CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Batticks, 10/20/20 – **JUROR OUTBURST / NO *BUFORD* INQUIRY**

The question presented was whether the judge erred in declining to conduct a *Buford* (69 NY2d 290) inquiry in response to a juror's outburst during the cross-examination of a prosecution witness. The Court of Appeals answered "no." The defendant and codefendants Bailey and Wiggins were tried jointly for assaulting the victim while all were incarcerated. To goad the victim during cross, Bailey's counsel repeated a racial slur Wiggins had uttered. The fifth time, a juror stood and said: "Please, I am not going to sit here . . . and [have] you say that again. Don't say it again or I'm leaving.... I find that very offensive." Counsel for Batticks asked the trial court to conduct an inquiry to determine if the juror was grossly unqualified. The court denied such relief; admonished the juror and counsel; and delivered a curative instruction. The defendant was convicted of 2nd degree assault. In a 4-3 decision by the Chief Judge, the COA sustained a First Department order affirming the conviction. Judge Wilson dissented, joined by Judges Rivera and Fahey, opining that the majority wrongly concluded that the juror's anger did not taint her view of the case. In no other NY case had a juror interrupted a cross-examination and threatened to walk out unless counsel stopped. Given this juror's extraordinary eruption in open court, there was no issue about the existence of a credible allegation of unfitness. The required action was a *Buford* inquiry into the juror's impartiality or, on consent, her replacement with an alternate. Our system must not tolerate outlandish behavior by jurors. The defendant's right to a fair trial was violated.

http://www.nycourts.gov/reporter/3dseries/2020/2020_05840.htm

People v Goldman, 10/22/20 –

SEARCH WARRANT FOR DNA / REDACTED VIDEO

In this People's appeal, the issues presented were (1) whether pursuant to *Matter of Abe A.*, 56 NY2d 288 (standards for court order to obtain suspect's corporeal evidence), the hearing court properly precluded defense counsel from reviewing the People's application for a search warrant to obtain a saliva sample for DNA purposes, where the defendant had not been charged and was in custody on an unrelated charge; (2) whether the People properly authenticated a music video posted on social media, where no one testified who was there during the filming or who participated in editing it. The majority answered "yes" to both questions and reversed a First Department order vacating the defendant's conviction of 1st degree manslaughter. Judge Fahey concurred, sharing the majority's view as to the warrant and opining that the video was not properly authenticated but the error was harmless. Judge Rivera dissented, joined by Judge Wilson. The majority had sanctioned the government's ex parte request to remove genetic material from an uncharged suspect without a showing of a risk of flight or destruction of potential evidence. The defendant's due process rights were violated. *Abe A.*'s safeguards applied because of the nature of the request—intrusion into the body to collect corporeal evidence—not because a defendant was at liberty. The majority had also erred by upholding the admission

of an unauthenticated, redacted music video. The prosecutor argued that the YouTube video depicted the defendant singing lyrics to "Mobbin' Out"—a rap song about gang violence—and further urged that the video mirrored the crime. The defendant contended that the singing was added after the video was recorded; and there was no testimony from anyone involved in the video's creation, nor was there any expert testimony as to its unaltered state. The video tainted deliberations by depicting defendant as glorifying street violence and embracing gang life.
http://www.nycourts.gov/reporter/3dseries/2020/2020_05977.htm

FIRST DEPARTMENT

People v Powell, 10/22/20 – **SENTENCES / CONCURRENT**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him, upon his plea of guilty, of 3rd degree robbery and 4th degree larceny and imposing consecutive terms. The First Department modified, directing that the sentences be served concurrently, because the crimes were committed through a single act. Legal Aid Society of NYC (Simon Greenberg, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_06026.htm

People v Francis, 10/20/20 – **REDIRECT / IMPROPER**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1st degree manslaughter and 2nd degree CPW. The First Department affirmed, but did find that, on redirect of a prosecution eyewitness, the court erred in allowing testimony that the witness believed that the defendant's friends belonged to the Bloods gang. Defense counsel did not open the door by merely asking why, on the night of the shooting, the witness had pointed out the defendant to the victim. Further, this was not a sufficiently material issue to warrant introduction of the evidence. However, any prejudice was minimal. The defendant's aggregate prison term was reduced from 25 to 20 years. The Office of the Appellate Defender (Stephen Strother, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05867.htm

People v Manafort, 10/22/20 – **DOUBLE JEOPARDY / DISMISSAL**
The People appealed from an order of NY County Supreme Court, granting the defendant's motion to dismiss the indictment on the ground of statutory double jeopardy. The First Department affirmed. The federal charges of which the defendant was convicted involved the same fraud and the same victims as charged in the NY indictment. The exception set forth in CPL 40.20 (2) (b) was inapplicable. The People failed to establish that the federal and state statutes were designed to prevent very different kinds of harm or evil.
http://nycourts.gov/reporter/3dseries/2020/2020_06027.htm

APPELLATE TERM – FIRST DEPT.

People v Parsons, 2020 NY Slip Op 20268 – **INFORMATION / DEFECTIVE**
The defendant appealed from a NY County Criminal Court judgment, convicting him, upon a plea of guilty, of 7th degree criminal possession of a controlled substance. The Appellate Term, First Department reversed and dismissed the accusatory instrument. The information

did not contain sufficient non-conclusory allegations to establish the basis for the officer's belief that the substance seized was a controlled substance. The instrument stated that the officer recovered a substance from the defendant's jacket pocket; and based on his professional training and the characteristic packaging, the officer determined that the substance contained synthetic marijuana. But there were no averments as to the nature of the packaging, and no non-conclusory statements suggesting the presence of other indicia of criminality. Thus, the information was jurisdictionally defective.
http://nycourts.gov/reporter/3dseries/2020/2020_20268.htm

SECOND DEPARTMENT

People v Grant, 10/21/20 –
CORAM NOBIS / RARE GRANT / TWO DECADES LATE
The defendant sought a writ of error coram nobis to vacate a 1998 appellate decision affirming a Suffolk County judgment convicting him of 2nd degree murder and other crimes. The Second Department granted the application, vacating the appellate order, reversing the judgment of conviction, and ordering a new trial. The record did not establish that the trial court read to the parties the contents of a substantive jury note, discussed the contents with counsel, or gave counsel an opportunity to propose a response. Preservation of the issue was not required. Given the absence of record evidence that the court complied with its core CPL 310.30 duties, reversal was mandated. There could be no valid reason for counsel's failure to contend that a mode of proceedings error occurred, based on the *O'Rama* (78 NY2d 270) violation. This single failing was so egregious and prejudicial as to deprive the defendant of the effective assistance of counsel. Thomas Butler represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05922.htm

People v Rodriguez, 10/21/20 – **ILLICIT TEXTS / AUTHOR UNCLEAR**
The defendant appealed from a judgment of Queens Count Supreme Court, convicting him of attempted use of a child in a sexual performance, 1st degree disseminating indecent material to a minor, and another crime. The Second Department reversed. The trial court improperly admitted five screenshots purporting to depict portions of a text conversation between the defendant and the complainant. Neither the text messages nor the complainant's testimony were sufficient to establish that the defendant was the author. Part of the subject conversation occurred while the complainant's former boyfriend was in possession of her unlocked phone. A new trial was ordered. Further, the court found that the above-named counts were duplicitous and dismissed them with leave to the People to re-present any appropriate charges to a Grand Jury. Two justices dissented. Appellate Advocates (Samuel Barr, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05944.htm

People v Joseph, 10/21/20 – **SENTENCE REDUCED / 364 DAYS**
The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of 4th degree criminal possession of stolen property. The Second Department modified. The purported waiver of his right to appeal was invalid because the plea court incorrectly stated that the appellate rights waived constituted an absolute bar to a direct appeal and

failed to inform the defendant of issues available for review. Further, the written waiver form did not overcome the flawed colloquy. Although the defendant had served his sentence, the question of whether the period imposed was too severe was not academic, since the sentence might have potential immigration consequences. The defendant's contention that the punishment violated the Eighth Amendment was unpreserved, but the appellate court reduced his sentence from one year to 364 days. Appellate Advocates (Dina Zloczower, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05928.htm

People v Merrill, 10/21/20 – **GRAVITY KNIFE / DISMISSED**
The defendant appealed from a judgment of Westchester County Supreme Court, convicting him of attempted 3rd degree CPW (gravity knife). The Second Department reversed. The defendant sought dismissal of the indictment because the simple possession of a gravity knife had been decriminalized. Even though the subject statute did not take effect until after his conviction, the appellate court vacated the judgment and dismissed the indictment, in the interest of justice. Adam Seiden represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05936.htm

People v Brown, 10/21/20 – **TRANSCRIPT / CORRECTED**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree rape and other crimes. The Second Department affirmed. Among other things, the appellate court agreed with the grant of the People's motion to resettle the trial transcript and the finding, after a hearing, that the transcript should reflect that the court read a jury note into the record verbatim. A party to an appeal is entitled to have his case show the facts as they really happened at trial. Courts have the inherent power to correct clerical errors and to conform the record to the truth. Here the hearing evidence supported the finding that the original transcript erroneously indicated that the word "parts" instead of "counts" was stated when the court read the jury note into the record; and that the incorrect word was the result of a stenographic error.
http://nycourts.gov/reporter/3dseries/2020/2020_05912.htm

People v Acevedo, 10/21/20 – **COLLISION / NOT MANSLAUGHTER**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree manslaughter (two counts), criminally negligent homicide, and another crime, arising from a two-car collision. The Second Department modified. The guilty verdicts as to the above-named crimes were not supported by legally sufficient evidence. The People failed to establish that the defendant engaged in an additional affirmative act, aside from speeding, as required to find recklessness or criminal negligence. Jonathan Edelstein represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05909.htm

THIRD DEPARTMENT

People v Caden N., 10/22/20 – **COLLISION / MANSLAUGHTER**
The defendant appealed from a Chemung County Court judgment, which sentenced him upon his adjudication as a youthful offender for having committed acts constituting 1st degree vehicular manslaughter. The Third Department affirmed. The proof at the bench trial supported the finding that the defendant operated his vehicle, while impaired by marihuana, in a manner that caused the victims' deaths. As to causation, the People showed that, by abruptly turning left in front of a motorcycle, the defendant set in motion events that led to the deaths of that vehicle's driver and passenger; and it was foreseeable that the victims could die as a result of the defendant's conduct.
http://nycourts.gov/reporter/3dseries/2020/2020_05979.htm

People v Chappell, 10/22/20 – **VERDICT SHEET / ANNOTATIONS**
The defendant appealed from a judgment of Broome County Court, convicting him of 2nd degree murder and other crimes. The Third Department withheld decision. County Court made notations on the verdict sheet that were not authorized under CPL 310.20 (2), so the defendant's consent was required. The record did not reveal if the defendant had an opportunity to review the verdict sheet, because the charge conference was held in chambers off the record. Remittal for a reconstruction hearing was ordered. Paul Connolly represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05978.htm

M/O State v Kenneth II., 10/22/20 – **MHL ART. 10 / IAC**
The respondent appealed from orders of Cortland County Supreme Court, entered in proceedings pursuant to Mental Hygiene Law Article 10. He asserted that defense counsel did not provide effective assistance. Among other things, counsel failed to move for a *Frye* hearing to challenge the diagnosis of other specified paraphilic disorder (nonconsent). The Third Department withheld decision. Court of Appeals decisions in 2012 and 2014 clearly set the stage for such a challenge, and there was no tactical reason not to have seized the opportunity. This single failing deprived the respondent of effective assistance. Thus, there was a remand for a *Frye* hearing. Adam Van Buskirk represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05980.htm

FAMILY

FIRST DEPARTMENT

M/O Stephanie M. v Edgar C., 10/20/20 –
CREDIBILITY DETERMINATION / *ANDERS* BRIEF ACCEPTED
The father appealed from an order of NY County Family Court, which granted the mother's petition seeking an order of protection. The First Department affirmed and granted assigned counsel's application to withdraw as counsel. There were no non-frivolous issues to be raised on appeal. No grounds existed to disturb the trial court's credibility determination; and the record supported excluding the father from the mother's residence as reasonably necessary to provide meaningful protection to her and to advance the best interest of the parties' child. *(Cf. Matter of Hannah T.R., 149 AD3d 957 [2nd Dept], and Matter of Darin J. v Tylena S., 298 AD2d 630 [3rd Dept] [rejecting Anders briefs]).*
http://nycourts.gov/reporter/3dseries/2020/2020_05858.htm

SECOND DEPARTMENT

M/O Palombelli v Guglielmo, 10/21/20 – **SUPPORT VIOLATION / REVERSAL**
The mother appealed from an order of Westchester County Family Court, which found that she willfully violated a support order. At a hearing on the confirmation of willfulness, the mother proffered evidence that she was indigent and unable to pay child support. Yet Family Court did not allow her to adduce any evidence as to her financial situation, and denied her request for an adjournment to obtain more proof. That was error. If the mother had been given a chance to substantiate her claims and had done so, the court would have been constrained to deny the father's petition. The matter was remitted for a new hearing. W. David Eddy represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05903.htm

M/O Azayla K. L. (Aleisha L.), 10/21/20 – **SUMMARY JUDGMENT / ERROR**
The mother appealed from a Kings County Family Court order, which granted ACS's motion for summary judgment. The Second Department reversed. The agency did not establish, as a matter of law, derivative neglect of the youngest child. Medical records revealed that, by making progress in mental health treatment, the mother resolved issues underlying the neglect findings as to the two older children. Brooklyn Defender Services represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05902.htm

THIRD DEPARTMENT

M/O Thomas GG. v Bonnie Jean HH., 10/22/20 – **SUMMARY JUDGMENT / ERROR**
The mother appealed from an Albany County Family Court order, granting the father's motion for summary judgment, terminating his child support obligation on the ground of his abandonment by the child. The Third Department reversed and remitted. Given his long absence from his son's life and the child's development disabilities, the father did not

establish, as a matter of law, that the teenager's refusal to have contact with him was unjustified. A full evidentiary hearing was needed. Although Family Court did not err in declining to assign an AFC, such an appointment would have been advisable and should occur upon remittal. Sandra Colatosti represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05988.htm

M/O Edwin Z. v Courtney AA., 10/22/20 – **PARENTAL ACCESS / REVERSED**
The father appealed from an order of Schenectady County Family Court, which, at the close of his proof, granted the mother's petition to dismiss his petition seeking expanded parental access and an order allowing enrollment of the child in a designated public school. The Third Department reversed and remitted. The father established a change of circumstances; there was no order as to what school the child would enroll in, after having attended parochial school through eighth grade. Family Court erred in denying his request for a *Lincoln* hearing with the 14-year-old child, which was needed to make a sound decision. Karen Kimball represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05987.htm

M/O Matthew DD. v Amanda EE., 10/22/20 – **PARENTAL ACCESS / *MICHAEL B.***
The mother appealed from an order of Broome Court Family Court, which granted the father's petition to modify visitation, allowing for overnight access on alternate weekends. The Third Department, which had granted a stay pending appeal (*see* Family Ct Act § 1114 [b]), reversed and remitted. The AFC advised the appellate court of subsequent developments showing that the record was no longer sufficient to determine the father's fitness for overnight visitation. *See Matter of Michael B.*, 80 NY2d 299. It was undisputed that he had moved into new lodgings with three or four roommates, who made the child, age 12, feel uncomfortable. Also, due to the crowded conditions, she had to share a bed with the father. Lisa Miller represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05997.htm

M/O Alison RR., 10/22/20 – **PARENTAGE / ASSISTED REPRODUCTION**
The petitioners appealed from an Albany County Family Court order, which dismissed their application for an order declaring them to be the legal parents of the subject child. The Third Department affirmed. The petitioners were a same-sex couple who were named as the child's parents on her birth certificate. Petitioner Alison RR. gave birth to the child with the assistance of a sperm donor who gave up his parental rights. Family Court did have subject matter jurisdiction to hear petitions seeking a declaration that a person was the parent of a child born out of wedlock. But these petitioners were married at all relevant times. Soon Family Ct Act Article 5-C (L 2020, ch 56, part L, §§ 1, 29, eff. Feb. 15, 2021) would allow for a judgment of parentage. In the alternative, the petitioners could bring a declaratory judgment in Supreme Court to determine the status of the child and the rights of interested parties.
http://nycourts.gov/reporter/3dseries/2020/2020_06002.htm