CRIMINAL

FIRST DEPARTMENT

People v Santiago, 1/12/21 – **SEVERANCE / IMPROPER DENIAL**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of DWI and leaving the scene of an accident without reporting. The First Department reversed and remanded for new trials. The defendant's motion to sever should have been granted, where the crimes occurred on different dates and were based on different facts, and none of the proof necessary for each offense was material to the other. The testimony of an arresting officer for the DWI charge was not needed to identify the defendant as the person depicted in a video and stills regarding the incident of leaving the scene. The error was not harmless. A jury instruction to consider the evidence separately did not prevent prejudice. David Bertan represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00130.htm

People v Moore, 1/12/21 – **SEVERANCE / PROPER DENIAL**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree burglary and three counts of 3rd degree burglary. The First Department affirmed. The counts were properly joined on the ground of overlapping evidence, pursuant to CPL 200.20 (2) (b). While not identical, the crimes involved a sufficiently unique M.O. so that the evidence of each was admissible as to the others. Further, the counts were properly joined as legally similar, pursuant to subdivision (3), and the defendant had not made a sufficient showing for discretionary severance.
http://nycourts.gov/reporter/3dseries/2021/2021_00127.htm

SECOND DEPARTMENT

People v Petersen, 1/13/21 – **BURGLARY / UNCHARGED THEORY / REVERSED**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree burglary (two counts) and other crimes. The Second Department vacated the burglary convictions and ordered a new trial on those counts. A defendant has a right to be tried only for the crimes charged in the indictment. Where the prosecution is limited to a certain theory by the indictment or bill of particulars, the court must hold the prosecution to such theory—including in burglary cases regarding the crime the defendant intended to commit. In the instant case, the People limited their theory to intent to commit property damage and/or theft. Thus, the trial court erred in permitting the prosecutor to instead argue, during summation, that the defendant had intended to assault the victim. Since there was proof supporting the uncharged theory, it was impossible to discern whether the verdict was founded on such theory, and harmless error analysis did not apply. In any event, the People's failure to give the defendant notice of the new theory denied him a fair trial on the burglary charges. Jonathan Edelstein represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00193.htm

People v Porter, 12/30/20 – **DEFENDANT'S "STATEMENT" / NOTICE NEEDED**
The defendant appealed from a judgment of Queens County Supreme Court, convicting her of drugs and weapons possession charges. The Second Department reversed. According to a detective's trial testimony, a search warrant was executed at an apartment where the defendant resided. When the defendant was brought to a bedroom, the detective told her that a safe there "needed to be opened." She typed in the combination and opened the safe, which contained drugs and firearms. The trial court erred in overruling an objection to the testimony about the defendant's communicative acts. Such evidence was subject to the CPL 710.30 (1) (a) notice requirement. Whenever the People intend to offer evidence of a statement made by a defendant to a public servant, which would be suppressible if made involuntarily, they must give notice of such intention. The defendant's unlocking of the safe, in direct response to the detective's request, constituted a statement. Further, there was a question as to involuntariness; when the defendant acted, she was handcuffed and un-*Mirandized.* At retrial, the People could seek leave to give late notice upon a showing of good cause. If relief was granted, the defendant could make a motion to suppress. Appellate Advocates (Anders Nelson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_08122.htm

People v Cuencas, 12/30/20 – ***PAYTON* / SUBJECTIVE INTENT**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder (two counts) and 2nd degree robbery. The Second Department affirmed. The appeal brought up for review an order denying suppression. There was no basis to disturb the finding of tacit consent to police entry of the apartment where the warrantless arrest occurred. However, the appeal presented a question left open by *People v Xochimitl*, 32 NY3d 1026—whether a home visit by police for the sole purpose of making a warrantless arrest, not otherwise justified by exigent circumstances, violated a defendant's indelible right to counsel. The hearing evidence did indeed show that police went to the residence intending to make a warrantless arrest. But NY law did not recognize a category of *Payton* violations based on subjective police intent.
http://nycourts.gov/reporter/3dseries/2020/2020_08118.htm

People v Smith, 1/13/21 – ***ANDERS* BRIEF / NEW COUNSEL**
The defendant appealed from two judgments of Nassau County Supreme Court, convicting him of attempted 1st degree robbery and another crime upon his pleas of guilty. Appellate counsel filed an *Anders* brief, which the Second Department found deficient, since it failed to adequately analyze potential legal issues, including whether the consecutive sentences imposed were excessive. The brief erroneously stated that Supreme Court was mandated to impose the maximum terms. New appellate counsel was assigned.
http://nycourts.gov/reporter/3dseries/2021/2021_00194.htm

THIRD DEPARTMENT

People v Kabia, 1/14/21 – **SUPPRESSION / ALTERNATE GROUND**
The defendant appealed from an Albany County Court judgment, convicting him of 2nd degree CPW. In denying a motion to suppress, the trial court held that the shotgun shell found on the defendant's person supplied probable cause to search the vehicle. However, the hearing evidence showed that the vehicle was searched before the defendant was. While the People raised alternate grounds, the appellate court was statutorily precluded from considering issues not ruled upon by the trial court. Thus, the denial of suppression was reversed, the appeal was held in abeyance, and the matter was remitted. Danielle Reilly represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00209.htm

People v Decker, 1/14/21 – **SEALING / COURT JUMPED THE GUN**
The defendant appealed from a Sullivan County Court order, denying his CPL 160.59 application to seal his criminal conviction. The Third Department reversed and remitted. The lower court issued a decision two days before the deadline set for all submissions. The defendant was thus denied an opportunity to provide additional information. Jonna Spilbor represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00217.htm

People v Sammeth, 1/14/21 – **PROSECUTOR / UNSWORN WITNESS**
The defendant appealed from an Ulster County Court judgment, convicting him of 2nd degree attempted rape. The Third Department affirmed. In summation, defense counsel argued that the credibility of police officer witnesses was diminished by inaccurate statements they made before the grand jury, and asserted that the indictment was obtained based on their shared falsehoods. The prosecutor countered in closing statement that, if there was a conspiracy, "It's me too." Defense counsel sought a mistrial, contending that the prosecutor made himself an unsworn witness. The trial court denied a mistrial, but gave a curative instruction advising the jury that some of the officers' grand jury testimony was inaccurate. The reviewing court stated that the prosecutor's remark was improper but caused only "some" prejudice, not "substantial" prejudice.
http://nycourts.gov/reporter/3dseries/2021/2021_00212.htm

People v Green, 1/14/21 – **THREE STRIKES / BUT NO IAC**
The defendant appealed from a judgment of Tompkins County Court, convicting him of 2nd degree assault upon a partial jury verdict in a first trial, and 2nd degree murder upon a jury verdict in a second trial; and from an order summarily denying his CPL 440.10 motion. The Third Department rejected his claims of ineffective assistance based on three errors. First, trial counsel refrained from calling an eyewitness who gave non-committal, vague answers when interviewed. The appellate court found that counsel made a reasonable strategic decision, as set forth in his affirmation, based on his concern that putting the witness on the stand would reek of desperation and harm the defense. Second, trial counsel failed to question a prospective juror who disclosed that the DA had done legal work for him and his family and that such prior relationship would be in the back of the juror's mind. Counsel stated that he did not know why he failed to delve into the matter. The appellate

court held that there was no reason to believe that the juror, who was empaneled, was biased. Third, trial counsel admitted that he forgot to seek a detailed jury charge regarding the voluntariness of the defendant's statement to police. The reviewing court noted that counsel explored the voluntariness issue at trial; and the jury was charged to consider the circumstances under which the defendant's statement was made. All in all, counsel's performance was adroit, despite missteps, the Third Department held.
http://nycourts.gov/reporter/3dseries/2021/2021_00207.htm

People v Stroud, 1/8/21 – **PROTECTIVE ORDER / EXPEDITED REVIEW**
Pursuant to CPL 245.70 (6), the defendant sought expedited review of a protective order granted to the People by Rensselaer County Court. A Third Department justice upheld the order. The prosecution's ex parte application sought to withhold grand jury testimony, identification procedures, and interviews of a certain witness. Following an ex parte hearing, County Court directed that disclosure would be denied until 30 days before trial. Counsel argued that the People improperly sought the protective order without notice to the defense. But such proceedings could be entirely ex parte based on clear necessity, such as here, where the information was of an extremely sensitive nature. In most cases, the better practice was for the People to provide notice, by motion brought on by OTSC, that certain information was not disclosed and that a protective order was being sought. In any event, upon receipt of the order, the defendant presented information regarding good cause to the reviewing justice.
http://nycourts.gov/reporter/3dseries/2021/2021_00101.htm

SECOND CIRCUIT

Hurd v Fredenburgh, 1/12/21 – **SENTENCING ERROR / QUALIFIED IMMUNITY**
The plaintiff appealed from a judgment of District Court – EDNY, dismissing his 42 USC § 1983 complaint for failure to state a claim. The Second Circuit affirmed. Because of sentencing calculation errors, the plaintiff was imprisoned for nearly an additional year beyond his mandatory release date. He sued a NY DOCCS inmate records coordinator, alleging 8th and 14th Amendment violations. A settlement was reached with the NYC defendants. District Court erred in concluding that the plaintiff's injury was not cognizable. Unauthorized detention of just one day past a mandatory release date qualified as a harm under the 8th Amendment. No matter that the plaintiff was detained past his conditional release date, as opposed to the maximum expiration date. He had enough jail-time credit and approved good-time credit to make his conditional release date mandatory. The appellate court did not reach the issue of deliberate indifference, because it found that the defendant was shielded by qualified immunity. At the time of the error, it had not been clearly established that prolonged detention past the mandatory release date was a harm of constitutional magnitude. Similar reasoning applied regarding qualified immunity on the substantive due process claim.
https://www.ca2.uscourts.gov/decisions/isysquery/ccdb6829-e5d5-41ec-b765-ac4f59812fb2/1/doc/19-3482_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/ccdb6829-e5d5-41ec-b765-ac4f59812fb2/1/hilite/

FAMILY

SECOND DEPARTMENT

M/O Jaydin R. (Anonymous), 1/13/21 – **JD / DISMISSED**
The respondent appealed from a Westchester County Family Court order finding that he committed acts, which if done by an adult, would constitute the crime of making a terroristic threat. *See* Penal Law § 490.20 (1). The Second Department reversed and dismissed the petition. The respondent and another 8th grade student joked and argued. Then respondent told the other student that he was "going to be 14 years old, chopped up in somebody's backyard," and the respondent was "going to get a white person to shoot up the school." The general motion to dismiss was not directed at the error urged on appeal, but in the interest of justice, the appellate court found the proof legally insufficient. The presentment agency presented no proof of the defendant's intent to intimidate a civilian population. Salihah Denman represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00176.htm

M/O Zowa D.P. (Jenia W.), 1/13/21 – **DEFAULT / DISMISSED**
The mother appealed from a Westchester County Family Court order, which found that she abandoned the subject child, and terminated her parental rights. The mother defaulted by failing to appear in court for the final day of the fact-finding hearing. Her attorney was present, but after the court denied a request to adjourn, counsel said he was no longer participating. No appeal lies from an order entered on default. However, the adjournment denial was appealable because that request was the subject of a contest below. Such ruling was proper, given the lack of an explanation for the mother's absence, several missed court dates, the long pendency of the case, and the merits.
http://nycourts.gov/reporter/3dseries/2021/2021_00175.htm

M/O Briceyda M. A. X., 1/13/21 – **SIJS / REVERSED**
In a Family Court Act Article 6 guardianship proceeding, the children appealed from an order of Queens County Supreme Court, which denied their motions seeking findings needed to petition for SIJS status. The Second Department reversed. Reuniting the children with the father was not viable due to his abandonment of two children and educational neglect of a third child. Returning to Guatemala would not serve the children's interests. Davis Polk LLP represented the children.
http://nycourts.gov/reporter/3dseries/2021/2021_00180.htm