FIRST DEPARTMENT

People v Jones, 12/6/18 – **INEFFECTIVE COUNSEL / NO LESSER INCLUDED REQUEST**
The defendant appealed from a judgment of New York County Supreme Court, convicting him of 3rd degree robbery. The First Department reversed and remanded for a new trial. A single, prejudicial error may constitute ineffective assistance. At trial, it was undisputed that the defendant wrongfully took money from the victims, and the defense theory was that, rather than using force, he tricked the victims. However, counsel requested a jury charge on the misdemeanor of fraudulent accosting, which was not a lesser included offense. Counsel's failure to request an instruction on petit larceny deprived the defendant of effective assistance. The failure was not strategic, and it was prejudicial: there was a reasonable view of the evidence to support petit larceny, and the evidence of forcible theft was not overwhelming. The Office of the Appellate Defender (Margaret Knight, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08356.htm

People v Desselle, 12/4/18 – **NO CONST. SPEEDY TRIAL VIOLATION / CONCURRENCE**
The defendant appealed from a judgment of New York County Supreme Court convicting him, upon his plea of guilty, of attempted 2nd degree murder. The First Department concluded that the trial court had properly denied his constitutional speedy trial motion. The 28-month delay was attributable to both the prosecution and the defense; and the defendant had not shown how his defense was impaired by the delay, which was not so egregious as to warrant dismissal. A concurring justice criticized the prosecution for largely causing the substantial, unnecessary delay by insisting on motion practice and missing deadlines.
http://nycourts.gov/reporter/3dseries/2018/2018_08252.htm

People v Ventura, 12/4/18 – **JOINT APPLICATION / NEW COUNSEL NOT NEEDED**
The defendant appealed from a judgment of New York County Supreme Court convicting him of 2nd degree murder and 2nd degree CPW. The First Department held that the trial court providently exercised its discretion in denying the defendant's requests for new counsel during the suppression hearing and jury selection. Regardless of the sufficiency of the first inquiry, the court conducted a thorough inquiry into the defendant's second request and provided many opportunities for him to explain how counsel was unprepared. The defendant's only specific complaints were unfounded. When joining in the application, as the basis for his request, defense counsel cited only the defendant's recent request and his belligerence in court the preceding day. That did not amount to an irreconcilable conflict that required counsel to be relieved.
http://nycourts.gov/reporter/3dseries/2018/2018_08233.htm

SECOND DEPARTMENT

People v Sarner, 12/5/18 – **COUNSEL'S ADVERSE POSITION / NEW COUNSEL NEEDED**
The defendant appealed from a judgment of Nassau County Supreme Court convicting him of criminal contempt. The Second Department remanded for further proceedings on his motion to withdraw his plea of guilty, for which he would be appointed new counsel. At sentencing, the defendant had stated that he wished to withdraw his plea of guilty because he was innocent and was coerced into pleading guilty. His attorney stated that he did not want to be a party to the motion and added: "I fought long and hard to get this. I thought we had this." The court advised the defendant not to say anything further; warned that he could be charged with perjury; denied the motion; and imposed sentence. The defendant's right to counsel was denied when his attorney took a position adverse to him. Before determining the motion, the trial court should have assigned a new attorney. Moreover, in advising the defendant not to say anything further because he could be charged with perjury, the court denied the defendant the opportunity to present his contentions. Steven Feldman represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08335.htm

People v Drayton, 12/5/18 – ***DUBARRY* DECISION / NOT APPLIED RETROACTIVELY**
In *People v Dubarry*, 25 NY3d 151, the Court of Appeals concluded that a defendant cannot be convicted of depraved indifference murder and intentional murder on a transferred intent theory where he or she killed one victim in the course of attempting to kill somebody else. In that case, it was error for the trial court to submit both charges to the jury in the conjunctive, rather than in the alternative. In the instant case, the Second Department concluded that the *Dubarry* rule should not be applied retroactively to the defendant's collateral attack on the judgment convicting him of 2nd degree murder and other crimes. The appellate court thus affirmed the challenged order of Dutchess County Court denying his CPL 440.10 motion.
http://nycourts.gov/reporter/3dseries/2018/2018_08323.htm

THIRD DEPARTMENT

People v Richardson, 12/6/18 – **TERRORISTIC THREAT / AGAINST WEIGHT**
A verdict convicting the defendant of the crime of making a terroristic threat was against the weight of evidence, the Third Department held. The judgment of conviction rendered in Chenango County Court following a jury trial was reversed, and the indictment was dismissed. When the defendant was in jail for violating an order of protection, he sent two letters to his estranged wife in envelopes addressed to her mother. In one letter, he expressed anger toward a judge and others involved in judicial proceedings impacting his family, and he said that he wanted to "put a 45 slug" between the judge's eyes. In the second letter, the defendant wrote that he would deal with the judge when he got out of jail. While it was no defense that the statements were not made to the subject of the threat, missing from the prosecution's case was evidence that the defendant intended to influence the judge's policy or conduct. Indeed, between the two letters, the defendant was granted visitation by the judge. While the appellate court did not sanction the defendant's actions,

his statements did not comport with the court's understanding of terrorism. John Trice represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08368.htm

People v Lavelle, 12/6/18 – **FELONY SEX OFFENSE / SENTENCE VACATED**
The defendant appealed from a judgment of Schenectady County Court, convicting him, upon his plea of guilty, of 1st degree attempted dissemination of indecent material to a minor. On appeal, he contended that he was illegally sentenced as a felony sex offender. The Third Department agreed. Although a conviction of the crime charged could be considered a felony sex offense, the accusatory instrument must specify that the offense is charged as a sexually motivated felony. The instant accusatory instrument did not contain the requisite language. The issue survived a valid waiver of the right to appeal. The sentence was vacated and the matter remitted for resentencing. G. Scott Walling represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08378.htm

FAMILY

FIRST DEPARTMENT

Kahlisha K.J. v Eddie R., 12/6/18 – **CUSTODY / NO CHANGE OF CIRCUMSTANCES**
An appeal as of right did not lie from the challenged order of Bronx County Family Court, directing that a best interests hearing should be held regarding the mother's custody modification petition. Given the significance of the issues, however, the First Department treated the father's notice of appeal as an application for leave to appeal and granted leave. A parent seeking a change of custody must first make an evidentiary showing that there has been a sufficient change in circumstances to warrant a hearing. Family Court failed to apply this standard. The reviewing court further found that the mother's petition should be denied, since she failed to establish a sufficient change in circumstances to warrant a best interests hearing. The fact that she voluntarily moved from the Bronx to Middletown did not constitute the requisite change. Further, the evidence did not establish that the father's conduct constituted parental alienation. The mother's appeal from the order granting a stay was moot, since the stay expired with the instant decision. Randall Carmel represented the father.
http://nycourts.gov/reporter/3dseries/2018/2018_08352.htm

SECOND DEPARTMENT

DECISION OF THE WEEK

Matter of Saad A. (Umda M.), 12/5/18 – **FCA § 1028 ORDER / REVERSAL**
The mother appealed from an order of Queens County Family Court, which denied her Family Ct Act § 1028 application for the return of her child to her custody. The Second Department reversed. The petitioner agency commenced a neglect proceeding against the parents and made the § 1027 application for removal, which was granted. The parents' application for return of the child was denied after a hearing. Although the child had since been returned, the appeal was not academic, since the removal created a permanent, significant stigma. An application for the return of a temporarily removed child must be granted, unless that would present an imminent risk to the child's life or health. The trial court must: (1) weigh whether imminent risk could be mitigated by reasonable efforts to avoid removal; (2) balance that risk against the harm removal might bring; and (3) determine what action is in the child's best interests. The salient concerns here—that the parents' efforts to safety-proof their home were inadequate and subjected the child to possible risk of ingesting harmful substances—did not constitute an imminent risk that could not have been mitigated. The petitioner had been directed to assist the family in safety-proofing the home and failed to do so. The Center for Family Representation (Claibourne Henry, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08292.htm

Matter of Montanez v Tompkinson, 12/5/18 – **UCCJEA / INCONVENIENT FORUM**
The father appealed from an order of Kings County Family Court which declined jurisdiction on the ground that New York was an inconvenient forum and stayed the proceedings pending the reopening of the mother's custody proceeding in Hawaii. The Second Department reversed. The parties' child was born in New York in 2016. The following year, the mother and child moved to Hawaii, after the father allegedly committed domestic violence against the mother in the child's presence. The mother sought a temporary order of protection in Hawaii, and the father initiated a custody proceeding in New York. Both states have adopted the UCCJEA. Family Court should not have declined to exercise jurisdiction and should not have designated Hawaii as a more appropriate forum, without first being assured by the Hawaii Court that its prior orders—issued without subject matter jurisdiction—were vacated. Moreover, any stay of the father's New York custody proceeding should have been conditioned on proceedings being promptly recommenced in Hawaii. Upon remittal, Family Court was to determine whether New York was an inconvenient forum and Hawaii was a more appropriate forum. Mark Brandys represented the father.
http://nycourts.gov/reporter/3dseries/2018/2018_08335.htm

Matter of Phoenix (Joseph K.), 12/5/18 – **ADOPTION GRANTED / REVERSAL**
The petitioners and the child appealed from an order of Suffolk County Family Court denying an adoption petition. The Second Department reversed and granted the petition. The subject child, born in 2008, was removed from his mother's care and placed in foster care in 2011 and then placed with the petitioners in 2014. In 2017, they sought to adopt the child. A hearing established that previous foster parents did not adopt him because of

behavioral problems. A psychologist testified that the child was severely traumatized, had attachment disorder, and could not control his emotions and behavior. The petitioners were very capable parents; could manage the child; and could provide for his emotional and intellectual development and provide a safe, nurturing environment.
http://nycourts.gov/reporter/3dseries/2018/2018_08309.htm

Levitin v Levitin, 12/5/18 – **CUSTODY UPHELD / SHUNNING IN RELIGIOUS COMMUNITY**
In a divorce judgment, Supreme Court properly considered allegations of domestic violence in awarding sole custody of the children to the mother. The determination, that her proposed relocation to California with the children was in their best interests, was sound. The mother demonstrated that the father ostracized her within their Orthodox Jewish community in New York; that she could not meet the family's living expenses here; and that if she were permitted to relocate, she would receive financial assistance from her parents, as well as help with child care and rent-free housing. Although relocation would have an impact on the father's parental access, a liberal schedule would allow for the continuation of a meaningful relationship. He should be given additional holiday access, and his telephone contact should be modified to accommodate religious observances.
http://nycourts.gov/reporter/3dseries/2018/2018_08288.htm

Matter of Shaundell M. v Trevor C., 12/5/18 – **PATERNITY / ESTOPPEL APPLIED**
The putative father appealed from an order denying his application for DNA genetic marker testing and from an order of filiation. The Second Department affirmed. The mother commenced a paternity/support proceeding to adjudicate the appellant to be the father of the child, born in 2005. No father was named on the birth certificate, and the mother never married. Family Court conducted a hearing to determine if equitable estoppel should preclude DNA testing. The proof showed that the child considered the appellant to be her father, called him "dad," and wanted a relationship with him; and he held himself out to be her father. Moreover, the child referred to the appellant's older children as her sister and brother and had a relationship with them.
http://nycourts.gov/reporter/3dseries/2018/2018_08304.htm

ARTICLES

FIRST DEPARTMENT TAKES DIFFERENT APPROACH TO APPEAL WAIVERS
NYLJ, 12/7/18, By Hon. Rolando Acosta, Presiding Justice, First Department
The First Department applies a "streamlined" approach to appeal waivers. In most "excessive-sentence-only appeals," the court determines that the sentence was not excessive without reaching the validity of any appeal waiver—unlike the Second Department's approach described in *People v Batista* (11/7/18), that is, first analyzing whether the waiver is defective. To focus on an appeal waiver when the sentence is not excessive, Justice Acosta observed, is like letting the home baseball team bat in the bottom of the ninth when they are ahead.

Court Defeat: DA WILL NOT SEEK U.S. SUPREME COURT REVIEW

Courthouse News Service, 12/4/18, and *NYLJ*, 12/5/18

A week after the Court of Appeals found in *People v Suazo* (11/27/18) that the risk of deportation entitles noncitizens to jury trials on misdemeanor charges, the Bronx DA changed her tune about seeking U.S. Supreme Court review. Darcel Clark said the State Legislature should amend the state law. At the heart of the problem are outdated laws from the 1970s allowing bench trials in NYC for misdemeanors carrying less than six months' incarceration. "The risk of deportation is a harsh reality for many Bronx residents," Clark said in the statement, adding that "the criminal courts of New York State are not in the best position to forecast the outcome of a deportation case." An OCA spokesperson said that the consequences of the decision are being reviewed, and noted that last year in NYC, there were 159,000 misdemeanor filings in Criminal Court; and 470 of the 645 misdemeanor trials held were bench trials.