CRIMINAL

SECOND DEPARTMENT

People v Bernard, 6/9/21 – **440 / *PADILLA* / REVERSED**
The defendant appealed from an order of Queens County Supreme Court, which denied his CPL 440.10 motion to vacate judgments, convicting him of 5th degree criminal sale of a controlled substance and another crime. The Second Department reversed and remitted for a hearing. In his motion, the defendant contended that he was denied effective assistance by counsel's failure to advise him of clear immigration consequences of his pleas. The plea transcript did not indicate that counsel advised the defendant about such consequences. Moreover, it appeared that a decision to reject the plea offer would have been rational. The defendant and his partner had four children in this country. Appellate Advocates (Michael Arthus, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03601.htm

People v Benitez, 6/9/21 – ***CATU* / REVERSED**
The defendant appealed from a judgment of Dutchess County Court, convicting him of 2nd degree criminal sale of a controlled substance. The Second Department reversed, vacated the guilty plea, and remitted. The trial court did not fulfill its constitutional duty to ensure that the defendant had a full understanding of the plea consequences, including the specific or maximum period of post-release supervision. *See People v* Catu, 4 NY3d 242. The plea was thus not knowing, voluntary, and intelligent. Carol Kahn represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03600.htm

People v Dillon, 6/9/21 – ***CATU* / REVERSED**
The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 2nd degree assault and other crimes. The Second Department reversed, vacated the plea, and remitted. Supreme Court failed to advise the defendant, at the time of his plea, that he would be sentenced on his assault conviction to a period of post-release supervision. Contrary to the People's contention, the plea of guilty to each count had to be vacated, since the counts were part of one indictment and one judgment, and the sentences would run concurrently. Jillian Harrington represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03607.htm

People v Canady, 6/9/21 – **SORA / REVERSED**
The defendant appealed from an order of Queens County Supreme Court, which designated him a level-three sex offender. The Second Department reversed and found him a level-two offender. The SORA court improperly assessed 25 points under risk factor 2 and 20 points under risk factor 4, where the People failed to establish that the defendant engaged in sexual contact with the victims or that, under a theory of accessorial liability, he shared the intent of the victims' clients in engaging in sexual contact. Russell Rothberg represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03618.htm

People v Mott, 6/9/21 – **SORA / REVERSED**
The defendant appealed from a Dutchess County Court order, which designated him a level-three sex offender. The Second Department reversed and found him a level-two offender. County Court lacked the discretion to upwardly depart, because the People failed to identify an aggravating factor not adequately considered by the Guidelines. They relied on a prior conviction for public lewdness and indications that the defendant had not accepted responsibility for his sexual misconduct. The prior conviction was a misdemeanor sex crime, which was accounted for under risk factor 9. Lack of acceptance of responsibility was covered by risk factor 12. Steven Levine represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03621.htm

People v Velasquez, 6/9/21 – **SORA / REVERSED**
The defendant appealed from an order of Westchester County Supreme Court, which designated him a level-three sexually violent offender. The Second Department reversed and found the defendant a level-two sexually violent offender. The existence of a familial relationship between the offender and the victim, standing alone, did not constitute an aggravating factor justifying an upward departure. That relationship was considered by the Guidelines, which deliberately excluded familial relationships from the assessment of points on the RAI and expressly determined that intrafamilial offenders did not pose a comparatively higher risk of recidivism or danger to the community. Jason Bernheimer represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03625.htm

APPELLATE TERM, SECOND DEPT.

People v Sosa, 2021 NY Slip Op 50519 (U) – **SPEEDY TRIAL / DISMISSAL**
The People appealed from a Queens Criminal Court order, dismissing the accusatory instrument on statutory speedy trial grounds. Appellate Term, Second Department affirmed. The defendant was charged with DWI per se and common law DWI. The original accusatory instrument was facially insufficient, since factual allegations did not show that the defendant had operated the vehicle—an element of each of the charged offenses. Any Statement of Readiness by the People was illusory because they could not validly declare themselves ready until there was an accusatory instrument sufficient for trial. The People's failure to be ready within the 90-day statutory period, or to make a sufficient showing of excludability, required dismissal.
http://nycourts.gov/reporter/3dseries/2021/2021_50519.htm

THIRD DEPARTMENT

People v Williams, 6/10/21 – **HARSH SENTENCE / CONCURRENT**
The defendant appealed from a judgment of Albany County Supreme Court, resentencing him following his conviction, upon a verdict, of conspiracy and controlled substances crimes. The Third Department modified. In 2012, the defendant was sentenced to an aggregate term of 42 years plus post-release supervision. He made a CPL 440.20 motion to set aside the sentence on the ground that his federal crime, the predicate offense, did not constitute a felony under NY law. Supreme Court granted the motion but treated the

defendant as a second felony offender based on a 2005 NY conviction. After the 2005 conviction was vacated in response to a CPL 440.10 motion, the defendant was resentenced, as a first felony offender, to an aggregate term of 27 to 32 years. He contended that such sentence was harsh and excessive. The reviewing court agreed. The 2005 conviction was a reason cited for the imposition of consecutive sentences. Thus, the sentences were modified to run concurrently. The Albany County Public Defender (James Bartosik, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03634.htm

People v Brown, 6/10/21 – **JAIL CALLS / ADMITTED**
The defendant appealed from a judgment of Albany County Supreme Court, convicting him of 2nd degree burglary. The Third Department affirmed, rejecting the defendant's assertion that it was error to admit phone conversations he placed from jail. The record belied the claim that the defendant had no notice that all phone calls, except for certain privileged communications, might be recorded. The defendant also argued that admission of the calls violated his rights because he was held on bail, rather than serving a sentence. The Court of Appeals had not differentiated the constitutional standards for those scenarios.
http://nycourts.gov/reporter/3dseries/2021/2021_03633.htm

FAMILY

SECOND DEPARTMENT

M/O Magana v Delph, 6/9/21 – **CUSTODY REVERSED / *MICHAEL B.***
The mother appealed from an order of Kings County Family Court, which granted sole custody to the father and limited access to the mother. The Second Department reversed and remitted for a reopened hearing. The AFC's brief alleged new developments, including that the father told the child that the mother was evil, and the child no longer wanted to see the mother. Thus, the record was not sufficient to determine the best interests of the child. *See generally M/O Michael B.*, 80 NY2d 299.
http://nycourts.gov/reporter/3dseries/2021/2021_03589.htm

M/O Geddiah S. R. (Seljeana P.), 6/9/21 – **TPR / DISMISSED**
The petitioner appealed from an order of Kings County Family Court, which dismissed a termination of parental rights petition based on permanent neglect. The Second Department affirmed. Contrary to Family Court's determination, the petitioner did demonstrate diligent efforts to encourage and strengthen the mother-child relationship. However, the court properly dismissed the petition, since the petitioner did not show that the mother failed to maintain contact with the child or plan for the future. Although inconsistent in exercising parental access and participating in individual therapy, the mother completed domestic violence and anger management programing, obtained adequate housing and employment, and maintained contact with the caseworker to comply with parental access and therapy when scheduling conflicts arose.
http://nycourts.gov/reporter/3dseries/2021/2021_03592.htm

M/O Prince v Ford, 6/8/21 – **FAMILY OFFENSE / REINSTATED**
The petitioner appealed from an order of Kings County Family Court, which dismissed her family offense petition at the close of her case. The Second Department reversed, reinstated the petition, and remitted for a new fact-finding hearing. The petition alleged that, between 2015 and 2019, the respondent had struck and slapped her, causing her pain and injury; cursed at her; taken her belongings; and collected her mail and her tenants' rent without her permission. In deciding a motion to dismiss for failure to establish a prima facie case, a court must accept the evidence as true and give the petitioner the benefit of every reasonable inference. Family Court failed to apply this standard. Deana Balahtsis represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03591.htm

THIRD DEPARTMENT

M/O Renee S. v Heather U., 6/10/21 – **GRANDMOTHER / RIGHT TO COUNSEL**
The petitioner, the child's maternal step-grandmother, appealed from an order of Chemung County Family Court, which dismissed her custody modification petition. The Third Department withheld decision. The grandmother shared secondary legal custody with the mother. She contended that, under Family Ct Act § 262, she was eligible for assigned counsel to represent her at the fact-finding hearing, and that Family Court committed reversible error in failing to advise her of that right. As petitioner, the grandmother was not eligible for assigned counsel. However, the grandmother became potentially eligible when the mother thereafter filed a petition listing her as a respondent. Further, while the great aunt, the primary legal custodian, did not file a cross petition, she was seeking sole legal custody. Thus, Family Court erred in failing to advise the grandmother of her rights. The matter was remitted to determine whether the grandmother would have been financially eligible for assigned counsel. Matthew Buzzetti represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03635.htm

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