# CRIMINAL

## COURT OF APPEALS

### *DECISION OF THE WEEK*

***People v Diaz***, 12/11/18 – **PEOPLE'S APPEAL / SORA AND OUT-OF-STATE CONVICTIONS**
The defendant had a Virginia murder conviction for killing his 13-year-old sister, a crime for which there was no sexual component. After being paroled, he was required to register in Virginia under its sex registry act. The issue on this People's appeal was whether, upon moving to New York, the defendant was required to register under SORA. In an opinion authored by Judge Feinman, the Court of Appeals answered "no" and affirmed the challenged order. SORA, which primarily seeks to provide law enforcement with information to prevent sexual victimization, requires registration of sex offenders from other jurisdictions. Virginia—which requires registration for various nonsexual violent crimes against minors, such as the instant crime—did not consider the defendant a sex offender. Thus, he was not required to register here. "Blind deference" to another jurisdiction's registry would contravene the statute. The holding in this case merely required a determination as to whether the out-of-state registrant was considered a sex offender by the foreign jurisdiction. Judge Fahey wrote a dissenting opinion in which Chief Judge DiFiore and Judge Stein concurred, stating: the "majority supplant[ed] the legislature's straightforward method with an impractical invention that will obstruct officials every time they are faced with the question whether an offender from another state must register here." The Center for Appellate Litigation (Abigail Everett, of counsel) represented the respondent.
http://www.nycourts.gov/reporter/3dseries/2018/2018_08424.htm

***People v Allen***, 12/13/18 – **GRAND JURY ERROR / NO REVERSAL REQUIRED**
The defendant was the getaway driver during a shooting that resulted in a death. He and two codefendants were indicted. In the first indictment, the defendant was charged with 1st degree manslaughter and attempted murder (two counts) as to surviving victims. The first grand jury deadlocked on a charge of 2nd degree murder. After the deadlock, the People filed a second indictment containing a murder count. Because the People failed to obtain permission to resubmit the matter to a new grand jury, the defendant moved to dismiss the murder count. Supreme Court denied the motion, and the defendant proceeded to trial on both indictments. He was convicted of the manslaughter count and acquitted of the other charges contained in the first indictment, as well as the murder count in the second indictment. The Appellate Division granted a new trial on manslaughter. The Court of Appeals reversed. The improper murder count did not require a new trial on the manslaughter count. CPL 190.75 (3) provides that, if a grand jury has dismissed a charge, it "may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the people to resubmit such charge to the same or another grand jury." The People violated the statute, and Supreme Court erred in denying the defendant's motion to dismiss. However, the error did not require reversal; there was no reasonable possibility that the presence of the murder count during trial influenced in any meaningful way the jury's

decision to convict the defendant of manslaughter. Judge Rivera wrote a concurring opinion.
http://www.nycourts.gov/reporter/3dseries/2018/2018_08537.htm

***People v Hakes***, 12/13/18 – **SCRAM / DEFENDANT REQUIRED TO PAY**
As a condition of probation, sentencing courts can require defendants to wear—and pay for—Secure Continuous Remote Alcohol Monitoring (SCRAM) bracelets that measure alcohol intake, the Court held. Penal Law § 65.10 (4) authorizes sentencing courts to require defendants to wear such devices. The associated costs are part and parcel of satisfaction of the condition itself. In the instant case, the defendant made several payments for the SCRAM bracelet, but then stopped, resulting in the revocation of probation after a hearing. The defendant contended that the payment requirement was punitive and served no public safety goal. But nothing in the legislative history of Penal Law § 65.10 supported that position. Instead, defendants are required to pay many costs understood to be necessary to satisfy conditions. If a defendant claims financial inability, a hearing is needed to resolve the issue. Judge Rivera dissented.
http://www.nycourts.gov/reporter/3dseries/2018/2018_08538.htm

***People v Flores***, 12/13/18 – **ANONYMOUS JURY / NO JUSTIFICATION**
In a People's appeal, the Court of Appeals held that Orange Court had committed reversible error by empaneling an anonymous jury in violation of CPL 270.15. Assuming that, under certain circumstances, the trial court may anonymize jurors, the trial court acted without any factual predicate for the extraordinary procedure. Indeed, the court expressly based its decision on anecdotal accounts from jurors in unrelated cases and took no steps to lessen potential prejudice.
http://www.nycourts.gov/reporter/3dseries/2018/2018_08540.htm

# SECOND DEPARTMENT

***People v Joseph***, 12/12/18 – **SECOND VFO / ERROR**
The defendant appealed from a judgment of Nassau County Supreme Court convicting him of 1st degree robbery and other crimes upon his plea of guilty. He should not have been sentenced as a second violent felony offender with respect to his convictions of counts one and two, the Second Department held. The commission of the first two robbery counts occurred prior to sentencing for the earlier conviction. Since this affected the legality of the sentence, the issue was reviewable irrespective of a valid waiver of appeal. Judah Maltz represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08506.htm

***People v Ramos***, 12/12/18 – **SORA / ERROR**
The defendant appealed from an order of Kings County Supreme Court designating him a level-three sex offender. The Second Department reversed and remitted. At the SORA hearing, the court found to be premature the defendant's request for a downward departure from the presumptive risk level. That was error; the trial court should have addressed the merits. A defendant seeking a downward departure has the initial burden of: (1) as a matter of law, identifying an appropriate mitigating factor—one which tends to establish a lower likelihood of re-offense or danger to the community and which is not adequately addressed

by the Guidelines; and (2) establishing supporting facts by a preponderance of the evidence. If the defendant makes that showing, the court must determine whether a departure is warranted. Appellate Advocates (Jenin Younes, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08517.htm

# THIRD DEPARTMENT

***People v Gannon***, 12/13/18 – **SCI / JURISDICTIONAL DEFECT**
The defendant appealed from a judgment of Saratoga County Court convicting her upon a plea of guilty of 1st degree criminal sexual act and 1st degree sexual abuse. After police discovered that the defendant had assisted her husband in having inappropriate sexual contact with her two minor daughters, the defendant waived indictment and agreed to be prosecuted by an SCI. The Third Department held that the waiver and SCI were jurisdictionally defective with respect to 1st degree sexual abuse, because the relevant provision of the Penal Law was not in effect when the alleged criminal conduct occurred. The waiver of the right to appeal did not preclude the issue. The plea as to the errant count was vacated, and the count was dismissed. Brian Quinn represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08582.htm

# SECOND CIRCUIT

***United States v Lutchman***, 12/6/18 – **APPEAL WAIVER / NO CONSIDERATION**
The defendant pleaded guilty to conspiracy to provide material support to a foreign terrorist organization and was sentenced in the Western District to the statutory maximum of 240 months and supervised release. On appeal, he argued that his sentence was procedurally and substantively unreasonable. The plea agreement contained an appellate waiver, but the Second Circuit concluded that the agreement was not supported by consideration and declined to enforce the waiver. While a defendant's right to appeal his sentence may be waived, plea agreements are construed according to contract law principles, and a guilty plea can be challenged for a lack of consideration. Since plea agreements are unique contracts, ordinary contract principles are tempered with special due process concerns, and agreements are strictly construed against the Government. The defendant's waiver was unsupported by consideration. The plea agreement stated that he would waive indictment, plead guilty to the subject crime, and waive the right to appeal any sentence less than or equal to the 240-month maximum. The agreement offered nothing to the defendant that affected the likelihood that he would receive a sentence below the statutory maximum. Thus, the waiver was unsupported by consideration. The appellate court severed the waiver from the plea agreement and proceeded to the merits, but rejected the defendant's sentencing arguments.
http://www.ca2.uscourts.gov/decisions

# FAMILY

## FIRST DEPARTMENT

***Matter of Michael G. v Katherine C.***, 12/13/18 – **CUSTODY / HEARING NEEDED**
The mother appealed from an order of New York County Family Court, which granted the father's custody modification petition and awarded him sole custody, suspended her access for a year, and prohibited her from filing any modification petitions for such period. The First Department struck the provisions precluding access and filings and remanded. There were adequate allegations to support a finding of changed circumstances, including that the mother had thwarted the father's visitation; made an unfounded report of abuse by the father; and coached the three-year-old child to make false allegations. The court erred in issuing a final order without holding an evidentiary hearing. There was no basis to find that it served the child to have no contact for a year with his mother, who had been the primary caretaker. The court also erred in prohibiting her from filing future petitions without court leave; she did not have a history of engaging in frivolous litigation. Anna Boudakova represented the mother.
http://nycourts.gov/reporter/3dseries/2018/2018_08568.htm

## SECOND DEPARTMENT

***Williams v Jenkins***, 12/12/18 – **CUSTODY / RASH RULING TO PUNISH FATHER**
The father appealed from an order of Kings County Supreme Court which granted the mother's petition for sole custody and permission to relocate with the child to Illinois and suspended the father's parental access. The Second Department reversed and remitted for a hearing before a different Judge. A prior order provided for joint legal custody, physical custody to the mother, and parental access to the father. Neither parent could relocate without consent or a court order. After the mother petitioned to relocate, the father purportedly appeared at the courthouse and screamed profanities at courthouse staff. The trial court then summarily made the challenged ruling, stating that, due to his obstreperous behavior, the father's parental access was suspended. But a full hearing was needed to resolve factual issues. The order served more as a punishment to the father than as a custody award in the child's best interests. Russell Bloch represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08491.htm

***Rudy v Rudy***, 12/12/18 – **MAINTENANCE MOD / PROOF MISREAD**
The father appealed from an order of Orange County Family Court denying his objections to an order dismissing his petition for a downward modification of maintenance. The Second Department reversed and remitted. A stipulation of settlement incorporated, but not merged, into the judgment of divorce required the petitioner to pay maintenance until 2021. An extreme hardship standard applied. The Magistrate misconstrued the evidence of the father's *biweekly* income as showing his *weekly* income. Further, he was denied an opportunity to submit proof as to diligent efforts to find a job. The father represented himself upon appeal.
http://nycourts.gov/reporter/3dseries/2018/2018_08487.htm