COURT OF APPEALS

DECISION OF THE WEEK

People v Odum, 5/3/18 – **PEOPLE'S APPEAL / IMPROPER BREATHALYZER TEST**
In a 4-3 opinion authored by Judge Stein, the Court of Appeals held that, because a breathalyzer test was not administered as required by Vehicle & Traffic Law § 1194, and the defendant's consent to take the test was not voluntary, the results were properly suppressed. The VTL grants a motorist a qualified right to decline to voluntarily take a chemical test, after being warned that a refusal will result in immediate license suspension and that the evidence of refusal will be admissible at trial. The statute further mandates that a breathalyzer test pursuant to the "deemed to consent" provision must be performed within two hours of arrest. In the instant case, the test was not done within such time frame. Because the police warning that evidence of a refusal would be admissible was inaccurate, the defendant's consent was involuntary. Bronx Defenders (Vanessa Marika Meis, of counsel) represented the respondent.
http://www.nycourts.gov/reporter/3dseries/2018/2018_03173.htm

People v Roberts, 5/3/18 – **IDENTITY THEFT / PERSONAL IDENTIFYING INFORMATION**
The common issue presented in the two subject appeals was whether the People may establish that a defendant "assumes the identity of another," within the meaning of Penal Law §§ 190.79 and 190.80, by proof that he or she used another person's identifying information, such as bank accounts or credit card numbers. In the instant matter, the First Department answered no and vacated a conviction, whereas the Fourth Department answered yes and affirmed a conviction. The Court of Appeals concluded that the use of personal identifying information is one of the express means by which a defendant assumes a person's identity. Judge Rivera wrote the majority opinion. Judge Wilson dissented in part and concurred in part.
http://www.nycourts.gov/reporter/3dseries/2018/2018_03172.htm

People v Aleynikov, 5/3/18 – **SECRET SCIENTIFIC MATERIAL / CONVICTION**
When the defendant left his computer programmer position at Goldman Sachs, he uploaded a large quantity of its trading source code to the hard drive of a server in Germany and then downloaded the code to his electronic devices for use by his new employer. Following a jury trial, the defendant was found guilty of one count of unlawful use of secret scientific material. However, New York County Supreme Court granted his motion for a trial order of dismissal. The First Department reinstated the verdict. When the defendant uploaded the source code, he made a "tangible reproduction or representation" of it within the meaning of Penal Law § 165.07, the Appellate Division held. In an opinion by Judge Fahey, a unanimous Court of Appeals agreed, reasoning that a copy of code may be tangible even if the code is not.
http://www.nycourts.gov/reporter/3dseries/2018/2018_03174.htm

FIRST DEPARTMENT

People v Anonymous, 5/1/18 – **UNSEALING IMPROPER / BUT NO RESENTENCING**
In *Matter of Katherine B. v Cataldo*, 5 NY3d 196, the court held that the "law enforcement agency" exception in CPL 160.50 did not authorize the unsealing of records for sentence recommendation purposes of the prosecution. That decision controlled in the instant case, in which the First Department held that it was of no moment that the unsealed material did not relate to "acquitted conduct," in that the unsealed records involved an uncharged drug crime, not the robbery as to which the defendant was acquitted. The reviewing court observed that the core purpose of the sealing statute was to protect against disclosure of information as to a charge that terminated in a defendant's favor, so that no stigma would result from an unsustained accusation. While finding that unsealing was improper, the appellate court rejected the defendant's request for resentencing, citing *People v Patterson*, 78 NY2d 711. Two justices concurred in a separate memorandum.
http://nycourts.gov/reporter/3dseries/2018/2018_03097.htm

SECOND DEPARTMENT

People v Balcerak, 5/2/18 – **PEOPLE'S APPEAL / NO SOMTA WARNING**
The defendant pleaded guilty to a sexual offense. Shortly before his release, a civil management petition was filed against him under SOMTA (Mental Hygiene Law article 10). In a CPL 440.10 application, the defendant sought to vacate his conviction. He asserted that his plea was not valid because counsel had not warned him about possible SOMTA consequences. Nassau County Supreme Court denied the motion without a hearing. The Second Department reversed and remitted for a hearing. After such hearing, the trial court vacated the conviction, and the People appealed. In the instant decision, the Second Department affirmed. A guilty plea may be deemed involuntary if a defendant can show that the prospect of SOMTA confinement was realistic enough that it reasonably could have caused him—and in fact would have caused him—to reject an otherwise acceptable plea bargain. The defendant made the requisite factual showing. The Legal Aid Society of Nassau County (Tammy Feman and Argun Ulgen, of counsel) represented the respondent.
http://nycourts.gov/reporter/3dseries/2018/2018_03138.htm

THIRD DEPARTMENT

Matter of Matheson KK., 5/3/18 – **INEFFECTIVE ASSISTANCE / CPL 330.20**
Ulster County Court found that the respondent had a dangerous mental disorder and committed him to the custody of the Commission of Health. On appeal, the respondent argued that he was deprived of effective assistance of counsel during the initial commitment hearing, held pursuant to CPL 330.20. The Third Department found that the waiver of appeal executed in connection with the plea agreement did not preclude such argument. The initial commitment hearing was a critical stage of the proceedings; and counsel's performance fell short. She did not contest any findings contained in the psychiatric reports, did not call witnesses, and did not seek to cross-examine the psychiatrists who prepared the report. The reviewing court could discern no plausible

strategy for counsel's conduct. The challenged order was reversed and the matter remitted for a new hearing. Mental Hygiene Legal Service (Laura Rothschild, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03195.htm

People v Butler, 5/3/18 – **SORA / REDUCTION TO LEVEL TWO**
Warren County Court classified the defendant as a level-three sex offender, following his plea of guilty to third-degree rape. On appeal, the defendant contended that, in arriving at its score of 115 points, the trial court had improperly tallied the points assessed as to various risk factors on the RAI. The Third Department agreed, finding that the score should have been 95 points and designating the defendant a level-two sex offender. His further assertion, that points were erroneously assigned based on his prior youthful offender adjudications for sexual misconduct, was rejected in light of *People v Francis*, 30 NY3d 737, decided after the appeal was submitted. The Rural Law Center of New York (Kelly Egan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03183.htm

People v Gerbino, 5/3/18 – **HUNTING ACCIDENT / NOT HOMICIDE**
The defendant hunter saw what he thought were antlers. He fired, killing a companion. After a nonjury trial on stipulated facts, County Court found him guilty of criminally negligent homicide and ordered a conditional discharge. The appellate court reversed: the hunters agreed to use separate tree stands, the victim had taken drugs, and he used an unsafe path after being told not do.
http://nycourts.gov/reporter/3dseries/2018/2018_03179.htm

FOURTH DEPARTMENT

People v Borcyk, 5/4/18 – **440 MOTION / SUMMARY DENIAL WAS ERROR**
The defendant appealed from an order of Monroe County Court that denied, without a hearing, his CPL 440.10 motion to vacate his murder conviction. The Fourth Department concluded that County Court had erred. The affidavit of a witness, stating that her former boyfriend admitted that he committed the murder, was not newly discovered: it was contained in a police report timely provided to counsel. However, a hearing was warranted based on ineffective assistance, where counsel failed to subpoena, or otherwise secure the presence of, a witness who had potentially exculpatory information.
http://nycourts.gov/reporter/3dseries/2018/2018_03256.htm

People v Willis, 5/4/18 – **WAIVER INVALID / YO RIGHTS VIOLATED**
The defendant was convicted of manslaughter on a plea of guilty. The Fourth Department found that the waiver of the right to appeal was invalid and that the sentencing court had erred in failing to determine whether the defendant should be afforded youthful offender status. He was an eligible youth; and the sentencing court is required to make a YO determination when a defendant is eligible, even where he or she fails to so request. The appellate court reserved decision and remitted the matter. The Monroe County Public Defender (Janet Somes, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03291.htm

People v Doty, 5/4/18 – **CONVICTION AFFIRMED / PEOPLE CHASTISED**
The defendant appealed from a Steuben County judgment convicting her upon a jury verdict on drug possession and sale charges. After concluding that the verdict was not against the weight of evidence, the appellate court felt compelled to comment on how the prosecution had presented the case. In the direct examination of law enforcement witnesses and the confidential informant—and again upon summation—the prosecutor emphasized the purported "controlled" nature of the purchase. But the informant lived in the same household with defendant before the sale. The prosecutor elicited officer testimony regarding the informant's actions inside the house. Yet the officers could not have seen those actions, and the testimony was not corroborated by the audio surveillance. In the reviewing court's view, such conduct by the People warranted a reminder that prosecutors have a duty to deal fairly with the accused and to be candid with the courts.
http://nycourts.gov/reporter/3dseries/2018/2018_03245.htm

People v Bishop, 5/4/18 – **CONVICTION AFFIRMED / WARRANT DRAFTER CHASTISED**
The defendant appealed from an Erie County animal fighting conviction. The police discovered the dog-fighting paraphernalia in plain view, and suppression was thus properly denied, the Fourth Department held. However, the reviewing court voiced its condemnation of a witness who testified that he was deliberately vague in drawing the warrant. "That is an unacceptable practice and should be discontinued immediately because it is in direct contravention of the principles of the Fourth Amendment," the court declared.
http://nycourts.gov/reporter/3dseries/2018/2018_03265.htm

SECOND CIRCUIT

United States v Alexander, 5/1/18 – **GUNS FOUND IN CURTILAGE / SUPPRESSION**
Without a warrant or probable cause, police searched a portion of the defendant's property and found two guns inside a bag. District Court – Eastern District denied suppression, holding that the firearms were found outside the curtilage of the home. After a trial, the defendant was convicted of being a felon in possession of a firearm. The Second Circuit reversed. Suppression should have been granted. The guns were found in front of a shed, at the end of the driveway, just a few steps from the defendant's back door. The area immediately surrounding and associated with the home is the very definition of curtilage, the appellate court observed. On three sides, fencing enclosed the defendant's shed and house. The top of the driveway was used for parking cars and occasionally for recreation. Based on such factors, the guns were recovered from within the curtilage. The Federal Defenders of New York (Allegra Glashausser, of counsel) represented the appellant.
http://www.ca2.uscourts.gov/decisions.html

United States v Brooks, 5/2/18 – **VIOLATION / NO LIFETIME SUPERVISED RELEASE**
Following a conviction on drug charges, the defendant was sentenced by the District Court – Southern District to a term of imprisonment and three years' supervised release. After a violation, he was sentenced to one year in prison and a life term of supervised release. That was an extreme and unusual remedy, the Second Circuit observed. To some degree, a lifetime of supervised release was at odds with the rehabilitative purpose of release, as such period presumed that the need for supervision would never end and the defendant was

essentially incorrigible. The significant justification needed to support such severity was absent in the record. The defendant's conduct, in testing positive for drugs and not reporting for testing, was common among recidivist defendants struggling with addiction. Cases were legion in which similarly situated offenders received far shorter terms of supervised release. Life terms typically involved child pornography or violent crimes. The period imposed was unreasonable. The matter was remanded. Kafahni Nkrumah represented the appellant.
http://www.ca2.uscourts.gov/decisions.html

FAMILY

THIRD DEPARTMENT

DiBella v DiBella, 5/3/18 – **RIGHT TO COUNSEL DENIED / NEW CUSTODY TRIAL**
The parties stipulated to a divorce, and a trial was held on custody and support. Following a nonjury trial, Ulster County Supreme Court awarded sole legal custody to the father. The mother had initially been represented by counsel, but had discharged her attorney and been granted adjournments to retain new counsel. When new counsel did not appear for a court date, the trial court denied the mother's request for a further adjournment and informed her that she would have to proceed pro se—which she did, to her great disadvantage. On appeal, the mother contended that, when Supreme Court compelled her to proceed pro se, she was deprived of her statutory right to counsel. The Third Department agreed. Pursuant to Judiciary Law § 35 (8), Supreme Court was required to adhere to Family Ct Act § 262. Yet nothing in the record indicated that the trial court ever advised the mother of her right to the assignment of counsel if she was financially unable to retain counsel. In the absence of the statutory advisement or her valid waiver, the mother was deprived of her fundamental right to counsel. Thus, the matter was remitted for a new trial. Bruce Wagner represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03186.htm

Matter of Cooper v Williams, 5/3/18 – **NO JOINT CUSTODY / MEDICAL DISPUTES**
The parents filed competing custody modification petitions. Clashes about the children's medical needs were the core issue, and Madison County granted the mother sole decision-making power in such matters. The Third Department affirmed. The father constantly interfered with reasonable medical treatment, including ADHD medication for one of the children. The inability of the parents to agree on the medical care of the children was so egregious that their lifelong pediatrician would no longer accept them as patients. William Roth represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03185.htm

Matter of Brent O. v Lisa P., 5/3/18 – **RELOCATION / FATHER AND KIDS TO OKLAHOMA**
For years, the mother had custody of the parties' daughter; and the father lived in North Carolina and spent the summers with the child. When the father moved to Oklahoma, he sought custody. St. Lawrence County Family Court granted the petition, and the Third

Department affirmed. The mother's life, residence, and relationships were unstable. The child had been sexually abused, yet the mother permitted a convicted sex offender to join family gatherings. On Facebook, the mother posted provocative photos of herself and made lewd comments; and she was oblivious to potential impact of such conduct on the child. The girl was failing core classes at school, but the mother was not tuned into her academic problems. Moreover, the mother sought to alienate the child from her father. In contrast, the father offered stability. His wife of 10 years was an airline executive, and he was retired from the U.S. Army and thus available to care for the child when she was not in school. The father also encouraged the mother-daughter relationship. Family Court had considered the impact of the separation of the child from her half siblings. Although not dispositive, the attorney for the child supported Family Court's decision. Stephen Vanier represented the respondent.
http://nycourts.gov/reporter/3dseries/2018/2018_03187.htm

FOURTH DEPARTMENT

Matter of Beyer v Hofmann, 5/4/18 – **REVERSAL / UCCJEA VIOLATED**
The father appealed from an Erie County Family Court order dismissing his petition, seeking custody of his twin daughters, on the ground that Pennsylvania was the children's home state. Since the order did not determine a motion on notice, it was not appealable as of right (*see* CPLR 5701 [a] [2]; Family Ct Act § 1112 [a]). Rather than dismissing the appeal, the Fourth Department sua sponte treated the notice of appeal as a motion for leave to appeal and granted the application in the interest of justice. Under the UCCJEA, Family Court had jurisdiction to make an initial custody determination when the father commenced the instant proceeding, whereas Pennsylvania had such jurisdiction when the mother initiated a proceeding in that state. The reviewing court agreed with the father that Family Court erred in declining to exercise jurisdiction and dismissing the proceeding without following UCCJEA protocols and without giving the parties the opportunity to present facts and arguments regarding jurisdiction. The challenged order was reversed, the petition reinstated, and the matter remitted for further proceedings. Denis Kitchen represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03259.htm

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