CRIMINAL

COURT OF APPEALS

People v McGhee, 3/25/21 – **PEOPLE'S APPEAL / *BRADY***
In a People's appeal, the Court of Appeals held that the First Department erred in finding that a witness statement, disclosed by the People after the defendant's trial, was material for purposes of his *Brady* claim. Since the defendant made a specific request for the evidence, the "reasonable possibility" standard applied. Such standard was not met, where the undisclosed witness's description of the shooter and his flight path did not differ in any material respect from that of the eyewitness who identified the defendant in court as the perpetrator. Considerable other evidence supported the verdict, and the undisclosed statement lacked sufficient impeachment value to cast doubt on the fairness of the trial.
http://www.nycourts.gov/reporter/3dseries/2021/2021_01836.htm
http://nycourts.gov/reporter/3dseries/2019/2019_09116.htm

People v Vasquez, 3/25/21 – **730 EXAM / DENIED**
The COA upheld the lower courts' determination that the defendant was not entitled to a third CPL Article 730 examination to determine his competency to proceed. The First Department correctly held that the prosecutor's questioning of a defense witness and summation remarks improperly associated the defendant with uncharged crimes, but were harmless; and correctly denied a request for an adjournment to interview a defense witness before the witness testified.
http://www.nycourts.gov/reporter/3dseries/2021/2021_01837.htm
http://nycourts.gov/reporter/3dseries/2020/2020_02237.htm

FIRST DEPARTMENT

M/O Pantaleo v O'Neill, 3/25/21 – **ERIC GARNER / COP PUNISHED**
The petitioner appealed from a determination by the NYPD, which dismissed him and ordered forfeiture of his retirement benefits, following a disciplinary trial regarding his actions in the arrest and death of Eric Garner. The First Department confirmed. A NYPD Deputy Commissioner's report found that: the petitioner committed acts constituting 3rd degree assault when he used a prohibited chokehold on Garner for 10 seconds during the arrest; the officer acted recklessly; and such conduct was a significant factor in triggering an asthma attack that contributed to Garner's death. The Police Commissioner approved the report and recommendations. Substantial evidence supported the challenged ruling, and the penalty was fitting.
http://nycourts.gov/reporter/3dseries/2021/2021_01857.htm

People v Johnson, 3/25/21 – **CPW 3rd / DISMISSED**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree CPW and another crime upon his plea of guilty. The First Department vacated the weapon possession conviction and dismissed that count. In light of recent legislation amending Penal Law § 265.01 to decriminalize simple possession of gravity knives, the People agreed that the charge should be dismissed, even though the amendment did not

apply retroactively. The Center for Appellate Litigation (Claudia Trupp, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_01864.htm

M/O Stengel v Vance, 3/23/21 – **FOIL / NO DISCLOSURE**
The petitioner appealed from a judgment of NY County Supreme Court, denying his petition to compel the respondents to disclose records and dismissing the Article 78 proceeding. The FOIL request sought a list of police officers indicating adverse credibility findings for a specified period. The District Attorney did not possess such a list. In any event, a spreadsheet purportedly constituting a responsive record was properly withheld as attorney work product. The document could not be redacted, since the statute permitted redaction only under the personal privacy exemption.
http://nycourts.gov/reporter/3dseries/2021/2021_01734.htm

SECOND DEPARTMENT

People v DeLaCruz, 3/24/21 – **PRETRIAL SILENCE / INADMISSIBLE**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree robbery and other crimes. The Second Department (which previously granted the defendant's motion for a stay pending appeal) reversed and remitted for a new trial. Evidence of a defendant's pretrial silence is generally inadmissible. In this case, the People improperly used the defendant's silence against him on their direct case, and the error was not harmless. Although the issue was unpreserved for appellate review, the reviewing court reached it in the interest of justice. Stephen Preziosi represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_01785.htm

People v Mohabir, 3/24/21 – **FEDERAL CONVICTION / NOT PREDICATE**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree sexual abuse. The Second Department modified. The defendant's federal conviction of conspiracy to deal in firearms was not a predicate felony conviction, because the federal statute contained different elements than its NY equivalent. It was possible to violate the federal statute without engaging in conduct that was a felony in NY. Thus, the appellate court vacated the defendant's adjudication as a second felony offender and the sentence imposed thereon, and remitted for resentencing. Appellate Advocates (Samuel Barr, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_01789.htm

People v Lopez, 3/24/21 – **SORA / ERROR BUT AFFIRMED**
The defendant appealed from an order of Westchester County Supreme Court, designating him a level-two sex offender. The Second Department affirmed, but found that the SORA court improperly assessed 20 points under risk factor 7. The victim had known the defendant since 2014; he was a regular customer at the restaurant where she worked and started to ask her out on dates in 2017. Thus, he was not a stranger to the victim at the time of the 2018 crime. Further, the People did not show that the defendant established a relationship with the victim primarily for victimization. However, after deducting the 20

points, the defendant's score placed him in the range for a presumptive level-two designation, and he did not demonstrate that a downward departure should be ordered.
http://nycourts.gov/reporter/3dseries/2021/2021_01793.htm

People v Patel, 3/24/21 – **SORA / ERROR BUT AFFIRMED**
The defendant appealed from an order of Nassau County Supreme Court, which designated him a level-three sex offender. The Second Department affirmed, but found that the People failed to prove that the defendant's living situation was inappropriate, so as to warrant 10 points under risk factor 15. The evidence showed that the defendant's living situation was uncertain. However, after deducting the 15 points, the defendant's score placed him in the range for a presumptive level-two adjudication, before any departures. The SORA court properly granted the People's application for an upward departure, based on the abhorrent nature of the crime; the fact that the defendant was previously diagnosed as a pedophile; and other factors. The defendant did not establish that the failure to request a downward departure rendered counsel ineffective.
http://nycourts.gov/reporter/3dseries/2021/2021_01794.htm

APPELLATE TERM, 2nd DEPT.

People v Kashif, 2021 NY Slip Op 21062 – **NO STRATEGY / INEFFECTIVE**
The defendant appealed from a conviction in the Poughkeepsie Justice Court, convicting him of 3rd degree assault. Appellate Term, Second Department ordered a new trial. Defense counsel did not conduct pretrial research to determine whether the defendant had a criminal history; did not seek a *Sandoval* hearing; and at trial, asked the defendant about a prior criminal conviction when he was 17 that arose from joyriding in a stolen car—for which he had received a youthful offender adjudication. There was a sharp credibility contest between the defendant, who claimed self-defense, and the complainant. No strategy could validate counsel's conduct, which may have affected the outcome and was sufficiently egregious to warrant reversal. Steven and Arza Feldman represented the defendant.
http://www.nycourts.gov/reporter/3dseries/2021/2021_21062.htm

People v Ciccone, 2020 NY Slip Op 20363 – **INFORMATION / DEFECTIVE**
The defendant appealed from a Kings County Criminal Court judgment, convicting him of attempted 7th degree criminal possession of a controlled substance and 3rd degree criminal trespass. Appellate Term, Second Department reversed and dismissed, finding both counts of the accusatory instrument facially insufficient. As to the trespass, the information did not state that NO TRESPASSING signs were conspicuously posted. As to the drug charge, the officer said that he saw that the defendant had crack cocaine in a pocket, but the proof did not support the inference that the officer recognized a controlled substance. Legal Aid Society, NYC (Paul Wiener of, counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_20363.htm

THIRD DEPARTMENT

People v Marte-Feliz, 3/25/21 – **CPL 440.10 / DENIED**
The defendant appealed from an Albany County Supreme Court order, summarily denying his CPL 440.10 motion to vacate a judgment, which convicted him of 3rd degree criminal sale of a controlled substance. The Third Department affirmed, finding no need for a hearing on an ineffective assistance claim that was based on counsel's failure to advise the defendant of immigration consequences. At the plea proceeding, Supreme Court asked the defendant if he had discussed with his attorney that his conviction "may" likely result in deportation, and the defendant answered in the affirmative. In sustaining the 440 denial, the appellate court relied on such exchange, while acknowledging that the defendant spoke little English; that supporting submissions stated that counsel did not meet privately with the defendant and an interpreter to discuss the case; and that the subject crime subjected him to deportation.
http://nycourts.gov/reporter/3dseries/2021/2021_01810.htm

TRIAL COURT

People v Lagas, 3/22/21 – **DVSJA / RESENTENCING**
Columbia County Court resentenced the defendant pursuant to the Domestic Violence Survivors Justice Act (P.L. § 60.12, CPL 440.47). As a child, the defendant was severely sexually abused by his uncle for several years and suffered trauma which continued throughout his adult life and led to his drug addiction. To get cash to buy drugs, the defendant committed burglaries. The instant application, which sought resentencing for a 2nd degree burglary conviction, was supported by testimony of a therapist about the defendant's successful trauma therapy, a recovery coach about his diligent participation in a drug addiction program, and both about his favorable prognosis. The court distinguished between trauma as a causal factor of crime and the lower statutory standard of "significant contributing factor." The defendant was resentenced to a determinate term of 5 years plus 4 years' post-release supervision. He was represented by Louise Roback. *[Ms. Roback noted that key guidance was provided by Alan Rosenthal, co-chair of the DVSJA Statewide Defender Task Force. A copy of the decision is available upon request.]*

FAMILY

FIRST DEPARTMENT

Michael J.F. v Jennifer M.B., 3/23/21 – **OLD SUPPORT ORDER / INVALIDATED**
The father appealed from an order of NY County Family Court, which denied his application to invalidate a 2014 child support order entered on consent. The First Department reversed, held that the consent order was unenforceable; vacated a willfulness finding and money judgments issued; and remanded for an expeditious hearing on the mother's support petition. The 2014 order did not comply with Family Ct Act § 413 (1) (h) requirements. Neither the hearing record nor the consent order set forth the presumptive support amount or the parties' incomes, or explained whether or why there was a deviation from the CSSA amount. Brian Perskin represented the father.
http://nycourts.gov/reporter/3dseries/2021/2021_01718.htm

Griselda N.G. v Yvette C., 3/25/21 – **NONAPPEARANCE / NOT DEFAULT**
The mother appealed from an order of NY County Family Court, which awarded custody of the subject child to the maternal grandmother. In affirming, the First Department found that the order was appealable, notwithstanding that the mother did not appear on the final date of the proceeding, and her attorney did not participate on that date. The proceedings had effectively concluded. Only the possible redirect of the respondent had not occurred. Further, the challenged order did not state that it was entered on default.
http://nycourts.gov/reporter/3dseries/2021/2021_01852.htm

SECOND DEPARTMENT

M/O Emig v Emig, 3/24/21 – **SUPPORT ORDERS / WRONG STANDARD**
The father appealed from an order of Kings County Family Court, which denied his objections to an order dismissing his petition for a downward modification of maintenance and child support. The Second Department reversed and ordered a new hearing. The parties' judgment of divorce incorporated but did not merge the terms of a stipulation of settlement regarding financial matters. Contrary to the conclusion of the Support Magistrate, the father was not obligated to demonstrate a substantial and unanticipated change in circumstances, since the child support stipulation was executed after the effective date of amendments to Family Ct Act §451 (3) (b). Under the amendments, a court could modify a support obligation upon a showing that the payor's income decreased by 15%, as long as the reduction was involuntary, and diligent efforts were made to secure employment commensurate with the party's education and abilities. Further, the Support Magistrate did not evaluate whether the father showed that an extreme hardship would result absent a downward modification of maintenance. The father represented himself.
http://nycourts.gov/reporter/3dseries/2021/2021_01772.htm

M/O Chaloeicheep v Hanrahan, 3/24/21 – **CUSTODY / REVERSED**
The mother appealed from an order of Kings County Family Court, which granted the father's custody petition and denied her petition. The Second Department reversed and

ordered the transfer of custody to the mother. The father lived in Brooklyn and the mother and child in upstate NY. After a weekend visit with the child, the father decided not to return the child as planned and kept the child in Brooklyn. He filed a custody petition, falsely alleging that he was the child's primary caregiver and that the mother was not communicating with him. The mother drove to Brooklyn and attempted to see the child, but the father's apartment locks had been changed, and police intervention was necessary. Such past performance by the father was a factor cited by the appellate court in reversing the order appealed from. Lauri Gennusa represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_01765.htm

M/O Lobb v Nanetti, 3/24/21 – **WILLFUL VIOLATION / NOTICE**
The father appealed from an order of Westchester County Family Court, finding that he willfully violated terms of a temporary order of protection. The Second Department reversed. The hearing evidence did not show that the father was either served with a copy of the subject order of protection or made aware of its contents. The transcript regarding issuance of the order was not admitted into evidence; and no testimony or other competent proof demonstrated that the father was on notice of the prohibited conduct. Peter Kapitonov represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_01777.htm

THIRD DEPARTMENT

M/O Saber v Saccone, 3/25/21 – **WILLFUL VIOLATION / COUNSEL**
The father appealed from orders of Essex County Family Court entered pursuant to Family Ct Act Article 4. The Third Department modified. Family Court violated the father's right to counsel at the confirmation hearing when it failed to conduct the requisite searching inquiry, after the father asked that his attorney be relieved. English was not the father's first language, and court proceedings revealed that he did not understand the role of counsel and had made inadequate pro se submissions. The lower court further erred in holding that discharged counsel could not serve as standby counsel. The waiver of the right to counsel was not voluntary, knowing, and intelligent. In the circumstances presented, the proper relief was to vacate the finding of willfulness to prevent potential future prejudice. Lisa Burgess represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_01811.htm

M/O Kaleb EE., 3/25/21 – **JD AFFIRMED / ARTICLE 3 APPEALS**
The defendant appealed from orders of Essex county Family Court, which adjudicated him a juvenile delinquent and placed him with OCFS for one year. In affirming, the Third Department noted that no appeal as of right may be taken from a non-dispositional order in an Article 3 proceeding. *See* Family Ct Act § 1112 (a). Thus, the appeal from the fact-finding order was dismissed. However, the appeal from the dispositional order brought up for review all aspects of the fact-finding order. *See* CPLR 5501 (a) (1).
http://nycourts.gov/reporter/3dseries/2021/2021_01825.htm

McKenzie v Berkovitch, 3/25/21 – **ORDER OF PROTECTION / REVERSED**
The respondent appealed from an order of Sullivan County Family Court, which found that he committed a family offense and issued an order of protection. The Third Department reversed. The parties bought a farm. The petitioner lived there, while the respondent lived on Long Island. Before the instant application, the parties had been in an intimate relationship. The petitioner contended that the respondent had committed 2nd degree harassment by surreptitiously installing four cameras in the farmhouse and recording her. The evidence showed only that he contacted a security company only to upgrade the alarm system and install cameras so that the petitioner could watch the animals when she was away. Terry Forman represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_01814.htm

M/O Tasheanna CC. v Debron EE., 3/18/21 –
CUSTODY MODIFICATION / NO CHANGE IN CIRCUMSTANCES
[amended summary] The father appealed from an order of Chemung County Family Court, granting the mother's petition to modify visitation. The Third Department reversed. The mother sought certain parenting time with the children, who lived with the father in Florida. The appellate court agreed with the AFC that the mother failed to show the requisite change in circumstances so as to warrant a "best interests" analysis. The record did not demonstrate the claimed inability of the parents to communicate; the father's mistreatment of the children; or his thwarting of the mother's visits or phone calls with the children. Adam Van Buskirk represented appellant. Lisa K. Miller represented the children.
http://nycourts.gov/reporter/3dseries/2021/2021_01539.htm