SECOND DEPARTMENT

DECISION OF THE WEEK

People v Augustus, 7/25/18 – **IMPROPER SEARCH WARRANT FOR SALIVA / REVERSAL**
The defendant's appeal from a judgment of Kings County Supreme Court convicting him of second-degree murder brought up for review the denial of his motion to controvert a search warrant authorizing the taking of a saliva sample from him and to suppress the evidence seized. The Second Department held that the trial court should have granted the motion. A search warrant application must support a reasonable belief that evidence of a crime may be found in a certain place. The supporting affidavit of the detective was conclusory and insufficient. He stated that he believed that evidence related to the murder might be found in the defendant's saliva, based on his interview of witnesses, information from fellow officers, and a review of police department records. However, the detective did not identify the witnesses, indicate what information was obtained, or specify what records were reviewed. The error was not harmless. Thus, the judgment of conviction was reversed, and a new trial was ordered. Appellate Advocates (Alexis Ascher, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05480.htm

People v Smith, 7/25/18 – **CONSECUTIVE TERMS / MUST RUN CONCURRENTLY**
The sentence imposed as to the defendant's Richmond County conviction of CPW in the second degree, for possessing a loaded firearm with intent to use it unlawfully against another, had to run concurrently with the term imposed for murder. The People did not prove that the defendant had unlawful intent that was separate from his intent to shoot the victim. Appellate Advocates (Jenin Younes, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05498.htm

People v Crawford, 7/25/18 – **ELICITING INCRIMINATING RESPONSE / BUT HARMLESS**
The defendant was convicted, following a Westchester County jury trial, of the murder of a woman who was stabbed 31 times and found in his bed. His pre-*Miranda* statements were the product of improper custodial interrogation by a detective whose questions were likely to elicit an incriminating response. In the 25-minute interview, the detective did not just seek mere pedigree information when asking about the defendant's family and criminal history and about whether he knew why he was being questioned. However, the error in denying suppression was harmless. Further, the record supported the denial of a request to charge manslaughter in the first degree as a lesser included offense. Given the nature and brutality of the slaying, there was no reasonable view of the evidence that the defendant intended to inflict serious physical injury, rather than death.
http://nycourts.gov/reporter/3dseries/2018/2018_05484.htm

FOURTH DEPARTMENT

People v Wood, 7/25/18 – **JURY NOTES / DEFECTIVE RESPONSE**
After the defendant ate at a Rochester restaurant, he belligerently complained about the cost of the meal and was asked to leave. According to trial testimony, he returned weeks later, pulled out a gun, and pointed it at the complainant, who asked him to leave. When police apprehended the defendant nearby, they found a loaded antique pistol in his waistband. In two counts, he was charged with second-degree CPW on the grounds that he possessed a loaded firearm and (1) was not in his home or place of business and (2) had the intent to use the weapon unlawfully against another. The third count charged the defendant with second-degree menacing on the ground that, by displaying the firearm, he intentionally placed another person in reasonable fear of physical injury. The defendant testified that the gun had belonged to his grandfather, a veteran; he was transporting it to another family member; and he did not display it at the restaurant. During deliberations, the jury requested clarification of the terms "intent" and "unlawfully" and a read back of testimony about the interaction in the restaurant. The prosecutor asked the court to respond in part by instructing the jury that possession of a loaded firearm is presumptive evidence of intent to use the weapon unlawfully. Over objection, the court gave the instruction; and within two minutes, the jury reached a verdict. The Fourth Department held that the trial court did not provide a meaningful response to the jury notes, and the defendant was prejudiced. However, the error did not compel reversal as to the first CPW count, which did not require intent. Danielle Wild represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05422.htm

SECOND CIRCUIT

United States v Townsend, 7/23/18 – **"CONTROLLED SUBSTANCES" / SCOPE**
Following indictment by a federal grand jury, the defendant pled guilty to possessing alprazolam with the intent to distribute it and to being a felon in possession of a firearm. The latter crime had a Sentencing Guidelines base offense level of 20 if the defendant committed the offense after sustaining one felony conviction for a crime of violence or a controlled substance offense. The level increased to 24 where there were two such prior convictions. In the case at bar, the presentence investigation report determined that the base level was 24, based on the defendant's prior convictions in New York and New Jersey. The New York conviction was for criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31), which criminalizes the sale of HCG. The Second Circuit held that, for purposes of the Guidelines, "controlled substance" refers exclusively to substances covered by the federal Controlled Substances Act (CSA). If conduct is criminalized by a state statute, but not by analogous federal law, the state conviction cannot support an increase in the base offense level. At the time of the defendant's conviction, the New York drug schedule included HCG as a Schedule III controlled substance, but HCG was not a controlled substance under the CSA. Thus, the defendant's New York conviction was not a predicate offense for the purposes of an enhanced sentence. The District Court's judgment was vacated, and the matter remitted for resentencing. The Federal Defenders of New York (Daniel Habib, of counsel) represented the appellant.
http://www.ca2.uscourts.gov/decisions.html

OTHER COURTS

People v Santagata, 7/13/18 – **POT IN TIN FOIL / NOT OPEN TO PUBLIC VIEW**
The defendant was arrested for possessing a tin foil packet containing a green leafy substance. After a nonjury trial, he was convicted of criminal possession of marijuana in the fifth degree. On appeal, he argued that the "open to public view" element was not met, since the marijuana was wrapped in tin foil and concealed from public view. *See People v Jackson*, 18 NY3d 738. The Appellate Term, Second Department agreed. Appellate Advocates (Laura Tatelman, of counsel) represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_51122.htm

People v Buchanan, 7/23/18 – **REARGUMENT APPLICATION / BAD *MIRANDA* WAIVER**
The defendant was charged with CPW in the fourth degree, menacing in the second degree, and other crimes. Following a suppression hearing, City Court of Mount Vernon orally granted his motion to suppress certain statements. The People moved for reargument. The CPL did not provide for leave to reargue. CPLR 2221 standards were applied, but not the time limitation of 30 days after service of the order with notice of entry. City Court held that the time to seek reargument should instead commence from the date the decision was "rendered to the parties" and that the motion was untimely. In any event, the defendant's statement was involuntary, since there was no meaningful exchange about whether he understood the rights delineated in the *Miranda* waiver form. Judith Permutt represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_28231.htm

FAMILY

SECOND DEPARTMENT

Matter of Ashley G. (Eggar T.), 7/25/18 – **NEGLECT PETITIONS DISMISSED / AFFIRMED**
In child neglect proceedings, the petitioner agency appealed from an order of Kings County Family Court, which dismissed the petitions against the father after a fact-finding hearing. The Second Department affirmed. The father was accused of neglecting one child, Amy G., by committing sexual abuse; neglecting another child, Sharman S., by inflicting excessive corporal punishment; and derivatively neglecting the other children. Siblings' out-of-court statements may be used to cross-corroborate one another; but they must describe similar incidents of abuse and be sufficiently detailed to support their reliability. Such standard was not met in the instant case.
http://nycourts.gov/reporter/3dseries/2018/2018_05468.htm

FOURTH DEPARTMENT

Burns v Burns, 7/25/18 – **AGREEMENT SILENT ON TERM / DRL FILLS GAP**
Unless the parties clearly provide otherwise in a divorce settlement agreement, the payor's obligation to pay maintenance ends upon the payee's remarriage. Here, the parties' agreement was silent on the matter. Thus, the husband's maintenance obligation terminated upon the wife's remarriage. Monroe County Supreme Court properly denied her motion to hold him in contempt

and recover unpaid maintenance, the Fourth Department held. The appellate court invoked the principle that the law in force at the time an agreement was made becomes part of the agreement if it does not otherwise provide. The parties are presumed to have contemplated such law when the contract was made. Domestic Relations Law § 236 includes this caveat: any maintenance award shall terminate upon the death of either party or upon the payee's remarriage. Further, in this case, no extrinsic evidence indicated that a remarriage clause was purposefully omitted from the parties' agreement.
http://nycourts.gov/reporter/3dseries/2018/2018_05411.htm

O'Reilly-Morsehead v O'Reilly-Morsehead, 7/25/18 – **VERMONT CIVIL UNION / COMITY**
In 2003, the parties entered into a civil union in Vermont. In 2006, they were married in Canada. When the plaintiff commenced the instant action seeking dissolution of the marriage in 2014, the defendant counterclaimed for dissolution of the civil union and equitable distribution of property acquired during the union, and she moved for summary judgment. Monroe County Supreme Court dissolved the civil union and held that the property acquired during the civil union and before the marriage was not subject to equitable distribution. The Fourth Department disagreed. The trial court should have applied principles of comity and recognized that both parties had property rights. The Court of Appeals has held that a Vermont civil union creates *parental* rights which should be recognized under New York law. *See Matter of Debra H. v Janice R.*, 14 NY3d 576, *cert denied* 562 US 1136. The Fourth Department concluded that comity also required the recognition of *property* rights arising from such a civil union. Under the laws of both Vermont and New York, property acquired during a legal union of two people was subject to equitable distribution, with similar factors governing distribution determinations. The Empire Justice Center and the Legal Aid Society of Rochester represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05419.htm

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