CRIMINAL

FIRST DEPARTMENT

People v Martin, 1/7/20 – **CPL 440.10 / HEARING NEEDED**
The defendant appealed from an order of NY County Supreme Court, which summarily denied his CPL 440.10 motion. The First Department reversed and remanded for a hearing, while holding in abeyance the defendant's appeal from the underlying judgment, convicting him of 2nd degree murder, aggravated vehicular homicide, and other crimes. The motion presented a material factual dispute. Motion counsel's supporting affirmation reported that defense counsel said he did not realize he could have called an expert regarding whether, based on ingesting drugs, the defendant could not have shown depraved indifference. Further, an expert affidavit stated that the defendant did not possess the requisite mental state. In opposition, the prosecutor reported that defense counsel said he was indeed aware that he could have called an expert, but for strategic reasons chose not to. Aidala, Bertuna & Kamins represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00067.htm

People v Thomas, 1/7/20 – **SORA ERROR / BUT AFFIRMED**
The defendant appealed from an order of Bronx County Supreme Court, which adjudicated him to be a level-three sexually violent offender. The First Department found that the SORA court incorrectly assessed 15 points under the risk factor for acceptance of responsibility. The defendant was removed from sex offender treatment for reasons not tantamount to a refusal to participate. Instead, the court should have assessed 10 points under that risk factor, based on the defendant's general failure to accept responsibility for his sexual misconduct. The SORA court correctly assessed 20 points for unsatisfactory conduct while confined. The defendant remained a level-three offender, and the appellate court found no basis for a downward departure.
http://nycourts.gov/reporter/3dseries/2020/2020_00084.htm

SECOND DEPARTMENT

People v Alleyne, 1/8/20 – **JUROR / NOT "UNAVAILABLE"**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree assault and 4th degree CPW. The Second Department reversed and ordered a new trial. After both sides had rested and over defense objections, the trial court excused juror 10 because she had to travel to Maryland for an evening work obligation the next day (Friday). The day after the alternate was substituted, the jury reached its verdict. A defendant has a constitutional right to a trial by a particular jury, chosen according to the law, in whose selection the defendant had a voice. The trial court must discharge a juror who is "unable to continue serving by reason of illness or other incapacity, or for any other reason is unavailable for continued service," at any time after the jury has been sworn and before the rendition of a verdict. *See* CPL 270.35 (1). However, this juror's work obligation, and the potential inconvenience or financial hardship flowing from jury service, did not render her "unavailable." The People engaged in pure speculation that, had juror

10 not been excused, she might have been distracted due to her work conflict. Legal Aid Society of NYC (Ellen Dille, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00154.htm

People v Zachary, 1/8/20 – **TOSSING BAG / NOT TAMPERING**
The defendant appealed from a judgment of Orange County Court, convicting him of 2nd degree assault, tampering with physical evidence, and other crimes, upon a jury verdict. The Second Department reduced the tampering conviction to an attempted crime. Police observed the defendant as he left a store holding a brown paper bag, drank from a bottle in the bag, dropped the bag, and fled. An officer then saw the defendant discard a different, plastic bag, which was later determined to contain marijuana. In the interest of justice, the appellate court found the tampering proof legally insufficient. The defendant discarded the subject plastic bag while being pursued for violating the open-container law. Richard Greenblatt represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00165.htm

People v Blanton, 1/8/20 – **YO / NOT CONSIDERED**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of attempted 2nd degree CPW, upon his plea of guilty. The Second Department vacated the sentence and remitted. CPL 720.20 (1) requires a youthful offender determination in every case where the defendant is eligible, even where he or she fails to request the determination or agrees to forgo it as part of a plea bargain. *See People v Rudolph*, 21 NY3d 497. This defendant was eligible, but Supreme Court did not consider whether he should be afforded YO status. Appellate Advocates (De Nice Powell, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00156.htm

FAMILY

FIRST DEPARMENT

Matter of Katherine U. (Jose U.), 1/7/20 – **CLOSED-CIRCUIT TV / DUE PROCESS**
The respondent father appealed from an order finding neglect and from a subsequent order of disposition. The appeal from the fact-finding was dismissed, given the entry of the order of disposition. *See Matter of Aho*, 39 NY2d 241, 248. However, the appeal from the order of disposition brought up for review the fact-finding order. *See* CPLR 5501 (a) (1); Family Ct Act § 1118. The First Department affirmed. In permitting the child to testify via closed-circuit television, Family Court properly balanced the respondent's due process rights against the child's emotional well-being. During testimony, the child was visible and subject to contemporaneous cross-examination by counsel, in consultation with the respondent. A social worker's affidavit established that the child would suffer emotional harm if required to testify in open court. In any event, the respondent was collaterally estopped from rebutting the allegations of sexual abuse set forth in the Article 10 petition. Prior to the conclusion of the fact-finding hearing, the respondent was convicted of

predatory sexual assault against a child, 1st degree rape, and other offenses. He had a fair opportunity to litigate the charges in the criminal trial, at which the child testified in open court. The criminal acts mirrored the sexual abuse allegations in the Article 10 petition.
http://nycourts.gov/reporter/3dseries/2020/2020_00066.htm

Matter of Jaquan L. (Pearl L.), 1/9/20 – **KINSHIP PAYMENTS / RETROACTIVITY**
This appeal concerned an order of Bronx County Family Court, which denied a motion to extend kinship guardianship assistance payments for the subject children until they turned 21. The First Department reversed and granted the motion. The respondent executed kinship guardianship petitions for her two grandchildren, then both under age 16. Monthly subsidies were to be provided until the children reached age 18. Family Court approved the guardianship petitions, and the children were discharged from foster care. While the instant motion to extend the payments was pending, the KinGAP statute was amended to make subsidies available until age 21 for children who were under age 16 at the time of execution of the petitions. The Legislature was silent as to retroactivity; but the appellate court held that the amendment should apply retroactively, given its remedial nature and the sense of urgency conveyed by the Legislature. The law rectified an anomaly that resulted in the arbitrary denial of benefits. Prior to the KinGAP expansion, had the children been adopted by the grandmother and remained with her under the auspices of foster care, or had she proceeded with guardianship after they turned 16, they would have been entitled to subsidies until age 21. The Legal Aid Society of NY (Claire Merkine, of counsel) represented the appellants.
http://nycourts.gov/reporter/3dseries/2020/2020_00213.htm

Matter of Daniel P. (Noheme P.), 1/7/20 – **DEFAULT / NOT APPEALABLE**
The respondent mother appealed from order of disposition of Bronx County Family Court. Based on a determination of neglect, the child was placed with in the supervised custody of the non-respondent father. The appeal from the disposition was moot, since the placement had expired. For the first time on appeal, the mother argued that Family Court incorrectly held that the underlying fact-finding order was upon her default. The record belied her stance. Counsel was not authorized to participate in court proceedings until the mother arrived. By the time she did, Family Court had admitted key treatment records. When the mother was present, she did not seek to introduce any proof. Since the fact-finding order was indeed upon the mother's default, it was not appealable. *See* CPLR 5511. The reviewing court rejected the mother's complaint that Family Court granted her requests for substitute counsel and her unpreserved argument that the non-respondent father should not have been allowed to participate in the fact-finding hearing. A non-respondent parent may take part in hearings affecting temporary custody of the child.
http://nycourts.gov/reporter/3dseries/2020/2020_00077.htm

SECOND DEPARTMENT

Matter of Defrank v Wolf, 1/8/20 – **CUSTODY / REVERSED**
The mother appealed from an order of Nassau County Family Court, which dismissed her custody petition based on a lack of subject matter jurisdiction in NY and a finding that Pennsylvania—where the family had previously resided and the father continued to live—

had jurisdiction under the UCCJEA. The Second Department reversed and remitted. The child did not have a home state at the time of commencement. NY could exercise jurisdiction to make an initial custody determination, since the child and the mother had a significant connection with this state; and substantial evidence was available here as to the child's care, protection, training, and personal relationship. *See* Domestic Relations Law § 76 (1) (b). Carol Lewisohn represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00126.htm

Lopez v Wessin, 1/8/20 – **WILLFUL VIOLATION / ILLEGAL PUNISHMENT**
The father appealed from a Queens County Family Court order, placing him on probation for five years. The Second Department reversed. The mother alleged that the father had willfully violated a child support order. After a hearing, the Support Magistrate agreed. Family Court confirmed such finding, ordered jail absent payment of a purge amount, and further ordered probation. Although unpreserved, the challenge to the unlawful sentence was not subject to the preservation requirement. Family Ct Act § 454 authorizes imposition of either probation or incarceration, not both. Since the father had completed his jail term, probation had to be vacated. Ian Tarasuk represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00137.htm

Matter of Miller v DiPalma, 1/8/20 – **WILLFUL VIOLATION / IAC**
The father appealed from an order of commitment of Orange County Family Court, which was based on his willful violation of a child support order. The order to jail the father was moot, but the underlying willfulness finding was not. The Second Department reversed and remitted for a new hearing on the violation petition, finding ineffective assistance of counsel. The father's defense was that he could no longer work as a mail carrier due to a back injury and that he sought different work. Yet counsel failed to procure medical records or testimony, financial documentation, or records regarding the job search. Dawn Shammas represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00140.htm

Denise R.-D. v Julio R.P., 1/8/20 – **PATERNITY / NO EQUITABLE ESTOPPEL**
The mother appealed from an order of Queens County Family Court, which denied her application for a genetic marker test and dismissed the petition, and from findings of fact of that court. The appeal from the findings was dismissed; no appeal lies therefrom. The Second Department reversed the order, reinstated the petition, vacated the denial of the genetic marker test, and remitted. The mother commenced the proceeding to adjudicate Julio R.P. to be the father of the subject child. The putative father moved to dismiss, based on equitable estoppel. After a fact-finding hearing, the Family Court estopped the mother from asserting paternity, in light of the lack of a relationship between the putative father and the child, compared to the child's lengthy relationship with the mother's husband. But the mother had told the child about the putative father. The record did not indicate that, if the genetic test were ordered, the child would suffer irreparable loss of status, destruction of his family image, or other harm. Deana Belahtsis represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00145.htm

Matter of Makris v Makris, 1/8/20 – **MAINTENANCE / WAIVED**

The husband appealed from an order of Westchester County Family Court, granting the wife's petition to enforce a maintenance provision in the divorce judgment. The Second Department reversed. Although a court has no discretion to reduce or cancel child support arrears that accrue before a modification application, a maintenance order may be modified or annulled after arrears accrue, based on good cause. The husband did not seek relief until the instant enforcement proceeding was filed, because 16 years earlier, the wife waived maintenance in an oral agreement. Frank Salvi represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00139.htm

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