CRIMINAL

THIRD DEPARTMENT

People v Wakefield, 8/15/19 –
TRUEALLELE / SOURCE CODE WAS NOT DECLARANT
The defendant appealed from a judgment of Schenectady County Supreme Court, convicting him of murder and robbery charges. In affirming the conviction, the Third Department stated that the defendant had raised substantial questions regarding a violation of his right to confront witnesses, based on his not having had access to the source code for TrueAllele—a computer program that subjects DNA mixtures to statistical modeling techniques to infer what DNA profiles contributed to the mixture. The defendant contended that that the code itself was a declarant. The appellate court held that the TrueAllele report was testimonial in nature, but the source code was not a declarant. In an "epistemological, existential and legal sense," the declarant was the program's creator, who testified at trial. But perhaps an AI-type system could be a declarant in certain circumstances, the court observed, given that the testimonial aspects of the TrueAllele report were formulated through a synergy of human and machine.
http://nycourts.gov/reporter/3dseries/2019/2019_06143.htm

NACDL ARTICLES

4TH AMENDMENT AND DATA: Privacy Policies in Record
The Champion, July 2019, by Jim Harper
In *Carpenter v US*, 138 S Ct 2206, regarding government access to cellular telecommunications data, Justice Gorsuch's dissent offered crucial insights: in such cases, the defendant should argue that he has property rights in his digital data held by third-party service providers. Counsel should enter into evidence providers' privacy policies and terms-of-service statements to create a foundation for such arguments. This approach should also apply to financial services and health care providers and any other service provider that gave the government information about a defendant that was derived from his or her use of their services; and such arguments are clear, compared to the "turgid" doctrine of "reasonable expectations."

BEYOND *BATSON*: Challenging Systemic Racism
The Champion, July 2019, by Drew Findling
In *Batson v Kentucky*, 476 US 79, Justice Marshall's concurrence presciently observed, "merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge." Indeed, purposeful discrimination to exclude potential jurors based on race has persisted. In *Flowers v Mississippi*, 588 US ___ (2019), there was evidence of blatant unconstitutional behavior by prosecutors. More often at issue, though, is quiet and insidious racism. Other aspects of the system are affected by racist behavior. A recent survey revealed thousands of racist posts by police officers, who surely carry those beliefs into practice. The defense bar must call out systemic racism at every level.

RESOURCES

NY EVIDENCE GUIDE

Now available to the bar is a remarkable resource, the GUIDE TO NEW YORK EVIDENCE, published only online, by the Unified Court System. The Guide sets forth NY's rules of evidence, accompanying each rule with a note regarding the source for the rule and emphasizing NY Court of Appeals precedent.
http://www.courts.state.ny.us/JUDGES/evidence/

NY COURT OF APPEALS

For insightful analyses of June 2019 NY Court of Appeals decisions, by Timothy Murphy, go to:
https://www.ils.ny.gov/files/Appellate/Buffalo%20Legal%20Aid/LAB.COA%20Analysis%20June%202019.pdf

APPEALS CLE PROGRAM

For a brochure on an innovative appellate training program for criminal defenders being offered in Albany on September 13, as well as information on the ILS Appellate Defender Council, go to:
https://www.ils.ny.gov/content/appellate-defender-council

RAISE THE AGE

J.B. v Onondaga County, 2019 WL 3776377, 8/12/19 –
COUNTY VIOLATED RIGHT TO COUNSEL / PRELIMINARY INJUNCTION
The plaintiffs were charged in the Youth Part in City of Syracuse criminal court. Before each court appearance, they sought to consult in private with their attorneys, but a law enforcement officer remained in the room. To end such practice, the plaintiffs filed suit in District Court–NDNY. The AG's brief urged: (1) State Commission of Correction regulations did not require supervision of AOs during attorney-client courthouse meetings; (2) posting officers in the interview room violated the youths' 6th Amendment right to counsel; and (3) the court should grant a preliminary injunction. District Court did so, and it granted class certification. The right to counsel included a candid consultation with counsel in order to prepare a defense. Pre-arraignment courthouse interviews were the only chance to elicit salient facts for arraignment. A preliminary injunction was necessary, since the County "clung to its careless reading of the Commission's regulations;" failed to recognize that it was subjecting teenagers to unfair pretrial incarceration without counsel; and undermined the integrity of the system. By instead posting guards *outside* interview rooms, the defendants could assure safety, while honoring constitutional guarantees. The county was directed to make a courthouse room available for teens to confer—privately—with counsel, before and after court appearances. Legal Services of CNY (Josh Cotter, of counsel) represented the plaintiffs.