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Sent: Monday, February 5, 2018 2:19 PM

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Subject: Decisions of Interest

CRIMINAL

DECISION OF THE WEEK

People v Carter, 2/2/18 – **MURDER CONVICTION OVERTURNED**

The murder victim checked into a hotel he often used for sexual encounters with other men. The next morning, his body—with the skull crushed and ligature marks on the neck—was found in his hotel room. The People did not prove beyond a reasonable doubt that the defendant was the killer, the Fourth Department held. Their case rested on proof that: (1) the defendant entered the hotel with the victim the night before the body was found, (2) yet the defendant said that he did not know the victim; and (3) the victim's vehicle was found abandoned less than a mile from the defendant's residence. However, the Medical Examiner could not determine the time of death; and other persons may have been in the hotel room that night. The defendant might well have lied because he was not openly gay. Further, the People did not suggest a motive for the brutal killing. Where a case is based entirely on circumstantial evidence, motive may be not only material, but controlling. DNA from two other men was found in the hotel room on a plastic cup, and a strand of hair in the sink was not the defendant's. Yet police did not obtain DNA samples from a man the victim had met earlier on the day in question, nor from an abusive ex-boyfriend the victim planned to see that weekend. While an appellate court must defer to jury credibility determinations, almost all relevant facts adduced at trial were undisputed, and the jury was called upon to make inferences based on the evidence—a task that the reviewing court was no less qualified to undertake. Two justices dissented. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_00711.htm

First Department

People v Palmer, 2/1/18 – **NO IMMIGRATION CONSEQUENCES WARNING / REMAND REGARDING PREJUDICE**

The defendant was born in Jamaica and immigrated to the U.S. at age 23. He had a long history of mental illness. From the time of his 2008 arraignment on first-degree sex abuse charges until his guilty plea five years later, he was repeatedly found unfit; confined to psychiatric wards; and suffered from delusional thinking—even after forced medication and a finding of fitness to proceed. At the plea proceedings, when the court asked the defendant if he was a U.S. citizen, he responded, "Yes, your Honor." The defendant appeared before a different judge for sentencing. Although the presentence report stated that the defendant was a Jamaican citizen and his alien status was "undocumented," the judge made no relevant inquiry. When the defendant referred to "the principles of [the] tree of life" in a rambling dialogue, the sentencing court did not probe. In 2014, the defendant was paroled to ICE and is now detained at a psychiatric center. The reviewing court observed that due process required that the

plea court apprise the defendant that, if he was not an American citizen, he may be deported based on a guilty plea to a felony. *See People v. Peque*, 22 NY3d 168. The defendant did not purposefully misrepresent his immigration status. Further, the requisite warning is required whether or not the court has reason to believe the defendant is a non-citizen. The First Department held the appeal in abeyance so that the defendant could move to vacate his plea based on a showing of a reasonable probability that, had the plea court properly warned him, he would have rejected the plea. One justice dissented. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00638.htm

People v Marcucci, 2/1/18 – **Erroneous Charge / New Trial**
The defendant was convicted of assault in the second degree. The jury charge had failed to convey that an acquittal on the top count of attempted second-degree murder, based on a finding of justification, would preclude consideration of the remaining charges. The First Department found that the error was not harmless and that it warranted reversal in the interest of justice. Thus, the judgment of conviction was reversed, and a new trial was ordered. The Office of the Appellate Defender (Eunice Lee, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00634.htm

People v Deleon, 1/30/18 – **People's Appeal / Attempted Grand Larceny Counts Reinstated**
The evidence before the grand jury indicated that the defendant was apprehended before he extracted, from a mailbox, his fishing device—a water bottle coated in a sticky substance so that envelopes would adhere to it. A police-postal service task force had inserted $3,000 in money orders into the mailbox and had it under surveillance. No evidence was presented as to whether envelopes found stuck to the defendant's device contained planted money orders. The trial court erred in finding that attempted grand larceny charges required evidence of intent to steal property of a certain value. Mental culpability requirements were identical for an attempt and the completed object crime. Thus, the reviewing court reversed an order dismissing the count of attempted third-degree grand larceny and reducing the attempted fourth-degree offense.
http://nycourts.gov/reporter/3dseries/2018/2018_00531.htm

Second Department

People v Serrano, 1/31/18 – **Attempted Assault / Verdict against Weight of Evidence**
The defendant was convicted of attempted assault in the first degree. The First Department reversed and dismissed the indictment, finding the verdict against the weight of evidence based on several factors. The only witness who identified the defendant before trial admitted to being intoxicated at the time of the stabbing and failed to identify the defendant at trial. Three other witnesses who were present at the scene of the crime identified the defendant at trial, but not before trial; and two of them offered descriptions that were inconsistent with defendant's clothing upon arrest minutes later. Further, a police officer briefly lost sight of the perpetrator before apprehending the defendant. Appellate Advocates (Erin Tomlinson and Rebecca Gannon, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00573.htm

People v Orama, 1/31/18 – **Ineffective Assistance / Lesser Included Offense Charge Eschewed**
The defendant was convicted of burglary in the second degree. On appeal, he contended that counsel

was ineffective for failing to seek submission of second-degree criminal trespass as a lesser included offense. A reasonable view of the evidence supported a finding that the defendant intended to commit the lesser crime, but not the charged crime, whereas the mistaken-identification defense presented was weak. Further, as a persistent violent felon, the defendant faced a minimum of 16 years to life for the burglary charge, while the trespass charged carried a maximum of only one year in jail. In such circumstances, counsel's failure regarding the lesser included offense could not be deemed the product of a legitimate strategy, the Second Department held. A new trial was ordered. Appellate Advocates (Anna Pervukhin and Lisa Napoli) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00571.htm

People v Freire, 1/31/18 – **More Ineffective Assistance / Stance Adverse to Client**
After the defendant was convicted of robbery in the first degree, he made a pro se CPL 330.30 motion. At sentencing, defense counsel stated that he did not think that the motion was correct, and Supreme Court declined to review it. By taking a position adverse to that of his client, counsel had deprived him of effective assistance. The matter was remitted to Supreme Court for further proceedings. Appellate Advocates (Skip Laisure, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00564.htm

People v McCullum, 1/31/18 – **Eviction / No Privacy Interest**
The defendant lived in a bedroom within an apartment leased by another person and had keys to the apartment and the bedroom. In 2012, all apartment occupants were effectively evicted by the execution of a "legal possession." (A City Marshal executes a warrant of eviction either by a full eviction, in which both a tenant and his/her property are removed, or by effectuating a legal possession, in which the tenant is removed, but his property remains temporarily under landlord control.) The same day as the eviction, while investigating a trespassing complaint, police found eight guns in the defendant's bedroom. Supreme Court held that he lacked standing to challenge the search and seizure. He was convicted of second-degree criminal possession of a weapon. The reviewing court affirmed, after considering a question of first impression: whether the defendant had a reasonable expectation of privacy because a legal possession, not an eviction, was executed. The Second Department concluded that the distinction did not matter for Fourth Amendment analysis. Appellate Advocates (Benjamin Litman, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00570.htm

Fourth Department

People v Willingham, 2/2/18 – **Weapon Possession Conviction Reversed / Legally Insufficient Proof**
Police had a house under surveillance due to reports that its residents might retaliate after a homicide. They observed a man, later charged as a codefendant, carrying a distinctive long gun and entering a car with the weapon. The defendant entered the same vehicle. The officers lost sight of the vehicle, and then other officers stopped it and removed the four occupants. A long gun identical to the one the codefendant had carried—an assault weapon—was found near where the first group of officers lost sight of the vehicle. The defendant was convicted in Monroe County Court of criminal possession of a weapon in the second degree. However, no direct evidence connected him to the weapon. There was no proof that he owned or operated the vehicle or constructively possessed the weapon. The statutory

presumption of possession did not apply, where the weapon was not found in the vehicle, and the codefendant had been holding it when entering the vehicle. Jon Getz represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00733.htm

People v Roberts, 2/2/18 – **Another Weapon Possession Charge Vanquished / Bad Suppression Ruling**
On a plea of guilty, the defendant was convicted of criminal possession of a weapon in the second degree. On appeal, he contended that Monroe County Court erred in denying his motion to suppress a handgun police seized from him. The Fourth Department agreed. As the People conceded, the officer's encounter with the defendant constituted a level-three forcible detention. However, the People failed to establish that the officer had a reasonable suspicion that the defendant was involved in a felony or misdemeanor. The indictment was dismissed. The Monroe County Public Defender (Thomas Schultz, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00725.htm

People v Keith B.J., 2/2/18 – **Reversal of Yet Another Illegal Weapon Conviction / YO Status Granted**
The defendant was convicted upon a plea of guilty of second-degree criminal possession of a weapon. On appeal, he contended that he should have been adjudicated a youthful offender. County Court had implicitly resolved in the defendant's favor the threshold issue of eligibility despite his conviction of an armed felony. The only factor weighing against YO treatment was the seriousness of the crime. Other relevant factors weighed in favor of such status. The defendant was age 17 at the time of the crime and had no prior criminal record or history of violence. He had accepted responsibility for his actions and expressed genuine remorse. The presentence report recommend YO treatment, and the record established that the defendant had the capacity for a productive, law-abiding future. The matter was remitted for sentencing on the adjudication. The Monroe County Public Defender (David Juergens, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00734.htm

People v Taylor, 2/2/18 – **Arson in Second Degree / Reduced to Third Degree**
A mother and daughter were found dead in a Wayne County residence where they had gone to care for the absent owner's pet. The defendant was convicted of first-degree murder, first-degree burglary, and second-degree arson. The appellate court reduced the arson conviction. An element of the second-degree offense was that the fire was set when another "person" who was not a participant in the crime was present. The proof indicated that both victims were already dead at the time that the fire started. Although previous decisions had affirmed second-degree convictions in cases in which the victim was dead when the fire was started, those defendants did not challenge the sufficiency of evidence on that ground. Penal Law article 150 did not define "person," so the Fourth Department turned to cases interpreting the definition of "person" under Penal Law § 10.00 (7) ("a human being"). Those decisions established that a living human being was contemplated. Relying on such definition, Article 130 made a distinction between a living human being and a dead human body; and Article 150 should do so as well, the reviewing court reasoned. Further, the danger to human life was the factor elevating third-degree arson to the higher offense; if no living person was in the building, there was no danger to human life. David Abbatoy, Jr. represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00709.htm

People v Jones, 2/2/18 – **New Trial / Two Hearsay Errors**

An Onondaga County conviction of criminal possession of a forged instrument in the second degree was reversed and a new trial granted, based on the trial court's improper admission of two categories of hearsay evidence. The court admitted—and allowed the jury to consider for the truth of the matter asserted—a printout of electronic data that was displayed on a computer screen after the defendant presented the allegedly forged instrument. The People failed to fulfill the foundational requirements: that the data displayed on the screen resulting in the printout was entered in the regular course of business and that the entrant was under a business duty to obtain and record the statement reflected in the printout. *See People v Patterson*, 28 NY3d 544, 550. The court also erred in admitting an investigator's testimony about a search he ran in a credit bureau database, where the investigator did not testify that he was familiar with the practice of such company and that he generally relied upon such records. *See People v Brown*, 13 NY3d 332, 341. These errors were not harmless. Hiscock Legal Aid Society (Piotr Banasiak, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_00710.htm

People v McDonald, 2/2/18 – **Illegal Sentence / Sua Sponte Relief**

The defendant was convicted in Niagara County Court upon a plea of guilty to rape in the third degree, as well as failure to register internet identifiers, a class D felony defined in Correction Law § 168-f (4) (regarding registration duties of sex offenders). For the latter crime, the defendant was sentenced as a second felony offender. He validly waived the right to appeal, foreclosing review of the severity of his sentence—but not of the illegality of his sentence. As to the Correctional Law offense, sentencing as a second felony offender was improper, since such enhancement applies only to crimes defined by the Penal Law. *See* Penal Law § 70.06 (1) (a). The issue was not raised before the sentencing court or on appeal, but by the reviewing court sua sponte, which remanded the matter for resentencing.

http://nycourts.gov/reporter/3dseries/2018/2018_00657.htm

FAMILY

First Department

Matter of Rachel D. (Sandy D. – Luis N.), 1/30/18 – **Therapeutic Visitation / Reversal**

Family Court granted the mother's motion to modify a prior dispositional order suspending visitation, by ordering a supervised therapeutic visit with the subject children. The First Department reversed, holding that the trial court's determination lacked a sound and substantial basis in the record. Family Court erroneously found that no visitation had occurred since 2012, overlooked a supervised therapeutic visit that caused the older child stress and anxiety, and failed to address forensic evaluations opining that visitation would be detrimental to the children. The trial court also failed to explain how the child protective agency had purportedly been lax in its reunification efforts. Given a finding of the mother's neglect and abuse and the documented history of stress triggered by visits, the order for a supervised therapeutic visit was an abuse of discretion.

http://nycourts.gov/reporter/3dseries/2018/2018_00517.htm

Second Department

Culen v Culen, 1/31/18 – **POST-DIVORCE PROCEEDINGS / ATTORNEY FEE OF $90,000**

The Second Department increased a counsel fee award from $20,000 to $90,000, based upon the relative merits of the parties' positions and the husband's obstructionist tactics, which unnecessarily prolonged the matrimonial litigation in Westchester County Supreme Court. Among other things, he attempted to prevent the plaintiff from obtaining discovery regarding an inheritance he was entitled to receive—in derogation of liberal discovery rules, including as to separate property not subject to equitable distribution. William Martin represented the appellant wife.

http://nycourts.gov/reporter/3dseries/2018/2018_00542.htm

Matter of Mary A. G. v Ira T. B., 1/31/18 – **NO JURISDICTION / FISHY AFFIDAVIT OF SERVICE**

In 2005, the petitioner commenced a proceeding under the Uniform Interstate Family Support Act, alleging that the respondent was the father of the subject child. Upon his default, orders of filiation and child support were entered. Several years later, pursuant to CPLR 5015 (a) (4), the respondent moved to vacate, based on the ground that he was never served with the underlying paternity petition. After a traverse hearing, Kings County Family Court vacated the orders and dismissed the underlying petitions due to a lack of personal jurisdiction. Personal service of the summons and petition was required. An affidavit of a process server ordinarily constitutes prima facie proof of proper service. But when a respondent refutes the affidavit with a sworn denial of service, the petitioner must establish personal jurisdiction by a preponderance of the evidence. The evidence in the instant case established that the process server's description of the individual served differed considerably from the respondent's appearance. The process server did not testify and was not shown to be unavailable. The Second Department rejected the contentions of the attorney for the non-party child appellant that the challenge to jurisdiction was precluded by the delay in the motion *(where want of jurisdiction is the ground for vacatur, the motion may be made at any time, since laches cannot confer on a court jurisdiction it does not have).*

http://nycourts.gov/reporter/3dseries/2018/2018_00553.htm

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