CRIMINAL

FIRST DEPARTMENT

People v Hamilton, 8/29/10 – **REMAND / SENTENCING INTENT UNCLEAR**
The defendant appealed from a 2015 judgment of NY County Supreme Court, convicting her of tampering with physical evidence. The First Department affirmed. She also appealed from a 2016 judgment, convicting her of 1st degree robbery, 2nd degree robbery (two counts), 2nd degree kidnapping, and two other crimes, and sentencing her as a persistent violent felony offender to an aggregate term of 50 years to life, concurrent with the sentence imposed on the prior judgment. The First Department remanded for resentencing and otherwise affirmed. Although the trial court should have permitted the defendant to introduce expert testimony on cross-racial identification, any error was harmless. The ID by one of the robbery victims was only a small component of the People's case; and even if some circumstantial proof could be viewed in isolation as equivocal, viewed as a whole, the evidence made a finding of guilt inescapable. The court properly admitted evidence of uncharged robberies committed in Queens as part of a closely connected series of crimes, including the charged crimes, that occurred over several days and involved the same participants. Details of the uncharged crimes provided circumstantial evidence of identity. The sentencing court's statement, that consecutive terms of 25 years to life should be imposed on 1st degree robbery as to one incident and 2nd degree kidnapping as to another, was inconsistent with the sentence and commitment sheet. Further, the convictions of those offenses arose from the same incident. Thus, the intended sentence was unclear. Since the sentencing justice had retired, a full de novo sentencing proceeding would be appropriate. The Center for Appellate Litigation (Arielle Reid, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_06153.htm

SECOND DEPARTMENT

People v Garcia, 8/21/19 – **YO / REMITTAL**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2nd degree CPW. The Second Department modified the judgment. The defendant's valid waiver of the right to appeal precluded review of a suppression argument. However, his contention that Supreme Court failed to consider youthful offender treatment was not precluded by the waiver. As the People correctly conceded, the court erred in failing to consider whether the defendant, who was 18 when he committed the offense, should be afforded youthful offender status. The sentence was vacated and the matter remitted for consideration of YO treatment. Appellate Advocates (Sean Murray, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_06205.htm

People v Smith, 8/21/19 – **SORA / NOT PREDICATE OFFENDER**
The defendant appealed from an order of Nassau County Supreme Court, designating him a level-three sex offender and, in effect, a predicate sex offender. The Second Department modified, by deleting the provision regarding predicate status. In 1983, the defendant was

convicted in Michigan of 2nd degree breaking and entering an occupied dwelling with the intent to commit criminal sexual conduct. He was released on in 2002. The following year, the defendant was convicted in NY of attempted 1st degree rape and other crimes and sentenced as a prior violent felony offender. Supreme Court should not have designated the defendant a predicate sex offender based on his Michigan conviction. Where the prior conviction was in a jurisdiction other than NY, it must include all essential elements of a crime enumerated as a "sex offense" or "sexually violent offense" in NY Correction Law or must require registration as a sex offender in the other jurisdiction. Although the Michigan crime was equivalent to NY 2nd degree burglary, our crime is not classified as a "sex offense" or a "sexually violent offense." Further, the People did not rely on the 1983 conviction as constituting a sexually motivated felony; and that crime was not considered a sex offense requiring registration as a sex offender there. Charles Holster III represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_06181.htm

People v Marroquin, 8/21/19 – **CPL 440.10 / DENIAL REINSTATED**
The defendant appealed from an order of Westchester County Supreme Court, which granted the People's motion to reinstate a 2014 order denying his CPL 440.10 motion to vacate a judgment. The Second Department affirmed. In 2003, the defendant, a native of Guatemala, pleaded guilty to 1st degree criminal contempt. He later sought to vacate the judgment on the ground of ineffective assistance, contending that defense counsel errantly stated that he would not be subject to deportation based on a guilty plea. Supreme Court denied the motion, finding that the defendant had not shown prejudice, where deportation proceedings had been instituted because he was not legally admitted to this country. Thereafter, the defendant moved for leave to renew, asserting that, at the time of the conviction, he had a valid work permit that allowed him to remain in the U.S. In a 2016 order, Supreme Court found that the defendant was entitled to a hearing and directed him to produce a copy of the work permit. The defendant failed to do so, and the People moved to reinstate the 2014 order. The court granted the motion. The defendant failed to show that he received ineffective assistance. To prevail under the U.S. Constitution, a defendant must show that counsel's representation fell below an objective standard of reasonableness and thereby prejudiced the defense. Under the State Constitution, a defendant must show that he was not afforded meaningful representation. Here, the defendant failed to show that his trial counsel misadvised him regarding immigration consequences or that he was prejudiced. Deportation proceedings were instituted because he was an alien who was not admitted or paroled. Moreover, the defendant did not produce the work permit.
http://nycourts.gov/reporter/3dseries/2019/2019_06191.htm

THIRD DEPARTMENT

***Matter of Piagentini v NYS Board of Parole*, 8/22/19 –**
PAROLE GRANT / VICTIM'S WIDOW NO STANDING
The petitioner appealed from a judgment of Albany County Supreme Court, which dismissed her CPLR Article 78 petition to review a determination of the Board of Parole granting parole to Herman Bell, who was released in 2018. After a trial in 1975, Bell was convicted of two counts of murder for the 1971 deaths of police officer Joseph Piagentini

and a second officer. Bell was sentenced to two concurrent terms of 25 years to life. In anticipation of his eighth appearance before the Board, the petitioner—Piagentini's widow—had submitted a victim impact statement. On appeal, she argued that the Board did not give enough weight to such statement. The Third Department affirmed the dismissal of the Article 78, finding that the petitioner lacked standing. Crime victims do not have the right to control the criminal process or collateral proceedings. Only the parolee has standing to challenge the substantive determination regarding parole, and the Legislature did not envision challenges to parole grants. A concurrence opined that the petitioner had standing to ensure that the Board considered her victim impact statement, but since the Board otherwise acted within its discretion, the petition was properly dismissed. One justice dissented, observing that the Board made no reference to the petitioner's statement opposing parole, only to the statement of another family member favoring release. The Board should have addressed both viewpoints, and the failure to do so was arbitrary and capricious, requiring a reopened hearing. Robert Boyle represented Bell.
http://nycourts.gov/reporter/3dseries/2019/2019_06229.htm

SECOND CIRCUIT

Scrimo v Lee, 8/20/19 – **MURDER / PROOF WRONGLY EXCLUDED**
In 2002, the petitioner was convicted of murder by a Nassau County jury, based on testimony of a person who was in the room when the victim was killed: John Kane. The Second Department affirmed the conviction, and leave was denied. After having served 17 years of his sentence of 25 years to life, the petitioner sought a writ of habeas corpus, asserting that he was deprived of the right to present a complete defense when evidence of third-party guilt was excluded. District Court–EDNY denied the writ, but the Second Circuit reversed. The petitioner's defense was that Kane choked the victim in a drug sale dispute. The defense tried to show that Kane and the victim had a sexual relationship and that he sold her drugs. But the trial court thwarted such defense by sustaining attempted cross-examinations and precluding as collateral three proffered witnesses. The appellate court concluded that the petitioner's claim was based on clearly established constitutional law; the trial court improperly applied state evidentiary rules; and the error was not harmless. The subject evidence of third-party guilt was probative and powerful, where: Kane was at the murder scene; DNA under the victim's fingernails pointed to him; there was no plausible motive for the petitioner to kill her; and the only question was whether Kane did it. The excluded evidence would have introduced reasonable doubt. A concurring opinion explored the relevance of proof regarding an incident three years before the murder in which Kane allegedly choked another customer in a drug sale dispute. Randall Unger represented the appellant.
http://www.ca2.uscourts.gov/decisions/isysquery/180faffd-01ab-4876-b7f5-ab09c27dcec8/3/doc/17-3434_complete_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/180faffd-01ab-4876-b7f5-ab09c27dcec8/3/hilite/

USA v Parkins 9/19/19 – **COMMUNITY SERVICE / UNREASONABLE**
The defendant appealed from a sentence of District Court–SDNY, imposed for conspiracy to commit bank and health care fraud. In 2017, he was sentenced to time served and three

years of supervised release with 300 hours of community service per year. In a prior appeal, the Second Circuit vacated that condition. Upon remand, the District Court required 575 hours of community service for the remaining period release, in addition to service already performed, resulting in 695 total hours. The appellate court again vacated the sentence. Special conditions of supervised release must be reasonably related to: the offense, the defendant, the need for deterrence, and protection of the public. A federal provision, that community service generally should not exceed 400 hours, applied to the entire term of release. District Court did not explain what was special about the defendant's case so as to warrant exceeding the cap. The Government argued that community service would keep the defendant productively occupied. But his job driving for Uber could do that, while allowing him to provide for his young daughter, the reviewing court stated.
http://www.ca2.uscourts.gov/decisions/isysquery/04c82da1-18ee-4447-9010-3bf4cfc1c856/3/doc/18-1019_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/04c82da1-18ee-4447-9010-3bf4cfc1c856/3/hilite/

ARTICLES

COA / 2018-2019 TERM
NYLJ, 8/16/19, BY PAUL SCHECHTMAN
In the 2018-2019 term, the Court of Appeals decided 42 criminal cases, the People prevailed in 74%, the COA affirmed in 66%, and memoranda opinions were issued for 50% of cases. Judges Rivera and Wilson dissented in 14 and 12 cases, respectively. A few cases stand out. In *People Suazo*, the Court held that a non-citizen charged in NYC with a class B misdemeanor is entitled to a jury trial if a conviction carries the potential penalty of deportation. But how will judges determine if such charges have potential immigration consequences; and what if a defendant is deportable, regardless of the outcome of the trial, the author wondered? In *People v. Diaz*, the Court held that the 4th Amendment was not violated by the release to the DA's Office of an inmate's recorded calls, without a warrant. In dissent, Judge Wilson questioned the continued viability of the third-party doctrine. The *People v. Alvarez* decision found that appellate counsel, who did not challenge the defendant's very lengthy sentence, was not ineffective. In dissent, Judge Wilson focused on the defendant's rehabilitation and illness—facts outside the record. The Legislature should consider establishing a procedure to allow a "second look" at long sentences imposed on young offenders, the author opined. The COA found in *People v. Grimes* that counsel's failure to file a requested leave application was not ineffective. In dissent, Judge Wilson disagreed with the notion that counsel is unimportant in leave applications.

CPL 245.70 / PROBLEMATICAL REVIEW
NYLJ, 8/16/19, BY DONNA ALDEA
Eff. Jan. 1, CPL 245.70 permits either party to move for a protective order limiting, upon good cause shown, information to be turned over to the other party. Subsection (6)—which provides for expedited review by an Appellate Division justice of the trial court's order resolving such motion—may be problematical. To the extent that that section provides for interlocutory appellate review by a single justice, it seems to run afoul of the State Constitution. Perhaps the review is not really an

appeal. After all, even where such review occurred, upon appeal from the judgment of conviction, a defendant may again attack as error the trial court's ruling. The Appellate Division Departments are developing procedures for expedited review. Given the automatic stay of the subject order pending review, quick decisions will be important.

FAMILY

FIRST DEPARTMENT

Matter of Barry H. v Veronica S., 8/29/19 – **CUSTODY / REMITTAL**
The father appealed from an order of Bronx County Family Court which, after a hearing, dismissed with prejudice his petition for modification of a prior custody order concerning the parties' daughter. The First Department held its decision in abeyance and remitted for further proceedings. The child was born in 2009. The parties entered a custody order on consent in 2015, which granted joint legal custody to the parents, with primary residential custody to the mother. In 2017, the father sought modification. Family Court held that he failed to demonstrate a sufficient change in circumstances. Allegations of corporal punishment upon the child by the mother were unfounded and not corroborated. The fact that the mother had relocated several times did not constitute the requisite change, because she was living in a shelter at the time the parties entered the prior order. The First Department found that the record showed a change in circumstances, requiring a hearing to determine best interests. The child's school records revealed poor grades and attendance. Inadequate consideration was given to other relevant claims by the father as to the child's dental health and the mother's unstable housing. Anne Reiniger represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_06152.htm

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