CRIMINAL

DECISION OF THE WEEK

People v McGhee, 12/1/19 – ***BRADY*** **VIOLATION / REVERSED**

The defendant appealed from an order of NY Supreme Court, denying his CPL 440.10 motion to vacate a judgment convicting him of 2nd degree murder and 2nd degree CPW. The First Department reversed and ordered a new trial based on a *Brady* violation. The People failed to disclose a witness statement that could have aided the defense in impeaching the only eyewitness to the shooting, presenting a misidentification defense, and pursuing an additional avenue of investigation. Coupled with other trial errors, the People's failure to turn over the statement deprived the defendant of a fair trial. Here as in *People v Rong He*, 34 NY3d 956, only one eyewitness testified, making her credibility pivotal. At trial, the defendant had little ammunition for questioning the eyewitness's ID. Thus, any ability to challenge her description would have been critical. Moreover, the undisclosed statement suggested an alternative theory about who killed the victim. One justice dissented, opining that overwhelming evidence showed that the defendant was hired as a contract killer by a local drug dealer to execute the victim and that the undisclosed statement would not likely have altered the verdict. The Center for Appellate Litigation (Ben Schatz, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_09116.htm

COURT OF APPEALS

People v Cook, 12/19/19 – **SUPPRESSION / REOPENING / DISSENT**

The COA affirmed a First Department order upholding a Bronx judgment, convicting the defendant of attempted 1st degree robbery and 2nd degree assault. Supreme Court properly reopened the suppression hearing, the majority concluded in an opinion by Judge Garcia. The defendant urged that, once the People had rested, the hearing court did not have discretion to reopen the suppression hearing, absent exceptional circumstances. The COA disagreed. Absent finality concerns and the risk of improper tailoring of testimony, a rule constricting the lower court's discretion to reopen before ruling on suppression could not be justified. Judge Stein dissented in an opinion in which Judge Rivera concurred. After the sole witness testified and the parties rested, the defendant argued that the victim's description of the perpetrator was too vague to provide reasonable suspicion; the court expressed concerns; and reopening the hearing allowed the People to elicit testimony tailored to judicial concerns.

http://www.nycourts.gov/reporter/3dseries/2019/2019_09059.htm

People v McCullum, 12/17/19 – **SUPPRESSION / STANDING / NOT PRESERVED**

The COA affirmed a Second Department order, which upheld the defendant's Kings County conviction of CPW 2. He failed to preserve his argument: that after a warrant of eviction has been issued, an occupant of a rental apartment retains standing to challenge a search when a City Marshall has tendered "legal possession" of the premises to a landlord without physical eviction.

http://www.nycourts.gov/reporter/3dseries/2019/2019_08977.htm

People v Udeke, 12/19/19 – **PLEA / *SUAZO* / DISSENT**
The COA affirmed an order of the Appellate Term, First Department, sustaining the defendant's NY County conviction of aggravated felony offense. He pleaded guilty to that class B misdemeanor in satisfaction of accusatory instruments charging him with class A misdemeanors. Judge Rivera dissented, joined by Judge Wilson. The trial court told the defendant, a noncitizen, that he had no right to a trial by jury for a deportation-eligible class B misdemeanor. While the defendant's leave application was pending, *People v Suazo*, 32 NY3d 491, held that noncitizens had the right to a jury trial for crimes carrying the potential penalty of deportation. The decision applied retroactively to the instant appeal. The plea colloquy misinformed the defendant in stating that he would not be entitled to a jury trial if the People prosecuted him on the reduced B charge. Thus, the plea was not knowing, voluntary, and intelligent.
http://www.nycourts.gov/reporter/3dseries/2019/2019_09057.htm

People v Patterson, 12/17/19 – **TRIAL / JUROR CHALLENGE / PROPER DENIAL**
The COA affirmed a Fourth Department order sustaining Monroe County convictions for drug possession crimes. The trial court properly denied a challenge for cause to a prospective juror. Counsel asked, "If you don't hear from defendant, you don't hear him speak, are you going to hold that against him?" The juror responded, "I don't believe that I would." That response refuted any bias; no further inquiry was needed. Judge Fahey dissented in part, in an opinion in which Judges Rivera and Wilson concurred. The prospective juror expressed a preference to hear the defendant testify and never unequivocally stated that she would not be influenced by his silence. The court should have asked if the juror would be influenced by the defendant's failure to testify.
http://www.nycourts.gov/reporter/3dseries/2019/2019_08982.htm

People v Britt, 12/19/19 – **TRIAL / COUNTERFEIT BILLS / DISSENT**
The COA affirmed a First Department order sustaining the defendant's NY County conviction of 17 counts of 1st degree criminal possession of a forged instrument and another crime. There was legally sufficient evidence of the defendant's "intent to defraud, deceive or injure another" within the meaning of Penal Law § 170.30. In addition to direct evidence of his knowing possession of counterfeit bills, there was circumstantial evidence from which the jury could infer the intent to defraud. The circumstances included the defendant's possession of $300 in counterfeit bills on his person and the separation of fake and genuine currency. Judge Wilson dissented, joined by Judge Rivera, opining that the factors relied on by the majority said nothing about the requisite intent.
http://www.nycourts.gov/reporter/3dseries/2019/2019_09060.htm

People v Mairena* and *Altamirano, 12/17/19 – **TRIAL / SUMMATION / HARMLESS**
In these Kings County cases, the trial courts erred by failing to charge the jury pursuant to pre-summation rulings on defense requests. But the errors were harmless under the constitutional or nonconstitutional standard. So held the COA in an opinion authored by Judge Stein, affirming two Second Department orders. In a concurring opinion, Judge Fahey opined that the constitutional standard should apply. The parties must know how the court will charge the jury in order to prepare summations. Judge Rivera dissented in an opinion in which Judge Wilson concurred. Counsel in both cases planned their summations based on promised charges. Appellate review should focus on how errors impacted the

summation, not on evidentiary support for the verdict. The denial of the right to present an effective summation undermined the defense in both cases.
http://www.nycourts.gov/reporter/3dseries/2019/2019_08978.htm

SECOND DEPARTMENT

People v Dunbar, 12/18/19 – **NEW EVIDENCE / SUPPRESSION REOPENED**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of attempted 2nd degree robbery and 4th degree criminal mischief. The appeal brought up for review the denial of suppression. The Second Department remitted for a suppression hearing on issues raised as a result of newly discovered evidence. After a first trial, the Second Department reversed the judgment and ordered a new trial. When the prosecutor revealed new information prior to the second trial, the defendant moved to reopen suppression, and the trial court denied the motion. That was error. CPL 710.40 (4) permits a court to reopen a suppression hearing if the defendant could not, with reasonable diligence, have discovered the additional pertinent facts before the determination of the original motion. Here, the earlier suppression determination would have been affected by the revelation that the description of a livery car used by a perpetrator came from an unidentified and anonymous bystander, thus creating questions about the identity and reliability of the source and lawfulness of the stop. Appellate Advocates (Anders Nelson and Leila Hull, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_09018.htm

People v Richard Lewis, 12/18/19 – **PREJUDICIAL PHOTOS / REVERSED**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 3rd degree criminal sexual act (two counts), 3rd degree sexual abuse (three counts), and endangering the welfare of a child—his teenage stepdaughter. The Second Department reversed and ordered a new trial. The admission into evidence of photographs depicting the complainant's genitals and anus was unduly prejudicial. The appellate court reached the unpreserved issue in the interest of justice. Although the complainant's pediatrician testified that there were no relevant injuries, the photographs were displayed to the jury. The photos were irrelevant and served no purpose other than to inflame the jury and elicit impermissible sympathy. The error was compounded when the prosecutor argued in summation that the complainant had to "get on a table and open up her legs and have her genitals photographed to be shown to 15 strangers...What did she gain out of this? Nothing." The reviewing court also noted that the prosecutor engaged in extensive improper conduct during summation, including attempting to arouse the sympathy of the jurors and, while discussing the character of the defendant-church pastor, referencing sexual abuse scandals in the Catholic Church. Edwin Schulman represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_09023.htm

People v Jarama, 12/18/19 – **SORA / REVERSED / FACTOR 4**
The defendant appealed from an order of Kings County Supreme Court, designating him a level-two sex offender. The Second Department reversed and adjudicated the defendant to be level one. The SORA court erred in assessing 20 points under risk factor 4. Although the People submitted evidence that the defendant engaged in sexual contact with the victim

on three or four occasions, they failed to submit any evidence as to when these incidents occurred relative to one another, so as to demonstrate that they were separated in time by at least 24 hours. Appellate Advocates (Angad Singh, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_09044.htm

People v Edward Lewis, 12/18/19 – **SORA / REVERSED / RISK FACTOR 9**
The defendant appealed from an order of Kings County Supreme Court, designating him a level-two sex offender. The Second Department reversed in the interest of justice. Supreme Court erred in assessing 30 points under risk factor 9, based on a prior conviction for attempted endangering the welfare of a child. That conviction was not a felony, sex offense, or conviction for actually endangering a child. Since the erroneous assessment may have influenced the People in refraining from seeking an upward departure, remittal was ordered. Appellate Advocates (Tammy Linn and Jenna Hymowitz, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_09045.htm

FOURTH DEPARTMENT

People v Lawhorn, 12/20/19 – **DUE PROCESS VIOLATION / NEW TRIAL**
The defendant appealed from a judgment of Monroe County Supreme Court, convicting him of 1st and 2nd degree robbery upon a jury verdict. The Fourth Department reversed and ordered a new trial before a different justice. The trial court erred in entering into a plea agreement with a codefendant, requiring him to testify against the defendant in exchange for a more favorable sentence, thus denying the defendant a fair trial. *See People v Towns*, 33 NY3d 326. Kathryn Friedman represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_09223.htm

People v Nelson, 12/20/19 – **GANG ASSAULT 2 / REDUCED**
The defendant appealed from a judgment of Supreme Court, convicting him of 1st degree gang assault. The Fourth Department reduced the conviction to a 2nd degree offense. The evidence was legally insufficient to establish that the defendant shared the codefendant's intent to cause serious physical injury to the victim. According to a witness, the knife used by the codefendant was not visible during the assault, and the defendant had given the weapon to the codefendant before they knew that the victim was in the area. Immediately after the assault, the defendant complained that he had not given the codefendant the knife to be used in such a manner. The proof established the lesser included offense on a theory of accomplice liability. The Monroe County Public Defender (David Juergens, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_09144.htm

People v Desius, 12/20/19 – 12/20/19 – **INCONSISTENT VERDICT / NO RULING**
The defendant appealed from a County Court judgment, convicting him upon a nonjury verdict of 2nd degree assault (two counts). The Fourth Department reserved decision. The defendant contended that the verdict was inconsistent in finding him guilty of both recklessly and intentionally causing serious injury. He raised the issue at sentencing. The

court did not rule on his motion, and such failure could not be deemed a denial. The Wayne County Public Defender (Mary Davison, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_09164.htm

People v Ramos, 12/20/19 – **SEX OFFENDER / NOT**
The defendant appealed from an Oswego County Court order, which determined that he was a level-one sex offender. The Fourth Department reversed and annulled the determination. The Board of Examiners of Sex Offenders based its determination that the defendant was a sex offender on his purported conviction of a felony sex offense in Puerto Rico for which he was required to register. However, the Board erred in relying on documents in Spanish. Upon the defendant's objection, no translated documents were provided. Therefore, there was no competent evidence to support the determination against the defendant. Robert Gallamore represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_09153.htm

SECOND CIRCUIT

Attipoe v Barr, 12/19/19 – **EQUITABLE TOLLING / VACATUR**
The petitioner sought review of a BIA decision refusing to accept his untimely appeal of an IJ order of removal to Ghana. The Second Circuit granted the petition, vacated the decision, and remanded. The BIA erred in refusing to consider whether the appeal deadline was subject to an equitable tolling exception. In his pro se motion, the petitioner asserted that his retained attorney failed to bring the appeal as directed; the equities weighed in his favor; and he was detained, limiting the risk of flight. Claim-processing rules—such as the filing deadline here—are not jurisdictional. Statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling. The BIA must consider the principles of equitable tolling when an untimely appeal is filed and the petitioner raises the issue. On remand, the BIA could develop the factors to be applied in considering equitable tolling, consistent with *Holland v Florida*, 560 US 631, 646.
http://www.ca2.uscourts.gov/decisions/isysquery/f5e9e18b-ef61-4a76-949d-c410a627b2a1/3/doc/18-204_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/f5e9e18b-ef61-4a76-949d-c410a627b2a1/3/hilite/

ARTICLE

NOT EXCITED ABOUT EXCITED UTTERANCES
NYLJ, 12/16/19
By Judges Ark, Doyle, Taylor, and Dollinger
In the last two years, the excited utterance exception has come into question in two dissents by Judge Rivera. In *People v Cummings*, 31 NY3d 204, 214, she opined that the exception warrants serious reconsideration "in light of advances in psychology and neuroscience that demonstrate an individual's inability to accurately recall facts when experiencing trauma." In *People v Almonte*, 33 NY3d 1083, 1100, Judge Rivera acknowledged arguments that the exception should be abolished, but found the issue unpreserved for review in that case. The *Nucci v Proper* (95 NY2d 597) court noted that faulty memory or perception, and

insincerity or ambiguity, are infirmities against which the hearsay rule guards. But such concerns are swept aside when an anonymous 911 call identifying a perpetrator is offered and the declarant does not appear. The time is ripe for judicial reevaluation of the excited utterance exception, the authors concluded.

FAMILY

FIRST DEPARTMENT

Matter of Kelly G. v Circe H., 12/17/19 – **FIRST IMPRESSION / COUNSEL FEES**
The petitioner appealed from orders of NY County Supreme Court, awarding the respondent $200,000 in interim counsel fees; directing the petitioner to pay 100% of the costs of an AFC and a forensic evaluator; and setting criteria to establish equitable estoppel. The case presented an issue of first impression: whether in a proceeding to establish standing to assert parental rights under DRL § 70, the court had discretion to direct the more monied party—not yet adjudicated a parent—to pay the other party's counsel and expert fees under DRL § 237. The reviewing court concluded that the court did have such discretion and upheld the amount. As parens patriae, the trial court also had authority to direct the petitioner to pay for the AFC and to allocate payment of the forensic evaluator between the parties. Finally, the trial court properly articulated equitable estoppel factors to be considered. That portion of the order was appealable, despite the lack of a motion, where the issue was briefed. On the merits, the estoppel factors were appropriate.
http://nycourts.gov/reporter/3dseries/2019/2019_08961.htm

SECOND DEPARTMENT

Walter v Walter, 12/18/19 – **CUSTODY MOD / HEARING NEEDED**
The defendant appealed from an order of Queens County Supreme Court, which granted the plaintiff's motion to modify a so-ordered stipulation of custody incorporated but not merged into the parties' judgment of divorce, so as to award him final decision-making power. The Second Department reversed. The stipulation of custody provided that, except in cases of emergency, the parties would jointly make major decisions. Without a hearing, the plaintiff was awarded final decision-making authority. Modification of a court-approved custody stipulation requires a showing that there has been a change in circumstances such that a modification is necessary to ensure the best interests of the child. In view of disputed factual allegations, a hearing was needed. Furthermore, the interests of the child should be independently represented. Thus, the matter was remitted for appointment of an AFC and a hearing. Patricia Fersch represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_09056.htm

People ex rel. Accomando v Kirschner-Melendez, 12/18/19 –
GRANDPARENT VISITATION / DENIED
The adoptive mother of the two subject children appealed from an order of Suffolk County Supreme Court, which granted the paternal grandmother's DRL § 72 (1) habeas corpus

petition for visitation rights. The Second Department reversed. The grandmother had standing, but the record did not establish that visitation would be in the children's best interests, where: (1) the grandmother failed to acknowledge issues that led to the termination of the biological parents' rights; (2) believed that the removal and the adoption of the children were part of a government conspiracy; (3) feared that her car was wiretapped; and (4) allowed the bio father to have contact with the children in violation of an order of protection. Heather Fig represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_09015.htm

FOURTH DEPARTMENT

Matter of Johnston v Dickes, 12/20/19 – **CUSTODY PETITION / REINSTATED**
The mother appealed from a Family Court order dismissing her custody petition seeking to relocate. The Fourth Department reversed, reinstated the petition, and remitted. The allegations established the need for a hearing on whether her relocation was in the child's best interests. On a CPLR 3211 (a) (7) motion, the court must give the pleading a liberal construction, accepting the facts alleged as true, according the nonmoving party the benefit of every favorable inference, and determining only whether the facts fit within a cognizable legal theory. The pleading withstood scrutiny under such standard. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_09208.htm

Matter of Benson v Smith, 12/20/19 – **VISITATION / WRONGFUL DENIAL**
The father appealed from a Steuben County Family Court order. The Fourth Department vacated a provision denying the father visitation or contact with the child. Visitation is presumed to be in the child's best interests. Denial is drastic, requiring compelling reasons and proof that visitation would harm the child. Such proof was lacking here. The matter was remitted to set an appropriate schedule. The appellate court also vacated the errant conditions that the father could not file future modification petitions absent his release from custody, successful mental health treatment, and waiver of confidentiality rights. Mary Davison represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_09175.htm

ARTICLES

INTERLOCUTORY CUSTODY APPEALS / CLARIFICATION
A 12/18/19 NYLJ article addressing interlocutory orders in custody cases does not cite to any NY statutes or cases; states that attorneys should consider appealing from adverse interim orders; advises that such orders are generally not appealable as of right; and warns that attorneys face a high hurdle in obtaining permission to appeal. The article does not explain that, where custody is litigated in NY Supreme Court—as in divorce proceedings—there is a broad right to interlocutory appeal, pursuant to CPLR 5701 (a) (1). In Family Court Act Article 6 proceedings, however, intermediate orders are indeed not appealable as of right. Though not explained in the article, under Family Court Act § 1112 (a), interlocutory appeals from any Family Court orders are considered solely "at the discretion

of the appropriate Appellate Division," except in the case of Article 10 proceedings, where interim orders are appealable as of right.

REPRESENTATION DURING INVESTIGATION

NY Daily News, 12/14/19

By Michele Cortese and Tehra Coles

The Administration for Children's Services overwhelmingly investigates poor black and brown families for neglect. These New Yorkers are not receiving the same access to justice that wealthy families do. So the NYC Council has proposed giving parents meaningful access to legal representation during ACS investigations. Opponents claim that this will make investigations more adversarial. In fact, access to representation brings with it social workers to help parents engage productively in mandatory ACS meetings and with caseworkers, as well as other collaborative efforts directed toward family safety and preventing foster care. Critics also claim that timely legal representation could endanger children. Yet parents' counsel focus on child safety. Several years ago, the Center for Parental Representation and ACS partnered in a small pilot providing for legal and other services during investigations. Prosecution was avoided 80% of the time, families accessed services, children were safe, money was saved. We must level the playing field so poor parents facing the formidable power of ACS have the same legal support as parents with means.

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