by exceptional circumstances," including "additional time to prepare the people's case [when] additional time is justified by…exceptional circumstances."[6]

3. The First Department's Unwarranted Extension of the Prosecutor's Time to Be Ready

Although the Court of Appeals has explicitly stated that exclusions of time may only be granted when they are "excludable under the terms of the statute,"[7] the First Department has grafted onto the statutory list of eleven excludable periods an additional one—a "reasonable time to prepare for trial" after motion practice (including the decision) is concluded. No other Department has accepted such an exclusion, it appears.[8] This court-made exclusion is purportedly justified under CPL § 30.30(4)(a) on the ground that delay may "result from" motion practice or other proceedings even after those proceedings are over.[9]

Thus, under First Department practice, despite the clear time limitations set forth in CPL § 30.30(2), the District Attorney generally need not be ready for trial within six months for a felony, 90 days for an A misdemeanor, 60 days for a B misdemeanor, or 30 days for a violation. The prosecution need not even *begin* to prepare for trial until all motions are decided since it is generally allowed an extra 30-40 days to be ready in addition to the statutory time periods. If defense (or even prosecutorial) motions are made—whether or not the motions could conceivably have affected trial preparation—the prosecution is automatically granted an additional time period following any decision on motions to prepare for trial.[10] Such additional periods of as much as 39 days have been approved by the First Department.[11]

The genesis of this judicially created exclusion appears to have been *People v. Green*.[12] In *Green*, the First Department upheld an exclusion under CPL § 30.30(4)(a) of ten days during which the case was adjourned for hearings and trial.[13] Since the trial court could not decide defense motions until the hearings were held, the exclusion reasonably fit within the language of CPL § 30.30(4)(a), which provides an exclusion for "a reasonable period of delay resulting from…pretrial motions…and the period

during which such matters are under consideration by the court."

The rule of *Green*, however, has subsequently been extended to cases in which no motions are pending and nothing is under consideration by the court, including time after the decision on appeal reinstating an indictment,[14] time after a decision completely resolving the defendant's omnibus motion,[15] and time after a decision on a speedy trial motion pursuant to CPL § 30.30.[16] The rule has even been extended further to allow an exclusion of time "resulting from defendant's failure to accomplish his stated intention to file motions."[17]

The rationale offered for the trial preparation exclusion is often that since the prosecution cannot know what the result of motions or an appeal will be, it cannot be expected to be ready for trial immediately after they are decided.[18] This rationale has been rejected by the Court of Appeals in other factual settings. In *People v. Correa*,[19] the Court of Appeals rejected the prosecution's claim that it should not have to prepare prior to arraignment because defendant might plead guilty ("that defendant might plead guilty then or at any other time before trial should not excuse the prosecutor from taking the necessary steps to be ready for trial within the prescribed period"). Similarly, in *People v. Collins*,[20] delay resulting from the case's transfer to an IAS Part was not excluded, since "to accept the People's argument that the adjournment was an excludable motion-related delay because transfer to an IAS Part was a condition precedent to any defense motion which might later be made falls outside of a fair reading of the statutory language, which generally refers to delays attributable to responding to and deciding motions actually made."

Although the First Department has justified its exclusion as "*resulting* from pre-trial motions," the rule has been extended to motions or appeals when the decision on motions could not conceivably have had any impact on evidentiary or other trial preparation issues. For example, the First Department has allowed a trial preparation exclusion after decisions on 30.30 motions,[21] even though the only way a 30.30 motion could impact trial preparation is by eliminating the need for a trial because the case is dismissed. Analytically, this situation is indistinguishable from *Correa*,[22] where the prosecution unsuccessfully argued it should not be required to prepare because the defendant might plead guilty at arraignment and thus eliminate the need for a trial.

The First Department's rule also ignores that the statute itself provides the prosecution with what the legislature determined was ample time to prepare. Without the "trial preparation exclusion," the prosecution still would not have to be ready the very day motions are decided—unless the prosecution has neglected to get "ready" during the period authorized by CPL § 30.30(2).[23] The Court of Appeals[24] has allowed exclusions of time only when they are "excludable under the terms of the statute."[25]

Additionally, the statute does provide for an adjournment for additional time for trial preparation in extraordinary circumstances. CPL § 30.30(4)(g) specifically provides an exclusion to allow the district attorney additional time to prepare the People's case when "additional time is justified by the **exceptional circumstances** of the case" (emphasis added).[26] In order to avail itself of this "exceptional circumstances" provision, however, the prosecution must raise it in the trial court,[27] and generally show diligent efforts to be ready within the statutorily prescribed time period.[28] If certain evidence is disallowed by a decision on a motion to preclude or suppress, the prosecutor might in some circumstances seek additional time to search for other evidence to cover that area of proof, and an exclusion might be justifiable for "exceptional circumstances." However, the First Department's rule is applied automatically in every case when motions are made whether or not the decision on the motion might affect the prosecutor's preparation[29] (as well as in at least some cases when motions were not made),[30] without any consideration of the "exceptional" nature or lack thereof of the case, and, further, without any consideration of the prosecution's efforts to be ready. CPL § 30.30(4)(g)'s limited trial preparation exclusion, which must be justified by "exceptional circumstances," makes it clear that the legislature did not intend that an exclusion for trial preparation should be given routinely in run-of-the-mill cases every time the defendant makes any motion, or even requests an opportunity to do so.[31]

Since motions are routinely made and are often a minimal requirement for effective representation under the federal and state Constitutions, the First Department's practice eviscerates the statutory limits of CPL § 30.30. To an extent, it penalizes a defendant for bringing motions, especially 30.30 motions, since such a motion not only stops the speedy trial clock but also affords the prosecution a virtually automatic additional 30-day or more exclusion.[32] The First Department rule thus discourages defense counsel from making motions and competently and diligently representing the accused, while it encourages prosecutors' laxity by allowing them to wait until a decision on motions before focusing on the strengths and weaknesses of the case.

4. Conclusion

The First Department's special exclusion from the computation of speedy trial time for trial preparation following a decision on a motion—any motion—is violative of the specific language and spirit of the speedy trial laws (as well as Court of Appeals case law). It also contributes to a culture of lassitude where prosecutors in the First Department can delay trial preparation and the intense consideration of a case that trial preparation requires. Although its effect is difficult to quantify, the exclusion

undoubtedly contributes to the excessive delays in the conclusion of cases in the First Department.

The First Department, considering the statutory language, case law, the intent of the law, and the dilatory effects of its judicially made exclusion, should reconsider the exclusion and reverse itself. In fact in the recent case of *People v. Sibblies* the Court of Appeals clearly indicated that it was moving to limit speedy trial exclusions (see page 16).

Defense lawyers in the First Department should be cautious in making motions in cases in which they suspect the district attorney may have a problem in being "ready" within the 30.30 limits. They should carefully assess the time periods and merits before submitting a 30.30 motion for dismissal. Any motion, including a 30.30 motion, not only stops the speedy trial clock but adds to it a "trial preparation" period of perhaps 30-40 days.

Endnotes

1. *See People v. Gruden*, 42 N.Y.2d 214, 217, 397 N.Y.S.2d 704, 706 (1972) (discussing history of CPL § 30.30 enactment).
2. *See* CPL § 30.30(1)(a).
3. *See also* CPL §§ 170.30(1)(e), 210.20(1)(g).
4. There is generally no time limit for cases involving homicides. CPL § 30.30(3)(a).
5. CPL § 30.30(1).
6. CPL § 30.30(4)(g).
7. *People v. Cortes*, 80 N.Y.2d 201, 208, 590 N.Y.S.2d 9, 13 (1992).
8. We have been unable to locate a single reported decision outside the First Department that allows such an exclusion and at least one Third Department case suggesting a contrary rule. *See People v. O'Connell*, 133 A.D.2d 970, 971, 521 N.Y.S.2d 121, 122 (3d Dep't 1987) (CPL § 30.30(4)(a) excludes only time "attributable to consideration and determination" of motions); *see also People v. Seamans*, 85 A.D.3d 1398, 925 N.Y.S.2d 266 (3d Dep't 2011) (factors that do not actually delay trial preparation do not justify excluding time); *People v. Rahim*, 91 A.D.3d 970, 972, 937 N.Y.S.2d 325, 327 (2d Dep't 2012) (rejecting exclusion of time as "reasonable delay to allow [prosecutor]…to prepare for hearings" when four months had passed since decision on defense motion).
9. *People v. Osorio*, 39 A.D.3d 400, 401, 835 N.Y.S.2d 82, 84 (1st Dep't 2007), *lv. denied*, 9 N.Y.3d 295, 844 N.Y.S.2d 180 (2007).
10. This extra time has been granted even if the prosecution still has ample time left on the clock. *E.g.*, *Ali*, 195 A.D.2d 368, 600 N.Y.S.2d 55 (applying trial preparation exclusion to time period when there had not yet been any time chargeable to prosecution); *Luna*, 261 A.D. 245, 690 N.Y.S.2d 534 (same); *People v. Espinal*, 1 Misc.3d 134(A), 781 N.Y.S.2d 626, 2004 WL 178612 (App. Term 1st Dep't 2004) (applying trial preparation exception to only arguably excludable time period); *lv. denied*, 1 N.Y.3d 627, 777 N.Y.S.2d 26 (2004).
11. *See People v. Ali*, 195 A.D.2d 368, 369, 600 N.Y.S.2d 55, 57 (1st Dep't 1993) (exclusion of adjournment after decision on 30.30 motion "granted to the People to prepare for trial"), *lv. denied*, 82 N.Y.2d 804, 604 N.Y.S.2d 940 (1993); *see also People v. Luna*, 261 A.D.2d 245, 245, 690 N.Y.S.2d 534, 536 (1st Dep't 1999) (29 days "excludable as a reasonable time for the People to prepare" after omnibus motion was decided), *lv. denied*, 93 N.Y.2d 1001, 690 N.Y.S.2d 534 (1999); *People v. Heine*, 238 A.D.2d 212, 212, 656 N.Y.S.2d 258, 259 (1st Dep't 1997) (32 day adjournment "reasonable amount of time to prepare the case following motion practice"); *lv. denied*, 90 N.Y.2d 905, 663 N.Y.S.2d 517 (1997).

    Lower courts have granted much lengthier exclusions. *See, e.g.*, *People v. West*, 41 Misc. 542, 970 N.Y.S.2d 867(Crim. Ct. Bx. Co. 2013) (51 day exclusion to prepare after motions waived).
12. 90 A.D.2d 705, 455 N.Y.S.2d 368 (1st Dep't 1982), *lv. denied*, 58 N.Y.2d 784, 459 N.Y.S.2d 638 (1982).
13. 90 A.D.2d at 705, 455 N.Y.S.2d at 369.
14. *Osorio*, 39 A.D.3d at 401, 835 N.Y.S.2d at 84.
15. *People v. Fleming*, 13 A.D.3d 102, 785 N.Y.S.2d 333 (1st Dep't 2004), *lv. denied*, 5 N.Y.3d 788, 801 N.Y.S.2d 809 (2005).
16. *Ali*, 195 A.D.2d 368, 600 N.Y.S.2d 55.
17. *People v. Fuller*, 8 A.D.3d 204, 205, 780 N.Y.S.2d 320, 320 (1st Dep't 2004), *lv. denied*, 3 N.Y.2d 706, 785 N.Y.S.2d 34 (2004); *People v. Garrett*, 182 A.D.2d 496, 582 N.Y.S.2d 189 (1st Dep't 1992) (excluding 40-day adjournment after defendant waived motions on due date so prosecutor could prepare for trial); *see also People v. Bahadur*, 41 A.D.3d 239, 240, 841 N.Y.S.2d 5, 6 (1st Dep't 2007) (excluding time to "prepare for trial following failed plea negotiations"), *lv. denied*, 9 N.Y.3d 920, 844 N.Y.S.2d 175 (2007). *Contra*, *People v. Brown*, 206 A.D.2d 326, 328, 615 N.Y.S.2d 16, 17 (1st Dep't 1994) (no exclusion for time "incident" to breakdown in plea negotiations because it is merely a "euphemism for time to prepare for trial"), *lv. denied*, 84 N.Y.2d 933, 621 N.Y.S.2d 530 (1994).
18. *See Osorio*, 39 A.D.3d at 401, 835 N.Y.S.2d at 84; *People v. Campbell*, 255 A.D.2d 229, 681 N.Y.S.2d 491 (1st Dep't 1998), *lv. denied*, 93 N.Y.2d 851, 688 N.Y.S.2d 498 (1999).
19. 77 N.Y.2d 930, 931, 569 N.Y.S.2d 601, 602 (1991).
20. 82 N.Y.2d 177, 181, 604 N.Y.S.2d 11, 13 (1993).
21. *People v. Rowe*, 227 A.D.2d 212, 213, 642 N.Y.S.2d 276, 277 (1st Dep't 1996), *lv. denied*, 88 N.Y.2d 993, 649 N.Y.S.2d 400 (1996); *Ali*, 195 A.D.2d at 369, 600 N.Y.S.2d at 57.
22. 77 N.Y.2d 930, 569 N.Y.S.2d 601.
23. *See People v. Schneck*, 20 Misc.3d 1146(A), 873 N.Y.S.2d 236, 2008 WL 4277255, *2 (Crim. Ct. N.Y. Co. 2008) (no trial preparation exclusion for time in which defendant did not make motions; "the Legislature has already determined what that reasonable period" for trial preparation is); *People v. Santiago*, 147 Misc.2d 143, 144, 555 N.Y.S.2d 569, 570 (Crim. Ct. N.Y. Co. 1990) (no exclusion for trial preparation post-arraignment when defendant waived motions; CPL § 30.30 "does not provide the People with a reasonable excludable adjournment to prepare for trial" but only the specific period set forth in § 30.30(1)); *cf. People v. Anderson*, 66 N.Y.2d 529, 537, 498 N.Y.S.2d 119, 124 (1985) (speedy trial statute "was intended to limit the People's time for preparation to the period specified," no more or less).
24. *People v. Cortes*, 80 N.Y.2d 201, 208, 590 N.Y.S.2d 9, 14 (1992).
25. The statutory list of acceptable delays excludable from speedy trial computation is "*exhaustive*; only those delays specifically recognized under subdivision four will be excludable." Lawrence K. Marks et al., *New York Pretrial Criminal Procedure* § 9:26 (2nd ed. 2007) (emphasis in original); *accord*, Preiser, *Commentary to N.Y. Crim. Proc. Law CPL 30.30* (McKinney 2003) at 213. ("Any exclusion of time to toll the readiness period must be based squarely upon a circumstance specified in subdivision four" of CPL § 30.30.) Subdivision 4, of course, contains no general exclusion for trial preparation.
26. Exclusions under CPL § 30.30(4)(g) are most often granted due to the unavailability of witnesses or the need to protect an ongoing investigation. *E.g.*, *People v. Woody*, 24 A.D.3d 1300, 1301, 806 N.Y.S.2d 820, 822 (1st Dep't 2005) (exclusion based on unavailability of witness), *lv. denied*, 7 N.Y.3d 852, 823 N.Y.S.2d 782 (2006); *People v. Caparelli*, 68 A.D.2d 212, 416 N.Y.S.2d 798 (1st Dep't 1979) (exclusion based on "exceptional circumstance" of ongoing narcotics investigation). Additionally, with the advent of

DNA evidence, this provision of the statute has addressed delays needed to obtain DNA results. *E.g., People v. Robinson*, 47 A.D.3d 847, 850 N.Y.S.2d 533 (2d Dep't), *lv. denied*, 10 N.Y.3d 869, 860 N.Y.S.2d 495 (2008); *People v. Williams*, 244 A.D.2d 587 (2d Dep't 1997), *lv. denied*, 91 N.Y.2d 899 (1998).

27. *People v. Chavis*, 91 N.Y.2d 500, 673 N.Y.S.2d 29 (1998).

28. *See People v. Zirpola*, 57 N.Y.2d 706, 454 N.Y.S.2d 702 (1982) (delay caused by unavailability of witness); *People v. Valentin*, 184 Misc.2d 942, 944, 712 N.Y.S.2d 734, 736 (Sup. Ct. Bronx Co. 2000) (burden is on prosecution to show exceptional circumstance); *People v. Laspina*, 135 Misc.2d 422, 428 fn**, 515 N.Y.S.2d 694, 699 fn** (Crim. Ct. Bronx Co. 1987) ("Repose by the People certainly is not an 'exceptional circumstance.'").

29. The denial of a motion to dismiss or motion to suppress should almost never affect the prosecutor's preparation.

30. *See Fuller*, 8 A.D.3d at 205, 780 N.Y.S.2d at 320; *Garrett*, 182 A.D.2d at 496, 582 N.Y.S.2d at 189.

31. One potential reason for the "trial preparation" exclusion, although not to our knowledge ever explicitly expressed in a judicial opinion, is that it may save prosecutorial time. The vast majority of cases in New York State Courts result in guilty pleas, and defendants often are reluctant to plead guilty before motions are decided. Additionally, some motions result in dismissals or other rulings which lead to a revised plea offer more acceptable to the defendant. The prosecutor's preparation for trial prior to a decision on motions thus arguably might be unnecessary or wasted effort. Of course, proper management by the prosecutor of the time period (beyond excludable time) afforded by the statute should nonetheless leave her ample time to prepare in the vast majority of cases. And, in any case, this reason has not been recognized in the statute and, further, as explained below, has a serious negative dilatory impact.

32. *Cf. North Carolina v. Pearce*, 395 U.S. 711 (1969) (harsher sentence following appeal appears punitive and may discourage appeals).

Lawrence S. Goldman and Elizabeth M. Johnson are partners in the New York City law firm of Goldman and Johnson which concentrates in criminal defense, both white collar and non-white collar. Mr. Goldman is a graduate of Brandeis University and Harvard Law School. He has been an attorney since 1966 and has been in private practice since 1972. He is a past president of the National Association of Criminal Defense Lawyers, New York State Association of Criminal Defense Lawyers and the New York Criminal Bar Association, and is a former chair of the New York State Commission on Judicial Conduct. He is a past recipient of this Section's Charles F. Crimi Memorial Award for Outstanding Private Defense Practitioner. Ms. Johnson is a graduate of Yale University and the Law School of Columbia University in the City of New York. She is a member of the National Association of Criminal Defense Lawyers.

Judge Rivera for the Defense

By Spiros Tsimbinos

New York State Court of Appeals Judge Jenny Rivera, after being appointed by Governor Cuomo, was confirmed by the State Senate on February 11, 2013, and after assuming her seat on the Court, participated in decisions which began being issued in late April of 2013. She has now participated in a little over a year of decision-making and it is a good time to review any trends or patterns that have emerged while she has been serving on the Court.

A biographical sketch of Judge Rivera which appears in the official pamphlet from the New York Court of Appeals describes Judge Rivera in the following manner:

> She spent her entire professional career in public service. She clerked for the Honorable Sonia Sotomayor, on the Southern District of New York, and also clerked in the Second Circuit Court of Appeals Pro Se Law Clerk's Office. She worked for the Legal Aid Society's Homeless Family Rights Project, the Puerto Rican Legal Defense and Education Fund (renamed Latino Justice PRLDEF), and was appointed by the New York State Attorney General as Special Deputy Attorney General for Civil Rights. Judge Rivera has been an Administrative Law Judge for the New York State Division for Human Rights, and served on the New York City Commission on Human Rights. Prior to her appointment, she was a tenured faculty member of the City University of New York School of Law, where she founded and served as Director of the Law School's Center on Latino and Latina Rights and Equality. She graduated from Princeton University, and received her J.D. from New York University School of Law and her LL.M. from Columbia University School of Law.

At the time of the Judge's appointment, a review of the Judge's background indicated that she would probably fall within the liberal wing of the Court, since she was actively involved in many social, civil rights and constitutional matters. In the area of Criminal Law, it was widely expected that she would be favorable to the defense. An analysis of some 82 Criminal Law decisions which we have reviewed in our *Newsletter* over the last year clearly confirms that in the Criminal Law area, Judge Rivera has now emerged as the most pro-defense member of the Court of Appeals, even surpassing Judge Lippman, who basically held that position for the last several years.

Of the total 82 decisions reviewed, the Court as a whole voted for the defense in 29 cases, or a pro-defense rating of 35.3%. Judge Rivera, on the other hand, voted for the defense in 46 of these cases, or a total pro-defense rating of 56.1%. Her voting record in favor of the defense was thus more than 20% higher than that of the Court as a whole. Chief Judge Lippman, who previously was viewed as the most pro-defense member of the Court, voted in favor of the defense in 40 cases, or a pro-defense rating of 48.9%. Thus even when compared with Chief Judge Lippman, Judge Rivera had a substantially higher voting record in favor of the defense than the second highest pro-defense member of the Court. Based upon her voting record, Judge Rivera, in the 82 decisions, dissented from the rest of the Court on 17 occasions. This was six times more than Chief Judge Lippman, who dissented on 11 occasions.

The pro-defense pattern in Judge Rivera's voting record was detected very early in her term on the Court of Appeals. Leading Criminal Law practitioner and commentator Paul Shechtman, in his annual review of Criminal Law decisions from the New York Court of Appeals, which covered only three months of Rivera decisions, commented in the *New York Law Journal* special section on the Court of Appeals of August 26, 2013, at page S-3:

> Of the 89 cases that the Court decided last term, 60 were affirmed and 29 were reversed. The People prevailed in 52 (58.4 percent) and the defendant in 37 (41.6 percent). There were 61 unanimous decisions, and 30 cases were decided in memorandum opinions. Judge Rivera showed herself to be a spirited dissenter: she dissented in seven cases, all on the side of the defendant, five times with Chief Judge Lippman and two times alone.

During the last several years, the Court as a whole has basically voted in favor of the defense between 33% and 41% of the time. Judge Rivera's pro-defense rating of 56.1% is way above the usual percentage manifested by the Court as a whole. In issuing her many dissents, Judge Rivera appears to be greatly concerned about police testimony and search and seizure issues. In this regard, she has occasionally voted in favor of the defense even when her usual ally, Chief Judge Lippman, has joined the majority pro-prosecution position. Thus, in *People v. Padilla*, which was decided on June 6, 2013 and which was reviewed at page 16 of our Fall 2013 issue, Judge Rivera dissented in a case where the Court, in a 5-1 decision, upheld a police search of a Defendant's vehicle. Judge Rivera argued that the majority holding had the potential to encourage police officers to ignore established written police protocols.

In determining whether the defense could be successful in a criminal appeal, criminal appellate attorneys often attempt to count votes. In the United States Supreme Court, for example, Justices Sotomayor, Kagan and Ginsburg are largely viewed as good prospects for a defense decision. In the Court of Appeals, former Justices Kaye and Ciparick were largely viewed as being pro-defense. Within the current Court, Chief Judge Lippman, during the last few years, was regarded as the most pro-defense, and the Judge who often dissented when the Court voted in favor of the prosecution. At the present time, based upon the analysis which has been conducted, it appears clear that Judge Jenny Rivera, with respect to Criminal Law issues, has become the most pro-defense member of the Court, and the Judge who most often dissents in favor of the defense when the Court goes the other way. When criminal defense lawyers count possible votes on the Court, they begin by having a good chance to have Judge Rivera in their favor. If you don't have Judge Rivera as a pro-defense vote, then a defense victory appears hopeless.

An additional three vacancies will open up on the New York Court of Appeals within the next two years. Two of the Judges whose terms are expiring, Judges Graffeo and Smith, have largely been viewed as pro-prosecution. When Governor Cuomo selects replacements for these two Judges, it may lead to a further shift in the Court with respect to either a pro-defense or a pro-prosecution pattern. We will continue to analyze decisions emanating from the New York Court of Appeals and any future changes in personnel as they occur.

New York Court of Appeals Review

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from February 1, 2014 to April 30, 2014.

Affirmative Defense of Extreme Emotional Disturbance

People v. Gonzalez, decided February 13, 2014, (N.Y.L.J., February 14, 2014, p. 20)

In a unanimous decision, the New York Court of Appeals concluded that CPL 250.10 regarding providing notice of intent to offer evidence in connection with the affirmative defense of extreme emotional disturbance does not apply when a requested jury charge is based solely upon evidence presented by the People. In the case at bar, the Defendant offered no evidence of extreme emotional disturbance at trial, but requested a jury charge based solely upon the evidence presented by the People. The trial court failed to provide the requested jury instructions, and the New York Court of Appeals concluded that the trial court ruling was error and required a new trial. The Court concluded that a Defendant is entitled to a jury charge on extreme emotional disturbance where the evidence viewed in the light most favorable to the Defendant is sufficient for the jury to find by a preponderance of the evidence that the elements of the affirmative defense are satisfied. This is true even if the Defendant did not testify or otherwise present evidence, and the request for an extreme emotional disturbance charge is based entirely on proof elicited during the People's case where the fact that the Defendant never provided a CPL notice has no bearing on the requirement to provide a jury charge.

Legally Sufficient Evidence

People v. Schreier, decided February 13, 2014 (N.Y.L.J., February 18, 2014, p. 18)

In a unanimous decision, the New York Court of Appeals concluded that there was legally sufficient evidence to support the Defendant's conviction for the crime of unlawful surveillance in the second degree, pursuant to Penal Law Section 250.45. The Court found that each element of the offense was established beyond a reasonable doubt. In the case at bar, the Defendant had stood outside the front door of his neighbor's townhouse and used his compact video camera to film the complainant while she was naked in her second floor bathroom. The Court of Appeals concluded that under the circumstances, in the case at bar the evidence established that the Defendant had surreptitiously recorded the complainant for his own amusement or entertainment at a time and place where she had a reasonable expectation of privacy.

Pro Se Representation

People v. Stone, decided February 13, 2014 (N.Y.L.J., February 18, 2014, p 18)

In a unanimous decision, the New York Court of Appeals concluded that the Defendant's constitutional rights were not violated by the trial court's failure to sua sponte inquire into his mental capacity to represent himself prior to granting his application to proceed pro se. The Defendant proceeded to trial on two counts of burglary. He expressed distrust of his lawyer and asked to proceed pro se. During the course of the proceedings, the Court and assigned counsel repeatedly advised the Defendant of the perils of self-representation, and attempted to persuade him to work with his assigned counsel. Following his conviction, he appeared for sentence, and while giving a lengthy personal statement, made no mention of any mental incapacity. On appeal, however, the Defendant argued that his constitutional right to counsel was violated when the trial court permitted him to proceed pro se without first having him examined to determine whether he met a heightened competency standard necessary for self-representation. The Court of Appeals rejected the Defendant's argument and concluded that on the record before it, it could not be said that the trial court abused its discretion in failing to undertake a particularized assessment of Defendant's mental capacity when resolving Defendant's request to proceed pro se.

Legal Insufficiency

People v. Reed, decided February 13, 2014 (N.Y.L.J., February 18, 2014, p. 20)

In a 4-3 decision, the New York Court of Appeals concluded that there was sufficient evidence to convict the Defendant of first degree robbery as an accessory. The Defendant contended that there was insufficient evidence of a robbery in the course of which a killing occurred. He argued that in order to prove that the Defendant was guilty of first degree robbery, the prosecution had to prove sufficient evidence that Defendant, or someone whom he intentionally aided, forcibly stole property. According to Defendant, there was insufficient proof that anything was stolen from the victim. The Court's majority concluded that evidence that $40,000 was taken from the victim was circumstantial; however, the standard of appellate review regarding legally sufficient evidence is the same for circumstantial and non-circumstantial cases. Viewing the evidence in the light most favorable to the prosecution, a rational jury could have found the elements of the crime for which the Defendant was convicted were proven beyond a reasonable doubt.

Chief Judge Lippman dissented, concluding that a crucial requisite element of felony murder and two counts of robbery in the first degree, to wit: that there was a forcible taking of property, was not proven by the People's evidence, and therefore the evidence was legally insufficient to support the judgment of conviction. Chief Judge Lippman was joined in dissent by Judges Rivera and Abdus-Salaam.

Adverse Inference Charge

People v. Martinez, decided February 18, 2014 (N.Y.L.J., February 19, 2014, pp. 1, 8 and 22)

In a 4-3 decision, the New York Court of Appeals held that trial judges are not bound to give juries an adverse inference charge when the handwritten complaint reports prepared by arresting officers are missing. In a majority opinion written by Judge Read, the Court concluded that it would continue to follow a rule where non-willful negligent loss or destruction of *Rosario* material does not mandate a sanction unless the defendant establishes prejudice. The majority emphasizes that it would defer to judicial discretion by trial judges in making a final determination regarding the giving of an adverse inference charge. Judge Read was joined in the majority by Judges Graffeo, Smith and Pigott. Chief Judge Lippman dissented, and was joined in dissent by Judges Rivera and Abdus-Salaam. The dissenters argued that since evidence in the case at bar with respect to Defendant Christopher Martinez was not overwhelming, it could not be considered harmless, and since the Defendant was prejudiced, the conviction should be reversed.

Confessions

People v. Thomas, decided February 20, 2014 (N.Y.L.J., February 21, 2014, pp. 1, 2 and 22)

In a unanimous decision, the New York Court of Appeals reversed a Defendant's homicide conviction where the police had used deception and subterfuge to trick a Defendant into confessing to the murder of his four-month-old child. The Court concluded that the sheer volume of deceptive techniques used by police to obtain a confession overwhelmed the Defendant's free will and rendered his statement involuntary. The Court therefore held that the statement should have been suppressed, and ordered the holding of a new trial. The case at bar had received substantial notoriety and was the subject of a television documentary which focused attention on the use of various police techniques in obtaining confessions.

Prosecutorial Misconduct in Grand Jury

People v. Thompson, decided February 20, 2014 (N.Y.L.J., February 21, 2014, p. 24)

In a 4-3 decision, the New York Court of Appeals concluded that the actions of the prosecution in failing to call a particular witness to testify at the grand jury proceeding did not impair the integrity of that proceeding and did not warrant dismissal of the indictment. Following the Defendant's request to have a particular witness called, the prosecutors handling the case asserted that the witness's testimony would be irrelevant, and the grand jury thereafter voted and declined to hear from the witness. The four-Judge majority, after noting that they were concerned about the possibility of prosecutorial overreach in the grand jury proceeding, determined that in light of the totality of the circumstances, they could not conclude that the integrity of the grand jury proceeding had been compromised, and therefore the Defendant's conviction was upheld. Chief Judge Lippman dissented, and argued that the prosecutor impermissibly substituted their digression for that legally committed to the grand jury and should not provide the statements which were made. Judge Lippman was joined in dissent by Judges Rivera and Smith.

Dismissal of Appeal

People v. Aveni, decided February 20, 2014 (N.Y.L.J., February 21, 2014, p. 26)

In a 6-1 decision, the New York Court of Appeals determined that the instant appeal should be dismissed on the grounds that the modification by the Appellate Division was not on the law alone or upon the law and such facts which, but for the determination of law, would not have led to a modification. In the case at bar, the Appellate Division had reversed the Defendant's conviction based upon a faulty confession which was obtained through deception and trickery. The majority concluded that the Appellate Division's conclusion that the Defendant's will was overborne was fact-based and therefore barred from review by the Court of Appeals. Judge Pigott dissented.

Ineffective Assistance of Counsel

People v. Santiago, decided February 25, 2014 (N.Y.L.J., February 26, 2104, pp. 1, 9 and 24)

In a 5-2 decision, the New York Court of Appeals upheld a Defendant's manslaughter conviction and disregarded an inappropriate and prejudicial summation which included a power point presentation by the prosecutor because defense counsel did not object to the remarks which were made. Judge Pigott stated that the issue raised by the Defendant was not so clear-cut or dispositive as to amount to ineffective assistance of counsel. Judge Pigott was joined in the majority by Judges Graffeo, Read, Smith and Abdus-Salaam. Chief Judge Lippman and Judge Rivera dissented, arguing that the power point demonstration manipulated the evidence by use of the fade-to-white technology and was designed to inflame the passion of the jury in order to engender prejudice against the Defendant. The majority also rejected the

Defendant's claim that her confession was insufficiently corroborated by independent evidence, and that the trial court abused its discretion in admitting certain letters into evidence that were not sufficiently redacted.

Search and Seizure

People v. Jiminez, decided February 25, 2014 (N.Y.L.J, February 26, 2014, pp. 1, 9 and 22)

In a 4-3 decision, the New York Court of Appeals reversed a Defendant's conviction for criminal possession of a weapon after it concluded that the loaded handgun discovered in the Defendant's purse was the result of an illegal search. Chief Judge Lippman, writing for the majority, stated that exigent circumstances did not exist to justify the warrantless search. The majority concluded that the testimony at the suppression hearing demonstrated that the Defendant was cooperative and offered no resistance to the removal of her purse from her shoulder. The stated reason for searching the woman's purse was that it felt heavy, but Judge Lippman concluded for the majority that the unremarkable fact that a woman's purse appeared heavy on its own failed to support a reasonable belief that it contains either a weapon or destructible evidence. The majority opinion also noted that as many as eight police officers were on the scene and were clearly able to prevent the Defendant from grabbing any weapon from the purse. Judges Graffeo, Smith and Rivera joined in Judge Lippman's decision. Judge Abdus-Salaam issued a dissenting opinion in which Judges Read and Pigott joined. The dissenters argued that the Defendant gave evasive answers to police and that it was not inconceivable that she might have a weapon in the purse as she clutched it to her body. The dissenters therefore concluded that a reasonable inference that the requisite exigency existed could be drawn from the facts established at the suppression hearing.

Forcible Touching Statute

People v. Guaman, decided February 25, 2014 (N.Y.L.J., February 26, 2014, pp. 1, 9 and 27)

In a decision supported by five of the Judges in the New York Court of Appeals, the Court gave a broad reading to the State's Forcible Touching Statute, Penal Law Statute 130.52. The Court upheld the validity of an information which charged the Defendant with rubbing his exposed penis against another man's buttocks inside the subway station. In the majority decision, written by Judge Read, the Court determined that the Legislature mentioned squeezing, grabbing or pinching only as examples which may be charged as forcible touching. The court concluded that any bodily contact involving the application of some level of pressure to the victim's sexual or intimate parts qualifies as forcible touching. Judges Graffeo, Smith, Pigott and Rivera joined in the ruling. Chief Judge Lippman concurred in the determination but stated that the majority opinion went beyond what was necessary to uphold information and was expanding the scope of the Forcible Touching Statute by adding the imprecise phrase "some level of pressure." Judge Abdus-Salaam took no part in the ruling.

Defendant's Presence at Conference

People v. Flinn, decided February 25, 2014 (N.Y.L.J., February 26, 2014, pp. 9 and 23)

In a 6-1 decision, the Court held that the Defendant knowingly waived his right to be present during a bench conference at which prospective jurors were questioned at his attempted murder trial. In the case at bar, the trial Judge had informed the Defendant that he was welcome to attend the conferences, but the Defendant chose not to do so. The Court of Appeals determined that this invitation was sufficient to notify the Defendant of his rights under *People v. Antommarchi*, 80 NY 2d, 247 (1992). Judge Smith wrote the majority opinion and was joined in by Judges Graffeo, Read, Pigott, Lippman and Abdus-Salaam. Judge Rivera dissented, arguing that the Defendant's waiver was only implicit and not sufficient to demonstrate that it was voluntary, knowing and intelligent.

Post-Release Supervison

People v. Sintron, decided February 27, 2014 (N.Y.L.J., March 28, 2014, p. 22)

In a unanimous decision, the Court denied a Defendant's claim that he was subject to double jeopardy because an Appellate Court, in order to correct a Defendant's illegal sentence, imposed a term of post-release supervision after the Defendant had completed the illegal sentence. Dealing with a longstanding problem which has plagued the court system, the Court concluded that although the Defendant had served the imprisonment portion of his sentence, the direct appeal of that sentence was not over but was presently in the appellate process. Consequently the Defendant had not acquired a legitimate expectation of finality.

Denial of CPL 440 Motion

People v. Zeh, decided March 27, 2014 (N.Y.L.J., March 28, 2014, p. 27)

In a unanimous decision, the New York Court of Appeals held that an evidentiary hearing should have been held on a Defendant's 440 Motion regarding the Defendant's claim that he was denied the effective assistance of counsel. The Court concluded that based on the facts, none of the attorneys who represented the Defendant sought to suppress statements and evidence derived from police searches. The Court concluded that there was enough presented in the court below to establish the possible legitimacy of the Defendant's claim and that he was entitled to an opportunity to establish that he was de-

prived of meaningful legal representation. Under the circumstances the matter was remitted to the County Court for further proceedings.

Misdemeanor Complaint

***People v. Kasse*, decided March 27, 2014 (N.Y.L.J., March 28, 2014, p. 28)**

In a unanimous decision, the New York Court of Appeals affirmed the Defendant's conviction and held that the misdemeanor complaint under which he was charged was jurisdictionally valid because it described facts of an evidentiary nature which established reasonable cause to believe that the Defendant engaged in unlicensed general vendoring in violation of a New York City Administrative Code provision. The complaint alleged that the arresting police officer observed the Defendant at a specific time and public location standing behind a suitcase with more than 10 handbags which he offered for sale to various individuals. At the officer's request the Defendant failed to produce a valid vendor's license. The Court concluded that these allegations were sufficient for pleading purposes since they provided adequate notice to enable the Defendant to prepare a defense. The misdemeanor complaint was therefore jurisdictionally valid.

Charge to the Jury

***People v. Sage*, decided April 1, 2014 (N.Y.L.J., April 2, 2014, pp. 22 and 23)**

In a 5-2 decision, the New York Court of Appeals concluded that it was reversible error for a trial court to fail to charge the jury with an accomplice-in-fact instruction regarding the People's key witness. The five-Judge majority noted that the evidence created a factual issue as to whether the witness was an accomplice, and that the trial judge under these circumstances was obligated to provide an accomplice charge as requested. The Court noted that the prosecution's key witness in question admitted to his presence during the incident and in being involved in the altercation. Although the People attempted to argue harmless error in the case at bar, the majority of the Court rejected such a claim. The majority concluded that the record did not support such an argument and that although the People presented corroborative evidence of the witness's testimony, the jury could have discounted such testimony and determined the witness was not credible and therefore the remaining evidence was insufficient to find the Defendant guilty beyond a reasonable doubt. Under these circumstances the failure to instruct the jury to consider whether the witness was an accomplice was not harmless, and a new trial is required.

Judges Pigott and Abdus-Salaam dissented, arguing that although an accomplice instruction should have been a given, in their view the error was harmless because there was sufficient corroborating evidence tending to connect the Defendant to the commission of the crime and overwhelming evidence of his guilt.

Search and Seizure

***People v. Johnson*, decided April 1, 2014 (N.Y.L.J., April 2, 2014, p. 25)**

In a unanimous decision, the New York Court of Appeals held that a Defendant's motion to suppress evidence should have been granted and that the indictment must be dismissed. The Defendant was arrested for disorderly conduct, and after being searched by police was found to be in possession of cocaine. The Court concluded that suppression was warranted because the arrest that was the predicate for the search was made without probable cause. The Court relied upon Penal Law Section 240.20(6), which states that a person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm or recklessly creating a risk thereof, he congregates with other persons in a public place and refuses to comply with a lawful order of the police to disburse. Based upon the evidence, the Court concluded that the required elements of the Statute were not met and that the evidence was insufficient to provide the arresting officer with probable cause to believe that the Defendant either intended to cause public inconvenience, annoyance, or alarm or was reckless in creating a risk of those consequences.

Dismissal of Appeals

People v. Perez

People v. Kalaff

People v. Dockery

***People v. Lopez*, all decided April 3, 2014 (N.Y.L.J., April 4, 2014, p. 23)**

In a single opinion covering four cases, the Court determined that dismissal of the Defendants' appeals in three of the cases did not violate the Defendants' constitutional rights and were proper exercises of discretion. In *People v. Lopez*, the matter was remitted to the Appellate Division so that counsel could be appointed to represent the Defendant in opposing the dismissal of his appeal. All four cases involved criminal appeals that were not pursued for more than a decade after the filing of a notice of appeal. In each case the Appellate Division dismissed the appeal on the People's motion. In issuing its ruling, the five-Judge majority found that in three of the cases, the Defendants' delays in processing their appeals were extremely long and the Defendants did not provide a good excuse for them. With respect to the Defendant Lopez, the majority concluded that the Appellate Division should not have dismissed the Defendant's appeal before assigning him counsel and giving counsel a chance to review the record, even though Defendant Lopez had absconded and was convicted in absentia.

Judge Rivera dissented and was joined in dissent by Chief Judge Lippman, although agreeing with the majority's position with respect to *People v. Lopez*. As to two of the other Defendants, the dissenters in *People v. Perez* and *People v. Dockery* argued that the Defendants' rights had been violated and that the dismissal of the appeals should be reversed.

Speedy Trial

***People v. Sibblies*, decided April 8, 2014 (N.Y.L.J., April 9, 2014, p. 22)**

The New York Court of Appeals, in a unanimous decision, held that the People did not meet their speedy trial obligation under CPL 30.30 to be timely ready for trial, and as a result, the misdemeanor information which charged the Defendant should be dismissed. In the case at bar, there was a period of time between an off-calendar declaration of readiness by the People and their statement of unreadiness at the next court appearance. The New York Court of Appeals concluded that this period could not be excluded from the statutory speedy trial period required by the Statute. The Court found that the People's unreadiness in the case at bar was not occasioned by an exception of fact or circumstances and thus it should not have been excluded for the required time period. Chief Justice Lippman issued the main opinion of the Court in which Judges Graffeo, Read, Smith, Pigott and Rivera concurred. Judge Graffeo also issued a separate concurring opinion on the grounds that she would have decided the decision on a narrower basis, to wit: that there was a period of time in which the People claimed that they were ready when in fact they were not.

Submission of Manslaughter Charge

***People v. Rivera*, decided April 8, 2014 (N.Y.L.J., April 9, 2014, p. 23)**

In a 5-2 decision, the New York Court of Appeals held that a trial Judge had acted within his discretion in refusing to charge second degree manslaughter as a lesser count to be considered by the jury. The case involved the killing of an individual by the Defendant following a bar argument and fight. Following the conclusion of the evidence, the Defendant requested a charge of second degree manslaughter, arguing that a jury could conclude that he killed the victim recklessly. The New York Court of Appeals rejected the Defendant's argument and concluded that in fact there was no reasonable view of the evidence that would support a finding that the Defendant acted recklessly when he stabbed the victim. Chief Judge Lippman and Judge Abdus-Salaam dissented.

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

During the last few months, the Supreme Court began issuing a series of cases involving criminal law and constitutional issues. These cases are summarized below.

***Burrage v. United States*, 134 S. Ct. 881 (January 27, 2014)**

In a unanimous decision, the United States Supreme Court held that a defendant could not be sentenced to a mandatory 20 years in prison when the heroin he sold only contributed to the death of a user who had also ingested many other drugs. The Court's decision could be a major one with respect to the concept of sentencing of defendants, since it narrows the test for punishing a defendant for death which could have been caused from multiple sources. The case in question tested the meaning of the Controlled Substances Act, which calls for a 20-year minimum sentence for defendants found guilty of distributing illegal drugs when death or serious bodily injury results from the use of such substance. Justice Scalia issued the decision for the unanimous Court. Justice Scalia asserted that the ordinary meaning of "results from" is that the harm would not have occurred in the absence of the defendant's conduct. Justice Scalia concluded that Congress could have worded the statute differently if the drug sold was just a contributing factor. Although the Court provided a unanimous result by its decision, Justice Scalia's opinion was joined in by Chief Judge Roberts, Justices Kennedy, Breyer and Kagan. Justice Alito joined the opinion in part, and Justices Ginsburg and Sotomayor filed separate concurring opinions.

***Hinton v. Alabama*, 124 S. Ct. 1081 (February 24, 2014)**

In a unanimous decision, the United States Supreme Court held that a defense counsel's failure to request additional funds to replace an inadequate expert amounted to ineffective assistance of counsel. The case involved a capital murder prosecution in which the prosecution's experts concluded that bullets involved in murders had been fired from Defendant's revolver. Defense counsel failed to request additional funds to replace an inadequate expert in firearms and toolmark evidence. His failure was based on a mistaken belief that available funding was capped at $1,000. The defense attorney could have requested more funding to present an effective rebuttal to the State's expert, but defense counsel failed to make even a cursory investigation of the state statute that provided funding for indigent defendants. Under the circumstances, the Supreme Court vacated the state court decision and remanded the matter for further proceedings. In recent years, the Supreme Court appears to be more sensitive to questions of ineffective assistance of counsel, particularly in the area where indigent defendants have been assigned counsel. It has issued a series of decisions including the instant matter where defense counsel is being held to a higher standard of representation.

***Fernandez v. California*, 134 S. Ct. 1126 (February 25, 2014)**

In a 6-3 decision, the United States Supreme Court held that police officers may enter and search a home without a warrant as long as one occupant consents, even if another resident had previously objected. The case involved a Los Angeles man who was arrested in 2009 as a suspect in a street robbery, and was taken from his home to the police station. During the arrest, he refused to allow police to search his home. Officers had knocked at the door and had spoken to a woman who was living with the Defendant. After his arrest, police returned an hour later and, after obtaining the consent of the woman, searched his apartment and found a shotgun. The Supreme Court majority, in a decision written by Judge Alito, held that the Defendant did not have a right to prevent the search of his apartment after his co-tenant had consented to the search. Chief Justice Roberts and Justices Kennedy, Thomas, Breyer and Scalia joined in the majority decision. Justices Ginsburg, Sotomayor and Kagan dissented. The dissenters argued that the police had ample time to obtain a search warrant, and that an inhabitant's express refusal of consent to a police search of his home is dispositive as to him regardless of the consent of a fellow occupant.

***McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (April 2, 2014)**

In a 5-4 decision, the United States Supreme Court, in another important campaign financing case, struck down federal limits on the total amounts individuals may contribute to candidates and political committees. Chief Justice Roberts, writing for the five-Judge majority, held "an aggregate limit on how many candidates and committees and individuals may support through contributions is not a modest restraint on protected political speech." The government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse. The Court's decision is a follow-up to its major ruling in *Citizens United v. the Federal Election Commission*, which was decided in 2010, and which removed restrictions on how much corporations can donate to campaigns. Joining Judge Roberts in the majority were Justices Alito, Scalia, Kennedy and Thomas. Justice Breyer issued a vigorous dissent and

was joined in dissent by Justices Sotomayor, Kagan and Ginsburg. The dissenters argued that the Court's decision could well open a floodgate where enough money calls the tune and the general public will not be heard.

***Schuette v. Coalition to Defend Affirmative Action et al.*, 134 S. Ct. 1623 (April 22, 2014)**

In a 6-2 decision, the United States Supreme Court upheld a ban by the State of Michigan on using race as a factor in college admissions. Michigan voters in 2006 had decided to change their State Constitution in order to prohibit public colleges and universities from taking account of race in admissions decisions. A lower federal court had set aside the ban as being discriminatory. The United States Supreme Court, however, in a decision written by Justice Kennedy, determined that there was nothing in the Constitution or the Court's prior cases which gave Judges the right to overturn the determination by the State's voters on the issue in question. Justices Sotomayor and Ginsburg dissented, arguing that the vote by Michigan voters trampled on the rights of minorities and was constitutionally prohibited. A few other states had adopted affirmative action legislation similar to Michigan's, and it appears that those provisions are now protected. While agreeing with Justice Kennedy in the result, Justice Scalia also issued a separate opinion in which he stated that Michigan residents favored a colorblind Constitution, and it would be shameful for the Court to stand in their way.

***Paroline v. United States*, 134 S. Ct. 1710 (April 23, 2014)**

In a 5-4 decision, the United States Supreme Court determined that victims of child pornographers whose images of sexual abuse have circulated on the Internet may claim damages from every person caught with the illegal images, but the amount of the damages must be in proportion to their respective causal roles and their own circumstances. The Court thus rejected the position that the full amount of damages can be assessed against a single person who possesses such images. In the case at bar, a $3.4 million verdict was assessed against a Texas man in favor of a woman whose childhood rape was photographed and widely circulated on the Internet. The Supreme Court determined that a Defendant can be required to pay only a reasonable amount in line with his role in the crime and cannot be held responsible for the entire amount of damages. Justice Kennedy issued the majority opinion in which Justices Alito, Breyer, Kagan, and Ginsburg joined. Chief Justice Roberts and Justices Scalia and Thomas dissented, in a joint opinion, and Justice Sotomayor dissented in a separate opinion.

***Hall v. Florida*, 134 S. Ct. __ (2014), No. 12-10882**

On October 21, 2013 the United States Supreme Court also granted certiorari with respect to a Florida case which involves using an IQ score of 70 as a firm cutoff for determining if a Defendant is mentally retarded and may not be executed. Over the years the Supreme Court has been gradually limiting the use of the death penalty, and this latest case offers an additional opportunity for the placement of new restrictions. Oral argument was heard by the Court on March 3, 2014. During oral argument, several Justices asked questions which appeared to indicate that the Court was having trouble with the Florida Statute. Justice Kennedy, in particular, who is often viewed as the critical swing vote, appeared to be troubled by the rigidity of Florida's IQ score threshold. Justice Kagan also asked several questions which appeared to place her among the Justices likely to vote to strike down the Florida statute. On May 27 the Court by a 5-4 vote struck down the Florida procedure. (Details in our next issue.)

Pending Cases

***Noel Canning Company v. National Labor Relations Board*, 134 S. Ct. __ ( )**

On January 13, 2014, the United States Supreme Court heard oral argument on a case that involves the authority of the President to make appointments without congressional approval while the Congress is in recess. The case involves the Noel Canning Company with respect to a dispute with the National Labor Relations Board. Two of the three Labor Board members had been appointed by President Obama in January 2012. They had not, however, been confirmed by the Senate. The Constitution authorizes Presidents to make such appointments during the recess of the Senate, which shall expire at the end of its next session. The Senate claimed that it was not actually in recess when the President made the appointments, and that instead the appointments were made to bypass Senate approval. Forty-five Republican Senators led by Minority Leader Mitch McConnell had joined the litigation and had participated in the oral argument time which was allotted. During oral argument, it appeared that the Court was somewhat split on the issue, with several Justices expressing concern about the aggressiveness of executive power. A decision on this important issue concerning a dispute over presidential and congressional authority was expected sometime in late May.

***Sebelius v. Hobby Lobby Stores*, 134 S. Ct. __ ( )**

***Conestoga Wood Specialties v. Sebelius*, 134 S. Ct. __ ( )**

On March 25, the United States Supreme Court heard oral argument in this important case involving an additional challenge to President Obama's Affordable Care Act. The issues involved in the cases deal with whether employers with religious objections may refuse to provide their workers with mandated insurance coverage for contraceptives, and whether corporations are covered by the First Amendment guarantee of free exercise of religion.

The Court allowed a lengthy oral argument, and during the proceedings it once again appeared that the Court was split along the traditional conservative-liberal divide. The issue also appears to have strongly divided the nation with attorney generals from 18 states siding with the religiously affiliated corporations, and some 13 states supporting the mandated provision in the statute. The Court was expected to issue a decision sometime in June, at the end of its current session.

Same-Sex Marriage Cases

On Monday, January 6, 2014, the United States Supreme Court also issued a stay with respect to the Utah decision regarding same sex-marriages. A federal Judge in Utah had ruled that the state's ban on same-sex marriage was constitutionally impermissible. The State of Utah had appealed to the United States Supreme Court for a stay while the full appeal was to be heard in the Tenth Circuit Court of Appeals. The initial stay application had been made to Justice Sotomayor, and the full Court subsequently granted the request for a stay while the Circuit Court considered the issue. The Utah litigation has unfortunately placed a cloud of doubt over the marriages of nearly 1,000 couples who had initially been granted marriage licenses.

***Riley S. v. California*, 134 S. Ct. __ ( )**

***United States v. Wurie*, 134 S. Ct. __ ( )**

On January 14 and 17, 2014, the United States Supreme Court granted certiorari to consider the issue of whether police need a warrant to search the cellphones of people they have arrested. The Court accepted two cases which were argued on April 29th. One of the cases emanates from a decision of the Federal Court of Appeals located in Boston, and the other involves a decision by the California state courts. These cases involve important issues which will greatly affect the Criminal Justice System, and we look forward to reporting on the Supreme Court decision.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from January 13, 2014 to May 1, 2014.

People v. Robles (N.Y.L.J., January 13, 2014, pp. 1 and 7)

In a unanimous decision, the Appellate Division, Third Department, upheld the Defendant's conviction despite criticizing the conduct of a Sheriff's Deputy who slipped a religious pamphlet into the Defendant's pocket during his trial, urging him to confess. In the case at bar, the pamphlet, which was provided to the Defendant by the Sheriff's Deputy, stated, "Yes, you have the right to remain silent. You have the right to remain in your sins. But please don't. Your conscience testifies against you. 'Confess your sins' or 'spend eternity in a prison called hell.'" When the incident came to light, the trial Judge conducted a colloquy to make sure that the Defendant, when he confessed, was not acting under pressure and understood his decision not to testify in his own defense. The appellate panel concluded that despite the unusual circumstances presented in the case, it could not conclude that the Defendant's right to a fair trial was compromised or that a reversal was warranted. The four-Judge appellate panel, which credited the trial court for conducting its proper inquiry, consisted of Justices Lahtinen, Stein, Egan and Presiding Justice Peters.

People v. Major (N.Y.L.J., January 15, 2014, pp. 1 and 6)

In a 4-1 decision, the Appellate Division, First Department, reversed a Defendant's drug conviction. The four-Judge majority concluded that the police had no good reason to stop a man for taking a bag of what turned out to be marijuana from a driver who had been pulled over. In the case at bar, a police officer had pulled over a driver when he saw a black Lexus with heavily tinted windows. While the officer was checking the driver's information, he saw the Defendant standing at the window of the Lexus take a black plastic bag from the driver through the car window. At that point, the officer stopped the Defendant and had him hand over the bag. The majority of the Court concluded that the officer at the time of the seizure did not have probable cause with respect to the Defendant and that the bag in question should have been suppressed following a suppression motion. The majority opinion was written by Justices Richter, Sweeney, DeGrasse and Friedman. Justice Mazzarelli dissented.

People v. Duart (N.Y.L.J., January 29, pp. 1 and 6)

In a unanimous decision, the Appellate Division, Second Department, ordered a new hearing and sent the matter back to the Suffolk County Court on the grounds that the Court should have assigned a Defendant a new lawyer when he requested at the time of sentence to take back his guilty plea. The trial court denied the Defendant's motion to withdraw the plea, and the Appellate Division concluded that the Defendant's right to counsel was adversely affected when his attorney took a position adverse to the Defendant's request. When the Defendant with assigned counsel appeared for sentencing after having taken a plea, he told the sentencing court that he wished to withdraw his plea. According to the transcript, his assigned counsel told his client he thought it was in his best interest to maintain his plea. The Defendant insisted, however, on his request for withdrawal. The sentencing court, however, noted that the Defendant had previously had the benefit of legal advice from multiple attorneys and that the matter had been ongoing for many months. The Defendant was thereafter sentenced to 3 to 6 years. The appellate panel concluded that the sentencing Judge should have assigned a different attorney to represent the Defendant before she determined the withdrawal request from the Defendant. Although a new hearing was ordered, the Court noted that the Defendant had already served his prison terms and had been released on parole while his appeal was pending. As a practical matter, it appears that the appellate ruling may be of limited value to the Defendant.

People v. Brown (N.Y.L.J., January 30, 2014, pp. 1 and 7)

The Appellate Division, Second Department, unanimously agreed that paroled drug offenders are technically in custody of a Unified Parole and State Corrections Department and therefore can apply for resentencing under the new drug law reforms. The Second Department decision will now allow drug crime parolees to petition for resentencing under the Drug Reform Act of 2009, which would dramatically decrease the time they are supervised by a parole officer. In writing for the Court, Justice Cohen stated that legislative intent indicated that the aim of the law reform measures dictated the result reached by the Court.

People v. Riffas (N.Y.L.J., February 18, 2014, p. 4)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's conviction and ordered a new trial. The Court held that statements the Defendant had made after his arrest should have been suppressed. The Defendant was arrested without a warrant, and he tried to close his apartment door on police officers. When police knocked on Defendant's door early in the morning, he answered the door appearing to be half asleep. He began to close the door and the police then forced their way into the apartment and arrested him. The

Court concluded that the Defendant's Fourth Amendment rights were violated and that any statements made thereafter were obtained in violation of constitutional principles. A new trial was ordered.

People v. Denson (N.Y.L.J., February 20, 2014, pp. 1 and 2)

In a 3-2 decision, the Appellate Division, First Department, upheld the attempted kidnapping sentence of a previously convicted child molester who repeatedly made advances toward a 10-year-old girl. The appellate majority ruled that the Defendant offered the keys to the girl in the hope that she would come willingly to his apartment where he could molest her and that this constituted attempted kidnapping, even though there was no evidence that the child might have agreed.

The majority consisted of Justices Mazzarelli, Daniels, and Gische, who argued that although the Defendant did not harm the girl, he came dangerously near to achieving his objective. The majority therefore upheld the 10-year sentence which was imposed. Justices Saxe and Andreas dissented, arguing that although the Defendant did endanger the welfare of the girl, his behavior did not amount to attempted kidnapping. Based upon the sharp split in the Appellate Division, it appears that this case will eventually reach the New York Court of Appeals.

People v. Brown (N.Y.L.J., February 24, 2014, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's conviction of sexually abusing a six-year-old child and ordered a new trial. The Court concluded that the jury had improperly heard statements in which the Defendant allegedly described a previous uncharged sexual encounter with a 13--year-old girl. The prosecution had failed to seek a ruling from the trial Judge before eliciting the statements in question, and defense counsel had immediately objected. Although the trial Judge had attempted to provide a curative instruction to jurors, the appellate panel concluded that it was not sufficient. The Court found that the statements in question were in violation of the longstanding prohibitions enunciated in *People v. Molineux*. The Court concluded that none of the *Molineux* exceptions applied in the instant case and that whatever probative value the statements may have had was far outweighed by the obvious prejudice to the Defendant. Since the Defendant's guilt was not overwhelming, the Harmless Error Doctrine could not be applied and a new trial was required.

People v. Ingram (N.Y.L.J., February 25, 2014, pp. 1 and 3)

In a 3-2 decision, the Appellate Division, Fourth Department, upheld the suppression of a weapon ordered by the trial court. The panel concluded that although a Buffalo police officer had correctly guessed that a man was pulling a gun out of his pocket, he had no right to pursue the suspect because he had neither seen the weapon nor its outline in the man's jacket. The majority opinion stated that since the police conceded that neither the Defendant nor his companion were doing anything illegal when they first saw them, the officers were limited under the *DeBour* decision to requesting basic information. The majority pointed out that the Defendant, after he was asked his name, did nothing to justify further intrusion by the police. Justices Scudder and Peradotto dissented and argued that while there may not have been any single element that permitted police to go beyond a simple inquiry, the combination of a high crime location, the presence of a recent shooting victim, Defendant's initial behavior, and his conduct indicative of a weapon, gave the officers the requisite reasonable suspicion for the pursuit. Based upon the sharp division in the Appellate Division, it appears certain that this case will eventually be heard in the New York Court of Appeals.

People v. Heatley (N.Y.L.J., February 28, 2014, pp. 1 and 6)

In a majority ruling, the Appellate Division, Fourth Department, reduced a Defendant's conviction from first degree murder to first degree manslaughter. The Court issued its determination after reviewing the sufficiency of the evidence, and concluded that prosecutors had failed to prove that the Defendant, who stabbed his victim eight times, intended to commit murder. By applying the sufficiency of the evidence standard, the Court was able to reduce the charge in question rather than dismissing the entire indictment. The majority held that if it had applied a weight of the evidence analysis it would have had no choice but to dismiss the indictment. One of the dissenting Justices argued that the weight of evidence analysis should have been applied and that the indictment should have been dismissed. In issuing its determination, the Appellate Division grappled with the Court of Appeals' explanation regarding the distinguishing between sufficiency and weight of the evidence, which was issued in *People v. Bleakley*, 69 NY 2d 490 (1987). In the case at bar, the Defendant had become involved in an altercation and had pulled two knives from out of a sheath on his belt and repeatedly stabbed the victim in an effort to free himself from a headlock. Under the circumstances, the three-Judge majority concluded, "We agree with Defendant that despite the number of injuries the victim sustained, including a single fatal stab wound, the credible evidence is not sufficient to prove beyond a reasonable doubt that he intended to kill the victim."

People v. Hicks (N.Y.L.J., March 3, 2014, p. 1)

In a unanimous decision, a Defendant was granted a new trial after being convicted of attempted rape in 2000. DNA recovered from the victim's fingernails was

analyzed 9 years later, and found not to match his. The appellate panel concluded that the DNA evidence was material and exculpatory, and that a CPL 440.10 motion was properly granted by the Court below. The appellate panel found that there was a reasonable probability that the jury would have rendered a more favorable verdict for the Defendant if it had heard the DNA evidence, and ordered that a retrial be conducted.

People v. Lloyd (N.Y.L.J., March 13, 2014, pp. 1 and 6)

In a 3-1 decision, the Appellate Division, Second Department, reversed a Defendant's murder conviction and ordered a new trial. The three-Judge majority found that the Defendant's right to confront his accuser was violated when a prosecutor's questions on cross-examination and in summation left the impression that a non-witness had implicated the Defendant. In the case at bar, the prosecution had alleged that the Defendant had left the party at his sister's apartment in search of an intoxicated man who had caused a ruckus at the party. About 3:00 a.m., the Defendant found the individual and shot him in the face. During the trial, the prosecutor had pursued a line of questioning suggesting that the sister and the other woman had argued because the woman who did not testify at an earlier trial and failed to identify the Defendant had implicated her brother. The prosecutor further stated on summation that the sister was angry because she knew the other woman had identified her brother. Defense counsel had objected to these statements and the Appellate Division concluded that a reversal was required. The three-Judge majority consisted of Justices Balkin, Leventhal and Austin. Justice Roman dissented, arguing that evidence of the Defendant's guilt was so pervasive that any errors committed by the prosecutor were harmless beyond a reasonable doubt. The case involved a 1981 shooting and the Appellate Division's ruling involved the Defendant's third trial after two earlier trials.

People v. Wright (N.Y.L.J., March 25, 2014, pp. 1 and 8)

In a 3-2 decision, the Appellate Division, Fourth Department, affirmed a Defendant's murder conviction even though the prosecutor, in her summation, had expanded the scope of the DNA evidence in the case. Records established that DNA was collected from a vaginal swab, the victim's underwear, and from material which was used to bind the victim's hands. In her summation, the prosecutor stated that the Defendant left his DNA all over the crime and that the Defendant's sperm was inside the victim and on her underwear. The prosecution's expert, however, had testified that the DNA analysis could not exclude either Wright or the victim's husband. On appeal, the Defendant had argued that the prosecutor had committed misconduct by overstating the DNA link and that defense counsel, during the trial, had been ineffective in failing to challenge the prosecutor's remarks. The three-Judge majority, however, voted to uphold the conviction, and declined to reach the unpreserved misconduct issue, and concluded that the evidence was legally sufficient to support the jury's verdict. The 3-2 split in the Appellate Court indicates that the matter may eventually wind up in the New York Court of Appeals.

People v. Thomas (N.Y.L.J., March 27, 2014, p. 1)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's weapons possession conviction and ordered a new trial. The Court concluded that the trial Judge had provided incomplete instructions to the jury. During deliberations, the jury had forwarded several notes requesting clarification on several issues. The Court merely provided a readback of its original charge and did not provide the clarification which was requested by the jury. It also appeared that there was some missing content in the trial Judge's comments to the jurors. Under these circumstances, a new trial was required.

People v. Jones (N.Y.L.J., March 27, 2014, p. 1)

In a unanimous decision, the Appellate Division, Second Department, concluded that a Defendant was entitled to a hearing regarding his claims of actual innocence and ineffective assistance of counsel. The trial Court denied the Defendant's motion without granting a hearing, but the Appellate Division concluded that the Defendant's latest motion raised new claims which had not been previously raised, and that a hearing was required.

People v. Caza (N.Y.L.J., March 28, 2014, p. 4)

In a 3-2 decision, the Appellate Division, Third Department, affirmed an enhanced prison term for a Defendant who had ignored a Judge's directive to participate in the preparation of a pre-sentence report involving her case. The County Court Judge had originally agreed to impose concurrent sentences, but after the Defendant had tried to avoid being interviewed by the Probation Department and when finally interviewed gave evasive and contradictory answers, the trial court changed the original agreed upon sentence from 1 to 3 years to run consecutively. Under the circumstance herein, the Appellate Division concluded that the trial judge was justified in imposing the enhanced sentence. The dissenting Justices argued that the trial court should have allowed the Defendant to withdraw her guilty plea before imposing the enhanced sentence.

People v. Ugweches (N.Y.L.J., April 7, 2014, pp. 1 and 6)

In a unanimous decision, the Appellate Division, First Department, reversed a Defendant's conviction and ordered a new trial, on the grounds that the Defendant had received the ineffective assistance of counsel. The appellate panel found that defense counsel had failed to object to various hearsay statements which were inadmissible, and which appeared to have strongly influenced the jury's decision. The panel found no strategic basis for defense counsel's actions and for other lapses which appeared in the record. Under these circumstances a new trial was required.

People v. Adams (N.Y.L.J., April 8, 2014, p. 2)

In a unanimous decision, the Appellate Division, First Department, upheld a Defendant's conviction and rejected a defense claim that the trial Judge, by asking many questions of expert witnesses, assumed the improper role of an advocate. In the case at bar, the trial Judge had peppered two experts who testified at the trial with questions to the extent that with respect to 70 pages of transcript the Judge's questions appeared on 44 of the pages. The appellate panel, however, found that many of the trial Judge's questions were merely attempts to clarify expert testimony, and that further the Judge had instructed the jury not to consider his questions as any indication of his opinion in reaching the verdict. Under these circumstances, the Judge's questions were deemed acceptable and the Defendant's conviction was affirmed.

People v. Russell (N.Y.L.J., April 8, 2014, p. 4)

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's conviction and ordered a new trial because the trial court failed to conduct a further inquiry when seven potential jurors raised doubts about their impartiality during voir dire. In the case at bar, the trial court had denied the defense's request to dismiss the jurors for cause because the Defendant had exhausted his peremptory challenges as some of the jurors in question were seated. Under these circumstances, the appellate panel found that the Defendant was denied a fair trial. The jurors in question had raised a number of red flags during questioning by several responses which indicated they might not be impartial. Despite these statements, the jurors were not questioned further by the trial Judge and none of them made unequivocal assertions of impartiality.

People v. Velcher (N.Y.L.J., April 11, 2014, p. 4)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's conviction and ordered a new trial on the grounds that the trial court should have provided an intoxication charge to the jury. The Defendant had testified and stated that he had begun drinking in order to relieve his stress and frustration and testified that he had finished a large bottle of vodka within an hour of the incident. He also stated that he kept pouring cognac in his coffee and that leading up to the incident he felt out of his mind and lacked control. Under these circumstances the Appellate Court concluded that there was sufficient evidence of intoxication to allow jurors to consider if the Defendant was drunk to the point of being incapable of having the required mental state for the crime.

People v. Barben (N.Y.L.J., April 11, 2014, pp. 1 and 2)

In a unanimous decision, the Appellate Division, First Department, determined that stealing another person's credit card number is not by itself identity theft. In reaching its determination, the appellate panel reviewed Penal Law Section 190.80, which states that a person commits identify theft when he or she knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person or by acting as that other person or by using personal identifying information of that other person. In striking down the Defendant's conviction, the Court noted that although the Defendant used another's personal identifying information he never assumed the other person's identity. The appellate panel also found that the statute in question had some other facial ambiguities and was susceptible to two reasonable interpretations so that the Court was required to choose the interpretation most favorable to the Defendant.

People v. Colon (N.Y.L.J., April 16, 2014, p. 1)

In a unanimous decision, the Appellate Division, Third Department, held that even though a robbery victim was not directly threatened, and even though the weapon may have been a BB gun and not a firearm, the Defendant's conviction for robbery in the second degree was still valid. In the case at bar, the Defendant confronted a cashier and said to him "give me the money, I have a gun" but did not display any weapon. After the Defendant fled, a customer chased him down the block, at which time the Defendant pointed a weapon at him. The weapon was never recovered and the pursuer testified that it could have been a BB gun. On appeal, the Defendant argued that his conviction should have been reduced to third degree robbery because there was no proof that he displayed an apparent firearm. The appellate panel upheld the conviction on the basis that there was sufficient evidence to show that the Defendant displayed what appeared to be a firearm to the individual who pursued him.

***People v. DeGerolamo* (N.Y.L.J., April 18, 2014, pp. 1 and 7)**

In a 3-2 decision, the Appellate Division, First Department, reversed a Defendant's conviction and ordered a new trial on the grounds that the trial court had committed reversible error when it allowed testimony from a woman who stated that the Defendant stole rings from her as well under similar circumstances. The three-Judge majority found that the Defendant was entitled to a new trial because the evidence of his alleged prior theft was inadmissible under the standards outlined in *People v. Molineaux*. The three-Judge majority consisted of Justices Acosta, Friedman, and DeGrasse. Justices Andrias and Freedman dissented.

***People v. Dashnaw* (N.Y.L.J., April 18, 2014, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Third Department, upheld a Defendant's conviction following a re-trial, even though the trial court had told prospective jurors that he was stuck "retrying the case" after the first conviction was tossed on a technicality. The Defendant had been convicted of a grisly double murder and the Appellate Division upheld his second conviction, despite the trial Judge's remarks, because the trial court had also repeatedly reminded the jurors that the Defendant was presumed to be innocent. Justice Egan, writing for the Court, stated that the trial Judge's comments to the jury pool were directed either at a panel of potential jurors that was struck in its entirety or to a group from which only three alternates were chosen. Thus, viewed in the context of voir dire as a whole, the isolated statements did not deprive Defendant of a fair trial.

***People v. Beckingham* (N.Y.L.J., April 28, 2014, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Third Department, ordered a hearing on the question of whether a juror was tainted when her son-in-law, a Sheriff's Deputy assigned to the Courthouse, allegedly told her during the trial that he knew the Defendant was guilty from day one.

Although the trial court had summarily denied the Defendant's CPL 440 motion, the Appellate Division concluded that sufficient questions were raised to warrant a hearing. The matter was therefore remitted to the Otsego County Court for further proceedings.

For Your Information

Status of New York City Stop-and-Frisk Cases

After Judge Scheindlin denied the City's request for a stay of her decision in the stop and frisk cases, 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 29, 2013. On October 31, 2013, the Second Circuit issued its decision and granted a stay of the Judge's ruling pending the determination of the full appeal. In an unexpected development, the Court also took the unusual step of removing Judge Scheindlin from the case, finding that she had improperly conducted interviews and issued public statements which called her impartiality into question. Efforts by Judge Scheindlin and her supporters to re-argue the removal motion were denied in November. An effort to re-argue the issue of a stay was also denied in early November. The City pushed for a speedy determination by the Circuit Court of Appeals on the merits of the case. The Corporation Counsel's Office had asked the Second Circuit Court of Appeals for an accelerated briefing schedule, and it appeared clear that the City was seeking to obtain a decision on the merits prior to the end of the year, when the new Mayor, William DeBlasio, assumed office. Mr. DeBlasio was on public record as stating that he would not pursue an appeal of Judge Scheindlin's order. In late January, Mayor DeBlasio did announce that he was withdrawing the pending appeal. It is not clear at the present time what the reactions of the federal courts will be to this application, since the police unions had also petitioned the Court to be allowed to participate in the appeal. The police unions had filed supporting papers and had also received support for their position from various sources, including former Mayor Giuliani and former U.S. District Judge and U.S. Attorney General Michael Mukasey. The U.S. Circuit Court of Appeals had scheduled additional proceedings on the matter during the month of February, and on February 22, 2014, remanded the matter back to the District Court to pursue further proceedings.

The District Court established a motion schedule to determine several issues, including the motions by the police unions to intervene in the litigation. The matter in the District Court is now before Judge Torres, and the parties were asked to complete all submissions by March 14th. Judge Torres also indicated in a brief order that she is available to the parties in the event they wish her participation in further settlement discussions. We will keep our readers advised.

Police Unions Sue Over Anti-Profiling Law

In a related matter to the stop-and-frisk controversy, the New York City police unions announced that they would continue to challenge a controversial anti-profiling law despite Mayor DeBlasio's attempt to drop the City's claim which was filed by former Mayor Bloomberg. The City Council had passed local law 71 of 2013, known as the Community Safety Act. The law barred law enforcement officials from profiling based on race, national original, color, creed, age, citizenship, gender, sexual orientation and disability or housing status. The police litigation argues that the City Council exceeded its authority and that the local law is preempted by state statute. Mayor Bloomberg had previously vetoed the legislation but the City Council overrode his veto. He thereafter filed a lawsuit on behalf of the City, claiming it hindered effective policing by making officers too hesitant to act. When Mayor DeBlasio took office he announced that he would drop the City's lawsuit. The police unions, however, have now announced that they would seek to continue the litigation in question. We will keep readers advised of developments.

Economic Position of Senior Citizens Improves

A recent study released by the Akron (Ohio) B*eacon Journal* based upon an analysis of census data indicates that the number of senior citizens living below the poverty line has dramatically declined during the last 50 years. In 1964, it was estimated that 27% of senior citizens were living below the poverty line. According to the analysis, the percentage today has dropped to 9%. The decline has occurred at the same time that the elderly population, 65 years of age or older, has more than doubled in the United States, to 40.6 million. Today there are 3.7 million seniors living in poverty compared with 5.2 million some 50 years ago. The report credits a combination of social security pensions, 401-K programs, and Medicare for having sharply reduced the number of seniors below the poverty level. The study also noted that many seniors have continued to work, primarily in part-time positions, and that this has also contributed to the better economic position of senior citizens today.

Office of Court Administration Obtains Slight Increase in Judicial Budget

Chief Administrative Judge A. Gail Prudenti submitted to the Legislature, on behalf of the Court system, a

proposed budget for the next fiscal year, which includes a 2.5% increase. During her appearance before the legislative committee, support for the requested increase seemed strong based upon the prior cutbacks that have been made and the judicial budget. Governor Cuomo, however, had earlier requested that any budget submitted not involve an increase greater than 2%. It therefore appeared uncertain whether the Court's request would be approved in total. In testifying on behalf of the proposed 2014-2015 budget request, Judge Prudenti stated, "This is not a wish list budget; I call it a road to recovery." Both Judge Prudenti and Chief Judge Lippman have argued that the court system, after five years of absorbing additional costs without an increase in funding, is at a point where direct services are in jeopardy.

Although generally favorable to the judicial budget which was submitted, a slight difference of opinion resulted between the State Assembly and the State Senate. The Assembly had favored approving the judicial budget with a 2.5% increase as requested, while the Senate was seeking to limit the increase to 2%. The difference between the two Chambers amounted to about $9 million of a $1.81 billion budget. After some discussion, the Legislature approved a budget containing the 2.5% increase which was requested by the court system. Governor Cuomo, in April, accepted the Legislature's actions and signed the judiciary budget, leaving completely intact the spending plan proposed by the Office of Court Administration, which included the 2.5% increase. The Legislature also provided separate funds for the appointment of several new Family Court Judges. The New York State Bar Association had supported the creation of the additional Family Court judgeships, and it is expected that approximately 20 new positions will be created.

Sentencing Reforms

Following statements by President Obama and actions by his Attorney General Eric Holder regarding efforts to provide for more lenient sentencing in certain areas, the United States Senate appears to be moving in the same direction with regard to a major overhaul of the federal and criminal sentencing laws. Lawmakers from both parties have begun to support a concept known as the Smarter Sentencing Act of 2014, which would cut in half mandatory minimum sentences for non-violent drug offenses and mandatory minimums for drug offenders who lack criminal history. The Senate Judiciary Committee, in late June, approved legislation regarding the new sentencing concept, and the Bill may be heading to the Senate floor in the near future. New York's Senator Chuck Schumer has indicated his support for the proposed legislation and had voted to move the Bill out of committee.

While awaiting Senate action, the Justice Department, at the instigation of President Obama and Attorney General Holder, is broadening the criteria it will use in evaluating clemency petitions from certain federal prisoners, and expects the changes to result in thousands of new applications. The criteria for obtaining clemency are aimed at inmates serving time for non-violent drug offenses and are intended to lead to a reduction in the Nation's federal prison population, and also to insure that those who have paid their debts have a chance to become productive citizens. In recent months, the Obama administration has been pushing an effort to reevaluate sentences for drug crimes that it believes were unduly harsh and that were imposed under old federal guidelines. Attorney General Holder recently stated that the Justice Department was prepared to receive thousands of clemency applications and would assign dozens of lawyers to review them. Deputy Attorney General James Cole recently discussed the Justice Department's new initiative when he addressed our annual luncheon meeting in January. The proposed clemency review is further discussed by our Section Chair, Mark Dwyer, in his message at page 4 of this *Newsletter*.

Higher Education Still Key to Higher Income

Despite recent doubts that have been expressed regarding the value of a college education, recent studies continue to indicate that despite the high cost of college, a college education continues to yield higher income in the future. New data from the Pew Research Center indicates that for people 25 to 32, the gap in earnings between college graduates and those with a high school diploma or less has never been greater. According to the report, persons in that age bracket who have college degrees made about $17,500 more in 2012 on average than their peers who had only a high school diploma. The study also indicated that those with college degrees were less affected by the economic recession, and their unemployment rate was substantially lower than those with lesser education. The report found that the unemployment level in 2012 for high school graduates was 12.2%. Those with a 2-year degree or some college had an unemployment rate of 8.2% and those with a bachelor's degree or higher had an unemployment rate of 3.8%. The new figures appear highly relevant to the recent discussion regarding whether the very high cost of a college education is worth it. It appears that it is.

The Pew Research Center also reported that with respect to a high school diploma for young adults in 2012, it resulted in earnings which were only 62% of a typical college graduate's pay. The report indicated that typical recent graduates from four-year colleges ages 25 to 32 who were working full time earned $45,500. Contemporaries with two-year degrees or some college earned $30,000, and contemporaries with only high school diplomas earned $28,000. Based upon these figures, it appears that although college is expensive, it still may be worth it.

Attorney General Calls for End to Ban on Felons Voting

During recent years, there has been an ongoing discussion as to whether convicted felons should have their voting rights restored after they have completed serving their sentences. Several states have moved to restore voting rights while others continue to impose strict prohibitions. United States Attorney General Eric Holder recently joined the discussion by calling for the repeal of a law that prohibits millions of felons from voting. The Attorney General indicated that an estimated 5.8 million Americans are prohibited from voting because of current or previous convictions. He stated that it is time to rethink laws that permanently disenfranchise people who are no longer under federal or state supervision. The Attorney General targeted 11 states which continue to restrict voting rights. He identified the 11 states as Arizona, Florida, Alabama, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Wyoming, Tennessee and Virginia. Comments from some of the identified states following the Attorney General's remarks were to the effect that this was a matter for each individual state to decide and that there were valid reasons for the prohibitions which existed.

Union Membership

A recent report from the Bureau of Labor Statistics regarding union membership in 2013 indicated that 11.3% of American workers have a union membership. This was unchanged from 2012. Overall, union membership in the United States in 2013 is estimated at 14.5 million. During the last two decades, union membership has declined in the United States but labor unions have recently commenced aggressive campaigns to increase union membership and have targeted workers in several industries which have never before been unionized. They have also attempted to increase unionization in several southern states, which basically have right to work laws. Recently, however, labor unions have received a setback to their organizing campaign when the United Auto Workers lost its bid to organize workers at a Volkswagen factory in Tennessee. In a recent ballot which was taken at the Chattanooga facility, 712 workers opposed being represented by the UAW, with 626 voting in favor of the plan to join the union.

Governor Backs Increase in Age of Criminal Responsibility

Chief Judge Lippman during the last few years has sought to obtain an increase in the age of criminal responsibility from 16 to 18. The Governor, in his recent State of the State address, indicated in his legislative agenda that he backed such an increase. Governor Cuomo stated that New York and North Carolina are the only states that allow teens as young as 16 to be prosecuted in adult criminal courts. He indicated that our juvenile justice laws are outdated, and he recently appointed a 16-member commission to provide concrete actionable recommendations on juvenile justice with the aim of raising the age of criminal responsibility. With the Governor's support, it appears that the issue will be seriously considered and that some legislative changes may result. It appears likely that raising the age of criminal responsibility will find support within the State Assembly but may meet some resistance in the State Senate. We will keep our readers advised.

Economic Inequality Highest in Big Cities

Recent public attention has been focused on the growing economic inequality between rich and poor. New studies have indicated that the gap between the wealthy and the poor appears to be the most extreme in several of the most prosperous and largest cities in the United States. A study recently released by the Brookings Institute indicates that the economic divide in Atlanta, San Francisco, Washington, D.C., New York, Chicago and Los Angeles is significantly greater than the national average. The study indicated that the mentioned cities are home to some of the highest paying industries and jobs in the country. At the same time, many of these cities may inadvertently widen the gap between rich and poor because they have public housing and basic services that are attractive to low wage workers. Incomes for the top 5% of earners in Atlanta averaged $279,827 in 2012. That was almost 19 times more than the bottom 20% of that city's population. This ratio is more than double the nationwide average for the measure of income inequality. The top 5% of earners across the country have incomes 9.1 times greater than the bottom 20%. Similar situations that exist in Atlanta were also reported in San Francisco and New York City.

U.S. Net Worth Hits Record High

Due to a rising stock market and rebounding home prices, the household net worth for Americans jumped nearly $3 trillion during the last quarter of 2013. Stock and mutual funds gained nearly $1.7 trillion, or 9%, and the value of American homes rose just over $400 billion for a 2% gain. Household wealth or net worth reflects the value of homes, stocks, bank accounts, and other assets minus mortgages, credit cards and other debts. The recent surge in net worth has brought U.S. wealth back to pre-recession levels. Net worth in the last quarter of 2013 amounted to $80.7 trillion, an increase over the 2009 level.

Foreign-Born Population

A recent survey by the U.S. Census Bureau indicates that the percentage of foreign-born persons in the United States is rising as a percentage of the overall population. At the end of 2010, the foreign born population was placed at 40 million, or 12.9% of the overall population. In the late 1800s and early 1900s there was a dramatic

increase in the U.S. in foreign-born population due to the large wave of immigrants which entered the U.S. Immigration slowed, however, after 1930 and amounted to less that 5% of the total population in 1970. However, over the last four decades the United States has experienced a second wave of immigration, and since 1970 the foreign born population has continually increased in size and as a percentage of the total population. Currently, 1 in 8 persons in the United States is foreign born.

California Continues to Deal with Overcrowded Prison Population

Despite some improvement in reducing the overcrowded conditions in California's prison population, the state still faces significant problems in that area. As a result of a United States Supreme Court decision which occurred two years ago, California reduced its state prison population by 25,000; however, recently inmate population has resumed rising, and it was recently estimated that California's state prison population is nearly 133,000 as of June 2013. The state continues to be under a mandate to reduce its prison population to a certain level by February 2016. Last month federal judges gave California an additional 2 years to comply with the mandate. California continues to struggle with the crisis and is taking a variety of steps to reduce its population to about 112,000.

The Duty to Retreat

As a result of some recent cases which have involved so-called stand your ground statutes and the duty to retreat, public attention has been focused on the issue, and nationwide attention has caused surveys to be conducted regarding the number of states which operate under the different procedures. One such recent analysis found that 20 states having a combined population of some 88 million currently have duty to retreat statutes. New York is included in this group. Thirty states, either because of stand your ground statutes or case law, require no duty to retreat. These states have a combined population of some 227 million and involve 30 states.

Wall Street Bonuses Once Again on Rise

The average bonus paid to security industry employees in New York City grew 15% last year to more than $164,000, the largest average Wall Street bonus since the 2008 fiscal crisis. Following the Wall Street crisis, much criticism was leveled at the securities industry for providing huge bonuses while the firms were approaching bankruptcy. Following the fiscal crisis, there was some talk of sharply reducing or eliminating the bonus practice; however, the recent situation appears to indicate that good times are once again here on Wall Street. The securities industry has been profitable for five consecutive years, and it still maintains some 165,000 workers in New York City. The bonuses paid in 2013 were the third highest on record.

Federal Defenders Refill Positions

As a result of recent budget increases, the offices of federal defenders who lost hundreds of employees during the last year have started to refill most of the lost positions. At a recent meeting of the Federal Judicial Conference, it was announced that Congress's fiscal year appropriation for 2014 would allow officials to refill about 350 jobs within the various defender offices. The most recent budget appropriation includes a $316 million increase in discretionary spending, which restores most of the $350 million cut which occurred during the last two years. In the federal courts on a nationwide basis there were nearly 15% fewer staff in clerk's offices, probation and pre-trial services offices, and appeals court offices than there were in 2011. Staffing levels today are about on par with 1997 levels. Although some of the past fiscal cuts have been restored, the tenuous economic situation and the continued disagreement over budgets continue to create uncertainty within the federal courts as to the level of future staffing.

Filings Within New York's Federal Courts

In the face of budget cuts within the last two years, it has been somewhat fortunate that court filings in New York's Federal Courts have basically remained stable. A report issued by the Administrative Office for the U.S. Courts for the year ending September 30, 2013 indicates that with respect to New York's four Federal Districts, some experienced only a slight increase in filings and others actually experienced a reduction in their caseloads. The report indicated that filings fell 7.6% in the Southern District and 13.8% in the Northern District. They increased by 4.7% in the Eastern District and 5.5% in the Western District. Filings in the Second Circuit Court of Appeals fell 7.9% in fiscal 2013 as compared to 2012. In terms of raw figures, filings in the four District Courts in 2013 amounted to 11,900 in the Southern District, 8,341 in the Eastern District, 2,328 in the Northern District and 3,187 in the Western District. The total filings in the State of New York amounted to 25,756. Nationwide, for all District Courts, there were 391,652 filings. With respect to appeals, the Second Circuit Court of Appeals had 5,093 filings. Nationwide, the Federal Appellate Circuits had filings of 56,475. Further details regarding the status of the Federal Courts was provided in an article in the *New York Law Journal* of March 21, 2014 at page 5.

Ranking of New York State Law Schools

The recent annual rankings of the Nation's law schools published by *U.S. News & World Report* indicate that some of the 15 law schools within the State advanced in ranking while others slipped to lower levels. With respect to the 3 top-ranked law schools, this year's ranking

remained the same as last year. Columbia Law School was ranked number 4, NYU was ranked number 6 and Cornell was ranked number 13. Of the schools which went up in rankings, Fordham Law School went up to 36 from 38, CUNY went up to 113 from 132, Albany went up to 118 from 133 and New York Law School went up to 140 after not being ranked last year. The U.S. News and World Report ranks only the top 147 schools.

The schools that dropped in ratings involved Cardozo, which dropped to 64 from 58, Brooklyn, which dropped to 83 from 80, SUNY Buffalo, which dropped to 100 from 86, Syracuse, which dropped to 107 from 96, St. John's, which dropped to 108 from 98, Hofstra, which dropped to 135 from 113, and Pace, which dropped to 139 from 134. Touro Law School was not ranked, since it did not make the top 147. A similar situation existed in 2012. A review of the entire listing indicates that Hofstra saw the biggest drop, sliding 22 places, while CUNY gained the most, going up by 19 places.

Brooklyn Law School Reduces Tuition

Brooklyn Law School, which has experienced a drop in enrollment during the last few years, announced in early April that it was reducing tuition for law school students effective in the Fall of 2014. Tuition will drop for a three year program from $53,850 to $45,815, representing a 15% decrease. The reduction by Brooklyn Law School is the first among law schools in New York State and only a handful of other law schools in the United States have taken such a step. Due to the rising concern about the affordability of law schools and a nationwide decline in law school enrollment, which has dropped by 11%, it is possible that other law schools in New York will soon follow Brooklyn's lead.

New Yorkers Most Heavily Taxed

A recent study conducted by Wallet Hub, a financial news organization, revealed that New Yorkers pay the most taxes of any state in the nation, at $9,718 per year. The lowest tax burden was enjoyed by the citizens of Wyoming, who last year paid a total of $2,365 in state and local taxes. Other States which benefited from low tax rates were Florida, which was listed as fourth in the Nation in terms of a tax burden. The study considered various types of taxation, including state and local income taxes, fuel taxes and sales and use taxes.

Home Ownership Drops While Rentals Increase

Reflecting a change in attitudes and finances as a result of the recent fiscal crisis, a recent report by the U.S. Census Bureau reveals that the share of people who own a home has dropped to its lowest point since 1995. Home ownership nationwide is currently estimated to be 65%. At the same time the number of people renting instead of owning has steadily risen during the last 5 years. Since many families experienced a situation where their homes were worth less than the mortgage amount owed, home ownership has not been viewed as the type of good investment which it was several years ago. Many young couples have decided to rent rather than to own, and may be missing out on the opportunity to obtain record low mortgage rates.

OCA Seeks to Modify Penalties for Non-Violent Offenders

As part of their legislative package, the state court administrators are seeking to allow for the erasing of misdemeanor convictions if an offender is not rearrested within 7 years, and of non-violent felony convictions where the offenders have not been arrested for 10 years. The OCA legislative initiatives also include a possible increase in the age of criminal responsibility to 18 from 16, and the reduction in the amount of bail applied to non-violent offenders. Since the legislature will be meeting within the next several weeks, we will be able to obtain a better assessment of whether the OCA proposals have a good chance of passage.

Public Transportation Increasing Rapidly in the United States

A recent report by the American Public Transportation Association indicates that Americans are boarding public buses, trains and subways in greater numbers. It was estimated that nearly 10.7 billion trips on public transportation occurred in 2013, the highest total since 1956. The public transportation system within the New York area was listed as experiencing the greatest gain, and now accounts for 1 in 3 public transportation trips which are taken nationally.

Family Income Fails to Keep Up with Inflation

According to data from the U.S. Census Bureau, the average family is now bringing home $4,000 less than they did 5 years ago. The report indicated that for inflation-adjusted mean family income, the amount fell from $87,312 in 2007 to $82,843 in 2012, or a drop of $4,469. We hope that as the economy recovers, family income will once again begin to rise.

Lawyers Fund Reimbursement to Clients in 2013

The New York Lawyers Fund for Client Protection recently issued its annual report covering 2013. The Fund reported that it had approved awards totaling $6.9 million and 218 awards were approved for clients of some 68 attorneys. The Fund's report emphasized that the 68 attorneys who were responsible for client losses constituted only a tiny fraction of the 289,000 registered attorneys in New York State. Fund administrators reported that the largest single category of awards paid out last year were

for estate and trust losses, which amounted to $2.7 million, or 39%. Real estate property escrow thefts were the second largest category, amounting to $2 million, or 30% of the payouts. The total payout for 2013 was close to the average payout for previous years, but the total number of awards was higher than the average for prior periods. Funds for the reimbursement program are obtained from the $375 biennial registration fee from which $60 is assigned to the Fund. The Fund is administered by a Board of Trustees comprised of 7 members. Since 1981, the makeup of the Board consists of five members of the Bar and 2 visitors and community leaders. The Trustees serve renewable 3-year terms and receive no compensation for their services. The Fund's office is located in Albany.

Increase in Job Growth

Recent reports have indicated that private sector jobs are increasing throughout the nation, and that the unemployment rate is slowly dropping. The largest gains in private sector jobs during the last year were experienced in Texas, which in March had a gain of 28,650. California came in second with 25,550 jobs added, and the state of Florida was third, adding 14,580 jobs. Jobs in the Midwest and Northeast continue to lag behind other sections of the nation. Another positive sign is the recent report from the Labor Department that the unemployment rate for 2013 college graduates who were between 20 to 29 and who had earned a 4-year advanced degree was currently 10.9%, which was a reduction from 13.3% in 2012. The Labor Department reported that the drop reflects the steady recovery in overall United States economic growth and hiring.

New York City Proposes Budgets for City Prosecutors

The recent budget for the fiscal year 2014-2015, which was presented by the Mayor's office, provides for basically a status quo with very little additional funding. The total request for the five district attorney's offices plus the Special Narcotics Prosecutor is for nearly $294 million. This is almost identical to the amount provided in last year's proposal. Among the various offices, only Staten Island is listed for a 3.6% increase, with Brooklyn, the Bronx and Queens requested to take very minor decreases. The Manhattan budget remains the same, and the Office of the Special Narcotics Prosecutor is given only the slightest of increases. The Mayor's budget still has to be acted upon by the City Council, which usually makes some modification in the budget requests. Final budgets may not be set until the end of June or early July.

Additional $12 Million Provided for Indigent Representation

The State Office of Indigent Legal Services recently began distributing $12 million to 45 counties outside of New York City to improve representation and reduce caseloads. Most of the counties receiving the funds are located in upstate New York. The additional funds will be used to reduce caseloads and to support services such as hiring additional investigators. Representation may also be provided in various family courts. It is expected that some 129 legal service providers in some 45 counties will receive grants from the additional funding provided.

Appointments to Appellate Divisions

On April 15, 2014, Governor Cuomo announced the appointment of 5 Justices to the various Appellate Divisions. Three Justices were appointed to fill vacancies on the Appellate Division, Third Department. These Justices are Christine Clark, who had been sitting on the Supreme Court in Schenectady; Eugene Devine, who had been sitting in Albany, and Michael Lynch, also of Albany. The 3 Judges appointed to the Third Department were sworn in on April 24, and officially joined the Court on that date. The Appellate Division, Third Department, had been operating with a 40% vacancy rate and 2 vacancies on that Court still remain. The Governor also appointed Betsy Barros of Brooklyn to serve in the Appellate Division, Second Department and Brian DeJoseph of Syracuse, to serve in the Fourth Department. With the 5 latest appointments, all but 6 of the 66 Appellate Division positions have been filled. Two positions still remain vacant in the First and Third Departments and one each in the Second and Fourth Departments. The Governor has recently been criticized for long delays in making appointments to the Appellate Divisions, and his most recent appointments go a long way to solving the serious vacancy rate which existed. All of the five appointees made by the Governor on April 15 were Democrats.

U.S. Middle Class No Longer Most Affluent

A recent analysis by the *New York Times* indicates that the U.S. middle class, which has long been the single most affluent in the world, has lost that distinction. After tax, middle class incomes in Canada now appear to be higher than in the United States. The median per capita income in the United States in 2010 was listed as being $18,700, which was virtually unchanged since 2000. The same median income was found to exist in Canada in 2010, which had experienced a 20% increase since 2000. Income surveys conducted by government agencies suggest that since 2010, pay in Canada has risen faster than pay in the United States, thereby putting the middle class in Canada ahead of the middle class in the United States. According to the *Times* report, although economic growth in the United States is presently occurring, a small percentage of United States households is fully benefiting from it.

New York State Expensive to Live In

According to a recent report by the United States Department of Commerce, New York State is the third most

expensive place to live in within the United States. Topping the list as the most expensive areas are Washington, D.C. and Hawaii. The least expensive states are listed as Mississippi and Arkansas. The report indicated that one of the major changes in state rankings has occurred with respect to the State of Florida. Florida was once listed as a relatively cheap state. It has now moved up to the rank of 16, with 34 other states being considered less expensive than Florida. Among the large states, areas like Michigan, Ohio and Pennsylvania are now ranked as being more affordable than Florida. The cost of living in Florida appears to be steadily growing as the state's population rises and it now has become the third most popular state in the nation, with a population of approximately 19.5 million.

Employment Opportunities Improve for New York Law Graduates

A recent employment report released by the American Bar Association indicates that members of the class of 2013 from New York's 15 law schools are doing slightly better than their predecessors in finding jobs. For the 5,009 graduates of New York schools, 62.9% had found full time permanent jobs requiring bar passage as of February 15, 2014. This constitutes roughly a 3% increase over last year. Nationwide, 57% secured jobs, which was only slightly higher than the 56.2% which occurred in 2012. The law schools with the highest percentage of graduates finding employment were listed by the American Bar Association study as being Columbia and New York University. Both of these schools had an employment rate of 90% or over. The schools with the lowest employment rates were Hofstra, New York Law, Pace and CUNY. It is good to see that better economic times have brought some improvement for law graduates. Let's hope that the improvement continues in the coming years.

Upcoming Court of Appeals Vacancies

Within the next two years, three additional vacancies are expected within the New York Court of Appeals. Senior Associate Court of Appeals Judge Victoria Graffeo will see her term expire at the end of November. She was appointed by Governor Pataki in 2000, and her term expires on November 30th. She has already indicated that she will seek reappointment, and the Commission on Judicial Nominations will soon be accepting applications in order to make recommendations for the open position. Judge Robert Smith will also be retiring on January 1, 2015, since he will reach the age of 70. Judge Smith was also appointed by Governor Pataki, and has served on the Court since January of 2004. Chief Judge Lippman will also be reaching the age of 70 in 2015, and his position will also become open at that time. With the three new vacancies expected within the coming two years, Governor Cuomo will have the opportunity to leave his strong imprint on the Court.

About Our Section and Members

Section and State Bar Membership

In our last issue, we indicated that as of the beginning of January 2014, our Criminal Justice Section had 1,506 members. I am happy to report that during the months of January and February, the Section experienced a jump in membership, and that as of March 3, 2014, we had 1,565 members. This brings us to about the same total that we had experienced in the last two years. A listing of the new members who have joined in recent weeks is included within our Welcome New Members Section. The State Bar Association as a whole also experienced a jump in membership and as of March 3, 2014, had 75,000 members. The Bar Association continues to have 25 Sections and our Section ranks number 18 in total membership among the 25 Sections. We will continue to provide membership and financial information regarding our Section on a periodic basis for the benefit of our members.

Judge Kamins Article Appears in *New York Law Journal*

Judge Barry Kamins, who has been a regular contributor to our *Newsletter*, also recently had an interesting and important article published in the *New York Law Journal*. His article concerned the strategy utilized by the New York Court of Appeals regarding the defense of extreme emotional disturbance. Judge Kamins discussed the recent New York Court of Appeals decision in *People v. Kevin W.*, 22 NY 3d, 287 (2013). The Judge concluded that the New York Court of Appeals, in its recent decision, for the first time has sharply defined a defendant's burden in establishing an affirmative extreme emotional disturbance defense. The Judge's article appeared at pages 3 and 5 of the *New York Law Journal* for April 7, 2014. The article is recommended to our readers.

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.

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

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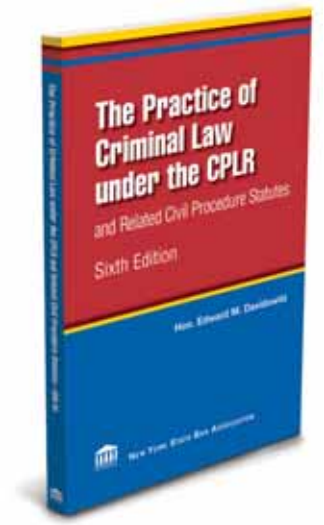

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