CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Tsintzelis* and *Velez, 3/24/20 –
DNA EVIDENCE / CONFRONTATION CLAUSE

The admission of DNA lab reports through the testimony of an analyst who did not perform or supervise the DNA testing violated the defendants' confrontation clause rights. When confronted with testimonial DNA evidence at trial, a defendant is entitled to cross-examine an analyst who witnessed, performed or supervised the generation of the defendant's DNA profile or who used his or her independent analysis on the raw data. *People v Jones*, 27 NY3d 294; *People v Austin*, 30 NY3d 98. The instant records did not establish that the testifying analyst had such a role. Further, her hearsay testimony as to the DNA profiles developed from post-arrest buccal swabs satisfied the primary purpose test for determining whether evidence was testimonial. Finally, the errors were not harmless, since the People relied on the DNA profiles to prove guilt. The challenged Appellate Division orders were reversed and new trials were ordered. In concurring, Judge Rivera rejected the People's argument that, in the admitted Forensic Biology (FB) files, the listing of the analyst's name as a reviewer or analyst on some testing reports, and the appearance of her initials on each page of the files, sufficed. On several documents related to the final stages of DNA typing, the analyst was not listed at all as a reviewer or analyst. Further, her name or initials on any FB file document, including as a reviewer, was meaningless without testimony about what such a designation meant. Legal Aid Society of NYC (Tomoeh Murakami Tse, of counsel) and Appellate Advocates (Yvonne Shivers, of counsel) represented appellants Tsintzelis and Velez, respectively.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02026.htm

People v Perez, 3/26/20 – **SORA / RISK FACTOR 9 / DISSENT**

The SORA hearing court did not err in assessing 30 points for risk factor 9 (prior conviction for misdemeanor sex crime or endangering welfare of child or any adjudication for sex offense) based on a prior NJ conviction for lewdness. It was proper to rely on the underlying conduct of the foreign conviction, which included the defendant knowingly exposing himself to the 12-year-old victim and making sexual and offensive gestures. Judge Wilson dissented, joined by Judge Rivera. The only argument preserved by the People—that the defendant's *conduct* warranted 30 points—could not be considered under risk factor 9, which required a *conviction* or *adjudication*. The People failed to preserve any argument based on the lewdness conviction; and there was not a "considerable overlap" in the elements of the NJ lewdness statute and the NY crime of endangering the welfare of a minor, notwithstanding the majority's analysis.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02096.htm

People v Hymes, 3/26/20 – **IAC / 440 NEEDED**

The defendant asserted that County Court erroneously admitted certain testimony regarding the victim's out-of-court disclosures of sexual abuse and failed to instruct the

jury that such evidence could be considered only to explain the investigative process and complete the narrative as to events leading to the defendant's arrest. These arguments were unpreserved and unreviewable. Further, the defendant did not demonstrate the absence of strategic or other legitimate explanations for trial counsel's failure to object to the testimony challenged on appeal or seek a limiting instruction. Thus, the claim of ineffective assistance on direct appeal was rejected. To the extent the defendant wished to advance such a claim based on matters outside the record, he could commence a proceeding pursuant to CPL 440.10. (NOTE: Under Administrative Order AO/78/20, www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf, it would appear that such proceedings cannot be commenced until the emergency order is lifted.)
http://www.nycourts.gov/reporter/3dseries/2020/2020_02097.htm

SECOND DEPARTMENT

People v Derival, 3/25/20 –
CRIMINALLY NEGLIGENT HOMICIDE / INDICTMENT DISMISSED
The defendant appealed from a Rockland County Court judgment, convicting him of criminally negligent homicide after a nonjury trial. The Second Department reversed and dismissed the indictment. The case arose out of 2013 collisions among three vehicles traveling northbound on a parkway with two lanes for vehicles traveling in that direction. The defendant's vehicle was attempting to pass the other two vehicles. Following the collisions, his vehicle traveled into the median and struck a tree, resulting in the death of his passenger. County Court found that the defendant was traveling more than 40 mph above the speed limit when he tried to enter the occupied passing lane, causing an impact with vehicle one and secondarily with vehicle two. The appellate court concluded that the verdict was against the weight of the evidence. The People did not establish that the defendant failed to perceive a substantial and unjustifiable risk, thus causing the death of his passenger. No single consistent version of the accident emerged. Even the People's experts were at odds with each other. Moreover, the findings about the defendant's speed and improperly changing lanes were inconsistent with eyewitness testimony. Two justices dissented. John S. Edwards represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02072.htm

People v Shrayef, 3/25/20 – **SEALING DENIAL / AFFIRMED**
The defendant appealed from an order of Queens County Supreme Court, which denied his CPL 160.59 motion to seal his conviction of 2nd degree money laundering. The Second Department affirmed. In 2004, the defendant pleaded guilty and was sentenced to three months' imprisonment and probation. It was undisputed that the conviction was eligible for sealing and that the defendant satisfied the 10-year statutory period. The only issue was whether the Supreme Court improvidently exercised its discretion in denying the motion. The non-exhaustive list of relevant factors set forth in CPL 160.59 (7) was properly considered. Weighing in favor of sealing were the time since the defendant's conviction and his lack of contacts, before or since, with the criminal justice system. However, weighing against relief were the circumstances and seriousness of the offense, including the defendant's central role. Further, although he submitted evidence demonstrating his professional success, he failed to provide proof needed to aid the court in considering other

aspects of his character and to determine the impact sealing would have on his rehabilitation and his successful reentry into society.
http://nycourts.gov/reporter/3dseries/2020/2020_02073.htm

FAMILY

FIRST DEPARTMENT

Shaun C.S. v Kim N.M. 3/326/20 – **REFEREE / OUT OF BOUNDS**
The mother appealed from an order of Bronx County Family Court, which issued a custody order. The First Department reversed for further proceedings before a Family Court judge. In 2018, the parents filed separate custody petitions, but then withdrew them. In those terminated proceedings, the parties stipulated that a Family Court referee would determine the matter, as well as any future petitions. When new petitions were filed, the mother made an application to have the case transferred from the referee to a Family Court judge. That request was improperly denied. An order of reference to a JHO to hear and determine a matter is permissible only with the consent of the parties. The consent of these parties to have the referee hear and determine their dispute in the prior proceedings did not remain effective after those proceedings were terminated. A Family Court judge may refer the parties to a referee for a hearing and report, even in the absence of their consent. CPLR 4001, 4201, 4212. In such case, the parties have the right to bring a motion to confirm or reject in order to seek review of the referee's findings by a Family Court judge. CPLR 4320, 4403. Here, the referee exceeded her authority by determining the issues. A judicial determination was needed as to whether any further hearings were necessary and to give the parties an opportunity to seek confirmation or rejection of the referee's findings and conclusions. Howard Gardner represented the mother.
http://nycourts.gov/reporter/3dseries/2020/2020_02099.htm

SECOND DEPARTMENT

Matter of Siegell v Iqbal, 3/25/20 – **CUSTODY / BIAS / REVERSED**
The mother appealed from a Suffolk County Family Court order, granting custody to the father. The Second Department reversed and remitted for a new hearing before a different judge. Both parents petitioned for custody of the daughter, born in 2018. The record supported the mother's contention that Family Court was biased against her, depriving her of a fair and impartial hearing. The appellate court reached the unpreserved issue in the interest of justice. The trial court predetermined the outcome during the hearing and took an adversarial stance against the mother by interjecting itself into the proceedings and cross-examining the mother on irrelevant matters, while giving the father a free pass in questioning him on other topics. Francine Moss represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02084.htm

People v Georgiou-Ely v Ely, 3/25/20 – **CUSTODY / CHANGE / REVERSED**
The mother appealed from a Nassau County Family Court order, which dismissed her modification petition seeking sole custody of the parties' children and supervision of the father's access. The Second Department reversed and remitted. Family Court erred in finding no change in circumstances, where the children's relationship with the father has deteriorated, he threatened to strike them with a belt, and he denigrated the mother in their presence. Further, the children, age 11 and 13, wanted to live with the mother. Amy Colvin represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02049.htm

Matter of Elliot P. N. G. (Jonathan H. G.), 3/25/20 –
ART. 10 / DISCOVERY DENIAL / REVERSIBLE ERROR
The stepfather, a respondent in Article 10 proceedings, appealed from an order of Kings County Family Court, which denied his motion for the production of certain records by nonparties. The Second Department reversed provisions denying applications for records of certain nonparties. After the subject child made allegations of sexual abuse against the stepfather and the petitions were filed, he made motions pursuant to CPLR 3125 and Mental Hygiene Law § 33.13. It was error to deny disclosure of certain records from two different sources. Family Court Act § 1038 (d) provides that CPLR article 31 applies to abuse and neglect proceedings. CPLR 3101 (a) mandates full disclosure of all matter material and necessary in the defense of an action. The words "material and necessary" are to be interpreted liberally to require disclosure. The court must weigh (a) the need of the party for the discovery to assist in the preparation of the case and (b) any potential harm to the child from the disclosure. The crux of the instant defense was that Magnolia S.'s mother had a history of fabricating allegations against the stepfather. The records sought were material, as they bore on the truth or falsity of the allegations against him. The need for discovery was greater than the risk of harm to the children. They did not have an ongoing therapeutic relationship with a neutral forensic evaluator in previous custody litigation, whose records were sought. Further, the other records sought did not contain information from therapy sessions with the children. Jonathan Gordon represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02091.htm

Nasir C. (Aliyyah Rashida C.), 3/25/20 – **REMOVAL DENIAL / REVERSED**
The petitioner agency appealed from an order of Kings County Family Court, which denied an application pursuant to Family Ct Act § 1027 to remove the subject child from the custody of the mother. The Second Department, which had stayed enforcement of the order pending appeal, reversed. ACS commenced this proceeding alleging that the mother neglected the subject child, who was born several days earlier. The subject child was the mother's fifth. In 2006, her first child died at the age of two months after sustaining multiple head fractures as a result of blunt force trauma. In 2008, at the age of four months, the second child sustained rib fractures and other injuries, and the mother was found to have abused that child. In 2012 and 2013, she gave birth to a third and fourth child, who were removed from her care pursuant to Article 10 proceedings. Although those children were thereafter returned on a trial discharge, ACS ended the discharge when the mother failed to ensure that the children attended school and received mental health treatment.

Since the evidence failed to establish that the mother addressed the circumstances that led to the death of her first child and the removal of other children, denial of removal was error. http://nycourts.gov/reporter/3dseries/2020/2020_02092.htm