NYSBA SPRING 2016 | VOL. 14 | NO. 2

# New York Criminal Law Newsletter

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

## Members Gather at Annual Luncheon

*(See Photospread at Pages 20-21)*

# Table of Contents

# Message from the Chair

## Discovery

Discovery in criminal cases is in serious need of reform. There is far too much of a difference between the discovery process in criminal and civil cases. The distinctions are shocking to most attorneys who practice civil law as well as to clients charged with crimes. Defendants in criminal cases deserve to know and understand not only the charges brought against them, but what the evidence will show. People charged with crimes should be able to properly investigate their cases and prepare for all aspects of their case whether it be a plea or a trial. No person should be asked to enter a guilty plea to a criminal charge without being given the opportunity to evaluate the evidence and claims against him or her thoroughly.

It is time for change, and the New York State Bar Association (NYSBA) is at the forefront of that process. In January 2015, The House of Delegates of the NYSBA heard and adopted a report by the Task Force on Criminal Discovery. This report contained an affirmative legislative proposal which was introduced to the House by Assemblyman Joseph R. Lentol. The proposed Bill will promote fairness by codifying the earlier exchange of information between the prosecution and defense.

As a criminal defense attorney, I have experienced being provided police reports, witness lists, photographs, and other vital information *after* jury selection. Some of this material was in the possession of the prosecution from the inception of the case. Moreover, I requested the production of such materials from the time my representation began.

When I was taught trial techniques, and when I teach it to attorneys today, the same principle applies: preparation, preparation, preparation. But how does one prepare for the unknown? There is far too much at stake in a criminal case for it to be treated like a sporting event. Irresponsible plea bargaining and wrongful convictions occur far too often. One can never be given back years of one's life deprived by wrongful incarceration.

There are many factors about which I am sure most of you are aware that lead to wrongful convictions, but the one relevant to this discussion is quite basic. If both sides are aware of all the witnesses and the evidence in a reasonable time prior to trial, allowing for meaningful investigation, it would result in earlier plea dispositions at a savings to the overburdened court system and greater fairness for those cases which proceed to trial.

Our justice system must be about fairness and truth. It has been 35 years since New York State visited discovery reform. The time has come to further reform the disclosure of information in a criminal case in order to achieve justice for all. All criminal justice practitioners should join together to support discovery reform. It is clearly the single most important issue we can easily address to assure that fairness and truth will prevail.

**Sherry Levin Wallach**

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

# Message from the Editor

In this issue, we report upon the untimely death of former Chief Judge of the New York Court of Appeals, Judith Kaye. Judge Kaye was a giant in the legal community and we were greatly saddened to learn of her passing. We provide a tribute to Judge Kaye and report on the funeral services which were held on her behalf and the tributes given by various colleagues and leaders of both the government and the legal community. We also provide a feature article which discusses the two new members of the New York Court of Appeals who began their service in February. We also discuss and provide biographical sketches of three newly elected District Attorneys regarding counties within the City of New York and for Nassau County. Our third feature article concerns the arrest provision covered by CPL Section 180.80 and discusses the various consequences which arise when an arrest is made pursuant to a warrant or was warrantless. This article is written by Judge John J. Brunetti who has been a regular contributor to our *Newsletter*.

Within a matter of months after beginning its October 2015-16 term, the United States Supreme Court issued two very important decisions dealing with Criminal Law. The first case resulted in a declaration that Florida's death penalty procedure was unconstitutional and the second case held that the Court's earlier decision barring life without the possibility of parole for juvenile offenders had to be applied retroactively. These cases, *Hurst v. Florida* and *Montgomery v. Louisiana*, are discussed in our Supreme Court section.

Even though it was operating with less than seven Judges, the New York Court of Appeals did issue numerous decisions following the resumption of its term in September. These cases involved such issues as the failure to advise counsel of jury notes, adverse inference charges, the ineffectiveness assistance of counsel, and the application of identification hearings to situations where prosecutors have displayed photos to eyewitnesses in the name of trial preparation. Unfortunately, due to the fact that in some instances only five or six Judges were available to hear the cases in question, a few had to be set down for reargument.

In our Appellate Division Section, we also discuss several cases which were issued by the various Appellate Divisions. Pursuant to a good suggestion from one of our readers, we are now including topic headings regarding the Appellate Division decisions. In our For Your Information Section, we discuss such topics as the recommendation by a Special Commission for Judicial Pay Increases and pay increases which apparently are forthcoming for District Attorneys within the City of New York. We also cover the situations regarding New York's fifteen Law Schools and deal with the issue of this year's Bar Examination pass rate as well as declining law school enrollment.

Since our Section held its Annual Meeting on January 27, 2016, at the New York Hilton Midtown, we also provide photos and details regarding the activities at our Awards Luncheon and CLE Program. We were pleased to have had New York City Police Commissioner William Bratton as our guest speaker. Several awards were also presented to noteworthy recipients. It was a pleasure to recognize these individuals for their outstanding work and service to the Criminal Justice System. The names of this year's award winners are published in our About Our Section and Members portion. We also present in that article information regarding the current status of our financial condition and membership. I continue to thank our Members for their support of our *Newsletter.* As always, I look forward to the submission of articles for possible publication and appreciate comments or suggestions regarding our *Newsletter*.

**Spiros A. Tsimbinos**

# New Court of Appeals Judges Begin Their Service on the Court

By Spiros Tsimbinos

In late January 2016, the State Senate approved Governor Cuomo's nomination of Janet DiFiore to serve on the New York Court of Appeals as the new Chief Judge. DiFiore replaces Chief Judge Lippman who faced mandatory retirement as of December 31, 2015. Judge DiFiore was serving as the Westchester County District Attorney prior to her judicial nomination to the New York Court of Appeals. She had served as Westchester County District Attorney since 2007. Prior to her service as District Attorney, she served as a Supreme Court Justice in Westchester. She also previously served as a Westchester County Court Judge. At one time, Judge DiFiore was a registered Republican but she switched her party enrollment in 2007 and became a Democrat. Judge DiFiore is sixty years of age and is a graduate of St. John's University School of Law. Judge DiFiore is married and has three adult children. During the last several years, she has also served on various commissions and public service organizations. These include a member of the Commission on Youth, Public Safety and Justice. In 2013, she also served as Chair of the New York State Joint Commission on Public Ethics. From 2011 to 2012, she was President of the New York State District Attorney's Office. As New York's new Chief Judge she will fulfill a dual role as Chief Judge of the Court of Appeals and also as the top administrative Judge of the State's 1,250 judges and 12,000 non-judicial employees within the court system. Her appointment as the new Chief Judge received favorable comment from various sections of the legal profession. Judge DiFiore's appointment brings some more regional balance to the Court and also restores a judge from an Italian-American background to the Court. Governor Cuomo's failure to reappoint Judge Graffeo had left the Court without a representative of the Italian-American community for the first time in many years. Chief Judge DiFiore began hearing cases before the Court on February 9, 2016.

On January 21, 2016, Governor Cuomo also made known his choice to fill the Associate Judge position vacated by Judge Read in August 2015. The State Commission on Judicial Nominations had sent the Governor a list of seven nominees to wit:

- Michael Garcia, 54, partner at Kirkland & Ellis
- Judith Gische, 59, associate justice, Appellate Division, First Department
- Caitlin Halligan, 49, partner at Gibson, Dunn & Crutcher
- Erin Peradotto, 55, associate justice Appellate Division, Fourth Department
- Benjamin Rosenberg, 56, general counsel for the Manhattan District Attorney's Office
- Rowan Wilson, 55, partner at Cravath, Swaine & Moore
- Stephen Younger, 59, partner at Patterson Belknap Webb & Tyler

The Governor announced his selection and nominated Michael Garcia to fill the remaining seat on the New York Court of Appeals. Mr. Garcia's nomination was approved by the State Senate in February and he began his service on the Court on February 9. Prior to his appointment, Mr. Garcia had served as a partner at Kirkland & Ellis. From 2005 to 2008, he served as the U.S. Attorney for the Southern District of New York. He has focused on litigation and has a prior connection with the New York Court of Appeals since following his graduation from Albany Law School he served as a law clerk for the Court of Appeals assigned to Judge Kaye from 1990 to 1992. He is Hispanic and his appointment to the Court will increase the number of judges with a Hispanic background on the Court of Appeals to two. He is also a Republican and was the only Republican included in the list of seven. Analysts have conjectured that Governor Cuomo was under some pressure to name a Republican to the Court since next year Judge Pigott, who is the only Republican currently serving on the Court, will be retiring. Some have raised concerns that since all of Governor Cuomo's appointments to date have been Democrats, the Court would lack political balance. Mr. Garcia's appointment by the Governor was somewhat of a surprise since recent speculation had centered on Stephen Younger, former President of the New York State Bar Association. With Judge Pigott's seat opening up at the end of 2016, Mr. Younger's eventual appointment is still a possibility. Among the list of seven nominees who were presented to the Governor, only two, Justice Gische and Justice Peradotto, had any prior judicial experience. The Governor once again surprised many by selecting a nominee directly from the private practice of law. The confirmation of Chief Judge DiFiore and the confirmation of Michael Garcia as an Associate Judge will go a long way toward restoring the Court to its former level of normalcy and efficiency.

Unfortunately, during the month of January 2016, the Court was forced to operate with only five judges. Since a vote of at least four was required to reach a decision on a case, several cases had to be reargued or postponed. See, for example, *People v. Barden*, decided January 14, 2016 ordering reargument (N.Y.L.J. January 15, 2016, p. 22). We welcome the appointment of Judges DiFiore and Garcia to the Court of Appeals and look forward to their service on the Court.

# Newly Elected District Attorneys

By Spiros Tsimbinos

The November 2015 election saw the selection of several new District Attorneys throughout the State. Profiles of the new District Attorneys are presented below.

## Darcel Clark

### Bronx County

Darcel Clark was elected to replace Robert Johnson, who served as Bronx District Attorney since 1989. Johnson was elected to serve in the Supreme Court in the Bronx. Darcel Clark had previously served as an Associate Justice of the Appellate Division, First Department. Clark also previously served as an Assistant District Attorney in the Bronx office and is a longtime resident of the Bronx. Upon her election, she has formed a Task Force to advise her regarding the hiring of her top assistants to replace several who have announced that they were leaving the office following Johnson's departure. Darcel Clark has indicated that she will administer justice with compassion and has described herself as being tough but practical with the aim of rendering efficient public service to the residents of the Bronx. She has supported the effort to increase the budget for the Bronx office in order to keep the best and brightest prosecutors. Clark is a graduate of New York University School of Law.

## Michael McMahon

### Staten Island

The voters of Staten Island in the November election, in a close contest, selected the Democratic candidate Michael McMahon to replace District Attorney Donovan, who earlier was elected to a Congressional seat. McMahon has long been active in the Staten Island community and was previously elected to serve in the City Council and as a Congressman. As an attorney, he was basically involved in a litigation career where he primarily represented plaintiffs in personal injury cases. He also did criminal defense work for several years and in 1993 founded his own law firm. He is a graduate of New York Law School and is married with two adult children. The newly elected District Attorney has indicated his opposition to Governor Cuomo's appointment of the Attorney General as a Special Prosecutor to supersede local district attorneys in cases involving the death of civilians at the hands of police. McMahon is 58 years of age and is basically viewed as being somewhat conservative, in keeping with the views of most Staten Islanders. The Staten Island Office has about 48 prosecutors and serves a constituency of nearly 500,000 residents.

## Madeline Singas

### Nassau County

Although she has been serving for a little over a year as Acting District Attorney following the election of Kathleen Rice to Congress, Madeline Singas in November won election in her own right as Nassau County District Attorney. Although it was expected that the race would be very close, Singas was, in fact, elected with nearly 59% of the vote. She is a longtime prosecutor and she emphasized her prosecutorial experience during her race. She served from 1991 to 2005 in the Queens County District Attorney's Office in various bureau assignments and then was selected by Kathleen Rice to serve as Chief of the Special Victims Bureau. She served in that capacity from 2005 to 2011 and then became the Chief Assistant District Attorney, a position she held from 2011 to 2014. In January 2015, she was appointed by the Governor to serve as Acting Nassau District Attorney. She is a graduate of Fordham University School of Law and has an undergraduate degree from Barnard College at Columbia University. She is 49 years of age and currently resides in Manhasset with her husband and her 13-year-old twins. In various interviews, Singas had indicated that she believed that former District Attorney Rice built an office that was both aggressive and progressive and she stated that she plans to continue that legacy. The Nassau County office has some 105 Assistant District Attorneys and operates with a budget of $34.6 million. It is one of the largest prosecutor's offices in the state.

# Are CPL § 180.80 "Hours in Custody" to Be Calculated Differently, Depending Upon Whether the Arrest Was Made Pursuant to a Warrant or Was Warrantless?

By John Brunetti

The question posited by the title to this article may sound like heresy. Permit me to explain.

CPL § 180.80(1) provides, in relevant part: "Upon application of a defendant against whom a felony complaint has been filed with a local criminal court, and who, since the time of his arrest or subsequent thereto, has been held in custody pending disposition of such felony complaint, and who has been confined in such custody for a period of more than…one hundred forty-four hours, without either a disposition of the felony complaint or commencement of a hearing thereon, the local criminal court must release him on his own recognizance."[1]

In applying CPL 180.80 in the cases of both warrant and warrantless arrests, the starting point from which the number of hours is to be calculated differs because of the phrase "such custody."

1. There must be an "application of a defendant against whom a felony complaint has been filed."
2. "Who, since the time of his arrest or subsequent thereto, has been held in custody pending disposition of such felony complaint."
3. "Who has been confined in ***such custody***," for the requisite number of hours without disposition of the felony complaint.

What custody is "such custody"? It is the "custody pending disposition of such felony complaint." In warrantless arrest cases, a felony complaint does not exist at the time of arrest. As a result, it is literally impossible for a person to be "held in custody pending disposition of such felony complaint" until a felony complaint at least exists (not necessarily an arraignment thereon). Only in cases where a felony complaint exists at the time of an arrest, i.e., arrest warrant cases, is it possible for a person to be held in custody pending disposition of a felony complaint from the time of arrest. Therefore, the 144 hours runs from the time of arrest in arrest warrant cases where a felony complaint has necessarily been filed prior to arrest as required by CPL 120.10, but runs from the time of existence (for practical purposes, filing) of the felony complaint on warrantless arrest cases.

If CPL 180.80(1) was designed to treat warrantless arrest cases the same as arrest warrant cases in calculating the 144 hours, it would simply read: "Upon application of a defendant against whom a felony complaint has been filed with a local criminal court, who, since the time of his arrest…has been confined in custody for a period of more than…one hundred forty-four hours, without either a disposition of the felony complaint or commencement of a hearing thereon…," such defendant must be released. But, CPL 180.80(1) does not say that.

The phrase "who, since the time of his arrest or subsequent thereto, has been held in custody pending disposition of such felony complaint" is necessary to reach both arrest warrant cases and warrantless arrest cases. The "since the time of his arrest" clause reaches solely arrest warrant cases because the existence of the felony complaint temporally precedes the arrest. The "subsequent thereto" clause reaches solely warrantless arrest cases because the existence of the felony complaint temporally follows the arrest. The result is two different start times for calculating how many hours a defendant "has been held in custody pending disposition of such felony complaint."

The definition of the adjective "such" found in the Random House Unabridged Edition of the English Language is "of the kind indicated." There is no doubt that under the old version of CPL 180.80, the adjective "such" modified the word "custody" and referred to the "kind" of custody "indicated," i.e., "custody of the sheriff pending disposition of such felony complaint."[2]

The first appearance of the word "custody" in the present version of CPL 180.80 is found in the clause "custody pending disposition of such felony complaint," and the adjective "such" modifies the word "custody" when it appears the second time and refers to the same "kind" of custody "indicated" in the original version, i.e., "custody pending disposition of such felony complaint."

The juxtaposition of the former and present versions of CPL 180.80 demonstrates that the change from "arraignment" to "arrest" was accomplished by plugging the new words into the existing statute without removing the now problematic phrase "pending disposition of such felony complaint."

| Present Version: | Prior Version: |
|---|---|
| "Upon application of a defendant against whom a felony complaint has been filed with a local criminal court, and who, | "Upon application of a defendant against whom a felony complaint has been filed with a local criminal court, and who, |
| **since the time of his arrest or subsequent thereto, has been held in custody** | **either at the time of arraignment thereon or subsequent thereto, has been committed to the custody of the sheriff** |
| pending disposition of such felony complaint, and who has been confined in such custody for a period of more than | pending disposition of such felony complaint, and who has been confined in such custody for a period of more than |
| **one hundred forty-four hours,** | **seventy-two hours** |
| without either a disposition of the felony complaint or commencement of a hearing thereon, the local criminal court must release him on his own recognizance." | without either a disposition of the felony complaint or commencement of a hearing thereon, the local criminal court must release him on his own recognizance." |

As is obvious from the above, if "pending disposition of such felony complaint" had been removed from the present version, it would treat warrantless arrest cases the same as arrest warrant cases. However, it remains and describes the kind of custody that has to last 144 hours before release is mandated.

No court has ever directly addressed this issue.

Three Apellate Division opinions emanating from the First, Second and Third Departments offer the observation that the 144 hours runs from the time of arrest, but close examination of each suggests that each observation may viewed as dictum should the need arise to squarely address the issue raised here.

The First Department case involved an arrest warrant, so the felony complaint was necessarily pending at the time of the arrest. The core holding of the case was that if 180.80 time expires early in the business day, the deadline may not be extended to the close of that business day because "144 hours means 144 hours."[3] It was in that context that the Court observed that, "for future guidance we may say that the statutory reference to a 144-hour limitation period from arrest to indictment (where a weekend intervenes) means what it says." The Court's rationale for its ruling, however, was that 144 hours means 144 hours.[4]

The Second Department case involved a period of nine days, and the felony complaint was filed almost immediately after the defendant's arrest, so the starting time was not in issue. The core holding of the case was that a defendant does not have to demand his release to start 180.80 time because the statute imposes no such requirement.[5] It was in this context that the Court observed that "the 144-hour period begins to run at the time of the arrest of the accused." The Court's rationale for its ruling, however, was that CPL180.80 "provides that the local criminal court must release the accused from jail within the prescribed time frame unless an indictment has been returned, or a preliminary hearing has been commenced, or a showing of other special circumstances has been made." That was the reason why no demand was necessary.[6]

The Third Department case involved period of eight days, so again, the starting time was not in issue. The core holding of the case was that a defendant does not have to demand a preliminary hearing to start 180.80 time because the statute imposes no such requirement.[7] While the Court observed that "CPL 180.80 speaks directly to the "custody" or confinement of a defendant, the start of which always begins at the moment of arrest," the rationale for the ruling was that "the burden of ensuring that such a hearing is held falls on the prosecution" and that CPL 180.10 (4) provides that "[t]he court…must itself take such affirmative action as is necessary to effectuate [a preliminary hearing]."

Dictum is a statement by a court that is not necessary to the disposition of the case[8] that "could have been deleted without seriously impairing the analytical foundations of the holding."[9] Set forth via endnote are reproductions of each of the three Appellate Division cases, one with the potential dictum italicized[10] and one with the potential dictum deleted. [11] You make the call!

## Endnotes

1. The exceptions [good cause, indictment voted or filed] are omitted for ease of reading.
2. The predecessor CPL 180.80 statute read: "Upon application of a defendant against whom a felony complaint has been filed with a local criminal court, and who, either at the time of arraignment thereon or subsequent thereto, has been committed to the custody of the sheriff pending disposition of such felony complaint, and who has been Confined in such custody for a period of more than seventy-two hours without either a disposition of the felony complaint or commencement of a hearing thereon, the local criminal court must release him on his own recognizance."
3. *People ex rel. Arshack on Behalf of Ellis v. Koehler,* 151 A.D.2d 309, 542 N.Y.S.2d 578 (1st Dep't 1989).
4. *People ex rel. Arshack on Behalf of Ellis v. Koehler,* 151 A.D.2d 309, 542 N.Y.S.2d 578 (1st Dep't 1989).
5. *People ex rel. Vancour v. Scoralick*, 140 A.D.2d 658, 529 N.Y.S.2d 11 (2d Dep't 1988). ["The petitioner was arrested at 4:00 A.M. on January 19, 1987, and taken to the Town Court of the Town of Unionvale, where he was arraigned upon a felony complaint. The petitioner was then remanded to the Dutchess County jail in lieu of $10,000 bail. On January 28, 1987, the petitioner's attorney made an ex parte oral application to a Justice of the Town Court for an order pursuant to CPL 180.80 releasing the petitioner on his own recognizance.… With respect to the merits, we conclude that the County Court erred in holding that the time limitations set forth in CPL 180.80 begin to run only when a suspect, who has been incarcerated after arraignment upon a felony complaint, demands his release from jail. The statute provides, to the contrary, that that 144-hour period begins to run at the time of the arrest of the accused, and further provides that the local criminal court must release the accused from jail within the prescribed time frame unless an indictment has been returned, or a preliminary hearing has been commenced, or a showing of other special circumstances has been made. In the present case, no valid reason was shown for continuing the detention of the petitioner beyond a period of 144 hours after his arrest. The writ of habeas corpus should therefore have been sustained *(see, People ex rel. Barna v. Malcolm*, *660 *supra*; *People v. Aaron*, 55 AD2d 653)."].
6. *People ex rel. Vancour v. Scoralick*, 140 A.D.2d 658, 529 N.Y.S.2d 11 (2d Dep't 1988).
7. *People ex rel. Wagner v. Infante*, 167 A.D.2d 630, 632, 562 N.Y.S.2d 861 (3d Dep't 1990). ["The language of the statute is unequivocal. Entitled 'Proceedings upon felony complaint; release of defendant from custody upon failure of timely disposition,' CPL 180.80 speaks directly to the 'custody' or confinement of a defendant, the start of which always begins at the moment of arrest *(see, People ex rel. Vancour v. Scoralick, supra; see also, People ex rel. Arshack v. Koehler, supra; People ex rel. Gilbert v. Scoralick, supra,* at 534; *People v. Edwards,* 121 Misc 2d 505, 506; Bellacosa, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 180.80, at 175-176). Thus, the contention that the period for confinement addressed by the statute would begin at the time of the request of a preliminary hearing is misguided. The burden of ensuring that such a hearing is held falls on the prosecution *(see, People ex rel. Gilbert v. Scoralick, supra,* at 534; *People v. Edwards, supra,* at 506). CPL 180.10 (4) provides that '[t]he court…must itself take such affirmative action as is necessary to effectuate [a preliminary hearing].' Furthermore, it has been noted that '[t]he burden is on the prosecution to commence a hearing before the magistrate within the time limitation under [CPL 180.80]' (1 Callaghan, Criminal Procedure in New York §12:02 [1987 rev ed)."].
8. *233233 Co. v. City of New York*, 171 A.D.2d 492, 496, 567 N.Y.S.2d 411, 415 (1991) ["Appellate Term's 1980 decision as to the proper way to terminate the City's tenancy and to evict subtenants was dictum and was not necessary and essential to its determination."]; *Dow v. Niagara Square Associates*, 190 A.D.2d 1016, 1016, 594 N.Y.S.2d 1007 (1993) ["We add only that the statement contained in the last paragraph of Supreme Court's written decision constituted dictum and was not necessary to the court's resolution of the issues raised."].
9. *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 508 (2d Cir. 1996) ["'Dictum' generally refers to an observation which appears in the opinion of a court which was 'unnecessary to the disposition of the case before it'." *Burroughs v. Holiday Inn,* 621 F.Supp. 351, 353 (W.D.N.Y.1985) (quoting 1B Moore's *Federal Practice,* ¶ 0.402[2] at 40 (2d ed. 1984)). It is a "statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding.…" *Sarnoff v. American Home Products Corp.,* 798 F.2d 1075, 1084 (7th Cir. 1986).
10. *People ex rel. Arshack on Behalf of Ellis v. Koehler,* 151 A.D.2d 309, 542 N.Y.S.2d 578 (1st Dep't 1989) ["We do not find the issue to be moot before us since this situation will undoubtedly recur *(see, People v. Sweeney*, 143 Misc 2d 175), and more likely than not evade direct review *(cf., Matter of Hearst Corp. v. Clyne*, 50 NY2d 707, 714-715; *People ex rel. Barna v. Malcolm*, 85 AD2d 313, *appeal dismissed* 57 NY2d 675). However, we also do not find that this record adequately presents the broad issue that defendant would now have us face, namely, whether the disposition of this case was affected by any pervasive Criminal Court 'policy' to rewrite CPL 180.80 to mean six days, so as to authorize the court to hold defendant until 5:00 P.M. at the close of day for court business whether or not the applicable hourly limit had expired before that time. *For future guidance we may say that the statutory reference to a 144-hour limitation period from arrest to indictment (where a weekend intervenes) means what it says, and cannot be made subject to judicial construction translating the given hourly time frame into a less exacting interval measured by days.* And, where the People seek even a brief enlargement of the applicable hourly period, they must advance 'good cause,' which does not mean the 'imminence' of an indictment, standing alone, as the basis for a routine extension until the close of the same business day."].

    *People ex rel. Vancour v. Scoralick*, 140 A.D.2d 658, 659, 529 N.Y.S.2d 11 (2d Dep't 1988) ["The petitioner was arrested at 4:00 A.M. on January 19, 1987, and taken to the Town Court of the Town of Unionvale, where he was arraigned upon a felony complaint. The petitioner was then remanded to the Dutchess County jail in lieu of $10,000 bail. On January 28, 1987, the petitioner's attorney made an ex parte oral application to a Justice of the Town Court for an order pursuant to CPL 180.80 releasing the petitioner on his own recognizance.…With respect to the merits, we conclude that the County Court erred in holding that the time limitations set forth in CPL 180.80 begin to run only when a suspect, who has been incarcerated after arraignment upon a felony complaint, demands his release from jail. *The statute provides, to the contrary, that that 144-hour period begins to run at the time of the arrest of the accused,* and further provides that the local criminal court must release the accused from jail within the prescribed time frame unless an indictment has been returned, or a preliminary hearing has been commenced, or a showing of other special circumstances has been made. In the present case, no valid reason was shown for continuing the detention of the petitioner beyond a period of 144 hours after his arrest. The writ of habeas corpus should therefore have been sustained *(see, People ex rel. Barna v. Malcolm*, *supra*; *People v. Aaron*, 55 AD2d 653)."].

    *People ex rel. Wagner v. Infante*, 167 A.D.2d 630, 632, 562 N.Y.S.2d 861 (3d Dep't 1990*)* ["The language of the statute is unequivocal. Entitled 'Proceedings upon felony complaint; release of defendant from custody upon failure of timely disposition,' CPL 180.80 speaks directly to the 'custody' or confinement of a defendant, the start of which always begins at the moment of arrest *(see, People ex rel. Vancour v. Scoralick, supra; see also, People ex rel. Arshack v. Koehler, supra; People ex rel. Gilbert v. Scoralick, supra,* at 534; *People v. Edwards,* 121 Misc 2d 505, 506; Bellacosa, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 180.80, at 175-176). Thus, the contention that the period for confinement addressed by the statute would begin at the time of the request of a preliminary hearing is misguided. The burden of ensuring that such a hearing is held falls on the prosecution *(see, People ex rel. Gilbert v. Scoralick, supra,* at 534; *People v. Edwards, supra,* at 506). CPL 180.10 (4)

provides that '[t]he court…must itself take such affirmative action as is necessary to effectuate [a preliminary hearing].' Furthermore, it has been noted that '[t]he burden is on the prosecution to commence a hearing before the magistrate within the time limitation under [CPL 180.80]' (1 Callaghan, Criminal Procedure in New York §12:02 [1987 rev ed])."].

11. *People ex rel. Arshack on Behalf of Ellis v. Koehler*, 151 A.D.2d 309, 542 N.Y.S.2d 578 (1st Dep't 1989) ["We do not find the issue to be moot before us since this situation will undoubtedly recur *(see, People v. Sweeney*, 143 Misc 2d 175), and more likely than not evade direct review *(cf., Matter of Hearst Corp. v. Clyne*, 50 NY2d 707, 714-715; *People ex rel. Barna v. Malcolm*, 85 AD2d 313, *appeal dismissed* 57 NY2d 675). However, we also do not find that this record adequately presents the broad issue that defendant would now have us face, namely, whether the disposition of this case was affected by any pervasive Criminal Court 'policy' to rewrite CPL 180.80 to mean six days, so as to authorize the court to hold defendant until 5:00 P.M. at the close of day for court business whether or not the applicable hourly limit had expired before that time. *For future guidance we may say that the statutory reference to a 144-hour limitation perio…means what it says, and cannot be made subject to judicial construction translating the given hourly time frame into a less exacting interval measured by days.* And, where the People seek even a brief enlargement of the applicable hourly period, they must advance 'good cause,' which does not mean the 'imminence' of an indictment, standing alone, as the basis for a routine extension until the close of the same business day."].

*People ex rel. Vancour v. Scoralick*, 140 A.D.2d 658, 529 N.Y.S.2d 11 (2d Dep't 1988) ["The petitioner was arrested at 4:00 A.M. on January 19, 1987, and taken to the Town Court of the Town of Unionvale, where he was arraigned upon a felony complaint. The petitioner was then remanded to the Dutchess County jail in lieu of $10,000 bail. On January 28, 1987, the petitioner's attorney made an ex parte oral application to a Justice of the Town Court for an order pursuant to CPL 180.80 releasing the petitioner on his own recognizance.....With respect to the merits, we conclude that the County Court erred in holding that the time limitations set forth in CPL 180.80 begin to run only when a suspect, who has been incarcerated after arraignment upon a felony complaint, demands his release from jail. *The statute…*provides that the local criminal court must release the accused from jail within the prescribed time frame unless an indictment has been returned, or a preliminary hearing has been commenced, or a showing of other special circumstances has been made. In the present case, no valid reason was shown for continuing the detention of the petitioner beyond a period of 144 hours after his arrest. The writ of habeas corpus should therefore have been sustained *(see, People ex rel. Barn v. Malcolm*, supra. *People v. Aaron*, 55 AD2d 653)."].

*People ex rel. Wagner v. Infante*, 167 A.D.2d 630, 632, 562 N.Y.S.2d 861 (3d Dep't 1990*)* ["**…**Thus, the contention that the period for confinement addressed by the statute would begin at the time of the request of a preliminary hearing is misguided. The burden of ensuring that such a hearing is held falls on the prosecution *(see, People ex rel. Gilbert v. Scoralick, supra,* at 534; *People v. Edwards, supra,* at 506). CPL 180.10 (4) provides that '[t]he court…must itself take such affirmative action as is necessary to effectuate [a preliminary hearing].' Furthermore, it has been noted that '[t]he burden is on the prosecution to commence a hearing before the magistrate within the time limitation under [CPL 180.80]' (1 Callaghan, Criminal Procedure in New York §12:02 [1987 rev ed])."].

**John Brunetti has served as a Judge of the Court of Claims and acting Supreme Court Justice assigned to criminal matters. He has been a regular contributor to our** *Newsletter.*

# Legal Community Mourns the Death of Judith Kaye

By Spiros Tsimbinos

The legal community was shocked and deeply saddened to learn that Judge Judith Kaye who served on the New York Court of Appeals, both as an Associate Judge and the Chief Judge from 1993 to 2008, died in her Manhattan home on Thursday, January 7, 2016. Judge Kaye was 77 years of age and the cause of death was reported as being cancer. Judge Kaye was considered a giant in the legal community, and even after retiring from the Court of Appeals she continued to remain active both in private practice and a variety of public service functions. At the time of her death, she was serving in the law firm of Skadden, Arps, Slate, Meager and Flom.

Judge Kaye made history in 1983 when she was appointed by former Governor Cuomo to the New York Court of Appeals as the first woman to serve on the New York Court of Appeals. In 1993, she was elevated by Governor Cuomo to the position of Chief Judge where she served in that capacity until 2008. Her fifteen-year service as Chief Judge was the longest in New York State history. Almost immediately after leaving the Court, Judge Kaye continued her public service by serving on a variety of commissions and boards. Up to the date of her death, she served as Chair of the State Commission on Judicial Nominations which had just recently concluded its business of sending potential nominees to the Governor for selection to the New York Court of Appeals. Judge Kaye was a graduate of New York University School of Law and remained active in that school's alumni functions.

Following her death, Governor Cuomo ordered that flags be flown at half-staff on government buildings and Mayor de Blasio issued a similar order with regard to New York City. Colleagues expressed sadness over Judge Kaye's loss and described her as a person of great intelligence and determination and as a real class act. Governor Cuomo himself issued a statement in which he said, "Chief Judge Kaye's passing is a true loss to our State and I have no doubt that her legacy will continue to be felt for many years to come." Former Associate Judge of the Court of Appeals Joseph Bellacosa, in a beautifully written article in the November/December 2015 issue of the *New York State Bar Journal*, reminisced about his service in the Court of Appeals under Judith S. Kaye and issued the following statement:

> In 1987, I was fortunate to become one of Judge Kaye's colleagues on the Court, and afterwards, I proudly sat alongside her when Governor Cuomo appointed her Chief Judge in 1993.
>
> Not very long afterward, a somber Chief Judge Kaye walked into my Chambers across the corridor to utter a different end-of-session goodbye, saying that she might not be coming back to Albany. I was stunned, as she confided that she had been summoned to Little Rock to talk to President Clinton about both a vacancy on the Supreme Court and the office of Attorney General. We hugged and I wished her well. Fortunately for the Court of Appeals, she said, "No thanks, Mr. President" to whatever he was contemplating, and she remained as our Chief for a long and successful tenure. She, of course, had a Cardozean "aura" of her own unique distinction.

Former Associate Judge of the New York Court of Appeals Carmen Ciparick and a longtime friend of Judge Kaye also commented, "You contributed so much, not just to the jurisprudence of the state, but also the creation of the modern court system, and when you left the court, Judith, you didn't stop. You kept going."

Funeral services were held for Judge Kaye on January 10, 2016 with some 1,500 mourners attending the services. Among the attendees were former New York City Mayor Michael Bloomberg, former Chief Administrative Judge A. Gail Prudenti, former Chief Judge Jonathan Lippman, as well as various former colleagues, public officials, family and friends. She is survived by her three children and seven grandchildren. She will be sorely missed.

# New York Court of Appeals Review

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from October 20, 2015 through January 30, 2016. Due to the fact that replacements for Judges Read and Lippman were not confirmed by the State Senate until February 9, 2016, some of the decisions summarized below were decided without a full complement of seven Judges. A few cases even had to be reargued or delayed for oral argument since a split had developed among the remaining Judges as to the appropriate decision. See, for example, *People v. Mack*, decided October 27, 2015, reported in N.Y.L.J. of October 29, 2015, at page 22.

## Sex Offender Registration Risk Assessment Level

***People v. Izzo*, decided October 20, 2015 (N.Y.L.J., October 21, 2015, p. 26)**

In a unanimous decision, the New York Court of Appeals reversed an Appellate Division determination as to the proper risk assessment level which was assigned to a defendant. The Court agreed with the defendant that he should not have been assessed points under Factor 7 because the Appellate Division had used an incorrect RAI score. The matter was therefore remitted to the County Court for determination of the defendant's downward departure application. In issuing its determination, the Court cited its previous decision *In People v. Gillotti*, 23 NY3d, 841 (2014.)

## Misdemeanor Information

***People v. Barnes*, decided October 20, 2015 (N.Y.L.J., October 21, 2015, p. 26)**

In a unanimous decision, the New York Court of Appeals upheld the validity of misdemeanor information which was filed against the defendant and which charged him with criminal trespass in the second degree. The defendant argued that the misdemeanor information was jurisdictionally defective for two reasons. First, he asserted that he could not be charged with second degree criminal trespass for being in the common area of a public housing authority building because such areas are open to the public. Second, he argued that even if he could be charged with second degree criminal trespass the misdemeanor information insufficiently alleged that his presence in the lobby of the building was unlawful. The defendant had been arrested when he was observed by a police officer in the lobby of a building where a "no trespassing" sign was posted and when asked, the defendant was unable to identify any resident who had invited him and acknowledged that he did not reside at the building.

In issuing its decision, he Court pointed out that the defendant was in a public housing building and that the word public refers to ownership, not access. Further, the presence of a "no trespassing" sign indicated that the common area of a publicly owned building is not open to the public. Under the circumstances in question, every element of the second degree criminal trespass charge was established and provided reasonable cause to believe that the defendant committed that offense.

## Justification

***People v. Walker*, decided October 27, 2015 (N.Y.L.J., October 29, 2015, pp. 1, 2 and 21)**

In a unanimous decision, the New York Court of Appeals reversed a defendant's conviction with respect to a manslaughter charge. The trial court had charged the jury on the issue of justification but had added language which the Court of Appeals found confusing to the effect that someone may use deadly force upon another individual if they believe the use of deadly force is imminent against them. Further, the term initial aggressor would be properly defined as the first person in the encounter to use deadly force. In a decision written by Judge Stein, the Court of Appeals concluded that the charging instructions were misleading because they did not include a full definition of initial aggressor where a defendant contends he is coming to the defense of another. In the case at bar, the defendant had argued that he fatally stabbed a man who was beating his brother in the head with a hammer in a 2007 fight that commenced before he intervened. The Court of Appeals contended that in the context of the case, the jury should have received supplemental instructions that justification can be invoked if the defendant had nothing to do with the original conflict he entered as a third party or had no idea who initiated the conflict. The Court of Appeals dismissed the indictment in question with leave to the people to resubmit the charge of manslaughter in the first degree to a new Grand Jury if they so desired.

## Preservation of Right to Appeal

***People v. Nealon*, decided October 27, 2015 (N.Y.L.J., October 29, 2015, pp. 2 and 19)**

In a 4-2 decision, the New York Court of Appeals held that lawyers must object specifically to preserve their right to appellate review of instances where they believe trial judges have improperly handled notes from deliberating jurors. The Court thus reversed a ruling of the Appellate Division, Second Department and reinstated the assault and robbery conviction of a defendant. In the case at bar, the trial judge had responded to three notes sent by jurors without first informing defense counsel of

their contents and giving him a change to consult with his client on a response. Defense counsel never objected to this situation and the Court of Appeals majority determined that no mode of proceedings error had occurred. If defense attorneys want to preserve a claim for errors in these circumstances, they must object. The majority decision was written by Judge Fahey and was joined in by Judges Pigott, Abdus-Salaam and Stein. Chief Judge Lippman and Judge Rivera dissented. Judge Lippman, in dissent, stated that the majority was making a significant departure from the Court's earlier decision *In O'Rama*, 78 NY2d, 270 (1991). The purpose of their O'Rama obligation, according to Judge Lippman, was to provide the defense with opportunities for input at the most critical stages of jury trials.

***People v. Sydoriak*, decided October 27, 2015 (N.Y.L.J., October 29, 2015, p. 22)**

In a case involving similar issues to that of *People v. Nealon* discussed above, the Court once again split 4-2 with Chief Judge Lippman and Judge Rivera dissenting. The majority opinion reversed the prior Appellate Division determination and remitted the case back to the Appellate Division for consideration of the facts and issues raised but not determined.

## Trial Judge Error

***People v. Taylor*, decided October 27, 2015 (N.Y.L.J., October 29, 2015, p. 18)**

In a unanimous decision, the New York Court of Appeals reversed a defendant's conviction and determined that the trial judge had abused its discretion and committed reversible error when in response to a request from a deliberating jury, it did not provide the jury with a substantial portion of requested evidence regarding the potential bias of key witnesses and then suggested that there was no evidence relevant to the inquiry. The Court of Appeals in rendering its determination issued two opinions—a majority opinion issued by Judge Abdus-Salaam and a concurring opinion issued by Judge Rivera and joined in by Chief Judge Lippman, in which they concurred in the result only.

## Evidence of Prior Conviction

***People v. Denson*, decided October 27, 2015 (N.Y.L.J., October 29, 2015, p. 20)**

In a 5-1 decision, the New York Court of Appeals upheld a defendant's conviction for attempted kidnapping in the second degree and determined that the trial court did not commit error in admitting evidence of defendant's prior conviction. The trial judge had admitted evidence of a 1978 sodomy conviction arising from his sexual abuse of his stepdaughter. The Court of Appeals upheld the introduction of such evidence as evidence of his intent with respect to the instant matter. The Court found that under the Molineux Rule, such evidence was admissible to establish motive or intent. The Court found that the People had demonstrated that they wished to introduce the Molineux evidence for a proper non-propensity purpose and that the trial court was within its discretion in issuing its ruling. The Court's majority opinion was written by Judge Fahey. Judge Pigott dissented. Judge Pigott argued that the admission of the evidence in question was not relevant in a case where no sex crime was involved or charged.

## Failure to Advise Counsel of Jury Notes

***People v. Menendez*, decided October 27, 2015 (N.Y.L.J., October 29, 2015, p. 22)**

In a unanimous decision, the New York Court of Appeals reversed a defendant's conviction on the grounds that the trial judge had committed reversible error in the manner in which he handled a juror request. During the trial, the People had utilized transcripts as an aid to the jurors while they were listening to telephone recordings. The Court informed the jurors that the transcripts were not in evidence but if they wanted to see the transcripts during deliberation, they should ask to do so and that the Court would then distribute the transcripts while the recordings were played back to the jury. During deliberations, the jurors sent out notes requesting to see the transcript. The Appellate Record did not indicate that the trial court informed counsel of these notes or responded to the jury in any way. The New York Court of Appeals held that a reversal was required because the jury's request to see the transcripts did not merely require the ministerial actions of informing the jury that none of the items they requested were in evidence. The jury's request for the transcripts thus required a substantive response and reversal was required because the substantive jury notes marked as Court exhibits were neither revealed to the attorneys nor addressed by the Court.

## Use of Uncharged Crimes

***People v. Israel*, decided November 18, 2015 (N.Y.L.J., November 19, 2015, pp. 1, 10, and 22)**

In a unanimous decision, the New York Court of Appeals affirmed a defendant's conviction for murder in the second degree and rejected his claim that the trial judge had improperly allowed evidence regarding uncharged crimes that had occurred in the past. In an opinion written by Judge Stein, the Court noted that the defendant had involved the defense of extreme emotional disturbance and as a result the evidence in question was permitted for a limited purpose as an aid in the evaluation of psychiatric testimony and not to establish a defendant's general propensity. The evidence of uncharged crimes involved an incident in 2002 where the defendant was alleged to

have punched and choked a girl and an incident in 2005 when he had punched a fast food worker. The evidence in question was used to counteract the testimony of an expert witness who argued that the defendant's condition regarding the instant charges was triggered by his involvement in a 2005 street brawl in which he suffered several stab wounds. The Appellate Panel thus concluded that the limited use of uncharged crimes was proper to refute the defendant's contention regarding a post-traumatic stress disorder. The Panel further noted that the trial court had provided limiting instructions and that the evidence presented was not prejudicial to the point of denying him a fair trial.

## Circumstantial Evidence Charged

***People v. Hardy*, decided November 18, 2015 (N.Y.L.J., November 19, 2015, pp. 10, and 22)**

In a unanimous decision, the New York Court of Appeals affirmed the conviction of a security guard for grand larceny and petit larceny for stealing a purse. Surveillance cameras caught the defendant while he committed the crime. The defendant claimed that the evidence against him was circumstantial and that the court should have provided a circumstantial evidence charge to the jury. Judge Fahey, writing for the Court, rejected the defendant's contentions and held that the circumstantial evidence charge was unnecessary because the presence of the surveillance tapes constituted direct evidence against the defendant. In his decision, Judge Fahey stated, "A particular piece of evidence is not required to be wholly dispositive of guilt in order to constitute direct evidence, so long as it proves directly a disputed fact without requiring an inference to be made. In other words, even if a particular item of evidence does not conclusively require a guilty verdict, so long as the evidence proves directly a fact in question, the evidence is direct evidence of guilt."

## Stipulated Evidence

***People v. Gary*, decided November 18, 2015 (N.Y.L.J., November 19, 2015, pp. 22 and 23)**

In a unanimous decision, the New York Court of Appeals upheld a defendant's conviction involving numerous crimes during a scheme to defraud mortgage lenders. During the trial, defendant had entered into a stipulation deeming certain enumerated exhibits admissible as evidence in chief for all purposes. Included within the documents was some information which was harmful to the defense. Subsequently, defense counsel raised a hearsay objection to the receipt of the detrimental evidence. The Court denied the defendant's application, observing that the evidence had already been the subject of unobjected to testimony. The Court later indicated that it would have ruled differently had defendant's objection been timely. The Court of Appeals concluded while the Court might had exercised its discretion differently, its decision not to revisit the issue cannot, under the circumstances, be characterized as an abuse of discretion as would be necessary for it to qualify for the relief requested. Although the stipulation was not irreversibly binding, it was at least presumptively enforceable and the defendant offered no plausible excuse for failing earlier to seek an exception from its coverage. Under the circumstances, the defendant's conviction should be affirmed.

## Vindictive Sentencing

***People v. Martinez*, decided November 19, 2015 (N.Y.L.J., November 20, 2015, pp. 1, 8 and 24)**

In a 5-1 decision, the New York Court of Appeals held that a judge did not violate the rights of a man who raped a child and then spurned a plea offer of ten years' probation by sentencing him to ten to twenty years in prison after he was convicted at trial. In a decision written by Chief Judge Lippman, the Appellate Panel concluded that while New York courts have recognized claims of judicial vindictiveness under the due process clause, the narrow circumstances required to prove such claims were not present in the defendant's case. The Appellate Panel noted that the trial judge had cautioned the defendant regarding the risks of turning down the plea agreement and clearly indicated to him that he would be subject to prison time. In eventually opposing the long-term prison sentence, the trial court had also explained that she was basing her sentence on what had been presented in testimony and evidence at the trial and upon a review of the defendant's background. Judge Fahey dissented from the Court's decision and argued that the only logical conclusion that could be drawn from the great difference between the plea bargain and the prison term he received is that the defendant was being punished for passing up the plea and going to trial.

## Subway Larceny

***People v. Matthew P.*, decided November 19, 2015 (N.Y.L.J., November 20, 2015, p. 26)**

In a 5-1 decision, the New York Court Appeals upheld a defendant's conviction for larceny based upon a defendant's use of a stolen New York City Transit Authority key. In exchange for a fee, the defendant had allowed two individuals to enter the subway system through an emergency exit gate. On appeal, the defendant had argued that the accusatory instrument which charged the defendant contained a jurisdictional defect because the New York City Transit Authority was not the owner of any property that was taken within the meaning of the larceny statute. The Court of Appeals rejected the defendant's argument and concluded that it was enough that the person has a right to possession of the property superior to that of the thief. A possessory right, which however limited or con-

tingent, is superior to that of the defendant. In the case at bar, the information adequately alleged all the elements of a larceny in setting forth defendant's unauthorized use of the illegally obtained key to allow the undercover officers to enter through the emergency exit in exchange for money, thereby depriving the New York City Transit Authority as the owner of its property. The Court's majority opinion was issued by Judge Stein. Chief Judge Lippman dissented.

## Second Violent Felony Offender

***People v. Samuel Small*, decided November 19, 2015 (N.Y.L.J., November 20, 2015, p. 24)**

In a unanimous decision, the New York Court of Appeals concluded that the defendant should not have been sentenced as a second violent felony offender and remitted the matter for resentencing. The defendant argued that he should not have been sentenced as a second violent felony offender for a January 2005 burglary because his 1985 conviction for second degree robbery occurred more than ten years earlier and the intervening periods of incarceration did not close the gap. With respect to the case at bar, the Court concluded that whereas here a period of incarceration has been deemed unlawful and unsupported by evidence, it should not be used to extend the ten-year limitation on prior violent felony convictions.

## Ineffective Assistance of Counsel

***People v. Wragg*, decided November 19, 2015 (N.Y.L.J., November 20, 2015, p. 24)**

In a unanimous decision, the New York Court of Appeals upheld a defendant's conviction for sexual abuse in the first degree and rejected his claim of ineffective assistance of counsel. The defendant presented a mistaken identity defense at trial and began to establish the groundwork for that defense during jury selection. Defense counsel built on this theory of the case during the cross-examination of prosecution witnesses. He also presented testimony from witnesses regarding his whereabouts around the time of the incident. The defendant argued on appeal that defense counsel improperly permitted the prosecution to remind the jury that the victim had previously identified the defendant as the assailant. The Appellate Panel concluded that defense counsel's actions were in line with his argument that the victim made an honest, even understandable, mistake given the lapse of time and that further, when counsel failed to object to remarks by the prosecutor impugning the defendant, they were consistent with counsel's theory of the case. The Appellate Panel concluded that in viewing counsel's representation in its totality, defendant received effective assistance of counsel under the state standard pronounced in *Baldi*, 54 NY2d, 147.

## Adverse Inference Charge

***People v. Durant*, decided November 23, 2015 (N.Y.L.J., November 24, 2015, pp. 1, 2, and 25)**

In a unanimous decision, the New York Court of Appeals held that judges are not required to instruct jurors that they may draw an adverse inference from police failure to videotape a confession. In a decision written by Judge Abdus-Salaam, the Court stated that a police department's failure to record the interrogation did not necessarily suggest that it declined to make the recording because it wished to avoid supplying unfavorable proof at the eventual trial of the suspect. Rather, the police's choice is just as likely to stem from an innocent oversight or a legitimate adherence to a neutral department policy. Judge Abdus-Salaam's opinion was joined in by Judges Pigott, Stein and Rivera. Chief Judge Lippman concurred in the result but urged that in the future, law enforcement agencies should adopt a videotaping policy and that the failure to create a video record could result in a different judicial response regarding an adverse inference charge. Since the Court has been operating with only six Judges, the decision in the above matter was reached by the four-Judge opinion written by Judge Abdus-Salaam and by Chief Judge Lippman's concurrence. Judge Fahey took no part in the decision.

## Ineffective Assistance of Counsel

***People v. Harris*, decided November 23, 2015 (N.Y.L.J., November 24, 2015, p. 22)**

In a 4-2 decision, the New York Court of Appeals found that a defense counsel's failure to have a time barred petit larceny count dismissed constituted the ineffective assistance of counsel. The defendant had been indicted for burglary in the second degree and petit larceny. The complainant had awakened during the night to a sight of a man standing over her and when she screamed the man fled. A pair of earrings was missing from the apartment. The defendant was eventually located in 2010 based upon DNA profiling. The petit larceny count in effect was beyond the statute of limitations and the four-judge majority in the Court of Appeals concluded that defense counsel should have moved to dismiss that charge in question and that his failure to do so constituted ineffective assistance of counsel. Chief Judge Lippman issued the majority opinion, which was joined in by Judges Rivera, Stein and Fahey. Judge Abdus-Salaam dissented in an opinion which was joined by Judge Pigott. The dissenting opinion held the view that defense counsel may have had a reasonable strategy for allowing both the burglary count and the petit larceny count to be considered by the jury. The dissenting opinion further argued that it was inconsistent to conclude that counsel was ineffective in failing to seek dismissal of the petit larceny charge but nonetheless hold that defendant's conviction for the burglary may stand, as such a conclusion indicates that overall counsel provided meaningful representation.

## Brady Violation

***People v. Negron*, decided November 23, 2015 (N.Y.L.J., November 24, 2015, p. 22)**

In a 4-2 decision, the New York Court of Appeals found that a reversal was required and a new trial should be held because the People failed to disclose required materials and that their failure denied the defendant a fair trial. The relevant material in question involved information that another man was arrested in the building and that several witnesses had seen this other man run with a weapon that could have been used in the shooting. The four-Judge majority further concluded that the evidence against the defendant was far from overwhelming and there was a reasonable possibility that the verdict would have been different if the information in question had been disclosed. Under the circumstances, the defendant did not receive a fair trial and a reversal is required. Judge Pigott and Judge Abdus-Salaam issued a dissenting opinion.

## Jurisdictional Defect

***People v. Hatton*, decided November 23, 2015 (N.Y.L.J., November 24, 2015, p. 23)**

In a 5-1 opinion, the New York Court of Appeals rejected a defendant's claim that the accusatory instrument should have been dismissed as being jurisdictionally defective. The defendant was charged with two counts of forcible touching (Penal Law Section (130.52), Sexual Abuse in the Third Degree, Penal Law Section (130.55) and Harassment in the Second Degree (Penal Law Section 240.26)(1). The accusatory instrument contained almost identical factual allegations that the defendant smacked the buttocks of two different women for a total of six complaints over the course of three weeks. The accusatory instruments differed only in the date, time and location of the incidents and the respective complainant's name. The People subsequently filed supporting depositions. The accusatory instrument did contain factual allegations regarding the matter. In reviewing the factual allegations, the five-Judge majority concluded that they easily satisfied the facial sufficiency standard to uphold the validity of the accusatory instrument. Judge Stein dissented, claiming that the factual recital failed to include that the defendant committed the acts for no legitimate purpose. Based upon the decision by the five-Judge majority, which was written by Judge Rivera, the defendant's conviction was reinstated following its dismissal by the Appellate Term.

## Ineffective Assistance of Counsel

***People v. Ambers*, decided November 23, 2015 (N.Y.L.J., November 24, 2015, p. 24)**

In a unanimous decision, the New York Court of Appeals upheld a defendant's conviction and rejected the defendant's claim that his trial counsel was ineffective for failing to seek the dismissal of time-barred charges and failing to object to certain statements by the prosecutor during her summation. In the case at bar, the defendant claimed that his attorney should have moved to dismiss the endangering the welfare counts because they were barred by the statute of limitations. The defendant had been convicted of rape in the second degree as well as the two counts of endangering the welfare of a child. The Appellate Panel concluded that defense counsel's decision could have been based on a trial strategy to provide the jury with an opportunity to render a compromised verdict based upon the less serious charges. Further, with regard to the prosecutor's statements during summation that the children were sexually abused and that the defendant had a history of alcoholism, the Court found that defense counsel had rendered objections to some of these comments but not all and that the Court had issued a curative instruction with respect to some of the remarks based upon these factors. Defense counsel's overall performance did not reach the level of being ineffective and on the contrary, trial counsel had zealously advocated for the defendant and had provided meaningful representation.

## Resentencing Pursuant to Drug Reform Law of 2009

***People v. Golo*, decided November 23, 2015 (N.Y.L.J., November 24, 2015, p. 26)**

In a unanimous decision, the New York Court of Appeals agreed with the defendant that it was an error for the courts below to decide his resentencing motion without giving him an opportunity to be heard. In the case at bar, the defendant moved in March of 2012 to be resentenced on his 2004 conviction for criminal sale of a controlled substance in the third degree. The Supreme Court summarily denied his motion on the grounds that he was ineligible because he had been convicted of an exclusion offense within the ten-year period between his sentencing on his 2004 conviction and his application for resentencing. The Appellate Panel concluded that under the circumstances of the defendant's situation, a further factual explanation was required and that the lower court should have given the defendant an opportunity to be heard on his request. The matter was therefore remitted to the Supreme Court, Queens County for further proceedings.

## Sufficiency of Guilty Plea

***People v. Conceicao*, decided November 24, 2015 (N.Y.L.J., November 25, 2015, pp. 1, 6 and 22)**

In a 4-2 decision, which also applied to several cases, the New York Court of Appeals emphasized that the standard for determining whether a guilty plea was validly entered was the totality of circumstances in determining whether a defendant understood that his rights were

being forfeited by pleading guilty to a criminal charge. The four-Judge majority opinion, which was written by Judge Pigott, stated that there must be some indication in the record that defendants knowingly and willingly have given up their right to a jury trial, to confront their accuser and against self-incrimination by pleading guilty. No particular litany is required for trial courts to utilize and each case must be viewed based on the totality of circumstances. The four-Judge majority indicated that it was reinforcing its prior decision in *People v. Tyrell*, 22 NY 3d, 359, (2013). In the case at bar, the defendant had pleaded guilty to a misdemeanor drug possession charge. A review of the plea colloquy indicated, however, that no adequate record had been established, that the defendant had made a knowing and intelligent waiver of his rights. Under those circumstances, his conviction must be vacated. In two companion cases, however, the four-Judge majority did conclude that there was an adequate showing that the defendants understood their rights. Chief Judge Lippman issued a separate concurring opinion and Judge Rivera dissented in part.

## Validity of a Guilty Plea

### *People v. Pellegrino*, decided November 24, 2015 (N.Y.L.J., November 25, 2015, p. 23)

Based upon their decision in *People v. Conceicao*, discussed above, the four-Judge majority upheld the defendant's guilty plea and determined that the record as a whole affirmatively disclosed a knowing, intelligent and voluntary waiver by the defendant. The plea had been discussed with the attorney for two days and the defendant affirmatively confirmed that he was pleading guilty of his own free will because, in fact, he was guilty of the charge. All of the facts reviewed established a knowing, intelligent and voluntary waiver. Chief Judge Lippman and Judge Rivera dissented based upon their opinions in *People v. Conceicao*.

### *People v. Sougou*, decided November 24, 2015, 2015 (N.Y.L.J., November 25, 2015, p. 23)

In a unanimous decision, the Court upheld as valid a defendant's guilty plea to a charge of unlicensed general vending under the New York City Administrative Code, which is classified as a misdemeanor. The defendant had received a conditional discharge. The record revealed that defense counsel stated that the defendant had authorized him to enter a guilty plea and that he had discussed the matter with the defendant. The trial judge then directly addressed the defendant and asked specifically whether the defendant had discussed the plea and sentence as described in open court with his lawyer and whether he was pleading voluntarily and of his own free will and whether he was giving up his right to a trial and hearings, to which the defendant answered yes on each and every question. Under these circumstances the record affirmatively demonstrated that the defendant understood the consequences of his plea and that he was entering such a plea voluntarily.

## Sufficiency of Accusatory Instrument

### *People v. Afilal*, decided November 24, 2015 (N.Y.L.J., November 25, 2015, p. 22)

The defendant claimed that the accusatory instrument upon which he was convicted was insufficient because it failed to allege sufficient facts to establish "the public place element of Section 221.10(1)" relating to a conviction of criminal possession of marijuana in the fifth degree. In the case at bar, the accusatory instrument failed to allege that the defendant was standing on a sidewalk or in a park when the police officer saw him holding a bag of marijuana. Given the absence of such a factual allegation, the complaint failed to meet the reasonable cause requirement so as to sustain a conviction under Penal Law Section 221.10(1). Therefore, the conviction must be dismissed. The Court's decision was unanimous.

## Sufficiency of Misdemeanor Information

### *People v. Smalls*, decided December 15, 2015 (N.Y.L.J., December 16, 2015, p. 25)

In a unanimous decision, the New York Court of Appeals determined that a misdemeanor information which described the circumstances surrounding the defendant's possession of alleged drug residue, the appearance of the residue, and the officer's experience in identifying controlled substances set forth a prima facie case of criminal possession of a controlled substance in the seventh degree. The defendant claimed that since the information did not describe the residue as a burnt residue, it was insufficient to support the charge in question. The Court of Appeals, however, concluded that the information was facially sufficient notwithstanding the absence of a lab report or a description of the appearance of the drugs themselves. The totality of the officer's statements and his experience supplied the basis for his belief that the substances in question were illegal drugs and that, therefore, in the case at bar, the minimal requirements for the validity of a misdemeanor information were met.

## Motion to Set Aside Sentence

### *People v. Carl Chu-Joi*, decided December 15, 2015 (N.Y.L.J., December 16, 2015, p. 25)

In the case at bar, the defendant's 440.20 motion to set aside his sentence was denied in the trial court without a hearing. The defendant contended that his allegations and supporting documents established that he was 15 years of age at the time of the offense and therefore should have

*(continued on page 22)*

# Criminal Jus
# Annual Meeting P
# and Awards
## Thursday, January 28, 2016


Award winner
Benjamin Ostrer


Panelist John
Temple


Panelist Carl Berry explains video presentation

Panelists Jillian Modzeleski and Amy Fleischauer


Judges Cheryl Chambers and Amy Martoche
discuss human trafficking issues


Panelists at CLE program


Post-Conviction Relief Panelists Oliver, Serita,
Piplani, Mogulescu and Macri address members

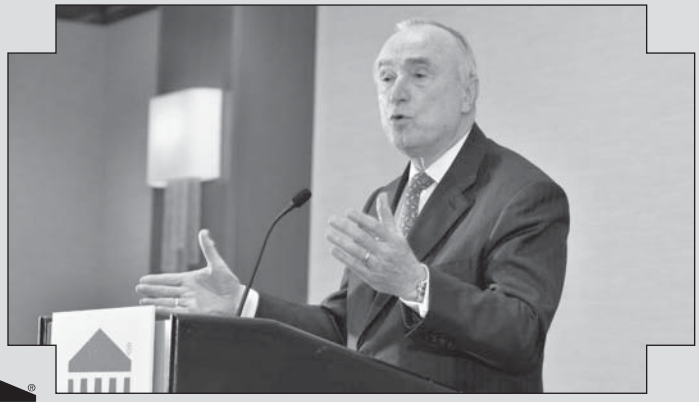
## stice Section
# rogram, Luncheon
# s Ceremony
## • New York Hilton Midtown

New York State Bar Association President David P. Miranda addresses members

Members welcome Commissioner Bratton

Section Chair Sherry Wallach welcomes members

Sherry Wallach and Robert Masters present award to Commissioner Bratton



New York City Police Commissioner William Bratton delivers speech at luncheon

Tucker Stanclift presents award to Warren County District Attorney Kathleen B. Hogan

Norman Effman presents award to Court of Appeals Judge Eugene Pigott, Jr.

(continued from page 19)

been sentenced as a juvenile offender, not as an adult. In support of his motion, he attached a copy of his baptismal and birth certificates. The defendant had been born in Peru. In opposition to the defendant's motion, the People provided information by the Peruvian government that stated that the defendant's purported baptismal certificate was a forgery. In addition, documents from the National Identification and Civil Registry of Peru indicated that the defendant was born June 24, 1976 and not 1977 as claimed by the defendant. A copy of the defendant's Peruvian passport also indicated that he was born in 1976. Under these circumstances, the Court of Appeals determined that written submissions regarding the motion were adequate and that a hearing was not required. The Court noted that the People provided unquestionable documentary proof from the Peruvian government that the defendant was 16 at the time of the murder, effectively refuting any reasonable possibility that the defendant's claims were accurate.

## Late Filing of Notice of Appeal

***People v. Rosario*, decided December 16, 2015 (N.Y.L.J., December 17, 2015, p. 22)**

In a 4-2 decision, the New York Court of Appeals determined that the defendant was not entitled to Appellate relief after learning after the expiration of a one-year grace period that a notice of appeal was not timely filed on his behalf due to the ineffective assistance of counsel. In the case at bar, the defendant had accepted a plea offer and nearly four years later through new counsel filed an application for a writ of error coram nobis claiming that his plea counsel did not speak with him about his right to appeal. The defendant was subject to deportation based upon his plea conviction. The Court of Appeals majority held that the grace period provided by CPL 460.30 is strictly enforced since the time limits within which appeals must be taken are jurisdictional in nature and courts lack inherent power to modify or extend them. In the majority opinion, written by Judge Pigott, a discussion was had regarding *People v. Syville*, 15 NY 3d, 391 (2010) in which the Court held that a defendant who learns after the expiration of the one-year grace period that a notice of appeal was not timely filed due to ineffective assistance of counsel may under very limited circumstances have recourse by way of a coram nobis application. In the case at bar, the defendant has only provided a self-serving affidavit and the circumstances present in *People v. Syville*, are not applicable to the case at bar. Under these circumstances, the defendant failed to meet his burden and coram nobis relief would not be granted. Chief Judge Lippman and Judge Rivera issued dissenting opinions.

## Attorney Motion to Withdraw

***People v. Ortiz*, decided December 16, 2015 (N.Y.L.J., December 17, 2015, p. 23)**

In a unanimous decision, the New York Court of Appeals held that counsel's motion to withdraw should have been granted by the trial court or a mistrial should have been declared. In the case at bar, the People were permitted to introduce a statement made by defense counsel at arraignment that was damaging to her client. The court then denied counsel's request to withdraw. One of the issues during the trial involved the use of a kitchen knife and a razor blade. The defendant, during the trial, testified that one of the alleged victims came after him with a kitchen knife. The People then sought to introduce a statement made by defense counsel at arraignment to show that defendant previously told his attorney that the victim came after him with a razor blade, not a kitchen knife as he testified. Defense counsel vigorously objected, arguing that she misspoke at arraignment and that introducing the statement would force her to become a witness. The court overruled defendant's objection and allowed the prosecutor to impeach the defendant with prior counsel's prior statement. The Court of Appeals concluded that defense counsel was placed in an untenable position when the People introduced counsel's statement from arraignment. Defense counsel had no choice but to withdraw and the trial court should have granted counsel's request to withdraw or should have declared a mistrial. Under the circumstances, the defendant's conviction must be reversed and a new trial ordered.

## Identification Hearing

***People v. Marshall*, decided December 17, 2015 (N.Y.L.J., December 18, 2015, pp. 1, 6, and 22)**

In a 4-2 decision, the New York Court of Appeals held that pretrial photo displays which prosecutors make to eyewitnesses in the name of trial preparation are not exempt from a hearing on unduly suggestive identifications. In issuing its decision in an opinion by Judge Rivera, the Court overruled its prior ruling in *People v. Herner*, 85 NY 2d, 877 (1995). Judge Rivera, writing for the Court, stated that the concern that a pretrial identification will result in witness error is the same regardless of the People's motive. There should be no basis to maintain a distinction between viewings of a defendant's image in preparation for trial and for any other out of court identifications. Both expose a witness to defendant's likeness, with the potential risk for undue suggestiveness. Photo displays done for preparation purposes maybe challenged in a Wade hearing just like all contested out of court identifications. Although all six Judges agreed with this viewpoint, Judge Rivera, along with Judges Pigott, Abdus-Salaam and Fahey, concluded that in the instant matter any error which occurred in not holding a Wade

hearing was harmless and the defendant's conviction should be upheld. Chief Judge Lippman and Judge Stein dissented and concluded that the defendant was entitled to an actual Wade hearing.

## Declaration Against Interest

***People v. Soto*, decided December 17, 2015 (N.Y.L.J., December 18, 2015, p. 22)**

In a 5-1 decision, the New York Court of Appeals held that the introduction at trial of an unavailable witness's statement to a defense investigator that she, not defendant, was the driver at the time of the accident and that she fled the scene should have been allowed. The statement was sought to be admitted as a declaration against interest since the witness was aware at the time she made the statement that it was against her interest. The Court's majority determined that the statement met the four prongs of the test described in *People v. Settles*, 46 NY 2d, 154 (1978) and that therefore the statement was properly admissible as a declaration against interest. Judge Pigott dissented, stating that there was record support for the trial court's finding that the declarant was unaware that her statement was against her penal interest at the time it was made,

## Denial of a Fair Trial

***People v. Pavone*, decided December 17, 2015 (N.Y.L.J., December 18, 2015, p. 24)**

In a 5-1 decision, the New York Court of Appeals upheld a defendant's conviction for murder in the first degree and rejected his claim that the People violated his right to remain silent and that he was denied a fair trial due to the ineffectiveness of counsel. The Court of Appeals majority determined that the defendant's argument regarding the People's use of his silence at trial was generally unpreserved and in either event, after reviewing the record as a whole, a harmless error doctrine could be applied. Further, the defendant failed to sustain his burden to establish that his attorney failed to provide meaningful representation that compromised his right to a fair trial. Under these circumstances, the defendant's conviction should be affirmed. Judge Pigott dissented and adopted the reasoning of the dissenting opinion in the Appellate Division.

## The Filing of Notice of Appeal

***People v. Varenga*, decided December 17, 2015 (N.Y.L.J., December 18, 2015, p. 25)**

In a 4-2 decision, the New York Court of Appeals determined when a defendant's judgment of conviction and sentence becomes final for purposes of applying a new rule of federal constitutional criminal procedure when the defendant does not take a direct appeal to the Appellate Division. The majority held that when a defendant does not take a timely direct appeal from the judgment and does not move for leave to file a late notice of appeal pursuant to CPL 460.30 (1), the judgment becomes final 30 days after sentencing on the last day that a defendant has an inviable right to file a notice of appeal pursuant to CPL460.10(a). The case at bar involved the retroactivity of the Supreme Court ruling in *Padilla v. Kentucky* and its subsequent decision in *Chaidez v. United States*, 133 S.Ct. 1103, (213). Judge Rivera issued a dissenting opinion in which Chief Judge Lippman concurred.

## Use of Photo Array

***People v. Holley*, decided December 17, 2015 (N.Y.L.J., December 18, 2015, p. 26)**

In a unanimous decision, the New York Court of Appeals determined that when using a photo array as an identification procedure, the People should preserve a record of what was viewed. Failure to do so gives rise to a rebuttable presumption that the array was unduly suggestive. The obligation to preserve is not diminished by the type of system used, computer screen or mug shot books. The People's obligation is the same. In the case at bar, the People failed to preserve a computer–generated array of photographs shown to an identifying witness. This gave rise to a rebuttable presumption that the array was unduly suggestive. However, in the case at bar, the People overcame the presumption through testimony established at the suppression hearing.

## Second Felony Offender Adjudication

***People v. Jurgins*, decided December 17, 2015 (N.Y.L.J., December 18, 2015, p. 27)**

In a 5-1 decision, the Court held that the defendant was erroneously sentenced as a predicate felon based upon a prior Washington, DC conviction for attempt to commit robbery. The Court concluded that this conviction was not the equivalent to any New York felony and therefore did not provide s proper basis for his adjudication as a second felony offender. A review of the Washington statute indicates that a person can be convicted of the crime in that jurisdiction without committing an act that would qualify as a felony in New York. Therefore, the Washington conviction was not a proper basis for a predicate felony offender adjudication. Judge Pigott dissented.

# 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 below.

***Mullenix v. Luna*, 136 S. Ct. 305 (November 9, 2015)**

In an 8-1 decision, the United States Supreme Court held that police officers are immune from lawsuits involving the use of deadly force against fleeing suspects unless it is beyond debate that a shooting was unjustified and clearly unreasonable. In the case at bar, a Texas police officer had ignored his supervisor's warning and took a high-powered rifle to a highway overpass to shoot at an approaching car. The officer said that he intended to stop the car but instead he shot and killed the driver. The eight-Judge majority stated that the Court has never found that the use of deadly force in connection with a dangerous car chase violated the Fourth Amendment and that the benefit of the doubt in such cases always goes to the police officer who sees a potentially dangerous situation. Justice Sotomayor dissented and argued that the majority's decision was sanctioning a shoot first, think later approach to policing.

***Maryland v. Kulbicki*, 136 S. Ct., p. 2 (October 5, 2015)**

After granting certiorari, the Supreme Court immediately issued a unanimous per curiam opinion which reversed a judgment of Maryland's highest court that a murder defendant's trial counsel was ineffective in failing to anticipate that comparative bullet lead analysis, which was validly accepted as a forensic tool at the time of trial, would later be discredited. The Maryland high court had reasoned that counsel should have unearthed a report that cast some doubt on the validity of a bullet lead analysis. The Supreme Court found that counsel was not deficient in dedicating his time and focus to elements of the defense that did not involve poking holes in a then-uncontroversial mode of ballistic analysis. The Supreme Court further questioned whether counsel could even have found the report in 1995, an era of card catalogs instead of the worldwide web. The Maryland Court of Appeals decision was therefore reversed.

***Hurst v. Florida*, 136 S. Ct. 616 (January 16, 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 to recommend a death sentence based upon a vote which was not unanimous. The issue involved was 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 was 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. On January 12, 2016, the Court issued its ruling and determined the case on the second issue which was presented. The Court held in an 8-1 decision that Florida's death penalty procedure was unconstitutional, in that it allowed judges and not juries to be responsible for the final decision regarding the imposition of the death penalty. The Court relied upon its prior ruling in *Ring v. Arizona*, and stated in a decision written by Justice Sotomayor that the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough. Under Florida's procedure a jury could find aggravating circumstances to justify the imposition of the death penalty with less than a unanimous vote and could make such a recommendation to the judge but the Florida judge still remained the ultimate determiner of the issue. In issuing its decision, the Supreme Court overruled two earlier Supreme Court rulings issued prior to the *Ring* decision which had upheld Florida's capital sentencing structure.

Justice Alito issued a dissenting opinion. The Court's majority ruling places in doubt several hundred Florida death sentences. The next issue to be determined is whether the *Hurst* ruling applies retroactively or is only applicable to cases where appeals are still pending. Despite the *Hurst* ruling, Florida recently issued execution orders for Florida defendants where the same issue is involved. It is expected that a stay of such an execution will be issued until the Florida courts and the state legislature deal with the sudden and unexpected development.

***Montgomery v. Louisiana*, 136 S. Ct. 718 (January 25, 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 deter-

mination 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 existed 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.

On January 25, 2016, however, the Court determined by a 6-3 vote that the prior ruling in 2012 applied retroactively. As expected, the key Justice in the Court's decision was Justice Kennedy who issued the ruling for the majority. Justice Kennedy stated that prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption and if it did not, their hope for some years of life outside prison walls must be restored. It is expected that some 1,000 cases may be affected by the Court's ruling. According to Kennedy's decision, those currently serving life imprisonment terms must be afforded at least new parole hearings. Justice Scalia issued a dissenting opinion in which he was joined by Justices Alito and Thomas. The dissent attacked the majority ruling as being just a devious way of eliminating life without parole for juvenile offenders.

## Pending Cases

***Whole Woman'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.

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

The issue in this case is whether the Eight 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 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 has 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 enrolment 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 on December 9, 2015. During oral argument, it appeared that the Justices were sharply divided and it appears that another split decision is likely. A decision is expected 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 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 a union if they want no part of it. Briefs were filed in this case and an oral argument date was held on January 11, 2016. A decision is expected in May or June.

***Foster v. Chapman*, 136 S. Ct. ___ (_____, 2016)**

On November 2, 2015, the United States Supreme Court heard oral argument in a claim involving exclusion of black jurors during a Georgia murder trial which occurred in 1987. Georgia prosecutors had issued peremptory challenges against several black jurors and the defense raised issues of Batson violations. During litigation which has been ongoing in Georgia for many years, notes were obtained which indicated that prosecutors had focused on potential black jurors and had handwritten notations next to their name indicating a definite NO. Largely based on these notations, defense counsels have argued that a pattern existed of racial discrimination during jury selection. During oral argument, it appeared that some of the Justices seem inclined to believe that Georgia prosecutors had improperly excluded African-Americans from the jury. A decision in the case is expected within the next few months.

***Little Sisters of the Poor v. Burwell*, 136 S. Ct. ___ (_____, 2016)**

***Priest for Life v. Department of Health and Human Services*, 136 S. Ct. _____ (_____, 2016)**

On November 6, 2015, the United States Supreme Court agreed to hear claims by religious non-profit organizations regarding an outright exemption from providing their female employees with contraceptive health insurance under the Federal Affordable Care Act. The Court will hear seven challenges consolidated for review by religious non-profit organizations to the way the government accommodates their objections to contraceptive health insurance under the Federal Health Care Law. A case emanating from Staten Island as titled above is among the seven cases in question. The Justices in granting certiorari directed the religious groups and the government to address whether the contraceptive coverage requirement and the government's accommodation violate the Religious Freedom Restoration Act of 1993. It is expected that no decision will be reached in this matter until the very end of the Court's current term.

***Evenwell v. Abbott*, 136 S. Ct. ___ (_____, 2016)**

An interesting case is pending before the United States Supreme Court involving the way that legislative districts are comprised. Two Texas voters are claiming that legislative districts should be drawn so that they contain roughly equal numbers of eligible voters, not just equal numbers of people. Oral argument was heard in the matter on December 8, 2015. During oral argument it appeared that the Court's liberal block consisting of Justices Ginsburg, Sotomayor, Kagan and Breyer were firmly against any change in the current procedure and they repeatedly stated that there is a representational interest in using total population. Although some of the conservative justices appeared receptive to the argument being made, it appears unlikely that the Texas petitioners will succeed in their challenge. Once again, Justice Kennedy appears to be a critical vote regarding the ultimate decision in the matter. Both the New York City Corporation Counsel and Attorney General Schneiderman have filed amicus briefs regarding the matter and have urged the Court to reject the argument of the Texas petitioners. A decision is expected in late Spring.

***United States v. Texas*, 136 S. Ct. ___ (_____, 2016)**

On January 19, 2016, the Supreme Court granted certiorari in a case involving President Obama's authority to declare that millions of immigrants living in the country illegally may be allowed to remain and work in the United States without fear of deportation. The issue involves the extent of executive power versus legislative authority. The State of Texas is arguing that the President's action is unconstitutional in that it covers an area which can only be dealt with by congressional action. Texas has been joined by twenty-five other states in the lawsuit and several federal courts have ruled that the President's actions have exceeded his authority. The importance of the issue has led the Supreme Court to decide to hear the matter and it is expected that a ruling will be issued before it adjourns in June.

***Betterman v. Montana*, 136 S. Ct. ___ (_____, 2016)**

The Supreme Court on December 4, 2015, agreed to hear a Montana case involving the issue of whether the Sixth Amendment speedy trial clause applies to the sentencing phase of a case. In the matter, a 14-month delay had occurred between the defendant's plea and his ultimate sentence.

***Birchfield v. North Dakota*, 136 S. Ct. ___ (_____, 2016)**

On December 18, 2015, the Supreme Court also granted certiorari in a case form North Dakota and two companion cases from Minnesota which raised the issue of whether in the absence of a warrant, a state may make it a crime for a person to refuse to take a chemical blood test to detect the presence of alcohol in the person's blood. It is unclear whether there will be sufficient time for briefs and oral argument in these cases so that a decision could be rendered before the end of the June session. We will keep readers advised.

# Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were issued from October 16, 2015 through January 28, 2016.

## Improper Jury Instruction

***People v. Bautista*** **(N.Y.L.J., October 27, 2015, pp. 1 and 8)**

In a unanimous decision, the Appellate Division, First Department vacated a conspiracy conviction on the grounds that the trial judge improperly advised a jury that $658 million in assets held by Imelda Marcos belonged to the Philippine nation. The Appellate Panel found that the opinion read to the jury consisted of fact findings and thus were not proper subjects of judicial notice pursuant to CPLR 4511(b). The trial court had implicitly implied collateral estoppel which was inapplicable even under the standards governing civil cases since the defendant was not a party to the Philippine case and had no opportunity to litigate the issues involved. The case involved the conviction of a Philippine national accused of attempting to sell four French Impressionist paintings which were once owned by the former first lady of the Philippines.

## Search and Seizure

***People v. Nonni and Parker*** **(N.Y.L.J., October 27, 2015, pp. 1 and 9)**

In a 3-2 decision, the Appellate Division, First Department upheld a robbery conviction and upheld the right of police officers to stop and detain the defendants. They were arrested based upon a 911 call of a reported burglary at a private waterfront club in the Bronx. When the police arrived, they observed the defendants walking on the driveway of the club toward a public street carrying a bag. As the police approached, the defendant Nonni ran and the defendant Parker walked away at a hurried pace. The three-judge majority found that the police had a founded suspicion of criminality which elevated to justifying the pursuit and an investigative detention. After a search of the defendants' pockets and the bags they were carrying, a crowbar, two knives and three envelopes containing $1,000 in cash were discovered. The majority opinion was written by Justice Friedman and was joined by Justices Andrias and Saxe. Justices Manzanet-Daniels and Richter dissented, arguing that when the defendants were approached there was no indication that they were engaged in illegal or suspicious activity. Based upon the closeness of the issue involved and the split in the Appellate Division it appears likely that the matter will soon reach the New York Court of Appeals.

## Brady Violation

***People v. Hubbard*** **(N.Y.L.J., November 2, 2015, p. 1 and 4)**

The Appellate Division concluded that a trial judge had properly determined that a Brady violation had occurred when prosecutors failed to inform the defense that the police witness against a murder defendant was accused of securing a false confession in an unrelated case. The Panel found that the evidence in question was favorable to the defense and material to the defendant's case. The Appellate Panel further pointed out that there was no physical evidence tying the defendant to the crime and there was no eyewitness identifying him as the shooter. There was thus a reasonable possibility that the outcome of the trial would have differed if the evidence in question would have been produced.

## Preservation

***People v. Sirico*** **(N.Y.L.J., October 29, 2015, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Second Department held that by pleading guilty to driving while impaired on prescription drugs, a defendant forfeited his right to challenge a trial court's decision to admit evidence that he had refused to submit to a chemical test after his arrest. The Appellate Court stated that because the defendant pleaded guilty, he forfeited his right to challenge the pretrial ruling to allow the admission of evidence of the defendant's refusal.

## Right to Counsel

***People v. Slocum*** **(N.Y.L.J., November 13, 2015, pp. 1 and 10)**

In a unanimous decision, the Appellate Division, Third Department reversed a defendant's conviction and ordered a new trial on the grounds that police had violated the defendant's rights when they continued to question him after he had unequivocally invoked his right to counsel. In the case at bar, police had been notified by a public defender that the defendant was his client and that his representation of the defendant continued from an unrelated ongoing criminal case. Police investigators, however, continued to question the defendant. Under these circumstances a new trial was required.

## Lack of Evidence

***People v. Mais* (N.Y.L.J., November 16, 2015, p. 4)**

In a unanimous decision, the Appellate Division, Second Department held that there was not enough evidence to support an attempted rape conviction for a man who broke into a woman's home, ordered her to disrobe and demanded money but did not touch her or demand sex. The complainant had testified that she was sleeping when she awakened to find the defendant in her bedroom after he had entered her house though a window. When the woman began screaming, the defendant fled. The Appellate Panel concluded that although it could reasonably be inferred that the defendant had intended to engage in some type of criminal sexual conduct, it cannot be inferred that he attempted to engage in sexual intercourse by forcible compulsion. While dismissing the attempted rape charge, the Court upheld convictions for second degree burglary and attempted robbery.

## Denial of Fair Trial

***People v. Stone* (N.Y.L.J., November 17, 2015, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Third Department reversed as defendant's conviction and ordered a new trial on the grounds that statements made to relatives four years after the alleged incident claiming the sexual abuse in question were too old and stale to be used as evidence under the prompt outcry exception to the hearsay rule. The Appellate Panel noted that decisions of the New York Court of Appeals have indicated that a complaint must be made at the first suitable opportunity for it to qualify as an exception to the hearsay rule.

## Effective Assistance of Counsel

***People v. Casey* (N.Y.L.J., November 18, 2015, p. 4)**

A unanimous decision by the Appellate Division, Fourth Department held that a trial judge should have ordered a hearing regarding defendant's 440.10 motion so that her claim of ineffective assistance of counsel could be further reviewed. The Appellate Panel found that it was unclear whether defense counsel called the proper expert witness to rebut the prosecution's testimony regarding a fatal fire. A hearing should therefore have been ordered.

## Withdrawal of Guilty Plea

***People v. Burns* (N.Y.L.J., November 23, 2015, p. 1)**

In a unanimous decision, the Appellate Division, Third Department refused to let a defendant withdraw his guilty plea to a second degree murder charge. The plea was entered shortly after speaking with the daughters of the woman he was accused of killing. The defendant argued on appeal that his plea was involuntary because he was distraught after the girls begged him to admit to the stabbing and save them from having to testify at trial. The Appellate Division concluded that there was no support in the record for the defendant's claim and that the minutes of the plea colloquy indicated that the defendant understood and had sufficient time to discuss his plea with counsel.

## Handling of Jury Note

***People v. Smith* (N.Y.L.J., November 27, 2015, pp. 1 and 4)**

In a unanimous decision, the Appellate Division, First Department reversed a defendant's conviction and ordered a new trial because the trial judge had improperly handled the issuance of a jury note. During a break, while the defendant's lawyer was at lunch, a note was received from the jury which requested a copy of the transcript of the court proceedings. Without consulting the defense, the Judge informed the jury that they were not entitled to have the complete trial transcript. In issuing its reversal, the Appellate Panel stated that the trial judge failed to meet its core responsibilities to provide defense counsel with meaningful notice of a jury note and to provide the jury with a meaningful response. It noted that if defense counsel had been apprised of the request, he might have proposed that what the jury was really seeking was a read back of particular testimony and the better way to proceed would be for the Court to ask if they wanted a specific read back. The trial court further compounded its errors by noting that there was an additional request for copies of all telephone conversations which the trial judge never responded to. Under the circumstances, a new trial was required.

## Inaccurate Defense Counsel Advice Regarding Possible Deportation

***People v. Pinto* (N.Y.L.J., November 27, 2015, pp. 1 and 6)**

In a unanimous decision, the Appellate Division, Second Department reversed a lower court ruling regarding a CPL 440 motion and vacated a defendant's twelve year old drug conviction on the grounds that he received inaccurate advice from his lawyer on the matter of deportation. The defendant was arrested in 2002 on a charge of selling drugs and eventually pleaded guilty. At the plea hearing, the Judge asked defense counsel if there was any issue as to deportation, to which defense counsel replied there might be a possibility of that, but that the defendant wanted to plead despite that issue. The defendant was sentenced to five years' probation. However, in 2012, the Department of Homeland Security began removal proceedings based on the grounds that his conviction required mandatory deportation. Based upon these circumstances the matter was remitted to the Supreme Court for further proceedings.

## Improper Police Interrogation

***People v. Henry* (N.Y.L.J., December 1, 2015, pp. 1 and 4)**

In a unanimous decision in the Appellate Division, Third Department reversed a defendant's assault conviction after it concluded that police improperly questioned the defendant after he told them that he had a lawyer and did not wish to talk. The Appellate Panel concluded that any interrogation should have stopped at that point and that any statements subsequently made to police should have been suppressed.

## Search and Seizure

***People v. Clermont* (N.Y.L.J., December 1, 2015, pp. 1 and 6)**

In a unanimous decision, the Appellate Division, Second Department reversed a defendant's conviction after concluding that the trial judge should have suppressed a firearm which the police recovered during a foot pursuit. In the case at bar, police, in plain clothes, were patrolling an area known for gang activity in Jamaica, Queens. They observed the defendant walking down the street making constant adjustments to the right side of his waistband. As police approached, the defendant ran off. During a foot chase, the defendant removed a fully loaded automatic handgun from his waistband and threw it on the ground before he was apprehended. The Appellate Court found that police officers lacked reasonable suspicion to pursue the defendant and that therefore the pursuit was unlawful. The police officers' experience with gang activity and their observations of the defendant adjusting his waistband did not establish reasonable suspicion.

## Ineffective Assistance of Counsel

***People v. Ramsey* (N.Y.L.J., December 8, 2015, pp. 1 and 9)**

In a unanimous decision, the Appellate Division, Third Department reversed a defendant's conviction for assault in the second degree and ordered a new trial on the grounds that defense counsel had provided ineffective representation. In the case at bar, defense counsel had failed to object to a prosecutor's summation that referred to a statement which was stricken from the record. In issuing its decision, the Appellate Panel concluded that the defendant had met the burden of demonstrating a lack of strategic or otherwise legitimate reason for his defense lawyer's failure to object. The alleged statement in which the defendant implicated himself in the crime was ordered stricken from the record but the prosecution insisted on referring to the statement twice in its closing argument. On both occasions, defense counsel failed to object. The Appellate Panel concluded that since the evidence of guilt was not overwhelming and the statement in question was harmful to the defendant, no reasonable defense lawyer would have failed to object to the comments in question. Under the circumstances a new trial is required.

## Denial of Fair Trial

***People v. DeJesus* (N.Y.L.J., December 10, 2015, p. 4)**

In a unanimous decision, the Appellate Division, First Department reversed a defendant's assault conviction on the grounds that hearsay evidence was allowed into the trial which denied the defendant's right of confrontation. The Appellate Panel also found that the trial judge had improperly permitted prosecutors in their summation to refer to evidence which had been ruled inadmissible. Other improprieties in the prosecution's summation included emotional appeals, safe street argument and denigration of defense counsel. Considering the totality of the circumstances, the Appellate Division concluded that the defendant had been denied a fair trial and that a reversal was required in the interest of justice.

## Right to Counsel

***People v. Carrino* (N.Y.L.J., December 24, 2015, pp. 1 and 2)**

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 his constitutional rights when he made incriminating statements to the police without an attorney present even though he repeatedly invoked his right to counsel. After the defendant was arrested, he was placed in an interview room and advised of his Miranda rights. During a nearly three-hour police interview, he repeatedly asked for an attorney at least three times. The Appellate Panel concluded that the defendant's second and third request for an attorney were unequivocal and that at least at that point questioning by the investigators should have ceased. Further, the failure to suppress the statements was not harmless error and there was a reasonable possibility that the statements he made to police after invoking his right to counsel contributed to his conviction.

## Search and Seizure

***People v. Graham* (N.Y.L.J., December 28, 2015, p. 1)**

In a unanimous decision, the Appellate Division, Second Department reversed a defendant's conviction and ordered a dismissal on the grounds that the trial court should have suppressed a gun that police found on him. The Panel ruled that the defendant had not been arrested prior to the discovery of the weapon and that an illegal search and seizure had occurred. The Appellate Division ruled that the officer had failed to confine the scope of his search to an intrusion reasonably necessary to protect himself from harm. Without the gun evidence, there was insufficient evidence for a conviction and the indictment should be dismissed.

## Adverse Inference Charge

***People v. Austin* (N.Y.L.J., December 29, 2015, pp. 1 and 6)**

In a 3-1 decision, the Appellate Division, First Department ruled that the prosecution was not at fault regarding the loss of blood evidence in a warehouse which had been flooded by Hurricane Sandy. Under such circumstances, the defendant was not entitled to an adverse inference charge regarding the unavailability of the evidence for trial purposes. The majority Panel noted that the blood had been tested before trial and an expert testified based on that test that DNA in the blood evidence found at the crime scene matched that of the defendant.

## Undisclosed Jury Note

***People v. Brink* (N.Y.L.J., December 30, 2015, pp. 1 and 4)**

In a unanimous ruling, the Appellate Division, Fourth Department ordered a new trial on the grounds that the defendant was not informed by the trial judge of the contents of a note sent by jurors before they found the defendant guilty. The Court found that the judge did not disclose a third note which had been sent by the jury regarding the seeking of testimony of a particular witness. Although the trial judge had indicated that he would look over the note and inform the parties about its contents, there was no further indication in the record that he did so. Citing the provisions of CPL 310.30, the Appellate Panel noted that a court requirement was violated and reversible error committed.

## Jury Instruction

***People v. Colasuonno* (N.Y.L.J., January 11, 2016, p. 4)**

The Appellate Division, First Department reversed a defendant's conviction and ordered a new trial with regard to an assault conviction on the grounds that the trial judge failed to properly instruct the jury on how to apply a justification defense to lesser included charges. The Panel concluded that based upon the judge's instructions and the verdict sheet, the jury could have concluded that they were required to consider lesser included charges even if they found the justification defense as reason for an acquittal on the higher charge.

## Ineffective Assistance of Counsel

***People v. Kindell* (N.Y.L.J., January 12, 2016, pp. 1 and 3)**

In a 4-1 decision, the Appellate Division, First Department reversed a defendant's conviction for burglary and ordered a new trial on the grounds that defense counsel failed to request a new suppression hearing when a trial witness contradicted police testimony given at an earlier hearing. In the case at bar, the defendant was encountered in the hallway of a building by the superintendent. The superintendent suspected a burglary in progress and chased the defendant into the street. When confronted, the defendant claimed he was a handyman doing a repair for a tenant but could not name the tenant or describe the repairs. As a result, the superintendent called a police cruiser. When police arrested the defendant in the superintendent's presence, they searched a zippered bag he was carrying and discovered burglary tools. The defendant moved to suppress the police testimony about the tools but the arresting officers claimed that the bag had been on the ground open and the tools were in plain view, making the search and seizure legal. The superintendent did not testify at the suppression hearing. But when he testified at trial, he said the bag was closed and the police had directed the defendant to open it. The four-Judge majority held that defense counsel's failure to move to reopen the suppression hearing constituted the ineffective assistance of counsel. The majority pointed to CPL 710.40(4) which allows for a suppression hearing to be reopened upon a showing that the defendant has discovered additional pertinent facts that could not have been discovered with reasonable diligence before the determination of the motion. Justice Andrias dissented, claiming that counsel's failure may have been part of a trial strategy and noted that the Judge had granted a defense request to provide the jury with an adverse inference charge because the tools had subsequently been lost by the police.

**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 began with the last issue to add topic headings in the Appellate Division area and will continue to do so with respect to future issues.

# For Your Information

## Mexican Migration to U.S. Slows

According to a recent Pew Research Center Report, more Mexicans are now leaving the United States than are moving in. The Center reported that slightly more than 1 million Mexicans and their families including American-born children left the United States from 2009 to 2014. During the same five years 870,000 Mexicans came to the United States resulting in a net flow to Mexico of 140,000. The situation during the last five years reverses a half century of mass migration from Mexico to the United States. The situation during the last five years is attributed to a sluggish U.S. economy, tougher border enforcement and an increasing desire to reunite with families. The Pew Center Report indicated that some 11.7 million Mexicans were living in the United States in 2014, down from a peak of 12.8 million in 2007. That figure includes some 5.6 million living in the United States illegally, which is down from 6.9 million in 2007. The Pew Report findings run somewhat counter to the recent narrative of an out of control border and a flood of Mexican immigrants to the United States.

## Dangerous Use of Prescription Drugs

A new study published in the Journal of the American Medical Association reveals that American have become increasingly medicated during the last fifteen years and that today fully 59% of the adults in the United States were on at least some type of prescription drugs and that more than 15% take five or more drugs. The increase in prescription drugs is attributed to an aging population and the increasing readiness of physicians to prescribe various drugs. Ten drugs were listed as the most widely used and they relate to treating diabetes, high cholesterol, high blood pressure or other conditions related to obesity problems. The increasing use of prescription drugs is raising some concerns and is cause for continued monitoring.

## Special Commission on Legislative, Judicial and Executive Pay

Governor Cuomo and the leader of the State Senate have recently filled the last openings on a Special Commission to study pay raises for State Commissioners, Legislators and Judges. Although the original Special Commission was established to deal with pay raises for judges, its authority was recently expanded to include the pay of Commissioners and State Legislators. The Commission has begun holding public hearings and will make recommendations regarding possible pay increases within the coming months. We will keep our readers advised of developments.

## U.S. Wine Sales

More and more Americans are consuming wines. A latest Nielsen report indicates that consumers spent $13 billion on table wine during the 52 weeks which ended September 12, 2015. The most popular wine seems to be Cabernet Sauvignon, which accounted for 16.2% of the money spent and Chardonnay, which accounted for 19%. Other popular wines were Pinot Grigio and a variety of red blends. The popularity of wine has been growing steadily in the United States and it appears that U.S. Consumers may now be wining a little more than previously.

## July 2015 Bar Exam Results

The pass rate for students at New York's fifteen law schools has been declining over the last few years. The results of the July 2015 bar exam which were reported in early November indicates that ten of New York's fifteen law schools had their pass rates decline from last year. Three law schools, Touro, New York Law and Albany Law School had a double digit or near double digit decline. The statewide rate was 79%, down from 83% last year and the lowest rate since 2004. Touro Law School was at the bottom of the list of fifteen with a pass rate of only 52.5%, down more than 12% from last year. The law schools with the highest pass rate were Columbia, NYU and Cornell, each having a pass rate of over 90%. All of these three top schools improved their rating over last year.

## New Eastern District Judicial Appointment

On October 20, 2015, the United States Senate confirmed Ann Donnelly as a Justice on the Eastern District of New York. She had been nominated in November of 2014 and her confirmation was by a vote of 95-2. Judge Donnelly is a former prosecutor who held many roles during her two years with the Manhattan District Attorney's Office. Prior to her selection for the Eastern District bench, she had been serving as a Court of Claims Judge and Acting Manhattan Supreme Court Justice. She is a graduate of Ohio State University College of Law. With Judge Donnelly's appointment, there are now two remaining vacancies in the Eastern District.

## State Commission on Judicial Salaries

The State Commission on Judicial Salaries, which was established several years ago, has held public hearings throughout the state in order to make recommendations for increases in the salaries of Judges. The Commission has recommend increases in salaries and has suggested that New

York State Judges in the Supreme Court should be paid the same as Federal Judges in the Federal District Courts. The Commission's members were sharply split, with respect to their recommendations with Governor Cuomo's appointees dissenting from the majority recommendations. Although they favor some increase, the dissenters argued that raising salaries to the level of Federal Judges would be too great of an increase and would clash with efforts to promote fiscal restraint and could lead to inflationary implications with regard to other State employees. The final Commission plan would be for Supreme Court Justices in 2016 to make 95% of Federal District Judges. This would mean that Supreme Court Justices would make $193,000.00 since Federal Judges are expected to make $203,100.00 next year. The Commission's recommendations will automatically become law for the year 2016-17 unless the legislature passes and the Governor signs a bill by March 31 changing the recommendation. It appears certain that an increase in judicial salaries will be recommended. The question is how much and when will the raises become effective. Governor Cuomo recently criticized the OCA's request for a 2.4% increase in its judicial budget and also indicated that judicial salary increases would have to come out of the annual budget for the operation of the courts. OCA has already indicated it would request a supplemental budget to cover salary increases. We await developments.

## Older Workers Continue to Work

Recent statistics from the Bureau of Labor indicate that older workers are postponing retirement and are continuing to work on either a full-time or part-time basis. 17.7% of people 65 and older are still working in some capacity compared with only 11.7% in 1995. Many employers continue to favor utilizing older employees and the growing number of baby boomers

This has created a situation where it is estimated that in the coming years more than 40% of older workers will still be employed in some type of capacity

## Declining Middle Class

A recent report by the Pew Research Center indicates that for the first time after more than four decades, the middle class in the United States is no longer the nation's majority. The report indicated that as of 1971, 60.7% of Americans were in the middle class. This has now dropped to 49.8%. The number of households that are now middle class is now matched by those that are either upper or lower income. The interesting development over the last 40 years has been that some from the middle class have moved up while others have moved down. While in 1971 just 14% of Americans were in the upper income tier, today 21% of American households are in the upper earning category. The Pew Center has defined the upper category of at least $126,000.00 a year for a three-person household. As of 1971, 25% of American households were listed in the lower income category. By the end of 2015, 29% of American households are now placed in that category. The Pew Center has defined the lower income category as those earning $42,000.00 or less for a three-person household. According to the survey, the current middle class category ranges between $42,000.00 and $126,000.00 a year for a three-person household. The Pew Center report was based upon an analysis of recent data from the Census Bureau, Labor Department and Federal Reserve.

## Jail Population in Smaller Counties Rises

Recent statistics indicate that U.S. jails now hold nearly 700,000 inmates and that smaller counties throughout the United States hold 44% of the overall total, which is up from 28% in 1978. Although many big cities have reduced their jail populations, midsize counties with populations of between 250,000 and 1,000,000 have seen their jail population quadruple since 1970. Small counties with 250,000 residents or less saw their jail populations increase nearly sevenfold. Although overall the number of inmates in U.S. jails is expected to be reduced due to recent sentencing initiatives, the growth in jail populations within the smaller counties in the nation appears to be a recent trend which should be carefully monitored.

## Coffee Back in Favor

A recent study by researchers at Harvard University provides some good news for coffee drinkers. The research has found that drinking three to five cups of coffee a day reduces the risk of dying early from things like heart disease and diabetes. For many years, medical researchers have advised against too much coffee drinking but the recent Harvard study provides further evidence that moderate consumption of coffee may confer health benefits. This data supports the 2015 dietary guidelines advisory report that concluded that moderate coffee consumption can be incorporated into a healthy and dietary pattern. Enjoy your coffee.

## Record Auto Sales

End-of-the-year statistics indicate that U.S. auto sales reached a record high of 17.5 million in 2015. This was the highest number since the year 2000. Automakers attribute the sharp increase in auto sales to the improving employment picture and to low gas prices and historically low interest rates on automobile purchases. An equally good or better sales picture is expected in 2016.

## Pay Increase for New York City District Attorneys

An advisory commission recently recommend at 12% raise for New York City's five District Attorneys. The report recommended a $22,000 raise to $212,800. The District Attorneys themselves had sought a $60,000 increase but the commission rejected such a large increase while nevertheless recommending a raise in salary. In late January, Mayor de Blasio accepted the commission's recommen-

dations. The City Council, however, must approve the recommended increases and we will report on the final determination in our next issue.

### Law School Enrollment

New York's fifteen law schools sustained a 3% decrease in enrollment in 2015. Four law schools among the fifteen were able to obtain an increase in the size of their student bodies. These law schools were Brooklyn, City University of New York, Cornell Law School and Pace University School of Law. The total enrollment within the fifteen law schools in New York at the end of 2015 was 11,565, down from 12,033 in 2014, or a reduction of 3.9%. New York University School of Law continues to have the largest enrollment with 1,395 followed by Columbia Law School with 1,167. The smallest enrollment was found at CUNY Law with 359 students. On a nationwide level, the total number of law students fell by nearly 6,000. The 2015 enrollment nationwide was 113,900, a 5% decrease from 2014.

### Governor's Conditional Pardons for Young Offenders

Governor Cuomo announced at the end of 2015 that he would offer conditional pardons to an estimated 10,000 New Yorkers who committed non-violent crimes when they were 16 or 17. A website would be established for people to apply for the pardons in question and they would be granted to teenage offenders if they had gone 20 years without committing another offense. It is estimated that some 350 offenders would become eligible for the pardons in question each year.

In another recent move regarding youthful offenders, the Governor also ordered the Corrections Department to establish separate correctional facilities and to reduce the use of solitary confinement. Following Governor Cuomo's announcement regarding state prisoners, President Obama also announced that he would order an end to solitary confinement for young adults incarcerated in federal facilities.

### Veterans Defense Program

The Veterans Defense Program operated by the New York State Defenders Association recently released its report regarding the operation of the program which began in the Spring of 2014. The report stated that nearly 1,000 veterans and public defense attorneys representing veterans in New York State's Criminal and Family Court Systems have been served. The report indicates that studies have found that approximately 112,000 veterans in the state have mental or health ailments and that these conditions have often led to criminal conduct. The program provides training, support and legal assistance. Over 100 criminal and family court cases involving veterans have been serviced. The Veterans Defense Program received $500,000.00 in the state budget for its operation and an additional $600,000.00 is being requested for the executive budget for 2016-2017. The program provides training, support and legal assistance to promote informed and zealous representation of veterans and current service members and the additional budget request was made to enlarge the services provided. The program works closely with several veterans groups and has been operating largely in Upstate New York and in the Western section of the state. Jonathan E. Gradess, who has long been active with our Criminal Justice Section, is currently serving as Executive Director of the program.

### FBI Reports Increase in Violent Crime

Statistics recently released by the Federal Bureau of Investigation regarding the level of crime in the first six months of 2015 reveal a 1.7% jump in the number of violent crimes reported by local law enforcement to the FBI compared with the same period last year. Increases were found with respect to murder, rape, robbery and aggravated assault. The growing level of violent crime has again drawn the attention of many Americans as many major cities have reported significant increases in the number of violet crimes, including the number of homicides. FBI statistics have recorded a 6.2% jump in murders from January to June 2015. Let's hope that this is not the beginning of a new violent trend in America.

### Hispanic Voters Comprise Important Voting Block

According to new research by the Pew Research Center, the number of eligible Hispanic voters in the United States has expanded by more than 4 million since 2012. Eligible Hispanic voters are now listed as numbering 27 million for the 2016 Presidential election. The growth among eligible Hispanic voters has been driven by the more than 3 million U.S.-born Hispanics who have reached voting age since the last Presidential election. While the number of eligible Hispanic voters has grown, prior statistics indicate that in general, Hispanic voters have a lower turnout rate than other groups. Currently, Hispanics represent about 12% of the total voting population in the United States, which is roughly equal to the 12% share of voters who are African-Americans. Hispanic turnout in 2012 was just 48% compared to 67% among Black voters and 65% among White voters. That number is even lower among Hispanic millennials with just 38% showing up in the last Presidential election. Black voter turnout among millennials in 2012 was 55%, White voter turnout within the same age group was 48%. As we look to the Presidential election in 2016, it is clear that Hispanic voters make up a crucial part of the eligible voting population and that voter turnout will also be a critical factor in the final voting result.

# About Our Section and Members

## Annual Meeting Luncheon and Program

The Section's Annual Meeting and CLE Program was held on Wednesday, January 27, 2016 at the New York Hilton Midtown. The CLE Program at the Annual Meeting was held at 8:50 a.m. This year's topic involved the issue of human trafficking and included several speakers on various aspects of this topic. The topics included "Identifying Human Trafficking Cases: Representing Victims and Traffickers." This topic involved the following panelists: Honorable Amy C. Martoche, Carl Berry, John F. Temple, Esquire, Amy Fleischauer, and Jillian Modzeleski, Esquire. Appellate Division Justice Cheryl E. Chambers acted as Moderator.

A second topic involved "Post Conviction Relief and Federal Immigration Protections for Human Trafficking Victims." Panelists for this topic were Honorable Toko Serita, Roni Piplani, Esquire, Kate A. Mogulescu, Esquire, and Joanne Macri, Esquire. This panel was moderated by the Honorable Arlene Gordon Oliver from White Plains.

Introductory remarks regarding the overall Program were provided by Section Chair Sherry Levin Wallach and author Peggy Kern. The CLE Program was attended by approximately 60 members.

Our Annual Luncheon was held commencing at 12:30 p.m. and featured New York City Police Commissioner William Bratton as guest speaker. Commissioner Bratton was also the recipient of one of the Section awards. Following the Luncheon, a presentation of the Annual Awards was made as follows:

***Charles F. Crimi Memorial Award for Outstanding Private Defense Practitioner***
**Benjamin Ostrer, Esquire**
Ostrer & Associates, PC, Chester

***Outstanding Police Contribution in the Criminal Justice System***
**William Bratton**
New York City Police Commissioner

***The Vincent E. Doyle, Jr. Award for Outstanding Judicial Contribution in the Criminal Justice System***
**Honorable Eugene F. Pigott, Jr.**
New York State Court of Appeals, Albany

***Outstanding Prosecutor***
**Kathleen B. Hogan, Esquire**
Warren County District Attorney, Lake George

Additional awards will be presented at the Spring Meeting and we will report on those presentations in our next issue.

## Financial Status and Membership Composition

The financial report covering the year 2015 indicates that the Criminal Justice Section was over budget by some $3,700.00. The total income for the Section comprised of membership dues, CLE functions and miscellaneous items totaled approximately $63,500.00. Overall expenses for the Section amounted to approximately $66,800.00, leaving a net loss of approximately $3,700.00. Membership dues for the year 2015 were down by $4,000.00 from 2014. The greatest expenses incurred by the Section involve catering and banquets regarding our various programs and expenses to operate our Section Executive Committee meetings. Although the Section sustained a slight loss in 2015, it still has an accumulated surplus from prior years of some $35,000.00. Treasurer David Cohen issued his financial statement to the members during our Annual Meeting.

With regard to membership, as of January 1, 2016, our Section had 1,470 members. This was a slight increase from the same period last year. With respect to the composition of the Section, 73% are male, which is about the same as last year, and 23% are female, which is also similar to last year. 47% are in private practice, which is a slight decline from last year. Solo practitioners comprise 22% of the Section, which is also slightly below last year. With respect to age, 21% are 66 and over and 21% are between 56 and 65. Approximately 23% are between 24 and 35, which indicates a slight improvement in younger members who are part of the Section. Approximately 27% have been admitted to practice for less than 14 years. The greatest percentage of the Section has been admitted for more than 20 years and they comprise almost 50% of the membership. The Criminal Justice Section is one of the 25 Sections in the New York State Bar Association, which had as of January 1, 2016, a total membership of approximately 74,000 members.

## Michael T. Kelly

The Criminal Justice Section was sad to learn of the recent passing of former Section Chair Michael T. Kelly. Michael passed away on November 24, 2015 and services were held at the West Seneca Chapel in Upstate New York. Michael served for many years as a Special Prosecutor for New York State and he was the Chair of our Section for two years. While serving as Chair, Michael had several major accomplishments, including the initiation of our Criminal Law *Newsletter* and placing the Section on a sound financial footing. He had a deep commitment to our Section and his son, Kevin, currently serves as one of our District Representatives. Michael is survived by his wife Ellen, several children and grandchildren and will be missed by his family and our Section Members.

# 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.

Istiak Ahmed
Jennifer Nye Amarnath
Matthew Arpino
Daniel N. Arshack
Irina Victoria Bihary
Julia Boms
Gregory Lee Bonney
David M. Brickner
Rebecca Rader Brown
Mari Byrne
Edward J. Canter
Christina Kearney Canto
Craig P. Carriero
Martin L. Cohen
Abigail Flynn Coster
Theodore Michael Cropley
Mirah Curzer
Matthew J. D'Emic
Nancy K. Deming
Tonastacia S. Dennis-Taylor
Richard Diorio
Neil Patrick Diskin
Allegra Edelman
Tabitha Ashley Ferrer
Andrea Lassow Fishman
Rebecca L. Fox
Denyse Coyle Galda
Lorraine Gauli-Rufo
Alexander Grass
Edward S. Graves
Marina Gubenko
Joseph Hladki
Jennifer M. Hoefling
Thomas Hoffman
Taalib T. Horton
James F. Hughes
Michael Adam Jaffe
Barry J. Jones
Steve Kessler
Alexandra Kontos
Warren S. Landau
Laurence J. Lebowitz
Travis Joshua Long
Brian Scott MacNamara
Donielle Maier
Rebecca Grace Mangold
Richard A. Mantellino
Nicole Christine Mather
Anthony Mattesi
Mark Peter McAuliffe
Yoshiaki Miyamoto
Jamelia Natasha Morgan
Thomas J. Murphy
Andrew Newmark
Donald G. O'Geen
Queenie Paniagua
David A. Price
Richard Lee Price
Hillary Profita
Raabia Qasim
Steven M. Raiser
Gregory Sheindlin
Barbara J. Sherman
Jenna Spenard
Rhiannon Spencer
Joshua Surivani
Jason Swinburne
Ronald A. Szot
Guy A. Talia
Adam M. Thompson
Patrick J. Timmins
Joseph Vincent Treanor
Shivani Trivedi
Marissa Clair Tuohy
Alan B. Vickery
Michael E. Weinstein

# Section Committees and Chairs

**Appellate Practice**
Robert S. Dean
Center for Appellate Litigation
120 Wall St., 28th Floor
New York, NY 10005
rdean@cfal.org

Lyle T. Hajdu
Erickson, Webb, Scolton and Hajdu
414 East Fairmount Avenue
P.O. Box 414
Lakewood, NY 14750-0414
lth@ewsh-lawfirm.com

**Awards**
Norman P. Effman
Wyoming County Public Defender
Wyoming County Attica Legal Aid Bureau Inc.
18 Linwood Avenue
Warsaw, NY 14569
attlegal@yahoo.com

**Bail Reform**
Roger B. Adler
233 Broadway, Suite 1800
New York, NY 10279
rbalaw@verizon.net

Hillel Joseph Hoffman
350 Jay St., 19th Floor
Brooklyn, NY 11201-2908
hillelhoffman@verizon.net

**Bylaws**
Marvin E. Schechter
Marvin E. Schechter Law Firm
1790 Broadway, Suite 710
New York, NY 10019
marvin@schelaw.com

**Continuing Legal Education**
Paul J. Cambria Jr.
Lipsitz Green Scime Cambria LLP
42 Delaware Avenue, Suite 300
Buffalo, NY 14202-3901
pcambria@lglaw.com

**Correctional System**
Leah Rene Nowotarski
Wyoming County Public Defender
18 Linwood Avenue
Warsaw, NY 14569
lnowotarski.attlegal@yahoo.com

Norman P. Effman
Wyoming County Public Defender
Wyoming Cty Attica Legal Aid Bureau Inc.
18 Linwood Avenue
Warsaw, NY 14569
attlegal@yahoo.com

**Defense**
Harvey Fishbein
111 Broadway, Suite 701
New York, NY 10006
hf@harveyfishbein.com

Xavier Robert Donaldson
Donaldson & Chilliest LLP
1825 Park Avenue, Suite 1102
New York, NY 10035
xdonaldson@aol.com

**Diversity**
Guy Hamilton Mitchell
163 West 125th Street
New York, NY 10027
guymitchell888@hotmail.com

**Ethics and Professional Responsibility**
Lawrence S. Goldman
Goldman and Johnson
500 5th Avenue, 34th Floor
New York, NY 10110-3399
lsg@goldmanjohnson.com

**Judiciary**
Michael R. Sonberg
New York State Supreme Court
100 Centre Street
New York, NY 10013
msonberg@nycourts.gov

Cheryl E. Chambers
Appellate Division, Second Judicial Dept
45 Monroe Place
Brooklyn, NY 11201
cchamber@nycourts.gov

**Law School Student**
Erin Kathleen Flynn
Law Offices of Eric Franz
747 Third Avenue, 20th Floor
New York, NY 10017
erin.k.flynn@gmail.com

**Legal Representation of Indigents in the Criminal Process**
David A. Werber
85 1st Place
Brooklyn, NY 11231
werbs@nyc.rr.com

**Legislation**
Hillel Joseph Hoffman
350 Jay St., 19th Floor
Brooklyn, NY 11201-2908
hillelhoffman@verizon.net

**Membership**
Erin Kathleen Flynn
Law Offices of Eric Franz
747 Third Avenue, 20th Floor
New York, NY 10017
erin.k.flynn@gmail.com

**Nominating**
Mark R. Dwyer
NYS Supreme Court, Kings County
320 Jay Street
Brooklyn, NY 11201
mrdwyer@courts.state.ny.us

**Prosecution**
John M. Ryan
Queens District Attorney
125-01 Queens Blvd.
Kew Gardens, NY 11415
jmryan@queensda.org

**Sealing**
Richard D. Collins
Collins, McDonald & Gann, P.C.
138 Mineola Blvd
Mineola, NY 11501
rcollins@cmgesq.com

Jay Shapiro
White and Williams LLP
One Penn Plaza
250 West 34th Street Suite 4110
New York, NY 10119
shapiroj@whiteandwilliams.com

**Sentencing and Sentencing Alternatives**
Susan M. BetzJitomir
BetzJitomir & Baxter, LLP
1 Liberty Street, Suite 101
Bath, NY 14810
betzsusm@yahoo.com

Robert J. Masters
District Attorney's Office
Queens County
125-01 Queens Boulevard
Kew Gardens, NY 11415
Rjmasters@queensda.org

**Town and Village Justice Court Task Force**
Clare J. Degnan
The Legal Aid Society
of Westchester County
1 N Broadway, 9th Floor
White Plains, NY 10601-2310
cjd@laswest.org

Leah Rene Nowotarski
Wyoming County Public Defender
18 Linwood Avenue
Warsaw, NY 14569
lnowotarski.attlegal@yahoo.com

**Vehicle and Traffic Law**
Tucker C. Stanclift
Stanclift Ludemann Silvestri
& McMorris, P.C.
3 Warren Street, P.O. Box 358
Glens Falls, NY 12801
tcs@stancliftlaw.com

**White Collar Crime**
Jean T. Walsh
162-21 Powells Cove Blvd.
Beechhurst, NY 11357
jtraceywalsh@hotmail.com

**Wrongful Convictions**
Barry Kamins
Aidala, Bertuna & Kamins P.C.
546 5th Avenue, 6th Floor
New York, NY 10036
judgekamins@aidalalaw.com

Linda Kenney Baden
Law Office of Linda Kenney Baden
15 West 53rd Street
New York, NY 10019
kenneybaden@msn.com

## Publication and Editorial Policy

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

**Publication Policy:** All articles should be e-mailed to: newsletters@nysba.org.

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

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

**Accommodations for Persons with Disabilities:** NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.


ISSN 1549-4063 (print) ISSN 1933-8600 (online)

## NEW YORK CRIMINAL LAW NEWSLETTER



**From the NYSBA Book Store >**

# New York Criminal Practice

## Fourth Edition

**Section Members get 20% discount*** with coupon code PUB8255N

**EDITOR-IN-CHIEF**
**Lawrence N. Gray, Esq.**
Former Special Assistant Attorney General
Medicaid Fraud Control Unit

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

This fourth edition expands on the coverage of the best-selling previous editions and updates case and statutory references.

**Contents at a Glance:**

The Privilege Against Self-Incrimination
Preliminary Hearing
Grand Jury Proceedings
Motion Practice
Plea Negotiations
Jury Selection
Opening Statements
Direct Examination
Defense Cross-Examination
Evidentiary Issues and Objections
Summations
Jury Instructions
Sentencing
Appeals in Criminal Cases
Extradition
*More…*

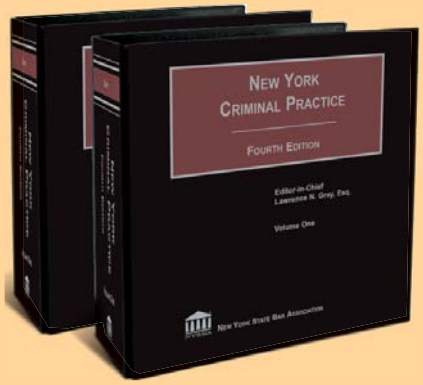
*I always go to New York Criminal Practice before the Internet because "it's all there"…. If more ... attorneys used this invaluable publication conscientiously, I suspect that the practice of criminal law...would improve exponentially.*

*Richard Manning*
*Former District Attorney*
*St. Lawrence County, NY*

## Get the Information Edge

1.800.582.2452 www.nysba.org/pubs

Mention Code: PUB8255N




**PRODUCT INFO AND PRICES**
2014 • 1,260 pp.
2 volumes • loose-leaf
PN:41464

**Order Now!**

| | |
|---|---|
| **NYSBA Members** | **$150** |
| Non-members | $185 |

$5.95 shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be based on destination and added to your order. Prices do not include applicable sales tax.

*Discount good until April 15, 2016

*LEGALEase* Brochure Series From The New York State Bar Association


Display Them. Send Them. Use Them.
Order online @ www.nysba.org/legalease

NYSBA

NEW YORK STATE BAR ASSOCIATION
**CRIMINAL JUSTICE SECTION**
One Elk Street, Albany, New York 12207-1002



NEW YORK STATE BAR ASSOCIATION

# Lawyer Referral and Information Service

## Interested in expanding your client base?

## Join the Lawyer Referral & Information Service

### Why Join?

> Expand your client base
> Benefit from our marketing strategies
> Increase your bottom line

### Overview of the Program

The New York State Bar Association Lawyer Referral and Information Service (LRIS) has been in existence since 1981. Our service provides referrals to attorneys like you in 44 counties (check our website for a list of the eligible counties). Lawyers who are members of LRIS pay an annual fee of $75 ($125 for non-NYSBA members). Proof of malpractice insurance in the minimum amount of $100,000 is required of all participants. If you are retained by a referred client, you are required to pay LRIS a referral fee of 10% for any case fee of $500 or more. For additional information, visit **www.nysba.org/joinlr**.

### Sign me up

Download the LRIS application at **www.nysba.org/joinlr** or call **1.800.342.3661** or e-mail **lr@nysba.org** to have an application sent to you.

**Give us a call! 800.342.3661**

MEETS ABA STANDARDS FOR LAWYER REFERRAL
AMERICAN BAR ASSOCIATION
THE RIGHT CALL FOR THE RIGHT LAWYER™

NYSBA