CRIMINAL

U.S. SUPREME COURT

Nielsen v Preap, 3/19/19 – **NONCITIZEN DETENTION / NO BAIL HEARING**
The INA provision, 8 USC § 1226 (c), addressing potentially deportable noncitizens who committed certain offenses or have ties to terrorism, requires DHS to take those aliens into custody "when…released" from prison and to hold them without a bail hearing until Government authorities decide whether to deport them. The question presented here was whether: **(A)** the "no-bail-hearing" category encompasses aliens taken into custody years or decades after release; or **(B)** the category covers only aliens promptly taken into custody when released from prison. In an opinion by Justice Alito, the USSC majority chose (A), whereas Justice Breyer endorsed (B) in a dissent in which Justices Ginsburg, Sotomayor, and Kagan joined. The dissenters pointed out that aliens subject to detention without a bail hearing may have been convicted of minor crimes; after release may have established families and roots in a community; and ultimately may be found eligible for relief from removal. Congress did not likely intend the majority's interpretation, which will harm fundamental American principles, the dissenters opined.
https://www.supremecourt.gov/opinions/18pdf/16-1363_a86c.pdf

SECOND CIRCUIT

U.S. v Black, 3/18/19 **– 68 MONTHS IS NOT SPEEDY / DISMISSAL**
The Second Circuit held, for the third time in two years, that criminal defendants' rights to a speedy trial were violated in the Western District of NY. In the case at bar, the two defendants, who endured a 68-month delay, repeatedly requested a speedy trial. The court affirmed dismissal of remaining charges against them. The relevant interval ran from the first, not the superseding, indictment. The Government was at fault for not timely resolving the death-penalty question; for not filing the superseding indictment until the time was about to expire; for losing key evidence; and for often failing to produce the defendants in court.
http://www.ca2.uscourts.gov/decisions/isysquery/055f347f-cbd3-4d24-b06d-143be7e70bb0/2/doc/18-496_complete_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/055f347f-cbd3-4d24-b06d-143be7e70bb0/2/hilite/

U.S. v Mehta, 3/21/19 – **MARRIAGE/IMMIGRATION FRAUD – VACATED**
The defendants appealed from District Court – NDNY judgments of conviction. Gaurav and Isha Mehta were issued tourist visas to enter the U.S. from India for six months. While here, the Mehtas married U.S. citizens and then applied to adjust their status to LPRs. They were charged with marriage and immigration fraud. During trial, the judge met with jurors ex parte to discuss concerns about the defendants' out-of-court behavior, called it "disturbing" and "unusual", and implied that they posed a threat to jurors. Later the judge instructed that the jurors could consider how the defendants' self-interest may have created

a motive to testify falsely. The Second Circuit vacated the judgment, given the violation of established procedures for handling jury inquiries and the erroneous jury charge.
http://www.ca2.uscourts.gov/decisions/isysquery/d240f839-66f0-4b86-91ba-8d056fbeecf5/1/doc/16-2585_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/d240f839-66f0-4b86-91ba-8d056fbeecf5/1/hilite/

FIRST DEPARTMENT

People v Holmes, 3/19/19 – **CIVIL LAW SUIT / TO IMPEACH OFFICER**
The defendant appealed from a judgment of New York County Supreme Court convicting him of 2nd degree CPW. The First Department reversed and ordered a new trial. The trial court improperly precluded counsel from cross-examining an officer regarding allegations against him in a settled federal civil action. Counsel had a good faith reason to ask whether the officer had assaulted the plaintiff in the civil case and had filed baseless criminal charges against him. The Center for Appellate Litigation (Megan Byrne, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02033.htm

People v Golden, 3/19/19 – **UNFULFILLED PROMISE / PLEA VACATED**
The defendant appealed from a judgment of New York County Supreme Court convicting him of attempted 2nd degree assault. The First Department reversed. The defendant was entitled to vacatur of the plea because a promise of shock incarceration could not be honored. *See* Penal Law § 60.04 (7). The Center for Appellate Litigation (Claudia Trupp, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02027.htm

SECOND DEPARTMENT

People v Kostyk, 3/20/19 – ***PEQUE* VIOLATION / REMITTAL**
The defendant appealed from judgments of Kings County Supreme Court, convicting him of two counts each of 2nd degree burglary and 2nd degree criminal trespass. *People v Peque*, 22 NY3d 168, requires the plea court to apprise noncitizens pleading guilty to a felony of the possibility of deportation as a consequence of the plea. A defendant seeking to vacate a plea, based on a lapse by the court in this regard, must demonstrate that there is a "reasonable probability" that, had the court warned of the possibility of deportation, he or she would not have pleaded guilty. In the instant case, the record did not show that Supreme Court fulfilled its *Peque* duty. The Second Department remitted so the defendant could move to vacate his pleas within 60 days. Appellate Advocates (Kathleen Whooley, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02118.htm

THIRD DEPARTMENT

People v Hinson, 3/21/19 **– SORA / ERRONEOUS ASSESSMENT**

The defendant appealed from an order of Albany County Supreme Court which classified him as a level-three sex offender. The Third Department held that he should not be assessed 20 points for continuing course of sexual misconduct, since there was no indication as to when the second sexual contact occurred. The defendant was thus a level-two offender. In the SORA court, the People had asked for consideration of an upward departure, in the event of a level-two finding. Therefore, the matter was remitted. Kathy Manley represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02184.htm

FOURTH DEPARTMENT

People v Givans, 3/22/19 – **NO CI AT *DARDEN* HEARING / DISMISSAL**
The defendant appealed from a judgment of drug possession conviction rendered in Jefferson County Court. The Fourth Department reversed and dismissed the indictment. At a *Darden* hearing, the People offered the confidential informant's death certificate and failed to establish the existence of the informant by extrinsic evidence. Nothing proved that the alleged informant made the statements attributed to her—or refuted the possibility that they were fabricated and that information needed for probable cause was obtained through illegal police action. Kevin Lane represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02220.htm

People v Knox, 3/22/19 – **SHOWUP INFIRM / REVERSAL**
The defendant appealed from a Supreme Court judgment convicting him upon a jury verdict of 2nd degree CPW (two counts). The Fourth Department reversed. The trial court erred in refusing to suppress showup identification testimony. Such IDs are inherently suggestive, but not presumptively infirm. Given the victim's ID of the defendant during the first showup, the second showup ID—by a non-complainant witness in a hospital parking lot—was improper. A lineup could have been done. The error was not harmless; the victim could not ID the assailant at trial. The Monroe County Public Defender (A. Vincent Buzard, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02230.htm

People v Pendergraph, 3/22/19 **– 440.10 DENIAL / REVERSED**
The defendant appealed from order of the Onondaga County Court which summarily denied his CPL 440.10 motion seeking to vacate 2nd degree murder and 2nd degree CPW convictions. The Fourth Department reversed and remitted. A hearing was needed to determine whether counsel was ineffective in telling the jury that the defendant would testify. The defendant's affidavit stated that counsel never discussed with him whether taking the stand would be a good idea—an account supported by the affirmation of appellate counsel, based on defense counsel's admission. Hiscock Legal Aid Society (Piotr Banasiak, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02220.htm

People v Hamell, 3/22/19 – **ENHANCED SENTENCE / REDUCED FROM 16 TO 10 YRS**
The defendant appealed from a judgment of Oneida County Court, which convicted him of 3rd degree criminal sale and possession of a controlled substance. The Fourth Department

reduced the sentence. Although the defendant pleaded guilty in exchange for a promised aggregate term of six years, County Court imposed an enhanced term of 16 years after he failed to appear for sentencing and remained at large for two years. The appeal waiver was unenforceable, and the enhanced sentence was too severe, even in light of the defendant's criminal record and flight from justice. An aggregate term of 10 years was ordered. Anthony Brigano represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02229.htm

FAMILY

SECOND DEPARTMENT

Matter of Cano v Bussey, 3/20/19 – **AMENDING PETITION / LIBERAL LEAVE**
The mother appealed from an order of Westchester County Family Court which dismissed her custody modification petition without a hearing. That was error. The Second Department reversed and granted the mother's application to amend the petition. Leave to amend should be freely given, pursuant to CPLR 3025 (b), provided that the amendment is not palpably insufficient, does not prejudice the opposing party, and is not patently devoid of merit. None of those factors existed here. Maria Frank represented the mother.
http://nycourts.gov/reporter/3dseries/2019/2019_02086.htm

Matter of Aracelis L. (Diamond P.), 3/20/19 – **NO REMOVAL / AFFIRMED**
The petitioner agency appealed from an order of Kings County Family Court, which denied its Family Court Act § 1027 application to remove the child from the mother's custody. The Second Department affirmed. Family Court properly found that ACS failed to prove imminent risk. The trial court must engage in a balancing test of imminent risk and best interests and, where appropriate, reasonable efforts to avoid removal. Denial of the application was sound, where any risks were mitigated by conditions imposed on the mother. Brooklyn Defender Services represented the mother.
http://nycourts.gov/reporter/3dseries/2019/2019_02097.htm

Matter of Jordin B. (Tiaya B.), 3/20/19 – **NO NEGLECT /AFFIRMED**
The petitioner agency appealed from an order of Kings County Family Court finding no neglect. The Second Department affirmed. The trial court erred in failing to give preclusive effect to binding findings made in an unrelated proceeding—that Cecil R., a person legally responsible for the subject child, sexually abused another child. Nonetheless, the petitioner failed to establish that Cecil R. posed an imminent danger to the subject child and that the mother neglected the child by allowing him to live in the home. Brooklyn Defender Services represented the mother.
http://nycourts.gov/reporter/3dseries/2019/2019_02083.htm

Matter of Jaylhon C. (Candace C.), 3/20/19 – **NEGLECT / SUMMARY JUDGMENT**
The mother appealed from an order of Queens County Family Court, which granted the petitioner's motion for summary judgment on a neglect petition. The Second Department affirmed. While Family Court Act Article 10 contains no provision regarding summary judgment, such relief may be granted when no triable issue of fact exists, pursuant to CPLR 3212 and FCA § 165 (a). ACS established prima facie that the mother neglected the older children and derivatively neglected the youngest child. The agency submitted recent prior orders finding neglect, directing the mother to have a mental health evaluation and comply with treatment, and indicating that she failed to do so. The affirmation of the mother's attorney failed to raise a triable issue.
http://nycourts.gov/reporter/3dseries/2019/2019_02085.htm

Gandham v Gandham, 3/20/19 – **COERCION / NO SUMMARY JUDGMENT**
The defendant appealed from an order granting the plaintiff's motion for summary judgment dismissing her counterclaim to enforce a stipulation of settlement. The Second Department reversed. The plaintiff met his prima facie burden via evidence that the defendant coerced him to sign the stipulation by threatening to commit suicide. However, in opposition, the defendant raised a triable issue of fact. Radhika Nagubandi represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02069.htm

Fortgang v Fortgang, 3/20/19 – **OVERPAYMENT REIMBURSEMENT / REVERSED**
The mother appealed from an order which granted the father's motion for a money judgment reimbursing him for overpaid child support. The Second Department reversed. There is strong public policy against recoupment of support overpayments, which are deemed to have been used for support. The father could have requested a modification, but failed to do. Christopher Chimeri and Glenn Jersey represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02068.htm

THIRD DEPARTMENT

Matter of Benjamin OO. v Latasha OO., 3/21/19 – **SPARSE VISITS / INMATE DAD**
The Third Department upheld an order of Delaware County Family Court awarding the incarcerated father two visits a year with his children. The appellate court recognized that recent social science research supports the presumption that children benefit from continuing contact with an incarcerated parent. One justice who dissented in part. He observed that the parents had together raised their children—ages six and seven at the time of the hearing—until 2013, when the father was incarcerated for drug sale crimes. He was a good parent and continued to maintain a positive relationship with the children after incarceration. This case was unique in providing only semi-annual visitation, despite many factors favoring visitation. Four visits a year was appropriate.
http://nycourts.gov/reporter/3dseries/2019/2019_02187.htm

FOURTH DEPARTMENT

Matter of Liam M.J. (Cyril M.J.), 3/22/19 – **ADVERSE INFERENCE / HARMLESS ERROR**
The father appealed from an order of Genesee County Family Court, which found neglect and abuse. The Fourth Department affirmed, but said that the trial court erred in drawing a negative inference against the father, based on his failure to call his girlfriend as a witness. A missing witness charge is warranted when a party establishes that an uncalled witness, possessing information on a material issue, would be expected to provide noncumulative testimony favoring the opposing party and is available to that party. The proponent must set forth the basis for the request as soon as practicable. In its written decision, the court sua sponte drew a negative inference. The father did not have an opportunity to explain his failure to call his girlfriend. However, the error did not affect the result.
http://nycourts.gov/reporter/3dseries/2019/2019_02207.htm

ARTICLES

ENDING RACISM IN JURY SELECTION
NY Times Editorial Board Opinion, 3/21/19
In the case of Mississippi death-row prisoner Curtis Flowers, which the U.S. Supreme Court heard on March 29, the court should send a message that racism has no place in jury selection. Flowers faced trial six times for the 1996 murder of four people at a store. The same District Attorney tried him each time, resulting in three convictions that were overturned because of prosecutorial misconduct and two mistrials after jurors could not agree on a guilty verdict. Clear racism infected each jury selection process, in brazen disregard of *Batson v Kentucky*. Flowers deserves a fair trial.

EXCERPTS OF ORAL ARGUMENT – *FLOWERS v MISS.*
APPELL COUNSEL: Doug Evans began jury selection in Flowers VI with an unconstitutional end in mind: to seat as few African-American jurors as he could…He asked the struck …jurors an average of 29 questions. He asked the seated white jurors an average of 1.1 questions (T3-4).
CHIEF JUSTICE: The case is unusual because you have the extensive history. And…that's probably why the case is here (T18).
J. KAVANAUGH: We can't take the history out of the case…It was 42 potential African-Americans, and 41 are stricken, right?***And…there's a stereotype that you're just going to favor someone because they're the same race (T32, T46).
J. ALITO: Well, could we say…because of the unusual and really disturbing history, this case [should]…not have been tried this sixth time by the same prosecutor? (T49).
J. KAGAN: The numbers themselves are staggering…This prosecutor would question a white person…and the questions are all designed to rehabilitate the person (T50).
J. GINSBURG: But there were no questions of white jurors who said they had a relationship with defense witnesses (T53).
J. KAVANAUGH: Part of *Batson* was about the confidence of the community and the fairness of the criminal justice system, right? (T54).

J. SOTOMAYOR: My former state prosecutor's office would have substituted attorneys long before the fifth, sixth trial (T56).
https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-9572_2c8f.pdf

BAIL / REJECTING DANGEROUSNESS
By Tina Luongo, Justine Olderman, and Lisa Schreibersdorf
NYLJ, 3/20/19
As final details of an overhaul of NY bail laws are resolved, we should keep in mind that mass pretrial incarceration does not improve public safety; and the abuse of money bail has made the presumption of innocence all but meaningless. Every year NYC courts' over-reliance on pretrial incarceration keeps 47,000 people in jail before they have been convicted of any wrongdoing. This is racially discriminatory—93% of those jailed in NYC are people of color. Extending preventive detention to accused New Yorkers based on perceptions of "dangerousness" would sanction further discrimination. Legislators should maintain the risk of flight standard and ensure that release is guaranteed for misdemeanors and nonviolent felonies.

BOONE ACQUITTED – *NY TIMES*, 3/18/19
Otis Boone, whose appeal to the Court of Appeals resulted in the decision regarding cross-racial identifications (30 NY3d 521), was acquitted on March 1 at his second trial, after having spent seven of the last eight years behind bars. According to the Innocence Project, 70% of convictions overturned with DNA evidence since 1992 involved witnesses who identified the wrong assailant, and nearly half of the mistaken IDs involved a witness and suspect of different races. One of the *Boone* jurors said that the jury instruction on cross-racial identifications solidified her doubts about the reliability of a prosecution witness's testimony.

CYNTHIA FEATHERS, Esq.
Director of Quality Enhancement
For Appellate and Post-Conviction Representation
NY State Office of Indigent Legal Services
80 S. Swan St., Suite 1147
Albany, NY 12210
Office: (518) 473-2383
Cell: (518) 949-6131