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New York Criminal Law Newsletter

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

Members Attend Spring 2016 Meeting at Beautiful Montauk Yacht Club in Montauk, NY

(See photos at pp. 18-19 and details at page 31)

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Contents at a Glance:

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

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Message from the Chair

The Criminal Justice System is designed to ensure that justice is served in the handling of criminal cases throughout our state and country. We as attorneys and judges are bound by our ethical rules to practice law fairly, honestly and justly. I think we would all like to say that we strive to accomplish these goals with every case we handle. However, too often, we are faced with issues upon which we all cannot agree. It is at this time that we must strive to reach consensus for those who rely upon us for their freedom, and often for their ability to have a successful future.

One place where this consensus is desperately needed is with the issue of the sealing of criminal records under appropriate circumstances. The State of New York is one of the few states in our country that still has no avenue for a person's past criminal record to be sealed or expunged. For the past several years, bills have been introduced to our State's legislature proposing different possibilities for the sealing of past criminal records for certain offenses and offenders, but none have passed. This failure is predominantly due to a number of reasons. Unfortunately, one factor has been the inability of the criminal justice community as a whole to reach a consensus on this issue.

While we argue, negotiate and repeatedly discuss the issue without reaching an agreement, people's lives are redirected, limited and often fall apart. The stigma of a criminal record in our society limits opportunities, prevents employment and prevents rehabilitation from going forward. Many of those individuals who have a criminal history have done their time, paid their fines, performed their community service and moved on with their lives, never repeating the type of mistake that led them to have that record in the first place, but they can only move on so far. Their inability to find a job, their limited employment opportunities, or their inhibited opportunity to secure housing remind them only too often of that past mistake, and it haunts them for the rest of their lives. By not allowing these people to move forward as contributors, all of society is harmed.

The time has come for New York State to join the ranks of so many other states and offer an option for our citizens to make applications for the sealing of their past criminal records. It has been four long years since the New York State Bar Association's House of Delegates passed a report on sealing, making it the policy of this organization to stand behind legislation to allow sealing of criminal records in certain instances. I implore you all not to stop there. Let us find a way to reach consensus across the opposite sides of the aisles and do justice for all our people. Let us realize this effort with accomplishment and make our state a better place. We must lift the stigma of a criminal history from those found deserving of that relief, and give them back the drive, hope and opportunity to be productive successful members of our communities.

Sherry Levin Wallach

Message from the Editor

In this issue, we report on the effects of Judge Scalia's recent death with respect to the decisions emanating from the United States Supreme Court. It is already apparent that there is a deep 4-4 split within the Court and this division has already had an unexpected impact on several cases which were argued while Judge Scalia was still on the Court but which are now being decided. In an important case involving public service unions, the Court divided 4-4 which left the lower court ruling in effect. During oral argument, it appeared clear that Judge Scalia would vote against the union position and the final deadlock decision of the Court left the lower court ruling, which Judge Scalia would have overturned, in place. Similar deadlocked decisions were issued in several other cases. The apparent effort by President Obama to appoint Judge Scalia's replacement to the Court appears totally blocked by the position of Republican Senate leaders that any such appointment should await the election of a new President. The decisions issued by the Court to date and the ensuing developments regarding the Court's makeup are discussed in the second and third feature articles as well as in our Supreme Court Section.

With regard to the New York Court of Appeals, the Court, after regaining its full complement of judges in early April, began issuing numerous decisions. A few decisions were still issued by a five-Judge court reflecting the period of time when oral arguments were held prior to the confirmation hearings regarding Chief Judge DiFiore and Judge Garcia. The decisions issued in the field of criminal law included the areas of search and seizure, ineffective assistance of counsel, the right of confrontation, and the need for preservation before the court would rule on a matter. The more than twenty decisions issued by the Court are covered in our Court of Appeals Section.

In our first feature article, we are pleased to present a discussion by Leon Polsky regarding the denial of a jury trial to New York City residents charged with a Class B misdemeanor. This issue has long been the topic of discussion and we are fortunate that Mr. Polsky has once again addressed a serious inequity between citizens of New York City and those in the rest of the state. Mr. Polsky has a distinguished background in the field of law having served as a criminal Judge of the New York State Court of Claims and for many years as the former head of the Appeals Bureau for the New York City Criminal Division of the Legal Aid Society. Mr. Polsky is a first-time contributor to our newsletter and we welcome his contribution.

In our last feature article, we also present a discussion on the history of juvenile sentencing, which was prepared by two law students at CUNY Law School who are also members of our recently formed Law Student Committee.

As in the past, we also provide a selection of interesting cases from the various Appellate Divisions. In our For Your Information Section, we provide a variety of articles covering government matters, increases in judicial pay, raises in the minimum wage and comments by law school graduates as to whether they were happy with their law school experience. In our portion regarding Section activities, we report on the May Spring Meeting and also on the recent appointment of former Section Chair Judge Dwyer as Co-Chair of the New York Justice Task Force. The Task Force was formed in 2009 to deal with the issue of wrongful convictions.

On a final note, I was recently advised by the Executive Committee of our Section that at the behest of the Bar Association, they are contemplating changes in the way the *New York Criminal Law Newsletter* is prepared and distributed. As a result, I will no longer serve as Editor of the *Newsletter* and this issue will be the last one in which I serve in that position. In order to effectuate a smooth transition, I have agreed to continue to prepare, at least for the next several issues, the portions of the *Newsletter* which deal with the United States Supreme Court and the New York Court of Appeals. We have been publishing the *Newsletter* for 13 years and have endeavored to provide a quality publication which expeditiously reported on important events to our members in an informative and interesting manner. During these 13 years, I have been assisted in the publication of the *Newsletter* by two members of the staff at the State Bar. To wit, Lyn Curtis and Wendy Harbour. I thank them for their cooperation and assistance during my service as Editor. I also thank our contributors to the *Newsletter*, especially such regulars as Paul Shechtman, Barry Kamins and Judge John Brunetti. Their numerous articles have provided invaluable information and have helped to maintain the high quality of our publication. I also thank the Members of the Section for their favorable comments and support of our *Newsletter*. I hope that any future changes will serve to enhance and enrich the publication.

Spiros A. Tsimbinos

It's Time to Change the Mode of Trial for New York City Class B Misdemeanors

By Leon B. Polsky

I would like to propose for consideration the repeal of subdivision 2 of CPL 340.40—the provision that denies jury trial upon B Misdemeanor charges prosecuted within the City of New York, while allowing it elsewhere in the State.[1]

I will not repeat the general argument favoring jury trials as I will take it as common ground that jury trials are a good thing and we have societally given it a preferred position, not only as a truth-finding mechanism but as a fundamental right of the citizen and non-citizen alike.

As far as I can tell the only authoritative case discussing this section is the mandamus, transformed into a declaratory judgment, *Morgenthau v. Erlbaum*, 59 N.Y. 2d 143, decided 33 years ago. That case passed only upon the "serious crime" criteria which had formed the basis for the earlier Sixth Amendment determination in *Baldwin v. New York*, 399 U.S. 66 (1970), invalidating New York's denial of jury trials in Class A misdemeanor cases.

I suggest the following reasons why the statute should be repealed.

1. Times and factual background have changed since the "serious crime" analysis in *Morgenthau v. Erlbaum:*

   (a) Non-citizens may face deportation or denial of reentry because of B Misdemeanor convictions;

   (b) Citizens and non-citizens alike in our computerized-record-access age face housing, employment, and other liabilities arising from their conviction;

   (c) The "administrative burden" argument cited as justifying a New York City-wide limitation on jury trials, if persuasive when there had been 9,328 misdemeanor trials as in 1968, is no longer tenable in light of the dramatic reduction in the number of trials 45 years later:

2013	**Guilty**	**Not Guilty**	**Total**
Bench	263	219	482
Jury	125	94	209
2012			
Bench	238	150	388
Jury	98	47	145

2. Although the "equal protection" question is not of a traditional sort, there is something not right in denying to New York City defendants the kind of trial thought fundamental enough to be made available in 57 other counties of the State.[2] Although there are many instances of legislation whose impact is determined by the size or location of a county or city, I can think of none which touches upon what is perceived as such an important, if not fundamental, incident of the criminal justice system.

3. A somewhat related consideration is that our present jury-trial parsimony as an historical sport.

From 1824 until the post-*Baldwin* amendment of the New York City Criminal Court Act, all New York City misdemeanors were tried in the Court of Special Sessions where the defendant could opt to be tried either by a single judge or by a panel of three judges, the notion apparently being that giving the City defendant three judges was a fair way of dealing with the then perceived calendar exigencies, yet striking a rough balance with the six-person jury available to misdemeanor defendants in th rest of the State. This was the view expressed by the ABA's *Project on Minimum Standards of Criminal Justice, Standard Relating to Trial by Jury (Tent. Draft 1968)*:

> Use of a multi-judge court would appear to have some of the benefits of a jury trial. There will be an opportunity and necessity of a group judgment; there is not the risk of coming before a single judge with a fixed point of view with respect to certain kinds of cases; and it may be that a multi-judge court would be less reluctant than a single judge to act in mitigation. Thus apart from the question of whether the limitation on jury trials in New York City can be justified, trial by a multi-judge court deserves consideration as an alternative where jury trial is not permitted or waived.

All this changed after *Baldwin*.

As recommended in 1971 by the Criminal Courts Committee of the Association of the Bar of the City of New York,[3] the New York City / rest of the State dichotomy should be ended—jury trials should be made available for all misdemeanors and the three-judge court

discontinued as no longer necessary. (1971 Legislative Bulletin 17).

However, a funny thing happened on the way to the Legislature; the 3-judge panel was abolished but the jury trial proposal was not adopted. Thus, what some had perceived as a rough equality between the City and non-City defendants was abandoned. It is now time to revisit this issue.

Endnotes

1. Although not here directly addressed, there lurks within the arguments justifying repeal the notion that it is time to revisit the contention that the statute offends against the State or Federal due process and equal protection provisions.
2. In this context Judge Burke's dissent in *Hogan v. Rosenberg*, 25 N.Y. 2d 207, *rev'd sub nom. Baldwin v. New York, supra*, should not go unnoticed. There he suggests that the otherwise statewide availability of jury trials for *all* misdemeanors is an expression of the judgment of the people that all misdemeanors are "serious" offenses.
3. Among the committee members were Judge Denzer, and Michael Juviler and Will Hellerstein, the opposing counsel in *Baldwin*.

Leon B. Polsky is a retired Judge of the New York State Court of Claims. He served for many years as the head of the Appeals Bureau for the Criminal Division of the New York City Legal Aid Society and also as Attorney-in-Charge of both its Civil and Criminal Divisions. He is a first-time contributor to our *Newsletter.*

A Snapshot View of the United States Supreme Court

By Spiros A. Tsimbinos

Much attention is being focused during the current Presidential campaign on the makeup of the United States Supreme Court. The recent unfortunate death of Justice Scalia and the upcoming dispute over the appointment of a new Justice to fill the vacancy has further thrust the Court into the public limelight. The Court as one of the three branches of government plays an important role in our nation, especially in recent years. It therefore seems appropriate to provide at least a snapshot view of the Court and the current Justices for our readers.

Current Justices of the Court

The United States Supreme Court is comprised of nine Justices, one who serves as the Chief Justice and eight Associate Justices. The current members of the Court are as follows:

- **Chief Justice–**John G. Roberts, Jr., age 61, appointed by President George W. Bush in 2005. Has currently served for 11 years on the Court.

Associate Justices in order of seniority:

- Anthony M. Kennedy, age 79, appointed by President Ronald Reagan in 1988. Currently has served for 28 years on the Court.
- Clarence Thomas, age 67, appointed by President George H.W. Bush in 1991. Currently has served for 25 years on the Court.
- Ruth Bader Ginsburg, age 82, appointed by President Bill Clinton in 1993. Currently has served for 23 years on the Court.
- Stephen G. Breyer, age 77, appointed by President Bill Clinton in 1994. Currently has served for 22 years on the Court.
- Samuel A. Alito, Jr., age 65, appointed by President George W. Bush in 2006. Currently has served for 10 years on the Court.
- Sonia Sotomayor, age 61, appointed by President Barack Obama in 2009. Currently has served for 7 years on the Court.
- Elena Kagan, age 55, appointed by President Barack Obama in 2010. Has served for 6 years on the Court.

The Operation of the Court

The Supreme Court was created and receives its authority from Article III of the United States Constitution. Justices are nominated by the President of the United States and must be confirmed by the U.S. Senate. Justices can serve for life and their compensation cannot be diminished during their terms of office. The Court currently issues decisions in approximately 75-80 cases per year. Some 10,000 applications are filed in the Court every year for cases to be heard, so that the chances of having a decision rendered by the Court are quite small. During oral arguments, attorneys are usually granted a maximum of 30 minutes to present their arguments. In exceptional cases, the Court can provide additional time for oral arguments. Oral arguments are open to the public but there is only a limited number of first-come, first-served seats provided in the courtroom, usually no more than 100 to 150. Currently, TV cameras are not allowed in the courtroom. Audio transcriptions of proceedings are available, usually within a day or two of the oral arguments. Recently, there has been a growing movement to have oral arguments televised but the Court to date has resisted such a development.

Interestingly, although the Supreme Court is the highest legal tribunal in the nation, the Constitution does not require that the Justices have to be lawyers. By tradition, however, every Justice who has served on the Court has in fact been an attorney. The current yearly salary of the Associate Justices is $249,300.00. The Chief Justice makes $260,700.00.

The unfortunate recent death of Justice Scalia also highlights the possibility that additional vacancies may occur on the Court in the near future. As indicated above, Justice Ginsburg is 82 years of age and has had recent health problems. Justice Kennedy and Justice Breyer, who are in their late 70s, have also been recently been the subject of possible retirement. Thus, the new public attention focused on the Court is clearly warranted.

President Obama Nominates Justice Scalia's Replacement but Senate Confirmation Remains Unlikely

By Spiros A. Tsimbinos

The death of Justice Scalia on February 13, 2016, was not only unexpected and a tragic loss for the Supreme Court, it has also created a deeply divisive political issue as we head into next Presidential election regarding a possible replacement for Judge Scalia's seat. The loss of Justice Scalia has created a basic 4-4 division within the Court regarding conservative and liberal viewpoints. President Obama on March 16, 2016, announced that he was nominating Judge Merrick Garland who has been serving as the Chief Judge for the Court of Appeals for the D.C. Circuit. Justice Garland is 63 years of age and has been serving on that Court for 19 years. He previously served in the United States Justice Department as an Associate Deputy Attorney General and supervised investigations into the 1995 Oklahoma City bombing. He is a graduate of Harvard College and Harvard Law School. He is a native of the State of Illinois. Based upon his judicial record, Justice Garland has been characterized by legal analysts as being somewhat in the center on most issues. However, he appears to have a liberal record with regard to gun control issues, which has raised concern among conservative groupings. In a recent analysis, by several law professors, the opinion was expressed that if Justice Garland obtained a position on the United States Supreme Court, he would vote somewhat similar to Justice Kagan and Justice Breyer but would be more conservative than Justice Sotomayor and Justice Ginsburg.

Despite President Obama's nomination, leaders in the Senate, which is currently controlled by Republicans, have indicated that they would not act on Justice Garland's nomination and that since we are in the midst of a pending Presidential election, the vacancy should be filled by the next elected President. The sharply different positions by President Obama and leaders of the Senate have created another divisive issue during the Presidential campaign and it remains unclear as to whether Judge Scalia's seat will be filled within the remaining time of President Obama's term or whether a replacement will have to await the election of a new President.

Despite the currently firm opposition by the Republican Senate leadership to acting on Judge Garland's nomination, some have speculated that if Hillary Clinton wins the Presidential election, the Republican Senate may actually act after the November election to confirm Judge Garland, who is viewed as being somewhat moderate, rather than talking a chance that President Clinton would appoint someone who was considered far more liberal. We will report on any developments on this important issue as they occur.

Juveniles Then and Now, Through the Ages—An Analysis of Juvenile Sentencing

By Natasha Pooran and Peter Arete

The words of the Eighth Amendment are not precise and their scope is not static; the Amendment must draw its meaning from the evolving standards of decency that mark the progress of maturing society.

—*Trop v. Dulles* (1958),[1] Justice E. Warren

Setting the Stage: *Stanford* and *Roper*

On March 1, 2005 the U.S. Supreme Court issued its ruling in *Roper v. Simmons*[2] holding that the death penalty was an unconstitutional punishment for juvenile offenders, and overturning the *Stanford v. Kentucky*[3] 1989 decision that juveniles could be sentenced to death. That opinion turned on the Court's recognition of our evolving standards of decency.[4]

Similar to the individual, the Constitution acknowledges that as a society we are capable of growing in our understanding of humanity. As we learn more about ourselves as people, our criminal justice policies evolve to reflect a more complex and accurate understanding of the human condition.

This analysis seeks to present the historical and continuing framework of the evolving standards of juvenile sentencing.

Graham v. Florida (2010)[5]

The framework progressed in *Graham v. Florida* where the Court held that a minor could not constitutionally be sentenced to life imprisonment without parole for a non-homicidal offense.[6]

The Court considered firstly, the objective indicia of society's standard expressed in legislative enactment and state practice.[7] Next, they determine whether there is a national agreement against the current sentencing norm when adopting a new categorical rule for an entire class of criminal defendants.[8]

A determination based upon precedents and its understanding of the Eighth Amendment's text, history and meaning is made by the court. In *Graham*, the court noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"[9]—for example, in "parts of the brain involved in behavior control."[10] The court reasoned that those findings, "of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his "'deficiencies will be reformed.'"[11] Nor can deterrence do the work in this context, because "'the same characteristics that render juveniles less culpable than adults'"—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment.[12] And for the same reason, rehabilitation could not justify that sentence. Life without parole "forswears altogether the rehabilitative ideal.[13]" It reflects "an irrevocable judgment about [an offender's] value and place in society," at odds with a child's capacity for change.[14] And this lengthiest possible incarceration is an "especially harsh punishment for a juvenile,"[15] because he will almost inevitably serve "more years and a greater percentage of his life in prison than an adult offender."[16] The penalty when imposed on a teenager, as compared with an older person, is therefore "the same…in name only."[17] In the case at bar, the court restated the protection against cruel and unusual treatment thus: "the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A state need not guarantee…eventual release, but if it imposes a sentence of life, it must provide him or her with some realistic opportunity to obtain release before the end of that term."[18]

Miller v. Alabama (2012)[19]

In July 2003, Evan Miller, along with Colby Smith, killed Cole Cannon by beating Cannon with a baseball bat and burning Cannon's trailer while Cannon was inside.[20] Miller was 14 years old at the time.[21] In 2004, Miller was transferred from the Lawrence County Juvenile Court to Lawrence County Circuit Court to be tried as an adult for capital murder during the course of arson.[22] In 2006, after a grand jury indictment, the trial jury returned a verdict of guilty.[23] Miller was sentenced to a mandatory term of life imprisonment without the possibility of parole.[24]

Miller filed a post-trial motion for a new trial, arguing that sentencing a 14-year-old to life without the possibility of parole constituted cruel and unusual punishment in violation of the Eighth Amendment.[25] The trial court denied the motion and on appeal, the Alabama Court of Criminal Appeals affirmed the lower court's decision.[26] The Supreme Court of Alabama denied Miller's petition for writ of certiorari.[27]

In the companion case, petitioner Kuntrell Jackson, along with Derrick Shields and Travis Booker, robbed a local movie store in Blytheville, Arkansas in November, 1999.[28] The three boys were 14 years old at the time.[29] While walking to the store, Jackson discovered that Shields was hiding a shotgun in his coat.[30] During the rob-

bery, Shields shot the store clerk and the three boys fled the scene.[31] Jackson was tried and convicted of felony capital murder and aggravated robbery in July, 2003.[32] The trial court sentenced Jackson to a mandatory term of life imprisonment without the possibility of parole.[33]

In January 2008, Jackson filed a petition seeking a writ of habeas corpus in circuit court.[34] He argued that his sentence was unusual and excessive, violating his rights under the Eighth and Fourteenth Amendments.[35] The circuit court dismissed the petition and Jackson appealed.[36] The Supreme Court of Arkansas affirmed the lower court's decision.[37]

The question then became whether the imposition of a life-without-parole sentence on a fourteen-year-old child violated the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment. Writing for the majority, Justice Elena Kagan wrote "that mandatory life without parole for those under age of 18 at the time of their crime violates the 8th Amendment's prohibition on cruel and unusual punishment."[38] She continued:

> In light of the reasoning in *Graham*, these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties, by their nature, preclude a sentence from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve.[39]

Sentencing juveniles to life holds them to a higher standard than is just given the propensities and challenges that pubescence and maturity require. "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."[40] Even worse, a host of circumstances beyond a juvenile's control are ultimately held against them. "[Juvenile sentencing in this manner]… prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional."[41]

For instance, Justice Kagan used Kuntrell Jackson's and Evan Miller's crimes as an example of the problem at hand. Both Jackson and Miller did not have the requisite culpability: in Jackson's case, Jackson did not fire the bullet that killed the store clerk and at no time did the State argue that he intended to.[42] Kagan speculates that perhaps Jackson learned before the robbery that his friend was carrying a gun, but his age could have well affected his calculation of the risk.[43] Similarly, although Miller committed a vicious murder, he did it high on drugs consumed with the adult victim.[44] Furthermore, his stepfather had abused him and his addict mother neglected him, resulting in Miller being in and out of foster care.[45] Kagan stressed that the sentencer needed to assess all these circumstances before concluding that life without parole was appropriate for these two boys.[46]

The Wake of *Miller*

The Supreme Court's juvenile jurisprudence has evolved rapidly in a decade. In the wake of *Miller*, the lower courts were left scrambling to resolve lingering questions. The biggest question of them all, however, was what was going to be done about the offenders who had previously been sentenced to juvenile life without parole and serving life sentences as adults.

As of March of 2015, Florida, Illinois, Iowa, Massachusetts, Mississippi, Nebraska, New Hampshire, South Carolina, Texas and Wyoming all decided that the *Miller* decision applied retroactively. Louisiana, Michigan, Minnesota and Pennsylvania decided that *Miller* did not apply retroactively. Because the lower federal courts and state courts were divided on whether *Miller* applies retroactively, in March of 2015, the Supreme Court granted cert for *Montgomery v. Louisiana*, in order to settle the lower court split.[47]

Montgomery v. Louisiana

After more than 50 years in prison for a murder he committed when he was 17, Henry Montgomery petitioned for a reduction in his life sentence last year, seeking to apply *Miller* retroactively.[48] Montgomery characterized his rehabilitation from a misguided youth to a model member of the prison community; he had become a mentor to younger inmates, offering advice and also serving as a coach on the boxing team.[49] The court does not accept these claims on their face, but does say it is one example of demonstrating rehabilitation.[50]

In deciding this case, the Court was split as to whether *Miller* authored a substantive rule protecting a fundamental right or merely established a process to consider a juvenile's age before delivering a penalty.[51] If *Miller* is interpreted to reveal a procedure then the issue of a constitutional violation is only possible. Ultimately, the court held that *Miller* established a substantive rule

because it barred the sentencing of juveniles to life without parole. "*Miller* recognized that children differ from adults in their diminished culpability and greater prospects for reform."[52] A judicial recognition requires greater justifications before delivering a life sentence without the chance of parole.[53] Since it will be the rare incorrigible soul whose crime admits of "irreparable corruption," the class of juveniles merited constitutional protection.[54] Therefore, it must be applied retroactively because a rule guaranteeing constitutional protection of a right merits more than procedural security.[55]

Meanwhile in the minority, Justice Scalia dissented over the issue of jurisdiction and in favor of the procedural reading. There was precedent that a case on collateral review of a state court decision is considered differently than those on direct review from federal courts.[56] Justice Scalia argued that the state had discretion in applying *Miller* retroactively, and that the state could still hand out life sentences without parole as long as it considered the factor of the juvenile's age.[57]

Conclusion

The wake of *Montgomery* now leads to resentencing and parole hearings for some 2,100 offenders convicted of murder.[58] Depending on the state, they could still possibly be sentenced to life without parole or to life with parole eligibility after a specified number of years, or be released for time served. Every offender sentenced as a child under a mandatory sentencing scheme to die in prison will be afforded a second chance to demonstrate rehabilitation and the capacity to re-enter into the community. Now, indecent mistakes made long ago need not be suffered; there is a remedy, for those sentenced as children and for our maturing society.

Endnotes

1. *Trop v. Dulles*, 356 U.S. 86, at 101 (1958).
2. *Roper v. Simmons*, 541 U.S. 553, at 570 (2005).
3. *Stanford v. Kentucky*, 492 U.S. 361 at 361 (1989).
4. *Trop*, 356 U.S. at 101.
5. *Graham v. Florida*, 560 U.S. 48 (2010).
6. *Id.* at 75.
7. *Id.* at 51.
8. *Id.*
9. *Id.* at 68.
10. *Roper*, 543 U.S. at 569-70.
11. *Id.* at 570.
12. *Graham*, 560 U.S. at 72.
13. *Id.* at 74.
14. *Id.*
15. *Id.* at 70.
16. *Id.*
17. *Id.*
18. *Id.* at 82.
19. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).
20. *Id.* at 2462.
21. *Id.*
22. *Id.* at 2455.
23. *Id.* at 2461.
24. *Id.*
25. *Id.*
26. *Id.* at 2455.
27. *Id.* at 2463.
28. *Id.* at 2461.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 2456.
39. *Id.* at 2468.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 2469.
45. *Id.*
46. *Id.*
47. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).
48. *Id.* at 736.
49. *Id.*
50. *Id.*
51. *Id.* at 747.
52. *Id.* at 724, quoting *Roper*, 543 U.S., at 571.
53. *Id.* at 724.
54. *Id.*
55. *Id.* at 733.
56. *Id.* at 746-747.
57. *Id.* at 747.
58. http://www.npr.org/sections/itsallpolitics/2015/10/13/448379021/supreme-court-hears-arguments-on-resentencing-for-juvenile-lifers.

The authors are law students at CUNY Law School and are members of the Section's Law Student Committee. We have recently adopted a policy of encouraging submissions from law schools and we thank the authors for their contributions.

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 February 1, 2016 through April 30, 2016. Due to the fact that replacements for Judges Read and Lippman were not confirmed by the State Senate until early February 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.

Removal of Defense Counsel

People v. Watson, decided February 11, 2016 (N.Y.L.J., February 16, 2016, pp. 1, 2 and 19)

In a unanimous decision, the New York Court of Appeals upheld the removal of defense counsel and the appointment of a conflict-free attorney despite the defendant's objection to having new counsel appointed. In the case at bar, defense counsel who had represented the defendant for several months, and who was a member of the New York County Defender Services, learned that another attorney form that organization was representing a man who fled from police in a Manhattan park as his client was being arrested and that it was possible the other individual was involved in the crime. Defense counsel brought the potential conflict to the attention of the trial judge who subsequently determined that the defendant's representation by the attorney in question had to cease and new counsel appointed.

In issuing its decision upholding the determination of the trial judge, the Court of Appeals noted that supervisors at the New York County Defender Services had prohibited the original attorney from calling the other person as a witness or from cross-examining him if the prosecution called him to testify at the trial. Under these circumstances, the Court of Appeals concluded that the trial court's actions were justified. In a decision written by Judge Stein, the Court stated, "Even if the institutional representation of Stephens did not, in and of itself, present a conflict, such a conflict was created by the conditions imposed by Fisher's supervisors, which hampered his ability to zealously and single-mindedly represent defendant." The New York Court of Appeals in issuing its decision reversed a prior ruling of the Appellate Division, First Department which had ordered a new trial.

Resentencing

People v. Thompson, decided February 11, 2016 (N.Y.L.J., February 16, 2016, p. 19)

In a unanimous decision, the New York Court of Appeals concluded that the revocation of a probationary sentence does not amount to an annulment of the original sentence under Penal Law Section 60.01. The Court stated that the principal question to be resolved was whether the date of the original sentence rather than the date of the resentence determines whether the prior conviction comes within the ten-year look-back period in the second violent felony offender statute for the purpose of imposing sentence on the instant conviction. Penal Law Section 70.04 provides that the sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted for the prior conviction to constitute a predicate violent felony. Based upon this determination that the revocation of probation is not the annulment of a sentence, the Court concluded that the original sentence controls for the purpose of determining eligibility under the look-back period in Penal Law Section 70.04. Under these circumstances, the defendant should not have been resentenced as a second violent felony offender with respect to the instant conviction.

Voluntariness of Confession

People v. Jin Cheng Lin, decided February 18, 2016 (N.Y.L.J., February 19, 2016, pp. 1, 7 and 24)

In a unanimous decision, the New York Court of Appeals upheld the admissibility of a defendant's conviction, finding it to be voluntary even though there was a 28-hour lag between the man's arrest and his arraignment. The defendant had argued that the police had intentionally kept him away from an arraignment judge in order to wring out a confession. Judge Rivera, however, writing for the unanimous Court, concluded, "While defendant makes a compelling case that the police were intentionally dilatory in delaying his arraignment and thus prolonged his detention, we cannot say, based on the totality of the circumstances and as a matter of law, that his statements were involuntary." This case was one of several decided by five Judges since the decision occurred before Chief Judge DiFiore and Judge Garcia took their seats on the Court.

Mandatory Surcharge

People v. Jones, decided February 18, 2016 (N.Y.L.J., February 19, 2016, p. 22)

In a unanimous decision, the New York Court of Appeals rejected a defendant's claim that his due process rights were violated when the sentencing court refused to consider his request to defer payment of a mandatory surcharge which was imposed upon him pursuant to Pe-

nal Law Section 60.35. The Court concluded that no such discretion was provided to the sentencing court under the applicable statutory scheme, and that therefore, the defendant was not entitled to the relief he was seeking. The Court's opinion was written by Judge Rivera and the decision was rendered by the five Judges sitting on the Court at the time the matter was determined.

Ineffective Assistance of Counsel

People v. Gross, decided February 18, 2016 (N.Y.L.J., February 19, 2016, p. 24)

In a 4-1 decision, the New York Court of Appeals concluded that defense counsel's alleged failures were insufficient to overshadow her overall meaningful representation of the defendant and that therefore the defendant had received the effective assistance of counsel. The Court's majority opinion was written by Judge Abdus-Salaam. The defendant claimed that defense counsel had failed to object to inadmissible testimony and had not consulted with an expert witness who may have been able to provide relevant information on issue of the claimed child sexual abuse. The majority concluded that the clamed testimony was properly admitted and that defense counsel's actions with regard to the other issues could have been part of an overall defense strategy. The majority also concluded that a review of the entire record indicated that defense counsel's zealously advocated for the defendant making multiple successful objections and otherwise presenting a vigorous defense. Judge Rivera dissented and pointed to defense counsel's failure to object to the prosecutor's summation, which she concluded was totally improper and denied the defendant a fair trial. Under these circumstances, the failure to timely object and to request an instruction to the jury to ignore the prosecutor's argument constituted ineffective assistance of counsel. Judge Rivera would, therefore, have ordered a new trial.

Appellate Division Review

People v. Nicholson, decided February 18, 2016 (N.Y.L.J., February 19, 2016, p. 23)

In a unanimous decision, the New York Court of Appeals upheld a defendant's conviction and reaffirmed that the Appellate Division does not exceed its statutory authority or run afoul of prior Court of Appeals decisions when it relies on the record to discern that inarticulate predicate for the trial court's evidentiary ruling. The Court therefore, on the merits, rejected defendant's claim that the trial court committed reversal error by admitting rebuttal testimony intended to provide evidence of defendant's sole witness's bias or motive to fabricate. The Court further rejected the defendant's challenges to several other trial court evidentiary rulings as well as his claim that his trial counsel was ineffective.

Drug Factory Presumption

People v. Hogan, decided February 18, 2016 (N.Y.L.J., February 19, 2016, p. 27)

In a unanimous decision, the New York Court of Appeals held that under the circumstances of the instant case, the drug factory presumption under Penal Law Section 220.25 was properly considered by the fact finder. During a non-jury trial, police officers testified that upon entering the apartment they found several bags of packaged crack cocaine and fifty unused baggies in plain view. The defendant's former girlfriend also testified that she had purchased the cocaine and was in the process of moving it when police arrived. Based upon these factors, and other evidence, the drug factory presumption was properly considered by the Court in rendering its decision.

With regard to a secondary issue, the defendant argued that the decision regarding whether to testify before the Grand Jury is fundamental and therefore reserved to defendants, rather than a matter of strategy that rests with defense counsel. The Court of Appeals rejected this argument and held that the decision is a strategic one requiring the expert judgment of counsel. Under these circumstances, the refusal to timely facilitate defendant's appearance before the Grand Jury does not per se amount to ineffective assistance of counsel.

Search and Seizure

People v. Sanders, decided February 23, 2016 (N.Y.L.J., February 24, 2016, p. 24)

In a unanimous decision, the New York Court of Appeals concluded that the defendant's constitutional right to be free from unreasonable searches and seizures was violated when police took defendant's clothing, which had been placed in a clear hospital bag, without obtaining either a warrant or the defendant's consent. Under these circumstances, the defendant's motion to suppress the physical evidence would have been granted and the defendant's conviction was reversed. This case was also decided by five Judges in an opinion written by Judge Fahey.

Preservation

People v. Leach, decided February 18, 2016 (N.Y.L.J., February 24, 2016, p. 24)

In a unanimous decision, the New York Court of Appeals stated that the defendant's challenge to the voluntariness of his guilty plea was unpreserved for Appellate review. The Court of Appeals observed that contrary to defendant's contention, the narrow exception to the preservation requirement did not apply in the case at bar. The Court cited its earlier decision on *People v. Lopez*, 71 NY2d, 662 (1988). Judge Rivera concurred in the result with the four other Judges of the Court but issued a separate concurring opinion.

Search and Seizure

People v. Miranda, decided March 24, 2016 (N.Y.L.J., March 25, 2016, p. 22)

In the case at bar, the defendant had argued that the warrantless search by police officers was unlawful as being beyond the scope of a search incident to an arrest. In particular, the defendant contended that the exigencies that existed at the time of the arrest no longer existed at the time of the search because he was handcuffed and the seizure of the satchel was outside of a permissible full search of his person incident to an arrest. At the trial level the defendant had made a motion to suppress physical evidence "seized on his person" on the basis that the property seized was the fruit of an unlawful arrest. At the conclusion of the suppression hearing, the trial court found probable cause for the arrest based on the officer's observations.

The New York Court of Appeals, in a unanimous decision, concluded that the hearing court did not expressly decide in response to any defense protest the issue which was now being raised on appeal. The issue at the suppression hearing was whether the officers had probable cause to arrest the defendant. The hearing court's mere reference to a search incident to a lawful arrest was insufficient to preserve the defendant's current arguments before the Court of Appeals. The Court of Appeals in issuing its decision referred to the provisions of CPL 470.05(2) which provides that a question of law regarding a ruling is presented in a criminal proceeding "when a protest thereto was registered, by the party claiming error, at [a] time… when the court had an opportunity of effectively changing the same…or if in response to a protest by a party, the court expressly decided the question raised on appeal."

Undue Restriction on Defense

People v. DiPippo, decided March 29, 2016 (N.Y.L.J., March 30, 2016, pp. 1, 2 and 25)

In a 4-1 decision, the New York Court of Appeals reversed a defendant's murder conviction and ordered a new trial on the grounds that the defendant was improperly denied the opportunity to present evidence which implicated a third party. The majority opinion, written by Judge Stein, concluded that compelling and highly probative evidence existed which implicated another man in the crimes for which the defendant was charged and that the trial judge committed reversible error when he refused to allow the defendant to mount a defense based on that premise. The majority opinion, in which Judges Pigott, Rivera and Abdus-Salaam joined, concluded that all the elements of admissibility of third-party culpability existed in the instant matter as outlined in the case of *People v. Primo*, 96 NY 2d 351 (2001). Judge Fahey issued a dissenting opinion and argued that the decision to allow third-party culpability evidence has traditionally been reserved to the discretion of the trial judge and that procedure should apply in the instant matter. The Court's reversal of the defendant's conviction sets up a third trial for the defendant since earlier convictions were also reversed on appeal.

Right of Confrontation

People v. Cedeno, decided March 29, 2016 (N.Y.L.J., March 30, 2016, pp. 2 and 26)

Ina 5-2 decision, the New York Court of Appeals reversed a defendant's conviction and held that evidence which was presented to the jury prejudiced the defendant who did not have the opportunity to challenge the witnesses directly, thereby amounting to a "Bruton" violation. The defendant had contended that the admission of statements that two of his six co-defendants gave to police after the fatal stabbing of a member of a rival gang to the Latin Kings, to which the defendant and his co-defendants belonged, violated his right of confrontation. Although the statements were redacted to remove references to Cedano, the redacted versions still obviously implicated him. Judge Stein, writing for the majority, concluded that the statements powerfully implicated the defendant without giving him recourse at confronting the co-defendant who made the statement and created the high risk of being prejudicial against him in the eyes of the jury. Based upon the majority ruling, a new trial was ordered. Judge Pigott issued a dissenting opinion which was joined in by Judge Garcia. Judge Pigott questioned whether the redacted materials were as incriminating as described by the majority.

Right of Confrontation

People v. Johnson, decided March 29, 2016 (N.Y.L.J., March 30, 2016, pp. 2 and 24)

In a 4-3 decision, the New York Court of Appeals also ruled that the statements of the defendant's co-defendant which were introduced at trial clearly placed him in possession of the proceeds of a robbery as well as connected him to drug related activities. In a decision written by Judge Rivera and joined in by Judges Abdus-Salaam, Fahey and Chief Judge DiFiore, the majority concluded that the admitted statements were powerfully incriminating and constituted a violation of the "Bruton" principles. Judge Pigott issued a dissenting opinion which was joined in by Judges Stein and Garcia. The dissenters argued that the statement at issue did not clearly implicate the defendant and that therefore a reversal was not required. In issuing his dissent, Judge Pigott suggested that the Court's majority ruling may have the practical effect of requiring severance of every joint trial in which a false exculpatory statement of one defendant is sought to be used in direct conflict with the state's strong public policy favoring joinder.

Effective Assistance of Counsel

People v. King, decided March 29, 2016 (N.Y.L.J., March 30, 2016, p. 22 and March 31, 2016, pp. 1 and 2)

In a 4-1 decision, which was written by Judge Pigott, the New York Court of Appeals denied the defendant's clam that she had been denied the effective assistance of counsel because he had failed to object to certain improper statements made by the prosecutor during summation.

The defendant claimed that the prosecutor's summation appealed to gender bias and degraded the defendant's alibi defense and that trial counsel failed to object to any of these remarks. The majority concluded that with respect to some of the prosecutor's remarks, the trial judge had provided adequate curative instructions. With regard to certain other remarks, although the majority concluded that the remarks were inflammatory and should not have been made, defense counsel's failure to object did not meet the standard of ineffectiveness. Under these circumstances, the defendant's conviction should be affirmed.

Judge Rivera dissented, finding that the defendant was denied a fair trial due to her defense counsel's failure to object to the prosecution's inflammatory, irrelevant and prejudicial gender-based summation. The prosecutor's comments during summation included such remarks as "only a woman would inflict this kind of beating" and "hell hath no fury as a woman scorned."

Use of Prior Statement

People v. Berry a/k/a Tucker, decided March 29, 2016 (N.Y.L.J., March 30, 2016, p. 23)

In a unanimous decision, the New York Court of Appeals upheld a defendant's murder conviction and ruled that the defendant was not denied a fair trial when the prosecutors called a witness who subsequently invoked his Fifth Amendment privilege. After the witness in question had testified prosecutors sought to impeach his testimony with a statement that he had given shortly after the shooting. The Court allowed a redacted version of the statement to be introduced into evidence for impeachment purposes, with a limiting instruction that the statement was admitted not for its truthfulness but for the sole purpose of impeaching the witness's credibility. The Court of Appeals upheld the right of the prosecution to call the witness in question and found that his invocation of the Fifth Amendment privilege did not result in an unfair trial. The Court also concluded that it was acceptable to impeach the witness with his prior inconsistent statements and that the Court had issued appropriate curative and limiting instructions.

Preservation

People v. Jordan, decided March 29, 2016 (N.Y.L.J., March 30, 2016, p. 27)

In a 4-1 decision , the New York Court of Appeals affirmed a defendant's conviction and concluded that the defendant had failed to preserve his contention that the trial court discharged prospective jurors based on a hardship without conducting a sufficient inquiry. Judge Rivera dissented based upon her dissenting opinion in *People v. King* (discussed above).

Search and Seizure

People v. Bilal, decided March 31, 2016 (N.Y.L.J., April 1, 2016, p. 26)

In a unanimous decision, the New York Court of Appeals remanded the matter back to the trial court for a suppression hearing. The Court concluded that on the instant record and in light of issues which were framed by the parties in connection with the defendant's CPL 440.10 motion, the defendant was denied the effective assistance of counsel. The defendant had been indicted on the charge of criminal possession of a weapon. Defense counsel had failed to move to suppress the gun that was recovered during defendant's encounter with the police. The defendant had established through his counsel's affidavit that there was no strategic or other legitimate explanation for defense counsel's failure to file a motion to suppress. Under these circumstances, the defendant was denied meaningful representation. Accordingly, he is entitled to a suppression hearing and if he prevails at the hearing a new trial. The matter is therefore remitted for further proceedings.

Effective Assistance of Counsel

People v. Gray, decided March 31, 2016 (N.Y.L.J., April 1, 2016, p. 24)

In a 5-2 decision, the New York Court of Appeals determined that the defendant was not deprived of the effective assistance of counsel when his attorney declined to move to reopen a suppression hearing. The defendant claimed that based upon a detective's trial testimony, defense counsel should have moved to reopen a suppression hearing claiming inconsistencies in the two statements. In response to the defendant's CPL 440.10 motion, defense counsel had filed an affidavit claiming that he had declined to make such a request based upon a trial strategy. The People had also argued that there was no reasonable possibility that the defendant would have won any reopened suppression hearing. The New York Court of Appeals, in an opinion written by Judge Abdus-Salaam, concluded that defense counsel did not deprive the de-

fendant of the effective assistance of counsel when he decided not to move to reopen the suppression hearing. Defense counsel's decision was based upon sound trial strategies and it was highly unlikely that the court would have suppressed the evidence in question at any reopened hearing. Judge Stein, in a dissenting opinion which was joined by Judge Fahey, stated that contrary to the majority's determination, she believed that the detective's trial testimony substantially undermined the prior suppression determination and that under the facts of the case, defense counsel's failure to move to reopen the suppression hearing constituted ineffective assistance of counsel.

Parent Recording of Child's Conversation

People v. Badalamenti, decided April 5, 2016 (N.Y.L.J., April 6, 2016, pp. 1, 2 and 26)

In a 4-3 decision, the New York Court of Appeals held that parents can surreptitiously record conversations involving their minor children if it is in the children's best interest. In issuing its ruling the majority recognized a new exception to the State's illegal eavesdropping statute. In an opinion written by Judge Fahey, the majority concluded that by adding a vicarious consent on behalf of a minor child to exceptions to New York State's eavesdropping statute, Penal Law Section 250.00(2), the Court was furthering the ability of parents or guardians to protect their children. Judge Fahey concluded that there was no basis in legislative history or precedent for concluding that the New York Legislature intended to subject a parent or guardian to criminal penalties for the act of recording his or her minor child's conversation out a genuine concern for the child's best interest.

Judges Stein, Rivera and Abdus-Salaam dissented. The dissenters argued that since the State's statute was silent on the issue, settled principles of statutory interpretation require the Court not to encroach on the province of the legislature and that therefore an ambiguity regarding the issue should be left to the legislature.

Fair Trial

People v. Nelson, decided April 5, 2016 (N.Y.L.J., April 6, 2016, pp. 2 and 25)

In a unanimous decision, the Court upheld a murder conviction of a defendant who claimed he was prejudiced by the fact that a few spectators in the Brooklyn Supreme Court wore t-shirts showing the face of his alleged victim during the trial. Judge Fahey, issuing the decision for the Court, wrote that a harmless error analysis showed that there was no significant probability that the trial court's failure to instruct the spectators to remove or cover the t-shirts upon the defense request contributed to the guilty verdict. The Court noted that the t-shirts were not prominently enough displayed nor did the spectators engage in demonstrations as to warrant a reversal of the conviction.

Recording Jail Phone Calls

People v. Johnson, decided April 5, 2016 (N.Y.L.J., April 6, 2016, pp. 2 and 23)

In a unanimous decision, the Court upheld the conviction of a defendant based in large part on evidence which was gathered by prosecutors from recordings of telephone calls he made while incarcerated at Rikers Island. Judge Rivera, in an opinion for the Court, stated that the Department of Corrections was not acting as an agent for the State when it recorded the conversations of inmates and that all inmates are warned that their calls are subject to recording and monitoring. The defendant was not induced or coerced by the Corrections Department to call friends and family and to make statements that were detrimental to his defense.

Preservation

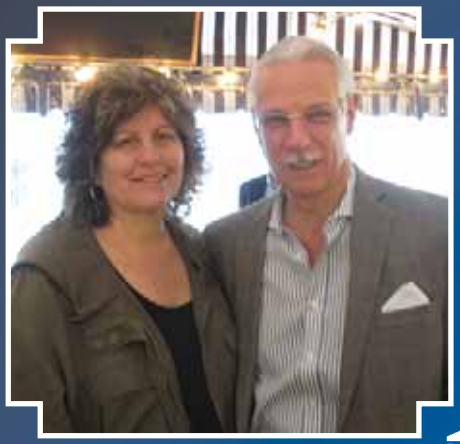
People v. Williams, decided April 5, 2016 (N.Y.L.J., April 6, 2016, p. 23)

In a 5-2 decision, the New York Court of Appeals concluded that the defendant's effort to withdraw his guilty plea had not been preserved for Appellate review. In the case at bar, the defendant during the plea colloquy had been informed about the sentence to be imposed. The defendant was also informed by the Court about the possible imposition of a predicate felony sentence. The defendant responded that he understood the conditions of the plea and the consequences of failing to fulfill them. It subsequently became apparent that the promised sentence could not legally be imposed based upon the defendant's predicate status and that he instead faced a sentencing range of 6-15 years. The majority opinion on the New York Court of Appeals concluded that because the defendant through counsel could have raised his current challenge to the propriety of his guilty plea prior to the imposition of sentence, he was obligated to preserve his claim and his failure to object to the plea in the trial court precluded Appellate review in the Court of Appeals regarding his present contention. Judges Rivera and Fahey dissented.

Admissibility of Third-Party Culpability Evidence

People v. Powell, decided April 5, 2016 (N.Y.L.J., April 6, 2016, p. 27)

In a unanimous decision, the New York Court of Appeals concluded that the trial court did not abuse its discretion by precluding the defendant's ill-defined and speculative third-party culpability evidence. In issuing its opinion, the Court relied upon its earlier ruling in *People v. Primo*, 96 NY 2d 351 (2001). Using the standard enunciated in that case, the Court reiterated that third-party culpability evidence should be evaluated in accordance with ordinary evidentiary principles by balancing the proffered evidence's probative value against its potential for undue prejudice, delay and confusion. Under the circumstances of the instant case, the trial court properly exercised its discretion in precluding the proffered evidence.



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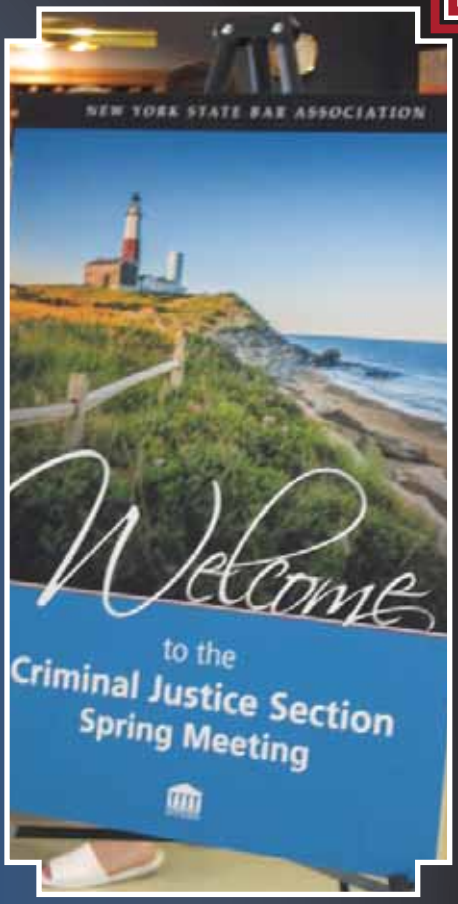

Recent United States Supreme Court Decisions Dealing with Criminal Law and Recent Supreme Court News

The Court continued to issue several important decisions during the last few months. These are summarized below.

***Kansas v. Carr*, 136 S. Ct. 633 (January 20, 2016)**

The issue in this case was whether the Eighth Amendment involving cruel and unusual punishment requires a jury instruction in capital murder cases that mitigating circumstances need not be proven beyond a reasonable doubt. In an 8-1 decision issued on January 20, 2016, the Court in an opinion by Justice Scalia held that the Eighth Amendment does not require capital-sentencing courts to instruct a jury that mitigating circumstances need not be proved beyond a reasonable doubt. Justice Sotomayor issued a dissenting opinion.

***Friedrich v. California Teachers Assn*, 136 S. Ct. 1083 (March 29, 2016)**

This case involved 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 issued in 2014 in the case of *Harris v. Quinn*, 134 S. Ct. 2618, 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 raised the argument that freedom to associate in a union implies the right not to associate and that it is unfair to make workers pay for union representation if they want no part of it. Briefs were filed in this case and an oral argument was held on January 11, 2016. Based upon the Court's prior decision, and comments made by several of the Justices in the conservative grouping, it was widely anticipated that the Court would rule against the public service unions.

As a result of the death of Justice Scalia, who was one of the Justices who voted in the majority in the *Harris v. Quinn* case, the Court issued a decision on March 29, 2016 announcing that it was equally divided on a 4-4 basis. Under this situation, the prior decision of the Ninth Circuit Court of Appeals which had ruled in favor or the unions was affirmed. Therefore, the Justices without any further discussions issued a one-line statement stating that the Ninth Circuit's ruling is "affirmed by an equally divided Court." Thus the loss of Justice Scalia became immediately apparent with respect to several closely divided cases which had been argued but not yet decided.

***Caetano v. Massachusetts*, 136 S. Ct. 1027 (March 21, 2016)**

In a unanimous decision, the United States Supreme Court reversed a defendant's conviction which was based upon her carrying a stun gun in public. The defendant had argued that she kept a stun gun to defend herself against an abusive ex-boyfriend. Relying upon their earlier decision in *Heller*, the Justices reiterated their view that the self-defense weapons protected by the Second Amendment are not limited only to weapons which might be useful in warfare. The Court stated that the Second Amendment extends prima facie to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding of the nation. Further, the Second Amendment is fully applicable to the states.

***State of Nebraska and State of Oklahoma v. State of Colorado*, 136 S. Ct. 1034 (March 21, 2016)**

By a 6-2 vote, the Justices of the Supreme Court denied a writ of certiorari involving the challenge of two states against Colorado's liberalization of its marijuana laws. Nebraska and Oklahoma had argued that illegal marijuana was pouring into their states as a result of Colorado's legalization of marijuana. The states argued that Colorado's law violated federal statutes and had urged the Supreme Court to decide the issue as a matter of original jurisdiction and declare that Colorado's law was preempted by the federal Drug Laws. The Supreme Court, with two Justices dissenting, apparently did not wish to become involved in this issue and declined to accept the case. Justices Thomas and Alito dissented from the Court's ruling and indicated that the Court should have addressed the matter.

Justice Thomas stated that he has acknowledged that sound reasons support the Court's discretionary approach to its original jurisdiction, but that approach "bears reconsideration," as it appears to be at odds with the text of § 1251(a) and in conflict with the policy choices that Congress made in specifying the Court's original jurisdiction. The fact that, if the Court does not exercise jurisdiction over a controversy between two States, then the complaining State has no judicial forum in which to seek relief, further demonstrated the need for reexamination of the Court's exercise of discretion in this area.

***Evenwell v. Abbott*, 136 S. Ct. 1120 (April 4, 2016)**

An interesting case had been 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, was 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 appeared unlikely that the Texas petitioners would succeed in their challenge. Once again, Justice Kennedy appeared to be an important 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 unanimous decision was rendered on April 4, 2016. The Court upheld the longstanding practice of using total population rather than eligible voter population in drawing legislative districts. The Court, in issuing its ruling, criticized any approach that could recast thousands of electoral maps. Judge Ginsburg issued the decision for the Court and concluded "appellants have shown no reason for the court to disturb this longstanding use of total population." Even though the Court's determination was unanimous, Justices Alito and Thomas issued concurring opinions offering some criticism of the reasoning within the majority opinion.

Wearry v. Cain, 136 S. Ct. 1002 (March 7, 2016)

In a 6-2 decision, the United States Supreme Court reversed a defendant's conviction on the grounds that prosecutors in the State of Louisiana failed to disclose material evidence regarding the statements of inmates which had cast doubt on the credibility of the State's star witness. During the trial, the prosecution had relied heavily on the testimony of an alleged co-defendant. While the witness had been incarcerated he had evidently made statements to fellow inmates which cast doubt on his credibility. One inmate reported hearing that the witness had stated he wanted to make sure Wearry gets the needle and the other inmate had reported that the witness had suggested that lying about having witnessed a murder would get him out of jail. None of these statements were disclosed to the defense under the Brady Principles and the Supreme Court determined that this failure violated the defendant's due process rights. Justices Alito and Thomas dissented, arguing that although the information should have been turned over under the circumstances of the case, there was no reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Luis v. United States, 136 S. Ct. 1083 (March 30, 2016)

In a 5-3 decision, the United States Supreme Court in an opinion written by Justice Breyer held that pretrial restraint of a defendant's legitimate untainted assets needed to retain counsel of choice violates the Sixth Amendment. In the case at bar, prosecutors had sought a restraining order against the assets of a defendant who was charged with conspiracy to commit healthcare fraud. This action presented the defendant from hiring defense counsel of his choice. The plurality ruling consisting of Chief Justice Roberts, Justice Ginsburg and Justice Sotomayor, along with Justice Breyer, stated that a criminal defendant's Sixth Amendment right to the assistance of counsel is fundamental and that the prosecutor's actions were inappropriate with regard to the pretrial stage. Justice Thomas joined in the result in a concurring opinion and stated, "I agree with the plurality that a pretrial freeze of untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice. But I do not agree with the plurality's balancing approach. Rather, my reasoning rests strictly on the Sixth Amendment's text and common-law backdrop." Justices Kennedy and Alito filed a separate dissenting opinion and Justice Kagan also dissented, stating that she felt bound by an earlier court decision. The breakdown in this case was an interesting one since it did not involve merely a division between liberal and conservative blocks.

Bank Markazi v. Peterson, 136 S. Ct. 1310 (April 20, 2016)

In a 6-2 decision, the Supreme Court cleared the way for families of victims of the 1983 Marine Corps barracks bombing in Beirut and other attacks linked to Iran to collect nearly $2 billion from frozen Iranian funds. The ruling could affect some 1,300 relatives of victims who have been seeking compensation for more than 30 years. The Court affirmed a ruling by the U.S. Court of Appeals for the Second Circuit and stated that Congress did not violate the separation of powers doctrine when it passed legislation to enable enforcement of the $1.75 billion judgment against assets held by the Central Bank of Iran. The ruling was important since it provides a monetary penalty against Iran for its past support of terrorism and clears the way for an avenue to collect from frozen Iranian assets. The Court's majority decision was written by Justice Ginsburg. Justices Roberts and Sotomayor dissented.

Foster v. Chapman, 136 S. Ct. _____ (May 23, 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 7-1 decision was issued by the Court on May 23, 2016, holding that a *Batson* violation had occurred.

***Betterman v. Montana*, 136 S. Ct. 1609 (May 19, 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. On May 19, 2016 in a unanimous decision, the Court concluded that the speedy trial rule does not apply to sentencing delays.

Editor's Note: The decisions in Foster v. Chapman *and* Betterman v. Montana *were received as we were going to press. Further details regarding these cases will be provided in our next issue.*

***Zubik v. Burwell,* 136 S. Ct. 1557 (May 16, 2016)**

***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. On March 3, 2016, the Court heard oral argument on the matter and it immediately appeared clear that the Court was once again sharply divided between the conservative block and the liberal justices. The impact of Judge Scalia's death once again became immediately apparent as it appeared that any decision could again result in a 4-4 split. Several days after oral argument, the Court issued a further directive requesting that additional briefs be filed on the matter prior to any determination being reached.

The Court had raised the issue of whether the parties felt that any compromise could be reached on the matter. On May 16, 2016, the Court, apparently looking for an easy way out of a deadlocked decision, issued a three-page unanimous decision remitting the matter back to the lower court in order to determine whether a compromise could be reached. In a unanimous decision, the Court stated that both the petitioner and the government had confirmed that such a compromise was feasible. Within its three-page decision, the Court further remarked that it expressed no view on the merits of the case. Following the Court's ruling, the parties indicated that reaching any compromise would be difficult and it is clearly possible that the ultimate determination in this matter by the Supreme Court has simply been delayed.

Pending Cases

***Whole Woman's Health v. Hellerstedt*, 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 was issued in the matter and oral argument was held on March 2, 2016. It once again became readily apparent that the Court was deeply divided on the issue and that the possibility once again existed of a 4-4 tie due to the death of Justice Scalia. In this case, however, a 4-4 split would have the effect of leaving in place a ruling by the U.S. Court of Appeals for the Fifth Circuit which had upheld the Texas regulations. Whether the Court will decide this case or will reschedule for re-argument at a later point remains to be seen.

***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 enrollment decisions. Those challenging affirmative action have argued that the use of affirmative action treats individuals differently on the basis of race and therefore creates a constitutional violation. Based on past voting patterns, it appears that any new decision will involve a divided 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 controversial decision

is likely. A decision is expected in the closing days of the Court's term.

***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 oral argument was held on April 18, 2016. It is expected a ruling will be issued before the Court adjourns in June and another 4-4 deadlock is possible.

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

On December 18, 2015, the Supreme Court also granted certiorari in a case from 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.

***McDonald v. Virginia*, 136 S. Ct. ____ (_____, 2016)**

On April 27, 2016, the Court heard oral argument on the case involving the conviction of former Virginia Governor Bob McDonald on political corruption charges. During oral argument, it appeared that Justices for both the liberal and conservative sides were seriously concerned about the constitutionality of the statutes under which the Governor was convicted. A serious claim is being made that the Federal Statutes involved are unconstitutionally vague and too broadly written. A decision in this matter is expected by the end of the June session.

Supreme Court News—Court Grants Relief to Juvenile Offenders

Relying on its earlier decisions, the United States Supreme Court in March issued some 40 rulings which concern the sentencing of juvenile homicide offenders to life imprisonment without parole. The United States Supreme Court granted certiorari, vacated the judgments, and remanded for further consideration in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (Jan. 25, 2016). In that case, the Supreme Court held that the rule announced in *Miller v. Alabama*, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012), that mandatory life imprisonment without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition of cruel and unusual punishments, applies retroactively in state cases on collateral review.

Justice Thomas, joined by Justice Alito, concurred in the action taken by the Court in each of the 40 cases but issued a statement, applicable to each case, emphasizing that the Court had not assessed whether each of the prisoners had properly presented a claim for retroactive relief.

Most of the 40 cases in question, emanated from the States of Alabama and Louisiana. A few were from Virginia and Michigan. The United States Supreme Court apparently acted after the State Courts were slow in responding to the *Montgomery* and *Miller* decisions which were issued in 2016 and 2012.

In an additional assist to juvenile offenders, the Court also declined to grant a petition for certiorari filed by the State of Kansas in a case in which Kansas Supreme Court held that mandatory lifetime post-release supervision for a juvenile offender convicted of aggravated taking indecent liberties with a child was categorically cruel and unusual punishment in violation of the Eighth Amendment. The Kansas Supreme Court had concluded that the diminished moral culpability of a juvenile when he committed the crime diminished the goals of lifetime supervision. The Kansas Court also observed that mandatory lifetime post-release supervision was a severe sanction in Kansas. The standard conditions of supervision required the offender to register with and report to the local sheriff as directed, report to his parole officer as directed, undergo a polygraph examination ordered by his parole officer, submit to searches of his residence, automobile, and personal effects, not travel outside the state unless he has his parole officer's permission, not drink alcohol without permission from his parole officer, and not hunt with a firearm.

The State of Kansas had argued that the Kansas Supreme Court misinterpreted the Supreme Court decisions in *Graham v. Florida*, 130 S. Ct. 211 (2010) and *Miller v. Alabama*, 132 S. Ct. 2455 by vastly expanding the reach of those decisions to encompass Eighth Amendment prohibitions on sentencing in which a juvenile is not imprisoned but instead is given a second chance with a lifetime parole sentence. The United States Supreme Court rejected the position taken by Kansas and in declining to grant its petition for certiorari, once again issued a determination in favor of juvenile offenders.

Editor's Note: Our fourth feature article at page 10 discusses in detail the historical progression by the United States Supreme Court with respect to the issue of juvenile sentencing.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were issued from January 27, 2016 through April 30, 2016.

Dismissal of Juror

People v. Spencer **(N.Y.L.J., January 27, 2016, pp. 1 and 2)**

In a 3-1 decision, the Appellate Division, First Department upheld a defendant's manslaughter conviction and ruled that the trial judge had properly declined to dismiss a juror who had indicated she could not separate her emotions from the case. The trial judge had urged the juror to continue deliberations with her fellow jurors and to decide the facts and apply the law as it was given to her. The majority concluded that the trial judge had patiently listened to the juror and tactfully asked her probing questions to determine whether for some reason she could not be impartial. Under the circumstances the test for disqualification was not met. The three-judge majority concluded that no coercion had occurred and that the conviction could be upheld. Justices Saxe, Richter, and Gische constituted the majority. Justice Tom dissented and argued that the trial judge's main concern was not determining whether the juror was grossly unqualified but was to avoid declaring a mistrial. Judge Tom further argued that the record clearly supported the fact that the Court coerced the juror who may have surrendered her conscious belief in order to render a verdict. Due to the issue raised in the case and the division within the Appellate Division, it appears likely that the New York Court of Appeals may grant review in this matter.

Sex Offender Risk Assessment Level

People v. Francis **(N.Y.L.J., January 28, 2016, pp. 1 and 7)**

In a 3-1 decision, the Appellate Division, Second Department held that a trial judge properly considered a defendant's youthful defender adjudication in determining his risk level when he was later convicted of rape and became a registered sex offender. The three-judge majority consisted of Judges Leventhal, Chambers and Duffy. The majority argued that the Board when formulating the guidelines for determining a sex offender's risk assessment made a conscious decision to define crimes as encompassing youthful offender adjudications. Justice Hall dissented and argued that the Board had exceeded its authority in including youthful offender adjudications in light of statutory provisions under the CPL relating to youthful offender adjudications. It also appears possible that this decision will be reviewed by the New York Court of Appeals.

Prompt Outcry

People v. Ortiz **(N.Y.L.J., February 1, 2016, p. 1)**

In a unanimous decision, the Appellate Division, First Department reversed a defendant's conviction of sexual assault and ordered a new trial on the grounds that the trial judge had improperly permitted the fifteen year old complainant to testify that she sent a text message discussing the alleged sexual assault to her two friends two or three months after the alleged incident. The Appellate Division ruled that because of the time delay, the messages did not constitute a prompt outcry and the defendant was denied a fair trial due to the admission of the evidence in question. The Court further concluded that the erroneous admission of the evidence was not harmless and there was a significant probability that the prior consistent statement affected the verdict by bolstering the veracity of the victim.

Uncharged Crimes

People v. Graves **(N.Y.L.J., February 9, 2016, pp. 1 and 4)**

In a unanimous decision, the Appellate Division, Fourth Department reversed a defendant's conviction regarding sexual assault on the grounds that the trial judge within his jury instructions made erroneous references to uncharged crimes. Specifically, the Appellate Panel stated the indictment charged Graves with multiple counts of predatory sexual assault against a child and a criminal sexual act for having "contact between the mouth and the penis." But the court said that in charging the jury, Judge Joseph Fahey made erroneous references to the charges being based on unlawful contact between "mouth and the… vagina." The Appellate Panel further concluded that the trial judge's error may have led the jury to have convicted the defendant upon an uncharged theory. It is well established that a defendant has a fundamental right only to be tried on crimes charged in the indictment and the bill of particulars.

Vehicular Manslaughter Conviction

People v. Dobson **(N.Y.L.J., February 19, 2016, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Second Department reinstated a vehicular manslaughter conviction and ordered a resentencing of a woman who had been given probation for a one car accident in which her friend was killed. The Appellate Division concluded that the trial judge improperly set aside his own verdict of guilty and had then convicted the defendant in the lesser charge of criminally negligent homicide. In the case at bar, the defendant in the early morning hours had been drinking alcohol at a Manhattan club and was driving on a roadway on her way to Queens. The defendant's friend, who was 21, and 3 other people were in the vehicle. The defendant lost control of the vehicle causing it to strike a divider and spin onto a concrete barrier. The defendant's friend was ejected from the car and died at the scene. The other

passengers were severally injured. A blood sample taken from the defendant revealed a blood alcohol content of .08%. Police had determined that the defendant had been driving at 66 miles per hour in a 35-mile an hour zone. Defendant had been charged with second degree manslaughter, two counts, and several lesser charges.

Following a bench trial, the Judge acquitted her of manslaughter and found her guilty of one count of vehicular manslaughter. After making such a determination, the Court announced that he would set aside the verdict on the manslaughter count. In issuing its ruling, the trial judge had stated that while there was sufficient scientific proof that defendant's blood alcohol content was above the legal limit, prosecutors had not proven beyond a reasonable doubt that she was intoxicated when she was driving the car. The Appellate Division, citing the Court of Appeals decision in *People v. Carter*, 63 NY2d, 530 (1984), held that a trial judge who has handed down a guilty verdict after a bench trial does not have the authority to reassess the facts and change his verdict as against the weight of evidence. The power to set aside a verdict as against the weight of the evidence is reserved for the Appellate Division. The Panel then observed that the evidence was legally sufficient for a conviction of second degree manslaughter.

Speedy Trial

***People v. Gonzalez* (N.Y.L.J., March 1, 2016, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, First Department dismissed an indictment filed against the defendant regarding the seizure of weapon. In the case at bar, Bronx prosecutors had committed repeated delays in releasing DNA test results which connected the gun to the defendant. The Appellate Panel found that the Bronx District Attorney's office did not exercise due diligence and had incurred a 98-delay in obtaining DNA test results. The defendant had been arrested in June 2013 and a gun was recovered near the scene. The defendant was indicted 4 months later. Prosecutors waited three months to send the weapon to the City Medical Examiner to determine whether it had quantities of DNA on it sufficient for a comparison test. The Medical Examiner took nearly three months after receiving the gun to determine that enough DNA was available. Under these circumstances the Appellate Panel concluded that the trial court had correctly granted the motion to dismiss pursuant to CPL 30.30.

Admission in Incriminating Statements

***People v. McGraw* (N.Y.L.J., March 7, 2016, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Second Department held that a trial court properly allowed the admission of an incriminating conversation between two defendants which was recorded by a police car's dashboard camera. The defendant had been driving in a car and he was stopped for excessive speeding. A Westchester Police Officer smelled marijuana. A passenger in the car told the officer that he had smoked marijuana and that there was marijuana in the car. The officer then placed the passenger and the defendant McGraw in the back seat of his patrol car while he conducted a search of the car. While in the patrol car, the two discussed their concern that the officer would find a gun inside the car. The officer did find more than one-half pound of marijuana as well as a loaded 45 caliber pistol.

During the trial, the Judge had allowed prosecutors to present to the jury the recording which had been taken from the dashboard camera and a transcript of the defendant's conversation in the patrol car. Although the defendant had not been advised of his Miranda rights, the Appellate Panel concluded that the recording was not the fruit of a law enforcement investigation nor instigated by law enforcement conduct. The Appellate Division also noted that the defendant had no expectation of privacy in the backseat of the patrol vehicle. Under these circumstances, the defendant's conviction was affirmed.

Improper Jury Instructions

***People v. James* (N.Y.L.J., March 22, 2016, pp. 1 and 4)**

In a unanimous decision, the Appellate Division, Fourth Department ordered a new trial for a defendant who was convicted of manslaughter and assault on the grounds that the trial judge had provided improper instructions to the jury. The Appellate Panel concluded that the trial judge should not have refused a defense request to charge the jury on the justification defense regarding the use of deadly physical force. The Appellate Court concluded that while the Judge gave instructions on the justification defense for the manslaughter count, he had failed to do so on the assault count. There was a significant factual relationship on the charges that could have affected the jury's view on both counts. The Appellate Court concluded that there was a reasonable view of the evidence, viewed in the light most favorable to defendant, that the first victim was using deadly force by striking defendant's brother in the head with a champagne bottle when defendant assaulted her.

Fair Trial

***People v. Ulerio* (N.Y.L.J., March 29, 2016, p. 4)**

In a unanimous ruling, the Appellate Division, First Department ordered a hearing on a defendant's 330.30 motion to set aside his conviction. The Appellate Panel found that facts in the investigation revealed that arresting officers were indicted for perjury in similar cases and that the situation was similar enough so that the defendant was entitled to have a hearing on the issue.

Search and Seizure

***People v. Savage* (N.Y.L.J., March 29, 2016, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Fourth Department reversed a defendant's conviction on the grounds that his initial arrest was based on nothing more than the defendant looking in the direction of police as he walked in a high crime area of Buffalo. The Court concluded that the police lacked particularized reasons and that the mere fact that he stared at them was insufficient to support the ensuing events. The defendant had been convicted of possession of a hand gun based upon the police officers' subsequent actions following the initial stop.

Removal of Potential Juror

***People v. Malloy* (N.Y.L.J., April 1, 2016, p. 4)**

The Appellate Division, Second Department ordered a new trial for a defendant on the grounds that the trial judge should have granted a motion to dismiss a prospective juror who had expressed doubt that she could render an impartial verdict. During the voir dire, the prospective juror stated that because her aunt was a victim of a violent sexual assault it would be a little hard for her to keep an open mind while listening to the facts of the case. The Appellate Panel concluded that based upon these comments, the juror should have been excluded since she did not express an absolute belief that her prior experience would not influence a verdict.

Identification

***People v. Haskins* (N.Y.L.J., April 5, 2016, p. 4)**

In a unanimous decision, the Appellate Division, Second Department ordered a new trial for a defendant who had been convicted of robbery on the grounds that a show of identification was unduly suggestive. The defendant and three other people were approached by police in an area where a knifepoint robbery had recently occurred. A wallet was found on one of the suspects during a search. The victim said the wallet was his before officers asked if he recognized any of the suspects. The Appellate Division concluded that the show-up identification was rendered unduly suggestive because the victim was asked to identify the proceeds of the crime before identifying the defendant.

District Attorney's Authority

***People v. Smith* (N.Y.L.J., April 7, 2016, pp. 1 and 2)**

The Appellate Division, First Department unanimously rejected a claim that prosecutors have the power to limit certain kinds of defendants to whom judges can grant drug treatment diversion in place of criminal penalties. In issuing its decision, the Appellate Panel criticized a practice of the Manhattan District Attorney's Office where charges to indictments were added that were not specified in the diversion statute as being diversion eligible and then asserting that judges were precluded from granting diversion. The Appellate Division stated "the inescapable conclusion is that the legislature's decision not to list certain offenses as disqualifying means that their mere inclusion on an indictment will not prevent an otherwise eligible defendant form making an application for judicial diversion."

Removal of Defendant from Courtroom

***People v. Burton* (N.Y.L.J., April 19, 2016, pp. 1 and 9)**

In a unanimous decision, the Appellate Division, Second Department reversed a defendant's conviction when a Judge had him removed from the courtroom without warning him of the consequences of his loud interruptions. The defendant was apparently disruptive during the trial making remarks and protesting various procedures which were being carried out. The trial judge eventually ordered the defendant handcuffed and removed from the courtroom. The Appellate Division concluded, however, the court did not provide sufficient warnings to the defendant as to the possible consequences of his actions before ordering the removal and that as a result a new trial is required.

Propensity Evidence

***People v. Hawkins* (N.Y.L.J., April 20 2016, pp. 1 and 8)**

In a unanimous decision, the Appellate Division, First Department reversed a defendant's conviction for gun possession on the grounds that the trial court had improperly admitted photos of the defendant holding guns and a Facebook message boasting about gun incidents. The Appellate Panel concluded that the photos and messages were classic propensity evidence which lacked probative value and prejudiced the jury. A new trial was therefore ordered.

Ineffective Assistance of Counsel

***People v. Velez* (N.Y.L.J., April 25, 2016, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Second Department held that the defendant was denied the effective assistance of counsel because her attorney failed to challenge the use as evidence of cocaine that authorities discovered in the backyard shed while searching her property. The manner in which the search was conducted raised serious issues as to whether the police had violated the defendant's Fourth Amendment rights. Defense counsel, however, had failed to move to suppress such evidence and there appeared to be no strategic or legitimate explanation for defense counsel's failure. Accordingly, a new trial was ordered.

For Your Information

Governor Cuomo Finally Fills Some Appellate Division Vacancies in Order to Relieve a Critical Situation

For the last year the various Appellate Divisions have been operating with significant vacancies in their Judicial complements. As of the end of January, six vacancies existed in the Appellate Division, First Department. Since that Court is allocated 21 justices, the vacancy rate was the highest in nearly 20 years. The First Department also had a vacancy in the important position of Presiding Justice. Judge Gonzalez has left the Court at the end of 2015. No replacement has yet been appointed by Governor Cuomo. Justice Peter Tom, who is the senior judge on the Court has been serving as acting presiding justice until a new appointment is made. In the Fourth Department, former presiding justice Henry Scudder had reached the mandatory age of 70 and was no longer eligible to serve as presiding justice. Justice Scudder elected to remain on the Court as an Associate Justice and is presently serving in that capacity. A new Presiding Justice for the Fourth Department has not yet been designated. The Fourth Department also had four vacancies.

Justice Karen Peters remains as the Presiding Justice of the Third Department, but that court had three vacancies within its normal compliment of nine judges. Randal Eng continues to serve as Presiding Justice of the Second Department, but that court also has several existing vacancies. The significant number of vacancies within the various Appellate Divisions posed serious problems for the orderly operation of those courts. The volume of cases is heavy and replacement of the justices who have left their positions became a priority and many in the legal community urged Governor Cuomo to move quickly to make the new appointments which were required.

On February 22, 2016, the Governor finally issued a list of ten judges he was appointing to the various Appellate Divisions. Three appointments were made to the First Department; two appointments to the Second Department; two appointments to the Third Department and three appointments to the Fourth Department. The new appointees to the Appellate Divisions are as follows:

FIRST DEPARTMENT—Ellen Gesmer, Marcy Louise Kahn and Troy Karen Webber

SECOND DEPARTMENT—Francesca Connelly and Valerie Braithwaite Nelson

THIRD DEPARTMENT—Sharon A.M. Aarons and Robert Mulvey

FOURTH DEPARTMENT—John Curran, Patrick NeMoyer and Shirley Troutman

Among the ten judges appointed by the Governor, seven are women and four are black. Despite the Governor's new appointments, six vacancies still remain within the Appellate Divisions. Three seats are still open in the First Department, and one seat each is available in the remaining three Departments. The newly appointed Justices have already begun serving on the various Appellate Divisions with Justice Sharon Aarons and Justice Robert Mulvey being sworn in at the Appellate Division, Third Department in a special ceremony held at that Court on March 22, 2016. We will keep our readers advised of any further appointments as they occur.

FBI Statistics Confirm Rise in Violent Crime Rate

During the last year, several large American cities, including Baltimore, Chicago and New York City, have reported an alarming increase in violent crime. Chicago, for example, reported that homicides and shootings have doubled over the same period in 2015. The Federal Bureau of Investigation in issuing its statistics for the year 2015 confirmed the view that violent crime had increased throughout the United States. According to the FBI statistics, the number of murders in 2015 increased by 6.2% and overall the level of violent crime was up by 1.7%. Various factors have been attributed to the increase in violent crime, including, as stated by FBI Director James Comey, a possible "Ferguson" effect where police have become increasingly reluctant to engage in criminal conduct. Recent restrictions on police conduct such as in the area of stop and frisk may have also contributed to the situation. Further, the nation is once again experiencing an increase in drug trafficking and a rise of gang activity in some of America's large cities. The most recent FBI statistics have set off alarm bells and have indicated a situation which must be closely monitored in order to avoid returning to the bad old days of rampant crime in America.

Exonerations in 2015 Reach Record Number

In recent years, there have been increasing situations of defendants who have been incarcerated and have subsequently been exonerated after determining that

they were wrongfully convicted. A recent report by the National Registry of Exonerations, a joint project of the University of Michigan Law School and the Northwestern University School of Law, revealed that in 2015, 149 inmates were exonerated. This number included dozens who were wrongfully convicted of murder and several defendants who had pleaded guilty or who had falsely confessed. The number of people exonerated in 2015 was an all-time yearly record. The National Registry reported that since 1989 some 1733 exonerations had occurred in the United States. The increasing use of DNA and other procedures which have led to review of questionable convictions appear to account for last year's record number of exonerations.

New District Attorney to Be Selected for Westchester County

Following the appointment of Janet DiFiore as Chief Judge of the New York Court of Appeals, the Westchester office has been operating with James McCarty as acting district attorney. Mr. McCarty has recently announced that he will not be entering the race to succeed Judge DiFiore which will be held in November. McCarty has been a 35-year veteran of the office who has served as chief of trial operations for the last ten years. Instead, Westchester has three announced candidates for the position of District Attorney at the November election. Two Republicans have indicated their interest in the position. Bruce Bendish, a criminal defense attorney and a named partner at Goodrich & Bendish with offices currently in Elmsford, and Mitchell Benson, a former prosecutor for the Nassau County District Attorney's Office, have both announced their intention to run for the office. On the Democratic side, George Fufidio, Jr., a partner in a law firm in White Plains, has indicated his interest in obtaining the Democratic nomination. Former Westchester Surrogate Anthony Scarpino has also indicated some interest in running for the seat as a Democrat. Registered Democrats outnumber Republicans in Westchester County by roughly 2 to 1. However, many observers predict that the race to replace Judge DiFiore will be a close one and that the voters may have several qualified and interesting candidates to choose from.

Best Places to Live

A recent survey by *U.S. News and World Report*, listed the ten best cities among the 100 largest U.S. metropolitan areas. The magazine utilized a variety of measures including cost of living, job prospects and quality of life to determine the best places to live. Denver, Colorado was listed as the number one best city. Austin, Texas and Fayetteville, Arkansas took the second and third spots. Six Florida metropolitan areas were also listed as being included in the top 50. California also placed several cities within the top 50. Unfortunately, New York City, along with Chicago and Miami, were ranked near the bottom of the list. The low rating for New York basically occurred because of large income disparities and expensive housing.

Health Survey

An annual United Health Foundation Survey ranked Americans in all 50 states by their health. The study considered such factors as diet, smoking, alcohol abuse and obesity. Based upon the survey, people living in Vermont were listed as being the healthiest, followed by New Hampshire and Minnesota. New York was placed as number 21 among the 50 states. A positive for New York was the ready availability for home health care. A negative was the high percentage of seniors living in poverty. At the bottom of the list were Louisiana and Mississippi.

Justice Department Takes More Lenient Position on Drug Sentencing

Recent statistics released by the United States Justice Department indicates that the number of Federal drug prosecutions has dropped in the last year by 6% from fiscal 2014 to 2015. Federal prosecutors are also charging drug criminals less frequently with crimes carrying the rigid mandatory minimum punishments. It was reported that fewer than half of all drug cases in fiscal 2015 involved charges with a mandatory minimum sentence. Justice Department officials have stated that the new figures indicate that the prosecutors are embracing a "smart on crime initiative," the goal of which is to give prosecutors greater discretion in charging decisions and sentencing recommendations. Based upon the new approach, the number of drug cases has dropped by nearly 5,000 between 2012 and 2015.

Former Associate Judge of the New York Court of Appeals Susan Read Joins Manhattan Law Firm

It was announced in early March that Susan Read, who retired as an Associate Judge of the New York Court of Appeals in August 2015, had joined the law firm of Greenberg Traurig. Judge Read will serve as of counsel in the firm's global litigation practice and will split her time between the firm's Albany and Manhattan offices. Judge Read will continue to keep her primary residence in Albany. By joining the Greenberg Traurig firm, Judge Read will be reunited with Carmen Ciparick, also a former Court of Appeals Judge, who joined the Greenberg firm in 2013. Judge Ciparick was quoted in an interview by the *New York Law Journal* as stating that Judge Read was happy and excited and that she herself was happy to be reunited with her former colleague. Judge Read, who is 69 years of age, had served on the Court of Appeals for 12½ years and we wish her well in her new endeavors.

Convicted Lawmakers Receive State Pensions

Despite being convicted of various acts of corruption, former Senate Majority Leader Dean Skelos and former Assembly Speaker Sheldon Silver will be receiving State pensions on a monthly basis. The State Comptroller's Office recently reported that Skelos will be entitled to receive an annual State pension of $95,831.00. Sheldon Silver will be receiving $79,222.00. Both individuals have indicated that they will be appealing their convictions and it may take some time before a final adjudication of their matters is determined by the Appellate Court. In recent years, due to the numerous convictions of public servants, the issue of whether they should continue to receive government pensions has been raised and many have called for new legislation which would deny State pensions to any elected official convicted of official misconduct. Although Governor Cuomo and some legislative leaders have expressed support for such a position, little has been done to date within the State Legislature to advance such legislation.

Law Graduates Comment on Law School Experience

In a recent study conducted by the Gallup Polling Group, it was revealed that approximately 67% of recent law graduates stated that they would go back to Law School if they had to do it over again. Among this group who indicated that they were happy in their current legal positions, many reported that they had received encouragement and support while in Law School. The study found that those who felt most supported on campus had professors who cared about them and made them excited about learning. It was also reported that clerkships and internships helped with the sense of job satisfaction and purpose. The study also reported some distinctions between law graduates from the 1960 to 1980 era and those who graduated between 2000 and 2015. Among the earlier group, 75% indicated that their law degree was worth the cost. Among the more recent group, only about 20% indicated that their degree was worth the cost. This disparity in views could be attributed to the fact that in the earlier group 70% reported that they had a job waiting for them after graduation while among recent graduates, only 38% reported that they had a job lined up. The recent Gallup Poll results, which were published in the March 25 issue of the *New York Law Journal* at page 5, provide some interesting insights into the current viewpoints of recent Law School graduates.

Changing Views on 1994 Crime Bill

In 1994 during the administration of President Bill Clinton, a comprehensive crime bill was passed which added some additional 100,000 police officers, built new prisons and encouraged harsher sentences for various types of crime. Recently, certain groups, primarily within the black community, have attacked the 1994 Crime Bill as having led to unnecessary incarceration and to creating a prison system which was largely composed of blacks and Hispanics. It seems uncontested that crime experienced a serious drop following the enactment of the Bill. In the early 1990s almost 11 million violent crimes were committed in the United States, including 24,000 homicides. In 2014, the number of homicides was one-half of the number in 1994 and several types of violent crimes had drastically been reduced. Whether the positive effects of the 1994 Crime Bill outweigh some of its negative aspects is an issue which is being sharply debated and is one which may arise during the current Presidential campaign since President Bill Clinton was recently condemned by a protest group regarding its enactment following an appearance by him at a rally in support of his wife's candidacy.

Judicial Salary Increases and Some Unforeseen Consequences

Although the Governor failed to specifically provide additional funding to cover the judicial pay increases that went into effect in early April, the Office of Court Administration indicated that it could find ways to cover the increases within the guidelines of its overall judicial budget. It is estimated that some $27 million will be required to cover the pay increases, which involve an 11% increase. Judicial salaries for Supreme Court Justices with the recent pay increase now amount to $193,000. The Office of Court Administration had received an overall 2.4% increase in its budget following the approval of the Governor and Legislature. This was slightly higher than the 2% increase granted to other branches of the government and it appears that the operation of the Court system will be able to cover the judicial salary raises while also providing funds for the Office of Indigent Legal Services and other Court improvements.

Although Judges were happy to receive their 11% increase, the judicial raise in salary has led to some unexpected consequences. The State Judiciary Law Section 183-a mandates that counties with populations of 500,000 or more must pay their District Attorneys a salary equivalent to those of Supreme Court Justices. Counties with between 100,000 and 500,000 residents must pay their District Attorneys what their local County Judges make. Because of the State Statute, District Attorneys throughout the States are now requesting that their salaries be increased. County Executives have indicated that they cannot afford the raises in question for their local prosecutors and further argue that any increases should be forthcoming form State funds. Since some of the counties have already passed their budgets for the current year, they have refused to issue the increases sought by the District Attorneys and this has created a situation of a possible conflict between the State and the localities and the local District Attorneys and their County Executives.

District Attorneys have argued that their raises should be effective as of April 1 when the Judges received their increases. The State Judiciary Law applies to Counties outside of New York City and would require, for example, that the District Attorneys in such counties as Nassau, Suffolk and Westchester would see an increase from $174,000 to $193,000. Other District Attorneys in smaller counties could see a raise to $183,350 and those in even smaller Upstate counties could be entitled to a salary ranging between $152,500 to $174,000. Recently District Attorneys in New York City were granted a raise by the City Council to $212,800 from the prior salary of $190,000. We will report to our Members on the eventual resolution of the consequences of Judicial Salary increases as they have impacted the local District Attorneys.

Three United States Supreme Court Justices Appear at New York City Functions

During the month of April, New York City was fortunate enough to have the participation of several Supreme Court Justices at various legal functions. On Wednesday, April 6, Justice Alito participated in a panel discussion at the Brooklyn Bar Association. The panel discussion touched upon the issue of campaign financing and Justice Alito was joined during the discussions by Acting Supreme Court Justice Mark Dwyer and former New Jersey Judge and FOX News Contributor Andrew Napolitano. All three panelists had attended Princeton University and Justice Dwyer and Justice Alito were roommates at Yale Law School, from which they graduated in 1975. Also on April 8, Justice Sotomayor appeared at the Plymouth Church in Brooklyn Heights in a program which was hosted by Brooklyn Law School. During her remarks, Justice Sotomayor called for greater diversity on the Court. Brooklyn Law School Dean Nicholas Allard participated in some of the questioning of the Justice. Also in early April, Justice Elena Kagan was featured in a question and answer discussion which was conducted at the New York University School of Law.

Increases in Minimum Wage

The recent trend toward increases in the minimum wage, which has been sweeping the country, reached the two largest states of California and New York during the month of April. In New York, Governor Cuomo signed the bill which would gradually boost the State's minimum wage from $9.00 to $15.00 an hour. California also passed a similar bill which would lift the minimum wage in that state to $15.00 an hour by 2022. Following the increases in New York and California, President Obama repeated a statement urging Congress to raise the Federal minimum wage. The New York legislation provides for certain distinctions applicable to New York City and the rest of the State and will take several years to actually reach the $15.00 figure set by the statute.

College Degrees Within the Labor Force

A recent report found that about two-thirds of the people in the labor force do not have a college degree. The share of the labor force with a college degree is around 34% and the situation varies greatly among the various states. States such as New York, California and Florida have labor forces who have college degrees that amount to about 50%. Some of the states with the lowest percentage of college degrees in the labor force are located in the deep South such as Alabama, Mississippi and Louisiana.

About Our Section and Members

Spring Meeting

Our Section's Spring Meeting was held at the Montauk Yacht Club, Montauk, New York on the weekend of May 21-22, 2016. The Saturday Program involved a panel discussion on recent Appellate decisions emanating from the New York Court of Appeals. The panelists included Judge Jenny Rivera from the New York Court of Appeals, Defense Counsel Daniel N. Arshack and Prosecutor Robert J. Masters from the Queens District Attorney's Office. An additional panel during the Saturday session included a discussion on the defense of mental disease or defect. The panelists included Dr. Alexander Sasha Bardey, Director of Forensic Psychology at the Nassau County Department of Health, Fred B. Klein, Esquire, from the Nassau County District Attorney's Office, and Attorney Anthony M. LaPinta.

During the Saturday Dinner at the Spring Meeting awards were presented to Peter Gerstenzang, Esquire, Cynthia Conti-Cook, Esquire, Barbara J. Davies, Esquire and Judy Clarke, Esquire. Dinner was preceded by an enjoyable cocktail reception.

The Sunday CLE Session consisted of a discussion regarding the criminal defense of individuals with mental disabilities. The panelist consisted of Sheila E. Shea and Christy A. Coe. Additional afternoon panels dealt with early release from prison with a discussion by Patricia Wath, an attorney with the New York State Office of Indigent Legal Services in Albany. Concluding the Sunday session was a discussion by Vincent E. Doyle, III, on legal ethics and criminal practice. Introductory remarks on both days were provided by Sherry Levin Wallach, Chair of the Section. The Sunday Program was preceded by a continental breakfast.

The Spring CLE Program was attended by 50 Members.

Kamins Article on Wade Hearings

Former Supreme Court Justice Barry Kamins, a longtime contributor to our *Newsletter,* presented an interesting article on changes in New York's Wade hearings in the February 1, 2016 issue of the *New York Law Journal*. The article appeared on pages 4 and 9. In the article, the Judge presented an analysis of the recent New York Court of Appeals decision in *People v. Marshall*. In that case, the Court determined that the procedure by which prosecutors show a photo display to a witness prior to trial is subject to a Wade hearing in order to determine suggestiveness. The Kamins' article in detail discusses several New York Court of Appeals cases gong back some twenty years and provides valuable information for criminal practitioners. We recommend it to our readers.

Mark Dwyer Appointed Co-Chair of New York State Justice Task Force

In early April, Chief Judge Janet DiFiore announced that she was appointing Acting Supreme Court Justice Mark Dwyer to succeed her as Co-Chair of the New York State Justice Task Force. The Task Force was formed in 2009 to examine causes of wrongful convictions and to recommend ways that they can be avoided. Justice Dwyer will serve as Co-Chair with Carmen Beauchamp Ciparick, former Judge of the New York Court of Appeals.

Mark Dwyer has been a Court of Claims Judge since 2010 and has been assigned as an Acting Justice to a Criminal Part in the Brooklyn Supreme Court. Prior to his elevation to the Branch, he had served for 33 years in the Manhattan District Attorney's Office where he served as Chief of the Appeals Bureau and Chief Assistant to D.A. Robert Morgenthau. He is a graduate of Yale Law School. Justice Dwyer has also been active for many years with the Criminal Justice Section and recently served as Chief of the Section. We congratulate Judge Dwyer on his recent appointment.

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.

Mohamed Abdel Rahman
Rojia Afshar
P. Nikolai Alzate
Jean Robert B Auguste
Arvind Babajee
Stephanie Baehr
Sara Barlowe
Julia Bensur
Elizabeth Bernhardt
Kyle Andrew Blyth
John Boselli
Skylar Braun
Keith M. Bruno
Preston F. Bruno
Ruby-Beth Buitekant
Stephen L. Buzzell
Matthew Aaron Calarco
Brittany Calzone
Frank Dennis Camera
Edward Carrasco
Asima Chaudhary
Louis F. Chisari
Christine M. Clark
Barry Coburn
Anthony J. Colleluori
Seanna M. Conway
John Cosgrove
Heather Marie Crimmins
Peter A. Cristo
Daniel Curbelo Zeidman
Julia J. D'agostino
Michael V. D'Ambrosio
Eileen Daly
Katherine Demartini
Jamie William Dening
Bruna L. Dibiase
Robert F. Docherty
Mary Doherty
Shea Ivy Donato
Kareem El Nemr
Anna Federico
Giovanna H. Fernandez Harswick
Stephen Ferri
Riquet Figaro
Richard L. Filiberto
Angela V. Forese
Vlad Frants
Anthony T. Freeman
Robert T. Gallo
Linda Gehron
David Gelfand
Abraham M. George
Sara A. Goldfarb
Arlene Gordon Oliver
Kristen Grabowski
Adam K. Grant
Emilio F. Grillo
Kent Lewis Gubrud
Zachary Peter Halperin
Frank Harvey
Caroline Brianne Heicklen
Milvelys Hernandez
Nyasa Lisa Hickey
Kristin Husebye
Zane A. Illing
Stephen E. Jaffey
Hai Jiang
Anthony Jude Johnston
Chelsy E. Jones
Nicole Danielle Jones
Len Joseph
Victoria Karnisky
Daniel Evan Kelly
Lawen Kokoyi
Yitzchok Kotkes
Lawrence G. Lee
Sarah Lesser
Zoe Ruth Lester
Cassandra Love
Stephanie Lugaro
Nicole Lyalin
Francesca Maiotto
Yael Mandel
Kylie Marcus
Joseph J. Marusak
Jada Mayson-Osabu
Carlos Andres Medina
Diana Mondragon
Carol K. Morgan
Ian H. Moss
Brian Peter Murphy
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Karen R. Needleman
Daniel Opatut
Emily Rose Pelz
Carlos Mendez Perez
Nina E. Pinto
Sheralyn Pulver
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Michael Henry Ricca
Christina Rizzolo
Nicholas Brendan Robinson
Elana Sara Rodman
Cynthia H. Roeser
Marc Harris Ruskin
Elaine Saly
Jacob Samuels-Kalow
Michael Sanchez
Karen A. Sferlazzo
Audrey Sheetz
Jonathon Sizemore
Mark Smalec
Fatima M. Sorbo
Raymond D. Sprowls
Adam D. Staier
Joseph Stanzione
Jessica Stertzer
Kyeko Stewart
Michael Joseph Stirrup
Sarah Stoughton
Lawrence G. Stuart
Samantha Surdi
Haran Tae
Jillian Ashley Tivin
John F. Tobin
Christopher Valencia
Annelien Vink
Deirdresha Wint
Zakary Izak Woodruff
Michael A. Zamora
Tara Marie Zurheide

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

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

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: Jay Shapiro at shapiroj@whiteandwilliams.com.

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.

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