CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Tiger, 6/14/18 – **440 MOTION / NO FREESTANDING INNOCENCE CLAIM**
Under CPL 440.10 (1) (h), a claim of actual innocence is not available to a defendant seeking to vacate a conviction rendered upon a guilty plea, the Court held in an opinion by Chief Judge DiFiore. In 2012, the defendant pleaded guilty to first-degree endangering the welfare of an incompetent or physically disabled person, in connection with burns the child victim suffered, purportedly from scalding bath water. The defendant did not move to withdraw her guilty plea before sentence and did not appeal the conviction. In 2014, she sought to vacate the conviction, alleging ineffective assistance based on counsel's failure to investigate the cause of the injuries, and asserting a claim of actual innocence. The defendant produced proof that the victim's injuries were caused by a medical condition associated with an adverse reaction to medication. The motion was summarily denied. The Second Department reversed and ordered a hearing on both branches of the application. The People appealed the order insofar as it granted a hearing on the actual innocence claim. CPL 440.10 (1) (h) allows a defendant to move to vacate a judgment obtained in violation of the defendant's constitutional rights. Subdivision (1) (g), as to newly discovered evidence, is inapplicable to judgments based on guilty pleas. A new statutory provision, allowing for vacatur of convictions in plea cases in light of DNA evidence, is a narrow exception. Permitting collateral attacks on guilty pleas, based on claims of new evidence that contradicts admissions entered in judicial proceedings free of constitutional error, would have enormous ramifications on the efficacy of the criminal justice system. The instant defendant could proceed with her claim of ineffective assistance or seek a pardon. Not presented or decided was the issue of whether a defendant convicted after trial could raise a freestanding actual innocence claim. Judge Garcia concurred. Judge Wilson dissented, opining that relief should be available in exceptional cases where, as here, a clearly innocent person pleaded guilty. Judge Rivera joined in the dissent.
http://www.nycourts.gov/reporter/3dseries/2018/2018_04377.htm

People v Thibodeau, 6/14/18 – **440 MOTION / DIVIDED COURT UPHOLDS DENIAL**
A store clerk disappeared from her job in 1994 and had not been seen or heard from since. In 1995, upon a jury verdict, the defendant was convicted of kidnapping her. In 2014, he moved to vacate the judgment of conviction based in part on newly discovered evidence. Following a hearing, County Court found that alleged extrajudicial admissions by three men were inadmissible hearsay, not declarations against penal interest. At the hearing, the declarants denied making the admissions. The Fourth Department affirmed. In a memorandum decision, the Court of Appeals held that the defendant's new evidence consisted of uncorroborated hearsay, which the hearing court was entitled to reject as untrustworthy and inadmissible at trial and thus not of a character that would have resulted

in a more favorable verdict. Judge Rivera dissented, stating that the confessions were corroborated and analyzing declarations against penal interest and the declarants' statements. Judges Wilson and Feinman concurred in the dissent.
http://www.nycourts.gov/reporter/3dseries/2018/2018_04378.htm

People v Wilson, 6/14/18 – **DEPRAVED INDIFFERENCE ASSAULT / UNANIMOUS COURT**
The defendant was convicted of intentional assault in the second degree, as well as depraved difference assault in the first degree. At issue on appeal was whether the latter conviction was sufficiently supported by the evidence that the defendant assaulted his girlfriend on multiple occasions over a period of two months, causing numerous broken bones, a brain injury, and lifelong cognitive impairments. The court answered in the affirmative and upheld the challenged Second Department order. A defendant could intend one result—serious physical injury—while recklessly creating a grave risk of a more serious result—death. Judges Rivera and Wilson wrote concurring opinions.
http://www.nycourts.gov/reporter/3dseries/2018/2018_04380.htm

People v Bailey, 6/14/18 – ***BUFORD* INQUIRY / UNPRESERVED BY CODEFENDANT**
The defendant challenged an assault conviction, claiming that the trial court erred by failing to inquire as to a juror's impartiality and fairness, as required by *People v Buford*, 69 NY2d 290. Such claim was found unpreserved, in an opinion authored by Judge Rivera. To preserve an issue of law for appellate review, counsel must register an objection, and apprise the court of grounds on which the objection is based, at the time of the allegedly erroneous ruling or at any later time when the court has an opportunity to change the ruling. When referring to the juror being grossly unqualified, counsel raised the matter solely in relation to his position that the defendant was entitled to a mistrial. Counsel did not join in a codefendant's request for a *Buford* inquiry. The codefendant's request for such an inquiry did not preserve the issue for the defendant's appeal. Codefendants might not share the same position, and the silence of counsel for the defendant-appellant could reflect a strategic choice. The reference in CPL 470.05 to "such party" must be understood to refer to the appealing party; the section addressed the situation in which an appellate court was authorized to consider an issue of law based on either the appealing party's protest or the court's ultimate decision. The First Department order appealed from was affirmed. Judge Wilson dissented, and Judge Fahey concurred in the dissent.
http://www.nycourts.gov/reporter/3dseries/2018/2018_04383.htm

People v Henry, 6/12/18 – **PEOPLE'S APPEAL / NO RIGHT TO COUNSEL VIOLATION**
In 2010, two masked men robbed occupants of a tattoo parlor. Days later, a masked gunman shot and killed a 19-year-old man sitting in a car at a gas station store. Soon thereafter, the defendant was pulled over for traffic infractions. He was charged with possession of marijuana, had assigned counsel, and was released on bail. A BlackBerry found in the defendant's car following the marijuana arrest had been stolen in the tattoo parlor robbery. A black Hyundai Sonata with tinted windows was involved in all three incidents. Days after the marijuana arrest, the defendant was arrested for traffic infractions and was questioned about the robbery and murder. He made incriminating statements. The defendant moved to suppress his statements as having been obtained in violation of his right to counsel, which had attached as to the marijuana charge. Supreme Court suppressed

the defendant's statement regarding the robbery. He was convicted on several charges, and the Second Department held that statements regarding the murder should also have been suppressed. The Court of Appeals reversed. The Appellate Division did not perform the relevant analysis: whether the unrepresented charge was sufficiently related to the represented charge. It was not. The mere fact that a black Sonata was used in both the murder and marijuana possession crimes did not make them closely related.
http://www.nycourts.gov/reporter/3dseries/2018/2018_04275.htm

People v Credit Suisse Securities, 6/12/18 – **MARTIN ACT / 3-YEAR LIMITATIONS PERIOD**
Enforcement actions brought by the State Attorney General to fight fraud on Wall Street must be quickly brought. Claims under the Martin Act, which grants the AG broad power to pursue securities fraud, are governed by a limitations period of three years, the Court held in a case involving risky mortgage securities. The applicable provision was CPLR 214 (2), imposing a three-year limitations period for an action to recover upon a liability, penalty or forfeiture created or imposed by statute. Under CPLR 213 (3), a six-year period applied to an action based on fraud. Under the Executive Law, where the AG sued on a common law fraud theory, a six-year limitations period applied. In dissent, Judge Rivera declared that it now falls to the Legislature to amend the Martin Act to impose a six-year statute of limitations as part of a "flexible, virile fraud-hunting State machinery." Otherwise, significant damage would be done to the securities markets of New York—a global financial center.
http://www.nycourts.gov/reporter/3dseries/2018/2018_04272.htm

FIRST DEPARTMENT

People v De Los Santos, 6/14/18 – **FLAWED PLEA / NO *PEQUE* WARNING**
During the plea proceeding, New York County Court said to defense counsel, "I'm assuming based on his criminal history…we have no immigration issues." Counsel said that he had discussed immigration consequences with the client. The court thus failed to advise the defendant that, if he was not a U.S. citizen, he could be deported as a result of his plea, as required under *People v Peque*, 22 NY3d 168. The defendant was to be afforded an opportunity to move to vacate his plea upon a showing that there was a reasonable probability that he would not have pleaded guilty if the court had properly advised him. The Center for Appellate Litigation (Allison Kahl, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04434.htm

THIRD DEPARTMENT

People v Diaz, 6/14/18 – **STRATEGIC DECISIONS / BY DEFENSE COUNSEL**
In the defendant's appeal from multiple convictions, he presented arguments relating to the division of final decision-making authority between a represented defendant and his attorney. The defendant contended that: (1) Washington County Court impermissibly allowed counsel to overrule his preference to pursue a psychiatric defense at trial; and (2) following certain prejudicial testimony, counsel abdicated strategic decision-making authority to the defendant by ceding to him the choice as to whether to forgo a mistrial application. On both points, the Third Department disagreed. A defendant retained

authority over whether to plead guilty, waive a jury trial, testify in his own behalf, and take an appeal. In contrast, with respect to tactical decisions concerning the conduct of trials, defendants were deemed to have reposed authority in their lawyers. Whether to present a psychiatric defense was a strategic decision involving the exercise of professional judgment, over which defense counsel retained ultimate power. Counsel fully explored a possible defense and made a reasonable decision, which resulted in the defendant's acquittal of attempted second-degree murder. The choice to seek a mistrial or not was also one for the lawyer. After prejudicial testimony, the defendant had moved for a mistrial. Upon conferring with the defendant, counsel withdrew the application and sought a strong curative instruction. The trial court confirmed with the defendant that he wished to proceed with the trial. The record thus reflected that counsel had properly consulted with the defendant before opting to withdraw the motion. Under these circumstances, the defendant was not deprived of his Sixth Amendment right to the expert judgment of counsel.
http://nycourts.gov/reporter/3dseries/2018/2018_04389.htm

People v Douglas, 6/14/18 – **PROSPECTIVE JUROR / IMPLIED BIAS / EXTRA PEREMPTORY**
The defendant appealed from an Albany County conviction of drug crimes. He contended that reversal was required because the trial court denied his challenge for cause to a prospective juror who was related to a trial witness. The juror said the witness was a cousin or second cousin. Defense counsel challenged the juror based on that relationship. The trial court observed that the juror said he could treat the witness' testimony fairly. That was the wrong standard. A prospective juror may be challenged for cause if he has a relationship within the sixth degree by consanguinity. Such a relationship established an implied bias, requiring automatic exclusion, regardless of the professed ability to be fair and impartial. Whether the instant witness was a first or second cousin, his relationship with the witness fell within the sixth degree of consanguinity. However, reversal was not required, since the error was cured when the defendant was granted an additional peremptory challenge.
http://nycourts.gov/reporter/3dseries/2018/2018_04388.htm

FAMILY

COURT OF APPEALS

Matter of Mason H., 6/14/18 – **NO ABANDONMENT / NO PROOF ON COMMUNICATION**
In a termination of parental rights proceeding based on abandonment, the petitioner agency's caseworker testified that the respondent father, who was incarcerated, did not visit the child or communicate with the caseworker or other agency personnel in the six months preceding the filing of the abandonment period. However, the record contained no evidence establishing that, during the relevant period, the father failed to communicate with the child, directly or through the foster parent. Thus, the petitioner did not meet its burden of demonstrating by clear and convincing evidence that the father abandoned the child. The order of the Third Department was reversed, and the petition was dismissed. Sandra Colatosti represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2018/2018_04384.htm

Natasha W. v Office of Children & Family Serv., 6/14/18 – **SHOPLIFTING / INDICATED**
The petitioner took her five-year-old son to Bloomingdale's and was arrested for attempted shoplifting. She had no prior involvement with the criminal justice system or child welfare services and was attending college to earn a degree in early childhood education. Her charge was resolved by an adjournment in contemplation of dismissal. However, the Child Abuse Register referred her case to the local child protective agency. The agency found that the child was not likely to be in immediate danger of harm, and no intervention was needed, yet the report was marked "indicated." That meant that any prospective employers in the appellant's chosen occupation would be informed that she was unfit to work with children. An ALJ denied the petitioner's appeal, finding that the shoplifting incident could doom the child to a life of crime. Supreme Court reversed, characterizing such conclusion as an offensive rendition of the adage that the apple does not fall far from the tree. A divided First Department affirmed. In a memorandum decision, the Court of Appeals reversed, holding that it was rational for the ALJ to conclude that the child was placed in imminent risk of impairment, constituting maltreatment, and that the petitioner's actions were reasonably related to the child-care field. Judge Wilson dissented. The definition of "maltreatment" in the Social Services Law included the definition of "neglected child" in Family Court Act. But no imminent risk or need for intervention was shown in the case at bar.
http://www.nycourts.gov/reporter/3dseries/2018/2018_04379.htm

Keller-Goldman v Goldman, 6/12/18 – **MARITAL AGREEMENT / JUDGE'S DISCRETION**
Domestic Relations Law § 240 (1-b) (h) allows for the parties to voluntarily enter into agreements that deviate from the basic child support obligation, if certain statutory safeguards are adhered to. However, the provision further states that the court retains discretion with respect to child support. In the instant case, the parties negotiated a comprehensive, 55-page settlement agreement, in which they expressly agreed to deviate from CSSA guidelines. In the contract, the parties agreed that the father would receive a credit against his child support obligations in the amount he paid for one child's room and board at an educational institution. New York County Supreme Court added a provision calling for a cap on that credit. A divided First Department affirmed. In a memorandum decision, the Court of Appeals upheld that determination, citing the significant downward departure from the CSSA guidelines. Judge Stein dissented, in an opinion in which Judge Garcia concurred. In the dissenters' view, Supreme Court's conclusion, that the children would be inadequately supported if the agreement were enforced, was wholly speculative, and public policy concerns did not justify the court's exercise of its discretion to rewrite the contract. Without considering the overall settlement, Supreme Court improperly altered on isolated provision of the agreement.
http://www.nycourts.gov/reporter/3dseries/2018/2018_04278.htm

SECOND DEPARTMENT

Matter of Menghi v Trotta-Menghi, 6/13/18 – **DEFAULT ORDER / REVERSAL**
On the adjourned date for a hearing on the father's petition to modify a prior custody order, the mother did not appear. Suffolk County Family Court relieved her attorney, proceeded to an inquest, and granted the father's petition. Generally, no appeal lies from an order made upon the default of an appealing party. The proper procedure is instead to move to vacate the default and, if necessary, appeal from the denial of such motion. In the instant case, however, no proper order was entered upon default, the Second Department held. An attorney of record may withdraw as counsel only upon sufficient cause and upon notice to the client. There was no indication that the mother's attorney informed her that he was seeking to withdraw. Thus, the attorney should not have been relieved. Since no order was properly ordered upon default, the mother's appeal was not precluded. The challenged order was reversed, and the matter was remitted for a new hearing. Steven Feldman represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04324.htm

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