CRIMINAL

SECOND DEPARTMENT

People v Jhagroo, 8/19/20 – **ASSAULT / NO PHYSICAL INJURY**
The defendant appealed from a judgment Queens County Supreme Court, convicting him of 3rd degree assault and other crimes. The Second Department vacated the assault conviction, finding that the People failed to present legally sufficient evidence of physical injury. The issue was not preserved: at the conclusion of the People's case, defense counsel made a generalized motion for a trial order of dismissal, without any argument specifically directed at the error being urged on appeal. However, the appellate court reached the issue in the interest of justice. The complainant testified that the defendant pushed him to the ground and slapped him several times in the face, and the complainant cried because he "was in a lot of pain." There was no evidence corroborating the subjective description of the degree of pain experienced. No testimony addressed the duration of the pain; whether the shove or slaps left any visible bruising, swelling, or redness; or whether the complainant sought medical treatment or missed any time from work or school. Appellate Advocates (Jonathan Schoepp-Wong, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04580.htm

People v Hill, 8/19/20 – **PERSISTENT VIOLENT FELON / SENTENCE VACATED**
The defendant appealed from two judgments of Queens County Supreme Court, each convicting him of 2nd degree burglary under two separate indictments, upon his pleas of guilty. The Second Department vacated the sentences and remitted for resentencing. The defendant's adjudication as a persistent violent felony offender—based on the convictions enumerated in the People's CPL 400.16 statement—was improper, since he committed the second predicate violent felony offense before he was sentenced for the first one. Appellate Advocates (Kendra Hutchinson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04575.htm

People v Kostyk, 8/19/20 – **YO NOT CONSIDERED / SENTENCE VACATED**
The defendant appealed from two judgments of Kings County Supreme Court, each convicting him of 2nd degree burglary and 2nd degree criminal trespass under two separate indictments, upon his pleas of guilty. The Second Department vacated the sentences. In a prior decision, the appellate court had remitted to give the defendant an opportunity to move to vacate his pleas based on the lower court's failure to advise him of the possibility of deportation. The defendant made such an application. Then, prior to a hearing, counsel said that the defendant intended to withdraw his motion. However, the challenged judgments were modified for another reason. Under CPL 720.20 (1), upon the conviction of an eligible youth, when pronouncing sentence, the court must determine whether or not the eligible youth is a youthful offender. Even though this defendant was an eligible youth, the record did not demonstrate that, at the time of sentencing, the Supreme Court considered and determined whether he should be treated as a YO. Appellate Advocates (Kathleen Whooley, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04582.htm

People v Huertas, 8/19/20 – **DISSENT / *MOLINEUX* ERROR**
The defendant appealed from a Queens County Supreme Court judgment, convicting him of 2nd degree murder and 2nd degree CPW. The Second Department affirmed. Two justices dissented, focusing primarily on a *Molineux* ruling. The prosecutor sought to cross-examine the defendant regarding all underlying facts of three prior gun-related convictions, if he testified that the instant shooting was an accident. The court granted the motion and denied the defendant's application to introduce into evidence his written statement regarding the claimed accident. The dissenters observed that, if the defendant had testified consistent with his statement to police, proof concerning the underlying facts of his decades-old gun-related convictions had no relevance to any material issue. Therefore, such evidence should have been excluded. Permitting the People to elicit the underlying facts of those acts—which were totally unrelated to this victim—would serve only to show that the defendant had a propensity for gun violence. The errant ruling effectively precluded the defendant from testifying and presenting a defense, and it prevented the jury from considering his contention that the shooting was an accident. The *Molineux* ruling, combined with other errors, deprived the defendant of a fair trial. While there was compelling evidence that the defendant shot the victim, whether the shooting amounted to intentional murder—as opposed to an accidental or reckless act—was far less clear. Thus, if harmless error analysis applied, the error was not harmless beyond a reasonable doubt. A new trial was warranted, in the dissenters' view.
http://nycourts.gov/reporter/3dseries/2020/2020_04577.htm

People v Rodriguez, 8/19/20 – ***ANDERS* BRIEF / REJECTED**
The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of drug and firearm possession offenses. The Second Department found deficient the *Anders* brief submitted, and assigned new counsel. The brief did not address the colloquy regarding the defendant's purported waiver of his right to appeal or whether the sentence imposed was excessive. Since the defendant did not receive the minimum punishment, the failure to identify and analyze the appellate waiver and sentence issues was consequential.
http://nycourts.gov/reporter/3dseries/2020/2020_04590.htm

THIRD DEPARTMENT

DECISION OF THE WEEK

People v Callahan, 8/20/20 – **MURDER / REVERSAL / INTEREST OF JUSTICE**
The defendant appealed from a judgment of Otsego County Court, convicting him of 2nd degree murder. The Third Department reversed. In 2000, the defendant truck driver and his wife parked at a Pennsylvania truck stop near the NY border. After the wife exited the cab, the defendant slowly moved the truck, and she was fatally run over. Sixteen year later, he was charged with murder. Territorial jurisdiction existed because the defendant's conduct in NY manifested his intent to commit the crime in PA. Reversal was required because of a *Molineux* issue. County Court granted the People's application to offer proof of *verbal and emotional* abuse by the defendant of the victim. At trial, however, the defendant's *physical* abuse of his wife was the subject of testimony by her niece. The niece said that the victim told her that the defendant once grabbed her arm in a store and that he caused bruises on her legs. The witness also testified that she saw the defendant kick the victim in

the stomach. County Court's instruction to the jury—to not to consider *Molineux* evidence as propensity proof—was tailored only to the emotional abuse. Defense counsel failed to object to the niece's testimony and to preserve the argument raised on appeal—that the niece's testimony about physical abuse, some of which was hearsay, exceeded the scope of the *Molineux* ruling and deprived the defendant of a fair trial. Reaching the issue in the interest of justice, the appellate court agreed with the appellant's arguments, found that proof of guilt was not overwhelming, and ordered a new trial. The Rural Law Center of NY (Kelly Egan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04618.htm

FOURTH DEPARTMENT

People v Dortch, 8/20/20 – **NO VALID ARREST WARRANT / REVERSAL**
The defendant appealed from a Supreme Court judgment, convicting him after a nonjury trial of 2nd degree CPW. The Fourth Department reversed and dismissed the indictment. The trial court erred in denying suppression. The police arrested the defendant based on arrest warrants issued for his brother. Once the defendant challenged the existence and validity of the warrants at the suppression hearing, the People were required to produce the warrants themselves or other reliable evidence that they were active and valid. Since the People failed to do so, they did not establish the legality of the police conduct in arresting the defendant. Two justices dissented. The Monroe County Public Defender (Julia Malinka, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04711.htm

People v Ringrose, 8/20/20 – **LURING CHILD / DISMISSED**
The defendant appealed from a judgment of Ontario County, convicting him of luring a child (six counts) and other crimes. The Fourth Department dismissed the above-named counts, because the People failed to prove that the defendant lured the two victims into a motor vehicle. The indictment did not identify the defendant's relevant statements to the victims. At trial, the People argued that the defendant induced the victims to enter his vehicle by making numerous false statements to them before he met them in person and by flattering them about their appearances. However, the defendant's utterances, made well before rendezvous plans, clearly were not designed to persuade the victims to enter his vehicle. Brian Shiffrin represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04719.htm

People v Jumale, 8/20/20 – ***PEQUE* VIOLATION / REMITTAL**
The defendant appealed from a judgment of Erie County Supreme Court, convicting him of attempted 2nd degree burglary. The Fourth Department reserved decision. The defendant, a noncitizen, contended that his guilty plea was not validly entered because Supreme Court failed to advise him of potential deportation consequences, as mandated by *People v Peque*, 22 NY3d 168. Even assuming, arguendo, that the defendant was required to preserve his contention under the circumstances of this case, the appellate court exercised its power to address the due process question as a matter of discretion in the interest of justice. The record of the plea proceeding established that the court did not make the *Peque* advisal. The case was remitted to give the defendant the lower opportunity to move to vacate his

plea, upon a showing that there was a reasonable probability that he would not have pleaded guilty, had the court advised him of the possibility of deportation. The Legal Aid Bureau of Buffalo (Erin Kulesus, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04697.htm

People v Rogers, 8/20/20 – **PRO SE DEFENDANT / SENTENCING EXPOSURE**
The defendant appealed from a Monroe County Court judgment, convicting him of certain drug crimes. The Fourth Department affirmed, rejecting the defendant's contention that the trial court erred in granting his request to proceed pro se for a part of the proceedings. The defendant asserted that his waiver of the right to counsel was automatically invalid in light of the trial court's failure to discuss the potential maximum sentences and the nature of the crimes charged. The appellate court found that the trial court adequately discharged its core obligation to warn the defendant about the dangers and pitfalls of self-representation; and it declined to follow *People v Rodriguez*, 158 AD3d 143 (1st Dept 2018) (waiver of right to counsel at suppression and *Sandoval* hearings invalid where trial court failed to ensure that defendant was aware of sentencing exposure).
http://nycourts.gov/reporter/3dseries/2020/2020_04658.htm

People v Horn, 8/20/20 – **MURDER AFFIRMED / PREJUDICIAL FILM SCENE**
The defendant appealed from a judgment of Steuben County Court, convicting him of 2nd degree murder and other crimes. The case arose from the violent death of an alleged drug dealer and white supremacist. The Fourth Department affirmed, but stated that the trial court erred in allowing the prosecutor to play for the jury a scene from the film, *The Boondock Saints* (a vigilante action/ thriller film). The scene took place inside a courtroom, where the vigilante protagonists threatened everyone with pistols, while jurors watched in astonishment and ducked for cover. The vigilantes made self-aggrandizing statements and put their guns to the back of the head of the criminal defendant character, while he was made to kneel on the floor. Gunfire erupted. People screamed and fled the courthouse. In this case, the defendant posted quotes from the scene on social media two days after the instant murder. The People ostensibly played the scene to rebut his testimony that he was coerced into participating in the murder. The prejudice was obvious—the jury might perceive the defendant as endorsing violence; and the depiction of violence against a jury at a criminal trial likely affected their objectivity. Moreover, the scene had little probative value. The defendant never posted the video; he only quoted from it. The prosecutor could have simply asked him about the posted quote upon cross-examination. However, the error was harmless.
http://nycourts.gov/reporter/3dseries/2020/2020_04712.htm

People v Blue, 8/20/20 – **SORA / LEVEL REDUCED**
The defendant appealed from a County Court order designating her a level-two risk under SORA, based on her conviction in federal court of conspiracy to commit sex trafficking of a minor. The Fourth Department ordered a reduction to level one. The SORA court improperly assessed 25 points under risk factor two for sexual contact with the victim and 20 points under risk factor four for engaging in a continuing course of sexual misconduct. The People did not establish that there was any sexual contact between the defendant and the victim or that the defendant shared the intent of the victim's clients regarding sexual

contact. The Monroe County Public Defender (David Juergens, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04689.htm

People v Dukes, 8/20/20 – **SORA / DISSENT**
The defendant appealed from a Monroe County Court judgment, determining that he was a level-three risk pursuant to SORA. The Fourth Department affirmed. Two judges dissented, opining that the SORA court erred in relying on the facts underlying two JD adjudications to grant an upward departure. The defendant challenged the admissibility of the JD facts as set forth in the presentence report, asserting that they were based on admissions he made in Family Court. It did indeed appear to the dissenters that the PSR summary of the facts was based upon the defendant's admissions, which would render the summary inadmissible under Family Ct Act § 381.2 (1) (JD's admission in Family Court is inadmissible against him or his interests in any other court).
http://nycourts.gov/reporter/3dseries/2020/2020_04679.htm

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