CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Britton, 4/26/18 – **SORA / ACQUITTAL BUT POINTS ASSESSED**
After a Kings County jury acquitted the defendant of rape and other felony charges and convicted him only of a misdemeanor, the SORA court assessed 25 points for the conduct on which the felony charges were based. In a memorandum decision, the Court of Appeals affirmed, holding that the acquittals did not foreclose the SORA court from finding, by clear and convincing evidence, that the defendant had engaged in the sexual acts charged. Judge Rivera dissented, concluding that, because the jury clearly had grave doubts about the complainant's narrative of events and there was no physical evidence, the subject proof was unreliable for SORA purposes. Given the severe consequences of SORA determinations, the People are subject to an exacting evidence standard, which is only "some slight measure" below the reasonable doubt standard. While there might be cases in which acquittals would not preclude adverse SORA assessments, this was not such a case, the dissenter opined. Appellate Advocates (Denise Corsi, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2018/2018_02830.htm

FIRST DEPARTMENT

People v Johnson, 4/26/18 – **DRUG FACTORY PRESUMPTION / ERRONEOUS INSTRUCTION**
The two defendants were present when parole officers entered a Manhattan apartment to arrest a third person for a parole violation. While in close proximity to the defendants, officers found, in plain view on a kitchen counter, 26 "twists" within a Ziploc bag containing a total of one gram of crack cocaine, as well as white residue on another kitchen counter. Suppression motions were denied, and both defendants were convicted of drug possession charges. On appeal, they argued that Supreme Court had erred in charging the jury with the "drug factory" presumption (Penal Law § 220.25 [2]). The First Department agreed. The quantity of drugs found did not demonstrate an intent to prepare drugs for sale, nor did the presence of the untested white powder justify the charge, where it was equally consistent with kitchen products. Given the absence of packaging or processing materials, the bag containing the twists was not, by itself, conclusive evidence that the drugs therein were packaged in the apartment. The Center for Appellate Litigation (Mark Zeno, of counsel) and the Office of the Appellate Defender (Joseph Nursey, of counsel) represented the appellants.
http://nycourts.gov/reporter/3dseries/2018/2018_02879.htm

People v Colson, 4/26/18 – **GRATUITOUS ADVERSE POSITION / NEW COUNSEL ASSIGNED**
Before his sentencing in New York County, the defendant made a written pro se motion to withdraw his guilty plea as involuntary. Defense counsel told the court that she did not think that there was a basis for the motion, thus taking a position adverse to the client and warranting the assignment of new counsel. After the denial of the withdrawal application, counsel made additional comments bearing on her plea advice to the client. Such statements were unnecessary, because the pro se motion did not complain about the attorney's conduct. Therefore, the appellate court remitted the matter for further proceedings on the defendant's motion to withdraw his plea, with new assigned counsel. The Center for Appellate Litigation (Megan Byrne, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02885.htm

SECOND DEPARTMENT

People v Hinds, 4/25/18 – **TRIAL JUDGE'S ROLE / PROTECT RECORD, DON'T MAKE IT**
A Queens County jury convicted the defendant of second-degree robbery and another crime. On appeal, he contended that he was deprived of a fair trial by Supreme Court's unwarranted, pervasive interference in the examination of witnesses. The Second Department agreed, observing that a trial judge's function is "to protect the record, not to make it." Frequent interjection and extended questioning by the trial judge presents significant risks. In the instant case, the trial tribunal asked 400 questions, developed facts damaging to the defense, and created the impression that the court was an advocate on behalf of the People. Appellate Advocates (Sean Murray, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02804.htm

People v James, 4/25/18 – ***CATU* VIOLATION / PLEA VACATED**
Before a defendant pleads guilty, the trial court must advise him of the direct consequences of the plea, including any period of post-release supervision. *See People v Catu*, 4 NY3d 242. In the instant Westchester County case, post-release supervision was not mentioned until the conclusion of the sentencing proceeding. Under such circumstances, the defendant's claim that his plea was not knowingly or voluntarily entered did not need to be preserved. The drug possession conviction was reversed, the plea vacated, and the matter remitted. Jason Bernheimer represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02805.htm

People v Rovinsky, 4/25/28 – **PRO SE MOTION NOT CONSIDERED / REMITTAL**
At a resentence proceeding in Suffolk County, the defendant made an oral pro se application to withdraw his plea of guilty to assault charges. The trial court did not grant or deny the motion, thus precluding appellate review. *See* CPL 470.15 (1); *People v LaFontaine*, 92 NY2d 470 (Appellate Division may not review issues decided in appellant's favor or not ruled on by trial court). The matter was held in abeyance and remitted for further proceedings on the defendant's motion to withdraw his plea, with new counsel assigned. Alfred Cicale represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02814.htm

People v Grubert, 4/25/18 – **ILLEGAL RESENTENCE / MODIFICATION**
The defendant was charged with first-degree sexual abuse and another crime and sentenced to an agreed-upon term. Thereafter, he was resentenced as a second child sexual assault felony offender. The question of whether such adjudication was proper was reviewable, despite a valid waiver of the right to appeal, since the predicate status related to the legality of the sentence. Sexual contact was not an element of the defendant's prior conviction of possessing a sexual performance by a child. Thus, that conviction did not come within the ambit of Penal Law § 70.07 (2) regarding predicate felonies. The subject adjudication was vacated, and the period of post-release supervision was reduced from 10 to six years. Appellate Advocates (Joshua Levine, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02816.htm

People v Baptiste, 4/25/18 **– GRAND JURY / INTEGRITY NOT IMPAIRED**
An indictment should be dismissed where the grand jury proceeding fails to conform to statutory requirements to such a degree that the integrity of the proceeding is impaired, and prejudice to the defendant may result. The exceptional remedy of dismissal is available only when the defense demonstrates egregious, prejudicial prosecutorial misconduct. That test was not met in the instant case. Pursuant to CPL 190.50, the defendant requested that the Kings County grand jury call three specified witnesses; the prosecutor proffered the proposed witnesses; and the grand jury decided to hear from only one of them. The proffer was proper, and the grand jury had discretion to not hear from two witnesses. A judgment of conviction of second-degree assault was upheld.
http://nycourts.gov/reporter/3dseries/2018/2018_02798.htm

THIRD DEPARTMENT

People v Holton, 4/26/18 **– WARRANTLESS BODY CAVITY SEARCH / REVERSAL**
The defendant was being held at the Broome County jail when correction officers conducted a "shakedown" of his housing unit. During a strip search of the defendant, an officer observed a white item protruding from his buttocks, did a manual cavity search, and found a packet of cocaine. Following denial of suppression, the defendant pleaded guilty to promoting prison contraband in the first degree. On appeal, he contended that the body cavity search violated his Fourth Amendment rights. The Third Department agreed. There was probable cause, but no showing of exigent circumstances, as needed to validate the warrantless intrusion. *See Bell v Wolfish*, 441 US 520; *People v Hall*, 10 NY3d 303. The motion to suppress was granted, and the indictment was dismissed. In a concurring opinion, Justice Clark opined that the standard to apply, when assessing the constitutionality of a warrantless manual body cavity search of a pretrial detainee in a correctional facility, was whether the search was reasonable. Two justices dissented. Philip Grommet represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02836.htm

People v Cubero, 4/26/18 **– CONSTITUTIONAL CHALLENGE / EXEC. LAW ARTICLE 20**
The defendant was a residence counselor at a Sullivan County group home for adults with mental illness. The New York State Justice Center for the Protection of People with Special Needs received a report that he had sexually abused a resident; a special prosecutor

obtained an indictment; and the defendant was convicted of several charges. On appeal, the defendant contended that the Executive Law statute authorizing the creation of the Justice Center violated the State Constitution, because it empowered a special prosecutor to usurp the constitutional duties of District Attorneys and the Attorney General. As the defendant failed to raise these arguments in County Court, the issue was unpreserved; and the Third Department majority discerned no authority permitting corrective action in the interest of justice. Justice Lynch dissented. Invoking a dissent by Judge Rivera in *People v Davidson*, 27 NY3d 1083, 1086-1096, he observed that, for the statute to pass constitutional muster, the special prosecutor may only appear upon the consent of the local District Attorney. In the dissenter's view, the Appellate Division had inherent authority to remit the matter to develop the record regarding such consent.
http://nycourts.gov/reporter/3dseries/2018/2018_02839.htm

FOURTH DEPARTMENT

People v Boykins, 4/27/18 – **DRUG CONVICTIONS / NO PERSISTENT SENTENCING**
For his drug conviction, the defendant was sentenced as a persistent felony offender (PFO). He challenged the sentence in a CPL 440.20 motion, which was denied by Yates County Court. The Fourth Department reversed, rendering the first Appellate Division decision to rule that, under the 2004 Drug Law Reform Act, a defendant convicted of a drug or marijuana crime cannot be sentenced as a PFO, even if the defendant has two prior felony convictions that would otherwise qualify him or her as a PFO. (The decision is discussed in NYSDA's April 30 News Picks. For past News Picks: www.nysda.org/?page=NewsPicks.) D.J. & J.A. Cirando represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02919.htm

People v Smouse, 4/27/18 **– REVERSE *BATSON* / MERITLESS GENDER ARGUMENT**
Supreme Court erroneously sustained the People's gender-based *Batson* application. The People failed to even establish a prima facie case of discrimination. The prosecutor contended that the defense used every peremptory challenge to strike women from the jury panel, but such assertion was belied by the record, which established that the defense had also used peremptory challenges to strike men. Since the defendant was convicted of a relatively minor offense—reckless endangerment in the second degree—and had already served his sentence, the Fourth Department dismissed the indictment, rather than granting a new trial. The Monroe County Public Defender (David Juergens, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02921.htm

People v Morales, 4/27/18 – **CONVICTION BASED ON UNINDICTED THEORY / REVERSAL**
There must be a reversal where a jury instruction on a particular count contains a theory not alleged in the indictment, and given the trial evidence, there is a possibility that the jury convicted the defendant based on the uncharged theory. That was the situation in the instant case involving a charge of harassment in the second degree. The defendant was not required to preserve the issue, because he had a non-waivable right to be tried only on the crimes charged. Moreover, the reviewing court found unduly severe the sentence imposed for the first-degree rape charge, citing these factors: (1) the incident occurred in the context of an

intimate relationship that lasted several months between two otherwise consenting adults who were close in age; (2) the defendant did not have an extensive criminal history; and (3) the sentence was double that of the plea offer. The term of 18 years' imprisonment was reduced to eight years, plus post-release supervision. The Ontario County Public Defender (Mary Davison, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02958.htm

People v Swift, 4/27/18 – **MANSLAUGHTER / DEATH FROM HYPOTHERMIA FORESEEABLE**
The trial proof indicated that the defendant ordered the codefendants to brutally attack the victim, that he took part in the assault, and that the assailants left the victim virtually naked in near- freezing conditions. Fatal hypothermia was a reasonably foreseeable result of such actions, not an intervening cause relieving the defendant of criminal responsibility. *See People v Davis*, 28 NY3d 294. Thus, the conviction of first-degree manslaughter was affirmed.
http://nycourts.gov/reporter/3dseries/2018/2018_02914.htm

People v Smith, 4/27/18 – **NO AUTHORITY TO ORDER SHOCK / PLEA VACATED**
An order directing "shock camp" was an element of the plea deal. But the sentencing court had no authority to so order, and the defendant was not admitted into the shock incarceration program. Thus, the plea of guilty to falsifying business records in the first degree was vacated, and the matter was remanded. The Monroe County Public Defender (Drew DuBrin, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03025.htm

Matter of Doorley v Castro, 4/27/18 – **DISCLOSURE / PROHIBITION GRANTED TO PEOPLE**
Monroe County Court ordered the District Attorney to permit defense counsel to inspect a video of an interview of a three-year-old child sexual assault victim. The DA commenced a CPLR Article 78 proceeding in the nature of prohibition. The Fourth Department held that County Court had acted in excess of its authority; since there had been no determination that the video contained exculpatory evidence, the defendant had no right to the disclosure ordered.
http://nycourts.gov/reporter/3dseries/2018/2018_02939.htm

SECOND CIRCUIT

United States v Bove, 4/26/18 – **HYDE AMENDMENT / NO ATTORNEY'S FEES**
The government prosecuted the defendant based on a novel theory regarding the Hobbs Act, involving the use of extortion to replace non-union workers with union workers. After acquittal of extortion and conspiracy charges, the defendant sought reasonable attorney's fees under the Hyde Amendment to the Equal Access to Justice Act (18 USC § 3006A Note). That provision allows a prevailing criminal defendant to be awarded a reasonable attorney's fee and other litigation expenses where the position of the United States was vexatious, frivolous or in bad faith. The District Court for the Western District denied the application. The Second Circuit held that an abuse of discretion standard applied and upheld the denial of the application. The government's arguable theory was not frivolous,

and the prosecution was not vexatious simply because a witness' testimony was arguably not credible. (Dkt #16-3848-cr, listed as *United States v Larson.*)
http://www.ca2.uscourts.gov/decisions

FAMILY

SECOND DEPARTMENT

Matter of Mendoza-Pautrat v Razdan, 4/25/18 – **CIVIL CONTEMPT / REVERSAL**
The mother sought to hold the father in contempt, pursuant to Judiciary Law § 753 (A) (3), for alleged violations of Queens County Family Court visitation orders. After a hearing, Family Court dismissed the claim, finding that any noncompliance was not willful. The Second Department reversed and remitted for the imposition of a fine as a sanction. The hearing record showed that the father had knowingly violated unequivocal judicial mandates and thereby prejudiced the mother. Willfulness was not required. Once the movant makes the required showing, the contemnor must refute the showing or offer evidence of a defense, and such showing was absent in the case at bar. Carol Kahn represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02790.htm

Matter of Sottilare v Fahner, 4/25/18 – **FRIVOLOUS CONDUCT / COUNSEL FEE SANCTION**
Suffolk County Family Court properly exercised its discretion in granting the mother's motion for attorney's fees, pursuant to 22 NYCRR 130-1.1, based on the father's frivolous conduct in bringing and prosecuting two identical proceedings, one in New York and the other in Florida. However, the sum of $10,995 was too high and was reduced to $4,000. http://nycourts.gov/reporter/3dseries/2018/2018_02792.htm

FOURTH DEPARTMENT

Matter of Schultz v Berke, 4/27/18 – **CUSTODY / REVERSAL**
Pursuant to a consent order, the mother and her parents had joint legal custody of the subject child, who lived with the grandparents, and the father had visitation. He petitioned for custody or increased visitation. Monroe County Family Court dismissed the custody claim based on a lack of changed circumstances, proceeded to trial on visitation only, and ordered a negligible increase in access for the father. That was error. Where a parent seeks to regain custody from a nonparent and no extraordinary circumstances have been found, the parent need not show a change in circumstances. Though the record established extraordinary circumstances, given the father's prolonged separation from the child, a hearing was still needed to determine the best interests of the child. As to the ungenerous visitation awarded to the father, Family Court's written decision was riddled with misstatements and incorrect assertions of fact that were central to the outcome. A hearing was needed to determine if a change in custody was warranted and, if not, if the father should be awarded expanded visitation. Michael Steinberg represented the father.
http://nycourts.gov/reporter/3dseries/2018/2018_02945.htm

Matter of Humbert v Humbert, 4/27/18 – **SUPPORT / FINDINGS OF FACT REQUIRED**
The father's child support obligation was set forth in a judgment of divorce. He filed a petition in Cattaraugus County Family Court seeking to terminate support. The Support Magistrate granted the petition in part, and the mother filed objections. Family Court reversed and vacated the challenged order and reinstated the terms of the divorce judgment. Since Family Court had failed to make the findings of fact required by Family Ct Act § 439 (e), the Fourth Department reversed and remitted for review of the mother's objections. Pieter Weinrieb represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03035.htm

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