CRIMINAL

FIRST DEPARTMENT

People v Hayes, 2/4/20 – **SEX TRAFFICKING / LEGALLY INSUFFICIENT**
The defendant appealed from a NY County Supreme Court judgment, convicting him of sex trafficking and other crimes. The First Department dismissed the trafficking count, finding that the conviction was not supported by legally sufficient evidence. The proof did not establish that the defendant used force, or engaged in a scheme or plan, to induce the alleged victim to engage in prostitution. The alleged victim and two other women sought to earn money by prostitution. To do so, they voluntarily traveled with the defendant from Florida to NY. At times, he left them alone. A detective overheard a phone call in which the defendant was angry with the alleged victim because she did not get money from a client. That did not constitute the requisite proof. The Office of the Appellate Defender (David Bernstein, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00832.htm

People v Dais, 2/4/20 –
VICTIM INVOKES PRIVILEGE / DEFENDANT ABSENT AT SENTENCING
The defendant appealed from judgments of NY County Supreme Court, convicting him of attempted 1st and 2nd degree murder, 1st degree assault, and other crimes. The First Department held that, because the defendant was absent when the court imposed post-release supervision for the crimes carrying determinate terms, he had to be resentenced on those convictions. The trial court properly declined to strike the testimony of the victim, who invoked the privilege against self-incrimination when asked about drug activities. It was undisputed that the victim was a drug dealer and, on the day of the shooting, was in NY to buy drugs. On summation, defense counsel exploited the victim's refusals to answer; and the court properly instructed the jury. The prosecutor became an unsworn witness during redirect examination of the victim. There was a material issue involving whether the prosecutor had informed the victim about his statutory immunity. By repeatedly asking the victim if he recalled discussing the importance of "telling the truth," the ADA risked improperly influencing the jury. But the error was harmless. The Center for Appellate Litigation (Arielle Reid, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00828.htm

People v Rodriguez, 2/4/20 – **PEOPLE'S WITNESS / NO BAD FAITH**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted 1st and 2nd degree assault. The First Department affirmed. The record did not show that, in bad faith, the People called the victim—the defendant's girlfriend—in order to impeach her with prior inconsistent statements implicating the defendant. The victim provided direct testimony as to other key proof. She testified that the defendant was in the apartment when the assault allegedly occurred and she discovered a suggestive text from another woman on his phone. The trial court properly received evidence of an uncharged assault by the defendant against the victim, 18 months before the instant incident, as background to show the abusive relationship. Since the victim's testimony as to the uncharged crime was not affirmatively damaging to the People's case, the trial court erred

in permitting the prosecution to impeach her with a police report containing her description of that assault. But the error was harmless.
http://nycourts.gov/reporter/3dseries/2020/2020_00827.htm

SECOND DEPARTMENT

People v Kluge, 2/5/20 – **MODE OF PROCEEDING ERRORS / NEW TRIAL**
The defendant appealed from a judgment of Suffolk County Court, convicting him of 1st degree rape and other crimes. The Second Department reversed based in part of mode of proceedings errors, which did not require preservation for appellate review and were impervious to harmless error analysis. *See People v Mack*, 27 NY3d 534, 540. During deliberations, the court erred in responding to concerns of juror C.H., who had left the court a phone message. Outside the defendant's presence, the juror told the court and counsel that someone was "stirring the jury" and that other jurors had been "influenced." The court directed a court officer to return C.H. to the jury room and provide her with writing materials to note her concerns. A defendant's right to be present extends to all material stages of the trial in which his presence could have a substantial effect on the ability to defend against the charges. That included the instant situation, in which the juror's communication implicated the integrity of the deliberation process. Further, after the colloquy with C.H., the defendant was returned to the courtroom, and the court stated that it had received a jury note, marked as "Court Exhibit X" and sealed with the consent of all parties. No further discussion of the exhibit appeared on the record. The court failed to comply with CPL 310.30: upon receipt of a substantive note from a deliberating jury, the court must provide counsel with meaningful notice of its content and provide a meaningful response. Thomas Theophilos represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00878.htm

People v DeFelice, 2/5/20 – **UNCHARGED CRIMES / HARMLESS ERROR**
The defendant appealed from a judgment of Suffolk County Court, convicting him of 2nd degree murder and other crimes. The appeal brought up for review the denial of suppression of the defendant's statement. The trial court erred in failing to redact portions of the written statement pertaining to uncharged drug crimes and in allowing the jury to consider those parts to complete the narrative and explain the defendant-codefendant relationship. In appropriate instances, evidence of uncharged crimes may be allowable as background or narrative where juries might otherwise struggle to sort out ambiguous but material facts. *See People v Resek*, 3 NY3d 385. Here the sections of the statement relating to drug activity were not necessary to assist the jury; the uncharged conduct was not material; the narrative of events was not incomplete; and the subject statements were not necessary to explain the relationship. But the error was harmless.
http://nycourts.gov/reporter/3dseries/2020/2020_00874.htm

People v Echevarria, 2/5/20 – **WAIVER OF APPEAL / INVALID**
The defendant appealed from a sentence imposed by Queens County Supreme Court, upon his plea of guilty, asserting that the 18-year sentence imposed for 1st degree manslaughter was excessive. The Second Department held that the purported waiver of the right to appeal was invalid, but the sentence was not excessive. Particularly in light of the defendant's

young age and inexperience with the criminal justice system, the terse oral colloquy was insufficient to demonstrate that the waiver was knowing, voluntary, and intelligent. Although the defendant executed a written appeal waiver prior to the colloquy, the court did not ascertain if he had read it.
http://nycourts.gov/reporter/3dseries/2020/2020_00875.htm

People v Frias, 2/5/20 – **WAIVER OF APPEAL / INVALID**
The defendant appealed from a Kings County Supreme Court judgment, asserting that the sentence imposed was excessive. The Second Department held that the purported waiver of his right to appeal was invalid, but the sentence was not excessive. The plea court's statement to the defendant—that, by signing the written waiver he was giving up his right to appeal "any issue that may arise from this case, including sentencing"—erroneously suggested that the waiver was an absolute bar to an appeal. The written waiver did not overcome the ambiguities; it did not clarify that appellate review was available for certain issues. *See People v Thomas*, 2019 NY Slip Op 08545 (2019).
http://nycourts.gov/reporter/3dseries/2020/2020_00876.htm

FOURTH DEPARTMENT

People v Work, 2/7/20 – **"COMPLETE CONFUSION" / PLEA VACATED**
The defendant appealed from a judgment of Erie County Supreme Court, convicting him of 3rd degree CPW. The Fourth Department reversed and vacated the plea of guilty. The trial court and counsel misapprehended the sentencing options. The narrow exception to the preservation applied. *See People v Williams***,** 27 NY3d 212. Counsel advocated for parole supervision under CPL 410.91, and the court said that it would consider such punishment, yet the defendant was not eligible for such sentence. The conviction appeared to be based on complete confusion by all concerned. The Legal Aid Bureau (Kristin Preve, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00962.htm

People v David T., 2/7/20 – **MENTAL DISEASE / HEARING NEEDED**
The defendant appealed from a CPL 330.20 order of Onondaga County Court, committing him to the custody of the Commissioner of Mental Health for confinement. The Fourth Department reversed and remitted. After the defendant was charged with 2nd degree arson, County Court accepted his plea of not responsible by reason of mental disease or defect. As a result, the defendant was examined by two qualified psychiatric examiners, who concluded that he had a dangerous mental disorder. County Court failed to conduct the initial hearing required by statute to determine his present mental condition. Mental Hygiene Legal Service (Laura Rothschild, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00964.htm

State of NY v Richard F., 2/7/20 – **MHL ART. 10 / NO LEGAL BASIS**
The respondent appealed from a MHL Article 10 order of Oneida County Supreme Court, which found that he was a dangerous sex offender requiring confinement and committed him to a secure treatment facility. The Fourth Department reversed and remitted for imposition of a regimen of strict and intensive supervision and treatment. Unrefuted

testimony from the State's and the respondent's experts opined that the respondent, age 76, was able to control his sexual misconduct. Supreme Court's contrary determination was without foundation; there was no reason to disregard the experts. Indeed, the trial court remarked that the State "has no case," yet ordered confinement without any legal basis. The appellate court expressed "deep concern" regarding the trial judge's abandonment of her neutral role. She called and aggressively cross-examined a witness, and she repeatedly overruled the respondent's objections. It is the function of the judge to protect the record, not to make it, the appellate court declared, and the line is crossed when the judge takes on the function or appearance of an advocate. Thus, further proceedings were to be conducted before a different judge. Mental Hygiene Legal Service (Patrick Chamberlain, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00943.htm

People v Nazario, 2/7/20 –
PEOPLE'S APPEAL / SUPPRESSION / AFFIRMED
The People appealed from an order of Erie County Supreme, which granted the defendant's motion to suppress the physical evidence seized, statements allegedly made by him, and identifications of him. The Fourth Department affirmed. The suppression hearing evidence established that an officer responded to a radio dispatch regarding a burglary in progress and noticed the defendant three blocks from the crime scene. The officer exited his vehicle and asked what the defendant was doing, and the defendant said he was looking through garbage cans. Then the officer checked the defendant's bag for weapons and drove him to the crime scene, where a show-up identification was conducted. Earlier, the officer had received a BOLO photo depicting the defendant, but did not recognize him until after driving to the crime scene. Thus, the BOLO information could not be used to validate the officer's conduct. Moreover, the officer was not justified in searching the defendant's bag, where there was no proof that the officer reasonably suspected that the defendant was armed and posed a threat to his safety.
http://nycourts.gov/reporter/3dseries/2020/2020_00955.htm

People v Newsome, 2/7/20 – ***MOLINEUX* ERROR / HARMLESS**
The defendant appealed from a Supreme Court judgment, convicting him of 3rd degree burglary. The Fourth Department affirmed, though it found that the trial court erred in admitting testimony that the defendant had committed a theft years before the instant offense in order to establish intent, identity based on unique modus operandi, and absence of mistake. Since the defendant's identity was conclusively established by trial proof, the subject testimony was not properly admitted. Further, the testimony was not needed to show intent, which could be inferred from the crime itself. Finally, the testimony was not relevant to absence of mistake. But the error was harmless.
http://nycourts.gov/reporter/3dseries/2020/2020_00942.htm

People v Brown, 2/7/20 – **WAIVER "IRREDEEMABLE" / SENTENCE AFFIRMED**
The defendant appealed from an Onondaga County Court judgment, convicting him of 2nd degree CPW. The Fourth Department affirmed but found that the defendant did not validly waive his right to appeal, because the plea court's advisement as to the rights relinquished as incorrect and "irredeemable." The court told the defendant that, by waiving the right to

appeal, he could obtain no further review of the conviction or sentence by a higher court—omitting any mention of the rights and issues that survived the waiver. Thus, the colloquy did not ensure that the waiver was voluntary, knowing, and intelligent. However, the sentence was not unduly harsh or severe.
http://nycourts.gov/reporter/3dseries/2020/2020_00944.htm

FAMILY

FIRST DEPARTMENT

Rebecca V. (Diomedes V.), 2/4/20 – **NEGLECT / HEARSAY EXCEPTIONS**
The father appealed from orders of fact-finding and disposition entered in Bronx County Family Court. The appeal from the fact-finding order was subsumed in, and brought up for review by, the appeal from the final order. *See Matter of Aho*, 39 NY2d 241; CPLR 5501 (a) (1). The First Department affirmed the neglect finding, since it was supported by the mother's statements that the father stabbed her and took the child from the home in a car. Such statements were admissible under the present sense impression and excited utterance exceptions. The fact that the statements were made to a 911 operator moments after the attack indicated that the mother was in shock and spoke without reflection. A finding of neglect could rest on a single incident. The father's violence severely impaired judgment that exposed the child to a risk of substantial harm.
http://nycourts.gov/reporter/3dseries/2020/2020_00825.htm

Mathiew v Michels, 2/4/20 –
RELOCATION TO ENGLAND GRANTED / AFFIRMED
The father appealed from an order of NY County Supreme Court, which granted the mother's application to relocate with the parties' minor children to London for a year. The First Department affirmed. Because no prior custody order was in place, the "best interests" test should have been applied, but the challenged decision was sound. The mother landed a position in London in reliance on the father's promise that the family would move there if she found a job there with a certain salary. She had an apartment and family in London, and the children spent time there every year with their grandmother. As the primary caregiver, the mother would not engage in "negative gatekeeping." The father was employed by a company with a London office but failed to explain why he could not work there. He said that a move from NY would uproot the children, but had no such concerns when considering a move to Texas and Massachusetts to advance his career.
http://nycourts.gov/reporter/3dseries/2020/2020_00815.htm

SECOND DEPARTMENT

Matter of Massiello v Milano, 2/5/20 –
RELOCATION TO SOUTH CAROLINA DENIED / REVERSED
The mother appealed from an order of Dutchess County Family Court, which denied her custody modification petition so as to permit the parties' children to relocate to South Carolina to live with her, and granted the father sole physical custody. The Second Department reversed, granted the mother's petition, and remitted. Under *Matter of Tropea v Tropea*, 87 NY2d 727, the court was required to weigh many factors, including that the mother had been the primary caregiver, and the children wanted to move with her. Moreover, she had been diagnosed with multiple sclerosis and had support from the maternal grandmother, with whom she would reside, and from her extended family in South Carolina. A meaningful relationship between the father and the children could be fostered by the mother and by an order providing for a liberal parental access schedule. Thomas Keating represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_00863.htm

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