CRIMINAL

FIRST DEPARTMENT

DECISION OF THE WEEK

People v McGregor, 11/14/19 – **AMOROUS JUROR'S MISCONDUCT / REVERSAL**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted 2nd degree murder, 2nd degree conspiracy, and other crimes, following a six-week trial involving nearly 100 witnesses. He was acquitted of substantive charges arising from three out of four gang-related shooting incidents. The First Department reversed and ordered a new trial, because the lower court erred in denying the defendant's post-conviction motion. After the verdict, but before sentencing: (1) a rival gang member/cooperating witness informed the prosecutor that he had been corresponding with Juror 6, who was currently visiting him jail; (2) the juror sent the prosecutor a letter requesting that the witness's sentence be reduced, in light of his cooperation; and (3) the witness sought the court's assistance in obtaining a license to marry the juror. An investigation by the prosecutor revealed that the romance was sparked while deliberations were underway. At that time, juror 6 wrote to the witness in jail, because she felt for him and wanted to speak to him, and she provided her phone number. After the verdict, the juror and witness communicated by phone several times a day, and the juror wrote 50 letters to the witness.

At the CPL 330.30 hearing, juror 6 testified that she contacted the cooperating witness because she felt bad for a person who had tried to change his life and then found that his "history caught up" with him; and "obviously, there was a physical attraction." Supreme Court found that the juror's conduct, while "unwise," did not affect the fairness of the proceedings. That was error. CPL 330.30 (2) authorizes a court to set aside a verdict on the ground of juror misconduct that may have affected a substantial right of the defendant and was not known to him prior to the verdict. Here the misconduct was willful and blatant. Assertions of impartiality by juror 6 had to be taken with a grain of salt; the actual and implied bias present here indicated a predisposition to credit the witness's testimony. The juror misconduct undermined the defendant's right to a fair trial. Debevoise and Plimpton represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08283.htm

People v Richards, 11/14/19 – **IMMIGRATION / IAC / REVERSAL**

The defendant appealed from an order of Bronx County Supreme Court, which denied his CPL 440.10 motion to vacate a judgment convicting him of 3rd degree robbery. The First Department reversed and remanded. Hearing proof established that the defendant was denied effective assistance in regard to immigration-related aspects of plea negotiations. Defense counsel had no strategic reason for not seeking a sentence that would avoid immigration consequences. Indeed, counsel admitted that, at the time of the plea, he did not know what an aggravated felony was and mistakenly believed that the defendant was rendered deportable due to his prior youthful offender adjudication—which resulted in a violation of probation charge disposed of at the time as the instant plea. The People agreed

to total prison time of one to three years for the robbery and VOP; and there was no evidence that they actively sought the defendant's deportation. Thus, there was a reasonable probability that the prosecution would have agreed to an immigration-favorable disposition resulting in the same aggregate prison time. The Legal Aid Society of NYC (Richard Joselson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08268.htm

SECOND DEPARTMENT

People v Buyund, 11/13/19 –
BURGLARY ONE AS SEX OFFENSE / NOT REGISTERABLE / REVERSAL
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree burglary as a sexually motivated felony upon his plea of guilty, sentencing him, and requiring him to register as a sex offender. The Second Department reversed. The defendant's conviction was not a registerable sex offense under Correction Law § 168-a (2) (a). From the statute's "clear and unambiguous" language the appellate court drew an "irrefutable inference" that the omission of certain sexually motivated felony offenses was intentional. The People's suggested interpretation would broaden the scope of the statute to include all sexually motivated felony offenses as registerable under SORA. Had the Legislature intended that result, it would have said so. The argument did not require preservation. Appellate Advocates (Patricia Pazner, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08207.htm

People v Walton, 11/13/19 – **NO PRS NOTICE / REVERSAL**
The defendant appealed from a judgment of Rockland County Court, convicting him of 2nd degree CPW. The Second Department reversed, vacated the guilty plea, and remitted. At the plea proceeding, the court informed the defendant that the promised sentence was conditioned upon him not being arrested before the imposition of sentence. But the defendant was arrested, so County Court imposed an enhanced sentence, which included post-release supervision. Since PRS was not previously mentioned, the defendant's plea was not knowing, voluntary, and intelligent. *See People v Turner*, 24 NY3d 254. Gary Eisenberg represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08230.htm

People v Williams, 11/13/19 –
PERSISTENT VIOLENT FELONY OFFENDER / MODIFICATION
The defendant appealed from a Queens County Supreme Court judgment, convicting him of 2nd degree attempted CPW and sentencing him as a persistent violent felony offender (PVFO). The Second Department vacated the sentence, because the defendant should not have been sentenced as a PVFO. In 2006, he pleaded guilty to attempted 3rd degree CPW as the sole count of an SCI. Such crime did not constitute a violent felony offense, unless pleaded to as a lesser included offense under an indictment charging a greater offense. *See* Penal Law § 70.02 (1) (d); *People v Dickerson*, 85 NY2d 870. Thus, the defendant's conviction of that prior crime was not a violent felony, and he was not a PVFO. Appellate Advocates (Paul Skip Laisure, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08231.htm

FOURTH DEPARTMENT

People v Tripp, 11/15/19 – **CONSECUTIVE TERMS / MODIFICATION**
The defendant appealed from a judgment of Onondaga County Court, convicting him of 2nd degree CPW (two counts) and 2nd degree assault. The Fourth Department modified the judgment. The sentence was illegal insofar as County Court directed that the CPW 2 sentences would run consecutively to the assault term. The People failed to meet their burden of establishing that the crimes were committed through separate acts or omissions. The issue did not require preservation. All sentences would run concurrently. Linda Campbell represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08339.htm

People v McDermid, 11/15/19 – **APPEAL WAIVER / INVALID**
The defendant appealed from a Lewis County Court judgment, convicting him of 1st degree manslaughter and other crimes. The Fourth Department held that his oral waiver of the right to appeal from his "conviction" did not encompass his challenge to the severity of the sentence and thus did not foreclose review of the sentence. *See People v Maracle*, 19 NY3d 925. Although the defendant also executed a written waiver of appeal, that document also failed to state that he was waiving his right to appeal the severity of the sentence. However, the sentence was upheld.
http://nycourts.gov/reporter/3dseries/2019/2019_08340.htm

SECOND CIRCUIT

Francis v Fiacco, 11/12/19 –
SECTION 1983 / DUE PROCESS / QUALIFIED IMMUNITY
The plaintiff pleaded guilty to two separate charges in Erie County Supreme Court and Federal District Court–WDNY. The state sentencing occurred first. Supreme Court directed that the term of imprisonment imposed would run concurrently to the federal term. But NY courts lack the authority to order that a state sentence will run concurrently with a sentence from another jurisdiction, unless that other sentence was "imposed at a previous time" and was "undischarged." *See* Penal Law § 70.30 (2-a). To address the problem, the plaintiff contacted Supreme Court, which erected "a Kafkaesque sequence of roadblocks and prerequisites to consideration of his claim." The lower court inaccurately stated that a formal motion was required; rejected the plaintiff's ensuing motion on technical grounds; and suggested a CPLR Article 78 proceeding—which could not have been initiated until after the plaintiff sustained the deprivation of liberty he sought to prevent.

DOCCS officials did not implement the concurrency directive, instead taking the plaintiff into custody, upon completion of his 10-year federal term, to begin his state sentence. *See* Penal Law § 70.30 (1). The plaintiff served four months of his state sentence, before an adjustment caused his release. In an 18 USC § 1983 action, the plaintiff alleged that DOCCS officials violated his due process rights by holding him after the expiration of his federal sentence. District Court–NDNY denied the defendants' motion for summary judgment. They appealed, and the Second Circuit reversed. The defendants violated the plaintiff's due process rights but were shielded by qualified immunity, because the law had

not been clearly established at the time of their conduct. However, the appellate court sharply criticized the defendants. Merely notifying a prisoner that his liberty might be in jeopardy and placing on him the burden of navigating the legal system—from his prison cell and without counsel—did not satisfy due process. Prison officials implementing a sentence that appears to be in error under applicable law must promptly inform the sentencing court, the DA, and defense counsel, so that the problem may be addressed. Such duty was statutory (*see* Correction Law § 601-a) and constitutional.
http://www.ca2.uscourts.gov/decisions/isysquery/868c1adc-e5a2-4509-a4d4-6c80bcb7db13/1/doc/18-1011_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/868c1adc-e5a2-4509-a4d4-6c80bcb7db13/1/hilite/

FAMILY

FIRST DEPARTMENT

Matter of Krystal R. v Kriston L., 11/12/19 – **NEGLECT / AFFIRMANCE**
The father's appeal from an order of disposition rendered by Bronx County Family Court brought up for review a fact-finding order, holding that he neglected the subject child. In addition, the father appealed from an order denying his motion to vacate an order of protection entered against him, after an inquest, upon his default. The First Department affirmed. The neglect finding was supported by the evidence: the father had multiple altercations with the mother in the child's presence, and on at least one occasion, injured them. Regarding the vacatur motion, the father had no reasonable excuse for his failure to appear at the family offense hearing. *See* CPLR 5015 (a) (1). Although he contended that he had just been evicted, he admitted that he simply forgot the date. The lower court properly denied the counsel's adjournment request, where no explanation was provided for the father's absence.
http://nycourts.gov/reporter/3dseries/2019/2019_08152.htm

SECOND DEPARTMENT

Matter of Pinto v Pinto, 11/13/19 – **CUSTODY / REVERSAL**
The father appealed from a Westchester County Family Court order. The Second Department reversed and remitted. There were many controverted issues. Yet prior to the completion of the hearing, Family Court awarded the mother sole custody of the parties' daughter and permitted her to relocate with the daughter. That was error. The father had no opportunity to present a case or cross-examine a key witness. Moreover, the trial court failed to consider the effect relocation would have on the sibling relationships. Joan Iacono represented the father.
http://nycourts.gov/reporter/3dseries/2019/2019_08195.htm

FOURTH DEPARTMENT

Matter of Carmellah Z. (Judasia V.), 11/15/19 – **NEGLECT / REVERSAL**
The mother appealed from an order of Onondaga County Family Court finding neglect. The Fourth Department reversed. Family Court failed to provide adequate factual findings, merely repeating verbatim petition allegations. However, the record permitted resolution on the merits. Family Court erred in denying the mother's motion to dismiss at the close of the petitioner's proof. The agency alleged that the youngest child engaged in an age-inappropriate sexual act with a non-family member, and the mother knew about it but did not timely act. Two caseworkers described an out-of-court disclosure by the youngest child. But the petitioner did not offer enough corroborative evidence. No expert validation testimony was submitted. Since the mother did not have firsthand knowledge of the incident, her purported admission lacked probative value. Further, the agency did not prove when the mother became aware of that incident. Finally, the caseworkers could not remember basic details. Linda Campbell represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08298.htm

Cynthia Feathers, Esq.
ILS | NYS Office of Indigent Legal Services
Director, Quality Enhancement for Appellate
And Post-Conviction Representation
80 S. Swan St., Suite 1147, Albany, NY 12210
(518) 949-6131 | Cynthia.Feathers@ils.ny.gov