CRIMINAL

SECOND DEPARTMENT

People v McKinnon, 9/23/20 – **BURGLARY / AGAINST WEIGHT**
The defendant appealed from a judgment of Queens County Supreme Court. The Second Department found the conviction for 3rd degree burglary against the weight of evidence and dismissed that count. Trial proof established that the defendant used a public entrance to the subject self-storage facility during business hours, but thereafter entered a non-public area. As to the jury charge, the People did not object to an omission from the definition of "enter or remain unlawfully"; the trial court did not instruct the jury that a license or privilege to enter a building partly open to the public does not allow for entry into an area not open to the public. Thus, the People were bound to satisfy the heavier burden as set forth in the charge, but failed to do so. The appellate court rejected the defendant's contention that trial counsel was ineffective for failing to move to dismiss the indictment on statutory speedy trial grounds. To find IAC, such a violation must be clear-cut and dispositive, which was not shown here. Appellate Advocates, Nao Terai and Mark Vorkink, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05056.htm

People v Reynolds, 9/23/20 – **APPEAL WAIVER / INVALID**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of attempted 3rd degree criminal possession of a controlled substance. The Second Department affirmed, but found invalid the purported waiver of the right to appeal. A preprinted form stated that the waiver encompassed any issue as to a predicate felony or enhanced sentence and barred post-conviction claims. Those misstatements were not corrected by Supreme Court in the oral colloquy. Thus, the challenged suppression ruling was reviewable. However, the People established probable cause for the arrest. Hearing testimony indicated that the defendant fell in front of a police vehicle, and officers then saw a large plastic bag protruding from his pants pocket. The testimony was not patently false, nor did it describe physically impossible circumstances.
http://nycourts.gov/reporter/3dseries/2020/2020_05057.htm

THIRD DEPARTMENT

People v Stevens, 9/24/20 – **PLEA AGREEMENT / COURT ERROR**
The defendant appealed from a judgment of Franklin County Court, convicting her of 2nd degree criminal contempt and other crimes. The Third Department modified. On appeal, the defendant asserted that imposition of both a 365-day jail sentence and a $1,000 fine violated the plea agreement. Such contention survived the appeal waiver, which explicitly excluded the issue. The sentence imposed did not reflect the plea agreement. The defendant had served her jail time, and the fine was vacated. Dana Salazar represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05093.htm

People v Kinchoy, 9/24/20 – **NEGOTIATED SENTENCE / COURT DISCRETION**
The defendant appealed from a Broome County Court judgment, convicting him of 1st degree rape. The Third Department affirmed. The defendant's argument that the plea court abdicated its responsibility to impose a fair sentence survived the valid waiver of appeal. Until the time of sentencing, a trial court retains discretion to impose the appropriate punishment. If warranted, the court may impose a shorter sentence than the one negotiated (and the People must be offered the chance to withdraw their consent to the plea, if it was premised on a specific sentence). Perhaps County Court misapprehended the scope of its discretion when stating, at sentencing, that it was bound by the agreement and could not impose a more lenient sentence. However, the appellate court found no reason to vacate the sentence, since the lower court expressed no concerns about the fairness of the sentence imposed pursuant to the plea deal.
http://nycourts.gov/reporter/3dseries/2020/2020_05098.htm

SECOND CIRCUIT

Ferreira v City of Binghamton, 9/23/20 –
NO-KNOCK WARRANTS / CERTIFIED QUESTION
The plaintiff—an unarmed overnight guest of a drug investigation suspect—was shot in the stomach with an assault rifle by a Binghamton police officer executing a no-knock search warrant. In a 42 USC § 1983 action, the plaintiff appealed from a District Court–NDNY judgment for the City. The Second Circuit found sufficient evidence to support a jury finding that the City violated acceptable police practice, so discretionary immunity did not apply. But the appellate court certified to the NY Court of Appeals the question of whether the District Court correctly ruled that the plaintiff's claim against the City was barred by NY's "special duty" rule. Such a duty can arise where (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government voluntarily assumed a duty to the plaintiff beyond that owed to the public generally; or (3) the municipality took positive control of a known, dangerous safety condition. There was conflicting COA guidance as to the plaintiff's argument that the special duty requirement did not apply where the alleged negligent conduct involved the municipality's own infliction of injury. The Second Circuit opined that the plaintiff's interpretation made more sense than the City's—which would immunize a municipality from liability in many cases in which its employee or agent negligently inflicted harm.
https://www.ca2.uscourts.gov/decisions/isysquery/386a2188-e36b-4b08-8257-b8aa94e7237a/1/doc/17-3234_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/386a2188-e36b-4b08-8257-b8aa94e7237a/1/hilite/

USA v Bolin, 9/24/20 – **SUPERVISED RELEASE / FIRST AMENDMENT**
The defendant appealed from supervised release provisions issued by District Court–WDNY upon his conviction of making materially false statements to FBI agents. The Second Circuit vacated and remanded in part. A defendant does not surrender all constitutional rights when he enters prison or exits on supervised release. A condition prohibiting the defendant from the online posting of statements promoting or endorsing violence infringed on his First Amendment right to free speech, because it was too broad and vague. Based on the underlying crime, relevant violence would be against persons

because of their membership in a certain social group or their race. The trial court was directed to appropriately revise the provision and resentence the defendant.
https://www.ca2.uscourts.gov/decisions/isysquery/bcc693e1-a537-4d85-aba9-6b0331904cb1/1/doc/19-2119_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/bcc693e1-a537-4d85-aba9-6b0331904cb1/1/hilite/

USA v Rich, 9/24/20 – **SUPERVISED RELEASE / FAMILIAL RELATIONSHIP**
The defendant appealed from a judgment of conviction, entered in District Court–VT, following his plea of guilty to drug and firearms charges. The Second Circuit vacated the judgment as to challenged conditions of supervised release and remanded in part. A communications condition would bar him from speaking to his brother, a convicted felon. The trial court did not make the required thorough and specific findings to justify such a prohibition, which implicated a protected familial relationship and liberty interest.
https://www.ca2.uscourts.gov/decisions/isysquery/bcc693e1-a537-4d85-aba9-6b0331904cb1/4/doc/18-3569_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/bcc693e1-a537-4d85-aba9-6b0331904cb1/4/hilite/