CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Anonymous, 2/18/20 – **SEALING VIOLATION / REVERSAL**

A trial court is without authority to consider, for sentencing purposes, erroneously unsealed official records of a prior criminal proceeding terminated in favor of the defendant. Where a violation of CPL 160.50 impacts the ultimate sentence, correction is warranted. Here that meant reversal of a First Department order and remittal for resentencing, without consideration of the sealed record. The defendant pleaded guilty to a drug possession offense, and the lower court adjourned sentencing and imposed a condition that he "stay out of trouble." Thereafter, he was arrested for a robbery, tried, and acquitted. The People sought an enhanced sentence for the drug crime and unsealing of the trial records as to the robbery. The sentencing court granted the motion and enhanced the sentence. That was error. The exception set forth at CPL 160.50 (1) (d) (ii) (access permitted where law enforcement agency shows that justice so requires) did not apply. Guidance was provided by *People v Katherine B.*, 5 NY3d 196, 203 (error to unseal records for non-investigatory purpose of sentencing recommendation). It did not matter that the instant promised sentence was conditional. *People v Patterson*, 78 NY2d 711, was distinguishable. Here the improper use of the defendant's trial testimony was not a technical violation—it was the sole basis for the enhanced sentence. Judge Rivera authored the majority decision. Chief Judge DiFiore wrote a dissent in which Judges Garcia and Feinman concurred. The Office of the Appellate Defender (Katherine Pecore, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2020/2020_01113.htm

People v Wheeler, 2/13/20 –
ACCUSATORY INSTRUMENT / JURISDICTIONAL DEFECT

The defendant was convicted of 2nd degree obstructing governmental administration for backing his vehicle away from police officers. Prior to trial, he moved to dismiss the accusatory instrument as facially insufficient. The Information lacked factual allegations providing notice of the official function the defendant allegedly interfered with—a police stop of him in his vehicle to execute a warrant to search the vehicle. The defendant thus lacked sufficient notice to prepare his defense, rendering the Information jurisdictionally defective. Richard Herzfeld represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2020/2020_00998.htm

People v Francis, 2/13/20 – **CPL 440.20 DENIAL / AFFIRMED**

In 2015, the defendant made a CPL 440.20 motion to set aside a 1988 sentence on the ground that the term imposed was illegally lenient. The motion court denied the application, and the First Department found that it could not consider the merits because the challenged order had not "adversely affected" the defendant. The COA affirmed, rejecting the arguments that the jurisdictional restrictions of CPL 470.15(1) did not apply to appeals of CPL 440.20 orders or that denial of the motion did "adversely affect" the defendant in preventing him from overturning the 1988 conviction and ultimately vacating

a 1997 sentence. The COA held that the speculative harms cited were contingent on how the defendant litigated future proceedings and thus were not within the scope of the negative impact contemplated. By its plain terms, the statute limited review to errors that hurt the appellant in the instant proceedings.
http://www.nycourts.gov/reporter/3dseries/2020/2020_00996.htm

People v Diaz, 2/18/20 – **SORA / "RELIABLE" HEARSAY / "FARCE"**
At a SORA hearing, the defendant was adjudicated at level two, based in part on an assessment of 10 points under risk factor one (use of violence). Such assessment was based entirely on a statement in the PSI report: "on one or more occasions, he used physical force to coerce the victim into cooperation." Such statement, which the defendant did not challenge, met the "reliable hearsay" standard. Judge Rivera dissented, joined by Judge Wilson. The unattributed conclusory hearsay sentence was not reliable; extended *People v Mingo* (12 NY3d 563) too far; and rendered the SORA proceeding "a farce." Such an isolated statement regarding the use of violence did not constitute clear and convincing evidence of forcible compulsion. It was one thing to admit a PSI report and quite another to credit such a conclusory statement, despite the lack of any evidentiary support. A reasonable mind would not rely on the statement as true.
http://www.nycourts.gov/reporter/3dseries/2020/2020_01114.htm

FIRST DEPARTMENT

People v Rivera, 2/13/20 – **FAMILY EXCLUDED / NEW TRIAL**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree criminal sale of a controlled substance and another crime. The First Department reversed and ordered a new trial. At a *Hinton* hearing (31 NY2d 71), there was no testimony that the defendant or any family member threatened, or otherwise posed a threat to, two testifying undercover officers. Defense counsel requested that family members be permitted to attend the officers' trial testimony, and the prosecutor did not oppose. Yet the court denied the application, without any supporting findings. This was error. An order of closure that does not make an exception for family members is overbroad, unless specific reasons validate such exclusion. The defense was not obligated to identify specific family members who might attend, absent a request by the prosecutor or the court. The Center for Appellate Litigation (Jan Hoth, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_01035.htm

People v Fernandez, 2/18/20 – **CPL 440.10 DENIAL / AFFIRMED**
The defendant appealed from an order of NY County Supreme Court, which summarily denied his CPL 440.10 motion to vacate a judgment of conviction based on ineffective assistance of counsel. The First Department affirmed. The motion contained no additional factual allegations beyond the record on direct appeal. On direct appeal, the appellate court had found the record insufficient to establish that alleged deficiencies as to suppression issues were a product of counsel's misunderstanding of the law (158 AD3d 462). The 440 motion was supported by an affirmation from appellate counsel, but did not shed any new light regarding whether trial counsel reasonably believed that raising the additional issues would be unwise. While appellate counsel made diligent efforts to obtain that information,

the defendant was unable to show the absence of legitimate explanations, so it would be presumed that trial counsel acted in a competent manner.
http://nycourts.gov/reporter/3dseries/2020/2020_01128.htm

SECOND DEPARTMENT

People v Ramirez, 2/13/20 – **SUMMATION & *MOLINEUX* ERRORS / NEW TRIAL**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree gang assault. The Second Department reversed and ordered a new trial based on two distinct errors. The prosecutor made improper statements in summation—an issue that was partially unpreserved—by suggesting that jurors should disregard the grand jury testimony of a central prosecution witness, and by inviting the jurors to speculate that, if called to testify, a missing witness would have given supporting testimony. Such comments were prejudicial, given that the credibility of the witness was crucial and the evidence was not overwhelming. An erroneous *Molineux* ruling also occurred. It was not relevant that the defendant allegedly resisted arrest six months following the incident in question, after violating an order of protection against him in favor of the complainants. Such offense was too far removed from the underlying incident to be relevant to consciousness of guilt. The Legal Aid Society of NYC (David Crow, Daniel Ruzumna, Nicholas Hartmann, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_01087.htm

People v Carlos M.-A., 2/13/20 – **YO / GRANTED**
The defendant appealed from a judgment of Rockland County Court, convicting him of 2nd degree robbery, upon his plea of guilty. The Second Department reversed, finding that the defendant was a youthful offender, and remitted for imposition of sentence. The defendant was convicted of an armed felony but was eligible to have this conviction replaced with a YO adjudication. Mitigating circumstances were present, including the lack of injury to the complainant. Relevant factors supporting YO treatment included that: (1) the defendant was only 16 at the time of the crime and used a BB gun; (2) he had no prior criminal record or violent history; (3) he had strong family support; (4) the presentence report recommended a YO adjudication and a term of probation supervision; and (5) the defendant expressed genuine remorse and a sincere desire to make better choices in the future. Lois Cappelletti represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_01083.htm

People v Clark, 2/19/20 – **DELAY IN PROSECUTION /REMITTAL**
The defendant appealed from a judgment of Rockland County Court, convicting him of 3rd degree criminal mischief upon a jury verdict. The appeal brought up for review the denial, without a hearing, of the defendant's motion to dismiss the indictment based on the People's unjustified delay in prosecution. The Second Department remitted for a hearing. The factors considered to determine if a defendant's rights have been abridged are the same whether he asserts a speedy trial right or the due process right to prompt prosecution. A lengthy and unjustifiable delay in commencing prosecution may require dismissal, even though no actual prejudice is shown. County Court failed to appropriately balance relevant circumstances, which included a delay of 22 months from the incident to the indictment;

the People's failure to offer a reason for the delay; and the defendant's claim of prejudice. The appellant represented himself.
http://nycourts.gov/reporter/3dseries/2020/2020_01180.htm

People v Juan R., 2/19/20 – **COMMITMENT ORDER / IAC**
The defendant, who had pleaded not responsible by reason of mental disease or defect, appealed from an order of Rockland County Court, committing him to a secure facility for six months, pursuant to CPL 330.20 (6), upon a finding that he had a dangerous mental disorder. The Second Department reversed and remitted. Although the order had expired, the appeal was not academic, because the challenged determination had lasting consequences. The initial hearing is a critical stage of the proceedings during which the defendant is entitled to effective assistance of counsel. No valid strategy could have warranted the concession that the defendant suffered from a dangerous mental disorder; and that admission did not relieve County Court from the obligation to provide the mandatory hearing. Mental Hygiene Legal Service represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_01190.htm

People v Rivera, 2/19/20 – **LARCENY / REDUCED**
The defendant appealed from a judgment of Westchester County Supreme Court, convicting him of several crimes after a nonjury trial. The Second Department reduced the conviction of grand larceny from 3rd to 4th degree. The People were required to establish that the market value of the stolen items at the time of the crime exceeded $3,000. As to some of items, the only evidence of the value was the complainant's testimony regarding the purchase price, and he did not say when he bought those items or state their market value or the cost to replace them.
http://nycourts.gov/reporter/3dseries/2020/2020_01192.htm

People ex rel. Rosario v Superintendent, Fishkill Corr. Fac.,
2/19/20 – **SARA / RESIDENCY REQUIREMENT**
The defendants appealed from a Dutchess County Supreme Court judgment/order, which granted a habeas corpus petition regarding SARA housing. The Second Department reversed. As the result of a rape conviction, the petitioner was designated a level-three sex offender. He received a final discharge in 2013. Thereafter, he was convicted of attempted 2nd degree burglary and sentenced as a second violent felony offender. He was not released to PRS in the community upon the 2018 maximum expiration date and was instead placed in a residential treatment facility at a state prison because he was unable to identify SARA-compliant housing. The arguments raised were academic because the petitioner has been released. However, application of the *Matter of Hearst Corp. v Clyne* (50 NY2d 707) mootness exception was warranted. As a result of inartful language, Executive Law § 259-c (14) had been interpreted in opposing fashion by the Third and Fourth Departments. (On May 3, 2019, the Third Department granted leave to the AG to appeal from *People ex rel. Negron v. Superintendent, Woodbourne*, 170 AD3d 12.) In the Second Department's view, the legislative history supported an interpretation that imposed the SARA-residency requirement based on either an offender's conviction of a specifically enumerated offense against an underage victim ***or*** the offender's status as a level-three sex offender.
http://nycourts.gov/reporter/3dseries/2020/2020_01178.htm

People v Anderson, 2/19/20 – **NO COMBAT BY AGREEMENT / ERRANT CHARGE**
Th defendant appealed from a Kings County Supreme Court judgment, convicting him of 2nd degree murder and attempted murder. The Second Department affirmed but found that the trial court had erred as to a jury charge. The defendant, who was 14 at the time of the incident, was seated at the back of a bus when rival gang members boarded. As they approached, the defendant shot at them, hitting and killing an innocent passenger, and then ran off the bus and continued shooting. A justification defense is negated where the physical force used by a defendant was the product of combat by agreement. Supreme Court should not have charged that exception based on generalized evidence that the defendant was a member of a gang which had a rivalry with other gangs. Any proof of an agreement was tacit, open-ended as to time and place, and applicable to all members of the local gangs. The exception is generally limited to agreements to combat between specific individuals or small groups on discrete occasions. But the error was harmless.
http://nycourts.gov/reporter/3dseries/2020/2020_01179.htm

FAMILY

FIRST DEPARTMENT

Matter of K.S. (Dyllin S.), 2/11/20 –
NO NEGLECT / SLEEPING CHILD / REVERSED
The father appealed from an order of disposition of NY County Family Court, which brought up for review (*see* CPLR 5501 [a] [1]) a fact-finding order holding that he neglected the subject child. The Second Department reversed and dismissed the petition. The child was in the home when the incident occurred, but was sleeping in another room, as proven by credible testimony of the parents and the responding police officer. Lewis Calderon represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00979.htm

Matter of Zaire S. (Mary W.), 2/13/20 –
NO NEGLECT / ADDICT BOYFRIEND / REVERSED
The respondent grandmother appealed from an order of fact-finding of NY County Family Court, which found that she neglected the subject child. The First Department reversed and dismissed the petition. The test is "minimum degree of care"—not ideal care. The agency presented insufficient evidence that the grandmother knew, or should have known, that the boyfriend had a serious substance abuse problem. While she was aware that he used alcohol frequently, and he once overdosed on drugs, the record did not establish the frequency or duration of his drug use prior to the underlying incident. Steven N. Feinman represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_01027.htm

THIRD DEPARTMENT

Adam V. v Ashli W., 2/20/20 – **CUSTODY ORDER / NO CONSENT**
The mother appealed from an order of Ulster County Family Court, which granted the father's custody modification petition and was ostensibly entered upon consent. The Third Department modified. No appeal lies from an order entered upon the consent of the appellant. However, when the instant agreement was placed on the record, the mother made specific objections, so the order was appealable. Moreover, the stipulation terms were not accurately reflected in the order, which was modified accordingly. Daniel Gartenstein represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_01231.htm

Erica X. v Lisa X., 2/20/20 – **CUSTODY ORDER / NO CONSENT**
The AFC appealed from an order of Albany County Family Court, granting the maternal aunt's custody modification petition, which was purportedly entered upon consent. The Third Department reversed and remitted. No appeal lies from an order entered upon the consent of the appellant. But during court proceedings, the trial judge and the AFC questioned the ability of the disabled mother to consent to anything. Thus, the record did not establish that her consent was valid. Peter Scagnelli represented the child.
http://nycourts.gov/reporter/3dseries/2020/2020_01224.htm

Tara DD. v Seth CC., 2/20/20 – **CUSTODY PROOF / PRECLUSION / ERROR**
The father appealed from an order of Tompkins County Family Court, which granted the mother's custody modification petition. The father untimely filed an answer and provided certain discovery. As a result, the lower court granted a motion to preclude him from offering any proof and contesting the mother's allegations. That was error, where there was no showing of willfulness, and preclusion barred proof needed to determine the best interests of the child. The matter was remitted for a new hearing. Dennis Laughlin represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_01227.htm

Sadie HH. v Darrin II., 2/20/20 – **CONVENIENT FORUM / REVERSED**
The mother appealed from an order of Otsego County Family Court, which granted the father's motion to dismiss her enforcement and modification petitions. The father and child lived in Arizona, while the mother resided in NY. Family Court erred in finding that NY was an inconvenient forum for several reasons. Most testimony would come from the mother and other NY witnesses; and the father could testify by phone. Further, prior proceedings had occurred here; the mother could not afford to fly to Arizona or retain counsel; and she might not be assigned counsel there. The Rural Law Center of NY (Kelly Egan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_01219.htm

Lila JJ. (Danelle KK.), 2/20/20 – **ART. 10 / DEFAULT / VACATUR**
The grandmother appealed from an order of Cortland County Family Court, which denied her motion to vacate an order finding neglect. The Third Department reversed. The controlling provision was Family Ct Act § 1042, not CPLR 5015. The mother did fail to

appear, and the matter could have properly proceeded without her. However, she was only notified that a conference, not a fact-finding hearing, could occur. Further, the trial court erred in finding the petition allegations proven without the presentation of any evidence by the petitioner. The Rural Law Center of NY (Kristin Bluvas, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_01216.htm

Rahsaan I. v Schenectady Co DSS, 2/20/20 – **TPR / REVERSED**
The mother appealed from an order of Schenectady County Family Court, terminating her parental rights based on mental illness. That was error, due to the absence of the statutorily mandated contemporaneous psychological exam. There was no proof that the mother refused to be evaluated or made herself unavailable. Even though she raised no objection below, the statutory command required reversal and a new hearing. Paul Connolly represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_01212.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