CRIMINAL

COURT OF APPEALS

People v Walley, 12/22/20 – **WAIVER OF INDICTMENT / *LANG* CONTROLS**
The People appealed from a Third Department order, which reversed a Schenectady County Court judgment convicting the defendant of 2nd degree CPW, upon his plea of guilty. The Third Department found defective the waiver-of-indictment form, since it did not include the approx. time of the crime. The Court of Appeals reversed. After the challenged order was rendered, *People v Lang*, 34 NY3d 545, held that a guilty plea forfeited a claim as to omission of non-elemental factual information. The time of the incident was not an element of this crime. *Lang* controlled.
http://www.nycourts.gov/reporter/3dseries/2020/2020_07691.htm

FIRST DEPARTMENT

People v Watt, 12/22/20 – **SENTENCE REDUCTION / MENTAL ILLNESS**
The defendant appealed from a judgment of NY County Supreme Court, convicting him upon his plea of guilty, of attempted 2nd degree murder and 1st degree robbery, and sentencing him to concurrent terms of 14 years plus post-release supervision. In the interest of justice, the First Department reduced the prison terms to 10 years, balancing the horrific nature of the crime against the extraordinary circumstances. Four men brutally attacked two victims in Riverside Park and robbed one of them. Since childhood, the defendant had suffered from mental illness and intellectual disability. Prior to the incidents, he had no convictions. A codefendant—with whom the defendant began to associate a year before the incidents—had a huge influence on him and his role in the attacks. Given his age (19 at the time of the crimes) and cognitive deficits, the defendant was susceptible to negative influences. People with serious psychiatric disorders were more likely to be victimized in prison. The defendant attempted suicide at Rikers Island. His sentence was reduced to match the terms imposed on two codefendants. One justice dissented, opining that the majority acted solely out of sympathy for the defendant and that extraordinary circumstances had not been demonstrated. The Center for Appellate Litigation (Emilia King-Musza, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07721.htm

APPELLATE TERM, FIRST DEPT.

People v Konneh, 2020 NY Slip Op 51524 (U) – **INAUDIBLE / NEW TRIAL**
The defendant appealed from a judgment of NY County Criminal Court, convicting him of reckless driving. Appellate Term, First Department reversed and ordered a new trial. Sua sponte, the trial judge had improperly raised and considered the defendant's recent prior conviction for the same offense. Further, there were many gaps in the trial transcript due to inaudibility.
http://nycourts.gov/reporter/3dseries/2020/2020_51524.htm

SECOND DEPARTMENT

People v Morales, 12/23/20 – **SENTENCE REDUCTION / REHABILITATION**
The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of 5th degree criminal possession of a controlled substance, upon a jury verdict, and sentencing him to a determinate term of 4½ years plus two years' post-release supervision. The Second Department reduced the sentence to the minimum of 2½ years' imprisonment and one year of PRS. The defendant had only one prior felony. At the time of sentencing, he was 23 and had a new marriage and infant son. During the presentence interview, the defendant complained that the judge, prosecutor, and jury showed favoritism to the arresting officer. When asked about that complaint, he told the court that he wanted to move on and had learned his lesson. Yet the court said that the defendant did not accept responsibility, and imposed the maximum, in part due to the defendant's criticism about how the trial was conducted. The nonviolent crime involved a small amount of drugs; and the defendant had substance abuse issues. A dissenting justice essentially said bah humbug as to the mercy shown. Appellate Advocates (Priya Raghavan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07919.htm

People v Antoine, 12/23/20 – **DEFENDANT'S REMOVAL / REVERSAL**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2nd degree murder and other crimes. The Second Department reversed and ordered a new trial. After the jury foreperson announced a guilty verdict on the final charge, the clerk inquired if that was the jurors' verdict. Before they could respond, the defendant had an outburst. The trial court told court officers to remove him from the courtroom, and they did so after more outbursts. The court erred in not first warning the defendant that he would be taken out of the courtroom if his disruptions continued. A criminal defendant has a right to be present at all material stages of a trial. The defendant's conduct was inappropriate, but did not create an emergency. Two justices dissented. Appellate Advocates (Alice Cullina, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07907.htm

People v Clark, 12/23/20 – **SERIOUS INJURY / INSUFFICIENT PROOF**
The defendant appealed from a Dutchess County Court judgment, convicting him of 2nd degree assault and other offenses. The Second Department dismissed the assault count, based on legally insufficient proof of a serious physical injury. The People did not produce medical or other evidence to demonstrate that, as a result of the attack, the complainant suffered the requisite protracted impairment of the function of a bodily organ. Yasmin Duncan represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07911.htm

People v Lowe, 12/23/20 – ***SANDOVAL*** **/ HARMLESS ERROR**
The defendant appealed from a Queens County Supreme Court judgment, convicting him of 2nd degree robbery (two counts), unauthorized use of a vehicle, and several other crimes. The Second Department stated that, after a *Sandoval* hearing, Supreme Court should not have held that if the defendant testified, the prosecutor could cross-examine him about facts

underlying prior convictions for unauthorized use of a vehicle, arson, and reckless endangerment. Prejudice outweighed probative value. However, the error was harmless. The appellate court reduced the robbery terms from 23 to 16 years to life. Appellate Advocates (Joshua Levine, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07918.htm

APPELLATE TERM, SECOND DEPT.

People v Lakhani, 2020 NY Slip Op 20342 – **UNFAIR TRIAL / IAC**
The defendant appealed from a Justice Court judgment, convicting him of 2nd degree sexual abuse. Appellate Term, Second Department reversed. To rebut testimony of the defendant's forensic psychiatrist, the People called a social worker. On cross-exam, she said: "[T]he original trace memory is the original memory. Even if this…adult…is trying to put something else there…it's not going to change…that original trace memory…That's encoded." Such statements improperly bolstered the victim's testimony. Then in cross-exam of the defendant, the prosecutor asked if the victim lied and why she would have lied—even though on direct the defendant did not say she lied. In summation, the prosecutor invoked such questions. Counsel did not object to such burden-shifting. The defendant received ineffective assistance. John Ingrassia represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_20342.htm

People v Moneke, 2020 NY Slip Op 51493 (U) – **VIDEO / IMPROPER**
The defendant appealed from a District Court judgment, convicting him of reckless driving. Appellate Term, Second Department reversed and ordered a new trial. The trial court improperly admitted an Instagram video purportedly depicting the offense. The People did not establish that the video was a fair and accurate depiction of the offense. County Legal Aid Society (Tammy Feman and Dori Cohen, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_51493.htm

People v John E., 2020 NY Slip Op 51498 (U) – **YO / MANDATORY**
The defendant appealed from a Queens County Criminal Court judgment, convicting him of endangering the welfare of a minor. Appellate Term, Second Department reversed. For the defendant, age 18 at the time of the crime, adjudication as a YO was mandatory pursuant to CPL 720.20 (1) (b) (court must find eligible youth to be YO where conviction is in local criminal court and prior to guilty plea, youth was not convicted of crime or found to be YO). Appellate Advocates (Nao Terai, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_51498.htm

THIRD DEPARTMENT

People v Hiedeman, 12/24/20 – **ATTEMPTED RAPE / DISMISSED**
The defendant appealed from a judgment of Warren County Court, convicting him of attempted 2nd degree rape and related attempted crimes. The Third Department dismissed the indictment. The proof did not establish that the defendant came dangerously near having sexual contact with the purported victim. He had conversations contemplating sexual contact with a 14-year-old and drove to the designated rendezvous location, but his conduct did not pass beyond mere preparation. Matthew Hug represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07954.htm

People v Lukosavich, 12/24/20 – **ALIBI PROOF / ERRANT PRECLUSION**
The defendant appealed from a County Court judgment, convicting him of 4th degree grand larceny. The Third Department reversed and granted a new trial. The trial court erred in precluding the defendant from introducing his father's alibi testimony. The defendant was not given a chance to respond to the People's motion to preclude; and the court found no improper purpose in the late alibi notice and did not consider less drastic sanctions. The People were already aware of the father's statement; and the alibi testimony was important to the defense. The error was not harmless, given the largely circumstantial evidence and reliance on accomplice testimony. The Cortland County Public Defender's Office (Keith Dayton, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07953.htm

People v Drayton, 12/24/20 – **ALIBI PROOF / ERRANT 440 DENIAL**
The defendant appealed from an order of Sullivan County Supreme Court, denying his CPL 440.10 motion to vacate a judgment convicting him of 2nd degree robbery (two counts) and other crimes. The Third Department reversed. County Court erred in not considering claims of ineffective assistance based on a finding that the claims could be reviewed on the direct appeal. The defendant said that counsel did not interview alibi witnesses and obtain certain surveillance video. The matter was remitted to determine the merits of the IAC claim. Sandra Colatosti represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07951.htm

People v Drayton, 12/24/20 – **DEFECTIVE PLEA / ENHANCED SENTENCE**
The defendant appealed from a Sullivan County Court order, convicting him of 3rd degree criminal sale of a controlled substance (two counts). The Third Department vacated the guilty plea, because County Court failed to adequately advise the defendant of the constitutional rights he would be forfeiting. The appellate court noted that the lower court also erred in imposing an enhanced sentence. At the plea colloquy, the People had recommended concurrent terms of 3½ years plus supervision. Yet the court imposed nine-year terms, without stating any reason or giving the defendant an opportunity to withdraw his guilty plea. Sandra Colatosti represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07952.htm

FOURTH DEPARTMENT

People v Z.H., 12/23/20 – **YO / GRANTED**
The defendant appealed from an Onondaga County Court judgment, convicting her of guilty of 2nd degree assault. The Fourth Department adjudicated her to be a youthful offender. A fellow student attacked the defendant, who lashed out with a knife in self-defense, mistakenly striking the hand of an intervening substitute teacher. Multiple factors warranted YO status: (1) the defendant was not violent—she carried the knife because she was bullied; (2) she had no prior convictions; (3) the prosecutor, probation officer, and victim recommended YO treatment; (4) the defendant pleaded guilty and took responsibility for her actions; (5) while incarcerated, she had obtained her diploma and been accepted to college; and (6) she was successfully rehabilitated. Sentencing courts should consider whether defendants faced discrimination. A national report indicated that Black girls, such as the defendant, were less likely than white girls to have charges against them dismissed. Hiscock Legal Aid Society (Nathaniel Riley, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07824.htm

People v Ruise, 12/23/20 – **SENTENCE / NO DISCRETION**
The defendant appealed from a Supreme Court judgment, convicting him of attempted 2nd degree CPW, upon his plea of guilty. The Fourth Department vacated the sentence and remitted. When the defendant violated the terms of interim probation, the court failed to exercise its discretion, instead automatically imposing the term previously discussed. There was no consideration of the crime, the defendant's circumstances, the purpose of punishment, or the presentence report. The Monroe County Public Defender (Janet Somes, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07785.htm

People v Caswell, 12/23/20 – **RESENTENCE / RIGHT TO COUNSEL**
The defendant appealed from a resentence imposed by Monroe County Supreme Court upon his conviction of attempted 3rd degree robbery. The Fourth Department reversed and remitted. The defendant was deprived of his right to counsel when Supreme Court failed to assign an attorney in response to his multiple requests. Thus, the defendant could not effectively contest his adjudication as a second felony offender or argue against the maximum. Paul Watkins represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07810.htm

People v DiRoma, 12/23/20 – **TAMPERING / DISMISSED**
The defendant appealed from a Supreme Court judgment, convicting him upon a jury verdict of 3rd degree tampering with a witness. The Fourth Department reversed and dismissed. After assaulting the victim, the defendant left voicemails threatening violence if she pressed charges. Since he had not yet been arrested, the victim was not "about to be called as a witness in a criminal proceeding," as required by Penal Law § 215.11. The Monroe County Public Defender (Harry Morgenthau, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_07817.htm

FAMILY

FIRST DEPARTMENT

DECISION OF THE WEEK

M/O Ashlynn R., 12/22/20 – **MOTHER REDEEMED / ACTIONS VS. WORDS**

The mother appealed from a NY County Family Court order, which found abuse and neglect by her and the father and denied their Family Ct Act § 1061 motions for a trial discharge of the two subject children into her care. The First Department reversed. The record supported findings that both parents abused one child when the father inflicted injuries and thereby derivatively abused the other child. However, medical neglect findings against the mother were unsound, since the proof did not show that her delay in seeking care for a burn or rash caused harm. Further, Family Court erred in denying the mother's § 1061 motion, since good cause was shown. The children had been placed in the fourth foster home; and the mother had complied with all services, attended unsupervised visits, and received positive reports. While she continued to maintain that the subject injuries were accidental, her conduct demonstrated an acceptance of ultimate responsibility. She had proven that she could provide competent care. The petitioner and Family Court disturbingly downplayed the emotional harm that removal caused to the children. The daughter suffered such severe anxiety, night terrors, and other health issues that she had to receive emergency hospital care. The matter was remanded to a different judge. Carol Kahn represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_07726.htm

THIRD DEPARTMENT

M/O Michael U. v Barbara U., 12/24/20 – **ACCESS / SUPERVISION**

In appeals from a Schuyler County Family Court custody modification order, the Third Department modified. Family Court erred in giving the father unsupervised access, and in fact, should have ordered more stringent control of access. The parents had sex when the mother was 16 (the subject daughter's current age) and the father was 48. He had not had any counseling to address the illicit relationship, and he lacked insight as to the child's emotional needs and problems. Lisa Miller represented the mother.

http://nycourts.gov/reporter/3dseries/2020/2020_07957.htm

M/O Isayah R. (Shaye R.), 12/24/20 – **PERMANENCY / NOT MOOT**

The mother appealed from an order of Sullivan County Family Court, which modified the subject child's permanency plan. The Third Department affirmed. The appeal was not moot—even though the petitioner had filed a petition to terminate the mother's parental rights and another permanency hearing had been scheduled. Family Court changed the permanency goal from reunification to termination and permanent placement. Thus, any new orders would be the result of that order. Although Family Court failed to conduct an age-appropriate consultation, as required by Family Ct Act § 1089 (d), reversal was not needed because of extensive testimony from a psychologist.

http://nycourts.gov/reporter/3dseries/2020/2020_07967.htm