CRIMINAL

FIRST DEPARTMENT

DECISION OF THE WEEK

People v Crovador, 10/30/18 – ***BOONE* RETROACTIVE / REVERSAL**

The defendant appealed from a judgment of Bronx County Supreme Court convicting him of 3rd degree robbery. The First Department reversed and remanded for a new trial. The trial court should have permitted the defendant to introduce expert testimony that witnesses are less likely to accurately identify persons of other racial groups than persons of their own race; and it should have the granted the defendant's request for a cross-racial identification charge. *People v Boone*, 30 NY3d 521, should be applied retroactively. Since *Boone* announced a new rule based on state law, its application to cases pending on appeal depended on three factors. *See People v Mitchell*, 80 NY2d 519. (1) Standards going to the heart of a reliable determination of guilt or innocence favored retroactive application. (2) Extent of judicial reliance on the old rule weighed for prospective application. (3) Retroactive application would not significantly affect the administration of justice. The Legal Aid Society of NYC (Katheryne Martone, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07273.htm

People v Brith, 10/30/18 – **CHALLENGE FOR CAUSE / REVERSAL**

The defendant appealed from a judgment of New York County Supreme Court convicting him of drug charges. The First Department reversed and ordered a new trial. The trial court erred in denying the defendant's challenge for cause to a prospective juror who repeatedly expressed a predisposition to credit police testimony and a belief that innocent defendants would testify. The panelist did not give an unequivocal assurance as to his ability to be fair and impartial. The Legal Aid Society of NYC (Jonathan Garelick, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07250.htm

SECOND DEPARTMENT

People v Martinez, 10/31/18 – **CHALLENGE FOR CAUSE / CONSOLIDATION / REVERSAL**

The defendant appealed from a judgment of Kings County Supreme Court convicting him of 2nd degree burglary and other charges. The Second Department reversed and ordered new trials. In two separate indictments, the defendant was accused of committing four separate home burglaries. As the People conceded, the trial court erred in denying the defendant's for-cause challenge to a prospective juror who indicated that, given his experience in a high-crime area, it was a "legitimate question" whether he could be fair. The prospective juror was not rehabilitated by a collective response. Since the defendant exercised a peremptory challenge to remove the prospective juror and later exhausted his challenges, the issue was preserved. Supreme Court also erred in granting the People's motion to consolidate the indictments. There was a substantial disparity in the evidence tying the defendant to the offenses in the separate indictments. The jury may have

convicted the defendant as to the charges in one of the indictments due to the cumulative effect of the evidence. Appellate Advocates (Anders Nelson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07329.htm

Peter v Gerardi, 10/31/18 – **SEXUAL OFFENSES DUPLICITOUS / DISMISSAL**
The defendant appealed from a judgment of Queens County Supreme Court convicting him of multiple sexual offenses. The Second Department vacated rape and criminal sexual act convictions under counts 28–47 and 49–58. The complainant's testimony demonstrated that each of those counts was premised on multiple acts of rape and criminal sexual act, and the counts were thus void for duplicitousness. Appellate Advocates (Alexis Ascher, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07325.htm

THIRD DEPARTMENT

People v Simon, 11/1/18 – **DEFECTIVE PLEA / REVERSAL**
The defendant appealed from a judgment of Sullivan County Supreme Court, convicting him of drug and weapon charges. On appeal, he asserted that his guilty plea was not knowing, voluntary and intelligent, because County Court failed to adequately inform him of the constitutional rights he was waiving. The Third Department agreed. While the argument was unpreserved, the appellate court exercised its interest of justice jurisdiction. In its abbreviated colloquy, County Court made no mention of the privilege against self-incrimination or the right to be confronted by witnesses. The court conducted only a vague inquiry into whether the defendant had spoken to counsel about his rights. Theodore Stein represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07370.htm

People v West, 11/1/18 – **BOATING TRAGEDY / MANSLAUGHTER AFFIRMED**
The defendant appealed from a judgment of Warren County Court convicting him of 2nd degree manslaughter and other charges, and imposing an aggregate term of 5 to 15 years. The Third Department affirmed. On a summer evening, Robert Knarr was taking his family for a ride in his boat on Lake George when the boat was struck and overrun by another vessel, steered by the defendant. As a result of the collision, Knarr's young granddaughter was killed and his daughter was seriously injured. The integrity of the grand jury proceeding was not undermined when the prosecution presented inadmissible blood test evidence; there was no indication of the People's bad faith. County Court did not err when it granted the People's for-cause challenge to a prospective juror who was under investigation for rape. The defendant acted with the requisite degree of recklessness: after a day of heavy drinking and drug use, he piloted the boat at excessive speeds in the dark, struck the other boat, ignored screams, resumed his course, and failed to report the incident. Finally, County Court properly allowed the People to impeach their own witness with a prior inconsistent statement regarding whether the defendant had appeared impaired.
http://nycourts.gov/reporter/3dseries/2018/2018_07373.htm

OTHER MATTERS

Court Watcher Blog, 10/28/10 – **COURT OF APPEALS IN THE ERA OF TRUMP**
Prof. Bonventre's concluding thoughts: It remains to be seen how faithful the current New York Court of Appeals will be to the historic tradition of the independent protection of state constitutional rights and fundamental fairness. Of late, that tradition has been manifesting itself primarily in dissenting opinions decrying the majority's indifference to injustices left unredressed. In the Trump era, and of the federal Supreme Court the President is remaking, the fundamental role of state courts could not be more compelling: to be mindful of the dual sovereignty of our system of government and stand as a bulwark against the erosion of fundamental rights and liberties.
http://www.newyorkcourtwatcher.com

Transcript of Oral Argument, U.S. Supreme Court – *GARZA V. IDAHO*, 10/30/18
The issue: Whether the presumption of prejudice recognized in *Roe v Flores-Ortega*, 528 US 470, applies when a defendant instructed his trial counsel to file a notice of appeal, but counsel countermanded that instruction because the plea agreement included an appeal waiver. On appeal, the United States supported the respondent State of Idaho as amicus curiae. Here are some comments from the bench, Justice Kavanaugh: "I haven't seen much evidence of practical problems from the presumption" (p 49). "And if there's no evidence of a problem, why complicate the law?" (p 50). "An appeal waiver never gives up everything. It can't" (p 51). Justice Breyer: "*Flores-Ortega* says that "the complete denial of counsel during a critical stage of a judicial proceeding … ordinarily requires a presumption of prejudice…why isn't that exactly the same here?" (p 57).
https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1026_m6

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