# CRIMINAL

## FIRST DEPARTMENT

***People v Nunez***, 1/19/21 – **SUPPRESSION REOPENED / REVERSAL**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree CPW. The First Department reversed and ordered a new trial. The People gave notice of their intent to offer evidence of two statements made by the defendant while in custody following arrest. At the initial *Huntley* hearing, the People called a special agent who allegedly overhead the first statement, but not the detective who heard the second one. Months later, when the special agent was unavailable, the People sought to reopen the suppression hearing to call the detective to the stand. Over objection, the testimony was permitted. That was error. The prosecution had a full and fair opportunity to present both witnesses, but chose not to. The error was not harmless. The Center for Appellate Litigation (Anjali Pathmanathan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00266.htm

***People v DeBlasio***, 1/21/21 – **TERRORISTIC THREAT / DISTORTING MEANING**
The defendant appealed from a NY County Supreme Court judgment, convicting him of making a terroristic threat. The First Department reversed and dismissed. Proof of "intent to intimidate or coerce a civilian population" was legally insufficient. After an altercation, the defendant, a Muslim, threatened to shoot several Bangladeshi worshippers at his mosque. Although the defendant may have harbored animus toward Bangladeshis, his threat mentioned no group or population and was apparently based on a personal dispute over money or a phone. To find that the defendant's act amounted to a terroristic threat would trivialize the definition of "terrorism" and defy a collective understanding of what it means. The Office of the Appellate Defender (Margaret Knight, of counsel) represented the defendant.
http://nycourts.gov/reporter/3dseries/2021/2021_00376.htm

***People v Stroud***, 1/21/21 – **NO ENTRAPMENT / BAD COP**
The defendant appealed from a NY County Supreme Court judgment, convicting him of 1st degree criminal possession of a controlled substance (two counts) and official misconduct (four counts). The First Department affirmed. The convictions stemmed from the delivery of large quantities of drugs during an undercover sting operation. The defendant's entrapment defense failed. The undercover officer simply asked if the defendant (a police officer) wanted to make money by helping with drug deliveries, and she readily agreed.
http://nycourts.gov/reporter/3dseries/2021/2021_00375.htm

***People v Francis***, 1/19/21 – **SUGGESTIVE ID / HARMLESS**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of certain larceny and stolen property crimes. The First Department affirmed. An identification of the defendant—based on a single photo shown to a detective a few days after his very brief viewing of the defendant, who was not otherwise known to him—should have been suppressed as unduly suggestive. The detective's observation was not so clear

that the ID could not have been mistaken so as to render the delayed ID confirmatory. But the error was harmless.
http://nycourts.gov/reporter/3dseries/2021/2021_00267.htm

# THIRD DEPARTMENT

***People v Duggins***, 1/21/21 – **CPL 30.30 (6) / NOT RETROACTIVE**
The defendant appealed from a Brome County Court judgment, convicting him of 5th degree criminal possession of a controlled substance, upon his plea of guilty. The Third Department affirmed. The defendant argued that the People violated his statutory right to a speedy trial. The appellate court held that CPL 30.30 (6) (L 2019, ch 59, pt KKK) (guilty plea does not forfeit statutory speedy trial claim) did not apply where, as here, the sentence was imposed prior to the amendment's January 1, 2020 effective date.
http://nycourts.gov/reporter/3dseries/2021/2021_00336.htm

***People v Murphy***, 1/21/21 – ***ANDERS* BRIEF / NEW COUNSEL**
The defendant appealed from an Albany County Court judgment, convicting him of 2nd degree CPW. Appellate counsel submitted an *Anders* brief. The Third Department withheld decision and assigned new counsel. An issue of arguable merit—whether the waiver of the right to appeal was valid—could impact other potential issues, such as the denial of suppression.
http://nycourts.gov/reporter/3dseries/2021/2021_00334.htm

# SECOND CIRCUIT

***U.S. v Gatto***, 1/15/21 – **PAY-FOR-PLAY / AFFIRMED**
Three defendants appealed from judgments of District Court – SDNY, convicting them of engaging in a scheme to defraud three universities, by funneling secret payments of tens of thousands of dollars from Adidas to families of high school basketball players to induce them to attend the universities, and by covering up the payments so the recruits could certify that they had complied with rules barring such payments. The Second Circuit affirmed. The defendants knowingly and intentionally advanced a scheme, through use of wires, to defraud the universities of financial aid they could have given to other students. The "Bridgegate" case was different, since there retaliation was the goal. One judge concurred in part and dissented in part.
https://www.ca2.uscourts.gov/decisions/isysquery/c0243476-a28c-48b4-8032-23490e8b526c/2/doc/19-783_complete_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/c0243476-a28c-48b4-8032-23490e8b526c/2/hilite/

# FAMILY

## FIRST DEPARTMENT

***Tsung v Tso***, 1/19/21 – **SUA SPONTE / FEES ADJUSTED**
The mother appealed from a NY County Supreme Court order modifying the parties' custody agreement. The First Department affirmed. The trial court properly sua sponte increased the mother's share of fees to the parenting coordinator beyond what the parties' stipulation stated, in light of her failure to cooperate with the coordinator. The modest increase was a reasonable disincentive for the mother's bad behavior. For similar reasons, the court properly denied her request for counsel fees and an adjustment of fees payable to the AFC.
http://nycourts.gov/reporter/3dseries/2021/2021_00275.htm

## SECOND DEPARTMENT

***M/O Iven J. E. (Isaac E.)***, 1/20/21 – **FCA § 1028 / DENIAL REVERSED**
The mother appealed from a Queens County Family Court order, denying her Family Ct Act § 1028 motion for the return of the subject children to her custody. The Second Department reversed. The petitioner commenced neglect proceedings against the parents, alleging that the father had slapped and choked the mother in the presence of their three young children. The mother was directed to cooperate with the petitioner as to supervision and orders of protection against the father. Upon her alleged failure to do so, the children were removed, she made the instant application, and a hearing was held. The record did not support the challenged order. Any concerns that the mother would not enforce the orders of protection did not amount to an imminent risk that could not have been mitigated by reasonable efforts. The petitioner's witnesses did not have concerns about the mother caring for the children, and the agency never followed through on an offer to change the locks and place rail guards on the mother's windows. Family Court erred in finding that the mother did not address the situation that led to the removal. While initially resistant, she pledged cooperation after the removal, mostly complied with the service plan, and understood the harm that observing domestic violence would have on the children. The court also granted her motion to strike from the petitioner's brief references to matters dehors the record, which were not considered in determining the appeal. Elliot Green represented the mother.
http://nycourts.gov/reporter/3dseries/2021/2021_00309.htm

# THIRD DEPARTMENT

***M/O Diana XX. v Nicole YY.***, 1/21/21 – **UCCJEA / FIASCO**
The instant case involved the custody modification application of a paternal grandmother seeking sole custody of her grandchild and the child's sibling. The Third Department reversed Chemung County Family Court orders appealed from. Tennessee had initiated neglect proceedings based on an incident at a motel during a short family visit there. Summarily, Family Court found that NY was not a convenient forum, declined a transfer of jurisdiction, and dismissed the grandmother's petitions. Her first assigned counsel was wholly ineffective, so new counsel was assigned. The Tennessee court repeatedly complained about Family Court's failure to cooperate in resolving jurisdictional issues. On appeal, all parties agreed that Family Court made many errors, that reversal was required, and that a different judge should be assigned. The appellate court—clearly troubled by the "heartbreaking circumstances"—agreed with the parties. Family Court judges must learn and carefully apply the UCCJEA, the Third Department declared. Under such statutory scheme, Family Court had jurisdiction over neglect proceedings when, as here, NY was the home state at the relevant time. NY was in a better position than Tennessee to render a disposition as to neglect. Family Court failed to do a jurisdictional analysis and created due process concerns in dismissing the custody modification petitions.
http://nycourts.gov/reporter/3dseries/2021/2021_00352.htm

***M/O Lexie CC. (Liane CC.)***, 1/21/21 – **NEGLECT / REVERSED**
The mother appealed from a Delaware County Family Court order, which found that she neglected her two children. The Third Department reversed. The mother admitted to using marihuana to cope with her husband's domestic violence and substance abuse. But there was no proof that she used pot in the children's presence or was rendered unable to care for them. She agreed to a safety plan; sought an evaluation when a child had behavioral issues; and obtained proper medical care for him. While the family was in crisis and the mother should have coped in a healthier matter, her failings did not rise to the level of neglect. Renee Albaugh represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00342.htm

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