CRIMINAL

SECOND DEPARTMENT

People v Rose, 7/17/19 – **ADVERSE POSITION / NEW COUNSEL**
The defendant appealed from a judgment of Suffolk County Court, convicting him of 3rd degree criminal sale of a controlled substance and 2nd degree conspiracy. At sentencing, the defendant made a pro se application to withdraw his plea. He asserted that the prosecutor had coerced him into pleading guilty by threatening to prosecute his father, and that his attorney had failed to provide effective assistance. Defense counsel said that he had told the defendant that he was willing to try the case, but that the defendant had decided to take the plea deal. Further, counsel said that the defendant had accused everyone but himself and had refused to accept responsibility for his actions. Then counsel asked the trial court go forward with the imposition of sentence. The Second Department held that the defendant's right to counsel was violated when his counsel took an adverse position as to his plea withdrawal motion. Thus, the appellate court directed that new counsel be assigned and held the matter in abeyance pending remittal. Steven Feldman represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05696.htm

People v Bakayoko, 7/17/19 – **BAD APPEAL WAIVER / REDUCTION TO 364 DAYS**
Following pleas of guilty, the defendant was convicted in Queens County Supreme Court of 3rd degree robbery and attempted 3rd degree robbery and sentenced to concurrent terms of 2 to 6 years and 1⅓ to 4 years. Upon appeal, he challenged the sentences as excessive. The Second Department found the waiver of the right to appeal invalid. The terse colloquy was insufficient to show that the defendant appreciated the consequences of the waiver, given that: he was age 20, had dropped out of high school in 11th grade, had mental health issues, and had limited experience in the criminal justice system. The written waiver could not cure the defects. Although the defendant had served the sentences, the excessiveness question was not academic, in light of the potential immigration consequences. Thus, the appellate court reduced the sentences to concurrent definite terms of 364 days. Appellate Advocates (Erica Horwitz, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05677.htm

THIRD DEPARTMENT

People v Shanks, 7/18/19 – **JURY TRIAL / WAIVER OF APPEAL**
The defendant appealed from a judgment of Otsego County Court, convicting him of 3rd degree grand larceny. The defendant represented himself at trial and had an assigned legal advisor. At the conclusion of that trial, the jury found the defendant guilty as charged. The defendant thereafter retained counsel, and pursuant to an agreement, withdrew his motions and waived his right to appeal, in return for a sentence of time served and the resolution of unrelated criminal charges. The Third Department affirmed. A defendant may waive the right to appeal from a jury verdict. The appellate court was satisfied that, notwithstanding isolated uses of language more appropriate for a waiver as part of a plea agreement, the

defendant knowingly, voluntarily and intelligently waived his right to appeal. The defendant argued that he was improperly found to have forfeited his right to counsel at trial. Assuming that this argument survived his valid appeal waiver, the reviewing court rejected the argument, due to the defendant's persistent pattern of threatening, abusive, obstreperous, and uncooperative behavior with successive assigned counsel.
http://nycourts.gov/reporter/3dseries/2019/2019_05724.htm

People v Gaworecki, 7/18/19 – **FATAL OVERDOSE / CAUSATION / TWO DISSENTS**
The People appealed from an order of Broome County Court, which partially granted the defendant's motion to dismiss the indictment. He was charged with 2nd degree manslaughter and drug possession and sale charges. With respect to the manslaughter count, the People alleged that the defendant sold the victim heroin, which resulted in his subsequent overdose and death from acute heroin toxicity. County Court dismissed the manslaughter count. The Third Department reversed. Given the defendant's knowledge of the potency of the drugs he was distributing and their potential lethality, the risk involved was of such degree that his failure to perceive it constituted a gross deviation from reasonable care, and his actions were a sufficiently direct cause of death. Two judges dissented, opining that the evidence failed to prove that the sale of heroin to the victim created a substantial and unjustifiable risk of death or that the sale was a sufficiently direct cause of death. There was no evidence that the victim overdosed on the heroin that the defendant sold. Moreover, no evidence established that the defendant was aware that the heroin would result in the victim's death. In this regard, testimony of an ex-girlfriend regarding the strength of the heroin was mere speculation, and another user's warning about the heroin did not occur until after the defendant had sold the heroin to the victim. The defendant's warning to the victim to "be careful" was not enough to hold him criminally liable.
http://nycourts.gov/reporter/3dseries/2019/2019_05725.htm

FAMILY

FIRST DEPARTMENT

Matter of Emmanuel B. (Lynette J.), 7/16/19 –
ICPC / NOT FOR OUT-OF-STATE BIO PARENT
Emmanuel B. appealed from a Bronx County Family Court order, which remanded his care and custody to ACS. The First Department reversed and vacated the order. The appeal presented a matter of first impression: whether the Interstate Compact for the Placement of Children (ICPC) (Social Services Law § 374-a) applied to out-of-state noncustodial parents. The First Department concluded that it did not. In 2017, ACS filed a petition alleging that the mother had neglected the child, then age two, who was removed from the mother's care and placed with an aunt. In 2018, the father, who resided in New Jersey, filed a custody petition. Family Court denied custody, based on the need for from the ICPC, which did later approve the father. The *Hearst Corp. v Clyne* (50 NY2d 707) mootness exception applied. Nothing in the statute or legislative history indicated that the ICPC was intended to address any individual other than an out-of-state foster or adoptive parent.

Interpreting the statute to apply to an out-of-state noncustodial parent—as the Second Department had done—flew in the face of NY's policy of keeping biological families together. A statute designed to provide more opportunities for children in need of placement should not be construed to prevent their placement with a natural parent. The Legal Aid Society, NYC (Claire Merkine, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05640.htm

THIRD DEPARTMENT

Matter of Nicole TT. v David UU., 7/18/19 – **CUSTODY / REVERSED**
The mother appealed from an order of Rensselaer County Court. After a 13-day trial, the court dismissed her custody petition, awarded the father sole custody, and granted her two hours' supervised visitation per week. The Third Department reversed. The appellate court found that the challenged decision mischaracterized the evidence and included "unfortunate and bizarre commentary." The mother was the primary caretaker of the child, born in 2010. The father had spent much time at home playing with video games, rather than caring for the child. In 2015, a CPS report was indicated for abuse, after an investigation validated a claim that the father punched the mother in the face in the child's presence. Family Court wholeheartedly credited the father's testimony; viewed the evidence in a light least favorable to the mother; and diminished the evidence of domestic violence. While the proof showed that the father did not sexually abuse the child during one visit, that did not validate the determination that another allegation regarding abuse was a fabrication. To the contrary, an investigation supported the mother's concerns and actions. Given the passage of time, an updated fact-finding hearing was ordered; and given the trial court's undue bias in favor of the father, such hearing would be heard before a different judge. Matthew Hug represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05729.htm

Joan HH. v Maria II., 7/18/19 – **RESETTLEMENT / NO BIG CHANGES**
The mother appealed from an order of Cortland County Family Court, which resettled a prior order. After the father died, the paternal grandmother filed a custody petition as to the child, born in 2009. After multiple court appearances, the parties entered into a stipulation on the record, designating the mother as the sole custodian and according the grandmother extensive visitation. It was further agreed that the mother, who had since relocated to Monroe County, would be placed on probation for one year, based on allegations of substance abuse and mental health problems. An order on the stipulation was entered. When Cortland County Probation declined to accept a transfer of the case, Family Court issued a resettled order, terminating the probation provision and substituting a directive that the mother submit to drug/alcohol and mental health evaluations. The Third Department reversed. Probation was a material term of the original order. Resettlement was designed to correct errors as to form, not to make a substantive change in a prior decision. Lisa Miller represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05737.htm