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New York Criminal Law Newsletter

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

New York Court of Appeals Modifies Doctrine of Inconsistent Verdicts

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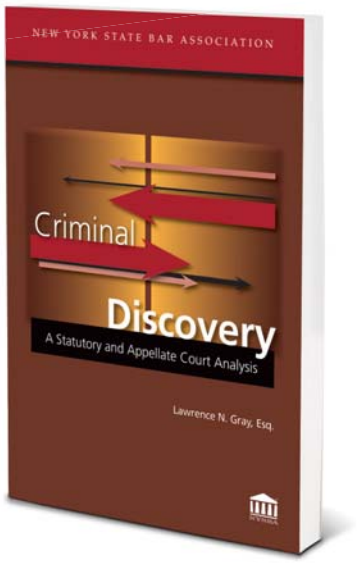

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Message from the Chair

This is my last column as Chair of the Section. As it is written on February 4, 2013, the prospects for change on several issues—eyewitness identification, false confessions, *Brady* compliance—are currently being discussed in various forums. The Justice Task Force convened by Justice Lippman has commenced discussions re discovery reform and the New York State Bar Association has a committee appointed by President Seymour James dealing with discovery issues. At the Annual Executive Committee Meeting in January, 2013, I announced, after discussions with the officers, that the Section would form a Litigation Reform Committee which would simultaneously investigate and report on the problem of ineffective assistance of counsel and how that issue is dealt with by the disciplinary system, a subcommittee which would explore the creation of a model CLE program for teaching *Brady* compliance and also develop a publication which would delve into the ethical obligations associated with the same, and finally a subcommittee which would engage in a root cause analysis of *Brady* non-compliance and make appropriate recommendations for change. The last committee would be comprised of an equal number of prosecutors and defense attorneys with a non-voting chair. We can expect that the work of all the committees will take a year.

The *Brady* non-compliance subcommittee is the most controversial. The reasons for establishing such a committee are self-evident. First, the cases keep on coming. In *Lopez v. Miller*, Judge Garaufis found that the defendant did not receive a fair trial and ordered his release from prison after 23 years of incarceration. Mr. Lopez was the victim of the perfect storm: ineffective assistance of counsel, judicial failure to give meaningful consideration to powerful defense arguments, and the prosecutor's false representation to the trial court that a "contract" was not discussed with the witness when in fact it had been discussed in another court before another judge, the "contract" being testimony against Mr. Lopez in return for consideration on a pending VOP. The court, echoing words that were previously alluded to by Judge Walker in *People v. Waters*, a Bronx case where a mistrial was granted because of the prosecutor's "act of deceit," said Mr. Lopez had been wronged at the hands of "an overzealous and deceitful trial prosecutor." The defense attorney, egregiously, had failed to interview alibi witnesses that could have been helpful to the defense.

In Sullivan County, Judge Frank LaBuda declared a mistrial in a sexual abuse case when it was discovered at trial that *Brady* material had not been revealed to the defense. In his decision Judge LaBuda rejected the prosecutor's claims that the material was not *Brady*, noting that the material was clearly identifiable as *Brady* material and that it had not been given to the defense in a timely manner so as to permit its proper usage in defending the client. Additionally, the court stated that aside from the duty to disclose *Brady* material, there is an additional duty to inform the court of the *"existence of material not believed by them to require disclosure but as to which there may exist an element of doubt."* *People v. Gonazales*, 74 AD 2d 763, 765 (emphasis supplied).

The *Brady* issue is not going away. The National Association of Criminal Defense Attorneys has secured sponsorship of a *Brady* reform bill before Congress. Three different authors have recently written law review articles analyzing the possible causes of non-compliance. Section member Joel Rudin has written a law review article in the *Fordham Law Review* which recounts several *Brady* abuses occurring in New York City cases. Jack Welch of the Department of Justice has written in the *National Law Journal* that *Brady* problems stem from a "conflict of interest" that prosecutors have since they believe the person they are prosecuting committed the crime but are confronted by evidence which may indicate that is not the case. This focused attention requires that the issue be undertaken by the Section.

As you are aware, in September the Section Executive Committee passed a motion that it is *not* the position of the Section that District Attorneys teach their assistants to violate *Brady*. That alone, in conjunction with the currency of the issue, should be enough to insure that the Section undertakes a position. Far more important, however, is the need to air this issue in a fair way so as to end the disconnect between the prosecutors and the defense bar regarding this issue. Many defense counsels believe that *Brady* material is withheld, just as many prosecutors claim there is no *Brady* problem at all. Such a gulf on any issue among lawyers for both sides must be bridged if there is to be an end to the far too many cases where the courts continue to find *Brady* being violated.

To be sure there are many prosecutors who have never violated the *Brady* mandate but are at a loss to provide an explanation for the repeated violations. Yet the case law clearly indicates that a pattern of violations exists from the highest levels of the Department of Justice all the way down to local courts. Some prosecutors have advanced the notion that more training is needed. In July/August, 2012, however, several prosecutors in letters to the *New York Law*

Journal indicated that training is already being done, and in fact, extra training is the order of the day. If that is so then something is wrong with the training based on the case law results. More importantly, no one has offered a concrete reason why training is the answer because no one has yet analyzed what is causing the non-compliance. Is it seriously being contended that after 50 years of decisions and training programs prosecutors do not understand *Brady*? Several authors have suggested the problem lies in the lack of accountability, specifically a veiled disciplinary system that rarely sanctions prosecutors for *Brady* failures. Of the many parts to the puzzle clearly the disciplinary system which applies to all lawyers is in serious need of reform.

Change is difficult and often engenders resistance. Some people are ready to change and others are not. Change will come, however, because our system of justice has yet to attain the levels of fairness guaranteed by the Constitution. Compliance is merely following the law. As for the Section, we will be better off for tackling this issue by having all voices heard even if the debate will be painful. We simply can no longer look the other way.

Marvin E. Schechter

The opinion expressed in this column are solely those of the Chair and do not reflect the position of the New York State Bar Association or the Criminal Justice Section.

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Message from the Editor

In this issue we present an interesting article by Judge Brunetti regarding the use of deception by police to obtain confessions from Defendants. The article is particularly relevant at this time since the New York Court of Appeals presently has before it two cases involving the issue where various Appellate Divisions have taken conflicting positions on the matter. Judge Brunetti provides a detailed history of the issue dealing with both federal and state case law. The Judge has become a regular contributor to our *Newsletter* and we thank him for his informative article. We also provide a feature article regarding a recent case from the New York Court of Appeals which modified the doctrine of inconsistent verdicts. The article is written by Paul Schechtman and Megan Quattlebaum. Paul Schechtman is a leading criminal law practitioner and has been a regular contributor to our *Newsletter*. Co-author Megan Quattlebaum is an associate and colleague of Mr. Schechtman's in the law firm of Zuckerman Spaeder LLP. She is a first-time contributor to our *Newsletter* and we look forward to receiving additional articles from her.

We also provide information regarding recent developments in the New York Court of Appeals, including the recent death of Judge Theodore Jones. We present a tribute to Judge Jones. Governor Cuomo recently announced the appointment of CUNY Law Professor Jenny Rivera to fill the seat vacated by Judge Ciparick, who recently retired. We provide a profile of the new Court of Appeals Judge. Nominating procedures to fill the additional Court of Appeals vacancy are continuing, and we report on developments on this matter. Also with respect to the New York Court of Appeals, we provide summaries of recent decisions dealing with significant criminal law issues.

The United States Supreme Court has also recently heard oral argument in several important cases and we discuss these matters as well as reporting on already issued decisions on criminal law issues. In the "For Your Information" section we provide details regarding recent occurrences which have affected the operation of the court system, including the submission of the judicial budget for the coming year and the felony conviction rate for the various counties within the City of New York.

Since our Section had its Annual Meeting on January 24, 2013 at the Hilton Hotel in New York City, we also provide photos and details regarding the activities at our awards luncheon and CLE program. Our luncheon was attended by approximately 135 members. As in the past, several awards were distributed to noteworthy recipients. It was a pleasure to recognize these individuals for their outstanding work and service to the Criminal Justice System. The names of this year's award winners are published in our "About Our Section and Members" article.

This *Newsletter* serves as the lines of communication between our Criminal Justice Section and its members, and we encourage comments and suggestions from the membership. As in the past, I also appreciate receiving articles for possible inclusion in the *Newsletter*, and encourage the submission of such articles by our members. We are completing the tenth year of our publication, and I again thank our members for their support of our *Newsletter*.

Spiros A. Tsimbinos

LOOKING FOR PAST ISSUES
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Deception During Custodial Interrogations

By John Brunetti

Introduction

Any discussion about the use of deception during a custodial interrogation to which *Miranda* applies should begin with *Miranda* itself: "[a]ny evidence that the accused was threatened, ***tricked,*** or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege."[1] The Supreme Court would reassert that principle in *Moran v. Burbine*: "…the relinquishment of the right [to remain silent] must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or ***deception***."[2]

A WestLaw search for deception cases in the U.S. Supreme Court database[3] turns up only eight post-*Miranda* cases,[4] none of which either expressly ruled, or even impliedly suggested, that deception may be used during custodial interrogation without violating *Miranda*.[5] The New York Court of Appeals has never issued a ruling that expressly approves of the use of deception during custodial interrogations to which *Miranda* applies.[6]

The New York Deception Cases

The existing New York Court of Appeals' rule governing the admissibility of statements procured via deception was expressed in *People v. Tarsia*[7] in the context of a non-custodial interview. Since the defendant in *Tarsia* was not in custody when he made his statement, *Miranda* was inapplicable. As a result, the only arguments Tarsia had to advance when seeking suppression of his statement based on deception were a traditional involuntariness/due process claim and a CPL 60.45(2)(b)(i)[8] claim. It was in the context of rejecting the due process claim that the Court of Appeals stated the rule governing the use of deception to obtain a suspect's admission (during a non-custodial interview), a rule that has been cited time and time again since: "But such stratagems need not result in involuntariness without some showing that the deception was so fundamentally unfair as to deny due process or that a promise or threat was made that could induce a false confession."[9]

The *Tarsia*[10] rule was announced in a case where the statement was procured via deception in a non-custodial interview and has been properly applied to those settings by the Court of Appeals[11] and Appellate Division.[12] In fact, both the First and Second Departments have made special note of the fact that "the defendant was not in custody"[13] when applying *Tarsia*. However, *Tarsia* has also been cited by the Appellate Division, instead of *Miranda*, in cases where the statement was the product of custodial interrogation[14] to which all aspects of *Miranda* are applicable.

Under the foregoing backdrop, it is difficult to understand how the Second Department could assert in a 2012 custodial interrogation case to which *Miranda* applied: "Our review of the case law amply demonstrates that when interrogating a suspect, the police may, as part of their investigatory efforts, deceive a suspect, and any resulting statement will not be suppressed for that reason alone" and "mere deception, without more, is not sufficient to render a statement involuntary."[15] The only Court of Appeals cases cited for those propositions were three non-*Miranda* cases: *People v. Tarsia,* where the defendant was not in custody and both *People v. Pereira* and *People v. McQueen,* where *Miranda* was inapplicable.[16]

Is There a Difference Between Deception in Extracting a Waiver and Deception in Extracting an Answer?

The propriety of the use of deception during custodial interrogations may turn upon whether there is a constitutional difference between the use of deception to cajole a defendant into an initial agreement to speak with the police and the use of deception during the interview to cajole the defendant to answer a particular question. Said another way, when an express *Miranda* waiver precedes questioning, each time a suspect is asked a question, he has to decide whether or not to answer that question. If he does so, he is committing a waiver of the right to silence and counsel by answering that particular question.

Eight Reasons Why There is No Difference Between Deception in Extracting a Waiver and Deception in Extracting an Answer

There are eight reasons why *Miranda's* and *Burbine's* deception decrees may not be confined to the defendant's initial waiver, but also apply throughout the entire interrogation because an answer to an interrogator's question, in and of itself, constitutes a discrete *Miranda* rights waiver.

First, the striking similarity evident in the Supreme Court's definitions of a voluntary statement and a voluntary *Miranda* rights waiver demonstrates their functional equivalents. In *Colorado v. Spring*,[17] the Court defined a voluntary *Miranda* waiver as meaning "voluntary in the sense that it was the product of free and deliberate choice." Nineteen years earlier in *Greenwald v. Wisconsin*,[18] the Court defined the due process voluntariness test as requiring that the statement itself be a product of the defendant's "free and rational choice."[19] The similarity of these definitions begs the question: What is the difference between requiring that a "voluntary statement" be the

product of the defendant's "free and rational choice" and requiring that a "voluntary *Miranda* waiver" be the product of the defendant's "free and deliberate choice"?

Second, twelve years after *Miranda*, in *Fare v. Michael C.*,[20] the Court said that "the determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have counsel." The Court did not limit the scope of the inquiry to the circumstances surrounding the defendant's initial decision to speak, but rather extended it to the circumstances surrounding the entire interrogation.

The third reason is the required content of the warnings. Omission of the advisement of the right to assert silence and/or request counsel *during* questioning is a fatal defect.[21] If deception is used to leverage an admission *during* the interrogation, and if *Miranda* rights include the right to remain silent and consult counsel *during* interrogation, then it would seem to follow that a waiver secured by deception during an interrogation is not valid.

The fourth reason is the Supreme Court's decision in *Colorado v. Spring*.[22] There the Court held that police need not advise the defendant of the crime that is going to be the subject of the questioning, because the *Miranda* advisement "anything you say may be used against you" literally covers "anything." The defendant in *Spring* relied upon the Supreme Court's statement in *Miranda* that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will…show that the defendant did not voluntarily waive his privilege."[23] The Court rejected that argument, saying, "Spring, however, reads this statement in *Miranda* out of context and without due regard to the constitutional privilege the *Miranda* warnings were designed to protect." The Court would go on to say that it had "never held that mere silence by law enforcement officials as to the subject matter of an interrogation is 'trickery' sufficient to invalidate a suspect's waiver of *Miranda* rights, and…expressly decline[d]" to so hold. However, at the same time the Court made clear via footnote that it was "not confronted with an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation and [would] not reach the question whether a waiver of *Miranda* rights would be valid in such a circumstance."[24]

The fifth reason is the express finding by the U.S. Supreme Court in its 2010 decision in *Berghuis v. Thompkins*:[25] "Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that *Miranda* rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests."[26]

The sixth reason is the rule adopted by both the United States Supreme Court[27] and the Court of Appeals,[28] that a defendant who is shown to have understood his *Miranda* rights and thereafter answered questions about the crime will be found to have committed an implied waiver of his rights to silence and counsel even if he never says words to the effect, "I understand my rights and I am willing to answer your questions."[29]

The seventh reason is the Chief Judge of the State of New York's view, albeit expressed in a dissent, that each answer a suspect gives to an interrogator's question is, in and of itself, a discrete *Miranda* rights waiver. In a lengthy dissent in *Matter of Jimmy D.*,[30] Chief Judge Lippman asserted:

> The majority's evident insistence that subsequent to the initial waiver, the question of whether the waiver remains valid is supplanted by an inquiry into the [traditional] voluntariness of any ensuing confession, is simply not compatible with the basic waiver theory upon which *Miranda* rests.… Contrary to the majority's view, the continuing validity of a *Miranda* waiver is not a non-issue after the waiver has first been made, even in the absence of the waiver's retraction. Logically, every response made during a custodial interrogation is a reaffirmation of the original waiver.[31]

The eighth and perhaps most important reason is the Supreme Court's assertion that one of "[t]he purposes of the safeguards prescribed by *Miranda*, [is] to ensure that the police do not coerce or trick captive suspects into confessing."[32] Key here is that the Court did not say "trick the suspect into talking." If it had, then one could argue that deception is only prohibited in extracting a suspect's agreement to talk. But the Court went further—deception is prohibited in extracting a "confession."

Endnotes

1. *Miranda v. Arizona*, 384 U.S. at 476–77. The Court would later reassert this principle in *Moran v. Burbine*: "…the relinquishment of the right [to remain silent] must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception."
2. *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135 (1986).
3. "MIRANDA & BURBINE & or FRAUD or DECEI! or DECEPTION or TRICK! or CAJOLE or RUSE."
4. *Moran v. Burbine*, 475 U.S. 412 (1986); *Colorado v. Connelly*, 479 U.S. 157 (1986); *Colorado v. Spring*, 479 U.S. 564 (1987); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *Illinois v. Perkins*, 496 U.S. 292 (1990);

Missouri v. Seibert, 542 U.S. 600 (2004); *Montejo v. Louisiana*, 556 U.S. 778 (2009); *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010). "MIRANDA & TRICK or CAJOLE /P FRAUD or DECEI! or DECEPTION or TRICK! or CAJOLE or RUSE" turns up sixteen cases, but none that expressly address deceit.

5. The Supreme Court's 1969 decision in *Frazier v. Cupp*, 394 U.S. 731, 738, 89 S.Ct. 1420 (1969), should not be read as controlling precedent on deception in the *Miranda* context, despite the fact that the Supreme Court of Minnesota once did so in *State v. Thaggard*, 527 N.W.2d 804, 810 (Minn., 1995) (The Supreme "Court did not intend to adopt a per se rule of exclusion of all post-waiver confessions and statements induced by the use of trickery and deceit," citing *Frazier*). In *Frazier*, the Supreme Court expressly stated that "*Miranda* does not apply to this case." *Frazier v. Cupp*, 394 U.S. at 738.

6. *People v. Everett*, 10 N.Y.2d 500, 225 N.Y.S.2d 193 (1962), *cert. denied*, 370 U.S. 963, 82 S. Ct. 1593 (1962), was a pre-*Miranda* case which applied a "century"-old New York precedent for trickery ["Almost a century ago, Chief Judge Davies stated that 'a confession is admissible, although it is…obtained by artifice or deception.'"] and upheld a confession procured by the police falsely telling a suspect that the victim was still alive downstairs and had identified him, even though the victim had died a week earlier and never identified him. *People v. Tankleff*, 84 N.Y.2d 992, 622 N.Y.S.2d 503 (1994), *conviction vacated*, 49 A.D.3d 160, 848 N.Y.S.2d 286 (2d Dep't 2007), was a non-*Miranda* case where the defendant was not in custody at the time he was questioned about the death of his parents. He knew his mother was dead, but was not sure about his father. The police knew the father was in a coma, near death. The police faked a phone call to the hospital and falsely informed the defendant that his father had not only come out of the coma, but also accused the defendant of stabbing him. The defendant was prompted to confess, and his motion to suppress the confession was denied. Both *People v. Pereira*, 26 N.Y.2d 265 (1970) and *People v. McQueen*, 18 N.Y.2d 337 (1966), were traditional voluntariness cases. *Pereira* does not even mention *Miranda* and *McQueen* expressly finds *Miranda* non-retroactive and inapplicable.

7. *People v. Tarsia*, 50 N.Y.2d 1, 11, 427 N.Y.S.2d 944 (1980).

8. CPL 60.45 Rules of evidence; admissibility of statements of defendants:

> 1. Evidence of a written or oral confession, admission, or other statement made by a defendant with respect to his participation or lack of participation in the offense charged, may not be received in evidence against him in a criminal proceeding if such statement was involuntarily made.
>
> **2.** A confession, admission or other statement is "involuntarily made" by a defendant when it is obtained from him:
>
> (a) By any person by the use or threatened use of physical force upon the defendant or another person, or by means of any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement; or
>
> ***(b) By a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him:***
>
> ***(i) by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself;*** or
>
> (ii) in violation of such rights as the defendant may derive from the constitution of this state or of the United States.

9. *People v. Tarsia*, 50 N.Y.2d 1, 427 N.Y.S.2d 944 (1980).

10. *People v. Tarsia*, 50 N.Y.2d at 11. The Second Department has expressed the *Tarsia* test as whether or not the conduct was so "fundamentally unfair to the defendant as to deprive him of due process of law." *People v. Brewley*, 192 A.D.2d 540, 596 N.Y.S.2d 91 (2d Dep't 1993), *lv. den.*, 81 N.Y.2d 1070, 601.

11. The best example is *People v. Tankleff*, 84 N.Y.2d 992, 622 N.Y.S.2d 503 (1994), *conviction vacated*, 49 A.D.3d 160, 848 N.Y.S.2d 286 (2d Dep't 2007), which was a non-*Miranda* case where the defendant was not in custody at the time he was questioned about the death of his parents. He knew his mother was dead but was not sure about his father. The police knew the father was in a coma, near death. The police faked a phone call to the hospital and falsely informed the defendant that his father had not only come out of the coma, but also accused the defendant of stabbing him. The defendant was prompted to confess, and the admissibility of his confession was upheld.

12. *See, e.g.*, *People v. Rivera*, 285 A.D.2d 385, 386, 728 N.Y.S.2d 446 (1st Dep't 2001), where the court emphasized that "*since* no promises or threats were made and *defendant was not in custody*, the deception employed by the police was not so fundamentally unfair as to render defendant's subsequent statements involuntary, or to deny him due process"; *People v. Newcomb*, 45 A.D.3d 890, 844 N.Y.S.2d 489 (3d Dep't 2008), where the court, in rejecting a deception argument, emphasized that the defendant was not in custody; *People v. Williams*, 272 A.D.2d 485, 708 N.Y.S.2d 875 (2d Dep't 2000), *lv. den.*, 95 N.Y.2d 873, 715 N.Y.S.2d 228 (2000), where the Court properly cited *Tarsia* and *Tankleff* in a ruling upon the admissibility of a statement produced by a non-custodial interview and emphasizing that "since…the defendant was not in custody, this deception was not so fundamentally unfair as to render the defendant's subsequent statements involuntary."

13. *People v. Williams*, 272 A.D.2d 485, 708 N.Y.S.2d 875 (2d Dep't 2000), *lv. den.*, 95 N.Y.2d 873, 715 N.Y.S.2d 228 (2000). "*[S]ince* no promises or threats were made and the ***defendant was not in custody***, this deception was not so fundamentally unfair as to render the defendant's subsequent statements involuntary." *People v. Rivera*, 285 A.D.2d 385, 386, 728 N.Y.S.2d 446 (1st Dep't 2001) ("Moreover, ***since*** no promises or threats were made and **defendant was not in custody,** the deception employed by the police was not so fundamentally unfair as to render defendant's subsequent statements involuntary, or to deny him due process.") (emphasis added).

14. *See People v. Walker*, 278 A.D.2d 852, 717 N.Y.S.2d 440 (4th Dep't 2000), *lv. den.*, 96 N.Y.2d 869, 730 N.Y.S.2d 44 (2001), where defendant in custody was falsely told that the victim gave a dying declaration implicating the defendant. The Court used the regular *Tarsia* test instead of *Miranda's* "cajole" test; *People v. Dickson*, 260 A.D.2d 931 (3d Dep't 1999), *lv. den.*, 93 N.Y.2d 1017, 697 N.Y.S.2d 576 (1999), where defendant in custody was "fully informed of his *Miranda* rights" and confessed after an officer falsely told him "that his actions were memorialized on a video surveillance camera in the gas station." Suppression was denied because "this deception was not so fundamentally unfair as to deny defendant due process or accompanied by a promise or threat likely to produce a false confession," citing *Tarsia*; *People v. Sobchik*, 228 A.D.2d 800, 644 N.Y.S.2d 370 (3d Dep't 1996), where defendant was in custody and was questioned regarding a series of burglaries. He was asked if he would be willing to take a polygraph test and agreed. Once hooked up to the machine (which was not working), he admitted his involvement in the burglaries and ultimately gave a confession. Since there was no indication of misrepresentation of the results of the test, suppression was denied, citing *Tarsia*; *People v. Hassell*, 180 A.D.2d 819, 580 N.Y.S.2d 73 (2d Dep't 1992), *lv. den.*, 79 N.Y.2d 1050, 584 N.Y.S.2d 1017 (1992), where the Court applied *Tarsia* test to deception employed by officers who interrogated a defendant in custody.

15. *People v. Aveni*, __ A.D.3d __, 2012 WL 4901136 (2d Dep't 2012).

16. Both *People v. Pereira*, 26 N.Y.2d 265 (1970) and *People v. McQueen*, 18 N.Y.2d 337 (1966) were traditional voluntariness cases. *Pereira* does not even mention *Miranda,* and *McQueen* expressly finds *Miranda* non-retroactive and inapplicable.

17. *Colorado v. Spring*, 479 U.S. 564, 107 S. Ct. 851 (1987).

18. *Greenwald v. Wisconsin*, 390 U.S. 519, 88 S. Ct. 1152 (1968).

19. *Greenwald*, 390 U.S. at 521.

20. *Fare v. Michael C.*, 442 U.S. 707, 99 S. Ct. 2560 (1979).

21. *People v. Tutt*, 38 N.Y.2d 1011, 1013, 384 N.Y.S.2d 444 (1976) ("[There is] no doubt that the right to counsel extends to representation during any interrogation by the police and that the defendant is entitled to advice to such effect."); *People v. Hutchinson*, 59 N.Y.2d 923, 466 N.Y.S.2d 294 (1983), where the Court found the warnings fatally defective due to the officer's failure to advise suspect that he "was entitled to the assistance of counsel during his questioning by the officer, an aspect of the warnings to which appellant concededly was entitled." The Record on Appeal in *Hutchinson* reveals that the warnings were: "You have the right to remain silent until you have consulted with an attorney. Anything you do say might and will be used against you in a court of law. You have the right to remain silent until you have consulted with one" [Rec. on App., Transcript of Suppression Hearing, p. 6]. Noticeably absent is an advisement of the right to counsel free of charge, yet the Court of Appeals apparently ignored that additional flaw in the warnings. *People v. Gomez*, 192 A.D.2d 549, 550, 596 N.Y.S.2d 439, 441 (2d Dep't), *lv. den.*, 82 N.Y.2d 806, 604 N.Y.S.2d 942 (1993), where the Court found that the detective's failure "to advise the defendant that he had the right to have counsel present during the interrogation" was a fatal defect. The Record on Appeal in *Gomez* reveals that the advisement was words to the effect that: "You have the right to remain silent. You have the right to a lawyer. If you cannot afford a lawyer, one will be assigned to you." The Defendant's appellate brief complained that these warnings were defective for their failure to advise the defendant he "could ask for a lawyer at any time and that he did not have to speak to the officers until the attorney was appointed" [Rec. on App., Appellant's Brief, p. 6].

22. *Colorado v. Spring*, 479 U.S. 564, 107 S. Ct. 851 (1987).

23. *Colorado v. Spring*, 479 U.S. at 575.

24. *Colorado v. Spring*, 479 U.S. at 576 n.8.

25. *Berghuis v. Thompkins*, __ U.S. __, 130 S. Ct. 2250 (2010).

26. *Berghuis v. Thompkins*, 130 S. Ct. at 2264.

27. *North Carolina v. Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979).

28. *See, e.g.*, *People v. Sirno*, 76 N.Y.2d 967, 968, 563 N.Y.S.2d 730 (1990) ("[W]here, as here, undisturbed findings have been made that a defendant clearly understands his *Miranda* rights and promptly after having been administered those rights willingly proceeds to make a statement or answer questions during interrogation, no other indication prior to the commencement of interrogation is necessary to support a conclusion that the defendant implicitly waived those rights."); *People v. Davis*, 55 N.Y.2d 731, 733, 447 N.Y.S.2d 149 (1981) ("No express waiver of [*Miranda*] rights was required.").

29. *See People v. Hale*, 52 A.D.3d 1177, 1178, 859 N.Y.S.2d 838 (4th Dep't 2008) ("Contrary to the contention of defendant, the court properly refused to suppress his statements to the police, based on the court's determination that defendant implicitly waived his *Miranda* 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) ("Contrary to the contention of defendant, no express waiver of his *Miranda* rights was required. Where, as here, a defendant has been advised of his *Miranda* rights and within minutes thereafter willingly answers questions during interrogation, 'no other indication prior to the commencement of interrogation is necessary to support a conclusion that the defendant implicitly waived those rights.'").

30. *Matter of Jimmy D.*, 15 N.Y.3d 417, 912 N.Y.S.2d 537 (2010).

31. *Matter of Jimmy D.*, 15 N.Y.3d at 428.

32. *Berkemer v. McCarty*, 468 U.S. 420, 433, 104 S.Ct. 3138, 3146-3147 (1984).

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Editor's Note: Judge Brunetti's article is particularly relevant at the present time, since the New York Court of Appeals has before it two cases involving the issue of deception. The cases are *People v. Thomas* from the Third Department, and *People v. Aveni* from the Second Department, in which the Courts reached differing results. It is expected that the New York Court of Appeals may have a decision on these matters by the end of June. These cases were discussed in an article in the *New York Law Journal* of October 18, 2012 at pages 1 and 9.

New York Court of Appeals Modifies Doctrine of Inconsistent Verdicts

By Paul Schechtman and Megan Quattlebaum

Last term, in *People v. Muhammad*, the New York Court of Appeals substantially modified the doctrine of inconsistent verdicts.[1] *Muhammad* is noteworthy for what it says about the role of the jury in our criminal justice system.

A. Federal Law

The United States Supreme Court first considered inconsistent verdicts in 1932 in *Dunn v. United States*.[2] There, the defendant had been indicted on three counts: (i) maintaining a common nuisance by keeping intoxicating liquor at a site; (ii) unlawful possession of liquor; and (iii) unlawful sale of liquor. The jury convicted him of the first count but acquitted him of the second and third counts. In an opinion by Justice Holmes, the Court rejected the defendant's claim that he was entitled to an acquittal on count one because of the verdicts' inconsistency. Quoting Judge Learned Hand who had considered the same issue seven years earlier, Justice Holmes wrote this:

> The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.[3]

Dunn remains the federal rule: "consistency in the verdict is not necessary."

Notably, in 1984, the Court revisited the issue when the Ninth Circuit attempted to carve out an exception to *Dunn* in *United States v. Powell*.[4] Betty Lou Powell was charged with conspiracy to sell cocaine with her husband and 17-year-old son and with four counts of using a telephone in the course of committing the drug conspiracy. She was acquitted of the conspiracy count but convicted of three of the telephone counts. The Ninth Circuit concluded that the acquittal on the predicate felony (drug conspiracy) necessarily indicated that there was insufficient evidence to support the telephone count convictions. It therefore mandated an acquittal on that count as well.

The Supreme Court granted the government's petition for certiorari and unanimously reversed. Writing for the Court, Justice Rehnquist reaffirmed *Dunn*'s holding:

> inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government… is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause. Inconsistent verdicts therefore present a situation where "error"…most certainly has occurred, but it is unclear whose ox has been gored.

In rejecting Powell's claim, Justice Rehnquist observed that a defendant "already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts."[5]

Justice Rehnquist also sounded a second theme in reaffirming *Dunn*: the reluctance of courts to inquire into the jury's thought processes. Thus, as a general rule, "once the jury has heard the evidence…the litigants must accept [its] collective judgment." For a reviewing court to dissect a jury's verdict is to threaten not only "needed finality" but the central place of the jury in the criminal justice system.

And so, 80 years later, *Dunn* remains the federal rule.

B. New York State Prior to *Muhammad*

Dunn, it seems, was also the rule in New York State until 1968. In 1944, for example, the Second Department upheld the conviction of a defendant for robbery in the first degree even though the jury had acquitted him of grand larceny on the same facts.[6] Citing *Dunn*, the majority wrote simply that "consistency in the verdict is not necessary."

Allegiance to *Dunn* began to wane in New York in 1968 when the Fourth Department decided *People v. Bullis*.[7] There, the defendant was acquitted of sodomy in the first degree but convicted of sexual misconduct. The former crime, a class B felony, required proof of deviate sexual intercourse with a person less than 11; the latter, a class A misdemeanor, required proof of deviate sexual intercourse with a person less than 17. For the Fourth Department, the verdicts were "not merely inconsistent but repugnant," since the victim was an eight-year-old girl.[8] On that basis, the court departed from *Dunn* and vacated the sexual misconduct conviction.

The Court of Appeals spoke to the issue in 1976 in a memorandum opinion in *People v. Carbonell*.[9] The jury had

acquitted the defendant of all larceny counts but convicted him of the robbery count, and "the robbery could not have occurred unless…there had been a larceny in some degree." (The jury reached its verdict by disregarding the trial court's instruction not to reach the larceny counts if it found the defendant guilty of robbery.) Declaring the verdicts "internally self-contradictory," the Court vacated the robbery conviction and dismissed the indictment.

Next came *People v. Tucker* in 1981.[10] Tucker was acquitted of robbery in the first degree (robbery using a loaded and operable weapon); convicted of robbery in the second degree (robbery displaying what appeared to be a handgun, as to which it was an affirmative defense that the gun was inoperable); and convicted of possession of a loaded firearm (possessing an operable gun).

Were the verdicts fatally inconsistent? In answering that question, the Court of Appeals found guidance in a thoughtful law review article by Steven Wax, then an Assistant District Attorney in Brooklyn.[11] (The Court cited the article twice.) Wax proposed this test: "[w]hen acquittal on one charge is conclusive as to an element which is necessary to…a charge on which a conviction has occurred, the conviction should be reversed." In applying that test, Wax argued (i) that "the existence of illogic on the facts should be countenanced;" and (ii) that the elements of the crime should be those "defined by the court's charge," even if the charge is erroneous.

Without extended discussion, the *Tucker* court applied the Wax test. The jury could have found, "however illogically, that the gun's capability to fire was not proven" beyond a reasonable doubt but that the defendant had not shown inoperability by a preponderance of the evidence. And the jury was not charged, as it should have been, that a conviction for possession of a firearm required proof of operability. That meant the verdicts could be reconciled this way: The jury could have acquitted on the first count, concluding that the defendant did not use an operable gun in the robbery. It could have convicted on the second count, concluding that the defendant displayed what appeared to be a handgun and that he had not proven inoperability to a preponderance so as to make out the affirmative defense. And it could have convicted on the firearm count, concluding that, in light of the court's erroneous instruction, a finding of operability was not required. Thus, for the Court, "no actual inconsistency [was] presented."

C. *People v. Muhammad*

After *Tucker*, New York courts continued to apply the Wax test, at times with some difficulty. Last term's decision in *Muhammad*, however, altered the test. There, the defendant shot another man during a street altercation and was indicted for attempted murder, assault in the first degree and criminal possession of a weapon in the second degree. The jury acquitted the defendant on the murder and weapon possession charges but convicted him of the assault charge. In a 4-3 decision, the Court of Appeals upheld the conviction as non-repugnant. Writing for the majority, Judge Graffeo concluded that the inconsistent verdict doctrine is essentially a variant of the "'theoretical impossibility' test that is applied in the realm of lesser included offenses." A verdict is repugnant "only if it is legally impossible—under all conceivable circumstances—for the jury to have convicted the defendant on one count but not the other." Most importantly, the issue should be examined "[b]ased on the instructions that were given to the jur[y] and viewed from a theoretical perspective without regard to the evidence presented at the[] trial."

Freed of the need to consider the evidence presented at trial, Judge Graffeo then asked this question: "theoretically" could a defendant be convicted of first-degree assault (causing serious physical injury by means of a deadly weapon, with intent to inflict such injury) and be acquitted of the weapon possession charge (knowingly possessing an operable firearm with intent to use it unlawfully against another)? To answer that question, Judge Graffeo conjured up this hypothetical: a defendant uses an inoperable handgun to pistol whip his victim and thereby causes serious physical injury. And this one: a defendant throws his victim in front of a moving bus. In each, the defendant could be convicted on the assault charge and acquitted on the weapons charge. That hypothetical possibility was enough for the majority to reject the challenge to the verdicts.

Judge Ciparick dissented, joined by Chief Justice Lippman and Judge Jones. The dissenters chided the majority for "conjur[ing] inapplicable scenarios that depart from an analysis of the charge at issue in a particular case." They especially took issue with the majority's hypothetical of a defendant pushing a victim in front of a moving bus:

> Under the facts of [that] example, however, a defendant would not have been indicted on a weapon possession charge since it would clearly be unwarranted as there was no evidence the assailant physically possessed or exercised dominion or control over the instrument at issue [*i.e.*, the bus]. Since the assailant could not properly be charged with weapon possession in the example cited above, no jury would have the occasion to consider whether, much less find that, such possession occurred in the first instance.

D. Conclusion

Muhammad moves New York State law closer to federal law. After *Muhammad*, New York courts will uphold inconsistent verdicts if they can conceive of *any* facts under which a jury could render such verdicts even if the facts have nothing to do with the instant case (and even if it is hard to imagine that a defendant would ever be indicted on the charges based on those facts). That means that virtually all inconsistent verdict claims will now be rejected. One cannot help but think that New York law would be on a sounder footing if the Court of Appeals had simply opted to follow *Dunn*.

There is one caveat: a case like *Powell* would still come out differently in New York than in federal court. Compound felonies (using a telephone in the course of a cocaine conspiracy) and the predicate offense (cocaine conspiracy) stand in a greater offense/lesser offense relationship, and an acquittal on the greater is logically inconsistent with a conviction on the lesser. In such circumstances, even the most imaginative judge could not conjure up a hypothetical in which the counts are reconcilable.[12]

Of course, cases in which a jury convicts on the greater and acquits on the lesser should be rare. Under New York law, when a lesser offense is properly submitted as an alternative, the court must instruct the jury to consider the lesser only *after* it has found the defendant not guilty of the greater.[13] Moreover, a trial court is empowered to reject a legally defective verdict and to direct the jury to reconsider it.[14] The "acquit-first" instruction and the power to resubmit defective verdicts should prevent cases like *Carbonell* from occurring.

All of this means that, after *Muhammad*, the inconsistent verdict doctrine in New York is moribund, if not dead. Should its (almost) passing be mourned? Writing more than 60 years ago, Professor Alexander Bickel gave perhaps the most compelling defense of a rule permitting jurors to return inconsistent verdicts.[15] He wrote:

> The law states duties and liabilities in black and white terms. Human actions are frequently not as clean-cut. Judges themselves sometimes undertake, in sentencing, the search for a middle ground between the absolutes of conviction and acquittal. To deny the jury a share in this endeavor is to deny the essence of the jury's function.… Should *Dunn* be overruled, jurors who in the typical inconsistent verdicts case presumably believe that, in the sense of having done the act charged, the defendant is guilty, [might well] be strong-armed into rendering an all-or-nothing verdict.

The point can be put more broadly. Ours is a system in which guilt or non-guilt is decided by twelve lay jurors who must render a unanimous verdict. We prefer the commonsense justice of the jury to the more tutored but perhaps less sympathetic reaction of a professional judge and believe that only unanimous verdicts are considered ones.[16] In such a system, messy compromises are inevitable, and unexplained verdicts the norm. Asking the jury to explain its verdict would likely be counterproductive; it would weaken the legitimacy of the jury system, not strengthen it.

Moreover, we allow jurors to flout the law in some cases and to follow their consciences (even if we do not tell them that the power is theirs). And we deny the prosecution the right to appeal acquittals, even erroneous ones, in order to protect the jury trial right.[17] A system that combines lay jurors, unanimous (and unexplained) verdicts, and the power to nullify inevitably will produce some inconsistent verdicts. But that seems a small price for what we get in return.

If that view is correct, then the (almost) death of the inconsistent verdict doctrine in New York should not be greatly mourned.

Endnotes

1. *People v. Muhammad*, 17 N.Y.3d 532 (2011).
2. *Dunn v. United States*, 284 U.S. 390 (1932).
3. Judge Hand's opinion is *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir. 1925).
4. *United States v. Powell*, 469 U.S. 57 (1984).
5. In New York, a defendant has the added protection of weight of the evidence review in the Appellate Division. *See People v. Delamota*, 18 N.Y.3d 107 (2011).
6. *See People v. Sciascia*, 268 A.D. 14 (2d Dept. 1944).
7. *People v. Bullis*, 30 A.D.2d 470 (4th Dept. 1968).
8. Since *Bullis*, the Court of Appeals has made clear that "[w]hether verdicts are described as 'repugnant' or 'inconsistent' is substantively inconsequential"; the two terms are "interchangeabl[e]." *Tucker*, 55 N.Y.2d 1, 6 (1981).
9. *People v. Carbonell*, 40 N.Y.2d 948 (1976).
10. *People v. Tucker*, 55 N.Y.2d 1 (1981).
11. Wax, *Inconsistent and Repugnant Verdicts in Criminal Trials*, 24 N.Y. L. Sch. L. Rev. 713 (1978).
12. In this regard, consider this example from Professor Preiser: a defendant is acquitted of a violent felony offense but convicted of wearing a body vest during commission of that felony (Penal Law §270.20).
13. *People v. Boettcher*, 69 N.Y.2d 174 (1987).
14. CPL §310.50(2).
15. Bickel, *Judge and Jury—Inconsistent Verdicts in the Federal Courts*, 63 Harv. L. Rev. 649, 651-52 (1950).
16. *See Duncan v. Louisiana*, 391 U.S. 145 (1968); *see also* Damaska, *Evidence Law Adrift* (1997).
17. *See Fong Foo v. United States*, 369 U.S. 141 (1962).

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Jenny Rivera Appointed to New York Court of Appeals

By Spiros Tsimbinos

On January 15, 2013, Governor Cuomo announced his selection to replace Judge Ciparick on the New York Court of Appeals. The Governor chose Jenny Rivera, who had been serving as a Professor of Law at the City University at New York School of Law since 2008. The Governor's appointment was confirmed by the State Senate in the following weeks and Ms. Rivera took her seat on the Court in the middle of February. The High Court's newest member is 51 years of age. She had previously served as a Special Deputy State Attorney General for Civil Rights when Governor Cuomo was the Attorney General in 2007 and 2008. She has been active in numerous organizations regarding the rights of Latinos, including service as the founder of the Center on Latino Rights and Equality at the CUNY Law School, and Associate Counsel for the Puerto Rican Legal Defense and Education Fund.

In her earlier legal career, she served as a Commissioner on the New York City Commission on Human Rights, and also was a Law Clerk to Supreme Court Justice Sotomayor when she served in the Southern District of New York. From 1992 to 1993, she was an Administrative Law Judge with the New York Commission of Human Rights.

Judge Rivera received a Bachelor of Arts Degree in 1982 from Princeton University and graduated from New York University School of Law in 1985. She also holds an LLM degree which she received from Columbia Law School in 1993. She resides in the Bronx and lists her political affiliation as a Democrat.

With the appointment of Judge Rivera to the New York Court of Appeals, the Court will continue to have one Hispanic member, and the gender balance will remain at 4 men and 3 women. With the retirement of Judge Ciparick, it was widely expected that Governor Cuomo would look to appoint a Hispanic to the Court. Some commentators had focused, however, on Judge Acosta, who had been serving in the Appellate Division, First Department, since 2008, and had over 10 years of judicial experience. The appointment by Governor Cuomo of Judge Rivera, who comes to the Court with no prior judicial experience, is not totally unusual, however. Judge Kaye had previously been appointed to the Court by the Governor's father without prior judicial service, and Judge Robert Smith had been appointed to the Court by Governor Pataki directly from private practice.

Following the Governor's appointment, many who know Ms. Rivera praised her ability and predicted that she would make an excellent addition to the Court of Appeals. Chief Judge Lippman remarked that she was a terrific appointment, and the Dean of the CUNY Law School stated that although her appointment was a loss for the Law School, it was a substantial win for the New York Courts. The only area of some concern is the limited experience of Judge Rivera in the everyday practice of law, and for criminal law attorneys, her lack of any experience in the criminal law area. With her appointment, Judge Rivera will serve a 14-year term, and will be receiving a salary of $184,800 when the expected pay raises go into effect on April 1, 2013.

We congratulate Judge Rivera on her appointment and wish her all the best as she begins her service on the highest Court.

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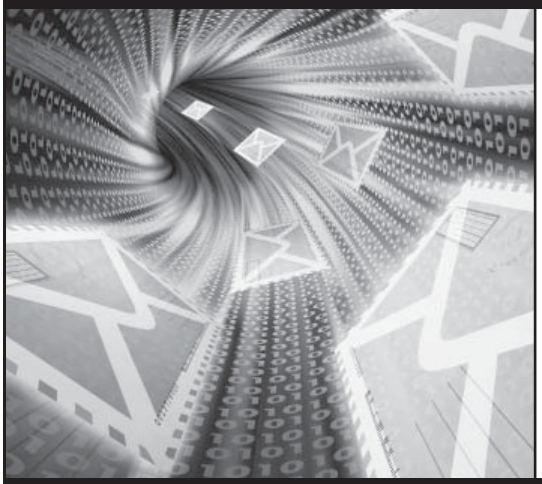

If you have written an article and would like to have it considered for publication in *New York Criminal Law Newsletter*, please send it to the Editor-in-Chief:

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

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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 October 23, 2012 to January 30, 2013.

Rape Shield Law

***People v. Halter*, decided October 23, 2012 (N.Y.L.J., October 24, 2012, pp. 2 and 25)**

In a 5-2 decision, the New York Court of Appeals affirmed the Defendant's conviction for the rape of his 13-year-old daughter. The 5-Judge majority determined that the trial court had properly applied CPL Section 60.42, commonly known as the Rape Shield Law, to preclude the Defendant from questioning the girl about her sexual relationship with a boyfriend or her sexually provocative postings on a social media site, as well as her tendency to wear what the father deemed to be inappropriate clothing. The majority concluded that the precluded evidence fell squarely within the ambit of the Rape Shield Law, and the trial court had properly applied the statute. Judges Pigott, Jr. and Smith dissented. The dissenters vigorously argued that the trial court should have exercised its discretion to allow the evidence in question, and they expressed concern that the majority was erroneously affirming a conviction in a case where the Defendant could be innocent. Judge Smith in particular stated that he was most disturbed by the majority's opinion, and urged the District Attorney to exercise discretion and to re-examine the matter.

Order of Protection

***People v. Cajigas*, decided October 23, 2012 (N.Y.L.J., October 24, 2012, p. 22)**

In a unanimous decision, the New York Court of Appeals held that a Defendant could be convicted of attempted burglary in the second degree based upon his violation of an order of protection. The Court concluded that the *mens rea* element of burglary could be satisfied by an intent to commit an act that would not be illegal in the absence of the order. The Defendant had resided at a residence with the complainant and her teenage daughter. As a result of violent arguments, the complainant had obtained an order of protection which barred the Defendant from the complainant's residence. When the Defendant attempted to see the complainant after she had moved into a new apartment, he was arrested and indicted for attempted burglary in the second degree and several counts of criminal contempt in the first degree. At trial, defense counsel had argued that based upon an earlier case from the New York Court of Appeals, to wit: *People v. Lewis*, 5 NY 3d, 546 (2005), the People were prevented from using a violation of the order of protection to prove two elements of burglary—unlawful entry and the intent to commit a crime therein. The New York Court of Appeals, however, concluded that based upon the Defendant's persistent and blatant disregard of the conditions of the orders of protection, the prosecution was justified in bringing an indictment for attempted burglary and his conviction of that crime would be upheld.

Sleeping Juror

***People v. Herring*, decided October 30, 2012 (N.Y.L.J., October 31, 2012, pp. 1 and 17)**

In a unanimous decision, the New York Court of Appeals upheld a Defendant's murder conviction even though it was possible that a juror had slept through part of the trial and possibly much of the deliberations. In the case at bar, one of the jurors had reported that a member of the jury panel had been sleeping through much of the deliberations. The trial court, however, questioned the juror in question and the juror denied the allegations and gave assurances that she was capable of fulfilling her duties. The trial court conducted no further inquiry. The New York Court of Appeals concluded that under the circumstances in question, the trial judge did not abuse her discretion in deciding that the juror in question was fit to continue to serve on the jury.

Preservation of Appellate Issue

People v. Alvarez

***People v. George*, decided October 30, 2012 (N.Y.L.J., October 31, 2012, pp. 1 and 14)**

In a unanimous decision, the New York Court of Appeals determined that preservation is required for a defendant to pursue a post-conviction claim that he was denied the Sixth Amendment right to a public trial. In the *George* case, the Defendant did not object at trial to an order which temporarily barred his family from the courtroom. In the *Alvarez* case, the Defendant had objected. Thus, based upon the issue of preservation, the New York Court of Appeals affirmed the conviction in the *George* case, but reversed in *Alvarez,* finding that the trial judge had not considered other alternatives to a seating capacity problem before barring the Defendant's parents during the early stages of jury selection.

Attorney Conflict of Interest

***People v. Solomon*, decided October 30, 2012 (N.Y.L.J., October 31, 2012, pp. 1 and 15)**

In a unanimous decision, the New York Court of Appeals reversed a sex crime conviction where the Defendant's Attorney was simultaneously representing a prosecution witness in an unrelated matter. The Court of Appeals concluded that the trial Judge failed to conduct a meaningful inquiry to insure that the Defendant was aware of the risks posed by the potential conflict of interest. Under these circumstances, there was no valid waiver of the Attorney's conflict of interest, and the Defendant was entitled to a new trial.

Inventory Search

***People v. Walker*, decided November 19, 2012 (N.Y.L.J., November 20, 2012, p. 23)**

In unanimous decision, the New York Court of Appeals upheld the impounding of a vehicle by police after a Defendant was arrested for driving with a revoked license. The vehicle was impounded even though the police officer did not inquire whether the Defendant's passenger, who was not the registered owner of the car, was licensed and authorized to drive it. The Court concluded that such an inquiry was not constitutionally required and that the officer's search of the car after he decided to impound it was a valid inventory search. The search in question revealed the presence of a weapon and the Defendant had been convicted for criminal possession of a weapon in the second degree. The Court determined that the impounding of the vehicle and the subsequent search was in accordance with established police procedure, and was sufficient to meet constitutional standards.

Shackling of Defendant

***People v. Best*, decided November 20, 2012 (N.Y.L.J., November 21, 2012, pp. 1, 2 and 22)**

In a 5-1 decision, the New York Court of Appeals held that restrictions on shackling defendants in the courtroom apply to bench trials as well as to cases being heard by juries. In the case at bar, a Nassau County District Judge had ordered that the Defendant be cuffed behind his back when he appeared for a bench trial on a misdemeanor charge. The New York Court of Appeals, in a decision written by Judge Ciparick, determined that the Judge had failed to state a particularized reason on the record for having the Defendant shackled in violation of U.S. Supreme Court and Court of Appeals rulings. The majority rejected the prosecution's argument that the shackling decisions were inapplicable to the case at bar because they were not tried before a jury. On the contrary, the majority determined that the same standards would apply in both cases. After determining the issue, the Court's majority nevertheless upheld the Defendant's conviction, concluding that any constitutional error was harmless. The majority stated that there was overwhelming evidence in the case and there was no reasonable possibility that the Defendant's appearance in handcuffs contributed to the Court's finding of guilt. Chief Judge Lippman dissented to the extent that he would have ordered a new trial.

Use of Uncharged Crimes

***People v. Bradley*, decided November 20, 2012 (N.Y.L.J., November 21, 2012, p. 22)**

In a 6-1 decision, the New York Court of Appeals reversed a Defendant's conviction and ordered a new trial on the grounds that the trial court had allowed a social worker to testify from her notes that the Defendant had reported that she had stabbed a gentleman in the thigh who had been harassing her on a prior occasion some ten years ago. The Defendant in question had been convicted of manslaughter in the first degree, which involved the stabbing of her boyfriend. She had essentially advanced a claim of self-defense. The majority concluded that the evidence which was admitted did not have probative value because of the age of the alleged incident, and was not related to the charges in the indictment. Under these circumstances, the admission of the evidence in question was prejudicial, and a new trial should be ordered. The majority opinion was written by Chief Judge Lippman, and Judge Smith dissented.

Exclusion from Courtroom

***People v. Torres*, decided November 20, 2012 (N.Y.L.J., November 21, 2012, p. 25)**

In a unanimous decision, the New York Court of Appeals upheld a reversal of the Defendant's conviction by the Appellate Division on the grounds that the exclusion of the Defendant's Wife from the Courtroom violated his right to a public trial, and that such an action during jury selection was not a trivial matter. The Court further determined that the Defendant had adequately preserved this argument for appellate review.

Ineffective Assistance of Counsel

***People v. Townsley*, decided November 27, 2012 (N.Y.L.J., November 28, 2012, pp. 1, 8 and 23)**

In a 4-2 decision, the New York Court of Appeals upheld the murder conviction of a Defendant who claimed that he was denied the effective assistance of counsel by both his trial and appellate Attorneys. The Defendant argued that the Attorneys had failed to challenge improper remarks made by the District Attorney during summation. While concluding that the comments were inappro-

priate, the majority found that although defense counsel should have objected, the failure did not deny the Defendant a fair trial and the comments, although improper, were not of such a prejudicial nature that would justify a reversal. Judge Ciparick and Chief Judge Lippman dissented and argued that a reversal was warranted because appellate counsel had failed to raise the ineffective assistance of counsel issue at the Appellate Division.

Search and Seizure

***People v. Gavazzi*, decided November 27, 2012 (N.Y.L.J., November 28, 2012, p. 24)**

In a 5-1 decision, the New York Court of Appeals upheld the suppression of evidence which was seized pursuant to a warrant on the grounds that what was taken did not substantially comply with CPL 690.45(1). The appellate panel found that in reviewing the warrant, which was signed by a village Judge, there was no indication of the Court from which the warrant emanated. There was no seal and the caption typed by the trooper referred to a non-existent town. In addition, the Judge's signature was somewhat illegible. Under these circumstances, the validity of the warrant could not be upheld. Judge Smith dissented, arguing that the suppression of the evidence was a drastic remedy, and that the defects in the warrant were of a ministerial nature, which should not warrant suppression.

Suppression of Statements

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

In a unanimous decision, the New York Court of Appeals upheld the Appellate Division ruling which ordered the suppression of the Defendant's statement. The panel concluded that there was support in the record for the Appellate Division's determination that the Defendant unequivocally invoked his right to counsel while in custody. Further, the hearing court's error in failing to suppress the Defendant's statements was not harmless beyond a reasonable doubt, and the Defendant is entitled to a new trial.

Probable Cause for Arrest

***People v. Vandover*, decided November 29, 2012 (N.Y.L.J., November 30, 2012, p. 22)**

In a unanimous decision, the New York Court of Appeals upheld lower court determinations that there was an insufficient basis to establish probable cause to arrest the Defendant. The appellate panel first determined that the lower courts had applied the correct standard in deciding the question of probable cause for arrest. Further, since the conclusion that no probable cause existed is a mixed question of law and fact for which there is support in the record, the Court of Appeals would defer to the findings of the lower courts. The Court of Appeals concluded that although different inferences could be drawn from the facts in the case, they were faced with affirmed findings of fact precluding further review by the State's highest Court.

Agency Defense

***People v. Watson*, decided November 29, 2012 (N.Y.L.J., November 30, 2012, p. 22)**

In a 5-1 decision, the New York Court of Appeals concluded that based upon the plain language of the facilitation statutes and the historic rationale underlying the agency doctrine, agency may not be interposed as a defense to a charge of criminal facilitation. Therefore, the Defendant was properly convicted of that offense. In the case at bar, the Defendant, at trial, had claimed that he was not guilty of the sale or facilitation counts because he was acting as an agent of the buyer. The New York Court of Appeals, however, denied his agency claim. Chief Judge Lippman dissented.

Terrorism Statute

***People v. Morales*, decided December 11, 2012 (N.Y.L.J., December 12, 2012, pp. 1, 2 and 22)**

In a unanimous decision, the New York Court of Appeals held that criminal activity traditionally ascribed to gangs cannot be prosecuted under the anti-terrorism statutes which were enacted as a result of the September 11, 2001 attacks. The Court found that Bronx prosecutors had improperly invoked the anti-terrorism law against the Defendant who was a member of a street gang. As a result the Defendant's convictions for first degree manslaughter and attempted murder were dismissed, and a new trial was ordered on remaining counts in the indictment. The Court found that the terrorism statutes were designed for a specific purpose, and although the Defendant had been charged with a tragic shooting, his actions did not form the basis of a terrorism act.

Plea Allocution

***People v. Mox*, decided December 11, 2012 (N.Y.L.J., December 12, 2012, p. 24)**

In a 5-1 decision, the New York Court of Appeals concluded that the Defendant's plea allocution to the crime of manslaughter in the first degree was inadequate to establish that he was entering such a plea in a knowing and intelligent manner. The Defendant had undergone a period of psychiatric hospitalization, and during the plea colloquy he stated that on the day of the crime he was hearing voices and feeling painful sensations. The trial court

did not inquire further. The New York Court of Appeals concluded that under established case law, the Court was under a duty to make a further inquiry. In the case at bar, the Court's failure to do so required that the plea in question be vacated. Judge Smith dissented, indicating that the Court's inquiry as to whether the Defendant had discussed his plea and the possible defense with his Attorney was sufficient to uphold the allocution in question.

Double Jeopardy

***People v. McFadden*, decided December 13, 2012 (N.Y.L.J., December 14, 2012, p. 22)**

In a 5-1 decision, the New York Court of Appeals concluded that the double jeopardy clause did not preclude a Defendant's retrial and that the finding of the Appellate Division should be reversed. In the case at bar, the People wished to retry the Defendant for criminal possession of a controlled substance in the third degree after a previous jury had been locked on that charge, but rendered a partial verdict convicting him of the lesser included offense of criminal possession of a controlled substance in the seventh degree. The panel found that in the case at bar, the Defendant, by his conduct, had relinquished a double jeopardy claim. Defense counsel had failed to object to an improper jury instruction and had affirmatively requested a mistrial after the Court had stated that the Defendant faced retrial on the top two counts. By opting for a mistrial and a retrial on the remaining counts, Defendant cannot now claim that his retrial is barred. Judge Pigott dissented, arguing that the facts of the instant case were squarely within the Court's prior holding in *People v. Fuller*, 96 NY 2d, 881 (2001).

Harmless Error

***People v. Spencer*, decided December 13, 2012 (N.Y.L.J., December 14, 2012, p. 24)**

In a unanimous decision, the New York Court of Appeals held that although the trial court improperly precluded evidence pertaining to complainant's friendship with a third party, the error in question was harmless beyond a reasonable doubt. In reviewing the record as a whole, the panel concluded that there was overwhelming independent proof at trial involving the testimony of several eyewitnesses and other evidence which established the Defendant's guilt. At trial, the Defendant had interposed a defense, claiming that the complainant had falsely implicated him and that it was a third party who possessed a firearm. Based upon the entire record, however, the Court of Appeals determined that any error which occurred was harmless.

Traffic Stops

***People v. Garcia*, decided December 18, 2012 (N.Y.L.J., December 19, 2012, pp. 1, 2 and 22)**

In a 5-1 ruling, the New York Court of Appeals determined that police may not ask the occupants of a vehicle involved in a routine traffic stop whether they possess weapons unless the officers have a founded suspicion that the passengers are engaged in criminal behavior. The Court's decision was the first where the Court applied its longstanding framework for reviewing the intrusiveness of police encounters with pedestrians to people in vehicles. In a decision written by Judge Ciparick, the Court concluded that officers who pulled over the vehicle driven by the Defendant because it had a defective brake light did not have the sufficient founded suspicion that the Defendant or his four passengers were engaged in criminal activity. As a result of the officers' actions, a knife and several air guns were recovered. The Court held that these items should have been suppressed. Judge Smith dissented.

Depraved Indifference Murder

***People v. Martinez*, decided December 18, 2012 (N.Y.L.J., December 19, 2012, p. 23)**

In a unanimous decision, the New York Court of Appeals vacated the Defendant's conviction of depraved indifference murder and granted the People leave to present a charge of manslaughter in the first degree to a new grand jury. The New York Court of Appeals concluded that even viewed in the light most favorable to the People, the evidence in the case at bar was inconsistent with a conviction for depraved indifference murder. The evidence which was established indicated that the Defendant, after an altercation with the victim, obtained a gun, chased him down and fired four or five shots at near point blank range. Judge Smith, although concurring with the result, issued a separate concurring opinion.

Fair Trial

***People v. Mays*, decided December 18, 2012 (N.Y.L.J., December 19, 2012, p. 24)**

In a unanimous decision, the New York Court of Appeals affirmed a Defendant's robbery conviction and rejected the Defendant's claim that the prosecutor had improperly interacted directly with the jury while replaying a surveillance video. In the case at bar, while the prosecutor was playing the video, jurors called out repeated requests; for example, to reduce the glare to freeze a view,

and to play the video again. This resulted in some back and forth colloquy between the prosecutor and the jury. The Defendant argued this constituted a violation of the Court of Appeals ruling in *People v. O'rama*, 78 NY 2d, 270 (1991). The Court of Appeals concluded, however, that the complained of communications were merely ministerial in nature and were unrelated to substantive legal or factual issues. Further, there was no basis to conclude that the trial judge improperly delegated judicial responsibility, or that he lost control of the courtroom. Under these circumstances, the Defendant was not denied a fair trial, and the convictions in question should be upheld.

Harmless Error

***People v. Johnson*, decided January 8, 2013 (N.Y.L.J., January 9, 2013, p. 22)**

In a unanimous decision, the New York Court of Appeals upheld a Defendant's re-sentencing, and determined that any error which may have occurred in allowing the Defendant to proceed pro se was harmless. The Court noted that the issue before the Court involved a single question of law, and counsel who had been assigned as Defendant's legal advisor argued the issue on the Defendant's behalf. The Defendant's argument was to the effect that the People were not entitled to withdraw their consent to a re-sentence without a period of post-release supervision. After the People had indicated their consent, the Defendant had requested an adjournment, and the Court informed the Defendant that it was holding its re-sentencing decision in abeyance. The Court of Appeals held that the People were under no continuing obligation to consent to a re-sentence that did not include post-release supervision. When the People withdrew their consent the re-sentencing Court was compelled to impose post-release supervision at the subsequent re-sentencing in accordance with the Penal Law Statute.

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Participants at CLE program

Former Section Chair Michael Kelly with Linda Kenney Baden

Susan Walsh presents award for Outstanding Appellate Practitioner to Robert S. Dean

Guest speaker Justice Frank LaBuda addresses attendees at luncheon meeting

Chief Judge Lippman and Justice Kamins present award for Outstanding Jurist to Theodore Jones III, which was awarded posthumously to his father, Court of Appeals Judge Theodore Jones, Jr.

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NUAL TING

24, 2013
New York City

Guests at luncheon

Norman P. Effman presents award for Outstanding Public Defense Practitioner to Daniel E. Barry Jr.

ADA Robert Masters presents award for Outstanding Prosecutor to Kristine Hamann

Marvin Schechter greets guests at luncheon (l-r): Ben Ostrer, President ot the NYS Assoc. of Criminal Defense Attorneys and Exec. Committee members Gerard Damiani and Jane Fisher-Byrialsen

Judge Marks accepts award for Outstanding Private Defense Practitioner on behalf of Thomas J. Cocuzzi, which was presented by Sherry Levin Wallach

Legal Community Mourns Death of New York Court of Appeals Judge Theodore Jones, Jr.

By Spiros Tsimbinos

The legal community was saddened to learn that Judge Theodore Jones, Jr., who served on the New York Court of Appeals, died on November 5, 2012, apparently from a heart attack. Judge Jones was 68 years of age and had served on the Court for five years after being appointed by former Governor Spitzer in 2007. He also previously served as a Supreme Court Justice in Brooklyn. Judge Jones was born in Brooklyn, New York and attended public schools in New York City. He was a graduate of Hampton University in Virginia, where he graduated in 1965, receiving a Bachelor of Arts Degree in History and Political Science. He received his law degree in 1972 from St. John's University School of Law. He remained active with St. Johns Law School until the date of his death, serving as a member of the Board of Trustees of the University and the Board of Directors of the Law School.

After conducting a private practice for several years in Brooklyn, he was elected to the New York State Supreme Court in 1990. Prior to his elevation to the Bench, Judge Jones also served for many years as a criminal defense attorney with the Legal Aid Society. He eventually became the Administrative Judge for the civil term in Brooklyn.

Judge Jones also had a distinguished military background, having served in Vietnam and having reached the rank of Captain in the United States Army. He had also served as an Adjunct Professor at the City University of New York and St. John's University School of Law.

During his tenure on the Court, Judge Jones often joined the grouping consisting of Chief Judge Lippman and Judge Ciparick. He often showed sensitivity for the rights of criminal defendants, and during the last term in which he served, he issued some 24 dissents, the second highest within the Court.

He is survived by his wife and two sons. Funeral services for Judge Jones were held on November 16th at the Mount Pisgah Baptist Church in Brooklyn. The funeral services were attended by over 1,200. Judge Jones was highly regarded by the legal community and was known for his excellent judicial demeanor and his legal scholarship. Our *Newsletter* extends sympathies to his family and is saddened by his loss.

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

The U.S. Supreme Court opened its new term on October 1, 2012, and began hearing arguments on several cases involving criminal law matters. In late December, it began issuing decisions on some of these cases which are summarized below.

***Ryan v. Gonzalez*, 133 S. Ct. __ (January 8, 2013)**

***Tibbals v. Carter*, 133 S. Ct. __ (January 8, 2013)**

In a unanimous decision, the United States Supreme Court ruled that mentally ill prisoners do not have a right to put off their federal habeas corpus appeals while they try to regain mental competency. Justice Thomas issued the opinion for the Court, and stated that attorneys can effectively represent mentally incompetent clients and are quite capable of reviewing state court records, identifying legal errors and marshaling relevant arguments, even without their clients' assistance. Thus, there is no necessity to delay federal habeas corpus appeals when mentally incompetent defendants are involved. The two cases involved appeals from Arizona and Ohio, and the Court's decision vacated stays which had been issued pending Supreme Court action.

***Clapper v. Amnesty International*, 133 S. Ct.**

On October 29, 2012, the United States Supreme Court heard oral argument on the narrow issue of whether a lawsuit can proceed with respect to a constitutional challenge to amendments to the Foreign Intelligence Surveillance Act, which expanded the government's authority to use electronic surveillance. The parties who commenced the lawsuit have argued that although the statute targets foreign non-U.S. persons, their communications might get swept up as well in the surveillance of foreign targets. The lawsuit, which was filed by the American Civil Liberties Union, alleges violations of privacy and free speech rights, as well as the separation of powers. The present posture of the lawsuit was that the initial claim was rejected by the federal District Court based upon lack of standing, but the U.S. Court of Appeals for the Second Circuit found that the Plaintiffs had established injury in fact because of additional burdens and expenses they had incurred to preserve the confidentiality of their communications. The issue before the United States Supreme Court was thus narrowly restricted as to whether the Plaintiffs have standing and the matter can proceed. Just before we were going to press, the Court dismissed the lawsuit. Details in our next issue.

***Chaidez v. United States*, 133 S. Ct.**

On October 30, the Court heard arguments in *Chaidez v. United States* involving the issue of whether the Court's recent decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) should be applied retroactively. In *Padilla*, the Court had ruled that a lawyer's failure to advise an alien client of the deportation consequences of a guilty plea amounted to ineffective assistance of counsel. In late February, the Court held that *Padilla* was not retroactive. Details in our next issue.

***Florida v. Jardines*, 133 S. Ct.**

***Florida v. Harris*, 133 S. Ct.**

On October 31, 2012, the Court heard oral argument on two Florida cases which it could not reach during its last term. The two cases involve search and seizure issues regarding the use of specially trained dogs to sniff out narcotic substances. In *Jardines*, the Court will consider whether probable cause is needed to conduct a front-door sniff outside a private home. In *Harris*, the Court will consider whether to establish probable cause for a vehicle search following a dog's alert, the prosecution must present complete field records for the dog, not just its training and certification records. During oral argument, several of the Justices appeared troubled by the use of the drug-sniffing dogs and whether in the instant cases the Defendant's constitutional rights were violated. In particular Justices Kennedy and Ginsburg asked several questions which appeared to indicate their concerns. In late February, the Court ruled in favor of the prosecution. Details in our next issue.

Pending Cases

***Fisher v. University of Texas at Austin*, 133 S. Ct.**

In another case which is of significance to the legal profession, as well as the public at large, the Court heard oral argument on October 10 in *Fisher v. University of Texas at Austin*. This case involves the issue of affirmative action where the Plaintiff complained that she was denied a place at the University of Texas because of an affirmative action program at the University. Abigail Fisher, who has since graduated from Louisiana State University, contended that she was discriminated against when the Texas university denied her a spot in the entering class in 2008. The United States Supreme Court, while still upholding the concept of affirmative action, has sharply limited its application in recent decisions. During oral argument on the instant matter, it appeared that the Justices were sharply divided on the issue, and observers are awaiting the outcome of this decision to see whether the Supreme Court will further limit or end affirmative action programs at public universities. A decision on this case is expected sometime during the late spring of 2013.

Alabama v. United States

In early November, the United States Supreme Court agreed to hear an important voting rights case which may involve striking down part of the landmark Voting Rights Act which still requires many Southern states and some specific counties in other parts of the Country to get advance approval from Washington before making changes in election laws or voting rules. Several years ago, the Supreme Court indicated that it may be time to end the preclearance rules of the Voting Rights Act, and the instant case will once again allow the entire Supreme Court to review the issue. Since Congress recently extended the Voting Rights Act and its preclearance rules for another 25 years, any Supreme Court ruling could also involve the issue of judicial authority to overturn or modify legislative acts. A ruling in this case is not expected for at least several months.

Hollingsworth v. Perry

United States v. Windsor—The Gay Marriage Cases

In late November, the United States Supreme Court agreed to hear two cases involving the legality of gay marriage. The cases will have an impact on state laws in several states, including New York, and the dispute over whether California's Proposition 8, which the voters adopted in 2008, and which banned gay marriage, was constitutional. The Supreme Court, by granting certiorari in the cases in question, could allow the justices to decide whether the United States Constitution's guarantee of equal protection means that the right to marriage cannot be limited to heterosexuals. The Court announced in early January that it will hear two days of arguments on the cases in question. Oral argument on the *Hollingsworth* case is scheduled for March 26 and on the *Windsor* matter for March 27. The Court's decision on these matters in not expected until the end of the Court's current term in June.

Missouri v. McNeely, 133 S. Ct.

In early January, the United States Supreme Court heard oral argument on the issue of whether police can routinely order blood tests for unwilling drunken driving suspects without at least trying to obtain a search warrant from a judge. Based upon the oral argument, commentators have concluded that the Court seemed reluctant to allow police to routinely order such tests. On the other hand, the Court also appeared concerned about the enormous problem of drunken driving incidents and the numerous numbers of deaths resulting therefrom. During oral argument and in the briefs, the Court was informed that there is a serious national problem involving more than 10,000 deaths from crashes involving alcohol-impaired drivers. Currently, about half of the States already prohibit warrantless blood tests in all or most suspected drunk driving cases. These state statutes are based on the belief that blood tests violated the Constitution's prohibition against unreasonable searches and seizures and that police should obtain a warrant whenever necessary except where a death could threaten a life or destroy potential evidence. A decision is expected from the High Court sometime in June, just before the Court begins its summer recess.

Other News

It was recently announced that Supreme Court Justice Sonia Sotomayor has recently completed her memoirs. The book, entitled *My Beloved World*, is being published by Alfred A. Knopf and was released in January. The book includes the Judge's perspective on her long-term battle against diabetes and her rise from poverty in the South Bronx. The Judge includes an excerpt on affirmative action and stresses its importance to give disadvantaged students a chance for success. She discusses her own entry into Princeton University and Yale Law School as a result of affirmative action programs. It is reported that the Judge has received more than $1 million as an advance for the book and it will be published simultaneously in both English and Spanish.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from October 20, 2012 to January 30, 2013.

People v. Harden (N.Y.L.J., October 23, 2012, pp. 1 and 10)

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's conviction and ordered a new trial on the grounds that the Defendant should have been allowed to testify even though he did not express his interest in doing so until right before summations were scheduled. In the case at bar, the defense had rested and a charge conference was under way when the Defendant stated he wished to testify. The trial court refused to re-open the proof, stating that it was too late. Stressing that the request to testify had occurred before summations, the appellate panel concluded that reversible error had occurred by the trial court's actions. The Appellate Division specifically stated, "Unlike strategic or tactical decisions concerning a trial, which are within the statutory authority of counsel, a defendant retains the authority to make certain fundamental decisions, including whether to testify on his or her own behalf."

People v. Porter (N.Y.L.J., November 1, 2012, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Third Department, upheld a Defendant's conviction for criminal possession of a weapon and denied his claim that a police stop based upon an informant's tip was unconstitutional. In the case at bar, the Defendant was arrested in part by a tip from a confidential informant that he possessed a handgun in his home. Two parole officers found a bullet under a couch cushion but no gun during a subsequent search of the Defendant's residence. A parole officer received a second tip from the same informant, who stated that he had seen the Defendant with a silver handgun in his waistband in a location in Schenectady, New York. When the parole officer and police arrived at the scene minutes later and the Defendant was ordered out of his vehicle, he admitted to having the gun and the Defendant was arrested. The Defendant had argued on appeal that prosecutors had failed to establish the two-prong test in *Agilar–Spinelli*, which requires both that the knowledge and reliability of a confidential informant be demonstrated, and that the informant's information establish reasonable suspicion. Applying the test in question, the Appellate Division concluded that the subsequent search and seizure was proper.

People v. Brown (N.Y.L.J., November 2, 2012, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Third Department, reduced a conviction for first degree assault and determined that the evidence did not establish the critical element of serious physical injury within the meaning of the Penal Law. The appellate panel noted that in the case at bar, the cut in question did not injure any internal organs, that exploratory surgery took less than 20 minutes, and that no main blood vessels were damaged. Further, the victim was discharged from the hospital within 12 hours with a wound that was expected to take no more than 3 months to heal. Under these facts, the Court concluded that the injury did not establish the serous physical injury element of first degree assault.

People v. Moreno (N.Y.L.J., November 9, 2012, p. 4)

In a unanimous decision, the Appellate Division, First Department, upheld the conviction of two former police officers for official misconduct. The officers in question had been acquitted last year of raping a woman in her East Village apartment. The officers had been convicted, however, of official misconduct. The Appellate Division rejected the argument raised on appeal that their actions were not official misconduct because they did not occur as part of their official police functions. The panel noted that the Defendants first obtained the woman's keys and entered her house as part of their duties, and that they falsely assured the complainant's neighbor that they were investigating a report of a prowler. The appellate panel concluded in its decision that "[e]ntering a building or an apartment therein for the purpose of conducting an investigation or assisting an occupant is an official police function. Accordingly, making such an entry on the pretext of doing one of those things, when the police officer's actual intent is to obtain a personal benefit, would constitute official misconduct."

People v. Warren (N.Y.L.J., November 14, 2012, pp. 1 and 2)

In a 3-2 decision, the Appellate Division, Fourth Department, reversed a Defendant's conviction because the trial Judge, who had three years earlier argued with the Defendant's girlfriend and knew that the Defendant's name was on a grievance which was filed against the Judge, refused to recuse himself from the case. The three-Judge majority concluded that under these circumstances, recusal was required, and ordered that a new trial be held before a different Judge. The two Justices in dissent agreed that it would have been better practice for the trial Judge to remove himself, but there was no requirement that he do so.

People v. Kanciper (N.Y.L.J., November 16, 2012, pp. 1 and 8)

In a unanimous decision, the Appellate Division, Second Department, vacated a woman's conviction of child endangerment and determined that there was insufficient evidence to sustain the verdict. In the case at bar, the Defendant, who was the President of a horse rescue organization, injected a dog with a tranquilizer to begin the euthanization process. This was done in front of a 10-year old child, who was on the premises and was taking horse riding lessons from the Defendant. The prosecution claimed that by her actions the Defendant was guilty of child endangerment. The Appellate Division, however, concluded that "[t]he evidence failed to establish that witnessing the injection of the tranquilizer was likely to result in harm to the physical, mental, or moral welfare of the child."

People v. Jones (N.Y.L.J., November 16, 2012, p. 2)

In a unanimous decision, the Appellate Division, Fourth Department, reduced a conviction for depraved indifference murder to manslaughter in the second degree. The appellate panel concluded that under Court of Appeals determinations which have come down in recent years, the circumstances of the crime in question did not fit into the category of depraved indifference homicide. The Appellate Court concluded that the Defendant did not torture his 11-year-old stepsister, and he did not abandon a helpless victim. Under those circumstances, he had intended neither to kill nor seriously injure and the evidence against him was legally insufficient to sustain a depraved mind murder.

People v. Hicks (N.Y.L.J., November 16, 2012, p. 2)

In another 3-2 decision, the Appellate Division, Fourth Department, reversed a Defendant's conviction on the grounds of prosecutorial misconduct. The prosecutor in the case at bar had attempted to have the Defendant characterize prosecution witnesses as liars, and had also made misstatements regarding previous discussions on a possible plea. The majority opinion ordering a new trial was joined in by Justices Lindley, Centra and Martoche. Justices Scudder and Smith dissented.

People v. Lleshi (N.Y.L.J., November 19, 2012, pp. 1 and 4)

In a unanimous decision, the Appellate Division, Second Department, upheld a conviction of a Defendant who threatened to behead the Judge who had sent him to jail on two separate occasions. The issue on appeal was whether the trial court had properly permitted the prosecution to bring forth evidence of prior convictions and the facts underlying those convictions. The appellate panel concluded that the evidence which was admitted demonstrated that the Defendant had a motive to commit the threatened crimes against the Judge and the underlying facts were probative on a relevant material issue and were therefore admissible.

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

In a unanimous decision, the Appellate Division, Fourth Department, reversed a Defendant's drug conviction, and ordered a new trial. The appellate panel concluded that the trial court never answered Defendant's complaints that he had never met his assigned counsel prior to trial and that he had never been told that the trial was about to begin. Based upon these serious allegations, the Appellate Court concluded that the trial Judge should have at least conducted a detailed inquiry on the allegations in question.

People v. Members (N.Y.L.J., November 23, 2012, p. 7)

In a unanimous decision, the Appellate Division, Fourth Department, reversed a Defendant's murder conviction where the Court had accepted a verdict from 11 members of the jury after one of the jurors had gotten sick. Even though on the following day the missing juror returned to Court and reaffirmed that he would have voted for conviction, the appellate panel concluded that a verdict should not have been accepted without the written consent of the Defendant and that the action of the trial court violated statutory procedures.

People v. Christopher B. (N.Y.L.J., November 29, 2012, pp. 1 and 2)

In a unanimous decision, the Appellate Division, First Department, held that prosecutors are entitled to the psychiatric records of a man who set fire to furniture in a building lobby and who had been found mentally unfit to stand trial. The District Attorney's Office sought the records so it could participate in a hearing known as a retention hearing to determine whether the Defendant continued to remain unfit to stand trial. The Defendant had argued that under CPL Section 730.50(2), which governs retention proceedings, the DA's office was not mentioned, and therefore he was not a proper party to obtain the records in question. The Appellate Division, however, rejected the Defendant's claim.

People v. McArthur (N.Y.L.J. December 6, 2012, p. 1)

In a unanimous decision, the Appellate Division, Second Department, reversed a murder conviction and granted a new trial. The Court found that errors committed by both the prosecutor and the defense denied the Defendant a fair trial. The Appellate Division found that

the prosecutor had made improper inferences during his summation and that the Defendant's silence when questioned by police reflected his guilt. The prosecutor also made several other comments which were improper and which should have been objected to by defense counsel. The panel also faulted defense counsel for opening the door to certain testimony which proved to be highly prejudicial and which would not have been admitted but for defense counsel's actions.

People v. Youngs (N.Y.L.J., December 24, 2012, p. 1)

The Appellate Division, Fourth Department, overturned a 2008 ruling and clarified the manner in which ineffective assistance of counsel claims related to an alleged speedy trial violation will be addressed. Previously, the Court held that a defendant, by establishing that six months elapsed between the commencement of a criminal action and the prosecution's announcement of readiness for the trial had made a prima fascia showing of ineffective assistance, shifting the burden to the District Attorney to show that a motion for dismissal on speedy trial grounds would not have succeeded. In its most recent ruling, the Fourth Department held that the Defendant had not made a prima fascia showing that he was denied effective assistance due to defense counsel's alleged failure to challenge an indictment on speedy trial grounds. It stated that argument must be made through a CPL article 440 motion.

People v. Carnevale (N.Y.L.J., December 24, 2012, pp. 1 and 7)

In a 4-1 decision, the Appellate Division, Third Department, reversed a Defendant's conviction and ordered a new trial on the grounds that defense counsel had rendered ineffective assistance throughout the trial. Defense counsel was faulted for not challenging incriminating statements which were made during a lengthy police interrogation. In addition, he allowed the admission of other evidence, failing to raise hearsay grounds, which may have led to their exclusion. The majority opinion was joined in by Justices Lahtinen, Kavanagh, McCarthy and Spain. Justice Rose dissented.

People v. Gordon (N.Y.L.J., December 31, 2012, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's robbery conviction because of the prosecution's fundamentally flawed presentation of the case against him to the Grand Jury. The panel concluded that the presentation contained prejudicial and inadmissible aspects to such an extent that the integrity of the Grand Jury proceedings was so impaired as to require a presentation to another Grand Jury. The appellate panel's action was a rare step, since defects in Grand Jury's presentations are rarely grounds for reversal, especially where there has been a trial on the merits which have subsequently resulted in the Defendant's conviction. In the case at bar, however, the Appellate Division concluded that the errors which occurred were of such an egregious nature that the Defendant's conviction could not stand.

People v. Holmes (N.Y.L.J., January 2, 2013, pp. 1 and 8)

In a unanimous decision, the Appellate Division, Fourth Department, upheld a conviction under Penal Law Section 235.22 involving the sending of an obscene message to a teenage girl. The message was sent by phone, which is not specifically included in the Penal Law Statute. The Appellate Division concluded, however, that the conviction would be upheld even though the statute referred only to computers and does not mention telephones. In a case of an apparent first impression, the appellate panel concluded the conduct of the Defendant fit within the intent of the statute if not its precise words.

People v. Driscoll (N.Y.L.J., January 2, 2013, p. 1)

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's drug conviction on the grounds that the evidence in question should have been suppressed. In the case at bar, the police had conducted a traffic stop because the Defendant was playing his car stereo too loud. After the stop they proceeded to conduct a pat frisk of the Defendant which resulted in the discovery of cocaine. The appellate panel concluded that the police lacked justification to conduct the search in question, since they lacked the required reasonable suspicion to conclude that the Defendant was armed or posed a threat to the officer's safety so as to justify the frisk.

People v. Santiago (N.Y.L.J., January 3, 2013, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Fourth Department, reduced a Defendant's conviction from depraved indifference murder to second degree manslaughter. In the case at bar, the Defendant had put a comforter over a crying 2-year-old until he passed out and then left him alone for some 19 hours. The Appellate Division found that the evidence did not establish the degree of wickedness necessary to sustain a depraved indifference murder conviction. On the contrary, under the circumstances in the case, a conviction for manslaughter in the second degree was the appropriate crime based upon the Defendant's actions. The above case is yet another in a long series resulting from a change in the view of the Court of Appeals with respect to depraved indifference convictions.

People v. Delgado (N.Y.L.J., January 3, 2013, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Second Department, ordered a new trial after concluding that the defense attorney's failure to obtain a ruling about the permitted scope of cross-examination before a Defendant with prior convictions took the stand constituted ineffective assistance of counsel. The Defendant, who had been convicted of a burglary, had several other prior burglary convictions. He took the stand in his own defense but defense counsel had never followed through with a request for a *Sandoval* hearing. Under these circumstances, the Court concluded that even though there was sufficient evidence to support the burglary conviction, a new trial was required because of defense counsel's failure.

People v. Bailey (N.Y.L.J., January 14, 2013, pp. 1 and 7)

In a unanimous decision, the Appellate Division, Second Department, overturned a Defendant's attempted murder conviction on the grounds that the reliability of the prosecution's key witness was subject to serious doubt. The case involved eyewitness identification from a Complainant who admitted he was drunk and high on drugs at the time of the alleged incident. The Appellant Panel indicated that it had conducted an independent review of the weight of the evidence and had concluded that it was too skimpy to establish guilt beyond a reasonable doubt. The Defendant had been charged after he was accused by the Complainant of pointing a semiautomatic pistol at him and pulling the trigger. The weapon in question, however, did not fire. In dismissing the indictment, the Appellate Court pointed to the Defendant's intoxicated state, both from alcohol and marijuana, and also pointed out that the Complainant's attention was focused on the gun rather than the gunman during the brief incident, so that the Complainant fully did not have a good opportunity to review the gunman. In addition, the Complainant could not recall whether the perpetrator had facial hair or any scars on the face, even though the Defendant had a prominent facial scar. The Court's decision indicates an increasing concern about the reliability of eyewitness identifications, an issue which has been the recent subject of much discussion and increasing litigation.

People v. McCray (N.Y.L.J., January 18, 2013, pp. 1 and 7)

In a 3-2 decision, the Appellate Division, Third Department, upheld a rape conviction where the Defendant was provided with only a sampling of the alleged victim's mental health records and denied access to information that may have cast dispersions on the accuser and her accusations. The three-Judge majority, which consisted of Justices Spain, Stein and Garry, argued that the withheld records would not have been admissible, and stated that the trial court had properly balanced the Defendant's Sixth Amendment right to cross-examine an adverse witness and his right to any exculpatory evidence against the countervailing public interest in keeping certain matters confidential. The two dissenters, consisting of Justice McCarthy and Justice Mercure, stated that the standard for disclosure is not admissibility but whether the suspect needed and was entitled to the information to prepare a defense. The two dissenters strenuously argued that the Defendant was denied his Sixth Amendment rights and was entitled to a new trial. The sharp split in the Appellate Division and the issue involved makes it certain that the matter will eventually be addressed by the New York Court of Appeals.

People v. Green (N.Y.L.J., January 23, 2013, pp. 1 and 2)

In a 3-2 decision, the Appellate Division, First Department, upheld a conviction where the element of depraved indifference was involved. The Defendant, who had become drunk, had thrown beer bottles from the 26th floor of a Manhattan hotel. He was convicted of first degree reckless endangerment. The three-Judge majority determined that the Defendant's actions indicated callous and dangerous behavior, which satisfied a conviction involving depraved indifference. The three-Judge majority consisted of Justices Gonzalez, Freidman and Roman. Justices Daniels and Renwick dissented. The dissenters argued that although the Defendant's conduct reflected stupidity and drunken thoughtlessness, it did not rise to the level of a heinous and despicable act required to establish depraved indifference. Based upon the sharp split in the Court, it is likely that this case will wind up in the New York Court of Appeals.

People v. Bristol (N.Y.L.J., January 25, 2013, p. 1)

In a unanimous decision, the Appellate Division, Second Department, ordered a re-trial after it concluded that the trial Judge did not conduct a sufficiently searching inquiry of a Defendant who wanted to represent himself during his criminal trial. Because of the failure to conduct a proper inquiry the Defendant's waiver of his right to counsel was deemed ineffective, and a new trial was required. The appellate panel noted that in the type of situations involved in the case at bar, the trial court must adequately warn Defendants of the risk of appearing pro se, and must conduct a proper inquiry to determine whether the Defendant's waiver of his right to counsel is knowingly, intelligently and voluntarily made.

For Your Information

FBI Report Indicates Decline in National Crime Rate

In late October, the FBI issued its final report with respect to reported crimes throughout the Nation during the year 2011. The report concluded that the number of violent crimes reported to police decreased 3.8% in 2011. The number of reported violent crimes was 1.2 million, which represented a fifth straight year of declining figures. Since 1993, violent crime has dropped by 65%. The number of reported property crimes was down by 0.5% to 9 million, the 9th consecutive year that the figures have fallen. The report estimated that property crimes in 2011 had resulted in losses of $156.6 billion.

With respect to individual crimes, the FBI data for 2011 revealed that 14,612 people were murdered, which represented a 14.7% reduction from 2007. Rapes involved 83,425 people, a drop of 9.4% from 2007. Robberies dropped from 447,324 in 2007 to 354,396 in 2011. Assaults also dropped from 866,358 in 2007 to 751,131 in 2011, a decline of 13.3%.

With respect to the different sections of the Country, the FBI report indicated that 41.3% of violent crimes occurred in the South, 22.9% of violent crimes were reported in the West. The Midwest had 19.5% of reported violent crimes, and the Northeast had 16.2% of reported violent crimes. The report indicated that the increasing decline in crime statistics is attributed to a drop in the number of people in the peak crime age of 18 to 25, the use of new policing practices and several other factors.

Judicial Stipends to Cease

In October, Chief Administrative Judge A. Gail Prudenti advised the State's Supreme Court Justices that the $10,000 stipend which had been paid in recent years will not be continued. The stipend was issued during a period of time when judges had not had a pay increase in 13 years, and was viewed as a temporary accommodation to assist the members of the judiciary with certain personal expenses. Since the judiciary has now received a pay raise which amounted to 17% as the first installment of a 3-year, 27% pay hike, the necessity of continuing the stipend is no longer present. In issuing her statement, Judge Prudenti remarked, "I don't believe it was intended to be permanent and having received a raise, although less than expected, in these difficult times of workforce reductions and budget cuts, the allowance was not sustainable."

New York Becomes Highest Tax State in the Nation

According to a recent survey by the Tax Foundation, New York has earned the distinction of having the highest tax burden of any state in the Nation. According to the report, New Yorkers in 2010 were hit with an average tax burden of 12.8% of their income. In terms of dollars, the average tax burden for every man, woman and child in New York State has reached $6,375. The Tax Foundation listed the five states with the highest tax burden, and the five states with the lowest tax burden, as follows:

Highest		**Lowest**	
1. New York	12.8%	50. Alaska	7.0%
2. New Jersey	12.4%	49. South Dakota	7.6%
3. Connecticut	12.3%	48. Tennessee	7.7%
4. California	11.2%	47. Louisiana	7.8%
5. Wisconsin	11.1%	47. Wyoming	7.8%

The average for the Nation as a whole was set at 9.9%.

New York Court of Appeals Rejects 18-B Lawsuit

In a 4-3 decision, the New York Court of Appeals determined on October 30, 2012, that New York City had established a legally valid plan for indigent defendants that utilizes both institutional providers and private assigned counsel under 18-B of the County law, and that the City's ability to enact such a system was not contingent on the approval of local Bar Associations. The City during the last several years has gradually moved from a system relying heavily on 18-B attorneys to one involving private contractor plans. Several New York City Bar Associations had commenced a lawsuit against the City arguing that under the original provisions of County Law Section 722, the City could not effect the changes it sought without Bar Association approval. The majority decision, in an opinion which was written by Judge Ciparick, concluded that the plan, which was submitted by Mayor Bloomberg in 2008 and modified in 2010, satisfied the requirements of County Law Section 22 for a so-called combination plan in which the City assigns to institutional providers the cases of poor defendants where primary legal services

providers have a conflict of interest. Further, the City's ability to do so is not contingent on the approval of local Bar Associations. The majority further concluded that they did not believe that the legislature intended to create a situation where the Bar Associations would control the City's ability to fulfill a statutory mandate to provide for indigent defense. The case in question was known as "*Matter of the New York County Lawyers Association vs. Bloomberg.*" Joining Judge Ciparick in the majority opinion were Judges Graffeo, Read, and Jones. Chief Judge Lippman, joined by Judges Smith and Pigott, dissented. The issue in question has been highly controversial, and the narrow, split 4-3 decision followed a 3-2 decision in the Appellate Division.

Additional Appellate Division Vacancies Created by Loss of Republican Judges in Recent Election

As a result of the November 6 election, three Republican Justices were defeated for re-election and have thus lost their seats on the Appellate Division. Justice Catterson, who had been sitting on the First Department, lost a re-election effort in Suffolk County. Justices Cavanaugh and Malone, who had been sitting in the Appellate Division, Third Department, also were defeated by Democratic candidates. In other local races involving Appellate Division Justices, Justice Leonard Austin, a Democrat, and Peter Skelos, a Republican, were re-elected in Nassau County and will therefore continue to sit in the Appellate Division, Second Department. The heavy Democratic vote in New York for President Obama was attributed to helping defeat Republican judicial candidates, and the number of Republicans sitting in New York Courts is steadily decreasing.

Governor Cuomo to Fill New York Court of Appeals Vacancy by March

The State Commission on Judicial Nomination made its recommendations to Governor Cuomo in early March on its nominees to fill the Court of Appeals vacancy recently created by the death of Judge Theodore Jones. The nomination process is governed by State Judiciary Law 68 (2). The Governor will have between 15 and 30 days to make a nomination from the list of 3 to 7 candidates which was sent to him. Any nominee must then be confirmed by the State Senate.

Number of Poor in the United States Continues to Grow

According to a recent Census Report, the ranks of America's poor continue to increase, and last year amounted to a record high of 49.7 million. This represents approximately slightly more than 16% of the U.S. population. According to the report, the States with the greatest number of poor persons were Mississippi, New Mexico, Arizona and Louisiana. The report also indicated that the poverty rate is rising dramatically among people 65 and older. The few bright spots in the new report were that the poverty level for children has declined slightly and that the poverty rate for African-Americans has also registered a modest decrease.

New York Law School Enrollment

A recent article in the October 30, 2012 issue of the *New York Law Journal* indicated the number of students enrolled in law schools within the state of New York during the Fall of 2012. The article indicated that the law school with the highest enrollment of full-time students was New York University School of Law, which had an enrollment of 1,464 students. The law school with the smallest enrollment of full-time students was CUNY, which had 429 students. The breakdown of the various schools for both full-time and part-time students was listed as follows:

Law School	Full-Time	Part-Time
Albany	617	40
Brooklyn	1,204	172
SUNY Buffalo	637	4
Cardozo	1,038	102
Columbia	371	0
Cornell	603	0
CUNY	429	0
Fordham	1,244	252
Hofstra	1,074	70
New York	1,365	400
NYU	1,464	0
Pace	644	132
Syracuse	640	5
St. John's	787	148
Touro	805	225

Governor Issues Temporary Suspension of Time Limitations with Regard to Pending Criminal Matters

As a result of the emergency disaster situation created by Hurricane Sandy, Governor Cuomo on October 26, 2012, issued Executive Order no. 47, which temporarily suspended time limitations in pending criminal matters. The Order applied to such areas as speedy trial time periods, time to appeal and other provisions affecting criminal cases. The Order was effective until further notice from the Governor. Criminal Law attorneys should be aware of the Governor's Order and how it might affect certain situations involving criminal matters.

Attorney General Announces New Executive Appointment

Attorney General Eric Schneiderman, in early November, announced the appointment of Kelly Donovan as Executive Deputy Attorney General for Criminal Justice. She will oversee seven Bureaus with approximately 100 Attorneys involved in various criminal law cases. Donovan formerly served as Chief of the Medicaid Fraud Bureau, and was also an Assistant District Attorney in the Manhattan Office. She is a graduate of Columbia Law School. We congratulate her on her recent appointment, and wish her well in her new position.

Wiretap Measure Extended

In late December, the Senate gave final congressional approval to renewing the Government's authority to monitor overseas phone calls and e-mails of suspected foreign spies and terrorists without obtaining a court order for such intercept. The classified Foreign Intelligence Surveillance Act was on the brink of expiring by the end of the year. The Bill received overwhelming approval in the Senate and was approved by a vote of 73 to 23. The authorization has now been extended for five years. The President signed the Bill within a few days after final legislative action.

A Tale of Two Cities

Year-end crime reports in New York City and Chicago have revealed wide disparities. Crime in New York City on an overall basis continues to remain at record lows, although there has been some slight increase in crime in some New York City precincts. Overall the City recorded a number of record lows. For example, the number of murders at the end of the year was set at 418. This was the lowest level since 1963. In comparison, the City of Chicago, which has one quarter of New York City's population, registered an all-time high in violent crimes and murders. At the end of the year, 511 murders had occurred in Chicago. Both the Mayor and Police Officials in Chicago are seeking ways to reduce violent crime in that City and to institute improvements which appear to have worked well in New York City.

Number of Death Penalty Executions Dips to 20-Year Low

A recent study from the Death Penalty Information Center revealed that fewer states carried out executions in 2012 than at any time in the last 20 years. In 2011, 43 death sentences were carried out, a drop of 56% since 1999. The report indicated that since 1990, the lowest number of state executions occurred in 1991, a total of 14. During the last 5 years the lowest number took place in 2008 with 37 death sentences being carried out. The number of death penalty executions is concentrated in 9 states, Texas, Arizona, Oklahoma, Mississippi, Ohio, Florida, South Dakota, Delaware and Idaho. This year Texas led the list of death sentences, with 15 executions. Arizona, Oklahoma and Mississippi followed Texas with 6 executions each. The study concluded that many states are reconsidering the use of the death penalty and that several may take up the question of death penalty repeal in the years ahead.

Governor Signs New Domestic Violence Legislation

In late October, Governor Cuomo signed into law a bill that provides more serious punishment for the perpetrators of domestic violence-related crimes and offers greater protection for its victims. The legislation creates a new crime of aggravated family offense, a class E felony.

Many New Yorkers Moving to Florida

A recent report from the U.S. Census Bureau indicated that during the last several years there has been a large movement of New Yorkers relocating to Florida. The report indicated that from 2000 to 2010, more than 600,000 people moved from New York to Florida. The movement is largely fueled by better climate conditions, lower taxes and a better quality of life. As a result of the movement into Florida of many New Yorkers and people from various other states, Florida's population is now almost equal to that of New York State and projections are that Florida's population may pass that of New York within the next few years. Currently it is estimated that the population of the two States is separated by about 500,000 people. The 2010 census put Florida's population at about 18.8 million and New York's at approximately 19.3 million.

Law Schools Experience Lower Bar Pass Rates

The results of the 2011 July Bar examination revealed a lower pass rate for many of the state's Law Schools. The average overall pass rate for first-time candidates dropped by one percentage point to 85%. New York Law School experienced the most serious plunge, with a pass rate of 70%, down 10 points from the previous year. The schools with the highest pass rate continue to be Columbia and NYU, which had pass rates of 96 and 95% respectively. Cornell, Fordham, Cardozo and Brooklyn also had pass rates above the state average. Other law schools with pass rates below the state average were CUNY, Buffalo, St. John's, Hofstra, Albany, Syracuse, Pace, and Touro. The greatest improvement was experienced by CUNY Law School, whose pass rate jumped by 10 points from the previous year.

Despite Aggressive Actions, Labor Unions Continue to Lose Membership

A recent report indicated that overall union membership in the United States has shrunk to just 11.8% of the workforce as of the end of 2011. It was expected that in

2012, a further decline in union membership would occur after public sector unions lost additional members in Wisconsin and other States due to layoffs and the adoption of right to work laws. In fact, the Bureau of Labor Statistics, for 2012, indicated that overall, union membership had dropped to 11.3%. This was a decline of approximately 400,000, so that only 14.37 million workers were union members as of the end of last year. Excluding union membership for government workers, private sector workers dropped to 6.6% of the total work force from 6.9% in 2011. In response to the decline in union membership, organized labor is planning political actions and other measures in such states as Ohio, Pennsylvania and Florida in order to guard against proposed legislation which it views as being anti-labor.

U.S. Population Shows Slow Growth

New 2012 estimates recently released by the Census Bureau indicate that the U.S. population appears to be leveling off with very little, if any, growth. It was estimated that as a whole, the U.S. population during the year 2012 grew by only 2.3 million people, reaching a total of 313.9 million. This year's low rate of growth is the lowest since 1937. The Nation is also getting older. In all, 26 States grew faster this year compared to the previous year, of which 19 were in the South and Western regions. The highest rate of growth was experienced by North Dakota with a 2.2 % increase. Several other states are also experiencing a higher level of growth than the average in the Country. These include Texas, Colorado, Oregon and Virginia. Two States that are in fact losing population are Rhode Island and Vermont. California still remains as the most populous State, followed by Texas, New York, Florida and Illinois.

2012 Felony Conviction Rates within New York City

The Division of Criminal Justice Services recently reported on the felony conviction rates in 2012 for the five District Attorney's Offices within the City of New York. The highest conviction rate was posted by Queens, with 70.1%. Queens was followed by Manhattan, which had a conviction rate of 69.2. Staten Island was next with a rate of 65.6. Brooklyn posted a rate of 59.3, and the Office with the lowest conviction rate was the Bronx with a rate of 56.9. Overall on a citywide average, the conviction rate was 63.5%. In comparison to prior years, the conviction rates have remained fairly constant over the last 5 years, with the exception that in 2012, the New York County District Attorney's Office experienced a significant increase in its conviction rate of almost 13%.

Federal Court Vacancies

Concern has recently been expressed regarding the large number of vacancies which exist in the Nation's Federal District and Circuit Courts. When President Obama came into office in 2009, 55 vacancies existed in the Federal Courts. Currently there are 73 vacancies. The number of vacancies has made it more difficult for the Federal Courts to keep up with a rising caseload, and several Federal Judges, including Chief Judge Roberts, have expressed concern that the Senate is not acting quickly enough to fill judicial vacancies. The nomination procedure for federal judges is often lengthy, sometimes stretching beyond a year or two, and many have called for an expedited procedure before the situation becomes critical.

Appointment of New Court of Appeals Judge

In early December, the Commission on Judicial Nominations reported its seven candidates for appointment to the New York Court of Appeals. An opening resulted on the Court as a result of the retirement of Judge Ciparick. The Commission, which has been chaired by former Chief Judge Judith Kaye, after an extensive process, sent to the Governor the names of their seven recommendations. The candidates in question were as follows:

Sheila Abdus-Salaam—currently a Justice in the First Department

Rolando Acosta—currently a Justice in the First Department

Kathy Chin—currently a partner with Cadwalader, Wickersham & Taft

Eugene Fahey—currently a Justice with the Fourth Department

Jenny Rivera—a Professor at CUNY School of Law

Margarita Rosa—currently Executive Director at Grand Street Settlement

David Schulz—currently a partner with Levine Sullivan Koch & Schulz

The Governor had between January 1 and January 15 to select one of the 7 candidates as his nominee. On January 15, the Governor selected Jenny Rivera to fill the vacancy on the Court. The Senate confirmed the Governor's nomination in February, and the new Judge began serving on the Court shortly thereafter.

Unfortunately, due to the recent death of Judge Theodore Jones, the Judicial Commission would shortly be reporting on a new list of 7 candidates to fill that vacancy. The Governor is expected to make his nomination at the end of March or early April, with Senate confirmation expected in April or May. Judge Jones' replacement is expected to take a seat on the Court sometime in early May. The Court thereafter will be restored to its constitutional number of seven members. In recent months, it has been operating with 5 or 6 Judges.

OCA Submits No-Growth Budget for 2013–2014 Fiscal Year

Recognizing the fiscal crisis faced by the State, the Office of Court Administration indicated that it is imposing several belt tightening measures, and it has submitted a budget for the current 2013-2014 fiscal year which is identical to the current budget and which provides for no increase. Chief Administrative Judge Prudenti stated that the OCA has submitted a zero growth budget which attempts to strike a delicate balance between the judiciary's obligations and the need to be a responsible partner in government. The new budget does provide for some increases in aid for civil legal services, additional support for indigent criminal defense, and judicial pay raises. These increases have been offset by cuts in operational expenses. Judge Prudenti further added that OCA expected to benefit from cost deficiencies resulting from expanded e-filings, restraints on hiring and restrictions on overtime. The overall budget request for the judiciary was placed at slightly under $2 billion. In his recent budget address, Governor Cuomo applauded the submission of the judicial budget and basically endorsed its contents.

Home Prices Finally Rise

An indication of economic recovery is the fact that in recent months, housing prices have begun to rise following several years of decline. A recent report indicated that home prices rose 6.3% in October 2012, compared with a year earlier. This was the largest yearly gain since July 2006. Home prices also extended their gains in November, rising 7.4% compared with a year ago. According to the report, prices increased in 45 States in October with the biggest increases occurring in Arizona and Hawaii. With mortgage rates at a near record low, and the number of available houses at its lowest level in ten years, prospects for continued increases in home prices are good. Only 5 States continue to report price declines in October 2012. These States were Illinois, Delaware, Rhode Island, New Jersey and Alabama. Since the housing industry is a major part of the U.S. economy, it is hoped that a turnaround in the housing market will lead to a dramatic improvement in the Nation's economy.

OCA Addresses Felony Caseload Backlog within New York City

A serious backlog of felony cases has developed within the City of New York, and the Office of Court Administration recently announced that it was assigning at least 10 judges from outside of New York City to conduct trials over the next 6 months in an effort to reduce the current backlog. Figures released by the Office of Court Administration indicate that the worst backlog as of the end of 2012 existed in the Bronx, with 3,690 felony cases which are more than 6 months old. Of this number 931 are older than 2 years. A serious backlog also exists in Brooklyn, where 1,566 are over 6 months old, and 150 are more than 2 years old. Manhattan has 1,535 which are more than 6 months old, and 217 which are more than 2 years old. Queens and Staten Island are in somewhat better shape, with Queens having 686 which are more than 6 months old, and 87 which are more than 2 years old. Staten Island has only 38 cases which are 6 months old, and no cases which are over 2 years. Judge Prudenti indicated that special blockbuster parts will be created to deal with the felony backlog. The situation appears reminiscent of several years ago, where due to a large number of drug cases, judges from outside of the City were drafted to handle cases within New York. We will monitor the situation for readers, and hopefully the new OCA initiative will be successful.

New York City Police Department Ordered to Limit Searches

As a result of an ongoing trial before Judge Scheindlin in the Southern District of New York, the Police Department has been ordered to limit certain police procedures involving stop-and-frisk and warrantless searches. The Judge recently concluded that the Plaintiffs demonstrated a clear likelihood of proving that the police displayed a deliberate indifference toward a widespread practice of unconstitutional trespass stops outside of certain buildings. After issuing her ruling, the Judge stayed its enforcement pending an appeal. The controversy and litigation over this and related search and seizure matters is continuing, and efforts are still being sought to balance police procedures to insure the safety of the public versus respect for the constitutional rights of citizens.

New York Quickly Enacts Tough Gun Control Law

Responding to the recent unfortunate incidents involving gun violence in schools, the Governor and the State Legislature, within the course of a few weeks, adopted new restrictions on the use of guns in New York State. A summary of the new provisions includes a mandate to establish a police registry for assault weapons, stricter background checks, a ban on online sale of assault weapons, restrictions on the amount of ammunition which can be stored by gun owners, and increasing sentences for gun crimes. Opponents of the gun legislation have pointed out some technical defects in the already passed Statute, and it appears that future refinement of the new legislation will be required, and that litigation may result as opponents of stricter gun controls seek to attack the Statute.

About Our Section and Members

Annual Meeting, Luncheon and CLE Program

The Section's Annual Meeting, luncheon and CLE program was held on Thursday, January 24, 2013 at the Hilton New York in New York City, at 1335 Avenue of the Americas (6th Avenue at 55th Street). The CLE Program at the Annual Meeting was held this year at 9:00 a.m. This year's topic covered the issue of ineffective assistance of counsel. A distinguished panel discussed the recent United States Supreme Court decisions in *Lafler v. Cooper,* 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, U.S. 132 S. Ct. 1399 (2012), which held that plea negotiations were a critical stage of the criminal proceedings requiring effective assistance of counsel and their effect upon the practice of criminal law. The CLE program had a registration of 59 members.

Our annual luncheon, which had an attendance of approximately 137, was held at 12:00 p.m., and included as a guest speaker Justice Frank J. LaBuda from Sullivan County in upstate New York. Justice LaBuda spoke on Pre-trial discovery. Several awards were also presented to deserving individuals as follows:

The Michele S. Maxian Award for Outstanding Public Defense Practitioner:
Daniel E. Barry, Jr., Esq.

The Charles F. Crimi Memorial Award for Outstanding Private Defense Practitioner
Thomas J. Cocuzzi, Esq.

The Outstanding Appellate Practitioner Award
Robert S. Dean, Esq.

The Outstanding Prosecutor Award
Kristine Hamann, Esq.

The Vincent E. Doyle, Jr. Award for Outstanding Jurist
Hon. Theodore T. Jones (posthumously)

At our Annual Meeting, new officers and district representatives were elected to serve for the coming year effective June 1, 2013. The officers and district representatives are as follows:

Chair—**Hon. Mark R. Dwyer**

Vice-Chair—**Sherry Levin Wallach**

Secretary—**Robert J. Masters**

Treasurer—**Tucker C. Stanclift**

Representatives:

First District—**Guy Hamilton Mitchell**

Second District—**Allen Lashley**

Third District—**Michael S. Barone**

Fourth District—**Donald T. Kinsella**

Fifth District—**Nicholas DeMartino**

Sixth District—**Kevin Thomas Kelly**

Seventh District —**Betsy Carole Sterling**

Eighth District—**Paul J. Cambria**

Ninth District—**Gerard M. Damiani**

Tenth District—**Marc Gann**

Eleventh District—**Anne Joy D'Elia**

Twelfth District—**Christopher M. DiLorenzo**

Thirteenth District—**Timothy Koller**

Membership Composition and Financial Status

As of January 29, 2013, our Criminal Justice Section had 1,575 members. This is an increase of approximately 60 members from the same time last year. With respect to gender, the Section consists of 1,120 men, or approximately 71%, and 409 females, or approximately 26%. The percentage of women in the Section has slowly been rising, and is now about 3 points higher than it was in 2011. In a somewhat similar situation to last year, slightly over 47% of the membership composition is in some type of private practice. Within the private practice group, the largest composition continues to be solo practitioners who make up over 31% of the Section. This number represents a slight increase of approximately 3% in the solo practitioner group over last year.

In terms of age groupings, slightly over 22% are between 56 and 65. This is a slight decline from last year, when approximately 25% of the Section was within this age grouping. The number of younger attorneys, 36 and under, now comprises slightly over 22%, which is up about 1% from last year. In terms of years of practice, slightly more than 48% have been in practice for 20 or more years. This is about the same as last year. About 19% have been in practice for 5 years or less, which is also about the same as last year.

The Criminal Justice Section is one of 25 Sections in the New York State Bar Association which had, as of January 29, 2013, a total membership of slightly more than 75,000 members, a slight decline from the last two years. We regularly provide a welcome to those members who have recently joined, and a list of our new Section members who have joined in the last several months appears on the next page.

With respect to the financial status of our Section, our Treasurer, Tucker C. Stanclift, recently reported at our Annual Meeting that as of the end of the year, the Section had income of approximately $82,000. Overall expenses slightly exceeded income so that the Section ended the year with a deficit of about $5,500. The Section, however, still maintains an accrued surplus from past years of approximately $45,000. The Treasurer reported that one of the largest expenses for the year 2012 was Section Executive Committee meetings, which involved an expense of

approximately $11,500, an increase of slightly more than $4,000 over the 2011 amount. The Treasurer's report also concluded that it will be important for the Section to focus on increasing revenue from events which were held in order to reach the projected amount anticipated in next year's budget.

Task Force on Criminal Discovery

Section Vice-Chair Mark R. Dwyer was recently appointed by State Bar President Seymour James to serve as the Co-Chair of a Task Force which will examine the criminal discovery process in the State and recommend ways to make it fairer. Mark Dwyer is currently an acting Supreme Court Justice in Brooklyn and previously served in an executive position with the Manhattan District Attorney's Office. Also named as Co-Chair of the Task Force is Peter Harvey, a partner at Patterson Belknap Webb & Tyler. In establishing the Task Force, President Seymour James stated, "New York's discovery statute sets significant limitations on the material available to the opposition in criminal cases. In fact, New York's statute is one of the most restrictive in the Country." The Task Force will prepare a report on discovery practices and make recommendations that will be presented to the House of Delegates, the State Bar's policy-setting body, for adoption sometime in the late Spring.

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.

Judith Aarons
Amy Adelson
Adler Charles Bernard
Laura G. Birger
Alexander W. Bloomstein
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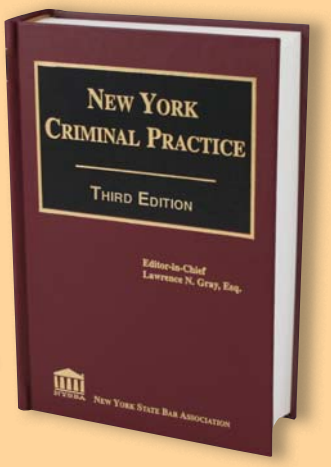

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