CRIMINAL

FIRST DEPARTMENT

People v Breckenridge, 6/7/18 – **ASSAULT CONVICTION / REVERSAL**
At a New York County trial, the jury charge failed to convey that acquittal on the top count of attempted second-degree murder, based on a finding of justification, would preclude consideration of the first-degree assault count. The First Department held that such error warranted reversal of the assault conviction in the interest of justice. Given that an eyewitness testified that the defendant fired when the knife-wielding victim ran toward him, the jury might well have credited the justification defense. A single justice dissented. The Office of the Appellate Defender (Katherine Pecore, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04074.htm

People v Rosario, 6/7/18 – **INEFFECTIVE ASSISTANCE / BAD IMMIGRATION ADVICE**
In New York County, the defendant pleaded guilty to a drug sale felony in return for five years' probation and a certificate of relief from civil disabilities. Supreme Court denied his CPL 440.10 motion after a hearing. The First Department reversed. The defendant had shown that his attorney was ineffective, in that he provided erroneous advice about immigration consequences. Counsel misadvised the defendant that the certificate would protect him from deportation. The defendant showed a reasonable probability that, had he known that the plea would render him deportable, he would have gone to trial. The judgment was vacated, and the matter was remanded for further proceedings. The Legal Aid Society of New York City (Harold Ferguson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04114.htm

THIRD DEPARTMENT

People v Haggray, 6/7/18 – **PEOPLE'S VIDEO EXHIBITS / ACCESSIBLE FORMAT**
In challenging an Albany County conviction, the defendant contended that the People deprived him of an opportunity to effectively present his appeal by failing to provide video and photographic exhibits in easily viewable form. The defendant had a fundamental right to appellate review, and the People were required to provide record documents sufficient to enable him to present his arguments on appeal, the Third Department declared. Based on its own efforts to view the exhibits, the appellate court sided with the defendant. The court withheld decision and directed the People to provide exhibits in a format readily accessible by modern personal computer equipment, along with the necessary instructions. Further, the defendant could file a supplemental brief. Theodore Stein represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04036.htm

People v Horton, 6/7/18 – **CHALLENGE FOR CAUSE DENIED / REVERSAL**
The denial of a challenge for cause deprived the defendant of a fair trial in Tompkins County. A physician the People intended to call as a witness had been the prospective juror's primary care physician for 15 years. Moreover, the juror's husband had been the victim of a robbery; and because the perpetrator "got off," she was a bit cynical about the criminal justice system.

The juror's general equivocality was problematic. Since the court failed to make further inquiry, denial of the defense challenge was error. The defense had exhausted its peremptory challenges. Thus, the judgment was reversed. Danielle Reilly represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04040.htm

People v Marshall, 6/7/18 – **NO SERIOUS PHYSICAL INJURY / CHARGE REDUCED**
Upon review of a Tompkins County conviction of first-degree assault, a divided Third Department held that the weight of the evidence did not support a finding of serious physical injury. At close range, the defendant shot the victim in the leg, resulting in a shattered tibia, two surgeries, and insertion of pins. The injuries did not create a substantial risk of death, protracted impairment of health, or a protracted loss of function of a bodily organ. Although the victim had a significant injury right after the shooting, there was no proof regarding long-term effects. As to disfigurement, the victim showed his scar to the jury; but no contemporaneous description was provided for the record. For these reasons, the conviction was reduced to attempted assault in the first-degree, and the matter was remitted for resentencing. Two justices dissented. Paul Connolly represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04038.htm

People v Trapani, 6/7/18 – **RIGHT TO COUNSEL DENIED / INDICTMENT DISMISSED**
When the defendant appeared in City Court for arraignment, he sought to represent himself. Without inquiry, the court granted his wish. The defendant remained unrepresented for a second appearance. At both appearances, he asserted his right to testify before the grand jury. The People disregarded the request because the defendant did not make a written demand. After indictment, the defendant appeared with counsel. Upon a guilty plea in Schenectady County Court, he was convicted of burglary. The Third Department held that the defendant should not have been permitted to proceed pro se prior to indictment, where the trial court did not conduct the requisite inquiry regarding self-representation. This failure caused a deprivation of the defendant's right to counsel. Because the defendant was denied a chance to consult with counsel and make an informed decision as to grand jury testimony, dismissal of the indictment was required, albeit without prejudice to the People to re-present any appropriate charges to another grand jury. G. Scott Walling represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04041.htm

People v Holmes, 6/7/18 – **BAD PLEA / REVERSAL**
Broome County Court made only passing reference to the rights the defendant was giving up by pleading guilty to coercion in the first degree; did not mention the privilege against self-incrimination; and failed to ascertain whether the defendant had conferred with counsel regarding the rights forfeited. The plea was therefore invalid and had to be vacated. Christopher Hammond represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04039.htm

People v Moore, 6/7/18 – **PEOPLE'S APPEAL / SUPPRESSION ERRONEOUS**
Albany County Court erred in suppressing evidence derived from the defendant's cell phone, where he never moved to suppress such evidence and the People thus were not on notice that the issue would be raised at a combined *Huntley/Dunaway/Wade* hearing. County Court also erred in suppressing the defendant's statements. The record belied the court's conjecture that

the phone was searched before *Miranda* warnings and that there was likely some conversation between the defendant and police when the phone was seized.
http://nycourts.gov/reporter/3dseries/2018/2018_04042.htm

FOURTH DEPARTMENT

People v Williams, 6/8/18 – **NO CONSTRUCTIVE POSSESSION / INDICTMENT DISMISSED**
In Oneida County, the defendant was convicted on a jury verdict of criminal possession of a controlled substance in the third degree. The Fourth Department reversed and dismissed the indictment. The evidence was legally insufficient to establish that the defendant constructively possessed the heroin recovered from the apartment where she was arrested. No evidence showed that she was an occupant or regularly frequented the apartment. Thus, the People failed to prove her dominion and control over the drugs. Donald Gerace represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04173.htm

People v Perri, 6/8/18 – **DEFENDANT INCOMPETENT AT GRAND JURY / NEW TRIAL**
County Court erred in suppressing only a portion of the defendant's videotaped statement to police; the portion not suppressed was also obtained prior to *Miranda* warnings. Further, the Fourth Department held that the trial court erred in denying a motion to preclude the People's use of the defendant's grand jury testimony at trial, given his incompetence at the time of testimony. The defendant overcame the presumption of competence with proof that: (1) his testimony was a rambling, delusional narrative; (2) the arraigning court referred him for a 730 exam due to his bizarre behavior; and (3) he was the involuntarily committed to a psychiatric facility. A new trial was granted. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2018/2018_04134.htm

People v Wilson, 6/8/18 – **440 MOTION / HEARING NEEDED AS TO INEPT ASSISTANCE**
In a rape prosecution, Onondaga County Court erred in summarily denying the defendant's CPL 440.10 motions, where they raised questions of fact regarding whether he received meaningful legal representation. A hearing should have been held to determine whether trial counsel had an adequate explanation for the failure to pursue certain lines of cross-examination and to call an expert on the defendant's behalf. Defense counsel also failed to address portions of medical records that tended to disprove allegations of penetration and to seek suppression of damaging DNA evidence, despite the defendant's sworn allegations that buccal swabs were taken by excessive force. Bradley Keem represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04233.htm

SECOND CIRCUIT

United States v Castillo, 6/4/18 – **MANSLAUGHTER / CRIME OF VIOLENCE**
The U.S. District Court for the Southern District erred when it found that the defendant's prior Bronx County conviction for manslaughter in the first degree, in violation of Penal Law § 125.20 (1), did not qualify as a "crime of violence" for the purpose of sentencing enhancement. The elements of the New York offense were narrower than those of the generic

offense of manslaughter. The generic definition called for the mens rea of recklessness; the New York crime required an intent to cause serious injury; and it was impossible to intend to cause serious injury without possessing a mens rea of recklessness. The sentence was set aside and the matter remanded for resentencing.
http://www.ca2.uscourts.gov/decisions

FAMILY

DECISION OF THE WEEK

Matter of Shawn S., 6/8/18 – **PERMANENCY HEARING / CHILD WAIVES PARTICIPATION**
The issue on appeal was whether Family Court has the authority to compel participation in a permanency hearing by a child who has waived such right after consultation with counsel. An Oswego County judge answered in the affirmative. That was error, in the view of the Fourth Department. After the 14-year-old's waiver of his right to participate, Family Court directed that he be present in person or electronically and declared that the pertinent statute should not be read to give children the final word. The child appeared by phone, and the permanency hearing concluded. The issue was moot, but the *Matter of Hearst Corp. v Clyne* (50 NY2d 707) exception applied. The statutory language was clear. A permanency hearing must include an age-appropriate consultation with the child. However, that requirement may not "be construed to compel a child who does not wish to participate…to do so." *See* Family Ct Act § 1090-a (1), (g). Family Court lacked the authority to force a child to participate when he or she declined to do so after speaking to counsel. It was not for the court to opine about whether a law was wise or to allow its own policy assessment to supplant the judgment of the legislature. Courtney Radick, attorney for the child, was the appellant pro se. Lawyers for Children, Inc. appeared as amicus curiae.
http://nycourts.gov/reporter/3dseries/2018/2018_04208.htm

FIRST DEPARTMENT

Finkelstein v Finkelstein, 6/5/18 – **FROZEN EMBRYO TO HUSBAND / FOR DISPOSAL**
After the parties were married in Israel, they unsuccessfully tried in vitro fertilization (IVF). They then moved to New York and engaged the services of the New Hope Fertility Center (NHF) to conceive a child via implantation of cryopreserved embryos in the wife's uterus. A Consent Agreement with NHF addressed the use of frozen embryos created from the parties' genetic donations. Following multiple unsuccessful IVF attempts, the husband filed for divorce and revoked his consent to any use of his genetic material. New York County Supreme Court found that the husband did not have the right to revoke and awarded the embryo to the wife. The First Department reversed and awarded the embryo to the husband for disposal. *Kass v Kass*, 91 NY2d 554, held that agreements between donors using IVF should be enforced under general rules of contract interpretation. Supreme Court's construction was contrary to the Agreement's plain meaning. It did not give the divorce court plenary authority to determine ownership of the embryo. Moreover, the revocation of consent did not violate DRL § 236 (B) (2) (b) automatic orders. Eran Regev represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03926.htm

Matter of Nafees F., 6/5/18 – **JUVENILE DELINQUENT / NO APPEAL FROM CONSENT ORDER**
The appellant appealed from orders of disposition of Bronx County Family Court adjudicating him to be a juvenile delinquent. He admitted that he had committed acts that would constitute third-degree sexual abuse if perpetrated by an adult. The appeal was therefore dismissed. Because each dispositional order was entered upon the appellant's consent, he was not an aggrieved party within the meaning of CPLR 5511.
http://nycourts.gov/reporter/3dseries/2018/2018_03940.htm

Kesavan v Kesavan, 6/7/18 – **CHILD'S DIET / NOT A RELIGIOUS CHOICE**
The parties agreed to jointly determine all major matters, including the child's religious upbringing, and their written agreement did not refer to dietary matters. A parenting coordinator recommended that each party should be free to decide what to feed the child during their parenting time. After a trial, New York County Supreme Court found that the child's diet was a religious choice and that the child should not be fed fish, meat or poultry without both parents' consent. The mother appealed. The First Department held that the trial court had abused its discretion. Any pre-marital promise by the mother to raise the children as vegetarians was not binding and was omitted from the parties' agreement. The parenting coordinator's recommendation was to be implemented. Naved Amed represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04088.htm

SECOND DEPARTMENT

Weidman v. Weidman, 6/6/18 – **DIVORCE APPEAL / MODIFICATIONS**
The parties took appeals from a decision, an order, and the judgment of divorce entered in Suffolk County Supreme Court. The appeal from the decision was dismissed; no appeal lies from a decision. *See* CPLR 5512 (a). On the Second Department's own motion, the notices of appeal and cross appeal from the order, which concerned counsel fees, were treated as applications for leave to appeal, and such relief was granted. *See* CPLR 5701 (c). Supreme Court should have denied as premature the defendant's request to allocate the responsibility for the future college expenses of the then 13-year-old child. The plaintiff failed to rebut the presumption that the defendant, as the less monied spouse, was entitled to counsel fees. Considering conduct during the litigation, the court should have awarded fees of $40,000, not $25,000. The defendant was properly awarded an equitable share of the appreciation in the value of the marital residence—the separate property of the plaintiff—since such appreciation was attributable to the parties' joint efforts.
http://nycourts.gov/reporter/3dseries/2018/2018_04027.htm

THIRD DEPARTMENT

Matter of Jason HH. v Kylee II., 6/7/18 – **VISITATION / CURTAILED ACCESS EXPANDED**
Pursuant to an order on consent, the parties shared custody. Warren County Family Court modified the order, granting sole custody to the father and six hours of supervised visitation to the mother. The record provided a solid basis for the custody award, but not the reduction in parenting time. A temporary order did not require supervision, even though the mother was living with a boyfriend who allegedly abused the child. A second temporary order removed

restrictions prohibiting contact between her boyfriend and the child. By the hearing, the mother had left the boyfriend. She had a positive relationship with the child, who wanted to spend more time with her. The record did not indicate that unsupervised access would be detrimental. Thus, there was no valid rationale for supervision, nor for severely limiting the mother's parenting time. She would have visitation two out of every three weekends, alternating weeks during the summer, and alternating holidays. The Rural Law Center of NY (Kelly Egan, of counsel) represented the mother.
http://nycourts.gov/reporter/3dseries/2018/2018_04048.htm

FOURTH DEPARTMENT

Matter of Mauro v Costello, 6/8/18 – **PAROLE LIMITS ON ACCESS / CURTAILED CALLS**
In seeking to modify a custody order entered on consent, the father established the requisite change in circumstances. However, Steuben County Family Court properly determined that the mother should retain primary physical custody. While several factors strongly favored the father, the conditions of his parole required supervision of his contact with the child and thus constituted a legal impediment to the relief he sought. Family Court erred, though, in denying the father's violation petition. The terms of the consent order were unequivocal and were repeatedly violated by the mother, who thwarted the father's Skype contact and visitation. By clear and convincing evidence, the father proved the mother's noncompliance with such directives. The Fourth Department advised that she must abide by such obligations. Travis Barry represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04124.htm

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