CRIMINAL

THIRD DEPARTMENT

People v McCabe, 4/16/20 – **CUSTODIAL INTERROGATION / REVERSED**
The defendant appealed from a judgment of Fulton County, convicting him of 1st degree assault, 1st degree strangulation, and 4th degree CPW after a jury trial. He was acquitted of attempted 2nd degree murder. The Third Department reversed. The defendant contended that County Court committed reversible error in denying his motion to suppress his un-*Mirandized* statements. After arriving at the crime scene and finding the defendant in the driveway, a police officer entered the residence where the victim was being treated by the defendant's mother. The officer summoned emergency services and then informed the defendant that he was being detained for questioning. After handcuffing the defendant and placing him in the patrol car, the officer asked him, "What happened?" The defendant responded that he "snapped" and "wanted her to feel the pain he had" and admitted, "I choked her with a rope but never struck her in the face." County Court allowed the statements, purportedly elicited by questioning meant to clarify the nature of the volatile situation, not to elicit evidence of a crime. The appellate court disagreed. The incident had been completed, the parties identified, and medical assistance requested. The defendant had been cooperative and responsive. Thus, the custodial questioning constituted interrogation. There was no merit in the People's assertion that a reasonable person in the defendant's situation would have believed he was free to leave at any time. The error was not harmless. The statements were clear admissions, and it could not be said beyond a reasonable doubt that they did not contribute to the conviction. Robert Cohen represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02288.htm

SECOND CIRCUIT

USA v Nolan, 4/15/20 – **HABEAS CORPUS / IAC / FLAWED IDS**
The petitioner was convicted in District Court–SDNY of multiple crimes in connection with an armed robbery at a Bronx apartment occupied by an allegedly drug-dealing family, four of whom identified him as one of the robbers. He sought a writ of habeas corpus on the ground of ineffective assistance, contending that there was no conceivable strategic rationale for his attorneys' failures: (1) to pursue a pretrial motion to preclude in-court identification testimony by the victims; (2) to hire an expert on eyewitness testimony or to introduce expert testimony about the unreliability of the IDs; and (3) to seek to exclude a Facebook photo of him posing with a BB gun that looked like a handgun. District Court denied the petition without a hearing. The Second Circuit reversed, vacated the conviction, and remanded. Counsel's abandonment of the pretrial motion in favor of trying to impeach the ID testimony was professionally unreasonable. Multiple factors undermined the IDs: the perpetrators wore disguises that partially obscured their faces; they were armed, suggesting "weapon focus" by the victims; the robbers' aggressive behavior placed the victims under stress; the victims were black and Hispanic, while the petitioner was white; right after the crime, two victims who knew the petitioner did not identify him; many weeks elapsed between the crime and a photo array; and police allowed co-witness interaction that likely contaminated the IDs. Under these

circumstances, counsel's failure to consult an expert was inexcusable. An expert witness could have explained why the IDs were highly unreliable for reasons beyond the ken of the typical juror. The Facebook photo did not place the petitioner at the robbery, and the Government offered a weak rationale—that the photo showed his access to firearms. The prejudice was clear. Without the IDs, the prosecution case was thin; and in summation, the Government relied heavily on the IDs. The Facebook photo of the petitioner with an apparent firearm likely elicited jurors' emotional reaction in this armed robbery case. Susan Walsh represented the appellant.
http://www.ca2.uscourts.gov/decisions/isysquery/b9c9d468-8df1-45d6-8abc-ee1d63a338c2/3/doc/16-3423_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/b9c9d468-8df1-45d6-8abc-ee1d63a338c2/3/hilite/

Janakievski v Executive Director, Rochester Psychiatric Center, 4/10/20 –
HABEAS CORPUS / INVOLUNTARY COMMITMENT / NOT MOOT
The petitioner was involuntarily committed to a NY State psychiatric institution in 2009 after being charged with 1st degree assault and pleading not responsible by reason of mental disease or defect, pursuant to CPL 330.20. He filed a pro se petition for a writ of habeas corpus. In 2018, state court ordered him conditionally released. The District Court–WDNY dismissed his petition on the ground that it was moot. The Second Circuit held that the petition was not moot because the orders challenged in the pleading continued to impose restrictions on his liberty. Under NY law, the petitioner remained more vulnerable to recommitment, and that constituted an actual injury traceable to the orders attacked and likely to be redressed by a favorable judicial decision. Although the habeas petition did not challenge the 2018 order of conditions, District Court should have given the pro se petition a liberal reading and offered the petitioner a chance to amend it. The imposition of the 2018 order was a direct consequence of 2009-2012 confinement orders cited. Thus, the District Court judgment was vacated and the matter remanded for further proceedings.
http://www.ca2.uscourts.gov/decisions/isysquery/7429a790-d5ee-429e-a952-be10aef52898/1/doc/18-3235_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/7429a790-d5ee-429e-a952-be10aef52898/1/hilite/

COVID-19

DECISION

People ex rel. Nevins v Brann, decided 4/3/10, posted 4/16/20
TOLLING EXEC ORDER / CPL 180.80
On the day that Executive Order 202.8 was issued, the defendant was charged in a felony complaint with 1st and 3rd degree robbery. He was currently detained. In the instant petition for a writ of habeas corpus, he contended that he was being unlawfully detained, in violation of CPL 180.80, which was not suspended by the EO tolling provisions. Queens County Supreme Court held that CPL 180.80 was within the ambit of the order. Courts had stopped trying cases and Grand Juries were not convening. Deadlines related to those court functions

had to be suspended. The defendant could seek release in other ways. Bail applications had been deemed essential matters. At any time, a defendant may ask the court to reconsider a securing order based on a change in circumstances. A defendant may also obtain de novo review, by a Supreme Court justice, of a securing order set by a criminal court judge or may file a petition for a writ of habeas corpus alleging violations of constitutional or statutory standards prohibiting excessive bail, or the arbitrary refusal of bail. The defendant had indeed argued that bail was excessive, and it was reduced.
http://nycourts.gov/reporter/3dseries/2020/2020_20083.htm

COURT OPERATIONS

SCOTUS / TELECONFERENCE ARGUMENTS

National Law Journal, 4/14/20
In early May, the U.S. Supreme Court will hold oral arguments by teleconference for the first time. The oral arguments in the 10 scheduled cases were postponed from the March and April sessions due to the pandemic. Some advocates noted the disadvantage in not seeing nonverbal cues from judges. Further, justices will not be able to see each other's reactions. The Court has also relaxed filing and service requirements and deadlines due to the impact of Covid-19.

FIRST AND SECOND DEPARTMENTS / VIRTUAL COURTS

According to announcements posted to their websites, the First and Second Departments have expanded operations as virtual courts. The First Department stated that it will resume calendaring appeals and motions; scheduling preargument conferences; admitting attorneys; and processing attorney grievance complaints. The May and June Special Terms will be held May 4-29 and June 1-26, and calendars will be published on the court's calendars webpage. Oral argument will occur via Skype. Admission ceremonies will be held remotely via Skype. The Second Department has begun to publish calendars for April 27 through May 8 and will also hold oral arguments via Skype. The court held a virtual admission ceremony on April 14.
http://www.nycourts.gov/courts/ad1/PDFs/AD1v2.pdf
http://www.nycourts.gov/courts/ad2/pdf/Second_Dept_Expands_Virtual_Operations.pdf

PRISONER RELEASE

FEDERAL PRISONS / RELEASE CONDITIONS

NYLJ, 4/15/20
Federal prison are experiencing exponential increases in Covid-19 cases, due to the inability to implement social distancing. For non-violent offenders who have exhausted administrative remedies, the First Step Act may bring compassionate release based on extraordinary and compelling reasons. In an EDNY case, the federal Bureau of Prisons seemed to indicate that the threat of contracting Covid-19 could meet the FSA standard. Recently, the DOJ recognized the FSA as an avenue for relief in light of the pandemic; urged the increase of home confinement for inmates at institutions with significant levels of infection; and directed federal prosecutors to consider Covid-19-related medical risks in their advocacy under the Bail Reform Act. These actions suggested that the FSA offers a promising avenue to seek a

sentence reduction for the right applicant, based on individual medical circumstance and the particular facility.

PRISONERS RELEASED / WESTCHESTER COUNTY JAIL
Mid-Hudson News, 4/17/20
Thanks to a cooperative effort of the Legal Aid Society of Westchester County and the District Attorney's Office, 79 inmates were allowed to leave jail, after a review of the files of prisoners who were sentenced to a year or less, were due to be released soon, or were serving time for violations or probation. The review included consideration of potential health issues, the nature of the crime, and the potential danger to the community.

NY PRISONERS / MANY RELEASED
NYLJ, 4/15/20
Due to the Covid-19 pandemic, the State prison system will release some prisoners over age 55 who have three months or less remaining on their sentences and did not commit a sex offense or violent felony, according to the Governor's office. The affected persons represent a small fraction of older prisoners vulnerable to the coronavirus. For weeks, there have been many calls for authorities to release more inmates in correctional facilities, which are a dangerous incubator for the virus. Last month, DOCCS reported that as many as 1,100 people jailed on parole violations would be released.

***WEBINAR:* COMPASSIONATE RELEASE**
ABA, 4/3/20, Summary of Webinar:
https://www.americanbar.org/content/dam/aba/administrative/crsj/webinar/compassionate-release-webinar-summary.pdf
Also, see the recent webinar on Covid-19 and **Child Welfare Cases**:
https://www.americanbar.org/groups/crsj/events_cle/program-archive/covid-child-welfare/

***LETTER:* GRANT CLEMENCY NOW**
Albany Times Union, 4/17/20
By Jose Saldana, Director, Release Aging People in Prison Campaign
There is only one true solution that will prevent a COVID-19 catastrophe in state prisons: releasing people. During my 38 years behind bars, I consistently saw how ill-equipped the prisons were at combatting viruses. It is just a matter of time before this virus becomes catastrophic, including for people I left behind—a 73-year-old with cancer who has been incarcerated for 35 years and helped create some of the most meaningful in-prison programs in the history of the state prison system; a 61-year-old scholar living with HIV who has been incarcerated for 27 years; and a 68-year-old who has serious asthma and a thyroid condition and is mentor to countless incarcerated people. COVID-19 could likely kill them and so many others. To leave thousands of human beings in prison to die from this virus is a humanitarian crisis. Gov. Cuomo must grant mass clemency.

***OPINION:* RELEASE MANY MORE PEOPLE NOW**
By Paul Skip Laisure, Robert Dean, Christina Swarns, Justine Luongo, Tammy Feman, Edward Smith
NY Daily News, 4/15/20

"Yesterday, Gov. Cuomo announced that he had begun the process of releasing people from New York's prisons in response to the coronavirus crisis. But his plan will barely make a dent in the prison population and will leave the vast majority of vulnerable individuals behind bars. He must do more…As the leaders of some of the largest public defender organizations in the state, we represent many of the approximately 80,000 individuals incarcerated in New York's jails and prisons. We estimate that more than 10,000 are at grave risk from the COVID-19 virus, either because of age or serious pre-existing illness. Several thousand more have served the vast majority of their sentences and are due to be released in the coming months, but are at risk every day they remain incarcerated…On April 3, we and other public defenders sent the governor a detailed blueprint of which individuals to consider for immediate release, including those who are older than 50, have serious medical conditions that put them at risk, and/or are due for release within the next 12 months. Many of us also have sent carefully screened lists of individual clients who fall into these categories and whose personal circumstances demand immediate attention. Together with an extensive network of law firm partners and reentry organizations, we stand ready to work with the administration in ensuring safe and orderly release for these people…Only immediate release can adequately protect these at-risk individuals. As the chief physician of New York City's jail system recently emphasized…the fundamental reality of incarcerated existence…makes effective safety measures impossible. Incarcerated individuals have next to no control over their living conditions or personal interactions. They share cells, use communal bathrooms, eat in crowded mess-halls, work in cramped areas, and exercise in overflowing yards…By acting, the Governor would not only protect at-risk individuals, sparing them the terror of spending this crisis incarcerated…he would lower the infection risk for the corrections officers who…return to their families and communities each night...At the beginning of this unprecedented crisis, the Governor wrote: 'We are going to fight every way we can to save every life that we can. That's what it means to be an American and that's what it means to be a New Yorker.' Our clients are New Yorkers, too. They have committed crimes and been punished accordingly, but none of them deserves a death sentence."
https://www.nydailynews.com/opinion/ny-oped-release-more-prison-cuomo-20200415-smib6uwwarbuvjnygbpqmn5zja-story.html

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