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Queens Bar Bulletin
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The Queens Veterans

by Queens District Attorney Richard A. Brown

The wounds of war are not always visible. Many of our returning veterans witnessed horrific violence and unimaginable devastation in war torn areas. Some veterans returned with serious emotional and psychological scars that can result in their becoming involved in the criminal justice system. In 2010, to assist our returning troops, the Queens District Attorney's office in collaboration with the Unified Court System established the Queens Veterans Court.

One of the first such courts in the State, the Queens Veterans Court was designed to provide an alternative to incarceration for returning veterans charged with non-violent crimes whose criminal behavior may have been motivated by substance abuse or mental health issues related to their military service. Modeled on our very successful Treatment Court, the Queens Veterans Court offers veterans an opportunity to get the help they need – whether it is treatment for drug or alcohol abuse, post-traumatic stress disorder or brain injury – under the supervision and monitoring of the Court. If the individual successfully completes the required one year treatment program, he or she will receive a favorable disposition of their case.

In addition to treatment, a host of supportive services are available to veterans who participate in the program. These include the assistance of a peer mentor who acts as both a role model and an advocate, as well as vocational, educational and housing assistance as needed.

Veterans 18 years of age or older who have served in any branch of the military and have demonstrable clinical needs are eligible to participate in the program. Nearly 60 veterans have been aided by our Veterans Court and to date, 76 percent of these participants have successfully completed the program. These graduates have previously served in Vietnam, the first Gulf War and conflicts in both Iraq and Afghanistan.

We are extremely proud of this program, which along with our many other alternative to incarceration programs, recognizes and addresses the treatment needs of certain offenders charged with non-violent offenses and transforms these offenders into law abiding and productive citizens.

One of the challenges in providing diversion services to veterans is in identifying individuals entering the criminal justice system who have previously served in the military. In our experience, many veterans who have been arrested do not identify themselves as veterans either because they are unaware that there are services available in the court designed to address their special needs or because they feel embarrassed about their current situation. Defense attorneys who believe that their clients would benefit from the programs and services offered by the veterans court are encouraged to reach out to either Doug Knight, our full time Director of Alternative Sentencing, or to the assigned Assistant District Attorney to discuss whether veterans court is an appropriate option in the particular case. Mr. Knight can be reached at 718-286-6130.

"29 in '64"- Kitty Genovese and the case that transformed America

Robert E. Sparrow

I intend to bring you all back to 1964 - consider - 50 years have just flashed by and it is now a time - probably when you were all too young to remember… It was a time of major and social and political upheaval - a time that was dramatic, heroic, tragic, and utterly chaotic - a truly unforgettable era.

March, 1964 - the nation was still reeling from the assassination of a charismatic young president and the end of the brief "Camelot" era in which we all fleetingly basked; it was the year in which our leaders found an excuse to go to war with a far off land called Vietnam; in 1964 Nelson Mandela was sentenced to life in prison in South Africa - but also the year that LBJ literally pushed the Civil Rights Act through Congress; it was the year that Martin Luther King Jr. was awarded the Nobel Peace Prize - and, indeed, it was the year when the Beatles burst, blazingly, upon the scene. Clearly, it was a year of such momentous events that the world would never thereafter be quite the same!

Well, 1964 was also the year that a vivacious, 28 year old girl, named Catherine "Kitty" Genovese, met a horrible, brutal demise - but, because of a unique set of circumstances, her name and the legal proceedings which ensued, have been perpetuated in the newsrooms, in the classrooms which teach sociology, psychology and law - and it resonates in the social consciousness of a city, and of the nation and beyond.

"29 in '64"

It was March of 1964, and I had just turned 29… It was March of 1964, and one Winston Moseley had just turned 29…

Kitty Genovese continued…

It was March of 1964, and the lovely Kitty Genovese, expecting to turn 29 that July, tragically never got there!

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Being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th Street, Jamaica, NY. Due to unforeseen events, please note that dates listed in this schedule are subject to change. More information and changes will be made available to members via written notice and brochures. Questions? Please call 718-291-4500.

CLE Seminar & Event Listing

June 2015

Wednesday, June 10	QVLP Foreclosure Training
Wednesday, June 17	CLE: Juvenile Justice Committee & Seminar

September 2015

Monday, September 7	Labor Day – Office Closed
Monday, September 21	Golf & Tennis Outing - Garden City Country Club

New Members

Melanie Abrams	Alexander Goldman	Malvina Mardirosyan	Kyce Siddiqi
Laura L. Bahmanzad	Michael H. Goldman	Edwin Maria	Michael Siegel
Julian Balrup	Maricel Gonzalez	Yuriy Mavashev	Samantha Snyder
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Thomas Austin Brown	Chrissy Grigoropoulos	Philip Salvatore Milone	Jason A. Speights
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Dineen Cato	Yue He	Robert W. Napoles	Marc Alan Strauss
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Meagan P Chen	Jonathan Herman	Christopher Oxx	Eric Subin
Sarrah Cherizard	Pamela Hirschhorn	Nicholas Pagano	Sun Eloise Suh
Shantelee N. Christie	Noah Hussain	Cynthia Parache-Brito	Jan Tamoor
Trent Clarke	Michael Iakovou	Eric Bryan Perlmutter	Subhan Tariq
Martha J. de Jesus	Latoya S. Jeffers	Jonelle Phelps	Nathaniel R. Torres
George Despotopoulos	Janine Kapp	Justin Piccione	Wilber Trivino
Za'Kiya Juanita Dorch	Janet Keller	Mishael Minnie Pine	Vita V Trujillo
Steven B. Drelich	JoAnna C. Kelly	Ariel Poltielov	Danielle Waldeis
Scott Andrew Edley	Rafeena Khairullah	Sean Reidy	James Joseph Walsh, III
Ethan Michael Felder	Sumaiya Khalique	Anthony C. Rezzonico	Youli Wang
Keith Felsenfeld	Maya Khodos	Stephanie C. Robayo	Eileen Padraigin Ward
Solomon Aryeh Frager	Andrew Klaben-Finegold	Adriana Rodriguez	Brent G. Weitzberg
Benjamin J. Frenkel	Seth I. Koslow	Brandon S. Ross	Leo T. White
Michael A. Fritz	Rick J. Lasher	Jeffrey Roth	Yulianna Yagoudaeva
Konstantinos Gaisidis	Elan Layliev	Joseph H. Rotkowitz	Peter Zhang
Maria F. Galante	Janelle M. Lewis	Tamanna Rubya	
Alina Gavrilov	Arthur Orson Louissaint	William A. Sarro	
Evaggelia Giannopoulos	Stephanie Lugaro	Ankesh Sharma	
Ian Glick	Solmaz Mahalli	Sean Shekib	

Necrology

Hon. Allen Beldock
Raymond P. Cash
Jerry M. Decker
Douglas H. Krieger
Alexander J. Lapinski
Alan M. Rosenfeld
John F. Scheich
William M. Spanakos

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PRESIDENT'S MESSAGE

As this is our last Bar Bulletin of the year, this is the last "message from the President." This is the time when the president gets all melancholy remembering the past year. Not this guy. While it was my privilege and honor to serve as the president of the QCBA, I have to tell you, it was a blast and I am just as excited now as when I took office.

Before we get too deep into this, first let me congratulate our new president, Paul Kerson and his new incoming Board of Managers and his Executive Board. Paul is an incredibly bright and thoughtful guy and he is going to do a great job. I hope to see everyone at his installation at The Terrace on the Park on May 7, 2015. Good luck, Paul!

I would also like to thank Arthur Terranova, our wonderful executive director who, at times, had to be the Tom Hagen to my Michael Corleone and the Jiminy Cricket to my Pinocchio. Arthur, you are the best and thank you for the support and guidance throughout, not just my term, but my entire tenure with the QCBA.

I also would be remiss if I did not thank Sasha Khan, Janice Ruiz and Shakema Oakley for their support all year. They are the backbone of this Association.

As a child, I learned a lesson from a long time Forest Hills resident, the late Ben Parker, who imparted to me this lesson, "with great power comes great responsibility." This phrase best describes our Board of Managers this year. These men and women take time away from their personal and professional lives in order to work for the betterment of the lawyers and judges of this County and their accomplishments need to be acknowledged. I am so proud of what they have achieved.

Most Boards are lucky if they accomplish one or two things during the course of a year. This board, however, was phenomenal. Their accomplishments included the formation of an LGBT committee, a Professional Development Committee and Animal Law Committee. From what I have seen, the devotion, commitment and excitement generated by the members of these committees ensures that these committees will continue to grow, thrive and provide valuable resources for our members.

Speaking of the Professional Development Committee, Kristen Dubowski, Charles Giudice and Emilie Simone hosted the first ever "speed networking event." The event, in which 20-30 younger attorneys had a chance to sit down and speak with 20 or so seasoned attorneys from various fields of practice was extremely well received by all who participated. A common theme that I found when speaking with our younger attorneys served to reinforce my belief in the importance of belonging to a bar association. That theme was "personal interaction." In speaking with our attendees, they acknowledged that every job they have ever had, whether a summer job they had as a teenager or a job they had while putting themselves through college or law school or their current employment, they got through a personal connection that they made in their life. Whether it be a friend, a friend of a friend, a friend of a family member, these jobs were obtained because someone got to know them as an individual on a personal basis. It is this opportunity for personal interaction that membership in the Queens County Bar Association affords our members by way of committee involvement, social events and CLE seminars.

The Board, in partnership with Mark Weliky, the Executive Director of the Queens Volunteer Lawyers Project and Councilman Rory Lancman, also oversaw a hugely successful coat drive, in a short period of time, which benefitted The Jamaica Armory Shelter for Women. The coats were timely donated right in the middle of February!

One of the planks in our platform for this year was recognizing the efforts of the women and men of our armed forces. In this regard, I would like to acknowledge the efforts of Mark Weliky and the QVLP for their work with The Veterans Advocacy Project at the Urban Justice Center which focuses on assisting veterans with discharge upgrades.

Not stopping there, the Board and Mark Hoorwitz, Lisa Baldi and Dietz Reporting, combined to make a night out with the Islanders a smash. Over 130 tickets were sold and, the best part, we raised $1,300 for The Wounded Warriors Project. Wait, it gets better, Mark and Dietz matched what we raised! A great job for a great cause by all involved.

The Board also created the Queens County Bar Appreciation Award, an annual award which will be given to a member of the court system, in acknowledgement and appreciation of their career. Our inaugural award was given to Patty Krisman.

Because there was still some time left in the year, the Board also organized an inaugural outing to Citifield.

There were so many members who helped this Association and me throughout this year and I would like them to know that I am extremely thankful for the help and support, especially George Nicholas…yes, THAT George Nicholas.

On behalf of the Board of Managers I would like thank you, our members, sponsors and corporate sponsors, for your support this year and look forward to your continued support for this Association. 'Nuff said.

Joseph Carola, III

2015 American Bar Association Mid-Year Meeting

By Catherine Lomuscio

The American Bar Association (ABA) convened for its mid-year meeting in Houston on February 4-9, 2015. The conference had over 3,000 registrants. Lawyers from across the country participated in hundreds of committee, task force and state bar leadership meetings, providing information and discussion on many important issues facing our profession and the system of justice. There were also many networking opportunities for all association members, law students and state and local bar leaders.

The ABA's Nominating committee meeting took place on Sunday, February 8, 2015. The ABA's commitment to bringing diversity to its leadership ranks was on dramatic display at the meeting. At the "coffee with the candidates" session, the six current or soon to be officers of the association were a diverse mixture of race and gender. As a matter of fact, the next Chair of the House of Delegates, starting in 2016, will be an African-American woman from New York, Deborah Enix-Ross, who is senior advisor to the international dispute resolution group at Debevoise & Plimpton in New York City. The formal election of the candidates is still a year away, but the Nominating Committee did formalize its selection of Linda Klein from Atlanta as the ABA's President-Elect. At the House meeting itself, A. Vincent Buzard of Rochester, New York, a long-time member of the NY delegation and former President of the NYS Bar Association, was elected to the Board of Governors – the ABA's top executive body.

The House of Delegates met on February 9, 2015. New York's delegation held a caucus on the morning before the House convened for a final review of the House agenda and to hear from ABA leaders and candidates for office.

One of the important resolutions the ABA House of Delegates took a strong stand on was opposing the controversial "stand your ground" laws and urged repeal or substantial amendment to existing ones. For more information on issues impacting your practice and the profession visit the ABA Home Page, www.americanbar.org. There you will be able to access ABA programs, as well as other member benefits.

The ABA will hold its next Annual meeting in Chicago from July 30 to August 4, 2015. Details on how to register for the meeting is currently available on the ABA website.

MARITAL Quiz

By George J. Nashak Jr.*

Question #1 - Is it always required to subtract maintenance payments from payer spouse's income for the purpose of calculating his child support obligation?
Your answer -

Question #2 - In calculating child support, in accordance with the CSSA guidelines, do you add maintenance to the payee spouse's income?
Your answer -

Question #3 - Does an appeal lie from an order that is entered on default of the appealing party?
Your answer -

Question #4 - May the Appellate Division dismiss an appeal where the party seeking relief is a fugitive while the matter is pending?
Your answer -

Question # 5 - Is a marriage between a half-uncle and a half- niece void as incestuous?
Your Answer -

Question #6 - Can trial court deviate from the Temporary Maintenance Guidelines?
Your answer -

Question #7 - Does an appeal lie from an order entered on the consent of the appealing party?
Your answer -

Questions #8 - In calculating child support, in accordance with the CSSA guidelines, do you deduct from the payer spouse's income the amount of maintenance he or she is paying to the payee spouse?
Your answer -

Question #9 - Does the existence of a non-waiver clause in an agreement preclude the court from finding waiver?
Your answer -

Question #10 - Does a motion to vacate a judgment of divorce on the grounds of excusable default have to be made within one year after service of a copy of the judgment?
Your answer -

* Editor's Note: Mr. Nashak is a Past President of our Association and has now retired from the practice of law. He was a former partner of the firm of Ramo, Nashak, Brown & Garibaldi LLP.

Answers Appear on Page 17

CIA v. Facebook, Google, Microsoft & Apple

By Paul E. Kerson

This past month, the U.S. Senate released its report on the Central Intelligence Agency's use of torture in "black sites," prisons it established around the world with our tax dollars in fully one-quarter of the world's countries. The cooperating nations were blacked out of the report.

Simultaneously, the New York Times reports that Apple sells more iPhones and iPads in Shanghai, China and St. Petersburg, Russia than it does in San Diego, CA. The same report goes on to tell us that more than 80% of Facebook's 1.3 billion users live outside the United States, many in Brazil and India. Google and Microsoft lead the on-line search market world wide.

Bill Gates, Steve Jobs, Sergei Brin and Mark Zuckerberg appear to have conquered the world in a way that no Government or Empire ever did or could.

Contrary to world history to date, Governments in capital cities no longer govern the world as we have come to know it on the computer screen Bill Gates promised would be on every desk, and Steve Jobs moved to every hand. It is only a matter of time before these computer screens are in every pair of eyeglasses and earpieces. And after that, surgically implanted?

So why the "black sites" with torture?

If the real governing bodies of world are in the corporate offices in California and Washington State, perhaps the tax-supported Government in the District of Columbia should get on the plane at Dulles (after being "searched" of course), and take a trip to the True American Capitals on the West Coast. There they might learn that torturing the bodies of possible "enemies" is not only immoral, it is unnecessary.

What "terrorist" today operates without the computerized world? The defense question is not torture or death, it is this: How to bend the minds of would-be "terrorists" with the technology they themselves use.

Instead of brute force, the CIA ought to be finding out what technology is used by each suspect, and enlist the Tech Wizards of Silicon Valley and Seattle to foil them. We should not be physically hurting people or killing them with drones, we should be reprogramming their iPads, iPhones and PCs so they cannot be used to harm us.

In doing this, we would return to our most cherished principles: Due Process and Equal Protection. The Government in the District of Columbia is still our Government even if California and Washington State carry more clout. If our technology has extended the American Way of Life worldwide, so our Government must follow Technology's head start and Govern in the new environment of the wired and wireless world.

We should use our Technology Sector's lead to bring our basic principles to the World, not trash them. Our most basic legal principles should go where our technology has led. The torture and killing must stop; the reprogramming must begin. There is no constitutional right to have your iPad or iPhone programmed to harm the United States.

However, the CIA has shown itself to be a rogue government agency, relying on Justice Department "memos" rather than our Constitution and decisional law from our State and Federal Courts.

Before reprogramming a potential enemy's computer, the CIA should be compelled to obtain a warrant from that most important of all Government officials, a U.S. Magistrate Judge in a non-secret court. The record can always be sealed in the event of an imminent threat to national security. Instead of acting within their warped culture, the CIA must be able to make their case for reprogramming to a neutral Magistrate from the Judicial Branch.

American Exceptionalism has propelled us to a place not even imagined ten years ago. We must take steps to keep it all within the legal bounds that created this Exceptionalism to begin with. Otherwise, we will face the self-destruction of prior leading nations.

Notice from the Honorable Joseph A. Zayas

Administrative Judge, Criminal Term, Queens County

The Mayor's Office of Criminal Justice (MOCJ), formerly known as the Criminal Justice Coordinator's Office, and OCA (in consultation with the Administrative Judges of Criminal Term), have adopted a plan, called Justice Reboot, to attempt to move to trial or resolve all cases in which the defendant has been incarcerated for over one year. The cases identified by MOCJ have been placed on a list. MOCJ and OCA have had various meetings with DOC, the defense bar and the District Attorneys' Offices. I have also met with the QDAO, and representatives from the LAS, QLA and the 18B Panel.

The Administrative Judges have been asked to implement the plan by calendaring the cases on the list. Accordingly, over the next five weeks, commencing on April 13, 2015, I will be calendaring and conferencing all of the remaining cases on the list in a new Part (K-11C), attempting to resolve the matter (in which case I will keep the case for plea and sentence in my Part), or set a firm trial date by reconciling and prioritizing the attorneys' conflicting schedules (in which case I will adjourn the matter back to the respective parts with my endorsements on an endorsement sheet). When the cases are initially conferenced, the court file will be temporarily transferred from the Parts in which the case is pending, and the attorneys will appear without the defendant. Our Chief Clerk Maureen D'Aquila and Senior Court Clerk Shevket Murad will be implementing and overseeing the calendaring of the conferences, as well as following up with the Parts and attorneys if necessary.

Should you have any questions about the implementation of this new effort, please feel free to reach out to my chambers at (718) 298-1418.

TAX CAP PROTECTION FOR COOPS/CONDOS-THE TIME IS NOW

By: Geoffrey Mazel, Esq.

In the last few years Coop shareholders throughout New York City were embroiled in a battle with the Department of Finance regarding the flawed valuations in the Real Estate Tax Assessments. Many of these flawed assessments occurred in Northeast Queens, a Coop rich area. In 2011, several Coops in Queens experienced valuation increases of over 100% increases from the prior year. If left alone these increased valuations would have had devastating financial impacts on these Cooperative Corporations.

In 2011, the Coop shareholders of Queens protested in the form of Town Hall meetings attended by thousands of Coop shareholders and in public hearings before the New York City Council Finance Committee. As a result, the Commissioner of Finance placed a temporary cap on these valuation increases as a short term solution. The long term solution is still being debated by members of the New York City Council and the New York State Legislature.

As a result of the unconscionable valuation increases posted for tax year 2011/12 by the New York City Department of Finance a flurry of legislative proposals have been introduced in the New York State Legislature and several are currently pending. The purpose of these legislative efforts is to protect Coop owners from these types of wild increases in real estate tax increases. The New York State legislature is responsible to set real estate classifications and parameters for valuations, while the New York City Council sets the tax rate. Therefore, the State legislature needs to enact new laws in order to re-classify Coops and to provide the necessary tax cap protections needed.

One of the significant proposals introduced in the New York State legislature bears bill number S4371 in the Senate and A608 in the Assembly. This legislative initiative is designed to reclassify Coops and Condos from their current classification as Class 2 properties to a new classification consisting solely of properties held in cooperative or condominium form. This legislation would amend the current Class 2 classification to consist only of cooperatives or condominiums and add a new property tax Class 5 to consist of all residential property that is not classified as Class 1 or Class 2. Furthermore, the legislation would extend the assessment caps of 8% in any one year and 30 % in any five years to all Class 2 properties, including cooperatives and condominiums with 11 or more units.

Currently, residential one, two and three family homes are classified as Class 1 properties under New York State law. The big advantage of being classified as Class 1 is that these properties enjoy tax cap protection from real estate tax increases. Section 1802 of the Real Property Tax Law states in pertinent part that "the assessor of any special assessing unit shall not increase the assessment of any individual parcel in Class 1…by more than six percent and shall not increase such assessment by more than twenty percent in any five year period." Under this bill, the Coops would still be compared to rental properties for valuation purposes. Therefore, the only thing that would change under this proposal would be that Coops and Condos would be afforded tax cap protections similar to residential one, two and three family homes.

In addition, another proposal in the New York State legislature bears bill number S893 in the Senate and A4224A in the Assembly. This bill would simply classify properties held in Cooperative form for assessment purposes as Class 1 properties. The result would be that Cooperative's would be afforded the exact same tax cap protections as one, two and three family residential buildings. However, under this proposal Coops would then be assessed according to market value, which is the manner in which one, two and three family properties are currently assessed. Therefore, the valuation of a Coop unit would then be based on sales prices and not be compared to rental properties for valuation purposes. This legislation passed in the State Senate in last year's session, but was not passed in the Assembly.

Finally, a resolution is being introduced in the New York City Council calling upon the New York State Legislature to pass, and the Governor to sign proposals S4371 and A608, which is described above. The passage of this resolution would provide an impetus for this legislation to pass at the State level.

Obviously, the imposition of this tax cap has resulted in cost certainty and great tax savings to the Owners of one, two and three family homes in New York City. The design of these legislative initiatives is simply extends these tax cap protections to Coop and Condo unit owners. These proposals are designed to create a new residential property class for Coops and Condos in the City of New York to bring these properties more in line with the way in which residential one, two and three family homes are assessed. The theory being that Coops and Condos represent a valuable housing stock in the City of New York and deserve the same consideration and protections as one, two and three family residential buildings.

At this point, the merits of these proposals are being debated on the State and City level by elected officials and Coop advocate groups. One point is clear - it is time that Coop Owners be afforded tax cap protection and cost certainty currently enjoyed by one, two and three family residential homes in this City. The crisis brought on by the New York City Department of Finance in the Coop community, with their unconscionable tax increases, must be curbed in order to protect the Coop housing stock, an invaluable asset in the City of New York.

Kitty Genovese continued...

Thus, I present to you the intersection of these 3 lives - a juxtaposition which occurred, for a brief time, 50 years ago - and which, ironically, recurs here, today.

My birthday was February 26. I was an ambitious, enthusiastic young lawyer, a junior partner in the criminal defense firm of my father, Sidney G. Sparrow. He was a brilliant, charismatic, trial lawyer, generally considered to be the "dean" of the criminal defense bar in Queens.

Marcia and I had just become parents of our new son David, who thus joined his four-year-old sister Laurie.

Winston Moseley's 29th birthday was four days after mine. When I first met him, in the prison psych ward at Kings County Hospital, I confronted a slightly built man of average appearance. Although possessed of a 135 IQ, he was also apparently possessed by an unspeakably evil demon!

Mosely was married to Betty, a pretty nurse, whom I well recall, in her striking white uniform. They were parents of two young sons. He had a job, a home, two cars, four German shepherds, and an ant farm which he tended assiduously - and he also had a periodic uncontrollable urge to prey upon women!

Kitty, our contemporary, was, fatefully, destined to be a victim of that demonic urge - and, ironically, to become a symbol and a catalyst in our perception of communal responsibility.

I remember Kitty. She had come to our office in 1962, seeking representation for herself and a friend, Dolores Guarnieri, regarding a minor gambling offense. Kitty was pretty, dark-haired, petite, and had a friendly, quiet nature. We ultimately resolved the gambling charges with a $50 fine.

Thus, we three were all born in 1935. Our paths were somehow fated to intersect that year of 1964. And now, 50 years later, I find myself to be, apparently, the only survivor of those participants in the courtroom drama which ensued (with the possible exception of that monster who languishes, confined in an upstate New York prison - and he is not likely to add anything to this narrative).

I shall now endeavor to encapsulate those events.

When Winston Moseley was arrested - quite by chance, as he was placing the fruits of one of his many burglaries in his car - upon questioning by the police he readily admitted his involvement in the murder of Kitty Genovese. This all occurred shortly before the "Miranda Decision," in which the US Supreme Court imposed the now well known restrictions on police interrogations, and stressing the right

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THE QUEENS' CARTOONISTS

by HOWARD L. WIEDER

On February 28, 2015, I walked into the Skyline Center mall in downtown Flushing, just to browse, but made a great unexpected discovery. A six-man jazz/swing band named **THE QUEEN'S CARTOONISTS** were performing a free concert. I found an available front row seat and had a memorable time. **THE QUEEN'S CARTOONISTS** is a high energy swing/jazz band. Its music-playing was perfect, and its enthusiastic renditions were so infectious that they brought instant smiles on the faces of the listeners. I was in such rapture listening to them that I had tears of joy.

THE QUEEN'S CARTOONISTS offer a tour de force of the Swing Era's zaniest and most creative music, much of which was written for or adapted for classic cartoons. The band's repertoire includes the wacky pieces of Raymond Scott, John Kirby's swing arrangements of classical compositions, and both original and rejigged music used by Carl Stalling for Warner Brothers classic Looney Tunes & Merry Melodies.

The six musicians of **The Queen's Cartoonists** are:
MARK PHILLIPS clarinet and soprano sax;
DREW PITCHER tenor sax;
GREG HAMMONTREE trumpet;
JOEL PIERSON keyboard;
ANDREW GRAU double bass; and
ROSSEN NEDELCHEV drums and percussion.

THE **QUEEN'S CARTOONISTS** say that they are on a musical mission consisting of equal parts music preservation, music education, and live performance. The heyday of swing music has passed, but this music survives in the memories of anyone who grew up watching classic cartoons or listening to classical music. The group says on its website in language that I cannot paraphrase: "From the Big Apple to Hollywood, brunos and sweet patooties alike can't get enough of this clam bake! So leave your Chicago typewriter at home and join us Okies at the gin mill for an evening of leg shakin', hooch swiggin' good times!" I may not understand the foregoing word-for-word, but I get the drift of the message, and, after listening to this superb and extraordinary talented band, I thunderously shout out "Amen!" Check the group's web site, www.thequeenscartoonists.com, regularly for its next "gig." This group is fantastic.

CARNEGIE HALL: MAESTRO DAVID ROBERTSON CONDUCTS THE ST. LOUIS SYMPHONY IN DEBUSSY'S NOCTURNES, A NEW WORK BY MEREDITH MONK, AND TCHAIKOVSKY SYMPHONY NUMBER 4

On March 20, 2015, **MAESTRO DAVID ROBERTSON,** the Music Director and Conductor of the **ST. LOUIS SYMPHONY** gave an excellent performance of:

DEBUSSY Nocturnes
MEREDITH MONK Weave (NY Premiere)
TCHAIKOVSKY Symphony No. 4

Nocturnes, sometimes Trois Nocturnes or Three Nocturnes, is an orchestral composition in three movements by the French composer Claude Debussy. It was completed on 15 December 1899. The three movements are: Nuages ("Clouds"), Fêtes ("Festivals"), and Sirènes ("Sirens").

DR. MEREDITH JANE MONK, age 72, (born November 20, 1942), is an American composer, performer, director, vocalist, filmmaker, and choreographer. Since the 1960s, Monk has created multi disciplinary works which combine music, theater, and dance, recording extensively for ECM Records. Her music has been featured in several films including The Coen Brother's legendary "The Big Lebowski." **The performance of her new work was brilliant and creative.**

PETER TCHAIKOVSKY [1840-1893]was the first conductor when Carnegie Hall opened its doors on May 5, 1891. **ANDREW CARNEGIE** paid Tchaikovsky $2,500 for the engagement [today the equivalent of $70,000]. Maestro Robertson's conducting of the Tchaikovsky 4 was ferocious, fierce, and exhilarating, balancing this wonderful symphony's intense tension of moods of hope and despair and celebration. From the commanding "fate" motif first intoned by the brasses at the very beginning of the symphony to the nearly hysterical triumph of the finale, this is a piece that grabs you by the lapels and doesn't let go until the end. Maestro Robertson, who may be the future choice to conduct the New York Philharmonic, and the famous St. Louis Orchestra were pretty near flawless with excellent use of tempo and dynamic contrasts.

MAESTRO DAVID ROBERTSON's relationship with the **ST. LOUIS SYMPHONY ORCHESTRA ("SLSO"), one of the leading American orchestras,** began in January 1999 when he made his first conducting appearance with the orchestra. Robertson's second appearance with the SLSO occurred in February 2002 at Carnegie Hall after the SLSO's then music director Hans Vonk withdrew a few days before the concert due to health problems. Robertson agreed to substitute, and he and the orchestra had only one rehearsal before the concert, which received a favorable review from The New York Times. He later appeared with the SLSO in March 2003, and the SLSO named Robertson its next Music Director in December 2003, effective with the 2005 2006 season.

In April 2005, Robertson led the SLSO for the second time in a Carnegie Hall concert, after a labor dispute at the SLSO was resolved. Robertson conducted the SLSO in Carnegie Hall again in November 2005, March and April 2006, and March 2007.

Robertson is generally regarded as having restored the SLSO's artistic prominence after the sudden resignation of the prior music director, Hans Vonk, and the orchestra's labor dispute in the winter of 2005. New concert series begun during his tenure include a group of contemporary music concerts with The Pulitzer Foundation for the Arts and a series of "Fusion Concerts" at the Touhill Performing Arts Center of the University of Missouri–St. Louis. In September 2006, the SLSO announced the extension of Robertson's contract through 2010, with a clause to allow for yearly renewal. As of November 2009, his SLSO contract was through the 2011 2012 season. Following a subsequent contract renewal through 2014, his SLSO contract was extended, in January 2013, through the 2015 2016 season. In March 2014, the orchestra and Robertson announced a further extension of his SLSO contract through the 2017 2018 season.

From the start of his tenure in St. Louis, speculation had been intense that both the Chicago Symphony Orchestra ("CSO") and the New York Philharmonic ("NYP") were both trying to sign Robertson as their music director. The 2006 SLSO action momentarily ended the discussion relating to the Chicago position, at least through 2010, although there was renewed Chicago press speculation in 2007 that the CSO restored Robertson to its list of candidates. This speculation ended with the naming of Riccardo Muti as the CSO's next music director in April 2008. In 2007, press reports said that the New York Philharmonic was still considering signing Robertson as its next music director, which ended with the July 2007 naming of Alan Gilbert to that post.

With the SLSO, Robertson has conducted a commercial recording of music of John Adams for the Nonesuch label, featuring Guide to Strange Places and the revised version of the Doctor Atomic Symphony. The Maestro makes his home in New York City.

Now permit a tangent on Tchaikovsky Symphony Number 4. The Tchaikovsky Symphony Number 4, from its opening chords with blasts of the horns, is one of the greatest works in classical music. I have twenty (20) versions of it in my music

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The Queens' Cartoonists continued...

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Now permit a tangent on Tchaikovsky Symphony Number 4. The Tchaikovsky Symphony Number 4, from its opening chords with blasts of the horns, is one of the greatest works in classical music. I have twenty (20) versions of it in my music library. Legendary Russian conductor Evgeny Mravinsky's conducting of the passionate, exuberant performance of Tchaikovsky Symphony Number 4 by the Leningrad Philharmonic Orchestra [available on the Deutsche Grammophon label], is the gold mark standard. Permit me a tangent on Mravinsky: Mravinsky, one of my favorite conductors, was an incredible, obsessed perfectionist. In a filmed rehearsal of Schubert's Unfinished Symphony, he had the orchestra repeat the same bar of music 12 consecutive times till they played it to the Maestro's satisfaction. On another occasion, another famed conductor went backstage to visit Mravinsky minutes before the curtains were raised to give him "good luck" greetings and found the Maestro weeping. When asked why he was crying, Mravinsky stated that he was not certain whether the horn section would come in on the right moment of the piece. Finally, revealing unchecked perfectionism, while in Japan, on a sold-out international tour, Mravinsky did an afternoon dress rehearsal that he said was so sublime and perfect that he cancelled the evening performance, explaining he could never top that rehearsal's execution of the piece. A 99.9% percent effort to this driven, obsessed, perfectionist, was unsatisfactory. I am sure the producers of the concert, forced to refund sales of the sold-out event, were fit to be tied.

Among film directors, there are a number of past and present giants of the industry who are reported to be control-obsessed, detailed-oriented perfectionists, including Stanley Kubrick (1928-1999), David Fincher (born 1962), and Martin Scorsese (born 1942). Director Lloyd Bacon (1889-1955) was noted for destroying his very expensive hats on set when an actor, in filming a take of a scene, did not give a performance in a take that Bacon expected and demanded. At any rate, the work of these men stand out.

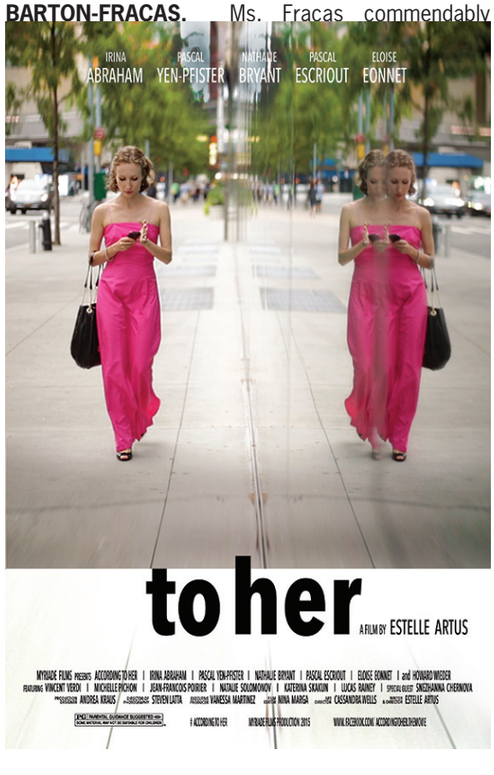
PRIVATE FILM SCREENING OF "ACCORDING TO HER" A private film screening for actors and crew was held n Manhattan of director Estelle Artus's forthcoming feature **"ACCORDING TO HER." ESTELLE ARTUS** is a French born director living in New York. She earned a PhD in visual arts at Sorbonne University where she taught before moving to the United States in 2007. Her short films have been screened worldwide at festivals and art venues. **"ACCORDING TO HER"** is **ESTELLE ARTUS's** debut feature.

ESTELLE ARTUS's filmography consists of: According to Her (feature 2015), and the following short **movies**:
My City (2010)
Where It clicks (2006)
Ring Road (2005)
Domestic Underground (2004)
Play Again (2003)
I love Korea and Korea loves me (2002)

More info on talented film director **ESTELLE ARTUS** can be found at www.artusestelle.com.

PETER BARNES's "RED NOSES" BY NICU's SPOON
Set in mid 14th century France at the height of the Great Plague, **RED NOSES** is a hilarious and thought provoking play that blends humor a la Monty Python, song and dance, naughty and bawdy banter, biting satire, and deep and moving theatrical moments. Written in 1978 by British playwright Peter Barnes and first produced in 1985, Red Noses is perhaps even more topical today than when it was written.

The play received the Olivier Award, the equivalent of Broadway's Tony Award, for Best Play in London in 1985. For the Nicu's Spoon production company, the Off-Off Broadway show that just closed on April 19, 2015, at the Secret Theater in Long Island City, Queens, was sprightly directed by **STEPHANIE BARTON-FRACAS.** Ms. Fracas commendably cut out a lot of the verbosity and repetition that detracted from the original very long script, molding



this production to a manageable and entertaining two hours.

The original costume and lighting design by **STEPHANIE BARTON-FRACAS** and her choice of contemporary music, including Pharrell Williams's "Happy," and an occasional panorama of thought-provoking quotations [e.g. "We all die. The goal isn't to live forever, the goal is to create something that will."] displayed on a screen in the back of center stage added to the show's cleverness.

Red Noses is the story of a Catholic monk, Marcel Flote, wonderfully played by **JAMES HARTER,** who seeks a heavenly sign to show him the way to serve God's will and ease man's suffering in the face of the Black Death, the Great Plague that has taken the lives of more than a third of the people in Europe. When Flote accidentally makes people laugh, he hears the sign he has so long awaited. He decides that he must spread laughter and joy, and recruits a band of misfit performers he calls the Red Noses to spread happiness and hope. Ms. Fracas has engaged in wonderful casting to play the zanies, and the ensemble cast is great.

DIANA BENIGNO was memorable as Marguerite, giving a multi-faceted, thoughtful, and funny performance. **MARGARET H. BAKER** was brilliant as Sonnerie, communicating by bells, and not words.

Granted the status of a religious order by Pope Clement VI, played deliciously by the riveting and accomplished **FENTON LI,** the Red Noses must navigate the treacherous landscape of plague ridden France. **FENTON LI**, whose papal character, was rolled around in a tilted chair on wheels, made his ex cathedra statements pronouncements absorbing, in character, while not losing the pace set by director **STEPHANIE BARTON-FRACAS** to her well-paced production.

BUTTERFLY HOUR -
The play **"BUTTERFLY HOUR,"** written by **CLAUDE SOLNICK** and directed by **DANIEL HIGGINS**, was performed last December at **THE THEATER FOR THE NEW CITY** in Manhattan. The play is about a group of American army veterans who after returning home from Iraq become involved in a life of crime and violence.

The play invokes a major issue. No one knows how many veterans are incarcerated, but according to one survey, compiled by the Department

Queens Cartoonists continued...

of Justice's Bureau of Justice Statistics in 2004, found that nearly one in 10 inmates in U.S. jails had prior military service. Extrapolated to the total prison population, this means that approximately 200,000 veterans were behind bars. It would likely take years for these numbers to reflect the toll on veterans of Iraq and Afghanistan. About one third of servicemen and

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ANIMAL ABUSE AND MEDICAL TREATMENT

by HON. GEORGE M. HEYMANN

During the last N.Y.C. mayoral campaign and subsequent thereto, a great deal of press and media attention has been generated regarding Mayor de Blasio's determination to remove hansom cabs from the city streets, especially in and around Central Park, where they have been a staple for tourists and residents alike for more than a century.

Among the many issues being argued by both proponents and opponents on this subject is the alleged cruelty and/or mistreatment to the horses by their owners and/or drivers. While this article takes no position in this ongoing debate, which will ultimately be voted on by the N.Y.C. Council, it brings to the fore an open dialogue of what is considered cruel treatment of animals.

For the past 40 years, a key question that has been debated by the courts and, to date, remains unresolved with respect to animal abuse, is whether the failure to provide medical treatment to animals in need of such care is an omission or an act of cruelty and abuse in violation of the existing law subject to prosecution.

At the present time, the only N.Y. statute that pertains to the treatment of animals is Section 353 of Agriculture and Marketing Law (AG&M Law) which reads in relevant part as follows:

A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who wilfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a class A misdemeanor… (Emphasis added)

Although this statute has roots going back to 1866, there is no correlating statute in the New York's Penal Law.

With respect to the few published decisions that address this issue, there is no uniformity regarding the interpretation of some of the words and phrases incorporated therein, specifically the term "sustenance" and whether or not it includes medical treatment to an injured animal or whether it simply means providing sufficient food and drink; or what constitutes an "unjustifiable" act. The only definitions provided by the Legislature are found in section 350 of the AG&M Law which provides: "1. 'Animal,' as used in this article, includes every living creature except a human being; 2. 'Torture' or 'cruelty' includes every act, omission, or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted." The use of the word "unjustifiable," without more, has raised issues of vagueness as to what a reasonable person may consider as an unjustifiable act.

As a result, in every instance of alleged mistreatment of an animal it will be up to the trier of fact to decide whether the conduct proscribed in section 353 of the AG&M Law can be applied.

The court in People v. Arroyo held that the statute was not vague because the test to be applied was "whether the language used 'convey[ed] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'"

The defendant Arroyo was charged pursuant to AG&M Law §353 for, inter alia, "overdriving, torturing and injuring animals and failure to provide proper sustenance" to his dog based on the observations of a special investigator of the ASPCA. The investigator noticed that the dog had a large ulcerated tumor that leaked fluid which caused pain to the animal. He stated in the accusatory instrument that he had been informed by a doctor from the ASPCA that the dog's condition was terminal. Although the defendant was aware of his dog's condition, he stated in his defense that he was morally opposed to medical treatment, that he did not have the financial means to pay for it, and that the language of the statute did not require it, wherefore, the information should be dismissed.

MEDICAL CARE

Addressing the wording of the statute, the court noted that phrases such as "necessary sustenance food or drink;" "such sustenance or drink" or "be deprived of necessary food or drink" were added to the current statute in 1881 without further explanation as to whether "sustenance" had any other intended meaning than the general understanding that it refers to providing the essential nutrients, etc., for a creature to survive.

The issue before the court was whether the owner of the pet in question could be prosecuted criminally for not providing medical care to his terminally ill dog. Distinguishing this case from the decision in People v. O'Rourke, written nearly three decades earlier, and the only case to interpret the term "sustenance" to include medical care, the Arroyo court declined to follow its reasoning:

The primary consideration in interpreting a statute is to 'ascertain and give effect to the intention of the Legislature' and the plain meaning of the statutory text is the best evidence of such intent. (Citation omitted) The court finds that the plain meaning of the term 'sustenance' in the statute does not include medical care. Therefore, the provision making it a violation of the statute to fail to provide necessary sustenance does not afford notice to a person of ordinary intelligence that not providing medical care for an animal is a violation of the statute.

People v. O'Rourke involved a limping horse pulling a hansom cab. On three separate occasions, inspectors warned the driver of the cab about the horse's condition and in each instance a summons was issued to the defendant-driver. On the third occasion, the defendant-owner was also summoned.

In response to a query by the court at trial, a doctor/veterinarian testified that, after careful examination of the horse in question, the limping by the horse evidenced pain and that it was, in fact, experiencing pain.

In its decision, the court posited three questions that it needed to decide in order to conclude that the defendants were in violation of the statute: "Are omission and neglect punishable under section 353 of the Agriculture and Markets Law, as are incidents of active cruelty? Does driving a lame horse constitute torture under that section? Is the element of a culpable state of mind necessary for conviction, and if so, have the people demonstrated sufficiently that such state of mind existed here?"

Reading section 353 in conjunction with section 350 of the AG&M Law, which, as set forth above, defines "torture" and "cruelty," the court pondered whether the failure to provide medical care for the limping horse was either an omission or neglect under the statute punishable as an act of cruelty.

Here, the court held that in order to convict under the statute it was necessary to prove that the defendants acted with a culpable state of mind as there was no clear legislative intent to impose strict liability. Thus, the defendants did not have to act in a malicious manner to commit a wrong – their mere knowledge that the horse was injured and that continuing to drive it without proper medical attention would cause it to suffer torture or pain was sufficient to warrant their conviction.

Because the terms of proscription in section 353 of the AG&M Law are open to interpretation, the moral standards of the community in which the charges are brought enter into the equation in assessing the conduct of an owner or others with respect to their treatment of the abused animals. In other words, it all boils down to common decency among the populace as to what is acceptable behavior towards animals.

UNJUSTIFIABLE ACTS AND PAIN

What constitutes an unjustifiable act? Here, again, it is up to the trier of fact to determine whether a person's conduct is unjustifiable and

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1 Hon. George M. Heymann, a retired Judge of the NYC Housing Court, and Of Counsel to Finz & Finz, PC, is a member of the newly created Animal Law Committee of the Queens County Bar Association.

2 In 1999, in response to an increase in low level crimes, and studies showing a direct correlation between animal abusers and crimes among humans, the Legislature created a new sub-section to the statute known as "Buster's Law," named after a cat that was doused in kerosene and set on fire. Section 353-a of the AG&M Law provides for "Aggravated Cruelty to Animals:" 1. A person is guilty of aggravated cruelty to animals when, with no justifiable purpose, he or she intentionally kills or intentionally causes serious physical injury to a companion animal with aggravated cruelty. For purposes of this section, "aggravated cruelty" shall mean conduct which: (i) is intended to cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner. (Emphasis added)

Aggravated cruelty to animals is a felony for which a definite term of imprisonment, not exceeding two years, can be imposed.

It should be noted that the felony statute for aggravated cruelty statute is limited to "companion animals," i.e.: dogs, cats and other domesticated animals defined in AG&M §350(5), as opposed to the all-encompassing classes of animals/creatures in the misdemeanor statute.

Animal Abuse continued...

unacceptable behavior in the specific circumstances in which it is alleged.

After concluding that the defendant in People v. Arroyo did not violate the abuse statute by failing to provide medical treatment as sustenance, the court focused on the intended meaning of "unjustifiable physical pain" which is prohibited as "torture" or "cruelty," juxtaposed against the mere causing of pain to an animal, which is not prohibited and does not rise to the level of proscribed conduct. Is the failure to provide medical treatment an unjustifiable act of omission or neglect?

Here, again, the court declined to impose a duty upon the defendant that was not clearly enunciated by the Legislature. It questioned the legislative logic of adding the word "unjustifiable" before the words "physical pain" in order to turn a lawful act into a criminal one. Expressing its "trouble" by the imposition of such a duty by a statute that is "so general in its terms" Animal Abuse continued...
the court concluded the statute did not (and does not) give notice to a person of ordinary intelligence that they are required to provide medical care to an ill, or, in this case, a terminally ill animal. The court opined that "[i]f we, as a society, have arrived at the point where we feel that the provision of medical care to alleviate or avoid pain and suffering is a duty undertaken by pet owners toward their pets, and the failure to fulfill this duty is a crime, it is incumbent upon our Legislature to enact a provision that clearly sets the standard for – and gives notice of – the proscribed conduct."

The most recent case on the subject, People v. Torres , involved the torturing, neglect and failure to provide medical care to the defendant's dog which required it to be euthanized. Defendant moved for dismissal of the information on the ground that it was facially insufficient and defective. He argued that the alleged failure to provide veterinary care for the dog's open wounds and not keeping it in a clean environment (floors covered with feces and urine) and not providing sufficient food and drink which caused the animal to become emaciated, did not constitute a violation within the plain meaning of section 353 of the AG&M Law. The signed accusatory instrument was based on the complaints, observations and conversations with an animal control officer and the defendant's admission that the dog was his.

In Torres, the court noted that while the defense was correct that the plain language of the statute does not reference medical neglect, there has been a divergence of opinions in this regard. Over the years subsequent to the holding in People v. O'Rourke, many trial and appellate courts have held that failure to provide medical treatment is actionable under the statute. On the other hand, some courts have opted not to follow the court's reasoning in O'Rourke, relying on the rules of statutory construction, that the plain meaning of the term "sustenance" does not include medical care, most notably People v. Arroyo.

Based on the police officer's direct observations that the animal-victim was in unjustifiable pain and suffering due to its open wound, and the omission of medical care, as well as ongoing neglect, the court found the information against Torres facially sufficient and that the alleged cruelty proscribed by the statute was clearly established. The court distinguished its case from Arroyo on three grounds: 1) Arroyo was decided on the issue of constitutional vagueness as opposed to

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women experience some sort of social psychological problem as they struggle to integrate back into society from these wars. As a result, court systems across the nation are seeing more combat veterans in trouble for alcohol related crimes and violence that in many cases stem from their post traumatic stress disorders.

A mercurial job market has made it difficult for many vets to find steady employment. The employment rate for veterans remains stubbornly lower than the rate for nonveterans.

In the United States, Americans embrace veterans. That is not the way other countries view their soldiers. Putting aside the terrible amount of maimed individuals who have survived Iraq and Afghanistan, the writer and director of **"BUTTERFLY HOUR," CLAUDE SOLNICK and DANIEL HIGGINS**, respectively, are to be congratulated for dramatizing the plight of emotionally and mentally afflicted veterans of these wars.

BUTTERFLY HOUR's concept is good, but its execution is flawed and clumsy. The writing had a lack of character development that would make any of the protagonists seem engaging or likable. The direction was very flawed. For some unknown reason, huge gaps of time were lost for interminable scene changes of long duration that basically consisted of dragging a clunky sofa on and off set. The play's rhythm thus suffered. Also, video clips shown throughout the [p]lay had little to do with the story line.

Despite the deeply troubled writing and direction, the four members of the cast were excellent given the material. They each gave outstanding performances, including **TOM ASHTON, in a superb, masterful performance** as Matt, **CHRISTINA GERMAINE** as Bethany, **SCOTT MCINTYRE** as Rick, and **PAUL WALLACE** as Oats.

* **HOWARD L. WIEDER** is the Principal Law Clerk to Justice Martin E. Ritholtz in Supreme Court, Queens County, in Jamaica, New York.

3 See, People v. Voelker, 172 Misc2d 564, 569 (Crim Ct, Kings Co [1997]) "Whether or not the People can prove that defendant 'unjustifiably' committed these acts is a matter best left to the trier of fact."
4 3 Misc3d 668 (Crim Ct, Kings Co [2004])
5 83 Misc2d 175 (Crim Ct, NY Co[1975])
6 The court provided a few examples where driving a sick, lame or disabled horse is not, per se, torture – such as driving a horse directly to the stable after it becomes sick or disabled while on the road.
7 In People v. Bunt, 118Misc2d 904 (Just Ct, Duchess Co [1983]), the defendant was charged with brutally beating a dog with a baseball bat. His defense was that the term "unjustifiable" was too vague. The court disagreed and applied a common sense approach and held that defendant had enough notice that his conduct would not be acceptable when judged by the average person who understands the meaning of cruelty and, thus, was "unjustifiable."
8 AG&M Law §353 specifically excepts "properly conducted scientific tests, experiments or investigations, involving live animals, performed or conducted in laboratories of institutions, which are approved for these purposes by the state commissioner of health."
9 2015 NY Slip Op 50253 (U) (City Ct, Albany Co [decided 2/26/15])

Kitty Genovese continued...

to counsel. Moseley later told me that there had been "some" physical abuse by the cops, but nothing extreme, and he was quite forthcoming in his multiple confessions.

After detailing his ghastly actions of that night when he had killed Kitty, detectives had asked him, "Winston, did you kill anyone else?," and he, almost offhandedly, told them that he had murdered a lady named Annie Mae Johnson the previous month - and he also confessed to having killed 14-year-old Barbara Kralik, in her own bed, that previous summer.

When asked, "How did you kill Annie Mae?," he said he'd come up behind her as she was opening the door to her home in south Queens, at dusk, and he shot her in the torso six times with a .22 caliber rifle. He then dragged her body inside and proceeded to ransack the house (despite hearing people and activity upstairs - confident he would not be disturbed). He sexually abused the corpse (he was later diagnosed as a necrophiliac). He set fire to the body and the house, and calmly left. When asked what happened to the rifle he told them that he had thrown it into the wet concrete foundation of the Cross Bronx Expressway which was then under construction. Upon hearing this chilling narrative the police said, "Winston, you're full of crap," - for the coroner's report had clearly stated poor Annie Mae's cause of death as being "six stab wounds", probably caused by an ice pick or screw driver. I well recall our meeting in the office of Phil Chetta, the investigating homicide ADA, and discussing Moseley's bizarre confession which totally contradicted the ME's conclusion. It was determined to exhume Annie Mae's body to make sure. Chetta, I recall, was delighted at the prospect of a free trip - even if it was only to Moncks Corner, South Carolina. Indeed, he, my Dad, Sidney Sparrow, and the deputy Medical Examiner, flew down, where the body was exhumed and X-rayed. To the utter amazement of all, in each of the fatal "stab wounds" was found a .22 caliber rifle bullet! The Coroner resigned shortly after, and the DA's office now faced a significant dilemma - for, since Moseley had now established his credibility, how could they continue with the ongoing prosecution of 18-year-old Alvin Mitchell, who had confessed to the killing of Barbara Kralik - a confession which conflicted with Moseley's own confession.

14-year-old Barbara Kralik, asleep in her own bed and with her parents in an adjacent room - was viciously stabbed to death by an intruder who had, somehow, invaded the house in the early AM. Alvin Mitchell was a young thug and gang member, who knew Barbara. He told his attorney that his confession was the result of police brutality. He was already indicted when Moseley arrived on the scene, and gave details of his own which had not been published in the papers, and could be known only to the perp. These "twisted confessions" (the name of prosecutor Charlie Skoller's recently published book) threw the whole scenario into a confused, conflicted uproar!

Of course, Moseley's veracity had already been established - by physical evidence confirming his having murdered Kitty Genovese (certain items, including one of her falsies, which he had taken with him perhaps as "mementoes" of his crime, were found by police, where he told them to look, near his place of employment in Westchester County) - and assuredly by the Annie Mae Johnson exhumation which verified that, as he claimed, he had shot this poor lady rather than stabbed he as per the coroner's report.

The DA was now faced with a dilemma. The elected DA in Queens, for many years, was Frank D. O'Connor, an ethical and incorruptible prosecutor, who at first seriously considered dismissing the murder charges against Alvin Mitchell.

The assistant DA, who was assigned to try Mitchell, was a young, eager prosecutor named Charlie Skoller. Skoller ultimately convinced his boss to proceed with the prosecution - fully aware of Moseley's own confession, details of which we had shared with the DAs - for we felt morally obligated to help prevent a miscarriage of justice. We were convinced of Moseley's guilt in the Kralik murder, and felt that our strategy would both be the ethical approach, but that we would at the same time be bolstering our insanity defense for Moseley in the Genovese trial. Thus, at Mitchell's trial, we allowed Mitchell's attorney, Herbert Lyon (a top criminal trial lawyer) to call our client to testify - as he did, under a waiver of immunity. He admitted to details of the event, consistent with his confession. Mitchell's trial jury ended up hung - and I was later told they were 11 to 1 for acquittal! However, at Mitchell's retrial, for reasons known only to him, Moseley refused to testify - and Mitchell was convicted of manslaughter. I understand he served 12 years, and that he could have succeeded in being paroled much earlier, had he admitted guilt - guilt which he denies to this day, at age 69.

Many years later, Charlie Skoller wrote his book, "Twisted Confessions." It is an interesting read. Marcia and I had dinner with Charlie and Myrna Skoller several years ago - shortly after we both participated in the filming of a documentary film in which Kitty's younger brother Bill is the focal figure. I am told this film will be coming out by the end of the year! Interestingly, it was filmed in the very courtroom in which Moseley's trial was held almost 50 years prior. Charlie, unfortunately, died 2 years ago.

Ultimately, then - although he had confessed to three murders, Moseley was tried only for the Kitty Genovese crime. Although indicted for the Annie Mae Johnson atrocity, he was never tried for it - largely because of the finality of the verdict in Kitty's case….

Well, let me now tell you about Kitty Genovese. She was raised in a large, nurturing, religious Italian American family. She was the eldest of five siblings. When the Genovese clan relocated from Brooklyn to Connecticut - basically to avoid the crowds - and the crime

Kitty elected to spread her wings and remain in New York, which she found to be electric, and full of life and excitement. About a year before the murder, she moved into a small apartment in a walkup in the upper middle class community of Kew Gardens, Queens. She shared this apartment with Mary Ann, an attractive young woman whom all the neighbors assumed to be a "friend" - for, even in that "enlightened" era, homosexuality was frowned upon by both society and the law - the "closet door" remained shut in 1964.

On that fateful Friday the 13th, in March of 1964, Kitty left the Jamaica Avenue bar, of which she had become the manager. It was 3 AM. Meanwhile, urged on by his demons which told him he had to find a girl to kill, Winston Moseley left the sleeping children in the care of the four German Shepherds - and of his busy, tunneling ants. (Betty worked the night shift at Elmhurst Hospital). He went out into the night in search of prey!

Quite by chance, as he drove along a deserted Jamaica Avenue, he saw this slim white girl getting into her car - he decided to follow her, and he did - right to Austin Street in Kew Gardens. Kitty exited her vehicle and started down Austin towards the corner, around which was home. She heard running footsteps behind her, and she began to run - but Moseley was faster. As he caught up to her, he stabbed her twice in the back. Her anguished screams of pain and terror - "Help me - he stabbed me - I'm dying!" - caused lights to go on and shades to go up in dozens of windows on both sides of the street. Some windows opened, and one man actually yelled out "leave that girl alone!" - a momentarily spooked Moseley ran around the corner to his car - but he returned minutes later, now wearing a different hat - and confident, as he later told the police, that no one would actually intercede.

By then, the seriously - but not mortally wounded girl had staggered around the corner. Unable to make it to her own doorway, she entered the door just before her own, and collapsed at the bottom of the stairs. Dozens of people watched the monster, trying door after door - until he , too, went out of sight around the corner - where he ultimately found the cringing, bleeding Kitty - and was now free to complete his grotesque mission. She screamed - he stabbed her in the throat to silence her. Carl Ross, a "friend" of Kitty's, lived at the top of those stairs. Alerted by her screams, he opened his door, clearly saw what was occurring below - and he silently retreated back into his apartment. He later told police he "didn't want to get involved." Moseley told the police that he saw the man, and was certain he posed no threat.

Moseley attempted to have sex with the ravaged, barely alive victim - he was unsuccessful - and he finally left, carrying some mementos of his conquest. Ross finally told another neighbor what he had seen, and she called the police. She then rushed to Kitty's side, cradling the dying girl until the ambulance arrived - Kitty died in that ambulance, en route to the hospital.

When arrested, Moseley also admitted to having committed dozens of burglaries - many of them in daylight - generally stealing TV sets, which he brought to his father's TV repair shop (Daddy was also arrested for receiving stolen goods). Ironically, the man who got away with murder in front of dozens of witnesses (most of whom had seen parts, but not all, of what had occurred in the street below) - was arrested through the efforts of two good Samaritans. One neighbor saw him come out of a home carrying a TV set. He asked Winston what he was doing, and Moseley said he was "helping them move". He put the set in his trunk, and went back in to retrieve his screwdriver. Neighbor 1 then verified from neighbor 2 that "those people aren't moving!" This good gentleman then proceeded to disable Moseley's car by detaching the distributor - and then he called the police (incidentally, 911 had not yet been developed - it was instituted about two years later, largely as a result of this case!) Such a call a week before, might have saved poor Kitty's life. A frustrated Moseley, unable to start his car, walked down the block, and was apprehended minutes later.

Moseley's trial for Kitty's murder was presided over by Judge J. Irwin Shapiro, perhaps the most brilliant jurist I ever encountered in my 53 years at the bar. He was a strict disciplinarian, and prevented the trial from becoming a media circus. He had great respect for my father, and thus the appointment as assigned defense counsel in this highly sensitive and publicized case.

Parenthetically, I had tried my first jury trial, as a neophyte attorney, before Judge

Continued on page 16

At NY Families for Autistic Children Foundation 17th Ann Din with Andrew Baumann and Michael Brothers

Attendees of Holiday Party 12-2014

Karina Alomar-Pres, LLAQC, Joseph Carola-Pres, QCBA, Janet Keller-Pres, Brandeis Assn, Tom Principe-Former Pres, St. John's Alum, Zenith Taylor-Pres, QCWBA

NYSBA President-Elect David Miranda Guest Speaker for the evening

Hon. Jeremy Weinstein, Special Presentation Award Winner Patricia Krisman and President Joseph Carola

Winner Jeff Kuhlman of Refer A Colleage Contest with Arthur Terranova, Exec Dir, QCBA

J. Gardiner Pieper, Pres of Pieper Bar Review, NY Ct of Appeals Associate Judge Jenny Rivera, Spiros Tsimbinos, QCBA President Joseph Carola

Past Presidents

Attendees to Bar at the Bar Networking Meeting

Past President Joseph DeFelice being presented with his Presidents Scroll by President Joseph Carola

Looking Back — at the — 2014-2015 Year

Pictures by Walter Karling

Pres Joseph Carola with Golden Jubilarians Bernard Vishnick, Robert Lucas and Samuel Freed

Dean Hon. Ritholtz giving the Academy of Law Award to George Nashak

Hurricane Grill facing off against The Jurassic Pucks in the game after the game at QCBA Night with the Islanders.

Joseph Carola-Pres, QCBA, David Cohen-Chair, Golf Outing, Art Terranova-Exec Dir, QCBA

QCBAs 1st Coat Drive with Councilman Rory Lancman

SEARCHES INCIDENT TO ARREST IN NEW YORK

By: STEPHEN R. MAHLER, ESQ.

Any discussion of this area of the law must begin by referencing the seminal case of Chimel v. California, 395 U.S. 752, 762-763 (1969), in which it was established that an arresting officer may search an arrestee's person in order to remove any possible weapon he may be carrying and/or seize any concealed evidence to prevent its destruction.

Also deemed permissible in this regard was a search of the area into which an arrestee might reach in order to grab a weapon or evidentiary item.

That permissible search "area" was defined as that within the arrestee's "immediate control," meaning the area within which he might gain possession of a weapon or destructible evidence, often later referred to as the arrestee's "grabbable area." But it was made clear that in making their arrest the police could not routinely search any room other than that in which the arrest occurred or, for that matter, search through the desk drawers or concealed areas in that room itself in the absence of a search warrant.

Subsequently, in New York v. Belton, 453 N.Y. 454 (1981), the court went beyond Chimel in upholding the search of an arrestee's jacket (resulting in the seizure of cocaine for which he was indicted and convicted) found inside the passenger compartment of the vehicle in which he had been an occupant, after he was made to exit that vehicle and had already been placed under arrest for the unlawful possession of marijuana, the court concluding that the search of the jacket was incident to a lawful arrest and that the jacket was within the arrestee's immediate control within the meaning of Chimel.

The court also decided that not only was the search of the passenger compartment justified under these facts but that the police were also justified in examining the contents of any container found in the passenger compartment, whether open or closed, the lawful custodial arrest of Belton justifying the infringement of any privacy interest he may have had.

But on the Belton remand back to the New York Court of Appeals [People v. Belton, 55 N.Y. 2d 49 (1982)] we were reminded that, despite the Supreme Court's validation of the search under the Federal Constitution and the identity of wording of the pertinent section of the State Constitution (art.1, sec.12) with the Fourth Amendment, a State tribunal was not prevented from construing its State Constitution more strictly. Accordingly, it held the search to be unconstitutional under the State Constitution as a search incident to arrest, it having extended beyond boundaries thought permissible.

Nevertheless, the end result was the same as the search was upheld under the "automobile exception" to the search warrant requirement, a theory not relied upon by the Supreme Court.

The court's position was summed up as follows:

"….where the police have validly arrested an occupant of an automobile and they have reason to believe that the car may contain evidence related to the crime for which the occupant was arrested or that a weapon may be discovered or a means of escape thwarted, they may contemporaneously search the passenger compartment, including any containers found therein."

The inclination of the Court of Appeals to depart on appropriate occasion from a ruling of the Supreme Court in search and seizure cases was explained in People v. Smith, 59 N.Y.2d 454, 457), wherein the court took note of the fact that" [A]lthough both Federal and State warrant requirements derive from the common law…..they are measured differently. The Supreme Court has interpreted the United States Constitution to permit if not require the drawing of a bright line for reasons of efficiency between permissible and impermissible searches, even though the result is occasionally to forbid a reasonable search or permit an unreasonable one…..We have interpreted the New York Constitution to require that the reasonableness of each search or seizure be determined on the basis of the facts and circumstances of the particular case…."

Smith goes on to point out that under pertinent federal cases like Belton and United States v. Robinson, 414 U.S. 218 [1973], the court approved "the search of any closed container taken from the person of, or within the 'grabbable area' accessible to, the person arrested, even though the police had no reason to fear for their safety or to suspect that evidence of the crime for which the arrest is made will be found in the container. However, under the State Constitution such a search of a closed container can only be justified "[F]or compelling reasons, such as the safety of the officers or the public or to protect the person arrested from embarrassment," and 'if not significantly divorced in time or place from the arrest' may be conducted even though the arrested person has been subdued and his closed container is within the exclusive control of the police….."

But a different analysis was required for searches of closed containers incident to arrest where at the time of arrest the arrestee was situated in an automobile. Therefore, in People v. Langen, 60 N.Y. 2d 170 (1983) it was held that when police have probable cause to arrest a driver or passenger in an automobile amidst circumstances that support the belief that the vehicle contains contraband related to the crime for which the arrest is made, they may search any container, locked or otherwise found in that automobile within a reasonable time after the arrest.

Just a few weeks after Langen, the court decided People v. Gokey, 60 N.Y.2d 309 (1983), wherein the police received a tip from an informant that the defendant was traveling on a bus from New Jersey to Watertown, New York with marijuana and hashish in his possession.

Armed with an arrest warrant for Gokey on an unrelated larceny charge, five police officers waited at the bus terminal in Watertown accompanied by a dog specially trained to detect marijuana.

When the defendant disembarked from the bus carrying a duffel bag, one of the officers approached and informed him that he was under arrest, and he was ordered to place his hands against the wall and spread his feet so he could be frisked.

The duffel bag lay on the ground between defendant's feet and the dog reacted in a way as to indicate that it contained marijuana, which resulted in the defendant being handcuffed, the bag being searched and eleven ounces of marijuana found inside of the bag.

In reversing the denial in the courts below of the defendant's motion to suppress the marijuana in the bag, the court expounded as follows on the state of the law in New York in this regard:

"In New York v. Belton….the Supreme Court set forth a general rule under the Fourth Amendment of the United States Constitution that a custodial arrest will always provide sufficient justification for police to search any container within the 'immediate control' of the arrestee. Under this standard, it is clear that defendant's Federal constitutional rights were not violated.

This court has declined to interpret the State constitutional protection against unreasonable searches and seizures so narrowly (citing Smith and Langen).

Under the State Constitution, an individual's right of privacy in his or her effects dictates that a warrantless search incident to arrest be deemed unreasonable unless justified by the presence of exigent circumstances. When an individual subject to arrest has a privacy interest in property within his or her immediate control or 'grabbable area,' this court has identified two interests that may justify the warrantless search of that property incident to a lawful arrest: the safety of the public and the arresting officer; and the protection of evidence from destruction or concealment (emphasis supplied and citations omitted).

The reasonableness of a police officer's assertion of the presence of either or both of these predicates to justify a warrantless search is measured at the time of the arrest. Moreover, the search must have been conducted contemporaneously with the arrest." Six years later, in People v. Torres, 74 N.Y. 2d 234 (1989), the court once again parted company with the Supreme Court, disagreeing with its rationale for upholding the search of the vehicle that was conducted in Michigan v. Long, 463 U.S. 1932 (19), to wit, that a suspect that had been stopped and questioned without incident and was about to be released and permitted to proceed on his way could conceivably, upon reentry into his vehicle, reach for a concealed weapon and threaten the departing police officer's safety. Under this theory Torres' motion to suppress would have failed.

Again invoking the State Constitution in finding the Torres search to be impermissible, the court recounted that at the time of the vehicle search the suspects had already been removed from the car and been patted down without incident and" [A]t that point, there was nothing to prevent these two armed detectives from questioning the two suspects with complete safety to themselves, since the suspects had been isolated from the interior of the car, where the nylon bag that supposedly contained the gun was located. Any residual fear that the detectives might have had about the suspects' ability to break away and retrieve the bag could have been eliminated by taking the far less intrusive step of asking the suspects to move away from the vicinity of the car……"

Summing up, the court concluded "that the detective's conduct in reaching into the defendant's car and removing his bag, conduct which revealed the presence of a gun, was not reasonably related to protect the officers' safety in this street

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encounter. The detective's actions were thus improper under article I, sec. 12 of our State Constitution, and the resulting evidence should have been suppressed.*** The rule we fashion asks only that once the officers have taken steps to secure their own physical safety, they limit their intrusion to the inquiry permitted by CPL 140.50 [Temporary questioning of persons in public places; search for weapons]."

This area of the law was revisited again in People v. Carvey, 89 N.Y.2d 707 (1997), wherein, as the result of a lawful traffic stop, a police officer noticed that the defendant, in the rear passenger seat, while bending down to place something under his seat, was wearing a bullet proof vest under his sweat shirt. At this point all four passengers were removed from the car, the defendant was patted down with no result and handed over to one of the officers on the scene, and the officer who had made the observations of the defendant, reached into the car, under the rear passenger seat, and removed a gun from where the defendant had been seated.

Relying on language in Torres (at p. 231, n.4.) that '…there may well be circumstances where, following a lawful stop, facts revealed during a proper inquiry or other information gathered during the course of the encounter lead to the conclusion that a weapon within the vehicle presents an actual and specific danger to the officer's safety notwithstanding the suspect's inability to gain access to that weapon' and "that a further intrusion might be justified even in the absence of probable cause (albeit recognizing that a reasonable suspicion alone will not suffice) and that" the likelihood of a weapon in the car must be substantial and the danger to the officers safety 'actual and specific,' the court upheld the search based on the presence of the bullet proof vest.

Later, in People v. Mundo, 99 N.Y.2d 55 (2002), the court seemed to stretch the boundary of the Torres reasoning to give the police much greater latitude in conducting their rather wide ranging vehicle search upon the strength of a somewhat skimpy fact pattern, which Judge Ciparick, in her dissent, reviewed in great detail: "During a routine afternoon patrol, two New York City police officers observed a white Nissan with Florida license Plates, carrying three occupants, make an illegal right turn through a red light. Defendant was riding in the rear seat of the vehicle. After observing the traffic infraction, the officers activated their high intensity lights and attempted to stop the vehicle. The vehicle stopped and the officers casually approached. As the officers neared the vehicle it slowly pulled away. The officers returned to their vehicle, activated their lights and siren and followed the Nissan. The vehicle stopped again and then proceeded to drive away as the officers approached. For a third time the officers continued after the vehicle, this time observing defendant, in the rear seat of the vehicle, turn to face the pursuing officers and make an 'unusual' movement. This 'chase' spanned approximately one-half of a city block, with an estimated top speed of 10 mph. The Nissan finally came to a halt, and this time the officers approached with their weapons drawn.

The officers advised the three occupants to exit the vehicle. The officers safely isolated the individuals on their knees and away from the car, frisked them and found nothing further to arouse their suspicions. Nevertheless, one of the officers proceeded to search the vehicle's backseat. He pulled down the armrest revealing an opening to the trunk. There he saw a small package and smelled the distinct odor of a chemical used in processing cocaine. He then exited the car and opened the trunk to retrieve the package which contained approximately one kilogram of cocaine."

Based upon these facts, the majority concluded that the "evidence in the record clearly supports the Appellate Division's conclusion that the officers could reasonably have concluded that 'a weapon located within the vehicle present[ed] an actual and specific danger' to their safety' and affirmed the denial of defendant's motion to suppress.

Then, somewhat surprisingly after this history of intricate appellate analysis, the Supreme Court, in 2009, decided Arizona v. Gant, 556 U.S. 332, a rather straight forward opinion that set forth some clear guideline principles regarding automobile searches incident to arrest that requires a reexamination of the reasoning of the Court of Appeals in Carvey and Mundo in its wake.

In the first place, Gant stands for the proposition that the police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest.

The holding also makes clear, that if there is no possibility of the arrestee gaining access to the vehicle after his arrest, a search of his automobile based upon the automobile exception is not permissible, thus narrowing the reach of Belton and restricting that of Chimel but, jn significant part, goes on to confirm that the search would still be justified if there was reason to believe that evidence relevant to the crime of arrest might be found in the vehicle.

Consequently, there would appear to be insufficient factual support justifying the search of the vehicle in Mundo under the Gant criterion, while the observation in Carvey of the bullet proof vest prior to the search would seem to be sufficient to create the reasonable belief that there was a gun to be found in the car and thus uphold the legitimacy of that search.

Most recently decided was People v. Jimenez, 22 N.Y.3d 717 (2014), dealing once more with the issue of warrantless searches of closed containers incident to arrest as the result of a street encounter rather than an automobile stop. Here, the police responded to a radio run of a burglary in progress in an apartment building, with a description of the suspects provided by the 911 caller, and

apprehended a man and woman inside of the premises who were questioned and determined to be trespassers and placed under arrest for trespassing.

In the course of processing the

Searches, continued...

woman - the defendant Jimenez - a large purse was removed from her shoulder, which appeared to be heavy, and when opened was found to contain a loaded handgun.

The trial court, in denying her motion to suppress, ruled that the search was justified for safety reasons as the purse was not within the exclusive control of the police and that a facial gesture made by the superintendent of the building at the scene and her point out of the eventual arrestees suggested in some way that they were connected to a burglary.

On appeal, the Appellate Division found the search to be proper because the bag was large enough to contain a weapon and was within the defendant's grabbable area at the time of her arrest. It further agreed with the trial court that the police lacked exclusive control over the bag and that "the surrounding circumstances….support a reasonable belief in the existence of an exigency justifying a search of the bag, even though the officers did not explicitly testify at the suppression hearing that they feared for their safety."

In reversing her conviction and granting her motion to suppress the gun, Chief Judge Lippman, writing for the court, comprehensively reviewed the guiding legal principles that should be employed in evaluating the circumstances arising in these type of cases:

1. All warrantless searches presumptively are unreasonable per se and the People have the burden of overcoming the presumption of unreasonableness;

2. Under the State Constitution, to justify a warrantless search incident to arrest the People must satisfy two separate requirements:

a) The first imposes spatial and temporal limitations to ensure that the search is not significantly divorced in time or place from the arrest.

b) The second requires the People to demonstrate the presence of exigent circumstances.

3. Two interests underlie the exigent circumstances requirement:

a) The safety of the public and the arresting officer.

b) The protection of evidence from destruction or concealment.

4. Exigency must be affirmatively demonstrated, therefore even a bag within the immediate control or grabbable area of a suspect at the time of his arrest may not be subject to a warrantless search incident to arrest unless the circumstances leading to the arrest support a reasonable belief that the suspect

may gain possession of a weapon or be able to destroy evidence located in the bag.

5. The crime for which there is probable cause to make the arrest may provide the requisite exigency but it may also derive from circumstances other than the nature of the offense (e.g., bullet proof vest).

6. While an officer does not have to affirmatively testify as to his safety concerns to establish exigency, such apprehension must be objectively reasonable.

7. The information on the radio run does not necessarily translate to exigency absent other appropriately supporting circumstances on the scene.

In conclusion, as a result of the Gant and Jimenez decisions, the law in New York as to searches incident to arrest seems reasonably settled, at least until future interpretations of them by the intermediate appellate courts come into play.

Subsequently. the Appellate Division, Second Department, followed these Gokey guidelines in cases such as People v. Hernandez, 40 A.D. 3d 777 (2007) and People v.Warner, 94 A.D.3d 916 (2012).

But just as this area of the law seemed to have become settled, the Second Department decided People v. Thompson, 2014 NY Slip Op. 04524 (6-18-2014), wherein, although the court upheld the suppression ruling in the court below, relying on Gokey and its own prior holdings stemming from Gokey, it implied that it might have seriously considered the People's alternative argument that "the search was justified because the detective had probable cause to believe that the backpack contained a weapon…." had that argument been properly preserved, but citing no supporting case law for this seemingly contrary theory.

Furthermore, where the People offer alternate theories for suppression on appeal that were not raised before the hearing court, or even advanced those theories after the suppression hearing has been concluded and defendant's motion to suppress has been granted, they are not entitled to a new or continued hearing at which to develop those contentions unless some valid argument could be made that they were denied a full opportunity to develop those arguments in the first instance. See, People v.Havelka, 45 N.Y.2d 636, 643 (1978); People v. Knapp, 57 N.Y.2d 161, 175 (1982).

Kitty Genovese continued...

Shapiro. I remember his marshalling of the evidence and the applicable law, and delivering a brilliant charge to the jury, while pacing behind the bench and never referring to a single note!

I had met Moseley, bearing a reel to reel tape recorder - both alone and later with my father. Moseley was cooperative, intelligent - and displayed absolutely no emotion - and no remorse! The affect was flat and startling - his relating of events so evil, so depraved - in that flat, emotionless tone and manner. We realized immediately that a defense of insanity was both appropriate and necessary - and, indeed, our only option in our desperate effort to avoid the death penalty.

At the trial, we had engaged Dr. Oscar Diamond, chief psychiatrist at Manhattan State Hospital. In attesting to Moseley's depraved mental state - lack of understanding of "the nature and quality of his actions, and knowing that those actions were wrong" - the ancient McNaughton Rule, derived from English common law. Frankly, in retrospect, I feel he was a weak witness, whom ADA Frank Cacciatore made to look inadequate! I was unimpressed!

What really sealed Moseley's fate - besides the overwhelming evidence of guilt - was the testimony of the prosecution's competing psychiatrist. He refuted Moseley's claim of legal insanity, and, astoundingly, stated that his conclusion was based upon merely a reading of the psychiatric reports (Kings County Hospital, etc.), and observing the subject on the witness stand (for Moseley had testified in his own behalf) - he never came face to face with the defendant! We were, and are, certain that the jury rejected all psychiatric testimony out of hand, concluding that all shrinks are worthless - and anyhow, how could we let this serial killer go to a mental hospital? A verdict of guilt inevitably and quickly ensued.

In those days, New York still had the death penalty. Capital crimes involved a bifurcated trial. In the second, penalty phase of the trial, numerous victims of Moseley's many burglaries, rapes and assaults testified for the People. Then, when it was our turn, we attempted to introduce testimony, through psychiatrists, of mental incapacity (as a medical, rather than legal, proposition). Judge Shapiro, to our chagrin, refused to allow such testimony, claiming the issue had already been resolved. The jury clearly got the message, and voted for the death penalty. Shapiro garnered national - even international - publicity when, as he sentenced Moseley to die in the electric chair, he said he was morally opposed to the death penalty, but upon "seeing this monster" he said he wished that he "could pull the switch myself".

As an interesting side note. The Court of Appeals, New York's highest court, attributed reversible error to Shapiro regarding his limitation of our offer of medical insanity testimony in the sentencing phase, and sent the case back for re-sentencing to life in prison. We know that Judge Shapiro was much too smart to unknowingly commit reversible error - but quite smart enough indeed to intentionally build in such error. We are thus certain that by his rulings, he satisfied the public outcry for Moseley's blood, while fulfilling his own moral objection to the death penalty. In effect, that sly rascal had his cake and ate it, too!

Well, Moseley continues, 50 years later, as the longest serving inmate in the NY State prison system!

Moseley's continuing saga involved a successful jailbreak from Attica - a few years later. That rascal severely injured his own anus, requiring hospitalization - and he overpowered a corrections officer en route back to jail. While free over the course of a week he carjacked a family at gunpoint, committed a rape, and held another family hostage in their home on Grand Isle in the Niagara River. Ultimately he surrendered to an FBI hostage negotiator, having successfully terrorized the entire city of Buffalo. He later became a "model" prisoner, and even obtained a college degree at taxpayers' expense.

About 20 years ago, Moseley brought suit in Federal Court, seeking a new trial based upon a claim of "ineffective assistance of counsel." This was based upon the following:

In 1962, when Kitty had been arrested on that gambling charge (apparently she had taken horse racing bets as an accommodation to bar patrons, which she forwarded to a bookmaker) - who did she come to for legal representation? Sparrow and Sparrow! I do remember Kitty - and I am undoubtedly the only living person who knew both Kitty and Winston. In any event, the gambling charge resulted in a mere $50 fine. Our prior representation of Kitty was made known to Judge Shapiro - and to Moseley before his trial. Thus his claim of "conflict of interest" was dismissed out of hand. Since then Moseley's petitions, every two years, for release on parole, have been rejected.

Well, I stand alone. The prosecutors - fiery little bulldog Frank Cacciatore, Charlie Skoller, Phil Chetta, and their boss, Frank O'Connor - are all gone (O'Connor had made his name initially as a lawyer in the "Wrong Man" case - later made into a Hitchcock film starring Henry Fonda. O'Connor had also made an unsuccessful run for New York State Governor, losing to Nelson Rockefeller in 1966). Shapiro, the defense team, all gone except for yours truly.

I have stared evil incarnate in the face. I am shocked, but not intimidated.

I have seen how the "Kitty Genovese syndrome" - the "bystander syndrome" - the "I don't want to get involved syndrome" - have become a part of our folklore.

We have all witnessed acts of supreme courage and self denial - and conversely, considering the very recent action of that Korean ferryboat captain and his crew - and the cowardly captain of the sinking Costa Concordia - and these drive home the recognition that cowardice and selfishness are still prevalent in society - as it also was on that fateful night of March 13, 1964, when Kitty's "friend," Karl Ross, opened his door at the top of those stairs, and saw his friend being stabbed to death - and he closed his door and retreated inside!

I believe it is up to each of us - individually and collectively - to recognize our membership in, and obligation to, a greater society.

I. personally, always feel compelled to go to the aid of those in need. I recall in my past, pulling a couple out of an overturned car; aiding a fellow scuba diver who was out of air; helping a woman who was being abused on the street; carrying my own two young children out of a burning motel; and donating one of my own kidneys to our daughter when she was in kidney failure. I mention these personal acts as a reminder that there is a lesson which resonates here. We are all part of a greater humanity. We owe that humanity, and by our own behavior we can repay that debt.

One hero to whom I shall allude is Bill Genovese - Kitty's brother - younger than she by 12 years – who, 2 years after her death (which totally devastated the family) enlisted, went to Vietnam, and lost both legs to an exploding land mine. This unique gentleman went on to earn advanced degrees, and become a husband, father, grandfather and a successful businessman. He and his lovely wife live here in Washington, CT. Marcia and I have dined with them - they are great people and he is a true American hero.

In final summary - after Moseley's unsuccessful effort in the Federal Court, I wrote the following published poem, which pretty much summarizes my feelings…

THE BALLAD OF KITTY AND WINSTON

He stalked the streets
In search of prey-
When darkness fell
He knew his way

Of confidence
He had no lack
That no one would oppose
His vicious attack

On a helpless girl
Who tried to run
He followed and stabbed
For his perverse fun

Then, finally trapped
In a stairway hall
She screamed for help-
Her final call.

Windows opened,
And then slammed shut
Leaving her victim
Of this gruesome nut

Finally arrested-
Some good police work,
He readily admitted
With a sardonic smirk

To a spree of crime
That boggles the mind
Murders and burglaries
And rapes of a kind
That reflect the ways
Of a necrophiliac-
Now how to defend
This homicidal maniac?

A psychiatric approach,
"Nature and quality of act"
A vigorous defense
He never lacked.

The jury spoke-
You will sit in the chair
The Judge said he only
Wished he could be there

To pull the switch
And watch him fry,
But the Court of Appeals
Said "you won't die-
"you will spend
Your life in jail-"
But then the system
Tends to fail-

From Attica
He does escape
Once again
Free to rape!

Caught again,
He tries to avail
Of ways to limit
His confined travail…

Now, 31 years later,
He makes a motion
Questioning
His lawyer's devotion-

That record reviewed
Let's put it to rest
His representation
Was clearly the best!

So stay where you are
And ruminate-
This is justice
A killer's fate!

Rest peacefully, Kitty.

Robert E. Sparrow

Marital Quiz Answers

From page 4

Question #1 - Is it always required to subtract maintenance payments from payer spouse's income for the purpose of calculating his child support obligation?
Answer: No, DRL§ 240 [1-b] [b] [5] [vii] [C] provides that maintenance paid or to be paid should be subtracted from the payers income only where "the order of agreement provides for a specific adjustment in the amount of child support payable upon the termination of alimony or maintenance." Schmidt v. Schmidt 107 A.D.3d 1529; 968 NYS2d 284 (4th Dept. 2013) cited in
Doctor v. Doctor 986 N.Y.S.2d 357 (2nd Dept. 2014)

Question #2 - In calculating child support, in accordance with the CSSA guidelines, do you add maintenance to the payee spouse's income?
Answer: Only to the extent that maintenance was or should have been included in the payee spouse's last income tax returns. Tryon v. Tryon 37 AD3d 455; 830 NYS2d 233 (2nd Dept. 2007).

Question #3 - Does an appeal lie from an order that is entered on default of the appealing party?
Answer: No, Matter of Wong v. Liu 2014 NY Slip Op 6588 (2nd Dept.)

Question #4 - May the Appellate Division dismiss an appeal where the party seeking relief is a fugitive while the matter is pending?
Answer: Yes, under the fugitive disentitlement doctrine, provided there is a connection between a defendant's fugitive status and the appellate process. Allain v, Oriola-Allain 2014 NY Slip Op
7151 (2nd Dept.)

Question # 5 - Is a marriage between a half-uncle and a half- niece void as incestuous?
Answer: No, Nguyen v. Holder 2014 NY Slip Op 7290 (Court of Appeals)

Question #6 - Can trial court deviate from the Temporary Maintenance Guidelines?
Answer: Yes, either upward or downward. Joseph M. V. Lauren J. 2014 NY Slip Op 51536(U)
(Supreme Court, New York County)

Question #7 - Does an appeal lie from an order entered on the consent of the appealing party?
Answer: No, Matter of Stein v. Stein 2014 NY Slip Op 8446 (2nd Dept.)

Questions #8 - In a motion to enforce a charging lien under Judiciary Law §475 is a law firm entitled to a money judgment and interest on the amount owed by the client?
Answer: No, absent the commencement of a plenary action. Wasserman v. Wasserman 2014 NY

Slip Op 5535 (2nd Dept.)

Question #9 - Does the existence of a non-waiver clause in an agreement preclude the court from finding waiver?
Answer: No. Stassa v. Stassa 2014 NY Slip Op 8629 (2nd Dept.)

Question #10 - Does a motion to vacate a judgment of divorce on the grounds of excusable default have to be made within one year after service of a copy of the judgment?
Answer: Generally yes, but the Supreme Court has the inherent authority to vacate the judgment in the interest of justice, even where the statutory one-year period has expired. Goldenberg v.
Goldenberg 2014 NY Slip Op 8601 (2nd Dept.)

Animal Abuse continued...

the facial sufficiency; 2) the defendant Arroyo's moral beliefs and 3) the fact that defendant Arroyo did not display a pattern of neglect to his pets as did the defendant Torres.

CONCLUSION: It is apparent that the language of section 353 of the AG&M Law is open to a myriad of interpretations with no clear cut, unambiguous, guidance from the Legislature. While the debate about hansom cabs continues in the city, this would be an appropriate time for Albany to revisit this statute to clarify the various laundry list of terms that were lumped together to define and proscribe animal cruelty for which an individual can be prosecuted. This will not only assist the prosecutors in drafting their accusatory instruments where allegations of abuse have been raised, it will also assist the courts in rendering their decisions with greater understanding of the legislative intent of the statute, as well as providing due process to the accused by avoiding issues of vagueness and providing sufficient notice that alleged illegal conduct was based on explicit, objective, uniform application of the statute in order to prepare a defense.

Perhaps this article will serve as a catalyst for such discussion and clarification of section 353 of the AG&M Law.

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10 See, People v. Mahoney, 9 Misc3d 101 (AT 9&10 [2005] which upheld the jury charge that the term "sustenance" was distinguishable from the term "food or drink" and under the statute "sustenance" meant the provision of "veterinary care and shelter adequate to maintain health and comfort."

See also, People v. Fritze, 2010 NY Slip Op 51413(U) (Dist Ct, Nas Co) Defendant's intent may be established by his cognizance of his cat's condition and his failure to obtain medical care.

11 See, People v. Curcio, 22 Misc3d 907 (Crim Ct, Kings Co [2009])

12 See, Stephen Iannacone, Felony Animal Cruelty Laws in New York, 31 Pace L Rev 748, 760 (2011) "One way to solve this apparent flaw in New York's law is to explicitly include failure to provide medical care as neglect in the statute."

Should the Legislature consider such a change, it must be as specific as possible to address new issues that will arise such as the standard of medical care to avoid prosecution. What if the individual cannot afford such treatment or opposes it on moral grounds that it is invasive and may only lessen pain without curing the condition? Should an injured animal's life be prolonged or should it be euthanized? (See, People v. Arroyo, supra, n.4) There are no easy answers to these questions and, no doubt, there will be many opinions expressed by various organizations and associations throughout the state that deal with these issues on a regular basis, if any action on this matter is taken up by the Legislature.

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