CRIMINAL

FOURTH DEPARTMENT

People v Searight, 6/15/18 – "**PYRAMID OF HEARSAY" / COCAINE SUPPRESSED**
Upon a plea of guilty in Onondaga County, the defendant was convicted of criminal possession of a controlled substance in the third degree. At the suppression hearing, two Syracuse police officers testified concerning their stop of the defendant's vehicle based on traffic infractions. After the stop, they learned that the City of Cortland had issued a warrant for the defendant on drug charges. One officer communicated with the 911 Center, which reported that the Cortland Police Department had confirmed an active warrant. The officers arrested the defendant and transported him to the Criminal Investigation Division, where an officer asked if he had anything illegal on his person. The defendant produced two baggies containing cocaine. The Fourth Department suppressed his statements and the drugs and dismissed the indictment. The People had failed to demonstrate the legality of police conduct. They did not produce the arrest warrant, relying on a "pyramid of hearsay"—the officer's testimony as to his communications with an unidentified person and his assumption about how the warrant's validity was confirmed. The Hiscock Legal Aid Society (Elizabeth Riker, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04466.htm

People v Nichols, 6/15/18 – **REPUGNANCY ARGUMENT / PROTECTIVE ORDER DURATION**
A Steuben County grand jury indicted the defendant on six counts resulting from an altercation with his estranged wife. At trial, a Family Court clerk testified that, before the incident, an order of protection had been personally served on the defendant while he was in court. The jury convicted him of criminal contempt in the first degree and reckless endangerment in the second degree, but acquitted him on the remaining counts. On appeal, the defendant argued that, due to the acquittals, the convictions were legally insufficient. His "classic masked repugnancy argument" was doomed by controlling authority, the Fourth Department stated. The jury's verdict on one count could not be "weaponized" to attack the sufficiency of the convictions. *See People v Abraham*, 22 NY3d 140. However, the final protective order contained an expiration date more than eight years after the sentencing and maximum expiration dates, in violation of CPL 530.12 (5). The matter was remitted. Guy Talia represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04502.htm

People v Perkins, 6/15/18 – **TWO SENTENCING ERRORS / REMITTAL**
Erie County Supreme Court erred in changing the sentence, for a conviction of aggravated unlicensed operation of a motor vehicle, after the defendant left the courtroom. A resentencing to correct an error in a sentence must be done in the defendant's presence. As to a DWI conviction, the sentencing court erred in imposing a five-year conditional discharge to monitor the ignition interlock device. The maximum term was three years. Both issues regarded the legality of sentences and thus survived a valid waiver of the right

to appeal. The matter was remanded for resentencing. The Legal Aid Bureau of Buffalo (Deborah Jessey, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04472.htm

People v McIntosh, 6/15/18 – **NO LESSER OFFENSE CHARGES / HARMLESS ERROR**
The defendant appealed from convictions of second-degree murder and first-degree manslaughter arising from the stabbing of his roommate. Monroe County Court erred in refusing to charge the lesser included offenses of second-degree manslaughter and criminal negligence. As to such crimes, there was a reasonable view of the evidence that the defendant acted with the requisite mental state, but not with intent to cause death or serious physical injury. Consistent with the defendant's testimony, the first stab wound to the victim's leg was superficial and non-lethal, and the second wound to the chest may have been caused by the victim moving into the knife. However, the jury charge error was harmless. Where a court charges the next lesser included offense of the crime alleged in the indictment, but refuses to charge still lesser offenses, a conviction of the top offense dispels concerns about prejudice. *See People v Boettcher*, 69 NY2d 174. The manslaughter conviction was dismissed as a lesser inclusory count of murder. Two justices dissented, opining that the error was not harmless.
http://nycourts.gov/reporter/3dseries/2018/2018_04455.htm

People v Andrew Graves, 6/15/18 – **CRIMINAL MISCHIEF / DEALERSHIP IS A "PERSON"**
Upon a Seneca County jury verdict, the defendant was convicted of criminal mischief in the second degree and conspiracy in the fifth degree, in connection a vandalism spree at an auto dealership. The Fourth Department affirmed, rejecting the argument that the victim named in the indictment, "Bill Cram Chevrolet," did not qualify as a "person." The jury was properly instructed that the People had to prove that the defendant damaged the property of "another person." A "person" can mean a private or public corporation, unincorporated association, partnership, a government or a governmental instrumentality. *See* Penal Law § 10.00 (7). The trial court did not provide an instruction on the statutory definition of a "person." But it was common knowledge that personhood can attach to nonhuman entities. *See e.g. Citizens United v Federal Election Commn.*, 558 US 310. Further, the jury had ample basis to infer that Bill Cram Chevrolet was a private corporation or a partnership or other appropriate nonhuman. Defendant's arguments regarding the $40,743 restitution award were unpreserved and did not implicate the illegal sentence exception to the preservation requirement.
http://nycourts.gov/reporter/3dseries/2018/2018_04503.htm

People v McCullen, 6/15/18 – **18-MONTH DELAY IN SENTENCING / EXCUSABLE**
In an appeal from an Erie County larceny conviction, the defendant contended that the 18-month delay in sentencing him was unreasonable as a matter of law and required vacatur of the conviction and dismissal of the indictment. *See* CPL 380.30 (1) (sentence must be pronounced without unreasonable delay). The contention survived the waiver of the right to appeal, but was unpreserved. In any event, the Fourth Department rejected the argument, reasoning that the excusable delay was attributable to ongoing proceedings involving the codefendants, in which the defendant was required to cooperate pursuant to his plea deal.
http://nycourts.gov/reporter/3dseries/2018/2018_04486.htm

People v Flax, 6/15/18 – **DNA TESTING / LOST JUMPSUIT**
The defendant was convicted of rape in 1988. On a prior appeal (117 AD3d 1582), the Fourth Department remitted for a hearing to determine whether a jumpsuit worn by the complainant at the time of the rape still existed, and if so, whether there was sufficient DNA material for testing. At the hearing, the People established that the garment could not be located. CPL 440.30 (1-a) (b) expressly precluded the court from drawing an adverse inference based on a purported failure to preserve evidence, where the People established that, despite their efforts, the location of the evidence was unknown.
http://nycourts.gov/reporter/3dseries/2018/2018_04492.htm

People v Dwight Graves, 6/15/18 – **SORA ERROR / BUT STILL RISK LEVEL THREE**
The Fourth Department agreed with the defendant that Monroe County Supreme Court erred in assessing 20 points under risk factor 7 on the ground that the victim and the defendant were strangers. There was no direct evidence concerning the relationship between them. The circumstantial proof presented did not constitute clear and convincing evidence that the defendant and the victim were strangers. However, even after subtracting the 20 points, the defendant remained a level-three sex offender.
http://nycourts.gov/reporter/3dseries/2018/2018_04485.htm

FAMILY

FOURTH DEPARTMENT

Woodman v Woodman, 6/15/18 – **INADEQUATE RECORD / APPEAL DISMISSED**
The defendant appealed from a Niagara County Supreme Court judgment awarding the plaintiff maintenance and equitably distributing marital assets. The appeal was dismissed based on the defendant’s failure to provide an adequate record to permit meaningful review. The record did not contain all the relevant papers that were before the Supreme Court. On appeal, the defendant contended that the plaintiff did not timely respond to his discovery requests and failed to disclose discovery material and to file a note of issue and certificate of readiness. However, the record did not include the necessary and relevant motion papers and exhibits with respect to such issues. Additional documents annexed as exhibits to the defendant’s brief were not properly part of the record.
http://nycourts.gov/reporter/3dseries/2018/2018_04479.htm

Matter of David C. (Lawrence C.), 6/15/18 – **SEXUAL ABUSE FINDING / AFFIRMED**
In Erie County Family Court, a preponderance of evidence showed that the respondent sexually abused a seven-year-old girl, for whom he acted as a parent substitute, and derivatively neglected the victim’s two siblings, who resided in the same household. If reliably corroborated, a child’s out-of-court statements may form the basis for a finding of abuse. A relatively low degree of corroborative evidence was sufficient. The victim told two teachers, a sister, and an investigator about the abuse. Although there may have been minor inconsistencies in her statements, she did not waver in key elements, and medical evidence provided further corroboration. The respondent had acknowledged having been

alone in a bedroom with the victim. Because he did not testify, Family Court could draw the strongest possible inference against him. The sexual abuse justified derivative neglect findings as to other children, including the respondent's biological daughter, who was born after the petition was filed.
http://nycourts.gov/reporter/3dseries/2018/2018_04477.htm

Biernbaum v Burdick, 6/15/18 – **MOTHER'S ANIMUS / CHILDREN'S PREFERENCES**
In a custody modification proceeding, Ontario County Family Court properly granted the father parental access equal to that of the mother. Increasing animosity between the parties was among the facts constituting a change in circumstances. In determining the best interests of the children, Family Court did not err in failing to abide by the children's preferences. There was evidence that the mother's animus toward the father had harmed the children's relationship with him. Further, the court-appointed psychologist opined that the children's interests would best be served by equal parenting time.
http://nycourts.gov/reporter/3dseries/2018/2018_04489.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