CRIMINAL

FOURTH DEPARTMENT

People v Hall, 5/7/21 – **PREDICATE FELONY / INVALID**
The defendant appealed from a Lewis County Court judgment, convicting him of 1st degree course of sexual conduct against a child and another crime and sentencing him as a second felony offender (SFO). The Fourth Department modified. The sentence for the predicate felony was imposed more than 10 years before the instant offense, so the statutory tolling period based on subsequent incarceration were critical to the analysis. The People's SFO statement did not set forth the dates or locations of incarceration. At sentencing, the prosecutor made assertions about the defendant's time in custody but did not document the claims. The defendant objected to the calculation of the tolling period. Thus, County Court erred in adjudicating him a SFO without giving him reasonable notice and an opportunity to be heard. The matter was remitted for the filing of a new SFO statement and resentencing. Philip DiGiorgio, Jr. represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_02901.htm

People v Bagley, 5/7/21 – **NO CUSTODY / NO ESCAPE**
The defendant appealed from an Ontario County Court judgment, convicting him of multiple crimes. The Fourth Department modified, by dismissing the charge of 1st degree escape. The proof was legally insufficient to establish that the defendant was in custody at the time of the alleged escape. An officer informed the defendant that he was under arrest and tried to pull him from the driver's seat of a vehicle. The defendant drove off, dragging officers across the parking lot. Bradley Keem represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_02964.htm

People v Jennings, 5/7/21 – **440 MOTION / CONFLICT**
The defendant appealed from an Onondaga County Court order, which denied his CPL 440.10 motion to vacate a judgment convicting him of 1st degree assault. The Fourth Department reversed. A hearing was needed to determine whether the defendant validly waived counsel's potential conflict of interest and whether the conflict operated on the defense. Hiscock Legal Aid Society (Sara Goldfarb, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_02937.htm

People v Thomas, 5/7/21 – **SENTENCE REVIEW / BROAD POWER**
The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of attempted 2nd degree murder (two counts). The Fourth Department affirmed. The People correctly conceded that this defendant did not validly waive the right to appeal, but incorrectly asserted that any defendant must show extraordinary circumstances or an abuse of discretion to obtain a sentence reduction. The appellate court was "compelled to emphasize once again" that such view of the scope of its sentence review authority was erroneous. *See* CPL 470.15 (6) (b) (Appellate Division may modify as matter of discretion in interest of justice when sentence was unduly harsh or severe); *People v Cutaia*, 167 AD3d 1534 (Appellate Division's sentence review power may be exercised without

deference to sentencing court; reviewing court may substitute its discretion for that of trial court which has not abused discretion).
http://nycourts.gov/reporter/3dseries/2021/2021_02923.htm

People v Wilcox, 5/7/21 – **PEOPLE'S APPEAL / DISMISSAL REVERSED**
The People appealed from an Oswego County Court order, granting the defense motion to dismiss two drug charges. The Fourth Department reversed. This was not one of those rare cases where the exceptional remedy of dismissal was appropriate. True, the People should have presented to the grand jury the defendant's request that two other vehicle occupants be called as witnesses. But there was no showing that, absent the misconduct, the grand jury might have decided not to indict the defendant. New statements by the requested witnesses did not constitute the type of exculpatory evidence that had to be presented.
http://nycourts.gov/reporter/3dseries/2021/2021_02893.htm

FAMILY

FOURTH DEPARTMENT

M/O Balle S. (Tristian S.), 5/7/21 – **WHOOPING / NEGLECT**
The father appealed from an order of Onondaga County Family Court, which determined that he neglected the subject children. The Fourth Department affirmed. The father admitted that he "whooped" the oldest child and struck her repeatedly with various objects. Further, the out-of-court statements made by the younger children to a caseworker established that such excessive corporal punishment was part of a pattern. The fact that the punished child did not require medical attention did not preclude a finding of neglect, where harm was indicated by her pain and fear. The other children were derivatively neglected, given the father's fundamental defect in understanding his parental duties. It did not matter that the other children were not present during the underlying incident.
http://nycourts.gov/reporter/3dseries/2021/2021_02914.htm