CRIMINAL

U.S. SUPREME COURT

DECISION OF THE WEEK

Collins v Virginia, 5/29/18 – **VEHICLE SEARCH / CURTILAGE / 4TH AMEND. VIOLATION**
Two Virginia police officers searched for a motorcyclist who had eluded the police by speeding away following traffic infractions. The officers went to the motorcyclist's home and, in his driveway under a tarp, they found his distinctive motorcycle. The defendant was convicted of receiving stolen property, and ultimately the Virginia Supreme Court affirmed. In a decision authored by Justice Sotomayor, the U.S. Supreme Court ruled 6-1 that the automobile exception did not allow an officer to enter a home or its curtilage without a warrant to search a vehicle. The automobile exception was based on the "ready mobility" of vehicles and the "pervasive regulation of vehicles capable of traveling on the public highways." Such justifications were not implicated by a vehicle parked at a home or its curtilage. The "sanctity" of such areas was protected by the Fourth Amendment. In a separate opinion, Justice Thomas agreed with the majority's conclusions, but expressed "serious doubts" about the Court's authority to require states to follow the exclusionary rule. Justice Alito was a lone dissenter.
https://www.supremecourt.gov/opinions/17pdf/16-1027_7lio.pdf

FIRST DEPARTMENT

People v Herbin, 5/29/18 – **PRO SE INQUIRY INADEQUATE / REVERSAL**
The defendant appealed from a New York County judgment of conviction of criminal sale of a controlled substance in the third degree, arguing that he had not validly waived the right to counsel. The First Department agreed, reversed, and remanded for a new trial. The trial court had failed to conduct a searching inquiry to communicate the two requisite elements regarding self-representation: (1) the risks inherent in proceeding pro se and (2) the importance of a lawyer in the adversarial system. Such inquiry is still required where, as in the instant case, a defendant has expressed a strong desire to proceed pro se and has shown that he might be relatively capable of doing so. The trial court had merely warned the defendant that self-representation was a "big mistake" and that the court had seen many pro se defendants convicted after trial. The fact that the defendant had served his sentence did not warrant dismissal of the indictment. The Center for Appellate Litigation (Carl Kaplan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03811.htm

People v Cabassa, 5/29/18 – **THIRD-DEGREE ROBBERY / LESSER INCLUDED OFFENSE**
In this New York County case, there was a reasonable view of the evidence supporting the defendant's request for submission of third-degree robbery as a lesser included offense of the second-degree robbery charge. The appropriate remedy for such an error would normally have been a new trial. However, the People had conceded that, if the First

Department found error, the conviction should be reduced. Thus, a new trial was unnecessary. The matter was remanded for resentencing. The Center for Appellate Litigation (Jan Hoth and Andrei Popovici, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03810.htm

People v Deyvone C., 5/29/18 – **YO STATUS GRANTED / LIMITED ROLE IN CRIME**
Upon a plea of guilty, the defendant was convicted in New York County of second-degree robbery. The First Department modified the judgment as a matter of discretion in the interest of justice, adjudicating the defendant as a youthful offender and reducing the sentence from 3½ years to 1 to 3½ years. The reviewing court cited: (1) the defendant's limited role in the crime, in which his older cousin displayed what appeared to be a firearm; (2) the defendant's lack of a criminal history; and (3) the recommendation of YO treatment by both the prosecutor and the presentence report. New York County Defender Services (Jessica Horani, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03797.htm

People v Lopez, 5/31/18 – ***O'RAMA* INVOKED / NO MODE OF PROCEEDING ERROR**
In a New York County trial on criminally negligent homicide, during a readback of certain testimony given through an interpreter, a juror interjected, "The Spanish was not put in the transcript, correct?" The court immediately replied, "Correct." Defense counsel objected on *O'Rama* (*People v O'Rama*, 78 NY2d 270) grounds, requested the declaration of a mistrial, and declined the court's offer to deliver an additional instruction. The First Department held that there was no mode of proceedings error. *See generally People v Nealon*, 26 NY3d 152. The defendant had notice of the unambiguous question; the matter was plainly ministerial and non-substantive; the court gave the only suitable answer; and defense counsel requested inappropriate relief. (Today the Court of Appeals will hear oral arguments in *People v Morrison*, regarding whether certain jury notes were merely ministerial, so that *O'Rama* protocols did not apply.*)*
http://nycourts.gov/reporter/3dseries/2018/2018_03905.htm

SECOND DEPARTMENT

People v Charles, 5/30/18 **– SORA APPEAL RIGHTS / AFFIRMANCE**
The defendant, a level-three sex offender, appealed from an order of Kings County Supreme Court that denied his petition to modify his SORA risk level. On appeal, the Second Department observed that Correction Law § 168-o (2) did not provide a sex offender with an appeal as of right from an order denying a modification petition. However, an aggrieved defendant was entitled to appeal pursuant to CPLR 5701 (a) (2) (v) (appeal available from any Supreme or County Court order resolving motion on notice and affecting substantial right). The Correction Law did not curtail such Appellate Division powers, especially where serious due process concerns were implicated. However, the instant defendant failed to establish facts warranting a modification. The reviewing court acknowledged that the defendant was in his 70s, but observed that he had committed the relevant sexual offenses when in his 50s. His poor physical health had not been shown to render him less likely to commit a future sex crime. It was commendable that he had not committed additional crimes and had complied with registration requirements, but that did

not outweigh the serious nature of the underlying sex crimes. Finally, the defendant had never completed treatment or accepted responsibility for his offenses. Appellate Advocates (Jenin Younes, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03864.htm

People v Giddens, 5/30/18 – **STATEMENT NOT VOLUNTARY / ERROR HARMLESS**
The defendant appealed from robbery, drug, and weapon possession convictions. The Second Department agreed that Rockland County Supreme Court should have suppressed his videotaped interrogation. The People did not prove beyond a reasonable doubt that the statement was voluntary, rather than the product of psychological coercion. The detectives made repeated threats that they would tell the codefendant that the defendant had incriminated him. However, the constitutional error was found harmless beyond a reasonable doubt.
http://nycourts.gov/reporter/3dseries/2018/2018_03855.htm

THIRD DEPARTMENT

People v Ellis, 5/31/18 **– FAILURE TO REGISTER AS SEX OFFENDER / REVERSAL**
The defendant was charged in Essex County with the crime of failure to register as a sex offender, based on not reporting his Facebook account on the SORA registration form. Arguing that he had complied with statutory requirements by disclosing his email address and screen names, the defendant moved to dismiss the indictment. The motion was denied, and the defendant pleaded guilty. The Third Department found merit in his contention that the indictment was jurisdictionally defective—a contention that was not foreclosed by the guilty plea. The salient issue was whether a Facebook account constituted an "Internet identifier," that is, a "designation used for the purposes of…Internet communication." The reviewing court concluded that an "Internet identifier" is not a social networking website or account, but instead the manner in which a person identifies himself or herself when accessing such an account. Noreen McCarthy represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03873.htm

People v Lockrow, 5/31/18 – **SORA DECISION NOT FILED / APPEAL DISMISSED**
The defendant appealed from a decision of Rensselaer County Court classifying him as a level-three sex offender with a sexually violent offender designation. The Third Department dismissed the appeal. The standard SORA form signed by County Court did not contain the "so ordered" language required for an appealable paper. Further, a superseding SORA order was not entered and filed in the office of the clerk of the court, and no notice of appeal was filed therefrom.
http://nycourts.gov/reporter/3dseries/2018/2018_03881.htm

People v Osborne, 5/31/18 – **QUARTER MILLION IN RESTITUTION / FALLEN PASTOR**
The defendant, a Baptist church pastor, pleaded guilty in Columbia County to third-degree grand larceny. Following a restitution hearing, he was ordered to pay $256,488. On appeal, he challenged such amount. The Third Department affirmed. Because there were no records regarding the church's finances during the defendant's 18-year tenure, an accounting firm conducted an audit. It revealed a $40,000 loan; cash withdrawals and

checks payable to the defendant and his wife with no receipts to substantiate a church purpose for such funds; and credit card payments for unauthorized personal expenses, including a car for the pastor's wife. The appellate court noted that the defendant could apply at any time for resentencing upon the ground that he was unable to pay the restitution amount. *See* CPL 420.10 (5).
http://nycourts.gov/reporter/3dseries/2018/2018_03876.htm

FAMILY

FIRST DEPARTMENT

Matter of Elijah Manuel V. (Ismanuel V.), 5/29/18 – **ADOPTION / CONSENT NOT REQUIRED**
Bronx County Family Court found that the respondent's consent to the child's adoption was not required under Domestic Relations Law § 111 (1) (d) and in the alternative, that he had abandoned the subject child. The First Department affirmed. The father challenged the constitutionality of the statutory financial support requirement, contending that it violated equal protection guarantees by imposing on unwed fathers, but not unwed mothers, a threshold requirement to make payments toward support of the child. But the U.S. Supreme Court has upheld such gender-based distinctions. *See Lehr v Robertson*, 463 US 248. The father had failed to maintain substantial and continuing contact after his son entered foster care; and he had taken no steps to manifest or establish his parental responsibility. His incarceration alone was no excuse for the failure to maintain contact or pay support. For those reasons, his consent was not required. Further, there was no basis to disturb the alternative finding of abandonment. The father did not rebut testimony that, for at least six months before the petition was filed, he did not visit the child or communicate with him or the agency.
http://nycourts.gov/reporter/3dseries/2018/2018_03804.htm

Matter of Ezequiel L.-V. v Inez M., 5/31/18 – **PATERNITY PETITION / REINSTATED**
Without a hearing, New York County Family Court dismissed a paternity petition by the respondent mother's ex-husband, based on the existence of a valid acknowledgment of paternity executed by her and another man. However, such acknowledgment did not bar a claim of paternity by petitioner. Moreover, the petition was not necessarily doomed based on the judgment of divorce, which held that the petitioner abandoned the mother. The judgment did not state when the petitioner constructively abandoned her by not having sexual relations with her for a year, nor whether there was an attempt at reconciliation during the period of abandonment. Thus, the petitioner was entitled to a hearing. Larry Bachner represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03895.htm

SECOND DEPARTMENT

Matter of Stylianos T. v Tarah B., 5/30/18 **– UCCJEA / HEARING ON HOME STATE**
The petitioner, the putative father of a child born in 2013, filed paternity, custody, and habeas corpus petitions in 2017. The mother reported that she had moved to South Carolina with the child more than six months before the petitions were filed. On such basis, Orange County Family Court dismissed the applications. That was error. Under the UCCJEA, the court was required to hold a hearing regarding whether New York or South Carolina was the child's home state, since there were disputed issues of fact as to when the mother moved. Thus, the matter was remitted for a hearing and a new determination on the issue of jurisdiction and thereafter on the merits, if warranted. Evan Zucker represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03846.htm

Matter of Matsen v Matsen, 5/30/18 – **RELOCATION DENIED / REVERSAL**
The mother appealed from an order of Dutchess County Family Court that denied her application to relocate to Connecticut and awarded the father sole custody of the parties' two young children. The Second Department modified, granting the mother custody and permission to relocate. Contrary to the trial court's conclusion, the mother's testimony did not show that her sole motivation for the relocation was to ease her fiancé's commute. Instead, she also considered the undisputed enhanced educational and social opportunities for the children in Connecticut; her fiancé's inability to move his businesses; and the feasibility of frequent access to the father following relocation. The father's work schedule would give him the opportunity to participate in the children's activities; and the mother's reduced hours would enable her to facilitate liberal physical access, which would be supplemented by Skype calls. Kelley Enderley represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03836.htm

Matter of Renee P.-F. v Frank G., 5/30/18 – **DISPUTE BETWEEN FATHERS / AFFIRMANCE**
Domestic partners Joseph and Frank asked Joseph's sister Renee to act as a surrogate. She agreed, was impregnated with Frank's sperm, and gave birth to fraternal twins. During the first several years of the children's lives, the men equally shared parenting duties, but Joseph did not adopt the children. Renee also often saw the children. After the partners separated, Frank refused to allow Joseph or Renee to see the children. Without notice, he moved to Florida with them. All three adults sought custody or guardianship of the children. A previous appeal regarding the instant parties (142 AD3d 928) established that Joseph had standing to seek custody, pursuant to *Matter of Brook S.B. v Elizabeth A.C.C.*, 28 NY3d 1. In the instant order, Orange County Family Court awarded custody to Joseph, and the Second Department affirmed. Frank's refusal to allow Joseph to have any contact with the children, and his surprise move to Florida, constituted willful interference with the children's relationship with Joseph. Frank's allegations of risky sexual behavior by Joseph were not supported by credible evidence, and thus Family Court properly discounted his excuse for his conduct. Awards of attorney's fees to Joseph and Renee were sustained based on the parties' respective financial situation and the circumstances of the case.
http://nycourts.gov/reporter/3dseries/2018/2018_03839.htm

Matter of Root v Root, 5/30/18 – **CONSTRUCTIVE EMANCIPATION / NOT PROVEN**

The parties had two children, and the mother was the custodial parent. Westchester County Family Court found that the parties' son was constructively emancipated, and thus the father was not entitled to an offset against his child support obligation for the amount he was expending to support the emancipated child. The father appealed, and the Second Department reversed. A child may be deemed constructively emancipated if, without cause, he or she withdraws from parental supervision and control. The right to demand support is forfeited by a child of employable age and in full possession of his faculties who voluntarily or without cause abandons his home, against the will of his parents and to avoid parental control. The mother failed to present the requisite proof. The son had moved from one parent's home to the other's, but was neither self-supporting nor free from parental control. The matter was remitted for recalculation of support. Daniel Pagano represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03843.htm

Matter of Young v Young, 5/30/18 – **AFC FEES / FATHER MUST SHARE COST**
Westchester County Family Court properly ordered the father to pay $10,556, as half of the counsel fees awarded to the attorney for the child. Courts are authorized to direct a parent who has sufficient financial means to pay some or all such fees. *See Matter of Plovnick v Klinger*, 10 AD3d 84. The Second Department affirmed. The mere fact that the AFC adopted positions adverse to the father did not show that the attorney was biased against him. In custody proceedings, the role of the AFC is to zealously advocate the child's position, not those of the parents.
http://nycourts.gov/reporter/3dseries/2018/2018_03850.htm

CYNTHIA FEATHERS, Esq.
Director of Quality Enhancement
For Appellate and Post-Conviction Representation
NY State Office of Indigent Legal Services
80 S. Swan St., Suite 1147
Albany, NY 12210
Office: (518) 473-2383
Cell: (518) 949-6131