CRIMINAL

DECISION OF THE WEEK

People v Parris, 6/14/19 – **MURDER / NO DEPRAVED INDIFFERENCE**

The defendant accosted the decedent, who had purportedly been sent by another man to injure the defendant. Then the defendant fired at the victim around eight times. At least six bullets struck the victim. The defendant was charged with felony murder, intentional murder, depraved indifference murder (DIM), and other crimes. At the 2003 trial, in a motion for a trial order of dismissal with respect to DIM, counsel argued that the defendant's conduct was intentional or it was nothing at all. The defendant was acquitted of felony murder and intentional murder and other charges but was convicted of DIM and other crimes. He appealed to the Fourth Department, which affirmed in a 2006 decision (30 AD3d 1108). Before leave to appeal was denied (7 NY3d 816), the Court of Appeals decided *People v Feingold*, 7 NY3d 288 (2006), and held definitively for the first time that the depraved indifference element of DIM is a culpable mental state, rather than the circumstances under which the killing is committed.

More than a decade later, in the case at bar, the Fourth Department granted a coram nobis application and vacated its decision sustaining the conviction (153 AD3d 1673), on the ground that appellate counsel had failed to argue that the DIM conviction was not supported by legally sufficient evidence. In the instant appeal, the People conceded that the *Feingold* standard applied, since the direct appeal was pending when *Feingold* was decided. Moreover, before *Feingold*, the Court of Appeals had repeatedly stated that DIM was not committed where the defendant perpetrated "a quintessentially intentional attack directed solely at the victim" (*see e.g. People v Hafeez*, 100 NY2d 253, 258 [2003]); and that "the use of a weapon can never result in DIM when there is a manifest intent to kill" (*see e.g. People v Payne*, 3 NY3d 266, 271 [2004]). In the instant appeal, the Fourth Department held that the evidence unequivocally established that the defendant intended to kill the victim, and thus the evidence was insufficient to support the conviction of DIM. The appellate court thus reversed that part of the challenged judgment and dismissed that count. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_04828.htm

COURT OF APPEALS

People v Giuca, 6/11/19 – **PEOPLE'S APPEAL / *BRADY* ISSUE / DISSENT**

The defendant was convicted in Kings County of 2nd degree murder and other crimes. His CPL 440.10 motion asserting a *Brady* violation was denied. The Second Department reversed and vacated the conviction, and the People appealed. In an opinion authored by the Chief Judge, the COA reversed. The Appellate Division erred in holding that the jury could have found a tacit understanding that a prosecution witness ("JA") hoped to receive a benefit for his testimony. A witness's subjective hope was not enough. True, some of the undisclosed evidence could have strengthened the defense argument that the prosecution witness was testifying falsely to receive favorable treatment; but there was no reasonable

possibility that the information would have resulted in a different verdict. Judge Rivera dissented. The People improperly failed: (1) to provide the defendant with impeachment material regarding the informant's motivation to fabricate statements; and (2) to correct misrepresentations in the informant's testimony. The suppressed information would have given the defense ammunition to dispute the prosecutor's claim that JA was simply "doing the right thing" by testifying. The majority's view of what constituted cumulative evidence was overly broad. The error was not harmless.
http://www.nycourts.gov/reporter/3dseries/2019/2019_04642.htm

People v Lopez-Mendoza, 6/13/19 – **IAC / 440 REQUIRED / DISSENT**
The defendant appealed from an order of the First Department, affirming his conviction of 1st degree rape. The COA affirmed, stating that a 440 motion was needed with regard to the claim of ineffective assistance. Judge Rivera dissented. The trial record was adequate to find IAC. The defense pursued by counsel was certain to be proven false by surveillance video. Counsel either did not view the video or did not understand its impact. Either way, he was ineffective. In his opening statement, counsel presented a theory based on a time frame of events affirmatively disproved by the video. After a sidebar about the video, counsel abandoned the consensual sexual intercourse narrative and, in summation, presented a different theory. In a case turning on competing narratives of the sexual attack, defense counsel's actions were devastating and deprived the defendant of meaningful representation.
http://www.nycourts.gov/reporter/3dseries/2019/2019_04759.htm

People v Mendoza, 6/13/19 – **NO IAC / NULLIFICATION HAIL MARY OK**
The defendant appealed from a First Department order affirming his conviction for 2nd degree burglary. A unanimous COA upheld the conviction, rejecting arguments that counsel was ineffective in conceding guilt and pursuing a jury nullification defense, to the exclusion of other viable defenses. Facing overwhelming incriminating evidence and limited available strategies, counsel raised factual issues, such as the method of entry. He gave cogent opening and closing arguments; moved to dismiss after the People's case-in-chief; and thoroughly cross-examined witnesses. Moreover, the trial court did not curb counsel's jury nullification summation arguments.
http://www.nycourts.gov/reporter/3dseries/2019/2019_04758.htm

FIRST DEPARTMENT

People v Hemphill, 6/11/19 –
MURDER / DISSENT / VERY REASONABLE DOUBT AND MISLED JURY
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree murder. The First Department affirmed. One justice dissented, opining that the defendant's identity as the shooter was not proven beyond a reasonable doubt. In a lineup after the shooting, three witnesses ID'd as the shooter another man, Nicholas Morris, who was initially charged with the murder. The defendant—not arrested until seven years after the murder—was not ID'd as the shooter by any of the initial eyewitnesses. The only witness to ID him was the accomplice, who was cooperating to avoid a murder sentence and who changed his story repeatedly. At a minimum, the defendant was entitled to a new

trial. He was denied the right to effectively cross-examine a witness who had testified before the grand jury in 2006 and 2007 and had ID'd Morris as the shooter the latter time. Yet at trial, the witness falsely maintained that she never identified Morris. Defense counsel tried to impeach her, but mistakenly referred to the 2006 testimony. Thereafter, the trial court would not allow corrective action concerning the witness's 2007 ID of Morris. Further, the court allowed the prosecutor to affirmatively mislead the jury into believing that the witness never ID'd Morris and that defense counsel had been disingenuous. The defendant was thus deprived of a fair trial, the dissenter stated.
http://nycourts.gov/reporter/3dseries/2019/2019_04646.htm

SECOND DEPARTMENT

People v Goondall, 6/12/19 – **IAC / CHANGE IN DEFENSE / NEW TRIAL**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree robbery (two counts) and other crimes, upon a jury verdict. The Second Department reversed and ordered a new trial. Midstream, counsel abandoned a misidentification defense, in favor of a nebulous and hopeless argument—that no forcible taking of property had occurred. Defense counsel's confused and contradictory actions deprived the defendant of effective assistance. Appellate Advocates (Anjali Biala, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04721.htm

People v Lewis, 6/12/19 – **SORA / REDUCTION**
The defendant appealed from an order of Kings County Supreme Court, designating him a level- three sex offender. The Second Department reversed and classified him as level two. The lower court erred in granting the People's application to depart from the presumptive level-two designation. The SORA court must: (1) decide whether the aggravating or mitigating circumstances alleged are not adequately taken into account by the Guidelines: (2) then determine whether the proponent established that the subject circumstances exist; and (3) finally, make a discretionary determination as to a departure. Here, the People failed to establish that the subject circumstances existed, that is, that the defendant attempted to flee with the child. Instead, relevant grand jury testimony belied damning statements contained in the case summary and presentence report. Appellate Advocates (Joshua Levine, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04738.htm

People v Ramirez, 6/12/19 – **ANOTHER YO GOOF / SENTENCE VACATED**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree robbery, upon his plea of guilty. The Second Department vacated the sentence and remitted. CPL 720.20 requires the sentencing court to determine whether an eligible defendant is to be treated as a youthful offender, even where the defendant failed to request such treatment, or agreed to forgo it as part of a plea agreement. *See People v Rudolph,* 21 NY3d 497. The defendant's waiver of appeal was invalid, because the plea court failed to confirm that he understood the nature of the right to appeal and the consequences of waiving it. In any event, a valid waiver would not bar his contention that

the court failed to consider YO treatment. The Legal Aid Society of NYC (Justine Luongo and Nancy Little, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04727.htm

THIRD DEPARTMENT

People v Wager, 6/13/19 – **ATVs / NOT MOTOR VEHICLES**
The defendant appealed from a judgment of Saratoga County Court, convicting him of 1st and 2nd degree vehicular manslaughter (two counts each); aggravated driving while intoxicated; and DWI (two counts). The underlying incident involved an ATV. The Third Department held that an ATV is not a motor vehicle under Penal Law § 125.13 (1) and dismissed a conviction for 1st degree vehicular manslaughter (count 1), as well as other inclusory concurrent counts. Brian Quinn represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04786.htm

People v Carlin, 6/13/19 – **PEOPLE'S APPEAL/ DISMISSAL PROPER**
The People appealed from an order of St. Lawrence County Court. The defendant was charged with two counts each of 3rd degree criminal sale and possession of a controlled substance. County Court concluded that the grand jury proof did not sufficiently establish that the substances were cocaine. The People appealed, and the Third Department affirmed. As to the first transaction, the CI believed the substance to be crack cocaine, but did not describe it or explain the basis for his belief. Regarding the second transaction, the CI did not express any belief as to the nature of the substance. In testifying about testing chunky white substances, the investigator did not describe his training and experience in field testing, explain how testing occurred, or identify what he did to determine that the substances were cocaine. The Rural Law Center of NY (Kelly Egan, of counsel) represented the respondent.
http://nycourts.gov/reporter/3dseries/2019/2019_04788.htm

FOURTH DEPARTMENT

People v Geddis, 6/14/19 – ***ANTOMMARCHI* VIOLATION / NEW TRIAL**
The defendant appealed from a judgment of the Cattaraugus County Court, convicting him of 2nd degree assault and other charges. The Fourth Department reversed and ordered a new trial. There was a violation of the defendant's right to be present during questioning of prospective jurors regarding bias, etc. *See People v Antommarchi*, 80 NY2d 247. The defendant was not present when a prospective juror advised the court that her son was a convicted felon. The question about crime was relevant to potential bias; the interaction was a material stage of the proceedings; and the defendant did not waive his right to be present. Legal Aid of Buffalo (Benjamin Nelson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04819.htm

People v Partridge, 6/14/19 – **PREDATORY SEXUAL ASSAULT / DISMISSED**
The defendant appealed from a judgment of the Onondaga County Court, which convicted him of predatory sexual assault against a child and other crimes. The Fourth Department dismissed the predatory assault count, based on legally insufficient evidence as to the

relevant time frame. It was possible that the instances of anal sexual conduct occurred before the statute's effective date or after the victim turned 13. Hiscock Legal Aid Society (Philip Rothschild, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04848.htm

People v Burman, 6/14/19 – **ASSAULT / NO MENS REA AS TO VIC'S AGE**
The defendant appealed from a judgment of Oswego County Court, which convicted him of 2nd degree assault. The Fourth Department affirmed. The conviction arose out of a fight that occurred when the defendant was 31 and the victim was 69. Penal Law § 120.05 (12) elevated, from a class A misdemeanor to a class D violent felony, the crime of intentionally causing physical injury to a person 65 years of age or older by a defendant more than 10 years younger. The Legislature did not attach any culpable mental state to the aggravating circumstance. Thus, the People did not need to prove that the defendant knew that the victim was 65 or older.
http://nycourts.gov/reporter/3dseries/2019/2019_04820.htm

FAMILY

SECOND DEPARTMENT

Matter of DiSisto v Dimitri, 6/12/19 – **CUSTODY / HEARING NEEDED**
The father appealed from a Westchester County Family Court order, granting the mother's petition for sole custody of the parties' child and denying his petition. The Second Department reversed and remitted for a hearing before a different judge. Family Court denied the father a hearing, even though the record did not demonstrate the absence of unresolved factual issues, so as to render a hearing unnecessary. Custody determinations should generally be made only after a plenary hearing. This rule furthered the substantial interest in ensuring that custody proceedings generated a just and enduring result that served the best interest of a child. Daniel Pagano represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04695.htm

Matter of Ralph E. B. v Jovonna K. F., 6/12/198 – **UCCJEA / REVERSAL**
The defendant appealed from an order of Kings County Family Court, which dismissed his custody modification petition. The Second Department reversed and remitted. Family Court should not have summarily determined that it lacked jurisdiction, on the ground that the child had resided in Florida since October 2016. The trial court had made previous custody determinations as to the subject child, and the court would ordinarily retain exclusive continuing jurisdiction. Family Court should have afforded the parties an opportunity to present evidence as to whether: (1) the child had maintained a significant connection with NY; and (2) substantial evidence was available here concerning the child's care. Richard Herzfeld represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_04689.htm