CRIMINAL

NY COURT OF APPEALS

DECISION OF THE WEEK

People v Anderson, 5/4/21 – **TEEN PSYCHE / NO EXPERT**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder and attempted 2nd degree murder. At age 14, he shot at members of a rival gang and killed a bystander. Without holding a *Frye* hearing, the trial court precluded expert testimony regarding adolescent brain development. The Second Department affirmed the conviction, finding that the expert proof was not necessary to aid the jury in deciding whether the People disproved justification, because adolescent impulsiveness was not an issue beyond the ken of the typical juror. The Court of Appeals affirmed. Deciding whether an expert would aid a jury in reaching a verdict was within the sound discretion of the trial court. Here the judge properly exercised that discretion.
http://www.nycourts.gov/reporter/3dseries/2021/2021_02735.htm

People v Slade, 5/6/21 – **TRANSLATOR / NO HEARSAY DEFECT**

In three appeals, the defendants challenged the facial sufficiency of the accusatory instrument filed against each of them, arguing that the participation of a translator created a hearsay defect. The Court of Appeals disagreed. The four corners of each instrument indicated that an accurate verbatim translation occurred, and after the translation, the witness/complainant adopted the statement as his/her own. Judge Garcia wrote for the majority. Judge Rivera dissented. There was a systemic problem where the sufficiency of the accusatory instrument depended on supporting depositions by persons who lacked English-language proficiency. The prosecution failed to timely submit documentation as to translator qualifications and translation accuracy. It was troubling that the instant incriminating statements were translated by unknown individuals of unknown skills. Justice Wilson dissented separately. There was little reason to trust the soundness of these accusatory instruments. A certificate of translation under penalty of perjury—in which the translator attested to fluency in the relevant languages and affirmed the accuracy of the translation—would have provided confidence in each translation.
http://www.nycourts.gov/reporter/3dseries/2021/2021_02866.htm

People v Brown, 5/6/21 – **SENTENCING / DEFENDANT'S STATEMENT**

The defendant's contention, that there was a violation of his CPL 380.50 (1) right to an opportunity to make a personal statement at sentencing, did not survive the valid appeal waiver. An enforceable unrestricted waiver could preclude appellate review of claims arising during sentencing. Judge Wilson dissented. The defendant had the right to speak his mind at sentencing and did not waive that right, which implicated the fundamental fairness of our criminal justice system. The sentencing allocution provided the one unfettered opportunity for a convicted defendant to address the court and make a public statement. Such statements had the potential to influence the length of sentence and the terms of reentry. The instant issue survived the waiver of appeal. The record

unequivocally demonstrated that the defendant did not bargain away his right to allocute, and everyone understood that he had not done so. Judge Rivera joined the dissent.
http://www.nycourts.gov/reporter/3dseries/2021/2021_02867.htm

FIRST DEPARTMENT

People v Saladeen, 5/4/21 – **FALSE INSTRUMENT / VACATED**
The defendant appealed from a NY County Supreme Court judgment, convicting him of 3rd degree assault, 1st degree offering a false instrument for filing (three counts), and another crime, after a nonjury trial. The First Department vacated the conviction of one false instrument count. The police officer–defendant could not reasonably have believed that he had to repeatedly punch the cuffed, prone victim. Further, the defendant intentionally caused false statements to be written on officially filed forms—with one exception. The Investigating Supervisor's Report was not prepared, reviewed, or filed by the defendant; and the evidence did not show that he knew that his oral statements to his commanding officer would be memorialized therein. The trial court correctly precluded proof of the victim's prior acts to show his violent propensity as relevant to the justification defense. Such facts were irrelevant to the defendant's state of mind since they were unknown to him at the time of the incident. Rae Koshetz represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_02760.htm

People v Ponder, 5/6/21 – **POT ODOR / TRUNK SEARCH**
The defendant appealed from a judgment of NY County Supreme Court, convicting him, upon his guilty plea, of 2nd degree CPW and the unlawful possession of marijuana. The First Department reversed and dismissed the charges. The odor of marijuana, together with a de minimis amount of pot in the vehicle's center console, did not furnish probable cause to search the trunk. There was no factual nexus between the possession of an amount consistent with personal consumption and the trunk search. To the extent that prior First Department decisions stood for a per se rule, that the smell of marijuana alone provided probable cause to search a trunk, those decisions should not be followed. Center for Appellate Litigation, New York (Brittany Francis of counsel), represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_02880.htm

People v McEachern, 5/6/21 **– SUPERVISION / REDUCED**
The defendant appealed from judgments of NY County Supreme Court, convicting him of 2nd and 3rd degree burglary and sentencing him to an aggregate term of 3½ years, with five years' post-release supervision. The First Department reduced the supervision component to three years and vacated the surcharge and fees, based on the People's consent and the interest of justice. The Center for Appellate Litigation (Robert Dean, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_02882.htm

SECOND DEPARTMENT

People v Kaval, 5/5/21 – **SENTENCE / PERSISTENT FELON / LAW OF CASE**
The defendant appealed from a resentence of Queens County Supreme Court, imposed on convictions of 2nd and 3rd degree CPW. The Second Department reversed and remitted. After the defendant's conviction, the People sought and obtained a persistent violent felony offender (PVFO) adjudication. However, in a prior appeal, the People conceded that there was an insufficient tolling period as to one predicate. Upon remittitur, the People again sought a PVFO adjudication, which Supreme Court granted, after allowing additional prosecution evidence about the tolling period. Such decision violated the doctrine of law of the case. The prior appellate resolution was binding, where there was no indication that the new information was not available before, and the People had had a full, fair opportunity to litigate the issue. Legal Aid Society, NYC (Simon Greenberg) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_02823.htm

People v Williams, 5/5/21 – **SENTENCE / DLRA / REVERSED**
The defendant appealed from a County Court order, which denied his motion to be resentenced, pursuant to the DLRA of 2004 and CPL 440.46, on his 2000 convictions of 1st and 3rd degree criminal possession of a controlled substance. The Second Department reversed and remitted. Where a defendant was eligible for DLRA relief, there was a statutory presumption in favor of resentencing, based on the legislature's judgment that the prior sentencing scheme for certain drug offenses was excessively harsh. That presumption was not overcome here by the factors invoked by County Court—the defendant's criminal history, the quantity of drugs, and his disciplinary infractions in prison. The Dutchess County Public Defender (Jennifer Burton, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_02831.htm

People v Adams, 5/5/21 – **SENTENCE / CONCURRENT TERMS**
The defendant appealed from Suffolk County Court judgments, convicting him of two counts of 3rd degree CPW, upon his pleas of guilty. The Second Department reversed. Consecutive sentences should not have been imposed, since there was no showing that the acts underlying the crimes were separate and distinct. Under the circumstances of this case, upon remittal, the People should be given the opportunity to withdraw their consent to the plea agreement. Arza Feldman represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_02808.htm

People v Crumb, 5/5/21 – **GEOGRAPHIC JURISDICTION / NEW TRIAL**
The defendant appealed from a Nassau County Supreme Court judgment, convicting him of 2nd degree murder and other offenses. The Second Department vacated the convictions of 1st degree reckless endangerment, 2nd degree assault, and resisting arrest and ordered a new trial on those counts. The defendant stabbed and killed his wife and injured his daughter in their Nassau County home. As to the crimes that occurred after he fled, Supreme Court erred in instructing the jury that geographic jurisdiction over one count conferred jurisdiction over all the other counts. The defendant was entitled to have the jury determine factual issues as to venue. Matthew Brissenden represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_02816.htm

THIRD DEPARTMENT

People v Green, 5/6/21 – **ROBBERY & ASSAULT / DISMISSED**
The defendant appealed from a Supreme Court judgment, convicting him of 2nd degree robbery, 2nd degree assault, and other crimes. The Third Department reversed and dismissed. The convictions were not supported by legally sufficient evidence and were against the weight of the evidence. The People failed to prove that the defendant was one of three perpetrators who robbed and assaulted the victim. The trial proof did not establish a firm timeline of events; the victim vaguely described the assailants as three Black men; and the three codefendants pleaded guilty. The Albany County Alternate Public Defender, Albany (Steven Sharp, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_02841.htm

State of NY v John T., 5/6/21 – **CIVIL MANAGEMENT / PRO SE**
In a MHL Article 10 civil management proceeding, Clinton County Supreme Court granted the respondent's request to proceed pro se but directed MHLS to act as standby counsel. The court further ruled that the respondent could personally conduct cross-examinations, but victims could testify by simultaneous two-way video. The Third Department modified. Standby counsel should do victim cross-examinations. Supreme Court failed to engage in the requisite analysis. Whether a MHL Art. 10 respondent possessed a due process right to self-representation appeared to be an open question. If the respondent had such right, it was not absolute. Under the relevant balancing test, requiring counsel to question the victims should not increase the risk of a wrong result adverse to the respondent and should serve the State's interest in protecting the public. Allowing the respondent to question victims could retraumatize them and thwart the petitioner's ability to sustain its burden of proof. Mental Hygiene Legal Service (Matthew Bliss) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_02862.htm

FAMILY

FIRST DEPARTMENT

M/O Scott W. v Krizzia G., 5/4/21 – **DECISIONS / MOTHER KNOWS BEST**
NY County Family Court awarded the mother physical custody of the child and decision-making authority over education and granted the father sole say over medical and dental care. The First Department modified. The record did not provide a sound basis for such power to the father. Given the child's serious behavioral issues in school and the overlap between school and health issues, letting the mother rule in both areas made more sense. She was better able to address the child's educational, mental health, and social needs and to cooperate with the other parent on the child's behalf.
http://nycourts.gov/reporter/3dseries/2021/2021_02741.htm

SECOND DEPARTMENT

Grace G. (Gloria G.), 5/5/21 – **PERMANENT NEGLECT / SUSPENDED JUDGMENT**
The mother appealed from an order of Queens County Family Court, terminating her parental rights based on permanent neglect. The Second Department reversed. A suspended judgment should have been entered. Although the child had been in foster care for several years, the mother had called and visited weekly, fostering a strong bond. Further, the mother had completed drug treatment and parenting classes, received therapy and preventive services, obtained an associate degree, and secured an apartment. Helene Bernstein represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_02795.htm

M/O Kassim v Al-Maliki, 5/5/21 – **UCCJEA / NY OR YEMEN**
The mother appealed from an order of Kings County Family Court, which granted the father's motion to dismiss for lack of subject matter jurisdiction. The Second Department reversed. Under the UCCJEA, Family Court was required to hold a hearing as to whether NY or Yemen was the children's home state, since there were disputed issues of fact as to circumstances under which the parties moved. The petition was reinstated, and the matter remitted. Sanctuary for Families represented the mother.
http://nycourts.gov/reporter/3dseries/2021/2021_02800.htm

M/O Georgiou-Ely v Ely, 5/5/21 – **CUSTODY / ANOTHER REMITTAL**
The mother appealed from a Nassau County Family Court order, ordering certain supervised parental access for the father. The Second Department reversed and remitted—again. In a previous appeal, the appellate court had reversed a custody order, awarded the mother sole legal and physical custody, and remitted. In the order challenged here, the remittal court set a parental access schedule for the father, but there was no record of any conferences or hearings nor required findings. To permit appellate review, the trial court was required to state the facts deemed essential to its determination. A hearing was needed to determine the best interests of the children, who were of such age and maturity that their preferences had to be discerned. Amy Colvin represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_02796.htm

THIRD DEPARTMENT

Christie BB. v Isaiah CC., 5/6/21 – **CONFEDERATE FLAG / CHILD'S INTERESTS**
The father appealed from an order of Tompkins County Family Court, which modified a prior custody order. The Third Department modified. Not addressed by Family Court or the AFC was proof that the mother had a small confederate flag painted near her driveway. That was not in the best interests of the child, who should be encouraged to embrace her mixed-race identity. The flag was a symbol inflaming the strained relationship between the parties. While recognizing the mother's First Amendment rights, the appellate court held that, if the flag were not removed by a specified date, its continued presence would constitute a change in circumstances relevant in any future "best interests" analysis.
http://nycourts.gov/reporter/3dseries/2021/2021_02847.htm