CRIMINAL

FIRST DEPARTMENT

People v Perez, 3/14/19 – **ID AND BUY MONEY / SUPPRESSED / NEW TRIAL**
The defendant appealed from a judgment of New York County Supreme Court, convicting him after a jury trial of 3rd degree criminal sale of a controlled substance. The First Department reversed. The suppression court determined that reasonable suspicion supported the defendant's detention. However, the appellate court stated that handcuffing the defendant was inconsistent with an investigatory detention and elevated the intrusion to an arrest. Probable cause was needed, but did not exist until the undercover identified the defendant. There was no reason to conclude that the defendant was armed or likely to flee. Therefore, the ID and the buy money should have been suppressed. The defendant was entitled to a new trial, preceded by an independent source hearing. The Legal Aid Society, NYC (David Crow and Lindsay Schare, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01822.htm

SECOND DEPARTMENT

People v Robinson, 3/13/19 – **CALLS WRONGLY ADMITTED / NEW TRIAL**
The defendant appealed from a judgment of Queens County Supreme Court convicting him of 2nd degree CPW. The trial court allowed the People to introduce, as admissions, recordings of phone calls he made while detained at Rikers for an unrelated gun charge. That was error, the Second Department held. There was a risk that the jury would believe that the recordings referred to the instant offense, but it seemed more likely that they addressed the later charge. The defendant was between a rock and a hard place—he had to accept the misleading narrative or disclose his other arrest. The error was not harmless; proof of guilt was not overwhelming. Further, the focus on the calls in the People's summation exacerbated the problem; and the jury asked to hear the recordings again during deliberations. Appellate Advocates (Sean Murray, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01799.htm

People v Gonsalves, 3/13/19 – **CONFRONTATION CLAUSE / NEW TRIAL**
The defendant appealed from a judgment of Kings County Supreme Court convicting him of several crimes in connection with the gunpoint robbery of Robert Fernandez at his Brooklyn barbershop. The Second Department reversed and ordered a new trial. Supreme Court should not have admitted Fernandez's testimony that, several days after the robbery, the defendant's stepfather came to the barbershop to say he was sorry, return keys taken, and offer to replace the complainant's cell phone. There was no proof that the defendant was connected to the stepfather's actions. Further, the defendant's Confrontation Clause rights were violated by the investigating detective's testimony about a conversation with an anonymous informant—a nontestifying eyewitness who identified the defendant by name. The errors were not harmless; proof of guilt was not overwhelming. Appellate Advocates (Meredith Holt, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01792.htm

People v Garcia, 3/13/19 – **DLRA RESENTENCES / REDUCED BY 15 YRS**
For convictions of 1st degree criminal possession and criminal sale of a controlled substance, Orange County Supreme Court sentenced the defendant to consecutive indeterminate terms of 17½ years to life. He moved for resentencing pursuant to the DLRA. The aggregate determinate term of the proposed resentences was 35 years, to be followed by post-release supervision. On appeal, the defendant contended that such punishment was unduly severe, given his positive institutional record. He had done vocational educational programs to become a residential electrician and learn computer repair; earned a GED; successfully completed drug and violence rehabilitation programs; worked for eight years as a janitor; and earned the high regard of his teachers, work supervisors, and correctional personnel. A modification by the Second Department resulted in an aggregate term of 20 years. Thomas Villecco represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01791.htm

People v Smith, 3/13/19 – ***ANDERS* BRIEF / NEW COUNSEL**
The defendant appealed from a judgment of Suffolk County Supreme Court convicting him of 3rd degree assault and another crime. After counsel submitted an *Anders* brief, the Second Department assigned new counsel. Upon independent review of the record, the appellate court concluded that there were nonfrivolous issues, including whether the purported waiver of the right to appeal was valid, which was relevant to determining if review of the denial of suppression was available.
http://nycourts.gov/reporter/3dseries/2019/2019_01801.htm

THIRD DEPARTMENT

People v Smith, 3/14/19 – **IN ABSENTIA / NEW TRIAL**
The defendant appealed from a judgment of Tioga County Court convicting him of 3rd degree rape and another crime. He did not appear for trial. The Third Department held that County Court abused its discretion in conducting the trial in the defendant's absence. Even where, as here, the defendant was warned of the consequences of nonappearance, trial in absentia is not automatic. In the instant case, several factors militated against that outcome. (1) The defendant had been present at all prior appearances. (2) His attorney detailed efforts to locate him and requested an adjournment. (3) There was no indication of difficulty in rescheduling the trial. (4) There was no fear that evidence would be lost or that further efforts to locate the defendant would be futile. (5) Commencement of trial immediately after issuance of a bench warrant showed a minimal effort to locate the defendant before trial. John Trice represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01858.htm

People v Vandegrift, 3/14/19 – **VOP / COMPETENCY / REMITTAL**
The defendant appealed from a Chemung County Court judgment revoking probation. Despite conflicting psychiatric exam reports, the trial court did not conduct a competency hearing. The Third Department ordered a reconstruction hearing as to the defendant's mental capacity at the violation hearing. One justice dissented. John Cirando represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01854.htm

People v Dorsey, 3/14/19 – **RECANTATION / UNRELIABLE**
The defendant and codefendant Riddick were charged with attempted 2nd degree murder, 1st degree assault, and other crimes in connection with the firing of six shots at a victim who was struck by one bullet. The instant appeal was from a judgment of Albany County Supreme Court convicting the defendant, upon his plea of guilty, of attempted 2nd degree CPW in that matter. The Third Department affirmed. The trial court did not err in denying the defendant's motion to withdraw his guilty plea, based on the victim's recantation of statements incriminating the defendant. The appellate court had been unimpressed by same recantation statement when codefendant Riddick submitted it. *See People v Riddick*, 136 AD3d 1124 (recantation proof inherently unreliable, particularly where, as here, recanting victim was in custody in the facility with codefendants; plea proceeding reflected valid plea). *[For a different result in another recent recantation case, see Fernandez v Capra, infra.]*
http://nycourts.gov/reporter/3dseries/2019/2019_01852.htm

FOURTH DEPARTMENT

People v Lendof-Gonzalez, 3/15/19 – **ATTEMPTED MURDER / DISMISSED**
The defendant appealed from a judgment convicting him of two counts each of 1st and 2nd degree attempted murder and one count of 2nd degree criminal solicitation. The Fourth Department held that the attempted murder convictions were not supported by legally sufficient evidence and dismissed those counts. The defendant had been arrested for attacking his wife and was remanded to county jail. While there, he passed notes to an inmate in a neighboring cell, asking him to kill his wife and her mother on a specified date, at a specified place. The defendant promised to give the inmate a house in return. The inmate informed authorities. Neither the defendant nor the inmate took steps to effectuate the crime. Thus, the People failed to establish that the crimes were "dangerously near" to completion. Robert Graff represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01904.htm

People v Fitch, 3/15/19 – **ELECTRONIC MONITORING / ERROR**
The defendant appealed from a judgment convicting him, upon his plea of guilty, of attempted marihuana possession. The Fourth Department held that the electronic-monitoring condition of probation was error. The issue did not require preservation since it implicated the legality of the sentence. A defendant may be required to submit to electronic monitoring where such provision would advance public safety or probationer control or surveillance. The instant court failed to make such determination. To the contrary, the sentencing court did not consider the defendant to pose a threat to public safety. The matter was remitted since there may been a legitimate purpose for the monitoring. Paul Dell represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01973.htm

People v Washington, 3/15/19 – **PSR / REDACTION ORDERED**
The defendant appealed from a judgment of Erie County Supreme Court, convicting him upon his plea of guilty of 1st degree manslaughter. The Fourth Department held that the trial court erred in declining to redact certain information in the presentence report (PSR).

The defendant's contention survived his appeal waiver. Failure to redact erroneous information from a PSR creates an unjustifiable risk of future adverse effects to the defendant, including in appearances before the Parole Board. An inaccurate PSR could cause a defendant to be incarcerated for a longer time, affect determinations of legal status, and impact other rights. The inclusion in the PSR of the arresting officer's reference to the defendant as a "sociopath" was inappropriate and inflammatory. Supreme Court was ordered to redact the offending phrase from all copies of the PSR. The Legal Aid Bureau of Buffalo (Kristin Preve, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01994.htm

SECOND CIRCUIT

Fernandez v Capra, 916 F3d 215 – **RECANTATION / NEW TRIAL**
The petitioner appealed from a judgment of District Court – SDNY, which denied his petition for federal habeas relief with respect to his conviction for the 1993 murder of a member of a rival gang. The Second Circuit reversed and ordered a new trial, finding that New York County Supreme Court unreasonably determined that an eyewitness's recantation was not credible. The testimony of an investigation officer had already been compromised; and the state court acknowledged that: (1) the eyewitness, a teenager at the time of trial, would have been vulnerable to coercion by an overzealous officer; (2) by the time of his recantation testimony, the witness had become a responsible adult who lived a stable life; (3) his recantation seemed plausible and had the ring of truth; (4) much of the witness's trial testimony could be reconciled with the recantation; and (5) there was no showing that he had a motive to lie. The state court questioned why the eyewitness had waited so long to come forward; but it was unreasonable to place great weight on a citizen's hesitation to voluntarily place himself in peril of imprisonment for perjury. Like anyone who recanted, the eyewitness had lied under oath on at least one occasion, the state court pointed out. The Second Circuit stated that such observation was not a sufficient basis to discredit the new testimony. The state court's observation was true of every recanting witnesses; and it said nothing about the salient inquiry—when the eyewitness lied, then or now. In sum, the challenged decision contained sound reasons to credit the recantation and unsound reasons to discredit it. There was more than a reasonable likelihood that the eyewitness testimony had influenced the jury. *[For a different result in a recantation case, see People v Dorsey, supra.]*
http://www.ca2.uscourts.gov/decisions/isysquery/a2ae3517-1967-467a-b245-ed56ebf541bb/16/doc/16-4053_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/a2ae3517-1967-467a-b245-ed56ebf541bb/16/hilite/

FAMILY

FIRST DEPARTMENT

Jazlyn Z. (Jesus O.), 3/14/19 – **1028 TESTIMONY / OKAY AT FACT-FINDING**
The respondent appealed from orders of Bronx County Family Court finding sexual abuse and derivative abuse. The appeal raised the issue of whether a child's testimony, stricken from a Family Court Act § 1028 hearing, may be considered in a fact-finding hearing. The First Department answered "yes" and affirmed the challenged order. Family Court Act § 1046 (a) (vi) provides that previous statements by a child, relating to allegations of abuse or neglect, are admissible when corroborated. Here, after three days of cross-examination, the 14-year-old child refused to continue to testify at the 1028 hearing. Her therapist said that doing so would be detrimental. The reviewing court held that, at the fact-finding hearing, Family Court could rely on her prior testimony, subject to corroboration. Using incomplete testimony was consistent with legislative recognition of the reluctance or inability of victims to testify.
http://nycourts.gov/reporter/3dseries/2019/2019_01846.htm

SECOND DEPARTMENT

Matter of Vasquez v Mejia, 3/13/19 – **SIJS / REVERSAL**
The mother filed a petition for custody of her son. After Nassau County Family Court granted the application, the mother then moved for an order that would enable the child to petition for SIJS. The motion was denied on the ground that the child was 18. The mother appealed, and the Second Department found error. Since the custody petition was granted prior to the child's 18th birthday, the trial court should not have denied the motion based on the lack of jurisdiction. Remittal was ordered, because the record did not reveal whether reunification of the child with the father was viable and whether returning to Honduras would be in the child's best interests. Bruno Bembi represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01780.htm

Olivieri v Olivieri, 3/13/19 – **CUSTODY REVERSAL / MOM KNOWS BEST**
The mother appealed from an order of Kingston County Family Court which granted sole custody to the father. The Second Department reversed. The mother, who was the primary custodian of the children since 2015, paid close attention to their needs and promptly addressed areas of concern. She had a history of stable employment and made all medical and educational decisions for the children. The mother's special-education training enabled her to meet the special needs of the eldest child. Further, she had fostered a relationship between father and children. She had not appealed the denial of her cross petition to relocate with the children to New Jersey. The appellate court awarded her sole physical custody and final decision-making authority. The matter was remitted to set a parental access schedule. Zachary Karram and Lisa D'Agostino represented the mother.
http://nycourts.gov/reporter/3dseries/2019/2019_01768.htm

Rizzo v Pravato, 3/13/19 – **ARTICLE 8 / "INTIMATE RELATIONSHIP" QUESTION**
The petitioner appealed from a Kings County Family Court order which dismissed her petition based on a lack of subject matter jurisdiction. The Second Department reversed. Family Court should not have determined, without a hearing, the issue of intimate relationship. Courts must resolve such issue on a case-by-case basis, considering the nature of the relationship—regardless of whether it was sexual in nature; the frequency of interaction; and the duration of the relationship. In light of the conflicting allegations, Family Court should have conducted a hearing.
http://nycourts.gov/reporter/3dseries/2019/2019_01776.htm

THIRD DEPARTMENT

Ulster County SCU v Beke, 3/14/19 – **DISSENT / APPEARANCE BY PHONE**
The respondent appealed from an order of Ulster County Family Court which found him in willful violation of a support order. The Third Department held that the trial court properly found the respondent in default, and he should have moved to vacate, rather than taking an appeal. One justice dissented. There was no default and the order was appealable, given the appearance by assigned counsel at the confirmation hearing and his explanation that the respondent could not afford to travel from his Florida home to attend. The respondent had been allowed to appear by phone at three prior appearances. The dissenter opined that it was an abuse of discretion to deny his final request to appear by phone, pursuant to Family Court Act § 433 (c) (Family Court may allow testimony by phone where party lives in another county or it would be an undue hardship for such party or witness to testify in court).
http://nycourts.gov/reporter/3dseries/2019/2019_01864.htm

FOURTH DEPARTMENT

Justin M.F. (Randall L.F.), 3/15/19 – **NEGLECT DISMISSAL / REVERSED**
The petitioner agency and AFC appealed from an order of Monroe County Family Court dismissing an Article 10 petition. The Fourth Department reversed and found that the subject child was neglected. The agency established that the father inflicted excessive corporal punishment. Testimony and medical records indicated that, when the father struck him, the child sustained a bruised left temple, a bruised eye, and a bloody and swollen nose.
http://nycourts.gov/reporter/3dseries/2019/2019_01907.htm

FEDERAL DISTRICT COURT

R.F.M. v Nielsen, 3/15/19 – **SIJS / RIGHTS PROTECTED**
In a lawsuit in District Court – SDNY, the five plaintiffs are young immigrants who were determined by NY Family Courts to have been abused, abandoned or neglected by one or both parents. They each obtained orders including findings that reunification with one or both parents was not viable and that return to the previous country of nationality, or of last habitual residence, would not be in his or her best interest. However, each plaintiff's application for Special Immigrant Juvenile Status (SIJS)—and a path to become a LPR—

was denied because of a policy change by the U.S. Citizenship and Immigration Services. Under such policy, Family Courts are deemed to not be "juvenile courts" when exercising jurisdiction over immigrants aged 18 to 21. District Court declared that only Congress could make such a policy change; the new policy was inconsistent with the statute that created the SIJS scheme; and it misinterpreted New York law. Class certification was granted. The plaintiffs are represented by the Legal Aid Society, NYC, and Latham & Watkins.

RAISE THE AGE

People v L.M., 2019 NY Slip Op 50305 (U) –
FIVE SHOTS FIRED / DEADLY WEAPON / RETAINED IN YOUTH PART
The defendant was charged with 2nd degree attempted murder and other counts, as an AO in the Youth Part of Nassau County Court. The indictment alleged that the AO possessed a loaded pistol while attempting to cause the death of another person. According to additional hearsay facts, the AO fired five shots. Medical records indicated that one bullet remained lodged in the complainant's abdomen. The People argued that the case should remain in the Youth Part, based on the display of a deadly weapon and the significant injury inflicted. The court agreed as to the deadly weapon, but found no need to reach the injury issue. Nothing in CPL 722.23 (b) required that the sixth-day appearance include testimonial evidence or allegations of sworn fact based on the affiant's personal knowledge, the court observed. The matter was retained in the Youth Part.
http://nycourts.gov/reporter/3dseries/2019/2019_50305.htm

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