CRIMINAL

FIRST DEPARTMENT

People v Pinilla, 8/30/18 – **IMMIGRATION MISADVICE / NO PREJUDICE**
At the time of his guilty plea to a drug sale crime, the defendant was a legal resident of the U.S. In a CPL 440.10 motion filed 17 years later—after immigration authorities initiated deportation proceedings—the defendant claimed that trial counsel had erroneously advised him that a guilty plea would have no adverse immigration consequences. New York Supreme Court found that the defendant had thereby established that counsel's representation fell below an objective standard of reasonableness. A hearing was held to determine whether there was a reasonable probability that, but for counsel's bad advice, the result would have been different. The hearing court denied the motion, finding that the defendant was not credible and that he had not "met his burden and has not proved by a preponderance of the evidence" that he was unduly prejudiced. The defendant was deported to Panama. On appeal, he argued that the only relevant inquiry was whether there was a "reasonable probability" that he would have proceeded to trial had he known about the immigration consequences, and that it was error to refer to a burden based on a "a preponderance of the evidence." The First Department agreed, citing *United States v Benitez*, 542 US 74, 83 n 9. However, the reviewing court affirmed, deferring to the hearing court's finding that the defendant was not credible.
http://nycourts.gov/reporter/3dseries/2018/2018_05960.htm

SECOND DEPARTMENT

People v Marin, 8/19/18 – **CONVICTIONS REVERSED / NO RECKLESSNESS**
The defendant inadvertently shot his friend, Fernando Morales, in the leg. At trial, Morales testified that he found a gun on a park bench wrapped inside a paper bag, was concerned about the safety of children in the park, and intended to bring the gun to a police station. Before doing so, he stopped at the defendant's home, placed the bag on a shelf, and told the defendant about the gun. Morales fell asleep and awoke when he felt a burning pain in his leg. The defendant was holding the gun and saying, "I'm sorry." In his statement to police, the defendant explained that he was curious about the gun, so he picked it up, and it went off accidentally. A Queens County jury found the defendant guilty of 2nd degree reckless endangerment and 3rd degree assault. On appeal, the defendant argued that the verdict was against the weight of evidence because the element of recklessness was not adequately proven as to both crimes. The Second Department agreed. The People did not introduce evidence that the defendant: (1) was familiar with weapons; (2) knew that the gun was loaded or knew how it operated; or (3) was aware of, and consciously disregarded, a risk that the weapon might misfire. The judgment was reversed and the indictment was dismissed. One justice dissented. Appellate Advocates (Benjamin Litman, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05942.htm

People v Wisdom, 8/19/18 – **NO SUPPRESSION / RIGHT TO SILENCE NOT INVOKED**
In its review of a Kings County murder conviction, the Second Department upheld Supreme Court's order denying suppression of a statement by the defendant at the police station. After waiving her *Miranda* rights, she freely and voluntarily made a videotaped statement. The interview ended after half an hour, not because the defendant unequivocally invoked her right to remain silent, but rather because she needed to compose herself. She remained in custody, and questioning resumed the following morning. At that time, the defendant was reminded of her rights, agreed to continue answering questions, and admitted stabbing the victim. The Second Department held that the police were free to resume their questioning of the defendant within a reasonable time without repeating *Miranda* warnings.
http://nycourts.gov/reporter/3dseries/2018/2018_05950.htm

OTHER TRIBUNALS

DECISION OF THE WEEK

Matter of Acosta, 8/29/18 – **IMMIGRATION – FINALITY REQUIREMENT**
In proceedings before the Board of Immigration Appeals concerning the respondent's removal, he sought remand based on new evidence that the Appellate Division – First Department had granted his CPL 460.30 motion for leave to file a late notice of appeal as to his drug conviction. He argued that, because the New York conviction was on direct appeal, it was not sufficiently final for immigration purposes and could not serve as a predicate for his removal. The BIA agreed. Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), a conviction did not attain sufficient finality for immigration purposes until direct appellate review on the merits of the conviction was exhausted or waived. The Second Circuit has presented conflicting views in dicta regarding whether the finality requirement survived the enactment of IIRIRA, while the Third Circuit has held that it did survive. *See Orabi v U.S. Att'y. Gen.*, 738 F3d 535 (3rd Cir 2014). The BIA agreed with that conclusion and remanded the respondent's case to the Immigration Judge to consider the status of the appeal.
https://go.usa.gov/xUhQC

People v Paniccia, 8/24/18 – **OFFICER MISTAKE / NOT OBJECTIVELY REASONABLE**
The defendant moved to suppress all evidence obtained after the stop of his motor vehicle and for dismissal of charges in City Court of Gloversville. An officer initiated a traffic stop of the motor vehicle operated by the defendant, based on the belief that the condition of the vehicle violated VTL §375 provisions regarding insufficient tail lights. Three of the vehicle's four tail lights were in proper working order. After the officer saw the defendant throw a broken crack pipe out of the window, she summoned assistance, the defendant was ordered to exit his vehicle and subjected to a pat search, and the vehicle was searched. The defendant admitted to having consumed alcohol, failed field sobriety tests, and was arrested on suspicion of DWI. Citing *Deveines v New York State Dept. of Motor Vehicles Appeals Bd.*, 136 AD3d 1383 (4th Dept 2016), City Court stated that a probable cause standard applies to traffic stops prompted by an alleged violation of the VTL. The Court concluded that the defendant was not in violation of the relevant provision, which required only that one tail light on each side function. While the Fourth Amendment tolerated objectively

reasonable mistakes supporting a belief that a traffic violation has occurred, the instant mistake was not reasonable. Thus, any evidence obtained had to be suppressed. Paul Callahan represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_28259.htm

People v Daniels, 8/17/18 – **CONDUCT NOT LEWD / CHARGE DISMISSED**
The defendant was charged with public lewdness based on his conduct while in a holding cell at a police precinct, observed via a live video feed. On appeal, he contended that the accusatory instrument failed to allege that he meant for his actions be observed by others. There was no allegation that there were people in or near the holding cell, that other persons could see the defendant, or that he knew that a camera was in his cell. Richmond County Criminal Court held that nothing in the accusatory instrument permitted an inference that the defendant intended to be observed. The conviction was reversed, and the charge was dismissed. The Legal Aid Society of NYC (E. Deronn Bowen, of counsel) represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_51245.htm

FAMILY

SECOND DEPARTMENT

Matter of Ja Niyah M. (Anonymous), 8/29/18 – **RETURN OF CHILD / IMPROPER GRANT**
ACS filed a petition alleging that the mother neglected her six-year-old child by inflicting excessive corporal punishment. As a result, he was placed in a foster home. The following month, the mother gave birth to another child, who was removed, and ACS commenced the instant proceeding charging derivative neglect. The mother sought a Family Ct Act § 1028 hearing and return of the child. After the hearing, Kings County Family Court granted return of the child. ACS appealed. The Second Department observed that a § 1028 application must be granted unless Family Court finds that the return of the child would present an imminent risk to the child's life or health. Family Court's determination will not be disturbed if supported by a sound and substantial basis in the record. The trial court must balance the risk to the child, if returned, against the harm removal might cause. Here, Family Court erred in ordering the infant's return to the mother's care. The evidence demonstrated the mother's long history of neglect and abuse toward the older child and her failure to substantially comply with recommended services and to fully cooperate with ACS.
http://nycourts.gov/reporter/3dseries/2018/2018_05928.htm

ARTICLES OF INTEREST

Criminal Cases Faced Divided Court, 8/17/18 – ***NYLJ* ARTICLE**
BY PAUL SCHECHTMAN
The author provided a roundup of Court of Appeals cases decided in the 2017-2018 term. He observed that the Court decided 58 criminal cases, down from an average of 93 in the past five years; that 30 were decided by memorandum opinion; and that the Court was often divided. Judge Rivera dissented in 12 cases, Judge Wilson in 11, the two judges were often together in dissent, and in all of the dissents, they wrote on the side of the defendant. Judge Garcia dissented eight times, always for the prosecution. The People prevailed in 67% of the decisions. *People v Boone*, on cross-racial identification, was seen as perhaps the term's most significant case. Also deemed noteworthy was *People v Tiger*, in which the court held that a claim of actual innocence does not lie under CPL 440.10 (1) (h) to vacate a judgment of conviction obtained upon a defendant's guilty plea.
https://www.law.com/newyorklawjournal/2018/08/17/only-58-criminal-cases-heard-by-an-often-divided-court-in-the-2017-2018-term
NOTE: For further discussion of Court of Appeals criminal decisions, see: Analyses by the Legal Aid Bureau of Buffalo, NYSDA's THE REPORT*, the New York Court Watcher blog, and ILS Decisions of Interest. Here are links:*
https://www.ils.ny.gov/content/legal-aid-bureau-buffalo-court-appeals-analyses
https://www.nysda.org/page/TheReport?&hhsearchterms=%22report%22
http://www.newyorkcourtwatcher.com
https://www.ils.ny.gov/content/decisions-interest

Seven Tips as to Reply Briefs, 7/27/18 **– *NYLJ* ARTICLE**
BY HON. DAVID SAXE AND Y. DAVID-SCHARF
The authors observed that a reply brief is an appellant's last chance for written persuasion, asserted that appellate counsel should never forego the opportunity to file a reply, and offered seven tips. (1) Do not rehash the opening brief; focus only on important points; and do not refute, line-by-line, every argument in the respondent's brief. (2) Adhere to the structure used in the initial brief, rather than the respondent's structure. (3) Do not distinguish every case your adversary cited—select only important cases. (4) Maintain your theme; it should advance your cause in a simple, direct fashion and be woven throughout your reply brief. (5) Use short, punchy sentences and paragraphs to be most persuasive, and avoid acronyms and abbreviations. (6) Call attention to the respondent's failure to address an issue raised in your opening brief. (7) Finally, make the reply brief a stand-alone document that clearly and succinctly states salient factual points and legal arguments.
https://www.law.com/newyorklawjournal/2018/07/27/the-appellants-end-game-some-thoughts-on-the-reply-brief-and-the-rebuttal-argument
NOTE: ILS Appellate Standards and Best Practices provide that appellate counsel should file a reply brief unless doing so would not serve the client's best interests. Standards XIII. The Commentary states that, in most cases, a reply brief will advance the client's cause, and this is the case where misstatements should be corrected and new issues or cases addressed.
https://www.ils.ny.gov/files/Appellate%20Standards%20Final%20010515.pdf