CRIMINAL

DISCOVERY

People v Bonifacio, 1/23/20 – **PROTECTIVE ORDER / VACATED**
The defendant applied pursuant to CPL 245.70 (6) to review a ruling of Nassau County Supreme Court set forth in a protective order dated January 10, 2020, and to vacate or modify the ruling. A justice of the Second Department vacated the order and remitted to give the defendant an opportunity to make arguments with respect to the prosecution application. After the defendant was charged with attempted 2nd degree murder, the People made an ex parte application for a protective order regarding certain information otherwise subject to automatic disclosure. On January 10, 2020, Supreme Court issued the protective order, under which the People were not required to provide information regarding a certain witness until the completion of jury selection. After reviewing the order, defense counsel requested an opportunity to be heard, but the court refused. That was error. New CPL Article 245 provides for automatic disclosure within days after of arraignment. Upon a showing of good cause by either party, the court may make appropriate orders regarding discovery. The court has authority to grant ex parte protective orders, but the new scheme—which recognizes that the parties and the trial court should strive to resolve discovery disputes—must be construed to permit ex parte relief only where a clear necessity has been shown. No such necessity was shown here, so counsel's reasonable request should have been granted.
http://nycourts.gov/reporter/3dseries/2020/2020_00517.htm
Second Department protocol for processing CPL 245.70 (6) applications:
https://www.nycourts.gov/courts/ad2/forms/Protocol_for_Processing_CPL245.70(6)_Applications.pdf

FIRST DEPARTMENT

People v Guillen, 1/21/20 – **CPL 330.30 HEARING / AMOROUS JUROR**
The defendant appealed from judgment of NY Supreme Court, convicting him of attempted 2nd degree murder and other crimes. The First Department remitted the matter for a hearing on the defendant's CPL 330.30 motion. The trial court erred in denying the application without a hearing. A prosecution trial assistant disclosed that, after the trial and before sentencing, he received a handwritten note in the mail from the jury foreperson, stating: "Now that the trial is over ...", followed by the juror's name and contact information. Based on a crossed-out phrase, it appeared that the note had been written during the trial. Standing alone, the note raised an issue of fact about whether the foreperson's apparent romantic interest in the prosecution assistant prevented her from deliberating fairly. It was not dispositive that the assistant did not respond to the note, since the relevant issue was the juror's misconduct during the trial. The trial court also erred with regard to a second juror, who had a sufficiently close relationship with a witness to warrant a hearing as to whether that juror engaged in misconduct by failing to disclose the relationship. The Office of the Appellate Defender (Rosemary Herbert, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00387.htm

People v Torres, 1/23/20 – **EX POST FACTO / SUB COUNSEL**
The defendant appealed from judgments of NY County Supreme Court, convicting him of multiple sexual offenses and sentencing him to an aggregate term of 42⅓ years to life. In the interest of justice, the First Department modified. The People conceded that certain counts should be dismissed as inclusory concurrent counts and that the conviction of 2nd degree incest (P.L. § 255.26) violated the Ex Post Facto Clause, because it was based on conduct that occurred before the statute became effective. Accordingly, such count was reduced to incest (not divided into degrees)—the equivalent offense at the time of the defendant's conduct (former Penal Law § 255.25). The matter was remanded for resentencing on the modified count. However, the defendant's remaining Ex Post Facto claim was unavailing. One count of 1st degree course of sexual conduct was based on conduct that ended before a statutory amendment expanded the definition of "sexual conduct." But the conduct cited by the defendant as being covered by the amendment had no relevance. Thus, the statutory change had no effect on the defendant, and there was no Ex Post Facto violation. *See Dobbert v Florida*, 432 US 282. Supreme Court properly denied the defendant's request, made shortly before trial, for new counsel. The defendant did not establish good cause, and the request was properly denied in light of the timing and the court's confidence in counsel's abilities. *See People v Porto*, 16 NY3d 93. While the defendant's main complaint involved a lack of communication about witnesses to be interviewed, a change of counsel would not likely have improved this situation. Counsel called appropriate witnesses, and there was no indication that any witnesses with information material to the defense were omitted. Counsel's permissible explanation of his own performance did not create a conflict. *See People v Nelson*, 7 NY3d 883. The Center for Appellate Litigation (Hunter Haney, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00480.htm

SECOND DEPARTMENT

People v Allen, 1/22/20 – **YO / NOT CONSIDERED**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree robbery and 2nd degree CPW, upon his plea of guilty. The Second Department vacated the sentence and remitted. With respect to the weapons charge—an armed felony—the trial court was required to determine whether the defendant was an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3); and, if so, whether he should be afforded youthful offender status. The record did not show compliance by the trial court. As to the robbery, the lower court did not consider whether the defendant should be afforded YO treatment. Appellate Advocates (Jonathan Schoepp-Wong, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00423.htm

People v Pittman, 1/22/20 – **SORA / REVERSED**
The defendant appealed from an order of Kings County Supreme Court, which designated him a level-three sex offender. The Second Department reversed and reduced his status to level two. The defendant was presumptively at level-two risk, but the SORA court granted the People's application for an upward departure. A departure from the presumptive risk level is the exception, not the rule. Here the People failed to prove the existence of an

aggravating factor. Supreme Court relied on the defendant's criminal history, but the Guidelines adequately accounted for that history. Evidence regarding prior conduct for which the defendant was charged, but not convicted, did not meet the clear and convincing evidence standard. Appellate Advocates (Stephanie Sonsino, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00443.htm

People v McNeil-Smith, 1/22/20 – **CONCURRENT TERMS / MODIFICATION**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2nd degree assault and 3rd degree CPW, and sentencing him to consecutive terms. The Second Department held that the sentences had to run concurrently. The facts adduced at the plea allocution did not establish that the defendant's acts underlying the crimes were separate and distinct. Appellate Advocates (David Goodwin, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00434.htm

THIRD DEPARTMENT

People v Burdo, 1/23/20 – **WAIVER OF APPEAL INVALID / AFFIRMED**
The defendant appealed from a judgment of Clinton County Court, convicting him of 1st degree burglary and 1st degree robbery. The People conceded, and the Third Department agreed, that the appeal waiver was invalid. County Court did not advise the defendant that the right to appeal was separate and distinct from the other trial-related rights forfeited by the guilty plea or that he fully comprehended the consequences of the appeal waiver. Furthermore, the record did not reflect that the defendant signed the written waiver in open court after conferring with counsel. Accordingly, he was not precluded from challenging the severity of the sentence. Nevertheless, the sentence was neither harsh nor excessive.
http://nycourts.gov/reporter/3dseries/2020/2020_00456.htm

FAMILY

FIRST DEPARTMENT

Matter of Anthony S. v Monique T.B., 1/21/20 –
SUPPORT / NON-CUSTODIAL PARENT PETITION OKAY
The mother appealed from an order of Bronx County Family Court, which denied her objection to the order of a Support Magistrate awarding child support to the father as to the parties' two children. The First Department affirmed. In a recent appeal involving the instant parties, the appellate court determined that the trial court properly ordered a determination regarding whether the father was a custodial parent or otherwise a proper party to file a petition (167 AD3d 408). The Magistrate determined that the father was a proper party—despite the lack of proof that the children lived with him, not their paternal grandmother. The Family Court Act did not prohibit a non-custodial parent from commencing a support proceeding. *See* Family Ct Act § 422 (a). While in a shared custodial

arrangement, the custodial parent cannot be required to pay child support, the unusual facts of the instant case did not demonstrate a shared custodial arrangement. There was no reason to disturb the Support Magistrate's determination that the father was credibly seeking support on behalf of the subject children and the paternal grandmother. To dismiss the petitions would be to improperly release the mother from her support obligations.
http://nycourts.gov/reporter/3dseries/2020/2020_00382.htm

Maxine B. v Richard C., 1/23/20 – **PROTECTIVE ORDER / BAD SON**
The respondent son appealed from an order of protection, entered by Bronx County Family Court in favor of the petitioner mother, based on acts constituting 3rd degree menacing. The First Department affirmed. The son emphasized that the mother said in court that she did not need the order. However, the record demonstrated that such statements, made when the son was present, did not fully reflect the mother's wishes. There had been multiple temporary orders of protection against the son. A social worker credibly testified that he isolated, controlled, and abused the mother. She was afraid to return home because the son was there. The proof supported the menacing finding. The mother testified that, one night, after the son became angry with her for cooking at 2 a.m., they struggled and she sustained a black eye.
http://nycourts.gov/reporter/3dseries/2020/2020_00482.htm

SECOND DEPARTMENT

Acosta v Melendez, 1/22/20 – **CUSTODY / DELEGATING AUTHORITY**
The father appealed from an order of Kings County Family Court, which granted the mother's modification petition, awarding her sole custody of the parties' two children, and granted supervised access to the father, who had been adjudged to have abused another child and thereby to have derivatively neglected the subject children. The Second Department remitted. The award of custody to the mother was proper, but Family Court erred in delegating its authority to determine parental access. The challenged order effectively conditioned the father's parental access on the mother's wishes. Upon remittal, a parental access schedule was to be set. Michael Fietcher represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00409.htm

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