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New York Criminal Law Newsletter

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of the New York State Bar Association

In Memory of Sheila Abdus-Salaam

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Also in This Issue

At left, Sherry Levin Wallach with Sarah Gold and Erin Flynn.

Below, Sherry at Annual Meeting.

At bottom, the Criminal Justice Section Executive Committee meeting at the Annual Meeting.

Sherry Levin Wallach

Thank You for Your Leadership as Section Chair!

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Message from the Chair

It has been a true honor to serve this section as its Chair for the past two years, and to work with such an outstanding group of law students, attorneys and judges. The Section continues to provide top continuing legal education programs that are inspiring and interesting. The Section's Executive Committee works very hard to be sure that our discussions are thorough and our decisions are informed. Our Section has a voice, and that voice has and should continue to be heard.

I am so proud of the dedication that our Section and Association have shown in promoting and advocating for criminal justice reform. We have encouraged the adoption of legislation for the sealing of criminal convictions, addressing wrongful convictions issues, funding for indigent legal services, and raising the age of criminal responsibility. Seeing all of these areas included as criminal justice reform in the 2018 New York State budget gives us great satisfaction. They were much needed positive steps toward improving New York State's criminal justice system.

As we are all well aware, the issues surrounding criminal justice are many, so even with these positive reforms, there is no time for rest. Our Section will continue to work on issues including wrongful convictions, discovery reform, revision of the sex offender registry guidelines, bail reform, and counsel at first appearance. We will continue to review proposed legislation, further our study of the town and village justice courts, and begin work on studying, evaluating and addressing mental health issues as they relate to criminal justice. This Section's dedicated and commitment to the betterment of our State's criminal justice system is strong.

I am particularly proud of the Section's reports. This Section brought a report to the NYSBA House of Delegates in 2012 on *Sealing of Criminal Convictions* which was adopted and made a NYSBA legislative priority. The report was authored by members of our Section, who were chaired by Jay Shapiro, our newsletter editor, and Rick Collins, who presented it to the House and has worked tirelessly to encourage the passage of sealing legislation in New York State. Therefore, it is a true victory to see that sealing legislation was adopted in the State's 2018 budget. I am also incredibly proud of our Town and Village Justice Court Task Force's report on counsel at first appearance, which will be brought to the NYSBA House of Delegates this June in Cooperstown. This task force is being co-chaired by Leah Nowotarski and Clare Degnan. The report is posted in our communities page and your feedback is encouraged.

I would also like to thank each and every one of you who have been active members of this Section, for all of you hard work and commitment. You have all inspired me, taught me and guided me. I will not be your Chair after June 1, 2017, but I will always be there by your side inspiring you and working with you. Whether or not you have realized it yet, members of this Section are bound together professionally. We respect one another and support one another. If you have not been actively involved, I ask you now to get involved. It will make you a better lawyer, a better advocate and open professional doors to you. I leave you with this thought: "[T]he great thing in the world is not so much where we stand, as in what direction we are moving."—Oliver Wendell Holmes.

Sherry Levin Wallach

Message from the Editor

When Spring arrives for the Criminal Justice Section, we welcome it with our annual Spring Meeting. This year, Seneca Falls was the location and our gathering was a resounding success.

Attendance figures for the CLE program and the dinner were impressive. Our Section is about education and, of course, socializing. Norm Effman, one of the program's co-chairs along with Russell W. Dumbrow of the Dombrow Law Firm, PLLC, reported in detail about the events. In terms of education, there is no dispute that real experiences can have significant impact on our practices. The tour of the Willard Drug Treatment Center, a "boot camp"-style rehabilitation center for inmates with substance abuse problems was such an event. This facility, run at the site of the infamous Willard Asylum, is operated by the New York State Department of Corrections. The tour was led by the current superintendent of the facility and was fully booked. It was an important opportunity for lawyers to appreciate first-hand a program to which their clients may be sent.

On Friday and Saturday, the learning continued in a more traditional setting, with panels on sentencing alternatives, dram shop and alcohol-related arrests and a Court of Appeals update. Judge Jenny Rivera of the Court of Appeals, Daniel N. Arshack of Arshack, Hajek & Lehrman, PLLC, and Robert J. Masters of the Queens County District Attorney's Office were in positions to provide the three essential perspectives—judicial, defense and prosecution—of the Court of Appeals' jurisprudence.

Rulings from 2016 and early 2017 run the full gamut of the criminal process. Decisions that impact the criminal justice process during that time period include the following subjects: grand jury process; accusatory instruments; statutory construction; preservation of error; evidence; confrontation clause; sufficiency of evidence; summation; and sentencing issues.

Throughout the Spring Meeting, attendees were engaged and involved. Willing to learn, willing to share. Those essential characteristics are critical to our Section's well-being.

Jay Shapiro

In Memoriam

Honoring Judge Sheila Abdus-Salaam—1952-2017

The Criminal Justice Section mourns the passing of Sheila Abdus-Salaam, Associate Judge of the Court of Appeals. The first black female judge on our highest court, Judge Abdus-Salaam was born in Washington, D.C. in 1952. A product of Washington, D.C.'s public schools, she went on to graduate from Barnard College in 1974 and received her J.D. from Columbia Law School in 1977. She was a classmate of former U.S. Attorney General Eric Holder, who attended her Court of Appeals swearing in ceremony.

Judge Abdus-Salaam's dedication to public service was remarkable. She first worked as a staff attorney at East Brooklyn Legal Services Corporation and then spent time as an Assistant New York Attorney General. She then served New York City as as General Counsel for the Office of Labor Services.

Judge Abdus-Salaam first served as a Civil Court Judge following her 1991 election. Two years later, she was elected to the Supreme Court, New York County, and was re-elected in 2007.

Governor Paterson elevated Judge Abdus-Salaam to the Appellate Division, First Department in March 2009. Four years later, Governor Andrew M. Cuomo named her to the Court of Appeals. Just last year, Judge Abdus-Salaam was the recipient of the Bar Association's Commercial and Federal Litigation Section's Stanley H. Fuld Award, named after the Court of Appeals' long-time chief judge.

Tributes to Judge Abdus-Salaam came from diverse segments of the bar. In her relatively brief time on the Court of Appeals, she wrote many decisions impacting civil and criminal jurisprudence. Her commercial decisions were lauded and she had the opportunity to write numerous important criminal justice decisions. Her opinions included right to counsel, statutory interpretation, evidentiary issues, legal sufficiency and sentencing.

Below, I briefly describe some of Judge Abdus-Salaam's criminal justice opinions. First, though, it is important to note the breadth of her knowledge and how she valued our Constitution. That recognition is easily found in her opinion in *People v. Peque*, 22 N.Y.3d 168 (2013), where the court held that a trial court must inform a defendant who is not a U.S. citizen that pleading guilty to a felony may result in deportation. Judge Abdus-Salaam found that decision as "grounded in the right to due process of law, the bedrock of our constitutional order." In explaining the decision, Judge Abdus-Salaam provided us with a history lesson dating back from Dutch Colonial times.

Other criminal justice decisions of note included:

- *People v. Anderson*, 2017 N.Y. Slip Op. 2589, determining that the prosecution's use of power point slides in summation was proper.
- *People v. Leonard*, 2017 N.Y. Slip Op. 2359, ordering a new trial because of *Molineux* error in a sexual abuse prosecution.
- *People v. Vining*, 2017 N.Y. Slip Op. 1144, upholding the admission of an adoptive admission that came in the form of a call recorded while the defendant was incarcerated.
- *People v. Valentin*, 2017 N.Y. Slip Op. 2470, upholding a court's justification instruction on the issue of whether the defendant was the initial aggressor.
- *People v. Perkins*, 2016 N.Y. Slip Op. 8483, reversing the lower court's decision that lineups were not unduly suggestive. Judge Abdus-Salaam's opinion noted that the defendant was the only participant with long dreadlocks, a feature that had been mentioned by victims.
- *People v. Smith*, 2016 N.Y. Slip Op. 5061, upholding a defendant's right to cross-examine law enforcement officers on allegations of prior misconduct made in an unrelated federal lawsuit, pointing to the "unremarkable proposition that law enforcement witnesses should be treated as any other prosecution witness for purposes of cross-examination."
- *People v. Golo*, 26 N.Y.3d 358 (2015), reversing a sentence because the defendant was not heard as to his resentencing motion.
- *People v. Golb*, 23 N.Y.3d 455 (2014), addressing crimes associated with an Internet campaign "to attack the integrity and harm the reputation" of Dead Sea Scrolls scholars.
- *People v. Boyer*, 22 N.Y.3d 15 (2013), reviewing sequential sentencing pursuant to New York's sentence enhancement statutes.

Court of Appeals and Second Circuit Disagree on Searches Incident to an Arrest

By Hon. Barry Kamins

The United States Court of Appeals for the Second Circuit recently rendered a decision dealing with searches incident to an arrest that squarely conflicts with a prior decision of the New York Court of Appeals. Which decision must a state court judge follow? What consequences will flow if a state judge ignores the federal decision? Finally, how can the conflict be resolved? This article will address these questions, which arose as a result of the Second Circuit's ruling in *U.S. v. Diaz*, (155-3776-cr, decided 4/18/17), which directly took issue with recent New York Court of Appeals precedent.

Before examining the current conflict over searches incident to an arrest, it is instructive to review a few prior disputes between these courts and how they were resolved. Twenty-six years ago, the New York Court of Appeals reminded state court judges that they are bound to follow the U.S. Supreme Court's interpretations of federal statutes and the federal Constitution. However, the Court also noted that the interpretation of a federal constitutional question by a lower federal court is not binding on state courts, although it may serve as useful and persuasive authority. Thus, if a conflict exists between the Second Circuit and the New York State Court of Appeals, a state judge is bound by the ruling of our state's highest court.

The analysis starts with *People v. Mealer*, 57 N.Y.2d 214 (1982). In *Mealer,* the defendant was under indictment for murder. The police received a report that the defendant was attempting to suborn perjury from a witness and instructed that witness to speak to the defendant, who offered the witness money to perjure himself. The Court of Appeals held that the defendant's right to counsel was not violated when the police arranged for the meeting between the witness and the defendant in which the defendant offered the witness money to change his story even though the defendant was represented by counsel at the time. In addition, the court held that evidence of the defendant's conduct could be offered at the murder trial to establish consciousness of guilt. The defendant was later convicted of murder and filed a petition for a federal writ of habeas corpus.

Two years later, the Second Circuit disagreed with the Court of Appeals and held that the defendant's right to counsel had been violated when the post-indictment statements were offered at the murder trial.[1] The court also held that the defendant's post-indictment statements could only be admitted at a separate trial for the crime of suborning perjury.

Thus, the Second Circuit's decision created a conflict because it interpreted the federal right to counsel more broadly than the Court of Appeals did and held that even if the police had a good faith basis to investigate the new crime—as the Court of Appeals had found—they were still interested in the indicted crime, which was intimately connected to it, and therefore could not seek to obtain statements from an indicted defendant.

The following year, a state trial judge was presented with the same issue that had divided the two courts. In *People v. Otero*, 127 Misc. 2d 628 (Sup. Ct., Kings Co. 1985), the prosecution sought to offer a police-arranged tape recording in which the defendant attempted to bribe a witness. The tape was made while the defendant was under indictment for murder. The court recognized that it was bound only to follow the decision by the Court of Appeals. However, it also recognized that if it admitted the bribery tape at the murder trial, the defendant would unquestionably prevail in a federal habeas proceeding on the strength of the Second Circuit decision. The court concluded that it was in the interest of all that if a conviction resulted from the trial, it should be immune from collateral attack. As a result, the court declined to follow the Court of Appeals ruling and precluded the introduction of the tape at the murder trial.

Later that year, the conflict was resolved when the issue was addressed by the U.S. Supreme Court. In *Maine v. Moulton*, 474 U.S. 159 (1985), the court, in adopting the Second Circuit's position, held that a defendant's right to counsel is violated when a defendant's post-indictment statements are introduced at trial, even though the state had legitimate reasons for recording these conversations to investigate possible uncharged offenses. However, the court also held that the introduction of the statements in a subsequent trial for the new crime would be permissible.

The Court of Appeals and the Second Circuit have disagreed on other occasions. In *People v. Lemmons*, 40 N.Y.2d 505 (1976), the Court of Appeals upheld the convictions of four defendants for gun possession premised, in part, on Penal Law Section 265.15(3). That section, known as the "car presumption," provides that, with certain exceptions, the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons occupying the vehicle.

The defendants challenged the constitutionality of the statute as applied in this case but the argument was rejected by the New York Court of Appeals. A petition was then filed for federal habeas relief. The Second Circuit, without

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deciding whether the presumption was constitutional as applied in this case, concluded that the statute was unconstitutional on its face. It held that the statute was overbroad because it could apply to individuals who had no rational connection to the car, such as hitchhikers.[2]

Once again, trial courts in this state found themselves in a quandary when presented with an issue that had divided the Second Circuit and our state's highest court. Several courts that were confronted with this issue recognized that they were not bound by the Second Circuit but took pains to explain why they were not adopting its finding that the statute was void on its face. One court found the statute unconstitutional as applied to the facts of the case[3] while another found the statute met the "as applied" test.[4] One court expressed its frustration in dealing with the conflict:

> It is apparent that the inevitable determination must be made by the Supreme Court. The problem is that such determination may be long coming, and arrests will be made under the presumption statute during such interim. The avoidance of coming to grips with the problem until such decision is rendered could be a judicial convenience, but it would be hardly equitable to place litigants in legal limbo to their mutual prejudice for an indefinite period.[5]

The following year, the United States Supreme Court resolved the conflict. In reversing, it held that the Second Circuit should not have decided the facial validity of the statute; rather, it should have only decided an "as applied" challenge. The Court upheld the statute as constitutional because, as applied to the facts, the permissive presumption of possession was entirely rational.[6]

In 2017, the conflict that divides the two courts is the search-incident-to-an-arrest doctrine. The doctrine serves two interests: protecting the safety of police officers and safeguarding any evidence of the offense that an arrestee might conceal or destroy.

There are two basic requirements for a search incident to a lawful arrest. First, the search must be contemporaneous in time with the arrest because the validity of the search depends on unity of time. The Court of Appeals has held that the arrest and the search must be "nearly simultaneous."[7]

The second requirement for this search is spatial—the search must be limited to the area within the arrestee's immediate control. This area is commonly referred to as the "grabbable area" because it is within this space that the arrestee could reach for evidence, a weapon, or fruits of the crime.[8] Obviously, the "grabbable area" can never be measured in precise feet or inches; its boundaries must be reasonable.[9] As might be expected, different courts have reached different conclusions as to what is a reasonable definition of the "grabbable area."

The New York Court of Appeals has emphasized that there must be a "robust" evidentiary showing of exigent circumstances to justify a search of a closed container incident to an arrest. In *People v. Jimenez*,[10] the court reiterated that the prosecution must clearly establish exigent circumstances before invoking this exception. The Court reminded prosecutors that they can establish exigent circumstances through a number of factors including the nature of the offense, testimony by the police that they feared for their safety or for the destruction of evidence or, finally, other objectively reasonable facts that establish the officer's concerns.[11] Courts have begun to apply *Jimenez* in determining the existence of exigent circumstances.[12]

"The New York Court of Appeals has emphasized that there must be a 'robust' evidentiary showing of exigent circumstances to justify a search of a closed container incident to an arrest."

The issue that now divides the Court of Appeals from the Second Circuit arose in *People v. Reid*,[13] in which a police officer had probable cause to arrest a motorist for drunk driving but chose not to do so. The officer then asked the motorist to step out of the car and patted him down. In the course of doing so, he found a switchblade knife in the motorist's pocket. The motorist was then arrested.

The People argued that the pat down was incident to the arrest for the drunk driving charge, arguing that a search incident to an arrest may occur before the formal arrest, when (1) the police have probable cause to arrest before they begin the search and (2) the search is nearly contemporaneous with the formal arrest.

The Court of Appeals rejected that argument, holding that the search-incident-to-an-arrest doctrine requires proof that at the time of the search an arrest has already occurred or is about to occur. Where no arrest has yet taken place, the officer must have intended to make one if the doctrine is to be applied. Thus, a search must be incident to an actual arrest, not just to probable cause that might have led to an arrest but did not.

The Court noted that its decision was predicated on *Knowles v. Iowa*,[14] in which an officer stopped the defendant for speeding, had probable cause to arrest him under Iowa law, but chose to issue him a citation instead. The officer then searched the car, found marijuana and arrested

the driver. The Supreme Court held that the search was unlawful as violative of the search-incident-to-an-arrest doctrine.

The Second Circuit has now weighed in on this issue and held that the Court of Appeals misinterpreted *Knowles*. In *U.S. v. Diaz*, (155-3776-cr, decided 4/18/17), a police officer was conducting a vertical patrol in a trespass affidavit building. Upon entering the building the officer smelled marijuana and she proceed to climb the stairs to the third floor landing. She observed three men, one of whom was Diaz, who was sitting next to a bottle of vodka and holding a red plastic cup. As she approached Diaz, she saw clear liquid in the cup and smelled what seemed to be alcohol.

The officer testified that she did not initially intend to arrest Diaz, but only issue a summons for violating the open-container law, a violation. She did not, however, feel safe confronting Diaz while he was seated and ordered him to stand against the wall and produce his identification. Diaz stood and then, as if to retrieve something, fumbled with his hands in his jacket pocket and rearranged his waistband. Fearing for her safety, the officer frisked Diaz and felt a bulge in his pocket. She opened the pocket and discovered a loaded firearm. The defendant was then arrested.

In upholding the search as incident to an arrest, the Second Circuit disagreed with the New York Court of Appeals in its interpretation of *Knowles*. According to the Second Circuit, the New York court ignored the fact that an officer who stops a person to issue a citation faces an evolving situation in which events develop and new information comes to light. As these events develop, a police officer is entitled to change her course of action. In addition, the Second Circuit concluded that the New York court ignored the fact that the search doctrine is a bright line rule and does not require an analysis of a police officer's intent at the time of arrest.

The Second Circuit noted that in *Knowles* the search occurred *after* a citation had been issued. Thus, the Supreme Court was holding, according to the Second Circuit, that the search-incident-to-an-arrest would only be unlawful where an officer has completed the encounter by issuing a citation instead of making an arrest. No citation had been issued by the officer before Diaz was frisked; thus, the search was lawful. Similarly, in *Reid*, no summons had been issued to the driver and, therefore, the ensuing search was lawful under the Second Circuit's analysis.

Thus, the Second Circuit concluded that *Reid* was decided incorrectly. Under the Second Circuit's holding, a search incident to an arrest is lawful when (1) a police officer has probable cause to believe a crime has been committed; (2) the officer does not intend to arrest the suspect when he begins the search but the situation continues to evolve; and (3) a custodial arrest follows quickly after the search. In addition, it is irrelevant whether, at the time of the search, an officer intended to arrest the individual or merely issue a summons.

The split between the Second Circuit and the New York Court of Appeals could be resolved in a number of ways. The Second Circuit could grant an *en banc* hearing to revisit the issue or the Supreme Court could grant *certiorari*, as it has in the past to resolve similar conflicts.

Should the conflict not be resolved, however, that would leave different rules in state court as opposed to federal court—something to be avoided. That could produce a situation in which a defendant wins a motion to suppress in state court under *Reid* but loses a subsequent claim in federal court pursuant to 42 U.S.C. 1983, under *Diaz*. Hopefully a solution to this conflict can be found.

Endnotes

1. *Mealer v. Jones*, 741 F.2d 1451 (2d Cir. 1984).
2. *Allen v. County Court, Ulster County* 568 F.2d 998 (1977).
3. *People v. Alston*, 94 Misc.2d 89 (Supreme Court, Bronx Co. 1978).
4. *People v. Williams*, 93 Misc.2d 93 (Supreme Court, Queens Co. 1978).
5. *Id*.
6. *County Court of Ulster Co. v. Allen*, 442 U.S. 140 (1979). The two courts have disagreed on other issues as well, e.g. whether a defendant who knowingly and voluntarily pleads guilty may collaterally attack the conviction on the ground that he had been coerced into making a confession and that the existence of the coerced confession induced him to enter the plea of guilty. Ultimately the Supreme Court agreed with the position of the New York Court of Appeals that a defendant cannot attack a guilty plea on that ground. *McMann v. Richardson*, 397 U.S. 759 (1970). More recently, the courts have disagreed on the issue of effective appellate counsel and, specifically, the application of the standard governing ineffective assistance claims. See, e.g. *Ramchair v. Conway*, 601 F.3d 66 (2d Cir. 2010); *People v. Ramchair*, 8 N.Y.3d 313 (2007).
7. *People v. Evans*, 43 N.Y.2d 160, 400 N.Y.S.2d 810, 371 N.E.2d 528 (1977).
8. *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); *People v. Temple*, 165 A.D.2d 748, 564 N.Y.S.2d 271 (1st Dep't 1990) (sweater was within "grabbable area").
9. *People v. Lucas*, 53 N.Y.2d 678, 439 N.Y.S.2d 99, 421 N.E.2d 494 (1981) (search of entire motel room unreasonable); *People v. Crandall*, 181 A.D.2d 687, 581 N.Y.S.2d 215 (2d Dep't 1992) (area beneath couch was "grabbable area"); *People v. Johnson*, 178 A.D.2d 490, 577 N.Y.S.2d 421 (2d Dep't 1991) (dresser was within arm's reach); *People v. Wainright*, N.Y.L.J. 3/10/92 (N.Y. Crim. Ct. 1992) (area underneath stereo rack not "grabbable area").
10. *People v. Jimenez*, 22 N.Y.3d 717, 985 N.Y.S.2d 456, 8 N.E.3d 831 (2014).
11. *Matter of Kenneth S.*, 27 N.Y.3d 926, 28 N.Y.S.3d 677 (2016).
12. *People v. Gray*, 143 A.D.3d 909 (2d Dep't 2016); *People v. Diaz*, 143 A.D.3d 559 (1st Dep't 2016); *People v. Anderson*, 142 A.D.3d 713, 37 N.Y.S.3d 151 (2d Dep't 2016); *People v. Ortiz*, 141 A.D.3d 872, 35 N.Y.S.3d 536 (3d Dep't 2016); *People v. Wilcox*, 134 A.D.3d 1397, 22 N.Y.S.3d 717 (4th Dep't 2016); *People v. Alvarado*, 126 A.D.3d 803, 5 N.Y.S.3d 271 (2d Dep't 2015); *People v. Morales*, 126 A.D.3d 43, 2 N.Y.S.3d 472 (1st Dep't 2015); *People v. Febres*, 118 A.D.3d 489, 987 N.Y.S.2d 133 (1st Dep't 2014); *Matter of Tonay C.*, 119 A.D.3d 560, 987 N.Y.S.2d 893 (2d Dep't 2014); *People v. Miranda*, 44 Misc. 3d 140A, 999 N.Y.S.2d 798 (App. Term 1st Dep't 2014), *aff'd*, 27 N.Y.3d 931, 30 N.Y.S.3d 600 (2016).
13. *People v. Reid*, 24 N.Y.3d 615 (2014).
14. *Knowles v. Iowa*, 525 U.S. 113 (1998).

New York Expands Criminal Records Sealing

By Rick Collins

While much of the media attention concerning the 2017-18 New York State budget focused on the debate over amending state law to raise the age of criminal responsibility in New York to age 18,[1] an equally important and potentially more far-reaching provision was included into the law signed by Governor Cuomo. New York has finally joined ranks with states across America by enacting a "second chance law" with broad application. The law adds a new section to the Criminal Procedure Law (CPL), Section 160.59, permitting the sealing of certain criminal convictions.[2] Becoming effective in October 2017, Section 160.59 will benefit tens of thousands of New Yorkers who will now be eligible to seal their criminal convictions and gain a fresh start on life.

Before this new change in the law, a criminal conviction in New York typically remained on a person's record permanently. It would appear as part of any civil background check, destroying opportunities in employment, housing, education, and many aspects of ordinary life we take for granted. As a result, reformed ex-offenders remained unemployed or underemployed despite years or even decades of good conduct, to the detriment of themselves and their families. Employers were also the losers if they rejected job applicants on whom they might otherwise have taken a chance. For those ex-offenders unable to support themselves or their loved ones, the financial burden fell to the taxpayers. Over the years, several standalone bills have attempted to remedy the situation, sponsored by legislators including New York State Assemblyman Joseph R. Lentol, State Senator Lee Zeldin (now a U.S. Congressman) and State Senator Patrick M. Gallivan, but never became law.

Only a select group of cases were eligible for post-conviction sealing under a 2009 statute enacted to aid only those whose drug or alcohol addiction led them to commit crimes.[3] This limited and grossly underutilized statute provided those convicted of drug offenses an opportunity to have their criminal records conditionally sealed under Criminal Procedure Law Section 160.58, if as part of their sentence they successfully completed a judicially sanctioned drug treatment program.[4] Under the requirements of the 2009 sealing provision, the applicant seeking sealing of a criminal record must file a motion with the court. The court then puts the office of the local District Attorney on notice that it is considering sealing the records, and the DA's office is given an opportunity to respond.[5] Some of the relevant factors for the court to consider when weighing the motion include the circumstances and seriousness of the offense, the character of the defendant, including his or her completion of the judicially sanctioned treatment program, and the impact of sealing the defendant's records upon his or her rehabilitation and successful and productive reentry into society.[6]

Should the judge grant the motion and order the records sealed, this sealing is conditional pursuant to a so-called "spring-back provision." If the applicant is rearrested and charged with a new misdemeanor or felony offense, the sealed records "spring back" and are immediately unsealed.[7] If the new arrest results in a termination of the action or a non-criminal disposition, the records that were unsealed due to the new arrest are then resealed, once again on a conditional basis.[8] If a criminal conviction occurs, the previously sealed record remains unsealed. Thus, the benefits of sealing can be lost based on new criminal conduct, effectively placing the person on lifetime probation to retain the sealed status.

"CPL Section 160.59 does not require completion of a judicially sanctioned treatment program, and it expands sealing availability to include most misdemeanor and felony convictions, including driving while intoxicated convictions."

The new law is different. CPL Section 160.59 does not require completion of a judicially sanctioned treatment program, and it expands sealing availability to include most misdemeanor and felony convictions, including driving while intoxicated convictions.[9] Sex offenses, homicides, and other violent felonies are among the crimes that are ineligible for sealing.[10] A person with two or more felony convictions, or who has been convicted of more than two crimes, is also ineligible for record sealing.[11] The law permits two eligible offenses to be sealed, but not more than one eligible felony offense may be sealed.[12]

The new law spells out the process for those convicted of a crime to apply to the court on motion to have their records sealed. To qualify, ten years must have passed since the imposition of sentence on the most recent conviction.[13] The term is extended to the date of re-

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lease if imprisonment was part of the sentence.[14] An applicant also cannot have any pending charges[15] or have received any criminal convictions within the preceding ten years.[16]

The motion for sealing must contain a sworn statement by the defendant stating the reasons why the court should exercise its discretion and grant the sealing application.[17] A copy of the motion must be filed with the local District Attorney's office.[18] The DA's office has 45 days to object to any sealing application, and if such an objection is lodged, the court must conduct a hearing on the matter.[19] Factors for the court to consider in deciding whether to grant sealing include the amount of time that has elapsed since the last conviction, the character of the defendant, including any measure the defendant has taken towards rehabilitation, such as treatment programs, work, school, or volunteer work, and the impact sealing would have on the defendant's rehabilitation and his or her successful and productive reentry into society.[20]

Should the court grant the motion, records related to the conviction are sealed.[21] Unlike sealing pursuant to CPL Section 160.58, records sealed pursuant to Section 160.59 are not conditionally sealed, as there is no "spring-back provision." The practical effect is the conviction would no longer appear on a background check, whether for employment, housing, or schooling. However, the conviction would still be accessible by certain law enforcement agencies, including local agencies responsible for the issuance of gun permits.[22] The law separately amends Executive Law Section 296(16), whereby a person who has his or her record sealed pursuant to CPL Section 160.59 will not have to divulge information related to the sealed offense in connection with any licensing, employment, or application for credit.[23]

The new section also directs the Office of Court Administration to create a form for applicants to use.[24] While there may be *pro se* applications, the possibility of opposition by a DA's office and a hearing before a judge will likely mean that strong legal advocacy will play a pivotal role in the process.

CPL Section 160.59 comes after years of tireless work by members of this Section and many others. Truly, this was a team effort by a dedicated and enthusiastic coalition of people too numerous to name. Among them, the Section's Sealing Committee, formed by then-Chair Marvin Schechter, was co-chaired by Jay Shapiro and myself and included original members Roger Adler, Kevin O'Connell, James Mellion, Larry Goldman, and Marvin Schechter. Other members of the Section, including Hillel Hoffmann, retiring Section Chair Sherry Wallach, and Past Chair Hon. Mark Dwyer, made substantial contributions to the cause, and Section Secretary Bob Masters was instrumental in including the District Attorneys Association of the State of New York (DAASNY) among the collation of advocates for a new sealing law. We were also aided by Kevin Kerwin and the NYSBA staff, and we must thank the NYSBA leadership for making criminal records sealing a priority of the Association. Assemblyman Lentol and Senator Gallivan deserve credit for their perseverance as sponsors, and the Governor credited for his essential support. Other acknowledgments include Mike Green, Acting Commissioner of the New York State Division of Criminal Justice Services (DCJS), and Rockland County District Attorney Tom Zugibe, DAASNY President, for their considerable efforts and brave support for this endeavor.

Criminal Procedure Law Section 160.59 will have a dramatic, positive impact on people throughout New York whose lives have been tarnished and dreams dashed by the stigma and consequences of a criminal record. Allowing these convictions to be sealed provides a much-needed opportunity for deserving ex-offenders throughout New York State to truly wipe the slate clean to the benefit of all.

Endnotes

1. Jesse McKinley, *Assembly Clears Hurdle in Budget Talks With Deal on Age of Criminal Responsibility*, N.Y. Times, Apr. 5, 2017, at A18.
2. At the time of this article's publishing, the law has not been printed in an official reporter, but is available online at http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S02009&term=2017&Summary=Y&Text=Y.
3. N.Y. Crim. Proc. Law § 160.58.
4. *Id*. § 160.58(1).
5. *Id*. § 160.58(2)(d).
6. *Id*. § 160.58(3).
7. *Id*. § CPL 160.58(8).
8. *Id*.
9. *Id*. § 160.59(1)(a).
10. *Id*.
11. *Id*. §160.59(3)(h).
12. *Id*. § 160.59(2)(a).
13. *Id*. § 160.59(5).
14. *Id*.
15. *Id*. § 160.59(3)(e).
16. *Id*. §160.59(3)(f).
17. *Id*. § 160.59(2)(b)(v).
18. *Id*. § 160.59(2)(c).
19. *Id*. § 160.59(6).
20. *Id*. § 160.59(7).
21. *Id*. § 160.59(8).
22. *Id*. § 160.59(9).
23. Available at http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S02009&term=2017&Summary=Y&Text=Y.
24. N.Y. Crim. Proc. Law § 160.59(1-a).

A Conversation with Professor Thompson, Author of Pulitzer-winning Book *Blood in the Water*

By Peter Areté, Eugene Frenkel, and Natasha Pooran

Heather Ann Thompson is an American historian, author, activist, and speaker from Detroit, Michigan. She won the 2017 Pulitzer Prize in History for her work *Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy* (Pantheon).

First, congratulations on winning the Pulitzer Prize for History! What seems to be the reception to your book? Are people shocked that something like this could happen?

It has been a really amazing reception and I hope that people will now start reading even more about Attica, prisons in general and prison conditions. Also I hope it will stir interest in cases defense lawyers have litigated. The book has won so many prizes now and is being used in different settings.

Have you heard any word if anyone has started to use it in classroom settings?

Yes; I have heard from people that told me they have used it in their liberal arts classes. I have done quite a few law school talks, but I do not know whether the chapters on the cases have been assigned in any law schools. That is one of the reasons that I am loving to talk with you guys because I really hope that one day this case is read by a lot of law students. This is something that a lot of law students do not read. It is important to think about the ways in which the law touches upon the actual people.

I have this feeling that it might become like *Silent Spring*, creating a point in time that becomes a teaching point.

One of the things I hope for is for law schools to start teaching it. This nation created this incredibly vast apparatus of containment, control, and surveillance. This apparatus is a historical anomaly. Never has the US done this, nor has any other country. So this means that there is a lot of work for law students and lawyers to take on. This is is going to be ground zero for legal work for the next few decades.

The legal work involves defending people accused of crimes, but it can be so much bigger than that. Legal work also needs to be done to oversee policing, conditions of confinement, or immigration detention centers. It can also help remedy things like the crack cocaine disparity that still exists today.

Every element of this apparatus that we implemented over last 40 years is, at its bottom, a question of legality, law, and justice.

How did you first begin to study mass incarceration?

I, like so many people, did not see the elephant in the room. I was interested in civil rights. I originally started the *Attica* book because I was intrigued that there was a civil rights riot in a prison. But I did not know anything about prisons nor even the language of mass incarceration.

In the process of writing the book, it occurred to me and many others, "What in the world?" Somehow, right after Attica, we started to lock up everybody. This changed our society fundamentally.

I started wondering about the why and how. This series of questions led me to become a scholar on the incarcerated state in general. I wanted to write about it as a matter of policy and activism, as something we needed to do something about.

What is it that draws you to study such a challenging subject that others do not want to talk about? What is different about you that draws you to this topic that others would prefer not to talk about?

Fundamentally, it is because I grew up in Detroit and I watched the drug war decimate the city I grew up in. I was a white kid growing up in a mostly black city. All around me I am watching the extraordinary possibility of

Peter Areté is a current 2L graduate fellow at CUNY Law, aspiring to serve his community as a prosecutor here in New York. He graduated from Portland State University with a BA in Philosophy and Liberal Studies. Prior to attending law school, Peter served his country as a Peace Corps Volunteer in the Republic of Vanuatu, 2012-15. Peter is a CUNY School of Law '18 student. **Eugene Frenkel** decided to attend the Benjamin N. Cardozo School of Law to become a prosecutor after graduating from Baruch College. During law school, he kept New Yorkers safe from harm in his internships with U.S. Department of Homeland Security, U.S. Attorney's Office, Southern District of New York, and the U.S. Securities and Exchange Commission. After graduating law school in May of 2017, he will begin his service as an Excelsior Fellow with the New York State Government, continuing his mission of keeping New Yorkers safe. He is the founder and outgoing Chair of the Criminal Justice Section's Law Student Committee**.** **Natasha Pooran** received BAs in Honors Criminal Justice and English from SUNY Albany, where she graduated *magna cum laude*. Currently enrolled as a 2L at CUNY Law, she is the founder and leader of the Civil Service Association, aimed at providing educational and career advancement opportunities for students seeking careers in civil and public service. She hopes to work as an Assistant District Attorney in New York City. Natasha is a CUNY School of Law '18 student.

civil rights struggles and the possibilities of black leadership in one of the major American cities. However, all of it was undercut by the politics of treating addiction and poverty as a crime. In Detroit, 1 in 22 people are under correctional control.

It feels very personal to me that so many are in correctional control. It was the same when I taught at Temple University and I watched the same crisis of mass incarceration play around me in Philadelphia.

Later on, I became a parent to three biological children and also to another child who was abused by the system. It became very personal when I watched it play out with someone who is so important to me.

That is the personal aspect. But I also think that people with access to education really do not know about what is going on on the ground. I feel an obligation to talk about things that many others do not see and will never see.

"We all have faith in our government, but it is shocking when you see how reality goes down."

When and how did you first find out about the Attica uprising?

If you study African American history, everyone knows about Attica. It is one of those psychotic moments in our history. But, that said, I did not know very much about it. I knew it happened, and I watched a documentary on it but did not know more than that. It was intriguing and I knew that it mattered and was important but I did not understand how extraordinary it was. What was extraordinary was how traumatic it was for the people, the depths the state went to cover it up, and what it was about.

How did you piece together the story?

Because access to the records was largely barred, it was a fundamental question of who has the originals of what the state has. It was a guiding principle for me as I go through any other possible archival holding. I went through other agencies, but I did rely heavily on the prisoners and survivors at first. I also relied on the lawyers who were involved in the legal aspects. One attorney's life was fighting on behalf of the prisoners and she had an extraordinary collection of resources on that end.

And it was just a lucky break of coming across records in the courthouse as I mentioned in the book's prologue.

At what point in your research did you discover the hidden aspect of this story?

I did not realize the lengths that New York had gone to in order to make the records inaccessible. The blocking of records and denial of Freedom of Information Act requests. But I was able to get pieces through survivors and some documents through archival research.

Then when I happened on the cache of documents in my prologue, I was taken aback by the level of abuse and horror of what retaking the prison was like and how many people with power, privilege, and access that could have done the right thing and could have apologized at the very least and held people responsible for it. But they did not do anything. In fact, they all did the opposite, turned a blind eye, and covered it up.

We all have faith in our government, but it is shocking when you see how reality goes down.

Over what time period did you do this research?

I began in 2004 and finished the book in 2017.

What were the prison conditions like?

Brutal. Though I have to say that, ironically, they are even worse today. At that time, people were fed on 63 cents a day, locked in cells all day long, and denied religious freedoms. For example, Muslims were forced to eat pork. There was a basic grinding down of humanity. Not being allowed to see children if they were not married to their mother. Just on and on and on…

These men tried to work through system to get their needs met and problems remedied. They did not riot because of a plan. An organized rebellion came out of a few men being locked in a tunnel. But because of the way the state lied about what happened in Attica, the message that the world took was that prisoners did not deserve rights. As a result, prisons became much, much worse.

How did these prisoners actually feel about Attica?

One-hundred-twenty-eight of them were shot so severely they could not walk or stand. They were tortured for weeks. They had their eyeglasses smashed so they could not see. They had their dentures smashed so they could not eat. It was traumatizing.

Despite that, they managed to effect some important reforms, all of which made New York a better place than other states. But, in time, so many of those gains were lost in the punitive mood that eventually took over the nation.

It was a real trauma. The state made prisoners pay dearly for that riot.

Who did you speak with for the book? Were they open to speaking with you?

I talked with so many people. I talked with some of the guard hostages, some of the troopers, lawyers, judges, and reporters. I had lots of conversations with people for the book. It was more of a conversation; I asked people to share their stories with me and they did.

Were there any civil cases brought against the state as a result of the riot?

Yes; first the state went after the prisoners in a set of criminal cases, which is why the chapter on criminal defense is so important for law students. But also prisoners filed a civil suit. That case took three years to get through the court system.

It's a powerful story. Not just the story of the criminal prosecution but there is also the civil case covered in the book. This is a book for everyone.

How did some of the people that you spoke with feel? How did prisoners react as opposed to the judges, defense attorneys, or prosecutors? Or the state officials?

They have been really amazing. The number of people who have written to me from every one of those groups that have expressed such gratitude that the story was told.

The survivors found the book difficult because they had to relive the trauma. To lay it all out on paper and have the dots connected was very difficult for them. A lot of survivors had to read it slowly and take it in doses.

Some of the judges were grateful that the story was told.

State officials have been quiet and said very little. They initially said that they would make Attica records searchable online. But I think it was mostly a PR ploy. You can find the archive online but nothing particularly earthshattering is there.

State officials need to take the opportunity to apologize. The State of New York has not apologized.

The defense attorneys who defended the Attica brothers have been grateful for the book. The ones who defended the state in the criminal trial have been very generous about the book. I met some of them at that luncheon [in January].

The prosecutor in the criminal case thought very differently at the time, but was very generous about the book at that luncheon. Prosecutors at the time were doing their job, but perhaps now look back on it and see it as more of a one-sided prosecution.

I have not heard from the state lawyers defending the state in the civil case.

What about the men who rioted? Where are they now? What happened to them?

They are all over the place. There are guard survivors who I am still in contact with. Some prisoner survivors are still alive, but are not getting medical care. A great number of Attica survivors have not lived well. One of the guys died of cancer in 2004, for example. The *New York Times* reporter died before the book came out. Others died before the book came out.

Bringing everything that you learned together, what is the future of mass incarceration? Is there something that can be done? Is there something that is currently being done?

I think we are in the moment of discussing criminal justice reform passionately. We are still discussing it passionately, but I am worried about this electoral moment. I am hearing a different message from the White House now than six months ago. Now it is a law and order message.

There can be stuff done. Let's start with the basic premise that we do not solve social problems through the criminal justice system. You solve them through the social welfare and education system.

Mass incarceration is a policy choice that can be unchosen. From a legal point of view, mass incarceration is dependent upon laws proven unusual and that are unjust. The final piece: policing and prosecution need to abide by the fundamental principle that all are entitled to full justice under the law. If we did that, our prison populations would be reduced exponentially.

Different people commit the same offenses and they do not get equal time or prosecuted in equal numbers.

Thank you so much for your time!

You are welcome; this is a pleasure to do.

The Criminal Justice Section and the Young Lawyers Section Trial Academy

From April 5-9, the Young Lawyers Section of the New York State Bar Association held its annual Trial Academy at Cornell Law School, in Ithaca, NY. Members of our Section played important roles at the Academy, including Section Chair Sherry Levin Wallach, Peter Gerstenzang, Xavier Donaldson and Hon. Guy Mitchell.

The CJS was a co-sponsor of the Academy, and provided two scholarships for young attorneys to attend. The recipients were Rasheim Donaldson and Jessica Drury. Below are their reflections on the Academy.

Rasheim Donaldson, a recipient of a scholarship provided by the Criminal Justice Section at the Criminal Justice Section and the Young Lawyers Section Trial Academy at Cornell Law School.

Rasheim Donaldson is an Assistant District Attorney at the Bronx District Attorney's Office with a focus on investigating and prosecuting violent felonies, ranging from armed robbery to attempted murder. A New York City native, he received his B.A. from Lafayette College, J.D. from Wake Forest University School of Law, and LL.M. Degree from Temple Law School. Outside of work, he regularly mentors high school students, coaches mock trial, and participates in youth development programs.

Rasheim Donaldson Wrote:

Motivational speaker Jim Rohn has a profound philosophy: "Don't wish it were easier, wish that you were better. Don't wish for fewer problems, wish for more skills. Don't wish for less challenge, wish for more wisdom." I applied his philosophy to the New York State Bar Association Trial Academy and achieved great results. Although being on trial is not easy, I learned that the problems and challenges of trial are not insurmountable. By empowering me with tools for success, the Trial Academy made me a better, more skillful, wiser trial lawyer.

The Trial Academy lecturers delivered thoughtful instruction. Each morning began with well-designed, dynamic demonstrations and lectures from accomplished practitioners. Presenters provided helpful content and reinforced key principles in both civil and criminal law. The demonstrations put the lectures in context and modeled successful approaches. Each presenter had a different style, providing balance and perspective. I left each lecture with a wealth of knowledge and reference material.

I thrive when challenged to perform, so I was thrilled to gain practical experience before distinguished judges and lawyers. From jury selection to the summation, I felt like I was truly on trial. I prepared cases, incorporated advanced strategies, developed areas of improvement and cultivated my strengths. I also benefited from watching other participants meticulously use the fact patterns to advocate for each side. Although the atmosphere was quite collegial, the experience reminded me of the level of preparation and tenacity required to prevail in our competitive, adversarial legal system. While my nervousness before each performance was inevitable, I became more comfortable with each experience.

The constructive criticism was invaluable. My group leader effectively highlighted my progress from start to finish. After each performance, I received feedback from rotating faculty members with diverse perspectives. Then, I met with a different faculty member for a comprehensive review of each of my recorded performances. Reviewing video helped me refine my word choice, polish my presentation, and eliminate unhelpful gestures. Fortunately,

Pictured above, faculty members Eric Sills, David Haggard, Xaxier Donaldson and Timothy Fennell are joined by Criminal Justice Section Chair Sherry Levin Wallach at the Welcoming Reception to launch the Trial Academy at Cornell University. Next year's Trial Academy will take place from April 4–8, 2018.

I have a compilation of videos, which will continue helping me self-correct, as a memento of the program.

The Trial Academy was sublime. I gained information, training, experience, and feedback to improve as a trial lawyer. The program encouraged me to not only learn from others, but also to seek within to succeed. As I strive to master trial advocacy, I sincerely appreciate my Trial Academy experience as a powerful opportunity to improve my best.

Jessica Drury Wrote:

Thank you to the Criminal Justice Section of the NYSBA for awarding me a scholarship to attend the NYSBA's Young Lawyers Section Trial Academy this April 2017. The Academy undoubtedly transformed my life. My voice was unearthed. My talent for trial strategy was discovered. For the first time in my life, I found legal mentors. I ultimately solidified my decision to pursue a career in criminal law.

The first day of the Academy, my teacher Anthony Colleluori, Esq., a New York City criminal defense attorney, instructed the class that no notes would be allowed. "You will learn to speak on your feet," he assured. After each day's performance of a different aspect of trial, I would review the videotape of my performance. Day one, I was a bit soft spoken. By the end of the Academy, I was confident and my voice was solid.

Each night of the Academy, Mr. Colleluori invited his class to dinner to talk strategy for the next day's performances. I discussed a daring cross-examination strategy that I ultimately employed. It turned out to be a great success. I felt like a natural. In addition to Anthony Colleluori, I met another criminal defense attorney, David Chidekel, Esq., who is also the Vice President of the Brooklyn Bar Association. He noticed that my name-tag stated that I was from Brooklyn and he asked if I wanted to get more involved in Brooklyn's legal community. I said "of course!" Both he and Mr. Colleluori have invited me to many legal events since the Academy and have mentored me during my current transition to criminal law.

Finally, the most invigorating part of the Academy for me was when I gave the opening statement for the criminal defense mock case. I knew I wanted to do criminal law as soon as I gave it. The stakes were high. The topics were intriguing. My decision was solidified. I later

expressed this decision at the Academy to yet a third criminal defense attorney, Sherry Levin Wallach, Esq. She invited me to work on an article for the NYSBA's Criminal Justice Section on New York's Sex Offender Registration Act. I accepted! To conclude, the Academy was life changing. I found my voice, love for trial strategy, amazing mentors, and my career path of criminal law. Thank you again to the Criminal Justice Section of the NYSBA for the scholarship.

Jessica Drury is a recently admitted New York attorney and graduate of Benjamin N. Cardozo School of Law. She is currently an Associate at Helen F. Dalton & Associates, P.C. She is passionate about criminal law. She is also the drummer in the all-girl band called Return of the Fairies.

Pictured above, Jessica Drury, Trial Academy Scholarship Recipient, Garry Voskresensky and Victoria Munian.

Criminal Justice Section Spring Meeting

Peter Gerstenzang on Dram Shop and Handling Alcohol-Related Arrests

The Section's Spring program included a lecture by Peter Gerstenzang, of Gerstenzang, Sills, Davis Cohn & Gerstenzang in Albany, on dram shop and handling alcohol related arrests. The Dram Shop Law, in one form or another, is incredibly enduring: it celebrates its 160th Anniversary this year. Peter, one of New York State's most renowned experts in this area, described the Dram Shop Law in detail, explaining that it is a curious anomaly because it contravenes ordinary principles of negligence.

Peter Gerstenzang spoke at the Criminal Justice Section's Spring Meeting on dram shop and handling alcohol-related arrests. He is pictured here at the Trial Academy event at Cornell.

Mr. Gerstenzang noted that the law first requires that the liquor dealer commit the crime of unlawful sale of an alcoholic beverage pursuant to Alcoholic Beverage Control Law § 65. This section prohibits the sale of alcohol to a minor, a visibly intoxicated person, and a known drunkard. The classification of "known drunkard" is somewhat ambiguous since historical records do not reveal any registry of known drunkards, nor specific criteria for one's attainment of this designation.

Secondly, the Dram Shop Law does not provide for the recovery of damages by customers from the establishment that wrongfully served them. It defies conventional theories of privity and proximate cause because it does hold the errant liquor dealer liable to innocent third parties injured by the intoxicated actions of the wrongfully served customer. Given the awful damage still being caused by intoxicated people, this subject was both timely and relevant.

For Photos from the Spring Meeting, see Page 18

Criminal Justice Section Spring Meeting

May 4-6, 2017 | Seneca Falls, NY

Above left, Monica Wallace, Assemblymember, NYS Assembly 143rd District; MaryBeth Covert, Assistant Federal Defender WDNY; Fonda Kubiak, Assistant Federal Defender WDNY; Hon. Michael Mohun, NYS Supreme Court; and Barry Covert. Above right, Hon. Jenny Rivera, NYS Court of Appeals and Sharon Stern Gerstman, Esq., NYSBA President. Below, Section Chair Sherry Levin Wallach, Esq., Spring Award Recipients Gary Muldoon, Esq. and Cheryl Meyers Buth, Esq., Hon. Jenny Rivera, and Spring Award Recipient Karen L. Murtagh, Esq.

Above, Marc Gann, Esq., Claudia Schultz, Esq., and Leah Nowotarski, Esq. Right, the CWIL Trailblazers Exhibit at the Seneca Falls Visitor's Center. Below left, Adam Koch, Esq., Andrew Kossover, Esq. and Norman Effman, Esq. take a tour of the Willard Drug Treatment Facility. Below right, Judicial Diversion Courts Panelists Hon. Michael Mohun, Sheralyn Pulver, Esq., Scott D. McNamara, Esq. and Linda Palmer.

The Criminal Justice Section's Award Recipients

The Criminal Justice Section honored this year's award recipients at two events: the annual section luncheon in New York City on January 25 and at the Section's Spring Meeting in Seneca Falls on May 5. This distinguished group was selected by the Section's Award Committee, chaired by Norman P. Effman, who was joined by fellow committee members Daniel N. Arshack, Susan M. BetzJitomir, Richard D. Collins, Lawrence S. Goldman, Kevin Thomas Kelly, Robert J. Masters and John M. Ryan.

Here are this year's award winners:

Karen L. Murtagh, Esq., Outstanding Contribution in the Field of Correctional Services

Karen L. Murtagh, Esq. received the award for Outstanding Contribution in the Field of Correction Services. Ms. Murtagh is the Executive Director of Prisoners' Legal Services of New York (PLS), a not-for-profit legal services organization that was founded in 1976 to provide civil legal services to indigent inmates in New York State correctional facilities. She is a graduate of Clarkson University and Albany Law School. She is admitted to practice law in New York State, all Federal District Courts of New York and the U.S. Supreme Court. She has litigated issues concerning prisoners' due process rights at disciplinary hearings, prison conditions, deliberate indifference, the First Amendment and the Prison Litigation Reform Act (PLRA). She has tried cases in both the Court of Claims and Federal Court and has argued numerous cases before New York State courts including the New York Court of Appeals where she successfully argued that an incarcerated person's mental health must be considered as a mitigating factor at a prison disciplinary hearing. Ms. Murtagh was also successful as *amicus*, appearing before the U.S. Supreme Court in a case challenging the constitutionality of a New York State statute that prohibited prisoners from filing federal 1983 actions in state court.

Mr. Murtagh has worked as a staff attorney, managing attorney, Director of Litigation and Deputy Director for PLS. She has provided extensive training to staff and pro bono attorneys on administrative and Article 78 practice and how to litigate excessive force cases in federal court. She also served on the faculty of Albany Law School as an adjunct professor, where she established a clinic program for prisoners' rights and taught Civil Procedure, Administrative Law, Constitutional Law, Court of Claims Practice, and Litigation Skills. She conducts an annual training for CUNY law students in the Criminal Defense Clinic, training them on the prison disciplinary process and Article 78 procedure. She has lectured and conducted CLE trainings across the State on prisoners' rights issues.

Ms. Murtagh is the author of *Solitary Confinement in New York State*, the New York State Bar Association's Committee on Civil Rights Report to the House of Delegates, which resulted in the House of Delegates adopting a resolution urging, among other things, that the imposition of long-term solitary confinement on persons in custody beyond 15 days be proscribed.

Under her leadership, PLS was awarded the 2014 Denison Ray Non-Profit Organization Award which recognized PLS' extraordinary commitment to strengthening access to justice initiatives, delivering the provision of civil legal services to low-income and disadvantaged clients, increasing the provision of pro bono services and marshaling resources to maximize services to the community.

Ms. Murtagh is a member of the New York State Bar Association and sits on its Civil Rights Committee. She is also an advisor to the NYSBA Immigration Committee.

Gary Muldoon, Esq., Outstanding Contribution in the Field of Criminal Education

Gary Muldoon of Muldoon, Getz & Reston in Rochester is a graduate of Skidmore College and Buffalo Law School. He has been author or coauthor of various books on law, including *The Education of a Lawyer* and *Handling a Criminal Case in New York*, as well as *Family Law for New York Paralegals*. He is also a Contributing Lawyer Editor for the 10th Edition of *Black's Law Dictionary*. Mr. Muldoon's bar association work includes being former dean of the Academy of Law of the Monroe County Bar Association and chair of the Law Practice Management Committee. He has received several awards, including the Pro Bono Award from the United States District Court for the Western District of New York in 2012 and the Raymond J. Pauley Award from the Monroe County Bar Association in 2004. Mr. Muldoon chaired the Fee Arbitration Committee for the Seventh Judicial District and is a frequent speaker at bar association seminars.

Mr. Muldoon's areas of practice include criminal and civil appeals, as well as litigation generally; criminal law; family law; and professional responsibility. He has been a member of the Attorney for the Child panel in the Fourth Department. He has argued before the Second Circuit Court of Appeals, as well as New York State's highest court, the Court of Appeals. He also handles residential real estate and estate law matters.

Mr. Muldoon has been a VISTA volunteer, a Legal Services attorney, instructor at Cornell Legal Aid Clinic, assistant public defender, and law clerk to judges in city and county court. He served on Rochester City Council, including four years as its vice president. He is an adjunct instructor at the State University of New York at Buffalo School of Law. He has also taught college courses on family law, legal research, and wills and estate planning.

Mr. Muldoon is a columnist for the *Rochester Daily Record* on the subjects of Criminal Law, as well as Attorney & Client. His articles have also appeared in the *Buffalo Law Review*, the *New York Law Journal*, *NYS Bar Journal*, *The Rochester Daily Record*, *The Defender* and *The Magistrate*.

Cheryl Meyers Buth, Esq., Charles F. Crimi Memorial Award

This award recognizes the professional career of a defense lawyer in private practice that embodies the highest ideals of the Criminal Justice Section of the NYSBA. This year's recipient is Cheryl Meyers Buth, founder of the Meyers Buth Law Group PLLC in Orchard Park. After graduating from the University of Toledo College of Law, Cheryl Meyers Buth began her legal career at Lipsitz, Green in Buffalo, New York with former Crimi Award winners Paul J. Cambria and Herbert L. Greenman.

After 18 years representing criminal defendants in state and federal courts, in the summer of 2012 she became involved in a case that the *Buffalo News* has called one of the ten most infamous cases in Western New York in the past 50 years. *People v. Corasanti* was a highly publicized vehicular manslaughter trial. Along with Joel Daniels, another Crimi Award winner, Ms. Meyers Buth represented a doctor accused of driving drunk after leaving a country club golf tournament. Prosecutors alleged he was talking on his cell phone when he hit and killed a teenager riding her skateboard home at night from her job at a pizzeria. The doctor was charged with leaving the scene and tampering with evidence in order to conceal his involvement in the accident. The sensational facts divided the community, with most media sources vilifying the doctor. As a member of the defense team Ms. Meyers Buth, among other things, delivered a closing argument in the case that persuaded the jury to acquit her client of manslaughter and all other felony charges.

Over the past few years, Ms. Meyers Buth has obtained acquittals for other clients in a number of cases that have garnered media attention. One such case involved a first team, All-New York high school football star from Corning, who was accused of gang-raping the niece of a Congressman at an after-prom party. In another case she represented a mother who, along with two of her sons, was accused of murder and trafficking guns and drugs. Witnesses claimed she asked to borrow a shovel the night the victim was stabbed and buried in a shallow grave just down the road from their house. The jury acquitted her of all charges after a six-week trial in federal court last summer.

Ms. Meyers Buth is a past recipient of the Criminal Justice Act Award for her work with indigent federal defendants (2013); The M. Dolores Denman Lady Justice Award for Lifetime Achievement from the Western New York Chapter of the Women's Bar Association of the State of New York (2013); and she received the Woman Lawyer of the Year Award from the Women Lawyers of Western New York (100th Anniversary Year) (2014). Since 2013, Ms. Meyers Buth has regularly appeared on the Buffalo NBC affiliate, WGRZ Channel 2 TV, as a legal commentator.

In 2015, Ms. Meyers Buth was certified as an agent for the National Basketball Players Association. In addition to her role as a founding partner in her law firm, she is the owner of R1 Sports Mgnt (www.R1SportsMgnt.com), a sports agency that represents professional athletes and coaches.

Malvina Nathanson, Esq., Outstanding Appellate Practitioner

This award is given in recognition of outstanding advocacy, protection of due process and the public welfare, and the integrity of the judicial system by defense attorneys and prosecutors. Malvina Nathanson has been in private practice in New York City since 1990, concentrating on criminal and civil appeals and post-conviction proceedings in state and federal court. She began her career with the Criminal Appeals Bureau of The Legal Aid Society in January 1966, where she was a staff attorney and then Assistant Attorney-in-Charge, a tenure broken by a leave of absence to clerk for Court of Appeals Judge Charles D. Breitel. In 1973, she went to Boston, where she served as Chief Appellate Defender of the statewide public defender (then known as Massachusetts Defenders Committee). On her return to New York, she was Assistant Attorney-in-Charge of Special Programs in the Criminal Defense Division of The Legal Aid Society, Chief of the Appeals Bureau of the Queens County District Attorney's Office, and Administrator of the Assigned Counsel Plan for Brooklyn, Queens and Staten Island.

Malvina has served on the Executive Committee of the Criminal Justice Section and is a member of the State Bar's Committee to Ensure Quality of Mandated Representation and Committee on Courts of Appellate Jurisdiction. She has also been active in The New York State Association of Criminal Defense Attorneys, having served as Editor in Chief of the magazine; Secretary, Chair of the Amicus Committee, and member of the Board of Directors.

Malvina received the award for Outstanding Contribution to the Bar and Community from the Criminal Justice Section of the New York State Bar Association and for Outstanding Service to the Criminal Bar from the New York State Association of Criminal Defense Lawyers.

Dr. Heather Ann Thompson, Outstanding Contribution in the Field of Public Information

This award is presented in recognition of a significant effort to acquaint the public and the bar with the operation of the criminal justice system; to alert the public to the problems besetting that system; and to foster dedication to the preservation of liberty through law.

Dr. Heather Ann Thompson is an award-winning historian in the Department of Afro-American and African Studies, the Residential College, and the Department of History at the University of Michigan in Ann Arbor. Her recent book, *Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy*, has been profiled on television and radio programs across the country, was named a finalist for the National Book Award, has been named on the Best Books of 2016 lists of *The New York Times*, *Newsweek, Kirkus Review,* the *Boston Globe, Publishers Weekly*, and has been listed as one of the Best Human Rights Books of 2016. *Blood in the Water* has also been optioned by TriStar Pictures and will be adapted for film by acclaimed screenwriters Anna Waterhouse and Joe Schrapnel.

Thompson has written on the history of policing, mass incarceration and the current criminal justice system for *The New York Times, Newsweek, Time, The Atlantic, Salon, Dissent, NBC, New Labor Forum,* and *The Huffington Post*, as well as for the top scholarly publications in her field. She served on a National Academy of Sciences blue-ribbon panel that studied the causes and consequences of mass incarceration in the United States and has given congressional staff briefings on this subject. Thompson is also the author of *Whose Detroit? Politics, Labor, and Race in a Modern American City* (new edition out in 2017), and the editor of *Speaking Out: Activism and Protest in the 1960s and 1970s.*

Rick Jones, Esq., The Michele S. Maxian Award for Outstanding Public Defense Practitioner

This award recognizes an outstanding public defense practitioner. Rick Jones is the Executive Director and a founding member of the Neighborhood Defender Service of Harlem (NDS). He is a distinguished trial lawyer with more than 25 years' experience in complex multi-forum litigation. He is a lecturer in law at Columbia Law School and on the faculty of the National Criminal Defense College in Macon, Ga.

Rick currently serves as President-Elect of the National Association of Criminal Defense Lawyers (NACDL). At NACDL he has served as co-chair of both the Special Task Force on Problem-Solving Courts and the Task Force on Restoration of Rights and Status After Conviction. Both of these efforts resulted in the publication of ground-breaking reports and continuing reforms.

Internationally, Rick was invited to participate as an expert in a Rule of Law Symposium sponsored by the United Nations in Monrovia, Liberia. He was similarly invited by the International Legal Foundation (ILF) to travel to Kathmandu, Nepal in an effort to help sustain, strengthen and institutionalize the public defense function in their newly created constitutional government. Most recently, Rick was invited to the Second Interna- tional Conference on Access to Legal Aid in Criminal Justice Systems in Buenos Aires, Argentina as a speaker to address issues pertaining to government-contracted public defense models of service and the disparate impact of fees, fines and bail on the poor, the marginalized and people of color. In December, 2016 Rick was invited to join the Board of the International Legal Foundation.

Rick is a commissioner on the New York State Council on Community Re-Entry and Reintegration. He is an inaugural member of the steering committee of the National Association for Public Defense, sits on the boards of the New York State Defenders Association and the Sirius Foundation and serves on the Editorial Board of the *Amsterdam News*. He was recently appointed to the Advisory Board of the National Task Force on Fines, Fees, and Bail Practices.

Hon. Judge John M. Leventhal, Vincent E. Doyle, Jr. Award for Outstanding Judicial Contribution in the Criminal Justice System

This award honors outstanding judicial effort to improve the administration of the criminal justice system. This year's recipient, Hon. John M. Leventhal, was appointed by Governor Eliot Spitzer on January 25, 2008, as an Associate Justice of the Appellate Division, Second Judicial Department, to hear civil and criminal appeals. Justice Leventhal was first elected to the Supreme Court, Second Judicial District, in November 1994 and re-elected in 2008. From June 1996 to January 2008, Justice Leventhal presided over the nation's first felony Domestic Violence Court. The "DV" Court was cited for its practices at the Northeast States Domestic Violence Registry Conference in November 1997 and has been observed by jurists and court administrators from New York and other states as well as from other countries. From 2001 to January, 2008, Justice Leventhal also presided over a guardianship part for alleged incapacitated persons. This assignment required the supervision of the management of assets, medical malpractice and personal injury awards as well as other economic issues concerning incapacitated individuals.

Prior to his election to the bench, Justice Leventhal was in private practice from 1982 until 1994 concentrating on criminal and civil litigation and appeals. Justice Leventhal is a frequent lecturer on evidence, domestic violence, elder abuse, actual innocence and wrongful convictions, guardianship, foreclosures and other topics before bar associations, law schools, civic groups, court administrators and governmental agencies.

In 2015, he received the Brooklyn Bar Association's Annual Award For Outstanding Achievement in the Science of Jurisprudence and Public Service. In 2009, he was given the Brooklyn Law School Alumni of the Year Award. In 2008, he received the Distinguished Achievement Medal from the New York State Free and Accepted Masons, the Brooklyn Women's Bar Association Beatrice M. Judge Recognition Award "for outstanding service to the women of the Bar, to the community and the law," and the New York Board of Rabbis and Dayenu Voices of Valor "Elijah Award" for male leadership in ending domestic violence. He also received the National College of District Attorneys' Stephen L. Von Riesen Lecturer of Merit Award "in recognition of exceptional service in the continuing professional education of all individuals who work on behalf of domestic violence survivors, their families and our communities."

In 2005, Justice Leventhal received a Special Commendation from the U.S. Department of Justice "in recognition of his extraordinary contribution to the prevention of violence against women . . . and for his groundbreaking work and leadership on the role of judicial reviews in the supervision and accountability of domestic violence offenders." In 2003, he was a recipient of the Ruth Moscowitz Gender Fairness Award presented by the Second Judicial District. In 2001, he was recognized by the Brooklyn Women's Bar Association "for his continuous support of and commitment to women in law and society." In 2000, he received the Fordham University School of Law's "in The Trenches" award for his work in the Domestic Violence Court. Justice Leventhal has authored or co-authored 24 articles relating to criminal and civil law. He has written a book entitled *My Partner, My Enemy,* released in June 2016, about his experiences presiding over the nation's first felony Domestic Violence Court. His work as a judge dealing with domestic violence cases has been featured in a number of newspaper and magazine articles and television and radio programs, including a profile in "Public Lives" of *The New York Times* as well as on MSNBC, Fox and Friends, National Public Radio's Brian Lehrer Show and Public Television's MetroFocus program.

Justice Leventhal was the Editor in Chief of the *Barrister*, the legal quarterly publication of the Brooklyn Bar Association (1982-1994); *Veritas*, the legal publication of the Brooklyn Law School Alumni Association (1982-1984), as well as a Trustee of the Brooklyn Bar Association (1987-1994) and a Director of the Brooklyn Law School Alumni Association (1983-2004). He has a J.D. from Brooklyn Law School, an M.S. from Hunter College (CUNY) and a B.A. from Case Western Reserve University.

Preet Bharara, Esq., Outstanding Prosecutor

This award recognizes a prosecutor who has made special contributions to not only the prosecution community, but to the bar at large, and whose professional conduct evidences a true understanding of a public prosecutor's duty to advance the fair and ethical administration of criminal justice. This year's award winner, Preet Bharara, Esq., is the former United States Attorney for the Southern District of New York. He was appointed to that post by President Barack Obama. Mr. Bharara's nomination was unanimously confirmed by the U.S. Senate on August 7, 2009, and he was sworn in on August 13, 2009.

As U.S. Attorney, Mr. Bharara oversaw the investigation and litigation of all criminal and civil cases brought on behalf of the United States in the Southern District of New York, which encompasses New York, Bronx, Westchester, Dutchess, Orange, Putnam, Rockland and Sullivan counties. He supervised an office of more than 220 Assistant U.S. Attorneys, who handled a high volume of cases that include domestic and international terrorism, narcotics and arms trafficking, white collar crime, public corruption, gang violence, organized crime, and civil rights violations.

As U.S. Attorney, Mr. Bharara applied renewed focus on large-scale, sophisticated financial frauds by creating two new units—the Complex Frauds Unit and the complementary Civil Frauds Unit. The Civil Frauds Unit collected close to $500 million in settlements since its inception, including multi-million dollar settlements with Deutsche Bank and CitiMortgage for faulty lending practices and other fraudulent conduct.

In addition to prosecuting financial fraud, the Complex Frauds Unit was tasked with addressing the threat of cybercrime and has prosecuted core members of the computer hacking groups, LulzSec and Anonymous. Together with the FBI, the office also announced the largest international takedown of defendants allegedly engaged in the theft of personal identification information and other crimes over the Internet.

Recognizing the growing nexus between international narcotics trafficking and terrorism, Mr. Bharara merged two previously independent units to form the Terrorism and International Narcotics Unit. The Unit worked closely with partner agencies and international law enforcement, and was responsible for prosecuting leaders and associates of organizations that engage in transnational acts of terrorism, narco-terrorism, narcotics trafficking, and money laundering.

Under Mr. Bharara's supervision, the office combated corruption in city and state government. The office was at the forefront of prosecuting corruption in Albany and at the local level, bringing charges and securing convic-

tions against multiple elected officials and other corrupt public servants. The office also prosecuted more than 500 members and associates of various gangs operating in the Bronx, Newburgh, Yonkers and other areas in an effort to make communities in the Southern District safer for residents.

During Mr. Bharara's tenure as U.S. Attorney, the office successfully extradited and prosecuted one of the most notorious arms traffickers in the world, Viktor Bout, who is now serving a 25-year sentence. The office also obtained a life sentence for Faisal Shahzad, the Times Square bomber, and for one of the Al Qaeda plotters of the 1998 bombings of two American embassies in East Africa. In addition, the office convicted scores of insider trading defendants, including Raj Rajaratnam, who was sentenced to 11 years, and Rajat Gupta.

The office secured the guilty plea of Peter Madoff for his role in his brother Bernard's Ponzi scheme that included an agreement to a 10-year sentence, the statutory maximum. Together with the Madoff trustee, the office also achieved the largest forfeiture in U.S. history—$7.2 billion from the estate of Jeffrey Picower.

Mr. Bharara served a two-year term as a member of the Attorney General's Advisory Committee and as Chair of its Subcommittee on White Collar Fraud. He is Co-Chair of the Securities and Commodities Fraud Working Group of the interagency Financial Fraud Enforcement Task Force.

Prior to becoming the U.S. Attorney, Mr. Bharara served as Chief Counsel and Staff Director of the U.S. Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts. During his tenure, he helped to lead the Senate Judiciary Committee investigation of the firing of United States Attorneys.

From 2000 to 2005, Mr. Bharara served as an Assistant U.S. Attorney in the Southern District of New York, where he prosecuted a wide range of cases involving organized crime, racketeering, securities fraud, money laundering, narcotics trafficking, and other crimes.

Mr. Bharara was a litigation associate in New York at Swidler Berlin Shereff Friedman from 1996 to 2000 and Gibson, Dunn & Crutcher from 1993 to 1996. He graduated *magna cum laude* from Harvard College with an A.B. in Government in 1990, and from Columbia Law School with a J.D. in 1993, where he was a member of the *Columbia Law Review.*

Kenneth P. Thompson, Esq., David S. Michaels Memorial Award

Kenneth P. Thompson, the former Kings County District Attorney, was recognized for his courageous efforts in promoting integrity, justice, and fairness in the criminal justice system. District Attorney Thompson tragically passed away in October 2016 after a battle with cancer. Mr. Thompson was elected the District Attorney of Kings County in November 2013.

District Attorney Thompson is a former federal prosecutor who served in the United States Attorney's Office for the Eastern District of New York, where he successfully investigated and prosecuted a wide range of criminal cases, and gained a reputation as an exceptional trial lawyer.

As an Assistant U.S. Attorney, Mr. Thompson was a member of the federal prosecution team whose outstanding work and legal skill forced former New York City Police Officer Justin Volpe, who brutally beat and sodomized Abner Louima inside a bathroom at the 70th Precinct in Brooklyn, to plead guilty during the middle of trial.

Prior to joining the U.S. Attorney's Office, Mr. Thompson was an attorney in the United States Treasury Department in Washington, D.C., where he served as Special Assistant to the Treasury Department Undersecretary for Enforcement, and later the Department's General Counsel's Office. Mr. Thompson also played a key role on the team of lawyers and federal agents that investigated the raid on the Branch Davidian Compound in Waco, Texas. In that raid, four federal agents were killed and 20 others shot.

After serving as a federal prosecutor, Mr. Thompson entered into private practice and worked at a prominent international law firm. He then co-founded his own law firm where he represented victims—everyday men and women—who had suffered unlawful discrimination or sexual violence.

Most notably, Mr. Thompson worked with elected officials and members of the clergy to convince the United States Department of Justice to reopen the investigation into the 1955 murder of 14-year-old Emmett Till in Mississippi. He also represented Nassatou Diallo, the chambermaid who reported that Dominique Strauss-Kahn, the former head of the International Monetary Fund, sexually assaulted her in a Manhattan hotel room.

Early years and personal life

Mr. Thompson's mother was instrumental in his legal and public service career path. In 1973, Mrs. Thompson became a police officer with NYPD, and was one of the first women to go on patrol in the history of the city.

Mr. Thompson attended John Jay College of Criminal Justice for his undergraduate studies and graduated *magna cum laude*. He earned his law degree at New York University Law School, where he was awarded the prestigious Arthur T. Vanderbilt Medal for his outstanding contributions to the law school community.

Mr. Thompson is survived by his wife, Lu-Shawn, and their two young children.

United States Supreme Court News

By Spiros Tsimbinos

Introduction

The most significant news involving the United States Supreme Court during the last few months was the announcement by President Donald Trump that he was nominating Judge Neil Gorsuch to fill the vacancy on the United States Supreme Court that occurred as a result of the death of Justice Scalia. We provide details on the background of Judge Gorsuch and also comment on the bitter and contentious Senate confirmation process that ensued. The Court, while operating with eight justices, also issued some significant decisions and we summarize these cases for the benefit of our readers. We also deal with some important cases that are still pending and were not expected to be determined until the last few days of the Court's current term.

United States Senate Confirms President Trump's Nomination of Judge Neil Gorsuch to Fill Vacancy Created by the Death of Justice Scalia; Bitter and Contentious Senate Confirmation Process Finally Ends

On January 31, 2017, less than two weeks after his own induction as President of the United States, Donald Trump moved to fill the vacant seat on the United States Supreme Court. He selected Judge Neil Gorsuch who had been sitting in the Federal Court of Appeals for the Tenth Circuit. In making his nomination, President Trump fulfilled his campaign promise to select a nominee from a list of some twenty Judges he had named during the campaign, as well as his commitment to act quickly on the nomination.

Judge Gorsuch is 49 years of age and will be the youngest Supreme Court Justice in some 25 years. He was born in the State of Colorado where he still resides with his wife and two daughters. Judge Gorsuch's family has a long term affiliation with the Republican Party since his mother, Ann Gorsuch Buford, was the first female head of the Environmental Protection Agency and served under President Ronald Reagan. He has served for many years on the Tenth Circuit Court of Appeals after being appointed to that Court by President George W. Bush. During his career, Judge Gorsuch also clerked for Supreme Court Justices Byron White and Anthony Kennedy. He also served for two years in the Department of Justice.

In terms of his educational background, he received a B.A. degree from Columbia University in 1991 and his law degree from Harvard Law School in 2004. The Judge is known for his skill in writing clear and effective legal decisions and is viewed as being a member of the Conservative Block. Recently, he received some notoriety for his concurring opinion in favor of the Hobby Lobby stores in which he favored a defense of a religious freedom argument in opposition to provisions of the Affordable Care Act that required many employers to provide free contraception coverage. His reasoning and position was ultimately supported by the U.S. Supreme Court, which ruled in favor of Hobby Lobby in 2014.

Supporters of Judge Gorsuch had argued that he will issue rulings in the style and mode of Justice Scalia who he has been appointed to replace. Almost immediately after the President's nomination of Judge Gorsuch, Senate Democrats indicated that they would present vigorous opposition to the Judge's appointment and expressed concern that his appointment would break the current 4-4 deadlock and restore some conservative victories in the United States Supreme Court. Under the Senate rules which were in place at the time of his nomination, 60 affirmative votes in the Senate were required to confirm the Judge's nomination. Based upon the action of almost all the Democrat Senators in recent months in opposing almost all of President Trump's Cabinet nominations, it appeared that it would be difficult for Judge Gorsuch to obtain 60 votes. The President and Senate Republican leaders had reached out to several more moderate Democrats who came from states that President Trump carried during the Presidential Election and who are up for reelection in 2018. They had therefore, expressed some hope that enough Democrats would support the Gorsuch nomination so that he could receive the 60 required votes. If unable to do so, the Republicans in the Senate appeared ready to adopt what has been referred to as "The Nuclear Option" which involved a change of rules so as to allow a majority vote of the Senate to be sufficient for confirmation.

Despite Republican efforts, it quickly became apparent that almost all of the Democratic Senators would oppose Judge Gorsuch's nomination even though he had previously been unanimously approved when he was

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nominated for a seat on the Circuit Court of Appeals and was rated well-qualified by the American Bar Association. In fact, with respect to his Supreme Court nomination, they commenced a lengthy filibuster in order to delay or derail his nomination. Many Democrats viewed this process as payback for the refusal of Senate Republicans to proceed to act on President Obama's nomination of Judge Garland. Following several weeks of contentious discord and rancor, the Republicans invoked the so-called Nuclear Option and changed the Senate Rules in order to apply a 51-vote majority as the necessary number to confirm a Supreme Court Justice. In 2013, under the leadership of Senator Harry Reid, the Democrats had employed a similar change in Senate rules in order to effectuate the confirmation of Judges to the federal district and appellate courts.

On April 6, 2017, 52 Republican Senators joined by only three Democrats (Donnelly of Indiana, Heitkamp of Montana, and Manchin of West Virginia) voted to reduce the required number for confirmation of a Supreme Court Justice to 51 instead of 60 votes. On the next day the Senate then proceeded by a vote of 54-45 to finalize the confirmation of Justice Gorsuch as the newest member of the United States Supreme Court. Justice Gorsuch was sworn in on Monday, April 10, 2017 and immediately took his place on the U.S. Supreme Court. He began hearing oral arguments on April 19, 2017 and will probably be able to participate in about ten cases before the Court recesses in late June. This group of cases includes the important issue regarding Church-State relationships involved in the case of *Trinity Lutheran Church v. Pauley*. The appointment of Justice Gorsuch to the Court adds some additional diversity to the Supreme Court since Judge Gorsuch is from a western state and is also a member of the Protestant faith. In terms of legal education, the Court will continue to be comprised of all Justices who graduated from either Yale or Harvard Law School.

If I may be permitted to make a prediction? Based upon my review of Justice Gorsuch's background and his judicial voting record in the Court of Appeals, I do not believe, despite the fears of many liberals, that he will be a strong conservative consistently voting with Justice Alito and Justice Thomas. Instead, I think that in the long run, he will generally follow the pattern of Justices Kennedy and Roberts and will occasionally join the liberal grouping in advocating a more centrist position. In his first consequential decision, he did vote with the conservative group in denying a stay of execution for an Arkansas defendant who was facing the imposition of the death penalty. Only time will tell in what direction Justice Gorsuch will be heading and we may have some further indication of his voting pattern as he casts a decision in the remaining 10 cases to be completed before the end of the term. We await developments.

In addition to the Gorsuch nomination, it is likely that President Trump may have an opportunity during his term to fill additional vacancies on the Supreme Court since Justice Ginsburg has already reached the age of 83 and three other Justices are approaching the age of 80. Thus, the Justices in question may decide to seek retirement during the next few years, opening up additional vacancies on the Court. The contentious and bitter partisan dispute that occurred during the Gorsuch nomination process was most unfortunate and will have serious consequences for future nominations. Fourteen months after the death of Justice Scalia, his vacancy will finally be filled and the Court can return to its normal complement of Justices. However, the political divide within the Court will continue. The bitter political divide appears to be growing worse within our country and poses serious dangers to all of our political and governmental institutions.

Recent Decisions

Death Penalty

Buck v. Davis, 137 S. Ct., 759 (February 22, 2017)

In October, during the first month of its new term, the Court heard oral argument on a case which presented new aspects with respect to the death penalty. The issue in the instant case involved the ineffective assistance of counsel. In a 6-2 decision, in an opinion written by Chief Justice Roberts, the United States Supreme Court held that defense counsel's performance during the penalty phase of a capital murder trial, in bringing forth evidence from expert testimony that the prisoner was statistically more likely to act violently in the future because he was black, fell outside the boundaries of competent representation and constituted the ineffective assistance of counsel. The Court held that the defendant had demonstrated both ineffective assistance of counsel under the *Strickland Rule* and was entitled to relief under Rule 60(b) (6). Therefore, the Fifth Circuit Court of Appeals was in error in denying the defendant a certificate of appealability so he could pursue his claims on appeal. The judgment of the Fifth Circuit was therefore reversed and the case was remanded for further proceedings consistent with the Supreme Court decision. Joining Justice Roberts in the majority were Justices Kennedy, Ginsburg, Breyer, Sotomayor and Kagan. Justices Thomas and Alito dissented. The dissenters accused the majority of bypassing procedural obstacles to the defendant's claim and misapplied settled law to justify their actions.

Moore v. Texas, 137 S. Ct., 1039 (March 28, 2017)

On November 29, 2016, the United States Supreme Court heard oral argument on 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 13, Mr. Moore did not understand the days of the week, the months of the year, the seasons and how to tell time. At-

torneys 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, during oral argument, 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, was viewed as the critical swing vote that could decide the issue.

On March 28, 2017, the Supreme Court in a 5-3 decision held that Texas used outdated medical guidelines in deciding if a death row inmate was intellectually disabled ,thereby making him ineligible for the application of the death penalty. The majority opinion was written by Justice Ginsburg. Justice Kennedy joined the liberal grouping thereby insuring the majority result. Justices Alito, Thomas and Chief Justice Roberts dissented.

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 U.S. 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 that 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 20 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.

Election Districts

Bethune Hill v. Virginia State Board of Elections, 137 S. Ct., 788 (March 1, 2017)

In a 7-1 decision, the United States Supreme Court concluded that the District Court had employed incorrect legal standards in determining that race did not predominant in 11 of 12 new state legislative districts drawn by the Virginia State Legislature. The District Court had required challengers to establish, as a prerequisite to showing racial predominance, an actual conflict between traditional redistricting criteria and race. Under these circumstances, the matter was remitted for further consideration. Justice Kennedy delivered the opinion of the Court. Justice Alito concurred in part and Justice Thomas concurred in part and dissented in part.

Student Disability Programs

Endrew v. Douglas County School District, 137 S. Ct., 988 (March 22, 2017)

In a rare unanimous decision, the United States Supreme Court determined that in order to meet its substantive obligation under the Individual with Disabilities Education Act, a public school must offer an individualized educationalized program which is reasonably calculated to enable a child to make appropriate progress in light of the child's circumstances. In the case at bar, the petitioner had autism and his parents had been forced to send him to a private school where he substantially improved with the program which was provided by the private school. When the parents approached the public school regarding utilizing the same program, the public school had refused to offer a comparable program. Under the Supreme Court ruling it now appears that public schools are under a greater obligation to provide adequate services to disabled students.

Transgender Use of School Bathrooms

Gloucester County School Board v. G.G., ex rel. Grimm, 137 S. Ct., _____ (March 6, 2017)

This case involved a challenge to a lower court ruling that 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 was not clear when or how the Supreme Court would deal with it. The Court granted certiorari on October 28, 2016 and oral argument was expected sometime in the Spring. However, following President Trump's election and the selection of a new cabinet Secretary, the Court was advised that the regulation in question was being withdrawn. The Court, on March 6, 2017, vacated the judgment of Virginia courts and remanded the case to the Fourth Circuit for further consideration in light of the guidance document issued by the United States Departments of Education and Justice on February 22, 2017.

Judicial Recusal

Rippo v. Baker, 137 S. Ct., 905 (March 6, 2017)

In a unanimous decision, the United States Supreme Court granted certiorari and vacated the determination of the Nevada Supreme Court with instructions to reconsider their earlier determination. The Court concluded that the Fourteenth Amendment's due process clause may sometimes demand recusal even when a Judge has

no actual bias. In the case at bar, the defendant had received information that the Judge who was trying his case was the target of a federal bribery probe and he surmised that the District Attorney's Office, which was prosecuting him, was playing a role in that investigation. The defendant contended that the Judge could not impartially adjudicate a case in which one of the parties was criminally investigating him. The Nevada Supreme Court had dismissed the defendant's contentions on the grounds that there was no indication that the trial judge was actually biased in the case. The U.S. Supreme Court, however, vacated the judgment of the Nevada Supreme Court because it applied the wrong legal standard. The United States Supreme Court determined that the due process clause may sometimes demand recusal even when a judge has no actual bias. Therefore, further proceedings were required and the matter was remanded to the Nevada courts.

Impeachment of Jury Verdict

***Pena-Rodriguez v. Colorado*, 137 S. Ct., 855 (March 6, 2017)**

In a 5-3 decision, in an opinion written by Justice Kennedy, the Supreme Court held that where a juror makes a clear statement that indicates that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. The matter was therefore remanded for further consideration. Chief Justice Roberts and Justices Alito and Thomas dissented.

Sentencing Guidelines

***Beckles v. United States*, 137 S. Ct., 886 (March 6, 2017)**

In a unanimous decision, the United States Supreme Court held that the Sentencing Guidelines are not subject to a void for vagueness challenge under the Fifth Amendment Due Process Clause. Justice Thomas delivered the main opinion for the Court in which Chief Justice Roberts and Justices Kennedy, Breyer and Alito joined. Justice Kennedy also filed a concurring opinion in which Justices Ginsburg and Sotomayor concurred. Justice Kagan took no part in the case.

Colorado Exoneration Act Violates Due Process

***Nelson v. Colorado*, 137 S. Ct., _____ (April 19, 2017)**

In a 7-1 decision, the United States Supreme Court struck down a Colorado statute which required defendants to prove by clear and convincing evidence in a civil proceeding that they were innocent before the state would return fees, court costs and restitution exacted from defendants whose convictions were subsequently invalidated by Appellate Courts and no retrial had occurred. The majority opinion, written by Justice Ginsburg, concluded that due process considerations weighed decisively against Colorado's Exoneration Act when petitioners' convictions were invalidated by a reviewing court. The majority concluded that petitioners had an obvious interest in regaining the money they paid to Colorado and that the Colorado statute created an unacceptable risk of erroneous deprivation of defendant's property when the state had a zero claim of right. Justice Thomas issued a dissenting opinion.

Pending Cases

Racial Gerrymandering

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

The United States Supreme Court has 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 by the late Spring and we will report on any decision rendered in our next issue.

***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 run by a church for resurfacing its playground with recycled rubber materials. The case presents an op-

portunity for the Court to review the issue of how much government aid to religious institutions is too much.

***Packingham v. North Carolina*, 137 S. Ct., _____ (_____, 2017)**

In late February the U.S. Supreme Court heard a case involving whether North Carolina can bar registered sex offenders from using Facebook, Twitter, and similar services. The petitioner is claiming that North Carolina's actions violate his rights under the First Amendment. During oral argument, questions from several of the Justices indicated that the North Carolina law could be struck down and a decision is expected in the final days of the Court's current term.

***Class v. U.S.*, 137 S. Ct., _____ (_____, 2017)**

In late February, the United States Supreme Court granted certiorari on a criminal law matter which involved the question of whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his state conviction. Before he entered his guilty plea and on appeal, the defendant contended that the statute as applied and under which he was convicted violated his Second Amendment right to bear arms and further violated due process of law. The defendant's petition noted that in the 1970s, the Supreme Court held that a guilty plea does not inherently waive claims for two types of pre-plea constitutional claims that do not challenge the factual basis for a guilty plea. It appears that the federal circuits are split on the question of whether a guilty plea inherently waives a constitutional challenge to the statute of conviction. Under these circumstances, the Supreme Court determined that granting certiorari was warranted. It appears, however, that no decision on this matter will be forthcoming until the Court begins its next term in October.

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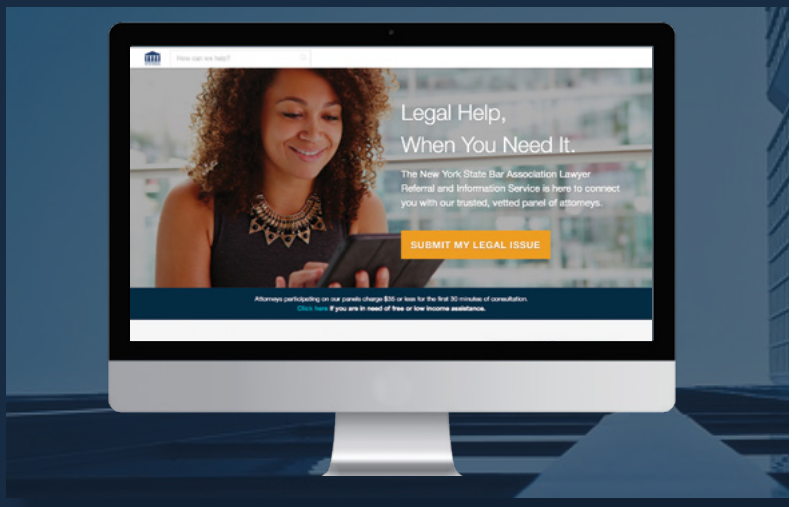

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