CRIMINAL

SECOND DEPARTMENT

DECISION OF THE WEEK

People v Nettles, 8/26/20 – **SEARCH WARRANT / CONTROVERTED**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of criminal possession of a firearm, upon a jury verdict. The appeal brought up for review the denial of the defendant's motion to controvert a search warrant and for a *Darden* hearing. The Second Department reversed and dismissed the indictment. A detective's affidavit in support of a no-knock warrant ("affidavit") averred that, based on information from a confidential informant, there was reasonable cause to believe that specified evidence of drug crimes would be found at the specified location. Previously (172 AD3d 1102), the appellate court found that, without the information from the CI, the detective's observations during two controlled buys fell short of probable cause. The Second Department held the appeal in abeyance and remitted for a hearing pursuant to *People v Darden*, 34 NY2d 177. Following the hearing, the trial court made credibility determinations favorable to the People. In the instant decision, the Second Department found that such credibility determinations were not supported by the record and that the People did not establish that the individual referred to as a CI at the *Darden* hearing was, in fact, the CI named in the affidavit. There were substantial material discrepancies between the detective's affidavit and the purported CI's testimony. Their description of facts surrounding controlled buys materially diverged. Moreover, in his affidavit, the detective said that the CI provided reliable information once before, but the detective did not indicate that he ever personally worked with the CI. In contrast, the purported CI testified that he worked with the detective 100 times before and had sworn out 100 search warrants for him. While the detective offered similar hearing testimony, he did not explain why his affidavit and testimony were so inconsistent. Where a search-warrant application is based on hearsay information from a CI, the officer must provide accurate information so that the court may assess the CI's reliability. Two justices dissented. Appellate Advocates (Samuel Barr, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04776.htm

People v Sanchez, 8/26/20 – **SORA / REVERSED**
The defendant appealed from Queens County Supreme Court orders, designating him a level-three sex offender. The Second Department reversed and reduced the defendant's status to level two. The SORA court erred in denying an application for a downward departure from the presumptive risk level. Medical evidence demonstrated that the defendant, who used a wheelchair, had had a stroke that caused permanent paralysis on his right side. A treating physician testified that there was no possibility of improvement and that the defendant required assistance in propelling the wheelchair and transferring himself to a shower stall, and was unable to stand for any length of time. Further, the defendant had no disciplinary infractions in prison. Such evidence demonstrated a greatly reduced likelihood that the defendant would reoffend or would present a danger to the community. Appellate Advocates (Lisa Napoli, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04796.htm

People v Taylor, 8/26/20 – **330.30 MOTION / VERDICT REINSTATED**
The People appealed, pursuant to CPL 450.20 (3), from a Suffolk County Court order, granting the defendant's CPL 330.30 motion to set aside, on legal sufficiency grounds, a verdict convicting him of endangering the welfare of a child. The Second Department reversed and reinstated the verdict. After the jury was discharged, defense counsel moved to set aside the guilty verdict as inconsistent with acquittals of multiple counts of 3rd degree rape and 3rd degree sexual criminal act. Then the defendant formally moved for relief on the grounds of legal insufficiency and prosecutorial misconduct. A CPL 330.30 (1) motion must be based on an on-the-record claim that would require reversal or modification of the judgment as a matter of law by an appellate court. The defendant contended that, under certain circumstances, a factual inconsistency in the verdict may provide grounds for an appellate court to consider an acquittal on one count to determine if a factually inconsistent conviction on another count was supported by legally sufficient evidence. There was some support for such contention—but only within the context of a direct appeal, when the intermediate appellate court had broad authority to grant relief, in the interest of justice, based on unpreserved errors. Such issues did not require reversal or modification as a matter of law. Thus, a trial court could not grant a CPL 330.30 motion based on such unpreserved issues. Here, defense counsel made only a general, pro forma motion for a trial order of dismissal. After the close of the evidence, there was no timely request for dismissal of the relevant count, on the ground that there was no evidentiary basis upon which the jury could find the defendant guilty of that crime, yet innocent of the higher charges. After the verdict was returned, but before the jurors were discharged, defense counsel did not assert a factual inconsistency claim. Making the claim at such time would have given the trial court one final opportunity to issue appropriate instructions and ask the jurors to continue their deliberations. The defendant also cross appealed from so much of the trial court order as rejected the 330.30 prosecutorial misconduct claim, but review of such issue had to await his appeal from the judgment of conviction. See CPL 450.10 (1).
http://nycourts.gov/reporter/3dseries/2020/2020_04790.htm

People v Morales-Aguilar, 8/24/20 – **PROTECTIVE ORDER / EXPEDITED REVIEW**
Both the People and the defendant sought CPL 245.70 (6) review of a protective order issued by Nassau County Supreme Court. A Second Department justice granted relief to the People, permitting them to withhold from the defense, until the completion of jury selection, all subject documents. The defendant's interest in obtaining information for defense purposes had to be balanced against concerns for witness safety and protection. The challenged order was an improvident exercise of discretion. Supreme Court had not granted an adequate protective order to the People in directing that certain documents would be provided to defense counsel no later than 15 days before the first scheduled date for hearing or trial and could be shared with the defendant at the start of jury selection, and that the remaining subject documents would be disclosed immediately to defense counsel. The appellate justice held that, under the circumstances presented, concerns for witness safety far outweighed the value of the discovery to the defense.
http://nycourts.gov/reporter/3dseries/2020/2020_04721.htm

APPELLATE TERM, SECOND DEPT.

People v Nikoghosyan, 8/26/20 – ***PEQUE* VIOLATION / MISDEMEANOR**
The defendant appealed from a judgment of Queens Criminal Court, convicting him of 4th degree CPW. The Appellate Term, Second Department held the appeal in abeyance and remitted. The plea court violated *People v Peque*, 22 NY3d 169, by failing to advise the defendant that his guilty plea might subject him to adverse immigration consequences, including deportation. The *Peque* court reserved on the question of whether the advisal duty applied to a misdemeanor. Assuming that it did, the record did not demonstrate that the Criminal Court mentioned, or that the defendant was otherwise aware of, the possibility of deportation. The sentence was imposed immediately after entry of the plea; and the defendant was not otherwise made aware of the deportation consequences of his plea. *Cf. People v Delorbe*, 35 NY3d 112. Thus, he had no practical ability to object to the plea allocution or otherwise tell the court that he would not have pleaded guilty if he had known about the possibility of deportation. Further, the deficiency in the allocution was clear from the face of the record. For these reasons, the defendant's claim fell within the narrow preservation exception. Upon remittal, he must be given the opportunity to move to vacate his plea and to establish the existence of a reasonable probability that, had the court properly advised him, he would have rejected the plea and opted to go to trial. Steven A. Feldman represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_50952.htm

FOURTH DEPARTMENT

Matter of State of NY v Donald G., 8/20/20 – **MHL ART. 10 / VERDICT REINSTATED**
In a MHL Article 10 proceeding, the jury found that the respondent was not a detained sex offender suffering from a mental abnormality. Supreme Court granted the petitioner's CPLR 4404 (a) motion to set aside the verdict and grant a new trial, based on juror misconduct. The Fourth Department reversed and reinstated the jury verdict. During voir dire, the foreperson did not reveal that his father had been a correction officer. The appellate court concluded that such failure was based on a reasonable misunderstanding and did not prejudice the petitioner; several jurors worked in a prison or had close relatives who were correction officers or had law enforcement jobs. Neither party seemed to have considered that to have been a disqualifying attribute: those persons were selected to serve on the jury. Indeed, because the trial was held in the shadow of Auburn Correctional Facility, it would have been difficult to select 12 qualified jurors with no connection to the prison. Further, no prejudice was likely caused by remarks attributed to the foreperson's father—"if inmates wanted to do something in prison, they could do it." At the hearing on juror misconduct, several jurors had expressed the vague notion that inmates engaged in unsavory activities; and experts gave detailed testimony as to sexual misbehavior in prison. Two justices dissented. Gary Muldoon represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04716.htm

FAMILY

FAMILY COURT

Matter of K.B. v R.S., decided 8/18/20, posted 8/26/20 –
PATERNITY / NO EQUITABLE ESTOPPEL
In Onondaga County Family Court, the putative father filed a paternity petition before the child was born, thus placing all parties on notice that he was claiming to be her father. Given that the child was now seven months old, the court found that genetic marker testing would not be traumatic to her. Testing might upset the current living situation of the child, the mother and her husband, but the child's interest in knowing the identify of her biological father outweighed that concern. The mother could not prevail simply by relying on the presumption of legitimacy. She had failed to raise the issue of equitable estoppel. But the AFC properly did so. A prima facie case of equitable estoppel had not been made, though. The petitioner did not acquiesce in the husband developing a relationship with the child, since the paternity petition was filed before the child's birth. Moreover, there were no claims that the child would suffer loss of status, family image, or other harm if the genetic test was ordered. No hearing to reach an informed decision, which the court was eager to render without further delay, given the lengthy period after the proceeding was initiated, in part due to the pandemic, and given the urgent need to resolve an uncertain familial situation for the benefit of everyone involved.
http://nycourts.gov/reporter/3dseries/2020/2020_50958.htm