

## CRIMINAL

### SECOND DEPARTMENT

***People v Dimon*, 7/3/19 – PLEA TERMS VIOLATION / HEARING NEEDED**

The defendant appealed from a judgment of Suffolk County Court, convicting her of 3<sup>rd</sup> degree criminal mischief and 2<sup>nd</sup> degree reckless endangerment. She pleaded guilty in exchange for a promise that she would be placed in a Mental Health Court program. If the defendant succeeded in treatment, her convictions would be dismissed or reduced. If she failed, she would be sentenced to jail time. Based merely on the prosecutor's representation at sentencing, the defendant was sentenced to one year. The Second Department reversed and remitted. The defendant was entitled to a hearing regarding whether she violated the plea conditions. Steven Feldman represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05417.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05417.htm)

***People v Wright*, 7/3/19 – REGISTRATION CRIME / REVERSED**

The defendant appealed from a Dutchess County Court judgment, convicting him of failure to register or verify as a sex offender, upon his plea of guilty. The Second Department reversed and vacated the plea. In his factual allocution, the defendant indicated that he provided DCJS with his address at a homeless shelter, where he stayed unless all beds were taken, in which case, he stayed with a friend. Such statements demonstrated that the defendant did not change his address and was not required to notify DCJS. Steven Feldman represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05428.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05428.htm)

***People v Covington*, 7/3/19 – SORA / DIAZ MANDATES REVERSAL**

The defendant appealed from an order of Westchester County Court, designating him a level-three offender. The Second Department reversed and dismissed. In 2002, the defendant was convicted in Virginia of 2<sup>nd</sup> degree murder. For the offense, involving a victim under age 15, he was required to register as a sex offender in Virginia upon his release. In 2017, the defendant moved to NY, where the SORA court determined that the Virginia registration made him a sex offender. The Second Department reversed, as required under *People v Diaz*, 32 NY3d 538 (mandatory registration as murderer under Virginia Code, under provision regarding nonsexual violent crimes against minors, did not qualify defendant as sex offender in NY). The Westchester County Legal Aid Society (Debra Cassidy, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05429.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05429.htm)

### THIRD DEPARTMENT

***People v Saxe*, 7/3/19 – MOLINEUX ERROR / REVERSAL**

The defendant appealed from a judgment of Cortland County Court, convicting him of 1<sup>st</sup> degree criminal sexual act and another crime. The Third Department reversed, based on an erroneous *Molineux* ruling. The People should not have been allowed to present detailed testimony from two female relatives regarding alleged sexual abuse by the defendant seven

years before the instant victim's disclosure. The testimony was not necessary to complete the narrative; and the prior acts did not bear sufficient similarity to the charged crimes so as to constitute a common scheme or show intent or motive. The evidence was not probative, and even if it were, the prejudicial effect was too great. The Rural Law Center of NY (Kelly Egan, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05345.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05345.htm)

***People v Daniels*, 7/3/19 – JUSTIFICATION CHARGE / REVERSAL**

The defendant appealed from a judgment of Schenectady County Supreme Court, convicting him of attempted 1<sup>st</sup> degree assault and 3<sup>rd</sup> degree CPW. The Third Department reversed in the interest of justice. The trial court failed to convey that, if the jury found the defendant not guilty of attempted 2<sup>nd</sup> degree murder based on justification, it was not to consider the lesser counts to which that defense applied. The failure may have led the jury to conclude that deliberation on the remaining counts required reconsideration of justification. A new trial was ordered. Carolyn George represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05343.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05343.htm)

***People ex rel. Johnson v Superintendent*, 7/3/19 –**

**SARA QUAGMIRE / CONCURRENCE CONCERNS**

The petitioner appealed from a judgment of Essex County Supreme Court, which denied his application regarding SARA-compliant housing. The Third Department affirmed. Two justices wrote separately to address conundrums created by mandatory conditions prohibiting certain sex offenders from residing within 1,000 feet of school grounds. Much of NYC is within the buffer zone and off limits to sex offenders. The petitioner, who was granted parole in June, awaited placement in a SARA-compliant homeless shelter in NYC. Since SARA restrictions may do more harm than good, a reexamination by the Legislature is needed. Legal Aid Society of NYC (Denise Fabiano, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05359.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05359.htm)

***People v Johnson*, 7/3/19 – JURY NOTE / RECONSTRUCTION**

The defendant appealed from a judgment of Sullivan County Supreme Court, convicting him of predatory sexual assault against a child. The record lacked critical information about three jury notes. The Third Department invoked *People v Meyers* (reconstruction hearing to determine whether purported jury note was request within ambit of CPL 310.30 and *People O'Rama*, 78 NY2d 270. Here the scanty and ambiguous record precluded resolution of the issue. Remittal was ordered. Paul Connolly represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05344.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05344.htm)

## FOURTH DEPARTMENT

***People v Grimes*, 7/5/19 – JURY NOTE / NO MEANINGFUL NOTICE**

The defendant appealed from a judgment of Genesee County Court, which convicted him of 2<sup>nd</sup> degree burglary. The Fourth Department reversed, as a result of the absence of record proof that, in response to two substantive jury notes, the trial court complied with its CPL 310.30 obligation to provide meaningful notice in response to two substantive jury notes.

The stenographer was unable to transcribe the final day of trial; due to a snafu, the electronic stenographic notes were unrecoverable. A reconstruction hearing failed to establish the court's on-the-record handling of the notes. The reviewing court could not assume that the proper procedure was used, where the record was devoid of information as to how the jury notes were handled. A new trial was granted. The Legal Aid Bureau of Buffalo (James Specyal, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05461.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05461.htm)

***People v Herrod*, 7/5/19 – *BATSON / RACE-NEUTRAL REASON***

The defendant appealed from a judgment convicting him of 2<sup>nd</sup> degree murder. The trial court determined that the People offered a nonpretextual, race-neutral reason for excluding the prospective juror at issue. The Fourth Department affirmed. At a remittal hearing, the prosecutor testified the prospective juror was stricken because he was a crime victim who expressed dissatisfaction with the manner in which the crime against him had been prosecuted. Further, his statements suggested that he might be receptive to a potential justification defense. The remittal court's findings were entitled to great deference.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05450.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05450.htm)

***People v Herrod*, 7/5/19 – *PERSISTENT VIOLENT FELON / VACATED***

The defendant appealed from a Steuben County Court judgment, convicting him of several offenses and sentencing him as a persistent felony offender. The Fourth Department vacated the PFO finding. The defendant's history did not include violence, drugs, or serious offenses. The sentence of 15 years to life was harsh, given the plea offer of 2½ to 5 years. The aggregate term was modified to 9 to 18 years. Mary Davison represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05454.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05454.htm)

## FAMILY

### FIRST DEPARTMENT

***Matter of Sandra Y. v Jahi J.Y.*, 7/2/19 – *CUSTODY / REVERSED***

The AFC appealed from an order of NY County Family Court, which granted the father temporary custody of the subject children. The First Department reversed and remanded for a hearing. Modification of custody on a temporary basis requires a hearing, absent an emergency. The court's determination was based on school records, allegations of educational neglect, and other matters set forth in a court-ordered investigation. But no emergency was articulated. Lawyers for Children (Shirim Nothenberg, of counsel), represented the children.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05324.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05324.htm)

## SECOND DEPARTMENT

***Matter of Christopher M.S. (Christine F.S. – Donna B.),*** 7/3/19 –  
**ACS APPEAL / VISITATION ORDER / AFFIRMED**

In 2017, the subject child was born with a positive toxicology for heroin, resulting in a restrictive placement with his paternal grandmother. In 2018, ACS commenced a proceeding alleging abuse by the parents and grandparents. The grandmother was compliant with her service plan. Following a 1028 hearing, the court continued the child's placement in foster care, but granted the grandmother access. ACS appealed, and the Second Department affirmed. During a neglect proceeding, a respondent has the right to reasonable access, unless the child would be endangered thereby. There was no such showing here.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05407.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05407.htm)

***Damani B. (Theresa M.),*** 7/3/19 – **PERMANENCY / USEFUL DISCUSSION**

The mother appealed from a permanency hearing order of Kings County Family Court, which determined that ACS made reasonable efforts to implement the original permanency plan of reunification with the parent; and changed the permanency goal from reunification to adoption. In affirming, the Second Department provided an expansive discussion of Family Court Act article 10–A permanency hearings and standards.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05399.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05399.htm)

## THIRD DEPARTMENT

***Matter of Liska J. v Benjamin K.,*** 7/3/19 – **CUSTODY / NEW HEARING**

The father appealed from an order of Albany County Family Court, which granted the mother's custody applications. The Third Department reversed and remitted. Family Court erroneously held that, because the father did not file a custody petition, it could not consider much of his proof. At trial, the father did not object to the evidentiary limitations. However, the trial court's failure to give him a full and fair opportunity to present evidence was a due process violation requiring a new hearing. Alexandra Buckley represented the father.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05347.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05347.htm)

***Matter of Richard L. v Kristen M.,*** 7/3/19 –  
**MODIFICATION / JOINT LEGAL CUSTODY**

The father appealed from an Ulster County Family Court order, which modified a prior order and awarded the mother sole physical and legal custody. The Third Department modified. There was no proof that the parties' relationship was acrimonious; and there was proof that they communicated about how to care for the child. Thus, joint legal custody was reinstated. The father did not preserve his contention that the AFC improperly substituted judgment. But the reviewing court reiterated that an AFC must advocate for the client's wishes, unless the child lacks the capacity for considered judgment and honoring his/her wishes could present a risk of harm. Azra Khan represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05348.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05348.htm)

***Matter of Carmine GG. (Christopher HH.),*** 7/3/19 –

### **TEMPORARY ORDER OF PROTECTION / UNSOUND CONDITIONS**

The father appealed from a temporary order of protection issued in an Article 10 proceeding. The Third Department reversed. The instant conditions, proposed by the mother, were not necessary to protect the child. The father was required to submit to random urine tests upon the mother's request; but it would make more sense for such tests to occur prior to his parenting time. Thus, the order was vacated. Jonathan Becker represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05360.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05360.htm)

## **FOURTH DEPARTMENT**

### ***Matter of Rapp v Horbett*, 7/5/19 – SHARED CUSTODY / SUPPORT MODIFIED**

The mother appealed from an Erie County Family Court order, which denied her objections to the Support Magistrate's child support order. In this case of shared physical custody, the father should have been deemed the noncustodial parent for the purpose of support, given his higher income. The mother was entitled to a credit against any arrears. Although there is a strong public policy against recoupment of overpayments, the credit was appropriate. The mother received certain public assistance, whereas the father received pension benefits and had significant assets; and the credit would not prevent him from meeting the child's needs. The mother represented herself.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_05447.htm](http://nycourts.gov/reporter/3dseries/2019/2019_05447.htm)

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