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New York Criminal Law Newsletter

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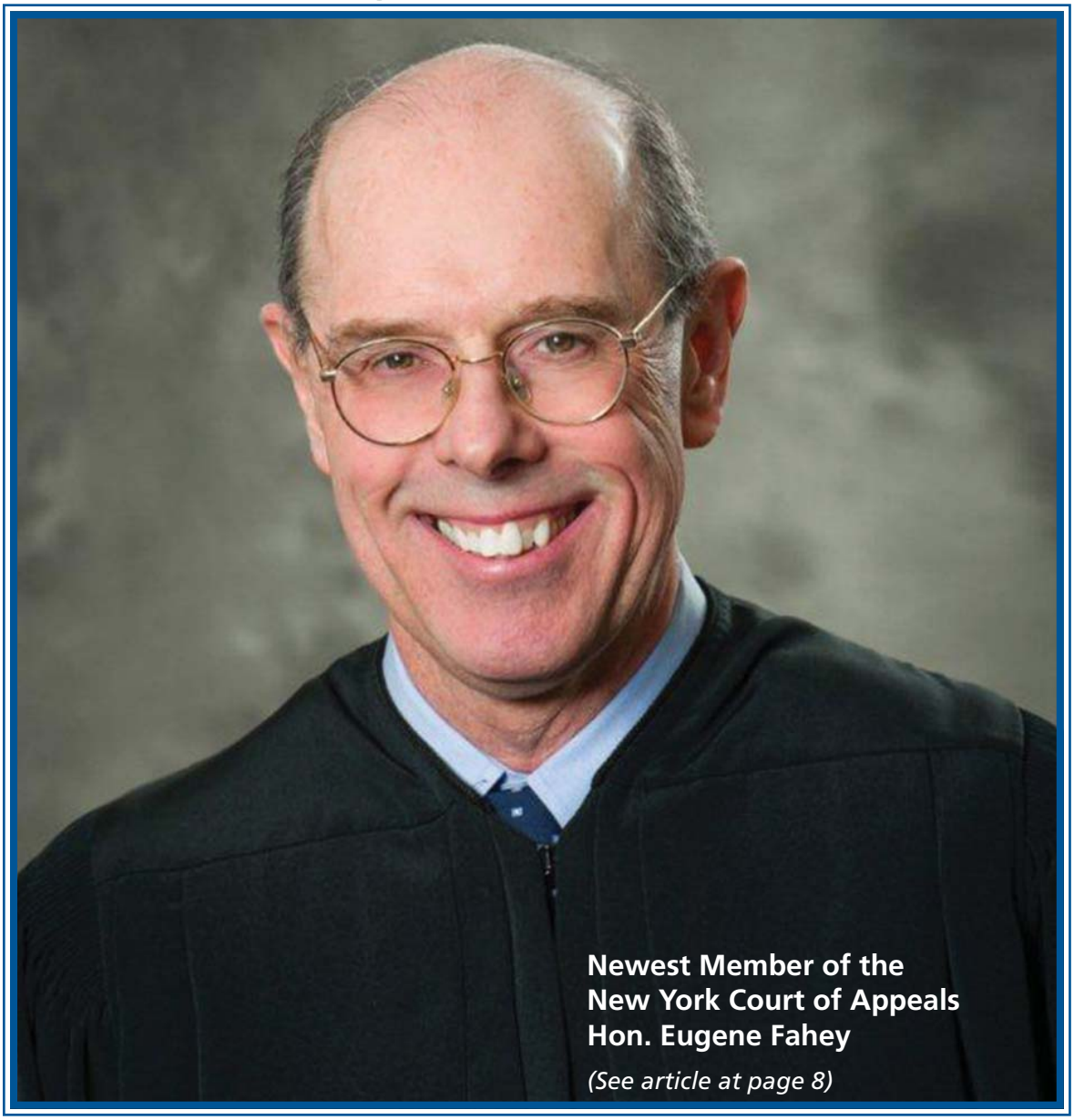
New York Court of Appeals Undergoes Personnel Change—Part II



Newest Member of the New York Court of Appeals Hon. Eugene Fahey

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Message from the Chair

Odds, and Ends

I write this column on deadline—how unusual for a litigator!—on February 3, 2015. On January 29th, the Section did its part in the State Bar Annual Meeting for this year. I want to thank Bob Masters, Bob Dean, David Klem, and Claudia Trupp for joining me in the morning CLE presentations. I would like as well to thank the dozens of Executive Committee members who attended the afternoon committee meeting. We addressed a number of "hot topics" calling for Section input, including the use of force by the police and discipline for prosecutorial misconduct. Shortly before the meeting, by email, we had voted to support the Report of the Task Force on Discovery, and a set of proposed standards for lawyers representing juveniles promulgated by another state bar Section. Despite our occasional divisions, we concluded a very substantive meeting—and with nary a word spoken in anger. (For those who might be interested, the Bar Association's Executive Committee and the House of Delegates approved the Task Force Report without a recorded dissenting vote, and with but one abstention.)

In my view, the high point of the day was the award lunch. Hey, the beef was *excellent,* and that yam-type stuff was none too shabby. But it was the All-Star cast of award winners that made the event special. Terrence Connors, Judge Robert Russell, DA Gerald Mollen, and Judges Smith and Graffeo were the worthies. We were immensely pleased to offer each of them a token in recognition of their important career work. Also in the audience were Chief Judge Lippman, Judge Pigott, and—at the end—Judge Ciparick. We had a court quorum—a hard thing to come by these days even in Albany.

In more somber news, we are overdue in acknowledging the passing of Ed Davidowitz. I should, no doubt, speak of the Honorable Edward M. Davidowitz, of the New York Court of Claims and the New York Supreme Court (ret.), but I don't care. I'll stick with Ed. Ed was not only a great lawyer, judge, legal scholar, mentor, and friend, but to boot an extremely valuable contributor to our work in the Section. And I've never heard a negative word spoken about him; Ed was a gentleman and a great human being. We offer condolences to his loving family.

In the title of this column I mention "ends." Well, this is my final column, as my term as Chair is about up. As to the earlier columns—most importantly, *please* remember "the only rule" in your writing. Otherwise, let me thank my fellow officers—Sherry, Bob, and Tucker—for keeping the ship mostly upright. Let me add special thanks to Pat Johnson and Amy Jasiewicz, who have performed the generally thankless administrative tasks that have plugged the leaks in the ship's bottom. It has been an honor and a pleasure to be Chair, and I look forward to many years of working with you for Truth, Justice, and the American Way as a former Chair.

Mark R. Dwyer

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

Message from the Editor

In this issue, we present three feature articles which deal with a variety of issues affecting criminal law. Our first article discusses concerns raised by the United States Supreme Court with respect to overreach by federal prosecutors in bringing various prosecutions. Our second article concerns the personnel changes which are being experienced within the New York Court of Appeals and the unfortunate delay which has resulted in confirming the two nominees who have been selected to replace Judge Graffeo and Judge Smith. Although Judge Stein was nominated in early November, and Judge Fahey was picked by Governor Cuomo on January 15, neither one had been confirmed by the Senate until mid-February and the Court had been forced to function with only five Judges for several months. The changes in the New York Court of Appeals are discussed in the second feature article and biographical material is provided for both of the new members of the Court.

In our third feature article, we present an interesting and important article having to do with an analysis of the recent Court of Appeals case, *People v. Peque.* This case required trial judges to advise all criminal defendants pleading guilty to felony crimes that if they are not citizens of the United States, their conviction may render them deportable. The possible ramifications of the *Peque* decision are discussed by Sheila Bautista, an Assistant District Attorney in the Appeals Bureau of the New York County District Attorney's Office. Sheila Bautista previously made a contribution to our *Newsletter* and we welcome her return as the author of the third featured article.

As usual, we also present our New York Court of Appeals review where we discuss several recent decisions that have been issued by the New York Court of Appeals. The United States Supreme Court has just begun issuing some criminal law decisions and also has several matters concerning criminal law and constitutional issues. We discuss all of these cases in our Supreme Court section. We also continue to present important and interesting cases which have been decided by the various Appellate Divisions during the past several months. Our For Your Information section continues to provide information on a variety of matters including the recent nomination of Loretta Lynch as the new United States Attorney General. We also discuss new rules regarding the confinement of juvenile inmates, as well as the results of the July 2014 bar exam.

Since our Section held its Annual Meeting on January 29, 2015, at the New York Hilton Midtown, we also provide photos and details regarding the activities at our Awards Luncheon and CLE Program. We were pleased to have former Judge of the New York Court of Appeals Victoria Graffeo address the luncheon as our featured speaker. Judge Graffeo and Judge Smith were also presented with awards for their distinguished judicial service on the Court. Several of the Judges from the Court of Appeals attended the Luncheon in honor of their former colleagues. Several other awards were also presented to noteworthy recipients. It was a pleasure to recognize those individuals for their outstanding work and service to the criminal justice system. The names of this year's award winners are published in our About Our Section and Members article. We also present in that article information regarding the current status of our membership and financial condition.

I thank our Members for their continued support of our *Newsletter*. I continue to urge the submission of articles for possible publication and I look forward to any comments or suggestions regarding our publication.

Spiros A. Tsimbinos

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U.S. Supreme Court Questions Overreach by Federal Prosecutors

By Spiros A. Tsimbinos

In two recent cases, the United States Supreme Court questioned and severely criticized prosecutions which were commenced by federal prosecutors and which the Court found involved improper prosecutorial overreach. On June 2, 2014, at the end of the Supreme Court's recent term, the Court, in a unanimous decision, held that a federal statute which utilized a provision of the International Chemical Weapons Treaty could not be used to reach a local offense which was clearly outside of the scope of the statute. In *Bond v. U.S.,* 134 S.Ct. 2077 (2014), a jilted wife had attempted to injure her husband's lover by spreading two toxic chemicals on a mailbox and a door knob. Pennsylvania prosecutors had charged the defendant with only a minor offense based on harassment and had declined to prosecute her for any type of assault.

However, because the crime happened on a U.S. mailbox, postal inspectors got involved and the Justice Department assumed jurisdiction. Federal prosecutors charged the defendant not only with two counts of mail crimes, but also with violating Section 229(a) of the United States Code which supplemented the International Chemical Weapons Treaty and which carried a possible 20-year sentence. In fact, after her conviction, Bond was sentenced to 6 years. The Court found that a fair reading of the statute indicated that it was not Congress' intention to utilize the statute in instances involving local criminal activity, which was best left to the states. In reaching its conclusion, the Court stated at page 134 S.Ct., 2093:

> Prosecutorial discretion involves fully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State. Here in its zeal to prosecute Bond, the Federal Government has "displaced" the "public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign," that Bond does not belong in prison for a chemical weapons offense. *Bond I, supra*, at __, 131 S.Ct., at 2366; see also *Jones, supra*, at 859, 120 S.Ct. 1904 (Stevens, J., concurring) (federal prosecution of a traditionally local crime "illustrates how a criminal law like this may effectively displace a policy choice made by the State").

In early November another case was orally argued before the U.S. Supreme Court which involved the conviction of a commercial fisherman, John Yates, for destroying evidence. In the case at bar, prosecutors had charged Yates under the Sarbanes-Oxley Act of 2002. This act had been passed in response to the Enron accounting scandal when scores of documents were shredded to conceal wrongdoing. Part of the Sarbanes-Oxley Law prohibits knowingly altering or destroying any record, document or tangible object with the intent to obstruct an investigation. The government's theory for prosecution was that the term "tangible object" included the fish which were tossed overboard.

In the case involving defendant Yates, a federally deputized state fish and wildlife conservation officer boarded his boat in the Gulf of Mexico for a routine inspection. The officer found that 72 red grouper out of a catch of about 3,000 were undersized. The officer issued a citation and made Yates isolate illegal fish so they could be destroyed when the boat returned to dock. Later, at the dock, the inspector found that the fish did not match his original measurements. He questioned the crew and discovered that Yates had ordered them to throw the undersized fish overboard and replace them with larger fish.

In 2011, a jury found Yates guilty of destroying property to prevent a federal seizure and destroying a "tangible object" to obstruct a federal investigation. He was sentenced to 30 months in jail followed by three years' supervised release. Prosecutors had sought two years in prison.

During oral argument several Supreme Court Justices raised serious questions regarding the federal prosecution. "What kind of a mad prosecutor would try to send this guy up for 20 years in prison or risk sending him up for 20 years?" asked Justice Scalia. Justice Scalia further added, "Who do you have out there that exercises prosecutorial discretion? Is this the same guy who bought the prosecution in Bond last term?"

Chief Justice Roberts remarked to the prosecutor arguing the case, "You make him sound like a mob boss or something." Justice Kennedy remarked, "Perhaps Congress should have called this the Sarbanes-Oxley-Grouper Act." Justice Breyer also indicated that the law could be void for vagueness under the interpretation advanced by the prosecution. Justice Breyer remarked "If you can't draw a line, it seems to me that the risk of arbitrary and discriminatory enforcement is a real one."

The issue of prosecutorial overreach generated by the two cases discussed above has led to increasing public concern regarding the issue. Amicus briefs in support of

Yates were filed by several organizations, including the National Association of Criminal Defense Attorneys, the United States Chamber of Commerce, and some 18 professors of criminal law from across the country. In addition, a major article on the issue by authors Robert J. Anello and Richard F. Albert appeared in the December 3 issue of the *New York Law Journal* at pp. 3 and 8. The two prosecutions in question certainly appear bizarre and unwarranted. Whether it was bad judgment, personal factors, or a change in priorities, there appears to be no rational reason why years of litigation should have been expended on these two matters and thereby reducing resources available for National Security and serious crime concerns.

On Wednesday, February 25, 2015, the Supreme Court in a 5-4 decision held that prosecutors had indeed engaged in improper overreach and reversed the Yates conviction. Chief Justice Roberts writing for the majority stated that the Courts would not allow prosecutions to be upheld based upon tortured legal analysis. The *Bond* and *Yates* decisions clearly indicate that the Court has grave concerns regarding overreach by federal prosecutors. It is hoped that federal prosecutors take note of the Court's concern and begin to adequately address the issue.

New York Court of Appeals Undergoes Personnel Change—Part II

By Spiros A. Tsimbinos

In our last issue, we discussed the appointment of Leslie Stein to replace Judge Graffeo on the New York Court of Appeals. A second vacancy occurred as of December 31, 2014 when Judge Robert Smith reached the mandatory retirement age of 70. On December 1, 2014 the Commission on Judicial Nominations forwarded to the Governor a list of seven candidates to replace Judge Smith. The list included Justices Eugene Fahey and Erin Peradotto, who are currently sitting on the Appellate Division, Fourth Department. The other five individuals are currently partners in major law firms. The five partners consisted of Kathy Chin from Cadwalader, Wickersham and Taft LLP; Hector Gonzalez, a partner from Dechert LLP; Mary Kay Vyskocil, a partner at Simpson Thacher & Bartlett LLP since 1991; Rowan Wilson, a partner at Cravath, Swaine & Moore since 1992; and Stephen Younger, a partner at Patterson, Belknap, Webb &Tyler LLP.

Governor Cuomo had by statute between January 5 and January 15 to make his selection, and on January 15 he selected Justice Eugene Fahey as his nominee. Justice Fahey served in the Appellate Division, Fourth Department since 2006. He is a graduate of Buffalo Law School and was a member of the Buffalo Common Council. He became a Buffalo City Court Judge in 1995, and a Supreme Court Justice from 1977 to 2006. He previously worked in private counsel and for the Kemper Insurance Company as counsel before joining the Bench. Justice Fahey is 63 years old and had previously appeared on the list of candidates to fill New York Court of Appeals vacancies. Judge Fahey is a Democrat and the political composition of the Court will now be altered to reflect five Democrats and two Republicans. In terms of geographical balance, the Court will consist of three Judges from the City of New York and four Judges from Upstate.

Both Judges Graffeo and Smith have entered private practice following their service on the New York Court of Appeals, and in fact, Judge Smith upon leaving the Court joined the 60-attorney law firm of Friedman Kaplan Seiler and Adelman. Judge Smith will serve as an active litigation partner as head of the firm's appellate practice. Judge Graffeo has joined the firm of Harris Beach in Albany, New York as a named partner.

The delay caused by both the Governor and the State Senate in acting to fill the two vacancies which occurred in the New York Court of Appeals had caused some problems in the Court's operations and had led to a few cases having to be reargued since the Court was unable to reach a four-Judge majority with only five Judges available to hear the cases. Several other cases had to be rescheduled because of recusals by some of the Judges. Finally, in early February, the State Judiciary Committee approved both Judges Stein and Fahey and on February 9, 2015 the full Senate voted to confirm the Governor's nominees. They then began hearing cases on February 17, 2015.

Request for Articles

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

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

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People v. Peque: A New Due Process Requirement with Many Open Questions

By Sheila L. Bautista

On November 19, 2013, the Court of Appeals decided *People* v. *Peque*, which now requires trial court judges to advise all criminal defendants pleading guilty to felony crimes that if they are not citizens of the United States, their conviction may render them deportable.[1] *Peque* overruled the Court's 1995 decision in *People* v. *Ford*,[2] which had previously held that the failure to provide deportation warnings to noncitizen defendants did not violate due process because deportation is a collateral consequence of a criminal conviction.[3] Similar to the analysis underlying the Supreme Court's decision in *Padilla v. Kentucky*,[4] *Peque* discussed how federal immigration laws passed in 1996 significantly curtailed discretion to grant relief from deportation, which in turn increased the likelihood that a criminal defendant might face deportation following conviction of a removable crime.[5] Reasoning that deportation as a consequence of conviction is more of a certainty now than when *Ford* was decided, *Peque* held that deportation is one of those "rare" situations, previously alluded to in *People v. Gravino* and *People v. Harnett*,[6] in which a collateral consequence of a criminal conviction could affect the voluntariness of a defendant's guilty plea.[7]

To satisfy the requirements of *Peque*, the court must tell the defendant pleading guilty to a felony, in substance, that if the defendant is not a citizen of the United States, he or she may be deported upon a guilty plea.[8] In that respect, the *Peque* requirement is more general than what is required of defense counsel under *Padilla*.[9] Thus, *Peque* also suggested, but did not require, that courts encourage a defendant to speak to defense counsel about what particular deportation consequences might arise from pleading guilty.

The *Peque* decision provided some guidance about the procedure for criminal defendants to obtain relief under the new due process requirement. One rule the Court discussed was preservation. When a defendant has "no practical ability to object to an error in a plea allocution which is clear from the face of the record," then a *Peque* challenge to the conviction need not be preserved by way of a CPL 220.60(3) motion to withdraw a guilty plea or a CPL 440.10 motion to vacate a conviction.[10] For example, if there is no proof that a defendant was aware that deportation was a possible consequence of pleading guilty, then the *Peque* challenge need not be preserved. Ironically, the defendant in *Peque* was unable to obtain relief from the rule that bears his name. At sentencing, Peque's attorney told the court that defendant would be subject to deportation after he completed his sentence. Facing 17½ years in prison and 5 years of post-release supervision for committing first-degree rape, Peque asked the sentencing court for "mercy" and requested that he be deported back to his home country within five years. By doing so, he demonstrated his awareness that he could be deported if he pleaded guilty; thus, he was required to preserve his due process challenge to the guilty plea. The Court ultimately found that he had failed to do so.[11]

Peque also made clear that a court's failure to provide a deportation warning to a defendant pleading guilty does not automatically entitle a defendant to relief. Once a *Peque* violation has been established on appeal, then the case should be remitted to the trial court for a defendant to demonstrate prejudice by way of a motion to vacate the plea. Upon a facially sufficient motion, the court should grant a hearing to give the defendant an opportunity to demonstrate prejudice arising from the court's failure to warn—that is, a "reasonable probability" that if he had known that the guilty plea potentially rendered him deportable, he would not have pleaded guilty and would instead have gone to trial. In making the prejudice determination, the court may consider the favorability of the plea, the potential consequences the defendant might face upon conviction after trial, the strength of the People's case, the defendant's ties to the United States, and any advice defense counsel may have given regarding deportation.[12]

This new hybrid, two-stage procedure, combining aspects of direct and collateral review, has raised a host of questions for criminal practitioners, few of which have been addressed in subsequent appellate decisions. First of all, how may a defendant bring a *Peque* claim? By creating the procedural mechanism for appellate courts to remit cases with *Peque* violations back to the trial court for a prejudice hearing, the *Peque* court arguably directed that these claims must be brought on direct appeal, rather than in a collateral post-conviction motion.[13] The Appellate Division, First Department espouses this view and has ruled that a *Peque* claim cannot be brought collaterally via CPL 440.10 motion because the failure to administer a *Peque* warning is the kind of error that is apparent from the record that must be brought on direct appeal.[14]

The next question is, what procedural rules govern the second-stage prejudice proceeding? The *Peque* court provided limited guidance to this question. *Peque*'s requirement that a defendant present a facially sufficient plea vacatur motion before the court holds a hearing to determine prejudice mirrors the requirements of CPL 440.30. Yet, it is unclear from *Peque* whether 440.30 applies in full.

Finally, the issue of *Peque's* retroactivity to convictions that were final before the case was decided has to be considered. Thus far, the Appellate Division, First Department is the only appellate court to decide the issue of *Peque*'s retroactive and prospective application. In *People v. Llibre*, the court ruled that *Peque* does not apply retroactively to convictions that were final before *Peque* was decided.[15] However, if a defendant had a direct appeal pending when *Peque* was decided, he may raise a *Peque* claim on direct appeal.[16] In other words, if a defendant filed a notice of direct appeal prior to the date *Peque* was decided, but the direct appeal had not yet been completed by that date, he may obtain *Peque* relief on direct appeal. In *People v. Brazil*, the People argued that *Peque* should apply only prospectively to cases in which judgment was entered after the date of the *Peque* decision, but the First Department rejected that argument on the ground that *Peque* announced a rule of federal constitutional law. But the court denied *Peque* relief on the grounds that the defendant misrepresented to the court that he was a United States citizen. The defendant's application for leave to appeal the decision in *Brazil* is currently pending.

Though the new due process requirement in *Peque* sounds simple, the decision leaves open many complex questions. Time will tell how these issues will be resolved.

Endnotes

1. *People v. Peque*, 22 N.Y. 3d 168, 197 (2013). The *Peque* court did not decide whether deportation warnings are also required for misdemeanor convictions.
2. *People v. Ford*, 86 N.Y.2d 397, 403 (1995).
3. Since 1996, CPL 220.50(7) has also required courts to advise defendants pleading guilty of the deportation consequences of their criminal conviction. The statute also provided that "failure to do so does not affect the voluntariness of a guilty plea," which is no longer the law of the state, in light of the *Peque* decision. *See* William C. Donnino, Practice Commentary to CPL 220.10, McKinney's Cons. Laws of N.Y., Book 11A, at 25 (2014).
4. In 2010, *Padilla v. Kentucky*, 559 U.S. 356 (2010), announced a new rule requiring defense attorneys to advise noncitizen criminal defendants of the deportation consequences of pleading guilty.
5. *Peque*, 22 N.Y.3d at 187-88.
6. *People v. Gravino*, 14 N.Y.3d 546, 559 (2010), and *People v. Harnett*, 16 N.Y.3d 200, 207 (2011), dealt with the collateral consequences arising from the conviction of sex offenders. Though failure to warn of those collateral consequences did not implicate the voluntariness of guilty pleas in those cases, the Court acknowledged the possibility that there may be a "rare case" where the failure to warn about the collateral consequence of a guilty plea could indeed violate due process.
7. *Peque*, 22 N.Y.3d at 192.
8. *Peque*, 22 N.Y.3d at 197.
9. When the deportation consequences of a criminal conviction are "succinct, clear, and explicit" from the statute mandating an individual's removal, defense counsel must advise a criminal defendant that the guilty plea will result in a deportable conviction. *Padilla*, 559 U.S. at 369. Yet when the deportation consequences of a conviction are unclear, defense counsel must only advise a client of the possibility of deportation. *Padilla*, 559 U.S. at 357.
10. *Peque*, 22 N.Y.3d at 182-83.
11. *Peque*, 22 N.Y.3d at 178, 183.
12. *Peque*, 22 N.Y.3d at 198-99, 200-01.
13. *Peque*, 22 N.Y.3d at 200-01.
14. *People v. Llibre*, Slip Op. 00817, at *1 (1st Dept. Feb. 3, 2015); *People v. Simpson*, 120 A.D.3d 412 (1st Dept.), *lv. denied*, 24 N.Y.3d 1046 (2014).
15. *Llibre*, Slip Op. 00817, at *2.
16. *People v. Brazil*, 123 A.D.3d 466, 466 (1st Dept. 2014).

Sheila L. Bautista is an Assistant District Attorney in the Appeals Division of the New York County District Attorney's Office. She is a previous contributor to the *Newsletter*.

New York Court of Appeals Review

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from October 21, 2014 to January 30, 2015. Due to the fact that replacements for Judges Graffeo and Smith were not confirmed by the State Senate until February 9, 2015, some of the decisions summarized below were decided without a full complement of seven Judges. Several cases also had to be reargued or delayed for oral argument.

Right to Counsel

***People v. McLean*, decided October 21, 2014, (N.Y.L.J., October 22, 2014, pp. 10 and 18)**

In a 5-2 decision the New York Court of Appeals held that when police are told by a lawyer that he no longer represents a suspect, they are free to question the defendant without violating his right to counsel. Counsel had represented a defendant with respect to a 2003 robbery case which had been concluded. Subsequently, police wanted to question the defendant regarding a 2002 murder and had asked defense counsel whether he still represented the defendant. The attorney replied no and said the defendant has been sentenced, and the robbery case was over. The five-Judge majority, in an opinion written by Judge Smith, rejected the defendant's appellate argument that his statements about the murder were involuntary and should have been suppressed. The majority concluded that the police had an excellent reason to believe that the attorney-client relationship had ended and that thereafter questioning by the police did not violate the defendant's right to counsel. Chief Judge Lippman and Judge Rivera dissented and argued that an ambiguity existed as to whether the defendant was represented and that the police should have conducted a more detailed inquiry regarding his invocation of the right to counsel.

Failure to Charge on Justification Issue and Adverse Inference

***People v. Blake*, decided October 21, 2014 (N.Y.L.J., October 22, 2014, p. 18)**

In a unanimous decision, the New York Court of Appeals rejected the defendant's argument that his attorney should have requested a justification charge and adverse inference charge. After reviewing the record, the Court concluded that there was no reasonable possibility that the jury, if offered the opportunity, would have elected to draw an adverse inference against the prosecution or to conclude that the defendant's conduct was justified. Under these circumstances it could not be said that defense counsel's failure to request the charges in question constituted the ineffective assistance of counsel.

Adjournment of Trial

***People v. William O'Daniel*, decided October 21, 2014 (N.Y.L.J., October 22, 2014, p. 20)**

In the case at bar, defendant's retained counsel was suffering from a debilitating medical condition and on the day of trial requested an adjournment for one week. The trial court granted the request but subsequently additional adjournments were requested on the basis of medical reasons. The defendant's file was eventually taken over by another attorney who subsequently requested additional adjournments so that the original attorney could enter the case. The Court was advised, however, that if necessary the second attorney had reviewed the defendant's file and would be ready to proceed to trial if required. The trial court subsequently denied any further adjournments and the case proceeded to trial with the second attorney. On appeal, the defendant claimed that the trial court violated his right to have the counsel of his choosing. The Court of Appeals in a 6-1 decision concluded that the record did not indicate that the defendant was asking for an adjournment in the hope that his original attorney would recover quickly enough to become his trial counsel. Rather the defendant simply sought an adjournment to give his second counsel more time to prepare. Under these circumstances there was no obligation on the part of the trial court to conduct a further inquiry since the defendant's second counsel had already indicated that he was ready to proceed to trial. Chief Judge Lippman dissented and argued that the second attorney was never formally substituted as the defendant's counsel and was merely appearing at the request of the original attorney to accommodate the trial court's concerns. Judge Lippman argued that in effect the defendant was forced to proceed to trial with a lawyer he had not retained.

Sufficiency of Evidence

***People v. Horton*, decided October 21, 2014 (N.Y.L.J., October 22, 2014, p. 21)**

In a unanimous decision, the New York Court of Appeals determined that the evidence seen in the light most favorable to the people was sufficient to establish that the defendant knew that a confidential informant might testify in a proceeding and that he wrongfully sought to stop her from doing so. Under these circumstances, the defendant's conviction for fourth degree witness tampering was upheld. In the case at bar messages had been sent on Facebook denouncing snitches in general and the confidential informant specifically and included warnings that "snitches get stiches and I hope she gets what's coming to her." The Court held that these types of postings were sufficient to uphold the conviction in question.

Timeliness of Double Jeopardy Article 78

***Smith v. Brown and Holder*, decided October 21, 2014 (N.Y.L.J., October 22, 2014, p. 21)**

In a unanimous opinion, the New York Court of Appeals reversed an Appellate Division ruling regarding a defendant's application to prohibit a re-trial. In the case at bar the defendant's original trial had resulted in a mistrial after the Court refused to proceed with only eleven jurors remaining. The defendant had commenced an Article 78 proceeding more than two years after the original trial. The people claimed that the Article 78 petition was untimely because it was filed more than four months after the mistrial had been declared. Although the Appellate Division had upheld the petition under a "continuing harm" theory, the New York Court of Appeals concluded that the proceeding was barred by the statute of limitations and that the defendant was obligated to have commenced his proceeding within the statutorily prescribed time frame.

Preservation

***People v. Turner*, decided October 23, 2014 (N.Y.L.J., October 24, 2014, p. 22)**

In a 5-2 decision, the New York Court of Appeals reversed a defendant's conviction, vacated the plea and remitted the matter to the trial court for further proceedings. The Court concluded that the trial Judge should have notified the defendant regarding the term of post-release supervision sufficiently in advance of its imposition so that the defendant would have the opportunity to object to the deficiency in the plea proceeding and in the absence of such an opportunity, preservation is unnecessary. The defendant claimed that her plea was not knowingly and voluntarily entered when she first received notice of the imposition of a term of post-release supervision at sentencing and submitted to the sentencing with the post-release supervision addition. The Court of Appeals concluded that to meet due process constitutional requirements, a defendant must be aware of the post-release supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action. A defendant cannot be expected to object to a constitutional deprivation of which she is unaware. Judge Abdus-Salaam and Judge Smith dissented.

Admissibility of Statements

***People v. Ludwig*, decided October 23, 2014 (N.Y.L.J., October 24, 2014, p. 23)**

In a 5-2 decision, the Appellate Division concluded that a trial Judge did not abuse his discretion when he permitted the people to elicit testimony about complainant's consistent prior statements disclosing sexual abuse and precluded defendant's mother from testifying about a prior allegedly inconsistent statement made by the complainant. The Court found that the challenge testimony was admissible for the non-hearsay purpose of explaining to the jury how and when the sexual abuse came to light, resulting in an investigation and defendant's eventual arrest. The defendant's mother's proffered testimony, however, was inadmissible hearsay not subject to any exception. Chief Judge Lippman and Judge Rivera dissented and argued that the evidence admitted unfairly bolstered the complainant's testimony and constituted reversible error.

Criminal Possession of a Controlled Substance in the First Degree

***People v. Kims II*, decided October 23, 2014 (N.Y.L.J., October 24, 2014, p. 25)**

In the case at bar the trial court had charged the jury on defendant's knowing criminal possession of drugs under the "drug factory" presumption in Penal Law Section 220.25(2). The Court of Appeals concluded that the defendant was not within "close proximity" to the drugs found in his apartment once he exited the premises and entered his car. Further, no evidence suggests that he was in immediate flight from the premises in an attempt to escape arrest. Therefore, the trial court erroneously charged the jury with respect to the charges in question.

Admissibility of Statements

***People v. Cullen*, decided October 23, 2014 (N.Y.L.J., October 24, 2104, p. 27)**

In a unanimous decision, the New York Court of Appeals determined that the trial Judge did not abuse his discretion when he allowed the people to elicit testimony about the fact and timing of complainant's revelations regarding sexual abuse for the non-hearsay purpose of explaining the events which led to the investigative process that resulted in charges filed against the defendant. The defendant had been charged with second degree rape and second degree incest as well as other crimes. In the case at bar, the complainant had admittedly passed up many opportunities to report defendant's alleged sexual misconduct and the defendant attributed her accusations to the wrath of a troubled girl. The jury was therefore permitted to consider evidence of the circumstances of complainant's delayed disclosure.

Vacation of Plea

***People v. Moore*, decided October 23, 2014 (N.Y.L.J, October 24, 2014, p. 27)**

The defendant had entered a guilty plea to criminal possession of a controlled substance in the seventh degree. The trial court in accepting the plea did not address the defendant and the defendant was not advised of any

constitutional rights he was waiving. Because the record failed to establish that the plea was knowingly and voluntarily made, the New York Court of Appeals concluded that it must be vacated. Since the defendant had already completed the sentence which was imposed, the accusatory instrument was also dismissed.

Pre-Arraignment Interviews

***People v. Dunbar*, decided October 28, 2014 (N.Y.L.J, October 29, 2014, pp. 1, 2 and 23)**

In a 6-1 decision, the New York Court of Appeals held that a pre-arraignment interview procedure which had been routinely used by the Queens District Attorney's Office was invalid. Prior to advising a defendant of his rights, a preamble was read to the suspect which included statements such as "this is your opportunity to tell us your story, you have to tell us now and if you have an alibi, give me as much information as you can." The Court found that the preamble in question rendered subsequent Miranda warnings, inadequate and ineffective. The majority opinion was written by Judge Read and concluded that the preamble "undercut the meaning of the Miranda warnings which followed." The procedure used by the Queens Office has been the subject of a great deal of controversy over the course of the last several years, and some 15,000 defendants have undergone such interviews since 2007. The Appellate Division, Second Department found the interview procedure to be improper and the Court of Appeals affirmed the Appellate Division holding. Judge Smith dissented and argued that Miranda did not require law enforcement officials to repress or forbid defendants to make statements to law enforcement officials. Following the New York Court of Appeals decision, Judge Brown indicated that his office would seek certiorari in the United States Supreme Court and a petition was recently filed.

Double Jeopardy

***People v. Sweat*, decided October 28, 2014 (N.Y.L.J, October 29, 2014, p. 26)**

In a unanimous decision, the New York Court of Appeals held that where a Court subjects a defendant to conditional imprisonment in an attempt to compel defendant to testify and does not otherwise adjudicate defendant to be in criminal contempt or impose punishment that is criminal in nature, double jeopardy will not bar a subsequent prosecution for contempt under the Penal Law.

Dismissal of Appeal

***People v. Polhill*, decided October 28, 2014 (N.Y.L.J, October 29, 2014, p. 27)**

In a unanimous decision, the New York Court of Appeals dismissed a people's appeal on the grounds that the Appellate Division's determination was based upon a mixed question of law and fact and that since the Appellate Division's reversal was not on the law alone, or upon the law and such facts which but for the determination of law would not have led to reversal, the order was not appealable. The Appellate Division had determined that identification evidence should have been suppressed because the people lacked reasonable suspicion to stop and detain the defendant on the street. Pursuant to CPL 450.90(2)(a), the Appellate Division order was not appealable.

Double Jeopardy

***Gorman v. Rice*, decided November 18, 2014 (N.Y.L.J, November 19, 2014, pp. 7 and 22)**

In a unanimous decision, the New York Court of Appeals ruled that no double jeopardy had attached when the trial court ordered a mistrial regarding drunken driving charges which had been filed against the defendant. Following repeated contention between defense counsel and the trial court, the defense attorney indicated to the judge that he intended to file a complaint against the judge for bias. The trial judge then stated that he was declaring a mistrial based upon the threats of counsel. The trial judge subsequently told defense counsel and the defendant that they had five minutes to decide whether they wanted him to continue to preside over the trial or whether they wanted a mistrial. The defendant opted for a mistrial but then claimed in an Article 78 proceeding that double jeopardy had attached. The New York Court of Appeals determined that the record in the case at bar made clear that the trial judge was leaving the mistrial decision up to the defendant. Because she decided to go with the mistrial, she consented to it and her double jeopardy claim failed.

CPL 440.10 Motion

***People v. Grubstein*, decided November 18, 2014 (N.Y.L.J, November 19, 2014, p. 22)**

In a unanimous decision the New York Court of Appeals held that a defendant who asserted that he was deprived of his right to counsel when he pleaded guilty pro se is not barred from raising that claim in a motion under CPL 440.10 by his failure to raise it on direct appeal. In an opinion by Judge Smith, the Court stated that there was an obvious risk of unfairness in applying a procedural bar when the defendant raises the issue of being deprived of his right to counsel. The Court argued that if a defendant was indeed deprived of that right the very deprivation may well have led him either not to appeal or not to have presented the issue to an Appellate Court. A defendant who has wrongly been deprived of a lawyer can hardly be blamed for failing to follow customary legal procedures.

Right to Remain Silent

***People v. Hill*, decided November 18, 2014 (N.Y.L.J, November 19, 2014, p. 22)**

In a unanimous decision the New York Court of Appeals reversed a defendant's conviction and ordered a new trial. In the case at bar, the trial judge had allowed the prosecution to introduce evidence that the defendant remained silent at the time of arrest. Citing established law, the Court concluded that such a ruling was impermissible. The Court stated, "Under the circumstances presented, we conclude that defendant did not open the door to evidence of his post-Miranda silence and, therefore, Supreme Court erred in permitting its introduction at trial. Nor can the error be viewed as harmless in this case."

Preservation

***People v. Caza*, decided November 20, 2014 (N.Y.L.J, November 21, 2014, p. 21)**

In a unanimous decision the New York Court of Appeals refused to address in the defendant's argument that the County Court erred in enhancing her sentence by departing from its conditional promise to make her two terms of imprisonment run concurrently. The Court concluded that the issue was not properly preserved for Court of Appeals review and that therefore, the Order of the Appellate Division had to be affirmed.

***People v. Davis*, decided November 20, 2014 (N.Y.L.J, November 21, 2014, p. 21)**

In a unanimous decision the New York Court of Appeals determined that the defendant had failed to bring a motion to withdraw his plea on the CPL 220.60(3) or a motion to vacate the judgment of conviction pursuant to CPL 440.10. Nor did his factual recitation negate the intent element of the crime to which he pleaded guilty. The panel therefore concluded that his guilty plea did not qualify for the rare case exception to the preservation requirement. Consequently, defendant's challenge to the factual sufficiency of his allocution "was properly rejected by the Appellate Division and its order upholding the plea and conviction should be affirmed" (*People v. Toxey*, 86 NY2d 725, 726 [1995].

Inconsistent Verdict

***People v. Delee*, decided November 24, 2014 (N.Y.L.J, November 25, 2014, pp. 1, 6 and 23)**

In a unanimous decision the New York Court of Appeals held that it was legally inconsistent to find a defendant guilty of manslaughter as a hate crime while acquitting him at the same time of plain manslaughter. The Court also ruled, however, that prosecutors would be allowed to resubmit the vacated manslaughter charge as a hate crime count to another grand jury. In this regard, the Court stated that

> There is no constitutional or statutory provision that mandates dismissal for a repugnancy error. Given that New York's repugnancy jurisprudence already affords defendants greater protection than required under the Deferral Constitution (see *Muhammad*, 17 NY34d at 538), permitting a retrial on the repugnant charge upon which the jury convicted, but not on the charge of which the jury actually acquitted defendant, strikes a reasonable balance. This is particularly so given that a reviewing court can never know the reason for the repugnancy. Accordingly, the People may resubmit the crime of first-degree manslaughter as a hate crime to a new grand jury (see People v. Mayo, 48 NY2d 245, 253 [1979]).

Judge Read issued the Court's main opinion and Judge Abdus-Salaam issued a concurring opinion.

Mode of Proceedings Error

***People v. Silva*, decided November 24, 2014 (N.Y.L.J, November 25, 2014, p. 23)**

In a 5-1 decision the New York Court of Appeals held that a mode of proceedings error occurred when the trial court accepted a verdict without affirmatively acknowledging or responding to a jury's substantive request for information during their deliberations. In the case at bar, the jury, during their second day of deliberations, had sent a note requesting further information on a particular issue. The note was marked as a court exhibit but nothing in the record demonstrates the Court informed the parties about the jury inquiry. Subsequently, the jury sent another note indicting that a verdict had been reached. The Court indicated that in prior decisions and in reliance of CPL 310.30 it had outlined a careful procedure to be followed when a jury note was delivered to the Court. In the case at bar these procedures were not followed and the failure to preserve the issue did not bar Appellate review since it fell within the narrow exception reserved for mode of proceeding errors that go to the essential validity of the judicial process. The defendant's conviction should therefore be modified so as to vacate the conviction in question. Judge Smith issued a dissenting opinion. Judge Abdus-Salaam took no part in the decision.

Search and Seizure

***People v. Argyris, People v. Disalvo, People v. Johnson*, all decided November 25, 2014 (N.Y.L.J, November 26, 2014, pp. 1, 6 and 22)**

In *People v. Argyris* and *People v. Disalvo*, the New York Court of Appeals in a 4-3 vote upheld the defendants' convictions for weapons possession. The police had arrested the defendants after they had received a 911 com-

munication that four big, bully white guys had gotten into a black Mustang in the Astoria section of Queens and one of them had a big gun. The caller had also reported the vehicle's license plate. The police had stopped the vehicle in question and had discovered that Argyris was wearing a bulletproof vest and Disalvo had a revolver in his waistband. The four-Judge majority consisting of Judges Graffeo, Smith, Pigott and Abdus-Salaam stated that the stop was justified using either the *Aguillar-Spinelli* standard or the so-called totality of circumstances test. The majority ruled that because sufficient information in the record supports the lower Court's determination that the tip was reliable, the lawfulness of the stop is beyond further review. Judges Rivera, Lippmann and Read dissented.

In the case of defendant Johnson, the Court held that evidence of his intoxication discovered after a traffic stop could not be used against him. In *Johnson*, the anonymous caller stated that Johnson was either sick or intoxicated. His vehicle was pulled over after a Sheriff's Deputy stated that it was briefly straying into an oncoming lane of traffic. The Court's opinion concluded that the caller's cursory allegation that the driver of the car was either sick or intoxicated, without more, did not supply the Sheriff's Deputy with reasonable suspicion that the defendant was driving while intoxicated so as to justify the stop in question. Judges Graffeo, Smith, Pigott and Abdus-Salaam supported the majority opinion. Judges Smith and Pigott issued a separate concurring opinion.

Preservation

People v. Allen, decided November 25, 2014 (N.Y.L.J, November 26, 2014, p. 22)

In a unanimous decision, the New York Court of Appeals held that a duplicity argument based on trial evidence must be preserved for appeal where the count is not duplicitous on the face of the indictment. In the case at bar, the defendant attempted to shoot the victim while he was in the street but the gun did not fire. Approximately ten minutes later, the defendant fired two shots in front of the victim's house, one of which hit the victim in the head and killed him. The defendant was charged with one count of second degree murder and one count of attempted second degree murder. The defendant was also charged with a separate count of attempted murder in the second degree. During opening arguments, the People raised both incidents of defendant attempting to shoot the victim (both the gun not firing and the missed shot in front of the house ten minutes later, applying the term attempted murder only to the earlier one. The defendant made no objection. In closing argument, the prosecutor did not clarify which incident formed the basis of the attempted murder count. The court also did not specify which conduct the attempted murder charge was based on. The defendant was convicted on all counts and received a sentence that was to run consecutively with respect to the attempted murder count. The Appellate Division had unanimously modified the judgment of conviction as a matter of discretion in the interest of justice by directing that all terms of imprisonment run concurrently. The defendant contended in the Court of Appeals that the jury verdict on the attempted murder count could have represented either a finding as to the first incident, the second incident, or a combination of the two. He further argued that preservation is unnecessary where a count is not duplicitous on its face but where it is the evidence produced at trial that renders a count duplicitous, contending that the defect constitutes a mode of proceedings error. The Court of Appeals rejected the defendant's argument and held that issues of non-facial duplicity like those of facial duplicity must be preserved for Appellate review.

Withdrawal of Guilty Plea

People v. Spears, decided November 25, 2014 (N.Y.L.J, November 26, 2014, p. 28)

In a 6-1 decision the New York Court of Appeals rejected a defendant's claim that defendant should have been granted an adjournment prior to sentencing so that he could further consider the issue of whether he would withdraw his guilty plea. In the case at bar the defendant was charged with a Class D felony in a sexual abuse crime. He pleaded guilty to a reduced charge, which was a misdemeanor, and was promised a sentence of six months' probation. Over two months later he appeared at sentencing and requested an adjournment. Defendant's counsel indicated that she had spoken to the defendant and he was requesting an adjournment in order to pursue the possibility of withdrawing his plea. The People opposed an adjournment, arguing that the defendant had over two months to consider his position. The New York Court of Appeals in its majority decision concluded that neither the defendant nor his counsel was able to articulate to the trial court a ground upon which the plea could be withdrawn. If defendant could have articulated such a ground it appears that the court would have been willing to grant an adjournment as evidenced by the Judge's inquiry about defendant's reason for his request. Although granting an adjournment would not have resulted in prejudice to the People, absent any indication that defendant had grounds to support a plea withdrawal, the trial court's refusal to grant the adjournment was not an abuse of discretion. Judge Pigott dissented.

Court of Appeals Review

People v. Jones, decided December 16, 2014 (N.Y.L.J, December 17, 2014, pp. 1, 2 and 22)

In a unanimous decision the New York Court of Appeals held that it would begin exercising the power to review whether lower courts that deny CPL 440.10 motions to vacate convictions have abused their discretion. In

issuing its ruling, the Court abandoned a position which it had taken nearly 40 years ago in the case of *People v. Crimmins*, 38 NY 2d 407, 2975. The Court in that case held that the review of a discretionary order denying a motion to vacate a judgment based on newly discovered evidence ceases at the Appellate Division. In an opinion by Judge Pigott, the Court held that the *Crimmins* decision needlessly restricted the Court's power of review and that it was time to follow a different path. In his opinion, Judge Pigott stated, "Although we are prohibited from weighing facts and evidence in noncapital cases, we are not precluded from exercising our 'power to determine whether in a particular judgmental and factual setting there has been an abuse of discretion as a matter of law' because, in so doing, we are not 'passing on facts as such, but rather considering them to the extent that they are a foundation for the application of law.'"

Search and Seizure

People v. Reid, decided December 16, 2014 (N.Y.L.J, December 17, 2014, pp. 1, 2 and 22)

In a 4-1 decision, the New York Court of Appeals concluded that a switchblade which an officer found while patting down the defendant had to be suppressed because the officer did not intend to arrest the man whom he had stopped on suspicion of drunken driving. In an opinion by Judge Smith, the Court's majority held that a police search of an individual incident to arrest is invalid unless the police officer has actually arrested the person or is about to do so. In issuing its ruling, the Court relied upon the United States Supreme Court decision in *Knowles v. Iowa*, 525 U.S. 113(1998). Judge Read dissented and argued that the validity of the search was not dependent on the subjective intent of the arresting police officer. Judge Abdus-Salaam took no part in the decision and the Court issued its ruling on the basis of a five-judge determination.

People v. Ingram, decided December 16, 2014 (N.Y.L.J, December 17, 2014, p. 23)

In a unanimous decision, the Court upheld an Appellate Division determination as to whether police had reasonable suspicion to justify a stop. The Court found that the issue involved a mixed question of law and fact and that there existed in the record support for the Appellate Division's determination. Therefore, the issue was beyond further review by the Court of Appeals.

Right to Counsel

People v. Johnson, decided December 17, 2014 (N.Y.L.J, December 18, 2014, pp. 1, 9 and 22)

In a 5-1 decision, the New York Court of Appeals held that the defendant did not waive his right to have an attorney present when he was questioned by police officers and as a result any incriminating statements which were made had to be suppressed and a new trial ordered. The police had called the defendant to a meeting to discuss having him tape conversations with a friend who they suspected of being involved in a stabbing. During their discussion with the defendant he offered differing accounts of certain details and eventually implicated himself in the stabbing. After being read and waiving his Miranda rights, he signed a written confession. Six months earlier, the defendant had appeared with an attorney on another matter. The Court of Appeals found that the attorney's representation of Johnson in the first case was continuing when he was questioned about the stabbing and the statements Johnson made without the attorney's presence violated the defendant's right to counsel. Judge Smith issued the majority ruling and Judge Pigott rendered a dissenting opinion. Judge Pigott argued that neither the attorney nor police expected the defendant to make the incriminating statements in question. Judge Pigott argued that although the detectives were prohibited from questioning the defendant about the unrelated earlier charge, they were not prohibited from questioning him about the stabbing once the issue arose.

Outside the Record

People v. Giles, decided December 18, 2014 (N.Y.L.J, December 19, 2014, pp. 2 and 24)

People v. Hawkins, decided December 18, 2014 (N.Y.L.J, December 19, 2014, pp. 2 and 24)

In a 4-2 decision the New York Court of Appeals held in *Giles* that the defendant's CPL 330.30 motions were procedurally improper because they were premised on matters outside the existing trial record. The Court reaffirmed that the statute does not permit defendants to expand the record after motions are filed. In *Hawkins* the Court issued a 5-1 ruling. In *Hawkins*, Judge Pigott criticized the majority finding that the Court could not address the defendant's challenge to his conviction based on the contention that he was denied a public trial.

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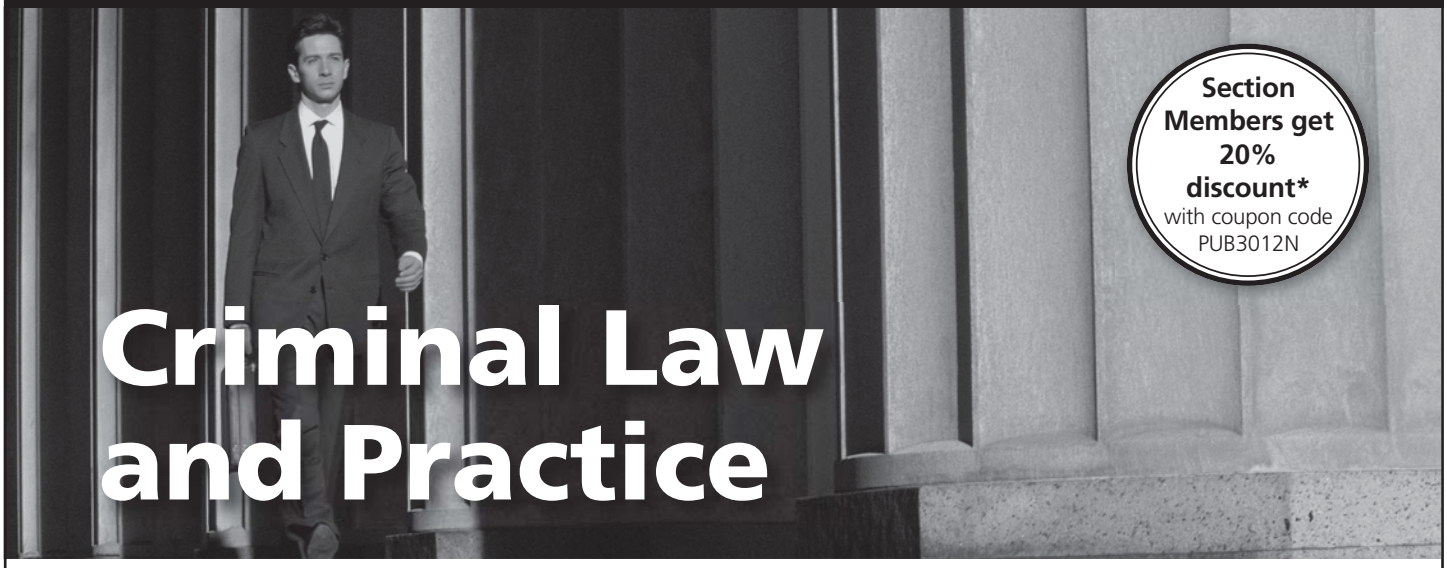

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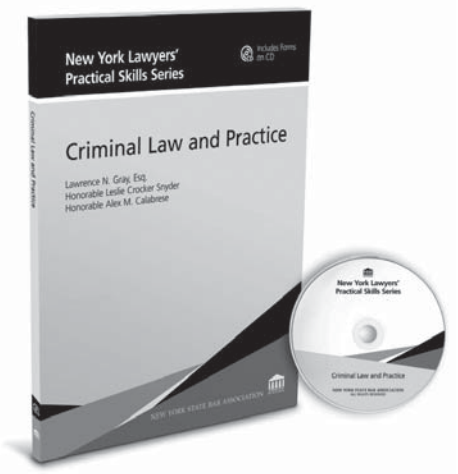

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Luncheon and Aw

Thursday, January 29, 2015

Section Chair Mark Dwyer welcomes members

Barry Kamins listens to speakers

Members mix and mingle

Sherry Levin Wallach greets luncheon guests

Section Chair Mark Dwyer congratulates Judges Graffeo and Smith on their awards

Vincent Doyle III presents award to Terrence Connors

Jack Ryan presents award to Broome County D.A. Gerald Mollen

stice Section

wards Ceremony

• New York Hilton Midtown

Former Judge of the New York Court of Appeals Robert S. Smith accepts award

Members socializing at the luncheon

Luncheon speaker, former Judge of the New York Court of Appeals Victoria Graffeo, addresses members

Robert Masters in conversation with D.A. Gerald Mollen

Chief Judge Jonathan Lippman and Judge Victoria Graffeo join Section officers for luncheon

Vincent Doyle III presents award to Judge Robert Russell

Mark Dwyer presents award to former Court of Appeals Judge Robert S. Smith

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. In late October, it heard oral argument on an interesting case involving the conviction of a fisherman in Florida. That case, *Yates v. United States* is the subject of our first feature article and a decision in the matter was issued on February 25, 2015.

***Glebe v. Frost*, 135 S. Ct. p. 429 (November 17, 2014)**

In a unanimous decision, the United States Supreme Court held that there was no clearly established Supreme Court decision which stood for the proposition that restriction of summation was a structural error that required automatic reversal. In the case at bar a defendant had sought federal habeas corpus relief on the grounds that the state trial court violated his right to due process and assistance of counsel by requiring him at the time of summation to choose between contesting elements of the crime and presenting an affirmative defense of duress. The Supreme Court held that it was not clearly established under federal law that this mistake was a structural error which required automatic reversal. Under such circumstances habeas corpus relief was not necessarily required and the case was remitted to the Washington state courts for further proceedings.

***Heien v. North Carolina*, 135 S. Ct. 530 (December 15, 2014)**

In an 8-1 decision the United States Supreme Court upheld a car search even though police had made a reasonable mistake about the law. In the case at bar, a North Carolina police officer had stopped the defendant's vehicle when he noticed that only one of the vehicle's brake lights went on when the car slowed. The officer mistakenly thought that North Carolina Law required that cars have two working brake lights. After the vehicle was stopped a search revealed cocaine. The Judges of the United States Supreme Court held that the stop and subsequent search was permissible even though the officer was in error in thinking that the car violated state law governing warning brake lights. Chief Judge Roberts issued the majority opinion and stated that to be reasonable is not to be perfect and that the Fourth Amendment allows for some mistakes on the part of government officials, giving them fair leeway for enforcing the law in the community's protection. Justice Roberts further noted that the Fourth Amendment prohibits unreasonable search and seizures and that reasonable men make mistakes of law. Some 19 states had filed briefs on the side of North Carolina. The so-called liberal block in the Court fractured in the instant case with only Justice Sotomayor dissenting and arguing that the majority decision was further eroding the Fourth Amendment's protection of civil liberties. Justice Sotomayor in dissenting remarked "to my mind, the more administrable approach—and the one more consistent with our precedents and principles—would be to hold that an officer's mistake of law, no matter how reasonable, cannot support the individualized suspicion necessary to justify a seizure under the Fourth Amendment."

***Whitfield v. United States*, 135 S. Ct. __ (January 13, 2015)**

In a unanimous decision, the United States Supreme Court upheld a 1930s federal law which provided for increased sentences for defendants who force another to accompany them while robbing a bank or fleeing from the event. The law was directed at bank robbers such as John Dillinger who would take hostages. The defendant had fled from an unsuccessful 2008 attempt to rob a Savings and Loan Association in North Carolina. While fleeing, the defendant had guided a person a short distance from a hallway into another room. That person subsequently died of a heart attack. The defendant claimed that he improperly received extra years in prison for violating the federal law alleging that the word "accompany" in the statute indicated a longer distance than the one he travelled with the victim. Justice Scalia, writing for the entire Court, stated, however, that the word accompany means simple to go with someone. It does not connote a movement over a substantial distance. In upholding the defendant's conviction and sentence, the Court stated that the Congress that wrote this provision may well have had most prominently in mind John Dillinger's driving off with hostages but it enacted a provision which goes well beyond that.

***Yates v. United States*, 135 S. Ct. __ (February 25, 2015)**

In the case at bar, a Florida commercial fisherman was charged and convicted for destroying evidence under the Sarbanes-Oxley Act of 2002. The fisherman was accused by the Justice Department of throwing overboard groupers that appeared to be less than twenty inches long, which is the minimum length permitted by law. A Florida Fish and Wildlife officer had inspected Yates' boat and discovered groupers that were less than the minimum length. When Yates was ordered to return to port so the fish could to be seized, he tossed the fish overboard and tried to replace them with a slightly larger fish. Prosecutors charged the defendant under the Sarbanes-Oxley Act of 2002 ,which was passed in response to the Enron accounting scandal. Part of the law prohibits knowingly altering or destroying a record, document or tangible object with the intent to obstruct an investigation. The defen-

dant's attorneys argued before the Supreme Court that the phrase "tangible object" only means items used to preserve information such as computers, servers, or other storage devices and does not include fish. During oral argument, some of the Justices appeared amused by the prosecution in question. Chief Judge Roberts remarked that the defendant was made to sound like a mob boss. Justice Breyer indicated that the law could be void for vagueness and Judge Scalia remarked, "What kind of a mad prosecutor would try to send this guy up for twenty years or risk sending him up for twenty years?"

On February 25, 2015, the Supreme Court in a 5-4 decision held that prosecutors had engaged in improper overreach and reversed the Yates conviction. Chief Justice Roberts writing for the majority stated that the Courts would not allow prosecutions to be upheld based upon tortured legal analysis. Justice Kagan issued a dissenting opinion.

Pending Cases

***Elonis v. United States*, 135 S. Ct. __ (_____, 2015)**

On December 1, 2014, the United States Supreme Court heard oral argument on a case which involved a defendant's conviction after he had posted offensive words on Facebook. The case involved a domestic dispute when the defendant's wife moved out of their home with their two children. He subsequently issued hostile sounding Facebook postings which included comments such as "There is one way to love you but a thousand ways to kill you; I'm, not going to rest until your body is a mess soaked in blood and dying from all the little cuts." The defendant had argued that his postings were similar to fictitious lyrics and that he was merely letting off steam. The case presented the Court with an opportunity to address whether comments on social media can amount to criminal conduct. The Justices during oral argument appeared to be concerned about First Amendment freedom of speech.

***Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. __ (_____, 2015)**

In late November the United States Supreme Court heard oral argument in a case involving race and voting rights. In Alabama the legislature had redistricted certain areas to include a large percentage of black voters into certain districts. The plaintiffs contended that this was accomplished in order to create a majority of districts which were more white and which voted Republican. The State of Alabama argued that the redistricting was done in order to comply with earlier court rulings which indicated that more legislative seats could be won by minority candidates. A decision is expected within the next several months.

***King v. Burwell*, 135 S. Ct. __ (_____, 2015)**

In early November, the Supreme Court agreed to hear a new challenge to the Obama Healthcare Law. The new case involves tax subsidies that are provided to persons who have enrolled in certain states where the Federal Government has established federal exchanges. The claim is being made that the Affordable Care Act authorized subsidies specifically for insurance bought on an exchange established by the state. The case was argued on March 4, 2015 and a decision is expected in late June close to the end of the Court's current term. Since at the present time only 16 states have set up their own exchanges, a ruling in favor of the Plaintiffs would severely limit the viability of the Obama statute.

***Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. __ (_____, 2015)**

In early December, the Court also agreed to hear an interesting First Amendment protection case involving the issue of whether freedom of speech allows limits on the range and type of messages which can be displayed on state-issued license plates. The State of Texas had recently denied a request to issue a license plate upon which Confederate battle flags could be displayed. The State of North Carolina was also involved in a controversy as to whether the abortion related message "choose life" could be displayed on license plates issued by the State. The Supreme Court agreed to hear an appeal in the case of *Walker v. Texas Division of Sons of Confederate Veterans*. The argument has been made that official license plates are government speech and are shielded from free speech attacks. The State should not be forced to convey a license plate holder's message by etching onto a plate marked with the State's name. It is expected that oral argument will be heard on the issue sometime in the late spring and a decision may not be reached until the final dates of the Court's current term.

***Toca v. Louisiana*, 135 S. Ct. __ (_____, 2015)**

On December 12, 2014, the United States Supreme Court also agreed to hear the case of *Toca v. Louisiana*, which involves the issue of whether the court's earlier decision in *Miller v. Alabama* should be applied retroactively. In *Miller.* the Court ruled that mandating life imprisonment for juvenile defendants charged with murder was unconstitutional. The Court when it rendered that determination in 2012 was silent on whether the prohibition would apply retroactively to hundreds of offenders who had previously been sentenced. It appears that now the Court is ready to address the issue and a decision is expected by the end of the Court's current term. The key justice in any forthcoming decision appears to be Justice Kennedy, who previously cast the critical fifth vote in the Court's earlier decisions on the issue.

***Yulee v. Florida State Bar*, 135 S. Ct. __ (_____, 2015)**

In late January, the Court also heard oral argument in a case involving the issue of whether judicial candidates can directly ask for donations when they are seeking judicial office. In the case at bar, a judicial candidate in Florida sent out a direct mailing soliciting donations. The Florida Bar had an ethical rule which prohibits Judges and judicial candidates from personally soliciting funds for their campaigns. The issue is whether such rules violate the free speech right of a candidate running for office. A decision in this case is expected by the early summer.

***Brumfield v. Cain*, 135 S. Ct. __ (_____, 2015)**

In late December, the Supreme Court granted certiari in a case filed by a death row inmate in Louisiana. The defendant contends that he was denied a due process right to state funding for expert evidence to develop his Atkins claim of mental retardation, which would preclude his execution.

***Obergefell v. Hodges*, 135 S. Ct. __ (_____, 2015)**

***Tanco v. Haslam*, 135 S. Ct. __ (_____, 2015)**

***DeBoer v. Snyder*, 135 S. Ct. __ (_____, 2015)**

In a series of cases, the Court on January 16, 2015 agreed to decide the issue of whether gay marriage must be allowed in all 50 states. There have been several conflicting decisions among the various federal jurisdictions and the Court has finally agreed to decide several cases which involve this controversial issue. Since the Supreme Court's 2013 decision in *United States v. Windsor*, many states have moved to uphold gay marriages and differing policies in various states have forced the Supreme Court to act on the issue. Oral argument is expected in April and a decision should be forthcoming by early June.

***Glossip v. Oklahoma*, 135 S. Ct. __ (_____, 2015)**

In late January, the Supreme Court granted certiari in a case involving the issue of whether the drugs used by the State of Oklahoma to effectuate the death penalty constitute cruel and unusual punishment. The defense claims that the State was experimenting with new and scientifically untested methods of execution and that the use of the new drug would cause an inmate to suffer searing and unnecessary pain in violation of the cruel and unusual punishment prohibition.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from October 16, 2014 to January 30, 2015.

People v. Williams (N.Y.L.J., October 31, 2014, pp. 1 and 5)

In a 3-2 decision, the Appellate Division, First Department held that a defendant's conviction could not stand when neither the court nor the parties realized a sentencing agreement was illegal. In the case at bar, the defendant agreed to plead guilty in 2011 to third degree criminal sale of a controlled substance. In exchange, the court promised a three-year prison term with two years of post-release supervision. Between his plea and sentence the defendant was again arrested and the Court determined that since the plea deal terms had been violated a sentence of six years plus two years of supervised release would be imposed. Neither the attorneys nor the Judge realized that the original offer of three years was illegal since the defendant had a prior criminal history which prevented such a sentence. The defendant thereafter moved to vacate his original plea on the grounds that his due process rights were violated because he was induced to plead guilty by the promise of an illegal sentence. The majority opinion consisting of Justices Renwick, Freedman and Clark agreed and vacated the defendant's plea. Justices Tom and Andrias dissented. The dissenters argued that despite the original plea offer, the increased sentence which was imposed was lawful and, in addition, the defendant never moved to withdraw his plea.

People v. Ayala (N.Y.L.J., November 4, 2014, pp. 1 and 2)

In a unanimous decision the Appellate Division, Second Department reversed a defendant's murder conviction and ordered a new trial. The Court found that the trial judge had improperly permitted a prosecutor to impeach the only eyewitness to the crime. In the case at bar, prosecutors were allowed to use a witness's grand jury testimony and photo array of the shooter to impeach a witness's trial testimony. The Appellate Panel held that a party is permitted to impeach its own witness with prior inconsistent statements only when the testimony of the witness on a material issue tended to disprove a party's position or affirmatively damage its case. In the case at bar, the witness's difficulty in identifying Ayala at trial because of the passage of time and her struggles with alcohol and depression did not tend to disprove or cause affirmative damage to the People's case. The Appellate Division further stated that the trial Judge exacerbated his error by permitting the Assistant District Attorney to suggest in her summation that the jury could consider the impeachment material as direct evidence that the defendant was the shooter. Under all these circumstances, the defendant was deprived of a fair trial and a new trial was required.

People v. Daniel (N.Y.L.J., November 7, 2014, pp. 1 and 2)

In a 4-1 decision, the Appellate Division, First Department reversed a defendant's conviction and held that statements which she had made were tainted and therefore should have been suppressed. The defendant had made some brief statements to the police before she had received the Miranda warnings and therefore admissions which were made after the warnings were given were tainted and required suppression. The Court determined that the statements made prior to the given warnings gave rise to a continuous chain of events that led directly to the formal incriminating statements she gave the detectives within the next few hours. The majority panel concluded that although the pre-warning exchange was very brief and did not include any admission by the defendant of criminal conduct, her unwarned statements plainly tended to incriminate her by acknowledging that she knew something about the murder, and by placing herself at the scene of the crime with the victim and the other alleged perpetrator. Justices Tom, Friedman, Manzanet-Daniels and Gische joined in the majority opinion. Justice Clark dissented.

People v. Sassi (N.Y.L.J., November 18, 2014, pp. 1 and 4)

In a unanimous decision the Appellate Division, Second Department ordered a new trial for a former police detective after finding that the trial judge improperly denied a defense request to define what constitutes burglary. The defendant had been convicted of falsely reporting a burglary in progress. The Appellate Panel held that it was reasonable for the Judge to tell the jury what constitutes burglary in order for them to determine if one might have been happening when the defendant phoned in his report to police.

People v. Knapp (N.Y.L.J., November 18, 2014, pp. 1 and 2)

In a unanimous decision the Appellate Division, Fourth Department reversed a defendant's conviction and ordered a new trial on the grounds that admissions to police were the product of suggestibility and were therefore inadmissible. The defendant had an IQ of 68 and the record indicated that he could not have understood the

Miranda warnings which were given to him. The Appellate Panel concluded that the police did not properly accommodate the defendant's limited mental capacities when they questioned him and, in fact, took steps to improperly obtain statements from him.

People v. Fugua (N.Y.L.J., November 20, 2014, p. 4)

The Appellate Division, Fourth Department unanimously reversed a defendant's murder conviction and ordered a new trial. The Appellate Court found that although the eyewitness had testified before a Grand Jury, he was not called during the trial. Prosecutors indicated that if the witness was called at trial, he was going to invoke his Fifth Amendment rights. The Appellate Division concluded that the defendant in such a situation was entitled to a missing witness charge based on the common sense notion that the non-production of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause.

People v. Hester (N.Y.L.J., November 21, 2014, pp. 1 and 4)

In a unanimous decision the Appellate Division, Second Department, upheld a defendant's conviction even though an imitation gun which was stored at an evidence facility could not be produced for trial as a result of Hurricane Sandy. The facility in which the gun had been stored had been severely flooded and prosecutors were unable to retrieve it for trial. In upholding the conviction, the Appellate Division noted that the defense had ample opportunity to question witnesses about the pistol's appearance and that a photograph of the pistol was also used during the trial. The Panel stated that "[s]ince the People did not act in bad faith and the defendant was not prejudiced by the People's failure to produce the gun at trial, the court did not improvidently exercise its discretion in declining to give an adverse inference charge."

People v. Watson (N.Y.L.J., December 3, 2014, pp. 1 and 2)

In a 4-1 decision the Appellate Division, First Department held that a trial court committed reversible error in disqualifying a defense attorney against the wishes of his client. Following his arrest, the defendant had been assigned an attorney from the New York County Defender Services. A few months into the case, the attorney realized his office previously represented another man who was arrested with the defendant but separately charged with misdemeanor drug possession. The other defendant had already pleaded guilty as part of an agreement with the Manhattan District Attorney's office. Defense counsel alerted the trial judge of a potential conflict. Watson told the Judge he still wanted the attorney to represent him even if he could not call the co-defendant as a witness. The prosecution moved to remove the attorney in question. The trial court ruled that a conflict of interest existed and disqualified counsel from continuing with the case. On appeal Watson argued that the trial court deprived him of his Sixth Amendment right to be represented by counsel of his choosing. Further, he argued that there was no conflict in the first place since counsel supervisors would not allow him to examine the organization's files on the co-defendant. The Appellate Division ruled that there was no evidence counsel ever used or was privy to any confidential information regarding the co-defendant's case. Thus, he would not have been placed in the awkward position of having to balance a duty of confidentiality while conducting either a cross-examination or direct examination. Under these circumstances the defendant was denied his right to counsel and his conviction was overturned. The majority ruling was issued by Justices Moskowitz, DeGrasse, Richter and Kapnick, and Justice Tom dissented.

Matter of Jamals (N.Y.L.J., December 8, 2014, pp. 1 and 10)

In a 3-2 decision the Appellate Division, First Department held that a juvenile defendant should not have been taken into police custody for riding his bicycle the wrong way on a one-way street. After the police had stopped the teenager they found a gun in his shoe. The majority stated that even if holding him on a disorderly conduct violation was proper, removing his shoes could not be justified as a protective measure when he had already been searched twice by officers who had no reason to expect that he had anything on him or otherwise posed a danger. The majority opinion was issued by Justices Acosta, DeGrasse and Richter. Justices Andreas and Tom dissented. The dissenters argued that the police were well within their powers to take the defendant into custody and to conduct a search, which was reasonable in manner of scope and manner of execution.

People v. Johnson (N.Y.L.J., December 18, 2014, p. 4)

In a 4-1 decision, the Appellate Division, First Department reversed a defendant's conviction on the grounds that the trial court violated the Bruton Principles when it allowed grand jury testimony of a co-defendant which directly incriminated another defendant and which could not be subject to cross-examination since the declarant chose not to testify at a joint trial. The four-judge majority consisted of Justices Tom, Friedman, Andrias, and Saxe. Justice DeGrasse dissented and argued that the testimony in question did not directly incriminate Johnson because it made no mention of any interaction between defendant and the undercover officer or that Johnson demanded or took possession of the buy money during a drug transaction.

People v. Nelson (N.Y.L.J., December 30, 2014, pp. 1 and 3)

In a 3-1 decision, the Appellate Division, Second Department upheld a defendant's murder conviction and denied the defendant's claim that he was denied a fair trial when certain people in the courtroom wore t-shirts with the image and name of the murder victim. The three-judge majority concluded that the clothing did not jeopardize the jury's ability to stay impartial. The three judge majority consisted of Justices Miller, Balkin and Roman. Justice Dickerson dissented and argued that the facts in the case at bar gave rise to an unacceptable risk that impermissible factors would come into play in the jury's verdict.

People v. Robinson (N.Y.L.J., December 31, 2014, p. 2)

In a unanimous decision, the Appellate Division, Second Department reversed a defendant's robbery conviction and ordered a new trial. The Court found that a faulty photo array and a suggestive lineup had been conducted and that a new hearing was required to determine whether an independent source of identification existed.

People v. Sanchez (N.Y.L.J., January 5, 2015, p. 4)

In a unanimous decision, the Appellate Division, First Department upheld a defendant's murder conviction and ruled that a trial judge who excused a juror who was tied up with transportation problems did nothing which would require a reversal and a new trial. In the case at bar the court had waited for about two hours for a tardy juror whose car had broken down and was being repaired. The Court dismissed the juror and brought in an alternate just before opening statements. The Appellate Panel found that the trial judge had probably exercised her discretion when excusing the juror with car problems. The Panel pointed to case law that had stated that courts have broad discretion to let go of jurors who are deemed not likely to show up in two hours.

People v. Salce (N.Y.L.J., January 13, 2015, pp. 1 and 2)

In a unanimous decision the Appellate Division, Third Department reversed a defendant's conviction and ordered a new trial on the grounds that the trial judge improperly refused to let an expert witness testify about the nature of defensive wounds. The Court found that the Judge's actions may have hindered the self-defense case of a woman who stabbed her husband. The Appellate Panel found that the issue of whether the defendant was acting to protect herself was a close and highly contested one and that the expert witness in question should have been allowed to testify. The Appellate Judges noted that prosecutors were allowed to elicit testimony about the extensive wounds of the victim and that the defense expert should have been heard about his interpretation of how the wounds were inflicted.

People v. Joseph (N.Y.L.J., January 14, 2015, pp. 1 and 2)

In a 3-2 decision, the Appellate Division, First Department held that a seven story building which had a deli on the ground floor and apartments above was a "dwelling" under Penal Law Section 140.25(2) and thus the conviction for second degree burglary rather than third degree burglary was warranted. In the case at bar, the defendant had been locked inside the basement of the building and could not access the apartment above. The defendant therefore argued that the occupants were never in danger. The Appellate Panel held, however, that the essence of the crime of burglary according to the common law is the midnight terror excited and a liability created by it of danger to human life growing out of the attempt to defend property. The majority opinion relied upon the 1878 case of *Quinn v. People*, 71 NY 561. Due to the interesting issue involved and the sharp division in the Appellate Panel, it appears likely that this matter will end up in the New York Court of Appeals.

People v. Morgan (N.Y.L.J., January 8, 2015, pp. 1 and 2)

In a 4-1 decision, the Appellate Division, First Department affirmed a defendant's manslaughter conviction and denied the defendant's claim that the trial Judge had committed reversible error by his charge to the jury after it had reported being deadlocked on several occasions. After providing the jury with the standard Allen charge, on their first request, when it was necessary to once again address the issue, the Court neglected to repeat the admonition "that no juror should surrender their individual judgment or surrender an honest view of the evidence simply because he our she wants the trial to end or is outvoted." The Court declined to add this cautionary language even though defense counsel raised the issue. The jury subsequently returned a guilty verdict on a first degree manslaughter charge but acquitted on the top count of second degree murder. The four-Judge majority in the Appellate Division held that the Court's original instruction had adequately apprised the jury of its obligations and that the Court's failure to repeat the admonition in question was not coercive. It noted that the jury did not announce its verdict until a full day after the disputed charge was given and this indicated that it had continued to carefully deliberate. Justice Manzanet-Daniels dissented and stated that the original holdouts may have been coerced by the Court's failure to repeat the full Allen charge.

For Your Information

Solitary Confinement for Juvenile Inmates

Pursuant to a settlement agreement which has been negotiated during the last few years, the New York City Department of Corrections has agreed to update its policies to further limit use of solitary confinement for inmates under eighteen years old. The settlement was reached with Prisoners' Legal Services as part of the resolution of litigation which was commenced in *Cookhorne v. Fisher.* An earlier agreement was also reached with the New York Civil Liberties Union to provide alternatives to solitary confinement. Under the new agreements, cell time for juvenile offenders would be limited to nineteen hours per day from the typical twenty-three and separate solitary units for sixteen- and seventeen-year-old prisoners would be created. Underage inmates serving disciplinary confinement time in a special unit would get an extra hour of out-of-cell recreation time daily. For five days per week they will also have access to four hours of juvenile-specific education and transitional programming. The Department of Corrections also agreed to consider age as a mitigating factor in disciplinary proceedings involving juveniles. The Department of Corrections has indicated that it would implement the agreed upon changes during the next twenty-four months.

New Congress Reveals Increasing Diversity

As a result of the November 2014 election the makeup of the new Congress will include 107 female members, 20 of them who will serve in the United States Senate. Among the female members, 79 are Democrats and 28 Republicans. The new Congress will also be a lot younger with the average of age of the 11 newly elected Senators averaging 16 years younger than the lawmakers they are replacing. Four of the new senators are under 50, with Senator Tom Cotton of Arkansas being the youngest at age 37. Elise Stefanik, a 30-year-old New York State Republican, is also the youngest woman ever elected to Congress. The recent election will also bring to the Congress 38-year-old Mia Love of Utah, who will be the first black female Republican to win a seat in Congress. Senator Tim Scott a Republican from South Carolina, will be the first African-American Senator from the South since just after the Civil War. The new Congress will have a total of 48 African-Americans, an increase over the 113th Congress. Thirty-nine Latinos were also elected to serve in the Congress. Thirty-six will serve in the House of Representatives and 3 will sit in the Senate, the largest number ever. The number of African-American in Congress will increase from 43 to 48. Two of the oldest Senators, Republican Pat Roberts of Kansas and Thad Cochran from Mississippi, were also re-elected. Roberts is 78 and Cochran is 77.

In the area of religion, 92% of the incoming members of Congress are Christian and 57% are Protestant. About 31% identify themselves as Catholic. Among the nation as a whole, 49% of Americans are listed as being Protestant and 22% are Catholic.

Loretta Lynch Nominated as New U.S. Attorney General

In late January and early February, Loretta Lynch, the President's nominee as United States Attorney General, underwent confirmation hearings by the United States Senate. Lynch has a long career in law enforcement, having served for many years in the U.S. Attorney's Office, most recently as U.S. Attorney for the Eastern District of New York. She is 55 years of age and was born and raised in North Carolina. She is the daughter of a librarian mother and a Baptist Minister. She is a graduate of Harvard College and Harvard Law School. Prior to beginning her career as a prosecutor, she worked for several years as an associate at Cahill Gordon & Reindel.

While in the U.S. Attorney's Office she handled several high profile cases, including the prosecution of several police officers for violating the civil rights of Abner Louima, a Haitian immigrant who was beaten and terrorized by police officers while in custody. Lynch is highly regarded within the legal community and her appointment was applauded by many members of the legal community who worked with her or against her in a variety of cases. It is expected she will be confirmed shortly and will be assuming her new office in late March, following the resignation of Attorney General Eric Holder.

New Statistics on U.S. Elderly

Several new reports, including statistics from the U.S. Census Bureau, indicate that the care of the United States aging population is becoming a national concern. By 2050 there will be 83.7 million people in the United States age 65 and older. This is almost double the estimated 2012 number of 43.1 million. Elderly Hispanics will make up more than 1 in 5 of the 2015 number.

A bit of good news is that a recent survey by the Federal Reserve indicates that the net worth of elderly

persons between 69 to 86 has climbed substantially and is near the top compared with other age groups from just two decades ago. Those born between 1928 and 1945 have benefited from improved health, a more generous social safety net, an exit from the job market ahead of the past recession and rebounding stock and home values. The median family net worth of Americans 75 and older was $194,800 compared with $130,900 in 1989.

Recent data from the National Center for Health Statistics also indicates that the average national life expectancy is slowly increasing and is presently listed at 78.9 years. Good news for New Yorkers is that the average life expectancy within our state is 80.5 years, somewhat above the national average. The state with the highest life expectancy is Hawaii at 81.3 years and the lowest is West Virginia at 75.4 years.

Illegal Immigration

In the midst of the current controversy regarding illegal immigration the Pew Research Center issued a new report which tracks the number of illegal aliens within each state. The report concluded that California has some 2.5 million illegal residents, followed by Texas with 1.7 million, and Florida with 925,000. The report estimated that the total unauthorized immigrants in the United States is currently 11.2 million. The report further concluded that in recent years the states which have gained the largest increase in illegal residents was New Jersey, where some 75,000 new arrivals were reported, and Florida, where some 55,000 new immigrants were documented. The largest number of new arrivals in Florida were said to be arriving from Mexico.

Cost of College Education Continues to Rise

The College Board recently reported that the cost of attending college has continued to rise during the past year. The average sticker price with room and board included for undergraduate students attending a four-year college or university in their home state was $18,943 per year. Out-of-state students at those schools paid on average $32,762. At two-year public schools in-state students paid an average of $11,052. The cost to attend a private four-year non-profit college, including housing and a meal plan, was listed at $42,419. The highest rate of increase of 3.7% was among private non-profit colleges.

District Attorney Rice Elected to Congress—Madeline Singas Assumes Office as Acting District Attorney

Kathleen Rice, who has served as Nassau County District Attorney for the last six years, was elected to Congress in the November election and as a result a vacancy was created in the office of Nassau County District Attorney. Rice received 52.6% of the vote, defeating her Republican opponent. She will be succeeding Carolyn McCarthy, a Democrat from Mineola who decided to retire. In leaving the District Attorney's Office, Rice requested that her seat be filled by her Chief Assistant, Madeline Singas, in order to assure continuity. Rice was sworn in as a Congresswoman on January 3. As expected, Madeline Singas assumed the office of Acting District Attorney and immediately announced that she will be running for the office in a special election in November to serve a full term. Singas is a career prosecutor. She worked in the Queens District Attorney's Office for several years, rising to the rank of Deputy Bureau Chief in the Domestic Violence Bureau. She joined the Nassau County Office in 2006 and served a Chief of the Special Victims Bureau. She was designated as Chief Assistant in 2011. She is a graduate of Fordham University School of Law and is 48 years of age.

Justice Department Reports on Financial Collections

At the end of the year, the U.S. Department of Justice reported that in 2014 it had secured $24.7 billion from its cases. This amount was more than triple the amount from fiscal 2013. A good deal of the money collected came directly from the settlement with several large banks regarding financial fraud claims stemming from the 2008 financial crisis. Of the $24.7 billion collected, $13.7 billion was retained by the Justice Department for various activities and programs and $11 billion was distributed to other agencies and entities. In reporting the new figures, outgoing U.S. Attorney Eric Holder stated, "Every day, the Justice Department's federal prosecutors and trial attorneys work hard to protect our citizens, to safeguard precious taxpayer resources, and to provide a valuable return on investment to the American people. Their diligent efforts are enabling us to achieve justice and recoup losses in virtually every sector of the U.S. economy."

July 2014 Bar Examination Results

Results of the recent bar examination indicate that New York law schools posted an 83% pass rate, which was down five points from last year. All but three of the state's fifteen law schools reported a decline in pass rates for first time candidates who took the July Bar Exam. 3,740 first time test-takers from New York law schools took the exam in July. The law schools with the highest pass rate continue to be NYU, Cornell and Columbia but even those schools saw somewhat of a decline in their pass rate. NYU dropped from a 97% pass rate in July of 2013 to 94% and Columbia dropped to 92% from a 96% pass rate in 2013. Cornell maintained its pass rate at 94%. Only Syracuse and Touro Law School had a higher pass rate in July 2014 than in July 2013. Syracuse went from an 84% pass rate to an 87% pass rate and Touro went from a 67% pass rate in 2013 to a 67.5% in 2014. In all 8 schools had a pass rate above the statewide average and 7 schools

fell below the statewide average. Several law school Deans expressed concern regarding the disappointing results.

Former Senator Bruno Receives Reimbursement for Legal Defense Fees

It was announced in late December that New York Attorney General Schneiderman had approved the reimbursement of $2.4 million for the legal defense bills that were incurred by former State Senate Majority Leader Joseph Bruno. Senator Bruno had undergone years of litigation with the U.S. Justice Department and was recently acquitted of federal fraud charges. Under New York law, payment of reasonable attorneys' fees for officials accused of criminal wrongdoing are authorized upon acquittal. In approving the payment in question, the Attorney General's office noted that it had no choice but to approve the reimbursement and that the statute mandates payment. A final review of the payment is waiting in the Comptroller's Office and payment to Mr. Bruno is expected shortly. Former Senator Bruno is currently 85 and had claimed that his two trials and appeals had cost him more than $4.1 million.

New York Law School Enrollment Declines

In a recent report by the American Bar Association which is reported in the *New York Law Journal* of December 26, 2014, it was noted that first year enrollment in New York's 15 law schools had declined over the previous year. Among the 15 schools only 5 reported an increase in first year enrollment over the prior year. These schools were Brooklyn Law, Cornell Law, Columbia Law, Hofstra Law and NYU Law. Among this group Hofstra Law reported the largest increase amounting to 26.3%, with an enrollment going from 228 in the Fall of 2013 to 288 in the Fall of 2014. Among the 10 schools which experienced a decline, the greatest loss was sustained by Buffalo Law which went from 198 in the Fall of 2013 to 143 in the Fall of 2014, or a decline of 27.8%. New York Law School also experienced a sharp decline, going from 322 in the Fall of 2013 to 243 in the Fall of 2014. Overall among the 15 schools New York enrollment declined by 4.7% going from 3,962 in the Fall of 2013 to 3,772 in the Fall of 2014. The New York decline mirrored the decline nationwide with a total enrollment in all U.S. schools in the Fall of 2013 going from 39,675 to 37,924 in the Fall of 2014, representing a 4.4% decrease. According to the American Bar Association, the Fall 2014 entering class is the smallest since 1973.

Huge Increase in U.S. Auto Sales

Auto manufacturers recently released glowing figures for auto sales in the United States for the period ending November 2014. Subaru reported a 24% increase over November 2013. Chrysler had a 20% increase. GM was up by 6%. Honda gained 5%. Toyota and VW gained 3%. Sight losses were reported by Ford, Nissan and Hyundai which were down by 2%, 3% and 4%, respectively. According to the recent figures, auto sales are on track to end the year 2014 at approximately 16.5 million, which represents a 6% increase from 2013. It was just recently reported that the month of January of 2015 was also a record month for the auto industry with sales of 1.5 million autos or a 15% increase over the same time last year.

U.S. Home Prices Rise

At the end of the past year, the good news was reported that the median sale price for homes throughout the country has increased dramatically. It was reported that the median sale price for homes in November 2014 was $190,000, up some 15% over November 2013. December's figures revealed a further increase in the median existing home price to $208,500, the highest since 2007. Home prices have experienced a steady increase over the last year and moderate increases are expected to continue. The rebound in home prices has helped the overall economy and has helped many homeowners whose mortgage had exceeded the value of their properties.

It's Official—New York Drops to Number Four in Population Race

In late December 2014, the U.S. Census Bureau reported that Florida had officially overtaken New York in the population race and is now the Nation's third most populous state. At the end of the 2010 census, New York and Florida were separated by only a few hundred thousand in the population race, but New York managed to hold on to third place. In the last few years, however, Florida's population growth was substantially greater than New York's and by the end of last year, the Census Bureau officially recognized the change in population positions. In 2014 Florida's population grew by 293,000 and now has a population slightly over 19.9 million. New York's population during the last year rose by only 51,000 and it currently has a population of slightly over 19.7 million. New York for approximately 150 years was the nation's most populous state. It eventually lost first place to California and then second place to Texas. It has now lost third place to Florida. Ironically, many of Florida's new residents come from New York State and have helped make Florida the third most populous state in the nation. The U.S. Census Bureau estimates that in 2013 and 2014 some 55,000 New Yorkers relocated in each of those years to Florida. The Census Bureau report also indicated that Americans appear to be seeking warmer climates. Of the 10 fastest growing states, all but one was in the South or West which are generally known as the Sun Belt States.

Unfortunate Increase in Police Officer Deaths

The recent killing of two police officers in New York City and other violent acts against law enforcement members throughout the nation have increased concern for police officers' safety. The dangerous nature of the job is illustrated by the significant increase recently reported in the number of law enforcement officers killed with firearms. The end of 2014 saw a 56% increase and included 15 ambush deaths. The annual report by the National Law Enforcement Officers Memorial Fund found that 50 officers were killed by guns in 2014. That is substantially higher than the 32 such deaths which were reported in 2012 and 2013. In all, the report found that 126 federal, local, tribal and territorial officers were killed on duty in 2014. Of the 126 officer deaths, shootings were the top cause followed by traffic fatalities at 49. The states with the highest officer deaths were California with 14, Texas with 11 and New York at 9.

Judiciary Budget

The office of Court Administration has submitted a request for its 2015-16 State Budget which calls for a 2.5% increase. The Legislature began hearings on the budget on February 26 and it is expected that the proposed budget will be approved including the requested increase. Governor Cuomo has already indicated in his State of the State address that he would support the judiciary's request for the new budget.

About Our Section and Members

Annual Meeting Luncheon and Program

The Section's Annual Meeting and CLE program was held on Thursday, January 29, 2015 at the New York Hilton Midtown at 1335 Avenue of the Americas (6th Avenue at 55th Street) in New York City. The CLE Program at the Annual Meeting was held at 9:00 a.m. This year's topics involved "What Can Go Wrong After the Jury Charge; Motions, Preservation and Other Issues About Making a Record; Court of Appeals Update." The distinguished panel consisting of Honorable Mark R. Dwyer, Robert J. Masters, Robert J. Dean, Claudia S. Trupp, and David J. Klem discussed these various issues.

Our annual Luncheon was held, and included former Judge of the New York Court of Appeals Victoria A. Graffeo as guest speaker. Judge Graffeo and Judge Smith were presented with this year's Doyle Award for outstanding judicial service and several of their former colleagues from the Court of Appeals attended the Luncheon. A presentation of the several awards to other deserving individuals are as follows:

Charles F. Crimi Memorial Award to Recognize the Professional Career of a Defense Lawyer in Private Practice That Embodies the Highest Ideals of the Criminal Justice Section
Terrence Connors, Esquire

Outstanding Contribution to Bar & Community
Judge Robert Russell

Outstanding Prosecutor
Gerald Mollen
Broome County D.A.

The Vincent E. Doyle, Jr. Award for Outstanding Judicial Contributions in the Criminal Justice System
Judge Robert S. Smith
Judge Victoria A. Graffeo

It was also announced at the Annual Meeting that additional awards will be made at our Spring Meeting in Upstate New York as follows:

Outstanding Contribution in the Field of Correctional Services
Sister Teresa Fitzgerald
Hour Children, Long Island City

Outstanding Police Contribution in the Criminal Justice System
Chief Margaret Ryan
Dryden Police Department
Former President NYS Association of Chiefs of Police

Outstanding Appellate Practitioner
Janet C. Somes, Esquire
Office of the Monroe County Public Defender, Rochester

The Michele S. Maxian Award for Outstanding Public Defense Practitioner
Andrew Kossover, Esquire
Ulster County Public Defender, New Paltz

New Officers

Our current officers will be serving until May 31, 2015. New Section Officers and District Representatives will be announced at our Spring Meeting and we will publish the list in our Sumer issue.

Membership Composition and Financial Status

As of January 20, 2015, our Criminal Justice Section had 1,425 members. This contrasts with 1,506 at the same time last year, a drop of 81 members. With respect to the composition of the Section, 73% are male, which is about the same as last year, and 23% are female, which is a slight drop from last year. In a somewhat similar situation to last year, slightly over 49% are in private practice of which 27% are in solo practice. The solo practitioners are down about 3% from the 30% which existed in 2014. With respect to age, 23% are between the ages of 56 to 65 which is about the same as last year, and 18% are 35 and under which is a slight drop from last year. 54% are admitted more than 30 years and 19% are admitted for less than 5 years. These figures are similar to 2014.

The Criminal Justice Section is one of 25 sections in the New York State Bar Association which had as of January 20, 2015 a total membership of 74,610 which was slightly less than a year ago. The overall composition consists of 60% male and 33% female.

With respect to the financial status of our Section, our Treasurer, Tucker C. Standclift, recently reported at our Annual Meeting that as of the end of the year, the Section was in sound financial condition. This year's income slightly exceeded our expenses.

Former Judge Barry Kamins Re-Enters Private Practice

Barry Kamins, an active member of our Criminal Justice Section and a regular contributor to our *Newsletter*, recently joined the criminal defense firm of Aidala & Bertuna as a named partner. Barry Kamins served as a Supreme Court Justice until he retired from the bench at the end of 2014. Judge Kamins, who is 71 years of age, will handle attorney disciplinary matters and criminal defense with an emphasis on motion and appellate matters. We wish Judge Kamins all the very best as he resumes a career in private practice.

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.

Zeena Judith Abdi
Jeremy D. Alexander
Samson Oluwasegun Asiyanbi
Laurie Marie Beckerink
Destini K. Bowman
Corey Michael Briskin
Adam Kahan Brody
Dustin Bruhns
Patrick Steven Burns
Sean M. Byrne
Thomas J. Carroll
Lionel J. Castro
Michael Edward Cirigliano
W. Benjamin Coffin
Alyssa S. Congdon
Robert E. Cosentino
Matthew R. Coseo
John C. Cuddy
Michael Christopher Cyr
Mary C. D'Allaird
Charlotte E. Davidson
Elliot Dolby-Shields
Scott Thomas Dwyer
Elizabeth Noelle Ensell
Katherine Fang
Luke Z. Fenchel
Patrick Mcsherry Fergusson
Michael D. Ferrarese
Tinamarie Fisco
Yevgeniy Frenkel
Nick M. Frisco
Erin P. Gall
Mario F. Gallucci
Nicole Alayne Gentile
Carolyn B. George
Cesar Gonzalez
Chrissy Grigoropoulos
Melissa Grippa
Robert Adam Gross
Fang He
James Lee Healy
Joseph J. Hester
Nicholas Himonidis
Frederic K. Howard
Mary Jean Howland
Lincy Marie Jacob
David Richard Johanson
Jonathan Powell Lax
John R. Lewis
Ruth M. Liebesman
Alexander S. Lombard
Andrew C. Lotempio
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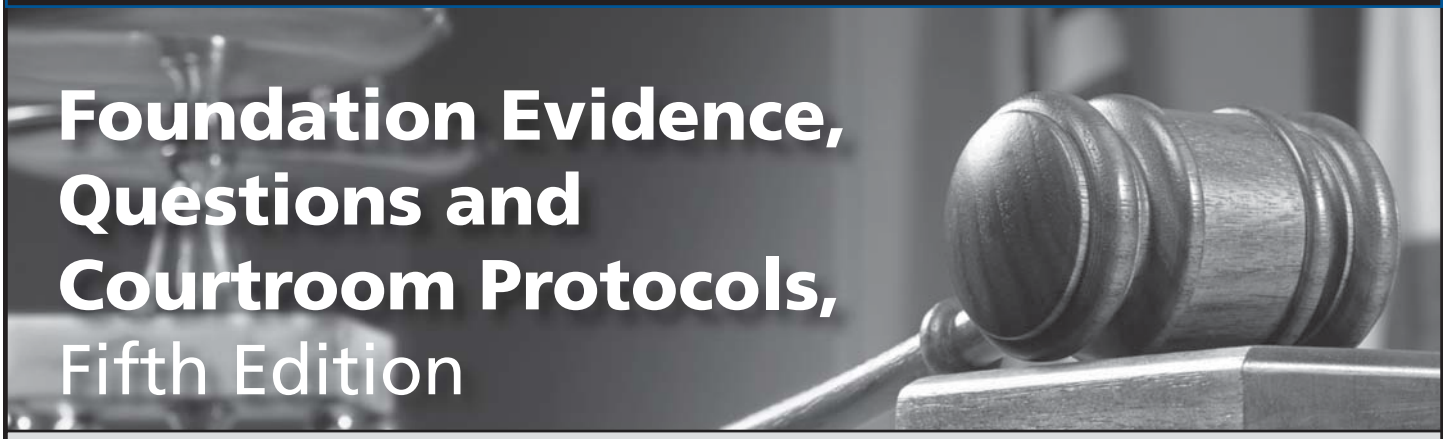

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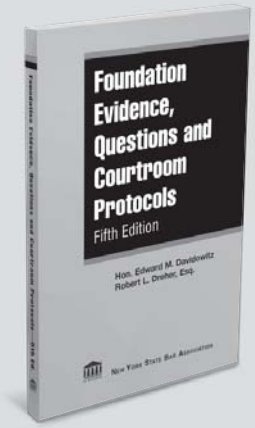

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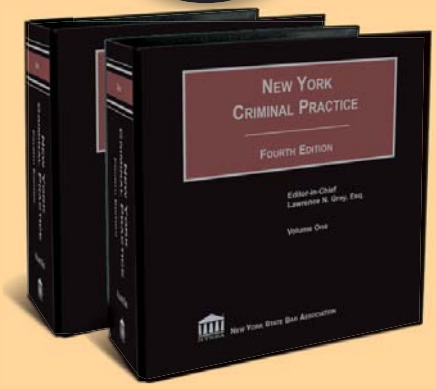

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