

## CRIMINAL

### COURT OF APPEALS

***People v Lang*, 6/23/20 – JUROR UNAVAILABILITY / NO INQUIRY**

In a unanimous opinion, the Court of Appeals reversed a murder conviction and ordered a new trial because the trial judge discharged a sworn juror as unavailable without the requisite inquiry and notice. Judge Garcia authored the opinion. Before the ninth day of trial began, the Essex County Court judge informed the parties that juror 9 was absent, due to an important appointment for a family member. Without stating that a substitution would occur, the court seated alternate 1 in place of juror 9. There was no inquiry into juror 9's likelihood of appearing. At a recess, defense counsel objected, asserting that the court had failed to conduct an inquiry into the juror's absence and to give counsel an opportunity to be heard. At a later recess that day, counsel moved for a mistrial based on the substitution. The motion was denied, and the defendant was convicted of 2<sup>nd</sup> degree murder and 4<sup>th</sup> degree CPW. The Third Department affirmed. Judge Rivera granted leave. To find that an absent juror may be presumed unavailable for continued service, the trial court must make a reasonably thorough inquiry; and before discharging the juror, the court must give the parties an opportunity to be heard. *See* CPL 270.35 (2) (a), (b). Matthew Hellman represented the appellant.

[http://www.nycourts.gov/reporter/3dseries/2020/2020\\_03487.htm](http://www.nycourts.gov/reporter/3dseries/2020/2020_03487.htm)

***People v Hemphill*, 6/25/20 – DISSENT / TESTIMONY NOT COLLATERAL**

The Court of Appeals affirmed a First Department order upholding a murder conviction. Judge Fahey dissented. Initially, Nicholas Morris was prosecuted for the crime. At 2006 grand jury (GJ) proceedings, Brenda Gonzalez did not identify Morris *by name* as the shooter, but she did so before a 2007 GJ. After a mistrial, the People abandoned Morris's prosecution and pursued the defendant. (DNA on a sweater linked to the crime matched defendant's.) In cross-examining Gonzalez, defense counsel read her 2007 GJ testimony, but referred to it as 2006 testimony. She denied giving the testimony and falsely stated that she had never identified Morris. The People called the 2006 GJ reporter to show that defense questions were disingenuous, yet the defense was not allowed to call the 2007 GJ reporter to reveal the truth. In the dissenter's view, the ruling was reversible error. Evidence tending to show that a witness was fabricating testimony was never collateral.

[http://www.nycourts.gov/reporter/3dseries/2020/2020\\_03567.htm](http://www.nycourts.gov/reporter/3dseries/2020/2020_03567.htm)

### FIRST DEPARTMENT

***People v Ni*, 6/25/20 – OVERSTATEMENT / IMMIGRATION IMPACT**

The defendant appealed from an order of NY County Supreme Court summarily denying his CPL 440.10 motion to vacate a judgment convicting him, after a jury trial, of 3<sup>rd</sup> degree grand larceny and other crimes. The First Department reversed. The defendant asserted that his attorney advised him that a guilty plea to petit larceny would result in mandatory deportation. In fact, such a plea would only have rendered the defendant deportable with the possibility of discretionary relief. The defendant claimed that he rejected a favorable

plea offer based on the misadvice. The appellate court found that a hearing was necessary to determine whether counsel gave erroneous guidance and the defendant was thereby prejudiced. Eric Siegle represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03621.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03621.htm)

## SECOND DEPARTMENT

### ***People v Illis*, 6/24/20 – DEPRAVED INDIFFERENCE / DISMISSED**

The defendant appealed from an order of Kings County Supreme Court, which denied his CPL 440.10 motion. The Second Department reversed. By a 2002 judgment, the defendant was convicted of depraved indifference murder, based on evidence that he repeatedly struck the victim in the head with a concrete slab, causing his death. At trial, Supreme Court denied a motion to dismiss, which was based on the argument that the defendant's actions were intentional, not reckless. The conviction was affirmed, and leave to appeal was denied. Before the conviction became final, *People v Payne*, 3 NY3d 266, set forth a new standard for depraved indifference murder. In the instant appeal, the Second Department held that the motion court erred in equating the leave denial to a rejection of arguments based on the changed law. *See Matter of Calandra v Rothwax*, 65 NY2d 897. Further, the denial of the defendant's federal habeas corpus petition was not a procedural bar, since NY law was in flux at the time. Because the trial evidence was not legally sufficient to support the verdict, the murder count was dismissed. Appellate Advocates (Joshua Levine, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03535.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03535.htm)

### ***People v Khan*, 6/24/20 – SENTENCES / CONCURRENT**

The defendant appealed from an order of Queens County Supreme Court, which denied his CPL 440.20 motion to set aside the sentences imposed upon his 1991 convictions of 2<sup>nd</sup> degree kidnapping and 2<sup>nd</sup> degree murder (three counts). The Second Department reversed. Consecutive sentences for the kidnapping and felony murder convictions were unlawful, since the kidnapping was the underlying felony in the felony murder. Thus, those sentences had to run concurrently. The defendant further argued that running the kidnapping sentence consecutively to the sentences for the other murder convictions violated his equal protection rights, in that a codefendant received concurrent sentences for such counts. Since the motion court failed to address that issue, remittal was required. Appellate Advocates (Anders Nelson, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03537.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03537.htm)

### ***People v Banuchi*, 6/24/20 – SORA / HEARING NEEDED**

The defendant appealed from an order of Queens County Supreme Court, which denied his petition to modify his SORA risk-level classification. The Second Department reversed and remitted. Supreme Court denied the petition without holding a hearing. That was error. *See* Correction Law § 168-o (4). The Legal Aid Society of NYC (Rachel Pecker, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03553.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03553.htm)

***People v Murray*, 6/24/20 – SORA / LEVEL REDUCED**

The defendant appealed from a Supreme Court order designating him a level-two sex offender. The Second Department reversed and reduced his status to level one. The SORA court should not have granted an upward departure. The People failed to establish that the defendant's conduct was an aggravating factor not adequately taken into account by the Guidelines. The Legal Aid Society of Westchester County (Salvatore Gaetani, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03554.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03554.htm)

## THIRD DEPARTMENT

***People v Anderson*, 6/25/20 – NEOPHYTE / FLAWED APPEAL WAIVER**

The defendant appealed from a Schenectady County Court judgment, convicting him of attempted 2<sup>nd</sup> degree murder. The Third Department affirmed, but found unenforceable the waiver of the right to appeal. The plea court advised the defendant that the appellate rights being relinquished were listed on the written waiver he signed. That document contained overbroad language, stating that the defendant was giving up all appeal rights, including any collateral attack on the conviction. There was no indication that the defendant—a first-time felony offender—understood that he retained the right to some appellate review.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03571.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03571.htm)

## FAMILY

### FIRST DEPARTMENT

***Veronica C. v Ariann D.*, 6/25/20 – FAMILY OFFENSE / NO INTIMATE RELATIONSHIP**

The respondent appealed from an order of NY County Family Court, which found that he committed certain family offenses and issued an order of protection. The First Department reversed. The proceeding was initiated by the foster mother of the respondent's biological children. The parties were not members of the same family or household, and the petitioner did not establish that they had an intimate relationship. Indeed, the petitioner's contact with the respondent was very limited. Thus, Family Court lacked subject matter jurisdiction over the proceeding. Thomas Villecco represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03612.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03612.htm)

***Ayanna P. (Darryl B.)*, 6/25/20 – DERIVATIVE NEGLECT / NOT PROVED**

The respondent appealed from an order of Bronx County Family Court, which found that he sexually abused his teenage granddaughter and derivatively abused his son. The latter finding was error. The children were so differently situated that the respondent's conduct toward the girl was insufficient to show that the boy was at risk of harm. There was no proof that the son was even aware of the abuse of the granddaughter. Larry Bachner represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03622.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03622.htm)

## SECOND DEPARTMENT

*Nevetia M. (Tiara M.)*, 6/24/20 – **DERIVATIVE NEGLECT / NOT PROVED**

The mother appealed from an order of Kings County Family Court, which found that she neglected her older child and derivatively neglected her younger child. The Second Department reversed the finding of derivative neglect. The proof established educational neglect as to the older child. In one school year, she was absent 48 days and late 78 days. There was no likelihood that neglect of the eight-year-old harmed the four-month-old. Cheryl Charles-Duval represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03515.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03515.htm)

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