CRIMINAL

FIRST DEPARTMENT

DECISION OF THE WEEK

Matter of Figueroa v Fabrizio, 5/28/19 – **DNA / YOs / EXPUNGEMENT**

In 2015, the then 16-year-old petitioner was arrested on a weapons charge. After he signed a consent form, a buccal swab was obtained from him. Later indicted for CPW 2, the petitioner agreed to a youthful offender disposition before a decision on his suppression motion was rendered. Subsequently, he sought to have his DNA and related records expunged from NYC's local DNA databank, operated by the Office of the Chief Medical Examiner. Supreme Court denied the motion, finding no authority to grant such relief under Executive Law 49-B or CPL Article 720. The petitioner initiated a CPLR Article 78 proceeding in the nature of mandamus, and the First Department granted the petition. In a matter of first impression, the appellate court ruled that the NYC DNA databank is subject to state law, since the broad definition of "forensic laboratory" in the Executive Law includes DNA laboratories operated by local governments. By establishing a state DNA identification index, the state created a comprehensive scheme to regulate the field. In another matter of first impression, the reviewing court held that the trial court did have the authority to expunge, where the DNA was collected during an investigation that culminated in a YO determination. The motion court erred in concluding that a YO finding did not meet any Executive Law § 995-c (9) (b) criteria for discretionary expungement, including where a judgment was vacated. The instant conviction was vacated and replaced by a YO determination. On remand, the lower court was to consider the petitioner's role in the crime; the circumstances as to consent to DNA sampling, including the absence of a parent at the time of consent; and his claim of developmental delays. The Legal Aid Society of NYC (Terri Rosenblatt and Leonid Sandler, of counsel) represented the appellant. *[A 5/29/19 NYLJ article quoted Rosenblatt as stating: "The decision, while a success for our client, emphasizes the need for city and state lawmakers to make clear that the city cannot maintain its unregulated shadow database." According to the article, Democrats have introduced a bill that would "affirm a single, statewide DNA index and require that local databanks expunge their records."]*

http://nycourts.gov/reporter/3dseries/2019/2019_04120.htm

People v Coulibaly, 5/30/19 – **SPEEDY TRIAL / INEFFECTIVE COUNSEL**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree assault. The First Department reversed. In his CPL 30.30 (2) motion for the defendant's release, counsel mistakenly calculated 99 days of includable time, instead of the correct figure of 103 days. The People conceded the 99 days, and the court released the defendant. When counsel moved to dismiss the indictment under CPL 30.30 (1), he repeated the chargeable time error, and the court found only 181 days of time and denied the motion. Had counsel correctly calculated the period, the relevant figure would have totaled 185 days, and the motion would have been meritorious. Rather than ordering further speedy trial proceedings with new counsel, the appellate court dismissed the indictment, since that would have been the result, but for the ineffective assistance of counsel. The

Office of the Appellate Defender (Eunice Lee and Brenton Culpepper, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04289.htm

SECOND DEPARTMENT

People v Pelige, 5/29/19 – **SENTENCE / INSUFFICIENT INFO**
Upon the defendant's appeal from a sentence of Kings County Supreme Court, the Second Department vacated the sentence. The record did not reflect that the defendant validly waived his right to appeal. Given his inexperience with the criminal justice system, the colloquy at the plea allocution was insufficient to advise him of the nature of the right to appeal. There was no indication that the defendant understood the distinction between the right to appeal and the other trial rights forfeited by a plea of guilty. He signed a written waiver, but required a Sinhala interpreter and the record did not show that the waiver was translated. The defendant agreed to plead guilty to attempted 2nd degree murder in exchange for 15 years, followed by post-release supervision. However, there were some problems regarding the sentence. For one thing, the trial court did not inquire about the defendant's mental status at the time of the plea and sentence, even though he had been found unfit to proceed prior to the plea proceeding and then found fit after treatment. For another thing, the sentencing court lacked sufficient information regarding the sentence, since the Department of Probation did not interview the defendant when it could not secure an interpreter. The appellate court invoked *People v Farrar*, 52 NY2d 302 (court must exercise discretion at sentencing, even where sentence was negotiated at plea; must be free to impose lesser penalty, if warranted by facts available upon sentencing; but court should hear People's request to withdraw consent to plea in response to less severe sanction). The matter was remitted for resentencing upon submission of a new PSR, which must include an interview with the defendant for which an interpreter was provided. Appellate Advocates (Skip Laisure, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04204.htm

SECOND CIRCUIT

U.S. v Pauling, 5/23/19 – **DRUG WEIGHT / INFERENCE v SPECULATION**
Following his conviction for conspiracy to distribute at least 100 grams of heroin, the defendant moved for acquittal. District Court – SDNY granted acquittal on the conspiracy charge and entered a verdict of guilty to a lesser included offense. The Government appealed. The Second Circuit affirmed and remanded for sentencing, holding that the evidence was insufficient to find that the conspiracy involved 100 grams of heroin. The parties agreed that the government proved that 89 grams were attributable to the conspiracy, but disagreed as to the additional 11 grams. To prove the quantity of drugs, the Government must introduce specific evidence of quantity, or evidence from which quantity can through inference be logically approximated or extrapolated. Ordinarily, there must be evidence of known quantities, which are sufficiently representative of the unknown quantities and from which an approximation of the unknown quantities can logically be derived. The Government relied on a request for "same thing as last time" when an order for 14 grams was placed, as well as a reference to "a nice amount," in the context of a

history of transactions. Such proof was insufficient. The case tested the boundary between permissible inference and impermissible speculation. Only surmise and guesswork could have led to the jury's verdict as to the 11 grams.
http://www.ca2.uscourts.gov/decisions/isysquery/7dd4c243-759d-41cf-ba26-4762eafd04cf/4/doc/17-2539_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/7dd4c243-759d-41cf-ba26-4762eafd04cf/4/hilite/

Washington v Barr, 5/30/19 – **MARIJUANA / SCHEDULE I LISTING CHALLENGED**
The plaintiffs appealed from the judgment of District Court – SDNY, dismissing their complaint for failure to exhaust administrative review. They challenged the inclusion of marijuana on Schedule I of the federal Controlled Substances Act (CSA). This was the latest in a series of cases that stretched back decades. The current case was unusual, in that the plaintiffs included individuals who plausibly alleged that the CSA schedule posed a serious threat to their health. The crux of the case was that a reexamination of marijuana's scheduling under the CSA was required, due to new facts as to accepted treatment regimens and the federal government's involvement in relevant research. The reviewing court noted the transformative effects that marijuana purportedly had on the lives of the plaintiffs who said their lives were extended, seizures were cured, and pain was manageable. The plaintiffs had failed to exhaust their administrative remedies, as they should have. However, in light of the DEA's history of dilatory action, the reviewing court did not dismiss the case, but rather held it in abeyance and retained jurisdiction to take appropriate action if the DEA did not act with dispatch in any further administrative proceedings. One judge dissented.
http://www.ca2.uscourts.gov/decisions/isysquery/35840428-958b-428b-b278-0503bd4243a0/1/doc/18-859_complete_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/35840428-958b-428b-b278-0503bd4243a0/1/hilite/

FAMILY

FIRST DEPARTMENT

Rolando A.G. v Marisol R.M., 5/30/19 – ***ANDERS*** **/ MOOTNESS/ DISMISSAL**
The father appealed from an appeal an order of Bronx County Family Court, which denied his application to suspend the mother's overnight and unsupervised visits with the subject child. The First Department dismissed the appeal as moot and granted an application of assigned counsel to withdraw as counsel. There were no nonfrivolous issues. The interim order was not appealable as of right, since it was issued in an Article 6, not 10, proceeding. The father did not seek leave to appeal. Furthermore, the challenged order was moot, since it was superseded by a subsequent order granting the mother overnight visits, and the father did not allege any further incidents of inadequate care of the child.
http://nycourts.gov/reporter/3dseries/2019/2019_04268.htm

Matter of Shelley H. v Melvin Jermaine R., 5/30/19 – **CONTEMPT / DENIED**
The mother appealed from an order of NY County Family Court, which denied her motion to hold the father in contempt for violating a temporary order of visitation. The First Department affirmed, albeit for different reasons. The father's counsel acknowledged that his client was aware of the order, yet failed to follow its clear directive, that he drop off the child at a designated time and place for visitation. Although the record showed that the father disobeyed the temporary order, the court denied the contempt motion on the basis that the father acted "per the instructions of counsel." This was improper. But the record contained a valid reason for not finding contempt: the mother's right to visitation time was not prejudiced by the wrongful conduct; the parties entered into a stipulation, which was so-ordered, providing her with "make up time." In addition, phone records showed that the mother's claim, that the father violated a directive regarding phone contact, was unfounded.
http://nycourts.gov/reporter/3dseries/2019/2019_04278.htm

SECOND DEPARTMENT

Jennifer P. (Walter A.-L.), 5/29/19 – **BOYFRIEND / LEGALLY RESPONSIBLE**
The ACS appealed from an order of Kings County Family Court, which granted the respondent's motion to dismiss abuse petitions. The Second Department reversed and remitted. The petitions alleged that the respondent sexually abused child one and derivatively abused child two. Testimony established that the respondent was the boyfriend of child one's mother and the father of child two. During the second year of the adults' relationship, he lived in the household as a father figure; engaged in family activities with the mother and children; and at times was the only adult in the home with child one. When arrested, the respondent gave police the family's apartment address, where he received mail. Further, the mother testified that she and the respondent acted as parents of the children. After the ACS rested, the respondent moved to dismiss, on the ground that ACS failed to establish that he was a person legally responsible for the children. The grant of such motion was error. ACS established a prima facie case that the respondent was a person legally responsible. Upon remittal, Family Court was to complete the fact-finding hearing and determine the petitions on the merits.
http://nycourts.gov/reporter/3dseries/2019/2019_04171.htm

THIRD DEPARTMENT

Matter of Sadie J. v Schenectady Co. DSS, 5/30/19 – ***ANDERS*** / **MOOTNESS / DISMISSAL**
The mother appealed from an order of Schenectady County Family Court, which granted the respondent's motion to dismiss her petition. In a previous order, Family Court terminated her parental rights on the ground of abandonment, and she did not appeal from that order. Four years later, the mother commenced the instant proceeding, pursuant to Family Ct Act § 635, seeking to restore her parental rights. Appellate counsel sought to be relieved of his assignment on the basis that there were no nonfrivolous issues on appeal. The AFC advised the court that the children's adoption has been finalized. Thus, the appeal was moot, and no exception to the mootness doctrine applied. The appeal had to be dismissed. There was no need to address counsel's application to be relieved.
http://nycourts.gov/reporter/3dseries/2019/2019_04240.htm

Matter of Peter LL. v Charles KK., 5/30/19 – **ONE CHILD / THREE APPEALS**
Jillian KK. appealed from an order of Saratoga County Family Court, which granted the petitioner's application for custody of the subject child. In 2000, the mother had married Charles KK., and the child was born during the marriage, but the mother and husband had lived apart since 2003. For a decade, the mother was involved in an intimate relationship with the petitioner. In 2015, following the petitioner's assault conviction stemming from a domestic incident, the mother obtained an order of protection against him, and he moved to California. When the mother died in 2018, the child lived with Jillian KK., her older half-sister. Without a hearing, Family Court dismissed the sister's and the husband's custody petitions, granted the petitioner's custody petition, and issued an order of filiation declaring him to be the father. In addition to the petitioner, the husband and sister appealed, but had not yet perfected their appeals. The Third Department stated that, since the three appeals had to be decided together, a decision was withheld. An expedited briefing schedule was set forth.
http://nycourts.gov/reporter/3dseries/2019/2019_04260.htm

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