CRIMINAL

FOURTH DEPARTMENT

People v Bradbury, 5/1/20 – **DWI / AGAINST WEIGHT**
The defendant appealed from a Supreme Court judgment, which convicted her upon a jury verdict of two counts of felony DWI. The Fourth Department reversed and dismissed the indictment, because the People failed to establish that the defendant operated the subject vehicle. At 6 a.m., a passing motorist observed the defendant outside her car, stuck in the brush off the roadway. The defendant asked the motorist not to call 911, but the motorist did anyway. When a State Police investigator responded to the scene, the defendant said that the car had been driven by Paul, a man she had met at a bar the night before, and that he fled on foot after crashing the vehicle. Field sobriety tests and a subsequent chemical test showed that the defendant was intoxicated. The defendant's assertions about Paul were not inconsistent with the evidence. The request that the motorist not call 911 was evidence of consciousness of guilty, which is a weak type of proof. The fact that the defendant did not provide a detailed description of Paul did not disprove her innocence. The Ontario County Public Defender (David Abbatoy, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02577.htm

People v Johnson, 5/1/20 – **SUPPRESSION / NO PROBABLE CAUSE**
The defendant appealed from a judgment of Monroe County Supreme Court, which convicted him upon a plea of guilty of 3rd degree criminal possession of a controlled substance and 2nd degree CPW. The appeal brought up for review an order denying a motion to suppress. The Fourth Department reversed and dismissed the indictment. The trial court erred in refusing to suppress evidence obtained from the defendant's vehicle. After observing the vehicle turning left without activating the blinker, a deputy initiated a traffic stop. The defendant pulled into a driveway and exited the vehicle, and the deputy told him to get back into the vehicle. The defendant made furtive movements toward the center console and then fled. After he was caught and arrested, the deputy opened the front passenger door, smelled marijuana, and found crack cocaine under the armrest of the vehicle. Upon obtaining a search warrant, the deputy seized a handgun from the glove compartment. The appellate court held that the deputy lacked probable cause to open the door and search the vehicle. There was no direct nexus between the traffic stop and the search, nor between the arrest and the search. The defendant made no statements to suggest that the vehicle contained contraband or evidence of a crime; the deputy did not observe contraband in plain view; and he did not find contraband on the defendant's person. The defendant's furtive movements did not suggest that criminal activity was afoot. Since the deputy did not smell the marihuana until after opening the door, all physical evidence obtained had to be suppressed. Danielle Wild represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02576.htm

People v Taglianetti, 5/1/20 – **EED CHARGE / HARMLESS ERROR**
The defendant appealed from a Chautauqua County Court judgment, which convicted him of 2nd degree murder upon a jury verdict. The Fourth Department affirmed. The trial court erred in deciding, prior to trial, not to charge the jury on the affirmative defense of extreme emotional disturbance. Based solely on the People's proof, a defendant may be entitled to such an instruction. However, the error was harmless. The defendant was not entitled to such a charge where, viewed in the light most favorable to him, the evidence was not sufficient for the jury to find by a preponderance of the evidence that the elements of EED were satisfied.
http://nycourts.gov/reporter/3dseries/2020/2020_02561.htm

People v Allen, 5/1/20 – **JUSTIFICATION / DISSENT**
The defendant appealed from a judgment of Livingston County Court, which convicted her upon a jury verdict of 2nd degree manslaughter in the stabbing death of her boyfriend. The Fourth Department affirmed. One justice dissented, opining that the People failed to disprove the justification defense beyond a reasonable doubt. On the night of the incident, the defendant called 911 and told the operator, "He tried to kill me." When officers arrived, the defendant had a large amount of blood on her body, and her boyfriend was slumped over in front of a couch. The defendant had a black eye and bruises and scratches on her neck, and she was bleeding from lacerations on her hand. En route to the hospital, she told a paramedic that the decedent tried to kill her. Later she explained to police that the decedent had tried to choke and she could not breathe. While the defendant made some inconsistent statements, she was intoxicated. Moreover, her statements were consistent regarding her belief that she had to stab her boyfriend to defend herself. A neighbor testified that he heard a struggle and someone saying, "Don't kill me." The home was in disarray, and there was blood throughout the house.
http://nycourts.gov/reporter/3dseries/2020/2020_02595.htm

People v Harwood, 5/1/20 – **SERIOUS DISFIGUREMENT / DISSENT**
The People appealed from an order of Livingston County Court, which reduced counts one and two of the indictment from 1st degree assault to attempted assault. The Fourth Department reversed and reinstated the assault counts. Two justices dissented and would have affirmed, opining that the evidence before the grand jury was legally insufficient to demonstrate that the eight-year-old victim suffered serious disfigurement. Eight months after the crime, the victim testified before the grand jury. The grand jurors were not shown any contemporaneous photograph of her neck, and there was no indication that they had the opportunity to observe her exposed neck. The medical records from the ER visit did not indicate that the victim would have future scarring.
http://nycourts.gov/reporter/3dseries/2020/2020_02594.htm

SECOND CIRCUIT

USA v Rosemond, 5/1/20 – **RIGHT TO AUTONOMY / AFFIRMANCE**
The defendant appealed from a judgment of District Court–SDNY, convicting him of murder-for-hire and related charges. The Second Circuit affirmed. The defendant was deprived of his Sixth Amendment rights to autonomy and effective assistance of counsel. Over the defendant's objection, his lawyer conceded an element of the charged crime—that the defendant hired individuals to shoot the victim. But counsel also argued that the Government failed to prove intent to kill the victim. A defendant has a right to make fundamental choices about his own defense, including whether to persist in maintaining his innocence, even in the face of overwhelming guilt. *McCoy v Louisiana*, 138 S Ct 1500. Violating the right to autonomy was per se harmful. That right is not implicated when, as here, defense counsel conceded one element of the crime, while maintaining that the defendant is not guilty as charged. Such stance fell within the ambit of trial strategy. Assuming that the defendant's objective was to maintain non-guilt, there was no *McCoy* violation when a lawyer made strategic concessions in pursuit of an acquittal. In the case at bar, there was ample evidence supporting the strategy to concede that the defendant ordered a shooting.

FAMILY

FOURTH DEPARTMENT

Matter of Alwardt v Connolly, 5/1/20 – **CUSTODY / REVERSED**
The father appealed from an order of Genesee County Family Court, which denied his petition to modify custody and granted primary residential custody to the mother. The Fourth Department reversed. Family Court failed to address relevant "best interests" factors. The only factor favoring the mother was the duration of the existing arrangement. However, while in the mother's care, the child performed poorly at school and was depressed. Due to the mother's work schedule, the child had to rise before 5 a.m. and stay with a relative for two hours before going to school. Moreover, the mother could not help with school work or attend medical or counseling appointments. The father could provide a more stable home, and the child wanted to live with him. At age 14, the child's wishes were entitled to great weight. Mary Hajdu represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02574.htm

Matter of Driscoll v Mack, 5/1/20 – **EXTRAORDINARY CIRC. / TEST CLARIFIED**
The mother appealed from an order of Cayuga County Family Court, which awarded physical custody of the subject children to the maternal grandmother. The Fourth Department affirmed. The grandmother met her burden of establishing extraordinary circumstances. She then had the burden of establishing a change in circumstances since entry of the prior order. To the extent that prior decisions suggested that such analysis was not required in a situation like this, they should no longer be followed.
http://nycourts.gov/reporter/3dseries/2020/2020_02559.htm