NYLJ LETTER TO EDITOR

APPEAL WAIVERS ARE NOT TRULY VOLUNTARY

BY DAVID LOFTIS, 11/15/18

"NY Appeals Judges Say Trial Courts Should Act to Quell Appeal Waiver Challenges **(NYLJ, 11/9/18)** describes comprehensive opinions by Second Department Presiding Justice Alan Scheinkman and Associate Justice John Leventhal that urge trial courts to be more careful about ensuring the voluntariness of appeal waivers in guilty plea cases. The main problem, however, is not the ill-chosen words of plea court judges. It is that, under the current appeal waiver regime, such waivers are not—and cannot truly be—voluntary. In the main, appeal waivers are not individually negotiated components of a larger plea bargain for which an accused receives a measurable benefit. Rather, in most New York City counties, district attorneys (and even some judges) demand appeal waivers as a non-negotiable ironclad condition of any plea bargain in any case. Such across-the-board waiver policies are antithetical to a fair criminal justice system. They are particularly pernicious in cases where a plea follows the denial of a defense suppression motion. Appeal waiver policies in these cases operate to conceal instances of racial profiling, police perjury, unreliable identification procedures, and coerced statements. They deprive the accused of an opportunity to vindicate his or her constitutional rights on appeal, an opportunity otherwise guaranteed by the Criminal Procedure Law in guilty plea cases, and always available to the prosecution when the court rules in favor of the defense; they stunt the development of appellate suppression jurisprudence and; they are flat-out bad public policy. Rather than seeking to shore up such regimes, our appellate courts should, as former federal judge and current Harvard faculty member Nancy Gertner recommends, act to disassemble them."

David Loftis is the Attorney-in-Charge of Post-Conviction and Forensic Litigation for the Legal Aid Society of NYC.

CRIMINAL

FIRST DEPARTMENT

People v Vasquez, 11/13/18 – **NO PRS NOTICE / PLEA VACATED**

The defendant appealed from a judgment of New York County Supreme Court convicting him of 2nd degree robbery. The First Department reversed. At no time before sentencing did the court inform the defendant that post-release supervision would be included in the enhanced sentence he would receive if he violated conditions of his plea agreement. The ADA's and defense counsel's references to PRS, immediately before sentence was imposed, did not provide notice that would require the defendant to preserve the claim. *See People v Louree*, 8 NY3d 541. The Office of the Appellate Defender (Victorien Wu, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_07658.htm

SECOND DEPARTMENT

People ex rel. Wells v DeMarco, 11/4/18 – **NY OFFICERS / NO IMMIGRATION ARRESTS**
New York law does not permit state and local law enforcement officers to effectuate civil immigration arrests, the Second Department held. The court thus rejected the Suffolk County Sheriff's policy of keeping inmates who are subjects of ICE detention or deportation orders for up to 48 hours after they would normally have been released. ICE warrants and detainers do not fall within CPL definitions of warrants, which do not apply to immigration violations. Since such warrants and detainers are not issued by courts and are administrative in nature, they are unenforceable by state/local agencies in New York.
http://nycourts.gov/reporter/3dseries/2018/2018_07740.htm

People v Fletcher, 11/14/18 – **JURY CHARGE ERRORS / NEW TRIAL**
The defendant appealed from a judgment of Nassau County Supreme Court convicting him of 2nd degree assault and 3rd degree CPW. The Second Department reversed and ordered a new trial. The trial court erred as to instructions regarding justification, as well as temporary and lawful possession of a weapon. The appellate court reviewed the issues in the interest of justice. The justification charge did not convey that, if the jury found the defendant not guilty of 1st degree assault based on the justification defense, then it should render a verdict of acquittal and cease deliberation. Further, the trial court should have delivered an instruction on temporary weapon possession, since if a jury believed that the defendant's use of the knife was justified, such use would have been lawful. Thomas Villecco represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07747.htm

People v Ghingoree, 11/14/18 – **IMMIGRATION CONSEQUENCES / PLEA VACATED**
The non-citizen defendant appealed from a Suffolk County Court conviction for drug possession. The Second Department reversed and vacated the plea. In a motion to withdraw the plea, the defendant said that counsel failed to inform him of immigration consequences. The appellate court held that the defendant had not received effective assistance and there was a reasonable probability that, if properly advised, he would not have pleaded guilty. He had lived in the U.S. since age four and had significant family ties here, including a wife, children, parents, and siblings. Alfred Cicale represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07748.htm

People v Jones, 11/14/18 – ***CRAWFORD* VIOLATION / NEW TRIAL**
The defendant appealed from a judgment of Queens County Supreme Court convicting him of 2nd degree conspiracy and other charges. The Second Department reversed and ordered a new trial based on a *Crawford* violation. The defendant and four other alleged members of the SNOW gang were tried together in connection with the murder of two rival gang members. At trial, Supreme Court declared two law enforcement officers to be gang experts. Information derived from the debriefing of arrested gang members constituted testimonial statements; and the substance of such statements was conveyed to the jury in the guise of expert testimony.
http://nycourts.gov/reporter/3dseries/2018/2018_07752.htm

People v Lucas, 11/14/18 – **LEGALLY INSUFFICIENT EVIDENCE / CONSPIRACY**
As to another defendant in the SNOW gang matter, the evidence was legally insufficient to establish the defendant's guilt of 2nd degree conspiracy. No direct or circumstantial evidence tied this defendant to any plan specifically intended to kill either victim. The defendant was not present at an alleged planning meeting and was not listed as a participant in any social media discussions in which other SNOW gang members discussed the targets. Joseph DeFelice represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07752.htm

THIRD DEPARTMENT

People v Cherry, 11/15/18 – **PRS / STATEMENT STRICKEN**
The defendant appealed from a judgment of Albany County Court convicting him of 3rd degree criminal sexual act. At sentencing, County Court granted his request to redact a portion of the presentence report (PSR) containing a statement made by the arresting officer. On appeal, the defendant contended, inter alia, that the PSR had not been revised. The Third Department ordered that the objectionable statement be redacted from all copies of the PSR. The court cited *People v Freeman*, 67 AD3d 1202, which explained that failing to redact erroneous or improper information from a PSR creates a risk of future adverse effects to a defendant in other contexts, including appearances before the Board of Parole. *See People v* Hicks, 98 NY2d 185 (PSR may be single most important document at sentencing and correctional levels of criminal process). The Albany County Public Defender (Jessica Gorman, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07782.htm

FOURTH DEPARTMENT

People v Flagg, 11/16/18 – **TRAMADOL PILLS / NOT DANGEROUS CONTRABAND**
The defendant appealed from a judgment of the Onondaga County Court convicting him of 1st degree promoting prison contraband and 7th degree criminal possession of a controlled substance. The Fourth Department modified by reducing the contraband conviction to the 2nd degree offense. The charges arose after correction officers recovered four Tramadol pills from the defendant. The appeal turned on the scope of "dangerous contraband," that is, contraband "capable of such use as may endanger the safety or security of a detention facility or any person therein." *People v Finley*, 10 NY3d 647, set forth the test: whether there was a substantial probability that the item would be used in a manner likely to cause death or other serious injury; to facilitate an escape; or to bring about other major threats to institutional safety or security. In the instant case, the focus belonged on the dangerousness of use of the drug at issue; and salient proof was lacking. Hiscock Legal Aid Society (Nathaniel Riley, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07849.htm

People v Vo, 11/16/18 – **MOTIVE TO LIE / PROBATIVE TO VICTIM'S CREDIBILITY**
The defendant appealed from a Supreme Court judgment convicting him of 1st degree sexual abuse. The Fourth Department reversed and granted a new trial. The trial court improperly precluded the defendant from presenting evidence to establish that the

complainant had a reason to fabricate the allegations against him. A victim's motive to lie is not collateral—it is directly probative on the issue of credibility. The excluded evidence was not speculative or cumulative; and defense counsel offered a good faith basis for the excluded line of questioning. The error was not harmless. Defendant also correctly contended that the court erred in permitting the People to present prompt outcry testimony that exceeded the proper scope—i.e. only the fact of a complaint is allowed, not its accompanying details. The Monroe County Public Defender (David Juergens, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07909.htm

People v Pearson, 11/16/18 – **SENTENCING COURT ERROR / REMITTAL**
The defendant appealed from a Supreme Court judgment which convicted him of 2nd degree CPW and misdemeanor DWI. The Fourth Department modified by vacating the sentence for the DWI. Supreme Court failed to apprehend the extent of its sentencing discretion. The contention was not foreclosed by the waiver of the right to appeal and did not require preservation. During the plea colloquy, the court informed the defendant that the fine for the DWI was between $1,000 and $5,000, when it was actually between $500 and $1,000; and the fine was discretionary, not mandatory, if the court imposed a period of imprisonment. Additionally, the record did not establish that the court was aware of the possible periods of probation and the duration for the condition of the ignition interlock device. The matter was remitted for resentencing. Legal Aid Bureau of Buffalo (Kristin Preve, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07908.htm

People ex rel. Garcia v Annucci, 11/16/18 – **SARA / LEVEL-THREE OFFENDERS**
When an incarcerated person previously convicted of a sex offense is conditionally released or released on parole, the Board of Parole must under certain circumstances require, as a mandatory condition of such release, that he refrain from going within 1,000 feet of any school or other facility that primarily serves children. *See* Executive Law § 259-c (14). The condition must be applied to all level-three sex offenders, not only those serving a sentence for an offense enumerated in the above-cited statutory provision, the Fourth Department held. Thus, it affirmed the Erie County Supreme Court order denying the petitioner's application seeking immediate release. The petitioner asserted that he was not subject to the mandatory condition since he was serving a sentence for 3rd degree robbery—a crime not set forth in Executive Law § 259-c (14). The case turned on the meaning of "such person," which was ambiguous. Legislative history strongly supported the respondents' interpretation.
http://nycourts.gov/reporter/3dseries/2018/2018_07868.htm

FAMILY

FIRST DEPARTMENT

Jolanda K. v Damian B., 11/13/18 – **DEFAULT ORDER / VISITATION DENIED**
The father appealed from an order of Bronx County Family Court that denied his motion for visitation and for vacatur of a final order. Upon the father's default, the trial court granted sole custody of the child to the mother. The First Department observed that default orders are disfavored in custody cases, and thus vacatur rules are not applied rigorously. While the father's excuse was unreasonable, the final custody order could not stand, because it did not provide for visitation and offered no rationale for that drastic result. The hearing proof established that the father had regular unsupervised and overnight visitation with the child; and the AFC said that the child strongly wished to resume visits. In remanding, the appellate court cited *Matter of Michael B.*, 80 NY2d 299, 318 (new developments may have special significance in custody matters; appellate court may take notice of new allegations indicating record is no longer sufficient for a determination, requiring remittal). George Reed represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07675.htm

SECOND DEPARTMENT

Thomas R.K. v Tamara S.K., 11/14/18 – **THERAPEUTIC VISITS / IMPROPER DELEGATION**
The mother appealed from an order of Orange County Family Court granting her only limited supervised therapeutic parental access to the parties' two children, while awarding sole custody to the father. The Second Department found that such determination was supported by a sound and substantial basis in the record, but that the trial court erred in failing to set forth a schedule and to designate a provider for the mother's parental access, and instead implicitly delegating those issues to the parties. Thus, the matter was remitted. Rhett Weires represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07725.htm

Matter of Berg v Berg, 11/14/18 **– ORDER OF COMMITMENT / BIASED JUDGE**
The father appealed from an order of commitment of Nassau County Family Court, which was based on his willful violation of spousal and child support obligations. On appeal, the father contended that the trial judge was biased. The Second Department agreed. The judge stated that the father: (1) "symbolize[d] everything that's wrong with the world today;" (2) was "selfish, self-interested, and self-seeking" and "lazy and arrogant;" and (3) was "the last guy" that the Judge "would want to be in a fox hole with" because he would "fold like a cheap suit." Further, the judge compared the father's experiences to his own, describing his own past misfortune and how he picked himself up to become a judge. The father was ordered committed for four months—which was four times the incarceration period recommended by the Support Magistrate. The appeal as to the jail time was dismissed as academic; but the order was reversed insofar as it found a willful violation, and the matter remitted for further proceedings before a different Judge. Lisa Siano represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07719.htm

FOURTH DEPARTMENT

Matter of Brown v Orr, 11/16/18 – **NO CUSTODY FACTUAL FINDINGS / REVERSAL**
The mother appealed from an order of Steuben County Family Court which dismissed her custody modification petition and granted sole custody of the child to the father. The Fourth Department reversed and remitted. Pursuant to a consent order, the parents had joint legal custody and shared physical custody. After entry of the consent order, each parent filed a modification petition. The trial court failed to make factual findings to support the award of custody, as required by CPLR 4213 (b). Particularly in child custody cases, effective appellate review requires appropriate factual findings by the trial court—the court best able to measure the credibility of the witnesses. Upon remittal, findings were needed as to a change in circumstances and the best interests of the child, following an additional hearing if necessary. Mary Benedict represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07905.htm

Happy Thanksgiving!

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