CRIMINAL

FIRST DEPARTMENT

People v Smith, 4/11/19 – **PRECLUDING CROSS / HARMLESS ERROR**
The defendant appealed from a NY County Supreme Court judgment, convicting him of drug sale/possession crimes. The First Department affirmed. The trial court should have permitted the defense to cross-examine a detective about a lawsuit in which he was accused of fabricating evidence. The defendant had a valid basis for impeaching the detective regarding such purported misdeed, which was specific to him and relevant to his credibility. The court's rationales for precluding impeachment were that such questioning would be "incendiary" and that the detective denied the misconduct when questioned out of the presence of the jury. The first ground was inconsistent with the satisfied requirement that cross-examination be based on specific, good faith allegations that implicated the officer's credibility. The second rationale was also insufficient, since jurors should have been given the opportunity to assess the officer's credibility for themselves. But the error was harmless.
http://nycourts.gov/reporter/3dseries/2019/2019_02803.htm

THIRD DEPARTMENT

People v Montague, 4/11/19 – **SFO / BEYOND LOOK-BACK PERIOD**
The defendant appealed from an order of Albany County Court, which denied his CPL 440.20 motion to set aside a sentence following a February 2014 drug sale conviction. That was error. County Court unlawfully sentenced the defendant as a second felony offender. The controlling date as to the prior felony was that of the April 2002 original sentencing, not the March 2005 resentencing. *See People v Thompson*, 26 NY3d 678. The People conceded that the days of incarceration during the relevant period were not enough to bring the prior felony within the 10-year look-back period. The matter was remitted for resentencing. The Albany County Public Defender (Jessica Gorman, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02750.htm
***NOTE**: CPL Article 440 motions will be among the topics explored at a one-day appeals CLE in Albany on May 17. Other subjects will include implicit bias in appellate representation; brief writing and oral argument tips; and attacking guilty pleas and appeal waivers.*
https://protect2.fireeye.com/url?k=129d6585-4ea5c2e7-129f9cb0-000babd9f75c-8d396b416e42eb07&u=https://www.ocbaacp.org/wp-content/uploads/2019/03/NYSDA_brochure_Criminal-Appeals-and-Post-Conviction.pdf

People v Secor, 4/11/19 – **SORA / MODIFICATION**
The defendant appealed from an order of Albany County Court which found him to be a level-two offender. The Third Department reduced the classification to risk level one. The SORA court should have granted a downward departure, based on the victim's consent to engage in sexual intercourse when she was nearly age 17. The Board recommended the

departure, based on the mitigating factors, which were not taken into account by the guidelines. Yet County Court declined to grant the relief sought, citing the defendant's light sentence based on the victim's consent. That was an inappropriate factor to consider; the SORA court abused its discretion. Thus, the appellate court placed the defendant at risk level one. Paul Connolly represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02759.htm
NOTE: *SORA appeals will be addressed at the May 17 appellate training program, to be presented by ILS and NYSDA.*
https://protect2.fireeye.com/url?k=87e523d4-dbdd84b6-87e7dae1-000babd9f75c-c5f869e6ced3fb6d&u=https://www.ocbaacp.org/wp-content/uploads/2019/03/NYSDA_brochure_Criminal-Appeals-and-Post-Conviction.pdf

OTHER STATE COURTS

People v H.M. (2019 WL 1526963), 4/10/19 – **YO / 440.20 APP GRANTED**
Before Bronx County Supreme Court was the application of the defendant to be adjudicated a youthful offender upon his plea of guilty to 1st degree manslaughter. Finding the original sentence of 25 years unduly severe, the First Department reduced the term to 20 years. Thereafter, the defendant made a CPL 440.20 application under *People v Rudolph*, 21 NY3d 497 (YO determination is required in every case in which defendant is eligible). Supreme Court granted the motion. The court noted that the defendant was born to a crack-addicted mother, and at the time of the 2009 crime, he was age 16 and had never been convicted of a crime. At the sentencing proceedings, counsel had indicated that the defendant might be bipolar and had unaddressed anger and control issues; and counsel stated that the defendant was remorseful. Regarding the instant application, the issue was what was an appropriate sentence, given subsequent changes in the law and the evolution in society's understanding of juvenile brain functioning and the relationship between youth and unlawful behavior, as embodied in the RTA law. It appeared that the defendant had matured during his time in prison and upon reaching adulthood, and that he had bright prospects for a future constructive life. By making YO treatment available for a 1st degree manslaughter conviction, the Legislature has determined that the serious nature of the offense alone did not mandate denial of such status. For all these reasons, the defendant was adjudicated a YO. A sentence of 1⅓ to 4 years—in effect, time served—was imposed. The Center for Appellate Litigation (Allison Haupt, of counsel) represented the appellant.

SECOND CIRCUIT

USA v Thompson, 4/10/19 – **ENHANCEMENT / ERRONEOUS**
The defendant appealed from a judgment of District Court – SDNY sentencing him to 60 months for cyberstalking and making hoax threats. On appeal, he argued that the trial court erroneously applied a two-level sentencing enhancement for offenses that involved the violation of a NY court order of protection. The Second Circuit agreed. The Government failed to prove that the defendant was properly served with the ex parte order, pursuant to NY Family Court Act Article 8; that Family Court exercised personal jurisdiction over him; and that the NY court thus had the power to enjoin his behavior. Therefore, the order of protection could not serve as the basis for an enhancement under the Guidelines.

http://www.ca2.uscourts.gov/decisions/isysquery/eeb95307-2a5e-4a4f-9527-73905bb78827/1/doc/18-74_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/eeb95307-2a5e-4a4f-9527-73905bb78827/1/hilite/

FAMILY COURT

SECOND DEPARTMENT

Petrosino v Petrosino, 4/10/19 – **DIVORCE / VACATUR**
The defendant moved to vacate a judgment of divorce, pursuant to CPL 5015 (a) (3). Kings County Supreme Court denied the application without an evidentiary hearing. That was error, the Second Department held. The defendant produced proof indicating that the plaintiff may have led her to believe that she did not need to defend the matrimonial action. Although the defendant signed an affidavit waiving her right to answer the complaint, that had to be considered in light of possible deceptions perpetrated by the plaintiff. The matter was remitted for a hearing regarding whether the plaintiff fraudulently induced the defendant into acquiescing in terms that were unconscionable or the product of fraud and overreaching. Howard File represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02733.htm

ARTICLE

PARENTAL ALIENATION / STANDARDS
By Jordan Trager, *NYLJ*, 4/0/19
A recent trial court decision suggested the following standard regarding proof of parental alienation: "Extreme and outrageous conduct, with the intent to cause severe alienation of a parent from a child, together with a causal connection between the alienating parent's conduct and the child's rejection of a parent, and severe parental alienation." In this article, the author proposed a second standard: "Where a child refuses to have a relationship with a non-custodial parent, a court should thoroughly explore the specific reasons why not. The absence of any reasonable explanation shall raise a strong probability of parental alienation on the part of the custodial parent." The proposed standard rests on three principles: (1) Generally, it is natural for a child to want to have a relationship with both parents. (2) Absent a reasonable explanation for the child not desiring a relationship with a parent, parental alienation must be considered a strong probability. (3) Parental alienation is not merely an act upon the targeted parent; it is a form of child abuse.

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