CRIMINAL

COURT OF APPEALS

People v Tapia, 4/2/19 – **GRAND JURY TESTIMONY / ADMITTED AT TRIAL**
In an assault trial, a witness's grand jury testimony was properly admitted, the Court of Appeals held 4-3. At trial, when the officer could not independently recall the circumstances leading to the defendant's arrest, the People sought to introduce his grand jury testimony as a past recollection recorded. Finding a proper foundation, the trial court allowed a portion of the subject testimony to be read into the record. When the officer took the stand at trial, his memory failure did not make him unavailable for cross-examination. Judge Wilson, joined by Judges Rivera and Fahey, dissented. CPL 670.10 did not allow for admission of the grand jury testimony. The majority had taken a large step toward trial by declaration or affidavit.
http://www.nycourts.gov/reporter/3dseries/2019/2019_02442.htm

People v Rodriguez, 4/2/19 – **COOPERATION AGREEMENT / ENHANCED SENTENCE**
As part of a plea agreement regarding murder and assault charges, the defendant promised to cooperate with a law enforcement on all matters in which cooperation was requested, including the prosecution of his accomplices regarding the subject charges. The agreement warned that a failure to fully cooperate would result in an enhanced sentence. County Court determined that the defendant violated the agreement in refusing to testify in a different case involving a home invasion against his family, and imposed consecutive rather than concurrent terms. Judge Rivera dissented. The defendant justifiably understood the agreement to require cooperation as to the crimes to which he pleaded guilty. Faced with a demand for cooperation outside the agreement, he sought to withdraw his guilty plea. That motion should have been granted or the defendant should have been sentenced to a concurrent term on the assault conviction. Judge Wilson concurred in the dissent.
http://www.nycourts.gov/reporter/3dseries/2019/2019_02444.htm

FIRST DEPARTMENT

People v Gentles, 4/4/19 – **CHANGED THEORY / NEW TRIAL**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of overdriving, torturing, and injuring animals. The First Department found that an unpreserved error warranted reversal in the interest of justice. The jury charge constructively amended the indictment, which was limited to a theory that the defendant personally mistreated his dog. The errant instruction allowed the jury to convict the defendant if he permitted another person to abuse the animal. The error was not harmless, because there was evidence from which the jury could have inferred that the defendant took the blame for his dog's condition to cover for his uncle. The fact that the defendant had completed his sentence did not warrant dismissal of the indictment, given the serious abuse at issue. Thus, a new trial was ordered. The Center for Appellate Litigation (Alexandra Mitter, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02623.htm

People v Muhammad, 4/4/19 – **NO JURY COERCION / DISSENT**
The defendant appealed from a judgment of New York County Supreme Court, convicting him of 1st degree sexual abuse. The First Department affirmed. Two judges dissented, opining that the trial court created a substantial risk of jury coercion during deliberations. On a Friday—knowing that the jury remained deadlocked after two *Allen* charges and having been informed that three jurors had extended travel plans starting the following Monday—the court granted the jury's request to continue deliberations that afternoon. Hours later, a verdict was reached. The dissenters opined that the majority failed to discern the impact of a supplemental instruction not addressing the scheduling conflict. The constitutional guarantee of trial by jury contemplates a jury free of coercion; and there was a real possibility that jurors were coerced by the improper instruction.
http://nycourts.gov/reporter/3dseries/2019/2019_02609.htm

SECOND DEPARTMENT

People v Floyd, 4/3/19 – **MURDER / OVERTURNED / SUPPRESSION**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder and other crimes upon a jury verdict. The appeal brought up for review the denial of a motion to suppress a revolver. The Second Department reversed, granted suppression, and ordered a new trial. The police lacked reasonable suspicion to stop a U-Haul truck based only on the anonymous tip regarding men suspiciously going in and out of the vehicle. The anonymous information was insufficient to indicate possible criminal activity, where the behavior described was consistent with the ordinary use of such a truck. Appellate Advocates (De Nice Powell, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02546.htm

People v Mohamed, 4/3/19 – ***PEQUE* VIOLATION / REMITTAL**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 3rd degree criminal sale of a controlled substance. The Second Department remitted. *People v Peque*, 22 NY3d 168, held that due process requires a court to apprise a noncitizen pleading guilty to a felony of the possibility of deportation as a consequence of the plea. A defendant seeking to vacate a plea based on a *Peque* defect must demonstrate a reasonable probability that he or she would not have pleaded guilty had the court given the requisite warning. In the instant case, the defendant contended that his plea was not valid, because Supreme Court did not deliver a *Peque* warning. To preserve a challenge to the validity of the plea, a defendant generally must move to withdraw the plea or otherwise object to its entry prior to sentencing. A narrow exception exists where there was no reasonable opportunity to object to a fundamental defect which was clear on the face of the record and to which the court's attention should have been drawn. Here the exception applied. At the plea proceeding, the court merely asked counsel if he had discussed with the client the potential immigration consequences. Counsel responded: "He is here on a Green Card. We have discussed the immigration consequences." The record did not demonstrate that the plea court mentioned, or that the defendant was otherwise aware of, the possibility of deportation. He had no practical ability to object to the court's inadequate statement. Upon

remittal, the defendant would have an opportunity to move to vacate his plea and to show prejudice. Appellate Advocates (Ronald Zapata, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02557.htm

People v Easley, 4/3/19 – **FST / NO *FRYE* HEARING**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd and 3rd degree CPW. The Second Department affirmed. The trial court properly denied the defense request for a *Frye* hearing regarding the forensic statistical tool (FST) used to evaluate the likelihood that the DNA mixture found on the trigger of the firearm originated from the defendant. A court of coordinate jurisdiction had determined that FST was not a novel scientific technique, but a software program that used accepted mathematical equations to calculate the likelihood ratio of obtaining a recovered mixture of DNA if the suspect was a contributor versus the probability of getting the same mixture if the suspect was not a contributor. The appellate court also agreed with the denial of the defense request for disclosure of the source code, algorithm, and validation studies. Such materials were not made by law enforcement personnel nor an intended prosecution witness, and they were not in the People's control.
http://nycourts.gov/reporter/3dseries/2019/2019_02545.htm

THIRD DEPARTMENT

People v Titus, 4/4/19 – **WAIVER OF INDICTMENT / DEFECTIVE**
The defendant appealed from a judgment of Broome County Court. He executed a waiver of indictment and was charged in a SCI with 3rd degree burglary. As part of a global disposition, he pleaded guilty to attempted 3rd degree burglary. The Third Department held that, because there was not strict compliance with statutory mandates, the defendant's waiver of indictment was invalid. The jurisdictional challenge was not precluded by the guilty plea, nor was it subject to the preservation requirement. CPL 195.20 requires that a waiver of indictment include the date and approximate time of the charged offense. When filed together, the waiver and SCI may be read as a single document to satisfy the statutory requirements. However, here neither document indicated the time of the charged offense. Thus, the waiver of indictment was invalid, and the SCI was jurisdictionally defective, thereby requiring vacatur of the guilty plea, reversal of the judgment, and dismissal of the SCI. G. Scott Walling represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02588.htm

People v Jones, 4/4/19 – **DOUBLE JEOPARDY / SENTENCE**
The defendant appealed from a judgment of Albany County Supreme Court, convicting him of 2nd degree assault. In 2001, he had been convicted of that crime and sentenced to a determinate term of seven years, followed by post-release supervision. He timely took an appeal, but for some reason did not perfect until 2015, resulting in reversal based on a *Batson* issue, remittal, and the instant guilty plea. The defendant was sentenced, as a second violent felony offender, to five years, followed by PRS, with the sentence to run concurrent to a term for a murder conviction. The Third Department held that counsel was ineffective in failing to recognize that, at the time of remittal, the defendant had served the maximum sentence that could be imposed upon him as a second violent felony offender. Thus, double

jeopardy prohibited additional prison time. Given the reasonable probability that, but for counsel's errors, defendant would not have pleaded guilty, the plea was vacated and the matter remitted. Kelly Egan represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02586.htm

SECOND CIRCUIT

USA v Walker, 4/4/19 – **MURDER PLEA DEAL / GOV'T RENEGED**
The defendant appealed from a judgment of District Court – EDNY sentencing him to 30 years for a drug conspiracy conviction. The Second Circuit vacated the sentence because the Government breached a plea agreement calling for an estimated range of 9-11 years, based on information it had at the time of the plea deal. The defendant could not be deemed to have been on notice that such a dramatic increase might occur in the absence of new facts.
http://www.ca2.uscourts.gov/decisions/isysquery/5a1a0474-424c-4ad9-981c-4e0569ba1968/2/doc/17-1896_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/5a1a0474-424c-4ad9-981c-4e0569ba1968/2/hilite/

FAMILY

FIRST DEPARTMENT

Cristian M-B. v Rosalba S., 4/2/19 – **FAMILY OFFENSE / FACTS NOT ALLEGED**
The respondent appealed from an order of Bronx County Family Court, which issued a one-year order of protection based on findings that he committed several family offenses. The First Department observed that the expiration of the protective order did not moot the appeal, in light of the significant enduring consequences. Family Court erred in determining that the respondent's actions constituted the family offense of 3rd degree assault as to a specified incident, where the necessary facts were not alleged in the petition.
http://nycourts.gov/reporter/3dseries/2019/2019_02470.htm

SECOND DEPARTMENT

J. A. H. v E. G. M., 4/3/19 – **DIVORCE / AGREEMENT / REVERSAL**
The plaintiff appealed from an order of Queens County Supreme Court which modified the parties' separation agreement so as to reduce the defendant's child support obligations and entitle him to a credit based on payments for college room and board. The Second Department reversed. Since the parties executed the agreement prior to 2010 amendments to Family Court Act § 451, the defendant had to show an unreasonable and unanticipated change in circumstances. His change in employment was not unreasonable, because he voluntarily left his law firm; and the return to full-time employment of the plaintiff, also a lawyer, was not unanticipated, given that the agreement provided for only two years'

maintenance. Further, it was clear that the parties did not intend that the defendant receive the subject credit. Dorothy Courten represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02505.htm

Verfenstein v Verfenstein, 4/3/19 – **BIRACIAL CHILD / EDUCATION**
The mother appealed from an order of Nassau County Supreme Court which denied her motion for permission to enroll the parties' child in a Manhattan private school. The Second Department affirmed. The boy, born in 2009, was biracial. When the parties separated in 2010, they agreed that their son would live with the mother in Queens. When the child began attending kindergarten, the parties agreed that he would attend public school near the father's home in Port Washington. In 2016, the mother sought permission to enroll the child at the U.N. International School (UNIS). While a diverse academic environment was desirable, no evidence showed that the child had been denied his biracial identity in the Port Washington school or that his status had hindered his development. Indeed, he had excelled academically.
http://nycourts.gov/reporter/3dseries/2019/2019_02583.htm

Matter of Dupree M. (Samantha Q.), 4/3/19 – **ICWA TRANSFER / AFFIRMED**
In an Article 10 proceeding, the child appealed from an order of Suffolk County Family Court, which granted the application of the nonparty Unkechaug Indian Nation to dismiss the proceeding and transfer jurisdiction to the tribe, pursuant to the Indian Child Welfare Act (ICWA). The Second Department affirmed. The ICWA was enacted to address the removal of a high percentage of Native American children from their families by nontribal public and private agencies. After passage of the federal law, New York amended the Social Services Law. Although the ICWA applied only to federally recognized tribes, and the Unkechaug did not appear to be so recognized, the Social Services Law encompassed any Indian tribe designated as such by NY, and that included the Unkechaug.
http://nycourts.gov/reporter/3dseries/2019/2019_02523.htm

FOURTH DEPARTMENT

Matter of Jewels J. (Justin J.), 4/2/19 – **CORAM NOBIS / APPEAL REINSTATED**
In a termination of parental rights case, the Fourth Department granted the County's motion to dismiss the appeal as untimely. Counsel for the respondent father then sought vacatur of the dismissal order via an application for a writ of error coram nobis. The motion papers argued that respondents in termination proceedings have the statutory and constitutional right to effective assistance of counsel, and that in Family Court cases, just as in criminal cases, counsel is ineffective where he or she fails to timely file a notice of appeal on behalf of a client who requested such action. The appellate court granted the requested relief, without opinion, vacating the order of dismissal and deeming the notice of appeal to be timely filed.

RAISE THE AGE

People v J.W., 4/2/19 – **STAB WOUNDS / SIGNIFICANT PHYSICAL INJURY**

The defendant was charged as an AO, on a felony youth complaint, with various assault and other charges. The felony complaint alleged that the defendant stabbed the complainant four times in the back and once in the thigh. The People asserted that the complainant sustained significant physical injuries. At a hearing, they produced a photograph of the injuries sustained and reported that the complainant was admitted to the hospital for three days and suffered bleeding to the chest cavity as a result of one wound. The court found that the People met their burden, by a preponderance of the evidence, that the complainant suffered a significant physical injury. Therefore, without the consent of the People, the matter could not be removed to Family Court.

http://nycourts.gov/reporter/3dseries/2019/2019_50458.htm

CYNTHIA FEATHERS, Esq.
Director of Quality Enhancement
For Appellate and Post-Conviction Representation
NY State Office of Indigent Legal Services
80 S. Swan St., Suite 1147
Albany, NY 12210
Office: (518) 473-2383
Cell: (518) 949-6131