CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Thomas, Green, Lang, 11/26/19 – **WAIVERS OF APPEAL / UNENFORCEABLE**

In three consolidated appeals, the defendants' written waivers of the right to appeal contained mischaracterizations of the scope of rights waived. Such waivers are never an absolute bar to an appeal to an intermediate appellate court. *See Garza v Idaho*, 139 S Ct 738. Some appellate claims are non-waivable; waivers serve only to narrow the issues available for review. Appeal waivers are enforceable if they were knowingly, intelligently, and voluntarily entered—which was not the case in *Green* and *Lang*. The trial court mischaracterized the waivers as constituting an absolute bar to the taking of a direct appeal, and the right to assigned appellate counsel and to post-conviction relief. The muddled nature of the court's advisements made it impossible to tell if the defendants understood the rights waived. However, the incorrect language regarding "no notice of appeal" in the *Thomas* written document did not void that waiver of appeal. The form contained clarifying language, and the court's colloquy was sufficient. The *Thomas* comprehensive waiver covered an appellate challenge to the adverse suppression ruling, even though not expressly mentioned. Chief Judge DiFiore authored the majority opinion.

Judge Wilson's separate opinion addressed fundamental concerns regarding appeal waivers. In dissenting in *Thomas* and concurring in *Green* and *Lang*, he decried the erosion of the integrity of the process caused by waivers that: (1) are rarely truly knowing, voluntary, and intelligent; (2) lack consideration; and (3) insulate errors from review. Defendants' purported understanding is often based on monosyllabic answers directed by counsel and a form executed in a coercive situation. Where misleading information is conveyed, appellate courts cannot ensure that defendants fully appreciated the rights waived. Surely many cases never reach an appellate court because errant waivers deter defendants from effectuating their rights. Contrary to the "mutual concessions" envisioned in *People v Seaberg* (74 NY2d 1, 7), defendants receive no additional consideration for waiving the right to appeal. Only the government benefits, by receiving immunity from review for harmful errors. The state constitutional right of defendants to review of final judgments of conviction should not be compromised by appeal waivers. Their *raison d'etre*—finality—does not justify their existence. In reality, waivers are a pathway to future litigation. The Legal Aid Bureau of Buffalo (James Specyal and Susan Ministero, of counsel) represented Green and Lang.
http://www.nycourts.gov/reporter/3dseries/2019/2019_08545.htm

People v Rouse, 11/25/19 – **CURTAILED IMPEACHMENT / REVERSED**

The defendant appealed from a First Department order affirming a Bronx County Supreme Court judgment, convicting him of 2nd degree attempted murder and other crimes. A unanimous Court of Appeals reversed and ordered a new trial. In criminal cases, cross-examination is the principle truth-seeking device by which the veracity of witnesses is tested. Prosecution witnesses may be cross-examined as to prior bad acts reasonably related

to credibility, if there is a good-faith basis for the inquiry. In *People v Smith*, 27 NY2d 652, the COA observed that law enforcement witnesses can be cross-examined like any other prosecution witnesses. In the case at bar, the trial court erred in refusing to allow the defendant to cross-examine two police officers central to this case, via one officer's misstatements made to a federal prosecutor in a different matter and prior judicial determinations finding the testimony of both officers incredible. The effect of the instant errors was glaring. The evidence of guilt was not overwhelming, and the convictions hinged on the identification of the defendant as the shooter by the officers. The Center for Appellate Litigation (John Vang, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2019/2019_08522.htm

People v Stan XuHui Li, 11/26/19 – **PILL MILL / CAUSATION / MANSLAUGHTER**
The defendant appealed from an order of the First Department insofar as it affirmed a judgment of NY County Supreme Court, convicting him of 2nd degree manslaughter for recklessly causing the death of two patients. The Court of Appeals affirmed. The defendant physician ran a "pill mill" and prescribed high doses of controlled substances as a first resort. The two victims died of overdoses shortly after filling prescriptions he issued. The convictions were supported by legally sufficient evidence. The People's expert testified that the defendant did not consider non-opioid pain management and disregarded warning signs that patients were addicted to opioids. Although it was not clear that he knew that the deceased patients were addicts, a rational jury could have found that he consciously disregarded a substantial and unjustifiable risk. Causation was proven. The defendant's actions forged a link in the chain of events that caused the patients' deaths; and the fatal result was reasonably foreseeable.
http://www.nycourts.gov/reporter/3dseries/2019/2019_08544.htm

FIRST DEPARTMENT

People v Duval, 11/26/19 **– SEARCH WARRANT / DISSENT**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him upon his plea of guilty of 3rd degree CPW. The First Department affirmed. Two judges dissented. They would have reversed and granted the defendant's motion to suppress evidence, because the search warrant did not specify which apartment in the three-unit building was to be searched. Under *Groh v Ramirez*, 540 US 551, it was error for the motion court to consider materials that were not incorporated into the search warrant to cure the deficiency in the warrant.
http://nycourts.gov/reporter/3dseries/2019/2019_08542.htm

SECOND DEPARTMENT

People v Ahsan, 11/27/19 – **REARGUMENT / JURY TRIAL / *SUAZO***
The defendant was convicted in Richmond County Supreme Court, after a nonjury trial, of attempted 3rd degree assault and 2nd degree harassment. He appealed to the Second Department, which affirmed (169 AD3d 815). The defendant made a motion for leave to reargue, which was granted. The prior decision was recalled and vacated. The appellate court reversed the judgment of conviction, as a matter of discretion in the interest of justice,

and ordered a new trial. The noncitizen defendant was entitled to a jury trial under the Sixth Amendment, because the assault charge, a class B misdemeanor, carried a potential penalty of deportation. See *People v Suazo*, 32 NY3d 491. Since Suazo was decided before the appeal was decided, the change in the law applied to the defendant. See Gurnee v Aetna Life & Cas. Co., 55 NY2d 184 (absent sharp break in continuity of law, judicial decisions apply retroactively to all cases still in normal litigation process). Philip C. Segal represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08571.htm

People v Delcid, 11/27/19 – **REARGUMENT / INCLUSORY COUNTS**
The defendant was convicted in Supreme Court of 1st degree aggravated unlicensed operation (AUO) of a motor vehicle and other crimes. He appealed to the Second Department, which affirmed (174 AD3d 818). The defendant moved for leave to reargue, and the motion was granted. The prior decision was recalled and vacated, and the reviewing court modified the judgment of conviction. The counts alleging *DWAI* (VTL § 1192 [1]) and 2nd degree AUO were inclusory concurrent counts of 1st degree AUO and thus were dismissed. Nassau County Legal Aid Society (Tammy Feman and Marquetta Christy, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08575.htm

People v Benson, 11/27/19 – **POST-RELEASE SUPERVISION / ILLEGAL**
The defendant appealed from a judgment of County Court, convicting him of attempted 2nd degree robbery, upon his plea of guilty, and sentencing him to five years' imprisonment followed by five years' post-release supervision. The Second Department held that the period of PRS was illegal. Pursuant to statute, the court was required to impose a period of one-and-a-half to three years. The period was vacated, and the matter was remitted. The Suffolk County Legal Aid Society (Edward Smith, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08572.htm

THIRD DEPARTMENT

People v Harris, 11/27/19 – **RIGHT TO COUNSEL / REVERSED**
The defendant appeal from a Schenectady County Supreme Court judgment, convicting him of 2nd degree arson and other crimes. The Third Department reversed. The trial court erred in denying the defendant's motion to suppress a potentially incriminating statement, made after invocation of the right to counsel during a custodial interrogation, and in allowing a video of the statement to be played for the jury. While interrogated, the defendant stated, "Maybe I should get a lawyer…I don't want to f**k myself"—an unequivocal request for counsel. Thus, the video should have been stopped before such statement, and the motion to suppress all statements thereafter should have been granted. Instead, the jury viewed the offending video three times. Curative instructions failed to direct them to disregard any reference to an attorney and to reiterate that the defendant had an absolute right to remain silent. The prosecution case was largely circumstantial; jury notes revealed a struggle to reach a guilty verdict on the top counts; and a consensus was not reached until after an *Allen* charge. Matthew Hug represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_53943.htm

People v Mackie, 11/27/19 – **CONSPIRACY / DISMISSED**
The defendant appealed from a judgment of Clinton County Court, convicting him of two counts of 4th degree conspiracy and multiple drug crimes. The Third Department dismissed the conspiracy counts, which were jurisdictionally defective. A person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy. *See* Penal Law § 105.20. Here the conspiracy counts neither alleged that an overt act was committed nor included factual allegations describing such an act. There was no assertion that the defendant took any action beyond agreeing to engage in, or cause the performance of, a class B felony. Lisa Burgess represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_53940.htm

People v Mack, 11/27/19 – **TEMP. POSSESSION / JURY CHARGE / REVERSED**
The defendant appealed from a judgment of Chemung County Court, convicting him of CPW in the 2nd and 3rd degrees. The Third Department reversed. The trial court erred in denying the defendant's request to charge the jury on the defense of temporary and lawful possession. At trial, the defendant claimed that a sweatshirt in which a loaded pistol was discovered belonged to an individual who robbed him minutes before the police arrived and that he was unaware that the sweatshirt contained the weapon. If credited, the defendant's testimony provided sufficient facts from which the jury could find a lawful basis for his having possessed the pistol without illicit intent or a chance to turn it over to police. Kevin Jones represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_53930.htm

People v Barnes, 11/27/19 – **IAC / ENHANCED SENTENCE / NO *PARKER* WARNINGS**
The defendant appealed from a judgment of Albany County Supreme Court, convicting him upon his plea of guilty of 3rd degree criminal sale of a controlled substance. The Third Department vacated the sentence. When the defendant failed to appear, an enhanced sentence was imposed. That was error, since *Parker* warnings (*People v Parker*, 57 NY2d 136) had failed to advise the defendant of such potential consequence. The lack of preservation was the fault of defense counsel, who did not challenge the enhanced sentence—for which there could be no strategic reason. The matter was remitted for imposition of the agreed-upon sentence or an opportunity for the defendant to withdraw his guilty plea. Marshall Nadan represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_53934.htm

FAMILY

THIRD DEPARTMENT

Andreija N. (Michael N.), 11/27/19 – **STAY-AWAY ORDER / REINSTATED**
The petitioner agency appealed from an order of Montgomery County Family Court, which granted the respondent's motion to modify a stay-away order of protection. The Third Department reversed. Family Court had broad authority to modify the order, but the requisite "good cause" was not shown. There were credible allegations of sexual abuse. The child suffered emotional stress due to the respondent's threats against the mother. The grant of unsupervised overnight visits to the respondent occurred on the first day of trial, before the record was developed. The respondent engaged in an ongoing campaign of threats to control and coerce the mother and intimidate others. His misbehavior against the mother constituted domestic violence and should not have been minimized as "unconventional". A footnote indicated that the appellate court had considered the respondent's text messages and Facebook postings. Such documents were contained in the record, may not have been presented to Family Court, but were reviewed by the forensic psychologist. During the litigation, the respondent threatened several judges. The night before the child's interview with the psychologist, he posted, "I'm ready to take back what's mine tomorrow." On the day of the interview, he posted that he was "waiting at the psychologist…about 45 minutes until the sh** hits the fan…You all deserve what you get."
http://nycourts.gov/reporter/3dseries/2019/2019_53957.htm

Matter of Marina C. v Dario D., 11/27/19 – **CUSTODY / AFC NEEDED**
The father appealed from a Delaware County Family Court order, which granted the mother's petition to modify custody. As an alternate argument, the father argued that the matter should be remitted for a new hearing because Family Court erred in failing to appoint an AFC. The Third Department agreed. Despite Family Court's order being supported by the current record, the appellate court reversed and remitted for further proceedings conducted with the involvement of an AFC. The appointment of AFCs in a contested custody matter was the strongly preferred practice, since they can protect the interests of children; provide a different perspective than the parents' attorneys; present evidence; and recommend alternatives for relief. Family Court had appointed an AFC for this child in a previous proceeding but did not do so when the parties' relationship deteriorated, thus prejudicing the child. No objection was raised when the therapist testified as to information the child disclosed in therapy or when the father offered hearsay testimony regarding the child's statements. Alena Van Tull represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_53953.htm

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