CRIMINAL

COURT OF APPEALS

People v Crespo, 10/16/18 – **RIGHT TO GO PRO SE / TIMELINESS CHANGE**
During jury selection, the defendant made requests to proceed pro se. The trial court summarily rejected the unequivocal requests as untimely. The defendant was convicted of 1st degree assault and 3rd degree CPW, but acquitted of attempted 2nd degree murder. The First Department reversed, finding that the defendant's requests, made before the prosecution's opening statement, were timely pursuant to *People v McIntyre*, 36 NY2d 10. The Court of Appeals reversed, in an opinion authored by Chief Judge DiFiore, holding that a jury trial commences with the selection of the jury, and a motion to proceed pro se after jury selection has commenced may be denied as untimely as a matter of law. Judges Fahey and Wilson concurred in a dissenting opinion by Judge Rivera. The dissenters opined that the denial of the defendant's application was clear error. Forty years of jurisprudence made this a straightforward case. There was no proof that the *McIntyre* rule was unworkable or that the rule advanced by the People was needed to avoid disruption.
http://www.nycourts.gov/reporter/3dseries/2018/2018_06849.htm

FIRST DEPARTMENT

People v Allende, 10/18/18 – **1ST DEGREE ROBBERY / DISMISSED**
The defendant appealed from a judgment of New York County Supreme Court convicting him of 1st degree robbery and two counts of 2nd degree robbery and sentencing him to concurrent terms of eight years. The First Department vacated the 1st degree robbery conviction and dismissed that count. The evidence did not establish the element of display of what appeared to be a firearm. The robbery was accomplished by assaulting the victim and taking his wallet. Although an eyewitness saw what appeared to be a firearm, there was no evidence that the victim saw it. Two justices stated that, as to the 2nd degree counts, a sentence of five years would be more appropriate. The defendant was only 21 years old, and this was his first felony. His mother died when he was 16, and he struggled with depression and bipolar disorder. It was the codefendant who violently punched the victim, yet he received only a five-year term. The Center for Appellate Litigation (Megan Byrne, of counsel), represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06967.htm

NYS OMH v Marco G., 10/18/18 – **MENTAL DISEASE / REHEARING REQUIRED**
The respondent appealed from an order of New York County Supreme Court, which denied his CPL 330.20 petition for a jury rehearing and review, and from an order of the same court recommitting him from non-secure to secure confinement. The First Department reversed. After a defendant is found not responsible because of mental disease or defect, the court must decide if he has a dangerous mental disorder or is mentally ill and must be committed to the custody of the Commissioner of Mental Health. An aggrieved defendant may request, as of right, a rehearing and review de novo before a jury. The defendant made such request, and his application was erroneously denied. While the CPL does not state

that a defendant may appeal from an order denying rehearing and review, this appeal was properly before the Appellate Division, under CPLR 5701 (a) (2) (v), as an appeal as of right from an order resolving a motion on notice and affecting a substantial right. *See People v Charles*, 162 AD3d 125. Mental Hygiene Legal Service (Diane Goldstein Temkin and Sadie Zea Ishee, of counsel), represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06998.htm

SECOND DEPARTMENT

People v Mota, 10/17/18 – **SORA / ERRANT UPWARD DEPARTURE**
Westchester County Supreme Court designated the defendant a level-three sex offender. The Second Department reversed and reduced his adjudication to level two. The trial court erred in granting the People's request for an upward departure. Such a departure is permitted only if the court concludes that an aggravating factor was not adequately accounted for by the Guidelines. A SORA court must engage in a three-step inquiry: (1) whether the People articulated, as a matter of law, a legitimate aggravating factor; (2) whether the People established, by clear and convincing evidence, facts supporting that factor; and (3) whether the presumptive risk level would result in an underassessment of the danger of re-offense. Here the People failed to identify an aggravating factor; the defendant's abuse of trust within a family relationship was adequately accounted for by the Guidelines. Richard Willstatter represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06950.htm

APPELLATE TERM, SECOND DEPT.

People v Todd J., 10/17/18 – **SEALING CRIMINAL RECORD / REVERSAL**
Orange County Court denied the defendant's motion to conditionally seal the record of his 1988 drug possession conviction. The Appellate Term, Second Department reversed and remitted. County Court erred in denying the motion on the basis that the treatment programs completed by the defendant were not undertaken pursuant to the narrowly defined programs enunciated in CPL 160.58 (1). He completed the programs prior to the enactment of the statute. The remittal court should consider, among other things, whether the programs the defendant completed were similar to the judicial diversion programs authorized in CPL Article 216. Rayminh Ngo represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_28318.htm

OTHER COURTS

Matter of Arroyo v Annucci – **SARA / UNCONSTITUTIONAL AS APPLIED**
Albany County Supreme Court, decided 9/7/18, posted 10/15/18. The petitioner, who pled guilty to a sexual crime, was not released when eligible for conditional release or after reaching his maximum expiration date, because he could not find SARA-compliant housing. He was age 63, terminally ill, and housed in a prison residential treatment facility when he initiated the instant Article 78 proceeding. Supreme Court observed the "Kafkaesque irony" that the petitioner was serving post-release supervision in the prison

where he had served his sentence; and the application of SARA effectively converted his prison term into a life sentence. No compelling state interest justified such outcome. The court held that SARA's geographical limitations were unconstitutional as applied to the petitioner; as a requirement of his post-release supervision, DOCCS could impose a reasonable alternative to SARA's geographic limitations (such as electronic home monitoring); and the petitioner was entitled to immediate release. The Center for Appellate Litigation (Abigail Everett and Anokhi Shah, of counsel) represented the petitioner. http://nycourts.gov/reporter/3dseries/2018/2018_28316.htm.

NOTE: *On October 16, the Court of Appeals heard arguments in Matter of Gonzalez v Annucci as to whether DOCCS must substantially assist an inmate in obtaining SARA-compliant RTF housing.*

http://www.nycourts.gov/ctapps/summaries/Daily/2018/October16.pdf

FAMILY

COURT OF APPEALS

Lacee L. (Stephanie L.), 10/18/18 – **ADA / REASONABLE EFFORTS / PERMANENCY**

Bronx County Family Court correctly held that, as required by Family Court Act § 1089, the petitioner agency made reasonable efforts to achieve the permanency goal of returning the subject child to the mother. ACS must comply with the ADA, but a failure to provide certain services when a six-month permanency reporting period ends does not necessarily mean that the agency failed to make reasonable efforts. Family Court tried to meet the disabled mother's need for services. Judge Rivera dissented, opining that ACS did not provide the mother with services required by the ADA, and it took two years and the efforts of her counsel, a social worker, and Family Court's continued prodding, before the mother obtained some appropriate services.

http://www.nycourts.gov/reporter/3dseries/2018/2018_06966.htm

SECOND DEPARTMENT

Matter of Keanu S., 10/17/18 – **SIJS / NOT FOR JD**

Queens County Family Court held that the subject child was not an intended beneficiary of Special Immigrant Juvenile Status provisions, since he was not placed in the custody of the Commissioner of Social Services due to his status as an abused, neglected, or abandoned child. Instead, he was placed after committing acts which, if committed by an adult, would have constituted serious crimes. The Second Department affirmed, observing that allowing the child tried to use his wrongdoings and JD adjudication to meet the SIJS dependency requirement would subvert Congress's intent in enacting the SIJS scheme.

http://nycourts.gov/reporter/3dseries/2018/2018_06918.htm

Matter of Migliore v Santiago, 10/17/18 – **CUSTODY / FULL HEARING REQUIRED**

Without a hearing, Westchester County Family Court granted the mother's petitions by modifying a prior custody order and denying the father's petitions. He appealed, and the

Second Department reversed and remitted. Where a facially sufficient petition has been filed, modification of custody orders generally requires a comprehensive hearing. Family Court relied solely on information provided at court conferences and the hearsay statements and conclusions of a forensic evaluator whose opinions were untested by either party. Nancy Nissen represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06911.htm

Matter of George C. S. v Kerry-Ann B., 10/17/18 – **PATERNITY / EQUITABLE ESTOPPEL**
Before resolving the issue of equitable estoppel in a paternity proceeding, Kings County Family Court directed the petitioner and the child to submit to genetic marker testing. The child appealed, and the Second Department stayed enforcement of the order pending appeal. The appellate court reversed the challenged order and remitted. Pursuant to Family Court Act § 532, if Family Court decided that equitable estoppel should not be applied based on the child's best interests, the court should order genetic marker or DNA tests.
http://nycourts.gov/reporter/3dseries/2018/2018_06917.htm

THIRD DEPARTMENT

Matter of Liana HH. (Christopher HH.), 10/18/18 – **ABUSE / PRESUMPTION OVERCOME**
The father appealed from an order of Sullivan County Family Court adjudicating the subject children to be abused and neglected. When one of the children was alone with the father, she stopped breathing. Respondent tried to resuscitate her, and she was airlifted to a hospital for care. No fractures or bruising suggested abuse. The prima facie case presented by the petitioner established a rebuttable presumption of parental responsibility. The father presented the testimony of a pediatric neurologist, who found it unlikely that head trauma caused the child's condition and opined that a venous thrombosis arose from undiagnosed thrombophilia. The presumption of abuse was overcome by the persuasive explanation as to how the child's condition could reasonably have occurred without the father's acts or omissions. Heather Abissi represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07001.htm

Matter of Fisher v Perez, 10/18/18 – **RELOCATION / ERROR TO DENY PERMISSION**
The mother appealed from an order of Broome County Family Court which denied her request to relocate with the parties' child to Texas to live with and near family. The Third Department granted her sole legal custody and permission to relocate. Because Family Court had not yet issued an initial custody determination, strict application of *Tropea* was not required. The record included no evidence as to the father's relationship with the child. Given his significant criminal history, including domestic violence against the mother, joint legal custody was improper. The matter was remitted to set a schedule for telephone calls and visits. Alena Van Tull represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07014.htm

Matter of Hoppe v Hoppe, 10/18/18 – **RELOCATION PROPER / MORE VISITS TO DAD**
The father appealed from an order of Chemung County Family Court granting the mother's petition to relocate with the parties' two children. The Third Department modified. The mother had valid reasons to relocate 50 miles from the father's home. Her new husband

was contractually required to live near the hospital where he worked as a psychiatrist. The relocation would reduce the mother's daily commute and allow her to spend more time with the children. However, the challenged order reduced the father's parenting time, so the appellate court granted additional summer vacation time. Matthew Hug, Albany, for appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07015.htm

Matter of Crisell v Fletcher, 10/18/18 – **NO FAILURE TO PROSECUTE / REVERSAL**
Delaware County Family Court erred in dismissing the mother's petition (seeking to direct the grandparents to facilitate court-ordered visitation) based on her failure to prosecute. Although the mother was not present on a hearing date, counsel explained her absence and was ready to call the grandparents as witnesses, as directed by the mother. Under these circumstances, there was no failure to prosecute. The matter was remitted to continue the fact-finding hearing. Monique McBride represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07016.htm

Ferguson v Weaver, 10/18/18 – **GRANDPARENT VISITATION / HEARING NEEDED**
The maternal grandparents appealed from an order of Saratoga County Family Court, which granted the motion of the paternal grandmother to dismiss their petition. The Third Department reversed and remitted. The fact that the maternal grandparents could join the mother during her weekly parenting time was not dispositive. Family Court relied on information from prior proceedings that were not part of the record. Since the record presented a material factual dispute, an evidentiary hearing was needed to resolve standing and best interests. Elena Tastensen represented the appellants.
http://nycourts.gov/reporter/3dseries/2018/2018_07005.htm

Matter of Hiles v Hiles, 10/18/18 – **UCCJEA / HEARING NEEDED**
The mother appealed from an Albany County Family Court order dismissing her custody modification application. Since 2014, neither parent had resided in Mississippi, where a custody order had been entered. The father lived in Colorado, and the mother and child in New York. Family Court held conferences with counsel and the parties and with the Mississippi judge who presided over their matrimonial action. The court then dismissed the mother's application, stating that Mississippi had retained jurisdiction. The Third Department reversed and remitted. Family Court failed to make a record of all communications and to give the parties the opportunity to present facts and legal arguments. If Mississippi determined that New York was a more appropriate forum, Family Court could exercise jurisdiction. Elena Defio Kean represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07004.htm

Matter of Pike v Bigelow, 10/18/18 – **VIOLATIONS / NO NOTICE**
The mother appealed from an order of Essex County Family Court which held her in willful violation of a visitation order. The Third Department reversed and remitted. The mother did not receive adequate notice of the allegation underlying the decision. In granting the father's petition, Family Court found violations not alleged and raised for the first time in court. Moreover, the trial court did not entertain any proof with respect to the actual allegations in his petition. The father did not move to amend his pleadings or conform the

pleadings to the proof. The matter was remitted for a new hearing. Noreen McCarthy represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07006.htm

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