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New York Criminal Law Newsletter

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

Spring Meeting at Beautiful Saratoga Springs, New York

See details and photos on pages 28 and 29

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Message from the Chair

The world of Criminal Justice is constantly being faced with issues and challenges. Many of these issues affect the very freedoms that we hold dear as Americans. As practitioners and Judges in this field, we are constantly being faced with new court rules, regulations, legislation and case law, which affect the ever-changing landscape of our Criminal Justice System. The Criminal Justice Section of the New York State Bar Association is an incredible resource to all criminal practitioners and I am honored to be given the opportunity to Chair this Section. I am also humbled to be able to take the reins from the Honorable Mark Dwyer, our Section's Immediate Past Chair, and I thank him for his excellent leadership, contributions and service.

This past year has been a particularly challenging one for our criminal justice community, but that is nothing new to our world. We have seen issues arise out of the shooting deaths of both civilians and police officers that have led to suggestions for grand jury reform. We continue to struggle with the use of solitary confinement in our prisons. The issues surrounding wrongful convictions have yet to be resolved or fully addressed and the sealing of certain criminal convictions still remains an open issue. Our Section, of a diverse body of practitioners and Judges, has the opportunity to effect positive and productive change. In order to do this, we must work together and be sure that we are a balanced group. To that end, one of my focuses as Chair will be to encourage greater participation in our Section of prosecutors. I believe that our members working together can make our system stronger, fairer and more trustworthy.

Due to recent events throughout our Country, the trust in our system of Criminal Justice, amongst our communities, is wavering and this benefits no one. Instead of placing fault and blame, we, as experienced practitioners, can work to effect change which we can all support. Our work can help to prevent this lack of trust from developing in the future. I implore each one of our members to become more active and get involved. We need all perspectives at our table to have an outcome that will work. I believe that we can agree and move forward as one body, that of the Criminal Justice Community.

Along with issues that will come before us, in the near future, involving grand jury reform, and the ever-existing issues of wrongful convictions, we must keep our eyes and ears open and our hands on the pulse of Criminal Justice in our State. Therefore, during my tenure, I plan to focus our continued efforts toward resolving issues of wrongful convictions and sealing of certain criminal records. Our Committees will continue their excellent work toward the implementation of the recommendations of the Task Force on Wrongful Convictions Report and the Sealing Report, both of which were adopted by the New York State Bar Association's House of Delegates. We must continue to focus our efforts on working to ensure that appropriate legislation be adopted to support the recommendations in these reports. I would like to continue to focus efforts on the still existing issues of the use of solitary confinement, as well as revive our Legislation Committee to keep us up to date regarding proposed legislation. Finally, I will continue the work I have already begun to revive our Vehicle and Traffic Law Committee as well as create a new committee on the Town and Village Justice Courts.

It is a busy agenda for the next two years, but the issues are all very important. I have faith that working together, we can accomplish positive change that will improve the practice of criminal law in our State.

Sherry Levin Wallach

***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 report on the adoption by the State Bar House of Delegates of the Task Force Report which was presented with regard to the issue of criminal discovery. The Section played a major role in formulating the report and Section and Immediate Past Chair Mark R. Dwyer served as Co-Chair of the Task Force. The Section at its May meeting also designated new officers to serve during the next two years. Sherry Levin Wallach will serve as Chair of the Section. Robert J. Masters will serve as Vice-Chair. Tucker C. Stanclift will move up from Treasurer to Secretary. David Louis Cohen will assume the office of Treasurer. We present brief biographical sketches of the new Officers in our About Our Section portion. We thank Acting Supreme Court Justice Mark R. Dwyer for his service to our Section during the last two years and we wish him well as he assumes a position in the State Bar House of Delegates.

In our Feature Articles Section, we also present an important warning from Judge John Brunetti regarding a new preservation rule for statement suppression claims. Judge Brunetti has been a regular contributor to our *Newsletter* and we thank him for his latest article. We also include our Annual Report from the Clerk of the New York Court of Appeals regarding important statistical and other information concerning the Court's work product in 2014.

Both the United States Supreme Court and the New York Court of Appeals have issued some important decisions during the last few months in the areas of Criminal Law and Constitutional Law. As it was approaching the end of its current term, the Supreme Court issued divided and controversial decisions in the areas of voting rights, free speech, search and seizure, and prosecutorial overreach. With respect to prosecutorial overreach by Federal prosecutors, we provide more details in one of our feature articles involving the case of *Yates v. United States* concerning a seven-year legal battle for a defendant accused of catching undersized fish. These decisions are discussed in our Supreme Court Section.

The New York Court of Appeals dealt with such matters as drug possession, search and seizure, the right to counsel and the right to testify before the Grand Jury. These cases are discussed in our Court of Appeals Section. The various Appellate Divisions also issued several significant decisions and these matters are discussed in the Appellate Divisions portion of the *Newsletter*.

In our For Your Information Section, we provide a variety of articles covering economic issues, government matters and other developments which should be of interest and concern to the legal profession. More specifically, we deal with changing policies on sentencing, the growing problem of student debt and final action taken on the nomination of Loretta Lynch to be the next Attorney General.

In our About Our Section portion, in addition to reporting on the new section officers, we provide information regarding our Spring Meeting, as well as activities which are planned for the coming months. Our *Newsletter* is published four times a year and we hope that our Members continue to read and support our publication. We do need additional articles for future issues and we encourage our Members to submit articles for possible publication. We also appreciate any comments or remarks from our readers.

Spiros A. Tsimbinos

Task Force Recommends Changes in Criminal Discovery

By Spiros A. Tsimbinos

In 2012 then-Bar President Seymour W. James appointed a special Task Force to review the issue of discovery in criminal law cases and to make appropriate recommendations. The Task Force consisted of twenty members and included both members of the Defense Bar and the Prosecution. Mark Dwyer, the Chair of our Criminal Justice Section, was appointed to Co-Chair the Task Force. He was joined as a Co-Chair by Peter Harvey, an attorney in New York City from the law firm of Patterson, Belknap, Webb and Tyler, LLP. Mark Dwyer had an extensive background in criminal law, having served in various high level positions in the New York County District Attorney's Office, and who currently is serving as an acting Supreme Court Justice in Brooklyn. Mr. Harvey previously served as New Jersey Attorney General and was a Federal Prosecutor.

After two years of extensive work, the Task Force issued its report toward the end of 2014 and in January 2015 the report, which issued several recommendations, was approved by the State Bar Association House of Delegates. The major recommendation made by the report was that prosecutors should provide witness information to the defense much earlier in the legal process. The Task Force recommended that witness information be released in two "calibrated phases." In the first phase prosecutors would release electronically stored police reports, defendant's statements, witnesses' statements, *Brady* information, exculpatory or favorable within fifteen days of a defendant's indictment.

Within ninety days of an arraignment, prosecutors would reveal grand jury testimony, expert information, intended exhibits, police reports, *Brady* and other information not available earlier. The report also recommends that penalties for witness tampering and intimidating a witness should be significantly enhanced and that the defendant's obligation to provide reciprocal discovery should be strengthened.

The issue of criminal discovery has long been a contentious one between the defense and prosecution, and three members of the Task Force, all of them prosecutors, issued a dissenting opinion. The dissenters, consisting of Chief Assistant District Attorney Steven M. Goldstein from the New York City Office of the Special Prosecutor, District Attorney Cristy Sprague from Suffolk County, and Executive Assistant District Attorney Itamar Yeger from Rockland County, voiced objections to the early release of witnesses' personal information. In their dissent, they argued "identifying civilian witnesses so early in the process would have a 'potentially devastating impact on our ability to secure the cooperation of civilian witnesses and ensure their safety.'" "What is most troubling" about the majority of the report, wrote the dissenters, "is its failure to weigh appropriately the effect its proposals would have on those caught up in the criminal justice system as victims, witnesses or 'persons with relevant evidence or information.'"

Any changes in the discovery procedures would require a restructuring of Criminal Procedure Law Section 240. Considering the anticipated opposition to any major changes by prosecutors, it is unclear whether any of the Task Force recommendations will be actually adopted. The Task Force report, however, opens up additional dialogue and discussion on an important issue which is dealt with on a daily basis by both the defense and the prosecution.

Request for Articles

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

Spiros A. Tsimbinos
1588 Brandywine Way
Dunedin, FL 34698
(727) 733-0989 (Florida)

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

www.nysba.org/CriminalLawNewsletter

More on the Fish Case

By Spiros A. Tsimbinos

Introduction

In our last issue, I discussed in one of the feature articles the concerns expressed by the United States Supreme Court on the issue of overreach by federal prosecutors. The Court expressed this concern in the recent cases of *Bond v. U.S.*, 134, S. Ct. 2077(2014) and *Yates*, 135, S. Ct. 1074 (2015). While I discussed the Court's determination in the *Yates* case, the decision was rendered only a few days before we were going to final print. As a result, I only had an opportunity to briefly discuss the Court's ultimate ruling. In reviewing and analyzing the full decision, I find that it contains many interesting aspects which should be brought to the attention of our readers. I have thus prepared this follow up article.

More Details on the Facts

Yates was a commercial fisherman who was accused of illegally removing undersized red grouper from the federal waters in the Gulf of Mexico. His boat was inspected in 2007 by federal officers and was found to contain 72 fish that were short of the Federal Regulation requiring immediate release of red grouper less than twenty inches long. Most of the fish in question measured between nineteen and twenty inches. Three were less than nineteen inches, but none were smaller than 18.75 inches. After the offending fish were separated, and before the boat returned to shore, Yates was accused of throwing the fish in question overboard. One of the crew members told the inspecting officers that the defendant had told him to get rid of the offending fish.

As a result, the defendant Yates was charged in 2010 with violating two federal statutes. Under Section 2232(a) of the U.S. Code, which carried a term of imprisonment of no more than five years, he was charged with destruction or removal of property to prevent seizure. The defendant was also charged with violating U.S.C. § 1519, and was enacted as part of the Sarbanes-Oxley Act of 2002 which related to the collapse of financial markets. Although the defendant did not contest his conviction for violating Section 2232(a), he did object to the charges filed under Section 1519 which carried a possible 20-year term. The defendant argued that the fish in question did not come within the term "tangible object," which he argued referred to only documents and not to fish.

Also included within the factual recitation of the plurality decision which was written by Justice Ginsburg, was the fact that criminal charges were brought against Yates more than 32 months after the incident and that by the time of the indictment, the minimum legal length for red grouper has been lowered from 20 inches to 18 inches, and that therefore no measured fish in Yates' catch would have fallen below that limit under the new regulations.

The Majority Decision

On February 25, 2015, the Supreme Court reached its determination in favor of Yates through a plurality decision which was issued by Justice Ginsburg and joined in by Justices Breyer, Sotomayor and Chief Judge Roberts. Justice Alito filed a separate concurring decision which he based on narrow grounds. In the plurality decision, the four Justices concluded that a tangible object captured by Section 1519 must be one used to record or preserve information and therefore could not be extended to include physical objects such as fish. Justice Ginsburg, writing for the four Judges in question, stated at 135 S. Ct., 1081 (2015): "We agree with Yates and reject the Government's unrestrained reading; 'Tangible Object' in Section 1519, we conclude, is better read to cover only objects one can use to record or preserve information, not all objects in the physical world."

Expressing further implied criticism of the government's prosecution, Justice Ginsburg added at 135 S.Ct. 1087:

> Having used traditional tools of statutory interpretation to examine markers of congressional intent within the Sarbanes-Oxley Act and §1519 itself, we are persuaded that an aggressive interpretation of "tangible object" must be rejected. It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record keeping…
>
> Yates would have had scant reason to anticipate a felony prosecution, and certainly not one instituted at a time when even the smallest of the fish he caught came within the legal limit. See *supra*, at 1080; cf. Bond v. United States, 572 U.S. ___, ___, 134 S.Ct. 2077, 2089-2090, 189 L.Ed.2d 1 (2014) (rejecting "boundless reading" of a statutory term given "deeply serious consequences" that reading would entail).

In her concluding remarks, Justice Ginsburg further stated at 135 S.Ct. 1088:

> Finally, if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of "Tangible object," as that term is used in §1519, we would invoke the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'."… That interpretive principle is relevant here, where the Government urges a reading of §1519 that exposes individuals to 20-year prison sentences.

Justice Alito concurred in the judgment and provided the crucial fifth vote to overturn the defendant's conviction. He attempted, however, to base his conclusion on narrow grounds. He thus stated at 135, S.Ct. 1089:

> This case can and should be resolved on narrow grounds. And though the question is close, traditional tools of statutory construction confirm that John Yates has the better of the argument. Three features of 18 U.S.C. §1519 stand out to me: the statute's list of nouns, its list of verbs, and its title. Although perhaps, none of these features by itself would tip the case on favor of Yates, the three combined do so.

In her dissenting opinion, which was written by Justice Kagan and was joined in by Justices Scalia, Kennedy and Thomas, the argument was made that the term tangible object in §1519 is a broad one and covered any object capable of being touched. As such, it invariably covers the physical objects of all kinds and that Congress meant the term to have a wide range. Justice Kagan included within her remarks that in her view conventional tools of statutory construction lead to a conventional result. "A tangible object is an object that is tangible and I would apply that statute that Congress enacted and affirm the judgment below."

In view of the unanimous decision in the *Bond* case, as well as the several negative comments regarding the prosecution case, which were issued by several Justices during oral argument, I had expected a stronger condemnation of the prosecution's actions, as well as a decision which had the support of most or all of the Court's members. I was, thus, somewhat surprised when the final result was only a 5-4 decision with the actual result being based on a four-Judge plurality and a separate concurring opinion written by Judge Alito and which was based on narrow grounds. The final result of a 5-4 decision appears to me to be somewhat surprising, especially that Justice Scalia joined the four dissenters.

In either event, we now have two recent Supreme Court decisions where the majority has struck down two federal prosecutions which in my mind should never have been commenced in the first place. The *Yates* prosecution has generated a great deal of discussion and criticism within the legal community and the general public media. Several legal articles were written on the matter and the National Association of Criminal Defense Attorneys, as well as some eighteen professors of criminal law from across the country, had filed amicus briefs in support of Yates.

In a time of increasing terrorist threats, gang violence erupting in some of our major cities, and continued problems with serious drug and violent crimes, it appears somewhat bizarre, and a case of misplaced priorities, that federal prosecutors should have engaged in an eight-year long prosecution to punish an individual for catching 72 undersized fish which later were no longer unlawful. Certainly prosecutors have bigger fish to fry and should take note of the serious concerns raised by the legal community and the Court regarding the two instant prosecutions. Hopefully, the issue of federal prosecutorial overreach will continue to be discussed and properly addressed with respect to future cases.

A New Preservation Rule for Statement Suppression Claims?

By John Brunetti

Most criminal law practitioners know that failure to raise a specific argument at a suppression hearing results in the non-preservation of that argument for appellate review. However, most practitioners rest assured that a motion to suppress based upon a specific claim is enough to preserve that claim both by statute[1] and case law, even if there is no objection to the admissibility of the statement at trial. That is because case law from the Court of Appeals[2] and each Department of the Appellate Division[3] provides that the assertion of a specific suppression claim litigated to a final order rejecting it is enough to preserve that claim.

Despite a specific statutory provision and well settled case law that provides that a suppression claim is preserved if it is raised and ruled upon at a suppression hearing, a 2015 Appellate Division ruling suggests otherwise.

In *People v. Wright*,[4] the Third Department considered a case where a Judicial Hearing Officer conducted a suppression hearing and recommended denial. The recommendation was never acted upon by the trial court, but the Appellate Division ruled that it was the equivalent of a denial. What the Court said next was the interesting part.

The Court identified four separate statements used against the defendant at trial that were made "(1) when he initially was approached by the police near the scene of the crime, (2) while he was being transported to the police station in a patrol vehicle, (3) after he was advised of his *Miranda* warnings at the police station and interviewed, and (4) after he invoked his right to counsel." [5]

A review of the Judicial Hearing Officer's findings of fact and conclusions of law reveals that the constitutional admissibility of each of those four statements was litigated and ruled upon prior to trial.[6] Nevertheless, the Appellate Division decreed that "a review of the trial transcript reveals that defendant did not object to the admission of any of the now challenged statements and, therefore, we find this issue to be unpreserved for our review." The Court relied upon CPL 470.05(2) and two cases: *People v. Devers*[7] and *People v. Perkins*,[8] neither of which concerned preservation of a constitutional pretrial suppression claim. *Perkins* concerned the lack of redaction of prejudicial material in a statement while *Devers* concerned the foundation for introduction of a videotaped statement. Practitioners beware!

Endnotes

1. CPL 470.05(2):

   > For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an "exception" but is sufficient if the party made his position with respect to the ruling or instruction known to the court, or if in reponse [typo in original] to a protest by a party, the court expressly decided the question raised on appeal. In addition, a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered.

2. People v. Edwards, 95 N.Y.2d 486, 491 n. 2, 719 N.Y.S.2d 202, 204 (2000) ("Contrary to the People's contention, the issue of probable cause to arrest is preserved for our review because, in its written decision denying defendant's motion to suppress, the trial court 'expressly decided' the question in response to a "protest by a party" (CPL 470.05[2]"); People v. Dunn, 85 N.Y.2d 956, 626 N.Y.S.2d 1007 (1995) ("While defendant argued that subsequent statements were involuntary because defendant's mental incapacity made it impossible for him to understand the consequences of a *Miranda* warning, he did not raise either at the suppression hearing or as a ground for objection to the admission of the evidence at trial his present contention on appeal: that as a result of his mental incapacity, he was incapable of uttering his initial, 'spontaneous' statement. Although the Appellate Division considered, in the interests of justice, whether defendant's mental incapacity might render him particularly vulnerable to coercion, that issue is not preserved for us as a question of law."); People v. DeMauro, 48 N.Y.2d 892, 424 N.Y.S.2d 884 (1979) (Defendant's challenge to testimony concerning oral statements to police was unpreserved where defendant neither sought a pretrial ruling upon admissibility of testimony nor objected to it at trial).

3. People v. Watts, 309 A.D.2d 628, 766 N.Y.S.2d 22 (1st Dep't 2003), *lv. den.*, 1 N.Y.3d 582, 775 N.Y.S.2d 798 (2003)("Defendant's claims [about] lack of Miranda warnings…..were unpreserved, as defendant never moved for such suppression or exclusion at trial, and court never decided the admissibility of the statement."); People v. Rogers, 34 A.D.3d 504, 824 N.Y.S.2d 121 (2d Dep't 2006), *lv. den.*, 8 N.Y.3d 849, 830 N.Y.S.2d 708 (2007) ("Defendant's contention that statements he made to police detective after administration of *Miranda* warnings should have been suppressed because they were product of continuous custodial interrogation which began before he was advised of his constitutional rights was rendered unpreserved for appellate review by his failure to raise such argument in support of suppression at *Huntley* hearing."); People v. Cody, 260 A.D.2d 718, 689 N.Y.S.2d 245 (3d Dep't 1999), *lv. den.*, 93 N.Y.2d 1002, 695 N.Y.S.2d 747 (1999) (Defendant's challenge to testimony concerning oral statements to police was unpreserved for appellate review, where defendant neither sought a pretrial ruling upon admissibility of testimony nor objected to it at trial); People v. Caballero, 23 A.D.3d 1031, 803 N.Y.S.2d 849 (4th Dep't 2005), *lv. den.*, 6 N.Y.3d 846, 816 N.Y.S.2d 752 (2006) ("Defendant failed to preserve for appellate review his contention that his pre-*Miranda* conversation with the police constituted custodial interrogation, where defendant failed to raise that specific contention in his motion papers or at the hearing on his motion to suppress.").

4. People v. Wright, 126 A.D.3d 1036 (3d Dep't 2015).

5. People v. Wright, 126 A.D.3d at 1036.

6. Transcript of Suppression Hearing:

   [1] "The brief questioning of the defendant at the old Mohawk Honda parking lot by Officer Thorne was not custodial interrogation but was a brief investigatory inquiry concerning a report of what appeared to be a serious Incident at the home of Kristy Kenyon on the Early morning of August 19, 2010."

   [2] "The statements that the defendant made in the patrol car of Officer Thorne on the way to the Schenectady City Police Station from 9 Grove Place in the City of Schenectady was not the product of any Questioning by Officer Thorne."

   [3] "The statements that the defendant made in the interview room of the Schenectady City Police Department in the early morning of August 19, 2010, which were shown on the videotape when no one was present in the room were not the product of any interrogation by any police officer, were clearly spontaneous and voluntary."

   [4] "The statements that the defendant made in the interview room after he requested an attorney and when the interview stopped, were voluntary and spontaneous statements made by the defendant."

7. People v. Devers, 82 A.D.3d 1261, 1262, 920 N.Y.S.2d 177(2d Dep't 2011), *lv den.*, 17 N.Y.3d 794, 929 N.Y.S.2d 102 (2011).

8. People v. Perkins, 24 A.D.3d 890, 891, 804 N.Y.S.2d 698 (3d Dep't 2005), *lv den.*, 6 N.Y.3d 816, 812 N.Y.S.2d 456 (2006).

John Brunetti has served as a Judge of the Court of Claims and Acting Supreme Court Justice assigned to criminal matters since 1995. He is the author of *New York Confessions* published by Lexis Nexis Matthew Bender as well as a number of law review articles and judicial training handouts. He has also previously contributed several articles to our *Newsletter*.

A Summary of the 2014 Annual Report of the Clerk of the Court of the New York Court of Appeals

By Spiros A. Tsimbinos

The New York Court of Appeals recently issued its Clerk's Report for the year 2014. 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, 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 2014. The third section highlights selected decisions of 2014. The fourth part consists of appendices with detailed statistics and other information.

This year's report also includes an introductory letter from Chief Judge Lippman, who announces that he will retire from the Court on December 31, 2015 since he has reached the mandatory retirement age of 70. Chief Judge Lippman thanks his colleagues and the personnel of the Court of Appeals and states that he will miss working on the Court.

This year's report indicates that in 2014, the New York Court of Appeals decided 235 appeals, 144 of which involve civil matters and 91 which dealt with criminal law issues. The Court in 2014 decided slightly fewer appeals than it did in 2013 and issued a significantly lower amount of decisions in criminal cases. In 2013, the Court had decided 148 civil matters and 111 criminal law matters and had issued a total of 259 decisions.

With respect to criminal leave applications, the Court agreed to hear 81 of the 2,090 criminal leave applications which were filed. This represented a percentage of 3.9 which was slightly higher than the grant of 74 leave applications from a total of 1,923, which were made in 2013. With respect to civil cases, the Court decided 934 motions for leave to appeal of which 7.7% were granted. This compared with 996 motions which were decided in 2013 and for which 6.5% were granted. The report also noted that during the six years of Chief Judge Lippman's term, the Court agreed to hear 4.2% of the criminal matters, which was substantially higher than the less than 2% that had occurred in the ten-year period from 1998 to 2008.

In 2014, litigants and the public continued to benefit from the Court's tradition of prompt calendaring, hearing and disposition of appeals. The average time from argument or submission to disposition of an appeal decided in the normal course was 40 days; for all appeals, the average time from argument or submission to disposition was 35 days. The average period from filing a notice of appeal or an order granting leave to appeal to calendaring for oral argument was approximately 12 months.

With respect to budget matters, the Court, in response to the State's continuing fiscal crisis, requested a total budget for the fiscal year of 2015-2016 that was only slightly higher than the previous year. The total request for fiscal year 2015-2016 for the Court and its ancillary agencies is $14.9 million. The Court's budget for 2015-2016 will cover the operation of the Court and its ancillary services.

For the benefit of criminal law attorneys, the Report also summarizes, in the year-end review section, some 24 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 or 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 the highlights for our members.

New York Court of Appeals Review

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from February 1, 2015 through April 30, 2015. Due to the fact that the replacements for Judges Graffeo and Smith were not confirmed by the State Senate until February 9, 2015, some cases had to be rescheduled and others experienced delay in calendaring for oral argument. As a result, the number of decisions which were handed down during the last few months was somewhat less than the Court's normal production. Covered below are the cases which were in fact decided by the Court within the last few months.

Drug Possession

***People v. Diaz*, decided February 12, 2015 (N.Y.L.J., February 17, 2015, p. 22)**

In a unanimous decision, the New York Court of Appeals affirmed a defendant's conviction for criminal possession of a controlled substance in the seventh degree. The Court concluded that the trial evidence supported a conclusion that the defendant exercised dominion and control at least jointly with the co-defendant over the contraband. The Court noted that police had discovered bundled glassine envelopes of heroin and drug paraphernalia in defendant's apartment located exclusively in and spread throughout the defendant's bedroom. The Court stated that the jury could readily infer from the facts in question that the defendant exercised dominion and control over the contraband which was found in the apartment.

Lesser Included Offense

***People v. Repanti*, decided February 17, 2015 (N.Y.L.J., February 18, 2015, p. 24)**

The defendant was convicted of attempted assault in the third degree and harassment in the second degree. He claimed that because these counts were based on the same conduct, the harassment charge should have been treated as a lesser included offense. The Court of Appeals in a unanimous decision rejected this contention. The Court concluded that a comparison of the attempted assault and harassment charges established that those counts did not share a common intent element and therefore the defendant's claim was without merit.

Right to Testify Before Grand Jury

***People v. Brumfield*, decided February 18, 2015 (N.Y.L.J., February 18, 2015, p. 24)**

In a unanimous decision, the New York Court of Appeals denied a people's appeal and affirmed the order of the Appellate Division which vacated the defendant's judgment of conviction. The Appellate Division concluded that the defendant was denied his right to testify before the grand jury. In the case at bar, the waiver which the defendant was asked to sign included the statutory provisions but contained additional provisos. The defendant refused to sign the waiver as presented. The Assistant District Attorney then advised the defendant and counsel that unless a unilateral waiver of immunity was signed, defendant would not be permitted to testify. The Assistant District Attorney's instructions went beyond the provisions of the statutory requirement under CPL 190.45(1) and the defendant's statutory right to testify before the grand jury was violated.

Search and Seizure

***People v. Gibson*, decided February 17, 2015 (N.Y.L.J., February 18, 2015, p. 24)**

In a unanimous decision, the New York Court of Appeals concluded that the issue as to whether exigent circumstances existed to justify the warrantless entry into the defendant's apartment involved a mixed question of law and fact. Since there was present in the record support for the Appellate Division's resolution of the question, further review was beyond the Court's power. Accordingly, the Appellate Division order was affirmed.

Reckless Endangerment

***People v. Williams*, decided February 19, 2015 (N.Y.L.J., February 20, 2015, pp. 6 and 24)**

In a 4-1decision, the New York Court of Appeals upheld that a first degree reckless endangerment charge was properly reduced to a second degree count because the defendant did not show the necessary depraved indifference when he had unprotected sex, even when he knew he was infected with the HIV virus. The Court held that the first degree charge required a showing that the defendant acted with wanton cruelty, brutality or callousness toward the victim, elements which were not supported by the instant record. Judge Pigott dissented and said that it was irrelevant that the defendant may have expressed remorse six months after the incident. According to Judge Pigott the critical inquiry was whether the defendant exhibited a depraved state of mind at the time the act was committed.

Post-Release Supervision

***People v. Crowder*, decided February 19, 2015 (N.Y.L.J., February 20, 2015, p. 24)**

In a 4-1 decision, the New York Court of Appeals held that in the case at bar the defendant had failed to preserve for Appellate review his claim that the trial court

had failed to properly advise him regarding the imposition of a three-year period of post-release supervision. The majority of the Appellate Panel concluded that the defendant and his attorney had three opportunities to object to the imposition of post-release supervision: at the initial scheduled sentencing, the resentencing date and an additional court appearance. Since he had ample opportunity to raise his objection, he was required to preserve his claim. In issuing its ruling the Court cited to its earlier decision in *People v. Murray*, NY3d 725, 727 (2010). Chief Judge Lippman dissented and argued that the instant facts were distinguishable from the *Murray* decision.

Search and Seizure

***People v. Brown*, decided March 26, 2015 (N.Y.L.J., March 27, 2015, pp. 1-6 and 22)**

***People v. Thomas*, decided March 26, 2015 (N.Y.L.J., March 27, 2015, pp. 1-6 and 22)**

In two cases which were jointly decided, the New York Court of Appeals held that it did not have authority to review decisions by Appellate Division Panels which reversed the convictions of two men for stealing a Rolex watch near Times Square. The robbery cases hinged on whether police had reasonable suspicion to stop and question the suspects just prior to their arrest. The First Department decisions were not on the law alone, or upon the law and such facts which, but for the determination of law, would not have led to a reversal. The Court found that under CPL Section 450.90(2) (a), it was blocked from considering the appeals and had no authority to act on the matters. The cases were decided by a 6-1 vote with Judge Pigott issuing a dissenting opinion. Judge Pigott argued that the Appellate Division erred as a matter of law in holding that the undisputed facts and the reasonable inferences drawn therefrom failed to satisfy the minimum showing necessary to establish reasonable suspicion.

Persistent Felony Offender

***People v. Jones*, decided March 26, 2015 (N.Y.L.J., March 27, 2015, p. 22)**

In a unanimous decision, the New York Court of Appeals upheld the sentencing of a defendant as a persistent felony offender, and the two concurrent indeterminate terms of incarceration of 15 years to life, following his conviction for forgery crimes. The sentence as a persistent felony offender was based upon three prior felonies, two of which were in foreign jurisdictions. The defendant argued that the sentence imposed was unconstitutional and relied upon convictions which did not have equivalent elements to the crimes under New York State law. The Court of Appeals rejected the defendant's argument and concluded that the persistent felony offender statute does not require that out of state predicate felonies must have a New York counterpart. The Court pointed to Penal Law Section 70.10. It thus affirmed the Appellate Division finding in the matter.

Search and Seizure

***People v. Mercado*, decided March 26, 2015 (N.Y.L.J., March 27, 2015, p. 23)**

In a unanimous decision, the New York Court of Appeals affirmed a defendant's conviction and upheld a police search of the defendant's car and then his trunk. The issue of whether the defendant consented to a search of the vehicle all involved mixed questions of law and fact. The Appellate Division determinations were supported by the record and were beyond further review by the Court of Appeals.

Right to Confrontation

***People v. Garcia*, decided March 31, 2015 (N.Y.L.J., April 1, 2015, p. 23)**

In a unanimous decision, the New York Court of Appeals held that the introduction of purported background and narrative evidence through the testimony of police detectives violated the defendant's right to confrontation. The defendant had been charged with murder in the second degree following an argument. Although there were fifteen people in the area of the argument only one eyewitness testified at trial. The shooting involved the death of one Michael Colon and during the trial a detective was called who testified that Colon's sister assisted in the investigation and told him that Colon had been having a problem with the defendant. Defense counsel objected, stating that "we don't have that witness here." The Court of Appeals concluded that the defendant's argument had merit and that the detective's remark that Colon's sister had said that there was friction between the defendant and Colon was improper and prejudicial. Thus, a harmless error analysis could not be applied and the defendant was entitled to a new trial.

Denial of Fair Trial

***People v. Shaulov*, decided March 31, 2015 (N.Y.L.J., April 1, 2015, p. 24)**

In a unanimous decision, the New York Court of Appeals reversed the defendant's conviction and ordered a new trial on the grounds that the trial court abused its discretion by refusing to declare a mistrial or to strike prompt outcry testimony that was elicited by the people in disregard of the prosecutor's pre-trial representation that no such testimony would be offered. At a pre-trial hearing, the people explicitly represented to the court and defense counsel that there would be no prompt outcry testimony as the complainant had not disclosed the sexual assault to anyone until at least six months after it allegedly happened. However, during the trial, the complainant testified on direct examination that she had called a

friend on her way home from the apartment the night the incident allegedly occurred and told her friend what had happened. The people purposefully elicited this testimony. Defense counsel objected and sought a ruling striking that portion of the testimony. The New York Court of Appeals concluded that relying on the people's pretrial representation, defense counsel had shaped a certain trial strategy and as a result of the surprise testimony, his trial strategy was irreparably undermined. The resulting prejudice was not insubstantial and the trial court abused its discretion by denying defendant a remedy for the unfair and prejudicial surprise.

Youthful Offender Adjudication

***People v. Anthony C.*, decided March 31, 2015 (N.Y.L.J., April 1, 2015, p. 24)**

In a unanimous decision, the New York Court of Appeals affirmed an Order of the Appellate Division, finding that the Appellate Division opinion did not suggest a misapprehension or misapplication of its authority to review youthful offender adjudications for abuse of discretion or under its interest of justice jurisdiction.

Lack of Preservation

***People v. Garay*, decided March 31, 2015 (N.Y.L.J., April 1, 2015, p. 22)**

In a 4-3 decision, the New York Court of Appeals concluded that a right to counsel claim raised by the defendant on his appeal was not preserved for Appellate review and that his other claims lacked merit. The defendant had argued that his right to counsel under the New York Constitution was violated in connection with the trial court's replacement of a sick juror with an alternate juror. The trial court had made its decision at a time when counsel was not physically present. Defense counsel, however, was in the courtroom when the Judge told the alternate to take the seat of the sick juror but raised no objection. His second contention was that the Court violated his right to a public trial under the Sixth Amendment of the United States Constitution by failing to consider reasonable alternatives to closure before ordering the courtroom closed during the testimony of two undercover officers. As a third issue, the defendant argued that the Court erred in summarily denying his request for a suppression hearing under CPL Section 710.60(3). The majority opinion was written by Judge Abdus-Salaam and was joined in by Judges Read, Pigott and Rivera. Chief Judge Lippman dissented and was joined in dissent by Judges Stein and Fahey. The dissenters argued that violations of the right to counsel where counsel is absent during critical parts of the proceedings do not require preservation and that a claimed deprivation of the State Constitution and right to counsel may be raised in appeal notwithstanding that the issue was not reserved.

Right to Counsel

***People v. Carr* and *People v. Cates*, decided April 2, 2015 (N.Y.L.J., April 3, 2015, p. 22 and April 6, 2015, pp. 1 and 2)**

In a 5-2 decision, the New York Court of Appeals reversed the convictions of two defendants and ordered a new trial on the grounds that the trial court violated the defendant's right to counsel by holding an in camera proceeding without counsel present to discuss the mental and physical ability of the People's main witnesses to testify. Because under the facts of the instant case, the witness's mental and physical health were inextricably tied to his credibility, it was a non-ministerial issue for trial. The trial court thus violated the defendant's right to counsel by denying defense counsel's access to the proceeding. The majority opinion was written by Chief Judge Lippman and was joined by Judge Read, Rivera Abdus-Salaam, and Stein. Judges Fahey and Pigott dissented. The dissenting Judges argued that the in camera inquiry was merely ministerial and that a new trial was not required.

Comments on Defendant's Silence

***People v. Williams*, decided April 7, 2015 (N.Y.L.J., April 8, 2015, pp. 1, 2 and 24)**

In a 5-2 decision, the New York Court of Appeals held that the prosecution's use of a defendant's refusal to answer police questions violates common law principles and is admissible only in extreme circumstances. In the case at bar, a detective testified that after a defendant was taken into custody, he was read his Miranda rights and after initially indicating that he was willing to speak to police, refused to sign a Miranda form. During interviews, police stated that the defendant was evasive at times, repeating questions and at other times not responding to them at all. During the trial, prosecutors brought up the defendant's selective silence to impeach his testimony before a Grand Jury in which he said the sex was consensual. The prosecution asked one of the detectives during the trial whether Williams was specifically asked whether he had sex with the victim. The detective responded that he didn't answer. The Assistant District Attorney reiterated he didn't answer, to which the detective answered no. The five-Judge majority found the questioning as to the defendant's silence to be improper and reversed the conviction and ordered a new trial. In the majority opinion written by Judge Fahey, the Court held that the potential risk of prejudice form evidence of a defendant's selective silence is great and that jurors are more likely to construe a defendant's refusal to answer as an admission of guilt. Judges Abdus-Salaam and Pigot dissented, finding that the error was harmless because of the highly persuasive and admissible proof of defendant's guilt.

Search and Seizure

***People v. Guthrie*, decided April 7, 2015 (N.Y.L.J., April 8, 2015, pp. 1, 2 and 24)**

In a 6-1 decision, the New York Court of Appeals ruled that a traffic stop by a police officer can be valid even if based on his objectively reasonable misunderstanding of the traffic law involved. In the case at bar, a police officer stopped a defendant's vehicle after observing the vehicle drive past a stop sign without stopping. The stop sign was located at the edge of a supermarket parking lot. Upon stopping, the officer smelled a strong odor of alcohol on the defendant's breath and after failing sobriety tests, he arrested her. The defendant asserted lack of probable cause for the initial stop, claiming that the stop sign was not properly registered as required by the vehicle and traffic law. Although the stop sign was not legally authorized, the Court of Appeals concluded that the officer acted in good faith and that the police officer's actions were reasonable. The Court of Appeals relied upon the recent Supreme Court decision in *Helen v. North Carolina*, 135 S.Ct. 530 (2014) which held that the Fourth Amendment tolerates objectively reasonable mistakes supporting such a belief, whether they are mistakes of fact or mistakes of law. Judge Rivera dissented and argued that courts of the state have consistently held that a police officer's mistake of law cannot provide the requisite probable cause for a valid search and seizure. Judge Rivera in issuing her dissent relied upon the State Constitution rather than federal Law.

Multiple Liability for a Single Homicide

***People v. Dubarry*, decided April 7, 2015 (N.Y.L.J., April 8, 2015, p. 22)**

In a 4-3 decision, the New York Court of Appeals concluded that the defendant could not be convicted of depraved indifference murder and intentional murder on a transferred intent theory where defendant kills one victim in the course of attempting to kill someone else. In the case at bar, approximately ten men went to a residential building in Brooklyn looking for someone who had previously assaulted one of the men. While they were standing inside the lobby, they saw the defendant walk down the staircase. After the defendant walked by, someone in the group said "that's him." The men then followed the defendant. The defendant and a man called Benjamin pulled out guns and shot at one another. Instead of hitting Benjamin, one of the bullets fired by the defendant fatally struck the victim who was uninvolved in the events and was innocently standing a few buildings away from the shooting. The defendant was eventually charged with intentional murder and depraved indifference murder. Based upon the Court's use of an improper transferred intent theory, it erroneously submitted to the jury improper charges on the issue. The majority opinion, therefore, concluded that the matter had to be remitted to the trial court for further proceedings. Judges Pigott, Read and Fahey issued a dissenting opinion, in part.

Ineffective Assistance of Counsel

***People v. Jarvis*, decided April 7, 2015 (N.Y.L.J., April 8, 2015, pp. 2 and 26)**

In a 5-1 decision, the New York Court of Appeals determined that the defendant was entitled to a new trial regarding a second degree murder conviction due to numerous errors committed by his attorney. The Court found that the defendant's counsel failed to invoke a prior judicial order precluding evidence against him when the prosecution presented such evidence during the trial. The defendant's attorney also presented elements of an alibi defense which were demonstrably untrue and which prejudiced the defendant's case. The court found that the evidence against the defendant was weak and the cumulative effect of the attorney's lapses deprived the defendant of meaningful representation. Judge Pigott dissented, arguing that defense counsel's actions may have been part of a certain trial strategy and that the defendant had failed to meet his burden of establishing ineffective assistance of counsel.

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

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

Yates v. United States, 135 S. Ct. 1074 (February 25, 2015)

In the case at bar, a Florida commercial fisherman was charged and convicted for destroying evidence under the Sarbanes Oxley Act of 2002. The fisherman was accused by the Justice Department of throwing overboard groupers that appeared to be less than twenty inches long, which was the minimum length permitted by law. The Florida Fish and Wildlife had inspected Yates' boat and discovered groupers that were less than the minimum length. When Yates was ordered to return to port so the fish could to be seized, he tossed the fish overboard and tried to replace them with a slightly larger fish. Prosecutors charged the defendant under the Sarbanes-Oxley Act of 2002 which was passed in response to the Enron accounting scandal. Part of the law prohibits knowingly altering or destroying a record, document or tangible object with the intent to obstruct an investigation. The defendant's attorneys argued before the Supreme Court that the phrase tangible object only means items used to preserve information such as computers, servers, or other storage devices and does not include fish. During oral argument, some of the Justices appeared amused by the prosecution in question. Chief Judge Roberts remarked that the defendant was made to sound like a mob boss. Justice Breyer indicated that the law could be void for vagueness and Judge Scalia remarked "what kind of a mad prosecutor would try to send this guy up for twenty years or risk sending him up for twenty years."

In fact, on Wednesday, February 25, 2015, the Supreme Court in a 5-4 decision held that prosecutors had indeed engaged in overreach and reversed the Yates conviction. Justice Ginsburg, writing for the majority, stated that the Court would not allow prosecutions to be upheld based upon tortured legal analysis. Joining Judge Ginsburg in the majority was Chief Judge Roberts and Justices Breyer and Sotomayor. Justice Alito filed a separate concurring opinion joining in the judgment. Justice Kagan issued a dissenting opinion which was joined in by Justices Scalia, Kennedy and Thomas. The breakdown among the Justices in the instant case was highly unusual, both in the majority and dissent and for the first time in a long while, Justice Kagan found herself allied with Justices Scalia and Thomas from the conservative side of the Court.

EDITOR'S NOTE: In our last issue, we inadvertently stated that Chief Justice Roberts had written the majority opinion. Although the Chief Justice did join in the majority, the opinion was actually by Justice Ginsburg. We also discuss further details on the Yates *case in our first feature article at page 7.*

Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (March 25, 2015)

In late November the United States Supreme Court heard oral argument in a case involving race and voting rights. In Alabama the legislature had redistricted certain areas to include a large percentage of black voters into certain districts. The plaintiffs contended that this was accomplished in order to create a majority of districts which were more white and which voted Republican. The State of Alabama argued that the redistricting was done in order to comply with earlier court rulings which indicated that more legislative seats could be won by minority candidates. A decision was issued on February 25, 2015 and the Court in a 5-4 decision, concluded that procedural errors occurred at the District Court level and that the matter should be remanded to that Court for further consideration. The five Judge majority voting to remand the case consisted of Justices Breyer, Kennedy, Ginsburg, Sotomayor and Kagan.

Justice Scalia issued a strong dissent finding that the Alabama courts had acted correctly in dismissing the defendant's case. He criticized the majority's actions and stated "But allowing appellants a second bite at the apple invites lower courts similarly to depart from the premise that ours is an adversarial system whenever they deem the stakes sufficiently high. Because I do not believe that Article III empowers this Court to act as standby counsel for sympathetic litigants, I dissent." He was joined in dissent by Justices Thomas and Alito and Chief Justice Roberts.

Williams-Yulee v. Florida State Bar, 135 S. Ct. 1656 (April 29, 2015)

In late January, the Court also heard oral argument in a case involving the issue of whether judicial candidates can directly ask for donations when they are seeking judicial office. In the case at bar, a judicial candidate in Florida sent out a direct mailing soliciting donations. The Florida Bar had an ethical rule which prohibits Judge and judicial candidates for personally soliciting funds for their campaigns. The issue is whether such rules violate the free speech right of a candidate running for office. A decision was issued on April 29, 2015 and by a 5-4 vote, the Court upheld the Florida Regulations. Chief Justice Roberts issued the majority opinion and held that Judges are not politicians even when they come to the Bench by way of the ballot and that therefore, the Florida Bar was within its rights to issue the regulations in question. The majority opinion further added that a state's decision to elect its judiciary does not compel it to treat judicial candidates

like campaigners for political office. Chief Judge Roberts was joined in the majority by Justices Ginsburg, Breyer, Sotomayor and Kagan.

Justice Scalia issued a sharp dissent. Judge Scalia argued that one cannot have judicial elections without judicial campaigns and judicial campaigns without funds for campaigning and funds for campaigning without asking for them. Judge Scalia insinuated that the Court's majority ruling was really a veiled attack on the selection of Judges by election. Judge Scalia was joined in dissent by Justices Alito, Thomas and Kennedy.

Rodriguez v. United States, 135 S. Ct. 1609 (April 21, 2015)

In a 6-3 decision, the United States Supreme Court held that police may not turn routine traffic stops into drug searches using trained dogs. A Nebraska police officer had stopped a defendant following a routine traffic stop. He then had a drug-sniffing dog circle the defendant's vehicle which eventually led to the discovery of a large bag of illegal drugs. The six-judge majority concluded that police may not prolong detention of a car and driver beyond the time reasonably required to address the traffic violation and that in the case at bar, it was an unconstitutional search and seizure. Justice Ginsburg, writing for the majority, stated that police officers who stop a car for speeding or another traffic violation are justified in checking the motorist and his driver's license. But a traffic stop does not give the officers authority to conduct an unrelated investigation involving drugs. She was joined in her opinion by Justices Scalia, Breyer, Sotomayor, Kagan and Chief Justice Roberts. Justices Thomas, Alito and Kennedy dissented. Justice Alito, in his dissent, called the majority decision unnecessary, impractical and arbitrary, arguing that the officer did have reasonable suspicion that the car contained drugs.

Grady v. North Carolina, 135 S. Ct. 1368 (March 30, 2015)

In a unanimous decision, the United States Supreme Court granted certiorari and immediately ruled on the merits with respect to a North Carolina program under which recidivist sex offenders were subject to satellite based monitoring. The Court found that the program constitutes a Fourth Amendment search and that the protections of the Fourth Amendment applied. The matter was remanded to the North Carolina Courts for further proceedings.

Woods v. Donald, 135 S. Ct. 1372 (March 30, 2015)

In a unanimous decision, the Supreme Court granted certiorari and immediately issued a determination on the merits in a matter which involved the absence from the courtroom for ten minutes by defense counsel during testimony concerning other defendants. The Court concluded that the instant situation did not amount to per se ineffective assistance of counsel, and that the Federal court decision granting federal habeas corpus relief was an unreasonable application of the Supreme Court decision in *United States v. Cronic*, 466 U.S. 648 (1984). In issuing its decision, the Supreme Court applied the deferential standard for federal habeas review of state court decisions on the merits.

Elonis v. United States, 135 S. Ct. __ (June 1, 2015)

On December 1, 2014, the United States Supreme Court heard oral argument on a case which involved a defendant's conviction after he had posted offensive words on Facebook. The case involved a domestic dispute when the defendant's wife moved out of their home with their two children. He subsequently issued hostile sounding Facebook postings which included comments such as "there is one way to love you but a thousand ways to kill you; I'm not going to rest until your body is a mess soaked in blood and dying from all the little cuts." The defendant had argued that his postings were similar to fictitious lyrics and that he was merely letting off steam. The case presented the Court with an opportunity to address whether comments on social media can amount to criminal conduct. The Justices during oral argument appeared to be concerned about First Amendment freedom of speech. However, on June 1, 2015 in a 7-2 decision it reversed the defendant's conviction on the narrow ground that the government needed to prove more than the defendant was negligent or that a reasonable person would regard the statements as a threat. Chief Justice Roberts issued the majority opinion with Justices Alito and Thomas dissenting.

PENDING CASES

King v. Burwell, 135 S. Ct. __ (_____, 2015)

In early November, the Supreme Court agreed to hear a new challenge to the Obama Healthcare Law. The new case involves tax subsidies that are provided to persons who have enrolled in certain states where the Federal Government has established federal exchanges. The claim is being made that the Affordable Care Act authorized subsidies specifically for insurance bought on an exchange established by the state. Since at the present time, only 16 states have set up their own exchanges, a ruling in favor of the Plaintiffs would severely limit the viability of the Obama statute. Oral argument was heard on the issue on March 4, 2015 and it appeared that the Court was once again sharply split largely between the liberal members of the Court and the conservative group led by Justices Scalia and Alito. A decision is expected sometime in June.

Walker v. Texas Division, Sons of Confederate Veterans, Inc., 135 S. Ct. __ (_____, 2015)

In early December, the Court also agreed to hear an interesting First Amendment protection case involving the issue of whether freedom of speech allows limits on

the range and type of messages which can be displayed on state issued license plates. The State of Texas had recently denied a request to issue a license plate upon which Confederate battle flags could be displayed. The State of North Carolina was also involved in a controversy as to whether the abortion related message "choose life" could be displayed on license plates issued by the State. The Supreme Court agreed to hear an appeal in the case of *Walker v. Texas Division of Sons of Confederate Veterans*. The argument has been made that official license plates are government speech and are shielded from free speech attacks. The State should not be forced to convey a license plate holder message by etching onto a plate marked with the State's name. Oral argument was heard on the issue in the late spring and a decision is expected during the final dates of the Court's current term.

Montgomery v. Louisiana, 135 S. Ct. __ (_____, 2015) replacing *Toca v. Louisiana*, 135 S. Ct. 781 (February 3, 2015)

On December 12, 2014, the United States Supreme Court also agreed to hear the case of *Toca v. Louisiana*, which involves the issue of whether the court's earlier decision in *Miller v. Alabama* should be applied retroactively. In *Miller,* the Court ruled that mandating life imprisonment for juvenile defendants charged with murder was unconstitutional. The Court when it rendered that determination in 2012 was silent on whether the prohibition would apply retroactively to hundreds of offenders who had previously been sentenced. It appears that now the Court is ready to address the issue. In a surprise move, the Court on February 3, 2015 dismissed the certiorari petition in *Toca* on the grounds that the parties had notified the Court that pursuant to a recent state court development, the defendant had been released from prison after agreeing to enter an Alfred plea to manslaughter. Pursuant to Rule 46, the Supreme Court was obligated to dismiss the case if all of the parties agreed in writing. In the *Toca* case, a written stipulation had been filed with the Court requesting dismissal.

The Supreme Court however, within less than two months, indicated its resolve to decide the retroactivity issue by granting certiorari in another Louisiana case. Thus, on March 23, 2015, it granted certiorari in the matter of *Montgomery v. Louisiana*. Since it does not appear that the Court has sufficient time to review briefs and to hold oral argument in this matter during the current term, it is expected that a decision will not be reached until sometime in late 2015 or early 2016. The key justice in any forthcoming decision appears to be Justice Kennedy, who previously cast the critical fifth vote in the Court's earlier decisions on the issue. We await the results.

Brumfield v. Cain, 135 S. Ct. __ (_____, 2015)

In late December, the Supreme Court granted certiorari in a case filed by a death row inmate in Louisiana. The defendant contends that he was denied a due process right to state funding for expert evidence to develop his Atkins claim of mental retardation, which would preclude his execution.

Obergefell v. Hodges, 135 S. Ct. __ (_____, 2015)

Tanco v. Haslam, 135 S. Ct. __ (_____, 2015)

DeBoer v. Snyder, 135 S. Ct. __ (_____, 2015)

In a series of cases, the Court on January 16, 2015 agreed to decide the issue of whether gay marriage must be allowed in all 50 states. There have been several conflicting decisions among the various federal jurisdictions and the Court has finally agreed to decide several cases which involve this controversial issue. Since the Supreme Court's 2013 decision in *United States v. Windsor*, many states have moved to uphold gay marriages and differing policies in various states have forced the Supreme Court to act on the issue. Oral argument was held on April 28, 2015 and a decision should be forthcoming by late June.

Glossip v. Oklahoma, 135 S. Ct. __ (_____, 2015)

In late January, the Supreme Court granted certiorari in a case involving the issue of whether the drugs used by the State of Oklahoma to effectuate the death penalty constitute cruel and unusual punishment. The defense claims that the State was experimenting with new and scientifically untested methods of execution and that the use of the new drug would cause an inmate to suffer searing and unnecessary pain in violation of the cruel and unusual punishment prohibition. While this case was pending in the Supreme Court several states which utilized the same type of drug in their death penalty procedures issued stays of execution pending the final outcome by the U.S. Supreme Court. As late as February, the Supreme Court in Florida had refused to allow any further executions until the issue was finally determined. On April 29, 2015 the Court heard oral argument in this matter and a decision is expected in June toward the end of the Court's current term.

Hurst v. Florida, 135 S. Ct. __ (_____, 2015)

In another death penalty case, the United States Supreme Court on March 9, 2015 agreed to accept a case emanating from Florida which involved a jury decision in 2007 to recommend a death sentence based upon a vote which was not unanimous. The issue involved is whether Florida's lack of a requirement that juries be unanimous in recommending the imposition of the death penalty violates constitutional principles under the Sixth and Eighth Amendments of the U.S. Constitution. Florida remains unique and is only one of a few states not requiring unanimity of either the findings or recommendations of death or of the aggravating factors that justified that verdict. It is expected that this case will not be decided until the Court's next term.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from January 26, 2015 through May 1, 2015.

People v. McCummings (N.Y.L.J., January 26, 2015, pp. 1 and 15)

In a 4-1 decision, the Appellate Division, First Department reversed a defendant's conviction for attempted murder after concluding that the trial judge denied the defendant's request for new counsel without conducting a proper inquiry as required. The defendant had complained about his assigned counsel, stating that he was not doing his proper work. The defendant also sought to present a notice of motion for reassignment of counsel but the trial judge refused to look at it and arbitrarily declared "I will not reassign counsel." The four-Judge majority in the Appellate Division ruled that the trial judge had acted improperly and had failed to even learn the nature of the disagreement between the defendant and counsel and did not even ask any questions about the apparent dispute. The majority opinion consisted of Justices Sweeny, Jr., Andrias, Richter, and Feinman. Justice Saxe dissented and argued that the trial judge had more than ample firsthand knowledge of counsel's highly competent work and representation and there was no indication of a conflict which would require reassignment.

People v. Beato (N.Y.L.J., January 28, 2015, pp. 1 and 4)

In a 4-1 decision, the Appellate Division, First Department upheld a defendant's conviction for selling crack cocaine even though it found that the use of hearsay testimony constituted a violation of the confrontation clause. The trial judge had allowed a police sergeant to testify as to the statements made by three persons who had purchased drugs from the defendant. The trial judge allowed the hearsay testimony in question and gave the jury a limiting instruction that the testimony was to be considered only for the purpose of completing a narrative and explaining police actions and not for the truth of the statements. In reviewing the record, the four-judge majority found that proof of the defendant's guilt was overwhelming and was established by other evidence and thus any error which was committed by the admission of the hearsay testimony was harmless. The defendant's conviction would therefore be affirmed.

People v. Mitchell (N.Y.L.J., February 4, 2015, pp. 1 and 9)

In a unanimous decision, the Appellate Division, Second Department overruled a trial judge's decision which had suppressed certain evidence. In the case at bar, one of the officers involved in a drunken driving arrest died before he could testify on the circumstances of the stop. The Appellate Panel concluded that probable cause could still be established through the testimony of an officer who subsequently arrived at the scene. The Panel stated that the second officer relaying the first officer's observations were enough to show probable cause for the arrest. The matter was then remitted to the trial court for further proceedings.

People v. Mangum (N.Y.L.J., February 6, 2015, p. 2)

In a unanimous decision, the Appellate Division, First Department held that the fact that a defendant could have been arrested for littering did not justify a search that revealed a pistol. The Appellate Division therefore dismissed the charges and ordered the release of the defendant from custody. In issuing its decision the Panel relied upon the recent decision of the New York Court of Appeals in *People v. Reid*, which was decided on December 17, 2014. Based upon the *Reid* decision, the Panel concluded that it was now clear that the police must either make an arrest or intend to make an arrest at the time of the search in order for the search to be considered lawful.

People v. Wesley Jones (N.Y.L.J., February 6, 2015, p. 4)

In a unanimous decision, the Appellate Division, First Department reversed a defendant's conviction for drug possession and ordered a new trial. The Court found that the trial judge had committed reversible error when he failed to excuse a prospective juror for possible pro-police bias. During the voir dire, the juror was asked whether he would be inclined to believe the testimony of a police officer over ordinary witnesses. The juror replied that his best friend was a police officer and he might be more inclined to believe police because of his relationship. The trial judge denied defense counsel's request that the juror be excused for cause and failed to further question the juror about his response. In issuing its ruling, the Appellate Panel concluded that it was incumbent upon the trial court to take corrective action in order to elicit unequivocal assurances from the juror that he would be able to reach a verdict based solely upon the Court's instructions on the law. The trial court's failure in this regard required a new trial.

People v. Scheidelman (N.Y.L.J., February 10, 2015, pp. 1 and 7)

In a 3-1 decision, the Appellate Division, Fourth Department reversed a defendant's conviction for child sex abuse on the grounds that the prosecutor had inquired

about the defendant's homosexuality and had elicited irrelevant and prejudicial information. The three-Judge majority found that the probative value of the contested testimony was far outweighed by the prejudice it created and that therefore the defendant had been denied a fair trial. The majority panel consisted of Justices Smith, Whalen and DeJoseph. Justice Eugene Fahey, who was recently elevated to the New York Court of Appeals issued a dissenting opinion.

People v. Morales (N.Y.L.J., February 11, 2015, pp. 1 and 7)

In a 4-1 decision, the Appellate Division First Department reversed a defendant's drug possession conviction on the grounds that police had improperly searched the defendant's jacket when it was beyond defendant's grabable area. In the case at bar, the defendant was sitting handcuffed inside a police car and the jacket was lying outside on the vehicle's trunk. Numerous officers were on the scene. The Panel concluded that there was no reasonable possibility that the defendant could have reached the jacket and therefore the search which revealed a loaded gun was improperly conducted. The majority opinion consisted of Justices Richter, Acosta, Moskowitz, and Clark. Justice Friedman dissented and argued that not searching the jacket could have still posed a danger to police officers as they drove to the station since during the trip access to the jacket could have become available to the defendant or an impact with another vehicle might have caused the loaded gun in the jacket to discharge. Due to the split within the Panel, and the nature of the case, it is possible that leave to the Court of Appeals may be sought and that an eventual decision may be made by that Court.

People v. Jackson (N.Y.L.J., February 19, 2015, p. 4)

In a unanimous decision, the Appellate Division, First Department reversed the defendant's conviction and ordered a new trial on the grounds that the trial judge failed to instruct prospective jurors that the prosecution had the burden to prove a defendant's guilt and that defendants have the right not to testify. The Appellate Panel noted that such instructions were fundamental principles of the law and that the defendant was denied a fair trial by the Court's failure to provide the necessary instructions in question.

People v. Griffin (N.Y.L.J., February 20, 2015, p. 4)

In a unanimous decision, the Appellate Division, Fourth Department reversed a defendant's conviction and ordered a new trial because the prosecutor had made improper comments during summation. During a robbery trial, where the testimony came from a sole witness, the prosecutor had argued that the witness had the ring of truth and was truthful. The Court concluded that this constituted improper vouching for the witness's veracity and under the circumstances of the case at bar, denied the defendant a fair trial. The Appellate Court also pointed to other improper statements made by the prosecutor, which permeated the entire trial and required a reversal.

People v. Ryan (N.Y.L.J., February 9, 2015, pp. 2 and 8)

In a unanimous decision, the Appellate Division, Second Department reinstated the charge of aggravated vehicular homicide which had been dismissed by the trial court. The Appellate Panel concluded that in viewing the evidence with a view most favorable to the prosecution there was legally sufficient proof before the grand jury that the defendant's actions caused the police officer's death. In the case at bar, the defendant, who had been driving while drunk, caused an accident in which several people were injured and a police officer was killed. The County Court Judge had determined that he police officer's death was solely attributed to another driver who was not part of the continuing chain of events set off by the defendant's actions. The Appellate Panel indicated that the test of criminal liability was whether it was reasonably foreseeable that the defendant's actions would result in the victim's death. If so, that could constitute a sufficiently direct cause. Under these circumstances the original charge was reinstated.

People v. Garcia (N.Y.L.J., February 24, 2015, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Second Department reversed a second degree gang assault conviction and ordered a new trial on the grounds that the trial court should have granted the defendant's challenges for cause with respect to two prospective jurors who expressed doubt about their ability to be objective. During the voir dire, the two prospective jurors stated they had been victims of crimes and were uncertain if they could be objective. They made statements such as, "I am not sure," "probably not and I will try my best." The Appellate Panel held that the prospective jurors must state unequivocally that their prior state of mind would not change their verdict and that under the circumstances a new trial was required.

People v. DiTommaso (N.Y.L.J., February 25, 2015, pp. 1 and 9)

In a unanimous decision the Appellate Division, First Department reversed a perjury conviction of a businessman who had been connected to former New York City Police Commissioner Bernard Kerik. The Appellate Panel found that it was improper to question a witness using grand jury testimony. The Appellate Panel concluded that it was error to admit a contractor's grand jury testimony about allegedly concealed payments under the "past recollection recorded" exception to the hearsay rule. The exception allows the admission at trial of a memorandum of

fact known or a previously observed event where a witness cannot or refuses to testify and otherwise competent evidence establishes that the witness observed the matter recorded and the recollection was fairly fresh when recorded or adopted. The Panel concluded that in the case at bar, there was a six-year gap between the underlying events and the grand jury testimony in 2006, and that therefore there was a question regarding the accuracy of the testimony in question. The Appellate decision concluded that the People had an obligation to satisfy the foundational requirement that the recollection was fairly fresh when recorded or adopted.

People v. Lewis (N.Y.L.J., February 27, 2015, p. 2)

In a unanimous decision, the Appellate Decision, Third Department reversed a trial court order which had summarily denied the defendant's 440 motion. The defendant had claimed that the principal witness against him had been coerced. The defendant claimed that the prosecutor's office had committed *Brady* violations. The Appellate Panel concluded that he was entitled to receive a hearing on the issues raised. The Panel in remitting the matter back to the trial court stated, "Due process requires that the People disclose evidence relating to a witness' credibility, including the existence of an agreement between the prosecution and a witness, made to induce the testimony of the witness." In issuing its decision, the Court cited the Court of Appeals decision in *People v. Novoa*, 70 NY 2d, 490 (1987).

People v. Bell (N.Y.L.J., March 11, 2015, pp. 1 and 6)

In a unanimous decision, the Appellate Division, Second Department reversed a defendant's manslaughter conviction on the grounds that prosecutors used race-based challenges against two black prospective jurors in violation of the United States Supreme Court ruling in *Batson v. Kentucky*, 476 U.S. 79. The Appellate Panel concluded that the prosecutor's pretextual excuses for their peremptory challenges were unsupported by the circumstances and should have been rejected as untrue.

People v. Morris (N.Y.L.J., March 18, 2015, pp. 1 and 3)

In a unanimous decision, the Appellate Division, Second Department affirmed a trial judge's ruling which suppressed a firearm which was found during a warrantless search conducted on the defendant's property. The Panel concluded that the District Attorney's Office failed to justify the police officer's warrantless entry into the defendant's property where the officers found a gun in a black plastic bag that the defendant had dropped in his driveway. The Panel found that based upon United States Supreme Court decisions, the driveway and front yard, which were both fenced, were in close proximity to the defendant's house and would have to be considered to be within the curtilage of his house. The Appellate Panel also emphasized that the prosecution had not shown any exigent circumstances that would have justified a warrantless entry into the defendant's property and the ensuing search.

People v. Gibson (N.Y.L.J., March 24, 2015, pp. 1 and 2)

In a 4-1 decision, the Appellate Division, Fourth Department held that a trial judge had improperly kept assigned counsel as a defendant's lawyer despite declarations from both that their relationship had irrevocably broken down as the case was headed to trial. Defense counsel had sent a letter to the Court about two weeks before trial that he was unable to communicate effectively with his client and did not want to represent him any further. Some two weeks earlier, the defendant had sent a similar letter. Defense counsel had further indicated that relationships with the defendant had become antagonistic and there had been an irreparable breakdown in the attorney-client relationship. Under these circumstances, the Court concluded that a new trial was warranted. Justice DeJoseph dissented and indicated that the trial court had conducted an extensive inquiry into the grievances alleged and found them insufficient for the appointment of new counsel.

People v. Mitchell (N.Y.L.J., March 27, 2015, pp. 1 and 3)

In a unanimous decision, the Appellate Division, Second Department upheld the suppression of a gun and marijuana on the grounds that the police had conducted an illegal search. The Court found that the full interior of a rooming house and not just a room where a man lived should be considered his home. The defendant was arrested inside the rooming house without a warrant. During a search, the officer observed marijuana and a further search obtained with a warrant revealed a gun. The Court found that the officers had not obtained needed consent to enter the rooming house and that any further observations and seizures violated the defendant's constitutional rights. The People had appealed the trial court's ruling, but a unanimous panel affirmed the suppression of the items in question.

People v. Wiggins (N.Y.L.J., March 30, 2015, pp. 4)

In a 3-2 decision, the Appellate Division, Third Department concluded that a defendant's plea should be vacated because it was entered under the mistaken belief that he would qualify for a shock incarceration program. The defendant had been allowed to plead to fourth degree criminal possession of a controlled substance. After the plea, it was discovered that his prior conviction for burglary made him ineligible for the program. The three-Judge majority concluded that due to the mistake, the defendant did not enter a plea knowingly and voluntarily and that therefore the plea had to be vacated.

Justices Clark and Egan dissented finding that a review of the record indicated that the plea that was entered was not formally conditioned on the defendant's entry into a shock incarceration program.

People v. Stilley (N.Y.L.J., April 2, 2015, pp. 1 and 8)

The Appellate Division, First Department affirmed a trial court's denial of a mistrial motion based upon an alleged Brady violation. Prosecutors had failed for five months to tell the defense that a drug dealer who testified in a murder case had sold Angel Dust to an undercover officer the evening before telling a jury he had turned his life around and stopped selling drugs. The Appellate Panel found that even if the information in question had been disclosed before the end of trial, there was no reasonable possibility that the verdict would have been different. They also found that the defendant had failed to establish that a *Brady* violation occurred because there was no conclusive showing that the information about the drug dealing was in the People's custody, possession or control before the trial ended.

People v. McCulloug (N.Y.L.J., April 3, 2015, pp. 1 and 6)

In a 3-2 decision, the Appellate Division, Fourth Department reversed a defendant's conviction on the grounds that the defendant was not allowed to present expert testimony about the potential unreliability of a witness who testified against him. The case hinged almost exclusively on the accuracy of a witness's identification. The three-Judge majority ruled that the defendant had met the two-step process of determining the admissibility of expert proof as set forth in the Court of Appeals decision of *People v. LeGrand*, 8 NY 3d, 449 (2007) and *People v. Muhammad*, 17 NY 3d, 532 (2011). Justices Centra, Peradotto and Whalen were in the majority and presiding Justice Scudder and Justice Lindlay dissented. Because of the sharp split in the Court and the importance of the issue, it appears that this case will eventually be decided by the New York Court of Appeals.

People v. Lang (N.Y.L.J., April 7, 2015, pp. 1 and 2)

The Appellate Division, Third Department unanimously vacated the defendant's plea and ordered a new trial. The defendant had shot and killed his brother and during the entry of his plea indicated that he had been drinking at the time of the incident and that "I drink every goddamn day." The defendant never mounted an intoxication defense and the Appellate Panel found that the trial court that accepted his plea to first degree manslaughter hindered the defendant from the possibility of entering such a defense. The defendant also had a long history of intoxication. Even though the trial court had been made aware of the defendant's intoxication problem, he seemed unwilling to allow such a defense during any forthcoming trial. Under these circumstances the Appellate Panel concluded that a new trial was required.

For Your Information

U.S. Justice Department Eases Policy on Drug Sentences

As he prepared to leave office, Attorney General Eric Holder revealed in a recent address that statistics compiled over the last few years show that sentences for drug defendants are increasingly being based less on rigid formulas and more on the circumstances of each crime. New data compiled by the U.S. Sentencing Commission shows a shift in which prosecutors steer away from seeking the harshest penalties for low level offenders and are redirecting their resources to go after more violent criminals. Figures reveal that federal prosecutors pursued mandatory minimum punishments in about 51% of drug cases, the lowest rate on record in the year that ended in September 2014 and that was down from 64% the year before. Overall, the number of federal drug trafficking prosecutions dropped by 6% during the same period.

During his six years as Attorney General, Holder has sought limits on long term drug sentences and has argued that a key goal of the new policy was to provide fairer sentences and to limit an overcrowded prison population which was bloated with drug offenders.

Student Loan Debt Continues to Be a Growing Burden

Recent statistics from the Federal Reserve Bank of New York revealed that younger Americans are struggling to keep up with a steadily rising student debt load and the growing burden is limiting their ability to buy homes, thereby adversely impacting the housing sector. The new statistics revealed that the percentage of student loans which are overdue 90 days or more rose to 11.3% in the final three months of last year. That is the highest yet recorded. Total student borrowing was placed at $1.16 trillion, the most on record and 7.1% higher than 12 months earlier. A Federal Reserve spokesman stated that student loan delinquencies and repayment problems appear to be reducing the ability of younger persons to form their own households. Outside of the student loan problem, the one bright spot in the Federal Reserve statistics was that there has been a slight improvement with respect to debt involving auto loan and delinquency rates for home mortgages. Currently, about 3.1% of mortgages are delinquent down from the nearly 9% reached in early 2010.

Amendments to Sentencing Guidelines for Fraud Crimes

On April 9, 2015, the Sentencing Commission took a small step in modifying the sentencing guidelines under Section 2B1.1 involving fraud crimes. The amendments are proposing certain changes which may lead to lower sentences for defendants charged under the fraud provisions. Critics have argued that some of the factors used, such as intended loss, sometimes led to unwarranted heavy sentences and in recent years calls have been issued for certain modifications. A period of notice and comment was allowed up to March 18, 2015 and public hearings were held on the issue. Good articles on the amendments appeared in the *New York Law Journal* of January 29, 2015 at pages 1 and 8, and on May 15, 2015 at pages 4 and 8.

New Filings Within the Federal Courts

Recent statistics released by the Administrative Office of the United States Courts indicate that the various Federal Courts within the New York area continue to see increases in their caseloads. Statistics reveal that as of the end of September 30, 2014, the Southern District of New York had 13,318 filings for the year. This was up from 11, 900 in 2013. The Eastern District had 9,050 filings up from 8,341. The Northern District had 2,331 filings up from 2,328. Only the Western District saw any reduction in its caseload going from 3,187 in 2013 to 2,890 in 2014. Overall, the district courts within New York had total filings of 27,589, almost 2,000 more than the 25,756 in 2013. With respect to the Second Circuit Court of Appeals, it basically experienced the same level of caseload as the previous year. In 2014, its filings were listed as 5,044 slightly down from 5,093 in 2013.

Attorney Standards Issued for Handling Indigent Criminal Appeals

The State Office of Indigent Legal Services recently announced the first set of standards to guide assigned counsel and lawyers working for institutional providers in criminal appellate cases. The standards include a demonstration of competence to handle appeals, a review procedure before briefs are filed, full discussions with the client regarding the processing of the appeal and an increase in face-to-face meetings with clients. Further details regarding the standards were discussed in the *New York Law Journal* of January 8, 2015 at pages 1 and 2.

Civics Test for High School Students

Increasing complaints regarding the lack of knowledge by high school students regarding the workings of our government have prompted several states to begin to consider requiring high school students to pass a civics exam before graduation. The State of Arizona in January 2015 became the first state in the nation to actually pass such a law and the Florida Legislature requires high school students to correctly answer 60 of 100 questions on the civics portion of the U.S. Citizenship Test. Similar action is being considered by other states and a big push is being made in this area as we approach the 230th anniversary of the U.S. Constitution in 2017.

Loretta Lynch Assumes Office of Attorney General

In late January and early February, Loretta Lynch appeared before the Senate Judiciary Committee with respect to her nomination to serve as U.S. Attorney General. Following Senate Committee hearings, she was approved and her nomination proceeded through the full Senate where she was once again approved in late April by a 56-43 vote after a substantial delay that resulted from a partisan scheduling dispute between Democrats and Republicans. Loretta Lynch was officially confirmed on April 23, 2015 and was sworn in on April 27, 2015. She immediately assumed her new office.

Lynch has a long career in law enforcement, having served for many years in the U.S. Attorney's Office, most recently as U.S. Attorney for the Eastern District of New York. She is 55 years of age and was born and raised in North Carolina. She is the daughter of a librarian mother and a Baptist Minister. She is a graduate of Harvard College and Harvard Law School. Prior to beginning her career as a prosecutor, she worked for several years as an associate at Cahill Gordon & Reindel.

She succeeds Eric Holder, who served as Attorney General during of the Obama Administration and who resigned seven months ago. Loretta Lynch's new position came in the midst of riots and protests which had erupted as a result of another unfortunate police incident, occurring in the City of Baltimore. She moved immediately to deal with the matter and met with the family of the deceased Freddie Grey as well as local political and community leaders and members of the Baltimore Police Department. She has indicated that the Justice Department is considering commencing a civil rights case regarding the incident. She faces many difficult tasks ahead but has the respect and confidence of the legal community.

Justice Department Issues New Report Calling for Changes in Police Procedures

A task force created by the Obama Administration following the unfortunate incidents which arose in Ferguson, Missouri, recently issued 63 recommendations regarding proposed reforms in police procedures throughout the United States. Among its recommendations is a call for external independent criminal investigations involving outside prosecutors when police actions result in the death of a citizen. In issuing its report, the Justice Department also concluded that no federal charges were warranted against the police officer who was involved in the Ferguson, Missouri incident. A separate report, however, did issue criticisms of the Ferguson Police Department and issued calls for reforms.

Queens Interview Program Reviewed by Supreme Court

Following the recent decision by the New York Court of Appeals that a pre-arraignment interview procedure which has been conducted by the Queens District Attorney's Office for many years was unconstitutional as violating the requirement for the issuance of Miranda warnings, the office recently announced that it had filed a petition for writ of certiorari in the United States Supreme Court. The cases in the Supreme Court are listed as *New York v. Lloyd-Douglas* and *New York v. Dunbar.* The certiorari petition was considered by the Court in late April and in early May the Court denied the application.

Task Force Report Regarding Criminal Discovery

A New York State Bar Association Task Force has recommended that prosecutors turn over more information much earlier to the defense and has advocated significant changes in criminal discovery procedures. The Task Force report was developed over the past two years and was approved by the New York State House of Delegates on January 30, 2015. Our Section's Immediate Past Chair, Mark Dwyer, served as co-chair of the Task Force. The Task Force was also chaired by Peter Harver and included some twenty members. Prosecutors have basically objected to the proposed changes and several who were on the Task Force dissented to the proposed changes. Further details regarding the Task Force recommendations are provided in our feature article at page 6.

Older Workers Remaining in Workforce

A recent study by the AARP, which was reported in their magazine of February-March, 2015 (Volume 58-2C), indicates that the overall participation of workers 65 and over as an overall percentage of the entire workforce in the United State has steadily grown from 2002. In that year, older workers constituted 13% of the workforce. In 2012, the percentage had grown to 19%. As we look to the future estimates that by the year 2022, older workers will make up 23% of the overall workforce. The changing situation is attributed to a variety of factors. Many workers, based upon improved health and longer longevity, are choosing to continue working rather than enter retirement. For others, economic reasons are causing many to postpone retirement and to continue to work in order to meet daily expenses and the rising cost of living.

Government Agencies Continue to Make Unwarranted Payments

It was recently reported that a survey of all government agencies revealed that in 2014, a total of $125 billion was made in improper payments. This was up some $19 billion from 2013. The areas where the largest improper payments were made were Medicare and Medicaid and people who improperly received the earned tax credits after filing their income tax. The figure reflects a bureaucratic government system whose efficiency and accountability are open to serious question.

Ranking of U.S. Presidents

The 2014 survey of the American Political Science Association regarding who are considered the best Presidents in the United States revealed some expected choices and some unexpected results. As expected, the top four Presidents were listed as Abraham Lincoln, George Washington, Franklin Roosevelt and Theodore Roosevelt. The unexpected results placed Harry Truman as number 6, and President Eisenhower as number 7. Both of these two Presidents have continued to gain in status as the years have progressed. Among the most recent Presidents, Clinton placed number 8 and President Reagan came in at number 11. Although President Obama's legacy has yet to be determined, he was ranked at number 18 in the survey.

Appellate Division Openings

As of March, four vacancies continue to exist within the various Appellate Divisions. The elevation of Justices Stein and Fahey to the Court of Appeals has created a vacancy for the Presiding Justice of the Third Department and a vacancy for an Associate Justice in the Fourth Department. The expected retirement of Justice Acosta has also created a vacancy for Presiding Justice of the Appellate Division, First Department. In addition, vacancies also exist for an additional justice in both the Third and Fourth Departments. It is expected that Governor Cuomo will move to fill these vacancies within the next several months and we will report on any new appointments which are made.

Upstate Indigent Criminal Defense Settlement Obtains Judicial Approval

Several months ago as a result of litigation commenced in the Third Department in the case of *Hurrell-Harring v. State of New York*, a settlement was reached regarding the issue of providing adequate legal representation for indigent criminal defendants in five upstate counties. The settlement covered the Counties of Schuyler, Ontario, Suffolk, Washington and Onondaga. Under the terms of the settlement, the office of Indigent Legal Services is to oversee steps to improve representation of poor defendants by guaranteeing that they have counsel at arraignment, instituting quality standards for attorneys and ensuring that public defenders have manageable caseloads over the next 7 ½ years. The agreement further calls for the state to spend $4 million in the next fiscal year to fund the improvements and in a greater amount in future years. The $4 million has already been included in the Governor's proposed budget for 2015-2016. The five counties involved are not required to contribute to the amount required. Over the next several months an implementation attorney, along with several assistants, will be hired to oversee compliance with the settlement. The lawsuit in question was brought by the law firm of Schulte, Roth, and Zabel, as well as the New York Civil Liberties Union. According to the settlement, the law firm will receive $3 million in attorneys' fees and the NYCLU will be paid $2.5 million. Both payments will be made by the State.

The settlement received final judicial approval in the middle of March 2015 with the Judge, Acting Supreme Court Justice Connolly, indicating that the settlement was fair and reasonable. Although the settlement currently applies to only five upstate counties, it is anticipated that it will be used as a model for a possible statewide plan. The recent creation of the Office of Indigent Legal Services, the settlement in question and various other developments all point to eventual efforts to achieve a unified statewide program for the handling and funding of a system for providing adequate legal representation for indigent defendants.

Proposed Grand Jury Reforms

In recent months, both Chief Judge Lippman and Governor Cuomo have offered proposals for incorporating changes in the current grand jury system. The proposals arise from the controversies that have been generated with respect to police actions in Ferguson, Missouri and Staten Island, New York. The proposals in question seek to provide a greater and earlier judicial role in grand jury proceedings and in allowing for more open public disclosure of grand jury proceedings. The proposals have raised serious questions and some opposition in various quarters and the State Legislature recently raised various concerns. A constitutional issue has also been raised regarding the proposal to treat police officers differently from other accused with respect to how grand jury proceedings are handled. It appears that the issues will be sharply debated in the coming months and we will report on any developments in this area.

Christians Losing Majority Status

A recent report from the PEW Research Center indicates that Christianity, which has long been the world's largest religion, is losing ground to the growing number of Muslims in the world and it is expected that by the year 2070, Christianity will no longer be the world's majority religion. The report also concluded that Christianity is also declining within the United States. The report concluded that those claiming no religion will make up about a quarter of the population by 2050, an increase of some

16% from 2010. The population of American Christians will decline to 66% by 2050 from 78% in 2010. The number of Muslims on the United States is expected to pass the number of Jews by 2035.

The decline in the number of Christians within various segments of the legal community was also highlighted in a separate report issued by the Northwestern University School of Law. That report found that although 59% of lawyers in the United States in the year 2013 identified as being white Christians and comprised nearly 57% of the working population, white Christians made up only 34% of law professors. The report also found that in the underrepresented group, Republican men, who comprised 23% of the working population and attorneys in the United States, only 10% were employed as law professors. The Northwestern University report also found that women were slightly over-represented on law faculties compared to the pool of lawyers and comprised nearly 36% of law professors.

Soaring Rents Impact Family Finances

A recent report by Enterprise Community Partners, a non-profit corporation that helps finance affordable housing, concluded that during the last several years rental prices for housing have dramatically increased and that currently 26% of U.S. renters spend about one-half of their income on housing. The report stated that since the end of 2010, rental prices have surged at nearly twice the pace of average hourly wages. The sharp increase in rents was attributed to the effects of the recent economic recession and to the increasing decline in homeownership resulting in more people seeking to rent a housing stock which has declined. The rental situation is especially severe in California, Florida, New Jersey, and New York where it was found that more than 30% of renters devote at least one-half their incomes to housing and utilities. It is currently estimated that there is a shortage of some seven million apartments in the United States and no relief from soaring rents is expected within the near future.

About Our Section and Members

New Officers

The new Section Officers were announced at the Spring Meeting and the new officers were named as follows:

Chair	Sherry Levin Wallach
Vice-Chair	Robert J. Masters
Secretary	Tucker C. Stanclift
Treasurer	David Louis Cohen

Enclosed below are biographical sketches of each of the new officers.

Section Chair Sherry Levin Wallach

Sherry Levin Wallach is a Principal and Partner with the law firm of Wallach & Rendo, LLP of Mount Kisco, New York. Ms. Wallach founded the law practice with her partner in 2003. The practice is primarily dedicated to criminal defense, personal injury, residential real estate and general civil litigation. Ms. Wallach is serving her second term as a Member-At-Large on the Executive Committee of the New York State Bar Association (NYSBA). She also serves as Co-Chair of the NYSBA Membership Committee.

As a former Assistant District Attorney of Bronx County, Ms. Wallach concentrates her practice on criminal defense in state and federal courts throughout New York, Bronx, Westchester, Putnam and Rockland Counties. She serves on the Westchester and Putnam County 18B panels providing criminal defense for indigent people. Ms. Wallach cases range from handling basic misdemeanor matters in local courts and all level felonies in supreme/county and federal courts, to defending white collar cases in both state and federal courts.

Prior to starting her firm, Ms. Wallach worked for the law firm of McAlcon and Friedman, where she handled all aspects of the defense of medical malpractice claims including trial. Upon starting her firm, Ms. Wallach was Of Counsel to the law firm of Worth Longworth and London where she represented New York City Police Officers in internal investigations, in the Civilian Complaint Review Board and in courts throughout New York State.

Ms. Wallach received her Juris Doctor from Hofstra University School of Law and a Bachelor of Business Administration from George Washington University in Washington, D.C. She is admitted to practice in New York, U.S. District Courts for New York's Southern and Eastern Districts, and the United States Supreme Court.

She has long been active in our Criminal Justice Section after having previously served as Secretary and Vice-Chair of the Section. She has also published several articles which have appeared in various New York State Bar Association publications.

Vice-Chair Robert J. Masters

After graduating from St. John's University School of Law, Bob Masters worked as a law clerk for various Judges of the Criminal Term of the Supreme Court in both Queens and Kings County. Since 1990, Bob has been an Assistant District Attorney in Queens County, and has worked primarily on homicide cases since 1992. Since 1993, he has held various administrative posts within the District Attorney's office, was the Deputy Executive Assistant District Attorney for the Trial Division from 2005 through September of 2012 and was recently promoted to Executive Assistant District Attorney. As EADA, Bob is currently designated as the acting Chief of the Legal Affairs Division. He is also the official liaison to the NYPD and other law enforcement agencies. During his tenure, Bob has handled dozens of homicide cases, as well as long-term investigations into narcotics enterprises and their related murders. Additionally, Bob has concentrated in handling homicides in which psychiatric defenses are interposed. Among the high-profile cases handled by Bob, was the trial of Patrick Bannon for the murder of Police Officer Paul Heidelberger, the trial of serial-killer Heriberto Seda, the "Zodiac Killer" of the 1990s, as well as the prosecutions of the infamous "Wendy's Massacre" in which 5 fast-food employees were murdered and the capital trial of John Taylor resulted in the imposition of the death penalty. The prior prosecution of Taylor's mentally retarded accomplice, Craig Godineaux, resulted in the imposition of 5 consecutive life sentences. Bob has also been designated a Special Assistant District Attorney in both Franklin County and Suffolk County to assist those offices in handling complex litigation. He is also a founding member of the New York State District Attorneys Association's Best Practices Committee. Bob is currently an adjunct faculty member at St. John's University School of Law and has lectured frequently throughout the State on various trial and ethical issues. During the last two years, he served as Secretary of our Section.

Secretary Tucker C. Stanclift

Tucker C. Stanclift has served as Treasurer of our Section for the last two years. He was born and raised in Lake Placid, New York. Tucker played ice hockey there and graduated from Lake Placid Central School in 1990. He received his under graduate degree from St. Bonaventure University and earned a law degree from the State University of New York at Buffalo School of Law. Tucker is a proud father of three boys and lives in Queensbury, New York. He enjoys boating on Lake George with his kids in the summer.

Tucker is the founding principal of Stanclift Ludemann & McMorris, PC. He focuses his practice area in criminal law, DWI's, civil litigation, personal injury, and vehicle and traffic law. Tucker is known for his aggressive, yet compassionate representation of his clients. He is dedicated to the legal profession and is active in the New York State Bar Association where he formerly was Chair of the Young Lawyers Section.

Within the community, Tucker is active in the theater. He previously studied Shakespeare at Oxford University and enjoys live performances. He has been a member of the Glens Falls Community Theater and the Hudson River Shakespeare Company. He currently serves on the Board of Directors for the Charles R. Wood Theater in downtown Glens Falls.

Treasurer David Louis Cohen

David Louis Cohen has been a well-known and respected defense attorney for more than forty years. The thousands of cases he has handled include homicide, mortgage fraud, tax fraud, Medicaid fraud, insurance fraud, enterprise corruption, internet gambling, driving while intoxicated and most other major crimes. He has tried more than three hundred cases in Federal and State Courts.

Mr. Cohen obtained a Bachelor of Science Degree from the New York University School of Business and a Juris Doctor from Brooklyn Law School. From 1971 to 1974, he was a Staff Attorney with the Criminal Defense Division of the Legal Aid Society of the City of New York. In 1975, he opened his own private practice concentrating on the aggressive defense of those accused of crimes in both Federal and State Courts. In 1980, he was elected to the New York State Assembly and served until 1982. Since 1995 he has served as Counsel to Assemblymember Joseph R. Lentol, Chair of the Codes Committee.

Mr. Cohen is a Past President of the Queens County Bar Association and the Queens County Criminal Courts Bar Association. He was a founding member-at-large of the Executive Committee of the New York State Bar Association. He is the executive Committee's liaison to the New York State Bar Association's Criminal Justice Section and was a member of the Task Force on Wrongful Convictions, and the Special Committee on Criminal Discovery. David has been designated by the New York State Bar Association to serve on the Board of Directors of Prisoners Legal Services. He has also been appointed to the Chief Judge's Criminal Discovery Committee. David also serves as a member of the Grievance Committee of the Second, Eleventh, and Thirteenth Judicial Districts.

Mr. Cohen was an Adjunct Professor at the Intensive Trial Advocacy Program of Hofstra University Law School. He is a member of the faculty of the New York State Bar Association's Trial Advocacy Academy held at Cornell Law School. He has participated in training programs conducted by the Legal Aid Society Criminal Defense Division and the Office of the District Attorney of Queens County. He has also lectured on various criminal defense issues before numerous bar associations.

Mr. Cohen is admitted to practice in New York State, the United States District Courts for the Southern, Eastern and Northern Districts of New York, the Supreme Court of the United States and the United States Court of Appeals for the Fourth Circuit. Long active in our Criminal Justice Section, he joins this year's officers as Treasurer.

Spring Meeting

Our Section's Spring Meeting was held at the Saratoga Hilton in Saratoga Springs, New York on the weekend of May 16 and 17. The Saturday program included a continental breakfast and panel discussions involving recent Court of Appeals decisions and the Sex Offender Registration Act. Panelists for the morning program involved the Honorable Jenny Rivera, Associate Judge of the New York Court of Appeals, Daniel M. Arshack and Robert J. Masters. The afternoon program included Robert G. Wells, Jason D. Effman, Jennifer Buckley, James G. Eckert and Renee Sorrentino.

The CLE Program was followed by a cocktail reception and a dinner and awards ceremony during the evening hours. Award recipients were Andrew Kossover, Police Chief Margaret E. Ryan, Sister Teresa Fitzgerald and Janet C. Somes.

The Sunday program involved panel discussions on DWI cases, direct and cross-examination of arresting officers at pretrial hearings and Department of Motor Vehicle Regulations. The panelists for the Sunday session included David P. Miranda, Matthew R. Coseo, Thomas J. O'Hern, Tucker C. Stanclift and Jonathan D. Cohn.

The Spring Meeting was well attended with about 60 participants enjoying the wonderful sights of beautiful Saratoga, New York while obtaining interesting and important information involving criminal law issues.

Scenes from the Criminal Justice Section

Spring Meeting

Saratoga Hilton • Saratoga Springs, NY
May 16-17, 2015

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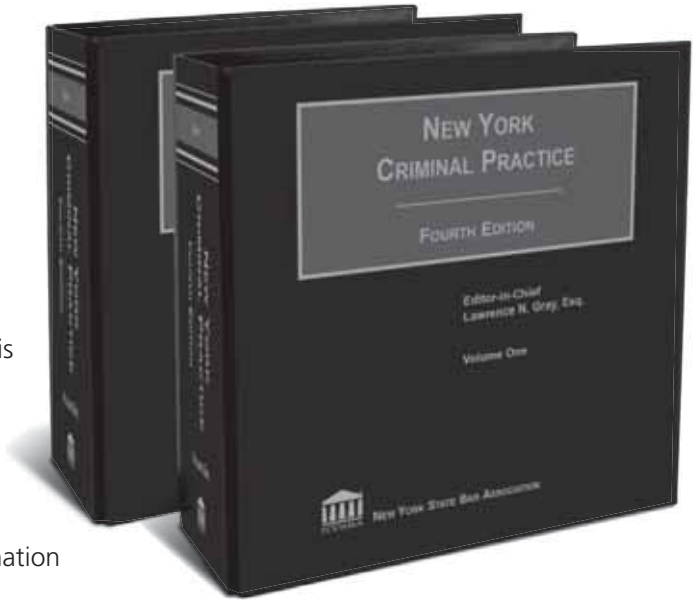

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Richard Manning
Former District Attorney
St. Lawrence County, NY

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NYSBA

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.

Keith Lawrence Abrams
Amy Addenberg
Gabriella Ali-Marino
Peter-Daniel Apostol
Manuel L. Batista
G. Michael Bellinger
Anthony Beneduce
Barry James Bisson
Peter Botti
Sylvie Bourassa
Mary Beth Buchanan
Brian Buckmire
Anthony M. Capozzolo
Peter P. Charnetsky
Mary Lou Chatterton
Chanel Clinton
Jonathan David Cohn
Alessandra DeBlasio
James A. DeFelice
John A. Della Ratta
Chantee Lucine Dempsey
Madalyn Rosa DeThomasis
Christopher James Di Donna
James D. Doyle
Lissette Antonia Duran
David Vincent Falkner
Kristin M. Finan
Stephen Alexander Fowler
Jeannie Gallego
Lacey Garnett
Paul Gentile
Donald E. Gogerty
Grace E. Golando
Lawrence W. Golden
Uzma A. Gulamali
Jonathan N. Halpern
Kurt D. Hameline
Joana Haxhiu
Devin Horzempa
David M. Hutter
Randall F. Inniss
Rachel L. Izower-Fadde
Meagan Kelly
Nicole Rene Kilburg
Jason Kleiger
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Seth Herschel Kretzer
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Leanne M. Lapp
Peter Gordon Larson
Kevin A. Leahy
Jonathan Falk Lenzner
Allen F. Light
Colin Michael Linsenman
James C. Locantro
Justine M. Luongo
Ying-ying Ma
JM Mariotti
Jose Antonio Masini-Torres
Robert J. Masters
Sean McLeod
Paul Mezan
Mildred Morillo
Zarema Muratova
Ernest Louis Nargi
Michael Thomas Nolan
Lillian Ortiz
John D. Pappalardo
Michael Papson
Joseph Carmen Patituce
Thomas D. Pickering
Claire L. Pizzarello
Jaclyn Quiles
Tracie Rozhon
Anthony J. Schepis
Stephanie Paige Schneider
Salvatore Serravillo
Madeline Shapiro
Lois J. Shapiro Canter
Diane Alicia Shearer
Nicole Theresa Staring
Vita V. Trujillo
Donald H. Vogelman
Shakiva Shantell Wade
Elisa Talora Wiygul
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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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For ease of publication, articles should be submitted on a CD preferably in WordPerfect. Please also submit one hard copy on 8½" x 11" paper, double spaced.

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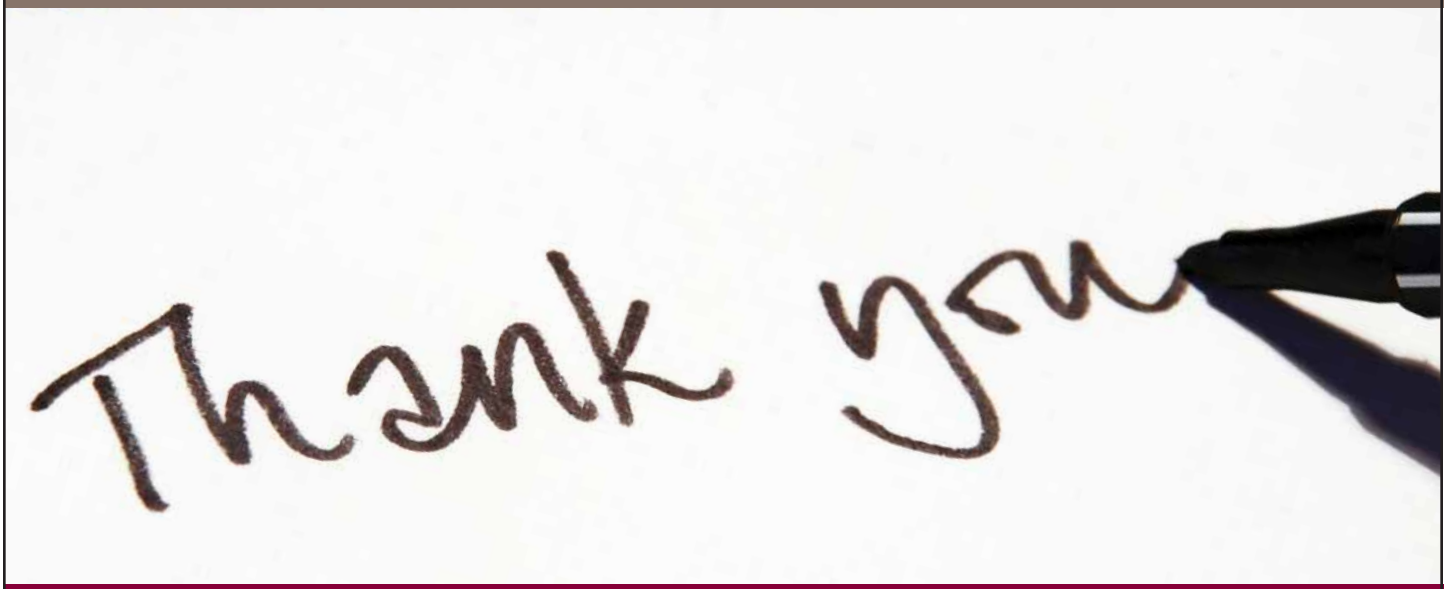

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