CRIMINAL

U.S. SUPREME COURT

DECISION OF THE WEEK

Garza v Idaho, 2/27/19 – **FAILURE TO APPEAL / WAIVER / PREJUDICE PRESUMED**

The petitioner entered into plea agreements in two separate cases. The agreements required him to waive his right to appeal. Shortly after sentencing, the petitioner informed his trial counsel that he wished to appeal, but counsel declined to file the notices of appeal, based on the waivers. Four months later, the petitioner filed applications for post-conviction relief, based on the ineffective assistance of his trial attorney in not preserving his right to appeal. The Idaho Supreme Court said that the petitioner had to demonstrate prejudice, but the U.S. Supreme Court disagreed. Justice Sotomayor wrote for the majority. In *Roe v Flores-Ortega*, 528 US 470 (2000), the Court held that, when an attorney's deficient performance costs a defendant an appeal that he or she would have otherwise pursued, prejudice should be presumed. The instant case held that such rule applied even when the defendant signed an "appeal waiver." That term can be misleading, since no appeal waiver is an absolute bar to all appellate claims. The waiver language and scope can vary widely; some claims are not waivable; and the waiver itself can be challenged. Thus, while signing an appeal waiver may mean giving up most appellate claims, some claims do remain. Filing a notice of appeal is a simple, non-substantive act that is within the defendant's prerogative. Appellate counsel, who will be responsible for deciding which appellate claims to raise, may not yet be involved in the case when the notice of appeal is filed. Justice Thomas filed a dissenting opinion, in which Justice Gorsuch joined and Justice Alito joined in part.
https://www.supremecourt.gov/opinions/18pdf/17-1026_2c83.pdf

SECOND CIRCUIT

USA v Kroll, 3/5/19 – **NY SEX CRIME / NOT VALID PREDICATE**

The defendant appealed his sentence of life imprisonment imposed following his guilty plea to two counts of sexual exploitation of a child. At sentencing, the District Court – EDNY concluded that a life sentence was mandatory, based on a determination that a 1993 NY conviction of 2nd degree sodomy was a "prior sex conviction" under 18 USC §3559 (e). The Second Circuit held that the District Court erred in failing to apply the "categorical approach." The NY conviction did not qualify as a "prior sex conviction" because the state statute swept more broadly than the federal equivalent, punishing activity the federal statute did not encompass. The judgment was vacated and the matter remanded for resentencing.
http://www.ca2.uscourts.gov/decisions/isysquery/8ed8f967-cb17-40a3-94f2-b2027a081d89/5/doc/16-4310_op.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/8ed8f967-cb17-40a3-94f2-b2027a081d89/5/hilite/

FIRST DEPARTMENT

People v Bilal, 3/7/19 – **NO REASONABLE SUSPICION / VAGUE GENERIC DESCRIPTION**
The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree CPW after a jury trial. The First Department reversed, suppressed the weapon, and dismissed the indictment. At around 9:20 p.m., police received a report about six shots being fired. An anonymous informant said the perpetrator was a black man wearing a black jacket. Lacking information about the path of the fleeing shooter, police acted on a hunch and drove to a Harlem apartment complex a few blocks from the location of the reported shooting. The defendant and another black man were exiting the building. The man with the defendant matched the description of the shooter. "Hey, Buddy...come here," said a plainclothes officer in an unmarked car. The defendant began running and threw a black object over a fence. Police pursued, apprehended him, and found a gun on the ground. The First Department stated that police had no reason to suspect that the defendant was the gunman, since the description of the shooter was vague and generic; the defendant was not leaving a location specified by the radio call; and the area was not desolate. Flight in conjunction with equivocal circumstances might permit a request for information, but did not constitute a reasonable suspicion justifying pursuit. The defendant had the right to run away. Moreover, when police pursue a suspect after an illegal attempt to seize him, his act of discarding property during the chase is not an abandonment. Two justices dissented. The Center for Appellate Litigation (Matthew Bova, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01673.htm

People v Cartagena, 3/7/19 – **TEXTS ABOUT MURDER / HARMLESS ERRORS**
The defendant appealed from a judgment of New York County Court, convicting him after a jury trial of 2nd degree murder and other crimes. The codefendant's text message that the murder was about to be committed, and his Facebook post that it was done, exceeded the proper bounds of state-of-mind proof. While that evidence should have been excluded, the errors were harmless. The trial court properly permitted the People to introduce text messages between the defendant and his girlfriend, while redacting a portion of the messages in which he denied having committed the murder. There was no violation of the rule of completeness; the messages that were introduced did not contain anything that needed to be explained by way of the redacted self-exculpatory messages. The messages in evidence tended to establish other matters, such as a timeline of events.
http://nycourts.gov/reporter/3dseries/2019/2019_01652.htm

People v Dorsey, 3/5/19 – **CPL 440.30 (1-A) / MOTION DENIED**
The defendant appealed from orders New York County Supreme Court that denied his CPL 440.30 (1-a) motion for DNA testing and his CPL 440.10 to vacate a 1998 conviction of 1st and 2nd degree sodomy (two counts each). After the First Department affirmed his convictions, a petition for a federal writ of habeas corpus was granted based on ineffective assistance. Counsel did not introduce results of serological testing performed on the complainant's underwear. The habeas court found that the testing showed the presence of two types of antigens at the site of the semen stain, both of which could have come from the victim, but only one of which could have come from defendant. At the second trial, the People informed the court that the physical evidence had been destroyed. The defendant was convicted again; and the conviction was affirmed. Thereafter, he moved for DNA

testing of the complainant's underwear, arguing that the People had failed to establish that the NYPD destroyed the evidence. The 440.10 motion asserted that, if the NYPD did destroy the semen sample, it did so in bad faith and in violation of the defendant's due process rights. The motions were denied. In the instant appeal, the First Department affirmed. Notwithstanding systemic problems in how the NYPD tracked whether evidence had been destroyed, the People proved that the subject evidence could not be located. Further, the defendant did not show that, had he been able to secure the original evidence and test it, the verdict would likely have been different. As to due process, with due diligence, the defendant could have adduced supporting facts that would have provided an adequate basis for review on direct appeal.
http://nycourts.gov/reporter/3dseries/2019/2019_01526.htm

APPELLATE TERM – FIRST DEPT.

People v Kilkenny, 3/5/19 – ***SUAZO* / JURY TRIAL / INVALID INVENTORY SEARCH**
The defendant appealed from a judgment of NYC Criminal Court, rendered after a nonjury trial, convicting him of attempted forcible touching, 3rd degree sexual abuse, and attempted 3rd degree criminal possession of a forged instrument. As the People conceded, the noncitizen defendant was entitled to a jury trial because the charged crimes carried a potential penalty of deportation. *See People v Suazo*, 32 NY3d 491. Thus, the judgment was reversed, and a new trial was ordered. Appellate Term – First Department also held that Criminal Court erred in denying suppression of a forged MetroCard recovered from inside the defendant's wallet. The hearing proof was insufficient to establish that police did a legitimate inventory search; and the hearing evidence did not establish exigent circumstances justifying the warrantless search. Since the possession of a forged instrument charge was based upon evidence obtained by means of the unlawful search of defendant's wallet, that count of the accusatory instrument was dismissed.
http://nycourts.gov/reporter/3dseries/2019/2019_50245.htm

SECOND DEPARTMENT

People v Maiwandi, 3/6/19 – **SUPPRESSION GRANTED / INDICTMENT DISMISSED**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 3rd degree criminal possession of a controlled substance (four counts) and other drug crimes, upon a jury verdict. The appeal brought up for review the denial of the defendant's suppression motion. The Second Department reversed, grant suppression, and dismissed the indictment. The People failed to establish the legality of the police conduct. The detective's testimony was patently tailored to meet constitutional objections. His version of events strained credulity and defied common sense. The detective claimed that he observed an alleged transaction through his rearview mirror with sufficient clarity to identify as Suboxone an object passed between the defendant and another occupant of the car. Obviously, the dashboard of the defendant's vehicle would have obscured the detective's view of a hand-to-hand transaction. Without the suppressed evidence, there would not be legally sufficient evidence to prove the defendant's guilt. Thus, the indictment was dismissed. Appellate Advocates (Cynthia Colt, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01618.htm

People v Lugo, 3/6/19 – **RESTITUTION / VACATED**
The defendant appealed from a judgment of Orange County Court, convicting him of 1st degree assault upon his plea of guilty and imposing sentence, including restitution of $73,000, plus a surcharge of $7,300. The Second Department vacated the restitution and surcharge order. The defendant's purported waiver of his right to appeal was invalid. In any event, the contentions that the restitution order and surcharge were not lawfully imposed survived a valid waiver. County Court should not have summarily ordered restitution absent a proper factual record from which the amount of medical expenses incurred by the injured victim could be inferred. Philip Schnabel represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01617.htm

People v Davis, 3/6/19 – **SURCHARGE / VACATED**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree manslaughter upon his plea of guilty. The Second Department held that the mandatory surcharge, DNA databank fee, and crime victim assistance fee had to be vacated. The defendant was previously convicted of 1st degree assault for the injuries he caused to the victim in the instant matter, and a mandatory surcharge and fees were imposed. The manslaughter conviction arose from the victim's subsequent death from the injuries suffered in the assault. Under these circumstances, the imposition of a second mandatory surcharge and fees was improper. Appellate Advocates (Jonathan Schoepp-Wong, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01615.htm

People v Anderson, 3/6/19 – **INVALID APPEAL WAIVER / SENTENCE UPHELD**
The defendant appealed from judgments conviction of weapons possession charges upon pleas of guilty. He did not validly waive the right to appeal. In light of his age (19 at the time of the plea), ninth grade education, and lack of experience with the criminal justice system, the cursory colloquy regarding the appeal waiver was insufficient. It was also relevant that counsel did not participate in the colloquy and did not sign the written waiver form.
http://nycourts.gov/reporter/3dseries/2019/2019_01610.htm

THIRD DEPARTMENT

People v Rosario, 3/7/19 – **CONFLICT / DEFENSE COUNSEL BECOMES JUDGE**
The defendant appealed from an order of Sullivan County Supreme Court which denied his CPL 440.10 motion to vacate a judgment of conviction for certain sexual crimes. When he was Chief Assistant and Director of the Legal Aid Panel, the judge who denied the instant motion had represented the defendant in the underlying criminal case. Pursuant to Judiciary Law § 14, a judge must not take any part in deciding a matter in which he was counsel. This statutory disqualification deprived the court of jurisdiction. Thus, the order under review was void, and the matter was remitted for review before a different justice. Aaron Louridas represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01679.htm

People v Rudolph, 3/7/19 – **NO CONFLICT / DA BECOMES DEFENSE COUNSEL**
The defendant appealed from a judgment of Albany County Court, convicting him upon his pleas of guilty of drug possession crimes; and from an order denying his CPL Article 440 motions. The Third Department affirmed. There was an inherent conflict of interest where a defense attorney who initially represented a defendant joined the DA's office during the pendency of the criminal proceeding—but not when the reverse occurred. In the instant case, an ADA became defense counsel. The defendant set forth no information that counsel obtained about him during his prior employment that compromised the representation provided. Further, there was no evidence that the potential conflict operated on the defense; counsel did not make any statements of substance at sentencing, and the agreed-upon sentence was imposed.
http://nycourts.gov/reporter/3dseries/2019/2019_01675.htm

People v Vega, 3/7/19 – **KILLING OF MOTHER / ILLEGAL ABORTION**
The defendant appealed from a judgment of Rensselaer County Court convicting him, following a jury trial, of 1st degree manslaughter, 2nd degree arson, and 1st degree abortion. The Third Department affirmed. The abortion conviction was not against the weight of the evidence; the intentional strangulation of the victim necessarily resulted in the death of the unborn child. Although Penal Law § 125.45 was recently repealed, the instant decision may affect prosecutions for acts committed prior to the repeal's effective date. In that regard, the appellate court observed that its conclusion did not raise the specter of criminalizing justifiable abortional acts.
http://nycourts.gov/reporter/3dseries/2019/2019_01677.htm

FAMILY

SECOND DEPARTMENT

Parris v Wright, 3/6/19 – **DAD SHOULD GET VISITS / NEW HEARING**
The father appealed from an order of Westchester County Supreme Court which denied him parental access to the children. The Second Department reversed and ordered a new hearing. The evidence did not demonstrate that supervised parental access with the father would be harmful to the children or that he forfeited his right to access. The order was improper to the extent that it directed counseling and/or compliance with prescribed medication as a pre-condition for future parental access or re-application for parental access. Since more than a year has passed since the order was issued, a new hearing was needed as to the father's petition.
http://nycourts.gov/reporter/3dseries/2019/2019_01602.htm

THIRD DEPARTMENT

Melissa KK. v Michael LL., 3/7/19 – **PARENTAL SURRENDER / CUSTODY DISMISSED**
The grandmother appealed from an order of Clinton County Court dismissing her application for custody of the subject children. The Third Department affirmed. Once parents have voluntarily surrendered their children, adoption is the exclusive means to gain custody; courts are without authority to entertain custody proceedings commenced by a member of the child's extended family. Regardless of the quality of the grandmother's proof, Family Court was divested of authority to entertain her custody petitions when the parents surrendered their parental rights to the Department of Social Services. Further, since the grandmother's notice of appeal was limited to the order dismissing her custody petitions, her contentions regarding related child protective proceedings were not properly before the appellate court.
http://nycourts.gov/reporter/3dseries/2019/2019_01690.htm

OTHER MATTERS

CHIEF JUDGE / STATE OF JUDICIARY:
18-B Rate Increase / Court Structure / Parental Representation
NYLJ, 3/1/19
New York state lawmakers have responded positively to proposals set forth by Chief Judge Janet DiFiore in her State of the Judiciary speech on February 26. Those proposals included higher **18-B rates** for 18-B attorneys. According to Brad Hoylman, State Senate Judiciary Committee Chair, there's widespread support for the rate hike proposal.
NYLJ, 3/6/19
State Bar leaders applauded the Chief Judge's endorsement of **court system restructuring** and agreed that NY should consolidate its trial courts into a two-tiered system. They noted that a superior court would have original jurisdiction over most cases, and a District Court would handle housing, minor criminal, and civil matters. New York should also create a Fifth Judicial Department to help relieve the caseload in the Second Department, which handled 11,600 appeals in 2015, compared to the 6,340 appeals in the other three Departments combined, the State Bar leaders opined.
CHRONICLE OF SOCIAL CHANGE, 3/5/19
As noted in the State of the Judiciary address, the Commission on **Parental Legal Representation**, created a year ago by the Chief Judge, has issued an interim report focusing on child welfare. The report makes six recommendations: timely access to counsel; caseload caps; statewide eligibility standards; doubling the 18-B rate; State funding of mandated parental representation; and creation of a State Office of Family Representation.

PROFESSIONAL ETHICS / Opinion 1084 (1/22/2016)
Defense Counsel's Knowledge of Co-D's Innocence
Where a defense attorney obtained information from a deceased client that appears to exonerate a co-defendant, that information is protected as confidential. However, authorization to disclose such information may have been expressed by the client or may

be implied when disclosure is consistent with the client's best interests and reasonable under the circumstances.
https://protect2.fireeye.com/url?k=d74d8583-8b6984ca-d74f7cb6-0cc47aa8d394-b33f7ba5e6c66cac&u=http://www.nysba.org/CustomTemplates/Content.aspx?id=62009

FIRST DEPARTMENT / Four-Judge Panels
NYLJ, 3/5/19
The First Department will use panels four-judge panels, beginning in April, because of three vacancies and one justice's medical leave, Presiding Justice Acosta announced. Further, Justice Kahn is retiring in September and Justice Sweeny will leave in December. Justice Acosta noted that, when there are two-two splits, a fifth judge will be brought in to break the tie. Four-judge panels have been used in the Second Department since 1978.

SECOND DEPARTMENT / Withdrawals and Notification of Settlement
Given the Second Department's high volume of perfected pending appeals, a new local rule amplifies the language of section 1250.2(c) of the Appellate Division Practice Rules. That section requires litigants to immediately notify the court when there is a settlement of a matter or any issue therein or when a matter or any issue therein has been rendered moot. Section 670.2(b) of the Local Rules provides that settlement includes any oral or written agreement or understanding which may, once memorialized, render a determination of the cause unnecessary. The Court also amended its Local Rules of Practice in relation to what is required to withdraw an appeal which has been calendared. *See* 22 NYCRR § 670.2.

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