CRIMINAL

SECOND DEPARTMENT

DECISION OF THE WEEK

People v Batista, 11/7/18 – **SENTENCE UPHELD / APPEAL WAIVER ANGST**

On appeal from a sentence imposed by Queens County Supreme Court on a 1st degree robbery conviction, the defendant contended that the term was excessive. The Second Department affirmed, finding that the appeal waiver was valid and precluded review of the sentence. However, the appellate court took the opportunity to urge trial courts to give greater attention to the colloquy used in taking a waiver of the right to appeal. *People v Brown*, 122 AD3d 133, described a proper colloquy. Moreover, the CJI & Model Colloquies include an apt model colloquy for an appeal waiver. While such a waiver is meant to advance finality and hold parties to their bargains, trial courts often conduct perfunctory waiver colloquies, which then serve as a pathway to future litigation. In concurrence, Justice Scheinkman expressed concern about the growing appeal waiver jurisprudence. In case after case, the same trial judges use flawed formulations, thus causing reviewing courts to devote countless hours to scrutinizing the inquiries. Use of a model colloquy would help. The "appeal waiver" was really an "appeal limitation." Regardless of the label, appeal waivers have become part and parcel of plea bargaining. On the one hand, appeals are perfected in only a small fraction of plea cases; perhaps waivers cause many defendants to forgo appeals. On the other hand, in the past five years, waivers were found invalid in the First, Second, Third, and Fourth Departments in 15, 200, 75, and 90 cases, respectively. While waivers are part of the consideration for the plea deal, invalidating a waiver does not undo the plea, so prosecutors have an incentive to be proactive in ensuring judges ask the right questions. Appellate Advocates (A. Alexander Donn, of counsel), represented the appellant. [A Nov. 9 New York Law Journal article noted that this decision comes as reducing backlogs remains a top priority for New York judges, and that the Second Department is a prime example of an overburdened court.]
http://nycourts.gov/reporter/3dseries/2018/2018_07445.htm

People v Malik, 11/7/18 – **PRE-*PADILLA* CASE / IAC HEARING ORDERED**

The defendant appealed from a Queens County Supreme Court order which denied his CPL 440.10 motion without a hearing. The Second Department ordered a hearing. The defendant moved to the United States from Pakistan in 2003 as a lawful permanent resident. Upon a plea of guilty in 2007, he was convicted of 1st degree reckless endangerment. The defendant completed a program, and five years' probation was imposed, consistent with the plea deal. His 440 motion alleged that he had been deprived of effective assistance by counsel's incorrect statement that he would not be subject to deportation as a consequence of his plea. *Padilla v Kentucky* was inapplicable; but prior to *Padilla*, the Court of Appeals held that inaccurate advice about immigration consequences fell below an objective standard of reasonableness. *See People v McDonald*, 1 NY3d 109. The defendant affirmed that he rejected an initial plea offer that included incarceration because of the risk of deportation. Defense counsel did not dispute these facts. The defendant was entitled to a hearing regarding the errant advice and whether it was

reasonably probable that, if correctly advised, he would not have pleaded guilty. Labe Richman represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07452.htm

THIRD DEPARTMENT

People v Kurtis P., 11/8/17 – **SIX-FIGURE RESTITUTION / UPHELD**
The defendant appealed from an order of Chemung County Court directing him to pay restitution. When the defendant was age 16, he and a codefendant set fire to a warehouse. The defendant pled guilty to arson charges, was adjudicated a youthful offender, and was ordered to pay restitution. After a hearing, County Court directed the defendant to pay $622,400. He contended that quoted demolition costs of $480,000 exceeded the out-of-pocket loss resulting from the crime. The Third Department observed that it did not matter if the warehouse owner did not actually expend the amount quoted for demolition. Moreover, the claim that the trial court failed to take into consideration the defendant's ability to pay was unavailing. County Court had acknowledged the defendant's youth and his ability to pay only a small amount and had ordered payments of only $100 per month while defendant was in school. The matter was to be returned to court later to revise the repayment schedule. The court noted that the defendant was free to apply for resentencing under CPL 420.10 (5) based on his inability to pay the restitution award.
http://nycourts.gov/reporter/3dseries/2018/2018_07489.htm

FOURTH DEPARTMENT

People v Davis, 11/9/18 – ***BATSON*** **/ PRETEXT REASON / REVERSAL**
The defendant appealed from a judgment of Onondaga County Court convicting him, upon a jury verdict, of two counts of 2nd degree rape and several other charges. On a prior appeal, the Fourth Department determined that the defendant met the initial burden on his *Batson* application, but reserved decision and remitted for the People to articulate a nondiscriminatory reason for striking an African-American prospective juror, and for the court to determine whether the proffered reason was pretextual. On remittal, the People failed to meet their burden. The ADA did not remember his reason for striking the prospective juror at issue; stated that it had "nothing to do with race;" and further recalled that "there was something" on the juror's questionnaire that he "did not particularly like." Such explanation was inadequate, since it was little more than a denial of discriminatory purpose and a general assertion of good faith. The reviewing court reversed the judgment and granted a new trial. Hiscock Legal Aid Society (Phil Rothschild, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07569.htm

People v Rosario, 11/9/18 – **PLEA ALLOCUTION RAISES DOUBT / REVERSAL**
The defendant appealed from a judgment of Niagara County Court convicting him of 1st degree sexual abuse (two counts). The Fourth Department reversed, vacated the plea, and remitted. Although defendant's contention survived his valid waiver of the right to appeal, he failed to preserve that contention; did not move to withdraw the plea or to vacate the judgment of conviction on that ground. The case fell within the rare exception to the

preservation requirement: the defendant made a statement during the plea allocution that raised a potentially viable affirmative defense, thereby giving rise to a duty on the part of the court to ensure that the defendant was aware of that defense and was knowingly and voluntarily waiving it. The appellate court concluded that the court's inquiry was insufficient to meet that obligation. Legal Aid Bureau of Buffalo (Tim Murphy, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07564.htm

People v Jones, 11/9/18 – **NO YO UPHELD / SENTENCE REDUCED**
The defendant appealed from a judgment of Onondaga County Supreme Court, which determined that he was ineligible for youthful offender status. The defendant had been convicted of the armed felony offenses of 1st degree assault and 2nd degree CPW; he was not a minor participant in the crimes; and there were no mitigating circumstances bearing directly on how the crimes were committed. The Fourth Department held that, although the trial court did not abuse its discretion as to the YO adjudication, the aggregate term of 35 years was too severe. The victim was a rival gang member who tried to rob members of the defendant's gang when the defendant shot at the victim, who was struck by a bullet, but survived. The defendant had no prior criminal record; he was only 18 years old when he committed the crimes; and the People offered him 20 years prior to trial. Two justices dissented. Hiscock Legal Aid Society (Kristen McDermott, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07556.htm

People Funk, 11/9/18 – **OUT-OF-STATE FELONY / IMPROPER PREDICATE**
The defendant appealed from a judgment of Ontario County Court convicting him, upon a jury verdict, of 2nd degree assault and other charges. The Fourth Department held that the defendant was improperly sentenced as a second felony offender. The predicate conviction—the Pennsylvania crime of burglary—was not the equivalent of a New York felony. Although the defendant failed to preserve that contention for review, the appellate court exercised its interest of justice jurisdiction. There is no element in the Pennsylvania statute, comparable to the element in the analogous New York statute, that an intruder knowingly entered or remained unlawfully in the premises. The sentence was vacated and the matter remitted for resentencing. The Ontario County Public Defender (Mary Davison, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07558.htm

People v Griffith,11/9/18 – **SORA / INEFFECTIVE ASSISTANCE**
The defendant appealed from an order of Onondaga County Court which denied his petition seeking a downward modification of his previously imposed classification as a level-three risk. The Fourth Department reversed, reinstated the petition, and remitted. The appellate court noted that the right to appeal was conferred by CPLR 5701. *See People v Charles*, 162 AD3d 125. The defendant was denied effective assistance of counsel. In response to his petition, assigned counsel wrote to the SORA court indicating that the petition lacked merit; counsel would not support it; and he had advised defendant to withdraw it so that he would not needlessly delay his right to file a new modification petition in two years. Thus, defense counsel essentially became a witness against the defendant and took a position

adverse to him. Further, a defendant may commence a Correction Law § 168-o (2) proceeding annually; thus, the advice was also incorrect. However, the SORA court did not err in refusing to allow the defendant to challenge his plea or other aspects of his underlying conviction, as the defendant pro se asserted; a SORA proceeding may not be used to challenge the underlying conviction. William Clauss represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07579.htm

People v Page, 11/9/18 – **PEOPLE'S APPEAL / NO VALID CITIZEN'S ARREST**
The People appealed from an order of Erie County Supreme Court which granted the defendant's motion to suppress the evidence seized as the result of a traffic stop. The Fourth Department affirmed and dismissed the indictment. The case hinged on the status of a marine interdiction agent with the US Customs and Border Protection Air and Marine Operations, who was a deputized task force officer with the Niagara County Sheriff's Department. He was traveling on a highway in Erie County in an unmarked truck when he observed a vehicle engaging in dangerous maneuvers and allegedly committing several traffic violations. The agent called 911 and followed the vehicle. Buffalo Police then arrived and seized a firearm in the vehicle, resulting in a CPW charge. On appeal, the People contended that the agent was not a peace officer. The appellate court held that, if the agent was not a peace officer, he did not make a valid citizen's arrest. A private person is not authorized to display emergency lights nor to approach the seized vehicle as backup officer for safety purposes, as this agent also did. Legal Aid Bureau of Buffalo (Robert Kemp, of counsel) represented the defendant-respondent.
http://nycourts.gov/reporter/3dseries/2018/2018_07552.htm

FAMILY

SECOND DEPARTMENT

Matter of Argueta v Santosi, 11/7/18 – **SIJS PETITION / SPECIAL FINDINGS MODIFIED**
The father appealed from an order of Nassau County Family Court that denied the motion of the subject child and the father to amend a prior special findings order. The Second Department modified. The father had filed a Family Court Act Article 6 petition for custody of the subject child to obtain an order making the specific findings needed to enable the child to apply for Special Immigrant Juvenile Status (SIJS). The child filed a motion seeking an order making the requisite special findings. Family Court granted the child's motion, and thereafter, the child submitted a petition for SIJS. The petition was initially approved. However, USCIS then stated its intention to revoke the approval based on deficiencies in the special findings order. The child moved to amend the findings, and the father joined in the motion. Family Court denied the motion. The appellate court amended the special findings order to clarify that the basis for Family Court's jurisdiction was Family Court Act § 651(a) and to specify that it would not be in the child's best interests to be returned to El Salvador because the mother was unable to protect the child from harm by gang members there. Bruno Bembi represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07424.htm

Matter of Tyler D., 11/7/18 – **PINS ORDER / REVERSED**
In a Family Court Act article 7 proceeding, the appellant challenged an order rendered by Putnam County Family Court. The Second Department reversed. In 2015, the assistant principal at the appellant's high school filed a PINS petition based on persistent truancy. Represented by counsel, the appellant admitted to truancy and consented to an ACD order. The Probation Department alleged that the appellant violated the terms of the ACD order. Following a hearing, Family Court issued an order finding violations, restoring the matter to the calendar, vacating the ACD order, adjudging the appellant to be a PINS, and directing that he be placed in the custody of the local Social Services Department for up to 12 months. Although that term had expired, the order was not academic, in light of potential enduring consequences of a violation finding. Family Court Act § 741(a) provided that at the initial appearance of a respondent in a proceeding, and at the commencement of any hearing, the respondent and his parent must be advised of his right to remain silent. The failure to abide by such mandate constituted reversible error, even if a respondent consented to the disposition in the presence of counsel or failed to seek to withdraw his admissions. Here Family Court never apprised the appellant of his right to remain silent, and that error could not be considered harmless. William Horwitz represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07427.htm

Lueker v Lueker, 11/7/18 – **INABILITY TO PAY / NO CONTEMPT**
In post-divorce proceedings, the plaintiff appealed from an order of Kings County Supreme Court which granted the defendant's motion to hold him in contempt for failure to comply with a prior order. The Second Department reversed. The prior order directed the plaintiff to post a bond for $150,000, as security for payment of tuition for the parties' daughter, as required by the judgment of divorce. In response to the defendant's showing that she was prejudiced by the plaintiff's knowing disobedience of a lawful order of the court expressing an unequivocal mandate, the plaintiff proffered credible evidence of a defense—inability to obtain the bond. The appellant represented himself on appeal.
http://nycourts.gov/reporter/3dseries/2018/2018_07421.htm

FOURTH DEPARTMENT

Matter of Parmenter v Nash, 11/9/18 – **SUPPORT / QUITTING JOB / NOT VOLUNTARY**
The father appealed from an order of Onondaga County Family Court which denied his objection of petitioner to the Support Magistrate's order. The Fourth Department reversed, granted the objection, reinstated the petition, and remitted. From 2013 to 2015, the parties resided together with their son in Virginia. In 2015, the mother relocated with the child to New York. Six months later, the father quit his and moved to New York to be closer to the child. He then petitioned to reduce child support because his new job paid less than his prior position. The Support Magistrate dismissed the petition because the father voluntarily left his higher-paying job. Family Court upheld the order. Loss of employment may constitute a change in circumstances, justifying a modification of support, where the loss occurred through no fault of the petitioner and he diligently sought re-employment. The need to live closer to a child is a compelling reason to quit a job. That parent should not be deemed voluntarily unemployed or underemployed where he is a loving parent trying to

do the right thing for the children. In such circumstances, to punish such a parent by requiring higher child support is neither good law nor good policy. Legal Aid Society of Mid-NY (Joseph Maslak, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07553.htm

ARTICLE

"Unjust and Nonsensical" Disparity in Scope of Appellate Representation
NEW YORK LAW JOURNAL, NOV. 9, 2018, BY AL O'CONNOR
Legislation is needed to ensure that all indigent New Yorkers have a fair opportunity to litigate IAC claims related to their direct appeals. A bill sponsored by Assemblywoman Vivian E. Cook would do just that. The bill (A8465/2017-18) would amend County Law § 722 to provide that any assignment of counsel for a direct appeal "includes authorization for representation" in CPL Article 440 proceedings. Lawyers would be paid for work associated with the "preparation and proceeding" of a 440 motion, including time spent investigating facts, researching the law, and drafting pleadings. The bill covers IAC claims and all other issues cognizable under CPL Article 440. Because the 440 authorization is granted under the umbrella of an appellate assignment, the bill's language would presumably allow attorneys to voucher time spent investigating seemingly promising issues that do not pan out. In this way, lawyers would no longer need to fear being financially penalized for exercising due diligence on a client's behalf. The amendment would allow all appellate attorneys to practice in conformance with professional standards and repair the current system, which the bill memo calls "unjust and nonsensical." The bill would not establish a free-standing right to counsel in CPL Article 440 proceedings and would apply only when there is a pending direct appeal and a 440 motion implicates the conviction or sentence being appealed. The bill passed 127-0 in the New York State Assembly, but died in the Senate. Attached is a PDF of the compelling article regarding the bill.

CYNTHIA FEATHERS, Esq.
Director of Quality Enhancement
For Appellate and Post-Conviction Representation
NY State Office of Indigent Legal Services
80 S. Swan St., Suite 1147
Albany, NY 12210
Office: (518) 473-2383
Cell: (518) 949-6131