CRIMINAL

U.S. SUPREME COURT

U.S. v Sineneng-Smith, 5/7/20 – **SHAPING ISSUES / NOT COURTS' ROLE**
The defendant, who operated an immigration consulting firm, was convicted after a jury trial for encouraging or inducing aliens to illegally come to, enter, or reside in the U.S. in violation of the INA, and of other counts she did not contest. District Court–Northern California denied her motion to dismiss the immigration-related charges, based on her First Amendment rights to free speech and to petition. Although the defendant did not argue that the subject statute was unconstitutional, the Ninth Circuit invited three designated amici to brief a First Amendment overbreadth issue and then reversed the immigration-related convictions on that ground. The Government petitioned for review. In a unanimous opinion authored by Justice Ginsburg, the U.S. Supreme Court held that appeals panel abused its discretion in departing drastically from the principle of party presentation. The challenged judgment was vacated and the matter remanded for adjudication of the appeal as shaped by the parties. Our adversarial system relies on the parties to frame the issues for decision and assigns to courts the role of neutral arbiter of matters the parties present. There are circumstances in which a modest initiating role for a court is appropriate. In criminal cases, departures from the principle of party presentation have usually occurred to protect a pro se litigant's rights. In the instant case, no extraordinary circumstances justified the panel's takeover of the appeal. While a court is not bound by counsel's precise arguments, the Ninth Circuit's radical transformation of this case went too far. Judge Thomas filed a concurrence.
https://www.supremecourt.gov/opinions/19pdf/19-67_n6io.pdf

Kelly v U.S., 5/7/20 – **NO PROPERTY FRAUD / REVERSAL**
In an opinion by Justice Kagan, a unanimous U.S. Supreme Court reversed convictions arising from Bridgegate, involving the September 2013 closure of toll lanes from Fort Lee, NJ to the George Washington Bridge, as punishment for the Mayor's refusal to endorse Governor Christie's reelection bid. The jury convicted two former Christie aides under the statutes prohibiting wire fraud and fraud against a federally funded program or entity—laws targeting schemes to obtain money or property. The Third Circuit upheld the verdicts. The salient question before SCOTUS was whether the defendants committed property fraud. They did not. The realignment of the toll lanes was an exercise of regulatory power, which failed to meet the property requirement. The employees' labor was just the incidental cost of that regulation, rather than itself an object of the scheme. Federal prosecutors may not use property fraud statutes to set standards of good government for local and state officials. The defendants abused their power for political payback, used deception to reduce access lanes, and thereby jeopardized the safety of the town's residents. But not every corrupt act by government officials is a federal crime.
https://www.supremecourt.gov/opinions/19pdf/18-1059_e2p3.pdf

NY COURT OF APPEALS

People v Holz, 5/7/20 – **SUPPRESSION ORDER/ REVIEWABLE**
CPL 710.70 (2) gives a defendant the right to review of a suppression order "upon an appeal from an ensuing judgment of conviction, notwithstanding the fact that such judgment is entered upon a plea of guilty." That provision encompasses a suppression order related to a count, satisfied by a guilty plea, to which the defendant did not plead guilty, a unanimous Court of Appeals held in an opinion by Judge Fahey. The defendant was charged with two counts of 2nd degree burglary, relating to a laptop computer and jewelry taken from the same dwelling on separate days. After his motion to suppress the jewelry was denied, the defendant pleaded guilty to the count relating to the laptop. The Fourth Department erred in holding that it was jurisdictionally precluded from reviewing the suppression order. In referring to the "ensuing judgment of conviction," the legislature chose broad terms to define the connection between the suppression order and the judgment of conviction. To require a narrow causal relationship would conflict with that broad language. When a conviction is based on a guilty plea, an appellate court will rarely be able to determine whether an erroneous denial of suppression contributed to the plea. To suppose that a suppression order directly relating to one count had no effect on the plea to another count would ignore practical realities. Legislative history and policy considerations also supported the broad construction, as did policy considerations, in that the Fourth Department's interpretation would insulate erroneous decisions from review. The Monroe County Public Defender (Lana Ulrich, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02682.htm

People v Maffei, 5/7/20 – **NO CHALLENGE FOR CAUSE / NOT IAC**
The defendant contended that he was denied effective assistance based on counsel's failure to challenge a prospective juror. Finding that a CPL 440.10 motion was needed to present such argument, the Court of Appeals upheld a conviction for 2nd degree murder. Counsel's decisions during jury selection may be based on many factors, including matters dehors the record. A juror who reads about a crime must be able to lay aside his opinion and render a verdict based on the evidence, but need not be totally ignorant of the facts involved. Here the statements of prospective juror 10 did not reflect actual bias against the defendant, merely general discomfort with the case based on media coverage. The record did not reflect what was said between the defendant and his counsel or how that conversation may have affected counsel's actions. Chief Judge DiFiore authored the majority opinion. Judge Rivera dissented. During the prosecutor's questioning, juror 10 volunteered his doubts about his ability to be impartial. He stated that he "kind of" made up his mind, based on what he read about the crime, because he "didn't like the circumstances." The juror never disavowed those statements. Counsel's actions in not challenging the juror could not be explained away. The defendant was tried by a juror who was unsure if he could fairly evaluate the evidence. A single error may qualify as IAC if sufficiently egregious and prejudicial. Jury selection was a strategic decision solely within the province of defense counsel. The majority had, in effect, adopted a per se rule that IAC claims must be considered via a 440 motion.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02680.htm

FIRST DEPARTMENT

People v Johnson, 5/7/20 – **RANGERS TICKETS / FORGED INSTRUMENTS**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree criminal possession of a forged instrument (four counts). The First Department reversed and dismissed the indictment. The defendant's protest that the People had not proven "all the essential elements of the charges" preserved the issue. The evidence was not legally sufficient. The People failed to prove that the defendant knew that four NY Rangers tickets were counterfeit. Before a game, he approached fans outside of Madison Square Garden; said "tickets, tickets;" met a man who handed him an envelope containing the forged tickets; and gave the envelope to a codefendant. The evidence suggested that the defendant sought to buy or sell tickets, not that he knew the tickets were forged. The defendant's flight from a plainclothes officer was equivocal. For example, the defendant may have been aware that it was unlawful to sell even genuine tickets near the Garden. The Office of the Appellate Defender (Sheila O'Shea, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02708.htm

People v Pinnock, 5/7/20 – ***PEQUE* VIOLATION / REMITTAL**
The defendant appealed from a Bronx County Supreme Court judgment, convicting him of criminal possession of a firearm. The First Department reserved decision. The defendant, a noncitizen, had pleaded guilty. The plea court did not advise him that, if he was not a citizen, he could be deported as a consequence of his plea. Although the defendant did not move to withdraw his plea, there was no evidence that he knew about the possibility of deportation during the plea and sentencing proceedings. Thus, his claim fell within the narrow exception to the preservation doctrine. *See People v Peque*, 22 NY3d 168. The defendant was entitled to an opportunity to move to vacate his plea, upon a showing that there was a reasonable probability that he would not have pleaded guilty, had the court advised him. The appellate court also reversed a judgment of resentence, rendered the same day as the firearm conviction, which convicted the defendant upon his plea of guilty of a violation of probation, revoked probation, and resentenced him to incarceration. The plea of guilty to a VOP was defective because there was no allocution about whether the defendant understood that he was giving up his right to a hearing. The unpreserved claim was reviewed in the interest of justice. The Center for Appellate Litigation (Barbara Zolot, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02731.htm

People v Nichols, 5/7/20 – **REMISSION OF FORFEITED BAIL / EXCEPTIONAL CIRCUMSTANCES**
The First Department held that Bronx County Supreme Court abused its discretion in denying the application of the nonparty appellant surety seeking remission of forfeited bail, pursuant to CPL 540.30. When the defendant was arraigned on burglary and other charges, the appellant posted cash bail of $15,000. The defendant failed to appear for his scheduled court appearance, and the court ordered the bail forfeited, pursuant to CPL 540.10. His ultimate disposition was a misdemeanor conviction. The appellant moved pro se for relief as to the bail. In an affidavit, she explained that she had appeared in court and advised the court that the death of the defendant's brother caused him to suffer from a deep depression and miss his court date. She submitted an affidavit from the defendant and his psychiatrist regarding his mental breakdown. Since the appellant was representing herself, her papers were given a broad and liberal interpretation. She

proved that the defendant's nonappearance was not willful. The appellant apparently had a significant relationship with the defendant and an opportunity to observe his mental state. The psychiatrist's letter was sufficiently specific to demonstrate the defendant's disabling mental illness at the relevant time. The People conceded that prejudice was not at issue. Exceptional circumstances included the hardship to the appellant if relief was denied and the fact that she reportedly posted bail because of her abusive relationship with the defendant. Megan Reilly and Sabrina Baig represented the appellant pro bono.
http://nycourts.gov/reporter/3dseries/2020/2020_02741.htm

SECOND DEPARTMENT

People v Marcel G., 5/6/20 – **YO / GRANTED**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2nd degree robbery. The Second Department adjudicated the defendant to be a youthful offender. The purported waiver of the right to appeal was invalid. The defendant's youth, limited education, and lack of experience with the criminal justice system warranted a more thorough explanation; and there was no indication on the record that he read the written waiver. Denial of YO status was an improvident exercise of discretion. The defendant, who was 17 at the time of the offenses, admitted his guilt and took responsibility for his actions. As part of his plea conditions, he successfully completed a treatment program, passing every drug test administered; and he received positive reports from a second program. The PSI report recommended YO status. Although the defendant did not fully comply with all plea conditions, in view of his tender years and other mitigating factors, the interest of justice would be served by relieving him of the onus of a criminal record. Appellate Advocates (Sean Nuttall, of counsel) represented the appellant.
http://www.courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D62758.pdf

People v Butler, 5/6/20 – **DNA TESTIMONY / REVERSAL**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st and 2nd degree robbery. The Second Department reversed and ordered a new trial. When confronted with testimonial DNA evidence at trial, a defendant is entitled to cross-examine an analyst who witnessed, performed or supervised the generation of the defendant's DNA profile or used his or her independent analysis on the raw data. The People failed to establish that the analyst who testified played such a role. *See People v. Tsintzelis*, 2020 NY Slip Op 02026. The error was not harmless. Appellate Advocates (Dina Zloczower, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02676.htm

People v Gonzalez, 5/6/20 – **ATTEMPTED ESCAPE / INSUFFICIENT PROOF**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of multiple crimes, including attempted 2nd degree escape. His contention that the evidence was legally insufficient to support the attempted escape conviction was unpreserved, but reached in the interest of justice. The Second Department dismissed the escape count. The evidence did not establish that the defendant was under arrest when he allegedly attempted to open the door of the police car in which he was being detained. Appellate Advocates (Samuel Barr, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02675.htm

FAMILY

FIRST DEPARTMENT

Matter of Jeanine N. v Mamadou O., 5/7/20 – **SUPERVISION OF VISITS / LIFTED**
The mother appealed from an order of Bronx County Family Court, which awarded sole custody to the father and required him to supervise her parental access. The First Department modified, granted certain interim unsupervised visitation, and remanded. The determination that the mother would be limited to two hours' on Saturdays, supervised by the father at a location agreed upon by the parties, was not sound. Supervision is only appropriate where the child's physical safety or emotional well-being would otherwise be at risk. There was no evidence that the mother acted improperly during visits. Even if supervision were necessary, the father should not oversee the mother's parenting time, since the parties did not communicate with each other. Given the passage of time, further proceedings were needed to set a parental access schedule. Bruce A. Young represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02730.htm

SECOND DEPARTMENT

Matter of Goodine v Evans, 5/6/20 – **CHILD SUPPORT VIOLATION / RIGHT TO COUNSEL**
The father appealed from a Nassau County Family Court order, which confirmed an order finding a willful violation of a prior child support order and committed him to jail for 30 days, unless he paid a certain purge amount. The Second Department vacated the willful violation order and remitted for a new hearing. The period of incarceration had expired, but in light of the enduring consequences, the appeal was not academic. The father had a constitutional right to counsel; incarceration was a possible disposition. Family Ct Act § 262 (a) mandated that the judge advise the father that he had the rights: to be represented by counsel of his own choosing; to an adjournment to confer with counsel; and to have counsel assigned by the court if he was financially unable to retain counsel. When the father first appeared, the Support Magistrate informed him that, if he was employed, he was ineligible for assigned counsel and could represent himself or request an adjournment to retain counsel. The father stated that, although employed, he could not afford retained counsel, and he requested assigned counsel. The Magistrate denied counsel and adjourned the matter for a hearing. Instead, the court should have delved into the father's financial circumstances. Jan Murphy represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02668.htm

THIRD DEPARTMENT

Matter of Kane FF. v Jillian EE., 5/7/20 – **SUPERVISION / WRONGLY LIFTED**
The mother appealed from an order of Chemung County Family Court, which modified a prior visitation order. The Third Department modified, holding that Family Court erred in granting the father unsupervised parenting time. The court had ordered him to complete domestic violence counseling and provide a report to the court. The counseling was never undertaken, and no reason appeared on the record for the failure. Further, the court made no finding that the father had demonstrated a change in circumstances sufficient to warrant reconsideration of the child's best interests and did not explain the lifting of the supervision requirement or dispensing with the DV

counseling requirement. The matter was remitted to determine a parenting schedule. Christopher Hammond represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02691.htm

Matter of Sarah KK. v Roderick LL., 5/7/20 – **NO NOA / NO AFFIRMATIVE RELIEF**
The mother appealed from a Broome County Family Court order, which dismissed her application to modify a prior custody order. The Third Department affirmed. Having failed to take an appeal from the order, the AFC could not seek affirmative modifications to the terms of supervised visitation. Further, the mother's belated attempt to join in those arguments was unavailing. Issues raised by an appellant for the first time in a reply brief were not properly before the appellate court.
http://nycourts.gov/reporter/3dseries/2020/2020_02685.htm