CRIMINAL

COURT OF APPEALS

People v Foster-Bey, 3/31/20 – **LCN AND FST / *FRYE* HEARING NEEDED**
Last week's DECISIONS OF INTEREST summarized *People v Williams*, regarding problematical Low Copy Number and Forensic Statistical Tool techniques. *People v Foster-Bey* was argued with that case but decided separately. While the facts of the cases were different, the analysis and result were the same. Standard DNA analysis could not connect this defendant to the subject gun, so the People sought to introduce evidence based on LCN typing and FST analysis. The trial court denied a motion to preclude such evidence, without conducting a *Frye* hearing. In the instant case, as in *Williams,* the defense cited a scholarly writing in contending that: LCN evidence was not generally accepted in the relevant scientific community; the NYC Office of the Chief Medical Examiner was the only government facility using that method in criminal prosecutions; and the FST had not been validated by any entity other than the OCME. The motion court relied on flawed trial-court decisions in denying the defense application. As in *Williams*, the COA concluded that it was an abuse of discretion as a matter of law to admit the evidence without holding a *Frye* hearing. However, the error was harmless, given eyewitness testimony and the defendant's admission. Chief Judge DiFiore, joined by Judges Garcia and Feinman, concurred in the result of the Memorandum opinion and noted that the multiple-source DNA sample used here was below the apparent threshold validated by OCME internal studies and approved by the Commission on Forensic Science. Appellate Advocates (Dina Zloczower, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02124.htm

FIRST DEPARTMENT

People v Vasquez, 4/9/20 – **IMPROPER CROSS OF COHORT / DISSENT**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1st degree robbery and 1st degree assault. The First Department affirmed. The defendant was convicted based on his role in the crimes along with three other participants, including Francisco Calderon. While the prosecutor improperly cross-examined Calderon, the error was harmless. Two justices dissented, opining that the defendant was deprived a fair trial. The cross-examination left the impression that the defendant had participated with Calderon as a getaway driver in a spree of uncharged violent robberies. Such propensity evidence must not be admitted at trial. Further, the prosecutor argued in summation—without any basis in the record—that the defendant's SUV was Calderon's getaway vehicle for the other robberies. The evidence of guilt was not so overwhelming that the errors could be deemed harmless. The defendant was alleged to be at most a getaway driver; was not found with fruits of the crime; and was implicated on the word of more culpable accomplices who received beneficial plea bargains.
http://nycourts.gov/reporter/3dseries/2020/2020_02237.htm

THIRD DEPARTMENT

People v Burwell, 4/9/20 – **TWEET STORM / NOT PUBLIC ALARM**
The defendant appealed from a judgment of Albany County Supreme Court, convicting her of 3rd degree falsely reporting an incident (two counts). The charges arose from her involvement in an altercation and its aftermath on a city bus bound for the SUNY–Albany campus. The indictment alleged that: (1) knowing the information to be false, the defendant reported in a 911 call that she was jumped on a bus by a group of males; and (2) knowing the information to be false, she circulated via social media a false allegation that she was the victim of a racially motivated assault. The Third Department dismissed the latter count. As applied here, Penal Law § 240.50 (1) was unconstitutional. The statute was impermissibly broad in criminalizing the subject false speech. The Twitter storm that ensued after the defendant posted false tweets did not cause "public alarm." The retweets led to nothing more than a charged online discussion, and false tweets were debunked through counter speech. Frederick Brewington represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02205.htm

People v Clark, 4/9/20 – **GRAND JURY / NO CHANCE TO TESTIFY**
The People appealed from an order of Columbia County Court, which dismissed the indictment. The Third Department affirmed. The defendant was arraigned on drug possession charges, remanded to the county jail, and assigned a Conflict Defender. A few days later, the People faxed to the Conflict Defender a notice stating that the matter would be presented to the grand jury, but not specifying a presentment date. The next day, the People presented the matter to the grand jury. County Court properly granted the defendant's motion to dismiss the indictment pursuant to CPL 190.50 (5), since the People failed to give him a reasonable opportunity to consult with counsel and decide whether to exercise his right to testify before the grand jury.
http://nycourts.gov/reporter/3dseries/2020/2020_02204.htm

People v Jones, 4/9/20 – **ARMED FELONY / YO ELIGIBLE?**
The defendant appealed from a judgment of Rensselaer County Court, convicting him upon his plea of guilty of 2nd degree CPW. He challenged the lower court's determination to deny him youthful offender status. Although County Court did expressly consider whether the defendant was a YO, it was unclear whether the court recognized that he had pleaded guilty to an armed felony and that a judicial finding regarding YO-eligibility, based on the CPL 720.10 (3) factors, was required. There was no reference at the plea or sentencing to an armed felony. The sentence was vacated, and the matter remitted to County Court. Linda Johnson represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02202.htm

FAMILY

SECOND DEPARTMENT

Amira W. H. (Tamara T. H.), 4/9/20 – **ART. 10 / ABSENT MOTHER / REVERSAL**
The mother appealed from an order of Kings County Family Court, which found that she permanently neglected the subject child and terminated her parental rights. The Second Department reversed and remitted. The mother failed to appear on a date when continued fact-finding was scheduled, and an adjournment was granted. When she did not appear on the next date, counsel stated that she would participate on the mother's behalf. Thus, the mother was not in default as to the fact-finding hearing. The trial court's refusal to permit counsel to introduce into evidence certain documents, based on the mother's failure to appear, violated her due process rights. A parent has a right to be heard on matters concerning her child. Absent a convincing showing of waiver, such rights must not be disregarded. Brooklyn Defender Services represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02264.htm

Matter of Katie P. H. (Latoya M.), 4/9/20 – **ART. 10 / ABSENT MOTHER/ REVERSAL**
The mother appealed from a Westchester County Family Court order finding neglect. The Second Department reversed and remitted. DSS alleged that the mother hit and Tasered the maternal grandmother in the subject child's presence. On the fifth day of the hearing, the mother did not timely arrive in court, because her bus from Georgia was delayed. Counsel notified the court of the delay and the mother's intention to testify and sought an adjournment. The court erroneously denied the adjournment, as well as a request to reopen the hearing, made when the mother arrived shortly after summations. William Eddy represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02265.htm

Simone C.P. (Jeffry F.P.), 4/9/20 – **ART. 10 / SMOKING POT / REVERSAL**
The father appealed from an orders of fact-finding and disposition rendered by Queens County Family Court, which found that he neglected the subject child, and placed the child in the custody of the agency. The Second Department dismissed the appeal from the fact-finding order, which was subsumed by the dispositional order and was brought up for review by the appeal from the final order. *See Matter of Aho*, 39 NY2d 241; CPL 5501 (a) (1). The neglect petition was dismissed. The evidence did not show that the father's alleged domestic violence against the mother and use of marijuana harmed the child. Center for Family Representation (Michele Cortese, Emily Wall, of counsel), represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02270.htm

Cohen v Cohen, 4/9/20 – **COMPELLING RELIGIOUS PRACTICE / UNCONSTITUTIONAL**
The father appealed from an order of Rockland County Supreme Court, which modified a judgment of divorce so as to direct that, during his parental access with the two children, he must comply with the cultural norms of the religion practiced during the marriage. The children had been raised in accordance with the practices of Satmar Hasidic Judaism. The hearing proof made it clear that the "cultural norms" reference in the challenged provision

meant that each parent must comply with the religious requirements of Hasidic Judaism. The Second Department reversed. The subject provision unconstitutionally compelled the father to practice a religion, rather than merely directing him to provide the children with a religious upbringing. Morrison & Foerster represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02263.htm