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New York Criminal Law Newsletter

A publication of the Criminal Justice Section
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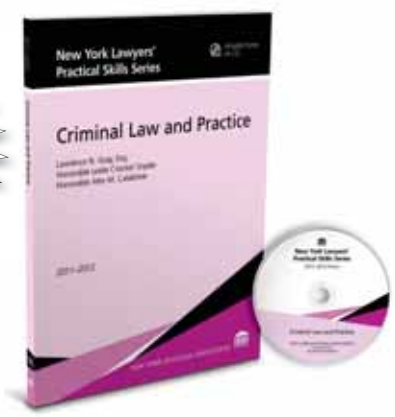

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Message from the Chair—A Personal Commentary

The core of the legal system involves the art of decision making by judges. In recent years, social scientists have been exploring how decisions are made, and the news is not good. Psychologists have learned that human beings rely on mental shortcuts, often referred to as "heuristics" to make complex decisions, and while most of the time heuristics can lead to good judgments they can also produce systemic errors in judgment. Reliance on heuristics can create cognitive illusions—seeing that which is not there—which can produce erroneous judgments. Decades of research regarding juries indicate that cognitive illusions adversely affect how they make decisions, but little research has been done about how judges decide matters. It is known that cognitive illusions plague the decision-making of many professionals, including doctors, engineers, accountants, options traders and even lawyers.

A 2001 empirical study of how 167 federal magistrates made decisions revealed that while the judges were less susceptible to two heuristics—"framing" (treating economically equivalent gains and losses differently) and "representativeness" (ignoring important background statistical information in favor of individualizing information)—they were highly susceptible to three others, namely "hindsight bias" (perceiving past events to have been more predictable than they actually were), "anchoring" (making estimates based on irrelevant starting points) and "egocentric biases" (overestimating one's own abilities). Thus even if judges have no bias or prejudice towards the litigants, fully understand all the relevant law and know all the relevant facts, they still make erroneous decisions.

Recent events in New York State seem to suggest that these biases are at play not only for judges but for public commissions entrusted with oversight responsibilities. What is one to make of the recent decision in *People v. Griffin*, 6425/05, (App. Div., 1st, decided December 15, 2011), a case involving a defendant charged with robbery and attempted robbery at Starbucks' stores. Multiple prosecutors represented the People in the first five months of the case. The first prosecutor left the District Attorney's office during this period, and the case was delayed for a new prosecutor to familiarize himself with the matter. Six weeks later the new prosecutor had done little to prepare the case. During the first five months of the case, the prosecutor sought several adjournments based upon unavailable police witnesses, all of which were granted. In April 2006, the prosecutor was unavailable and on July 10, 2006, the prosecutor was again not ready because police witnesses were still unavailable. He asked for a date of July 25, which was granted.

At that point, the Legal Aid Attorney, who had been representing the Defendant since arraignment, informed the Court he was leaving the office and asked that the next court date be for "control purposes" for the assignment of a new attorney. The Court denied the request, telling the Legal Aid Attorney to have the new attorney be in Court that day or the next to confer with him so the case would be ready for trial on July 25. The assigned Legal Aid attorney then told the Court that the two attorneys who could replace him would not be back from vacation until the end of July, but the Court insisted that a new attorney be assigned, opining that the assigned counsel surely must have told his supervisors about his departure from the office and that there must be more than two sufficiently experienced counsel at Legal Aid who could be assigned. The defense attorney noted that the case was serious, involving a potential life sentence, and that two weeks for a new counsel to prepare would be insufficient. Still the Court disagreed and stood by its previous ruling.

Next, a supervisor told the Court that Legal Aid would not be ready on the next court date, and if the Court wished, it could relieve the Society, noting that the two replacement attorneys would be on vacation through the middle of August. The Court criticized the Society as being unprofessional and not responsible and further noted that the Society, because it experienced a high turnover rate, should assign two attorneys to every case. The Court relieved the Society and provided for the assignment of 18b counsel. The case was transferred to another Judge and in October, 2006, the Defendant pleaded guilty to concurrent terms of 20 years to life. The Defendant filed an ineffective assistance motion seeking to withdraw his plea, but this was denied, and he was sentenced.

In reversing the Defendant's conviction in the interest of justice, the Appellate Division noted that "court's improvident exercise of discretion reflected a difference in treatment of the Legal Aid Society as compared to the People." This was evident by "the disparaging remarks made by the Court about the Legal Aid Society." The Court added that on July 10 the prosecutor had sought a delay due to the unavailability of two police witnesses, one who was out on sick leave and the other who would not be returning until late August (an important fact because the Court had insisted that the case proceed to trial on July 25).

How does one explain what happened in this case? Perhaps there was a time when a simple, but improvable, answer might have been that the Court was seemingly biased against the defense. Or maybe the Court was just rightly concerned with moving its calendar. Heuristics, however, may give us a clue to the jurist's reasoning process—an incorrect *assumption*, as the authors of the above

study "Inside the Judicial Mind," by C. Guthrie, et al., (Cornell Law Review, Vol. 86:777), have discovered, that perhaps the Legal Aid Society was trying to delay the case. The case illustrates in stark terms how a case from 2006, made it to the docket of the Appellate Division five years later. What this means for the prosecution of this matter, after so long a period of time, is also of concern.

Heuristics can have a collective effect on a group of decision makers as evidenced by the activities of the NYS Commission on Forensic Science (CFS) (the author is currently a member of the CFS since September, 2010). By December, 2010, the Nassau County Police Department Forensic Evidence Bureau (FEB) failed the vast majority of measured benchmarks set by the accrediting agency, American Society of Crime Lab Directors / Laboratory Accreditation Board (ASCLD / LAB), resulting in the laboratory being placed on immediate probation.

As it turns out, the laboratory had previously been placed on probation in 2006, also for failing a number of key benchmarks. The CFS was made aware of the problems and the probation but deferred to ASCLD / LABG regarding remediation. Apparently no one informed the Nassau County District Attorney in 2006, including the Nassau County Police Department, the CFS or ASCLD / LAB. In February, 2011, Nassau County closed the lab. Thus for a lengthy period of time, prosecutors were pursing cases with potentially suspect forensic results and certainly defense attorneys were unaware what was happening as they prepared for trials where forensic evidence was in play. Governor Cuomo ordered an investigation, and in November, 2011, Inspector General Ellen Biben issued her report. With respect to the CFS, Inspector General Biben concluded that it had failed to effectively respond to the troubled eight-year history of the FEB, including a failure to respond to the 2006 ASCLD / LAB probation, the first and only time a New York lab had been placed on probation. The CFS conducted no hearings, imposed no sanctions, engaged in no independent monitoring and failed to notify anyone of FEB's probationary status. These failures were in part due to "the Forensic Commission's almost complete abdication of it responsibility for forensic laboratory accreditation and monitoring to a private accrediting agency."

In this instance the CFRS may have fallen victim to egocentric, framing, anchoring and representativeness biases. How else can one explain a collective failure to exercise oversight of a police laboratory? Like the new, possible trial for Mr. Griffin resulting from the aforementioned reversal, so also the decision making (or perhaps the decisions not to make decisions) has resulted in the closing of a laboratory and the outsourcing of forensic evidence work at a cost to the Nassau County taxpayers of $100,000 per month.

The criminal justice system is complicated, and heuristics can explain, but not ameliorate, the harms caused by cognitive illusions. In the months ahead, we will explore Brady violations and how a culture of non-compliance contributes to wrongful convictions. In the meantime, there are no cognitive illusions about persons serving thirty years in prison for crimes they did not commit.

Marvin Schechter

Message from the Editor

In this issue, we provide photos and details regarding the activities at our Section's Annual Meeting, awards luncheon and CLE program, which were held at the Hilton Hotel in New York City on January 26, 2012. Our annual awards luncheon was attended by approximately 100 members. As in the past, several awards were distributed to noteworthy recipients. This year's awards were presented to several individuals who have contributed in some outstanding manner to the criminal justice system. It was a pleasure to recognize these individuals for their outstanding work and service. The names of this year's award winners are published in our "About Our Section and Members" article.

This issue also contains an informative and interesting article regarding the admissibility of DNA identification evidence. This article is written by Shirley K. Duffy, who previously contributed an article to our *Newsletter*. Her article in this issue provides valuable details regarding an area which is constantly developing and which is important for criminal law attorneys to comprehend. We thank Shirley Duffy for her most recent article and look forward to additional articles from her.

During the last several months, the New York Court of Appeals also began issuing several important decisions in the area of criminal law, including issues involving expert identification testimony, and prompt outcry. Since the Court began some two years ago to accept a greater number of cases involving criminal law issues, the Court's criminal law docket has grown significantly and we are now summarizing approximately 20 to 25 cases from the Court of Appeals in each issue. These summaries are found in our New York Court of Appeals section.

The United States Supreme Court has also recently heard several cases involving significant criminal law issues. Decisions on these matters are expected within the next few months, and we will report on them as soon as decisions are available. The Court did issue decisions on the use by police of GPS tracking devices without a warrant, the reliability of eyewitness identification and the extension of a deadline for a death row inmate to file a habeas corpus petition. These cases are discussed in our Supreme Court section.

In the For Your Information section we provide details regarding recent occurrences which have affected the operation of the court system. These include some significant changes in the court personnel in the various Appellate Divisions, as well as the effects of recent cuts in the judiciary budget on the operation of the court system.

This *Newsletter* serves as the lines of communication between our Criminal Justice Section and its members, and we encourage comments and suggestions from the membership. As in the past, I also appreciate receiving articles for possible inclusion in the *Newsletter*, and encourage the submission of such articles by our members. We have entered the tenth year of our publication, and I again thank our members for their support of our *Newsletter*.

Spiros A. Tsimbinos

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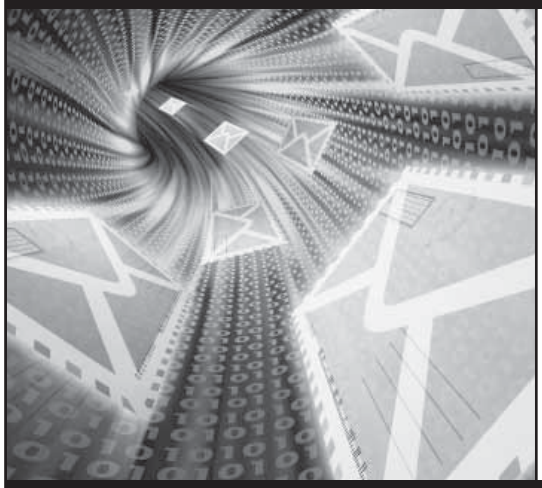

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Challenging the Admissibility of DNA Identification Evidence

By Shirley K. Duffy

Introduction

DNA identification by matching a suspect's DNA profile to evidence found at the crime scene provides probative evidence for the trier of fact in criminal cases. It helps to convict the guilty. It also exonerates the innocent with thanks to the Innocence Project.[1] However, the method needs renovation and repair. This article makes suggestions on how to do so.

Justice is only accomplished by attorneys for both parties to the litigation having equal access to the tools and resources to argue issues from opposing viewpoints so that the court and jury can make well informed decisions. To that end this article discusses challenging the admissibility of expert testimony on DNA identification evidence in New York.

Despite increasing use of DNA identification evidence to identify, convict, and exonerate individuals, current practices are inadequate and lack standardization. There has been limited testing of underlying assumptions, lack of control and failure to use double-blind techniques. When confronted with the use of DNA identification evidence, one should keep in mind the relative "newness" of current DNA practices and the aforementioned issues.

Review of genetics, biochemistry, population biology, probability and statistics are beyond the scope of a 3,000 word article. Good references on these concepts are: Donald E. Riley, Ph.D. *DNA Testing: An Introduction for Non-Scientists; an Illustrated Explanation*. Scientific Testimony an Online Journal. www.scientific.org; Federal Judicial Center *Reference Guide on DNA Evidence* (2000); The National Research Council (NRC), *The Evaluation of Forensic DNA Typing* (2000) and John M. Butler, *Forensic DNA Typing* (2001). (Endnote 32 is a summary of basic concepts.)

Law Governing Expert Testimony

In *People v. Wesley*, 83 NY2d 417, 422 (NY 1994) the New York Court of Appeals applied the *"Frye"* (*Frye v. United States*, 293 F. 1013) standard to determine the admissibility of expert testimony concerning DNA testing: "The long-recognized rule of *Frye v. United States* (*supra*) is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field." [*See also Giordano v. MK & Ames, Inc.* 2010 NY Slip Op. 8382, 15 N.E.2d 727 (2010)].

The *Wesley* Court held DNA evidence was generally accepted as reliable by the scientific community and upon proper foundation DNA profiling evidence was admissible. (*Wesley* at 425).

In *Wesley* the Concurring Opinion by Judge Kaye warned of the dangers of a presenter of the evidence, i.e., a scientist as entrepreneur, who had a proprietary interest in the techniques in question testifying to its general acceptance:

> A *Frye* court should be particularly cautious when—as here—"the supporting research is conducted by someone with a professional or commercial interest in the technique." (Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half Century Later*, 80 Colum. L. Rev. 1197, 1213). DNA forensic analysis was developed in commercial laboratories under conditions of secrecy, preventing emergence of independent views. No independent academic or governmental laboratories were publishing studies concerning forensic use of DNA profiling. The Federal Bureau of Investigation did not consider use of the technique until 1989. Because no other facilities were apparently conducting research in the field, the commercial laboratory's unchallenged endorsement of the reliability of its own techniques was accepted by the hearing court as sufficient to represent acceptance of the techniques by scientists generally.

In summary, the theme of New York precedent is that both reliability of testimony and the general acceptance of the method in the scientific community are indicia of DNA identification as a credible source of evidence.

Limitations of the National DNA Index System (NDIS): Inadequate Quality Assurance and Control

The Office of the Inspector General of the U.S. Department of Justice reports irregularities in the upload of forensic profiles into the National DNA Index System (NDIS)[2] (see Combined DNA Index System (CODIS) Operational and Laboratory Vulnerabilities, May 2006 p. vi-vii)**.** The Federal Bureau of Investigation (FBI) has been relying on self-certification by laboratories indicating personnel have read reminders of categories of acceptable data, as outlined by the NDIS, and will abide by them.[3] The Office of the Inspector General concluded that this was not sufficient, noting that use of certification forms was inconsistent and that the forms themselves did not ensure CODIS compliance.[4]

The Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing Laboratories,[5] effective July 1, 2009, attempt to address some of these concerns through: 1) continuing education [Standard 5.1.3]; 2) making the laboratory's Casework CODIS Administrator responsible for quality assurance of CODIS operations [Standards 5.3.4 through 5.3.6]; 3) technical review of uploads [Standard 12.2.7]; 4) proficiency testing [Standard 13.1.9]; 5) external audits with NDIS laboratories reporting to the FBI [Standard 15] and guidelines for outsourcing [Standard 17.3].

However, these remedial measures are prospective and do not correct past irregularities in uploads. Therefore, matches of past crime scene samples with CODIS profiles remain compromised, especially in cold cases.

Interpretation of Mixtures

The interpretation of mixtures is subjective and prone to influence by knowledge of the known sample and blind testing should be the rule.[6] The FBI'S Quality Assurance Standards do not require blind testing [Standard 7.1.1].

Recently the Scientific Working Group on DNA Methods (SWGDAM) provided guidelines for the analysis of mixtures.[7] A limitation of SWGDAM'S method is that thresholds are used to analyze the data.[8] The DNA laboratory sets a "threshold" above which all data peaks are considered equally. An analogy would be viewing a landscape of mountains ranging in height from 30 to 1,000 feet. If someone told you only the peaks over 200 feet were real, would you believe them?[9]

Similarly, with SWGDAM'S threshold method peaks below the threshold are ignored. This can be problematic for the defendant. If he or she has been falsely accused of a crime there may be someone else's DNA in the data not belonging to the defendant. If the stranger's DNA peaks fall below the threshold some laboratories may report this evidence as inconclusive and the actual perpetrator is not implicated.

However, there is hope. Section 3.2.2 provides that a probabilistic genotype approach supported by empirical data, internal validation and documented standard operating procedures may be used.[10] One such approach is the Cybergenetics' TrueAllele which considers information-rich peak heights both above and below the threshold. TrueAllele interprets a physical process (DNA typing laboratory results) with probability theory which is applied by a computer program.[11] The method is truly a stroke of genius. It is blind testing of all the data and an objective result is obtained.

In cold cases crime scene DNA is compared to the CODIS database to find suspects. The problem with CODIS is that it stores DNA evidence as "alleles" which discards most of the identification information. CODIS nonspecifically returns hundreds of candidate matches but the actual perpetrator may or may not be on the list because his or her DNA contribution was below the threshold. As a criminal defense attorney your client may be implicated because he or she shows up on the list but since the method lacks sensitivity the actual perpetrator may elude detection.

In addition to these limitations of DNA typing theory and irregularities in the DNA database are the practical concerns of typing done on limited amounts[12] of DNA and laboratory error.[13]

Limitations of the National Research Council Evaluation of Forensic DNA Evidence

In 1996 the National Research Council[14] (NRC) evaluated the use of DNA evidence in criminal cases and its underlying assumptions. However, the NRC analysis was based on small sample sizes of only 212 blacks and 413 whites. Based upon these results, the NRC concluded that DNA typing methods conformed to population genetics theory.[15] Larger sample sizes more closely reflect DNA distribution in the general population and would be a better indicator of conformity with population genetics theory.

Based upon these assumptions, the NRC derived factors and equations to analyze and explain DNA typing results. The population of the United States has subgroups: white, black, Hispanic, Asian, etc.[16]

A factor called (theta) was derived to account for the effects of population subdivision.[17] Also, population structure equations were derived to estimate DNA types where no data for a particular subgroup (i.e. black, Asian, etc.) were available.[18]

Theta corrects the proffered evidence for population substructure. The correction has little effect. If the probability of a random match is one in ten trillion, after correction it will be one in one trillion. The correction is made to make the proffered evidence unassailable. It also enhances believability. Sometimes the random match probability is in the quadrillions but there are only seven billion people in the world after all.

In the National Research Council study, the underlying assumptions that DNA identification typing was in accord with population genetics theory was based on limited data. These assumptions were used as the basis for and the population structure equations.

Although subsequent population dynamics studies have revealed that the factor is a good estimator of population substructure, it exemplifies the Orwellian nature of the field. Decisions are made based on inadequate empirical evidence and the data to justify the conclusions are obtained after the fact in self-validation of the method. More study is required before decisions of life and death with consequences on people's lives are made.

The 13 CODIS Core Loci May Not Provide Sufficient Resolving Power

Currently the Federal Bureau of Investigation (FBI) assumes that the 13 CODIS (Combined DNA Index System) core loci are an adequate number to distinguish between profiles of two unrelated individuals. In 1997 the FBI announced a new policy which is practically incomprehensible to a nonscientist and is referred to as the statistical basis for individualization.[19] If DNA typing results conform to this statistical concept then is can be said that there is a "reasonable scientific certainty" that a particular individual was the source of the DNA.[20]

Perlin (2010)[21] suggests another approach which asks the question: how does the evidence support the contention that the suspect is the contributor? Then, the answer is expressed in a form that is easier for the trier of fact to understand i.e. a match between the evidence and the suspect is a given number (e.g. 10, 100, 1000, etc.) times more probable than coincidence.

Weir (1999)[22] suggests that uniqueness is not an issue that can be addressed with statistics. This is because the current method does not take into account family members and relatives which can prejudice the ability to find uniqueness.

The bottom line is that the 13 CODIS core loci may not be enough to distinguish between two different people. This means that there may be another person in the world who has the same DNA profile as your client.

A quote often attributed to Mark Twain is "There are lies, damn lies and statistics." Given that familial and evolutionary relatedness are not taken into account in the FBI's paradigm of uniqueness, how can it be said that their results can be stated with "reasonable scientific certainty"?

This evidence is presented as if it comes down from "On High" to us mere mortals and is infallible,[23] when actually there are limitations of the process. Expert testimony for the defense and adequate jury instructions should take into account the limitations of the method.

Other ways of expressing DNA testing data should be considered as the current numerical expression of results gives a patina of infallibility and certainty where there is none.

Other Approaches Considering the Facts and Circumstances of the Case

Dennis Lindley, a Bayesian statistician in England, introduced likelihood ratios into forensic science first with glass evidence.[24] An intuitive introduction to probability concepts *Understanding Uncertainty* is an outstanding book written by Lindley for lawyers, judges and nonscientists.[25] In the last two decades John Buckleton, Ian Evett and Bruce Weir have brought the likelihood ratio to the interpretation of DNA and mixtures.[26]

Currently the way DNA evidence is presented by the prosecution is to merely review the credentials of the expert testifying with a brief description of methods and presentation of the results of the tests as a random match probability. Foreman (2003) suggests that DNA results should be analyzed by considering the facts and circumstances of the crime under a framework of circumstance.[27] This method utilizes the foundational work of Lindley in the interpretation of DNA results.

In analyzing DNA identification evidence the defendant needs to provide alternative explanations (hypotheses) for the events at the crime scene. These alternative hypotheses should be ranked and tested with the weight of the DNA evidence reported as a likelihood ratio.[28]

In our system of jurisprudence the weight of the evidence is determined by the jury (or judge in nonjury trial). An expert may offer an opinion but the ultimate decision is the duty of the trier of facts.

Any other analysis impermissibly alters the role of the jury and alters the prosecution's burden of proof from beyond a reasonable doubt to a number left to expert opinion that there is little doubt that the defendant's DNA exists at a crime scene.

Even though a defendant's DNA is at a crime scene there may be alternative explanations for it and these must be considered. Thus the prosecution's expert impermissibly shifts the burden of proof to the defendant.

This would be more fair if the defendant can afford an expert but is a denial of due process and a fair trial where he or she cannot afford one and a court will not make providing one a remedy.

A good thing about Foreman's method is that interpretation of the evidence is not possible unless at least two competing propositions are considered.[29] This approach also allows for additional factors to be considered such as transfer and background probabilities in contrast to the current approach which focuses only on random match probabilities.

An expert for the defense is needed to critique the methods of the prosecution, assure quality control, and interpret the results by taking the entire facts and circumstances of the crime into account. In cases involving indigent defendants, experts typically are not utilized by the defense or the courts will not provide one even when they have the power to do so.

New York County Law 722-c[30] gives the court the power to appoint an expert at no charge to the defendant if he/she is unable to pay for one. Some courts do not do so or the DNA results are turned over to the defendant on the eve of trial when it is difficult or impossible to obtain an expert opinion.

The arguments in this article and the alternative methods it suggests can be used to raise reasonable

doubt. An expert is needed to do so. Denying an expert denies the Defendant the right to put on a defense.

If the expert retained by the defense agrees with the prosecution his / her report is not discoverable by the prosecution. Criminal Procedure Law 240.30[31] provides that Defendant turn over the report only if he / she intends to introduce it at trial. To be cautious the expert should provide an oral preliminary report. If his / her conclusions support the defense's case, then a written report may be prepared.[32]

Requests for expert review remain a relevant issue when DNA reports are introduced into evidence. The government has a monopoly on the expertise in these cases and to deny the defendant an expert violates due process and fundamental fairness.

Conclusion

The underlying reasoning of the National Research Council for using DNA identification has limitations. The thirteen CODIS loci lack adequate power to resolve matches and non-matches. The DNA database used to match profiles from a crime scene to convicted felons from its inception has not had adequate quality assurance and control. There has not been sufficient analysis of the problems of resolving mixtures, results based on small samples of DNA, and laboratory error. Analysis and presentation of this evidence at trial is limited because the whole story of the crime is not told because the results have not been analyzed using the alternative methods suggested herein.

This article was written to raise awareness of the issues and promote discussion for all members of the criminal justice system and the society it serves. This article does not have the answers. Perhaps the answers will be obtained through discussion of the issues. The only person who wins by a misidentification whether by DNA or eyewitness evidence is the real culprit. Everyone, except the real perpetrator, has an interest in getting it right.

Endnotes

1. www.innocenceproject.org.
2. U.S. Department of Justice, Office of the Inspector General, *Combined DNA Index System Operational and Laboratory Vulnerabilities*, p. vi-vii (2006).
3. *Id.*
4. *Id.*
5. Quality Assurance Standards for Forensic DNA Testing Laboratories (2009), www.fbi.gov / hq / lab / html / testinglab.htm.
6. Dr. William Shields personal communication.
7. Scientific Working Group on DNA Methods (SWGDAM) Interpretation Guidelines for Autosomal STR Typing by Forensic DNA Testing Laboratories. January 14, 2010, www.fbi.gov / about-us / lab / codis / swgdam-interpretation-guidelines.
8. Section 3.2 Application of Peak Height Thresholds to Allelic Peaks p. 6, *supra* note 6, at 6.
9. Cybergenetics Newsletter. The DNA Investigator. Winter 2011. www.cybgen.com / information / news_winter2011.shtml.
10. SWGDAM, *supra* note 7, p. 6-7.
11. Mark W. Perlin, Explaining the Likelihood Ratio in DNA Mixture Interpretation Promega's Twenty First International Symposium on Human Identification, October 14, 2010, San Antonio, Texas. www.cybgen.com / information / presentations / 2010.
12. Problems with small amounts of DNA are: alleles may be missing (allelic dropout); some alleles may amplify more efficiently than others (differential amplification); one of the two different alleles in a heterozygote may be present in a larger amount than the other allele (stochastic effects) [See Riley and Butler in Introduction].
13. Some concerns about laboratory error are: 1) where sample sizes are small or degraded extra vigilance with negative controls to determine contamination by running blanks along with samples is necessary (Riley at 4); 2) since the chance of laboratory error is much larger than a coincidental match, laboratories should document analytical steps and reserve portions of DNA samples for future testing (Reference Guide 521-522 and Riley, p.11); 3) Since the Polymerase Chain Reaction (PCR) method is very sensitive to contamination problems, DNA samples should be collected carefully to reduce contamination (i.e., paper envelopes for storage of sample should not be used, Riley p. 11); 5) "chain of custody" should be scrutinized, the laboratory's protocols should be examined and verified, and confirmatory tests should be performed if suspicious circumstances exist to eliminate the hypothesis of laboratory error (Reference Guide at 522).
14. National Research Council, The Evaluation of Forensic DNA Evidence. p. 90-104 (1996).
15. The Hardy / Weinberg law provides that the frequencies of alleles are constant from generation to generation given the following: mating is random and mutation, selection, immigration and emigration do not occur (NRC 92-94). Remember there are two alleles (types of genes) at a locus (a place on a chromosome) since one chromosome comes from the mother and one from the father. See Endnote 32 for an explanation of Hardy / Weinberg proportions.
16. *Id.* at 99.
17. *Id.* at 102-104.
18. Theta ( ) is used to generate an estimated frequency for a given sub-group by inserting the value of for the sub-group along with known values for the general population into the population structure equations. See Endnote 32 for an explanation of theta and the population structure equations.
19. U.S. Department of Justice, Future of Forensic DNA Testing (2000). See p. 19, and Appendix A1.b., p. 41.
20. *Id.*, note 21, at 25.
21. Perlin, *supra* note 11, at 7.
22. Bruce S. Weir, Are DNA Profiles Unique? Proceedings of the Ninth International Symposium on Human Identification. Pp. 114-117. Promega Corp. Madison, WI (1999).
23. Riley p. 6; see Introduction to this article.
24. Dennis V. Lindley. A Problem in Forensic Science. 64 Biometrika 2, 207-213 (1977).
25. Dennis V. Lindley. Understanding Uncertainty. Hoboken, NJ: John Wiley and Sons (2006).
26. John S. Buckleton, Christopher M. Triggs, and Simon J. Walsh, Editors. Forensic DNA Interpretation. Boca Raton, FL: CRC Press (2004); and Ian W. Evett and Bruce S. Weir. Interpreting DNA Evidence: Statistical Genetics for the Forensic Scientist. Sunderland, MA: Sinauer Assoc. (1998).
27. Foreman L.A., C. Champod, I.W. Evett, J.A. Lambert and S. Pope. *Interpreting DNA Evidence: A Review.* 71 International Statistical Review, 71, 3. 473-495; n.72 at 473-475 (2003).
28. *Id.* at 481.
29. *Id.*

30. New York County Law. Article 18-B. Section 722-c. Services other than counsel.

31. New York Criminal Procedure Law. Section 240.30. Discovery; upon demand of prosecutor.

32. Explanatory Note. The theory behind the method of multiplying allele frequencies in the general population at each locus to obtain the random match probability is reviewed after a brief section on definition of terms.

A brief definition of terms follows: A "locus" is merely a position on a chromosome. An "allele" is a gene of a certain type. (In a population of organisms there can be many types of [alleles] at a given position on a chromosome [locus]).

Since one chromosome is inherited from the mother and another from the father, each person has two "alleles" at a given position, on two different chromosomes. In an individual, there are usually only two alleles at a locus.

The individual can either have two alleles of the same type at a locus, in which case it is a homozygote, or two different types of alleles at a locus, in which case it is a heterozygote.

"Genotype" is the genetic constitution of an organism determined by the two alleles at a locus. "Phenotype" is the expression of the genotype. In simple terms phenotype is what a person sees or can measure biochemically, behaviorally, etc. (Ref. Guide 525)

"Random match probability" is a number indicating the probability that a person drawn at random from the population of unrelated individuals would have the same DNA profile as the blood stain, semen stain, etc. found in the evidence. (Ref. Guide, note 243, at 539)

In order to use the product rule whereby allele frequencies found in the general population are multiplied to get a random match probability, it is assumed that the population of genotypes is close to Hardy Weinberg proportions and that there is linkage equilibrium. (NRC, 90-93)

Hardy / Weinberg proportions are exhibited in a randomly mating population. (NRC, 92) In a population of people or most other organisms that reproduce sexually, the proportion of persons with two copies of the same allele is the square of that allele's frequency in the population, and the proportion of persons with two different alleles is twice the product of the two frequencies in the population. (NRC, 92) This is expressed by Equations 4.1(a) and 4.1(b): (NRC, 94)

homozygotes: A_iA_i: $P_{ii} = p_i^2$ [Eq. 4.1(a)]

heterozygotes: A_iA_j: $P_{ij} = 2p_ip_j$, $i \neq j$ [Eq. 4.1(b)].

"Linkage equilibrium" is a state exhibited by a population of organisms in which the frequency of a multilocus genotype (typically in forensic analysis the number of loci is thirteen, plus a sex specific) is the product of the genotype frequencies at the separate loci. (NRC, 106)

Real populations of organisms may or may not be close to Hardy / Weinberg proportions and linkage equilibrium. (NRC, 97 and 110) The proponents of these methods provided limited data for the proposition that Hardy / Weinberg ratios are closely approximated in real populations: the M-N blood group data in New York City whites. (NRC, 94)

Additionally, the population of the United States has population subgroups: white, black, Hispanic, Asian, etc. (NRC, 99) Therefore, a parameter called *theta* ( ) was derived to take into account the effects of population subdivision. (NRC, 102-104) Basically, the Hardy / Weinberg proportions are modified by a factor to take into account population subdivision. Equations 4.4a and 4.4b are: (NRC, 102)

$$A_iA_i: P_{ii} = p_i^2 + (1-p_i)\ _{ii} \text{ [Eq. 4.4(a)]}$$

$$A_iA_j: P_{ij} = 2p_ip_j(1-q_{ij}),\ i \neq j \text{ [Eq. 4.4(b)].}$$

The factor can be calculated empirically from data in the real world, and indeed this was done for the locus D2S44 with a value of equal to 0.0015 as the result. (NRC, 100-105, Table 4.5 & Box 4.2 & text)

If the race of the person who left the evidence sample is known, then the allele frequencies for that person's race is used with the product rule; that is, multiplying the single-locus allele frequencies observed in the population to get the random match probability for a multi-locus test. (Ref Guide, *supra* n. 25 at 529)

Since analytical methods often are insufficient to adequately resolve the presence of homozygotes, the 2p rule, which overestimates the number of homozygotes, is used to provide conservative estimates that underestimate the weight of the evidence against the defendant. (NRC, n. 14 at 105-106) The derivation of the 2p rule was provided by the National Research Council (NRC, n. 14 at 105-106) and is explained in the Federal Judicial Center guidance. (Ref Guide, supra n. 25 at 529 and note 182). An example of how the 2p rule is used was provided by the NRC. (NRC n. 14 at 111)

If allele frequencies for a subgroup are not known and data for the full population exists, the population structure equations (NRC 114-115) are used to estimate frequencies for each locus and the resulting values are multiplied to obtain a random match probability:

Homozygote: $P(A_i A_i | A_i A_i) =$ (Eq. 4.10a) $\dfrac{[2\theta + (1 - \theta)p_i][3\theta + (1 - \theta)p_i]}{(1 + \theta)(1 + 2\theta)}$

Heterozygote: $P(A_i A_j | A_i A_j) =$ (Eq. 4.10b) $\dfrac{2[\theta + (1 - \theta)p_i][\theta + (1 - \theta)p_i]}{(1 + \theta)(1 + 2\theta)}$

In these equations default values for are used to estimate the number of homozygotes and heterozygotes in the population. (NRC 116, 119). In essence, is used to correct the observed data for the possible effects of population structure. (NRC 104)

In estimating homozygotes, the 2p rule used in conjunction with the assumption of Hardy / Weinberg proportions is more conservative than the above procedure. (NRC 116). A value of of 0.01 for urban populations and 0.03 for isolated villages was recommended for use in the population structure equations. (NRC 115). This can be somewhat confusing, but first a parameter theta ( ) that takes into account population subdivision must be derived before that parameter can be used to make corrections.

The above analysis was done for VNTR (Variable Number of Tandem Repeat) loci. (Ref. Guide 494). VNTRs are longer (i.e., have more base pairs) than STR (Short Tandem Repeats). (Ref. Guide 494) STR loci are amplified by PCR-based systems (Polymerase Chain Reaction). (Ref. Guide 563). However, the same analysis derived for VNTR loci was recommended for PCR-based systems. (NRC n. 14 at 119)

A PCR-based system just takes a DNA sample of limited quantity and makes more copies of the DNA for analysis. (Ref. Guide 563). A value of 0.03 for is recommended for PCR-based systems and PCR and VNTR loci can be combined. (NRC, n. 14 at 119). For more detailed discussion of concepts see Riley and Butler in Introduction.

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New York Court of Appeals Review

The New York Court of Appeals has issued several important rulings in the field of criminal law in the last few months. Summarized below are the significant decisions issued by the New York Court of Appeals from October 13, 2011 to January 30, 2012.

Pro Se Representation

People v. Crampe

***People v. Wingate*, decided October 13, 2011 (N.Y.L.J., October 14, 2011, pp. 1, 8 and 24)**

In a series of three cases, the Court held that trial judges must do more than merely caution criminal defendants that they might be convicted if they insist on representing themselves. The Court held that to insure that the waiver of the right to counsel is knowing, intelligent and voluntary, trial judges must make a searching and adequate inquiry before allowing the right to counsel to be waived and for defendants to proceed pro se. In the case of Defendant Crampe, the Court ordered a new trial in a unanimous verdict after determining that the town Justice had merely read a form to the Defendant regarding his waiver of counsel, and had failed to make a searching inquiry to determine whether the Defendant understands and acknowledges the risks of self-representation. In the Wingate matter, the Defendant had appeared without counsel during a suppression hearing. The Court ordered that a new suppression hearing be held because once again the warnings provided by the trial Judge were not fully adequate to apprise the Defendant of the risks of proceeding pro se.

Admissibility of Evidence

***People v. Robinson*, decided October 13, 2011 (N.Y.L.J., October 14, 2011, p. 25)**

In a unanimous decision, the New York Court of Appeals reversed the Defendant's conviction and ordered a new trial. The Court found that the trial Judge had improperly prevented the Defendant from explaining certain statements that he had allegedly made to the police. The Appellate Division had found that the error in question was harmless, but the Court of Appeals concluded that in the case at bar, the evidence against the Defendant was not overwhelming and that he should have been allowed the opportunity to explain the statements which were made and that his explanation could have created doubt in the jury's mind which may have been sufficient to result in an acquittal. Under these circumstances, a new trial was required.

Assault in the Second Degree

***People v. Brown*, decided October 13, 2011 (N.Y.L.J., October 14, 2011, p. 25)**

In a unanimous decision, the New York Court of Appeals modified the Defendant's conviction for reckless assault in the second degree by reducing it to criminal negligent assault in the third degree. The Appellate Court found that the evidence in question was not sufficient to support a finding of recklessness, and that therefore a reduction to a charge involving criminal negligence was warranted. The issue involved a situation where the Defendant had splashed the victim with water that had been heated on the stove while engaging in horseplay and other pranks. The Court found that the standard regarding recklessness had not been met and that a lower charge was appropriate.

Prompt Outcry

People v. Rosario

***People v. Parada*, decided October 18, 2011 (N.Y.L.J., October 19, 2011, p. 24)**

In the cases at bar, the Court of Appeals was presented with the issue of whether prior consistent statements alleging sexual abuse were properly admitted under the prompt outcry rule or, in the alternative, in the *Rosario* case, to rebut a claim of recent fabrication. In the *Rosario* matter, which involved a sixteen-year old complainant who testified that her father began to sexually abuse her when she was nine years old, the Court concluded that the statements in question were inadmissible. The statements in question involved information that was allegedly given by the victim in a note to her boyfriend many months after the alleged incident. The Court concluded that the note in question containing the alleged statements did not qualify as a prompt outcry in view of the months-long delay between the charged conduct and the writing of the note. The note also did not qualify as a rebuttal to a claim of a recent fabrication.

In the *Parada* case, the victim testified that the Defendant abused her when he babysat with her during school breaks from mid-2002 until 2004. The Defendant claimed that she had disclosed this situation to a female cousin and subsequently to an aunt more than a year later. The Appellate Court found that the statement allegedly made to the aunt constituted harmless error and therefore the determination of the Appellate Division would not be disturbed. The majority opinion was written by Judge Read, and was joined in by Chief Judge Lippman and Judges Ciparick, Graffeo, Pigott and Jones. Judge Smith dissented with respect to the *Rosario* determination.

Overwhelming Proof of Guilt

***People v. Porco*, decided October 18, 2011 (N.Y.L.J., October 19, 2011, pp. 1, 2 and 24)**

In a unanimous decision, the New York Court of Appeals upheld the Defendant's conviction for murder in the

second degree. The Defendant was a college student who was convicted of killing his father, who served as a confidential law clerk of the Presiding Justice of the Appellate Division, Third Department. The Court of Appeals found that there was overwhelming proof of the Defendant's guilt and that any error which might have occurred by the trial court with respect to allowing into evidence testimony regarding a nod that the Defendant's mother made to Detectives when asked if her son Christopher was the assailant in the attack against her and her husband was negated by the totality of the evidence against the Defendant. The Defendant had argued that the evidence in question had denied his right of confrontation. The Court of Appeals, however, stated that "Trial errors resulting in violation of a criminal defendant's Sixth Amendment right to confrontation 'are considered harmless when, in light of the totality of the evidence, there is no reasonable possibility that the error affected the jury's verdict.'"

Criminal Possession of a Forged Instrument

People v. Rodriguez, decided October 18, 2011 (N.Y.L.J., October 19, 2011, p. 22)

In a unanimous decision, the New York Court of Appeals determined that the evidence in question was legally sufficient to convict the Defendant of criminal possession of a forged instrument in the second degree. In the case at bar, a police Detective, based upon certain information he had received, detained the Defendant and subsequently discovered that he possessed a forged New York State driver's license and several other forged documents. Following a jury trial, the Defendant was convicted of four counts of criminal possession of a forged instrument in the second degree, which requires an intent to defraud. The Defendant argued that evidence was insufficient to establish the critical element of intent. The New York Court of Appeals, however, stated that evidence is sufficient to sustain a conviction where there is a valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial. The Court concluded that because intent is an invisible operation of the mind, direct evidence is rarely available and is unnecessary where there is legally sufficient circumstantial evidence of intent. Under the circumstances herein, the Defendant carried the false documents separately from his true identification, and the number of false documents discovered indicated that he was actively participating in false identifications for the purpose of committing fraud. Therefore, the evidence introduced at trial established more than the Defendant's knowing possession, and provided a solid basis for the jury to infer that the Defendant had the requisite intent to defraud.

Expert Identification Testimony

People v. Santiago, decided October 20, 2011 (N.Y.L.J., October 21, 2011, pp. 1, 6 and 25)

In a unanimous decision, the New York Court of Appeals held that the Defendant was entitled to a new trial because the trial Judge should have allowed the defense to present expert testimony about the reliability of eyewitness identifications. Expanding on its recent rulings regarding the issue, the Court found that based upon the facts of the case, the victim's identification of the Defendant was not sufficiently corroborated by other evidence so as to render expert testimony on eyewitness recognition unnecessary. It was therefore reversible error to exclude the proposed testimony. In the case at bar, the victim was attacked by a stranger on a subway station. She eventually selected the Defendant from a six person lineup. The victim, on other occasions, however, had expressed some doubt regarding the accuracy of his identification. In addition there was no physical evidence which linked the Defendant to the assault. Under these circumstances, the New York Court of Appeals concluded that unlike the situation in some of its earlier decisions, the Defendant should have been allowed to present expert testimony on eyewitness recognition. As a result of the Court's decision, a new trial was awarded.

Erroneous Exclusion of Evidence

People v. Becoats

People v. Wright, decided October 20, 2011 (N.Y.L.J., October 21, 2011, pp. 24 and 25)

The Defendants were convicted of manslaughter and robbery, and the Court of Appeals rejected several of their claims which were raised on appeal. With respect to the Defendant Wright, however, the Court ordered a new trial because it found that the trial Judge had committed reversible error in excluding evidence which the defense tried to present. The evidence linking Defendant Wright to the attack on the victim came from two witnesses who said that they saw the attack. One of the witnesses had given a deposition to the police about a week after the event, and within the deposition were certain statements which the Defendant Wright sought to elicit. The trial Court, however, prevented this evidence from being explored, and the jury was never allowed to hear the conversation. The Court of Appeals concluded that the excluded conversation could have been helpful to the Defendant Wright because it indicated his absence from the planning session and the participation in it by one of the People's key witnesses. The Court concluded that the evidence in question could have been very valuable to the Defendant Wright since the case against him was dependent on the testimony of two eyewitnesses—both of whom had criminal records. The error which occurred as to the Defendant Wright was therefore not harmless and a new trial as to him was ordered by the Court of Ap-

peals following the affirmance of the Defendant Becoats' conviction.

Legally Sufficient Evidence

People v. Grant, decided October 20, 2011 (N.Y.L.J., October 21, 2011, p. 22)

In a 4-3 decision, the New York Court of Appeals reversed a Defendant's conviction for robbery in the first degree, and held that a Defendant's written statement threatening to shoot a robbery victim with a gun was legally insufficient to establish that he was actually in possession of a dangerous instrument at the time of the crime to support the charge of robbery in the first degree under Penal Law Section 165.15 (3). In an opinion written by Judge Ciparick, and joined in by Chief Judge Lippman and Judges Pigott and Jones, the Court of Appeals held that based upon Appellate Division precedent which had discussed the type of situation herein, a Defendant's statement alone that he is in possession of a dangerous instrument does not supply sufficient proof to establish actual possession of a dangerous instrument to support the charge of robbery in the first degree. Rather, the type of statement herein only establishes the threat of physical force necessary to support the charge of third degree robbery. Under these circumstances, the reduction of the charge to robbery in the third degree which occurred in the Courts below was the proper solution, and the order of the Appellate Division would be affirmed.

In a dissenting opinion written by Judge Graffeo, and joined in by Judges Read and Smith, the dissenters argued that the Defendant's statement in question was sufficient to support a first degree robbery conviction. The dissenters reviewed the language of the Penal Law Section and concluded that it did not expressly require actual possession of a dangerous instrument, but instead the Appellate Courts had engrafted such a requirement through appellate decisions. The dissenters further argued that under well-established principles, admissions by a party are always competent evidence, and that a logical inference can be drawn that a Defendant has actual possession of a dangerous instrument when he threatens its use. This is but another example of a criminal law decision which has revealed a sharp split within the Court.

Repugnant Verdicts

People v. Muhammad

People v. Hill, decided October 20, 2011 (N.Y.L.J., October 21, 2011, p. 22)

In another 4-3 decision, the New York Court of Appeals concluded that jury verdicts which convicted the Defendants of assault while acquitting them of criminal possession of a weapon were not legally repugnant and that therefore, the verdicts were valid. In the two cases, the Defendants contended that the verdicts were legally repugnant because it was impossible to intentionally injure a person with a weapon that a jury found the accused did not possess with the intent to use unlawfully. The Court of Appeals majority, in an opinion written by Judge Graffeo, reviewed the history of decisions regarding repugnant verdicts, and adopted the rationale of the Appellate Division which held that jury instructions provided in the cases at bar allowed the jurors to consider the state of mind of the accused at the time the weapon was initially possessed or acquired, and before the formation of an intent to use it unlawfully against another. Under this theory, the verdicts were not legally repugnant, and would be allowed to stand. Judge Graffeo issued the majority opinion, and was joined in by Judges Read, Smith and Pigott. Judge Ciparick dissented, arguing that the acquittal of one crime in the case at bar negated the existence of an essential element on the other crime, and that therefore, the verdicts were repugnant and the conviction should be set aside. Judge Ciparick was joined in dissent by Chief Judge Lippman and Judge Jones. With respect to a procedural issue which also was involved in the *Hill* matter regarding the Defendant's Motion to Suppress, the Court remitted the case back to the Appellate Division for further proceedings.

Dismissal of Appeals

People v. Ventura

People v. Gardner, decided October 25, 2011 (N.Y.L.J., October 26, 2011, pp. 1, 2 and 20)

In a set of cases, the New York Court of Appeals, in a unanimous decision, ruled that the Appellate Divisions may not dismiss pending criminal appeals which have been filed by defendants if their absence from New York and unavailability to obey the Court's directive are caused by their deportation from the United States. Judge Jones, writing for the unanimous Court, stated that defendants could not be penalized with respect to pending appeals if they have been involuntarily and forcibly removed from the Country. To date, appellate courts have treated people who have been deported in the same manner as those who have intentionally absented themselves from the Court's jurisdiction. In the instant ruling, the New York Court of Appeals has clearly stated that absences due to deportation are in a different category, and the appellate panels involved in the instant cases were directed to consider the merits of their appeal. The instant ruling may have an effect on many of the cases since it is presently unclear how many appeals have been routinely dismissed by the four Appellate Departments based upon defendant deportations.

Resubmission of Charges to Grand Jury

People v. Credle, decided October 25, 2011 (N.Y.L.J., October 26, 2011, p. 18)

In a 4-3 decision, the New York Court of Appeals determined that an indictment should be dismissed because the prosecutor resubmitted to the grand jury without obtaining the required judicial permission as set forth

in Criminal Procedure Law 190.75. Leave was granted, however, to the People to apply for an order permitting resubmission of the charge to another Grand Jury. The majority decision was written by Chief Judge Lippman, and was joined in by Judges Ciparick, Graffeo and Jones. Judges Pigott, Read and Smith dissented. The dissenters argued that the prosecutor in the case at bar had resubmitted the charges to a second grand jury because the first one was deadlocked and that under these circumstances, the People were not required to obtain court authorization before representment to another grand jury.

Grand Jury Presentment

People v. Davis

***People v. McIntosh*, decided October 25, 2011 (N.Y.L.J., October 26, 2011 p. 20)**

In split decisions, the New York Court of Appeals concluded that the People's withdrawal of their case from the first grand jury presentation due to witness unavailability did not constitute the functional equivalent of a dismissal pursuant to CPL 190.75. In the case at bar, the People had begun presenting assault charges against the Defendants. Subsequently, however, they advised the grand jury that they were withdrawing the case due to witness unavailability and the fact that it was the grand jury's last day. Several months later, the People presented evidence in the matter to another grand jury. The Defendants argued that the People should have obtained court authorization before representing the case to a second grand jury. The majority discussed the statutory provisions and also the Court's prior decision in *People v. Wilkins*, 68 NY 2d 269 (1986). The Court determined that the essential issue in deciding whether the People's withdrawal from the grand jury should be treated as a de facto dismissal was the extent to which the grand jury considered the evidence and the charge. Applying this principle to the facts of the instant cases, the majority concluded that the proceedings had not gone far enough to warrant a dismissal. The People were therefore not required to obtain court authorization before representing the case to another grand jury. The majority opinion in *Davis* was written by Judge Pigott and was joined in by Chief Judge Lippman, and Judges Ciparick, Graffeo, Read, Smith and Jones. Chief Judge Lippman also issued a separate concurring opinion, in which Judges Ciparick and Jones joined. In *McIntosh*, the majority opinion was written by Judge Pigott, in which judges Graffeo, Read and Smith joined. Judge Lippman dissented, and was joined in dissent by Judges Ciparick and Jones.

Dismissal of Prospective Juror

***People v. Guay*, decided November 15, 2011 (N.Y.L.J., November 16, 2011, pp. 22 and 23)**

In a unanimous decision, the New York Court of Appeals held that a trial Judge did not abuse his discretion when he dismissed a hearing-impaired prospective juror for cause. In the case at bar, the Defendant was convicted for first-degree rape and other related sexual offenses. During the selection of the jury, the People moved to dismiss a prospective member after the prosecutor indicated that the panelist had trouble hearing the Court, and the prospective juror himself had indicated he had certain difficulty in hearing some things. The prosecutor also pointed out that since the child victim would be testifying, child victims frequently have trouble speaking up, and that this could cause a further problem for the prospective juror to fully understand the testimony that was being given. The trial court therefore indicated that it felt that the prospective juror's hearing issue was a big enough problem, and it then disqualified the individual for cause.

The New York Court of Appeals, after considering the relevant case law and statutory provisions, concluded that the record supported the determination that the juror's hearing impairment would have unduly interfered with the ability to be a trial juror. In rendering its decision, the Court noted that it would recommend that in the future, a more detailed inquiry be conducted regarding any handicaps that the prospective juror may have, but that under the instant situation, the trial court was within its discretion to make the ruling which it did.

Waiver of Appeal

***People v. Qoshja*, decided November 15, 2011 (N.Y.L.J., November 16, 2011, p. 23)**

In a unanimous decision, the Court of Appeals reversed an order of the Appellate Division, First Department, and remitted the matter back to that Court for further proceedings. The Court of Appeals noted that the Appellate Division's summary decision and order was unclear as to whether the panel reached the merits of the Defendant's claim, or whether it failed to conduct an adequate review based upon the fact that the Defendant had signed a waiver of appeal. The Court, reiterating its prior statement in *People v. Callahan*, 80 NY 2d 273, 285 (1992), stated

> [I]n cases where there has been a bargained-for waiver of the right to appeal and the intermediate Appellate Court determines that the judgment of conviction should be affirmed, it would be helpful if the intermediate Appellate Court would specify whether its disposition is based on the existence of an enforceable waiver or instead on the merits of the Defendant's appellate claims. Such specificity would facilitate further appellate review and minimize unnecessary remittals.

Identification

People v. Delamota, decided November 17, 2011 (N.Y.L.J., November 18, 2011, p. 23 and November 21, 2011, p. 2)

In a 4-3 decision, the New York Court of Appeals ordered a new trial for a Defendant who had been convicted of robbery. The Defendant had been identified in a photo array by the robbery victim's son. The son had acknowledged during testimony that he had seen the Defendant around the area prior to translating for his father as the father examined photographs of suspects. The four-Judge majority in the New York Court of Appeals held that the trial court had fatally undermined the Defendant's rights by not re-opening a Wade hearing into the propriety of the son's participation in the identification process. Judge Graffeo, who wrote the majority opinion, stated that suggestive pre-trial identification procedures violate the due process clause, and that the police may have committed error in enlisting the son to translate for the father. The majority opinion was joined in by Judges Ciparick, Read, and Pigott, Jr.

Chief Judge Lippman, in a separate opinion, would have gone even further and stated that he would have vacated the conviction and dismissed the indictment because there also existed a deficiency of proof as to the Defendant's guilt. Judge Lippman pointed out that the victim's account was riddled with inconsistencies, and that the circumstances herein required a dismissal. Judges Smith and Jones joined Judge Lippman in voting for a dismissal of the indictment.

Charge on Intent

People v. Medina, decided November 17, 2011 (N.Y.L.J., November 18, 2011, p. 22)

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction for robbery in the first degree on the grounds that the trial court failed to properly charge the jury on the statutory definition of "appropriate and / or deprive" which forms part of the definition of larcenous intent and was a required element for the robbery conviction. In the case at bar, the Defendant had been working as a paid informant for the Drug Enforcement Agency and had participated in an unauthorized break-in at a home. He claimed that he had participated because he really intended to stop the robbery. The jury deliberated for many days and evidently had difficulty in reaching a verdict. The Defendant claimed on appeal that the trial court had failed to adequately instruct the jury on the statutory definitions of deprive and appropriate as they related to the meaning of larcenous intent.

In light of the fact that the jury was having difficulty in reaching a verdict and had sent several notes to the Court stating that they did not understand the meaning of intent, the New York Court of Appeals concluded that the Defendant's position had merit and that a reversal was required. The Court further concluded that contrary to the People's position, the Defendant's challenge to the jury charge was adequately preserved and that under the circumstances herein, the error was not harmless. The Defendant's conviction was therefore reversed and a new trial ordered.

Shackling of Defendant

People v. Cruz, decided November 22, 2011 (N.Y.L.J., November 23, 2011, pp. 1, 2 and 26)

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction and ordered a new trial because the Defendant had been shackled in the Courtroom during trial proceedings. Court personnel had placed opaque covering around the bottom of the table where the Defendant was sitting during his trial in 2008. In rendering its decision, the New York Court of Appeals considered the United States Supreme Court decision in *Deck v. Missouri*, 544 U.S. 622 (2005), which generally held that trial courts may not shackle defendants routinely but only if there is a particular reason to do so. The Court of Appeals concluded that on the record before it, it could not conclude that the shackles were not visible to the jury or that the jury was not able to infer from other circumstances that the Defendant was being held in leg irons. Further, the trial court did not place on the record any specific findings as to the Defendant Cruz justifying the use of leg irons. Rather, it appeared that the trial court had a general policy of doing so for any defendant who might cause problems in the Courtroom. The New York Court of Appeals found the situation unacceptable, and determined that a new trial had to be held. Judge Lippman also issued a separate concurring opinion in which Judges Ciparick and Jones joined, where he advocated the establishment of a clear rule that the failure to make a record justifying the use of restraints will automatically necessitate a new trial.

People v. Clyde, decided November 22, 2011 (N.Y.L.J., November 23, 2011, pp. 2 and 25)

In an unrelated but similar case, the Court held by a 4-3 vote that a harmless error analysis should be applied when a trial court orders the use of visible shackles on a Defendant at trial, but does not put adequate justification for doing so on the record. Judge Pigott rendered the decision for the majority and held that since the Court could not ascertain from the record in the case whether the trial Judge shackled the Defendant as a matter of routine or whether he had some specific reasoning for doing so, the Court would engage in a harmless error analysis. Doing so, the majority concluded that there was overwhelming proof of the Defendant's guilt and that the error regarding his shackling during the trial was harmless.

Chief Judge Lippman, applying his reasoning in the *Cruz* case discussed above, argued that the Defendant's

due process rights had been violated because the shackling was in plain view of the jurors. Under these circumstances, the Defendant's right to a fair trial had been violated no matter how strong the prosecution's case might be. Judge Lippman was joined in dissent by Judges Ciparick and Jones.

Criminal Law Authority of Attorney General

***People v. Cuomo v. First American Corporation*, decided November 22, 2011 (N.Y.L.J., November 23, 2011, pp. 1, 2 and 22)**

In a 6-1 decision, the New York Court of Appeals held that there was nothing in the federal law to prevent New York State's Attorney General from pursuing allegations that real estate appraisers engaged in fraudulent and deceptive business practices. The Defendants had argued that the state action was barred by a series of federal laws which preempted the State from acting. The majority opinion, written by Judge Ciparick, however, upheld the right of the Attorney General to act, and concluded, "In aiming to prevent further real estate appraisal abuse, Congress envisioned a robust partnership with the states, and there was no basis for reading the federal Statutes as preempting states from enforcing state laws. Judge Ciparick was joined in the majority opinion by Chief Judge Lippman and Judges Graffeo, Smith, Pigott and Jones.

Judge Read dissented, noting that recent federal rulings in the Southern District and elsewhere have found that federal Statutes preclude state involvement in the real estate appraisal process. Whether further litigation on this issue in the federal courts is forthcoming is unclear at the present time.

Post-Release Supervision

***People v. McAlpin*, decided November 22, 2011 (N.Y.L.J., November 23, 2011, p. 26)**

In the case at bar, the Defendant had pleaded guilty to robbery in the second degree, with the understanding that he would be adjudicated a youthful offender and receive a term of probation. He was further advised that if he violated certain specified conditions, the sentencing agreement would be vacated and the Court could impose a prison sentence of at least 3½ years or a maximum of 15 years. After violating the agreement, the Defendant was in fact sentenced to 3½ years plus 5 years of post-release supervision. On appeal, the Defendant contended, pursuant to recent rulings form the New York Court of Appeals, that the trial court had failed to refer to the possibility of post-release supervision in the original agreement, and that therefore, his conviction had to be vacated. The New York Court of Appeals, relying upon *People v. Catu*, 4 NY 3d 242 (2005) and subsequent rulings, concluded that the Defendant was correct in seeking a reversal of his conviction, and that vacature of the plea was the appropriate remedy.

Judge Pigott dissented, arguing that the Defendant at the time of sentence made no objection to the post-release supervision term and that therefore he had waived the right to raise it on appeal. Judge Pigott further noted that the instant case involved a violation of a plea agreement and that the trial court had indicated during the course of proceedings that it was its recollection that it had informed the Defendant of the possibility of a post-release supervision term. Under these circumstances, vacature of the plea was not required.

Improper Cross-Examination

***People v. Rivers*, decided November 22, 2011 (N.Y.L.J., November 23, 2011, p. 25)**

In a unanimous decision, the New York Court of Appeals upheld a Defendant's conviction for arson in the third degree, and rejected his argument that improper actions by the prosecution denied him a fair trial. The Defendant claimed that the prosecutor repeatedly violated the trial court's *Molineux* rulings, and elicited from expert testimony inadmissible evidence regarding the origins of the fire. Although the Court of Appeals concluded that certain questions asked by the prosecutor did violate the *Molineux* rulings, the contested testimony elicited on the whole was not of such significance as to deny the Defendant a fair trial. The Court also noted that the trial court took steps to minimize the impact of any arguably improper testimony and provided curative instructions.

Legal Insufficiency

***People v. Bueno*, decided November 21, 2011 (N.Y.L.J., November 22, 2011, p. 22)**

In a 5-2 decision, the New York Court of Appeals concluded that the evidence was legally sufficient to establish that the Defendant acted with the intent to prevent an emergency medical technician from performing a lawful duty when he caused the technician to suffer physical injury as specified in Penal Law Section 120.05 (3). An emergency medical technician and his partner, on a two-man ambulance crew, were about to drive away from premises where they had treated an injured woman. As the technician was climbing into the driver's side of the ambulance, the Defendant blind-sided him with a blow to the head, threw him to the ground, and repeatedly struck him about the face and head. The Defendant had apparently been drinking, and was also in need of medical attention, in addition to the woman who had been assisted. Defense counsel, during the trial, told the jury that the Defendant was the victim, he was the man with the bleeding face whom the technicians were dispatched to treat, but they failed in their duty to render him aid and instead got him arrested. The defense in essence argued that at the time he committed the assault, he did not possess the requisite intent to prevent the technician from performing a lawful duty.

In the majority opinion, written by Judge Read, the Court concluded that the evidence was legally sufficient to support the Defendant's conviction, based upon sufficient circumstantial evidence from which a reasonable jury could infer the requisite intent that was required before the commission of the crime. Chief Judge Lippman issued a dissenting opinion, which was joined in by Judge Smith. The dissent concluded that in the case at bar, the People established only that the victim was subjected to an entirely unexplained, senseless assault at the hands of the Defendant, and that was precisely why the evidence was insufficient to sustain the conviction under Penal Law Section 120.05(3).

First Degree Robbery

People v. Hall

***People v. Freeman*, decided November 21, 2011 (N.Y.L.J., November 22, 2011, p. 22)**

In both of the above cases, the New York Court of Appeals, in a unanimous verdict, concluded that convictions for robbery in the first degree could not be sustained because the People had failed to prove that stun guns were dangerous instruments as defined under Penal Law. In both of the above cases, no evidence was presented by the People to establish that stun guns could be classified as dangerous instruments. The People's argument that such an inference could be drawn was unacceptable to establish the required evidence, and under these circumstances the convictions in question would have to be reduced to robbery in the second degree.

Identification

***People v. Thomas*, decided November 21, 2011 (N.Y.L.J., November 22, 2011, p. 26)**

In a 4-3 decision, the New York Court of Appeals upheld a Defendant's conviction on the grounds that any error which might have been committed by the introduction of show-up identification was harmless. The Defendant Thomas had proceeded to trial after his Co-Defendant Cruz had decided to plead guilty. The show-up identification involved the Co-Defendant Cruz, and Thomas argued that the admissibility of this evidence violated the traditional Trowbridge rule. The Court of Appeals' majority further determined that the evidence in question was probative of whether the Defendant Thomas had also attacked the victim. This is because the accuracy of the Cruz identification was relevant to the conditions on the street at the time of the incident, and whether they were conducive to observing the other attacker and to accurately identifying him at trial.

Judge Ciparick dissented, and was joined in dissent by Chief Judge Lippman and Judge Jones. The dissenters pointed out that the evidence in the case involved a one-witness identification, and that therefore the harmless error principles should not have been applied.

Waiver of Appeal

***People v. Bradshaw*, decided December 13, 2011 (N.Y.L.J., December 14, 2011, pp. 1, 8 and 22)**

In a 4-3 decision, the New York Court of Appeals vacated a plea of guilty in a rape case because the trial judge failed to elicit a clear oral statement from the Defendant that he understood that he was waiving his right to appeal, even though the Defendant had signed a written waiver. In a majority opinion written by Judge Ciparick, the Court concluded that even though there was a written waiver, the record on appeal did not demonstrate that the waiver was made knowingly, intelligently and voluntarily, and that no clear oral statement was elicited from the Defendant to the effect that he understood the consequences of the waiver of appeal. In the case at bar, the Defendant had a history of various mental problems, and the guilty plea was entered after more than twelve months of plea negotiations. The majority concluded that the trial court had made only fleeting references to the Defendant's waiver of appeal, and that its colloquy with the Defendant on this issue was inadequate. Judge Ciparick was joined in the majority opinion by Chief Judge Lippman and Judges Pigott and Jones. Judge Read issued a vigorous dissent, arguing that the majority holding was contrary to a consistent body of law which had been developed on the issue of waiver of appeal and that its ruling had taken away the certainty afforded by a written waiver and had instead transformed the taking of an appeal waiver into something as uncertain as the lottery. Judge Read was joined in dissent by Judges Graffeo and Smith.

Larceny

***People v. Hightower*, decided December 13, 2011 (N.Y.L.J., December 14, 2011, pp. 1, 8 and 22)**

In a unanimous decision, the New York Court of Appeals concluded that while it was criminal for someone to purchase a metro card for unlimited subway rides and then accept money for swiping it on behalf of others, the appropriate crime was not larceny. The Defendant argued that he did not commit the crime of petit larceny because he did not wrongfully take property from an owner, which is a required element of the charge. The Court concluded that although the information in this case described the events with enough clarity to provide reasonable cause that the Defendant was engaged in the unlawful sale of New York City Transit Authority services and providing unlawful access to services, it was jurisdictionally defective as to the crime to which Defendant was actually convicted—petit larceny. The Authority was not deprived of an unknown amount of money that Defendant accepted from the subway rider because it never owned those funds. The Court's opinion was written by Chief Judge Lippman.

Dismissal of Appeal

People v. Omowale, decided December 13, 2011 (N.Y.L.J., December 14, 2011, p. 24)

In a unanimous decision, the New York Court of Appeals affirmed the dismissal of a People's appeal involving the issue of whether the police reasonably could have concluded that a weapon was located in Defendant's vehicle following a traffic stop, and whether the situation presented an actual and specific danger to the safety of the officers. The New York Court of Appeals concluded that the determination by the Appellate Division involved a mixed question of law and fact, and was not a reversal on the law alone. Under such circumstances, the Appellate Division's determination was beyond the reviewing authority of the New York Court of Appeals. The People's appeal therefore required a dismissal.

Exclusion of Juror

People v. Furey, decided December 15, 2011 (N.Y.L.J., December 16, 2011, pp. 1, 5 and 22)

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction and ordered a new trial on the grounds that the trial court had committed reversible error by not granting a for-cause challenge to seating as a juror the local police chief's wife, who acknowledged knowing eight of fourteen witnesses the prosecution planned to call. Even though the juror had assured the Court that she could be fair and impartial, the Court of Appeals concluded that this was insufficient to guarantee her impartiality in the trial, and that the Criminal Procedure Law Statute required that the challenge for cause should have been granted because the situation herein required the implied bias standard to be applied pursuant to CPL 270.20(1)(c).

Assault in the Second Degree

People v. Stewart, decided December 15, 2011 (N.Y.L.J., December 16, 2011, p. 24)

In a unanimous decision, the New York Court of Appeals reduced the Defendant's conviction for assault in the first degree to one of assault in the second degree. The Court found that the required elements of assault in the first degree were not made out and that the lesser assault charge was the appropriate conviction. It therefore remitted the matter to the County Court for re-sentencing.

Speedy Trial

People v. Dickinson, decided December 15, 2011 (N.Y.L.J., December 16, 2011, p. 24)

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction and ordered the dismissal of the indictment. The Court concluded, after reviewing the appellate record, that the People were not ready for trial within six months after commencement of the action as is required by CPL 30.30 and that therefore the Defendant's motion to dismiss the indictment should have been granted.

Dismissal of Appeal

People v. Holland, decided December 20, 2011 (N.Y.L.J., December 21, 2011, pp. 1, 6 and 23)

In a 5-2 decision, the New York Court of Appeals dismissed a Defendant's appeal on the grounds that the reversal by the Appellate Division was not on the law alone within the meaning of CPL 450.90(2)(a). The Court's majority concluded that the Appellate Division reversal of the Supreme Court's order granting suppression while termed "on the law" was actually predicated upon a differing view concerning the issue of attenuation, which is a mixed question of law and fact. A reversal on a mixed question does not meet the requirements of review by the New York Court of Appeals. The majority opinion was joined in by Judges Graffeo, Read, Smith, Pigott and Jones.

In a vigorous dissent by Chief Judge Lippman, which was joined in by Judge Ciparick, it was argued that the majority was incorrect in its determination. Judge Lippman wrote "instead of pigeonholing this appeal as one involving a 'mixed question,' the Court makes a choice that is not only unsound jurisdictionally, but erosive of this Court's role in articulating the law governing police-civilian encounters." The case at bar involved a situation in which a Defendant scuffled with police after claiming he was illegally detained and justified in shoving and pushing a police officer. The Defendant had been charged with assault and drug possession, and the original trial court had found that the police had no right to stop and detain the Defendant in the first place. The Appellate Division had, however, reversed the suppression ruling, holding that once the Defendant assaulted the officer, any allegedly unlawful conduct in stopping and questioning him was attenuated by his calculated, aggressive and wholly distinctive conduct. The dissenters argued that the Appellate Division ruling was really based upon a question of law and not a mixed question of fact and law. Therefore, the Court should not have dismissed the appeal.

Reconstruction Hearing

People v. Walker, decided December 20, 2011 (N.Y.L.J., December 21, 2011, p. 22)

In a unanimous decision, the New York Court of Appeals concluded that a reconstruction hearing was necessary to determine whether the Defendant was present during a Sandoval hearing. It therefore remitted the matter back to the Supreme Court, Monroe County, for further proceedings. The Court of Appeals directed that if it was determined that the Defendant was not present during the Sandoval hearing, a new trial must be ordered. If, however, it was found that the Defendant was present, the judgment of conviction would be allowed to stand.

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

The Court opened its new term on October 3, 2011, and began hearing arguments on several cases involving criminal law matters. In late November, it began issuing decisions on some of these cases which are summarized below.

Perry v. New Hampshire, 132 S. Ct. 716 (Jan. 11, 2012)

On November 2, 2011, the U.S. Supreme Court heard oral arguments in a matter involving the reliability of eyewitness identifications. Recent studies and research projects have cast some doubt on the reliability of eyewitness identifications, and defense counsel in the case at bar had argued that the danger of misidentification implicates due process considerations and requires an evaluation of the reliability of the identification. In the past, the Court's decisions have centered on the question of suggestiveness, and during oral argument, several members of the Court appeared reluctant to expand previously crafted protections. Justice Scalia, for example, during oral argument, questioned defense counsel as to whether due process is not solely limited to suggestive circumstances created by the police. After several months, the Court issued its ruling on January 11, 2012, and declined to extend constitutional safeguards against the use of some eyewitness testimony. In an 8-1 decision, Justice Ginsburg, writing for the majority, stated that in her opinion, in cases with no police misconduct, lawyers can cross-examine a witness and juries can weigh the reliability of the testimony. She further indicated that a prime reason for excluding such testimony when the police are involved is deterrence, and that where there is no improper conduct, there is nothing to deter.

Justice Sotomayor dissented, arguing that recent empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in the country. She indicated that concern about the reliability of eyewitness identifications should go beyond the mere question of police deterrence.

Maples v. Thomas, 132 S.Ct. 912 (November 2011)

On October 4, 2011, the U.S. Supreme Court heard oral arguments in a case which involves an Alabama death row inmate who lost his chance to bring a critical appeal because of a mailroom snafu in a New York law firm. Mr. Maples was sentenced to death in 1995 and was represented pro bono in his state post-conviction appeal by two associates at Sullivan and Cromwell. As required by Alabama rules at the time, the two lawyers associated themselves with the local Alabama attorney in order to be admitted to practice in the State. Although the rules required the Alabama attorney to be jointly and severally responsible for the case, he claimed his only role was to secure the New York attorneys' admission. The three attorneys filed a state post-conviction petition for Mr. Maples in which they raised ineffective assistance of trial counsel. After 18 months, the trial judge denied the petition. The court clerk sent notices of the denial order to the two associations and the Alabama attorney. The associates, however, had left the law firm for other positions, and had failed to inform Mr. Maples or the Court that they no longer represented him. The firm's mailroom returned the denial notices to the court clerk marked "returned to sender and left firm." The Alabama attorney did nothing after receiving his notice, assuming the New York associates were still handling the case.

Mr. Maples actually learned of the denial and the missed appeal deadline when the prosecutor sent him a letter alerting him that the time for filing a federal habeas petition was close to expiring. In the federal habeas petition, which Mr. Maples eventually filed, he raised ineffective assistance of counsel. The federal court denied the petition on procedural grounds—to wit: that the required time period had passed. During oral argument before the Supreme Court, Mr. Maples' new counsel argued that there was sufficient cause in the instant matter to excuse the default which had occurred. It was stated that the State itself had contributed to the default, and that Mr. Maples had effectively been abandoned, so that the delay caused by the attorney conduct could not be imputed to him.

On January 18, 2012, the Supreme Court, in a 7-2 decision, ruled that Maples should not be penalized for missing a crucial appeal deadline, when the error was caused by his pro bono attorneys from Sullivan and Cromwell. Justice Ginsburg, writing for the majority, stated that "Maples was left unrepresented at a critical time, and he lacked a clue of any need to protect himself pro se. No just system would lay the default at Maples' death cell door." Justices Scalia and Thomas dissented, arguing that defendants have no constitutional right to be represented by counsel in post-conviction proceedings, and that the client bares the risk of all attorney errors, regardless of the egregiousness of the mistake.

U.S. v. Jones, 132 S. Ct. 945 (January 23, 2012)

On November 8, 2011, the U.S. Supreme Court heard oral arguments on the issue of whether police require warrants to conduct surveillance by using GPS tracking devices. The issue has split the various federal courts, and the U.S. Supreme Court granted certiorari in order to decide the issue. In New York State, our Court of Appeals in *People v. Weaver*, 12 N.Y.3d 433 (2009), determined that state constitutional law mandated that judicial warrants be obtained. On January 23, 2012, the U.S. Supreme Court issued its ruling in the matter and unanimously determined that the use of GPS tracking devices by police required a judicial warrant, and that the failure to obtain such a warrant violated the Fourth Amendment's protection against unreasonable searches and seizures. Justice Scalia, writing for a unanimous Court as to the Court's determination, concluded that police had engaged in a physical intrusion into private property, and that "there was no doubt that such a physical intrusion would have been considered a search within the meaning of the Fourth Amendment when it was adopted." Although all of the Justices reached a unanimous result, some of the Justices

issued concurring opinions, presenting differing approaches to the issue involved. Justice Alito issued the main concurring opinion, which was joined in by Justices Ginsburg, Breyer and Kagan. It appears that the Supreme Court will continue to address the issue of GPS tracking in future cases.

Pending Cases

Florence v. Board of Chosen Freeholders, 132 S. Ct. __ (Jan. __, 2012)

On October 12, 2011, shortly after it began its new term, the U.S. Supreme Court heard argument on the issue of whether jail officials may conduct intrusive strip searches of all arrestees, even of those detained for minor offenses, or whether the U.S. Constitution places some limitations on these actions by prison officials. In the case at bar, Albert Florence, a resident of New Jersey, was arrested after a traffic stop on a bench warrant for failure to pay a fine. Although he produced a receipt showing payment of the fine, the officer still proceeded to arrest him, and took him to the county jail. At that facility, he was forced to undergo a thorough strip search, and underwent what he alleged were numerous personal indignities. The charges were subsequently dismissed, and he was released after several days. Mr. Florence then sued the County and various officials with respect to the situation. A Federal District Court granted summary judgment in favor of Mr. Florence. The U.S. Court of Appeals for the Third Circuit reversed, holding that prison officials should be accorded wide-ranging deference in enforcing policies necessary to maintain security and order in their prisons.

Mr. Florence's attorneys argued in the U.S. Supreme Court that the Fourth Amendment requires reasonable suspicion for strip searches of all arrestees in order to protect individual integrity and dignity. They claimed that what is not subject to a reasonable suspicion standard is anything other than close inspection of a person at arm's length. Government attorneys argued in the Supreme Court that reasonable suspicion should not be required when an arrestee is going to be put into the general prison or jail population. They argued that a blanket policy of strip searching is designed to insure not just that no contraband comes into the prison, but for the protection of the arrestee as well.

New York Federal Courts have long disfavored routine suspicionless strip searches under the rule enunciated by the U.S. Court of Appeals for the Second Circuit in *Weber v. Dell*, 804 F 2d 796 (1986). Other federal jurisdictions have been somewhat split on this issue, and it was hoped that the Supreme Court ruling would be determinative of a number of strip search cases which have been pending, both in New York and across the Country.

During oral argument, the various Justices asked numerous questions, and appeared to be somewhat divided and troubled on the issue.

U.S. Supreme Court Schedules Oral Arguments on Health Care Law Cases

In late December, the U.S. Supreme Court announced that it had scheduled oral argument on the cases involving challenges to the new Health Care Law for a 3-day period in March 2012. The arguments were heard from March 26-28. The main case on the issue involves a ruling by the U.S. Court of Appeals for the 11th Circuit in *State of Florida v. Department of Health and Human Services*. In addition to the individual mandate, the Court will hear arguments on various aspects of the law, and the total oral argument time currently scheduled involves over six hours of oral argument. The Solicitor General, Donald Verrilli, Jr., will argue on behalf of the new law, and 26 State Attorney Generals, represented by Paul Clement, will raise the various challenges to the law's validity. It is also expected that numerous amicus briefs will also be submitted.

The eventual decision on the Health Care Law cases is expected to result in a sharp division within the Court, and various groups supporting various sides of the issue have raised the question as to whether two of the Justices should recuse themselves from the matter. Justice Elena Kagan previously served as Solicitor General, and as such, may have worked or contributed to the drafting of the Health Care Bill. The wife of Justice Thomas has been active with various conservative groups which have openly opposed the Health Care Law. Whether these two Judges should recuse themselves from the matter has resulted in a growing controversy, and Chief Justice Roberts recently saw it necessary to comment on the issue. In his year-end report, Justice Roberts made clear that the decision to recuse oneself rests with each individual Judge, and that he would not suggest any changes in the current procedure. He stated that his colleagues are "jurists of exceptional integrity and experience," and he had complete confidence in the capability of his colleagues to determine when recusal is warranted. Justice Roberts further commented on the recusal issue that the public should keep in mind a key difference between lower-court judges and Supreme Court justices: While lower-court judges can be replaced when they recuse themselves from cases, that is not the case at the "court of last resort." "A justice accordingly cannot withdraw from a case as a matter of convenience or simply to avoid controversy," Roberts wrote. "Rather, each justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case."

Florida v. Jardines

In late January, the U.S. Supreme Court granted certiorari in a Florida case which could have a significant impact on the Search and Seizure Laws in the United States. The issue involves the use of the K-9 sniffing dogs, and presents the issue of whether a dog sniff outside a house gives officers the right to get a search warrant for illegal drugs, or is the sniff itself an unconstitutional search. In the case at bar, the dog sniff occurred outside a private residence, and Florida's highest Court determined that the action had crossed the constitutional line. Florida's State Attorney General, Pam Bondi, decided to petition the U.S. Supreme Court for review of the matter. The case involved is *Florida v. Jardines*, and is being closely monitored by law enforcement agencies throughout the Nation who utilize dogs for a wide range of law enforcement activities. The U.S. Supreme Court has to this point approved drug dog sniffs in several cases, but the Florida case presents the issue of whether a private residence is entitled to greater privacy than cars on the road, or a suitcase in an airport.

Scenes from the Criminal Justice Section

Annual Meeting

Thursday, January 26, 2012

Hilton New York • New York City

Section Chair Marvin Schechter presents award to former Section Chair James Subjack for his past services

Group Award presented to defense team for Ahmed Ghailani, Guantanamo detainee

Section Chair Marvin Schechter presents award to Anthony L. Ricco

Luncheon and CLE Program

Guest speaker Abbe Lowell

Queens ADA Robert Masters presents posthumous Outstanding Prosecutor Award to Veronica McCarthy, widow of Bronx ADA Daniel McCarthy

Christine Hanna presents police award to NYC Chief of Detectives Phil T. Pulaski

Panelist Paul Cambria makes a point during sesssion

Panelist Steven Teglia addresses Section members

Hon. Barry Kamins moderates CLE program

Panelists at CLE session

NYSBA President Vincent Doyle presents award to Chief Administrative Judge A. Gail Prudenti

Mark Your Calendar Now!

2013 Annual Meeting

Thursday, January 24, 2013

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U.S. Supreme Court Announces Assignment of Justices During the October 2011 Term

With the opening of the Court's new term, Chief Justice Roberts announced the allotment of the Justices to the various federal circuits throughout the Nation. The new allotment includes the assignment of Justice Kagan, who recently replaced Justice Stevens.

DISTRICT OF COLUMBIA AND FEDERAL CIRCUITS

Chief Justice JOHN G. ROBERTS, JR., of Washington, D.C.

Appointed Chief Justice by President George W. Bush September 29, 2005; took office October 3, 2005

FIRST CIRCUIT

Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico

Justice STEPHEN BREYER, of Massachusetts

Appointed by President Clinton August 2, 1994; took office September 30, 1994

SECOND CIRCUIT

Connecticut, New York, and Vermont

Justice RUTH BADER GINSBURG, of New York

Appointed by President Clinton August 3, 1993; took office August 10, 1993

THIRD CIRCUIT

Delaware, New Jersey, Pennsylvania and Virgin Islands

Justice SAMUEL A. ALITO, JR., of New Jersey

Appointed by President George W. Bush January 31, 2006; took office January 31, 2006

FOURTH CIRCUIT

Maryland, North Carolina, South Carolina, Virginia, and West Virginia

Chief Justice JOHN G. ROBERTS, of Washington, D.C.

Appointed Chief Justice by President George W. Bush September 29, 2005; took office October 3, 2005

FIFTH CIRCUIT

Louisiana, Mississippi, and Texas

Justice ANTONIN SCALIA, of Washington, D.C.

Appointed by President Reagan September 25, 1986; took office September 26, 1986

SIXTH CIRCUIT

Kentucky, Michigan, Ohio, and Tennessee

Justice ELENA KAGAN, of Massachusetts

Appointed by President Obama May 10, 2010, took office August 7, 2010

SEVENTH CIRCUIT

Illinois, Indiana, and Wisconsin

Justice ELENA KAGAN, of Massachusetts

Appointed by President Obama May 10, 2010; took office August 7, 2010

EIGHTH CIRCUIT

Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota

Justice SAMUEL A. ALITO, JR., of New Jersey

Appointed by President George W. Bush January 31, 2006; took office January 31, 2006

NINTH CIRCUIT

Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Northern Mariana Islands

Justice ANTHONY M. KENNEDY, of California

Appointed by President Reagan February 11, 1988; took office February 18, 1988

TENTH CIRCUIT

Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming

Justice SONIA SOTOMAYOR, of New York

Appointed by President Obama May 26, 2009; took office August 8, 2009

ELEVENTH CIRCUIT

Alabama, Florida and Georgia

Justice CLARENCE THOMAS, of Georgia

Appointed by President Bush October 16, 1991; took office October 23, 1991

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from October 3, 2011 to January 25, 2012.

People v. Sanders (N.Y.L.J., October 13, 2011, pp. 1 and 10)

In a unanimous decision, the Appellate Division, Fourth Department, rejected an effort by the Monroe County District Attorney to resurrect a technically flawed conviction. The situation involved a Defendant who could apparently wipe an assault conviction off his record, but doing so would expose him to an indictment on a higher charge. The District Attorney had apparently attempted to obtain a grand jury indictment against the Defendant, charging him with first degree assault for the same crime for which he had previously pleaded guilty and served time. The appellate panel held that as long as the Defendant stands convicted of second degree assault, he cannot be charged with first degree assault without violating the double jeopardy clauses in the State and Federal Constitutions. The Court concluded that even though the 2003 conviction for assault in the second degree was jurisdictionally defective, it could not be vacated absent a motion. Since it had not been vacated, the District Attorney could not indict him in connection with the same incident. The practical consequence of the Court's decision was that the Defendant escaped the possibility of being sentenced as a persistent felony offender, which could have carried a life sentence.

People v. Sayas (N.Y.L.J. October 24, 2011, pp. 1 and 4)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's conviction involving the shooting of a police officer because the Court concluded that the trial judge had made a series of legal errors and displayed an antagonistic attitude toward defense counsel which denied the Defendant a fair trial. The errors listed by the Appellate Court included failure to suppress certain evidence, the refusal to charge on the defense of justification, and denigration of defense counsel in the presence of the jury. Under all the circumstances, the Defendant was entitled to a new trial.

People v. Borukhova (N.Y.L.J., October 28, 2011, pp. 1 and 5)

In a unanimous decision, the Appellate Division, Second Department, upheld the murder conviction of a Queens doctor who plotted to have her husband killed. The Court acknowledged that a number of evidentiary and trial rulings were in error, but concluded that there was overwhelming proof of guilt, and that any errors which occurred were harmless, and did not deny the Defendant a fair trial. The unanimous appellate panel consisted of Justices Eng, Mastro, Dillon and Sgroi.

People v. McPherson (N.Y.L.J., November 7, 2011, p. 1)

In a 3-1 decision, the Appellate Division, Second Department, upheld a depraved indifference murder conviction of a driver who was involved in a fatal wrong-way collision on the Long Island Expressway in October 2009. The Defendant was driving after a night of drinking at a nightclub. The Court concluded that the Defendant was not too drunk to form the culpable mental state necessary to prove depraved indifference. The majority opinion was joined in by Justices Florio, Dickerson and Leventhal. Justice Belan dissented, arguing that evidence of depraved indifference was glaringly absent, and that the conviction should be reduced to second degree manslaughter.

People v. Bowles (N.Y.L.J., November 7, 2011, pp. 1 and 13)

In a unanimous decision, the Appellate Court held that due process requires the effective assistance of counsel in cases involving mandatory sex offender registration in the same manner as a criminal proceeding. In the case at bar, however, it determined that counsel was not ineffective and the determination of the court below was upheld.

People v. Nesbitt (N.Y.L.J., November 8, 2011, pp. 1 and 9)

In a 3-2 decision, the Appellate Division, First Department, determined that an attorney's failure to argue that the Defendant was not guilty of assault in the first degree did not constitute ineffective assistance of counsel. Counsel had told the jury that the Defendant was not guilty of attempted murder, and his strategy was obviously to try to win part of the case which involved a lower penalty. The Court's majority concluded that counsel's strategy was to focus the jury on what he correctly believed was the winnable part of the People's case. The Court's majority consisted of Judges Mazzarelli, Sweeney and Roman. Justices Renwick and Moskowitz dissented, and argued that there was room for argument that the Defendant's action did not rise to the level of first degree assault, and the jury should at least have been urged to consider lesser included offenses.

People v. Wallace (N.Y.L.J., November 18, 2011, p. 1)

The Appellate Division, First Department, unanimously reversed a ruling by a trial court which had suppressed a weapon. The appellate panel concluded that the police were justified in grabbing a bag from a subway passenger which turned out to contain a loaded gun. The police had received a tip from a train conductor that a black man wearing a brown coat had a gun in a brown bag and was showing it to passengers in the first car of a train. When the officers entered the first car of the train in question, they saw the Defendant, who matched the description provided, trying to make his way into the crowd. The officers told the Defendant to get off the train but he did not obey their commands. The officers then pushed the Defendant against the wall, grabbed the bag and found the gun inside. The appellate panel concluded that the totality of the circumstances herein provided reasonable suspicion of the police to act. Further, the potential danger to both innocent bystanders and the police officer in the confined subway car justified their actions.

People v. Pelair (N.Y.L.J., November 28, 2011, pp. 1 and 7)

In a unanimous decision, the Appellate Division, Fourth Department, held that records attesting to the accuracy of a breathalyzer are not accusatory and are therefore admissible at a driving while intoxicated trial without supporting testimony. The Court's decision was a further effort to alleviate and limit the holding of the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), which held that the United States Constitution bars the admission of testimonial out-of-court statements by a witness not subject to cross-examination. Since *Crawford,* Appellate Courts have struggled to come up with a comprehensive definition of the term testimonial. The Fourth Department concluded that one factor which must be considered is the degree to which a statement is deemed accusatory. The appellate panel concluded that two documents which were at issue in the case—a calibration certificate generated by the Division of Criminal Justice Services, and a simulator solution certificate produced by the state police, were not accusatory and were properly admitted as business records. Both documents are used to establish that the breath test machine used in a particular case is accurate, a necessary foundational requirement for the admission of breath test results.

People v. Allen (N.Y.L.J., December 5, 2011, pp. 1 and 7)

In a unanimous decision, the Appellate Division, Third Department, reversed a Judge's ruling on a suppression motion because he had conducted an independent test of a vehicle tail light without informing either the police or the motorist before he granted the driver's motion to suppress evidence. The appellate panel concluded that the Judge had conducted an improper experiment without the knowledge of either side and had violated the concept that while the trier of fact may apply logic, common sense, and everyday experience to interpret the admitted evidence, he may not engage in conduct that tends to put the fact-finder in possession of evidence that was not introduced. The Appellate Division, Third Department found that by the trial judge's actions after the close of the suppression hearing without informing the parties, the Court deprived the parties of the opportunity to address the differences in conditions between the experiment and the actual incident. The appellate panel, which consisted of Justices McCarthy, Mercure, Mallone, Stein and Egan, remitted the matter back to the Supreme Court in Albany for a new suppression hearing.

People v. Griffin (N.Y.L.J., December 16, 2011, pp. 1 and 2)

In a 3-2 decision, the Appellate Division, First Department, reversed a Defendant's conviction after determining that the trial Judge had improperly removed a Defendant's Legal Aid attorney after counsel had requested an adjournment. The three-Judge majority, consisting of Justices Acosta, Gonzalez and Daniels, concluded that the Court's actions were capricious and arbitrary, and denied the Defendant his right to counsel. In the case at bar, the Defendant had been assigned several Legal Aid attorneys, and at an additional court appearance the Legal Aid attorney who was representing the Defendant at that time requested a further adjournment based upon the fact that he was soon leaving Legal Aid and a new attorney would have to be assigned. The trial Judge remarked that the Legal Aid attorney's request was not professional or responsible and he ordered the removal of Legal Aid from the case and the appointment of 18-B counsel. The Defendant was never consulted regarding the removal of one attorney and the appointment of the other.

The appellate panel majority concluded that the Defendant had the right to continue his long-standing relationship with the Legal Aid Society and that the Court had abused its discretion in arbitrarily removing Legal Aid counsel and in engaging in disparaging remarks about the agency. It further noted that the District Attorney's Office had been granted numerous adjournments in the past. The majority conceded that trial judges should have broad discretion in the scheduling of cases, and that the right to counsel did not mean the right to counsel of the Defendant's choice. However, in the case at bar, the trial Judge had gone too far in his actions and remarks. Justices Sweeney and Moskowitz dissented, arguing that the trial Judge had acted within his discretion, and that Legal Aid did not present sufficient information regarding the continual turnover of counsel from their staff who were assigned to the Defendant. It appears likely that due

to the sharp division in the Court and the issue involved, that this matter will eventually reach the New York Court of Appeals.

People v. Oliveras (N.Y.L.J., December 28, 2011, pp. 1 and 3)

In a 3-2 decision, the Appellate Division, First Department, reversed a Defendant's conviction and ordered a new trial on the grounds that his attorney did not provide adequate assistance of counsel. The Defendant had a history of mental illness and he confessed to a murder after hours of police interrogation. The Court's majority concluded that counsel had failed to seek psychiatric records of the Defendant which could have been relevant with respect to the issue of whether the Defendant's confession was voluntary. The Court noted that the People's evidence involved only one eyewitness to the crime and that the Defendant's confession was not consistent with some of the facts as to how the crime occurred. The Defendant's attorney presented evidence from the Defendant's mother that he only had a grade school education, was learning disabled and had been hospitalized several times for psychiatric problems. However, defense counsel never sought the Defendant's medical records, which could have been used as evidence. The records would have shown that the Defendant suffered from depression and suicidal thoughts since he was 15, and frequently heard voices.

The Court's majority, which consisted of Justices Gonzalez, Acosta and Manzanet-Daniels, concluded that the defense had everything to gain by obtaining Defendant's records and in consulting with the psychiatric expert to support the claim that the Defendant lacked the mental capacity to voluntarily confess to the crime. The majority further stated that had the jury heard evidence of the Defendant's mental illness, there is a reasonable probability that the verdict would have been different. Justices Catterson and Saxe dissented, arguing that defense counsel's decision could have been based on a reasonable and legitimate defense strategy, and therefore would not constitute ineffective assistance of counsel. Due to the sharp division in the Court and the issue involved, it appears almost certain that this matter will eventually be determined by the New York Court of Appeals.

People v. Bush (N.Y.L.J., December 30, 2011, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Second Department, ruled that a Defendant who had been convicted 35 years ago was now entitled to an additional DNA test regarding previously untested fingernail scrapings from a 14-year-old victim. The Defendant had been convicted of murdering the 14-year-old girl in 1976. The appellate panel concluded that the testing of the previously untested fingernail scrapings could reveal a more complete genetic contributor to the DNA sample which was already found in an earlier scraping. In addition, such testing could reveal a genetic profile complete enough to run through a large DNA database or that could be matched to the male contributor to the DNA which was also found on a black plastic comb. The Court's ruling remitted the matter back to the Suffolk County Court for further proceedings based upon the new testing which is being ordered.

People v. Wiasiuk (N.Y.L.J., January 3, 2012, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's conviction for murdering his Wife because defense counsel had failed to react to juror misconduct and had committed error in introducing highly prejudicial and inadmissible evidence to such an extent that it constituted ineffective assistance of counsel. The record established that one of the jurors had been dishonest during voir dire regarding knowledge of the victim and information regarding the Defendant's history of domestic violence. Despite this fact, defense counsel refused to agree to the discharge of the juror, even though both the prosecutor and the Judge had raised concerns regarding the juror's fitness. In addition, defense counsel introduced diary entries which had previously been ruled inadmissible and which were harmful to the defense. The appellate panel therefore ordered a new trial.

People v. Howard (N.Y.L.J., January 13, 2012, pp. 1 and 2)

In a 3-2 decision, the Appellate Division, First Department, concluded that the use of a BB gun instead of a real gun in a robbery is not sufficient to reduce a robbery charge from first to second degree. The three-judge majority, consisting of Justices Richter, Saxe and Friedman, concluded that the evidence was sufficient to establish that what was displayed appeared to be a weapon. Justices Freedman and Moskowitz dissented, and argued that the interests of justice mandate a reduction of the conviction, based on the fact that the only evidence of a weapon which was presented was that of a BB gun rather than a firearm, and that the Defendant should have been afforded the benefit of the affirmative defense provided for in Penal Law Section 160.15(4). Because of the split in the Court, and the unique nature of the issue, it appears this case may go to the New York Court of Appeals.

People v. Harris (N.Y.LJ., January 17, 2012, pp. 1 and 8)

In a 3-1 decision, the Appellate Division, Second Department, reversed a Defendant's conviction on the

grounds that he had invoked his right to counsel when he commented to a police detective, "I think I want to talk to a lawyer." The three-judge majority, consisting of Justice Chambers, Leventhal and Florio, held that the comment was sufficiently unequivocal to invoke the right to counsel, and that therefore any statement which was taken should have been suppressed. Justice Dillon dissented, finding that the evidence against the Defendant was overwhelming, and that therefore the error which was committed was harmless. The District Attorney's Office has indicated it will seek leave to appeal, and this matter may have to be decided by the Court of Appeals.

People v. Tucker (N.Y.L.J., January 17, 2012, p. 2)

In a unanimous decision, the Appellate Division, Third Department, reduced a conviction regarding first degree assault after concluding that even though the victim had been stabbed eight times, he did not suffer a serious physical injury within the meaning of the Statute. The case involved an attack on several college students by the Defendant and two others. The Court found that the most serious wound suffered by the victim was a four-inch cut, which required a few sutures. The Court concluded that this injury was not one involving a substantial risk of death, and that the victim's wounds were mostly superficial. Based upon the Court's decision, the matter was remanded to the County Court for re-sentencing. The Defendant's original sentence involved 12 years in prison and 5 years of post-release supervision.

People v. Teatom (N.Y.L.J., January 18, 2012, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's conviction for driving while intoxicated, after concluding that the trial Judge had improperly discharged a juror and substituted an alternate. The Court had failed to obtain a written consent which was signed in the presence of the Court. The Appellate Division found that the issue in question was one of constitutional dimension, and required a reversal, despite the failure to preserve the issue.

For Your Information

Report Indicates Possible Fraud in Receipt of College Tax Credits

In a report recently issued by the Inspector General for the Treasury Department, it was stated that for the first five months of 2010, $2.6 billion went to 1.2 million taxpayers for students for whom the Internal Revenue Service lacked documents showing that they had actually attended school. An additional $550 million went to 371,000 taxpayers for students who didn't qualify because they didn't attend school long enough or were graduate students. In addition, it was reported that 250 prisoners who were in custody for all of 2009 erroneously got $256,000 in tax credits.

The credits, which were questioned in the report, represent more than 1/5 of the $15.5 billion in college credits that were granted to nearly 8.9 million taxpayers through 2010. The report was issued after an analysis of the American Opportunity Tax Credit Act, which was created in 2009 as part of President Obama's economic stimulus package. The program was an expansion of the Hope Scholarship Tax Credit, which was extended by Congress last year through 2012. It provides tax credits of up to $2,500 annually for students as long as their families don't exceed income limits.

After receiving word of the report, the Internal Revenue Service disputed some of the findings, stating they were overstated and based on a faulty analysis. The Bureau has, however, agreed to implement many of the recommendations made by the report to insure that only eligible taxpayers receive the credit.

College Tuition Soaring

A recent study published by the College Board indicated that the costs of college tuitions are increasing rapidly across the Country. Increases are especially significant with respect to public colleges. The report found that average in-state tuition and fees at 4-year public colleges rose $631, or 8.3%, compared with a year ago. The cost of a full credit load on a national basis has now passed $8,000, an all-time high. If room and board is included, the average price for a state school now runs more than $17,000 a year. This year's increases were largely fueled by cuts in state budgets to educational facilities, and by the necessity of the educational institutions to make up the deficits by raising tuition. The situation in California particularly contributed to the national increase, since California enrolls 10% of public 4-year students, and this year faced a 21% increase in tuition. In concluding its report, the College Board reported that 56% of 2009-2010 bachelor degree recipients at public 4-year colleges graduated with a debt averaging $22,000. At private non-profit universities, the figure was higher, with 65% owing approximately $28,000.

U.S. Income Gap Widens

Additional recent figures from the United States Census Bureau indicate that 50% of U.S. workers earned less than $27,000 last year, reflecting a growing income gap between the Nation's rich and poor. The number of people making $1 million or more, however, grew by more than 18% from 2009. Further, a recent report from the Congressional Budget Office found that the top 1% in the after-tax income bracket made $165,000 or more in 1979, and that figure had jumped to $347,000 in 2007. Income earners in the lower brackets saw only a modest increase in their incomes over the last 30-year period. While the average U.S. income for all earners was $39,959 last year, the mean income—the figure where half earned more and half earned less—was $26,364. This disparity reflects the fact that the distribution of workers by wage level is highly skewed. The Social Security Administration reported that the median compensation last year was just 66% of the average income, compared with nearly 72% in 1980.

The conclusions drawn from the combined studies of the Census Bureau and the Congressional Budget Office appear to be that the richest 1% of Americans have been getting far richer over the past three decades, while the middle class and poor have seen their after-household income only crawl up in comparison. Adding further fuel to the fire is a recent study from the University of Michigan which reveals that the net worth of members of the U.S. House of Representatives has increased dramatically during the last 20 years, and that the disparity between the legislative officials and their constituents has grown ever wider. According to the study, from 1984 through 2009, the median net worth of a member of the House of Representatives has more than doubled, rising from $280,000 to $725,000 in inflation-adjusted dollars. During the same period, the wealth of an American family has declined slightly, with the median sliding from $20,600 to $20,500.

A recent report by the Pew Research Center also reveals that the growing gap between rich and poor is increasing tensions within the U.S. population, and that about 3 in 10 Americans feel that there are very strong conflicts between the rich and poor. The report indicated that there has been an increase in this viewpoint in three important swing groups—whites, middle income Ameri-

cans, and political independents—and it suggested that this growing viewpoint could have an impact in the upcoming Presidential election.

Reduction in Public Sector Positions

Hit hard by plunging tax revenues, state and local governments have been forced to shed more than a half million jobs since the recession began in December 2007. In the last year alone, states have cut 49,000 jobs and localities have trimmed another 210,000. This most recent analysis was conducted by the Labor Department. The report also indicated that federal workers have been reduced by 30,000, which includes the loss of 5,300 postal service positions. The loss of public service positions has been a drag on efforts to reduce the unemployment rate. The current unemployment rate of 9.1% has basically stayed steady during the last few months, because there has been some improvement in the addition of private sector positions. The Labor Department indicated that in the last 12 months, private sector positions have increased by 1.6 million. Lower tax revenues and continued high unemployment may continue pressure on state and local governments to further reduce their employment rolls.

Increase in Gang Activities

The FBI recently reported that the gang problem in the United States is growing, and that there are an estimated 1.4 million gang members in some 33,000 gangs throughout the United States. At a recent briefing held at FBI headquarters, it was reported that gang membership continues to flourish, and gang leaders are entering into new alliances with other criminal organizations in an effort to maximize profits. Gangs are said to be collaborating in drug trafficking organizations, various fraudulent and counterfeiting schemes, as well as the sale and distribution of firearms. The increase in gang membership is estimated to be almost 40% during the last two years. The greatest increase in gang membership was reported to be in the Northeast and Southeast regions of the Country.

Justice Prudenti Named Chief Administrative Judge

Following the recent announcement that Judge Ann T. Pfau had resigned as the Court's top administrator, to return to the Brooklyn Supreme Court where she will handle medical malpractice cases, Chief Judge Lippman named A. Gail Prudenti as the new Chief Administrative Judge effective as of December 1, 2011. Judge Prudenti had served as the Presiding Justice of the Appellate Division, Second Department since 2002, when she was appointed to that position by former Governor Pataki. Judge Prudenti has been credited with instituting several innovative programs which have improved the efficiency and productivity of the Appellate Division, Second Department, which is the busiest Appellate Court in the State. She was first elected to the Supreme Court in Suffolk County in 1991, and was then elected as Suffolk County Surrogate in 1994. From 1999 to 2001, she served as the Administrative Judge for Suffolk County. Judge Prudenti is 58 years old and is a graduate of Marymount College in Tarrytown, New York, and the University of Aberdeen in Scotland. Because of an interest in international law, she attended law school in Scotland and gained admission to the Bar in New York State by petitioning the Court of Appeals for permission to take our State's bar examination. Justice Prudenti resides on Long Island with her husband, Robert J. Cimino, who is presently in private practice. As Chief Administrative Judge, she will receive an annual salary of $147,600, a $5,000 increase from her salary as Presiding Justice. Her salary is expected to be increased on April 1, 2012, when the pay increases for all New York Supreme Court Judges goes into effect. Judge Prudenti has an outstanding reputation in the New York legal community, and we congratulate her on her new position. We also thank Judge Pfau for her 4½ years of service as Chief Administrative Judge during a difficult period of time for the judicial system and we wish both Judges well as they pursue their new careers.

Numerous Federal Inmates to Receive Early Release

Due to the recent reductions in the penalties for possession of crack cocaine, and the recent decision by the U.S. Sentencing Commission to apply the reductions retroactively, numerous federal prisoners are expected to be released within the next few months. It has recently been reported that some 1,900 prisoners are eligible for immediate release, which began taking effect in late November. Over the next several years, some 12,000 federal prisoners are expected to benefit from the new sentencing modifications. Under the old system, a person convicted of crack possession got the same mandatory prison term as someone with 100 times the amount of powdered cocaine. Five grams of crack, about the weight of 5 packets of Sweet and Low, involved a mandatory five-year prison term, while it took 500 grams of powder to get the same sentence. In 2010, Congress reduced the disparity in sentences for future cases, and last summer the U.S. Sentencing Commission decided to apply the new regulations to inmates already serving time. Some prosecutors have raised the issue as to whether the reduction in sentences can be applied retroactively, and the United States Supreme Court recently granted certiorari in two cases involving the issue. In the cases of *United States v. Dorsey*, and *Hill*, the Defendants were both convicted of crack cocaine crimes, but were not sentenced until after the new sentencing act had taken effect. In accepting the matter, it appears that the United States Supreme Court itself will weigh in on whether the more lenient sentences can be retroactively applied.

Earth's Population Reaches Seven Billion

The United Nations recently announced that as we entered the month of November, it was estimated that the

world's population had reached 7 billion persons. The U.N. reported that it expects the world's population to reach 8 billion by 2025, and 10 billion by 2083. The actual figures could vary widely, however, depending on infant mortality rates and increases in life expectancy in the various countries throughout the world. China continues to be the world's most populous Nation, with India in second place.

New Statistics Reveal Startling Increase in Poverty in America

Several years of economic downturn and high unemployment are being felt in the most recent statistics released by the Census Bureau regarding increasing poverty in the United States. New census data indicates that the ranks of the poorest in the United States have reached a record high. One in fifteen people is now considered to be living in poverty. This accounts for approximately 46.2 million people. About 20.5 million Americans, or 6.7% of the U.S. population, are considered the poorest of the poor. This group is defined as those at 50% or less of the official poverty level. This group earns an income of $5,570 or less for an individual, or $11,157 for a family of four. The 6.7% in the poorest group is the highest that has been reached in the last 35 years. The report also indicated that poverty for Americans 65 and older is also rapidly increasing and may be on track to double within the next few years.

A further indication of the increase in poverty in the United States is the recent report from the Department of Agriculture that reveals that approximately 45.8 million Americans now receive food stamps, constituting 15% of the population. In fact, in several states, the percentage of food stamp recipients has exceeded 20%. Mississippi has the highest percentage of food stamp recipients at 21.5%, followed by New Mexico, Tennessee, Oregon and Louisiana. It also was recently revealed that in the State of Florida, which now has a population of approximately 19 million, the number of food stamp recipients has now exceeded 3 million.

In addition to those included within the poverty group, another 97 million Americans fall into the next listed category, which is classified as low income and involves persons whose earnings are between 100 and 199% of the poverty level. The combination of these two groups has now reached almost 48% of the U.S. population which can basically be considered as in some form of economic distress.

Suffolk County Provides Additional Funding for Assigned Counsel Fund

In our prior issue, it was reported that the fund to pay assigned counsel in Suffolk County had been depleted as of the end of August. The Suffolk County Legislature in October voted to provide an additional $500,000 for the assigned counsel fund, to cover the balance of the 2011 year. Due to the situation which arose, Suffolk County will have to reevaluate its overall funding requirements for assigned counsel when it prepares its budgets for future years.

More Americans Living to Age 90

In a recent report issued by the U.S. Census Bureau, it was concluded that Americans are more likely than ever to reach the age of 90. The number of people who are age 90 or older has nearly tripled since 1980, and now comprises some 1.9 million people. According to current trends, by the year 2050, it is expected that some 8.7 million Americans may fall in that older category. This is a dramatic change from more than 100 years ago when fewer than 100,000 were in that category. The report also indicated that the three States which lead the Nation in the 90-plus population, each having more than 130,000 in that age category, are California, Texas and Florida.

U.S. Court of Appeals Reverses Bruno Convictions and Orders New Trial

On November 16, 2011, the United States Circuit Court of Appeals, Second Circuit, issued its long awaited decision in the case involving former State Senate Majority Leader Joseph L. Bruno. The Court determined that pursuant to the recent United States Supreme Court decision, in *United States v. Skilling*, 130 S. Ct. 2896 (2010), which re-defined a federal law making it a crime to deprive people of "honest services," his convictions would have to be overturned, and a new trial ordered. Bruno's defense team had argued that subjecting him to a new trial would violate double jeopardy principles. The Court, however, concluded that a new trial was warranted since the government's evidence would permit a reasonable jury to find that Bruno performed virtually non-existent consulting work for substantial payments, and attempted to cover up his dealings. His retrial would involve a single count of honest services fraud, on which the prior jury was hung, and which was based on Senator Bruno's alleged failure to disclose conflicts of interest. The former State Senator is currently 82 years old and there have been some suggestions that negotiations may occur with federal prosecutors prior to the holding of any new trial, in an effort to bring an end to the case. We will keep our readers informed of any further developments.

Criminal Appeals Statistics

In a recent article in the November-December 2011 issue of the New York State Bar Association *Journal*, former Justice of the Appellate Division, First Department, Bentley Kassal, discussed recent appellate statistics in New York State. Justice Kassal, who has been conducting this annual review for many years, indicated that in the New York Court of Appeals for the year 2010, the Court decided 100 criminal law cases. Sixty-three were affirmed, 33 were reversed and 4 were modified. With respect to

the Appellate Divisions, slightly more criminal appeals resulted in a reversal in the First, Second and Fourth Departments, while the number of reversals in the Third Department dropped significantly. With respect to the total caseload for all Appellate Divisions, the First Department had 2,432 dispositions in 2010, down slightly from 2009. The Second Department, which is the busiest Appellate Court, had 11,952 dispositions, up slightly from 2009. The Third Department had 1,907 dispositions for 2010, up slightly from 2009, and the Fourth Department had 1,635 for 2010, up slightly from 2009.

Inspector General Issues Report on Nassau County Police Lab

Following recent disclosures that the Nassau County Police Department Crime Lab may have committed numerous errors in its analysis of evidence, the Governor appointed Inspector General Ellen Biben to review the situation and to issue a report. On November 14, 2011, the *New York Law Journal* reported that the report had been issued and had concluded that the Nassau County Police Department Crime Lab had been plagued with significant and perverse problems which reflected a failure of oversight at both the state and local levels. The 166-page report recommended a broader review of all laboratory disciplines as well as the addition of prosecutors to act as liaisons with the laboratory. The report also called for better training of assistant district attorneys to understand the significance of the various lab reports. The problems at the Nassau County Laboratory have resulted in numerous motions by defendants, and many cases are in the process of review and possible retrial. In an effort to resolve the situation regarding the Nassau County Lab, Nassau County Executive Edward Mangano announced in late December that former State Homeland Security Czar Michael Balboni will lead a Board to oversee the restoration of the Lab. It is anticipated that the Lab will move to a new facility, and that a new group of civilian scientists and other accredited officials will be appointed.

Governor Cuomo to Fill Appellate Division Vacancies

With the elevation of A. Gail Prudenti to the position of Chief Administrative Judge and the retirement and subsequent death of Justice Cardona, Governor Cuomo was faced with filling the two vacancies for Presiding Justices in the Second and Third Departments. In addition, he has to name 8 new Associate Justices in several Appellate Divisions to fill existing vacancies. With respect to the position of Presiding Justice for the Third Department, four currently sitting Justices on that Court were being considered to serve as Judge Cardona's successor. These Justices were Judges Mercure, Peters, Stein and Eagan, Jr.

With respect to the Appellate Division, Third Department, Justice Cardona had announced that he would retire at the end of the year. However, he had been battling cancer for a long period of time and he unfortunately died on December 4 at the age of 70. Justice Cardona had served as Presiding Justice of the Third Department since 1994, and was a graduate of Albany Law School. The Court closed for business on December 9 and held a special memorial service in his honor.

With respect to the Appellate Division, Second Department, several sitting Justices in the Second Department were being considered to serve as Judge Prudenti's successor.

The Governor also needs to fill a vacancy in the Appellate Division, Fourth Department, following the retirement of Justice Samuel L. Green, who reached the mandatory retirement age at the end of the past year. Justice Green was the first African American outside of New York City to be elected to a state judgeship, and was the longest serving Associate Justice in the Fourth Department, having been appointed in 1983. He is a graduate of Buffalo School of Law. Governor Cuomo's selections are expected shortly and we will report on his choices in our next issue.

Appellate Courts Struggle With Two Years of Drug Law Re-Sentencing

Since drug law reform measures were passed some two years ago, Appellate Courts have struggled with the practical application of the re-sentencing provisions. The Drug Law Reform Act of 2009 eliminated the remaining vestiges of the harsh Rockefeller Drug Laws and phased in a four-part transformation. In April 2009, several mandatory minimum sentences were eliminated or reduced, and eligibility for treatment was expanded. In June 2009, a conditional sealing provision took effect. In October 2009, Judges were vested with the discretion to steer some addicted offenders to treatment without the consent of the District Attorney, and retroactive sentencing relief began for B offenders in state custody. In November 2009, the new crimes of felony drug sale to a child and operating as a major trafficker also took effect.

The re-sentencing provisions generated considerable litigation, and required the Appellate Courts to issue several rulings on the matter. The New York Court of Appeals to date has issued two major rulings. In June, it determined in *People v. Paulin*, 17 NY 3d 238 (2011) that parole violators are eligible for re-sentencing under the Drug Law Reform Measure. In *People v. Santiago*, 17 NY 3d 246 (2011), the Court held that offenders who apply for re-sentencing while they are in custody are eligible even if they are subsequently paroled. Following the Court of Appeals pronouncements, the Appellate Divisions, Second and Third Departments, have dealt with several cases involving similar issues. A good summary regarding the problems faced by Appellate Courts in dealing with the

drug re-sentencing matters appeared in the *New York Law Journal* of November 21, in an article written by John Caher, at pages 1 and 6. Our readers are referenced to that article for further details.

Border Arrests of Illegal Aliens

Evidently due to increased deportation of illegal aliens and the economic recession in the United States which has reduced employment possibilities, the number of persons seeking illegal entry into the United States border with Mexico has dramatically decreased. A recent report indicated that arrests of illegal immigrants along the U.S. border with Mexico are at their lowest level in more than 40 years. In the fiscal year that ended September 30, 2011, the U.S. Border Patrol reported that it had arrested 327,577 people trying to cross the Southern U.S. border. During the same period, Customs Enforcement officials deported a record 396,906 people. The number of illegal immigrants attempting to enter the United States has been steadily declining during the last few years and the focus now appears to be on how to deal with the almost 11 million illegal immigrants who have been living in the U.S. for 10 years or longer. The issue of illegal immigration is becoming a major matter in the upcoming Presidential elections, and will be the focus of several important rulings which are expected from the United States Supreme Court involving efforts by Arizona, Alabama, and other States to utilize state Statutes to deal with the immigration problem.

Cutbacks Affecting Operation of Court System

Recent cutbacks in the number of non-judicial employees and other measures instituted to reduce expenditures by the court system are beginning to have a significant effect on the operation of the court system. It was recently reported that overtime pay has been substantially reduced in recent months, and that many court operations are being terminated at 4:00, and that some court offices are closing during lunch hours. Cutbacks appear to have had a very significant effect on the arraignment of criminal defendants in various counties in New York City. Several months ago, additional arraignment hours had to be added in Brooklyn after the time from arrest to arraignment skyrocketed beyond legal limit. Recently, it was announced that additional hours were being added to the Bronx Criminal Court for weekend arraignments, which also saw unacceptable delays in the arraignment process. Due to cutbacks, the average arraignment time in the Bronx had jumped in November to just over 29 hours. Brooklyn was experiencing an average of 27-hour delays. Only Manhattan, Queens and Staten Island were within the 24-hour deadline established by the New York Court of Appeals in 1991, and those Courts were barely making that time limit.

Former Chief Administrative Judge Pfau stated that cutbacks have come at a price, and that cases which may have taken three days to try will now probably take four days, and that the routine operations of the court system have been impacted. In the criminal area, weekend arraignment hours have been strained, and it is expected that the backlog of cases in several courts may begin to grow. Several Bar Associations, including our own State Bar, have issued detailed reports which have confirmed that the recent budget cuts have had a harmful and far-reaching effect on the operation of the New York Courts. In addition to the State Bar, reports have also been issued by the New York City Bar Association and the New York County Lawyers Association. It is expected that Chief Administrative Judge A. Gail Prudenti, who assumed her new office in December, will issue additional reports and recommendations regarding the state of the court system in the next few months. We will keep our readers advised of developments in this area.

Office of Court Administration Submits New Judicial Budget

In early December, the Office of Court Administration submitted its budget proposal for the year 2012-2013 to the Governor and Legislature. The budget calls for $2.3 billion. The budget includes monies, some $27.7 million, to cover the salary increases for members of the judiciary which were recently recommended, but through other cost saving measures the overall budget is almost identical to the past year. Non-judicial employees would receive contractually required raises totaling $21.3 million, and additional funding has been added for civil legal services. Although by law the proposed budget had to be submitted by December 1, 2011, final action by the Legislature and Governor will not be forthcoming for several months.

The new budget anticipates no further layoffs but the Court system intends not to fill some positions which will be open due to continued retirements. The proposed judicial budget received the support of several Bar leaders, including that of New York State Bar Association President Vincent E. Doyle, III, who called the budget a reasonable compromise between the needs of the courts and fiscal reality.

Passage of Bar Exams

A recent report covering the law schools in New York State regarding the passage rate on the bar examination for first-time candidates reveals that a majority of the law schools had a higher pass rate this year over last year. Among the 15 schools listed, Columbia Law School and NYU Law School continue to have the highest pass rate, to wit: 96%. Cornell was in third place with 92%. The statewide average was listed as 86%, which was the same as last year. Cardozo, Fordham, Brooklyn and St. John's Law School all had rates which were better than the statewide average. The law schools with the lowest scores were CUNY, which had a pass rate of 67%, down from

73% in 2010, Pace and Albany, with a passing rate being 76 at Pace and 78 at Albany. Overall, eight of the fifteen law schools reported a higher pass rate for the July 2011 bar exam over the previous year.

Population Growth in United States Slows Significantly

A recent Census Bureau report covering the year 2011 reveals that many states which experienced large population increases in the prior decade have now seen population growth declining significantly. The Bureau estimated that during the last year, the U.S. population grew by 2.8 million, reaching a figure of 311.6 million people. That growth of 0.92% was the lowest since the mid-1940s. Previously, from 2000 to 2010, the Nation grew by 9.7%. The Census Bureau reported that the Nation's overall growth rate is now at its lowest point since the baby boom. The economic slump which has affected large portions of the South and West, that previously saw large population growth and a reduction in the level of immigration, are cited as some key factors regarding the decline in population growth.

States such as Arizona, Nevada, Florida and Georgia, which previously saw significant growth, are now reporting almost zero population increases, and the Sunbelt explosion which existed five years ago has now appeared to have come to an end. The report concluded that 38 States showed lower growth in 2011 than in the prior two years, 23 of which were in the South and Western regions.

Number of Marriages Sharply Decreasing

A recent report by the Pew Research Center concludes that as we head into the year 2012, barely half of all adults in the United States are married, and the median age at the time of the first marriage has never been higher—slightly more than 26 years for women and nearly 29 for men. The report concludes that adults are marrying later or are bypassing the institution of marriage totally. The report estimates that the share of married persons in the United States could also dip below 50% in a few years. The number of new marriages in the United States fell 5% from 2009 to 2010. The situation appears to be most prevalent in adults between the ages of 18 and 29. In 1960, nearly 60% of adults who were in the ages of 18-29 were married. In the year 2011, only 20% in that category were married. The study concludes with an observation as follows: "We as a society have to recognize that people do still get married but cycle into marriage later and may cycle out of marriage. Marriage is perceived as a very desirable good but no longer a necessity."

Renting Increases as Homeownership Declines

A recent real estate study revealed that more and more persons are renting homes or apartments and that homeownership is steadily falling. In 2006, the ratio of homeowners to renters was approximately 70 to 30. Currently, it is estimated to be about 62 to 38. It is also expected that within 5 years the ratio would be closer to 52-48. The drastic decline in home prices and the uncertainty in the economy have led many people to prefer a rental situation rather than to assume the current risks of homeownership.

Court System Conducts Jury Pool Survey

The Office of Court Administration recently announced the results of a new study, which examined the composition of jury pools throughout the State. The report concluded that within New York City, Hispanics represented a smaller share of potential jurors than of the general population. For example, in Queens, Hispanics make up 26% of the population, but only represented 17% of the jurors who served. In Manhattan, the Hispanic population was 23%, but they comprised only 18% of jurors.

Other juror demographics which were revealed by the survey were that in the area of gender, 52% of the jurors were female. By age grouping, the largest percentage of the jury pool was the 25–44 year age group, which made up 37%. This was followed by the age group 45–64, which comprised 35%. The report also found that whites comprised approximately 61% of the jurors, and that blacks comprised 17%. The number of Asians has increased steadily during the last few years and now comprises 9% of the jury pool. The report that was issued was the first annual report pursuant to Section 528 of the judiciary law.

New Study Pinpoints Major Causes of U.S. Deaths

The Center for Disease Control and Prevention recently issued its National Vital Statistics Report for the past year and concluded that there were approximately 2.4 million deaths in the United States during the past year, and that the major causes involved heart disease and various forms of cancer, which each accounted for almost 600,000 deaths. Overall, the report listed 113 different causes of deaths in the United States. Within the top 15 causes of death were accidents, which registered at number 5, and suicide, which registered at number 10. For the first time in almost 50 years, homicide did not make the top 15 causes of death.

The Counting of Prisoners for Election Purposes

A lingering dispute regarding the issue of whether inmates in the State's prisons should be counted for election purposes in the locality where the prison is located, or in their home neighborhoods, appears to be finally resolved by a compromise arrangement which appears to have been negotiated within the New York State Senate. Under the proposed arrangement, 46,000 of the State's 58,000 prisoners would be counted as potential voters back in their home neighborhoods for the purpose of re-drawing election districts. Previously, inmates, pursuant to a recent State law, were counted for legislative reapportionment

purposes in their last home districts, mostly in Democratic New York City, rather than their prisons, most of which are in upstate Republican areas. The new proposed arrangement was finalized following extensive computer analysis of the inmate's home neighborhoods.

2011 New York City Crime Statistics Indicate a Slight Increase in Major Crimes

Recent statistics issued by the New York City Police Department involving the crime rate for the year 2011 indicate that major crimes have increased slightly, to wit: by 0.4%. The report showed that some 105,000 murders, robberies and other serious crimes were reported throughout the five boroughs. With respect to the crime of murder, 500 murders were reported, which indicated a drop of approximately 4% in 2011. Assaults, rapes and robberies all registered slight increases over the previous year. Burglaries and auto thefts, however, declined from the prior year.

Fewer Judges Leave Bench in 2011

A recent report issued by the Office of Court Administration and Chief Judge Lippman revealed that far fewer judges left the Bench in 2011 than in 2010. In 2011, 54 judges left the Bench through retirement, resignation or death. This was less than half of the 110 judges who left in 2010. All told, there are some 1,200 judges in New York State. Judge Lippman attributed the lower number in 2011 in part to the recent recommended pay increases, which he stated should help to keep experienced judges on the Bench.

Governor Cuomo's Proposed Extension of DNA Database to Cover All Crimes

During his recent state address, Governor Cuomo proposed as his criminal justice initiative that defendants convicted of any Penal Law offense would be required to submit a genetic fingerprint, which would be included in the DNA database. Currently, this is required only for felony crimes and certain specified misdemeanors. Extending the requirement to hundreds of misdemeanor offenses has proven controversial, and although the proposal appears to be backed by those in law enforcement, various defender groups have raised civil liberties objections and questions on whether the current system will be overburdened by the addition of thousands of samples, based upon lower-level crimes. We will keep our readers informed of developments on the progress of this controversial proposal.

Governor Proposes Handling Forfeiture Proceedings at Sentencing

In another controversial proposal which was included within the Governor's budget, it is being suggested that judges be required to order asset forfeiture at every felony and misdemeanor sentencing. The measure is designed to eliminate the need to pursue assets in a civil action, as is presently required. The Governor's proposal has already been attacked as violative of due process principles, and for bypassing a civil forfeiture procedure which has worked well in the State for many years. It is also argued that the court system is already overburdened with handling criminal matters, and adding complicated forfeiture procedures to their dockets would further bog down the criminal justice system. Officials from both the New York State Defender Association and the National Association of Criminal Defense Lawyers have already issued public statements stating the bill "would result in a dangerous and burdensome expansion of the Criminal Court's responsibility." We will continue to monitor developments on this issue.

About Our Section and Members

Annual Meeting, Luncheon and CLE Program

The Section's Annual Meeting, luncheon and CLE Program were held on Thursday, January 26, 2012 at the Hilton Hotel in New York City, at 1335 Avenue of the Americas (6th Avenue at 55th Street). The CLE Program at the Annual Meeting was held this year at 9:00 a.m., and dealt with Fourth Amendment issues regarding searches of electronic media. With the ever expanding reliance, both in business and in personal life, on e-mail, text messaging, cell phones and computers, the government's authority to monitor and seize data from these electronic media has become a significant and yet largely uncharted area of the law. A distinguished panel, composed of Paul J. Cambria, Jr., Susan Axelrod, JaneAnne Murray, and Stephen Treglia, discussed the various aspects of this topic, including warrantless searches of cell phones and text messages, cell site records and GPS tracking, confidentiality issues, and logistical issues in computer searches. The CLE program was moderated by the Honorable Barry Kamins, Administrative Judge for Criminal Matters in the Supreme Court, Kings County.

Our annual luncheon was held at 12:00 p.m. and included Abbe David Lowell, Esquire, as a guest speaker. Introductory remarks were also provided by Section Chair Marvin E. Schechter. Approximately 100 attorneys, judges and governmental officials attended. During the luncheon, several awards were presented to outstanding practitioners and governmental officials for exemplary service during the past year. The awards presented were as follows:

Charles F. Crimi Memorial Award
for Outstanding Private Defense Practitioner
Anthony L. Ricco, Esq.
Anthony L. Ricco Attorney at Law, New York City

The Vincent E. Doyle, Jr. Award
for Outstanding Jurist
Honorable A. Gail Prudenti
Chief Administrative Judge of the State of New York
New York City

Outstanding Police Contribution in the Criminal Justice System
Phil T. Pulaski
Chief of Detectives, New York City

Outstanding Prosecutor
Daniel A. McCarthy, Esq. (Posthumously)
Chief Trial Counsel
and Director of Trial Training
Office of the Bronx District Attorney, Bronx

David S. Michaels Memorial Award
for Courageous Efforts in Promoting Integrity in the Criminal Justice System
G. Hanna Antonsson, Esq.
New York City

Michael K. Bachrach, Esq.
Law Office of Michael K. Bachrach, New York City

Karloff C. Commissiong, Esq.
Adams & Commissiong LLP, New York City

Peter Enrique Quijano, Esq.
Quijano & Ennis, P.C., New York City

Anna N. Sideris, Esq.
Quijano & Ennis, P.C., New York City

Steve Zissou, Esq.
Steve Zissou & Associates, Bayside

Some additional awards are scheduled to be presented at our May meeting in Saratoga Springs. The scheduled awards are as follows:

The Michele S. Maxian Award
For Outstanding Public Defense Practitioner
Joseph J. Terranova, Esq.
Law Office of Joseph J. Terranova, Esq., Lancaster

Outstanding Contribution in the Field of Criminal Law Education
Professor Richard F. Farrell
Wilbur A. Levin Distinguished Service Professor of Law
Brooklyn Law School, Brooklyn

Outstanding Contribution in the Field of Corrections
Mr. Richard deSimone
The New York State Department of Corrections
And Community Supervision, Albany

At our Annual Meeting, the current officers and district representatives of the Criminal Justice Section were elected to serve for an additional year. The officers and district representatives are as follows:

Chair—Marvin E. Schechter

Vice-Chair—Hon. Mark R. Dwyer

Secretary—Sherry Levin Wallach

Treasurer—Tucker C. Stanclift

Representatives

First District—Guy Hamilton Mitchell

Second District—Patricia A. Pileggi
Third District—Michael S. Barone
Fourth District—Donald T. Kinsella
Fifth District—Nicholas DeMartino
Sixth District—Kevin Thomas Kelly
Seventh District – Betsy Carole Sterling
Eighth District—Paul J. Cambria
Ninth District—Gerald M. Damiani
Tenth District—Marc Gann
Eleventh District—Anne Joy D'Elia
Twelfth District—Christopher M. DiLorenzo
Thirteenth District—Timothy Keller

Following the annual luncheon, the Executive Committee held its meeting and also heard a report by former Chief Judge of the Court of Appeals, Judith S. Kaye on the operation of Youth Courts. The Committee also discussed the Section's report on the sealing of certain criminal records. The Section's report, which was written by Richard Collins, was subsequently approved on January 30, 2012 by the House of Delegates. Whether the Legislature takes any action on this issue is yet to be determined, and we will keep our readers advised of developments.

Spring CLE Program Set

It was recently announced that the Spring CLE Program will be held from May 11 to May 13 in Saratoga Springs, New York, and will deal with the topic "Evidently Evidence II." Details regarding the event will shortly be forthcoming in a separate mailing.

Justice Kamins Appointed New Administrative Judge for the New York City Criminal Court

Chief Administrative Judge A. Gail Prudenti announced in early January that Barry Kamins, who has been serving as an Acting Supreme Court Justice in Brooklyn, was being appointed, effective immediately, as the new Administrative Judge for the entire New York City Criminal Court System. Justice Kamins is 68 years of age, and for the past few years has served as the Administrative Judge of the Criminal Court in Kings County.

Justice Kamins is well known to our Section, having served for many years on our Executive Committee, and having been a long-time contributor to our *New York Criminal Law Newsletter*. He is widely recognized as an outstanding legal scholar, and has risen rapidly within the court system following his appointment to the Criminal Court Bench in 2008 by Mayor Bloomberg. We congratulate Justice Kamins on his new appointment, and wish him well in his new position.

Membership Composition and Financial Status

As of January 13, 2012, our Criminal Justice Section had 1,516 members. This number is almost identical to our overall membership at the same time last year. With respect to gender, the Section consists of 1,108 men, or approximately 73%, and 368 females, or approximately 24% of the Section. No data was available for 40 members. In line with last year's situation, slightly over 49%, or 751 members, are in some type of private practice. Within the private practice group, the largest composition continues to be solo practitioners, who make up slightly over 28% of the Section. This number represents a slight increase of approximately 2% in the solo practitioner group over last year.

In terms of age groupings, approximately 25% of the Section is between 56 and 65, which is roughly the same as last year. The number of younger attorneys, 36 and under, now compromises slightly over 21%, which is up about 1% from last year. In terms of years of practice, slightly more than 49% have been in practice for 20 or more years. About 19% have been in practice for 5 years or less.

The Criminal Justice Section is one of 25 Sections in the New York State Bar Association which had, as of January 13, 2012, a total membership of just over 77,000. We regularly provide a welcome to those members who have recently joined, and a list of our new Section members who have joined in the last several months appears on the next page.

With respect to the financial status of our Section, our Treasurer, Tucker C. Stanclift, recently reported at our Annual Meeting, that as of the end of the year, the Section's financial status was sound, and that we expect when all outstanding bills are paid, to end the year with a small surplus. Income for the year 2011 was $69,912.76. Income slightly outpaced expenses, which totaled $69,753.02. The Section still maintains an accrued surplus from past years of approximately $45,000.

The Criminal Justice Section Welcomes New Members

We are pleased that during the last several months, many new members have joined the Criminal Justice Section. We welcome these new members and list their names below.

Paige A. Adams
Cheryl Padua Andrada
William Anshen
Peter W. Avery
Brooks T. Baker
Piotr Banasiak
Ashley Baynham
Joanna Rosett Beck
Bryce Edward Benjet
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Persons interested in writing for this *Newsletter* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *Newsletter* are appreciated as are letters to the Editor.

Publication Policy: All articles should be submitted to:

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

For ease of publication, articles should be submitted on a 3½" floppy disk or CD preferably in WordPerfect. Please also submit one hard copy on 8½" x 11" paper, double spaced.

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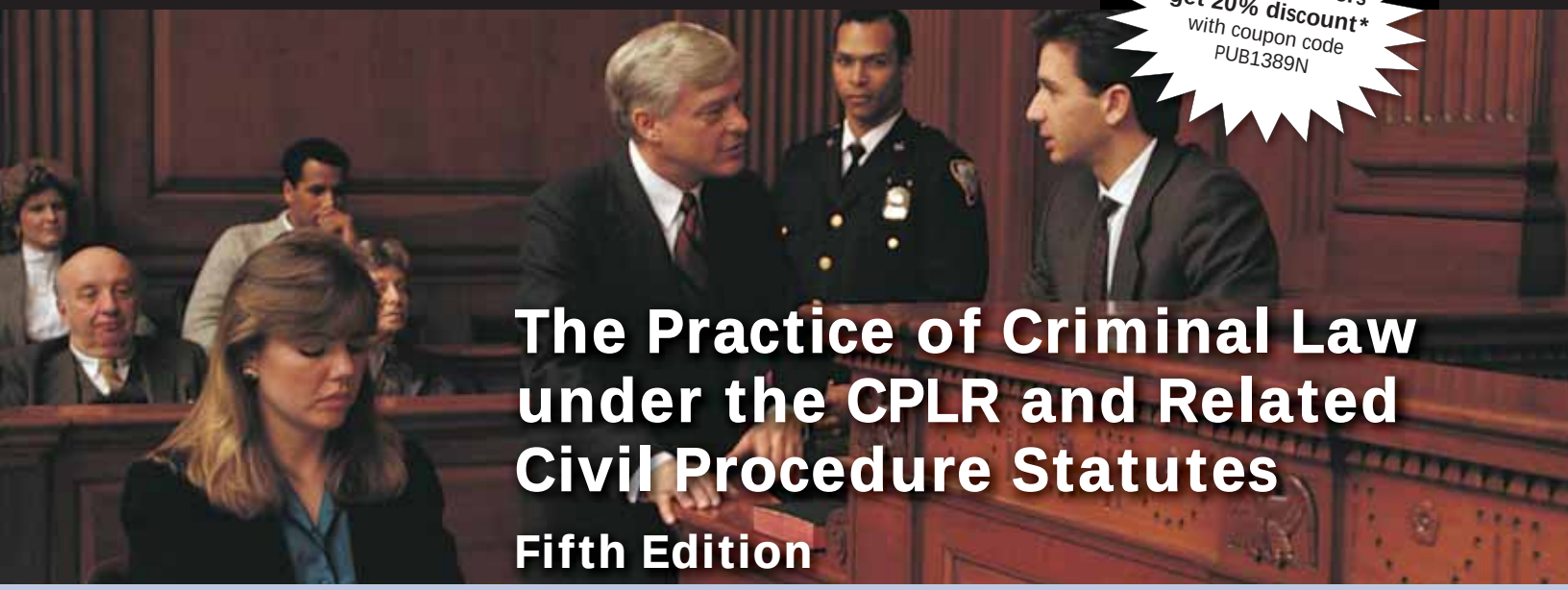

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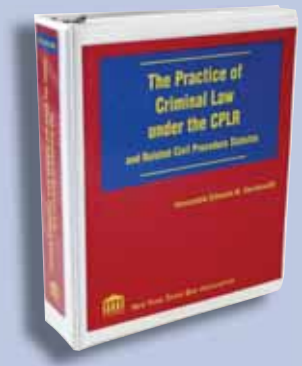

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Bronx County Supreme Court

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Many attorneys whose practices consist solely of criminal matters are unfamiliar with the precise rules that apply to civil actions. Moreover many of those rules are scattered throughout New York's Penal Law, Criminal Procedure Law and other statutes, and are difficult to find without the aid of an organizational reference.

The Practice of Criminal Law Under the CPLR and Related Civil Procedure Statutes, Fifth Edition, written by Judge Edward Davidowitz, solves this problem. This book pulls together in an orderly, logical way the rules and provisions of law concerning jurisdiction, evidence, motion practice, contempt proceedings and article 78 and habeas corpus applications—none of which is covered in the CPL or the Penal Law.

Additionally, some rules that have evolved through judicial precedent—for example, the parent-child and other common law privileges, or the provisions of relevant civil case and statute law to rules of evidence in criminal trials and proceedings—are included and discussed. This edition features greatly expanded discussions of case law and the relevant statutes.

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