CRIMINAL

DECISION OF THE WEEK

Matter of Duffy v NYS Board of Parole, 7/5/18 –**RESCISSION / PAROLE REINSTATED**
In 1979, the then 19-year-old petitioner fatally stabbed the 15-year-old victim following an argument. He was convicted of murder and sentenced to 20 years to life. The petitioner first became eligible for parole in 2001. At each appearance, the victim's family strenuously opposed parole. On the petitioner's ninth try, parole was granted. However, after reviewing two videos prepared by the family, the Board rescinded the grant. The petitioner commenced an Article 78 proceeding. The Third Department held that the record did not support a finding that the videos contained any information not known to the Board before it granted parole. The appellate court acknowledged the family's trauma and grief, but noted that the videos were submitted to the Board in 2001 and 2007. In rescinding parole, the Board did not make the required finding regarding the existence of significant information that was not previously known. The determination was annulled, and the petitioner's parole release was reinstated. Two judges dissented. The Legal Aid Society of NYC (Cynthia Conti-Cook, of counsel) represented the petitioner.
http://nycourts.gov/reporter/3dseries/2018/2018_05002.htm

FIRST DEPARTMENT

People v Ross, 7/5/18 – **BENT METROCARDS / FORGED INSTRUMENT**
The evidence in a New York County trial failed to establish the knowledge element of criminal possession of a forged instrument. Two MetroCards, bent in a manner known to permit unpaid rides, qualified as forged instruments. But the evidence was consistent with an innocent explanation for the defendant's possession, such as that he picked up the discarded cards in the hope that they might have fares remaining on them. The Office of the Appellate Defender (Daniel Lambright, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04971.htm

THIRD DEPARTMENT

People v Yerian, 7/5/18 – **DRUG POSSESSION / NO CONTROL / DISMISSAL**
After receiving a tip, police obtained a warrant, searched a residential garage, and found drugs and various household items used to manufacture meth. The defendant and two other persons were there. A Cortland County jury found the defendant guilty of second-degree criminal possession of a controlled substance based on a theory of constructive possession. The Third Department held that the proof—the defendant's presence in the garage/meth lab, knowledge of the existence of an illegal substance there, and prior drug use—did not establish her dominion or control over the drugs. The judgment of conviction was reversed, and the indictment was dismissed. The Rural Law Center of New York (Kelly Egan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04981.htm

People v Croley, 7/5/18 – **MURDER / ACCESSORY / DISMISSAL**
During a joint Albany County jury trial, the People argued that the codefendant shot the victim with the intent to kill, and the defendant aided him with the knowledge of such intent. Surveillance video and cell phone records were introduced to support the theory that the defendant assisted in the crime by tracking the victim's whereabouts, driving the codefendant to the scene, and acting as a getaway driver. The defendant was convicted of second-degree murder. The Third Department held that the evidence did not prove that, before the shooting, the defendant knew that the codefendant planned to kill the victim and shared such intent. The defendant could have had other plausible reasons for wanting access to the victim, such as robbery or assault. The judgment was reversed, and the indictment was dismissed. Matthew Hug represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04984.htm

People v Lentini, 7/5/18 – **PROOF RE SEEKING COUNSEL / ERROR TO DENY MISTRIAL**
In the early morning hours, the defendant was driving on a dark road when she struck and killed a pedestrian in her lane of traffic. An investigation revealed that the accident was unreported for more than an hour and that, for part of that period, the defendant might have left the area. At trial, the defendant contended that she did not immediately contact authorities because she was in shock after the victim's body was propelled through her windshield. In response to a defense motion, the trial court precluded proof regarding the defendant's efforts to consult with counsel on the night of the accident. A Saratoga County jury convicted the defendant of leaving the scene of an incident without reporting a personal injury, in violation of Vehicle & Traffic Law § 600 (2). On appeal, she contended that County Court should have declared a mistrial after a deputy sheriff testified that she did not feel comfortable answering questions without her lawyer present, and after her boyfriend testified that she called him for his attorney's number shortly after the accident. Both times, the offending testimony was stricken, a curative instruction was given, and a mistrial was denied. In the view of the appellate court, a mistrial should have been declared. Finding that the People did not deliberately provoke the mistrial, the Appellate Division remitted the matter for a new trial. James Knox represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04983.htm

People v Wilson, 7/5/18 – **JURY DEADLOCK / ERROR TO DECLARE MISTRIAL**
After a controlled-buy operation in Clinton County, the defendant was charged with drug sale and possession counts. The jury had deliberated for only two hours when the court received a jury note stating, "There appears not to be any way to a unanimous decision," and seeking guidance on how to proceed. Without consulting the parties, the trial court summoned the jury into the courtroom and delivered an *Allen* charge. Fifty-one minutes later, County Court recalled the jury and asked whether they were still deadlocked. The foreperson confirmed that they were. Without seeking input from counsel, County Court declared a mistrial. The defendant entered an *Alford* plea. The Third Department dismissed the indictment, concluding that County Court had erred in declaring a mistrial, jeopardy attached, and the People were precluded from reprosecuting the defendant. Lisa Burgess represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04982.htm

People v Sears, 7/5/18 – **NO EMERGENCY EXCEPTION / REVERSAL**
Police received a call from an occupant of an apartment directly below the defendant's. The caller, who thought that the defendant was incarcerated, heard noises suggesting that an interloper was present. The police learned that the defendant had been released from jail, and they found no evidence that the apartment had been forcibly entered. They heard a muffled sound heard from outside the apartment and saw faint light seen through the window—consistent with an occupant watching television. Without a warrant, they entered the apartment based on the emergency exception. The Third Department held that there was no basis to believe that there was an ongoing emergency. The court should have granted suppression of the evidence seized. Noreen McCarthy represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04980.htm

Matter of State of New York v John T., 7/5/18 – **MHL ART. 10 / CLOSED COURTROOM**
Clinton County Supreme Court denied the motion by the respondent to close the courtroom from press during a high-profile trial of his Mental Hygiene Law article 10 civil management proceedings. Both parties asserted that good cause existed for closure. The respondent sought to protect the confidentiality of his mental health records, whereas the petitioner asserted that the victims' anonymity should be protected. The Third Department embraced the latter rationale in reversing the challenged order. Mental Hygiene Legal Service (Charles Bayer, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05012.htm

FOURTH DEPARTMENT

People v Williams, 7/6/18 – **COLLATERAL ESTOPPEL / NEW TRIAL**
In trial #1, the defendant was acquitted of criminal conduct involving two checks ("A" and "B"), and on appeal, he was granted a new trial as to another allegedly forged check ("C"). At trial #2, the People used checks A and B as evidence of the defendant's criminal intent and motive with respect to check C. Ontario County Court referred to the defendant's alleged involvement with checks A and B as "uncharged conduct." The Fourth Department held that the trial court was collaterally estopped from presenting any evidence relating to checks A and B at trial #2. Thus, yet another trial was granted. The defendant represented himself upon appeal.
http://nycourts.gov/reporter/3dseries/2018/2018_05089.htm

People v Spinks, 7/6/18 – **SUPPRESSION GRANTED / NEW TRIAL**
Police responded to a 911 dispatch regarding the robbery of a cab driver, and a short time later, the defendant was stopped and detained. After a jury trial, he was convicted of robbery in the first and second degrees. The Fourth Department held that the information available to the detaining officer did not provide a reasonable suspicion to stop and detain the defendant. The suppression court failed to give adequate consideration to the half-mile distance between where the dispatcher said the suspects were observed running and where the defendant was stopped. Further, no search occurred in the area where the suspects were originally observed. The victim's identification of the defendant at a showup procedure was suppressed as the unattenuated product of the illegal stop and detention. The defendant

was entitled to a new trial, preceded by a hearing as to whether there was an independent basis for the identification testimony. Brian Shiffrin represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_05103.htm

FAMILY

THIRD DEPARTMENT

Richard HH. v Saratoga County DSS, 7/5/18 – **FCA § 1017 / CUSTODY TO UNCLE**
Two children were removed from their mother's care and placed with Saratoga County Social Services. There was a violation of Family Ct Act § 1017, which required the agency to do an immediate investigation to locate relatives who might be a placement resource and to give such persons notice and the opportunity to seek custody. Yet DSS and Family Court faulted the uncle for not seeking custody until a year after placement. The Third Department sharply criticized the agency and the court for violating the statute and creating the harm it was meant to prevent—long-term placement in foster care, rather than with a suitable relative. The reviewing court further observed that DSS had ignored the uncle's initial expression of willingness to be a custodial resource and, along with the trial court, had treated him as an unwelcome intervenor when he filed for custody. The dismissal of his petition was error. Contrary to Family Court's determination, the record established that the uncle and his wife could provide a suitable home. The opinion of the younger's therapist, relied on by Family Court, was flawed; and the AFC's assertions about the child's wishes were belied by the record. The uncle was granted custody of the younger child. (The uncle withdrew his petition as to the older child, who reached the age of majority during the pendency of the proceedings.) Pamela Babson represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04990.htm

Matter of Hensley v DeMun, 7/5/18 – **RIGHT TO COUNSEL VIOLATION / NEW HEARING**
The father appealed from an order of Chenango County Supreme Court awarding sole custody to the mother and finding that he had violated a prior custody order. The Third Department reversed and remitted for a new hearing. When the father appeared at the hearing unrepresented, the trial court erred in proceeding without first ascertaining that he was unequivocally waiving the right to counsel and conducting a searching inquiry. The violation of his right required reversal without regard to the merits of his position. Larisa Obolensky represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04995.htm

Matter of Cecilia P. (Carlenna Q.), 7/5/18 – **SUSPENDED JUDGMENT / REMITTAL**
In permanent neglect proceedings in Delaware County, numerous violations of the terms of a suspended judgment were established. However, the bests interests of the child had to be considered to arrive at an appropriate disposition. Family Court did not make the requisite findings, and the record lacked evidence relating to the child's present circumstances and relationship to the respondent and the potential effect on that child of the termination of parental rights and adoption. Thus, the matter was remitted for a full dispositional hearing. Teresa Mulliken represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_04993.htm

FOURTH DEPARTMENT

Matter of deMarc v Goodyear, 7/6/18 **– 2 MOTHERS / 5 CHILDREN / STANDING ISSUE**
The petitioner alleged that she and the respondent had been involved in a romantic relationship and had entered into an agreement to raise and co-parent the respondent's child, and that they further agreed that the respondent would conceive additional children and they would jointly raise them. The respondent did indeed have more children—four, who were conceived by the implantation of fertilized eggs. The petitioner commenced a proceeding seeking joint custody of the five children. Following a hearing on standing, the referee granted the respondent's motion to dismiss the petition as a matter of law. That was error. The referee made credibility determinations and weighed evidence, which was not proper under CPLR 4401. The matter was remitted for a new hearing regarding standing. At such hearing, an attorney for the children was to be appointed. Michael Steinberg represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05095.htm

Matter of Smith v Lopez, 7/6/18 – **NON-BINDING STIP / INTEMPERATE REMARKS**
The Fourth Department affirmed an order of Onondaga County Family Court awarding primary custody to the father. In doing so, the court rejected the mother's contention that the trial court erred in failing to limit its determination to the issues to which the parties did not stipulate. Where the parties stipulated to certain issues relating to custody and visitation, the court was not bound by that stipulation and could instead consider proof relating to the child's best interests in resolving the issues. In response to the mother's contentions that Family Court made comments demonstrating prejudice against her, the reviewing court noted that the court's "intemperate remarks" reflected a lack of patience that was inappropriate to this delicate matter, but discerned no indication of bias.
http://nycourts.gov/reporter/3dseries/2018/2018_05079.htm

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