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New York Criminal Law Newsletter

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

Inside

FORENSICS AND THE LAW VI: SHIFTING PARADIGMS*

Tuesday, February 28, 2017 | New York Law School

Co-Sponsored by the Criminal Justice Project of the NYLS Impact Center for Public Interest Law

Schedule of Events

9:30 – 10 a.m.: Check-in and On-Site Registration (continental breakfast served)

10 – 10:10 a.m.: Welcome and Introductions

Section Chair: Sherry Levin Wallach, Esq., Wallach & Rendo, LLP, Mount Kisco, NY

10:10 – 11 a.m.: The Flaws in Microscopic Hair Comparison Evidence

A significant percentage of wrong convictions cases involve invalid or exaggerated forensic evidence. Microscopic Hair Comparison evidence is one example of such evidence. Working with the U.S. Department of Justice, the Federal Bureau of Investigation and the Innocence Project, the NACDL pioneered the Microscopic Hair Comparison Review Project to help identify areas where faulty science has led to wrongful convictions.

Speaker: Norman L. Reimer, Esq., Executive Director, National Association of Criminal Defense Lawyers, Washington, DC

* This is a live program only, and will not be recorded, broadcast or available online.

11 – 11:50 a.m.: Challenging Science in the Criminal Justice System

Forensic science paradigms, once widely accepted, are often proven wrong. What are the consequences for the criminal justice system? How should legislatures, courts and litigants respond? How should lawyers challenge faulty science? How should cases determined under the old paradigms be handled?

Speaker: Dana Delger, Esq., Staff Attorney, Strategic Litigation, Innocence Project, New York, NY

11:50 a.m. – 12:30 p.m.: Lunch

12:30 – 1:20 p.m.: Forensic Pathology Perspectives on Questioned Diagnoses

The underlying forensic pathology principles involved in several controversial diagnoses (i.e. Shaken Baby Syndrome, Excited Delirium) will be explored.

Speakers: Michael Baden, M.D., Former Chief Medical Examiner of New York City, New York, NY, and Vincent E. Doyle III, Esq., Connors LLP, Buffalo, NY

1:20 – 1:30 p.m.: Break

1:30 – 2:45 p.m.: Panel Discussion: Flawed Forensics, Shifting Paradigms

Panelists will discuss several examples of forensic science paradigms shifts, including how they happened, how the criminal justice system responded, and what implications there are for scientific evidence currently being challenged.

Speakers: Program Chair, Vincent E. Doyle III, Esq., Connors LLP, Buffalo, NY; Leigh Bishop, Esq., Chief, Child Fatality Unit, Queens District Attorney's Office, Kew Gardens, NY; Michael Baden, M.D., Former Chief Medical Examiner of the City of New York, New York, NY; Mark M. Baker, Esq., Of Counsel, Brafman & Associates P.C., New York, NY; Dana Delger, Esq., Staff Attorney, Strategic Litigation, Innocence Project, New York, NY; Norman L. Reimer, Esq., Executive Director, National Association of Criminal Defense Lawyers, Washington, DC; and Professor Adele Bernhard, Adjunct Professor and Supervising Attorney, NYLS Post-Conviction Innocence Clinic, New York, NY

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Message from the Chair

I write at the end of this year's NYSBA Annual Meeting, which was a wonderful success for the Criminal Justice Section. I would like to thank the Hon. Cheryl Chambers, who chaired the Section's excellent CLE program this year, and our speakers. I would also like to thank Norman Effman, the Chair of our Awards Committee, the committee members, and those who sent nominations, for their participation and dedication to choosing outstanding honorees from a pool of most deserving nominees.

This year's CLE program focused on handling cyber crimes and included a dynamic discussion on significant criminal cases pending in the New York Court of Appeals. Our CLE presenters came from the bench, the prosecution and the defense. They shared facts, their opinions, and offered advice. They demonstrated to the attendees the importance of knowing and understanding both sides of an issue, as this allows us to be better advocates.

Our keynote speaker, author Dr. Heather Ann Thompson, provided a historic accounting of the Attica Uprisings of 1971. She graphically described this event that began as a cry by the inmates for basic human and civil rights, including such demands as that prisoners be provided a healthy diet, allowed true religious freedom, and provided adequate medical treatment. Unfortunately, this historic moment ended in death, bloodshed and torture. Dr. Thompson discussed the roles played by those from the legal community during the uprising and during the months and years to follow. In addition to honoring our Dr. Thompson, other honorees included Preet Bharara, U.S. Attorney SDNY; Kenneth P. Thompson, recognized posthumously for his work as Kings County District Attorney; Hon. Jonathan Leventhal, Associate Justice, Appellate Division, Second Judicial Department; Malvina Nathanson, Appellate practitioner; and Rick Jones, Neighborhood Defender Service of Harlem.

We all sat together as members of the criminal justice legal community, and learned together from one another. That is what we do, and that is what we must continue to do during the difficult times facing our nation and our communities. The Criminal Justice Section of the State Bar is an outstanding group that works all year to bring attention to and action on issues that affect New York State's criminal justice community. In 2016, we addressed issues including sealing of criminal convictions, the town and village justice court system, the funding of indigent legal services, counsel at first appearance, wrongful convictions, poor person's relief on appeal, and the ethics of a defendant's waiver of ineffective assistance of counsel. We are still working on many of these issues and often our legislative efforts take years to come to fruition.

Because we are a group consisting of members from all over the State and from many of the facets of the criminal justice community, our voice is strong. We are able to reach a consensus on issues, because our focus is on making the criminal justice system fairer, more efficient and more effective. This spring we will be holding a meeting in Seneca Falls, New York, where we will be addressing alternatives to incarceration, diversion courts and the recent Court of Appeals decisions in the area of criminal justice. I hope to see you all there ready to roll up your sleeves and join us, as we work together, for the betterment of our great profession and the clients we serve.

Sherry Levin Wallach

Message from the Editor

We rely on precedent. Courts cite precedent when they present their opinions. Lawyers search precedent to develop arguments and in their efforts to provide courts with reasons to take a particularly favorable position. By its very nature, the concept of precedent makes us look to the past. And yet, as criminal practitioners we know that every case offers something different, whether it is a nuanced change or a dramatically different set of facts. So, while we practice in the present we must rely on the past. Today is influenced by yesterday.

In this issue, we devote time to legal precedent with Part Two of a thorough discussion of *Miranda.* This final installment discusses how the Supreme Court processed the case, what intentions underlie the decision, and the prospects for the future. Speaking of the future, you will read in this issue a discussion of the final step in the establishment of the "Cuomo Court." And, in our Supreme Court article, we describe the new nominee for the Supreme Court.

You will find an interesting article about the emergency exception and how an Appellate Division interpreted precedent. Also, we highlight our annual luncheon and the keynote speaker, Professor Heather Ann Thompson, whose work and presentation on the Attica uprising emphasizes that we can never forget the past and we must learn from our mistakes.

Back to the future for another few moments. Our Section is very much about the future. In her column, our Section Chair describes that there is much to be done by our Section members to improve the criminal justice system for generations to come. When you read Sherry's message, consider how you can assist our Section's efforts. And take note of our newest column: Practice Corner.

Finally, take note of the presentation that was arranged by our Student Committee about careers in criminal law. I was honored to participate in that evening alongside Judge Guy Mitchell and Xavier Donaldson. Our past may be on paper, but so much of our future rests in the hands of the youngest members of our Section.

Jay Shapiro

Miranda at Fifty and Beyond (Part II)

By Edward L. Fiandach, Esq. and Erinmarie Byrnes

This article is continued from Part I, which appeared in the Winter 2017 issue of the New York Criminal Law Newsletter.

Miranda v. Arizona Reaches the Court

One of the more intriguing questions about *Miranda v. Arizona* is what was the Court hoping to accomplish when it accepted the matter for review? Recognizing that the case was heard at the behest of Chief Justice Earl Warren as a "clarification"[75] of the holding in *Escobedo*, the answer to this question is most likely found in the commonality of the "questions presented" by *Miranda* and each of its companion cases. In the end, it may have been that the Chief Justice was attempting to achieve far more than he eventually was able to accomplish.

In August of 1965, Warren advised his newly assembled law clerks that he had a "special assignment" for them. He told them that "*Escobedo* had laid down new law, but that he felt the ruling needed clarification."[76] One of Warren's clerks, Kenneth Ziffren, recalled in 2005 that some 200 to 300 cases were reviewed, but after weeding out those that touched on other issues such as Fourth Amendment search and seizure or even coercion, they settled on four and suggested *Miranda v. Arizona* as the lead case.[77] As noted internally,[78] *Miranda* was indeed the ideal case to extend the framework first crafted in *Escobedo.* In *Miranda*, there was no request for counsel and counsel did not request to see the suspect. Further, *Miranda* had not been advised of his right to counsel, although arguably there was an issue as to whether this point had been adequately preserved.[79]

Nonetheless, given the posture of the case below, Miranda's counsel sought far more than mere "clarification." The relief sought, as noted in the "question presented,"[80] clearly represented a radical extension of the rather circumspect holding in *Escobedo.* Companion cases[81] went even further than *Miranda* in attempting to extend the scope of the Sixth Amendment's right to counsel. *Westover* asked whether counsel should be appointed to a "prime suspect" at "the preliminary stage."[82] *Stewart*, as proffered by the ACLU, literally went to the wall and argued that an advisement was not enough, that counsel must be provided to bolster confidence, and to ensure that an accurate and complete record is kept of the proceedings.[83] Closest to *Miranda*, *Vignara* asked whether a confession should be admitted in the absence of a request for counsel.[84]

This common Sixth Amendment thread, the presence of counsel, apparently fell on deaf ears. As a result, the opportunity to consider the admissibility of any custodial admission or confession made in the absence of counsel was lost, perhaps forever, as *Miranda* slowly morphed into a Fifth Amendment case.

The brief in *Miranda* was written by John Frank and argument in the lead case was by John P. Flynn, an experienced[85] Phoenix criminal trial lawyer. While Frank's brief had argued the case on Sixth Amendment grounds,[86] Flynn had purportedly maintained from the outset that the Fifth Amendment was dispositive, a position he strongly pursued at oral argument. Stressing the importance of the suspects' knowledge of their Fifth Amendment rights, Flynn, in responding to a question from Justice Stewart, seamlessly melded the Fifth and Sixth Amendments into one cogent argument by suggesting that knowledge of Fifth Amendment protections will necessarily lead to a request for counsel.[87] The discussion then continues as Flynn gave one of the most telling answers in the history of the Court. In doing so, he foreshadowed the Court's ultimate decision by describing, almost word for word, the Court's famous fivefold warning:

> MR. JUSTICE STEWART: And what would a lawyer advise him that his rights were?
>
> MR. FLYNN: That he had a right not to incriminate himself; that he had the right not to make any statement; that he had a right to be free from further questioning by the police department; that he had the right, at the ultimate time, to be represented adequately by counsel in court; and that if he was too indigent or too poor to employ counsel, the state would furnish him counsel.[88]

Concurring with Justice Brennan as to the importance of the decision the Court was about to issue,[89] Chief Justice Earl Warren assigned the majority opinion to himself. Warren, who by this stage in his tenure generally had his clerks author his opinions, chose to personally draft *Miranda*, largely on his own.[90] Initially sharing his drafts with his clerks but not his brethren, he eventually sought out Justice Brennan, his faithful friend and ally. In a 21 page memorandum dated May 11, 1966, and addressed solely to the Chief Justice, Brennan counseled reliance upon *Malloy v. Hogan*,[91] which had recently rendered the Fifth Amendment's right to remain silent binding upon the States through the operation of the Due Process clause of the 14th Amendment.[92] Fifty years after the event, it is hard for us to envision Brennan's concern, but at this point, Brennan was viewing the Sixth Amendment as a trial right. Prior to cases such as *Brewer v. Williams*,[93] Brennan was quite correct to assert that Miranda had been represented at trial but by the time the matter was reached

for trial, given the confession, there was little even the ablest attorney could do to save him.[94] In essence, Brennan believed Miranda's waiver of his Fifth Amendment right had trumped whatever value he may have possibly derived from the Sixth.

Accepting Brennan's counsel, Warren drafted what eventually became the Court's majority opinion.

The *Miranda* Decision

While most lay persons, many experienced criminal defense counsel, and even the Supreme Court, casually speak of "*Miranda* rights,"[95] as applied to substantive rights, the term is a misnomer. *Miranda v. Arizona*[96] created no substantive rights. If *Miranda* can be said to have created any rights at all, it did so by emphasizing the then-existing need for waiver through the vehicle of an advisement whereby a custodial suspect is to be informed of his or her Fifth and Sixth Amendment rights as previously determined by the Court in *Malloy*, *Gideon* and *Escobedo*.

In the end, *Miranda* added little that did not exist on the eve of the decision. The importance of *Miranda* is one of procedure, as opposed to substance, in that it now required a formal declaration of the rights previously recognized in *Gideon*, *Malloy*, and *Escobedo.*

The Aftermath of *Miranda*

While *Miranda* immediately and permanently became an anathema for all aspects of law enforcement and was seen by large segments of the public as "handcuffing" the police, this is a conclusion that is at best questionable in terms of post-*Miranda* experience.[106]

The key aspect of *Miranda,* apparently overlooked by many, is that if *Miranda* had never been decided, the prosecution would still have to demonstrate, prior to offering a purported confession at trial, that the defendant made a knowing and intelligent waiver of his or her Fifth and Sixth Amendment rights. Under principles firmly established since *Johnson v. Zerbst*,[107] this would require proof

"Far from handcuffing the police, Miranda *empowered them to secure the necessary waiver at a time when the suspect was most vulnerable, immediately after the trauma of an arrest and while in custody."*

In *Miranda v. Arizona,* Warren commenced with an examination of the techniques presently taught and used by law enforcement personnel.[97] Thereafter, with some disdain, he noted:

> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.[98]

After a review of *Malloy* and *Escobedo*, Warren proceeded to set forth the Court's now famous requirement that suspects in a custodial setting be advised of their right to remain silent,[99] be administered a warning describing the possible consequences of failing to remain silent,[100] be informed that they are entitled to counsel not only at a trial but during the interrogation phase,[101] and be informed of the right to appointed or assigned counsel.[102] Finally, the Court discussed the "heavy burden" to be borne by the prosecution when maintaining that the suspect had knowingly and voluntarily waived the rights as described by the Court.[103] In setting forth these demands, Warren harkened back to *Johnson v. Zerbst*[104] and specifically noted that "[t]his Court has always set high standards of proof for the waiver of constitutional rights."[105]

that the suspect was made aware of his or her rights, and that he or she voluntarily chose to waive the same. Far from handcuffing the police, *Miranda* empowered them to secure the necessary waiver at a time when the suspect was most vulnerable, immediately after the trauma of an arrest and while in custody. The strangest irony contained in the majority opinion is that the Court seemingly decided as it did in order to defuse the advanced psychological techniques[108] which it conceded fell short of even the most liberal Due Process definition.[109] However, when one closely examines this aspect of the Court's rationale, it becomes readily apparent that the majority obviously missed "the elephant in the room"—*the very techniques which the Court abhorred in obtaining confessions were equally capable of being used to obtain a waiver*.

The failure to recognize this crucial element ultimately led to re-imposition by the Court of the "totality of the circumstances" test with disastrous consequences. In *Moran v. Burbine*,[110] the defendant and two others were arrested for burglary. A tipster had provided information that the defendant may have been responsible for a murder that occurred several months earlier. He was arrested, and when the investigating detective informed him of his *Miranda* rights, he refused to execute a written waiver. Thereafter, the co-defendants in the robbery were questioned concerning the murder and gave statements implicating the defendant.

Meanwhile, family members had successfully made contact with the local public defender's office and an assistant public defender phoned the police department where the defendant was being held and informed the detectives that she would be representing him in the event of a lineup or questioning. Less than one hour later, the defendant was brought to an interview room. Despite his earlier refusal, on three separate occasions the defendant signed a written form acknowledging that he understood his right to the presence of an attorney and explicitly indicated that he " '[did] not want an attorney called or appointed for [him] before he gave a statement.' "[111]

Following a conviction for murder, the case worked its way through the state and federal appeals process and ultimately reached the Supreme Court. In upholding the waiver and in refusing to find that it was tainted by the failure to inform the defendant that he had counsel, the Court, per Justice O'Connor, resorted to a rationale intellectually indistinguishable from that seen nearly thirty years earlier in *Spano v. New York*.[112] The 6-to-3 decision analyzed the confession and waiver by means of the "totality of the circumstances test."[113] As in *Spano*, the availability[114] of counsel was viewed as a circumstance to be evaluated in assessing the overall picture. The upshot of *Burbine* is that *Miranda* is no longer employed as the shield envisaged by the Court in 1966, but as a sword with which to validate a suspect's waiver and subsequent confession:

> Echoing the standard first articulated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), *Miranda* holds that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.[115]

Thus, the greatest virtues to be bestowed by *Miranda* no longer run to suspects vulnerable in a custodial setting, but to law enforcement. By permitting an irrevocable waiver[116] at the station house, crucial decisions concerning the future conduct of the defense are placed squarely in the hands of the suspect. Most ironic is that a defendant is permitted to waive the presence of counsel without legal advice as to the advisability of such a decision. When one becomes cognizant of the fact that after *Gideon*, *Malloy*, and *Escobedo* some form of notification and waiver is necessary, the much maligned *Miranda* decision represents the safest and least destructive course of conduct from the vantage point of those most interested in securing a confession.

Unfortunately, in spite of *Miranda*, custodial abuses still occur. In *Mincey v. Arizona*,[117] the defendant confessed after he was subjected to four hours of interrogation while incapacitated and sedated in an intensive care unit. In *United States v. Rullo*,[118] the evidence was that while he was at the police station, the officers threw the defendant to the ground, punched and continued kicking him until he confessed. In *People v. Guilford*,[119] Syracuse, New York, police officers locked the defendant in a 10-by-10 room for 49 $^{1}/_{2}$ hours. He was watched the entire time and was aggressively interrogated by four rotating pairs of detectives in relatively brief intervals. There was no direct evidence that he slept and, apart from one sandwich, he did not eat. Described as "defeated," he constantly stared at the floor, and often wept.[120] Perhaps the saddest commentary is that the Innocence Project reports that more than one out of four people wrongfully convicted but later exonerated by DNA evidence were reported to have made false confessions.[121] At a minimum, the persistence of such practices, even in the face of *Miranda*, indicate the present need to capture all interrogations on video from the point when custody commences until that point where the interrogation finally ceases.[122]

By now it should be apparent that the rule from *Miranda* should be modified to include the need for judicial approval of all waivers. While waivers could still be secured in a custodial setting, for a confession to be admissible, a valid waiver of the right to remain silent and the right to counsel at the time of the original interrogation would have to be reaffirmed within a judicial setting. While this could take several forms, the most efficacious method would be a reaffirmation of the waiver before the trial judge. At that time, the Court would inform the suspect turned defendant of his or her Fifth and Sixth Amendment rights and conduct an inquiry as to whether he or she wished to waive the same.[123]

While the likely effect of such a procedure would be to abolish admissions in all but plea situations, it is submitted that the net effect upon the criminal justice system would be positive. The most immediate impact would be to end judicially approved coercion of those who are, by and large, most vulnerable.[124] Next, it would work to once and for all free law enforcement from its chronic addiction to confessions.[125] Third, such a decision would benefit the public by forcing law enforcement to reorganize so as to end archaic interdepartmental rivalries.

One need only look at recent terrorist attacks to see how much information is lost in disputes between agencies. Fourth, the virtual elimination of confessions will force law enforcement to utilize all of the technological tools at its disposal of which DNA testing is but the tip of the iceberg. Increased use of technology by police agencies will result in swifter, more effective law enforcement. [126]

Finally, such a decision would be Constitutionally honest. It would breathe new life into the Founder's expression of the basic human principle that "no person * * * shall be compelled in any criminal case to be a witness against himself" and will serve to rediscover the fundamental brilliance of *Bram*.

Endnotes

75 Jim Newton, Justice For All, Earl Warren and the Nation He Made, 464 (2006); see also, Lucas A. Powe, The Warren Court and American Politics, 393 (2000).

76 Newton, *supra.*

77 *Id.*; see also, Baker at 103.

78 A *certiorari* memorandum from Jerome B. Falk to Justice William O. Douglas dated September 10, 1965, succinctly summed up the basis of acceptance:

> This is a good case to consider because (1) it presents the issue squarely without doubt as to whether the accused was warned of his right to counsel or not; (2) it will be argued by competent counsel—John P. Frank; (3) there is no possibility of anyone seriously arguing that this [Petitioner] clearly knew of his rights, since he is ill-educated and apparently mentally unstable.

79 The crucial objection upon which *certiorari* was based was "the Supreme Court of the United States says a man is entitled to an attorney at the time of his arrest" (Gary Stuart, Miranda, The Story of America's Right to Remain Silent, 23 [2004]). Legally incorrect, this statement made no mention of the failure to advise *Miranda* of his right to counsel.

80 "Whether the confession of a poorly educated, mentally abnormal, indigent defendant, not told of his right to counsel, taken while he is in police custody and without the assistance of counsel, which was not requested, can be admitted into evidence over specific objection based on the absence of counsel?" *Miranda v. Arizona*, Brief for Petitioner at p.6.

81 *Michael Vignara v. New York, Carl Calvin Westover v. U.S., California v. Roy Allen Stewart.*

82 "Under the same Escobedo decision, must the government, before any accusatory interrogation, actually furnish appointive counsel to a "prime-suspect" indigent, at the preliminary stage, and inform him of his right to have such counsel provided to him, as it must at the time of trial itself?" Brief for Petitioner, Questions Presented, Question 2, p. 2.

83 The California Supreme Court had previously reversed Stewart's conviction for first degree murder finding that the "accusatory stage" had been reached (*People v. Stewart*, 400 P.2d 97 [Cal. 1965]).

84 *Vignara* also raised a rather straight forward Fifth Amendment voluntariness issue. *Vignara v. New York,* Brief for Petitioner, p. 2.

85 Flynn's competence was such that it was cited in one of the certiorari memorandums as a basis for accepting the case (*see* n. 73, *supra*.).

86 *Miranda v. Arizona*, Brief for Petitioner, p.2; Stuart, at 47.

87 *Miranda v. Arizona*, 384 U.S. 436, transcript of oral argument.

88 *Miranda v. Arizona*, 384 U.S. 436, transcript of oral argument.

89 In a memorandum to Warren dated May 11, 1966, Brennan predicated his remarks by presciently noting that "this will be one of the most important opinions of our time . . .". Justice William J. Brennan, memorandum to Chief Justice Earl Warren dated May 11, 1966.

90 Newton, at 465.

91 *Malloy v. Hogan*, 378 U.S. 1 (1964).

92 Specifically, Brennan advised, "[y]ou may recall that at the initial conference to select the cases for argument, I offered the following: that the extension of the privilege against the states by Malloy v. Hogan inevitably required that we consider whether police interrogation should be hedged about with procedural safeguards effective to secure the privilege as we defined it in Malloy, namely, 'The right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" William J. Brennan, memorandum to Chief Justice Earl Warren dated May 11, 1966.

93 *Brewer v. Williams*, 430 U.S. 387 (1977).

94 Newton, at 465.

95 *See*, *e.g.*, *Yarborough v. Alvarado*, 541 U.S. 652 (2004).

96 *Miranda v. Arizona*, 384 U.S. 436 (1966).

97 *Miranda v. Arizona*, 384 U.S. 436 (1966) at 449-455.

98 *Miranda v. Arizona*, 384 U.S. 436 (1966) at 457.

99 *Miranda v. Arizona*, 384 U.S. 436 (1966) at 467-468.

100 *Miranda v. Arizona*, 384 U.S. 436 (1966) at 489.

101 *Miranda v. Arizona*, 384 U.S. 436 (1966) at 471.

102 *Miranda v. Arizona*, 384 U.S. 436 (1966) at 473.

103 *Miranda v. Arizona*, 384 U.S. 436 (1966) at 475.

104 *Johnson v. Zerbst*, 304 U.S. 458 (1938).

105 *Miranda v. Arizona*, 384 U.S. 436 (1966) at 475.

106 *See* Schulhofer, *Miranda's Practical Effect: Substantive Benefits and Vanishing Small Social Costs*, 90 N.W.U.L.Rev. 556-60 (1996); *but see* Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 N.W.U.L.REV. 387, 486-97 (1996).

107 *Johnson v. Zerbst*, 304 U.S. 458 (1938).

108 *See Miranda v. Arizona*, 384 U.S. 436 (1966) at 449-455.

109 *Miranda v. Arizona*, 384 U.S. 436 (1966) at 457.

110 *Moran v. Burbine*, 475 U.S. 412 (1986).

111 *Moran v. Burbine*, 475 U.S. 412 (1986) at 417-418, *quoting app. to* Pet. for Cert. 94, 103, 107.

112 *Spano v. New York*, 360 U.S. 315 (1959).

113 *Moran v. Burbine*, 475 U.S. 412 (1986) at 421.

114 Electronically, of course.

115 *Moran v. Burbine*, 475 U.S. 412 (1986) at 421 [*emphasis* supplied herein].

116 Although a suspect may clearly rescind his or her waiver during the course of interrogation, that recession will only be prospective in nature. A defendant, when able to calmly reflect upon the effect of his or her decision will not be able to rescind statements previously made.

117 *Mincey v. Arizona*, 437 U.S. 385 (1978).

118 *United States v. Rullo*, 748 F. Supp. 36 (D. Mass. 1990).

119 *People v. Guilford*, 991, N.E.2d 204 (New York 2013).

120 991 N.E.2d at 207.

121 Innocence Project, http://www.innocenceproject.org/causes/false-confessions-admissions/.

122 Such will permit the trier to fully and accurately determine the voluntariness of any waiver which is secured.

123 For an analog of the proposed statute, *see*, N.Y. C.P.L. § 320.10(2).

124 While the Innocence Project calls for police videotaping of confessions as a means of eliminating abuse, it is submitted herein that such will have little or no effect upon the decision to waive in the absence of counsel.

125 *See Escobedo v. Illinois*, 378 U.S. 478 (1963) at 488-489. "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."

126 Since this process will nonetheless permit a preliminary waiver to occur at the police station, the police will not lose the benefit of the defendant's admissions in solving related crimes.

Edward L. Fiandach, a Rochester New York trial lawyer, is ABA Board Certified in DUI defense, is a Past Dean of the National College for DUI Defense and is the owner of the Rochester-based law firm, Fiandach & Fiandach. He is a 1975 graduate of St. John Fisher College, a 1978 graduate of Albany Law School and is an Assistant Adjunct Professor at the University of Rochester where he teaches Constitutional Law and Criminal Procedure. He is the author of *New York Driving While Intoxicated, New York Driving While Intoxicated* 2d and *Handling Drunk Driving Cases* 2d, which are all published by Thomson Reuters. He also writes and publishes *Fiandach's New York DWI Bulletin,* a monthly publication on DWI. related cases and issues. He is the author of numerous articles and has successfully litigated numerous appeals in both the New York and Federal system.

Erinmarie Byrnes is a Senior at the University of Rochester studying Political Science, English, and Legal Studies. She does research on Graduate Writing, and was the Executive Director of Academic Affairs in Student Government. She is a Teaching Assistant for Fiandach's Constitutional Law and Criminal Procedure course and interned with his office this summer. She hopes to continue her Constitutional studies in law school.

Where's the Emergency? Courts Narrowly Construe the Emergency Exception to the Fourth Amendment

By Hon. Barry Kamins

In *People v. Ringel*,[1] the Appellate Division, Second Department has recently reminded prosecutors that courts will narrowly construe the emergency exception to the Fourth Amendment: when the police rely upon this doctrine to enter a premises without a warrant they must, in fact, have a reasonable basis to believe that there *is* an emergency.

Under the emergency doctrine, a police officer can enter premises without a warrant to protect individuals in distress,[2] to assist victims of crimes that have just occurred, or to investigate suspicious signs of impending danger.[3] This exigency, therefore, is based on the officer's obligation to protect life and property.

The Court of Appeals has defined the guidelines for the application of the emergency doctrine. In *People v. Mitchell*,[4] the Court held that there are three basic requirements: (1) the police must have reasonable grounds to believe that there is an emergency at hand and that there is an immediate need for their assistance for the protection of life or property;[5] (2) the search must *not* primarily be motivated by an intent to arrest and seize evidence;[6] and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or property to be searched.[7]

The Supreme Court has also reviewed the emergency exception and its decision may have an impact on *Mitchell*. In *Brigham City v. Stuart*,[8] the Court rejected a subjective standard for determining the existence of the emergency exception. The Court held that suppression courts must apply an objective standard to assess whether the police entered a dwelling because of an emergency situation. It rejected a subjective standard, as used in *Mitchell*, because the Court found it too difficult to determine the subjective belief of a police officer and whether the "primary motivation" for *entry* was the rendering of emergency aid.

The New York Court of Appeals has not yet decided whether to adopt *Brigham City* or retain the subjective standard enunciated in *Mitchell*.[9] In the interim, intermediate appellate courts have differed on *Brigham City's* impact. The Second Department has acknowledged that pursuant to *Brigham City*, there is no longer any need to determine the subjective motivation of the police. In addition, on a number of occasions the Second Department has not found it necessary to determine whether the second prong of *Mitchell* is still viable under the state constitution because, in those cases, the Court found the police conduct permissible under *Brigham City* and *Mitchell*.[10] The Third Department has eliminated the motivation factor in its analysis.[11] However, the Fourth Department has retained the *Mitchell* standard.[12]

The issue recently raised in the *Ringel* case relates to the first criteria articulated in *Mitchell*: the police must have reasonable grounds to believe that there is an emergency at hand and that there is an immediate need for their assistance for the protection of life or property. Thus, if there is no reasonable basis to believe that an individual in the premises requires emergency assistance, the police may not enter.

In *Ringel*, the police received a notification regarding a silent alarm at a house in Woodmere, New York. One of the two police officers who responded to the alarm testified at the suppression hearing that he had responded to hundreds of similar alarms during his career and that they were usually false alarms. In addition, although many people would allow the police to search their homes when the police arrived in response to such notifications, a search was not a requirement of the Nassau County Police Department.

When the two police officers arrived at the address specified in the notification they observed the defendant working underneath a van. The officers detected no sign of a break-in and there was no evidence that the defendant; a middle-aged man, had been involved in any criminal activity.

The defendant informed the police that the house was owned by his parents but could not produce any photographic identification. Although the defendant produced a credit card bearing the name of the homeowner, the defendant's father, and a set of house keys, the officers told him that they had to ensure that "everybody in the house was okay."

The officers radioed for additional officers because the defendant was unable to produce photographic identification and because he became agitated and evasive. At one point the defendant demonstrated that his keys could open the front door and, after doing so, attempted to enter and close the door behind him. One officer pushed the defendant forward and entered the house himself. Once inside, the officer saw two hand grenades and a handgun. After the defendant was handcuffed and placed in a police car, the police went through the house. No one was there.

The police obtained a search warrant and, during the ensuing search, they recovered guns, forged gun permits, explosives, ten pounds of marijuana and forged currency. The suppression court denied suppression of the physical

evidence, holding that the police had lawfully entered the house pursuant to the emergency exception.

In reversing, the Second Department held that, as a threshold matter, the evidence did not establish that the police had an objectively reasonable basis for believing that a person within a premises was in need of immediate aid. None of the facts known to the officers who responded supported an objectionably reasonable belief of an emergency.

Initially, the Court noted that the police had responded to an alarm that was frequently found to be a false alarm; the triggering of the alarm did not, in itself, permit the police to enter the house under the emergency exception.

When the police arrived, they found the defendant, a middle-aged man, working on a van in the driveway. He had a key to the house and explained his connection to the house. He also gave the police his cell phone so that his sister could corroborate what he had told the police. Finally, the Court took note that there was no evidence of a break-in and neither of the police officers testified that they had any indication that there were guns in the house. Thus, the Court concluded, these facts fell far short of the circumstances under which the emergency doctrine has been held applicable.

The Court also pointed out that, while the police were not permitted to enter the house, there were other investigative options that could have been pursued. For example, the officers could have spoken to a neighbor who was sitting in a car in the driveway next door. In addition, the police could have waited to speak to the defendant's sister who came to the house minutes after speaking to the police on the defendant's cell phone. Instead of waiting, the police decided to enter the house.

Ringel is only one of a handful of cases in which courts have found that the prosecution failed to establish the existence of an emergency. For the most part, New York courts have approved warrantless searches in a variety of settings. In one line of cases, the police have lawfully entered premises to locate or aid the victims or possible victims of a reported crime.[13] Courts have also condoned police entry when there is a report of a violent fight involving a gun;[14] a report of a domestic dispute and the police enter a room to determine whether one of the parties is safe;[15] or a report of screaming and a serious verbal dispute.[16]

In other cases, the emergency doctrine has been based on a need to investigate suspicious sounds or to look for persons who are missing, unaccounted for, or have been kidnapped.[17] When the police receive a report of an emotionally disturbed person, they have the right to enter without a warrant.[18] Also, fire marshals can make a warrantless entry to discover the cause of a fire but *not* to gather evidence for an arson prosecution.[19] Other courts have condoned a warrantless entry where there is a report of explosives on the premises;[20] a gasoline leak;[21] an odor indicating a fire;[22] or a severe water leak.[23]

Courts will also apply the emergency doctrine when the police must enter premises to ensure the safety of children.[24] In addition, the exception will be applied when the life of an undercover officer is in jeopardy.[25]

Finally, a warrantless entry can be based upon reports that a gun has been fired in a home, in combination with other factors that lead the police to reasonably believe an emergency is at hand. Thus, when there is a report of "shots fired"[26] in an apartment or "person shot in an apartment,"[27] the police may enter if the totality of the circumstances leads the officers to believe that an emergency exists.

"Ringel is only one of a handful of cases in which courts have found that the prosecution failed to establish the existence of an emergency. For the most part, New York courts have approved warrantless searches in a variety of settings."

Despite the large number of settings in which courts have upheld the application of the emergency exception, courts will suppress evidence when the facts do not support an objective basis for believing an emergency exists.

For example, in *People v. Mormon*,[28] the police were investigating a shooting and arrived at the building where the defendant lived. A downstairs neighbor told the police she had heard a "loud bang" come from the defendant's upstairs residence, which sounded like someone had "dropped a broom." However, when she later went outside and saw the police and an ambulance, she concluded that the sound had been a gunshot. She told the police the defendant lived with his girlfriend and their children.

While still outside the defendant's building, the detective interviewed the defendant, who told him that he had been shot on the street about one block from his home. After performing a cursory search of the area outside of the defendant's building, the police entered the defendant's residence and recovered physical evidence.

In affirming the hearing court's suppression of the evidence, the Second Department noted that the warrantless entry occurred 45 minutes after the police arrived on the scene and almost two hours after the time of the

alleged shooting. The court concluded that the minimal police investigation failed to establish that any children were in imminent danger.

Similarly, in *People v. Garrett*,[29] the police unlawfully entered an apartment in Brooklyn, New York after a minimal investigation failed to establish that any children were in imminent danger. The police were summoned by employees of the Kings County Society for the Prevention of Cruelty to Children (SPCC). The agents of SPCC had received an anonymous complaint, *one day earlier*, that there were two children screaming in the defendant's apartment. The police entered the apartment without a warrant after the defendant refused entry. The Court noted that the entry and search was triggered by "ambiguous and uncorroborated information relayed by members of a volunteer organization, who were responding to a day-old anonymous complaint."[30]

Other courts have refused to find the existence of an emergency when the police enter a premises *after* firefighters have completed their duties;[31] when the only sounds emanating from an apartment are a banging sound and a woman's voice;[32] and where the police chase a defendant in possession of a gun into a house, remove the defendant from the house (which is otherwise empty) and enter the house to search for the gun.[33]

The emergency exception remains a viable doctrine under which law enforcement may enter premises without a warrant to protect and assist those whose lives are in jeopardy. The doctrine will be construed narrowly, however, to ensure that it is not being used as a pretext to search for evidence. *Ringel* serves as a reminder that when the police rely upon the emergency exception to enter a premises without a warrant they must, in fact, have a reasonable basis to believe there *is* an emergency.

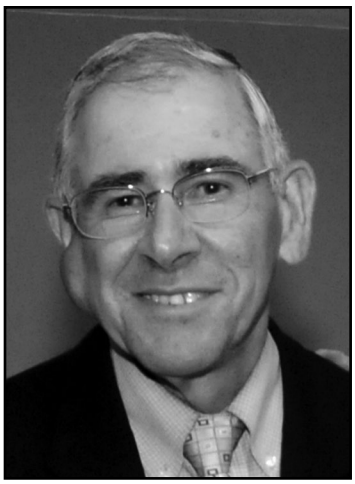
Endnotes

1. *People v. Ringel*, ___ A.D.3d ___, 2016 N.Y. Slip Op. 08887 (2d Dep't 2016).
2. *City and County of San Francisco v. Sheehan*, ___ U.S. ___, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015).
3. The emergency exception has also been extended to protect the lives of animals. *People v Roundtree*, ___ Misc. 3d ___, 2016 N.Y. Slip Op 26333 (Justice Ct. Monroe Co. 2016); *People v. Juliano*, ___ Misc. 3d ___ , 2016 N.Y. Slip Op 32210 (County Ct. Wayne Co. 2016); *People v. Rogers*, 184 Misc. 2d 419, 708 N.Y.S.2d 795 (App. Term 2d Dist. 2000).
4. *People v. Mitchell*, 39 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 607 (1976).
5. *People v. Molnar*, 98 N.Y.2d 328, 746 N.Y.S.2d 673, 774 N.E.2d 738 (2002); *People v. Taylor*, 24 A.D.3d 1269, 806 N.Y.S.2d 822 (4th Dep't 2005); *People v. DePaula*, 179 A.D.2d 424, 579 N.Y.S.2d 10 (1st Dep't 1992); *People v. Kane*, 175 A.D.2d 881, 573 N.Y.S.2d 729 (2d Dep't 1991) (foul odor from an apartment constituted emergency exception).
6. *See, e.g.*, *People v. Price*, 211 A.D.2d 943, 621 N.Y.S.2d 413 (3d Dep't 1995). However, if the police make an arrest after entering because of an emergency, the arrest can still be valid. *People v. Fields*, 191 Ill. 2d 542, 738 N.E.2d 931, 250 Ill. Dec. 462 (2000).
7. *People v. Andujar*, 160 A.D.2d 403, 553 N.Y.S.2d 759 (1st Dep't 1990); *People v. Denis*, 29 Misc. 3d 1150, 909 N.Y.S.2d 325 (Dist. Ct. Nassau Co. 2010); *cf. People v. Liggins*, 64 A.D.3d 1213, 883 N.Y.S.2d 415 (4th Dep't 2009).
8. *Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006); *see also Michigan v. Fisher*, 558 U.S. 45, 130 S. Ct. 546, 175 L. Ed. 2d 410 (2009).
9. In *People v. Dallas*, 8 N.Y.3d 890, 832 N.Y.S.2d 893, 865 N.E.2d 1 (2007), the Court affirmed the finding of a proper emergency search and found all three criteria of *Mitchell* supported in the record. The Court stated it had no occasion to consider whether *Mitchell* should be modified in light of *Brigham City*.
10. *People v. Loucks*, 125 A.D.3d 887, 4 N.Y.S.3d 256 (2d Dept. 2015); *People v. Rossi*, 99 A.D.3d 947, 952 N.Y.S.2d 285 (2d Dep't 2012), *aff'd*, 24 N.Y.3d 968, 995 N.Y.S.2d 692, 20 N.E.3d 637 (2014); *People v. Stanislaus-Blache*, 93 A.D.3d 740, 940 N.Y.S.2d 136 (2d Dep't 2012); *People v. Rodriguez*, 77 A.D.3d 280, 907 N.Y.S.2d 294 (2d Dep't 2010); *People v. Helenese*, 75 A.D.3d 653, 907 N.Y.S.2d 223 (2d Dep't 2010); *People v. Leggett*, 75 A.D.3d 609, 904 N.Y.S.2d 773 (2d Dep't 2010); *People v. Dillon*, 44 A.D.3d 1068, 844 N.Y.S.2d 402 (2d Dep't 2007); *People v. Desmarat*, 38 A.D.3d 913, 833 N.Y.S.2d 559 (2d Dep't 2007).
11. *Colao v. Mills*, 39 A.D.3d 1048, 834 N.Y.S.2d 375 (3d Dep't 2007).
12. *People v. Doll*, 98 A.D.3d 356, 948 N.Y.S.2d 471 (4th Dep't 2012), *aff'd*, 21 N.Y.3d 665 (2013); *People v. Stevens*, 57 A.D.3d 1515, 871 N.Y.S.2d 525 (4th Dep't 2008).
13. *People v. Gibson*, 117 A.D.3d 1317 (3d Dep't 2014); *People v. Timmons*, 54 A.D.3d 883 (2d Dept. 2008).
14. *People v. Garcia*, 27 A.D.3d 307 (1st Dept. 2006).
15. *People v. Thatcher*, 9 A.D.3d 682 (3d Dep't 2004).
16. *People v. Paulino*, 216 A.D.2d 238 (1st Dep't 1995).
17. *People v. Mitchell*, 39 N.Y.2d 173 (1976).
18. *People v. Eckhardt*, 305 A.D.2d 860 (3d Dep't 2003).
19. *People v. Calhoun*, 49 N.Y.2d 398 (1980).
20. *People v. Bower*, 27 A.D.3d 1122 (4th Dep't 2006).
21. *People v. Johnson*, 48 Misc. 2d 907 (Sup. Ct. N.Y. Co. 1965).
22. *U.S. v. Klump*, 536 f. 2d 113 (2d Cir. 2008).
23. *People v. Nusslein*, 248 A.D.2d 560, *aff'd*, 92 N.Y.2d 858 (1998).
24. *People v. Hodge*, 2 A.D.3d 1428 (4th Dep't 2003).
25. *People v. Gonzalez*, 232 A.D.2d 273 (1st Dep't 1996).
26. *People v. Parker*, 299 A.D.2d 859 (4th Dep't 2002) (report of gunfire and the presence of several people in the house, including children).
27. *People v. Clemente*, 202 A.D.2d 202 (1st Dep't 1994) (police heard glass and metal breaking).
28. *People v. Mormon*, 100 A.D.3d 782 (2d Dep't 2012).
29. *People v. Garrett*, 256 A.D.2d 588 (2d Dep't 1998).
30. *Id*. at 589.
31. *People v. Christianson*, 57 A.D.3d 1385 (4th Dep't 2008).
32. *People v. Hammett*, 126 A.D.3d 999 (2d Dep't 2015).
33. *People v. Scott*, 133 A.D.3d 794 (2d Dep't 2015).

Hon. Barry Kamins is a retired Supreme Court Justice, author of *New York Search and Seizure* (Lexis/Nexis 2016) and a partner in Aidala, Bertuna & Kamins. He is an adjunct professor of law at Brooklyn Law School where he teaches New York Criminal Procedure.

The Governor Selects Rowan Wilson as His Nominee for A Seat on the New York Court of Appeals, Thereby Completing the "Cuomo Court"

By Spiros Tsimbinos



In the last issue of the *Newsletter*, I wrote about the "Cuomo Court" and noted that the Governor had appointed all six of the currently sitting Judges on the New York Court of Appeals and was in the process of selecting a replacement for Judge Pigott, who reached the mandatory retirement age and who was the last of the Pataki appointments. I indicated that in making this latest appointment, the Governor in the space of four years had transformed the Court into his own making and that this would be one of his most lasting legacies.

On December 1, 2016, the Judicial Nominating Commission announced its selection of seven possible appointees to the New York Court of Appeals, which the panel had forwarded to Governor Cuomo. Speculation had been high that Stephen Younger, former President of the New York State Bar Association, would be one of the seven recommended by the Judicial Commission since he had previously been on other lists. It was further rumored that Mr. Younger would actually be the Governor's final choice.

In a somewhat surprising development, when the list of seven was announced on December 1, Mr. Younger's name was not among the group of seven. Rather, the seven nominees presented to the Governor were as follows:

Erin Peradotto—Associate Justice of the Appellate Division, Fourth Department.

Caitlin Halligan—Partner at Gibson, Dunn and Crutcher and former Executive Assistant in the New York County District Attorney's Office.

Rowan Wilson—Partner at Cravath, Swaine & Moore.

Eric Corngold—Partner at Friedman Kaplan Seiler & Adelman.

Judith Gische—Associate Justice in the Appellate Division, First Department.

Benjamin Rosenberg—Former General Counsel of the Manhattan District Attorney's Office and currently a Partner at the Dechert Law Firm.

Robert Spolzino—Partner at Wilson Elser Moskowitz Edelman & Dicker.

Several of the candidates on the list of seven had been considered for prior vacancies. With respect to filling Judge Pigott's seat, much attention had focused on Justice Peradotto since she would replace Judge Pigott as a person from Upstate New York. According to state statute, the Governor had until January 15, 2017, to make his selection.

Just before the designated deadline, the Governor announced his selection of Rowan Wilson. Mr. Wilson had been on the list of seven on four prior occasions but had been passed over in favor of other candidates. This time, the Governor decided it was time to place Mr. Wilson on the Court as the replacement for Judge Pigott. Rowan Wilson is 56 years of age and a graduate of Harvard Law School. He resides in Port Washington in Nassau County. For the past 30 years, he has been a member of the law firm of Cravath, Swaine & Moore and he has served as a Partner since 1992. He has extensive experience in the commercial law area and Governor Cuomo cited this experience in announcing his selection. The Commercial Bar has for several years advocated the appointment of an expert commercial litigator to serve on the Court and Mr. Wilson meets this requirement. Mr. Wilson had been rated well qualified by our New York State Bar Association.

Mr. Wilson has also been active in many civil and social activities, having served in a leadership capacity at his law firm with regard to pro bono work. He has also served as Chairman of the Neighborhood Defender Services of Harlem since 1999. He represented employees in Jefferson County, Alabama, in a matter involving fair hiring practices. Prior to joining the Cravath law firm, he clerked for James Browning, the Chief Judge of the U.S. Court of Appeals for the Ninth Circuit.

In my prior article, I indicated that in picking his prior appointees, Governor Cuomo sought to advance two major goals: to make the Court more diverse, and to move the Court toward more liberal policies. In making his latest appointment, he has further advanced these goals. The Court, for the first time in its history, will now have two black members and along with its current two

members from the Hispanic community, the Court will have a majority complement comprised of members from minority groups. With Mr. Wilson's political affiliation as a Democrat, the Court will also be comprised of six Democrats and only one Republican, in contrast to the many years where the Court had a Republican majority. In terms of geographic makeup, the Court will now be heavily represented by New York City residents and a diminished number from Upstate New York. Mr. Wilson's residence in Nassau County also makes him the first member of the Court from that county in 25 years. In terms of gender, the Court will have a majority of four women and three men.

The State Senate has until February 15, 2017, to act on Mr. Rowan's nomination but it is expected that he will face little opposition and that he will be able to officially join the Court by the end of February. Following the announcement of his nomination, Mr. Wilson stated, "My entire career has been dedicated to the pursuit of justice and there is no better place to continue these efforts than on the New York State Court of Appeals." We congratulate Mr. Wilson on his appointment and wish him well as he begins his service on the State's highest court.

Mr. Wilson will be replacing Judge Pigott, who left the Court on December 31, 2016 due to having reached the mandatory retirement age. Rather than leaving the judicial system entirely, Judge Pigott has opted to apply for certification so that he can continue to serve on the Buffalo Supreme Court. Judge Pigott served on the Court with distinction for ten years after having been appointed by Governor Pataki in 2006. Previously he served as Presiding Justice of the Appellate Division, Fourth Department. Judge Pigott was known as a moderate Republican who often took a middle-of-the road position, especially in the area of criminal law.

He was also highly regarded by his colleagues and members of the Bar and was known for his calm and gracious demeanor and his excellent judicial temperament. On a personal note, I had the pleasure of interviewing Judge Pigott for an article in our *Newsletter* when he was first appointed in 2006. I found him to be extremely gracious and forthcoming and after following his ten-year career on the New York Court of Appeals, I can clearly state that he served with a great deal of distinction and well served the people of New York.

We thank Judge Pigott for his many years of service and contributions to the Bench and Bar and the people of New York State and wish him well in his new endeavors.

Spiros Tsimbinos is the former editor of the *New York Criminal Law Newsletter* and a recognized expert on New York Criminal Law and related subjects.

2017 NYSBA A

Criminal Justice

January

New York Hil

Above, Criminal Justice Section Chair Sherry Levin Wallach welcomes the crowd during the Criminal Justice Section Award program; above right, Queens County Chief Assistant District Attorney Jack Ryan presents the Outstanding Prosecutor Award to the U.S. Attorney for the Southern District of New York, Preet Bharara; at right, Hon. John M. Leventhal, Associate Justice, Appellate Division Second Judicial Department, accepts the Vincent E. Doyle, Jr. Award for Outstanding Judicial Contribution from Hon. Barry Kamins; below left, Queens County District Attorney Robert J. Masters honors the late Brooklyn District Attorney Kenneth P. Thompson, and presents the David S. Michael Memorial Award to Mrs. Lu-Shawn Thompson and Acting Brooklyn District Attorney Eric Gonzalez; and below right, Dr. Heather Ann Thompson addresses the crowd.

nnual Meeting

Section Awards

25, 2017

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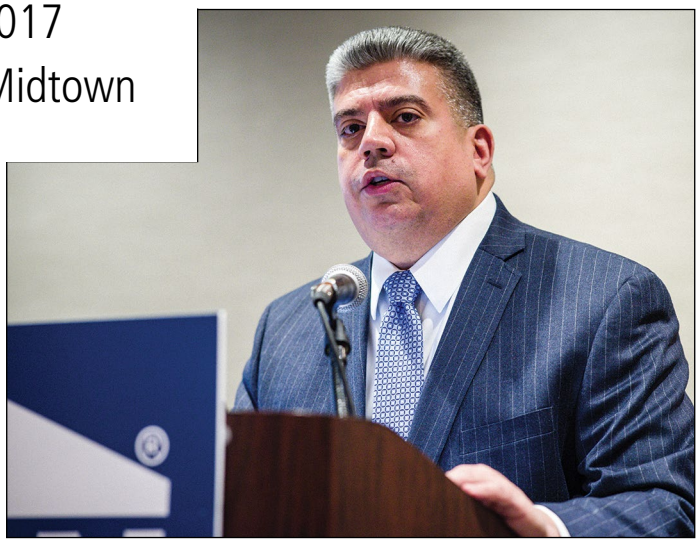

At top, Malvina Nathanson accepts the Outstanding Appellate Practitioner Award from Awards Committee Chair and Wyoming County Public Defender Norman P. Effman and Rick Jones, Executive Director of Neighborhood Defender Service of Harlem, accepts the Michele S. Maxian Award for Outstanding Public Defense from Lawrence S. Goldman; above, NYSBA President Claire Gutekunst congratulates the award recipients; at left, Eric Gonzalez addresses the crowd, below left, Preet Bharara sits with Michael Miller; below right, Sherry presents the Outstanding Contribution in the Field of Public Information to Dr. Heather Ann Thompson, author of Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy.

A Night of Learning

On Tuesday, November 29, 2016, the Criminal Justice Section Law Student Committee sponsored the event, "Criminal Law: The People, the Practice, and the Lifestyle." The program was designed specifically for students considering a career in the criminal justice field. Students were invited from schools across the city to explore their interest through an exciting panel discussion at White and Williams LLP. Panelists included Jay Shapiro, Esq. of White and Williams LLP, defense attorney Xavier R. Donaldson, Esq. of Donaldson & Chilliest, LLP and New York Criminal Court Judge, the Honorable Guy Mitchell. All three of the panelists served as prosecutors—Judge Mitchell in the Bronx District Attorney's Office, the United States Attorney's Office in Puerto Rico and the New York Attorney General's Office; Jay Shapiro in both the Bronx and Brooklyn District Attorney's Office, and Xavier Donaldson, a former Bronx ADA.

This was not your ordinary panel discussion. The conversation took an exciting turn as the panelists gave an account of their roles in the courtroom using a case study based on the hit HBO mini-series, *The Night Of*. Each panelist was very transparent in both their opinions of the show and the reality of the criminal justice system. As they engaged in this exciting role play, students were able to get an idea of what being an agent in the criminal justice system really means and what capacity they may wish to pursue. In addition to the role play, the panelists offered insight from past and current experiences and positions.

The event concluded with a Q&A session which allowed students an acute perception of the system and to inquire about any concerns they may have. While some panel discussions can seem flowery and ideological, students were able to walk away with tangible, real and valuable insight all the while being captivated by this presentation. The night ended with networking among colleagues and professionals over refreshments.

Dana Kai-el McBeth
***Juris Doctor Candidate*, 2019**
Fordham University School of Law

Change Is Upon Us but the Need for More Still Exists

By Sherry Levin Wallach

With the settlement of the *Hurrell Harring* lawsuit, which looked at the adequacy of criminal defense services being provided in five of New York State's counties, the Governor's signing of the Centralized Arraignment Bill (S7209-A) and efforts being made on wrongful convictions issues, such as the continued expansion of the use of video-taping interrogations and the use of police body cameras, much needed change is beginning to take effect in New York. While New York still needs significant funding to effectuate much of this change, and must address discovery reform and a law allowing sealing of certain criminal convictions, these recent developments have pointed us in the right direction.

The *Hurrell Harring* case has forced our State to look more closely at the adequacy and availability of indigent criminal legal services. It has spurred the implementation of standards to ensure quality mandated representation and encouraged more uniform implementation of training and availability of resources for defense attorneys statewide. While providing standards for representation has been a concern and focus of many in the criminal justice arena for many years, *Hurrell Harring* put the spotlight on the need for their further evaluation and implementation statewide.

In this regard, one of the biggest struggles that the criminal justice system faces outside of the City of New York is to provide defendants with counsel at their first appearance before the court, otherwise referred to as CAFA. The jurisdictions throughout New York State, due to their economic and geographic diversity, have sought to effectively provide people with this basic constitutional right. In early December 2016, Governor Cuomo signed the Centralized Arraignment Bill, which sets a framework for the establishment of off-hour arraignment parts throughout the State. This bill provides town and village Justice Court magistrates with the jurisdiction to sit in any off-hour arraignment parts in the county in which they preside. Having established centralized arraignment parts to handle off-hour arraignments will facilitate defendants being arraigned with counsel within the 24-hour statutory period from arrest.

The creation of regular off-hour arraignment parts will more easily enable courts to handle off-hour arraignments in many jurisdictions of the state, where the justice courts meet once a week or sometimes once every other week. CAFA is an absolute right to any criminal defendant charged with a crime or against whom a restraining order is being sought. While it may take some time for the counties to develop and implement their plans to effectively meet this requirement, this new legislation has fostered information and idea sharing that will not only facilitate the development of statewide centralized arraignment parts, but will also, hopefully, assist our State in having a more uniform criminal justice system.

> *"The* Hurrell Harring *case has forced our State to look more closely at the adequacy and availability of indigent criminal legal services."*

Two issues for criminal justice reform that have yet to be resolved are more expansive discovery in criminal cases and the sealing of certain criminal convictions. The New York State Bar Association issued reports on both of these topics in the recent past. Discovery reform is much needed, and it is being discussed among the interested parties. Hopefully, there will be a meeting of the minds that will allow for the expansion of discovery in criminal cases to make it more consistent with that provided in civil cases. More thorough discovery in criminal cases will promote fairness in criminal trials and reduce the likelihood of wrongful convictions. The sealing of criminal convictions is a NYSBA Legislative Priority. Our State legislature continues to draft and evaluate bills proposing sealing of certain criminal convictions. A criminal conviction can provide life-changing consequences for the past offender and his or her family. Such reform would allow members of our community the ability to be more productive members of our communities, which is a benefit to us all.

These changes and proposed changes are more than merely steps forward—they address fundamental needs. A more efficient and more uniform criminal justice legal community will provide for better representation of clients, more productivity and ultimately a more highly respected system. There are other areas where reform is needed, but the recent changes show there is a willingness on the part of interested and involved parties to listen to one another and be productive. I applaud all who are involved, no matter which side of the bench or bar they sit or stand, for working together on these important efforts.

Sherry Levin Wallach is the chair of the Criminal Justice Section.

Practice Corner
How to Demonstrate Rehabilitation to Potential Employers after Criminal Convictions

By Valerie K. Mitchell, Esq.

In the wake of a criminal conviction, a client's most immediate concern may be the effect that a criminal record will have on her future job prospects. Fortunately, there are protections in place that limit the degree to which an employer may discriminate against a person on the basis of her criminal history. While such protections exist under federal, state, and city law,[1] this article will focus on New York state law and the ways in which people with criminal convictions who are applying for professional licenses and employment may best demonstrate rehabilitation to maximize their likelihood of success.

Article 23-A of the New York Correction Law prohibits employers from denying employment or a professional license to an applicant based solely on her status as an ex-offender.[2] However, the law carves out two exceptions to this rule. The first applies where there is a direct relationship between the criminal offense and the specific license or employment that the applicant is seeking.[3] The statute defines a "direct relationship" as one in which "the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought."[4] The second exception attaches where the license or employment would involve an unreasonable risk to the safety or welfare of people or property.[5]

Where either exception might apply, the agency or employer must consider the eight factors articulated in New York Correction Law Section 753.[6] In cases potentially implicating the "unreasonable risk" exception, the employer considers the eight factors to determine whether the risk posed is actually unreasonable, such that it should preclude the applicant from obtaining the specific employment or license sought.[7] If the employer or agency determines that there is a direct relationship between the criminal conduct and the duties and responsibilities of the job or license being sought, it considers the eight factors to determine whether to award the employment or license to the applicant notwithstanding the existence of such a relationship.[8]

These eight factors include the duties entailed in the license or employment; the interest in protecting public safety; and three factors regarding the criminal offense—the age of the applicant at the time of the offense, the seriousness of the offense, and the time that has elapsed since the commission of the crime.[9] The seventh of eight factors is "any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct."[10]

Under either the unreasonable risk exception or direct relationship exception, the production of information demonstrating rehabilitation is unique, in that it is the only factor over which the applicant has any control after the time of the offense. So how can someone with a criminal conviction demonstrate rehabilitation? One way is by obtaining a certificate of relief from disabilities or a certificate of good conduct. To obtain these documents, an applicant must present evidence of rehabilitation to the sentencing court or Department of Corrections and Community Supervision (DOCCS).[11] A field Parole Officer may interview the applicant as part of the decision-making process.[12] If granted, a certificate of good conduct or certificate of relief from disabilities creates a statutory presumption of rehabilitation.[13]

Where an employer or licensing agency wrongly failed to credit the applicant with the presumption of rehabilitation based on her certificate of relief from disabilities, courts have held that a denial of the application is improper. In *Matter of Dellaporte v. New York City Department of Buildings*, 106 A.D.3d 446 (1st Dep't 2013), the Department of Buildings denied the petitioner's renewal application for a stationary engineer license, in part because petitioner's evidence of rehabilitation was insufficient.[14] The First Department reversed the denial of petitioner's Article 78 petition, holding that the respondent had failed to afford petitioner the mandatory presumption of rehabilitation based on his certificate of relief from disabilities and appeared to have disregarded additional evidence of rehabilitation.[15]

In *Meth v. Manhattan & Bronx Surface Transit Operating Authority*, 134 A.D.2d 431 (2d Dep't 1987), the respondent was denied employment as a bus driver due to his prior conviction for receiving a bribe.[16] The Second Department held that the transit authority had not met its burden of rebutting the presumption of rehabilitation established by the certificate of relief from disabilities, and had not established that any of the exceptions enumerated in N.Y. Correction Law Section 752 existed.[17]

Apart from a certificate of relief from disabilities or a certificate of good conduct, evidence of rehabilitation may also include letters of recommendation, professional references attesting to the applicant's good moral charac-

ter, proof of educational attainment or employment, and corroboration of participation in church and other community involvement.[18] Additionally, the applicant may present letters from volunteer work; proof of attendance in a job training program; or proof of participation in an addiction, mental health, or other social service program.[19]

Although rehabilitation is an important factor for the agency or employer to consider in determining whether to grant a license or employment, it is only one of eight factors to be considered.[20] Even where there is a presumption of rehabilitation, consideration of the other factors may warrant a denial of the license or employment. In *Arrocha v. Board of Education*, although the petitioner had submitted a certificate of relief from disabilities, letters of recommendation, and evidence of educational attainment, the Court of Appeals upheld the Board of Education's decision denying a license to the petitioner because the Board simply gave greater weight to the other statutory factors.[21] The court stated that "there is no justification for overturning the Board's determination without engaging in essentially a re-weighing of the factors."[22]

While criminal convictions can still have a lasting negative impact on people's lives, the law is increasingly recognizing that individuals with criminal histories, as much as anyone, need to have the tools to find work and thrive financially and professionally. We see this in New York City's Fair Chance Act (made effective in October 2015) which prohibits employers from inquiring into a job applicant's criminal history until extending a conditional offer of employment.[23] The trend goes beyond New York. President Obama directed federal agencies to "ban the box" in their hiring decisions, prohibiting such agencies from asking prospective government employees about their criminal histories on job applications.[24] These shifting attitudes towards providing more opportunities for those with criminal convictions may allow attorneys to advocate successfully for judicial applications of the New York Correction Law that are more protective of the rights of job applicants with criminal histories. Additionally, attorneys can utilize these mounting legal protections to provide assistance and encouragement to clients facing this uphill battle.

Endnotes

1. *See* Title VII of the Civil Rights Act, which prohibits using criminal and arrest history in two ways. First, the law prohibits disparate impact discrimination, which means that if the practice disproportionately results in the exclusion of a people of a particular race or national origin, the employer must show that the exclusion is "job related and consistent with business necessity." Second, Title VII prohibits employers from treating job applicants with the same criminal records differently based on race, national origin, or other protected characteristics. *See* Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, April 25, 2010, https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. *See also* Fair Chance Act, N.Y.C. Admin. Code Section 8-107(11), prohibiting employers from inquiring about an employment applicant's arrest and criminal conviction record until after extending a conditional employment offer to the applicant.
2. N.Y. Corr. Law § 752.
3. N.Y. Corr. Law § 752(1).
4. N.Y. Corr. Law § 750(3).
5. N.Y. Corr. Law § 752(2).
6. *Bonacorsa v. Van Lindt*, 71 N.Y.2d 605, 613 (1988) ("The interplay of the two exceptions and section 753(1) is awkward, but to give full meaning to the provisions, as we must, it is necessary to interpret section 753 differently depending on whether the agency or private employer is seeking to deny the license or employment pursuant to the direct relationship exception…or the unreasonable risk exception.").
7. *Id*.
8. *Id*.
9. N.Y. Corr. Law § 753(1).
10. *Id*.
11. For more information, see http://www.doccs.ny.gov/pdf/DOCCS-CRD-Application_Instructions.pdf.
12. *Id.*
13. N.Y. Corr. Law § 753(2).
14. *Matter of Dellaporte v. New York City Dept. of Bldgs.*, 106 A.D.3d 446 (1st Dep't 2013).
15. *Id*.
16. *Meth v. Manhattan & Bronx Surface Transit Operating Authority*, 134 A.D.2d 431 (2d Dep't 1987).
17. *Id*.
18. *Matter of Soto v. New York Off. Of Mental Retardation & Dev. Disabilities*, 26 Misc.3d 1215(A) (Sup. Ct. Kings Cnty. 2010).
19. https://lac.org/wp-content/uploads/2016/04/How-to-Gather-Evidence-of-Rehabilitation-3.30.16.pdf.
20. *Bonacorsa v. Van Lindt*, 71 N.Y.2d 605, 614 (1988).
21. *Arrocha v. Board of Education*, 93 N.Y.2d 361 (1999).
22. *Id.* at 367.
23. N.Y.C. Admin. Code Section 8-107(11).
24. Obama Takes Steps to Help Former Inmates Find Jobs and Homes, nytimes.com, November 2, 2015, http://www.nytimes.com/2015/11/03/us/obama-prisoners-jobs-housing.html.

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United States Supreme Court News

By Spiros Tsimbinos

Introduction

After opening its new term in October 2016, and hearing oral argument in several cases, the United States Supreme Court began issuing decisions in a variety of cases. These cases decided in the early part of the Court's current term are summarized below. Decisions in several other significant cases are still pending.

Death Penalty Sentence

***Bosse v. Oklahama*, 137 S. Ct. 1 (October 11, 2016)**

In a per curiam decision, the United States Supreme Court determined that an Oklahoma Appeals Court had committed error in concluding that the Supreme Court's decision *Payne v. Tennessee*, 501 U.S. 808 (1991), implicitly overruled the Court's prior decision in *Booth v. Maryland*, 482 U.S. 496 (1987), which held that the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence that does not relate directly to the circumstances of the crime. The Supreme Court emphasized that it is the prerogative of the Supreme Court alone to overrule one of its precedents. Therefore, the state courts remain bound by *Booth's* prohibition on characterizations and opinions from a victim's family members about the crime, the defendant and the appropriate sentence unless the Supreme Court itself reconsiders the ban on such victim impact testimony. The decision of the Court of Criminal Appeals of Oklahoma was therefore vacated and the case remanded for further consideration. Justice Thomas and Justice Alito joined the other Justices in the result but saw fit to issue a concurring opinion and saw fit to emphasize that the decision in *Payne* did not expressly overrule the determination in *Booth*.

Sentencing of Juvenile Offenders

***Tatum v. Arizona*, 137 S. Ct. _____ (October 31, 2016)**

Purcell v. Arizona

Najar v. Arizona

Arias v. Arizona

DeShaw v. Arizona

In a series of 6-2 decisions involving cases from the State of Arizona, the Supreme Court granted writs of certiorari and vacated the judgments of the Court of Appeals of Arizona for reconsideration in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), dealing with the sentencing of juvenile offenders. The defendants were sentenced to life without the possibility of parole for crimes they committed before they turned 18. The Supreme Court determined that in light of the *Montgomery* decision, the lower courts should consider whether the defendant's sentences comply with the substantive rule regarding the imposition of life without parole on a juvenile offender. The Supreme Court indicated that on the record before it, the sentencing judges failed to address the question of whether the defendants were among the very rarest of juvenile offenders whose crime reflected permanent incorrigibility. Justices Alito and Thomas dissented arguing that the Arizona courts had already evaluated the sentences in question and had reached conclusions that were eminently reasonable. It was therefore unclear as to why the majority was insisting on a "do over" or why it expected the results to be different the second time around.

Ineffective Assistance of Counsel

***Elmore v. Holbrook*, 137 S. Ct. _____ (October 17, 2016)**

In a 6-2 decision, the Supreme Court denied a defendant's writ of certiorari and rejected his claim that he had received the ineffective assistance of counsel. The defendant had argued that during the sentencing phase of a capital murder trial his court-appointed attorney had failed to introduce mitigating evidence of a prior medical history. The Court's majority rejected the defendant's claim, but Justices Sotomayor and Ginsburg issued dissenting opinions and argued that defense counsel had never tried a capital case before and had failed to introduce relevant information regarding the fact that the defendant may have suffered brain damage as a young man when he was exposed to dangerous toxins. As a result, the jury did not hear the testimony of experts who concluded that the defendant was cognitively impaired and unable to control his impulses. Despite the horrific nature of the crime in question, the dissenters would have granted the defendant's application and summarily reversed the sentence imposed on the grounds that defense counsel's performance during the penalty phase violated his Sixth Amendment right to the effective assistance of counsel.

Double Jeopardy

***Bravo-Fernandez v. United States*, 137 S. Ct. 352 (November 29, 2016)**

In a unanimous decision, which was delivered by Justice Ginsburg, the United States Supreme Court held that a Puerto Rican politician and a business executive must face a second trial on bribery charges and their claim of double jeopardy was not applicable to the facts of the case. A jury had convicted the two men of bribery but acquitted them of related charges that they had traveled

or conspired to commit bribery. The verdicts were impossible to reconcile and the only contested issue on any of the charges was whether there had been a bribery. A federal appeals court had later vacated the remaining convictions on the grounds that the judge had provided improper instructions to the jury. The defendants argued in the Supreme Court that any second trial would violate the constitution's double jeopardy clause.

Justice Ginsburg stated that the guilty verdicts which ware vacated on appeal because of the error in the judge's instructions were unrelated to the verdicts' inconsistencies; therefore, the vacated guilty verdicts would not be involved in the double jeopardy analysis. One cannot ascertain from the jury's report why it returned no verdict. Thus, reviewing the cases' tangled procedural history, a retrial is not barred and the double jeopardy clause is not implicated.

Insider Trading

***Salman v. United States*, 137 S. Ct. _____ (December 6, 2016)**

On October 5, 2016, the United States Supreme Court heard argument in a case involving insider trading prosecutions. A decision by the Federal Court of Appeals for the Second Circuit had made it harder for the government to proceed in certain insider trading prosecutions. During oral argument, however, the questioning by the Justices appeared to have a pro prosecution tenor. The Justices indicated that the integrity of the stock markets was very important for the Country and that a change in the rules would threaten that integrity. The issue in this case has been defined as whether and what kind of personal benefit for the tipper must be proven to successfully prosecute an insider trading case. From the questions asked, it appeared that the Justices would be content with a broad definition of personal benefit that would include a tipper helping a family member without necessarily pocketing any money himself or herself.

On December 6, 2016, the Supreme Court in a unanimous ruling sided with the government's position and held that sharing corporate secrets with friends or relatives is illegal even if the insider providing the tip does not receive anything of value.

Warrantless Blood Tests

***Timm v. North Dakota*, 137 S. Ct. _____ (October 31, 2016)**

In a unanimous decision, the United States Supreme Court granted certiorari, vacated the defendant's convictions and remanded the case to the North Dakota Courts for further consideration in light of its 2016 decision in *Birchfield v. North Dakota*, 135 S. Ct. 2160. In that case, the Supreme Court had held that the Fourth Amendment prohibits warrantless blood tests as incident to lawful arrest for drunken driving. In the case at bar, the defendant had conditionally pled guilty to driving under the influence, but had reserved the right to appeal a trial court order denying his motion to suppress evidence of the blood test which had been conducted without a warrant. Under current law, the Fourth Amendment permits breath tests incident to lawful arrest for drunk driving but not warrantless blood tests.

Pending Cases

***Buck v. Davis*, 137 S. Ct. _____ (_____, 2017)**

***Moore v. Texas*, 137 S. Ct. _____ (, 2017)**

In October, during the first month of its new term, the Court heard oral argument on a case that presented new aspects with respect to the death penalty. The issue in the instant case involves the effective assistance of counsel and the question of when death row inmates are too intellectually disabled to be executed. The defendant argued during oral argument that Texas had used outdated medical standards and looked to factors rooted in stereotypes. Attorneys for the defendant Moore had specifically argued that at the age of thirteen, Mr. Moore did not understand the days of the week, the months of the year, the seasons and how to tell time. Attorneys for the State of Texas argued that the State had followed the requirements of the Supreme Court decision in *Atkins v. Virginia*, which was rendered in 2002. During the last year Justices Breyer and Ginsburg had raised concerns about the constitutionality of the death penalty and had indicated that it was time to revisit the issues. In particular, Justices Breyer, Sotomayor and Ginsburg appeared greatly concerned about the Texas standards. Justice Alito, on the other hand, appeared willing to accept the position taken by Texas. Once again, Justice Kennedy, who along with the liberal group of justices appeared skeptical regarding the Texas procedures, might cast a critical swing vote to decide the issue.

It appears that on a case-by-case basis the Court may be steadily restricting the use of the death penalty until it reaches a point when it may be totally eliminated. The recent trend in the United States Supreme Court appears to be following a drop in support for the death penalty within the United States. A recent Pew Center poll conducted in September of 2016 found that just 49% of Americans now support capital punishment. This represents a seven point decline within the last two years and a steep drop from the 80% of the population which supported the death penalty in 1994. The survey also found that men are more likely than women to support the death penalty. Whites are much more likely to support the death penalty than Hispanics or African-Americans. Further, fewer Americans between the ages of 18 and 29 support the death penalty than any other age group. Last year there were only 15 executions conducted in the United States, down from 98 in 1999. During

the past five years nine states have suspended capital punishment. It is still legally available in 30 states but its actual usage has been confined to only a small group of states, primarily located in the South and West. It is expected that a decision involving the Defendants Buck and Moore will be forthcoming sometime in the early Spring and we will keep our readers advised as soon as a decision issued.

Racial Gerrymandering

Jennings v. Rodriguez, 137 S. Ct. _____ (_____, 2017)

On November 30, 2016, the United States Supreme Court heard oral argument on a matter which involved the issue of whether immigrants detained for possible deportation can be incarcerated indefinitely without a hearing or bond application. The issue involves the interpretation and application of 8 U.S.C. 1226 (c). During oral argument some of the Justices indicated that indefinite detention appeared unreasonable and expressed concern about the current situation. A decision is expected by late Spring.

Trinity Lutheran Church v. Pauley, 137 S. Ct. _____ (_____, 2017)

This case involves the issue of Church-State relationships and concerns statutory legislation which bars the expenditure of any government funds in aid of any church, sect, or denomination of religion. At issue is a Missouri provision that caused the refusal to grant money to a pre-school that was run by a Church for resurfacing its playground with recycled rubber materials. The case presents an opportunity for the Court to review the issue of how much government aid to religious institutions is too much.

Gloucester County School Board v. GG, 137 S. Ct. _____ (_____, 2017)

This case involves a challenge to a lower court ruling which deferred to the Department of Education and the Department of Justice on a transgender student's use of school bathrooms. This is an issue that has resulted in a great deal of controversy and it is not clear when or how the Supreme Court will deal with the issue. The Court granted certiorari on October 28, 2016 and oral argument is expected sometime in the late Spring.

McCrory v. Harris, 137 S. Ct. _____ (_____, 2017)

The United States Supreme Court heard oral argument on December 5, 2016, on an appeal by North Carolina officials from a three-judge district court's finding that, even assuming that compliance with the Voting Rights Act (VRA) was a compelling state interest, the North Carolina legislature engaged in unconstitutional racial gerrymandering, in violation of equal protection, in redrawing two congressional districts with an increased number of potential African-American voters, because racial gerrymandering was not reasonably necessary under a constitutional reading and application of federal law. It was claimed that North Carolina had improperly put more blacks in a few voting districts thereby diminishing the voting power of minority groups on a statewide basis. A decision in this case is expected in the Spring and we will report on any decision rendered in our next issue.

Justice Thomas Assumes Additional Jurisdiction

Each year the Justices of the Supreme Court are assigned to the various Circuits within the country so they can hear any emergency applications. Justice Scalia had previously been assigned to the Fifth Circuit which covered Louisiana, Mississippi and Texas. Following Justice Scalia's death in February 2016, Justice Thomas agreed to cover those three states within the Fifth Circuit as well as continuing to cover the Eleventh Circuit to which he was already assigned. The Eleventh Circuit covers Alabama, Florida and Georgia.

Garland Nomination Withdrawn

President Trump Moves to Fill Scalia Vacancy

Even though President Obama on March 16, 2016, nominated Judge Garland to fill the seat vacated by Justice Scalia, the Senate Republican leadership kept firm in its position that the vacancy should be filled by the next President and no action had been taken prior to the November 8, 2016 election. It had been speculated, however, that if Hillary Clinton had won the Presidential election then the Republicans could actually act after the November election to confirm Judge Garland, who was viewed as being somewhat moderate, rather than taking a chance that Presidential Clinton would appoint someone who was considered far more liberal. Donald Trump's election has changed what President Obama set in motion. The proposed Garland nomination has thus been officially withdrawn and President Trump has moved to fill Judge Scalia's vacancy. During the campaign, President Trump committed himself to selecting a new Justice from a list of some 20 basically conservative oriented judges. Within weeks of his official installation as the new President, he made his selection and announced that he had picked Judge Neil Gorsuch of the Court of Appeals for the Tenth Circuit.

Judge Gorsuch graduated from Columbia University and Harvard Law School. He clerked for two Supreme Court Justices, Byron White and Anthony Kennedy. He has a degree from Oxford and practiced law in Washington, D.C. He was appointed to the Tenth Circuit by George W. Bush. As of this writing, Democrats have indicated that there will be challenges to the nomination of this conservative jurist. We will report back on the process in our upcoming issue.

New York Court of Appeals Review

By Jay Shapiro

The Court of Appeals issued significant decisions in November and December in the areas of statutory construction, trial practice and sentencing.

People v. Alexis Ocasio and *People v. Antonio Aragon*, both decided Nov. 1, 2016

Criminal Possession of a Weapon—"Billy"

Criminal Possession of a Weapon—"Brass Metal Knuckles"

In *Ocasio,* the Court of Appeals reached back more than a century in its decision as to whether a "billy" under Penal Law Section 265.01(1) included a "rubber gripped, metal, extendable baton." The defendant argued that "billy" only encompasses short, wooden clubs that are not extendable. The Court of Appeals looked to the dictionary definition of billy club, New York precedent and courts of other jurisdictions to reach the conclusion that a billy club under the Penal Law was not restricted to the narrow terms offered by the defendant.

Brass metal knuckles was the focus of the Court of Appeals' decision in *People v. Aragon.* Penal Law Section 265.01(1) includes metal knuckles as a per se weapon. Defendant was charged with possessing brass metal knuckles and he argued that the accusatory instrument was deficient because brass knuckles are included in describing "jewelry pieces, cell phone cases, luggage tags, and other novelty items." The Court of Appeals rejected that argument, noting that the use of the term brass metal knuckles provided a clear description of what was recovered from his pocket. As in *Ocasio,* the Court of Appeals looked to common usage and the dictionary definition of the term.

People v. Lyxon Chery, decided Nov. 1, 2016

Impeachment of Defendant with his Selective Silence

Defendant was charged with a robbery committed at a grocery store. The defendant moved to suppress a statement made to the police asking why the complaining witness was not being arrested; "he kicked my bike, he should be going to jail too." The hearing court determined that the statement was spontaneous and denied the motion.

The defendant testified at trial, and offered a lengthier version of the events surrounding his altercation with the complainant, that the complainant had hit him on the head with a piece of wood, and that he had told the police the complainant "was kicking my bike, and then we got into a fight, and if he come with the wood, that's not my wood, that's his wood."

Before cross-examining the defendant, the prosecutor requested permission to impeach him on the omissions from the spontaneous statement to the police. The trial court granted the application. The cross-examination of the defendant resulted in the delivery of inconsistent versions of what he had told the police.

The Court of Appeals held that because the defendant had "elected to provide some explanation of what happened at the scene, and it was unnatural to have omitted the significantly more favorable version of events to which he testified at trial—that complainant had assaulted him," it was proper for the cross-examination to include questions about those omissions.

People v. Timothy Brewer, decided Nov. 17, 2016

Evidence—Prior Sexual Conduct of Defendant

In a prosecution for sexual abuse of two minor girls, the trial court allowed the prosecution to elicit evidence that the defendant had engaged in sexual acts with consenting adult women. In upholding this ruling, the Court of Appeals acknowledged that the aim of a party is to present evidence that is "prejudicial" to the other side's case, but that alone does not make the evidence inadmissible.

Here, the evidence was admissible because "it strengthened the People's case by making the victims' accounts ring true." The evidence of those prior encounters with adult women was consistent with the testimony offered by the minor victims.

People v. Havert Stephens, decided Nov. 21, 2016

Noise Ordinance

The defendant was stopped by Syracuse police for violating the city's noise ordinance by blaring his car stereo. After the stop, the police observed crack cocaine in his car. The noise statute provides that "No person shall make, continue or cause or permit to be made any unnecessary noise." "Unnecessary noise" is defined as "any excessive or unusually loud sound or any sound which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a reasonable person of normal sensibilities, or which causes injury to animal life or damage to property or business." Additionally, the statute sets forth 14 sections that describe acts which would be prima facie evidence of violation. The one that was the basis of this prosecution sanctioned the playing of a device that creates "unnecessary noise at fifty (50) feet from such device, when operated in or on a motor vehicle on a public highway."

The Court of Appeals held that the Syracuse ordinance is constitutional because it is based upon an objective standard: "a reasonable person of normal sensibilities." Addi-

tionally, the Court of Appeals found that the Syracuse law was tailored to specific contexts.

People v. Matthew A. Davis, decided Nov. 21, 2016

Murder-Causation

The Court of Appeals issued this decision finding legally sufficient evidence to sustain a murder conviction based upon a fact-pattern worthy of a bar examination question. The victim died as a result of an assault committed by the defendant during the course of a robbery-burglary in his home. The medical examiner found that the victim had been assaulted but that the cause of death was hypertensive cardiovascular disease. The medical examiner's testimony was that, but for the violent struggle the victim had, he would not have died when he did. However, the ME said that the manner of death was categorized as "undetermined," because of "the inability to discern, on the facts known, between other manners of death, including natural and homicide."

In upholding the murder conviction, the Court of Appeals reversed the Appellate Division decision that the prosecution had failed to prove beyond a reasonable doubt that death was a reasonably foreseeable consequence of the assault. The Court of Appeals wrote that "[f]rom all of the evidence and the circumstances surrounding this violent encounter, the proof was sufficient to permit the jury to conclude that the victim's heart failure, induced by the extreme stress and trauma of such a violent assault, was a directly foreseeable consequence of defendant's conduct." (Internal citation omitted.)

People v. Jose Aviles, decided Nov. 22, 2016

Equal Protection and Due Process

The Court of Appeals ruled that the New York City Police Department did not violate a defendant's equal protection and due process rights when following his arrest the police did not administer a physical coordination test because of a language barrier. The defendant was arrested after he drove into a marked police car. Following the accident, the police smelled alcohol on his breath and he admitted having recently consumed three beers. Although the police administered a breathalyzer test, which he passed, he was not given the coordination test because there was no provision to give them other than in English.

In holding that there was no Equal Protection violation, the Court of Appeals pointed out that "coordination tests are uniquely ill-suited for administration via translation" because of their length and the need for contemporaneous instructions. In holding that the policy of only administering the test in English was rationally based, the Court of Appeals pointed to the "168 distinct languages and countless dialects" spoke in New York City. The Due Process violation claim was similarly rejected, as the Court of Appeals noted that the coordination test is "a discretionary, investigative technique designed to gather evidence of intoxication" and there is no constitutional right to having the test translated.

People v. Phillip Couser, decided Nov. 22, 2016

Sentencing, Alford Plea

The Court of Appeals decided two appeals presented by this defendant. In the first, it held that Penal Law Section 70.25(2) permitted the imposition of consecutive sentences for robbery and attempted robbery. Although both crimes were committed when defendant and several accomplices approach five people on the street, the Court of Appeals held that the robbery of one victim was separate and distinct from the shooting of a second victim. "The taking of this [the first] victim's purse constituted a separate act against a single victim that was distinct from defendant's use of a gun in an attempt to rob the remaining victims."

In the second appeal, the Court of Appeals held that defendant's counsel was not ineffective in his representation at the sentencing. Additionally, the Court of Appeals found that the record of defendant's plea allocution demonstrated that he entered his *Alford* plea knowingly and voluntarily.

People v. James Brown, *People v. Terrence Young*, *People v. Earl Canady*, decided Dec. 20, 2016

Speedy Trial

In these three appeals, the Court of Appeals addressed an outstanding question from its ruling in *People v. Sibblies*, 22 N.Y.3d 1174 (2014), holding that the defendant, not the prosecution, has the burden of proving that the prosecution's "previously filed off-calendar statement of readiness is illusory." In explaining how a court should evaluate a CPL 30.30 motion, the Court of Appeals wrote: "If the People announce that they are not ready after having filed an off-calendar statement of readiness, and the defendant challenges such statement—at a calendar call, in a CPL 30.30 motion, or both—the People must establish a valid reason for their change in readiness status to ensure that a sufficient record is made for the court to determine whether the delay is excludable. The defendant then bears the ultimate burden of demonstrating, based on the People's proffered reasons and other relevant circumstances, that the prior statement of readiness was illusory."

People v. Immanuel Flowers, decided Dec. 22, 2016

Sentencing

Defendant was charged with attempted murder and related charges. At the end of the prosecution's case, the court granted the defendant's motion to dismiss the attempted murder charge but weapons possession charges remained. The defendant was convicted of the single

weapon possession charge submitted to the jury and the defendant was sentenced as a persistent violent felony offender to 20 years to life. The Appellate Division remanded the case for re-sentencing, determining that the sentencing court's comments indicated that it had improperly considered dismissed counts.

The court re-sentenced the defendant to the same 20-years-to-life term. The Court of Appeals reviewed the defendant's argument that this sentence was improper in the context of defendant's claim that his counsel was ineffective for failing to object to the term imposed. The Court of Appeals held that there was no per se violation in imposing the same sentence, nor did that discretionary decision demonstrate vindictiveness on the part of the sentencing court.

People v. James Miller, decided Dec. 22, 2016

Jury Selection

The Court of Appeals reversed the defendant's first degree manslaughter conviction finding that the trial court improperly restricted the defense counsel on voir dire. Defense counsel requested permission to inform the prospective jurors that there are rules about involuntary statements. The prosecution responded that it had not yet determined whether it would offer defendant's post-arrest statement into evidence. The court held that because the prosecution was uncertain about using the statement the line of questioning was speculative; it also held there was no need to inquire about the prospective jurors' views concerning involuntary confessions in light of the publicity about coerced statements.

The prosecution did present the defendant's statements during its case. The Appellate Division affirmed his conviction, notwithstanding his arguments concerning the voir dire ruling. The Court of Appeals reversed, writing that the proposed questioning "went to the heart of determining whether those jurors could be impartial and afford defendant a fair trial." In addressing the trial court's position that the use of the statement was "speculative," the Court of Appeals noted "the court could have instructed the prospective jurors that it did not yet know whether there were any statements that would come in as evidence, but if there were, it was the law that such statements must be disregarded if the jury found them to be involuntary."

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