# SECOND CIRCUIT

## *DECISION OF THE WEEK*

***United States v Sampson***, 8/6/18 –**CONVICTIONS UPHELD / CHARGES REINSTATED**

The Second Circuit issued a pair of decisions regarding a former New York State Senator, one decision upholding his convictions and another reinstating embezzlement charges. The convictions, rendered after a Brooklyn jury trial, were for obstruction of justice and making false statements to federal agents. As to the obstruction charge, the proof established that the defendant's intent in acquiring confidential information was to tamper with a witness. As to both convictions, the sentence of five years, plus three years' supervised release, was upheld. An upward deviation was warranted in part because the defendant abused a position of public trust. His actions were "particularly worthy of opprobrium," because they involved his status as an attorney and knowledge of the criminal justice system, as well as his abuse of his role as an elected public servant. In addition, the reviewing court restored two embezzlement charges, which were based on the defendant's theft of $440,000 from escrow accounts while he acted as a court referee in foreclosure proceedings. The defendant's Rule 12 (b) motion to dismiss the charges on limitations grounds effectively asked the District Court to make a factual finding about the precise moment at which he acted with fraudulent intent to convert the funds. The trial court erred in concluding, as a matter of law, that the defendant formed the requisite intent—and the crime was thus complete—when he failed to timely remit surplus funds. The question as to *when* the defendant possessed fraudulent intent was inherently intertwined with the question of *whether* he possessed the requisite intent—one of the elements of embezzlement. The Government had not made a full proffer of the proof it would present at trial. The defendant's deposit of surplus funds in banks other than those directed could constitute evidence of intent, but such evidence was not conclusive.
http://www.ca2.uscourts.gov/decisions

# NY COURT OF APPEALS

***People v Boykins***, 7/31/18 – **PEOPLE'S APPLICATION / LEAVE DENIED / KEY CASE**

The Court of Appeals (Garcia, J.) has denied the People's leave application in *People v Boykins*, 161 AD3d 183. In that case, the Fourth Department held that, under the DLRA, a defendant convicted of a current controlled substance or marijuana felony cannot be sentenced as a persistent felony offender, even if the defendant has two prior felony convictions that would otherwise qualify him or her as a PFO. The Appellate Division decision (which was previously discussed in the May 1, 2018 ILS Decisions of Interest and the April 30, 2018 NYSDA News Picks), provides a tool for defense counsel to use when District Attorneys threaten persistent sentencing in felony drug cases to coerce plea to harsh sentences.

# SECOND DEPARTMENT

***People v Milman***, 8/8/18 – **TWO COUNTS DISMISSED / TIME-BARRED**
In Suffolk County, the defendant was charged with 2nd and 3rd degree grand larceny and 1st degree scheme arising from her conduct in obtaining funds from several friends and associates based upon her false representations that they were investing in a company she controlled. After the close of the People's case, the defendant moved to dismiss several counts as time-barred, contending that the proof showed that the offenses terminated more than five years before the indictments were issued. The trial court denied the motion. Defense counsel requested that the jury be charged on the statute of limitations. The trial court denied the request. The Second Department dismissed the 2nd degree grand larceny charges as time-barred, since prosecution proof demonstrated that the final taking occurred more than five years before the accusatory instruments were filed. However, the trial court had properly declined to dismiss the scheme to defraud charges. By its very nature, such crime may be committed by multiple acts and is a continuing offense. In the case at bar, although the thefts from certain complainants occurred outside of the relevant period, the defendant's scheme involved other complainants, and those thefts occurred within the relevant period. The requested jury instruction should have been given. Given the lack of an instruction, it could not be determined whether the scheme convictions were based upon timely conduct. Thus, the scheme to defraud convictions were vacated, and a new trial was ordered. Nathaniel Marmur represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05699.htm

***People v Williams***, 8/8/18 – **PLEA VACATED / NO INQUIRY ABOUT DEFENSE**
The defendant was convicted in Suffolk County Court, upon a plea of guilty, of 2nd and 3rd degree assault. The Second Department reversed, vacated the plea, and remitted the matter for further proceedings. During the plea proceeding, the defendant insisted that the complainant had pulled a gun on him and that he had acted in self-defense. Yet the plea court did not ask him any questions about a possible justification defense. When a defendant's recitation clearly casts significant doubt upon his guilt or otherwise calls into question the voluntariness of the plea, the plea court has a duty to inquire further to ensure that the defendant understands the nature of the charge and that the plea has been intelligently entered. Where the court failed in its duty to inquire further, a defendant may raise a claim regarding the validity of the plea, even without having moved to withdraw the plea. The Legal Aid Society of Suffolk County (Alfred Cicale, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05711.htm

***People v Sands***, 8/8/18 – **SENTENCES ILLEGAL / CLASS D NONVIOLENT FELONIES**
The defendant appealed from a Queens County judgment convicting him of 2nd degree murder, 1st and 2nd degree robbery, 3rd degree CPW, and 3rd degree criminal possession of stolen property. The Second Department held that the sentences imposed on the convictions for CPW and possession of stolen property were illegal. Both crimes were class D nonviolent felonies. The appropriate sentencing range for such felonies, committed by a defendant who was a second violent felony offender, was between 2 to 4 years and 3½ to

7 years. The sentence of 4 to 8 years was therefore illegal. Appellate Advocates (De Nice Powell, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05701.htm

***People v Dimon***, 8/8/18 – ***ANDERS* BRIEF REJECTED / NONFRIVOLOUS ISSUES**
The defendant appealed from a judgment of Suffolk County Court convicting her of 3rd degree criminal mischief and 2nd degree reckless endangerment. Assigned counsel submitted an *Anders* brief, moving leave to withdraw as counsel. The Second Department granted the motion, but assigned new counsel. The brief failed to adequately analyze potential issues or highlight facts that might arguably support the appeal. Upon independent review of the record, the appellate court concluded that nonfrivolous issues existed, including whether: (1) the appellant's plea was knowing, voluntary, and intelligent; (2) her right to a hearing, to determine whether she violated the conditions of the plea, was honored; and (3) she was competent at the time of sentencing.
http://nycourts.gov/reporter/3dseries/2018/2018_05688.htm

***People v Rosario***, 8/8/18 – **SORA / REFUSAL TO PARTICIPATE IN TREATMENT**
The defendant appealed from a Kings County Supreme Court order designating him a level-three sex offender. The Second Department affirmed. In establishing an offender's appropriate risk level, the People bear the burden of proof by clear and convincing evidence. Evidence may be derived from (1) the defendant's admissions; (2), the victim's statements; (3) evaluative reports completed by the supervising probation officer, parole officer, or corrections counselor; (4) case summaries prepared by the Board of Examiners of Sex Offenders (Board); or (5) any other reliable source, including reliable hearsay. The Second Department agreed with the assessment of 15 points under risk factor 11. The defendant's history of drug or alcohol was demonstrated by his presentence report and the Board's case summary, and he was abusing drugs and alcohol at the time of the offense. Further, the People established that assessing 15 points under risk factor 12 was appropriate based on the defendant's refusal to participate in a sex-offender treatment program. Such a refusal automatically demonstrated an unwillingness to accept responsibility for the crime. Although the defendant contended that he refused treatment because he was afraid of another inmate, the risk assessment guidelines did not contain exceptions with respect to the reasons for refusing treatment.
http://nycourts.gov/reporter/3dseries/2018/2018_05712.htm

***People v Sturges***, 8/8/18 – **330.30 MOTION / ERRONEOUS GRANT**
The People appealed from a Kings County Supreme Court order which granted defendant's CPL 330.30 motion to set aside his conviction of endangering the welfare of a child and dismissed the indictment in its entirety. The Second Department reversed and reinstated the indictment and verdict. The defendant was charged with various offenses, based on certain sexual acts allegedly perpetrated by him against a 10-year-old complainant. The Supreme Court submitted 27 counts to the jury. After the jury convicted the defendant of EWC and acquitted him of all other charges, he moved to set aside the conviction. The trial court granted the motion on the ground of legally insufficient evidence, reasoning that the jury acquitted the defendant of charges of criminal sexual act and sexual abuse, and there was no evidence of any other conduct that could support a conviction of EWC. That was

error. A factual inconsistency in the verdict does not render the evidence legally insufficient. Where a verdict is not repugnant, it is imprudent to speculate concerning the factual determinations underlying the verdict; what might appear to be an irrational verdict may constitute a jury's permissible exercise of mercy or leniency. *See People v Horne,* 97 NY2d 404, 413.
http://nycourts.gov/reporter/3dseries/2018/2018_05703.htm

# THIRD DEPARTMENT

***People v Wilson***, 8/9/18 – **NO *FRYE* HEARING / INEFFECTIVE ASSISTANCE**
The defendant appealed from judgments of Chemung County Court convicting him, upon a verdict, of burglary, robbery, and several sexual offenses; and, upon a guilty plea, of 2nd degree burglary. On appeal from the judgment on the verdict, the defendant asserted that trial counsel should have requested a *Frye* hearing to challenge the reliability of the TrueAllele Casework System (System)—a proprietary computer program that used mathematics and statistics to interpret the electronic data generated from the DNA mixtures taken. The System was used in this case to determine the statistical probability of a match between the defendant's DNA and that found on the inside of a glove found near the apartment of a victim. The Third Department held that this was one of those rare cases where the sole failure of defense counsel—who rendered otherwise proficient representation—constituted ineffective assistance. At the time of the pretrial proceedings in 2014, no reported New York State decisions established that the reliability of the System had been assessed through a *Frye* hearing. (Subsequently, a decision was rendered in *People v Wakefield*, 47 Misc 3d 850.) Thus, a request for a *Frye* hearing would have been colorable, and the reviewing court could discern no reasonable legitimate explanation for the failure to request a hearing. The expert testimony presented by the People provided the only DNA evidence connecting the defendant to the crimes. Counsel had everything to gain and nothing to lose by challenging the expert's testimony. Thus, the matter was remitted for a post-trial *Frye* hearing, and a decision was withheld. As to the appeal from the judgment entered on the guilty plea, the appellate court held that the defendant did not knowingly, voluntarily, and intelligently enter his plea, since County Court failed to advise him about post-release supervision. Catherine Barber represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05715.htm

***People v Gretzinger***, 8/9/18 – **MODIFICATION / EXTRAORDINARY CIRCUMSTANCES**
Th defendant appealed from a Saratoga County Court judgment, upon a verdict convicting her of 2nd degree criminal possession of a forged instrument. The charges stemmed from her deposit of a check into an individual bank account she was opening. The check was made out to the defendant and Gerard Gretzinger, at a time when they were engaged in tumultuous divorce proceedings. When the husband later learned of the check's existence, he reported the matter to authorities. On appeal, the defendant argued that jail time was inappropriate. She had no prior criminal record, and County Court had admitted its struggle to fashion an appropriate sentence, citing the unusual nature of the case, the effect that the defendant's incarceration might have on her children, and her sincere remorse. Yet, the sentencing court concluded that four months' incarceration, plus five years' probation, was warranted due to the defendant's delay in accepting responsibility for her actions. In the

view of the Third Department, the circumstances were extraordinary. The defendant has already served 13 days in jail. As a matter of discretion in the interest of justice, the reviewing court reduced the jail component of her sentence to time served. Robert Cohen represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05716.htm

***People v Rodriguez***, 8/9/18 – **VIOLATION OF AGREEMENT / DIVIDED COURT**
The defendant appealed from a Schenectady County Court judgment convicting him on his plea of guilty of 1st degree assault. He and his family were the victims of a home invasion burglary that occurred due to a dispute with Jose Sanchez over a minivan. Sanchez and three accomplices, one later identified as Victor Marin, were armed. After threatening the defendant and his family, they left with the minivan. Later the defendant spotted the minivan nearby, and he and the accomplices went to Sanchez's residence. The defendant confronted Sanchez at gunpoint, and his accomplices stabbed Sanchez's brother. Sanchez was stabbed and shot, and he died. The defendant was charged with 2nd degree murder and 1st degree assault. He accepted a plea bargain to: (1) plead guilty to 2nd degree murder and 1st degree assault, with proposed sentences of 20 years to life and (2) cooperate fully and truthfully with the District Attorney's office. He waived his right to appeal. During the plea allocution, the defendant executed an agreement requiring him to "cooperate completely and truthfully with law enforcement authorities, including the police and the District Attorney's Office, on all matters in which his cooperation is requested." After the defendant refused to testify at Marin's trial, the sentencing court imposed consecutive sentences. On appeal, the defendant contended that the agreement only required him to cooperate in the prosecution of accomplices involved in Sanchez's murder. The majority disagreed. Two judges dissented because the cooperation agreement lacked any language referring to the home invasion or Marin. The focus of the investigation was to identify and prosecute the accomplices involved in the homicide event. Further, the defendant refused to testify at Marin's trial over concerns for the safety of his family, the dissenters stated.
http://nycourts.gov/reporter/3dseries/2018/2018_05717.htm

## FAMILY

# FIRST DEPARTMENT

***Matter of Barbara T. v Acquinetta M.***, 8/9/18 – **CHILD SUPPORT / AFC OBJECTIONS**
The Children's Law Center (CLC) appealed from an order of New York County Family Court which dismissed, for lack of standing, its objections to a Support Magistrate's order. The First Department held that Family Court erred in determining that CLC did not have standing. Family Court may appoint attorneys for children where appointments are not mandatory, when doing so would serve the purposes of the Family Court Act. *See Family Ct Act* § 249. AFCs are often indispensable in making reasoned determinations of fact and proper orders of disposition. *See* Family Ct Act § 241. The record did not support the determination that CLC was appointed to represent the child solely regarding constructive emancipation and abandonment. The adoptive mother argued that Family Ct Act § 439(e) restricted the filing of objections to a "party or parties." But such terms were used in the general sense of persons served with a support order. It would make little sense for Family

Court to appoint AFCs in support cases and then not permit those attorneys to file objections. Thus, CLC had standing to file objections to the Support Magistrate's order. Family Court properly determined that an adoption subsidy should be considered as a resource of the child when determining support, but erred in failing to consider the mother's eligibility for the subsidy in determining whether her basic support obligation was unjust or inappropriate. Child support should have been set at no less than the amount of the adoption subsidy for so long as the adoptive mother was eligible to receive the subsidy.
http://nycourts.gov/reporter/3dseries/2018/2018_0573

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