CRIMINAL

DECISION OF THE WEEK

People v Abelove, 11/21/19 – **AG AUTHORITY / PROSECUTING DA**

The AG appealed from an order of Rensselaer County Supreme Court, which granted a motion to dismiss the indictment. The Third Department reversed. A 2015 Executive Order (EO) provided for the appointment of the AG as special prosecutor where a police officer caused the death of an unarmed citizen or there was a significant question as to whether the civilian was armed and dangerous. In 2016, a Troy police sergeant shot and killed an unarmed DWI suspect. Two days later, the AG's office wrote to the Rensselaer County DA seeking information to determine if the AG had exclusive jurisdiction. The DA responded that his office had decided that the EO did not apply, because the victim was driving a vehicle, and that made him an armed civilian. Three days after that, a grand jury returned a no true bill against the sergeant shooter.

A 2017 EO empowered the AG to investigate misconduct arising from those grand jury proceedings. The DA was charged with official misconduct, for withholding material evidence from the grand jury and allowing the sergeant to testify without waiving immunity from prosecution; and 1st degree perjury, for giving false testimony regarding his misconduct. The DA moved to dismiss the indictment based on the AG's lack of authority to prosecute. The appellate court held that the AG had the requisite power, pursuant to Executive Law § 63 (2), (13) and the 2017 EO. The entire indictment against the former DA was reinstated.
http://nycourts.gov/reporter/3dseries/2019/2019_08453.htm

COURT OF APPEALS

People ex rel. Prieston v Nassau County Sheriff, 11/21/19 –
BAIL / REVIEWING COLLATERAL

Under CPL 520.30 (1), a court conducting a bail sufficiency hearing may review collateral pledged on an insurance company bail bond for the purpose of ensuring a defendant's return to court. Nassau County Supreme Court did not abuse its discretion by disapproving the bond at issue, and the Second Department erred in granting the writ of habeas corpus.
http://www.nycourts.gov/reporter/3dseries/2019/2019_08447.htm

FIRST DEPARTMENT

People v Johnson, 11/19/19 – **IAC / IMMIGRATION**

The defendant appealed from judgment of NY County Supreme Court, convicting him of 3rd degree criminal possession of a controlled substance. The First Department held the appeal abeyance and remanded. The defendant was deprived of effective assistance when counsel advised him that, because of his plea, he "will most likely be deported." Such remark was sufficient to permit review on direct appeal. The defendant was entitled to move to vacate his plea upon a showing that there was a reasonable probability that he would not have pleaded guilty had he been made aware of the mandatory deportation

consequences. One justice dissented, opining that a CPL 440.10 motion was needed to discern if "will most likely be deported"—spoken by counsel to the court—reflected the advice to the defendant. The dissent noted that the People served the defendant with a notice of immigration consequences; the court provided immigration warnings; and the defendant said he wanted to plead guilty, regardless of immigration consequences. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08348.htm

People v Delacruz, 11/21/19 – **ATT. GANG ASSAULT 2 – NO SUCH THING**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted 2nd degree gang assault and 2nd degree assault. The First Department vacated the gang assault conviction. A person is guilty of 2nd degree gang assault when, with intent to cause physical injury to another person and when aided by other persons present, he causes *serious* physical injury to such person or to a third person. The attempt to commit such crime was a legal impossibility, since one cannot attempt to cause an unintended result. The Legal Aid Society of NYC (Ellen Dille, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08498.htm

People v Lora, 11/21/19 – **PEOPLE'S APPEAL / SPEEDY TRIAL / DISSENT**
The People appealed from a Bronx County Supreme Court order, granting the defendant's speedy trial motion and dismissing the indictment. The First Department reversed. Two justices dissented. Parties must honor court-imposed deadlines. The trial court advised the parties that it would not entertain untimely requests for extensions to respond to motions. Yet the People untimely sought more time to respond to a CPL 30.30 motion. Since the People defaulted, dismissal was proper.
http://nycourts.gov/reporter/3dseries/2019/2019_08478.htm

People v Shu Ng, 11/21/19 – **ASSAULT / INTENT / INSTAGRAM BRAGGADOCIO**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree assault. The First Department affirmed. During an argument between defendant and his girlfriend, without provocation, the defendant approached the victim and punched him in the face, knocking him back onto the pavement and causing permanent, catastrophic brain injuries. The trial court properly admitted limited evidence of the defendant's athletic and martial arts abilities, consisting of an Instagram photo he posted, along with a document declaring his martial arts prowess. The evidence was relevant to intent, since it tended to show that serious physical injury was a natural consequence of the defendant's act and that he was aware of that fact.
http://www.nycourts.gov/reporter/3dseries/2019/2019_08491.htm

SECOND DEPARTMENT

People v Steele-Warrick, 11/20/19 – **ASSAULT / INTENT / REVERSED**
The defendant appealed from a judgment of Queens County Supreme Court, convicting her of 1st degree assault. The Second Department reversed, vacated the plea, and remitted. The defendant was charged after stabbing her mother-in-law with scissors during an altercation in their home. The police recovered the scissors from a kitchen drawer. During the plea colloquy, the defendant admitted the elements of 1st degree assault as including the intent to inflict physical injury and conduct that caused such injury. However, the crime required *serious* physical injury and conduct that caused such injury. The allocution thus failed to make out the requisite elements of the crime. Appellate Advocates (Angad Singh, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08428.htm

People v Ferguson, 11/20/19 – **PROBATION / ILLEGAL / VIOLENT FELONY**
The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of 2nd degree assault and sentencing him to three years' probation. The Second Department vacated the sentence and an order of protection. The sentence was illegal, since Penal Law § 60.05 (5) required a term of imprisonment. Thus, the matter was remitted for resentencing or to allow the defendant to withdraw his plea of guilty. The defendant requested that his resentence be equivalent to time already served. The sentencing court could determine whether such sentence was appropriate based on all relevant circumstances, the appellate court observed. The reviewing court further held that the order of protection—issued in favor of an individual who was neither a victim of nor a witness to the crime—violated CPL 530.13 (4). The Legal Aid Society of NYC (Eve Kessler, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08424.htm

THIRD DEPARTMENT

People v Vanhyning, 11/21/19 – **PROBATION / ILLEGAL / SIX YEARS**
The defendant appealed from a judgment of St. Lawrence County Court, which resentenced him following a drug possession conviction. In September 2015, upon his plea of guilty, he was sentenced to five years' probation. In September 2016, the defendant admitted the VOP and thereafter completed treatment programs. In September 2017, he was resentenced to five years' probation, to expire in September 2022. The Third Department found the sentence illegal and vacated it. If the defendant served the whole term, he would have been on probation for a total of six years—a period that exceeded the statutory maximum. The Rural Law Center of NY (Kristin Bluvas, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08451.htm

People v Colon, 11/21/19 – **SEPARATE TRIALS / REVERSED**
The defendant appealed from a judgment of Albany County Supreme Court, convicting him of drug possession crimes. The Third Department reversed. The defendant's motion for a separate trial should have been granted, pursuant to CPL 200.40 (1). Severance is compelled where the core of each defense presents an irreconcilable conflict, which could

lead the jury to infer the defendant's guilt. *See People v Mahboubian*, 74 NY2d 174. The co-defendant denied knowledge of the existence of the cocaine found in his car, and implicated the defendant, a passenger. The defendant contended that he did not know the cocaine was in the car and it must have belonged to the co-defendant, who had a history of drug crimes. The defenses were antagonistic, mutually exclusive, and irreconcilable. A new trial was required. Catherine Barber represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08449.htm

People v Tromans, 11/21/19 – **EVIDENCE TAMPERING / REVERSED**
The defendant appealed from an Albany County Supreme Court judgment, convicting him of leaving the scene of an incident and tampering with physical evidence. At the trial, the court dismissed the criminally negligent homicide count. Upon appeal, the Third Department dismissed the tampering count as against the weight of evidence. The proof did not establish efforts to conceal, alter or destroy incriminating evidence, where: (1) the defendant did not hide or throw away broken vehicle parts; (2) when bringing the damaged vehicle to a friend who could order parts, the defendant let the friend use the vehicle's VIN to obtain quotes—which led the police to the defendant; (3) while the defendant repaired the vehicle himself, he often worked on cars; and (4) he did not wash the car, which allowed police to obtain the victim's DNA from the hood. Lee Kindlon represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08454.htm

SECOND CIRCUIT

Rodriguez v Barr, 12/21/19 – **ICE RAID / RACE-BASED**
The petitioner sought review of a decision of the Board of Immigration appeals denying his motion to suppress evidence of his alleged alienage. The Second Circuit granted the petition, finding that the petitioner made a prima facie showing of an egregious violation of his Fourth Amendment rights—the standard applicable in removal proceedings—and remanded to the BIA for additional proceedings. The petitioner was arrested during a widespread raid on a Hispanic neighborhood in New Haven, Connecticut. The raid occurred 36 hours after the city passed an immigrant-friendly municipal ID card program, which ICE had opposed. The raid was not announced to the local Police Department, in violation of ICE policy. During the raid, only five of the 30 people arrested had outstanding deportation orders. The petitioner was arrested upon arriving at a location where federal officers had entered apartments without consent and without a warrant. The record did not establish probable cause for his arrest, and an inaccurate report was filed about it. During the raid, officers made derogatory and racist remarks. As to a Hispanic man, one officer said: "They all look the same. Just arrest him." For all these reasons, the raid and the petitioner's arrest appeared to have been racially motivated.
http://www.ca2.uscourts.gov/decisions/isysquery/a08285ab-6145-459a-bef6-4d0866359139/4/doc/15-3728_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/a08285ab-6145-459a-bef6-4d0866359139/4/hilite/

FAMILY

FIRST DEPARTMENT

Matter of Kwesi P., 11/19/19 – **JD ALLOCUTION DEFECTIVE / REVERSED**
The respondent appealed from an order of disposition of NY County Family Court, which adjudicated him a juvenile delinquent upon his admission to acts constituting 4th degree criminal facilitation. The First Department reversed. The allocution of the mother failed to advise her of the rights the respondent was waiving and the dispositional consequences, as required by Family Court Act § 321.3 (1). However, because the respondent violated probation—which was extended and remained in effect—the petition was not dismissed. The matter was remanded for a new fact-finding determination. Lewis Calderon represented the respondent JD.
http://nycourts.gov/reporter/3dseries/2019/2019_08359.htm

SECOND DEPARTMENT

Matter of Vetrano v Vetrano, 11/20/19 – **CHILD SUPPORT / REVERSED**
The father appealed from an order of Suffolk County Family Court, which dismissed his petition seeking to reduce child support. The Second Department reversed and remitted for a new hearing. The appellate court agreed with the Support Magistrate's determination that the father failed to establish that the reduction in his income was involuntary, and that he made diligent attempts to secure employment commensurate with his education, ability, and experience. However, the father's loss of assets and the mother's significant increase in income warranted a new determination. In addition, the judgment of divorce and stipulation of settlement failed to set forth the presumptively correct amount of support and to articulate reasons for deviating from CSSA guidelines. Jonathan Tatun represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08415.htm

Matter of Rodriguez v Sabbat, 11/20/19 – ***ANDERS*** **BRIEF / NEW COUNSEL**
The mother appealed from an order denying her violation petition and sua sponte curtailing her parental access. Assigned counsel submitted an *Anders* brief, and the Second Department assigned new counsel, finding that non-frivolous issues included whether Family Court properly found that the father did not willfully violate a prior order and whether the modification of the order of parental access was supported by the record. The mother was entitled to "the single-minded advocacy of appellate counsel."
http://nycourts.gov/reporter/3dseries/2019/2019_08414.htm

THIRD DEPARTMENT

Crosby v Crosby, 11/22/19 – **NO PERSONAL JURISDICTION / REVERSED**
The husband appealed from a Schuyler County order, which denied his motion to dismiss a divorce complaint. The Third Department reversed. The husband, who lived in Kentucky, sought to dismiss based on a lack of personal jurisdiction. He attached an amended answer asserting that affirmative defense and then moved to amend the answer. Supreme Court should have granted leave to amend and dismissal. Requiring the father to defend an action here would be unreasonable, given that: the parties had not resided together in NY since 1995; from 2003 to 2015, they lived together in Kentucky, where the husband was employed as a university professor and the parties owned real property; and his only purported NY contacts were described in the wife's vague assertions as unspecified visitation with the child in this state. Anthony Elia represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08469.htm

RAISE THE AGE

People v J.R., decided 10/22/19, posted 11/18/19 –
NO EXTRAORDINARY CIRCUMSTANCES
The defendant was charged as an AO in the Youth Part in Nassau County. The People sought to prevent removal based on extraordinary circumstances. The court denied the application. The AO was charged with assault and other offenses. At the time of arraignment, he was in custody for an attempted 1st degree murder charge. The People contended that: (1) in this case, the AO actively participated in the violent assault of a 16-year-old victim, and the offense was motivated by gang-related disputes; and (2) the AO's criminal history and character, and the impact of removal on the community, constituted extraordinary circumstances. The court observed that the Legislature intended that only extremely rare and exceptional cases would remain in the Youth Part. The People failed to establish that the AO acted in a cruel and heinous manner or was a ringleader. To the contrary, it appeared that he was coerced into participating. Denying removal based on another incident would contravene the spirit of the RTA law. The court was troubled by the two alleged violent incidents but noted that no serious injuries resulted.
http://nycourts.gov/reporter/3dseries/2019/2019_51825.htm

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