# CRIMINAL

## FIRST DEPARTMENT

### *DECISION OF THE WEEK*

***People v Herrera***, 2/23/21 – ***VELEZ* ERROR / REVERSED**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree assault. The First Department reversed and ordered a new trial. Justification was central to the case. Counsel explained in the opening statement that "this was truly a case of self-defense." The defendant testified that she had felt like she was fighting for her life; upon summation, counsel addressed self-defense; the jurors were instructed on justification; and they submitted a jury note about it. But the jury instructions failed to convey that acquittal of attempted 1st degree assault based on justification would preclude consideration of the lesser included offense of 2nd degree assault. *See People v Velez*, 131 AD3d 129. The verdict sheet was also incorrect. (The model verdict sheet was revised in 2018 to reflect *Velez* and its progeny.) In response to the jury note, the trial court repeated the erroneous jury instruction. The jury would have continued to the lesser count, even if acquittal on the greater count was based on justification—an impermissible result. It was impossible to know the theory the jury relied upon in acquitting the defendant of attempted 1st degree assault. Counsel failed to object, but the issue was reached in the interest of justice, since the error undermined the reliability of the verdict. The Center for Appellate Litigation (Robert Dean, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_01148.htm

***People v Bruno***, 2/23/21 – ***PEQUE* / ABEYANCE**

The defendant appealed from a NY County judgment convicting him of 3rd degree criminal sale of a controlled substance. The appeal was held in abeyance, because it was not clear that the defendant was made aware of any potential *Peque* (22 NY3d 168) issues and had reached an informed decision not to raise them. Counsel was directed to attempt to discuss with the defendant any issues that could be raised about not having been told that he might be deported as a consequence of his guilty plea, and the possible consequences of an appeal arguing such issues.
http://nycourts.gov/reporter/3dseries/2021/2021_01150.htm

## SECOND DEPARTMENT

***People v Murphy***, 2/24/21 – **PLEA WITHDRAWAL / ABEYANCE**

The defendant appealed from a Rockland County Court judgment, convicting him of 3rd degree robbery. The Second Department remitted and held the appeal in abeyance. Prior to sentencing, represented by new counsel, the defendant moved to withdraw his guilty plea. In an affidavit, he claimed innocence and asserted that he had pleaded guilty out of fear that prior counsel would not ably represent him. County Court deemed the application to be a CPL 330.30 (1) motion, declined to consider supporting documents, and denied the motion. That was error. The motion was made pursuant to CPL 220.60 (3), and the

accompanying materials should have been reviewed. Upon remittal, the defendant would be assigned new counsel. Gary Eisenberg represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_08203.htm

***People v Edmondson***, 2/24/21 – **MULTIPLICITOUS / DISMISSED**
The defendant appealed from a Westchester County Court judgment, convicting him of 1st degree assault, 1st degree robbery, and other crimes. The Second Department modified. The defendant's contention that the above-named counts were multiplicitous was unpreserved, but the appellate court reviewed the issue in the interest of justice. The jury instructions for the two offenses were essentially identical. Although the dismissal of the assault count would not affect the duration of the sentence, such relief was appropriate, given the stigma of redundant convictions. Samantha Cruzado represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_08201.htm

# THIRD DEPARTMENT

***People v Walker***, 2/25/21 – **IAC CLAIM / AFFIRMED**
The defendant appealed from an Albany County Court judgment, convicting him of 2nd degree burglary. The Third Department affirmed, rejecting a claim of ineffective assistance. Where the defense was based on a lack of identification evidence, counsel's failure to request DNA testing of items recovered from the scene of the crime could have been a strategic judgment. As to counsel not challenging certain prospective jurors, jury selection involved a quintessentially tactical decision that appellate courts were loath to second-guess.
http://nycourts.gov/reporter/3dseries/2021/2021_01157.htm

***People v Mazzeo***, 2/25/21 – **AAG / OK as ADA**
The defendant appealed from an Albany County Court judgment, which revoked probation and imposed a sentence of imprisonment. The Third Department affirmed. An Assistant Attorney General properly assumed a prosecutorial role in the proceeding, since the People adhered to the dictates of County Law § 702 and the DA retained ultimate prosecutorial authority over the matter.
http://nycourts.gov/reporter/3dseries/2021/2021_01162.htm

# FAMILY

## SECOND DEPARTMENT

***Rosado v Cornielle***, 2/24/21 – **TEMP. CUSTODY / LEAVE TO APPEAL / REMITTAL**
The mother appealed from an order of Kings County Family Court which granted the AFC's motion to award temporary physical custody of the parties' child to the father. The appeal was by permission. *See* Family Ct Act § 1112 (a). The Second Department reversed. The appellate court had stayed enforcement of the subject order pending the determination of the appeal or the issuance of a dispositional order, whichever occurred first. *See* Family Ct Act § 1114 (b). The grant of temporary custody to the father was not in the best interests of the child under the totality of circumstances, which included that the mother had been the primary custodian since at least 2016, when the father relocated to Pennsylvania. The mother had not presented her evidence, and there were many controverted issues. The matter was remitted for completion of the custody hearing.
http://nycourts.gov/reporter/3dseries/2021/2021_08188.htm

***Conroy v Vaysman***, 2/24/21 – **RELOCATION / LEAVE TO APPEAL / REMITTAL**
The mother appealed from an order of Kings County Family Court, which, among other things, denied her motion to enjoin the father from relocating with the child to NJ. The Second Department reversed such denial and remitted for a new hearing. As a threshold matter, on the court's own motion, the notice of appeal was deemed to be an application for permission to appeal, which was granted. *See* Family Ct Act § 1112 (a). Family Court erred in deciding the motion without doing a best interests analysis under *Matter of Tropea v Tropea*, 87 NY2d 727. Anna Stern represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_08182.htm

***M/O Elijah P. (Jane W.)***, 2/24/21 – **DERIVATIVE NEGLECT / AFFIRMED**
The mother appealed from an order of Kings County Family Court. Regarding the subject children, the court found that she neglected Elijah and derivatively neglected Saamiyah. The Second Department affirmed, finding sufficient evidence of neglect and derivative neglect. The appellate court rejected the mother's argument that dismissal of the proceeding as to Saamiyah, pursuant to Family Ct Act § 1051 (c) (aid of court no longer needed), meant that the derivative neglect finding could not stand. The dismissal order did not vacate the neglect finding. Because the adjudication of derivative neglect constituted a permanent and significant stigma which might indirectly affect the mother's status in future proceedings, the appeal from that finding was not academic. However, on the merits, the adjudication was sustained. The mother's excessive corporal punishment of Elijah demonstrated a fundamental defect in her understanding of parental duties relating to any children in her care.
http://nycourts.gov/reporter/3dseries/2021/2021_08186.htm

# THIRD DEPARTMENT

***M/O Lazeria F. (Paris H.)***, 2/18/21 – **ART. 10 DECISION / CORRECTED**
On February 18, the Third Department handed down an opinion which modified the challenged Chemung County Family Court order. The appellate court held that the "father" could not be found to have severely abused the deceased child and derivatively severely abused the older daughter and son, who were not his biological children. Such holding was based on Social Services Law § 384-b (8) (a) (i) ("for the purposes of this section a child is 'severely abused' by his or her parent if…"). Upon the court's own motion, on February 23, that opinion was vacated and a new opinion was substituted. The cases cited in the vacated opinion predated an amendment to Family Ct Act § 1051 (e) (L. 2015, c. 492, eff. Feb. 18, 2016) ("finding of severe or repeated abuse under this section may be made against any respondent as defined in subdivision [a] of section one thousand twelve of this act," and such definition encompassed "any parent or other person legally responsible for a child's care"). There was no dispute that this father was a "person legally responsible" for the subject children's care. Although he was the biological father only of the younger daughter and son, he lived with, and had been in a relationship with, the mother for five years and referred to all of the children as "our kids."
http://decisions.courts.state.ny.us/ad3/Decisions/2021/528467motiondec.pdf
http://nycourts.gov/reporter/3dseries/2021/2021_01155.htm

***M/O Bradley Q. (Elizabeth R.)***, 2/25/21 – **ART. 10 APPEALS / MOOT**
In a Family Ct Act Art. 10 proceeding, the respondent pursued interlocutory appeals as of right (Family Ct Act § 1112 [a]) from two interim orders of Schenectady County Family Court—one temporarily removing the subject children and the other granting the petitioner agency's motion to compel discovery. The Third Department, which had denied the appellant's Family Ct Act § 1114 (b) application for a stay pending appeal, dismissed the appeals as moot. Regarding the removal order, during the pendency of the appeal, a fact-finding hearing had been held, and the subject children had been adjudicated to be neglected. As to discovery, Family Court had ordered the respondent to comply with the petitioner's demands, finding that Family Ct Act § 1038 did not modify the mutuality of discovery proscribed in CPLR 3101 or 3121. However, the appeal from the discovery order was also moot, based on the completion of the fact-finding hearing. The reviewing court advised that the respondent could raise the issue on appeal from an eventual dispositional order. *See M/O Ameillia RR.*, 112 AD3d 1083.
http://nycourts.gov/reporter/3dseries/2021/2021_01167.htm

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