CRIMINAL

DECISION OF THE WEEK

People v Beaton, 1/17/20 – **DISCOVERY REFORM / PROTECTIVE ORDER**

The defendant made an application to a Second Department justice for review of a protective order, which was granted on November 1, 2019 by Richmond County Supreme Court and was sustained by the trial court upon renewal on January 7, 2020. The appellate justice granted the application and vacated the protective order, without prejudice to the submission by the People of a further application to the trial court for a protective order, with appropriate supporting papers. The defendant was charged with 1st degree murder, 1st degree rape, and related charges. In May 2019, the People made an ex parte application for a protective order permitting them to withhold the names, addresses, and identifying information of certain witnesses. On January 7, 2020, under the new statutory framework, the defense renewed opposition to the protective order. Defense counsel acknowledged having received various police reports which had been heavily redacted, including as to the identity of two witnesses whose identifications of the defendant were to be the subject of a *Rodriguez* (79 NY2d 445) hearing. Supreme Court denied the application.

CPL 245.70 (1) provides that, upon a showing of good cause, the trial court may order that disclosure and inspection are denied, restricted, conditioned, or deferred, or make such order as appropriate. The court may condition discovery on the information being made available only to defense counsel or may provide for redacted copies to be shown to the defendant. Subdivision (4) sets forth numerous factors relevant to "good cause." Pursuant to subdivision (6), an aggrieved party may obtain expedited review by an individual justice of the relevant intermediate appellate court. This case was one of the first under the new review procedure. While the statute was silent regarding the standard to apply, the reviewing justice held that the question was whether the challenged determination was a provident exercise of discretion. The People's affirmation was unaccompanied by an affidavit from anyone with personal knowledge. While alleging that a witness had been approached—in person and via social media by "associates" of the defendant—the People did not set forth the name of the witness or the associate; the relationship between the defendant and the associate; the date and time of the alleged improper approach; or a general description of the incident. In short, the affirmation was vague, speculative, and conclusory—and thus legally insufficient. Detailed factual predicates are required in order to enable the courts to evaluate the relevant statutory factors. If the affirmation had been legally sufficient, then in its de novo review, the trial court would have been required to determine whether the redacted information could be disclosed to defense counsel and the defense investigator.

http://nycourts.gov/reporter/3dseries/2020/2020_00372.htm

FIRST DEPARTMENT

People v Martinez, 1/14/20 – **IMMIGRATION / IAC**
The defendant appealed from an order of NY County Supreme Court, which denied his CPL 440.10 motion to vacate a 2007 judgment of conviction of 4th degree criminal possession of a controlled substance. The First Department reversed. At the time of his plea, the defendant was a lawful permanent resident of the U.S. and resided with his children and their mother in Massachusetts. In his motion, the defendant asserted that counsel was ineffective for failing to adequately advise him of immigration consequences. Counsel had stated that it was possible that deportation "would not be compulsory" and that, if the defendant did not get in trouble during his term of probation, he should not worry. In fact, the subject crime was an aggravated felony and deportation was mandatory. The defendant testified that he had been living in this country since 1991 and that, in more recent years, he resided in Boston with his partner and their three children. The defendant's partner testified that, in 2007, she and the defendant were planning to become U.S. citizens. In finding no prejudice, Supreme Court erred in focusing on the defendant's explanation about events in 2017. At that time, the defendant sought to find out about the immigration consequences of his 2007 plea, because he learned that the conviction was an obstacle to expanding his taxi business. The relevant inquiry concerned what the defendant's circumstances were at the time of the guilty plea. Noncitizen defendants confront very different concerns than U.S. citizens and may care more about staying in the U.S. than about staying out of jail. This defendant had a long history in the country, sought to become a citizen, and had family and gainful employment here. *See Lee v U.S.*, 137 S Ct 1958. In light of counsel's erroneous assurances, it was not surprising that the defendant made no statements at the plea proceedings about avoiding deportation. Further, the plea court's *Peque* warning did not mitigate the harm caused by counsel's misadvice. The matter was remanded for a hearing regarding prejudice before a different justice. Lauriano Guzman represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00252.htm

People v Bryan, 1/14/20 – **ADJOURNMENT DENIED / REVERSAL**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree grand larceny and 1st degree perjury. The First Department reversed and ordered a new trial. The trial court erred in denying the defense an adjournment to the next business day to call an absent witness whose testimony would have been material. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00243.htm

SECOND DEPARTMENT

People v Kamenev, 1/15/20 – **NO PROBABLE CAUSE / REVERSED**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW, upon a jury verdict. The appeal brought up for review the denial of suppression. The Second Department reversed and ordered a new trial. The defendant, who allegedly shot his ex-wife, moved to suppress lineup ID testimony and statements he made to police, on the ground that the police lacked probable cause to arrest

him. Probable cause requires more than mere suspicion. Facts relied upon were too innocuous—including that a person believed to be the defendant was seen riding a bicycle several blocks from the scene of the crime shortly before the shooting. On appeal, the People argued that the defendant was not in custody when he made his statements, but Supreme Court did not rule on that issue, and it could not be considered on appeal. Appellate Advocates (Mark Vorkink, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00301.htm

People v Arana, 1/15/20 – **IMMIGRATION / *PEQUE* VIOLATION**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 3rd degree assault as a hate crime. The Second Department remitted. The defendant contended that he was denied due process because he was a noncitizen and the plea court failed to address deportation. A defendant seeking to vacate a plea based on such failure must demonstrate that, had the court warned about deportation, there was a reasonable probability that he would gone to trial. *See People v Peque*, 22 NY3d 168. Further proceedings were needed to allow the defendant to move to vacate his plea and establish prejudice. Appellate Advocates (Martin Sawyer, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00290.htm

People v Ramos, 1/15/20 – **IN ABSENTIA / DEFENDANT'S FAULT**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder and 2nd degree assault, upon a jury verdict. The Second Department affirmed. The defendant did not appear in court on the fourth day of trial, after refusing transport to the courthouse. The trial court properly continued without him. The defendant had been informed of his rights to be present at trial and to testify, and that he could be tried in absentia if he was a deliberate no-show. *See People v Parker*, 57 NY2d 136. He waived his right to be present by disrupting the proceedings; changing his position regarding his need for a Spanish language interpreter; moving for new counsel during jury selection without stating a reason; and choosing to absent himself from the proceedings after requesting, and being granted, an adjournment.
http://nycourts.gov/reporter/3dseries/2020/2020_00306.htm

THIRD DEPARTMENT

People v Stone, 1/16/20 – **RIGHT TO CONFRONTATION / NEW TRIAL**
The defendant appealed from a judgment of Cortland County Court, upon a verdict convicting him of 3rd degree unlawful manufacture of methamphetamine and other crimes. Since the defendant failed to renew his motion for a trial order of dismissal after the presentation of his case, his legal sufficiency argument was unpreserved. However, based on a violation of the right to confront the witnesses, the Third Department reversed and ordered a new trial. The trial court admitted a statement by the defendant's girlfriend/codefendant, with whom he was jointly tried. Where a codefendant's statement facially incriminates a defendant, it violates the right of confrontation. Although the codefendant's statement was redacted, there were obvious indications that it was altered to protect the defendant's identity, and the statement suggested that he possessed know-how the codefendant lacked and was involved in the crimes. Further, County Court failed to

instruct the jury to consider the statement only against the codefendant. The Rural Law Center of NY (Kelly Egan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00323.htm

People v Barrales, 1/16/20 – **WAIVER OF APPEAL / INVALID**
The defendant appealed from a judgment of Sullivan County Supreme Court, convicting her of attempted 2nd degree CPW and another crime. The defendant's waivers of the right to appeal were invalid. The written waivers stated that she gave up the right to raise "all issues that may validly be waived" on appeal, without elaboration. Moreover, the waiver inaccurately stated that the defendant was forfeiting her right to have counsel assigned, to submit a brief, to orally argue the appeal, and to seek post-conviction relief in state or federal court. In *People v Thomas* (11/26/19), the Court of Appeals held that appeal waivers in two of the cases under review (*People v Green*, 160 AD3d 1422, and *People v Lang*, 165 AD3d 1584) were not valid where they contained erroneous advisements warning of absolute bars to pursuing all potential remedies, including collateral relief. Under such authority, the instant waiver was unenforceable. *People v Gruber*, 108 AD3d 877, was overruled. However, the challenged judgment was affirmed.
http://nycourts.gov/reporter/3dseries/2020/2020_00329.htm

People v Elric YY., 1/16/20 – **SCI / NO JURISDICTIONAL DEFECT**
The defendant appealed from a judgment of Broome County Court, which sentenced him upon his adjudication as a youthful offender. The Third Department affirmed. The defendant contended that the waiver of indictment was invalid and the SCI was jurisdictionally defective for failing to set forth the approximate time of the offense. *People v Thomas* (11/26/19) controlled. In rejecting an argument raised in *People v Lang*, 165 AD3d 1584, the *Thomas* court discussed the proper assessment of the facial sufficiency of facts, alleged as to non-elements of the crime in an accusatory instrument. The fundamental concern was whether the defendant had reasonable notice of the charges for double jeopardy purposes and to prepare a defense. A guilty plea forfeited arguments based on the omission from the waiver of indictment of non-elemental factual information, such as the approximate time. No longer applicable was the standard set forth in *People v Busch-Scardino*, 166 AD3d 1314.
http://nycourts.gov/reporter/3dseries/2020/2020_00326.htm

FAMILY

SECOND DEPARTMENT

Matter of Alexandra R.-M. (Sonia R.), 1/15/20 – **NEGLECT / PRO SE**
The mother appealed from an order of Queens County Family Court, finding that she neglected the subject child. The Second Department reversed. The mother-child relationship was filled with strife. While the mother's insults and name-calling were inappropriate, they did not constitute improper supervision or guardianship. The court rejected the argument that the mother was denied the right to counsel. Family Court conducted a searching inquiry to ensure that the waiver of representation was valid. Yasmin Daley Duncan represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00280.htm

Matter of Campbell v Blair, 1/15/20 – **CUSTODY MOD / REVERSED**
The mother appealed from an order of Nassau County Family Court, which granted the father's motion, at the close of her case, to dismiss her custody modification petition. The Second Department reversed and reinstated the petition. A prior order awarded the father sole custody of the parties' child and vacations with the mother, who then lived in the country of Jamaica. The mother presented sufficient prima facie evidence of a change of circumstances. She had moved to Staten Island with her husband, and the stepmother had allegedly used corporal punishment on the child—despite a prohibition against such conduct in the prior custody order. Ralph Carrier represented the mother.
http://nycourts.gov/reporter/3dseries/2020/2020_00270.htm

Adam M. M. (Sophia M.), 1/15/20 – **COUNSEL / TERMINATION**
The mother appealed from orders of fact-finding and disposition issued by Queens County Family Court in a termination of parental rights proceeding. In rejecting the mother's contention that she received ineffective assistance, the court noted that the respondent in a termination proceeding had the statutory right to counsel, which encompassed effective assistance. The right to counsel under Family Ct Act § 262 brought "protections equivalent to the constitutional standard of effective assistance of counsel afforded to defendants in criminal proceedings." The mother failed to establish the absence of legitimate explanations for counsel's acts.
http://nycourts.gov/reporter/3dseries/2020/2020_00276.htm

THIRD DEPARTMENT

Starasia E. v Leonora E., 1/16/20 – **CUSTODY / RIGHT TO BE HEARD**
The father appealed from an order of Broome County Family Court, which granted the custody petition of the mother's cousin. An officer of the Pennsylvania Department of Corrections wrote to the court advising that the father wished to participate by telephone, but Family Court denied his request and granted the petition, following a § 1034 investigation. The Third Department reversed and remitted for a new hearing. Parents, including those who are incarcerated, have a fundamental interest in the care and control

of their children, as well as a fundamental right to be heard in custody matters. The trial court should have permitted the father to testify by phone. *See e.g.* Domestic Relations Law § 75-j (2); *Matter of Westchester County Dept. of Social Servs.*, 211 AD2d 235. Matthew Hug represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00334.htm

ARTICLE

REPLY BRIEFS: MAKING THE LAST WORD COUNT
NYLJ, 1/13/20, by Thomas Newman and Steven Ahmuty
Generally, a reply brief should be filed so that the respondent's unanswered arguments do not take hold before oral argument and the lack of a reply is not viewed as a concession to opposing arguments. In any event, many lawyers cannot resist the temptation to have last word. Counsel must be clear about what the reply brief is, and is not, meant to be. It should be a concise answer (7,000 words or less under appellate court rules) to material arguments by the respondent, including a discussion of facts, law, and policy needed to effectively counter the adversary's position. The reply brief should not rehash arguments in the appellant's main brief; respond tit-for-tat; or present new arguments. Only opposing counsel's key assertions and cases should be addressed. If new, relevant appellate decisions have been issued, the reply may discuss them. Actually, the foundation for an effective reply brief is the opening brief, which should have addressed damaging elements to lessen the potential impact of the respondent's brief. This approach will allow the reply to focus on the respondent's weak points, while reinforcing the client's strong arguments. Usually, to refocus the court on the principal arguments, it makes sense to eschew the structure of the respondent's brief and follow that of the main brief.

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