CRIMINAL

U.S. SUPREME COURT

LOUISIANA SCANDAL / CERT. DENIED
Marshall Project, 12/10/19, by Andrew Cohen
ABA Journal, 12/9/19, by Debra Weiss
On December 9, the U.S. Supreme Court declined to intercede in a case tainted by misdeeds at a Louisiana (LA) appellate court. Two decades ago, Louie Schexnayder was convicted of murder in a LA state court and sentenced to life, following a trial that raised several significant issues. He represented himself in a midlevel appeals court at a time when that court provided no judicial review of pro se prisoner appeals. Instead, all such appeals were reviewed by staff; automatically rejected based on a set of predetermined generic reasons; and the dismissal orders were rubber-stamped by judges. About 300 pro se appeals in 13 years were thus summarily dismissed. The scheme was exposed via a suicide note in 2007, when the chief of the court's central staff shot himself in his courthouse office.

The LA Supreme Court held that judges at the court that permitted the sham reviews could conduct a reconsideration of the appeals, while a dissenter opined that other courts should do so to avoid an appearance of impropriety. Upon the reevaluations, none of the 300 pro se appellants received relief. The NACDL filed an amicus brief supporting the instant pro se petition for certiorari, contending that under AEDPA, a federal court was not required to defer to the LA court decisions, given the grave due process violation at issue. While not dissenting, Justice Sotomayor opined that the LA review procedure raised "serious due process concerns." However, the defendant did not clearly make his "no deference" claim in federal habeas corpus proceedings in District Court and the Fifth Circuit. When the issue is properly raised, lower federal courts may examine what deference is due to such decisions, Justice Sotomayor observed.
https://www.supremecourt.gov/orders/courtorders/120919zor_ihdj.pdf

SECOND CIRCUIT

U.S. v Pugh, 12/10/19 – **SENTENCING ERROR / NO JUDICIAL REASONING**
The defendant appealed from a District Court–EDNY judgment of conviction of attempting to provide material support to a foreign terrorist organization and obstruction of justice. He was sentenced to an aggregate term of 35 years. The Second Circuit remanded for resentencing. District Court failed to state the reasons for imposing the statutory maximum and to thereby demonstrate that it had reached an informed and individualized judgment as to what was sufficient, but no greater than necessary, to fulfill the purposes of sentencing. The record did not permit meaningful appellate review of the defense argument that the sentence was substantively unreasonable. Judge Calabresi concurred, emphasizing the risks posed by the crime of obstruction of justice. The defendant's main conviction for offering his services to ISIS carried a statutory maximum of 15 years. District Court sentenced him to an incongruous additional 20 years because of the

destruction and deletion of insignificant information. That sentence appeared to be a way to use the obstruction count to exceed the maximum allowed for the terrorism count.
http://www.ca2.uscourts.gov/decisions/isysquery/248ceaa8-72d2-4eef-a994-a1b67bae5597/2/doc/17-1889_complete_amd_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/248ceaa8-72d2-4eef-a994-a1b67bae5597/2/hilite/

Sloley v Van Bramer, 12/12/19 – **VISUAL CAVITY SEARCH / REASONABLE SUSPICION**
The plaintiff brought a 42 USC § 1983 action, based on a 4th Amendment violation. District Court–NDNY granted summary judgment to the defendants. The Second Circuit vacated in part, holding for the first time that visual body cavity searches incident to arrest must be supported by "a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity." Such searches are invasive and degrading, and the government had only a slight interest in conducting them without suspicion. Concealment of a weapon seemed unlikely, and requiring a reasonable suspicion addressed the government's interest to recover illegal drugs. If the requisite suspicion was lacking, the government's interest in preserving evidence had to yield to the individual's strong privacy interest—regardless of the level of crime. As to qualified immunity, at the time of the search, the reasonable suspicion requirement would have been sufficiently clear to a reasonable NY state trooper, given the decision in *People v Hall*, 10 NY3d 303. Issues of fact existed as to whether the defendants had the requisite predicate for the search. One judge wrote a concurring opinion, and another dissented.
http://www.ca2.uscourts.gov/decisions/isysquery/608064de-6b7b-4c7e-95b2-d49638108455/2/doc/16-4213_complete_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/608064de-6b7b-4c7e-95b2-d49638108455/2/hilite/

FIRST DEPARTMENT

People v Camacho, 12/12/19 – **IAC / NO LESSER INCLUDED REQUEST**
The defendant appealed from a judgment of NY County Supreme Court. The First Department vacated a 3rd degree robbery conviction and ordered a new trial, and it dismissed a 4th degree grand larceny conviction. The defendant was deprived of effective assistance when his attorney failed to make a timely request for submission of petit larceny as a lesser included offense of the robbery. The defense conceded that the defendant stole a cell phone, but denied that any force was used; and a reasonable view of the evidence supported a petit larceny charge. Clearly, the failure to seek an available charge was a mistake, not a strategic decision. The defendant was also entitled to dismissal of the grand larceny charge, which was based on the total value of phones taken from two different AT&T stores on two different days. The People failed to prove that the stores and phones had the same owner for the purpose of aggregating multiple thefts. The Office of the Appellate Defender (Margaret Knight and Matthew Specht, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08944.htm

People v Baines, 12/10/19 – **DUPLICITOUS CHARGE / DISMISSED**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 1st degree rape and other sexual offenses and sentencing him to an aggregate term of 50 years. The First Department dismissed a 2nd degree promoting prostitution charge as duplicitous, because it spanned the same time period as sex trafficking counts and did not require proof of any other facts. As a matter of discretion, the appellate court also directed that the rape sentence would run concurrently with all other sentences. The new aggregate term was 28½ to 32 years. The defendant was not deprived of the right to counsel. After being represented at the grand jury presentation, the defendant represented himself with the aid of a legal advisor in pretrial proceedings and then chose to be represented at trial. The record included the combined effect of several waiver colloquies, along with other indicia of the defendant's ability to represent himself and awareness of the disadvantages of doing so. The Office of the Appellate Defender (Christina Swarns, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08794.htm

People v Rose, 12/10/19 – **OPINION TESTIMONY / UNPRESERVED**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree robbery and other crimes. The First Department affirmed. The trial court providently exercised its discretion in allowing the arresting detective to opine about events depicted in a surveillance video. As the People pointed out, the defendant's argument on appeal was unpreserved because, at trial, defense counsel sought no additional relief after the court sustained counsel's objection and gave a curative instruction.
http://nycourts.gov/reporter/3dseries/2019/2019_08805.htm.

People v Lashley, 12/12/19 – **SENTENCING ERROR / PREDICATE STATEMENT**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree criminal possession of a forged instrument and sentencing her as a second felony offender. The First Department vacated the SFO adjudication and sentence and remanded for resentencing, including the filing by the People of a proper predicate felony statement. The defendant's challenge to the facial sufficiency of the document did not require preservation. Nothing in the record demonstrated a sufficient tolling period to support the predicate felony statement. Thus, the People's failure to include this information in the statement was not harmless. The Center for Appellate Litigation (Kate Skolnick, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08934.htm

SECOND DEPARTMENT

People v Devorce, 12/11/19 – **SENTENCING ERROR / CONSECUTIVE TERMS / TRIAL**
The defendant appealed from a resentence imposed by Westchester County Supreme Court upon his conviction of 2nd degree CPW, 1st degree robbery (12 counts), attempted 1st degree robbery (two counts), and 1st degree assault, following a jury trial. The Second Department held that the CPW sentence must run concurrently with the other terms. The People's theory was that the defendant possessed a gun with the intent to unlawfully use it during a robbery. Since they did not prove that he had an unlawful intent, separate and distinct from

the intent to commit the robbery, the consecutive sentence imposed for CPW 2 was impermissible. The Legal Aid Society of Westchester County (David Weisfuse, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08859.htm

People v Robinson, 12/11/19 – **SENTENCING ERROR / CONSECUTIVE TERMS / PLEA**
The defendant appealed from a Kings County Supreme Court judgment, convicting him of attempted 3rd degree CPW (two counts). The Second Department modified by providing that the sentences would run concurrently. Where a defendant pleads guilty to a lesser offense than charged in the indictment, the People may rely only on the facts admitted during the allocution to establish the legality of consecutive sentences. No facts adduced at the instant allocution demonstrated two separate acts of constructive possession, so the imposition of consecutive sentences was illegal. Appellate Advocates (Anna Kou, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08875.htm

People v Peterson, 12/11/19 – **SENTENCING ERROR / NO PSI REPORT**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree assault, 2nd degree CPW, and other crimes. The Second Department vacated the sentence and remitted for resentencing. When a defendant convicted of a felony offense absconds during trial and is sentenced in absentia, the court must still order a presentence investigation and may not pronounce sentence until it has received a written PSI report. Because that was not done here, the appellate court could not reach the defendant's contention regarding the alleged excessiveness of the sentence. Jonathan Strauss represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08871.htm

People v Grant, 12/11/19 – **SENTENCING ERROR / RESTITUTION**
The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 2nd degree manslaughter and several other crimes, upon a jury verdict, and ordering restitution of nearly $40,000. The Second Department reduced the restitution to $15,000, the statutory cap pursuant to Penal Law § 60.27 (5). There are exceptions to that cap—where the defendant consents, restitution was a condition of probation or conditional discharge, or a greater amount is needed to achieve the return of the victim's property or reimburse him or her for actual medical expenses—but none applied here. Steven A. Feldman represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08864.htm

People v Day, 12/11/19 – **PROSECUTOR SUMMATION / REVERSAL**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree assault and 1st degree robbery. The Second Department reversed and ordered a new trial. As the People conceded, the prosecutor made comments during summation—that the defendant's DNA was found on the weapon used to shoot the victim—that had no evidentiary support in the record. The remarks, which were promptly objected to by defense counsel, were highly prejudicial and deprived the defendant of his right to a fair

trial, particularly where the trial court refused to give a curative instruction. Justin Bonus represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08858.htm

THIRD DEPARTMENT

People v Badmaxx, 12/12/19 – ***PEQUE* LAPSE / UNPRESERVED**
The defendant appealed from a Washington County Court judgment, convicting him of 3rd degree criminal sale of a controlled substance. The Third Department affirmed. The defendant alleged that County Court failed to fulfill its *People v Peque* (22 NY3d 168, 176) duty to advise him of potential deportation consequences, rendering his guilty plea involuntary. The appellate court found such challenge unpreserved for appellate review. The defendant knew about the possibility of deportation throughout the proceedings; did not make any statements calling into question the voluntariness of his plea; and did not file a post-allocution motion. *See Peque*, *supra*, at 183.
http://nycourts.gov/reporter/3dseries/2019/2019_08893.htm

OTHER ITEMS OF INTEREST

SNARKY LAWYER / KICKED OUT
While not arising from a criminal or family case, the brief argument in *Doyle v Palmer* may be of interest to ILSAPP readers who orally argue appeals. The argument offers a stunning example of what advocates should not do, i.e. behave so discourteously and inappropriately that an appellate judge (here Second Circuit Judge Chin) orders security to escort counsel from the courtroom.
http://www.ca2.uscourts.gov/decisions/isysquery/dedf65b1-7b44-4796-aa77-eea67f729313/11-20/list/

ANNUAL REVIEW: CRIMINAL JUSTICE LEGISLATION
State Bar Journal, December 2019, Barry Kamins
No legislative session in recent memory produced as many significant changes in the criminal justice system as the last one. Sweeping reforms included a drastic reduction in the use of monetary bail, which is expected to bring the mandatory release of about 90% of persons arrested. Another expansive new law replaces one of the most regressive discovery statutes in the country, while providing for the imposition of protective orders to address prosecution concerns. Significant speedy trial statute amendments should end illusory statements of readiness for trial. New crimes include revenge porn and staging a motor vehicle accident, while decriminalized conduct includes possession of marijuana. One new law expands opportunities for child victims of sexual abuse to bring civil claims, while another extends the limitations periods for certain sexual offenses. In a major revision to civil forfeiture procedures, the Legislature has curtailed the prosecutor's authority to seize a defendant's assets. The so-called "gay panic" defense has been eliminated. Assigned appellate counsel have been authorized to handle post-conviction collateral attacks on judgments of conviction. The Domestic Violence Survivors Justice Act provides for potential reduced sentences and resentences for defendants who were victims of domestic violence, where the abuse was a significant contributing factor to the

crime. To protect non-citizens from deportation, the maximum sentence for a class A misdemeanor has been changed from one year to 364 days. The Legislature has also removed certain restrictions for persons with felony convictions to obtain licenses to be real-estate brokers, check cashiers, insurance adjustors, etc.

FAMILY

FIRST DEPARTMENT

Matter of Catherine L. v Jeffrey S., 12/12/19 – **VISITATION / REMAND**
The mother appealed from an order of NY County Family Court, which granted the father's petition to relocate with the parties' child to Georgia. The First Department modified. As to the relocation, the trial court had considered relevant factors, including the father long role as primary caregiver; had established that the move would improve the child's quality of life; and had demonstrated his commitment to fostering a mother-child relationship. However, the lower court erred in failing to set an appropriate visitation schedule. Given the parties' chronic inability to communicate and the mother's mental illness, the expectation that the parties would cooperate to effectuate appropriate visitation was a pipe dream. Moreover, the court improperly delegated to the father its authority to determine visitation. Randall Carmel represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_08941.htm

Anthony V. L. v Bernadette R., 12/10/19 – **CHILD SUPPORT / REMAND**
The father appealed from two NY County Family Court orders regarding child support. The First Department held that the appeal from a 2013 order was timely. The record did not show that the mother served the father with notice of entry, so the time to take an appeal never began to run. Family Court properly declined to vacate the 2013 order pursuant to a CPLR 5015 (a) (3) motion, in which the father alleged that the mother engaged in fraud by inflating the child's rent, health care, and child care costs and sought vacatur based on subpoenaed documents. He failed to show that the "new" evidence could not have been found earlier with due diligence. Further, the father took four years to make the motion—not a reasonable time, as required by the statute. However, at a hearing regarding the 2017 order, the father proved that there had been a substantial change in circumstances, based on the mother's actual housing costs. Additional findings of fact were necessary to decide if he was entitled to an overpayment credit to be applied to future add-on expenses. Family Court properly awarded half of claimed attorneys' fees to the mother, the non-monied party, who had to defend against numerous allegations unrelated to the modification petition and to respond to pointless motion practice.
http://nycourts.gov/reporter/3dseries/2019/2019_08796.htm

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