CRIMINAL

SECOND CIRCUIT

DECISION OF THE WEEK

Bellamy v City of NY, 1/29/19 – **WRONGFUL CONVICTION / TRIAL ORDERED**
In 1998, the plaintiff was convicted of 2nd degree murder and a related weapons charge and sentenced to 25 years to life. In 2006, he made a CPL 440.10 motion to vacate the conviction. Following a hearing, the motion was granted, based in part on new evidence that another person might have convicted the murder. Upon the People's appeal, vacatur was upheld. *See People v Bellamy*, 84 AD3d 1260. The plaintiff brought an action against NYPD investigating detectives and NYC, pursuant to 42 USC § 1983 and state law. District Court – EDNY granted the defendants' motion for summary judgment dismissing the action; but the Second Circuit revived most of the claims and remanded for a trial. Material issues of fact existed as to claims of fabricated evidence and *Brady* violations. The *Brady* evidence might well have made a difference, given how "relatively thin" the overall evidence was. The appellate court also found that the trial court erred in dismissing *Monell* claims against NYC, since the plaintiff presented triable issues regarding whether municipal policies and practices—including the failure to discipline errant prosecutors—resulted in misconduct by an ADA in summation and in the nondisclosure of benefits a key witness received. Among numerous improper closing statements about the plaintiff at his criminal trial: "You are not going to get away with it, *not this time*." The trial court took no curative measures. Since the criminal trial existed "at the cusp of reasonable doubt," a jury evaluating the due process claim could reasonably find that the ADA's remarks pushed the case over the line. One judge dissented. Joel Rudin represented the appellant.
http://www.ca2.uscourts.gov/decisions.html

USA v Thrower, 1/31/19 – **3RD DEGREE ROBBERY / ACCA / PREDICATE VIOLENT**
The Government appealed from a judgment of District Court – EDNY, contending that the trial court erred in concluding that the defendant's prior convictions for the NY offenses of 3rd degree robbery and attempted 3rd degree robbery did not qualify as predicate violent felonies under the ACCA. The Second Circuit agreed, citing to the recent decision in *Stokeling v US*, 139 S Ct 544.
http://www.ca2.uscourts.gov/decisions.html

FIRST DEPARTMENT

People v Barnar, 1/3/19 – **MANSLAUGHTER / NEW TRIAL / INTEREST OF JUSTICE**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1st degree manslaughter and sentencing him to 25 years. The First Department reversed in the interest of justice and remanded for a new trial, based on the principles set forth in *People v Velez*, 131 AD3d 129, which was decided after the defendant's trial. In *Velez*, a jury found the defendant guilty of lesser included offenses arising out of a stabbing incident, but acquitted him of the top count, attempted 2nd degree murder. Justification was a central issue. The trial court's instructions did not convey that acquittal of the greater

charge based on justification precluded consideration of the lesser offenses. Thus, the verdict was ambiguous and reversal was warranted. The Legal Aid Society of NYC (Denise Fabiano, of counsel) represented the *Barnar* appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00673.htm

People v Robinson, 1/29/19 – **KIDNAPPING / SENTENCE CUT / 25 TO 10 YEARS**
The defendant appealed from a judgment of New York County Supreme Court, which convicted him after a jury trial, of 2nd degree kidnapping, 3rd degree witness tampering, and other crimes, and sentenced him as a second felony offender to an aggregate term of 29 to 33 years. The First Department modified in the interest of justice to the extent of reducing the sentence for kidnapping from 25 years to 10 years, resulting in an aggregate term of 14 to 18 years. The evidence established that the defendant intended to prevent his five-year-old niece's liberation by holding her where she was unlikely to be found. Seeking revenge against the victim's mother, he took the child to stay at his girlfriend's motel and did not disclose her whereabouts when family members repeatedly contacted him. The Center for Appellate Litigation (Alexandra Mitter, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00565.htm

SECOND DEPARTMENT

People v Keller, 1/30/19 – **BAD INFO RE MAXIMUM / PLEA VACATED**
The defendant appealed from a Queens County Supreme Court judgment convicting him of criminal possession of a firearm. The Second Department reversed, vacated the plea, and remitted. The defendant was charged with criminal possession of a firearm and 2nd degree criminal contempt. During the plea proceeding, defense counsel stated that he had advised the client that he could face consecutive sentences, if convicted at trial. The defendant was not presented with legitimate alternatives about the maximum. The firearm count was a class E felony, and the longest sentence a SFO could receive was 2 to 4 years. The criminal contempt charge was a class A misdemeanor, punishable by one year. Pursuant to Penal Law § 70.35, the sentences had to run concurrently. The erroneous threat of the higher sentence rendered the plea involuntary. Appellate Advocates (Lynn Fahey, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00620.htm

People v Dessasau, 1/23/19 – **CPW2 CONVICTION / SUPPRESSION / DISMISSAL**
[This summary appeared in the 1/24/19 Decisions of Interest. The listing for appellant's counsel has been amended.] The defendant appealed from a judgment of Queens County Supreme Court convicting him of 2nd degree CPW. The appeal brought up for review the denial of his motion to suppress a gun. The Second Department reversed, granted suppression, and dismissed the indictment. When the defendant pleaded guilty, he did not waive his right to challenge the suppression ruling. The appellate court disagreed with the hearing court's sua sponte determination that the defendant lacked standing to challenge the search of the minivan where the gun was found. The defendant, who had been sitting in the front passenger seat, told the police that the van was his work vehicle. No evidence was presented to contradict his testimony. The defendant exercised sufficient dominion and control over the van to demonstrate his legitimate expectation of privacy. Under the

circumstances, where the defendant already had been removed from the van and no one else was in the vehicle, the police lacked probable cause to conduct a warrantless search. The Legal Aid Society of NYC (Rachel Pecker and Lawrence Hausmen, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00456.htm

People v Fulgencio, 1/30/19 – **RIGHT TO COUNSEL / NOT OF ONE'S OWN CHOOSING**
The defendant appealed from a judgment of Westchester County Supreme Court convicting him, upon a jury verdict, of 1st degree assault and 4th degree CPW. The Second Department affirmed, rejecting arguments regarding the right to counsel. Such constitutional right did not encompass the right to counsel of one's own choosing; and the right to a court-appointed lawyer did not include a right to successive lawyers at a defendant's option. Upon the defendant's request for substitute counsel, the trial court had properly discharged its inquiry duty.
http://nycourts.gov/reporter/3dseries/2019/2019_00617.htm

THIRD DEPARTMENT

People v Faulkner, 1/31/19 – **ADVERSE POSITION / NEW COUNSEL REQUIRED**
The defendant appealed from a Schenectady County Court judgment convicting him of 3rd degree rape. At a court proceeding following his plea of guilty, the defendant made an oral pro se motion to withdraw the plea, and defense counsel repeatedly asserted that there was no basis for the motion. Yet County Court did not assign new counsel, and it denied the pro se motion on the merits. On appeal, the defendant contended that his right to effective assistance was violated, and new counsel should have been assigned. The People and the Third Department agreed. Counsel may not become a witness against the client; make remarks that affirmatively undermine a client's arguments; or otherwise take a position adverse to the defendant. When counsel does so, a conflict of interest arises. The matter was remitted for assignment of new counsel and reconsideration of the defendant's motion. Robert Gregor represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00645.htm

FOURTH DEPARTMENT

People v Tchiyuka, 2/1/19 – **UNFULFILLED PROMISE / VACATUR**
The defendant appealed from a judgment of Oneida County Court convicting him of 2nd degree robbery. He contended that his plea was induced by a promise of jail time credit that could not legally be fulfilled. The Fourth Department agreed. Where a guilty plea was induced by an unfulfilled promise, the sentencing court must vacate the plea or honor the promise. If the promised sentence cannot be imposed, the sentencing court may impose another lawful sentence that comports with the defendant's legitimate expectations. The appellate court vacated the sentence and remitted the matter. Matthew Hug represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00754.htm

People v Thomas, 2/1/19 – **YO / PROCEDURE NOT FOLLOWED**
The defendant appealed from a Supreme Court judgment convicting him, upon a jury verdict, of 2nd degree robbery (five counts). The Fourth Department held that the trial court erred in failing to

determine whether the defendant should be afforded youthful offender status. *See generally People v Rudolph*, 21 NY3d 497. Where, as here, the defendant has been convicted of an armed felony offense, the court is required to determine whether he or she is an eligible youth by considering the statutory factors. If the court determines that one or more of the relevant factors is present and the defendant is an eligible youth, it must determine whether the defendant is a youthful offender. The court failed to follow the proper procedure. Therefore, the appellate court ordered that the case be held, decision reserved, and the matter remitted. The Monroe County Public Defender (Timothy Davis, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00795.htm

People v Dean, 2/1/19 – **SORA / NO FINDINGS OR CONCLUSIONS**
The defendant appealed from a Supreme Court order which determined that he was a level-three sex offender. The Fourth Department held that the SORA court failed to comply with Correction Law § 168-n (3), requiring the trial court to set forth the findings of fact and conclusions of law upon which it based its determination. Although Supreme Court provided a list of the risk factors for which points were assessed, and held that the defendant failed to rebut the presumption that he was a level-three risk, the court did not provide findings/conclusions supporting denial of the request for a downward departure. The reviewing court therefore held the case, reserved decision, and remitted the matter. The Legal Aid Bureau of Buffalo (Alan Williams, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00765.htm

FAMILY

FIRST DEPARTMENT

Selena O. (Lakeysha H.), 1/29/19 – **NEGLECT / NOT TO BE LIGHTLY FOUND**
The mother appealed from an order of Bronx County Family Court which found that she neglected the subject children. The First Department reversed and dismissed the petition. The petitioner agency, ACS, failed to establish that any of the subject children were neglected. Although Mariana was struggling in school, she had a good attendance record, and a special needs teacher was assigned to her. Some of the chronic communication difficulties between the school and the parents arose because of the school's practice of communicating with the mother through Mariana, despite her learning issues. In addition, with respect to Jesus, ACS did not prove that the mother, who was hearing impaired, failed to exercise a minimum degree of care in not addressing the toddler's speech delays. ACS only presented evidence of one conversation between its caseworker and the mother regarding the speech problems. The caseworker did not make any recommendations or referrals. True, the parents had a history of neglect, and their parental rights had been terminated as to an older child with extensive unmet medical needs. However, a finding of neglect should not be made lightly, nor should it rest upon past deficiencies alone. Geoffrey Berman represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00546.htm

Uriah V.A.J.C. (Arkia B.–Kirk C.), 1/29/19 – **SUSPENDED JUDGMENT / UPHELD**
The AFC appealed from an order of New York County Family Court, which suspended for one year a judgment that the respondent mother permanently neglected the subject child. The First Department affirmed. The trial court providently exercised its discretion in ordering such disposition in the child's best interests. The AFC did not cite a single case in which the First Department had reversed an order suspending the termination of parental rights as an abuse of discretion. Moreover, the respondent Catholic Guardian Services, which had been involved with this family for many years, strongly recommended a suspended judgment. The mother had complied with her service plan by attending and completing required services, testing negative for drugs, and maintaining consistent visitation.
http://nycourts.gov/reporter/3dseries/2019/2019_00556.htm

SECOND DEPARTMENT

Matter of Granzow v Granzow, 1/30/19 – **TEEN'S WISHES / GREAT WEIGHT**
The mother appealed from an order denying her application to modify a prior custody order. In affirming, the Second Department stated: "To the extent that the court relied upon the in camera interview of the then 14-year-old child, it was entitled to place great weight on his expressed wishes (*see Matter of Rosenblatt v. Rosenblatt,* 129 AD3d 1091, 1093; *Matter of Nicholas v. Nicholas,* 107 AD3d 899, 900.
http://nycourts.gov/reporter/3dseries/2019/2019_00594.htm

THIRD DEPARTMENT

Ulster County SCU v McManus, 1/31/19 – ***ANDERS* BRIEF REJECTED**
The father appealed from orders of Ulster County Family Court, which, after fact-finding and dispositional orders, held him in willful violation of two prior orders of support for the parties' three children; two money judgments; and two orders of commitment. Appellate counsel filed an *Anders* brief. The Third Department observed that it is rare that such a brief will reflect effective advocacy in a contested case where a full evidentiary hearing has occurred. A review of the record revealed issues of arguable merit related to the father's ability to pay and whether he was deprived of effective assistance. Thus, the reviewing court granted counsel's request to withdraw and assigned new counsel to address the issues identified and any others the record might disclose.
http://nycourts.gov/reporter/3dseries/2019/2019_00650.htm

FOURTH DEPARTMENT

Matter of William F.G. v Lisa M.B., 2/1/19 – **CUSTODY / REVERSED**
The mother and AFC appealed from a Family Court order which adjudged that the father's wife could supervise his visits with the parties' children. The Fourth Department reversed. The prior consent order—entered after the father was convicted of sexually abusing the parties' then-four-year-old daughter—granted sole custody to the mother and required the father's visitation to be supervised by his therapist or the maternal grandmother. The father failed to establish a sufficient change in circumstances. An established arrangement should not be changed solely to

accommodate the desires of the children. Moreover, in this case, the children were unaware that visitation with the father had been supervised by their grandmother for five years because of his sexual abuse conviction. Moreover, replacing the grandmother as visitation supervisor would not advance the children's best interests. She had a long history of successfully facilitating positive interaction between the children and the father, while providing meaningful protection to the children. The grandmother testified that she would be willing to allow the father's wife into her home. In addition, the record established that the wife did not know the real, sordid details of the sexual abuse and believed a fake, sanitized account. The Monroe County Public Defender (Janet Somes, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00774.htm

Matter of Lakeya P. v Ajja M., 2/1/19 – **CUSTODY / MODIFIED**
The mother appealed from an order of Onondaga County Family Court which granted custody of the children to the petitioners, an aunt and great aunt. The Fourth Department held that Family Court erred in granting the mother only so much supervised contact as was "deemed appropriate" by the petitioners. The court may not delegate such authority to a party. The appellate court therefore remitted the matter to Family Court to determine the supervised visitation schedule. Family Court also erred in ordering that any petition, filed by the mother to modify or enforce the custody orders, must have a judge's permission to be scheduled. Public policy mandates free access to the courts, and such access must not be restricted without a finding that the restricted party engaged in meritless, frivolous, or vexatious litigation, or otherwise abused the judicial process. There was no such finding here.
http://nycourts.gov/reporter/3dseries/2019/2019_00761.htm

***Alger v Jacobs*, 2/1/19 – CUSTODY / EMERGENCY JURISDICTION**
The father appealed from (1) an order of Ontario County Family Court which directed him to stay away from mother and the subject child, issued upon a finding that he committed a family offense; and (2) an order granting sole custody to the mother. On appeal, the father contended that the mother's petitions should have been dismissed based on a lack of subject matter jurisdiction. The Fourth Department rejected his arguments. Pursuant to the UCCJEA, Domestic Relations Law §76-c, NY had temporary emergency jurisdiction, where the child was present in this State, and jurisdiction was necessary in an emergency to protect the child and parent. Such statutory provision was enacted with the intent of protecting victims of domestic violence. The allegations in the petitions were sufficient to establish the requisite emergency. The pleadings alleged acts of physical violence by the father against the mother. She suffered a subdural hematoma and other serious injuries, resulting in her hospitalization in an intensive care unit for several days. The mother had no knowledge as to when the father would be released from jail in Florida. To be safe in the event of his release, she relocated to New York, where her family lived.
http://nycourts.gov/reporter/3dseries/2019/2019_00766.htm

ARTICLES

Alternatives to Incarceration / HON. JONATHAN LIPPMAN
USA TODAY – OPINION, 1/24/19
Incarceration in the U.S. peaked in 2008. Since then, many jurisdictions have expanded alternatives for low-level offenders, decriminalized some minor offenses, and reformed police practices. The federal FIRST STEP Act, signed into law last year, is designed to reduce sentences for nonviolent offenses. This is good news for those of us who care about creating a more rational, humane justice system. But FIRST STEP will only impact federal inmates. States must act. Many community-based programs can reduce re-offending for more serious cases. These include programs that use cognitive behavioral therapy. NYC offers a potential glimpse of what can happen when the justice system invests in such alternatives. From more than 21,000 detained persons in 1991, there are now 8,200 persons behind bars in NYC, in part because of alternative-to-incarceration programs. Judges play a crucial role—they are the bulwark against overzealous prosecution and too much incarceration. In many cases, lengthy prison terms do little to deter negative behavior and make it more difficult for individuals to reintegrate into society. We need to strengthen offenders' connections to the community, not undermine them. Judges need information about programs that provide evidence-based interventions, rigorous supervision, and thorough reporting back to the court.

OCA May Limit ICE Courthouse Arrests, DOCUMENTED, 1/30/19
Chief Administrative Judge Lawrence Marks told Albany lawmakers on Jan. 29 that OCA is considering steps to limit ICE officers from conducting civil immigration arrests inside courthouses. He reiterated the position of Chief Judge DiFiore that ICE will not be banned from entering courts, but left open the possibility of prohibiting detentions in the absence of a judicial warrant, rather than the administrative warrants typically carried by ICE officers. DOCUMENTED reported over the weekend that internal OCA documents showed that, in some cases, court officers coordinated with ICE prior to arrests. The Immigrant Defense Project has released a report showing that courthouse arrests greatly increased from 2017 to 2018.

ARE POLICE LINEUPS ALWAYS FAIR? *NY Times*, 1/29/19
Over the past two decades, the quality of NY lineups appears to have improved over the years, as police have become more attuned to the risks of suggestive procedures yielding mistaken IDs. While the NYPD has taken steps to improve fairness, suggestive lineups are not a thing of the past. For example, sometimes teenage suspects are placed in lineups alongside much older and heavier grown men. The NYPD did 1,353 lineups last year, about half as many as two years ago. But lineups remain a key tool.

One Lawyer, 194 Felony Cases, and No Time, *NY Times*, 1/31/19
Poor defendants have the right to a competent lawyer, but there has never been any guarantee that those lawyers will have enough time to handle their cases; and there has never been a reliable standard for how much time is enough. Now the ABA is completing studies in a dozen states to create a new standard that will help judges and policy makers determine how many cases public defenders can ethically handle. Nationwide, roughly

four out of five criminal defendants are too poor to retain a lawyer, and use public defenders or court-appointed counsel. Due in part to excessive caseloads, public defenders rarely take cases to trial; and 94% of convictions in state courts are the result of plea.

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