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CRIMINAL

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First Department

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DECISION OF THE WEEK

***People v Montgomery*, 1/18/18 – REVERSE *MOLINEUX* ERROR / NEW TRIAL**

Suppression hearing evidence established seven robberies committed by the same man as part of a pattern. The defendant was identified as a suspect in each robbery, following his arrest on drug charges, because he resembled the man in the surveillance video of one robbery. After his indictment as to four robberies in which witnesses identified him, the defendant moved to sever the counts for trial; but the People opposed, contending that each offense was part of a “pattern robbery.” Supreme Court denied the motion, and the first trial ultimately ended in a mistrial. At the second trial, the People proceeded on only two of the robberies. The defendant sought to introduce surveillance video from three other robberies to show that the culprit in the videos did not match his description, as well as testimony of three witnesses who did not identify him in lineups. The trial court denied the defendant’s request, which the First Department concluded was error. Evidence that a third party had committed bad acts similar to the charges against the defendant was relevant where the crimes reflected a modus operandi connecting the third party to the charged crimes. In the instant case, there was strong evidence that the same person committed six of the robberies. Every witness described a similar perpetrator and similar sequence of events; and surveillance video from four robberies showed the same man. The Center for Appellate Litigation (Mark Zenon, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_00351.htm

Second Department

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***People v Metellus*, 1/17/18 – DISMISSAL OF JURY PANEL / MURDER CONVICTION REVERSED**

Supreme Court opened jury selection by swearing in and questioning a full panel of prospective jurors. After a recess, defense counsel and the prosecutor notified the court that a potential juror had hugged and chatted with the defendant’s brother, possibly within earshot of three other potential jurors. Supreme Court granted the prosecutor’s application to dismiss the entire panel. That was error, where the trial court did not first conduct an inquiry as to what the potential jurors had seen and whether they could remain impartial. A new trial was ordered. The reviewing court also noted that, although the issue was unpreserved, the admission of DNA profiles and reports violated the defendant’s right to confrontation

under *Crawford*. Such proof was testimonial because it was generated in aid of a police investigation of defendant for the purpose of proving his guilt; and it was improperly admitted based on testimony of an analyst who did not perform, witness or supervise the generation of the DNA profile or perform an independent analysis. Appellate Advocates (Leila Hull, of counsel) represented the defendant.

http://nycourts.gov/reporter/3dseries/2018/2018_00312.htm

***People v Sanabria*, 1/17/18 – CORAM NOBIS GRANTED / PLEA COERCION NOT RAISED**

During plea negotiations, the court warned the defendant that she would be sentenced 60 years in prison if convicted after a trial on assault and other charges. The defendant then accepted a plea deal for an aggregate term of 23 years. Prior appellate counsel failed to argue that the plea was coerced, despite the explicit threat as to a maximum term. The guilty plea was vacated. Covington & Burling LLP represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_00316.htm

***People v Hernandez-Beltre*, 1/17/18 – JUDGMENT REVERSED / AFFIRMATIVE DEFENSE OF MENTAL DEFECT PROVEN**

Following a nonjury trial, the 19-year-old defendant was convicted of the sexual assault and rape of his mother. He asserted the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, and relied on the expert testimony of a forensic psychiatrist who testified about his psychotic disorder and its impact on his capacity to understand his actions. Supreme Court found that the defendant did not establish the defense by a preponderance of the evidence. The prosecution's expert had agreed that the defendant had a psychotic disorder, but had theorized that it did not affect his ability to understand the nature and consequences of his actions. After a careful weight-of-the evidence analysis, the reviewing court found that the defendant had met his burden as to the defense, reversed the judgment, and remitted the matter for further proceedings pursuant to CPL 330.20. Appellate Advocates (William Kestin, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_00307.htm

FAMILY

First Department

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***Matter of Antoinette T. v Michael J.M.*, 1/16/18 – FAMILY OFFENSE / AGGRAVATING CIRCUMSTANCES**

New York County Family Court found that the respondent had committed third-degree attempted assault; but the First Department held that the facts supported a finding that the completed crime had been committed. The respondent had inflicted physical impairment and substantial pain by punching the petitioner in the head and face. Further, Family Court had improvidently exercised its discretion in declining to find aggravating circumstances, where offending conduct from 2009 and onward had placed the petitioner at continuing risk. The two-year order of protection was extended to a five-year period. Kerry Burns represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_00247.htm

Second Department

Matter of Skyler G. (Heather G.),* 1/17/18 - **TERMINATION OF PARENTAL RIGHTS / REVERSAL*

The petitioner agency charged that the mother had violated the terms of a suspended judgment. After a hearing in Dutchess County Family Court, the suspended judgment was revoked, and the mother's parental rights were terminated based on permanent neglect. While the proof showed that the mother had failed to comply with certain conditions, the evidence did not support a finding that ending parental rights was in the children's best interests. They had lived primarily in a residential children's home, not in foster care; they emphatically wanted to be with the mother, who regularly visited them; and there was a strong mother-child bond. Further, the mother had not been using illegal substances, had completed various programs, and had obtained an order of protection against her abuser. Lawrence Moore represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_00288.htm

Matter of Ricki I.,* 1/17/18 – **JURISDICTIONAL DEFECT / JD PETITION DISMISSED*

Neither the juvenile delinquency petition nor the supporting deposition contained the required sworn, non-hearsay allegations as to the appellant's age, which was an element of the crime of unlawful possession of a weapon by a person under age 16. Thus, the petition was jurisdictionally defective and should have been dismissed. Glenn Gucciardo represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_00291.htm

Matter of Nelson A. G.-L. (Maria Y. G. S.),* 1/17/18 – **SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) / REVERSAL*

The petitioner sought an order making the requisite declaration and findings to enable the child to petition for Special Immigrant Juvenile Status. After a hearing, Suffolk County Family Court denied the motion. Contrary to the trial court's conclusion, the record supported a finding that reunification of the child with one or both parents was not viable due to neglect or abandonment. While in El Salvador, the child had repeatedly been approached by gang members, but the parents did nothing to secure his safety. The parents had encouraged the child to leave the family home, but did not provide alternate living arrangements. Immigration Legal Services of Long Island represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_00289.htm

Third Department

Matter of Jose YY. (Ericza K.),* 1/18/18 – **ANOTHER SIJS CASE / ANOTHER REVERSAL*

The petitioner sought an SIJS order for her brother. After a hearing, Sullivan County Family Court erroneously denied the motion. The record supported a finding of dependency, by virtue of the court having already appointed a permanent guardian. Both parents were deceased, making reunification impossible and rendering the child abandoned and/or destitute. Returning the child to Honduras would not be in his best interests, where no family members resided there; but his guardian/sister had provided a stable home for him in New York. Wilson Elser LLP and Safe Passage Project represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_00375.htm

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