CRIMINAL

COURT OF APPEALS

People v Balkman, 11/19/20 – **STOP / NO REASONABLE SUSPICION**
The defendant appealed from an order of the Fourth Department, affirming a conviction of 2nd degree CPW, upon a plea of guilty. The Court of Appeals reversed in a unanimous opinion by Judge Feinman. While information generated by running a license-plate number through a government database may provide police with reasonable suspicion to stop a vehicle, the information's sufficiency to establish reasonable suspicion is not presumed. Thus, when police stop a vehicle based solely on such information and the defendant challenges its sufficiency, the People must present evidence of the content of the information. The People failed to present such proof here. Thus, the suppression court could not independently evaluate whether the officer had reasonable suspicion to make the stop. The Monroe County Public Defender (Janet Somes, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2020/2020_06838.htm

People v Pena, 11/19/20 – **MISTAKE OF LAW / OBJECTIVELY REASONABLE**
The People appealed from an order of the Appellate Term, First Department, affirming an order of Bronx Criminal Court, which granted the defendant's motion to suppress physical evidence and statements. In a memorandum decision, the Court of Appeals reversed. The sole issue was whether the officer's belief—that the defendant violated the VTL by operating a vehicle with a non-functioning center brake light—was objectively reasonable. The COA concluded that it was; Judge Feinman concurred; and Judge Wilson dissented, objecting that the plurality failed to state whether the officer's interpretation of the VTL was a mistake of law. The stop was not supported by probable cause because the legislature had not authorized the stop of a vehicle with two working brakes lights, one on each side, and the officer's error was not objectively reasonable. Judge Rivera joined in the dissent and wrote separately. An ambiguous law was not a justification to relax constitutional protections. Mistaken, unlawful stops should not be incentivized.
http://www.nycourts.gov/reporter/3dseries/2020/2020_06836.htm

FIRST DEPARTMENT

M/O State of NY v David S., 11/19/20 – **MHL ART. 10 / VERDICT SET ASIDE**
The respondent appealed from an order of Bronx County Supreme Court, which denied his CPLR 4404 motion to set aside the verdict adjudicating him a sex offender, suffering from a mental abnormality, who required civil management under MHL Article 10. The First Department reversed and ordered a new trial. Supreme Court erred in denying a requested supplemental jury instruction regarding anti-social personality disorder (ASPD). The trial court should not have relied on the PJI general jury charges; they are not dispositive. Where there is an ASPD diagnosis, the charge must state that ASPD, standing alone, cannot be used to support a finding that a respondent has a mental abnormality. *See Matter of State of NY v Donald DD.*, 24 NY3d 174. The error was not harmless, because there was a

reasonable possibility that the jury would have reached another verdict, if properly instructed. Mental Hygiene Legal Service (Alexandra Keeling, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_06876.htm

People v Lao, 11/17/20 – **CONSOLIDATION / 911 CALL**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of two counts of 2nd degree burglary. The First Department affirmed. The trial court properly consolidated two indictments charging separate burglaries. Evidence regarding the second burglary was admissible to prove the first. When arrested for the later crime, the defendant and his codefendant were wearing the same distinctive clothing as the persons in a surveillance videotape of the earlier crime. A 911 call by an eyewitness reporting the second burglary was properly admitted as a present sense impression. The caller described events immediately after they unfolded, the call was corroborated, and the caller testified to the same facts at trial.
http://nycourts.gov/reporter/3dseries/2020/2020_06721.htm

People v Wayman, 11/17/20 – **SUPPRESSION / COP CREDIBILITY**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him after a jury trial of 2nd degree CPW. The First Department affirmed. A motion to suppress the defendant's post-arrest statements to police was properly denied. After the People met their burden of coming forward, the defendant did not prove the illegality of his arrest. The hearing evidence established that a detective, who had ample probable cause for the arrest, issued an I-card (indicating that defendant was wanted for a crime); and the warrant squad arrested the defendant on that basis. In addition, reversal was not warranted based on the preclusion of the cross-examination of an officer about allegations of misconduct substantiated by the Civilian Complaint Review Board. Even if the allegations were relevant to credibility, the basis for cross-examination was too speculative.
http://nycourts.gov/reporter/3dseries/2020/2020_06720.htm

SECOND DEPARTMENT

People v Bravo, 11/18/20 – **LARCENY BY FALSE PROMISE / AGAINST WEIGHT**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 3rd degree grand larceny. The Second Department reversed and dismissed the indictment. The conviction was based on a theory of larceny by false promise. At trial, the complainant testified that she was unable to send large amounts of money to her family Peru and asked the defendant to assist her in doing so. Her family never received the funds, though. The complainant also testified that the defendant tried to correct an error in the name of the intended recipient of the transferred funds, but could not make the change over the phone, due to the policies of the money transfer agencies. The appellate court found that the verdict was against the weight of evidence; the proof did not establish that the defendant obtained the funds by a false representation and with the requisite intent. Appellate Advocates (David Goodwin, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_06804.htm

People v Flinn, 11/18/20 – **CPL 440.10 MOTION / IAC**
The defendant appealed from an order of Suffolk County Court, which summarily denied his CPL 440.10 motion to vacate a judgment, convicting him of 1st degree robbery (two counts). The Second Department reversed. The defendant's plea of guilty was predicated upon his display of what appeared to be a gun in the course of forcibly stealing property on two separate occasions. A presentence investigation report indicated that the defendant offered no explanation for the "imitation weapon" he carried during the crimes. The defendant asserted that he had received ineffective assistance since counsel did not advise him regarding a potential affirmative defense, i.e. that the object displayed was not a loaded weapon from which a shot—readily capable of producing death or other serious physical injury—could be discharged. The motion papers warranted a hearing on the issue of IAC. Matthew Muraskin represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_06809.htm

THIRD DEPARTMENT

People v Hall, 11/19/20 – **CPL 440.20 MOTION / CONSECUTIVE TERMS**
The defendant appealed from an order of Albany County Supreme Court, which denied his CPL 440.20 motion to set aside a sentence imposed on convictions of 2nd degree burglary and 4th degree criminal possession of stolen property. Although the record did not reflect that the defendant raised the legality of the consecutive sentences at, or prior to, sentencing, he did not waive the issue. The CPL 440.20 was a proper vehicle for such a challenge, where it was not previously decided upon appeal. However, the instant motion was properly denied, since consecutive sentences were lawful under Penal Law § 70.25.
http://nycourts.gov/reporter/3dseries/2020/2020_06825.htm

SECOND CIRCUIT

Lucente v County of Suffolk, 11/17/20 – **INMATE ABUSE / SUIT REVIVED**
In this 42 USC § 1983 action initiated by three female inmates at the Suffolk County Correctional Facility in connection with their sexual harassment/assault by a correction officer, the plaintiffs appealed from a District Court–EDNY judgment dismissing their claims. The Second Department vacated the dismissal as to two plaintiffs' claims against the county and individual defendants. There were material issues of fact as to whether facility supervisors acquiesced in the officer's pervasive pattern of egregious misconduct. Numerous complaints placed officials on notice, yet they failed to act.
https://www.ca2.uscourts.gov/decisions/isysquery/75969af3-4a56-42e3-a0bb-476bd7141819/3/doc/19-347_opn_Redacted.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/75969af3-4a56-42e3-a0bb-476bd7141819/3/hilite/

FAMILY

FIRST DEPARTMENT

M/O Ramon R. v Carmen L., 11/17/20 – **DOMESTIC VIOLENCE / RELOCATION**
The father appealed from an order of Bronx County Supreme Court, which granted the mother's application for sole custody of the children and permission to relocate with them. The First Department affirmed. The father's testimony was found incredible; and the trial court properly considered the mother's testimony at an emergency hearing on relocation, and that of the subject children and their older siblings at a *Lincoln* hearing. The mother, who had been the children's primary caregiver, was better able than the father to provide a stable home. The children's lives would be enhanced by permanent relocation to Colorado from NY—where the mother had been living in shelters after fleeing domestic violence by the father.
http://nycourts.gov/reporter/3dseries/2020/2020_06727.htm

M/O Amir R. (David M.), 11/17/20 – **DOMESTIC VIOLENCE / NEGLECT**
The respondent appealed from an order of disposition entered in Bronx County Family Court, which brought up for review a fact-finding order, determining that he had neglected two children. *See* CPLR 5501 (a) (1). The First Department affirmed. Even if police records should have been admitted as prior inconsistent statements for impeachment purposes, their preclusion did not impact the ultimate outcome. Several incidents of domestic violence supported findings of neglect. The appellate court rejected the argument that there was no evidence that either child was harmed: their exposure to the DV created an imminent danger of harm.
http://nycourts.gov/reporter/3dseries/2020/2020_06714.htm

SECOND DEPARTMENT

M/O Jafer v Marsa, 11/18/20 – **GRANDPARENTS / BEST INTERESTS**
The maternal grandparents appealed from an order of Suffolk County Family Court, which denied their visitation petition. The Second Department reversed and remitted. Since the grandparents had standing, Family Court should have proceeded to conduct a hearing on best interests. Instead, the grandparents were not permitted to present evidence; no testimony was taken from any parties; and no in camera review of the child was conducted. Jerome Wisselman and Joseph Bracconier represented the appellants.
http://nycourts.gov/reporter/3dseries/2020/2020_06789.htm

Palazzola v Palazzola, 11/18/20 – **CUSTODY MOD / HEARING NEEDED**
In a matrimonial action, the wife appealed from an order of Richmond County Supreme Court, which granted the husband's motion to modify the parties' stipulation of settlement, providing for joint custody of the child. Without a hearing, the lower court awarded the father sole custody and sharply limited the mother's access. The Second Department reversed. Since there were disputed factual issues regarding the child's best interests, a hearing was necessary. In making its determination, Supreme Court had improperly relied

solely on statements of witnesses whose opinions and credibility were untested. Cheryl Charles-Duval represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_06801.htm

M/O Keuleman v Earp, 11/18/20 – **ACTIVE JUDGE / FAIR TRIAL**
The father appealed from an order of Dutchess County Family Court, which awarded sole custody to the mother. In affirming, the Second Department rejected the argument that the father was deprived of a fair trial because the judge took on the function of an advocate by excessively questioning witnesses during the fact-finding hearing. The function of the judge was to protect the record at trial, not make it. A trial judge must avoid taking on the function or appearance of an advocate at trial. Such principles applied to bench trials, including custody hearings. Yet the trier of fact may examine witnesses where necessary to expedite orderly hearing progress. Here the court actively participated, but did not deprive the father of a fair hearing.
http://nycourts.gov/reporter/3dseries/2020/2020_06790.htm

M/O Jolani P. (Parris M.), 11/18/20 – **PERMANENCY ORDER / AFFIRMED**
The mother appealed from a permanency hearing order issued by Westchester County Family Court, which continued the subject child's placement with the petitioner agency, until the completion of the next permanency hearing or pending further order of the court. In affirming, the Second Department addressed relevant standards as to appeals from permanency orders, which often give rise to mootness concerns. The record supported the finding that the child should remain in foster care. *See* Family Ct Act § 1089 (d). While the mother progressed in services, she was then arrested and incarcerated. Upon her release, she did re-engage in services, but she was still on a waitlist for a parenting course, and her parental access was limited to one hour per week.
http://nycourts.gov/reporter/3dseries/2020/2020_06795.htm

M/O Scott v Rhodes, 11/18/20 – **SURRENDER / FACEBOOK BLUNDER**
The biological mother appealed from an order of Dutchess County Family Court, which denied her petition to enforce an agreement regarding post-adoption contact, entered into as part of a judicial surrender. The Second Department affirmed. The bio mom violated the prohibition against posting photos of, or information about, the child on Facebook. Further, agreements regarding post-adoption contact will be enforced only where they serve the child's best interests. Family Court properly credited the adoptive mother's testimony that the child was deeply upset after visits with the bio mother.
http://nycourts.gov/reporter/3dseries/2020/2020_06797.htm