CRIMINAL

COURT OF APPEALS

People v Hill, 5/2/19 – **SUPPRESSION / GRANTED**
Suppression hearing proof demonstrated that police officers' basic request for information from the defendant implicated level one of *People v De Bour*, 40 NY2d 210, and the requisite objective credible reason existed. However, the encounter then rose beyond level one, and the People failed to preserve any argument regarding justification under levels two or three. Thus, the COA held that suppression should have been granted, and the indictment was dismissed. The Legal Aid Society of NYC (Susan Epstein, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2019/2019_03405.htm

People v Brown , 5/2/19 – **440 MOTION / HEARING NEEDED**
The defendant's CPL 440.10 motion to set aside a murder conviction, based on a violation of his right to conflict-free representation, was summarily denied. The COA held that a hearing was warranted to address allegations regarding counsel's concurrent representation, in an unrelated manner, of another suspect who was with the defendant at the scene of the murder. Judge Stein dissented. The Center for Appellate Litigation (David Klem, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2019/2019_03404.htm

FIRST DEPARTMENT

People v Brown, 4/30/19 – **NO REASONABLE SUSPICION / DISMISSAL**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him, upon his plea of guilty, of 3rd degree CPW. The First Department reversed. The police lacked reasonable suspicion to frisk the defendant based on the tip of an anonymous caller. The tipster said that a black man in a bodega, wearing a black coat with a fur hood, had a gun and drugs in his pocket. When police arrived a minute later, they observed someone fitting the defendant's description, but saw no suspicious behavior. The defendant tried to leave the store and did not walk away in a hurried or evasive manner, yet police prevented him from exiting and frisked him. When the defendant placed his hand inside his jacket pocket, an officer pulled his wrist, and a firearm fell to the ground. The People argued that the defendant's pocket motion gave rise to reasonable suspicion. But the defendant had already been seized. The judgment was reversed, and the indictment dismissed. The Legal Aid Society of NYC (Rachel Pecker, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03305.htm

SECOND DEPARTMENT

People v Torres, 5/1/19 – **CUSTODIAL INTERROGATION / NEW TRIAL**
The defendant appealed from a judgment of Rockland County Supreme Court, convicting him of 4th degree criminal possession of stolen property (six counts), upon a jury verdict.

The Second Department reversed. The statements that the defendant made to detectives were the product of a custodial interrogation without the benefit of *Miranda* warnings. He was clearly in custody: he was handcuffed in the backseat of a police vehicle; bargaining with the police for his freedom; and not free to leave, according to an officer's testimony. Further, the defendant's statements were the result of the functional equivalent of interrogation. The failure to suppress the statements and a wallet was not harmless. The evidence of guilt was not overwhelming, and there was a reasonable possibility that the admission of the illicit evidence might have contributed to the conviction. A new trial was ordered. Ellen O'Hara Woods represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03380.htm

People v Hickey, 5/1/19 – **WARRANTLESS SEARCH OF HOME / NO CONSENT**
The defendant appealed from a judgment of Suffolk County Court, convicting him upon his plea of guilty, of 2nd and 3rd degree CPW. The appeal brought up for review the denial of suppression. Subject to narrow exceptions, a warrantless search of an individual's home is per se unreasonable. The consent of the defendant's mother for police entry into the home to speak with him did not encompass a search of the living room. The seizure of a firearm did not fall within the plain view exception; the officer did not know what the object was until he moved a chair. The physical evidence and the defendant's subsequent statements had to be suppressed. The indictment was dismissed. Carol Castillo represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03364.htm

People v Palmer, 5/1/19 – **BAD WAIVER / BUT AFFIRMED**
The defendant appealed from a sentence imposed upon his plea of guilty in Queens County Supreme Court. The purported waiver of the right to appeal was invalid, the Second Department held. The plea court's terse colloquy failed to advise the defendant of the nature of the right to appeal and to ensure that he grasped the concept of the appeal waiver and the nature of the right he was forgoing. Although the defendant signed a written waiver, the court did not ascertain whether he read the document or was aware of its contents. Since the purported waiver was invalid, the Court was not precluded from reviewing the issue of excessive sentence. However, the appellate court affirmed.
http://nycourts.gov/reporter/3dseries/2019/2019_03382.htm

People v Leon, 5/1/19 – **SORA / REDUCTION**
The defendant appealed from an order of Queens County Supreme Court, which designated him a level-three sex offender. The Second Department found him to be level two. To support the assessment of points under risk factor 11, the People must establish that the offender used drugs or alcohol in excess at the time of the crime or repeatedly in the past. Insufficient evidence was presented as to such factor. The Legal Aid Society of NYC (Amy Donner, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03388.htm

THIRD DEPARTMENT

People v Moseley, 5/2/19 – **SUPERSEDING INDICTMENT / NULLITY**
The defendant appealed from a judgment of Ulster County Court. In March 2014, he was charged by indictment with 2nd and 3rd degree CPW for his alleged involvement in a shooting in January 2014. Before trial, the People obtained a superseding indictment that charged him with 3rd degree CPW. After the jury was sworn, a mistrial was granted, and County Court did not dismiss the superseding indictment or authorize the People to re-present new charges to a grand jury. However, the People obtained a second superseding indictment, charging the defendant with 2nd and 3rd degree CPW. County Court dismissed the 3rd degree count before submitting the case to the jury. The defendant was convicted on the remaining count. The Third Department held that the People had been limited to retrying the defendant upon the superseding indictment; the second superseding indictment was a nullity—as was any action that flowed from its filing. Thus, the judgment was reversed. Mitch Kessler represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03408.htm

FOURTH DEPARTMENT

DECISION OF THE WEEK

People v McDonald, 5/3/19 – **MURDER / AGAINST WEIGHT**
The defendant appealed from a judgment of Monroe County Court, convicting him of 2nd degree murder. The Fourth Department reversed and dismissed the indictment. The People's theory at trial was that the codefendant—the defendant's boyfriend—shot the victim multiple times after he exited a bar and walked to his vehicle. The People argued that the defendant drove the codefendant to the scene, picked him up after the murder, and then drove him to his residence. After a joint trial, a jury found both guilty, with the defendant's conviction based solely on accessorial liability. A defendant's presence at the scene of the crime, standing alone, is insufficient to find criminal liability. The People offered no motive for the crime. Proof that the defendant was staring at the victim 40 minutes before the shooting, and that she may have dropped the codefendant off at the bar prior to the shooting, was insufficient to establish that she was aware of, and shared, her boyfriend's intent to kill the victim. If arguendo the proof was legally sufficient, the verdict was against the weight of the evidence. Mark Davison represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03494.htm

People v Lee, 5/3/19 – **CPL 440.10 / HEARING ORDERED**
The defendant appealed from an order of Monroe County Supreme Court, which denied his CPL 440.10. The Fourth Department reversed. Following a jury trial, the defendant was convicted of 10 charges, including 1st degree robbery, and such conviction was upheld upon appeal. In support of the instant motion, the defendant submitted credible evidence—which the People did not counter—indicating that he was absent from the *Sandoval* hearing. Thus, Supreme Court erred in denying his motion without conducting a hearing. Jeffrey Wicks represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03516.htm

People v Hector, 5/3/19 – **GUILTY PLEA / VACATED**
The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him, upon his plea of guilty, of 1st degree offering a false instrument for filing. The Fourth Department reversed and remitted, finding that the plea was not entered knowingly, intelligently, and voluntarily. Although the defendant failed to preserve the contention for review and the case did not fall within the narrow exception to the preservation rule, the appellate court considered the issue in the interest of justice. After Supreme Court accepted the guilty plea, the defendant said that he was confused by the plea proceeding, and the court asked him if he had any questions about the consequences of pleading guilty. The ensuing remarks by the defendant indicated that he did not understand the nature of the crime to which he had entered his guilty plea. Although he was obviously confused, the court made no further inquiry. Hiscock Legal Aid Society (William Clauss, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03504.htm

People v Campagna, 5/3/19 – **SENTENCE / ILLEGAL**
The defendant appealed from a judgment of Cayuga County Court, convicting him upon his plea of guilty of several crimes. The Fourth Department modified. The mandatory term of probation with an ignition interlock device under Penal Law § 60.21 did not apply to the aggravated vehicular homicide and aggravated vehicular assault counts, and thus the term of probation was vacated. Although the issue was not raised before the sentencing court or on appeal, the appellant court could not allow an illegal sentence to stand.
http://nycourts.gov/reporter/3dseries/2019/2019_03495.htm

People v Chrisley, 5/3/19 – **SORA / REVERSED**
The defendant appealed from an order of Genesee County Court, which determined that he was a level-three risk. The Fourth Department reversed and remitted. The SORA court violated the defendant's right to due process by assessing points on a theory not raised by the Board or the People. A court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprived the defendant of a meaningful opportunity to respond. Despite the lack of preservation, the appellate court reviewed the issue in the interest of justice, because of the substantial infringement on the defendant's due process and statutory rights. The Legal Aid Bureau of Buffalo (James Specyal, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03505.htm

FAMILY

SECOND DEPARTMENT

Matter of Raees T.B., 5/1/19 – **JD / ROBBERY / LEGAL INSUFFICIENCY**
The appellant appealed from an order of Westchester County Family Court, finding that he committed acts, which if done by an adult, would constitute 2nd degree robbery and 2nd degree assault. The Second Department reversed and dismissed the petition. The presentment agency failed to proffer legally sufficient evidence of robbery. The record did not show that the appellant was involved in, or even present for, the alleged robbery; and that was the felony upon which the assault charge was predicated. Keith Ingber represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03331.htm

Onorina C.T. v Ricardo R.E., 5/1/19 – **PATERNITY / EQUITABLE ESTOPPEL**
The challenged order of Kings County Family Court denied the mother's petition to adjudicate the respondent Ricardo R.E. to be the father of the subject child. The Second Department reversed and granted the petition, which alleged that: (1) the child was conceived and born while the petitioner was married to another man, her sex trafficker, who played no role in the child's life; (2) Ricardo R.E. was the biological father, was named on the birth certificate, and had supported and raised the child since birth. The presumption that the child was the legitimate child of the petitioner and the husband was not rebutted, but equitable estoppel should have been considered. The record proved that it was in the child's best interests to equitably estop the husband's paternity claim. The Children's Law Center (Laura Solecki, of counsel) represented the child-nonparty-appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03345.htm

Saunders v Scott, 5/1/19 – **CUSTODY / RIGHT TO COUNSEL / WAIVED**
The father appealed from a Queens County Family Court order granting sole custody to the mother. The Second Department affirmed. Parties in custody proceedings have a right to counsel. A party may waive that right and proceed without counsel, provided he or she makes a knowing, voluntary, and intelligent waiver. The trial court must conduct a searching inquiry to ensure that the waiver has been made validly, and that the party was aware of the dangers and disadvantages of self-representation. Here, the Family Court provided the requisite explanation, and the father unequivocally acknowledged that he understood the right he was waiving and that he wished to proceed without counsel.
http://nycourts.gov/reporter/3dseries/2019/2019_03344.htm

Ricardo T., 5/1/19 – **TERMINATION / RIGHT TO COUNSEL / VIOLATED**
A respondent in a termination of parental rights proceeding has the right to effective assistance of counsel. Family Court Act § 262 affords protections equivalent to the constitutional standard for criminal defendants. Further, certain Family Court proceedings implicate constitutional due process considerations. The father demonstrated that assigned counsel's failure to timely file a notice of appeal constituted ineffective assistance. The Second Department vacated the challenged order and directed the remittal court to issue a

replacement order, so the time to appeal would run anew. Geoffrey Chanin represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03347.htm

Markel C. (Kwanza H.), 5/1/19 – **SUSPENDED JUDGMENT / REVERSAL**
The mother failed to comply with certain conditions of a suspended judgment. However, the Second Department held that the evidence did not support Nassau County Family Court's order terminating the mother's parental rights. She had done so much right, in that she: (1) learned how to provide the special care needed; (2) was emotionally attuned to the child's needs; (3) obtained stable housing and engaged in counseling; (4) took responsibility for the initial neglect that led to removal; (5) had cooperated with services and providers; (6) had positive visits with the child; and (7) had a support system in place. The matter was remitted for a dispositional hearing to determine the best interests of the child. Steven Feldman represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03332.htm

THIRD DEPARTMENT

Nahlaya MM. (Britian MM.), 5/2/19 – **SUSPENDED JUDGMENT / REVERSAL**
The respondents appealed from an order of Chemung County Family Court which revoked a suspended judgment and terminated their parental rights. The Third Department modified. Although Family Court properly intended to give the mother a short leash, based on her history of noncompliance with programs, most allegations against her relied on conduct that predated issuance of the underlying SJ. Moreover, the mother was making genuine progress, and the agency failed to show that she violated the terms of the SJ during the grace period. As to the father, a dispositional hearing was needed to discern the best interests of the children. Lisa Miller represented the mother, and Christopher Hammond the father.
http://nycourts.gov/reporter/3dseries/2019/2019_03418.htm

Matter of Marotta v Casler, 5/2/19 – **ARREARS PAID / COMMITMENT ERROR**
The father appealed from an order of Clinton County Family Court which committed him to jail for 20 days for willfully violating a prior child support order. The Third Department, which stayed the challenged order pending appeal, held that since the father paid the support arrears in full prior to imposition of the sentence, Family Court erred in ordering jail time. Lisa Burgess represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_03417.htm

Mauro NN. v Michelle NN., 5/2/19 – **CUSTODY / REVERSED**
The father appealed from an order of Rensselaer County Family Court, which sua sponte dismissed his custody modification petition. That was error. A prior order stated that either party could seek to modify without a change in circumstances, so the sole issue was best interests. Custody decisions should generally be made after a plenary hearing. At trial, the father submitted evidence concerning the middle child's "illegal tardies" and disciplinary issues. He also testified about the denial of visitation with the children. In dismissing the

petition, Family Court erroneously treated as dispositive the father's failure to complete required counseling. A new hearing was ordered. Philip Vecchio represented the father.
http://nycourts.gov/reporter/3dseries/2019/2019_03423.htm

RAISE THE AGE

People v M.M., 5/1/19 – **NO EXTRAORDINARY CIRCUMSTANCES / REMOVAL**
As set forth in a March 21, 2019 decision, the defendant was charged as an OA with multiple robbery counts in the Youth Part of Nassau County Court. The court held that the People did not prove that he displayed a firearm or deadly weapon; and the four pending matters would all proceed toward automatic removal to Family Court, absent a motion to prevent that. The People made the motion and cited several factors to show extraordinary circumstances: (1) the AO's extensive contact with the criminal justice system; (2) prior court intervention that did not curtail his misconduct; (3) the premeditation in the instant crimes; (4) the seriousness of those crimes; and (5) the AO's role as the sole participant. The statute expressed a statutory preference for removal, but did not define "extraordinary circumstances," which Black's Law Dictionary characterized as "a highly unusual set of facts that are not commonly associated with a particular thing or event." The Assembly RTA Law record indicated that "one out of 1,000 cases" should remain in the Youth Part; that robberies did not alone automatically meet the extraordinary circumstances standard; and that salient factors included whether the crime was committed in a "cruel and heinous manner" and whether the AO was a ringleader who coerced relevant youths to participate. The trial court was unimpressed by the People's stance that the AO acted alone and yet played a leadership role—you can't be a ringleader when there is no ring. Also rejected were prosecution arguments based on the AO's history as a juvenile delinquent: Family Court Act § 381.2 prohibited using the AO's JD history against him. The four pending offenses were serious, and the conduct charged was troublesome and might warrant considerable punishment and rehabilitative services. However, the conduct was not cruel and heinous and did not rise to the high level of extraordinary circumstances. There were no allegations regarding physical injuries or criminal sexual act, nor indications that the AO would not benefit from the heightened services offered by the Family Court. The Legal Aid Society of Nassau County (Jenna Suppon, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_29124.htm