CRIMINAL

FIRST DEPARTMENT

People v Zaragoza, 6/17/21 – **TOUCHING / DISMISSED**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted forcible touching and another crime. The First Department dismissed the touching count. The complaint was jurisdictionally defective since it failed to allege that pressure was applied to the victim's sexual or intimate parts. Legal Aid Society, NYC (Richard Joselson) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03915.htm

People v Jamison, 6/15/21 – **CPL 440.20 / CONSECUTIVE**
The defendant appealed from an order of NY County Supreme Court, which summarily denied his CPL 440.20 motion. The First Department affirmed. The defendant was not entitled to serve the sentence for his 1993 drug conviction concurrently with the sentence for his 1991 murder conviction. A sentence not specified as consecutive is automatically concurrent. The minutes of the 1993 sentencing proceeding were lost. However, the sentence and commitment sheet and the court worksheet indicated that a consecutive sentence was pronounced. Further, the defendant must have known that his sentences were consecutive; in requesting resentencing on the 1993 conviction under the DLRA, he litigated whether concurrent sentences could be ordered.
http://nycourts.gov/reporter/3dseries/2021/2021_03816.htm

People v Simmons, 6/17/21 – **OUT-OF-STATE / EQUIVALENT**
The defendant appealed from a judgment of NY County Supreme Court, resentencing him as a second felony offender to 10 years for 1st degree assault. The First Department affirmed. In a prior appeal, the court had found that the defendant's Pennsylvania drug possession conviction could serve as a predicate felony. In this appeal, the appellate court found it inappropriate to give preclusive effect to its own prior decision. The broader knowledge requirement of the PA statute raised the possibility that the defendant could have been convicted without being guilty of a NY felony. However, the accusatory instrument revealed that the PA conviction was equivalent to a NY felony.
http://nycourts.gov/reporter/3dseries/2021/2021_03924.htm

SECOND DEPARTMENT

People v Johnson, 6/16/21 – **OBSTRUCTION / DISMISSED**
The defendant appealed from a Dutchess County Court judgment, which convicted him of DWI as a felony and 2nd degree obstructing governmental administration. The Second Department dismissed the obstruction count based on legal insufficiency. The arresting officers testified that the defendant was argumentative during a traffic stop and uncooperative during the arrest-booking process. Such conduct did not constitute a knowing physical interference with the official function being performed. Gary Eisenberg represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03851.htm

People v Applewhite, 6/16/21 – **FST / NEW TRIAL**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree CPW. The Second Department reversed and ordered a new trial. Prior to trial, Supreme Court denied a defense motion to preclude the introduction of DNA testing results and testimony about the Forensic Statistical Tool or to hold a *Frye* hearing. That was error. Since proof of guilt was not overwhelming, the error was not harmless. Heather Stepanek represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03847.htm

People v Kerringer, 6/16/21 – **SENTENCING REVIEW / STANDARDS**
The defendant appealed from a judgment of Dutchess County Court, convicting him of attempted 2nd degree criminal possession of a controlled substance and sentencing him to 6½ years' imprisonment plus five years' post-release supervision. The Second Department reduced the period of imprisonment to four years. An intermediate appellate court had broad power to modify an unduly harsh sentence. If the interest of justice warranted, the power could be exercised without deference to the sentencing court. Relevant factors included the crime charged, the defendant's circumstances, and the purpose of a penal sanction—societal protection, rehabilitation, and deterrence. As to deterrence, this defendant's employment as a correction officer militated in favor of a severe sentence. However, he had no prior criminal history, took responsibility for actions, and expressed remorse. Further, he had strong community ties and supported his parents. Two justices dissented. The sentence at the midpoint of the range was appropriate. Carol Kahn represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03852.htm

People v Acuna, 6/16/21 – **PROBATION CONDITION / IMPROPER**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 3rd degree burglary and another crime and imposing concurrent terms of probation. One condition required him to consent to searches and to seizures of any illegal drugs and weapons found. The Second Department eliminated that condition. Any conditions of probation must be reasonably necessary to ensure that the defendant will lead a law-abiding life. The defendant was not required to preserve the issue for appellate review. When he committed the crimes, he was not armed or under the influence of any substance, and his criminal history did not include offenses involving weapons or drugs. Appellate Advocates (David Goodwin, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03846.htm

People v Sestito, 6/16/21 – **SORA / REVERSED**
The defendant appealed from an order of Kings County Supreme Court, which designated him a level-two sex offender. The Second Department reversed and found him a level-one offender. The defendant pleaded guilty to attempted possession of a sexual performance by a child and was sentenced to probation. Defense counsel's request for a downward departure should have been granted. The RAI overassessed the risk of reoffense, given several factors: (1) the few images on the defendant's cell phone; (2) the lack of child pornography on his laptop; (3) the brief period at issue; (4) the defendant's lack of a criminal history; and (5) a psychosexual evaluation report finding a low risk of reoffense. Appellate Advocates (Rebecca Gannan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03859.htm

FOURTH DEPARTMENT

People v Robinson, 6/17/21 – **NEW COUNSEL / MINIMAL INQUIRY**
The defendant appealed from an Onondaga County Court judgment, convicting him of 3rd degree robbery. The Fourth Department reversed. Over many months, the defendant made serious complaints about defense counsel. The protests, suggesting a complete collapse in communication, were sufficiently serious to trigger the court's duty to conduct a minimal inquiry. County Court erred in denying the defendant's request for new counsel without conducting any inquiry. Two justices dissented. Hiscock Legal Aid Society (Christine Cook, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03939.htm

People v Darwish, 6/17/21 – **NEW COUNSEL / MINIMAL INQUIRY**
The defendant appealed from an Onondaga County Court judgment, convicting him of 1st degree robbery and other crimes. The Fourth Department reversed and ordered a new trial. The court committed reversible error by failing to conduct an inquiry following the defendant's requests for new counsel. Prompted by the defendant's complaints about his defective performance, counsel sought to be relieved. In response, the defendant described a breakdown in communication. Statements by the defendant and counsel suggested an irreconcilable conflict. The court failed to fulfill its obligation to carefully evaluate serious complaints about counsel. Hiscock Legal Aid Society (Dianne Russell, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03936.htm

People v Moore, 6/17/21 – **SUPPRESSION / NOT COMMON AREA**
The defendant appealed from an Erie County Court judgment, convicting him of 3rd degree criminal possession of a controlled substance and 2nd degree CPW. The Fourth Department reversed, vacated the plea, and dismissed several counts of the indictment. The appeal brought up for review an order denying suppression of physical evidence. The warrant authorized a search of "865 woodlawn upper apt. buffalo, n.y. 2 ½ story wood frame house white with white trim. attached garage and common areas." Drugs were found behind a doorway on stairs leading to the attic—not in a common area. Legal Aid Bureau of Buffalo (Robert Kemp, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03975.htm

People v Wagoner, 6/17/21 – **RAPE / AGAINST WEIGHT**
The defendant appealed from a Cattaraugus County Court judgment, convicting him of 1st degree rape, 2nd degree promoting prostitution (two counts), and another crime. The Fourth Department dismissed the rape count and one prostitution count and reduced the sentence for the remaining counts and directed that they run concurrently. The man at issue denied having sexual contact with the victim, who testified that she did not believe that the defendant knew what the man was doing to her the night he raped her. Legal Aid Bureau of Buffalo (Robert Kemp) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03981.htm

People v Mack, 6/17/21 – **440 / MIXED CLAIM**
The defendant appealed from a Monroe County Court order, which denied his CPL 440.10 motion to vacate a judgment convicting him of 1st degree gang assault. The Fourth Department reversed and remitted for a hearing. The motion court erred in limiting the scope of the hearing on ineffective assistance to alleged errors that could not have been raised on direct appeal. An IAC claim constituted a single ground upon which relief was requested, was concerned with the fairness of the entire process, and had to be viewed in totality. A 440 proceeding was the proper vehicle for a mixed claim alleging errors appearing in, and dehors, the record. Monroe County Public Defender (Drew DuBrin, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_03982.htm

FAMILY

SECOND DEPARTMENT

M/O Brown v Simon, 6/16/21 – **CUSTODY / ALIENATION**
The parents cross-appealed from an order of Westchester County Family Court, which awarded the father sole physical custody of the child and granted the mother modest supervised therapeutic access. The Second Department modified. The evidence did not support the father's allegations that the child was sexually assaulted by her older sister while in the mother's care. Those charges had repeatedly been deemed unfounded. The child reacted negatively to the mother, but her preferences were not dispositive. The record was replete with proof of the father's alienating behavior. Nevertheless, to promote stability, physical custody should remain with him. Weekly reunification therapy was ordered to rebuild the mother-child relationship, and the father was directed to pay for such counseling. The mother was entitled to liberal unsupervised parental access. Gretchen Kim represented the mother.
http://nycourts.gov/reporter/3dseries/2021/2021_03831.htm

M/O Lopez v Reyes, 6/16/21 – **CUSTODY / CHILDREN'S DESIRES**
The two children appealed from an order of Orange County Family Court, which awarded sole custody to the mother in litigation involving two prior appeals and two reopened hearings. The Second Department reversed. The proof did not show that the father was less capable of providing a stable home than the mother. On school days, her work schedule required her to leave the children alone in the morning, and they were often tardy. Given that they were 12 and 14 at the time of the proceedings, the children's desire to live with the father deserved great weight. Custody to him and liberal parental access to the mother would best serve them. Theoni Stamos-Salotto represented the children.
http://nycourts.gov/reporter/3dseries/2021/2021_03840.htm

Winter v Winter, 6/16/21 – **SUPPORT VIOLATION / INEFFECTIVE**
In a matrimonial action, the father appealed from an order of Suffolk County Supreme Court, finding a willful violation of a child support order. The Second Department reversed and ordered a new hearing. The father owed arrears but contended that his failure to pay arose from his inability to work due to a medical condition. He was denied effective

assistance. Supreme Court sustained objections to the father's testimony because evidence from a medical professional was needed. Thus, counsel should have obtained the relevant proof. The reviewing court granted the mother's motion to strike parts of the father's brief referring to matters dehors the record.
http://nycourts.gov/reporter/3dseries/2021/2021_03865.htm

M/O Messiana v Pena, 6/16/21 – **SUPPORT / COLLEGE**
The father appealed from an order of Kings County Family Court, which modified child support to direct him to pay a pro rata share of private college expenses and arrears for such expenses. The Second Department affirmed. The father erred in taking an appeal from the order of the Support Magistrate. On its own motion, the appellate court deemed the notice of appeal to be from the Family Court order denying his objections. Pursuant to Domestic Relations Law § 240 (1-b) (c) (7), the court may direct a parent to contribute to a child's college education absent special circumstances or an agreement.
http://nycourts.gov/reporter/3dseries/2021/2021_03841.htm

THIRD DEPARTMENT

M/O John U. v Sara U., 6/17/21 – **AGREEMENT / AMBIGUOUS**
The father appealed from an order of Rensselaer County Family Court, which granted the mother's motion to dismiss his petition seeking enforcement of settlement agreement incorporated into their judgment of divorce. The subject provision stated that "the children shall continue to attend school within the school district." There was an ambiguity as to whether that meant the children would be home-schooled, as they were when the agreement was signed, or attend public school, as they had at other times. Given the absence of an unequivocal mandate, the mother was properly not held in contempt. But the lower court erred in dismissing the father's petition, rather than holding a hearing to discern the parties' intent. David Siegal represented the father.
http://nycourts.gov/reporter/3dseries/2021/2021_03892.htm

FOURTH DEPARTMENT

M/O Vega v Delgado, 6/17/21 – **ALIENATION / SUBSTITUTED JUDGMENT**
The mother appealed from an order of Monroe County Family Court, which awarded the father physical custody of the child. The Fourth Department affirmed. The AFC did not improperly substitute her judgment for the child's. The mother's pervasive pattern of alienating the child from the father was likely to result in a risk of serious harm to the child. Thus, the AFC acted ethically by informing the court of the child's wishes and then advocating for a result different.
http://nycourts.gov/reporter/3dseries/2021/2021_03956.htm

M/O Dobson v Messervey, 6/17/21 – **CUSTODY / TRANSFER**
The father appealed from an order of Ontario County Family Court, which awarded the mother primary physical custody of the child. The Fourth Department modified. The father was the more stable and fit parent; had not used drugs for years; and was steadily employed. In contrast, the mother continued to abuse drugs and was unemployed. In the months leading up to the hearing, she overdosed and had to be revived with Narcan; was found

passed out in a parking lot; and went missing over a weekend, leaving the child with the maternal grandfather. The mother acknowledged that her addiction affected her parenting and helped account for the child's absences from school. The appellate court awarded physical custody to the father and remitted so that Family Court could set a visitation schedule for the mother. Gary Muldoon represented the father.
http://nycourts.gov/reporter/3dseries/2021/2021_03962.htm