

CRIMINAL

SECOND DEPARTMENT

***People v Larman*, 8/7/19 – SUBBED ALTERNATE JUROR / REVERSAL**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree grand larceny and other offenses. The Second Department reversed and ordered a new trial.

An alternate juror briefly participated in deliberations with 11 sworn jurors, while the 12th sworn juror was absent. The court replaced the alternate juror with the 12th juror and told the jury to deliberate. The defendant moved for a mistrial, and the court reserved decision. The next day, the court questioned the 11 sworn jurors about their ability to disregard prior deliberations. They provided assurances, and the court directed them to start deliberations anew. That was error. Once deliberations begin, a regular juror may be replaced by an alternate only upon the defendant's written consent. The error infringed on the defendant's constitutional rights and was not cured by the instructions to the reconstituted jury. Christopher Booth represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_06097.htm

***People v Cianciulli*, 8/7/19 – ECL / DUMPING DEBRIS**

The defendant appealed from a Suffolk County Supreme Court judgment, convicting him of endangering public health, safety or the environment in the 3rd and 4th degrees, in violation of the ECL. The Second Department vacated those convictions, based on legally insufficient evidence of the element of conscious disregard of the risk that dumping demolition debris would release hazardous substances. However, the proof established guilt of operating a solid waste management facility without a permit. John Carman represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_06094.htm

THIRD DEPARTMENT

***People v Butkiewicz*, 8/8/19 – SENTENCE MODIFIED / SUPPRESSION ISSUE**

The defendant appealed from a judgment of Warren County Court, convicting him of 1st degree attempted rape, 1st degree sexual abuse, and other crimes. The Third Department held that County Court erred in directing that the terms for attempted rape and sexual abuse run consecutively, since those convictions may have been based on the same act. Two concurring justices opined that evidence obtained from the defendant's cell phone should have been suppressed, but the error was harmless. There was insufficient proof about how the wife came to possess the cell phone, and no proof as to the extent of her access to, or usage of, the phone. The privacy interests at stake were significant—cell phones contain a digital record of nearly every aspect of one's life. The evidence fell far short of showing the wife's actual authority to consent to the warrantless search or the police officers' reasonable belief she had the requisite authority. The Rural Law Center of NY (Kristin Blugas, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_06118.htm

SECOND CIRCUIT

***U.S. v Prado*, 8/5/19 – DRUGS AT SEA / INDICTMENT DISMISSED**

The defendants appealed from a judgment of District Court–SDNY, convicting them of conspiracy to distribute cocaine, and to possess cocaine with intent to distribute, while onboard a stateless vessel. The Second Circuit dismissed the indictment. While on patrol off the coast of Central America, the Coast Guard received a tip from DHS that a Colombian drug cartel was sending a large shipment of cocaine toward Costa Rica on a small boat. Officers recovered drugs, arrested the defendants, and set fire to the boat and sank it. The boarding party’s violation of governing law doomed the prosecution. They destroyed the vessel without having secured a vessel identification number to discern whether it was registered to a nation, or was stateless and thus subject to U.S. jurisdiction under the Maritime Drug Enforcement Act. Subject matter jurisdiction could be raised for the first time on appeal. The plea allocutions were also defective: the court did not set forth the nature of the charges and determine a factual basis for the pleas.

http://www.ca2.uscourts.gov/decisions/isysquery/dd54d9dd-0269-4da4-99f1-7c3abff47d51/2/doc/16-1055_complete_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/dd54d9dd-0269-4da4-99f1-7c3abff47d51/2/hilite/

RESOURCES OF INTEREST

DVSJA

The current *PRO SE*, a newsletter published by Prisoners Legal Services of NY, contains a helpful summary regarding resentencing under the Domestic Violence Survivors Justice Act (pp 11-16).

<https://nebula.wsimg.com/02fdbd909c24ff5475290b0691fe2bfa?AccessKeyId=58077DB5116E2803DCE5&disposition=0&alloworigin=1>

SORA

A Defense Attorney’s Guide to SORA Proceedings offers a comprehensive treatment of SORA, including charts, checklists, and sample documents. Click on this link to access the Manual, authored by Alan Rosenthal, in cooperation with the Onondaga County Bar Association ACP:

<https://www.ils.ny.gov/files/Appellate/Resources/SORA%20Manual%202019.pdf>

FAMILY

SECOND DEPARTMENT

***Matter of Means v Miller*, 8/7/19 – UCCJEA / REVERSAL**

The mother appealed from an order of Kings County Family Court, which dismissed her custody modification petition. The Second Department reversed and remitted. In 2010, Family Court awarded the father custody of the parties' child. Seven years later, the mother filed for sole custody. At a court appearance, she asked to represent herself. The court cautioned that she would be held to the same standards as an attorney; granted the request; and dismissed the petition, due to a lack of jurisdiction, based on the child's residence in NJ. That was error. A NY court made the initial custody determination and thus had continuing jurisdiction under the UCCJEA, until a finding that jurisdiction should be relinquished. The mother was not given the chance to present evidence on the jurisdiction issue. Moreover, she did not knowingly waive her right to counsel, since the court failed to conduct a searching inquiry, exploring the disadvantages of proceeding pro se. Rhea Friedman represented the mother.

http://nycourts.gov/reporter/3dseries/2019/2019_06088.htm

***Matter of Paese v Paese*, 8/7/19 – CUSTODY / MODIFICATION**

In a DRL § 70 habeas corpus proceeding, the father appealed from an order of Westchester County Supreme Court, which denied his petition for custody of three children. The Second Department modified and remitted. When the parents met in 2007, the mother had a daughter, Isabella, from a prior relationship. The father moved in and helped raise the girl. The parties then had two children together. After a custody trial, the father filed the instant petition. The Second Department held that Supreme Court erred in finding that he lacked standing as to Isabella. A prior appeal resulted in a finding that, based on judicial estoppel, he had standing. Remittal was needed to determine Isabella's best interests. As to the other children, the father did not show a change in circumstances.

http://nycourts.gov/reporter/3dseries/2019/2019_06090.htm

LETTER TO EDITOR

HEARING CHILDREN'S VIEWS – NYLJ, 8/5/19

By Gary Solomon, Karen J. Freedman, Karen Simmons

A recent NYLJ article, "Does Empowering Children During Divorce Litigation Serve Them Well?," misapprehends the role of AFC and the purpose of Rule 7.2—to help the court reach the right result, by ensuring that the child is represented by loyal counsel and can effectively assert his/her position. AFCs can help children make sound decisions, and judges can reach fair judgments based in part on attorneys' factual presentations made to further their clients' interests. AFCs are informed by the wisdom of children, whose judgments about their best interests are often as reasonable as those of adults—who sometimes do not distinguish their children's needs from their own. If AFCs advocated for the clients' best interests, the attorneys' personal biases could prevail. The power of the adversary process lies in the full presentation of different points of view.

RAISE THE AGE

***People v L.L.* – NO EXTRAORDINARY CIRCUMSTANCES / 1ST OFFENSE**

Decided 7/16/19, Posted 8/6/19

In Queens County Supreme Court, the AO was charged with robbery in various degrees and other offenses, all in connection with a single incident. The People sought to prevent removal to Family Court based on extraordinary circumstances. The court denied the application. The AO had no prior convictions or arrests and was not the principal actor. The evidence did not establish that he displayed a firearm or caused a significant physical injury or that the facts were unusual or heinous. The AO's poor judgment and impetuous conduct warranted removal to redirect his errant path.

http://www.nycourts.gov/reporter/pdfs/2019/2019_32330.pdf