CRIMINAL

U.S. SUPREME COURT

UNANIMOUS VERDICTS / OVERTURNING PRECEDENT
By Linda Greenhouse, NY Times, 4/23/30
This week in *Ramos v Louisiana*), the U.S. Supreme Court held that the Constitution requires juror unanimity for a felony conviction in state court. Unanimity has long been understood as constitutionally required in federal court as a matter of the Sixth Amendment right to trial by jury. The only outlier among the states was Oregon. Louisiana, where the case originated, changed its rule two years later to require unanimity going forward. Six justices agreed that, contrary to the outcome of *Apodaca v. Oregon*, a 1972 case, conviction only by a unanimous jury verdict is the rule for both federal and state court; the 14th Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict. The decision is fascinating and revealing. Below the surface lies a maelstrom of clashing agendas. What the case was really about was precedent: when to honor it, when to discard it, and how to shape public perceptions of doing the latter. Justice Kavanaugh's concurring opinion included a list of 30 notable decisions that overturned earlier rulings. He used the instant case as an opportunity to expound on his theory of precedent so as to inoculate himself against criticism for overturning precedents that might pass his way in the future. The case left the court's usual ideological alignment in disarray. The six justices who voted to require unanimous juries were Justices Kavanaugh, Gorsuch—who wrote the controlling opinion—Ginsburg, Breyer, Sotomayor, and Thomas. Justice Alito's dissenting opinion was joined by Chief Justice Roberts and Justice Kagan. A puzzling bundle of opinions was issued not so much from a court as from nine individuals in pursuit of agendas far removed from the controversy they undertook to resolve. The real failure lies not in what the Supreme Court did in 1972, but in what it did this week, in its inability to provide a coherent answer to the question it chose to ask.
https://www.nytimes.com/2020/04/23/opinion/supreme-court-precedent.html?auth=login-email&login=email&searchResultPosition=1

THIRD DEPARTMENT

People v Chapman, 4/23/20 – **RIGHT TO SILENCE / NEW TRIAL**
The defendant appealed from a judgment of Albany County Court, upon a verdict convicting him of attempted 1st and 2nd degree murder and related charges, arising from allegations that he hired two individuals to rob and shoot the victim, who had shot the defendant two years earlier. The Third Department reversed. County Court erred in admitting a redacted video of the defendant's police interrogation. Evidence of a defendant's pretrial silence is generally inadmissible. The instant video consisted of police recounting their case against the defendant and being met largely with silence from a dismissive defendant. The evidence of selective silence lacked probative value and was highly prejudicial. There was a significant risk that the jurors deemed the defendant's failure to answer questions to be an admission of guilt. The error was compounded by the prosecutor's use of the video during summation, when the defendant's silence was

highlighted, thus improperly shifting the burden to him. The error was not harmless. The proof was mostly circumstantial, and there were numerous inconsistences in the testimony of the coconspirators. Lucas Mihuta represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02330.htm

Matter of Green v LaClair, 4/23/20 – **SARA / INAPPLICABLE**
The petitioner appealed from an order dismissing his CPLR Art. 78 petition. In 1989, he was convicted of 1st degree rape. After he completed his sentence in 2003, he was designated a risk-level three sex offender. Several years later, the petitioner was convicted of 2nd degree robbery and 3rd degree burglary, and based on those offenses and his level-three designation, he was found subject to SARA. The Third Department reversed. The crimes for which the petitioner was serving a sentence were not enumerated offenses. *See People ex rel. Negron v Superintendent*, 170 AD3d 12 (Exec. Law § 259-c [14] school-grounds restriction applies to offender serving sentence for enumerated Penal Law offense, where in addition, either victim was under age 18 at time of offense or defendant was designated risk-level three sex offender). PLSNY (Michael Cassidy, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02338.htm

FOURTH DEPARTMENT

People v Newman, 4/24/20 – **CPL 330.30 / REENACTMENT**
The defendant appealed from a County Court judgment, convicting him of menacing peace officers and 3rd degree criminal trespass. The Fourth Department reserved decision. The conviction arose from an incident in which uniformed sheriff's deputies responded after receiving a 911 call stating that the defendant had thrown a brick through a neighbor's garage door window and entered the garage. Two deputies approached the defendant's front door, and one knocked and announced their presence. The defendant opened the door holding a shotgun in the "low ready position." When ordered to drop the weapon, he complied. County Court erred in summarily denying a CPL 330.30 motion to set aside the verdict on the ground of misconduct during jury deliberations. The alleged misconduct involved a reenactment, thus requiring the court to inquire into whether the jury's conduct was a conscious experiment directly material to a critical issue that may have colored the jurors' views and prejudiced the defendant. A defense affidavit explained that counsel learned that, by using the bathroom door in the deliberation room to reenact the scene, the jurors had attempted to determine whether the defendant was aware that the persons knocking at his door were sheriff's deputies. Clearly, the reenactment involved a critical issue. A hearing was required. The Monroe County Public Defender (Helen Syme, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02449.htm

People v Swem, 4/24/20 – **CIRCUMSTANTIAL EVIDENCE / REVERSAL**
The defendant appealed from a judgment of Jefferson County Court, convicting him upon a jury verdict 2nd degree murder, 2nd degree assault, and other crimes. The Fourth Department reversed and ordered a new trial. County Court erred in denying the defendant's request for a circumstantial evidence instruction. At a crowded house party,

there were multiple physical fights The victim was involved in fights with at least two others; was stabbed five times; and had one wound that was 5" deep. The defendant was seen fighting with the victim, but not holding a knife, and no blood was found in the room where they fought. To return a guilty verdict, the jury was required to infer that he was the perpetrator who had the knife and used it to stab the victim. Contrary to the People's contention, this was not the exceptional case where the failure to give the circumstantial evidence charge was harmless error. Caitlin Connelly represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02435.htm

People v Beckwith, 4/24/20 – **PERJURY / DISMISSED**
The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him upon a jury verdict of resisting arrest and 1st degree perjury. The Fourth Department dismissed the perjury count. The People failed to prove that any of the defendant's allegedly perjurious statements to the grand jury were actually false. Hiscock Legal Aid Society (Linda Campbell, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02395.htm

People v Fenton, 4/24/20 – **SENTENCE REDUCED / AGE & MINIMAL HISTORY**
The defendant appealed from a Yates County Court judgment. The Fourth Department reduced the sentence from 7½ to 2½ years, followed by post-release supervision. At the time of the sale of $50 worth of cocaine, the defendant was 56 and had a minimal criminal record. His son, who arranged the sale, pleaded guilty and got probation. D.J. & J.A. Cirando represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02428.htm

People v Timmons, 4/24/20 – **RECONSTRUCTION / REVISED TRANSCRIPT**
In his appeal from a Monroe County Court judgment, the defendant contended that the trial court failed to provide counsel with meaningful notice of the specific content of the jury note requesting read-backs of the testimony of five witnesses. The Fourth Department affirmed the judgment of conviction. Previously, the appellate court had reserved decision and remanded for a reconstruction hearing. During that hearing, the court reporter testified that, upon review of her stenographic notes and contemporaneous handwritten notes, she determined that she had inadvertently omitted from the transcript portions of the trial court's reading of the jury note. A revised transcript reflected that the trial court had complied with its core responsibility to give counsel meaningful notice of the jury note. The hearing court credited the court reporter's testimony, and the reviewing court found no basis to disturb the credibility determination.
http://nycourts.gov/reporter/3dseries/2020/2020_02448.htm

People v Harris, 4/24/20 – **PLEA VACATED / NEW DEAL**
In full satisfaction of an eight-count indictment, the defendant pleaded guilty to attempted 3rd degree CPW and attempted 1st degree promoting prison contraband. On a prior appeal, the appellate court vacated the contraband charge due to a flawed allocution; remitted for further proceedings; and stated that the People could move to vacate the plea in its entirety. The People did so. The judgment was vacated, and the indictment was reinstated in its entirety. The defendant again pleaded guilty to attempted 3rd degree CPW, along with 5th

criminal possession of stolen property. The Fourth Department affirmed. The defendant's failure to admit the elements of the crimes did not invalidate his plea. The allocution showed that he understood the charges and made an intelligent decision.

FAMILY

FIRST DEPARTMENT

Matter of F. W. (Monroe W.), 4/23/20 – **ARTICLE 10 / EXPEDITED HEARING**
In a post-dispositional neglect proceeding, the father appealed from a Bronx County Family Court order, which denied his motion for an expedited hearing to determine whether the subject children, removed through a failed trial discharge, should be returned to him. The First Department reversed. When the matter arose, the AFC said that she was not ready to participate. The parties agreed to brief the expedited hearing issue. Two weeks later, the hearing commenced, but it took six months to complete. Meanwhile the children manifested negative effects from the family separation, and the father made repeated requests for earlier adjourn dates. Ultimately, the court ordered a conditional trial discharge. The issues raised on appeal fit the mootness exception. The government had an interest in ensuring a correct adjudication, even if that might lengthen the proceeding. Also to be weighed, though, was the significant emotional harm to the children due to separation from their parents. The lengthy delay was not needed to protect the children; it flowed from scheduling conflicts. In the post-dispositional phase, the father was entitled to the same due process safeguards as those afforded in underlying neglect proceedings. An expedited post-deprivation hearing should be measured in hours and days, not weeks and months. Bronx Defenders and NYU School of Law represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02385.htm

FOURTH DEPARTMENT

Matter of Grabowski v Smith – **CUSTODY / ALIENATION/ AFC ROLE**
The father and AFC appealed from an order of Onondaga County Family Court, which modified a prior order and granted the mother sole custody of the child. The Fourth Department affirmed. Although Family Court did not expressly find a change in circumstances, the appellate court independently reviewed the record and found a significant change. Acrimony made the prior joint custody arrangement unworkable; the father violated the prior order; and he sought to alienate the child from the mother. Custody to the mother served the child's interests. The AFC's endorsement of a result contrary to the child's wishes did not constitute effective assistance of counsel. The 10-year-old wanted no contact with the mother, but abiding by such wishes would sever the mother-child relationship, to the child's detriment. The AFC was justified in advocating a position contrary to the client's wishes, based on her age and the parental alienation.
http://nycourts.gov/reporter/3dseries/2020/2020_02400.htm