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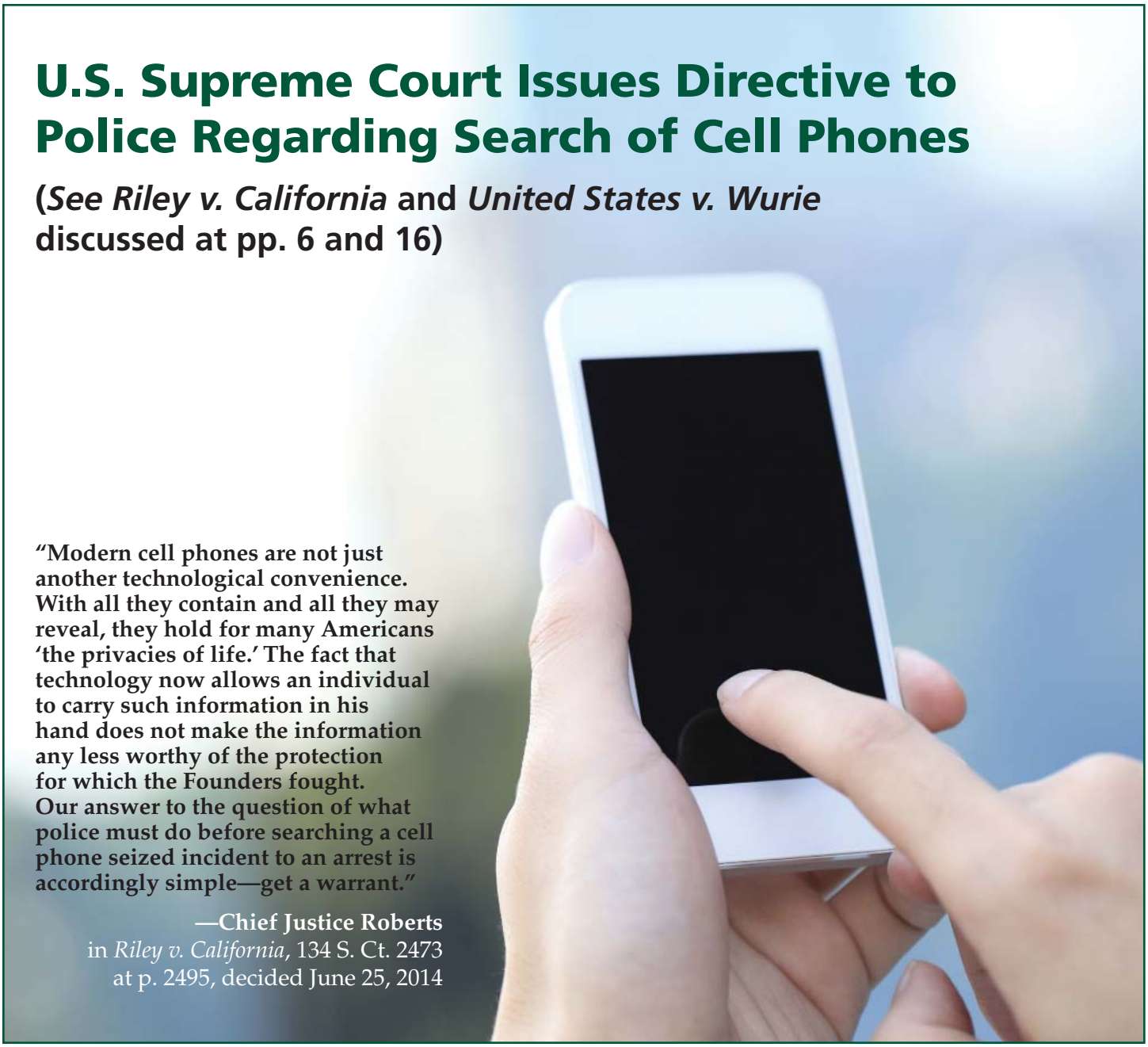
New York Criminal Law Newsletter

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

U.S. Supreme Court Issues Directive to Police Regarding Search of Cell Phones

(*See Riley v. California* and *United States v. Wurie* discussed at pp. 6 and 16)



"Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."

—Chief Justice Roberts
in *Riley v. California*, 134 S. Ct. 2473
at p. 2495, decided June 25, 2014

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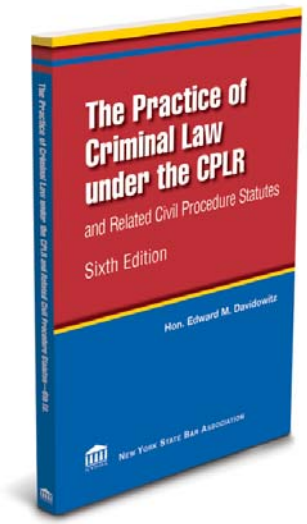

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Bronx County Supreme Court

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Message from the Chair

Jury Duties

In voir dire I tell my prospective jurors that the jury has been a cornerstone of the American criminal justice system for over 200 years, and that we want citizens, not government officials, to decide who is guilty. Because it is true.

To be sure, not everyone is willing to serve. The Clerk's Office tells me that over half those summoned to jury duty simply do not appear. Some who appear will say whatever it takes to dodge service. My favorite excuse, offered by prospective jurors for two separate trials, is that they would be unable to follow the instruction not to research the case until it was over. "Judge, I just won't be able to stop myself!" Others say they have an implacable hatred of prosecutors, or the police, or defense counsel, or defendants. To date, no one has boasted of an implacable hatred of judges, but surely that will come with time. Some of my fellow judges don't even bother: they simply ask who does not want to serve, and let them go.

Still, after one or perhaps two days, I always emerge with a panel of 12, and a number of alternates I happily compare to Mariano Rivera. I think those selected—with some exceptions, of course—are excited. They agree with my suggestion that they are serving their community in a profoundly important way, topped only by those in our military. They do not know what they soon will learn—that it is damnably hard to reach a verdict in a criminal case. I've tried three defendants non-jury myself, and I know: it is tough to "pull the trigger" on another human being. And it is equally tough to dismiss the plea of the complaining witness who, generally speaking, plainly has been wronged. To get a verdict usually requires readbacks, repeated jury instructions—"why can't you give us the elements in writing?"—and lunch on the second day of deliberations. And we get all that hard work from them for just $40 a day.

After the verdict, and especially after a conviction, the jurors look spent. Of course, then it is the judge's turn to sweat, over what sentence to impose. But that's for another column. As to the jurors, I joke that we'll get back together and do it again in six or eight years.

They never laugh.

I have also been impressed with the performance of counsel for both sides during the jury selection process. In a past life I litigated a number of appellate *Batson* issues, and I assumed that as a trial judge I would see frequent *Batson* challenges. I have those three steps memorized! But in over four years, I've seen only one or two *Batson* applications. It seems that Brooklyn is so diverse that you could not hope arbitrarily to exclude whites, blacks, Hispanics or even Asians. To the credit of the attorneys on both sides, no one seems to try. A typical jury in my part is half black and one-third white, with a miscellaneous dose of "other" to fill out the roster.

The jurors take their responsibilities seriously. They pay attention. During deliberations, they work very, very hard. They may not, in my opinion, always reach the "right" result. But it's not a bad system. After all, we want citizens, not government officials, to make these calls.

Mark R. Dwyer

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

Message from the Editor

In this issue we present our annual review of developments in the United States Supreme Court. The Court during the past year issued a series of significant decisions in the areas of Criminal and Constitutional Law, including warrantless searches of cell phones, the use of anonymous information to support a vehicle stop, further restrictions on the death penalty, and First Amendment issues regarding freedom of religion and freedom of speech. The Court also placed limits on the use of Presidential power and upheld certain restrictions on the Obama Health Care Law. All of these cases are summarized in our Supreme Court Section and are further discussed in a separate feature article.

The New York Court of Appeals also issued some important decisions in the Criminal Law area, holding that the *Padilla* decision was not to be applied retroactively even under State Law. It also placed further restrictions on the use of coerced confessions and issued several rulings on the question of ineffective assistance of counsel. We review these matters in the New York Court of Appeals Section. As in the past, we also include a summary of the 2013 Annual Report of the Clerk of the Court of Appeals which provides a detailed review of the Court's activity during the past year. The Annual Report also includes a farewell note from Judge Robert S. Smith who will be retiring from the Court at the end of the year. We also present several cases of significance from the various Appellate Divisions.

In our Feature Articles section we also present a summary and analysis of the Court of Appeals decision in *People v. Baret* which involved the issue of the retroactivity of the *Padilla* decision.

We also provide detailed information on upcoming programs and activities of the Criminal Justice Section as well as its individual members. A fall CLE event involving forensic issues is planned for October 17 and 18, 2014, in New York City, and further details will be provided in separate mailings. It also was recently announced that Seymour James, who has been a longtime member of our Section and who most recently served as President of the New York State Bar Association, has been elevated by the New York City Legal Aid Society to the position of head of the Society. Seymour was promoted after serving for many years as the attorney in charge of the Criminal Law Division of the Society.

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

Spiros A. Tsimbinos

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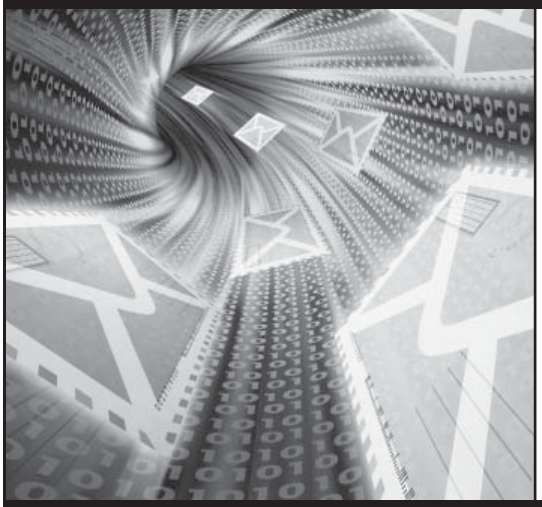

If you have written an article and would like to have it considered for publication in *New York Criminal Law Newsletter*, please send it to the Editor-in-Chief:

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A Review of the 2013-2014 Term of the United States Supreme Court

By Spiros Tsimbinos

The United States Supreme Court concluded its most recent term on June 30, 2014. It ended by issuing a series of decisions on highly controversial issues, such as the power and authority of the President, the necessity of a warrant to search cell phones, and issues involving freedom of religion and freedom of speech. The Court during the last term once again revealed a sharp split among the Justices which was indicative of their philosophies, backgrounds and political leanings. In a few instances, however, it displayed an unexpected unanimity. The Court is recessed for the summer and will begin its new term on October 6, 2014. It is thus a good time to review developments in the Court which occurred during the past term and to summarize some of the highlights and trends which have emerged.

The Court's Work Product

The Court during its past term handled 70 cases which involved oral arguments and the issuance of full decisions. This was slightly less than the Court's work product in recent terms. Although the Court's decisions were again highlighted with a significant number of 5-4 decisions, the Court did issue unanimous decisions in nearly two-thirds of its cases and in several significant cases where unanimous decisions were generally unexpected. This year the Court issued many more decisions in civil cases than it did in criminal law matters and the breakdown between civil and criminal matters was roughly 75% to 25%.

Some Partisanship, Several 5-4 Decisions and Some Unexpected Unanimity

The Court in recent years has been basically divided between a liberal and conservative grouping with Justice Kennedy and sometimes Chief Justice Roberts, occupying a centrist role, often providing a critical fifth vote. Recent studies by legal scholars have basically placed Justices Kagan, Sotomayor, Ginsburg and Breyer within the liberal grouping and Justices Scalia, Thomas and Alito within the conservative designation. The most recent analysis which covered the 2012 and 2013 term now identifies Justice Kagan as being the most liberal member of the Court with an approximately 70% liberal voting record. Justice Kagan has replaced Justice Ginsburg in the most liberal category, which she held at the end of the 2000 term. On the conservative spectrum, Justice Alito is now listed as the most conservative member of the Court with a conservative record of over 60%. Justice Alito has replaced both Justice Thomas and Justice Scalia, who once held the position of most conservative. Justice Kennedy appears to be right smack in the middle with a 50% liberal rating and a 50% conservative rating. During the past term, the Court decided about 15% of its cases by a narrow 5-4 vote with Justice Kennedy usually providing the critical fifth vote. Thus once again, Justice Kennedy was instrumental in chipping away at the use of the death penalty when he voted in *Hall v. Florida* to strike down Florida's system of using an IQ ratio of 70 in order to establish eligibility for the death penalty. As in the recent past, Justice Kennedy was in the majority over 90% of the time followed by Chief Justice Roberts.

The Court during the last term did manage to achieve consensus in three important decisions. One involved the holding that a search warrant is required before police can search a person's cell phone (see *Riley v. California* and *United States v. Wurie*, 134 S. Ct. 2473 (June 25, 2014.) The other case involved the ruling that President Obama had acted outside of his authority in making recess appointments to the National Labor Relations Board without the Senate's approval. See *National Labor Relations Board v. Noel Canning Company*, 134 S. Ct. 2550 (June 26, 2014). The third case was *McCullen v. Coakley*, 134 S. Ct. 2518 (June 26, 2014). The Court struck down a Massachusetts Law which established a 35-foot buffer zone outside a clinic that performed abortions, holding that the practice violates the First Amendment. Justice Roberts appears to have achieved unanimity in several cases, including the three just cited, by basing decisions on the narrowest ground possible.

Criminal Law Decisions

With the exception of one case where the Court upheld the use of an anonymous tip to support a traffic stop and subsequent search (see *Navarrete v. California*, 134 S. Ct. 1683 (April 22, 2014)), the defense fared well with respect to the Court's decision on various criminal cases. The use of warrants to search cell phones was established. Further restrictions were placed upon the use of the death penalty and fundamental principles regarding double jeopardy were reaffirmed. The number of criminal law decisions issued by the Court this year was slightly less than last year and the traditional groupings involving pro-defense and pro-prosecution judges continue to play out. Justices Kagan and Sotomayor continue to be regarded as the most pro-defense members of the Court, and Justice Alito and Justice Thomas are still viewed as the most pro-

prosecution on the Court. Even Justice Alito, however, voted for the defense in over 50% of the major criminal law decisions, which was a great deal above his less than 20% rating last year.

The Various Groupings and Alliances

The three female members of the Court continue to vote together on many occasions and are firmly established as the three most liberal members of the Court. Justice Alito and Justice Thomas often voted together and Justice Alito is increasingly being recognized as the leader of the conservative block. Chief Justice Roberts and Justice Kennedy voted together in an overwhelming number of cases and Justice Kennedy continued to be in the majority in approximately 90% of the decisions rendered. Justice Breyer appears to have moved somewhat closer to the middle and has a voting record that has moved somewhat closer to that of Chief Justice Roberts.

A Look Toward Next Term

During recent years, the United State Supreme Court has increasingly become the focus of public attention as major social and political issues of a highly controversial nature have reached the Court. Recent studies indicate that the Court currently enjoys a 30% approval rating among the public. Chief Justice Roberts, evidently aware of the unique nature of the Court, has striven to obtain some unanimity and to limit the number of 5-4 decisions. He has done so, however, by deciding cases on the narrowest ground and in postponing broad decisions for the future. The framers of our Constitution wisely provided for a separation of powers with three distinct branches of government. The United State Supreme Court continues to play a vital rule in reaching a final determination on controversial matters in a peaceful manner, utilizing the rule of law. This process will continue as the Court opens its new term in October and begins once again issuing decisions on controversial issues in a nation sharply divided on many matters.

A Summary of the 2013 Annual Report of the Clerk of the New York Court of Appeals

By Spiros Tsimbinos

The New York Court of Appeals recently issued its Clerk's Report for the year 2013. The Report, which is prepared on an annual basis by the Clerk of the Court of Appeals, provides a yearly summary of the workload of the Court and any new procedures or rule changes which have been adopted. This year's report was prepared by Andrew W. Klein, the Clerk of the Court, and is divided into four parts. The first section is a narrative, statistical and graphic overview of matters filed with and decided by the Court during the year. The second describes various functions of the Clerk's Office and summarizes administrative accomplishments in 2013. The third section highlights selected decisions of 2013. The fourth part consists of appendices with detailed statistics and other information.

This year's report also includes an introductory letter from Judge Robert S. Smith, who announces that he will retire from the Court on December 31, 2014 since he has reached the mandatory retirement age of 70. Judge Smith thanks his colleagues and the personnel of the Court of Appeals and states that he will miss working on the Court. He also indicates that he is looking forward to his next career, which may involve a return to private practice.

This year's Report indicates that in 2013 the New York Court of Appeals decided 259 appeals, 148 of which involved civil matters and 111 which dealt with criminal law issues. The Court therefore decided a slightly higher number of appeals than it did in the last two years. Significantly, with respect to criminal law decisions, there occurred an increase of 20 over last year when 91 criminal decisions were issued. Of the appeals decided in 2013, 166 were decided unanimously. A total of 81 dissenting opinions were issued with Chief Judge Lippman and Judge Jenny Rivera being the judges with the greatest number of dissenting opinions.

With respect to motions, the Court decided 996 motions for leave to appeal in civil cases. This was 3 fewer than were decided in 2012. The Court granted leave to appeal in civil cases 6.5% of the time which was almost identical to the situation in 2012. With respect to criminal leave applications, the Judges of the Court granted 74 of the 1,923 applications for leave to appeal in criminal cases which were down slightly from the grant of 99 of the 2,096 applications made in 2012.

The Court of Appeals continues to maintain a prompt and efficient method of handling its caseload. The average time from argument or submission to disposition of an appeal decided in the normal course was 36 days; for all appeals, the average time from argument or submission to disposition was 34 days. The average period from filing a notice of appeal or an order granting leave to appeal to calendaring for oral argument was approximately 11 months. The average period from readiness (papers served and filed) to calendaring for oral argument was approximately six months. The Court's promptness statistics for 2013 are basically the same as in 2012.

With respect to budget matters, the Court in response to the State's continuing fiscal crisis requested a total budget for the fiscal year 2014-2015 of $14,568,842.00. This is slightly less than the request for the previous fiscal year. The Court's budget for 2014-2015 will cover the operation of the Court and its ancillary services. The Court's Report also announces that it had made several changes to the Rules of Practice and the Rules for Review of the Determinations of the State Commission on Judicial Conduct and that these changes were made to principally address the new Court–PASS filing system.

For the benefit of criminal law attorneys, the Report also summarizes, in the year-end review section, some 20 of the most significant criminal law decisions issued by the Court during the last year.

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

New York Court of Appeals Upholds Non-Retroactivity of *Padilla* Decision*

On March 31, 2010, the United States Supreme Court issued a landmark ruling which held that an attorney's failure to advise immigrant defendants regarding the possibility of deportation as a consequence of a guilty plea constitutes ineffective assistance of counsel. See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). As a result of the Supreme Court decision, New York State Trial and Appellate Courts have struggled for the last few years to implement the new ruling and to deal with the consequences of the decision.

Of the many questions that developed in *Padilla*'s wake, perhaps the most fundamental was the issue of its retroactivity with respect to convictions that had become final prior to the Supreme Court's decision. Under *Teague v. Lane*, 489 U.S. 288 (1989), *Padilla*'s retroactivity effectively depended on whether the Court had announced a new rule, that is, whether *Padilla*'s holding had been dictated by precedent at the time the defendant's conviction had become final. Had the result in *Padilla* not been "apparent to all reasonable jurists" before it was decided, then it would not be given retroactive effect. See *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997). On the other hand, had *Padilla* simply involved the application of the already existing ineffective assistance of counsel standard set forth in *Strickland v. Washington*, 104 S. Ct. 2052 (1984), to a particular set of facts, then it would apply retroactively.

Last year in the case of *Chaidez v. United States*, 133 S. Ct. 1103 (2013), the Supreme Court in a 7-2 decision concluded that *Padilla* was a new rule under *Teague* that did not apply retroactively to convictions that had already become final before March 31, 2010, the day the *Padilla* decision was announced. Key to the majority opinion, which was written by Justice Kagan, was the fact that *Padilla* marked the first time the Court had ever recognized an attorney's duty under the Sixth Amendment to advise a criminal defendant about collateral non-criminal consequences of entering a guilty plea.

Where *Padilla*'s threshold question involved whether *Strickland* was even applicable under the circumstances, the Court rejected the notion that *Padilla* was simply another "garden variety" ineffective assistance of counsel analysis applied to a different set of facts. The *Chaidez* court also observed that the ruling in *Padilla* had overruled existing law in ten federal circuits and over thirty states, which had previously held that defense attorneys were not obligated to provide advice to clients about collateral consequences of pleading guilty.

Between the *Padilla* decision and the U.S. Supreme Court decision in *Chaidez*, several New York Trial and Appellate Courts issued conflicting decisions on the issue of retroactivity and the Appellate Division, First Department, in *People v. Baret* had determined that the *Padilla* decision was to be applied retroactively utilizing the *Teague* standard to support its conclusion.

In *Danforth v. Minnesota*, 552 U.S. 264 (2008), the United States Supreme Court had held that a state court is not required to follow federal retroactivity law and that it can apply Rules of Criminal Procedure with broader retroactivity than the federal standard would dictate. Thus, following the *Chaidez* decision the question still remained whether the New York Court of Appeals would apply state law to make the *Padilla* decision apply retroactively.

The answer came on June 12, 2014 when the New York Court of Appeals, in a 5-2 decision, concluded that *Padilla* had announced a new rule and therefore did not apply retroactively in state post-conviction proceedings. In an opinion written by Judge Read, the majority found that *Padilla* was not a watershed rule of criminal procedure, i.e, one so "central to the accurate determination of guilt or innocence that full retroactivity was required."

Chief Judge Lippman and Judge Rivera dissented in separate opinions, which took different courses. Chief Judge Lippman found that *Padilla* was a "watershed decision," one that "implicates basic questions of humanity and justice," and therefore should be applied on collateral review. Judge Rivera, like Justice Sotomayor who dissented in *Chaidez,* argued that *Padilla* had *not* announced a new rule and therefore should be applied retroactively. Judge Rivera added this: "A criminal justice system that affects the lives of [so] many must be able to assure its constituents that every proceeding is fair and that all defendants are treated justly, regardless of immigration status."

Thus, after a long and winding road, the issue of the retroactivity of the *Padilla* decision appears to have been finally settled, both under the federal and state law. Prosecutors and trial courts can finally breathe a sigh of relief that the *Padilla* decision is not retroactive.

***Editor's Note**: This updated article on the retroactivity of the *Padilla* decision utilized material and excerpts from two prior articles on the subject, which appeared in the Spring 2014 issue of our *Newsletter.* See "New York Court of Appeals Deals with Consequences of *Padilla* Decision" by Spiros Tsimbinos and "Retroactivity of *Padilla v. Kentucky* in New York State" by Sheila L. Bautista. Reference is also made to a summary of the *Baret* decision, which appeared in the annual article by Paul Shechtman involving recent decisions from the New York Court of Appeals and which appeared in the special section of the *New York Law Journal* on August 25, at page S3.

New York Court of Appeals Review

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

Harmless Error

***People v. McCray*, decided May 1, 2014, (N.Y.L.J., May 2, 2014, pp. 1, 9, and 23)**

In a 4-3 decision, the New York Court of Appeals affirmed the rape conviction of a defendant who claimed that he was denied a fair trial because the trial court had denied the defense access to all but a few pages of the victim's extensive mental health records. In a decision written by Judge Smith, the majority concluded that the trial judge was within his discretion to issue the ruling in question and there was no reasonable possibility that the guilty verdict would have been different if the withheld materials had been made available to the defense. In addition to Judge Smith, the majority consisted of Judges Graffeo, Read and Abdus-Salaam. Judges Rivera, Lippman and Pigott dissented and argued that the defendant's right to confront witnesses was unfairly hampered by the denial of access to the complainant's health records.

Credit Card Conviction

***People v. Lewis*, decided May 1, 2014 (N.Y.L.J., May 2, 2014, pp. 2 and 25)**

In a unanimous decision, the New York Court of Appeals upheld the conviction of a defendant for his role in a sophisticated credit card scam even though it was conceded that authorities improperly attached a GPS device to the defendant's car without the required warrant. Four of the judges on the Court concluded that the police had obtained minimal information from the GPS device and that there was no reasonable possibility that the error could have contributed to the defendant's conviction. The four judges consisting of Judge Lippman, Smith, Rivera and Pigott thus applied a harmless error analysis in reaching their determination. The other three judges, Graffeo, Read and Abdus-Salaam, indicated that defense counsel had failed to adequately preserve the GPS issue for the Court but that his failure did amount to the ineffectiveness of counsel.

Use of Grand Jury Testimony

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

In a unanimous decision, the New York Court of Appeals held that the court below was correct in determining that the defendant obtained a witness's unavailability by wrongdoing and thereby forfeited his constitutional right to the exclusion of the witness's grand jury testimony at trial. In the case at bar, the defendant's girlfriend suddenly indicated that she would not testify at the trial and would assert her Fifth Amendment right. The records of hearings below indicated that the defendant had pressured the witness through threats and other devices and was responsible for her failure to testify. During a hearing on the issue of whether the witness's grand jury testimony could be utilized by the prosecution, the trial court had concluded that the people had more than carried their burden of proof. The Court of Appeals upheld the trial court's actions and upheld the defendant's conviction.

Right to Counsel

***People v. Washington*, decided May 6, 2014 (N.Y.L.J., May 7, 2014, pp. 2 and 22)**

In a 4-3 decision, the New York Court of Appeals concluded that the defendant's right to counsel was violated when Nassau County police officers failed to inform her that her lawyer had called police headquarters with orders not to question or test her for drunken driving. The attorney had called police headquarters at 3:29 a.m. and had cautioned officers to stop any questioning and that there was no consent to any form of testing. The police were already in the process of administering a blood alcohol test to the defendant with her written consent. The defendant had no knowledge at the time that her attorney had contacted police. The defendant subsequently sought suppression of the blood alcohol test results that she would not have consented had she known that an attorney had contacted police on her behalf.

Judge Graffeo writing for the Court's majority stated that the statutory right to legal consultation applied when a legal attorney contacts the police before a chemical test for alcohol is performed and the police must alert the subject through the presence of counsel whether the contact is made in person or telephone. Judges Lippman, Pigott and Rivera joined the majority ruling. Judges Read, Smith and Abdus-Salaam dissented, stating that there was no statutory right in New York for suspected drunken drivers to be able to consult with counsel before agreeing to take a chemical breath test.

Enterprise Corruption

People v. Kancharla

***People v. Barone*, both decided May 8, 2014 (N.Y.L.J., May 9, 2014, pp. 8 and 23)**

In a unanimous decision, the New York Court of Appeals issued an opinion clarifying the legal standard which is necessary to sustain an enterprise corruption conviction. The Court concluded that the Appellate

Division, First Department, had applied an improper standard in reviewing the sufficiency and the weight of the evidence. The matter was remitted to the Appellate Division for reconsideration of the enterprise corruption count for a determination of whether the evidence was factually sufficient. The Appellate Division had originally vacated the enterprise corruption conviction, finding that the prosecution had failed to produce any evidence that either defendant knew that the results and inspection reports were fabricated. The Court of Appeals concluded that the Appellate Division had misapplied the law and that direct proof is not essential to a legally sufficient case of enterprise corruption.

Harassment

***People v. Golb*, decided May 13, 2014 (N.Y.L.J., May 14, 2014, pp. 1, 6 and 27)**

In a 6-1 decision, the New York Court of Appeals held that New York's second degree aggravated harassment statute which criminalizes communications likely to cause annoyance or alarm to another person is unconstitutional. The Court therefore vacated the charges which were lodged against the defendant. The Court concluded that the law was not clear about what the words likely to cause annoyance or alarm meant or what actions the statute proscribes. The statute in question was thus deemed to be unconstitutionally vague and overbroad. The defendant had waged a campaign on the internet to defend an unconventional theory regarding the origins of the Dead Sea scrolls. The Court's ruling follows similar determinations by some federal courts. As a result of the Court of Appeals ruling, the Legislature has passed legislation which is meant to cure the defects in the original statute. (See For Your Information section at page 21.)

Preservation of Error

***People v. Finch*, decided May 13, 2014 (N.Y.L.J., May 14, 2014, pp. 1, 6 and 24)**

In a 4-3 decision, the New York Court of Appeals dismissed a defendant's conviction for resisting arrest and in doing so applied a more relaxed standard regarding preservation of issues for Appellate review. In a decision written by Judge Smith and which was joined in by Judges Lippman, Pigott and Rivera, the Court stressed that justice, not strict adherence to procedural rules, is an overarching concern. In issuing its decision, the majority reached out to a situation in which the defendant had asserted an issue way back at arraignment even though he had not repeated the matter at later stages in the trial. The issue involved whether police who knew the defendant was an invited guest had probable cause to arrest him for trespassing and, if not, whether the related arrest for resisting arrest was valid. In holding that the raising of the issue at arraignment was sufficient, the majority expanded the parameters of the preservation rule. Judges Abdus-Salaam, Read and Graffeo issued rigorous dissents and indicated that the majority's reasoning was "downright bizarre and result oriented."

Drunken Driving Instruction

***People v. Frantangelo*, decided June 5, 2014 (N.Y.L.J., June 6, 2014, pp. 2 and 23)**

In a unanimous decision, the New York Court of Appeals held that in a prosecution for drunken driving the opinion of a defense expert that the defendant's blood alcohol content was below the statutory threshold is not "prima facie evidence" that the defendant was not intoxicated. The Court concluded that the defendant is entitled to an instruction that if the jury finds that the blood alcohol content was as the expert testified, it may find that the defendant was not intoxicated. A prima facie evidence instruction is not warranted and under the circumstances in the case at bar the defendant's conviction was affirmed.

Facial Sufficiency of Accusatory Instrument

***People v. Dumay*, decided June 5, 2014 (N.Y.L.J., June 6, 2104, p. 24)**

In a unanimous decision, the Court of Appeals held that since the defendant waived prosecution by information and the accusatory instrument met the factual sufficiency requirements of a misdemeanor complaint, the defendant's conviction should be affirmed. The defendant had challenged the facial sufficiency of the people's accusatory instrument which charged him with obstructing governmental administration in the second degree by preventing a police officer from patrolling the neighborhood. The accusatory instrument stated that the defendant slammed the trunk of the police officer's vehicle and prevented the vehicle from moving. The defendant had agreed to plead guilty in exchange for a 15-day sentence and the Court had asked defense counsel if the defendant waived prosecution by information. Under these circumstances, the accusatory instrument was subject to a lower level of legal standards. The Court reiterated that a misdemeanor complaint in comparison to information need only set forth acts that establish reasonable cause to believe that the defendant committed the charged offense. Under these circumstances the defendant's conviction was affirmed.

Vacation of Guilty Plea

***People v. Johnson*, decided June 5, 2014 (N.Y.L.J, June 6, 2014, p. 25)**

In a unanimous decision, the New York Court of Appeals granted a defendant's motion to vacate his guilty plea on the grounds that the plea allocution provided no support for the idea that the victim was mentally inca-

pacitated as defined in the penal law. The defendant had pleaded guilty to the Class D felony of rape in the second degree. That Penal Law section states that the crime is committed when a person engages in sexual intercourse with another person who is incapable of consent by reason of being mentally incapacitated. Mentally incapacitated is then defined in the Penal Law as meaning that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent. In the case at bar the only evidence presented was that the victim had been drinking in a bar and may have been intoxicated. The Court concluded that the Penal Law statute under which the defendant was convicted was apparently aimed primarily at a rapist who uses date rape drugs. There was no indication on the record that the victim was incapacitated other than voluntary intoxication. Thus, it was highly unlikely that the defendant actually committed the crime to which he pleaded guilty. The matter was therefore remitted to the Supreme Court for further proceedings.

Failure to Administer Oath

***People v. Wisdom*, decided June 5, 2014 (N.Y.L.J., June 6, 2014, p. 25)**

In a unanimous decision, the New York Court of Appeals reinstated a judgment of conviction which had been dismissed by the Appellate Division. In the case at bar the victim had provided testimony in a Grand Jury proceeding through videotape because of the severity of her injuries. The testimony, however, was given without an oath having been administered. When the prosecutor having realized that this error had been committed, a second videotape in which the defendant had sworn to be truthful and in which she declared that her prior testimony had been accurate was shown to the Grand Jury. The Appellate Division had concluded that the Grand Jury proceeding was defective because of the error which had occurred with respect to the witness's first recorded examination. The Court of Appeals, however, determined that the error which occurred did not reach the very precise and very high statutory standard of impairment of Grand Jury proceedings. The Court concluded that the lack of an oath was not the product of nefarious design to deliberately cause unfairness. Rather, it was an oversight that the people sought to correct by securing judicial permission to record a second interview in which the witness swore to be honest and verified the truth of her prior statements. The Court therefore concluded that based on the circumstances the defendant had not established a possibility of prejudice which justified the exceptional remedy of the dismissal of the indictment. The matter was then remitted to the Appellate Division for consideration of other facts and issues which were not raised in the appeal before the Court of Appeals.

Recusal by District Attorney

***Working Families Party v. Fisher*, decided June 10, 2014 (N.Y.L.J., June 11, 2014, pp. 1, 2 and 28)**

In a unanimous decision, the New York Court to Appeals upheld the right of a District Attorney to recuse himself from a case by demonstrating reasonable grounds why disqualification is appropriate. The case involved the Staten Island District Attorney's Office. D.A. Donovan had removed himself from the case and a special prosecutor had been assigned. The Working Families Party had argued that District Attorneys can disqualify themselves only on a showing of actual prejudice based upon a demonstrated conflict of interest. The Court of Appeals disagreed and held that D.A. Donovan was within his rights to exercise recusal in the case a bar. The matter was ordered to proceed with Roger Bennett Adler acting as a Special District Attorney.

Right to Be Present

***People v. Rivera*, decided June 10, 2014 (N.Y.L.J., June 11, 2014, p. 22)**

In a 4-3 decision the New York Court of Appeals determined that a trial court's violation of a defendant's right to be present during a supplemental jury instruction to a single juror constitutes a mode of proceedings error which entitled the defendant to a new trial. The majority opinion involved Chief Judge Lippman and Judges Pigott, Rivera and Graffeo. Judges Abdus-Salaam, Read, and Smith dissented. In the case at bar, the trial judge had answered a juror's question outside of the presence of the defendant. When the Court realized that the defendant was absent, it provided a condensed version of the discussion and advised counsel and the defendant that a transcript was available for review. No objection was made nor a read back requested. The Appellate Division had concluded that the robing room colloquy constituted a mode of proceedings error and that, therefore, the issue had been preserved for Appellate review.

Late Leave to Appeal Applications

***People v. Andrews*, decided June 12, 2014 (N.Y.L.J., June 13, 2014, pp. 1, 9 and 22)**

In a decision involving several cases, the New York Court of Appeals held that a Writ of Error Coram Nobis cannot be utilized to extend a deadline for applying for leave to appeal to the Court of Appeals with respect to criminal leave applications. In the cases at bar, defense counsel had failed to file a discretionary application for leave to appeal. Defendants sought to take advantage of a 2010 precedent of the Court of Appeals in *People v. Syville*, 15 N.Y. 3d 391, which opened a narrow window of opportunity to defendants denied first-level appellate review. The Court of Appeals distinguished between a lawyer's

failure to file an appeal as right to the Appellate Division and counsel's failure to file a discretionary application for leave to the Court of Appeals. The Court's majority opinion joined in by six of the Court's Judges said that standards protecting a defendant's right to mid-level appellate review do not apply equally and when the inmate is seeking discretionary review by the high court. Judge Graffeo writing for the majority stated "Unlike an Appeal as a right,…there is no federal constitutional entitlement to legal representation on a discretionary application for an appeal to a State's highest court. Thus, the failure to file" a criminal leave application standing alone does not necessarily establish that the defendant was deprived of effective assistance of counsel or due process of law. Judge Rivera dissented and argued that the defendant had been unduly prejudiced through no fault of his own and that the Court should grant the relief requested.

Burglary Conviction

***People v. McCray*, decided June 12, 2014 (N.Y.L.J., June 13, 2014, p. 23; June 16, 2014, pp. 1 and 4)**

In a unanimous decision, the New York Court of Appeals upheld a burglary conviction and determined that breaking into a non-residential part of a building that has residential units qualified as a break-in of a dwelling. In the case at bar, the defendant had broken into a locker room in a building that also housed a hotel. The defendant had argued that he had committed only third degree burglary and not the more serious offense of burglarizing a dwelling. The Court of Appeals, however, in a decision by Judge Smith, stated that even though the locker room was a good distance from the hotel guest rooms, the defendant was in two stairways that provided access to the hotel and that this provided sufficient evidence to sustain a second degree burglary conviction.

Robbery in the First Degree

***People v. Gordon*, decided June 12, 2014 (N.Y.L.J., June 13, 2014, pp. 9 and 24)**

In a 5-2 decision, the New York Court of Appeals reinstated a robbery conviction when the allegedly stolen property was never recovered. The defendant was accused of forcible robbery after allegedly swiping jewelry at a local mall. The defendant had gone to the mall with a friend, a teenage son and a toddler and store authorities claimed that they saw her take earrings from a rack and tear off the backings. After she left the store, she was confronted by store officials and she raged aggressively and threatened two officers with pens and punched a store employee. The defendant was searched but the jewelry was never found. The authorities, however, chased her son, who fled and while fleeing was seen tossing items into a nearby cemetery. The Appellate Division had reduced the robbery counts to petit larceny, holding that the higher count could not stand since there was no stolen property recovered from the defendant. The Court of Appeals, however, in a decision by Judge Rivera, reinstated the robbery convictions, finding that the facts revealed an inference of forcible theft. Judges Lippman and Abdus-Salaam dissented.

The Modification of Verdict

***People v. Walston*, decided June 12, 2014 (N.Y.L.J., June 13, 2014, p. 25)**

In a unanimous decision, the New York Court of Appeals vacated a defendant's conviction of manslaughter in the first degree. The Court found that the Appellate Division had committed reversible error by finding that the defendant was required to preserve a claim that the trial court had violated a required procedure in the handling of a jury note. The Court of Appeals concluded that the error in question was one involving a mode of proceedings and was not subject to preservation rules. The Court found, however, since the jury note at issue was addressed to an element relative to the homicide counts and not to the weapon possession count there was no danger of prejudice as it related to the latter count.

Action by Parole Board

***Matter of Costello v. New York State Board of Parole*, decided June 26, 2014 (N.Y.L.J., June 27, 2014, pp. 1 and 26)**

In a unanimous decision, the New York Court of Appeals ordered the Parole Board to free a defendant whose release was rescinded following criticism and complaints from the survivors of a murder victim. The Parole Board had voted to release the defendant in 2009. However, members of the victim's family, the New York City Patrolman's Union and the *New York Daily News* criticized the Parole Board's decision. Following this criticism, the Parole Board rescinded its decision. The New York Court of Appeals concluded, however, that there was no new and substantial information that should justify rescinding the original parole ruling. The defendant's parole was therefore reinstated.

Prosecutors' Brady Obligations

***People v. Garrett*, decided June 30, 2014 (N.Y.L.J., July 1, 2014, pp. 1, 6, and 27)**

In a unanimous decision, the New York Court of Appeals refused to expand the Brady obligations of the prosecution to include allegations of misconduct which were commenced against police witnesses in unrelated cases. In the case at bar, the defendant alleged that he was entitled to a CPL 440.10 hearing to consider whether he was denied a fair trial because the detective who took his confession was facing a federal civil rights suit for coercing a confession from a defendant in an unrelated case. The five judge majority found that it would be imposing

an unreasonable burden on prosecutors to make them disclose under the Brady principles the information in question. Judge Abdus-Salaam wrote the Court's majority decision and stated that the Court was declining to construe the people's Brady obligations in so broad a manner. Judges Smith and Pigott concurred in their result but issued a separate concurring opinion.

Retroactivity of *Padilla* Decision

***People v. Baret*, decided June 30, 2014 (N.Y.L.J., July 1, 2014, p. 23)**

In a 5-2 decision, the New York Court of Appeals determined that the recent United States Supreme Court decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that the Sixth Amendment required defense counsel to advise their non-citizen clients about the risks of deportation arising from a guilty plea, is not to be applied retroactively. The United States Supreme Court in *Chaidez v. United States,* 133 S. Ct. 1103 (2013) recently held that as a matter of Federal Law, the *Padilla* decision was not to be applied retroactively. In the case at bar the defendant had claimed that the Padilla decision could be applied retroactively under State Law. The majority opinion in the New York Court of Appeals rejected the defendant's claim and held in an opinion by Judge Reed that applying the rule retroactively was not warranted. Chief Justice Lippman and Judge Rivera each dissented in separate opinions. For more details on the *Baret* decision, see feature article at p. 9.

Best Evidence Rule

***People v. Haggerty*, decided June 30, 2014 (N.Y.L.J., July 1, 2014, p. 27)**

In a unanimous decision, the New York Court of Appeals upheld the conviction of a defendant for grand larceny and money laundering involving evidence that he defrauded former New York City Mayor Michael Bloomberg of $750,000.00. The defendant argued on appeal that testimony was submitted regarding the source of the stolen funds which violated the best evidence rule. During the trial, the people's financial investigator testified that the defendant paid for his house in Queens with funds that originated with the Independence Party with which the defendant was affiliated. The investigator testified that the Independence Party received the funds through two wire transfers from the Michael M. Bloomberg Revocable Trust. Documents supporting these allegations were admitted into evidence. On cross-examination, the investigator admitted that he did not know the name of the trustee, or the name of the beneficiaries.

Defense counsel raised the possibility that the funds were not property belonging to Mayor Bloomberg, but rather property belonging to the Trust which was a separate legal entity. The people then called a witness who testified that the trust funds belonged to Mayor Bloomberg. The defense claimed that the best evidence rule required the people to introduce the trust instrument itself. The Court of Appeals, however, rejected this argument on the grounds that by the time the defense raised this objection, Mayor Bloomberg and several other prosecution witnesses had already provided testimony that proved ownership. Further, based upon the entire trial record there was no significant probability that the jury would have failed to convict even without the disputed testimony.

Cyberbullying Law

***People v. Marquan*, decided July 1, 2014 (N.Y.L.J., July 2, 2014, pp. 1, 2, and 22)**

In a 5-2 decision, the New York Court of Appeals struck down an Albany County anti-cyberbullying law on the grounds that its broad language violated the First Amendment. Judge Graffeo wrote the majority opinion and held that while criminal laws against cyberbullying among minors were not necessarily illegal, the law passed by Albany County went too far and criminalized protected speech. Judges Smith and Pigott dissented. The Court concluded that although the Albany statute was motivated by a laudable public purpose of shielding children from cyberbullying, the language of the statute was overbroad and violated aspects of the First Amendment. Judges Smith and Pigott in dissent argued that the objectionable provisions of the Albany statute could be severed from the rest of the legislation and that under those circumstances the statute could pass constitutional muster.

Depraved Indifference Murder

***People v. Maldonado*, decided July 1, 2014 (N.Y.L.J., July 2, 2014, p. 24)**

In a 5-2 decision, the New York Court of Appeals concluded that the evidence against the defendant was legally insufficient to support a conviction for depraved indifference murder. The Court therefore reduced the defendant's conviction to one of manslaughter in the second degree. The majority concluded that the circumstances of the high-speed vehicular police chase which occurred in the case at bar did not fit in the narrow category of cases wherein the facts evince a defendant's utter disregard for human life. Judges Pigott and Graffeo dissented. Judge Pigott in his dissent vigorously argued, "Once again a person is dead because a defendant, concerned about being arrested for theft, led police on a highspeed chase through residential neighborhoods. And, once again the majority treats this crime with unfathomable and unjustified leniency."

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

As the United States Supreme Court neared the end of its current term, it issued several decisions of major importance in the criminal and constitutional law areas. These decisions are summarized below.

***Navarette v. California*, 134 S. Ct. 1683 (April 22, 2014)**

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

On April 22, 2014, the Court issued its decision and held that even though the motorist's 911 emergency call in reporting that a pickup truck had run her off the road was anonymous, her tip was sufficiently reliable since she had provided details regarding the vehicle and thus in the motorist's tip provided reasonable suspicion to conduct a traffic stop. The Court divided in a 5-4 decision with Justice Thomas writing for the Court's majority. Joining Justice Thomas were Justices Alito, Breyer, Kennedy and Chief Judge Roberts. Justice Scalia issued a dissenting opinion which was joined in by Justices Ginsburg, Sotomayor and Kagan. Justice Scalia issued a vigorous dissent and argued that law enforcement agencies based upon the court's ruling will identify the new rule and will use it to support future unauthorized traffic stops. An interesting twist with regard to the instant case is that Judge Scalia, who usually votes with the conservative wing of the Court, issued a strong dissent in favor of the defense and Justice Breyer, who normally votes with the liberal section of the Court, voted in favor of the prosecution.

***Town of Greece, NY v. Galloway*, 134 S. Ct. 1811 (May 5, 2014)**

In a 5-4 decision, the United States Supreme Court upheld the right of a municipality to offer prayers which reflect adherence to a single religious belief and that such a practice would not run afoul of the First Amendment's prohibition against the establishment of religion. Justice Kennedy issued the majority opinion and held that absent a pattern of prayers that over time denigrate or portray an impermissible government purpose a challenge based solely on the content of a prayer would not likely establish a constitutional violation. The Constitution does not require an effort to achieve religious balance. The case at bar involved a town near the City of Rochester in which the town council began its monthly meeting with a prayer from a Christian pastor. The narrow issue presented in the case was whether the town's practice had improperly favored one religion over others. Justices Kagan, Ginsburg, Breyer and Sotomayor dissented.

***Hall v. Florida*, 134 S. Ct. 1986 (May 27, 2014)**

On October 21, 2013 the United States Supreme Court 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 offered 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, 2014, the Court by a 5-4 decision did in fact nullify the Florida procedure. The Court held that the rigid rule set by Florida and several other states that deny leniency to a convicted murderer who scores at least 70 on an IQ test was improper. As expected, Justice Kennedy voted with the majority and issued the Court's decision. Justice Kennedy stated that intellectual disability is a condition and not a number. He further added that the Court must recognizes, as does the medical community, that the IQ test is imprecise. The Court held that Florida and a handful of other states must look beyond IQ scores when inmates test in the range of 70 to 75. IQ tests have a margin of error and those inmates whose scores fall within the margin must be allowed to present other evidence of mental disability. In addition to Florida, Virginia, Alabama and Kentucky had been utilizing the IQ test of 70 in determining whether the imposition of a death penalty was possible. Justice Kennedy was joined in the majority by Justices Ginsburg, Breyer, Sotomayor and Kagan. Justices Alito, Scalia, Thomas and Chief Justice Roberts dissented, arguing that the Court had no evidence that relying on

test scores just above 70 was unreasonable and that therefore Florida's procedure was not unconstitutional. The Court's most recent decision continues to be a chipping away at the death penalty with Justice Kennedy continuing to act as the critical swing vote.

***Martinez v. Illinois*, 134 S. Ct. 2070 (May 27, 2014)**

In a unanimous decision, the United States Supreme Court held that double jeopardy had attached when the jury was sworn and that the double jeopardy clause barred any further appeal by the State. In the case at bar, a trial date had been set for the Defendant. His counsel was ready but the State was not. The Court then swore in a jury and invited the State to present its first witness. The State declined to present any evidence. The Court then directed a not guilty verdict upon the Defendant's request. The State subsequently sought to appeal the Judge's action. In the United States Supreme Court, the Court ruled that the double jeopardy clause barred any further attempt by the State to appeal in the hope of subjecting the Defendant to a new trial.

***Bond v. U.S.*, 134 S. Ct. 2077 (June 2, 2014)**

In a unanimous decision, the United States Supreme Court held that a federal statute which implemented an international chemical weapons treaty could not be used to reach a local offense of an attempt by a jilted wife to injure her husband's lover. In the case at bar the Defendant had sought revenge against the woman with whom her husband had carried on an affair. The Defendant had spread two toxic chemicals on a mailbox and a door knob. Federal prosecutors charged the Defendant with, among other things, violating Section 229 (a) which supplemented the international chemical weapons treaty. The Court found that a fair reading of the statute indicated that it was not Congress' intention to utilize the statute in instances involving local criminal activity, which was best left to the States.

***Abramski v. U.S.*, 134 S. Ct. 2259 (June 16, 2014)**

In a 5-4 decision, the United States Supreme Court held that the federal government may strictly enforce a law that prohibits purchase of guns intended for others. The Court upheld a conviction of a Defendant who bought a handgun for his uncle. The Defendant did not reveal that he was purchasing the gun for another but both he and the other individual were eligible to own guns. Justice Kagan, writing for the Court's majority, stated that the government had good reason to prevent straw purchases and to assume that the person who buys the gun would be the weapon's legitimate owner. Justice Kagan was joined in the majority opinion by Justices Sotomayor, Ginsburg, Breyer and Kennedy, who cast the critical fifth vote. Justice Scalia dissented, arguing that it was not a crime for one lawful gun owner to buy a gun for another lawful gun owner. Justice Scalia was joined in dissent by Chief Justice Roberts and Justices Thomas and Alito. This case is an interesting one in that the traditional groupings seem to have switched positions in reaching their result. The four liberal Justices who traditionally vote for the defense this time supported the prosecution and the four conservative Judges who usually support the prosecution voted in favor of the defense. This unusual result may have been based on the fact that the four liberal Justices favor gun control while the four conservative Members are advocates of the Second Amendment. The conflicting views may account for the final result in the case.

***Riley v. California*, 134 S. Ct. 2473 (June 25, 2014)**

***United States v. Wurie*, 134 S. Ct. 2473 (June 25, 2014)**

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 cell phones of people they have arrested. The Court accepted two cases which were argued on April 29, 2014. One of the cases emanated from a decision of the Federal Court of Appeals located in Boston, and the other involved a decision by the California State Courts. On June 25, 2014, as the Court was nearing the very end of its term, it issued a unanimous decision holding that police may not search the cell phones of people they arrest without first getting a search warrant. The decision was written by Chief Justice Roberts and contained an emphatic defense of privacy in the digital age. Justice Roberts wrote that cell phones are "not just another technological convenience," but ubiquitous, increasingly powerful computers that contain vast quantities of personal sensitive information. "With all they contain and all they may reveal, they hold for many Americans the privacies of life so the message to police about what they should do before rummaging through a cellphone's contents following an arrest is simple: Get a warrant." The sweeping nature of the decision and its unanimity surprised many observers who had expected the possibility of a split within the Court.

***National Labor Relations Board v. Noel Canning Company*, 134 S. Ct. 2550 (June 26, 2014)**

In the closing days of its term, the United States Supreme Court issued a decision which held that President Obama had overreached his constitutional authority by making recess appointments to the National Labor Relations Board during a time when the Senate was taking brief breaks from its work. During the time in question, the Senate was convening every three days in short pro forma sessions in which no business was conducted. The Court held that these breaks were too short to warrant the recess appointments which were issued. Interestingly, the Court's judgment was unanimous and even included the Court's more liberal members, with President Obama's own appointees of Justice Kagan and Justice Sotomayor joining in the Court's decision. However, the main majority opinion, which was issued by Justice Breyer, determined the issue on narrow grounds which emphasized the short 3-day break in question.

Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, would have issued a broader decision and concurred in the judgment only. In fact, Justice Scalia criticized the majority opinion and stated, "Today's Court agrees that the appointments were invalid, but for the far narrower reason that they were made during a 3-day break in the Senate's session. On its way to that result, the majority sweeps away the key limitations on the recess-appointment power."

***McCullen v. Coakley*, 134 S. Ct. 2518 (June 26, 2014)**

In a unanimous decision, the United States Supreme Court struck down a Massachusetts Law which established a thirty-five foot buffer zone outside a clinic that performed abortions, holding that the practice violates the First Amendment. The Court found that because the Massachusetts statute encompassed public sidewalks, it made it impossible to converse with women walking to abortion clinics. Chief Justice Roberts, writing for the unanimous Court, stated that the Massachusetts restrictions imposed serious burdens on petitioners' speech depriving them of their two primary methods of communicating with arriving patients: close personal conversations and distribution of literature.

***Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (June 30, 2014)**

***Conestoga Wood Specialties v. Burwell*, 134 S. Ct. 2751 (June 30, 2014)**

On the final day of its term, the United States Supreme Court issued a significant and highly controversial 5-4 ruling and held that the contraceptive mandate in the Federal Health Care Law violated the religious freedom of corporate owners who objected to providing the coverage in employee insurance plans. In a decision written by Justice Alito, the Court held that closely held companies can deny on religious grounds health care coverage of certain birth control measures. In issuing its ruling, the Court relied upon the Religious Freedom Restoration Act which was passed by Congress in 1993 and which states that the government may substantially burden a person's exercise of religion only if it demonstrates that the application of the burden to the person is the least restrictive means of furthering a compelling governmental interest.

Justice Alito was joined in the majority opinion by Chief Justice Roberts and Justices Kennedy, Scalia and Thomas. Justices Breyer, Ginsburg, Kagan and Sotomayor dissented. In joining the majority opinion, Chief Justice Roberts regained some of his standing with conservative groups who were surprised and disappointed by his support of the Obama Health Care Law. The majority opinion in the cases at bar drew sharp dissenting opinions and revealed a gender gap within the Court with all three female members of the Court dissenting from the majority ruling.

***Harris v. Quinn*, 134 S. Ct. 2618 (June 30, 2014)**

In a 5-4 decision the United States Supreme Court held that fees charged to certain non-union members violated the members' First Amendment rights. The case involved a challenge by a group of Illinois Home Care workers who argued that the fee charged by the Service Employees International Union violated their rights by forcing them to associate with a particular union. The majority opinion was written by Justice Alito and was joined in by Chief Justice Roberts and Justices Scalia, Kennedy and Thomas. Justice Kagan issued a dissenting opinion which was joined in by Justices Ginsburg, Breyer and Sotomayor. The Court's ruling was viewed as a setback for Labor Unions and may limit public sector unions in their future efforts to increase membership.

Cases of Interest in the Appellate Divisions

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

People v. Walker **(N.Y.L.J., May 5, 2014, p. 1)**

In a unanimous decision, the Appellate Division, Third Department, determined that DNA evidence linking a defendant to a shooting was improperly collected and should be suppressed. The Panel concluded that police were not authorized to swab the mouth of the defendant for a DNA sample pursuant to a no-knock search warrant they executed at his home.

People v. Mack **(N.Y.L.J., May 6, 2014, p. 4)**

In a 3-1 decision, the Appellate Division, Third Department, reversed a gang assault conviction because the trial judge accepted the guilty verdict without responding to three notes from the jury, including one asking for the definition of reasonable doubt. In the case at bar, the jury had submitted three notes, but had subsequently stated that it had reached a verdict. Without any mention of the previous notes, the trial court accepted the verdict. The Appellate Panel concluded that the notes indicated the jury was confused as to the law and the failure of the Court to provide a meaningful response constituted reversible error. Justice Lindley in dissent argued that the jury in issuing its final note effectively rescinded the others.

People v. Brown **(N.Y.L.J., May 19, 2014, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Fourth Department, reversed a defendant's conviction and ordered a new trial based upon a recent New York Court of Appeals ruling in *People v. Colville*, 20 NY 3d, 20 (2012). The Court found that a trial judge had acquiesced to a defendant's refusal to allow the jury to consider a lesser offense. Defense counsel had requested such a submission but the defendant was opposed to his defense counsel's advice. The New York Court of Appeals had concluded that a decision to seek a lesser included offense is a tactical matter that should be determined by defense counsel and not the defendant. Under the circumstances a new trial was required.

People v. Davis **(N.Y.L.J., May 9, 2014, pp. 1 and 4)**

In a unanimous decision, the Appellate Division, Second Department, reduced a defendant's murder conviction to second degree manslaughter on the grounds that the requisite intent was not shown. The defendant had engaged in a sexual encounter and the partner had died of asphyxiation. The Appellate Division concluded after reviewing the evidence that it did not establish beyond a reasonable doubt that it was the defendant's conscious objective to kill the victim.

People v. Green **(N.Y.L.J., May 12, 2014, pp. 1 and 6)**

In a unanimous decision, the Appellate Division, Third Department, held that a cell phone in prison constitutes dangerous prison contraband and supported a felony conviction. The Court stated that while possession of a cell phone was not inherently dangerous it created a substantial security risk by allowing inmates to monitor and record calls.

People v. Elmy **(N.Y.L.J., May 13, 2014, pp. 1 and 7)**

In a unanimous decision the Appellate Division, Third Department, ordered a new trial on the grounds that the trial court had improperly allowed a jury to hear evidence of a prior uncharged crime. The defendant was charged with assaulting his wife and the trial court had allowed testimony regarding uncharged prior abusive acts. The Appellate Panel concluded that the prejudicial effect of this testimony denied the defendant a fair trial since the trial judge did not even provide appropriate limiting instructions.

People v. Harris **(N.Y.L.J., May 15, 2014, pp. 1 and 2)**

In a 3-1 decision, the Appellate Division, Second Department, upheld a bribery conviction for a defendant who attempted to silence testimony from three teenagers who witnessed a murder in a park. The majority Panel concluded that the defendant had not been deprived of a fair trial when the prosecution told jurors that a fourth witness of the murder in the park had been fatally shot days before he was supposed to testify. The majority stated that the impact of the murder of the fourth witness on the state of mind of the other three witnesses was interwoven with the narrative of the charged crimes and was necessary to help the jury understand the case in context because it explained the girls' conduct in coming forward to disavow their statements that recanted their original information. Justice Miller dissented.

People v. Pavone **(N.Y.L.J., May 30, 2014, pp. 1 and 2)**

In a 4-1 decision, the Appellate Division, Third Department, upheld a defendant's murder conviction where the prosecution mentioned the defendant's silence as a means of undermining his claim of extreme emotional disturbance. In the case at bar, the defendant shot and killed his former girlfriend and her boyfriend. He admitted the shooting but asserted an affirmative defense of extreme emotional disturbance in an effort to obtain a lesser conviction involving manslaughter. At the trial the prosecution established that after the defendant was advised of his Miranda rights he remained silent and did not articu-

late to the police that he was suffering from an extreme emotional disturbance. Defense counsel did not object to the prosecution's remarks. Justice Egan, writing for the majority, concluded that defense counsel had made a tactical decision which did not constitute ineffective assistance of counsel and that there was no reasonable possibility that the jury's verdict would have been different but for the admission of the challenged testimony. The majority thus applied the harmless error doctrine in upholding the defendant's conviction. Justice Garry dissented and would have reversed in the interest of justice. Justice Garry argued that the restriction against the use of a defendant's silence is premised upon the fundamental unfairness that arises when the state implicitly assures an arrested person that silence will not be used against him and then reneges upon the promise. Based upon the split in the Court's decision and the importance of the issue involved, it appears that the matter may be headed for the Court of Appeals.

People v. Gibson **(N.Y.L.J., June 3, 2014, p. 4)**

In a 3-1 decision, the Appellate Division, Third Department, upheld a defendant's conviction and a 15 year to life prison sentence. The court held that exigent circumstances justified a police search that led to a gun which the defendant possessed. Police had received a call that a man had waved a pistol at two cab drivers outside the defendant's apartment. When police arrived they saw the defendant emerging from a side door and ordered him to lie on the ground. After police found that he was unarmed, they entered the building and searched his apartment. Once inside the apartment, they discovered a gun in a holster. The three-Judge majority consisting of Justice Peters, Stein and Egan upheld the search in question, finding that the police had acted reasonably due to the circumstances of the case. Justice Rowe dissented, arguing that once the defendant was in the control of the police his apartment should not have been searched without a warrant.

People v. Cole **(N.Y.L.J., June 9, 2014, pp. 1 and 9)**

In a unanimous decision, the Appellate Division, First Department, vacated a defendant's conviction on the grounds that a trial judge had allowed a defendant to waive his right to counsel without conducting a proper and detailed inquiry. The Court found that no searching inquiry was conducted as to whether the defendant knew what he was doing and that it was not enough to simply tell the defendant that it was against his interest to represent himself, even when coupled with advice about the consequences of conviction. The Appellate Court indicated that a searching inquiry must include the age, level of education, occupation and previous exposure through the legal system. In the case at bar, the trial court had repeatedly urged the defendant not to proceed without counsel and had intimated the risks of going pro se. In making its ruling, it appears that the Appellate Division, First Department is requiring stringent rules regarding the type of inquiry which trial judges must engage in before accepting a valid waiver. The prosecution has indicated that it is planning an appeal to the Court of Appeals and there appears to be a good possibility that the Court of Appeals will address the issue.

People v. Canales **(N.Y.L.J., June 17, 2014, p. 4)**

In a unanimous decision, the Appellate Division, Second Department, reversed a defendant's conviction and ordered a new trial where a deadlocked jury quickly reached a guilty verdict after a judge replaced a sick juror before getting written permission from the defendant. The Appellate Panel held that the trial court deprived the defendant of the opportunity of consultation with counsel to make an informed strategic decision as to whether to consent to the substitution or accept a mistrial.

People v. Archie **(N.Y.L.J., June 20, 2014, p. 4)**

In a unanimous decision the Appellate Division, Fourth Department, upheld a depraved indifference murder conviction. In the case at bar, the defendant was jumped at school by a fellow student who lived at a housing development. Three days later the defendant went to the development with a 220-caliber pistol and fired several shots at a group of three people, killing one and seriously injuring another. The defendant claimed that the murder had to be classified as intentional and could not have resulted from a depraved indifference to human life. The Appellate Panel, however, said that shooting into a crowd of people is a typical example of depraved indifference. The Court stated that in the case at bar, either theory would have been plausible and that under the circumstances hereon a depraved indifference conviction could be sustained.

People v. Brewer **(N.Y.L.J., June 25, 2014, pp. 1 and 7)**

In a unanimous decision, the Appellate Division, Fourth Department, reversed a defendant's murder conviction because a Judge charged the jury on an affirmative defense that had not been raised. The Appellate Panel concluded that the trial judge, in addressing an inquiry from the jury, instructed the jury on the defense of renunciation. The defendant had never raised such a defense and the Appellate Court found that the instruction may have ultimately undermined the defense that was presented. Under these circumstances the Court concluded that the charge delivered after summations imposed an after-the-fact burden on the defendant that he could not possibly meet or address. Under these circumstances a new trial is required.

People v. Henry **(N.Y.L.J., July 8, 2014, p. 4)**

In a unanimous decision, the Appellate Division, Second Department, reversed a defendant's robbery conviction on the grounds that the trial judge had failed to follow up in an appropriate inquiry on reports that a

juror had been flirting with the defendant's wife and a co-defendant's daughter. The Appellate Panel held that the trial court should have questioned the juror in camera as the defense had requested. The court had admonished the jury to keep an open mind and had asked generally if any of the jurors had changed their mind about their ability to be impartial. The Appellate Panel concluded that the trial court had failed to conduct a probing and tactful inquiry which was required under its decision in *People v. Buford*, 69 NY 2d 290 (1987).

People v. Casanova **(N.Y.L.J. July 8, 2014, p. 4)**

In a unanimous decision, the Appellate Division, Third Department, reversed a defendant's drug conviction because of the prosecutor's repeated attempts during summation to impermissibly shift the burden of proof to the defense. The Panel concluded that the prosecutor made remarks which improperly denigrated the defense and suggested it was the defendant's affirmative burden to establish certain details. The Appellate Division further noted that many of the prosecutor's comments passed without objections and with few curative instructions. Under these circumstances a new trial is required.

People v. Robinson **(N.Y.L.J., July 10, 2014, p. 4)**

In a unanimous decision the Appellate Division, Second Department, overturned a defendant's conviction and dismissed an indictment for endangering the welfare of a child. The defendant had been accused of shaking her baby to the point of causing serious injury. The Appellate Panel found, however, that the prosecution's evidence did not properly establish that the defendant had the mens rea or guilty mind required to commit the crime in question. The Court indicated that the expert witnesses who testified in the case provided conflicting testimony and that the people's own evidence established that the defendant denied knowing that her actions caused injury to the child.

People v. Angona **(N.Y.L.J., July 16, 2014, pp. 1 and 2)**

The Appellate Division, Fourth Department, upheld a defendant's conviction for first degree sodomy, rejecting claims of ineffective assistance of counsel and prosecutorial misconduct. The Panel split, however, on whether the 25-year prison sentence which was imposed was excessive. The three-Judge majority upheld the sentence in question even though the defendant would have faced no jail time if he had been a mere 6 months younger when he committed his crimes. The crimes were committed when the defendant was 16. Two Judges on the Panel would have reduced the defendant's sentence to 15 years, noting the defendant's young age and also the fact that he had been offered plea deals which would have resulted in short jail terms.

People v. Walker **(N.Y.L.J., July 17, 2014, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Fourth Department, reversed a defendant's burglary conviction on the grounds of prosecutorial misconduct. The Appellate Court found that the prosecutor inappropriately and repeatedly vouched for the credibility of prosecution witnesses, suggested that the defendant was a liar, characterized the defendant's testimony as smoke and mirrors and otherwise improperly denigrated the defense. The Appellate Court's determination in this matter follows several recent Appellate Division decisions involving claims of prosecutorial misconduct.

People v. McTiernan **(N.Y.L.J., July 18, 2014, p. 1)**

In a unanimous decision, the Appellate Division, First Department, reversed a defendant's conviction for second degree murder on the grounds that the trial judge failed to inform jurors that a robbery victim is justified in using deadly force against an assailant who is not presenting a lethal threat. The Appellate Panel found that the trial court failed to apply the proper provisions of the penal law in dealing with the issue of justification. The Justices found that while an assault victim can use deadly force only if his or her life is in jeopardy, a robbery victim pursuant to Penal Law Section 35.15 can use deadly force to confront any physical threat.

Hamilton v. New York State Division of Parole **(N.Y.L.J., July 25, 2014, pp. 1 and 6)**

In a 3-2 decision the Appellate Division, Third Department, refused to overturn a Parole Board's determination to deny the inmate early release even though he had an extraordinary record of institutional achievement. In addition, many supporters including top correction officials and prosecutors had recommended early release. The three-Judge majority found that the court must yield to the discretion of the Board of Parole. Presiding Justice Peters and Justice Garry dissented and stated that the majority had established an overbroad rule in which it wholly abdicated a critical judicial function and closed the courthouse doors on a viable appeal. The defendant has been incarcerated since 1982 in connection with a robbery which resulted in the killing of an off-duty police officer. He had received a term of 18 years to life and had been denied parole 7 times.

For Your Information

Former State Senator Bruno Acquitted

After a nearly nine year corruption investigation which involved a prior trial and numerous appeals, Joseph Bruno, former leader of the New York State Senate, was acquitted of Federal fraud charges. Senator Bruno had originally been convicted but his convictions had been overturned on appeal. Despite numerous efforts to resolve the charges and to end the litigation, the matter was not finally ended until a jury acquitted him after four hours of deliberation. The former Senator had been accused of improperly accepting $360,000.00 in consulting fees. Due to the lengthy litigation and the Senator's advanced age, to wit, 85, many questioned whether the government acted wisely in continuing to press a trial in the matter. Following his acquittal, Senator Bruno announced that he would seek reimbursement from New York for the nearly $4 million he spent defending himself against the Federal charges of accepting bribes. The former Senator is seeking reimbursement under the state's Public Officer's Law which provides that employees may seek the reasonable attorneys' fees and expenses they incur while successfully defending themselves relating to the performance of their official duties. Whether the state will make the payments sought remains to be seen, and Attorney General Schneiderman has yet to comment on Senator Bruno's request.

Upcoming Vacancy on New York Court of Appeals

The 14-year term of Judge Victoria Graffeo will expire on November 29, 2014 and the Commission on Judicial Nomination has been accepting applications for the upcoming vacancy. Judge Graffeo, who is presently 62 years old, has announced that she will seek reappointment to the Court. Judge Graffeo was originally appointed by Governor Pataki and since Governor Cuomo's most recent appointments to the Court have involved the appointment of Democrats, there is some question as to whether the Governor will bypass his previous practice and appoint a Republican. Working in Judge Graffeo's favor is the fact that she has had a 14-year term in which she has been highly regarded and it would be difficult for the Governor to bypass an already sitting Judge. The Judicial Nomination Commission provided a list of seven candidates to the Governor in early September which included Judge Graffeo. The Governor will take several weeks to make his final appointment. Additional vacancies in the New York Court of Appeals are expected within the next several months. Judge Robert Smith will be retiring as of December 31, 2014, as he has reached the mandatory retirement age of 70. The Judicial Nomination Commission has begun accepting applications to fill his vacancy and the Governor's appointment to fill that seat is expected by the end of the year. Chief Judge Lippman will be reaching the mandatory retirement age of 70 in 2015 and his vacancy will have to be filled next year. We will keep our readers advised of developments.

Criminal Harassment Statute

On May 13, 2014, in the case of *People v. Golb*, the New York Court of Appeals declared the State's Criminal Harassment Statute under Penal Law Section 240.30 (1)(a) unconstitutional as being vague and overbroad. (See Court of Appeals Decisions in this issue at p. 11.) Since the Court's decision, the legislature has been seeking to correct the defects pointed out by the Court and to provide for a new criminal harassment statute. The legislature in late June did pass a new statute by making it applicable where an offender knows or reasonably should know that a communication will cause another person to reasonably fear harm to such person's physical safety or property or to the physical safety or property of a member of such person's same family or household. Governor Cuomo signed the new legislation on July 23, 2014 and it became effective immediately.

New Family Court Judgeships

At the end of the legislative session, both the Assembly and the Senate had agreed to provide for 25 new Family Court Judgeships. Under the agreed-upon legislation, nine of the new Judges would serve in New York City and the balance would be scattered in various Counties in Upstate New York as well as in Nassau and Suffolk Counties. Upstate will receive eleven new Judges this year and five as of January 1, 2016. The Legislature had previously provided a $5 million appropriation to cover the costs of the new Judgeships. Governor Cuomo signed the new legislation on June 26, 2014.

Recent Signs Point to Improving Economy

Recent statistics from the U.S. Labor Department indicate that the economy has finally regained all of the jobs

that were lost during the economic downturn. Employers are adding approximately 200,000 jobs a month and unemployment has currently dropped to 6.1%. Overall payrolls have also begun to exceed the pre-recession level. Average hourly earnings rose five cents to $24.30 in May and were up 2.1% in the past 12 months. Some weak spots continue to remain, with home ownership hitting its lowest level since the mid-1990s. Currently, 64.8% of American families own their own homes. This was down from 68.9% who were homeowners in 1995. In addition, home prices have begun to rise at a pace which is exceeding incomes and home ownership is beginning to be beyond the reach of many middle class Americans.

Aging Population

A recent report from the U.S. Census Bureau indicated that the number of Americans 65 and older is expected to nearly double by the middle of the century. It is expected that by 2050, the older population will make up more than one-fifth of the nation and will number 84 million Americans. This is an increase from 43 million in 2012. As the older population increases, it is expected that the country will be facing profound changes in areas ranging from social security, health care and education.

Number of Millionaires Hits Record

A recent report from the Royal Bank of Canada estimated that nearly two million people around the world became millionaires. This represents a 15% increase over last year and appears to be a result of higher stock and home prices. The number of millionaires around the world is said to stand at around 13.7 million. The number of millionaires in the United States is said to amount to 4 million, representing an increase of 570,000 over last year. After the United States, Japan has the most millionaires with a total estimated at 2.3 million. Japan had the largest percentage gain among the 25 countries with the most millionaires.

Crisis of Confidence

A recent Gallup Poll conducted among Americans revealed that there is a crisis of confidence in many of the nation's institutions. Only 29% of the respondents indicated that they had a great deal or quite a lot of confidence in the Presidency. Congress received only a 7% confidence rating, a historic low, and the United States Supreme Court received only a 30% rating. The Criminal Justice System itself had a rating of only 23% and Public Schools in the United States were rated at 26%. Only the Military and the Police received a rating over 50% with Americans providing the Military with a 74% confidence rating and the Police with 53% rating.

Improper Government Payments Estimated at $100 Billion

A recent report indicated that the estimated total amount that the Federal Government provided in payments to people who may not have been entitled to receive them is $100 billion. This figure included tax credits to families that did not qualify, unemployment benefits to people who had jobs and medical payments for treatment that might not have been necessary. The largest source of improper payments is Medicare. Its various health insurance programs to older Americans accounted for $50 billion in improper payments in the 2013 budget year. Some of the payments were the result of fraud and others were unintentional, caused by clerical errors or mistakes. Each year Federal Agencies are required to estimate the amount of improper payments and this year that estimate is $100 billion. This, in fact, is a decrease from 2010 when improper payments were estimated at $120 billion.

Commission on Prosecutorial Conduct

Plans to create a State Commission that would have the power to discipline prosecutors for misconduct or incompetence appear to have been shelved as the Legislature ended its most recent legislative session. Bills had been introduced in both the Senate and Assembly to create such a Commission which would act in a manner similar to the State Commission on Judicial Conduct which has investigated complaints against Judges in New York since 1975. Various District Attorneys have criticized the proposed legislation, stating that it contained a host of serious flaws. As the Legislature neared the end of its regular 2014 session, the proposed legislation had not been submitted for a vote and it would appear at least for the coming year the proposal has been shelved.

Federal Sentencing Commission Votes to Apply Reduced Drug Sentences Retroactively

In early July it was announced that the U.S. Sentencing Commission, which earlier this year voted for substantially lower recommended sentences for drug-dealing felons, voted unanimously to retroactively apply that change to prisoners who are now serving previously imposed sentences. It is estimated that some 46,000 inmates would now be eligible to seek early release under the Commission's decision. The Commission indicated that sentences could be cut by an average of 25 months and that early releases would start in November 2015 and be phased in over a period of years.

Congress has until November to voice any opposition to the Commission's plan, which appears unlikely. Otherwise, the sentencing guideline change and the retroactive application will go in effect. It is estimated that currently

nearly one-half of the Federal prison population is locked up for drug crimes. The new policy would dramatically reduce the number of prisoners incarcerated in Federal institutions and is expected to save millions of dollars which are currently spent for the Department of Corrections. The Sentencing Commission, which voted for the new changes, stated that the move would help ease prison overcrowding and reduce prison spending, which makes up about one-third of the Justice Department's budget. The Commission stressed that the thousands of early releases would not happen at once. Instead new prisoners would become eligible each year as they near the end of their sentences. A Federal Judge will review each request for early release.

Some 3,300 Federal inmates have already applied for clemency involving reduced sentences as a result of the Justice Department's announcement several months ago that it would support reduced sentences for non-violent drug offenses. Pursuant to the new initiatives by the Justice Department and now by the Sentencing Commission it is estimated that the Federal prison population could be reduced by half in the next several years. Supporters of reduced sentences have touted the new approach as both a humanitarian measure and a cost cutting approach that would save the Corrections Department millions of dollars.

One-Third of Americans Still Behind in Unpaid Debts and Face Debt Collections

Despite improvement in the economic situation in the United States during the last two years and the drop in the unemployment rate, a recent study released by the Urban Institute reported that more than 35% of Americans still have debts and unpaid bills that have been reported to collections agencies. These consumers have fallen behind on credit cards, hospital bills, mortgages, auto loans, and student debt. The study concluded that the amount owed among people reported to collection agencies for debt averaged $5,178.00 during the month of September 2013. The percentage of debt referred to collection agencies was higher in the South and West with the State of Texas having the highest percentage of debt collection. Several areas in the South and West had debt collection percentages of 40% and nearly 50%. These included areas in Nevada, Florida, Tennessee, South Carolina, and Mississippi. While more than one-third of the population were subject to debt collection, only about 20% of Americans with credit records had no debt at all.

About Our Section and Members

Spring CLE Program

On Saturday, May 3, 2014, the Criminal Justice Section held its Spring CLE Program entitled "Evidently Evidence." The program was held at the State Bar Center in Albany and consisted of lectures by Professor Christian Brook Sundquist from Albany Law School, Andrew C. Fine, Director of the Court of Appeals Practice Section of the Legal Aid Society, and Mark J. Mahoney from the Law Firm of Harrington & Mahoney in Buffalo, New York. Topics which were covered included hearsay and confrontation issues in domestic violence and sex cases, seizure and admissibility of identity-related evidence and the right to present the defense. The Program was attended by approximately 35 registrants and provided 4.5 CLE credits.

Judge Kamins' Article Appears in the *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 recent Court of Appeals case of *People v. Sibblies* which addressed the provisions of New York's speedy trial statutes. The Court addressed the common scenario where the people file an off-calendar statement of readiness and subsequently announce in court that they are not ready to proceed. The Court of Appeals issued two three-Judge concurrences and Judge Kamins examines the nuances and rationale of the Court's reasoning. Judge Kamins' article appeared in the *New York Law Journal* of May 16, 2014 at pages 4 and 8. It is recommended reading for our readers.

Nassau County District Attorney Kathleen Rice Runs for Congress

In the June Democratic Primary, Nassau County District Attorney Kathleen Rice won her bid to be the Democratic Nominee for a seat in the United State House of Representatives. District Attorney Rice won nearly 56% of the vote and will run in the General Election on November 4 against Bruce Blakeman,who won the Republican and Conservative party nominations. District Attorney Rice is seeking to replace Congresswoman Caroline McCarthy who is not seeking reelection when her term ends this year. If District Attorney Rice is successful with respect to the Congressional seat, Governor Cuomo would have to appoint an interim prosecutor to fill the post through 2015 and election for a new District Attorney in Nassau would have to be held in November of 2015.

Seymour James Selected to Head Legal Aid Society

Former President of the New York State Bar Association Seymour James, Jr. was selected at the end of June to become the new head of the Legal Aid Society in New York City. Seymour for many years served as the attorney in charge of criminal matters for the Legal Aid Society and after the departure of Stephen Banks, who served as the Legal Aid Society's top attorney for 10 years, Seymour was elevated to his new position. He will oversee some 110 attorneys and more than 700 support staff.

Seymour James has been an active member of the Criminal Justice Section and has served for many years on its Executive Committee. He is also a Past President of the Queens County Bar Association. Seymour is currently 66 years of age and his new appointment is a "nice culmination to a fine career." We wish him all the best in his new position.

Justice Mark Dwyer Appears in the *New York Law Journal*

Section Chair Mark Dwyer appeared on the first page of the *New York Law Journal* on July 10, 2014 with regard to a decision which he rendered in the case of *People v. Scott*. Judge Dwyer ruled that a 1999 Court of Appeals precedent upholding a "ghost" police officer's report that a drug crime had occurred is equally applicable in a prostitution case. The Judge found that the nature of the crime charged does not affect the probable cause determination under the Court of Appeals decision in *People v. Ketcham*, 92 N.Y.2d 416 (1999). Justice Dwyer, during the term of his judicial service, has had several of his opinions reported in the *New York Law Journal*. He is currently serving as an acting Supreme Court Justice sitting in Brooklyn.

Fall CLE Program

The Annual CLE Program dealing with forensics has been scheduled for Friday and Saturday, October 17 and 18, 2014, to be held at the India House at One Hanover Square in New York City. The Program will feature several distinguished speakers and will cover such topics as *Frye* Hearings, digital evidence, cross-examination of firearms identification experts, and DNA. Further details regarding the Program will be sent to our Members in a separate mailing.

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.

Carolyn Anne Abdenour
Douglas Brian Appel
Paul B. Ascher
Raymond Joseph Berti
Julia Lea Burke
Stephen L. Buzzell
David William Chandler
Mark Vincent Cowen
Cyntrena Cross-Peart
Alexandra Cusano
Patricia DeSalvo
Colby Marie Dillon
Vonnie Clay Dones
Timothy W. Fisher
Harjeet Elizabeth Gidha
Jennifer Glaeser
Alexandra Glick-Kutscha
Carlos Fernando Gonzalez
Alexandra Laignel Grant
John K. Grant
Donella Mae Green
Richard F.X. Guay
Charlotte Gunka
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Frederic Beach Jennings
Jimmy Johnson
David A. Jones
Mik Kinkead
Ryanne Guy Konan
Lisa Labenski
Dong Joo Lee
James Ginns Levine
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Carly E. Lynch-McGuire
Brian Scott MacNamara
Melissa N. Madrigal
Emily Dean Miller
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Arielle Montoro
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Publication and Editorial Policy

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

Publication Policy: All articles should be submitted to:

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(727) 733-0989 (FL)

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

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

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

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

NEW YORK CRIMINAL LAW NEWSLETTER

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