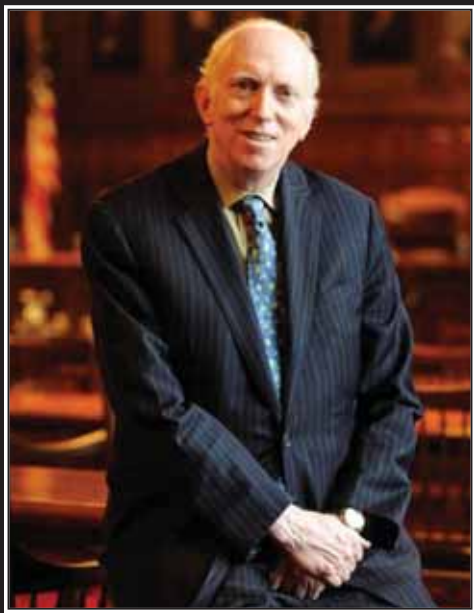


New York Criminal Law Newsletter



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

New York Court of Appeals Undergoes Personnel Changes



**At left: Retired Associate Judge of the Court of Appeals
Robert S. Smith**



**At right: Court of Appeals
Nominee Hon. Leslie E. Stein**

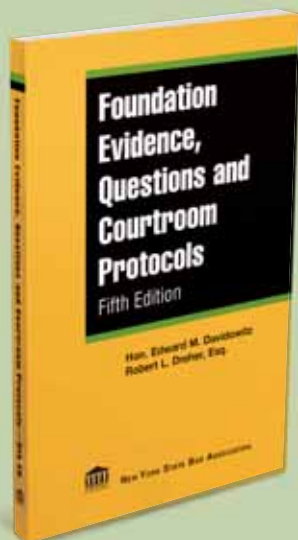
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**At right: Retired Associate Judge of the Court of Appeals
Victoria A. Graffeo**

(See article at page 11)

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Written by Hon. Edward M. Davidowitz and Robert L. Dreher, Executive Assistant District Attorney and Chief Trial Counsel at the Bronx District Attorney's Office, the new edition of *Foundation Evidence* is an indispensable addition to your trial library.

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Message from the Chair

Adopting Standards

There are other bar associations out there. The American Bar Association can fairly be considered the granddaddy of them all. In this column I would like to share with you a few facts and a few thoughts about a long-running project of the ABA's Criminal Justice Section—the Criminal Justice Standards Project.

The ABA standards provide comprehensive guidelines for conduct in the course of criminal practice. They are currently organized so as to cover 25 separate topic areas. The first edition of the standards, published in 1968, addressed 17 of those areas, with "black letter" standards accompanied by extensive explanatory commentary. Since then new standards have been prepared in the remaining areas, covering such topics as Prosecutorial Investigations and DNA Evidence. The existing standards are updated from time to time. For example, the present standards for the Defense Function and those for the Prosecution Function are now in their third edition.

The standards do not write themselves. For each new set of standards, and for each revision of prior standards, the ABA's Criminal Justice Section creates a task force with nine members and a reporter. Three members will be defense attorneys, three will be prosecutors, and three will be "neutrals"—usually judges or law professors. Occasionally one of the neutral members will be a non-lawyer. For example, the task force that created the DNA standards profited greatly from the input of a member who was a DNA expert with extensive experience at New York City's Office of the Chief Medical Examiner and at Penn State.

Each task force engages in a series of weekend meetings in which the standards are drafted and then improved. The task force reporter, generally a law professor with expertise in the area, does the actual drafting. The final product is examined in three levels of review. First, standards are comprehensively reviewed by the members of the Criminal Justice Standards Committee, nine lawyers balanced in the same manner as a task force, who each serve up to three two-year terms. The fruits of their labors are passed on to the Executive Committee of the Criminal Justice Section, and thereafter to the ABA House of Delegates, for possible revision and approval.

Finally, the reporter produces the commentary for the final product, providing standard-by-standard legal explanations for their content. The commentary is then reviewed and approved by the Standards Committee. The commentary, unlike the black letter, is not "official" ABA policy as it is not approved by the House of Delegates. But practitioners find the various comments to be an immense resource when doing legal research in the areas covered.

The standards are sufficiently authoritative to have been cited in well over 100 Supreme Court cases and thousands of lower court opinions. Justice Martin Marcus of the Bronx Supreme Court, formerly the Chair of the Standards Committee and now the head of a task force revising the Discovery standards, has chronicled their influence in a law journal article entitled "The Making of the ABA Criminal Justice Standards: Forty Years of Excellence," *Crim. Just.* Winter 2009, at 10, an article available in several locations on the internet. The standards and commentary are available free on the ABA website, at the address: http://www.americanbar.org/groups/criminal_justice/standards.html.

A final note: the most central standards are the lengthy ones addressing the Defense Function and the Prosecution Function. The third edition of each was published in 1993, and both the standards and the commentary are showing their age. A new task force undertook to revise them a decade ago. The project is finally near completion. The Executive Committee of the Criminal Justice Section is scheduled to vote on the standards in the near future, and approval is anticipated. If it comes, final endorsement by the House of Delegates would be expected next year. The commentary, being prepared by Professor Rory Little of the Hastings College of Law at the University of California, will follow—if not in 2015 then in 2016. In the meantime, the ABA will publish the black letter by itself.

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.**



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Message from the Editor

In this issue, we present our annual review of newly enacted criminal law legislation which has been prepared by Justice Barry Kamins. Justice Kamins has been preparing this annual update almost from the inception of our *Newsletter* some 12 years ago. We thank him for his continued service to our *Newsletter* and our Section. We have learned that Justice Kamins has retired from the judiciary at the end of the year and will probably be returning to the private practice of law. We wish him well in his new endeavors.



In our second feature article, we discuss the personnel changes occurring in the New York Court of Appeals and report on the first of Governor Cuomo's appointments to fill the two recent vacancies which have developed. The Governor failed to reappoint Judge Graffeo for a second term on the Court and instead named Justice Leslie Stein as his new appointee. The Governor is also expected to shortly name a candidate to replace Judge Robert S. Smith who reached the mandatory retirement age of 70. The Governor's failure to reappoint Judge Graffeo has led to a certain amount of criticism and this is discussed in detail in our second feature article. We also include biographical sketches of Justice Leslie Stein as well as Judges Graffeo and Smith.

The United States Supreme Court commenced its new term on October 6, 2014 and issued some preliminary rulings, including its determination not to grant certiorari in several same-sex marriage cases which had been decided by the various Federal Courts of Appeals. The Court also declined to halt elections in several states

whose voter identification cards were under attack. The Court has on its docket for the coming year cases involving discrimination in housing, voting procedures, campaign financing, and other controversial issues. We will report on any decisions in these areas in our future issues.

The New York Court of Appeals commenced hearing cases in early September following its summer recess and some of its decisions to date are summarized in our New York Court of Appeals section. During the summer months and in early fall, the various Appellate Divisions issued several decisions in the criminal law area and these matters are summarized in our Appellate Division Section.

In our For Your Information section, we provide articles regarding new federal sentencing initiatives, economic issues, diversity within the state judicial system, and other items of general interest. As in the past, the New York State Bar Association and our Criminal Justice Section will be holding their Annual Meeting in New York City. This year's meeting will again be held at the New York Hilton Midtown. The date for the Section Meeting, CLE Program and Luncheon has been scheduled for Thursday, January 29, 2015. As in the past, our Section will be presenting several awards to distinguished members of the legal profession who have exhibited exemplary legal skills or service to the community. Details regarding these events have been forwarded in a separate mailing. We hope that many of our readers will be able to attend.

I am again in need of legal articles for publication in our *Newsletter* and encourage our members to consider writing an article on a criminal law subject for possible publication. As we enter our 12th year of publication, I thank our members for their continued support of our *Newsletter* and invite comments and suggestions.

Spiros A. Tsimbinos

New Criminal Justice Legislation

By Barry Kamins

This article will discuss new criminal justice legislation signed into law by Governor Andrew Cuomo, amending the Penal Law, Criminal Procedure Law and other related statutes. While, in total, the Legislature passed the fourth lowest number of bills since 1915, there was no dearth of criminal justice measures. The discussion that follows will primarily highlight key provisions of the new laws, and as such the reader should review the legislation for specific details. In some instances, where indicated, legislation enacted by both houses is awaiting the Governor's signature, and, of course, the reader must check to determine whether the bill is ultimately signed or vetoed by the Governor.

There were three substantive pieces of criminal justice legislation enacted in the last session, and the one which appears to be most far reaching is the Public Trust Act.¹ This legislation was part of a package of bills that also included a modernization of New York's voting laws and campaign finance reforms.

The Public Trust Act

The Public Trust Act is an attempt to strengthen New York's laws relating to public corruption, and to provide prosecutors with better tools to prosecute these crimes. As noted in the Governor's Program Bill memorandum, New York's laws defining public corruption are obsolete and far less effective than federal statutes for prosecuting individuals who commit public corruption crimes.²

As part of the measure, the Legislature enacted two new crimes: Corrupting the Government and Public Corruption.³ Under prior law, only public officials and not private individuals could be convicted of defrauding the government.⁴ The new crime of Corrupting the Government can be committed by anyone who engages in a scheme to defraud the state or any political subdivision. It ranges from a class E felony to a class B felony depending upon the value of the property or services wrongfully obtained.

The Act confers the same statute of limitations on the crime of Corrupting the Government that currently exists for any offense involving misconduct in public office. Thus, the crime may be prosecuted against a public servant, or anyone acting in concert with a public servant, for five years after the termination of the official's term of service. In no event shall this period be extended by more than an additional five years. Finally, an individual or corporation convicted of this crime is now subject to a fine of up to three times the amount of the defendant's gain from the commission of the crime.

The second new crime, Public Corruption, can be committed by anyone, whether a public servant or a

person acting in concert with a public servant, who commits any grade of larceny or a scheme to defraud, and the owner of the property is a public entity. When a person is convicted of Public Corruption, and the underlying crime is a class C, D, or E felony, for purposes of sentencing, the crime is deemed to be one class higher than the underlying offense.

The Public Trust Act has amended the law of bribery in several respects. *First*, the monetary threshold for Bribery in the Second Degree and Bribe Receiving in the Second Degree has been reduced from \$10,000 to \$5,000. *Second*, Bribery in the First Degree and Bribe Receiving in the First Degree are now divided into two categories. An attempt to influence a public servant with respect to the investigation or prosecution of a class A drug felony continues to be a first degree offense, and there is no fixed threshold monetary value of the benefit. A second, and new, first degree offense was created where there is an attempt to influence a public servant on any matter, and the threshold monetary value of the benefit exceeds \$100,000. *Third*, the Act makes an attempt to commit the crime of Bribery the same level as the completed crime. For example, Attempted Bribery in the First Degree and Bribery in the First Degree are both class B felonies.

As part of the Public Trust Act, the Legislature has transferred a crime, Corrupt Use of Position or Authority, from the Election Law to the Penal Law.⁵ This crime is a class E felony, and is designed to prevent a public official from using his or her official authority to encourage another person to use political influence on behalf of the official.

It should be noted that the Public Trust Act contains a number of collateral consequences that flow from a conviction for these crimes, including the inability to hold civil office, the loss of employment as a lobbyist and the inability to enter into public contracts. The reader should consult the new statute for specific details of these collateral consequences.

Heroin Trafficking

The second substantive piece of legislation enacted in the last session was a package of eleven bills designed to address the dramatic increase in heroin trafficking, and abuse, in New York. Over the past few years, heroin-related deaths rose 84% in New York City, and over the last decade, heroin use has more than doubled in New York State among adults between the ages of 18 and 25.

The package of bills focuses on increased insurance coverage for addiction treatment, funding for public awareness of drug use, and relevant changes in school curricula. With respect to criminal justice issues, one

bill created a new crime, Fraud and Deceit Related to Controlled Substances,⁶ a class A misdemeanor. This crime will address fraudulent practices by individuals who unlawfully seek to obtain controlled substances or prescriptions for controlled substances.

It should be noted that this crime mirrors Public Health Law Section 3397, which remains in effect. The new Penal Law Section specifically incorporates certain evidentiary presumptions found in Public Health Law Section 3397, as well as a section in Public Health Law Section 3396 (1) relating to burdens of proof.

In addition, as part of this legislative package, a Penal Law amendment elevates the penalties for physicians and pharmacists who abuse the public's trust by selling controlled substances under the guise of legitimate health care practices. The renamed crime, Criminal Sale of a Prescription or a Controlled Substance by a Practitioner or Pharmacist, is elevated to a class C felony.⁷ In addition, this newly amended crime has been added as a designated offense for purposes of obtaining an eavesdropping warrant and a "criminal act" within the Penal Law definition of enterprise corruption.⁸

Compassionate Care Act

The third substantive piece of legislation in the past session was the passage of the Compassionate Care Act, permitting the use of marijuana for medical purposes.⁹ More than 20 other states have enacted some form of statute permitting the use of medical marijuana but New York's version has been viewed as one of the most carefully drafted,¹⁰ and contains a number of fail-safe provisions.

Initially, there is a sunset clause that requires the law to expire in seven years. Second, the Governor can suspend the program at any time upon the recommendation of either the State Police Superintendent or the Commissioner of Health if there is a risk to public health and public safety. Third, the law creates a category of Registered Organizations for the purpose of manufacturing, selling and dispensing marijuana for medical use. The law limits the number of these organizations to five. These companies cannot begin to operate until they are issued registration cards, and the law provides that the card shall be issued within 18 months of the law's effective date, or at such time as the Commissioner, and Superintendent, certify that the law can be implemented in accordance with public health and safety concerns.

As expected, there are a number of law enforcement provisions in the statute. Medical marijuana may only be prescribed by a physician, licensed in New York, who has the training or experience to treat the specified medical conditions for which marijuana can be dispensed and who has been registered with the Health Department to prescribe medical marijuana. The statute enumerates these conditions and identifies them as serious condi-

tions. In addition a patient can only be certified to use medical marijuana if the registered practitioner certifies that the patient has one of a number of specified medical conditions (i.e., a serious condition), is under the doctor's care and, in the opinion of the doctor, the patient is likely to receive therapeutic or palliative benefit from medical marijuana.

With these regulations as a backdrop, the Legislature created a new crime, Criminal Diversion of Medical Marijuana in the First Degree, a Class E felony. A practitioner can be convicted of this crime if he or she certifies a patient when the practitioner has reasonable grounds to know that the patient has no medical need for marijuana, or that the certification was for a purpose other than to treat a serious condition.¹¹

If a certified patient knowingly possesses, or stores an amount of medical marijuana in excess of the amount he or she is authorized to possess under the statute, the patient can be convicted of Criminal Retention of Medical Marijuana, a class A misdemeanor.¹² Finally, a person can be convicted of Criminal Diversion of Medical Marijuana in the Second Degree, a class B misdemeanor, if he or she sells or delivers medical marijuana to another with knowledge, or reasonable grounds, to know that the recipient is not registered to use medical marijuana.¹³ Finally, a defendant charged with any of these crimes listed above will be eligible for the judicial diversion drug program.¹⁴

Additional Changes

Each year the Legislature has expanded the definitions of certain crimes and increases penalties for others, and this year was no exception. In *People v. Golb*, 23 NY3d 455 (2014), the New York Court of Appeals struck down as unconstitutional, subdivision one of Aggravated Harassment in the Second Degree (PL 240.30 (1)). The Court found the statute unconstitutionally vague and overbroad under both the Federal and State Constitutions. Specifically, the Court held that the statute failed to properly define what causing annoyance or alarm means or specifically what behavior the law proscribes.

The Legislature reacted quickly in enacting a new statute to cure the constitutional defect, recognizing that this statute is often used as a predicate to obtain orders of protection in domestic violence cases.

The language found to be unconstitutional was removed and, in its place, the statute prohibits any communication of a threat to cause physical harm where the offender knows or reasonably should know that such communication will cause such person to reasonably fear harm to such person's physical safety or property, or to the physical safety or property of a member of such person's same family or household.¹⁵

The language also reflects the Legislature's acknowledgment of evolving technology; it eliminated a reference to telegrams and added the computer or any other electronic means as methods of communications that are now covered under the statute.

The Legislature has amended the Persistent Sexual Abuse statute to close what some believed to be a loophole. The crime was originally enacted to impose harsher penalties on criminals who commit specified sex crimes on multiple occasions during a ten-year period. However, under the prior law, the ten-year period could include time during which the offender was incarcerated and thus unable to commit any crime. The statute was amended to exclude time during which the offender was incarcerated for any reason.¹⁶

A new law has increased protection for two classes of individuals who are assaulted: employees of the New York City Housing Authority and school crossing guards. The law elevates a misdemeanor assault on a crossing guard to the crime of Assault in the Second Degree, a class D felony, by adding school guards to the list of service professionals against whom an assault is committed.¹⁷ A second new law elevates a misdemeanor assault to a class D felony, when it is committed against an employee of the New York City Housing Authority performing his or her duties at a housing project owned, managed or operated by the Authority.¹⁸

Two new laws expand the definition of Stalking and Unlawful Surveillance. Stalking in the Fourth Degree now includes the use of a GPS device, or other electronic devices, to follow someone. This amendment will be beneficial to victims of domestic violence who often have been tracked by the use of such devices.¹⁹

New York has joined eight other states that have passed new laws to address revenge porn, a practice in which individuals post intimate pictures or videos of former romantic partners. Prior law prohibited only the surreptitious viewing of another person's intimate body parts without that person's knowledge or consent. The statute, Unlawful Surveillance, was amended to prohibit the dissemination of an image in which an individual is engaged in sexual conduct regardless of whether the person's intimate body parts are exposed.²⁰

Other amendments include an increase in the penalty, from \$250 to \$1,000, for stealing Companion Animals.²¹ Individuals who hunt with a crossbow have been afforded an exemption from liability under the weapons section of the Penal Law similar to exemptions for those who hunt with rifles, shotguns and longbows.²² Finally, the Penal Law sections dealing with the possession and sale of fireworks have been rewritten to provide clearer definitions of fireworks, dangerous fireworks and novelty devices. In the past a number of courts have dismissed indictments because of ambiguities in the definition of these terms.²³

New Crimes

The Legislature enacted a series of new crimes in the last session. In response to a number of incidents, in which individuals have taken advantage of those seeking to become United States citizens, the Legislature enacted the Immigrant Assistance Service Enforcement Act.²⁴ The legislation makes changes to Article 28-c of the General Business Law, which regulates the conduct of immigrant assistance service providers, and it increases the number of prohibited acts and penalties under the General Obligations Law for violations of these provisions.

The law also creates a new Penal Law crime, Immigrant Assistant Services Fraud, which is committed when a service provider violates the provisions of the General Business Law, and wrongfully obtains property by false or fraudulent pretenses, representation or promises. The crime is a class A misdemeanor and is elevated to a class E felony if the value of the property exceeds \$1,000.

The Legislature also responded to increased incidents of public lewdness by those who have committed these acts in the past, enacting Public Lewdness in the First Degree, a class A misdemeanor. This new crime applies to individuals over the age of 19 who intentionally expose themselves to a person less than 16 years of age as well as a person who commits the crime of Public Lewdness and who has been convicted of Public Lewdness (a class B misdemeanor) within the preceding year.²⁵

In response to reports by the Federal Aviation Administration (FAA) that an increasing number of individuals have been pointing laser devices at aircraft, the Legislature enacted the crime of Directing a Laser At an Aircraft.²⁶ The crime, a class A misdemeanor, is committed when a person, with the intent of disrupting safe air travel, directs the beam of the laser onto an aircraft within the jurisdiction of the United States, and such beam exceeds the limits set by the FAA, and the pilot files an incident report with the FAA. The crime is elevated to a class E felony when the use of the laser beam causes a significant change of course, or other serious disruption to the safe travel of an aircraft.

In an attempt to curtail the slaughter of endangered African elephants and rhinos, the Legislature has outlawed the sale of ivory articles valued in excess of \$25,000, making it a class D felony under the Environmental Conservation law. The law also increases fines for the sale of goods under that amount.²⁷ Finally, under the Agriculture and Markets Law, it is now a Violation under the Penal Law for a person to subject an animal to tattooing, or skin piercing, unless such piercing provides a medical benefit, or is done for the purpose of identification of the animal.²⁸

Procedural Changes

A number of procedural changes were enacted in the last session. To assist elderly witnesses, who must testify

before the Grand Jury, a new law permits any person, older than 60 years of age, with a physical or mental infirmity, to be accompanied in the Grand Jury by a social worker or informal caregiver.²⁹ Second, all crimes committed in Rikers Island facilities will be prosecuted in Queens County, rather than Bronx County, saving much traveling time in the delivery of prisoners.³⁰ Third, a court must now waive the mandatory surcharge and crime victim assistance fee when the court finds the defendant is a victim of sex trafficking, as that term is defined in the Penal Law, or under federal law.³¹

Finally, a new law makes procedural changes in the process that is followed when 16- and 17-year-old defendants are charged with prostitution. Last year, a new law gave Criminal Court judges the option of converting these charges to a PINS proceeding and granting relief under the Family Court Act. In the past session, the Legislature clarified the alternatives that are available to a court in these cases. The charges may be conditionally converted and retained by the court as a PINS proceeding; the charges may proceed as a criminal case which may lead to a conviction by plea or verdict (and a mandatory youthful offender adjudication); or the person may be referred by the court for specialized service alternatives and the charges subsequently dismissed in the court's discretion in the interest of justice on the grounds that the youth participated in the services provided to him or her. In addition all defendants charged with these crimes shall be deemed a sexually exploited child as defined in the Social Services Law, thus entitling these individuals to specialized services.³²

In the area of sentencing, a new law affords judges the discretion to choose the length of probation in both felony and misdemeanor cases. In felony cases, a court can now impose a probationary term of three, four or five years, except for any felony involving a sexual assault, a class A-II drug felony and certain class B felony drug convictions. For a class A misdemeanor, a court can impose a probation term of two or three years except for sexual assault. In addition, the new law eliminates the costly requirement of pre-sentence investigation reports in cities with a population of one million or more, where there is a negotiated sentence of imprisonment of 365 days or less.³³ A subsequent, and related, new law affords a defendant certain due process rights when a judge wishes to extend a shorter period of probation following a violation of probation.³⁴

Vehicle Offenses

A number of changes have been made in driver-related offenses under the Vehicle and Traffic Law. A new measure increases the fines for all motorists who text or use cell phones while operating a vehicle, with a third offense now carrying a maximum fine of \$450.³⁵ Another new law creates a class D felony for anyone arrested for DWI, after having been convicted of DWI or four related offenses, three or more times in the preceding 15 years.³⁶

Sex Offenders

With respect to sex offenders, a new law prohibits a person registered under SORA from becoming a volunteer firefighter.³⁷ Another law expands the state registry to include all prior sexual offenses for which an offender has been convicted.³⁸

Prisoners

Several new laws will affect prisoners. One new measure requires the Department of Corrections to maintain a website that provides accurate information concerning the visiting rules for all correctional facilities in New York State. This will resolve the perennial problem of family members who are turned away from facilities when they arrive at a facility on the wrong day.³⁹ Finally, the Department of Corrections may no longer release an inmate who has received mental health treatment without first devising a treatment plan to be implemented upon the prisoner's release.⁴⁰

Other Changes

Each year the Legislature enacts laws that either extend or repeal existing statutes. This year the Legislature extended, until May 14, 2015, the provision in the Arts and Cultural Affairs Law relating to the resale of tickets to places of entertainment.⁴¹

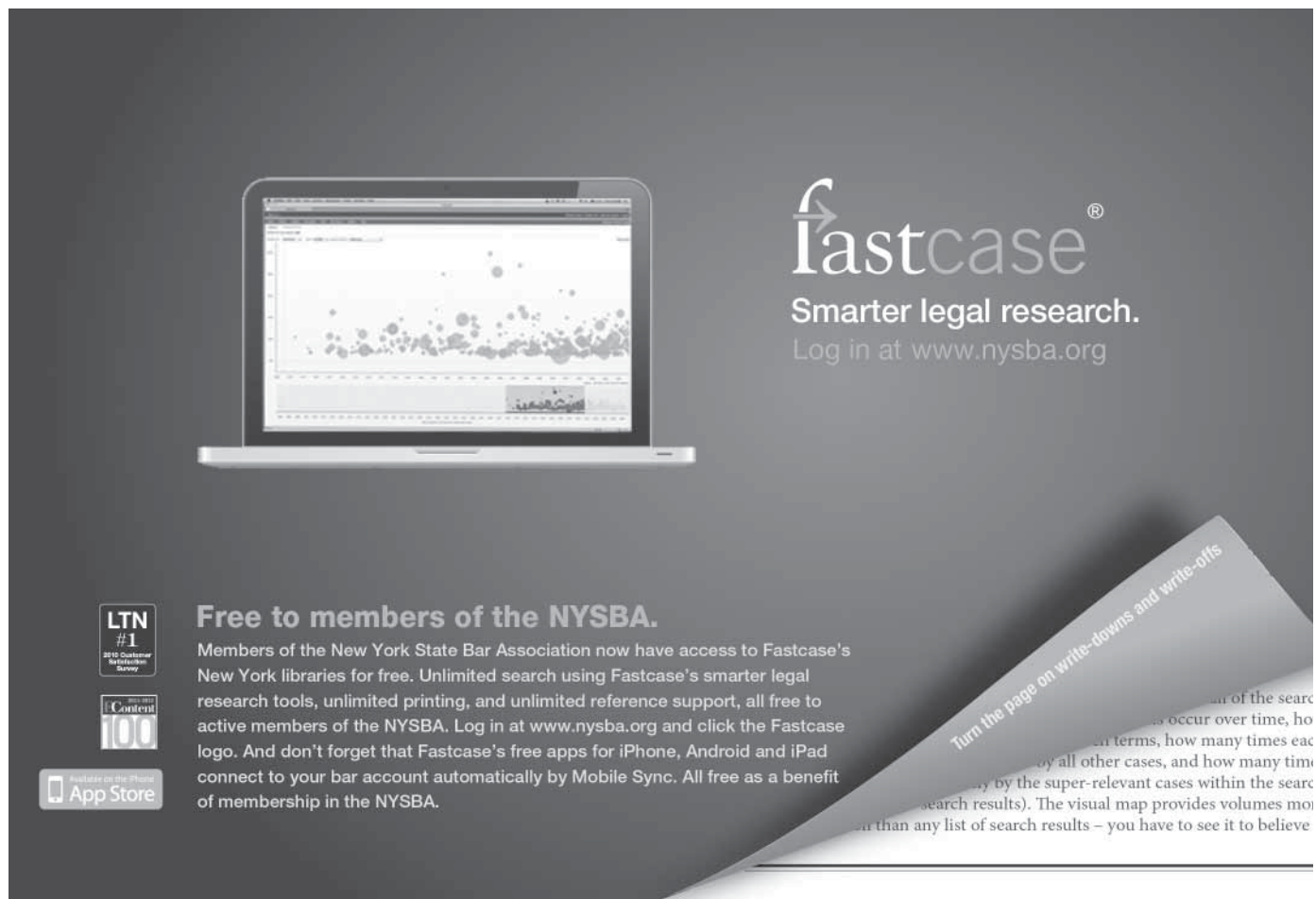
In various miscellaneous laws, access to opioid antagonists' has been expanded. These are drugs that neutralize and negate the effect of opioids, e. g. oxycodone, which can cause drug overdoses.⁴² Two new measures will affect children. One law expands the category of persons responsible for reporting cases of suspected child abuse,⁴³ and the other increases the ability of parents to protect their children from identity theft.⁴⁴ In another new measure, crime victims have been afforded greater monetary awards when medical equipment is damaged or stolen during a crime.⁴⁵ Finally, the personnel records of probation officers have been cloaked with the same degree of confidentiality as those of police officers, corrections officers and firefighters.⁴⁶

Endnotes

1. 2014 N.Y. Laws ch. 55, eff. Apr. 30, 2014.
2. Governor's Program Bill, #3, at p.1.
3. 2014 N.Y. Laws ch. 55 (adding PL § 496.02 and PL § 496.06), eff. Apr. 30, 2014.
4. See Penal Law § 195.20, Defrauding the Government.
5. Penal Law § 200.56, formerly Election Law §17-158 (now repealed).
6. 2014 N.Y. Laws ch. 36 (adding PL § 178.26), eff. June 23, 2014.
7. 2014 N.Y. Laws ch. 31 (renaming and amending PL § 220.65), eff. June 23, 2014.
8. 2014 N.Y. Laws ch. 37 (amending CPL § 700.05), eff. June 23, 2014.
9. 2014 N.Y. Laws ch. 90, eff. July 5, 2014.
10. See, Serbaroli, "A Primer on New York's Medical Marijuana Law," NYLJ 7/22/14.
11. 2014 N.Y. Laws ch. 90, (adding PL § 179.10), eff. July 5, 2014.

12. 2014 N.Y. Laws ch. 90, (adding PL § 179.15), eff. July 5, 2014.
13. 2014 N.Y. Laws ch. 90, (adding PL § 179.11), eff. July 5, 2014.
14. 2014 N.Y. Laws ch. 90 (amending CPL § 216.00), eff. July 5, 2014.
15. 2014 N.Y. Laws ch. 188 (amending PL § 240.30), eff. July 23, 2014.
16. 2014 N.Y. Laws ch. 192 (amending PL § 130.53), eff. Nov. 1, 2014.
17. 2014 N.Y. Laws ch. 196 (amending PL § 120.05), eff. Nov. 1, 2014.
18. 2014 N.Y. Laws ch. 197 (amending PL § 120.05), eff. Sept. 3, 2014.
19. 2014 N.Y. Laws ch. 184 (amending PL § 120.45), eff. Oct. 21, 2014.
20. 2014 N.Y. Laws ch. 193 (amending PL § 250.45), eff. Nov. 1, 2014.
21. 2014 N.Y. Laws ch. 185 (amending Agriculture and Markets Law § 366), eff. July 3, 2014.
22. 2014 N.Y. Laws ch. 55 (amending PL § 265.20), eff. April. 1, 2014.
23. A. 10141 (not yet signed by the Governor).
24. 2014 N.Y. Laws ch. 206 (amending GBL § 460-d and adding § PL 190.87 and 190.89), eff. Feb. 2, 2015.
25. 2014 N.Y. Laws ch. 186 (adding PL § 245.03, eff. Nov. 1, 2014.
26. 2014 N.Y. Laws ch. 98 (adding PL § 240.76), eff. Nov. 1, 2014.
27. 2014 N.Y. Laws ch. 326 (amending ECL § 71-0924), eff. Aug. 12, 2014.
28. A. 739 (not yet signed by the Governor).
29. 2014 N.Y. Laws ch. 347 (amending CPL § 190.25), eff. Sept. 4, 2014.
30. A. 7333 (not yet signed by the Governor).
31. 2014 N.Y. Laws ch. 385 (amending CPL § 420.35), eff. Sept. 23, 2014).
32. A. 8749 (not yet signed by the Governor).
33. 2013 N.Y. Laws ch. 556 (amending PL § 65.00), eff. Jan. 10, 2014.
34. 2014 N.Y. Laws ch. 17 (amending PL § 65.00), eff. Jan. 10, 2014.
35. 2014 N.Y. Laws ch. 55 (amending VTL § 1225-c), eff. Nov. 1, 2014.
36. 2014 N.Y. Laws ch. 191 (amending VTL § 1193), eff. Nov. 1, 2014.
37. 2014 N.Y. Laws ch. 198 (amending Executive Law § 837-o), eff. Dec. 2, 2014.
38. A. 6074 (not yet signed by the Governor).
39. 2014 N.Y. Laws ch. 286 (adding Correction Law § 138-a), eff. Nov. 9, 2014.
40. A. 10071 (not yet signed by the Governor).
41. 2014 N.Y. Laws ch. 21, eff. May 9, 2014.
42. 2014 N.Y. Laws ch. 42, (amending Public Health Law § 3309), eff. June 24, 2014.
43. 2014 N.Y. Laws ch. 205 (amending Social Services § 413), eff. Aug. 6, 2014.
44. A. 8955 (not yet signed by the Governor).
45. A. 4645 (not yet signed by the Governor).
46. A. 8192 (not yet signed by the Governor).

Barry Kamins is a former State Supreme Court Justice and the author of the learned treatise *New York Search and Seizure*. He has been a regular contributor to our Newsletter.



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New York Court of Appeals Undergoes Personnel Changes

By Spiros A. Tsimbinos

With the expired term of Justice Graffeo on November 29, 2014, and the retirement of Judge Robert S. Smith effective as of December 31, 2014, two additional openings occurred in the New York Court of Appeals within the last few months. In early September 2014, the State Commission on Judicial Nominations sent to the Governor a list of seven candidates to fill the seat held by Judge Graffeo. The list of seven candidates included Judge Graffeo, who had applied for re-appointment, and six other candidates as listed below:

Daniel Alter, who is serving as General Counsel with the State Department of State Financial Services;

Pretta Bansel, a visiting scholar at Harvard Law School;

Eugene Fahey, Associate Justice of the Appellate Division, Fourth Department;

Leslie Stein from the Appellate Division, Third Department;

Maria Vullo, a partner at Paul, Weiss, Rifkind, Wharton & Garrison; and

Rowan Wilson, a Partner at Cravath, Swaine & Moore.

Governor Cuomo, whose two previous appointments to the Court had been Democrats, was under some pressure to replace Judge Graffeo with an additional Democratic appointment so as to swing the balance of the Court from four Republicans and three Democrats to four Democrats and three Republicans. However, he was also under considerable pressure to re-appoint Judge Graffeo, who had a distinguished record on the Court of Appeals, and to avoid partisan politics in making his selection. Although according to the state statute, the Governor was to have made his selection by October 3, he announced in late September that he would be taking an additional two weeks to make his actual selection. Governor Cuomo indicated that he did not wish to make his selection in the midst of the upcoming election in November, when Senate candidates who would act on his appointment would face re-election, and preferred to defer his announcement so as to avoid partisan politics.

On Friday, October 17, 2014, the Governor did announce his choice and appointed Justice Leslie Stein, who had been sitting in the Appellate Division, Third Department. In failing to reappoint Judge Graffeo, the Governor received some substantial criticism from Republican leaders and members of the legal community. Although the Governor had indicated on several occasions that a major aim was to provide diversity on the Court, his critics charged that his quest for diversity apparently did

not extend to reappointing a distinguished sitting judge with Italian ancestry and who expounded Republican-Conservative principles. The Governor's critics also pointed out that his father, who was a former governor, did make several judicial appointments of Republicans. The Governor in selecting Judge Stein had issued remarks which indicated that he had based his appointment upon the Judge's views on various social and political issues. In an article which appeared in the *New York Post* of October 20, 2014, at page 14, Professor Michael Hutter from Albany Law School, who had taught Governor Cuomo, commented that the Governor has "politicized the judicial appointment process." He further stated, "Judge Graffeo deserved reappointment but the 'R' alone was the disqualification. The Court of Appeals through the years has never been perceived as rendering decisions based on its political composition, but the Governor appears to be on the road to seek that result."

In an article which appeared in the *New York Times* on October 18, 2014, Professor Bonventre, a frequent commentator on the New York Court of Appeals, also indicated that the Governor's appointment was based on political considerations and that the Governor "had avoided making an appointment which would upset his liberal base. In an article that appeared in the *New York Law Journal* of October 20, 2014 at page 1, Professor Bonventre was further quoted as stating that Judge Graffeo had become a very fine Judge who deserved to stay on the Court of Appeals.

The Governor's rejection of Judge Graffeo and the selection of Judge Stein will now swing the balance of the Court to the Democratic side, and it is expected that in the future the Court may be taking a more liberal course in cases involving both social and criminal law issues. In terms of geographic balance, Judge Stein's appointment will leave in place the current allocation of three seats for Upstate New York and four seats for the City of New York. The failure to reappoint Judge Graffeo also leaves the Court without an Italian-American Judge for the first time since 1985. In addition to bypassing Judge Graffeo, the Governor also bypassed Maria Vullo, who has been active in the Italian-American community and who served as the Vice Chair of the National Organization of Italian-American Women.

The New Appointee—Justice Leslie Stein

Justice Leslie Stein has served in the Appellate Division, Third Department since February 11, 2008. She previously was a Judge of the Supreme Court for the Third Judicial District, having been elected in 2001. She also

served as an acting Family Court Judge and an Albany City Court Judge. She is 57 years of age and a graduate of Albany Law School. From 1981 to 1983 she clerked with the Schenectady County Family Court. She thereafter entered the private practice of law and served in that capacity from 1983 to 1997. She concentrated in her practice on matrimonial and family law. She was elected as a fellow of the Academy of Matrimonial Lawyers in 1991. In 1999 she became a founding member of the New York State Judicial Institute on Professionalism in the Law. Republican leaders have expressed disappointment at the Governor's failure to reappoint Judge Graffeo and have indicated that they will carefully consider Judge Stein's qualifications before voting to confirm her. In fact the State Senate postponed acting on her nomination until the middle of January. It is expected, however, that she will be confirmed and will begin serving on the Court sometime in February.

Leaving the Court—Judges Graffeo and Smith

Following the Governor's failure to reappoint Judge Graffeo, she left the Court on November 29, 2014. It is expected that she will eventually re-enter the private practice of law. Judge Graffeo served as the Senior Associate Judge of the New York Court of Appeals. She was originally appointed by Governor Pataki and was confirmed by the State Senate on November 29, 2000. She served for fourteen years. Judge Graffeo is presently 62 years of age and was born in Rockville Centre. She received her J.D. from Albany Law School and was engaged in private practice from 1978-1982. She entered government service in 1982, as Assistant Counsel to the New York State Division of Alcoholism and Alcohol Abuse. She was also employed in the State Legislature as Counsel to the Assembly Minority Leader. From 1989 through 1994 she served as Chief Counsel to Assembly Minority Leader Clarence D. Rappleyea, Jr. In 1995, she was appointed as Solicitor General for the State of New York by Attorney General Dennis C. Vacco and served in that capacity until she received an appointment by Governor Pataki to fill a vacancy in the State Supreme Court within the Third Judicial District. She was thereafter elected to a full term, as a Justice for the State Supreme Court, and in March of

1998, became an Associate Justice of the Appellate Division, Third Department. She thereafter received her appointment to the New York Court of Appeals.

With respect to the second vacancy on the Court due to Judge Smith's retirement, the State Commission on Judicial Nominations conducted interviews and held hearings during the month of October and issued its recommendations to the Governor in early December. The seven names submitted to the Governor to fill the Smith vacancy are Justices Eugene Fahey and Erin Peradotto, presently sitting in the Appellate Division, Fourth Department, and five partners from major law firms, to wit: Kathy Chin, Hector Gonzalez, Mary Kay Vyskocil, Rowan Wilson and Stephen Younger. A selection to fill Judge Smith's seat is expected by February.

Judge Robert S. Smith who retired from the Court as of December 31, 2014, was appointed by Governor Pataki on November 4, 2003, and was confirmed by the State Senate on January 12, 2004. He had nearly ten years of service on the court and was generally known to have exercised an independent voice and often provided a swing vote on the Court. He was born in New York City and received his law degree from Columbia Law School, and prior to his appointment to the Court of Appeals he practiced law with Paul, Weiss, Rifkind, Wharton & Garrison. During his career he had also served as a visiting professor and lecturer at Columbia Law School. Judge Smith has also taught a constitutional law course at the Benjamin N. Cardozo School of Law. The Judge has three children and three grandchildren and continues to reside in New York City with his wife Dian G. Smith. It is expected that upon his retirement, Judge Smith will return to the private practice of law. We thank both Judges for their many years of distinguished judicial service and wish them the best in their future endeavors.

The last few months have seen dramatic changes in the personnel in the New York Court of Appeals. The decisions and direction of our State's highest court should be of interest and concern to all members of the Bench and Bar. We will continue to monitor developments in this area.

U.S. Supreme Court Announces Assignment of Justices During the October 2014 Term

With the opening of the Court's new term, Chief Justice Roberts announced the allotment of the Justices assigned to the various federal circuits throughout the Nation. The names of the individual Justices are printed below, along with the date of their appointment to the United States Supreme Court and the name of the President who appointed them. While normally the Justices would be assigned to cover areas near their home base, often some of the newer Justices are assigned to cover areas far from their home districts. Thus, for example, Justice Sotomayor, who is from New York, is assigned to cover the Tenth Circuit, which encompasses many of the Western states. Justice Kagan, who is originally from New York and now considers Massachusetts as her home base, is assigned to cover the Sixth and Seventh Circuits, which involve several states in the Midwest.

DISTRICT OF COLUMBIA AND FEDERAL CIRCUITS

Chief Justice JOHN G. ROBERTS, JR., of Washington, D.C.

Appointed Chief Justice by President George W. Bush September 29, 2005; took office October 3, 2005

FIRST CIRCUIT

Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico

Justice STEPHEN BREYER, of Massachusetts

Appointed by President Clinton August 2, 1994; took office September 30, 1994

SECOND CIRCUIT

Connecticut, New York, and Vermont

Justice RUTH BADER GINSBURG, of New York

Appointed by president Clinton August 3, 1993; took office August 10, 1993

THIRD CIRCUIT

Delaware, New Jersey, Pennsylvania and Virgin Islands

Justice SAMUEL A. ALITO, JR., of New Jersey

Appointed by President George W. Bush January 31, 2006; took office January 31, 2006

FOURTH CIRCUIT

Maryland, North Carolina, South Carolina, Virginia, and West Virginia

Chief Justice JOHN G. ROBERTS, JR., of Washington, D.C.

Appointed Chief Justice by President George W. Bush September 29, 2005; took office October 3, 2005

FIFTH CIRCUIT

Louisiana, Mississippi and Texas

Justice ANTONIN SCALIA, of Washington, D.C.

Appointed by President Reagan September 25, 1986; took office September 26, 1986

SIXTH CIRCUIT

Kentucky, Michigan, Ohio, and Tennessee

Justice ELENA KAGAN, of Massachusetts

Appointed by President Obama May 10, 2010, took office August 7, 2010

SEVENTH CIRCUIT

Illinois, Indiana, and Wisconsin

Justice ELENA KAGAN, of Massachusetts

Appointed by President Obama May 10, 2010; took office August 7, 2010

EIGHTH CIRCUIT

Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota

Justice SAMUEL A. ALITO, JR., of New Jersey

Appointed by President George W. Bush January 31, 2006; took office January 31, 2006

NINTH CIRCUIT

Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington and Northern Mariana Islands

Justice ANTHONY M. KENNEDY, of California

Appointed by President Reagan February 11, 1988; took office February 18, 1988

TENTH CIRCUIT

Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming

Justice SONIA SOTOMAYOR, of New York

Appointed by President Obama May 26, 2009; took office August 8, 2009

ELEVENTH CIRCUIT

Alabama, Florida and Georgia

Justice CLARENCE THOMAS, of Georgia

Appointed by President George H.W. Bush October 16, 1991; took office October 23, 1991

Request for Articles



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

Spiros A. Tsimbinos
1588 Brandywine Way
Dunedin, FL 34698
(718) 849-3599 (NY)
(727) 733-0989 (Florida)

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

www.nysba.org/CriminalLawNewsletter

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 August 1, 2014 to October 15, 2014.

Late Notice of Appeal

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

In a unanimous decision, the New York Court of Appeals granted a defendant's application for a writ of error *coram nobis* allowing a defendant to file a late notice of appeal regarding his case in the Appellate Division. In the case at bar, the defendant at the time of sentence had raised a challenge to his guilty plea. The trial court denied the challenge, but noted that defense counsel could file an appeal on the defendant's behalf. Defense counsel, however, failed to do so. The defendant had sent numerous letters to defense counsel inquiring as to the status of his appeal and after receiving no response had made a direct inquiry with the Appellate Division. He thereafter learned that a notice of appeal had never been filed on his behalf.

The defendant, acting pro se, attempted to get permission to file a late notice of appeal, but was procedurally barred from doing so because the one-year time period set forth by CPL 460.30 had passed. He thereafter made a pro se CPL 440 motion to the Appellate Division, which was denied on the grounds that it was procedurally barred. The New York Court of Appeals however, relying upon its recent decision in *People v. Syville*, 15 NY3d 391 (2010), reversed the Appellate Division's determination and granted the Defendant's application. The Court of Appeals in *Syville* opened a narrow window of opportunity to defendants who were denied first-level appellate review.

Sentencing of Drug Offenders

***People v. Coleman*, decided October 16, 2014 (N.Y.L.J., October 17, 2014, pp. 8 and 23)**

In a unanimous decision, the New York Court of Appeals issued a ruling which determined that the 2009 drug law reform legislation was more inclusive than a strict reading of the statute. Under CPL Section 440.46, the law says that offenders who were convicted of crimes for which a merit time allowance is not available are not eligible for drug sentence reductions. A person sentenced as a persistent felony offender is not eligible for merit time under the state Correction Law.

The Court of Appeals, however, in a decision written by Judge Salaam, stated that the Court must look past the language of the statutes and to the legislative intent. Finding that the 2009 Drug Law Reform Act was meant to ameliorate the harshness of the Rockefeller drug laws, persistent felony offenders who do not have a Class A-I felony or any of the other serious crimes mentioned in

the correction law are eligible for resentencing. The Court in issuing its decision, noted that its ruling should clarify the difference of opinion which has arisen over the resentencing question between the Second and Third Appellate Divisions.

Warrantless Search

***People v. Jenkins*, decided October 16, 2014 (N.Y.L.J., October 17, 2014, p. 23)**

In a unanimous decision, the New York Court of Appeals concluded that a warrantless search of a closed metal box in the defendant's home was not reasonable under the "exigent circumstances" exception to the warrant requirement. In the case at bar, two New York City police officers entered a building after hearing gunshots. When they reached the eighth floor they heard voices from the adjoining hallway and entered the hallway where one of the officers observed the defendant holding a firearm. The defendant and another man then fled into an apartment. The officers pursued the defendant into the apartment. The officers searched the apartment and located the defendant under a bed. The defendant was frisked and placed in handcuffs and moved to the living room. The officers then proceeded to search the entire premises looking for a gun and eventually found a silver box on the floor. The box was opened and the gun was discovered. The New York Court of Appeals concluded that since the defendant was already apprehended and in custody there were no exigent circumstances to justify the search which occurred. There was also no danger that the defendant could dispose of or destroy the weapon. The police in the case at bar were required to obtain a warrant prior to searching the box. Therefore, the suppression motion should have been granted.

Speedy Trial

***People v. Wells*, decided October 16, 2014 (N.Y.L.J., October 17, 2014, p. 24)**

In a unanimous decision, the New York Court of Appeals dismissed a defendant's misdemeanor conviction on the grounds that the People had provided no justification on the record for any reasonable period of delay. In the case at bar, the Appellate Term had reversed the defendant's original conviction and had ordered a new trial. The People had appealed to the New York Court of Appeals but the leave application was denied. When the case was re-calendared in the Criminal Court, the People at no time had declared themselves ready for trial. After 90 days had elapsed the defendant had moved to dismiss the accusatory instrument on speedy trial grounds. The People had argued that they had no obligation to advance

the case to an earlier date upon receiving the certificate denying leave. The New York Court of Appeals held, however, that this position was in error since in the case at bar the People had provided no justification on the record for any reasonable period of delay and had failed to declare themselves ready for trial.

Search and Seizure

***People v. Rossi*, decided October 16, 2014 (N.Y.L.J., October 17, 2014, p. 24)**

In the case at bar, two police officers entered the defendant's residence after a 911 call. The defendant was seen at the end of a hallway bleeding from his hand. The officers drew their weapons and ordered the defendant into the living room, where he was frisked but no weapon was found. The defendant stated that he was cleaning

the gun when it was discharged and did not know where the gun was. A third officer began searching the backyard and discovered a loaded gun near the shed. The defendant argued at a suppression hearing that search of his premises was unconstitutional because by the time the gun was discovered the scene was secure and the emergency had ended. A divided Appellate Division upheld the search in question. The New York Court of Appeals determined that the application of the "emergency doctrine" involved a mixed question of law and fact that is beyond the Court's review so long as there is support in the record for the findings of the court below. The Court then concluded that because there is record support for the majority's conclusion that the search was lawful under the emergency exception, any further review is beyond the Court's jurisdiction. The defendant's conviction was therefore upheld by a unanimous Court.

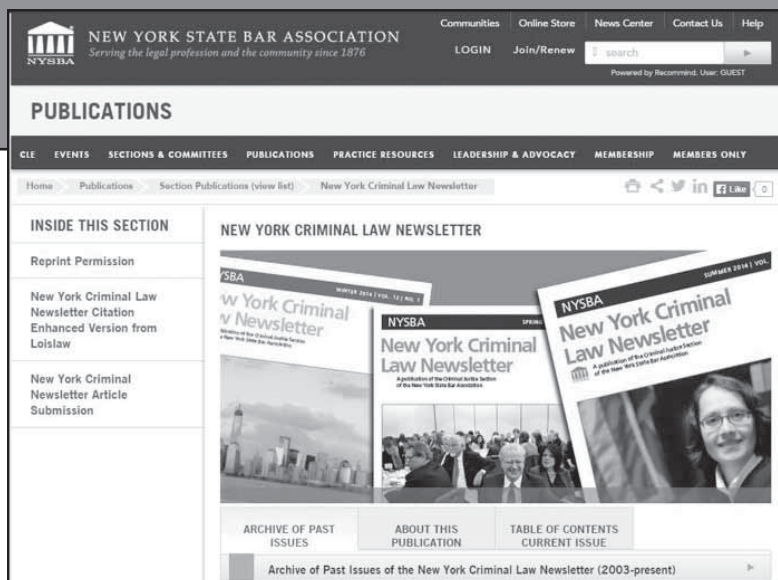
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Recent United States Supreme Court Decisions Dealing with Criminal Law and Recent Supreme Court News

The Court opened its new term on October 6, 2014, and began hearing oral argument on a variety of matters. The Court did issue one important constitutional decision on July 3, 2014, after it had concluded its last formal session. That case is summarized below.

The Court also granted certiorari with respect to a few criminal law cases, which are expected to be decided in the coming months. In all, the Court granted certiorari in eleven cases on its opening day. Among these cases were issues involving campaign financing, voting rights issues, and housing discrimination. The Court, however, surprised many observers by refusing to grant certiorari in several cases which involved the issue of same-sex marriage. Several circuit court of appeals had ruled that a state cannot deny gay marriages based upon constitutional principles. It was expected that the Court would take up these cases to further expound on its gay marriage decisions during the past term. The Court's refusal to hear the same-sex marriage cases and the resulting vacation of stays now means that same sex marriage is lawful in some thirty states.

The Court also in early October issued a ruling which allowed voting to proceed with regard to the November election, in several states whose voter identification laws have been challenged as being unconstitutional. The Court appeared reluctant and unwilling to take any action that would cause a disruption of the upcoming voting process. The Court may eventually rule on issues relating to voter identification laws in several cases which are pending before it. A short summary of already decided cases as well as important pending matters is also provided below.

***Wheaton College v. Burwell*, 134 S. Ct. 2806 (July 3, 2014)**

In a 6-3 decision the United States Supreme Court held that to obtain injunctive relief pending appeal a college was not required to follow notice procedures for a non-profit organization's claim for religious accommodation to which procedures the college objected on religious grounds. The Court's decision in this matter followed the Supreme Court determination in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (June 30, 2014), which held the contraceptive mandate in the Obama healthcare law violated the religious freedom of corporate owners who objected to providing the coverage in employee insurance plans. In the *Wheaton College* ruling, the majority opinion consisted of Chief Justice Roberts and Justices Alito, Scalia, Thomas, Kennedy and Breyer. Justice Sotomayor, joined by Justices Ginsburg and Kagan, filed a vigorous dissent. The three dissenting Justices had also dissented in the *Burwell* case, and the division within the Court on this issue reflected somewhat of a gender divide within the Court.

Justice Ginsburg Comments on Retirement Rumors

Although Justice Ginsburg has reached the age of 81 and several commentators have predicted her retirement sometime in the near future, in a recent magazine interview the Justice herself appeared to rule out any pending retirement. The Justice indicated that based upon the present partisan divide between the President and the Congress it would be unlikely that President Obama would be able to appoint anyone that she would like to see on the Court. Justice Ginsburg also indicated that she can still do the job as Justice full steam and that she would recognize when the time comes that she can no longer properly perform her judicial functions. She emphasized that at the present time she can perform all of her duties.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from August 2, 2014 to October 15, 2014.

***People v. Gordon* (N.Y.L.J., August 4, 2014, pp. 1 and 4)**

In a unanimous decision, the Appellate Division, Third Department, upheld a robbery conviction of a woman for stealing earrings that she apparently discarded after she had fled the store. The panel had earlier reduced the robbery counts to petty larceny, holding the more serious robbery charges could not stand because no stolen property was recovered as evidence from the defendant or her accomplices. The Court of Appeals had recently reinstated the robbery conviction and had remitted the matter to the Third Department for further consideration. On remand, the Appellate Division reconsidered its earlier determination and concluded the robbery convictions were not against the weight of the evidence.

***People v. Collins* (N.Y.L.J., August 7, 2014, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Second Department, modified a defendant's conviction on the grounds of ineffective assistance of counsel. In the case at bar, the defendant was convicted of forcibly stealing property while displaying what appeared to be a firearm. As part of the prosecution's case, evidence was submitted in which the defendant admitted to committing the robbery, but said he only pretended to have a gun. On appeal, the issue was raised criticizing defense counsel for failing to advise the jury that the object that appeared to be a firearm was not capable of causing injury or death. Under these circumstances the Appellate Panel reduced the conviction to second degree robbery, which resulted in a reduced sentence of 7-15 years.

***People v. Leonard* (N.Y.L.J., August 7, 2014, p. 4)**

In a 4-1 decision, the Appellate Division, Third Department reversed a defendant's drug conviction on the grounds that the evidence that was seized should have been suppressed. The court found that the 41 grams of heroin discovered in the back seat of a car, which was stopped for speeding, should have been suppressed because the prosecution failed to show that state troopers followed proper procedures for an inventory search. Justice Lynch dissented from the majority ruling, arguing that while it was not a model search, the testimony of the troopers established that they followed a single familiar standard according to state police rules.

***People v. Hall* (N.Y.L.J., August 14, 2014, p. 1)**

In a unanimous decision the Appellate Division, Second Department reversed a defendant's robbery and

drug convictions because his trial counsel neglected to seek severance of unrelated charges. The Appellate Panel found the robbery and drug charges were unconnected and had been improperly placed in the same indictment. It concluded that defense counsel should have moved prior to trial to sever the counts. The record established that defense counsel did not raise the issue until the date of sentence and that under the circumstances his actions amounted to the ineffective assistance of counsel. The Appellate Division concluded that as a result of defense counsel's error, the same jury that heard evidence regarding the robbery also heard of the voluminous evidence concerning the defendant's arrest and large quantity of drugs which were found at his mother's house. As a consequence the jury could have inferred that the robbery at issue was committed for drug-related purpose and that it was possible that the improper joinder tainted the jury's evaluation of the separate, unrelated incidents.

***People v. Benítez* (N.Y.L.J., August 22, 2014, p. 1)**

In a unanimous decision the Appellate Division, Second Department reversed a defendant's robbery conviction and ordered a new trial on the grounds of prosecutorial misconduct. The court found that the prosecutor during summation had suggested that another person in the one-witness case had also implicated the defendant. Defense counsel repeatedly objected throughout this line of argument but the trial court overruled the objection. The Appellate Division concluded that a new trial was required since the defendant had no opportunity to cross-examine the unnamed witness who had allegedly provided a tip to police, and since the evidence against the defendant was not overwhelming a new trial was required.

***People v. Chamlee* (N.Y.L.J., August 26, 2014, p. 4)**

In a unanimous decision the Appellate Division, First Department remanded a matter for the purposes of holding a suppression hearing. The Appellate Panel found that the defendant claimed that police recovered drug paraphernalia and a gun after an illegal entry of his apartment. After reviewing the search warrant and other factors involved in the case, the court concluded that under the circumstances which were presented, it was incumbent upon the motion court to conduct a hearing to determine whether there was sufficient exigent circumstances to justify the forced warrantless entry. The Appellate Panel's final determination of the defendant's conviction and the sentence imposed thereon was put on hold pending the results of the ordered suppression hearing.

***People v. McLeod* (N.Y.L.J., August 26, 2014, pp. 1 and 2)**

In a unanimous decision the Appellate Division, First Department held that a trial judge violated the defendant's right of confrontation by improperly limiting cross examination of the defendant's accomplice, who had testified for the prosecution. During the trial, the defendant's accomplice testified for the prosecution following a deal that he had struck with the district attorney's office. Defense counsel sought to question the accomplice about uncharged crimes he had admitted to, his criminal record and the details of the deal he had struck with the prosecution. The trial court curtailed the proposed line of questioning. The accomplice's attorney then advised the trial court that his client planned to invoke his Fifth Amendment right against self-incrimination.

The Appellate Panel concluded that the trial judge improperly exercised his discretion by allowing the accomplice to avoid invoking his Fifth Amendment privilege because the probative value of the questions targeted at the witness's credibility, bias, and motive to fabricate testimony was not outweighed by any purported prejudice against the people. The Appellate Panel further pointed out that the accomplice's testimony was the only evidence that suggested the defendant intended to participate in the robbery. It thus concluded that the defendant was unduly restricted from exercising his constitutional rights to cross-examine a witness against him under both the New York and United States Constitutions.

***People v. Sydoriak and People v. Morris* (N.Y.L.J., September 2, 2014, p. 1)**

In two unrelated cases, the Appellate Division, Second Department ordered reversals of convictions where the trial judges failed to apprise counsel of the contents of jury notes and allow them the chance to discuss the intended response. In the two cases in question, two Queens Supreme Court Judges had responded to jury questions without first advising counsel as to the notes contents. The Appellate Division held their actions amounted to reversible error, even though the defendants failed to object to the manner in which the trial judges dealt with the issue.

***People v. Mercado* (N.Y.L.J., September 2, 2014, pp. 1 and 6)**

In a 4-1 decision the Appellate Division, First Department upheld a police search of the trunk of a defendant's car during a traffic stop on the grounds that the consent, which was given, was voluntarily and legally valid. The record established that the motorist while giving his consent was visibly nervous and agitated during the police search of his vehicle. The Appellate Panel majority determined that no one circumstance determines whether consent is voluntarily given and that the fact the defendant

was nervous and agitated was not sufficient to invalidate his apparent consent. The dissenting justice argued that the defendant's distraught demeanor weighed against the finding that his consent was truly voluntary. The appellate majority concluded, however, that people had satisfied their heavy burden of proving voluntariness of consent and upheld the search of the defendant's vehicle, which revealed 120 glassine envelopes containing heroin.

***People v. Brown* (N.Y.L.J., September 15, 2014, pp. 1 and 2)**

In a unanimous decision the Appellate Division, Second Department held that a defendant's purported waiver of appeal was invalid on the grounds that the warnings given by the trial judge were terse and abbreviated and not sufficient to elicit a knowing and voluntary waiver of a defendant's right to appeal. The Appellate Panel stressed that trial judges have an obligation to clearly explain that the defendant's conviction and sentence are final when they agree to a waiver and that a full and complete record should be made before a valid waiver is accepted. The Court criticized the over-reliance of written waivers and emphasized that a written waiver is not a complete substitute for a proper colloquy supervised by a trial judge. Justice Skelos issued the opinion for the court.

***People v. Wagstaffe and Connor* (N.Y.L.J., September 18, 2014, pp. 1 and 10)**

In a unanimous decision the Appellate Division, Second Department reversed kidnapping convictions for two defendants who had been convicted more than twenty-years ago. The defendants had been accused of kidnapping and strangling a teenage girl in Brooklyn. After the defendants' original appeals had been denied, they commenced a CPL 440 action claiming the prosecutors from the Brooklyn District Attorney's office had committed discovery violations. After hearing oral arguments in December of 2013, the Appellate Panel, after a nine-month review, determined that prosecutors had buried key documents in disclosures made just before trial. The documents in question could have been used as impeachment material, but had been mixed in with other submissions which were handed over to the defense just before jury selection. The Appellate Panel concluded the inadequate disclosure of evidence clearly fell within the ambit of the prosecutor's *Brady* obligations. Therefore, the defendants' convictions could not be sustained.

***People v. Lee* (N.Y.L.J., September 26, 2014, pp. 1 and 2)**

In a unanimous decision the Appellate Decision, First Department reversed a defendant's conviction and ordered a new trial on the grounds that when the defendant provided incriminating statements that were used during the trial he had been deprived of his right to counsel and

therefore his statements should have been suppressed. In the case at bar, the defendant had insisted on allowing the jury to hear evidence of the incriminating statements over the vigorous opposition of his attorney. In issuing its ruling the Appellate Division determined that choices about evidence introduction were reserved to defense counsel and not to the defendant. Thus, pursuant to a recent decision from the New York Court of Appeals, the trial judge was in error in not accepting defense counsel's opposition to the evidence in question.

***Matter of Gentil v. Margulis* (N.Y.L.J., September 26, 2014, p. 4)**

In a unanimous decision the Appellate Division, Second Department granted an Article 78 motion and blocked a defendant's retrial on double jeopardy grounds. After deliberating for a day and a half, the jury had indicated that it could not decide on two of the counts and had a partial verdict on the remaining count. The trial judge refused to accept the partial verdict and told the jury to keep deliberating. Subsequently, the court dismissed the count where the jury had reached a partial verdict and then declared a mistrial on the two undecided counts.

When the prosecution sought to commence a retrial, the defendant filed an Article 78 motion claiming that double jeopardy had attached. The Appellate Division agreed and issued an order precluding any retrial on the remaining counts. The panel indicated that no manifest necessity was demonstrated for the mistrial and the trial court failed to explore all appropriate alternatives before declaring on its own motion a retrial.

***People v. Hutchings* (N.Y.L.J., September 30, 2014, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Fourth Department upheld a bribery conviction of an upstate police officer. The officer had been charged with accepting free or discounted services from local contracting companies. The officer had informed the contractors about days and locations of State Department of Transportation roadside safety inspections of commercial trucks. In return the officer received free work on his home and other gifts from the contractors. The Appellate Panel concluded that the evidence presented was legally sufficient to support the charge of third degree bribe taking as well as other related charges.

***People v. Martinez* (N.Y.L.J., October 6, 2014, p. 4)**

In a unanimous decision, the Appellate Division, First Department reversed a defendant's conviction and ordered the suppression of pictures of a pistol that police found on the defendant's cell phone. The police had searched the defendant's cell phone without a warrant and found two photos of a firearm resembling a pistol which was discovered on the defendant. Relying upon

the recent United States Supreme Court decision in *Riley v. California*, 134 S. Ct. 2473 (2014), the Court held that cell phones were not a proper subject of a warrantless search incident to arrest. The Appellate Panel reiterated that the police officer had used an unlawful confirmatory search that undermined the purpose of the search warrant requirement.

***People v. McCray* (N.Y.L.J., October 8, 2014, pp. 1 and 10)**

In a unanimous decision, the Appellate Division, Fourth Department held that a defendant's right to counsel does not attach when a third-party tells the police that a lawyer has been hired and is on route to the police station. The court stated that it was well settled that the right to counsel is personal and cannot be invoked by a third-party. Statements given by the defendant were therefore admissible and would not be suppressed.

***People v. Hadid* (N.Y.L.J., October 9, 2014, pp. 1 and 4)**

In a unanimous decision the Appellate Division, Second Department reversed a defendant's perjury conviction and dismissed the indictment after concluding that the prosecutors had not proven the defendant intentionally made statements he did not believe were true. The case involved a New York City police sergeant who had given testimony at a murder trial and which later was revealed to have been incorrect. The Appellate Panel stated that to prove false testimony prosecutors had to show that the defendant intentionally, rather than mistakenly, testified falsely. After reviewing the evidence the court stated that the defendant's statement was a mistake rather than an intentional falsehood. Under these circumstances, the conviction for perjury was reversed and the indictment was dismissed.

***People v. Adames* (N.Y.L.J., October 17, 2014, pp. 1 and 8)**

In a unanimous decision, the Appellate Division, First Department held that a defendant did not make a knowing and intelligent waiver of his rights against self-incrimination and that, therefore, any statements that he made had to be suppressed. In the case at bar, the defendant was 18 years of age, illiterate and unfamiliar with the criminal justice system. He provided police with a videotaped statement discussing his link to a fatal shooting. In viewing the videotaped statement, the Appellate Division concluded that he did not understand the Miranda warnings which were provided, did not know what the right to counsel meant and had expressed reservations on several occasions regarding his understanding of the rights. Under these circumstances the Appellate Division concluded that the defendant's manner and relays in the video showed his confusion so that the statements in question could not be upheld as being voluntarily made.

For Your Information

Federal Sentencing Commission Considers Further Reductions in Criminal Sentences

Following its recent announcement that it was moving to reduce federal sentences imposed for various drug crimes effective as of November 1, 2015, the Federal Sentencing Commission also announced that it plans in the next year to consider changes to sentencing guidelines for some white-collar crimes. The commission announced that a goal of its future proposals would be to measure the fairness of sentences for fraud and other economic crimes. The panel indicated that it had been reviewing data for several years and it will continue to hear from judges, victims and attorneys as to whether there are ways the economic crimes guidelines could work better. The Commission's recent initiative follows a 2013 proposal from the American Bar Association that would encourage judges to place less emphasis on how much money was lost and more on a defendant's culpability. Critics of the current sentencing structure argue that big players in a large fraud risk are getting socked with extremely harsh sentences despite playing a minimal role.

The federal sentencing guidelines are advisory, but judges still heavily rely on them. Many have argued that the white-collar sentencing guidelines are mixed up and crazy and lead to unfair results. Following the commission's recent initiatives with respect to drug sentencing, it appears possible that some changes may eventually be made with respect to economic crimes.

U.S. Teenagers Need More Sleep

The American Academy of Pediatrics recently declared that the chronic sleepiness of our nation's teenagers is becoming an important public health issue. Many schools throughout the nation currently start classes very early each morning and the Academy has declared that this has created a situation where many teenagers are beginning school too early and are suffering sleep deprivation. They have requested that middle and high schools push back their start times by 30 minutes to an hour, to allow students to get more rest. The organization stated that a substantial body of research has demonstrated that delaying school start times is an effective countermeasure to chronic sleep loss.

The Academy of Pediatrics estimated that 87% of U.S. high school students are getting less than the recommended 8½ to 9 hours of sleep and that high school seniors get less than 7 hours a night. It concluded that sleep

deprivation of teenagers is widespread and it called for corrective measures. The Academy recommended that no classes should be held before 8:30 a.m. and that exhaustion could have serious consequences. Currently, more than 40% of U.S. public high schools start their day before 8 a.m. and 10% start before 7:30 a.m.

Four New York Law Schools Experience Increase in Applications

Despite a national trend in which applications to law school have fallen, some 8.2% since last year, four New York law schools appear to be bucking the trend and have instead reported slight increases in their Fall 2014 enrollment. New York University School of Law, St. John's University School of Law, Syracuse University Law School and the Touro College Jacob D. Fuchsberg Law Center all received more applications for the Fall 2014 classes than they did in 2013. St. John's Law School had the greatest increase having received 2,840 applications, representing a 14% increase over last year; NYU Law School had a 8.2% increase; Syracuse University Law School increased by 6%, and Touro Law School experienced an increase of 5.2%. Five New York State law schools experienced slight declines in their received applications. These schools were Albany Law School, Cardozo Law School, Cornell Law School, Fordham University School of Law and Hofstra Law School.

Nationwide, law school applications began falling in 2010 when the prospects for job placement drastically declined. Some slight improvement has occurred during the last year, but on a national level the overall decline for 2014 was still 8.2% from the previous year. It is expected that some equilibrium between the number of graduates and the number of available jobs will occur within the next few years. That would be good news for both law schools and the students.

New York Does Well with Respect to Job Creation

A recent report from the United States Bureau of Labor statistics indicates that New York State is one of the states that has experienced one of the largest job increases during the period between July 2013 and July 2014. The Bureau reported that 114,800 new jobs were created in New York State during the period in question. New York came in at number four of the five states that had experienced the greatest number of new jobs. Topping the list was Texas followed by California and Florida. Texas and

California had both experienced new job creation of over 300,000 and Florida's new jobs had increased by 208,500. The state that had experienced the smallest number of new jobs was Montana, where only 8,800 new jobs were created.

U.S. Home Sales Begin to Slump

The Commerce Department released its home sale figures for the month of July 2014, and found that new home sales had declined from last year in most sections of the country. New home sales plunged 30.8% in the Northeast followed by smaller declines in the Midwest and West. Only the South saw a rise in new home sales, having gone up 8.1% over last year. The national median price of a new home in July 2014 was \$269,800.00, an increase of 2.9% over last year. Although the housing market has shown some improvement over the last few years, it remains somewhat unstable and volatile and requires continuing monitoring. One of the factors which may be significant in any housing recovery is whether the younger generation, which during the last few years has preferred renting homes to buying, begins to enter the housing market. The percentage of Americans under age 35 who currently own a home fell to 36% in 2013, the lowest level on record in modern times. Recent polls suggest that persons in their 30s have not given up on home buying altogether but have simply been delaying the decision. The view of many in the real estate industry is that 30- and 40-year-olds have been shaken, but not scared, by the housing bust and that nearly all of them want to own a home some day.

The Relative Value of \$100

The Bureau of Economic Analysis recently issued a report on the relative value of \$100 and indicated which states would offer the best return for a consumer who spends \$100. The report concluded that the purchasing power of \$100 would actually amount to only \$88.50 in California and \$86.66 in New York State. The best deal would be in Mississippi, where \$100 would actually have a value of \$115.74. The District of Columbia and Hawaii have the lowest \$100 value, with D.C. having a purchasing power of \$84.60 and Hawaii at \$85.32. An indication of the wide disparity in the purchasing power among the various states is the fact that a person who makes \$40,000.00 a year after taxes in Kentucky would have to have after-tax earnings of \$53,000.00 in Washington, D.C. just to have an equal standard of living.

New York City Adopts New Budget for Local Prosecutors

The six prosecutors' offices in New York City have been allocated a total of more than \$314 million for the fiscal year that began on July 1, 2014. This represents an increase of 6.1% over the amount allocated by the City

Council of the 2013-2014 fiscal year. The Staten Island District Attorney's office received the largest increase, being allocated \$9.5 million, which was an increase of 12.5%. The Manhattan District Attorney's office received an increase of 8.9%, followed by the Brooklyn office which received an increase of 5.4%. The Bronx office saw a rise of 3.7% and Queens County saw an increase of 4.8%. The office of the Special Narcotics Prosecutor saw a rise of 3.4%. In addition to its allocation for criminal law matters, the New York City Council also provided for a large increase to the City Law Department, amounting to a 16.5% rise to cover its handling of civil cases.

Wages Continue to Stagnate

Despite the fact that the nation has rebounded somewhat from the recent economic recession, regaining some 8.7 million jobs, Americans on average are making 23% less at those jobs than they were before the economic downturn. These figures were recently released in a report by the U.S. conference of Mayors. The average annual wage in sectors where jobs were lost was placed at \$61,637.00 before the recession. A similar accounting of the job gains through the second quarter of 2014 show average wages of \$47,171.00. The wage gap translates to a 23% decline. The report also highlighted the increasing disparity between rich and poor in the nation and the report pointed out that in 1975 the wealthiest captured 43.6% of the nation's income, while the poorest had a share of 4.3%. In recent years, however, low-income households saw their share drop to 3.2%, while the highest earners saw their share jump to 51%. A separate Federal Reserve survey also revealed that 4 in 10 U.S. households are straining financially, many struggling with tight credit, soaring education debt and profound issues relating to savings and retirement. Almost 40% reported that their families were "just getting by" or struggling to do so, and more people said their financial situation was worse rather than better off compared with five years ago. A bit of good news which may indicate an improvement in wages in the coming months is the fact that during the month of September the national unemployment rate fell to 5.9% from a previous 6.1%.

Recent Poll Continues to Reveal Wide Racial Divide

A recent New York Times/CBS News poll, which was taken following the incident which occurred in Ferguson, Missouri, revealed that blacks and whites are sharply divided on the issue of how police deal with each group and how both groups feel on a variety of issues. The poll indicated that an overwhelming majority of blacks think that generally the police are more likely to use deadly force against a black person. A majority of whites, however, say that race is not a factor in a police officer's decision to use force. Forty-five percent of blacks stated they have experienced racial discrimination at some point in their

lives, while virtually no whites have said they have. In response to a wide variety of questions asked, answers revealed a sharp division over the Ferguson incident, even before the full facts were known and no trial had yet been set. Fifty-seven percent of blacks indicated that the shooting was not justified, while only 18% of whites held the same opinion. With regard to whether people have confidence that the investigation by local authorities would be conducted fairly, 62% of whites expressed at least some confidence, while only 35% of blacks did.

New Yorkers Contribute to Florida's Growth and Population

The recent U.S. 2010 Census indicated that Florida and New York were neck in neck with respect to the number of people living in each state. New York continued to hold the number 3 spot and Florida a close number 4, with only a couple of hundred thousand separating the two. During the last year, recent estimates have indicated that Florida has already passed New York in terms of population and is now actually the third most popular state with a population estimated at slightly over 19.5 million. Interestingly, many New Yorkers have been moving to Florida in the last 30 years and have contributed to Florida's population growth at the expense of their former State of New York. A recent study indicated that in 1900, only 1% of people living in Florida were born in New York State. In 1980, the percentage had risen to 10% and in 2012, persons born in New York State accounted for 8% percent of Florida's population. Only recently, an additional study estimated that during the current year, some forty thousand New Yorkers have transplanted themselves to Florida.

New York City Moves to Withdraw Stop and Frisk Appeals

In early August, it was announced that New York City has moved to withdraw its appeal of the stop and frisk litigation, which had been filed with the U.S. Court of Appeals for the Second Circuit. Although former Mayor Bloomberg had vigorously pressed for an appeal on the original District Court decision, Mayor de Blasio upon his election, indicated that he would not press the appeals that were filed and would in fact move to withdraw them. In keeping with Mayor de Blasio's wishes, the law department asked the Federal Appeals Court to voluntarily dismiss appeals in the stop and frisk cases. This move follows the recent denial in the District Court of an application by the police union to intervene in the case. The stop and frisk matters are now currently before Southern District Judge Torres, and efforts to fully resolve the issue appear to be under way.

The police union, however, has pressed ahead with an appeal of the denial of its right to intervene in the case

involving the contested issues, and a three-judge panel at the U.S. Court of Appeals, in the Second Circuit heard oral argument on the police union's appeal on October 15, 2014. Subsequently the Appellate Court denied the police union's request. In the meantime, the city has indicated that it would go ahead with instituting a pilot project involving cameras for police officers, which was one of the provisions of the remedial order issued by the District Court in 2013.

Poverty Rate Begins to Decline

A recent report from the Census Bureau indicates that the poverty rate declined last year for the first time since 2006. The report stated the poverty rate in 2014 was 14.5%, down from 15% in 2012. The decrease was attributed to the growth in year-round employment by some 2.8 million jobs. The report also indicated the good news that there has been some improvement in the poverty rate for children under the age of 18. The rate declined for the first time since 2000, with the number of children in poverty listed at 14.7 million, a decrease of some 1.4 million. The poverty threshold is classified as \$23,830 for a family of four.

An additional recent study based upon Census Department figures also surveyed the median household income of the twenty-five most populated metropolitan areas of the United States. The survey found that Washington, D.C. had the highest median household income of just over \$90,000. New York City was seventh among the top twenty-five, with a median household income of approximately \$66,000. Miami and Tampa, Florida, were at the bottom of the list with a median household income just under \$50,000.

Justice Department to Study Racial Bias in Policing

Attorney General Eric Holder recently announced that the Justice Department has enlisted a team of criminal justice researchers to study racial bias in law enforcement in five American cities and to recommend strategies to address any discovered problems. The Justice Department will provide some \$5 million in a research grant to cover the cost of the study. New York researchers will play a major role in the study since the John J. College of Criminal Justice in New York City will be one of the groups working on the issue.

Size of Law Firms Major Factor in Billing Rates

A 2014 report discussed in the *New York Law Journal* of September 19, 2014, at pages 1 and 6, reveals that generally the larger the law firm the higher the hourly rates. For example, the average rate for New York partners practicing in the area of bankruptcy and collections with

a firm size of more than one thousand was \$656 per hour in 2013. For those practicing in the corporate area, the hourly rate was \$837 per hour and for those involved in real estate it was \$626 per hour. On the other end of the spectrum involving firms with a size of between 51 and 200 attorneys, the hourly rate for bankruptcy practice was \$402, for corporate partners \$498, and for real estate \$451. Further details regarding the study can be found in the *New York Law Journal* article.

Student Debt Follows Many into Old Age

A recent report from the Treasury Department and the Federal Reserve Bank of New York indicated that an estimated two million Americans age sixty or older are still in debt from unpaid student loans. The number of aging Americans with outstanding student loans has almost tripled from about 700,000 in 2005. The total debt among older people is up substantially to \$43 billion from \$8 billion in 2005. Payments to cover the student debt have been deducted from social security amounts and presently almost 140,000 individuals are having their social security payments reduced to pay down their outstanding student loans. In 2004, a total of about \$32 million was being withheld from social security payments to cover outstanding student debt. For the first seven months of this year, the figure has jumped to nearly \$101 million.

Ivy League Grads No Longer Receiving Top Salaries

A recent survey by *U.S. News & World Report* indicated that the country's top four universities consisting of Harvard, Princeton, Yale and Columbia no longer produce the top salaries for their graduates. A new report issued by PayScale, which collected salary data from thousands of different colleges, found that the top salaries in the country are garnered by military and tech schools. Graduates of the United States Naval Academy were found to earn a median annual salary of more than \$80,000 and graduates of Harvey Mudd, a liberal arts college that specializes in mathematics and the liberal arts, earned just under \$76,000. Graduates at West Point earned just over \$75,000 and graduates of the California Institute of Technology placed just under \$75,000. Among the Ivy League schools, Princeton was among the highest with its graduates having a median starting salary of \$60,000. Columbia came in at \$59,200, Yale was set at \$58,500 and Harvard was listed at \$57,700. The study concluded that specialized skills seem to offer a comparative edge over a liberal arts education.

Frank Sedita III New President of the District Attorneys Association

Frank Sedita III, the District Attorney for Erie County, recently was elected as the President for the District

Attorneys Association for New York State. District Attorney Sedita is 53 years old, has served as District Attorney since 2008 and is a graduate of Buffalo Law School. District Attorney Sedita comes from a family with a long legacy of public service. His grandfather and father both held judicial positions and he himself has been involved in public service almost from the beginning of his legal career. He took office as President of the District Attorneys Association in July and indicated that in addition to conducting prosecutions, District Attorneys have just as much of an obligation to exonerate the innocent as they do to convict the guilty. He indicated that during his term in office, some two hundred people have been cleared of charges, which were filed, and that he always conducts an independent review of the evidence submitted before action is taken. We congratulate District Attorney Sedita on his recent appointment and wish him well in his endeavors.

Living to Be One Hundred

According to the Guinness World Records, the number of persons living to the age one hundred and beyond is steadily increasing. Worldwide, the population of persons one hundred and older was set at 441,000 in 2013 and according to United Nations projections is expected to grow to 3.4 million by the year 2050. The country with the largest number of persons in the one hundred-plus population is Japan, which currently has some 58,820 persons in this category. A Japanese woman is said to be the oldest person in the world, having reached the age of 116. Within the United States it is said that we have 53,364 people who are at least one hundred years old, according to the 2010 census.

Bringing Home the Bacon, More Expensive Than Ever

One who visits a supermarket on a periodic basis cannot help but notice the steadily increasing prices of meat and other food products. A dangerous sign that inflation is beginning to have a severe impact on household income is the recent release within the Bureau of Labor Statistics, which indicates that the average price of a pound of sliced bacon has nearly doubled since the beginning of 2004. In January 2004, the price of a pound of bacon was set at \$3.16. As of June 2014, it had reach \$6.11. Only recently a visit to some supermarkets would reveal that it has risen to more than \$8 a pound. It appears to be taking more and more money to bring home the bacon.

Decline in Number of Deportations

Despite the concern about the number of illegal immigrants entering the country, recent figures from the Department of Homeland Security indicate there has been a recent substantial decline in the number of deportations. During an eight-month period from the end of 2011

through July 2013, it was reported that some 320,000 persons had been deported. For the same period ending July 2014, the number of deportations had amounted to 248,608, representing a nearly 20 percent decrease. The Obama Administration during the last two years has prioritized deportation cases involving criminal immigrants and has adopted a policy that has reduced the number of deportations. Recent statistics from the U.S. Immigration and Customs Enforcement Agency have revealed that about 70% of the immigration families the Obama Administration has released into the United States never showed up weeks later for follow-up appointments. The controversy over illegal immigration continues to be one of national concern and new developments regarding the issue appear on the horizon.

Civil Liberties Union Proceeds with Lawsuit Regarding Inadequate Public Defense System

The New York Civil Liberties Union stated in a recent report that the inadequacies that prompted it in 2007 to challenge the constitutionality of New York State's public defense system have improved little in the past seven years. As a result, it proceeded with a lawsuit, which it commenced in 2007 and which was scheduled for trial in Albany Supreme Court. The case is known as *Hurrell-Harring v. State of New York*. The lawsuit contends the defense system for indigent defendants in New York State remains underfunded, overburdened and not subject to controls that ensure minimum standards of representation everywhere in the state. The instant litigation has been pending for many years and most recently the Appellate Division, Third Department ruled the Civil Liberties Union would be allowed to call expert witnesses regarding their claims of inadequacies in the public defense system. The trial, which focuses on the situation in five upstate counties, was expected to last several weeks.

The lawsuit in a recent report by the State Office of Indigent Legal Services outlines a serious gap between the need for indigent criminal defense services and available resources in counties outside of New York City. This prompted recent discussions with governmental officials regarding a possible settlement of the lawsuit and the allocation of additional monies for indigent legal services. The Board of the State Office of Indigent Legal Services recently voted in early October to ask Governor Cuomo and the legislature for an additional \$34.6 million in the next state budget. A proposed 5-year plan would call for additional annual increases of about \$20 million annually. The report indicated that New York was way behind national standards and that additional funding was becoming an urgent necessity.

In late October, just before the trial was commenced, a settlement was reached with the state. The settlement would overhaul public defense in the five counties involved in the suit and lay the foundation for statewide reforms.

Federal Prison Population Begins to Decrease

Due to recent policy changes in federal sentencing, primarily dealing with drug offenses, the federal prison population has begun to decrease. The Justice Department recently reported that this year the number of inmates incarcerated in federal prisons dropped by 4,800, reducing the overall number of federal inmates to 215,000. It is expected that within the next few years the federal prison population will continue to decrease and may have as much as 46,000 fewer inmates than the current figure.

Convicted Political Officers Begin to Lose Pension Rights

Following the conviction of several political officials in New York State during the last few years, U.S. Attorney for the Southern District, Preet Bharara, criticized the New York system, which allows convicted officials to still receive pensions following their convictions. In an effort to correct this practice, his office has instituted a policy of making any plea arrangement conditioned on the defendant waiving and forfeiting the receipt of any pension. Under this practice, a former New York City Councilman who was convicted in 2005 and sentenced to 5 years in prison was ordered to forfeit a yearly pension of \$106,000. Similar procedures have been undertaken against other political figures who have recently pleaded guilty and are awaiting sentencing. The Southern District U.S. Attorney has publicly stated that it was "a galling injustice that officials convicted of corruption draw a publicly funded pension until their dying day." The Southern District U.S. Attorney has also called for legislative action to correct the situation in question.

New York City Sees Rise in Smoking

Although strenuous efforts have been made in recent years to curtail smoking within the city, a recent release by the New York City Health Department has revealed the surprising and disturbing data that currently more than one million New Yorkers are smoking. The study indicated that 16% of adult New Yorkers smoked in 2013, which was up from 14% in 2010. Since smoking rates across the country have been falling, the recent rise in New York City was generally unexpected. However, the New York rate is still somewhat lower than the national rate of 18%. The increase in smoking in New York is also surprising since a pack of cigarettes in the city is subject to more taxes than any other United States municipality and is basically a very expensive proposition.

Working Women Have Best Opportunities in Northeast

A recent report from the Women's Policy Research Institute indicates that the status of working women is the best in the Northeast. The study utilized four factors: median annual earnings; earnings ratio between men and

women; share of women in the workforce, and the share of women in managerial or professional jobs.

Utilizing these four factors, Massachusetts had the highest score among these states. Six of the ten highest-scoring states were in the Northeast. West Virginia and Alabama ranked at the bottom of the list.

Proposals to Improve the Appellate Division, First Department

In a recent article in the *New York Law Journal* of October 3, 2014 at page 6, Justice David B. Saxe, who sits on the Appellate Division, First Department, provides some ten ways to improve the operation of his Appellate Division. Among the proposals is a suggestion to stagger oral argument in order to reduce the waiting time for attorneys. The Justice also advocates a change in the procedure currently utilized for bail pending appeal applications. The current statute allows for defense counsel to select an individual justice before whom the application is to be made. Justice Saxe would change this procedure so that the applications would be directed to whichever judge is handling the matter on that day. He also advocates oral arguments in more matters and allowing en banc review. The article by Justice Saxe is both interesting and informative and is recommended to our readers.

Supreme Court Reversals of Circuit Court Decisions

In an article which appeared in the *New York Law Journal* of September 25, 2014 at pages 4 and 8, the authors analyze the affirmance and reversal record of the various Federal Circuit Courts of Appeals. According to the authors, during the October 2013 term the Third and Eighth Circuits had a reversal rate of 100% with each Circuit being reversed in two cases. The Ninth Circuit, which had twelve cases before the Court, the highest number, had eleven cases reversed and only one affirmed for a reversal rate of 92%. Our Second Circuit, which covers New York, had three cases affirmed and two reversed for a reversal rate of 40%. The article in question was written by Martin Flumenbaum and Brad S. Karp and we recommend it to our readers.

Charitable Giving

A recent analysis by the *Chronicle of Philanthropy* indicated that New York State was the second most generous state by residents' charitable donations. The report utilized data from the Internal Revenue Service. California was number one in the listing with \$22.7 billion contributed by residents. New York State residents contributed \$15.6 billion. Texas, Florida and Illinois rounded out the top five. Although statewide New Yorkers were at the top of the list, the report did find that New York City saw a decrease in charitable donations from 2006 to 2012 with

a drop of 8.7%. The report also indicated that Americans who earn \$200,000 or more have begun to reduce the share of their income which they gave to charity. From 2006 to 2012 charitable giving among this group had dropped by 4.5%.

Billionaires Row

A recent report by *Forbes Magazine* indicated that more of the nation's top billionaires live in New York City than any other city in the United States. Among the 400 richest people in the United States, 53 New Yorkers made the list having an average net worth of nearly \$6 billion. The number of billionaires in New York City increased by 7 from the 46 who were on last year's list. The top billionaire who lives in New York City was identified as David Koch with a net worth of \$42 billion, followed by former Mayor Michael Bloomberg with a net worth of \$35 billion.

Diversity in State Judicial System

In a recent report issued by the Judicial Section of the New York State Bar Association, it was revealed that minority groups are still largely underrepresented in New York State's judicial system. The greatest disparity seems to exist in Upstate counties with significant improvement having been achieved within New York City. The report stated that whites comprised 89% of the total population in the Upstate Third Department but account for 99% of state judges within that department. In the Fourth Department whites comprised 85% of the population but comprised 94% of the judiciary. Within the City of New York within the First Department whites make up 44% of the total population but represent 65% of the judiciary. Within the Second Department whites comprise 59% of the total population but represent 78% of the total judiciary. With respect to other statistics, the report found that women account for 52% of the state's overall population but only 35% of the state's judges are women. Within the Fourth Department 26% of the judges are women. Within the Third Department they comprise 19%, 38% in the Second Department and 46% in the First Department. Overall, on a statewide basis 93% of all minority Supreme Court Justices and 60% of female Supreme Court Justices were elected in New York City.

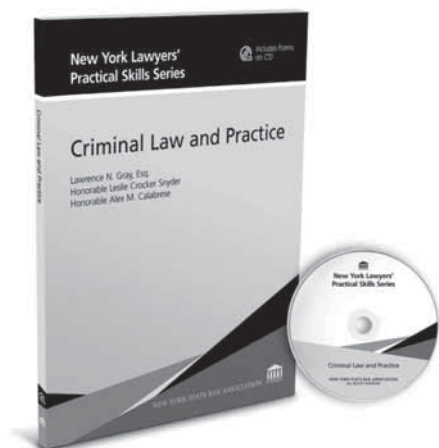
Living Longer

According to a recent study on the mortality rate from the Center for Disease Control and Prevention, life expectancy in the United States for a child born in 2012 is at a record high and has reached 78.8 years. That is up from 2011 when it was 78.7 years. According to the study, females continue to live longer than males with a life expectancy of a female born in 2012 projected to be 81.2 years. Increases in one's life span have advanced greatly over the last 80 years. A person born in 1930, for example, had a life expectancy of 59.7 years.

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Criminal Law and Practice



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About Our Section and Members

Fall CLE Programs

The Annual CLE Program dealing with forensics was held on Friday and Saturday, October 17 and 18, 2014 in New York City. The program featured several distinguished speakers and covered such topics as *Frye* hearings, digital evidence, cross-examination of firearm identification experts, and DNA. The program was attended by 85 members.

Annual Meeting, Luncheon and CLE Program

The Section's Annual Meeting, Luncheon and CLE Program will be held on Thursday, January 29, 2015 at the New York Hilton Midtown in New York City at 1335 Avenue of the Americas (6th Avenue and 55th Street). The CLE Program at the Annual Meeting will be held this year at 9:00 a.m. Information regarding this year's CLE Program will be provided to Members in a separate mailing.

Our Annual Luncheon will again be held at 12:00 p.m. and will feature a special guest speaker. The presentation of several awards to deserving individuals will also be made at the luncheon. Detailed information regarding

all events at the Annual Meeting will be forwarded under separate cover. We urge all of our members to participate in the Annual Meeting programs.

New Edition of *New York Criminal Practice*

The New York State Bar Association recently announced the publication of the fourth edition of the highly regarded treatise *New York Criminal Practice*. The newly issued fourth edition continues to be edited by Lawrence N. Gray, Esq., former Special Assistant Attorney General. The new edition contains 24 chapters and covers a variety of issues, including plea negotiations, preparation for trial, summations and other important topics in the criminal law area. The chapters continue to be written by leading criminal law practitioners and offer criminal lawyers an important source of material when pursuing their everyday practice. The new fourth edition is being offered to Criminal Justice Section members at a special 20% discounted price of \$120.00 with coupon code PUB2846N (see advertisement on the inside back cover of this issue). It can be ordered online at www.nysba.org/pubs or by telephoning the Bar Association at 1-800-582-2452.

The Criminal Justice Section Welcomes New Members

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

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Ryan Bergman
Arthur Biller
David I. Blumberg
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Clifton R. Branch
Danielle Brennan
Elizabeth Laura Brown
Martin Anthony Byrne
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Publication and Editorial Policy

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

Publication Policy: All articles should be submitted to:

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

For ease of publication, articles should be submitted on a CD preferably in WordPerfect. Please also submit one hard copy on 8½" x 11" paper, double spaced.

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NEW YORK CRIMINAL LAW NEWSLETTER

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New York Criminal Practice

Fourth Edition

EDITOR-IN-CHIEF

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From your right to counsel to your right to an appeal, *New York Criminal Practice*, Fourth Edition is an exhaustive guide to all aspects of the criminal case. Written and reviewed by dozens of practitioners including judges, criminal and defense attorneys with decades of practical experience in this field, this book is intended to guide both inexperienced and veteran attorneys who practice in this area. Many of the authors of this book have not only practiced in this area but lectured on these topics providing a wealth of invaluable information within these pages.

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Grand Jury Proceedings	Defense Cross-Examination	Appeals in Criminal Cases
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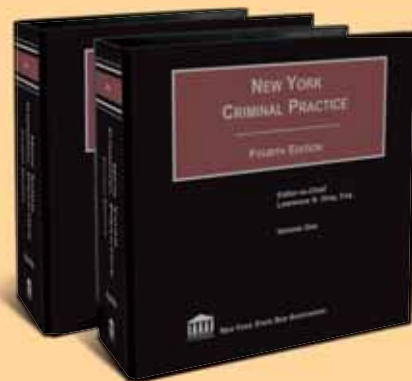
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