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Subject: Decisions of Interest

CRIMINAL

First Department

People v Southall (11/28/17) – **JUROR BIAS / NEW TRIAL**

In 2011, in New York County, the defendant was charged with murder in the second degree. During 2014 jury selection, a prospective juror told the court that she was an attorney at a large law firm and had been a paralegal in the U.S. Attorney's Office. Four days later, she was sworn as a juror. The defendant was convicted. Months later, an ADA who tried the case revealed that the above attorney-juror had applied for an ADA position in the NY County DA's office—two days before being sworn as a juror at the *Southall* trial. Based on the juror's failure to inform the trial court about her then pending application, the defendant made a CPL 440.10 motion, and a hearing was held. The problem juror testified that it was during the instant jury selection that she was inspired to become a prosecutor. Supreme Court denied the 440 motion, but the reviewing court reversed. The juror had concealed material information that showed a predisposition to favor the prosecution. The defendant was deprived of a fair trial by an impartial jury. The judgment was vacated, and the matter remanded for a new trial. The Center for Appellate Litigation (John Vang, of counsel) represented the defendant.

http://www.nycourts.gov/reporter/3dseries/2017/2017_08344.htm

People v Li (11/30/17) – **HOMICIDE / CAUSATION**

The defendant was a physician specializing in pain management. For years, he engaged in illicit prescription practices to profit from an opioid addiction epidemic. Two patients were found to have died due to the defendant's practices. He was convicted, inter alia, of two counts of second-degree manslaughter. On appeal, he contended that the sale of a controlled substance could never support a homicide charge, absent express legislative authorization. The First Department disagreed, finding that the People had presented sufficient evidence that the defendant had consciously disregarded the risk that the victims would die as a result of his

prescribing practices. The People's expert had testified that the defendant wrote medically unjustified prescriptions for highly addictive opioids in unreasonably high dosages, fostered addiction, and endangered patients' lives. As to one patient, the People's theory was that the Xanax that the defendant prescribed was a contributing factor in the death, when such drug worked synergistically with other drugs the patient ingested. In adopting such theory, the reviewing court explored the principles of causation in homicide cases, as set forth in *People v. Davis*, 28 NY3d 294.

http://www.nycourts.gov/reporter/3dseries/2017/2017_08438.htm

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People v Fagan (11/28/17) – **CATU / REDUCED SENTENCE**

In 2000, when convicted upon a plea of guilty of a prior attempted robbery, the defendant was not informed that his sentence would include a period of post-release supervision. Five years later, *People v. Catu*, 4 NY3d 242, was decided. In 2010, following a guilty plea, the defendant was sentenced for attempted robbery in the first degree. The 2000 conviction was used as predicate in finding him a persistent violent felon, and counsel did not challenge the constitutionality of that conviction. In 2014, the sentence as to the 2010 conviction was vacated based on *Catu*, and the defendant was resentenced. But the Court of Appeals reversed, holding that *Catu* did not apply retroactively in enhanced sentencing proceedings**.** Last week, the First Department reduced the sentence from 18 years to life to 16 years to life, noting that the defendant accepted responsibility for his crime, was not armed, and will be over age 65 when eligible for parole. The Center for Appellate Litigation (Barbara Zolot, of counsel) represented the defendant.

http://www.nycourts.gov/reporter/3dseries/2017/2017_08300.htm

People v Garland (11/28/17) – **SERIOUS PHYSICAL INJURY PROOF / DISSENT**

During a street brawl in Bronx in 2010, the defendant shot a gun toward a group of people and struck the leg of a teenage bystander, who thought he had been hit by a BB gun because the bullet hole was so small. The *Garland* majority upheld the verdict of guilty of two counts of first-degree assault and other counts. In dissent, Justice Manzanet-Daniels opined that a gunshot wound does not ipso facto establish serious physical injury. In a detailed discussion of relevant case law, the dissenter found legally insufficient these facts: the defendant used crutches for two months, he experienced intermittent pain, and he had lodged in his thigh bullet fragments not proven to have caused damage or to have endangered his life. The Center for Appellate Litigation (David Bernstein, of counsel) represented the defendant.

http://www.nycourts.gov/reporter/3dseries/2017/2017_08302.htm

Third Department

People v Morrison (11/30/17) – **COLLATERAL ESTOPPEL / DISMISSED INDICTMENT**

Following a jury trial, the defendant was convicted of second-degree attempted murder. When the victim died, the defendant was charged with second-degree murder. In obtaining the second indictment, the People advised the grand jury that, as a matter of law, it had been determined that the defendant shot the victim in the head and body with intent to cause death. Proof was submitted only as to causation. The defendant moved to dismiss the indictment, asserting that the People could not use collateral estoppel in such manner. The motion was granted, the People appealed, and the appellate court affirmed. In addressing collateral estoppel, the *Morrison* court pointed out that the doctrine: was rooted in civil litigation; does apply in criminal prosecutions to bar relitigation of issues necessarily resolved in a defendant's favor; but has not been used offensively against an accused; and advances different societal goals in the criminal vs. the civil context. The Third Department concluded that collateral estoppel could not be used to supplant the grand jury's role in determining whether there was reasonable cause to believe that an accused committed an offense. Carolyn George represented the respondent.

http://www.nycourts.gov/reporter/3dseries/2017/2017_08405.htm

FAMILY

First Department

Matter of Angel P. (Jose C.) (11/30/17) – **SEVERE ABUSE / NON-PARENT**

An appeal from an Article 10 order of disposition brought up for review a fact-finding order. The appellant was not the father of one of the subject children, Angel P. Family Court properly determined that the appellant was a person legally responsible for the child's care, but improperly found that he had severely abused the child. At the time of the fact-finding order, under Family Court Act § 1051 (e), severe abuse required acts committed by a parent. A subsequent amendment did not apply retroactively. The finding of abuse was upheld, however. Despite the fact that a related criminal case was pending against the appellant at the time of the Article 10 hearing, Family Court could properly draw a negative inference against the father, based upon his failure to testify at the fact-finding hearing. Family Court did not err by failing to sua sponte adjourn the abuse proceeding pending resolution of the criminal action. (Richard Herzfeld represented the appellant).

http://www.nycourts.gov/reporter/3dseries/2017/2017_08437.htm

Second Department

Matter of Elizabeth C. (Omar C.) (11/29/17) – **FAMILY COURT ACT § 1028 / EXCLUSION ORDER**

The appellant lived with his five children and their mother in Queens. Upon the filing of Article 10 petitions against him, without a hearing, Family Court issued a series of orders of protection, ultimately excluding him from the home for one year. The father contended that his loss of care of the children via the exclusion orders was the functional equivalent of their removal, entitling him to an expedited hearing under Family Court Act § 1028, to determine if the children should be returned or whether returning the children constituted an imminent risk to their life or health. While the appeal was pending, the matter was resolved in Family Court via an ACOD, and the father returned home. Nevertheless, the reviewing court concluded that the *Matter of Hearst v. Clyne*, 50 NY2d 707, exception to the mootness doctrine applied, and held that the due process protections of Family Court Act § 1028 apply both when a child is removed and when a parent is excluded from the home. The Center for Family Representation (Michele Cortese and Latham & Watkins LLP) represented the appellant.

http://www.nycourts.gov/reporter/3dseries/2017/2017_08370.htm

Matter of Sellers v Brown (11/29/17) – **DRL § 72 STANDING**

In affirming an order dismissing a maternal grandmother's custody petition, the Second Department stated that the fact that the child's mother was deceased did not constitute a per se extraordinary circumstance under Domestic Relations Law § 72, so as to give the grandmother standing. That section gave a grandparent standing to seek *visitation* when one or both parents were deceased, but did not apply where a grandparent sought *custody*. The grandmother had failed to establish extraordinary circumstances. The father had taken custody of the child soon after the mother died. The grandmother did not prove that separating the child from her would harm the child. Tammi Pere represented the respondent.

http://www.nycourts.gov/reporter/3dseries/2017/2017_08380.htm

Third Department

Matter of Montoya v Davis (11/30/17) – **CUSTODY / TAINTED FORENSIC EVALUATION**

For years, the mother was the primary custodian of the parties' son, while the father lived in North Carolina and was a limited presence in his life. When the father petitioned to lift supervision of visitation, a neutral forensic evaluator was appointed, and the father then sought primary physical custody. Based primarily on the views of the evaluator, Columbia County Family Court granted custody to the father and suspended the mother's parenting time for six months, ordering that she undergo counseling to address her purported acts of parental alienation. The Third Department—which had granted the mother's Family Court Act § 1114 (b) stay application—reversed and awarded primary physical custody to the mother. Family Court should not have delegated its decision-making role to any expert; and the instant evaluator had offered a flawed opinion. Although the mother had not preserved the argument, the reviewing court was "concerned" that the evaluator was deemed an expert in parental alienation. Such "syndrome" was not a DSM diagnosis and has been rejected in the criminal context as not being generally accepted in the scientific community. The evaluator's "recommendations were afflicted by a pervasive and manifest bias against the mother;" and she "abdicated her role as a neutral evaluator and…became an overly zealous advocate for the father." Further, the trial court had failed to apply a *Tropea* analysis to the issue of the relocation of the child to live with the father. Barrett Mack represented the appellant.

http://www.nycourts.gov/reporter/3dseries/2017/2017_08434.htm

Matter of Michael NN. v Chenango County Dept. of Social Services (11/30/17) –

CENTRAL REGISTER OF CHILD ABUSE / HEARSAY AS SUBSTANTIAL EVIDENCE

The Office of Children and Family Services received a report that the petitioner had sexually abused his fiancée's two daughters. The report was indicated; and following an administrative hearing, both children were found to have been maltreated. The petitioner commenced an Article 78 proceeding seeking amendment of the report, maintained in the Central Register of Child Abuse and Maltreatment, to state that it was unfounded and to have it expunged. The ALJ had found the older child sufficiently reliable, based on a recording of her interview by a caseworker. The reviewing court concluded that the hearsay allegations constituted substantial evidence supporting the challenged determination.

http://www.nycourts.gov/reporter/3dseries/2017/2017_08417.htm

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