CRIMINAL

SECOND DEPARTMENT

DECISION OF THE WEEK

People v Geddes-Kelly, 7/11/18 – **ILLICIT SEARCH OF WALLET / INDICTMENT DISMISSED**
One evening, based on traffic infractions, the police pulled over a vehicle driven by the defendant. During the stop, while looking through the window, police observed a bag of marihuana on the floor. The defendant was asked to step out of the vehicle. After frisking the defendant, an officer handcuffed him and then took his wallet from his pocket to search for pedigree information. In doing so, the officer found three credit cards, which he concluded were forged. Following a jury trial in Queens County, the defendant was convicted of criminal possession of a forged instrument in the second degree and marihuana possession. The Second Department held that suppression of the credit cards should have been granted, modified the judgment, and dismissed the indictment as to the forged instrument count. While the search of the defendant's pockets was justified since it arose from a search incident to a lawful arrest, the subsequent search of the wallet was unlawful. The proof adduced at the suppression hearing failed to support a reasonable belief that the suspect might have gained possession of a weapon or been able to destroy evidence. Appellate Advocates (Hannah Zhao, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05195.htm

People v Cherry, 7/11/18 – **MURDER CONVICTION / LESSER OFFENSE / NEW TRIAL**
The defendant killed the victim by shooting him in the head. He told police that he pointed the gun at the victim, and it fired while the two men struggled for the weapon, but he did not intend to pull the trigger. After a jury trial, the defendant was convicted of second-degree intentional murder. On appeal, he contended that Queens County Supreme Court erred in denying his request for an instruction on the lesser included offense of reckless manslaughter. The Second Department reversed. Reckless manslaughter was a lesser included offense. *See People v Rivera*, 23 NY2d 112, 120. Moreover, there was a reasonable view of the evidence that the defendant did not intentionally pull the trigger. Appellate Advocates (Denise Corsi, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05190.htm

People v Moulton, 7/11/18 – **UNSWORN WITNESS RULE / NEW TRIAL**
The defendant was convicted of first-degree rape by a Queens County jury. His argument, that the prosecutor violated the unsworn witness rule during the cross-examination of a witness, was unpreserved. However, in the interest of justice, the appellate court reversed the judgment. The prosecutor repeatedly injected her own credibility into the trial while examining the only defense witness other than the defendant. Given the importance of the witness's testimony to the defense, the defendant was deprived of a fair trial. Barry Kamins and John Esposito represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05203.htm

People v Trotter, 7/11/18 – **RISK FACTOR PROOF / REDUCTION TO LEVEL ONE**
Queens County Supreme Court designated the defendant a level-two sex offender. An assessment of points under risk factor 11 may be appropriate if the offender has a history of substance abuse or was abusing drugs and/or alcohol at the time of the offense. The People did not make the requisite showing. The presentence report contained only ambiguous information about the extent of the defendant's use of alcohol and marijuana between the ages of 16 and 20, and no information was presented about his use of those substances in the seven years before the sex offense. Moreover, the evidence at the hearing did not establish that, at the time of the offense, the defendant abused, or was under the influence of, alcohol or marijuana. Thus, he should not have been assessed points under risk factor 11, and he should have been designated a level-one sex offender. The Legal Aid Society of NYC (Nancy Little, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05211.htm

People v Cunny, 7/11/17 – ***SANDOVAL* ERROR / HARMLESS**
The defendant was convicted in Kings County of attempted assault in the first degree. After a *Sandoval* hearing, Supreme Court granted the People's application to cross-examine the defendant about the underlying facts of his 2006 conviction for attempted coercion. The defendant did not testify at trial. The reviewing court agreed with the defendant that the trial court erred in its *Sandoval* ruling, and it set forth a detailed discussion of the relevant standards. The facts underlying the 2006 conviction—which involved the threatened use of a hammer as a blunt force weapon—may have had some probative value as to the defendant's credibility. But any such value was outweighed by the potential prejudicial effect. There was no reasonable possibility that the error might have contributed to the conviction, however, the Second Department concluded.
http://nycourts.gov/reporter/3dseries/2018/2018_05191.htm

THIRD DEPARTMENT

People v Hulstrunk, 7/11/18 – **SCI / JURISDICTIONAL DEFECT**
In Saratoga County, the defendant was charged in felony complaints with menacing a police officer and criminal possession of a weapon in the second degree. He agreed to waive indictment and plead guilty to a SCI charging him with reckless endangerment in the first degree. The plea agreement included a waiver of the right to appeal. On appeal, the defendant contended that the waiver of indictment and SCI were jurisdictionally defective. The Third Department agreed and noted that the issue was not precluded by the defendant's guilty plea or appeal waiver and was not subject to the preservation requirement. The crime charged in the SCI, reckless endangerment, was not an offense for which the defendant was held for action of a grand jury, nor was it a lesser included offense of the crimes charged in the felony complaints. The plea was vacated, and the SCI was dismissed. Brian Quinn represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05234.htm

People v Myers, 7/11/18 – **ORDER OF PROTECTION / WITNESS DID NOT SEE CRIME**
After taking pictures of a fight outside his home, the victim was shot in the head, and he lapsed into a vegetative coma. One of the victim's neighbors, Frank Galaska, said that on

the date in question outside his apartment, he saw people screaming and arguing and the victim taking pictures, but he did not see who shot him. Another neighbor, Frank McGivern, saw the victim taking photos, then observed someone's arm rising, heard a pop, and saw a flash. McGivern then saw the victim fall to the ground. He identified the defendant as the shooter. The defendant was convicted by a Rensselaer County jury of first-degree assault and second-degree criminal possession of a weapon. The Third Department held that County Court did not err in issuing an order of protection as to McGivern, but such order should not have been issued in favor of Galaska. An order of protection may be entered for the benefit of a witness who actually witnessed the offense for which the defendant was convicted. Thus, the order of protection for Galaska's benefit was vacated. Dennis Lamb represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05225.htm

FAMILY COURT

SECOND DEPARTMENT

Matter of Luna V. (Natasha V.), 7/11/18 – **FCA § 1028 APPLICATION / REVERSAL**
The petitioner agency appealed from an order of Richmond County Family Court that granted the mother's application pursuant to Family Ct Act § 1028 for the return of the subject children. The Second Department stayed enforcement of the order. On appeal, the appellate court reversed. The record did not provide a sound and substantial basis for the determination that: (1) the mother's condition had been mere temporary drowsiness, resulting from her use of newly prescribed medication, and (2) the petitioner had failed to prove that an imminent risk would be presented by the return of the children, who were then age seven months and eight years. The mother was the only adult at home with the children when she locked herself in the bathroom for an extended period of time, and she did not answer when the older child repeatedly knocked. When the mother finally emerged, her speech was slurred, and she could not maintain her balance. The frightened child summoned her grandfather. He found the mother lying face down on the child's bed and called 911. The attending physician at the hospital testified that the mother appeared to have taken a large quantity of opiates.
http://nycourts.gov/reporter/3dseries/2018/2018_05179.htm

Denise V. E. J. (Latonia J.), 7/11/18 – **APPEAL ACADEMIC / VACATUR MOTION**
In permanency proceedings, Westchester County Family Court denied the motion of the child to participate in person at the hearing. Although the child was aggrieved by the order, the appeal was academic, the Second Department held. Where a dispositional order has been issued after a permanency hearing and a child was erroneously deprived of his or her statutory right to participate in person at that hearing, the remedy would be to vacate the order, grant the motion to participate in person, and remit the matter for a new permanency hearing pursuant to Family Ct Act § 1090-a. In the instant case, the appellate court was unable to grant such relief because the permanency hearing and dispositional order at issue

were superseded by later hearings and orders, and the child was permitted to participate in person at those proceedings. The appeal was dismissed.
http://nycourts.gov/reporter/3dseries/2018/2018_05163.htm

O'Brien v O'Brien, 7/11/18 – **IMPUTED INCOME INFLATED / CHILD SUPPORT REDUCED**
Orange County Supreme Court improvidently exercised its discretion by imputing to the defendant mother income of $66,000. She had a high school diploma, and at various times during the marriage, worked at a delicatessen, as a medical assistant, and as a dental assistant. Since the defendant left the marital residence, her mother had been giving her $1,800 to $2,000 a month. Family Court should have imputed income in the sum of $30,000, based on the mother's educational background, past earnings, and family gifts. Her support obligation was thus reduced. William Larkin III represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05182.htm

Perlman v Perlman, 7/11/18 – **VEXATIOUS / TRIAL COURT SAYS, "ENOUGH!"**
In matrimonial litigation, the Second Department agreed with the determination of Kings County Supreme Court enjoining the defendant from filing further motions without leave of court. A party may forfeit the right to free access to the courts if he or she abuses the judicial process by engaging in meritless litigation motivated by spite or ill will. The record reflected that the defendant did so through vexatious litigation.
http://nycourts.gov/reporter/3dseries/2018/2018_05212.htm

THIRD DEPARTMENT

Debra SS. (Brian TT.), 7/11/18 – **EXTRAORDINARY / GRANDMOTHER CUSTODY**
Broome County Family Court properly found that extraordinary circumstances existed and then awarded joint legal custody of the child to the grandmother, father, and mother, with primary physical custody to the grandmother. Notwithstanding Family Court's failure to address best interests, the Third Department could review the record and make its own independent determination. The appellate court concluded that the challenged order was indeed in the best interests of the child. The grandmother had been the child's primary caregiver since 2009 and had fostered the parents' relationship with the child. The father had not maintained a stable home or addressed his mental health problems. The mother, who had supported primary custody in the grandmother, did not appeal from the challenged order.
http://nycourts.gov/reporter/3dseries/2018/2018_05240.htm

Matter of Lee v Lee, 7/11/18 – **EXPOSURE TO PEANUTS AND CAT / MOOT APPEAL**
In Saratoga County Family Court, the mother filed a modification petition alleging that there had been a change in circumstances. In violation of the recommendation of the pediatrician, the father had taken the oldest child to an Asian restaurant where peanuts were an ingredient in the food. Further, the father had exposed the youngest child to his pet cat, even though the child was allergic to cats. Family Court dismissed the petition. While the mother's appeal was pending, the father filed a modification petition seeking additional visitation. An order on consent granted him expanded access. Although the order did not specifically address the issues raised in the mother's petition, it did impose restrictions on

the conduct of the parties. Since the order dealt with the father's conduct during visitation—the same issue raised in the mother's petition—her appeal was moot, the Third Department held.
http://decisions.courts.state.ny.us/ad3/Decisions/2018/525487.pdf

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