

New York Criminal Law Newsletter



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



Janet DiFiore

Governor's Appointee as New Chief Judge of the New York Court of Appeals

(See Feature Article at Page 10)

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Message from the Chair

Those of us who practice Criminal Law in New York State often forget that many criminal cases come before the Town and Village Justice Courts. Our Chief Judge Lippman's commitment to providing counsel at arraignment, his proposals for bail reform, the office of Indigent Legal Services focus on quality of representation, the



recent settlement in the *Hurrell-Harring* lawsuit, and the United State Supreme Court's decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) continue to lead to changes in the criminal justice system throughout the State. Courts are required to have counsel at first appearance for all defendants and to determine their eligibility for assigned counsel. Bail decisions are being scrutinized and the effect of criminal charges on a person's immigration status must be addressed by counsel in every criminal case. In many of the Justice Court jurisdictions, caseloads have increased as has the severity of the charges being filed. As a result, I have formed a Committee within our Section on the Town and Village Justice Courts.

These developments in policy and law have forced change in the way the Town and Village Courts have historically operated. Although the office of Indigent Legal Services (ILS) is providing both grant money and statutory monetary distributions for the counties to fund counsel at first appearance, this requirement, while absolutely necessary, has placed increased demands on the Town and Village Justice Courts. For example, until recently the large majority of these courts held arraignment without counsel. The case would then be adjourned to a time, when the court was in session, to have counsel appear. This was largely due to the fact that many of the Towns and Villages did not have overnight holding facilities for

arrestees or law enforcement available to monitor individuals, who were being held in custody. These resources are still lacking. Further, the procedure for locating counsel for arraignment varies from jurisdiction to jurisdiction. In most areas of the state, there are no centralized arraignment courts or holding facilities. The responsibility to find available and effective counsel falls on the court staff or, in many places, the Judge. The Justice Courts are presided over by part-time Judges, who, in many parts of the State, are not attorneys. These Judges are paid nominal salaries and given limited resources to run their courts. The funding for these courts is local and often insufficient. This framework makes it difficult for many of these courts to meet the demands and legal requirements necessary to administer justice. The Criminal Justice Section's committee will evaluate these issues among others.

In 2007, under the Presidency of Kathryn Grant Madigan, a Task Force of the New York State Bar Association looked at the Town and Village Justice Courts. The Task Force's report was adopted by the House of Delegates which included recommendations such as a reconsideration of the residency and practice restrictions placed on lawyer-judges, increased compensation for judges and court clerks, consolidation of jurisdictions, increased technology and better training and education for the justices. While some of these recommendations have been implemented, others may require additional study and further consideration. The Section's committee will consider these existing NYSBA policies in evaluating the more recent issues affecting the Town and Village Justice Courts. Ultimately, the committee hopes to produce a report and effect much needed change.

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.**

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Message from the Editor

In this issue we present our annual review of newly enacted criminal law legislation which has been prepared by former Justice Barry Kamins. Judge Kamins has been preparing this annual update almost from the inception of our *Newsletter* some thirteen years ago. We thank him for his continued support. In our second feature article, we discuss the upcoming changes in the New York Court of Appeals involving the appointment of Janet DiFiore as the new Chief Judge to replace Judge Lippman and a new Associate Judge to replace Judge Read. The State Commission on Judicial Nomination has recently issued its list of seven possible nominees for Judge Read's vacancy and Governor Cuomo will have to make his selection no later than January 22, 2016. The Governor's nomination must be reviewed by the State Senate, which is expected to act by February 2016. In our next *Newsletter* we will provide a detailed biographical sketch of the new Chief Judge as well as the appointment to replace Judge Read.



In our third feature article, we discuss the possible demise of the death penalty and some interesting activity which has occurred in the United States Supreme Court with respect to the death penalty issue. The United States Supreme Court commenced its new term on October 5, 2015. After making some preliminary rulings, it heard oral argument on several important cases which were held over from the last term. These pending cases are discussed in our Supreme Court Section.

The New York Court of Appeals commenced hearing cases in early September following its summer recess and some of its decisions to date are summarized in our *New York Court of Appeals Section*. In two interesting cases, the

New York Court of Appeals discussed the issues of witness tampering and loss of grand jury minutes. The Court has been operating with only six Judges as it once again faced a shortage of judicial personnel while the Governor and the State Senate were considering new appointees.

During the summer months and in early fall, the various Appellate Divisions issued several decisions in the criminal law area and these matters are summarized in our *Appellate Divisions Section*. Some of the Appellate Divisions also have existing vacancies in their judicial staff and are awaiting the Governor's appointments to replace Justices who have recently retired or left the Court.

In our *For Your Information Section*, we provide many interesting articles of general interest to our readers. They include new Federal sentencing initiatives which will greatly reduce the number of incarcerated prisoners. Other topics involve the state of the U.S. economy and the appointment of a new State Administrative Judge. We also discuss issues involving the deportation of illegal immigrants and the growing problem of student debt.

As in the past, the New York State Bar Association and our Criminal Justice Section will be holding Annual Meeting at the New York Hilton Midtown in New York City. The date for this year's Section Meeting, CLE Program, and Luncheon has been scheduled for Wednesday, January 27, 2016. As in the past, our Section will be presenting several awards to distinguished members of the legal profession who have exhibited exemplary legal skills or service to the community. Details regarding these events have been forwarded in a separate mailing. We hope that many of our readers will be able to attend.

As we enter our thirteenth year of publication, I thank our Members for their continued support of our *Newsletter*. I encourage Members to submit articles for possible publication and invite comments and suggestions.

Spiros A. Tsimbinos

Note New Day!

Criminal Justice Section

2016 Annual Meeting Program and Luncheon

Wednesday, January 27, 2016

New York Hilton Midtown

New Criminal Law Legislation

By Barry Kamins

This article discusses new criminal justice legislation signed into law by Governor Andrew Cuomo, amending the Penal Law, Criminal Procedure Law and other related statutes. The discussion that follows will primarily highlight key provisions of the new laws and as such the reader should review the legislation for specific details. In some instances, where indicated, legislation enacted by both houses is awaiting the governor's signature and, of course, the reader must check to determine whether a bill is ultimately signed or vetoed by the governor.

There were two substantive pieces of criminal justice legislation enacted in the last session. The first, entitled the Trafficking Victims Protection and Justice Act, significantly enhances protection to victims of human trafficking and in particular addresses the commercial sexual exploitation of children. In addition, it increases the accountability of traffickers.¹

One provision of the new legislation conforms the penalties for patronizing a prostitute when the person being patronized is less than seventeen years of age, with the penalties for rape when the victim is under seventeen. It accomplishes this by creating a new crime, Aggravated Patronizing a Minor for Prostitution in the 1st, 2nd and 3rd Degree. The crime both prohibits specific sexual conduct not covered by existing patronizing statutes and aligns the penalties for these new crimes with the penalties for Rape in the 1st, 2nd and 3rd Degree.

The new legislation also aligns the age of the victims in each degree of Patronizing a Prostitute with the age of the victim in the corresponding degree of rape offenses. In addition, it increases the age at which a person can be charged with Promoting Prostitution in the 1st and 2nd degree. Finally, the new legislation increases both the age at which a person can be charged with Compelling Prostitution, as well as the age limit of the victim.

Other provisions of the legislation increase penalties for certain forms of sex and labor trafficking. Those crimes have now been designated violent felonies where the defendant causes physical injury, serious physical injury, death or property damage.² In addition, the legislation creates a new offense, Aggravated Labor Trafficking, a class C felony. A person can be convicted of this crime when he compels another person to engage in labor by intentionally providing a controlled substance to such person for the purpose of impairing his or her judgment.

In response to concerns about patronizers who frequent school zones, a new crime was enacted, Patronizing a Person for Prostitution in a School Zone, a class E felony. Under this provision it is unlawful when a person who is twenty-one years or older patronizes a person less than

eighteen years of age, in a place that the patronizer knows or reasonably should know is a school zone.

In 2010, the Criminal Procedure Law was amended to enable a person to vacate a conviction of prostitution when his or her participation in the crime was a result of having been the victim of human trafficking. The new legislation complements that amendment by establishing an affirmative defense at trial to Prostitution or Loitering for the Purpose of Engaging in a Prostitution Offense. A defendant can now assert the defense by arguing that his or her participation in the crime was a result of having been the victim of Sex Trafficking, Compelling Prostitution or trafficking under the federal Trafficking Victim's Protection Act (USC, Title 22, Ch. 78).

Victims of Sex and Labor Trafficking and Compelling Prostitution may now commence a civil action for damages against his or her trafficker within ten years after the victim is no longer subject to the victimization. Finally, all reference in the Penal Law to "prostitute" have been replaced with the phrase "person for prostitution," a gender neutral term. Legislators noted that nowhere else does the Penal Law designate a defendant by the crime charged, *i.e.*, "murderer" or "robber," and this change will eliminate the stigma created by the term "prostitute."

The second substantive piece of legislation is the college campus sexual assault prevention and response bill.³ This law is intended to change the manner in which colleges and universities in New York State address reports of sexual assaults, dating violence, domestic violence and stalking.

The law requires schools to amend their codes of conduct to enhance a student's ability to report incidents of sexual assault to local law enforcement officials and to give students more control over the process that unfolds once an incident occurs. Schools must adopt a student's bill of rights as part of its conduct code. In addition, educational institutions must adopt procedural guidelines for student violations including due process requirements, appeal procedures and victim impact statements. The law also creates a definition of affirmative consent to sexual activity that requires a clear affirmative agreement between partners.

A third substantive development in the criminal justice system has resulted from an executive order issued by the Governor. In response to a series of deaths of unarmed civilians at the hands of police, Governor Cuomo issued an executive order designating the Attorney General as special prosecutor to investigate, and if warranted, prosecute certain matters involving the death of an unarmed civilian, whether in custody or not, caused by a law enforcement officer.⁴ The order has a one-year term and does not apply retroactively.

The executive order empowers the Attorney General, who supersedes all District Attorneys in these matters, to conduct an investigation by, among things, gathering evidence, conducting witness interviews, reviewing scientific reports and reviewing video recordings. Where the special prosecutor declines to prosecute or where a Grand Jury declines to vote any charges, he must file a report with the Governor explaining the outcome and offering any recommendation for systemic reform arising from the investigation.

Each year the Legislature has expanded the definitions of certain crimes and increased penalties for others, and this year was no exception. First, the Legislature closed what some believed to be loopholes in the definition of two sex crimes. It expanded the definition of Forcible Touching by making it unlawful to subject another person to sexual contact for the purpose of gratifying the actor's sexual desire when the other person is a passenger on a bus, train or subway. This amendment was in response to reports of individuals using public transportation who rub their genitals on fellow passengers while masturbating.⁵ Second, the definition of Public Lewdness was expanded to include individuals who engage in lewd acts while trespassing in a dwelling. This amendment followed an incident in which a Westchester homeowner discovered her neighbor masturbating while in the homeowner's dining room.⁶

The Legislature has increased the penalty for assaulting four classes of individuals: emergency medical paramedics and emergency medical service technicians; individuals who work at a secure facility and who are employees of the Office of Mental Health or the Office for People with Developmental Disabilities; health care workers who are not nurses but who provide direct patient care at various health care facilities; and public health sanitarians (those who conduct environmental health inspections). Simple assaults against these individuals will now elevate a misdemeanor charge to a class D felony.⁷

A person who performs services as a private investigator without a license can now be charged with an A misdemeanor.⁸ An individual who uses an unauthorized sticker or label on an official election ballot can now be charged with an E felony.⁹

The Legislature enacted a series of new crimes in the last session. In response to the widespread use of new synthetic drugs, the Legislature has added several substances to the list of hallucinogenic substances under the Penal Law. These substances known as "N-Bomb" or "Smiles" are meant to mimic the effects of LSD as an hallucinogen. In many cases, however, these drugs can have devastating side effects. Possession or sale of these substances can constitute either a misdemeanor or a felony, depending upon the weight of the substance.¹⁰

The Legislature also enacted a new crime, Aggravated Leaving the Scene of an Incident Without Reporting, a class C felony, in response to reports of individuals who

have left the scene of accidents which resulted in serious physical injury or death. A person can be convicted of the crime if he engages in reckless driving, leaves the scene of an accident where more than one person has been killed or seriously injured and (1) has had his driver's license revoked or suspended based on a conviction of Driving While Intoxicated, Driving While Impaired or Leaving the Scene of an Accident or (2) has been convicted within the past ten years of the above offenses.¹¹

Following a series of articles in the *New York Times* about working conditions in nail salons, it is now an unclassified misdemeanor to operate an "appearance enhancement business," e.g., nail salon, without a license. The penalty for this offense is a \$2,500.00 fine and a maximum of six months' imprisonment.¹² It is now a misdemeanor for any owner or manager of a residential building to discriminate against a victim of domestic violence by refusing to rent a residential unit to such person because of such person's status as a victim. The penalty carries no imprisonment, but imposes a fine of from one to two thousand dollars.¹³ Finally, individuals who conceal a body to prevent the discovery of a person's death can now be charged with Concealment of a Human Corpse, a class E felony.¹⁴

A number of procedural changes were enacted in the last legislative session. One amendment affects the expiration date of orders of protection in certain cases. When the Criminal Procedure Law was amended in 2006 to extend the permissible duration of a Final Order of Protection, the amendment did not account fully for the extended probation periods that were required for sexual assault convictions in felony and misdemeanor cases. As a result, orders of protection in these cases would expire before the defendant had completed probation. The amendment extends the expiration date on an order of protection for a felony sexual assault conviction where probation is imposed to ten years from the date of sentencing and to six years from the date of sentencing in a misdemeanor case where probation is imposed.¹⁵

A new rule of evidence has been enacted. In any prosecution for Prostitution or Loitering for the Purpose of Engaging in a Prostitution Offense, a prosecutor may no longer offer evidence that a person was in possession of one or more condoms for the purpose of proving probable cause for an arrest or for the commission of the crime itself.¹⁶

Sealing provisions have been amended to authorize a local criminal court to unseal records; previously, only a superior court could do so even where the application to unseal involved records that a local criminal court had initially sealed.¹⁷

In the area of drug treatment courts, the Legislature has amended the Criminal Procedure Law to impose a uniform state policy permitting drug courts to authorize medically prescribed treatment in a judicial drug diversion program. Previously, some courts had required partici-

pants to wean off medication, *e.g.*, methadone, in order to continue participation in their programs. The new policy will permit courts to allow defendants needing treatment for opioid abuse or dependence to have access to medication such as methadone and buprenorphine (brand name Suboxone). The new law permits treatment under the care of a duly licensed health care professional and prohibits a court from requiring a defendant to taper off the medication in order to remain in a diversion program.¹⁸

Finally, the Legislature has taken steps to expand the use of e-filing throughout the State. The initial legislation, authorizing the use of e-filing in designated counties and courts, was set to expire on September 1, 2015. The new legislation extends the sunset date to September 1, 2019 and continues the present authorization for the use of e-filing, both consensual and mandatory, in Supreme Court and County Courts. The new law also contains a provision authorizing each Appellate Division Department to promulgate rules authorizing the e-filing of appeals in criminal cases. However, before promulgating such rules all groups who would be affected must be given an opportunity to review and comment on the rules.¹⁹

A number of new laws will affect crime victims. One law provides for counseling programs for victims of sex offenses and child pornography crimes²⁰ while another permits the grandchild of a homicide victim to be reimbursed for counseling.²¹ Non-English speaking victims of domestic violence are now assured that their report to the police will be promptly translated into English in order to effectuate a swift investigation.²² Victims of domestic violence will also benefit from an amendment allowing people who change their names to seek waivers from the requirement that notice of a name change be published in designated local newspapers; they can now obtain a waiver without the necessity of showing a history of past abuse.²³

Victims of violent felonies can now avail themselves of a standardized form that will require law enforcement officials to notify them if the defendant has petitioned to change his or her name.²⁴ Crime victims who apply for victim compensation will need not show proof of financial difficulty if their claim is \$10,000.00 or less.²⁵ Finally, a court must waive the DNA data bank fee when the defendant is the victim of human trafficking and has been convicted of certain enumerated crimes relating to prostitution.²⁶

A number of changes have been made in driver-related offenses under the Vehicle and Traffic Law. One amendment will affect sentences of probation or a conditional discharge where there is a condition that the defendant install and maintain an ignition interlock device (IID).

Sentencing judges will normally impose a specific time period during which the IID must be maintained. However, when a defendant is accused of violating a condition of probation and the court issues a declaration

of delinquency, there is no automatic extension of the end date of the IID condition nor an express provision that would require a defendant to maintain the device during the delinquency period.

Thus, a defendant may inappropriately benefit when violating a sentencing condition if the court files a declaration of delinquency. The amendment will now require a defendant to maintain the IID device during the period of any declaration of delinquency and will authorize the court to extend the period of maintenance until the delinquency period terminates.²⁷

In addition, when a motorist is charged with a violation of the Vehicle and Traffic Law and the charge is dismissed, a motorist may no longer be charged with a fine or penalty of any kind.²⁸

Several new laws will affect prisoners and some of them relate to mental health issues. Initially, a new law provides that a parole hearing shall not proceed if the parole violator appears to be mentally incapacitated. In such cases, Article 730 of the Criminal Procedure Law will be triggered to determine whether the parolee is mentally fit to proceed.²⁹ In addition, inmates will now have more opportunities for their families to communicate with the Department of Corrections and Community Supervision about the inmate's medical condition.³⁰

In addition, the Department of Corrections and Community Supervision will now make the final determination regarding the medical release of inmates who are convicted of non-violent crimes.³¹ Incarcerated women who are pregnant or who have delivered within the preceding eight weeks will no longer be subjected to shackling unless extraordinary circumstances exist.³²

Finally, the Commissioner now has the discretion to advance an inmate's scheduled parole release date from a Friday to a Thursday in order to ensure that the parolee reports the next day to a community supervision program. In the past when parolees were released on a Friday and, as a result, did not report until Monday, there was a risk that the parolee might violate a parole condition during the two-day period prior to his or her reporting.³³

Numerous laws have had their expiration dates extended. The following statutes have been extended until September 1, 2017: determinate sentencing; the ignition interlock program; inmate work release program; electronic court appearances in designated counties; and the use of closed-circuit television for certain child witnesses.³⁴

The Legislature has extended the process by which a driver's license will be suspended if the motorist fails to pay child support; the law was extended until August 31, 2017.³⁵ Finally, the expiration date of a statute regulating the resale of tickets to places of entertainment within certain buffer zones has been extended until May 14, 2016.³⁶

In various miscellaneous laws, one bill would provide the Wyoming County District Attorney's office with

a more flexible recruiting process by permitting assistant district attorneys to be hired from adjoining counties. Wyoming County has the 8th smallest population in the state and other small counties, *i.e.*, Putnam, Fulton and Essex, have in the past been afforded an exception to the requirement that prosecutors reside in the county.³⁷

One new law expedites the availability of medical marijuana to certain patients whose serious health conditions warrant immediate use even before implementation of the 2014 medical marijuana law.³⁸

The Fair Chance Act will affect all New York City employers, both public and private. The law prohibits employers from inquiring about an applicant's criminal record until after they have made a conditional offer of employment. New York City joins other localities who have adopted this policy, *i.e.*, Buffalo, Rochester, Syracuse, Yonkers and Ulster County.

If, after receiving information regarding the applicant's record, the employer no longer wishes to employ the applicant, the employer must give a reason and provide a copy of the record to the applicant. The position must then be held open for at least seven business days during which time the applicant can respond, question any inaccuracies in the record and offer explanations regarding the criminal record. The employer need not wait for a response beyond seven days.³⁹ The law provides exemptions for public and private employers who are required by law to conduct criminal background checks and for several City agencies including the Police Department, Fire Department and Department of Corrections.

Finally, a new law prohibits the sale or manufacture in New York City of synthetic marijuana, commonly known as K2.⁴⁰ Possession of ten or more packets, individual containers or separate units of this substance would be presumptive evidence that an individual possessed the items with intent to sell.

A violation of this section constitutes a misdemeanor punishable by a fine of up to \$5,000.00 or imprisonment of up to one year, or both. An individual would also be liable for a civil penalty. First-time violators who have not been previously convicted of a felony or a serious offense as defined in Penal Law § 265.00(17) would be liable for a civil penalty of between \$500.00 and \$5,000.00 per violation. In addition, the law permits the sealing of a business when there are two violations of these provisions in a three-year period.

Endnotes

1. 2015 N.Y. Laws ch. 368, eff. January 19, 2016.
2. The statute has an error which will need to be corrected. It referenced Penal Law § 135.35(3) rather than § 135.35(4).
3. 2015 N.Y. Laws ch. 76 (adding Education Law, Article 129-B), eff. October 5, 2015; *see also* S. 1316 (awaiting the Governor's signature).
4. Executive Order 147, eff. July 8, 2015.

5. 2015 N.Y. Laws ch. 250 (amending Penal Law § 130.52), eff. November 1, 2015.
6. A. 2761 (awaiting the Governor's signature).
7. S. 4839, S. 3913, A. 1034, and A. 7542 (all awaiting the Governor's signature).
8. 2015 N.Y. Laws ch. 115 (amending General Business Law § 70), eff. August 13, 2016.
9. A. 7280 (awaiting the Governor's signature).
10. A. 627 (awaiting the Governor's signature).
11. A. 5266 (awaiting the Governor's signature).
12. 2015 N.Y. Laws ch. 80 (amending GBL § 412), eff. July 16, 2015.
13. 2015 N.Y. Laws ch. 366 (adding RPL § 227-d), eff. January 19, 2016.
14. 2015 N.Y. Laws ch. 242 (adding Penal Law § 195.02), eff. November 22, 2015.
15. 2015 N.Y. Laws ch. 240 (amending CPL § 530.12(5)), eff. October 22, 2015.
16. 2015 N.Y. Laws ch. 57 (adding Penal Law § 60.47), eff. April 13, 2015.
17. A. 7319 (awaiting the Governor's signature).
18. 2015 N.Y. Laws ch. 258 (amending CPL § 216.05(5) and (9) (a)), eff. September 25, 2015.
19. 2015 N.Y. Laws ch. 237 (amending CPL § 10.40 and Judiciary Law § 212), eff. August 31, 2015.
20. A. 86 (awaiting the Governor's signature).
21. 2015 N.Y. Laws ch. 104 (amending Executive Law § 626), eff. August 13, 2015.
22. A. 4347 (awaiting the Governor's signature).
23. 2015 N.Y. Laws ch. 241 (amending Civil Rights Law § 64-a), eff. September 22, 2015.
24. S. 1744 (awaiting the Governor's signature).
25. 2015 N.Y. Laws ch. 263 (amending Executive Law § 631), eff. September 25, 2015.
26. A. 2469 (awaiting the Governor's signature).
27. A. 6222 (awaiting the Governor's signature).
28. A. 7230 (awaiting the Governor's signature).
29. S. 4780 (awaiting the Governor's signature).
30. A. 7501 (awaiting the Governor's signature).
31. 2015 N.Y. Laws ch. 55 (amending Executive Law § 259-r), eff. April 13, 2015.
32. A. 6430 (awaiting the Governor's signature).
33. 2015 N.Y. Laws ch. 270 (amending Correction Law § 74), eff. October 25, 2015.
34. 2015 N.Y. Laws ch. 55, eff. April 13, 2015.
35. 2015 N.Y. Laws ch. 29, eff. June 30, 2015.
36. 2015 N.Y. Laws ch. 15, eff. May 14, 2015.
37. 2015 N.Y. Laws ch. 139 (adding Public Officers Law § 64), eff. August 13, 2015.
38. A. 8258, A. 7060 (awaiting the Governor's signature).
39. Local Law 63, eff. October 27, 2015.
40. Local Law 95, eff. December 20, 2015.

Barry Kamins is a former State Supreme Court Judge and is now a partner at Aidala, Bertuna & Kamins. He is also the author of *New York Search and Seizure* (Lexis/Nexis 2015) and is a frequent contributor to our Newsletter.

New Appointments to the New York Court of Appeals

By Spiros A. Tsimbinos

In an article which appeared in our last issue regarding the possible new appointees to the New York Court of Appeals, we mentioned that a possible selection as the new Chief Judge would be A. Gail Prudenti. Former Judge Prudenti had served as Chief Administrative Judge until June of 2015. Her possible appointment was somewhat clouded by her recent decision to leave the judicial system and accept a position as Executive Director for the Center for Families, Children and the Law at the Hofstra School of Law. When the State Commission on Judicial Nomination announced its selection of seven nominees which were sent to the Governor for selection of the next Chief Judge, Judge Prudenti's name did prominently appear in the list of seven. The seven nominees which were revealed in a press release on October 15, 2015, were as follows:

A. Gail Prudenti—Currently at the Hofstra Law School, former Chief Administrative Judge of the state of New York and former Presiding Justice of the Appellate Division Second Department.

Janet DiFiore—Currently Westchester County District Attorney, former Justice of the Supreme Court Westchester County.

Michael Garcia—Partner at Kurland & Ellis and former U.S. Attorney for the Southern District of New York.

Carey Dunne—Partner at Davis Polk & Wardwell.

Caitlin Halligan—Partner at Gibson, Dunn and Crutcher and former Executive Assistant at the New York County District Attorney Office.

Rowan Wilson—Partner at Cravath, Swaine & Moore.

Stephen Younger—Partner at Patterson Belknap Webb & Tyler and former President of the New York State Bar Association.

Somewhat of an unexpected surprise is that only two of the seven candidates, Janet DiFiore and A. Gail Prudenti, had prior judicial experience, and none of the current sitting Judges on the Court appeared on the list

for the next Chief Judge. Two of them on the list of seven, Stephen Younger and Rowan Wilson, have appeared on prior lists of prospective nominees with regard to recent appointment which were made involving Judge Stein and Judge Fahey. Legal analysts had focused on A. Gail Prudenti, Janet DiFiore and Stephen Younger as the strongest contenders for the position. In issuing its list of seven nominees, the Commission reported that it had received thirty-three applications, eight of whom were women and seven with diverse backgrounds.

Under current state law, Governor Cuomo was to have made his selection between November 15 and December 1, 2015. On the very last day, December 1, 2015, the Governor announced his choice and selected Janet DiFiore as his nominee. The nomination must then go to the State Senate which has thirty days to act on the Governor's nomination once he sends his selection to that body.

The leadership of the State Senate has indicated, however, that it will not take up the Governor's nomination until it resumes its session in January. Thus, although Chief Judge Lippman has stepped down as Chief Judge as of December 31, 2015, the new Chief Judge may not begin her service until the end of January or early February. The current designated salary of the Chief Judgeship is \$198,600.00.

In somewhat of a surprise, the State Commission on Judicial Nomination issued the names of seven nominees with respect to the position of Chief Judge prior to the time that it had issued its list of seven regarding the replacement of Judge Susan Read, who had taken early retirement effective on August 24, 2015. The list of possible replacements for Judge Read was to be presented to the Governor by December 22, 2015. The list included several names from the prior list (Garcia, Halligan, Wilson and Younger) and three new additions.

The Governor is expected to make his next selection by January 22, 2016 and the Senate is expected to act on the Read replacement in February. We will present detailed background information on Judge DiFiore and Judge Read's replacement in our next issue.

The Approaching Demise of the Death Penalty

By Spiros A. Tsimbinos

In the recent United States Supreme Court decision in *Glossip v. Gross*, 135 S. Ct. 2726 (June 29, 2015), Justices Breyer and Ginsburg indicated in their dissenting opinion that they felt it was time to review the constitutionality of the death penalty. Justice Breyer, with Justice Ginsburg joining in the dissent, stated at 135 S. Ct. 2755:

For the reasons stated in Justice Sotomayor's opinion, I dissent from the Court's holding. But rather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.

In an interview given to the *National Law Journal*, on September 2, 2015, some two months after the *Glossip* decision, Justice Breyer provided some additional details on his dissenting opinion. Justice Breyer confirmed that he had written the dissent before the *Glossip* case arose. "I have been working on it for a while," he said. "This case was there, and it seemed an appropriate place to say what I thought on the issue." Justice Breyer's dissent has already been cited in several legal briefs and the petitioners in the *Glossip* case, in fact, made specific reference to it in seeking to have the Supreme Court reconsider its original decision. The Court, however, in August denied the petition for a rehearing. (See 136 S. Ct. 20 (August 28, 2015)).

Justices Breyer and Ginsburg based their request on the claim that changing standards require the reopening of the constitutionality question. It appears that public attitudes have continued to change on the use of the death penalty and the number of executions and death sentences in the United States has been dramatically reduced. A new report recently issued stated that for the year 2014 the number of executions in the United States amounted to 35, which was down from 39 for the previous year. The number of death sentences handed out also declined to 77 from 95 in 2013. Since many stays on executions were issued during the year 2015 pending legal action, the number of executions in 2015 dropped to 28, the lowest level since 1991.

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 to 19 so that Nebraska has now joined 18 other state and the District of Columbia in

outlawing the death penalty. Previously in 2013, Maryland had also ended capital punishment. But a stay of the adopted legislation has been granted pending a referendum vote by the voters. Although currently the death penalty is legal in 32 of the 50 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. In 2015, the four states of Florida, Texas, Missouri and Georgia accounted for 93% of the total. Actually carrying out executions continues to be plagued by difficulties in utilizing lethal injections. The State of Oklahoma recently had to delay the execution of Richard Glossip, who was the subject of the recent Supreme Court decision, because a wrong drug was delivered to prison authorities. Because of this situation, no execution will be scheduled in Oklahoma until at least the beginning of next year.

Pope Francis himself, during his visit to the United States during his address to Congress, advocated for the global abolition of the death penalty. During his address, Justice Ginsburg, who agreed with Justice Breyer's dissent was in attendance. Chief Justice Roberts and Justices Kennedy and Sotomayor were also in attendance during the Pope's address.

A recent decision by the Connecticut Supreme Court also found that the death penalty no longer meets society's evolving standards of decency and that the death penalty violates the Connecticut constitution. In 2012 Connecticut abolished the death penalty for all future crimes. The Connecticut Supreme Court however, ruled that the abolishment should also apply retroactively to inmates who were on death row.

The Supreme Court has already restricted the use of the death penalty with respect to juveniles and defendants with mental retardation. The latest comments by Justices Breyer and Ginsburg indicate that a new effort may be under way by the four liberal Justices to provide a final death knell to the death penalty. It is highly likely based upon the recent voting patterns of Justice Kennedy that he would join the liberal grouping in any effort to finally rule the death penalty as being unconstitutional. It seems that the statements made by Justice Breyer and Justice Ginsburg were a signal to get the right case before the Court. It thus appears that the days of the death penalty may be numbered and that following the same-sex marriage ruling, another significant social change may be coming from the Supreme Court.

New York Court of Appeals Review

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from August 1, 2015 through October 25, 2015. The New York Court of Appeals commenced hearing oral arguments on September 8, 2015 after returning from its Summer recess. The Court once again began hearing cases without a full complement of Judges since Judge Read had left the Court as of October 24, 2015. It is expected that several months will pass before Judge Read's replacement will be selected and some of the decisions reviewed below were decided with six Judges participating.

Fair Trial

***People v. Harris*, decided October 15, 2015 (N.Y.L.J., October 16, 2015, p. 22 and October 19, 2015, p. 2)**

In a unanimous decision, the New York Court of Appeals upheld a trial judge's decision to allow discussion of a murder case during a witness tampering and bribery trial. The Court concluded that evidence of the murder case against a different defendant was relevant to Harris' trial because it showed the mindset of key witnesses. In a decision written by Judge Pigott, the Court concluded that any possible prejudice to the defendant if jurors linked him to the murder case was minimized by a limiting instruction which made clear to the jurors that the defendant had not been charged in the murder case.

Harmless Error

***People v. Baxin*, decided October 15, 2015 (N.Y.L.J., October 16, 2015, p. 22 and October 19, 2015, p. 2)**

In a unanimous decision, the Court of Appeals upheld a defendant's designation as a Level 2 sex offender, despite the defense's lack of access to grand jury minutes that were part of the materials considered by the Judge. Although the Court agreed that the lack of disclosure was a due process violation it concluded that the error which occurred was harmless in view of the overwhelming unchallenged evidence given to the defense. The defendant had been indicted on various sex crimes for abusing his ten-year-old stepdaughter.

Sufficiency of Accusatory Instrument

***People v. Sans*, decided October 15, 2015 (N.Y.L.J., October 16, 2015, p. 22)**

In a unanimous decision, the New York Court of Appeals upheld an Appellate Term determination that the accusatory instrument which was filed against the defendant in the criminal court was facially sufficient. The defendant had been convicted of criminal possession of a weapon in the fourth degree regarding possession of a gravity knife. In the accusatory instrument, the police officer stated that he had observed the defendant remove a knife from the defendant's pocket and that when the knife was tested it was determined to be a gravity knife in that it opens with centrifugal force and locks automati-

cally in place. The defendant claimed that the language in the accusatory instrument was insufficient because it failed to state that the blade of the knife, once released, was locked in place by means of a button, spring, lever or other device as required by Penal Law Section 265.00(5). The New York Court of Appeals rejected the defendant's argument, claiming that the language in the accusatory instrument gave defendant sufficient notice of the charged crime to satisfy the demands of due process and double jeopardy. The Court of Appeals also rejected other attacks upon the accusatory instrument alleged by the defendant.

Waiver of Appearance by Defendant

***People v. Poleun*, decided October 15, 2015 (N.Y.L.J., October 16, 2015, p. 23)**

In a unanimous decision, the New York Court of Appeals rejected a defendant's claim that he was improperly assessed a Level 3 sex offender classification because he was not present at the hearing. In the case at bar, the County Court prior to the hearing had received letters from the defendant stating that he did not wish to attend. Subsequently, defense counsel acknowledged that his office had spoken to the defendant regarding his absence and counsel filed with the Court a Waiver of Appearance executed by the Defendant. The defendant subsequently argued on appeal, that his Waiver of Appearance was not made knowingly, intelligently and voluntarily. The New York Court of Appeals rejected the defendant's claim. The Court noted the presence of the executed waiver, the fact that defense counsel represented the defendant at the hearing, as well as the fact that defense counsel did not raise any further objection. Based upon these factors, the Court determined that the defendant had in fact failed to preserve any challenge to his Waiver of Appearance and that this was not a rare case in which preservation is not required.

Sufficiency of Evidence

***People v. Jorgensen*, decided October 22, 2015 (N.Y.L.J., October 23, 2015, pp. 1, 5 and 22)**

In a 5-1 decision, the New York Court of Appeals held that a woman should not have been convicted of second-degree manslaughter for the death of her six-day-old

baby from in utero injuries sustained in a car accident she caused. Judge Pigott writing for the majority stated that when the provisions of the homicide statute are read in tandem with Penal Law Sections 125.05(1) and 125.15(1), it becomes clear that the legislature did not intend to hold a pregnant woman criminally responsible for reckless conduct with respect to herself and her unborn fetuses unless such conduct is done intentionally.

In the case at bar, the defendant, who police said was incapacitated by alcohol and prescription medications, was thirty-four weeks pregnant at the time. Her baby, injured when she struck the steering column in a crash, was

delivered by Caesarian section. The baby died six days later from the trauma of the crash and from organ failure. The mother was subsequently convicted of one count of second-degree manslaughter for the death of the baby with regard to reckless conduct. Judge Fahey dissented and argued that the majority had reached the untenable conclusion that the six-day-old baby was not a person under the homicide and manslaughter statutes. Judge Fahey argued that where the baby victim is born alive but subsequently dies, the Penal Law allows for the conviction of a defendant-mother of manslaughter in the second degree where the acts causing the baby's death occur before the infant was born.

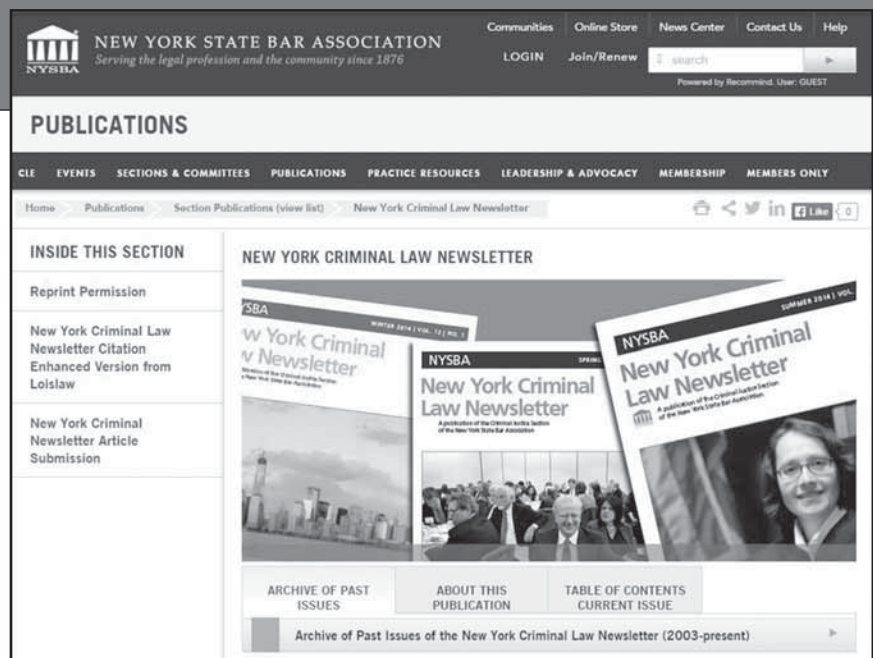
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Recent United States Supreme Court Decisions Dealing with Criminal Law and Recent Supreme Court News

The Court opened its new term on October 5, 2015 and began hearing oral argument on a variety of matters. Several cases which were pending last term were held over to the current term. Some of these cases involve important issues such as affirmative action, labor unions and the death penalty. These significant cases are summarized in our Pending Cases Section. During its summer recess, the Court did manage to issue a decision with respect to an important case which it had decided earlier in the term.

***Glossip v. Gross*, 136 S. Ct. 20 (August 28, 2015)**

In *Glossip v. Gross*, 135 S. Ct. 2726 (June 29, 2015), the United States Supreme Court by a 5-4 vote rejected a claim by several death row inmates that the use of the controversial drug midazolam in effectuating death penalty executions constituted cruel and unusual punishment. Going outside of the narrow issue presented by the case, two dissenting Judges, to wit, Justices Breyer and Ginsburg, indicated that changing times and conditions rendered the death penalty unconstitutional and that it was time to revisit the issue. Based upon these remarks in the dissenting opinion, the inmates in question sought a rehearing of their case and a determination on the constitutionality issue. The Supreme Court, however, denied the rehearing petition without comment or dissent on August 28, 2015. It appears that based upon the comments of Justices Breyer and Ginsburg and the fact that the four liberal Justices usually vote together, that an effort will be made at some time in the near future to have the High Court once again consider the constitutionality of the death penalty. In any such effort Justice Kennedy will again be the critical vote, and since in several recent cases he has voted to limit its use, the eventual demise of the death penalty may be on the horizon.

Pending Cases

***Whole Women's Health v. Cole*, 136 S. Ct. (2016)**

In the beginning of September, the Supreme Court granted certiorari with respect to an abortion rights case which involves the issue of what limitations the states can impose on that right. The State of Texas in 2013 passed a law which makes it more difficult for women to obtain abortions. One of the provisions requires doctors at a clinic to have admitting privileges at a nearby hospital. A second provision would require the clinics to meet the standards of an ambulatory surgical center. Lawyers for the State of Texas have argued that the requirements are designed to protect the health of women. Abortion rights attorneys seeking Supreme Court review have argued that the provisions are designed to restrict abortions because so few clinics can currently meet the requirements. A briefing schedule will soon be issued with regard to the pending case and oral argument and a decision on the matter are not expected until the early part of 2016.

***Montgomery v. Louisiana*, 136 S. Ct. (2016) 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 involves the issue of whether the court's earlier decision in *Miller v. Alabama* should be applied retroactively. In *Miller*, the Court ruled that mandating life imprisonment for juvenile defendants charged with murder was unconstitutional. The Court when it rendered that determination in 2012 was silent on whether the prohibition would apply retroactively to hundreds of offenders who had previously been sentenced. It appears that now the Court is ready to address the issue. 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 past term, it scheduled oral argument in the very beginning of its current term which opened in October. Thus, on October 13, 2015, the Court heard a seventy-five minute argument on the case. During oral argument it appeared that a procedural bar might exist to the Court's determining the issue on the merits. Justice Scalia, in particular, raised the issue of whether the Court properly had jurisdiction and suggested that perhaps the Court had no business hearing the *Montgomery* case. There thus exists the possibility that the Justices could dismiss the case on technical grounds and once again seek to take up another case to eventually decide the issue of retroactivity. It is expected that a decision will not be reached for several months and we will report the result to our readers. The key Justice in any forthcoming decision on the issue of retroactivity appears to be Justice Kennedy, who previously cast the critical fifth vote in the Court's earlier decision on the issue.

***Hurst v. Florida*, 136 S. Ct. ____ (_____, 2016)**

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. A secondary issue in the case is whether factual findings supporting the death penalty must be made by a jury and not a judge. In the Florida case, a jury divided 7-5 in favor of the death penalty and then a judge imposed that sentence. This case was also held over from last term and the Court heard oral argument on the issue on October 13, 2015. A decision is expected sometime within the next few months.

While the *Hurst* decision is pending, Florida has already scheduled two executions in cases which have similar issues. The Supreme Court, however, in the case of *Correll v. Florida*, 2015 WL 6111441, denied the petitioner cert petition and his application for a stay. Whether the Florida execution will proceed remains undetermined at this time.

***Kansas v. Carr*, 136 S. Ct. ____ (_____, 2016)**

The issue in this case is whether the Eighth Amendment involving cruel and unusual punishment requires a jury instruction in capital murder cases that mitigating circumstances need not be proven beyond a reasonable doubt.

***Fisher v. University of Texas at Austin*, 136 S. Ct. ____ (_____, 2016)**

In 2003, the United States Supreme Court in a 7-1 decision sent a case back to the Texas Federal Courts for

further review with instructions to apply strict scrutiny to the toughest evaluation of whether a government's action is allowed. The case involved the issue of affirmative action regarding a quota system utilized by the University of Texas in its enrollment procedures. After the case made its way through the Texas court system, it is once again before the United States Supreme Court and the University of Texas is facing an equal protection challenge to its use of racial balances in undergraduate admissions decisions. Opponents of affirmative action are viewing the new review by the United States Supreme Court as a possibility of eliminating affirmative action in enrollment decisions. Those challenging affirmative action have argued that the use of affirmative action treats individuals differently on the basis of race and therefore creates a constitutional violation. Based on past voting patterns, it appears that any new decision will involve a 5-4 decision, with Justice Kennedy once again being viewed as the critical swing vote. Briefs were filed in the case and oral argument was held in December. It is expected that any decision issued in the matter will come in the Spring 2016 or in the closing days of the Court's term.

***Friedrich v. California Teachers Assn*, 136 S. Ct. ____ (_____, 2016)**

This case involves the validity under the First Amendment of public sector unions (agency shop arrangements) requiring fair-share fees for non-union members. Non-union members have argued that they have a right not to associate with union activities and should no longer be required to pay union fees. In a decision last year, in a 5-4 result, the Supreme Court did place some limits on the right of unions to take fees from non-union members. This latest case again raises the argument that freedom to associate in a union implies the right not to associate and that it is unfair to make workers pay for union membership if they want no part of it. Briefs are expected to be filed in this case within the next few months and an oral argument date will probably be scheduled for early Spring 2016.

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Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were issued from August 1, 2015 through October 15, 2015.

Search and Seizure

***People v. Fletcher* (N.Y.L.J., August 3, 2015, pp. 1 and 4)**

In a 3-2 decision, the Appellate Division, Second Department upheld the denial of a defendant's motion to suppress and affirmed the defendant's conviction for weapons possession. A police officer conducted a stop-and-frisk search of the defendant after the defendant adjusted his waistband when making eye contact with the officer. The officer had testified at the suppression hearing that he was trained to know that a waistband is the most common place to carry a gun and that he saw a rectangular shape protruding through the defendant's clothes that resembled a firearm handle. The search revealed a pistol. The three-Judge majority consisting of Judges Skelos, Sgroi, and Duffy determined that the officer's decision to stop the defendant based upon his observations of the defendant's actions was reasonable and that the officer could rely on his training and experience with gun arrests. Justices Hinds-Radix and Hall dissented. Based upon the sharp split in the Appellate Division, it appears that this matter will be headed to the New York Court of Appeals.

Fair Trial

***People v. Nicholas* (N.Y.L.J., August 3, 2015, p. 4)**

The Appellate Division, Third Department reversed a defendant's conviction and ordered a new trial on the grounds that he was unfairly prejudiced by testimony that he had supplied drugs for an illegal transaction at an earlier uncharged drug buy. The Appellate Panel concluded that the testimony was highly prejudicial and was immediately objected to by defense counsel. The Appellate Panel in ordering a reversal also noted that the trial Judge gave no curative instructions to the jury regarding the improper testimony. In issuing its reversal, the Court also found that errors were committed by the prosecutor during summation where he improperly vouched for some police witnesses.

Search and Seizure

***People v. Kelly* (N.Y.L.J., August 10, 2015, p. 6)**

In a 3-1 decision, the Appellate Division, Second Department upheld a defendant's conviction and affirmed the trial court's ruling which denied a motion to suppress a firearm found during a warrantless search. In the

case at bar, the officer had heard a gunshot coming from the defendant's direction but did not see him with a gun. She did, however, see sparks and smoke coming from the direction where the defendant was present with a small group of others. Subsequently, the officer heard five or six more shots. The officer followed the group and eventually the four men were removed from their van, and following a search a gun was found and the defendant was arrested. The three-Judge Appellate Panel concluded that the motion to suppress was properly denied because the officers had probable cause to follow the van and that the stop and search was proper and legal. The three-Judge majority consisted of Justices Rivera, Austin and Roman. Justice Hall dissented and questioned the accuracy of the police officer's testimony describing the events in question.

Fair Trial

***People v. Grigoroff* (N.Y.L.J., August 14, 2015, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Second Department reversed a defendant's murder conviction and ordered a new trial on the grounds that the trial judge committed reversible error by allowing testimony regarding an unrelated shooting involving the defendant's identical twin. The Panel noted that the testimony involving the unrelated shooting occurred about two months before the incident which was the subject of the trial and had no bearing whatsoever on the defendant's culpability for the crime charged. Based on the evidence in the case, the Appellate Division refused to consider a harmless error application and held that a new trial was required.

Identification

***People v. Pena* (N.Y.L.J., August 28, 2015, pp. 1 and 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 identification lineup which was conducted was unduly suggestive and prejudicial. In the case at bar, the description of the perpetrator included a key factor, to wit that he was wearing a red shirt, in the lineup that was conducted. The defendant was the only one wearing a red shirt. Under these circumstances, the Appellate Panel concluded that it was improperly conducted and suggestive and that a new trial was required.

Submission of Expert Testimony on Confession Issue

***People v. Days* (N.Y.L.J., September 3, 2015, pp. 1 and 6)**

In a unanimous decision, the Appellate Division, Second Department reversed a defendant's conviction and ordered a new trial on the grounds that he was denied the right to submit expert witness testimony on the issue of false confessions. The defendant had been interrogated by the police for seven hours when he confessed to committing the murder in question. During the trial, there was no physical evidence or eyewitness testimony linking him to the crime and the alleged confession was a key part of the prosecution's case. The Appellate Panel concluded at the trial judge committed reversible error on failing to allow the defendant to admit proffered expert testimony from two psychologists on the issue of false confessions. In rendering its decision, the Appellate Panel also pointed to the fact the defendant appeared to be of borderline intelligence and to have an IQ of 85. Under these circumstances, it was possible that he could have been influenced in making the confession and that the expert testimony should have been presented. The defendant's case has involved many years of litigation and previously resulted in hung juries and prior appeals. The latest Appellate ruling clears the way for a possible fifth murder trial.

Search and Seizure

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

In a 3-1 decision, the Appellate Division, Second Department upheld a defendant's conviction and the lower court's decision regarding a suppression motion. The Court held that a traffic stop based on allegedly obstructive items dangling from a rearview mirror that led officers to discover a hand gun was lawful. The three-Judge majority consisting of Judges Balkin, Sgroi and LaSalle found that probable cause does not require certainty and the officer's testimony about the size and location of the ornaments was sufficient to establish probable cause. The officer in question had pulled up behind a car at a red light. He noticed several items including a heart-shaped necklace and an ornamental sandal hanging from the rearview mirror. He also noticed that the vehicle's center brake light was not working. After pulling the car over and approaching the defendant, he saw a cloudy plastic bag in a cup holder which he believed contained cocaine

residue. Subsequently, a further search of the vehicle's trunk revealed a hand gun. Citing the Vehicle & Traffic law provision regarding the placing of objects which may obstruct the operator's view through the windshield as well as the brake light violations, the majority panel concluded that the denial of the suppression motion was proper. Justice Austin dissented and even questioned the validity of the officer's testimony.

Official Misconduct

***People v. Flanagan* (N.Y.L.J., October 8, 2015, p. 1)**

In a unanimous decision, the Appellate Division, Second Department upheld a defendant's conviction for conspiracy and official misconduct for a former Long Island Police Chief. The defendant, who was a Deputy Chief of the Nassau County Police Department, was accused of assisting in the prevention of the arrest of a teenager whose father gave money to a police non-profit organization. The high school teenager had been arrested for stealing electronics from the school. The defendant had argued on appeal that the prosecution had issued prejudicial statements during opening and closing arguments which deprived him of a fair trial. The Panel concluded that the defendant was not deprived of a fair trial and since there was overwhelming evidence of guilt, any errors which occurred were harmless.

Depraved Indifference Murder

***People v. Scarlett* (N.Y.L.J., October 14, 2015, pp. 1 and 9)**

In a unanimous decision, the Appellate Division First Department reduced a second-degree murder conviction to manslaughter for a man who killed two British tourists with his garbage truck after he stopped taking medication for epileptic seizures. The Panel concluded that although the defendant's actions were unquestionably deplorable and reckless, he did not exhibit the mens rea necessary for either intentional murder or a depraved indifference to human life, which is required for a murder conviction. A reduction to manslaughter in the second-degree was warranted.

Editor's Note: We have recently received a request from one of our readers that we include topic headings with respect to Appellate Division Cases. We believe that this is a good recommendation and we are beginning with this issue to add topic headings in the Appellate Division area and will continue to do so with respect to future issues.

For Your Information

Despite Recent Stock Market Decline, U.S. Economy Continues to Do Well

Although the stock market experienced a sharp decline for two days in late August, causing some economic concern, several other indicators continue to support the view that the U.S. economy is continuing to improve. In August, it was revealed in a recent report by the U.S. Commerce Department that new home sales in the United States had increased 21.2% in the first half of 2015. New home purchases climbed 23.1% in the northeast with smaller gains in the south and west. In addition, U.S. automobile manufacturers reported increasing volumes during the last six months, with General Motors reporting a 6.4% increase in sales. Ford reported a 5% increase and estimates predict that carmakers will sell 17.1 million cars and light trucks during the year 2015.

The improving economy has also led to a decrease in the unemployment rate in the nation. The national rate at the end of August was 5.1%. A recent report by the Bureau of Labor Statistics for the month of July listed the states of Nebraska, North Dakota, Utah, Vermont, New Hampshire and Hawaii with the lowest rates, with Nebraska having an unemployment rate of 2.7%. The states that are still having some unemployment problems were listed as West Virginia, Nevada, Alaska, Mississippi, and New Mexico. West Virginia had the highest unemployment rate at 7.5%.

At the end of August, it was also reported that the nation's Gross Domestic Product was accelerating and that the GDP for the second quarter covering April, May and June was revised upward to 3.7% from the original estimate of 2.3%. An additional Labor Department report in early September also indicated that job openings have risen substantially and that currently some 5.75 million positions are available for persons seeking employment. The number of available positions is now at the highest number since 2000. Consumer confidence also appears to be rising with shoppers increasing their spending in July and August. Wages and salaries have also risen and at the end of July were up 0.5%, the biggest advance since November of 2014. The nation's savings rate has also risen. Let's hope that the good economic news continues and that the U.S. economy withstands deteriorating economic conditions in China and elsewhere and uncertainty regarding several global political events.

Ready to Retire?—Consider Tampa, Florida

A recent study by a financial planner website known as WalletHub.com revealed that a survey of 150 major cities in the United States determined that Tampa, Florida was the best place for retirees. The criteria utilized in announcing the ratings included cost of living, weather conditions, unemployment rate, the number of activities, quality of life and health care facilities. Other cities within the top four, included Scottsdale, Arizona, Boise, Idaho, and Cape Coral, Florida. Florida, in fact, had five cities included within the top 20. The city ranked at the bottom of the list was Newark, New Jersey.

Judge Marks Assumes Post of Chief Administrative Judge

On July 31, 2015, Judge Lawrence Marks assumed the position of Chief Administrative Judge for the New York Court System. Judge Marks had been serving as First Deputy Chief Administrative Judge since 2012. He has also served as an Acting Supreme Court Justice and as a Judge in the Court of Claims. Judge Marks is 58 years of age and stated that he would continue to serve as an Acting Supreme Court Justice in the Commercial Division of the Court.

Judge Marks assumes his new position following the resignation of Judge A. Gail Prudenti. Judge Prudenti left the Court in order to assume a new position at Hofstra Law School. Chief Judge Lippman announced that Judge Marks' appointment was made with the approval of the Administrative Board of the Courts which includes the four Presiding Justices of the Appellate Divisions. In making his announcement, Judge Lippman stated that Judge Marks is the best candidate to take on the challenges facing the court system. The annual salary for the Chief Administrative Judge is \$187,900.00. We congratulate Judge Marks and wish him well in his new position.

New Sentencing Guidelines Result in Decreased Prison Time

The United States Sentencing Commission recently made some major changes to the sentencing guidelines involving enhanced penalties for fraud and financial crimes. It did this by raising the amount of money that is applicable to the different levels of theft. The Commission adjusted the sixteen-tier theft and fraud table for inflation, meaning it would now take higher loss amounts to trig-

ger enhanced penalties. The new provisions took effect on November 1, 2015 and are applicable to all sentences occurring on or after that date. Examples of the new regulations are that stealing more than \$1 million has been replaced by stealing more than \$1.5 million; more than \$400 million has turned into more than \$550 million. With respect to lower levels of fraud, a defendant who could have received 21-27 months in prison for an amount involving \$78,000 under the new guidelines now would get 15-21 months. Attorneys who handle federal criminal law issues should be alerted to the new guidelines and should be prepared to apply them in representing their clients.

In addition to the recent reductions in the required sentencing for certain drug crimes, the new guidelines for theft and fraud losses will also lead to further reductions in the prison population. The Sentencing Commission itself estimated that the most recent changes involving fraud losses would make 2,204 prison beds available by the end of a year and 9,560 available at the end of five years.

Based upon the new sentencing initiatives by the Sentencing Commission and the United States Justice Department, some 6,000 inmates will obtain early release during the months of October and November. Many of them will be placed in halfway houses, home confinement or supervised release. The 6,000 figure is the first part in the sentence reduction process. It is estimated that eventually within the next year or so the Federal prison population will be reduced by approximately 46,000.

In addition to the sentencing reductions initiated by the Sentencing Commission and the Justice Department, the United States Senate also seems poised to enact new legislation which would allow some non-violent drug offenders to obtain reduced prison sentences and would give judges greater discretion in sentencing. The bi-partisan bill would also enhance prisoner rehabilitation programs and largely ban solitary confinement of juveniles. It was recently announced that a bi-partisan agreement had been reached on the proposed sentences and the proposed reductions could be headed for final approval in the Senate. The bi-partisan bill obtained the support of Senator Grassley, a Republican who chairs the Judiciary Committee. It also has the support of such influential Senators as Mike Lee, Republican from Utah; Patrick Leahy, a Democrat from Vermont; Richard Durbin, Democrat from Illinois, and New York Senator Charles Schumer. Whether the House of Representatives will go along with the proposed changes is unclear and we will keep our readers advised of any further developments.

Homicides Increase in Many Big Cities

After many years of decline, large cities throughout the United States are seeing a startling rise in murders during the year 2015. More than 31 cities have reported

increase in violence from a year ago. In New Orleans, 120 people had been killed by late August compared to 98 during the same period last year. Milwaukee has experienced 104 murders for the eight months of 2015 after having 86 homicides in all of 2014. Homicides in Baltimore hit 215, up from 138 at the same point in 2014. St. Louis recently reported a 60% rise in the murder rate from the same period last year, with 136 victims during the first eight months of this year compared to 85 murders for the same period last year. New York City has also experienced an increase in certain crimes and has had to deal with the killing of four police officers since the beginning of the year. This year's fatal shootings of on-duty police officers are the worst in 26 years.

Various factors have been attributed to the increased number of violent crimes. Some police officials have pointed to rivalry among organized street gangs, often over drug turf and the availability of guns. Other top officials have pointed to a growing willingness among disenfranchised young men in poor neighborhoods to use violence to settle ordinary disputes. Recently some police officials have also blamed intense national scrutiny of the use of force by the police, which has made officers less aggressive and has emboldened criminals to violent actions. Increasing violence in our nation warrants immediate attention and a search for solutions before things really get out of hand.

Supreme Court Justice Kagan Issues Interesting Interview on a Variety of Issues

The *New York Law Journal*, in an article of August 31, 2015 at page 6, reported on an interesting interview which was given by Justice Kagan during the month of July. Judge Kagan expressed a view that law schools should place more emphasis on legal writing and writing skills. She stated, "There are lots of students whose writing can be improved at all levels." In discussing her own writing skills, Justice Kagan indicated that she writes so that a non-lawyer can understand her opinion and that she has a reader of the *New Yorker* magazine or something like that in mind when she writes. During the interview, the Justice also revealed that she did not have any current interest in writing an autobiography. She also stated that the Court could decide more cases than it currently does but that if the number of decisions went above one hundred it could affect the quality of the decisions and the writing. In writing a decision, she has her clerks write a first draft of an opinion but the eventual final product is 98% hers. Justices Kagan, Sotomayor and Scalia have been more forthcoming in granting interviews and in issuing public comments than the other Justices on the Court. These public remarks and comments are always informative and help practitioners to better understand the workings and process of the Court.

Despite Economic Recovery, Incomes Remain Stagnant

Recent reports from the Census Bureau and other reported studies indicate that although the economy has improved during the last few years, household income for the average middle class worker remains stagnant. The U.S. Census Bureau recently reported that the median household income in the United States for 2014 was \$53,660.00 with no significant change from the prior year. The peak period for median income was reached in 1999 when the inflation-adjusted level reached \$57,843.00. It also reported that some 46.7 million people are still classified as living below the poverty level, amounting to 14.8% of the population and basically unchanged from the figure in 2013. The poverty rate was listed as being 12.3% in 2006, the year before the most recent recession.

A study from the Economic Policy Institute also revealed that between 1973 and 2014, the productivity of U.S. workers rose 72% while the hourly pay rate increased by only 9.2%. This was a substantial departure from the situation between 1948 and 1973 where productivity increased by 96.7% and hourly wages increased by 91.3%. The significant gap between productivity and wage increases highlights the recent focus on income inequality and points out the need to address the issue. The studies further report that the people who have been hardest hit by decline in incomes have been the workers in the lowest earning jobs.

Manhattan District Attorney Provides Funding for Testing of Rape Kits

After hearing recent complaints that thousands of rape kits have gone untested across the country, the Manhattan District Attorney's Office along with the U.S. Department of Justice, announced a combined effort to provide funds to various local and state law enforcement agencies in some twenty states to clear up the backlog. At a joint conference presided over by United States Attorney Loretta Lynch, Vice President Biden and Manhattan District Attorney Cyrus Vance, Jr., it was announced that the Justice Department will provide \$41 million in Federal funds and the Manhattan District Attorney's Office will provide \$38 million towards the joint project. The monies from Mr. Vance's office are coming from recent asset forfeitures which were derived from settlements with BP and HSBC holdings and other banks. Agreements have been reached to have two private forensic labs conduct the required testing.

Real Estate Market on Upswing

Recent reports from both federal agencies and real estate organizations have confirmed that home sales have greatly increased during the last year. Nationwide it was estimated that 1.9 million single family homes and condos sold for the first eight months of the year, a figure

which was 5.4% higher for the same time last year and the highest amount since 2007. In the previous month of July, home sales had increased by 12% from the same period last year. Median home prices have also increased with the August median price for a new home established at \$292,700.00. It is estimated that home prices have risen approximately 10% during the last year.

Increasing sales and rising home prices have also helped reduce the number of homeowners who are under water borrowers with respect to their mortgages. Currently, less than 9% of borrowers were under water. This is a reduction of approximately 6% from the situation in 2014. Some states, however, continue to have a high percentage of underwater homes. The state with the worst situation is Nevada, which is still experiencing an underwater percentage of 20.6%. Nevada is followed by Florida with 18.5% and Arizona with 15.4%. Federal programs to assist underwater homeowners appear not to have been too successful. A recent report regarding the Federal Hardest Hit Fund revealed a situation in Florida where taxpayers spent as much as \$3.57 million to bail out 85 people who in all likelihood will lose their homes anyway after receiving \$42,000.00 each in assistance. After receiving the Federal payment, within a few months they once again failed to make mortgage payments and since January banks have again served foreclosure notices on the properties.

U.S. Immigration Population Continues to Rise

A recent report from the Census Bureau indicated that the nation's immigrant population increased by more than 1 million last year. The new government data shows that there were 42.4 million foreign-born people in the United States, or 13.3% of the nation's population. That figure is up 1.04 million from 2013. The sharp increase in immigrants is coming from Asia and the states with the biggest surge in immigrant population are California and Florida. The increase in immigrant population during the last year is attributed to improving economic conditions and that many foreign-born people with advanced degrees are obtaining employment in the United States.

Several Prosecutors' Offices Undergo Leadership Changes

- Putnam County District Attorney Loses Republican Nomination and New DA Elected
- Bronx County Robert Johnson and Erie County Frank Sedita, III Move to Supreme Court
- Michael McMahon New Staten Island District Attorney
- Robert Capers New Eastern District U.S. Attorney

Adam Levy, Putnam County's incumbent District Attorney, who has served for eight years, recently lost his bid to obtain the Republican nomination for a third term.

He was defeated in the September primary by Robert Tendy, Putnam Valley Town Supervisor. The vote was 1,361 to 1,094. District Attorney Levy still had the Conservative and Independent line and remained on the ballot for the November election. There was no Democrat candidate in the race and as a result of the November election, Mr. Levy was defeated by Robert Tendy.

In late September, it was announced that Bronx District Attorney Robert Johnson, who had indicated that he would run for re-election, announced that instead he would seek a seat on the Bronx Supreme Court. District Attorney Johnson had served in his position for 27 years and is currently 67 years of age. He had obtained the Democratic Party nomination for a Supreme Court seat and was elected to that position in the November 6 election. Darcel Clark who had previously served in the Appellate Division First Department was elected at the November election to replace Johnson as Bronx District Attorney.

A change also occurred in Erie County where District Attorney Frank Sedita, III had multi-party endorsement to run for a State Supreme Court seat. He also was elected on November 6. DA Sedita was first elected as District Attorney in 2008 and is presently 54 years of age. He served as the immediate past President of the New York State District Attorneys Association. His replacement is to be selected shortly.

A contested election in Staten Island resulted in the election of Michael McMahon, a Democrat, as the new Staten Island District Attorney. McMahon defeated Joan Illuzzi, a former prosecutor in the Manhattan District Attorney's Office, who was the Republican candidate in the November election.

With regard to the U.S. Attorney's Office for the Eastern District of New York, it was announced in early October that President Obama had nominated Robert Capers, a Senior Federal Prosecutor in the office, to fill the position vacated by Loretta Lynch. Mr. Capers was confirmed by the Senate in December. He will replace Kelly Currie, who has been serving as Acting U.S. Attorney. Mr. Capers had been nominated by Senator Schumer. He is a graduate of Albany Law School and has worked in the Eastern District Office since 2003.

In another interesting race involving Nassau County, Madeline Singas, who had been serving as Acting District Attorney, defeated Kate Murray and will now serve a full term as District Attorney.

Increasing Rents and Higher Health Plan Costs Place Additional Financial Burdens on Families

Due to the fact that in recent years there has been a significant decline in homeownership and a corresponding rise in the number of people renting, current projections indicate that in coming years the cost of renting

may consume approximately one-half of household incomes. A study conducted by Harvard's Joint Center for Housing Studies found that the number of households that spent at least one-half of their income on rent would increase 25% and would involve some 14.8 million people over the next decade. The rule for many years has been that households should not spend more than 30% of income on housing. The new forecast raises a serious red flag involving additional financial hardship on households.

A separate study by the Kaiser Family Foundation also found that deductibles for employer-sponsored health plans have climbed by nearly 67% since 2010—far outpacing inflation and the rise in workers' wages. The study found that premiums for employer-sponsored health plans rose an average of 4% during the current year. The average annual premium for an individual was \$6,251.00 of which workers paid an average of \$1,071. Approximately 81% of workers with health insurance coverage had an annual deductible or a minimum amount that they had to pay out of pocket before the insurer would cover a claim. The average deductible in 2015 was \$1,318.00.

New York State High School Students Score Below SAT National Average

It was recently reported that according to last year's results the national average for the SAT scores was 1490. Among the states with large populations, students in Virginia scored the best with an average score of 1533 with 72% of the students in that state taking the test. New York fell below the national average with a score of 1469 with 75% of the students taking the exam. New York ranked behind such states as New Jersey, California, and Pennsylvania. Among the large states, it was only ahead of Florida and Texas. The issue of national education standards and recommendations to improve the educational system in the nation have been gaining recent attention. The latest information regarding the SAT results in the various states adds important information to the national dialogue.

New York Law Journal Article on Grand Jury Reforms

A recent article, which appeared in the September 10 issue of the *New York Law Journal* at page 7, discusses the recent proposals to reform the Grand Jury system which have arisen after the recent police incidents in Ferguson, Missouri and Staten Island, New York. The article is written by Steven M. Witzel, a partner at Fried, Frank, Harris Shriver and Jacobson. Of special interest to New York practitioners is the discussion in the article to provide special prosecutors to handle incidents involving police shootings. The article discusses Governor Cuomo's recent Executive Order #147 and procedures outlined by Attor-

ney General Schneiderman, who was designated under the Executive Order to handle such prosecutions. The Governor's Order and the superseding of local District Attorneys by the Attorney General in police shooting cases has been the subject of some confusion and controversy and the *Law Journal* article should be of interest to our readers. The Attorney General's office has already taken over the investigation of an incident involving the death of Raynette Turner who died in a Mount Vernon Police Department holding cell while awaiting arraignment on a shoplifting charge.

Recent Publication Discusses Contributions of Justices O'Connor and Ginsburg to the United States Supreme Court

A recent publication, *Sisters in Law*, written by Linda Hirshman, practitioner and novelist who has practiced before the United States Supreme Court and has written on its various activities, discusses the impact that Justices Sandra Day O'Connor and Ruth Bader Ginsburg have had on the Court and American Society as a whole. Included in the title is the phrase "How Sandra Day O'Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World." The book was published by Harper Collins and was reviewed in the *New York Law Journal* of September 8, 2015 by Emily Jane Goodman. The author discusses Justice Ginsburg's fight to transform the constitutional status of women in America. Justice O'Connor by her very appointment to the Court as the first woman was also viewed as bringing social change, although she came from a more conservative philosophy than Justice Ginsburg. Both the book review and the book itself should make for informative and interesting reading and we recommend them to our readers.

Beware of an Old Heart

A recent government report indicates that your heart may be older than you are. The Center for Disease Control and Prevention has taken a new approach to urge more Americans to take steps to prevent cardio-vascular disease. Scientists have estimated the average heart age of men and women in every state based on risk factors like high blood pressure, obesity and whether the individual smokes or has diabetes. These factors are then compared to average actual ages. The study reveals that nearly 3 out of 4 U.S. adults have a heart that is older than the rest of their body. For U.S. men on average, the predicted heart age was nearly 8 years greater than their real age. For U.S. women, it was about 5½ years. The new study rings an alarm bell and urges American to begin practicing better heart health.

New Construction Boom Results in Shortage of Skilled Workers

Despite an unemployment rate that is still hovering at 5%, many states where housing construction has once

again increased substantially are announcing problems related to the lack of skilled construction workers. A report indicates that as a result of the recent recession, many younger workers stopped seeking construction employment and since older workers are now retiring, shortages have developed in such areas as plumbing, electrical contractors and skilled steel workers. For example, Florida recently reported that 26,000 new construction jobs were available in 2014 and that currently 4,800 new construction jobs opened up in the month of July. The average starting hourly wage in the construction industry in Florida was listed at approximately \$18 per hour and various areas of construction work were listed as having significant openings during the next three years.

New York Contributes to Florida Population Growth

During the past year it was reported by the Census Bureau that Florida surpassed New York State as the third most populous state in the nation. It is now estimated that Florida has 20 million people, approximately 300,000 more than the State of New York. Interestingly, migration from New York State to Florida has been a significant factor in Florida's population growth. It was recently reported that this year Florida gained some 285,000 new residents and that slightly over 55,000 came from New York which was the top state to contribute to Florida's growth. In addition to New York, 35,000 came from Georgia and 30,000 came from New Jersey.

Number of Deportations Drops

It was recently announced that the Obama Administration deported fewer immigrants in the past 12 months than at any time since 2006. The overall total was placed at 231,000. This total was 42% lower than the peak figure reached in 2012. It was reported that some 2.4 million have been deported since President Obama took office in 2009. As a separate figure some 136,700 immigrants who were convicted of serious crimes were deported in the last 12 months. The deportation laws were apparently interpreted and enforced very aggressively in the beginning of the Obama Administration but during the last year due to certain policies initiated by the President, the number of deportations has dropped significantly. Overall, it is believed that roughly 11 million immigrants are living in the country illegally.

Review of Circuit Court of Appeals Decisions by the U.S. Supreme Court

A recent analysis of the performance of the various Circuit Court of Appeals during the October 2014 term of the United States Supreme Court revealed some interesting results. The U.S. Court of Appeals for the Second Circuit had only one case before the Court, which was reversed. The Court with the highest number of cases before the Supreme Court was the Ninth Circuit, with 16.

Ten of those were reversed or vacated and only six were affirmed. The Eleventh Circuit, covering Alabama, Florida and Georgia, had only five cases before the Supreme Court, all of which were reversed or vacated. The Third Circuit had three cases before the Supreme Court, and all of them were reversed or vacated. The best record was achieved by the First Circuit, which only had one case before the Supreme Court which was affirmed. Other Circuits which had a losing record before the Supreme Court were the Fourth, Fifth, Sixth, Seventh, Eighth and Tenth.

Rare Appellate Contempt Motion Resolved in St. Lawrence County

A hearing was recently held before an Appellate Panel in the Appellate Division, Third Department involving a rare contempt motion against the District Attorney of St. Lawrence County. Evidently, the St. Lawrence County District Attorney had failed to file briefs in several appeals due to the apparent negligence of an Assistant District Attorney in the Appeals Bureau. After repeated inquiries and warnings regarding the failure to file briefs in pending cases, the Appellate Division, Third Department issued a contempt motion against Mary Rain, the District Attorney of St. Lawrence County. Ms. Rain finally appeared before the Appellate Division on September 15, 2015, and reported that she was unaware of the situation since she had been assured by a veteran prosecutor in her office that the briefs had been filed. In a rare appearance before the Appellate Division, Ms. Rain accepted ultimate responsibility for the failings of her office and indicated that she had taken immediate action to correct the situation and that late briefs would be filed shortly. After a 15-minute hearing, the Appellate Court dismissed the contempt motion and accepted the District Attorney's assurance that the situation would be corrected. It could not be recalled that a sitting District Attorney had ever been summoned before the Appellate Division, Third Department to face contempt allegations. It is hoped that this embarrassing situation, unpleasant for all, has now been finally resolved.

Frequency of Religious Observance

Recent statistics released from a Gallup Poll tracked the percentage of people in each state who attended a church, synagogue, or mosque on a weekly basis in 2014. The report indicated that the states with the highest percentage of religious observance were largely located in the South, particularly among the states of Kentucky, Tennessee, Alabama and Louisiana. The state with the highest religious observance rate was the State of Utah, which has many Mormon residents. The states with the lowest percentage of religious observance were largely in the upper portion of the Northeast with Vermont registering the lowest observance rate at only 17%. The State of New York was listed as having an observance rate of 27%.

New York Court of Appeals Has New Court Clerk

The New York Court of Appeals announced in late September that it had promoted its Deputy Clerk, John Asiello, to the Chief Clerkship of the Court effective September 17, 2015. Mr. Asiello has worked for 34 years in various clerking positions at the New York Court of Appeals. He is a graduate of Cornell Law School and lives in the Albany suburb of Latham. He replaces Andrew Klein who similarly worked for many years in various clerking positions at the Court of Appeals. Mr. Klein became Chief Clerk in 2010 and will be leaving the Court to begin an early retirement. Our *Newsletter* has had a close working relationship with the Clerk's Office of the New York Court of Appeals and it has been gracious enough to provide us on a yearly basis with the Clerk's Report regarding the activities of the New York Court of Appeals. For many years we have summarized these reports for the benefit of our readers. We thank Mr. Klein for his years of distinguished service and wish him well on his retirement. We congratulate Mr. Asiello on his promotion and look forward to a continuing working relationship with the Clerk of the Court.

China-U.S. Relationship

Despite recent tensions between the United States and China over certain issues, some recent statistics indicate the importance of the relationship between the world's two largest economies. China is the world's largest economy after the United States, accounting for about 12% of the world economy and about a quarter of global growth in recent years. It is the United States' second largest trading partner and is now a major consumer of U.S. goods. About one-quarter of the soybeans grown in America go to China as well as one in five planes manufactured by Boeing. Apple now sells more iPhones in China than in the United States. China is also a big consumer of several American services, especially in the area of education. Currently one in three foreign students in the United States comes from China.

Chief Judge Lippman Initiates Bail Reforms Prior to His Departure

In one of his last administrative acts, Chief Judge Lippman, in October, issued a series of reforms regarding the bail system in New York State. Under Judge Lippman's plan, one Judge in each of New York City's five boroughs will be assigned to conduct de novo review of bail amounts for misdemeanor defendants that will be triggered if the defendants cannot make bail. Judge Lippman argued that the bail review Judges will have more time than arraignment Judges to consider bail determinations. In addition, defense attorneys will be able to present a more accurate client record to the Court. Regular judicial bail review will also be required in felony cases and Judges will hold status conferences to determine when and if the parties are ready for trial. Judges will also

About Our Section and Members

Fall CLE Program

The Fall CLE Program was held on Saturday, November 14, 2015. The meeting was held at New York University Law School and involved the topic of forensics. The program featured several distinguished speakers and covered such specific topics as “Understanding LCN DNA and Likelihood Ratio Software” and “Cutting Edge Issues in Forensic DNA Typing.” The speakers providing the lectures were Jessica Wren Goldthwaite, a staff attorney with The Legal Aid Society; Erin Murphy, a Professor of Law at New York University School of Law; and Michael Baden, former New York City Medical Examiner. In an additional segment, Marvin Schechter, former Chair of our Section, discussed various Brady issues.

This type of program has proven to be both informative and interesting and has in the past received good participation from our Members.

Bar Association Offers Several Publications on Criminal Law Issues

Among the various publications issued by the New York State Bar Association are several which should be of interest to criminal law practitioners. Some of these publications are authored by Lawrence N. Gray, who for many years has produced valuable Editions for the Bar Association. Listed below are some of the Criminal Law materials which are available to our Members at discounted prices along with a brief description of their contents.

Criminal Law and Practice, 2014-2015

Written by experienced prosecutors, criminal defense attorneys and judges, *Criminal Law and Practice* is a practical guide for attorneys representing clients charged with violations, misdemeanors or felonies. This monograph focuses on the types of offenses and crimes that the general practitioner is most likely to encounter. The practice guides are useful for the specialist and non-specialist alike.

New York Criminal Practice, Fourth Edition

From your right to counsel to your right to an appeal, this publication is a comprehensive guide for all aspects of the criminal case. Written by dozens of criminal law attorneys and judges with decades of practical experience in the field, this book is intended to guide both inexperienced and veteran attorneys who practice in this area. This fourth edition includes updated case law and statutes as well as additional legal topics.

The Practice of Criminal Law under the CPLR and Related Civil Procedure Statutes, Sixth Edition

This publication pulls together in an orderly, logical way the rules and provisions of law concerning jurisdic-

tion, evidence, motion practice, contempt proceedings and article 78 and habeas corpus applications—none of which are covered in the CPL or the Penal Law.

Evidentiary Privileges: Grand Jury, Criminal and Civil Trials, Fifth Edition

A valuable text of first reference for any attorney whose clients are called to testify before grand juries, or in criminal or civil trials, *Evidentiary Privileges*, 5th Edition, covers the evidentiary, constitutional and purported privileges that may be asserted at the grand jury and at trial. Included is the transcript of a mock grand jury session, providing cogent examples of how some of the mentioned privileges and objections have been invoked in real cases.

For pricing and other information, call the New York State Bar Association at 1-800-582-2452.

Decision by Justice Dwyer Reported on Front Page of *New York Law Journal*

In the *New York Law Journal* of October 13, 2015, at pages 1 and 9, an interesting decision rendered by Justice Mark Dwyer was discussed in great detail. The title of the article was “Judge Finds Arrest to Be Illegal by Just a Matter of Inches.” The ruling involved a New York City Detective who did not have a warrant when he reached through the door of a Manhattan apartment and pulled the occupant into the hallway outside to arrest him. The issue presented was what it means to cross the threshold of a person’s castle for the purposes of the Fourteenth Amendment since the Supreme Court ruling some 35 years ago in *Payton v. New York*. Judge Dwyer found that for the purpose of a *Payton* violation, the threshold is the area directly between door jambs—no more and no less. The article and the decision make for interesting reading. Justice Dwyer, a former Chief of Appeals in the Manhattan District Attorney’s Office, is a prolific writer and several of his decisions have already been noted in *New York Law Journal* articles.

Seymour James Obtains Residency at Touro Law School

It was recently reported that Seymour James, a past President of our Bar Association and an active member of the Criminal Justice Section, will become associated with Touro Law School through the use of a residency. James, who is also the head of the New York City Legal Aid Society, will teach some classes and will interact with student and faculty members. He will provide valuable insights into the Criminal Justice system and into the representation provided by Public Defenders.



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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.

Joseph Accurso	Leslie A. Farber	Adrienne D. Levy	Alyssa Renee Rodriguez
Alex Adams	Jonathan Charles Fayer	Zachary A. Lewis	Veronica Rose
Michael Joseph Alber	Oswald Feliz	Efraim S. Lipschutz	Jason Rubenfeld
Rosemary Almonte	Kimberley Felton	Yisroel Lubin	Romin Sadridinov
Vincent Altieri	John Fink	Jeruska Lugo-Sanchez	Jamie Sahagian
Patrick Antonikawski	Dane Fioravante	Nicole Lyke	Blake Saunders
Henna Arora	Pamela Fisher-McLeod	Meenka Maharaj	Deborah S. Schneer
Miles Ashton	David H. Fleishman	Roy S. Mahon	Marc A. Seedorf
Alisha Babar	Jaquelin Flores	Theonie Makidis	Pierinna Servat
Brenda Baddam	Gabriel L. Fonseca	Belline Manopla	Thomas Shaw
Sarah Bala-Gbogbo	Nicole Marie Fortier	Yuxin Mao	Ashleigh Shelton
Jerehme P. Bamberger	Latoya S. Funderburk	JM Mariotti	Stacy Lynn Siegel
Timothy Banker	Gabriel M. Garcia	Cylas Martell-Crawford	Allison Smalley
Myra Haskell Berman	Elizabeth Garry	Trevor R. Martin	Chanel Smith
Michael Bombad	Tyler Garvey	Victoria Massimino	Christine Luci Smith
Nicholas Bourland	Alicia B. Gilbert	James Lawrence Maswick	Hillary Smith
Jaime Breslin	Sean Glendening	Kevin F. McGarry	Joshua Soares
Nia Bronner	Amanda Gonzalez	Charlene Monique McGregor	Steven P. Solow
Robert E. Brown	Edward J. Graber	Kandice McLeod	Nico Soria
Colin Brucia	Alexis Grossman	Beau Melita	Kevin M. Stadelmaier
Danielle Bruno	Jason Gunning	Scott Migden	Maria Stamatelatos
Marian Luna Cajara	John James Hall	Ronald Brett Minsky	Samuel Steinbock-Pratt
Meagan Callahan	Kaleigh Henderson	Eleva Mitu	Robert D. Steinhaus
Christopher A. Carrion	Robert Hidalgo	Vlada Monaenkova	Claire Stottlemeyer
Margaux Chabrol	Michelle R. Hotchkins	Matthew Peter Montana	Shanaye Sweet
Derek P. Champagne	Amanda Iannuzzi	William Thomas Morrison	Anne J. Swern
Pei-Ching Chang	Cheddi Berret Jagan	Erin Elizabeth Murphy	Amanda A. Tagore
Neeraj Chechi	Steve James	Shannon Nakamoto	Michelle Tarangelo
Alan Chevat	Jack Jaskaran	Dennis J. Nave	Anastasia Sarantos Taskin
Nora E. Christenson	Sylvan Jaspen	Michelle K. Navin	Gerald H. Taylor
Andrew John Colascione	Enjole Johnson	Kevin D. O'Connell	Alexander Tesoriero
Amanda Cole	E. Danielle Jose-Decker	Eric Obryan	Kristen Anne Tietz
Christopher Sean Coleman	Neha Kala	Amanda L. Oren	Michael Tighe
Brendan Conley	Jessica Kalafut	Oluwatobi Oyetunde	Nicholas E. Tishler
Andrew David Correia	Fidan Karimli	Daniela Parra	Dominique Tonacchio
Sharon K. Covino	Bradley Kaufman	Benjamin Pena	Laura Megan Trachtman
Alexandra Cusano	Daniel Zachary Kay	Ian E. Penders	Matthew Trezza
Gary L. Cutler	Chris Ann Kelley	Michael Perez	Jonah Triebwasser
Cynthia Cuza-Howard	Bruce D. Klein	Jessica Perry	Claudia Sue Trupp
Ray Deleo	Kelly Kline	Chris Peticca	Eric Turetzky
Mark Diamond	Elizabeth Knowlton	George Pikus	H. Dana VanHee
Kelsey Dickman	Lynda Koenig	Natasha Pooran	Daniel VanVorst
John C. Doscher	Judy Kramer	Emily Price	Brianna Vaughan
Donald Wm. Driscoll	Leo Kreizman	William Quick	Priyanka Verma
Jacob Edward Drum	Randolph V. Kruman	Olivia Jardinado Quinto-Reyes	Jonathan F. Viray
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Norma Esquivel	Erica Leff	Natalie Rice	Jeffrey Scott Weiss
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Evidentiary Privileges

(Grand Jury, Criminal and Civil Trials)

Sixth Edition

Author

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Lawrence N. Gray is the author of numerous publications on criminal law and trial. This latest edition of *Evidentiary Privileges* draws from the author's experience as a former special assistant attorney general and his many years of practice in the field of criminal justice.

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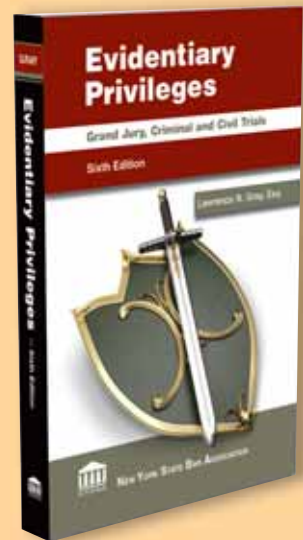
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