CRIMINAL

FIRST DEPARTMENT

People v Taylor, 4/16/19 – **DELAYED SENTENCING / DISMISSAL**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree gang assault. The First Department reversed and dismissed the indictment. The People had no excuse for a delay of one year plus in sentencing—a period that began when the defendant notified the prosecution that he was in custody in another state and wished to be produced for sentencing on this case. Thus, the sentencing court should have granted the motion to dismiss, pursuant to CPL 380.30 (1) (sentence must be pronounced without unreasonable delay). The Office of the Appellate Defender (Emma Shreefter, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02822.htm

People v Francisco, 4/16/19 – **BAD APPEAL WAIVER / SUPPRESSION UPHELD**
The defendant appealed from a NY County Supreme Court judgment convicting him of attempted 2nd degree CPW. The First Department affirmed. The appeal waiver was ineffective as to the suppression issue. During the allocution, the court said that, by pleading guilty, the defendant was waiving his right to "contest any search or seizure." By statute, though, the defendant did *not* automatically waive the suppression issue. *See* CPL 710.70 (2) (order denying motion to suppress may be reviewed on appeal from judgment entered upon plea of guilty). The written waiver provided correct information, but could not validate the flawed appeal waiver. However, suppression was properly denied.
http://nycourts.gov/reporter/3dseries/2019/2019_02821.htm

***People v Simmon*, 4/18/19 – SUPPRESSION / DECEIT OKAY**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted 1st degree assault and 2nd degree CPW. The First Department affirmed, finding that the lower court properly denied the defendant's suppression motion. Police had voluntary consent from an occupant to enter the defendant's apartment. A detective told the defendant that he would "probably be coming back" from the precinct, and he could bring his cell phone with him if he wished to do so. This was deceptive, because the detective intended to arrest the defendant and seize his phone. However, the deception was not so fundamentally unfair as to deny due process; it did not undermine the voluntariness of the defendant's actions. The detective only suggested that the defendant might want to bring his phone, and the deception was not a type that would compel him to do so. Thus, the appellate court found no basis to suppress the contents of the phone, which was seized incident to a lawful arrest and searched after police obtained a search warrant.
http://nycourts.gov/reporter/3dseries/2019/2019_02952.htm

People v Figueroa, 4/16/19 – **911 CALL INADMISSIBLE / BUT HARMLESS ERROR**
The defendant appealed from a judgment of New York County Supreme Court convicting him of 1st degree robbery and burglary. The First Department affirmed. The victim's statements during a 911 call did not qualify under the present sense impression exception. The call—made after an intervening chain of events that permitted time for reflection—was not substantially contemporaneous with the robbery. However, the error was harmless.
http://nycourts.gov/reporter/3dseries/2019/2019_02836.htm

SECOND DEPARTMENT

People v Smith, 4/17/19 **– 911 CALL ADMISSIBLE / CONSECUTIVE TERMS**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of two counts of attempted 2nd degree murder and other crimes. The Second Department affirmed. The trial court properly admitted a recording of a 911 call made by the father of the teenage victim. The call was made within seconds of the shooting, after the declarant's son cried out that he had been shot, and the other victim fell to the ground in a pool of blood. The statements fit the excited utterances or present sense impressions exception. Further, consecutive sentences for the two counts of attempted murder were proper. The defendant fired multiple times with the intent of hitting the older victim, and one shot hit the teenager. The shots that struck the two victims were the result of separate distinct acts, which did not merge and lose their individual character because the same criminal intent inspired the whole transaction.
http://nycourts.gov/reporter/3dseries/2019/2019_02911.htm

People v Johnson, 4/17/19 – **YOUNG ADULTS / NOT COGNIZABLE *BATSON* GROUP**
The defendant appealed from a judgment of Suffolk County Court, convicting him of 1st degree manslaughter. The Second Department affirmed. The defendant's claim, that the prosecutor discriminated against "young adults" in the exercise of his peremptory challenges, was unpreserved for appellate review. In any event, the contention was without merit, as young adults were not a cognizable group with regard to discrimination in jury selection.
http://nycourts.gov/reporter/3dseries/2019/2019_02897.htm

FAMILY

FIRST DEPARTMENT

Matter of Aliyah N. (Alvin N.), 4/18/19 – **ARTICLE 10 / EXPERT DEPOSITION**
In an Article 10 proceeding, the father appealed from an order of Bronx County Family Court, which denied his motion to compel the ACS medical expert to appear for a deposition. The First Department reversed and granted the motion. The father met his burden of demonstrating special circumstances warranting the grant of his application, given ACS's failure to oppose the application and its concession that it did not know whether the doctor's testimony at the fact-finding hearing would support its allegations of abuse. The excerpts of the child's medical records provided to the father did not indicate the substance of the expert's expected testimony, including her opinion as to the extent of the child's injuries, her future prognosis, or facts supporting her conclusion that the injuries were not accidental. The Bronx Defenders (Miriam Schachter, of counsel), represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02959.htm

Matter of Micah T. (Josette D.), 4/16/19 – **SIX ATTORNEYS / QUOTA**
The mother appealed from an order of New York County Family Court, which terminated her parental rights. Her due process arguments were unavailing, since six different attorneys had been appointed to represent her, and all were relieved of their assignments because she refused to work

with them. The mother thus exhausted her right to assigned counsel. Moreover, Family Court sufficiently advised her of the risks of self-representation and ensured that her waiver of counsel was validly made.
http://nycourts.gov/reporter/3dseries/2019/2019_02832.htm

Matter of Dajah S. v NYC ACS, 4/16/19 – **HALF-SISTER / NO SUPERIOR RIGHT**
The petitioner appealed from an order of Bronx County Family Court, which granted a motion to dismiss her petition for custody of her half-brother. The First Department affirmed. The child had been freed for adoption; and the petitioner's prior guardianship petition had been dismissed with prejudice. Further, the kinship tie did not afford her greater standing than the foster parents. Finally, the petitioner failed to show that awarding her custody would be in the best interests of the child, who had special needs; was well cared for in the foster home; and would be adversely affected by being removed from the only home he had ever known.
http://nycourts.gov/reporter/3dseries/2019/2019_02824.htm

SECOND DEPARTMENT

Matter of Chimienti v Perperis, 4/17/19 – **NONPARENT / CUSTODY STANDING**
In *Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1, the Court of Appeals left open the question of whether, in the absence of a preconception agreement, a former same-sex, nonbiological, nonadoptive partner of a biological parent can establish standing based on equitable estoppel. The Second Department answered in the affirmative and held that Nassau County Family Court properly found that the petitioner had standing to seek custody or visitation with the children.
http://nycourts.gov/reporter/3dseries/2019/2019_02866.htm

Matter of Goode v Sandoval, 4/17/19 – **UCCJEA / INCONVENIENT FORM**
The father appealed from an order of Westchester County Family Court which granted a motion to dismiss his violation petitions on the ground of inconvenient forum. The Second Department reversed. Pursuant to the UCCJEA, the New York State court that made the initial custody determination had exclusive continuing jurisdiction over that determination after the mother left the state with the children, while the father still lived in this state. A NY court may decline to exercise jurisdiction on the ground of inconvenient forum. The issue of an inconvenient forum dismissal is addressed to Family Court's discretion, after consideration of the statutory factors. Family Court failed to delineate the factors it considered. Thus, the matter was remitted. Marc Greenberg represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02872.htm

Matter of Garcia v Santana, 4/17/19 – **GRANDMOTHER / MORE VIDEO CHATS**
The paternal grandmother appealed from an order which granted her weekly video contact with the subject child for a period of five months. The Second Department modified. Family Court properly found that it was not in the child's best interests to award the grandmother visitation in NY with the child, who had relocated to Colorado. However, Family Court should not have limited the period for the grandmother's weekly video sessions. The mother was amenable to such contact. Moreover, requiring a new petition after five months would be disruptive of the relationship the grandmother was attempting to foster with the child.
http://nycourts.gov/reporter/3dseries/2019/2019_02871.htm

THIRD DEPARTMENT

Hassan v Barakat, 4/18/19 – **CUSTODY / REVERSAL**
The father appealed from an order of Rensselaer County Supreme Court granting primary physical custody to the mother as part of a judgment of divorce. The Third Department reversed and granted custody to the father. The wife admitted that she did not comply with the temporary custody order and did not want to foster a relationship between the father and the children. A parent who intentionally interferes with the other parent's relationship with the children is often unfit to act as the custodial parent. There was no record evidence indicating that the husband committed sexual crimes against his sons from a previous marriage, Family Court's concerns notwithstanding. Joint legal custody remained appropriate. Laura Hoffman represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02933.htm

ARTICLES

CRIMINAL JUSTICE REFORM
Go to NYSDA 4/17/19 NEWS PICKS for information regarding reforms to bail, discovery, and speedy trial, and regarding the new "364 Law" reducing maximum misdemeanor sentences and its ramifications for noncitizens. The current edition of NEWS PICKS contains links to helpful Practice Advisories from Legal Aid Society–NYC and the Immigrant Defense Project on these topics.
https://myemail.constantcontact.com/News-Picks-from-NYSDA-Staff--April-17--2019.html?soid=1111756213471&aid=DVgUnE4SNm4

STATE BAR ENDORSES MORE REFORMS
NYLJ, 4/18/19
The State Bar recommends that all state district attorneys create an internal conviction review unit. Only nine DA offices in the state have such units, which were one of several reforms proposed by the NYSBA Task Force on Wrongful Conviction and approved by the NYSBA House of Delegates last weekend. The other recommendations are: (1) to permit a person who has pleaded guilty to a crime to move to vacate the conviction based on newly discovered, non-DNA evidence establishing innocence; (2) to impose a more restrictive admissibility standard for forensic evidence in state criminal cases to prevent "junk" or other discredited evidence; and (3) for the State Bar to monitor more closely whether police are implementing new laws calling for "blind" suspect lineups and recording of certain custodial suspect interrogations.

SMART DEVISES / 4TH AMENDMENT
The use of evidence harvested from artificial intelligence implicates constitutional considerations. Similar to emails and texts, smart devices can record and store larges amount of information, some of which may be relevant to criminal investigations. The devices, for example, know our recent Internet browser searches; remember erased searches; and record comings and goings, where and when lights were turned on or off, whether patterns of behavior occurred or were normal or abnormal, and whether voice patterns reflect various emotional states. In one case, law enforcement served Amazon with a warrant to seize recordings made by an Echo in a murder suspect's home—the alleged scene of the crime. Amazon objected, but the suspect consented, so no decision was issued. Last year, a New Hampshire judge ordered Amazon to turn over recordings

made by an Echo present at the scene of a double murder. Most people have a reasonable expectation of privacy with regard to smart devices, thus necessitating a warrant. In some cases, smart devices will provide information helpful to a defendant—supporting an alibi, for example. As we advance toward AI that can be queried and provide testimonial equivalence, thorny constitutional issues will arise.

The author of this 4/16/19 NYLJ article, Katherine B. Forrest, was a District Court – SDNY Judge. Her forthcoming book is "When Machines Can Be Judge, Jury and Executioner: Artificial Intelligence and the Law."

NYC / TOO MANY EMERGENCY REMOVALS

WNYC News, 4/17/19

When NYC ACS believes that children are unsafe at home, they may file a petition in Family Court to remove those children from the care of their parents or guardians. But the City has authority to remove a child on an emergency basis, when court is closed and there is "imminent danger to the child's life or health." Advocates say the power is too often used in non-emergencies. Last year, the City used emergency powers in nearly half of removals; and almost all children removed were non-white. Parents and children do not gain access to an assigned attorney until a case is filed in Family Court. Having legal representation sooner would mean a chance to challenge the agency's facts or work with the City to develop a plan to keep children safe at home. The practice of emergency removals is especially troubling given the trauma that can result to the family. ACS has rolled out implicit bias training for staff to mitigate the effects of a system focused on non-white families.