CRIMINAL

SECOND DEPARTMENT

DECISION OF THE WEEK

People v Rose, 2/3/21 – **CPW / REVERSED**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree CPW and tampering with physical evidence (two counts). The Second Department found the weapon possession conviction against the weight of evidence. According to the defendant's testimony, upon exiting an apartment building, he saw his brother and the decedent arguing and struggled to disarm the latter. The decedent's gun fell to the ground, the defendant recovered it, the decedent charged toward him, and the defendant fatally shot him. While seeking his brother, the defendant briefly retained the weapon, and then unloaded and disposed of it, along with his bloodied shirt. A justification defense was successful, resulting in the defendant's acquittal on the murder charge. The reviewing court held that the temporary possession of the gun did not constitute a crime. The defendant initially took possession with a valid legal excuse, and there was no proof that he retained the weapon after opportunities to hand it over to authorities. One justice concurred in part and dissented in part. Appellate Advocates (Hannah Kon, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00577.htm

People v Cousar, 2/3/21 – **LARCENY / NO TERRIT. JURISDICTION**

The defendant pro se appealed from a Putnam County Court judgment, convicting him of 4th degree grand larceny. The appeal brought up for review the denial of a CPL 20.20 motion to dismiss for lack of territorial jurisdiction. The Second Department reversed, granted the motion, and dismissed the indictment. The defendant admitted that, while in NJ, he used the personal identifying information of a Putnam County, NY resident to electronically access his bank account and steal $9,000. None of the elements of the offense occurred in NY, so the People argued that the crime was a "result offense." It was not. No specific consequence was an element of the crime. The appellate court expressed no view as to whether territorial jurisdiction could have been established under CPL 20.20 (2) (b) (b) (statute designed to prevent occurrence of particular effect in NY and conduct performed with intent of having such effect here).
http://nycourts.gov/reporter/3dseries/2021/2021_00573.htm

People v Everett, 2/3/21 – ***O'RAMA* VIOLATION / NEW TRIAL**

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree murder and other crimes. The Second Department reversed. A new trial was required based on the trial court's failure to comply with CPL 310.30 and *People v O'Rama* (78 NY2d 270). The jury asked to view certain surveillance video. The lower court failed to notify the parties about the jury note, to read its contents into the record, or to respond. The mode of proceedings error required reversal. Legal Aid Society of NYC (Paul Wiener, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00575.htm

THIRD DEPARTMENT

People ex rel. Johnson v Uhler, 2/4/21 – **HABEAS CORPUS / DENIED**
The petitioner pro se appealed from a judgment of Franklin County Supreme Court, which granted the respondent's motion to dismiss his habeas corpus petition. He claimed that a robbery indictment had been improperly amended, and thus the trial court lacked jurisdiction to try him in 1988. The Third Department affirmed, but said that Supreme Court should not have premised the dismissal in part on the lack of service on the respondent. The petitioner properly submitted the application without notice (CPLR 7002 [a]), and the court did not issue the writ (CPLR 7003 [a]), so the petitioner's obligation to serve the respondent was not triggered (CPLR 7005). However, habeas relief was unavailable where, as here, the petitioner's claims were, or could have been, raised on direct appeal or in a CPL 440.10 motion. Denial of poor person status was proper under CPLR 1101 (a), given the patent lack of merit to the application. Since no basis existed to depart from traditional orderly procedure, dismissal of the petition was correct.
http://nycourts.gov/reporter/3dseries/2021/2021_00603.htm

FAMILY

FIRST DEPARTMENT

M/O Corp. Counsel v Tyrone M., 2/4/21 – **PATERNITY / NO EQUITABLE ESTOPPEL**
The father appealed from orders of NY County Family Court, which estopped him from obtaining a genetic markings test and declared that he was the father of the subject children. The First Department affirmed. The 18-year-old children viewed the respondent as their father for their entire lives, and he held himself out as such. Although the father spent less time with the children when they moved out of state, they still maintained some phone contact with him, and they had a familial relationship with his mother and relatives. Despite the limited relationship, the children's best interests would be served by estopping the father from disputing paternity. No appeal lies as of right from an order of affiliation (Family Ct Act § 1112 [a], and the court declined to deem the notice of appeal as an application for leave to appeal.
http://www.nycourts.gov/courts/ad1/calendar/List_Word/2021/02_Feb/04/PDF/H.,%20Joy%20%20v%20%20Tyrone%20M%20(2019-04759).pdf

M/O Mary H. v Cedric R., 2/4/21 – **WILLFUL VIOLATION / EFFECTIVE COUNSEL**
The father appealed from an order of Bronx County Family Court, which confirmed a finding of a willful violation of a child support order and from an order of commitment. The appeal from the order of commitment was dismissed, since the six-month period of incarceration had expired. Also dismissed was the challenge to the willful violation finding, since it was based on the father's default, and he did not move to vacate. In any event, the record did not support the claimed ineffective assistance of counsel. The father testified about his disability; his decision to depress his pension income to pursue a Social Security Disability income claim; and his resulting inability to pay child support. In light of such

testimony, the father did not establish that a lack of medical testimony or additional SSD records prejudiced him.
http://www.nycourts.gov/courts/ad1/calendar/List_Word/2021/02_Feb/04/PDF/H.,%20Mary%20%20v%20%20Cedric%20R.%20(2020-00157).pdf

SECOND DEPARTMENT

M/O Janiya T. (Johnas M.), 2/3/21 – **NEGLECT / AFFIRMED**
In an Article 10 proceeding, the mother appealed from fact-finding and dispositional orders rendered by Queens County Family Court. The Second Department dismissed the appeal from the fact-finding order, which was superseded by the order of disposition, but was brought up for review on the appeal from that order. *See* CPLR 5501 (a) (1). The appeal from so much of the final order as placed the child with Social Services was academic, since the placement had expired. However, the adjudication of neglect constituted a stigma that might impact the mother in future proceedings, so that aspect was reviewable. Neglect was proven by evidence that the mother repeatedly struck the child with a leather strap, leaving welts. The proof did not show that the mother acted in self-defense or reasonably in response to provocation.
http://nycourts.gov/reporter/3dseries/2021/2021_00568.htm