CRIMINAL

U.S. SUPREME COURT

DECISION OF THE WEEK

Carpenter v United States, 6/22/18 – **DIGITAL PRIVACY / WARRANT REQUIREMENT**

In a digital-era privacy case, the Court ruled 5-4 that the government generally needs a warrant to collect troves of location data about cellphone company customers. Chief Judge Roberts wrote the opinion, which was joined by Judges Ginsburg, Breyer, Sotomayor, and Kagan. The case began with the investigation of a series of armed robberies. The police suspected a man. From his cellphone service provider, they obtained data revealing his movements and calls for a period of 127 days. The Court observed that the location information implicated expectations of privacy in a person's location, as well as in information voluntarily turned over to third parties. Such records gave the Government near perfect surveillance and allowed it to retrace a person's whereabouts. The third-party doctrine—the presumption that if one shares information with a third party, he or she has forfeited the right to privacy as to that information—did not apply. In contrast to the instant exhaustive location information collected by a wireless carrier, prior third-party cases involved limited types of personal information voluntarily turned over to third parties. Cellphone location information is not truly "shared," in that cellphones are indispensable to participation in modern society, and cellphone use creates a cell-site record without any affirmative act on the user's part beyond powering up. The decision made exceptions for emergencies like bomb threats and child abductions.
https://www.supremecourt.gov/opinions/17pdf/16-402_h315.pdf

SECOND CIRCUIT

United States v Sawyer, 6/19/18 – **RESENTENCING MANDATE IGNORED / NEW JUDGE**

In 2014, the defendant pled guilty to sexual exploitation and child pornography charges based on his possession of illicit cell phone photos and images downloaded from the Internet. On a prior appeal, the Second Circuit concluded that the 30-year sentence imposed was substantively unreasonable, given two errors: (1) the District Court failed to give sufficient weight to the effect of the extraordinary sexual abuse the defendant endured in childhood; and (2) the trial court exaggerated his danger to the community. On remand, the District Court reduced the sentence to 25 years, based on the defendant's good conduct in prison. However, the court did not modify based on the grounds identified in the remand order. The resentencing judge thus erred. Compliance with a remand order is mandatory, regardless of whether the resentencing judge agrees with it. In deciding to whether to reassign a case on remand, the reviewing court considers whether: (1) the original judge could reasonably be expected to have substantial difficulty in setting aside his or her mind previous views; (2) reassignment is advisable to preserve the appearance of justice; and (3) reassignment would entail a waste of judicial resources disproportionate to any gain in

preserving the appearance of fairness. The reviewing court vacated the resentence and remanded for resentencing—before a different judge. One judge dissented.
http://www.ca2.uscourts.gov/decisions

United States v Jones, 6/19/18 – ***COLLINS V VIRGINIA*** / **COMMON PARKING AREA**
In the defendant's appeal from drug and weapons convictions, the Second Circuit held that the District Court properly declined to suppress evidence seized from a car parked at the rear of his home. After oral argument of the present appeal, *Collins v Virginia*, 584 US ___ (2018), held that the automobile exception did not permit police officers, without a warrant, to enter the curtilage of a home and search a vehicle parked there. That decision did not apply here, where the defendant had no exclusive control of a common driveway area he shared with tenants in two multi-family buildings and thus had no legitimate expectation of privacy.
http://www.ca2.uscourts.gov/decisions

Copeland v Vance, 6/22/18 – **GRAVITY KNIFE LAW / VAGUENESS CLAIM REJECTED**
Two plaintiffs were individuals who were charged with violating New York's gravity knife law and accepted ACODs. The third plaintiff was a Manhattan retailer that sold folding knives and that had entered into a deferred prosecution agreement in connection with its inventory of gravity knifes. Together they filed a complaint, against the New York County District Attorney and the City of New York, claiming that New York's ban on gravity knives (Penal Law §§ 265.00, 265.01) was void for vagueness under the due process clause. The District Court rejected the claim. On appeal, the plaintiffs' chief argument was that there was no way to reliably identify legal folding knives. The Second Circuit deemed the plaintiffs' claim to be a facial challenge, requiring a showing that the gravity knife law was invalid in all applications. The reviewing court concluded that the plaintiffs did not carry their burden and affirmed. Nevertheless, the Second Circuit observed that the statute's reliance on a functional test and its imposition of strict liability regarding what can be a common, if dangerous, household tool, might in some instances trap the innocent by not providing fair warning. The sheer number of people who carry folding knives that might or might not respond to the wrist-flick test raised concern about selective enforcement, warranting action by the legislature.
http://www.ca2.uscourts.gov/decisions

United States v Olmeda, 6/23/18 – **PRO SE DEFENDANT / WINS REMAND ON SENTENCE**
The Sentencing Guidelines instruct that a federal sentence shall run concurrently to a state term of imprisonment anticipated to result from another offense that is relevant conduct to the instant federal offense of conviction. The pro se defendant argued that such section applied where state charges for his relevant conduct were pending at the time of his federal sentencing. The Second Circuit agreed. At a minimum, such pending charges must be encompassed as an "anticipated" relevant sentence. The instant state offenses were not simply relevant—they formed the basis for a significant federal sentence enhancement. The reviewing court remanded with instructions for the District Court to vacate the sentence imposed for various firearms offenses and address the defendant's request for a concurrent sentence.
http://www.ca2.uscourts.gov/decisions

FIRST DEPARTMENT

People v Henriquez, 6/19/18 – ***PEQUE* HEARING / NO PREJUDICE SHOWN**
Previously, this appeal was held in abeyance (145 AD3d 543) and remanded for further proceedings pursuant to *People v Peque*, 22 NY3d 168. On remand, New York Supreme Court determined that the defendant had failed to show that he was prejudiced by the trial court's failure to advise him about possible deportation. There was no reasonable probability that, if properly advised, he would not have pleaded guilty. The First Department upheld such determination and thus the underlying grand larceny convictions. The fact that the defendant had significant ties to the United States was outweighed by other factors. At the time he pleaded guilty, the defendant knew that a prior grand larceny conviction in another county had rendered him deportable and that deportation proceedings based on that conviction were in progress. The earlier conviction ultimately led to the defendant's removal, independent of this matter. Further, the disposition in the present case was favorable, given the strength of the proof and the defendant's prior record. Finally, while trial counsel did not recall advising the defendant of immigration consequences, he said that it was his custom to do so.
http://nycourts.gov/reporter/3dseries/2018/2018_04505.htm

SECOND DEPARTMENT

People v Jones, 6/20/18 – **ATTEMPTED ASSAULT IN 2ND DEGREE / NO SUCH CRIME**
The defendant appealed from a Suffolk County judgment convicting him, upon a plea of guilty, of several crimes based on a vehicular accident. The Second Department modified by vacating the conviction of attempted assault in the second degree and dismissing that count. Such crime was a legal impossibility. *See People v Campbell*, 72 NY2d 602 (there can be no attempt to commit assault second, pursuant to P.L. § 120.05 [3]; one cannot have a specific intent to cause an unintended injury). Inclusion of the non-existent crime in the SCI constituted a non-waivable jurisdictional defect. Laurette Mulry represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04565.htm

People v Dilillo, 6/20/18 – **SORA / REDUCTION TO LEVEL TWO**
Upon a plea of guilty in Kings County, the defendant was convicted of sex trafficking and designated a level-three sex offender. On appeal, he challenged the assessment of points under certain categories. As to risk factor 4, it was improper to assess 20 points for a continuing course of sexual misconduct, the Second Department held. There was never any sexual contact between the defendant and the victim. Ten points should not have been assessed under risk 13 for unsatisfactory conduct while confined, including sexual misconduct. The physical contact at issue did not constitute inappropriate sexual behavior and was irrelevant to the defendant's potential for recidivism. His designation was thus reduced to level two. Appellate Advocates (Golnaz Fakhimi, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04578.htm

People v Pino, 6/20/18 – **CRIMINALLY NEGLIGENT HOMICIDE / FOUR DEATHS / DISMISSAL**
The evidence before a Suffolk County grand jury established that the defendant limousine driver picked up eight passengers at a winery; made a U-turn at an intersection; turned left, despite a partially obstructed view; and was broadsided by a pickup truck, resulting in the death of four passengers and injuries to the four surviving passengers. An indictment charged the defendant with criminally negligent homicide and other crimes. Supreme Court dismissed all counts based on legally insufficient evidence. The People appealed, and the Second Department affirmed. The carelessness required for criminal negligence was appreciably more serious than that required for ordinary civil negligence. Non-perception of a risk was not enough. Viewed most favorably to the People, the grand jury evidence did not establish the kind of seriously condemnatory behavior that the Legislature envisioned. Leonardo Lato represented the respondent.
http://nycourts.gov/reporter/3dseries/2018/2018_04573.htm

People v Mattison, 6/20/18 – **COLD CASE / NO DUE PROCESS VIOLATION**
A murder occurred in 1980. The investigation stalled. In 2008, the defendant's fingerprints were found to match prints recovered from the crime scene. The defendant, a high school student at the time of the murder, was absent from school that day. Following further investigation, he was arrested in 2012—more than 31 years after the crime—and was convicted of second-degree murder. The Second Department held that Queens County Supreme Court properly denied a motion to dismiss based on pre-indictment delay, a significant portion of which was due to a lack of evidence identifying a viable suspect. The extent of the delay was outweighed by the good cause established by the People, the nature of the crime, and the lack of pre-indictment incarceration.
http://nycourts.gov/reporter/3dseries/2018/2018_04569.htm

THIRD DEPARTMENT

People v Young, 6/21/18 – **ORDER DISCLOSING PSI / NO APPEAL**
The defendant appealed from a Saratoga County Court order granting a motion by the People for limited disclosure of a presentence investigation report (PSI). The PSI was produced in 2006 regarding a prior conviction, and the District Attorney sought to use it for a pending criminal action against the defendant. The Third Department dismissed the appeal. CPL 390.50 (1) provides for the confidentiality of a PSI, but permits disclosure upon specific authorization of the sentencing court. Appeals have been entertained from orders seeking disclosure of PSIs relating to administrative matters and civil actions. But the instant application occurred in the context of a criminal matter. No appeal lies from a determination in a criminal proceeding unless specifically provided for by statute. The Criminal Procedure Law contains no authorization for the instant appeal. However, the order could be challenged upon a direct appeal from the judgment of conviction.
http://nycourts.gov/reporter/3dseries/2018/2018_04596.htm

People v Althiser, 6/21/18 – **ORDER DENYING PSI DISCLOSURE / NO APPEAL**
The defendant pleaded guilty to first-degree rape. Five years later, he sought disclosure of the PSI because of collateral proceedings addressing the rape conviction and sentence.

Otsego County Court denied the motion. The defendant's application for disclosure of the PSI related to a criminal action. As explained in *People v Young* (DECISION OF INTEREST above), there was no statutory authorization for an appeal from an order regarding such a matter.
http://nycourts.gov/reporter/3dseries/2018/2018_04604.htm

People v Ash, 6/21/18 – **ASSAULT CONVICTION / FACEBOOK PROOF**
In Saratoga County Court, the defendant was convicted of second-degree assault and endangering the welfare of a child. While babysitting, he had picked up his infant son by the leg, causing a fracture of the right femur. The People's proof included thousands of pages of the defendant's Facebook messages, including flirtations with women soon after the child was injured and messages calling the child disparaging names and stating that children enraged him. The Third Department rejected the argument that the admission of such messages deprived the defendant of a fair trial. The evidence was relevant to intent, and its probative value outweighed any prejudice. The defendant also argued that, based on the spousal privilege, County Court erred in permitting his wife (who was not the mother of the child) to testify about a conversation she had with him. The People asked the wife what the defendant told her about how the victim was injured. She responded, "He said, if he did it, he didn't mean to." The privilege did not apply, since such statement was not prompted by the affection, confidence, and loyalty engendered by the marital relationship. *See People v Fediuk*, 66 NY2d 881.
http://nycourts.gov/reporter/3dseries/2018/2018_04601.htm

FAMILY

FIRST DEPARTMENT

Madison Mia B. (Katherine Janet B.), 6/21/18 – **DEFAULT ORDER / NO APPEAL**
The mother appealed from an order of New York County Family Court which, upon her default, terminated her parental rights based on mental illness. The First Department dismissed the appeal. An order entered on default is not an appealable paper. *See* CPLR 5511. In any event, clear and convincing evidence showed that the mother suffered from severe bipolar disorder, refused to appear for several mental health evaluations, and had exhibited increasingly violent and self-injurious behaviors. Despite some progress in treatment, and positive interactions with the child during supervised visitation, the mother never experienced a sustained period of improvement, according to expert testimony.
http://nycourts.gov/reporter/3dseries/2018/2018_04639.htm

SECOND DEPARTMENT

Matter of Spicer v Spicer, 6/20/18 – **MANDATE NOT CLEAR / NO CONTEMPT**
Pursuant to a Nassau County Family Court order, the parties had joint legal custody, with primary residential custody in the father. The mother sought to hold the father in contempt for violating the joint custody provisions, citing his actions in taking the child to a hospital

for a psychiatric evaluation and not informing her until the next day. The father moved to dismiss the petition based on the lack of a clear mandate. The violation petition was dismissed, and the appellate court affirmed, albeit for reasons other than those relied on by the motion court. Family Court should not have dismissed the mother's petition because it failed to state a cause of action, since the father's motion did not cite that ground. At argument, the parties and the court discussed another possible basis to dismiss—a related Supreme Court proceeding pending between the parties. A court has broad discretion in determining whether an action should be dismissed, where: (1) there is a substantial identity of parties; (2) the two actions are sufficiently similar; and (3) the relief sought is substantially the same. Here, the relief being sought in each forum was different. However, the ground invoked by the father did provide a sound basis for dismissal. An essential element for a contempt finding was missing here: that the alleged contemnor violated a lawful order of the court clearly expressing an unequivocal mandate. The subject order contained no mechanism for joint decision-making, nor did it set forth a time frame for communicating about medical issues. Further, upon learning from that the child was suicidal, the father had promptly texted the mother asking for a meeting. She refused and thereby forfeited her right to notice of the emergency evaluation.
http://nycourts.gov/reporter/3dseries/2018/2018_04550.htm

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