CRIMINAL

FIRST DEPARTMENT

People v Flanders, 10/8/20 – **FORGED INSTRUMENT / SECURITY GUARDS**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree criminal possession of a forged instrument. The First Department remanded and held the appeal in abeyance. The defendant was entitled to a hearing on the factual issue of whether the store security guards involved in his detention were licensed to exercise police powers or were acting as agents of the police. *See People v Mendoza*, 82 NY2d 415. Legal Aid Society of NYC (Harold Ferguson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05600.htm

People v Aleman, 10/8/20 – **SORA / SUBSTANCE ABUSE**
The defendant appealed from an order of Bronx County Supreme Court, adjudicating him to be a level-three predicate sex offender. The First Department affirmed, but did find that the defendant should not have scored 15 points for the risk factor of a history of drug of alcohol abuse. The People failed to prove the factor by clear and convincing evidence, given the absence of any reliable evidence of the defendant's use of drugs or alcohol at the time of the offense, and in light of insufficient evidence that he engaged in substance abuse repeatedly in the past. However, independent of any point assessments, the defendant automatically qualified as a level-three offender, based on a prior NJ felony sex crime conviction.
http://nycourts.gov/reporter/3dseries/2020/2020_05597.htm

People v Johnson, 10/6/20 – **PREDICATE / EQUIVALENT**
The defendant appealed from a NY County Supreme Court judgment, convicting him of a drug sale offense upon his guilty plea, and sentencing him as a second felony drug offender previously convicted of a violent felony; and from an order denying his CPL 440.20 motion. The First Department affirmed. The defendant did not affirmatively waive the predicate sentencing issue preserved by his 440.20 motion. However, his Maryland murder conviction was the equivalent of a NY felony. MD's statute encompassed four types of 2nd degree murder, and one was akin to NY intentional murder.
http://nycourts.gov/reporter/3dseries/2020/2020_05458.htm

People v Jackson, 10/6/20 – **PREDICATE / UNASSAILABLE**
The defendant appealed from a judgment of NY County Supreme Court, convicting him after a jury trial of attempted 1st and 2nd degree assault and other crimes and sentencing him as a persistent violent felony offender. The First Department affirmed. Supreme Court correctly ruled that the defendant was foreclosed from contesting the constitutionality of a 1992 conviction, which had been relied upon in 2004 in adjudicating him as a second felony offender. The defendant's claim of IAC in 2004 was unreviewable; the record did not reveal counsel's reason for not attacking the 1992 conviction.
http://nycourts.gov/reporter/3dseries/2020/2020_05461.htm

SECOND DEPARTMENT

People v Casares, 10/7/20 – **CO-D'S ADMISSION / NEW TRIAL**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree manslaughter and other crimes. The Second Department reversed and ordered a new trial. The admission of a codefendant's redacted statement to the police violated *Bruton v U.S.* (391 US 123), because the redaction would have revealed that the confession referred to the defendant. The error was not harmless. The statement was inconsistent with the defendant's justification defense, and the court failed to instruct the jurors to consider the statement only against the confessing codefendant. Randall Unger represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05520.htm

People v Kassebaum, 10/7/20 – **SEX ABUSE / AGAINST WEIGHT**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st and 3rd degree sexual abuse and criminal obstruction of breathing or blood circulation. The Second Department reversed and dismissed the indictment. The evidence was not legally sufficient to support the conviction of 3rd degree sexual abuse. The video recording of the incident did not establish that the contact between the defendant and the complainant was sexual; and the ambiguity was not clarified by the complainant's testimony. Further, the other convictions were against the weight of the evidence. The descriptions of the assailant by the complainant and two detectives varied greatly and were inconsistent with the defendant's appearance, and the complainant was not asked to make an in-court identification. Appellate Advocates (Kendra Hutchinson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05529.htm

People v Tactikos, 10/7/20 – **NO PHYSICAL INJURY / REDUCED**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree robbery and 2nd degree assault. The Second Department reduced both convictions to 3rd degree offenses, because the weight of evidence did not support a finding of physical injury. After the incident, the victim had an indentation on her wrist where a cord had been tied, her wrist was sore, and she had a red mark on her neck. She was numb, not experiencing pain. The victim, who declined to go to the hospital, also had difficulty swallowing and had a sore throat for a couple of days. Such proof did not establish that she suffered an impairment of a physical condition or substantial pain. Appellate Advocates (Anders Nelson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05535.htm

People v Sylvester, 10/7/20 – **STATEMENT / SUPPRESSION**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree assault and other crimes. The Second Department affirmed, but faulted the trial court for not suppressing an un-*Mirandized* statement made by the defendant to a police officer. The officer's utterances—"What happened?" and "I need to hear both sides of the story. Tell me what happened"—were interrogative. Further, the handcuffed defendant was in police custody when he made the statement; a reasonable, innocent person

would not have believed that he was free to leave. However, reversal was not required; proof of guilt was overwhelming.
http://nycourts.gov/reporter/3dseries/2020/2020_05534.htm

People v Singh, 10/6/20 – **PROTECTIVE ORDER / MODIFIED**
Pursuant to CPL 245.70 (6), the People sought to vacate or modify a protective order issued by Rockland County Court. A Second Department justice partially granted the order, deleting a provision allowing the People to withhold the name of a confidential information until 15 days before a pretrial hearing or trial and substituting a provision, stating that: (1) disclosure of audio and video records would be made to defense counsel only, to be viewed at the prosecutor's office; and (2) the disclosure of the name and contact information of the CI, as well as of names and work affiliation of undercover personnel, would be delayed until commencement of trial. Contrary to County Court's determination, the discovery statute permitted the People to withhold and redact, without a motion, the aforementioned names, contact information, and work affiliation. The People should have sought a protective order only regarding mandatory discovery material, and should have provided detailed facts as to good cause, rather than having to clarify the matter at the hearing.
http://nycourts.gov/reporter/3dseries/2020/2020_05479.htm

People v Harrigan, 10/8/20 – **PROTECTIVE ORDER / MODIFIED**
Pursuant to CPL 245.70 (6), the People sought to vacate or modify a protective order issued by Kings County Court. Citing concerns for witness safety, a Second Department justice partially granted the order. The disclosure of the names of three of the complainants would not be immediate and would instead be delayed until the commencement of trial; the disclosure of the names of those complainants' parents would be delayed until 15 days prior to trial; and both sets of names would be provided only to defense counsel.
http://nycourts.gov/reporter/3dseries/2020/2020_05612.htm

FOURTH DEPARTMENT

People v Ruvalcaba, 10/2/20 – **PEOPLE'S APPEAL / STRANGULATION**
The People appealed from a Monroe County Court order, which granted the defendant's motion insofar as it sought to reduce one count of the indictment from 2nd degree strangulation to criminal obstruction of breathing or blood circulation. The Fourth Department reversed. The trial court determined that the People's theory was that the defendant caused the victim's "stupor" and that, because that term was not defined for the grand jury, the proceeding was defective. That was error. First, a grand jury need not be instructed with the same precision as a petit jury. The prosecutor must merely provide enough information so that the jury can decide if a crime was committed and if legally sufficient evidence established the material elements. The grand jury was capable of applying the natural, obvious meaning of "stupor"—which is not defined in the Penal Law. Second, the evidence was legally sufficient. The defendant's girlfriend testified that he choked her until she could barely breathe and was starting to lose consciousness. She fell to the ground and gasped for air. For days, she was in pain; and she had bruises on her forehead, cheek, and arm. Third, the People did not limit their case to the "stupor" theory,

as stated by County Court. Instead, the bill of particulars indicated that the crime could also be based on the defendant having caused "any other physical injury or impairment."
http://nycourts.gov/reporter/3dseries/2020/2020_05354.htm

SECOND CIRCUIT

Trump v Vance, 10/7/20 – **GRAND JURY SUBPOENA / NOT OVERBROAD**
The President appealed from a District Court–SDNY judgment, granting a motion to dismiss by the NY County District Attorney, based on the failure to state a viable claim. The Second Circuit affirmed. The President had challenged a NY grand jury subpoena by filing this federal complaint. The subpoena sought tax returns and other financial documents dating back to 2011. The appellate court was mindful not to proceed against the President as against an ordinary individual and to be particularly meticulous. However, his complaint did not plausibly allege that the grand jury investigation was limited only to the Michael Cohen payments; and the subpoena was not overly broad. Perhaps it was broad, but grand juries had to paint with a broad brush. Further, none of the President's allegations raised a plausible inference that the subpoena was issued out of malice or an intent to harass. The motivations of unspecified Democrats could not be imputed to the District Attorney. An interim stay of enforcement, under terms agreed to by the parties, was ordered.
https://www.ca2.uscourts.gov/decisions/isysquery/17a14039-551c-4a23-b5a7-d75eec8e8298/2/doc/20-2766_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/17a14039-551c-4a23-b5a7-d75eec8e8298/2/hilite/

Hayes v Dahlke, 10/5/20 – § **1983 ACTION / ABUSIVE CO**
The plaintiff appealed from a District Court–NDNY order granting summary judgment to the defendants. The Second Circuit reversed in part. In this 42 USC § 1983 action, the plaintiff alleged that Coxsackie prison personnel violated his First and Eighth Amendment rights when he was sexually molested during a search and then subjected to retaliation for filing grievances. In a matter of first impression under the Prison Litigation Reform Act, the appellate court held that the plaintiff exhausted all administrative remedies when he followed the prison's inmate grievance procedures, and the Central Office Review Committee failed to respond to his appeal within the mandatory 30-day timeline prescribed by regulations. Triable issues existed as to the Eighth Amendment claim based an allegedly the invasive search by one named officer, and as to a First Amendment claim involving the filing of a retaliatory, false misbehavior report.
https://www.ca2.uscourts.gov/decisions/isysquery/635e3280-f08a-4153-83d0-042b8139f827/1/doc/19-650_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/635e3280-f08a-4153-83d0-042b8139f827/1/hilite/

FAMILY

FIRST DEPARTMENT

M/O Derek G. v Alice M., 10/8/20 – **INMATE / NO VISITATION**
The father appealed from an order of Bronx County Family Court, which dismissed his petition for visitation. The First Department affirmed. Visitation would be detrimental to the child. *See Matter of Granger v Misercola*, 21 NY3d 86. The father had been incarcerated for the attempted murder of the mother since 2014; and the child, who was eight at the time of the hearing, had not seen the father since she was 20 months old. Further, there was no viable option for facilitating visits, where the mother had an order of protection against the father and was justifiably afraid of him, and the father's aunt was unable to play that role.
http://nycourts.gov/reporter/3dseries/2020/2020_05576.htm

M/O Anais G. (Lionell M.), 10/6/20 – **NEGLECT / PHYSICAL ABUSE**
The father appealed from that part of a dispositional order of NY County Family Court which found neglect. The First Department affirmed. The respondent should have known that the mother was abusing the child. Since he often saw the same type of bruise on the child, he should not have accepted the mother's story about accidental injuries. Further, the father admitted that he did not know where the child and mother lived nor who cared for the child when the mother could not.
http://nycourts.gov/reporter/3dseries/2020/2020_05452.htm

M/O A.M.A. (Anggeluz A.), 10/8/20 – **NEGLECT / PHYSICAL ABUSE**
The mother appealed from that part of a dispositional order of NY County Family Court which found neglect. The First Department affirmed. The mother became enraged when the subject child showered late one night, struck her arm with a wooden pole, caused a fracture, and threatened to kill her. Another child, A.A., furtively recorded the event on a cell phone. A.A.'s out-of-court foundational statements, admitted through the testimony of a caseworker and police officer, were corroborated by the mother, who did not dispute the contents of the video.
http://nycourts.gov/reporter/3dseries/2020/2020_05570.htm

M/O McKayla T. J. (Faith J.J.), 10/6/20 – **TPR / PERMANENT NEGLECT**
The mother appealed from an order of Bronx County Family Court which terminated her parental rights based on permanent neglect. The First Department dismissed the appeal and granted assigned counsel's motion to withdraw. Counsel had properly advised the court that the case presented no viable issues, where: the notice of appeal was untimely; the order was entered on consent; and the appeal was moot, because the respondent's motion to vacate the default was granted. The mother failed to exercise her right to submit a pro se supplemental brief.
http://nycourts.gov/reporter/3dseries/2020/2020_05455.htm

M/O Annalisa G. (Tamara A.H.), 10/8/20 – **TPR / ABANDONMENT**
The mother appealed from an order of Bronx County Family Court, which terminated her parental rights based on abandonment. The First Department affirmed. The court properly drew the strongest negative inference from the mother's failure to call any witnesses or offer any rebuttal evidence at the fact-finding hearing. Her attorney's strategic decision not to call her to testify—made after investigating the facts and discussing the matter with the mother—was not a basis for finding ineffective assistance.
http://nycourts.gov/reporter/3dseries/2020/2020_05577.htm