NYSBA WINTER 2018 | VOL. 16 | NO. 1

New York Criminal Law Newsletter

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

In This Issue:

- New Criminal Justice Legislation
- Cell Phone Search and Seizure
- Fraud Case Disclaimers
- The REDEEM Act and Sealing
- Photos from Nassau County Bar Event

Get Ready for the 2018 Young Lawyers Section's Trial Academy

The Criminal Justice Section is pleased to co-sponsor the NYSBA Young Lawyers Section's annual Trial Academy, and offer a scholarship to attend the Academy.

The Young Lawyers Section Trial Academy is the New York State Bar Association's only comprehensive trial training program. This intensive five-day trial techniques and advocacy program is geared toward young and new lawyers—teaching, advancing, and improving the quality of their experience in the courtroom, in order to benefit their careers and their client's interests.

The Trial Academy will be held Wednesday, April 4, through Sunday, April 8, 2018.

Participating in the Trial Academy is the perfect opportunity to gain critically important trial experience outside of the courtroom. Participants attend a morning lecture on an aspect of a trial and spend the afternoons in small groups with their designated team leader demonstrating the day's trial skill from a previously provided fact pattern. One-on-one critiques will be provided by a rotating faculty made up of NYSBA leadership and leading litigators, advocates and judges from every region of New York.

The Trial Academy is open to any attorney wishing to learn or improve upon their trial skills and provides a unique opportunity for participants to have a meaningful experience which extends beyond a typical classroom setting.

To apply for the Criminal Justice Section's Trial Academy scholarship, please complete the application form, which can be found online at www.nysba.org/crimtrialacademy and submit by December 1, 2017. The scholarship is a full tuition scholarship; the attendee is responsible for room, travel, and some food. Scholarship recipients will be notified as soon as possible.

For more information, please email Amy Jasiewicz at ajasiewicz@nysba.org, or phone/digital fax 518-487-5682.

Visit www.nysba.org/crimtrialacademy to apply.

NYSBA

You can also apply for the Young Lawyers Section scholarship, deadline Feb. 2, 2018.

Table of Contents

NEW YORK STATE BAR ASSOCIATION

Request for Articles

If you have written an article you would like considered for publication, or have an idea for one, please contact *New York Criminal Law Newsletter* Editor:

Jay Shapiro
cjseditor@outlook.com

Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

Message from the Chair

One of the wonderful things about being Section Chair is the opportunity to travel the state to advance the interests of our members.

Our Fall Program was held at the Nassau County Bar Association with live demonstrations of a DWI arrest. (Photos are in this issue at pages 14–15). We enlisted local law enforcement to conduct Standardized Field Sobriety Tests (SFST) on volunteers in various states of intoxication. The program also included direct examination of the police officer by a local prosecutor, as well as cross-examination by a local defense attorney. I highlight this program above all others because it embraces everything our Section programs should be about: it was unique, insightful, hands-on and informative. We also worked closely with the local bar to co-sponsor the program, recruit local speakers, and promote it to prosecutors, institutional defenders, judges and private attorneys. We had attendees from most of these categories in greater numbers than in the past. The program concluded with an informal networking reception at a local restaurant. In my view, these opportunities are at the heart of what the Section should be doing for its members. We will be offering more of this type of programming!

Next, I traveled to Buffalo to connect with NYSBA President Sharon Stern Gertsman. I feel it is imperative that our Section leadership keep an honest and effective line of communication open with the Bar President and the Bar leadership as a whole. We discussed the financial health of the Section in comparison to other substantive sections and the ways we may be able to work together with these other Sections to provide cost-effective programs to appeal to the members of each Section. Additionally, we discussed bail reform and the importance of moving forward with that initiative as we approach the Annual Meeting. It is an important issue for our Section to advance because it is one that defenders, judges and prosecutors agree needs to be addressed. Our Bail Reform Committee is already working diligently to prepare a report to share with our Section's Executive Committee and the Association's House of Delegates. The hope is to create Bar policy on this issue.

I also traveled back to Nassau County to testify before the Governor's Traffic and Safety Commission on proposed legislation. In sum, the legislation seeks to create a duty on law enforcement to "field test" mobile telephones and other electronic devices after a motor vehicle accident. The technology is referred to as a "Textalyzer" primarily because the refusal to submit to the "field test" would result in the revocation of a motorist's driver's license similar to a refusal of a breathalyzer in the DWI context. This issue was explored by our Vehicle and Traffic Law Committee and a report was approved by our Executive Committee earlier this year. It is fair to say that not all our membership agreed with the conclusion to oppose the proposed legislation. However, the process embodies the diverse spirit of our Section's leadership in that it was debated by judges, defense attorneys and prosecutors. It is this type of spirited debate and consideration that adds legitimacy to all of our Section's reports. We continue to honor this tradition as we tackle other substantive criminal justice issues, such as the sealing of federal convictions, counsel at first appearance and centralized arraignments.

My previous "Message from the Chair" alluded to a strategic planning session of our Executive Committee. The session was productive and helped us focus on the various ways we deliver benefits to our members. We identified two key perspectives: (1) responsibility to the profession through the advancement and/or opposition to legislation affecting criminal justice, and (2) responsibility to our members by offering benefits such as programming that is unique, insightful, hands-on and informative. We focused upon the need for our committees to stay in front of proposed legislation so we can effectively research, report and debate *before* the issue becomes a legislative priority in Albany. We also recognized that too often our programs are geared toward the delivery of CLE. In this day and age, CLE can be obtained over the internet and by other providers. We committed to delivering programs that are not merely CLE-based. Instead, we will provide our members with an experience that cannot be duplicated while sitting at home in pajamas. We will endeavor to honor these responsibilities as we move into the new year…and beyond!

I look forward to seeing you at our Annual Meeting program in January in New York City. Thank you for the privilege of serving as your Chair.

Tucker C. Stanclift

Message from the Editor

As I write this Message I look at the calendar and wonder how the year has flown. This is the last Message that I will write in 2017 and so much has happened over the year, my first as editor.

We have celebrated our Section's accomplishments at statewide events, provided you with thoughtful legal commentary on cases and legal issues, offered practice pointers and kept our readers current on criminal justice issues. We said farewell to a wonderful Section chair and welcomed our new energetic leader.

We have been lucky to have contributions from all areas of our Section, ranging from the student leaders to jurists. And, of course, I have been fortunate to have articles authored by colleagues who have written for this publication for years and years (and who I can surely count on for years of future contributions)!

In that regard, it is nice to note that this issue has, once again, articles from Spiros Tsimbinos, Barry Kamins and Roger Bennett Adler. Spiros keeps us up to date on the Supreme Court, Barry provides us with his incredibly valuable review of new legislation and Roger offers a thoughtful piece on a significant question relating to fraud prosecutions. Also, Rick Collins, my co-chair on the Sealing Committee, has authored an important alert.

I know that our authors enjoy the process of writing and sharing their insights and knowledge with our membership. If you are interested in contributing to our efforts, and through your work, to the well-being of our Section, please feel free to contact me about your ideas for articles. My email is cjseditor@outlook.com. I look forward to hearing from you.

Jay Shapiro

NEW YORK STATE BAR ASSOCIATION

At the Annual Meeting

The New Age of Criminal Justice: Review, Revisions and Reform

9 a.m. to 12:10 p.m. | Wednesday, January 24, 2018 | David Cohen and Rick Collins, Co-Chairs

This year's "don't miss" CLE will offer three segments providing important updates for the criminal justice bench and bar.

Bob Dean, Esq., will provide an annual appellate review of the latest decisions. David Cohen, Esq., ADA Robert Masters, and the Hon. Barry Kamins will examine the hottest topics regarding revisions to the law: Raise the Age, Criminal Record Sealing, Admissibility of Photo Evidence, and the Video Recording of Confessions.

Lastly, a balanced panel led by Andy Kossover, Esq., and jointly sponsored by the State Bar Committee on Mandated Representation, will examine the bail system and how it may or may not benefit from an overhaul of the criminal justice policies currently under consideration (such as "risk to public safety") and the use of pretrial risk assessment tools. Among the issues discussed:

- Whether the proposed reforms disproportionately disadvantage people of color and the poor;
- Whether the bail system forces many people facing nonviolent or low-level charges to remain in jail when they could be released;
- Whether the system has contributed to jail overcrowding, with an increasing number of people spending longer periods behind bars without being convicted of a crime;
- How to maximize appearance rates while minimizing both intrusions to defendants' liberty and pretrial crime;
- Whether requiring a defendant to pay for his or her freedom violates the promise of equal access to justice under the U.S. Constitution.

A New Front in Sealing

By Rick Collins

After many years of effort by members of the Section, New York State finally enacted a broad sealing bill that allows for the sealing of criminal convictions, excluding violent or sex crimes. Criminal Procedure Law § 160.59 creates a process for those convicted of up to two crimes, but no more than one felony, to apply to the court to have their record sealed.

If granted by the court, a sealed conviction would no longer be made available to the public as part of a background check, whether for employment, housing, or schooling. This new law stands to benefit tens of thousands of New Yorkers who will now be eligible to seal their criminal convictions and gain a fresh start on life. The role that this Section played in moving this initiative forward is something we should regard with great pride.

However, there's more work to be done. There is no federal sealing or expungement statute to provide a remedy for the tens of thousands of New Yorkers who have been convicted of nonviolent, low-level federal crimes. For example, while a person in New York with a past state court drug sale conviction can now apply to have the record sealed, a New Yorker convicted for similar conduct in one of New York's federal district courts has no such recourse.

A bill called the REDEEM Act would change that, and would give those convicted of nonviolent federal crimes the chance to petition the court to have their records sealed. The bill was introduced by Sens. Rand Paul (R-KY) and Cory Booker (D-NJ) in the Senate and Rep. Elijah Cummings (D-MD) in the House. Although the REDEEM Act has attracted some support from both sides of the aisle, it does not yet appear to have the full support necessary to ensure its passage.

At this point, the Section has not taken a position on the REDEEM Act or on federal conviction sealing in general. However, the same equities that drove our push for sealing in the state courts applies to federal sealing. It is time for the Section to turn to consideration of federal sealing, and whether it wishes to make recommendations to NYSBA leadership.

Rick Collins, Esq. is a founding partner of the Long Island-based law firm of Collins Gann McCloskey and Barry, and a former Nassau County Assistant District Attorney. He is Co-Chair of the Criminal Justice Section Sealing Committee.

The Tech Corner

Carpenter v. United States—Search and Seizure (Cell Phone Records)

By Jay Shapiro

Question Presented:

Whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment.

The elasticity of the Fourth Amendment is tested as technology changes. The drafters did not anticipate motor vehicles, telephones and DNA testing. Similarly, courts could not have predicted how their search and seizure opinions would hold up in the face of scientific developments. The Warren Court was concerned with the gambler's expectation of privacy in a telephone booth in *Katz v. United States*, 389 U.S. 347 (1967), but what would those justices have thought of expectation of privacy afforded to cell phones used in public places?

More recently, in *United States v. Jones*, 132 S. Ct. 945 (2012), the Supreme Court recognized how technological improvements of devices can alter its analysis of Fourth Amendment protections. *Jones* involved the use of a GPS device attached to a Jeep by law enforcement in order to track the vehicle's movements. In its examination of precedent in this area, the Court pointed out that in a decision addressing the use of a much more primitive device, a beeper, it had left open the questions that could arise if law enforcement could conduct "dragnet-type law enforcement" surveillance (*quoting United States v. Knotts*, 460 U.S. 276, 284 (1983)).

The pay phone used by Katz was a primitive forerunner to today's cellular devices. In *Riley v. California*, 134 S. Ct. 2473 (2014), the Court noted, "The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." In *Riley*, the Court acknowledged the nature and vastness of what can be stored on a cellular device and ruled that, absent exigent circumstances, the police must obtain a warrant before conducting a search of a cell phone seized incident to arrest.

But there is no doubt that the Court's attention in *Riley* was on the content that could be accessed upon a cell phone search. The Court warned: "A cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is."

This term, *Carpenter v. United States* presents the Court with an opportunity to expand—or limit—its application of the Fourth Amendment to the cell phone context, specifically, provider records that permit law enforcement to ascertain historical location information. Timothy Carpenter was the leader of a group of robbers who had committed crimes in Michigan and Ohio in a four-month time span. After obtaining information from one of the participants, the FBI applied for an order pursuant to the Stored Communications Act for, among other information, cell-site information for calls. Pursuant to the statute, the application was based on reasonable grounds as opposed to probable cause. Ultimately, Carpenter was tried and convicted of Hobbs Act violations.

During Carpenter's trial, an FBI agent testified that the cell-site information revealed that the cell phones of Carpenter and his principal accomplice were within a half-mile to two miles of each location of the robberies when they took place. This evidence was consistent with a cooperating witnesses' testimony that Carpenter functioned as a lookout during the robberies, parking near the store that was being robbed.

Carpenter and his co-defendant (and half-brother) Sanders had moved to suppress the cell-site evidence, which was data supplied by their wireless carriers. They maintained that the Fourth Amendment required that the FBI obtain a search warrant based upon probable cause in order to get the information. The district court denied the motion, holding that the government did not conduct a Fourth Amendment search in order to obtain the information.

The Court of Appeals for the Sixth Circuit upheld that ruling. 819 F.3d 880 (2016). The court wrote, "The federal courts have long recognized a core distinction: although the content of personal communications is private, the information necessary to get those communica-

Jay Shapiro, editor of the *New York Criminal Law Newsletter,* is co-chair of the Cyber Law and Data Protection Group of White and Williams LLP.

tions from point A to point B is not." 819 F.3d at 886. The court employed the analogy that "[t]he Fourth Amendment protects the content of the modern-day letter, the email….[b]ut courts have not (yet, at least) extended those protections to the internet analogue to envelope markings, namely the metadata used to route internet communications, like sender and recipient addresses on an email, or IP addresses." 819 F.3d at 887.

The court's analysis focused on a number of important considerations. First, the court noted the nature of the information supplied by the records, that they did not reveal any content of the calls. Next, the court pointed out that the records came "from a third party, which can only diminish the defendants' expectation of privacy" in the information. The court also noted that the information provided by the records was nowhere as particular as that which can be obtained by a modern GPS tracking device.

How the Supreme Court rules on this matter will have significant impact of investigations conducted by law enforcement. New York courts have ruled that the "pinging" of a cell phone to obtain location information is not a search. *People v. Watkins,* 125 A.D.3d 1364 (4th Dep't 2015); *People v. Moorer,* 39 Misc. 3d 603 (County Ct. Monroe Co. 2013); and *People v. Wells,* 45 Misc. 3d 793 (S. Ct. Queens Co. 2014).

These rulings were similarly based upon the view that content is not exposed by obtaining cell site information associated with a cell phone. On the other hand, there is little doubt that the decision of the Court of Appeals in *People v. Weaver,* 12 N.Y.3d 433 (2009), revealed a far greater sensitivity to the impact on privacy through the use of the GPS device than was expressed by the Supreme Court in *Jones.*

We will keep a close eye on the oral argument and ruling in *Carpenter.*

"Deep Sixing" Disclaimers: The Court Rejects Fraud Case Disclaimers

By Roger Bennet Adler

For anyone who has engaged in a commercial or sales transaction, the oral representations (and responses) by sellers and promoters to questions by purchasers and investors are frequently effectively mooted by written sales contracts, which contain a "disclaimer" that any prior oral representations are expressly purged from the parties' negotiations. "Disclaimers" are the essential work product of counsel, which are drawn and seek to protect the seller from potential liability for oral representation, which may have been either incomplete, misleading, or even knowingly false. But, c.f. *United States v. Regent Office Supply Company*, 421 F. 2d 1174 (2nd Cir. 1970), recognizing that so-called "puffing," which does not misrepresent the nature or quality of the goods sold, and the goods in question were actually supplied (accord. *United States v. Starr*, 816 F. 2d 94, 99 (2nd Cir. 1987)), like representations are not fraudulently criminal.

Over the years, the question that has arisen in legal circles is whether such "disclaimers" are relevant to (and can effectively block) a prosecutorial contention that the buyer receiving a disclaimer (and subsequently sustaining a loss) has been the victim of fraud. Recently, in *United States v. Weaver*, 860 F. 3d 90 (2nd Cir. 2017), ruled that a defendant charged with conspiracy to commit mail and wire fraud in connection with a vending machine sales business was not entitled to a dismissal of criminal charges where the transaction documents contained a seller-drafted disclaimer of representations.

In so ruling, the *Weaver* Court's *per curiam* opinion contended that its decision followed prior rulings by sister Circuit Courts of Appeals in both the Seventh and Fifth Circuits. The panel decision asserts that the genesis for this disclaimer (hostile judicial policy) was the United States Supreme Court's decision in *Neder v. United States*, 527 U.S. 1 (1999). For the reasons which follow, this writer believes that the anti-disclaimer approach taken by courts rests on a doubtful (and short-sighted) legal foundation, and undermines a prophylactic legal approach seeking to limit potential criminal liability during negotiations, which can be susceptible to misunderstandings, misperceptions, and outright misstatements by salaried or commission seeking employees. It also strips service providers such as lawyers and accountants, who service business transactions and present data, but seek protection from misstatements made outside the scope of their engagement doctrine (*see e.g.*, *Danaan Realty Corp. v. Harris*, 5 N.Y. 2d 317, 184 N.Y.S.2d 599 (1959), *rev'g* 6 A.D.2d 674 (1st Dept. 1958)) (disclaimer of non-reliance inserted in a contract for lease of premises protects defendant regarding the building's true operating expenses).

The law of conspiracy allows a co-conspirator to withdraw from the conspiracy and terminate their continued legal exposure (see *United States v. Britton*, 108 U.S. 199, 2 S. Ct. 531, 27 L. Ed. 698 [1883]; *Smith v. United States*, __U.S.__, 133 S. Ct. 714, 718-719 184 L. Ed. 2 570 (2013) *aff'g* 651 F. 3d 30 (D.C. Cir.); *United States v. United States Gypsum Co.*, 438 U.S. 422, 462-465, 98 (1978); *United States v. Geibel*, 369 F. 3d 682, 695 (2nd Cir. 2004) *cert. den. Allen v. United States*, U.S. 125 S. Ct. 242), Modern Federal Criminal Jury Instruction 19-10. Accordingly, if "withdrawal" is a cognizable affirmative defense, it stands to reason that the use of a disclaimer constitutes *ante litum motum* proof that a party does not make any representations to the transaction counterpoint.

Courts that have debunked disclaimers fail to appropriately recognize that a contractual disclaimer is consistent with the individual's right to reject criminal exposure *ab initio* by expressly (and publicly) renouncing prior false (or misleading) statements that may have been uttered.

Query, if a conspirator can (as an affirmative defense) withdraw from the conspiracy, why should he be prevented from fostering what may be fraudulent conduct? At the "end of the day," mindful that every conspiracy requires a "meeting of the minds" (*United States v. Rosenblatt*, 554 F. 2d 36 (2nd Cir. 1977)), a disclaimer is consistent with communicating that the disclaiming party is not "in on the game," or willing to adopt prior representations not made in his presence, or even with his knowledge.

The Legal Playing Field

A. The *Neder* Case

In *Neder v. United States*, 527 U.S. 1, 24-25 (1999), the U.S. Supreme Court, in an opinion by Chief Justice William Rehnquist, upheld Neder's conviction for filing false income tax returns, and mail, wire, and bank fraud. The Court upheld Neder's conviction for land development fraud, even though the trial judge had erroneously refused to submit the issue of "materiality" to the jury on the tax fraud count. The opinion held that "materiality" was an element of the non-tax charged fraud counts (527 U.S. at 20-25). No contention was raised concerning the impact of a disclaimer.

Roger Bennet Adler is a past Criminal Justice Section Chair. He focuses on the defense of white collar criminal cases and civil and criminal appeals.

B. The Seventh Circuit

In *United States v. Ghilarducci*, 480 F. 3d 542, 546 (7th Cir. 2007), a panel of the Seventh Circuit Court of Appeals affirmed racketeering and wire fraud convictions of principals of Westchester Financial Associates, Inc. (WFA), under circumstances in which they charged WFA clients fees for procuring "confirmation of funds" letters from financial institutions. Such letters purported to demonstrate that financial institutions were capable of short-term leasing of large monetary sums to WFA clients.

In reality, however, the WFA letters were financially worthless, and WFA clients subsequently sustained huge financial losses. A second launch of investment deals involved the sale of historic railroad bonds issues in the late 1800s to clients at "enormous markups." The WFA clients failed to reap the promised financial benefits.

Defendants contended that the representations were not "material." They additionally argued that any oral misrepresentations which might have been made were "immaterial," because the investors signed written contracts which expressly stated that "no oral promises had been made," and relied upon *Rissman v. Rissman*, 213 F. 3d 381 (7th Cir. 2000 per Easterbrook, J.), involving a civil securities fraud case in which the purchaser had agreed he had not relied on the seller's oral representations. The panel upheld a grant of summary judgment to defendant, noting a buyer's representation of non-reliance precludes subsequent litigation.

Ironically, Circuit Judge Easterbrook was a member of the Panel in *Ghilarducci*, *supra*.

C. The Fifth Circuit

In *United States v. Lucas*, 516 F. 3d 316, 339 (5th Cir. 2008), defendants were convicted of violating the Clean Water Act (CWA), arising from septic system waste discharges installed on wetlands near the Gulf of Mexico. The defendants both sold lots and designed and certified septic systems, but represented the lots as dry. When the septic systems failed, waste was discharged, causing foreseeable environmental damage.

In an opinion by Circuit Judge Patrick E. Higginbotham, the panel upheld fraud convictions, noting fraudulent representation made that the home sites were both habitable and suitable for home sites. The panel expressly rejected defendants' claim that a sales contract disclaimer provision insulated the sellers from federal fraud charges, noting that the disclaimers were utilized even after agency warnings to the sellers that the septic systems were being installed in *saturated soils*, and advertised the lots as "high and dry."

Perhaps a litigative "tipping point" which Judge Higginbotham noted was buyer testimony that the sellers added language to the sales contract after it was signed, stating the buyer had been notified about potential wetlands on the property. The truth was that the properties were wet, and the septic systems backed up.

D. Practice Points

Courts are, understandably, wary of "snake oil" salesmen who seek to insulate themselves from potential criminal liability. The implicit suggestion is that the "disclaimer" is but another fraudulent indicia of "getting over on" victims.

This writer believes that, on reflection, there are both "clean" and fraudulent disclaimers. A clean disclaimer does not address particular oral representations, but rather simply notes "all bets are off."

By contrast, a "factual disclaimer" that no representations were either made (or relied upon) is neither candid (nor accurate). These are "factually challenged," and are not entitled to legal respect.

Mindful that many more fraud cases are investigated than reach the indictment stage, it may well be that the existence of a "clean disclaimer" will satisfy an Assistant United States Attorney (or Assistant District Attorney) that the clean disclaimer rebuts a claim of criminal intent. Accordingly, the issue of disclaimers will continue to percolate unless (or until) the United States Supreme Court rules in an appropriate case.

New Criminal Justice Legislation

By Barry Kamins

This article contains an annual review of new legislation amending the Penal Law, Criminal Procedure Law and other related statutes. The discussion that follows will primarily highlight key provisions of the new laws and as such the reader should review the legislation for specific details. In some instances, where indicated, legislation enacted by both houses is awaiting the Governor's signature and, of course, the reader must check to determine whether a bill is ultimately signed or vetoed by the Governor.

There were four substantive pieces of legislation that were enacted as part of this year's budget bill: evidence of identification by photographs; videotaping of confessions; raising the age of criminal responsibility, and sealing of prior convictions.

Effective July 1, 2017, a witness can now testify during trial that he identified a suspect from a photograph.[1] Such evidence, however, will only be admissible if a "blind" or "blinded" identification procedure was utilized. Those terms will be defined below.

Prior to enacting this legislation, New York had maintained an evidentiary rule—and was the only state to do so—that did not permit evidence that, prior to trial, a witness had identified the defendant from a photograph. This evidentiary rule existed statutorily for 90 years.

In *People v. Caserta*,[2] the Court of Appeals explained the twin rationales for the exclusion of such evidence. First, the court was concerned that jurors may draw the likely inference that the defendant had been previously arrested from the fact that the police were in possession of the defendant's photograph. Indeed, the court referred to the source of these photographs as the "rogues gallery."

The second rationale for the rule was a concern that photographs were a more suggestive, if not less reliable, means of identification. As the court noted, photographs are sometimes of poor or uneven quality and easily distorted. Such photographs could depict a dated or distorted image of a suspect and render any identification unreliable.

The prohibition against prior photo identification evidence was not absolute. For example, defense counsel could open the door to such evidence should counsel mislead a jury by creating an inaccurate impression that a witness was unable to identify, or had not identified, the defendant prior to trial. In addition, should a defendant refuse to participate in a corporeal lineup, evidence of a pre-trial photographic lineup would be admissible.[3] If a witness's testimony was challenged as a recent fabrication, evidence of a prior photographic identification would be admissible as a recent fabrication on the condition that the identification predated the motive to testify. Finally, a *defendant* could choose to waive the protection of the *Caserta* rule by eliciting testimony about a prior photographic identification with the intention of establishing that a witness had been mistaken.

Over the last decade, the *Caserta* rule was re-examined and debated by numerous groups addressing the causes of wrongful convictions. The Innocence Project noted that the scientific and psychological literature shows that witnesses tend to be committed to their initial identification even if that identification is mistaken. A photo array is often the first identification procedure and, therefore, it was seen as critical that the reliability of that procedure be improved.

In the last legislative session, prosecutors sought to overturn the *Caserta* rule in exchange for the imposition of procedures that would make identifications at photo arrays more reliable. Various defense groups advocated for changes in the procedure—some arguing for several mandatory reforms while others were willing to accept the "blinded" procedure as the only *quid pro quo*.

The new legislation does not make mandatory many of the reforms sought by some groups. What is an essential element of the legislation, however, is the required use of "blind" or "blinded" procedures.

In a "blind" procedure, the administrator does not know the identity of the suspect. Two people are required to conduct a blind array—one to assemble the array and one to administer it.

In a "blinded" procedure, while the administrator may know who the suspect is, by virtue of the procedure's administration, the administrator does not know the suspect's position in the array until the procedure is completed. This can be accomplished in several ways. An array can be assembled by someone other than the administrator, and then placed in an unmarked folder for the administrator. This is known as the "two-person shuffle." Or the administrator can create multiple arrays in which the suspect's position is different in each; each array is in a separate sealed envelope. The witness then selects one of the envelopes to use as the array. This is known as the "one-person shuffle." Regardless of which procedure is used, the administrator should be positioned in such a

Hon. Barry Kamins is a retired Supreme Court Justice, author of 'New York Search and Seizure' (Lexis-Nexis 2017) and a partner in Aidala, Bertuna & Kamins. He is an adjunct professor of law at Brooklyn Law School where he teaches New York Criminal Procedure.

way so that he is not in the witness's line of sight during the viewing of the array.

The above procedures were mandated based on the scientific literature that established certain principles relating to the role of an administrator conducting a photo array. It has been documented that the state of mind of the administrator might contribute to the suggestiveness of a photo array. Administrators who know the identify of the suspect in the array may inadvertently or intentionally influence the witness's identification. Conversely, an administrator who does not know the identity of the suspect is unlikely to steer the witness to the suspect through verbal or nonverbal cues.

If an administrator utilizes either a "blind" or "blinded" procedure, the prosecutor will now be permitted to offer testimony that the witness identified the defendant's photograph on a prior occasion as the perpetrator of the crime. This will constitute evidence-in-chief, thus overruling *Caserta*, and it will make New York the 22nd state to utilize blinded identification procedures.

The failure to utilize a "blinded" procedure will only affect the admissibility of testimony regarding a prior photographic identification. It cannot constitute a legal basis to suppress other identification evidence pursuant to CPL §710.20(6).

The legislation also required the Division of Criminal Justice Services (DCJS) to promulgate a number of written best practices for photo and corporeal (live lineup) identification procedures that must be disseminated to police agencies around the state. It is important to note that these procedures are not mandatory and should law enforcement not utilize them, evidence of a prior photographic identification will still be admissible provided, of course, that a "blind" or "blinded" photo array was utilized.

In June, DCJS promulgated these procedures and disseminated them to all police departments around the state. These best practices incorporate many years of scientific research on memory and interview techniques. They focus on seven critical aspects of administering photo arrays: selection of fillers; inviting a witness to view an array; instructions to the witness prior to viewing an array; administering the procedure; post-viewing questions of the witness; documentation of the procedure; and speaking with the witness after the procedure.

With respect to the selection of fillers, the new protocols suggest that a description of the perpetrator, given by the witness, be taken into account when selecting fillers to be used in the array. A witness's description of the perpetrator can be relevant to the suggestiveness inquiry. Prosecutors and defense counsel will argue whether the composition of an array unfairly highlighted a defendant based upon the witness's description. "The court, for its part, must evaluate the suggestiveness of the pre-trial identification procedure both in light of *and* in spite of the witness's description."[4]

The protocols discuss what the police should say to a witness when inviting him or her to view an array. For example, a police officer should *not* tell the witness whether a person is in custody or whether the police have any corroborating evidence, *e.g.*, a confession or physical evidence. The police should merely advise the witness that they intend to conduct an identification procedure without saying anything about the suspect.

Once the witness has arrived at the police facility, the protocols discuss the nature of the instructions that should be given to the witness. Initially, the witness should be told that the perpetrator may or may not be in the array and that the witness should not assume that the administrator knows who is the perpetrator.

"The failure to utilize a 'blinded' procedure will only affect the admissibility of testimony regarding a prior photographic identification. It cannot constitute a legal basis to suppress other identification evidence pursuant to CPL §710.20(6)."

The witness must also be instructed about the quality of the photographs in the array. For example, the witness should be told that individuals presented in the photo array may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change. In addition, the true complexion of a person may be lighter or darker than shown in the photograph. The witness will be told to ignore any markings that may appear on the photographs.

Finally, the witness should be told that every witness who makes an identification will be asked to describe their level of confidence about that identification in their own words and should avoid using a numerical scale of any kind.

After viewing a "blind" or "blinded" photo array, the witness will be asked whether he/she recognized anyone and, if so, what photograph was recognized. In addition, the witness will be asked "from where do you recognize the person in the photograph?" Finally, the witness will be asked to describe his or her level of confidence, *e.g.*, "without using a number, how sure are you?"

The protocols suggest certain best practices with regard to documenting the procedure. Unless the witness objects to the outset, the entire identification procedure should be memorialized using audio or video recording. This may not be possible if there are equipment issues or the police believe that a recording would jeopardize the safety of a witness. The memorialization should include any physical or verbal reaction to the array as will as a confidence statement by the witness.

Once the identification is concluded and documented, the administrator should not make any comment to the witness that would suggest that the witness had identified the correct suspect.

A few observations can be made about the new protocols. The "blind" procedure requires the use of two individuals while the "blinded" procedure, using the "one-person shuffle," only requires one administrator. Thus the "blinded" array will be easier for law enforcement to administer and may become the default method for the police. In addition, the police may decide not to conduct corporeal lineups at all since photo arrays are much easier to administer. As a result, in a case without any independent forensic evidence, a conviction could rest solely upon a single photo identification.

The above protocols reflect the results of substantial scientific research in the area of memory, perception and recall as they relate to eyewitness identification. As mentioned earlier, they are not mandatory and a failure to utilize them will not mandate the suppression of a pretrial identification. As many police agencies around the state begin to utilize them, however, they will undoubtedly become standardized procedures involving pre-trial identification.

These new procedures for law enforcement personnel in New York reflect a national trend of state-based eyewitness identification reform.[5] Many of these reforms embrace the current state of scientifically accepted identification research. For example, in *State v. Henderson*,[6] the New Jersey Supreme Court used its supervisory powers to direct law enforcement to adopt best practices based on the scientific research of the last three decades. Supreme Court Justice Sonia Sotomayor recently noted that a vast body of scientific literature, *i.e.*, more than 2,000 studies, has reinforced the concern expressed by the court a half-century ago that eyewitness misidentification is the single greatest cause of wrongful conviction in this country.[7]

A second substantive enactment in the budget bill requires the video recording of custodial interrogations by a public servant at a detention facility when the interrogation involves certain enumerated felonies.[8]

A "detention facility" is defined as any location where an individual is being held in connection with criminal charges that have been or may be filed. The statute expressly includes a police station, correctional facility, holding facility for prisoners and a prosecutor's office. The recording must include the entire custodial interrogation, including the administration of *Miranda* warnings and the waiver of such rights.[9]

The video recordings are required only when the interrogation involves one of 19 enumerated felonies. They fall within the following categories: any A-1 felony other than a controlled substance felony under Article 220 of the Penal Law; any Class B violent offense under Article 125 of the Penal Law (homicide); any Class B violent felony offense under Article 130 of the Penal Law (sex offense); and the A-II felonies of predatory sexual assault (PL §130.95 and §130.96). As a result, the statute does not apply to certain significant felonies, including Rape in the Second Degree and Robbery in the First Degree.

The statute excuses the failure to record a statement for "good cause" by the prosecutor and lists 10 examples of what would constitute good cause—however, the list is not exhaustive. The excuses fall into several general categories: where the failure to record is beyond the control of the People; where the recording would jeopardize the safety of any person or reveal the identity of a confidential informant; or where a suspect refuses to be interrogated if the interrogation is recorded.[10]

The prosecutor has the burden of establishing good cause for the failure to record the interrogation. Should a court find, however, that there was not good cause for failing to record, the court may not suppress a confession or statement based solely on that ground. A court shall consider the failure to record as a factor, but not as the sole factor, in determining whether such confession shall be admissible at trial. At the defendant's request, the court must instruct the jury that the People's failure to record may be weighted as a factor, but not as the sole factor, in determining whether a statement was voluntarily made, or was made at all.[11]

A third new law raises the age of criminal responsibility in New York.[12] As of October 1, 2018, all 16-year-olds and, on October 1, 2019, all 17-year-olds with a few exceptions, will no longer be criminally responsible for misdemeanors—those charges will now be adjudicated in Family Court where the individual may be adjudicated a "juvenile delinquent." The only exception is where the misdemeanor is either accompanied by a felony charge, is the result of a guilty plea in satisfaction of felony charges, or falls under the Vehicle and Traffic Law. In those instances, the misdemeanor charges will remain in the local criminal court. In addition, traffic infractions and standalone violations will continue to be adjudicated in local criminal courts.

The adjudication of felonies for the age group is more complicated. All felony cases will originate in a newly established Youth Part in the Superior Court in each county,

Continued on page 16

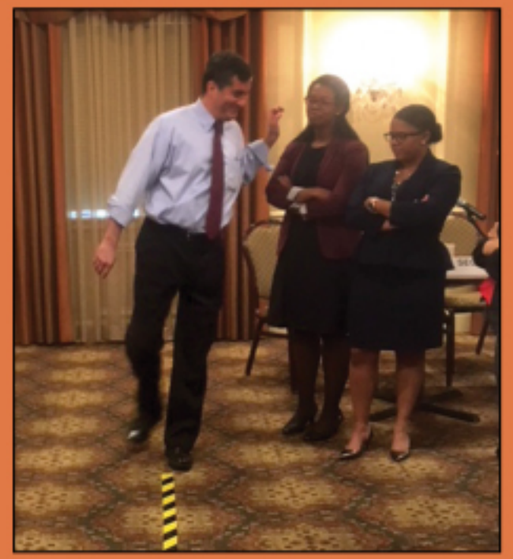
A Saturday Night Live: Criminal Justice Section Fall Meeting

October 6, 2017
Nassau County Bar Association

This program provided a unique view of what a DWI arrest looks like from the police officer's perspective—with live demonstrations involving people in various degrees of impairment.

Top left, Lt. Gustave Kalin, Nassau County Police, addresses attendees. On the panel are Gerard McCloskey, Marc Gann and Michael Bushwack. At right, Section members attend dinner.

Next page, top left, Marc Gann addresses the crowd while Police Officer John Obert-Thorn looks on. Top right, center and bottom right, attendees Max Sullivan, Melanie Hinger and James Baydar, demonstrate standarized field sobriety tests. Bottom left, Police Officer Rob Segretto speaks to attendees.



Continued from page 13

presided over by Family Court judges who will receive specialized training in juvenile justice and adolescent development.[13]

A 16-year-old or 17-year-old who is charged with a felony under the new law is designated an "adolescent offender" (AO) and, upon arrest, the AO will be arraigned in the Youth Part.[14] Thus, individuals in this age group will bypass the local criminal court completely unless they are arrested at a time when the Youth Part is not in session, *e.g.*, at night or on the weekend. At those times, the AO must be arraigned before special "accessible magistrates" designated by the presiding justice of each Appellate Division. These magistrates must be specially trained in juvenile justice and adolescent development and, presumably, current local criminal court judges would fill the role of "accessible magistrates."[15]

Once an adolescent offender is arraigned in the Youth Part, there is a provision for the case to be removed to Family Court where the individual could be adjudicated a "juvenile delinquent." Whether a case is removed depends on the severity of the offense.

When an adolescent offender is charged with any crime *other* than (1) a class A (non-drug) felony; (2) a violent felony; or (3) a felony for which a juvenile offender would be criminally responsible under CPL § 1.20(42), the statute comes close to a presumption in favor of a removal to Family Court.

The statute provides that the case "shall" be removed to Family Court *unless* the prosecutor files a motion within 30 days of the arraignment to prevent the removal. Ultimately, the court shall grant the motion for removal unless it determines that "extraordinary circumstances" exist that prevent the transfer to the Family Court. The statute does not define "extraordinary circumstances."[16]

When an adolescent offender is charged with a class A (non-drug) felony, or a violent felony, the court must adjourn the case no later than six calendar days after the arraignment. At the second appearance, the court must review the accusatory instrument to determine whether the case should be removed to Family Court. In order for the prosecutor to prevent the removal he or she must prove by a preponderance of the evidence that one of the following is established in the accusatory instrument: (1) the defendant caused "significant physical injury" (not defined) to a non-participant in the offense; (2) the defendant displayed a firearm, shotgun, rifle, or deadly weapon; or (3) or the defendant unlawfully engaged in sexual intercourse, oral sexual conduct, anal sexual contact or sexual contact.[17]

If the prosecution satisfies its burden, the case remains in the Youth Part and the defendant is prosecuted as an adult. Should the defendant be convicted, the court "shall consider the age of the defendant in exercising its discretion at sentencing."[18]

Under the new statute, *juvenile offenders* are arraigned in the Youth Part after their arrest and thus bypass the local criminal court unless the Youth Part is not in session.[19] The procedures for removing juvenile offenders to Family Court remains the same as under the prior statute although the numbering of the sections has changed.[20]

It should be noted that juvenile offenders and adolescent offenders who are not removed to Family Court are prosecuted as adults in the Youth Part. Nonetheless, they are still eligible for youthful offender treatment.

Finally, adolescent offenders who are held on bail prior to a conviction will no longer be held on Riker's Island as of October 1, 2018. Each county must provide a "detention center for older youth."[21] An adolescent offender sentenced to an indeterminant or determinate sentence will be committed to the Department of Corrections and Community Supervision for placement in an adolescent offender facility.

The fourth substantive change in the budget bill is an expansion of New York's sealing statute that aligns this state with a majority of other states in addressing the collateral consequences of past convictions. A new section, Criminal Procedure Law § 160.59, applies to all offenders (adults, adolescent offenders and juvenile offenders) who have past convictions.[22] It is the first time, New York will seal prior convictions—the current law only sealed violations and dismissed cases.

Under the new statute, an application can be made to seal up to two convictions, only one of which can be a felony. To qualify for sealing, at least ten years must have elapsed from the date of sentence or the release from incarceration, whichever comes later.[23] The application must be made to the sentencing judge and if the applicant has two convictions, the application must be made to the judge who presided over the higher classification of crime. If the two crimes are misdemeanors, the application must be made to the judge who sentenced the defendant on the later date.

If the prosecutor objects to the application, he or she has 45 days to file an objection and a court can conduct a hearing to make a determination. Pursuant to the statute, the court must consider any relevant factors including the impact of sealing upon the defendant's reentry or rehabilitation as well as the impact on public safety and the public's confidence.[24]

Certain convictions are not eligible for sealing, including violent felonies, sex offenses under Article 130 of the Penal Law, homicides, A felonies, and an offense for which registration as a sex offender is required.[25]

The new sealing statute is different from the current sealing statutes (CPL §§ 160.50 and 160.55). First, unlike the current statutes, the new law permits the Department of Criminal Justice Services to retain the fingerprint and photographs of the defendant. In addition, the new law permits a number of "qualified agencies," including prosecutor offices, to have access to these records.

Finally, a defendant cannot be required to waive the right to apply for sealing as part of any plea agreement.[26] In addition, an inquiry about a prior sealed conviction will constitute an unlawful discriminatory practice.[27]

Aside from the budget bill, the Legislature enacted a number of individual bills addressing criminal justice issues. As usual, the Legislature amended the definition of certain crimes and increased penalties of others. It should be noted that for the second year in a row, Governor Cuomo vetoed a bill that would have amended the definition of a gravity knife. Over the past 14 years, more than 65,000 New Yorkers have been arrested for possession of a gravity knife, making this one of the most prosecuted crimes.

A gravity knife is "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device."[28] The knife was originally designed for use by paratroopers in World War II who needed to cut themselves free from a parachute that had become tangled in a tree or other obstruction. The knife could be opened by using one hand; the user pointed the knife downward and the blade became free from the force of gravity and the flick of the wrist.

The law, which was enacted in 1958, has been criticized as being too broad in that it has been enforced against large groups of individuals who use these knives every day as part of their trade. Law enforcement officials, however, caution that these knives present a threat to safety and that there are many alternative instruments that can be used by tradespeople including the widely used utility knife with a half-inch blade and the standard folding knife.

The governor vetoed last year's bill because, in his opinion, the bill would have potentially legalized all folding knives and placed a burden on law enforcement to determine the design attributes of each knife. This year in vetoing the bill, the Governor found that while it did succeed in removing any ambiguity in the definition of a gravity knife, "it did so in a way that would essentially legalize all folding knives."[29] This, he said, would have resulted in greater confusion among law enforcement and knife owners.

The Legislature has responded to an increase of bomb threats against Jewish community centers by adding "community center" to the definition of "public place." As a result, a person who makes a bomb threat against a community center, can now be convicted of the felonies of Placing a False Bomb and Falsely Reporting an Incident.[30] In addition, the Legislature closed a loophole that had existed in enforcing the crime of Obstructing a Firefighting Operation. The law has been expanded to protect a firefighter who is performing emergency medical care on a sick or injured person.[31]

"Over the past 14 years, over 65,000 New Yorkers have been arrested for possession of a gravity knife, making this one of the most prosecuted crimes."

In another amendment, the Legislature has eliminated the inconsistent regulation of "sparkling devices" throughout New York State. A new law authorizes the sale of "sparkling devices" outside of cities with a population of one million or more, exempting them from the definition of "fireworks" and "dangerous fireworks."[32] Finally, illegal deer poaching is now a misdemeanor, punishable by up to a year in jail.[33]

As part of the budget bill, New York State will reimburse all counties for improvements in indigent defense services. This builds upon a 2014 settlement in which the State agreed to settle a class action lawsuit[34] that accused the State of failing to provide adequate representation to indigent defendants in five counties (Suffolk, Washington, Ontario, Onondaga and Schuyler). The settlement committed the State to pay for improved services to indigent defense systems in those counties, but did not address New York's other 57 counties.

Under the new legislation, the Office of Indigent Legal Services must provide a statewide plan to provide for the following: ensuring that defendants are represented by counsel at arraignment; reducing caseloads for public defenders; and improving the resources available to attorneys representing indigent defendants. In addition, the State will provide up to $250 million over six years to pay for the implementation of these reforms.[35]

A number of procedural changes were enacted in the last legislative session. In 2016, the Legislature enacted a bill establishing requirements for law enforcement agencies with respect to sexual offense evidence kits. This year the Legislature has enacted several amendments that clarify last year's bill.

First, it was clarified that the requirements apply to police and prosecutorial offices. Second, agencies are required to develop a DNA profile when the biological evidence obtained is eligible for comparison to the federal CODIS database. The agencies are also required to take an inventory of the kits and submit the inventory to the New York State Division of Criminal Justice Services. The agencies will also have less time to submit these kits for analysis; the time has been shortened from 180 days to 30 days. The failure of the agencies to comply with the time frames for submission and testing, however, will not be grounds for suppression of evidence under Criminal Procedure Law § 710.20. Finally, the effective date of most of these changes was extended to one year after it becomes law.[36]

Under current law, a pre-sentence investigation report may be waived by the parties when a sentence of felony probation is to be imposed. A new law now also permits a waiver of the report when a conditional discharge is to be imposed.[37] Another new law would require police officers investigating a vehicular accident to request that all operators of the motor vehicles involved in the accident submit to a field sobriety test where a person was seriously injured or killed as a result of the accident. The request must be made if the police officer has reasonable grounds to believe that the operator committed a "serious traffic violation," defined as operating a vehicle in violation of enumerated sections of the Vehicle and Traffic Law. These violations include driving with a suspended license, leaving the scene of an accident, speeding, and reckless driving. A motorist who refuses to take the test would be subject to a suspension of his or her license.[38]

Another procedural change is designed to facilitate the appeal from a court that is not designated a court of record. These courts do not utilize stenographers to make records of the proceedings. As a result, an appeal is heard on a record pieced together by means of (1) "an affidavit of errors" prepared by the appellant and (2) a summary of the facts made by the judge. A decade ago the Office of Court Administration installed electronic recording devices in these courts. Nonetheless, the Court of Appeals recently held that a transcript derived from an electronic recording of the proceedings is not an acceptable substitute for the filing of an affidavit of errors.[39] In order to provide an appellant sufficient time to obtain the transcript of the electronic recording, an amendment extends the time to file a Notice of Appeal from 30 to 60 days.[40]

Finally, the Legislature has concluded that the felony of animal fighting is a heinous crime that remains largely undetectable. As a result, it has added this crime to the list of designated crimes eligible for an application for an eavesdropping or video surveillance warrant.[41]

Several new laws will affect sex offenders. First, a "transportation network company," *e.g.,* Uber, Lyft, etc., cannot employ an individual who is a registered sex offender.[42] Second, the Division of Criminal Justice Services must notify the appropriate law enforcement agency within two business days (rather than 48 hours) if a registered sex offender changes residence or enrolls in an institution of higher learning.[43]

Victims of crimes will benefit from several new laws. Initially, the court system will make available translation services to all Family and Supreme Courts to assist in the translation of Orders of Protection where the person protected by the Order has limited English proficiency or has a limited ability to read English.[44] In addition, victims of domestic violence can now make an application in County and Family Court, in addition to Supreme Court, for an order separating their voting registration records and any other records from records available to the public.[45]

Under a new law, prosecutors must provide the Board of Parole with a copy of the written notice it provides crime victims regarding the disposition of a criminal case and the victim's right to be heard by the Board. This will enable the Board to contact crime victims about the status of a parolee's hearing.[46] Finally, crime victims will now be compensated for transportation costs associated with any appearance in a criminal case from an arraignment through post-trial hearings.[47] In addition, reimbursement for crime scene cleanup expenses will now be paid to additional members of a victim's family.[48]

Several new laws will impact prisoners. Recognizing that inmates are routinely transferred from one facility to another for a variety of reasons, the Legislature has enacted a new law that permits an inmate to call his or her family within 24 hours of arriving at a new facility.[49] The Parole Board will now be required to post its administrative appeal decisions online within 60 days of its determination.[50] Finally, last year a new law authorized the use of a qualified interpreter to be used at parole hearings where an inmate does not speak English as a second language. This year, an amendment requires the interpreter to be appointed by the New York State Office of General Services.[51]

A number of laws, scheduled to sunset this year, have been extended. For example, Kendra's Law was extended until June 20, 2022; it established a statutory framework for court-ordered assisted out-patient treatment of individuals with mental illness.[52] A number of laws had their expiration dates extended from September 1, 2017 to September 1, 2019: numerous sentencing laws as well as laws relating to inmate work release programs, electronic court appearances in designated counties, and the use of closed-circuit television for certain child witnesses.[53] Finally, certain sections of the Arts and Cultural Law, relating to the resale of tickets to places of entertainment, have been extended until June 20, 2018.[54]

The New York City Council has enacted a number of local laws designed to facilitate the posting of bail and the release of inmates. First, in any case where less than

$10,000 bail is set, the New York City Department of Corrections may delay the transportation of the defendant to a correctional facility for 4 to 12 hours to permit the inmate to have bail posted, if the delay is requested by a pretrial services agency.[55]

Second, the Department of Corrections will begin accepting cash bail payments online, beginning on April 1, 2018 and once cash bail is posted an inmate must be released within five hours (beginning on October 1, 2017); four hours (beginning on April 1, 2018); and three hours (beginning on October 1, 2018).[56]

Finally, where a defendant is held on bail, the Department of Corrections shall ensure that a "bail facilitator" meets with an inmate within 48 hours of admission to a facility. The facilitator must explain to the inmate how to post bail or bond, the fees that may be collected by bail bond companies and must assist the inmate with any reasonable measures related to the posting of bail.[57]

Endnotes

1. 2017 N.Y. Laws, Ch. 59 (amending Penal Law § 60.30), eff. July 1, 2017.
2. *People v. Caserta*, 19 N.Y.2d 18 (1966).
3. *People v. Perkins*, 15 N.Y.3d 200 (2010).
4. *New York Identification Law*, Hibel, at 4-16.
5. *The Promises and Pitfalls of State Eyewitness Identification Reforms*, 104 KY. L.J. 99 (2016).
6. *State v. Henderson*, 27 A3d 872 (2011).
7. *Perry v. New Hampshire*, 565 U.S. 228 (2012) (*dissenting opinion*); *U.S. v. Wade*, 388 U.S. 218, 219.
8. 2017 N.Y. Laws, Ch. 59 (amending Penal Law § 60.45).
9. Amending Penal Law § 60.45(3).
10. Amending Penal Law § 60.45(3).
11. Amending Penal Law § 60.45(3)(d).
12. 2017 N.Y. Laws, Ch. 59, eff. October 1, 2018 and October 1, 2019.
13. Criminal Procedure Law § 722.10.
14. Criminal Procedure Law § 1.20(44).
15. Criminal Procedure Law § 722.20 and § 722.21.
16. Criminal Procedure Law § 722.23(1).
17. Criminal Procedure Law § 722.23(2).
18. Penal Law § 60.10(a).
19. Criminal Procedure Law § 722.20.
20. *Id*.
21. Correction. Law § 40(2).
22. 2017 N.Y. Laws, Ch. 59, eff. October 7, 2017; Ch. 60.
23. Criminal Procedure Law § 160.59(5).
24. Criminal Procedure Law § 160.59(7).
25. Criminal Procedure Law § 160.59(1).
26. Criminal Procedure Law § 160.59(11).
27. Executive Law § 296 (16).
28. Penal Law § 260.00(5).
29. S. 4769, awaiting the Governor's signature.
30. 2017 N.Y. Laws, Ch. 167, eff. November 12, 2017 (amending Penal Law § 240.00).
31. 2017 N.Y. Laws, Ch. 124, eff. November 1, 2017 (amending Penal Law § 195.15).
32. S. 724, awaiting the Governor's signature.
33. S. 387, awaiting the Governor's signature.
34. *Hurrell-Harring v. New York*, 15 N.Y.3d 8 (2010).
35. 2017 N.Y. Laws, Ch. 59.
36. S. 980, awaiting the Governor's signature.
37. 2017 N.Y. Laws, Ch. 194, eff. August 21, 2017 (amending Criminal Procedure Law § 390.20).
38. S. 5562, awaiting the Governor's signature.
39. *People v. Smith*, 27 N.Y.3d 643 (2016).
40. 2017 N.Y. Laws, Ch. 195, eff. October 20, 2017 (amending Criminal Procedure Law § 460.10).
41. A. 2806, awaiting the Governor's signature.
42. 2017 N.Y. Laws, Ch. 60, eff. July 1, 2017 (amending Criminal Procedure Law § 700.05).
43. 2017 N.Y. Laws, Ch 17, eff. January 27, 2017 (amending Correction Law § 168-j).
44. 2017 N.Y. Laws, Ch. 55, eff. July 19, 2017 (amending Judiciary Law §212).
45. S. 6749, awaiting the Governor's signature.
46. 2017 N.Y. Laws, Ch. 193, eff. August 21, 2017 (amending Criminal Procedure Law § 440.50).
47. S. 338, awaiting the Governor's signature.
48. 2017 N.Y. Laws, Ch. 117, eff. January 21, 2018 (amending Executive Law § 624).
49. 2017 N.Y. Laws, Ch. 254, eff. September 21, 2017.
50. S. 3982, awaiting the Governor's signature.
51. 2017 N.Y. Laws, Ch. 9, eff. March 8, 2017 (amending Executive Law § 259-i).
52. 2017 N.Y. Laws, Ch. 67.
53. 2017 N.Y. Laws, Ch. 55.
54. 2017 N.Y. Laws, Ch. 68.
55. Local Law 1541, eff. September 20, 2017.
56. Local Law 1531, eff. October 1, 2017.
57. Local Law 1561, eff. January 18, 2018.

New York Court of Appeals Review

By Jay Shapiro

The New York Court of Appeals started of the fall with decisions involving significant constitutional issues.

Warrantless Arrest-*Payton*

***People v. Garvin* (decided October 24, 2017)**

The Court of Appeals was heavily divided as four Judges ruled that the Court would not overrule its precedent permitting the police to execute a warrantless arrest in the threshold of a residence when the suspect voluntarily answered the door and the police do not cross the threshold.

Judge Stein, joined by the Chief Judge and Judges Garcia and Feinman, wrote that there was no reason to overrule its "longstanding rule" permitting an arrest under these circumstances. The facts of this case were common to this type of situation. The defendant was wanted for a crime, the police had probable cause to arrest him, and they went to his residence. The arresting officer knocked on the apartment door and it was opened by defendant. As the defendant stood in the threshold, the officer told him he was under arrest, had the defendant turn to be handcuffed, and removed him from the apartment. The police never entered the residence.

The majority concluded that there was no *Payton* violation because there was no entry by the police. In explaining the rule's viability, the court wrote, "overruling our prior cases would present an unacceptable obstruction to law enforcement, eliminate a clear and workable rule that has guided the courts for decades, undermine predictability in the law and reliance upon our decisions."

Vehicle and Traffic Law-Police Scanner

***People v. Andujar* (decided October 24, 2017)**

VTL § 397 provides that it is a misdemeanor for a person other than a police or peace officer to equip a vehicle with a police radio scanner. The statute's goals were to prevent criminals from listening in on law enforcement and tow truck drivers from chasing accidents. The defendant in this case was involved in an accident in his pick-up truck that bore the logo of a tow company. He had a scanning device in his jacket pocket.

In holding that the defendant violated the statute even though the scanner was not attached, the court ruled that "equip" does not require that the device be attached to the vehicle. Rather, the court concluded that a fair definition of equip is "to provide something with a particular feature or ability."

Due Process-Appeal

***People v. Novak* (decided October 24, 2017)**

This case of constitutional concerns is a product of the state's system of judicial appointment and election. Defendant was arrested for driving while impaired. The same judge, sitting in City Court, denied the defendant's dismissal motion and then found him guilty in a bench trial.

The defendant appealed to County Court. As the appeal was pending, the trial judge was elected to County Court and was assigned defendant's single judge appeal. The conviction and sentence were upheld.

The Court of Appeals ruled that the judge should have recused himself from the appeal. The Court of Appeals acknowledged that there was no statutory rule requiring recusal, but "there was a clear abrogation of our State's court structure that guarantees one level of independent factual review as of right." The case was remanded to County Court for review by a different judge.

Confrontation Clause-Expert Testimony and Hearsay

***People v. Austin* (decided October 19, 2017)**

Defendant's burglary conviction was reversed because of the admission of improper DNA evidence. During the trial, it was revealed that the criminalist who was going to testify concerning DNA matches with the crime scenes was basing the conclusions on results that had been determined by other analysts. Defense counsel's hearsay objections relied upon the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). As the Court of Appeals commented those objections were "frustrated by the court."

The prosecution's expert testified as to matches "without having conducted, witnessed or supervised the generation of the DNA profiles." In overturning the conviction, the Court of Appeals wrote that "the criminalist's testimony was nothing more than a parroting of hearsay statements, made by other analysts and of which he had no personal knowledge."

United States Supreme Court News

By Spiros Tsimbinos

Just before beginning its summer recess, the Court re-visited a number of significant issues that had been decided by the Court in earlier decisions. The Court disposed of matters involving the issues of same-sex marriage, separation of church and state, and the death penalty.

Separation of Church and State

***Douglas County School Dist. v. Taxpayers for Public Educ., Colorado State Bd. of Educ. v. Taxpayers for Public Educ., Doyle v. Taxpayers for Public Educ., New Mexico Ass'n of Non-Public Schools v. Moses*, 137 S. Ct. _____ (June 27, 2017)**

In a series of four cases from Colorado and New Mexico, the Supreme Court granted *certiorari*, vacated the judgments and remanded the cases for further consideration in light of the ruling in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2410 (June 26, 2017). In that case, in a 7-2 decision, the United States Supreme Court held that the state's policy of categorically disqualifying churches and other religious organizations under its playground resurfacing program, an otherwise public benefit, violated the free exercise clause of the First Amendment. In the Colorado cases, the state Supreme Court had ruled that a scholarship program that permitted qualifying elementary, middle, and high school students to use taxpayer funded scholarships to pay tuition to attend private schools, including religious schools, violated a provision of the Colorado Constitution.

In the New Mexico case, the Supreme Court held that a school book loan program of the New Mexico Department of Public Education, which provided for the purchase and lending of instructional material to private schools, violated a provision of New Mexico Constitution involving separation of church and state. The decision in *Trinity Lutheran* appears to have opened the door for religious institutions to receive the benefits of some public governmental programs. In the Trinity Lutheran case, dissenting Justices Sotomayor and Ginsburg argued that the majority opinion weakened the commitment to the separation of church and state and constituted a radical mistake. Based on the *Trinity Lutheran* decision, however, the Court with unanimous agreement sent the four cases from Colorado and New Mexico back to the state courts for further consideration.

Same-Sex Marriage

***Pavan v. Smith*, 137 S. Ct. _____ (June 26, 2017)**

In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the United States Supreme Court held that same sex couples may exercise the fundamental right to marry, and states must recognize same-sex marriages validly performed out of state. The State of Arkansas had a specific statute regarding the listing of parents on a child's birth certificate. The statute provided that the mother is deemed to be the woman who gives birth to the child. The statute further instructed that the name of the husband shall be entered on the certificate as the father of the child. Two married same-sex couples who conceived children through anonymous sperm donation, and whose applications for birth certificates listed both spouses as parents, resulting in the issuance of certificates bearing only the names of the child's birth mothers, brought a state court action against Arkansas. They further sought a declaration that the state's birth certificate law violated the Constitution. The Supreme Court of Arkansas ruled that the state statute passed constitutional muster.

The Supreme Court, however, in a 6-3 decision, ruled that Arkansas law as interpreted by the Arkansas Supreme Court to deny same-sex parents the same right as opposite sex parents to be listed on the child's birth certificate violated the Court's prior ruling in *Obergefell v. Hodges* and was unconstitutional. The majority opinion conclude that the State of Arkansas used birth certificates to give married parents a form of legal recognition that is not available to unmarried parents and is therefore unconstitutional.

Justices Gorsuch, Thomas and Alito dissented and asserted that there was nothing in the *Obergefell* decision to question whether the Arkansas statute was unconstitutional. They further argued that there was no basis for a summary reversal in the matter.

Death Penalty

***Otte v. Morgan*, 137 S. Ct. _____ (July 25, 2017)**

Although the United States Supreme Court in recent years has been chipping away at the utilization of the death penalty and Justices and Breyer and Ginsburg have even raised the issue of its unconstitutionality, the Court as a whole continues to avoid a complete elimination of its use and in several recent matters has refused to grant stays of execution with respect to certain death row in-

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

mates. In the instant matter, the Court denied stays of execution for three Ohio death row inmates and denied a petition for certiorari review of the Sixth Circuits *en banc* decision vacating a preliminary injunction issued by a District Court. Justices Sotomayor and Ginsburg dissented and argued that the *en banc* Sixth Circuit ruling had failed to accord due deference to the District Court's finding under the clear error standard of review.

Important Cases Awaiting Decision in Upcoming 2017-2018 October Term

The Court granted has granted *certiorari* and agreed to a number of important cases during its current October term which began on October 3, 2017. Included in these cases are:

Class v. United States—Guilty Plea as Waiver of a Defendant's Right to Challenge the Constitutionality of State Conviction

In late February, the United State 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. A decision on this matter will be forthcoming when the Court begins its next term in October.

Collins. v. Virginia—Search and Seizure

Question Presented:

Whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a home, and search a vehicle parked a few feet from the house.

The police were investigating defendant as a suspect in offenses involving a motorcycle. They went to his home and saw a motorcycle under a tarp that was adjacent to his driveway, clearly on the property of the residence. They entered his property, lifted the tarp and after checking the vehicle identification number on the motorcycle determined it was stolen.

The state courts upheld the search, with the Virginia Supreme Court ruling that the automobile exception applies to vehicles that are not immediately mobile and even though they are on private property.

Byrd v. United States—Search and Seizure

Question Presented:

Does a driver have a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement?

Byrd was prosecuted federally for heroin offenses that were the product of a state police traffic stop in Pennsylvania. The officer based the stop on traffic violations; Byrd was driving a rental car although his girlfriend was the only person identified in the rental agreement. As the encounter on the side of the road continued, the officer asked Byrd for permission to search the vehicle, but also informed him that because he was not named in the agreement his consent was not required. The heroin was found in the trunk of the car.

The issue before the Supreme Court is whether the district court and Court of Appeals for the Third Circuit were correct in ruling that Byrd had no reasonable expectation of privacy in the vehicle because he was not named in the rental agreement. In granting *certiorari* in this case, the Supreme Court will be able to clarify what appears to be conflicting views of this issue in some of the other circuits.

Significant Non-Criminal Cases

President's Travel Ban

Trump, President of the United States, et al. v. International Refugee Assistance Project, et al. and Hawaii, et al., 138 S. Ct., p. _____ (October ____, 2017)

The United States Supreme Court had scheduled oral argument for October 10, 2017 on the controversial issue involving President Trump's imposition of a 90-day travel ban. In one of its final major actions in late June, the United States Supreme Court issued a unanimous ruling vacating most of the preliminary injunctions issued by the Fourth Circuit Court of Appeals and the Hawaii District Court with respect to the President's 90-day travel ban involving six Middle Eastern Countries. The Court granted the government's application to stay the preliminary injunctions which were issued to prevent enforcement of the President's Executive Order with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States. The Court only upheld that portion of the prior injunctions that determined it could not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.

Justices Thomas, Alito and Gorsuch, while concurring with the majority decision, dissented to that portion of the determination that allowed persons to enter who

had a credible claim of a bona fide relationship. The dissenters argued that this could invite a flood of litigation on the issue of what constitutes a bona fide relationship. They thus argued that the preliminary injunctions should therefore have been stayed in their entirety. The warning issued by the dissenting Justices regarding continued litigation was quickly borne out when the Hawaii District Court, following the Supreme Court ruling, nonetheless expanded the list of persons allowed to enter based upon a bona fide relationship. The District Court added some 24,000 refugees who had already been assigned to a charity or religious organization in the United States. This caused the Supreme Court on July 19, 2017 to once again limit the District Court's latest ruling and allow only an extension of family relationships to include grandparents among relatives who can help visitors from the six countries in question. In the July 19 Order, Justices Alito, Gorsuch and Thomas renewed their request for a complete stay with respect to any injunctions which were issued. The Supreme Court in its July 19 Order also stated that the Ninth Circuit Appellate Court should proceed to consider the appeal of the Hawaii matter.

Despite the actions taken by the United States Supreme Court, the lower Federal Courts continued in their attempt to modify the President's actions. Justice Kennedy in early September issued a further order staying federal action which had been taken by the Federal Court of Appeals for the Fifth Circuit. The preliminary determinations issued by the Supreme Court were largely a victory for the President's determinations and appeared to foreshadow the ultimate ruling which would have been issued by the Court following the October 10 oral argument. The Court's ultimate ruling involves a very important issue regarding the scope of presidential authority in the area of immigration and foreign policy.

Due to the fact that the 90-day ban would have expired by the time the Court held oral argument on the matter, many observers speculated that the Court would consider the matter moot and would exercise its option of avoiding any action on the merits of the case. In fact, in late September President Trump issued a new executive order of a more permanent nature and which contained several modifications from his earlier action. As a result, the Court removed the matter from the oral argument calendar of October 10, 2017 and instead requested both sides to submit letters with regard to their positions as to what the Court should do next. We thus await the Court's ultimate ruling on this matter.

Political Gerrymandering

***Gill v. Whitford*, 138 S. Ct. _____ (_____, 2017)**

On June 20, 2017, the Supreme Court agreed to hear a case from Wisconsin on the issue of whether Republican lawmakers in Wisconsin drew legislative districts that favor their party and were so out of whack with the state's political breakdown that they violated the constitutional rights of Democratic voters. Democrats argued that Republicans statewide had received 48% of the vote but occupied nearly 60% of the legislative seats. A lower court had struck down the districts as unconstitutional last year and the State of Wisconsin is now seeking review by the United States Supreme Court. In accepting the case, the Court will evidently take up the momentous issue involving manipulating electoral districts in order to gain partisan advantage. The case will be the Supreme Court's first matter in more than a decade on the issue of partisan gerrymandering and could affect the balance of power between Democrats and Republicans across the United States.

Oral argument was heard by the Court on October 3, 2017 and it appeared from the questioning by the various Justices that the ultimate decision might involve a 5-4 vote with Justice Kennedy once again rendering the critical swing vote. According to news reports, Justice Kennedy has long been troubled by extreme partisan gerrymandering but he has never found a satisfactory way to determine when voting maps are so warped by politics that they cross a constitutional line. Chief Justice Roberts, during oral argument, expressed reservations about having the Court involved in the political thicket and the positions taken by both he and Justice Kennedy may ultimately decide the issue.

Detention of Illegal Immigrants

***Jennings v. Rodriguez*, 138 S. Ct. _____ (_____, 2017)**

On November 30, 2016, the United States Supreme Court heard oral argument on the issue of whether immigrants detained for possible deportation can be incarcerated indefinitely without a hearing or bond application. The issue involved the interpretation and application of 8 U.S.C. Due to the absence of Justice Scalia, the Court apparently deadlocked on a 4-4 basis and ordered that the matter be set down for rehearing. The Court thus heard a second oral argument involving the case on October 3, 2017, the opening day of its new term. Justice Gorsuch, the new addition to the Court, participated in the questioning of the attorneys and it appears that he may be in the position of casting the determining vote on the matter. It is expected that a decision would be forthcoming in the next few months.

Collection of Union Dues and Free Association Violations

***Janus v. American Federation of State, County and Municipal Employees*, 138 S. Ct. _____ (_____, 2017)**

In 2016, the Court heard oral argument on the case of *Friedrich v. California Teachers Assn.* During oral argument with Justice Scalia participating, it appeared that the Court was on the verge of placing limits on the right of the unions to take fees from non-union members. As a result of Judge Scalia's death, the Court deadlocked 4-4

and allowed the lower court ruling in favor of the unions to stand. On October 5, 2017, however, the Court granted *certiorari* and agreed to hear the above-entitled, matter which once again raises the issue of whether government workers who choose not to join unions may be forced to pay for the union's collective bargaining work. With the addition of Justice Gorsuch to the Court, it appears that a ruling adverse to the unions may be in the making. If the Court rules against the unions, it is estimated that millions of government workers in more than 20 states would be allowed to opt out of paying for collective bargaining, thereby depriving unions of vast sums of money and making them less powerful and effective.

Free Exercise of Religion

***Masterpiece Cake Shop Limited v. Colorado Civil Rights Commission*, 138 S. Ct. _____ (_____, 2017)**

On June 26, 2017, the United States Supreme Court granted *certiorari* to address the issue of whether the Colorado Civil Rights Commission violated the free exercise and free speech rights under the First Amendment of an owner of a cake shop who has refused to create a cake for a same sex couples wedding because doing so would violate his Christian religious beliefs. A Colorado statute prohibited all places of public accommodation from discriminating against customers because of their sexual orientation. The bakery owner has argued, relying on the Supreme Court's prior decision in the *Hobby Lobby* case, that the Colorado Commission had targeted his religious beliefs about marriage for punishment in violation of the free exercise clause. A decision in this matter is expected sometime in the spring, and the recent addition of Justice Gorsuch to the Court may be a significant factor in the ultimate determination of this case as Justice Gorsuch was instrumental in initially advancing the legal arguments which resulted in the *Hobby Lobby* ruling.

Completed Citations

In our last issue, there were a few cases which were decided in the very last days of June and full citations were not available. These cases with their completed citations are listed below.

Turner v. United States, 137 S. Ct. 1885 (June 22, 2017)
Lee v. United States, 137 S. Ct. 1958 (June 23, 2017)
Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2410 (June 26, 2017)

Allotment of Justices

Following the swearing in of Justice Gorsuch on April 10, 2017, Chief Justice Roberts issued a new allotment of Justices for the various Federal Districts. Justice Gorsuch was assigned to the Eight Circuit, which covers Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota. The various Supreme Court Justices are assigned to the different Circuits so as to handle emergency matters. Justice Thomas, who was previously handling two Circuits due to the death of Justice Scalia, returned exclusively to the Eleventh Circuit, which covers Alabama, Florida and Georgia.

Section Committees and Chairs*

Appellate Practice
Robert S. Dean
Center for Appellate Litigation
120 Wall St., 28th Floor
New York, NY 10005
rdean@cfal.org

Awards
Norman P. Effman
Wyoming County Public Defender
Wyoming County Attica Legal Aid Bureau Inc.
18 Linwood Avenue
Warsaw, NY 14569
attlegal@yahoo.com

Bail Reform
Roger B. Adler
233 Broadway, Suite 1800
New York, NY 10279
rbalaw@verizon.net

Hillel Joseph Hoffman
788 Columbia Ave., 14E
New York, NY 10025
hillelhoffman@yahoo.com

Bylaws
Yevgeniy Frenkel
yevfrenkel@gmail.com

Continuing Legal Education
Nicholas J. DeMartino
Green & Brenneck
100 Madison Street, 17th Floor
Syracuse, NY 13202
Nick@teamgreenlawyers.com

Correctional System
Leah Rene Nowotarski
Wyoming County Public Defender
18 Linwood Avenue
Warsaw, NY 14569
lnowotarski.attlegal@yahoo.com

Norman P. Effman
Wyoming County Public Defender
Wyoming Cty Attica
Legal Aid Bureau Inc.
18 Linwood Avenue
Warsaw, NY 14569
attlegal@yahoo.com

Defense
Harvey Fishbein
111 Broadway, Suite 701
New York, NY 10006
hf@harveyfishbein.com

Xavier Robert Donaldson
Donaldson & Chilliest LLP
1825 Park Avenue, Suite 1102
New York, NY 10035
xdonaldson@aol.com

Discovery Reform
Xavier Robert Donaldson
Donaldson & Chilliest LLP
1825 Park Avenue, Suite 1102
New York, NY 10035
xdonaldson@aol.com

Diversity
Rasheim Jamil Donaldson
625 West 164 Street, Apt. 21A
New York, NY 10032
rasheim.donaldson@gmail.com

Guy Hamilton Mitchell
2611 Eighth Avenue, Unit 1-B
New York, NY 10030
guymitchell888@hotmail.com

Ethics and Professional Responsibility
Lawrence S. Goldman
Goldman and Johnson
500 5th Avenue, 34th Floor
New York, NY 10110-3399
lsgoldman2@hotmail.com

Judiciary
Michael R. Sonberg
New York State Supreme Court
100 Centre Street
New York, NY 10013
msonberg@nycourts.gov

Cheryl E. Chambers
Appellate Division,
Second Judicial Dept
45 Monroe Place
Brooklyn, NY 11201
cchamber@nycourts.gov

Law School Student
Alexandra Ferlise
150 Chamber Street, 2W
New York, NY 10007
alexandraferlise@gmail.com

Natasha Pooran
120-23 97th Avenue
South Richmond Hill, NY 11419
natasha.pooran@live.law.cuny.edu

Nishat Tabassum
1950 Gleason Avenue, Apt. 2
Bronx, NY 10472
nishattabassum93@gmail.com

Legislation
Hillel Joseph Hoffman
788 Columbia Avenue
14E
New York, NY 10025
hillelhoffman@yahoo.com

Prosecution
John M. Ryan
Queens District Attorney
125-01 Queens Blvd.
Kew Gardens, NY 11415
jmryan@queensda.org

Publications
Jay Shapiro
White and Williams LLP
Times Square Tower
7 Times Square
New York, NY 10036
cjseditor@outlook.com

Sealing
Richard D. Collins
Collins, McCloskey & Barry, PLLC
138 Mineola Blvd
Mineola, NY 11501
rcollins@cqmbesq.com

Jay Shapiro
White and Williams LLP
Times Square Tower
7 Times Square
New York, NY 10036
cjseditor@outlook.com

Sentencing and Sentencing Alternatives
Robert J. Masters
District Attorney's Office
Queens County
125-01 Queens Boulevard
Kew Gardens, NY 11415
Rjmasters@queensda.org

Sex Offender Registration Act
Robert S. Dean
Center for Appellate Litigation
120 Wall St., 28th Floor
New York, NY 10005
rdean@cfal.org

Sponsorships
David Louis Cohen
Law Office of David L. Cohen, Esq.
125-10 Queens Boulevard, Suite 5
Kew Gardens, NY 11415-1522
david@davidlouiscohenlaw.com

Task Force on Cameras in the Courtroom
David Louis Cohen
Law Office of David L. Cohen, Esq.
125-10 Queens Boulevard, Suite 5
Kew Gardens, NY 11415-1522
david@davidlouiscohenlaw.com

Town and Village Justice Court Task Force
Clare J. Degnan
The Legal Aid Society
of Westchester County
150 Grand Street, First Floor
White Plains, NY 10601-2310
cjd@laswest.org

Leah Rene Nowotarski
Wyoming County Public Defender
18 Linwood Avenue
Warsaw, NY 14569
lnowotarski.attlegal@yahoo.com

White Collar Crime
Jean T. Walsh
Bronx County District Attorney's Office
198 East 161st Street
Bronx, NY 10451
walshjt@bronxda.nyc.gov

Wrongful Convictions
Barry Kamins
Aidala, Bertuna & Kamins P.C.
546 5th Avenue, 6th Floor
New York, NY 10036
judgekamins@aidalalaw.com

Linda Kenney Baden
Law Office of Linda Kenney Baden
15 West 53rd Street
New York, NY 10019
kenneybaden@msn.com

Young Lawyers
Anthony Beneduce Jr.
111-40 118th St.
South Grove Park, NY 11420
abeneduce89@gmail.com

Andrea Luz Nieves
177 Livingston Street, 7th Floor
Brooklyn, NY 11201
anieves@bds.org

* To update your information, contact the NYSBA Member Resource Center at 1-800-582-2452.

Publication and Editorial Policy

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

Publication Policy: All articles should be e-mailed to: Jay Shapiro at cjseditor@outlook.com.

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

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

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

ISSN 1549-4063 (print) ISSN 1933-8600 (online)

NEW YORK CRIMINAL LAW NEWSLETTER

NEW YORK STATE BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
One Elk Street, Albany, New York 12207-1002

NEW YORK STATE BAR ASSOCIATION

NEW YORK CITY
New York Hilton Midtown

ANNUAL MEETING

2018
JANUARY 22 – 26

Get Social: #nysba18