CRIMINAL

FIRST DEPARTMENT

People v Whilby, 11/5/20 – **SEATBELT / CAUSATION**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of aggravated vehicular homicide and related crimes. The First Department affirmed. The trial court properly precluded the defendant from presenting expert testimony to establish that, if the victim had been wearing a seatbelt, he would have suffered minor injuries. A defendant's actions need not be the sole cause of death for criminal liability. The People need only prove that the defendant's actions were an actual contributory cause of death, that is, that they forged a link in the chain of causes that brought about the death and that the fatal result was reasonably foreseeable.
http://www.nycourts.gov/courts/ad1/calendar/List_Word/2020/11_Nov/05/PDF/People%20%20v%20%20Domonic%20Whilby%20(2019-5787).pdf

SECOND DEPARTMENT

DECISION OF THE WEEK

People ex rel. Tse v Barometre, 11/4/20 – **COVID / 8TH AMEND. / HABEAS CORPUS**
In this habeas corpus proceeding, the petitioner appealed from a judgment of Orange County Court, which refused to issue an order to show cause pursuant to CPLR 7003 (a). The Second Department reversed and remitted. The supporting petition alleged that named Otisville prison inmates were being imprisoned in violation of the Eighth Amendment. In light of certain conditions of individual inmates, as well as unalterable conditions of incarceration, there were allegedly no measures that could protect the inmates from a grave risk of serious illness or death posed by Covid-19; and the only remedy would be their immediate release. Such allegations were properly cognizable in a habeas corpus proceeding. Legal Aid Society of NYC (Antonio Villaamil, Hanna Gladstein, Dana Wolfe, and Tomoeh Murakami Tse, of counsel) represented the inmates. Numerous programs and individuals filed amici support.
http://nycourts.gov/reporter/3dseries/2020/2020_06280.htm

People v King, 11/4/20 – **UNLAWFUL IMPOUNDMENT / SUPPRESSION**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him, upon a jury verdict, of 2nd and 3rd degree CPW and operating a motor vehicle with tinted windows. The appeal brought up for review the denial of suppression. The Second Department vacated the CPW convictions and dismissed those counts. The arresting officer testified that the vehicle was legally parked. The People presented no proof of a history of burglary or vandalism in the area and thus did not show that impoundment served public safety or the police community-caretaking function. Further, the People did not offer proof about NYPD procedures and the officer's compliance with them. Due to the unlawful impoundment, the evidence yielded by the inventory search had to be suppressed. Courtney Smith and Leonard Ressler represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_06288.htm

People v Cabassa, 11/4/20 – **PREDICATE / NOT EQUIVALENT**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of promoting prostitution. In the interest of justice, the Second Department vacated his adjudication as a second felony offender. The defendant's federal conviction of unlawful possession of a firearm was not a predicate felony, since that crime did not require that the firearm be operable. Appellate Advocates (Anders Nelson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_06282.htm

People v Brocato, 11/4/20 – **SORA / DOWNWARD DEPARTURE**
The defendant appealed from an order of Westchester County Supreme Court, which designated him a level-two sex offender. The Second Department reversed and held that the defendant was level one. In cases of statutory rape, strict application of the Guidelines sometimes resulted in an overassessment of risk to public safety. Imposing 25 points under risk factor 2 was inappropriate. A downward departure was fair in light of three factors: this was the defendant's only sex-related crime; he accepted responsibility for the offense; and he was sentenced to only one year of probation. Bennet Goodman represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_06295.htm

THIRD DEPARTMENT

People v Carl, 11/5/20 – **DEFECTIVE PLEA / NO PRESERVATION**
The defendant appealed from a judgment of Warren County Court, convicting him of tampering with physical evidence and attempted 3rd degree robbery. The defendant contended that his guilty pleas were not knowing, voluntary, and intelligent—an argument that survived his appeal waiver. Although such a challenge was ordinarily required to be preserved by an appropriate post-allocution motion, the defendant could not file such an application, since the pleas and sentencing occurred in the same proceeding. Further, he could not have made a CPL 440.10 motion, because the alleged error was clear from the face of the record. However, on the merits, the plea was not defective. Thus, the challenge to the sentence as harsh and excessive was foreclosed.
http://nycourts.gov/reporter/3dseries/2020/2020_06314.htm

People v May, 11/5/20 – **ASSISTANCE / EFFECTIVE**
The defendant appealed from a judgment of Broome County Court, convicting him of predatory sexual assault against a child and a related crime. The record was silent as to why defense counsel did not retain an expert to rebut the testimony of the People's experts regarding, among other things, delayed disclosure of the sexual abuse. But such issue would be more appropriately raised in a CPL 440.10 motion. As to other critiques, appellate counsel overlooked a valid defense decision to avoid tangential battles that would distract the jury from the key issue of the victim's credibility. Counsel ably cross-examined the victim and the prosecution experts; made appropriate pretrial motions; and advanced a cogent, albeit unsuccessful, strategy.
http://nycourts.gov/reporter/3dseries/2020/2020_06316.htm

People v Davis, 11/5/20 – ***ANDERS* BRIEF / NEW COUNSEL**

The defendant appealed from a judgment of Columbia County Court, convicting him of 3rd and 7th degree criminal possession of a controlled substance. The Third Department granted appellate counsel's motion to withdraw, but assigned new counsel. The appeal brought up for review the denial, after a hearing, of a motion to suppress physical evidence. Following such order, the defendant pleaded guilty. Appellate counsel filed an *Anders* brief, asserting that no nonfrivolous issues could be raised on appeal. The appellate court disagreed. Issues of arguable merit included the propriety of the suppression ruling. *See* CPL 710.27 (2) (order finally denying motion to suppress evidence may be reviewed on an appeal from ensuing judgment of conviction, even if judgment was entered upon plea of guilty). New counsel was directed to address that issue and any others the record might disclose.
http://nycourts.gov/reporter/3dseries/2020/2020_06313.htm

SECOND CIRCUIT

USA v Cabral, 11/2/20 – **11 YEARS / SPEEDY TRIAL**

The defendant appealed from a District Court–SDNY judgment, convicting him of bank fraud. Under a conditional plea agreement, he preserved the right to appeal from the denial of his motion to dismiss. The Second Circuit affirmed the judgment, rejecting the argument that the delay between indictment and arrest denied the defendant's Sixth Amendment right to a speedy trial. Days after signing an admission of guilt in 2006, the defendant returned to his native Brazil. In 2007, he was indicted. Thereafter, he lawfully traveled to the U.S. seven times, but due to NCIC database errors, such trips were undetected until 2018, when he was arrested. The *Barker v Winger* (407 US 514) factor of lengthy delay was satisfied by the 11-year period, as was the factor for timely assertion of speedy trial rights. But other factors weighed against the claim. The defendant caused the delay by leaving the U.S. to avoid prosecution—no matter that law enforcement efforts to locate him were not exhaustive. Since the case was documented-based, there was no specific prejudice to the defense. The defendant's generalized claim of memory problems did not suffice.
https://www.ca2.uscourts.gov/decisions/isysquery/1d845ff2-b139-458a-b358-4f7db7ba67b4/1/doc/19-408_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/1d845ff2-b139-458a-b358-4f7db7ba67b4/1/hilite/

FAMILY

FIRST DEPARTMENT

M/O Kaeydan D.E.C. (Kevin C.), 11/5/20 – **DEFAULT / NO APPEAL**
The father appealed from that part of a dispositional order as found that he was guilty of permanent neglect. Since the order was entered on default, the First Department dismissed that appeal. The father also appealed from an order denying his motion to vacate the final order terminating his parental rights. The First Department affirmed. The father failed to demonstrate a reasonable excuse for the default; he provided no details or documents to support his claim that he was ill on the hearing date. Further, he did not assert a potentially meritorious defense, in that he presented no proof to show that he adequately planned for the children.
http://www.nycourts.gov/courts/ad1/calendar/List_Word/2020/11_Nov/05/PDF/C.,%20Nakeira%20%20v%20%20Kevin%20C.%20(2019-5909).pdf

M/O Edwin E.R. v Monique A.-O., 11/5/20 – **CUSTODY / GAPS IN PROOF**
The mother appealed from a Bronx County Family Court order, which awarded sole custody of the subject child to the father. The First Department reversed. The decision was based solely on an in camera interview with the 8-year-old child, who was inconsistent about how much time he spent with the grandmother. Courts should not use information from private interviews without checking on its reliability. The father's testimony could not serve as a reality check, since it was pure hearsay. Even though the mother's counsel failed to object, the court could not rely on the hearsay testimony. Further, the mother contradicted the father's testimony. In any event, the record was inadequate to determine best interests. The father presented no proof about where the child would go to school or about his work schedule. The court had a parens patriae duty to rule based on adequate proof. Elisa Barnes represented the mother.
http://www.nycourts.gov/courts/ad1/calendar/List_Word/2020/11_Nov/05/PDF/E.,%20Edwin%20v%20Monique%20A.O.%20(2020-00129).pdf

SECOND DEPARTMENT

M/O Gomez v Martinez, 11/4/20 – **CUSTODY / GAPS IN PROOF**
The mother and child appealed from an order of Queens County Family Court. The Second Department reversed. At a hearing on petitions by both parties, a forensic evaluator opined that custody should be with the mother. The court dismissed both petitions and discounted the forensic report. That was error. There were glaring gaps in the record. The forensic evaluator did not interview the mother's boyfriend; and the court did not have an in camera interview with the child, born in 2007. To protect the best interests of the child, there should be an updated forensic evaluation; in camera interview; further hearing; and new decision as to the mother's relocation petition. Jeffrey Bluth and Lewis Calderon represented the mother and child, respectively.
http://nycourts.gov/reporter/3dseries/2020/2020_06261.htm

M/O Freeborn v Elco, 11/4/20 – **NO WILLFUL VIOLATION / MORE ACCESS**
The mother appealed from orders of Suffolk County Family Court. The Second Department reversed the order of commitment and modified the order finding a willful violation of a prior custody order and providing for certain parental access by the mother. The father did not establish, by clear and convincing evidence, that the mother disobeyed the prior order by permitting certain cell phone contact by the child, since there was no proof that she was aware of the contact. The parental access schedule ordered failed to: (a) sufficiently consider the disruption that the schedule would cause to the child's relationship with her half-sister, who also lived with the mother, and (b) honor the 13-year-old child's wishes. Ronald Hariri represented the mother.
http://nycourts.gov/reporter/3dseries/2020/2020_06259.htm

M/O Chloe W. (Tara W.), 11/4/20 – **CONSENT / NO APPEAL**
The mother appealed from fact-finding and dispositional orders issued by Queens County Family Court in an Article 10 proceeding. The appeal from the fact-finding was dismissed as superseded by the order of disposition, but was brought up for review on the appeal from that final order. The Second Department dismissed so much of the final order as, upon the mother's consent, placed the child with the agency to reside in foster care until the completion of the next permanency hearing. No appeal lies from an order entered on the consent of the appellant. *See* CPLR 5511 (only an aggrieved party may appeal). The mother's contention that the oral allocution was defective was not properly before the appellate court. Her remedy was to move in Family Court to vacate that order. But the appeal from the consent order was academic, since it had expired by its own terms. The reviewing court upheld the finding that the mother had neglected the child.
http://nycourts.gov/reporter/3dseries/2020/2020_06276.htm

THIRD DEPARTMENT

M/O Adam O. v Tracie P., 11/5/20 – **CONSENT / NO APPEAL**
The mother appealed from an order regarding the parties' competing petitions seeking modification and enforcement of custody and visitation orders. The Third Department dismissed the appeal. Following the mother's testimony at a fact-finding hearing, the parties entered into an agreement on the record. Since the order was issued upon consent, it was not appealable. The challenged order did not differ from, or exceed, the terms of the agreement. To seek relief, the mother should have moved to vacate the order, asserting that her consent was not knowingly or voluntarily given.
http://nycourts.gov/reporter/3dseries/2020/2020_06318.htm