CRIMINAL

FIRST DEPARTMENT

People v Manning, 2/25/20 – **UNSWORN JUROR DISCHARGE / REVERSED**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree robbery and another crime. The First Department reversed due to the unjustified discharge for cause of a selected but unsworn juror. Initially, both the defendant and the People declined to challenge the juror, for cause or peremptorily. Subsequently, the trial court expressed concerns about an out-of-town meeting the prospective juror was to attend the day before the expected conclusion of trial. The prosecutor's ensuing challenge for cause was granted. Yet the juror never asked to be excused, and the record did not show that his state of mind would have prevented him from rendering an impartial verdict. The matter was remanded for a new trial, to be preceded by further suppression proceedings. A factual determination was needed as to whether plainclothes officers identified themselves to the defendant as police before he fled. On that point, the proof was conflicting, and the suppression court made no finding. The decision did not explain the conclusion that police actions leading to the defendant's arrest were lawful. The Center for Appellate Litigation (Jan Hoth, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_01308.htm

SECOND DEPARTMENT

People v Thelismond, 2/26/20 – **911 CALL INADMISSIBLE / REVERSAL**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW. The Second Department reversed and ordered a new trial. The trial court erred in admitting an anonymous 911 call. The statement of a non-participant can be admitted as an excited utterance, where he or she had an opportunity to personally observe the event described. Here the caller stated that somebody got shot, but not that the caller saw the shooting. For similar reasons, the present sense impression exception—for descriptions by a person perceiving an unfolding event—did not apply. The error was not harmless. Two eyewitnesses who identified the defendant as the shooter came forward only after their felony arrests two years later; and they received favorable cooperation agreements in exchange for their testimony. Further, the People placed significant reliance on the 911 call. Finally, the jurors reviewed the 911 recording during deliberations. Appellate Advocates (Alexis Ascher, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_01368.htm

People v Deverow, 2/26/20 – **GUN NOT IDENTICAL / BUT HARMLESS**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW. The Second Department reduced the sentence for murder from 23 to 17 years to life. The appellate court also addressed an error that was deemed harmless. The trial court should not have admitted a revolver recovered from underneath a vehicle located five or so blocks from the crime scene. The weapon was found seven hours after the shooting, when a passerby notified police. Where real evidence

is purported to be the actual object associated with a crime, the proponent must establish that the evidence is identical to the object involved in the crime and has not been tampered with. Here the proof was insufficient to provide reasonable assurances that the revolver was the weapon used in the shooting.
http://nycourts.gov/reporter/3dseries/2020/2020_01359.htm

THIRD DEPARTMENT

Matter of Matzell v Annucci, 2/27/20 – **SHOCK / UP TO COURT**
DOCCS appealed from a judgment of Albany County Supreme Court, which granted the petitioner's Article 78 petition to annul a determination finding him ineligible for the shock incarceration program. Following the petitioner's drug possession conviction, the sentencing court ordered his enrollment in the shock program (Penal Law § 60.04 [7]). Yet DOCCS found him "not suitable." The taking of the appeal triggered an automatic stay (CPLR 5519 [a][1]), but the petitioner's motion to vacate the stay was granted. Although he had completed a shock program, mooting the appeal, an exception to the mootness doctrine applied. The appellate court rejected DOCCS's contention that, regardless of a court order, it could consider an inmate's disciplinary record to deny shock incarceration. A 2009 DLRA amendment gave the sentencing court authority to order shock incarceration if the defendant was eligible. Before such amendment, DOCCS made the ultimate determination. DOCCS's interpretation of the statue was inconsistent with the amendment and CPL 430.10 (once court imposes sentence of imprisonment in accordance of law, such sentence may not be changed after commencement of period of sentence).
http://nycourts.gov/reporter/3dseries/2020/2020_01425.htm

DVSJA

People v Addimondo, decided 2/5/20, posted 2/24/20 –
DVSJA – ALTERNATIVE SENTENCING DENIED
At a 2019 trial in Dutchess County Court, the defense presented evidence regarding the abuse of the defendant by her partner—the homicide victim. The jury rejected a justification defense and convicted the defendant of 2nd degree murder and 2nd degree CPW. At a September 2019 hearing regarding a possible DVSJA sentence, the defense relied on trial proof of abuse and also presented testimony of an expert to address myths regarding domestic violence. In addition, a treating therapist testified, among other things, about the defendant's contemporaneous reports of abuse by the decedent. The sentencing court found insufficient the proof that abuse against the defendant, allegedly perpetrated by the decedent, was a significant contributing factor to the crime. The decision did not address the expert proof and salient elements the therapist's testimony.
http://nycourts.gov/reporter/3dseries/2020/2020_20048.htm

FAMILY

FIRST DEPARTMENT

Matter of Lorraine D.S. v Steven W., 2/25/20 –
PATERNITY DISAVOWAL / EQUITABLY ESTOPPED
The respondent appealed from an order of Bronx County Family Court, which equitably estopped him from denying paternity and entered an order of filiation declaring him the father of the subject teenage child. The First Department affirmed. Although no appeal lies as of right from an order of filiation in a support proceeding, the notice of appeal was deemed to be an application for leave, which was granted. Estoppel was proper, based on several factors. The respondent held himself out as the father. For five years, the child lived with the respondent and his mother, and the youth believed that the respondent was his father. After the respondent and the mother split, the respondent regularly visited the child. The respondent attended the basketball games and graduations of the youth, who was best man at the respondent's wedding to his current wife.
http://nycourts.gov/reporter/3dseries/2020/2020_01298.htm

RAISE THE AGE

People v S.E., decided 2/24/20, posted 2/26/20 –
EXTRAORDINARY CIRCUMSTANCES / NO REMOVAL
The AO was charged with 1st degree burglary and several other crimes in connection with his actions against a former girlfriend. The People moved to prevent removal to Erie County Family Court. After the victim ended the relationship, the AO continued to contact her against her wishes; went to her house; and destroyed her property, resulting in an order of protection. Still he persisted, committing several acts of domestic violence. The alleged behavior went beyond teenage unrequited love. The AO's text messages included threats to shoot the ex-girlfriend's mother and brother while she watched. He broke into the ex's home and jabbed a knife at her and her mother. The AO was not amenable to services. He had a JD history, had other pending cases, and had repeatedly violated probation conditions. Thus, extraordinary circumstances existed so as to prevent removal to Family Court. There was no merit, however, in the People's speculative arguments that removal would cause a lack of confidence in the judicial system.
http://nycourts.gov/reporter/3dseries/2020/2020_50262.htm

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