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New York Criminal Law Newsletter

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

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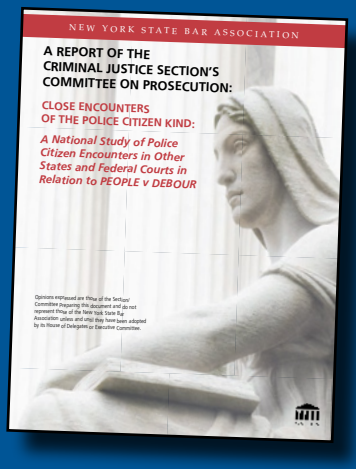

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Report Preview—
A Report of the
Criminal Justice Section's
Committee
on Prosecution

NEW YORK STATE BAR ASSOCIATION

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Criminal Justice Section
Spring Meeting & Awards Dinner

The Sagamore Hotel
Bolton Landing, New York
May 3 –5, 2018

SCHEDULE OF EVENTS HIGHLIGHTS:

- **Plea Negotiations in White Collar Cases**
- **Sentencing Issues in White Collar Cases**
- **New York State Court of Appeals Update**
- **Privilege and Ethical Issues Encountered in Corporate Investigations**

AWARD RECIPIENTS (FRIDAY DINNER):

- **Glenn A. Garber, Esq.,** Glenn A. Garber, PC, New York City—David S. Michaels Memorial Award
- **Hon. Craig D. Hannah**, Buffalo City Court Judge, Buffalo—Outstanding Contribution to the Bar and the Community
- **Thomas P. Zugibe, Esq.**, Rockland County District Attorney, New City—Outstanding Prosecutor

To book a hotel room, register or view the full program, visit www.nysba.org/CRIMSP18.

Under New York's MCLE rule, this program qualifies for 6.0 MCLE credits: 5.5 in Professional Practice and .5 in Ethics. This program is not transitional and is not suitable for newly-admitted attorneys.

NYSBA

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Message from the Chair

"I have found it advisable not to give too much heed to what people say when I am trying to accomplish something of consequence. Invariably they proclaim it can't be done. I deem that the very best time to make the effort."—Calvin Coolidge

As a criminal justice community we are required to re-examine our system to evaluate the current process in light of changing social norms and enlightenment. It's a simple proposition: Change necessitates change! But it isn't so simple. Jurisprudence, by its very nature, is slow to react and adapt, and we must show respect to a history of laws and culture that serves as a foundation of our criminal justice system.

With these considerations in mind, we have embarked on an era of opportunity in our criminal justice world. Last year signaled important improvements in the New York criminal justice system in that our citizens are now afforded even greater protections from the stigma of a criminal record. Thanks to the tireless work of our Section, we saw a new sealing law become effective in October 2017, a statutory scheme that assists certain prior offenders to seek employment and other opportunities without being haunted by the transgression of their youth.

The Section also reacted to society's recognition that our youth were dragged into criminal courts designed for adults. The "Raise the Age" legislation will help redirect our youth to Family Court for a more proper adjudication.

These legislative advancements foreshadowed the improvements we seek to accomplish in 2018. This is, in fact, the best time to make the effort to change and expand our jurisprudence on issues some proclaimed couldn't be done. For example, "Bail Reform" has been an area of concern for this Section for many years. Like the sealing legislation, we continue the fight in recognition of our changing social norms and we finally see change on the horizon.

New York Governor Andrew Cuomo recently released a framework for Bail Reform in New York. I must say that the term "Bail Reform" is a misnomer to some extent because our existing statutory framework already allows for a majority of "reform" the governor seeks to accomplish. We agree that most courts rely solely on cash bail or insurance company bond to secure a defendant's future appearance. This is true despite the availability of multiple alternatives set forth in Criminal Procedure Law § 520.10 (i.e., a secured surety bond, secured appearance bond, a partially secured surety bond, a partially secured appearance bond, an unsecured surety bond, an unsecured appearance bond, or a credit card or similar device).

We believe education of judges, courtroom support personnel and the Bar as to the availability of such existing alternatives would go a long way in accomplishing the stated goal—reduction of jail populations by those *not yet convicted of crime*! Accordingly, "Pre-trial Detention Reform" is the proper name for efforts to change our criminal justice system. Bail is merely one shift in the analysis. We must hone the courts' focus on the presumption of innocence of those arrested but not yet convicted and utilize alternatives to pre-trial detention by setting a new norm that defendants shall be presumed to be released on their own recognizance (R.O.R.) in certain cases. For example, we applaud the governor's proposal to establish such a presumption in misdemeanor and non-violet felony cases. Furthermore, the option of supervised release monitored by a pre-trial services agency should also assist in reaching the stated goal.

I am, however, concerned that some of this change will be a paradigm movement away from "Risk of Flight" as the sole basis for the court's considerations under Criminal Procedure Law § 510.30—application for recognizance or bail. The governor's framework calls for a new era of review that would allow for a shift to "dangerousness" of the accused based on a "current threat to the physical safety of a reasonably identifiable person or persons." This new model of risk analysis, in my view, is rife with opportunity to continue a cultural tradition in this country of bias and discrimination. Implicit bias is a social condition where we develop attitudes or stereotypes that affect our understanding, actions, and *decisions* in an *unconscious* manner. Pre-trial detention reform is progressive thinking and should not be shackled with the same old thinking of the mid to late 20th Century. Indeed, our State Bar president, Sharon Stern Gerstman, aptly states: "The fundamental principles of our justice system include not only the presumption of innocence, but that we do not presume that an individual is a threat to society until and unless he or she has been convicted of a crime."

My message: Pre-trial detention reform can be done and now is the time—let's do it right!

Other reforms are on the horizon. The Section's committees are looking at the State's approach to discovery in criminal cases, as well as a review of the Sex Offender Registration Act (SORA) Risk Assessment Instrument, and issues facing our town and village justice courts. I look forward to continued dialogue on these and other important issues at our next Executive Committee meeting on April 4, 2018, at the Statler Hotel in Ithaca during the Young Lawyers Section Trial Academy at Cornell University.

Tucker Stanclift

Message from the Editor

The Bar Association's Annual Meeting provides opportunities. As an association, we are given the chance to catch up with colleagues who practice in our area and friends who have nothing other in common aside from the practice of law. Together, we dine, trade stories and learn. The learning is indeed diverse. There are lectures and panels that provide the traditional learning sessions. But we also exchange ideas in Section meetings, luncheons, and at Executive Committee meetings and other organized gatherings.

At the Criminal Justice Section, we had a full morning of learning and collaboration. The luncheon was well-attended, and we learned about some very special contributors to matters that so concern our Section. During our Executive Committee half-day meeting, we discussed pressing issues that relate to defendants' rights and practice matters.

And I was fortunate enough to attend a meeting of Section publication editors. During that meeting, I was struck with how different Sections used their publications as vehicles to present important committee work. That Thursday meeting brought me back to discussions during our Tuesday Executive Committee meeting and sparked the idea of using this issue to present to a broad audience the important work of some of our committees.

The Prosecution Committee's impressive work studying *People v. DeBour* was ripe for this issue. So, working with that committee's chair, Jack Ryan, and others, we have been able to present to you in this issue an excerpted version of the report. To the extent that the report describes the difficulties that this seminal decision creates, I can sympathize with that view. During my final dozen years as a prosecutor, and now for the last 15 years in private practice, I have lectured law enforcement on street encounters. So, for 27 years I have tried to guide police officers on not only how they interact with others in street encounters but the prism through which courts view those interactions.

It is not unusual for my audiences to exhibit a panoply of reactions, including, but certainly not limited to, confusion, disbelief, apprehension and frustration. Whether it is a four-level paradigm or three levels of encounter, the reality is that fluid and stressful encounters are difficult to assess in the courtroom. And yet that is just what happens hundreds of times a week throughout New York State. If nothing else, then, this report is valuable in that it is likely to stimulate thoughtful discussion. Please read and digest it, and then use it as a launching pad for discussions with fellow practitioners and judges.

One of the most significant roles we play in the criminal justice system is how we are able to take the reality of the street and evaluate it in the courtroom through the applicable constitutional, statutory and precedential rules that we must follow. In order to perform that task effectively, we must continue to communicate. And we must continue to learn. Enjoy this issue!

Jay Shapiro

Criminal Justice Section Annual Meeting Awards

At the Criminal Justice Section's Annual Meeting Luncheon on January 24, 2018, the Section continued its tradition of presenting awards that recognized invaluable contributions by members of the Bar. The Awards Committee continues to be chaired by Norman P. Effman, who is joined on the committee by Daniel N. Arshack, Susan M. BetzJitomir, Richard D. Collins, Lawrence S. Goldman, Kevin Thomas Kelly, Timothy J. Koller, Robert J. Masters and John M. Ryan.

The keynote speaker and first honoree was **Michael C. Green, Esq.**, recognized for his Outstanding Contribution in the Field of Criminal Justice Legislation. This award recognizes outstanding work in proposing or implementing needed reforms, which specifically includes political action and fundamental research into the operation and effectiveness of the entire criminal justice system. The award was presented by **Robert J. Masters, Esq.**

Michael C. Green was appointed by Governor Cuomo in March 2012 to the position of Executive Deputy Commissioner of the New York State Division of Criminal Justice Services. From this post Green leads the agency responsible for many key parts of the criminal justice system in New York, including the State's DNA database, Criminal History Repository and Sex Offender Registry. Green's duties also include serving as chair of the New York State Commission on Forensic Science, and as a member of the New York State Sentencing Commission and the New York State Justice Task Force. Major initiatives Green is leading at DCJS include GIVE (Gun Involved Violence Elimination), working with local law enforcement to address shootings with evidence-based strategies and an emphasis on procedural justice, the redesign of ATI funding to incorporate evidenced based principles to the delivery of ATI services funded by the state, expansion of the state's network of Crime Analysis and Real Time Crime Centers, and implementation of Raise the Age legislation. Under his leadership in 2017, DCJS was named the number one large employer to work for in the Capital Region by the Albany *Times Union* based on employee surveys.

Prior to joining DCJS, Green served for 25 years in the Monroe County District Attorney's Office, including eight years as the elected District Attorney. In 2007 Governor Spitzer appointed Green to the Sentencing Reform Commission. In 2008, Green was appointed to the New York State Juvenile Justice Task Force by Governor Paterson. Mr. Green was named 2009 Prosecutor of the Year by the New York Prosecutors Training Institute. In 2011 the District Attorneys Association of the State of New York awarded District Attorney Green their Distinguished Service Award, and in 2012 he received the prestigious Ho-

Some of the awards given out at the Criminal Justice Section's Annual Meeting Awards Luncheon

gan award from the association recognizing a "lifetime of distinguished and honorable service."

Mr. Green has served as an adjunct professor in the Criminal Justice Department at Rochester Institute of Technology. He has served as faculty for the National College of District Attorneys at the National Advocacy Center and has lectured for the New York Prosecutors Training Institute.

Hon. Jenny Rivera was the recipient of the Vincent E. Doyle, Jr. Award for Outstanding Judicial Contribution in the Criminal Justice System, which honors outstanding judicial effort to improve the administration of the criminal justice system, presented by **Sherry Levin Wallach, Esq.**

Judge Rivera, Associate Judge of the Court of Appeals, was born in New York City in December 1960. On January 15, 2013, Governor Andrew M. Cuomo nominated her to the Court of Appeals, and the New York State Senate confirmed her appointment on February 11, 2013.

Judge Rivera has spent her entire professional career in public service. She clerked for the Honorable Sonia Sotomayor on the Southern District of New York, and also clerked in the Second Circuit Court of Appeals Pro Se Law Clerk's Office. She worked for the Legal Aid Society's Homeless Family Rights Project, the Puerto Rican Legal Defense and Education Fund (renamed Latino Justice PRLDEF), and was appointed by the New York State Attorney General as Special Deputy Attorney General for Civil Rights. Judge Rivera has been an Administrative Law Judge for the New York State Division for Human Rights, and served on the New York City Commission on Human Rights. Prior to her appointment, she was a tenured faculty member of the City University of New York School of Law, where she founded and served as Director of the Law School's Center on Latino and Latina Rights and Equality.

She graduated from Princeton University, and received her J.D. from New York University School of Law and her LL.M. from Columbia University School of Law.

Justine M. Luongo, Esq. received the Michele S. Maxian Award for Outstanding Public Defense Practitioner, presented by **Norman Effman, Esq.**

Ms. Luongo, known as Tina to all, is the Attorney-in-Charge of the Criminal Defense Practice of The Legal Aid Society. As the Chief Defender, Tina is responsible for leading a passionate and dedicated staff of over 1,100 responsible for representing more than 200,000 people in their trial, post-conviction and parole matters. In addition, Tina oversees two law reforms units that are involved in class action litigation and legislative advocacy that have forced critical reforms in the criminal justice system. During her time in this role, The Legal Aid Society opened the first-ever defense-focused Digital Forensic Unit, launched both the Cop Accountability and Decarceration Projects and increased the capacity of every trial office to provide the highest quality representation to clients. She is dedicated to increasing the diversity of the public defense workforce and is integrally involved in The Legal Aid Society's diversity initiative. She has been an active voice in the movement to foster best practices in public defense and continues to be involved in the dialogue about how public defenders can create systemic change, as well as be zealous advocates for their clients.

After graduating from Brooklyn Law School, Tina began her Legal Aid career in September 2002 as a staff attorney in the New York County trial office of the Criminal Defense Practice. In 2007, she was promoted to Supervising Attorney in the same office where she continued to directly represent clients, as well as train and manage her team of attorneys, paralegals and investigators. In May 2011, Tina was hired as the Deputy Attorney-in-Charge of the Criminal Defense Practice. Prior to joining the Legal Aid Society, Tina served as the Vice President of Operations for a national gang-intervention and prevention nonprofit organization known as the Council for Unity.

Throughout her careers at both organizations, Tina has focused on improving the lives of those marginalized by race, sexual orientation, gender identity and socio-economic status. She is driven to provide a voice for those silenced and to help empower others to create change.

She is a Vice President-at-Large of the ABA Criminal Justice Council, the President-Elect of the Chief Defenders Association of New York, a member of the NLADA Defender Council and a Steering Committee member of the National Association for Public Defense.

Elkan Abramowitz, Esq., was honored as the recipient of the Charles F. Crimi Memorial Award, which recognizes the professional career of a defense lawyer in private practice that embodies the highest ideals of the Criminal Justice Section, and was introduced by **Lawrence Goldman, Esq.**

Elkan Abramowitz of Morvillo Abramowitz Grand Iason & Anello P.C., in New York City, is a leading white-collar criminal defense lawyer experienced in handling civil and criminal matters in state and federal court for individual and corporate clients. He has built his career as a trial lawyer representing prestigious clients fallen into high stakes personal and professional crises. Elkan is the recipient of the 1999 Milton S. Gould Award for Outstanding Oral Advocacy presented by the Office of the Appellate Defender. Recently, Elkan received the *New York Law Journal's* Lifetime Achievement Award. He was also selected by *Chambers USA: America's Leading Lawyers for Business* to receive its Lifetime Achievement Award and has been named a leading lawyer by *Chambers USA* in the area of Litigation: White Collar Crime & Government Investigations every year since *Chambers'* 2003 launch in the United States, and described as "an unquestioned dean

of the field … with a potent combination of experience, intelligence and composure."

In addition, *Benchmark Litigation: The Definitive Guide to America's Leading Litigation Firms & Attorneys* awarded him "Trial Lawyer of the Year" as well as a "Top 100 Trial Lawyer in America," a "Top 10 Practitioner," and a "Litigation Star" in the area of White-Collar Crime/ Enforcement/Investigations. Elkan is listed as a "Leading Lawyer" and a "Leading Trial Lawyer" in White-Collar Criminal Defense by *The Legal 500 United States*. Elkan was named a White Collar "MVP of the Year" and "Trial Ace" by *Law360*, and a "White Collar Crime Trailblazer" by the *National Law Journal*. He is recognized by *Best Lawyers in America* in Bet-the-Company Litigation and Criminal Defense: White Collar. In addition, *Who's Who Legal – The International Who's Who of Business Lawyers* named Elkan one of eight "Most Highly Regarded Individuals" as well as a leading business crime defense lawyer. "Sources describe him as a 'towering figure' in the legal market and 'cannot recommend him highly enough.'" Elkan is a "'superb strategist and tactician' who has represented a host of well-known individuals and corporates over the course of his 'illustrious career' to date." He is also recognized in Thomson Reuters' *Super Lawyers* and named to its Top 100 list. In 2008, he was honored with the New York Council of Defense Lawyers' Norman S. Ostrow Award for the defense of liberty and the preservation of individual rights.

Elkan became a principal at a predecessor firm to Morvillo Abramowitz in 1979. He was appointed Special Deputy Commissioner of the Department of Investigation for the City of New York in 1990 to investigate a stock transfer by Mayor David Dinkins to his son. He served as counsel to the Special Master in the garment center antitrust case in 1992. Elkan has also served as Assistant Deputy Mayor for the City of New York, as a Special Counsel to the Select Committee on Crime for the U.S. House of Representatives, and as the Chief of the Criminal Division in the U.S. Attorney's Office for the Southern District of New York.

He is a Fellow of the American College of Trial Lawyers and a former director of the New York Council of Defense Lawyers. He is also a member of the New York State and American Bar Associations, the New York City Bar Association (past member of the Criminal Law, Federal Courts, Ethics, and Judiciary committees), and the Federal Bar Council. Elkan is a co-author of both "Corporate Sentencing Under the Federal Guidelines," a chapter in the treatise *White Collar Crime: Business and Regulatory Offenses,* and the "White Collar Crime" column in the *New York Law Journal.*

Hon. William C. Donnino received the award for Outstanding Contribution in the Field of Criminal Law Education, which recognizes outstanding work in criminal law education, the promotion of interest in the practice of criminal law, and the provision to students the opportunity to gain practical insight into the operation of the criminal justice system. The award was presented by **Daniel Arshack, Esq.**

Attendees at the Criminal Justice Section Annual Meeting Awards Luncheon

Judge William Donnino sat as a judge in the Supreme Court, Criminal Term for more than 28 years, including more than 13 years in the Bronx Supreme Court, one year in the Queens Supreme Court, and more than 13 years in Nassau County. He was Supervising Judge of the Nassau Supreme Court, Criminal Term from 2004 through 2011. In 2007 he received the New York State Bar Association Criminal Justice Section's Outstanding Jurist Award. He is the author of the *Practice Commentaries for McKinney's New York Penal Law and Criminal Procedure Law*, and of the book *New York Court of Appeals on Criminal Law*.

He is currently co-chair of Criminal Jury Instruction and Model Colloquies Committee that writes guideline jury instructions, as well as scripts for conducting various proceedings, such as the taking of a plea of guilty and the taking of a defendant's waiver of various rights. He is also co-chair of the Guide to New York Evidence Committee that is writing a guideline code of evidence for the bench and bar. Other committees of which he is an active member are the Justice Task Force and of the New York Sentencing Commission.

He has presented lectures to the bench and bar on a variety of criminal law subjects, including jury trial techniques, implications of the Sixth Amendment Crawford decision, search and seizure, discovery, appellate practice, sentencing, and updates on criminal law decisions, legislation, and associated issues.

For most of the last 19 years, he has annually given a multi-hour course for newly elected or appointed judges that includes most aspects of judging: motions, requirements of a plea colloquy, waivers of appeal, conduct of trial (particularly control of a courtroom), the requirements of jury instructions (voir dire, preliminary and final), the charging of lesser included offenses, and construction of a final charge (particularly as to the offenses charged). Along with the lecture, he has supplied new judges with a "trial manual" of jury instructions and scripts for various court procedures. Many of those instructions and scripts are now published online at the Criminal Jury Instruction and Model Colloquies website.

His 50-year career in criminal justice began in 1966 as an assistant district attorney in New York County. While there, he represented the district attorney on the Commission, which was then drafting the Criminal Procedure Law. He also led the development of the first program in New York State for prosecutorial screening of police arrests before the filing of an accusatory instrument.

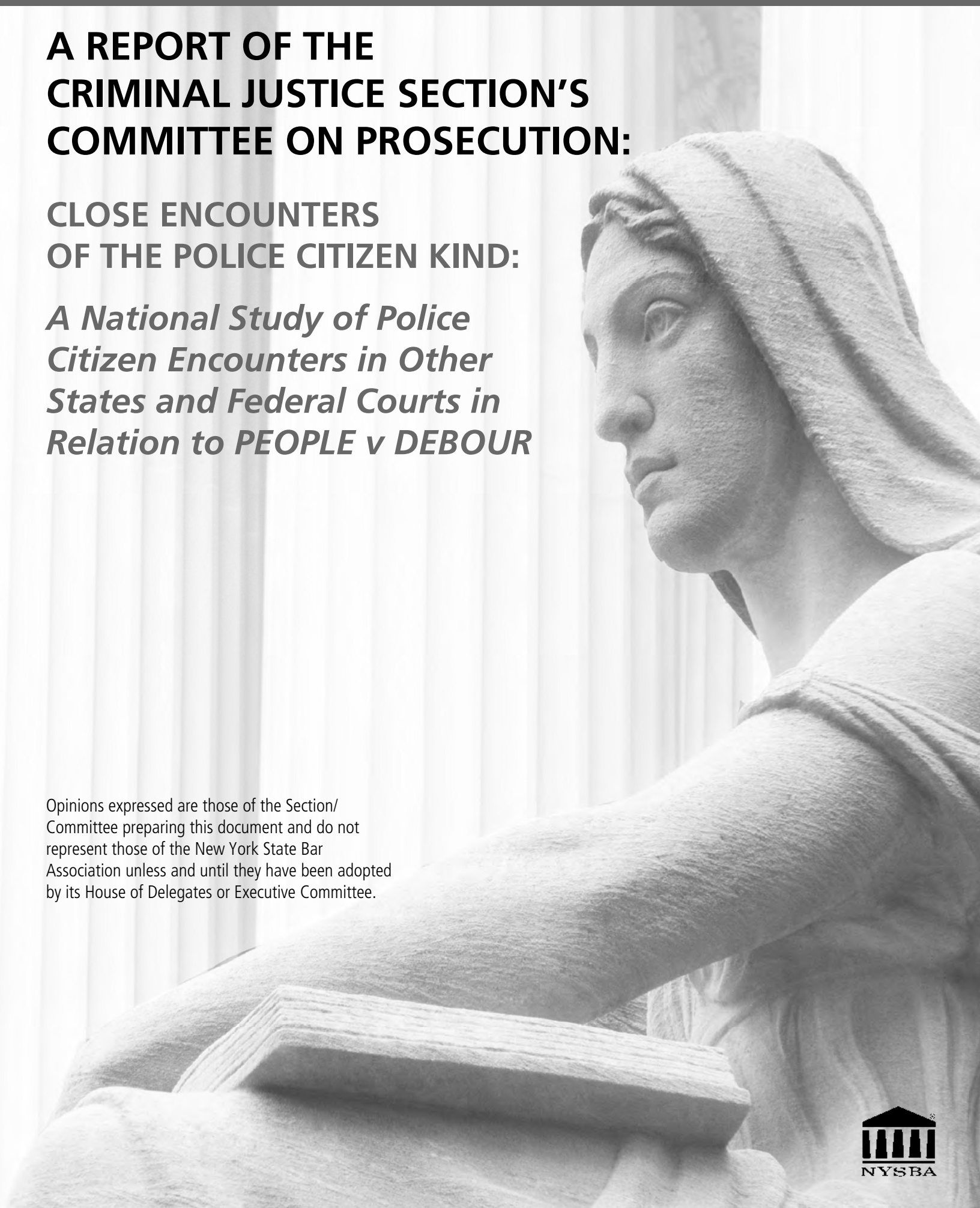
Thereafter he was, in 1971, assistant counsel to the governor for criminal justice, where he participated in authoring many criminal laws; in 1973 deputy commissioner and counsel for state correction and parole; in 1975 chief of the appeals bureau in the office of the district attorney of Nassau County; in 1982 chief assistant district attorney in the office of the district attorney of Brooklyn; and in 1988 until he became a judge, a defense attorney and counsel to a New York state Senator and Senate Committee on Crime and Correction.

For more photos of the awards, see pages 13-15.

A REPORT OF THE CRIMINAL JUSTICE SECTION'S COMMITTEE ON PROSECUTION:

CLOSE ENCOUNTERS OF THE POLICE CITIZEN KIND:

A National Study of Police Citizen Encounters in Other States and Federal Courts in Relation to PEOPLE v DEBOUR



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REPORT PREVIEW
A REPORT OF THE CRIMINAL JUSTICE SECTION'S COMMITTEE ON PROSECUTION:

Close Encounters of the Police Citizen Kind:

A National Study of Police Citizen Encounters in Other States and Federal Courts in Relation to People v. De Bour

At this year's Annual Meeting, the Executive Committee of the Criminal Justice Section was presented with a significant report from the Section's Prosecution Committee. The abstract to the report describes that it "examines police citizen encounters throughout the country in an effort to better understand New York's *People v. De Bour*, 40 N.Y.2d 210 (1976). The Article is a state and federal law survey that examines whether any state or federal Circuit has formed an express opinion about *De Bour* in case law or statute. The Article lays out the express state and federal rules concerning police citizen encounters and makes a recommendation based on the findings."

The report was the product of extensive work by the Committee, chaired by John M. Ryan, Natasha R. Pooran, lead author and coordinator, Peter M. Arete, deputy author and coordinator, Michelle A. Tarangello, author, and Privanka Verma, researcher. The report acknowledges the contributions and assistance received from Hon. Barry Kamins, Hon. Sol Wachtler, Sherry Levin Wallach, Esq., Eugene Frenkel, Cassandra Love and Richard Diorio.

Because of page limitations, we are unable to publish the Report in full in the *Newsletter*. However, the authors and our Section Chair have allowed us to publish the first portion of the Executive Summary and the Report's final section, Analysis and Conclusions. The views set forth in this report are those of the Committee and are not necessarily those of the Criminal Justice Section or the Bar Association.

EXECUTIVE SUMMARY

People v. De Bour, 40 N.Y.2d 210 (1976) turned 40 years old on June 15th, 2016.[1] It is a case that affects practically every police-civilian encounter in New York. It is a case that has caused many criminal defense attorneys, when arguing a *De Bour* issue to carry an index card listing the four levels of inquiry authorized by *De Bour*. Disagreement among judges over the proper level of *De Bour* and the appropriate police conduct, on a given case became more the rule than the exception.

In *People v. De Bour*, the New York Court of Appeals, for the first time, had to evaluate the most commonplace type of police and citizen interactions: general approaches and inquiries by officers on the street. The Court chose to develop its own model, one which would best maintain the proper balance of police needs and individual rights. This model included low-level intrusions within the scope of constitutional review; however, it required levels of justification less than reasonable suspicion for these intrusions. As a result, this four-tiered model became the standard that would be applied in all police-citizen encounters in New York for the next 40 years. In an effort to pierce through the complexities of *People v. De Bour*, this Article seeks to re-evaluate *People v. De Bour* in several ways: by assessing other state and federal models, and by examining statutes and case law examining police-citizen encounters.

Based on our state and federal law survey, no state has decided to follow in *De Bour*'s footsteps. Specifically, twenty-four states (including the District of Columbia) utilize a tiered model in police citizen encounters.[2] Unlike New York, however, of those twenty-four, only two have a four-tiered model, also including the Sixth Circuit.[3] The rest of these states apply a variation of the three levels: consensual or voluntary encounters, investigative detentions, and arrests.

* * *

Q: Do you teach De Bour?

A: Yes ... well no it is unteachable. We teach officer survival.[4]

"Consequently, as a matter of State common law, we will continue to apply De Bour to assess the propriety of encounters that do not rise to the level of a seizure for purposes of the Fourth Amendment."

—People v. Hollman[5]

I. Introduction

People v. De Bour, 40 N.Y.2d 210 (1976) turned 40 years old on June 15th, 2016.[6] It is a case that affects practically every police civilian encounter in New York. It is a case that has caused many criminal defense attorneys, when arguing *De Bour*, to carry an index card listing the four levels of inquiry authorized by *De Bour*. Disagreement among judges over the proper level of *De Bour* and the

appropriate police conduct on a given case became more the rule than the exception.[7]

In *People v. De Bour*, the New York Court of Appeals, for the first time, had to evaluate the most commonplace type of police and citizen interactions: general approaches and inquiries by officers on the street.[8] The Court had to balance whether these intrusions should not be subject to any constitutional scrutiny or whether these intrusions should be held to a reasonable suspicion standard.[9] However, the Court believed that the former would permit too much police discretion and would not adequately protect the privacy rights of citizens, while the Court believed that the latter would undermine attempts by police to carry out their multiple duties, thus hindering their efforts at crime prevention and detection.[10] Moreover, the Court was concerned that the reasonable suspicion standard would be too stringent for many police citizen encounters, leading to an abridgment of individual rights.[11]

Rejecting these two alternatives, the Court, instead, chose to develop its own model, one which would best maintain the proper balance of law enforcement needs and individual rights. This model included low-level intrusions within the scope of constitutional review; however, it also required two levels below the reasonable suspicion standard.[12] As the Court wrote: "[t]he basic purpose of the constitutional protections against unlawful searches and seizures is to safeguard the privacy and security of each and every person against all arbitrary intrusions by government. Therefore, any time an intrusion on the security and privacy of the individual is undertaken with intent to harass or is based upon mere whim, caprice or idle curiosity, the spirit of the Constitution has been violated."[13]

As a result, this four-tiered model then became the standard that has been applied in all police citizen encounters in New York for the next 40 years. In an effort to pierce through the complexities *De Bour*, this Article seeks to re-evaluate the decision in several ways: by assessing other state and federal models, and by examining statutes and case law examining police citizen encounters.

A. *People v. De Bour*

Facts

At 12:15 a.m. on the morning of October 15, 1972, Kenneth Steck, a police officer assigned to the Tactical Patrol Force of the New York Police Department, was assigned to patrol by foot a certain section of Brooklyn with his partner. While walking his beat on a street illuminated by ordinary street lamps and devoid of pedestrian traffic, he and his partner noticed someone walking on the same side of the street in their direction. When the solitary figure of the defendant, Louis De Bour, was within 30 or 40 feet of the uniformed officers he crossed the street. The two policemen followed suit and when De Bour reached them Officer Steck inquired as to what he was doing in the neighborhood. De Bour, clearly but nervously, answered that he had just parked his car and was going to a friend's house.

The patrolman then asked De Bour for identification. As he was answering that he had none, Officer Steck noticed a slight waist-high bulge in defendant's jacket. At this point the policeman asked De Bour to unzip his coat. When De Bour complied with this request Officer Steck observed a revolver protruding from his waistband. The loaded weapon was removed from behind his waistband and he was arrested for possession of the gun.

Holding

This case raised the fundamental issue of whether or not a police officer, in the absence of any concrete indication of criminality, could approach a private citizen on the street for the purpose of requesting information. The Court of Appeals said yes and created the four levels of police citizen encounters in New York:[14]

Level 1 - Request for Information

As long as a police officer has an objectively credible basis to approach an individual, even if it is not indicative of criminality, the officer may ask the individual for information. The officer may not stop, detain, search or frisk the individual.[15]

Level 2 - Common Law Right of Inquiry

Once a police officer has a founded suspicion as to some level of criminal activity, the officer may undertake a formal inquiry of the person. The officer may request permission to search the individual, but the officer is not permitted to forcibly detain or pursue the individual and the individual remains free to leave.[16]

Level 3 - Reasonable Suspicion to Stop

An officer can forcibly stop, detain and pursue a person when the officer has reasonable suspicion that the person has committed, is committing, or is about to commit a felony or misdemeanor. In addition, if the officer has a reasonable belief that the individual is armed and dangerous, the officer can conduct a frisk.[17]

Level 4 - Probable Cause to Arrest

Probable cause is information sufficient to warrant a person of reasonable caution in the belief that the defendant has committed a crime, or that the fruits, evidence or instrumentalities of crime can be found at a given location. If a police officer has probable cause with respect to an individual, the officer may arrest that person on the street without an arrest warrant and may search the individual incident to arrest without a search warrant.[18]

B. *People v. Hollman*

In 1992, the Court of Appeals addressed the vast confusion regarding the differences between levels one and

Continued on page 16

Criminal Justice Section Annual Meeting 2018

At right, pictured from left to right, are former Section Chair Sherry Levin Wallach, Section Chair Tucker C. Stanclift, Section Secretary David Louis Cohen, Vice-Chair Robert J. Masters and Treasurer Leah Rene Nowotarski at Annual Meeting 2018.

Below left, Andrew Kossover, Kossover Law Offices, speaks during the meeting.

Below right, Sean Hill, Senior Legal Fellow at the Katal Center for Health, speaks during the Proposed Bail Reform program. Fellow panelist Insha Rahman, project director at the Vera Institute, is to his left.

Criminal Justice Section

Criminal Justice Section Executive Committee at Annual Meeting.

Hon. Jenny Rivera, N.Y. Court of Appeals, recipient of the Vincent E. Doyle, Jr. Award for Outstanding Judicial Contribution in the Criminal Justice System, and former Section Chair Sherry Levin Wallach.

Marc Gann of Collins Gann McCloskey & Barry, PLLC, and Hon. William C. Donnino, Nassau County Supreme Court Justice.

For information about the award recipients, see pages 6-9.

Annual Meeting 2018

Elkan Abramowitz, Morvillo Abramowitz Grand Iason & Anello P.C., recipient of the Charles F. Crimi Memorial Award, and Lawrence S. Goldman, of Goldman and Johnson.

Justine (Tina) M. Luongo, Attorney-in-Charge, Criminal Practice, The Legal Aid Society, NYC, recipient of the Michele S. Maxian Award for Outstanding Public Service, and Norman P. Effman, Wyoming County Public Defender.

Michael C. Green, New York State Division of Criminal Justice Services, winner of the Outstanding Contribution in the Field of Criminal Justice Legislation Award, and Robert J. Masters, Queens County District Attorney's Office and Section Vice-Chair.

Hon. Barry Kamins, Aidala, Bertuna & Kamins P.C., speaks during the Criminal Justice Section's Annual Meeting program in New York City.

Continued from page 12

two of *De Bour*. The Court noted that a lot of the confusion stemmed from the similarity between the terms.[19] For that reason, the Court specified that a request for information is a general, non-threatening encounter in which an individual is approached for an articulable reason and asked briefly about his or her identity, destination, or reason for being in the area.[20] An officer can also ask about anything unusual that the individual carries. Once the officer's questions become "extended and accusatory," and the officer's questions focus on the "possible criminality of the person approached," giving the individual a reasonable belief that he or she is a suspect of wrongdoing, the encounter has become a common-law inquiry that must be supported by a founded suspicion that criminal activity is afoot.[21] Despite acknowledging that the distinction between the levels is a subtle one, the Court nevertheless decided that they would not purport a bright-line test for distinguishing the two levels, but rather must be determined on a case-by-case basis.[22]

Another issue the Court addressed was the People's contention that in light of the recent Fourth Amendment cases decided by the Supreme Court holding that there are situations not amounting to seizures and thus not protected by the Fourth Amendment,[23] the People argued that *De Bour* was in conflict with the Supreme Court and asked for the opinion to be overturned. The Court, however, stated that *De Bour* was the culmination of State common law and the New York Constitution, holding that in their judgment, "encounters that fall short of Fourth Amendment seizures still implicate the privacy interests of all citizens and that the spirit underlying those words required the adoption of a State common-law method to protect the individual from arbitrary or intimidating police contact."[24]

C. *People v. Garcia*

In 2012, the Court in *People v. Garcia* extended the *De Bour* framework to include traffic stops.[25] In that case, the vehicle was stopped for having a defective brake light. The Court followed the reasoning of the lower courts that have characterized a police officers inquiry as to whether an individual has a weapon as a common-law question requiring founded suspicion of criminality.[26] The Court held that even though a police officer may order the occupants to step out of a stopped vehicle,[27] "a police officer who asks a private citizen if he or she is in possession of a weapon must have founded suspicion that criminality is afoot" on penalty of suppression.[28]

D. *Terry v. Ohio*

The landmark case, *Terry v. Ohio*, was a decision by the United States Supreme Court which held that the Fourth Amendment prohibition on unreasonable searches and seizures is not violated when a police officer stops a suspect on the street and frisks him or her without probable cause to arrest, if the police officer has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime and has a reasonable belief that the person "may be armed and presently dangerous."[29]

For the officers' protection, police may perform a quick surface search of the person's outer clothing for weapons if they have reasonable suspicion that the person stopped is armed.[30] This reasonable suspicion must be based on "specific and articulable facts" and not merely upon an officer's hunch. This permitted police action has subsequently been referred to in short as a "stop and frisk," or more commonly known as a "Terry frisk."[31] The Terry standard was later extended to temporary detentions of persons in vehicles, known as traffic stops.[32]

[Editor's Note: In the final report, the authors and researchers presented their full survey of federal and state jurisdictions and then offered their analysis and conclusions, which are set forth below.]

ANALYSIS AND CONCLUSIONS

Our research indicates that no other state over the past 40 years has adopted *De Bour*. New York is the only state in the union that forbids police officers to talk to people they meet in the street unless certain preconditions are met, and requires the suppression of evidence derived from any conversation[33] held to be unlawful. *De Bour* is exceptionally unique in its ideology, holding that there are Fourth Amendment interests to be protected when, in fact, no seizure has occurred, in stark contrast with the Supreme Court's Fourth Amendment jurisprudence.[34]

The Court's purpose in *De Bour* was to provide clear guidelines for police officers seeking to act lawfully in what are fast moving street encounters and to offer a cohesive framework for courts reviewing the propriety of police conduct in those situations.[35] At the time *De Bour* was decided, New York courts were flooded with search and seizure cases. After all, in the wake of *Terry v. Ohio*, the nation was left with a "Terry frisk" doctrine without any further guidance from the Supreme Court and it would not be for another four years before the Supreme Court would address the issue in a litany of search and seizure cases.[36] In many cases, New York suppression courts held that searches were legitimate because the stop was based on suspicious activity thereby justifying a "Terry frisk." However, in other cases trial courts held that the stop was based on pretextual activity concocted by the police (e.g., the spotting of a dropped envelope or the bulge in a suspect's belt). In other cases, courts found that without "reasonable suspicion" a "suspect" could not be questioned at all. The lack of consistency in the trial courts, along with the lack of guidance from

the Supreme Court, became the motivating factor for *De Bour*.[37] The reality, however, is that regardless of what motivated the adoption of *De Bour*, as well intended as it was, *De Bour* has failed to provide either the clarity or guidance that it sought. And, unfortunately, the courts' slavish devotion to its unworkable structure has not served to benefit anyone.

De Bour's "unique" approach has been criticized by one of the leading treatises on searches and seizures as likely to result in "such confusion and uncertainty that neither police nor courts can ascertain with any degree of confidence precisely what it takes" to comply with its requirements.[38] It is telling that in the 40 years since *De Bour* was decided, not a single state has adopted it. Rather, other states seem to implicitly reject *De Bour*'s framework, relying on a three-tiered system of (1) non-seizure encounter requiring no grounds, (2) reasonable suspicion to stop and frisk, and (3) probable cause to arrest.[39] In *People v. Garcia*, the Court of Appeals expanded the already hyper-stringent rule of *People v. De Bour*, 40 N.Y.2d 210, (1976) and *People v. Hollman*, 79 N.Y.2d 181 (1992) to automobiles, indicating that the New York State Court of Appeals shows no signs of reversing or modifying *De Bour*.

Much confusion stems from the first and second tiers of *De Bour*: level one, the right to approach and request information and level two, the common law right to inquire. In *People v. Hollman*, the Court addressed this by defining subtle differences:

> Once the officer asks more pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer's investigation, the officer is no longer merely seeking information. This has become a common-law inquiry that must be supported by a founded suspicion that criminality is afoot.[40] Further, the distinction: [R]ests on the content of the questions, the number of questions asked, and the degree to which the language and nature of the questions transform the encounter from a merely unsettling one to an intimidating one. We do not purport to set out a bright line test for distinguishing between a request for information and a common-law inquiry. These determinations can only be made on a case-by-case basis.[41]

The "splitting hairs" difference between level one and level two has been a source of confusion among prosecutors, defense attorneys, and judges; some attorneys even carry an index card into court listing the tiers of *De Bour*. Professor LaFave comments that *De Bour* assumes that courts will develop, and police will apply, three separate and distinct evidentiary standards below probable cause for arrest—an "objective credible reason," which is less than "a founded suspicion," which in turn is less than "a reasonable suspicion."[42] Adding to the confusion, other states use the terms "founded suspicion" and "reasonable suspicion" interchangeably.[43] Furthermore, the Supreme Court has rejected similar schemes in the past, believing them to be much too confusing for the parties involved.[44]

"If New York wishes to provide greater protections for citizens and their individual liberties, perhaps a better and more effective way would be to adopt a different but less confusing system."

The question then becomes whether *De Bour* is really in the public interest. If prosecutors, defense attorneys, and judges alike remain confounded by the intricacies of *De Bour*, then it stands to reason that the police officers who are expected to follow the guidelines of *De Bour* during the course of their official law enforcement and public service duties are going to be confounded by the tiered levels as well.[45] This confusion will then lead officers to ignore these tiers during high stress situations and that will be detrimental to all parties involved: police officers, prosecutors, defense attorneys, judges, and the very citizens that *De Bour* is developed to protect. Professor LaFave states that in practice, this confusion causes appellate courts to defer to the trial courts and trial courts then defer to the police.[46] *De Bour*, then, is unrealistic in its assumption that police officers will guided by it in real time, during unpredictable encounters. Hence, on the street, the privacy interests of citizens gain no greater protection.

If New York wishes to provide greater protections for citizens and their individual liberties, perhaps a better and more effective way would be to adopt a different but less confusing system. For instance, the Sixth Circuit four-tiered system seems to afford its citizens broad protections in their level one Pre-Contact tier, but keeps the standard three tiers as their tiers two to four. This Pre-Contact stage, prior to the consensual encounter, occurs when officers observe citizens, and decide to "target" someone for further surveillance.[47] While there are no

Fourth Amendment protections in this stage, the Equal Protection Clause does apply, if they become the target of a police investigation solely on the basis of skin color.[48] Consequently, when police officers compile several reasons before initiating an interview, as long as some of those reasons are legitimate, there is no Equal Protection violation.[49]

In light of our state and federal findings, *De Bour* makes New York the national outlier, possibly making it more trouble than it is worth and should thus be re-evaluated. Though he has previously stated that he does not advocate overturning it, former Chief Judge of the Court of Appeals, Sol Wachtler, who wrote the *De Bour* opinion, has said that "no decision is 'immutable' and any precedent that has been in place for 40 years should be evaluated by the Legislature."[50] He has further commented that he is "surprised that *De Bour* has managed to survive for 40 years"[51] and that "some day technology, a constitutional interpretation, or the evolution of the common law will change the *De Bour* formulation—but we may have to wait another 40 years."[52] After all, this social experiment has lasted for 40 years and nothing lasts forever. Perhaps it is time that New York finds a different way.

What this project has proven is that the other 49 states and the federal system that have not operated under the confusion of this Fourth Amendment architecture have not descended into police states, nor have we, saddled with this artificial *De Bour* sliding scale, lurched toward anarchy. However, we have succeeded in creating an uneven enforcement of our laws, often not determined by the nature and quality of the evidence of guilt or innocence, but, rather, by the freakish quirks of fate visited by the application of a standard that does not mean the same thing to any two individuals who participate in the criminal justice system. It is difficult not to conclude that, in the main, we would all be better without it.

Endnotes

1. *See* People v. De Bour, 40 NY.2d 210 (1976).
2. *See infra* Table I, page 145 (summarizing nation-wide police citizen encounters).
3. *Id.*
4. This conversation occurred approximately in the late 1990's between the then Chief of Training at the NYPD Police Academy and a career prosecutor and member of the Criminal Justice Section. The prosecutor had been asked to participate in a law school panel discussion on *De Bour* and the conversation was part of the preparation for the panel.
5. People v. Hollman, 79 N.Y.2d 181, 196 (1992).
6. *See* People v. De Bour, 40 NY.2d 210 (1976).
7. This is the personal experience of the authors.
8. *See generally De Bour*, 40 N.Y.2d.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id.* at 217.
14. *See generally* People v. De Bour, 40 N.Y.2d 210 (1976).
15. *Id.*
16. *Id.*
17. *Id.*; *See also* Terry v. Ohio, 392 U.S. 1 (1968).
18. *Id.*
19. People v. Hollman, 79 N.Y.2d 181, 188 (1992).
20. *Id.* at 191.
21. *Id.*
22. *Id.* at 192.
23. United States v. Mendenhall, 446 U.S. 544, 554 (1980) (A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave); *see also* Michigan v. Chesternut, 486 U.S. 567, 573 (1988); *see also* Immigration and Naturalization Serv. v. Delgado, 466 U.S. 210, 215 (1984); *see also* Florida v. Royer, 460 U.S. 491, 502 (1983).
24. *Hollman*, 79 N.Y.2d at 195
25. People v. Garcia, 20 N.Y.3d 317, 319 (2012).
26. *Id*. at 322.
27. *See* People v. Robinson, 74 N.Y.2d 773, 775 (1989).
28. *Garcia*, 20 N.Y.3d at 324.
29. *See generally* Terry v. Ohio, 392 U.S. 1 (1968).
30. *Id*.
31. *Id*.
32. *Id*.
33. People v. Garcia, 20 N.Y.3d 317, 325 (2012) (Smith, J., dissenting); *see also* Davis v. United States, 564 U.S. 222, 237 (2011) ("Real deterrent value is a 'necessary condition for exclusion,' but it is not a sufficient one. The analysis must also account for the 'substantial social costs' generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a 'last resort.' For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs").
34. *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980); *see also* United States v. Berry, 670 F.2d 583, 591 (5th Cir. 1982) (finding that the Supreme Court holdings sculpt out, at least theoretically, three-tiers of police citizen encounters: communication between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment, brief 'seizures' that must be supported by reasonable suspicion, and full-scale arrests that must be supported by probable cause).
35. *See generally* People v. Moore, 6 N.Y.3d 496 (2006).
36. *See* United States v. Mendenhall, 446 U.S. 544 (1980); Florida v. Royer, 460 U.S. 491 (1983); I.N.S. v. Delgado, 466 U.S. 210 (1984); Florida v. Bostick, 501 U.S. 429 (1991); California v. Hodari D., 499 U.S. 621 (1991).
37. *See generally* People v. De Bour, 40 N.Y.2d 210 (1976); *see also* People v. Hollman, 79 N.Y.2d 181 (1992). The authors also reached out to former Chief Judge of the New York Court of Appeals, Sol Wachtler, for commentary.
38. 4 Wayne R. LaFave, Search and Seizure § 9.4[e] at 466, 468–469 [4th ed 2004].

39. *See supra* Table I.

40. *Hollman*, 79 N.Y.2d at 185.

41. *Id.* at 192.

42. Adding to the confusion is the New York element of flight in real time rapidly unfolding street encounters. *See* People v. Martinez, 80 N.Y.2d 444, 446 (1992) "Police-citizen encounters take a variety of forms, ranging from a request for information to an arrest. The greater the level of police interference, the greater the quantum of information necessary to justify it. Thus, we have held that the police need have only some objective credible reason to approach a citizen for information, but they must have probable cause to believe that a crime is or has been committed to support an arrest. There is a broad range of legitimate police activity between these two extremes, however, encounters which involve more than an informational stop and less than an arrest. Included among them are forcible stops and seizures which take place whenever an individual's freedom of movement is significantly impeded. Illustrative is police action which restricts an individual's freedom of movement by pursuing one who, for whatever reason, is fleeing to avoid police contact. Because the resulting infringement on freedom of movement is similar, both forcible stops and pursuits require the same degree of information to justify them." (internal citations omitted).

43. *See supra* notes 144–46 (Florida) and accompanying text.

44. *See* United States v. Montoya de Hernandez, 473 U.S. 531, § 10.5 (b) (1985); the lower court's "clear indication" test for other than routine border searches was rejected on the ground that a "third verbal standard" between "reasonable suspicion" and "probable cause" would likely "obscure rather than elucidate the meaning of the provision in question."

45. *See supra* note 8 (Conversation between the Chief of Training and a career prosecutor explaining that *De Bour* is unteachable and thus the police academy teaches officer survival) and accompanying text.

46. 4 Wayne R. LaFave, Search and Seizure § 9.4[e] at 466, 468–469 [4th ed 2004]; *see also* Dunaway v. New York, 442 U.S. 200 (1979) (In effect, respondents urge us to adopt a multifactor balancing test of 'reasonable police conduct under the circumstances' to cover all seizures that do not amount to technical arrests. But the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime.' … A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront).

47. *See supra* note 707 and accompanying text.

48. *See supra* note 708 and accompanying text.

49. *See supra* note 709 and accompanying text.

50. Andrew Deney, *After 40 Years, 'De Bour' Author Sees Need for a Fresh Look*, N.Y. Law J. (May 23, 2016), http://www.nycbar.org/media-listing/media/detail/after-40-years-de-bour-author-sees-need-for-a-fresh-look-new-york-law-journal.

51. The authors reached out to former Chief Judge of the New York Court of Appeals Sol Wachtler for a personal quote.

52. *Id.*

United States Supreme Court News

By Spiros Tsimbinos

Introduction

In the first few months of its new term, the Court issued a few decisions, heard oral arguments in several significant cases and granted certiorari in a host of new matters. These matters are summarized below.

Issued Decisions

President's Travel Ban

Trump, President of the United States, et al. v. International Refugee Assistance Project, et al. and Hawaii, et al., 138 S. Ct. 16 (October 10, 2017)

On October 10, 2017, the United States Supreme Court, after granting certiorari and removing the case from the oral argument calendar, vacated the judgment of the Fourth Circuit Court of Appeals which had affirmed a preliminary injunction against the enforcement of President Trump's original executive order suspending for 90 days the entry of nationals from six majority Muslim countries. The Court stated that the appeal no longer presented a live case or controversy regarding the 90 day travel ban because it expired by its own terms on September 24, 2017. Citing *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the Court vacated the Fourth Circuit's judgment and remanded the case to the Fourth Circuit with instructions to dismiss as moot the challenge to the executive order. Justice Sotomayor dissented from the portion of the Court's order vacating the Fourth Circuit's judgment. She would have dismissed the writ of certiorari as improvidently granted without vacating the judgment.

On October 24, 2017, after the expiration of his original orders, President Trump issued a new modified order which included some new modifications and added some additional countries to the list. On December 4, 2017, the United States Supreme Court allowed the new version of the Administration's travel ban to go into effect, by vacating any preliminary injunctions that had been issued by the lower federal courts. The Supreme Court action was considered a victory for the Administration. However, litigation continued in the federal appellate courts in the Fourth and Ninth circuits, and since the Supreme Court had urged those courts to move swiftly in issuing their determinations, oral arguments in the two Federal Circuits were scheduled for early December. Decisions from those courts continued to limit President Trump's order and challenged his presidential authority. As a result, the Supreme Court on January 19, 2018, announced it would hear the merits of the issues raised. It is expected that oral argument will be heard sometime during the Spring months and a final decision issued in June at the very end of the Court's current term. Thus, the issue of President Trump's travel restrictions may again reach the Supreme Court for a final determination. We will report on any further developments.

Death Penalty

Dunn v. Madison, 138 S. Ct. 9 (November 8, 2017)

In a unanimous decision, the United States Supreme Court upon granting certiorari held that the state court's determination that the defendant was competent to be executed was not an unreasonable application of current law. In the case at bar, the death row defendant had sought federal habeas relief on the grounds that he had become incompetent to be executed due to incurring several recent strokes.

The Supreme Court found, however, that the state court's determination of law and fact that the defendant was competent to be executed was not so lacking in justification as to give rise to error beyond any possibility for fair minded disagreement. Further, the state court did not unreasonably apply Supreme Court decisions in *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Penatti v. Quarterma*ine, 551 U.S. 930 (2007), when it determined that the defendant is competent to be executed because notwithstanding his memory loss he recognized he will be put to death as punishment for the murder he was found to have committed.

The state court decision was thus not founded on an unreasonable assessment of the evidence before it. Although concurring in the Court's main decision, Justice Breyer continued his long campaign regarding reconsideration of the death penalty itself. He thus concluded his concurring opinion with the following statement:

> Rather than develop a constitutional jurisprudence that focuses upon the special circumstances of the aged, however, I believe it would be wiser to reconsider the root cause of the problem – the constitutionality of the death penalty itself. *Glossip, supra*, at _____, 135 S. Ct. at 2755 (BREYER, J., dissenting).

Sentencing

Kernan v. Cuero, 138 S. Ct. 4 (November 6, 2017)

In a unanimous decision, the Supreme Court concluded that federal law as interpreted by the Supreme Court did not clearly establish that the defendant was entitled under the Constitution to specific performance of a lower

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sentence that he would have received under an original plea agreement had the state not made a sentence-raising amendment to the complaint to which the defendant pleaded, and thus federal habeas relief was not warranted. In issuing its decision, the Court noted that the defendant had been offered the ability to withdraw his guilty plea.

Oral Arguments

Political Gerrymandering

Gill v. Whitford, 138 S. Ct. _____ (_____, 2017)

On June 20, 2017, the Supreme Court agreed to hear a case from Wisconsin on the issue of whether Republican lawmakers in the state 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. Democrats argued that Republicans statewide had received 48 percent of the vote but occupied nearly 60 percent of the legislative seats. 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.

Oral argument was heard by the Court on October 3, 2017 and it appeared from the questioning asked by the various Justices that the ultimate decision might involve a 5-4 decision with Justice Kennedy once again rendering the critical swing vote. According to news reports, Justice Kennedy has long been troubled by extreme partisan gerrymandering but he has never found a satisfactory way to determine when voting maps are so warped by politics that they cross a constitutional line. Chief Justice Roberts expressed reservations during the argument about having the Court involved in the political thicket and his position, along with Justice Kennedy's, may ultimately decide the issue.

In January, the Court also issued a stay in a similar case involving the claim of gerrymandering of legislative districts in North Carolina. The courts there had ordered the redrawing of districts; however, the U.S. Supreme Court blocked such action pending their decision in the *Gill* matter.

Detention of Illegal Immigrants

Jennings v. Rodriguez, 138 S. Ct. _____ (_____, 2017)

On November 30, 2016, the United States Supreme Court heard oral argument in a matter which involved the issue of whether immigrants detained for possible deportation can be incarcerated indefinitely without a hearing or bond application. The issue involved the interpretation and application of 8 U.S.C. Following the death of Justice Scalia, the Court apparently deadlocked on a 4-4 basis and ordered that the matter be set down for rehearing. The Court thus heard a second oral argument involving the case on October 3, 2017, the opening day of its new term. Justice Gorsuch, the new addition to the Court, participated in the questioning of the attorneys and it appears that he may be in the position of casting the determining vote on the matter. It is expected that a decision would be forthcoming in the next few months.

The Fourth Amendment as Applied to Cell Phones

Carpenter v. United States, 138 S. Ct. _____ (_____, 2017)

After having granted certiorari, on June 5, 2017, the Court heard oral argument on November 29, 2017 with respect to an important 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, which 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 (212) 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.

Collecting cell phone data as an investigative tool has raised numerous privacy issues. The eventual decision of the Court will determine how the Fourth Amendment protects this kind of data. A decision on this important case is expected within the next few months. An article on the *Carpenter* case and its possible implications was published in the Winter 2018 *Newsletter* by Jay Shapiro, editor of the *Newsletter*. Our readers are urged to reference that article for further details on the issues.

Free Exercise of Religion

Masterpiece Cake Shop Limited v. Colorado Civil Rights Commission, 138 S. Ct. _____ (_____, 2017)

On June 26, 2017, the United States Supreme Court granted certiorari to address the issue of whether the Colorado Civil Rights Commission violated the free exercise and free speech rights under the First Amendment of an owner of a cake shop who has refused to create a cake for a same sex couples wedding because doing so would violate his Christian religious beliefs. A Colorado statute prohibited all places of public accommodation from discriminating against customers because of their sexual orientation. The bakery owner has argued, relying on the Supreme Court's prior decision in the *Hobby Lobby* case, that the Colorado Commission had targeted his religious beliefs about marriage for punishment in violation of the free exercise clause.

The Court heard oral argument on this case on December 5, 2017. It appeared during oral argument that the Justices were sharply divided and it seems that Justice Kennedy could once again emerge as the critical swing vote. A *New York Times* editorial on Dec. 6, 2017, in fact, concluded:

> Today's case will almost surely be decided by Justice Anthony Kennedy, the court's perennial swing vote. This time, the split he faces is not only among the other eight justices but also within himself, as the author of landmark decisions supporting both gay rights and free speech. Kennedy can conclude that Phillips is a reasonable and sincere person, and still decide that businesses may not disregard antidiscrimination laws by cloaking themselves in the First Amendment.

Justice Gorsuch, who recently joined the Court, appears likely to vote with the Court's conservative grouping and Justice Kennedy, along with Chief Justice Roberts could emerge as the pivotal figures in any decision to be reached. A decision is expected sometime in the Spring.

Certiorari Granted With Respect to Additional Criminal Law and Constitutional Issues

Collection of Union Dues, Free Association Violations

Janus v. American Federation of State, County and Municipal Employees, 138 S. Ct. _____ (_____, 2017)

In 2016, the Court had heard oral argument on the case of *Friedrich v. California Teachers Assn.* During oral argument, with Justice Scalia participating, it appeared that the Court was on the verge of placing limits on the right of the unions to take fees from non-union members. As a result of Judge Scalia's death, the Court deadlocked 4-4 and allowed the lower court ruling in favor of the unions to stand. On October 5, 2017, however, the Court granted certiorari and agreed to hear the above-entitled matter, which once again raises the issue of whether government workers who choose not to join unions may be forced to pay for the union's collective bargaining work. Petitioners in the case are relying upon the decision of the United States Supreme Court in *Harris v. Quinn*, 134 S. Ct. 2618 (2014). In *Harris*, the Court had indicated that earlier cases concerning laws authorizing compulsive fees in the private sector had been fundamentally misunderstood. With the addition of Judge Gorsuch to the Court, it appears that a ruling adverse to the unions may be in the making. If the Court rules against the unions, it is estimated that millions of government workers in more than 20 states would be allowed to opt out of paying for collective bargaining, thereby depriving unions of vast sums of money and making them less powerful and effective.

Requiring United States Provider of E-Mail Services to Comply with Probable-Cause-Based Warrant for Disclosure of Material Stored Overseas

U.S. v. Microsoft Corp., 138 S. Ct. _____ (_____, 2017)

Applying Automobile Exception to Search Warrant Requirement to Covered Motorcycle Parked on Defendant's Home Driveway

Collins v. Virginia, 138 S. Ct. _____ (_____, 2017)

Legality of Applying Fifth Amendment Right Against Self-Incrimination to Probable Cause Hearing

City of Hayes, Kansas v. Vogt, 138 S. Ct. _____ (_____, 2017)

Whether It Is Unconstitutional for Defense Counsel to Concede an Accused's Guilt Over the Accused's Express Objection During the Capital Phase of a Murder Trial

McCoy v. Louisiana, 138 S. Ct. _____ (_____, 2017)

Whether the Suppression of Evidence Obtained from Wiretaps Was Not Required as a Result of the District Court's Facially Invalid Authorization of the Wiretaps That Authorized Interception Beyond the Court's Territorial Jurisdiction

Dahada v. U.S., 138 S. Ct. _____ (_____, 2017)

Food for Thought

Does the Recent Repeal of the Obamacare Mandatory Tax Penalty Totally Nullify the Entire Obama Health Care Law and Should the United States Supreme Court Revisit the Issue?

On June 28, 2012, in the landmark case of *National Federation of Independent Business v. Sebelius*, 132 S. Ct., 2566 (2012), the United States Supreme Court, in a narrow 5-4 decision, upheld the constitutionality of the Obama Health Care Law with Chief Justice Roberts issuing the majority opinion solely on the ground that it was a "tax" within the taxing power of Congress. In the decision Justice Roberts specifically stated that the individual mandate imposing minimum essential coverage under which certain individuals must purchase and maintain health insurance coverage exceeded Congress' power under the Commerce Clause. He then upheld the constitutionality of the statute solely on the ground that the individual mandate was a "tax" that was within the taxing powers of Congress.

Now that the individual mandatory tax penalty has been repealed under the new tax law, which went into effect at the beginning of 2018, the question must arise whether the entire Obama Health Care Law is now unconstitutional and invalid? In addition to rising premiums, reductions in subsidies which supported many of the insurance policies issued, and recent predictions that the Obama Health Care Law could simply collapse under its own weight, now that its legal underpinning has apparently been undercut it could additionally be argued that the law is no longer validly in effect and, if necessary, the issue should be revisited by the United States Supreme Court. It is interesting that when the mandatory tax provision was repealed, no one appears to have considered the consequences of such an action.

Case Note:
The Court of Appeals Divides on the Application of "How Long Is Too Long?"

By Jay Shapiro

On February 15, 2018, the Court of Appeals issued its decision in *People v. Wiggins*, a speedy trial case that had its origins eight years ago. The majority of the Court joined in Judge Fahey's opinion that began with these important statements:

> An accused's right to be presumed innocent is protected by the right to prompt justice. Incarceration should generally follow conviction, not precede it. The failure of our criminal justice system to promptly resolve cases erodes faith in its fundamental fairness.

Those principles were used to answer Judge Fahey's opening question: "How long is too long?"

Reginald Wiggins was 16 years old when he was arrested on May 28, 2008, charged with murder in the second degree. The victim, an innocent bystander, was only 15. Defendant was indicted along with a codefendant, a factor that was significant in the years of delay that followed. For more than two years, the prosecution attempted to convince the codefendant to cooperate against Wiggins. The cases were not severed, so the adjournments that occurred as a result of those negotiations impacted on Wiggins' opportunity to go to trial. Ultimately, the prosecution tried the codefendant separately—three times. Hung juries and Hurricane Sandy were factors in those proceedings, and by the summer of 2014 the codefendant was awaiting his fourth trial in this case.

Meanwhile, the defendant had been convicted of a jailhouse assault that took place in October 2011. He was sentenced to four and one-half years imprisonment in June 2013. He pursued two speedy trial motions and finally, in September 2014, Wiggins pleaded guilty to manslaughter in the first degree and was sentenced to 12 years in prison.

The Appellate Division split 3-2 and affirmed Wiggins' conviction, holding that his constitutional speedy trial right was not denied. The Court of Appeals, however, disagreed, although the Court was closely split. Judge Fahey was joined by Judges Rivera, Stein and Wilson, and Chief Judge DiFiore authored a dissent, and Judges Garcia and Feinman concurred with her opinion. Both opinions analyzed the case under the seminal precedent, *People v. Taranovich*, 37 N.Y.2d 442 (1975), and the factors that decision set forth: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*id*. at 445).

The majority found that only the third factor, the nature of the crime, favored the prosecution in the calculus. The Chief Judge, however, saw a number of factors differently. Not surprisingly, she found the nature of the crime warranted consideration in favor of the prosecution. However, the Chief Judge also concluded that the prosecution's justification for the delay was acceptable under the various circumstances presented and that the defendant failed to demonstrate prejudice. That finding was in direct contrast with the majority's finding of, in essence, presumed prejudice.

The analysis presented by both the majority and the dissent demonstrate thoughtful and detailed evaluations of the relevant considerations. While both are well-reasoned, the most important question is not truly "How long is too long," but, rather, how is it that our system allows pretrial delays to extend for years and years?

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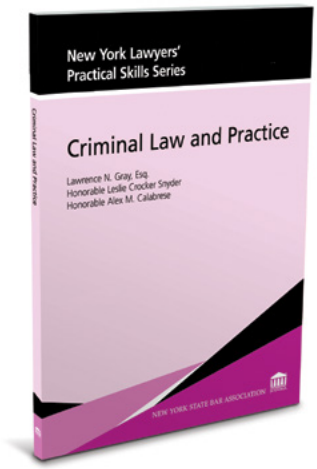

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