CRIMINAL

FIRST DEPARTMENT

People v Stewart, 4/25/19 – **SPEEDY TRIAL / INEFFECTIVE ASSISTANCE**
The People appealed from an order of New York County Supreme Court, which granted the defendant's CPL 440.10 motion. The First Department affirmed. The hearing court held that defense counsel was ineffective. Counsel filed a speedy trial motion alleging the required time. However, substantial periods alleged were not chargeable. If counsel had waited 10 days to file the motion, the additional period would have been charged to the People; the threshold would have been exceeded; and relief would have been granted. Counsel had no strategic reason for the premature motion. Dismissal was the appropriate remedy, since the indictment would have been dismissed, but for the ineffective assistance. The Center for Appellate Litigation (Matthew Nicholson, of counsel) represented the defendant.
https://protect2.fireeye.com/url?k=79d93922-25fc3541-79dbc017-0cc47aa88e08-8c23a18a66df0903&u=http://nycourts.gov/reporter/3dseries/2019/2019_03142.htm

People v Goldman, 4/23/19 – **DNA EVIDENCE / SUPPRESSION GRANTED**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1st degree manslaughter. The First Department reversed, granted the defense motion to suppress DNA evidence obtained via a search warrant, and remanded for a new trial. The hearing court improperly precluded defense counsel from reviewing the People's search warrant application used to obtain a saliva sample. In general, such applications are made ex parte. However, as explained in *Matter of Abe A.*, 56 NY2d 288 (https://www.leagle.com/decision/198234456ny2d2881315), special rules apply to evidence to be taken from a suspect's body. The Center for Appellate Litigation (Alexandra Mitter, of counsel) represented the appellant.
https://protect2.fireeye.com/url?k=b7f30a58-ebd6063b-b7f1f36d-0cc47aa88e08-ca292258c4539ec5&u=http://nycourts.gov/reporter/3dseries/2019/2019_02976.htm

People v Wah, 4/23/19 – ***VELEZ* JURY CHARGE ERROR / ANOTHER REVERSAL**
The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree assault. The First Department reversed. In *People v. Velez*, 131 AD3d 129 (https://protect2.fireeye.com/url?k=8437c984-d812c5e7-843530b1-0cc47aa88e08-df901b134278e707&u=http://www.nycourts.gov/reporter/3dseries/2015/2015_05619.htm), the court held that, where justification is a central issue, the jury charge must convey that acquittal of a greater charge precludes consideration of lesser offenses based on the same conduct. That principle was violated in this case, and the error was not harmless. The court noted that the instant trial was conducted before *Velez* was decided. One justice dissented. The Legal Aid Society of NYC (Tomoeh Murakami Tse, of counsel) represented the appellant.
https://protect2.fireeye.com/url?k=2fad00d3-73880cb0-2faff9e6-0cc47aa88e08-fb6ec0f7952ecd10&u=http://nycourts.gov/reporter/3dseries/2019/2019_02973.htm

SECOND DEPARTMENT

People v Cunningham, 4/24/19 **– IMPROPER SUMMATION / BUT AFFIRMANCE**
The defendant appealed form a judgment of Queens County Supreme Court, convicting him of 2nd degree burglary and other crimes. His contention that the prosecutor made improper remarks during his opening statement and summation was largely unpreserved. In any event, the Second Department agreed that certain remarks were improper, including those which denigrated the defense and were intended to evoke the jury's sympathy. But the errors did not deprive the defendant of a fair trial. The appellate court emphasized that summation is not an unbridled debate, and counsel must not employ all the rhetorical devices at his or her command. Instead, the prosecutor must stay within the four corners of the evidence and avoid irrelevant and inflammatory comments having a tendency to prejudice the jury against the accused.
https://protect2.fireeye.com/url?k=7c1f8a7e-203a861d-7c1d734b-0cc47aa88e08-43cd7fc57a1f1952&u=http://nycourts.gov/reporter/3dseries/2019/2019_03070.htm

People v Carpio, 4/24/19 – **ARTICLE 78 / REVIEW JAIL-TIME CREDIT**
The defendant's argument, that the post-release supervision component of his sentence should be reduced because he was never credited with 11 months of time served, was based on matters dehors the record. The proper vehicle to pursue a remedy was a CPLR Article 78 proceeding to review the prison authorities' calculation of his jail-time credit. Contrary to the defendant's contention, the fact that he was no longer in prison did not prevent him from commencing such a proceeding to challenge the PRS period.
https://protect2.fireeye.com/url?k=dd5e5242-817b5e21-dd5cab77-0cc47aa88e08-a197070785e400a0&u=http://nycourts.gov/reporter/3dseries/2019/2019_03068.htm

THIRD DEPARTMENT

People v Edwards, 4/25/19 – **SCI DEFECTIVE / DISMISSAL**
The defendant appealed from a judgment of Broome County Court, convicting him of attempted 2nd degree CPW. He waived indictment and pleaded guilty as charged in a SCI. On appeal, he contended that the waiver of indictment was deficient, because it did not set forth the approximate time of the offense, nor did the record establish that he signed the waiver in open court. Since the waiver was not procured in strict compliance with statutory provisions, it was invalid, requiring vacatur of the guilty plea and dismissal of the SCI. G. Scott Walling represented the appellant.
https://protect2.fireeye.com/url?k=82277953-de027530-82258066-0cc47aa88e08-7663cc3be23a9c0b&u=http://nycourts.gov/reporter/3dseries/2019/2019_03108.htm

FOURTH DEPARTMENT

People v Harrison, 4/26/19 – **SPEEDY TRIAL / DISMISSAL**
The defendant appealed from a judgment of the Cayuga County Court, convicting him upon a jury verdict, of drug possession and other crimes. The Fourth Department reversed and dismissed the indictment. The People had requested an adjournment because a critical witness was scheduled to be on a prepaid vacation. That time was properly chargeable to the People, who did not establish that they exercised due diligence to secure the witness's presence. When the People were charged

for the post-readiness delay, the statutory time period was exceeded. David Elkovitch represented the appellant.
https://protect2.fireeye.com/url?k=3a8b8dd0-66ae81b3-3a8974e5-0cc47aa88e08-9ec136793c4644a2&u=http://nycourts.gov/reporter/3dseries/2019/2019_03173.htm

People v Wassell, 4/26/19 – **AG NO AUTHORITY / DISMISSAL**
The defendant appealed from a Chautauqua County Court judgment, convicting him of 3rd degree CPW and other crimes. The charges arose from his sale of a semi-automatic rifle to an undercover investigator. The defendant contended that the AG lacked authority to prosecute him. The Fourth Department agreed. The People asserted that the State Police asked the AG to prosecute the matter, but the record did not establish that the Superintendent of the State Police asked the AG to do so. *See* Executive Law § 63 (3). Thus, the judgment was reversed, and the indictment was dismissed. James Ostrowski represented the appellant.
https://protect2.fireeye.com/url?k=87549c1f-db71907c-8756652a-0cc47aa88e08-0ec81d31c187b7c5&u=http://nycourts.gov/reporter/3dseries/2019/2019_03187.htm

People v Suttles, 4/26/19 – **SUPPRESSION / DISMISSAL**
The defendant appealed from a judgment of Erie County Supreme Court, convicting him of 2nd degree CPW. The Fourth Department reversed and dismissed the indictment. The conviction arose from an encounter during which an officer approached the parked vehicle in which the defendant was a passenger and observed that he had a gun. The police effectively seized the vehicle when two patrol cars prevented it from being driven away, but the requisite reasonable suspicion was lacking. The Legal Aid Bureau of Buffalo (Kristin Preve, of counsel) represented the appellant.
https://protect2.fireeye.com/url?k=36511833-6a741450-3653e106-0cc47aa88e08-6e2e5d61a37073fc&u=http://nycourts.gov/reporter/3dseries/2019/2019_03158.htm

People v Clark, 4/26/19 – **CHALLENGES FOR CAUSE / NEW TRIAL**
The defendant appealed from a judgment of Supreme Court convicting him of 1st degree assault. The Fourth Department reversed and granted a new trial. The trial court erred in denying challenges for cause to two prospective jurors. The first juror opined that the defendant's presence in the courtroom meant that something had happened in which he was involved. The second prospective juror said that, while hearing evidence of the instant stabbing, she would probably think about a friend's stabbing murder. Neither provided unequivocal assurances of impartiality. The Monroe County Public Defender (Benjamin Nelson, of counsel) represented the appellant.
https://protect2.fireeye.com/url?k=dc7dd5a3-8058d9c0-dc7f2c96-0cc47aa88e08-2b2acfcdd391e0dd&u=http://nycourts.gov/reporter/3dseries/2019/2019_03231.htm

People v Jackson, 4/26/19 – **STATEMENT SUPPRESSED / NEW TRIAL**
The defendant appealed from a judgment of Monroe County Court convicting him of 1st degree criminal sexual act and 3rd degree menacing. The Fourth Department reversed, granted suppression, and ordered a new trial. County Court erred in refusing to suppress statements the defendant made to investigators after asking for a lawyer. The error was not harmless. Reetuparna Dutta represented the appellant.
https://protect2.fireeye.com/url?k=2adf7cdf-76fa70bc-2add85ea-0cc47aa88e08-63437ccf74b0bdba&u=http://nycourts.gov/reporter/3dseries/2019/2019_03162.htm

People v McCullen, 4/26/19 – **SENTENCE VACATED / UNFULFILLED PROMISE**
The defendant appealed from a judgment of Erie County Court, convicting him of 1st degree scheme to defraud and other crimes. The Fourth Department vacated the sentence. The plea was induced by a promise that the defendant would receive credit for time served on the underlying indictment. Under the relevant statute, the court could not legally fulfill its promise, where the defendant was serving a sentence on a prior conviction throughout the instant proceedings. The issue survived the valid waiver of the right to appeal. The appellate court remitted for County Court to impose a sentence that met the defendant's legitimate expectations or to allow him to withdraw his plea. The Legal Aid Bureau of Buffalo (Robert Kemp, of counsel) represented the appellant. ***[The ILS/NYSDA appellate training in Albany May 17 offers a session on attacking guilty pleas and waivers of appeal.]***
https://protect2.fireeye.com/url?k=76c4960d-2ae19a6e-76c66f38-0cc47aa88e08-65624695b8d8dbb7&u=http://nycourts.gov/reporter/3dseries/2019/2019_03180.htm

DISSENTS OF INTEREST

People v Albert, 4/26/19 – TWO DISSENTS / CPL 710.30 VIOLATION
"We respectfully dissent because we disagree with the majority's conclusion that the failure of the People to provide a CPL 710.30 notice with respect to statements defendant made to a private citizen who was acting as an agent of the police does not warrant preclusion of those statements."
https://protect2.fireeye.com/url?k=e5cb35fe-b9ee399d-e5c9cccb-0cc47aa88e08-87381b5a3cc5ac1a&u=http://nycourts.gov/reporter/3dseries/2019/2019_03227.htm

People v Garrow, 4/26/19 – ONE DISSENT / RAPE NOT PROVEN
"In my view, the People failed to prove defendant's guilt beyond a reasonable doubt…The four-year-old complainant was examined at the hospital within a day of when she alleged that defendant had raped her…The examination of the victim revealed…no damage…[a result] not typical for such a young girl who has been raped by a grown man."
https://protect2.fireeye.com/url?k=98b3c869-c496c40a-98b1315c-0cc47aa88e08-463c68fc9666aebd&u=http://nycourts.gov/reporter/3dseries/2019/2019_03238.htm

FAMILY

FIRST DEPARTMENT

Kaeyden H. (Manuel H.), 4/25/19 – **FAMILY CT TRANSCRIPTS / DEFENSE COUNSEL**
The appellant challenged an order of Bronx County Family Court which precluded him from disseminating certain transcripts from a Family Court proceeding. The First Department modified, to the extent of allowing the appellant to share the transcripts with his attorney in a related criminal proceeding. An individual facing parallel proceedings may provide to criminal defense counsel documents that were lawfully obtained in the Family Court matter. *See Matter of Sean M. (Yanny M.)*, 151 AD3d 636. There was no meaningful distinction between the ACS investigative reports in *Sean M.* and the transcripts at issue here. David Elbaum represented the appellant.
https://protect2.fireeye.com/url?k=9aa24921-c6874542-9aa0b014-0cc47aa88e08-556f83439dbb3e4b&u=http://nycourts.gov/reporter/3dseries/2019/2019_03144.htm

SECOND DEPARTMENT

Matter of Haims v Lehmann, 4/24/19 – **CUSTODY TO AUNT / REVERSAL**
A custody order issued by Westchester County Family Court granted sole physical custody to the maternal aunt and joint legal custody to her and the father. The Second Department modified. The aunt demonstrated extraordinary circumstances. The father had abused alcohol for 20 years and had many relapses. Given the antagonism between the parties, the court should have awarded sole legal custody to the aunt. Lisa Zeiderman and Matthew Marcus represented the aunt.
https://protect2.fireeye.com/url?k=b953c082-e576cce1-b95139b7-0cc47aa88e08-1bf17c3eab4df656&u=http://nycourts.gov/reporter/3dseries/2019/2019_03048.htm

Lopez v Reyes, 4/24/19 – **REMITTAL HEARING FAIL / REDO ORDERED**
The father and children appealed from an order of Orange County Family Court, which awarded sole custody of the children to the mother. A previous appellate decision had ordered Family Court to conduct a remittal hearing regarding new developments. However, as to those developments, the court failed to conduct an evidentiary hearing. Instead, it relied on unsworn statements of the mother's counsel and the AFC and took no testimony. The court compounded its error by declining to conduct new in camera interviews of the children. The matter was thus remitted for a reopened hearing, including in camera interviews with the children. The father represented himself. Theoni Stamos-Salotto represented the children.
https://protect2.fireeye.com/url?k=d841d293-8464def0-d8432ba6-0cc47aa88e08-62a3b6fa9a4ffbb7&u=http://nycourts.gov/reporter/3dseries/2019/2019_03049.htm

Matter of Barbee M. (Racine B.), 4/24/19 – **ARTICLE 10 / NO EDUC. NEGLECT**
The mother appealed from an order of Kings County Family Court finding educational neglect. The petitioner agency failed to prove that she had not furnished the child with an adequate education. Neither the mother's refusal to consent to an IEP for the 2016–2017 school year, nor her failure to follow up with independent neuropsychological testing, constituted educational neglect. Moreover, the petitioner failed to establish medical neglect. While the evidence demonstrated that the mother delayed in scheduling an evaluation and the child missed doses of Adderall at his father's home, that did not cause impairment or imminent danger thereof. Thus, the petition was dismissed. Joel Borenstein represented the appellant.
https://protect2.fireeye.com/url?k=98a49656-c4819a35-98a66f63-0cc47aa88e08-e8133a25c6607f5e&u=http://nycourts.gov/reporter/3dseries/2019/2019_03050.htm

FOURTH DEPARTMENT

Matter of Brooks v Brooks, 4/26/19 – **CHILD SUPPORT / REVERSAL**
The mother appealed from an order of Ontario County Family Court, which denied her objections to a Support Magistrate's order. The Fourth Department reversed. The Magistrate erred in applying NJ law in calculating the father's modified support obligation. In 2011, a NJ court issued a judgment of divorce that incorporated but did not merge the parties' separation agreement. The agreement said NJ laws would apply to its enforcement. In 2016, when the parties and their children were living in NY, the mother filed the instant petition. Under UIFSA, Family Court had jurisdiction, and NY law applied. The Magistrate erred in determining that the choice-of-law

agreement provision controlled over the statute; that would violate NY public policy. Margaret Reston represented the appellant.
https://protect2.fireeye.com/url?k=555f27cb-097a2ba8-555ddefe-0cc47aa88e08-ca4d7a4d18d1b895&u=http://nycourts.gov/reporter/3dseries/2019/2019_03164.htm

Matter of Delgado v Vega, 4/26/19 – **DEFAULT / VACATED**
The mother appealed from a custody order of Monroe County Family Court that denied her application to vacate an order entered upon her default, granting sole custody of the parties' child to the father. The Fourth Department reversed. Default orders are disfavored in custody cases. The mother, who had physical custody of the child from birth until the father took custody pursuant to the default order, established a meritorious defense to his petition and raised an issue of fact as to whether she was served with the petition, thus warranting a traverse hearing. David M. Abbatoy, Jr. represented the appellant.
https://protect2.fireeye.com/url?k=68c06946-34e56525-68c29073-0cc47aa88e08-6287bb64a1b62982&u=http://nycourts.gov/reporter/3dseries/2019/2019_03160.htm

Matter of Nemes v Tutino, 4/26/19 – **UCCJEA / REVERSAL**
The father appealed from an order of Steuben County Family Court in a proceeding pursuant to Family Court Act Article 6. The Fourth Department reversed the challenged order and dismissed the competing custody petitions, finding that Family Court had no jurisdiction under Domestic Relations Law § 76. Susan Betzjitomir represented the appellant.
https://protect2.fireeye.com/url?k=ffbaf2f9-a39ffe9a-ffb80bcc-0cc47aa88e08-db38c7c1e4917382&u=http://nycourts.gov/reporter/3dseries/2019/2019_03236.htm

ARTICLES

FORENSIC PROOF / BEWARE
Experts Overstate Forensic Results*, NY Times*, 4/20/19
A prominent factor in wrongful convictions is misleading forensic evidence. Experts often use exaggerated statistical claims to bolster unscientific assertions. Once experts meet the qualifications to take the stand, there are few limits on the words that come out of their mouths. That includes offering up invented odds. The article offered three examples of wrongful convictions based on pseudo-science as to microscopic hair comparison; bite mark analysis; and DNA analysis. As to the final topic, *People v Herskovic* (165 AD3d 835), was discussed.
Raising Questions About DNA Test*, NY Times*, 4/23/19
Officials from the Office of the Chief Medical Examiner in NYC were furious when they heard that the office's toxicology lab director, Marina Stajic, had publicly questioned whether the OCME had sufficiently verified the reliability of a novel form of DNA testing, Low Copy Number DNA testing. The OCME was believed to be the only crime lab in the country to have used the method, which it phased out in January 2017. When Stajic was fired, she sued the City, which claimed it had done a study on the subject method, but refused to release it. Pretrial discovery proved that the vigilant lab director's suspicions were right—no study was done. This week she received $1 million in a settlement with the City.