CRIMINAL

FIRST DEPARTMENT

People v Remigio, 3/16/21 – ***PADILLA* / REMAND**
The defendant appealed from a NY County Supreme Court judgment, convicting him of attempted 1st degree robbery. The First Department held the appeal in abeyance. The defendant was deprived of effective assistance when counsel failed to advise him that a guilty plea to an aggravated felony would result in mandatory deportation. Counsel said only that the plea "may very well result" in deportation. The defendant was entitled to an opportunity to move to vacate his plea, upon showing a reasonable probability that he would not have pleaded guilty, had he been alerted to the deportation consequences. The Office of the Appellate Defender (Stephen Strother, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_01519.htm

People v Dray, 3/18/21 – **CPL 440.10 / NO HEARING NEEDED / IAC**
The defendant appealed from an order of NY County Supreme Court, which summarily denied his CPL 440.10 motion to vacate a judgment, convicting him of 1st degree sexual abuse after a jury trial. (He was acquitted of 1st degree burglary.) The First Department affirmed. The defendant alleged that counsel was ineffective in failing: (1) to tell him that the decision to testify was his; and (2) to request an intoxication charge when the deliberating jury asked about the issue as to the burglary charge. In opposition, the People submitted an affirmation from defense counsel, stating that: (1) he told the defendant it was his absolute right to testify at trial, and counsel believed that the defendant should testify; and (2) counsel did not pursue an intoxication defense because he did not believe it was meritorious. The reviewing court held that the defendant did not show prejudice as to his decision to testify, and counsel's tactical decisions would not be second-guessed.
http://nycourts.gov/reporter/3dseries/2021/2021_01559.htm

Conrad v City of NY, 3/16/21 – **QUALIFIED IMMUNITY / DISMISSAL**
The plaintiff appealed from an order of NY County Supreme Court, which granted the defendants' motion for summary judgment dismissing the complaint. The First Department affirmed. The defendants made a prima facie showing that the police officer's actions were objectively reasonable under the circumstances, which required split-second decision-making. The record raised disputed issues of fact as to whether the officer should have known that the decedent was an emotionally disturbed person at the time of their interaction. However, the officer was entitled to qualified immunity because his actions in trying to arrest the decedent were matters of discretion and professional judgment that did not violate clearly established procedures or protocols.
http://nycourts.gov/reporter/3dseries/2021/2021_01506.htm

Matter of NYLPI v NYPD, 3/18/21 – **FOIL / DIGNITY**
The NYPD appealed from an order of NY County Supreme, which granted a CPLR Article 78 petition to compel the police, pursuant to FOIL, to produce 911 calls and unredacted copies of video recorded by officers on body cameras during the fatal shooting of Susan Muller in Queens. The First Department modified. Muller's family had a compelling

interest in protecting her dignity, whereas the petitioner nonprofit sought to promote better outcomes in mental health crises. To balance those competing interests, the appellate court ordered that the video must be redacted to blur out sensitive footage of Muller's body and the scene of her shooting.
http://nycourts.gov/reporter/3dseries/2021/2021_01557.htm

SECOND DEPARTMENT

People v Rivera, 3/17/21 – **IMPOUNDMENT / IMPROPER**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree CPW, upon his plea of guilty. The Second Department reversed. The appeal brought up for review an order denying suppression. The People did not establish the lawfulness of the impoundment of the defendant's vehicle and the subsequent inventory search. There was no testimony that the vehicle was parked illegally; that there was a history of burglary or vandalism in the area; or that impoundment served public safety or the police community-caretaking function. Further, the People did not present proof as to the requirements of the impoundment policy or compliance with the guidelines. Appellate Advocates (David Fitzmaurice, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_08256.htm

People v Johnson, 3/17/21 – **PREDICATE / NOT EQUIVALENT**
The defendant appealed from Queens County Supreme Court judgments, convicting him of various crimes, upon his pleas of guilty. The Second Department modified in the interest of justice, vacating the second violent felony offender adjudication. The defendant's prior NJ conviction of aggravated assault did not constitute a felony under NY law. Appellate Advocates (Samuel Barr, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_08246.htm

People v Carmichael, 3/17/21 – **SORA / REVERSED**
The defendant appealed from an order of Kings County Supreme Court, which designated her a level-two sex offender. The Second Department reversed and found him a level-one offender. There was never any sexual contact between the defendant and the victim, so the SORA court improperly assessed 25 points under risk factor 2 (sexual contact with the victim) and 20 points under risk factor 4 (engaging in a continuing course of sexual misconduct). Appellate Advocates (Cynthia Colt, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_08263.htm

People v Green, 3/17/21 – **SORA / ERROR / AFFIRMED**
The defendant appealed from an order of Kings County Supreme Court, which designated him a level-three sex offender. The Second Department affirmed, but stated that the SORA court improperly assessed 30 points under risk factor 9 (*prior* conviction or adjudication) and 10 points under risk factor 10 (recent *prior* felony or sex crime) based on the defendant's Connecticut conviction. The instant offense—a continuing course of sexual misconduct—occurred on January 1 and April 1, 2008. The CT sexual crime occurred on April 1, 2008, and the defendant pleaded guilty on December 4, 2008. However, Supreme Court properly granted the People's alternative request for an upward departure.

http://nycourts.gov/reporter/3dseries/2021/2021_08265.htm

People v Momoh, 3/17/21 – **WAIVER OF APPEAL / INVALID**
The defendant appealed from a Rockland County Court judgment, convicting him of attempted 2nd degree criminal possession of a forged instrument, upon his plea of guilty. The Second Department affirmed, finding that the sentence was not excessive. The decision contains a detailed discussion of the defects in the waiver of the right to appeal and observes that a CPL 440.20 motion was the vehicle to challenge the procedure by which the defendant was sentenced as a second felony offender—an unpreserved issue.
http://nycourts.gov/reporter/3dseries/2021/2021_08251.htm

People v Bowen, 3/17/21 – ***ANDERS* BRIEF / NEW COUNSEL**
The defendant appealed from a judgment of Suffolk County Supreme Court, convicting him of attempted 2nd degree burglary. Assigned appellate counsel submitted an *Anders* brief. The Second Department assigned new appellate counsel. In conclusory fashion, the brief stated that there were no nonfrivolous issues, but failed to analyze any potential issues, including whether the plea of guilty was knowingly, voluntarily, and intelligently entered or the sentence was harsh and excessive. *[NOTE: This was one of three Second Department decisions this week rejecting Anders briefs.]*
http://nycourts.gov/reporter/3dseries/2021/2021_08242.htm

THIRD DEPARTMENT

DECISION OF THE WEEK

People v Stetin, 3/18/21 – **CPL 440.10 / HEARING NEEDED / IAC**
The defendant appealed from Montgomery County Court orders, denying his CPL 440.10 motions to vacate a judgment convicting him of 2nd degree burglary and 2nd degree assault. The Third Department reversed. A hearing was needed on two distinct grounds. First, the defendant alleged that trial counsel was ineffective in failing to conduct a proper investigation with regard to his residence. The defendant stated that counsel refused to pursue information that he lived at the victim's residence, which would have refuted trial evidence that he entered unlawfully. Detailed affidavits of four witnesses supported this claim. Second, the defendant presented affidavits of three witnesses that the victim recanted her testimony. The motion court erred in finding such proof merely relevant to impeachment. Instead, if proven, such proof could undermine the basis for the judgment of conviction. While recantation evidence was inherently unreliable, the proof presented here warranted a hearing. Matthew Hug represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_01529.htm

Matter of James Q., 3/18/21 – **CPL 330.20 / REVERSED**
In a proceeding pursuant to CPL 330.20, the petitioner appealed from Franklin County Supreme Court orders, which found that the respondent no longer suffered from a dangerous mental disorder and directed that he be transferred to a nonsecure facility for up to two years. The Third Department reversed. In 2010, the respondent entered a plea of not responsible by reason of a mental disease or defect to a charge of 3rd degree rape and several other crimes. He was found to suffer from a mental disorder and committed to a secure

facility. Retention was continued by subsequent orders. In the instant proceeding, the petitioner presented ample evidence to support continued secure confinement. The challenged decision was self-contradictory, perplexing, unsupported by the record, and not entitled to deference. The respondent continued to suffer from a dangerous mental disorder, requiring confinement in a secure facility until at least October 2021.
http://nycourts.gov/reporter/3dseries/2021/2021_01545.htm

FAMILY

SECOND DEPARTMENT

M/O Cole v Benjamin, 3/17/21 – **FAMILY OFFENSE / REINSTATED**
The petitioner appealed from an order of Nassau County Family Court, which summarily dismissed his family offense petition for failure to state a cause of action. The Second Department reversed and reinstated the pleading. Liberally construing the allegations and giving the petitioner the benefit of every favorable inference, the appellate court held that the petition adequately alleged that the respondent committed 2nd degree harassment. Jan Murphy represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_08230.htm

Treanor v Treanor, 3/17/21 – **ADVERSE INFERENCE / TOO BROAD**
In a divorce action, the plaintiff took an interlocutory appeal from an order of Westchester County Supreme Court, finding that she violated court directives to participate in an updated forensic evaluation and imposing a sanction. The Second Department modified. The sanction of drawing an adverse inference against the plaintiff, regarding all custody issues at trial, was too broad. The inference should have been limited to the circumstances of the forensic evaluation. McCarthy Fingar LLP represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_08276.htm

THIRD DEPARTMENT

M/O Erika UU., 3/18/21 – **JD / SPEEDY HEARING**
The respondent appealed from an order of Madison County Family Court finding him to be a juvenile delinquent. The Third Department reversed and dismissed. The respondent's statutory right to a speedy fact-finding hearing was violated. Her waiver of such right during the first appearance was limited to the time necessary to complete a diagnostic evaluation. By transferring the respondent to a secure facility, the court eliminated the chance that the evaluation would be done, so the waiver expired on the date of the order. The hearing should have been held three days thereafter, but was instead held 50 days later. William Koslosky represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_01543.htm

Tasheanna CC. v Debron EE., 3/18/21 –
CUSTODY MOD. / NO CHANGE IN CIRCUMSTANCES
The father appealed from an order of Chemung County Family Court, which granted the mother's petition to modify visitation. The Third Department reversed. The mother sought certain unsupervised parenting time with the children, who resided with the father in Florida. She failed to show the requisite change of circumstances. The record did not demonstrate the claimed inability of the parents to communicate; the father's mistreatment of the children; or his thwarting of her visits or phone calls with the children. The need for a "best interests" analysis was not triggered. Adam Van Buskirk represented the father, and Lisa K. Miller represented the mother.
http://nycourts.gov/reporter/3dseries/2021/2021_01539.htm

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