CRIMINAL

SECOND DEPARTMENT

People v Rodgers, 7/31/19 – **REVERSED / DISMISSED**
RAZOR BLADE NOT USED AS WEAPON
The defendant appealed from a judgment of Westchester County Court, convicting him of 3rd degree CPW. The Second Department reversed. The People failed to establish that the razor blade recovered was "designed, made or adapted for use primarily as a weapon." There was no testimony by the detectives involved that: (1) based on their experience, the primary use of such instrument wrapped in black tape was as a weapon, or (2) they tried to find out how the defendant used the razor. The defendant, who was socializing with two men, was not brandishing the razor in a threatening manner and did not flee or discard it when detectives approached. The indictment was dismissed. Judith Permutt represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_06002.htm

People v Smith, 7/31/19 – **REVERSED / NEW TRIAL**
ERRANT JUSTIFICATION INSTRUCTIONS
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree assault. The Second Department reversed and ordered a new trial. The defendant cut the victim's face with a piece of glass during an altercation. He was charged with five counts and asserted a justification defense. The jury acquitted him on all but one count. When a defendant asserts self-defense, the trial court must instruct the jurors that a finding of not guilty based on justification precludes a guilty verdict on lesser included offenses. Here, the verdict sheet did not mention justification, and it instructed the jurors to continue to the following count if they found the defendant not guilty of counts one to four. Justin Bonus represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_06004.htm

FOURTH DEPARTMENT

People v Gonzalez, 7/31/19 – **REVERSED / DISMISSED**
MANSLAUGHTER AGAINST WEIGHT
The defendant appealed from a judgment of Erie County Supreme Court, convicting him of 1st degree manslaughter, based on the alleged unintentional killing of his girlfriend's infant son. The Fourth Department found the verdict against the weight of evidence and dismissed the indictment. The People's theory was that the person who inflicted the victim's fatal injuries did so within 24 hours of death the morning of May 3, 2010. The defendant was alone with the victim for an hour on May 2. But on cross-examination, the Medical Examiner said that a delay in the onset of symptoms was common with a brain injury; that such an injury could occur up to 24 hours before symptoms; and that vomiting is a symptom. There was evidence that the victim vomited on the afternoon of May 2. Thus, the injuries could have been sustained the afternoon of May 1, when the defendant was not with the victim, but four other people were—none of whom was interviewed by police.

When the mother called 911 the evening of May 2, she said that the baby had been vomiting all day. Legal Aid Bureau of Buffalo (Erin Kulesus, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05947.htm

People v Johnson, 7/31/19 – **REVERSED / DISMISSED**
STATUTORY SPEEDY TRIAL VIOLATION
The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of a drug possession charge. The Fourth Department reversed and dismissed the superseding indictment. The People should have been charged with 87 days of post-readiness delay for the period between when they "implicitly requested" an adjournment to seek a superseding indictment and when they secured that indictment. When the 87 days were added to the pre-readiness delay chargeable to the People, the total exceeded the authorized period. Hiscock Legal Aid Society (Brittney Clark, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05920.htm

People v Vail, 7/31/19 – **REVERSED / NEW TRIAL**
BAD KIDNAPPING INTENT INSTRUCTION
The defendant appealed from a judgment of Ontario County Supreme Court, convicting him of 1st degree kidnapping. The Fourth Department reversed the judgment and granted a new trial. The court charged the jury that "intent does not require advanced planning, nor is it necessary that the intent be in the person's mind for any particular period of time." Such charge was inconsistent with Penal Law § 135.25(2)(a), which should be interpreted to require that the illicit intent existed for more than 12 hours during the period of restraint of the victim. A dissenter would have dismissed the charge. The 14-year-old alleged victim asked her boyfriend/defendant to drive her to Florida. She was voluntarily in his vehicle, and there was no indication that, had she changed her mind, the defendant would not have acquiesced. Mary Davison represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05848.htm

People v Hernandez, 7/31/19 – **REVERSED / NEW TRIAL**
CHALLENGE FOR CAUSE / SUPPRESSION
The defendant appealed from a Seneca County Court judgment, convicting him of 2nd degree assault and other crimes. The Fourth Department reversed and ordered a new trial. County Court erred in denying a challenge for cause. By insisting that officers were unlikely to lie under oath because that would endanger their pensions, the prospective juror cast doubt on his ability to render a fair verdict. The court failed to obtain required assurances. The defense exhausted peremptory challenges. The defendant's statements to police should have been suppressed, the appellate court ruled. He was ordered out of his bedroom in the middle of the night, directed to remain in a vestibule, not *Mirandized*, but subjected to pointed questions for an hour. Then at the station, the defendant said, "I think I need a lawyer," but questioning continued. J. Scott Porter represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05844.htm

People v Blunt, 7/31/19 – **DECISION RESERVED / REMITTED**
HEARING ON 330.30 MOTION
The defendant appealed from a County Court judgment, convicting him of 2nd degree murder and other crimes. The Fourth Department reserved decision. The trial court erred in summarily denying a CPL 330.30 motion to set aside the verdict. Sworn allegations indicated that a juror may have had an undisclosed, potentially strained relationship with the defendant's mother, resulting from attending high school and working together; he possibly knew about the defendant's criminal history; he purportedly tried to speak with the mother's husband during a break at trial; and the misconduct was not known to the defendant before the verdict. A hearing was needed. The Monroe County Public Defender (Drew DuBrin, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05917.htm

People v McCoy, 7/31/19 – **HARSH TERM CUT / MENTAL HEALTH**
The defendant appealed from an Erie County Supreme Court judgment, convicting him upon a nonjury verdict of 1st degree burglary and other crimes. The Fourth Department reduced the term for burglary from 12 to five years. Before indictment, the defendant was offered probation; and after indictment, five years. At that time, all relevant facts were known, including the defendant's history of mental illness. The victims were her defendant's parents, who opposed lengthy incarceration. Moreover, her prior convictions—none for felonies—were committed within three years of the instant offenses and only after the defendant began to suffer from serious mental health issues. The Legal Aid Bureau of Buffalo (Erin Kulesus, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05851.htm

People v Ayotunji A., 7/31/19 – **REVERSED / REMITTED**
PROBATION REVOCATION HEARING
The defendant was adjudicated a YO upon his plea of guilty to 3rd degree robbery and was sentenced to probation. He appealed from a subsequent County Court order revoking probation and imposing a term of imprisonment. The Fourth Department reversed and remitted. County Court erred in finding a VOP without holding a hearing or securing an admission. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05916.htm

SECOND CIRCUIT

U.S. v Boustani, 8/1/19 – **BAIL / NO TWO-TIER SYSTEM**
The defendant appealed from an order of District Court–EDNY denying bail. The Second Circuit affirmed and held that the Bail Reform Act does not permit a two-tiered bail system in which defendants of lesser means may be detained pending trial, whereas wealthy defendants may be released to self-funded private jails. The law protects "the interests of rich and poor criminals in equal scale." Under the Bail Reform Act, District Courts could not permit wealthy defendants to employ armed guards, where a similarly situated defendant without means would be detained. However, the private-security condition might be appropriate where the defendant was deemed a flight risk primarily *because of* his

wealth. In other words, a defendant may be released on such a condition only where, *but for* his wealth, he would not have been detained.
http://www.ca2.uscourts.gov/decisions/isysquery/d3679646-8da4-40dd-b911-1a5391df36f4/2/doc/19-1018_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/d3679646-8da4-40dd-b911-1a5391df36f4/2/hilite/

ARTICLES

NO "GAY RIGHTS DEFENSE": Due Process Concerns
By Barry Kamins, NYLJ, 8/2/19
On June 30, NY joined a national movement by banning the "gay and trans panic defense." A defendant may no longer raise an EED defense based upon having discovered a victim's sexual orientation, sex or gender. Defense organizations opposed the law, which could be challenged on constitutional grounds. But the "gay panic defense," which is of recent vintage, may not meet the definition of "fundamental" for purposes of due process analysis. The Court of Appeals will likely be called upon to decide whether the public policy to ban discrimination based on sexual orientation or gender identity outweighs the constitutional right to present a complete defense.

MISSING WITNESS CHARGE: *People v Smith*
By Michael J. Hutter, NYLJ, 1/31/19
In *People v Smith*, a June 6 decision, the COA rejected the unanimous view of the four Appellate Division Departments, that the proponent of a missing witness charge has the initial burden of establishing that the testimony of the uncalled witness would not be cumulative. COA precedent had been misapplied. The *Smith* decision, which complements the charges in PJI3d and CJI2d, contains several key takeaways:
• The proponent's initial burden of demonstrating prima facie entitlement to the charge has only two prongs: establishing that the uncalled witness (1) is knowledgeable about a material issue and (2) is under the direct control of the other party.
• Once the proponent meets that burden, the opposing party must show why the charge is inappropriate, and conclusory assertions are insufficient to do so.
• The opposing party may establish one of several enumerated factors, including that the testimony would be cumulative.
• The uncalled witness's testimony will be viewed as noncumulative when it may contradict or add to a key witness's disputed testimony.

FAMILY

THIRD DEPARTMENT

Matter of Kanya J. v Christopher K., 8/1/19 –
NO SUPPORT RECOUPMENT / AFC ROLE
The mother appealed from an order of Broome County Family Court involving child support and custody. The Third Department modified challenged orders. The mother had had sole custody of the child. After the parents initiated several proceedings, fact-finding hearings were held. Family Court suspended the father's child support obligation for eight months and held that payments made during that period would be applied against current obligations and arrears. That was error, the Third Department held. A court may suspend support where the custodial parent interfered with visitation. However, absent special circumstances, the suspension must be prospective. There is a strong public policy against recoupment. The reviewing court upheld a grant of joint legal custody and a finding of the mother's willful violation. Her motion to strike the AFC's brief was denied, based on the AFC's compliance with 22 NYCRR 7.2(d)(3) (if convinced child lacks capacity for knowing and voluntary judgment or that following child's wishes would likely result in substantial risk of imminent serious harm, AFC may advocate position contrary to such wishes).
http://nycourts.gov/reporter/3dseries/2019/2019_06030.htm

ARTICLE

EMPOWERING CHILDREN: In Their Best Interests?
By Lisa Zeiderman, NYLJ, 7/26/19
It is not clear that the AFC's role, as defined in Rule 7.2, always serves children. The child may be empowered too much when the AFC advocates the child's desire not to see a parent, especially after one parent has lobbied against the other and thereby influenced the child. If a child is to remain a child and not make adult decisions, the court must erect safeguards guard against manipulation of children by parents and the unwise empowerment of children in litigation. Where appropriate, forensic psychologists must be appointed. Courts should interview children in camera to understand the reasoning behind their views and must make decisions advancing their best interests. Children should understand that their voices will be heard, but that the court's decision will be based on their best interests.

RAISE THE AGE

People v A.M., 7/29/19 – **JD RECORDS / OFF LIMITS**

The AO was charged with certain crimes in NY County Supreme Court. The defendant moved to quash a subpoena to prevent the DA from accessing Family Court records that might exist regarding any JD matters against him. The court declined to sign the subpoena. Family Court Act § 381.2 (1) states: "Neither the fact that a person was before the family court under this article for a hearing nor any confession, admission or statement made by him to the court…in any state of the proceeding is admissible as evidence against him or his interests in any other court." The rationale for that statute is that delinquency proceedings are meant to rehabilitate, treat, and guide troubled youth. *See Green v Montgomery*, 95 NY2d 693. In the instant case, the plain meaning of the statute prohibited the court from considering delinquency records, when making CPL 722.23 retention determinations, as held in *People v M.M.*, an April 30 Nassau County decision.

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