CRIMINAL

FIRST DEPARTMENT

DECISION OF THE WEEK

People v Gonzalez, 12/10/20 – **SORA / DOWNWARD DEPARTURE**

The defendant appealed from a Bronx Count Supreme Court order, which adjudicated him a level-two sex offender. The First Department ordered a reduction to level one. The SORA court ignored a compelling basis for a downward departure to correct the overassessment of the defendant's risk of recidivism resulting from scoring under risk factors three and seven (multiple victims and stranger victim). *People v Gillotti*, 23 NY3d 841, warned of overassessments under such factors in child pornography cases. The Board of Examiners recommended level one here. The defendant's federal crime was based on conduct at the very low end; he viewed limited child pornography for a limited time and did not disseminate the images possessed. According to an evaluating psychologist, he was very unlikely to reoffend. District Court explained that he was deserving of a non-incarceratory disposition, as recommended by the probation department, because he had a record of no crime and a lifetime of hard work, was dedicated to his family, and presented character letters. The Center for Appellate Litigation (Camila Hsu) represented the appellant.
http://www.nycourts.gov/courts/ad1/calendar/List_Word/2020/12_Dec/10/PDF/People%20%20v%20%20Luis%20Gonzalez%20(2018-2719).pdf

People v Joseph, 12/10/20 – **INVALID PLEA / SENTENCE MISINFORMATION**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree burglary as a sexually motivated felony, 2nd degree burglary, and 1st degree sexual abuse. The First Department reversed, vacated the pleas, and remanded. In inducing the defendant to plead guilty, the court repeatedly said that he faced a possible sentence of 45 years for three open burglaries, but failed to reveal that such an aggregate sentence would have been automatically reduced to 20 years. The exception to the preservation doctrine applied, because the defendant could hardly be expected to move to withdraw his plea on a ground of which he had no knowledge. *See People v Louree*, 8 NY3d 541. The misinformation from the court impacted the defendant's plea—he told the Probation Department that he pleaded guilty because he feared the 45-year prison term. In sum, given the misinformation about the sentence exposure, the defendant's plea was not knowing, voluntary, and intelligent. The Office of the Appellate Defender (Victorien Wu, of counsel) represented the appellant.
http://www.nycourts.gov/courts/ad1/calendar/List_Word/2020/12_Dec/10/PDF/PEOPLE%20V%20JEFFREY%20JOSEPH%20OPN%20(2018-2420).pdf

People v Grasso, 12/8/20 – **CPW / ACCOMPLICE LIABILITY**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree CPW (six counts) and 3rd degree CPW. The First Department affirmed. The evidence was legally sufficient, under a theory of accomplice liability, to establish that the defendant possessed weapons recovered from the codefendant's person and the trunk of his car. The weapons were instrumentalities of a joint enterprise. Wiretapped communications and surveillance showed that, when the weapons were recovered, the

cohorts were poised to commit a crime against a targeted individual involving the possession of operable firearms. The defendant said that he would be arriving at their meeting spot "loaded up."
http://nycourts.gov/reporter/3dseries/2020/2020_07320.htm

SECOND DEPARTMENT

People v Diaz, 12/9/20 – **RETRIAL / SENTENCE / VINDICTIVE**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree course of sexual conduct against a child and another crime, upon a jury verdict. The Second Department modified, reducing the determinate term for the above-named conviction from 6 to 5 years, followed by post-release supervision. The judgment of conviction was previously reversed, and a new trial was ordered. Supreme Court erred in enhancing the original sentence. Under the NY Constitution, a presumption of vindictiveness applied where a defendant successfully appealed an initial conviction and was re-tried, convicted, and given a greater sentence. The sentencing court must state reasons for a higher sentence. There must be objective information as to conduct by the defendant after the initial sentencing. The ongoing impact of the crime on the complainant did not meet that test. Appellate Advocates (Sean Murray) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07392.htm

People v Soler, 12/9/20 – **SUPPRESSION / PLEA / CHARGE DISMISSED**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted criminal possession of a firearm, upon his plea of guilty. The appeal brought up for review an order denying suppression. The Second Department reversed and dismissed the indictment. The waiver of the right to appeal was invalid. Supreme Court incorrectly said that the defendant was giving up the right to appeal and that the case ended at sentencing. Thus, the merits were addressed. The defendant was observed with his hands at his side, and an officer saw a heavy L-shaped object in his sweatshirt pocket. The officer was justified in conducting a common-law inquiry and asking the defendant if he was carrying a weapon. However, the officer should not have tried to touch the defendant's pocket, since the defendant did not engage in any conduct warranting such as a self-protective measure. His response of fleeing and discarding the gun was not an independent act involving a calculated risk attenuated from the illegal police conduct. Appellate Advocates (Alice Cullina, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07404.htm

People v Tates, 12/9/20 – **SUPPRESSION / TRIAL / CONFUSED GROUNDS**
The defendant appealed from a Queens County Supreme Court judgment, convicting him of 2nd degree CPW and resisting arrest, upon a jury verdict. The appeal brought up for review an order denying suppression. The Second Department vacated the weapon possession conviction. At the suppression hearing, the People argued that the gun was properly recovered pursuant to an inventory search. The hearing court disagreed, but found that police had probable cause to search the vehicle pursuant to the automobile exception. That holding was improper, where the People did not argue such theory. As an alternative ground on appeal, the People argued valid inventory search. However, because Supreme

Court had decided that question for the defendant, CPL 470.15 (1) precluded appellate review of the issue. The matter was remitted for further proceedings. *See People v LaFontaine*, 92 NY2d 470, 474-475. Legal Aid Society of NYC (Harold Ferguson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07405.htm

People v Morris, 12/9/20 – **SUPPRESSION / TRIAL / NEW JUDGE**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW, upon a jury verdict. The appeal brought up for review an order denying suppression. The Second Department affirmed. The defendant contended that there was a violation of Judiciary Law § 21 (judge shall not decide question that was argued orally in court when he/she was not present and sitting as judge). The appellate court rejected such contention, since after the hearing justice's retirement, the defendant requested that the newly assigned justice review the hearing evidence and make a determination.
http://nycourts.gov/reporter/3dseries/2020/2020_07399.htm

People v Nelson, 12/9/20 – **SUB COUNSEL / DENIED**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 3rd degree grand larceny. The Second Department affirmed. The trial court properly denied the defendant's request for new assigned counsel, made prior to jury selection. The right to court-appointed counsel did not include appointment of successive lawyers on request. A trial court must consider substitution only where the defendant made a serious, specific complaint.
http://nycourts.gov/reporter/3dseries/2020/2020_07400.htm

FAMILY

FIRST DEPARTMENT

M/O Katharine B. v Thomas L., 12/8/20 – **PROTECTIVE ORDER / STANDING**
The respondent appealed from an order of NY County Family Court, which denied his motion to dismiss a family offense petition to the extent that relief was sought on behalf of his son. The First Department affirmed. The parties had one child in common. For five years, they lived together, along with the respondent's older child from a prior relationship. After the respondent moved out, both children remained with the petitioner. The respondent contended that the petitioner lacked standing to seek relief for his older child, because she was not his parent or legal guardian. But Family Ct Act § 821-a (2) (b) expressly authorized a temporary protective order in favor of any child in the household. The separate issue of the petitioner's standing to seek custody based on extraordinary circumstances would be resolved in pending custody proceedings.
http://nycourts.gov/reporter/3dseries/2020/2020_07310.htm

SECOND DEPARTMENT

M/O Noguera v Busto, 12/9/20 **– GRANDMOTHER / STANDING**
The maternal grandmother appealed from an order of Queens County Family Court, which found that she lacked standing to seek visitation with the subject child. The Second Department reversed. The determination of no standing was not supported by the record. The grandmother developed a relationship with the child early in his life and thereafter made repeated efforts to continue that relationship. She may have been aware of misconduct by the mother that deprived the father of contact for years, but that did not deprive her of standing. Upon remittal, Family Court should conduct an in camera interview with the child to help determine whether grandparent visitation would be in his best interests. Simpson Thacher & Bartlett represented appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07385.htm

M/O Cecile D. (Kassia D.), 12/9/20 **– WAIVER OF COUNSEL / SEARCHING INQUIRY**
The mother appealed from a Kings County Family Court order finding that she neglected the subject children. The Second Department affirmed. The mother knowingly, voluntarily, and intelligently waived the right to counsel. An Article 10 respondent had a constitutional and a statutory right to counsel, but could waive that right. Before permitting a party to proceed pro se, the trial court must conduct a searching inquiry, emphasizing the dangers and disadvantages of giving up the right to counsel. Family Court fulfilled that duty, and the mother unequivocally asserted that she understood the right she was waiving.
http://nycourts.gov/reporter/3dseries/2020/2020_07379.htm

Agulnick v Agulnick, 12/9/20 – **ADULTERY / SUMMARY JUDGMENT**
The plaintiff appealed from an order of Nassau County Supreme Court, which denied his motion for summary judgment dismissing the wife's counterclaim for divorce on the ground of adultery. The Second Department reversed. Despite no-fault divorce in NY, the counterclaim based on adultery was significant because of the parties' post-nuptial agreement, which imposed financial consequences in the event of the husband's adultery. Generally, allegations of adultery presented unique issues of proof, given the clandestine conduct. For 150 years, NY case law has provided that adultery may be circumstantially proven by proof of a lascivious desire, the opportunity to gratify the desire, and acting upon the desire. The husband met his prima facie burden. The wife's opposition consisted of mere speculation and surmise, stemming from the proximity of the husband to his alleged paramour. Kenneth Weinstein represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07335.htm

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