CRIMINAL

FIRST DEPARTMENT

DECISION OF THE WEEK

People v Patillo, 7/2/20 – **MURDER PLEA / INTELLECTUAL DISABILITY**

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree murder and another crime. The First Department vacated the guilty plea in the interest of justice. Persons with significant intellectual disabilities are uniquely vulnerable to injustice in criminal proceedings, more likely to give false confessions, and less able to assist counsel. The defendant was such a person. He had been diagnosed as mentally retarded; had an IQ of 56, placing him in the bottom one percentile of his peers; and had extremely low general cognitive ability. Reports revealed his lack of capacity to understand, or participate in, the criminal proceedings and his risk of impulsive behavior without regard to the consequences. The defendant's refusals to attend court or consult with his lawyer intensified doubts regarding his ability to enter a knowing and voluntary plea. Clearly, a standard plea allocution would be nearly incomprehensible to him. Yet the plea court made no effort to translate the usual litany into simple language that the defendant could understand. The Office of the Appellate Defender (Stephen Chu and Kami Lizarraga, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03754.htm

People v Laverpool, 7/2/20 – **PROSPECTIVE JUROR / FOR-CAUSE CHALLENGE**

The defendant appealed from a NY County Supreme Court judgment, convicting him of 4th degree larceny. The First Department reversed and ordered a new trial. The trial court should have granted a defense challenge for cause as to a panelist who stated that he could not be "fully fair" if the defendant did not testify and "defend himself," and that it might be difficult for him to acquit an accused person who did not testify, because then "we only get one side." Given the bias expressed, the panelist's subsequent statements to the court did not constitute the requisite unequivocal assurances. The prospective juror said that, if the defendant did not take the stand, he would "not hold it against him, but—I don't know." The panelist also stated, "I think I'll be able to give him a fair trial." The Center for Appellate Litigation (Molly Schindler and Hyun Bin Kang, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03745.htm

SECOND DEPARTMENT

People v Shehi, 7/1/20 – **YO / NOT CONSIDERED**

The defendant appealed from judgments of Kings County Supreme Court, convicting him of 3rd degree burglary and another crime. The Second Department held the appeals in abeyance. The lower court imposed the promised sentences without considering whether the defendant should be afforded youthful offender treatment. *See People v Rudolph*, 21 NY3d 497. Supreme Court was directed to determine whether the defendant, who had served his sentences, should be afforded YO and to thereafter submit a report to the

appellate court. In addition, the duration of orders of protection issued on the burglary conviction exceeded the statutory time limit. Thus, a new determination was needed. The Legal Aid Society of NYC (Laura Boyd, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03676.htm

People v Grant, 7/1/20 – **RESTITUTION / EXCESSIVE**
The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 2nd degree manslaughter and other crimes, upon a jury verdict. The sentence included a direction that the defendant make restitution of $39,374 to the Crime Victims Board for the victim's family. The Second Department modified. The amount violated the $15,000 cap set forth in Penal Law § 60.27 (5) (a). In addition, the sentencing court should not have ordered payment of the mandatory surcharge by civil judgment, rather than pursuant to P.L. § 60.35 (5). Arza Feldman represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03674.htm

THIRD DEPARTMENT

People v Mathis, 7/2/20 – **AMENDMENT OF INDICTMENT / IMPROPER**
The defendant appealed from a judgment of Columbia County Court, convicting him of 2nd degree assault. The Third Department reversed. As a result of an amendment of the indictment, the defendant was charged with a different crime than the one voted on by the grand jury. The People did not submit grand jury minutes to support the amendment. The record established only that the grand jury indicted the defendant for violating Penal Law § 120.05 (7), not subdivision (3), as was charged in the amended instrument. Thus, the defendant was deprived of his constitutional right to be prosecuted only by an indictment filed by a grand jury. *See* NY Const, Art. I, § 6; CPL 210.05. Such a claim was not waived by the guilty plea and could be raised for the first time on appeal. Marlene Tuczinski represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03696.htm

People v Oliver, 7/2/20 – **GUILTY PLEA / DEFECTIVE**
The defendant appealed from a judgment of Fulton County Court, convicting him of 1st degree sexual abuse. The Third Department reversed. The defendant's guilty plea was not knowing, voluntary, and intelligent; review of the issue was not precluded by the appeal waiver; and it was preserved by a motion to withdraw the plea. County Court did not advise the defendant that he was giving up the privilege against self-incrimination and did not ascertain whether he had conferred with counsel regarding the constitutional rights waived. The Rural Law Center of NY (Kelly Egan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03697.htm

People v Pizarro, 7/7/20 – **GUILTY PLEA / BELATED DISCOVERY**
The defendant appealed from a January 2018 judgment of Warren County Court, convicting him of attempted 2nd degree burglary. The Third Department affirmed. Days after the defendant pleaded guilty, the People provided a forensic report revealing that he was excluded as a donor of DNA found inside a window of the burglarized residence and that a DNA profile could not be detected from prints outside the window. The appellate

court declined to retroactively apply discovery reform provisions and find that disclosure of the DNA report was untimely. *See* CPL 245.25 (2). The report did not negate guilt; and the defendant was aware of the pending report when he pleaded guilty. Assuming, without deciding, that the law should be retroactively applied, the alleged violation did not materially affect the defendant's decision to plead guilty.
http://nycourts.gov/reporter/3dseries/2020/2020_03695.htm

SECOND CIRCUIT

Jones v Treubig, 6/26/20 – **EXCESSIVE FORCE / NO QUALIFIED IMMUNITY**
The plaintiff commenced a 42 USC § 1983 action after he was beaten, pepper-sprayed, and tased by police. A jury found that excessive force was used in violation of the 4th and 14th Amendments. But District Court–SDNY granted the defendant judgment as a matter of law on qualified immunity grounds. The Second Circuit reversed. Before the incident, controlling authority clearly established that it was a 4th Amendment violation for police to use significant force against a person who was no longer resisting and posing a safety threat. Any reasonable police officer would have known that use of a taser constituted significant force. In a special interrogatory, the jury found that the plaintiff was not resisting arrest after the first use of the taser—he was subdued and lying face down on the ground with his arms spread. Thus, the second tasering was clearly verboten. The jury verdict was reinstated.
https://www.ca2.uscourts.gov/decisions/isysquery/62dd4b63-a3ea-45f0-9bdd-fb230636df49/2/doc/18-3775_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/62dd4b63-a3ea-45f0-9bdd-fb230636df49/2/hilite/

FAMILY

SECOND DEPARTMENT

Matter of Ross v Ross, 7/1/20 – **CUSTODY TRANSFER / PUNISHMENT**
The mother appealed from a Queens County Family Court order, which granted the father's violation petition and directed that custody would be transferred to him if the mother did not return to NYC from Sweden within 30 days. The Second Department reversed and remitted. The conditional directive was meant to punish the mother, rather than to serve the child's best interests. Since no party had sought modification, the court should not have ordered such outcome without notice to the mother. Further, transferring custody to the father was improper on the merits. The mother had always been primary caretaker; the father did not have overnight visits; and the court had expressed concerns about his ability to care for the child for an extended period. Keith Ingber represented the mother.
http://nycourts.gov/reporter/3dseries/2020/2020_03668.htm

Matter of Nicholas O. (Jenny F.), 7/1/20 – **RETURN OF CHILD / REVERSED**
The petitioner, NYC ACS, appealed from a Kings County Family Court order, which granted the parents' FCA § 1028 application. The Second Department reversed. The challenged order lacked a sound and substantial basis. Hearing evidence demonstrated that the child's sibling, Michael, had special needs that required his constant supervision; and that on a prior occasion, the parents' inability to control Michael resulted in serious physical injuries to another sibling. The parents and Michael had not yet completed court-ordered services. The imminent risk to the subject child upon return to the parents could not be mitigated by the conditions imposed.
http://nycourts.gov/reporter/3dseries/2020/2020_03663.htm

THIRD DEPARTMENT

Matter of Jill Q. v James R., 7/2/20 – **CUSTODY / CHILD'S DISTRESS**
The parents filed cross appeals from a custody order of Broome County Family Court. The Third Department reversed as to the father's parenting time. At age 8, the child met the father for the first time. Months later, based on the child's distress, the mother sought to modify the custody order, and the father filed a competing petition. Hearing testimony showed that the child's mental health had declined after visits with the father. The appellate court found that Family Court erred in precluding a mental health counselor from testifying as to statements made by the child that were germane to diagnosis and treatment. It was also error to deny an AFC request to adjourn the fact-finding hearing to present testimony from a mental health professional who evaluated the child during the pendency of the hearing. Such proof was critical. The matter was remitted for a new hearing before a new judge. Michelle Rosien represented the mother, and Allen Stone represented the child.
http://nycourts.gov/reporter/3dseries/2020/2020_03700.htm