CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Towns, 5/7/19 – **JUDICIAL BIAS / REVERSAL**

The defendant was denied a fair trial when the trial court negotiated and entered into a cooperation agreement with a codefendant, requiring him to testify against the defendant in exchange for a more favorable sentence. In so doing, the trial court abandoned the role of a neutral arbiter and created a high risk of bias. The COA so held in a unanimous opinion authored by Judge Stein. The court reversed the Fourth Department order, which affirmed a judgment convicting the defendant of six counts of 1st degree robbery and ordered a new trial before a new judge. At trial, the defendant moved to preclude the codefendant's testimony and, upon conviction, sought to set aside the verdict based on the agreement and the codefendant's testimony. Although this case presented unique circumstances, a basic principle applied: the bench must be scrupulously free from even the appearance of partiality. The trial court's conduct violated concepts of fundamental fairness. The Monroe County Public Defender (Dianne Russell, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2019/2019_03527.htm

People v Brown, 5/7/19 – **PEOPLE'S APPEAL / REVERSED**

The defendant shot his pregnant daughter's boyfriend and was indicted for 2nd degree murder and 1st degree manslaughter. Defense counsel's request for a justification instruction was denied, and the defendant was convicted of manslaughter. The First Department reversed. However, finding that no reasonable view of the evidence warranted a justification charge, the COA reversed and remitted the matter to the Appellate Division for a determination of the facts and issues raised but not determined on appeal to that court. The defendant was the initial aggressor as a matter of law. Before drawing his gun, he was not threatened by the victim with the imminent use of deadly force. The defendant placed his gun in a position where he could fire it imminently. After taking out the gun, the defendant did not withdraw.
http://www.nycourts.gov/reporter/3dseries/2019/2019_03529.htm

People v Vega, 5/7/19 – **NO JUSTIFICATION CHARGE / AFFIRMED**

The defendant was charged with two counts of 2nd degree assault for beating the victim using a belt with a metal buckle. There was no reasonable view of the evidence that the defendant merely attempted, or threatened, to use the belt in a manner readily capable of causing death or serious physical injury, but that he did not use it in that manner. The challenged jury instruction was thus proper. Judge Garcia concurred in the memorandum decision.
(http://www.nycourts.gov/reporter/3dseries/2019/2019_03530.htm

People v Rkein, 5/7/19 – **NO JUSTIFICATION CHARGE / AFFIRMED**

The trial court properly denied the defendant's request for a justification instruction with respect to 2nd degree assault. If the jury convicted the defendant based on use of a dangerous

instrument, it necessarily determined that he employed deadly physical force by striking the complainant on the head with a pint glass. No reasonable view of the evidence supported a deadly force justification charge. At the time that the defendant employed force, the complainant had merely pushed him while a female patron tried to separate the men.
http://www.nycourts.gov/reporter/3dseries/2019/2019_03528.htm

People v Meyers, 5/9/19 – **JURY NOTE / MERE DRAFT**
While preparing the defendant's appeal, counsel discovered a purported jury note in the court file. The Appellate Division directed Supreme Court to conduct a reconstruction hearing to determine if the exhibit reflected a jury request for further instruction. The trial court concluded that the exhibit was a draft or derelict note that was never submitted to the court. Such finding was supported by the record, the COA held. Therefore, the CPL 310.30 jury note procedures were not triggered. Judge Garcia concurred in the result.
http://www.nycourts.gov/reporter/3dseries/2019/2019_03658.htm

FIRST DEPARTMENT

People v Peralta, 5/7/19 – **WRITTEN JURY INSTRUCTIONS / NEW TRIAL**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree assault. The First Department reversed. As the People conceded, the defendant was entitled to a new trial, because the trial court provided written instructions to the jury at its request, but over the defendant's objection. *See People v Johnson*, 81 NY2d 980 (CPL 310.30 prohibits giving copies of text of any statute to deliberating jury without consent of parties; court committed reversible error in providing material to jury over defendant's objection). The Legal Aid Society of NYC (David Crow and Randall Adams, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03539.htm

People v Teran, 5/7/19 – **CONCURRENCE / *BATSON* CONCERNS**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of drug sale charges. The First Department affirmed, finding that the trial court properly denied a *Batson* application. One justice wrote a concurring opinion. Whether *Batson* succeeded in ending racial discrimination in jury selection was an open question. Here the challenges against two African-American jurors were the product of the questionable assumption that social service workers who volunteered in soup kitchens and worked in HIV clinics were unduly sympathetic to criminal defendants. When explanations were based on absurd stereotypes, they should be rejected. During jury selection, the ADA said that a soup kitchen coordinator was challenged because such persons were often drug addicts. *Batson* must not be applied so as to blindly accept implausible reasons for exercising peremptory challenges.
http://nycourts.gov/reporter/3dseries/2019/2019_03532.htm

Matter of State of NY v Jerome A., 5/7/19 – **AG APPEAL / MHL ART. 10**
The State appealed from an order of NY County Supreme Court, which dismissed the MHL Article 10 petition and ordered the respondent released from custody, upon a determination

that he did not suffer from a mental abnormality. The appeal brought up for review a ruling that the diagnosis of unspecified paraphilic disorder (USPD) was not generally accepted in the relevant community. The First Department reversed and reinstated the petition. A 2018 Second Department case held the diagnosis of USPD had not achieved general acceptance. The First Department disagreed. Consistent with the Fourth Department, the reviewing court found that the evidence presented at the instant *Frye* hearing satisfied the State's burden.
http://nycourts.gov/reporter/3dseries/2019/2019_03531.htm

SECOND DEPARTMENT

People v Walters, 5/8/19 – ***SANDOVAL* ABOUT-FACE/ REVERSAL**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree burglary and other crimes. The Second Department reversed and ordered a new trial. After a *Sandoval* hearing, the trial court ruled that, if the defendant testified in his own behalf, the People could ask him whether he had two prior felony convictions, but they must not elicit the underlying facts. On direct examination, the defendant testified about a 2008 burglary conviction and a pending civil lawsuit against the police department based on his alleged beating. On cross-examination—without seeking an amendment of the *Sandoval* ruling—the prosecutor deeply delved into facts underlying the 2008 crime. Objections were overruled. The appellate court held that, when Supreme Court implicitly changed its *Sandoval* ruling, the defendant was denied his right to make an informed choice as to whether to take the stand. A mistrial should have been granted. The error was not harmless: cross-examination with respect to prior similar crimes may be highly prejudicial. Despite limiting instructions, the jury likely drew an improper conclusion of propensity. Appellate Advocates (Kathleen Whooley, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03632.htm

People v Ali-Williams, 5/8/19 – ***RUDOLPH* ERROR / REMITTAL**
The defendant appealed from a judgment of Orange County Court, convicting him of 1st and 2nd degree robbery and other crimes, upon his plea of guilty, and imposing sentence. The Second Department vacated the sentence and remitted. CPL 720.20 (1) requires a court to make a youthful offender determination in every case where the defendant is eligible, even where such adjudication was not requested. *See People v Rudolph*, 21 NY3d 497, 501. As to the instant robbery, an armed offense, the court was required to determine whether the defendant was eligible based on statutory facts. Regarding other convictions, the record did not show that County Court considered whether the defendant should receive YO treatment. Samuel Coe represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03609.htm

People v Arevalo, 5/8/19 – **PEOPLE'S APPEAL / NO GRAND JURY DEFECT**
The People appealed from an order granting the defendant's motion pursuant to CPL 210.20 to dismiss the indictment, with leave to re-present. The Second Department reversed and remitted. A grand jury indicted the defendant for 2nd degree murder and other charges. He was accused of striking a victim with his vehicle; driving fast with the victim on the hood; and then braking suddenly, causing the victim to be propelled onto the street.

An indictment should be dismissed where the integrity of the grand jury proceeding is impaired and prejudice to the defendant may result. The extraordinary remedy of dismissal was available in rare cases. Here the prosecutor was not obligated to present evidence that the defendant claimed to be favorable, since such proof was not entirely exculpatory and would not have materially influenced the investigation. Further, the prosecutor properly presented expert testimony as to a matter beyond the ken of the average juror. Finally, the defendant was not entitled to pre-indictment discovery of *Brady* material.
http://nycourts.gov/reporter/3dseries/2019/2019_03610.htm

FAMILY

FIRST DEPARTMENT

Zavion O. (Ella M.), 5/7/19 – **FCA § 153 / NO PROTECTIVE ARRESTS**
The First Department prohibited a longstanding controversial practice of NYC ACS: issuing warrants for protective arrest of children who have broken no law, but who have run away from foster care. Family Court Act § 153 did not authorize the issuance of a warrant for such protective arrests of children who were neither respondents nor witnesses in proceedings. The two children in these cases were at high risk of bringing harm to themselves or putting themselves in positions where others might harm them. The subject provision authorized Family Court to issue "in a proper case a warrant or other process to secure or compel the attendance of an adult respondent or child . . . whose testimony or presence at a hearing or proceeding is deemed by the court to be necessary." In the case at bar, the children's attendance for testimonial purposes was not required. Neither general parens patriae doctrine nor salutary goals to protect children could create jurisdiction. Family Court is a court of limited jurisdiction, with only such powers as the Constitution and NY laws expressly grant. It was for the legislature to provide ACS and other child protective agencies with the tools needed to maintain children who chronically abscond in controlled settings, where they can receive medically prescribed medication and appropriate therapeutic services. The Legal Aid Society of NYC (Israel Appel, of counsel), represented the children-appellants.
http://nycourts.gov/reporter/3dseries/2019/2019_03554.htm

Giovanni H.B. (Henry B.), 5/9/19 – **NO PRISON VISITS / AFFIRMED**
The incarcerated father appealed from an order of Bronx County Family Court, which denied him visitation with his son. The First Department affirmed. The father was serving a 12-year sentence for raping his then six-year-old daughter. Since age two, the son had not seen or spoken to the father, and he never asked to see him or inquired about his whereabouts. The boy had been diagnosed with autism spectrum disorder and suffered from anxiety. The appellate court found that the presumption that parental visitation was in the best interests of a child was overcome, given the father's heinous crime; the impact visitation would have on the abused daughter and her relationship with her brother; and the disruption the boy would suffer in connection with traveling to and from the prison. Family Court reasonably allowed the father to send letters that would be kept in agency files until mental health professionals provided more guidance on that issue.
http://nycourts.gov/reporter/3dseries/2019/2019_03680.htm