CRIMINAL

U.S. SUPREME COURT

DECISION OF THE WEEK

Flowers v Mississippi, 6/21/19 – ***BATSON* VIOLATION / REVERSAL**

In a 7-2 opinion by Justice Kavanaugh, the Supreme Court found a *Batson* violation and reversed a Mississippi Supreme Court decision upholding a conviction for four murders. The defendant, who is black, was tried six times before a jury and has been on death row for more than two decades. The same lead prosecutor represented the state in all six trials, despite reversals due to his misconduct in the first three trials. Four factors required reversal, Justice Kavanaugh stated. First, in all, the state peremptorily challenged 41 out of 42 black prospective jurors. Second, in the most recent trial, the state exercised peremptory strikes against five of the six black prospective jurors. Third, the state grilled each struck black juror, asking an average of 29 questions each, in contrast to an average of one question for each seated white juror. Fourth, the state removed a black prospective juror who was similarly situated to seated white jurors. The court was not breaking new legal ground and was simply enforcing *Batson* by applying it to extraordinary facts. Justice Alito filed a concurring opinion. Justice Thomas dissented, and Justice Gorsuch joined in parts of the dissent. After the decision was rendered, the prosecutor said that no determination has been made about whether to try the defendant a seventh time.
https://www.supremecourt.gov/opinions/18pdf/17-9572_k536.pdf

Gamble v U.S., 6/17/19 – **DOUBLE JEOPARDY / CLAIM REJECTED**

The defendant was convicted in an Alabama state court for possession of a firearm by a person previously convicted of a crime of violence. Thereafter, he moved to dismiss a federal charge for being a felon in possession of a firearm, on the ground that the indictment was for "the same offence" as the state charge and thus violated the double jeopardy clause of the Fifth Amendment. The motion was denied, and the defendant entered a guilty plea, but preserved his right to appeal the denial of the motion. The Eleventh Circuit affirmed the conviction, and certiorari was granted. In an opinion by Justice Alito, the U.S. Supreme Court affirmed, invoking *U.S. v Lanza*, 260 US 377 (under dual-sovereignty doctrine, double jeopardy clause allows successive prosecutions by separate sovereigns). Justice Thomas filed a concurring opinion. Justices Ginsburg and Gorsuch wrote dissenting opinions.
https://www.supremecourt.gov/opinions/18pdf/17-646_new_o759.pdf

FIRST DEPARTMENT

People v Disla, 6/20/19 – **MANDATORY DEPORTATION / BUT NO ADVICE**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree criminal possession of a controlled substance. The First Department held the appeal in abeyance. Although the defendant did not file a CPL 440.10 motion, the record was sufficient to review his ineffective assistance claim, based on counsel's failure to advise the defendant that his guilty plea to an aggravated felony would result in mandatory

deportation. The appellate court directed that the defendant should have the opportunity to move to vacate his plea, upon a showing that there was a reasonable probability that he would not have pleaded guilty, had he been made aware of the deportation consequences. While the defendant requested that his conviction be replaced by a conviction under a subdivision of Penal Law § 220.16 that might entail less onerous immigration consequences, the appellate court found such remedy inappropriate and remitted for a hearing. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04995.htm

SECOND DEPARTMENT

People v Truluck, 6/19/19 – **ASSAULT / LAWFUL DUTY / VACATUR**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree assault (two counts). The Second Department vacated one assault conviction as against the weight of evidence. To sustain the Penal Law § 120.05 (3) conviction, the People had to establish that the injured police officer was engaged in a lawful duty at the time of the assault, and that the defendant caused physical injury to her with the intent to prevent her from performing her duty. In its jury instructions, the Supreme Court did not initially define "lawful duty." During deliberations, the jury asked the court to explain the term. With the consent of both parties, the court gave a supplemental instruction that imposed upon the People a heavier burden of proof than legally required. Since the People failed to object, they were bound to satisfy the heavier burden, which they failed to do. Appellate Advocates (Sean Murray, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04969.htm

People v Jones, 6/19/19 – **AGAINST WEIGHT / SUGGESTIVE ID**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree robbery (two counts) and 2nd degree robbery (three counts). The Second Department found that the verdict as to one count of 1st degree robbery was against the weight of evidence. Further, Supreme Court had erred in denying suppression of the identification of the defendant from cell phone videos. The police arranged the ID procedure, even though they did not arrange the video content. The People failed to establish the reasonableness of police conduct and the lack of any undue suggestiveness. By showing the witness the cell phone and telling him that it was recovered from the robbery scene, the detective suggested that the phone might belong to a perpetrator. Only after being shown the video did the witness ID the defendant in a photo array. The error was not harmless with respect to a 2nd degree robbery count, despite the in-court ID of the defendant by the witness. A new trial was ordered as to such count. Appellate Advocates (Lauren Jones, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04966.htm

People v Vasquez, 6/19/19 – **FOREIGN PREDICATE / NOT EQUIVALENT**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of attempted 3rd degree burglary, upon his plea of guilty, and imposing sentence upon his adjudication as a second felony offender. The Second Department modified by vacating

the SFO adjudication and remitting for resentencing. Although the issue was unpreserved, the reviewing court reached it in the interest of justice. Under Penal Law § 70.06, an out-of-state felony conviction qualifies as a predicate felony only if the elements of the crime are equivalent to those of a NY felony. The defendant's prior Florida offense was not equivalent to a NY felony. Appellate Advocates (Alice Cullina, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04970.htm

THIRD DEPARTMENT

People v Henry, 6/20/19 – **JURY NOTE / NO MEANINGFUL NOTICE**
The defendant appealed from a judgment of Warren County Court, convicting him of 2nd degree murder and other crimes. The Third Department reversed the murder conviction. The record did not establish that the trial court gave counsel meaningful notice of the contents of a substantive jury note. County Court and counsel engaged in an off-the-record conference. There was no proof that counsel was informed of the precise contents of the note and had an opportunity to participate before the court gave a response. *See People v Parker*, 32 NY3d 54. Defense counsel's awareness of the gist of a jury note did not satisfy the CPL 310.30 notice duty. The note related solely to the murder count, which was dismissed, with leave to the People to re-present any appropriate charge to a new grand jury. Paul Connolly represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05024.htm

People v Johnson, 6/20/19 – **PROBATION REVOCATION / REVERSED**
The defendant appealed from a judgment of Cortland County Court, which revoked his probation and imposed a sentence of imprisonment. The Third Department reversed. County Court's finding that the defendant violated a condition of probation was improper, to the extent that it was based upon violations not alleged in the uniform court reports. As to a second violation, evidence that the defendant was arrested for an additional criminal offense was insufficient. Beyond a probation officer's testimony that two arrests occurred, no additional evidence was offered. The Rural Law Center of NY (Keith Schockmel, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05018.htm

People v Morehouse, 6/20/19 – ***ANDERS* / REJECTED**
The defendant appealed from a judgment of Washington County Supreme Court, convicting him of 3rd degree criminal possession of a controlled substance and 3rd degree CPW. He waived his right to appeal. Under the terms of the plea agreement, he was to be sentenced as a SFO. At sentencing, County Court realized that the agreed-upon sentence for CPW was illegal. Defense counsel indicated that the slightly greater sentence was acceptable to the defendant. Appellate counsel filed an *Anders* brief. The Third Department found at least one issue of arguable merit, with respect to the validity of the appeal waiver, which could impact the reviewability of the issue of excessive sentence. In his brief, appellate counsel failed to even mention the sentence change. The appellate court withheld decision and assigned new counsel.
http://nycourts.gov/reporter/3dseries/2019/2019_05020.htm

FAMILY

FIRST DEPARTMENT

Matter of A.V., 6/20/19 – **JD / DISSENTS / NOT LEAST RESTRICTIVE DISPO**
The appellant appealed from an order of disposition of Bronx County Family Court, which adjudicated her a JD, based on acts constituting assault, and placed her on probation for 12 months. The First Department affirmed, but two judges dissented. Under her father's direction, the then 13-year-old appellant joined in an attack against two strangers. That was her only arrest, and there was no evidence that she had ever been in any trouble before or since. The teen expressed remorse. After ACS removed her from the father's chaotic care, the child's school performance greatly improved, and she participated in counseling. Under these circumstances, probation was not the least restrictive alternative: an ACD with oversight services was appropriate and would have avoided the stigma of a JD adjudication.
http://nycourts.gov/reporter/3dseries/2019/2019_04996.htm

SECOND DEPARTMENT

Matter of Joseph Z. (Yola Z.), 6/19/19 – **NEGLECT / TRIABLE ISSUES**
The mother appealed from an order of Kings County Family Court, which granted the petitioner agency's motion for summary judgment against her on the issue of neglect. The Second Department reversed and ordered a hearing. In an appropriate case, Family Court may summarily find neglect. Here, the agency's motion included evidence submitted at a 1028 hearing. At that hearing, the mother—who was deaf and communicated through a sign-language interpreter—gave explanations for the scratches on the child. She said that she struggled to control the child, who had been diagnosed with ADHD and oppositional defiant disorder. The hearing evidence thus revealed triable issues of fact. Melissa Chernosky represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04957.htm

Matter of Emma R. (Evelyn R.), 6/19/19 – **FCA § 1061 / GRANTED**
The mother appealed from an order of Queens County Family Court, which denied her Family Court Act § 1061 motion to vacate an order of fact-finding and disposition. The order found that she neglected the subject children. The Second Department reversed. For good cause shown, Family Court may set aside, modify or vacate any Article 10 order. The mother demonstrated that she had successfully completed court-ordered programs; that she had complied with ordered conditions; and that the requested modification was in the best interests of the children. Heath Goldstein represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04948.htm

Sagaria v Sagaria, 6/19/19 – ***LINCOLN* HEARING / TRANSCRIPT**
In the context of a custody appeal, the appellate court discussed *Lincoln* hearings. In aid of a determination on the issues of child custody, the court may interview the subject child outside the presence of the parties and their counsel. *See Matter of Lincoln v Lincoln,* 24 NY2d 270. Such an interview must be conducted on the record, with the transcript sealed

to protect confidentiality. The *Sagaria* court observed that, where a sound reason is given for disclosure, the trial court has inherent authority to unseal the transcript. In the instant case, disclosure was not warranted. *See Matter of Heasley v Morse,* 144 AD3d 1405; *Matter of Sellen v Wright*, 229 AD2d 680.
http://nycourts.gov/reporter/3dseries/2019/2019_04980.htm

Cynthia Feathers, Esq.
ILS | NYS Office of Indigent Legal Services
Director, Quality Enhancement for Appellate
And Post-Conviction Representation
80 S. Swan St., Suite 1147, Albany, NY 12210
(518) 949-6131 | Cynthia.Feathers@ils.ny.gov