CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Smith, 6/6/19 – **MISSING WITNESS CHARGE / REVERSAL**

The defendant appealed from a judgment of conviction of attempted 2nd degree murder and other crimes. The Fourth Department affirmed, and a dissenting justice granted leave. A unanimous Court of Appeals ordered a new trial, because of reversible error in a ruling on a missing witness charge. As explained in *People v Gonzalez*, 68 NY2d 424, the missing witness instruction allows a jury to draw an unfavorable inference, based on a party's failure to call a witness who would normally be expected to support that party's version of events. As established in *Gonzalez,* initially, the proponent must demonstrate that: (1) there is an uncalled witness believed to be knowledgeable about a material issue in the case; (2) such witness can be expected to testify favorably to the opposing party; and (3) such party has failed to call the witness to testify. The party opposing the charge can defeat the initial showing by accounting for the witness's absence or demonstrating that the charge would be inappropriate, for example, because the testimony would be cumulative. The Court of Appeals has never required the proponent to negate cumulativeness to meet the prima facie burden; Appellate Division decisions placing that burden on the proponent have misapplied precedent. After all, the proponent of the missing witness charge typically lacks the information necessary to know what the uncalled witness would have said and, thus, whether the testimony would have been cumulative. The instant defendant met his initial burden, but the People failed to rebut the defense showing. Their conclusory argument, that the testimony would be cumulative, was insufficient and unsupported by the record. The error was not harmless because the evidence against the defendant was not overwhelming. The Monroe County Public Defender (Drew DuBrin, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2019/2019_04447.htm

FIRST DEPARTMENT

People v Folk, 6/4/19 – **GRAND JURY TESTIMONY / ERROR**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 1st degree assault and two counts of 2nd degree CPW. The First Department modified, vacating the assault conviction and one of the CPW convictions and remanding for a new trial on those counts. The People conceded that the trial court erred in admitting the grand jury testimony of a witness who indicated that the defendant fired an errant shot that struck a bystander. The People acknowledged that the testimony was not admissible under the "past recollection recorded" hearsay exception, because the witness did not testify at trial that the grand jury testimony correctly represented his knowledge and recollection when made. Further, the testimony was not admissible for impeachment purposes, because the witness's trial testimony—that he could not remember the relevant events—did not affirmatively damage the case of the party calling him. The error was not harmless with regard to the convictions for assault and CPW with intent to use the weapon unlawfully against another. The disputed grand jury testimony—read into the record and relied on by

the prosecutor in summation—effectively constituted the only eyewitness testimony indicating that the defendant fired the weapon, or that he displayed it or used it to threaten the opposing group. However, the error was harmless as to the conviction of CPW based on the defendant possessing a loaded firearm outside his home or place of business. The Office of the Appellate Defender (Elizabeth Moulton, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04321.htm

THIRD DEPARTMENT

People v Eggleston, 6/6/19 – **WAIVER OF INDICTMENT / INVALID**
The defendant appealed from a judgment of Ulster County Court, convicting him of 2nd degree CPW. The Third Department reversed and dismissed the SCI, finding that the waiver of indictment and SCI were jurisdictionally defective. The waiver of indictment, attempted after the grand jury actually indicted, was invalid under CPL 195.10 (2) (b), which requires such a waiver to be made before the filing of an indictment. Further, the SCI was jurisdictionally defective, because the crime named was not a lesser included offense of the original charge of CPW 3. Thomas Garner represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04497.htm

People v Cutler, 6/6/19 – **SENTENCE IN ABSENTIA / VACATUR**
The defendant appealed from a judgment of Columbia County Court, convicting him of 4th degree larceny. The Third Department vacated the sentence and remitted for resentencing, finding that the lower court abused its discretion in sentencing the defendant in absentia. County Court did not conduct the requisite inquiry into the reason for the defendant's absence and consider whether he could be located within a reasonable period of time. Instead, the sentencing court rejected defense counsel's request for an adjournment. The day after sentencing, counsel learned that the defendant had been absent because of an accidental drug overdose that led to his hospitalization. The Columbia County Public Defender (Jessica Howser, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04504.htm

People v Colon, 6/6/19 – ***RUDOLPH* ERROR / VACATUR**
The defendant appealed from a judgment of Albany County Supreme Court, which convicted him of attempted 1st degree robbery (an armed felony). The Third Department vacated the sentence and remitted. The record did not demonstrate that Supreme Court reached a determination as to whether the defendant was eligible for youthful offender treatment, and if so, whether he should be granted YO treatment. David Woodin represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04498.htm

People v Hunter, 6/6/19 – **IAC / ENHANCED SENTENCE / VACATUR**
The defendant appealed from a judgment of Sullivan County Court, convicting him of 2nd degree murder. The Third Department held that trial counsel was ineffective for failing to adequately challenge an enhanced sentence, which was imposed based on a finding that the defendant had violated a condition of his plea agreement, by being arrested on new

charges prior to sentencing. However, the court did not deliver *Parker* warnings and ensure that the defendant was fully aware of the consequences of being arrested prior to sentencing. The plea court should have given the defendant a chance to withdraw his plea. There was no apparent strategic reason for counsel's failure to challenge the enhanced sentence. Thus, the sentence was vacated and the matter remitted.
http://nycourts.gov/reporter/3dseries/2019/2019_04496.htm

People v Nitchman, 6/6/19 – **IAC / 440.10 HEARING ORDERED**
The defendant appealed from an order of Saratoga County Court, denying his CPL 440.10 motion to vacate a judgment convicting him of 1st and 2nd degree criminal sexual act. The People made a pre-indictment plea offer more lenient than the one the later accepted. The defendant said that he did not know about the offer and would have accepted it. The Third Department found that there was a reasonable possibility that the defendant's allegations were true, and thus County Court should have conducted a hearing. Remittal was ordered. Brian Quinn represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04501.htm

People v Marshall, 6/6/19 **– IAC / CONFLICT OF INTEREST / VACATUR**
The defendant appealed from a judgment Broome County Court, convicting him of 1st degree robbery and 3rd degree larceny. The Third Department reversed in the interest of justice and remitted, based on IAC flowing from a conflict of interest. While informing County Court about the terms of a plea offer, defense counsel said that the ADA had advised him that a number of counsel's former and current clients might be witnesses against the defendant; and if the case went to trial, defense counsel would have a conflict. However, the attorney continued to represent the defendant. The appellate court found that there was a significant possibility of an actual conflict. County Court failed to fulfill its duty to inquire as to whether the defendant understood the risks of counsel's continued representation and chose to waive the conflict. Kevin Jones represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04499.htm

FOURTH DEPARTMENT

People v Jones, 6/7/19 – **IAC / SUB COUNSEL REQUEST / VACATUR**
The defendant appealed from a County Court judgment, convicting him of 1st degree burglary. The Fourth Department reversed, vacated the plea, and remitted. The plea court violated the defendant's right to counsel when it failed to conduct a sufficient inquiry into his complaint regarding defense counsel's representation. During the plea colloquy, the defendant attempted to inform the court that he was pleading guilty only because he was not receiving effective assistance. The court refused to accept the defendant's pro se letter regarding the matter and did not otherwise allow him to expand on his claim. The court had no basis to completely cut off the discussion without hearing any explanation. The appellate court rejected the People's contention that the defendant abandoned his request when he decided to plead guilty, while still represented by the same attorney. After refusing to allow the defendant to articulate his argument, the court gave him an ultimatum to plead guilty or go to trial—in either case, with present counsel. The defendant's contentions

implicated the voluntariness of the plea. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04543.htm

People v Edwards, 6/7/19 – **IAC / SUB COUNSEL REQUEST / VACATUR**
The defendant appealed from a judgment of Onondaga County Supreme Court, which convicted him of attempted 1st degree murder and other crimes. The Fourth Department reversed and ordered a new trial, because the trial court violated his right to counsel by failing to conduct at least a minimal inquiry when the defendant voiced seemingly serious complaints about defense counsel. At a pretrial appearance, the defendant complained that counsel had failed to file discovery demands and omnibus motions. On appeal, the People conceded that defense counsel never filed any omnibus motions. The trial court erred in summarily denying the defendant's request for substitute counsel without conducting any inquiry, based on its mistaken belief that omnibus motions had been filed. The Hiscock Legal Aid Society (Kristen McDermott, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04537.htm

People v Ballowe, 6/7/19 – **GRAND JURY / FAILURE TO RULE**
The defendant appealed from a judgment of Erie County Supreme Court, convicting him of leaving the scene of an incident resulting in serious injury without reporting. The Fourth Department reserved decision, held the case, and remitted. The defendant contended that Supreme Court erred in granting the People leave to re-present the case to a second grand jury after the first one returned a "no bill." Supreme Court properly granted the People's application to re-present the charges, based on the availability of a witness who would provide new evidence. However, there was no ruling on the defense application for the court to discern whether the prosecutor had presented the promised new evidence. The Legal Aid Bureau of Buffalo (Nicholas DiFonzo, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04566.htm

People v Green, 6/7/19 – **SUPPRESSION / FAILURE TO RULE**
The defendant appealed from a judgment of Erie County Supreme Court, which convicted him of 2nd degree CPW. The Fourth Department held the case, reserved decision, and remitted. The motion court determined that a police officer had a founded suspicion of criminality prior to ordering the defendant to exit a vehicle for the pat search. A founded suspicion, standing alone, however, was insufficient to justify ordering the defendant to place his hands on the patrol car in preparation for a pat search. In making its determination, the court credited the officer's testimony that he smelled fresh marihuana emanating from the vehicle, but did not address whether the officer's observations provided probable cause. The appellate court could not affirm the order refusing to suppress the gun recovered based on a theory not reached by the suppression court. The Legal Aid Bureau of Buffalo (Patrick Fitzsimmons, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04608.htm

People v Simpson, 6/7/19 – **SENTENCE ILLEGAL / SUA SPONTE MODIFICATION**
The defendant appealed from a judgment of Jefferson County Court, convicting him of 3rd degree CPW and other crimes. The Fourth Department modified, by reducing the sentenced

imposed for the CPW count to 2⅓ to 7 years. The lower court imposed an illegal sentence of 3½ to 7 years for that conviction. Because the defendant was not sentenced as a predicate felon, the minimum period of her sentence had to be one-third, not one-half, of the maximum. Although the issue was not raised by either party, the court could not allow an illegal sentence to stand.
http://nycourts.gov/reporter/3dseries/2019/2019_04538.htm

People v Reid, 6/7/19 – **HARSH SENTENCE / REDUCED**
The defendant appealed from a judgment, convicting him upon a jury verdict of 3rd degree criminal sale of a controlled substance (two counts) and sentencing him to consecutive determinate terms of seven years, followed by two years' post-release supervision. On appeal, the defendant contended that the sentence was unduly harsh and severe. The Fourth Department directed that the sentences would run concurrently to each other, but consecutively to a prior sentence. The defendant, age 35 at the time of the crimes, had previously committed only misdemeanors. He was convicted in Oneida County Court of a similar offense, arising from an incident that occurred contemporaneously with the instant crimes, which involved sales of small amounts of cocaine. Further, there was no indication that the defendant was a large-scale drug dealer. Finally, prior to trial, the court had agreed that, if the defendant pleaded guilty, it would impose a sentence of four years on each count, to run concurrently with each other and to the Oneida County sentence. John Herbowy represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04565.htm

FAMILY

FIRST DEPARTMENT

Vanessa R. v Christopher A.E., 6/4/19 – **FAMILY OFFENSE / NO ASSAULT**
The respondent appealed from an order of NY County Family Court, which after a fact-finding hearing, found that he committed the family offenses of 2nd degree harassment and 2nd degree assault and issued a one-year order of protection. The First Department modified, vacating the finding of assault. Although the order of protection has expired by its own terms, it still imposed enduring consequences, and therefore the appeal was not moot. The evidence did not establish assault. The petitioner testified that, while the respondent was on top of her in bed, he caused some bruising to her legs, which she treated at home with an ice pack. There was no proof of intent to cause serious physical injury. Nor did the proof support a finding of assault 3. Even assuming that the bruising would support a finding of physical injury, the evidence failed to demonstrate the intent to cause such injury. The petitioner testified that the respondent said that he was play fighting and that she accepted this explanation. The finding as to harassment was sustained, however. The petitioner testified that the respondent made several threatening phone calls to her and followed her around the neighborhood, which alarmed her and served no legitimate purpose. She and her then eight-year-old daughter also testified to an incident in which the

respondent forced the child to consume a pack of gum, which caused her to vomit, and then to eat her own vomit. Larry Bachner represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04331.htm

Matter of Puah B. (Autumn B. – Hemerd B.), 6/6/19 –
INADEQUATE SHELTER / DISSENT RE EDUCATIONAL NEGLECT
The mother appealed from an order of fact-finding and disposition rendered by Bronx County Family Court in a neglect proceeding. The First Department modified. Family Court erred in finding neglect and derivative neglect, based on the mother's failure to provide adequate food, clothing and shelter. The caseworker's progress notes, and the police officer's testimony about her observations from a single visit to the home, were insufficient to support such determination. The record presented no basis for a conclusion that the children's condition had been impaired or was in imminent danger of becoming impaired. However, the evidence supported the finding of educational neglect as to the two older children, and derivative neglect as to the younger children. One justice dissented as to the issue of educational neglect. The mother attempted to follow DOE regulations, but did not receive responses to her letters, which were necessary to proceed with the process of submitting her Individual Home Instruction Plans (IHIPs). Moreover, there was no showing of impairment. The mother, a college graduate, had familiarized herself with IHIP standards. She was providing the children with a well-rounded education at home and had developed a curriculum consistent with the DOE's regulations. In addition to teaching the basic common core subjects, the mother provided instruction in computer skills; enrolled the children in online classes which used state-of-the-art adaptive technology; and exposed them to NY's cultural institutions. No testing established that the children were not performing at age-appropriate levels. Randall Carmel represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04451.htm

THIRD DEPARTMENT

Matter of Stephen N. v Amanda O., 6/6/19 –
PATERNITY / DAD IN JAIL / EQUITABLE ESTOPPEL ERROR
The petitioner and the mother appealed from an order of Albany County Family Court, which dismissed the petitioner's application to adjudicate him to be the father of the subject child. The Third Department reversed and remitted. Family Court erred in applying equitable estoppel, and it would be in the best interests of the child for DNA testing to occur. The child understood that William P. was her legal father and that there was a significant chance that the petitioner was her biological father. She had a tumultuous relationship with William P. and had communicated with the petitioner. If he was found to be the biological father, his lengthy prison term would impact the parent-child relationship. However, the potential benefit to the child of establishing paternity outweighed any potential negative impact. On appeal, Eric Gee represented the petitioner, and Aaron Louridas represented the mother.
http://nycourts.gov/reporter/3dseries/2019/2019_04510.htm

***Matter of Nathaniel V. v Kristina W.*, 6/6/19 –**
CUSTODY / DAD IN JAIL / HEARING NEEDED
The father appealed from an order of Saratoga County Family Court, which dismissed his custody modification petition. The Third Department reversed, finding that the trial court should have held a hearing. The father's pro se petition alleged that he was incarcerated and, as a result, had not had contact with the child for a year. If established, such facts would constitute a change in circumstances, triggering a "best interests" inquiry. Further, his allegations raised a question as to whether his incarceration inhibited his ability to comply with a prior order directing him to arrange for therapeutic parenting time and attend specified treatment programs. Thus, Family Court erred in dismissing the petition based on the father's noncompliance with such directives. Finally, the trial court failed to address the father's request to at least receive information about the child's well-being or some form of contact or connection. Alexandra Buckley represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04520.htm

FOURTH DEPARTMENT

Matter of Hilton v Hilton, 6/7/19 – **CUSTODY / NONPARENTS / HEARING NEEDED**
The mother appealed from an order of Oswego County Family Court, which awarded nonparents physical custody of the subject child and joint legal custody with the mother. The Fourth Department found that, where the mother's attorney appeared at a scheduled appearance, the trial court erred in entering an order upon the mother's default in not attending. Moreover, a hearing was required to determine if extraordinary circumstances existed and, if so, to evaluate best interests. Rebecca Konst represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04572.htm

Matter of Jarrett P. v Jeremy P., 6/7/19 – **ABANDONMENT / REVERSED**
The father appealed from an order of Ontario County Family Court, which terminated his parental rights. The Fourth Department held that the petitioner agency failed to establish by clear and convincing evidence that he abandoned the child. The record established that the father definitively established his paternity, while incarcerated, less than two months into the six-month period preceding the filing of the petition. Throughout the relevant period, the father initiated communications with the child's caseworker; sent letters inquiring about the child; and participated in a service plan review. His contacts were not minimal, sporadic or insubstantial. Thus, the finding of abandonment was error. However, permanent neglect was adequately proven. Mary Davison represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04609.htm

Matter of Montgomery v List, 6/7/19 – **IMPUTED INCOME / AFFIRMED**
The father appealed from a Monroe County Family Court order increasing support. The Fourth Department found that the trial court erred when it stated that it could not reduce his child support obligation, even if the father reasonably decided to take a lower-paying job, when he moved because his new wife accepted a job in North Carolina. A court's failure to exercise its discretion is, in itself, an abuse of discretion. However, the reviewing court found that the income imputed was appropriate. The father's earnings in the three years before he left his position in NY showed that he had the potential to earn to $64,819.

Further, a portion of his wife's salary could be imputed as his income, where his decision to leave his prior job resulted in an improvement in his overall financial condition.
http://nycourts.gov/reporter/3dseries/2019/2019_04560.htm

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