CRIMINAL

FIRST DEPARTMENT

People v Bloise, 2/26/19 – **REVERSE *BATSON* / NEW TRIAL**
The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW. The First Department reversed and remanded for a new trial. The trial court erred in granting the prosecution's reverse-*Batson* challenge to defense counsel's exercise of two peremptory challenges. There was no record support for the rejection of counsel's race-neutral reasons for striking the two panelists—that they were crime victims or relatives of crime victims. The People failed to show that racial discrimination was the motivating factor. There was no evidence of disparate treatment by defense counsel of similarly situated panelists; and the record otherwise failed to support the finding that the reasons cited for the challenges were pretextual. Legal Aid Society (Harold Ferguson, Jr., of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01363.htm

People v Tatis, 2/28/19 – **AMMUNITION CONVICTION / DISMISSED**
The defendant appealed from a judgment of Bronx County Supreme Court convicting him, after a jury trial, of attempted 1st degree assault, 2nd degree CPW, and unlawful possession of ammunition. The First Department vacated the ammunition conviction and dismissed that count. A NYC Administrative Code provision made it a crime to possess pistol or revolver ammunition, unless the possessor was authorized to possess such a weapon. The appellate court held that the relevant language constituted an exception, not a proviso. Thus, the People had the burden to prove that the defendant was not authorized to possess a pistol or revolver within NYC. The People did not meet their burden. The Center for Appellate Litigation (Scott Henney, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01507.htm

APPELLATE TERM, FIRST DEPT.

People v Wiltshire, 2/25/19 – **ACCUSATORY INSTRUMENT / JURISDICTIONAL DEFECT**
The defendant appealed from a judgment of Bronx County Criminal Court, convicting him upon a plea of guilty, of 7th degree criminal possession of a controlled substance. The Appellate Term – First Department reversed and dismissed the accusatory instrument. The instrument recited that, on a particular date and time, "underneath the overpass of the Bruckner Boulevard Expressway," a police officer observed the defendant "to have in his custody and control, on a concrete ledge where defendant was seated, one zip lock bag containing a white powdery residue" determined to be crack cocaine. These facts did not demonstrate reasonable cause to believe that the defendant constructively possessed the cocaine. There was no allegation: (1) that the defendant had control over, or a possessory interest in, the location, also described as "NYC property" with "no trespass" signs posted; (2) that he was engaged in drug-related activity; or (3) describing where the defendant was "seated" in relation to the drug residue and whether it was in plain view.
http://nycourts.gov/reporter/3dseries/2019/2019_50206.htm

SECOND DEPARTMENT

People v Rosario, 2/27/19 – **JUSTIFICATION / BAD CHARGE/ NEW TRIAL**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree assault and 1st degree reckless endangerment. The Second Department reversed and ordered a new trial. The case arose from an altercation that culminated with the defendant stabbing his cousin in the head, neck, and chest. The trial court instructed the jury on justification with respect to charges of attempted 2nd degree murder and the other counts. The instruction, in conjunction with the verdict sheet, failed to adequately convey that, if the jury found the defendant not guilty of attempted murder based on justification, then it must cease deliberations and acquit him of the lesser counts. Since there was no way of knowing whether the acquittal of attempted murder was based on a finding of justification, a new trial on the remaining charges was necessary. Appellate Advocates (Hannah Zhao, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01432.htm

People v Torres, 2/27/19 – **ADVERSE INFERENCE / NEW TRIAL**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of drug sale charges after a nonjury trial. The trial court should have granted the defendant's request for a permissive adverse inference charge upon the People's loss or destruction of the material he requested—tape recordings and other police records relating to taped interactions between the undercover officer and a witness to a sale. The error was not harmless. Appellate Advocates (Lynn Fahey, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01434.htm

People v Sheldon O., 2/22/19 – **DENIAL OF YO STATUS / REVERSAL**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree robbery, upon his plea of guilty. His purported waiver of the right to appeal was invalid. Supreme Court should have granted youthful offender status, in light of multiple factors: (1) the defendant was only 18 at the time of the incident; (2) he played a minor role in the crime, which was orchestrated by his older brother, a repeat offender who wielded a gun and sexually assaulted a victim; (3) the defendant had spent nearly two years in pretrial detention prior to pleading guilty; (4) he cooperated with authorities as part of his plea deal; (5) he did not have a prior juvenile or criminal record; (6) he suffered from development delays; and (7) he was about to graduate from high school. Appellate Advocates (David Goodwin, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01430.htm

THIRD DEPARTMENT

People v Sumter, 2/28/19 – **RESENTENCING / YET AGAIN**
In Albany County, the defendant pleaded guilty to attempted 3rd degree criminal sale of a controlled substance, waived the right to appeal, and was sentenced to five years' probation. After violating probation, he was sentenced to seven years in prison plus post-release supervision. In a prior appeal, the Third Department held that the defendant had improperly been adjudicated a second felony drug offender. The remittal court resentenced

him as a first-time felony drug offender. In the instant appeal, the Third Department reversed and remitted again, this time because the Public Defender who represented the defendant at the resentencing hearing was the County Judge who initially sentenced him. Erin Morigerato represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01460.htm

People v Mudd, 2/21/19 – ***Catu*** **Error / Reversal**
The defendant appealed from a judgment of Clinton Court, convicting him of drug sale and possession crimes. When he appeared in court, the People made an offer, which included a prison term of six years with post-release supervision. Two weeks later, the same offer was extended, the defendant did not accept, and it was withdrawn. Later, he pleaded guilty, with a promise from the court to not sentence him to more than the time offered by People. During the plea proceeding, the court said that it would not be bound by the six-year cap if the defendant committed a crime before sentencing. At sentencing, the defendant admitted his predicate felony, and the court imposed concurrent six-year terms plus PRS. The Third Department reversed, since County Court had failed to advise the defendant that the sentence would include PRS. *See People v Catu*, 4 NY3d 242. Preservation of the claim was not required, as the defendant had no practical ability to object to the PRS. Rebecca Fox represented the appellant
http://nycourts.gov/reporter/3dseries/2019/2019_01265.htm

FAMILY

SECOND DEPARTMENT

Norma U. v Herman T. R. F., 2/27/19 – **SIJS Denied / Reversal**
The petitioner appealed from two orders of Nassau County Family Court, which denied her applications pursuant to SIJS. The Second Department reversed. The record supported a finding that reunification of the children with their mother was not viable due to parental abandonment and that it would not be in their best interests to return to Honduras, where they were mistreated by relatives. Bruno Bembi represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01421.htm

Rina M. G. C. (Oscar L. G.), 2/27/19 – **SIJS Denied / Reversal**
The father appealed from an order of Nassau County Family Court, which denied his application pursuant to SIJS. The Second Department reversed. The record supported a finding that reunification of the child with the mother was not viable due to parental abandonment and that it would not be in the child's best interests to return to El Salvador, where she was threatened by gang members. Although the father had previously unsuccessfully moved for relief that would enable the child to petition for SIJS, the law of the case doctrine did not bind appellate courts. Bruno Bembi represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01407.htm

Schiavone v Mannese, 2/27/19 – **SUA SPONTE ORDER / REVERSAL**
The father appealed from an Orange County Family Court order finding that he willfully violated a child support order and directing that he be jailed for six months, unless he paid the purge amount. The Second Department reversed. A consent order had been entered, following the father's admission. Pursuant to such order, commitment was suspended on the condition that the father complied with the support order. Shortly after the consent order, Family Court received a phone call, ostensibly from the father's employer, stating that the father was not employed. The court sua sponte issued vacated the consent order, held a hearing, found a willful violation, and ordered the commitment. The Second Department reversed. Family Court lacked authority to vacate the consent order on its own motion. Moreover, Family Court should not have ruled based on unsworn statements. Kiel Van Horn represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01419.htm

Mark A.M. v Lesley R. S., 2/27/19 – **PATERNITY / ERRANT VACATUR**
The child was the nonparty-appellant as to an order which vacated an acknowledgment of paternity. The Second Department reversed. A party seeking to challenge such an acknowledgment more than 60 day after execution must prove fraud, duress or material mistake of fact. The Second Department held that the petitioner did not meet his burden. Hani Moskowitz represented the child.
http://nycourts.gov/reporter/3dseries/2019/2019_01414.htm

ARTICLES

NY Fines and Fees / RIPE FOR CHALLENGE
By Joanna Weiss and Lisa Foster, FINES AND FEES JUSTICE CENTER
NYLJ Op-Ed, 2/22/19
The U.S. Supreme Court's Feb. 20 decision, *Timbs v Indiana*—holding that the Eighth Amendment ban on excessive fines applies to state and local governments—is likely to have a significant impact in NY. A simple traffic ticket can cost hundreds of dollars, and when the fine is unpaid, the driver's license of the wrongdoer can be suspended. A New Jersey study found that more than 40% of persons who had their license suspended lost their jobs as a result. NY courts fail to consider ability to pay when imposing fines and fees. When used to generate government revenues, such penalties should be scrutinized for excessiveness. More than 1,200 NY towns and villages have their own courts; and a 2016 analysis found that six NY municipalities rank among the top 100 American cities most reliant on fines and fees. Three of those localities rely more heavily on fines and fees than Ferguson, Missouri, where a DOJ investigation exposed abusive practices. If policy changes are not implemented, NY fines and fees practices are ripe for litigation.

The following are summaries of articles in the Winter 2019 edition of the ABA's APPELLATE ISSUES, ***which is devoted to an ABA appellate summit.***

KEY U.S. SUPREME COURT DECISIONS

U.S. Supreme Court scholar, Professor Erwin Chemerinsky, stated that the most important criminal case of the year was *Carpenter v. United States*, concerning cell tower data. Every time we use our cellphone, the phone connects to a cell tower; and these connections generate records, which can include the GPS coordinates of each tower, and the day and time the phone tried to make that connection. Police can use this data to determine our rough location at almost any time and to track our movements historically. The question presented by *Carpenter* was whether the police needed a warrant to access this information, or whether they could simply send a subpoena to a cell phone company. The Supreme Court held that a request for cell-site data is a search under the Fourth Amendment and thus requires a warrant. Prof. Chemerinsky called this an "enormously significant decision" with potential consequences for decades, as technology advances. However, the Court left open many questions. What if police need "live" data to catch a fleeing criminal or want a list of all phone numbers connected to a particular cell tower at a specific time? Does *Carpenter* apply retroactively? What about the future of the third-party doctrine, which traditionally held that information possessed by third-parties could be acquired by subpoena without a warrant? In his session, the professor also addressed *McCoy v. Louisiana*. Robert McCoy was indicted for a triple murder. His retained lawyer told him to confess to the killings and to argue that he should not be convicted of first-degree murder. McCoy had no intention of doing that—he believed he was innocent. His motion to have the attorney removed was denied; and the trial court told the lawyer that trial strategy was his decision. Counsel took the instructions to heart; in his opening and closing arguments, he conceded that McCoy had killed the victims. McCoy was convicted and sentenced to death. The Supreme Court held that a criminal defendant has a Sixth Amendment right to prevent his counsel from conceding guilt. The error here was a structural one that did not require a showing of prejudice.

GREEK THEORY AND PERSUASIVE WRITING

One law professor applied Greek rhetoric theory to brief writing. The three elements of persuasive writing are the writer, the argument, and the reader. The writer needs integrity, credibility, and professionalism to be convincing. The argument requires logos, or plausible reasoning, as well as axios, or worthiness of the result sought. The audience seeks pathos, which in the brief-writing context translates to evoking emotion in the readers, that is, judges who want to do justice. Right up front, the brief should explain why the case or issue is before the court, and why the court should care. This is the big-picture analysis, going to the axios. The introduction should then focus on what the writer is asking the court to do and the basis for that result. That is the logos. The brief should strive to make the issues and outcome seem as simple as possible and should illustrate why precedent requires the desired result (assuming the attorney does not seek to create new precedent). Arguments should be presented in such a way that the brief could be a roadmap for the court's opinion.

REPLY BRIEFS: DO'S AND DON'TS

A session on reply briefs yielded the observations that such briefs are vital, since they can respond to new matters raised; distinguish the appellee's/respondent's case authorities; and highlight concessions on critical points. Further, they can serve as a preview of the appellant's oral argument. Reply briefs need not follow the structure and order of arguments in the opposing brief. A strong opening brief can set the stage for the reply brief; that is, the main brief can inoculate the appellant's presentation against less favorable aspects of the case by placing bad law or facts into context before the appellee does. The responding brief will then have less sting; and, in reply, the appellant need not waste space refuting all arguments. The reply brief allows the appellant to repair damage done by the responding brief; and that is easier where the opening brief anticipated the damage. The main brief should address obvious problems head-on, rather than saving them for reply. Panelists had three suggestions for what *not* to do in a reply brief: (1) Do not repeat the adversary's arguments. Instead, refute and reply. (2) Avoid emotion. The client may appreciate wild language, but the court does not. Take a step back and remind the court of what the appellant is trying to accomplish. (3) Do not waste time on nitpicky points. If the case authorities cited by opposing counsel are irrelevant red herrings, concisely explain. A reply brief can do more harm than good. For instance, where the adversary's brief is incomprehensible, do not clarify his or her arguments for the court. Finally, a reply brief may not be necessary where the responding brief merely addresses your arguments in a manner anticipated in the opening brief. Filing a reply in such a case would risk violating the maxim: "reply, do not repeat."

DISCRETIONARY REVIEW CHECKLIST

A panel on obtaining discretionary review yielded a state Supreme Court judge's checklist for the appellate advocate:

1. Have I thought about how my case extends beyond my client—does the case have broad impact and is the issue likely to recur?
2. Have I focused on important policy considerations, but avoided "the sky is falling" arguments?
3. Have I been candid about the facts?
4. Have I narrowed the issues and focused only on the strong ones?
5. Have I avoided distractions and cheap shots at the other side or the lower courts?
6. Is my motion or brief as clear and concise as possible?
7. Have I been specific about the relief requested?
8. Did I treat precedent fairly and distinguish cases honestly?

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