CRIMINAL

FIRST DEPARTMENT

People v Banyan, 10/27/20 – **JUSTIFICATION CHARGE / NEW TRIAL**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree assault and resisting arrest. The First Department reversed and ordered a new trial. The trial court erred in denying the defense request for a justification charge as to the defendant's kicking and flailing when officers tried to subdue and arrest him. Penal Law § 35.27 permitted justification claims based on excessive police force. Testimony and a video showed that, after the defendant resisted efforts to handcuff him, eight more officers joined in the struggle, punching and tasing him, and a baton was used to roll his Achilles tendon. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_06060.htm

People v McCray, 10/29/20 – **440 MOTION / IAC / HEARING**
The defendant appealed from an order of Bronx County Supreme Court, which denied his CPL 440.10 motion. The First Department reversed and held in abeyance an appeal from the judgment convicting the defendant of 2nd degree murder and another crime. The motion court erred in two ways. First, the court erroneously found that the trial record was sufficient to permit appellate review of the claim of ineffective assistance of counsel. However, the record did not establish whether counsel's allegedly deficiencies were based on a legitimate trial strategy. Second, the lower court erred in not holding a hearing to address the serious questions presented by motion counsel's affirmation, detailing his conversation with trial counsel. The matter was remanded for a hearing, for which trial counsel could be subpoenaed to testify or otherwise present evidence. The Office of the Appellate Defender (Julia Burke, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_06219.htm

APPELLATE TERM

People v Wilson, 10/27/20 – **PLEA DEFECTIVE / DISMISSED**
The defendant appealed from a judgment of NY County Criminal Court, convicting her of violating Public Health Law § 229 (non-compliance with Sanitary Code constitutes violation punishable by $250 fine and 15 days' incarceration). The First Department reversed. The record did not demonstrate that the guilty plea was knowing, voluntary, and intelligent. The plea court did not ask the defendant any questions, and she did not speak and was not advised of any constitutional rights she was waiving. Presuming waiver from a silent record was impermissible. Given the minor nature of the charge, the accusatory instrument was dismissed.
http://nycourts.gov/reporter/3dseries/2020/2020_51241.htm

SECOND DEPARTMENT

People v Hernandez, 10/28/20 – **SORA / LEVEL ONE**
The defendant appealed from an order of Nassau County Supreme Court, designating him a level-two sex offender. The Second Department reversed and reduced the adjudication to level one. The record did not support the assessment of 10 points under risk factor 13, for unsatisfactory conduct while confined. The misdemeanor conviction for 2nd degree promoting prison contraband occurred four years before the SORA hearing and before the defendant's transfer to State prison, and the misconduct was anomalous.
http://nycourts.gov/reporter/3dseries/2020/2020_06159.htm

People v Robinson, 10/28/20 – **SENTENCE VACATED / PERSISTENT FELON**
The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 2nd degree burglary. The Second Department vacated the sentence imposed. The defendant was improperly adjudicated a persistent violent felony offender, where he committed his second violent felony offense prior to the time of sentencing for the first felony conviction. Audrey Thomas represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_06151.htm

People v Battle, 10/28/20 – **SENTENCE VACATED / YO**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree manslaughter and another crime, upon his plea of guilty. The Second Department vacated the sentence imposed. Supreme Court failed to determine whether the defendant should be afforded youthful offender status. The matter was remitted. Appellate Advocates (David Greenberg, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_06135.htm

People v Maslowski, 10/28/20 – **PEOPLE'S APPEAL / 30.30 VIOLATION**
The People appealed from an order of Queens County Supreme Court, which granted the defendant's CPL 30.30 motion to dismiss the indictment. The Second Department affirmed. A 2017 order granted the defendant's prior 30.30 motion to dismiss a misdemeanor complaint charging 3rd degree assault. The People did not appeal and instead presented the case to a grand jury, which returned an indictment for 2nd degree assault. The defendant filed a second 30.30 motion, which was granted. The prior determination—finding 118 days chargeable to the People—was law of the case, and the People were chargeable with an additional 77 days.
http://nycourts.gov/reporter/3dseries/2020/2020_06146.htm

People v Shane, 10/28/20 – **EXPERT / ERRANT HYPOTHETICALS**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree rape and other crimes. The Second Department affirmed. The trial court properly allowed testimony on sexual abuse accommodation syndrome. The People's expert did not bolster, or vouch for, the complainant's credibility. While the expert did exceed permissible bounds, when the prosecutor tailored two hypothetical questions to include facts concerning the abuse in this particular case, the error was harmless.
http://nycourts.gov/reporter/3dseries/2020/2020_06152.htm

People v Gudanowski, 10/28/20 – **APPEAL WAIVER / DEFENDANT MISLED**
The defendant appealed from a judgment of Orange County Court, convicting him of 2nd degree assault and DWI. The Second Department affirmed, but addressed at length the defective waiver of appeal. County Court erroneously stated that the waiver constituted an absolute bar to taking a direct appeal and having counsel assigned, and failed to advise the defendant about the claims that survived a valid waiver. Contrary to the People's assertion, a defendant was not required to preserve for appellate review a challenge to an appeal waiver. However, the defendant's various claims were not preserved for appellate review.
http://nycourts.gov/reporter/3dseries/2020/2020_06141.htm

People v Platel, 10/28/20 – **APPEAL WAIVER / DEFENDANT MISLED**
The defendant appealed from a sentence of Queens County Supreme Court, imposed upon his plea of guilty. The Second Department affirmed, but found the purported waiver of the right to appeal unenforceable. The trial court utterly mischaracterized the nature of the rights the defendant was being asked to cede. In light of his age, lack of experience in the criminal justice system, and mental health history, the court's limited and misleading colloquy did not ensure that the defendant understood the nature and scope of the waiver. The written waiver did not cure the problem. However, the sentence imposed was not excessive.
http://nycourts.gov/reporter/3dseries/2020/2020_06150.htm

THIRD DEPARTMENT

People v Burks, 10/29/20 – **VALID PLEA / FORFEITED CLAIMS**
The defendant appealed from a judgment of Broome County Court, convicting him of 2nd degree manslaughter and 1st degree assault. The Third Department affirmed. The plea court properly denied the defendant's motion to withdraw his plea without a hearing. The record belied claims that the plea was impacted by the defendant's impaired mental or physical state. During the plea proceedings, he was coherent and assured the court that his prescription medications did not affect his understanding of the matters discussed in court. Further, he provided no relevant proof detailing the dosages or side effects of the medications. Appellate review of the argument that evidence seized should have been suppressed was forfeited when the defendant pleaded guilty before the motion was decided. The valid guilty plea also precluded review of the defendant's challenges to the denial of a severance motion and to the sufficiency of evidence before the grand jury.
http://nycourts.gov/reporter/3dseries/2020/2020_06172.htm

SECOND CIRCUIT

Velasco Lopez v Decker, 10/27/20 – **ICE DETENTION / DUE PROCESS**
The Government appealed from a District Court–SDNY judgment, granting the petitioner's habeas corpus application. The Second Circuit affirmed, thus prohibiting the lengthy incarceration of non-citizens, without justification, by the federal government. The petitioner, a Mexican citizen, was brought to the U.S. as a small child and later received DACA protection. ICE detained him after a 2018 arrest for DWI and related charges. There

has been no conviction in that matter. At the time of arrest, the petitioner faced charges stemming from a 2017 bar fight; those charges were later dropped. The petitioner was detained under 8 USC § 1226 (a), allowing for discretionary detention of non-citizens during the pendency of removal proceedings. The District Court held that the Government had the burden to justify detention—to show, by clear and convincing evidence, that the petitioner was a flight risk or a danger to the community. The showing was not made; the petitioner's release on $10,000 bond was granted. There were limitations on detention during removal proceedings; the Fifth Amendment entitled non-citizens to due process. The petitioner's rights were violated when he was incarcerated for 15 months, with no end in sight, and no showing that detention served any purpose.
https://www.ca2.uscourts.gov/decisions/isysquery/54ca01ad-b9dc-4609-a236-520136186cfa/6/doc/19-2284_op.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/54ca01ad-b9dc-4609-a236-520136186cfa/6/hilite/

FAMILY

FIRST DEPARTMENT

M/O Melinda B. v Jonathan L.P., 10/27/29 – **PLEADINGS V. PROOF**
The father appealed from an order of Bronx County Family Court, which found that he committed the family offense of harassment and granted a two-year order of protection. The First Department affirmed. Contrary to the father's contentions, Family Court did not violate his due process rights by addressing events he testified about, though they were not set forth in the petition. Sua sponte, the court could properly conform the pleadings to the proof. The challenged determination rested on the father's admissions, and he suffered no prejudice based on surprise.
http://nycourts.gov/reporter/3dseries/2020/2020_06046.htm

M/O Xavier S. (Josefina S.), 10/29/20 – **PARENT / INTELLECTUAL DISABILITY**
The petitioner appealed from an order of Bronx County Family Court, which dismissed a petition to terminate the parental rights of the mother as to two children. The First Department affirmed. The requisite showing of diligent efforts was lacking. The agency failed to assign the matter—which involved a cognitively impaired mother—to a caseworker with relevant experience; erroneously justified restricted visitation based on exaggerated safety concerns; and failed to address visitation space issues. Moreover, the petitioner did not refer the mother to services offered by the Office for People with Developmental Disabilities (https://opwdd.ny.gov/types-services). As amici curiae noted, people with intellectual disabilities possess the ability to be successful parents and should receive services and support appropriately tailored to their needs.
http://nycourts.gov/reporter/3dseries/2020/2020_06196.htm

SECOND DEPARTMENT

M/O Ayers v Babcock, 10/28/20 – **CUSTODY REVERSED / HEARING**
The father appealed from an order of Orange County Family Court, which granted the mother's motion to dismiss his custody modification petition at the close of his case. The Second Department reversed. The father presented made a prima facie showing of a change of circumstances—the child's changing needs as he grew older. Despite the fact that the child was age 14, the trial court failed to hold a *Lincoln* hearing; and the appellate AFC supported affirmance—contrary to the position of the trial AFC and, apparently, the child. *See* 22 NYCRR 7.2 (d) (2) (if child is capable of knowing, voluntary, considered judgment, AFC should generally advance child's wishes (http://ww2.nycourts.gov/rules/chiefjudge/07.shtml). The appellate court also criticized Family Court for stating that "joint custody goes out the window if we conclude this matter by a hearing." Gary Eisenberg represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_06119.htm

M/O Royal v Royal, 10/28/20 – **FATHER / AGGRAVATING IN 2, NOT 3, WAYS**
The father appealed from a Kings County Family Court order, finding that he committed various family offenses and determining that aggravating circumstances existed, based on (1) the father's commission of some offenses against the mother in the presence of the children; (2) his use of a gun to scare the mother; and (3) a physical injury to the mother. The Second Department modified the order of protection issued to reflect that there was no proof of an injury. Roger Schumann represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_06130.htm

THIRD DEPARTMENT

M/O Amirah P. (Aisha P.), 10/29/20 – **PARENT / INTELLECTUAL DISABILITY**
The mother appealed from a Schenectady County Family Court order, which terminated her parental rights based on her intellectual disability, which rendered her incapable of properly caring for the child. The Third Department affirmed, but noted that the AFC—who recommended affirmance—had cogently reviewed federal protections for disabled persons and had observed that parents with disabilities are separated from their children at disproportionately high rates. The decision court cited National Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*.
http://nycourts.gov/reporter/3dseries/2020/2020_06178.htm

M/O Frederick-Kane v Potter, 10/29/20 –
CHILD SUPPORT OVERPAYMENT / NO RECOUPMENT
The father appealed from an order of Albany County Family Court, which granted the mother's application to modify a prior child support order. The Third Department dismissed the appeal as moot. In November 2018, Family Court increased the father's obligation from $190 to $380 per week. The resulting arrearages had been paid in full. Because of the strong public policy against recoupment of child support overpayments, even if the appellate court reversed, the father would have no way to regain overpaid sums.
http://nycourts.gov/reporter/3dseries/2020/2020_06179.htm