CRIMINAL

FIRST DEPARTMENT

People v Serrano, 10/10/19 – **TRAFFIC INFRACTION / NO DOUBLE JEOPARDY**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him upon his plea of guilty of 2nd degree AUO of a motor vehicle. The First Department affirmed. Supreme Court properly denied a motion to dismiss the indictment on double jeopardy grounds. The prosecution was not barred by the defendant's conviction, before the DMV Traffic Violations Bureau (TVB), of the traffic infraction of unlicensed operation. The administrative adjudication was not a criminal punishment that triggered constitutional protections against multiple criminal punishments for the same offense. The prosecution also was not barred by CPL 40.20 (2), since the defendant was not "prosecuted" within the meaning of the statute when convicted before the TVB. He was charged by summons, not accusatory instrument; the administrative agency was not a criminal court; traffic infractions are established by clear and convincing evidence; and only fines may be imposed.
http://nycourts.gov/reporter/3dseries/2019/2019_07337.htm

SECOND DEPARTMENT

DECISION OF THE WEEK
People v Clavell, 10/9/19 **– MURDER / GUILT NOT PROVEN**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree murder. The Second Department reversed and dismissed the indictment. In 2000, Barbara Perez was found shot dead on the floor of a gym where she worked. Eleven years later, the defendant was indicted. The People's theory was that he was motivated to kill Perez because he was angry about his child support obligation for their son, and he had the opportunity to commit the crime. No direct evidence of guilt was produced. No forensic evidence linked the defendant to the crime. None of the fingerprints or hair fibers recovered were his. The defendant's DNA was not found on a broken fingernail. Police canines did not detect his scent at the crime scene. Thus, the People's case rested on inferences to be drawn from the circumstantial evidence, but an inference of guilt must be the only one fairly and reasonably drawn. The inferences here at most created a suspicion that the defendant might have committed the murder. Mischel & Horn represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07271.htm

People v Cruz, 10/9/19 – **DRUG CHARGE / AGENCY NOT DISPROVEN**
The defendant appealed from a Rockland County Court judgment, convicting him of drug sale and possession charges based on transactions on two separate days. The Second Department vacated a criminal sale charge stemming from a transaction on the second day, because the People failed to disprove the agency defense. On both dates, transactions occurred between an undercover officer and the panhandling defendant. On the second date, according to the People's proof, the defendant procured drugs at the request of the

officer and with the officer's funds. The two men were known to each other from the prior interaction of the same nature. The defendant was not promised a reward and, prior to the officer's approach, was not doing anything to suggest that he was selling drugs. Moreover, the People did not establish any relationship between the defendant and his supplier, other than the fact that the defendant, a daily user of crack cocaine, had previously bought drugs from him. John Lewis represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07273.htm

People v Hightower, 10/9/19 – **ID AND STATEMENT / SUPPRESSED**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st and 2nd degree robbery. The appeal brought up for review the denial of suppression. The Second Department reversed and suppressed identification evidence and a statement by the defendant. A new trial was to be preceded by an independent source hearing. At the suppression hearing, Police Officer Gorman had testified that, soon after the robbery, he interviewed the complainant and showed him a photo array including the defendant. After the complainant identified the defendant, the officer activated an investigation card. The next day, Officer Gorman learned that the defendant had been arrested on a different matter and was in the station house. The officer then conducted a lineup including the defendant. The complainant identified the defendant, who provided a statement to police. The appellate court found that there was insufficient evidence from which to infer that the police arrested the defendant pursuant to the I-Card or that the officer who actually arrested the defendant had probable cause to do so. The People did not present any testimony from the arresting officer as to what information he possessed or how he received it or any proof regarding the circumstances of the arrest or the charges on which the defendant was arrested. Appellate Advocates (Ronald Zapata, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07280.htm

People v Palant, 10/9/19 – **ASSAULT / NO SERIOUS PHYSICAL INJURY**
The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 1st and 2nd degree assault and other crimes. The Second Department held that the assault convictions were against the weight of the evidence. The jury was not justified in finding that the People proved that the victim sustained a serious physical injury to his eye. However, the victim did sustain a physical injury, so the appellate court reduced the convictions to 3rd degree offenses. Donna Aldea represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07289.htm

SECOND CIRCUIT

U.S. v Pierce, 10/10/19 – **INCONSISTENT VERDICT / SET ASIDE**
The Government appealed from an order of District Court–NDNY, setting aside a jury verdict finding the defendant guilty of a conspiracy to possess with intent to distribute, and conspiracy to distribute, four types of narcotics. The trial court ruled that the verdict was inconsistent with the jury's eight findings that it was "not proven" that the defendant conspired to possess with intent to distribute each one of the four types of narcotics or conspired to distribute each drug. The Second Circuit affirmed. The case illustrated the

care that must be taken in drafting special interrogatories to minimize the risk of inconsistent verdicts. The verdict was irreconcilably inconsistent with the interrogatories, all relating to the same defendant and the same count—a situation not addressed by previous U.S. Supreme Court cases regarding inconsistent verdicts. The prosecutor, who drafted the problematical verdict sheet, also failed to suggest that the discharged jury should be invited to resume deliberations. Setting the verdict aside was the appropriate remedy.
http://www.ca2.uscourts.gov/decisions/isysquery/f90c6498-8990-4efb-99be-a69e139ec99e/2/doc/16-3030_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/f90c6498-8990-4efb-99be-a69e139ec99e/2/hilite/

FAMILY

FIRST DEPARTMENT

Matter of Raymond S.H. Jr. v Nefertiti S.M., 10/10/19 –
RELOCATION DENIED / AFFIRMED
The father appealed from a New York County Family Court order, which denied his petition for permission to relocate with the parties' child to Florida. The First Department affirmed. The father, who had been the custodial parent since 2015, ostensibly sought to move to improve his son's life. However, he offered no proof regarding how life in Florida—including employment, housing, schools, and therapy for the child—would be better than in New York. Petitioner did not have a relocation plan, only an amorphous idea. The mother's failure to pay child support did not warrant a grant of relocation. Further, she had a well-founded concern that, if relocation were granted, she would rarely see the child, given the father's resistance to any visitation. The mother could not afford to go to Florida; and her relationship with the child was fraught, requiring consistent therapeutic visitation to repair it. While the child was thriving with the father, those positive developments occurred in NY. The record also showed that the child's former therapist opined that the father may have coached the child to impugn the mother. Finally, the father did not address the child's visitation with his siblings, with whom the child enjoyed a positive relationship.
http://nycourts.gov/reporter/3dseries/2019/2019_07329.htm

SECOND DEPARTMENT

Do'Naisha L. E. B. (Lisa A. B.), 10/9/19 – **TERMINATION / REVERSED**
The mother appealed from a Kings County Family Court order terminating her parental rights based on permanent neglect. The Second Department reversed. The agency did not establish that, during the relevant period of time, the mother failed to maintain contact with, or plan for the future of, the child. The evidence consisted of the mother's testimony, as well as orders in companion proceedings involving the child's siblings. The mother testified credibly that: she had complied with all of the requirements for return of the child, including participating in therapy and parenting classes; she did not believe that she was

neglectful or suffered from serious mental health issues; she benefitted from therapy; and parenting classes addressed matters of common sense. On such subjects, the petitioner failed to adduce any other evidence. Jill Zuccardy represented the appellant.
http://www.nycourts.gov/courts/AD2/Handdowns/2019/Decisions/D60904.pdf

Grover S. (Jonathan H. G..), 10/9/19 – **SUBPOENAS / WRONGLY QUASHED**
The father appealed from interlocutory Family Court Act Article 10 orders quashing subpoenas as to two nonparties. That was error, and the Second Department reversed. CPLR Article 31, which applies to abuse and neglect proceedings, mandates full disclosure of all matter "material and necessary" in the prosecution or defense of an action by a nonparty, upon notice stating the reasons disclosure is sought. The phrase "material and necessary" is interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy that will assist in preparation for trial by sharpening the issues. Here the subpoenas set forth the requisite reasons for disclosure, and the nonparty movants failed to show that disclosure was "utterly irrelevant" or that the process to uncover anything legitimate would obviously be futile. Philip Segal represented the appellant.
http://www.nycourts.gov/courts/AD2/Handdowns/2019/Decisions/D60839.pdf

Suarez v Suarez, 10/9/19 – **CUSTODY / ERRANT TEMPORARY ORDERS**
The mother appealed, by permission, from a Suffolk County Family Court order which modified temporary custody orders. The Second Department reversed. Although a psychologist testified that the children were alienated from their father, she did not conduct a forensic evaluation; acknowledged having continued to provide therapy to the father regarding his relationship with the children; and did not indicate that the ordered therapy program was necessary. Additionally, the court should not have considered the social worker's report, where the parties were not given an opportunity to review it or to cross-examine the author. The court improperly delegated its decision-making authority to the social worker. Michael J. Miller represented the appellant.
http://www.nycourts.gov/courts/AD2/Handdowns/2019/Decisions/D60888.pdf

RAISE THE AGE

Matter of Vance v Roberts, 10/10/19 – **PROHIBITION / DENIED**
The District Attorney initiated a CPLR Article 78 proceeding in the nature of prohibition to vacate an order of the trial judge, who severed certain charges against the 16-year-old respondent and removed them to Family Court. The First Department denied the petition. The respondent was arrested for two separate incidents. As to the second incident, he was arraigned in the Youth Part as an adolescent offender. The People sought to prevent removal to Family Court based on a significant physical injury. The application was denied. On the same day, the respondent was charged as to an earlier incident. Again, the People moved to prevent removal, but this time the motion was granted. Thereafter, in a single indictment, a grand jury accused the respondent of committing both incidents. The People again moved to prevent removal regarding the second incident. The motion was denied. The clerk advised the court that such charges could not be sent directly to Family Court because they had been combined with charges as to the other incident. Defense counsel

moved to sever. The People opposed, arguing that the court lacked statutory authority to grant the motion. The court held that the two sets of charges were not properly joinable, granted severance, and again ordered removal as to the second incident. The appellate court held that the extraordinary remedy of prohibition did not lie. Supreme Court had the authority to sever charges that were not properly joined in a single indictment.
http://nycourts.gov/reporter/3dseries/2019/2019_07358.htm

JUDICIAL ETHICS

ADVISORY COMMITTEE ON JUDICIAL ETHICS
OPINION 17-157
Verboten Emails from Trial Judge to Appellate Panel

Where a supervisory appellate judge concludes that a lower-court judge improperly contacted an appellate panel to influence the disposition of the appeal, the supervisory judge must ensure that the incident is reported to the Commission on Judicial Conduct. In the instant case, shortly after hearing oral argument, each judge on the panel received an email from the judge whose order was being challenged. The email shared the judge's "side of the story" in detail; made several factual assertions; characterized one attorney as "sleazy;" and attached a document from the county clerk's file that was not contained in the record on appeal. The inquirer stated that the trial judge had previously contacted certain appellate judges with an intemperate email after the court reversed him/her. The more recent email appeared to have been an impermissible substantive ex parte communication and attempt to influence the appellate jurists. Moreover, the appearance of impropriety was arguably exacerbated by the prior intemperate email. The conduct charged went to the heart of the judge's fitness and could undermine public confidence in the judiciary. The incident had to be reported; and the email had to be shared with the appellate attorneys to allow them to decide whether to act to protect their clients. The appellate judges could continue to preside in the matter if they believed that they could be fair and impartial. The supervisory judge had discretion to determine whether to permit the appeal to be decided by the panel or by new judges or to transfer the matter elsewhere for decision. *[While this opinion is dated last year, it was only recently "broadcast" by the Advisory Committee on Judicial Ethics.]*
http://www.nycourts.gov/legacyhtm/ip/judicialethics/opinions/18-157.htm

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