CRIMINAL

THIRD DEPARTMENT

People v Smith, 10/1/20 – **PLEA / NOT COERCED**
The defendant appealed from a Washington County Court judgment, convicting him of attempted 1st degree promoting prison contraband. The Third Department affirmed, rejecting the contention that the plea was involuntary because the defendant felt pressured to accept the offer. The issue was unpreserved by a post-allocution motion, and the narrow preservation exception did not apply: no statements made by the defendant during the colloquy negated an element of the crime, were inconsistent with guilt, or otherwise called voluntariness into question. In any event, the purported pressure was just the situational coercion faced by many defendants offered a plea deal. The defendant also asserted that County Court failed to advise him of his right to call witnesses. But counsel provided a list of persons the defendant intended to call if he went to trial.
http://nycourts.gov/reporter/3dseries/2020/2020_05258.htm

People v October, 10/1/20 – **VOP / AFFIRMED**
The defendant appealed from a Broome County Court judgment, which revoked probation and imposed a term of imprisonment. The Third Department affirmed. A VOP proceeding is summary in nature. Probation may be revoked if the defendant had an opportunity to be heard, and the court determined by a preponderance of the evidence that a condition was violated. A police officer's testimony established that the defendant possessed illicit drugs.
http://nycourts.gov/reporter/3dseries/2020/2020_05259.htm

FOURTH DEPARTMENT

People v Hernandez, 10/2/20 – **SUPPRESSION / NO REASONABLE SUSPICION**
The defendant appealed from a judgment of Onondaga County Supreme Court, which convicted him, upon a nonjury verdict, of 3rd degree criminal sale of a controlled substance and 3rd degree criminal possession of a controlled substance. The Fourth Department reversed and ordered a new trial. County Court erred in declining to suppress the defendant's statements made to police at the scene of his initial detention, and the cocaine seized as a result of those statements. The police lacked reasonable suspicion to detain the defendant. An officer—who was conducting surveillance at the parking lot of a shopping plaza known for drug transactions—saw the defendant approach a car in a remote part of the lot, but could not see any hand-to-hand transaction. Police stopped the defendant, handcuffed him, and questioned him. Such detention was an illicit de facto arrest. There was no testimony that the officer who handcuffed the defendant reasonably suspected that he was in danger of physical injury. A reasonable person, innocent of crime, would have thought that he was under arrest. Hiscock Legal Aid Society (J. Scott Porter, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05321.htm

People v Walls, 10/2/20 – **DISSENT / NO REASONABLE SUSPICION**
The defendant appealed from a Monroe County Supreme Court judgment, convicting him of 2nd degree CPW, upon a jury verdict. The Fourth Department affirmed, but the presiding justice dissented, opining that the police lacked the requisite reasonable suspicion of criminal activity to stop the vehicle in which the defendant was an occupant. An officer testified that he received a dispatch call regarding someone dressed in dark clothing getting into a van with a specified license plate and an occupant with a long gun. The contents of the 911 call that prompted the dispatch were not entered into evidence, and the People offered no proof to establish the basis of the caller's knowledge. Thus, the tip lacked sufficient indicia of reliability; the weapon should have been suppressed; and the indictment, dismissed.
http://nycourts.gov/reporter/3dseries/2020/2020_05337.htm

People v Mirabella, 10/2/20 – **CPL 440.10 / HEARING**
The defendant appealed from a Supreme Court order, which summarily denied his CPL 440.10 motion to vacate a judgment convicting him of 1st degree sexual abuse. The Fourth Department reversed and remitted. The trial court erred in denying the motion without a hearing with respect to whether defense counsel fulfilled his duty of advising the defendant that the decision to testify was ultimately his to make, not defense counsel's. The defendant made a proper showing for a hearing by asserting a viable legal basis for the motion, substantiated by his own unrefuted sworn allegations and other evidentiary submissions. The Monroe County Public Defender (Charles Steinman, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05388.htm

People v Harlee, 10/2/20 – **WAIVER OF APPEAL / INVALID**
The defendant appealed from a Wayne County Court judgment, convicting him of murder. The Fourth Department affirmed, but found unenforceable the purported waiver of the right to appeal. The written waiver and oral colloquy grossly mischaracterized the true nature of the waiver in referring to an absolute bar to a direct appeal, the loss of the right to assignment of counsel, and the forfeiture of the right to submit a brief or argue any issues as to the conviction or sentence.
http://nycourts.gov/reporter/3dseries/2020/2020_05386.htm

People v Carpenter, 10/2/20 – **BIASED JURORS / PEREMPTORIES**
The defendant appealed from a Genesee County Court judgment, convicting him of 2nd degree assault. The Fourth Department affirmed, rejecting the defendant's contention that the trial court should have excluded two prospective jurors who exhibited actual bias and another who had an implied bias. Even if the court erred in not acting sua sponte, the error did not require reversal, because the defendant did not peremptorily challenge the prospective jurors and did not exhaust his peremptory challenges. Further, the record did not establish that counsel lacked a legitimate strategy in not challenging the jurors.
http://nycourts.gov/reporter/3dseries/2020/2020_05355.htm

FAMILY

FOURTH DEPARTMENT

Hendershot v Hendershot, 10/2/20 – **VISITATION / EXPANDED**
In a post-divorce proceeding, the father appealed from an order of Ontario County Supreme Court, granting expanded visitation to the mother. The trial court failed to make the requisite determination of a change of circumstances, but the record supported such a finding based on the relocation of both parties. The father now attended college, lived in Ithaca (not Canandaigua) during the week, when the paternal grandmother cared for the children. Moreover, the mother had moved from Albany to Canandaigua. The desires of the 12- and 14-year-old children, to spend more time with the mother, were also relevant. The mere fact that the AFC drafted the schedule adopted by the court was of no moment.
http://nycourts.gov/reporter/3dseries/2020/2020_05384.htm

Matter of Marianys I. (Gabrielle I.), 10/2/20 – **DEFAULT / NO EXCUSE**
The mother appealed from an Erie County Family Court order denying her motion to vacate default orders terminating her parental rights on the ground of abandonment. A court may vacate a default judgment if there is a reasonable excuse and a meritorious defense. Even if the mother had a valid excuse for not answering the TPR petitions or appearing on the return date, she did not demonstrate a viable defense, where she did not dispute that she failed to visit or contact the children during the six-month period right before the filing of the petitions.
http://nycourts.gov/reporter/3dseries/2020/2020_05366.htm