CRIMINAL

FIRST DEPARTMENT

Matter of Samy F. v Fabrizio, 8/27/19 **– DNA DATABASE / EXEC. LAW**
ILS DECISIONS OF INTEREST (5/31/19) discussed a decision (174 AD3d 7), which held that the NYC DNA database is subject to State Executive Law, and Supreme Court had authority to order expungement where the DNA was collected during an investigation that culminated in a youthful offender determination. This week, the First Department recalled and vacated that decision, which referred to the DNA index in which the defendant's DNA was uploaded as "SDIS." The index was actually "LDIS," the local DNA index of the NYC Chief Medical Examiner's Office, and the reissued decision corrected that error. Legal Aid Society of NYC (Terri Rosenblatt and Leonid Sandlar, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_06374.htm

SECOND DEPARTMENT

People v Ward, 8/28/19 – **MURDER / REVERSED**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder. The Second Department reversed and ordered a new trial. Prior to trial, purported witness Mercedes Mitchell gave a statement that she saw the defendant shoot the victim, but she then recanted and said police coerced her statement. The appellate court held that the defendant was denied a fair trial by erroneous rulings relating to Mitchell's refusal to take the oath and her invocation of the 5th Amendment privilege. The trial court erred in letting her testify and in instructing the jury about corroboration of an unsworn witness. The defendant was prejudiced by prosecution questions revealing that Mitchell identified him as the shooter and by the court's instructions that the jury could draw an inference of his guilt from her refusal to testify. Further, in summation, the prosecutor improperly capitalized on Mitchell's refusal to testify. The new trial would be held before a different justice because, during sentencing, the trial judge made intemperate remarks (e.g. "you've never done anything worthwhile in your entire life, only been a scourge on society"). Appellate Advocates (Lauren Jones, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_06419.htm

People v Grimes, 8/28/19 – **SUPPRESSION / REVERSED**
The defendant appealed from a Queens County Supreme Court judgment, convicting him of 2nd degree CPW and other crimes, upon his plea of guilty. The appeal brought up for review the denial of suppression. The Second Department reversed, granting suppression, vacating the CPW 2 conviction, and dismissing that count. One afternoon, police officers went to the defendant's home in part in response to an informant's tip about guns and a firearm. Upon arrival, they observed the defendant smoking a marijuana cigarette on his porch. When they approached, they saw him grab a backpack matching the description provided. After apprehending him, the officers found a firearm and marijuana inside the

backpack. Denial of suppression, based on exigent circumstances, was error. Even a bag within the immediate control of a suspect at the time of arrest may not be subjected to a warrantless search, absent a reasonable belief that the suspect could gain possession of a weapon or destroy evidence. The appellant was represented by the Legal Aid Society of NYC (Jonathan MCoy, of counsel).
http://nycourts.gov/reporter/3dseries/2019/2019_06411.htm

People v Dorvil, 8/28/19 – **SUPPRESSION / REVERSED**
The defendant appealed from a Queens County Supreme Court judgment, convicting him of 1st and 2nd degree robbery and other crimes, upon a jury verdict. The appeal brought up for review the denial of suppression. The Second Department reversed, granted suppression, and ordered a new trial. The defendant was improperly subjected to custodial interrogation. After he was arrested and placed in an interview room but before he was *Mirandized*, a detective asked him questions. When questioning the defendant about his employment, the detective was aware that a cohort who implicated him said that they worked at the same bar. Moreover, since the unwarned statement gave rise to a subsequent *Mirandized* statement as part of a single continuous chain of events, the warned statement had to be suppressed. Appellate Advocates (Jonathan Schoepp-Wong and Grace DiLaura, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_06409.htm

People v Corchado, 8/28/19 – **SUPPRESSION / REVERSED**
The defendant appealed from a Queens County Supreme Court judgment, convicting him of drug and weapons charges, upon a jury verdict. The Second Department reversed. The defendant's contention—that weapons recovered from his home should have been suppressed as the fruits of suppressed statements—was unpreserved. The Second Department held that counsel's failure to raise the issue was ineffective. The defendant was granted the opportunity to make a new motion to suppress the weapons based on the suppression of his statements, and a new trial. Mischel & Horn, P.C. represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_06408.htm

FOURTH DEPARTMENT

People v Williams, 8/22/19 – **440.10 / FAILURE TO INVESTIGATE**
The defendant appealed from an order of Onondaga County Court denying his CPL 440.10 motion to vacate a murder conviction. The trial court erred in denying the motion without a hearing. The issue of whether counsel failed to file an alibi notice or fully investigate potentially exculpatory witnesses involved matters outside the record. The claim was not based on facts that should have been placed on the record during trial. John Lewis represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_06293.htm

People v Howard, 8/22/19 – **440.10 / FAILURE TO INVESTIGATE**
The defendant appealed from an order summarily denying his CPL 440.10 motion to vacate a murder conviction. The Fourth Department concluded that the defendant was entitled to

a hearing regarding ineffective assistance, based on counsel's failure to investigate witnesses who would have corroborated the alibi evidence. In written statements, two individuals claimed that they would have corroborated the testimony of the defendant and his mother—that he was at a party at her home the entire evening of the shooting. Two additional witnesses tended to support the alibi evidence. Legal Aid Bureau of Buffalo (Sherry Chase, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_06309.htm

People v Clayton, 8/22/19 – **1ST DEGREE MURDER / DISSENT**
The defendant appealed from a judgment of Steuben County Court. After the defendant's wife was found dead in her home, an investigation led police to suspect that his former employee and tenant ("principal") had bludgeoned her to death. The defendant was charged with 1st degree murder on the ground that he procured the commission of the killing pursuant to an agreement with the principal for a thing of pecuniary value. The Fourth Department upheld the 1st degree murder conviction, but dismissed the 2nd degree murder conviction as a lesser included count. Two dissenters opined that the defendant should have been found guilty only of 2nd degree murder. The pivotal text, which the principal sent to the defendant five days before the murder, read: "Need that eviction notice and a letter of release and a little bit please." Construing the "little bit" language as a request for money was too speculative, where the text was one in a series of innocent interactions as to the principal's eviction and termination from employment.
http://nycourts.gov/reporter/3dseries/2019/2019_06284.htm

People v Wilkins, 8/22/19 – ***ANTOMMARCHI*** / **DISSENT**
The defendant appealed from a Supreme Court judgment convicting him upon a jury verdict of 2nd degree murder and other crimes. The Fourth Department upheld the convictions, but held that the sentence on the felony murder count must run concurrently to robbery terms. A dissenting justice concluded that an *Antommarchi* violation required a new trial. The defendant did not attend a sidebar conference when the co-defendant's counsel used a peremptory challenge. CPL 270.25 (3) provides that, when multiple defendants are tried jointly, they are treated as a single party for the purpose of peremptory challenges, and a challenge must be allowed if a majority joins in. The record did not reflect that such procedure was violated. Thus, the assent of both defendants was needed for peremptory strikes, and the defendant might have provided valuable input regarding whether to excuse the prospective juror.
http://nycourts.gov/reporter/3dseries/2019/2019_06238.htm

People v Boyd, 8/22/19 – **SENTENCE / HALVED**
The defendant appealed from a judgment convicting him upon a jury verdict of three counts of 1st degree criminal sexual act and 1st degree rape. The aggregate prison sentence of 60 years, statutorily reduced to 50 years, was unduly harsh and severe, in the view of the Fourth Department. The defendant had no prior felonies. Further, before trial, the court had committed to a prison term of nine years. The reviewing court reduced the sentence, resulting in an aggregate 25 years, plus post-release supervision. Donald Gerace represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_06311.htm

People v Spratley, 8/22/19 – **SORA / MODIFICATION**
The defendant appealed from a County Court order classifying him as a level-two sex offender. The Fourth Department found error. Risk factor 5 allows the court to assess 30 points if any victim is 10 or younger, or 20 points if any victim is between age 11 and 16. The defendant was convicted of possessing a sexual performance by a child, which requires proof regarding the depiction of sexual conduct involving a child under age 16. Neither the defendant's guilty plea nor other proof supported the 30-point assessment, but adding 20 points was proper. After the deduction of 10 points, the defendant was a presumptive level one, and there was no basis for upward departure. The Monroe County Public Defender (David Juergens, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_06283.htm

FAMILY

SECOND DEPARTMENT

Zulena G. (Regilio K.), 8/28/19 – **ART. 10 / PERSON LEGALLY RESPONSIBLE**
The respondent appealed from orders of disposition, rendered by Kings County Family Court, finding that he sexually abused one child and derivatively neglected another. The Second Department reversed and dismissed. Family Court should not have determined that the respondent was a "person legally responsible" for the children's care. That term does not encompass persons who assume temporary care of a child, such as a supervisor of a play date or overnight visitor or persons who provide extended daily care in institutional settings. The respondent, a cousin of the children, resided with them for a while in their grandmother's apartment, along with the parents and other adults. Thus, the evidence did not establish that he acted as the functional equivalent of a parent. Nicole Barnum represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_06392.htm

THIRD DEPARTMENT

Charles KK. v Jennifer KK., 8/29/19 – **CUSTODY / RASH DISMISSALS**
In 2000, Jennifer KK. (mother), married Charles KK. (husband). They lived separately starting in 2003. For years thereafter, the mother was involved with Peter LL. (father). In 2012, when the subject child was born, the mother was still married to Charles KK. In 2015, after the father's conviction for assaulting the mother, she obtained an order of protection in favor of her and the child, which was to last until March 2020. The mother died in 2018, when the child resided with Jillian KK. (half-sister) and the mother. The father now lives in California. Custody was sought by the husband, the father, and the sister. After genetic testing indicated that Peter LL. was the biological father, he moved for summary judgment on his paternity and custody petitions. Jillian KK. opposed such application, but Saratoga County Family Court declined to consider her papers, since they had not been administratively processed. The trial court summarily granted custody to the father and dismissed the petitions by the husband and sister. Both appealed. The Third

Department held that Family Court erred as to both dismissals. The court ignored the sister's papers, despite awareness of minimal contact between father and the child; allegations of his substance abuse and violence; and the order of protection. Further, the husband was not given a fair chance to argue against summary dismissal or seek leave to amend. Thus, the appellate court reversed and remitted to a different judge for a consolidated hearing. Theresa Suozzi and Sarah Wood represented the husband and sister, respectively.
http://nycourts.gov/reporter/3dseries/2019/2019_06433.htm

FOURTH DEPARTMENT

Dinunzio v Zylinski, 8/22/19 – **DEFAULT / AGGRIEVEMENT / DISSENTS**
The mother appealed from an order of Erie County Family Court, which awarded the father sole custody of the subject child. During the hearing, the mother discharged her attorney, proceeded pro se, and then failed to appear. The Fourth Department rejected her challenge to the validity of her waiver of counsel. Two justices, who dissented separately and would have dismissed the appeals, offered lengthy analyses regarding default judgments and aggrievement principles.
http://nycourts.gov/reporter/3dseries/2019/2019_06337.htm

Cynthia Feathers, Esq.
ILS | NYS Office of Indigent Legal Services
Director, Quality Enhancement for Appellate
And Post-Conviction Representation
80 S. Swan St., Suite 1147, Albany, NY 12210
(518) 949-6131 | Cynthia.Feathers@ils.ny.gov