THE PETITIONS FOR WRITS OF HABEAS CORPUS SEEKING RELEASE FROM RIKERS ISLAND BASED UPON THE RISK OF CONTRACTING COVID-19 PROPERLY DENIED (FIRST DEPT).

The First Department determined the petitions for writs of habeas corpus brought by inmates at Rikers Island, arguing the risk of contracting COVID-19 at the jail required release, were properly denied. State and Federal constitutional arguments were raised. The analysis, which is too complex to fairly summarize here, came down to weighing the danger to the inmates against the danger to the public entailed by release:

> Far from acting recklessly, respondents [city and state] have demonstrated great care to ensure the safety of everyone who enters the facility. By any objective measure, they have been anything but indifferent to the risk that COVID-19 poses to the jail population.
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> Even petitioners admit that respondents have taken substantial measures to reduce the spread of the virus on Rikers Island, and have had success in doing so. Moreover, petitioners have not cited to any controlling authority to establish that anything short of release constitutes deliberate indifference. …
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> That the State has agreed to release a significant number of detainees to help control the spread of the virus actually demonstrates that it has given a great deal of consideration to who should and should not be released, and its decision not to release petitioners based on their criminal history backgrounds is thus persuasive. Coupled with what the State and City have done to protect detainees, discussed above, we conclude that the weighing of interests falls in respondents' favor. Matter of People ex rel. Stoughton v Brann, 2020 NY Slip Op 04236, First Dept 7-23-20

QUESTION OF FACT WHETHER FORFEITURE OF DEFENDANT'S VEHICLE WOULD BE A CONSTITUTIONALLY IMPERMISSIBLE EXCESSIVE FINE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there was a question of fact whether forfeiture of defendant's vehicle would impose an excessive hardship and would constitute an constitutionally impermissible excessive fine. Defendant pled guilty to possession of a weapon which was found in his vehicle:

> Plaintiff established by a preponderance of the evidence that defendant, the registered and titled owner of the vehicle, who pleaded guilty to criminal possession of a firearm, used the vehicle as a means of committing the crime of criminal possession of a firearm … .
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> In opposition, defendant, acting pro se, submitted an affidavit and supporting evidence in support of his argument that forfeiture of the vehicle, which he needed for getting to work with his tools and picking up his children from school, would impose an excessive and tremendous hardship on him and his family, particularly given that this is his sole criminal offense, and in light of other mitigating facts. This evidence is sufficient to raise an issue of fact as to whether, under all the factual circumstances, civil forfeiture of the vehicle would be grossly disproportionate to the offense and therefore a constitutionally impermissible excessive fine … . Property Clerk, N.Y. City Police Dept. v Nurse, 2020 NY Slip Op 03866, First Dept 7-9-20

THE COURT WAS TROUBLED BY NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIAL AND HEARINGS' (OATH'S) REQUIREMENT THAT PETITIONER PAY THE ORDERED RESTITUTION OF OVER $234,000 BEFORE PETITIONER COULD APPEAL THE DETERMINATION; THE ISSUE WAS NOT RAISED BY THE PARTIES AND THEREFORE COULD NOT BE DECIDED (FIRST DEPT).

The First Department noted it was troubled by the New York City Office of Administrative Trial and Hearings' (OATH'S) requirement that petitioner pay the ordered restitution as a prerequisite to appealing the determination. The issue was not raised by the parties so the First Department could not decide it:

> Although neither specifically preserved nor raised on appeal, we are troubled by the constitutional ramifications of an administrative tribunal insulating its decision by making judicial review contingent on satisfaction of its order, including, as here, the payment of money … . It seems patently unfair to force a litigant to pay restitution as a condition for filing an appeal where the litigant has received a waiver of prior payment of his fine due to financial hardship … . Petitioner here is excused from paying a $5,000 fine as a condition to filing an appeal based on financial hardship, but, notwithstanding its financial hardship, it is forced to pay almost a

quarter of a million dollars ($234,152.57) before it can file an appeal. Under this system, if you do not have the financial means to pay, you cannot come into court and seek review regardless of the merits of the challenged administrative determination … . Nonetheless, because this constitutional issue was not fully briefed before us, we do not decide it. Matter of Sahara Constr. Corp. v New York City Off. of Admin. Trials & Hearings, 2020 NY Slip Op 03715, First Dept 7-2-20

THE REGULATION REQUIRING NEW YORK HEALTH INSURANCE POLICIES TO COVER MEDICALLY NECESSARY ABORTION SERVICES, WHICH INCLUDES AN EXEMPTION FOR 'RELIGIOUS EMPLOYERS,' IS CONSTITUTIONAL AND WAS PROPERLY PROMULGATED (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Colangelo, affirming Supreme Court, determined the regulation requiring health insurance policies in New York to provide coverage for medically necessary abortion services, which includes an exemption for "religious employers," was properly promulgated and was constitutional. The Court of Appeals decision upholding a similar regulation for prescription contraceptives, Catholic Charities of Diocese of Albany v Serio (7 NY3d 510 [2006] …), was deemed the controlling precedent:

> At issue in Catholic Charities of Diocese of Albany was the validity of a provision of the Women's Health and Wellness Act (…[hereinafter WHWA]) that requires health insurance policies that provide coverage for prescription drugs to include coverage for prescription contraceptives … . The WHWA also provided an exemption from coverage for "religious employers" (Insurance Law § 3221 [l] [16] [E]), which exemption contains the identical criteria as the exemption applicable here … . … As the constitutional arguments raised by plaintiffs here are the same as those raised and rejected in Catholic Charities of Diocese of Albany, Supreme Court properly concluded that they must meet the same fate by operation of the doctrine of stare decisis. "Stare decisis is the doctrine which holds that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court will generally be followed in subsequent cases presenting the same legal problem" … .
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> We agree with Supreme Court that an analysis of the Boreali factors [Boreali v Axelrod, 71 NY2d 1] weighs in favor of rejecting plaintiffs' challenge that the Superintendent exceeded regulatory authority in promulgating the regulation at issue here. Roman Catholic Diocese of Albany v Vullo, 2020 NY Slip Op 03707, Third Dept 7-2-20

THE SENTENCE FOR KIDNAPPING MUST RUN CONCURRENTLY WITH THE SENTENCE FOR FELONY MURDER; MOTION TO VACATE THE CONVICTION PROPERLY BROUGHT PURSUANT TO CRIMINAL PROCEDURE LAW 440.20 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined: (1) the judge should have analyzed the motion to vacate the conviction under Criminal Procedure Law (CPL) 440.20, as well as 440.10; (2) the sentence for kidnapping should be concurrent with the sentence for felony murder; and (3) the judge failed to address whether the running of the kidnapping sentence consecutively to the other murder convictions violated defendant's rights to equal protection. Matter remitted for consideration of the equal-protection argument:

> The Supreme Court erred in construing the defendant's motion as one solely pursuant to CPL 440.10. Rather, the motion also sought resentencing on the basis that the kidnapping sentence "was unauthorized, illegally imposed or otherwise invalid as a matter of law" (CPL 440.20[1]) because it should have been made to run concurrently with the felony murder conviction under count three of the indictment, and it should have been made to run concurrently with all of the murder convictions based on his rights to equal protection. That branch of the motion was properly made pursuant to CPL 440.20 (see CPL 440.20[4]). …
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> … [T]he imposition of consecutive sentences for the kidnapping conviction under count four of the indictment and the felony murder conviction under count three of the indictment was unlawful, since the kidnapping … , of which the defendant was convicted under count four of the indictment, also constituted the underlying felony in his murder conviction under count three of the indictment, thereby constituting a "material element" of that crime (Penal Law § 70.25[2] …). …
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> The Supreme Court failed to address the only remaining issue raised by the defendant on this appeal—that the running of the sentence on the kidnapping conviction consecutively to the sentences on the other murder convictions violated his rights to equal protection. Accordingly, we remit the matter to the Supreme Court, Queens County, for a determination of that issue. People v Khan, 2020 NY Slip Op 03537, Second Dept 6-24-20

LOCAL LAW PROHIBITING SHORT-TERM RENTAL OF PROPERTIES WHERE THE OWNER DOES NOT RESIDE IS NOT UNCONSTITUTIONAL AS A REGULATORY TAKING (FOURTH DEPT).

The Fourth Department determined plaintiff's constitutional attack on a Local Law which prohibited short-term rental of properties where the owner did not reside did not constitute a regulatory taking of the property:

> In 2012, petitioner-plaintiff (plaintiff) purchased a single-family residence (subject premises) located in respondent-defendant Town of Grand Island (Town) for the purpose of renting it out on a short-term basis, i.e., for periods of less than 30 days. Plaintiff never resided at the subject premises. In 2015, the Town enacted Local Law 9 of 2015 (Local Law 9), which amended the Town Zoning Code to prohibit short-term rentals in certain zoning districts, except where the owner also resided on the premises. The Town enacted the law in response to significant adverse impacts to the community that it found were caused by permitting short-term rental of residential properties to occur. Local Law 9 contained a one-year amortization period—which could be extended up to three times upon application—during which preexisting short-term rental properties could cease operation. * * *
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> ... [P]laintiff did not submit evidence establishing that, due to the prohibition under Local Law 9 on short-term rentals, the subject premises was not capable of producing a reasonable return on his investment or that it was not adaptable to other suitable private use. Instead, plaintiff's submissions showed a "mere diminution in the value of the property, . . . [which] is insufficient to demonstrate a [regulatory] taking" ... . Matter of Wallace v Town of Grand Is., 2020 NY Slip Op 03301, Fourth Dept 6-12-20

HEARSAY STATEMENTS BY THE ONLY WITNESS TO IDENTIFY DEFENDANT AS A PERPETRATOR INDICATED THE WITNESS WAS NOT IN FACT ABLE TO IDENTIFY ANY OF THE PERPETRATORS; THE INCONSISTENT STATEMENTS SHOULD HAVE BEEN ADMITTED BECAUSE THEY WENT TO A CORE ISSUE IN THE CASE IMPLICATING THE RIGHT TO PUT ON A DEFENSE; CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined that a hearsay statement allegedly made by the only witness (Lindsay) to identify the defendant as one of the masked intruders in this home-invasion murder-assault-burglary case should have been allowed in evidence. Lindsay, who was shot by one of the intruders, initially claimed he could not identify anyone because they were wearing face-coverings. He later identified the defendant and the others, claiming that he initially did not identify them because he was afraid. The witness who was not allowed to testify, Boyd, is Lindsay's brother. Boyd would have testified that Lindsay repeatedly told him he could not identify any of the intruders. Boyd had contacted defense counsel only after Lindsay testified so no foundation for Boyd's testimony had been laid. The prosecutor was willing to allow Lindsay to be recalled for that purpose:

> "Once a proper foundation is laid, a party may show that an adversary's witness has, on another occasion, made oral or written statements which are inconsistent with some material part of the trial testimony, for the purpose of impeaching the credibility and thereby discrediting the testimony of the witness" ... . "Since evidence of inconsistent statements is often collateral to the ultimate issue before the [trier of fact] and bears only upon the credibility of the witness, its admissibility is entrusted to the sound discretion of the Trial Judge'" ... . Indeed, "[i]t is well established that the trial courts have broad discretion to keep the proceedings within manageable limits and to curtail exploration of collateral matters" ... . However, "the trial court's discretion in this area is circumscribed by the defendant's constitutional rights to present a defense and confront his accusers" ... . "Thus, while a trial court may preclude impeachment evidence that is speculative, remote, or collateral, [that] rule . . . has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the [trier of fact] must decide'" ... .
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> "Where the truth of the matter asserted in the proffered inconsistent statement is relevant to a core factual issue of a case, its relevancy is not restricted to the issue of credibility and its probative value is not dependent on the inconsistent statement" ... . Under such circumstances, the right to present a defense may "encompass[ ] the right to place before the [trier of fact] secondary forms of evidence, such as hearsay" ... . "Indeed where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice'" ... . People v Butts, 2020 NY Slip Op 03243, Second Dept 6-10-20

14-MONTH DELAY IN THE TRANSCRIPTION OF THE RECORD DID NOT DEPRIVE DEFENDANT OF HIS RIGHT TO APPEAL (THIRD DEPT).

The Third Department determined the 14-month stenographic delay, which prevented the perfection of defendant's appeal until after his release, did not deprive him of due process of law. Defendant contested his resentence after pleading guilty to a probation violation:

> Defendant argues that he was deprived of his right to appeal — and, thus, his right to due process — by approximately 14 months of stenographic delays prior to him obtaining the complete record in this matter so as to perfect his appeal … . He asserts that, because he has since been released from custody, and, thus, may no longer reasonably challenge the propriety of the resentence imposed — apparently the only issue taken with regard to the underlying proceedings — this Court should vacate, with prejudice, Supreme Court's finding that he violated his probation and dismiss the associated declaration of delinquency … .
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> Despite the unfortunate appellate delay, defendant has failed to establish that it resulted in prejudice so as to warrant the summary remedy he seeks … ; his sole argument regarding his resentence would have been equally unpersuasive had it been before us on any earlier date. * * * Without some showing of how he has been prejudiced by this singular claim being rendered moot, we cannot conclude that defendant suffered a deprivation of due process by the delays alleged … . People v McCray, 2020 NY Slip Op 03154, Third Dept 6-4-20

HABEAS CORPUS PETITION ORDERING THE RELEASE OF A PRISONER BECAUSE OF THE RISK POSED BY COVID-19 SHOULD NOT HAVE BEEN GRANTED; THE PETITION DID NOT DEMONSTRATE THE PRISON OFFICIALS WERE DELIBERATELY INDIFFERENT TO THE RISK (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Devine, reversing Supreme Court, determined the habeas corpus petition seeking the release from prison of a 68-year-old prisoner because of the danger of contracting COVID-19 should not have been granted. At the time the appeal was heard, the inmate, Muntaqim, was hospitalized with COVID-19. The appeal was heard as an exception to the mootness doctrine because the situation is likely to recur. Although the petition established Muntaqim was incarcerated under conditions which could cause him serious harm, the petition did not demonstrate the prison personnel were deliberately indifferent to the risk. The prison respondents outlined the steps taken and the prison to reduce the spread of the disease:

> Petitioner arguably established that Muntaqim was "incarcerated under conditions posing a substantial risk of serious harm" … . Annexed to the petition is a letter from a physician who discussed Muntaqim's medical condition and opined that he was at extreme risk of "a serious and possible fatal outcome if infected with the novel coronavirus" responsible for causing COVID-19, as well as a letter from a group of physicians who explained that the novel coronavirus is quite infectious and that serious outbreaks in prisons were inevitable given the close contact between individuals inherent to the prison setting. … What petitioner failed to demonstrate, however, was deliberate indifference on the part of prison officials. Petitioner provided nothing from anyone with firsthand knowledge — including Muntaqim, who neither verified the petition nor submitted an affidavit in support of it — as to what was being done to combat the spread of the novel coronavirus at SCF [Sullivan Correctional Facility] or to protect inmates at high risk from COVID-19. In contrast, respondents came forward with the affidavit of respondent Superintendent of SCF, who detailed the steps that had been taken up to that point to prevent the introduction of the novel coronavirus into the facility and reduce the risks of potential transmission. … Supreme Court determined that DOCCS had "done nothing wrong" in its response to the burgeoning threat. Petitioner has not demonstrated the subjective element of deliberate indifference required to establish an Eighth Amendment violation. People ex rel. Carroll v Keyser, 2020 NY Slip Op 03169, Third Dept 6-4-20

THE ARBITRATION AGREEMENT CALLED FOR NOTIFICATION OF AN ARBITRATION BY CERTIFIED MAIL; ALTHOUGH THE APPELLANT APPARENTLY NEVER PICKED UP THE MAILED NOTICE AND DID NOT APPEAR AT THE ARBITRATION, HER DUE PROCESS RIGHTS WERE NOT VIOLATED; THE PARTIES' AGREEMENT ON THE METHOD OF SERVICE CONTROLS (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Miller, determined the appellant, a registered broker with the Financial Industry Regulatory Authority (FINRA), was bound by the notice requirements in the arbitration agreement. The agreement called for notification of an arbitration by certified mail. The appellant did not appear and her former client was awarded over $3 million. The

appellant sought to vacate the award arguing that notification by mail deprived her of due process because she was often away from her residence and the client was aware she could be contacted by email. The certified mail notification was never picked up by the appellant:

> … [I]n the context of binding arbitration, it is the parties' consent which vests the authority in the arbitrator to decide a particular dispute. Accordingly, although the CPLR provides that a demand for arbitration, or a notice of intention to arbitrate, must be served "in the same manner as a summons or by registered or certified mail, return receipt requested" (CPLR 7503[c]), New York courts have long recognized that "parties to an arbitration agreement may prescribe a method of service different from that set forth in the CPLR" … . Indeed, "the parties may agree to other methods for service, either by stipulating the manner in the arbitration clause or, more generally, by adopting the arbitration rules of an arbitration agency" … . "Where . . . parties agree to the manner in which a demand for arbitration can be served, they do not have to comply with the service requirements established by CPLR 7503(c)" … . * * *
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> Where parties to an arbitration agreement have consented to an alternative method of service, "[t]he method of service by which parties have agreed to be bound must be complied with according to the exact terms thereof in order that the requirements of due process be satisfied" … . Matter of New Brunswick Theol. Seminary v Van Dyke, 2020 NY Slip Op 03114, Second Dept 6-3-20