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New York Criminal Law Newsletter

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

In This Issue

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Message from the Chair

Welcome to my first Chair's Message in the Criminal Justice Section's *New York Criminal Law Newsletter*. Most of you have been loyal members of our Section. Many of you are also active in the "business" of our Section. Thank you.

I am excited to begin my tenure as CJS Chair with a strategic planning session that will take place early this fall in Nassau County. It is my hope that the leadership of this Section can focus on redefining the ways in which we deliver CLE and other member benefits. We live in an ever changing technological world and you have many other choices in providers of CLE. Our goal will be to examine how the Criminal Justice Section can be your "go to" source for all your criminal law practice needs. To that end, I invite all of you to email me (tcs@stancliftlaw.com) any of your ideas, comments, or concerns.

Why the Criminal Justice Section?

No other Section of the New York State Bar Association, nor any other organization in my view, embodies such diverse perspectives on a single area of law. We are a unique blend of practitioners from varied walks of life, professional backgrounds, levels of experience, and ethnic diversity. We are judges. We are public defenders. We are private defense counsel. We are prosecutors. We are even civil practitioners who love the criminal law. I believe this diversity allows us an inimitable environment to challenge each other and debate the critical issues facing criminal justice in New York. I also believe that a significant part of this organization's duty is to improve your professional experience as a criminal lawyer. This Section should provide you with skills training, resources and professional development opportunities. I certainly have benefited greatly from the awesome influence of the venerable members of this Section since I was a young lawyer. I am honored to be your Chair and to serve you together with the other officers: Sherry Levin Wallach (Former Chair), Robert Masters (Chair-Elect), David Cohen (Secretary) and Leah Nowotarski (Treasurer). Together with our distinguished Executive Committee, we endeavor to confront injustice, promote diversity, influence legislation, and learn from each other.

Our foremost objective is to carry on the Section's traditions of excellence. Our publications and CLE programs have always been among the best that the New York State Bar Association has to offer. The manner in which we continue these traditions may change in the coming year or so depending on the outcome of the strategic planning retreat this fall. Every organization has traditions, but it also needs new goals and new initiatives from time to time. As a former Chair of the Young Lawyers Section, I appreciate fresh new ideas that take into account the time and budgetary constraints of today's criminal lawyer. Again, please forward any ideas!

How Can You Be Involved?

Get a seat at the table. Decisions are made by those that show up. Contact me with your area of interest and we can find a spot on a committee. Come to our meetings. Attend and participate in our programs. The fall program will be on October 6, 2017 at the Nassau County Bar Association. More information about that meeting and program will be coming to you soon. As an active member you can also help shape the future of our profession by helping us advance our initiatives.

We seek to continue some of the initiatives advocated over the last two years by former Chair Sherry Levin Wallach. These initiatives include legislation for the sealing of convictions, addressing wrongful convictions, funding for indigent legal services, raising the age of criminal responsibility, counsel at first appearance, and bail reform. Our efforts in these areas have demonstrated that your involvement can lead to real change. Despite these successes, however, we still have a great deal of work to do to ensure the implementation of these reforms will be applied fairly and effectively. I will be calling upon all active members to play a role in advancing the objectives of this section, as well as the initiatives of the New York State Bar Association that will be identified by our President, Sharon Stern Gerstman.

Our biggest project in the coming years will be Discovery Reform. An overhaul of New York's criminal discovery rules will help innocent or over-charged defendants to fairly prepare for trial, and it will encourage guilty defendants to plead guilty without needless and costly delays. I expect nothing less than a healthy professional debate among our diverse leadership on how best to accomplish this reform.

As I look forward with anticipation to the exciting work to be done this year and next, I feel trepidation because it seems like times are changing for many criminal lawyers. I understand that with change comes challenge. If you want change, I challenge you to be an active member. Our membership is down year after year. The reason for the decrease in membership, in my view, is a fundamental disconnect between the Section's "business" and our existing members' and potential members' professional needs. I hope to explore solutions to these challenges in the coming year. Thank you for the privilege of serving as your Chair.

Tucker C. Stanclift

Message from the Editor

One of the benefits of being the editor of this publication is that four times a year I have an opportunity to interact with contributors and our Section Chair to put together an informative and insightful issue. And, unfortunately, one of the drawbacks is that there are only four opportunities to present the *New York Criminal Law Newsletter* to our membership. One of our goals for the coming year is to deliver more online content to the Criminal Justice Section to keep you current on important developments and news.

For now, however, we have to deal with the realities of our publication schedule. We acknowledge in this issue the passing of Gus Newman last May. Roger B. Adler's wonderful tribute to Gus in the pages that follow provides our readers with an overview of a great and influential career. In the late 1980s, I had the privilege of working with Gus when I was between the Bronx and Brooklyn District Attorney's Offices. Like so many others who knew him, I found his professionalism and dedication so impressive. Gus looked at all aspects of a case and examined angles that mere mortals rarely recognize. But, to me, more than anything, Gus had **the voice**. Gus was one of those rare lawyers who captured your attention from his very first words. Of course, it didn't hurt that he was so thoughtful in what he said. As Roger so aptly describes it, Gus was a legend.

This issue contains another piece from Roger Adler, a review of a book that is a must-read for all of our members. Scott Iseman has written a piece on student disciplinary practice at colleges that most certainly presents issues that members of our Section have had to address when dealing with clients who are facing criminal and civil proceedings. We also have a review of the most recent Court of Appeals decision and a column from Spiros Tsimbinos wrapping up the Supreme Court cases from this year.

Not every article looks back. Judge Brunetti offers important insights on the new legislation concerning video recording of a defendant's statements. This issue also contains our first Chair's Message from Tucker Stanclift, our new Section Chair. Tucker has been at the reins for a while now, and his message reveals that he has great plans for his tenure. Welcome to Tucker. And, again, to Sherry Levin Wallach, we will miss you but we know that you're still an important member of our Executive Committee.

Jay Shapiro

Defining Substantial Evidence of Affirmative Consent in the Developing Legal World of College Disciplinary Proceedings

By Scott W. Iseman

Last year New York passed the "Enough is Enough" law requiring all private and public colleges in New York to adopt a uniform definition of affirmative consent with respect to sexual activity by college students.[1] This spring the Appellate Division, Third Department, decided two Article 78 petitions which challenged a college's determination of student conduct hearings where affirmative consent, or the lack thereof, was the primary issue. These separate Article 78 petitions provided the Appellate Division its first opportunities to evaluate whether there was substantial evidence of a lack of affirmative consent. In *Michael Weber v. SUNY Cortland, et al*, 2017 NY App. Div. Lexis 3747 (May 11, 2017), the Third Department upheld SUNY Cortland's determination that there was no affirmative consent but in *Haug v. SUNY Potsdam,* 149 A.D.3d 1200 (3d Dept. 2017), it overturned SUNY Potsdam's decision and held there was not substantial evidence of a lack of affirmative consent.

This article reviews these decisions, attempts to reconcile their holdings and provides practice points for attorneys representing both survivors and accused students during college disciplinary proceedings and in subsequent litigation challenging a college's determination in a court of law.

In both *Weber* and *Haug* the Appellate Division confronted fact patterns that are all too common throughout New York and, indeed, the United States. Petitioners (both accused male college students) socialized with female college classmates (the Complainants) and there was some level of mutual flirtation and consensual physical and sexual contact. Petitioners and Complainants eventually retire to a private room where there is intercourse. Both Complainants reported that they "froze" when confronted with the prospect of intercourse, and during intercourse, but both promptly reported that the intercourse was not consensual. After the Complainants' prompt reports, Title IX investigations and student disciplinary hearings began. Petitioners testified in their own defense and each was found responsible for some form of sexual assault offense. In *Weber*, the determination (which had been annulled by a previous Article 78 proceeding) was upheld, but in *Haug*, the determination was annulled. Obviously, the details matter, so let's dig in.

In *Weber*, the Complainant testified at the hearing and presented evidence that (1) she did not want to return to Petitioner's room; (2) she sent text messages to her friends stating that she thought she was about to be raped by Petitioner; (3) Petitioner did not ask her if she wanted to have sex, but only if she wanted him to wear a condom (intercourse appeared unavoidable to her at this point); (4) Petitioner knocked her cell phone out of her hand when a friend called Complainant and Complainant told Petitioner that she needed to leave; (5) Petitioner removed her clothes; and (6) she froze and closed her eyes during intercourse. In his defense, Petitioner stated he thought, based on (a) Complainant previously and consensually dancing with him at a bar; (b) consensually performing oral sex on him earlier in the evening; (c) returning to his apartment; and (d) telling him to use a condom, that he assumed she wanted to have intercourse. In weighing their testimony, the Court determined there was substantial evidence supporting SUNY Cortland's determination that there was no affirmative consent and Petitioner had committed rape and sexual assault as defined by SUNY Cortland's student regulations.

In *Haug*, Complaint and Petitioner, who had a pre-existing friendship, encountered one another on campus and Complainant invited Petitioner back to her room. Petitioner locked the door and the two began "making out" on Complainant's bed. When Petitioner suggested they have sex, Complainant said nothing but took off her shirt. Petitioner then removed her pants and they had intercourse during which the Complainant says she "froze up" and "did not respond to Petitioner's advances." *Haug*, 149 A.D.3d at 1201-02. Complainant promptly reported the incident but refused to name her assailant. Petitioner was later identified through an anonymous report.

Significantly, Complainant did not testify at the subsequent hearing. All evidence regarding the alleged assault was hearsay evidence presented through investigative reports and college administration witnesses.

Petitioner, testifying in his own defense, offered additional facts that Complainant told him "not to worry" about not using a condom; that Complainant put herself on top of Petitioner during intercourse and, at the conclusion, asked Petitioner if he had fun. SUNY Potsdam determined that the Complainant had not provided affirmative consent and found Petitioner responsible for sexual assault. The Appellate Division, in a 3-2 decision, annulled

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that determination and found that there was not substantial evidence of a lack of affirmative consent.

How do we reconcile these two decisions and what are the takeaways?

First, in *Haug*, the Complainant did not testify and the Court clearly discounted the hearsay evidence presented by SUNY Cortland, when compared to the in-person testimony provided by Petitioner. The Court determined that it was not clear that "a reasonable person could find from these hearsay accounts an absence of behavior that indicated[d], without doubt to either party, a mutual agreement to participate in sexual intercourse." *Haug*, 149 A.D.3d at 1202-03 (internal quotations and citations omitted). The Court went on to find that Petitioner's testimony "seriously controverted" the hearsay evidence and as a result, "common sense and elemental fairness suggest that [seriously controverted hearsay evidence] may not constitute the substantial evidence necessary to support the [challenged] determination." *Haug*, 149 A.D.3d at 1203 citing *McGillicuddy's Tap House, Ltd. v. NYS Liq. Auth.*, 57 A.D.3d 1052, 1053 (2015). The Petitioner in *Haug* clearly benefited from the Complainant's decision not to testify and his decision to testify in his defense.

Second, the Appellate Division had serious reservations about the manner in which SUNY Cortland conducted the hearing. While the Court provided little detail, it commented that many of the procedures employed by the hearing board gave it "pause"—intimating that they would have critiqued the process had Petitioner asserted a timely objection to those issues. *Id*. at 1201. Similarly, the Court also went out of its way to criticize SUNY Potsdam for enhancing Petitioner's punishment after he appealed the Board's decision. *Id*. 1203.

In *Weber*, the Petitioner obviously did not, and perhaps could not, offer any evidence that Complainant consented except for her conduct (the "preceding events") that were temporally attenuated to the intercourse. In short, Petitioner offered nothing to challenge Complainant's account that she froze and did not consent. Indeed, the Court found that basic facts were "uncontested." *Weber*, 2017 NY App. Div. Lexis 3747 at *3. Moreover, the Complainant testified during the hearing, which, no doubt, improved the credibility of her testimony.

With these considerations in mind, there are a number of practice points for those who represent accused students at disciplinary proceedings. First, the prompt and thorough preservation of errors and objections is critical in these matters. The Court in *Haug* refused to reach multiple arguments (that may have been meritorious) because the issues were not properly preserved. Common issues that require preservation in student disciplinary investigations and hearings include: (1) notice of the allegations; (2) right to counsel and/or advisor; (3) fair treatment under the school's procedures and the proper adherence to said procedures; (4) right to confront witnesses and challenge the reliability of evidence presented; (5) right to present a complete and meaningful defense; (6) the use of credibility assessments by the school's investigators; and (7) composition and right to challenge/*voir dire* the hearing board. When these and other issues arise, the attorney should make a written record of their objections at every stage of the proceeding (investigation, hearing, and appeal) to the Title IX coordinator, the liaison for the disciplinary board and the school's official who handles any internal review/appeal process.

"Counsel for students need to remember that student disciplinary proceedings, despite their dramatic consequences, are administrative, not criminal or even civil."

While these issues need to be preserved, *Weber* provides a cautionary tale about how difficult it is to prevail on these issues even if they are preserved. For example, in denying Petitioner's request to annul the college's determination for various Due Process and Constitutional deprivations, the Appellate Division emphasized that there is no general constitutional right to discovery in administrative proceedings and that there is only a "limited right" to cross examine adverse witnesses. *Weber*, 2017 NY App. Div. Lexis 3747 at *4.

Counsel for students need to remember that student disciplinary proceedings, despite their dramatic consequences, are administrative, not criminal or even civil. Students are not afforded the same level of rights and remedies as a criminal proceeding or the scope of discovery and opportunity to challenge a matter as in a civil proceeding. As a result, when challenging a college's determination even casual adherence to Due Process and other critically important rights can survive judicial review because colleges are afforded considerable discretion to draft and implement their procedures.

Next, whether the accused student testifies at a disciplinary hearing should be carefully considered rather than immediately dismissed as the prudent attorney might initially be inclined to do. In *Haug*, Petitioner obviously added facts that controverted the allegations and his testimony was critical to overturning the college's de-

termination. Without his testimony, the hearsay evidence alone may have been sufficient. After all, two dissenting Justices thought so despite his testimony.

Generally, the prudent attorney never exposes a client to speaking when the statements could later be used against the client in a criminal matter, as is possible with student disciplinary proceedings involving allegations of sexual assault, drug use and other prohibited conduct. *Haug*, however, gives a good reason for accused students to testify and participate in investigative interviews provided the testimony seriously controverts the facts underlying the allegation. When *Haug* is compared to *Weber* we see that testimony and evidence must focus on the Complainant's specific actions (i.e., conduct and statements) and be accompanied with an explanation of why those actions led the accused to reasonably believe there was consent for that specific sexual encounter.

Critically, testimony that one *assumed* or merely "thought" there was consent is, in fact, evidence that there was *not* affirmative consent. While caution is still required, the student's testimony may be the best and perhaps the only evidence to controvert the allegations.

For those providing counsel and advice to survivors of sexual violence or other misconduct, *Haug* and *Weber* also provide valuable lessons. No survivor wants to see their assailant exonerated or for the matter to drag on while attorneys and courts scrutinize the intimate details of a traumatic experience. Survivors respond differently and understanding what their goals are is essential to effective representation. Some survivors will want to speak in person as often as possible and others will want nothing to do with the process. Counsel's job in these matters is more than providing strict legal advice. Rather, counsel need to ensure that colleges take the allegations seriously; that there is a thorough and proper investigation and hearing; and that the survivors are provided with the accommodations and resources they are entitled to on campus generally and particularly throughout the investigation and hearing process.

These accommodations include changing of room assignments, class schedules, access to health care and mental health services and the opportunity to report to law enforcement. During disciplinary proceedings survivors also have the right to be separated from their assailant, have an advocate with them, and myriad other accommodations to ensure their comfort and ability to fully participate. Such accommodations and rights should be aggressively pursued and a college's failure to provide them may result in a private right of action for the survivor against the college.

Whether the survivor or the accused, students need experienced legal representation immediately and throughout these investigations and proceedings because the consequences are extraordinary: expulsion; permanent disciplinary marks on transcripts; forfeiture of scholarships and financial aid; loss of tuition and credits; and irreparable harm to one's reputation and job prospects for the accused. For survivors, the consequences are no less significant as they can be re-traumatized throughout the process and suffer irreparable emotional, psychological and reputational harm on top of the trauma they already experienced. While some colleges provide faculty/administrative advisors to survivors and the accused, these advisors, however well intentioned, rarely know how to develop evidence, how to properly preserve issues for challenge in a court of law or to prepare an accused student or a survivor for an adversarial hearing. Many times, students attempt to initially defend and prepare themselves, sometimes with the assistance of their parents or a college advisor, and often only compound their problems. Such early missteps are extremely difficult to reverse or correct.

"Critically, testimony that one assumed *or merely 'thought' there was consent is, in fact, evidence that there was* not *affirmative consent."*

Finally, student disciplinary proceedings are being litigated with increased frequency in state and federal courts by accused and survivors alike. In federal courts aggrieved students are successfully bringing claims under breach of contract theories and under gender discrimination claims under Titles VII and IX. [2] Due to the increasing frequency of this litigation and the Appellate Division's decision in *Haug*, it is fair to say that student disciplinary outcomes are on the courts' radar and will continue to be a ripe target for law making as more students challenge the process and the decisions they are subjected to.

Endnotes

1. A detailed summary is available here: https://www.ny.gov/programs/enough-enough-combating-sexual-assault-college-campuses.
2. Student Handbooks or Codes of Conduct are interpreted as a contract binding the school and student. When the school fails to live up to the terms of the agreement (fair proceedings, certain processes, etc), students can have a colorable claim. *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 481 (S.D.N.Y. 2015). Students also may have equal protection/sexual discrimination claims under Titles VII and IX. *See, e.g., Doe v. Columbia Univ.*, 831 F.3d 46 (S.D.N.Y. 2016).

Video Recording of Interrogations Circa April 1, 2018

By Judge John J. Brunetti

I. Introduction

It will be Spring 2018 before you know it. That is when New York's newly enacted statute that requires video recording of custodial interrogations takes effect. This article discusses existing law, the new statute, its apparent flaws and ways to remedy them in harmony with apparent legislative intent.

A. Existing Law

As of now, the case law in New York is: "There is no Federal or State due process requirement that interrogations and confessions be electronically recorded."[1] Since existing case law imposes no duty on police to videotape or audiotape a *Miranda* rights advisement or an interrogation, a jury instruction that the jury may draw an adverse inference from the police's failure to record an interview is not warranted.[2]

In 2015, the Court of Appeals expressly held that "the common law [does not] invariably require a court to issue an adverse inference instruction against the People at trial based solely on the police's failure to electronically record the custodial interrogation of a defendant," even when the police had "equipment at their disposal to record [that] interrogation[]."[3]

B. The New Statute[4]

1. Criminal Courts

The new statute applies to all statements made on or after April 1, 2018, during a custodial interrogation conducted in a "detention facility"[5] that "involves" selected felony offenses. The statute requires that "the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded by an appropriate video recording device."[6] The selected felonies are non-drug Class A felonies, the sex offense felonies defined in Penal Law §§ 130.95 and 130.96, and any felony in Penal Law Article 125 (homicides) or Article 130 (sex offenses) that is defined by Penal Law § 70.02 as a class B violent felony.[7] As a result, the statute does not apply to felonies such as robbery in the first degree, manslaughter in the second degree and rape in the second degree.

There are some flaws in this statute. First, the obligation to video record is triggered whenever the interrogation "involves" one of the specified felonies. Therefore, the statute is not limited to arrests or prosecutions for the specified felonies. Adding to the confusion is the change of the verb "involve" to "occur" in one of the statutory examples of good cause for failing to video record, i.e: "If the statement is made during an interrogation that is conducted when the interviewer is unaware that a qualifying offense has occurred."[8] The standard "occurrence of a qualifying offense" may be difficult to apply because it is not uncommon for police to have probable cause to arrest a person in connection with a matter, yet not know what specific offense "has occurred."

Suggestion[9] *for both sections:* "Whenever the police have probable cause to believe a person has committed a qualifying offense."

Another flaw in the statute is found in the "good cause" provision which is phrased in the present tense. It provides that "upon a showing of good cause by the prosecutor, the custodial interrogation *need not be* recorded."[10] It is probably meant to say "need not have been," but it does not say that. Making matters worse, all of the good cause factors are phrased in the present tense, e.g., "if electronic equipment is not available." The word "is" in each factor was probably meant to be "was" but it does not say that.[11] The way the statute now reads, a prosecutor needs to show good cause for failure to video record to an unnamed arbiter or tribunal before the interrogation begins.

Suggestion: Change every verb in the entire section from present tense to past tense.

Another flaw is found in CPL § 60.45(b), which provides that no statement of a defendant "shall be subject to a motion to suppress pursuant to subdivision three of section 710.20 based solely upon the failure to video record such interrogation" as required. What is likely meant is that "no statement shall be subject to a suppression order," but that is not what the statute says.

CPL § 710.60(1) allows a defendant to move to suppress a statement simply on the grounds of involuntariness as defined in CPL § 60.45, and no factual allegations are required for such a motion as per CPL § 710.60()(b). Therefore, this provision as written would rarely be applicable.

Suggestion: Re-phrase to make clear that the failure to video record may *not* be the sole basis for the judge's order suppressing a statement.

Another flaw is found in the statutory language addressing the adverse inference instruction when there is a failure to video record. CPL § 60.45(d) provides that upon a defendant's request,

> the court must instruct the jury that the people's failure to record the defendant's confession, admission or other state-

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> ment as required by this section may be weighed as a factor, but not as the sole factor, in determining whether such confession, admission or other statement was voluntarily made, or was made at all.

This language tells the jury what factors it may "weigh" in determining voluntariness. It does not tell the jury that there are any restrictions on which of those factors it may ultimately rely upon in finding that the People did not prove voluntariness beyond a reasonable doubt.

Suggestion: Re-phrase to make clear that the failure to video record may *not* be the sole basis for the jury's finding that the statement was not voluntary.

2. Family Courts

Video recording of interrogations is to be required by Family Court Act 344.2, which incorporates CPL § 60.45(3) by reference.[12] The provision begins by making reference to the interrogation of a "respondent," but then changes the reference to "the individual being questioned." Again, the present tense is used: "Where a respondent is subject to custodial interrogation." Since Family Court Act 301.2(2) defines "Respondent" as meaning "the person against whom a juvenile delinquency petition is filed pursuant to section 310.1," the video recording statute, by its terms, does not apply to a juvenile who has been taken into custody pursuant to FCA 305.2(3), but not yet charged by petition.

Suggestions: (1) Change to past tense; (2) Replace "respondent" with "an individual who has been taken into custody pursuant to Family Court Act 305.2."

Endnotes

1. *People v. Martin*, 294 A.D.2d 850, 741 N.Y.S.2d 763 (4th Dep't 2003), *lv. den.*, 749 N.Y.S.2d 9 (2002); *People v. Falkenstein*, 288 A.D.2d 922, 732 N.Y.S.2d 817 (4th Dep't 2001), *lv. den.*, 97 N.Y.2d 704, 739 N.Y.S.2d 104 (2002), *accord People v. Ferguson*, 285 A.D.2d 901, 902, 729 N.Y.S.2d 799 (3d Dep't 2000), *lv. den.*, 96 N.Y.2d 939, 733 N.Y.S.2d 379 (2001) ("[T]here is no authority in this State which supports the defendant's argument that failure to electronically record his statement requires that it be suppressed. We find no violation of due process rights."); *People v. Grimes*, 191 A.D.2d 745, 746, 594 N.Y.S.2d 392 (3d Dep't 1993), *lv. den.*, 81 N.Y.2d 1073, 601 N.Y.S.2d 593 (1993) ("Nor does defendant cite to any authority imposing an obligation on the police to prepare video or audio tapes of their questioning of a suspect, and we are aware of none.").
2. *People v. Hammons*, 68 A.D.3d 1800, 892 N.Y.S.2d 690 (4th Dep't 2009).
3. *People v. Durant*, 23 N.Y.S.3d 98, 26 N.Y.3d 341, 44 N.E.3d 173 (2015).
4. Chapter 59 of the Laws of 2017, Part VVV, S2009-C, A3009-C.
5. The term "detention facility" shall mean a police station, correctional facility, holding facility for prisoners, prosecutor's office or other facility where persons are held in detention in connection with criminal charges that have been or may be filed against them.
6. CPL § 60.45(3)(a):

   > shall be recorded by an appropriate video recording device if the interrogation involves a class A-1 felony, except one defined in article two hundred twenty of the penal law; felony offenses defined in section 130.95 and 130.96 of the penal law; or a felony offense defined in article one hundred twenty-five or one hundred thirty of such law that is defined as a class B violent felony offense in section 70.02 of the penal law.

7. Penal Law § 70.20(a) Class B violent felony offenses—Article 125 and 130: an attempt to commit the class A-I felonies of murder in the second degree as defined in section 125.25, manslaughter in the first degree as defined in section 125.20, aggravated manslaughter in the first degree as defined in section 125.22, rape in the first degree as defined in section 130.35, criminal sexual act in the first degree as defined in section 130.50, aggravated sexual abuse in the first degree as defined in section 130.70, course of sexual conduct against a child in the first degree as defined in section 130.75.40.
8. CPL § 60.45(3[c](v).
9. All "suggestions" are made to have the wording of the statute to be consistent with what appears to be the legislative intent, not to suggest a change or addition to substance.
10. CPL § 60.45[c]: Notwithstanding the requirement of paragraph (a) of this subdivision, upon a showing of good cause by the prosecutor, the custodial interrogation need not be recorded.
11. CPL § 60.45[c]: Good cause shall include, but not be limited to: (i) If electronic recording equipment malfunctions. (ii) If electronic recording equipment is not available because it was otherwise being used.(iii) If statements are made in response to questions that are routinely asked during arrest processing. (iv) If the statement is spontaneously made by the suspect and not in response to police questioning.(v) If the statement is made during an interrogation that is conducted when the interviewer is unaware that a qualifying offense has occurred.(vi) If the statement is made at a location other than the "interview room" because the suspect cannot be brought to such room, e.g., the suspect is in a hospital or the suspect is out of state and that state is not governed by a law requiring the recordation of an interrogation. (vii) If the statement is made after a suspect has refused to participate in the interrogation if it is recorded, and appropriate effort to document such refusal is made. (viii) If such statement is not recorded as a result of an inadvertent error or oversight, not the result of any intentional conduct by law enforcement personnel. (ix) If it is law enforcement's reasonable belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant.(x) If such statement is made at a location not equipped with a video recording device and the reason for using that location is not to subvert the intent of the law. For purposes of this section, the term "location" shall include those locations specified in paragraph (b) of subdivision four of section 305.2 of the family court act.
12. Subdivision 3 of section 344.2 of the Family Court Act is renumbered subdivision 4 and a new subdivision 3 is added to read as follows: 3. Where a respondent is subject to custodial interrogation by a public servant at a facility specified in subdivision four of section 305.2 of this article, the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded and governed in accordance with the provisions of paragraphs (a), (b), (c), (d) and (e) of subdivision three of section 60.45 of the criminal procedure law.

Tribute to Gus Newman

By Roger Bennet Adler

The May 1, 2017 death of Gustave (Gus) H. Newman from pancreatic cancer at age 90 brought down the litigative curtain on a man who undoubtedly earned the accolades as New York City's greatest (and most effective) trial attorney of the last half century. It was little short of a stupendous journey for a boy from Brownsville, Brooklyn who felt both the cruel effects of the Great Depression, and the uncertainties of World War II.

Born in a hardscrabble working class neighborhood and growing up in the somewhat cloistered "shtetl-like" world of Brownsville, where Yiddish was then openly spoken in the streets, he left the tough streets surrounding Hopkinson Avenue to graduate from Tilden High School in East Flatbush during World War II, and then enrolled in Brooklyn College. Drafted into the Army, he was one of many thousands of young men who answered his nation's call, and, following basic training, was dispatched on a troop ship bound for the Far East to serve as part of an anticipated invasion force destined for brutal combat with Japan on the home island.

Fortuitously for both Gus, and his military colleagues, President Harry S. Truman authorized the use of atomic weapons on Hiroshima and Nagasaki, forcing Japan's surrender. Estimates of allied casualties provided to General George Marshall had predicted over one million possible casualties upon an invasion. Fate had clearly intervened (in a good way). Discharged from military service, Gus returned home to New York City and enrolled in New York University (N.Y.U.). He graduated, and then attended N.Y.U. Law School, quickly gaining admission to the bar.

While many colleagues in the defense bar knew Gus as the consummate defense attorney, the reality was that he was initially a civil lawyer for many years, practicing with Bernie Jeffrey at 186 Joralemon Street, just off Court Street, just steps from the Brooklyn Bar Association (of which he was a longtime member). It was to be the formation of the partnership with the legendary late Jacob (Jack) Evseroff, after Jack resigned from his position as a Kings County Assistant District Attorney (ADA), assigned to the then County Court trial part of the legendary Judge Samuel Liebowitz.

Jack was clearly (and initially) the firm's "Big Enchilada," who both attracted (and controlled) the criminal clients at what later became "Evseroff, Newman and Sonenshine," when Bill Sonenshine, a great appellate lawyer ("law man") left the Brooklyn District Attorney's Office and joined Jack and Gus, creating a multifaceted and awesome criminal defense firm which could both "do it all," and "do it well."

It was to be Gus's good fortune that Jack preferred trying cases in State Court, and was only too willing to assign (push off) the cases in Federal Court to Gus, perceiving them to be challenging and "unwinnable." While a federal indictment remains a daunting charge to defend against, Gus found newer ways to create defense strategies which effectively squeezed testimonial concessions from Government witnesses, and, like flowerings in the crevices of cliffs, supported jury findings of "reasonable doubt."

With the criminal law revolution sparked by the "Warren Court," it was a golden age for criminal defense lawyers, as each week sparked Monday morning hand downs of decisions recognizing new constitutional protections, which continued until President Nixon's appointees under Chief Justice Burger began to change the Court's criminal justice philosophy to make it more law enforcement favorable.

Evseroff, Newman and Sonenshine (EN&S) continued to thrive and prosper. Into the mid-1970s, it was likely few major criminal matters which did not attract the attention (and retention) of EN&S. By then, tension developed in the firm as Gus began to perceive that a mid-Manhattan office would expand EN&S's access to more significant (and better paying) federal criminal cases. When Jack backed out, Gus confronted whether to stay in their successful Brooklyn warren of offices or "take a crack" at Manhattan.

Gus decided to go, and he moved to midtown Manhattan, renting space with the talented and charismatic James LaRossa, Esq. (LaRossa, Shargel & Fischetti). An early case was the defense of Rabbi Bernard Bergman in connection with criminal charges brought by the Special Nursing Home Prosecutor Charles (Joe) Hynes. Gus represented the Rabbi, along with Washington D.C. lawyer Nathan Lewin, Esq., and a young Jamie Gorelick, Esq.[1] (later to be Deputy U.S. Attorney General).

It was during the trial of Anthony Scotto (and his cousin, Anthony Anastasia) in Manhattan Federal Court before the late Hon. Charles Stewart that Gus did battle with then U.S. Attorney Robert Fiske. The defendants "went down," but not without mounting a vigorous

(and very respectable) defense to what was originally thought to be, by many, a "slam dunk" prosecution.

If Edward Bennet Williams was the "man to see" in Washington, D.C., Gus was now squarely on the radar of top New York City white collar lawyers. When then-District Attorney Morgenthau investigated B.C.C.I. Bank and indicted former Defense Department leader (and Washington D.C. "wise man" Clarke Clifford, Esq.), Gus was retained to represent Clifford's protégé, Robert Altman, Esq.

The case proceeded to trial in Manhattan Criminal Term before Justice Bradley and a jury, and ended in a stunning defense victory for Altman. It effectively shielded Clifford (represented by distinguished attorney Charles Stillman, Esq.) from trial. Gus was now the "man to see."

Brooklyn Assemblyman Dov Hikind (D–Borough Park), and Congressman Floyd Flake (D–Jamaica), were only two elected officials who earned acquittal (or dismissal) with Gus at the helm in hard-fought trials in Brooklyn Federal Court. The record of successes continued. Gus tried his last case at age 83! We will never know all those clients who he represented in investigations that were closed without charges being filed. His last trial at age 83 was in *People v. Nora Anderson*, successfully representing the Manhattan Surrogate against charges filed by District Attorney Morganthau of campaign finance fraud. The ultimate test is who do lawyers and judges turn to when they find themselves in legal trouble? Long before "Better Call Saul," most knew "Get Gus"!

I first saw Gus Newman when he was known as a "mob lawyer," and I was a young Appeals Bureau Deputy Chief in the Brooklyn District Attorney's Office, working for Gene Gold. He was arguing an "Einhorn" motion to quash a Grand Jury appearance of an alleged mobster, claiming the subpoena was the "evidentiary fruit" of unlawfully conducted electronic surveillance, and so required to be quashed.

As with so many cases, I found myself pulled by the force of Gus's powerful legal logic—not forceful table pounding—as I found myself irresistibly drawn to the validity of the advanced and creative legal position. Gus saw cases not unlike a great quarterback overlooking the line of scrimmage. He carefully watched the jury to measure its reaction to his cross. He was always conscious of his "audience," and strove to be seen as a credible practitioner. Like a three dimensional tic tac toe board, he would elicit a response, or introduce an exhibit, which would later undermine a subsequent witness, and a "trap door" would suddenly open during summation. He had, as President George H.W. Bush would say, "the vision thing."

His prowess as a trial lawyer was recognized by the New York Council of Defense Lawyers, the Criminal Justice Section of the New York State Bar Association, and many others. He lectured widely at law schools, before bar groups and judges, often teaching skills, and sharing tips with law students, young defense lawyers, and prosecutors alike.

For those old enough to remember the film *The French Connection*, Gus bore similarities to the actor Fernando Rey, tall, debonair, imposing, and charismatic. Visualizing him dining at *Copain*, with a vintage wine, involving a case of international intrigue, was a short mental reach. Today, like in *Sunset Boulevard*, the stage and screen are now, as Norma Desmond observed, decidedly "smaller," so too are the cases. Litigation is now all too frequently plea bargaining, and sentencing advocacy. If there was a "golden age," Gus was clearly one of the actors who dominated it, and made it so warmly memorable.

We will likely not see his kind again in my legal lifetime. Gus likely made criminal defense simultaneously legitimate (and career inspiring). If there were a Hall of Fame for criminal defense counsel, he would be its Joe DiMaggio—he did it all, he did it well, and he made it look effortless. Masking the hard work and dogged preparation (which was his hallmark), he never "mailed it in." Like Frank Sinatra, he performed to please and achieve success for his clients. May he rest in peace.

Endnote

1. Jamie currently represents President Trump's son-in-law, Jared Kushner. This writer had the privilege of arguing *People v. Bergman* dismissal motions before the late, great Justice Harold Birns, who later served with distinction in the Appellate Division, First Department.

Court of Appeals June 2017 Highlights

By Jay Shapiro

People v. Prindle, 2017 N.Y. Slip Op. 5267 (Decided June 29, 2017)

The Court of Appeals rejected defendant's *Apprendi* argument, challenging his sentencing as a persistent felony offender. The Court noted that it has repeatedly rejected these challenges, maintaining that the New York statute, PL Section 70.10(1)(a), is within the exception established by the Supreme Court in *Almendarez-Torres v. United States,* 523 U.S. 224 (1998). Defendant's argument was based upon the Supreme Court's decision in *Alleyne v. United States,* 133 S.Ct 2151 (2013), which involved the sentencing of a defendant who was sentenced pursuant to an increased mandatory minimum sentence of imprisonment. In response to defendant's argument, the Court of Appeals noted that the New York persistent felony offender statute does not increase the mandatory minimum sentence. Additionally, the Court ruled that because the increased sentencing under the New York statute is based upon prior felony convictions there is no judicial fact-finding that would violate *Apprendi.*

Gevorkyan v. Judelson, 2017 N.Y. Slip Op. 5176 (Decided June 27, 2017)

This decision came to the Court of Appeals following a certified question by the Court of Appeals for the Second Circuit "whether an entity engaged in the bail bond business may retain the premium paid on a criminal defendant's behalf when bail is denied and the defendant is never released from custody." The stakes here were significant, because the bail in the case of the defendant, Arthur Bogoraz, had been set at $2 million and the bond had been secured in exchange for a premium of $120,560. Bogaraz was not released because the court denied the bail bond following a bail source hearing. However, the bail bond agent refused to return the premium.

The Court of Appeals examined both the Criminal Procedure Law and the Insurance Law in reaching the determination that the certified question should be answered in the negative. The Court held that because "the Insurance Law provides that such an entity [the bail bond company] does not earn a premium for a bail bond if a court refuses to accept the bond following a bail source hearing…." In its analysis, the Court noted that a premium is based upon risk and there is none when the defendant is not released on bail—there is no danger of the defendant failing to appear when he is incarcerated.

People v. Spencer, 2017 N.Y. Slip Op. 05118 (Decided June 22, 2017)

The trial court was found to have committed reversible error when it failed to discharge a juror who stated that she could not decide the case based upon the facts and the law. The defendant was charged with intentional murder. On the fourth day of deliberations the juror in question told the clerk that she wanted to be excused from service. When questioned by the trial judge she said, "I'm not sure that I'm able to separate my emotions from the case…." During the course of an extensive colloquy with the juror, the court was unable to move her from the position that she could not decide the case following the court's instructions and through the deliberative process. Nevertheless, the court sent the juror back to deliberate. The alternates had been discharged.

The court denied the motion of the defense counsel for a mistrial and the jury ultimately convicted the defendant of manslaughter in the first degree. The conviction was affirmed by the Appellate Division, First Department, but the Court of Appeals reversed. The Court held that in stating "forthrightly that she could not separate her emotions from her ability to deliberate" the juror "was incapable of fulfilling her sworn duty to reach a verdict based solely on the evidence presented at trial and the law." Consequently, this juror was "grossly unqualified to serve," and the court should have ordered a mistrial.

People v. Minemier, 2017 N.Y. Slip Op. 5120 (Decided June 22, 2017)

Sentencing practice was at issue in this case, involving an 18-year-old who pleaded guilty to attempted murder in the second degree and related crimes. At his first sentencing proceeding, the court denied the defendant's application for youthful offender treatment and then sentenced him to a maximum of 20 years in prison. The case was remitted by the Appellate Division, Fourth Department, for the court to state on the record whether the defendant should be treated as a YO. The appellate court also directed that the court state on the record what statements it reviewed and why it refused to provide those statements to the parties.

At the new proceeding, the court stated that it had denied YO treatment based upon the information submitted to it. However, it refused to describe the nature, source or contents of a document that had been provided to the Probation Department on the condition of confidentiality. Although the Appellate Division found that the sentencing court had complied with its direction, the Court of Appeals disagreed. It held that the "defendant's due process rights" were violated because the court "fail[ed] to adequately set forth on the record the basis for its refusal to disclose to the defense certain statements that were reviewed and considered by the court for sentencing purposes."

People v. Frumusa, 2017 N.Y. Slip Op. 04495 (Decided June 8, 2017)

The Court of Appeals took the opportunity in this decision to explain the scope of *People v. Molineux*, 168 N.Y. 264 (1901). The defendant had been the subject of both civil proceedings and a criminal prosecution relating to a joint business venture with the victim. While the Court explained that *Molineux* is still a viable concept, permitting evidence of defendant's uncharged crimes or prior misconduct that can be connected to a material issue in the case and where its probative value outweighs undue prejudice, it also concluded that the evidence here was not *Molineux* evidence.

In this case, the prosecution used a contempt order in the related civil action as *Molineux* evidence. The defendant was convicted and the Appellate Division, Fourth Department, affirmed the conviction. However, two of the justices found that the evidence was not *Molineux* evidence and that it was unduly prejudicial. In affirming the conviction, the Court of Appeals determined that the dissenters were in part correct. The evidence was not *Molineux*, because that evidence "concerns a *separate* crime or bad act committed by the defendant." Here, the evidence directly related to the conduct charged in the criminal case. Nevertheless, the contempt order was relevant to the proof of defendant's intent to deprive the victim of property and was admissible.

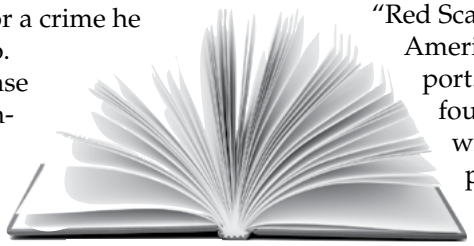
Broken Scales: Reflections on Injustice

By Joel Cohen
American Bar Association, 2017

Reviewed by Roger Bennet Adler

Joel Cohen's most recent book (authored with Dale J. Degenshein), *Broken Scales—Reflections on Injustice* (ABA Books, 2017), raises important questions about our justice system (both the criminal and civil sides), and focuses powerful attention on documented instances when it has fallen decidedly short, resulting in disastrous personal consequences to those involved.

Cohen has carefully selected ten dramatic instances of system failure, and focuses attention on both the wronged, and the perceived wrongdoer, in deep diving into deeply disturbing legal cases. Chapter 1 addresses the wrongful conviction of Glenn Ford, who was tried and convicted of the 1984 murder of a Shreveport, Louisiana jeweler, Isadore Rozeman, was sentenced to death, and served thirty years on Death Row for a crime he *never committed* (*Louisiana v. Ford*,[1] 489 So. 2d 1250 [Sup. Ct. La. 1986]. The state's case against Ford was based upon circumstantial evidence.



Southern justice "gone bad" is not an altogether new concept for us to confront. For every high profile Scottsboro Boys case (see *Norris v. Alabama*, 294 U.S. 587 [1935]; *Patterson v. Alabama*, 294 U.S. 600 [1935]), there were undoubtedly hundreds (if not thousands) of murder, rape, and robbery cases prosecuted in the segregated South under a then existing racist system that doomed minorities to apartheid like treatment (and justice).

A cruelly "rigged system" doomed minority accuseds to defending against criminal charges that were all too often tainted by racism. A lack of qualified criminal defense attorneys willing to defend poor minority defendants confronted a community bred to see the world through the lens of discrimination, and a pre-*Batson* jury system which excluded jury service by those resembling the accused.

Where Cohen breaks new ground is his quest to focus on the cost (and impact) upon the prosecutor, Martin Stroud, Esq., who prosecuted the Glenn Ford capital case in Shreveport. In 2012, previously undisclosed credible evidence came to the prosecutor's office, indicating that Ford didn't kill Rozeman, and the new District Attorney appropriately moved to vacate Ford's conviction. Ford was ultimately freed from Louisiana's notorious Angola State Penitentiary, and spared wrongful execution. How one attempts to recapture a life after three decades of being cooped up on Death Row is too haunting (and cruel) to long consider.

While Ford died at age 65 of lung cancer shortly after his release, for former prosecutor Stroud it appears the personal torment had only begun. He "self reported" his conduct to the applicable attorney disciplinary committee, even though it appears to have been the police who generated the evidence implicating Ford.

Mindful that the litigation stakes are significantly higher in a capital case, the abolition of the death penalty is, as Stroud notes, something which would have "put a smile on his face." Such thoughts were likely cold comfort to Mr. Ford, who was deprived of life's potentials (and pleasures).

Injustice is clearly not merely a Southern "gothic narrative." In "White Haired and Spirited—A Victim of the Red Scare," Cohen focuses on the post-World War II "Red Scare," and the investigations and trials of Americans for communist leanings and support. Cohen details how Miriam Moskowitz found herself in a romantic relationship with Abraham Brothman, an engineer by profession who, through a network of Soviet spies, conspired to pass secrets to the Soviet Union. Brothman was charged with conspiracy to obstruct justice and witness tampering, with a cooperating witness, Harry Gold—who later testified in the case against Ethel and Julius Rosenberg.

Moskowitz was convicted and served two years imprisonment (*United States v. Brothman*, 191 F. 2d 70 [2nd Cir. 1951]). In those pre-"Jencks Act" (18 U.S.C. 3500, see *Jencks v. United States*,[2] 353 U.S. 657 [1957], *rev'g* 226 F. 2d 540, 553 [5th Cir. 1955]) days, trial counsel did not have automatic access to Gold's prior statements—many of which were reportedly inconsistent (or exculpatory) concerning Moskowitz's guilt.

Years later, an application to vacate the conviction was docketed (*Moskowitz v. United States*, 14 CV. 6389 (AKH), and subsequently denied (64 F. Supp. 3d 574 [S.D.N.Y. 2014]). Moskowitz relied upon the common law petition for a writ of error *coram nobis*, based upon discovered (or alleged) inconsistencies between Gold's statements to the FBI (3500 material), and his trial testimony. Its focus was on whether Gold and Brothman actually discussed espionage activity in Moskowitz's presence. Judge Hellerstein acknowledged the trial strategy considerations that would have applied to those statements. He concluded that the

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withholding of the statements "did not make any difference to the outcome of Moskowitz's trial." This writer believes the Court failed to appropriately perceive how the previously undisclosed statements could have generated a reasonable doubt in the hands of skilled defense counsel.

A poignant aspect of the case, touched upon only in passing, was that she and her co-defendant, Brothman, were represented by a single lawyer—the legendary Colonel William Kleinman, Esq.[3*] In view of the practice of not discussing sensitive matters in front of her, the sense is that Kleinman had a clear conflict of interest, since Moskowitz and Brothman clearly had antagonistic defenses.

Mindful that the trial preceded cases like our *People v. Gomberg*, and "Curcio" warnings, it is still unclear why the Sixth Amendment issue wasn't raised before Judge Hellerstein, unless Ms. Moskowitz knowingly waived any potential conflict. The book doesn't say.

The chapter addressed to the travails of Dutchess County attorney Steven Pagones, Esq. at the hands of Tawana Brawley and her then lawyers, C. Vernon Mason and Alton Maddox, Jr., as well as Brawley "Family Advisor" Reverend Al Sharpton, is a painful reminder of a dark chapter in 20th century New York jurisprudence. Mindful of Shakespeare's line from *Othello*, "he who steals my purse steals trash, he who steals my reputation steals all," Pagones was cruelly linked to Brawley's bogus abduction claim, ostensibly presented as a fabricated excuse to avoid family discipline for socializing beyond her designated curfew. Reverend Sharpton professed not to have discussed the actual details with Ms. Brawley, an approach which smacks of "conscious avoidance."

Exonerated by a Dutchess County Grand Jury, Pagones sued civilly to clear his name. Like former U.S. Labor Secretary Ray Donovan, who sought to reclaim his good name following his acquittal in Supreme Court, Bronx County. Mason and Maddox were disbarred and suspended, but the Teflon Reverend Sharpton continued to brilliantly "grow his brand," to the point of getting his calls taken in the Obama White House. He was perceived as a political "kingmaker" in 2009, when he assisted Bill de Blasio in defeating Billy Thompson in the race for the Democratic Party's nomination for New York City Mayor.

If over the years Pagones has doggedly pursued his good name, Tawana Brawley, by contrast, has lived in her own self-created, shadowy world. Two participants, involuntarily caught up in a tapestry of deception, and dissembling. One is reminded of Rabbi Kushner's famous book, "When Bad Things Happen to Good People," when reflecting on the fallout when s*** happens.

Pagones' position is that "the media and these politicians have allowed Sharpton to rehabilitate himself without actually rehabilitating himself…I don't want him to apologize. It's not going to happen. I just want him to admit that now he knows he was wrong about me…" For those who practice in the Federal Court, we think of this as "acceptance of responsibility"—a degree of personal recognition which not everyone is capable of doing.

We clearly live in very turbulent times. Allegations of "fake news" (a/k/a propaganda) are now as common as the stars in the heavens. It is against this backdrop that Joel Cohen's fine book should be read as a cautionary tale of the limits of the law, and our need, now more than ever, for those who have the "right stuff," and who would be qualified for treatment in John F. Kennedy's book *Profiles in Courage*.

Too often truth never eradicates the falsehood, and as the old judge once said—do the best you can! The need to speak "truth to power" is needed now more than ever.

Endnotes

1. Chief Judge Dixon's decision found no merit to Ford's counsel's 48 separate claims that Ford voluntarily made admissions, and to the fairness of jury selection, etc. Justice Colagero dissented, and Justice Lemon concurred.
2. The Government's case was argued in the U.S. Supreme Court by John V. Lindsay, later a Manhattan congressman, and subsequently New York City Mayor.
3. Kleinman was the senior partner at Kleinman, Gold and Landsman, and a Past President of the Brooklyn Bar Association during the mid 1960s.

A Review of the 2016-2017 Term of the United States Supreme Court

By Spiros Tsimbinos

Introduction

Operating during most of its past term with only eight Justices, the Court issued only a limited number of rulings and apparently under the leadership of Chief Justice Roberts made an effort to avoid highly controversial issues and to issue determinations made on the narrowest grounds. Newly designated Justice Gorsuch did not officially join the Court until April 10, 2017 and did not begin hearing oral arguments until April 19, 2017. Thus, he was able to participate in only a small number of cases which were issued during the term. During the last months of the term, he was able, however, to participate in some important matters and his influence on the Court is beginning to be foretold by his initial determinations.

The Impact of Justice Gorsuch

Justice Gorsuch had the opportunity to participate in two very important matters that were decided by the Court on the very last day of its term. The first involved the decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer, Director Missouri Department of Natural Resources*, 137 S. Ct. (June 26, 2017), in which he voted to strike down a policy instituted by the State of Missouri to deny the possibility of a grant to a church to repair a playground and determined that such a procedure violates the free exercise of religion clause. In addition, Justice Gorsuch voted to stay the applications of the injunctions that had been issued against President Trump's travel ban and would have granted full relief sought by the government rather than leaving in place a small portion of the injunctions previously issued. In one of his first actions, Justice Gorsuch also voted with the Conservative group in denying a stay of execution for an Arkansas defendant who was facing the imposition of the death penalty. In issuing his rulings, Justice Gorsuch appeared to strongly align himself with Justices Alito and Thomas, the most conservative members of the Court.

Fewer Divided Decisions and a Higher Degree of Consensus

Because of the apparent efforts of Chief Justice Roberts to limit the number of controversial decisions and to determine matters on the narrowest grounds, the Court, operating for most of its term with only eight Justices, appears to have reached a greater consensus during the past term and had only a limited number of sharply divided decisions. In his annual analysis of the Supreme Court, Adam Liptak, a Supreme Court analyst for the *New York Times,* remarked in his June 28, 2017 article at page A16, "The last term was marked by a level of agreement unseen at the Court in more than 70 years. That resulted from a lack of divisive disputes on social issues and hard work by the Justices who often favored extremely narrow decisions to avoid deadlocks." The increase in consensus also reflected the reassertion of the authority and influence of Chief Justice Roberts to the extent that he was able to even get two of the liberal Justices, Kagan and Breyer, to support the majority view in the *Trinity Lutheran* case.

Mr. Liptak also referred to a study conducted by a law professor at Washington University which determined that the percentage of cases decided by a 5-4 or a 5-3 vote was 14% compared with an average since 1946 of 22%. It appears that the degree of consensus during the past term may only be a temporary phenomenon and that during the coming term, when the Court once again has a full complement and several divisive issues before it, the number of 5-4 decisions will once again increase and the sharp divisions among the Justices and will once again reappear. An indication that this will occur is illustrated by the vigorous dissent by the conservative grouping in the matter of *McWilliams v. Dunn*, 137 S. Ct. 1790 (June 19, 2017), a 5-4 ruling where the dissenters accused the majority of a "most unseemly maneuver and determining the issue on a question where there had been an express declination of review."

Chipping Away at the Death Penalty

Although the full Court has yet to accept the position of Justices Breyer and Ginsburg regarding the constitutionality of the death penalty, the Court continues to chip away at the various procedures involved in the implementation of the death penalty so as to increasingly diminish its actual implementation. Thus, in *Moore v. Texas*, 137 S. Ct. 1039 (March 28, 2017), the Court, in a 5-3 decision, held that Texas used outdated medical guidelines in deciding if a death row inmate was intellectually disabled, thereby making him ineligible for the applica-

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tion of the death penalty. Further, in *McWilliams v. Dunn*, 137 S. Ct. 1790 (June 19, 2017), the Court held that a state must provide a defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively conduct an appropriate examination and assist in the evaluation, preparation and presentation of the defense in the sentencing phase. In both of those cases, Justice Kennedy joined the liberal grouping to ensure the majority result. In death penalty matters, Justice Kennedy continues to be the critical swing vote.

"As a result of death penalty decisions by the Court in the last few years and diminishing public support for the death penalty, the number of executions in the United States has steadily declined."

As a result of death penalty decisions by the Court in the last few years and diminishing public support for the death penalty, the number of executions in the United States has steadily declined. Last year only 20 executions were conducted in the United States down from 98 in 1999.

Criminal Law Decisions

During the past term the Criminal Defense Bar continued to enjoy substantial success. Important defense victories were achieved in the areas of restitution and forfeiture. The Court in *Nelson v Colorado*, 137 S. Ct. 1249 (April 2017), struck down a statute which required defendants to prove by clear and convincing evidence in a civil proceeding that they were innocent before the State would return fees, court costs and restitutions exacted from defendants whose convictions were substantially invalidated by Appellate Courts and no re-trial had occurred. The Court in *Honeycutt v. U.S.*, 137 S. Ct. 1626 (June 5, 2017), also ruled that a co-conspirator is not subject to forfeiture on the basis of co-conspirator liability and that the Federal Forfeiture Act is limited to property the defendant actually acquired as a result of the crime. The Court also issued an important decision on judicial recusal (*Rippo v. Baker*, 137 S. Ct., 905 (March 6, 2017)).

Free Speech

The Court reaffirmed its strong position regarding protection of free speech. In the case of *Packingham v. North Carolina*, 137 S. Ct. 1730 (June 19, 2017), the Court unanimously held that a state prohibition which prevented sex offenders access to commercial and social networking was unconstitutional since it impermissibly restricted lawful speech in violation of the First Amendment's free speech clause. Even the Court's conservative members concurred in the Court's judgment.

Possible Additional Vacancies

In the closing days of the Court's term, several rumors became public that Justice Kennedy would soon announce his retirement. As the Court concluded its term, no retirement announcement was issued and the current feeling is that Justice Kennedy will continue to serve during the next term. According to reports, he had mentioned to his newly hired court clerks that he is thinking of retirement and that he may only be serving an additional one year. He has now reached the age of 81. Justice Ginsburg is now 83. Justice Breyer will soon reach 80. There thus continues to be increased speculation about additional retirements from the Court and future controversial battles over their eventual replacements.

Conclusion

As we look toward the Court's next term, commencing during the first week of October, the Court will be dealing with a number of important but controversial and divisive issues. They include the scope of Presidential Authority; the clash between gay rights and religious freedom involving the right of a baker to refuse to make a wedding cake for a gay couple; the constitutional limitations on partisan gerrymandering, and cell phone privacy matters. It therefore appears certain that the number of 5-4 decisions will increase and the high level of consensus achieved during the current terms will be shattered. As several legal scholars have commented, "We will look back at this term as the calm before the storm."

United States Supreme Court News

By Spiros Tsimbinos

Introduction

The Court continued to operate for most of its 2016-2017 term with only a complement of eight Justices following the death of Justice Scalia. Summarized below are various decisions dealing with Constitutional and criminal law issues which were decided by the Court during the last few months.

Recent Decisions

Racial Gerrymandering

***Cooper v. Harris*, 137 S. Ct. 1455 (May 22, 2017)**

The United States Supreme Court heard oral argument on December 5, 2016, on an appeal by North Carolina officials from a three-judge District Court's finding that, even assuming that compliance with the Voting Rights Act (VRA) was a compelling State interest, the North Carolina legislature engaged in unconstitutional racial gerrymandering, in violation of equal protection. The allegation was that the violation occurred as a result of redrawing two congressional districts with an increased number of potential African-American voters, because racial gerrymandering was not reasonably necessary under a constitutional reading and application of federal law. It was claimed that North Carolina had improperly put more blacks in a few voting districts, thereby diminishing the voting power of minority groups on a statewide basis. A decision was issued by the Court on May 22, 2017, and in a 5-3 ruling, the Court determined that the State had purposefully established a racial target for the election districts so as to increase the black voting population. It therefore concluded that the District Court had not acted in error is determining that racial considerations predominated.

The majority opinion held that, assuming that complying with the VRA was a compelling interest for racial gerrymandering in redistricting, the State did not have a strong basis in evidence for believing that it needed to draw its 1st Congressional District as an African-American majority-minority district in order to avoid liability under § 2 of the VRA for vote dilution. Thus, there was an equal protection violation under strict scrutiny, because such racial gerrymandering was not narrowly tailored to the State's objective.

The Court's majority opinion was written by Justice Kagan and was joined by Justices Thomas, Ginsburg, Breyer and Sotomayor. Justices Alito, Roberts, and Kennedy concurred in part and dissented in part.

Qualified Immunity

***County of Los Angeles, California v. Mendez*, 137 S. Ct. 1539 (May 30, 2017)**

In a unanimous decision, the United States Supreme Court vacated a determination by the Ninth Circuit Court of Appeals that had awarded damages to a defendant on the claim that deputies were liable for excessive force.

During a warrantless search of property on which a shack was located, Los Angeles County Sheriff's Deputies had shot and wounded an occupant therein. The United States Supreme Court in a decision written by Judge Alito held that the Ninth Circuit's provocation rule pursuant to which a law enforcement officer may be held responsible for an otherwise use of force where the officer intentionally or recklessly provoked a violent confrontation through a warrantless entry that was itself an independent Fourth Amendment violation, is incompatible with prevalent excessive force jurisprudence.

The Fourth Amendment provides no basis for a provocation rule which makes an officer's otherwise reasonable use of force unreasonable if the officer intentionally or recklessly provoked a violent confrontation. A different Fourth Amendment violation cannot transform a reasonable use of force into an unreasonable seizure.

The Court therefore vacated the Ninth Circuit's determination and remanded the matter for further consideration as to other claims advanced by the plaintiffs.

Forfeiture

***Honeycutt v. United States*, 137 S. Ct. 1626 (June 5, 2017)**

In a unanimous decision, the United States Supreme Court held that forfeiture pursuant to 21 U.S.C. § 853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime. In an opinion authored

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by Justice Sotomayor, the Court determined that a defendant may not be held jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire. Section 853 does not require any forfeiture with regard to a defendant who had no ownership interest and did not personally benefit from the illegal sales.

Juvenile Sentencing

***Virginia v. LeBlanc*, 137 S. Ct. 1726 (June 12, 2017)**

In a unanimous decision, the United States Supreme Court upheld a system utilized in Virginia where a geriatric release program allowed older inmates to receive conditional release under certain circumstances as satisfying the requirement issued in *Graham v. Florida*, 500 U.S. 48 (2011), which determined that juveniles convicted of non-homicide offenses and sentenced to life in prison be given a meaningful opportunity to obtain a release based on demonstrated maturity and rehabilitation. The Court held that the determination of the Fourth Circuit Court of Appeals erred in concluding that the state court's ruling involved an unreasonable application of the *Graham* decision. The decision of the Virginia Trial Court in denying a motion to vacate a sentence of a juvenile sentenced to life imprisonment for a non-homicide offense was therefore within that Court's discretion.

Qualified Immunity

***Ziglar v. Abbasi*, 137 S. Ct. _____ (June 19, 2017)**

In a 4-2 decision, the United States Supreme Court determined that officials who served in the George W. Bush administration cannot be sued for the treatment of detainees after the 9/11 terrorist attacks. Policies adopted by executive officials regarding detention procedures following the terrorist attacks that caused injuries alleged by detainees are subject to qualified immunity with respect to the claims in question. The instant case involved lawsuits commenced by detainees held at Guantanamo and elsewhere against former Attorney General John Ashcroft and other governmental officials. The Court's majority opinion was issued by Justice Kennedy and was joined in by Justices Roberts, Thomas and Alito. Justices Breyer and Ginsburg dissented. Justice Kagan and Gorsuch took no part in the determination.

Civil Rights

***Hernandez v. Mesa*, 137 S. Ct. _____ (June 26, 2017)**

In a unanimous decision, the United States Supreme Court remanded a matter for further proceedings in light of its announced decision in *Ziglar v. Abbasi.* In the case at bar, parents of a 15-year-old Mexican National who was standing on Mexican soil when he was shot and killed by a United States Border Patrol Agent sued for damages alleging that the agent violated the victim's Fourth and Fifth Amendment rights. The Court concluded that it would be imprudent for the Court to resolve questions of whether the shooting violated the victim's Fourth Amendment rights when in light of *Abbasi* doing so might be unnecessary to resolve the case. The Court found that the Circuit Court of Appeals erred in granting the Border Patrol Agent qualified immunity based on the fact that the victim was an alien who had no significant voluntary connection to the United States, where the victim's nationality and extent of his ties to the United States was unknown to the Agent at the time of the shooting.

Death Penalty

***McWilliams v. Dunn, Commissioner Alabama Department of Corrections*, 137 S. Ct. 1790 (June 19, 2017)**

In a 5-4 decision, which included the participation of newly appointed Justice Gorsuch, the Court held that a state must provide a defendant with access to a mental health expert who is officially available to the defense and independent from the prosecution to effectively conduct an appropriate examination and assist in the evaluation, preparation and presentation of the defense in a death penalty case. In the case at bar, the defendant had claimed an intellectual disability during the death penalty phase and the State of Alabama had failed to provide the defense with access to a competent psychiatrist. The majority opinion was written by Justice Breyer and was joined in by Justices Kennedy, Ginsburg, Sotomayor and Kagan. The majority opinion further directed that on remand, the Eleventh Circuit should determine whether the state court error had a substantial and injurious effect or influence so as to require a grant of habeas corpus relief. Justices Alito, Roberts, Thomas and Gorsuch dissented.

The dissenting opinion employed unusually strong language, arguing that a prior determination by the Court in *Ake v. Oklahoma*, 470 U.S. 68 (1985), did not clearly establish that a defendant is entitled to an expert who is a member of the defense team. The dissent also claimed that the majority opinion reached its result by a "most unseemly maneuver" and further that the Court decided a separate question on which there had been an express declination of review. Interestingly, Justice Kennedy joined the liberal grouping to cast the critical swing vote. He did so despite the fact that newly appointed Justice Gorsuch, who once served as Justice Kennedy's Law Clerk, joined in the vigorous dissent issued by the conservative Justices and in direct opposition to the majority view. The sharp disagreement within the Court on this case may be an indication of things to come in the future.

Free Speech

***Packingham v. North Carolina*, 137 S. Ct. 1730 (June 19, 2017)**

In late February, the United States Supreme Court heard a case where the issue involved was whether North Carolina can bar registered sex offenders from using Facebook, Twitter, and similar services. The petitioner was

claiming that North Carolina's actions violate his rights under the First Amendment. During oral argument, questions from several of the Justices indicated that the North Carolina law could be struck down. In a unanimous ruling, the Court on June 19, 2017, held that the North Carolina procedure impermissibly restricted lawful speech in violation of the First Amendment's free speech clause. The majority opinion was issued by Justice Kennedy and was joined in by Justices Ginsburg, Breyer, Sotomayor and Kagan. Justices Alito, Roberts and Thomas issued an opinion concurring in the judgment.

Brady Violation

Turner v. United States, 137 S. Ct. _____ (June 22, 2017)

In a 6-2 decision, the United States Supreme Court determined that even though the government failed to comply with a request to provide Brady material, the record of the lower court supports the finding that the evidence withheld by the government was not material under *Brady v. Maryland*, since there was not a reasonable probability that the withheld evidence would have changed the outcome of the petitioner's trial. The majority opinion was issued by Justice Breyer and was joined in by Justices Roberts, Kennedy, Alito, Thomas and Sotomayor. Justices Kagan and Ginsburg dissented.

Padilla Violation

Lee v. United States, 137 S. Ct. _____ (June 23, 2017)

In a 6-2 decision, the United States Supreme Court held that a defendant had adequately demonstrated a reasonable probability that he would have rejected a plea had he known that it would lead to mandatory deportation where both the defendant and his attorney testified that deportation was the determinative issue to the petitioner. The defendant, who was a lawful permanent resident, was subject to mandatory deportation as a result of his plea to an aggravated felony but was advised by his counsel that he would not be deported as a result of pleading guilty. The plea colloquy confirmed the importance the defendant placed on deportation. The majority opinion written by Justice Roberts determined that the defendant had received ineffective representation and demonstrated that he was prejudiced by his counsel's erroneous advice. The government had argued that the defendant had no viable defense and could not show prejudice. The majority, however, concluded that a per se rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial overlooks that the prejudice inquiry is focused on what an individual defendant would have done. Justice Roberts was joined in the majority by Justices Kennedy, Ginsburg, Breyer, Sotomayor and Kagan. Justices Thomas and Alito dissented.

Exercise of Religion

Trinity Lutheran Church of Columbia, Inc. v. Comer, Director Missouri Department of Natural Resources, 137 S. Ct. _____(June 26, 2017)

In a 7-2 decision, the United States Supreme Court held that the Missouri's policy of categorically disqualifying churches and other religions organizations under its playground resurfacing program, an otherwise public benefit, violates the free exercise clause of the First Amendment. The majority opinion, which was written by Chief Justice Roberts, and was joined in by Justices Kennedy, Alito, Kagan, Thomas, Breyer and Gorsuch, concluded that the Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion. The opinion was narrowly drawn and attracted even the votes of two of the Court's liberal Justices, Justices Kagan and Breyer. Some viewed the ruling as an opening for further governmental assistance to religious organizations, including possible voucher programs for school choice. Thus, Justices Sotomayor and Ginsburg in a vigorous dissent, argued that the majority determination weakened the commitment to the separation of church and state and constituted a "radical mistake." It appears that other issues involving church and state separation will be forthcoming in future decisions.

President's Travel Ban

Trump, President of the United States, et al. v. International Refugee Assistance Project, et al. and Hawaii, et al., 137 S. Ct. _____ (June 26, 2017)

In one of its final major actions, the United States Supreme Court issued a unanimous ruling vacating most of the preliminary injunctions issued by the Fourth Circuit Court of Appeals and the Hawaii District Court with respect to the President's 90-day travel ban involving six Middle Eastern Countries. The Court granted the government's application to stay the preliminary injunctions that were issued to prevent enforcement of the President's Executive Order with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States. The Court only upheld that portion of the prior injunctions which determined that it could not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.

Justices Thomas, Alito and Gorsuch, while concurring with the majority decision, dissented to that portion of the determination which allowed persons to enter who had a credible claim of a bona fide relationship. The dissenters argued that this could invite a flood of litigation on the issue of what constitutes a bona fide relationship. They thus argued that the preliminary injunctions should therefore have been stayed in their entirety. The warning issued by the dissenting Justices regarding continued litigation was quickly borne out when the Hawaii District

Court, following the Supreme Court ruling, nonetheless expanded the list of persons allowed to enter based upon a bona fide relationship. The District Court added some 24,000 refugees who had already been assigned to a charity or religious organization in the United States. This caused the Supreme Court on July 19, 2017, to once again limit the District Court's latest ruling and allow only an extension of family relationships to include grandparents among relatives who can help visitors from the six countries in question. In the July 19 Order, Justices Alito, Gorsuch and Thomas renewed their request for a complete stay with respect to any injunctions that were issued. The Supreme Court in its July 19 Order also stated that the Ninth Circuit Appellate Court should proceed to consider the appeal of the Hawaii matter.

The Supreme Court action appears to have been a victory for the President. The question remains how the issue of presidential authority in the area of immigration and foreign policy will be upheld when the Court hears the case on the merits during the October term. Since the 90-day ban will have expired by the time the Court hears the case on the merits, it is possible that the Court may never really determine the case and will avoid further comment on what has become a very divisive issue. In this regard, it is interesting to note that in its decision, the Court directed the parties to address the following question: "whether the challenges to section 2(c) became moot on June 14, 2017." As the matter currently stands, the Court granted both the government's petition for certiorari and consolidated the cases for oral argument. The Clerk was directed to set a briefing schedule that will permit the cases to be heard during the first session of the October term. On July 19, 2017, the Court set October 10, 2017 as the date for oral argument.

Cases Scheduled for Decision During the October 2017-18 Term

***Class v. U.S.*, 138 S. Ct. _____**

In late February, the United State Supreme Court granted certiorari on a criminal law matter that involves the question of whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his state conviction. Before he entered his guilty plea and on appeal, the defendant contended that the statute as applied and under which he was convicted violated his Second Amendment right to bear arms and further violated due process of law. The defendant's petition noted that in the 1970s, the Supreme Court held that a guilty plea does not inherently waive claims for two types of pre-plea constitutional claims that do not challenge the factual basis for a guilty plea. It appears that the federal circuits are split on the question of whether a guilty plea inherently waives a constitutional challenge to the statute of conviction. Under these circumstances, the Supreme Court determined that granting certiorari was warranted. A decision on this matter will be forthcoming when the Court begins its next term in October.

***Democratic Party v. Wisconsin*, 138 S. Ct. _____**

On June 20, 2017, the Supreme Court agreed to hear a case from Wisconsin on the issue of whether Republican lawmakers in Wisconsin drew legislative districts that favor their party and were so out of whack with the state's political breakdown that they violated the constitutional rights of Democratic voters. A lower court had struck down the districts as unconstitutional last year and the State of Wisconsin is now seeking review by the United States Supreme Court. In accepting the case, the Court will evidently take up the momentous issue involving manipulating electoral districts in order to gain partisan advantage. The case will be the Supreme Court's first matter in more than a decade on the issue of partisan gerrymandering and could affect the balance of power between Democrats and Republicans across the United States.

***Carpenter v. United States*, 138 S. Ct. _____**

On June 5, 2017, the Court granted certiorari on a matter involving the issue of whether obtaining cell tower locational data from a defendant's cell phone carrier constitutes a Fourth Amendment search which requires the obtaining of a warrant. The Sixth Circuit Court of Appeals concluded that the government was not required to obtain a search warrant for the records in light of the longstanding distinction between the contents of a communication that is protected under the Fourth Amendment and the information necessary to convey that content, which is not. The Sixth Circuit determined that because the cell site records obtained by the government did not include the content of the defendant's communication but instead only included information that facilitated his communications, the defendant had no expectation of privacy in these records. The Sixth Circuit, in issuing its ruling, distinguished two important United States Supreme Court decisions, *U.S. v. Jones*, 565 U.S. 400 (2012) and *Riley v. California*, 134 S. Ct. 2473 (2014), which apparently led the Supreme Court to grant review so as to clarify any confusion on the issue.

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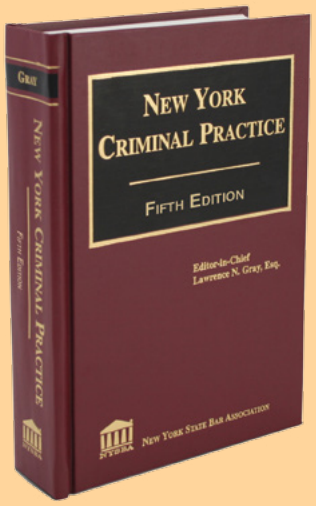

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