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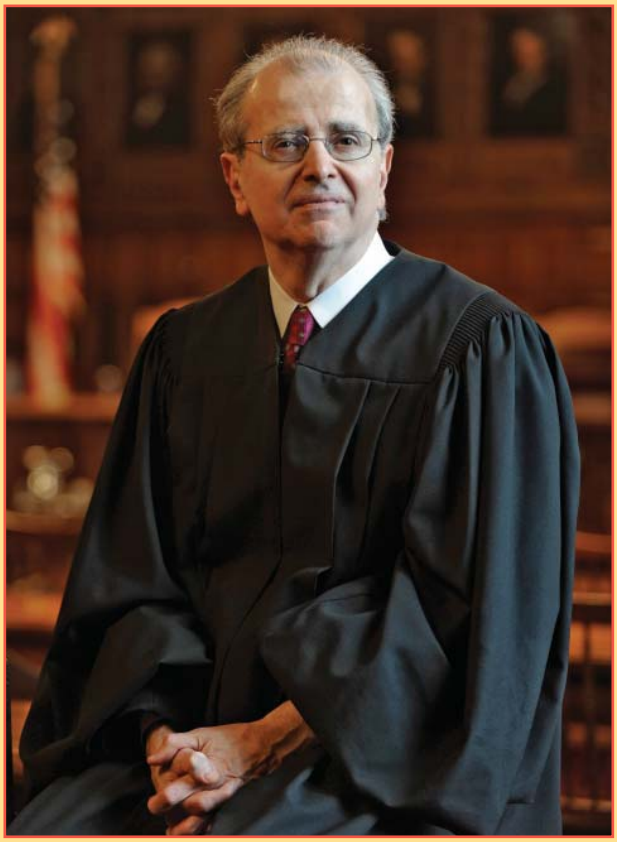
New York Criminal Law Newsletter

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



New York Court of Appeals Undergoes Additional Personnel Changes as Judge Read Takes Early Retirement Effective August 24, 2015 and Chief Judge Lippman Faces Mandatory Retirement as of December 31, 2015

See Feature Article at Page 12

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Richard Manning
Former District Attorney
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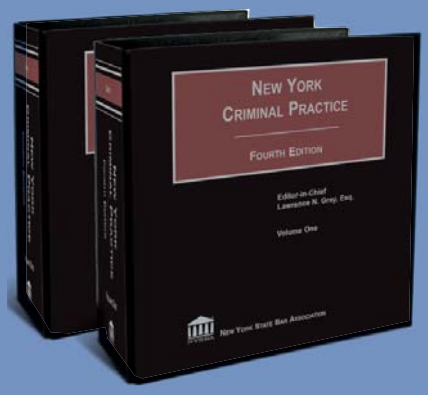

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Table of Contents

Message from the Chair

My term as Chair began with our Section being asked to consider the criminal justice issues being brought to the forefront in our State this summer. Those issues include sealing legislation, funding for indigent legal services, wrongful conviction legislation, a new proposal regarding cameras in the courtroom, as well as Human Trafficking.

I feel compelled to address the issue of Human Trafficking in this message, due to the fact that it came to my attention this summer from two distinct perspectives. I was fortunate enough to read the book written by a lifelong friend, Peggy Kern, which is titled *Little Peach.* In reading her book, I found my personal and professional life overlapping since the main character in the book had an almost identical experience to that of a woman I know. The issue of Human Trafficking affects all of us and all of our communities. The book, *Little Peach,* recounts the stories of several trafficked young girls and is written from the perspective of the main character, who is herself a trafficked young girl. As I finished reading this very moving book and worked to help the woman I know, who has suffered these horrors, it occurred to me that we all can do more. We, as practitioners in the criminal justice community, need to help identify trafficking victims, help them get their lives back on track, and not hold them accountable for actions and behaviors that were forced upon them. These victims should not be punished for the horrors they have been forced to endure. I believe we, as defense attorneys, prosecutors and judges, have a unique ability, in our positions within the criminal justice community, to help these victims, who usually will not self-identify.

Our State's creation of Human Trafficking Courts should be applauded, but these courts are often too far from the court of record to have a case transferred or handled by them. Additionally, to get cases sent to these courts, they must be identified as human trafficking cases. So, it falls on us, all of us, whether we are defense attorneys, prosecutors or judges, to help identify these victims and seriously consider their situations when handling their cases. Many of them have former convictions which arose solely due to their status as a trafficked individual in addition to their current case. Therefore, I encourage all of you to not only read *Little Peach*, but to also read the *Lawyer's Manual on Human Trafficking*, edited by Jill Laurie Goodman and Dorchen A. Leidholdt. I hope, by sharing my experiences, I will continue to raise awareness about this enormous problem, which touches each of us in our practice of criminal law. Together, we as a criminal justice community can make a difference.

Sherry Levin Wallach

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

Message from the Editor

In this issue, we present our annual review of developments in the United States Supreme Court. The Court during the past year issued a series of significant decisions in the areas of criminal and constitutional law, including search and seizure, First Amendment issues, additional aspects of the Obama Healthcare Law, and the death penalty. The Court also issued its controversial decision on same sex marriage. All of these cases are summarized in our Supreme Court Section and are further discussed in our first feature article. Our first feature article also highlights an important trend in this year's Supreme Court term—that is, the apparent move to the left by the Court and the increasing number of times that both Justice Kennedy and Chief Justice Roberts voted with the liberal group of Justices.

Our second feature article discusses aspects of *Sandoval* rulings and is presented by Judge John Brunetti who has been a regular contributor to our *Newsletter*. Our third feature article discusses upcoming personnel changes in the New York Court of Appeals resulting from the early retirement of Judge Read, effective as of August 24, 2015, and the mandatory retirement of Chief Judge Lippman, effective as of December 31, 2015. We discuss the various aspects of these changes and also provide some brief biographical sketches of both Judges as they leave the Court.

The New York Court of Appeals also issued some important decisions before it embarked on its Summer recess, including the doctor-patient privilege, suppression of statements, youthful offender adjudications, and the authority of District Attorneys. These cases are discussed in our New York Court of Appeals section.

During the summer months, various Appellate Divisions continued to issue several cases of interest. These decisions are summarized for our readers in our Appellate Division segment. In our For Your Information section, we provide a variety of articles dealing with such issues as the appointment of new District Attorneys in various counties, the continuing effort to restrict or eliminate the death penalty, the existence of several openings on the various Appellate Divisions, and the status of two important issues currently facing the State Legislature, to wit, raising the age of criminal responsibility and state review of police actions which involve the death of a citizen.

With regard to our segment concerning activities of our Section, we report on the Fall CLE Program which will involve the topic of forensics and which will be held on Saturday, November 14, 2015 in New York City.

Our *Newsletter* is published four times a year and we hope that our Members continue to read and support our publication. We welcome articles for possible publication in future issues and we appreciate any comments or suggestions from our readers.

Spiros A. Tsimbinos

Note New Day!

Criminal Justice Section

2016 Annual Meeting Program and Luncheon

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A Review of the 2014-2015 Term of the United States Supreme Court

By Spiros A. Tsimbinos

Introduction

In the final weeks of its term, the United States Supreme Court ended with a flurry, rendering several decisions of an important nature on criminal law and Constitutional issues, including the landmark decision on same-sex marriage. It ended its term on June 29, 2015 with several 5-4 decisions dealing with the death penalty, redistricting of congressional districts, and the validity of the EPA Obama regulations on mercury emissions. A review of the Court's current term continues to reveal a sharp 5-4 divide on several social and political issues and the movement by Chief Justice Roberts from the conservative side of the Court to a more moderate or middle position. In addition, Justice Kennedy, the traditional swing vote, also sided with the liberal block on many occasions. Thus, as a result, the Court as a whole moved toward the left. A detailed year-end analysis of this year's developments in the Court is therefore presented for our readers.

The Court's Work Product

The Court during its past term handled 74 cases in which full decisions and significant issues were involved. The number of criminal law decisions cromprised about 25% of the total issued. The number of unanimous decisions was also substantially less, occurring only about 40% of the time where last term the Court achieved unanimity in two-thirds of its rulings. The number of dissenting opinions also greatly increased, amounting to 53.

The Criminal Law Decisions

With the exception of two major cases which may be of substantial benefit to the prosecution in the future, the defense bar fared rather well, with the Court voting in favor of the defense in seven out of the thirteen criminal law decisions which we reported on in our *Newsletter* or a percentage of nearly 54%. The defense scored a major victory in *Rodriguez v. U.S.*, 135 S. Ct. 1609 (April 21, 2015) where the Court held that police may not turn routine traffic stops into drug searches using trained dogs. In *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (June 22, 2015) the defense was also successful in achieving a ruling that police cannot search a hotel registry for names of clients without obtaining judicial approval.

The prosecution achieved its major victory in *Heien v. North Carolina*, 135 S. Ct. 530 (December 15, 2014) by having the Court uphold a car search even though police had made a reasonable mistake about the law which prompted the initial traffic stop. On its last day of the term, the Court also upheld the use of a controversial drug utilized in the execution of the death penalty. (See *Glossip v. Gross*, 135 S. Ct. 2726 (June 29, 2015), giving prosecutors a second important victory.

A review of the thirteen major criminal law decisions covered in our *Newsletter* also reveals that the four liberal Justices voted as a group for the defense 70% of the time, with Justice Sotomayor emerging as the most pro-defense Justice voting for the defense 77% of the time. Justice Thomas was the most pro-prosecution Justice, siding with the prosecution 85% of the time. Justice Alito also continues to have a high pro-prosecution rating, supporting the prosecution 77% of the time.

The Court Moves Left as the Conservative Coalition Weakens

Supreme Court Analyst Adam Liptak in his article in the *New York Times* of July 1, 2015, at page A19, concludes "overall the story of the last nine months at the Supreme Court was of leftward movement." Several other analysts in reviewing the most recent term arrived at the same conclusion. In Mr. Liptak's article, he quotes, among others, Lisa S. Blatt, who has argued more than thirty cases in the Supreme Court and studied its work for two decades, who stated "it's clearly the most liberal term I have seen since I have been watching the Court." My own analysis of the nineteen major cases which we have covered in our *Newsletter* confirms the Court's movement to the left.

The movement leftward can be largely attributed to three significant developments: the movement of Chief Justice Roberts to the liberal group on several more occasions than he has in the past; the significant increase in the number of times Justice Kennedy has joined his liberal colleagues; and the cohesive coalition of the four liberal members who voted together almost all of the time.

When former President Bush selected Chief Justice Roberts and Justice Alito to fill vacancies on the Court, conservatives were elated and assumed that along with the votes of Justices Scalia and Thomas and the frequent support of Justice Kennedy, a conservative majority would control the Court for many years. A key factor in this analysis was that Chief Justice Roberts and Justice Alito would usually vote together. In fact, in the first few years, as colleagues on the Court (Chief Justice Roberts took office in 2005 and Justice Alito in 2006), the two Justices often voted together and the Court was described as having conservative leanings based upon the Roberts-Alito partnership and the expected support of Justices Scalia

and Thomas. During the 2010-2011 term, for example, Chief Justice Roberts and Justice Alito voted together 96% of the time. In the 2011-2012 term, it was 90% of the time. The partnership helped to ensure important conservative victories, such as the decision on campaign financing in the *Citizens United* case. A recent survey by the *New York Times* based on an analysis of data from the Supreme Court Data Base published June 26, 2015, at page 13A, indicated that the most conservative term of the Court since the Warren era occurred in 2008.

Beginning with the 2012-2013 term, however, Justice Roberts began to move more toward the middle of the Court and during that term, the two Justices voted together only about 79% of the time with Justice Alito remaining firmly in the conservative camp. During the term which just ended, Chief Justice Roberts once again voted to uphold the Obama Healthcare Law and joined liberal members of the Court in several other cases. His record of voting together with Justice Alito was 84% with regard to the nineteen major cases we reviewed. On the conservative side, the strongest alliance this year was between Justice Alito and Justice Thomas, who voted together 89% of the time.

Although Chief Justice Roberts continues to vote with the conservative group on several key cases, "the lean leftward" can largely be attributed to his movement to the center and his vote with the liberal block on several occasions this year, more so than in the past. The lean leftward was also accelerated by a more significant movement to the left by Justice Kennedy who this term voted more with the liberal block than with the conservative group. According to the article written by Adam Liptak, Justice Kennedy in thirteen controversial decisions involving 5-4 votes voted with the liberal group eight times and with the conservative block 5 times. In prior terms he had usually joined the conservative block approximately two-thirds of the time. My own analysis found that Justice Kennedy voted with Justice Kagan fourteen out of the nineteen cases we reviewed, or 73% of the time, and thirteen times with Justice Ginsburg, or 68%.

As the conservative alliance between Chief Justice Roberts and Justice Alito weakened and Justice Scalia occasionally abandoned the conservative group to vote for the defense, the liberal group alliance of Justices Ginsburg, Sotomayor, Kagan and Breyer remained as strong as ever. Thus these Justices voted together in eighteen of the nineteen decisions we reviewed in our *Newsletter* or an astronomical 95% of the time. In the July 1, 2015 *New York Times* article by Adam Liptak, the author observed at pages 1 and A19:

> the stunning series of liberal decisions delivered by the Supreme Court this term was the product of discipline on the left side of the Court and disarray on the right. *** Many analysts credit the leadership of Justice Ruth Bader Ginsburg, the senior member of the liberal justices, for leveraging their four votes. "We have made a concerted effort to speak with one voice in important cases," she said in an interview last year.

He further remarked at page 19, "The most interesting thing about this term is the acceleration of a long-term trend of disagreement among the Republican-appointed judges, while the Democratic-appointed judges continue to march in lockstep, said Eric Posner, a law professor at the University of Chicago."

Although it is an often-stated axiom that judges should be independent and should approach each case with an open mind and without any preconceived viewpoint, it is increasingly clear that the four members of the liberal group have come to the Court with strongly held principles and ideological views with a purposeful intent to advance a particular agenda. Thus, the frank admission by Justice Ginsburg in the above-cited interview that "we have made a concerted effort to speak with one voice in important cases."

In addition, the four liberal Justices appear to be bound to the policies and positions of the Presidents who appointed them. While Chief Justice Earl Warren issued many decisions which did not reflect the views of President Eisenhower,who appointed him, and Justice Kennedy has surely taken positions which would not be consistent with those of President Reagan, who appointed him, the four liberal Justices have exhibited a strong allegiance to the policies and programs of the Presidents who appointed them. Thus, Justices Sotomayor and Kagan this term supported the positions of President Obama in every case in which the issue arose.

During this past term, while Chief Justice Roberts and Justice Kennedy voted with the liberal block on several occasions and even Justices Alito, Scalia and Thomas did so on some occasions, not once in the major decisions I reviewed did a member of the liberal group vote with the conservatives.

An Interesting Development

One of the most unusual occurrences during the past term was the break by Justice Thomas from the conservative group to the liberal block in the case of *Walker v. Texas Division Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015), where the Court voted to uphold the right of Texas to refuse to grant a request to issue a license plate displaying Confederate flags. The case was decided 5-4 with Justice Thomas surprisingly providing the fifth critical vote and his joining a decision supported by Justices Ginsburg, Breyer, Sotomayor and Kagan. A most unusual happening.

The Continuance of 5-4 Decisions

Of the Court's 75 decisions, 19 were decided by 5-4 votes. However, these divided decisions came in cases involving sharp splits with the country itself on such issues of gay marriage, freedom of speech, voting rights and the death penalty. Thus, strong opinions on both sides were issued in *Obergefell v. Hodges*, 135 S. Ct., 2584 (gay marriage case), *Walker v. Texas Division Sons of Confederate Veterans*, 135 S. Ct. 2239, (2015) (freedom of speech), and *Glossip v. Gross*, 135 S. Ct., 2726 (death penalty case).

Justice Kennedy and Chief Justice Roberts continued to remain as the two critical swing votes whose determination often leads to the majority opinion. During this past term Chief Justice Roberts was in the majority 63% of the time and Justice Kennedy was successful 84% of the time.

Conclusion

Few people realize the critical importance the Supreme Court plays in American society. The term which ended resulted in a landmark decision and several very important rulings which will have a profound effect on the nation in the coming years. It also was a term in which the Court began moving toward a more liberal viewpoint on many social and political issues. A series of controversial issues continue to await the Court's ruling as it opens its new term in October. Cases involving affirmative action, the meaning of one person-one vote, abortion rights, religious freedoms, and additional death penalty issues are all on the Court's upcoming docket. Whether the Court continues its swing to the left or whether it will return to more conservative positions remains to be seen. We are therefore pleased to be able to review the work of the Court and to report on future developments as they occur.

A *Sandoval* Victory Lost and a Good Faith Basis

By John Brunetti

Most lawyers have either been taught or intuitively concluded that accrediting a witness in the beginning of direct examination is a fundamental tenet of trial advocacy. Indeed, an article published by the Association of Trial Lawyers of America asserts: "Always accredit your witness. In addition to name and address, you may inquire into educational background; work history; health history; the names, ages, and school or work locations of family members; *military service*; and club and organization memberships." When it comes to a criminal defendant who has won a favorable *Sandoval* ruling,[1] that would be bad advice.

Assume John Smith is on trial for burglary. At a pretrial meeting, the People express the intent to ask him about a criminal conviction for forgery in the third degree and a prior bad act of beating his wife that did not result in an arrest. The court rules, pursuant to *People v. Sandoval*,[2] that the probative weight as to both topics is outweighed by its prejudicial effect. The court precludes their use during cross-examination of the accused.

When Mr. Smith takes the stand, assume that after he provides name, address, occupation, and family background, the following ensues:

Q. Have you ever served in the military?

A. Yes.

Q. What branch?

A. Marine Corps.

Q. What type of discharge did your get?

A. Honorable.

During the middle of cross-examination, the prosecutor asks the following question:

Q. Isn't it a fact that on April 30, 2015, you struck your wife with an axe?

There is an objection based upon the *Sandoval* ruling and the rule that, by taking the stand at trial, a criminal defendant does not put his character in issue so as to allow proof of bad character by the People.[3]

The correct ruling on these two arguments is "Overruled"! Why?

The defendant became his own character witness and thereby opened the door to questioning that might otherwise have been precluded as a result of his successful *Sandoval* motion. Who says so? The Third Department—twice—once for a bad act and once for a conviction.

In *People v. Morehouse,* the Court ruled that "[d]uring defendant's testimony, he attested to his good character by submitting his military service record. Therefore, he opened the door to questioning concerning the prior bad act."[4] The Court cited *People v. Jones*,[5] where "[a]fter a favorable pretrial ruling on his *Sandoval* motion, the defendant took the witness stand and testified that while in the Marine Corps, serving in Vietnam, he received [a variety of awards]."

The Court ruled that since the only purpose of the military testimony was "evidence of good character," the question by the People, about the previously precluded conviction, was proper.

Proceedings in *People v. Smith* continue.

Counsel: All right, judge, but I have another objection.

Court: Yes?

Counsel: There is no good-faith basis for the question about the axe attack.

Court: Very interesting!

A witness in any civil or criminal case, whether a party or not, does not expose himself to cross-examination about a prior bad act[6] unless the cross-examiner has a good faith basis[7] to ask about it. The rule statement begs the question: exactly what constitutes a "good faith basis" for asking a prior bad act question on cross-examination?

The Court of Appeals tells us that the cross-examiner must have "some reasonable basis for believing the truth of things [s/he is] asking about,"[8] and that the judge makes that determination by ascertaining whether "the question pertains to an actual occurrence."[9] Examples of good faith bases include questions based on sworn testimony,[10] and, by extension, a description of an act alleged under oath or under penalty of a false statement prosecution. Thus, an act recounted in an affidavit, verified civil complaint, or in a police report of an interview of a person who reported an incident[11] would provide a good faith basis for asking about it, but the mere existence of a federal lawsuit naming the witness without a specific allegation of misconduct would not.[12] However, good faith bases are not limited to sworn statements. "There is no requirement that the [cross-examiner's] good-faith basis stem from evidence in admissible form."[13] Thus, even an unsworn disciplinary letter addressed to a witness by an employer fits the bill for a good faith basis.[14]

What does not constitute a good faith basis for a prior bad act question? One for which the judge rules that there is no "reasonable basis for believing the truth of things [counsel is] asking about,"[15] because the judge is not satisfied that "the question pertains to an actual occurrence."[16] Examples include an act verbally attributed to the accused by unnamed residents of a housing project[17] and an act of

misconduct at a school which was not sufficiently documented so as to satisfy the judge that the incident actually occurred.[18]

When it comes to criminal charges that did not result in a conviction, the waters get a bit murky. As a general rule, a charge for a criminal act that resulted in either an acquittal[19] or a dismissal on the merits[20] may not be asked about—a good faith basis is deemed eliminated by both results. Counsel seeking to impeach the witness by inquiring into an alleged bad act which was the subject of a criminal prosecution carries the burden of establishing that the witness was not acquitted and that a dismissal was not on the merits.[21] If counsel sustains that burden (notwithstanding sealed record provisions),[22] inquiry will be proper.[23]

It is important to remember that there are only three types of final dispositions of criminal cases: conviction, acquittal and dismissal. Unlike a conviction and an acquittal, a dismissal is often an "unexplained termination"[24] that provides no basis for determining whether the reason for the dismissal "bespeaks the absence of a reasonable basis for believing the truth of the charge."[25] Thus, the Court of Appeals has ruled that a witness may not be asked about acts underlying a charge that was dismissed at the close of the People's case,[26] yet may be asked about an incident presented to a grand jury that did not result in an indictment.[27] A criminal charge that was dismissed in satisfaction of a guilty plea to an unrelated charge would not seem not to be a dismissal on the merits[28] nor would or a dismissal in the interests of justice or an adjournment in contemplation of dismissal which leads to a dismissal.

Let's return to our scenario involving Mr. Smith. A police report of the incident recounting the spouse's allegations of assault would be enough for a good faith basis, but a mere unsworn verbal statement made by the spouse to the cross-examiner might not, depending on the judge's discretion, of course!

Endnotes

1. People v. Sandoval, 34 N.Y.2d 371 (1974).
2. People v. Sandoval, 34 N.Y.2d 371 (1974).
3. People v. Nuzzo, 294 N.Y. 227, 233 (1945) ["A defendant does not put his general character in issue by taking the stand unless he introduces affirmative proof of good character."]; People v. Kuss, 32 N.Y.2d 436, 443 (1973) ["Whether the defendant's character will become an issue in the trial is the defendant's option, for until he introduces evidence of good character the People are precluded from showing that it is otherwise."].
4. People v. Morehouse, 5 A.D.3d 925, 928 (3d Dep't 2004).
5. People v. Jones, 121 A.D.2d 398, 399 (1986). Conviction.
6. People v. Sorge, 301 N. Y. 198, 200; People v. Webster, 139 N. Y. 73, 84.
7. People v. Greer, 42 N.Y.2d 170, 176 (1977) ["Scarcely necessary for repetition is the rule that a defendant who chooses to testify may be cross-examined concerning any immoral, vicious or criminal acts of his life which have a bearing on his credibility as a witness, provided the crossexaminer questions in good faith and upon a reasonable basis in fact."].
8. People v. Alamo, 23 N.Y.2d 630, 633 (1969).
9. People v. Alamo, 23 N.Y.2d at 633, citing 3 Wigmore, Evidence [3d ed.], § 988 and Fisch, New York Evidence, § 178, p. 94.
10. People v. Montgomery, 216 A.D.2d 332 (2d Dep't 1995) ["The challenged questions were based on information derived from the Grand Jury proceedings. Therefore, the prosecutor had a good-faith basis for asking them."].
11. People v. Grant, 186 A.D.2d 267 (2d Dep't 1992) ["The questions posed concerning the gasoline station attendant were predicated upon a police report reciting the attendant's recollections that a man matching the defendant's description had purchased gasoline in an anti-freeze container near the scene of the fire shortly before the conflagration erupted. Likewise, a police **report** also indicated that the defendant was acquainted with a local livery cab driver and thus, a good faith basis existed for the prosecutor's questioning concerning an alleged encounter between the defendant and this driver following the fire."].
12. People v. Andrew, 54 A.D.3d 618 (1st Dep't 2008) ["The mere existence of the federal litigation was not a proper subject for cross-examination and the defense failed to establish a good faith basis for eliciting the underlying facts as prior bad acts as the complaints and amended complaints in the federal actions did not allege, or even support an inference, that this detective personally engaged in any specific misconduct or acted with knowledge of the misconduct of other officers."].
13. People v. Sealy, 167 A.D.2d 362 (2d Dep't 1990).
14. Winant v. Carras, 208 A.D.2d 618 (2d Dep't 1994) ["The plaintiff claims that it was reversible error for defendant Epstein's counsel to question the plaintiff's expert during cross-examination with respect to the expert's alleged drug addiction which, it was contended, had caused his employer to suspend his clinical activities. The questions, which were asked in good faith and based on a letter by the expert's employer, were properly used to cross-examine the expert with regard to inconsistent statements and his character in general."].
15. People v. Alamo, 23 N.Y.2d 630, 633 (1969).
16. People v. Alamo, 23 N.Y.2d at 633, citing 3 Wigmore, Evidence [3d ed.], § 988 and Fisch, New York Evidence, § 178, p. 94.
17. People v. Hargrove, 213 A.D.2d 492 (2d Dep't 1995) ["[D]efense attorney's offer of good faith for seeking responses to the questions which he was precluded from asking, was that he had been told by some residents of the housing project where the witness resided that the witness had previously dealt in stolen goods. The information allegedly obtained from people in the housing project constituted hearsay, and the trial court did not improvidently exercise its discretion in precluding questioning on the subject."].
18. People v. Colas, 206 A.D.2d 183 (1st Dep't 1994) [Prosecutor "phrased her questions to defendant to suggest that he 'grabbed a woman,' who was a fellow student at a school he attended, and 'dragged' her 'to a spot further down in the hallway to a corner in a secluded part of that hallway'… Discussion at a Bench conference reveals that no arrest resulted from this asserted assault. The school never reported it, and it was unknown whether any internal disciplinary action was taken against defendant as a result. Finally, the court was told that the alleged victim had no recollection of the incident, which was recounted to an investigator by an administrator at the school."].
19. People v. Alamo, 23 N.Y.2d 630, 633 (1969). People v. Schwartzman, 24 N.Y.2d 241; People v. Booker, 134 A.D.2d 949 (4th Dep't 1987).
20. People v. Steele, 168 A.D.2d 937, 938 (4th Dep't 1990) ["An acquittal of the witness or a dismissal on the merits negates the good-faith and basis-in-fact requirements."].

21. People v. Plaisted, 2 A.D.3d 906, 908 (3d Dep't 2003) ["Here, because defense counsel failed to 'demonstrate that the absence of convictions for those alleged crimes was for any reason other than an acquittal or dismissal on the merits,' we agree with County Court's determination that the subject questions were improper."]; *see also* People v. Grant, 291 A.D.2d 912 (4th Dep't 2002); People v. Stabell, 270 A.D.2d 894 (4th Dep't 2000).

22. CPL 160.50 for dismissals and acquittals; CPL 160.55 for non-criminal convictions. See also People v. Hunter, 88 A.D.2d 321 (2d Dep't 1982) ["We hold that where inquiry discloses that the basis for impeachment of a witness by interrogation concerning prior criminal, vicious, immoral or wrongful acts involving moral turpitude is the improper inspection and use of police records made confidential by section 784 of the Family Court Act, the Judge presiding at the trial should inform the witness that the source of the cross-examiner's question is privileged from disclosure and that he or she may either waive the privilege and consent to answer the questions or may refuse to waive it, in which event the jury must be instructed to disregard the questions."].

23. People v. Matthews, 68 N.Y.2d 118, 123 (1986) [inquiry proper where charge "was not finally dismissed on the merits"].

24. People v. Vidal, 26 N.Y.2d 249, 253 (1970) ["The otherwise unexplained 'termination' of the assault charge is not an acquittal, which bars cross-examination of the underlying acts."].

25. People v. Korn, 40 A.D.2d 561 (2d Dep't 1972).

26. People v. Vidal, 26 N.Y.2d 249, 253 (1970) ["Nor is a 'termination' necessarily tantamount to an acquittal, as is, for example, the dismissal of a case at the close of the prosecution's case."].

27. People v. Alamo, 23 N.Y.2d 630, 633 (1969) [[T]he failure of the Grand Jury to indict defendant for the taxicab robberies did not make it improper for the prosecutor to question defendant as to the underlying fact."].

28. People v. Steele, 168 A.D.2d 937, 938 (4th Dep't 1990) ["The record reveals that the charges against Ridgeway were dismissed and that the dismissal was not the result of a plea bargain or the grant of youthful offender treatment. Defense counsel was unable to establish that the dismissal was not on the merits, and thus, failed to establish a factual or good-faith basis for further inquiry. The trial court, therefore, did not abuse its discretion in restricting that line of questioning."].

John Brunetti has served as a Judge of the Court of Claims and Acting Supreme Court Justice assigned to criminal matters since 1995. He is the author of *New York Confessions* published by Lexis Nexis Matthew Bender as well as a number of law review articles and judicial training handouts. He has also previously contributed several articles to our *Newsletter*.

Additional Personnel Changes to Occur in New York Court of Appeals

By Spiros Tsimbinos

Only a few months after the New York Court of Appeals had reached its normal complement of seven Judges and was operating in a smooth and normal manner, the Court is again faced with additional personnel changes which may disrupt its normal procedure and operation during the coming months. It was announced in late June that Judge Read had decided to take early retirement and was resigning from the Court as of August 24, 2015. In addition, Chief Judge Lippman faces mandatory retirement effective as of December 31, 2015. Thus, two vacancies on the Court must be filled within the next several months. We hope that none of the inordinate delay in filling the two vacancies will occur as happened in the recent past and that the two vacancies will be filled with highly qualified judicial appointments who will well serve the Court and the public.

Chief Judge Jonathan Lippman

Chief Judge Lippman has reached the age of 70 and retirement rules require that he step down from his judicial position as of December 31, 2015. He has held the position of Chief Judge since February of 2009. The State Commission on Judicial Nominations has been accepting applications for Judge Lippman's replacement. The Commission is chaired by former Chief Judge Judith Kaye and applications were accepted until July 13, 2015. The Commission is to make its recommendations to Governor Cuomo no later than October 15, 2015 and the Governor is to nominate a successor between November 15 and December 1. The State Senate then has 30 days to confirm or reject the recommendation.

Judge Lippman was appointed to the Court by former Governor Paterson. His career in the Court system has spanned four decades, starting as an entry level court attorney in the Supreme Court in Manhattan. Subsequently, he served as Chief Administrative Judge of all New York State Courts from January 1996 to May 2007. He also previously served as Presiding Justice of the Appellate Division, First Department. He has also served as a member of the Board of Directors of the State Justice Institute and the Conference of Chief Justices. He has received numerous rewards and honors, including the William H. Rehnquist Award for judicial excellence from the National Center for State Courts. He has also published many articles and essays and has enjoyed a distinguished judicial career. He is a graduate of the New York University School of Law. It is expected that he may join a prominent large law firm and enter the private practice of law as some of his predecessors who have retired from the Court have done.

Associate Judge Susan Phillips Read

In addition to the retirement of Chief Judge Lippman, Associate Judge Susan Phillips Read issued a surprising announcement in late June that she would resign as of August 24, 2015 in order to spend more time with her husband and family. Judge Read is 67 years of age and was appointed to a fourteen year term by former Governor Pataki in January 2003. During her term, she was known for advocating Republican-Conservative positions on the Court. Her term would have expired on January 5, 2017. Her announcement immediately creates another vacancy on the Court. The State Commission on Judicial Nominations began accepting applications to fill Judge Read's position. The Commission requested that applications be submitted no later than August 24, 2015. The Commission will then forward to the Governor the names of 3-7 qualified candidates from which he will appoint a new Associate Judge. Both of the Governor's appointments are subject to Senate confirmation. Judge Read served on the Court for twelve years. She previously served as Deputy Counsel to former Governor George Pataki. She also served as Judge of the New York Court of Claims where she eventually was designated Presiding Judge of that Court. She is a graduate of the University of Chicago Law School and has resided in Saratoga Springs, New York. Prior to her elevation to the Bench she served for several years with various major corporations as counsel and as a partner in private practice. We thank both Chief Judge Lippman and Judge Read for their many years of distinguished service and wish them all the best in their new endeavors.

The Possible New Appointees and the Consequences

The resignation of Judge Read leaves the Court with only one Republican appointee on the Court. Judge Pigott, who was also appointed by former Governor Pataki, will also retire as of the end of 2016 and at that time Governor Cuomo will have the rare opportunity of having appointed all seven members of the New York Court of Appeals.

While the New York Court of Appeals was for many years almost evenly politically balanced with four Republicans and three Democrats, when Governor Cuomo failed to reappoint Judge Graffeo, who was recognized by the legal community as being highly qualified, and instead filled the vacancy with Judge Stein, a liberal Democrat, he issued remarks which indicated that he wished to move the Court toward a more liberal direction. He followed up

a few months later by filling the seat of Republican-Conservative Robert S. Smith with Democrat Judge Fahey.

If he now fills the seat vacated by Judge Read, a Republican-Conservative, with another Liberal-Democrat, the direction of the State's highest court will certainly take a move to the left. If at the end of Judge Pigott's term, he makes another Liberal-Democrat appointment to replace the last of the Pataki Judges, there will be no Republican-Conservative on the Court and Governor Cuomo will have exercised a significant influence on the makeup and direction of our State's highest court.

During the last several years, the need for diversity within the Court system has been an expressed goal and the Governor himself has emphasized its importance. Some commentators have argued that the concept of diversity should include a Republican-Conservative viewpoint on the Court and have urged the Governor to take this into consideration in making his appointment.

It has also been stated that the position of Chief Judge involves important administrative functions and that Judge Lippman's replacement should have both administrative skills and judicial qualities. Someone who immediately comes to mind and who has been mentioned as a possible replacement for Judge Lippman is Chief Administrative Judge A. Gail Prudenti, who also previously served as Presiding Justice of the Appellate Division, Second Department. Judge Prudenti, would bring to the Court of Appeals both administrative skills and judicial excellence. The appointment of Judge Prudenti, who is from Suffolk County, will also add to the Court a moderate Republican Judge and would keep a level of some political balance within the Court as well as increasing geographical balance.

The recent announcement by Judge Prudenti that she is leaving her position as Chief Administrative Judge to accept a position at Hofstra Law School has placed some doubt over her possible appointment to the Court. According to a *New York Law Journal* article, she has refused to state whether she has applied to the Judicial Nominating Commission and according to many she remains a viable prospect.

Another possible appointment to the Court is Justice Erin Peradotto, Associate Justice from the Appellate Division, Fourth Department. Justice Peradotto was on the list of seven with regard to the last appointment and her Upstate credentials are a factor in her favor as a possible replacement for Judge Read. In the last list of seven was also Kathy Chin, a partner at a leading law firm and someone who could become the first Asian-American on the Court if the Governor was so inclined to make such an appointment. We anxiously await the Governor's decision on the two pending vacancies and we will report any developments in our next issue.

No Arrest Should Mean No Misconduct

By Herberth Melendez

In 1993, the New York Court of Appeals decided *People v. Outley*, 80 N.Y.2d 702, seeking to answer one question: What are the minimum requirements of due process when a defendant breaches a no-arrest condition by being arrested before sentence but denies any complicity in the underlying crime?

In *Outley*, three defendants appealed enhanced sentences given to them as the result of a violation of their guilty pleas where the guilty pleas required that the defendants not be arrested while on release awaiting sentence. The *Outley* Court declined to adopt a preponderance of the evidence standard, which would have required the courts to find that the defendant did in fact commit the crime for which he was arrested (while awaiting sentencing) by a preponderance of the evidence.

The *Outley* Court stated that should it adopt such a standard it would have the effect of "changing the condition of the plea bargain from *not being arrested for a crime to not actually committing a crime." Id*. at 712. The language chosen in this phrase is very telling of the reasons why a preponderance of the evidence standard should have been adopted, considering that racial minorities are arrested at higher rates for offenses in which officers are able to exercise discretion (spitting on sidewalks, open containers, sleeping in the park after hours, loitering, jaywalking, taking up two seats on the transit at midnight). One might even consider situations where false reports are made out of spite, family feuds, or in messy divorces with child custody battles.

The *Outley* Court decided that the nature of the inquiry was left to the court's discretion so that it be sufficiently satisfied, not of the defendant's guilt on the new arrest or criminal charge, but only that there existed a "legitimate basis" for the new arrest. *Id*. at 713.

But in two of the three cases the *Outley* Court considered were cases where the defendants each conceded having committed some act which constituted a crime; however, in the third case, defendant Maietta unsuccessfully attempted to introduce exculpatory evidence in the form of alibi witnesses at sentencing. Defendant Maietta would then go on to petition a writ of habeus corpus in the Southern District of New York, asking that the court establish that a full hearing, rather than an inquiry, be the new rule for no-arrest conditions on pleas. *Maietta v. Irvin*, 1995 WL 505558 (SDNY 1993).

The *Maietta* Court stated that it would find such a rule if it could be deemed a watershed rule of criminal procedure implicating fundamental fairness and accuracy of the criminal proceeding, but declined to adopt a new rule because it is not central to an accurate determination of a defendant's innocence or guilt, but only involves the scope of the punishment. *Id*. at 3. However, where plea is offered and accepted of a lower crime than the crime charged, neither is that an accurate determination of innocence or guilt. In lower level misdemeanors, a defendant might plea to a violation with a no-arrest condition to forgo the hassle of missing work on multiple dates.

An alternative to adopting a preponderance of the evidence standard is establishing the practice of placing "no misconduct" conditions instead of "no arrest" condition on pleas.

> If you get rearrested, that's a voluntary choice you made by going out and doing something which you should not have been doing. It rests solely with you.

Spence v. Superintendent, Great Meadow Corr. Facility, 219 F.3d 162,167-168 (2d Cir. 2000). The *Spence* Court decided that the phrase quoted above said by the judge during the plea allocution resulted in a no misconduct plea which would require the trial court to find that the defendant did in fact commit that act for which he was arrested in order to withdraw its promised sentence and impose an enhanced sentence.

The defendant in *Spence* had been arrested but acquitted at trial for that same arrest which the lower court deemed was a violation of his plea. The *Spence* Court found that the defendant understood that he would not violate the plea condition if he did not do anything wrong and, therefore, as this constituted a "no misconduct" plea instead of a "no arrest plea," the Court did not reach the question of whether the "legitimate basis" test for an arrest under *Outley* afforded sufficient due process. After going into a discussion about why misconduct could not be shown for the enhanced sentence since Spence was acquitted, it ultimately decided that Spence deserved to be granted the writ.

But before ending, the Court also mentioned that "he had bargained for a term of probation in exchange for a promise not to engage in misconduct leading to an arrest. The state was therefore obliged to show by a preponderance of the evidence that he committed the criminal act underlying the arrest." *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 169 (2d Cir. 2000).

No arrest should mean no misconduct. It must be true in legal practice and life that being (re)arrested is a voluntary choice by doing something you should not have done and should be within an individual's control. Requiring only a legitimate basis for an arrest does not seem to comport with due process, especially since we do not simply

sentence individuals based on a legitimate basis of arrest alone; they must either plead guilty or be proven guilty beyond a reasonable doubt. The reasoning and rhetoric found in court opinions don't always make sense, see *Korematsu v. United States*, 65 S. Ct. 193 (U.S. 1944), but the language given by the trial judge in *Spence* was truly referring to what is required for there to be a legitimate basis for an arrest—that a defendant do something he was not supposed to be doing, to engage in misconduct, not outside influences such as false reports, spiteful ex-spouses, or eager officers. (The *Spence* Court thought it worth noting that the officer responsible for the defendant's re-arrest knew the terms of his plea).

Without misconduct, there should be no arrest. The courts need to reconsider the law, and the burden on the state to prove that the defendant breached his plea conditions. Showing that a defendant did in fact commit the underlying crime that is the basis for the arrest, by a preponderance of the evidence, would better serve justice.

The author is currently a student at Brooklyn Law School. We have recently instituted a segment of our *Newsletter* where we are inviting Law Students to submit articles for possible publication. Mr. Melendez's article is the first in this new initiative.

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 May 1, 2015 through July 31, 2015.

Doctor-Patient Privilege

***People v. Rivera*, decided May 5, 2015, (N.Y.L.J., May 6, 2015, p. 21, and May 7, 2015, pp. 1 and 2)**

In a unanimous decision, written by Judge Pigott, the New York Court of Appeals held that a doctor's statements which were allowed at the defendant's trial did not fall under any of the recognized exception to the doctor-patient privilege under CPLR 4504(a), and that by allowing such testimony the trial judge committed reversible error requiring a new trial. The Court in issuing its decision rejected the contention advanced by prosecutors that since the psychiatrist was bound to report the defendant's statement about committing abuse to the New York City Administration for Children Services, he could not reasonably expect such statements to remain confidential in the context of a criminal prosecution. In the case at bar, the testimony in question involved a patent's admissions to a psychiatrist regarding having sexually abused a young relative.

In issuing his opinion, Judge Pigott concluded, "It is one thing to allow the introduction of statements or admissions in child protection proceedings, whose aim is the protection of children, and quite another to allow the introduction of those same statements, through a defendant's psychiatrist, at a *criminal* proceeding, where the People seek to punish the defendant and potentially deprive him of his liberty."

Suppression of Statements

***People v. Graham*, decided May 5, 2015 (N.Y.L.J., May 6, 2015, p. 22)**

In a unanimous decision, the New York Court of Appeals affirmed an order and determination of the Appellate Division which upheld the denial of a suppression motion regarding certain statements that the defendant had made to police during a time which occurred outside the presence of his counsel. The Appellate Division had concluded that inasmuch as defendant's counsel was present during the first twenty minutes of the interview and informed the detectives that defendant was willing to cooperate, it was permissible for the officers to infer from defendant's conduct and his attorney's assurances that defendant's waiver of his Miranda rights was made on the advice of counsel. On appeal to the New York Court of Appeals, the defendant also advanced an additional argument regarding the admissibility of the statements. The New York Court of Appeals concluded that that issue had not been preserved for its review and affirmed the Appellate Division ruling.

Duplicitous Indictment

***People v. Flanders*, decided May 5, 2015 (N.Y.L.J., May 6, 2015, p. 23)**

In a unanimous decision, the New York Court of Appeals upheld the conviction of a defendant on one count of attempted murder in the second degree, assault in the second degree, criminal possession of a weapon in the second degree, and reckless endangerment in the first degree. The evidence at trial established that the defendant shot the victim following an argument between the victim's fiancé and the mother of the victim's child, who is defendant's sister. On the evening of the shooting, the victim saw defendant drive by his house and then pull over. The victim approached the defendant to inquire why he was there. During the conversation, the other occupant of defendant's vehicle got out and punched the victim in the head, which led to a fist fight. Defendant approached the victim, pistol whipped him in the head and then shot him, first with a .380 caliber, semi-automatic pistol and then with a .22 caliber rifle that defendant retrieved from the car. The victim's fiancé was in the immediate vicinity at the time of the shooting.

The defendant contended on appeal that the trial judge's instructions to the jury and the evidence that was established at trial rendered the indictment duplicitous. The New York Court of Appeals, after reviewing the record and the jury instructions in question, concluded that the defendant's argument lacked merit and that therefore, all four counts of his conviction should be upheld.

Consecutive Sentences

***People v. Rodriquez*, decided May 7, 2015 (N.Y.L.J., May 8, 2015, p. 19)**

In a 5-2 decision, the New York Court of Appeals upheld the imposition of a consecutive sentence with respect to a robbery conviction and a conviction for assault in the first degree. The Court had previously remitted the matter to the Appellate Division after it had modified some of the sentences which were previously imposed. The five-Judge majority concluded that the sentencing court acted within its discretion when it modified the defendant's sentence in accordance with the Appellate Division directive. The majority opinion was issued by Judge Stein. Chief Judge Lippman and Judge Fahey dissented. The dissenters argued that they believed the Supreme Court lacked the authority to restructure the defendant's sentence pursuant to CPL Section 430.10 following the remittal upon the previous appeal. The dissenters stated

When the Appellate Division corrected the illegality by ordering that those terms be served concurrently, defendant was subject to a lawful sentence. At this point, CPL 430.10 precluded Supreme Court—on remittal or otherwise—from further altering the length of any sentence that defendant had been serving since 2008.

Authority of District Attorney

***Soares v. Carter*, decided May 7, 2015 (N.Y.L.J., May 8, 2015, pp. 4 and 20)**

In a unanimous decision, the New York Court of Appeals held that judges may not compel prosecutors to call witnesses or take other actions within the District Attorney's discretion on the threat of the Court's power of contempt. In the case at bar, the Albany County District Attorney had refused to proceed with disorderly conduct prosecutions of demonstrators which had occurred in a March in 2012. In the case at bar, the District Attorney had offered the defendants a six month adjournment in contemplation of dismissal. The City Court refused to accept the pleas unless they were combined with a requirement of community service. The defendants rejected that condition. The People then sent a letter to the Court indicating that they had decided to discontinue prosecution. The Court, however, denied the motions to dismiss. The incident evolved into the taking of an Article 78 proceeding. In the Court of Appeals, the Court ruled in favor of the District Attorney's Office and stated, "Any attempt by the judge here to compel prosecution through the use of his contempt power exceeded his jurisdictional authority. It is within the sole discretion of each district attorney's executive power to orchestrate the prosecution of those who violate the criminal laws of the state."

Waiver of Youthful Offender Adjudication

***People v. Pacherille*, decided May 12, 2015 (N.Y.L.J., May 13, 2015, pp. 2 and 21)**

In a 4-2 decision, the New York Court of Appeals held that a teenage defendant was foreclosed from challenging a judge's decision which sentenced him as an adult upon the entry of his guilty plea and the valid waiver of his right to appeal. The four-judge majority stated that a valid waiver of the right to appeal, while not enforceable in the face of a failure to consider youthful offender treatment, forecloses appellate review of a sentencing court's discretionary decision to deny youthful offender status once a court has considered such treatment. In the case at bar, the trial judge had indicated that he considered sentencing the defendant to youthful offender treatment, but had decided against such action. Chief Judge Lippman and Judge Rivera dissented and argued that the court's ruling undermined public policy purposes behind youthful offender adjudications.

Resentencing Under the Drug Law Reform Act

***People v. Brown*, decided May 14, 2015 (N.Y.L.J., May 15, 2015, pp. 1, 6 and 17)**

In a 5-2 decision, the New York Court of Appeals concluded that prison inmates who are still on parole for drug offenses are eligible for resentencing under the reforms to the Rockefeller era drug laws which occurred in 2009. The Court determined an issue which had been left open in its prior ruling in *People v. Paulin*, 17 NY 3d 238 (2011). In an opinion written by Judge Lippman, the majority held that extending the resentencing provisions was in keeping with the intent of CPL Section 440.46 and with stated public policy goals. Judges Read and Abdus-Salaam dissented. The dissenters argued that the majority ruling directly contradicted language in the Court's earlier decisions and was contrary to the legislative history which created the drug law reforms.

Legal Sufficiency of Evidence

***People v. Lamont*, decided May 14, 2015 (N.Y.L.J., May 15, 2015, p. 19)**

In a unanimous decision, the New York Court of Appeals upheld a defendant's conviction for attempted robbery in the second degree, concluding that there was legally sufficient evidence to support the required intent in order to uphold the conviction. In the case at bar, employees of a Wendy's fast food store noticed the defendant and an accomplice at the rear door of the store in the early morning hours. They were masked and appeared to be armed. The employees called 911 and a patrol car responded and eventually caught the defendants as they were running away. Upon apprehension, the officers recovered a black knit hat and a black glove. Since no robbery had taken place, the defendants argued during trial and on appeal that the evidence was legally insufficient to establish that they had a specific intent to rob and steal from the store. The New York Court of Appeals, however, concluded that in the case at bar, there were permissible inferences that could led a rational person to conclude that every element of the charged crime had been proven beyond a reasonable doubt. Under such circumstances, the defendants' conviction was upheld.

Double Jeopardy

***People v. Lynch*, decided June 9, 2015 (N.Y.L.J., June 10, 2015, pp. 1, 2 and 22)**

In a unanimous decision, the New York Court of Appeals concluded that no double jeopardy existed as a result of the defendant's convictions for crimes involving a false identification. The Court found that the identifications which were falsely sought in his son's name were sufficiently separated by time and place so that they did not constitute double jeopardy. The defendant had argued that his prosecution in Suffolk County for attempting to file a false application form for a non-driver ID in the name of his

son was a duplicative of the criminal possession of a forged instrument charge he faced later in Westchester County. The charges in Suffolk County were brought in August of 2010, while the incident in Westchester County occurred in 2009. The Court determined that although the charges involved the same fraudulent ID, they were made in different counties and were more than four months apart. In this regard, there was no single criminal venture as required by CPL 40.10(2) so as to implicate double jeopardy principles.

Waiver of Appeal

***People v. Sanders*, decided June 9, 2015 (N.Y.L.J., June 10, 2015, p. 23)**

In a 6-1 decision, the New York Court of Appeals determined that the defendant's plea colliqui was adequate to uphold defendant's waiver of his right to appeal as being voluntary, knowingly and intelligently made. The Court also reviewed the relevant facts as well as the defendant's experience and background in order to determine the issue. In the case at bar, the defendant was accused of stabbing a sixteen year old victim and causing his death. After a motion to suppress was denied, he entered a guilty plea to the crime of manslaughter in the first degree. During the plea colliqui, the prosecutor specifically asked the defendant regarding his waiver of the right to appeal and whether he had discussed it with is attorney. Subsequently, the defendant appealed, claiming that the trial court itself should have addressed the issue of the waiver of appeal. Although the Court of Appeals reaffirmed the critical nature of a court's colloquy with the defendant regarding the relinquishment of the right to appeal, it concluded that under all the facts in the case at bar, the record demonstrated that the defendant knowingly and intelligently waived his right to appeal. Thus, in the case at bar, a specific colloquy conducted by the Court itself was not required. Judge Rivera dissented and stated that she was troubled by a trial court's delegation of the plea allocution to the prosecutor.

Search and Seizure

***People v. Rutledge*, decided June 9, 2015 (N.Y.L.J., June 10, 2015, p. 26)**

In a unanimous decision, the New York Court of Appeals reversed an Appellate Division ruling and granted a suppression motion on the grounds of its earlier decision in *People v. Dunbar*, 24 NY 3d, 304 (2014). The issue in *Dunbar* involved the improper questioning of defendants in a pre-arraignment interview program conducted by the Queens County District Attorney's Office. The procedure was declared improper by the Court of Appeals and a petition to the United States Supreme Court was recently denied.

Denial of a Fair Trial

***People v. Inoa*, decided June 10, 2015 (N.Y.L.J., June 11, 2015, pp. 2 and 22)**

In a unanimous decision, the New York Court of Appeals upheld a defendant's conviction for first and second degree murder even though it found that errors had been committed in allowing considerable portions of testimony of a detective which should otherwise not have been admitted. The Court found that the evidence against the defendant was overwhelming and it was doubtful whether the challenged testimony in question would have made a difference in the jury's verdict. The Court concluded that in the case at bar, a portion of the detective's testimony had been allowed in based upon his status as an expert witness. Although upholding the conviction in the instant matter, the Court felt it necessary to warn against the commission of any similar errors in other cases. In closing its decision, the Court commented, "the result of this appeal should not encourage any expectation that the harmless error doctrine will reliably insulate the practice of using government agents as expert summation witnesses and trial courts should accordingly be vigilant against the serious risks that such usage entails."

Defendant's Presence at Proceeding

***People v. Scott*, decided June 11, 2015 (N.Y.L.J., June 12, 2015, p. 25)**

In a unanimous decision, the New York Court of Appeals rejected a defendant's argument that he was entitled to a new trial based upon the fact that the supplemental jury instructions had been provided to the jury in the absence of the defendant and counsel. During the trial, the jury had been provided during the main jury instructions with the dates of the alleged crime being December 7 and December 8. The prosecutor then interrupted and told the judge that the correct dates were December 6 and December 7. The Judge then charged the jury with the dates given by the prosecutor. The following day, however, the Court, in the absence of the jury, defendant and counsel, stated on the record to the court reporter that she had charged the jury on the wrong dates and that the correct dates were December 7 and December 8. The Judge stated that she had spoken with the parties who agreed that the jury could be informed of this mistake outside of their presence. The Court of Appeals concluded that in the case at bar, the Court's supplemental instruction to the jury simply clarifying the dates of the crime did not require the defendant's presence. The Court's instruction was technical conformance with the indictment and did not require defendant's presence; therefore, no mode of proceeding error occurred.

Youthful Defender Treatment

***People v. Middlebrooks*, decided June 11, 2015 (N.Y.L.J., June 12, 2015, pp. 5 and 23)**

In a 4-3 decision, the New York Court of Appeals held that judges are required to state on the record whether young defendants convicted of certain felonies are eligible for youthful defender sentencing status. The majority relied upon both the statutory provision and a 2013 decision in *People v. Rudolph*, 21 NY 3d, 497. The Court of Appeals decision settled a dispute between the Appellate Division's Third and Fourth Departments and the Appellate Division

First Department. In a majority opinion written by Judge Fahey, the Court of Appeals has now ruled that the legislative language in CPL Section 720.10 and the *Rudolph* decision requires judges to make an on the record determination of youthful offender consideration regardless of whether the defendant asked for such treatment or forgoes it as part of a plea arrangement. Judge Fahey was joined in the majority by Chief Judge Lippman and Judges Rivera and Abdus-Salaam. Judges Stein, Read and Pigott dissented.

Sex Offender Registration Act

***People v. Lashway*, decided June 11, 2015 (N.Y.L.J., June 12, 2015, p. 23)**

In a unanimous decision, the New York Court of Appeals concluded that a County Court Judge did not abuse his discretion in denying a defendant's request for an adjournment of his reclassification of his risk level status under the sex Offender Registration Act. The Court found that the record evidence in the case at bar was overwhelming in support of the denial of any modification. The defendant was a repeat sex offender and the defendant was not prejudiced by the Court's denial of an adjournment.

Disorderly Conduct

***People v. Gonzalez*, decided June 25, 2015 (N.Y.L.J., June 26, 2015, pp. 7 and 23)**

In a unanimous decision, the New York Court of Appeals reversed a defendant's conviction and dismissed the charges finding that the defendant's arrest for disorderly conduct was not justified by his abusive behavior toward police officers in a Manhattan subway station. The defendant was arrested after he shouted obscenities at police officers. The Court, relying on its earlier decision in *People v. Baker*, 20 NY 3d 354 (2013), held that a person may be guilty of disorderly conduct only when the situation extends beyond the exchange between the individual disputants to a point where it becomes a potential or immediate public problem. The Justices found that the point was not reached with respect to the circumstances in the *Gonzalez* case.

Ineffective Assistance of Counsel

***People v. Washington*, decided June 25, 2015 (N.Y.L.J., June 26, 2015, p. 23)**

In a unanimous decision, the New York Court of Appeals concluded that the defendant's claim of ineffective assistance of counsel was not warranted and his conviction should be affirmed. In the case at bar, the defendant had filed a motion for reassignment of counsel. Counsel responded that he did not want to put himself in opposition to the defendant. After the Court made an inquiry of the defendant as to his complaints, the Judge asked defense counsel to once again respond and he explained what steps he had taken with regard to the defendant's case. The Court of Appeals concluded that although an attorney is not obligated to comment on a defendant's pro se motions or arguments, he may address allegations of ineffectiveness when asked to by the Court and should be afforded the opportunity to explain his performance. Applying settled principles to the facts of the case, the Panel concluded that defense counsel's comments in response to the judge's questions did not establish an actual conflict of interest. He did not suggest that his client's claims lacked merit, rather he informed the judge regarding facts concerning his representation. Thus he never strayed beyond a factual explanation of his efforts on his client's behalf.

Re-Sentencing

***People v. Lovett*, decided June 25, 2015 (N.Y.L.J., June 26, 2015, p. 23)**

In a unanimous decision, the New York Court of Appeals dismissed a defendant's motion for resentencing. The defendant had sought re-sentencing pursuant to the Drug Law Reform Act of 2004. The New York Court of Appeals cited *People v. Bautista*, 7 NY 3d 838 (2006) in which it held that there was no statutory provision authorizing a defendant to appeal from an Appellate Division order affirming the denial of the defendant's re-sentencing application. In the case at bar, even though the Appellate Division had consolidated its re-sentencing order with other appealable orders, it could not consider the re-sentencing issue. The Appellate Division's authority to consolidate appeals stems from its inherent authority to administer and manage its proceedings. The Appellate Division's use of this inherent authority does not expand or modify the scope of Court of Appeals jurisdiction as is established by statute.

Preservation of Issues

***People v. Brown*, decided June 25, 2015 (N.Y.L.J., June 26, 2015, p. 24)**

In a unanimous decision, the New York Court of Appeals affirmed the order of the Appellate Division and concluded that it could not consider the defendant's contentions since they had not been preserved for Court of Appeals review.

Criminal Enterprise

***People v. Keschner*, decided June 30, 2015 (N.Y.L.J., July 1, 2015, pp. 4 and 24)**

***People v. Goldman*, decided June 30, 2015 (N.Y.L.J., July 1, 2015, pp. 4 and 24)**

In a unanimous decision, the New York Court of Appeals upheld a conviction under the criminal enterprise statute of an internist and a chiropractor with respect to billing for treatments of phony or exaggerated car accident injuries. The defendants had argued that they could not have been engaged in a criminal enterprise because the criminal venture ceased to exist after its alleged organizer dropped out of the scheme and began cooperating with authorities. Judge Fahey, writing for a unanimous court, rejected the defendant's claim and held that the actions of the defendant

constituted a continuing nature of the criminal enterprise. The requirement is not that the group would continue in the absence of a key participant but rather that it would continue to exist beyond individual criminal incidents. The Court cited its previous determination in *People v. Weston Express International*, 19 NY 3d 652 (2012). The defendants had received sentences of one and one-half to four and one-half years for Keschner and two and one-half to seven years for Goldman.

CPL 710.30 Notice

***People v. Pacquette*, decided June 30, 2015 (N.Y.L.J., July 1, 2015, p. 23)**

In a unanimous decision, the New York Court of Appeals determined that the People were required to abide by the statutory notice requirements of CPL 710.30 and that therefore, the Court erred in allowing a police officer to testify at trial relative to his identification of the defendant at a pre-trial procedure. However, even though the prosecutor did not provide the required notice the Court affirmed the defendant's conviction, finding that the evidence at trial overwhelmingly established the defendant's guilt. At the trial, the primary undercover officer unequivocally identified the defendant as the seller of the illegal drugs. The defendant was also arrested minutes after the transaction and the pre-recorded buy money that had been used to purchase the drugs was found on the defendant's person. Further, the defendant's flight from police officers evinced a consciousness of guilt. Under these circumstances, the Court concluded that the detective who testified without the required statutory notice was merely cumulative and its admission could not have contributed to the defendant's conviction.

Legally Sufficient Evidence

***People v. Henderson*, decided June 30, 2015 (N.Y.L.J., July 1, 2015, p. 23)**

In a unanimous decision, the Court concluded that there was legally sufficient evidence to support the defendant's conviction for felony murder based upon the underlying predicate felony of burglary. The defendant, his cousin and a friend had broken into an apartment with the intent to assault another individual. Subsequently, a violent altercation occurred with some of the occupants in the building and a knife was used which resulted in the death of an individual. The defendant contended on appeal that the evidence of felony murder was legally insufficient because the predicate burglary was based upon his conceded intent to commit an assault. Relying on its prior decision in *People v. Miller*, 32 NY2d 157 (1973), a felony murder conviction may be predicated upon the commission of a burglary where the defendant's underlying intent is to assault the victim. The Court therein held that a felony murder charge predicated on burglary was sufficient for conviction of felony murder. The Court reiterated that it was entirely reasonable based upon the legislative intent that a person who unlawfully enters a building with the intent to commit an assault but causes the death of another may be convicted of felony murder in recognition that the homicide occurs in the context of other criminal activity that enhances the seriousness of the offense.

Cruelty to Animals

***People v. Basile*, decided July 1, 2015 (N.Y.L.J., July 2, 2015, p. 29)**

In a unanimous decision, the New York Court of Appeals upheld the conviction of a defendant charged with a Class A misdemeanor involving the deprivation of a dog in failing to provide necessary food and drink. The defendant claimed that the trial court committed error in refusing to instruct the jury that his conviction required proof of a mens rea specifically, that he knowingly deprived a dog of or neglected or refused to furnish the basic necessities required to maintain the animal's health. The ASPCA agent had testified that the dog looked skinny, its bones were prominent, there were fly bites on his ears, and there was no food, water, or nearby shelter. Although the defendant told the ASPCA agent that he could not afford to support the dog, the Court concluded that in light of the trial testimony about the dog's wasted appearance and dirty living conditions, there was no question that he was guilty under the relevant statute.

Prosecutorial Misconduct

***People v. Wright*, decided July 1, 2015 (N.Y.L.J., July 2, 2015, pp. 1, 6 and 23)**

In a 6-1 decision, the New York Court of Appeals reversed a defendant's conviction on the grounds that the prosecutor's contention at trial that the defendant left his DNA all over the crime overstated the scientific evidence against the defendant in a Rochester rape-murder trial and that further, the defense attorney's failure to challenge the prosecutor's misleading declarations did not prevent the necessity of a new trial. The majority opinion was written by Judge Rivera. The Court emphasized that while the prosecutor was entitled to fair comment on the DNA evidence available in the case, she was not entitled to present the results in a manner that was contrary to the evidence and the science. The prosecutor mischaracterized the DNA evidence which had been presented. Defense counsel had failed to object to the statements in question. However, although this amounted to ineffective representation, the Court based its decision on the prosecutor's summation which contained numerous misrepresentations of the evidence. Judge Pigott dissented and argued that the prosecutor's objectionable statements were isolated ones and that defense counsel had failed to object. Judge Fahey took no part in the ruling since he had participated in the Fourth Appellate Division decision in the matter.

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

During the last few months the Supreme Court began issuing a series of decisions in several important cases involving criminal law and constitutional issues. These cases are summarized below.

***Elonis v. United States*, 135 S. Ct. 2001 (June 1, 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 issues.

However, on June 1, 2015, in a 7-2 decision, the Court reversed the defendant's conviction on the narrow grounds that the government needed to prove more than the defendant was negligent or that a reasonable person would regard the statements as a threat. Chief Justice Roberts issued the majority opinion with Justices Alito and Thomas dissenting.

***E.E.O.C. v. Abercrombie & Fitch*, 135 S. Ct. 2028 (June 5, 2015)**

In an 8-1 decision, the Supreme Court held that under Title VII of the Civil Rights Act, an employer is prohibited from refusing to hire applicants because of religious practices that the company could accommodate without undue hardship and the company's liability could occur without actual knowledge. In the case at bar, the plaintiff applied for a position and appeared for the interview wearing a modified black hijab that she regarded as a symbol of modesty in her Muslim faith. The head covering was viewed as incompatible with the store's classic east coast collegiate look. The Court held that Abercrombie & Fitch could be held liable even if it did not know for certain that the head covering was a religious observance. The manager who conducted the interview assumed the scarf in question was being worn because the applicant was a Muslim but never specifically asked. Justice Scalia issued the majority ruling. Justice Thomas dissented and argued that intentional discrimination was not established.

***Zivotofsky ex rel v. Kerry*, 135 S. Ct. 2076 (June 8, 2015)**

In a 6-3 decision, the United States Supreme Court held that Congress overstepped its authority when it approved a passport law in 2002 which provided that Americans born in the City of Jerusalem could not list Israel as their birthplace on passports. The case involved a longtime dispute between the White House and Congress. The law which was struck down would have forced the State Department to alter its longstanding policy of not listing Israel as the birthplace for Jerusalem-born Americans. The policy is part of the government's refusal to recognize any nation's sovereignty over Jerusalem until Israelis and Palestinians resolve its status through negotiation. Justice Kennedy, writing for the majority, held that the President has the exclusive power to recognize foreign nations and that determining what a passport says is part of his executive authority. Justice Scalia along with Chief Justice Roberts and Justice Alito dissented. Chief Justice Roberts, in particular, issued a sharp dissent claiming that the Court's decision was dangerously groundbreaking. He stated that the Court takes the perilous step for the first time in our history by allowing the President to defy an Act of Congress in the field of foreign affairs.

***King v. Burwell*, 135 S. Ct. 2480 (June 25, 2015)**

In early November, the Supreme Court agreed to hear a new challenge to the Obama Healthcare Law. The new case involved tax subsidies that are provided to persons who have enrolled in certain states where the Federal Government has established federal exchanges. The claim was made that the Affordable Care Act authorized subsidies specifically for insurance bought on an exchange established by the state. Since at the present time only 16 states have set up their own exchanges, a ruling in favor of the Plaintiffs would have severely limited the viability of the Obama statute. Oral argument was heard on the issue on March 4, 2015 and it appeared that the Court was once again sharply split largely between the Liberal members of the Court and the Conservative group led by Justices Scalia and Alito. A decision was issued on June 25, 2015, just days before the end of the Court's current term. In a 6-3 ruling, the Court held that the term "exchange established by the state" is ambiguous when read in context and therefore can be interpreted in different ways. Chief Justice Roberts, who issued the majority opinion, stated that given that the text is ambiguous the Court must stick to the broadest structure of the Act. "[T]he statutory

scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid." Chief Judge Roberts was joined in the majority by Justices Ginsburg, Breyer, Sotomayor and Kagan. Justice Scalia issued a vigorous dissenting opinion, arguing that the Supreme Court has avoided the express language of the statute so as to save the statute. Judge Scalia stated "we should start calling this law SCOTUS care in light of the Court's somersaults of statutory interpretation and interpretive jiggery-pokery to uphold the law." Justice Scalia was joined in dissent by Justices Thomas and Alito.

***Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (June 18, 2015)**

In early December, the Court 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 argument had 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. Oral argument was heard on the issue in the late spring and a decision was rendered on June 18, 2015. The Court in a 5-4 decision upheld a ruling by the State of Texas that denied the Sons of Confederate Veterans plate with its confederate battle flag logo. In decision issued by Justice Breyer, the majority stated that when a message appeared on a license plate, it becomes the government's statement and not that of private individuals. Therefore, Texas had a right to refuse issuance of the plate. Justice Breyer was joined in the majority by Justices Sotomayor, Kagan, Ginsburg and, surprisingly, Justice Thomas, who usually votes with the Conservative block. A dissenting opinion was issued by Justice Alito, which was joined in by Justices Kennedy, Scalia and Chief Justice Roberts.

***Brumfield v. Cain*, 135 S. Ct. 2269 (June 18, 2015)**

In a 5-4 decision, the United States Supreme Court held that the determination by the State of Louisiana that a death row inmate with an IQ of 75 was not intellectually disabled was unreasonable. The defendant had contended that he was denied a due process right to state funding for expert evidence to develop his Atkins claims of mental retardation which would preclude his execution. The state courts in post-conviction hearings had arbitrarily denied the possible merits of his claim and the Supreme Court determined that the state determinations that the record failed to raise any question as to the prisoner's impairment was unlawful. Therefore, the matter was remitted for further consideration. The majority opinion was written by Justice Sotomayor and was joined in by Justices Breyer, Ginsburg, Kagan and Kennedy. Justices Thomas, Scalia, Alito and Chief Justice Roberts dissented.

***Ohio v. Clark*, 135 S. Ct. 2173 (June 18, 2015)**

In a unanimous decision, the Supreme Court determined that the statement of a three year old domestic abuse victim to pre-school teachers was not testimonial under the confrontation clause and was therefore admissible at trial. The statement had identified the defendant as the person who had caused his injuries. In holding that the statement was not testimonial, the court found that no violation of the confrontation clause had occurred and that therefore the *Crawford* ruling did not apply to the instant circumstances. The Court's majority opinion was written by Justice Alito and there were concurring opinions by Justices Scalia and Thomas joining in the result.

***Davis v. Ayalla*, 135 S. Ct. 2187 (June 18, 2015)**

In a 5-4 decision, the Supreme Court determined that any constitutional error which occurred from defense counsel's absence from an ex parte hearing regarding *Batson* challenges was harmless. Justice Alito issued the majority opinion and concluded that in a federal habeas corpus proceeding, the defendant had not established the required showing of prejudice regarding any error which was claimed to have occurred regarding the trial judge's ruling on *Batson* challenges. Therefore, any error which may have occurred was harmless. Justice Alito was joined in the majority by Justices Thomas, Kennedy, Scalia and Chief Judge Roberts. Justices Ginsburg, Sotomayor, Breyer and Kagan dissented.

***City of Los Angeles, California v. Patel*, 135 S. Ct. 2443 (June 22, 2015)**

In a 5-4 decision, the United States Supreme Court struck down a Los Angeles ordinance that allowed police to inspect hotel and motel guest registries without obtaining permission from a Judge. A group of motel owners had challenged the Los Angeles Law which allowed police to look at the registries at any time without the owner's consent or a search warrant. Justice Sotomayor, writing for the majority, held that owners who objected must be given the opportunity to make their case to a neutral decision maker before they are forced to turn over the records or risk arrest. Justice Sotomayor was joined in the majority by Justices Kagan, Ginsburg, Breyer and Kennedy. Justice Scalia dissented, arguing that the majority had struck a needless blow against a valuable and barely intrusive practice. He was joined in dissent by Chief Justice Roberts and Justices Thomas and Alito. The case is likely to have an impact on dozens of cities where law enforcement officials claimed that the warrantless searches allowed under the Los Angeles statute help catch fugitives and fight prostitution and drug dealing.

***Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (June 25, 2015)**

In a 5-4 decision, the Court ruled that the 1968 Fair Housing Act does not only ban overt discrimination in the housing market but can be sued to prohibit seemingly race neutral policies that have the effect of disproportionately harming minorities and other protected groups even if there is no overt evidence of bias. The majority decision written by Justice Kennedy adopts a broad interpretation of the statute and was supported by Justices Breyer, Ginsburg, Kagan and Sotomayor. Justices Scalia, Thomas Alito and Chief Judge Roberts dissented.

***Obergefell v. Hodges*, 135 S. Ct. 2584 (June 26, 2015)**

***Tanco v. Haslam*, 135 S. Ct. 2584 (June 26, 2015)**

***DeBoer v. Snyder*, 135 S. Ct. 2584 (June 26, 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 had 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 was held on April 28, 2015 and a decision was rendered on June 26, 2015, just before the Court concluded its current term. In a 5-4 ruling, the Court held that the right to marry was a fundamental right which was protected by the Fourteenth Amendment and that all fifty states are now required to uphold and recognize same sex marriage. The majority opinion was written by Justice Kennedy, who had issued the majority decision in *Windsor,* and his decision was joined in by Justices Ginsburg, Breyer, Kagan and Sotomayor. Justice Kennedy writing for the majority declared that same-sex couples respect marriage and asked for equal dignity in the eyes of the law. That right is granted by the Constitution. The four dissenting Justices each issued separate dissenting opinions. Chief Justice Roberts commented that the majority opinion was an act of will, not legal judgment and the right it announced had no basis in the Constitution. He argued that the Court had transformed a social institution and that the majority had usurped powers that belonged to the legislative branches of government. He concluded by asking "just who do we think we are?"

Justice Scalia issued a vigorous dissenting opinion in which he stated that the majority had exercised a naked judicial clam to power. Justices Thomas and Alito issued similar strong and vigorous dissents.

***Glossip v. Gross*, 135 S. Ct. 2726 (June 26, 2015)**

In late January, the Supreme Court granted certiorari 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 claimed 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. While this case was pending in the Supreme Court, several states which utilized the same type of drug in their death penalty procedures issued stays of execution pending the final outcome by the U.S. Supreme Court. As late as February, the Supreme Court in Florida had refused to allow any further executions until the issue was finally determined. On April 29, 2015 the Court heard oral argument in this matter and a decision was rendered on June 26, 2015. The Court determined by a 5-4 vote that the use of the drug known as midazolam did not violate the cruel and unusual punishment clause of the United State Constitution. Justice Alito, writing for the majority, held that the prisoners failed to show that the State's use of the drug involved a substantial risk of pain. Further, they had failed to identify an alternative method of execution that involved a lower risk of pain. Joining Judge Alito in the majority were Justices Scalia, Kennedy and Thomas, as well as Chief Justice Roberts. Juices Sotomayor, Breyer, Ginsburg and Kagan dissented. Perhaps with a view toward a future effort, Justices Breyer and Ginsburg, in issuing their dissents, went beyond the facts of the instant case and stated that they believed it was highly likely that the death penalty itself was unconstitutional.

***Michigan Power Company, et al. v. EPA*, 135 S. Ct. 2699 (June 29, 2015)**

In a 5-4 decision, the United States Supreme Court determined that the Environmental Protection Agency had exceeded its authority in adopting regulations regarding toxic emissions from coal and oil-fired plants. The regulations were aimed at an attempt to limit power plant emissions of mercury and other hazardous air pollutants. The five-Judge majority determined that in issuing its ruling, the agency had failed to take costs into account when the agency first decided to issue the regulations. Justice Scalia, who issued the majority opinion, stated that it was not appropriate to impose billions of dollars of economic costs on companies in return for a few dollars in health or environmental benefits. Justice Scalia was joined in the majority by Justices Kennedy, Thomas, Alito and Chief Justice Roberts. Justices Kagan, Ginsburg, Breyer and Sotomayor dissented, arguing that the EPA had considered costs at a later stage of its regulation process and that this was sufficient. The case was then remitted to the lower courts for the EPA to determine how to account for the costs of the proposed regulations.

***Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (June 29, 2015)**

In a 5-4 decision, the United States Supreme Court upheld the congressional districts which were drawn in Arizona by an independent commission and rejected a constitutional challenge that the State had improperly delegated its legislative authority to an outside body. The majority opinion was issued by Justice Ginsburg and was joined in by Justices Kennedy, Breyer, Kagan and Sotomayor. The majority held that there was no constitutional barrier to a state's empowerment of its people by embracing the concept of an independent commission. The argument had been presented that the independent commission violated the Constitution's Election Clause which gives state legislatures the power to set the time, place and manner of holding elections for Senators and Representatives. The independent commission process which was established in Arizona removed the legislature from the process. The four Justices who dissented indicated that the situation violated the Constitution. The dissenting Justices consisted of Chief Justice Roberts, and Justices Scalia, Alito and Thomas.

Pending Cases

***Montgomery v. Louisiana*, 136 S. Ct. __ (_____, 2015) replacing *Toca v. Louisiana*, 136 S. Ct. 781 (February 3, 2015)**

On December 12, 2014, the United States Supreme Court had agreed to hear the case of *Toca v. Louisiana*, which involved 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. In a surprise move, the Court on February 3, 2015 dismissed the certiorari petition in *Toca* on the grounds that the parties had notified the Court that pursuant to a recent state court development, the defendant had been released from prison after agreeing to enter an *Alford* plea to manslaughter. Pursuant to Rule 46, the Supreme Court was obligated to dismiss the case if all of the parties agreed in writing. In the *Toca* case, a written stipulation had been filed with the Court requesting dismissal.

The Supreme Court, however, within less than two months, indicated its resolve to decide the retroactivity issue by granting certiorari in another Louisiana case. Thus, on March 23, 2015, it granted certiorari in the matter of *Montgomery v. Louisiana*. Since the Court did not have sufficient time to review briefs and to hold oral argument in this matter during the current term, it is expected that a decision will not be reached until sometime in late 2015 or early 2016. The key justice in any forthcoming decision appears to be Justice Kennedy who previously cast the critical fifth vote in the Courts' earlier decisions on the issue. We await the results.

***Hurst v. Florida*, 136 S. Ct. __ (_____, 2015)**

In another death penalty case, the United States Supreme Court on March 9, 2015 agreed to accept a case emanating from Florida which involved a jury decision in 2000 to recommend a death sentence based upon a vote which was not unanimous. The issue involved is whether Florida's lack of a requirement that juries be unanimous in recommending the imposition of the death penalty violates constitutional principles under the Sixth and Eighth Amendments of the U.S. Constitution. Florida remains unique and is only one of a few states not requiring unanimity of either the findings or recommendations of death or of the aggravating factors that justified that verdict. This case will not be decided until the Court's next term.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were issued from May 1, 2015 through July 31, 2015.

People v. Clark **(N.Y.L.J., May 4, 2015, pp. 1 and 2)**

In a 3-2 decision, the Appellate Division, Second Department upheld a murder conviction of a defendant who insisted that he was misidentified as the shooter in a 2008 Brooklyn murder and claimed that he had received ineffective assistance of counsel because the alternative defense of justification was not presented. In the case at bar, the defendant had been fighting with the victim and during the trial defense counsel had informed the Court that he had advised the defendant of offering justification as an alternative defense in addition to his misidentification defense. Defense counsel had stated, however, that he would need the defendant's permission and that without his permission he could not do it. During deliberations the jury had issued a note asking that if the victim had initiated a physical struggle, and the defendant acted defensively, would that negate the intent to kill. When the trial judge asked defense counsel to comment on the note, he once again stated that the defendant only wanted to use one defense. On appeal, however, the defense argued that the attorney had committed ineffective assistance of counsel because he did not present a justification defense despite his client's instructions. The Appellate Division majority concluded that a defendant had the right to chart his own defense and that requiring defense counsel under the circumstances herein to undermine the assertion of innocence by injecting into the case a factually and logically inconsistent defense would compromise that right. In issuing its ruling, the majority relied upon a 1988 decision of the Court of Appeals, *People v. DeGina*, 72 NY2d, 768. Justice Mastro wrote the majority opinion and was joined by Justices Sgroi and Cohen. Justices Miller and Hinds-Ridix dissented. The sharp split in the Appellate Division and the interesting issue involved clearly indicates that the case may eventually have to be decided by the New York Court of Appeals.

People v. Martinez **(N.Y.L.J., May 6, 2015, p. 4)**

In a unanimous decision, the Appellate Division, Second Department reversed a defendant's conviction and ordered a new trial on the grounds that the prosecutor had made improper remarks throughout the trial and during summation which deprived the defendant of a fair trial. In the case at bar, the prosecutor had accused an expert witness of lying in this case and others and had also made himself an unsworn witness by suggesting that he had been present at the trial of another case in which the defendant's expert had lied.

People v. Pelosi **(N.Y.L.J., May 7, 2015, p. 4)**

In a unanimous decision, the Appellate Division, Second Department upheld a defendant's conviction for second degree murder. The Appellate Panel concluded that there was no merit to the defendant's arguments that the grand jury proceedings were defective because the prosecutor had presented the testimonies of two witnesses before the grand jury to a potential third witness. The Panel concluded that most of the conduct that the defendant complained about was not improper and the cumulative effect of any improper conduct did not deprive the defendant of a fair trial in light of the strong evidence of guilt. The conviction was therefore upheld.

People v. Valentine **(N.Y.L.J., May 8, 2015, pp. 1 and 4)**

In a 4-1 decision, the Appellate Division, First Department reversed a defendant's conviction and ordered a new trial on the grounds that the trial court committed reversible error when it instructed the jury that the defendant could not plead self-defense if he was the initial aggressor. The incident arose out of a neighborhood fight and the Court charged the jury on the various aspects of the justification defense. The majority in the Appellate Panel concluded that the evidence tended to indicate that it was either the deceased who first used force or that the defendant and the deceased acted simultaneously. Therefore a charge involving the issue of the initial aggressor was improper since there was no support in the record for a claim that the defendant acted as one. Justice Saxe dissented.

People v. White **(N.Y.L.J., May 12, 2015, p. 4)**

In a unanimous decision, the Appellate Division, Fourth Department upheld a search of a defendant as he was entering a courthouse which ultimately revealed the presence of illegal drugs. The Court concluded that signs outside the courthouse warned that anyone entering was subject to being searched. Since the defendant had notice of an impending search, he relinquished any reasonable expectation of privacy and impliedly consented to the search by seeking entry into the courthouse. The defendant's conviction was therefore upheld.

People v. James **(N.Y.L.J., May 14, 2015, p. 4)**

Ina 3-2 vote, the Appellate Division, Second Department reversed a defendant's conviction and ordered a new trial on the grounds that the trial court committed reversible error by not granting a defendant's motion to suppress evidence which was obtained through a show-

up identification in which the criminal suspect was presented to a person who was a victim of the crime. The Appellate Panel concluded that the police were actively involved in the identification process and that their actions made the procedure unduly suggestive. The Court noted that the victim had initially hesitated to identify the defendant and did not identify him until after the police had held up a striped shirt up against him, which they had recovered from the immediate area. The majority panel stated that this action by the police is akin to the police having pointed out the defendant as the perpetrator. Justices Dickerson, Cohen and Duffy comprised the majority opinion. Justice Dillon dissented and argued that the identification which occurred was reasonable under the circumstances.

People v. Cruz **(N.Y.L.J., June 4, 2015, pp. 1 and 6)**

In a 3-2 decision, the Appellate Division, First Department reversed robbery convictions involving a defendant who was identified by a robbery victim in a Manhattan apartment building. The police had conducted a show-up identification while the defendant was being restrained by police and appeared to be handcuffed. The majority of the Appellate Panel also indicated that lighting conditions at the time of the viewing may not have been adequate. Justices Tom and Gonzalez dissented and argued that the conditions asserted by the defendant and by the majority were merely those that are generally unavoidable in view of reasonable security concerns inherent in any show-up situation. Based upon the split in the Appellate Division and the issue involved, it appears that the matter will eventually be determined by the New York Court of Appeals.

People v. Dollinger **(N.Y.L.J., June 5, 2015, pp. 1 and 8)**

In a unanimous decision, the Appellate Division, Second Department held that there was a potential conflict of interest for the defendant to be represented at sentencing by a former Assistant District Attorney who prosecuted the case before entering private practice. Although the defendant had entered a plea while represented by an attorney from the Legal Aid Society, when he appeared for sentence several months later, he was represented by an attorney who was then in private practice but who had previously prosecuted the case as an Assistant District Attorney. After being sentenced to an indeterminate term of 1-4 years, the defendant claimed that he received ineffective assistant of counsel. The Appellate Division concluded that a potential conflict of interest existed and remanded the case to the lower court for resentencing.

People v. Graham **(N.Y.L.J., June 12, 2015, pp. 1 and 8)**

In a unanimous decision, the Appellate Division, Second Department reversed a defendant's conviction and ordered a new trial in a twenty-year-old murder case. The Court found that defendant's trial attorney had failed to provide psychiatric records to back up a claim of extreme emotional disturbance. Although the defendant's original conviction had been affirmed by the Appellate Court, subsequent proceedings based upon federal habeas corpus relief revealed the presence of extensive psychiatric records which were never disclosed in the state courts. Based upon this new information, the Appellate Division, Second Department held that a 440 post-conviction motion should have been granted and a new trial ordered.

People v. Brown **(N.Y.L.J., June 15, 2015, p. 4)**

In a unanimous decision, the Appellate Division, Second Department reversed a defendant's robbery conviction and ordered a new trial because the trial judge responded to a jury note without presenting it to the defense and prosecution and allowing them an opportunity to provide input. During the trial, the jury issued a note stating that one juror felt she could not make a decision based on the evidence presented. The trial judge read the note on the record in front of the jurors and immediately responded by encouraging the jury to make an attempt to arrive at a decision. The Appellate Panel concluded that the trial judge failed to comply with Criminal Procedure Law 310.30 and the procedure established in *People v. O'Rama*, 78 NY2d, 270 which required that juror inquiries be marked as exhibits and read into the record in the presence of counsel before the jury is called back into the courtroom. A new trial was therefore required.

People v. Henagin **(N.Y.L.J., June 16, 2015, p. 4)**

In a unanimous decision, the Appellate Division ordered a new trial for a defendant who was convicted of attempted burglary after a police officer found jewelry in the man's pocket. The Appellate Panel found that an illegal search had been conducted when police had stopped him a few blocks away from a reported burglary. The officer had conducted what he called a protective pat down and found a plastic bag containing jewelry that one of the victims said belonged to her. The Appellate Division concluded that the motion to suppress should have been granted and that the trial court was incorrect in concluding that the jewelry would have been discovered through normal police procedures.

People v. Pierre **(N.Y.L.J., June 17, 2015, p. 1)**

In a unanimous decision, the Appellate Division, Fourth Department upheld a determination that a defendant was entitled to a new murder trial despite the prosecution's argument that the defendant did not merit consideration pursuant to CPL Section 440.10. The Court determined that the defendant had met his burden of showing that new evidence which he presented if available during his 2003 jury trial may have affected his conviction. The Court stated that the new evidence, which included statements made by another to his girlfriend which indicated that he may have been responsible for

the killing, could be presented at any new trial and were relevant to a determination of the issues in the case.

People v. Montague **(N.Y.L.J., July 7, 2015, pp. 1 and 8)**

In 3-1 decision, the Appellate Division, Third Department vacated a defendant's guilty plea and dismissed the indictment on the grounds that the prosecution's five-year delay in filing charges violated the defendant's constitutional right to a speedy trial. In January 2009, police had seized the defendant's computer after a repair mechanic had told them that he believed he found child pornography on the instrument. About seven months later, police obtained a search warrant to analyze the computer. However, the defendant was not indicted in Albany County until December of 2013. The majority concluded that the prosecution failed to show good cause for the long delay which occurred in this matter and that the indictment therefore, should be dismissed. The majority opinion was written by Justice Lahtin and was joined in by Justices McCarthy and Rose. Presiding Justice Peters dissented.

People v. Velez **(N.Y.L.J., July 7, 2015, p. 6)**

In a unanimous decision, the Appellate Division, First Department reversed a defendant's murder and assault conviction and ordered a new trial on the grounds that the trial judge failed to properly instruct the jury on the law of self-defense. The defendant had been convicted only of assault. The Appellate Panel found that the trial judge failed to explicitly convey that a finding of justification on the top count precluded further deliberation on the lesser counts. The trial judge by telling the jury that when considering each offense they had to find that the defendant was not justified, may have led the jurors to improperly conclude that deliberation on each crime required reconsideration of the justification defense even if they had already acquitted the defendant of the top count of attempted murder based on justification.

People v. Paulino **(N.Y.L.J., July 8, 2015, pp. 1 and 6)**

In a unanimous decision, the Appellate Division, First Department upheld the conviction of a defendant and rejected a claim that a warrantless search of his apartment was improper. The Appellate Panel determined that exigent circumstances justified the warrantless entry into the apartment. The defendant had been involved in a shooting at a bar and the defendant had been identified shortly after the incident. Police immediately proceeded to his apartment. The Appellate Panel concluded that the exigent factors as set forth in the case of *People v. McBride*, 14 NY3d 440 (2010) applied to the circumstances in the case at bar. These factors included the violent nature of the offense; whether the suspect is reasonably believed to be armed; strong evidence the suspect committed the crime and strong reason to believe that the suspect is in the premises being entered; a likelihood that the suspect will escape if not swiftly apprehended, and the peaceful circumstances of the entry.

People v. Merrero **(N.Y.L.J., July 13, 2015, p. 1)**

The Appellate Division, Third Department vacated a defendant's guilty plea to a sex abuse charge after finding that a judge misstated what forcible compulsion means during the plea colloquy. The defendant had told the court that he had subjected the victim to sexual contact by grabbing her breast. The judge then asked if he did this by forcible compulsion, in other words without her consent or without her authority. The Appellate Court determined that the element of forcible compulsion was crucial with regard to the crime of first degree sexual abuse and that the trial judge did not properly explain the term in the context of the Penal Law definition. Under such circumstances it could not be determined that the defendant understood the nature of his guilty plea and the conviction had to be vacated.

People v. Irving **(N.Y.L.J., July 16, 2015, p. 1)**

In a unanimous decision, the Appellate Division, Second Department ordered a new trial for a defendant who is convicted of second degree murder. The Appellate Panel found that the trial judge should have instructed the jury to consider a justification defense because the man was defending himself against an attempted robbery. The issue arose from a landlord-tenant dispute.

People v. Cassala **(N.Y.L.J., July 20, 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 he had been denied the effective assistance of counsel. The Panel found that defense counsel had failed to educate himself about the alleged victim's medical problem, which left him unprepared to cross-examine the key prosecution witness. The Court found that a series of actions by defense counsel had the cumulative effect of falling below the required standard for meaningful representation.

People v. Mones **(N.Y.L.J., July 21, 2015, p. 1)**

In a 3-2 decision, the Appellate Division, Third Department reversed a defendant's conviction and remanded the matter to a trial court. The three-judge majority concluded that the trial judge had failed to inquire with sufficient specificity as to whether the defendant understood the rights he was waiving when pleading guilty to burglary. During the plea colloquy, the prosecutor repeated a recitation that by pleading guilty the defendant would waive his right to a trial and an appeal. The County Court simply asked the defendant if anyone was forcing him to give up his rights. Although the defendant had responded in the negative to these questions, the Appellate Panel found that in order for the plea to be valid there needed to be an explanation of waiving one's rights and the consequences for doing so. The three-judge majority consisted of Justice McCarthy and Justices Clark and Rose. Justice Devine and Egan, Jr., dissented. The dissenters argued that although further explanation would have

been welcome, the defendant was given adequate notices of what his plea meant. Due to the sharp split in the court it appears that the matter may eventually be determined by the New York Court of Appeals.

***People v. Cesar* (N.Y.L.J., July 27, 2015, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Second Department held that a trial court should not have relied solely on a man's immigration status when sentencing him to jail time for a drunken driving conviction. The trial judge reasoned that because the defendant was an undocumented immigrant, sentencing him to probation would create an aggravating circumstance and an ethical problem because he would be in violation of that probation as a result of his illegal status. The Court then sentenced him to eight months in jail. In issuing its ruling, the Appellate Division concluded that the trial judge's reliance solely on the defendant's immigration status was improper and ordered a resentencing.

***People v. Warrington* (N.Y.L.J., July 31, 2015, pp. 1 and 2)**

In a 3-1 decision, the Appellate Division, Third Department reversed a defendant's conviction and ordered a new trial on the grounds that the trial judge failed to thoroughly question a prospective juror who suggested she might be biased against a defendant in a child-killing case. During the questioning, the juror had given ambiguous answers as to whether she could be fair because of the respective ages of the victim and the defendant. The Court thereafter failed to sufficiently follow up with additional inquiries and the Appellate Panel concluded that under such circumstances a new trial was required. The majority opinion consisted of Justice Egan, Jr. McCarthy and Clark. Justice Devine dissented.

For Your Information

District Attorney Donovan Wins Congressional Seat—New District Attorney Assumes Vacant Seat in Staten Island

On Tuesday, May 5, 2015, Staten Island District Attorney Daniel Donovan, Jr. was elected to fill a vacant Congressional seat that covers all of Staten Island and a small portion of Brooklyn. The Congressional seat had become vacant due to the resignation of Michael Grimm, who was forced to resign in January after pleading guilty to tax fraud. Donovan captured nearly 60% of the vote in a special election, defeating New York City Councilman Vincent Gentile. Donovan's election maintains the seat for the Republicans. Donovan's election will mean the elevation of his chief Assistant District Attorney Daniel Masters, Jr. as acting District Attorney. Governor Cuomo, who is a Democrat, has the authority to appoint Donovan's replacement but if no action is taken Masters will continue to fill the position through the end of 2015. Masters, who is 61 years of age, has served as the Chief Assistant District Attorney for many years. Previously, he served as counsel to Staten Island borough presidents James Molinaro and Guy Molinari. He has also served as an adjunct professor at the Fordham University School of Law and received his J.D. degree from Georgetown University Law Center and also holds an LLM from Columbia Law School.

Daniel Masters will serve as Staten Island District Attorney only until the end of the year. He had indicated that he was not interested in running for the seat at the next general election. As a result, Joan Iluzzi-Orbon who has been in the Manhattan District Attorney's Office for the last 27 years, received the Republican nomination to run for that office. Her opponent in November will be Michael McMahon, a Democrat and a partner at Herrick, Feinstein.

The vacancy which occurred in Staten Island as a result of the District Attorney obtaining a Congressional seat is the second one to occur within the New York Metropolitan area within the last year. Only a few months ago, Kathleen Rice from Nassau County was elected to Congress and her position as District Attorney of Nassau County was assumed by Madeline Singas, who recently announced that she is seeking election to the office on a permanent basis. Singas has received the endorsement of the Democratic organization in Nassau County and she will be opposed in the November election by Hempstead Town Supervisor Kate Murray, who was recently endorsed by the Republican party.

Another vacancy recently occurred in the New York prosecutorial community when Loretta Lynch assumed the office of Attorney General in late April. Her First Assistant District Attorney, Kelly Currie, assumed the office as acting U.S. Attorney for the Eastern District. Mr. Currie is 51 years of age and is a graduate of the University of Virginia School of Law. He has been a prosecutor in the Eastern District from 1999 to 2010 and recently returned to the office after serving for four years as a partner at Crowell and Mooring. He will supervise a staff of approximately 170 attorneys and 125 support personnel. He is well regarded by the legal community and his appointment led to many complimentary remarks.

Judicial Conduct Commission Report

The New York State Commission on Judicial Conduct recently issued its report regarding its activity during the year 2014. The Commission reported that it had received a total of 1,767 complaints, which was about the same number as last year; 499 initial inquiries were conducted which led to 145 investigations. Five judges were publicly disciplined in 2014; two were censured and three were admonished. Nineteen judges, however, resigned while complaints were pending. The Commission is comprised of eleven members and it issues its report regarding discipline for the State's 3,500 state judges on a yearly basis.

Continuing Demise of the Death Penalty

As public attitudes continue to change, the number of executions and death sentences in the United States continue to drop. A new report recently issued states that for the year 2014, the number of executions in the United States amounted to thirty-five which was down from thirty-nine for the previous year. The number of death sentences which were handed out also declined to 77 from 95 in 2013. Nebraska, a relatively conservative state, recently voted to abolish its death penalty by a vote of 32 to 15. The Governor vetoed the legislative action but his veto was overturned by a vote of 30-19 so that Nebraska has now joined 18 other states and the District of Columbia in outlawing the death penalty. Previously, in 2013, Maryland had also ended capital punishment. Although currently the death penalty is legal in thirty-two of the fifty states, the only states that continue to actively utilize the death penalty are Florida, Texas, Missouri and Oklahoma which in 2014 accounted for 89% of the total executions in the nation.

Further action on the death penalty was recently taken by the United States Supreme Court in the case of *Glossip v. Gross* where the Court ruled in June to uphold the use of a controversial drug to effectuate executions. The Court, however, divided 5-4 with two of the dissenting Justices to wit, Breyer and Ginsburg, indicating that they felt the death penalty itself was unconstitutional.

Housing Sales and Prices Continue to Rise

Recent statistics issued in May from various sources confirm that the national housing market has almost fully recovered from the dark days of the recent recession. Nationally the median home price has climbed 8.9% over the last twelve months to $219,400.00 which is just short of the 2006 peak. The annual rate of home sales has risen to 5.05 million with April marking the second straight month that the sales rate has topped 4 million homes. The improvement in the housing picture appears to be based upon a strong economic recovery involving the improving job market and continued very low mortgage rates.

Report from the Lawyer's Fund

The Lawyer's Fund for Citizen Protection recently provided its report for the year 2014. The Fund reported that it paid out a total of $6.1 million to clients who were the subject of attorney misconduct. The theft of funds held by attorneys in real estate accounts continued to be the form of misconduct which resulted in the greatest amount of reimbursement. In 2014, a total of $1.97 million went to clients whose lawyers stole real property escrow funds. In 2014, the Fund also made reimbursements of $1.56 million to clients where lawyers misappropriated funds from investment accounts to which lawyers had access.

In total, 559 reimbursement awards were made to clients. One lawyer in particular, disbarred Albany lawyer Andrew Capoccia, was responsible for 405 or 72% of the awards made. He was convicted for fraud and other offenses and is currently serving a sixteen year federal prison term. Another attorney, James Kalpakas, who practiced in Old Westbury ,was responsible for over $66,000.00 in reimbursements for stealing money which was held in real estate accounts. He is currently serving a ten year sentence in state prison. The report continued to state that the required reimbursements were due to only a tiny fraction of attorneys who commit malpractice and that the overwhelming number of the more than 100,000 registered attorneys in New York State continues to act in a proper and ethical manner. The principal source of revenue for the Fund comes from the Bi-Annual Attorney Registration fee. Sixty dollars of the $375.00 paid for the registration fee goes to the Lawyer's Fund for Client Protection.

Proposed Sentencing Reforms

Chief Judge Lippman, following the recommendations of a State Commission on Sentencing which he established two years ago, recently advocated changes in the sentencing of some 200 different types of felonies. The proposals basically eliminate indeterminate sentences and calls for fixed periods of incarceration. The Commission is chaired by Manhattan District Attorney Cyrus Vance and Franklin County Family Court Judge Derek Champagne. It is comprised of both defense attorneys, prosecutors and judges and has been reviewing proposals for sentencing changes for many months. The proposals basically favor determinate sentences which Chief Judge Lippman says provides concreteness and different possible determinate sentences are being recommended for the different categories of felony crime. The proposal will soon be incorporated into a legislative bill for legislative approval. Indications are that it may receive mixed reviews within the current State Legislature. We will keep our readers advised of developments.

Obesity Rates

A recent Gallup Poll classified the various states with either the highest or lowest obesity rates among their populations. The states with the lowest obesity rate were Hawaii at 19.0%, Colorado with 20.3%, Montana with 23.5%, California with 23.9% and Massachusetts with 24.0%. New York State ranked eighth lowest with an obesity rate of 24.7%. Nationally, the obesity rate was placed at 27.7% up from 25.5% in 2008. The states with the highest obesity rates were Mississippi 35.2%, West Virginia with 34.3%, Louisiana at 33.2%, Arkansas at 33.0% and Oklahoma at 32.6%. As a general rule, a higher obesity rate seems to exist in the southern states and the lowest obesity rate is found in the western area.

U.S. Births Increase for First Time in Seven Years

A recent report by the Pew Research Center found that births in the United States during the year 2014 were up for the first time in seven years. About 53,000 more babies were born in 2014 than the year before, an increase of about 1%. Births were up for nearly every racial and ethnic group, but teenage births hit a historic low, dropping 9% from 2013. Births to teenagers have dropped by 61% since 1991. Overall, there were just under 4 million babies born in 2014. The greatest increase in births occurred with respect to women in their 30s and 40s.

Videotaping of Custodial Interviews

In early June, the New York State Bar Association, the District Attorney's Association and the Innocence Project stated that they agreed there should be legislation requiring the videotaping of some custodial interrogations of

suspects. During the last several years, the State Bar and State and Federal governments have funded pilot programs to provide recording equipment to police agencies. Studies of wrongful convictions by the State Bar and the State Courts have often pointed to improper confessions by suspects. The joint agreement by the three groups in question should further enhance efforts to obtain legislation in this area.

Appellate Division Openings

Mandatory retirements of Justice Gonzalez in the First Department and Justice Scudder in the Fourth Department will create two vacancies for Presiding Justice positions as of December 31, 2015. Screening Committees appointed by the Governor have been viewing applications to fill these positions. Appellate Division vacancies also exist for Associate Justice positions within the Third and Fourth Departments. An Associate Justice position also recently opened up with the unexpected announcement by Judge Skelos from the Appellate Division, Second Department that he is leaving the Court to re-enter private practice. He will be joining the firm of Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana in Uniondale, Long Island. It is hoped that the Appellate Division vacancies will be filled quickly so as not to create a situation where backlogs begin to occur in the Appellate Courts due to a shortage of judicial personnel.

Raising the Age of Criminal Responsibility

The recent efforts by Chief Judge Lippman and Governor Cuomo to raise the age of criminal responsibility from 16 to 18 years of age hit a roadblock this year when the state legislature failed to vote on the issue. As an interim measure, the Governor announced that he would order that all 16- and 17-year-old offenders be removed from state prisons and placed in separate facilities which will be designed and managed by the Department of Corrections and the Office of Children and Family Services. It is estimated that some 94 prison inmates who are 16 or 17 years of age will be subject to such transfers. The Governor indicated that he will again try to pass the proposed legislation when the legislature reconvenes for next year's session. The local District Attorneys have raised serious questions regarding the increase in the age of criminal responsibility. The State Senate also appears concerned about such legislation and it is currently unclear what the eventual outcome on this issue might be. We will keep our readers advised.

State Review of Police Actions

Governor Cuomo also recently issued an executive order empowering the Attorney General for the next year to review the work of local District Attorneys in investigating fatal shootings by police officers. Attorney General Schneiderman has sought special prosecutorial powers in police killing cases since December. The Governor and Attorney General had sought legislative action on a permanent approach regarding cases that involved fatal shootings by police officers. The legislature to date has failed to act on such proposals and the Governor's order is viewed as a temporary measure until the issue can again be addressed by the legislature. Local District Attorneys have raised serious questions regarding the possible constitutionality of the Governor's order, as well as procedures which have recently been issued to implement the executive order. President of the District Attorney's Association Gerald Mollen, from Broome County, recently wrote to Attorney General Schneiderman and questioned the recent guidelines issued by the Attorney General's office. District Attorney Mollen indicated that neither Executive Law 63(2) nor Governor Cuomo's executive order gives the Attorney General the authority to define the duties of local prosecutors. A meeting or conference call is being sought between the Attorney General and the local District Attorneys to resolve the complex practical and legal issues which have been created by Governor Cuomo's actions. With regard to the future of any proposed legislation, the State Senate in particular has expressed serious reservations about superseding the local District Attorneys with respect to the cases involving shootings by police officers and the entire issue continues to be of a highly controversial nature.

Reduction in Felony Backlog

In April, the Office of Court Administration had raised concerns regarding a pending backlog within New York City jails. A new initiative was begun to review cases which had been pending for a substantial period of time and which involved inmates at Rikers Island. As a result, in late June the Office of Court Administration announced that a substantial reduction in the number of such cases had been achieved. Thus, with respect to defendants who had been detained at Rikers Island for one year or longer, the number had dropped to 836 as of June 10, 2015 for the entire City of New York from a total of 1,427 in mid-April 2015. The reduction had been achieved through a cooperative effort by members of the judiciary, prosecutors and defense attorneys. The Office of Court Administration announced that its goal to be achieved by October 15, 2015 is to have a further reduction to 715 as a New York City total.

New York City Millionaires

A recent report issued by an organization known as Wealth in Sight revealed that New York City has the highest percentage of millionaires than any city on the United States. The percentage was placed at 4.63%. Overall the

destination with the highest percentage of millionaires was listed as Monaco with 29.2% followed by Zurich, Switzerland with 27.3%. The only other American city to make the top list was San Francisco which was listed at a millionaire rate of 2%.

Jobless Rate Decreases

Recent statistics from the United States Labor Department indicates that the national unemployment rate has reached 5.1% and has declined in 21 states. The figures indicate widespread improvement in the nation's job market. Employers added jobs in 31 states. Indications are for a continuing improvement in the nation's economy and unemployment figures.

Customer Service by Internal Revenue Service Reaches New Low

Recent reports by several taxpayer groups and acknowledgements from officials of the Internal Revenue Service clearly indicate that during this last tax season taxpayers received terrible service from the Agency. A report issued by the National Taxpayer Advocate Group indicated that only 37% of people who called the IRS for help during this tax season were able to reach a person. The IRS help lines were so overloaded that the system hung up on 8.8 million callers. The Agency has blamed recent budget cuts on the decline of customer service and improvement in the quality of service appears to be far away.

World Population Increases

A new United Nations report indicates that the world's current population is 7.3 billion people. According to the report, the world's population is expected to reach 8.5 billion by 2030 and 9.7 billion in 2050. It is expected that by the end of the current century, there should be 11.2 billion people on earth. The report also reveals the interesting information that the population of India is now expected to surpass that of China by the year 2022. China's population is currently 1.38 billion with India close behind at 1.31 billion. By 2022, India's population is expected to reach 1.4 billion, slightly surpassing that of China. The report also states that by the year 2050 the United States, which currently has the world's third largest population, will be surpassed by Nigeria and its total population will drop to fourth place.

Millennials Now Make Up Majority of U.S. Workers

A recent study issued by the Pew Research Center indicates that the group known as Millennials, who were those born between 1981 and 1997 now make up slightly more than 34% of the 2015 United States workforce and thus constitute the major group in the workplace. Those born between 1965 to 1980 and referred to as Generation X make up 34% of the 2015 workforce. Baby Boomers who were born between 1946 and 1964 constitute 29% of the current workforce and the senior group born between 1928 and 1945 referred to as the Silent Generation, now make up only 2% of the 2015 workforce.

About Our Section and Members

Upcoming Fall CLE Program

The Fall CLE Program, which will cover forensics, has been scheduled for Saturday, November 14, 2015 at New York University Law School. Details regarding the Program will be mailed to Members within the coming weeks. This type of Program has proven to be both informative and interesting and has in the past received good participation from our Members.

Barry Kamins Article

Former Supreme Court Justice Barry Kamins, a long-time member of the Criminal Justice Section and a regular contributor to our *Newsletter,* had an interesting article published in the *New York Law Journal* of August 3, 2015 at page 4. The article involved recent cases from the New York Court of Appeals which have set limits on the use of grand jury testimony at trial. We recommend it to our readers.

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.

Babatunde S. Aremu
Christine Aziz
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Sean Beherec
Bryce Edward Benjet
Stephen Bennett
Michelle E. Bleecker
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Pamela Fisher
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Michael Giordano
Stuart Gold
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Margot Marie Hanstein
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Jordan S. Hollander
Michelle R. Hotchkins
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Tara A. Laterza
Lisa Lewis
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Publication and Editorial Policy

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

Publication Policy: All articles should be submitted to:

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

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

Editorial Policy: The articles in this *Newsletter* represent the authors' viewpoints and research and not that of the *Newsletter* Editor or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

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Save the Date!

Criminal Justice Section Fall Meeting

Forensics and the Law V

Saturday, November 14, 2015

9:00 am – 4:30 pm

New York University School of Law

Speakers and registration information will be available soon

www.nysba.org/Criminal