CRIMINAL

FIRST DEPARTMENT

People v Correa, 10/1/19 – **DRUG SALE / AGAINST WEIGHT**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree criminal sale of a controlled substance. The First Department reversed and dismissed the indictment, finding the verdict against the weight of evidence. Two police officers testified that they observed the defendant, in a drug-trafficking area, approach and talk to another man, who gave the defendant money. There was allegedly an exchange, but the officers did not see what was exchanged. Shortly thereafter, one officer saw a woman approach the defendant, speak to him, and touch his hand. But the officer did not observe any exchange of money or drugs. After the defendant and the woman separated, the officer approached the woman and heard her chewing on something—a bag containing $10 worth of crack cocaine. The officer did not see the woman even bring her hand to her mouth. The defendant did not have any drugs on him, but had $10 in one pocket and cash in other denominations in another pocket. The appellate court concluded that the People did not prove that the defendant sold cocaine to the woman. There was no observation of an exchange or the woman putting the bag in her mouth. The People's theory, that the defendant sold two $10 bags, one to the man and the other to the woman, was inconsistent with the cash found on his person. The Center for Appellate Litigation (Ben Schatz and Maria Ortiz, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07017.htm

SECOND DEPARTMENT

People v Santiago, 10/1/19 – **PEOPLE'S APPEAL / SUPPRESSION UPHELD**
The People appealed from a Queens County Supreme Court order, which suppressed physical evidence and statements as to two defendants. The Second Department affirmed. In 2014, at the apartment of his aunt and his cousin (defendant Santiago), defendant Soto was apprehended by NJ parole officers for parole violations. While conducting a protective sweep of the apartment, the officers found Santiago in a bedroom and what they suspected to be heroin in a closet. They notified NYPD, and officers responded promptly. Soto, who was not *Mirandized*, admitted that a safe in the bedroom was his and contained two guns. He signed a consent form and opened the safe, where the officers found the weapons and ammunition. The defendants were charged with weapons and drug possession crimes. While Soto failed to establish that he had a reasonable expectation of privacy in the apartment, he had standing to challenge the search of his locked safe. A parolee possesses constitutional rights against unreasonable searches and seizures, albeit with a reduced expectation of privacy. Although Soto had consented to searches by NJ parole officers as a condition of parole, it was NYPD officers who searched the safe. The People could not rely on such consent to justify the search. Further, since the NYPD officers failed to *Mirandize* Soto, his statements and consent were not voluntary. The People offered no argument as to why the warrantless search was proper as to Santiago.
http://nycourts.gov/reporter/3dseries/2019/2019_07099.htm

People v Yegutkin, 10/2/19 – **REBUTTAL PROOF / PROPER**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 72 sexual offenses. The Second Department modified the judgment by vacating the convictions of 3rd degree sexual abuse under five counts of the indictment. His challenge to the legal sufficiency under those counts was unpreserved for appellate review, but in the interests of justice, the appellate court found the proof legally insufficient. As to other counts, the trial court properly permitted the prosecutor to introduce rebuttal testimony from a male witness, who stated that the defendant had previously propositioned him to engage in sexual conduct with him. The evidence was highly probative to counter defense testimony that, because of his religious beliefs and life as an observant Jewish person, the defendant would not have engaged in homosexual or masturbatory acts. Richard Mischel represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07102.htm

People v Delano F., 10/2/19 –
NO APPEAL / "NOT RESPONSIBLE" PLEA WITHDRAWAL DENIAL
The defendant appealed from an order of Suffolk County Supreme Court, which denied his CPL 220.60 (3) motion to withdraw his plea of not responsible by reason of mental disease or defect as to two counts of 3rd degree arson. The Second Department dismissed the appeal. The plea court found that the defendant suffered from a dangerous mental disorder and committed him to the custody of the Commissioner of Mental Health. Then the defendant made the plea withdrawal motion, which was denied. Unless authorized by the CPL, no appeal lies from an order arising out of a criminal proceeding. Appellate review is available where the defendant pleaded guilty—as opposed to "not responsible"—then a motion to withdraw that plea was denied, the defendant was sentenced, and an appeal was taken from the judgment the conviction. However, in the instant scenario, there was no authority for an appeal from denial of the plea withdrawal application. No avenue for appeal was created when the Legislature amended CPL 220.60 to permit motions to withdraw "not responsible" pleas.
http://nycourts.gov/reporter/3dseries/2019/2019_07089.htm

THIRD DEPARTMENT

People v Waldron, 10/3/19 – **ENHANCED RESTITUTION / REMITTAL**
The defendant appealed from a judgment of Franklin County Court, convicting him of 2nd degree burglary and other crimes. He pleaded guilty with the understanding that he would be required to pay $4,100 in restitution. At sentencing, the People requested an additional $500 in restitution to reimburse the victims for the insurance deductible paid. On appeal, the defendant contended that County Court erred in imposing the enhanced restitution without giving him an opportunity to withdraw his guilty plea. The issue was unpreserved, but the Third Department vacated the restitution award in the interest of justice and remitted. A sentencing court may not impose a more severe sentence than one bargained for, without giving the defendant an opportunity to withdraw his or her plea. Two justices dissented, for three reasons. (1) The increase in the amount was small; (2) the defendant failed to object at sentencing; and (3) this was not the type of "rare and unusual case that cries out for fundamental justice beyond the confines of conventional considerations" so

as to warrant the exercise of interest-of-justice jurisdiction. Lisa Burgess represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07116.htm

FOURTH DEPARTMENT

People v Dibble, 10/4/19 – **ATTEMPTED MENACING OFFICER / NO SUCH CRIME**
The defendant appealed from a judgment of Ontario County, convicting him upon a nonjury verdict of attempted menacing a police officer or peace officer and other crimes. The Fourth Department reversed and dismissed the attempted menacing conviction, because that was not a legally cognizable crime. Penal Law § 120.18 provides that a "person is guilty of menacing a police officer or peace officer when he or she intentionally places **or attempts to place** a police officer... in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon...pistol...or other firearm, whether operable or not, where such officer was in the course of performing his or her official duties and the defendant knew or reasonably should have known that such victim was a police officer [emphasis added]." Thus, an attempt is already an element of the offense, and there cannot be an attempt to commit a crime which is itself a mere attempt to accomplish a result. Although the defendant failed to raise the issue at trial, preservation was not required for the mode of proceedings error. Linda Campbell represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07165.htm

People v Kniffin, 10/4/19 – **DUPLICITOUS COUNT / REVERSED**
The defendant appealed from a County Court judgment, convicting him of 4th degree criminal mischief. The Fourth Department reversed. The single-count indictment was rendered duplicitous by the trial evidence. CPL 300.20 (1) provides that "each count of an indictment may charge one offense only. So acts which separately and individually make out distinct crimes must be charged in separate and distinct counts. Here, the indictment properly charged the defendant with damaging the road surface at a specified intersection. At trial, however, the evidence established that he committed two distinct offenses by damaging two different portions of the road at that intersection at two different times. Therefore, the jury may have convicted the defendant of an unindicted act of criminal mischief, resulting in the usurpation by the prosecutor of the exclusive power of the grand jury to determine the charges, as well as the danger that different jurors convicted the defendant based on different acts. The appellate court dismissed the indictment without prejudice to the People to file any appropriate charges. The Ontario County Public Defender (Gary Muldoon, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07176.htm

People v Weber, 10/4/19 – **SORA / REVERSED**
The defendant appealed from a County Court order, which determined that he was a level-three risk. The Fourth Department reversed. The SORA County Court erred in assessing 10 points, under risk factor 1, for the use of forcible compulsion. The defendant pleaded guilty to 1st degree criminal sexual act under a subdivision that did not require evidence of forcible compulsion. When the 10 points were subtracted, the defendant was a presumptive level two. However, because an upward departure might be warranted, the matter was

remitted to County Court. The Monroe County Public Defender (David Juergens, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07197.htm

People v Morris, 10/4/19 – **NO DECISION / NOT DENIAL**
The defendant appealed from a judgment of Onondaga County Court, convicting him of attempted 1st degree murder and 1st degree assault. The Fourth Department reserved and remitted. The defendant contended that County Court erred in failing to grant that part of his post-plea pro se motion that sought substitution of counsel. However, there was no indication that the court ruled on that part of the motion. Upon an appeal from a criminal judgment or order, the intermediate appellate court may determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant. CPL 470.15 (1). The Court of Appeals has construed such provision to preclude review of issues decided in the appellant's favor or not ruled on by the trial court. *See People v LaFontaine*, 92 NY2d 470.
http://nycourts.gov/reporter/3dseries/2019/2019_07201.htm

People v Valerio, 10/4/19 – **440 MOTION / GRANTED**
The defendant appealed from an Onondaga County Court order, which summarily denied his CPL 440.10 motion to vacate a judgment of conviction of 2nd degree criminal possession of a controlled substance. The Fourth Department reversed, granted the motion, and remitted. The defendant pleaded guilty in exchange for a determinate sentence to run concurrently with a sentence imposed on a prior unrelated conviction in Massachusetts. During the plea colloquy, Supreme Court assured the defendant that, due to such concurrency, he would have to serve no more than 1½ years of additional prison time for the NY crime. Four years later, the defendant's Massachusetts term was reduced in exchange for his cooperation in an unsolved homicide. Thus, it became impossible to fulfill the NY court's promise. Generally, when a guilty plea has been induced by an unfulfilled promise, the plea must be vacated or the promise honored. Hiscock Legal Aid Society (Nathaniel Riley, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07192.htm

People v Turner, 10/4/19 –
NO TRAFFIC VIOLATION / BUT REASONABLE BELIEF
The defendant appealed from a judgment, convicting him upon his plea of guilty of 2nd degree CPW. The Fourth Department rejected his contention that Erie County Court erred in refusing to suppress evidence obtained as a result of a traffic stop. Hearing testimony established that a patrol officer stopped the vehicle in which the defendant was a passenger after observing it make a left turn from a two-way road into the right-most of three lanes in the intersecting road. The officer said that he believed that the vehicle was required to complete the turn in the lane closest to the center line. That was incorrect. Vehicle & Traffic Law § 1160 (b) does not specify how close to the center line a vehicle must be when it completes a left turn, nor does it designate a specific lane within which the vehicle must complete the turn. However, suppression was not required because the stop was the result of an objectively reasonable belief. An officer's misreading of a statute susceptible of multiple interpretations may amount to a reasonable mistake justifying a stop. The

ambiguity in the subject provision had not previously been definitively construed by a NY appellate court.
http://nycourts.gov/reporter/3dseries/2019/2019_07190.htm

FAMILY

FIRST DEPARTMENT

Arthur v Galletti, 10/1/19 –
RELOCATION TO ITALY / NO AUTOMATIC RETURN TO NY
The parents took cross appeals from a NY County Supreme Court order, which awarded the father custody of the children and permission to relocate to Lodi, Italy. The First Department modified by vacating a directive that the children relocate to NY when the youngest child reached age eight. The children's best interests would be served by custody in the father, who acted as their primary caregiver, while the mother often absented herself from home. Allowing relocation was also sound. Since this was an original custody order, the *Tropea* factors did not govern, and relocation was merely one factor to weigh. The children had spent much of their childhood in Lodi, where they attended school and were surrounded by the father's family. However, the provision about a return to NY was improper. The disruption was not warranted; and prior decisions observed that custody orders should not alter an arrangement automatically upon the happening of a specified future event, without considering best interests at that time. *See e.g. Matter of Eason v Bowick*, 165 AD3d 1592. Bruce Wagner represented the father.
http://nycourts.gov/reporter/3dseries/2019/2019_07020.htm

Jonathan R.F.-C., 10/1/19 – **DERIVATIVE NEGLECT / AFFIRMED**
The father appealed from a Bronx County Family Court order of disposition, which brought up for review an order granting the petitioner agency's motion for summary judgment on the issue of his derivative abuse of the subject child. The First Department affirmed. The father failed to raise an issue of fact in opposition to the prima facie showing of derivative abuse. Following a trial, he was convicted of raping the child's then seven-year-old half-sister. The fact that the subject child had not been born at the time of the crime did not undermine the finding of derivative neglect, since the father's actions showed defective parental judgment and impulse control that created a substantial risk of harm to any child in his care. Further, the presumption in favor of parental visitation was rebutted. The now five-year-old child had never met the father, who continued to deny his guilt and failed to complete sex offender treatment. While the father suggested that visitation could be facilitated by the paternal grandmother, she was a complete stranger to the child. The record also supported Family Court's issuance of an order of protection.
http://nycourts.gov/reporter/3dseries/2019/2019_07025.htm

Lenora D. v Richard J.R., 10/3/19 – **GRANDPARENT / CUSTODY GRANT**
The mother appealed from a Bronx County Family Court order, which granted the grandmother's petition for sole custody of the child with visitation to the father. The First Department affirmed. The grandmother demonstrated extraordinary circumstances to

establish her standing to seek custody of the child after the mother died unexpectedly. For years before the mother's death, she and the child lived in the grandmother's household, and both women provided for the child's financial and other needs. In contrast, the father resided with the child for only two years after birth, until the mother moved out with the child. Thereafter, he saw the child sporadically and provided minimal financial support. The record also supported the finding that it was in the child's best interests to be in the custody of the grandmother, who had provided a stable and loving home and with whom the child was fully bonded.
http://nycourts.gov/reporter/3dseries/2019/2019_07143.htm

SECOND DEPARTMENT

Matter of David v LoPresti, 10/2/19 – **10-YR-OLD / PREFERENCE UNKNOWN**
The mother appealed from an order of Queens County Family Court, which denied her custody modification petition, seeking permission to temporarily relocate with the parties' child, and awarded physical custody to the father. The Second Department reversed and remitted. The record was insufficient to determine whether relocation was proper. The AFC failed to fulfill the duty to advise the Family Court of, much less advocate for, the position of the then 10-year-old child. Further, despite not being made aware of the child's position through counsel, the court did not meet in camera with the child. Denial of the petition without ascertaining the child's preference was unsound, where the mother had been the primary caregiver since birth, and relocation would only be temporary. In addition, the mother was improperly prevented by the Court Attorney Referee from presenting evidence regarding her reasons for the move and the impact it would have on the child. Family Court further erred in awarding the father permanent custody, given that the mother sought only temporary relief, and he withdrew his cross petition for custody. In light of intemperate remarks made by the Referee, a different Referee was needed for the de novo hearing.
http://nycourts.gov/reporter/3dseries/2019/2019_07066.htm

FOURTH DEPARTMENT

Matter of Smith v Ballam, 10/4/19 – **MOOTNESS EXCEPTION / ODD USE**
The grandmother appealed from an order of Steuben County Family Court, which denied her visitation application and granted custody to the mother. The Fourth Department affirmed. Initially, the appellate court noted that, while the appeal was pending, Family Court granted the grandmother's subsequent petition seeking visitation, and the mother moved to dismiss the appeal as moot insofar as it addressed visitation. Without explanation, the majority concluded that the exception to the mootness doctrine (*Hearst v Clyne*, 50 NY2d 707) applied, reached the merits, and affirmed the challenged order. The grandmother failed to establish extraordinary circumstances; and when the order was entered, it was in the best interests of the subject child to deny her visitation. One justice dissented. Where a party submits new information that a challenged order of visitation has been superseded, the appeal is rendered moot, and the exception does not apply, as many cases have held. The majority provided no explanation regarding why this case was different, and their approach created a confusing incongruence in the relevant

jurisprudence. Further, no aspect of the rationale underlying the exception to the mootness doctrine was implicated.
http://nycourts.gov/reporter/3dseries/2019/2019_07170.htm

Cynthia Feathers, Esq.
ILS | NYS Office of Indigent Legal Services
Director, Quality Enhancement for Appellate
And Post-Conviction Representation
80 S. Swan St., Suite 1147, Albany, NY 12210
(518) 949-6131 | Cynthia.Feathers@ils.ny.gov