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New York Criminal Law Newsletter

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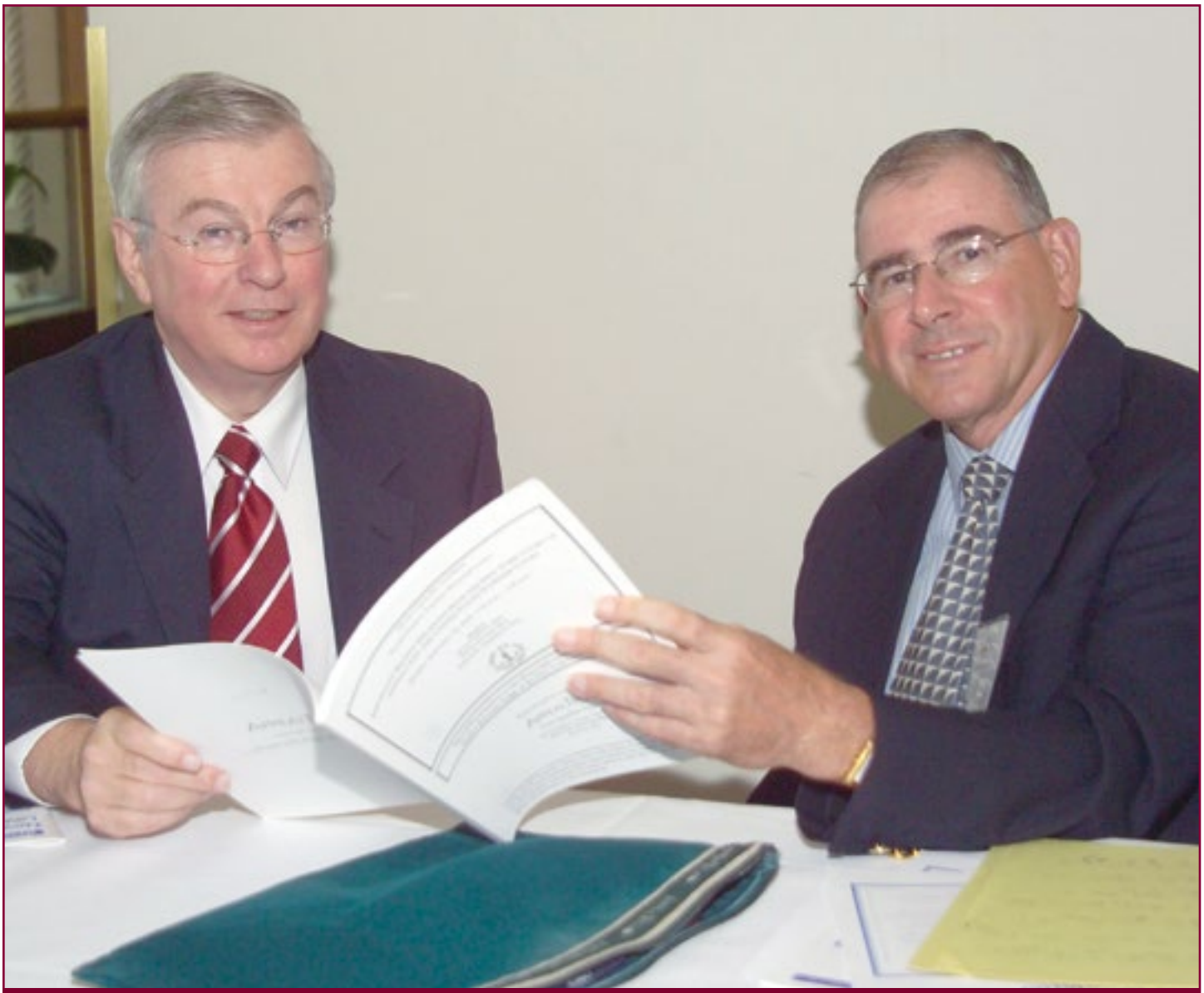

A Special Tribute to Spiros Tsimbinos

(*See page 2*)

A Special Thank You to Spiros Tsimbinos

As I pointed out in my Editor's Message, these pages are a tribute to Spiros Tsimbinos, a result of his dedicated hard work. His analysis of court decisions has for decades helped defense attorneys and prosecutors identify important rulings and use them in litigation. Trust me, these are not just kind words coming from a successor editor. Here is just a sampling of the messages of praise for Spiros:

Thank you, Spiros, for your expertise and dedication to the Criminal Justice Section. You have kept our Newsletter *alive and thriving for more years than I can remember. Your professionalism, knowledge and commitment will always be remembered and appreciated.*

Sherry Levin Wallach, Esq.

Spiros put his heart and soul into the Newsletter *and worked tirelessly over the years to keep Section members informed on the latest developments in criminal law, procedure and current events. And for that, the Section owes him a great debt.*

Judge Barry Kamins, Ret.

I have always appreciated Spiros' editing of our Newsletter. *He has done a fine job and I will miss his fine work, and wish him well in his new endeavors.*

Susan BetzJitomir, Esq.

Spiros—Your years of dedicated service to our Section is most appreciated. Your work has enabled our members to stay up to date on the most important recent decisions. Thanks.

David Louis Cohen

Spiros Tsimbinos, "The Ultimate Colleague."

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Message from the Chair

As we enter the Fall, it is time to look back on the legislative session that came to a close before the summer break. For many, it goes unrecognized since the legislative session does not run consistent with our calendar year. But for those of us who are involved in or follow legislative efforts, it is a significant time of year. At the end of June, we looked back at the legislative session to see what has been accomplished, and what lies ahead for the following year. Our efforts within the legislative arena are just one of the many ways we as a Section seek to effect positive change for the Criminal Justice System.

This year, there were numerous initiatives in the area of criminal justice. Two very important bills that passed both houses this session and await action from the Governor are the Fahy Bill (A10706), which provides state funding for indigent defense, and a bill which provides for Off Hour Arraignment Parts in Counties Outside of the City of New York (A10360/S7209-A). If these bills are signed, they would represent huge strides in the improvement of our criminal justice system. Both bills were spurred by the Hurrell-Harring settlement, which resulted from a lawsuit involving the rights of indigent defendants in five upstate counties. This lawsuit and subsequent settlement has been a basis for the efforts to encourage much needed statewide change. The question is why must we always wait for a lawsuit or a Court of Appeals ruling to effect change and improve the workings of our State's Criminal Justice System?

There are many other criminal justice issues that were promoted this year in Albany, including proposed legislation on discovery, sealing, wrongful convictions, raising the age of criminal responsibility, and prisoner re-entry. Unfortunately, these bills failed to succeed due to the inability of the houses to agree on the bills. We in our capacity as practitioners have a responsibility to continue to work to help the legislators agree and move forward. We are the experts on the issue of criminal justice and should work to inform elected officials of these issues and provide insight.

As members of the New York State Bar Association's Criminal Justice Section, we provide opinions from different criminal justice perspectives. New York's laws and the State's Constitution are in need of amendments and changes in the area of criminal justice. I hear desire from the defense bar, the judiciary, and the prosecution for reform. We should continue to find a ways to reach consensus and move forward. Let us help our State become a leader for criminal justice reform.

Our prisons are overcrowded. Our system is overwhelmed. We need reform now. We must join together and find a way to agree upon support for the legislation for sealing, raising the age of criminal responsibility, prisoner re-entry, wrongful convictions, bail reform and so much more. I have faith that when we sit together and discuss these issues we can find a common ground. I encourage those members of our Section who are not actively involved on a committee to become more involved. As practitioners in the criminal justice arena, we all bring important experiences and information to the table.

We are a Section that welcomes new blood, new ideas and fresh initiatives. Commit to becoming involved. If you don't know how, contact a member of our Executive Committee. There is a place for everyone at the table!

Sherry Levin Wallach

A Message from the Editor

The *Fantastiks* ran off-Broadway for 41 years. Cal Ripken, Jr., played in 2,632 consecutive games. And Spiros Tsimbinos has edited the *New York Criminal Law Newsletter* since its first edition, in the Fall of 2003. Contrary to popular belief, Spiros did not create the *Miranda* rights, he only wrote more case blurbs about them than any other member of our esteemed Section. For those of us who practice criminal law, Spiros has been a fixture in our profession for a very, very long time.

Join me in a bit of history: in a *New York Daily News* article published in 1995, Spiros was described as "a lawyer's lawyer." By that time, he had become the President of the Queens County Bar Association. After graduating from City College and NYU Law School, he had spent time in private practice, then went to the Queens District Attorney's Office as legal counsel and chief of the appeals bureau, and then returned to private practice. His constants were his prolific writing and his deep interest in criminal law.

Spiros' work demonstrates his desire to share his knowledge with others and to comment on significant developments in criminal law and procedure. He was, of course, a regular contributor to his own publication. That guaranteed high quality! Spiros solicited articles from an array of stellar practitioners, attorneys who appreciated the outlet that the *Newsletter* provided.

While Spiros has handed over the mantle of the *Newsletter*, he is not disappearing. In this, my inaugural issue as editor, I have the privilege of including his work reviewing state and United States Supreme Court decisions. I hope that we will continue to read Spiros' contributions for years to come.

Spiros' legacy as the editor is also found in elements of the *Newsletter* that will continue: the editor's column, the Section Chair's message, developments in recent cases and legislation and important news in the world of criminal justice world, focusing, of course, on New York State. We will continue to cover important Section developments and upcoming events.

In addition to the discussion of cases, in this issue we have our Section Chair's message, in which Sherry Levin Wallach describes some important legislative matters. We also have a column from Rick Collins, describing the lengthy efforts that he has spearheaded on behalf of the Section to have the legislature act on a proposal sealing certain criminal convictions. There are two thought-provoking articles from law student contributors---thanks to our law student liaison, the tireless Eugene Frenkel, for his assistance in bringing forth these contributions.

Just as the *Newsletter* evolved under Spiros Tsimbinos, so, too, will we move forward in the future. One area of that the *Newsletter* will focus on is the impact of technology on criminal investigations and trials. Whether it is a matter of the application of the Fourth Amendment to new surveillance techniques or how privacy rights are implicated by the use of social media, there are so many issues that require discussion and analysis. My hope is that the *Newsletter* becomes a leading platform for a discussion of these matters.

We will continue to publish four issues a year, but we are anxious to explore ways in which the *Newsletter* can present a vibrant interplay of ideas. I welcome your thoughts and contributions. Please feel free to email me at cjseditor@outlook.com.

And, one more time, Spiros, thanks for everything!

Jay Shapiro

Editor's Note

In this issue, we are featuring two articles from law students who have demonstrated their commitment to careers in criminal practice. While these articles are not presented to reflect the views of either the Section or the New York State Bar Association, they are clearly thought-provoking pieces.

The success of our profession lies in how well we nurture and develop future lawyers, just as our Section's vitality is enhanced by our younger members. Following each of these articles, we provide you with a bit of background about the authors. Please take note of those small biographies—you'll certainly be impressed with the authors and encouraged about the future.

Jay Shapiro

T and U Visas in the Immigrant Community and Criminal Justice Field

By Tinamarie Fisco and Priyanka Verma

I. Introduction

On February 9, 2016, Mayor Bill de Blasio and Commissioner and Chair of the New York City Commission on Human Rights (the "Commission") Carmelyn P. Malalis announced that the NYCCHR will be accepting requests for U and T visa certifications.[1] This policy represents efforts to encourage undocumented immigrants to report crime, to help law enforcement investigate and prosecute those crimes and to place immigrants on the path to legal permanent residence.[2] This will make the Commission the first and only anti-discrimination agency in a major U.S. city to provide the certification.[3] The U Visa is a form of immigration relief that intends to provide legal status to undocumented victims of crime if they have suffered substantial physical or mental abuse from the crime, and if the victim assists law enforcement officials in the investigation or prosecution of the crime.[4] The T Visa was created in 2000 as a way to improve the ability of law enforcement agencies to investigate and prosecute human traffickers by encouraging undocumented immigrant victims who are vulnerable due to their lack of immigration status in the U.S. to come forward and report abuse in exchange for potential government protection.[5] This effort is just one of multiple initiatives taking place throughout New York State to address the issues immigrants are facing.

One example demonstrating the challenges faced by those applying for a special U or T visa is the story of Yoselin, 31.[6] Yoselin fled Honduras in 2012 when she was harassed by her superiors at work after they found out she was HIV positive.[7] After arriving in New York, she filed for asylum, fearing that her native country's government would not protect her from persecution based on her HIV status.[8] In February 2015, Yoselin met a fellow immigrant and began a romantic relationship.[9] But the relationship soured. After filing a restraining order against him, he threatened to kill her and her unborn baby if she called the police.[10] Yoselin faced many obstacles during her process to seek asylum in the U.S.: "police prejudice, ignorance of the law on part of court officials, limited resources from their own organization and suspicion from the authorities that she was trying to get a free pass to stay in the US by seeking . . . a U visa."[11]

Immigrants still continue to face the type of hurdles that Yoselin faced. This article will address immigration in New York State, focusing on the crimes typically committed against immigrants. It will also discuss U and T visas and how advocates in the legal field can better assist these immigrants.

II. Background on Immigration in the U.S.

Each year, the U.S. government issues up to 15,000 U and T visas designated for crime and trafficking victims.[12] Currently, there are around 11.3 million undocumented immigrants living in the United States, and of these undocumented immigrants, an estimated 645,000 undocumented immigrants live in New York State.[13] There are approximately 535,000 undocumented immigrants in New York City alone.[14] Due to their status as undocumented immigrants, crimes against them like fraud and human trafficking often go unreported.

Under the Trafficking Victims Protection Act (TVPA) of 2000, "sex trafficking is the recruitment, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age."[15] Additionally, "labor trafficking is the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purposes of subjection to involuntary servitude, peonage, debt bondage, or slavery."[16] In the United States, there are an estimated 1.5 million victims of human trafficking.[17]

III. Remedies for Undocumented Immigrants

One remedy is the T Nonimmigrant Visa for Victims of Trafficking ("T" Visa), which is available to victims of human trafficking who are without valid immigration status. This population is particularly vulnerable to severe trafficking because of their reluctance to assist in the investigation and/or prosecution of this type of criminal activity.[18] The T visa, established under the federal law, Victims of Trafficking and Violence Prevention Act (VTVPA) of 2000, was enacted to strengthen the ability of law enforcement agencies to investigate and prosecute serious crimes and trafficking in persons, while offering protections to victims of such crimes without the immediate risk of being removed from the United States.[19] However, Congress has limited the number of available T visas for principal applicants to 5,000 per fiscal year.[20]

To demonstrate that a victim of severe human trafficking qualifies for a T Visa, there are a number of factors taken into consideration: (1) does the victim fit within the federal definition of a "victim" of a severe form of trafficking in persons;[21] (2) is the victim in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands or at a U.S. port of entry;[22] (3) has the

victim complied reasonably with any request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking; (4) would the victim suffer extreme hardship involving unusual and severe harm if removed from the United States; (5) would the victim of severe trafficking be inadmissible to the United States or be required to obtain a waiver of inadmissibility; and (6), would the victim of trafficking be able to demonstrate that he or she has not committed a severe form of trafficking offense.[23]

Nevertheless, the crux of a victim fitting into the definition to receive a T Visa is the consideration of whether the victim, while in the United States, has an ongoing duty to cooperate with law enforcement's reasonable requests for assistance in the investigation or prosecution of human trafficking.[24] Angela G., now 38, was rescued in 2008 when a neighbor alerted the police after noticing that Angela and her co-workers never seemed to get a day off.[25] This enabled Angela to build a case against her trafficker.[26] When Angela arrived in the United States, her trafficker took her passport and told her that she owed $12,000 in transportation and housing costs, which had to be paid off with a decade of work.[27] Angela was promised $600 per month in the Philippines, which was halved to $300 when she got here.[28] Angela had to wake up at 4:30 am each day for work as a caretaker at a residential care facility in Long Beach, California.[29] She and her co-workers ate leftovers from her residents' meals and her trafficker verbally abused her.[30] Angela had been afraid to speak out because she feared her trafficker would threaten her due to her immigration status; however, she received a T Visa after testifying against her trafficker.[31]

Another remedy for non-immigrants is the U Nonimmigrant Visa for Victims of Crime (U visa). When drafting the U visa, also established under the VTVPA of 2000, Congress intended to protect immigrant victims of crime vulnerable to crimes of domestic violence, stalking, sexual assault and other serious crimes while promoting collaboration between victims and law enforcement authorities.[32] There are 10,000 U visas available for applicants each year and any visas granted after the annual cap is reached will result in the issuance of a "conditional approval" and the issuance of a work authorization based on the grant of "deferred action" from removal until the U visa becomes available during the following fiscal year.[33] To qualify for a U visa, the applicant must be a direct or indirect victim of a qualifying crime that occurred in the United States or in violation of U.S. laws.[34]

Further, the applicant must have suffered substantial physical or mental abuse as a result of being a victim of the qualifying criminal activity.[35] The applicant also has to cooperate with law enforcement, prosecutors, judges, or other officials in the detection, investigation, prosecution, conviction, or sentencing following the criminal activity.[36] If the applicant refuses to assist the government following a grant of a U visa, the applicant is denied any possibility of pursuing adjustment of status.[37]

Maria O. left her hometown in Nicaragua 11 years ago because she feared her boyfriend after he placed a gun to her head and threatened to kill her.[38] As the police led her boyfriend away in handcuffs, he threatened her, "You know what's going to happen to you when I get out of here."[39] Maria then crossed the border illegally, settling in Texas where she met Miguel, who did not treat her well.[40] One night he came home angry, grabbed her and dragged her across the front yard.[41] Miguel was in jail for three weeks and when he got out, Maria got back with him.[42] Within a couple of weeks, he attacked her again and went back to jail. The violence continued even after they married and Maria became pregnant.[43] After Miguel punched Maria in the face while he was driving, she called the police and he went to jail again.[44] This time Maria decided to apply for a work permit and U visa so that she could leave Miguel, which took about a year.[45] She was able to apply for a work permit because she was also deemed eligible for a U visa which prevented her from being deported until the visa was issued.[46]

"To qualify for a U visa, the applicant must be a direct or indirect victim of a qualifying crime that occurred in the United States or in violation of U.S. laws."

IV. Recommendations for Bringing Awareness of This Initiative

While the T and U visas are some of the options available to undocumented immigrants, a major issue hindering progress is raising awareness to these remedies in immigrant communities. Education is the most valuable tool that agencies such as the NYCCHR can use to raise awareness. One suggestion is agencies such as the New York State Office for the Prevention of Domestic Violence campaign on a broader scale and in unusual areas such as community centers, churches, schools, and medical professional buildings, ultimately where there is direct access to the public. As Ms. Joanne Macri of the New York State Office of Indigent Legal Services stated, "It is about taking what is available and making sure [agencies] are aware of such things as trafficking."[47]

Because of this, former New York Chief Judge Jonathan Lippman established eleven Human Trafficking Intervention ("HTI") courts that have a presiding judge, equipped with training and knowledge in the dynamics of human trafficking, and support services for victims.[48] If the judge, defense attorney and prosecutor come to a consensus that the victim is in need of services, those victims that comply with the mandated services will have the opportunity to receive non-criminal dispositions or dismissal of their cases.[49] The main purpose of HTI court is to prevent further victimization of these defendants and provide the combined effort of defense attorneys, prosecutors, legal service providers, law enforcement officials, social services, vocational and educational training providers, domestic violence and sexual assault service providers and substance abuse and mental health treatment providers.[50]

V. Conclusion

New York City has taken an important initiative by stepping up the efforts to protect some of the most vulnerable immigrants from deportation by providing certification to undocumented immigrants who are victims of certain crime and who cooperate with law enforcement and giving them more possibilities to apply for special visas.[51] However, a barrier to progress in this area of the law is for immigrants to be aware of these special visas, especially when they become a victim to certain crime. Raising immigrants' awareness on their eligibility for special visas may help law enforcement members in their investigations.

Endnotes

1. Press Release, The City of New York Office of the Mayor, Mayor De Blasio Announces NYC Commission on Human Rights First Such Agency in Major US City to Issue U and T Visa Certifications (Feb. 9, 2016) (on file with author).
2. *Id.*
3. *Id.*
4. Jessica Farb, The U Visa Unveiled: Immigrant Crime Victims Freed from Limbo, 15 Hum. Rts. Brief 26 (2007).
5. Lauren R. Aronson, The Tipping Point: The Failure of Form over Substance in Addressing the needs of unaccompanied immigrant children, 18 Harv. Latino L. Rev. 1, 29 (2015); *See* also Victims of Human Trafficking: T Nonimmigrant Status, U.S. Citizenship & Immigration Servs., https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status (last updated Oct. 3, 2011).
6. Liz Robbins, *Immigrant Crime Victims Seeking Special Visas Find a Tough Path,* NY Times (March 8, 2016), http://www.nytimes.com/2016/03/09/nyregion/immigrant-crime-victims-seeking-special-visas-find-a-tough-path.html.
7. *Id.*
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9. *Id.*
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12. Ellen Wulfhorst, *New York agency offers help to undocumented trafficking and crime victims*, Reuters (Feb. 22, 2016, 4:18 PM), http://www.reuters.com/article/us-usa-crime-visas-idUSKCN0VV2DC.
13. *Id.*
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15. Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, 1513, 114 Stat. 1464, 1534 (codified at 8 U.S.C. §1101 (2000)).
16. *Id.*
17. Human Trafficking, National Resource Center, http://traffickingresourcecenter.org/type-trafficking/human-trafficking (last visited Apr 3, 2016).
18. 8 C.F.R. 214.11(a).
19. *Supra* note 14.
20. Trafficking Victims Protection Reauthorization Act 2005. Pub L. No. 109-164; *See* 8 U.S.C.1184 (o)(7) (2006).
21. INA 101(a)(15)(T).
22. *Id.*
23. *Id.*
24. *Supra* note 19.
25. Monica Luhar, 'I Have Freedom Now': Service Organizations Unite to Combat 'Modern Day Slavery', NBC News (Mar. 8, 2016, 8:30 A.M.) http://www.nbcnews.com/news/asian-america/i-have-freedom-now-service-organizations-unite-help-modern-day-n525821.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Supra* note 19.
34. Qualifying crimes consists of abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, felonious assault, female genital mutilation, fraud, hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture and trafficking, witness tampering, unlawful criminal restraint, and related criminal activities. *See* note 17.
35. 8 U.S.C. 1101(a)(15)(U).
36. *Id.*
37. *Id.*
38. *Long Waits for a Program That Gives Visas to Undocumented Immigrant Crime Victims*, Kera News (Apr. 5, 016) available at http://keranews.org/post/long-waits-program-gives-visas-undocumented-immigrant-crime-victims.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

47. Interview with Joanne Marci, New York State Office of Indigent Legal Services

48. *Announcement of New York's Human Trafficking Intervention Initiative*, http://www.courtinnovation.org/research/announcement-new-yorks-human-trafficking-intervention-initiative (last visited Apr 3, 2016).

49. *Id.*

50. *Id.*

51. *Supra* note 47.

Tinamarie Fisco is a third year law student at Albany Law School (Class of 2017) and a law intern in the Family Violence Litigation Clinic at Albany Law School Clinic and Justice Center. Aside from her studies, Tinamarie is an executive board member for the Albany Law School Pro Bono Society and co-planned the Special Needs Planning Series. She also works as an Admissions ambassador at the law school and as a law intern with the New York State Thruway Authority's Legal Department. Additionally, Tinamarie is an advocate with Court Appointed Special Advocates where she advocates for children in foster care due to abuse or neglect. She is from Saugerties, NY, and graduated Magna Cum Laude from Long Island University-Post as well as from Ulster County Community College. She hopes to practice in the field of family law once admitted to the bar.

Priyanka Verma is currently a third-year law student at the Maurice A. Deane School of Law at Hofstra University and is a Child and Family Advocacy Fellow. She received her B.A. in Psychology, Magna Cum Laude, from Adelphi University, Gordon F. Derner Institute of Advanced Psychological Studies. Priyanka is currently a pro bono volunteer with LawHelpNY, Legal Information for Families Today (LIFT), and a Student Advocate and Coordinator with the Courtroom Advocates Project. Priyanka has interned with the NYC Administration for Children's Services, the Legal Aid Society's Juvenile Rights Practice, and is interning this summer at the Queens County District Attorney's Office Domestic Violence Bureau. Upon graduation and admittance to the bar, Priyanka would like to practice in the area of child advocacy and domestic violence.

Urging States to Review Criminal Convictions Involving Hair Microscopy Evidence and Expert Testimony

By Lindsay Rechan and Katherine Sacks
Law School Student Committee

The FBI and the Department of Justice (DOJ) have made an astonishing acknowledgement that could affect the criminal convictions of roughly 2,500 individuals.[1] They have announced that 26 of the 28 examiners in the FBI Laboratory's microscopic hair comparison unit offered false testimony against criminal defendants in almost all trials in which they testified before the year 2000.[2] Since 2000, mitochondrial DNA testing of hair has become available at the FBI and has not only replaced, but has also undermined forensic hair microscopy.[3]

Microscopic hair comparison is a form of laboratory analysis wherein hair evidence in a criminal investigation is compared side-by-side to known hair samples from a suspect and the victim under a microscope.[4] The analyst characterizes the hairs being compared based on primitive visible traits, scientifically known as phenotypic traits, like width, weathering, and color. The analyst would then form a subjective opinion, absent any formal guidelines or thresholds to support the procedure or the conclusions made.[5] According to the oft-cited National Academy of Sciences Report from 2009, conclusions that these morphological characteristics of hairs are similar as between a known and unknown hair source has no probative value absent a corroborating result from the testing of nuclear DNA or mitochondrial DNA.[6] FBI Director James B. Comey clarified the limits of forensic conclusions resting on hair comparison when he addressed the Governors of the States in a letter dated February 26, 2016: "Hair is not like fingerprints, because there aren't studies that show how many people have identical-looking hair fibers."[7]

The scientific value of forensic hair microscopy evidence has long been misrepresented. The international community, including authorities from United States law enforcement, has advised prosecutors and defense counsel to meet in advance of trial to discuss the innately subjective testimony that is microscopic hair evidence comparisons as far back as 1985.[8] The structural variation of human hair is polygenic—a result of the expression of more than one gene—and results in broad intra-individual variability. It is then impossible to positively identify the source of a single unknown hair, and comparisons should only be presented with the support of other forensic evidence.[9]

There exists no accepted research on the uniqueness of each individual's physical hair characteristics, nor is there any statistical basis for hair comparison among the general population.[10] The baseline of the likelihood that any two individuals can have the same physical traits exhibited is not known. Therefore, any statement representing a probability that a hair came from a certain person would not be based in established frequencies. In fact, the FBI cautioned experts from making such probability statements in court.[11] However, hair examiners frequently violated these FBI guidelines by introducing trial testimony that included fabricated probabilities and conclusions, often mischaracterizing the comparative similarities or differences to establish a supposed "match" between crime-scene hairs and the hairs of defendants.[12] The testimony that influenced the convictions of thousands was faulty in that it often stated, to varying degrees, that there was a match to a source, to the exclusion of all other potential human contributors.[13] Even when the experts were reluctant to assign specific number probabilities, they would describe the level of certainty, given their experience, or make other individualizing statements that swayed jurors, despite the fact that the statements were mathematically unsupported.[14] The use of hair microscopy may be of use in class associations, for example, to state the possibility that a hair could have come from a person, though not for any positive, personal identification.[15]

In conjunction with the Innocence Project and the National Association of Criminal Defense Lawyers (NACDL), the FBI is conducting a review of lab reports and trial testimony from all cases before December 31, 1999, where the FBI's technique of microscopic hair comparison was used to establish a connection between a defendant and a crime scene.[16] As of last year, the review had been conducted on 500 of these cases and revealed that the FBI's forensic experts offered over-inclusive hair testimony favoring prosecution in a staggering 96% of the 268 cases.[17] Some of the defendants in the reviewed cases received death sentences and have since been executed primarily as a result of the persuasive presentation of the inflammatory hair evidence at their jury trials.[18] One reason behind the continued use of hair comparison, a method that ultimately depends on the "eyeballing" skills of an analyst with widely variable levels of practice experience, could be that the price of analyzing evidence under a microscope is cheaper than subjecting evidence to genetic sequencing.[19]

In federal cases, the FBI will provide free DNA testing in these cases pursuant to a court order or consent from the prosecutor. Furthermore, the DOJ has agreed not to raise procedural objections to federal defendants who move for a new trial.[20] In these federal cases, NACDL

is ensuring all affected defendants will have access to a volunteer lawyer who can advise them and assist in challenging their convictions.[21]

But what of state court prosecutions that included similar false hair comparison testimony? It is likely that the impact from faulty hair analysis testimony has in fact had a more profound effect in state court. This is due to the fact that the majority of FBI hair examiner testimony was offered in state court proceedings, as well as at the annual training courses provided to state hair analysts by the FBI for forty years.[22] The FBI has since admitted that it is indisputable that the language incorporated into these training sessions, and thus heard by state and local hair examiners nationwide, was scientifically erroneous.[23] Nevertheless, it is up to each individual state to determine whether to allow the affected cases to be re-opened.[24]

In some states, the federal review has triggered similar responses, often through joint efforts of The Innocence Project, defendant and prisoner advocacy groups, state legislators, local and state law enforcement divisions, and the offices of the District Attorneys in those states.[25] However, the ability to get these cases back into court will depend upon such factors as the impact the hair evidence had in each individual case and whether the hair at issue is still available for testing. In Washington D.C., a Superior Court judge recently awarded a wrongfully convicted man who had been exonerated in 2012 a settlement in the millions to compensate him for the injustice and 28 year sentence he had endured as a result of inappropriate hair comparison evidence. This was the third individual from D.C. who has been awarded a multi-million dollar settlement after his exoneration on these grounds. The pattern of exaggerated expert testimony regarding the strength of visual hair comparisons, unveiled by the D.C. Public Defender Services, has reportedly resulted in a court order for the city to pay $39 million in damages in the past year to the three men identified in D.C. alone as victims of faulty, misguided, mischaracterized testimony by forensic scientists.[26] In fact, it was this case that ignited the FBI and DOJ movement to review their own errors in implementing hair microscopy over the last two decades.

The Supreme Court of Massachusetts recently ordered a new trial, discrediting the conviction of a man incarcerated for 30 years based on a false affirmation by an expert that his hair comparison to one found at the scene established his presence at the scene of a 1985 rape.[27] The man will be subjected to another criminal trial. The outcome for the man as he faces a second jury trial is unclear, but his re-trial will certainly not include the debunked hair microscopy comparison as evidence against him.

Despite the efforts being taken by federal agencies, not all states have implemented the same thorough review processes of their state convictions; therefore, the scope of or even potential for remedies for the wrongfully convicted remains to be seen.[28] In New York, the New York State Commission on Forensic Science has surveyed labs and is planning on doing a review. However, it has yet to determine its methodology for review and therefore has not begun.

"Despite the efforts being taken by federal agencies, not all states have implemented the same thorough review processes of their state convictions; therefore, the scope of or even potential for remedies for the wrongfully convicted remains to be seen."

It is critical that New York establish a review process in order to begin to address and correct this gross injustice. The state has an obligation to initiate a review of the erroneous evidence it allowed into its criminal courts for decades. Like the FBI, New York must identify and notify the defendants affected by the false hair analysis reports and testimony and subsequently follow the DOJ in waiving all procedural objections to those who seek to have their convictions overturned or their cases re-tried. By delaying or denying such a task, New York turns its back on the Sixth Amendment and on one of the bedrock principles of our nation.

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Update: Criminal Conviction Sealing

By Rick Collins, Esq.

It is now estimated that more than one out of every three Americans passes through the criminal justice system. Many are non-violent offenders. The vast majority will reenter society, only to find that a criminal conviction can close doors on getting a job, going to school, voting, getting loans or licenses, or securing a place to live. Up to 60 percent of New Yorkers with criminal records remain unemployed one year later.

New York remains a state in which there is no expungement or sealing law applicable to the vast majority of adults who are convicted of crimes. There are no second chances. A conviction typically follows an ex-offender to the grave.

The Criminal Justice Section formed a Sealing Committee to study the issue. I was honored to be appointed as Co-Chair with Jay Shapiro. Our Committee's 38-page Report and Recommendations, which urged changing the law to allow record sealing for certain deserving non-violent ex-offenders, was adopted by the NYSBA House of Delegates in January 2012 and became a State Bar priority. The policy would not apply to violent felons or habitual or career criminals. Sealing would not be automatic; ex-offenders would have to apply to the court to have their records sealed. There would be a waiting period of five years for misdemeanors and eight years for Class D and E non-violent felonies. Up to three misdemeanors could be sealed, but only one felony. No records involving sex crimes or crimes against children would be eligible for sealing. Perhaps most significantly of all, sealing would have a "spring-back" condition—a subsequent arrest and conviction would undo the sealing and reopen the case to public view.

Regrettably, despite the hard work of the Committee and the CJS Executive Committee and zealous advocacy in Albany these past four years, sealing bills have thus far stalled in the State Legislature. However, there have been four positive developments over the past year worth noting.

First, Governor Cuomo created the Council on Community Re-Entry and Reintegration in July 2014 with the goal of identifying barriers formerly incarcerated people face when re-entering society after incarceration and suggesting changes. In September 2015, the Governor accepted all twelve recommendations of the Council. The recommendations will remove some obstacles people with convictions face when applying for New York State public housing or Section 8 rental assistance administered by the State, obtaining job licensing by the State, or applying for employment with a New York State agency. Governor Cuomo clearly recognized, by his adoption of all recommendations, that too often, a criminal conviction prevents true integration into mainstream society, resulting in increased rates of recidivism. However, his executive actions only apply to government entities and don't prevent private landlords or private employers from denying an applicant based solely on his or her record.

Second, in New Jersey, which has a broad expungement law, the time period that some ex-offenders have to wait in order to have their criminal records expunged was significantly reduced this year. Previously, the waiting period in New Jersey was 10 years; with this new law, the waiting period for expungement is now five years "from the date of the person's last conviction, payment of fine, satisfactory completion of probation or parole, or release from incarceration, whichever is later." New Jersey's revised expungement law also puts in effect further reductions in waiting periods for cases of disorderly person or petty disorderly person offenses, reducing that time from five to three years. We hope that the example set by New Jersey will inspire our State legislators to take their first step.

"Perhaps most significantly of all, sealing would have a 'spring-back' condition—a subsequent arrest and conviction would undo the sealing and reopen the case to public view."

Third, the "Ban the Box" movement in workplace hiring has made tremendous strides across the country in recent years (with New York City joining more than 100 other cities and 17 states that have passed similar "ban the box" laws). The move to encourage colleges nationwide, including those in New York, to re-evaluate questions pertaining to an applicant's criminal history continues to gain ground. Students with convictions may be less likely to complete college applications due to having to check the box to acknowledge their criminal history, as well as having to provide supplemental material that is required for applicants with a criminal conviction. A story in The Atlantic referenced a recent "Boxed Out" report concluding that 62.5 percent of SUNY applicants who disclosed a prior felony conviction never completed their applications, compared with 21 percent of applicants with no criminal record. At the national level, the guide "Beyond the Box: Increasing Access to Higher Education for Justice Involved Individuals" follows the Obama Administration's efforts "aimed at reversing policies that limit the opportunities available to people with criminal records"—making specific recommendations such as "clearly informing potential students as early as possible in the application

process about how to respond to questions about their criminal pasts" and "ensuring that such questions are narrowly focused, avoiding overly broad requests about criminal history."

Fourth, and lastly, in an unprecedented 2015 case, U.S. District Court Judge John Gleeson (EDNY) granted an order expunging the criminal record of a woman whom he had sentenced 13 years earlier. In Doe v. United States, Judge Gleeson discussed the "excessive and counterproductive employment consequences" of old convictions—noting how "Doe's criminal record has prevented her from working, paying taxes, and caring for her family, and it poses a constant threat to her ability to remain a law-abiding member of society. It has forced her to rely on public assistance when she has the desire and the ability to work." Noting that "nearly two decades have passed since her minor, nonviolent offense," he stated that "there is no justification for continuing to impose this disability on her"—sentencing her to "five years of probation supervision, not to a lifetime of unemployment." Judge Gleeson stressed that "[h]er case highlights the need to take a fresh look at policies that shut people out from the social, economic, and educational opportunities they desperately need in order to reenter society successfully."

Regrettably, not everyone shares Judge Gleeson's perspective. Not long ago, I found myself in our State Capitol speaking with members of the State Senate about sealing bills which were pending at that time. As I walked in for my scheduled appointment with one New York State Senator, he chided, "Oh, you're here on behalf of the criminals." In response, I spent the next 20 minutes explaining to him how overly simplistic his assumption was, and that the people I was championing were those who desperately need second chances, not some generic "criminals."

New York's failure to provide second chances to ex-offenders has created a permanently disenfranchised population to the detriment of individuals, families, taxpayers, and society at large. We can do better. We need not only defense lawyers but judges and prosecutors to embrace this cause and work together toward reform. Our Committee and this Section must continue to advocate on behalf of men and women who made very limited, non-violent mistakes and are now saddled with criminal records that restrict their options for employment, education, and housing. We all benefit when we get these folks back to playing a productive part in society. Providing people with an opportunity for redemption is the right thing to do.

New York Court of Appeals Review

By Spiros Tsimbinos

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from April 28, 2016 through July 25, 2016.

Right of Confrontation

***People v. John*, decided April 28, 2016 (N.Y.L.J., April 29, 2016, pp. 1, 6 and 22)**

In a major significant decision which divided the Court on a 4-3 basis, the Court ruled that prosecutors must produce forensic experts with requisite personal knowledge of how DNA samples are handled when that evidence is used against a criminal defendant. The majority opinion, which was written by Chief Judge DiFiore, relied upon rulings by the United States Supreme Court in *Bullcomings v. New Mexico*, 564 US 647 (2011) and in *Crawford v. Washington*, 541 US 36 (2004). The majority held that although each technician who handles a DNA sample need not be produced by the prosecution to vouch for the evidence's voracity, the technician who definitively links the sample to the defendant must be made available so that the defendant can exercise his or her Sixth Amendment right to confront the accusers in Court. The majority concluded that where the laboratory report is testimonial in nature, at least one analyst with the requisite personal knowledge must testify. Joining Chief Judge DiFiore in the majority were Judges Rivera, Fahey and Stein. Judge Garcia issued a dissenting opinion in which he characterized the majority view as being logically inconsistent and predicted that the opinion will be burdensome for prosecutors. Joining Judge Garcia in dissent were Judges Pigott, Jr. and Abdus-Salaam. The Court's decision in this matter will probably create some controversy and will have an impact on criminal law trials.

Preservation

***People v. Wallace*, decided April 28, 2016 (N.Y.L.J., April 29, 2016, p. 25)**

In a unanimous decision, the New York Court of Appeals determined that the defendant had failed to preserve for Court of Appeals review two arguments that he was raising on appeal. Although it was undisputed that the defendant was not advised of his Miranda rights before making a statement which ultimately led police to recover a weapon, he failed to make such an argument in the court below during a suppression hearing. With regard to another issue, there was a failure to object to the manner in which the trial court handled a jury request to take notes during a re-reading of a portion of the charge. The Court determined that this issue did not constitute a mode of proceeding error that required reversal despite the failure to object. Under these circumstances the defendant's arguments were not adequately before the Court for determination on the merits.

Harmless Error

***People v. Romero a/k/a Rosa*, decided April 28, 2016 (N.Y.L.J., April 29, 2016, p. 25)**

In a unanimous decision, the New York Court of Appeals determined that although a defendant's pre-Miranda statement while in custody in response to a detective's questions whether he would like to make a statement should have been suppressed, the error in failing to suppress the statement was harmless beyond a reasonable doubt. The Court concluded that in light of the overwhelming evidence against the defendant, there was no reasonable possibility that his statement contributed to the verdict, so that a new trial was not required.

Possession of Gravity Knife

***People v. Parrilla*, decided May 3, 2016 (N.Y.L.J., May 4, 2016, pp. 1 and 25)**

In a unanimous decision, the New York Court of Appeals upheld a defendant's conviction for illegal possession of a gravity knife, finding that his argument that he did not know of the knife's illegal features did not invalidate his conviction. During a traffic stop, a gravity knife was found in the defendant's pocket. The defendant argued that he used it to cut tiles in his employment as a tradesman. He argued that he was unaware that the knife opened with a flick of the wrist as well as two hands.

The Court of Appeals determined that Penal Law Section 265.01(1) makes it illegal to possess a gravity knife and that the statute does not require prosecutors to prove that a defendant knew that it meets the definition of such a knife as contained in the Penal Law provision. The Court therefore applied a strict liability standard to the statutory provision.

Withdrawal of Guilty Plea

***People v. Manor*, decided May 3, 2016 (N.Y.L.J., May 4, 2016, p. 25)**

In a unanimous decision, the New York Court of Appeals held that the trial court did not abuse its discretion in denying the defendant's motion to withdraw his guilty plea and that such an action did not require the holding of a hearing. The New York Court of Appeal relied upon

a review of the record in the matter which indicated that the defendant had been provided with two alternative plea offers and the plea allocution indicated that the defendant indicated that he understood and discussed the guilty plea with counsel. The Court noted that when a defendant moves to withdraw a guilty plea, the nature and extent of the fact finding inquiry rests largely in the discretion of the judge to whom the motion is made and a hearing will be granted only in rare instances. Under the instant circumstances, the trial court acted within its discretion in denying the withdrawal motion.

Probable Cause to Arrest

***People v. Joseph*, decided May 3, 2016 (N.Y.L.J., May 4, 2016, p. 26)**

After reiterating that the issue of whether the police had probable cause to arrest a defendant involves a mixed question of law in fact and is therefore beyond the Court's further review power if the Appellate Division's determination is supported by evidence in the record, the Court in a unanimous ruling determined that there was record support for the conclusion that the police possessed probable cause. In the case at bar, members of the New York Drug Enforcement Task Force had followed a man whom they knew to be a narcotics trafficker based on confidential information. They also observed during surveillance the defendant engage in activity indicative of a drug transaction. The defendant was subsequently arrested and a search of his person incident to the arrest recovered a bag containing cocaine. Under these circumstances the Appellate Division determination affirming the defendant's conviction was affirmed.

Sex Offender Registration

***People v. Howard*, decided May 3, 2016 (N.Y.L.J., May 4, 2016, p. 22)**

In a 6-1 decision, the New York Court of Appeals upheld a risk level 3 assessment imposed against a defendant where the unlawful imprisonment conviction did not involve a sexual component. In the record before it, the majority concluded that there was no abuse of discretion and the risk level which was imposed was proper. In the case at bar, the defendant, along with his co-defendant, tied-up the co-defendant's 8-year-old son, naked, in a standing position and repeatedly beat him with various dangerous instruments for a period of approximately five days. Based upon the extensive serious injury inflicted upon the victim, the finding that the defendant posed a serious risk to public safety justified the risk assessment imposed and did not constitute an abuse of discretion. Judge Rivera dissented.

Dismissal of Intermediary Appeals

***People v. Harrison*, decided May 5, 2016 (N.Y.L.J., May 6, 2016, p. 25)**

***People v. Serrano*, decided May 5, 2016 (N.Y.L.J., May 6, 2016, p. 25)**

In the two cases decided together, the New York Court of Appeals held that their earlier decision in *People v. Ventura*, 17 NY 3rd, 675 (2011) prohibits intermediate Appellate Courts from dismissing direct appeals due to the defendant's involuntary deportation regardless of the contentions raised by the defendant on appeal. The Court further concluded that consistent with this Court's authority to dismiss pending permissive appeals due to the defendant's involuntary deportation, intermediate Appellate Courts retained their discretionary authority to dismiss permissive appeals on that ground after the *Ventura* decision. In *Harris,* the defendant had a permissive appeal pending in the Appellate Division when he was deported. The Appellate Division, however, granted a people's motion to dismiss the appeal on the ground that the defendant was no longer available to obey the mandate of the court. After reviewing the situation, a six-judge majority of the Court of Appeals concluded that the Appellate division did not abuse its discretion in dismissing the defendant's permissive appeal due to his involuntary deportation. Judge Rivera dissented. With respect to the defendant Serrano, a direct appeal was pending before the Appellate term when defendant was deported. His direct appeal involved issues which if meritorious required his continued legal participation. Under these circumstances, the matter would be remitted to the Appellate Term for consideration of the merits of the appeal. With respect to the *Serrano* case, Judge Rivera concurred in the determination.

Restitution Hearing

***People v. Connolly*, decided May 10, 2016 (N.Y.L.J., May 11, 2016, p. 23)**

In a unanimous decision, the New York Court of Appeals upheld a determination that the defendant was required to pay restitution in the amount of $31,400.00. In the case at bar, exhibits and transcripts from a prior hearing conducted by a judicial hearing officer were admitted into evidence and no further evidence was taken despite county courts offering the parties an opportunity to call additional witnesses and put in further proof. On appeal the defendant argued that where a restitution hearing is required, the sentencing court commits reversible error when it relies upon a transcript of a hearing from a different fact finder without taking live testimony. The New York Court of Appeals rejected the defendant's argument, noting that he was given an opportunity to present additional evidence and failed to do so. Inasmuch as

the county court alone determined the proper amount of restitution based upon relevant evidence not legally privileged and after affording defendant a reasonable opportunity to contest the people's evidence and submit his own proof the hearing held met the required standard set forth in prior cases.

Ineffective Assistance of Counsel

***People v. Henderson*, decided May 10, 2016 (N.Y.L.J., May 11, 2016, p. 22)**

In a unanimous decision, the New York Court of Appeals reversed a determination of the Appellate Division that the defendant had received ineffective assistance of counsel. The defendant had argued that his attorney had failed to provide an expert witness with photographs or hospital records that would have assisted his testimony in support of the defendant. The Appellate Division had agreed with the defendant and had reversed his conviction, concluding that counsel's so-called strategic decision to withhold information from the expert allowed the prosecutor to demonstrate to the jury that the expert was ill-informed and the failure to disclose was intentional and possibly misleading. The New York Court of Appeals, however, in reviewing the record as a whole concluded that the defendant received meaningful representation and that defense counsel had mounted a cogent multi-pronged defense. Accordingly, the Appellate Division decision was reversed and the case was remitted to that court for further determination.

Waiver of Appearance at Sentence

***People v. Rossborough*, decided June 2, 2016 (N.Y.L.J., June 3, 2016, p. 22)**

In a unanimous decision, the New York Court of Appeals determined that a defendant may waive his right to be present at sentencing following his plea of guilty to a felony. The Court held that such a waiver was permissible under the circumstances of the case. In the case at bar, the defendant during the plea colloquy had specifically requested that he be permitted to waive his personal appearance at sentencing. On appeal, the defendant contended that CPL Section 380.40(1) required that a defendant be personally present at the time of sentence. In issuing its determination, the Court stated that there were recognized exceptions to the general rule requiring presence at sentencing and that in the case at bar, the defendant by his specific request had properly waived his appearance.

Summary Judgment Regarding Dismissal of Complaint

***People v. Greenberg*, decided June 2, 2016 (N.Y.L.J., June 3, 2016, p. 23)**

In a unanimous decision, the New York Court of Appeals denied the defendant's request to dismiss a complaint filed by Attorney General Schneiderman with respect to claimed violations of the General Business Law. The litigation in question involves a longstanding dispute between the Attorney General and the defendant. The Court of Appeals concluded that the claims against the defendant withstand summary judgment and that the matter should therefore proceed to trial.

Submission of Lesser Included Offense

***People v. Hull*, decided June 2, 2016 (N.Y.L.J., June 3, 2016, p. 23)**

In a unanimous decision, the Court of Appeals determined that the trial judge properly concluded that there was a reasonable view of the evidence that the defendant had committed first degree manslaughter but not murder in the second degree, and therefore no reversible error had been committed by submitting such a charge at the request of the People. In the case at bar, the defendant and the victim had argued and had engaged in a verbal altercation immediately before the shooting. The defendant's statements to the victim just before the shooting coupled with evidence of the struggle and defendant's testimony that he wanted to stop could have led the jury to conclude that the defendant intended only to injure the victim and that the victim's movements during the struggle resulted in his death. Therefore, the submission of the requested lesser included charge was proper.

Jury Notes

***People v. Mack*, decided June 7, 2016 (N.Y.L.J., June 8, 2016, pp, 1, 2, and 22)**

In a 6-1 decision, the New York Court of Appeals determined that the judge's failure to dispose of a note from deliberating jurors in a meaningful way before accepting the jury's verdict is not a proceedings error which requires automatic reversal. The majority opinion, written by Judge Fahey, concluded that counsel must expressly object to the trial court's handling of a jury note in order for the issue to be preserved for Appellate review. Since no proper objection had occurred in the case at bar, the Court reversed a prior ruling of the Appellate Division which had ordered a new trial. Judge Rivera issued a dis-

senting opinion and claimed that the current ruling was a significant departure from the Court's prior decisions on the issue.

Preservation

***People v. Morris*, decided June 7, 2016 (N.Y.L.J., June 8, 2016, p. 25)**

In a unanimous decision, the New York Court of Appeals held that a trial court's alleged failure to provide a meaningful response to the jury's note does not constitute a mode of proceeding error for which no preservation is required. In the case at bar, counsel had meaningful notice of the precise content of the jury note and was in the courtroom as the read-back was conducted. Counsel was therefore aware that the court had failed to read the witness's cross examination testimony. Counsel's knowledge of the precise content of the note and of the court's actual response or lack thereof removes the claimed error from the very narrow class of mode of proceedings error for which preservation is not required. Counsel's silence at a time when any error by the court could have been obviated by timely objection renders the claim unpreserved and unreviewable. The matter was therefore remitted back to the Appellate Division for consideration of facts and issued raised but not determined upon the appeal to that court.

Ineffective Assistance of Counsel

***People v. Carver*, decided June 7, 2016 (N.Y.L.J., June 8, 2016, p. 23)**

In a unanimous decision, the New York Court of Appeals rejected a defendant's contention that he had been deprived of the effective assistance of counsel. The defendant claimed that his trial attorney was ineffective for failing to seek suppression by challenging the legality of a traffic stop and a pat down incident to defendant's detention. The Court concluded that on the instant record there was no indication that counsel could have presented a colorable argument challenging the legality of the traffic stop. The record also indicated that counsel may have made a legitimate strategic decision not to move to suppress. Viewed in the totality of the circumstances, the Court concluded that counsel provided meaningful representation and that the defendant's claim was without merit.

Preservation

***People v. Reynolds*, decided June 7, 2016 (N.Y.L.J., June 8, 2016, p. 23)**

In a 6-1 decision, the New York Court of Appeals rejected a defendant's contention that his guilty plea be vacated on the grounds that it was conditioned on an alleged illegal pre-sentence condition that he remain incarcerated for an additional six months prior to sentencing. The Court concluded that the defendant failed to properly preserve his claim and that the Appellate Division correctly held that the plea was not conditioned on an illegal sentence nor was the actual sentence imposed illegal. The Court further concluded that with respect to the *Outley* hearing held by the trial court, it was correctly determined that the standards articulated by that case had been followed. Judge Rivera dissented and argued that the plea agreement conditioned on the defendant's interim incarceration lacked statutory authority and rendered the plea invalid.

Justice Center for People with Special Needs

***People v. Davidson*, decided June 7, 2016 (N.Y.L.J., June 8, 2016, p. 24)**

In a 4-2 decision, the New York Court of Appeals rejected a defendant's claim that a Special Prosecutor appointed pursuant to Article 20 of the Executive Law regarding protection of people with special needs did not have the authority to prosecute an offense against him in a local criminal court, and that such authority was limited to prosecuting abuse and neglect cases only in county and supreme court. The majority opinion in the New York Court of Appeals rejected the defendant's argument and stated that there was no indication from the statute that the Special Prosecutor's powers were limited as claimed by the defendant. Judges Rivera and Abdus-Salaam dissented and argued that the legislature could not transfer or diminish the core responsibilities and prosecutorial powers of a constitutionally elected officer, such as a District Attorney, through the appointment of an unelected official. Chief Judge DiFiore took no part in the decision.

Prejudicial Evidence

***People v. Frankline*, decided June 9, 2016 (N.Y.L.J., June 10, 2016, p. 25)**

In a unanimous decision, the New York Court of Appeals upheld a defendant's conviction and concluded that he was not denied a fair trial by the testimony of the victim regarding his prior acts of violence against her. The trial judge had allowed the testimony in question as an exception to the general prohibition on evidence of prior bad acts because it served as background regarding her relationship with the defendant as well as proof of intent and motive. The defendant claimed that the admission of such evidence was prejudicially excessive in scope. Since it was highly inflammatory, it made it impossible for the jury to fairly and objectively assess the evidence. The

Court, however, in reviewing the record concluded that under the circumstances of the case, no reversal of the defendant's conviction was required.

Denial of Post-Conviction Motion Without a Hearing

***People v. Wright*, decided June 9, 2016 (N.Y.L.J., June 10, 2016, p. 22)**

In a unanimous decision, the New York Court of Appeals held that under the circumstances of the instant case, a trial judge was within his discretion to summarily deny the motion of a defendant to vacate his judgment pursuant to CPL 440.10 without holding a hearing. The Court concluded that the defendant's motion papers failed to substantiate the allegations that there was an actual conflict of interest or that any potential conflict hindered the defendant's case. In the case at bar, the defendant had claimed that the prosecutor had a conflict of interest because he had once represented the District Attorney who was prosecuting his case. The Court concluded that there was no record support of the defendant's claim and his appeal was denied.

Unlawfully Dealing With a Child

***People v. Berry*, decided June 14, 2016 (N.Y.L.J., June 15, 2016, pp. 1, 2 and 22)**

In a 4-3 decision, the New York Court of Appeals reversed a defendant's conviction of unlawfully dealing with a child pursuant to Penal Law Section 460.20(1) on the grounds that the statute requires a finding that the defendant had power or control over youngsters found in a potentially dangerous place, not merely that he had knowledge about the presence of the minors. In the case at bar, a man sleeping in a Brooklyn apartment where cocaine was discovered had no control over the three children who were present. The defendant had claimed that he was homeless and occasionally spent the night in the apartment where a woman and her three children resided. The majority opinion was written by Judge Fahey and was joined by Judges Rivera, Abdus-Salaam and Stein. Judges Pigott, Garcia and Chief Judge DiFiore dissented. The dissenters argued that a jury could have reasonably rejected the defendant's claim that he was homeless and concluded that the defendant lived or otherwise had control over the apartment. According to the dissent, the evidence established the defendant knowingly permitted children to remain in an apartment where he knew or had reason to know that unlawful drug activity was being maintained.

Defense Counsel Representation at Suppression Hearing

***People v. Parson*, decided June 14, 2016 (N.Y.L.J., June 15, 2016, p. 24)**

In a unanimous decision, the New York Court of Appeals rejected a defendant's argument that he was denied the effective assistance of counsel based upon his attorney's performance in the litigation of the suppression motion. The Court concluded that the record did not support the defendant's contentions. Rather, the record demonstrated that defense counsel conducted a competent cross-examination of the witnesses at the suppression hearing and provided the Court with cogent legal arguments to support his motion to suppress the gun.

Ineffective Assistance of Counsel and Lack of Preservation

***People v. Griggs*, decided June 14, 2016 (N.Y.L.J., June 15, 2016, p. 23)**

In a unanimous decision, the New York Court of Appeals rejected a defendant's claim regarding the failure of his defense counsel to timely object to various claimed prosecutorial errors. The Court concluded that the defendant's challenges were basically unpreserved and in either event were without merit. The Court noted that during the proceedings, the defendant had raised numerous complaints and had even sought at one point to proceed pro se. The court concluded that the defendant's own actions hindered defense counsel's ability to make relevant objections and that his various claims were without merit.

Speedy Trial

***People v. Barden*, decided June 14, 2016 (N.Y.L.J., June 15, 2016, p. 22)**

In a unanimous decision, the New York Court of Appeals concluded that the defendant did not consent to additional delays attributable to court congestion and that the People failed to announce readiness within the statutory time period. Therefore, defendant was entitled to a dismissal of the indictment on speedy trial grounds. The opinion was written by Judge Stein.

Dismissal of Appeal

***People v. Palencia*, decided June 23, 2016 (N.Y.L.J., June 24, 2016, p. 23)**

In a unanimous decision, the New York Court of Appeals dismissed a defendant's appeal on the ground that the reversal by the Appellate Division was not "on the

law alone or upon the law and such facts which but for the determination of law would not have led to reversal."

Affidavit of Errors

People v. Smith

***People v. Ramsay*, decided June 23, 2016 (N.Y.L.J., June 24, 2016, p. 22)**

In a unanimous decision, the New York Court of Appeals held that the statutory language of CPL 460.10 is plain and requires that an affidavit of errors be submitted since it is a jurisdictional prerequisite for the taking of an appeal from a local criminal court where there is no court stenographer. In the case at bar, the defendants were convicted in a local court which was not designated by law as a court of record and did not have a court stenographer during the proceedings. In both cases the defendants were convicted in local village courts.

Darden Hearing

***People v. Crooks*, decided June 23, 2016 (N.Y.L.J., June 24, 2016, p. 24)**

In a unanimous decision, the New York Court of Appeals concluded that under the circumstances in the case, a Darden hearing was not required. The Court concluded that there was a basis in the record for the determination of the lower courts and that the police established probable cause based on their own independent observations without having to rely on the statement of the confidential informant. Thus, a hearing was not required.

Sex Offender Registration Act

***People v. Sincerbeaux*, decided June 28, 2016 (N.Y.L.J., June 29, 2016, p. 22)**

In a 4-2 decision, the New York Court of Appeals concluded that the lower court did not abuse its discretion in assessing defendant points under risk factors 1, 5 and 9 with regard to establishing a risk level pursuant to the Sex Offender Registration Act. The majority opinion was written by Chief Judge DiFiore and was joined in by Judges Abdus-Salaam, Stein and Garcia. Judges Rivera and Pigott dissented. Judge Fahey took no part in the decision.

Scope of Cross-Examination

People v. Smith

People v. Ingram

***People v. McGhee*, decided June 28, 2016 (N.Y.L.J., June 29, 2016, p. 25)**

In this package of three appeals, the issue was whether the trial courts abused their discretion in precluding any cross-examination into allegations of a law enforcement officer's prior misconduct made in a federal lawsuit. Applying the relevant principles involved, the Court concluded that with respect to the appeals by Defendants Ingram and McGhee, the trial courts abused their discretion and effectively imposed an improper prohibition against permissible cross-examination. The Court found, however, that with respect to McGhee the error was harmless. The Court also concluded that with respect to *People v. Smith*, any error which might have occurred was likewise harmless. With respect to *People v. Ingram*, the Court concluded that the limitation on cross-examination was not harmless and therefore the defendant was entitled to a new trial.

Identification Testimony

***People v. McCullough*, decided June 28, 2016 (N.Y.L.J., June 29, 2016, p. 26)**

In a 4-3 decision, the New York Court of Appeals reversed a determination of the Appellate Division and held that the trial court did not abuse its discretion as a matter of law in precluding the defense from presenting expert testimony on the reliability of eyewitness identification. The majority opinion concluded that trial court was entitled to reject the expert testimony after balancing the probative value of the evidence against it is prejudicial or otherwise harmful effects. The majority further noted that trial courts generally have the power to limit the amount and scope of evidence presented. The majority opinion consisted of Chief Judge DiFiore and Judges Pigott, Stein and Garcia. Judges Rivera, Abdus-Salaam and Fahey dissented.

Dismissal of Appeal

***People v. Daniel*, decided June 30, 2016 (N.Y.L.J., July 1, 2016, p. 24)**

In a unanimous decision, the New York Court of Appeals dismissed the defendant's appeal on the ground that reversal by the Appellate Division was not "on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal" (CPL 450.90[2] [a].

Preservation

***People v. Panton*, decided June 30, 2016 (N.Y.L.J., July 1, 2016, p. 24)**

In a unanimous decision, the New York Court of Appeals rejected a defendant's appeal on the grounds that he did not raise his particular claim either in a suppression motion or at a hearing and therefore it was unreserved for Court of Appeals review. The defendant had contended that police engaged in improper pre-Miranda custodial interrogation and as a result her post-Miranda video and statements should have been suppressed.

A Summary of the 2015 Annual Report of the Clerk of the Court of the New York Court of Appeals

By Spiros A. Tsimbinos

The New York Court of Appeals recently issued its Clerk's Report for the year 2015. The Report, which is prepared on an annual basis by the Clerk of the Court of Appeals, provides a yearly summary of the workload of the Court. This year's report was prepared by John P. Asiello, who recently assumed the position of Clerk of the Court. The Annual Summary is divided into several parts. The first section is a narrative, statistical and graphic overview of matters filed with and decided by the Court during the year. The second describes the various functions of the Clerk's office and summarizes administrative accomplishments in 2015. The third section highlights selected decisions issued in 2015. The fourth part consists of appendices with detailed statistics and other information.

This year's report includes an introduction from Eugene F. Pigott, Jr., the Court's Senior Associate Judge who will be retiring at the end of the year since he has reached the mandatory retirement age of seventy. Judge Pigott begins his introduction by recognizing former Court of Appeals Judges Graffeo and Smith for their service. He also pays tribute to former Chief Judge Jonathan Lippman, who ended his service on the Court as of December 31, 2015. Judge Pigott also recognizes the retirement of Andrew Klein as Clerk of the Court, effective as of September 17, 2015 and welcomes John Asiello as the new Clerk of the Court, indicating that he has served the Court in several capacities over the last thirty years. Both Judge Pigott and Mr. Asiello also recognized in their remarks the unfortunate passing of former Chief Judge Judith Kaye who died on January 7, 2016.

This year's report indicates that in 2015 the Court disposed of 3,781 matters including deciding 202 appeals, 1,378 motions and 2,201 criminal leave applications. The number of decisions issued in 2015 was slightly down from the 235 appeals decided in 2014. Of the 202 appeals decided in 2015, 112 involved civil cases and 90 involved criminal matters. This compared to 144 civil matters and 91 criminal matters in 2014. Of the 202 decisions issued, in the various appeals, 124 were decided unanimously. Sixty-eight dissenting opinions were issued in 2015.

With respect to criminal leave applications, 91 out of the 2,201 filed were granted. This was slightly up on a percentage basis from the grant of 81 of some 2,090 applications decided in 2014. With respect to civil cases, the Court decided 1,051 motions for leave to appeal, of which 5.5% were granted. This percentage was down from the 7.7% that were granted in 2014.

In 2015, litigants and the public continued to benefit from the Court's tradition of prompt calendaring, hearing and disposition of appeals. The average time from argument or submission to disposition of an appeal decided in the normal course was 38 days; for all appeals, the average time from argument or submission to disposition was 34 days. The average period from filing a Notice of Appeal or an Order Granting Leave to Appeal to calendaring for oral argument was approximately 12 months. The average period from readiness (papers served and filed) to calendaring for oral argument was approximately seven months. These time periods were similar to those experienced in 2014.

With respect to budget matters, the Court and its ancillary agencies operated under an appropriation of $15.4 million for the fiscal year 2015–2016. The total request for the fiscal 2016-2017 remains at $15.4 million.

For the benefit of attorneys, the report also summarizes in the year-end review significant decisions which were issued in 2015. The decisions cover various areas of the civil law and several major decisions involving criminal law and procedure. In all, some 57 decisions are summarized with 26 involving criminal law matters.

The annual report issued by the Clerk of the Court provides a wealth of information regarding the activity of the New York Court of Appeals. It provides valuable and interesting reading, and criminal law practitioners should be aware of its highlights.

We thank Mr. Asiello, the Clerk of the Court, and Mr. Gary Spencer, Public Information Officer of the Court, and the Staff of the New York Court of Appeals for their work in preparing this important document and for expeditiously providing us with a copy so that we could summarize the highlights for our readers.

A Review of the 2015-2016 Term of the United States Supreme Court

By Spiros Tsimbinos

Introduction

Following the 2014-2015 term of the Court, when the Court had moved significantly to the liberal side, conservatives hoped that with the opening of the 2015-2016 term, which began in October, they could emerge victorious on several key matters that were on the Court's docket and once again move the Court back to a centrist or more conservative position. These hopes were effectively dashed when Justice Scalia died in February and the conservative block lost one of its strongest advocates. As a result, along with Justice Kennedy's continued drift toward the liberal grouping, the Court had another term where significant liberal victories occurred. Adam Liptak, Supreme Court analyst for the *New York Times* in his article of June 29, 2016, at page A-13, remarked "the Justices delivered liberal decisions at a rate not seen since the Warren Court."

The Significant Impact of Justice Scalia's Absence

The significant impact of Justice Scalia's absence was immediately felt beginning in late March when the Court reached a result in the case of *Friedrich v. California Teachers Assn*, 136 S. Ct. 1083 (March 29, 2016). During the prior term, the Court had begun to place some restrictions on the right of public service unions to collect dues from non-members. Also, during oral argument in which Justice Scalia had participated it appeared likely that the Court was ready to vote against the public service unions. However, on March 29, 2016 the Court issued a 4-4 split decision which allowed the lower court ruling in favor of the unions to remain intact.

Similarly, another 4-4 split decision in *United States v. Texas*, 136 S. Ct. _____ June 23, 2016) regarding President Obama's authority to stay deportation of several million illegal immigrants was clearly the result of Justice Scalia's absence. Although the 4-4 spit in this case allowed the lower court ruling staying President Obama's actions to remain in place, it prevented the expected firm decision condemning the President's actions which surely would have been issued if Justice Scalia had voted on the matter. Justice Scalia's presence on the Court would also have resulted in a 4-4 decision with respect to the affirmative action decision in *Fisher v. University of Texas*, 136 S. Ct. _____ (June 23, 2016) rather than the 4-3 decision which occurred.

Further, in *Zubik v. Burwell*, 136 S. Ct. 1557 (May 16, 2016) Justice Scalia's absence apparently caused the Court to issue an unusual decision in which it remitted the case back to the lower court and urged the parties to seek to reach an appropriate compromise. The case involved the controversial issue of whether the contraceptive coverage requirement in the Obama HealthCare Law violated the Religious Freedom Restoration Act of 1993.

Justice Scalia's absence has also affected the Court's workload. Usually the Court issues decisions in about 75-80 cases. This year, it issued only 70 decisions. It has also limited the number of certiorari petitions granted and appears to have shied away from accepting highly controversial matters. Thus, the number of major decisions next year is expected to be significantly less.

Criminal Law Decisions

The continued movement to the left also resulted in major victories for the criminal defense bar. In 16 decisions involving criminal law issues, which were covered in our *Newsletter*, the defense was successful in nine, the prosecution in only six and one was in the nature of a split decision. This represents a nearly 57% success rate for the defense, substantially higher than the 30% to 40% rate which has occurred in past years. The defense saw the Supreme Court strongly reinforce the *Batson* ruling by reversing a defendant's conviction where the Court concluded the prosecution had used race to remove black jurors (*Foster v. Chapman*, 135 S. Ct. 1737 (May 23, 2016)). The Court also struck down Florida's system for imposing death penalty sentences. (*Hurst v. Florida*, 136 S. Ct. 616, (2016) and reiterated that Brady violations would not be tolerated (*Wearry v. Cain*, 135 S. Ct. 1002 (March 7, 2016). In the closing phase of its term, the Court also condemned prosecution efforts to impose pre-trial forfeiture on defendant assets which could be utilized to pay defense counsel. (*Luis v. United States*, 136 S. Ct. 1083 (March 30, 2016). In its last day it also, in a unanimous decision, overturned the conviction of former Virginia Governor McDonnell and placed restrictions on the use of federal bribery statutes to convict public officials. (*McDonnell v. United States*).

In only one case did the prosecution obtain a significant law enforcement victory. That case was *Utah v. Strieff*, 136 S. Ct. ___ (June 20, 2016), where the Court in a 5-3 decision relaxed the exclusionary rule and upheld a police search which had occurred following an illegal stop. In that case, Justice Breyer broke away from the traditional liberal grouping to give law enforcement a victory that could have important consequences in the future.

Another Court decision, *Birchfield v. North Dakota*, 136 S. Ct. ____ (June 23, 2016), resulted in a somewhat split decision where the Court in a 5-3 ruling held that the

Fourth Amendment permitted warrantless breath tests incident to arrest for drunken driving but not warrantless blood tests.

The liberal group of Justices Sotomayor, Ginsburg, Kagan and Breyer continue to by and large vote as a cohesive group in support of pro-defense issues. Justices Alito and Thomas remain as the two strongest pro-prosecution justices.

The Diminishing Influence of Chief Justice Roberts

By virtue of his position as Chief Justice, and as a member of the conservative grouping, Justice Roberts in the past has exerted a great deal of influence on the Court and has been in the majority sometimes almost 80% or 90% of the time. This year, however, his percentage of decisions in the majority have fallen substantially below 80% and Justices Kennedy, Kagan and Breyer have all been in the majority in a greater number of cases than he has. This term, for example, the Chief Justice was unable to carry the day in the significant ruling regarding affirmative action or the ruling involving the Texas abortion regulations. In his article in the *New York Times*, legal analyst Adam Liptak made the following comment regarding Chief Justice Roberts:

> Justice Scalia's absence has handed Chief Justice Roberts the difficult task of steering his colleagues toward consensus in big cases. Over the past term, when he succeeded the resulting decisions were sometimes so narrow that they barely qualified as rulings. When he failed, the court either deadlocked or left him in dissent.

The Court Continues to Drift Left

According to an analysis reported in the *New York Times* of June 28, 2016 at page A12, the Court issued liberal decisions in 56% of cases as reported by leading political scientists. Justice Sotomayor appears to have been the most liberal justice during the past term, followed by Justices Ginsburg, Kagan and Breyer. The four liberal Justices continue to basically follow President Obama's agenda, even apparently causing the anemic result which occurred regarding the President's immigration deportation order, rather than the strong condemnation which was expected. Justice Kennedy continued to move more to the left of the Court, casting significant rulings in the affirmative action case as well as the Texas abortion matter. On the conservative side, Justice Thomas is considered the most conservative member of the Court, followed by Justice Alito. Justice Roberts continues to attempt to play a more centrist role, being considered less conservative than Justice Alito and Thomas but more conservative than Justice Kennedy. In the area of criminal law, Justice Sotomayor continues to be the most pro-defendant.

Conclusion

It appears likely that the Court will have to continue to operate with only eight Justices for several months after the 2016 Presidential Election. This will mean that fewer cases overall will be decided during the next term and that the number of significant decisions involving controversial decisions will be limited wherever possible. It is possible that due to the age of some of the Justices presently sitting, additional vacancies may occur and the polarization and political wrangling over the Court's future will continue. The future makeup of the United States Supreme Court as an important issue in the upcoming presidential election cannot be overstressed. Adam Liptak saw fit in his article at pages A-1 and A-13, to comment:

> Yet the court, which ended its term on Monday, remains in a period of great transition. With one vacant seat and the possibility of more to come, it is almost certainly entering a new era, the shape of which will depend on the outcome of the presidential election.

Although we subscribe to the concept of an independent judiciary and a separation of powers was created to foster such a situation, today, unfortunately, we really do not have an independent or impartial judiciary functioning in the Supreme Court. Rather, we have two often deadlocked groups having vastly different philosophies, viewpoints and agendas and vying for control. The partisanship and polarization was clearly evident this year with the failure to replace a vacancy because of political motives, several deadlocked 4-4 decisions on important issues, and even the spectacle of well-respected Justice Ginsburg injecting herself into the political arena by criticizing in public interviews and comments Republican Presidential Nominee Donald Trump. The situation was made even worse by the fact that Justice Ginsburg was placed on the Court by former President Bill Clinton, the husband of the present Democratic Nominee Hillary Clinton. Her violation of longstanding traditions and possibly judicial ethics evoked criticism of Justice Ginsburg even from some of her supporters. Although she subsequently expressed regrets for her remarks, the remarks in question illustrate the point we have reached and what is at stake.

It is important to recognize the vital role that the Court plays in the constitutional structure of our government and all citizens should be concerned about its future direction. We look forward to new and significant developments which are sure to occur.

United States Supreme Court News

By Spiros Tsimbinos

Recent Decisions in the Fields of Criminal and Constitutional Law

When the Court concluded its current term in late June, it had issued several decisions of significance in the fields of Criminal and Constitutional Law. The recent death of Justice Scalia and the ensuing complement on the Court of only eight Judges, often bitterly divided, had a serious impact on several of the decisions which were rendered.

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 applied 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 an unusual unanimous ruling on a criminal law issue, the Court concluded that the Constitutional guarantee of a speedy trial does not protect defendants from lengthy sentencing delays. Justice Ginsburg issued the decision for the Court and argued that there was a serious difference between trials which adjudicated guilt and sentencing which determined punishment. Justice Ginsburg wrote that a measure protecting the presumptively innocent, to wit, the speedy trial right, like other similarly aimed measures loses force upon conviction. She further added that the sole remedy for a violation of a speedy trial right is dismissal of the charges which would be an unjustified windfall in most cases to remedy sentencing delays by vacating validly obtained convictions.

Luna Torres v. Lynch, 136 S. Ct. 1619 (May 19, 2016)

In a 5-3 decision, the United States Supreme Court upheld the removal of a lawful permanent resident who was convicted of a State crime regarding attempted arson. Prosecutors had argued that the State conviction was equivalent to an aggravated felony for purposes of the Immigration Law. The defendant had argued that the federal crime of arson is different from the state version. He also relied upon the fact that he had spent 23 years living in New York as a permanent resident. Justice Kagan issued the opinion for the five-judge majority and stated that there simply was a technical difference between the Federal and State statutes and not a meaningful distinction. Therefore, deportation was within the government's discretion. Justice Sotomayor issued a dissenting opinion in which she was joined by Justices Thomas and Breyer.

Foster v. Chapman, 136 S. Ct. 1737 (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 counsel had 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 in the case was issued by the Court on May 23, 2016 that a Batson violation had occurred. Writing for the majority, Chief Justice Roberts commented that the prosecutors' claims that they excluded several blacks from the jury for legitimate reasons was not believable and that prosecutors were motivated in substantial part by race when they struck black citizens from the jury. Justice Thomas dissented and indicated that the defendant had confessed to the murder in question and he did not believe the Court should afford a death row inmate another opportunity to re-litigate a long final conviction.

Lynch v. Arizona, 136 S. Ct. 1818 (May 31, 2016)

In a 6-2 decision, the United States Supreme Court held that a state supreme court had committed reversible error in concluding that a capital defendant had no right to inform the jury of his parole ineligibility when the state supreme court had found that the state had put the defendant's future dangerousness at issue during his capital sentencing proceeding and acknowledged that under state law defendant's only alternative sentence to death was life imprisonment without parole. Justices Thomas and Alito dissented.

Williams v. Pennsylvania, 136 S. Ct. _____ (June 9, 2016)

In a 5-3 decision, the United States Supreme Court issued a major decision with respect to the obligation of judges to recuse themselves from certain cases. The Court ruled that judges who have a significant personal involvement in a case during their previous role as a prosecutor must recuse themselves when ruling on the case at a later stage. In the case at bar, a state supreme court justice who had been the District Attorney and who gave his official

approval to seek the death penalty in a prisoner's case denied the prisoner's motion for recusal and participated in the decision to deny post-conviction penalty phase relief. In a decision written by Justice Kennedy and joined in by Justices Kagan, Breyer, Ginsburg and Sotomayor the Court concluded that such action violated the due process clause of the Fourteenth Amendment. The majority opinion stressed that there must be an objective standard that requires recusal when the likelihood of bias on the part of the judge is too high to be constitutionally tolerable. In the case at bar, Justice Kennedy once again played the role of being the critical swing vote when he joined the four judges of the so-called liberal block to reach the conclusion herein. Chief Justice Roberts, joined by Justices Thomas and Alito, dissented. Chief Justice Roberts in dissent noted that the Pennsylvania judge in question had little to do with the original death penalty determination and Justice Thomas in his dissent argued that the specter of bias alone in a judicial proceeding is not a deprivation of due process. The decision in the case at bar may have an effect on hundreds of judges nationwide who joined the bench after serving as prosecutors in the same jurisdiction.

Commonwealth of Puerto Rico v. Luis M. Sanchez Valle, 136 S. Ct. _____ (June 9, 2016)

In an interesting case involving the issue of double jeopardy, the Court in a 6-2 decision ruled that the double jeopardy clause bars Puerto Rico and the United States from successively prosecuting a single person for the same conduct under a criminal laws. In the case at bar, the defendant had been convicted by Federal prosecutors of selling guns. Subsequently, Puerto Rico indicted him for the same violations. The defendant argued that in effect since Puerto Rico was a Federal territory and not an individual state, the concept of dual sovereignty would not apply. In the majority opinion delivered by Justice Kagan, the Court concluded that double jeopardy attached because Puerto Rico's power to prosecute was embedded in Federal soil and therefore could not qualify as a separate sovereign jurisdiction. The majority opinion was joined in by Chief Justice Roberts and Justice Kennedy, Ginsburg and Alito. Justice Thomas issued a separate concurring opinion and Justices Breyer and Sotomayor dissented.

Whole Woman's Health v. Hellerstedt, 136 S. Ct. _____ (June 27, 2016)

In the beginning of September, the Supreme Court granted certiorari with respect to an abortion rights case which involved 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 had 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. On June 27, 2016, in a 5-3 decision the Court invalidated the Texas law. In a majority opinion written by Justice Breyer, the Court determined that the Texas regulations fulfilled no real legitimate purpose and instead placed an undue burden on a woman's right to have access to abortion clinics. In this case, Justice Kennedy joined the Court's four liberal members to provide the majority ruling. Justices Thomas and Alito and Chief Justice Roberts dissented.

Fisher v. University of Texas at Austin, 136 S. Ct. _____ (June 23, 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. fter the case had made its way through the Texas court system, it was once again before the United States Supreme Court and the University of Texas was facing an equal protection challenge to its use of racial balances in undergraduate admissions decision. Opponents of affirmative action were viewing the new review by the United States Supreme Court as a possibility of eliminating affirmative action in enrolment decisions. Those challenging affirmative action have argued that the use of affirmative action treats individuals differently on the basis of race and therefore creates a constitutional violation. Based on past voting patterns, it appeared 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 seemed that another controversial decision was likely. On June 23, 2016, the Court issued its ruling and came down with a somewhat surprising result. In a 4-3 decision with Justice Kennedy joining the liberal group, the Court upheld the affirmative action program and held that using race as one factor in the selection process was not prohibited.

Chief Justice Roberts and Justices Alito and Thomas dissented. Justice Kagan took no part in the decision since while serving as Solicitor General she had worked on the matter.

United States v. Texas, 136 S. Ct. _____ (June 23, 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 involved the extent of executive power versus legislative authority. The State of Texas had argued that the President's action was unconstitutional in that it covers an area which can only be dealt with by congressional action. Texas had 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 had led the Supreme Court to decide to hear the matter and oral argument was held on April 18, 2016. During oral argument, it appeared that a 4-4 deadlock was possible. In fact, on June 23, 2016, in a brief 4-4 decision, the Court left in place a lower court ruling which had granted a stay on the President's Program. As a result the future disposition of this issue remains somewhat in limbo.

Birchfield v. North Dakota, 136 S. Ct. _____ (June 23, 2016)

Bernard v. Minnesota

Beylund v. Levi

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 or a breath test. On June 23, 2016, the Court in a 5-3 decision issued a somewhat split ruling and held that the Fourth Amendment permits warrantless breath tests incident to arrests for drunken driving but not warrantless blood tests. The majority concluded that blood tests are more intrusive on the person requiring the piercing of skin and extracting a part of the subject's body. The physical intrusion resulting from breath tests is almost negligible. The majority opinion was issued by Justice Alito. Justices Sotomayor, Ginsburg and Thomas issued opinions dissenting in part and concurring in part.

McDonnell v. United States, 136 S. Ct. _____ (June 27, 2016)

On April 27, 2016, the Court heard oral argument in the case involving the conviction of former Virginia Governor Bob McDonnell on political corruption charges. During oral argument, it appeared that Justices from both the liberal and conservative sides were seriously concerned about the constitutionality of the statues under which the Governor was convicted. A serious claim was being made that the Federal Statutes involved were unconstitutionally vague and too broadly written. On June 27, 2016, the Court in a unanimous decision reversed the conviction and sent the case back for a re-trial. The Court concluded that the instructions given to the jury were too vague and that in order to trigger the corruption statute in question, an official must make or agree to make a decision or pressure another official to do so implicitly or explicitly. Such actions as arranging for constituents to contact other officials on their behalf or to arrange meetings on normal political events are not encompassed by the corruption statute. The Court's decision serves to narrow the scope of political corruption matters and may have some effect on the recent convictions of former leaders of the New York State Legislature, Dean Skelos and Sheldon Silver.

Utah v. Strieff, 136 S. Ct. _____ (June 20, 2016)

In a 5-3 decision, the United States Supreme Court in effect gave police more power to stop people on the street and question them even when it is not clear that they have done anything wrong. In an opinion written by Justice Thomas the Justices relaxed the exclusionary rule and upheld the use of drug evidence found on a Utah man who was stopped illegally by a police officer. Because the defendant had an outstanding warrant for a traffic violation, the illegal stop was ignored. The majority held that the drug evidence was admissible because the existence of a valid prior arrest warrant "attenuated" the connection between the illegal stop and the evidence seized. Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance. Justices Sotomayor, Ginsburg and Kagan dissented. Justice Sotomayor issued a strong dissent in which she argued that the Court's majority decision would allow the police to stop anyone on the street, demand identification and check for an outstanding traffic warrant even if they are doing nothing wrong. In a somewhat unusual occurrence, Justice Breyer broke from the usual liberal grouping to supply the majority ruling.

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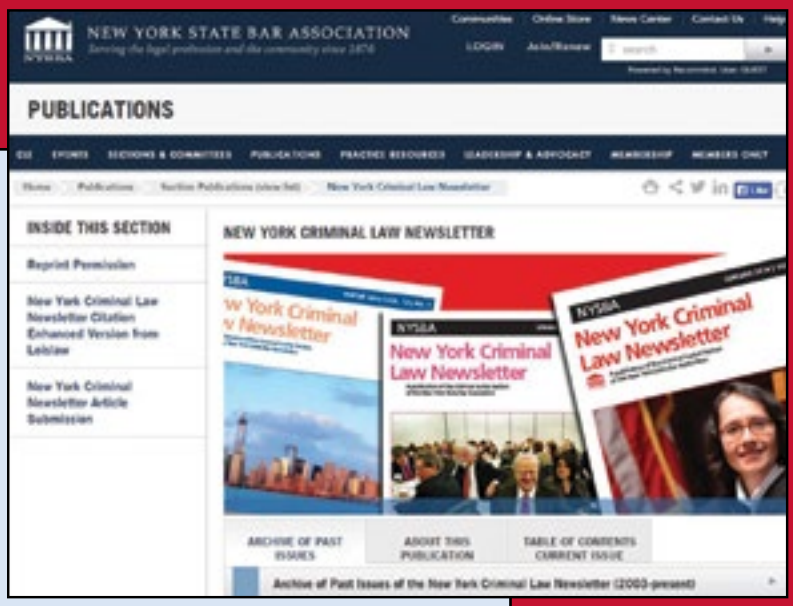

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