CRIMINAL

FIRST DEPARTMENT

People v Spinac, 7/16/20 – **REDUCED SENTENCE / AGE AND HEALTH**
The defendant appealed from a judgment of NY County Supreme Court, convicting him after a jury trial of 2nd degree assault and other crimes and sentencing him to an aggregate term of 3½ years plus three years' post-release supervision. The First Department reduced the prison term to time served. The charges arose from a 10-month campaign of harassment, during which the defendant terrorized the attorneys and female staff at the law firm representing his wife in a divorce. He called the firm 1,500 times, engaged in "vile" communications, and physically injured one victim. While not deeming the defendant to be deserving of leniency, the reviewing court nevertheless "extend[ed] to him the compassion and consideration he neglected to show the four women simply doing their jobs." Factors cited were his age and chronic health conditions and the fact that he had only a few months to serve before his release date. The Center for Appellate Litigation (Hunter Haney, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04002.htm

People v Moore, 7/16/20 – **CROSS-EXAMINATION / POLICE**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of two counts of 3rd degree criminal sale of a controlled substance. The First Department affirmed. Upon cross-examination, law enforcement witnesses should be treated as any other witness. *See People v Rouse*, 34 NY3d 269. Here the trial court properly limited cross-examination as to civil lawsuits in which the police witnesses were defendants. The court precluded certain improper defense questions, but would have considered revised questions. Yet counsel never pursued the matter. Any error was harmless. Further, the defendant waived objections to other rulings involving the credibility of police witnesses. One evidentiary error did occur, but was harmless. Testimony by a defense witness—that the defendant was not known to the witness as someone from whom he could buy drugs—did not constitute character evidence. The witness was relaying his personal knowledge regarding whether defendant sold drugs, not testifying about his reputation. So the People should not have been permitted to impeach that testimony by asking the witness if he was aware of prior drug sales by the defendant.
http://nycourts.gov/reporter/3dseries/2020/2020_03974.htm

People v Singh, 7/16/20 – ***PEQUE* VIOLATION / NO PREJUDICE**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd and 4th degree criminal possession of stolen property. The plea court did not advise the defendant that, if he was not a U.S. citizen, he could be deported as a result of his plea, as later required in *People v Peque*, 22 NY3d 168. Generally, the question of prejudice was determined by a hearing. However, there was no reasonable possibility that this defendant could make the requisite showing. When he pleaded guilty in 2009, he had a 2005 grand larceny conviction, which rendered him deportable. Moreover, after the instant plea, he was convicted in federal court of an aggravated felony. Thus, his status as a deportable

non-citizen would not have been affected, regardless of whether he pleaded guilty in 2009, had been found guilty after trial, or had been acquitted.
http://nycourts.gov/reporter/3dseries/2020/2020_03978.htm

People v Gardine, 7/16/20 – **CPL 440.10 / DENIED**
The defendant appealed from an order of NY County Supreme Court, which summarily denied his CPL 440.10 motion to vacate a judgment of conviction. The First Department affirmed. The defendant supplied the affidavit of an investigator recounting phone conversations with two eyewitnesses to the homicide, but not their affidavits. Further, he failed to explain the long delay in investigating these matters and the reliability issues arising from the fact that the witnesses were recalling events from 1994. Finally, the defendant did not satisfy requirements for newly discovered evidence: due diligence and materiality.
http://nycourts.gov/reporter/3dseries/2020/2020_04005.htm

People v Jenkins, 7/16/20 – **DEMONSTRATION / IMPROPER**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree murder in a fatal stabbing. The First Department affirmed. The defendant contended that the court should have granted a motion for a mistrial based on the prosecutor becoming an unsworn witness. She had demonstrated that the defendant's knife could be opened not only in the manner he described, but in two other ways. The argument was preserved for review, despite a three-day delay in raising it. *See* CPL 470.05 (2). The trial court gave a curative charge, chastising the prosecutor and instructing that flickability or non-flickability was not an issue. Such instruction, given in the form requested by defense counsel, was sufficient to prevent prejudice.
http://nycourts.gov/reporter/3dseries/2020/2020_04014.htm

SECOND DEPARTMENT

People v Savillo, 7/15/20 – **JUSTIFICATION / NEW TRIAL**
The defendant appealed from a judgment of Queens County Supreme Court. The Second Department reversed in the interest of justice and ordered a new trial. In a fight between two groups of young people regarding a cell phone, the victim threw a punch at the defendant, who slashed the victim with a knife. After Supreme Court instructed the jury on justification, the defendant was found not guilty of the 1st degree assault and guilty of 2nd degree assault and another crime. The jury failed to convey that, if the jury found the defendant not guilty of assault 1st based on justification, it should cease deliberations and acquit her of assault 2nd. The new trial was to be held before a different justice, because the instant trial justice extensively questioned witnesses, usurping the role of counsel; assisted in developing facts damaging to the defense; and created the impression that the court was an advocate for the prosecution. Legal Aid Society–NYC (David Crow and White & Case LLP, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03928.htm

People ex rel. Rolls v Brann, 7/15/20 – **PRELIMINARY HEARING / DATE**
A writ of habeas corpus seeking release did not demonstrate the illegality of the inmate's detention pursuant to a felony complaint. The People demonstrated good cause for the delay in conducting a preliminary hearing or obtaining an indictment. The Second Department noted that grand juries were scheduled to begin reconvening in Kings County on August 10 and stated that disposition of the instant felony complaint or a preliminary hearing should occur by August 17.
http://nycourts.gov/reporter/3dseries/2020/2020_03922.htm

FOURTH DEPARTMENT

People v Snow, 7/17/20 – **DEFENSE CURTAILED / REVERSAL**
The defendant appealed from a Supreme Court judgment, convicting him of 3rd degree robbery (two counts). The Fourth Department reversed. A cross-examining party could not call witnesses to contradict another witness's answers concerning collateral matters solely for the purpose of impeaching his or her credibility. However, that rule had no application where the testimony was relevant to core issues. The proposed testimony related to the content of the note the defendant presented to the bank employee in the first robbery incident. The note contained language that purportedly did not threaten the immediate use of force—contrary to the testimony of the bank employee. The testimony was material; disallowing it was error. A new trial was ordered as to the first robbery. The Monroe County Public Defender (Thomas Smith, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04024.htm

People v Cobb, 7/17/20 – **JUROR CHALLENGE / ERRANT DENIAL**
The defendant appealed from a Cayuga County Court judgment, convicting him of 1st degree promoting prison. The Fourth Department reversed and granted a new trial. The trial court erred in denying the defense challenge for cause to a prospective juror who stated that her friendship with a prosecution witness might affect her ability to be fair and that serving as a juror might be awkward. The panelist did not give an unequivocal assurance of impartiality in stating that she would not feel compelled to "answer" to the witness for her verdict. A person could be unable to judge a case impartially while feeling confident that she would not have to answer for the verdict to anyone. The defendant preserved the issue by peremptorily challenging the prospective juror and exhausting all of his peremptory challenges. David Elkovitch represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04055.htm

People v Hernandez, 7/17/20 – **FLAWED PLEA / PRESERVATION EXCEPTION**
The defendant appealed from a judgment of Monroe County Supreme Court, convicting him of attempted 2nd degree burglary. The Fourth Department reversed. The defendant negated the element of "intent to commit a crime therein". The factual recitation contradicted any allegation that the defendant intended to commit a crime in the apartment. Trespass could not itself be used as the sole predicate crime. Supreme Court failed in its duty to inquire further. Instead, the court stated that the defendant's defense of "going to the bathroom may be a difficult sell to a jury." Andrew Morabito represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04049.htm

People v Mineccia, 7/17/20 – **CPL 440.10 MOTION / NEW TRIAL**
The defendant appealed from a Monroe County Court order, denying his CPL 440.10 motion. The Fourth Department granted a new trial. The waiver of a jury trial was invalid because the defendant was not told that the prosecutor for preliminary proceedings was later appointed as confidential law clerk to the trial court. David Abbatoy represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04028.htm

People v Jeffords, 7/17/20 – **SENTENCE REDUCED / REMORSE AND NO HISTORY**
The defendant appealed from an Erie County Court judgment, convicting him of 1st degree manslaughter. The Fourth Department reduced the determinate term from 24 to 19 years, plus post-release supervision. Factors cited were his background, show of remorse, and lack of prior criminal history. The Legal Aid Bureau of Buffalo (Barbara Davies, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04037.htm

People v Williams, 7/17/20 – **YO / NOT CONSIDERED**
The defendant appealed from a Niagara County Court judgment, convicting him of attempted 1st degree assault. The Fourth Department reserved decision. County Court erred in failing to determine whether the defendant should be afforded youthful offender status. Because he was convicted of an armed felony offense, he was ineligible, unless the court determined that one of two mitigating factors was present. Upon remittal, County Court must make findings about whether the defendant was eligible and, if so, whether he should be afforded YO status. The Legal Aid Bureau of Buffalo (Allyson Kehl-Wierzbowski, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04092.htm

SECOND CIRCUIT

Jack v Barr, 7/16/20 – **FIREARMS OFFENSES / NOT REMOVABLE**
The two petitioners, both lawful permanent residents of NY, petitioned for review of decisions of the Board of Immigration Appeals ordering them removed based on the NY firearms convictions. The Second Circuit observed that conduct involving loaded "antique firearms" was criminalized by NY Penal Law §§ 265.03 and 265.11—the statutes of conviction—whereas such firearms were excluded from removal provisions in the Immigration and Nationality Act. The textual differences relating to antique firearms created a categorical mismatch; the petitioners' convictions thus were not removable offenses. The BIA erred in dismissing the appeals based on the failure to show a realistic probability that NY would prosecute conduct involving loaded antique firearms. That test applied to statutes of indeterminate scope, not the categorical analysis.
https://www.ca2.uscourts.gov/decisions/isysquery/b2f7395b-d2a5-45b6-8ac0-d795c6ceb59a/1/doc/18-842_opn%2018-1479_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/b2f7395b-d2a5-45b6-8ac0-d795c6ceb59a/1/hilite/

FAMILY

THIRD DEPARTMENT

Matter of Samah DD. v Mohammed EE., 7/16/20 –
FAMILY OFFENSE / OUT OF STATE
The father appealed from an order of Albany County Family Court regarding custody and related matters. The Third Department affirmed. The appellate court rejected the father's contention that Family Court lacked jurisdiction over the mother's family offense petitions because the abuse occurred largely in Arizona. Family Court's subject matter jurisdiction over family offenses was not limited by geography; the court could consider events that occurred outside its jurisdiction, including incidents that were not relatively contemporaneous with the date of the petition.
http://nycourts.gov/reporter/3dseries/2020/2020_03958.htm

Matter of Christina R. v James Q., 7/16/20 –
FAMILY OFFENSE / NO INTIMATE RELATIONSHIP
The mother appealed from an order of Tompkins County Family Court, which granted the motion by the respondent, the child's paternal uncle, seeking to dismiss her family offense petition against him. The Third Department affirmed. The parties were connected only by the child, and their interaction was limited to family events during the mother's one-year marriage to the respondent's brother. Family Court properly concluded that the parties did not have an intimate relationship within the meaning of Family Ct Act § 812 (1) (e).
http://nycourts.gov/reporter/3dseries/2020/2020_03957.htm

Matter of Sandra DD. (Kenneth DD.), 7/16/20 –
PERMANENCY / CONSULTATION WITH CHILD
The maternal grandfather of the subject child appealed from an order of Delaware County Family court, which continued placement of the subject child. The Third Department affirmed, but agreed with the grandfather that Family Court erred in failing to conduct an age-appropriate consultation with the child, as mandated under Family Ct Act § 1089 (d). The AFC did not articulate the child's wishes to the court, but reversal was unnecessary. Instead, in future permanency hearings, Family Court was to conduct an age-appropriate consultation with the child.
http://nycourts.gov/reporter/3dseries/2020/2020_03965.htm

FOURTH DEPARTMENT

Matter of Carmella H. (Danielle F.), 7/17/20 – **OBJECTION / PRESERVED**
The parents appealed from an Onondaga County Family Court order terminating their parental rights. The Fourth Department affirmed, but noted that, contrary to the assertions of the petitioner and the AFC, the parents preserved challenges to the admission of certain caseworker notes. When they objected to the notes of the first caseworker on the grounds raised on appeal, the trial court overruled their objections, definitively rejecting their challenges. Thus, the respondents were not required to repeat the same arguments to

preserve their contentions as to the second caseworker's notes. However, the appellate court rejected their arguments on the merits. In a TPR proceeding, CPLR 4518 governed the admission of agency records. Such reports were admissible if a sufficient foundation was laid. The agency had to show that: contemporaneously recording the subject acts was within the scope of an employee's duties, and each participant in the chain producing the record acted within the course of regular business conduct. Anthony Belletier and Todd Monahan represented the parents.
http://nycourts.gov/reporter/3dseries/2020/2020_04095.htm

Matter of Byler v Byler, 7/17/20 –
NON-PARENT / EXTRAORDINARY CIRCUMSTANCES
The father appealed form an order of Chautauqua County Family Court, dismissing his custody modification petitions. The Fourth Department reversed and remitted. In this contest between a parent and a non-parent, Family Court failed to find extraordinary circumstances. A prior consent order did not constitute such a finding. Linda Campbell represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04025.htm

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