

## CRIMINAL

### SECOND DEPARTMENT

***People v Ramsey*, 7/10/19 – JUDGE INTRUSIVE / DÉJÀ VU / REVERSAL**

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1<sup>st</sup> degree robbery. For the fifth time in two years, because of excessive questioning of trial witnesses by the same justice, the Second Department reversed a judgment of conviction and ordered a new trial, before a different justice. A trial judge's function is to protect the record, not make it. *See People v Yut Wai Tom*, 53 NY2d 44. Yet Supreme Court usurped the attorneys' roles, developing facts damaging to the defense and appearing to act for the People. Counsel did not object. But in the interest of justice, the appellate court held that the judicial interference deprived the defendant of a fair trial. Robert DiDio (Bonnie Brennan, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05571.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05571.htm)

***People v Robles*, 7/10/19 – ILLICIT ID TESTIMONY / REVERSAL**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2<sup>nd</sup> degree murder and other crimes. The Second Department reversed, in the interest of justice, and ordered a new trial. During a street fight, one victim was fatally stabbed and another was severely injured. The defendant was identified by the first witness. A second witness was unable to ID the defendant during identification procedures. Yet the People were permitted to elicit the second witness's testimony that, during a lineup, she said that she would "lean toward" the defendant as the perpetrator. CPL 60.25 foundational requirements were not met, since the witness did not ID the defendant at the lineup. The testimony was prejudicial. The reviewing court also decried the prosecutor's intemperate conduct in summation, sidetracking the jury from determining facts relevant to guilt or innocence. Appellate Advocates (Kendra Hutchison, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05572.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05572.htm)

***People v Alvarez*, 7/10/19 – CHALLENGE FOR CAUSE / REVERSAL**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 3<sup>rd</sup> degree burglary and other crimes. The Second Department reversed and ordered a new trial. Three prospective jurors demonstrated a state of mind likely to preclude an impartial verdict. The trial court failed to obtain the requisite assurances that they could set aside any bias, and erred in denying the defense challenges for cause. Such failure constituted reversible error, because the defendant exhausted his peremptory challenges. Appellate Advocates (Paul Skip Laisure, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05555.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05555.htm)

***People v Gooding*, 7/10/19 – PROTECTIVE ORDER / TOO LONG**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of criminal possession of a firearm. The Second Department vacated so much of the order of protection as directed that it remain in effect until January 4, 2029. The duration of the order exceeded the maximum statutory period and failed to take into account jail-time credit. Appellate Advocates (Alice Cullina, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05561.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05561.htm)

***Matter of Ted B.*, 7/10/19 – CIVIL MANAGEMENT / REVERSAL**

In a proceeding pursuant to MHL article 10, the appellant challenged an order of Orange County Supreme Court, which found that he suffered from a mental abnormality and was a dangerous sex offender requiring civil confinement. The Second Department reversed and remitted. The State failed to prove by clear and convincing evidence that the respondent had such an inability to control his behavior that, if not confined to a secure treatment facility, he was likely to be a danger to others and commit sex offenses. Mental Hygiene Legal Service represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05550.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05550.htm)

***Matter of Jamie R.*, 7/10/19 – DEFENDANT / MENTAL DEFECT**

The State Commissioner of Mental Health appealed from an Rockland County Supreme Court order, which denied a CPL 330.20 application for continued retention of the respondent. The Second Department reversed and granted the application. After a trial on a charge of 2<sup>nd</sup> degree assault, the respondent was found not responsible by reason of mental disease or defect. An attending psychiatrist's testimony established that the respondent was not prepared to function in the community in a less-supervised environment. Moreover, he lacked insight into his mental illness and the need for further treatment.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05545.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05545.htm)

## **THIRD DEPARTMENT**

### ***DECISION OF THE WEEK***

***People v Hodgon*, 7/11/19 – EXECUTIVE LAW § 552 / DA CONSENT NEEDED**

The People appealed from an Albany County Supreme Court order, which granted the defendant's motion to dismiss. The defendant—a counselor at a state-licensed residential substance abuse treatment—allegedly had sexual contact with a 16-year-old patient. The Justice Center for the Protection of People with Special Needs obtained an indictment for various offenses. The defendant contended that Executive Law § 552 is facially unconstitutional, because it purports to grant prosecutorial authority to an officer other than the Attorney General or a District Attorney. Supreme Court agreed and dismissed the indictment. The Third Department affirmed, adopting the reasoning of Judge Rivera's dissent in *People v Davidson*, 27 NY3d 1083, 1086-1096: the Legislature may not grant independent, “concurrent authority with district attorneys” to prosecute individuals accused of crimes against vulnerable persons. The reviewing court further held that the constitutionality of the Act may be preserved by construing it to limit the Special Prosecutor to conducting prosecutions only upon DA consent. Here consent was not validly obtained. The Albany County Public Defender (Jessica Gorman, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05596.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05596.htm)

## FAMILY

### FIRST DEPARTMENT

***Matter of Elijah M. (Robin M.),* 7/9/19 – NEGLECT / REVERSAL**

The respondents' appeal from an order of disposition of Bronx County Family Court brought up for review a fact-finding order, which held that they neglected their child. The First Department reversed. The agency filed the petition after a physical altercation between the teenage child and respondent father, which resulted in an order of protection against the child. The parents refused to allow the child to return home, and the agency tried to schedule a child safety conference with them. When their attorney insisted on communicating on their behalf and being present at the meeting, the instant proceeding was initiated. While often a child's disciplinary issues will not justify exclusion from the home, such cases typically do not involve an order of protection against the child. The respondents were wrongly prevented from presenting evidence that: (1) they acted reasonably and were unable to care for their son; and (2) their attorney conveyed their willingness to meet, and plan with, the agency. Stephen Preziosi represented the appellant. [http://nycourts.gov/reporter/3dseries/2019/2019\\_05471.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05471.htm)

### THIRD DEPARTMENT

***Matter of Nicole TT. v Rickie UU.,* 7/11/19 – DEFAULT / NO APPEAL**

The mother appealed from an order of Saratoga County Family Court, which granted the petitioner aunt's applications to modify a prior custody order. Family Court found the mother in default, awarded the aunt sole custody, and vacated all prior custody orders. The Third Department dismissed the appeal. CPLR 5511 states that an aggrieved party may not appeal from an order entered upon his or her default. The mother was personally served with the relevant pleadings, as well as with an application for electronic testimony and waiver of physical presence. Yet she failed to appear, file an application, or contact Family Court. On a prior petition, the mother had appeared telephonically, so she understood that option. To seek relief, she could make a CPLR 5015 (a) motion to vacate the default order. [http://nycourts.gov/reporter/3dseries/2019/2019\\_05599.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05599.htm)

**Cynthia Feathers, Esq.**

**ILS | NYS Office of Indigent Legal Services**

Director, Quality Enhancement for Appellate

And Post-Conviction Representation

80 S. Swan St., Suite 1147, Albany, NY 12210

(518) 949-6131 | [Cynthia.Feathers@ils.ny.gov](mailto:Cynthia.Feathers@ils.ny.gov)