# CRIMINAL

## U.S. SUPREME COURT

### *DECISION OF THE WEEK*

***Timbs v Indiana***, 2/20/19 – **EXCESSIVE FINES CLAUSE / APPLIES TO STATES**

The defendant sold $225 of heroin to Indiana undercover officers, pleaded guilty to dealing in a controlled substance and conspiracy to commit theft, and was sentenced to one year of house arrest and five years' probation and ordered to pay $1,200 in fees and fines. At the time of arrest, the police seized the defendant's luxury Land Rover, saying that he used it to commit the crimes. The vehicle had been purchased for $42,000, more than four times the maximum fine assessable against him for the drug conviction. The trial court denied the prosecution's application for civil forfeiture of the vehicle; the mid-level appeals court affirmed; but the Indiana Supreme Court reversed. In an opinion by Justice Ginsburg, a unanimous U.S. Supreme Court ruled that the Constitution places limits on the power of states and localities to take and keep cash, cars, houses, and other private property used to commit crimes; the Eighth Amendment's ban on excessive fines applies to the states. The excessive fines clause traced its lineage back to the Magna Carta, which required that economic sanctions "be proportioned to the wrong" and not be so large as to deprive an offender of his livelihood. In more recent times, because fines are a source of governmental revenue, they have sometimes been employed in a manner disproportionate to penal goals of retribution and deterrence. Today all 50 states have a constitutional provision prohibiting excessive fines. The historical and logical case for concluding that the 14th Amendment incorporated the Excessive Fines Clause was overwhelming. The challenged judgment was vacated, and the case was remanded for resolution of the question of whether the seizure of the Land Rover constituted an excessive fine.
https://www.supremecourt.gov/opinions/18pdf/17-1091_5536.pdf

***Moore v Texas***, 2/19/19 – **INTELLECTUAL DISABILITY / NO DEATH PENALTY**

In 2015, the Texas Court of Criminal Appeals held that the petitioner did not have an intellectual disability and thus was eligible for the death penalty. The U.S. Supreme Court vacated that decision in 2017, because the Texas court had erred in its analysis of the petitioner's "adaptive deficits," one of the relevant elements regarding intellectual disability. Upon reconsideration, the Texas court adhered to its prior conclusion. The petitioner sought certiorari, and the prosecutor agreed that he was intellectually disabled and could not be executed. In a 10-page unsigned opinion, the Supreme Court granted the petition and rebuked and reversed the appeals court. The Texas court had reiterated its previous flawed analysis: overemphasizing the petitioner's adaptive strengths; stressing his improved behavior in prison, despite the low probative value of such factor; and relying on fallacious factors that advanced lay stereotypes. Justice Alito dissented, joined by Justices Thomas and Gorsuch. If the Supreme Court believed that the Texas court erred, it should vacate the judgment, pronounce a clear standard, and remand for its application. The decision to instead issue a summary reversal belied the Court's role as a tribunal of review, not of first view, the dissenters opined.
https://www.supremecourt.gov/opinions/18pdf/18-443_8m58.pdf

# SECOND CIRCUIT

***USA v Valente***, 2/19/19 – **SENTENCING ERROR / RECIDIVIST STATUTE SENTENCE**
The defendant pleaded guilty to securities and mail fraud in District Court – NDNY. The Second Circuit held that his sentence was procedurally unreasonable. The sentencing court erred in adding a second criminal history point for a DWAI offense, where the defendant had not yet served the sentence for that offense. He was thus in Criminal History Category III, not IV; and his correct Guidelines Range was 188–235, not 210–262, months. The matter was remanded for resentencing. A restitution order for $8.6 million was upheld.
http://www.ca2.uscourts.gov/decisions

# NY COURT OF APPEALS

***People v Diaz***, 2/21/19 – **INMATE CALLS / DA CAN USE RECORDINGS**
After his 2012 arrest for burglary and robbery, the defendant was held in a Rikers Island Correctional Facility for eight months until he posted bail. During that time, he made 1,100 calls. At trial, the prosecution introduced excerpts of four of the defendant's phone calls, recorded by the NYC Department of Correction (DOC), that contained incriminating statements. The defendant was convicted, and the Second Department affirmed. On appeal, he asserted that consent to governmental intrusion can be no broader than the notice provided. The Court of Appeals disagreed. Detainees—having been informed of the monitoring and recording of their non-privileged calls—possessed no legitimate expectation of privacy in the calls. (DOC did not record calls made by inmates to their attorneys, doctors, clergy, and specified agencies.) A correctional facility may record calls and share the recordings with prosecutors. The majority rejected the argument that, once the calls were lawfully intercepted by DOC, the Fourth Amendment prevented DOC from releasing recordings to the DA's Office. Judge Feinman wrote the majority opinion. Judge Wilson dissented in an opinion in which Judge Rivera joined. DOC recorded calls for security purposes, yet delivered recordings to the People for use in prosecution. The Fourth Amendment cannot permit that. The majority ignored crucial facts: (1) The defendant was not free to leave Rikers and for eight months, and other than phone calls, had no viable means of communication with the outside world; (2) Other persons accused of crimes, but out on bail, cannot be subjected to governmental recording without a warrant; (3) The defendant needed to prepare a defense; (4) He was told that the recording of his calls was for jail security; and (5) He was not informed that his calls would be provided to the DA to use against him. The majority enabled the government to circumvent the Fourth Amendment by collecting private information without a warrant for one purpose and then deeming it non-private for another purpose.
http://www.nycourts.gov/reporter/3dseries/2019/2019_01260.htm

***People v Thomas***, 2/19/19 – **RESENTENCE DATE / NOT FOR PREDICATE STATUS**
In separate 1989 actions, the defendant was convicted of attempted robbery charges and sentenced as a SFO, based on YO adjudications. Then in 1993, he was convicted of 3rd degree robbery. In light of the 1989 convictions, he was sentenced as a SFO. In 2009 and 2012, the defendant's motions to set aside the 1989 sentences were granted, and he was resentenced, because his YO adjudications had improperly been used to find SFO status.

The defendant moved to set aside the 1993 sentence, arguing that the 1989 convictions were no longer predicates, since the 2009 and 2012 resentence dates should be used. His motion was denied, and the Second Department affirmed. In a 4-3 decision, the Court of Appeals upheld the challenged order, concluding that the dates of the original sentences, not the resentences, should be used under Penal Law § 70.06 (b) (ii) ("sentence upon such prior conviction must have been imposed before commission of the present felony"). Judge Fahey dissented in an opinion in which Judges Rivera and Wilson concurred. Legality should prevail over chronology. The only legal sentences existing as to the 1989 convictions were imposed in 2009 and 2012. In allowing the dates of the original, vacated sentences to control, the majority gave legal effect to illegal sentences. The CPL contained many statutes that apply to sentencing and remain applicable when a defendant is resentenced. No legislative history addressed the instant issue; but as a matter of fairness, an illegal, vacated sentence should not be used to enhance a defendant's future punishment. The People had not identified any case where the Appellate Division applied the original sentencing date after that sentence was vacated and an entirely new sentence was imposed. In some cases, the resentencing date would benefit the People by bringing a prior conviction within the 10-year look-back period.
http://www.nycourts.gov/reporter/3dseries/2019/2019_01167.htm

***Matter of James Q.***, 2/19/19 – **INSANITY ACQUITTEES / NO AUTOMATIC SEALING**
The issue was whether Mental Hygiene Law § 33.13, protecting the confidentiality of clinical records of patients and clients, required automatic sealing of the entire court record of proceedings involving insanity acquittees who had dangerous mental disorders within the meaning of CPL 330.20 (acquittees). The Court of Appeals unanimously held that sealing was not required, and the defendant's motion to seal was properly rejected. His diagnoses, treatment plan, and details in the psychiatric examiner's report had already been sealed. Documents relating to a legal proceeding, rather than treatment, should remain public. New York has a public policy of fostering open judicial proceedings. In balancing the defendant's privacy rights against the public's right to know how acquittees are managed, the legislature had eschewed an automatic sealing requirement. A case-specific analysis required good cause sufficient to rebut the presumption of public access.
http://www.nycourts.gov/reporter/3dseries/2019/2019_01166.htm

# FIRST DEPARTMENT

***People v Soto***, 2/19/19 – **SORA REMAND / DISCRETION NOT EXERCISED**
The defendant appealed from order of New York County Supreme Court, which adjudicated him a level-two sex offender. The First Department held the appeal in abeyance, and remanded for a r hearing regarding a downward departure. A three-step process applied: (1) The hearing court determined whether mitigating circumstances were not adequately considered by the Guidelines; (2) If so, the court applied a preponderance of the evidence standard to determine whether the defendant had proven the existence of the circumstances; and (3) If the first two steps were satisfied, the court exercised its discretion by weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warranted a downward departure. The instant decision suggested that, in this case of statutory rape, the court considered itself bound to conclude

that mitigating circumstances were adequately accounted for. That was erroneous. In such cases, the Board has recognized that strict application of the Guidelines may result in overassessment of risk to public safety. The Center for Appellate Litigation (Abigail Everett and Stephanna Szotkowski, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01184.htm

***Patrolmen's Benev. Assn. v De Blasio***, 2/19/19 –
**POLICE BODY CAMERAS / FOOTAGE PUBLIC**
In a defeat for NYC's largest police union, the First Department held that police body-camera footage can be shown to the public. The purpose of such footage was to advance transparency, accountability, and public trust. Although the camera program was also designed in part for performance evaluation purposes, the footage was not primarily for disciplinary matters and thus was not a personnel record covered by Civil Rights Law § 50-a.
http://nycourts.gov/reporter/3dseries/2019/2019_01170.htm

# SECOND DEPARTMENT

***People v Terry***, 2/20/19 – **ATTEMPTED KIDNAPPING / NOT EVEN CLOSE**
The defendant appealed from a judgment of Suffolk County Supreme Court, convicting him of attempted 2nd degree kidnapping and other crimes. The Second Department dismissed the attempted kidnapping conviction. The defendant had retained an attorney to represent him in a personal injury action, agreed to a settlement, had second thoughts, and aggressively urged his attorney to reopen the case. Years later, the defendant drove to the attorney's parking lot, stayed an hour, and returned to his nearby hotel. That same day, when police stopped the defendant for traffic infractions as he left his hotel, they found a Taser, gun, handcuffs, and other items. The proof was legally insufficient, since it did not establish that the defendant came "dangerously near" to committing the completed crime. Roger Adler represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01243.htm

***People v Fassino, Lappe*, and *Joseph***, 2/20/19 –
**NURSING HOME DEATH / REDUCED SENTENCES**
In 2012, a resident of a Suffolk County nursing home died. Staff members were charged with various crimes, including criminally negligent homicide, Public Health violations, and falsifying business records. The prosecution presented evidence at a jury trial that three codefendants ignored alarms and failed to respond to the decedent's urgent medical needs. The Second Department upheld the convictions, but reduced the sentences.
http://nycourts.gov/reporter/3dseries/2019/2019_01227.htm
http://nycourts.gov/reporter/3dseries/2019/2019_01232.htm
http://nycourts.gov/reporter/3dseries/2019/2019_01231.htm

***People v Farrell***, 2/20/19 – **WAIVER INVALID / SENTENCE REDUCED**
The defendant appealed from a judgment of Kings County Supreme Court, convicting her of 2nd degree kidnapping and 1st degree criminal sexual act, and imposing concurrent determinate terms of imprisonment of 20 years and post-release supervision of 20 years.

The Second Department found that the purported appeal waiver was invalid, given the skeletal colloquy and the defendant's youth, inexperience with the criminal justice system, and mental health history. The codefendant had anal sex with the victim, while the defendant held her down. The defendant was 22 at the time of the plea and had no prior felonies, whereas the codefendant was 33 and had committed a prior violent felony. Her prison time was reduced to 15 years, the period imposed on the codefendant. Appellate Advocates (Caitlyn Halpern, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01226.htm

***People v Jeffery***, 2/20/19 – **COUNSEL / ADVERSE POSITION**
The defendant appealed from a judgment of Kings County Supreme Court convicting him of 2nd degree attempted robbery. The Second Department remitted for a hearing on the defendant's application to withdraw his guilty plea. On the sentencing date, the defendant said that he wanted to take his plea back, briefly describing the reasons. Defense counsel disagreed with some of the defendant's assertions, and the court proceeded to impose sentence. The appellate court held that the defendant was not afforded a reasonable opportunity to present his contentions. Moreover, his right to counsel was violated when counsel took an adverse position. New counsel should have been assigned. Appellate Advocates (David Greenberg, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01229.htm

# THIRD DEPARTMENT

***People ex rel. Negron v Superintendent***, 2/21/19 –
**SCHOOL-GROUND RESTRICTION / INAPPLICABLE**
In 1994, the petitioner was convicted of 1st degree sexual abuse. He served his sentence and was adjudicated a level-three offender. In 2005, he was convicted of attempted 2nd degree burglary. Upon release to parole supervision, he was subject to various terms and conditions, including compliance with SARA provisions. The petitioner maintained that the Executive Law § 259-c (14) school-ground restriction was inapplicable to him, since the attempted burglary was not an offense enumerated in the statute. The Third Department agreed. The mandatory school-ground condition applied to an offender serving a sentence for an enumerated offense (1) whose victim was under age 18, or (2) who was designated a level-three offender. Because the petitioner was not serving a sentence for a delineated offense, the statute did not apply. The Third Department thus disagreed with the Fourth Department. *See People ex rel. Garcia v Annucci*, 167 AD3d 199. The Legal Aid Society (Elon Harpaz, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01267.htm

***People v Newman***, 2/21/19 – **INEFFECTIVE ASSISTANCE / REVERSAL**
The defendant appealed from a judgment of Broome County Court, convicting him of drug possession crimes. The Third Department reversed and ordered a new trial, based on ineffective assistance. At issue were counsel's failures to: (1) redact irrelevant, prejudicial hearsay— about a CI's alleged drug transactions with the defendant—from the search warrant application before introducing it for the limited purpose of revealing police errors; (2) request a limiting instruction that would have advised the jury of the limited purpose;

and (3) object to the prosecutor's exhortations to the jury to rely on the application's hearsay information as proof of guilt. These errors, as well as prejudicial testimony elicited from a detective on cross examination, were not harmless, given that proof of constructive possession was not overwhelming. There was no conceivable strategic explanation for counsel's conduct. The cumulative effect of the errors deprived the defendant of a fair trial. Paul Connolly represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01263.htm

# FAMILY

## FIRST DEPARTMENT

***Ja'Dore G. (Cannily G.)***, 2/21/19 – **DERIVATIVE ABUSE / REVERSED**
The father appealed from an order of New York County Family Court finding that he neglected and derivatively abused the subject child. The First Department sustained the finding of neglect, but reversed the finding of derivative abuse. As the petitioner and the AFC conceded by failing to raise opposing arguments, Family Court erred in finding derivative abuse based on a cousin's out-of-court statement that the father sexually abused him several years earlier. Because such statement was uncorroborated, it was insufficient to find sexual abuse and, in turn, derivative abuse.
http://nycourts.gov/reporter/3dseries/2019/2019_01305.htm

## SECOND DEPARTMENT

***Wright v Perry***, 2/20/19 – **TRIAL JUDGES / AVOID ADVOCATING**
A mother appealed from custody modification orders rendered by Queens County Family Court. The Second Department upheld custody to the father. The appellate court did agree with the mother that the trial court's intervention in questioning her was inappropriate, but found that she was not deprived of a fair hearing. The appellate court reminded the trial judge to avoid acting as, or appearing to be, an advocate. Family Court had also erred in enjoining the mother from filing petitions without prior court approval.
http://nycourts.gov/reporter/3dseries/2019/2019_01218.htm

***Matter of Zahir W. (Ebony W.)***, 2/20/19 – **NEGLECT / REVERSED**
The mother appealed from an order of Queens County Family Court finding that she neglected the subject children. The Second Department reversed and dismissed the petition. The finding of neglect was not supported by the record. The mother failed to retrieve the children from the aunt in fall 2016, as she had agreed to do after they stayed there for several months. However, there was no evidence that the children were not well-cared for by the aunt. Since ACS failed to establish that their condition was impaired or in imminent danger of becoming so, the agency did not establish neglect. Ann Marquez represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01216.htm

***Cabano v Petrella***, 2/20/19 – **PARENTS CAN'T AGREE / ON TIME OF DAY**
The mother appealed from custody orders issued by Suffolk County Family Court. The Second Department agreed with her that Family Court should have set forth a more precise parental access schedule as to birthdays. The order required the parties to cooperate in reaching an agreement regarding the details, but given the acrimonious relationship here, that was not in the cards. The matter was remitted.
http://nycourts.gov/reporter/3dseries/2019/2019_01210.htm

***R.K. v R.G.***, 2/20/10 – **WEEKEND TIME / FOR BOTH PARENTS**
Both parties appealed from orders of Westchester County Supreme Court regarding parental access. The Second Department disagreed with the trial court's determination regarding the father's access. A parenting schedule that deprived the custodial parent of any significant quality time with the child was excessive. Here, the schedule gave the father access with the school-aged child three weekends per month, thus depriving the mother of any significant quality time with the child. Every other weekend and one overnight per week for the father was more appropriate. Further, Supreme Court should have been more specific and clear about holiday and summer parental access. Remittal was needed. Since the record contained no indication that either party was less culpable, they would equally share parenting coordinator costs. Finally, the reviewing court deleted the provision authorizing the parenting coordinator to resolve issues between the parties; that was an improper delegation of judicial authority.
http://nycourts.gov/reporter/3dseries/2019/2019_01207.htm

***Isaiah L.***, 2/20/19 – **JD / DUE PROCESS DENIAL / UNREASONABLE DELAY**
In a juvenile delinquency proceeding, the presentment agency appealed from an order of Suffolk County Family Court that dismissed the petition based on a due process violation. The Second Department affirmed. In March 2018, the agency filed a petition alleging that in November 2017, the respondent had committed acts constituting attempted 1st degree robbery. The due process right to a speedy trial extends to JD proceedings. An unreasonable delay in prosecution following arrest can violate due process. Relevant factors included the extent of, and reason for, the delay; the nature of the charge; whether there had been extended pretrial incarceration; and whether the delay caused prejudice. Courts must honor the goals, character, and unique nature of JD proceedings. The central goal—rehabilitation through prompt intervention and treatment—was dishonored when the agency delayed in filing a petition. While the charges were serious and the respondent did not show prejudice, the agency gave no valid reason for delay. Maryanne Reiss represented the respondent.
http://nycourts.gov/reporter/3dseries/2019/2019_01215.htm