CRIMINAL

FIRST DEPARTMENT

Sehgal v DiRaimondo,10/4/18 – **LEGAL MALPRACTICE / IMMIGRATION ADVICE**
A lawful permanent resident of the United States, the plaintiff pled guilty in 2014 to certain violations of federal election laws and was sentenced to one year of probation. In the instant legal malpractice action, the allegations included that the plaintiff's attorneys/defendants erroneously said that after he entered a guilty plea, he was unlikely to be deported; and that if he was placed in removal proceedings, he could seek a waiver from inadmissibility. The plaintiff later traveled abroad. Upon his return to the U.S., he was detained, placed in removal proceedings, and incarcerated for four months. New York County Supreme Court granted the defendants' motion to dismiss the complaint. The First Department modified, reinstating one claim. Generally, to state a legal malpractice claim arising from negligent representation in a criminal proceeding, the plaintiff must allege his innocence of the underlying offense. *See Carmel v Lunney*, 70 NY2d 169. However, the plaintiff stated one claim that did not dispute the validity of his conviction—his assertion that he traveled outside the U.S. in reliance on the defendants' negligent legal advice.
http://nycourts.gov/reporter/3dseries/2018/2018_06619.htm

***People v Darryl T.*, 10/4/18 – IAC / CONCESSION RE MENTAL DISORDER**
The defendant was charged with 1st degree robbery and pled not responsible by reason of mental disease or defect. Before learning the conclusions of psychiatric reports, counsel conceded that the defendant had a dangerous mental disorder and waived an initial hearing, resulting in the severest classification and confinement/treatment level. The defendant sought to withdraw his plea and have an initial hearing. Bronx County Supreme Court denied his application. The defendant appealed, and a First Department justice granted leave to appeal. In the instant decision, the appellate court reversed and remanded for an initial hearing. Such hearing is a critical stage of proceedings, at which a defendant is entitled to the effective assistance. No legitimate strategy could have warranted counsel's concessions. Mental Hygiene Legal Service (Ana Vuk-Pavlovic and Dennis Feld, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06634.htm

Newton v State, 10/2/18 – **UNJUST CONVICTION / $1.2 MILL. FOR PAST SUFFERING**
The claimant was convicted in two 1985 prosecutions, but was exonerated of the second conviction after completing the first sentence and 12 years of the second one. Following a federal court victory based on NYC's 12-year delay in providing DNA evidence, the claimant brought the instant Court of Claims § 8-b action seeking damages for unjust conviction and incarceration. The trial court awarded $1.2 million for past pain/suffering and $250,000 for lost future earnings. The First Department upheld such awards and further found that the claimant was entitled to damages for post-incarceration and future pain/suffering. The record was inadequate to determine fair compensation for those damages, so the court remitted. But the record was adequate to determine future expenses for psychological injuries; and the reviewing court awarded $104,000 for anticipated psychotherapy expenses. John Schutty represented the claimant-appellant-respondent.
http://nycourts.gov/reporter/3dseries/2018/2018_06494.htm

SECOND DEPARTMENT

DECISION OF THE WEEK

People v Flores, 10/3/18 – **MANSLAUGHTER CONVICTION REVERSED / LESSER INCLUDED OFFENSE ERROR AND EGREGIOUS SUMMATION**

The defendant appealed from a Suffolk County Court judgment convicting him of 2nd degree manslaughter upon a jury verdict. The Second Department reversed and dismissed the indictment without prejudice to the People to re-present charges to another grand jury. The trial court should have granted the defendant's request to charge the jury on criminally negligent homicide as a lesser included offense of 1st degree manslaughter. The jury could have concluded that the defendant did not intend to cause serious physical injury and that he failed to perceive that his conduct created a substantial, unjustifiable risk of death. Additional bases for reversal existed. The trial court erred in letting the prosecutor question the defendant about his post-arrest silence. Further, in summation, the prosecutor committed misconduct in numerous ways: calling the defendant a liar, misstating evidence, denigrating the defense, shifting the burden of proof, attempting to arouse jurors' sympathies, and vouching for witnesses' credibility. The cumulative effect of such errors—some of which were unpreserved—deprived the defendant of a fair trial. The Legal Aid Society of Suffolk County (Lisa Marcoccia, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06557.htm

People v Spencer, 10/3/18 – **INVALID PREDICATE / REMITTAL IN INTEREST OF JUSTICE**

The defendant appealed from sentences imposed by Queens County Supreme Court upon his pleas of guilty. The Second Department vacated the sentences in the interest of justice and remitted. The defendant was improperly sentenced as a second felony offender where the predicate felony statement did not set forth the dates of his incarceration after the commission of his 1996 felony, as required by CPL 400.21 (2). Thus, the People failed to establish a sufficient tolling period to qualify the prior conviction as a predicate felony. Appellate Advocates (Paul Skip Laisure, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06574.htm

FOURTH DEPARTMENT

People v Bennett, 10/5/18 – **SCI / JURISDICTIONAL DEFECT**

The defendant appealed from a judgment of Oswego County Court convicting him, upon his plea of guilty, of attempted 2nd degree kidnapping. The Fourth Department reversed, vacated the plea, dismissed the SCI, and remitted. As the People conceded, the SCI was jurisdictionally defective. A defendant may waive indictment and consent to be prosecuted by a SCI. The offenses named may include any offense for which the defendant was held for action of a grand jury, i.e. the same crime as charged in the felony complaint or a lesser included offense. Attempted 2nd degree kidnapping did not fit either category. The defect did not require preservation and survived the guilty plea and waiver of appeal. Bradley Keem represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06663.htm

People v Ott, 10/5/18 – **REVERSAL / *O'RAMA***
The defendant appealed from a Monroe County Court judgment convicting him, upon a jury verdict, of 2nd degree murder and 1st degree assault. The Fourth Department reversed and granted a new trial. The trial court violated CPL 310.30 and *People v O'Rama*, 78 NY2d 270, in failing to advise counsel on the record of the contents of a substantive jury note. Thomas Theophilos represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06646.htm

People v Timmons, 10/5/18 – **RECONSTRUCTION / *O'RAMA***
The defendant appealed from a Monroe County Court judgment convicting him, upon a jury verdict, of 2nd degree murder. The Fourth Department reserved decision and remitted. A stenographic error may have resulted in a transcript that did not accurately reflect whether the trial court read the entire content of the note prior to responding. Thus, a reconstruction hearing was needed. *Cf. People v Parker*, ___ NY3d ___ (6/28/18) (no reconstruction hearing; trial court has duty to create record showing adherence to *O'Rama*). Bridget Field represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06644.htm

People v Perez, 10/5/18 – **SORA / REDUCED TO LEVEL ONE**
Supreme Court erred in assessing the defendant 20 points under risk factor seven, resulting in a level-two designation. The defendant's conduct was not directed at a stranger. He met the teenage victim while they both worked at a local Red Cross, and they communicated through social media before sexual contact occurred. Moreover, the People presented no evidence that the defendant targeted the victim primarily to victimize her. The Monroe County Public Defender (Kimberly Duguay, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06666.htm

People v Feher, 10/5/18 – **PLEA TERMS / REDUCED SENTENCE**
The defendant appealed from a judgment of Onondaga County Court convicting him, upon his plea of guilty, of 3rd degree burglary and 4th degree grand larceny. The Fourth Department modified in the interest of justice by reducing the sentence on one of the convictions to an indeterminate term of two to four 4 years. The defendant's valid waiver of appeal did not foreclose his contention that the sentence violated the terms of the plea bargain. Hiscock Legal Aid Society (Brittney Clark, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06653.htm

FAMILY

FIRST DEPARTMENT

Matter of George A. v Josephine D., 10/2/18 – **IN CAMERA STATEMENTS / DUE PROCESS**
The mother appealed from an order of Bronx County Family Court awarding the father sole custody. The First Department affirmed. If properly corroborated, a child's out-of-court statements regarding abuse or neglect are admissible. Here, in their in camera interviews, the children corroborated the father's testimony and revealed their custody preferences. Requiring supervision of the mother's access was proper, since she violated a prior order and maltreated the children. The appellate court rejected her contention that the

children's in camera statements were improperly obtained in a confidential setting. The court cited *Matter of Heasley v Morse*, 144 AD3d 1407, which explained that a *Lincoln* hearing may be used to ascertain the child's wishes and may also result in corroboration of abuse or neglect. An Article 6 custody proceeding is to be contrasted to an Article 10 proceeding, which may involve an adversarial relationship between a child and the accused parent and the child's testimony as the sole basis for a finding of abuse or neglect—thus implicating due process concerns.
http://nycourts.gov/reporter/3dseries/2018/2018_06497.htm

***Kenneth J. v Lesley B.*, 10/4/18 – IN CAMERA STATEMENTS / SUMMARY RULING**
New York County Family Court granted the mother's motion for summary judgment and suspended all contact between the father and the child. The First Department reversed and remanded. The trial court improperly determined the parties' custody petitions without a hearing. Even temporary modification of custody requires at least an abbreviated hearing, except in emergency cases. The court granted drastic relief based largely on its in camera interview with the child, motion papers, and an unsworn report by Family Court Mental Health Services (MHS). A child's expressed preference cannot be dispositive; and the court must consider the age and maturity of the child and potential influence exerted. Family Court improperly considered the MHS report, which was not referenced in the motion nor in admissible form. Moreover, the report did not recommend a suspension of father-child contact. The father represented himself on appeal.
http://nycourts.gov/reporter/3dseries/2018/2018_06625.htm

SECOND DEPARTMENT

Matter of King v Peters, 10/3/18 – **SUMMARY CUSTODY RULING / REVERSED**
The mother appealed from an order of Westchester County Family Court that denied her custody modification petition without a hearing and limited her to supervised parental access. The Second Department reversed and remitted since a custody decision should be based on an evidentiary hearing.
Christina Hall represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06538.htm

Matter of Alana H. (Caitlyn M.), 10/3/18 – **BRUISING / NO NEGLECT**
The parents appealed from a Dutchess County Family Court finding that they neglected Sophia H. and derivatively neglected Alana H. The Second Department reversed. The mother left the children with her boyfriend while she went to work. Upon return, she noticed bruising on Sophia's buttocks, but both children said that Sophia fell, and the mother believed that no medical care was needed. When delivering the children to the father for a visit, the mother alerted him to the bruising. When it became darker, the parents agreed that Sophia should be seen by her pediatrician. An exam revealed that the pattern of bruises was indicative of spanking. Family Services filed petitions against the parents. At the fact-finding hearing, there was no evidence that the mother knew of the boyfriend's propensity to hurt the children; and she could not be deemed to know the significance of the bruising pattern. Kelly Enderley and Christopher Montalto represented the mother and father, respectively.
http://nycourts.gov/reporter/3dseries/2018/2018_06534.htm

FOURTH DEPARTMENT

Matter of Bentley C. (Zachary D.), 10/5/18 – **DRUGS / NO NEGLECT**
The evidence did not support the finding by Yates County Family Court that the father neglected the child. The father tested positive for THC, oxycodone, and opioids on one occasion. That was insufficient to establish that he repeatedly misused drugs. His admission that he used marihuana was also inadequate to constitute neglect. The petitioner agency produced no evidence as to duration of frequency of use or whether the father was ever under the influence of drugs while in the presence of the child. Cara Waldman represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06667.htm

Matter of Delanie S. (Jeremy S.), 10/5/18 – **DÉJÀ VU: DRUGS / NO NEGLECT**
The evidence did not support the finding by Cattaraugus County Family Court that the respondents neglected the children. The mere use of illicit drugs was not enough. There was no evidence of drug use in the children's presence nor any proof about the duration or frequency of use. David Pajak represented the appellants.
http://nycourts.gov/reporter/3dseries/2018/2018_06677.htm

Matter of Chance C. (Jennifer S.), 10/5/18 – **CHILD'S STATEMENT / NO NEGLECT**
The mother appealed from an Onondaga County Family Court order adjudging that the subject children were neglected by her. The Fourth Department reversed and dismissed the petition. Evidence of mental illness alone does not support a finding of neglect. Family Court determined that the mother neglected the children by forgetting to feed them; but the only evidence of such a danger was the out-of-court statement of one child. Since there was no corroboration of the statement, the trial court erred in relying on it to find neglect. The determination that the mother stopped taking her medication and that her mental health could rapidly deteriorate and endanger the safety was belied by her counselor's testimony. Hiscock Legal Aid Society (Daniel Blackaby, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06642.htm

Matter of Driscoll v Mack, 10/5/18 – **CUSTODY / INCOMPLETE HEARING**
The mother appealed from an order of Cayuga County Family Court awarding physical custody of the subject children to the maternal grandmother. The Fourth Department reversed and remitted for a full hearing. The trial court erred in granting the petition prior to the completion of the hearing. The mother's testimony was not complete, the grandmother had not yet rested, the mother had not been afforded the opportunity to call witnesses, and controverted issues existed. Elizabeth Moeller represented the mother.
http://nycourts.gov/reporter/3dseries/2018/2018_06640.htm

Matter of Eason v Bowick, 10/5/18 – **CUSTODY / NO AUTOMATIC MOD**
Family Court denied the mother's relocation petition, and she appealed. The appellate court held that the trial court erred in including a provision calling for the transfer of custody of the child to the father if the mother relocated outside of Monroe County. Such provision impermissibly purported to alter custody automatically upon the happening of a future event, without considering the child's best interests at that time. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the mother.
http://nycourts.gov/reporter/3dseries/2018/2018_06641.htm

Matter of Valentin v Mendez, 10/5/18 – **CUSTODY / NO FACTUAL FINDINGS**
In awarding sole legal custody to the mother, Family Court failed to set forth the facts supporting the determination of best interests. Effective appellate review required appropriate factual findings. The Fourth Department therefore reserved decision and remitted. The Monroe County Public Defender (James Hobbs, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06680.htm

ARTICLES

Wrongful Conviction / BRONX CONVICTION INTEGRITY UNIT
As set forth in an October 3 *New York Times* article, Larry McKee spent two decades in prison for a murder he insisted he did not commit. Eight months ago, a state judge threw out his conviction on the recommendation of the Bronx District Attorney's office. The DA's Conviction Integrity Unit determined that exculpatory grand jury testimony was never shared with the defense. A person who knew the victim told the grand jury that in his last moments, the victim had described his killer as a "Spanish guy." The defendant is black. Risa Gerson, a senior investigative counsel with the Conviction Integrity Unit (and former ILS Director of Quality Enhancement for Appellate and Post-Conviction Representation) investigated the case. Since his release, McKee, now 47, has been learning to live in a bewildering world very different world than the one he left in 1997. One daunting challenge has been learning to deal with technology, including his iPhone, emails, and texts.
https://www.nytimes.com/2018/10/02/nyregion/wrongful-conviction-larry-mckee.html

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