CRIMINAL

U.S. SUPREME COURT

Stokeling v USA, 1/15/2019 – **PURSE SNATCHING / VIOLENT FELONY**
The defendant, who pleaded guilty to possessing a gun, had three earlier convictions, including a Florida robbery conviction for purse snatching. The prosecutor invoked the Armed Career Criminal Act. That federal statute mandates a 15-year term for a defendant convicted of possessing firearms who was previously convicted of three violent. Writing for the majority, Justice Thomas concluded that the Florida robbery conviction counted as a violent felony, since the crime required proof that the victim resisted; and even if minimal, the force necessary to overcome a victim's physical resistance is inherently violent. Justice Sotomayor dissented: "Under Florida law, 'robbers' can be glorified pickpockets, shoplifters, and purse snatchers," she wrote. Chief Justice Roberts and Justices Ginsburg and Kagan joined the dissent.
https://www.supremecourt.gov/opinions/18pdf/17-5554_4gdj.pdf

SECOND CIRCUIT

USA v Eaglin, 1/11/19 – **INTERNET BAN / UNREASONABLE**
In 2012, the defendant pleaded guilty to failing to register as a federal sex offender and was sentenced to imprisonment and supervised release. For various violations, District Court subsequently imposed conditions prohibiting his access to the Internet and to legal adult pornography. That was error, the Second Circuit held. The conditions were not reasonably related to the relevant sentencing factors and involved a greater deprivation of liberty than necessary. In modern society, citizens have a First Amendment right to access the Internet. The Internet had nothing to do with the defendant's 2012 offense, and he had not been convicted of a sex crime involving Internet use. Moreover, imposing an Internet ban would arguably impair his ability to receive needed training, medical care, or other correctional treatment in the most effective manner. An earlier Internet restriction placed on the defendant, under which his Internet use was monitored by the Probation Office, remained a viable option. Moreover, nothing in the record justified imposing an adult pornography ban. The matter was remanded for resentencing.
http://www.ca2.uscourts.gov/decisions.html

FIRST DEPARTMENT

People v Ortiz, 1/15/19 – **ERROR SMORGASBORD / NEW TRIAL**
The defendant appealed from a judgment of Bronx County Supreme Court convicting him of 1st degree assault and 1st degree burglary. The First Department reversed and remanded for a new trial. During trial, the court permitted a T-Mobile subpoena compliance agent to opine about the coverage area of a cell phone tower. That was error. Such testimony must be offered by an expert witness. The trial court also erred in permitting a police officer to testify about the victim's previous identification of the defendant. Furthermore, the jury charge improperly highlighted identification evidence favorable to the prosecution.

Supreme Court also erroneously failed to give a missing witness charge as to two lead detectives who possessed knowledge highly material to the case. Nor should the court have referenced the defendant's failure to testify. Moreover, a juror had revealed that an interaction with a court officer deeply upset him, yet the record contained no resolution regarding whether the juror was grossly unqualified to serve. The combined effect of the errors deprived the defendant of a fair trial. The Office of the Appellate Defender (Victorien Wu, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00221.htm

People v Jiggetts, 1/17/19 – ***BOONE* ERROR / HARMLESS**
The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree robbery and other crimes. The First Department affirmed. The trial court erred in denying the defendant's request for a charge on cross-racial identification. When identification is at issue, and the identifying witness and the defendant appear to be of different races, a party is entitled to a charge on cross-racial identification, and the trial court must give the charge if it is requested. *People v Boone*, 30 NY3d 52. However, the instant error was harmless. The key identifying feature was a red cloth that the victim stated the robber had been holding. The defendant appeared on a videotape holding such a cloth, as he tried to use the victim's credit card shortly after the robbery; and he admitted that he regularly carried such a cloth. Further, the evidence—which included the recovery of the victim's Social Security card from the defendant's apartment—was overwhelming; and the defendant provided an implausible explanation for his recent possession of the fruits of the crime. The Center for Appellate Litigation (Benjamin Wiener of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00348.htm

THIRD DEPARTMENT

People v Demkovich, 1/17/19 – **DEFICIENT PLEA / REVERSED / DIVIDED COURT**
The defendant appealed from a judgment of Broome County Court convicting him upon his plea of guilty of attempted 2nd degree kidnapping and 3rd degree criminal possession of a controlled substance. He contended that his plea was not knowing, voluntary, and intelligent because County Court failed to advise him of the constitutional rights he was waiving. Although he failed to preserve this contention, the reviewing court exercised its interest of justice jurisdiction to take corrective action and reverse. During the brief plea colloquy, County Court did not advise the defendant that he had a right to a jury trial or that he would be waiving the privilege against self-incrimination. Further, the court failed to obtain any assurance that the defendant had discussed with counsel the rights automatically forfeited by pleading guilty or the constitutional implications of a guilty plea. In the absence of an affirmative showing that the defendant understood and voluntarily waived his constitutional rights, the plea was invalid. Two justices dissented. There was nothing compelling about the case that cried out for fundamental justice, and interest of justice jurisdiction should be used sparingly. John Cirando represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00326.htm

People v Glover, 1/17/19 – **SIMILAR PLEA / BUT AFFIRMANCE / DIVIDED COURT**

The defendant appealed from a judgment of Broome County Court convicting her upon her plea of guilty of attempted 3rd degree criminal possession of a controlled substance. The defendant made a pro se motion to withdraw her guilty plea, but withdrew the motion before it was decided. Thereafter, in accordance with the terms of the plea agreement, she was sentenced as a second felony offender. The Third Department affirmed. Two justices dissented. The plea colloquy was nearly identical to the deficient colloquy in PEOPLE V. DEMKOVICH, SUPRA. The majority relied on the possibility that, upon vacatur of the guilty plea, the defendant might ultimately be convicted of the original charge and serve an additional period of incarceration. But such risk-benefit assessment was for the defendant to make, and he had requested corrective action.
http://nycourts.gov/reporter/3dseries/2019/2019_00325.htm

People v Hakes, 1/17/19 – **SCRAM BRACELET / NO WILLFUL VIOLATION**
The defendant appealed from a judgment of Sullivan County Court which revoked his probation. As conditions of his probation, defendant was required to wear a SCRAM bracelet and to pay the associated costs. The bracelet was removed when the defendant could not pay. After a VOP petition was filed against the defendant and a hearing was held, County Court found that he knowingly violated probation and sentenced him to one to three years. The Third Department reversed, the People appealed, and the Court of Appeals reversed, holding that sentencing courts can require defendants to pay electronic monitoring costs. Upon remittal, the Third Department held that County Court erred in finding that the People established a willful violation, since the defendant provided extensive proof demonstrating that he could not afford to pay the $11/day cost. The appellate court reversed the judgment revoking the defendant's probation and imposing a sentence of imprisonment. Donna Lasher represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00324.htm

People v Kaplan, 1/17/19 – **NO TERRORIST THREAT / REVERSED**
The defendant appealed from a judgment of Warren County Court convicting him of making a terroristic threat. He was arrested for an incident in the Town of Horicon. Items in his possession upon arrest (a cell phone, a police scanner, $2,707 in cash, and rolling papers) were held as evidence. A certificate of disposition did not identify the charges or the disposition; rather, it reported that the record was sealed. The defendant sought the return of his personal property, and when the request was denied, he reportedly became angry. As he turned to leave the County Sheriff's Office Building, he was heard mumbling that he was going to "come back and shoot the place down." The defendant was arrested, charged with making a terroristic threat, convicted after a jury trial, and sentenced to five years plus post-release supervision. The Third Department reversed. The record contained no evidence that the defendant intended to affect the conduct of a unit of government by murder, assassination or kidnapping. His imprudent statement reflected his vented anger that his property had not been returned to him. Mitch Kessler represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00329.htm

People v Degnan, 1/17/19 – **BURGLARY / INSUFFICIENT EVIDENCE**
The defendant appealed from a judgment of Broome County Court convicting him of 2nd degree burglary and other crimes. The burglary required proof that the defendant knowingly and unlawfully entered a dwelling with intent to commit a crime therein and

that, at the time of the unlawful entry, the defendant harbored a contemporaneous criminal intent other than criminal trespass. The People argued at trial that the defendant unlawfully entered the dwelling to evade arrest and that sometime thereafter he formed an intent to steal several articles of clothing. Yet the prosecution failed to present any evidence that, at the time of entry, the defendant had a larcenous intent. The proof was legally sufficient, though, to establish 2nd degree criminal trespass. Without permission, the defendant entered a fully furnished residence with working utilities that was used for lodging in warmer months. William Morrison represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00327.htm

FAMILY

SECOND DEPARTMENT

Matter of Agustin E. (Luis L.E.S.), 1/16/19 – **SIJS / REVERSED**
In a guardianship proceeding pursuant to Family Court Act article 6, the petitioner appealed from an order of Nassau County Family Court that denied a motion for an order making specific findings so as to enable the subject child to petition for special immigrant juvenile status. The Second Department reversed, granted the motion, and found that it would not be in the child's best interests to be returned to El Salvador. Testimony indicated that the father drank heavily and became aggressive and that he eventually returned to El Salvador on his own. Since the presumption of neglect created by the proof was not rebutted, Family Court should have found that reunification of the child with the father was not viable due to parental neglect. The record also established that gang members in El Salvador had threatened the father in the presence of the child, made the father do favors for them, and murdered the child's cousin. Alexandra Rivera represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00273.htm

Matter of Jose S.J. (Veronica E.J.), 1/16/19 – **SIJS / REVERSED**
The mother appealed from an order of Suffolk County Family Court which denied her motion to amend a prior fact-finding order. The Second Department reversed and remitted for a hearing. The mother's SIJS petition was granted. Thereafter, the child submitted an I–360 petition to USCIS, which notified the child that the petition would be denied, due to several deficiencies in the specific findings order: Family Court had failed to consider the child's alleged involvement with the MS–13 gang, and thus the court did not make an informed decision that it would not be in the child's best interests to be returned to El Salvador. The mother moved to amend the specific findings order to address the deficiencies. Family Court erred in denying the motion on the basis that the mother failed to state a sufficient reason to amend the order. The trial court should have considered the merits of the motion. Karen La Grega represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00275.htm

Mia C. (Misael C.), 1/16/19 – **CHILDREN' APPEAL / BAD DAD KEPT AWAY**
The subject children appealed from an order of Kings County Family Court which denied their motion to suspend supervised visitation with their father. The Second Department

reversed and granted the motion. At the hearing, the children's therapists testified that they were suffering from PTSD because of physical and sexual abuse they witnessed by the father against the mother and their half-siblings. The therapist recommended that there be no contact between the subject children and the father. The record showed that parental access with the father, even if supervised, would not be in the children's best interests. Janet Sabel represented the children.
http://nycourts.gov/reporter/3dseries/2019/2019_00270.htm

Alisah H. (Syed H.), 1/16/19 – **FCA § 1061 MOD / REVERSED**
The petitioner appealed from an order of Kings County Family Court which granted the father's Family Court Act § 1061 order to modify an order of disposition to grant a suspended judgment and to vacate an order which found that he neglected the subject children. The Second Department reversed and denied the motion. Despite successful completion of certain court-ordered programs, the father failed to establish good cause to modify the order of disposition and to vacate the finding of neglect. His misconduct was serious and repeated, and he showed no remorse for his actions.
http://nycourts.gov/reporter/3dseries/2019_00274.htm

THIRD DEPARTMENT

Schenectady Co. DSS v Joshua BB., 1/17/19 – **PATERNITY / REVERSAL**
The respondent appealed from an order of Schenectady County Family Court which ordered genetic marker testing to establishing the paternity of a child. The petitioner commenced the proceeding on behalf of the grandmother of the child (born 2012), seeking an order of filiation against the respondent. The child's mother was not married at the time of birth and, a year later, married her current husband. At the time that the petition was filed, the child was living with the grandmother. In 2018, Family Court ordered a genetic marker test of the child, the mother, and the respondent. The respondent appealed. The order appealed from was not final and, therefore, not appealable as of right. However, the Third Department deemed the notice of appeal to be a leave application and granted leave. In addition, the appellate court granted a stay pending appeal. On the merits, the Third Department reversed and remitted. The mother told Family Court that the child believed that her husband was the father. The record did not indicate that the AFC discussed with the child his belief as to who his father was. There was no substantive evidence of who had a parent-child relationship with the child and whether, due to equitable estoppel, a genetic marker test would not be in his best interests. Further, the child did not receive the effective assistance. There was no proof that the AFC consulted with the child, who was from 4½ to 6 years old during the litigation. Sandra Colatosti represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00335.htm

ARTICLES

All-Female Appellate Panel – *NYLJ*, 1/17/19
Last week an all-female panel presided over an appeal with the Fourth Department for the first time in the court's history, the court announced Thursday. Justices Peradotto, Smith,

Troutman, and Winslow heard arguments in a case involving the post-divorce distribution of assets. Smith was designated to the Fourth Department in 2004, making her the most senior member of the panel. Peradotto, Troutman and Winslow were designated in 2006, 2016 and 2017, respectively. Presiding Justice Gerald Whalen said the moment was long overdue and that he expected that, in the not-distant future, "a panel of this kind will not be unusual at all."

Parental Alienation Case Analyzed – *NYLJ*, 1/14/19
The author, Prof. Timothy Tippins, discussed a lengthy decision on parental alienation, *J.F. v D.F.*, 61 Misc 3d 1226(A). In that case, the parents had joint legal custody, and the father had primarily physical custody. Based on the mother's alleged parental alienation of the parties' three daughters against him, he sought sole custody. The opinion held that parental alienation should encompass several elements: extreme and outrageous conduct; an intention to cause alienation, or a disregard of the substantial probability that alienation would result; a causal connection between the acts of the perpetrator parent and the child's rejection of the other parent; and severe parental alienation. Such standard was not met in *J.F. v D.F.* Prof. Tippins opined that courts should not require proof that causing parental alienation was the bad parent's sole intent and or that severe alienation occurred. The process of alienation is long; and the custody court should be able to step in before it is too late to salvage the parent-child relationship under attack. The real focus should be on whether a parent acted in ways that were likely to foster or undermine the other parent's relationship with the child.

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