CRIMINAL

FIRST DEPARTMENT

People v Swails, 5/23/19 – **SPEEDY TRIAL / UNPRESERVED**
The defendant appealed from judgments of NY County Supreme Court, convicting him of certain robbery charges, upon his pleas of guilty. His constitutional speedy trial claim was unpreserved; in a CPL 30.30 motion, defense counsel made only a perfunctory constitutional claim without making any of the arguments raised on appeal. The First Department declined to review the issue in the interest of justice, for a few reasons: most of the delay cited occurred after the defendant's motion and was not the subject of any further motion; the defendant abandoned his constitutional claim by pleading guilty without obtaining any ruling on that part of his motion; and his claim was unreviewable, because he did not provide minutes necessary to determine the reasons for certain delays.
http://nycourts.gov/reporter/3dseries/2019/2019_04031.htm

SECOND DEPARTMENT

People v Robertson, 5/22/19 – ***MOLINEUX* ERROR / BUT HARMLESS**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree robbery and other crimes. The Second Department affirmed, but observed that the trial court erred in letting the People recall the arresting officer to testify that he was informed that fingerprints taken from the defendant, Erick Robertson, matched a NYSID number in the state database for an Eric Robinson. The officer repeated the number to the jury. The People used such testimony to link the defendant to certificates of disposition showing that Eric Robinson had been twice convicted of criminal possession of stolen property—which the court allowed into evidence in its *Molineux* ruling. The officer's testimony was inadmissible hearsay, since the information source did not testify and thus was not subject to cross-examination. However, the error was harmless, since there was overwhelming evidence of guilt and no significant probability that the error contributed to the conviction.
http://nycourts.gov/reporter/3dseries/2019/2019_03998.htm

People v Juarez, 5/22/19 – **THIRD-PARTY PERCEIVED THREAT / ERROR BUT HARMLESS**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder. The Second Department upheld the conviction, but noted that the trial court should not have allowed the People to elicit certain testimony from an eyewitness. The eyewitness stated that, while testifying at trial, he felt intimidated by a courtroom spectator who allegedly was a member of the codefendant's gang. *See People v Vargas*, 154 AD3d 971 (evidence that third party threatened witness with respect to testifying at a criminal trial is admissible as to consciousness of guilt—where such evidence links defendant to threat). However, the error was harmless.
http://nycourts.gov/reporter/3dseries/2019/2019_03990.htm

People v Shelly, 5/22/19 – **DEFENDANT'S THREATS / UNAVAILABLE WITNESS**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree CPW. At a *Sirois* (92 AD2d 618) hearing, the People established that the subject witness, who had testified before the grand jury, disappeared to another state during trial and was unavailable to testify. There was testimony as to threats to three other witnesses and their families; and other proof revealed that the defendant and another inmate discussed plans to intimidate witnesses. Such evidence was sufficient to establish that the subject witness was unavailable due to threats at the initiative or acquiescence of the defendant.
http://nycourts.gov/reporter/3dseries/2019/2019_04002.htm

People v Rodriguez, 5/22/19 – **YO NOT CONSIDERED / SENTENCE VACATED**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2nd degree murder, upon his plea of guilty. The Second Department vacated the sentence and remitted. CPL 720.20 (1) requires a court to make a youthful offender determination in every case where the defendant is eligible, even where he fails to request it or agrees to forego it as part of a plea bargain. *See People v Rudolph*, 21 NY3d 497. Here, the defendant was eligible for YO status, yet Supreme Court did not consider whether he should be afforded such treatment. Appellate Advocates (Jonathan Garelick, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03999.htm

THIRD DEPARTMENT

People v Robertucci, 5/23/19 – **YO NOT CONSIDERED / SENTENCE VACATED**
The defendant appealed from a judgment of St. Lawrence County Supreme Court, convicting him of 1st degree rape. A plea agreement arose out of an offense that the defendant committed when he was age 17. At sentencing, County Court did not determine the defendant's eligibility for youthful offender status, and it imposed the agreed-upon term of imprisonment. Therefore, the Third Department vacated the sentence and remanded. The Rural Law Center of NY (Kristin Bluvas, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04057.htm

People v Diego, 5/23/19 – **SCI DEFECTIVE / REVERSED**
The defendant appealed from a judgment of Schenectady County Court, convicting him of 2nd degree CPW. The Third Department reversed. The defendant was initially charged in felony complaints with 2nd degree CPW (P.L. **§ 265.03 [3]**), 4th degree criminal possession of stolen property, and five drug-related counts, and was held for grand jury action. Pursuant to a plea agreement, he waived indictment and consented to prosecution by a SCI charging him with 2nd degree CPW (P.L. **265.03 [1] [b]**). The waiver of indictment and SCI were jurisdictionally defective, because they did not charge an offense for which the defendant was held for action of a grand jury. *See* CPL 195.20. Since the SCI did not contain an offense charged in the underlying felony complaints or a lesser included offense of the original charges, it was jurisdictionally defective. Martin McGuinness represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04054.htm

People v Jones, 5/23/19 – **SORA / IAC**
The defendant appealed from an order of Rensselaer County Court, which classified him as a risk level-three offender under SORA. In 2006, he pleaded guilty to attempted 1st degree rape and was sentenced as a second violent felony offender. Such prior conviction triggered the application of an automatic override that resulted in a *presumptive* level-three classification, yet defense counsel mistakenly believed that level three was *automatic*. Counsel's failure to seek a downward departure constituted ineffective assistance, Thus, the Third Department reversed the challenged order and remitted. Linda Johnson represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04060.htm

People v Briscoe, 5/23/19 – **SORA / MODIFICATION**
The defendant appealed from an order of Sullivan County Court, which classified him as a risk level-three sex offender and designated him a sexual predator. He had pleaded guilty to two counts of 3rd degree rape. The RAI presumptively classified him as level three. Following a hearing, County Court adjudicated the defendant as level three and further designated him as a sexual predator. In such designation, the SORA court erred, because the conviction did not meet the statutory criteria. Thus, the Third Department modified the order. Adam Parisi represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04061.htm

FAMILY

SECOND DEPARTMENT

Matter of Lew v Sobel, 5/23/19 – **CHILD SUPPORT / LAW OF THE CASE**
The father appealed from an order of Nassau County Supreme Court, which denied his motion to terminate or decrease child support. The Second Department granted modification and remitted. One of the children was under age 21, so support was properly not terminated. However, the other child had turned 21, and the application for a downward modification should have been granted. A prior order provided that the father was not required to pay support after the older child turned 21 and would pay reduced support under the CSSA until the younger child's 21st birthday. Such order was law of the case, in the absence of any changed circumstances. A judge may not review or overrule an order of another judge of coordinate jurisdiction in the same proceeding. Jennifer Goody represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03972.htm

THIRD DEPARTMENT

Nilesha RR. (Loretta RR.), 5/23/19 – **STEPMOTHER / NOT FOSTER PARENTS**
In an Article 10 proceeding, Broome County Family Court dismissed the petitioners' Article 6 application for custody of their former foster child. The Third Department affirmed. The respondents were the biological parents of the subject child. At birth, the

child lived with the father and stepmother. When she was three months old, she was removed and placed with the petitioners, where she remained until her discharge to the father's care. After he died, the child was cared for by the stepmother. On appeal, the central issue was whether the decision to place the child with DSS—which resulted in her care by the stepmother—was proper. It was. Family Court carefully analyzed the suitability of the stepmother, who had a strong bond to the child and practiced Islam, as the father had. The court acknowledged the loving relationship between the foster parents and the child but observed that another change could cause trauma. In assessing best interests, consideration of the age, race, and religions of the foster parents and the stepmother was proper.
http://nycourts.gov/reporter/3dseries/2019/2019_04063.htm

OPINIONS

Advisory Committee on Judicial Ethics

Opinion 17-161 – ADA THEN JUDGE / REEVALUATION OF CASE
A judge who had prosecuted a case in which the DA's office now sought to reevaluate the conviction could, but was not required to, meet with defense attorneys seeking to vacate that conviction. The fact that the judge has met with the prosecutors reinvestigating the case did not change the analysis. A judge who previously represented the defendant in a criminal case may voluntarily give a statement or affidavit requested by an ADA, provided that no privileged information is disclosed. The judge may meet with a defender organization about the case with the same limitations. The decision to be interviewed by counsel for any parties to a proceeding prior to an appearance was personal and not ethical in nature. There was no ethical requirement for the judge to submit to an interview with a defender organization about the case just because he or she had spoken with the prosecution about it.
https://www.nycourts.gov/legacyhtm/ip/judicialethics/opinions/17-161.htm

Opinion 18-170 – REPORTING DA / FAILURE TO DISCLOSE
The judge had knowledge that a prosecutor failed to make disclosures to the defense about financial and other alleged connections between a local nonprofit organization and the prosecution's frequent expert witness. The judge had to determine whether there was a substantial likelihood that the prosecutor's actions constituted a substantial violation of the Rules of Professional Conduct. If so, the judge was required to take appropriate action, but could wait until the proceeding ended to do so. Appropriate action might include raising the issue on the record; counseling or warning the prosecutor; reporting the ADA to a superior in the DA's office; or contacting the grievance committee (NYLJ, 5/10/19).

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