# CRIMINAL

## COURT OF APPEALS

### *DECISION OF THE WEEK*

***People v Rong He***, 10/17/19 – ***BRADY* VIOLATION / NEW TRIAL**

The People's failure to disclose contact information for non-testifying eyewitnesses constituted a *Brady* violation. In a unanimous memorandum opinion, the Court of Appeals reversed a Second Department order affirming the defendant's Kings County conviction of 2nd degree assault and 4th degree CPW. By not providing the defendant with meaningful access to favorable witnesses, the People contravened their broad obligation under *Brady v Maryland,* 373 US 83. The owner of the nightclub where the crime occurred told police that he saw two people approach one victim and strike him with a beer bottle, and the owner identified someone other than the defendant as an assailant. Another witness arguably corroborated this description when he called 911. The caller claimed that, when leaving the location, two men stated that they were going to return with a gun. Such accounts would have contradicted the People's theory that the defendant was the sole perpetrator. There was no proof that the requested disclosure would pose a risk to the witnesses. Yet the People refused to disclose the witnesses' contact information, instead offering to provide the witnesses with defense counsel's information. The refusal to disclose the contact information was tantamount to suppression of the information, which was material. Since the defendant made a specific request for the evidence, the materiality test was whether there was a reasonable possibility that the verdict would have been different, had the evidence been disclosed. That test was met. The proof would have directly contradicted the People's theory of the case, and the only witness who identified the defendant at trial initially told the police that he did not see the perpetrator's face. Appellate Advocates (Paul Skip Laisure, of counsel) represented the appellant.

http://www.nycourts.gov/reporter/3dseries/2019/2019_07477.htm

## FIRST DEPARTMENT

***People v Carrasco***, 10/15/19 – **NO WARNING RE VIOLATION / VACATUR**

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1st degree robbery. The First Department reversed, vacated the plea, and remanded for further proceedings. The appellate court declined to exercise its discretion to dismiss the appeal. *See* CPL 470.60 (1) (at any time after appeal has been taken and before its determination, on motion of respondent or sua sponte, appellate court may dismiss appeal on ground of failure of timely perfection). The People conceded that, if the instant appeal was not dismissed, the defendant's guilty plea should be vacated, because he was not informed before sentencing that, if he violated plea agreement conditions, the enhanced sentence would include post-release supervision. *See People v McAlpin*, 17 NY3d 936. The Center for Appellate Litigation (Anjali Pathmanathan, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_07370.htm

***Cobb v DOCCS***, 10/17/19 – **PAROLE CONDITION / RIGHT TO TRAVEL**
The petitioner appealed from a judgment of Bronx County Supreme Court, which denied vacatur of a parole condition prohibiting him from traveling anywhere in the borough of Queens (where the victim lived) and dismissed his CPLR Article 78 proceeding. The First Department reversed. In 2010, the petitioner pleaded guilty to 2nd degree assault and was sentenced to six years' imprisonment, to be followed by five years' post-release supervision, and the court issued a full order of protection. After his release, the petitioner was arrested based on the victim's allegation that he approached her in Far Rockaway, Queens. He was acquitted, but was required to sign several new conditions of release, including the travel condition. Release conditions that implicate certain fundamental rights, such as the right to travel, must be reasonably related to a petitioner's criminal history and future chances of recidivism. The instant categorical ban was not thus reasonably related. Thus, the matter was remanded for issuance of a new travel restriction, which had to specify that any such restriction was subject to case-by-case exceptions for legitimate reasons. The Center for Appellate Litigation (Molly Schindler and Cathy Liu, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07480.htm

***People v Caviness***, 10/17/19 – **GRAVITY KNIFE / DISMISSED**
The defendant appealed from an August 10, 2016 judgment of NY County Supreme Court, convicting him upon a jury verdict of 3rd degree CPW, involving a gravity knife. The First Department reversed in the interest of justice and dismissed the indictment. The People agreed that the indictment should be dismissed under the particular circumstances of the case and in light of recent legislation amending Penal Law § 265.01 (L 2019, c 34, § 1, eff. May 30, 2019) to effectively decriminalize the simple possession of gravity knives—notwithstanding that the law did not apply retroactively. The Center for Appellate Litigation (Amith Gupta, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07494.htm

***People v Burden***, 10/17/19 – **SORA / REVERSED**
The defendant appealed from an order of Bronx County Supreme Court, which adjudicated him a level-two sex offender. The First Department reversed and vacated the adjudication. The defendant was not required to register in NY on the basis of his CT misdemeanor conviction for 4th degree sexual assault. The physical helplessness element of that crime would make it the equivalent of NY 1st degree sexual abuse, a registrable offense. However, there was no indication that either victim was physiologically incapable of speech, drugged into a stupor, or otherwise unable to communicate her unwillingness to submit to the sexual contact. In the absence of the helplessness element, the CT crime was equivalent to NY's 3rd degree sexual abuse, which was not registrable. The issue was reviewable, notwithstanding the defendant's failure to raise it in the SORA court. Preservation concepts relating to civil appeals applied. The appeal was reviewable because it presented a pure question of law that could not have been avoided if raised previously (*see Chateau D'If Corp. v City of NY, 219 AD2d 205); and because* the hearing court expressly ruled on the issue. The doctrine of laches did not warrant dismissal, despite the lapse of 13 years, where the People failed to show prejudice. Lloyd Epstein represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07497.htm

# SECOND DEPARTMENT

***People v Watts***, 10/16/19 – **PREJUDICIAL REDIRECT / REVERSED**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree course of sexual conduct against a child and other crimes in connection with offenses against his grade-school students. The Second Department reversed and ordered a new trial. On cross-examination, defense counsel broached the subject of civil actions against the defendant initiated by three complainants, in order to impeach their credibility based on possible pecuniary gain motivation. Such cross examination did not open the door to redirect examination regarding alleged uncharged complaints by 10 students. The trial court should normally exclude evidence not made necessary by cross-examination, particularly prejudicial proof of prior uncharged acts. The accused must be judged based on probative evidence, not propensity. In this case, the risk of prejudice outweighed potential probative value. The defendant was deprived of a fair trial, mandating reversal without regard to any harmless error evaluation. *See People v Crimmins*, 36 NY2d 230, 238. The appellate court also condemned the trial judge's participation as a reader when the jury asked for a read-back of testimony. By assuming the role of witness or counsel, a judge may convey that he or she is aligned with that person. Donna Aldea and Danielle Muscatello represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07426.htm

***People v Matos***, 10/16/19 – **PLEA WITHDRAWAL / DENIED**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree attempted robbery. The First Department affirmed. The decision to permit a defendant to withdraw a plea of guilty rests within the sound discretion of the plea court. Such a motion must be premised on evidence of possible innocence or of fraud, mistake, coercion or involuntariness in the taking of the plea. Only in rare instances will a defendant be entitled to an evidentiary hearing. Defense counsel's representation—that a private investigator had spoken to unnamed witnesses who allegedly recanted—was insufficient to warrant a hearing. Also, by pleading guilty, the defendant forfeited review of his argument that the Supreme Court erred in restricting his access to certain discovery. The valid waiver of the right to appeal precluded appellate review of the defendant's challenge to a suppression determination.
http://nycourts.gov/reporter/3dseries/2019/2019_07418.htm

***People v Ellison***, 10/16/19 – **WAIVER OF APPEAL / VITIATED**
The defendant contended that a sentence imposed by Queens County Supreme Court was harsh and excessive. He had pleaded guilty to 3rd degree burglary and waived his right to appeal in return for a sentence of three years. When the defendant appeared for sentencing, Supreme Court stated that the promised sentence was not legal, and he opted to plead to a reduced charge that included post-release supervision. The modification of the material terms of the original plea agreement vitiated the waiver of the right to appeal, yet the plea court failed to elicit the defendant's continuing consent to waive appeal rights. Thus, he was not precluded from arguing that the sentence imposed was unduly severe. Nevertheless, the sentence was not excessive.
http://nycourts.gov/reporter/3dseries/2019/2019_07413.htm

# THIRD DEPARTMENT

***People v Coss***, 10/17/19 – **SCI / JURISDICTION DEFECT**
The defendant appealed from a judgment of Delaware County Court, convicting him of DWI and 1st degree AUO of a motor vehicle. The Third Department reversed and dismissed the SCI. The jurisdictional challenge was not precluded by the guilty plea or waiver of the right to appeal and was not subject to the preservation requirement. DWI was a class D offense where, as here, the defendant was convicted of that offense twice in the preceding 10 years. Thus, it was a greater offense than the class E felony charged in the felony complaint. The constitutional considerations regarding the right to prosecution by indictment—that an SCI may not charge greater offenses than charged in the felony complaint—applied with equal force to a joinable offense in a higher grade than charged in the felony complaint. A joinable offense may not be included in a waiver of indictment and SCI unless that offense, or a lesser included offense, was charged in a felony complaint and the defendant was therefore held for the action of a grand jury upon that charge. The Rural Law Center of NY (Kelly Egan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07445.htm

***People v Jackson***, 10/17/19 –**CHALLENGE FOR CAUSE / REVERSED**
The defendant appealed from a judgment of Albany County Supreme Court, convicting him of 1st degree rape and 1st degree sexual assault. The Third Department reversed and ordered a new trial. The trial court erred in denying challenges for cause to two prospective jurors. Based on her status as a teacher and mother of five children, one juror expressed sympathy for the victim, who she guessed was around age 20. The prospective juror thought that she could be unbiased, though she added, "I do lean toward sympathy with the youth. That's where my life is." Another juror said that, during voir dire, he was having a hard time listening to the subject matter of the case because he had four younger sisters and a daughter. It was difficult to say whether he could be impartial, he added. Despite the absence of unequivocal assurances, Supreme Court did not pose questions to rehabilitate the prospective jurors, and denied the defense challenges. The defendant exhausted his peremptory challenges, thus preserving the issue. Paul Connolly represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07442.htm

***People v Turner***, 10/17/19 – **SUPPRESSION / REVERSED**
The defendant appealed from a judgment of Albany County Court, convicting him of 4th degree conspiracy and 3rd degree criminal possession of a controlled substance. The Third Department reversed. County Court erred in denying the defendant's motion to suppress drugs recovered from his clothing during a strip search. The search warrant did not authorize a search of the defendant; and the hearing proof did not support a strip search. The People did not prove that the officers had a reasonable suspicion that the defendant was concealing drugs under his clothing at the time of the search. He was thus entitled to suppression of the cocaine retrieved and any testimony or evidence concerning the search. The judgment of conviction was reversed in its entirety, because there was a reasonable possibility that admission of the cocaine and related testimony could have contributed to the jury's determination of both counts. George Hoffman represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07443.htm

***People v Roberts***, 10/17/19 – **VOP / REVERSED**
The defendant appealed from a Broome County Court judgment, which revoked probation and imposed a term of imprisonment. The Third Department reversed and remitted. The defendant argued that his plea to the violation was not knowing, voluntary, and intelligent, and that County Court failed to exercise its discretion in sentencing him. Although the defendant did not move to withdraw his plea, he was sentenced at the same proceeding and so had no practical ability to make a post-admission motion. Thus, his claim was reviewable on direct appeal. County Court abdicated its responsibility to carefully consider all facts available at the time of sentencing. Further, the plea was involuntary, where the People threatened to seek a harsher sentence if the defendant rejected the offer and was found guilty after a hearing. Karen Leahy represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07448.htm

## DVSJA RESOURCES

Here is a link to resources regarding CPL 440.47 resentencing applications under the Domestic Violence Survivors Justice Act: https://www.ils.ny.gov/content/domestic-violence-survivors-justice-act

# FAMILY

## SECOND DEPARTMENT

***Matter of Melody M. (Cierra B.)***, 10/16/19 – **REMOVAL / AFFIRMED**
The mother appealed from an order of Kings County Family Court, which granted the petitioner's application for temporary removal of the children from her custody. The Second Department affirmed. Two petitions alleged that the mother neglected the children by failing to provide adequate supervision. Once a child protective petition has been filed, Family Court Act § 1027 authorizes the court to conduct a hearing to determine whether the children's interests require protection. The court must consider imminent risk, best interests, and reasonable efforts that may obviate the need for removal. In the instant case, despite a stay-away order of protection barring the father from being near the children, the mother allowed him to care for them more than once. She did not discern the seriousness of his domestic violence against her in the children's presence.
http://nycourts.gov/reporter/3dseries/2019/2019_07399.htm

## THIRD DEPARTMENT

***Matter of Jordyn WW. (Tyrell WW.)***, 10/17/19 – **NEGLECT / NOT PROVEN**
The father appealed from an order of Ulster County Family Court, which adjudicated the subject child to be neglected. The father had discharged a firearm inside the home he shared with the child and the child's mother, neither of whom was home at the time. While his conduct was deficient, and one could imagine how things could have gone differently, the

record failed to establish imminent risk of danger to the child. Tracy Steeves represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07460.htm

***Matter of Elijah X.***, 10/17/19 – **JD / REVERSED**
The respondent juvenile delinquent appealed from an order of Rensselaer County Family Court, which found him in willful violation of probation. The Third Department reversed and dismissed the petition. On appeal, the respondent argued that his allocution did not comply with the mandates of Family Court Act § 321.3—a claim that did not require preservation. Although the respondent's mother was present, Family Court did not question her about his waiver of the fact-finding or failure to attend counseling. Further, the court did not determine whether the respondent and his mother understood the possible dispositional orders. Although the placement had expired, the appeal was not moot, given the potential collateral consequences. Sandra Colatosti represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07464.htm

***Rebekah R. v Richard R.***, 10/17/19 – **PARENTING TIME / MODIFIED**
The father appealed from an order of Otsego County Family Court, which granted the mother's application for permission to relocate to Arizona with the children. The Third Department held that the grant of permission was proper, but that the parenting-time provision was wholly inadequate. The father was to continue to have parenting time with the children "as the parties may reasonably agree." While they had previously agreed on a schedule, the relocation presented geographic and financial obstacles that did not exist before. Thus, Family Court should have included specific parameters for the father's parenting time to ensure that he would receive meaningful time with the children and should also have addressed the parties' respective financial obligations regarding transportation. The matter was remitted for consideration of such issues. The Rural Law Center of NY (Kristin Bluvas, of counsel) represented the father.
http://nycourts.gov/reporter/3dseries/2019/2019_07457.htm

***Matter of Cody RR. v Alana SS.***, 10/17/19 – **UCCJEA / REVERSED**
The father appealed from an order of Broome County Family Court, which dismissed his custody modification petition. The Third Department reversed and remitted. Family Court erred in summarily relinquishing jurisdiction. Pursuant to the UCCJEA, the court had exclusive continuing jurisdiction over the matter. No consideration was given to statutory requirements for finding that NY was an inconvenient forum and Florida was a more appropriate forum. The sparse record did not permit the appellate court to conduct an independent review. Lisa Miller represented the father.
http://nycourts.gov/reporter/3dseries/2019/2019_07471.htm

# RAISE THE AGE

***People v N.C.***, 2019 NY Slip Op 29315 – **FIREARM / "IN FURTHERANCE OF"**
Bronx County Supreme Court held that the People failed to prove that the AO displayed a firearm in furtherance of a violent offense, such that the instant matter was not subject to automatic removal. The defendant was charged with attempted 2nd degree murder, attempted 2nd degree CPW, and other crimes. The court held that the People established that he displayed an operable firearm, but not that he did so "in furtherance of" an underlying crime. That phrase should be given a narrow reading, in light of the purpose of the RTA statute, in contrast to the expansive interpretation of "in furtherance of" in other contexts. *See e.g. People v Henderson*, 25 NY3d 534, 541. Requiring the People to prove that an adolescent's display of a firearm was done to advance or promote the underlying felony would ensure that all but the most serious cases would be removed. The People supplied no facts to suggest that the firearm was allegedly displayed to advance or promote the attempted murder or weapons charges. Thus, the matter was subject to automatic removal, unless the People's motion to prevent removal was granted. Legal Aid Society of NYC (Deborah Rush, of counsel) represented the defendant.
http://nycourts.gov/reporter/3dseries/2019/2019_29315.htm

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