# CRIMINAL

## COURT OF APPEALS

### *DECISION OF THE WEEK*

***People v Ulett***, 6/25/19 – ***BRADY*** / **MURDER** / **UNANIMOUS REVERSAL**

The defendant was convicted of murder for a shooting in Brooklyn. Years after the verdict, pursuant to a FOIL request, the DA sent defense counsel a copy of a surveillance video. The defendant then made a CPL 440.10 motion to vacate his conviction, based on a *Brady* violation. The motion was denied, and the Second Department affirmed. But a unanimous Court of Appeals reversed. The People violated their constitutional obligation to disclose the video, which would have: set the scene of the murder; identified other potential witnesses; served to impeach eyewitness testimony; and provided a basis for an argument that other suspects might have been involved in the shooting. Further, the prosecutor's summation denying the existence of a video compounded the prejudice. The reasonable probability standard applied, since the defense did not specifically request the information; and that standard was met. The defendant was thus entitled to a new trial. Appellate Advocates (Leila Hull, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2019/2019_05060.htm

***People v Ellis***, 6/27/19 – **FACEBOOK** / **REGISTRATION** / **UNANIMOUS REVERSAL**

A unanimous Court of Appeals affirmed a Third Department decision, concluding that a Facebook account is not an "internet identifier" that a sex offender must disclose to DCJS, and dismissing the indictment for failing to register under Correction Law § 168-f (4). Neither Facebook nor the defendant's account was an email address or a "designation used for the purposes of chat, instant messaging, social networking or other similar internet communication." The defendant did disclose his email address, and he used his real name on Facebook. Noreen McCarthy represented the respondent.
http://www.nycourts.gov/reporter/3dseries/2019/2019_05183.htm

**DISSENTS OF INTEREST:**

*People v Almonte*, 6/27/19 –Lesser Included Offense / 911 Statements

The defendant was convicted of 2nd degree robbery and assault counts. The First Department upheld the conviction, and the Court of Appeals affirmed. In dissent, Judge Rivera opined that the trial court erred in refusing to charge the lesser included offense of 3rd degree assault and that 911 callback statements were not admissible as excited utterances. Judge Wilson concurred in part of the dissent.
http://www.nycourts.gov/reporter/3dseries/2019/2019_05185.htm

*People v Hill*, 6/27/19 – Suppression / CPL 470.15

The COA majority found no basis to disturb a suppression determination. Dissenter Judge Fahey would have reversed. The First Department improperly reviewed an issue that the trial court had not decided adversely to the defendant, offering a distinct alternative ground for affirmance, in violation of CPL 470.15 (1). Judges Rivera and Wilson concurred in the dissent.
http://www.nycourts.gov/reporter/3dseries/2019/2019_05187.htm

# FIRST DEPARTMENT

***People v Bermudez***, 6/25/19 – ***PEQUE* / REVERSED**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree robbery. The First Department reversed and vacated the plea. Previously, the reviewing court had remitted the matter for a hearing on *Peque* grounds. *See* 154 AD3d 410. The remittal court found a reasonable possibility that the defendant would not have pleaded guilty, had the court advised him of the possibility of deportation. The Center for Appellate Litigation (Arielle Reid, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05063.htm

***People v Olivarez***, 6/25/19 – ***PEQUE* / UNPRESERVED**
The defendant appealed from judgments of NY County Supreme Court, convicting him of bail jumping and a drug sale offense and from an order denying his CPL 440.10 motion. The First Department affirmed. The defendant had not established that the narrow exception to the preservation requirement applied to his *People v Peque* (22 NY3d 168) claim. He was informed of potential of deportation by a notice the People served at arraignment. In any event, the appellate court saw no reason to provide relief. While *Peque* warnings ordinarily are required whether a defendant is a citizen or not, this defendant misrepresented that he was a U.S. citizen. Counsel did not render ineffective assistance by failing to discover that the defendant was not a citizen, where counsel timely asked the defendant his status and had no duty to inquire further.
http://nycourts.gov/reporter/3dseries/2019/2019_05092.htm

***People v Cook***, 6/27/19 – ***CHAMBERS V MISSISSIPPI* / REVERSED**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of robbery and burglary charges. The First Department reversed and ordered a new trial. The trial court erred in denying the defendant's application under *Chambers v Mississippi,* 410 US 284. The defense sought to receive testimony that one of the robbery victims, who was unavailable to testify at trial, failed to identify the defendant at a lineup. Regarding the admission of the exculpatory hearsay evidence, only one requirement was in dispute: reliability. Although there were reasons to suspect that the victim made false statements, the nonidentification bore adequate indicia of reliability. It was for the jury to determine if the declaration created reasonable doubt. The Office of the Appellate Defender (Kami Lizarraga, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05210.htm

***People v Harris***, 6/25/19 –
**CONTAINER SEARCH / EXIGENT CIRCUMSTANCES / DISSENT**
The defendant appealed from a judgment of NY County Supreme Court, convicting him upon his plea of guilty of 4th degree criminal possession of stolen property. The First Department affirmed, but two justices dissented. The majority credited the People's argument that suppression was proper based on exigent circumstances validating the warrantless search. But the dissenters would have found that the People failed to establish such circumstances. When the suitcase was searched, the defendant and his companion had already been handcuffed and placed under arrest. The two men were surrounded by 10

armed officers; they could not realistically have threatened the officers' safety, nor gained access to the suitcase.
http://nycourts.gov/reporter/3dseries/2019/2019_05099.htm

# SECOND DEPARTMENT

***People v Morris***, 6/26/19 – **PSYCHIATRIC NOTICE / REVERSED**
The defendant appealed from a Dutchess County Court judgment, convicting him of 2nd degree burglary and another crime. The Second Department reversed. The trial court erred in not allowing the defendant to submit a late notice of his intent to introduce psychiatric evidence. The trial court should have weighed the defendant's constitutional right to present witnesses in his own defense against the prejudice to the People from late notice. Thomas Keating represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05160.htm

***People v Powell***, 6/26/19 – **SORA / REVERSED**
The defendant appealed from an order of Kings County Supreme Court, which designated him a level-two sex offender. The Second Department reversed and remitted. At the SORA hearing, the court found premature the defendant's request for a downward departure. However, as the People correctly conceded, the SORA court should have addressed the merits. Appellate Advocates (Nao Terai, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05170.htm

***People v Lopez***, 6/26/19 – **CONFLICT / REVERSED**
The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 3rd degree robbery. The Second Department remitted for a hearing on the defendant's application to withdraw his plea of guilty, for which he was to be appointed new counsel. The defendant's right to counsel was violated when his attorney took a position adverse to him with respect to his application to withdraw his plea at sentencing. Before determining the motion, Supreme Court should have assigned substitute counsel. Michael Fiechter represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05153.htm

# THIRD DEPARTMENT

***People v Palmer***, 6/27/19 – **CONFLICT / REVERSED**
The defendant appealed from a judgment of Broome County Court, convicting him upon his plea of guilty of a drug possession charge. The Third Department reversed. The People conceded that, during the criminal action, the Public Defender's office simultaneously represented the defendant and the confidential informant, who had opposing interests. The defendant never waived the conflict. Kevin James represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05228.htm

***People v Skyers***, 6/27/19 – **NARROW EXCEPTION / REVERSED**
The defendant appealed from a judgment of Clinton County Court, convicting him of 1st degree assault (two counts). The Third Department reversed and remitted. Midway through

his plea allocution, the defendant asserted that he was not guilty and that "everything was an accident," prompting County Court to adjourn the matter. The following day, the defendant pleaded guilty. When he returned for sentencing, the defendant expressed remorse, stating that, on the day in question, he had overdosed on medications while intoxicated; was not in his right state of mind; was not trying to hurt anyone; and did not recall what happened. Such statements raised the possibility of an intoxication defense, triggering the narrow exception to the preservation requirement and imposing a duty on the trial court to inquire further or to give the defendant an opportunity to withdraw the plea. William Reddy represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05233.htm

# FOURTH DEPARTMENT

***People v Bloodworth***, 6/28/19 – **IAC / SPEEDY TRIAL / REVERSED**
The defendant appealed from a judgment convicting him of robbery and grand larceny charges. The Fourth Department reversed, based on ineffective assistance that infected the plea-bargaining process. In a motion to dismiss on speedy trial grounds, defense counsel failed to correct the trial court's calculation error and to assert that the relevant period exceeded the six-month statutory period. Counsel instead focused on the constitutional speedy trial claim. Linda Campbell represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05284.htm

***People v Thomas***, 6/28/19 – **FAILURE TO RULE / REMITTAL**
The defendant appealed from a County Court judgment, convicting him of 2nd degree CPW. Prior to trial, he moved to dismiss the indictment, including on the ground that the grand jury proceedings were defective under CPL 210.35. On appeal, the defendant contended that the trial court erred in refusing to dismiss the indictment. However, the record did not contain any ruling on the relevant part the motion. The failure to rule could not be deemed a denial of the motion. Therefore, the Fourth Department reserved decision and remitted to County Court. The Niagara County Public Defender (Theresa Prezioso, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05290.htm

***People v Richardson***, 6/28/19 – **RIGHT TO COUNSEL / RESTITUTION**
The defendant appealed from an order of Monroe County Court, convicting him of 1st degree robbery and other crimes. The defendant contended that he was deprived of his right to counsel in connection with his decision to testify before the grand jury. The Fourth Department found the issue forfeited by the waiver of appeal, where the defendant did not contend that the violation tainted the voluntariness of the plea. The court explicitly declined to follow *People v Trapani*, 162 AD3d 1121 (3rd Dept) (where violation of statutory right to testify before grand jury purportedly occurred due to deprivation of right to counsel, issue survived guilty plea and appeal waiver). The appellate court further found that County Court erred in ordering restitution, since it was not part of the plea bargain. The court should have given the defendant a chance to withdraw his plea. As the People requested, the restitution order was vacated. Bridget Field represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05310.htm

# U.S. SUPREME COURT

***U.S. v Haymond*, 6/27/19 – JURY TRIAL / UNUSUAL PROVISION**
In 2010, the defendant was convicted of possessing child pornography; sentenced to prison, followed by supervised release; and required to register as a sex offender. In 2015, a federal District Court sent him back to prison for five more years because he violated the terms of supervised release. The controlling statutory provision provided that the judge was required to impose an additional prison term of at least five years and up to life, without regard to the length of the prison term authorized for the defendant's initial crime. The 10th Circuit agreed with the defendant that the federal law violated his 5th and 6th amendment right to have his sentence determined by a jury beyond a reasonable doubt. In an opinion by Justice Gorsuch, a divided Supreme Court agreed. The court emphasized that it was not saying that a jury determination is needed whenever a prosecutor seeks to revoke a defendant's supervised release. The opinion was limited to the "unusual provision" at issue. Justice Breyer agreed with the result, but not the reasoning. Four justices dissented.
https://www.supremecourt.gov/opinions/18pdf/17-1672_5hek.pdf

# SECOND CIRCUIT

***Hyman v Brown*, 6/25/19 –**
**ACTUAL INNOCENCE / UNCOMFORTABLY CLOSE QUESTION**
The respondent appealed from a judgment of District Court – EDNY, granting habeas corpus relief from a state murder conviction. The respondent challenged the determination that the petitioner made the gateway showing of actual innocence that was necessary for merits review of the procedurally barred ineffective assistance claim. The Second Circuit reversed. While the District Court did not err in considering impeachment evidence, the petitioner failed to make the necessary innocence showing. The credible new evidence showed only that a recanting trial witness did not view the shootout. A concurring opinion found innocence "an uncomfortably close question" and voiced a strong doubt that the victim was killed by a bullet fired by the petitioner from a gun that unaccountably turned up hidden in a place inaccessible to him. The reviewing court had to honor the strong limitations on its power, but not "without disquiet." The case was commended to the attention of the Governor.
http://www.ca2.uscourts.gov/decisions/isysquery/fd286730-6825-4bbf-a1a6-ca8e658d6793/1/doc/16-2723_complete_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/fd286730-6825-4bbf-a1a6-ca8e658d6793/1/hilite/

# FAMILY

## FIRST DEPARTMENT

***Irena K. v Francesco S.***, 65/25/19 – **FAMILY OFFENSE / MODIFIED**
The respondent appealed from an order of NY County Family Court, which granted an order of protection in favor of the petitioner. The First Department vacated the finding of 2nd degree assault. When the respondent bit the mother's ear during sex, his teeth did not constitute a dangerous instrument. Nor did the evidence show criminal obstruction of breathing or blood circulation. The petitioner testified that she had difficulty breathing when the respondent covered her nose or mouth during sex, but he stopped when she told him to do so. The findings that the respondent committed 2nd degree harassment and 2nd degree coercion were supported. The respondent threatened the petitioner that, if she stopped prostituting herself to him, he would cause her to lose her immigration status and custody of her child. The five-year order of protection was appropriate in view of the aggravating circumstances. Paul Matthews represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05066.htm

***Matter of Princetta J.S. v Felix Z.J.***, 6/27/19 – **CUSTODY / REVERSED**
The mother appealed from an order of NY County Supreme Court, dismissing her custody modification petition. The Third Department reversed and remanded for a hearing regarding visitation. The mother's allegations that the father had made baseless accusations regarding sexual abuse constituted a change in circumstances. Further, the mother stated that the child now wanted to spend one weekend per month with her. The current order did not allow the child to have any time with the mother on weekends. Tennille Tatum-Evans represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05214.htm

## SECOND DEPARTMENT

***Matter of John (Joseph G.)***, 6/27/19 – **BIO DAD / ADOPTION / REVERSED**
The biological father of a child—conceived with an anonymous egg donor and born to a gestational surrogate—sought to adopt the child and thereby terminate any parental rights of the gestational surrogate. The Second Department held that the father could do so and reversed a Queens County Family Court order dismissing the adoption petition. The petition did not require the court to enforce a surrogate parenting contract. The appellant, an adult unmarried person, was among the persons statutorily authorized to adopt. He properly sought to adopt the child to gain legal and social recognition for the existing relationship. The appellant represented himself.
http://nycourts.gov/reporter/3dseries/2019/2019_05132.htm

# FOURTH DEPARTMENT

***Matter of Sullivan v Sullivan***, 6/28/19 – **CUSTODY / REVERSED**
The defendant appealed from an order of Onondaga County Family Court which the granted the grandparents sole custody of the subject child. The Fourth Department reversed and remitted. The trial court abused its discretion in denying the mother's request to adjourn the hearing, where she presented a valid reason for her inability to attend the hearing and supported her request with a letter from her inpatient provider. The mother was prejudiced in not having the opportunity to testify. Hiscock Legal Aid Society (Philip Rothschild, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_05289.htm

***Ferratella v Thomas***, 6/28/19 – **ORDER OF PROTECTION / DUE PROCESS**
The mother appealed from an order finding that she willfully violated an order of protection when she left a voicemail for the father regarding a non-emergency issue. She contended that her due process rights were denied because the court considered conduct not alleged in the violation petition. The court addressed the issue in the interest of justice. While Family Court proceedings are permitted to be informal, due process considerations require that an order of commitment be based on facts alleged in the petition. However, reversal was not required, given evidence of another violation alleged in the petition and addressed at the fact-finding hearing.
http://nycourts.gov/reporter/3dseries/2019/2019_05282.htm

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