CRIMINAL

DECISION OF THE WEEK

People v Farley, 9/28/18 – **CHALLENGE FOR CAUSE / IMPLIED BIAS**
In Monroe County, the defendant was convicted of 1st degree assault. On appeal, he contended that Supreme Court erred in denying a challenge for cause. The Fourth Department agreed, reversed the judgment, and granted a new trial. During jury selection, a prospective juror said that she knew a potential witness, a trauma surgeon who treated the victim for wounds allegedly inflicted by the defendant and who two years earlier had been the prospective juror's surgeon. The juror was under his daily care for 14 days, and she believed that he saved her life. The appellate court held that such relationship gave rise to an implied bias requiring exclusion. *See* CPL 270.20 (1) (c). The erroneous denial of the challenge constituted reversible error. William Easton represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06380.htm

FIRST DEPARTMENT

People v Ramos, 9/25/18 – **ATTEMPTED ROBBERY REDUCED / NO FORCE**
In Bronx County Supreme Court, the defendant was convicted of attempted 2nd degree robbery, which the First Department reduced to attempted petit larceny based on legally insufficient evidence of force. There was no actual or threatened physical contact when an arrest was threatened by the defendant, a corrupt police officer. The Center for Appellate Litigation (Siobhan Atkins, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06192.htm

State of NY ex rel. Rischetti v Brann, 9/25/18 –**ATTEMPTED MURDER / BAIL DENIED**
The petitioner and the victim, unmarried psychiatrists, had a child together. The petitioner's cousin attacked the victim with a sledgehammer and knife, but did not inflict life-threatening injuries. Family Court found that the petitioner had masterminded the botched murder plot in order to obtain proceeds of a $1.5 million life insurance policy for which she was trustee, pursuant to a child custody agreement. The purported cohorts were charged with attempted 2nd degree murder. He was convicted, and she has been in jail for nearly a year awaiting trial. After being denied bail, she sought habeas corpus review. When bail was again denied, she appealed. The First Department affirmed, rejecting the petitioner's offer to pay for enhanced security to ensure her appearance. The appellate court cited the likelihood of conviction, potential sentencing exposure, the defendant's financial resources, and the risk of flight.
http://nycourts.gov/reporter/3dseries/2018/2018_06220.htm

People v Williams, 9/25/18 – **DEFENDANT ABSCONDED / APPEAL DISMISSED**
In 1984, the defendant absconded during a rape trial and was convicted in absentia. His attorney filed a notice of appeal, but the defendant did not perfect his appeal, which was dismissed in 1998. Meanwhile, in 1986, he was convicted of crimes in North Carolina and served a lengthy sentence there. In 2015, the instant appeal was reinstated; and in 2017, it was perfected. The People renewed a dismissal application, which the First Department granted. Where an absconding defendant's appeal remained pending for a lengthy period,

the Appellate Division has broad discretion as to whether the appeal should be permitted to proceed. In this case, the appellate court observed that the three-decade delay was caused by the defendant's own conduct.
http://nycourts.gov/reporter/3dseries/2018/2018_06182.htm

SECOND DEPARTMENT

People v Wood, 9/26/18 – ***O'RAMA* VIOLATION / NEW TRIAL**
The defendant appealed from a murder conviction rendered in Kings County Supreme Court. The Second Department reversed and ordered a new trial. The trial court's handling of two jury notes violated CPL 310.30 and *People v O'Rama*, 78 NY2d 270. The notes requesting material evidence and a readback of witness testimony were substantive, not ministerial, inquiries. Yet Supreme Court failed to read the notes into the record and to afford counsel a full opportunity to suggest appropriate responses. The mode of proceedings error did not require preservation. The Legal Aid Society–NYC (Arthur Hopkirk, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06277.htm

People v Cepero, 9/26/18 **– INDECENT MATERIALS CHARGES / DISMISSAL**
The defendant texted several nude photographs of his girlfriend to her son. In Orange County Court, following a jury trial, he was convicted of 2nd degree disseminating indecent material to minors, the attempt to commit such crime, and endangering the welfare of a child. Upon his appeal, the People sought dismissal of the indecent materials counts, given the finding in *American Libraries Assn. v Pataki*, 969 F Supp 160, that Penal Law § 235.21 (3) is unconstitutional. The Second Department dismissed the counts in the interest of justice. Anthony Iannarelli, Jr. represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06255.htm

People v Tromp, 9/26/18 – **CPW 2ND INDICTMENT / JURISDICTIONAL DEFECT**
In Richmond County Supreme Court, upon a jury verdict, the defendant was convicted of 2nd degree CPW. The Second Department vacated the conviction. Penal Law § 265.03 exempts from criminal liability a person's possession of a loaded firearm occurring in his/her home or place of business. The instant indictment failed to allege that possession occurred outside the defendant's home or business. Such jurisdictional defect was not waivable. Appellate Advocates (Cynthia Colt, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06275.htm

People v White, 9/26/18 – **MANSLAUGHTER INDICTMENT / NO JURISDICTIONAL DEFECT**
The People appealed from an order of Suffolk County Supreme Court dismissing an indictment charging the defendant with 1st degree manslaughter. The Second Department reversed. According to the evidence before the grand jury, the victim confronted his former girlfriend and the defendant as they were leaving a bar together. The victim and the defendant fought. The victim fell to the ground and was not defending himself when the defendant stomped on him, resulting in his death. In his motion to dismiss, the defendant contended that the prosecutor failed to instruct the grand jury on the defense of justification.

However, the appellate court held that a justification claim was precluded by the defendant's use of deadly physical force after the threat against him ended.
http://nycourts.gov/reporter/3dseries/2018/2018_06276.htm

THIRD DEPARTMENT

People v Wooden, 9/27/18 – **INTERIM PROBATION / FLAWED PLEA**
In Broome County Court, the defendant pleaded guilty to a drug charge with the understanding that he would be placed on interim probation to complete outpatient drug rehabilitation. If he was unsuccessful, sentencing would be up to County Court. Upon a VOP, the defendant was sentenced to three years in prison, plus two years' post-release supervision. The Third Department held that the plea was defective, since the defendant had not been made aware that, if he failed in treatment, the sentence would include a PRS component. The judgment was reversed and the matter remitted. Thomas Garner represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06298.htm

FOURTH DEPARTMENT

People v Dupont, 9/28/18 – **INTERIM PROBATION / FLAWED SENTENCING**
The defendant appealed from a conviction of aggravated criminal contempt. When imposing one year of interim probation, County Court told the defendant that if he complied with interim probation terms, a five-year term of probation would be ordered, and otherwise a "severe sanction" would be ordered. The defendant violated the interim probation terms. Thereafter, the sentencing court erroneously indicated that it was constrained to impose the maximum, and it failed to exercise its discretion. The Fourth Department vacated the sentence and remitted for resentencing. The Monroe County Public Defender (James Hobbs, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06392.htm

Matter of Gourdine v Annucci, 9/28/18 – **INMATE RULES / "THREAT" OF LITIGATION**
DOCCS's determination of the petitioner's guilt of a disciplinary rule violation had to be annulled. An inmate rule prohibiting threats cannot be deemed violated unless the inmate conveys an intent to do something illegal or improper. The petitioner had simply said that he intended to file a law suit. The respondent's interpretation of "threat" in this context would nullify protections under Correction Law § 138 (4), which allows inmates to seek changes in prison conditions and rules. Wyoming County-Attica Legal Aid Bureau (Lea Nowotarski, of counsel) represented the petitioner.
http://nycourts.gov/reporter/3dseries/2018/2018_06391.htm

FAMILY

FIRST DEPARTMENT

Matter of Charles v Poole, 9/25/18 – **INDICATED REPORT / ANNULLED**
In an Article 78 proceeding, the petitioners appealed from a determination of the State Office of Children and Family upholding a finding that child maltreatment allegations were "indicated." The First Department annulled the determination. The petitioners had complied with recommendations of the child's pediatrician. There was no evidence that the child's condition was impaired due to the petitioners' failure to take the child to regular visits with a hematologist or to administer a daily dose of penicillin. Further, the decision not to further vaccinate the child did not violate the pediatrician's directive. Carolyn Kubitschek represented the petitioners.
http://nycourts.gov/reporter/3dseries/2018/2018_06185.htm

Cornell S.J. v Altemease R.J., 9/27/18 – **VISITATION / NOT UP TO PARENT OR CHILDREN**
Bronx County Family Court granted a grandfather's guardianship applications. The children's adoptive mother—their great-grandmother (GGM)—abandoned them for five days without any adult care; and after a brief return, she left again and failed to contact the children for 11 months. Extraordinary circumstances existed, and it was in the children's best interests to grant guardianship to the grandfather, who had been their primary caregiver during the GGM's absence and had custody of their older sibling. Further, the children, ages 9 and 11, expressed their wish to remain with their grandfather. Family Court properly granted visitation to the GGM, but improperly delegated to the parties and the children its authority to set a schedule. Thus, the matter was remanded. Richard Herzfeld represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06320.htm

Matter of Heaven C.E. (Tiara C. – Maurice D.), 9/27/18 – **SEVERE ABUSE / AFFIRMED**
Bronx County Family Court held that the mother abused and severely abused Heaven C. and derivatively abused and severely abused Joseph C. The First Department affirmed. Expert testimony established that Heaven C. suffered non-accidental injuries, including brain trauma resulting in permanent damage. The treating physician credibly opined that the brain trauma was caused by partial strangulation. Even assuming that the mother's boyfriend caused the injuries, she was, or should have been, aware of the abuse; and she delayed in summoning medical help when Heaven was found comatose. The finding of derivative severe abuse was proper since the mother had a fundamental defect in her understanding of her parental obligations.
http://nycourts.gov/reporter/3dseries/2018/2018_06313.htm

FOURTH DEPARTMENT

Matter of Celeste S. (Michelle S.), 9/28/18 – **SEVERE ABUSE / SUMMARY JUDGMENT**
The petitioner agency commenced a Family Court Act Article 10 proceeding in Monroe County Family Court. In a criminal prosecution arising from the same sexual contact, the respondent was convicted of 1st degree rape. Thereafter, in Family Court, the petitioner moved for summary judgment; the motion was granted; and severe abuse, abuse, and neglect were found as a matter of law. The Fourth Department affirmed. In this Article 10 context, the movant met its initial burden by establishing that the respondent was convicted of sexual crimes involving the subject children and that those crimes fell within the broad allegations of the abuse petition. The respondent failed to create triable issues of fact.
http://nycourts.gov/reporter/3dseries/2018/2018_06347.htm

Matter of Michael S. v Christa P., 9/28/18 – **HABEAS CORPUS / WRONG VEHICLE**
The petitioners initiated a CPLR article 70 proceeding, asserting that they were suitable persons with whom the children should be placed following their removal from parental care. The Fourth Department dismissed the petition. The preferred procedure for seeking custody was for the petitioner grandfather to move to intervene in the neglect proceedings or to commence a custody proceeding. No extraordinary circumstances warranted a departure from traditional orderly procedure.
http://nycourts.gov/reporter/3dseries/2018/2018_06374.htm

RULES

Statewide Practice Rule 1250.3 addresses initial filings, active management of causes, and settlement or mediation programs. **Rule 1250.3 (a) regarding initial filings** states that, unless the court shall direct otherwise, in all civil matters, counsel for the appellant or the petitioner must file an initial informational statement (Info Statement) along with the notice of appeal or transfer order and order of judgment appealed from. The uniform Info Statement found on the websites of the First, Second, and Third Departments includes a Family Court case category.

First Dept. Rule 600.3 (a) is silent as to the Info Statement requirement.

Under **Second Dept. Rule 670.3 (a)**, counsel must file the Info Statement in all civil appeals; while in criminal appeals, the trial court clerk must prepare an Info Statement. The Third Dept. has no local rule as to State Rule 1250.3.

Fourth Dept. Rule 1000.3 (a) states that an Info Statement is not required; and subdivision (b) indicates that the court does not have a settlement or mediation program. (The other three Departments have such programs.)

Thus, it appears that, for all Family Court appeals to the First, Second, and Third Departments—including abuse/neglect cases previously exempted in some courts—the appellant's trial counsel must file an Info Statement with the notice of appeal. Attached is

the court form, along with Second Department instructions. Questions as to the Info Statement requirement should be directed to the relevant court clerk.

Rule 670.3 (b) states that the Second Department will actively manage Family Court appeals. Subdivision (d) provides that such appeals are excluded from the Mandatory Civil Appeals Mediation Program requirements, but counsel and parties to perfected custody appeals may jointly request that a particular appeal be designated for mediation.

ARTICLE

NY Court of Appeals: DEBATE AND DISSENT

In nearly half of the state's high court rulings so far this year, there has been dissent, a Sept. 26 *NYLJ* article noted. Albany Law Prof. Vincent Bonventre observed that there were also many dissents in the Lippman Court, but far fewer under Judge Kaye. The current Court of Appeals judges, all appointed by Governor Cuomo, constitute a "diverse array of ideological stripes," in Bonventre's view. Judge Lippman said that the judges' relatively short time together on the court may be a factor in the divisions in their rulings. "The court is finding its voice," he opined. Judges DiFiore and Lippman stated that dissents can sharpen majority arguments; but Bonventre observed that a divided opinion demonstrates that there is more than one way to decide a case and leaves the majority more exposed to criticism than a unanimous decision.
https://www.law.com/newyorklawjournal/2018/09/26/can-the-ny-court-of-appeals-comfortable-with-debate-and-dissent-foster-consensus/

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