

CRIMINAL

FIRST DEPARTMENT

***People v Murray*, 12/29/20 – EXCUSED ALTERNATE / DISSENT**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree robbery and another crime. The First Department affirmed. One justice dissented, opining that the trial court erred in seating a discharged alternate juror. Before lunch break, the court announced that deliberations would start and excused the two alternate jurors. Over lunch break, misconduct by a regular juror was reported, and defense counsel moved for a mistrial. The court told the alternates to report the next day, when the sworn juror was dismissed and the first alternate was seated without consent. No alternate juror was “available for service” so the court lacked authority to seat the alternate, the dissent asserted.

http://nycourts.gov/reporter/3dseries/2020/2020_08007.htm

***People v Brown*, 12/29/20 – ORDER OF PROTECTION /VOIDABLE**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 1st degree criminal attempt and other crimes. The First Department affirmed. The contempt conviction was valid. After the order of protection was issued and before its violation, *People v Golb* (23 NY3d 455) declared unconstitutional the law providing the predicate for the protective order, Penal Law § 240.30 (1) (a) (aggrav. harassment 2nd includes communications with intent to annoy). The instant order was not void, merely voidable.

http://nycourts.gov/reporter/3dseries/2020/2020_08011.htm

***People v Goldman*, 12/29/20 – GANG LINGO / YOUTUBE VIDEO**

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1st degree manslaughter. The First Department affirmed. The trial court properly let a detective testify about the meaning of a gang term, since coded communications are a proper subject of expert testimony; the proof dealt mostly with matters outside jurors’ ken; and the defendant was not intimately involved in the investigation. The probative value of a YouTube music video outweighed prejudice; it showed that the defendant knew two persons in the car during the shooting and belonged to the subject gang.

http://nycourts.gov/reporter/3dseries/2020/2020_08009.htm

SECOND DEPARTMENT

DECISION OF THE WEEK

***M/O Kurtzrock*, 12/30/20 – ADA / PUNISHED**

In a lengthy decision, the Second Department confirmed a report sustaining disciplinary charges against the respondent, a Suffolk County ADA, and suspended him from the practice of law for two years. During a murder prosecution, the respondent suppressed evidence that another suspect was involved in the shooting and that undermined the credibility of key witnesses. He thereby violated *Brady v Maryland* (373 US 83) and Rule 3.8 (b) of the Rules of Prof. Conduct (prosecutor shall make timely disclosure of existence

of evidence that tends to negate guilt, mitigate degree of offense or reduce sentence). The respondent was willfully blind—to avoid learning of the *Brady* material, he took deliberate and extraordinary steps. The failure to produce exculpatory information can cause wrongful convictions. In this case, the prosecutor's misdeeds seriously interfered with the administration of justice. As a result of the nondisclosures, the felony murder prosecution collapsed mid-trial, the defendant was deprived of a fair trial, and the victim's family was deprived of a full measure of justice. The ADA's misconduct merited the strongest possible condemnation, but there were also mitigating factors, including his remorse and cooperation.

http://nycourts.gov/reporter/3dseries/2020/2020_08114.htm

***People v Harris*, 12/30/20 – POLICE / INCREDIBLE**

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree criminal possession of a forged instrument, upon his plea of guilty. The appeal brought up for review an order denying suppression. As a passenger in the vehicle that was stopped, defendant had standing to challenge the lawfulness of the stop. Supreme Court fully credited both People's witnesses, despite their conflicting versions of events and implausible, contrived testimony. Most incredible was a police sergeant's claim that, while standing outside the vehicle, he could read the numbers on a credit card on the center console and see a stack of cards inside an envelope in the defendant's pocket. Since the People failed to demonstrate the legality of the stop, suppression was required. The indictment was dismissed. Appellate Advocates (Samuel Barr, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_08079.htm

***People v Abellard*, 12/30/20 – MENACING / DISMISSED**

The defendant appealed from a Rockland County Court judgment, convicting him of 2nd degree menacing and 3rd degree assault. The Second Department vacated the menacing conviction, based on legally insufficient evidence. The victim testified that the defendant was not holding the knife in a threatening manner, and the evidence did not show that he placed the victim in fear of physical injury. Thus, that count was dismissed. Further, the maximum sentence for assault was 364 days; the term imposed was reduced accordingly. John Lewis represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_08072.htm

***People v Cabrera*, 12/30/20 – SUPERVISION / DUE PROCESS**

The defendant appealed from an Orange County Court judgment, convicting him of 3rd degree criminal possession of a controlled substance. The Second Department reversed. To meet due process requirements, a court imposing post-release supervision must inform the defendant of the specific period or maximum potential duration. Here County Court did not specify either. The plea was thus not knowing, voluntary, and intelligent. Gary Eisenberg represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_08074.htm

***People v Filan*, 12/30/20 – FORGED INSTRUMENT / DISMISSED**

The defendant appealed from a judgment of Nassau County Supreme Court, convicting her of 2nd degree forgery (two counts), 2nd degree criminal possession of a forged instrument (two counts), and other crimes, upon a jury verdict. The Second Department modified. The possession counts had to be vacated. An individual may be charged with both forgery and criminal possession of a forged instrument, but cannot be convicted of both crimes as to the same forged instrument. Andrew MacAskill represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_08078.htm

FAMILY

SECOND DEPARTMENT

***M/O Follini v Currie*, 12/30/20 – CUSTODY / COUNSEL**

The mother appealed from an order of Orange County Family Court, which granted sole custody of the parties' children to the father. The Second Department reversed. Pursuant to Family Ct Act § 262, as the respondent in a custody modification proceeding, the mother had the right to counsel. Thus, the trial court erred in not advising her of such right. The matter was remitted for a new hearing. Joseph Artrip represented the mother.

http://nycourts.gov/reporter/3dseries/2020/2020_08062.htm

***M/O Munroe v Smith*, 12/30/20 – LEGAL CUSTODY / COOPERATING**

The parents filed cross-appeals from a custody order of Nassau County Family Court. The Second Department modified. Sole legal custody to the mother was improper since there was no evidence that the parties could not put aside their differences for the good of child. Moreover, the lower court gave no explanation for drastically reducing the father's parental access, where none of the parties requested such relief, and they had been cooperating as to the temporary schedule for a year. The matter was remitted to set a more liberal parental access schedule for the father.

http://nycourts.gov/reporter/3dseries/2020/2020_08066.htm

***M/O Corcoran v Liebowitz*, 12/30/20 – ACCESS / HEARING**

The father appealed from an order of Westchester County Family Court regarding custody and visitation. The Second Department reversed. The record demonstrated disputed factual issues requiring a hearing as to his parental access. In making its determinations without a hearing, the trial court relied on the hearsay statements and conclusions of the forensic evaluator, whose opinions and credibility were untested by the parties. The matter was remitted for a hearing. Helene Greenberg represented the mother.

http://nycourts.gov/reporter/3dseries/2020/2020_08058.htm