CRIMINAL

COURT OF APPEALS

People v Page, 6/11/20 – **FEDERAL AGENT / CITIZEN'S ARREST**
At issue in this People's appeal was whether a valid citizen's arrest, pursuant to CPL 140.30, was made by a federal marine interdiction agent with U.S. Customs and Border Protection. The Court of Appeals reversed a Fourth Department order, finding that it improperly relied on *People v Williams*, 4 NY3d 535. That COA decision held that actions of Municipal Housing Authority officers did not constitute a valid citizen's arrest, where such peace officers acted under color of law and with all the accouterments of official authority. *Williams* was inapposite. Marine interdiction agents were not encompassed in CPL 2.15, which accorded limited peace officer powers to certain federal law enforcement officers. Judge Feinman wrote the majority opinion. Judge Fahey dissented, in an opinion in which Judge Rivera concurred. The majority expanded the ability of law enforcement officials to effect arrests they had no authority to make, under the guise of a citizen's arrest, and undermined the rationale of *Williams*—to deter vigilantism and ensure that persons chosen to protect citizens from crime may be readily identified, and persons effectuating citizens' arrests must do so without pretense of other authority. The instant federal agent acted in the manner of a police or peace officer when he activated the emergency lights on his SUV. The salient test was not whether the individual was a police or peace officer, but instead whether he conveyed the appearance of acting as such an officer. The dissenters would reject the People's alternate argument that the gun should not be suppressed, even if the stop was illegal.
http://www.nycourts.gov/ctapps/Decisions/2020/Jun20/47opn20-Decision.pdf

People v Harris, 6/9/20 – **CPL 470.15 (1) SCOPE / REVERSAL**
The defendant appealed from a First Department order, affirming his conviction of 4th degree criminal possession of stolen property. The Court of Appeals reversed and remitted. Prior to pleading guilty, the defendant moved to suppress physical evidence found inside the closed suitcase he was carrying at the time of arrest, arguing that no exigent circumstances justified the warrantless search. In denying suppression, Supreme Court found that *People v Gokey*, 60 NY2d 309, did not apply and thus made no findings regarding exigent circumstances. Yet in affirming, the Appellate Division invoked a different ground and found exigent circumstances. That was improper. Upon an appeal from a criminal court judgment, an intermediate appellate court may determine any question of law or issue of fact involving error or defect which may have adversely affected the appellant. CPL 470.15 (1). Such provision precluded the Appellate Division from reviewing issues decided in an appellant's favor or not ruled upon by the trial court. Because the suppression court did not deny the defendant's motion based on exigent circumstances, that issue was not decided adversely to him and could not properly be invoked by the Appellate Division. The Legal Aid Society of NYC (Michael Taglieri, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2020/2020_03208.htm

Matter of Benson v NYS Bd. of Parole, 6/9/20 – **RESCISSION / UPHELD**
The petitioner appealed from a Third Department order, in a CPLR Article 78 proceeding, upholding the Parole Board's determination rescinding parole release (176 AD3d 1548). The Court of Appeals affirmed. Judicial intervention in Parole Board determinations was warranted only when there was a showing of irrationality bordering on impropriety. The petitioner failed to make such a showing. *Matter of Costello v NY Bd. of Parole, 23 NY3d 1002,* was distinguishable. Judges Rivera and Wilson dissented for reasons stated in the Third Department dissent.
http://www.nycourts.gov/reporter/3dseries/2020/2020_03207.htm

FIRST DEPARTMENT

People v Person, 6/11/20 –
SPEEDY TRIAL / REVIEW / VOLUNTARY WAIVER
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of attempted 1st degree sexual abuse. The First Department affirmed. Formerly, a defendant who pleaded guilty automatically forfeited appellate review of denial of a statutory speedy trial motion. Effective January 1, 2020, CPL 30.30 (6) was amended to provide that "an order finally denying a [30.30] motion to dismiss…shall be reviewable upon appeal from an ensuing judgment of conviction, notwithstanding the fact that such judgment is entered upon a plea of guilty." The amendment created reviewability that did not previously exist. However, by validly waiving the right to appeal, a defendant could voluntarily relinquish otherwise mandatory review. In any event, the speedy trial issues presented here lacked merit.
http://nycourts.gov/reporter/3dseries/2020/2020_03278.htm

People v Crum, 6/11/20 – **PRESERVATION / *CARPENTER* / PRESCIENCE**
The defendant appealed from a NY County Supreme Court judgment, convicting him of 2nd degree murder and other charges, and from an order denying his CPL 440.10 motion to vacate the judgment. At trial, the defendant did not preserve any claim relating to cell site location information obtained without a warrant. The motion court properly rejected the attempt to raise the issue via a post-conviction motion. The defendant asserted that it would have been futile for trial counsel to raise the issue, because the U.S. Supreme Court had not yet decided *Carpenter v U.S.,* 138 S Ct 2206. The appellate court concluded that the defendant was required to preserve the issue by advocating for a change in the law. An appellant may be penalized for the failure to anticipate the shape of things to come. *See People v Reynolds*, 25 NY2d 489.
http://nycourts.gov/reporter/3dseries/2020/2020_03282.htm

SECOND DEPARTMENT

People v Petrizzo, 6/10/20 – ***O'RAMA* ERROR / REVERSAL**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of resisting arrest. The Second Department reversed and dismissed the indictment. Supreme Court failed to comply with CPL 310.30 and *People v O'Rama*, 78 NY2d 270. In a note, the jury asked about the elements of resisting arrest. Twice when reading the note, Supreme Court substituted the word "initially" in place of "intentionally," and the record did not establish that the note was shown to counsel. There was mode of proceedings error. In addition, another note seeking clarification regarding requested read backs was not read into the record or revealed to the parties. Since the defendant was acquitted of the two most serious charges and had already served the misdemeanor sentence, dismissal of the indictment was appropriate. Appellate Advocates (Samuel Feldman, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03251.htm

People v Mann, 6/10/20 – **SUGGESTIVE LINEUP / AGAINST WEIGHT**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree robbery. The Second Department reversed and dismissed the indictment. The complainant, who was robbed inside an ATM bank vestibule, viewed a lineup five days later and identified the defendant as the perpetrator. At a *Wade* hearing, the defendant argued that the procedures were unduly suggestive. The hearing court denied suppression. At trial, the sole evidence against the defendant was the complainant's ID testimony. The appellate court held that the verdict was against the weight of evidence. The complainant described the perpetrator to the police as balding with no facial hair. The participants in the lineup wore hats to conceal their hairlines, but the defendant's significant facial hair was visible. Although the shirts of the participants were covered, the defendant's shoulders remained visible. He was the only participant wearing a yellow shirt. The complainant said that she recognized the defendant's yellow shirt as the one worn by the perpetrator. Her ID was not corroborated by any other evidence. Appellate Advocates (Jacqueline Chung, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03249.htm

People v Verneus, 6/10/20 – **ABHORRENT / NOT DEPRAVED INDIFFERENCE**
The Second Department reduced a Queens County conviction for assault from 1st to 3rd degree and a conviction for reckless endangerment from 1st to 2nd degree in connection with injuries sustained by her then 20-month-old foster child. The child suffered 2nd and 3rd degree burns on 12% of his body. The defendant said that the child was accidently scalded while unattended in the bathtub, and she then treated him with ointment and bandages. While her actions were abhorrent and must have caused great suffering, the People failed to prove depraved indifference to human life based on her failure to obtain proper medical care. The defendant took measures, albeit woefully inadequate ones, to care for the child. One justice dissented in part. Appellate Advocates (David Goodwin, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03256.htm

People v Butts, 6/10/20 – **IMPEACHMENT TESTIMONY / NO FAIR TRIAL**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder and other crimes. The Second Department reversed, finding that the defendant was deprived of a fair trial. The right to present a defense is a fundamental element of due process. Trial courts have broad discretion to curtail exploration of collateral matters, but must honor the defendant's constitutional rights to present a defense and confront his or her accusers. Here a victim testified that he recognized the defendant, because at some point a scarf no longer covered the defendant's face. The victim was the only witness who identified the defendant as one of the intruders. After the victim's testimony, his brother contacted defense counsel to report that the victim had told him repeatedly that he had not seen the intruders' faces. Supreme Court should not have precluded the proffered testimony, which went directly to the victim's credibility and to the defendant's guilt. The preclusion of such material and exculpatory evidence deprived the defendant of a fair trial. Appellate Advocates (Yvonne Shivers, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03243.htm

People v Pelt, 6/10/20 – **FST / *FRYE* HEARING NEEDED**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree CPW. The Second Department reversed and ordered a new trial. Prior to trial, the defendant moved to preclude evidence regarding DNA testing derived from the use of the Forensic Statistical Tool (hereinafter FST), or for a *Frye* hearing. Supreme Court denied the motion. Based on recent Court of Appeals decisions, the trial court erred in not holding a *Frye* hearing. There was uncertainty regarding whether the FST had been generally accepted in the relevant scientific community at the time of the motion. Appellate Advocates (Dina Zloczower, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03250.htm

People v Chy, 6/10/20 **– SUPPRESSION / REVERSAL**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 4th degree grand larceny (two counts), upon his plea of guilty. The appeal brought up for review the denial of suppression. The Second Department reversed. An officer arrested the defendant for criminal trespass, searched his backpack at the scene, and recovered two credit cards and a driver's license—all not bearing his name—along with a new laptop computer. The purported waiver of the right to appeal was invalid and thus did not preclude review of suppression issues. The search was not justified as incident to a lawful arrest. The officer did not act out of concerns for safety or evidence preservation. The People contended that, even if the search was unlawful, the defendant's statements were admissible, because they were sufficiently attenuated so as to purge the taint of the illegal search. Since Supreme Court did not rule on that issue, appellate review was precluded, and remittal was required. *See* CPL 470.15 (1). Appellate Advocates (Mark Vorkink, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03244.htm

SECOND CIRCUIT

US v Thompson, 6/8/20 – **NY CONVICTION / NOT FEDERAL DRUG OFFENSE**
The defendant appealed from a sentence entered in District Court–NDNY following his conviction of a federal drug offense. The Second Circuit vacated and remanded for resentencing. The trial court concluded that the defendant's prior conviction for attempted 5th degree sale of a controlled substance, in violation of NY Penal Law § 220.31, was a predicate "felony drug offense" for purposes of federal sentencing enhancement. That was error. The NY offense was not a categorical match to 21 USC § 802 (44); it criminalized conduct beyond the federal analog. The NY statute was indivisible, creating a single crime that could be committed by selling any substance listed in NY Public Health Law, which included compounds not encompassed in the generic federal definition.
https://www.ca2.uscourts.gov/decisions/isysquery/5c27fd76-e46d-417f-89c6-efba8ba0a97a/1/doc/18-2545_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/5c27fd76-e46d-417f-89c6-efba8ba0a97a/1/hilite/

US v Vargas, 6/9/20 – **SENTENCE VACATED / NEW JUDGE DENIED**
The defendant appealed from a judgment of District Court–SDNY, following her plea of guilty to a charge of conspiracy to distribute narcotics, and urged that the lower court erred by denying the Government's motion for a one-level reduction in her offense level. The Second Circuit vacated the judgment and remanded for resentencing. District Court did err in denying the motion. The court was notified of the defendant's intention to plead guilty one month before the scheduled trial date, thus allowing the court and the Government to save resources—a salient sentencing factor. The defendant's request for reassignment to a new judge was denied, based on consideration of the following factors: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected; (2) whether reassignment was advisable to preserve the appearance of justice; and (3) whether reassignment would entail waste out of proportion to any gain in preserving the appearance of fairness.
https://www.ca2.uscourts.gov/decisions/isysquery/26866b27-1a77-4ae1-93d0-4cd277b2aaca/2/doc/19-463_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/26866b27-1a77-4ae1-93d0-4cd277b2aaca/2/hilite/

Bacon v Phillips, 6/8/20 –
FIRST AMENDMENT / RETALIATION / QUALIFIED IMMUNITY
The plaintiff appealed from a judgment of District Court–Northern District, which dismissed his *Bivens* action (403 US 388) based on a First Amendment violation. The Second Circuit affirmed. The defendants violated the plaintiff's constitutional rights, but were entitled to qualified immunity. A letter the plaintiff sent from FCI Ray Brook to his sister was an exercise of his right to free speech, for which he was sent to the SHU for 89 days. The letter professed that he wanted a beautiful black woman; he later said that he was referring to a specific correctional officer. The appellate court held that the statement—made in correspondence to a third party outside the prison—merely expressed an attraction

and was not threatening. The plaintiff sufficiently alleged that he suffered retaliation as a result of protected speech. However, the defendant officials had qualified immunity, since the rights were not "clearly established": when the plaintiff sent the letter, neither U.S. Supreme Court nor Second Circuit precedent placed prison officials on notice that they could not punish such statements.
https://www.ca2.uscourts.gov/decisions/isysquery/1e62d544-bb95-4537-9c42-aa5c2bfaf494/3/doc/18-3377_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/1e62d544-bb95-4537-9c42-aa5c2bfaf494/3/hilite/