CRIMINAL

FIRST DEPARTMENT

People v Muhammad, 1/22/19 – **FOREIGN PREDICATE FELONY / NOT EQUIVALENT**
The defendant appealed from a judgment of Bronx County Supreme Court convicting him, upon his plea of guilty, of attempted 2nd degree murder and another crime and sentencing him as a second felony offender. The First Department vacated the SFO adjudication and remanded for resentencing. The Florida predicate was not the equivalent of a New York felony. The knowledge element of the Florida statute was that a defendant knew of the illicit nature of the items in his possession; and that was broader than the knowledge requirement under Penal Law § 220.16. The Center for Appellate Litigation (Benjamin Wiener, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00386.htm

People v Mitchell, 1/22/19 – **SENTENCED REDUCED / DISSENT**
The defendant appealed from a judgment of New York County Supreme Court convicting him of 1st degree criminal possession of a forged instrument and sentencing him, as a second felony offender, to 4 to 8 years. A homeless 53-year-old, the defendant tried to buy food and toothpaste with a counterfeit $20 bill. Five counterfeit $20 bills were recovered from him. The First Department reduced the sentence to 3 to 6 years. Despite being charged with five counts, the defendant was convicted of only a single count. The immediate object of his crime was to purchase basic human necessities. In consideration of such factors, as well as the defendant's medical and substance abuse issues, leniency was appropriate. His extensive criminal history did not preclude such relief. The most recent felony occurred nine years earlier and was nonviolent. One justice dissented. The Legal Aid Society, NYC (David Crow and Kathrina Szymborski, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00371.htm

People v Alston, 1/22/19 – **CPL 200.60 VIOLATION / DISSENT**
The defendant appealed from a judgment of New York County Supreme Court convicting him of 3rd degree CPW and other crimes. The First Department affirmed. The statutory purpose of CPL 200.60 was not satisfied where the court arraigned the defendant on a special information prior to jury selection. However, the defendant failed to show any prejudice. One justice dissented, opining that the statutory violation was inherently harmful, and traditional harmless error analysis was inappropriate. As the majority acknowledged, allowing a defendant to wait until after the commencement of trial to decide whether to admit his prior conviction ensured that he would have as much relevant information as possible in making that decision.
http://nycourts.gov/reporter/3dseries/2019/2019_00410.htm

Vargas v City of NY, 1/22/19 – **TRANSIT RECIDIVIST / CONCURRENCE**
The plaintiff appealed from an order of New York County Supreme Court which denied his motion for a declaration that a NYPD practice—stops of subway passengers who committed transit infractions for "transit recidivist" checks—violated the State

Constitution. The First Department affirmed. A concurring opinion observed that the transit database was likely contaminated by sealed arrests and summons histories, and undercut the presumption of innocence insofar as persons were threatened with punishment on account of allegations that may have been unsubstantiated or dismissed. Further, the database had a disproportionately negative effect on black and Hispanic communities.
http://nycourts.gov/reporter/3dseries/2019/2019_00370.htm

Matter of Luongo v Records Access Appeals Officer, 1/17/19 – **FOILED AGAIN**
The petitioner appealed from a judgment of New York County Supreme Court, denying a petition to compel the respondent to disclose documents requested pursuant to FOIL, and dismissing the Article 78 proceeding. The First Department affirmed. The NYPD personnel documents at issue contained information used to evaluate officers' performance, such as the dispositions of disciplinary charges. Moreover, these records were material ripe for degrading, embarrassing, harassing or impeaching the integrity of the officers, the First Department stated, citing the Court of Appeals decision in *Matter of NYCLU v NYPD* (12/11/18). Thus, Supreme Court properly found that the records sought were exempt from disclosure under Civil Rights Law § 50-a. *(The Legal Aid Society of NYC has stated its intention to appeal the decision and continue a campaign to repeal § 50-a.)*
http://nycourts.gov/reporter/3dseries/2019/2019_00344.htm

SECOND DEPARTMENT

People v Gross, 1/23/19 – **PRESCRIPTION DRUGS / CONVICTIONS REVERSED**
The defendant appealed from a judgment of Suffolk County Court convicting him of 1st degree grand larceny and other crimes. He had worked as an intermediary between a pharmacy supervisor and a distributor moving black-market drugs to treat HIV and AIDS patients. The Second Department held that the People failed to present legally sufficient evidence to support multiple counts. The purchasing agent for the pharmacy knew that it was unlawful to sell, transfer, and dispense the medications; such knowledge could be imputed to the pharmacy; and the People thus failed to prove the grand larceny element of making a false representation on which the pharmacy relied. As to the crime of diversion of prescription medications, the defendant was not a patient selling his medication on the street; and the statute could not be read to criminalize the brokering of sales of prescription drugs to a pharmacy. Conspiracy and money laundering convictions were also reversed. Garfunkel Wild, P.C. represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00461.htm

People v Krivak, 1/23/19 – **440 DENIAL / REVERSED**
The defendant appealed from an order of Putnam County Court which denied his CPL 440.10 motion seeking to vacate a judgment of conviction of 2nd degree murder and 1st degree rape. The Second Department reversed and remitted for a hearing. In his motion, the defendant argued that a new trial should be ordered based on newly discovered evidence relating to the culpability of a third party. The Second Department held that the motion court improvidently exercised its discretion in denying the motion without conducting a hearing. Following a full evidentiary hearing, the motion court could make its final decision

based upon the likely cumulative effect of the new evidence, had it been presented at trial. Adele Bernhard represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00464.htm

People v Stephans, 1/23/19 – **BRIBERY CONVICTION / RIGHT TO COUNSEL**
The defendant appealed from a judgment of Queens County Supreme Court convicting her of charges on bribery and falsely reporting an incident. The Second Department reversed and ordered a new trial. The police improperly questioned the defendant, in the absence of counsel, about the false reporting. They were aware that she was represented by counsel as to the bribery. The two offenses were so inextricably interwoven as to make it clear that an interrogation concerning the false report would elicit incriminating responses about the bribery. The error was not harmless beyond a reasonable doubt. A new trial was also warranted based on ineffective assistance of counsel. Defense counsel stipulated to the admission of a recording of the entire interview between the defendant and police, and failed to object to police testimony recounting the interview. One justice dissented. Danielle Muscatello represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00473.htm

People v Dessasau, 1/23/19 – **CPW2 CONVICTION / SUPPRESSION / DISMISSAL**
The defendant appealed from a judgment of Queens County Supreme Court convicting him of 2nd degree CPW. The appeal brought up for review the denial of his motion to suppress the gun. The Second Department reversed, granted suppression, and dismissed the indictment. When the defendant pleaded guilty, he did not waive his right to challenge the ruling. The appellate court disagreed with the hearing court's sua sponte determination that the defendant lacked standing to challenge the search of the minivan where the gun was found. The defendant, who had been sitting in the front passenger seat, told the police that the van was his work vehicle. No evidence was presented to contradict his statements. The defendant's statements were sufficient to establish that he exercised sufficient dominion and control over the van to demonstrate his own legitimate expectation of privacy. Under the circumstances here, where the defendant already had been removed from the van and no one else was in the vehicle, the police lacked probable cause to conduct a warrantless search. Janet Sabel represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00456.htm

THIRD DEPARTMENT

People v Barr, 1/24/19 – **CONSECUTIVE SENTENCES / MADE CONCURRENT**
The defendant appealed from a judgment of Albany County Supreme Court convicting him, upon his plea of guilty, of 4th degree grand larceny (two counts) and 5th degree conspiracy, all hate crimes. The Third Department held that County Court lacked the authority to impose consecutive sentences as to one of the grand larceny counts and the conspiracy count. The People failed to establish that the act underlying the grand larceny was separate and distinct from the actus rei of the conspiracy charged. Thus, the sentences were ordered to run concurrently to each other and consecutively to the remaining sentence imposed. Marshall Nadan represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00500.htm

Matter of Pinney v Van Houten, 1/24/19 – **SPECIAL PROSECUTOR / PROHIBITION DENIED**
The complainant alleged that she had been sexually assaulted by a deputy sheriff. Due to his close working relationship with the deputy sheriff, the Tompkins County District Attorney sought an order appointing a special DA. The order was granted, and thereafter the special DA's authority was expanded to investigate any other individuals who may have committed an offense against the complainant, including the petitioner. Pursuant to CPLR Article 78, the petitioner sought an order prohibiting the Special DA from prosecuting him. Prohibition was an appropriate remedy to void a court's improper appointment of a special prosecutor, the Third Department stated, but the appellate court denied the instant application. The appearance that a DA would prosecute an individual in a selective manner discouraged public confidence and justified recusal. However, the appellate court cautioned that recusal applications by DAs must be reviewed on a case-by-case basis and that the instant decision did not require recusal in all cases in which a DA was called upon to investigate or prosecute a police officer.
http://nycourts.gov/reporter/3dseries/2019/2019_00509.htm

SECOND CIRCUIT

U.S. v Boyles, 1/25/19 – **RISK CONDITION / TOO VAGUE**
The defendant appealed from a judgment of the Federal District Court in Vermont convicting him of possession child pornography and imposing a term of imprisonment and supervised release with two special conditions. A risk condition required the defendant to notify any person or organization of any risk he posed if his probation officer determined that he was a risk; and (2) a polygraph condition required him to submit to a polygraph exam, as directed by the probation officer as part of his sex offender treatment program. The Second Circuit held that the risk condition was too vague and afforded too much discretion to the probation officer. The appellate court had previously struck similar vague conditions that were based on a prior NY sex offense conviction (*U.S. v Peterson*, 248 F3d 79). The condition here went further than the condition in *Peterson*. The appellate court thus vacated the risk condition and remanded for a clarification of the scope of the condition. The polygraph condition was upheld.
http://www.ca2.uscourts.gov/decisions.html

STATE COURT MATTERS

VALUE OF APP DIV DISSENTS AND LEAVE GRANTS
Two retired justices of the First Department responded in the New York Law Journal to its recent article reporting that Chief Judge Janet DiFiore had advised Appellate Division justices to refrain from granting leave to the Court. The Hon. David B. Saxe said that a related area to be addressed was OCA's concerns about a large number of dissents. Yet dissents could serve to improve the majority's decision by stimulating an exchange of ideas, requiring the majority to wrestle with the objections, and encouraging it to tighten its analysis. He further stated that, when he sought certification, a factor considered was the number of dissents he authored and how prior dissents fared in the Court of Appeals. The Hon. Richard Andrias mused that a judge considering a dissent should consider

whether he or she was constantly a lone dissenter, how past dissents had fared, and whether the contemplated dissent concerned a new issue or matter of broad importance. While he respected the Court of Appeal's desire to control its own docket, sometimes appeals of nonfinal orders were of great importance.

DISSENTS ABOUT VALUE OF DISSENTS / COA DOCKET CONTROL

In the *Journal*, two other Judges countered the views of Judges Saxe and Andrias. Chief Administrative Judge Lawrence K Marks stated that the Administrative Board of the Courts never focused on the number of dissents in the certification process, but did consider how they fared upon further appeal. Retired Court of Appeals Joseph Bellacosa opined that the retired First Department justices had missed an essential consideration regarding dissents: institutional purpose. A threshold question was whether a particular additional dissent served the development of the jurisprudence, and the answer could differ in the Appellate Division vs. the Court of Appeals. As to the high court, many dissents did not serve the institutional purpose. Particular appellate tribunals were collective entities, not collections of individuals. Further, the Court of Appeals should be able to control its own docket.

CLOSED CAPTIONING / FOURTH DEPARTMENT

To broaden access to the courts, the Appellate Division, Fourth Department is making closed captions available for all archived oral arguments. To view closed captions in archived oral arguments, go to the Court's webcast page ad4.nycourts.gov/go/live, click on the relevant argument date, hover your cursor over the video, and click on the "cc" icon.

FEDERAL COURT MATTERS

New York State Rifle & Pistol Association v City of NY

GUN CONTROL / CERT. GRANTED

On January 22, the U.S. Supreme Court agreed to hear a challenge to a NYC gun ordinance that does not allow residents possessing premises licenses to transport the weapons outside the City—the first Second Amendment case to be heard by the case since 2010. The ordinance allows licensed persons to transport guns to shooting ranges within City limits, but not to such ranges outside the City. Three City residents and the New York State Rifle & Pistol Association sued to challenge the law, but lost in the Federal District Court for the Southern District and in the Second Circuit.

POST-*CARPENTER* LANDSCAPE

An article in the current issue of the NACDL publication *The Champion* states that the implications of *Carpenter v. U.S.*, 138 SCt 2206, are coming into view. In *Carpenter*, the court held that a warrant was required to access historical cell-site location information—data obtained from the cellphone service provider indicating where a phone was connected to a cellular network. The case marked a milestone in the rethinking of Fourth Amendment doctrines in the digital age. The article offered a snapshot of current investigative techniques that may be ripe for constitutional challenges. Location tracking cases and third-party record cases would be most directly affected. The push to apply *Carpenter* beyond historical cell-site location information has just begun. Fourth Amendment challenges will

occur as the possibilities of modern technologies spawn new devices and new types of data. Defense counsel should examine new cases invoking *Carpenter* and understand how relevant technologies work in order to educate judges and preserve constitutional guarantees in a digital world, the article advised.

IMMIGRATION RESOURCE

***Acosta* and Finality / A NEW RESOURCE**

The Immigration Defense Project has published 22-page Practice Advisory concerning the Conviction Finality Requirement, in light of the BIA decision *Matter of J.M. Acosta*, 27 I&N Dec. 420. Given the lack of clear precedent in the Second Circuit and the court's previous invitations to the BIA to clarify the conviction finality question, *Acosta* should be applied in the Second Circuit, the Practice Advisory states. The IDP has also prepared an issue-spotting checklist. These resources are intended to help immigration and criminal defense attorneys to determine whether a criminal conviction pending direct appeal can trigger deportation consequences, and to make defensive arguments before the immigration agency and federal courts. A link to the above resources and IDP contact info:
https://protect2.fireeye.com/url?k=bd6e297d-e1568fc0-bd6cd048-000babd9fa3f-1d707a72daea823f&u=https://www.immigrantdefenseproject.org/practice-advisories-listed-chronologically/
A link to all Regional Immigration Assistance Centers.
https://www.ils.ny.gov/content/regional-immigration-assistance-centers

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