CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Suazo, 11/27/18 – **NONCITIZEN DEFENDANTS / JURY TRIAL RIGHTS**
A noncitizen defendant who demonstrates that a charged crime carries the potential penalty of deportation is entitled to a jury trial. This guarantee applies to such defendants who are facing class B misdemeanor charges, notwithstanding CPL 340.40 requiring nonjury trials in NYC Criminal Court for such crimes. To the extent that the statute denies jury trials to noncitizens facing potentially deportable offenses, it is unconstitutional. Writing for the majority, Judge Stein observed that the Sixth Amendment requires that defendants accused of serious crimes be afforded the right to trial by jury; the most relevant criteria as to seriousness is the severity of the maximum penalty; and the penalty refers to more than prison time. The Court agreed with the defendant that the penalty of deportation, one of utmost severity, rebutted the presumption that the class B misdemeanors he faced were petty for Sixth Amendment purposes. Although the People were correct that deportation—a federally imposed penalty—is technically a collateral consequence of a state conviction, deportation is intimately related to the criminal process and virtually inevitable for a vast number of noncitizens convicted of crimes. New York courts will now have to determine potential immigration consequences as to pending charges in the narrow context of cases involving CPL 340.40-mandated nonjury trials of lesser misdemeanors in NYC. But in weighing harms and benefits on a constitutional scale, the possibility of some lost judicial efficiency is not a determinative factor. Further, it is the defendant's burden to overcome the presumption that the crime charged is petty and to establish a right to a jury trial. Judges Garcia and Wilson filed dissenting opinions. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2018/2018_08056.htm

People v Jones, 11/27/18 – **ENTERPRISE CORRUPTION / NO MENS REA**
The defendant was convicted of enterprise corruption. The Court of Appeals assumed, without deciding, that the People established the existence of a criminal enterprise. On the mens rea element, the People were required to prove that the defendant intentionally conducted, or participated in, the affairs of an enterprise. The proof was legally insufficient. The defendant's participation in the three requisite criminal acts included in the pattern did not establish his knowledge of the enterprise and the nature of its activities. In addition, trial testimony demonstrated that he was isolated from the enterprise and acted independently with the singular purpose of serving his own interests. Judge Rivera wrote a concurring opinion. Scott Danner represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2018/2018_08058.htm

Matter of Gonzalez v Annucci, 11/27/18 – **SARA / NO "SUBSTANTIAL ASSISTANCE"** The primary issue on appeal was whether the Appellate Division erred in holding that the Department of Corrections and Community Supervision (DOCCS)—which must "assist" inmates on, or eligible for, community supervision to secure housing pursuant to Correction Law § 201 (5)—has an obligation to provide sex offenders residing in a

residential treatment facility (RTF) with *substantial* assistance in identifying appropriate housing. The Court of Appeals held that it was error to impose a heightened duty on DOCCS and concluded that the agency met its statutory obligation to assist the petitioner in this case. DOCCS had properly interpreted its obligation under the statute as satisfied when it actively investigated and approved residences identified by inmates and when it provided adequate resources to allow inmates to propose residences for investigation and approval. In its discretion, the agency was free to provide additional assistance in locating SARA-compliant housing—particularly where an inmate was nearing the maximum expiration date or residing in an RTF with the associated restrictions on the ability to conduct a comprehensive search. But there was no statutory basis for imposing such an obligation. Judge Rivera concurred in part and dissented in part. Judge Wilson dissented.
http://www.nycourts.gov/reporter/3dseries/2018/2018_08057.htm

FIRST DEPARTMENT

People v Holmes, 11/29/18 – **3RD DEGREE ROBBERY / LESSER INCLUDED OFFENSE**
The defendant appealed from a judgment of Bronx County Supreme Court convicting him of 1st degree robbery. The First Department reversed and ordered a new trial. The trial court should have granted his request to charge 3rd degree robbery as a lesser included defense. There was a reasonable view of the evidence that the defendant forcibly stole property from the victim, but did not use, or threaten to use, a knife while doing so. The court should also have granted his request for an adverse inference charge as to surveillance photos taken in the victim's livery cab after other photos, introduced at trial, were taken. The defendant established that the missing photos were "reasonably likely to be material" since they might have shown what type of weapon or object was used by the perpetrator. This error was not harmless, and it compounded the failure to submit the lesser included offense. The Center for Appellate Litigation, (Allison Kahl of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08178.htm

People v Allison, 11/29/18 – **FORGED INSTRUMENT / INVALID PREDICATE**
The defendant appealed from a judgment of New York County Supreme Court and an order denying his CPL 440.20 motion. The trial court erred in sentencing him as a second felony offender based on his prior conviction in New Jersey of the crime of uttering a forged instrument. The out-of-state crime did not require the same intent as the New York crime. Therefore, the defendant was entitled to resentencing. Davis Polk & Wardwell and the Legal Aid Society of NYC represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08194.htm

SECOND DEPARTMENT

People v Ellis, 11/28/18 – **DISSENT / RIGHT TO COUNSEL OF OWN CHOOSING**
The defendant appealed from a judgment of Queens County Supreme convicting him of attempted 2nd degree murder and other crimes. The Second Department affirmed. One justice dissented based on three distinct issues. (1) While an indigent defendant's right to the assistance of counsel is not equated with a right to choose counsel, once an attorney-client relationship has been formed between assigned counsel and the defendant, the

defendant enjoys a right to continue to be represented by that attorney. Supreme Court should have inquired as to whether the defendant's prior counsel was ready, willing and able to accept the new assignment. (2) The defendant was deprived of a fair trial because he was compelled to wear the same prison clothing for three days of jury selection and five days of trial testimony. His complaints about the clothing were sufficient to preserve his claim. There was no rule that clothing constitutes identifiable prison garb only if it is orange or a jumpsuit. (3) The trial court erred in denying a for-cause challenge to a prospective juror based, inter alia, on his employment and familial relationships with the NYPD and allegations in another case that the defendant was involved in shooting an officer.
http://nycourts.gov/reporter/3dseries/2018/2018_08143.htm

People v Richard, 11/28/18 – **SENTENCE REDUCED / DISSENT**
The defendant appealed from a judgment of Kings County Supreme Court convicting him of 1st degree manslaughter and sentencing him to 15 years followed by post-release supervision. The Second Department reduced the prison term to 10 years. A dissenting justice disagreed with such modification. At sentencing, Supreme Court had noted that it had read letters from the defendant's family and friends; acknowledged that he did not have a prior criminal history; and stated that the presentence report indicated that the defendant had a difficult upbringing. The sentence imposed, which was in the middle of the statutorily permissible range, was a proper exercise of discretion, given the facts of the crime, the dissenter opined. The victim had gone to the wrong door of an unfamiliar apartment and jostled the door. There was no credible evidence of the victim's attempt to commit a burglary. In any event, after any possibility of a burglary had terminated, the defendant set out on a "manhunt;" set upon the victim without allowing him to explain; and inflicted significant head trauma by kicking and stomping him. Appellate Advocates (Alexis Ascher of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08152.htm

THIRD DEPARTMENT

People v McGee, 11/29/18 – **INEFFECTIVE ASSISTANCE IN PLEA / REVERSAL**
The defendant appealed from a judgment of Clinton County Court convicting him of drug and weapons charges. He asserted that he received ineffective assistance of counsel. Although the issue was unpreserved by a post-allocution motion, the Third Department exercised its interest of justice jurisdiction and reversed and remitted. Before the defendant entered into the underlying plea agreement, defense counsel said that: (1) he had misconstrued what the defendant was willing to do relative to the plea offer on the table at that time; and (2) because of counsel's conduct, a previous more favorable plea offer was no longer available. County Court failed to take appropriate action. Counsel's statements disqualified him from continuing to represent the defendant. The plea court should have adjourned to allow for the substitution of counsel and then conducted a hearing to determine whether the defendant received ineffective assistance during the plea negotiations. County Court failed to appreciate that, if he made the requisite showing, it could direct the People to reoffer the purported prior more favorable plea. Rebecca Fox represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08203.htm

FAMILY

FIRST DEPARTMENT

Natalie A. v Chadwick P., 11/27/18 – **DOMESTIC VIOLENCE / ERRANT VENUE CHANGE**
The mother appealed from an order of New York County Family Court which granted the father's motion to change venue and transfer her family offense and custody petitions to Clinton County. The First Department held that Family Court had improvidently exercised its discretion, where the parties lived in Clinton County from 2011 to 2017, when the mother fled to escape a physical altercation in the home. The Family Court failed to consider the allegations of domestic violence against the father in Clinton County. In support of her intent to remain in New York County, the mother submitted an affidavit that she had secured a full-time job, health insurance, and a pediatrician. The allegations of domestic violence and the safety of the mother supported keeping New York County as the venue for these proceedings. Andrew Baer represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08066.htm

SECOND DEPARTMENT

Gallousis v Gallousis, 11/28/18 – **SUPPORT VIOLATION / RIGHT TO COUNSEL VIOLATION**
The father appealed from an order of Orange County Family Court finding a willful violation of support provisions and from an order of commitment. The Second Department reversed. The father was not advised of his right to assigned counsel, as required by Family Ct Act § 262 (a). Further, there was no indication that he validly waived his right to counsel; the court failed to conduct the required searching inquiry. Under these circumstances, the father was deprived of his right to counsel and reversal was required, without regard to the merits of his position in the enforcement proceeding. Richard Herzfeld represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08129.htm

THIRD DEPARTMENT

Matter of Wood v Rebich, 11/29/18 – **FAMILY OFFENSE / INEFFECTIVE ASSISTANCE**
The respondent appealed from an order of Broome County Family Court which granted the petitioner's application finding that he committed a family offense and issued an order of protection. The Third Department found that the respondent was denied meaningful representation. Before the hearing, counsel did not engage in any discovery. At the hearing, counsel did not present an opening or closing statement; object when Family Court questioned the pro se petitioner and assisted her in establishing a foundation for photographic exhibits; object to many hearsay statements; or cross-examine the petitioner. The appellate court reversed and remitted for a new hearing. Catherine Stuckart represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08213.htm

Shirreece AA. v. Matthew BB., 11/29/18 – **DECISION MISSTATES PROOF / REVERSAL**

The mother appealed from an order of Essex County Family Court which dismissed her custody petition. The Third Department reversed, finding that the challenged determination mischaracterized record evidence. The trial court placed the mother in a prejudicial position by issuing a temporary order awarding the father physical custody of the child during the school week and thereby rewarding him for having usurped all decision-making authority regarding the child's education. The evidence belied the court's conclusion that there was no support for the mother's claim of substance abuse and domestic violence by the father. Moreover, Family Court misconstrued, mischaracterized, and otherwise amplified the evidence to portray the mother in the least favorable light. There was no basis for the severe reduction of her overall time with the child, particularly since the parties had previously shared 50/50 custody. Given the passage of time, the matter was remitted for an updated fact-finding hearing and Family Court was directed to consider assigning the mother new counsel, as her assigned counsel had consistently failed to protect her interests. Noreen McCarthy represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08215.htm

ARTICLES OF INTEREST

DiFiore Presses Appellate Judges to Send Fewer Appeals to High Court
NYLJ, 11/26/18
According to a recent *NYLJ* article, Chief Judge DiFiore has discouraged Appellate Division from sending cases to the high court in a departure from Chief Judge Lippman's practice. Several appellate justices said she had made statements as part of an effort to stanch the flow of discretionary appeals from the Appellate Division and that her statements had affected many justices' thinking on granting leave. Former Justice David Saxe said that he understood the desire to control the high court's docket, but opined that the COA should not try to affect the discretion possessed by the Appellate Division. Presiding justices of the First and Second Departments said that their courts knew of the chief judge's opinion, but would sometimes need to disregard it.

Holistic Representation / Reducing Incarceration
A new study by researchers at RAND and the University of Pennsylvania Law School has found that a holistic approach to defending poor clients in criminal cases can significantly reduce incarceration without harming public safety. The study, *The Effects of Holistic Defense on Criminal Justice Outcomes*, to be published in Harvard Law Review, examined more than half a million cases, handled in the Bronx by Bronx Defenders and the Legal Aid Society over a 10-year period, involving poor criminal defendants who received court-appointed lawyers. The study found that the holistic approach did not affect conviction rates, but reduced the likelihood of a prison sentence by 16% and the sentence length by 24%. Despite a higher release rate, defendants who received holistic defense services were shown to commit no more crime than those incarcerated for longer periods.