CRIMINAL

FIRST DEPARTMENT

People v Jamison, 3/19/20 – **NO PRS ADVISEMENT / REVERSAL**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of drug possession offenses. The First Department reversed, vacated the plea, and remanded. At the plea proceeding, the defendant agreed to plead guilty to 3rd and 5th degree possession, with the understanding that, if he complied with the terms of the agreement, he could withdraw his plea to the B felony and be sentenced solely on the D felony to 3½ years, followed by two years' post-release supervision. The court stated that, if the defendant violated the agreement, he could be sentenced to up to 15 years on the B felony. The defendant violated the plea agreement, and the court imposed an enhanced sentence, including PRS. However, the court had failed to provide the required advisement that in the event of a violation of plea conditions, the defendant's sentence would include PRS for a specified period. The Center for Appellate Litigation (Claudia Trupp, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_01955.htm

SECOND DEPARTMENT

People v Taisha Smith, 3/18/20 – **APPELLATE IAC / CORAM NOBIS**
The appellant applied for a writ of error coram nobis, on the ground of ineffective assistance, seeking to vacate a Second Department order affirming his Queens County conviction for 1st degree assault and other crimes. The appellate court reversed and remitted for a new trial before a different justice. Former appellate counsel was ineffective in failing to argue that the trial court's unwarranted and pervasive interference in its examination of witnesses deprived the defendant of a fair trial—an issue raised successfully by the co-defendant, with whom the defendant was tried jointly. It is the function of the judge to protect the record, not make it. Although the law will allow a certain degree of judicial intervention, the line is crossed when the judge takes on the function or appearance of an advocate, as occurred here. Patterson Belknap represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2020/2020_01937.htm

People v Lorenzo-Perez, 3/18/20 – **APPELLATE IAC / *ANDERS* BRIEF**
The defendant appealed from a Rockland County Court judgment, convicting him of attempted 2nd degree murder. The court granted the motion of assigned appellate counsel to withdraw as counsel but assigned new counsel, because the *Anders* brief failed to: (1) evaluate whether the plea was advantageous in light of the potential availability of an intoxication defense; (2) explore whether the defendant was deprived of effective assistance of counsel; (3) provide the relevant facts concerning the purported waiver of appeal; and (4) argue that the sentence was excessive.
http://www.nycourts.gov/reporter/3dseries/2020/2020_01931.htm

People v Ramone Smith, 3/18/20 – ***ROSARIO* VIOLATION / NO PREJUDICE**
The defendant appealed from judgments of Nassau County Supreme Court, convicting him of sexual offenses and other crimes. The Second Department affirmed. The prosecutor committed a *Rosario* violation by not giving the defendant the supporting deposition of one complainant until after her direct testimony. When the prosecutor discovered the error, prior to the cross-examination of the witness, she turned over the statement. The trial court granted a continuance and issued a curative instruction. Thus, the delayed disclosure did not prejudice the defendant.
http://www.nycourts.gov/reporter/3dseries/2020/2020_01936.htm

People v Batiste, 3/18/20 – **NO WAIVER / SENTENCE UPHELD**
The defendant appealed from a sentence imposed by Richmond County Supreme Court on the ground that it was excessive. The Second Department affirmed. The defendant pleaded guilty to 2nd and 3rd degree assault, in exchange for a promise that, if she successfully completed a mental health treatment program, her plea to the felony would be vacated and she would be sentenced to a conditional discharge on the misdemeanor. If the defendant failed to complete the program, she would be sentenced to two years. The defendant failed to complete the program, and the court imposed the promised sentence, plus two years of post-release supervision not previously mentioned. The valid waiver of appeal precluded review of the term of imprisonment as excessive. However, the waiver did not encompass the PRS period, since at the time of the waiver, the defendant was not told her about PRS. Nevertheless, the period of PRS was not excessive.
http://www.nycourts.gov/reporter/3dseries/2020/2020_01923.htm

People v Tellado, 3/18/20 – **BAD WAIVER / SENTENCE UPHELD**
The defendant appealed from a sentence imposed by Kings County Supreme Court on the ground that it was excessive. The Second Department affirmed after finding the purported waiver of the right to appeal invalid. Supreme Court stated that the waiver meant that no one would give the defendant a transcript or "any help whatsoever to appeal," and no group of judges would review anything the trial judge had done. Such statements utterly mischaracterized the rights to be ceded. The written waiver form did not clarify that review was available for certain issues, and the plea court failed to confirm that the defendant understood the content of the form.
http://www.nycourts.gov/reporter/3dseries/2020/2020_01938.htm

THIRD DEPARTMENT

People v Crandall, 3/16/20 – **BAD WAIVER / PROBABLE CAUSE / *ALFORD* PLEA**
The defendant appealed from a Hamilton County Court judgment convicting him of DWI. A Sheriff's Dept. sergeant came upon a single-vehicle accident and found the defendant standing by the side of the road. Emitting a strong odor of alcohol, the defendant was unsteady on his feet and had bloodshot eyes, impaired motor coordination, and slurred speech. When questioned, he complained of chest pains and was transported to a local hospital. No field sobriety tests, chemical testing or blood draw were performed. Following a hearing, County Court found probable cause for the arrest; and the defendant was charged with DWI and DWAI by drugs and/or alcohol, both as felonies. He entered an *Alford* plea

to DWI in exchange for time served. The Third Department affirmed, but found the waiver of appeal invalid. County Court did not distinguish the waiver from the trial rights forfeited by the guilty plea, and there was no written waiver. Asked if he would waive appeal rights, the defendant responded, "Yes, if that's what I gotta do, yes. If that's what you're making me do, I'll do it." Thus, the probable cause issue was reviewable, but the defendant's argument lacked merit. Further, his challenge to the voluntariness of his *Alford* plea was unpreserved, and in any event the plea was proper. Although the prosecutor should have placed on the record the evidence of guilt, the plea court was well aware of the evidence against the defendant, given the probable cause hearing. The reviewing court held that there was strong, competent evidence of guilt; and the defendant's statement that he sought to avoid a more severe sentence demonstrated that his plea decision was the product of a voluntary and rational choice.
http://nycourts.gov/reporter/3dseries/2020/2020_01857.htm

FOURTH DEPARTMENT

People v Sears, 3/20/20 –
SWITCHING SIDES / RIGHT TO COUNSEL / REVERSED
The defendant appealed from a judgment of Onondaga County Court, convicting him of 3rd degree burglary and related crimes. The Fourth Department reversed, vacated the plea, and remitted. At the time of the offenses, the defendant was participating in a drug treatment court program in connection with misdemeanor charges. He entered into an agreement whereby he agreed to plead guilty to the felony charges and to continue drug treatment court. Then the defendant failed to complete the program, he was sentenced on the felony charges, and the misdemeanor charges were dismissed. Reversal was required because the assigned attorney who represented the defendant on the misdemeanor charges in the preliminary stages later joined the District Attorney's Office and was assigned to the drug treatment court while the defendant's cases were pending there. A defendant's right to counsel was violated when a defense attorney who actively participated in the preliminary stages of the defense became employed as an assistant district attorney by the office prosecuting the defendant's ongoing case. Hiscock Legal Aid Society (Kristen McDermott, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_01974.htm

People v Rankin, 3/20/20 – **SENTENCE REDUCED / YOUTH CITED**
The defendant appealed from a County Court judgment, convicting him of 2nd degree murder in the shooting death of a rival gang member. The Fourth Department reduced the sentence from an indeterminate term of 23 years to life to a term of 18 years to life. County Court did not err in admitting a recorded jailhouse telephone call by defendant. Since he was informed of the recording of calls, he had no reasonable expectation of privacy in the call. However, the sentence was unduly harsh and severe under the circumstances of the case, which included that the defendant was 18 years old at the time of the incident. The Monroe County Public Defender (James Hobbs, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_01976.htm

People v Dogan, 3/20/20 – **440 DENIAL AFFIRMED / DISSENT**
The defendant appealed from an Erie County Court order, which summarily denied his CPL 440.10 motion to vacate a judgment convicting him of 1st degree assault and 1st degree robbery (three counts). The Fourth Department affirmed. The defendant failed to alleged in his motion papers that, had he been made aware of a potentially viable affirmative defense concerning the operability of the firearm used in the robberies, he would have rejected a favorable plea deal and insisted on going to trial. Two justices dissented. Although the motion did not include the particular litany required by the majority, the defendant did state that counsel failed to advise him about the affirmative defense and that he entered the guilty plea based on counsel's errors. That was sufficient to raise issues of fact regarding whether the plea was not knowing, voluntary, and intelligent, due to ineffective assistance. To insist that a pro se defendant use certain "magic words," despite his clear intent, would defeat the purpose of the statute, the dissenters opined.
http://nycourts.gov/reporter/3dseries/2020/2020_02021.htm

People v Maund, 3/20/20 – **SORA / LEVEL THREE TO TWO**
The defendant appealed from an Erie County Supreme Court order, which determined that he was a level-three risk under SORA. The Fourth Department ordered a reduction to level two. The People failed to prove that the defendant committed a continuing course of sexual misconduct—risk factor 4. The sole evidence presented was the case summary prepared by the Board of Examiners of Sex Offenders. At the hearing, the defendant denied that he engaged in a continuing course of sexual misconduct. He had been charged with, and pleaded guilty to, one count of 3rd degree rape, stemming from a specific instance of intercourse on one specified day. Where the defendant contested the factual allegations, the case summary alone was insufficient to satisfy the People's burden. Thus, Supreme Court erred in assessing 20 points for risk factor 4. The Legal Aid Bureau of Buffalo (Alan Williams, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02011.htm

People v Wilke, 3/20/20 – **SORA / DUE PROCESS VIOLATION**
The defendant appealed from a County Court order, which determined that he was a level-two risk pursuant to SORA. The Fourth Department reversed and remitted. County Court violated his right to due process by sua sponte assessing points on a theory not raised by the Board of Examiners or the People. No allegations were made that the defendant should be assessed 30 points under risk factor 3. The defendant learned of the additional points under that risk factor when the court issued its decision. The alternative basis for the determination also violated due process. The court stated that, if defendant were a presumptive level one risk, an upward departure to level two would be warranted based on certain aggravating factors stemming from the nature of the crimes. Those factors were not presented as bases for departure in the RAI or by the People at the hearing. The Monroe County Public Defender (David Juergens, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02002.htm

FAMILY

FOURTH DEPARTMENT

Tomeka N.H. v Jesus R., 3/20/20 –
DRL § 70 / NO 3-WAY PARENTING / DISSENT
The petitioner appealed from a Monroe County Family Court order dismissing her petition for joint custody and visitation. The Fourth Department affirmed. The issue was whether the petitioner had standing to seek a tri-custodial arrangement with the biological parents. The majority concluded that she could not establish standing under Domestic Relations Law § 70, which provided for only two parents. The AFC contended that the court should not address that statutory issue because the father raised it for the first time on appeal. The appellate court held that the argument was reviewable: it presented an issue of law appearing on the face of the record that could not have been obviated or cured by factual showings or legal counter-steps in the trial court.

One justice dissented. By concluding that the petitioner lacked standing—notwithstanding that she had parented that child for seven years—the majority defeated the DRL § 70. The interpretation of "either" as precluding more than two parents contravened the purpose of advancing the welfare of children, including those in nontraditional families. When the mother told the father she was pregnant, he accepted no responsibility until the child was age three. So the mother asked the petitioner, her former partner, if she would help raise the child; and the two women entered into an agreement to that end. The petitioner supported the mother throughout her pregnancy and helped raise the child, now age 9, for most of the child's life. The petitioner never wavered in her parenting commitment and remained a consistent, loving, and capable parent. The mother and AFC favored a tri-custodial arrangement; and the child would suffer as a result of separation from a primary attachment figure and de facto parent. Children have a fundamental liberty interest in preserving intimate family-like bonds. While the majority opined that a tri-custodial arrangement would raise problems, Family Courts are capable of grappling with such issues, the dissenter opined.
http://nycourts.gov/reporter/3dseries/2020/2020_02015.htm