CRIMINAL

SECOND CIRCUIT

DECISION OF THE WEEK

Hylton v Sessions, 7/20/18 – **CRIMINAL SALE OF POT / NOT AGGRAVATED FELONY**

The petitioner was admitted to the U.S. as a lawful permanent resident in 1989. He is married to a U.S. citizen and has two U.S. citizen brothers, a U.S. citizen mother, and three U.S. citizen children, whom he supports. In 2011, he was convicted of third-degree criminal sale of marijuana and thereafter was detained by DHS and charged as removable for having committed an aggravated felony. An immigration judge (IJ) ruled that, as a matter of law, the petitioner was not an aggravated felon. As a matter of discretion, the judge granted the cancellation of removal. The Government appealed, and the Board of Immigration Appeals (BIA) held that the New York crime was an aggravated felony and thus the petitioner was ineligible for the cancellation of removal. The Second Circuit vacated the BIA opinion. The BIA should have employed the categorical approach, identifying the minimum criminal conduct necessary for conviction under the state statute by looking only to the statutory elements. Under federal law, marijuana distribution is a misdemeanor where the defendant distributed a small amount of the drug for no remuneration. The Second Circuit held that an ounce (30 grams) is a small amount. Under New York law, the minimum offense conduct is a non-remunerative transfer of more than 25 grams of a substance containing marijuana. By its plain language, the statute punished conduct classified as a federal misdemeanor. Thus, the petitioner was not an aggravated felon, and equitable relief was available. The matter was remanded to the BIA to determine whether the IJ properly granted the cancellation of removal.

SECOND DEPARTMENT

People v Watson, 7/18/18 – **WEAPON POSSESSION CONVICTION / VIGOROUS DISSENT**

At a Richmond County trial on weapon possession charges, the People presented evidence that two officers became suspicious of the defendant when he entered a livery cab. After they stopped the vehicle for a traffic violation, an officer noticed the butt of a gun protruding from the defendant's waistband. The defendant said that he was enroute to a precinct station house to surrender the firearm as part of the City's Gun Buyback Program. *See* Penal Law § 265.20 (a) (1) (f). At trial, he sought to call witnesses regarding pre-arrest conversations about such intent. One such witness—the defendant's mother-in-law—was a senior police administrative aide at the station house. Sua sponte, the trial court precluded such testimony on hearsay grounds. The Second Department affirmed the conviction, concluding that conversations regarding the surrender were properly excluded. Moreover, several trial errors were deemed harmless: admitting photographs of guns found on the defendant's cell phone; precluding cross-examination of an officer about a federal lawsuit against him; and allowing the prosecutor's comment that defense counsel "can't lie to a jury." One justice dissented, opining that the cumulative impact of the errors denied the defendant of a fair trial. The defendant had properly sought to introduce pre-arrest conversations as probative of his state of mind. During summation, the prosecutor had

improperly accused defense counsel of lying to the jury and falsely insinuated that the People possessed information about the absence of a permit for the guns depicted in the cell phone photos, the dissenter stated.
http://nycourts.gov/reporter/3dseries/2018/2018_05342.htm

THIRD DEPARTMENT

People v Carey, 7/19/18 – **SUPPRESSION DENIED / VIGOROUS DISSENT**
At 3:30 a.m. one night, an officer stopped a vehicle after running its license plate and learning that the registration was suspended. The driver told the officer that he did not have his driver's license. The officer asked the defendant passenger for identification, which he provided. A computer search revealed that the defendant was on parole. The officer asked the defendant why he was on parole, and he responded, "sales." When the officer detected the odor of alcohol, he asked the defendant if he had been drinking. The defendant said no. Then the officer did a protective pat frisk, purportedly for his own safety. Upon opening the defendant's backpack, the officer found a bag containing ammunition, handcuffed the defendant, and searched his person. The officer observed the handle of a handgun in the defendant's front pocket, alerted another officer at the scene, and gave her the weapon. The defendant moved to suppress. Following a hearing, Ulster County Court denied the motion. The defendant pleaded guilty to criminal possession of a weapon in the second degree. The Third Department affirmed. The defendant was a parolee in apparent violation of his curfew and the standard no-alcohol prohibition. On the night in question, the hour was late, the driver was unlicensed, and the vehicle unregistered. Further, the defendant's "sales" response and denial of alcohol use "heightened the volatility of the situation." A single justice dissented. In her view, the proof did not show that the defendant posed a safety concern. He was not combative, and he followed instructions. There was no proof that the officer observed any bulges suggesting a weapon. The defendant did not make suspicious movements. No proof indicated that the officer felt threatened by the defendant's terse remark about his parole status or established that a volatile situation existed.
http://nycourts.gov/reporter/3dseries/2018/2018_05376.htm

TRIAL COURTS

People v Johnson, 7/16/18 – **DEFECTIVE GRAND JURY PROCEEDING / DISMISSAL**
In 2012, the defendant repeatedly discharged a firearm pointed at a group of individuals. Four persons sustained wounds. One died. In 2014, a Kings County grand jury returned a 14-count indictment, and the defendant was acquitted of murder in the second degree and convicted of the lesser included offense of manslaughter in the first degree. He appealed. The Second Department ordered a new trial based on a violation of the defendant's right to be present. *See* 154 AD3d 777. In connection with the same underlying events, a 2018 grand jury indicted the defendant for manslaughter in the first degree. Supreme Court found that the omission of material exculpatory information impaired the integrity of the grand jury proceedings. At the second grand jury, the only proof tending to establish the defendant's identity as the shooter was the testimony of a detective as to the defendant's confession and of an eyewitness who had stated at the 2014 grand jury that the defendant fired multiple shots. However, at the trial, that eyewitness testified that he could not recall

seeing anyone, let alone defendant, firing a weapon on the night in question. The People failed to inform the grand jury of such exculpatory testimony. The motion to dismiss the indictment was granted, albeit with leave given to the People to represent. Bernard Udell represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_51099.htm

People v Stanton, 7/17/18 – **PROBATION / MEDICAL MARIJUANA ALLOWED**
The Public Health Law (§§ 3360-3369) does not address whether an individual on felony probation with conditions to abstain from the use of alcohol or illicit substances can use medical marijuana. In a matter of first impression, Sullivan County Court decided a motion by the defendant seeking to amend his probation conditions to allow for the use of medical marijuana. After reviewing how other jurisdictions have addressed the issue, the motion court observed that the defendant's conviction was for a non-violent sexual offense. Further, he had no criminal history related to the use or possession of narcotics or firearms or any offenses for driving while intoxicated or ability impaired by drugs. Following grave injuries in a motorcycle accident, the defendant qualified for medical marijuana and had a valid prescription. If the defendant were prohibited from using marijuana, he would need to rely on addictive narcotics that interfered with his ability to function. Thus, his motion was granted: he could use medical marijuana during his probationary sentence if he maintained a valid prescription from a licensed physician associated with the State's Medical Marijuana Program. John Janusas represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_28221.htm

FAMILY

FIRST DEPARTMENT

Matter of Dayon G. v Tina T., 7/19/18 – **CPLR 5015 MOTION / IMPROPERLY DENIED**
In 2001, the mother Tina T. gave birth to a son. She agreed with Dayon G. that he was not the father. In 2007, the parties separated, and the mother moved to Georgia with the son. In 2009, she returned to New York with the boy, and the parties resumed their relationship. The mother gave birth to a girl in 2011. The father stated that he was her biological father, but the mother asserted that he was not. In 2016, Family Court issued a default order granting custody of the daughter to Dayon G. Bronx County Family Court denied the mother's CPLR 5015 (a) (1) motion to vacate the order. The First Department reversed and granted the motion. Default orders are disfavored in cases involving child custody, and thus the rules with respect to vacating such orders are not to be applied rigorously. The mother demonstrated a reasonable excuse for her default, in that there was only equivocal evidence that she was ever served with the custody petition. She asserted a meritorious defense by alleging that the girl had resided primarily with her, that the petitioner was not the biological father, and that she never signed the acknowledgment of paternity. The custody petition was remanded for further proceedings.
Larry Bachner represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05402.htm

SECOND DEPARTMENT

Maddaloni v Maddaloni, 7/17/18 – **CPLR 5015 MOTION / PROPERLY DENIED**
In a Suffolk County matrimonial action, the defendant appealed from an order denying his CPLR 5015 (a) (2), (3) motion. Under such provisions, the court that rendered a judgment may relieve a party from it on the ground of newly discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial; and/or on the ground of fraud, misrepresentation or other misconduct of an adverse party. Newly discovered evidence is evidence that was in existence, but was undiscoverable with due diligence at the time of the original judgment. The defendant failed to establish that the information offered could not have been timely discovered. In any event, he did not demonstrate that, if introduced at trial, the "new" evidence would probably have produced a different result. Moreover, he did not establish fraud, misrepresentation or misconduct on the part of the plaintiff.
http://nycourts.gov/reporter/3dseries/2018/2018_05294.htm

Matter of Mayra C. (Adan C.), 7/18/18 – **ARTICLE 10 / ABUSE PROVEN**
The petitioner commenced Family Court Act Article 10 proceedings alleging that the respondent sexually abused Daniela C. and derivatively abused the other subject children. After a hearing, Kings County Family Court dismissed so much of the petitions as alleged that the respondent abused Daniela C. and derivatively abused the other subject children. The petitioner appealed. The Second Department found that the evidence established sexual abuse. Daniela C.'s testimony as to multiple instances of such abuse was sufficient. Out-of-court statements regarding the abuse—made to a counselor, a therapist, a psychiatrist, and an emergency medical technician—constituted adequate proof. Such statements were corroborated by Daniela C.'s testimony, as well as testimony by one of the other children, that she once saw the respondent in bed with Daniela C. Any inconsistencies in the victim's testimony did not render her testimony unworthy of belief. The petitioner also established that the other children were derivatively abused; the abuse of Daniela C. while the other children were asleep in the same room indicated a fundamental defect in the respondent's understanding of the duties of a person legally responsible for their care.
http://nycourts.gov/reporter/3dseries/2018/2018_05304.htm

Papakonstantis v Papakonstantis, 7/18/18 – **MAINTENANCE / INCREASED**
A judgment of divorce entered in Suffolk County Supreme Court awarded the plaintiff maintenance of $1,000 per month for 12 months and of $750 per month thereafter for 60 months. That was insufficient. The plaintiff was 46 years old, and the parties were married for nearly 22 years. The plaintiff did not work outside the home for the entire marriage, having left her secretarial job to raise the parties' three children. She was entitled to maintenance of $3,000 per month for 72 months. Further, the trial court should have directed the defendant to maintain health insurance for the plaintiff until the expiration of the period of maintenance or until she was able to obtain insurance through employment, whichever came first. Bridget Tartaglia represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05326.htm

Cohen v Cohen, 7/18/18 – **STIPULATION AMBIGUOUS / REMITTAL FOR HEARING**
In a Nassau County matrimonial action, cross appeals were filed as to a stipulation governing the parties' share of an income tax liability. A stipulation of settlement is a contract, enforceable according to its terms. When the terms of a separation agreement are clear and unambiguous, the intent of the parties is to be found within the four corners of the agreement. Whether an agreement is ambiguous is a question of law for the court. The resolution of an ambiguous provision is for the trier of fact. In the instant case, the relevant provision of the parties' stipulation was ambiguous regarding how to calculate their income in connection with tax liability apportionment. The parties' submissions were insufficient to resolve the ambiguity. Accordingly, Supreme Court should not have determined the parties' respective tax liabilities. The matter was remitted for an evidentiary hearing, at which extrinsic evidence could be introduced to determine intent regarding the relevant provision.
http://nycourts.gov/reporter/3dseries/2018/2018_05277.htm

CYNTHIA FEATHERS, Esq.
Director of Quality Enhancement
For Appellate and Post-Conviction Representation
NY State Office of Indigent Legal Services
80 S. Swan St., Suite 1147
Albany, NY 12210
Office: (518) 473-2383
Cell: (518) 949-6131