CRIMINAL

FIRST DEPARTMENT

People v Rivera, 12/20/18 – **CHALLENGE FOR CAUSE DENIAL / REVERSED**
The defendant appealed from a judgment of Bronx County Supreme Court convicting him of 1st degree assault and 4th degree CPW. The First Department reversed and ordered a new trial. Supreme Court erred in denying the defendant's challenge for cause to a prospective juror who liked "hearing both sides of the story" and who would find it difficult to reach a verdict "without hearing from the defendant." The prospective juror was unable to give the requisite assurance that she would follow the law as charged. The Office of the Appellate Defender (Katherine Pecore, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08750.htm

People v Carter, 12/20/18 – **440 / INEFFECTIVE ASSISTANCE / REVERSED**
The defendant appealed from an order of New York County Supreme Court which denied his CPL 440.10 motion to vacate a judgment convicting her, after a jury trial, of 2nd degree assault, 1st degree vehicular assault, and operating a motor vehicle while under the influence of alcohol. The First Department reversed and ordered a new trial. Defense counsel rendered ineffective assistance. The case turned on whether the defendant was intoxicated at the time of the accident, and there was a serious dispute about the accuracy of the final Intoxilyzer reading. Yet counsel failed to call an expert to rebut the People's proof. At the 440.10 hearing, counsel conceded that: (1) his only reason for not calling an expert was the inability of the defendant to pay; (2) counsel took no steps to obtain a court-appointed expert; and (3) he was unaware that such remedy might be available. There was a reasonable probability that calling an expert would have affected the outcome. The Center for Appellate Litigation (John Vang, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08745.htm

SECOND DEPARTMENT

DECISION OF THE WEEK
People v Hernandez, 12/19/18 – **440 / DEPRAVED INDIFFERENCE / REVERSED**
The defendant appealed from an order of Queens County Supreme Court denying his CPL 440.10 motion without a hearing. The Second Department reversed; vacated a 2001 judgment convicting the defendant of 2nd degree murder upon a jury verdict; and dismissed the murder count, without prejudice to the People to re-present appropriate charges to another Grand Jury. PEOPLE V. PAYNE, *3 NY3D 266,* signaled a change in the law regarding depraved indifference murder. There the Court of Appeals first held that, absent unusual circumstances, a one-on-one shooting or knifing can almost never qualify as depraved indifference murder. The new law did not apply retroactively to convictions that became final prior to the change. But the defendant's conviction became final after PAYNE was decided. Upon reaching the merits, the court agreed with the defendant's legal insufficiency arguments. Jonathan Edelstein represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08690.htm

People v Smith, 11/19/18 – **CPW / CONCURRENT SENTENCES / MODIFIED**
The defendant appealed from a judgment of Kings County Supreme Court convicting him, upon a jury verdict, of multiple counts of 3rd degree CPW and other crimes. The Second Department modified by providing that the sentences imposed on three CPW counts would run concurrently. Such convictions were based on the defendant's act of constructively possessing three guns in the same location at the same time. The mere fact that the defendant possessed three guns did not prove three separate acts of possession. To the extent that prior Second Department authority so held, those cases should no longer be followed. Appellate Advocates (Kendra Hutchinson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08695.htm

FOURTH DEPARTMENT

People v Johnson, 12/21/18 – ***ALFORD* PLEA / VACATED**
The defendant appealed from a judgment convicting him of 2nd degree assault and 4th degree grand larceny. In the interest of justice, the Fourth Department held that County Court erred in accepting the defendant's *Alford* plea, where the record lacked strong evidence that he acted with the intent to deprive the owner of the subject property. The plea was vacated, and the matter was remitted. The Ontario County Public Defender (Bradley Keem, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08802.htm

People v Walker, 12/21/18 – **ROBBERY / DISMISSED**
The defendant appealed from a judgment of Monroe County Supreme Court, convicting him, upon a nonjury verdict, of 1st degree robbery (three counts) and 2nd degree robbery (three counts). The Fourth Department held that the verdict on four of the counts was against the weight of the evidence, because the only proof regarding the defendant's identity as the perpetrator was a very grainy surveillance video. Even a police investigator familiar with the defendant could not identify him in the video. Phil Modrzynski represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08797.htm

People v Ellison, 12/21/18 – **PERSISTENT FELONY OFFENDER / VACATED**
The defendant appealed from a judgment of Monroe County Supreme Court, convicting him, upon a jury verdict, of 3rd degree burglary (two counts) and 4th degree criminal possession of stolen property. In the interest of justice, the Fourth Department vacated the finding that the defendant was a persistent felony offender. Although he had a lengthy criminal history, almost all of his offenses stemmed from stealing to support his drug habit; and he had not been violent. The People never requested a PFO adjudication. Before trial, they offered concurrent terms of 2 to 4 years; and ultimately, the defendant was sentenced to 20 years to life. Such a disparity militated in favor of a sentence reduction. The new aggregate sentence was 5½ to 11 years. Donald Thompson represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08833.htm

People v Clause, 12/21/18 – **PROBATION REVOCATION / VACATED**
The defendant appealed from a judgment of Niagara County Supreme Court which revoked the sentence of probation imposed following her plea of guilty of 1st degree vehicular manslaughter and other crimes. The Fourth Department vacated the revocation and continued probation with additional conditions. At the time of the crime, the defendant was 18 and had no other criminal history. She completed substance abuse counseling and complied with reporting requirements. A treating psychologist opined that incarceration would impede her progress toward a sober, productive lifestyle; and the probation officer recommended against incarceration. Further, the defendant was employed full-time, intended to re-enroll in college classes, and committed no crimes after the underlying conviction. Erin McCampbell represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08815.htm

People v Fick, 12/21/18 – **DISSENT / PROSECUTORIAL MISCONDUCT**
The defendant appealed from a judgment of Livingston County Court convicting him of 1st degree burglary and other crimes. The Fourth Department affirmed. Two dissenting justices would have reversed in the interest of justice due to the fair trial rights implicated. The prosecutor caused substantial prejudice during the cross-examination of a defense witness in implying that, before the instant crimes, the defendant broke the windows of the witness' vehicle in retaliation for his use of the defendant's drugs. When the witness denied knowing who broke his windows, the prosecutor stated, "I would bet my career that person is in the courtroom." The prosecutor thus made himself an unsworn witness and injected the integrity of his office into the case. Further, he referred to the defendant's witnesses as "liars" and to the defendant as a "monster."
http://nycourts.gov/reporter/3dseries/2018/2018_08788.htm

People v Young, 12/21/18 – **DISSENT / INEFFECTIVE ASSISTANCE**
The defendant appealed from an order of Monroe County Supreme Court denying his CPL 440.10 motion to vacate a judgment of conviction of 2nd degree CPW, rendered upon a jury verdict. The Fourth Department affirmed. Two dissenting justices would have reversed. Defense counsel failed to conduct an investigation and to identify witnesses who could have placed the alleged gun owner in the defendant's van, identified the gun found as belonging to him, and testified that the owner had complained about the gun falling out of his pocket. Counsel unreasonably and erroneously believed that the alleged gun owner, a convicted felon, would testify against his own interest on the defendant's behalf to "do the right thing."
http://nycourts.gov/reporter/3dseries/2018/2018_08774.htm

People v Holz, 12/21/18 – **DISSENT / SUPPRESSION**
The defendant appealed from a Monroe County Supreme Court judgment convicting him, upon his plea of guilty, of 2nd degree burglary. The Fourth Department affirmed. The P.J. dissented. The case turned on the interpretation of CPL 710.70 (2), which states: "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty." In full satisfaction of a two-count indictment, the defendant pleaded guilty to count one, alleging that he committed a burglary. Count two alleged a second

burglary at the same location two days later. The trial court denied suppression of physical evidence relevant to that count. In the view of the dissenter, the suppression issue was reviewable upon the instant appeal. For support, the dissent cited several Third Department cases rejecting a restrictive interpretation of the above-cited statute.
http://nycourts.gov/reporter/3dseries/2018/2018_08763.htm

FAMILY

SECOND DEPARTMENT

Jaylen R.B. (Lisa G.), 12/19/18 – **TERMINATION OF RIGHTS / REVERSED**
The mother appealed from orders of Kings County Family Court finding that she permanently neglected her child and terminating her parental rights. The Second Department reversed. The petitioner agency failed to establish that the mother failed to maintain contact with, or plan for, the future of the children. She testified that she complied with all requirements communicated to her, including visiting with the children, undergoing mental health evaluations, participating in treatment, undergoing drug testing, completing parenting skills classes, visiting the children's school, and keeping up with their health status. Joel Borenstein represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08643.htm

Chloe-Elizabeth A.T. (Albert T.), 12/19/18 – **ARTICLE 10 REMOVAL / REVERSED**
The father appealed from an order of Kings County Family Court, which, after a hearing, granted the petitioner's Family Ct Act § 1027 application to temporarily remove the subject child from the father's custody and place her with the mother, and limited him to supervised parental access. Temporary removal is authorized to avoid imminent risk to the child's life or health. The court must consider the best interests of the child and reasonable efforts made to avoid removal. The petitioner failed to establish the requisite imminent risk. Mark Diamond represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08666.htm

Alivia F. (John F.), 12/19/18 – **RIGHT TO COUNSEL / REVERSED**
The father appealed from an order of Suffolk County Family Court finding that he neglected the subject children and releasing them to the custody of the non-respondent mother. The Second Department reversed. A respondent in an Article 10 proceeding has a right to counsel. He may waive that right, provided that he makes a knowing, voluntary, and intelligent waiver. The trial court must conduct a searching inquiry. Family Court failed to: (1) detail dangers and disadvantages of self-representation; (2) adequately apprise the father of the importance of having an attorney in a neglect proceeding, particularly where there was a related criminal matter; (3) adequately explore factors bearing on a competent waiver; and (4) ensure that he acknowledged his understanding of the perils of self-representation. Francine Moss represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08649.htm

THIRD DEPARTMENT

Matter of King v King, 12/10/18 – **DEFAULT ORDER / VACATED**
The wife appealed from an order of Warren County Family Court which denied her motion to vacate a default order of protection. The Third Department reversed. To vacate a default judgment, the movant is generally required to demonstrate a reasonable excuse for the failure to appear and a meritorious defense. No such showing is required where fundamental due process rights have been denied. In the instant case, the wife was not given notice that matters raised by Family Court sua sponte would be addressed at the hearing. Jeffrey McMorris represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08724.htm

Kristie GG. v Sean GG., 12/20/18 – **HEARSAY / NOT FOR ARTICLE 8**
The father appealed from orders of Otsego County Family Court in a family offense proceeding. The Third Department reversed. Family Court erred in admitting hearsay testimony of the children in the fact-finding portion of the Article 8 proceeding. Family Ct Act § 1046 (a) (vi) applies only in hearings under Family Ct Act articles 10 and 10-A and in Article 6 proceedings involving abuse or neglect. Without the hearsay, there was an insufficient basis to find that the father committed a family offense. Dennis Laughlin represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08718.htm

Matter of Lorimer v Lorimer, 12/20/18 – **DISSENT / *LINCOLN* HEARING**
The mother appealed from an order of Chenango County Family Court which partially dismissed her custody application. The Third Department affirmed. Two justices dissented, observing that there was no evidence revealing the preference of the older child. Family Court denied the AFC's request for a *Lincoln* hearing, erroneously stating that such a hearing should be rarely conducted and was not needed here because there was nothing "extremely disturbing" in the proof. However, the view of the child, age 11, was entitled to consideration. There was no suggestion that conducting the hearing would be futile or traumatic. Indeed, the AFC said that the older child was articulate and had expressed her wishes and that an interview with her would be enlightening. Steven Natoli was the AFC.
http://nycourts.gov/reporter/3dseries/2018/2018_08721.htm

FOURTH DEPARTMENT

Jesten J.F. (Ruth P.S.), 12/21/18 – **INCOMPETENT RESPONDENT / REVERSAL**
The mother appealed from an order of Family Court terminating her parental rights. The Fourth Department held that Family Court erred in failing to appoint a guardian ad litem. The public policy of this State is to provide rigorous protection to the mentally infirm. On its own initiative, the court should have held a hearing regarding the need to appoint guardian. The mother's attorney informed the court that she could not assist in her own defense and moved to strike her incoherent testimony. Moreover, the mother had a long psychiatric history and, during the instant proceedings, was involuntarily committed. The Monroe County Public Defender (Timothy Davis, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08812.htm

Matter of Dean v Sherron, 12/21/18 – **HOME STATE / REVERSAL**
The mother appealed from an order of Onondaga County Family Court dismissing her custody petition. The Fourth Department reversed. It was error to dismiss the petition based on a lack of jurisdiction without holding a hearing. There were disputed issues of fact regarding: (1) whether the child's five-month stay in North Carolina constituted a temporary absence from New York, in light of allegations that the respondent father withheld the child from the mother for purposes of establishing a home state in North Carolina; and (2) whether the mother's absence from New York interrupted the child's six-month pre-petition residency period, required by Domestic Relations Law § 76 (1) (a). Thus, the petition was reinstated and the matter remitted. Hiscock Legal Aid Society (Danielle Blackaby, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08807.htm

Jones v Laubacker, 12/21/18 – **GRANDPARENT VISITATION / REVERSAL**
The parents appealed from an order of Genesee County Family Court which awarded visitation with the subject children to the paternal grandmother. A justice of the Fourth Department stayed the order pending appeal. The Court reversed. Because the parents were fit, their decision to prevent the children from visiting the grandmother was entitled to special weight. Yet the trial court ignored salient and disturbing testimony by the parents. The grandmother was responsible for escalating a minor incident into a full-blown family crisis, totally ignoring the damaging impact her behavior would have on the family relationships. The animosity between the parties was so severe that it threatened to disrupt the family unit. Brian Hutchison represented the appellants.
http://nycourts.gov/reporter/3dseries/2018/2018_08822.htm

Happy Holidays!

CYNTHIA FEATHERS, Esq.
Director of Quality Enhancement
For Appellate and Post-Conviction Representation
NY State Office of Indigent Legal Services
80 S. Swan St., Suite 1147
Albany, NY 12210
Office: (518) 473-2383
Cell: (518) 949-6131