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of the New York State Bar Association

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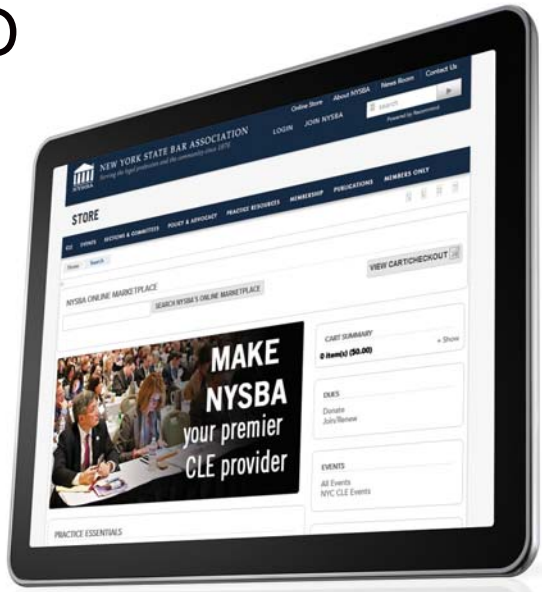

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Message from the Chair

The Only Rule

Litigators are of many types. Some are brash. Some are loud. Some are wise, and others are foolish. But surely the worst litigators are those who are fixated on grammar. You have selected a grammar nerd to be your Chair, a Felix in a world of Oscars. This column will teach you to be more careful in the future.

I gave up on unsplitting the world's infinitives years ago. Captains Kirk and Picard will never announce intent boldly to go someplace, and there is nothing I can do about it. In my time, I took the split infinitives out of hundreds of appellate briefs, but I always felt like Canute trying to stem the incoming tide. Ultimately, I recognized that this messy world will refuse to follow the rules, and learned to deal with it.

But there is one windmill at which I firmly resolve always to tilt. I will do my best to enforce the only rule—or, I suppose, the "only" rule. This rule, observed mostly in the breach, concerns the proper placement in a sentence of the emphasizing word "only." The rule may be stated this way: in a sentence, "only" should be placed immediately before the term it underscores, i.e., as far to the "right" in the sentence as it can go without losing its meaning.

Consider this sentence: "I only go to court to learn about sex crimes." That would be proper usage if the speaker means to convey that, to learn about sex crimes, he goes to court and not to the law library. More likely, however, the speaker intends to convey that there is but one motive that could lead him into a courtroom, that being his ambition to learn about sex crimes. To do so he should say, "I go to court only to learn about sex crimes." Similarly, one should say, "I only expect to address the court on the subject of the right to counsel." The intended meaning doubtless is, "I expect to address the court only on the subject of the right to counsel."

The rules of grammar are not intended to be uncomplicated. The "only" rule comes with one Latinesque corollary: the word sometimes best achieves its emphatic purpose when it is placed at the very end of the clause or sentence in which it appears. It would be wrong to say, "The offer of an A and a year is only on the table for today." It would surely be correct to say, "The offer of an A and a year is on the table only for today." Yet one might best convey the urgent need to make a quick decision by saying, "The offer of an A and a year is on the table for today only."

In the next issue of this magazine, we will discuss the significance of the Eighth Amendment on whether one may hang a participle. In the meantime, as this article is being read, the Annual Meeting of the State Bar Association has ended. Justices Leventhal and Kamins have joined me in presenting the morning CLE program. Our lunch speaker was Deputy Attorney General James Cole, who addressed the Obama administration's clemency policies. The hotel's chicken was pretty good. I hope that many of you attended.

Mark R. Dwyer

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

Message from the Editor

We are fortunate that in this issue we are able to present four feature articles dealing with a variety of important issues in the Criminal Justice System. First, we have two articles dealing with the consequences of the Supreme Court decision in *Padilla v. Kentucky*. The first article deals with the recent Court of Appeals decision requiring trial judges to advise immigrant defendants of the possible consequences of a felony guilty plea. The second article deals with the issue of retroactivity of the *Padilla* decision. Although the United States Supreme Court recently ruled that *Padilla* was not to be applied retroactively, the New York Court of Appeals presently has before it the issue of whether retroactivity can be applied under New York law. This article is written by Sheila L. Bautista, an Assistant District Attorney with the Appeals Bureau in the New York County District Attorney's Office. Ms. Bautista is a first-time contributor to our *Newsletter* and we welcome her article on an important Criminal Law subject.

In our last issue, Edward Fiandach presented an interesting article regarding intoxication and its effects on depraved indifference in alcohol-based motor vehicle fatalities. The New York Court of Appeals recently decided two cases which were discussed by Mr. Fiandach in his earlier article. He therefore provides us with a brief update of those cases and the Court of Appeals rulings. We thank Edward for his continued contribution to our *Newsletter*. For our fourth feature article we present "The Effect of Guilty Pleas on Subsequent 1983 Claims of Excessive Force." This article is written by Matthew Paulose, Jr. and Valerie K. Mitchell, practicing attorneys in the Bronx. They are also first-time contributors to our *Newsletter*, and we look forward to additional selections from them.

We also provide information regarding recent decisions from the New York Court of Appeals, as well as selected cases from the various Appellate Divisions. Although the United States Supreme Court has just begun issuing decisions, there have been a few which have involved Criminal Law issues and we summarize those cases for our readers. We also provide a preview of pending cases where decisions are expected within the next few months.

Since our Section had its Annual Meeting on January 30, 2014, at the New York Hilton Midtown, we also provide photos and details regarding the activities at our awards luncheon and CLE program. Our luncheon was well attended, with 102 members in attendance. As in the past, several awards were distributed to noteworthy recipients. It was a pleasure to recognize those 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. We also present in that article information regarding the current status of our membership and financial condition.

Our *Newsletter* serves as the lines of communication between our Section and its members. We appreciate receiving suggestions and comments. I appreciate receiving articles for possible inclusion in the *Newsletter*, and I am pleased that within the last few months we have received several articles for consideration, including many from first-time contributors. Keep the articles coming. Our *Newsletter* is now 11 years old and I thank our members for their support.

Spiros A. Tsimbinos

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New York Court of Appeals Deals with Consequences of *Padilla* Decision

By Spiros A. Tsimbinos

On March 31, 2010, the United States Supreme Court issued a landmark ruling which held that an attorney's failure to advise immigrant defendants regarding the possibility of deportation as a consequence of a guilty plea constitutes ineffective assistance of counsel. See *Padilla v. Kentucky* 130 S. Ct. 1473 (2010). As a result of the Supreme Court decision, New York State Trial and Appellate Courts during the last three years have struggled to implement the new ruling and to deal with the consequences of the decision.

In July of 2010, I authored an article dealing with the consequences of the *Padilla* decision. The article appeared in the Summer 2010 issue of this *Newsletter*. New York State, in 1995, had passed an addition to CPL Section 220.50 (7), which provided that a trial judge should advise an immigrant defendant of the possible deportation consequences of the plea. The effects of the new provision are, however, largely nullified by the additional proviso that the failure of the court to provide the advice regarding deportation would not affect the voluntariness of the plea or the validity of the conviction.

Following *Padilla*, I raised a serious question regarding the continued viability of the restrictive proviso and suggested that a good way of handling the situation created by *Padilla* was to make it a mandatory part of the court's colloquy in accepting a plea that the courts advise an immigrant defendant of the possibility of deportation. I specifically stated at page 9:

> By having the Court do so, it will also cure any lapse in defense counsel representation, since, if it appears on the record that the Defendant was so advised, the Defendant may not be able to establish the prejudice prong of the Strickland test, to wit: that he would not have pleaded but for the erroneous advice of counsel.

Three years after I made my suggestion, I was pleasantly surprised when I read the decision of the New York Court of Appeals in *People v. Peque* and two related cases, which was issued on November 19, 2013, in which a five-Judge majority of the Court held that trial judges must caution non-citizen defendants that they may be deported before allowing them to plead guilty to a felony. The court determined that the trial judge's failure would constitute a due process violation. Writing for the majority, Judge Abdus-Salaam acknowledged that it was taking the extraordinary step of overturning in part a prior precedent in *People v. Ford*, 86 NY 2d 397, which held that deportation is a collateral consequence of conviction and that the court's failure to inform the Defendant of that consequence never impacts the voluntariness of the plea. The five-Judge majority concluded that in today's times, thousands of defendants fall within the non-citizen category, and that fairness required that the defendants be informed of the deportation possibility before the acceptance of any felony plea. Thus, Judge Abdus-Salaam concluded the majority's decision by stating:

> In short, Chief Judge Lippman, Judges Graffeo, Read, Rivera and I conclude that deportation constitutes such a substantial and unique consequence of a plea that it must be mentioned by the trial court to a defendant as a matter of fundamental fairness.

The five-Judge majority constituted of Judges Abdus-Salaam, Graffeo, Read, Rivera and Chief Judge Lippman. Judges Smith and Pigott dissented on the due process violation. When it came to fashioning a remedy for the violation in question, the Court split, with Judges Lippman and Rivera arguing that that since a due process violation was involved, the pleas in question should be automatically vacated and the matters returned to the original trial court. Judges Salaam, Graffeo, Read, and this time joined by Judge Smith, held that the proper remedy was to allow defendants who had not received proper notifications regarding the ramifications of their plea to go back to court and show there was a reasonable probability that they would not have pleaded guilty but would have gone to trial had they been told that deportation awaited them under a guilty plea. Judge Pigott refused to sign on the proposed remedy, and instead took no position on the issue. In ordering any new hearings, the four-Judge majority stated:

> When weighing the question of prejudice, courts should consider "the potential consequences the defendant might face upon a conviction after trial, the strength of the People's case against the defendant, the defendant's ties to the United States" and other factors.

Some recent commentators have criticized the majority ruling regarding the remedy to be imposed and have supported the dissent of Judges Lippman and Rivera. In a

recent article, an attorney active in the immigration area commented as follows:

> While some may applaud this decision as yet another measure to safeguard the rights of non-citizens, as an immigration attorney that has represented clients that have not been adequately warned— whether by judges or by defense counsel—of the immigration consequences stemming from their pleas, from a practical point of view this ruling falls woefully short of providing non-citizen defendants with any real remedy.

(See letter to the Editor of Evangeline M. Chan, *New York Law Journal,* January 10, 2014, page 6.)

The majority opinion also sought to provide trial judges who are now required to administer the warnings with guidance as to what must be included. It therefore stated:

> Mindful of the burden this rule imposes on busy and calendar-conscious trial courts, they are to be afforded considerable latitude in stating the requisite advice. As this Court has repeatedly held, "trial courts are not required to engage in any particular litany during an allocution in order to obtain a valid guilty plea" (*People v. Moisset*, 76 NY 2d 909, 910 (1990). As long as the court assures itself that the defendant knows of the possibility of deportation prior to entering a guilty plea, the plea will be deemed knowing, intelligent and voluntary.
>
> The trial court must provide a short, straightforward statement on the record notifying the defendant that, in sum and substance, if the defendant is not a United States citizen, he or she may be deported upon a guilty plea. The Court may also wish to encourage the defendant to consult defense counsel about the possibility of deportation. In the alternative, the court may recite the admonition contained in CPL 220.50(7) that "if the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States." Again, these examples are illustrative, not exhaustive, of potential acceptable advisements regarding deportation.

Applying the legal principles which the court enunciated to the facts of the cases involved, the court concluded that with respect to the defendant Peque, his attorneys had failed to preserve the voluntariness question at trial, and therefore the Court of Appeals dismissed his appeal. Thus, although prevailing on legal grounds, procedural issues prevented the Defendant from obtaining any relief. With respect to the Defendants Diaz and Thomas, neither one was given proper court notification that their guilty pleas exposed them to deportation. Therefore, they were entitled to have their cases remitted to the trial court for further proceedings.

In another case, *People v. Hernandez*, decided by the Court on the same day but in a separate opinion, a 5-2 majority determined that the defendant had failed to show a reasonable probability that if counsel had informed him that he was certain to be deported as a result of his guilty plea he would not have pleaded guilty and would have gone to trial. The five-Judge majority consisted of Judges Graffeo, Read, Smith, Rivera and Salaam. Judge Pigott and Chief Judge Lippman dissented.

The recent Court of Appeals decision has broken new ground, which criminal law practitioners and trial judges must be aware of and must now apply when accepting guilty pleas from non-citizen defendants. The New York Court of Appeals will also shortly be addressing another consequence of the *Padilla* decision, that is, whether under New York law it should be applied retroactively. The Court has before it the case of *People v. Baret*, which is expected to be decided in the late Spring. Criminal law practitioners should be on the alert for this forthcoming decision. I hope that this article has served to clarify the issue and will make it easier for the various aspects of the criminal justice system to deal with and apply the new rules.

Editor's Note: The following article, written by Sheila L. Bautista, deals in detail with the issue of the retroactivity of *Padilla*.

Retroactivity of *Padilla v. Kentucky* in New York State

By Sheila L. Bautista

Nearly four years ago, the United States Supreme Court decided *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the landmark case that recognized the constitutional duty of criminal defense attorneys to advise their clients regarding the deportation consequences of pleading guilty. Of the many questions that developed in *Padilla*'s wake, perhaps the most fundamental was the issue of its retroactivity with respect to convictions that had become final prior to the Supreme Court's decision. Under *Teague v. Lane*, 489 U.S. 288 (1989), *Padilla*'s retroactivity effectively depended on whether the Court had announced a "new" rule, that is, whether *Padilla*'s holding had been "dictated by precedent existing at the time the defendant's conviction had become final." *Teague*, 489 U.S. at 301. Had the result in *Padilla* not been "apparent to all reasonable jurists" before it was decided, then it would not be given retroactive effect. *See Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997). On the other hand, had *Padilla* simply involved the application of the already existing ineffective assistance of counsel standard set forth in *Strickland v. Washington*, 104 S.Ct. 2052 (1984), to a particular set of facts, then it would apply retroactively.

New York courts weighed in on the issue prior to a ruling from the Supreme Court and found *Padilla* to be retroactive. Applying the *Teague* test, the First Department held in *People v. Baret*, 99 A.D.3d 408, 409 (1st Dept. 2012), that *Padilla* was not a new rule, but rather, "followed from the clearly established principles of the guarantee of effective of assistance of counsel under *Strickland*, and 'merely clarified the law as it applied to a particular set of facts'" (citations omitted). The Third Department agreed with this analysis in *People v. Rajpaul*, 97 A.D.3d 904 (3d Dept. 2012).

Last year, the Supreme Court had its own say in the matter. In a 7-2 decision, with Justice Elena Kagan writing for the majority, the Court ruled in *Chaidez v. United States*, 133 S.Ct. 1103 (2013), that *Padilla* was a new rule under *Teague* that did not apply retroactively to convictions that had already become final before March 31, 2010, the day the *Padilla* decision was announced. Key to this decision was the fact that *Padilla* marked the first time the Court had ever recognized an attorney's duty under the Sixth Amendment to advise a criminal defendant about collateral, non-criminal consequences of entering a guilty plea. Where *Padilla*'s threshold question involved whether *Strickland* was even applicable under the circumstances, the Court rejected the notion that *Padilla* was simply another "garden-variety" ineffective assistance of counsel analysis applied to a different set of facts. The *Chaidez* court also observed that the ruling in *Padilla* had overruled existing law in ten federal circuits and over thirty states which had previously held that defense attorneys were not obligated to provide advice to clients about collateral consequences of pleading guilty. Thus, *Padilla* had announced a result that had not been "apparent to all reasonable jurists." Indeed, prior to *Padilla*, although New York state courts recognized ineffective assistance of counsel claims when an attorney gave a criminal defendant incorrect advice regarding the deportation consequences of pleading guilty, *People v. McDonald*, 1 N.Y.3d 109 (2003), no such claim was recognized when an attorney failed to give any advice at all regarding such consequences. *People v. Ford*, 86 N.Y.2d 397 (1995). Since the Appellate Division in *Baret* had assessed *Padilla*'s retroactivity only under the *Teague* standard, *Chaidez* effectively overruled *Baret*, which the First Department later acknowledged in *People v. Verdejo*, 109 A.D.3d 138 (1st Dept. 2013).

The issue *of Padilla*'s retroactivity in New York did not end with *Chaidez*. *Danforth v. Minnesota*, 552 U.S. 264 (2008), allows states to apply rules of criminal procedure with broader retroactivity than the federal *Teague* standard would dictate. Thus, *Danforth* allows New York to determine for itself whether or not *Padilla* should be applied retroactively. Exactly which retroactivity standards New York will apply to *Padilla* remains an open question. Since *Danforth*, the Court of Appeals has not had occasion to determine whether it would continue to apply the *Teague* retroactivity test to cases that "fundamentally alter[ed] the Federal constitutional landscape," as it did in *People v. Eastman*, 85 N.Y.2d 265 (1995), which determined the retroactivity of a Supreme Court decision involving the Confrontation Clause. In deciding *Padilla*'s retroactivity, New York courts might also consider the three-part test in *People v. Pepper*, 53 N.Y.2d 213 (1981), which has been applied to new rules arising out of New York's own state court decisions. Those factors are: (1) the purpose to be served by the new standard, (2) the extent to which law enforcement authorities relied upon the old standard, and (3) the effect a retroactive application of the new standard would have on the administration of justice.

Since *Chaidez*, the First, Second, and Third Departments have held that *Padilla* is not retroactive. *See People v. Verdejo*, 109 A.D.3d 138 (1st Dept. 2013); *People v. Andrews*, 108 A.D.3d 727 (2d Dept. 2013); *People v. Bent*, 108 A.D.3d 882 (3d Dept. 2013). All three departments correctly followed the reasoning of *Chaidez* and found that *Padilla* was a new rule that was not to be given retroactive effect under *Teague*. The Second Department went one step further and applied New York's three-part *Pepper* test. Analyzing the first factor, which examines whether a new rule goes "to the heart of a reliable determination of guilt or innocence," the *Andrews* court found that advice about deportation consequences was "only collateral to or relatively far removed from the fact-finding process at trial,"

and thus weighed in favor of prospective application. The *Andrews* court also recognized law enforcement reliance on New York's pre-*Padilla* standards, which allowed prosecutors to recommend acceptance of plea allocutions even if a defendant had not been advised of deportation consequences. Finally, the Second Department observed that retroactive application of *Padilla* would "potentially lead to an influx of CPL 440.10 motions to vacate the convictions of defendant whose guilty pleas were properly entered and accepted by courts under the old standard." Accordingly, the Second Department held that all three factors weighed against *Padilla*'s retroactive application.

Andrews remains binding authority on trial-level courts throughout the state until another department or the Court of Appeals makes its own ruling on the matter. *See Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663 (2d Dept. 1984), *accord People v. Turner*, 5 N.Y.3d 476 (2005). The Court of Appeals will have an opportunity rule on *Padilla*'s retroactivity in *Baret*, for which leave was granted last year. It remains to be seen whether the Court will assess *Padilla*'s retroactivity only under federal *Teague* standard, or whether it will also decide the *Danforth* issue. *Baret* was decided in the Appellate Division prior to *Chaidez* and involved only an analysis under *Teague*, but the defendant in *Baret* has filed a brief urging the Court to also assess *Padilla*'s retroactivity under *Pepper*. The People argue that defendant's *Pepper*-based claims are unpreserved, but also contend that even under New York's retroactivity standards, *Padilla* should only apply prospectively.

Sheila L. Bautista is an Assistant District Attorney in the Appeals Bureau of the New York County District Attorney.

Court of Appeals Affirms *People v. Heidgen* and *People v. McPherson*

By Edward L. Fiandach

In the last issue of the *Newsletter*, I discussed how and under what circumstances intoxication may negate depraved intoxication in alcohol-based motor vehicle accidents. Crucial to that discussion was affirmance in two matters, *People v. McPherson*[1] and *People v. Heidgen*.[2] In each case, the issue before the Appellate Division was whether depraved indifference could be established when the defendant was extremely intoxicated. Taking a hard look at each and every action engaged in by the defendants, the Second Department found such actions to belie the claims made by each defendant that they were too intoxicated to form the necessary *mens rea*.[3]

On November 21, 2013, following publication of my article, *Heidgen*, *McPherson* and a companion case *People v. Taylor*[4] reached the Court of Appeals.[5] As in the matters below, the primary issue[6] in each case was whether depraved indifference could be established when the defendant was extremely intoxicated, or in the case of *Taylor* extremely high. Affirming in each instance, the court took the opportunity to reiterate the stance taken in *People v. Feingold*[7] that depraved indifference is a culpable mental state. Further, it found that the defendant's apparent awareness of his or her surroundings, as established by circumstantial evidence, negated, in each instance, the possibility of intoxication as the defense. Discussion concerning *Heidgen*, was typical of the rationale set out in each:

> [M]ore than one witness testified that defendant appeared to follow, or track, the headlights of oncoming vehicles. In addition, the toxicologist testified that defendant's blood alcohol level would have caused delayed reaction time, but that it would not have rendered him incapable of reacting at all. Based on this evidence, the jury could have found that, despite defendant's intoxication, he perceived his surroundings. The jury could have reasonably concluded that defendant drove, knowing that he was on the wrong side of the road and with an appreciation of the grave risks involved in that behavior.[8]

The upshot of the affirmance is to restate the proposition we set out in our earlier discussion, that "cases involving a depraved indifference to human life are highly fact-specific and dependent upon the individual defendant's particular mental state."[9] Hence, when attempting to prove or disprove depraved indifference, as we said before, great care should be taken not only to discern those actions which will be claimed were depraved, but those actions preceding the event for evidence that the defendant did or did not understand the reasonable ramifications of what he or she was doing.

Endnotes

1. 89 A.D.3d 752, 932 N.Y.S.2d 85 (2d Dept. 2011), *leave to app. granted*, 19 N.Y.3d 969 (2012).
2. 87 A.D.3d 1016, 930 N.Y.S.2d 199 (2011).
3. For a discussion concerning the need to establish *mens rea*, *see People v. Feingold*, 7 N.Y.3d 288, 852 N.E.2d 1163, 819 N.Y.S.2d 691 (2006) and *see* Fiandach, "Will Intoxication Negate Depraved Indifference in Alcohol Based Motor Vehicle Fatalities?," New York Criminal Law Newsletter, Winter, 2014, vol. 12, no. 1., p. 12.
4. In *Taylor*, the defendant took the drug "Ecstasy" (methylenedioxyanphetamine), drove at speeds upwards of 90 miles per hour and ultimately struck and killed a pedestrian by means of injuries that the court described as "more consistent with having been hit by a subway train than by a car."
5. *People v. Heidgen*, __ N.Y.3d.__, __ N.E.2d __, 2013 WL 6096138, 2013 N.Y. Slip Op. 07757 (November 21, 2013).
6. McPherson also received treatment on the issue of ineffective assistance of counsel.
7. 7 N.Y.3d 288, 852 N.E.2d 1163, 819 N.Y.S.2d 691 (2006).
8. *Heidgen*, *supra* note 5.
9. *Id.*

Edward L. Fiandach is a trial lawyer who is board certified in DUI defense. He practices in Rochester, New York and previously wrote an article on this subject which appeared in the last issue of our *Newsletter.*

Effect of Guilty Pleas on Subsequent Section 1983 Claims of Excessive Force

By Matthew Paulose Jr. and Valerie K. Mitchell

Pleas and plea allocutions can have harmful effects on subsequent Section 1983 civil rights claims. Attorneys who represent criminal defendants must be mindful of these effects and should, at a minimum, inform the defendants of the consequences. Properly informed, defendants will then be able to enter into pleas and plea allocutions that will likely not harm their civil rights claims.

The most relevant civil rights claims to discuss here are excessive force claims. In a typical excessive force claim, a criminal defendant accuses the arresting officers of applying more than the minimum amount of force required under the circumstances. But the arresting officers were usually smart enough to have charged the defendant with an underlying crime that serves to justify the use of force, such as the crimes of resisting arrest or assaulting an officer. "We used that much force on the criminal defendant," say the officers, "because he was assaulting us first." To most juries, the argument has instant appeal. But without a criminal conviction of the defendant proving that he truly engaged in such conduct, it is simply a he said/she said argument, which will succeed—if at all—only at the trial stage and not at the motion to dismiss stage or summary judgment stage.

And this is where the criminal defendant's plea and plea allocution come into play. If the criminal defendant agreed to a plea on the charge of assault, forcing the criminal defendant into a plea allocution, then the officers have the criminal defendant's own admission to move for an early dismissal of the civil rights case. Now their argument goes something like this: "We used that much force on the criminal defendant because he was assaulting us first, *and he has admitted to doing so*." It is the record of the plea and plea allocution that is used in the subsequent civil rights action to preclude the claim of excessive force at the motion to dismiss stage or summary judgment stage.

But is it so simple? Not always. Pleas and plea allocutions are sometimes not very detailed. Often, the criminal court judge is doing much of the talking at the plea stage, asking closed-ended questions prompting only yes and no answers from the criminal defendant. Nevertheless, the criminal defendant must be careful. If the details of an admission of guilt establish that no unreasonable force was used, then the criminal defendant will have precluded his civil rights claim. The devil is always in the details.

Here is an example of an allocution of a plaintiff pleading guilty to menacing a police officer. According to N.Y. Penal Law § 120.18, a person is guilty of menacing when he "intentionally places or attempts to place a police officer or peace officer in reasonable fear of" injury with a weapon. In the criminal complaint, the police had accused the defendant of threatening them with a knife, requiring them to use force. The plaintiff disputed those facts and brought a subsequent civil rights claim. But before he did, he pled guilty to menacing the officers:

> **The Court:** I direct your attention then to the 19th of May, 2009, about 9:15 in the evening, at 277 Thompson Street here in the City of Newburgh, New York. Were you at that location at that date and time?
>
> **The Defendant:** Yes, I was.
>
> **The Court:** All right. Did there come a time that you confronted, at that location, at that date and time, some police officers, one of whom was David Maine?
>
> **The Defendant:** Yes.
>
> **The Court:** Did there come a time during that confrontation that you brandished or threatened him with a knife?
>
> **The Defendant:** Yes.
>
> **The Court:** Was he trying to perform his duty at that time?
>
> **The Defendant:** Yes, he was.
>
> **The Court:** And was he in uniform? You knew he was a policeman?
>
> **The Defendant:** No. I didn't know he was a policeman.
>
> **The Court:** Because he had on a black shirt?
>
> **The Defendant:** Yeah.
>
> **The Court:** The other two guys with him were in uniform?
>
> **The Defendant:** Yes.
>
> **The Court:** You knew they were cops, right?
>
> **The Defendant:** Yes.
>
> …

> **The Court:** The court will accept that as a plea of guilty to menacing a police officer, a D Felony, in violation of 120.18.…[1]

Notice that the only relevant fact established from the plea is that at some time plaintiff at best "brandished or threatened" the officers with a knife. No fact is established as to when he did so. In other words, *time* was not established by the guilty plea. An allocution rarely pinpoints when a criminal defendant did or did not do something and when an officer did or did not do something. This is important.

In the subsequent civil rights case, plaintiff's version of events was that, yes, he had the knife in his hands when the police confronted him (and thus the guilty plea to "brandishing" or even "threatening"), but that they had directed him to drop the knife, which he indeed tried to do. But before he was able to drop the knife, the police unjustifiably attacked him, thus prompting his claim of excessive force. And because the allocution failed to address these details, the plaintiff was allowed to bring the subsequent civil rights action.

The cases of *Sanabria v. Martins*[2] and *McCrory v. Belden*[3] additionally illustrate how to ensure that a plea allocution will not necessarily preclude a subsequent civil rights claim. In *Sanabria*, the plaintiff had pled guilty to the crime of interfering with a police officer. By doing so, the subsequent civil rights court found that plaintiff was estopped from denying that he interfered with the defendant; that he did so with the requisite intent; and that he did so while the officer was conducting his duties, all three of which were elements of the crime to which the defendant pled. But the court nevertheless denied summary judgment concerning the excessive force claim. According to the *Sanabria* court:

> The analysis does not end here, however, because Plaintiff's § 1983 allegations are not wholly congruent with the facts determined by his guilty plea.… Sanabria could prove that Martins and Thor used excessive force in arresting him *after* he had completed the offense of interfering with an officer. Sanabria pleaded guilty to interfering with Martins on the night in question, necessarily admitting that he had "obstructed, resisted, hindered, or endangered" Martins in performing his duties. Sanabria cannot now proceed with a § 1983 action premised on his contention that he did nothing wrong and that Martins acted without provocation. But to the extent Plaintiff is seeking damages based on the quantum of force Martins used *after* Plaintiff completed the offense of interfering with an officer (or perhaps in response thereto), there remains a genuine issue of material fact for trial.[4]

Thus, because a guilty plea rarely establishes the sequence of events involved in an incident, e.g., when the plaintiff assaulted the officer and when the officer used force on the plaintiff, it cannot be used to preclude the force claim outright. In *McCrory*, the court narrowed in on the issue of how a plea does not establish time or the sequence of events underlying an excessive force claim:

> Three examples suffice to illustrate the point. First, if an officer punches or otherwise abuses an inmate and the inmate then retaliates or attempts to do so, the prior assault by the officer may still give rise to a litigable claim, irrespective of whether the inmate is convicted of assault or an equivalent crime for his retaliatory blows. Second, if an inmate strikes an officer without provocation but is then subdued, the officer's subsequent retaliatory blows may give rise to a civil claim even if the inmate is convicted for his conduct. Third, if an inmate punches an officer and the officer uses overwhelming and disproportionate force in subduing the inmate, that excessive response may trigger civil liability even if the inmate is successfully prosecuted for his own conduct. Since defendants can rely only on the conviction itself, necessarily they cannot prevail on a collateral estoppel theory.[5]

Thus, it is all about timing. And that is what criminal defense attorneys must focus on when advising the clients who are entering into plea allocutions. If the criminal defendant is allowed to admit to the sequence of events, he will likely be forfeiting his subsequent civil rights claim. If he is allowed, on the other hand, to simply admit to the crime, without admitting to the details of the crime, in particular the sequence of events, then he likely will not be forfeiting the civil rights claim. Criminal defense attorneys must be conscientious of the difference.

One final thought. Note that even if the criminal defendant is properly advised and does not admit to the timing of events, a guilty plea may nevertheless serve to weaken the subsequent civil rights case. This is because the doctrine of judicial estoppel will preclude a plaintiff from asserting facts inconsistent with his or her plea allocution. That is what happened in the *Sanabria* case above, highlighted by the court's ruling that while Sanabria could continue with his excessive force claim, he would however be precluded at trial from insisting "he did nothing wrong and that Martins (the defendant police officer) acted without provocation." After all, Sanabria did admit to interfering with an officer, a fact he could not sweep under the rug.

A more extreme example of the use of judicial estoppel is *McMillan v. City of New York*.[6] There, police had responded to a complaint that the plaintiff had pushed her mother. The police officers knocked on plaintiff's door, after which a struggle ensued between the plaintiff and police. The parties alleged differing versions of events. But the plaintiff ultimately pled guilty to the crime of resisting arrest. According to her plea allocution:

> **The Court:** Is it true…that you, in the course of being placed under arrest, struggled with the officers, fell to the ground and resisted arrest? Is that true?
>
> **The Defendant:** Yes.
>
> **The Court:** Is it further true that on March 18, 2007 at an address in Queens, that in the course of resisting arrest that you caused injury to Police Officer [Bhuvaneshway]? Is that true? That you caused injury?
>
> **The Defendant:** Yes.… When I resisted arrest and fell to the ground another officer was injured.[7]

When plaintiff brought a subsequent Section 1983 claim for excessive force against the police officers involved in the arrest, the defendants moved for summary judgment arguing that plaintiff's guilty plea collaterally estopped her from alleging excessive force.

While the court followed the general rule that "there is no inherent conflict between a conviction for resisting arrest…and finding that police officers used excessive force in effectuating that arrest," the court nonetheless applied the doctrine of judicial estoppel sua sponte to preclude plaintiff from alleging that she was "pulled from her apartment, without provocation, and brutalized by police."[8] Her claim in other words was not automatically barred by her guilty plea, but the facts after application of the doctrine of judicial estoppel nevertheless led the court to rule that no jury could rule in plaintiff's favor. Her case in other words was still dismissed. This is an extreme example of the use of judicial estoppel, but it shows how a criminal defendant—if significantly brutalized by the police—may not even want to plead. Criminal defense attorneys should advise accordingly.

Endnotes

1. *People v. Greenfield*, Index No. 2009-4230 (N.Y. County Court, Jan. 26, 2010). Certain details were altered from the original.
2. 568 F. Supp. 2d 220 (D. Conn. 2008) (refusing to preclude excessive force claim based on guilty plea of interfering with police officer).
3. 2003 U.S. Dist. Lexis 17381, Index No. 01 Civ. 0525 (S.D.N.Y. Sept. 30, 2003) (conviction of assault did not collaterally estop plaintiff from claiming excessive force was used either before or after inmate attempted to cause injury).
4. *Sanabria*, 568 F. Supp. 2d at 226 (emphasis added).
5. *McCrory*, 2003 U.S. Dist. Lexis at 11-12.
6. 2011 U.S. Dist. Lexis 141880, Index No. 10 Civ. 2296 (S.D.N.Y. 2011).
7. *Id.*, 2011 U.S. Dist. Lexis at *24-25.
8. *Id.*, 2011 U.S. Dist. Lexis at *30.

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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 15, 2013 to January 30, 2014.

Hearsay Evidence

People v. Shabazz

***People v. Perrington*, decided October 15, 2013 (N.Y.L.J., October 16, 2013, p. 25)**

In a 4-2 decision, the New York Court of Appeals reversed the conviction of two Defendants who were charged with weapons possession, on the grounds that the trial court had improperly precluded the introduction of certain hearsay evidence. In the case at bar, a female co-Defendant who was a passenger in the vehicle which was stopped by police had a conversation with the Attorney for the Defendant Perrington in which she stated that the gun belonged to her. The Defendants, who were tried jointly, requested that the Attorney be allowed to testify about the female co-Defendant's acknowledgment of gun ownership under the declaration against penal interest exception to the hearsay rule. The trial court held that the statement was inadmissible because the woman's unavailability had not been proven and the statement lacked reliability since she had testified at her separate trial that the firearm was not hers, and had therefore been acquitted of weapons possession.

The four-Judge majority reversed and stated that the statement in question should have been allowed. The majority concluded that the trial court committed error by focusing on the female co-Defendant's trial testimony and her pretrial statement to Perrington's lawyer. Applying the various legal standards applicable to the penal interest exception, the majority concluded that there was adequate evidence to establish admissibility under the particular facts of the case. The majority opinion noted that the handgun was found in a handbag located in the rear of the automobile directly adjacent to the female co-Defendant, and she was the only woman in the vehicle. The majority also found that the exclusion of the statement could not be deemed harmless because the People's case was not overwhelming. A new trial was therefore required. Judges Pigott and Smith dissented, and found that on the record before the Court, it could not be found that the trial court abused its discretion in making its ruling against admissibility.

Resentencing

***People v. Santiago*, decided October 15, 2013 (N.Y.L.J., October 16, 2013, p. 25)**

In a unanimous decision, the New York Court of Appeals found that the Defendant had been improperly sentenced on the basis of a Pennsylvania conviction which should not have served as a predicate felony because he was 15 years old at the time. The Defendant relied upon New York Penal Law Section 30, arguing that it provides that a 15-year-old cannot be prosecuted for second degree manslaughter or any other New York offense encompassed by the Pennsylvania crime of third degree murder. Penal Law Section specifies that a person must be at least 16 years old to be criminally responsible for his conduct. Although some exceptions are provided for in Penal Law Section 30.00(2), second degree manslaughter is not. Under these circumstances, a sentence enhancement was not authorized by New York law and a resentencing was required.

Intoxication Charge

***People v. Beaty*, decided October 17, 2013 (N.Y.L.J., October 18, 2013, p. 25)**

In a unanimous decision, the New York Court of Appeals affirmed a Defendant's conviction for rape in the first degree and denied his claim that the trial court should have provided the jury with an intoxication charge. In the case at bar, the evidence supporting the Defendant's claim of intoxication were his own self-serving statements and the victim's testimony that she smelled alcohol on the Defendant's breath. The Court of Appeals found that this was insufficient to establish his entitlement to an intoxication charge. Citing prior case law, the Court stated that in order to meet the relatively low threshold to obtain an intoxication charge, a Defendant must present evidence tending to corroborate his claim of intoxication, such as the number of drinks, the period of time between consumption, and the event at issue, whether he consumed alcohol on an empty stomach, whether his drinks were high in alcoholic content, and the specific impact of the alcohol upon his behavior or mental state. In the case at bar, the evidence was insufficient to allow a reasonable juror to harbor a doubt concerning the element of intent on the basis of intoxication. Given the instant circumstances, the trial court had correctly ruled that an intoxication charge was not warranted.

Accomplice Testimony

***People v. Rodriguez*, decided October 17, 2013 (N.Y.L.J., October 18, 2013, p. 26)**

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction and dismissed the indictment, on the grounds that the People's accomplice testimony was not sufficiently corroborated by other evidence, and that under the law which existed at the time of the trial, and the jury instructions provided thereto, the corroborating evidence was insufficient and was not independent of the accomplice testimony. The decision

discussed both the case of *People v. Hudson*, 51 NY 2d, 233 (1980), and *People v. Reome*, 15 NY 2d 188 (2010), which overruled *Hudson*, and their application to the applicable principles regarding accomplice testimony.

Assignment of Appellate Counsel

***People v. Kordish*, decided October 17, 2013 (N.Y.L.J., October 18, 2013, p. 26)**

In a unanimous decision, the New York Court of Appeals determined that the Appellate Division erroneously failed to assign counsel to represent the Defendant before dismissing his appeal as a right based on his failure to timely perfect it. Notwithstanding the Appellate Division's rule mandating automatic dismissal of an untimely perfected appeal, its decision to dismiss the appeal in the case at bar remained a discretionary determination on the merits of a threshold issue on the Defendant's first-tier appeal rather than an automatic bar to appeal. The Court remitted the matter back to the Appellate Division with instructions that the Appellate Division should decide whether the Defendant is indigent, and if so, it must assign counsel to litigate the dismissal motion and to determine whether dismissal is appropriate.

Ineffective Assistance of Counsel

***People v. Clermont*, decided October 22, 2013 (N.Y.L.J., October 23, 2013, pp. 1, 14 and 18)**

In a 5-2 decision, the New York Court of Appeals determined that the Defendant was denied meaningful representation leading up to, during, and after a suppression hearing. The majority remitted the matter to the Supreme Court of Queens County to reconsider whether evidence of a handgun should be admitted or suppressed during a gun possession trial. In the case at bar, the majority found that the defense attorney in question presented an incorrect version of the arrest and seizure of the weapon in court papers and failed to give the Court a post-hearing memorandum as promised, while handing off the case to another attorney before trial. The Court also noted that defense counsel had declined to offer opening and closing statements during the Defendant's trial. In a dissenting opinion, Judge Rivera and Chief Judge Lippman stated that based upon the record, the suppression motion should have been immediately granted, and that the Defendant's conviction should be vacated and the indictment dismissed.

Legally Sufficient Evidence to Establish Recklessness

***People v. Asaro*, decided October 22, 2013 (N.Y.L.J., October 23, 2013, pp. 14 and 18)**

In a unanimous decision, the Court of Appeals determined that there was legally sufficient evidence to show that the Defendant displayed recklessness when he drove his car at speeds of up to 130 miles per hour and crashed into an ongoing vehicle, killing the other driver and seriously injuring five passengers in the two vehicles. The Court upheld the Defendant's conviction for manslaughter and assault, as well as the sentence of 3 to 10 years, and stated that he acted by consciously disregarding the risk he created, as opposed to the less culpable mental state of negligently failing to perceive the risk.

Harmless Error

***People v. Wells*, decided November 14, 2013 (N.Y.L.J., November 15, 2013, pp. 9 and 22)**

In a 6-1 decision, the New York Court of Appeals held that a Defendant's guilty plea had to be vacated because an inventory search of his vehicle resulted in the improper seizure of a crack pipe and an open bottle of rum. The Defendant had entered a guilty plea after his motion to suppress evidence had been denied. In the New York Court of Appeals, the prosecution argued that the Harmless Error Doctrine could be used to uphold the guilty plea, even though the trial court had improperly denied a suppression motion. The six-person majority in the New York Court of Appeals, in a decision written by Judge Graffeo, rejected the prosecution's position, holding that improperly denied motions to suppress cannot be viewed as harmless error. The Court cited its earlier decision in *People v. Grant*, 45 NY 2d 355 (1978). Judge Pigott dissented, and advanced the view that under the circumstances of the instant case an Appellate Court could determine whether an erroneous denial of a motion to suppress contributed to the Defendant's decision to plead guilty, and that therefore the harmless error rule was applicable.

Sentencing

***People v. Boyer*, decided November 14, 2013 (N.Y.L.J. November 15, 2013, pp. 9 and 22)**

In a 5-2 decision, the New York Court of Appeals held that a Defendant's original sentencing date is the controlling date of sentence for a Defendant's prior conviction, even if a future sentence was imposed by the Court as defined in *People v. Sparber*, 10 NY 3d 457 (2008), involving the imposition of post-release supervision. The interpretation relating to the date in question applies when determining enhanced penalties for predicate felony offenders. Judge Abdus-Salaam wrote the opinion for the five-Judge majority. Joining Judge Abdus-Salaam were Judges Graffeo, Read, Smith and Pigott. The ruling in question was designed to provide Judges with guidance on an issue which was left undecided by the Court in *People v. Sparber*.

Judges Rivera and Lippman dissented, arguing that they could not accept giving the date when the Court handed down an illegal sentence validity for purposes of applying the predicate felony Statute. The Court's deci-

sion in this matter was made applicable to several other cases which were pending on the Court's calendar.

Consecutive Sentences

***People v. Brown*, decided November 14, 2013 (N.Y.L.J., November 15, 2013, p. 22)**

In a unanimous decision, the New York Court of Appeals determined that it was possible to impose, for simple knowing unlawful possession of a loaded weapon, a consecutive sentence to the sentence for another crime committed with the same weapon. The Court concluded that the Defendant completed the crime of possession independently of his commission of later crimes, and therefore consecutive sentencing was permissible. Although the Defendant was convicted of simple possession, and not with an intent to use, the crime was independent and separate from his later murder conviction. Consecutive sentences were therefore permissible, and the Court affirmed the prison terms of 25 years to life for the murder and 3 years for the weapons possession, which were imposed by the trial court. The *Brown* decision also included rulings with respect to two additional cases involving the same issue.

Court Warning on Deportation Consequences as a Result of Guilty Plea

People v. Peque

People v. Diaz

***People v. Thomas*, all decided November 19, 2013 (N.Y.L.J., November 20, 2013, pp. 1, 2 and 26)**

In a 5-2 decision, the New York Court of Appeals held that trial judges must caution non-citizen defendants that they may be deported before allowing them to plead guilty to a felony. Details regarding this important decision are covered in our first feature article.

Deportation Advice During Guilty Plea

***People v. Hernandez*, decided November 19, 2013 (N.Y.L.J., November 20, 2013, pp. 2 and 29)**

In a 5-2 decision, the New York Court of Appeals held that although a court is now required to provide a defendant with information regarding possible deportation as a result of a guilty plea, in the case at bar the Defendant failed to show a reasonable probability that if counsel had informed him that he was certain to be deported as a result of his guilty plea he would not have pleaded guilty and would have gone to trial. The five-Judge majority consisted of Judges Read, Graffeo, Smith, Rivera, and Abdul- Salaam. Judge Pigott dissented and was joined by Chief Judge Lippman, who argued that based upon the instant record, there was a reasonable possibility that the Defendant would not have pleaded had he realized the effects on his deportation status.

Speedy Trial

***People v. Velez*, decided November 19, 2013 (N.Y.L.J., November 20, 2013, p. 29)**

In a unanimous decision, the New York Court of Appeals affirmed the Defendant's conviction and rejected his argument that prosecutorial delay deprived him of a fair trial. The appellate panel concluded that the record supported the determination that the People established good cause for any delay which occurred.

Right to Bear Arms

***People v. Hughes*, decided November 19, 2013 (N.Y.L.J., November 20, 2013, p. 23)**

In a unanimous decision, the New York Court of Appeals upheld the Defendant's conviction for possessing a loaded weapon in his house as a Class C felony. Utilizing recent United States Supreme Court decisions regarding a citizen's right to bear arms, the Defendant argued that his conviction for the crime in question violated the Second Amendment. The Court, however, rejected this claim and held that the prosecution in question was within the legitimate right of the government to prevent the criminal use of firearms and to keep guns away from people who have shown they cannot be trusted to obey the law. The Appellate Court pointed out that the Defendant in question had certain previous convictions which were essential to supporting the current weapons conviction.

Gun Possession

***People v. Jones*, decided November 19, 2013 (N.Y.L.J., November 20, 2013, p. 24)**

In a unanimous decision, the Court of Appeals upheld a Defendant's indictment for possession of a weapon in the second degree. The Defendant claimed that despite his prior conviction, he could rely on the home or visitors exemption in the definition of second degree weapons possession. The Court of Appeals, however, rejected this claim.

Depraved Indifference Murder

People v. Heidgen

***People v. McPherson*, both decided November 21, 2013 (N.Y.L.J., November 22, 2103, pp. 1, 2 and 22)**

In a 5-2 decision, the New York Court of Appeals upheld the murder convictions of two drunken drivers and one impaired driver for triggering a catastrophic accident. The Court concluded that the Defendants could be convicted of depraved indifference murder and that extreme intoxication does not excuse drivers from prosecution for depraved indifference murders. The majority opinion consisted of Chief Judge Lippman and Judges Graffeo, Pigott, Rivera and Salaam. Judges Smith and Read dissented. In the various cases, in addition to being intoxicated, the De-

fendants had ignored repeated warnings from other drivers as they speeded in the wrong direction on parkways. In rendering its verdict, Chief Judge Lippman wrote for the majority, "One who engages in what amounts to a high speed game of chicken, with complete disregard for the value of the lives that are thereby endangered, is undoubtedly an individual whose culpability is the equivalent of an intentional murderer." The Court's decision upholding depraved indifference murder is one of the few that has been issued in recent years by the New York Court of Appeals on the issue.

Re-opening Suppression Hearing

***People v. Kevin W.*, decided November 21, 2013 (N.Y.L.J., November 22, 2013, p. 24)**

In a 6-1 decision, the New York Court of Appeals determined that the People, under the facts of the instant case, would be precluded from re-opening a suppression hearing. The Court relied upon its earlier decision in *People v. Havelka*, 45 NY 2d 636 (1978), and concluded that the People should not be given an opportunity to shore up their evidential or legal position absent their showing they were deprived of a fair and full opportunity to be heard. Judge Smith dissented, and argued that the instant matter was different from the *Havelka* decision because it involves not an appellate reversal after conviction, but a suppression court's discretionary decision before trial to reconsider its own order granting suppression and to redo the hearing.

Consecutive Sentences

***People v. Cheverko*, decided November 21, 2013 (N.Y.L.J., November 22, 2013, p. 26)**

In a unanimous decision, the New York Court of Appeals held that when Penal Law Section 70.30(2) (b) limits consecutive definite sentences to an aggregate term of 2 years imprisonment, jail time credit and good time credit should be deducted from that 2-year aggregate term rather than the aggregate term imposed by the sentencing court.

Plea of Guilty

***People v. Worden*, decided November 21, 2013 (N.Y.L.J., November 22, 2013, p. 26)**

In a unanimous decision, the New York Court of Appeals held that the Defendant's factual allocution during his plea was insufficient to support the conviction. In the case at bar, the Defendant had indicated that his sexual relationship with the alleged victim had been consensual. He subsequently entered a plea to rape in the third degree. In the case at bar, the appellate panel concluded that the record of Defendant's plea allocution revealed that the prosecution, defense counsel and the trial court all misunderstood the definition of lack of consent. Further, the defendant's factual recitation negated an element of rape in the third degree. Under these circumstances, the defendant's plea must be vacated, and the matter remitted for further proceedings.

Legal Insufficiency Due to Repugnant Verdicts

***People v. Abraham*, decided November 26, 2013 (N.Y.L.J., November 27, 2013, p. 22)**

In a 6-1 decision, the New York Court of Appeals upheld a Defendant's conviction and denied the claim that the factual inconsistency in a jury verdict which acquitted a Defendant of one count but convicted him of another rendered the record evidence legally insufficient to support the conviction. The Defendant was charged with arson in the third degree and insurance fraud. The jury found him guilty of insurance fraud but acquitted him of arson. The Court of Appeals concluded that when the evidence was reviewed, it was sufficient for a rational jury to conclude beyond a reasonable doubt that in order to solve his financial problems, Defendant lied about the cause of the fire to his insurance company in an effort to collect wrongfully on the policy, thereby committing insurance fraud in the second degree. This finding could have been made separate and apart from the claim regarding arson. The majority also rejected other defense arguments involving instructions to the jury and prosecutorial misconduct during summation. The Defendant's conviction was therefore affirmed. Judge Pigott dissented, arguing that reversible error had been committed by the trial court in denying a defense request regarding instructions to the jury.

Ineffective Assistance of Counsel

***People v. Howard*, decided November 26, 2013 (N.Y.L.J., November 27, 2013, p. 24)**

In a 4-3 decision, the New York Court of Appeals determined that the Defendant was not deprived of the effective assistance of counsel by failing to assert as an affirmative defense that one of two weapons allegedly displayed during a robbery was not a loaded weapon from which a shot readily capable of producing death or serious physical injury could be discharged. With respect to a secondary issue the Court also concluded that the record supports the lower court's determination that the robbery victim's show of identification of the Defendant was proper. In the case at bar, the Defendant argued that because the object displayed during the robbery was a BB gun and not a firearm, the affirmative defense in Penal Law Section 160.15(4) was made out as a matter of law and the conviction should have been reduced to robbery in the second degree. The majority concluded that there was some other evidence in the record that could support the inference that the display of a gun was not a BB gun, and defense counsel was not ineffective for neglecting to raise the issue, and that his actions fell within the area of

a reasonable defense strategy. With respect to the showup identification, the majority found that proper procedures were followed, and that the lower court was correct in failing to suppress the identification testimony. Chief Judge Lippman issued a dissenting opinion which was joined in by Judge Rivera. Judge Lippman found that the identification procedures were improper and violated the Defendant's constitutional rights. The Defendant was displayed to the victim two hours after the alleged robbery and 5 miles from the place of its commission. Judge Lippman argued that the showup identification between the suspect and the witness was inherently suggestive and strongly disfavored. Judge Abdus-Salaam also dissented in a separate opinion and argued that the showup which occurred was plainly unlawful under the Court's prior decision in *People v. Johnson*, 81 NY 2d 828 (1993).

Circumstantial Evidence Charged

***People v. Santiago*, decided November 26, 2013 (N.Y.L.J., November 27, 2013, p. 27)**

In a unanimous decision, the New York Court of Appeals reversed a Defendant's drug conviction and ordered a new trial. In the trial court below, the Defendant's request for a circumstantial evidence charge had been denied. The Court had instructed the jury on a constructive possession and the automobile presumption. The Court of Appeals concluded that it is well established that a Defendant's request for a circumstantial evidence instruction must be allowed when proof of guilt rests exclusively on circumstantial evidence. Constructive possession can be proved directly or circumstantially and the necessity of a circumstantial evidence charge should be resolved on a case-by-case basis. In the case at bar the Defendant was a passenger in the front seat. Proof connecting the Defendant to the drugs was wholly circumstantial. The Defendant was not the owner or driver of the vehicle nor was he the target of the surveillance operation. Further, there was not direct evidence that he was aware of the hidden compartment or that he exercised dominion or control over the concealed cocaine. Under these circumstances, the Defendant's conviction must be reversed and a new trial ordered.

Accusatory Instrument

***People v. Jennings*, decided December 10, 2013 (N.Y.L.J., December 11, 2013, p. 25)**

In a unanimous decision, the New York Court of Appeals upheld a Defendant's conviction for attempted criminal possession of a controlled substance in the third degree. The Court found that the accusatory instrument was facially sufficient to support the accusation that the Defendant had knowledge of the controlled substance presence. The Court found that both the accusatory instrument and the laboratory report referred to the presence of cocaine residue within the glass pipe. Notwithstanding the Defendant's contentions, the residue was of sufficient quantity and character as confirmed by certain lab tests to permit the inference that the possessors knew what they possessed. Further, the arresting officer testified that he observed the Defendant in possession of the glass pipe prior to the Defendant dropping it. Thus, under the totality of the circumstances, the accusatory instrument was sufficient to support the conviction.

Collateral Estoppel

***People v. O'Toole*, decided December 10, 2013 (N.Y.L.J., December 11, 2013, p. 24)**

In a 6-1 decision, the New York Court of Appeals held that under the facts of the case the Defendant's acquittal of a charge of first degree robbery that was based on the alleged display of a firearm barred the People from introducing, at a later trial for second degree robbery, evidence that a firearm was displayed. The majority held that principles of collateral estoppel were applicable and that the ruling was controlled by its prior decision in *People v. Acevedo*, 69 NY 2d 478 (1987). Judge Pigott dissented, arguing that collateral estoppel should be applied sparingly in criminal cases and that a strict and narrow interpretation of the holding in *Acevedo* was required. Using this approach, Judge Pigott argued that the facts did not warrant its application in the case at bar.

Denial of Fair Trial

***People v. Oddone*, decided December 12, 2013 (N.Y.L.J., December 13, 2013, pp. 1, 6 and 24)**

In a unanimous decision, the New York Court of Appeals reversed a Defendant's manslaughter conviction and ordered a new trial on the grounds that the trial judge committed reversible error by refusing to allow defense counsel to refresh the memory of a defense witness when she was on the stand. In the case at bar, the Defendant was accused of strangling a bar bouncer in a bar in the Hamptons. A waitress had told insurance investigators before the trial that she thought the Defendant had the victim in a headlock for maybe 6 to 10 seconds. When she was called as a defense witness and asked how long the headlock lasted, she replied that she didn't have a watch and that it could have been a minute or so. Defense counsel attempted to show the waitress her previous statement but was not permitted to do so by the trial judge.

In writing for the unanimous court, Judge Smith stated that the waitress's testimony was germane to an essential point of the defense and that limiting the testimony of a defense witness was important enough to justify a reversal. A new trial was therefore ordered.

Resentencing

***People v. Pignataroe*, decided December 12, 2013 (N.Y.L.J., December 13, 2013, p. 24)**

In the case at bar, the Defendant challenged his re-sentencing under Penal Law Section 70.85 regarding the institution of post-release supervision. In 2008, the legislature enacted Penal Law Section 70.85 to provide trial courts with another means to address previous errors which had occurred regarding the failure to impose a term of post-release supervision. The Statute authorized a trial court to re-impose with the People's consent the originally imposed determinate sentence of imprisonment without any term of post-release supervision. The Defendant argued that the law was unconstitutional because it deprived him of his right to vacate his guilty plea. In a unanimous decision, the Court of Appeals rejected the Defendant's argument and upheld the validity of the sentence imposed upon re-sentencing. The Court concluded that Section 70.85 was a constitutionally permissible legislative remedy for the defectiveness of the plea. Section 70.85 insures that the Defendant, who was no longer subject to post-release supervision, pleaded guilty with the requisite awareness of the direct consequences of his plea. The Court further found that on re-sentencing the trial Judge exercised his discretion under Penal Law Section 70.85 to enforce the Defendant's plea agreement by sentencing him to a 15-year determinate term without post-release supervision.

Sentencing

***People v. Collier*, decided December 12, 2013 (N.Y.L.J., December 13, 2013, p. 23)**

In a 5-2 decision, the New York Court of Appeals rejected the Defendant's argument that a sentence imposed on one of the counts of the indictment was illegal and that his plea should be vacated. As part of a plea agreement, the Defendant received a 5-year sentence on one of the counts of the indictment, with an overall sentence to include 25 years on one of the counts. The five-Judge majority held that the People can hold a Defendant to an agreed sentence rather than allow vacation of the plea when it would otherwise be prejudiced. In the case at bar, the Defendant, in fact, when the totality of his sentences was considered, received a lower sentence than he had bargained for, and that any modification which occurred when the Defendant was re-sentenced was within the trial court's discretion. The re-sentencing comported with Defendant's reasonable expectation that he would receive a minimum determinate prison term of 25 years and a maximum determinant prison term of 30 years in exchange for his plea. The County Court did not re-sentence the defendant in conformity with the technical terms of the plea agreement with respect to the fifth count of the indictment, but the defendant in fact achieved the best outcome allowed by his plea since the County Court, upon re-sentencing, reduced his maximum incarcetory term from 30 to 25 years in order to cure the illegality in the sentence originally imposed to resolve the fifth count. Thus the Defendant clearly received the benefit of his bargain. Chief Judge Lippman and Judge Rivera dissented, arguing that the Defendant's guilty plea was obtained in violation of due process rights and that vacature of the plea was the proper remedy.

CPL 440 Motion

***People v. Payton*, decided December 12, 2013 (N.Y.L.J., December 13, 2013, p. 25)**

In the case at bar, the Defendant had been charged with second degree robbery. About two weeks before Defendant's trial, the District Attorney's office had executed a search warrant on defense counsel's law office. After conviction by a jury verdict, the Judge revealed that after the verdict he had learned of a potential conflict of interest with respect to defense counsel's representation of the Defendant. A new defense counsel was assigned and the matter was set down for sentencing. New counsel moved, pursuant to CPL 330.30, to set aside the verdict, arguing that the police investigation of Defendant's trial counsel created an actual conflict of interest that should have been disclosed to the Defendant. The motion was denied and the Defendant sentenced to a determinate term of 13 years. He subsequently again moved to set-aside the verdict pursuant to CPL 440.10 after learning that his former attorney had in fact been arrested and convicted on a drug possession charge. The Defendant's 440 motion was denied without a hearing and the New York Court of Appeals held that a hearing should have been held to determine whether the conduct of the defense was in fact affected by the operation of the conflict of interest or that the conflict operated on the representation.

Uncharged Crimes

***People v. Myers*, decided December 12, 2013 (N.Y.L.J., December 13, 2013, p. 25)**

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction and ordered a new trial on the grounds that the trial court improperly admitted evidence of an uncharged crime. The Court found that evidence was not properly introduced for the purpose of establishing Defendant's identity and instead constituted an abuse of discretion. Because the evidence of Defendant's guilt was not overwhelming, the error was not harmless and a new trial was required.

Police Testimony

***People v. Smith*, decided December 17, 2013 (N.Y.L.J., December 18, 2013, pp. 10 and 22)**

In a 6-1 decision, the New York Court of Appeals held that a police officer may be allowed to testify about the description a crime victim gave about his or her at-

tack if that testimony does not tend to mislead the jury. The Court relied on its earlier ruling in *People v. Huertas*, 75 NY 2d 487 (1990), in which the Court held that crime victims could testify to their own descriptions of their attackers. The Court indicated that its most recent ruling is an expansion of its earlier decision. In a decision written by Judge Smith, the majority stated that it could see no reason why the earlier ruling should be limited to a witness's account of his or her own prior statement. In addition to Judge Smith, the majority consisted of Chief Judge Lippman and Judges Graffeo, Read, Pigott and Abdus-Salaam. Judge Rivera dissented and argued that the officer's testimony about the victim's description of an assailant would tend to unfairly bolster the veracity of the victim's testimony by being repeated by other witnesses in violation of *People v. Caserta*, 19 NY 2d 18 (1966).

Ineffective Assistance of Counsel

***People v. Babeaty*, decided January 16, 2014 (N.Y.L.J., January 17, 2014, p. 22)**

In a unanimous decision, the New York Court of Appeals reversed a determination by the Appellate Division and remitted the matter back to the Fourth Department, finding that the Court had improperly dismissed a Defendant's appeal after assigned counsel had filed a motion claiming that there were no non-frivolous issues to be raised on Defendant's behalf. The Court of Appeals found that the issues raised by the Defendant in a pro se supplemental brief were not wholly frivolous and therefore the Court should have denied appellate counsel's motion. Further proceedings were therefore required.

Ineffective Assistance of Counsel

***People v. Cortez*, decided January 21, 2014 (N.Y.L.J., January 26, 2014, pp. 1, 2 and 22)**

In various concurring opinions, the New York Court of Appeals fell one vote short of adopting a formal system of deciding whether defense counsel is too conflicted to provide adequate representation. Chief Judge Lippman wanted New York Judges to start using a method similar to one used in Federal Courts where trial judges ask six explicit questions to determine if counsel has a conflict of interest and if the defendant understands the implications of that conflict. Three other members of the Court argued, however, that the State's judiciary should continue using the method set forth by the Court of Appeals in *People v. Gomberg*, 38 NY 2d 307 (1975), where trial judges decide whether conflicts exist on a case-by-case basis as long as they are primarily satisfied that a defendant's waiver of a potential attorney conflict was informed. Joining Judge Lippman with respect to his decision were Judges Read and Pigott. Joining Judge Abdus-Salaam in her view were Judges Graffeo and Smith. Judge Rivera did not participate, thereby leaving the Court in somewhat of a standstill, which may have to be resolved at a future time.

Scenes from the Cri

Luncheon and A

Thursday, January 30, 2014

New York State Court of Appeals Chief Judge Jonathan Lippman

Paul Shechtman receiving award from Section Chair Mark Dwyer and Larry Goldman

Section members

Jessica Goldthwaite receiving award from Section Chair Mark Dwyer and Susan BetzJitomir

Anthony Colleluori receiving award from Section Chair Mark Dwyer and Rick Collins

N.Y.C. Police Chief Philip Banks, III receives award from Mark Dwyer and Jack Ryan

minal Justice Section
wards Ceremony
• New York Hilton Midtown

Luncheon guest speaker James M. Cole, Deputy Attorney General of the United States

s at the luncheon

Jason Effman receiving award from Section Chair Mark Dwyer and Norman Effman

Hon. Lee Zeldin from the N.Y.S. Senate receiving award from Mark Dwyer and Rick Collins

NYSBA

Mark Dwyer and Robert Masters present award to Michael J. Flaherty, Jr., representing D.A. Frank Sedita from Erie Co.

Chief Judge Jonathan Lippman joins Mark Dwyer in presenting award to Judge Barry Kamins

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

The Court opened its new term on October 7, 2013, and began hearing oral argument on a variety of matters. With respect to Criminal Law issues, the Court rendered opinions on several cases, which are summarized below.

Brown v. Plata, 134 S. Ct. 1 (August 2, 2013)

In 2011, the United States Supreme Court had issued its important ruling regarding jail overcrowding in the State of California. The Court had determined that the conditions in the California penal system violated the cruel and unusual punishment clause and ordered California officials to rectify the situation even if it meant the release of thousands of prisoners. During the last two years, although the prison population in California has declined, overcrowding still exists, and the State requested from the District Court, which was monitoring the situation, that an extension be granted allowing for additional time to relieve the overcrowding situation. After the District Court denied the application by the State, a direct petition was made to the Supreme Court in Washington. During its summer recess, the Court denied the application for a stay by a 6–3 decision. Justice Scalia, following his original dissent in the 2011 decision, continued to strongly object to the Court's action. Judge Scalia commented that due to the Supreme Court action, California must now release upon the public nearly 10,000 inmates convicted of serious crimes. Judge Scalia further warned about the power of the "black robe." In conclusion, Judge Scalia stated, "As for me, I adhere to my original view of this terrible injunction. It goes beyond what the Prison Litigation Reform Act allows, and beyond the power of the Courts. I would grant the stay and dissolve the injunction."

Kansas v. Cheever, 134 S. Ct. 596 (December 11, 2013)

In a unanimous decision, the United States Supreme Court held that the prosecution could introduce evidence from a defendant's court-ordered mental evaluation to rebut the Defendant's expert testimony. In the case at bar, the Defendant was charged with capital murder. He had raised a voluntary intoxication defense, offering expert testimony regarding his methamphetamine use. He had previously undergone a court-ordered psychiatric evaluation. The Defendant argued that that the prosecution could not use any information from that examination because it violated his Fifth Amendment rights, and the prior Supreme Court decision in *Estelle v. Smith*, 451 U.S. 454.

The Supreme Court rejected the Defendant's claim and held that when a Defendant presents evidence through a psychological expert who has examined him, the government is permitted under the Fifth Amendment to use the only effective means of challenging that evidence: testimony from an expert who also examined him. The Court, in reaching its determination, reaffirmed its earlier decision in *Buchanan v. Kentucky*, 483 U.S. 402, and stated that the earlier decision applied in the case at bar and permitted the prosecution to offer the rebuttal evidence at issue. Justice Sotomayor delivered the unanimous opinion of the Court.

Pending Cases

Noel Canning Company v. National Labor Relations Board, 134 S. Ct. __

On January 13, 2014, the United States Supreme Court heard oral argument on a case that involves the authority of the President to make recess appointments without congressional approval while the Congress is in recess. The case involves the Noel Canning Company with respect to a dispute with the National Labor Relations Board. Two of the three Labor Board members had been appointed by President Obama in January 2012. They had not, however, been confirmed by the Senate. The Constitution authorizes Presidents to make such appointments during the recess of the Senate, which shall expire at the end of their next session. The Senate claimed that it was not actually in recess when the President made the appointments, and that instead the appointments were made to bypass Senate approval. Forty-five Republican Senators, led by minority leader Mitch McConnell, had joined the litigation and had participated in the oral argument time which was allotted. During oral argument, it appeared that the Court was somewhat split on the issue, with several Justices expressing concern about the aggressiveness of executive power. A decision on this important issue concerning a dispute over presidential and congressional authority is expected sometime in the early spring.

Affordable Care Act Cases

The United States Supreme Court agreed on November 26, 2013 to hear several cases which involve a new challenge to President Obama's Affordable Care Act. The issues involved in the several cases deal with whether employers with religious objections may refuse to provide their workers with mandated insurance coverage for contraceptives. The issue has resulted in divided opinions

among the Circuit Court of Appeals, and the Plaintiffs are raising serious issues regarding the Constitution's guarantee of the free exercise of religion. The Court, in accepting various cases, indicated that the matters would be consolidated and that oral argument would probably be held in late March, with a decision expected possibly in late June. The Court will hear arguments in the consolidated cases of *Sebelius v. Hobby Lobby Stores* and *Conestoga Wood Specialties v. Sebelius*.

Same-Sex Marriage Cases

On Monday, January 6, 2014, the United States Supreme Court issued a stay with respect to the Utah decision regarding same-sex marriages. A federal Judge in Utah had ruled that the State's ban on same-sex marriage was constitutionally impermissible. The State of Utah appealed to the United States Supreme Court for a stay while the full appeal was to be heard in the Tenth Circuit Court of Appeals. The initial stay application had been made to Justice Sotomayor, and the full Court subsequently granted the request for a stay while the Circuit Court considered the issue. The Utah litigation has unfortunately placed a cloud of doubt over the marriages of nearly 1,000 couples who had initially been granted marriage licenses.

***Hall v. Florida*, 134 S. Ct. __**

On October 21, 2013 the United States Supreme Court granted certiorari with respect to a Florida case which involves using an IQ score of 70 as a firm cutoff for determining if a Defendant is mentally retarded and may not be executed. Over the years the Supreme Court has been gradually limiting the use of the death penalty, and this latest case offers an additional opportunity for the placement of new restrictions. The Court recently heard oral arguments and the Court may issue its decision at the end of its current term.

***U.S. v. Wurie*, 134 S. Ct. __**

***Riley v. California*, 134 S. Ct. __**

On January 14 and 17, 2014, the United States Supreme Court granted certiorari to consider the issue of whether police need a warrant to search the cellphones of people they have arrested. The Court accepted two cases which are expected to be argued in April and decided by late June. One of the cases emanates from a decision of the Federal Court of Appeals located in Boston, and the other involves a decision by the California State Courts. These cases involves important issues which will greatly affect the Criminal Justice System, and we look forward to reporting on the Supreme Court decision.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from October 8, 2013 to January 30, 2014.

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

In a unanimous decision, the Appellate Division, Fourth Department, held that a trial court should have suppressed a dagger and bag of cocaine in plain sight in the suspect's car because the police effectively arrested the man who was fleeing before they saw the evidence. The Court therefore ordered the dismissal of the indictment. In the case at bar, the police were conducting surveillance outside a bar which was known for drug activity. For half an hour, the police observed what appeared to be a series of transactions involving the Defendant and people outside the bar. Although police did not actually see drugs or cash change hands, they repeatedly saw a man with a satchel approach the Defendant, who was in a vehicle. At the vehicle, the man with the satchel would reach inside, seemingly retrieve something and then return to a group of people near the bar. He would thereafter shake hands in a manner suggesting an exchange of drugs and cash. When police approached the suspect, the man with the satchel took off on foot and the Defendant, Lee, fled in his vehicle. Police eventually stopped the vehicle and ordered Lee at gunpoint to lie on the ground, where he was subsequently searched and handcuffed and then placed in the back seat of the patrol car. Police subsequently saw a dagger and baggie with white residue in plain view in the Defendant's vehicle.

The appellate panel concluded that the police were justified in approaching the vehicle, but did not have probable cause to arrest the Defendant before the dagger and baggie were observed. The Fourth Department decision concluded that because the arrest of the Defendant was unlawful, the tangible evidence subsequently discovered should have been suppressed.

People v. Littlejohn (N.Y.L.J., October 31, 2013, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Second Department, upheld a Defendant's murder conviction, even though it found that the prosecutors were improperly allowed to link the Defendant to another crime. The panel determined that the Defendant was not deprived of a fair trial because evidence in the case was overwhelming, and there was no significant probability that the verdict would have been different had the trial court appropriately excluded the improper evidence. The Defendant, who worked at a Manhattan bar, was charged with sexually assaulting and killing a 24-year old graduate student. The prosecution was allowed, under the *Molineux* theory, to present evidence of a similar attack. The appellate panel concluded that evidence of the other crime was too dissimilar to be admissible at the Defendant's trial. However, the Appellate Division concluded that since the other evidence against the Defendant was so overwhelming, the admission of the improper evidence constituted harmless error. The decision was written by Justice Mastro, and was joined in by Justices Hall, Lott and Sandra Sgroi.

People v. Gadson (N.Y.L.J., November 1, 2013, p. 4)

In a unanimous decision, the Appellate Division, Second Department ordered a new trial for a Defendant who was convicted of robbery. The Court found that the trial judge had mishandled a situation which resulted from the issuance of a jury note, and that the trial court's actions constituted reversible error. In the case at bar, as the jury considered the evidence, it sent the trial judge four notes. On the fourth occasion, in a note involving questions on accomplice liability, the trial court did not disclose the contents of the note to the defense and prosecution until serially reading and immediately replying to the questions. Defense counsel did not object to the trial court's handling of the note. Despite the failure of defense objection, the Appellate Division concluded that a new trial was required because the trial court did not meaningfully comply with the jury deliberation requirements which were set forth in Criminal Procedure Law Section 310.10. The Appellate Division's decision stated, "The jury's requests for further explanation of the meaning of accomplice liability within the context of this case required a 'substantive response,' rather than a merely 'ministerial' one." The Appellate Division decision, which was rendered by Justices Mastro, Leventhal, Lott and Roman, concluded that as a result of the trial court's actions, the failure to afford the defense a chance to offer suggestions on the Court's response to the jury note was reversible error, despite the lack of a defense complaint.

People v. Obeya, (N.Y.L.J., November 4, 2013, pp. 1 and 8)

The Appellate Division, Third Department, in a unanimous decision, denied a Defendant's motion to vacate a 2008 misdemeanor conviction for petty larceny. The Court concluded that although his attorney told him he was unlikely to face immigration consequences for entering the

plea, this advice did not constitute ineffective assistance of counsel. The Court noted that the Defendant faced several felony charges, and the plea was entered after considering various factors. The appellate panel concluded that although defense counsel may have expressed his experience–based assessment of the likelihood that deportation proceedings might be instituted, his remarks were not misleading, and the record as a whole failed to establish the Defendant's ineffective assistance of counsel claim.

People v. Morgan (N.Y.L.J., November 13, 2013, pp. 1 and 7)

The Appellate Division, Third Department, unanimously reversed a Defendant's conviction and sharply criticized an Assistant District Attorney from the Erie County District Attorney's Office for prosecutorial misconduct. The Appellate Division had previously reversed the Defendant's earlier conviction and had ordered a retrial. During the retrial, the Appellate Division concluded that the prosecutor had again committed several transgressions, some of which were the same as had been criticized during the first trial. The Court found that the prosecutor had improperly denigrated the defense and defense counsel, made inappropriate arguments and made himself an unsworn witness. The appellate panel also stated that despite the prior admonitions on the Defendant's first appeal, the prosecutor, on retrial, repeated some of the improper comments from the first summation and made additional comments that it concluded were improper. Based upon the prosecutor's actions, the Appellate Division concluded, "In light of the foregoing, we conclude that reversal is warranted based upon the pervasive and at times egregious misconduct on summation, particularly in light of our previous admonition to the People in this matter."

People v. Singleton (N.Y.L.J., November 14, 2013, pp. 1 and 6)

In a unanimous decision, the Appellate Division, Second Department, held that a Defendant was entitled to a new trial and his conviction had to be reversed, even though the evidence was strong that he committed a double murder in Queens. The Court found that regardless of well-settled law, the confession of a non-testifying co-Defendant is not admissible at a joint trial and despite admonitions by the trial Judge, the prosecutor repeatedly misused the co-Defendant's confession to implicate the Defendant in the 2005 shooting. The panel found that in his opening statement and in summation, the prosecutor made comments which suggested that the co-Defendant had implicated the Defendant. Further, despite admonitions from the trial Judge, he continued on this path. The Justices on the appellate panel, in strong language, stated that the trial assistant's conduct constituted an unjustifiable circumvention of the *Bruton* Rule, as well as deliberate defiance of the pretrial order. The Court concluded by noting that it was recounting the examples of the prosecutor's misconduct in the hope that its disfavor would be noted and that those charged with the duty of participating as advocates in criminal trials will approach their responsibility in an appropriate manner.

People v. Gayden (N.Y.L.J., November 21, 2013, pp. 1 and 8)

In a unanimous decision, the Appellate Division, Fourth Department, reversed a murder conviction because the prosecutor had failed to disclose that a key witness was a paid informant. Defense counsel had specifically requested *Brady* material and the Fourth Department held that the prosecutor had an obligation to discover and reveal favorable evidence known to the government.

People v. Williams (N.Y.L.J., November 21, 2013, pp. 1 and 8)

In a unanimous decision, the Appellate Division, Fourth Department, reduced a charge for reckless endangerment involving depraved indifference because the evidence did not support a finding that the Defendant didn't care at all when he infected a person with the HIV virus. The appellate panel found that the Defendant's conduct did not create a grave risk of death, an element of first degree reckless endangerment, because an HIV infection is no longer tantamount to a death sentence. In the case at bar, the Defendant had notified the victim shortly after their sexual relationship ended, and urged the individual to get tested. The panel determined that the proper charge which the Defendant should have faced was reckless endangerment in the second degree.

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

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's conviction and ordered a new trial based upon the fact that the prosecutor had made improper remarks which strayed far beyond well-defined perimeters. The prosecutor had vouched for the credibility of his witnesses and had mocked the defense to the extent that the Defendant had been denied a fair trial. The panel also concluded that the prosecutor, in his summation, alleged that the Defendant's story only made sense if there was a widespread conspiracy involving law enforcement officials, the Judge and the prosecutor. The Appellate Court found that the remarks in question were inexcusable and could not be ignored.

People v. Piznarski (N.Y.L.J., December 9, 2013, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Third Department, upheld the conviction of a Defendant for the crime of second degree unlawful surveillance. The Defendant had videotaped two fellow college students without their knowledge while they had sex with him. The Court held that videotaping a consensual sex act without a partner's knowledge violates New York's law against unlawful surveillance. The law went into effect in 2003 and involves the conviction of a Class E felony. The Defendant had attacked the statute in question as being void for vagueness and had sought to overturn a conviction for which he received a sentence of 1 to 3 years.

People v. Soto (N.Y.L.J., December 11, 2013, pp. 1 and 6)

In a 3-2 decision, the Appellate Division, First Department, held that a new trial was required for a Defendant who was convicted of drunken driving, holding that the trial Judge should have admitted a hearsay statement from a 19-year old woman without a driver's license who told the investigator that she was actually the one driving the car, because the statement was admissible as an admission against her penal interest. The majority found that the trial judge's ruling denied the defendant a fair trial and that a new trial was required. The majority consisted of Justices Acosta, Saxe and Friedman. Justices Clark and Mazzarelli dissented.

People v. Santos (N.Y.L.J., December 12, 2013, p. 1)

In a unanimous decision, the Appellate Division, Second Department, overturned a Defendant's murder conviction on the grounds that the Defendant's videotaped confession was inadmissible because it was unclear whether the Defendant understood the Miranda warnings which had been provided to him. The Defendant was a 17-year-old Spanish-speaking native of the Dominican Republic. The Miranda warnings were read to him in English and there was a failure to show that the statement was knowingly and voluntarily given. In reviewing the record the Court concluded that the Defendant's proficiency in English was highly questionable. The appellate panel concluded that the prosecution failed to establish that the Defendant comprehended the Miranda warnings.

People v. Mehmood (N.Y.L.J., December 20, 2013, pp. 1 and 5)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's conviction involving several sex offenses on the grounds that the prosecutor had made improper and egregious comments during his summation. The panel also found that the Defendant's counsel had committed the ineffective assistance of counsel by the use of inadmissible and prejudicial testimony which in fact hurt the defense case. The Court issued a reversal in the interest of justice after finding that the cumulative effect of the errors which occurred denied the Defendant a fair trial.

People v. Curry (N.Y.L.J., December 27, 2013, p. 1)

In a unanimous decision, the Appellate Division, Second Department, reversed a defendant's drug conviction and dismissed the indictment after finding that the conviction was against the weight of the credible evidence. The case involved a drug deal which occurred in Staten Island and which involved the testimony of an undercover officer. The officer had informed a co-Defendant that he wanted crack cocaine. The co-Defendant thereafter stated that he had to call "his man." Subsequently, the Defendant and the co-Defendant returned with narcotics. The undercover officer testified that he did not see any handoff of money or drugs. The appellate panel concluded that the rational inferences which could be drawn from the evidence did not support a conviction involving the Defendant beyond a reasonable doubt. The appellate panel pointed out that the undercover officer was unable to witness the exchange of money or drugs between the Defendant and the other man and therefore a conviction could not be sustained.

People v. Greenfield (N.Y.L.J., December 31, 2013, p. 4)

In a unanimous decision, the Appellate Division, Third Department, reversed a defendant's conviction and ordered a new trial on the grounds that the trial Judge improperly denied the Defendant's challenge for cause for a potential juror, a federal agent who said he often worked on cases with county prosecutors. The appellate panel concluded that a reversal was required because the defense was forced to use a peremptory challenge to remove the agent, and the defense exhausted its allotment of peremptory challenges before a jury was seated. In issuing its ruling, the Court applied the concept of implied bias and warned trial judges to lean toward disqualifying a prospective juror of dubious impartiality, rather than testing the bounds of discretion by permitting such a juror to serve.

People v. Demagall (N.Y.L.J., January 10, 2014, pp. 1 and 8)

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's conviction and ordered a new trial. The Defendant had imposed an insanity defense and had previously been convicted on two

occasions, which were eventually reversed. With regard to his third trial, a dispute erupted between prosecution and defense witnesses regarding the Defendant's mental condition. In ordering a reversal for a third time, the Appellate Court determined that the trial Judge had wrongfully restrained defense counsel from cross-examining one of the chief prosecution psychiatrists. The psychiatrist had testified in rebuttal for the prosecution that the Defendant was malingering. His conclusion was directly at odds with his opinion of the Defendant's mental state at the 2006 trial. The psychiatrist was also allowed to testify about an article he had written, and an award he had received. The appellate panel concluded that the restrictions placed upon defense cross-examination and some of the psychiatrist's direct testimony created an inappropriate and unwarranted impression of the prosecution's psychiatrist and that he was more worthy of belief and acceptance than that of other experts who testified at trial. The appellate panel also found that the trial Judge wrongfully admitted records from the mental institution where the Defendant was detained and hearsay testimony of the treating physician. Taking all into account, the Court stated that "this was a very close case on the issue of Defendant's sanity at the time of the murder and with the scales so delicately balanced the errors gave prosecutors an unfair advantage."

People v. Jarvis (N.Y.L.J., January 14, 2014, pp. 1 and 7)

In a 3-2 decision, the Appellate Division, Fourth Department, reversed a Defendant's homicide conviction and ordered a new trial. The three-Judge majority concluded that the Defendant's trial attorney committed several egregious errors that the prosecution exploited, and that Defendant's appellate counsel failed to bring these matters to the attention of the Appellate Courts. The Court's determination was made as a result of a 440 application, and comes after the Defendant had already served 22 years in prison.

People v. Brown and Thomas (N.Y.L.J., January 17, 2014, p. 7)

In a 3-2 decision, the Appellate Division, First Department, determined that the police did not have grounds to stop the Defendants, who were running while looking over their shoulders near Times Square. The police had knowledge that one of the Defendants had a known criminal history, but the Appellate majority concluded that neither the criminal history nor the fact that they were running was a sufficient reason to stop them under the *DeBour* standard. Justices Saxe and Tom dissented, finding that the majority's ruling was discouraging police work that is not only constitutionally proper, but also laudable.

For Your Information

Status of New York City Stop-and-Frisk Cases

After Judge Scheindlin denied the City's request for a stay of her decision in the stop-and-frisk cases, the Corporation Counsel's Office renewed its request for a stay in the U.S. Circuit Second Court of Appeals, which heard oral argument in the matter on October 29, 2013. On October 31, 2013, the Second Circuit issued its decision and granted a stay of the Judge's ruling pending the determination of the full appeal. In an unexpected development, the Court also took the unusual step of removing Judge Scheindlin from the case, finding that she had improperly conducted interviews and issued public statements which called her impartiality into question. Efforts by Judge Scheindlin and her supporters to re-argue the removal motion were denied in November. An effort to re-argue the issue of a stay was also denied in early November. The City pushed for a speedy determination by the Circuit Court of Appeals on the merits of the case. The Corporation Counsel's Office had requested the Second Circuit Court of Appeals for an accelerated briefing schedule, and it appeared clear that the City was seeking to obtain a decision on the merits prior to the end of the year, when the new Mayor, William DeBlasio, assumed office. Mr. DeBlasio was on public record as stating that he would not pursue an appeal of Judge Scheindlin's order. In late January, Mayor DeBlasio did announce that he was withdrawing the pending appeal. It is not clear at the present time what the reactions of the federal courts will be to this application, since the police unions had also petitioned the Court to be allowed to participate in the appeal. The Second Circuit recently stated it was holding the matter in abeyance while further proceedings took place in the District Court. We will keep our readers advised of developments.

Budget Cuts' Impact on Operation of Federal Courts; Some Additional Funds Forthcoming

Recent budget cuts were beginning to have a serious impact on the operation of the Federal Courts. Only recently it was announced that the Chief Judges from 86 federal districts appealed directly to Congress to reinstate some of the cuts that have already been instituted. The letter, which was joined in by both the Chief Judges for the Southern and Eastern Districts, as well as the Northern and Western Districts of New York, expressed grave concern about the judiciary's ability to carry out its mission. Chief Judge Loretta Preska, from the Southern District of New York, recently stated in a *New York Law Journal* interview, "Going into the next fiscal year, if we don't get some relief, we might as well close our doors."

The federal budget cuts had also caused the layoff or furlough of many public defenders. Recently, discussions were held regarding the possibility of reducing the amount paid to CJA attorneys and using some of those funds to supplement the budgets of the federal public defenders. As a result of the temporary budget deal which was approved by Congress in the middle of October, it is expected that some 51 million additional dollars will be provided to the judiciary and to the federal defenders. This amount may alleviate some of the difficulties which have already been experienced. We will continue to monitor the financial situation regarding the judicial budget, and will provide periodic reports to our readers.

Judicial Retirement Amendment

The voters, in November, had an opportunity to determine whether the required retirement age for Supreme Court and Court of Appeals Judges would be raised. The amendment that was proposed would have allowed Supreme Court Justices to extend their time for retirement from 76 to 80 through a recertification process, and would have extended the mandatory retirement age for Court of Appeals Judges to 80 from 70. A strenuous effort was made by the Judges themselves and various segments of the legal community to achieve passage of the Bill. The Citizens Union, however, just prior to the November election, issued a statement indicating its opposition to the constitutional amendment. The Civic Watchdog Organization stated that its opposition was based chiefly on the fact that the amendment applied only to certain judges, and there was no principal reason for letting those judges stay on the bench until they were 80 while continuing to require other judges to step down at age 70. The statement also pointed out that there was a greater need to fill shortages in such courts as the Family Court, where the constitutional amendment did not provide for longer service. Early polls indicated that the Amendment was failing to achieve a majority of voter approval. The voters, on November 5, resoundly rejected the Amendment by a vote of 61% against and 39% in favor.

An ad hoc group of various attorneys from large firms had joined together to support the proposed amendment, both financially and through public education, and the Judges themselves, through their associations, had hired an advisor to provide professional advice and to promote

the passage of the proposed legislation. The ad hoc group of prominent attorneys operated under the name of "Justice for All 2013," and included Judges Judith Kaye and Carmen Beauchamp Ciparick, both of whom were forced to retire from the Court of Appeals when they reached the age of 70. By election time, the various ad hoc committees in favor of the amendment had raised approximately $632,000 to support their position. Certain Bar Associations such as the New York County Lawyers Association and the New York State Academy of Trial Lawyers had also issued public statements in support of the amendment. The Fund for Modern Courts also announced its support of the retirement amendment in the middle of September.

Following the Amendment's defeat, Chief Judge Lippman indicated that he would renew his efforts to pass a new retirement amendment. It appears that new legislation regarding the issue would have to be introduced in the Legislature, and that the issue would not be able to be re-presented to the voters for several years.

Defeat of Retirement Amendment Presents Governor Cuomo with the Opportunity to Appoint All Court of Appeals Members

The recent defeat of the effort to raise the retirement age for New York Court of Appeals Judges presents Governor Cuomo within the next few years with the opportunity to fill several additional vacancies. Chief Judge Lippman, who is 68, will be facing retirement under the present law at the end of 2015. Judge Robert Smith has only one year left on his period of service, and will be retiring on December 31, 2014. Judge Graffeo, who was appointed by Governor Pataki, will see her current term expire in November 2014. Judge Pigott will reach the age of 70 by 2016, and Judge Read, also a Pataki appointee, will complete her current tenure of service on January 2017. With the two appointments made by Governor Cuomo to date, he has the opportunity within the next three years to appoint all of the Court's personnel. He thus has an unprecedented opportunity to shape the future of the Court. The forthcoming vacancies also clearly indicate that within a few years, the political makeup of the Court will change from four Republicans and three Democrats to a majority of Democrats. The Governor's last two appointments, to wit: Judges Rivera and Abdus-Salaam, were Democrats. The Court also appears that it will maintain its current gender balance of four women and three men.

Appellate Division Vacancies

During the last several years, several vacancies have occurred within the various Appellate Divisions. As of the end of January, 2014, there were 3 vacancies within the First Department, which has an authorized complement of 20. The Second Department, with an authorized complement of 22, had 4 vacancies, and the Third and Fourth Departments, with authorized complements of 12, had 5 vacancies, 3 in the Third Department and 2 vacancies in the Fourth. Three Judges who sat in the Appellate Divisions are Republicans who faced stiff opposition from Democratic candidates in the November election. One of them, to wit: Judge Angiolillo, from the Ninth District in upstate New York, was in fact defeated in the most recent November election, leaving the Appellate Division, Second Department, with only 17 sitting Justices from an allotment of 22. Presiding Justice Randall Eng, of the Second Department, commented that with Judge Angiolillo's loss, the Appellate Division, Second Department, was in a "significant bind" and that the Court was stretched to the limit. It was also announced at the end of December that Justice Edward Spain, who had served in the Appellate Division, Third Department, for 19 years, had decided to retire. Judge Spain's retirement will place an additional burden on the Third Department, which will now have a vacancy rate of 40%.

The vacancy situation has increasingly alarmed various Bar Associations, including the New York State Bar, and they have called upon the Governor to begin making appointments as quickly as possible. The Governor had not issued an Appellate Division appointment in more than a year, and the Appellate Divisions as a whole are nearly 20% depleted. A spokesman for the Governor recently stated that appointments are expected in the near future and that the delay has been caused by a deliberative process which is utilized by the Governor's Screening Committee, and that sometimes the process is quite time-consuming. In late January, the Governor did announce 4 Appellate Division appointments. Justice Barbara R. Kapnick, who had been serving in the Manhattan Supreme Court, was elevated to one of the vacant positions in the First Department. In the Second Department, the Governor elevated Justices Colleen Duffy, of Westchester, Hector D. LaSalle, of Suffolk County, and Joseph J. Maltese, of Staten Island. Since several vacancies still remain, additional appointments from the Governor are expected within the coming months.

Significant Decline in Law School Applications

Recent statistics from the American Bar Association indicate that there has been a dramatic decline in the number of law school applications throughout the Country. During the last year, only 11 of about 200 American Bar Association-approved law schools in the United States saw any increase in applications. The survey included the 15 law schools in New York State. Among New York schools, only 3 had entering classes which were larger than last year's. Two schools which experienced a slight increase were Brooklyn Law School and Cornell Law School. Pace Law School experienced a significant increase of 16%. On the other hand, 12 schools all experienced significant declines, with New York Law and Hof-

stra Law School having an entering class in 2013 which had declined by 27% and 33% respectively. Overall, the 15 New York law schools' enrollment for the 2013-2014 term was 4,002, a decline of 9% over last year. The study also found that at the present time, New York law schools have a total enrollment of 15,872, a decline of 4% from the peak year of 2008-2009.

Death Penalty Support Drops Significantly

Recent results of a 2013 Gallup Poll indicate that Americans still favor the death penalty for convicted murderers, but that the percentage of support is at its lowest level in more than 40 years. In 1994, nearly 80% of Americans supported the use of the death penalty, largely as a result of a high crime rate which was sweeping the Nation. Support for the death penalty in 2012 dropped to about 60%, 20 points below the level of 18 years ago. The use of the death penalty and its support among Americans has been steadily decreasing, and since 2006, six additional states have repealed its use. When broken down by political affiliation, the recent Gallup Poll also found that Republicans in 2012 favored the use of the death penalty by 81%. Independent voters supported the death penalty by 60%, and among Democrats, support had fallen below 50% to 47%.

The use of the death penalty has in fact greatly fallen during the last several years. In 2013, 39 people were executed, only the second time in 19 years that the figure had reached fewer than 40. Statistics from the Death Penalty Information Center indicated that the 39 executions were carried out in 9 states—Texas had the most, with 16, followed by Florida, which had 7, Oklahoma had 6, Ohio 3, Arizona and Missouri 2 each, and Alabama, Georgia and Virginia, 1 each. All of the 3,125 inmates on death row as of January 1, 2013, came from just 20% of the counties in the United States. The peak in death penalty executions was reached in 1996, when 315 inmates were executed. Some 3,000 inmates still face possible execution and remain on death row.

U.S. Violent Crime Begins to Rise

After many years of declining crime rates, it appears that violent crime may be beginning to rise once again in the United States. Recent statistics from the FBI reveal that violent crime went up 15% last year and that property crime rose by 12%. Last year was the second year in a row for increases in certain types of crimes. FBI estimates regarding the year 2012 place the number of violent crimes at approximately 1.2 million. Crime rates had begun declining in 1993, with an uptick in 2006 being the only exception. From 1993 to 2011 the rate of violent crime declined by 72%. In the last 2 years, however, there have been indications that the trend is now beginning to rise, both nationwide and within certain areas of New York State. These developments are a cause for concern, and we will continue to monitor the situation for our readers.

New Kings County District Attorney Kenneth Thompson Begins His Term of Office and Begins Appointing Executive Staff

Following two highly contested and contentious elections, Kenneth Thompson, on January 1, 2014, began his term of office as the new Kings County District Attorney. He had defeated veteran D.A. Charles Hynes, both in the Democratic primary and in the general election, by significant margins, most recently by a margin of 75 to 25%. D.A. Thompson has been working with his transition team to fill the key executive spots in his office, and to effectuate an expeditious and smooth transition. It is expected that almost all of D.A. Hynes' key executives will be leaving the office, and that D.A. Thompson will be bringing in new members to comprise his top staff. In fact, in late December, he announced the selection of his new chief assistant. The appointment involves Mark Feldman, who had been serving as Deputy Inspector General for the Metropolitan Transit Authority. Feldman was previously the head of the Organized Crime and Racketeering Section of the Eastern District U.S. Attorney's Office. He was also a former Assistant District Attorney in the Brooklyn, Manhattan and Queens Offices. Mr. Feldman is charged with overseeing the management of the Kings County Office on a daily basis and will also direct specialized task forces and divisions.

Former District Attorney Hynes, who is 78, had served as the Brooklyn District Attorney for 24 years, and is credited with instituting several new initiatives. Unfortunately, in the last few years, his office has received criticism regarding the handling of several controversial matters, and it is unfortunate that his career as District Attorney had to end in the manner in which it did. A recent article in the *New York Law Journal* of December 27, 2013, at pages 1 and 8, analyzes former D.A. Hynes's legacy after 24 years as District Attorney and concludes that "it is neither black nor white, but shaded in gray." We wish former D.A. Hynes and newly elected D.A. Thompson the best of luck as they begin their new endeavors.

In other District Attorney races throughout the State, most incumbents were easily returned to office. Cyrus Vance, Jr. will continue as D.A. of New York County, and Kathleen Rice won a contested election in Nassau County. D.A. Thomas Spota won a fourth term in Suffolk, and in Westchester County Janet Difioro was elected for a third term. Orange County elected a new District Attorney, David Hoovler, replacing D.A. Frank Phillips, who retired after 7 terms.

Bar Exam Results

In early November, the State Bar of Law Examiners issued the names of candidates who passed the bar examination which was given on July 30 and 31. This year, of the 11,694 candidates who took the exam, 88%, or 8,098, passed. These candidates were certified before admission to the Bar and will be interviewed within the next several months by appropriate committees on character and fitness. The results of this year's bar exam were one of the best in recent years. The pass rate extended to almost all of the State's law schools, with only CUNY, Albany and Touro having a slightly lower pass rate than 2011. At the top of the list were NYU and Columbia, which had pass rates of 97% and 96% respectively. At the bottom of the list were Albany and Touro, which had pass rates of 80 and 68 respectively. The statewide average was listed at 88%.

Recent Law Graduates Having Difficulty Finding Legal Employment

The U.S. Bureau of Labor Statistics and the National Association for Law Placement have indicated that the attorney job market has become saturated and that many recent law graduates may have difficulty finding employment in the legal field. The U.S. Bureau of Labor Statistics recently stated, "More students are graduating from law school each year than there are jobs available. " The National Association for Law Placement reported that for 2012 law graduates, "Of those graduates for whom employment status was known, only 64.4% obtained a job for which bar passage is required." That was the lowest percentage the association has ever measured. Given the cost of a law degree and the sorry state of hiring for new lawyers, many are beginning to question whether law school is a wise investment. The declining admissions enrollment in the nation's law schools is a recent indication that the desire to get into law school and to become a lawyer is not what it once was.

Federal Government Continues to Make Payment to Many Who Have Died

A recent report indicated that in the past few years, the Social Security Administration paid $133 million to beneficiaries who were deceased. The Federal Employee Retirement System paid more than $40 million to retirees who had died. These errors are attributed to a glitch at the heart of the federal bureaucracy. The task of tracking deaths for the federal system is an enormous one since 2.5 million Americans die each year. Federal officials who were questioned regarding the recent findings stated that the vast majority of cases are handled correctly, but that mistakes are sometimes made and that the system is not perfect. The most recent audit suggested that more oversight and checking should be instituted to avoid the vast amount of monies which are improperly paid.

Efforts to Reduce Prison Populations

In the last several years, many states have introduced new procedures and programs in an effort to reduce their prison populations. Due to these efforts, recent incarceration rates in Texas have fallen by 10%. Recently, the State of Georgia began looking to follow Texas and is moving to improve public safety by making laws for drug possession less punitive. Currently, the State with the highest incarceration rate, which is currently under pressure to adopt significant changes, is the State of Florida. At the current time, Florida has 101,000 inmates, at a statewide cost of $2.4 billion. Of the persons incarcerated in Florida, almost 50% are imprisoned for non-violent crimes. The Florida Department of Corrections has recently requested an additional $59 million to reopen nine correctional facilities. This request and the progress made in other states have led to the call for reforms to be instituted in Florida. A recent editorial by the *Tampa Bay Time*s, one of Florida's leading newspapers, stated, "Florida should start following the smart justice example of Texas and Georgia. It saves money, helps those convicted improve their lives and still protects society." New York's incarceration figures have also dropped dramatically, from a high of nearly 80,000 more than 10 years ago to just under 60,000 at the present time. The cost of incarceration is high, and economics has propelled the effort to reduce the number of prisoners placed in correctional facilities, and to institute additional rehabilitation programs, especially for those who are charged with non-violent crimes.

Mortgage Delinquencies Decline and Home Prices Remain Strong

A recent business report indicated that mortgage delinquencies in the United States have fallen to their lowest level since 2008. Delinquencies during the July–September quarter for 2013 amounted to 4.9%—down from 5.33% in 2012. The rate of late payments on home loans has been steadily declining over the last year and a half. During that time, home sales and prices have been rebounding. Even with the present decline in the mortgage delinquency rate, delinquencies are still above the general average of 1-2 % which existed in the past. A positive key factor is that many of the mortgages which were issued in the last two years are performing at a very low delinquency rate, and hopes exist for a continued improvement in the overall delinquency rate. According to the survey, all states in the Nation posted a drop in late payment rates during the third quarter of 2013, with the best performing states being California, Nevada, Arizona, Colorado and Utah, registering declines of more than 30%.

Also on the plus side, recent studies indicate that home prices have been rising during the last several months, and that the price gains remain strong. For the year 2013 home prices have risen 13.6%. All of these statistics indicate that the housing market is on the road to recovery.

Hate Crimes

Recent statistics reported by the FBI indicate that there were fewer hate crimes in 2013 than in 2012. The numbers also revealed that hate crimes were down from the 6,222 reported in 2011. The number of hate crimes was listed as 5,796.

New City Courts

A Bill recently passed by the New York State Legislature provides for an increase of City Court judges. The Bill was awaiting Governor Cuomo's signature for several months, and he finally signed it on December 18, which was a deadline date. The new legislation would provide several new judges to serve in the various upstate counties. The legislation calls for 16 full-time judgeships.

Legalization of Marijuana

With the recent approval in several states regarding the use of medical marijuana, concern has arisen over the fact that changing attitudes have also led to increasing marijuana use among the Nation's younger population. The National Institute on Drug Abuse recently issued a report which indicated that 60% of 12th graders do not view regular marijuana use as harmful and more than 12% of 8th graders said they used the drug in the past year. The survey also found that 23% of high school seniors used marijuana in the past month, compared with 16% who smoke cigarettes. The Obama administration has expressed concern regarding the recent trend and has indicated that concern over the legalization in Washington State and in Colorado, and a statement was issued attacking the view that marijuana is less dangerous than other substances.

Court System Provides Increased Funds for Civil Legal Services

According to recent statistics supplied by the Office of Court Administration there has been a significant increase in state aid for civil legal services. Between the years 2011 and 2012, a total of $125,169 was provided to civil legal services in New York. In the period 2012 to 2013, this amount more than doubled, with $265,964 being provided to civil legal services programs. Chief Justice Lippman has been active in promoting the increases in question.

American Women Make Gains in Achieving Equal Pay

According to a new report issued by the Pew Research Center, young American women are increasingly likely to receive pay nearly equal to their male counterparts. It was estimated at the present time that their earnings are approximately at nearly 93% of men. Women are increasingly moving into higher career positions both in government and business and now make up nearly half of the workforce. In issuing its report, the Pew Center indicated that "today's generation of young women" is entering the labor force near parity with men in terms of earnings and extremely well prepared in terms of their educational attainment.

With respect to the legal profession, a recent report by the National Association for Law Placement found that women accounted for nearly 45% of associates in law firms in 2013, and that women partners in law firms rose to 20%.

2013 Sees Over 360,000 Deportations

The Immigration and Customs Enforcement Agency reported that during the year 2013, some 368,644 immigrants were deported from the United States. Some 235,000 were arrested near or at the U.S. border with Mexico. This year's number of deportations is down approximately 50,000 from the 409,000 removed last year. Almost 2 million immigrants have been deported since 2009.

Felony Backlog Drops in the Bronx

The Office of Court Administration announced in early December that a program which had been implemented a year earlier to speed up felony cases in the Bronx Criminal Court had substantially reduced the Borough's backlog of felonies which had been pending for at least 2 years. The number of felony cases which were older than 2 years in January of 2013 was 952. As of the end of December, 2013, the number of such cases had dropped to 397. The reduction had been accomplished by using a team of volunteer judges, mostly from the upstate courts, which operated blockbuster parts. The program instituted involved pushing for plea agreements or compelling attorneys to prepare for immediate trial. The overall caseload of felonies pending in the Bronx has also dropped from 4,755 to 3,880. The reductions in question were accomplished in part by holding more trials. In 2013 there were 256 felony trials in the Bronx, up 36% from the 188 which were tried in 2012.

New York County District Attorney's Office Experiences Turnover with Respect to Executive Staff

With the beginning of the New Year, it was announced by Manhattan District Attorney Cyrus Vance, Jr. that two of his senior staff will be leaving for private practice. Chief Assistant District Attorney Daniel Alonso and General Counsel Caitlin Halligan will be leaving the office effective in mid-January for the private sector. D.A.

Vance praised both members of his staff, stating they had done an exceptional job in their positions. Both Alonso and Halligan also expressed their thanks for service in Vance's office, indicating they had had a fabulous opportunity. It was announced by the District Attorney that Karen Friedman Agnifilo, who had been serving in the office as an Executive Assistant District Attorney and Chief of the Trial Division, would replace Daniel Alonso. No successor has yet been named for Caitlin Halligan.

World Facing Retirement Crisis

A global consulting company recently issued a report claiming that the world is facing a retirement crisis. The study found that many countries are slashing retirement benefits and raising the age to start collecting them. Further, many companies have eliminated traditional pension plans that cost employees nothing. In addition, most individuals spent freely over the years and have failed to provide for necessary savings. All of these factors have led the report to conclude that in the coming years many people will be forced to work well past the traditional retirement age of 65 to 70, and that living standards will fall and poverty rates will rise. The study was released by the Organization for Economic Cooperation and Development, which works with the United Nations. The report concluded that the retirement crisis will hit almost all countries, including the wealthy ones such as the United States. The report concluded that the retirement crisis could last for several years and its consequences will be far-reaching.

Decline in Law Enforcement Officers Deaths

An annual report issued by the National Law Enforcement Officers Memorial Fund found that deaths in the line of duty experienced by law enforcement officers in 2013 fell by 8%, and was the fewest since 1959. According to the report, 111 federal, state, local and territorial officers were killed in the line of duty nationwide during the past year compared with 221 in 2012. The States of Texas and California had the highest number of fatalities, with 13 and 10 respectively.

Florida Population on Track to Surpass New York Sooner Than Expected

In our last issue, we reported that Florida's population was set to surpass New York by the year 2015. A recent report just issued by the U.S. Census Bureau covering the year 2013 indicates that Florida may become the third most populous state in the Nation sooner than the original prediction. The Census Bureau report found that at the end of 2013, Florida's population was estimated at 19,552,860. Although by the end of 2013, New York was still ahead of Florida by 98,267 people, Florida has been growing at a rate of 3.75% since 2010, while New York's rate of growth has amounted to 1.3%. Based upon this pattern, Florida may actually become the third most populous State in the Nation by the end of the current year, dropping New York to number four. Interestingly, New Yorkers appear to be contributing to Florida's increasing population. A recent census study concluded that New Yorkers, in recent times, have contributed some 40,000 persons who have moved from New York to Florida, and that New York contributes the largest number of new residents to Florida than any other State. We will continue to monitor the population race between these two States.

Obama Appointments to New York Judicial Positions

A recent report in the *New York Law Journal* of January 3, 2014 at page 5 summarizes the number of judicial appointments that President Obama has made to the New York Courts since taking office in January 2009. He has nominated a total of 27 Judges in New York. Five have been selected to serve in the Second Circuit Court of Appeals. With respect to the Federal District Courts, 16 have been designated to the Southern District, one to the Northern District, 3 to the Eastern District and 2 to the Western District. Currently there is still one federal vacancy in New York, a position in the District Court for the Northern District. Overall, on a nationwide basis, President Obama still has some 59 vacancies to fill in the various District Courts, and 16 vacancies with respect to the Circuit Court of Appeals. Recently the number of judicial appointments has been increased since the Senate recently changed its rule for confirmation of judicial appointments by making it easier for the President to have his selections approved.

Automobile Industry Experiences Strong Sales in 2013

A recent analysis regarding automobile sales for the year 2013 indicates that the automobile industry has once again had a strong year. Automobile sales were estimated at about 15.6 million, the best performance since 2007. The 2013 increase was approximately 8% over the previous year. The Ford Motor Company was listed as leading all of the major automobile makers in 2013, with an 11% gain, to almost 2.5 million vehicles. Chrysler and Nissan experienced 9% gains. General Motors, Toyota and Honda all had gains of 7%. As the industry looks forward to 2014, it is expected that sales will continue to increase, and that some 16.3 million automobiles are expected to be sold in the United States in 2014. The worst year for U.S. automobile sales in recent times was in 2009, when U.S. sales hit a level of 10.4 million. The huge increase over the last four years is indicative of an economic recovery, and increasing confidence by U.S. consumers.

Judges Given Greater Authority with Respect to Probation Terms

On January 10, Governor Cuomo signed a legislative bill which allows judges to reduce probationary terms for felonies and misdemeanors so long as they are not sex-related charges or other high risk offenses. Under the new law, judges will have the choice of imposing 3- or 4-year probationary terms for most felonies, rather than the current mandatory term of 5 years. For misdemeanors, a judge may impose a 2-year term of probation rather than the mandatory 3-year current requirement. To effectuate the new Statute, changes were made to Penal Law Section 65.00 and Criminal Procedure Law 410.70(5).

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 30, 2014 at the New York Hilton Midtown at 1335 Avenue of the Americas (6th Avenue at 55th Street) in New York City. The CLE Program at the Annual Meeting was held at 9:00 a.m. This year's topic covered Search and Seizure Law, Right to Counsel Law and the Confrontation Clause. A distinguished panel consisting of Justice Barry Kamins, Justice John M. Leventhal and Justice Mark Dwyer discussed these various issues.

Our annual luncheon was held, and included James Cole, United States Deputy Attorney General, as guest speaker. A presentation of several awards was made to deserving individuals as follows:

Charles F. Crimi Memorial Award to Recognize the Professional Career of a Defense Lawyer in Private Practice that Embodies the Highest Ideals of the Criminal Justice Section
Paul L. Shechtman, Esq.
Zuckerman Spaeder LLP
New York

Outstanding Contribution in the Field of Correctional Services
Jason D. Effman, Esq.
NYS Dept. of Corrections and Community
Albany

Outstanding Contribution in the Field of Criminal Justice Legislation
Honorable Lee Zeldin
New York State Senate

Outstanding Contribution in the Field of Criminal Law Education
Anthony J. Colleluori, Esq.
Law Offices of Anthony J. Colleluori & Associates, P.L.L.C.
Syosset

Outstanding Police Contribution in the Criminal Justice System
Philip Banks, III
NYPD's Chief of Department

Outstanding Prosecutor
Frank A. Sedita, III, Esq.
Erie County District Attorney's Office
Buffalo

The Michele S. Maxian Award for Outstanding Public Defense Practitioner
Jessica W. Goldthwaite, Esq.
Legal Aid Society
Brooklyn

The Vincent E. Doyle, Jr. Award for Outstanding Judicial Contribution in the Criminal Justice System
Honorable Barry Kamins
Supreme Court, Kings County
Brooklyn

At our Section's Annual Meeting, the current officers and Section representatives were designated to continue to serve in their designated positions until June 2015. 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**

Thirteen District—**Timothy Koller**

Membership Composition and Financial Status

As of the beginning of January, 2014, our Criminal Justice Section had 1,506 members, which is a reduction of approximately 60 members from last year. With respect to gender, the Section consists of 72% men and approximately 26% women. These percentages have basically remained the same during the last 2 years. In a somewhat similar situation to last year, slightly over 48% of the membership composition is in some type of private practice. Within the private practice group, the largest portion continues to be solo practitioners who make up over 30% of the Section.

In terms of age groupings, nearly 22% are between 56 and 65. This is almost the same as last year. Those 36 and under comprise about 21%, which is also slightly down from last year. Among the membership, 66% are admitted to practice more than 10 years. 13.7% are admitted to the bar less than 3 years.

The Criminal Justice Section is one of 25 sections in the New York State Bar Association which had at the beginning of January a total membership of 74,672. This is about the same number as last year. 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 page 39.

With respect to the financial status of our Section, our Treasurer, Tucker C. Standclift, recently reported at our Annual Meeting that as of the end of the year, the Section had income of approximately $83,000. Expenses for the first 11 months of the year were approximately $75,000 and it is expected that when December's expenses are tabulated, the Section will end the year with a very slight surplus. The Section currently maintains an accrued surplus from past years of approximately $40,000, which is somewhat less than the amount maintained at the end of 2012.

Justice Kamins Promoted to Statewide Post

In addition to receiving this year's Section award for outstanding judicial contribution to the criminal justice section, Justice Barry Kamins, in late December, also received the news that he was being appointed as Chief of Policy and Planning for the statewide court system. His appointment was announced by Chief Administrative Judge A. Gail Prudenti. Justice Kamins will take over responsibility for 300 "problem solving courts, including drug, community, domestic violence, mental health, sex offenses, veterans, human trafficking and adolescent diversion court." He will also oversee the court system's efforts to move foreclosure cases. Justice Kamins, who has reached the age of 70, was appointed as New York City Criminal Court Judge in 2008. He was elevated to an acting Supreme Court Justice in 2009 and was elected to the Supreme Court in Kings County in 2012. He has served as Administrative Judge for Criminal Matters in Kings County Supreme Court.

Judge Kamins is also widely known for his extensive writings on criminal law, including being a regular contributor to our *Newsletter*. He has also served as a longtime member of our Section's Executive Committee. He is a graduate of Rutgers University School of Law and is a former President of the Bar Association of the City of New York. Judge Kamins is highly regarded, and his most recent appointment was applauded by the members of the legal community. In accepting his new position, Judge Kamins stated, "I am honored to be asked to coordinate policy and planning for the court system in addition to running the New York City Criminal Court. I hope to add a number of new criminal justice initiatives in my new role."

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.

Rachelle Abrahami
Karmella Marie Ressler Aiken
Crismeily Andujar Alburquerque
Jonathan Arias
Michael J. Balch
Alexander MacNeill Behr
Craig Jacob Bergman
Jeffrey Phillip Bloom
Joel L. Blumenfeld
Scott Brettschneider
Charlane O'Detta Brown
Jamie-Lynn Burns
Matthew Aaron Calarco
Paul M. Callahan
Eleanor Capogrosso
Clifton C. Carden
Stephen Carney
Brian Carroll
Peter M. Casey
Steven M. Cohen
Larry G. Covell
Gary L. Cutler
Esmeralda Daci
Lynn Alvey Dawson
Angel Francine Dipietro
Courtney Shanae Dixon
Joseph P. Donnelly
Wayne J. Donovan
Erica Dubno
Audrey Baron Dunning
Cenceria P. Edwards
Rachel Bronwyn Eeles
Herald P. Fahringer
Leslie A. Farber
Nicole White Feinberg
Lawrence S. Feld
Ross B. Galin
Eric R. Gee
Joseph M. Gerstenzang
Joseph Mead Gesley
Julianne Girard
Emily Gladden
Loren I. Glassman
Steven Todd Goldstein
Frank Gonnello
Akosua Goode
Benjamin Greenwald
Stephen A. Grossman
Christopher J. Gunther
Lisa Halloran
Andrew Hartman
Richard S. Hartunian
Mark E. Hartwell
Alfredo M. Hernandez
Katherine Vance Hynes
Melissa Janvier
Robert Cooley Jeffries
Mark Andrew Juda
Colette T. Katz
Frank T. Kelly
Michael George Kobbe
Anant Kumar
John Patrick Lacey
Fearonce G. LaLande
Nathaniel Bellucci Lamson
Maxim M. Lebowitz-Nowak
Stephen M. Leonardo
Adam S. Libove
Margaret M. Lin
Cary Louis London
Mary Jane MacCrae
Craig C. Mackey
Robert V. Magrino
Michael Stanley Mandel
Nicole Lynn Manini
Elizabeth Joan Mannion
Marly Valdy Marcellus
Edward J. Martin
Edward T. McCormack
Glen G. McGorty
Tyear Middleton
Steven Edward Miklosey
Andrea Gail Miller
Michelle Elizabeth Mitchell
Gerald F. Mollen
Danielle J. Moss
Abdulwali Muhammad
Holly A. Murray
Nicole Alisa Neckles
James William Neely
Daniel Brian Newcombe
Samuel P. Nitze
Jennifer Chika Okafor
Kimberly Anne Pelesz
Stephanie Corrado Pope
Vicki J. Prager
William D. Pretsch
Stefan Michael Privin
Dina Quondamatteo
Edward J. Rinaldi
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Jeremy Ian Stein
Scott G. Sullivan
Tracy Sullivan
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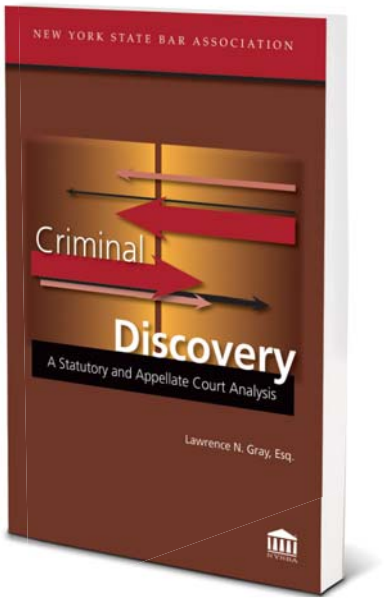

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