CRIMINAL

DECISION OF THE WEEK

People v Hargrove, 4/18/18 – **PEOPLE'S APPEAL / NEW TRIAL / POLICE MISCONDUCT**
Following his Kings County conviction of second-degree murder and first-degree assault, the defendant filed a CPL 440.10 motion seeking vacatur of the judgment and a new trial. A hearing was held, Supreme Court granted the motion and ordered a new trial, and a unanimous Second Department affirmed in a 45-page decision. Defense counsel had presented evidence that, in several other cases, a key detective investigating this case had procured false identification testimony. Where the defendant's conviction was based solely on the identification by a witness who had been prepared by the disgraced detective, there was a grave concern that the identification testimony was compromised. The identification at trial was inconsistent with the witness's initial description to police investigators. The detective's testimony at the CPL Article 440 hearing was found "false, misleading, and non-cooperative;" the People's case was deemed "exceptionally weak;" and the People's arguments upon appeal were labeled "disingenuous." The loss of blood samples brought into question the reliability and due process of the proceedings, and forensic evidence that was tested supported the defendant's claim of innocence. If the newly discovered evidence had been received at trial, the verdict would likely have been more favorable to the defendant. Edelstein & Grossman represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_02649.htm

U.S. SUPREME COURT

Sessions v Dimaya, 4/17/18 – **REMOVAL STATUTE / UNCONSTITUTIONALLY VAGUE**
An immigrant convicted of an aggravated felony under federal law is subject to mandatory removal and ineligible for most forms of relief from removal. The definition of aggravated felony incorporates a statutory provision defining a "crime of violence" as encompassing any felony that, by its nature, involves a substantial risk that physical force against the person or property of another may be used during the commission of the offense. The defendant, a lawful immigrant from the Philippines who had lived in the United States since 1992, had two residential burglary convictions, neither of which involved violence. Based on the convictions, he was ordered removed from the United States by the Board of Immigration Appeals. The Ninth Circuit overturned the removal order, finding that the relevant statutory provision was unconstitutionally vague. In an opinion by Justice Elena Kagan, the U.S. Supreme Court affirmed. The court noted that, to determine whether conduct falls within the "crime of violence" definition, courts use a distinctive form of the categorical approach: they consider the overall nature of the offense and ask whether the ordinary case of the offense poses the requisite risk. Defining the ordinary case under the "crime of violence" provision posed the same vagueness and due process problems as those identified in *Johnson v United States*, 135 SCt 2551. The majority observed that, because the penalty of deportation is so severe, the most exacting vagueness standard applies to

removal cases. Justice Gorsuch concurred in part and concurred in the judgment. Chief Judge Roberts dissented, joined by Justices Kennedy, Thomas, and Alito.
https://www.supremecourt.gov/opinions/17pdf/15-1498_1b8e.pdf

FIRST DEPARTMENT

People v Johnson, 4/17/18 – **PLEA VACATED / MISINFORMATION ON SENTENCE**
In 2015, the defendant, then age 15, pleaded guilty to first-degree robbery in New York County. The plea court told the defendant that, if she abided by certain conditions for one year, she would be adjudicated a youthful offender and sentenced to a conditional discharge. If she did not, she could be sentenced to from five to 25 years in state prison—the sentence range for an adult. In actuality, as a juvenile offender, the defendant's maximum exposure was 3-1/3 to 10 years in a juvenile facility. After violating certain conditions, the defendant moved to withdraw her guilty plea based on the erroneous sentencing information. Supreme Court denied the motion and sentenced her as a juvenile offender to 1-1/3 to 3 years' incarceration. On appeal, the defendant argued that, because of incorrect statements about the sentence, her plea was not knowing, voluntary, and intelligent. The First Department agreed, stating that inaccurate information regarding sentencing exposure must be considered upon a plea withdrawal application. *See People v Nettles*, 30 NY2d 841, 842. The defendant's belief about the risks of going to trial, along with her age and lack of familiarity with the criminal justice system, cast doubt on the validity of her plea. If accurately informed about the sentencing parameters, the defendant might not have pleaded guilty. The Center for Appellate Litigation (David Klem, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02566.htm

SECOND DEPARTMENT

People v Hall, 4/18/18 – **YOUTHFUL OFFENDER / STATUTE VIOLATED**
Even where the defendant has not asked to be treated as a youthful offender or has purported to waive his or her right to make such a request, the sentencing court is required by CPL 720.20 (1) to actually consider, and make a determination of, whether an eligible youth is entitled to YO treatment. As the People conceded in the instant case, Kings County Supreme Court had failed to comply with the statutory mandate. Thus, the defendant's sentence for attempted assault in the first degree was vacated and the matter remitted for a determination of whether he should be afforded YO treatment and then resentenced. Appellate Advocates (Meredith Holt, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02648.htm

***People v Cortez*, 4/18/18 – IMMIGRATION RISK / SENTENCED REDUCED TO 364 DAYS**
The defendant's waiver of the right to appeal was invalid. The terse oral colloquy was insufficient to ensure that the waiver was made knowingly, intelligently, and validly. Although the Spanish-speaking defendant signed a written waiver, the document was in English; and there was no indication that it was read, or thoroughly explained, to him. Considering all relevant circumstances—including potential immigration consequences—the reviewing court reduced by one day the one-year term for attempted grand larceny in

the second degree. Appellate Advocates (Tammy Linn, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02644.htm

THIRD DEPARTMENT

People v Nunez, 4/19/18 – **PHONY CIA AGENT / FORGED INSTRUMENT CONVICTION**
The defendant began an affair with Linda Kolman, who then received texts from a person who identified herself as Samantha and claimed that she was having an affair with Kolman's husband. Kolman told the defendant about the texts. The defendant, who was a dentist, then falsely told Kolman that he was a CIA special agent, offered to investigate the matter, and produced a phony CIA letter discussing the results of the illusory investigation. About a year later, Kolman's husband was found dead. Midazolam, a sedative used by dentists, was found in his system. Kolman turned over to police the purported CIA investigation letter. The defendant was identified as a suspect, search warrants were executed, and a false CIA ID card was found in his computer files. The defendant was charged with second-degree murder and second-degree possession of forged instruments (two counts). He was acquitted of murder, but convicted on the other charges. On appeal, the Third Department rejected the defendant's contention that no reasonable person could have perceived the amateurish letter and ID card to be authentic. Further, there was sufficient proof of intent to deceive, including testimony from an inmate who stated that the defendant bragged that using the fake CIA ID "spiced up" his sex life.
http://nycourts.gov/reporter/3dseries/2018/2018_02685.htm

FAMILY

SECOND DEPARTMENT

Matter of Cheryl P. (Ayanna M.), 4/18/18 – ***ANDERS* BRIEF / NON-FRIVOLOUS ISSUES**
The mother appealed from an order of Orange County Family Court which, after a hearing, denied her Family Ct Act § 1028 application for return of the subject child. Assigned counsel filed an *Anders* brief. Counsel's motion to withdraw as counsel was granted, but new counsel was assigned to perfect the appeal. Based on an independent review of the record, the Second Department concluded that non-frivolous issues existed. The reviewing court cautioned that it is essential for assigned counsel to appreciate the distinction between a potential appellate argument that is merely meritless or unlikely to prevail and one that is frivolous, that is, lacking in any basis in law or fact.
http://nycourts.gov/reporter/3dseries/2018/2018_02629.htm

Matter of Robinson v Benjamin, 4/18/18 – **ORDER OF PROTECTION / NO HARASSMENT**
After a Family Court Act Article 8 fact-finding hearing, Nassau County Family Court entered an order of protection against the appellant based on the family offense of second-degree harassment. Although the protective order had expired, the appeal was not rendered academic, given the enduring stigma of the contested order. The requisite intimate

relationship existed, conferring standing upon petitioner to commence the proceeding against the appellant, who was the grandfather of the petitioner's child. However, the petitioner failed to establish by a preponderance of the evidence that the appellant committed the relevant family offense. Upon seeing the petitioner on the street, the appellant had declared that he would "kick [the petitioner's] ass." There was no proof that the statement was serious or should reasonably have been taken as serious. Thus, the appellate court reversed the challenged order and dismissed the proceeding. Marjorie Adler represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02631.htm

Matter of Merritt v Merritt, 4/18/18 – **CHILD SUPPORT / REDUCTION WARRANTED**
In child support proceedings in Westchester County Family Court, the mother filed a violation petition, and the father sought to reduce support. The mother's proof of the failure to pay the support ordered constituted prima facie evidence of a willful violation. However, the father demonstrated that he was laid off from his job and actively sought employment. Family Court should have granted his objections to the order finding a violation and denying a downward modification. The father's proof, regarding the termination of his employment through no fault of his own and his diligent employment search, demonstrated a substantial change of circumstances warranting a reduction in child support. The matter was remitted. Jeffrey Rogan represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02628.htm

Matter of Makaveyev v Paliy, 4/18/18 – **CHILD SUPPORT / DEFAULT ORDER VACATED**
The mother sought increased support. The father failed to appear at a hearing, and the Support Magistrate issued an order directing payment of child support in a specified amount. The father's CPLR 5015 (a) (1) motion to vacate such order, and his objections, were denied by Nassaul County Family Court. That was error. The Second Department reversed, observing that default orders are disfavored in child support cases. The father had provided a reasonable excuse—a surgical procedure performed the day before the hearing. Moreover, he had showed that he had potentially meritorious defenses to the mother's modification petition. Nancy Peters represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02624.htm

THIRD DEPARTMENT

Abdelrahman v Mahdi, 4/19/18 – **CHILD SUPPORT / CONTROLLING AGREEMENT**
In the context of a divorce action, the parties entered into a written agreement, including a provision on child support. Thereafter, when the husband lost his job, he sought a reduction in his obligation and a temporary suspension of support payments. At the time, no support order or judgment of divorce had been entered. Saratoga County Supreme Court nevertheless suspended child support and maintenance obligations for 90 days or until the father secured employment, whichever occurred first. Further, Family Court forgave all arrears that had accrued prior to the hearing date. That was error. The separation agreement was the sole source of the husband's child support obligation; there was no valid basis to suspend his contractual obligation; and the father made no argument that the agreement

was invalid. Moreover, under the terms of the agreement, the wife's application for counsel fees should have been granted. Stephen Rossi represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02698.htm

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