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New York Criminal Law Newsletter

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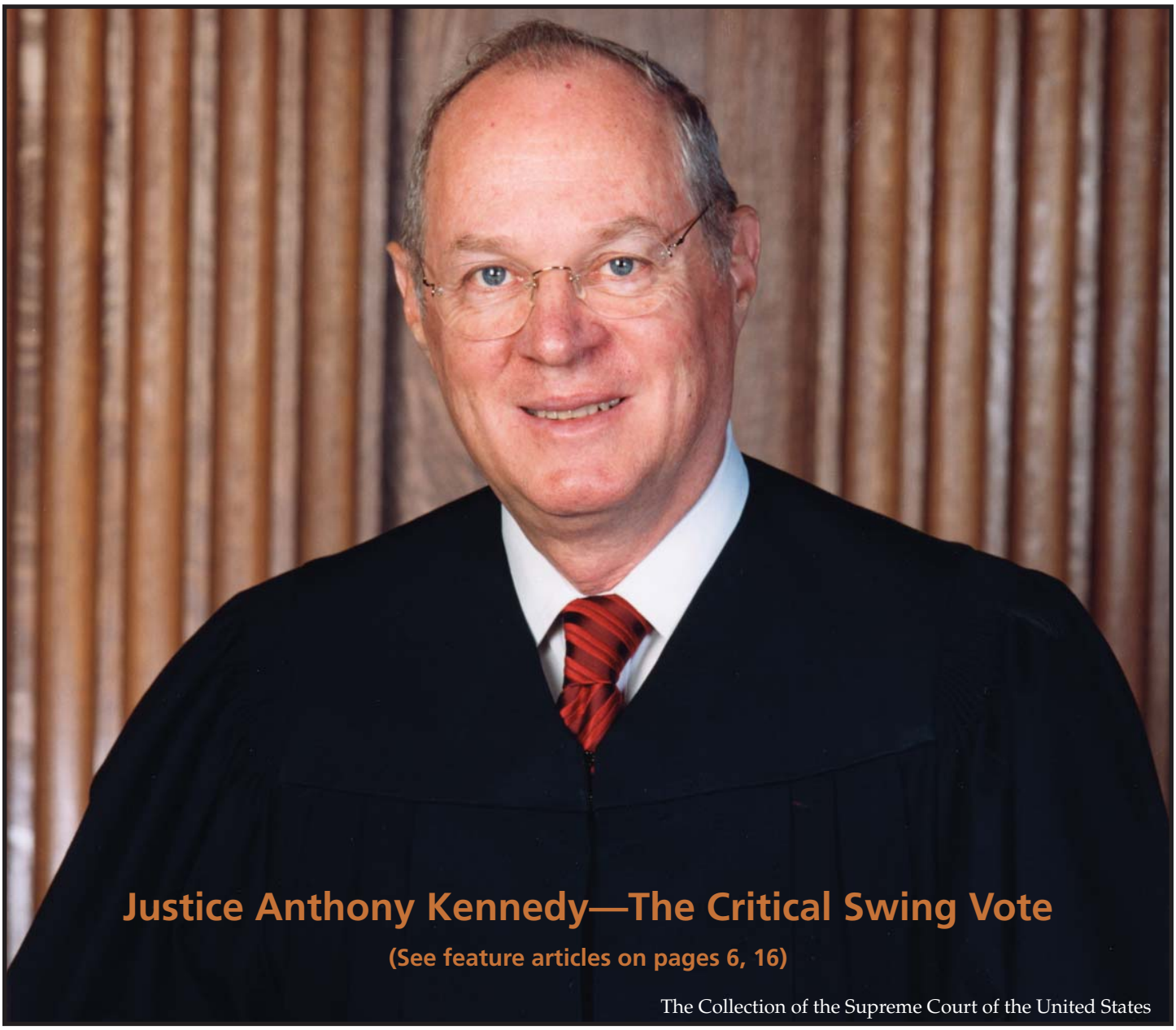

Justice Anthony Kennedy—The Critical Swing Vote

(See feature articles on pages 6, 16)

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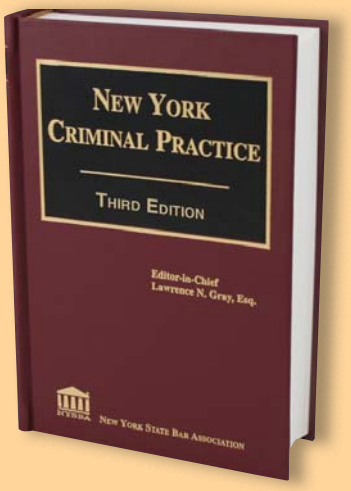

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Message from the Chair

The Moment for Reform: NY State's Commission on Forensic Science Addresses the Biben Report*

In December, 2010, the New York State Commission on Forensic Science (the Commission) received notification that the Nassau County Police Forensic Evidence Bureau (FEB) had failed the majority of its accreditation benchmarks following an audit by the American Association of Crime Laboratory Directors/ Laboratory Accreditation Board (ASCLD/LAB), which is the accrediting body utilized by the Commission to determine that laboratories under its jurisdiction are following established guidelines and rules for their proper operation. In short order, the Commission asked the lab personnel to appear in thirty days to report on what had occurred and then the Nassau County Executive, appearing publicly with the Nassau County District Attorney, closed the laboratory completely. The Governor then asked the Inspector General to conduct an investigation into what happened.

In November, 2011, Inspector General Ellen Biben issued her report entitled "Investigation into the Nassau County Police Department Forensic Evidence Bureau" (the Biben Report). The report made several recommendations. First, while acknowledging that a new Nassau County lab would be created under the auspices of the Medical Examiner's Office and independent of the Police Department, the new lab had to implement and maintain an effective quality assurance program, have an appropriately qualified management and staff, have staffing levels in certain forensic disciplines responsive to caseloads, have a contiguous physical plant conducive to forensic testing and a laboratory which communicates with the County Executive and the District Attorney keeping them apprised of forensic issues.

With respect to the Commission, the Biben Report specifically noted that it accepts the minimum standards set forth by ASCLD/LAB for all New York State forensic laboratories and even though more stringent standards would soon be applied under a new ASCLD/LAB program, the Commission need not be bound by the ASCLD/LAB standards for the reason that the Executive Law already empowers the Commission to set minimum standards and an accreditation program so that the Commission can set "necessary and appropriate" standards for the forensic labs' proper functioning in NYS. "Deferring to ASCLD/LAB standards has simply been the easier path," according to the Biben Report. Indeed, the Commission had instituted mid-cycle inspections instead of waiting for the five-year audit, a change with which ASCLD/LAB had complied, though the Biben Report noted that the mid-cycle inspections had only barely mitigated the unreliability of the self-audits. As such, the Commission was urged to undertake a better means of assessing the laboratory's status than self-audits. Further the Commission should require that any laboratory which receives a high number of non-compliances during an ASCLD/LAB inspection that is inconsistent with its prior self-audit, then it must seek assistance from another state laboratory for its next audit to better evaluate its operation.

There were numerous other recommendations of equal importance cited in the Biben Report, far too many to recount here. In October, 2012, the Commission will meet to consider the Biben Report recommendations (the author is a member of the Commission). Herewith are some other recommendations which could help to insure that our labs, almost all of which are compliant, continue to be so. First the Commission should require that all laboratories in NYS define the "customer" for their services as the criminal justice system. ASCLD/LAB defines "customer" as the entity requesting the laboratory's services and generally that is the police and the district attorney. There is a significant cultural shift that occurs when this kind of rule is adopted. Labs produce scientific results for courtrooms to be used either in support of a determination of guilt or to insure innocence. As such, the end user of the product is the police, the district attorney, the defense attorney, the judge and the jury. By changing to a criminal justice end user concept, as the state of North Carolina did following a major laboratory scandal a few years ago, the Commission can insure that there is a greater interplay between the defense bar and the court with respect to the documents and work product generated.

Next the Commission should form a subcommittee which will study the use of new terminology in reporting laboratory conclusions. The NAS Report noted that terms such as "match," "consistent with," "similar in all respects tested," etc., are imprecise. Among the ideas that such a subcommittee could review would be a scale of opinion which expresses a level of confidence with each term defined such as "unlikely," "highly unlikely," "probable," or "highly probable." Probability testimony has been approved by the International Association of Identification for fingerprints examiners when expressing a conclusion during testimony. The words used to express scientific conclusions can, and often do, have a profound effect upon juries.

Finally, the Commission could adopt as a set of mandatory rules that the lab reports produced to the parties be more complete and thorough. Methods and materials used should be stated, as well as procedures results and clear conclusions. Further sources of uncertainty should be clearly delineated. Limitations of the analysis should be noted. Appropriate case notes should reveal with precision the steps undertaken when a technician applies the laboratory standard operating procedure for a particular discipline. The idea is for the jury to understand what is in the report so it can make an informed decision.

As one of the most important entities in New York State's governmental structure, the Commission has the opportunity to exercise its rule making in a manner which is fair and consistent and which will aid the labs under its jurisdiction in producing the very best product for use in criminal proceedings.

Marvin E. Schechter

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

Message from the Editor

In this issue we present our annual review of developments in the United States Supreme Court. The Court, during the past term, issued a series of very significant decisions in the areas of criminal and constitutional law, including the validity of the Obama Healthcare Law and the Arizona Immigration Statute. The past term also saw Chief Justice Roberts and Justice Kennedy voting slightly more often with the liberal bloc of the Court, and perhaps the beginning of a new alliance between Justice Kennedy and Justice Kagan. These developments are discussed in one of our feature articles, as well as in the section dealing with Supreme Court decisions. A second feature article deals with the changes effectuated by the United States Supreme Court in the area of juvenile sentencing, and the significant role that Justice Kennedy, as the critical swing vote, has played in this development. Among our feature articles, we also present another article by Judge John Brunetti, who has become a regular contributor to our *Newsletter*. Judge Brunetti discusses the burdens of proof at *Miranda* statement suppression hearings.

The New York Court of Appeals also issued some important decisions in the criminal law area involving resentencing issues, waiver of appeal, post-release supervision and the appointment of assigned counsel. We review these matters in the New York Court of Appeals section. As in the past, we also include a summary of the 2011 Annual Report of the Clerk of the Court of Appeals, which provides a detailed review of the Court's activity during the past year.

As in the past, we also present several cases of significance from the various Appellate Divisions. In our Section and Members portion, we also review the recent Spring CLE program, which was held in Saratoga, New York, including photos from the program's activities. Our Section also received an award from the New York State Bar Association acknowledging the Section's efforts in making the Section more diverse. A photo of the award presentation is included in our issue. We also provide an update on future activities which are planned by the Section.

We view our *Newsletter* as the line of communication between our Section and our members. We appreciate comments and suggestions regarding the Section's activities and policies. Please provide us with your views through Letters to the Editor, and of course continue to send articles for possible publication. We are now in our tenth year of publication—oh, how time flies when you are having fun!

Spiros A. Tsimbinos

Request for Articles

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

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A Review of the 2011-2012 Term of the United States Supreme Court

By Spiros A. Tsimbinos

The United States Supreme Court concluded its October 2011 term on June 28, 2012 with the entire nation focused on its decision regarding the Obama Healthcare Law. Although this decision received almost all of the media attention, the Court did render several other decisions of importance and significance, both in the civil and criminal areas. It is thus appropriate to present a review of the Court's past term and to summarize some of the highlights of the Court's activities during the past year.

The Court's Work Product

The Court, during its past term, handled approximately 75 cases in which full decisions and significant issues were discussed. This total is down slightly from the 80 such cases handled in the prior term. The Court issued unanimous decisions 44% of the time.

The Continuation of 5-4 Decisions

Although Chief Justice Roberts has continued to make an effort to achieve greater consensus among the Court on many major issues, the Court continued to split, in a 5-4 manner, in many of the major decisions. This year the Court split 5-4 in 15 cases, or 20% of the total decisions rendered. Even though Justice Roberts surprised many by his vote with the so-called liberal bloc to uphold the Obama Healthcare Law, he continued overall to cast his vote with the conservative group. Justice Roberts' periodic alliance with the liberal four Justices allowed him to be in the majority 92% of the time, only 1 percentage point behind the traditional swing vote, Justice Kennedy, who was in the majority 93% of the time. The position of both Chief Justice Roberts and Justice Kennedy with respect to their place in the majority grouping was similar to that during the October 2010-2011 term. The Justices who were in the majority in the least number of cases were Justices Ginsburg and Breyer.

With his votes in the healthcare case and in the Arizona immigration matter, Chief Justice Roberts may have moved slightly toward the position of the more liberal grouping. Justice Kennedy, this year, in disputed matters, voted 25 times with the liberal wing of the Court, or as often as he did with the conservative group. Justice Kennedy's swing to the liberal bloc appears to have developed primarily in several important criminal cases, such as the matter eliminating mandatory life imprisonment without parole for juvenile offenders. Since 2000, there have been only two terms in which Justice Kennedy did not vote with the conservative bloc at least 60% of the time.

Old and New Alliances

Despite his vote in the Obama Healthcare case, Chief Justice Roberts continued to vote often in the same manner as Justice Alito, doing so more than 90% of the time. Justice Alito, in disputed cases, never voted once with the liberal wing of the Court, and is increasingly being viewed as the Court's most conservative member. In a similar manner, Justice Scalia and Justice Thomas also voted together more than 90% of the time, an even greater percentage than in the prior term. The liberal bloc of Judges also, for the most part, continued their traditional alliance with Justices Kagan, Sotomayor and Ginsburg often voting as a group. This situation followed a similar pattern of prior terms. One new interesting development, however, was the fact that Justice Kennedy and Justice Kagan also voted together 83% of the time. Justice Kennedy, in fact, in the case holding that mandatory life imprisonment without parole for juvenile offenders was unconstitutional and which involved a 5-4 decision, entrusted the majority opinion to Justice Kagan. Whether this is the beginning of a new alliance between these two Justices remains to be seen.

Criminal Law Issues

This past term was a particularly good one for criminal defense. The Court, in a unanimous decision, declared that warrants were required for the use of GPS devices by police. The Court also expanded the concept of effective assistance of counsel and held that states cannot impose mandatory terms of life imprisonment without the possibility of parole on juvenile offenders, even those convicted of murder. The Court, adhering to its strong defense of the First Amendment, also declared that the Stolen Valor Act, which made it a crime to lie about military honors, was unconstitutional as a violation of the right to free speech. In two important areas, the Court did side with the prosecution, upholding prison strip searches of defendants even when they are charged with minor crimes. The Court also drew back somewhat from its prior *Crawford* rulings and held that expert witnesses may discuss crime lab reports in criminal trials without live testimony from the analysts who created them.

Despite Some Big Wins, Obama Administration Has Losing Term

Despite the fact that some positions of the Obama administration which were advanced by the Solicitor General were upheld in both of the major cases involving healthcare and the Arizona Immigration Law, overall the administration had a difficult and largely unsuccessful term. This year, the Solicitor General's Office won only 11 of 24 cases which were presented, or a 45% win rate. Just prior to the healthcare and immigration decisions, it had in fact lost five times in several unanimous decisions which had rejected the administration's position. In the past, the Solicitor General 's office had usually been successful in 60 to 70% of its cases.

A Look Toward Next Term

Although no case which is on the Court's docket for the coming term appears to have the historic significance of the healthcare case, the Court is expected, during the next term, to decide several matters of significance. On the Court's docket are cases involving the issues of same sex marriage, affirmative action, voting laws, and search and seizure issues involving the use of dogs to detect narcotic substances. As we look to the future, it appears that Justice Kennedy will continue to occupy the critical swing vote, and that Chief Justice Roberts may have the opportunity to return to the conservative bloc, from which this year he occasionally strayed.

Burdens of Proof at *Miranda* Statement Suppression Hearings

By John Brunetti

I. Introduction

A. The Decision in *People v. Huntley*—the Derivation of the "Beyond a Reasonable Doubt" Burden

Statement suppression hearings were not required in New York until 1964 when the United States Supreme Court declared New York's procedure for addressing allegedly involuntary statements unconstitutional in *Jackson v. Denno*.[1] Prior to *Jackson*, the New York procedure was dictated by its Court of Appeals cases that construed the New York Constitution as requiring a jury to pass upon the voluntariness of a defendant's statement beyond a reasonable doubt, unless there was no factual dispute such that the court could find involuntariness as matter of law.[2] The Supreme Court found this procedure constitutionally defective, holding that due process entitled the defendant to a clear-cut judicial determination of the voluntariness of his statement.

Faced with the task of conforming New York's procedure to the constitutional requirements set out in *Jackson*, our Court of Appeals rendered its decision in *People v. Huntley*.[3] The new procedure required that "the judge must find voluntariness beyond a reasonable doubt before the confession can be submitted to the trial jury," and placed the burden on the People to prove voluntariness. This rule was necessarily limited to traditional voluntariness claims because *Miranda* had not yet been decided. Once *Miranda* was decided, courts began to apply the *Huntley* standard to *Miranda* claims,[4] and as late as 1998, the First Department upheld the admissibility of a statement, saying, "[T]he suppression hearing testimony established beyond a reasonable doubt that the defendant knowingly and voluntarily waived his *Miranda* rights."[5] Nonetheless, it has accurately been observed by Professor Peter Preiser in his Practice Commentary to CPL 710.60 that "the People's burden of proof beyond a reasonable doubt in a *Huntley* hearing is an anachronism and might well be reconsidered by the Court upon proper argument."

B. The Melding of Search and Seizure Burdens Into Statement Suppression Litigation

The 1982 decision of the Court of Appeals in *People v. Love*[6] is often relied upon for the proposition that the defendant has the ultimate burden of persuasion to prove a *Miranda* violation. The Court found in *Love* that the defendant's bare allegation that he had been a patient in a psychiatric hospital at the time of the alleged *Miranda* rights waiver did not automatically discharge "the defendant's burden of persuasion."[7] The basis for attributing that burden of persuasion to that defendant in a statement suppression context was citation to *People v. DiStefano*,[8] a minimization wiretap case, which cites *People v. Berrios*,[9] the landmark case placing the burden of persuasion on the defendant in search and seizure cases. Neither *Berrios* nor *DiStefano* had anything to do with statement suppression burdens. Yet, the infection of their search and seizure burden pronouncements into statement suppression procedures has evolved over the years to the point that "where the prosecution in the first instance establishes the legality of the police conduct and the defendant's waiver of his [*Miranda*] rights, the burden of persuasion on motion to suppress [a statement] rests with the defendant."[10]

II. The Fluctuation of Burdens in Statement Suppression Hearings

The fluctuation of burdens under the procedural construct of suppression hearings allows the People's potential burdens to be broken down into three categories: (1) the burden of going forward; (2) the ultimate burden of persuasion; and (3) the burden to call a particular witness, usually on rebuttal. The fluctuations in burdens of going forward and ultimate persuasion are dictated, in part, by the notion that because constitutional rights are personal, it is fair to make the defendant prove a violation of those rights.[11] These burdens are also influenced by judicial recognition that requiring the People to prove a negative is "a requirement the law finds 'generally unfair.'"[12]

The People always have the burden of going forward. However, once the People have met their initial burden of going forward, it is the defendant who shoulders the ultimate burden of proving that, among other things, he was seized or in custody, such seizure was unlawful, his *Miranda* rights waiver was not knowing and/or his indelible right to counsel had attached.

III. The People's Burden of Going Forward

The People have the burden of going forward at any suppression hearing to establish (1) a lawful rationale for the conduct of government agents; or (2) a basis for averting suppression.[13] When the People fail to go forward with evidence sufficient to avert suppression,[14] then the court is justified in granting the motion to suppress because the People have failed to discharge their initial burden of going forward.

A. The People's Burden of Going Forward on *Miranda* Issues

When dealing exclusively with a *Miranda* issue, the People have a single burden to go forward that they may meet in one of two ways. They may concede that the defendant was in custody and was interrogated, and then go forward with evidence necessary to avert suppression, i.e., the defendant was adequately advised of his rights and validly waived them. In addition or as an alternative, they may go forward with evidence tending to show that the defendant was not in custody (e.g., appeared at the police station voluntarily) or that he was not interrogated (e.g., made a spontaneous admission). If the People adduce evidence sufficient to sustain their position that warnings were either given and waived or not required, the burden of going forward then may shift to the defendant to prove that either he was subjected to custodial[15] interrogation or his waiver was not knowing.[16]

B. The People's Burden to Go Forward With Proof That Defendant Was Adequately Advised of His Rights

If the defendant was subjected to custodial interrogation, then the burden is on the People to go forward with evidence demonstrating the legality of the police conduct by showing that the defendant was "adequately advised" of his *Miranda* rights and voluntarily and knowingly waived them. Once the People have shouldered their burden of going forward to show that the defendant was adequately advised of his *Miranda* rights and voluntarily and knowingly waived them, the burden shifts to the defendant to show that the waiver of his rights was not knowing.[17]

C. The People's Burden of Going Forward to Prove a Waiver

The People shoulder the burden of going forward with proof of a valid *Miranda* rights waiver as part of their burden of going forward with evidence to withstand suppression. The People may discharge their burden in a variety of ways because valid waivers of *Miranda* rights take many forms. These waivers may be oral or written.[18] They may be express or implied.[19] The simple act of answering a question about crime involvement after being advised of the four basic warnings may constitute a valid waiver.[20] The Court of Appeals expressly recognizes an implicit waiver as valid, such that confessing after being advised of one's rights is the equivalent of a waiver, and that is all that is necessary to "support a conclusion that defendant implicitly waived those rights."[21]

D. The People's Burden of Going Forward on a Voluntary Accompaniment Theory

When the People are faced with a situation where the defendant was not given *Miranda* warnings prior to a station-house interrogation by police, they may argue that warnings were not necessary because the defendant voluntarily accompanied the police to the station-house. Voluntary accompaniment is a species of consent, and thus, the Court of Appeals imposes a "heavy burden" upon the People to prove voluntary accompaniment.[22]

IV. The Burdens of Persuasion

A. The People's Burden to Prove Traditional Voluntariness Beyond a Reasonable Doubt

In New York, unlike in federal court,[23] the prosecution must prove the voluntariness of a defendant's statement beyond a reasonable doubt.[24] This legal principle was first applied solely in the context of traditional voluntariness cases well before the advent of *Miranda*. When the terminology is changed from "voluntariness" to "involuntarily made" as that term is defined in CPL 60.45, the assertion that the People must prove beyond a reasonable doubt that a defendant's statement was not "involuntarily made" is inaccurate because, as will be discussed later, it is the defendant who has the burden of proving that his waiver of *Miranda* rights was not knowing.

B. The Burden to Prove Custody for *Miranda* Issues

The United States Supreme Court has placed the burden on the defendant to prove that he was in custody so as to have been entitled to *Miranda* warnings prior to interrogation. In *Berkemer v. McCarty*,[25] the Supreme Court faulted the defendant for having "failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest." Whether or not the New York rule is the same is an issue once viewed as unsettled. Judge Simons' dissent in *People v. Alls*[26] interpreted the majority opinion in *Alls* to "improperly suggest that the burden of proof is on the People to establish that the defendant was not in custody for purposes of *Miranda*,"[27] and the First Department once felt it necessary to introduce one of its custody holdings by saying, "Regardless of which party is deemed to have the burden of proof on the issue of custodial interrogation."[28] More recent decisions are in accord with the federal rule which places the ultimate burden to prove custody upon the defendant.[29]

In 2011 the Third Department asserted not only that the People have the burden of proving that the defendant was in *Miranda* custody, but also that they must do so beyond a reasonable doubt: "[t]he burden is on the People to prove beyond a reasonable doubt that the individual was not in custody before *Miranda* warnings were given."[30] The only support for the Court cited for that proposition was one of its own decisions issued three years earlier[31] where all the Court correctly asserted was that "[t]he People bore the initial burden of proving beyond a reasonable doubt that defendant's statements were voluntary," without reference to custody, and the only post-*Miranda* case cited for that proposition was *People v Rosa*,[32]

a case that places the burden upon the defendant to prove the attachment of the New York right to counsel.

C. The People's Burden to Prove That the Defendant Was Not Interrogated

It is the People's burden to prove that a defendant's statement was spontaneous and did not result from police interrogation.[33] The People will sustain this burden by demonstrating that the defendant was not asked questions which a reasonable police officer would anticipate to evoke an incriminating response.[34] This is an objective test of whether the defendant's statement was "triggered by police conduct which should reasonably have been anticipated to evoke a declaration from the defendant," rather than "whether, through hindsight, defendant professes to believe police intended to provoke an incriminating response."[35] It is reasonable to assume the interrogating officer is in the best position to deny or admit making statements or engaging in conduct that a reasonable police officer would believe likely to evoke an incriminating response, so the onus of drawing out information on that subject lies with the People.

D. The People's Burden to Prove an Adequate Advisement of *Miranda* Rights

As the United States Supreme Court said in *Miranda*: "No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given…."[36] If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[37] Thus, the People shoulder both the burden of going forward with a basis to avert suppression,[38] and the ultimate burden of persuasion to prove that the defendant was adequately advised of his rights to silence and counsel and waived them. Since a valid waiver is not possible unless the rights advisement is adequate, in order to prove a valid waiver, the People shoulder the burden to prove a valid rights advisement.

E. The People's Burden to Prove the *Miranda* Rights Waiver Was Voluntary

As discussed above, well before *Miranda* was decided, New York constitutional law required that the People prove to the trial jury the traditional voluntariness of a defendant's statement beyond a reasonable doubt. Subsequent to *Miranda*, courts began to require that the People prove to the suppression court the voluntariness of the *Miranda* rights waiver beyond a reasonable doubt.[39]

F. The Defendant's Burden to Prove the *Miranda* Rights Waiver Was Not Knowing

Experienced criminal litigators and judges may find the heading that introduces this segment misleading, if not downright inaccurate. Yet, the assertion that the defendant has the ultimate burden of persuasion[40] to prove that his *Miranda* rights waiver was not knowing is supported by Court of Appeals and Appellate Division case law worthy of quotation here. The Second Department: "[W]here the prosecution in the first instance establishes the legality of the police conduct and the defendant's waiver of his rights, the burden of persuasion on a motion to suppress [a statement] rests with the defendant";[41] "[T]he defendant offered no evidence and, thus, failed to meet his burden of persuasion concerning his state of mind at the time of his waiver."[42] The Court of Appeals: "That defendant was a patient in the Capital District Psychiatric Center at the time of the waiver is not sufficient to meet defendant's burden of persuasion, the People having shown the legality of the police conduct in the first instance."[43]

"[O]nce the People meet their initial burden of establishing the legality of the police conduct and the defendant's waiver of rights, the burden of proof at the suppression hearing shifts to defendant,"[44] to prove by a preponderance of the evidence that his waiver was not knowing, whether due to tender age,[45] mental impairment,[46] intoxication,[47] heroin withdrawal,[48] or some other factor. In the waiver context, the divergence in burdens for voluntary waivers and knowing waivers makes sense because only the defendant is privy to information that might render his waiver unknowing or unintelligent, whereas, when it comes to the voluntariness of the waiver, the police officers are certainly aware of their own treatment of a suspect.

G. The People's Burden to Disprove an Invocation of Rights Where There Is Some Evidence of an Invocation

When a statement suppression hearing begins, the People shoulder the burden of going forward with a basis to avert suppression by demonstrating either that the defendant was not in custody, not interrogated or was adequately advised of and waived his rights. In discharging their burden of going forward, the People are under no obligation to prove that the defendant did not invoke his right to silence or counsel. However, when there is testimony at a suppression hearing from the accused, or even a police officer, that could support an invocation finding, the People shoulder the burden of persuading the court that the defendant did not invoke silence or counsel. That is not the case when the defendant claims his right to counsel attached as a result of either the entry of counsel or commencement of a criminal action. In those two circumstances, the defendant shoulders the ultimate burden of persuasion.[49]

Once the defendant (or some other witness) testifies at a statement suppression hearing that the accused invoked his right to silence or counsel, it is up to the People to disprove that claim beyond a reasonable doubt. This

rule statement is drawn from a line of Appellate Division opinions (some where the Court of Appeals denied leave) that applied, correctly or not,[50] the doctrine of *People v. Huntley*,[51] (decided before *Miranda*) to *Miranda* suppression litigation issues and required that the People prove a valid *Miranda* rights waiver beyond a reasonable doubt.[52] The core obligation of this burden of persuasion is proof of a waiver, for if there is no waiver, a court need not reach issues of voluntariness or intelligence.[53] When there is some proof in the suppression hearing record that a defendant invoked silence or counsel at any time, even after an initial waiver,[54] it is impossible for the People to prove that a waiver of silence or counsel preceded statements which followed without, at the same time, proving that the defendant did not invoke silence or counsel.

In *People v. Pugh*,[55] decided in 1979, the Court required the People to disprove the defendant's invocation of silence claim beyond a reasonable doubt, whether the doubt arose from the defendant's testimony or that of the People's police witnesses: "divergence in their [officers'] testimony [may] give rise to a reasonable doubt as to whether defendant indicated at some point that he would prefer to remain silent."[56] Thus, since suppression is mandated where the court has a reasonable doubt about whether or not the defendant invoked his rights, the People necessarily shoulder the burden to remove that doubt. Federal courts and[57] the highest courts in other states agree.[58]

H. The Separate Burdens Where the First Admission Is Illegally Obtained

When the defendant is interrogated while in custody without having been advised of his rights, and he makes an admission, that statement is inadmissible. If the defendant is given his warnings after that first admission is made, and then makes a second admission, the defendant may argue that the second admission is the tainted product of the initial illegality consisting of his custodial interrogation without having been advised of his rights. Whether or not that second statement procured after the administration of *Miranda* warnings will be admissible will turn upon the application of the "continuous interrogation" and/or the "cat-out-of-the-bag" doctrines. Burden placement for these two doctrines differs.

i. The People's Burden of Proving That There Were Two Interrogations Rather Than "One Continuous Interrogation"

If a custodial interrogation was infected by police illegality, all statements produced by that interrogation will be subject to suppression unless there was a "pronounced break" in its continuity and it was conducted in the wake of an otherwise valid *Miranda* rights waiver. The burden rests with the People to prove a "pronounced break" in the continuity of the interrogation. Where the police are unable to pinpoint the precise point during an interrogation at which the defendant made his first admission, the People will be unable to prove that a "pronounced break" in the interrogation interrupted its continuity so as to save the second admission from being deemed tainted by the initial improper questioning.[59]

ii. The Defendant's Burden of Proving the "Cat-Out-of-the-Bag" Theory

When the defendant has made two statements, the first procured in violation of his constitutional rights and the second in compliance with them, he may argue that the second statement was compelled by the first. The defendant has the burden to prove such a "cat-out-of-the-bag" claim because the test is "whether the defendant felt so committed to this prior statement that he felt bound to make another."[60] The defendant is in the best position to prove how he felt, so he has the burden of doing so. In fact, a defendant has little chance of succeeding on such a theory if he does not testify at his suppression hearing.[61]

V. The People's Burden to Call Witnesses to Explain or Rebut Testimony

When the defense attributes conduct to an officer during the defense case at a suppression hearing that has bearing on a statement suppression issue, and there is some proof of that officer's interaction with the defendant, the People's failure to call that officer in rebuttal may result in suppression of the statement. That was the ruling in *People v. Valerius*,[62] where the People discharged their initial burden of going forward with regard to the admissibility of the statement by calling Officer Fuentes. Fuentes testified that the defendant emerged from a room in which he had been with Officer Cotter. Fuentes further testified that Cotter told him that the defendant had something to say, so Fuentes advised the defendant of his rights and took the defendant's confession.[63] After the People rested, the defendant testified that Officer Cotter physically abused him and verbally threatened him. The prosecution rested, assuming that the trial court would disbelieve defendant's claim of abuse. The Court of Appeals held that a voluntariness determination was not supportable because of the People's failure to call Officer Cotter. This was not a situation where the defendant's body displayed evidence of physical abuse. It was the defendant's uncontradicted testimony that an officer threatened him that was sufficient to preclude a finding of voluntariness beyond a reasonable doubt because the People did not call the officer to whom the threat was attributed to deny the allegations of coercion.

In *People v. Anderson*,[64] the defendant testified that he invoked his right to counsel to one of the officers in whose custody he was placed and who was not called by the People at the suppression hearing, either as part of their direct case or in rebuttal. The Court of Appeals reversed, finding that "while it is true that the People have no obligation to produce all police officers who had con-

tact with the defendant from arrest until the time that the challenged statements were elicited, this record does not support the determination by the lower courts that the defendant's right to counsel was not violated by questioning him after he had requested counsel."[65]

Endnotes

1. Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774 (1964).
2. "The New York rule does now and apparently always has put on the State the burden of convincing the jury beyond a reasonable doubt that a confession is voluntary. *See*, Stein v. New York, *above*, 346 U.S. at 173 and n.17, 73 S. Ct. at 1087; People v. Valletutti, 297 N.Y. 226, 229, 486." Jackson v. Denno, 378 U.S. 368, 378, 84 S. Ct. 1774 (1964) (Black, J., concurring in part and dissenting in part).
3. People v. Huntley, 15 N.Y.2d 72, 78, 255 N.Y.S.2d 838 (1965).
4. *See, e.g.*, People v. Higgins, 28 A.D.2d 1016 (3d Dep't 1967); People v. Szwalla, 31 A.D.2d 979, 297 N.Y.S.2d 843 (3d Dep't 1969), *aff'd*, 26 N.Y.2d 655, 308 N.Y.S.2d 386 (1970).
5. People v. Hawkins, 254 A.D.2d 96 (1st Dep't 1998), *lv. den*., 92 N.Y.2d 982 (1988).
6. People v. Love, 57 N.Y.2d 998, 457 N.Y.S.2d 238 (1982).
7. *Love*, 57 N.Y.2d at 999.
8. People v. Di Stefano, 38 N.Y.2d 640, 651 (1976).
9. People v. Berrios, 28 N.Y.2d 361, 321 N.Y.S.2d 884 (1971).
10. People v. Chavis, 147 A.D.2d 582 (2d Dep't 1989), *lv. den.*, 74 N.Y.2d 662 (1989), citing People v. Love, 57 N.Y.2d 998 (1982), and People v. Wilson, 143 A.D.2d 786 (2d Dep't 1988), *lv. den.*, 73 N.Y.2d 927 (1989), which cites *Love* and *Leftwich*. People v. Leftwich, 134 A.D.2d 371 (2d Dep't 1987), *lv. den.*, 70 N.Y.2d 957 (1988), cites only *Love*.
11. *See* People v. Wesley, 73 N.Y.2d 351 (1989), holding that because Fourth Amendment rights are personal, placing the burden on the defendant to prove his connection to the area searched is reasonable.
12. People v. West, 81 N.Y.2d 370, 386 (1993), citing People v. Rosa, 65 N.Y.2d 380 (1985).
13. Generally speaking, the People have the burden of going forward, also known as the burden of production, to establish either a lawful rationale for the conduct of the police agent or some other basis for averting suppression. *See generally* People v. Wesley, 73 N.Y.2d 351, 540 N.Y.S.2d 757 (1989).
14. People v. Bryant, 37 N.Y.2d 208, 211, 371 N.Y.S.2d 881 (1978); *see also* People v. Travis, 162 A.D.2d 807, 809, 557 N.Y.S.2d 975 (3d Dep't 1990), citing People v. Havelka, 45 N.Y.2d 636, 643, 412 N.Y.S.2d 345 (1978), where the Third Department found that the People failed to discharge their initial burden of going forward to prove probable cause when its alleged nonexistence was the basis for defendant's suppression claim. In addition, no reopening of the hearing was permitted because the People's failure to offer the particular evidence in question was not as a result of any error of law committed by the court.
15. *See, e.g.*, People v. Vidal, 44 A.D.3d 802, 844 N.Y.S.2d 55 (2d Dep't 2007), *lv. den.*, 9 N.Y.3d 1010, 850 N.Y.S.2d 398 (2007) ("The People made a prima facie showing that the defendant was not in custody prior to the administration of the *Miranda* warnings in this case. The defendant failed to demonstrate otherwise.").
16. People v. Tinning, 142 A.D.2d 402, 536 N.Y.S.2d 193, 195 (3d Dep't 1988), *lv. den*., 73 N.Y.2d 102, 541 N.Y.S.2d 777 (1989).
17. *Id.*
18. *See* North Carolina v. Butler, 441 U.S. 369, 99 S. Ct. 1755 (1979), where the Supreme Court held that an explicit statement of waiver is not necessary to support a finding that the defendant waived the rights guaranteed by *Miranda*. When asked if he understood his rights, the defendant replied that he did, but refused to sign the waiver at the bottom of the form. His waiver was valid.
19. People v. Hale, 52 A.D.3d 1177, 859 N.Y.S.2d 838 (4th Dep't 2008) ("court properly refused to suppress [defendant's] statements to the police, based on the court's determination that defendant implicitly waived his *Miranda* rights).
20. *See* People v. Davis, 55 N.Y.2d 731, 447 N.Y.S.2d 149 (1981) (incriminating response which immediately follows advisement of rights is a permissible implicit waiver); People v. Gianni, 33 N.Y.2d 547, 347 N.Y.S.2d 438 (1973) (waiver valid where the defendant interrupted the police in the process of administering warnings, and stated he waived his rights); People v. Goncalves, 288 A.D.2d 883, 732 N.Y.S.2d 765 (4th Dep't 2001), *lv. den*., 97 N.Y.2d 729, 740 N.Y.S.2d 702 (2002) (defendant implicitly waived *Miranda* rights by willingly answering officer's questions after receiving *Miranda* warnings); People v. Hastings, 282 A.D.2d 545, 722 N.Y.S.2d 759 (2d Dep't 2000) (implied waiver established where defendant was informed of his *Miranda* rights, understood them, and continued to speak with the officer); People v. Carrion, 277 A.D.2d 480, 481, 715 N.Y.S.2d 257 (3d Dep't 2001), *lv. den*., 96 N.Y.2d 757, 725 N.Y.S.2d 283 (2001) (defendant's action in speaking to the officer after rights advisement may constitute an affirmative waiver of *Miranda* rights); People v. Rodriguez, 167 A.D.2d 562, 562 N.Y.S.2d 232 (2d Dep't 1990) (defendant's willingness to answer questions after having been advised of his rights was a valid implied waiver); People v. Bretts, 111 A.D.2d 864, 865, 490 N.Y.S.2d 266 (2d Dep't 1985) (defendant was adequately advised of her rights, indicated that she understood them, but was never asked whether she was willing to make a statement without the assistance of a lawyer, prompting the ruling, "[S]ilence, coupled with an understanding of the rights and the course of conduct indicating waiver, is sufficient").
21. People v. Sirno, 76 N.Y.2d 967, 968, 563 N.Y.S.2d 730 (1990).
22. *See* People v. Dodt, 61 N.Y.2d 408, 417, 474 N.Y.S.2d 441 (1984), where an affirmative response to the suppression hearing question, "Did there come a time that this subject was asked to come down [to the police station]?" was insufficient proof of voluntary accompaniment, resulting in reversal and suppression; *See also*, People v. Gonzalez, 80 N.Y.2d 883, 587 N.Y.S.2d 607 (1992), where the hearing proof consisted of the three detectives' out-of-court statements to the People's only hearing witness that the defendant voluntarily accompanied them to the police station. Note that although the defendant sought suppression of his statements at a "*Huntley* hearing," the issue in *Gonzales* was the validity of the seizure, if any, and whether the "police acted legally in bringing him to the precinct." *Gonzalez*, 173 A.D.2d at 845.
23. As to the quantum of proof, the Supreme Court rejected a claim that it should be beyond a reasonable doubt in *Lego v. Twomey*, 404 U.S. 477, 92 S. Ct. 619 (1972). *See also* Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515 (1986).
24. *See, e.g.*, People v. Anderson, 69 N.Y.2d 651, 511 N.Y.S.2d 592 (1986); People v. Witherspoon, 66 N.Y.2d 973, 498 N.Y.S.2d 789 (1985); *People v. Rosa*, 65 N.Y.2d 380, 492 N.Y.S.2d 542 (1985), *on remand*, 116 A.D.2d 489, 496 N.Y.S.2d 1003 (1st Dep't 1986), *lv. den.*, 67 N.Y.2d 950, 502 N.Y.S.2d 1043 (1986); People v. Valerius, 31 N.Y.2d 51, 334 N.Y.S.2d 871 (1972).
25. Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138 (1984).
26. People v. Alls, 83 N.Y.2d 94, 112, 608 N.Y.S.2d 139 (1993), *cert. denied*, 511 U.S. 1090, 114 S. Ct. 1850 (1994).
27. *Alls* is not a ruling that placed the burden of proving custody upon the People in all cases, but rather one that recognized that a burden of proof on custody issues may shift to the People in prison inmate cases. The Court of Appeals found the inmate defendant was in custody because there was an "absence of proof" that could have led the defendant to reasonably believe he was free to decline to follow a correction officer's directions to proceed to a particular location. However, that observation was made in the context of the Court's recognizing that most prison inmates know that the

failure to follow a directive of a correction officer will result in "severe disciplinary sanctions," and that "the People could only have dispelled the inference of defendant's compulsion" by showing that he was offered a choice. Thus, *Alls* may be read to mean that a defendant shoulders the burden of proving custody, and that a prison inmate shoulders this burden by showing that he accompanied the authorities at a correction officer's direction and that failing to follow such a direction would likely have resulted in severe disciplinary sanctions. At that point, the burden shifts to the People to show that some statement was made to the defendant to dispel the institutional compulsion that required the inmate to accompany the correction officer.

28. *See* People v. Morales, 281 A.D.2d 182, 721 N.Y.S.2d 526 (1st Dep't 2001).

29. *See, e.g.*, People v. Vidal, 44 A.D.3d 802, 844 N.Y.S.2d 55 (2d Dep't 2007), *lv. den*., 9 N.Y.3d 1010, 850 N.Y.S.2d 398 (2007), where the Second Department placed the burden to prove custody on the defendant, saying, "[t]he People made a prima facie showing that the defendant was not in custody prior to the administration of the *Miranda* warnings in this case. The defendant failed to demonstrate otherwise"; *see also* People v. Colon, 5 Misc. 3d 365, 784 N.Y.S.2d 316 (Sup. Ct. N.Y. Co. 2004), for an excellent discussion of why the burden to prove custody is borne by the defendant.

30. People v. McCoy, 89 A.D.3d 1218, 933 N.Y.S.2d 425 (3d Dep't 2011), *lv. den.,* 18 N.Y.3d 960 (2012).

31. People v. Baggett, 57 A.D.3d 1093, 868 N.Y.S.2d 423 (3d Dep't 2008).

32. People v. Rosa, 65 N.Y.2d 380, 492 N.Y.S.2d 542 (1985).

33. *See* People v. Roberts, 12 A.D.3d 835, 784 N.Y.S.2d 692 (3d Dep't 2004) (defendant's "statements were thus subject to suppression unless the People established beyond a reasonable doubt that they were spontaneous"); People v. Wells, 288 A.D.2d 408, 733 N.Y.S.2d 634 (2d Dep't 2001) ("People sustained their burden at the hearing of proving beyond a reasonable doubt that the defendant's statement…was made voluntarily and spontaneously, and was not the product of police interrogation."); People v. Morgan, 226 A.D.2d 398, 640 N.Y.S.2d 586 (2d Dep't 1996), *lv. den.*, 88 N.Y.2d. 939, 647 N.Y.S.2d 173 (1996) (the People sustained their burden of demonstrating that the statement made by the defendant prior to his receipt of *Miranda* warnings was spontaneous and not the result of police interrogation or its functional equivalent); People v. Jackson, 211 A.D.2d 490, 621 N.Y.S.2d 323 (1st Dep't 1995), *lv. den.*, 85 N.Y.2d 939, 627 N.Y.S.2d 1001 (1995) (the People met their burden of proving that defendant's statement to the complainant, "Take your money," was spontaneous and, although uttered in the presence of police officers, was not the result of police custodial interrogation or its equivalent).

34. Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682 (1980); People v. Lynes, 49 N.Y.2d 286, 425 N.Y.S.2d 295 (1980); People v. West, 237 A.D.2d 315, 654 N.Y.S.2d 390 (2d Dep't 1990), *lv. den.*, 90 N.Y.2d 899, 662 N.Y.S.2d 442 (1997); People v. Hylton, 198 A.D.2d 301, 603 N.Y.S.2d 560 (2d Dep't 1993), *lv. den.*, 82 N.Y.2d 925, 610 N.Y.S.2d 177 (1994).

35. *Lynes*, 49 N.Y.2d at 294.

36. Miranda v. Arizona, 384 U.S. 436, 470 (1966).

37. *Miranda* at 475.

38. People v. DeFrain, 204 A.D.2d 1002, 613 N.Y.S.2d 303 (4th Dep't 1994), *lv. den.*, 84 N.Y.2d 825, 617 N.Y.S.2d 145 (1994).

39. *See, e.g.*, People v. Higgins, 28 A.D.2d 1016, 283 N.Y.S.2d 699 (3d Dep't 1967), *cert. denied sub nom*., Higgins v. New York, 392 U.S.941, 88 S. Ct. 2320 (1968); People v. Szwalla, 31 A.D.2d 979, 297 N.Y.S.2d 843 (3d Dep't 1969), *aff'd*, 26 N.Y.2d 655, 308 N.Y.S.2d 386 (1970), *cert. denied sub nom.*, Szwalla v. New York, 408 U.S. 926, 92 S. Ct. 2509 (1972).

40. People v. Di Stefano, 38 N.Y.2d 640, 652, 382 N.Y.S.2d 5 (1976) ("It is the accused, not the People, who must shoulder the burden of persuasion on a motion to suppress evidence"); People v. Bornholdt, 33 N.Y.2d 75, 83, 350 N.Y.S.2d 369 (1973), in commenting upon affirmative defenses, "That is to say, the defendant has the burden of going forward with evidence on the issue as well as the burden of persuasion thereon, but merely by a preponderance of the evidence"; People v. Kirkpatrick, 32 N.Y.2d 17, 25, 343 N.Y.S.2d 70 (1973), in commenting upon rebuttable presumptions in criminal cases, "Of course, the corollary principle, favoring the defendant, is that a plausible rebuttal may very well place the burden of going forward again on the prosecution if it is to sustain its overall burden of persuasion which is to establish guilt beyond a reasonable doubt"; People v. Laietta, 30 N.Y.2d 68, 75, 330 N.Y.S.2d 351 (1972), in commenting on entrapment as an affirmative defense, "[I]t is old law that presumptions, burdens of going forward, and burdens of persuasion in criminal cases may be placed on defendants."

41. People v. Chavis, 147 A.D.2d 582, 537 N.Y.S.2d 875 (2d Dep't 1989), *lv. den.*, 74 N.Y.2d 662, 543 N.Y.S.2d 405 (1989), citing People v. Love, 57 N.Y.2d 998, 457 N.Y.S.2d 238 (1982), and People v. Wilson, 143 A.D.2d 786, 533 N.Y.S.2d 313 (2d Dep't 1988), *lv. den.*, 73 N.Y.2d 927, 539 N.Y.S.2d 312 (1989), which cites *Love* and *Leftwich*. People v. Leftwich, 134 A.D.2d 371, 520 N.Y.S.2d 849 (2d Dep't 1987), *lv. den.*, 70 N.Y.2d 957, 525 N.Y.S.2d 840 (1988), cites only *Love*.

42. People v. Smith, 220 A.D.2d 704, 633 N.Y.S.2d 71 (2d Dep't 1995); *see also* People v. Grady, 6 A.D.3d 1149, 1150, 775 N.Y.S.2d 662 (4th Dep't 2004), *lv. den*., 3 N.Y.3d 641, 782 N.Y.S.2d 412 (2004) ("People met 'their initial burden of establishing the legality of the police conduct and defendant's waiver of rights,' and defendant failed to establish that he did not waive those rights, or that the waiver was not knowing, voluntary and intelligent"); People v. King 234 A.D.2d 923, 924, 653 N.Y.S.2d 464, 466 (4th Dep't 1996), *lv. den.*, 89 N.Y.2d 1012, 658 N.Y.S.2d 255 (1997) ("Once the People meet their initial burden of establishing the legality of the police conduct and defendant's waiver of rights, the burden of proof at the suppression hearing shifts to defendant").

43. People v. Love, 57 N.Y.2d 998, 999, 457 N.Y.S.2d 238 (1982). Four years earlier, the Court, without negative comment, observed in a footnote, "The trial court suppressed this statement on the ground that the 'People have failed to establish that the defendant while confined in a mental hospital following a hysterical reaction, was capable of knowingly, intelligently and voluntarily making a statement.' " People v. Singer, 44 N.Y.2d 241, 246 n.1, 405 N.Y.S.2d 17 (1978). However, not only is *Love* the more recent case, it is an express statement of a legal principle.

44. People v. King, 234 A.D.2d 923, 653 N.Y.S.2d 464 (4th Dep't 1995), *lv. den.*, 89 N.Y.2d 1012, 658 N.Y.S.2d 251 (1997), citing People v. Love, 57 N.Y.2d 998, 457 N.Y.S.2d 238 (1982), People v. Billington, 163 A.D.2d 911, 559 N.Y.S.2d 850 (4th Dep't 1990), *lv. den.*, 76 N.Y.2d 891, 561 N.Y.S.2d 553 (1990), and People v. Chavis, 147 A.D.2d 582, 537 N.Y.S.2d 875 (2d Dep't 1989), *lv. den.*, 74 N.Y.2d 662, 543 N.Y.S.2d 405 (1989); *see also* People v. Grady, 6 A.D.3d 1149, 775 N.Y.S.2d 662 (4th Dep't 2004), *lv. den.*, 3 N.Y.3d 64, 782 N.Y.S.2d 412 (2004) ("defendant failed to establish that he did not waive those [*Miranda*] rights, or that the waiver was not knowing, voluntary and intelligent"); People v. Duncan, 279 A.D.2d 887, 720 N.Y.S.2d 578 (3d Dep't 2001), *lv. den.*, 96 N.Y.2d 828, 729 N.Y.S.2d 448 (2001) (where defendant contended that suppression was required because the *Miranda* warnings were vague and he was unable to understand them because of his diminished mental capacity, court found that he failed to sustain his burden of proving as much); People v. Williams, 279 A.D.2d 276, 277, 719 N.Y.S.2d 227 (1st Dep't 2001), *lv. den.*, 96 N.Y.2d 869, 730 N.Y.S.2d 44 (2001) (once the People met their burden of going forward, "the burden of persuasion shifted to defendant to show that he was not mentally competent to voluntarily waive his rights."); People v. Guillery, 267 A.D.2d 781, 782, 701 N.Y.S.2d 150 (3d Dep't 1999), *lv. den.*, 94 N.Y.2d 920, 708 N.Y.S.2d 359 (2000) (where the defendant

contended "that her subnormal intelligence rendered it impossible for her to comprehend the *Miranda* warnings," the burden shifted to her to prove as much).

45. People v. Smith, 217 A.D.2d 221, 635 N.Y.S.2d 824 (4th Dep't 1995), *lv. den.*, 87 N.Y.2d 977, 642 N.Y.S.2d 207 (1996), *writ of error denied*, 242 A.D.2d 985, 669 N.Y.S.2d 115 (4th Dep't 1997) (a 13-year-old who was interrogated in the presence of two close relatives and given warnings tailored to the level of understanding of which he was capable was found to have fully understood his rights and waived them).

46. People v. Comfort, 6 A.D.3d 871, 775 N.Y.S.2d 127 (3d Dep't 2004) ("The People established the legality of the police conduct and the waiver by defendant. Thus, the burden shifted to defendant to establish that her statement was involuntary by reason of her diminished mental capacity."); People v. Chirse, 132 A.D.2d 615, 517 N.Y.S.2d 772 (2d Dep't 1987), *lv. den.*, 70 N.Y.2d 749, 520 N.Y.S.2d 1025 (1987).

47. *See* People v. Reynolds, 240 A.D.2d 517, 658 N.Y.S.2d 433 (2d Dep't 1997), *lv. den.*, 91 N.Y.2d 878, 668 N.Y.S.2d 577(1995) (defendant failed to establish he was intoxicated when his statement was made). The cases on this subject speak of insufficient evidence to establish the threshold proof, presumably as a result of a lack of proof from the defendant. *See, e.g.*, People v. Angel, 185 A.D.2d 356, 586 N.Y.S.2d 622 (2d Dep't 1992), *lv. den.*, 80 N.Y.2d 1025, 592 N.Y.S.2d 674 (1992), *lv. den.*, 81 N.Y.2d 1069, 601 N.Y.S.2d 588 (1993); *but see* People v. McLane, 256 A.D.2d 10, 682 N.Y.S.2d 24 (1st Dep't 1998), *lv. den.*, 93 N.Y.2d 901, 689 N.Y.S.2d 713 (1999), which groups the voluntariness of the waiver with the knowing portion in saying that the People met their burden of proving beyond a reasonable doubt that defendant's videotaped statement was unaffected by alcohol and was knowingly, intelligently, and voluntarily made.

48. *See, e.g.*, People v. Frejomil, 184 A.D.2d 524, 584 N.Y.S.2d 181 (2d Dep't 1992), *lv. den.*, 80 N.Y.2d 903, 588 N.Y.S.2d 829 (1992) (there was insufficient evidence to support the defendant's claim that he was suffering from heroin withdrawal when he made his statement).

49. People v. Rosa, 65 N.Y.2d 380, 386, 492 N.Y.S.2d 542 (1985).

50. See the discussion in sections [I][A] and [B], *supra*.

51. People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965).

52. People v. Wells, 288 A.D.2d 408, 733 N.Y.S.2d 634 (2d Dep't 2001) ("People sustained their burden at the hearing of proving beyond a reasonable doubt that the defendant's statement… was made voluntarily and spontaneously, and was not the product of police interrogation."); People v. Hawkins, 254 A.D.2d 96, 679 N.Y.S.2d 7 (1st Dep't 1998), *lv. den.*, 92 N.Y.2d 982, 683 N.Y.S.2d 763 (1998) ("The suppression hearing testimony established beyond a reasonable doubt that defendant knowingly and voluntarily waived his Miranda rights."); People v. Sappleton, 234 A.D.2d 81, 651 N.Y.S.2d 296 (1st Dep't 1996), *lv. den.*, 89 N.Y.2d 1100, 660 N.Y.S.2d 394 (1977) ("[T]he People proved beyond a reasonable doubt that [the defendant] knowingly, voluntarily and intelligently waived his Miranda rights."); People v. Mikel, 152 A.D.2d 603, 543 N.Y.S.2d 712 (2d Dep't 1989) ("[T]he People failed to prove beyond a reasonable doubt that the defendant voluntarily waived his rights."); People v. Ringer, 140 A.D.2d 642, 528 N.Y.S.2d 674 (2d Dep't 1988) ("The People have failed to meet their burden of proving beyond a reasonable doubt that the statements made by the defendant were voluntarily made after a waiver of the defendant's right to counsel.").

53. When a court does reach the issue of whether or not the defendant made a "knowing" waiver, the defendant may shoulder the ultimate burden of proving that his *Miranda* rights waiver was not knowing. *See, e.g.*, People v. King, 234 A.D.2d 923, 653 N.Y.S.2d 464 (4th Dep't 1995), *lv. den.*, 89 N.Y.2d 1012, 658 N.Y.S.2d 251 (1997).

54. Although New York's burden rules in statement suppression litigation place more of a burden on state prosecutors than the federal rules place on their federal counterparts, at least four Justices of the Supreme Court agree that in waiver-invocation analysis, there is no difference between an invocation which comes in immediate response to initial warnings and one which comes after an initial waiver of rights. That agreement is found in Justice Souter's concurring opinion in Davis v. U.S., 512 U.S. 452, 471, 114 S.Ct. 2350 (1994), where the Court held that a suspect's utterance, "maybe I should talk to a lawyer," was too ambiguous to either constitute an invocation of counsel or require a clarification inquiry by interrogators. Justice Souter expressed disagreement with the failure of the Court to require a clarification inquiry. He rejected any notion that an initial *Miranda* waiver of counsel and a subsequent invocation should be treated any differently, saying: "Nor may the standard governing waivers as expressed in these statements be deflected away by drawing a distinction between initial waivers of Miranda rights and subsequent decisions to invoke them, on the theory that so long as the burden to demonstrate waiver rests on the government, it is only fair to make the suspect shoulder a burden of showing a clear subsequent assertion. Miranda itself discredited the legitimacy of any such distinction."

55. People v. Pugh, 70 A.D.2d 664, 416 N.Y.S.2d 832 (2d Dep't 1979).

56. *Pugh*, at 665.

57. As recently as 1993, the United States District Court for the Eastern District of New York ruled in a *Miranda* statement suppression context as follows: "The government has satisfied its burden of proving the voluntariness of defendant's statement and that defendant did not equivocally invoke his right to counsel." U.S. v. Jones, 810 F.Supp. 453 (E.D.N.Y. 1993). More recently, the United States District Court for the District of Idaho corrected the Idaho Supreme Court on the issue of burden placement, saying: "To the extent that the Idaho Supreme Court applied a rule that requires a defendant to shoulder a burden to affirmatively prove that he had invoked his right to silence or counsel, this was an incorrect statement of law. Rather, the prosecution must demonstrate that a defendant has waived his rights before a statement that was made during custodial interrogation will be admissible." Rhoades v. Arave, 2007 U.S. Dist. LEXIS 38572 (D. Idaho 2007).

58. The Supreme Court of Wyoming has reasoned that, since the state has the burden of proving a statement voluntary, and the state has the burden of proving a consent voluntary, then "that same standard applies in the context of the accused's invocation of counsel." Burk v. State, 848 P.2d 225 (Wyo. 1993). An even more compelling analysis directly on point is found in the 2005 Oregon Supreme Court opinion in *State v. James,* where the Court directly confronted [and rejected] the prosecution's claim that, once the People go forward with a basis to avert suppression, the burden "shifts to defendant to prove that he subsequently invoked the right to counsel." The Court concluded that, as part of the state's burden to persuade the suppression court that there was a voluntary waiver of *Miranda's* right to counsel, the state bore the burden of proving that the defendant did not invoke his right to counsel. State v. James, 339 Or. 476, 123 P.3d 251 (2005). The Court explained its summary holding as follows:

> The burden of persuasion regarding compliance with the right to counsel remains with the state and does not shift. As the party with the burden of persuasion, the state bears an initial burden of production to show that the police afforded the right to counsel or that defendant validly waived his or her right to counsel. Once the state has offered such evidence, the trier of fact can accept it. And, because the trier of fact may accept that evidence, the defendant risks losing unless the defendant produces evidence that he or she subsequently invoked the right to counsel. The state then can decide to adduce still further evidence that the defendant did not invoke or validly waived his or her rights, or it can risk success on the record as it stands at that point. If the trial court

finds from the evidence in the record—whatever that evidence is, and whoever offered it—that the defendant unequivocally invoked his or her right to counsel, and that the authorities continued their questioning, the court must suppress the defendant's subsequent statements. If the trial court finds that the defendant did not invoke his or her right to counsel, or invoked it but validly waived that right after invoking it, the subsequent inculpatory statements are not subject to suppression. And, finally, when, as here, the trial court determines that the evidence regarding invocation of the right to counsel is in equipoise the state necessarily has failed to meet its burden of persuasion, and the state loses.

59. People v. Anderson, 178 A.D.2d 605, 577 N.Y.S.2d 873 (2d Dep't 1991).

60. People v. Tanner, 30 N.Y.2d 102, 331 N.Y.S.2d 1 (1972).

61. *See* People v. O'Hanlon, 252 A.D.2d 670, 672, 675 N.Y.S.2d 404 (3d Dep't 1998), *lv. den.*, 92 N.Y.2d 951, 681 N.Y.S.2d 481 (1998) ("[t]he so-called 'cat-out-of-the-bag' is inapplicable as no evidence was adduced at the suppression hearing establishing that, at the time of his utterances, defendant felt committed and constrained by his earlier admission"); People v. Schultz, 187 A.D.2d 466, 467, 590 N.Y.S.2d 729 (2d Dep't 1992) ("[a]dditionally, the defendant did not testify at the suppression hearing and no evidence was adduced in support of his contention that the station-house statement was involuntarily given on constraint of the prior inadmissible statement, under the so-called 'cat out of the bag' theory"); People v. Alaire, 148 A.D.2d 731, 737–38, 539 N.Y.S.2d 468 (2d Dep't 1989) ("since the defendant did not testify at the hearing, there is no factual basis for concluding that the latter statement was tainted by the earlier one"); People v. Shipman, 156 A.D.2d 494, 495, 548 N.Y.S.2d 574 (2d Dep't 1989), *lv. den.*, 75 N.Y.2d 924, 555 N.Y.S.2d 43 (1990) ("[t]he defendant did not testify at the hearing and there was no evidence adduced to support his contention that the statements made by him at the precinct were involuntarily given on constraint of his first statement, under the so-called 'cat-out-of-the-bag' theory").

62. People v. Valerius, 31 N.Y.2d 51, 334 N.Y.S.2d 871 (1972).

63. *Valerius*, 31 N.Y.2d at 54, n.2.

64. People v. Anderson, 69 N.Y.2d 651, 511 N.Y.S.2d 592 (1986).

65. *Anderson*, 69 N.Y.2d at 653.

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Justice Kennedy Effectuates Sea Change in Juvenile Sentencing

By Spiros A. Tsimbinos

Over a seven-year period, the United States Supreme Court, on a step-by-step basis, has brought about significant changes in the sentencing of juvenile offenders ranging in age from 13 to 18. The Justice most responsible for this change has been Justice Anthony Kennedy, who was appointed by President Reagan and who has been serving on the Court for 24 years. Beginning in 2005, in the case of *Roper v. Simmons*, 543 U.S. 551, in a 5-4 decision in which Justice Kennedy wrote the majority opinion, the United States Supreme Court held that the death penalty for juvenile offenders was unconstitutional as being violative of the Eighth Amendment against cruel and unusual punishment. Joining Justice Kennedy in the majority were Justices Souter, Stevens, Ginsburg and Breyer.

In deciding *Roper,* the majority focused on three general differences between juvenile offenders and adults, to wit: (1) A lack of maturity and an undeveloped sense of responsibility found in youth more often than of adults are more understandable among the young, and that these qualities often result in impetuous and ill-considered actions and decisions; (2) Greater vulnerability or susceptibility to negative influences and outside pressures, including peer pressure; (3) The character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory and less fixed. The Court further concluded that when dealing with juveniles "a greater possibility exists that a minor's character deficiencies will be reformed."

Over the last several years, scientific research and new studies have also indicated that the brains of juveniles are not fully formed, and that some of their behavior is due to their youth, which is subject to change as they mature into adulthood. Based upon these premises, attorneys representing juvenile offenders have strenuously argued that punishments imposed for juvenile criminal activity should not foreclose the possibility of rehabilitation and the leading of a productive life once the juvenile offender has reached adult status.

Utilizing the logic in *Roper*, and considering the new scientific evidence as well as changing attitudes, the Court, five years later, in 2010, rendered another decision in *Graham v. Florida*, 130 S. Ct. 2011, in which Justice Kennedy, again writing for a 5-4 majority, with a concurrence by Chief Justice Roberts, held that the cruel and unusual punishment clause of the Eighth Amendment prohibited a juvenile offender from being sentenced to life imprisonment without parole for a non-homicide crime. Joining Justice Kennedy in the full scope of his opinion, were Justices Stevens, Ginsburg, Breyer and Sotomayor. Justice Roberts concurred in the judgment but only to the extent that he felt that under the particular facts of the case, the sentence imposed was unconstitutional.

The dissenters in both the *Roper* and the *Graham* case argued that the Court had usurped a sentencing function which was traditionally left to the States and the People, and that since so many States allowed the sentences in question, there was no basis to rule that they were cruel and unusual.

On June 25, 2012, in two companion cases, *Miller v. Alabama*, and *Jackson v. Hobbs*, 132 S. Ct. 2455, Justice Kennedy, once again casting the critical swing vote, played a significant role in having the United States Supreme Court declare that States could no longer impose mandatory life imprisonment without parole with respect to juvenile offenders, even in cases where the juveniles have committed homicides. The two cases involved two 14-year-olds, one in Alabama and one in Arkansas, who were convicted of murder and given life imprisonment without parole. Justice Kennedy, although being the senior Justice, and casting the critical swing vote, assigned the writing of the actual opinion to Justice Kagan. Justice Kagan, writing for the majority, asserted that the lesser culpability of juveniles makes it unconstitutional for them to be sentenced under a scheme that does not give the judge the ability to consider factors such as the defendant's age, maturity and upbringing in determining the sentence. "Youth matters!," she declared. "Sentencers must be able to consider the mitigating qualities of youth." She thereafter concluded forcing judges and juries to give life without parole, regardless of mitigating circumstances, violates Supreme Court rulings requiring individualized sentencing for defendants facing the most serious penalties. "We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eight Amendment's prohibition on cruel and unusual punishment." Although the majority opinion still left open the possibility of a sentence of life without parole, the decision included a veiled warning to sentencing courts that it is expected that such a sentence would be uncommon. Even though Justice Kagan wrote the majority opinion, her logic is based upon Justice Kennedy's arguments in the prior decisions to such an extent that he could have written it himself.

Justices Scalia, Alito and Thomas, and this time joined by Chief Justice Roberts, attacked the majority ruling as usurping the authority of State Legislatures and

imposing their own moral code. The dissenters argued, in two separate opinions, that since 29 States provided for sentences of life without parole, which involved over 2,000 defendants, such sentences were far from unusual and could not be held to violate the Eighth Amendment. The dissenters also pointed out that the veiled warning in the majority opinion that the imposition of any future sentence of life without parole for juveniles should be uncommon indicated that the Court, in the future, could take the final step of prohibiting any life without parole sentence. Thus, Justices Thomas and Scalia specifically noted at 132 S. Ct. 2486:

> Today, the Court makes clear that, even though its decision leaves intact the discretionary imposition of life-without-parole sentences for juvenile homicide offenders, it "think[s] appropriate occasions for sentencing juveniles to [life without parole] will be uncommon." *Ante,* at 2469. That statement may well cause trial judges to shy away from imposing life without parole sentences and embolden appellate judges to set them aside when they are imposed. And, when a future petition seeks a categorical ban on sentences of life without parole for juvenile homicide offenders, this Court will most assuredly look to the "actual sentencing practices" triggered by this case. The Court has, thus, gone from "merely" divining the societal consensus of today to shaping the societal consensus of tomorrow.

Despite the strenuous dissent issued by four of the Court's members, it was once again Justice Kennedy's view that youth matters, which carried the day, and his vote completed the sea change in juvenile sentencing.

In seven years, Justice Kennedy steered a course which first found the death penalty for juvenile offenders unconstitutional, then concluded that life without parole for juvenile offenders who committed non-homicide crimes was also invalid, and ended the trilogy by finding that even with respect to the commission of murder, mandatory life without the possibility of parole for juvenile offenders constitutes cruel and unusual punishment. Thousands of juvenile offenders had been affected by Justice Kennedy's position in the three cases over the last seven years. Untold thousands will be affected in the future.

For many years, Courts were guided by the sentencing principle that rehabilitation rather than retribution was an important goal of the Criminal Justice System, especially with regard to juvenile offenders. In the late 1980s, however, as a result of widespread drug use and the rise of teenage gangs, many States responded by imposing harsh sentencing penalties and applied them even to juvenile offenders. The attitude changed from seeking rehabilitation to "getting them off the street," and "locking them up and throwing away the key." It appears now, through the three decisions in which Justice Kennedy has played such a significant role, that youth matters, and the possibility of parole after rehabilitation must be made available to juvenile offenders, even those who have committed the most brutal of crimes.

In recent years, Justice Kennedy has provided the critical swing vote in many major decisions. Any compilation of his most significant accomplishments must include his impact on the juvenile justice system. In seven years, Justice Kennedy, through a step-by-step approach, has largely been responsible for bringing about a sea change in juvenile sentencing. It is also possible that in the future there is more to come.[1]

Endnote

1. The decision by the United States Supreme Court that" youth matters " may also serve to invigorate the current efforts by former Chief Judge Judith Kaye to establish youth courts, and by Chief Judge Lippman to raise the age of criminal responsibility.

A Summary of the 2011 Annual Report of the Clerk of the New York Court of Appeals

By Spiros A. Tsimbinos

Andrew W. Klein, Clerk of the New York Court of Appeals, recently issued the annual report for the year 2011. The report, as in the past, provided details regarding the workings of the Court during the past year. The report stated that in 2011, the Court decided 242 appeals, 130 of which involved civil matters and 112 which dealt with criminal law. This compared to 137 civil appeals and 99 criminal appeals in 2010. Thus, in 2011, the number of decisions involving criminal matters increased while those involving civil cases declined. The overall number of appeals decided also increased over 2010 by 6 appeals. Of the appeals decided, 129 were decided unanimously, which was somewhat lower than the 159 which were determined by unanimous vote in 2010.

With respect to motions, the Court decided 1,107 motions for leave to appeal in civil cases during 2011—62 more than in 2010. Of these, the Court granted 7.4%, up from 6% in 2010. With respect to criminal leave applications, the Judges of the Court granted 91 of the 2,089 applications which were decided in 2011. This was slightly down on a percentage basis from the grant of 108 of the 2,220 applications which were decided in 2010. Thus in 2011, the percentage of criminal leave applications granted was approximately 4.3%, down from the nearly 4.9% which were granted in 2010. Overall, the New York Court of Appeals and its Judges in 2011 disposed of 3,686 matters, which included 242 appeals, 1,355 motions and 2,089 criminal leave applications.

The Court of Appeals continues to maintain a prompt and efficient method of handling its caseload, although in 2011 it appears to have taken a little longer to handle the Court's docket than it did in 2010. In 2011, the average time from argument or submission to disposition of an appeal decided in the normal course was 37 days. For all appeals, the average time from argument or submission to disposition was 35 days. The average period from filing a notice of appeal or an order granting leave to appeal to calendaring for oral argument was approximately 11 months. The average period from readiness (all papers served and filed) to the calendaring for oral argument was approximately 6 months. In 2010, the average period from readiness to calendaring for oral argument was approximately 4 months.

With respect to budget matters, the Court, in response to the State's fiscal crisis, requested a total budget of $14,412,047 for the fiscal year 2012-2013 to cover the workings of the Court and its ancillary agencies. This represented a decrease of $262,981, or 1.8%, from the current year appropriation.

The 2011 annual report is divided into four major parts. The first section is a narrative, statistical and graphic overview of matters filed and decided by the Court during the year. The second describes the various functions of the Clerk's office and summarizes administrative accomplishments in 2011. The third section highlights selected decisions of 2011. The fourth part consists of appendixes with detailed statistics and other information. The 2011 report also includes a moving and eloquent Foreword from Senior Associate Judge Carmen Beauchamp Ciparick. Judge Ciparick, who will be retiring from the Court at the end of the year, bids adieu to the Court and her colleagues in the following letter.

> I have been asked by Andrew Klein, our beloved Clerk of the Court, to write the Foreword to the 2011 Annual Report. It is with very mixed emotions that I do this. Mixed emotions because 2012 is the very last year I will be so privileged to sit on the New York State Court of Appeals. I will have spent nineteen years at the Court, spanning the tenures of three Clerks of the Court, two Chief Judges, twelve Associate Judges (including myself), twenty-two chamber's law clerks and one truly dedicated secretary.
>
> When I last authored this Foreword in March 2011, after completing only seven years on the Court, I commented at how quickly time passes "when one is immersed in the wonderful work of the Court, surrounded by chambers' and clerk's staff that give of themselves so tirelessly to ensure that our jurisprudence is reasonable, sound and enduring." Here I am elven years later still committed to that principle, still marveling at the extraordinary dedication of our judges and non-judicial personnel, still in awe of the Court and its work.
>
> One has but to peruse the pages of the report to witness how in difficult financial times, involving cutbacks and other budgetary restraints, "…our Judges and

staff maintained the same level of excellent service to the bar and the public that they have always provided in the past" (Annual Report, p. 1). The 2011 Annual Report chronicles our work of the past year, examines our docket and the ever efficient operation of our administrative offices. It highlights significant opinions, each year moving into new and different areas of the law, at the same time maintaining the Court's "long tradition of exceptional currency in calendaring and deciding appeals" (Annual Report, p. 5). I know of no other court that so promptly and expeditiously disposes of appeals and always with well-reasoned and scholarly opinions that contribute so markedly to the jurisprudence of the State.

I will miss Court of Appeals Hall. I will miss the beautiful building, and the spectacular courtroom where I am surrounded by portraits of eminent predecessors. I will miss the work of judging and writing, where I hope my contributions have been appreciated. I will miss my colleagues, whom I truly cherish as siblings, but most of all I will miss the people, the "family," and the faithful and loyal employees of the Court who keep this fine machine running. I have been truly blessed to be among you. Thank you for the experience.

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

New York Court of Appeals Review

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from April 26, 2012 to August 1, 2012.

Post-Release Supervision

***People v. Williams*, decided April 26, 2012 (N.Y.L.J., April 27, 2012, pp. 2 and 22)**

In a unanimous decision, the New York Court of Appeals held that the mandatory period of post-release supervision following a prison term is part of the sentence for the purpose of calculating the duration of an order of protection. In the case at bar, the Defendant pleaded guilty to first degree assault and was sentenced to 13 years in prison and 3 years of post-release supervision. An order of protection was also issued barring the Defendant from the victim and her son for 6 years after the end of his prison sentence. Under CPL Section 530.13(4), an order of protection issued upon a felony conviction is in effect for no more than 3 years after the expiration of the term of a determinate sentence of imprisonment actually imposed. The Court of Appeals emphasized that there were statutory as well as practical reasons to include the post-release supervision as part of the actually imposed prison sentence. Thus, under the situation herein, the order of protection issued against the Defendant ran from the expiration of his post-supervision term.

Legally Sufficient Evidence

***People v. Ramos*, decided May 1, 2012 (N.Y.L.J., May 2, 2012, p. 22)**

In a unanimous decision, the New York Court of Appeals upheld a Defendant's conviction for manslaughter in the first degree. In the case at bar, the Defendant had fired a gun into a crowd of people after he had become involved in a physical altercation with a woman. The Defendant argued that he did not intend to cause physical injury to the victim, who was a person standing in the crowd, and that therefore he could not be convicted of manslaughter in the first degree. The Court of Appeals determined, however, that in viewing the evidence in the light most favorable to the People, a reasonable jury could have concluded that the Defendant fired his gun with the intent to cause serious physical injury, and as a result caused the victim's death, and that in reviewing his actions, he intended the result which occurred.

Conditions of Plea

***People v. Alexander*, decided May 3, 2012 (N.Y.L.J., May 4, 2012, p. 22)**

In a 4-3 decision, the New York Court of Appeals upheld a Defendant's conviction which was based upon a guilty plea which was conditioned on the fact that the Defendant would withdraw any and all motions which included a recently filed pro se constitutional speedy trial motion and waive his right to appeal. The majority opinion upheld this procedure if the conditions were set forth by the Judge rather than the prosecution. The four-Judge majority, in an opinion written by Judge Read, relied upon the fact that the Trial Judge conducted a detailed allocution in which he asked the Defendant, on several occasions, whether he understood the conditions of the guilty plea and was willing to accept them. The Court's majority rejected the Defendant's claim that the plea conditions imposed were improper under prior decisions of the New York Court of Appeals, including *People v. Callahan*, 80 NY 2d, 273 (1992). Judge Ciparick issued a dissenting opinion, which was joined in by Chief Judge Lippman and Judge Jones. The dissenters argued that under prior case law there was a special consideration given to constitutional speedy trial guarantees, and that a Defendant should not be barred from pursuing those issues based upon a plea agreement which mandated that he give up the right to raise that issue.

Sex Offender Registration Requirements

***People v. Liden*, decided May 3, 2012 (N.Y.L.J., May 4, 2012, p. 23)**

In a unanimous decision, the New York Court of Appeals held that a determination by the Board of Examiners of Sex Offenders that a person who committed an offense in another state must register in New York is reviewable in a proceeding to determine the offender's risk level, and that an Article 78 proceeding is not required. The Court acknowledged that rulings of administrative agencies can ordinarily be reviewed only in proceeding under CPL Article 78. The unusual features of New York's sex offender registration system justified, however, an exception to that rule.

Depraved Indifference Murder

***People v. Bussey*, decided May 3, 2012 (N.Y.L.J., May 4, 2012, p. 24)**

In a unanimous decision, the New York Court of Appeals reduced a conviction for depraved indifference murder in the second degree to manslaughter in the second degree. The Court found that the evidence was legally insufficient to support the conviction for depraved indifference murder. The Court concluded that the prosecution did not demonstrate that the Defendant evinced utter disregard for the victim's life to the extent that he did not care whether the victim was killed. The evidence,

however, did support a claim of recklessly causing the death of the victim. Under such circumstances, a modification of the conviction to the lesser included count was warranted, and the matter was remitted to the County Court for resentencing.

Child Pornography Conviction

***People v. Kent*, decided May 8, 2012 (N.Y.L.J., May 9, 2012, pp. 1, 6 and 22)**

In a 5-2 decision, the New York Court of Appeals modified a conviction under New York's Child Pornography Statute, and stated that viewers of free on-line child pornography are not breaking the law if they just look but do not copy, purchase, download or otherwise exercise dominion and control over illegal images. In interpreting Penal Law Article 263, the majority opinion concluded that some affirmative act is required to show that the defendant in fact exercised dominion and control over the images that were on the screen. To hold otherwise would extend the reach of the Penal Law Statute to conduct—viewing—that our legislature has not deemed to be criminal. Judge Ciparick, writing for the majority, was joined by Chief Judge Lippman and Judges Read, Smith and Jones. Judge Graffeo issued a separate opinion in which she concurred in the result but not the majority's reasoning. Judge Pigott joined Judge Graffeo's opinion. Judge Smith also issued a separate concurring opinion.

Editor's Note: In the wake of the above decision, several legislative leaders have indicated they would introduce legislation to overturn the Court's ruling in the above matter. In fact, toward the end of the legislative session, legislation was passed to deal with the Court of Appeals decision (see page 36).

Confession

***People v. Suber*, decided May 8, 2012 (N.Y.L.J., May 9, 2012, pp. 2 and 24)**

In a 5-2 decision, the New York Court of Appeals reinstated a Defendant's conviction for failing to register his address changes with the Division of Criminal Justice Services, as was required for sex offenders. He had confessed to police regarding two unreported residences. The lower courts had held that the lack of corroboration of his confession rendered his conviction jurisdictionally deficient since it was based upon a misdemeanor information. The majority opinion in the New York Court of Appeals, however, explored the hierarchy of accusatory instruments and the requirement necessary to make out a prima facie case. The majority concluded that the legislative history unmistakably establishes that corroboration was intended to be a component of the prima facie case for an indictment but not for an information. They noted that while the statute governing indictments references the corroboration rule, the statute that addresses informations does not.

The majority thus held that corroboration of a Defendant's admission is not a component of the prima facie case requirement for an information. The majority made clear, however, that its decision did not dispense with corroboration for all purposes in a prosecution premised on misdemeanor information and stressed that the corroboration rule would be triggered if the Defendant went to trial.

Judge Ciparick and Chief Judge Lippman dissented, arguing that the majority opinion was departing from precedent and was brushing aside protections which should be afforded to misdemeanor defendants.

Waiver of Appeal

People v. Gillian

People v. Deluna

People v. Quintrelle

***People v. Norton*, all decided May 8, 2012 (N.Y.L.J., May 9, 2012, p. 25)**

In a series of unrelated cases, the New York Court of Appeals reversed orders of the Appellate Division and remitted the matter back to the Court for clarification regarding the basis of its decision. In each of the cases, the Defendants had pleaded guilty to a particular crime and waived the right to appeal. Each Defendant then subsequently challenged the validity of the waiver and asserted that the sentence was excessive. The Appellate Division summarily affirmed without indicating whether it relied on the waiver or determined that the sentence claim lacked merit. This was impermissible under the New York Court of Appeals ruling in *People v. Qoshja*, 17 N.Y. 3d, 910 (2011).

Depraved Indifference Murder

***People v. Matos*, decided May 31, 2012 (N.Y.L.J., June 1, 2012, p. 22)**

In a 5-2 decision, the New York Court of Appeals concluded that the evidence was insufficient to establish that the Defendant possessed the culpable mental state of depraved indifference to human life to warrant a conviction for murder in the second degree. The Defendant was accused of not promptly calling for help after her partner had severely beaten the Defendant's 23-month old son. The Court of Appeals majority concluded that although the Defendant's behavior fell short of what would be expected from an ordinary person faced with a child in distress, the Defendant's actions did not rise to the level of wickedness so as to render the Defendant culpable as one whose conscious objective is to kill. The charge relating to depraved indifference murder of a child was therefore vacated and the matter remitted to the Supreme Court for resentencing on remaining counts.

Judges Pigott and Read dissented, arguing that the Defendant's actions in the case at bar were a textbook case where failure to act demonstrated a wanton cruelty or callousness sufficient to uphold the charge in question. The dissenters argued that the jury could rationally have concluded that the Defendant did not care at all about her own child's plight, and that the conviction should be upheld.

Second Felony Offender

***People v. Yusuf a/k/a Ashford*, decided May 31, 2012 (N.Y.L.J., June 1, 2012, p. 23)**

The Defendant was convicted of three drug crimes. Prior to sentencing the People filed two statements of predicate felony convictions. The first involved a North Carolina conviction for robbery. The second involved a North Carolina conviction of possession with intent to sell. The Defendant challenged the use of the prior convictions, claiming that they occurred outside of New York and could not be utilized for the purposes of enhanced sentencing. Referring to the Drug Law Reform Act of 2004, the Court concluded that foreign violent felony convictions could be taken into account when determining a Defendant's sentencing status. Since the Court below had only addressed the utilization of one of the North Carolina convictions, the Court of Appeals remitted the matter to the Supreme Court for further proceedings.

Kidnapping

***People v. Leonard*, decided May 31, 2012 (N.Y.L.J., June 1, 2012, p. 23)**

In a 4-3 decision, the New York Court of Appeals held that a conviction for kidnapping could be upheld even in a case where a parent has custodial rights to a child. In the case at bar, the Defendant had a romantic relationship with a woman, which ended a few days after their daughter was born. Since there was no court order affecting the custody of the child, the Defendant and the woman were equally entitled to custody of the baby. When the baby was six weeks old, the Defendant paid an unexpected visit to the woman's new home, where an argument erupted and where the Defendant threatened to cut her with a knife. When police arrived, the Defendant used the baby as a hostage and threatened to kill her if the police approached. Among several charges, the Defendant was convicted of kidnapping in the second degree. In rendering its determination, the majority opinion analyzed Penal Law Section 135.30, which states that in any prosecution for kidnapping, it is an affirmative defense that the Defendant was a relative of the person abducted, and his sole purpose was to assume control of such person. The Court determined that on the facts found by the jury the Defendant's restriction of his daughter's movements was unlawful, and that the unlawfulness was blatant enough to justify the inference that he acted unlawfully. The evidence regarding second degree kidnapping was therefore legally sufficient. Judges Jones and Pigott dissented.

Drug Crime Resentencing

People v. Dais

***People v. Stanley*, decided May 31, 2012 (N.Y.L.J. June 1, 2012, p. 24)**

In a unanimous decision involving two related matters, the New York Court of Appeals held that in a resentencing proceeding under the Drug Law Reform Act of 2009, a de novo review of whether the Defendant's prior felony is non-violent or violent is proper during the sentencing proceeding. In both cases the Defendants had been sentenced as second felony offenders based upon a prior non-violent felony conviction. After the Defendants had moved for resentencing, the prosecution sought to rely upon a prior violent felony offense which had not been utilized previously. The Court of Appeals concluded that in each of the cases involving the Defendants, the issue of whether the Defendant had a prior violent or non-violent felony may be litigated at the resentencing hearing.

Confrontation Clause

***People v. Reid*, decided June 5, 2012 (N.Y.L.J., June 6, 2012, p. 1 and 23)**

In a unanimous decision, the New York Court of Appeals adopted the reasoning of several federal appellate courts and held for the first time that a Defendant can open the door to the admissibility of testimony that would otherwise have been barred by the confrontation clause. In a decision written by Judge Pigott, the New York Court of Appeals held that misleading questioning by defense counsel opened the door to the admission of a testimonial statement by a witness who did not testify and consequently could not be cross-examined.

Double Jeopardy

***People v. Gause*, decided June 5, 2012 (N.Y.L.J., June 6, 2012, pp. 1, 8 and 22)**

In a 5-2 decision, the New York Court of Appeals held that the double jeopardy clause prevented trying a Defendant for intentional murder after his conviction for depraved indifference murder had been reversed. The majority decision, written by Judge Jones, stated that a jury that was initially given the option of convicting on either the depraved indifference theory or the intentional theory had implicitly acquitted on the intentional charge. In the case at bar, the Defendant was accused of beating a victim with a metal pipe after the victim had been shot several

times by another man. The Defendant was charged with both intentional and depraved indifference murder, and the jury was instructed to consider either charge first, and if it reached a guilty verdict to go no further. The Defendant was convicted of depraved indifference murder. The Fourth Department reversed the conviction for depraved indifference murder, but ordered a new trial on an intentional murder theory. The Court of Appeals majority held that the second trial violated the double jeopardy clause. Judges Pigott and Read dissented, and predicted that the majority ruling will engender confusion and uncertainty.

Conditions of Probation

***People v. Pagan*, decided June 5, 2012 (N.Y.L.J., June 6, 2012, pp. 8 and 22)**

In a 5-2 decision, the New York Court of Appeals held that a Defendant may not appeal from an order modifying the conditions of a sentence of probation, since such an appeal is not authorized by the Criminal Procedure Law; instead, judicial review could only be sought in a CPL Article 78 proceeding. In the case at bar, the Defendant pleaded guilty to a weapons possession charge and was sentenced to six months in jail and five years' probation. Several months later, the Probation Department moved to expand the conditions of probation to permit the searching of his home for possible weapons. The Defendant thereafter sought to appeal the new conditions. The majority opinion, written by Judge Graffeo, stated that since the probation modification did not amount to a sentence or resentence, the Court had no review authority. The proper vehicle to utilize was an Article 78 proceeding and not a direct appeal. Judges Smith and Pigott dissented, arguing that it was almost impossible to believe that the Legislature would deprive a Defendant of any right to appeal such a drastic change in the conditions of probation.

Imposition of Consecutive Sentences

***People v. Wright*, decided June 5, 2012 (N.Y.L.J., June 6, 2012, p. 22)**

In a unanimous decision, the New York Court of Appeals concluded that under the circumstances of the instant case, Penal Law Section 70.25(2) precluded the imposition of consecutive sentences for the Defendant's convictions of murder in the first degree and criminal possession of a weapon in the second degree. The Court found that because the offense of possessing a gun with unlawful intent was only completed upon the Defendant's commission of murder in the first degree involving the shooting of the victims, consecutive sentencing was prohibited.

Aggravated Assault

***People v. Plunkett*, decided June 7, 2012 (N.Y.L.J., June 8, 2012, pp. 9 and 22)**

In a unanimous decision, the New York Court of Appeals reversed a conviction for aggravated assault upon a police officer where the element of "deadly force" was the saliva of a man infected with the AIDS virus. The Defendant, who was HIV positive, bit an officer and was charged with causing a physical injury by means of a deadly weapon or dangerous instrument. Relying upon its prior decision in *People v. Owusu*, 93 N.Y. 2d 298 (1999), holding that an individual's body part, such as teeth, cannot constitute an instrument, the Court concluded that Plunkett's saliva, like the Defendant's teeth in *Owusu*, came with him, and its utility for enhancement under the Penal Law could not be treated differently. The matter was therefore remitted to the County Court for resentencing on other related charges.

Severance

***People v. Chestnut*, decided June 7, 2012 (N.Y.L.J., June 8, 2012, p. 25)**

In a 4-3 decision, the New York Court of Appeals held that a trial court had committed error in denying the Defendant's request for a severance, based upon the improper joinder of certain counts relating only to a co-defendant, and that such an error was not harmless but required a reversal. The majority opinion was written by Judge Jones, and was joined in by Judges Ciparick, Pigott and Chief Judge Lippman. A dissenting opinion was written by Judge Read on the grounds that the Defendant never protested the alleged improper joinder on the grounds advanced on appeal, and therefore he had failed to preserve his objection for Court of Appeals review. Judge Read's dissent was joined in by Judges Graffeo and Smith.

Ineffective Assistance of Counsel

***People v. Haffiz*, decided June 7, 2012 (N.Y.L.J. June 8, 2012, p. 26)**

In a unanimous decision, the New York Court of Appeals upheld the denial of a Defendant's motion to withdraw his guilty plea based upon the fact that he was improperly informed by his defense counsel regarding the possibility of deportation arising from his criminal conviction. The Court found that the trial Judge did not abuse his discretion in denying Defendant's motion to withdraw his plea. The plea colloquy revealed that the Defendant knowingly and voluntarily admitted the factual allegations of the crime and that he did not properly support his *Padilla* allegations with supportive facts.

Lack of Preservation

***People v. Flores*, decided June 7, 2012 (N.Y.L.J., June 8, 2012, p. 26)**

In a unanimous decision, the New York Court of Appeals held that a Defendant had failed to preserve for appellate review his argument that the People were obligated to provide trial counsel with a copy of a videotape regarding the testimony of a nine-year old Complainant which had been presented to the Grand Jury. The District Attorney had provided Defendant's trial counsel with a copy of the Complainant's Grand Jury testimony, and trial counsel had viewed the videotape at the District Attorney's Office. Since trial counsel did not object to the arrangements made by the District Attorney for him to view the videotape, nor did he ever request a copy of the tape, the issue was not preserved for appellate review.

Assigned Counsel

***Matter of Smith v. Tormey*, decided June 12, 2012 (N.Y.L.J., June 13, 2012, pp. 1, 6 and 24)**

In a unanimous decision, the New York Court of Appeals held that Administrative Judges lacked the authority to review the assignment of counsel, and can only assess the compensation which was awarded to assigned counsel and reduce the amount when it is excessive. In the case at bar, an Administrative Judge for the Fifth Judicial District had overturned a trial Judge's decision involving a Syracuse attorney who was not on an assigned counsel list but nonetheless helped defend a murder suspect and then sought compensation for his services. The attorney in question was placed on the assigned counsel panel two weeks after the trial ended with a guilty verdict. The trial Judge who appointed him made the appointment retroactive and authorized the payment of legal fees. The Administrative Judge, however, declined to pay the fee because the attorney had not been approved at the time he participated in the case. The New York Court of Appeals held that the Administrative Judge had exceeded his authority, and could not review the assignment of counsel which was made.

Predicate Felony for Purposes of Sentencing

***People v. Ramos*, decided June 12, 2012 (N.Y.L.J., June 13, 2012, pp. 1 and 22)**

In a unanimous decision, the New York Court of Appeals held that a federal conviction for conspiracy to commit a drug offense cannot serve as a predicate felony for the purposes of sentencing. Utilizing the standard of "strict equivalency" in order for convictions rendered in other jurisdictions to serve as a predicate felony for sentencing purposes, the Court concluded that New York law requires proof of an element which the federal law did not, and that therefore the Defendant's federal conspiracy conviction could not serve as a predicate. Specifically the Court concluded that the commission of an overt act by one of the conspirators in furtherance of the conspiracy is required under New York law but not under federal law. The Defendant was therefore not properly sentenced as a predicate felon, and the matter was remitted to the New York Court Supreme Court for resentencing.

Use of DNA Evidence

***People v. Kelley*, decided June 12, 2012 (N.Y.L.J., June 13, 2012, p. 24)**

In a 6-1 decision, the New York Court of Appeals vacated a conviction for course of sexual conduct against a child in the first degree and endangering the welfare of a child and ordered a new trial on those counts. During the course of the trial, the Defendant relied heavily on the lack of any DNA evidence implicating him. Near the end of the People's case, the People suddenly disclosed that a towel had been analyzed and found to contain the Defendant's semen. Defense counsel argued that the evidence should be precluded or a mistrial ordered because the proffered scientific evidence had not been made available during the formation of Defendant's defense and it was too late for the Defendant to react to the matter. The trial court, however, allowed the People to introduce the DNA results. The New York Court of Appeals concluded, however, that the introduction of the evidence violated the Defendant's right to a fair trial since the trial had gone on far too long before the prosecution made mention of the DNA evidence in question. The majority concluded that the evidence should have been precluded or a mistrial declared. Judge Robert S. Smith dissented, arguing that although CPL Section 240.20 required the People to make available a written report concerning a scientific test, what occurred in the case at bar was an innocent mistake, and the trial court had asked the Defendant whether he would like a delay in the proceedings to deal with the matter. Judge Smith also concluded that other evidence which was presented during the trial played a larger role in the conviction and that under all the circumstances, a new trial was not required.

Court of Appeals Review

***People v. William*, decided June 12, 2012 (N.Y.L.J., June 13, 2012, p. 25)**

In a unanimous decision, the New York Court of Appeals affirmed an Appellate Division ruling with respect to whether the police had reasonable suspicion and whether a showup was unduly suggestive. The Court concluded that both issues presented a mixed question of law and fact which was beyond the review of the Court of Appeals if the determination had support in the record. In the case at bar, although different conclusions may

have been reasonable at the fact-finding level, record evidence supported the lower Court's determination that the police possessed reasonable suspicion. Similarly, the determination of the Courts below that the showup was reasonable and not unduly suggestive was supported by the record. Therefore, further review by the New York Court of Appeals was prohibited.

Resentencing

***People v. Gammon*, decided June 12, 2012 (N.Y.L.J., June 13, 2012, p. 25)**

In a unanimous opinion, the New York Court of Appeals upheld the resentencing of a Defendant who had been convicted of driving while intoxicated. The Defendant was initially sentenced to three years' probation and a 60-day term of incarceration. After serving the 60-day sentence, the Defendant was subsequently found to have violated a condition of probation, and the District Court sought to order an additional 60 days of imprisonment. On the day of sentencing, the Court, however, did not specify that it was ordering an additional term of imprisonment, pronouncing instead that the Defendant is terminated from probation and sentenced him to 60 days in jail. The Defendant was immediately taken to the Suffolk County jail but was released the same day because of an erroneous determination crediting him with time served for the original 60-day period of incarceration from the underlying conviction. After learning of Defendant's release, the District Court resentenced him to 120 days, which is an additional 60 days to the 60 days that he already served. The Defendant argued on appeal that the resentencing had violated the Criminal Procedure Law 430.10, and his constitutional right against double jeopardy.

The New York Court of Appeals, however, held that it was well established that Courts have the inherent power to correct their records where the correction relates to mistakes or errors which may be termed clerical in their nature or where it is made in order to conform the record to the truth. The Court found that it was clear from the record that the sentencing court intended to impose an additional 60 days for the violation of probation and that its failure to so specify was the type of ministerial error which could be corrected. The Court further found that the resentencing did not violate double jeopardy principles. The Defendant could not have acquired a legitimate expectation of finality when he was mistakenly released the same day he was taken into custody, and that the District Court appropriately could have taken corrective action to resentence the Defendant in accordance with its stated intent.

Extreme Emotional Disturbance

***People v. McKenzie*, decided June 26, 2012 (N.Y.L.J., June 27, 2012, p. 22)**

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction for second degree murder because the trial court had failed to allow the Defendant to interpose the affirmative defense of acting under the influence of extreme emotional disturbance. Viewing the evidence in the light most favorable to the Defendant, the Court found that the People's proof indicated that the Defendant had been involved in a heated argument and that the jury could have found the defense in question if it had been charged. A new trial was therefore required.

Search and Seizure

***People v. Miranda*, decided June 26, 2012 (N.Y.L.J., June 27, 2012, p. 26)**

In a unanimous decision, the New York Court of Appeals upheld a Defendant's conviction and denied a Defendant's claim that his motion to suppress a knife which was found on him should have been granted. A police officer observed a knife on Defendant's person and seized it while he was issuing a summons for trespass. The knife turned out to be a gravity knife and the Defendant was charged with possession of a weapon in the fourth degree. The Court concluded that when a knife (even if not necessarily an illegal one) becomes plainly visible to a police officer in the course of an authorized common law inquiry due to the suspect's own movement and no intrusive conduct on the officer's part, the officer is permitted to seize it so long as the ensuing intrusion is minimal and consonant with the respect and privacy of the individual. In the case at bar, the officer observed that the Defendant was armed while questioning him late at night in a high crime area after determining that he was trespassing. Under these circumstances it was reasonable for the officer to retrieve the knife and make an arrest when it turned out to be unlawful.

Appealability of Oral Rulings

People v. Elmer

***People v. Cooper*, decided June 27, 2012 (N.Y.L.J., June 28, 2012, pp. 1, 6 and 23)**

In a unanimous decision involving two cases, the New York Court of Appeals held that an oral ruling on a pre-trial motion is appealable. The Court's decision overturned two separate rulings by the Appellate Division's Third and Fourth Departments. The matters involved oral

rulings which were issued by County Courts in upstate communities on misdemeanor criminal matters. The Appellate Division had previously ruled that the failure to obtain a written order on the Courts' rulings regarding pretrial motions precluded any appeal. Judge Jones, however, writing for a unanimous Court, stated, "We conclude otherwise, holding that an appeal does lie from an oral order of a criminal court that finally disposes of the pretrial matter at issue."

Waiver of Appeal

***People v. Maracle*, decided June 27, 2012 (N.Y.L.J., June 28, 2012, pp. 1, 6 and 24)**

In a 7-2 decision, the New York Court of Appeals held that although the Defendant had waived her right to appeal a conviction, it was not clear from the record that she had also waived her right to appeal the severity of the sentence. The Defendant had pleaded guilty to a larceny charge and had agreed to pay $46,000 in restitution, and waived her right to appeal. She was told that if she came up with $23,000 by the time of sentencing, she would receive a 5-year term of probation. She was also told that if she did not pay the $23,000, there would be no promise as to the sentence and she would not be able to withdraw her plea. The Defendant was unable to pay the required restitution at sentencing, and received a term of 5 to 15 years.

The New York Court of Appeals determined that the Defendant's waiver as to the issue of excessive sentence was not knowing and voluntary, because it was not clear during the plea that she would end up with a prison sentence. In issuing its ruling, the Court distinguished its prior case in *People v. Hidalgo*, 91 N.Y.2d, 733 (1988). Judges Graffeo and Read dissented, and argued that there was no practical difference between the facts in the instant case and the Court's prior ruling in *Hidalgo*, and that the waiver of appeal should include the issue of sentencing.

Brady Violations

***People v. Sinha*, decided June 27, 2012 (N.Y.L.J., June 28, 2012, p. 25)**

In a unanimous decision, the New York Court of Appeals affirmed an Appellate Division ruling which modified a conviction only as to a charge involving bribing a witness. The Defendant argued that the convictions relating to other charges should also have been reversed, since the People had failed to make certain disclosures which might have been used to impeach one of the alleged victims. The Court of Appeals found that under the circumstances of the case, reversal was not required on the remaining counts, as there was no reasonable possibility that the evidence supporting the tainted count had a spillover effect on the other convictions.

Post Release Supervision

People v. Valez

***People v. Rodriguez*, decided June 28, 2012 (N.Y.L.J., June 29, 2012, pp. 24, 25 and July 6, 2012, p. 5)**

In two cases involving resentencing procedures under Correctional Law Section 601(d) involving post-release supervision, the New York Court of Appeals addressed the issue of whether resentencing was barred because the deadline provided for in the Statute was not met and whether resentencing could violate constitutional prohibitions on double jeopardy. In a unanimous opinion the New York Court of Appeals held that the failure to meet the 40-day deadline did not preclude resentencing. In the Rodriguez case, he was still under the control of the Department of Corrections when resentencing occurred, and his resentencing proceeding was upheld. With regard to the Defendant Valez, however, his resentencing occurred after he had served the maximum time of his prison sentence, and the Court found that double jeopardy principles applied so as to bar the imposition of any post-release supervision period after he had served the full sentence which had originally been imposed.

People's Appeal

***People v. Riley*, decided June 28, 2012 (N.Y.L.J., June 29, 2012, p. 25)**

In a 7-2 decision, the New York Court of Appeals determined that the People's appeal would be dismissed on the ground that the modification made by the Appellate Division was not on the law alone, or upon the law, and such facts which, but for the determination of law, would not have led to modification. In the case at bar, the Appellate Division utilized its interest of justice discretion to reach an unpreserved legal issue. Therefore, its Order was not appealable to the Court of Appeals, and the matter could not be considered by that Court. Judges Pigott and Smith dissented, arguing that the issue in question was a legal rather than a factual one, and was therefore subject to Court of Appeals review.

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

The U.S. Supreme Court concluded its 2011-2012 term in late June, and before it recessed, it issued a series of important decisions involving criminal law and constitutional issues. These decisions are summarized below.

Blueford v. Arkansas, 132 S. Ct. 2044 (May 24, 2012)

In a 6-3 decision which may prove highly controversial, the United States Supreme Court denied a Defendant's double jeopardy claim and ruled that Arkansas can retry a man for murder even through jurors in his first trial were unanimous that he was not guilty. The majority based its decision on the fact that the trial Judge dismissed the jury when it was unable to reach agreement on several lesser charges. During the colloquy with the Court, the jury had informed the Judge that they had found the Defendant not guilty on the murder charge, but the trial court did not enter any official ruling regarding the jury's determination on the murder charge. The Supreme Court therefore determined that the Defendant was not officially cleared of any of the charges, since there was no formal announcement of acquittal, and that he could be retried by the State of Arkansas. The three dissenting Judges, consisting of Justices Kagan, Sotomayor and Ginsburg, strongly objected to the majority ruling and argued that double jeopardy principles applied. The Court's majority ruling caught many in the defense bar by complete surprise, since it appeared that a ministerial lapse by the trial Judge in failing to officially enter the jury's verdict on the murder count would not normally be utilized to allow a retrial on that charge.

William v. Illinois, 132 S. Ct. 2221 (June 18, 2012)

In a 5-4 decision, the United States Supreme Court upheld the conviction of a Chicago rapist who was found guilty based on a DNA match which was done by a crime lab in Maryland. The majority opinion held that the expert testimony provided by an Illinois police lab analyst was sufficient, and therefore the Defendant's right of confrontation was not violated. The majority opinion was written by Justice Alito and held that the testimony which was admitted did not violate the Defendant's confrontation rights because the report which was referred to was not offered into evidence to prove the truth of the matter asserted, and the use of an expert witness to render an opinion was not a testimonial situation which violated the *Crawford* principles. Only recently, the Court had held that since lab reports supply crucial testimony, a technician who conducted the tests must testify. The Court's instant ruling seems to retreat somewhat from the Court's prior decision.

Justice Alito's opinion was joined in by Chief Justice Roberts and Justices Kennedy and Breyer. In a somewhat unusual situation, the fifth deciding vote was provided by Justice Thomas, who filed a concurring opinion. Justice Thomas, in the Court's previous decisions regarding the *Crawford* ruling, had joined with Justice Scalia. In the instant matter, however, although stating that he agreed with some of the dissenters' opinion, he cast the deciding vote as indicated above. The dissenting opinion thus consisted of Justices Kagan, Scalia, Ginsburg and Sotomayor.

Dorsey v. United States, 132 S. Ct. 2321 (June 21, 2012)

In another 5-4 decision, the United States Supreme Court held that the more lenient penalties of the Fair Sentencing Act which reduced the crack-to-powder cocaine disparity could be applied retroactively to cover those offenders whose acts preceded the effective date of the Act but who were sentenced after that date. The majority opinion was written by Justice Breyer and was joined in by Justices Kagan, Sotomayor, Ginsburg and Kennedy, who once again supplied the critical swing vote. A dissenting opinion was issued by Justice Scalia, which was joined in by Chief Justice Roberts and Justices Thomas and Alito.

Arizona v. United States, 132 S. Ct. 2492 (June 25, 2012)

On June 25, 2012, during the last week of the Court's term, the Supreme Court issued its decision regarding the constitutionality of Arizona's recently enacted immigration law. Reflecting the controversy which has involved the Statute, the Court divided on several of the Statute's key provisions. The Court opened its decision by first unanimously approving and upholding the right of Arizona police officers to check the immigration status of those they stop for other reasons. This provision, commonly referred to as the "show me your papers" requirement, was viewed as a cooperative measure involving consultation between local and federal authorities, which is already an important part of the immigration system. Although upholding this portion of the law, the Court indicated that it should be read so as to avoid concerns that status checks would lead to prolonged detention. With respect to the other three provisions of the Arizona Statute, the Court divided, on a 5-3 basis, and struck down those provisions which made it a crime under state law for immigrants to fail to register under a federal law, making it a crime for illegal immigrants to work or to try to find work, and allowing Arizona police to arrest suspected illegal immigrants without warrants.

Justice Kennedy issued the majority five-Judge ruling which held that the federal government's broad powers in setting immigration policy preempted state action in these areas. Justice Kennedy's majority opinion was joined in by Chief Justice Roberts, as well as Justices Breyer, Sotomayor and Ginsburg. Justice Scalia issued a vigorous dissenting opinion, which was joined in by Justice Thomas, and which would have allowed all of the challenged provisions to take effect. Judge Scalia argued that "Arizona is entitled to have its own immigration policy—including a more rigorous enforcement policy—so long as that does not conflict with federal law." Justice Alito issued a separate dissenting opinion which would have allowed the police to arrest immigrants without papers who seek work and also to make arrests without warrants. Justice Kagan did not take part in the case, since she had previously worked in the Obama administration and may have been involved in initial litigation against the Arizona Statute. Five other States—Alabama, Georgia, Indiana, South Carolina and Utah—have passed laws which are somewhat similar to Arizona's, and the Supreme Court ruling cast a cloud over the validity of these various state statutes and also continues to create some measure of confusion regarding the proper relationship between the federal government and the states on the enforcement of immigration policy.

Miller v. Alabama, 132 S. Ct. 2455

Jackson v. Hobbs, 132 S. Ct. 2455 (June 25, 2012)

Also on Monday, June 25, 2012, the Supreme Court issued a ruling as to whether the states can impose mandatory life sentences without the possibility of parole on juvenile offenders. The two cases before the Court involved two 14-year-olds who were convicted of murder, one in Alabama and one in Arkansas, and who were given life sentences without parole. The Defendants argued that the sentences which were imposed constituted cruel and unusual punishment in violation of the Eighth Amendment. In previous decisions, the United States Supreme Court has steadily expressed the view that young offenders should be treated differently than adult offenders. In 2005, the Court issued its decision in *Roper v. Simmons*, 543 U.S. 551, in which the Court held by a 5-4 decision that the death penalty for juvenile offenders was unconstitutional. In 2010, in *Graham v. Florida*, 130 S. Ct. 2011, the Court further held that the cruel and unusual punishment clause of the Eighth Amendment does not permit a juvenile offender to be sentenced to life imprisonment without parole for a non-homicide crime.

In the instant matter, the Court extended its earlier ruling and issued a 5-4 decision in which it effectively struck down 29 state laws that imposed mandatory life without parole sentences on juvenile murder defendants. Justice Elena Kagan wrote for the majority, and held that forcing judges and juries to give life without parole, regardless of mitigating circumstances, violated Supreme Court rulings which required individualized sentencing for defendants facing the most serious penalties. Under the majority ruling, judges can still impose a life sentence as long as all factors such as the juveniles' upbringing are taken into account. In addition to Justices Breyer, Sotomayor and Ginsburg, who normally vote with Justice Kagan, the critical swing vote was again supplied by Justice Kennedy, who going back to the earlier decisions appears to have single-handedly effectuated a major change in the area of juvenile justice. Chief Justice Roberts and Justices Alito, Thomas and Scalia dissented. The Court's ruling may affect some 2,000 inmates throughout the United States, and may require resentencing in the 29 states which are affected by the new ruling.

United States v. Alvarez, 132 S. Ct. __ (June 28, 2012)

In a 6-3 decision, the United States Supreme Court invalidated the Stolen Valor Act on the grounds that it violated the First Amendment. The federal Statute made it a crime to falsely claim that one was awarded a top military honor. The Defendant had risen at a public meeting and had claimed that he was a wounded war veteran who had received a Medal of Honor. When it was discovered that these claims were false, he was prosecuted under the federal Statute. Justice Kennedy, writing for the majority, indicated that even though the Defendant had lied, his untruths were protected by the First Amendment guarantee of free speech. Justices Alito, Scalia and Thomas dissented. The Court's decision follows several recent cases in which the Court has given due deference to First Amendment principles, even in cases where the action of the Defendants would be viewed as being detestable by most citizens.

Pending Cases

In early May, the United States Supreme Court granted certiorari in a matter involving the issue of whether the Court's decision in *Padilla v. Kentucky* should be decided retroactively. The case involves a Roselva Chaidez, an illegal immigrant who was in the process of being deported when the Court decided Padilla in 2010. The Defendant's lawyer never told her that her fraud conviction could lead to deportation. The Defendant is now claiming that she should be able to take advantage of the Supreme Court decision rendered in *Padilla*. The issue of retroactivity has been up in the air since the *Padilla* ruling, and the Supreme Court has indicated that it will hear arguments on the issue sometime in the fall.

The Court, during its next term, will also decide a search and seizure case involving the use of dogs to sniff out narcotic substances. The case is known as *Florida v. Harris*. Some briefs were submitted in the matter during the past term, but the Court has scheduled oral argument and will decide the matter in the Fall, after resuming its session in October.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from May 1, 2012 to August 1, 2012.

People v. Drake (N.Y.L.J., May 3, 2012, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Fourth Department, reversed a Defendant's homicide conviction on the grounds that the trial court wrongfully admitted evidence of an uncharged crime. In the case at bar, the trial Judge had allowed evidence of the Defendant's alleged post-mortem sexual assault on one of the victims to establish the issue of homicidal intent. The Appellate Division concluded, however, that this evidence was not directly relevant to the purposes for which it was offered, and since it related to a particularly heinous claim, its prejudicial effect outweighed any probative value. The Court also noted that another error had occurred during the trial when the Court failed to advise counsel regarding a jury note which had been received, and the Court even failed to respond to the jury note in question. Under these circumstances, a new trial is required.

People v. Lou (N.Y.L.J., May 10, 2012, pp. and 2)

In a unanimous decision, the Appellate Division, Second Department, held that a Defendant should be granted a new hearing to determine if he received ineffective assistance of counsel. In a case where the Defendant was convicted of murder some 20 years ago, he raised the issue in a post-conviction motion that his Attorney had failed to further investigate the case because he had been threatened by the co-Defendant. As part of his initial motion, the Defendant had attached an affirmation from the attorney in which he stated that he was threatened by his client's co-Defendant and believed that if he did not stop the investigation his life would be in jeopardy. The Court below denied the motion without a hearing and rejected the attorney's affirmation as being vague and unbelievable. The Appellate Division, however, concluded that a hearing should have been held, and testimony received regarding the issue in question.

People v. Cristos Tomo (N.Y.L.J., May 3, 2012, pp. 1 and 4)

In a unanimous opinion, the Appellate Division, First Department, held that a person who commits a violent felony while on work release from a drug sentence may still be eligible for resentencing. The Court noted that it and the New York Court of Appeals had already ruled in *People v. Paulin,* 17 N.Y.3d, 238, that the resentencing statute must be read literally and that a sentencing judge could still refuse to resentence if resentencing would not serve "substantial justice."

People v. McDuffie (N.Y.L.J., May 11, 2012, p. 2)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's murder conviction because the trial Judge had failed to obtain the Defendant's written consent to the substitution of a juror after the jury had begun deliberations. CPL Section 270.35 requires the completion of a jury substitution waiver form, and nothing in the record indicated that the form had been signed in open court before the Judge, as was required. The Court also noted that the trial Judge had failed to fully explore whether the Defendant was making an informed choice regarding the substitution waiver. The appellate panel relied upon a 1996 New York Court of Appeals ruling in *People v. Page*, 88 NY 2d 1, which equates Criminal Procedure Law 270.35 with State constitutional requirements for the valid waiver of a jury trial. Based upon the interesting issue which is presented in this case, it is possible it may eventually find its way to the New York Court of Appeals.

People v. Baez (N.Y.L.J., May 23, 2012, pp. 1 and 7)

The Appellate Division, First Department, affirmed a Defendant's conviction for weapons possession even though a majority of the panel concluded that the Trial Judge had committed error in failing to suppress a Defendant's admission that a knife found by police in a vehicle in which he was a passenger belonged to him. A three-Judge majority concluded that the Defendant was in custody and was interrogated under the Miranda standards without any warnings being read to him. Under these circumstances, the Defendant's admission should have been suppressed. Nevertheless, the majority concluded that a reversal was unnecessary, since at the trial the People presented overwhelming proof of Defendant's guilt, including a phone call from the jail in which the Defendant again admitted that the knife was his.

Two Appellate Division Judges joined the in the result affirming the Defendant's conviction, but argued that the trial Judge was correct in allowing the Defendant's statement into evidence and that the majority was incorrect in ruling that suppression was warranted.

People v. Clermont (N.Y.L.J., June 4, 2012, pp. 1 and 4)

In a 3-1 decision, the Appellate Division, Second Department, held that a Defendant did not receive ineffective assistance of counsel even though the Defendant's attorney had failed to make an opening and closing argu-

ment at a suppression hearing. The appellate panel ruled that notwithstanding the absence of an opening or closing statement, and the suppression court's mistaken factual findings as to when the Defendant dropped the weapon, the evidence, the law, and the particular circumstances of the case viewed in totality revealed that defense counsel provided meaningful representation. The three-Judge majority consisted of Justices Dillon, Eng and Sgroi. Justice Miller dissented.

People v. Guilford (N.Y.L.J., June 12, 2012, pp. 1 and 2)

In a 3-2 decision, the Appellate Division, Fourth Department, upheld the use of a confession that was taken during an interrogation which was conducted during a 49-hour period with an 8-hour break. The majority opinion upheld a final statement which the Defendant made toward the end of the interrogation, even though they suppressed virtually everything else that lead up to the admission. The Court found that the definite pronounced break between the 49½ hour session and the one that elicited the confession was sufficiently attenuated to remove any taint. The two dissenting Judges stated that in their view, the relatively brief break in the interrogation was not sufficient to return the Defendant to the status of one who was not under the influence of questioning. Due to the sharp division in the Court, it appears that this case will be headed to the New York Court of Appeals.

People v. Campbell (N.Y.L.J., June 14, 2012, pp. 1 and 3)

The Appellate Division, Second Department, unanimously held that a sexually violent Defendant with three arrests for sex crimes dating back to 1984 was improperly designated a high risk offender based upon a juvenile record. The Court held that in determining the risk level, juvenile records occurring in the Family Court could not be utilized to enhance the level. The Second Department, in issuing its ruling, observed that "If the mere fact that an individual was adjudicated a juvenile delinquent is to be considered in assessing points against an offender pursuant to [the Sex Offender Registration Act], such consideration must be specifically authorized by the Legislature and not by the courts or the Board of Examiners of Sex Offenders." The Second Department ruling is contrary to two holdings in the Third and Fourth Departments, and it appears that the issue may eventually have to be determined by the New York Court of Appeals.

People v. Huntsman (N.Y.L.J., June 15, 2012, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Fourth Department, upheld a Defendant's conviction even though the Court found that the prosecutor had engaged in various acts of misconduct. Although defense counsel had failed to object to the instances of misconduct and therefore failed to preserve the issue for appellate review, the Appellate Division exercised its interest of justice discretion to address the matter but concluded that the instances which occurred were harmless and did not require a reversal. The Court noted that the prosecutor in question had been admonished in the past and a reminder was warranted regarding the special responsibilities of prosecutors to safeguard the integrity of criminal proceedings and fairness in the criminal process.

People v. Blond (N.Y.L.J., June 18, 2012, pp. 1 and 8)

In a unanimous decision, the Appellate Division, Third Department, upheld a Defendant's conviction for raping his wife's 15-year-old niece, and held that evidence that he abused his wife was properly admitted to show implicit forcible compulsion. The Court noted that the victim had, on several occasions, seen the Defendant violently abuse her aunt and had reason to fear him. The jury thus could consider this information in determining whether an implied threat existed, and to counteract any defense claim that the victim had voluntarily complied. The Court concluded that the probative value of the evidence outweighed any prejudicial effect.

People v. Kins (N.Y.L.J., June 20, 2012, pp. 1 and 2)

In a 4-1 decision, the Appellate Division, Fourth Department, reversed a Defendant's conviction for cocaine. The drugs were in plain view in the Defendant's kitchen but the Defendant had left the apartment five minutes earlier. The apartment was also occupied by the Defendant's companion. In applying the Penal Law presumption that drugs found in a room are regarded as possessed by everyone in close proximity, the Appellate Division found that under the facts of the case, the Defendant was not in flight. He was apprehended several minutes after leaving the apartment, and the apartment was occupied by someone else. The distance in time and space between the drugs and arrest therefore rendered the presumption inapplicable, and the conviction should be reversed. In a similar ruling, the Appellate Division, First Department, in *People v. Rosado*, held that the presumption in question should apply only to crimes involving drug sales or amounts of narcotics greater than that required for a misdemeanor possession charge.

People v. Deacon (N.Y.L.J., June 21, 2012, pp. 1 and 7)

In a unanimous decision, the New York Court of Appeals reversed a Defendant's murder conviction and ordered a new trial. The Court concluded that the Defendant's post-conviction CPL 440 motion regarding a 20-year-old case should have been granted, based upon newly discovered evidence. In the case at bar, a key wit-

ness in the case had recanted, and a gang member had revealed after the original trial that another person, and not the Defendant, had killed the victim. In issuing its decision, the Appellate Division concluded, "We find that the likely cumulative effect of the newly discovered evidence and the recantation testimony established a reasonable probability that the result of a new trial would be a verdict more favorable to the Defendant."

People v. Chuang (N.Y.L.J., June 25, 2012, pp. 1 and 2)

In a 4-1 decision the Appellate Division, First Department, upheld a maximum 15-year sentence imposed upon a Defendant for weapons possession who threatened others with an assault rifle and a semi-automatic, even though he never fired them. The four-Judge majority found that the Defendant's actions were sinister and menacing, and involved behavior which would fit the definition of violent. Under these circumstances a maximum sentence was warranted. Justice Catterson dissented, arguing that the punishment was too harsh and that a maximum sentence for weapons possession had been traditionally upheld by the Appellate Court only when someone had been harmed by the weapon in question.

In re Darryl C. (N.Y.L.J., June 27, 2012, pp. 1 and 7)

In a 3-2 decision, the Appellate Division, First Department, held that the police had no right to stop and frisk a nervous looking young man in a gang-ridden area from whom they recovered a pistol. The three-Judge majority found that the officer lacked reasonable suspicion and held that his testimony that he feared for his personal safety when he saw the Defendant holding an unidentified black object was not sufficient to justify the subsequent action. The majority added that Courts have been scrutinizing aggressive police tactics, and that the officer in question was acting on a mere hunch when he reached into the Defendant's coat and found a pistol after stopping him. The officer's conduct thus could not be supported on the teenager's evasive response and the officer's unfounded claim of fearing for his safety. The majority opinion was written by Justice Tom and was joined in by Justices Moskowitz and Roman. A vigorous dissent was issued by Justices Richter and Abdus-Salaam. The sharp division in the Appellate Division in this case and the nature of the opinion makes it clear that in all likelihood, the matter will find its way to the New York Court of Appeals.

In re Jaquan (N.Y.L.J., July 5, 2012, pp. 1 and 2)

In another 3-2 decision involving a similar stop and frisk situation, as was discussed in *Darryl* C. above, the Appellate Division, First Department, ruled that police did not have probable cause to search a 14-year-old boy's backpack. The police officers had observed the boy remove an object which turned out to be a gun wrapped in bubble wrap from the waistband of his pants and place it into his backpack. The Court held that the object did not look like a gun when it was first observed, and that therefore the police lacked cause to search the backpack. The rulings of the Appellate Division, First Department, regarding these recent search and seizure rulings has engendered some controversy, and Mayor Bloomberg has publicly criticized the Court's rulings as limiting important police procedures. The three-Judge majority in the instant case consisted of Justices Mazzarelli, Renrick, and Friedman. Due to the controversy and the 3-2 nature of the Court's decisions, it appears likely that these cases will be appealed to the New York Court of Appeals.

People v. Doll (N.Y.L.J., July 10, 2012, pp. 1 and 9)

In a 3-2 decision, the Appellate Division, Fourth Department, upheld a Defendant's conviction and ruled that even though the Defendant was questioned in the absence of *Miranda* warnings after requesting an attorney, the statements which were made did not have to be suppressed because under the circumstances, the Emergency Doctrine was applicable. The Defendant was found wearing blood-soaked clothing. The police had a need to gain information about a possibly injured victim or victims, and the deputies had a right to continue questioning the Defendant despite his request for an attorney. The three-Judge majority consisted of Justices Smith, Scudder and Peradotto. Justices Centra and Fahey dissented, arguing that the notion of a victim in distress in the case at bar was speculative at best and not enough to trigger the Emergency Doctrine. The majority opinion relied upon the United States Supreme Court decision in *People v. Quarles*, 467 U.S. 649. The split decision within the Fourth Department and the issue involving the application of the Emergency Doctrine makes it likely that the matter will be addressed by the New York Court of Appeals.

People v. Torres (N.Y.L.J., July 11, 2012, pp. 1 and 2)

In another 3-2 decision, the Appellate Division, Fourth Department, reversed a Defendant's conviction and ordered a new trial on the grounds that barring the Defendant's Wife from the Courtroom for a period of time violated his right to an open trial. In the case at bar, the trial Judge had barred the Defendant's wife from the courtroom for the start of jury selection because "there wasn't any room." He stated that she would be allowed back in once the prospective jurors started to be excused. However, through an oversight, it was almost two hours before a court officer indicated to the wife that she could come back into the courtroom. During her absence, preliminary instructions were read to the jury, and some of the possible jurors were questioned and accepted or rejected. The majority opinion held that the right to an open trial was violated and that this right is not subject to

harmless error analysis. The majority decision consisted of Justice Peradotto, Fahey and Lindley. Justices Scudder and Centra dissented, and indicated that the situation which occurred was trivial and did not warrant a reversal. They further indicated that the Defendant and his wife made no effort to bring to the trial Judge's attention that the wife still wanted to enter the courtroom. This may be another case which would ultimately be decided by the New York Court of Appeals.

People v. Wisdom (N.Y.L.J., July 16, 2012, pp. 1 and 7)

In a unanimous decision, the Appellate Division, Second Department, held that the failure to swear in a Grand Jury witness regarding telling the truth before testifying was a fundamental violation and required a dismissal of the indictment against the Defendant. In the case at bar, a witness had testified in the Grand Jury but prosecutors had neglected to swear the witness as required. Eventually recognizing their error, prosecutors conducted another videotape examination during which the witness swore that she had told the truth during her first interview. The Court held that the second effort was inadequate to cure the harm which had occurred, and that a witness must be sworn before providing any testimony.

People v. Oouch (N.Y.L.J., July 16, 2012, pp. 1 and 7)

In unanimous decision, the Appellate Division, Third Department, applied the *Padilla* ruling retroactively and indicated that a Russian Defendant who pleaded guilty should have an opportunity to withdraw his plea on ineffective assistance grounds if he could show that his attorney failed to advise him of the immigration consequences. The appellate panel ordered a new hearing to determine the issues in question. It appears that the instant case is but one of many appellate rulings which will be forthcoming regarding the consequences of the recent *Padilla* decision by the United States Supreme Court.

People v. Perry (N.Y.L.J., July 20, 2012, pp. 1 and 7)

In a unanimous decision, the Appellate Division, First Department, reversed a Defendant's conviction for gun possession and ordered a new trial, on the grounds that a violation of his *Miranda* rights had occurred. The Defendant had shown police where the gun was hidden before being read his *Miranda* warnings. Even though subsequently *Miranda* rights were provided by the police, and the Defendant admitted the gun belonged to him, the appellate panel concluded that the later admission had to be suppressed because of the taint of the improper earlier admission when the Defendant responded to a police question regarding where the gun was. The appellate panel concluded that the initial non-*Mirandized* statement was a result of a conversation initiated by the police, and that the subsequent statement was obtained under circumstances indicating a single continuous chain of events. The statement should therefore have been suppressed, and a new trial was required.

People v. Pagan (N.Y.L.J., July 24, 2012, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Third Department, upheld a Defendant's conviction and ruled that he was not entitled to *Miranda* warnings when he was interrogated by telephone. The Defendant engaged in a telephone conversation with police while he was hundreds of miles away in another state, and made certain incriminating statements. The appellate panel ruled that he was not in custody at the time of the telephone call, since he could simply have gotten off the phone and hung up. Therefore, *Miranda* warnings were not required.

For Your Information

Governor Continues to Fill Appellate Division Vacancies

Governor Cuomo recently announced some additional appointments to the various Appellate Divisions. On April 5, 2012, he announced that he had appointed Justice Karen Peters as Presiding Justice of the Appellate Division, Third Department. Justice Peters replaces Justice Cardona, who died several months ago. Justice Peters is 64 years of age and is a graduate of New York University School of Law. She has served in the Appellate Division, Third Department since 1994 when she was appointed by former Governor Mario Cuomo. Justice Peters previously also served as a Justice of the Supreme Court and as an Ulster County Family Court Judge. Justice Peters is highly regarded and will be making a salary of $172,800 in her new position.

With regard to filling the position of Presiding Justice of the Appellate Division, Second Department, the Judicial Nominating Commission forwarded, in late May, the names of eight Appellate Division Justices to the Governor who were found "highly qualified." Six of the proposed nominees are presently sitting in the Appellate Division, Second Department, and two were selected from the Appellate Division, First Department. After the Governor has completed his review of the proposed nominees, he is expected to announce the appointment within the coming weeks.

The Governor is also expected to announce shortly additional appointments to cover vacancies in the various Appellate Divisions. Before the Governor began making his appointments, ten vacancies existed in the various Appellate Divisions. Three vacancies each were in the First, Second and Fourth Departments and one vacancy existed in the Third Department. Included in these vacancies were the positions of Presiding Justice in both the Second Department and the Third Department.

City Prosecutors Obtain Increases in Budgets

In early May, Mayor Bloomberg submitted his proposed budgets for the fiscal year beginning July 1, 2012, involving the five District Attorney's Offices in the City of New York, as well as the Special Narcotics Prosecutor. The Mayor's budget called for decreases in all of the District Attorney budgets ranging from 3½ to 14%. The largest decrease was scheduled for the Office of the Manhattan District Attorney, where a nearly 15% decrease was proposed. The smallest decrease, of approximately 3.5%, was targeted for Brooklyn, and the other three offices, as well as the Special Narcotics Prosecutor, were requested to accept decreases of approximately 6%.

Following strenuous objections from the City's District Attorneys, the Mayor, in his final 2013 executive budget, increased the allocations for each of the various offices so that overall, a 2.3% increase was provided over the 2012 budget, with each of the prosecution offices showing a gain over the prior budget.

Representatives of the various District Attorneys had turned to the City Council to obtain further increases in the Mayor's proposed budget. As a result, in the final budget which was approved by the Mayor and the City Council in July, an overall 3% increase for all of the City prosecutors was granted. Individually, the Manhattan office received only a slight increase of 0.35%. The Bronx was granted a 4.88% increase. Kings obtained a 3.99% raise. Queens received a 2.39% raise. Richmond obtained a 4.15% increase, and the Office of Special Narcotics received an increase of 6.64%. Overall, the 2012-13 budgets amount to slightly over 265 million dollars for all of the City offices, representing an increase of approximately 7 million dollars over last year's budget.

Federal Government Re-Indicts Former Senator Bruno

Following the recent reversal by the Second Circuit Court of Appeals of the federal conviction involving Former State Senate Majority Leader Joseph Bruno based upon the United States Supreme Court decision in the *Skilling* case, 130 S. Ct. 2896 (2010), the Justice Department proceeded to obtain from a federal grand jury a superseding indictment charging him with theft of honest services by accepting payoffs from an Albany area friend and businessman. The Second Circuit, although dismissing the original charges, had given the Justice Department permission to seek a new indictment. Former Senator Bruno is now 83 years of age, and there had been some speculation that both sides would seek to dispose of the matter without holding a retrial. Mr. Bruno pleaded not guilty to the latest indictment and was released without bail pending trial. A federal Judge recently set February 4, 2013 as the date to commence the retrial, which will be held in Albany. We will keep our readers advised of developments.

State Benefits Improperly Paid to Prison Inmates

In a continuing scenario involving the fact that government payments, both federal, state and local, have been improperly made to ineligible recipients, the New York State Comptroller, Thomas DiNapoli, recently reported that one of his audits discovered that more than $36,000 in Workers' Compensation benefits have been paid to seven inmates who were serving time in New York State prisons, and the report further indicated that as many as 193 other inmates may also have received compensation which they were not entitled to.

Chief Judge Lippman Establishes Pro Bono Requirement for Newly Admitted Attorneys

Chief Judge Lippman announced on Law Day that starting next year, prospective lawyers would have to show that they have performed at least 50 hours of law-related service before being admitted to the New York State Bar. Judge Lippman stated that the new requirement would serve a twofold purpose: it would address the large unmet need for lawyers to represent the poor and it would inculcate in aspiring lawyers a career-long duty to serve the public. The new requirement would be the first of its kind in the country for admission to a state bar. Judge Lippman's proposal appears to have drawn an initial favorable response from public officials. However, reaction has not yet been forthcoming from the various bar associations and the first class of attorneys who will be the subject of its mandate.

U.S. Home Ownership Drops to 15-year Low

Due to the prolonged economic downturn and the continued problems in the real estate market, a recent report from the Census Bureau indicated that home ownership in the United States has fallen to the lowest level in 15 years. The rate recently dropped to 65.4%, a full percentage point below last year, and way below the record of 69.2% which was reached in 2004. The report indicated that mounting foreclosures are continuing to displace homeowners, particularly the elderly, and that stricter mortgage standards are limiting purchases. The report further indicated that of the 132.6 million U.S. homes, approximately 18.5 million, or nearly 14%, are currently vacant. The report also forecasts that home ownership may continue to fall during the rest of 2012, and that an improvement may not begin to occur until the beginning of 2013.

Economic Recession Has Drained Family Savings

A recent study by the University of Michigan reported that although the economy may be slowly improving, many American families are still weighed down by increasing debt. The report found that 1 out of 5 families owes more on credit cards, medical bills, student loans and other unsecured debt than they have in savings. As of the end of 2011, the number of families that had no savings at all increased to 23.4%, compared to 18.5% in 2009. Another alarming finding was that 60% of workers reported to the survey that the value of their savings and investments was less than $25,000. The disparity between rich and poor appears to be increasing within the Nation since the Michigan study also reported that the number of American households having more than $50,000 in savings accounts and other liquid assets was now 14.6%, which was an increase from 11.8% in 2009.

Commission on Judicial Nominations Begins Search for Judge Ciparick's Replacement

Judge Carmen Beauchamp Ciparick has reached the mandatory retirement age of 70, and will be retiring from the New York Court of Appeals on December 31, 2012. The State Commission on Judicial Nominations, which is now headed by former State Chief Judge Judith Kaye, announced in early May that it is beginning its process to find a replacement for Judge Ciparick. The Commission is composed of twelve members, four chosen by the Governor, four by the Chief Judge of the New York Court of Appeals, and one each by the majority and minority leaders of the State Senate and Assembly. The Commission will be holding meetings throughout the State and will be interviewing prospective candidates. The Commission must send a list of seven nominees to the Governor by November 1, 2012, and the Governor must make his selection between January 1 and January 15, 2013. We will keep our readers advised of developments in this area.

Judge Lippman Proposes Raising Age of Criminal Responsibility

Chief Judge Lippman has announced that one of his aims regarding this year's legislative priorities is the passage of a court system reform that would raise to 18, from 16, the age of criminal responsibility for non-violent crimes. A bill already pending in the State Legislature would establish a "Youth Division" in State Superior Courts to hear misdemeanor and non-violent felony charges against 16- and 17-year-olds. The hybrid court part would stress a more rehabilitative approach in dealing with defendants in that age group, rather than possible incarceration. Judge Lippman has indicated that many sectors of the Criminal Justice System, such as prosecutors, probation departments, the defense bar, and county and municipal governments, have expressed an interest in the new proposal and its aim. However, questions have been raised regarding the course and details of the program, and it appears that additional discussion and careful consideration will be required before any final decision is made on the proposal. In fact, in an effort to meet some of the concerns which have been raised regarding the proposal, Judge Lippman provided some additional views and statistics on the situation regarding juvenile offenders, which were prominently reported in the *New*

York Law Journal of June 26, 2012 at pages 1 and 7. Since the New York State Legislature has already adjourned, it appears that any action on the Chief Judge's proposal will have to await next year's legislative session.

Minority Births Now Constitute Majority

In late May, the United States Census Bureau made official what had been projected for several months. The Bureau declared that white births are no longer a majority in the United States. As of the twelve-month period which ended in July, non-Hispanic whites accounted for 49.6% of all births. Minorities, which included Hispanics, blacks, Asians and those of mixed race, reached 50.4%, representing a majority for the first time in the country's history.

The Census Bureau also reported that overall, whites still represent 63% of the U.S. population. The white population, however, is steadily aging, and it is expected that in future years, the overall white population will continue to shrink, while the number of minorities grows. Minorities accounted for 92% of the nation's population growth in the period from 2000 to 2010. This trend is expected to continue during the next decade.

DNA Continues to Overturn Wrongful Convictions

A recent study conducted jointly by the University of Michigan Law School and Northwestern University School of Law has revealed that more than 2000 people who were falsely convicted of serious crimes have been exonerated in the United States in the past 23 years, and that in most of these instances, DNA evidence was responsible for correcting the wrongful conviction. The study also revealed that approximately 100 of the Defendants who had been exonerated had received death sentences.

Student Debt Rising

A recent report from the National Center for Education Statistics reveals that the amount of debt for college graduates jumped 5% from 2009 to 2010 for an average total of $25,200 per student. Millions of Americans now owe more for student loans than credit cards. The amount of debt would have climbed even higher if Congress had not recently voted to hold down interest rates on federally subsidized loans. The report indicated that ten States topped the list of average debt for the class of 2010. New Hampshire leads the nation, with an average debt of $31,048. New York ranked number 10, with an average debt for the class of 2010 listed at $26,271. The growing amount of student debt appears to be changing attitudes toward higher education, with many now questioning whether the high cost of a college education and the diminishing job prospects make the expense worthwhile.

Mayor Bloomberg Defends Police Policies

Following recent criticism by the New York Civil Liberties Union and other groups regarding New York City police policies regarding certain types of surveillance procedures and stop and frisk methods, Mayor Bloomberg, in early May, defended such policies as being necessary to protect the public and as having been beneficial in reducing crime rates. The Mayor, in an interview reported by the local press in early May, was quoted as stating: "Tampering with the NYPD's effective stop and frisk program could return the City to the days when it was one of the crime capitals of the United States." The Mayor pointed out that the murder rate in the City in 1990 was 2,245, and that for 2011 it had dropped to 515, less than one quarter of the 1990 totals. The New York City Civil Liberties Union, in several lawsuits which it had commenced against Police Department procedures, pointed out that the number of stop and frisks in 2002 was 97,296, while in 2011, it had jumped to 685,724. Recently, it appears that a settlement is being worked out between the Civil Liberties Union and New York City regarding the stop and frisk issue, and it appears that both sides are seeking to find a common ground which will ensure the safety of the public while protecting individual liberties.

Chief Judge Lippman to Serve on Board of the State Justice Institute

President Barack Obama, on May 23, 2012 announced that he had nominated Chief Judge Jonathan Lippman for a position on the Board of the State Justice Institute, which is a non-profit organization that works to improve the administration of justice in state courts. The State Justice Institute was established in 1984 to award grants to improve state courts, foster coordination between federal and state courts, and to develop and encourage innovative solutions to problems shared by the courts. The State Justice Institute has a budget of nearly 5 million dollars and distributes approximately 4.2 million in grants. Its Board consists of eleven members, six of whom must include state court judges who are appointed by the President and confirmed by the Senate. Chief Judge Lippman would be the first New York Chief Judge to serve on the Board since Judge Lawrence Cook served in the mid-1980s.

New York State Bar Association Pushes Legislation to Reduce Wrongful Convictions

At a formal press conference held in late May, the New York State Bar Association announced that it was pushing for the enactment of legislation which would require the police to videotape interrogations and also require "double–blind lineups" in which the officer overseeing the lineup does not know which individual is the suspect. During the press conference, which was held in Albany, several individuals who had been the subject of wrongful convictions commented on the need for reform

measures and spoke in support of two Assembly bills which are presently pending in the State Legislature that would advance the Bar Association's proposals. Past President Vincent Doyle III participated in the press conference, along with Barry Scheck from the Innocence Project. Our Criminal Justice Section has worked on the proposed legislation and has provided input to the State Bar on the issues involved.

Statistical Information Regarding the U.S. Economy

In preparation for the upcoming presidential election, PolitiFact.com, an independent fact-checking operation utilized by many daily newspapers, recently compiled statistics regarding various aspects of the United States economy. The information involved a comparison of January 2008 with April and May of 2012. Some of the interesting and important statistics are as follows.

	January 2008	**April, May 2012**
Unemployment rate	5%	8.2%
Total government jobs (federal, state, local)	22.4 million	22 million
Yearly gross domestic product	$13.2 trillion	$13.5 trillion
Disposal personal income per capita	$33,229	$32,677
People receiving food stamps	32 million	46 million
Overall inflation	4.3%	2.3%
Personal savings rate	5.4%	3.9%
Cumulative public debt	$5.14 trillion	$10.95 trillion

DNA Article

A detailed an informative article on DNA sampling was published in the *New York Law Journal* of May 22nd. The article was written by Ken Strutin, who is Director of Legal Information Services at the New York State Defenders Association. The article raises the question as to whether DNA sampling poses a challenge to privacy and dignity. It reviews the history of DNA sampling and covers legal cases which have considered the issue. The article should be of interest to many of our readers.

Cuomo Proposal Seeks to Lower Penalties for Public Marijuana Possession

In early June, Governor Cuomo called for the decriminalization of public possession of small amounts of marijuana. Under current law, possessing 25 grams or less of marijuana in private is a violation, but possessing the same quantity in public view is a Class B misdemeanor. The Governor is seeking to reduce the penalties for the same amount of marijuana in public view to a violation level. The Governor's proposal would extend the Marijuana Reform Act of 1977 to small quantities of public possession punishable by a $100 fine. The Governor's proposal is said to have the support of all five New York City elected District Attorneys and the New York City Police Commissioner. In response to the Governor's proposal, the New York Senate's Majority Leader, Dean Skelos, indicated that the Governor's proposal would not pass in his Chamber and that it would be wrong to downgrade punishment to a simple violation. The Senator indicated, however, that the Senate would be willing to work on a narrower measure. As the Legislature concluded this year's session, no action was taken on the Governor's proposal, and it appears that the matter will again be considered at the next legislative session.

Nation's Wealth Takes Dramatic Plunge

A recent report from the Federal Reserve clearly indicated the effect that the recent economic downturn has had on American families. The report indicated that the wealth of Americans in terms of a family's median net worth in 2010 had fallen to the lowest level since 1992. The survey reveals that a family's median net worth was $126,400 in 2007, but had plummeted to $77,300 by the end of 2010. This represents a 38.8% fall. Median family income dropped from $49,600 in 2007 to $45,800 in 2010, a drop of almost 7.7%. The report indicated that one of the main factors attributing to the decline in family wealth was the drop in home prices, with the middle class taking the biggest hit. Families in the South and West appear to have been hardest hit by the housing downturn.

Summer Jobs for U.S. Teens Decline

Initial reports regarding teenagers who are able to obtain summer jobs during this past summer indicate that it was probably one of the worst years since 2000. It was estimated that fewer than 3 in 10 American teenagers were able to obtain summer jobs this past year covering the months of June to August. The U.S. Bureau of Labor Statistics indicated that there has been a sharp decline in employment for 16- to 19-year-olds and that teen employment may never return to pre-recession levels. The drop in teen employment has been steeper than for other age groups. Summer employment for teenagers was listed as being particularly difficult in such areas as the District of Columbia, Arizona, California, Washington, Florida, Tennessee, North Carolina and Nevada.

New Child Pornography Legislation

As a result of a recent New York Court of Appeals decision which highlighted an apparent loophole in New York's child pornography statute, the Governor and the State Legislature moved at the end of the legislative session to enact new legislation dealing with the issue. The Court of Appeals had ruled that viewers of free on-line

child pornography were not breaking any law if they just looked but did not copy, purchase, download or otherwise exercise dominion and control over illegal images. Under the new law, which would closely resemble the federal Statute, what would be prohibited would also include "the knowing access with intent to view sexual performances by children." To protect attorneys who have access to such material solely in the course of their representation of defendants charged with possession of child pornography, the Statute contains a specific exemption to cover their representation.

2011 Law Graduates Still Face Tough Employment Market

A recent report by the National Association for Law Placement indicated that employment rates for 2011 law graduates is at an 18-year low. With respect to graduates from several New York area law schools, the study concluded that 9 months after graduation, the percentage of employed law graduates had dropped by approximately 6 percentage points from an all-time high in 2007. With respect to 8 New York law schools, the report indicated the following:

Law School	Employment Rate	% of Employed in Private Practice
Cardozo	82.6%	47.0%
CUNY	77.6%	25.3%
Columbia	98.2%	69.4%
Cornell	92.9%	52.7%
Fordham	86.0%	49.7%
Pace	85.3%	38.9%
St. John's	86.0%	48.3%
Syracuse	83.9%	41.7%
National Average	**85.6%**	**49.5%**

A report recently released by the American Bar Association also found similar results for the 8 schools listed above. With respect to the New York Schools not listed in the Law Placement survey, the American Bar Association revealed the following:

Law School	Employment Rate
Albany	80.5%
Brooklyn	67.0%
Buffalo	76.7%
Hofstra	78.8%
New York	77.7%
NYU	95.7%
Touro	76.9%

Asians Now Top U.S. Immigrants

A recent study by the Pew Research Center indicates that for the first time, the influx of Asians moving to the United States has surpassed that of Hispanics, and that now Asians constitute the fastest growing immigration group. According to the report, in the year 2010, approximately 430,000 Asians arrived in the United States, constituting 36% of all new immigrants. That compared with about 370,000 who were Hispanic, or 31% of the immigrant group. The report also found that many of the arriving Asians are highly skilled workers, and the Asian population appears to have a lower unemployment rate and a higher level of education than the overall U.S. population. For example, while the unemployment rate among all U.S. workers for the first quarter of 2012 was just under 8%, the unemployment rate for Asian Americans ages 25 and older was only 6%. Further, while 28% of the general U.S. population had at least a Bachelor's Degree, 49% of Asian Americans had reached at least that education level. Asian Americans, in 2010, also appeared to have a lower poverty rate level than the general U.S. population. The increase in the Asian population in the U.S. is attributed to changes in the immigration policy beginning in the 1990s, which began to favor wealthier and more educated workers from such countries as India and South Korea.

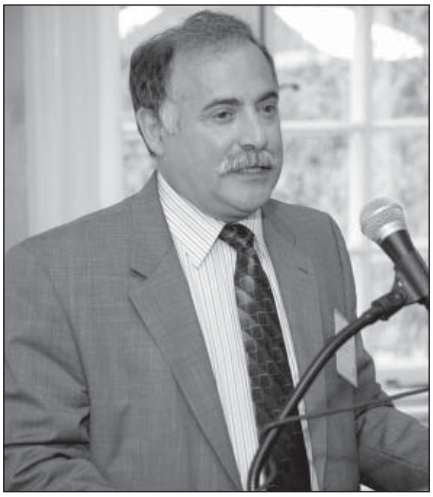
Job Situation Still Better in U.S. Than in Europe

Although the United States has been rightfully concerned about the high level of unemployment in the U.S. during the last several years, a recent report indicates that the U.S. employment situation is still far better than many of the nations in Europe. A report from the European Central Bank indicates that while in May 2012 the U.S. unemployment rate was at 8.2%, in several major European nations, it was higher than 10% and as high as 24%. Thus the report indicated that Ireland had an unemployment rate of 14.2%, Portugal had a rate of 15.2%, France was at 10.2%, Spain was at 24.3%, Italy was at 10.2%, and Greece was at 21.9%. Of the major European nations, only Germany had a better employment record than the United States, with Germany's unemployment rate settling at 5.4%. It appears that it will be difficult to improve the employment situation in the United States as long as many of the major nations in Europe continue to face their own serious economic problems.

About Our Section and Members

Spring CLE Program

Section Chair Marvin Schechter welcomes guests and introduces program



Guest speaker makes point at CLE portion

The Criminal Justice Section held its spring meeting and CLE program during the weekend running from May 4-6, 2012. The meeting was held at the Gideon Putnam Resort Hotel in Saratoga Springs, New York. The Saturday CLE program discussed various aspects regarding the presentation of evidence, including appellate evidence rulings, GPS devices and forensic discipline issues. The speakers included Professor Richard T. Farrell from the Brooklyn Law School, Attorney Jay Shapiro, and Section Chair Marvin E. Schechter. The Sunday session included additional discussion of troublesome evidence rules and discovery issues. These topics were discussed by Justice Mark R. Dwyer and Assistant District Attorney Robert Masters from the Queens District Attorney's Office.

The three-day session also included some social aspects, with a Friday night reception and dinner, and two breakfast sessions. The Spring program was attended by approximately 40 members.

Participants at the Saturday night dinner

Norman P. Effman presents award

Martin Adelman presents award

Section Receives Diversity Award

The Criminal Justice Section recently received a second place award for encouraging diversity within the Section. The award was presented at a recent program which was held by the New York State Bar Association, and the award was accepted on behalf of the Section by Guy Mitchell. The photo below depicts the award presentation ceremony. Participating in the presentation of the awards were New York State Bar Association President Seymour James and Past-President Vincent Doyle, III, both of whom have long been active in our Section, as well as Sherry Levin Wallach, who has been active both in our Section and on the Diversity Committee.

2012 President's Section Diversity Challenge

The New York State Bar Association President's Section Diversity Challenge: In 2011, NYSBA President Vincent E. Doyle III challenged NYSBA Sections to develop and execute initiatives to increase the diversity of their membership, leadership and programs, and to evaluate the results. The Committees on Membership and Diversity and Inclusion were tasked with coordinating the initiative. The Challenge began in June 2011 and concluded in March 2012.

Criminal Justice Section Awarded
2nd Place—Section Diversity Leaders

Working Together, Everything Fits

NYSBA

NEW YORK STATE BAR ASSOCIATION

Section Chair
Marvin E. Schechter, Esq.
New York City

Program Chair
Hon. Phylis S. Bamberger
New York City

NYSBA

Criminal Justice Section

Fall Meeting

Forensics and the Law

Concierge Conference Center
780 Third Avenue, New York, New York 10017
(Between East 48th & East 49th Streets)
Friday, October 12, 2012
8:30 a.m.–5:10 p.m.

Under New York's MCLE rule, this program has been approved for a total of up to 8.0 credit hours of professional practice. This program does not qualify for credit for newly admitted attorneys because it is not a basic practical skills program.

SCHEDULE OF EVENTS

Thursday, October 11

5:30 p.m. **Meeting of the Criminal Justice Section Executive Committee**
New York County Lawyers Association
14 Vesey Street (between Broadway and Church Street)
New York, NY 10007

Friday, October 12

8:30 a.m. – 8:45 a.m. **Registration**

8:45 a.m. – 9:00 a.m. **Welcome & Introductions**

9:00 a.m. – 9:50 a.m. **Review of Current Issues Involving False Identifications**

Jennifer Dysart, MD
Associate Professor, John J. College of Criminal Justice
New York City

Marvin E. Schechter, Esq.
New York City

9:50 a.m. – 10:40 a.m. **Issues Involving False Confessions**

Saul Kassin, Professor, John J. College of Criminal Justice
New York City

Hon. Phylis S. Bamberger
New York City

10:40 a.m. – 10:55 a.m. **Break**

10:55 a.m. – 11:45 a.m. **Review of Developments in Arson Investigation**

John Lentini, CFI, D-ABC, Scientific Fire Analysis
Big Pine Key, Florida

Marvin E. Schechter, Esq.
New York City

11:45 a.m. – 12:35 p.m. **Understanding the Impact of Human Factors on Latent Print Examinations**

Melissa Taylor, Study Director, Management & Program Analyst
Law Enforcement Standards Office Forensic Sciences Program
National Institute of Standards & Technology (NIST)
Gaithersburg, Maryland

Hon. Phylis S. Bamberger
New York City

SCHEDULE OF EVENTS

Friday, October 12 (continued)

12:35 p.m. – 1:35 p.m. **Break for Lunch**

1:35 p.m. – 2:25 p.m. **Issues Involving *New Jersey v. Henderson* in New York Practice**

Marvin E. Schechter, Esq., Marvin E. Schechter Law Firm
New York City

2:25 p.m. – 2:40 p.m. **Break**

2:40 p.m. – 5:10 p.m. **Panel Discussion**
"Legal Issues Arising from Forensic Laboratory Operations"

Moderator
Marvin E. Schechter, Esq., Marvin E. Schechter Law Firm
New York City

Panelists
Robert A. Adamo, M.S. D-ABC, Director, Division of Forensic Science
Westchester County Department of Laboratories and Research
Westchester, New York

Linda Kenney Baden, Esq.
Law Office of Linda Kenney Baden
New York City

Catherine Leahy Scott, Esq.
Acting State Inspector General
Albany, New York

Cocktail Reception Immediately Following Program

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The Criminal Justice Section Welcomes New Members

We are pleased that during the last several months, many new members have joined the Criminal Justice Section. We welcome these new members and list their names below.

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David B. I. Antler
Philip Vincent Apruzzese
Gil Auslander
Chris Balioni
Marie B. Beckford
Adele Bernhard
Alyssa Bombard
Kyle Brittingham
Ashley Carter
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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.

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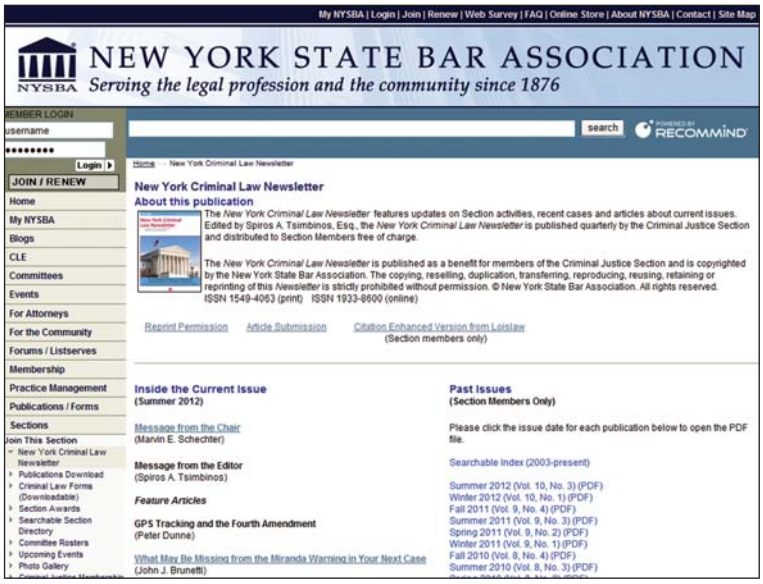

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