CRIMINAL

SECOND CIRCUIT

Rampersaud v Barr, 8/19/20 – **REMOVABILITY / VACATUR**
The petitioner, a native of Guyana and lawful permanent resident (LPR) in the U.S., was convicted in NY of insurance fraud and grand larceny. His sentence included an order to pay restitution of $77,000. Under federal law, a conviction of an offense involving fraud, in which the loss to victims exceeded $10,000, qualified as an aggravated felony. An Immigration Judge (IJ) found dispositive the restitution amount ordered here and directed that the defendant was removable. The Board of Immigration Appeals (BIA) affirmed. The petitioner sought review in the Second Circuit, which vacated the challenged decision and remanded. A "circumstance-specific" analysis applied to the question of the monetary threshold. The restitution order did not establish that a loss exceeding $10,000 was attributable to the insurance fraud. All or part of the restitution amount could have stemmed from the larceny or from uncharged criminal conduct that was part of the larceny transaction. *See* NY Penal Law § 60.27 (1), (4) (a) (NY courts may require restitution, including for any offense that was part of the same transaction as the crime of conviction). The BIA did not identify any proof to justify its conclusion regarding the losses fairly attributable to the insurance fraud. Thus, the Government did not meet its burden to show by clear and convincing evidence that the defendant was removable.
https://www.ca2.uscourts.gov/decisions/isysquery/3d111b9b-2846-4e09-b96d-926d0baa2a67/1/doc/19-825_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/3d111b9b-2846-4e09-b96d-926d0baa2a67/1/hilite/

Mota v Barr, 8/17/20 – **DRUG CRIME / CIMT**
The petitioner, a citizen of Portugal and LPR of the U.S., was convicted in Connecticut of possession of narcotics with intent to sell (two counts). An IJ found him removable based on a conviction for a crime involving moral turpitude (CIMT). The BIA sustained the order. The petitioner appealed, and the Second Circuit denied his petition. The subject crime involved "vile, reprehensible conduct." The BIA had previously held that evil intent was inherent in the illegal distribution of drugs and that participation in drug trafficking was a CIMT. *See e.g. Matter of J.M. Acosta*, 27 I&N Dec 420, 423 (BIA 2018) (NY conviction for attempted 3rd degree criminal sale of controlled substance constituted CIMT because statute involved inherently reprehensible conduct committed with mental state of knowledge or intent). The petitioner urged that "sale" encompassed conduct not involving moral turpitude, such as gifting a small amount of an illicit substance to a friend at a private party. However, under the applicable categorical approach, the focus was on the intrinsic nature of the offense, not the particular facts of the subject conviction.
https://www.ca2.uscourts.gov/decisions/isysquery/a30d0327-daa1-447a-b06e-3ba70585ad7a/7/doc/19-1385_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/a30d0327-daa1-447a-b06e-3ba70585ad7a/7/hilite/

USA v Delgado, 8/18/20 – **TEEN / LIFE VACATED**

The defendant appealed from a 2015 judgment, entered in District Court–WDNY, convicting him of conspiracy to violate RICO and other crimes, and sentencing him to life imprisonment. The racketeering activity in the gang-related crimes included the defendant's participation in a double murder when he was 17 years old. In imposing sentence, District Court failed to consider the defendant's age. The Second Circuit vacated the sentence and remanded for resentencing. *Miller v Alabama*, 567 US 460, declared that children are different from adults for sentencing purposes, and rarely will the harshest sentences be justified for juvenile offenders—even when they commit terrible crimes. Upon resentencing, District Court was directed to consider the mitigating circumstances of the defendant's youth, and it could also consider post-sentencing development.
https://www.ca2.uscourts.gov/decisions/isysquery/b254d6b0-0433-4687-a818-00af959200bc/1/doc/15-1453_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/b254d6b0-0433-4687-a818-00af959200bc/1/hilite/

USA v Anastasio, 8/19/20 – **ACCOMPLICE LIABILITY / INSUFFICIENT PROOF**

The defendant appealed from a judgment of District Court–WDNY, convicting him of conspiracy and racketeering charges arising from the events addressed in the above *Delgado* case regarding a co-defendant. The Second Circuit reversed the judgment as to two murder counts and two murder enhancements and remanded for resentencing. The defendant's conduct did not include an affirmative act, as needed for federal accomplice liability. Although he was present while gang members formulated a scheme for revenge, nothing suggested that he spoke during the planning process. Nor was there evidence that his mere presence encouraged the gang to commit the murders. In fact, it appeared that the defendant played no role in the execution of the retaliatory shooting, beyond that of a companion to the shooters. He did not supply firearms used; provide information on the location of the rival gang; serve as a look-out; transport any shooters; or help shield them from police investigation. The reviewing court also concluded that the defendant did not act as an accomplice within the meaning of NY Penal Law § 20.00, under which, similar to federal law, mere presence at the crime or association with the perpetrator was not enough. The accused had to exhibit some calculated or direct behavior that purposefully furthered the crime.
https://www.ca2.uscourts.gov/decisions/isysquery/30fd5c57-c5b7-43ad-b516-f2243cf5cd7e/4/doc/18-421_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/30fd5c57-c5b7-43ad-b516-f2243cf5cd7e/4/hilite/

FAMILY

SECOND DEPARTMENT

Zehner v Zehner, 8/19/20 – **MAINTENANCE / INADEQUATE**
The wife appealed from a judgment of divorce of Suffolk County Supreme Court. Among other things, she challenged the maintenance award. The Second Department modified the judgment. Supreme Court improvidently exercised its discretion in awarding maintenance of only $2,000 a month for only seven years. It was unrealistic to believe that the wife could achieve a level of financial independence, given the length of the marriage and the fact that she was 58, had been absent from the workforce for 20 years, had limited employment history and education, and suffered from physical and mental health issues. In setting maintenance, the trial court erred in imputing $30,000 in annual income to the wife. There was no evidence that her past income and/or demonstrated future potential earning capacity were anywhere near such amount. The appellate court increased maintenance to $3,000 per month until the wife became eligible to receive full Social Security retirement benefits. In addition, the attorney fee award was increased from $17,500 to $30,000. Michael LoFrumento represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04617.htm

THIRD DEPARTMENT

Matter of Lonny C. v Elizabeth C., 8/20/20 – **CUSTODY / JUDICIAL NOTICE**
The father appealed from Delaware County Family Court orders dismissing his custody mod. application. The Third Department affirmed. The parties' agreement required the mother to maintain a residence for the parties' two children within a radius of 40 miles from Deposit, NY or 20 miles from their school. After the mother moved to Clarks Summit, PA, the instant litigation ensued. Family Court rejected the father's argument that the distance was to be measured from his residence. Judicial notice was taken of the fact that 39 miles separated the boundaries of Deposit, NY and Clarks Summit, PA. The father's attorney did not object to such notice. In the challenged final decision/order, Family Court found a change in circumstances, but held that modification was not warranted. The appellate court highlighted Family Court's observation that much testimony concerned the father's convenience, not the children's interests. One justice concurred in part and dissented in part. Family Court erred in taking judicial notice of a fact—a matter which must not be based on a hearsay source or unidentifiable or non-indisputable sources. Fundamental fairness required explaining the basis for the judicial notice and giving the parties an opportunity to be heard. Family Court's threshold determination—that the relocation conformed to the agreement—was error; and the appellate majority's "best interests" analysis rested on that error.
http://nycourts.gov/reporter/3dseries/2020/2020_04620.htm

FOURTH DEPARTMENT

Matter of Honeyford v Luke, 8/20/20 – **AFC / ISSUES NOT REVIEWABLE**
Consolidated appeals arose from Monroe County Family Court orders granting visitation to the petitioner with two of her grandchildren and dismissed the parents' petition. The Fourth Department affirmed. The appellate AFC urged that the children were denied effective assistance of counsel in Family Court because the trial AFC failed to meet with them. The issue was not properly before the appellate court, for two reasons. First, there was no indication in the record regarding whether the trial AFC consulted with the children, so the IAC contention was based on matters outside the record. Second, the AFC did not file a notice of appeal from either order.
http://nycourts.gov/reporter/3dseries/2020/2020_04659.htm