CRIMINAL

FIRST DEPARTMENT

People v Cabrera, 2/7/19 – **PEOPLE'S APPEAL / COUNSEL'S IMMIGRATION ERROR**
The People appealed from an order of Bronx County Supreme Court which granted the defendant's CPL 440.10 motion and vacated a 2006 conviction for a domestic violence felony. The First Department affirmed. The motion court properly granted the defendant's application on the ground of ineffective assistance, consisting of counsel's affirmative misadvice about the deportation consequences of the defendant's guilty plea. *See People v McDonald, 1 NY3d 109 (2003).* The motion court conducted a hearing that included testimony from the defendant and prior counsel. Evidence credited by the court established that counsel advised that the defendant would not become deportable and would likely be granted citizenship five years after he completed probation, if he stayed out of trouble. Counsel's affirmative misrepresentations fell below an objective standard of reasonableness. Although the People disputed whether, at the time of the plea, the defendant's conviction rendered him deportable, they established at most that deportability was less clear in 2006 than today. Further, counsel's errant advice was not that defendant *might* avoid deportation, but that he *would* do so. The People did not challenge the finding that the defendant was prejudiced, that is, he would not have pleaded guilty had he received correct immigration advice. Jonathan Edelstein represented the respondent.
http://nycourts.gov/reporter/3dseries/2019/2019_00976.htm

SECOND DEPARTMENT

People v Hor, 2/6/19 – **REMITTAL / COURT'S IMMIGRATION ERROR**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree assault. He contended that the plea court never advised him of the possibility that he would be deported as a consequence of his guilty plea. The Second Department agreed and held that the plea court violated *People v Peque*, 22 NY3d 168 (due process requires that court apprise noncitizen pleading guilty to felony of possibility of deportation). To vacate a plea based on such defect, a defendant must demonstrate that there was a reasonable probability that, had the plea court given the deportation warning, he or she would not have pleaded guilty and would have gone to trial. The Second Department remitted to give the defendant an opportunity to move within 60 days to vacate his plea. Appellate Advocates (Jenin Younes, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00899.htm

People v Mejia, 2/6/19 – **MERGER / KIDNAPPING DISMISSED**
The defendant and Domingo Mateo were indicted for 2nd degree murder, 1st and 2nd degree kidnapping, and burglary and robbery charges, in connection with a home invasion that resulted in the death of a home occupant. They were tried separately and convicted on all counts. On Mateo's appeal, the Second Department dismissed the 2nd degree kidnapping conviction pursuant to the merger doctrine, which precludes a conviction for kidnapping based on acts which were so much a part of another substantive crime that the latter crime

could not have been committed without the kidnapping acts. *See People v Mateo*, 148 AD3d 727. Merger generally occurs where there is minimal asportation immediately preceding the other crime or the restraint and the underlying crime are simultaneous. In the instant appeal, the defendant contended that his conviction of 2nd degree kidnapping was similarly precluded. In the interest of justice, the appellate court vacated the conviction and dismissed that count. The Legal Aid Society of NYC (Jonathan Garelick and Harold Ferguson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00903.htm

People v Akbar, 2/6/19 – **NO "STOP DELIBERATIONS" CHARGE / NEW TRIAL**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree assault. The Second Department reversed and ordered a new trial. The defendant slashed his roommate's neck and stabbed him in the abdomen during a fight in their apartment. At trial, Supreme Court submitted to the jury attempted 2nd degree murder, two counts of 1st degree assault, and other charges; and delivered instructions on the justification defense. The jury acquitted the defendant of attempted murder and found him guilty of 1st degree assault (intent to cause serious physical injury with a dangerous instrument). Supreme Court erred in not instructing the jurors that, if they found the defendant not guilty of the greater charge based on justification, they were not to consider the lesser counts. *See People v Velez*, 131 AD3d 129; *People v Barnar* (ILS Decisions of Interest, 2/4/19). That was reversible error. Appellate Advocates (Meredith Holt, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00894.htm

People v Alleyne, 2/6/19 – **YO NOT CONSIDERED / VACATED**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him 1st degree course of sexual conduct. The Second Department vacated the sentence. CPL 720.20 mandates that the sentencing court determine whether an eligible defendant is to be treated as a youthful offender, even where the defendant fails to request such treatment or agrees to forgo it as part of a plea bargain. *See People v Rudolph*, 21 NY3d 497. As the People conceded, the record failed to show that the plea court considered the defendant's YO eligibility. Appellate Advocates (Nao Terai, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00895.htm

THIRD DEPARTMENT

People v Lavelle, 2/7/19 – **SORA / NO APPEALABLE ORDER**
The defendant appealed from a decision of Schenectady County Court which classified him as a level-two sex offender. Correction Law § 168-n (3) requires the SORA court to render an order setting forth its determination and the underlying findings of facts and conclusion of law. Such order must be entered in the SORA court clerk's office. In the instant case, an appeal was taken from a standard final risk-level classification form signed by the court. Such paper did not set forth findings/conclusions, nor did it include the requisite "so ordered" language. Given the absence of an appealable order, the appeal had to be dismissed.
http://nycourts.gov/reporter/3dseries/2019/2019_00937.htm

FOURTH DEPARTMENT

DECISION OF THE WEEK

People v Colon-Colon, 2/8/19 – **WAIVER OF INDICTMENT / JURISDICTIONAL DEFECT**
The defendant appealed from a judgment of Genesee County Court, which convicted him of attempted 2nd degree rape. The Fourth Department reversed, vacated the plea, and dismissed the Superior Court Information. A felony complaint filed in City Court charged the defendant with two counts of 2nd degree rape. The defendant waived his right to indictment and consented to prosecution by SCI. He signed a written waiver of indictment that did not contain the date, time, and place of each offense. The appellate court observed that a challenge to the validity of a waiver of indictment is not forfeited by a guilty plea, precluded by a valid waiver of the right to appeal, or subject to the preservation requirement. The State Constitution, Art. 1, § 6, allows for the waiver of indictment; and CPL Article 195 details the procedures that must be followed "to the letter." Failure to strictly adhere to the statutory requirements is a jurisdictional defect. CPL 195.20 provides that the written instrument must contain the date, approximate time, and place of each offense to be charged in the SCI. All statutorily prescribed aspects of the process for waiving indictment are of equal jurisdictional significance. Since the instant waiver failed to comply with statutory commands, it was jurisdictionally defective. The Legal Aid Bureau of Buffalo (Caitlin Connelly, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01039.htm

People v Brown, 2/8/19 – **NO JUSTIFICATION CHARGE / REVERSAL**
The defendant appealed from a judgment of Seneca County Court convicting him, upon a jury verdict, of 2nd degree assault and 1st degree promoting prison contraband. The Fourth Department reversed the assault conviction and granted a new trial on that count. County Court erred in refusing to charge the jury on the defense of justification. At trial, the defendant testified that the altercation was an unprovoked attack by correction officers in retaliation for his earlier grievances lodged against prison staff. The defendant explained that he felt "trapped" and bit a C.O. in self-defense. Witnesses testified that two fellow officers were engaged in a prolonged struggle with defendant, and the three men "wrestled pretty hard." The defendant's denial that he assaulted the subject officer did not preclude a justification charge. Andrew Morabito represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01023.htm

People v Logsdon, 2/8/19 – **SORA / LEVEL REDUCED**
The defendant appealed from an order of the Genesee County Court which determined that he was a level-two risk pursuant to SORA. The Fourth Department disagreed and held that the defendant was a level-one offender. Although the risk assessment instrument classified him as a presumptive level-one risk, County Court sua sponte ordered an upward departure based on the defendant's history of PTSD and purported TBI, and his removal of the victim from the State to continue a sexual relationship. That was error. The defendant was indeed diagnosed with PTSD and may have sustained a TBI; but the record was devoid of evidence that any such mental impairments were causally related to a risk of re-offense. Moreover, the evidence at the SORA hearing included: (1) a letter from his psychotherapist, indicating that the defendant was cooperative, willing to engage in treatment, and remorseful; and (2)

an assessment by his treatment counselor, opining that he had a low risk of recidivism. Further, the continuing nature of the crime did not support the upward departure. Even if additional points were assessed for that factor, the defendant's total score would not result in a level-two risk. His actions in taking the victim across State lines did constitute an aggravating factor not taken into account by the risk assessment. However, under the circumstances of this case, such factor did not warrant an upward departure. The Legal Aid Bureau of Buffalo (Caitlin Connelly, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_00998.htm

People v Freeman, 2/8/19 – **VOP / NOT MOOT / AFFIRMED**
The defendant appealed from a judgment of Monroe County Supreme Court which revoked probation and imposed a term of imprisonment. The Fourth Department affirmed. The defendant had served his sentence, and the maximum expiration date of his period of post-release supervision has passed. However, a determination that the defendant violated the conditions of his probation was a continuing blot on his record with potential future consequences. Thus, contrary to the People's contention, the appeal was not moot. But the defendant's arguments regarding the VOP determination were unpreserved and, in any event, lacked merit.
http://nycourts.gov/reporter/3dseries/2019/2019_01037.htm

SECOND CIRCUIT

USA v Ojudun, 2/8/19 – **STATEMENT / NOT AGAINST PENAL INTEREST**
The defendant appealed from a judgment of District Court – SDNY, revoking his supervised release because he left the judicial jurisdiction of supervision without permission and committed other violations of conditions. On appeal, the defendant contended that the trial court erred in denying his motion to preclude, as hearsay, evidence of post-arrest statements made about him by the vehicle of a driver that was stopped in New Jersey, leading to the defendant's arrest. The Second Circuit concluded that the statements were not against the driver's penal interests. *See* Rule 804 (b) (3) of Federal Rules of Evidence. The challenged judgment was vacated and the matter remanded. The District Court erred in failing to: (1) focus on each of the declarant's statements individually to determine which would reasonably have been viewed as so exposing him to criminal liability as to fall within the subject Rule; (2) address the statement most damaging to the defendant—which did not implicate the driver; and (3) determine whether corroborating circumstances indicated the trustworthiness and truth of the declarant's statements. As to the final factor, most statements minimized the declarant's involvement in a planned fraud and deflected responsibility onto the defendant. The appellate court disagreed with the Government's contention that any error was harmless; the District Court relied on a portion of a statement that was not against the declarant's penal interest.
http://www.ca2.uscourts.gov/decisions.html

FAMILY

FIRST DEPARTMENT

***Kaiyeem C. (Ndaka C.)*, 2/7/19 – TERMINATION / *ANDERS* BRIEF**

The mother appealed from an order of New York County Family Court which terminated her parental rights based on a finding that she suffered from a mental illness. An application by the mother's assigned counsel to withdraw as counsel was granted. The First Department had reviewed the record and agreed that there were no nonfrivolous issues that could be raised on appeal. *Cf. Ulster County SCU v McManus* (ILS Decisions of Interest, 2/4/19) (rare that *Anders* brief will reflect effective advocacy in contested Family Court case where evidentiary hearing occurred; new counsel assigned in that case in response to *Anders* brief).

http://nycourts.gov/reporter/3dseries/2019/2019_00956.htm

SECOND DEPARTMENT

Matter of Avery M. (Carlina W.), 2/6/19 – **VACATUR MOTION / GRANTED**

The appellant appealed from an order of Kings County Family Court which denied her motion to vacate an order of fact-finding and disposition, and found that she neglected the subject child, Avery M. The Second Department reversed and remitted for a reopened fact-finding hearing. ACS alleged that the appellant—Avery's sister and guardian—neglected the boy by using excessive corporal punishment; making negative statements as to his sexual orientation; and bathing him in bleach. When appellant's counsel appeared on the fact-finding hearing date, the appellant was not present. The ACS attorney said that the parties had agreed to a voluntary placement agreement. Subsequently, in adjourning the matter, Family Court told ACS to send the appellant a written notice stating that, if she failed to appear on the date set forth, an inquest would be held in her absence. When the appellant thereafter was not present in court, the court concluded that her failure to appear was willful; held the inquest; and entered an order finding neglect. The appellant moved to vacate pursuant to Family Court Act § 1042, which provides:

> If the parent or other person legally responsible for the child's care is not present, the court may proceed to hear a petition under this article only if the child is represented by counsel. The parent or other person legally responsible for the child's care shall be served with a copy of the order of disposition…Within one year of such service…the parent or other person legally responsible for the child's care may move to vacate the order of disposition and schedule a rehearing. Such motion shall be granted on an affidavit showing such relationship or responsibility and a meritorious defense to the petition, unless the court finds that the parent or other person willfully refused to appear at the hearing…

The instant record did not establish that the appellant was served with a notice of inquest; and she had a potentially meritorious defense. Charles Lawson represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_00878.htm

FOURTH DEPARTMENT

Graves v Huff, 2/8/19 – **CUSTODY / REVERSAL**
The father appealed from a Supreme Court order which dismissed his custody modification application. The Fourth Department reversed, reinstated the petition, and remitted. Supreme Court erred in dismissing on forum non conveniens grounds. In custody matters, before determining whether it is an inconvenient forum, a court must consider whether a court of another state could properly exercise jurisdiction, and must address factors enumerated in Domestic Relations Law § 76-f (2). The record failed to establish that the trial court had done so. The Monroe County Public Defender (James Hobbs, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01010.htm

ARTICLES

***People v Suazo* / Consequences**
BY HON. BARRY KAMINS, *NYLJ*, 2/1/19
Last year, the Court of Appeals held in *People v Suazo* that a noncitizen defendant charged with a deportable class B misdemeanor is entitled to a jury trial under the 6th Amendment, even though the maximum authorized sentence is a term of imprisonment of less than six months. Consequences of that decision will include that, for the first time, NYC Criminal Court judges will be placed in the middle of litigation involving a defendant's immigration status and the potential deportation consequences associated with pending charges. Moreover, courts will now be required to make specific findings as to the immigration impact of specific class B misdemeanors—more than 70 of which carry potential immigration consequences. Courts should also anticipate motions raising an equal protection challenge, based on the denial of jury trials to *citizens* facing charges that would entitle non-citizens to a jury trial. *See Issues to Develop at Trial*, Center for Appellate Litigation, Vol. 3, Issue 7 (link below). A bill introduced by Sen. Brad Hoylman would provide for jury trials for defendants charged with class B misdemeanors in NYC Criminal Court (S. 9198).
https://www.ils.ny.gov/files/Appellate/CAL/CAL%20Newsletter%20Issues%20to%20Develop%20at%20Trial/November%202018.pdf

Marijuana Arrest Rates / RACIAL DISPARITIES
NYLJ, 2/8/19
New York is moving toward the legalization of marijuana for recreational use, but in recent times, nonwhite persons have still been getting arrested for marijuana-related offenses at disproportionately higher levels, according to a new report by John Jay College of Criminal Justice which addresses data up to 2017. Since 1990 in NYC and since 2002 for the rest of the State, the racial disparities in marijuana arrests have grown, while the total number of arrests have declined. The report states that, in NYC, for every one white person arrested for a low-level marijuana offense in 2017, about eight black persons were arrested. The disparity is even greater in counties outside of the City. Last year, several District Attorneys

around the State announced that their offices would no longer prosecute low-level marijuana possession offenses.

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