**Court of Appeals Requires Some DNA Experts’ Production in Court**

On April 28, 2016, in *People v John* (2016 NY Slip Op 03208), the New York Court of Appeals ruled that the defendant’s Sixth Amendment right to confront witnesses against him was violated where the prosecution introduced testimonial DNA evidence and comparison results “without producing a single witness who conducted, witnessed or supervised the laboratory’s generation of the DNA profile from the gun or [the] defendant’s exemplar.” The DNA report was testimonial as it was created for the purpose of establishing the defendant’s guilt by linking him to the loaded gun. *John* can assist lawyers asserting that confrontation is necessary to determine whether forensic experts are conducting accurate examinations and arriving at reliable conclusions. Judge Garcia dissented. A summary of the decision appears at p. 17.

In the June 2016 edition of *Issues to Develop at Trial*, the Center for Appellate Litigation discusses how defense counsel should handle DNA lab reports and expert testimony in light of the Court of Appeals decision in *John*.

**State Legislature Passes Reimbursement of Counties’ Public Defense Costs**

At the end of the legislative session, a bill requiring New York State to reimburse counties for their public defense costs unanimously passed both houses. Introduced by Assemblymember Patricia Fahy (D-Albany) and Senate Deputy Majority Leader John DeFrancisco (R-Syracuse), the bill provides a seven-year phase-in period for state takeover of public defense expenses.

The bill also gives the Indigent Legal Services Office (ILS) the authority “to adopt, promulgate, amend or rescind rules and regulations to carry out the provisions of” the ILS statute, “including to (i) ensure the presence of counsel at the first appearance of any eligible defendant charged with a crime, (ii) establish caseload/workload regulations for attorneys providing mandated representation, and (iii) improve the quality of mandated representation.” A.10706/S.08114.

Passage of the bill received widespread praise, and concomitant calls for Governor Andrew Cuomo to sign the legislation. In a news release, NYSDA celebrated this step in the march to broad, much-needed reform of public defense services in New York State and lauded the bipartisan support that made it possible. Executive Director Jonathan E. Gradess commented that “[w]hen the Governor signs this bill, the State will move closer to fully meeting its constitutional and moral duty to ensure that effective public defense representation is provided in every court around New York State.” Links to NYSDA’s news release and other statements, including those of the New York Civil Liberties Union (NYCLU), NYS Bar Association, and the national Sixth Amendment Center, were posted at www.nysda.org.

The New York Association of Counties (NYSAC), a major proponent of the legislation, also lauded its passage. And the benefits to counties were noted in media across the state. For example, an article at Morningstar.com noted that “[l]ocal spending for indigent defense is a significant slice of county spending …; [l]ast year, legal services cost Otsego County $928,000, Delaware County $858,040,
Chenango County $589,846, and Schoharie County $437,214.” Similarly, the headline on a North Country Now item on June 21, 2016 read, “State agrees to cover indigent defense cost, legislation could save St. Lawrence County millions.”

The County Attorney and former Public Defender in St. Lawrence County, Stephen Button, spearheaded county efforts to secure this legislation, as noted by North Country Radio on June 17. For instance, Button facilitated a meeting of county attorneys, county executives, and public defenders in October 2015, in Syracuse, to discuss statewide efforts to alleviate unfunded mandates in public defense. As the REPORT went to press, NYSDA announced that Button, along with legislators Fahy and DeFrancisco, would be receiving the Association’s 2016 Service of Justice Award at this year’s Annual Conference.

The landmark legislation, if signed into law and implemented, should achieve a number of goals. Disparities in funding and quality of public defense among counties should be alleviated, so that effectiveness of representation received no longer varies depending on which side of a county line a person’s case arises. More specifically, the legislation should end the unfairness of having certain counties receive state funding to implement reform required by the settlement of the Hurrell-Harring lawsuit while leaving other counties vulnerable to liability; this issue was the bedrock of the county-led campaign to pass the reimbursement legislation. The Cuomo Administration agreed to the settlement in the suit brought by the NYCLU against the State, to which five counties were eventually added. Governor Cuomo called the settlement “a positive step” in 2014, but, according to the Niagara Gazette, a spokesperson has said only that the governor’s counsel will review the new legislation. “‘This is smart government legislation that moves us closer to achieving an improved, uniform statewide indigent defense system, and reduces the likelihood of future litigation,’ said Westchester County Executive Rob Astorino, [then] president of the New York State County Executives Association,” as noted in the NYSAC news release above.

Moving to state funding should also ease political pressure to avoid spending meager county funds on representation in locally unpopular matters. As a Lockport Journal editorial endorsing the bill’s enactment noted, one result of increasing criminalization of “every alarming and sometimes merely annoying aspect of human behavior” has led to higher law enforcement and court costs; paying the resulting public defense tab “is the price we pay to ensure justice for all.”

If the bill leads to provision of effective, client-centered representation statewide, it will help address systemic issues like costly, inhumane over-reliance on incarceration and removal of children from their parents that occurs today in part because individuals lack the ability to show that other dispositions will better address the issues underlying their cases. As Franklin County Public Defender Thomas Soucia said in a June 29 item at thedailystar.com about the need for state funding of public defense, defense lawyers need to deal with why a client is facing charges, including the heroin and prescription drug abuse he said is being increasingly noted in rural counties.

Albany Times Union writer Fred LeBrun observed in a July 9, 2016 article that the bill presents the Governor with an opportunity “to sign on to a significant reform of legacy quality,” noting that the legislation, which originated in Albany County with the work of County Executive Dan McCoy and former judge Larry Rosen, has national implications.

LeBrun also pointed out ties between much-needed public defense reform and the need to address racial disparity in the justice system: “Strictly speaking, the public defense reform bill … is about services for the indigent regardless of race. But as a practical matter, as widely attested by statistics, there is a correlation with race and poverty and jails.” Effective, client-centered representation should include identifying and helping remedy the racial bias that blights – and some would say defines – the current system. (For more on racial bias, see p. 3.)

Public Defense Evaluation Giant Bob Spangenberg Dies

Robert Spangenberg, whose work in evaluating public defense services is known nationwide, died in June at the age of 83. A moving statement of mourning and acknowledgement of Spangenberg’s contributions, written by the Chief Counsel of the Committee for Public Defense Evaluation Giant Bob Spangenberg Dies

Robert Spangenberg, whose work in evaluating public defense services is known nationwide, died in June at the age of 83. A moving statement of mourning and acknowledgement of Spangenberg’s contributions, written by the Chief Counsel of the Committee for Public Defense Services, is published throughout the year by the Public Defense Backup Center of the New York State Defenders Association, Inc., 194 Washington Avenue, Suite 500, Albany, NY 12210-2314; Phone 518-465-3524; Fax 518-465-3249. Our web address is http://www.nysda.org. All rights reserved. This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is distributed with the understanding that its contents do not constitute the rendering of legal or other professional services. All submissions pertinent to public defense work in New York State and nationwide are welcome.

THE REPORT IS PRINTED ON RECYCLED PAPER
Counsel Services in Massachusetts, where Bob lived, was reposted on the National Association for Public Defense website.

Bob formed his research organization, The Spangenberg Group (TSG), in 1985. TSG’s work was a big component in the foundation underlying the late Chief Judge Judith S. Kaye’s call for the complete replacement of New York’s county-based public defense system with a statewide public defender office overseen by an independent commission. The extensive report on public defense services in New York State created by TSG while acting as a consultant to what became known as the Kaye Commission was published in 2006 along with the oft-cited “Kaye Commission Report.” The influence of the Kaye Commission, and by extension the influence of Bob Spangenberg, continue; the Kaye Commission Report has been mentioned frequently in coverage of the public defense legislation discussed above.

NYSFDA Executive Director Jonathan E. Gradess made the following observation: “Bob was client centered, committed to quality, unafraid to speak the truth, and committed for all the years I knew him to fixing a broken system. His report in New York was a cornerstone in the structure still under construction; without it we would still be far behind. There are many who never knew him who will yet miss him. May he rest in peace.”

Evidence from Illegal Stop is Admissible Where Discovery of Outstanding Warrant is an Intervening Circumstance

On June 20, 2016, the U.S. Supreme Court ruled in Utah v Strieff that evidence discovered in an unconstitutional stop is admissible at trial if the search of the defendant’s person is conducted after the discovery of a valid arrest warrant and the officer’s misconduct is not purposeful or flagrant. The court found that the discovery of an arrest warrant for Edward Strieff was an “intervening circumstance” and the unlawful stop was merely negligent and not a result of “systemic or recurrent police misconduct.”

In an article on the National Association for Public Defense (NAPD) website, Tejas Bhatt said the high court’s decision “drove a police cruiser sized hole through” the attenuation exception to the exclusionary rule. In an opinion analysis on SCOTUSblog, Orin Kerr pointed out that this is “the Supreme Court’s first decision on the Fourth Amendment exclusionary rule in five years.”

Justices Sotomayor and Kagan filed dissenting opinions warning of the potential consequences of this decision. Justice Sotomayor said the Court’s opinion that this event was “isolated” is a mischaracterization because outstanding warrants are surprisingly common. Condoning officers’ use of “an array of instruments to probe and examine” persons “without adequate cause” gives police “reason to target pedestrians in an arbitrary manner” and risks “treating members of our communities as second-class citizens,” Sotomayor wrote. Justice Kagan warned that the majority’s misapplication of Brown v Illinois’ three-part inquiry “creates unfortunate incentives for the police—indeed practically invites them to” stop persons without lawful basis. The decision is summarized on p. 14.

Unlawful Searches Addressed in Appellate Division

Appellants had more success in two Fourth Department search cases in recent months; evidence was suppressed in both. In the first, People v Richardson (132 AD3d 1239) the court found that an officer had no reason to search Cardell Richardson after another officer had stopped him for walking in the middle of a roadway. The search was deemed unlawful as the defendant’s conduct did not create reasonable grounds justifying a search of his person. A summary of Richardson appears at p. 35.

More recently, in People v Elliott (KA 13-01689 [6/17/2016]), the Fourth Department held that the trial court erred by denying a motion to suppress evidence because the officer’s level three forcible detention of the defendant, upon seeing the defendant “quickly grab near his waistband” and then bend towards the floor after entering a vehicle, did not rest on reasonable suspicion that the defendant was involved in a crime.

Growing Recognition of Implicit Bias and Its Effects on Systems

Public defense lawyers and their clients maneuver daily through a milieu long delineated by racism. Overt racism continues in society and its institutions, but “implicit” or “unconscious” bias also contributes to the
intractable racial imbalance seen at every level of the justice system.

Social science examinations of data and neuroscience discoveries offer new understanding of implicit racial bias in individuals and how it manifests in the systems they create and maintain. Ongoing discoveries and discussions of how implicit bias affects the criminal and family court systems—and people within them, including prosecutors, judges, and public defenders—pose both opportunities and challenges to those seeking to eradicate inequities.

Identifying measures that will effectively curb implicit negative biases—racial and others—is a difficult and ongoing task. Lawyers may look to traditional legal avenues of relief, but litigating claims that “implicit invidious race bias” prevents a fair outcome seems futile “thanks to the seemingly impenetrable latticework of Supreme Court case law foreclosing vindication of claims of racial bias in criminal cases.” So noted Robin Walker Sterling in “Defense Attorney Resistance,” 99 Iowa L Rev 2245, 2250-2251 (2014).

Still, as the above author also notes, studies show that the force of implicit biases can be blunted, and suggestions include something that good defense lawyers already do—telling the client’s story. The use of narrative to create a three-dimensional picture makes it “more difficult to reduce the defendant to a two-dimensional stereotype.” And, jury instructions may be constructed to “implicate implicit bias research,” Sterling says, such as an instruction “that people are more likely to perceive a given ambiguous action as aggressive and dangerous when performed by an African American than when the same action is performed by a white person ....” Cynthia Lee of George Washington University Law School wrote a law review article last year about “A New Approach to Voir Dire on Racial Bias” that discusses implicit bias.

Defenders seeking to learn about and counter implicit bias that can harm their clients may turn to several different sources. Short videos and other introductory materials exist, including a TEDx talk by Prof. Jerry Kang in 2013 entitled “Immaculate Perception,” available on YouTube. A 2016 blog post, “Implicit Bias: Why Race is Hard Even When People are Good,” provides an introduction with a legal bent. Other introductory or summary materials include a webpage about Understanding Implicit Bias by the Ohio State University Kirwan Institute for the Study of Race and Ethnicity and the American Bar Association’s Implicit Bias Initiative website. The National Association for Public Defense (NAPD) website offers materials on Implicit Racial Bias.

Lawyers are also looking beyond the unconscious associations about race for which implicit bias, or cognitive bias, is best known. A new NAPD webinar, “Using Cognitive Biases for Good,” addressed a variety of cognitive associations that may affect decision-making. The presenter, Yali Correa-Levy, Deputy Public Defender, San Francisco Public Defender’s Office, described how lawyers may use those associations to strengthen advocacy using examples that ranged from ways to help jurors think about a statutory element of intent to how to frame statistical information to put it in the best light. The webinar is available to NAPD members online. Membership dues are $25 annually.

Implicit Bias May Affect Sentencing and General Judicial Decisionmaking

An article posted on the New York State Unified Court System’s website discusses, in the context of the decisions judges must make in sentencing, a number of different methodologies used in examining neurophysiologic reactions that underlie implicit bias. “The Court’s Brain: Neuroscience and Judicial Decision Making in Criminal Sentencing,” looks at four sentencing principles—in-capacitation, retribution, rehabilitation, and deterrence—and how neuroscientific discoveries about brain function may help explain how race becomes an improper factor in decision-making even when a judge is “committed to fairness and impartiality.” The article finds that the studies it reports on “have disturbing implications for the criminal justice system,” that it is naïve to assume that judges can eliminate bias in their decision-making just by trying harder, and that solutions based on neurophysiologic reactions and psychological processes must be found. The article is eye-opening, but offers little concrete help to defenders seeking to lessen the implicit bias that clients face in sentencing proceedings.

A ten-minute video of judges talking about (and to) judges also addresses bias in judicial decision-making. “Hidden Injustice: Bias on the Bench,” available on the American Bar Association website, makes suggestions for judges that may or may not amount to more than “trying harder.”

Bias Acknowledged in the Prosecution Function

Given the discretion that prosecutors exercise as to whether to charge someone, what crime(s) to charge, what if any plea offer to make, what sentencing recommendation to make, etc., any prosecutorial bias can have enormous consequences. The federal Department of Justice (DOJ) recently announced department-wide implicit bias training. An ABA Journal post noted that “[a]ccording to Reuters, the announcement brings the DOJ in line with many local police departments throughout the country that have instituted mandatory implicit bias training in the wake of a number of shootings of unarmed black men by white police officers.” The training encompasses federal prosecutors, not just agents; bias is not limited to one level of the system.
Prosecution bias, and the many points at which bias can intrude, was highlighted in a Vera Institute of Justice report in 2014. A study done in partnership with the District Attorney of New York County focused not on implicit bias itself but on statistical evaluation of racial disparities in outcomes along the prosecution continuum. The Manhattan DA did refer to unconscious bias, saying that shame lies not in having unconscious bias or policies that led to disproportional racial impacts but in refusing to correct the problems. A recent article from The Atlantic noted the Vera study as it wrestled with the question, “Are Prosecutors the Key to Justice Reform?” The answer noted in a subheading was “Given their autonomy—only if they want to be.”

How Does Implicit Bias Affect Defenders?

The bias of judges and prosecutors—and others in the criminal and family court arenas, from jurors to child protective services caseworkers—can taint any and every aspect of a case. And implicit biases afflict defense lawyers too, even as they consciously fight the racism and other prejudices that crush their clients.

One big way implicit bias could adversely affect representation is by multiplying the effect of excessive caseloads and lack of resources. If a lawyer already short of time to spend on each client’s case allows implicit bias to affect decisions about which cases to focus the most attention on, those clients against whom the lawyer has the bias will lose out. “Do Public Defenders Spend Less Time on Black Clients?,” an article posted by The Marshall Project asks. It goes on to note that the context of “stress, exhaustion, and speed—‘exactly the context in which public defenders find themselves’”—exacerbates the influence of implicit bias.

Some defense lawyers are explicitly acknowledging the need to address their own implicit bias. For example, the elected Public Defender of San Francisco, Jeff Adachi, has described some tactics being used. In 2012, Andrea D. Lyon, a well-known defense attorney and then-clinical professor at DePaul University College of Law published “Race Bias and the Importance of Consciousness for Criminal Defense Attorneys” in the Seattle University Law Review. Tejas Bhatt, an assistant public defender in Connecticut, wrote an article posted June 14, 2016, on the NAPD website. It talks about implicit bias in many justice contexts, from the ubiquitous racial inequity found at every phase of a criminal case to the very specific furor over the six-month rape sentence imposed on a young, white, male former Stanford University swimmer. The author posits as to defense lawyers that “[r]ecognizing these biases in ourselves allows us to honestly point them out in others—judges, jurors and prosecutors ....”

Implicit Bias and White Privilege

As perhaps illustrated by the Stanford rape sentence, implicit bias may take forms other than unconscious negative stereotyping. Authors of an article in the Alabama Law Review last year sought to “rotate the flashlight to reveal implicit favoritism,” asserting that “[w]hite favoritism can operate in a range of powerful ways that can be distinguished from traditional race-focused examples ....” The heading on a blog post at The Root puts it bluntly, “White Privilege Isn’t Tainting the Criminal Justice System. It Is the Criminal Justice System.”

Dealing With Racial and Other Biases in Many Ways, in Many Contexts

Defenders and others in the system know that bias—unconscious or not, unreasonable and unfair—taints every aspect of the judicial/justice system. The first statewide New York conference on representing parents in Family Court, cosponsored by NYSDA last October, included a keynote speech on “Fairness for Families: Confronting Implicit Bias, Racial Anxiety, and Stereotype Threat.” Bias can impact not just criminal or family litigation, but any and all proceedings; the ABA’s Section of Litigation has seen the need to create a “toolbox” on Implicit Bias.

Finally, defenders trying to deal with the newer principles of implicit bias cannot forget that overt bias, as noted earlier, continues as well. The Sentencing Project’s report, “Reducing Racial Disparity in the Criminal Justice System: a Manual for Practitioners and Policymakers” (2nd ed), notes that “[t]he need to address racism wherever and however it manifests itself is a basic component of a strategy to reduce racial disparity.” Published in 2008, the manual refers to a perceived lessening of overt racist languages and attitudes and the obvious fact that “racist attitudes still persist” and must be combatted throughout the system.

2016 Defender Institute Basic Trial Skills Program: 56 Graduates

A full complement of 56 attorneys from around the state completed NYSDA’s 2016 Basic Trial Skills Program.
BTSP, held in Troy, New York in June. This week-long, hands-on program demonstrates to lawyers early in their careers the winning power of client-centered representation. Coaches from around the country—excellent attorneys and communications experts from a variety of backgrounds—show participants techniques and expose them to principles upon which they can build, in their own style, the skills necessary to provide quality legal representation. Established in 1987, BTSP received the endorsement of the NYS Judicial Commission on Minorities in 1991 and 2011 (now known as the Franklin H. Williams Judicial Commission) for “enhancing the competence and racial sensitivity of public defenders ….”

Implicit Bias Included in Training

The BTSP curriculum this year included references to the role of implicit racial bias in the justice system. As discussed above, this topic is receiving growing recognition as a matter of importance in public defense advocacy.

Forensic Science News

Keeping up with the ever-growing developments in forensic evidence requires time and access to information. To understand legal issues such as whether a particular prosecution expert must be produced for cross-examination (see p. 1) requires understanding the relevant forensic discipline itself. NYSDA seeks to keep lawyers informed by publishing information, such as that below, in the REPORT and on www.nysda.org. The Backup Center also houses a clearinghouse of information for its staff lawyers to use in responding to requests for assistance. Public defense lawyers who lack either or both time and resources for challenging forensic evidence are particularly encouraged to contact us.

DOJ Proposes Uniform Language for Forensic Experts

As part of its efforts to improve the practice of forensic science, the Department of Justice (DOJ) announced proposed standardized language for use in reports and testimony from various forensic disciplines. The proposed language will apply, if adopted, to all DOJ personnel that issue forensic reports or provide expert testimony including those in the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); the Drug Enforcement Administration (DEA); and the Federal Bureau of Investigations (FBI). Public comments were accepted through July 8, 2016. A June 30 post on the Forensic Resources blog of the North Carolina Office of Indigent Defense Services states that “[a]ttorneys should be aware of these guidelines and be prepared to object to any lab report language or testimony that does not comply.” Of particular interest is the proposed guidance as to what experts cannot say about the evidence they are discussing, e.g., that two fingerprints originated “from the same source to the absolute exclusion of all other sources ….”

Once adopted, the set of documents will be known as the Uniform Language for Testimony and Reports.
posal covers the following disciplines: forensic toxicology, forensic examination of serology, and the disciplines of forensic latent print, forensic glass, forensic footwear and tire impressions, forensic textile fiber, and general chemistry. However, it is expected that proposed uniform language for additional disciplines will follow.

**Transfer DNA Poses Questions to Reliability of DNA Analysis**

Forensic analysis is sometimes the key to innocence or alternatively a death sentence for some defendants. A *Scientific American* article titled “When DNA Implicates the Innocent” discusses the case of Lukis Anderson, a homeless man charged with the murder of Raveesh Kumra based on DNA found at the scene. Further investigations revealed it was impossible for Mr. Anderson to have committed the murder as he was “drunk and nearly comatose” and “under constant medical supervision” on the night in question. Then how did his DNA get to the crime scene? It was transferred. The paramedics who arrived at Mr. Kumra’s residence had treated Mr. Anderson more than 3 hours prior and inadvertently transferred his DNA to the crime scene. Jennifer Friedman, a Los Angeles public defender and DNA specialist says “‘[a]lthough clear cases appear to be quite uncommon, I think it’s probably more prevalent than we think’ ….” “The problem is that what we don’t see frequently is the ability to prove that transfer occurred.”

While DNA evidence may be less subjective than other evidence, phenomena like DNA transfer underline the importance of ensuring the accuracy of such testing and highlighting prosecutors’ failure to produce additional corroborating evidence.

**State Police Counsel Asks DAs to Ban DNA Scientists**

The January-April 2016 issue (p. 6) of the REPORT noted that three people who worked at the New York State Police Forensic Investigation Center had filed suit against the State Police alleging that discrimination against them for their support of the TrueAllele method of statistical evaluation of DNA evidence and their criticism of administrators which allowed unreliable DNA practices in the Crime Lab had led to their investigation for allegedly cheating during TrueAllele training. One of the scientists was fired and two disciplined. The *Times Union* recently reported that the State Police General Counsel has now asked the District Attorneys Association of the State of New York (DAASNY) to “consider banning the work or testimony of multiple forensic scientists involved in [the] alleged cheating scandal ….”

A State Police spokesman maintains that the two DNA analysts who faced disciplinary action as a result of the investigation into alleged cheating are almost at the end of their retraining and the request was for district attorneys to “review each analyst individually, and decide whether each analyst will be permitted to work on criminal cases in their jurisdiction.” John William Bailey, the Albany attorney representing the scientists, was not convinced by the explanation. According to the article, he said “‘The NYS Police leadership is lying,’’ adding, “‘[t]hey are desperately trying to cover up longstanding immoral and illegal activities in the crime laboratory. They have effectively terminated key leaders who were determined to expose flawed forensic analysis so that they could continue a suspect-centric agenda.’”

While no official statement has been made regarding the request, district attorneys expressed skepticism. The suspicion is that the State Police may be using DAASNY to discredit the scientists in order to terminate them from their jobs. Some DAs pointed out that a disciplinary history would not presumptively rule out scientists from testifying, just as police officers with disciplinary records testify at trials on a regular basis; an employment-related disciplinary history does not automatically discredit a government witness. It is expected that this request will be discussed in length at the DAASNY annual summer conference. NYSDA will continue to monitor this matter and those with information about it are encouraged to contact the Backup Center.
OCFS Reacts to Phillips v County of Orange

The August 2015 federal court decision finding the questioning of a child at school to be, in the circumstances of the case, an unconstitutional seizure, generated reactions from the New York State Office of Children and Family Services (OCFS). The decision in Phillips v County of Orange (10-cv-00239 [SDNY 8/19/2015]) was noted in the November-December 2015 issue of the REPORT (p. 3), including the question left unresolved by the opinion: whether the school district was required to permit Child Protective Service (CPS) workers to interview children without parental consent or notification. In April 2016, the OCFS responded to Phillips by issuing a memorandum (16-OCFS-LCM-05) adopting the position that the Phillips decision should not have any bearing on the policies or protocols in any county outside of Orange County.

The memo argues that because the opinion was issued orally and not reduced to a written decision, it has little to no precedential value. It also questions the court’s analysis of lower court decisions in the Second Circuit and notes that the Seventh Circuit decision cited in Phillips is not binding in New York.

On May 23, 2016 OCFS issued an emergency/proposed rule that amends 18 NYCRR 423.3 to require school districts to allow county Department of Social Services (DSS) investigators access to interrogate children who are the subjects of a report of child abuse or neglect without parental consent. According to the rule making notice, OCFS determined that clarification was needed, despite the issuance of the memorandum, because “some school districts have begun denying access to the child protective service … or requiring additional CPS actions prior to allowing CPS access to children in a school setting without parental consent.”

Resistance to permitting in-school interrogations is apparently driven by school districts’ fear that they can be held liable for an unconstitutional seizure. The Phillips court did not resolve the question, and found that “there is a material question of fact as to whether the school district was required to permit CPS to interview children without parental consent or notification,” as no statute or regulation imposing such a legal obligation was cited. The U.S. Supreme Court declined to address this issue in Camreta v Greene (563 US 692 [2011]). The OCFS rule likewise is silent as to liability or constitutional issues, but purports to provide authority for schools to allow interrogation of students in the absence of parental consent.

The OCFS emergency rule is set to expire Aug. 20, 2016 with the possibility of an extension. As noted in the June 30, 2016 edition of News Picks from NYSDA Staff, a deadline of July 23, 2016 was set for commenting (electronically or otherwise) on the emergency/proposed rule. Materials of possible interest to those commenting on otherwise dealing with this issue include the amicus briefs submitted in Camreta, including those from the National Association of Criminal Defense Lawyers, the New York University School of Law Family Defense Clinic, and The Legal Aid Society’s Juvenile Rights Practice.

Lawyers representing parents are encouraged to comment on the rule while there is time—please send a copy to Family Court Staff Attorney Lucy J. McCarthy at the Backup Center—and to raise the constitutional issues on behalf of their clients when the situation arises.

Death of Suffolk Legal Aid Leader Announced

The obituary of Robert C. Mitchell, the Attorney-in-Charge at the Legal Aid Society of Suffolk County, Inc., appeared in Newsday on June 6, 2016. Mitchell, a NYSDA member, had held the chief defender position since 1994. His family, to whom the Association offers condolences, fittingly suggested that “donations be made in Robert’s loving memory to the Innocence Project ….”

Jail Issues Drawing Attention in New York and Nationwide

Policies that affect local jail populations impact local tax expenditures, local communities, and, of course, the people who make up those populations. Initially ignored for the most part in discussions of “mass incarceration,” local jails are now drawing the attention of researchers, activists, and the public defense community. The headline and subhead of a July 6, 2016 post at The Marshall Project say it concisely: “Measuring Incarceration—Don’t overlook local jails.”

What follows is a description of jail issues focused on bail. Public defense attorneys may find the information helpful in their work, whether as policy arguments to support pretrial release of a particular client or topics to raise in county public safety committees, etc. to support broader change.

Bail Practices and Effects Vary from NYC to DC to Texas

The enormity of jail issues has been set out in, among other places, a New York Times Magazine article entitled The Bail Trap: “In a given year, city and county jails across the country admit between 11 million and 13 million people.” Author Nick Pinto, noting that “in America, [bail] has become less and less a tool for keeping people out of jail, and more and more of a trap door for those who cannot afford to pay it,” compared New York City with other jurisdictions and found that while the City imposes bail less frequently than some, about 45,000 people are
detained yearly because they cannot afford bail; “only one in 10 defendants is able to pay it at arraignment. . . . Even when bail is set comparatively low—at $500 or less, as it is in one-third of nonfelony cases—only 15 percent of defendants are able to come up with the money to avoid jail.”

In Washington, DC, courts have been releasing most people held overnight without requiring bail payments for over two decades. The Washington Post recently reported that 90 percent of defendants in DC are released with only a promise to return to court and the requirement of meeting conditions set by the court such as: stay-away orders, reporting for periodic drug testing, or checking in with officers. This is a huge variation from the 47 percent of felony defendants nationally who remain in jail awaiting trial, unable to make bail. And from the 77 percent of the people locked up in Harris County, TX—over 6,800—who are there because they can’t pay bail, as reported in June on Salon.com.

Under DC’s risk-based system, pretrial officers find information on people prosecutors intend to charge before they appear before a judge. The information is compiled through various record checks and interviews with those the officers call “clients.” A database then calculates the risk of the accused not returning for court. (Unfortunately, the database also calculates risk of committing another crime; unlike New York, DC allows preventive detention based on considerations of public safety. While policies that lead to the pretrial release of clients should be encouraged, NYSDA has long opposed preventive detention in any form.)

Even without the possibility of foregoing money posted for bail, most defendants avoid subsequent arrests. “In the past five years, about 90 percent of defendants released were not arrested again before their cases were resolved, according to data collected by the D.C. Pretrial Services Agency. Of the roughly 10 percent who did get in trouble again, the vast majority are not rearrested for violent crimes.” DC Superior Court Judge Truman Morrison says “[w]e’ve proven it can work without money, but the whole country continues as if in a trance to do what we know does not work.” Judge Morrison called the practice of keeping defendants in jail when they are unable to pay, “irrational, ineffective, unsafe and profoundly unfair.”

The costs of keeping a person in jail are much higher than supervised release. The Washington Post, citing the Pretrial Justice Institute, says supervising a person in the community costs an average of $7 a day, while holding someone in jail before trial costs $75 a day. Public defenders who successfully argue for changes in pretrial release policies to reduce detentions, or successfully argue for individual clients’ prerelease, save public money.

Bail Funds Can Help Until Bail Reform is Achieved

Five years ago, NYSDA presented a CLE session on “Bail Advocacy in New York State,” during which presenters pointed out that New York State law provides for many different forms of bail in addition to cash bail, yet, typically, courts use only cash bail or insurance company bond. Deep problems associated with bail, particularly cash bail, subsequently broke into nationwide media. As the REPORT noted in the May-July 2015 issue (p. 9) a year ago, calls for bail reform have been varied and widespread, and defendants have played a role.

But at least until true reform comes, other advocacy and avenues for pretrial release can assist clients. One such avenue is the use of revolving bail funds. And among the best-known bail fund is The Bronx Freedom Fund.

In its Second Annual Report 2015, The Bronx Freedom Fund states that “[w]e have bailed out over 300 misdemeanor defendants in the Bronx . . . 97 percent returned for all of their court appearances—some for as many as 15 court dates in a row.” This statistic, like the statistics from the DC courts, above, supports the argument that bail is unnecessary to ensure that people return to court. But as Nick Pinto wrote in The Bail Trap, above, “even the staunchest supporters of bail funds are quick to say that they are at best, temporary Band-Aids for a broken system.” Scott Hechinger, who co-founded the Brooklyn Community Bail Fund but is no longer affiliated with it, said bail funds are “an intervention for an urgent need. But they are not actually bail reform.”

NYSDA supports the expansion of bail funds in New York State as one way to combat excessive pretrial detention until broader bail reform occurs.

Ignition Interlock and DWI Updates

Proposed Amendments to Ignition Interlock Device Regulations

The New York State Division of Criminal Justice Services, Office of Probation and Correctional Alternatives (OPCA) has proposed amendments to the regulations governing ignition interlock devices (IID), 9 NYCRR Part 358. A summary of the amendments, as well as the proposed text, are available on the OPCA website. Many of the amendments are designed to reflect recent statutory changes, including the amendments that authorize pre-sentence installation of IIDs and impose IID conditions in youthful offender cases. The amendments would also allow courts to permit drivers with certain medical conditions to use IIDs that require a reduced breath sample, consistent with the National Highway Traffic Safety Administration standards. Other amendments include:
a requirement that, where an operator has missed a service visit and has not had his/her vehicle serviced within three business days immediately following that missed visit, the monitor shall notify the appropriate court and district attorney no later than the close of business on the third business day;

(2) a procedure for handling cases in which an individual is ordered to install an IID in advance of sentencing and resides in a county other than the county of prosecution;

(3) provisions regarding the “Emergency Notification Program,” which allows for contemporaneous notification to law enforcement of certain failed or missed re-tests;

(4) deletion of the second sentence of the definition of “service visit,” which addresses the act by an operator of sending the data log and breath testing portion of an IID to a qualified manufacturer for data downloading and recalibration; and

(5) new requirements for county Ignition Interlock Program Plans.

The proposed rule making notice appears in the June 22, 2016 issue of the State Register, beginning on p. 4. Comments on the proposed amendments are due on Aug. 6, 2016. Those who submit comments are asked to forward a copy to the Backup Center.

Ignition Interlock Enforcement Initiative Launched

Earlier this year, the Governor’s Traffic Safety Committee and the Division of Criminal Justice Services announced a pilot DWI-Ignition Interlock Enforcement initiative in three counties, Dutchess, Oneida, and Onondaga. The initiative, funded by a $100,000 grant, “will allow [participating law enforcement agencies] to conduct enhanced enforcement activities targeting those who violate the state’s ignition interlock requirements. The targeted enforcement will occur between Memorial Day and Labor Day ....” The intention is to make this a yearly grant program.

(continued on page 38)
The following are short summaries of recent appellate decisions relevant to the public defense community. These summaries do not necessarily reflect all the issues decided in a case. A careful reading of the full opinion is required to determine a decision’s potential value to a particular case or issue.

For those reading the REPORT online, the name of each case summarized is hyperlinked to the slip opinion. For those reading the REPORT in print form, the website for accessing slip opinions is provided at the beginning of each section (Court of Appeals, First Department, etc.), and the exact date of each case is provided so the case may be easily located at that site or elsewhere.

United States Supreme Court

In the online version of the REPORT, the name of each case summarized is hyperlinked to the opinion on the US Supreme Court’s website, www.supreme court.gov/opinions/opinions.aspx. Supreme Court decisions are also available on a variety of websites, including Cornell University Law School’s Legal Information Institute’s website, www.law.cornell.edu.


The defendant, who was required to register as a sex offender following a federal conviction and later moved from Kansas to the Philippines without notifying authorities, was improperly charged with violating 18 USC 2250(a), for failing to comply with 42 USC 16913, which requires offenders subject to registration to “appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required . . . .” Subsection (a) requires registration in jurisdictions where an offender lives, works, or attends school. When the defendant ceased residing in Kansas, that state ceased to be an involved jurisdiction. No foreign country is an “involved jurisdiction.” Interpreting the law in this manner does not mean sex offenders can escape punishment for leaving the country without notifying the jurisdictions they lived in domestically. The parties here agree that the conduct in question is covered by new statutes regarding registered sex offenders who travel abroad. See 42 USC 16914(a)(7); 18 USC 2250(b).


The Sixth Circuit erred in holding that state appellate counsel had been ineffective for not raising on appeal, on confrontation grounds, trial counsel’s failure to object to admission at trial of evidence about an anonymous tip and that no fairminded jurist could find otherwise. The tip, saying that two men in a certain car possibly had drugs, led to the stop of the defendant’s car and discovery of drugs. “A ‘fairminded jurist’ could conclude that repetition of the tip did not establish that [its] uncontested facts . . . were submitted for their truth.” Such a jurist could place weight on the undisputed nature of the tip’s content, and on a lack of prejudice from the overlap between the content of the tip and the testimony of the codefendant, who was a passenger in the car, or conclude the failure to object was strategic, as the tip corresponded to the defense that the drugs belonged to the codefendant passenger. In federal habeas corpus review, trial counsel’s actions are reviewed under a doubly deferential standard, and a fairminded jurist could conclude that a reviewing court was not objectively unreasonable in finding that appellate counsel was not incompetent for deciding that trial counsel’s inaction did not constitute ineffective assistance.

Welch v United States, 578 US __, 136 SCt 1257 (4/18/2016)

The narrow question here is whether a federal Court of Appeals judge erred in denying the petitioner a certificate of appealability from denial of his collateral challenge to the sentence imposed under the residual clause of the Armed Career Criminal Act of 1984, 18 USC 924(e)(2)(B)(ii). That narrow question implicates the broader question of whether the decision in Johnson v United States (576 US __ [2015]), finding the clause unconstitutionally vague, was a substantive one with retroactive effect in cases, like this one, on collateral review. “On the present record . . . , and in light of today’s holding that Johnson is retroactive in cases on collateral review, reasonable jurists at least could debate whether [the petitioner] is entitled to relief. For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.”

Dissent: [Thomas, J] “The majority ignores an insuperable procedural obstacle: when, as here, a court fails to rule on a claim not presented in a prisoner’s §2255 motion, there is no error for us to reverse. The majority also misconstrues the retroactivity framework developed in Teague v. Lane, 489 U. S. 288 (1989), and its progeny, thereby undermining any principled limitation on the finality of federal convictions.”

Molina-Martinez v United States, 578 US __, 136 SCt 1338 (4/20/2016)

“When a defendant is sentenced under an incorrect [federal Sentencing] Guidelines range—whether or not the defendant’s ultimate sentence falls within the correct
range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.” The Guidelines play a significant role in sentencing, entering the process long before sentence is imposed. Due to the complexity of the Guidelines, an incorrect Guidelines range may go unnoticed in cases where the sentence imposed falls within that range. Appellate review when there was a failure to object to a miscalculation is governed by the rule dealing with harmless and plain error. Since courts need not provide extensive explanations for imposing sentences within what is thought to be the correct Guidelines range, defendants are less likely to be able to point to evidence in those cases that an inaccurately calculated range influenced the resulting sentence.

Concurrence: [Alito, J] “I would not speculate about how often the reasonable probability test will be satisfied in future cases.”

Ocasio v United States, 578 US __, 136 SCt 1423 (5/2/2016)

The defendant’s challenge to his conspiracy conviction on the basis that he, a police officer, could not as a matter of law be convicted of conspiring with shopkeepers to obtain money from them under color of law is rejected. “Under longstanding principles of conspiracy law, a defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he entered into a conspiracy that had as its objective the obtaining of property from another conspirator with his consent and under color of official right.”

Concurrence: [Breyer, J] Because in this case we must take Evans v United States (504 US 255 [1992]), which may well have been decided incorrectly, as good law, I concur.

Dissent: [Thomas, J] Today’s holding “that an extortionist can conspire to commit extortion with the person whom he is extorting,” further exposes the flaw in how extortion is understood. I would not extend further the errors that began in Evans v United States.

Dissent: [Sotomayor, J] The reading of the Hobbs Act phrase “from another” that underlies the majority decision “is not a natural or logical way to interpret the phrase . . . .”

Kernan v Hinojosa, 578 US __, 136 SCt 1603 (5/16/2016)

Contrary to the Ninth Circuit’s decision, the California Supreme Court’s summary denial of state habeas corpus relief was based on the merits, not a procedural bar, and should have been reviewed through the deferential lens of the Antiterrorism and Effective Death Penalty Act of 1996. The Ninth Circuit’s judgment is reversed.

Dissent: [Sotomayor, J] Where a California Superior Court denied a petition because it was filed in the wrong county, and the California Supreme Court later denied the same petition without explanation, the presumption should be that the state high court denied the petition because the petitioner filed first in the wrong county.

Betterman v Montana, 578 US __, 136 SCt 1609 (5/19/2016)

The Sixth Amendment’s guarantee of a speedy trial protects accused individuals “from arrest or indictment through trial,” but as a measure to protect the presumptively innocent, “does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges.” Defendants may have other recourse for inordinate delay in sentencing, such as invocation of the Fifth and Fourteenth Amendment Due Process Clauses, but the defendant here raised only a Sixth Amendment speedy trial claim.

The primary protection from delay before arrest or indictment is a statute of limitations.

Concurrence: [Thomas, J] The Court correctly expresses no opinion on how the Due Process Clause might apply in the sentencing context. The factors applied in Speedy Trial precedent may not translate to delayed sentencing.

Concurrence: [Sotomayor, J] I emphasize that the question of what test might apply in considering a due process challenge to a delay in sentencing is an open one. The factors set out in Barker v Wingo (407 US 514 [1972]) capture many of the concerns posed in the sentencing context.

Luna Torres v Lynch, 578 US __, 136 SCt 1619 (5/19/2016)

A state crime that corresponds to an aggravated felony as described in the Immigration and Nationality Act (INA) in all ways except for an interstate commerce element is an aggravated felony for purposes of imposing certain adverse immigration consequences under the INA. The interstate commerce element is jurisdictional, and a settled practice of distinguishing between such elements and the substantive elements of crimes supports the holding.

Dissent: [Sotomayor, J] The federal offense in question, arson, has one more element than the state offense—that interstate or foreign commerce be involved. The petitioner was therefore “not convicted of an offense ‘described in’ the’ INA. ‘[A]n element is an element, and I would not so lightly strip a federal statute of one.”
**US Supreme Court** continued

**Foster v Chatman**, No. 14–8349 (5/23/2016)

The prosecutor’s file from the death row petitioner’s 1987 trial, which the petitioner obtained through a state Open Records Act while a habeas corpus proceeding was pending, contained documents admitted by the habeas court, including copies of the jury venire list on which names of black prospective jurors were highlighted in green with a legend indicating that green ““represents Blacks” and a letter “B” by each of those names. Testimony at the hearing indicated that the lists were circulated in the district attorney’s office for information sharing. Other documents similarly indicating that black prospective jurors had been singled out were admitted. “Despite questions about the background of particular notes, we cannot accept the State’s invitation to blind ourselves to their existence.” The circumstantial evidence leaves “the firm conviction” that peremptory strikes of two of the black prospective jurors were ‘‘motivated in substantial part by discriminatory intent.’’ Two are “two more than the Constitution allows.”

**Concurrence:** [Alito, J] On remand, the state Supreme Court is bound to accept this Court’s finding that the petitioner adduced sufficient evidence to make out a Batson claim, “but whether that conclusion justifies relief under state res judicata law is a matter for that court to decide.”

**Dissent:** [Thomas, J] The state courts repeatedly rejected claims that the prosecution violated Batson in this case, yet the Court rules in the petitioner’s favor decades after the trial “without adequately grappling with the possibility that we lack jurisdiction” and the majority’s ruling on the merits “distorts the deferential Batson inquiry.”

**Johnson v Lee**, No. 15–789 (5/31/2016)

The Ninth Circuit’s judgment in this habeas corpus matter, holding California’s procedural default bar inadequate to preclude consideration of a federal claim on collateral review that could have been raised on direct appeal, is summarily reversed. “California’s procedural bar is longstanding, oft-cited, and shared by habeas courts across the Nation ....”

**Lynch v Arizona**, No. 15–8366 (5/31/2016)

The Arizona court’s ruling of no error for failure to instruct the jury during the penalty phase that the defendant, whom the state had argued could be dangerous, was ineligible for parole conflicted with Supreme Court precedents. The defendant would only be eligible for executive clemency, which does not diminish a capital defendant’s right to have the jury told of parole ineligibility. The possibility of future state legislation rendering the defendant parole eligible similarly cannot justify refusing the parole-ineligibility instruction.

**Dissent:** [Thomas, J] “Today’s summary reversal perpetuates the Court’s error in Simmons [v South Carolina, 512 US 154 (1994)].”

**Ross v Blake**, No. 15–339 (6/6/2016)

While “the Fourth Circuit’s adoption of a ‘special circumstances’ exception to” the “Prison Litigation Reform Act of 1995 (PLRA) mandate[] that an inmate exhaust ‘such administrative remedies as are available’ before bringing suit to challenge prison conditions,” is rejected, the prisoner’s “contention that the prison’s grievance process was not in fact available to him warrants further consideration below.” On remand, three questions about the availability of administrative measures must be considered after a thorough review of relevant materials. Did standard grievance procedures potentially offer the prisoner relief or was that foreclosed by a referral of the incident to the Internal Investigative Unit? If available, were the procedures “knowable by an ordinary prisoner ... or ... so confusing that no such inmate could make use of” them? And “is there persuasive evidence that Maryland officials thwarted the effective invocation of the administrative process through threats, game-playing, or misrepresentations, either on a system-wide basis or in the individual case?”

**Concurrence in Part** [Breyer, J] With the exception I described in Woodford v Ngo (548 US 81 [2006]), that “exhaustion” means “proper exhaustion,” encompassing “well-established exceptions to exhaustion,” I join the Court’s opinion.

**Simmons v Himmelreich**, No. 15–109 (6/6/2016)

A federal prisoner filed suit against the United States for releasing into general prison population the inmate who attacked him after that inmate had threatened to “‘smash’” someone convicted of the type of crime for which the plaintiff was imprisoned. The suit was treated as one under the Federal Tort Claims Act (FTCA) and was dismissed because actions of federal employees taken in the course of a discretionary function—such as deciding where to house prisoners—are excepted from the FTCA. But before that dismissal, the plaintiff filed a second suit against individual prison employees rather than the government itself; the employees argued that the second suit could not proceed because of the FTCA’s “judgment bar.”
To foreclose a suit against a government employee because the government cannot be held liable “would be passing strange.”


“[B]ecause the oldest roots of Puerto Rico’s power to prosecute lie in federal soil,” Puerto Rico and the United States may not “successively prosecute a single defendant for the same criminal conduct.”

**Concurrence:** [Ginsburg, J] “I write only to flag a larger question that bears fresh examination in an appropriate case.” Current doctrine hardly serves the objective of double jeopardy, “to shield individuals from the harassment of multiple prosecutions for the same misconduct,” a matter that “warrants attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA.”

**Concurrence in Part:** [Thomas, J] “I cannot join the portions of the opinion concerning the application of the Double Jeopardy Clause to successive prosecutions involving Indian tribes.”

**Dissent:** [Breyer, J] “I would hold for Double Jeopardy Clause purposes that the criminal law of Puerto Rico and the criminal law of the Federal Government do not find their legitimacy-conferring origin in the same ‘source.’”

**Williams v Pennsylvania, No. 15–5040 (6/9/2016)**

The petitioner was denied due process where the district attorney who approved seeking the death penalty in the petitioner’s case later became a justice of the state supreme court and participated in the decision to deny the petitioner post-conviction relief after denying a motion for recusal. The “unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote.”

**Dissent:** [Roberts, C]J “The majority opinion rests on a proverb rather than precedent.” Neither the procedural questions of whether the petitioner can overcome the prohibition on untimely habeas petitions nor the merits claim concerns the decision to seek the death penalty.

**Dissent:** [Thomas, J] This post-conviction proceeding is a new civil matter, not an extension of the petitioner’s criminal case. The former prosecutor’s participation in the resolution of the post-conviction matter did not violate due process.

**United States v Bryant, No. 15–420 (6/13/2016)**

Because the Sixth Amendment right to counsel does not apply in tribal-court proceedings, where appointed counsel is required only where a sentence of over a year is imposed, the use of uncounseled tribal-court convictions, valid when entered, as predicate offenses for purposes of 18 USC 117(a), which targets serial domestic violence offenders in Indian country, does not violate the Constitution.

**Concurrence** [Thomas, J] “[T]hat this case arose at all ... illustrates how far afield our Sixth Amendment and Indian-law precedents have gone.” The decision in *Burgett v Texas* (389 US 109 [1967]), prohibiting federal government use in later proceedings of prior convictions obtained in violation of the right to counsel, was likely wrong; “I would be open to reconsidering Burgett in a future case.” And tension exists within this Court’s Indian-law jurisprudence, exemplified by two assumptions underpinning this case; “I continue to doubt whether either view of tribal sovereignty is correct.”

**Taylor v United States, No. 14–6166 (6/20/2016)**

Because precedent under the Commerce Clause allows Congress to regulate the national market for marijuana, including “purely intrastate production, possession, and sale,” Congress may similarly regulate intrastate drug theft. The commerce element of the Hobbs Act is satisfied where the prosecution “shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds.” Unresolved here is “what the Government must prove to establish Hobbs Act robbery where some other type of business or victim is targeted.”

**Dissent:** [Thomas, J] “Because Congress has no free-standing power to punish robbery and because robbery is not itself ‘Commerce,’ Congress may prohibit and punish robbery only to the extent that doing so is ‘necessary and proper for carrying into Execution’ Congress’ power to regulate commerce.” But if the Government cannot prove that a robbery in a State affected interstate commerce, then the robbery is not punishable under the Hobbs Act.”

**Utah v Strieff, No. 14–1373 (6/20/2016)**

Where police unconstitutionally stop someone, learn during that stop that the person is subject to a valid arrest warrant, then arrest the person on the warrant and find incriminating evidence during a search incident to the arrest, the evidence is admissible because discovery of the warrant “attenuated the connection between the unlawful stop” and the seized evidence. Evidence subject to challenge under the exclusionary rule and “fruit of the poisonous tree” doctrine should only be suppressed when the “deterrence benefits outweigh [the] substantial social costs.” Here, the officer’s conduct, after mistakes made in the initial stop, was lawful. Nothing indicates that the “stop was part of any systemic or recurrent police mis-
conduct.” That failure to suppress will lead to dragnet searches in jurisdictions where outstanding warrants are prevalent “is unlikely” as it “would expose police to civil liability.”

Dissent: [Sotomayor, J] “The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer’s violation of your Fourth Amendment rights.” “[T]he Fourth Amendment should prohibit, not permit, such misconduct ….”

Dissent: [Kagan, J] That police discover, after an illegal stop, that the person detained has an outstanding arrest warrant “makes no difference under the Constitution ….”

Birchfield v North Dakota, No. 14-1468 (6/23/2016)

The “founding era” in which the Fourth Amendment was created provides no definitive guidance as to the constitutionality of warrantless use of blood and breath tests measuring the concentration of alcohol in a person who has been lawfully arrested. Examination of the degree to which such tests intrude on the person’s privacy along with the degree to which legitimate governmental interests call for their use leads to the conclusion “that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving.” Nor can a state deem motorists who drive on public roads to have consented to blood tests.

Concurrence in Part, Dissent in Part: [Sotomayor, J] “[N]o governmental interest categorically makes it impractical … to obtain a warrant before measuring a driver’s alcohol level”; absent exigent circumstances, a warrant should be required.

Concurrence in Part in the Judgment, Dissent in Part: [Thomas, J] The better and simpler way to resolve these cases is to find both breath and blood tests conducted without a warrant to be constitutional under the exigent circumstances exception.

Mathis v United States, No. 15-6092 (6/23/2016)

Prior crimes qualify as predicate offenses under the Armed Career Criminal Act (ACCA) only if the prior crimes have elements that are the same as, or narrower than, the commonly-understood, or “generic,” version of offenses listed in the ACCA; there is no exception to this rule for offenses based on statutes that list multiple, alternative factual means of satisfying at least one of their elements. “[T]he court below erred in applying the modified categorical approach to determine the means by which Mathis committed his prior crimes.” Looking at the factual record is proper only to determine which elements of an offense were involved in a defendant’s conviction, not to look behind the elements to determine the means by which the offense was committed.

Concurrence: [Kennedy, J] The Court relies in part on Apprendi v New Jersey (530 US 466 [2000]), which was incorrectly decided and “does not compel the elements based approach.” Congress’s failure to amend the ACCA in the face of “the arbitrary and inequitable results produced by applying an elements based approach to this sentencing scheme” warrants revisiting existing precedents.

Concurrence: [Thomas, J] The Court’s opinion “avoids further extending its precedents that limit a criminal defendant’s right to a public trial before a jury of his peers.”

Dissent: [Breyer, J] The majority’s view that the “elements/means distinction” matters for sentencing purposes “will unnecessarily complicate federal sentencing law, often preventing courts from properly applying the sentencing statute ….”

Dissent: [Alito, J] Precedent beginning 26 years ago has brought the Court to a decision under which many burglary convictions may not count as predicate offenses under the ACCA despite Congress’s obvious intent.


The convictions here “must be vacated because the jury was improperly instructed on the meaning of ‘official act’ under §201(a)(3) of the federal bribery statute.” “[A]n ‘official act’ is a decision or action on a ‘question, matter, cause, suit, proceeding or controversy’” that involves “a formal exercise of governmental power ….” Under such a bounded interpretation of the statute, “setting up a meeting, calling another public official, or hosting an event” alone does not constitute an “official act” because “conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time.” While the facts here are not typical, the Government’s expansive interpretation of what constitutes official acts “is not confined to cases involving extravagant gifts or large sums of money, and we cannot construe a criminal statute on the assumption that the Government will ‘use it responsibly.’” The matter is remanded for the Court of Appeals to determine the sufficiency of the evidence in light of this opinion; if there is sufficient evidence to support a conviction, the case may be set for a new trial.

The claim that “the honest services statute and the Hobbs Act are unconstitutionally vague” is rejected.


“[M]isdemeanor assault convictions for reckless (as contrasted to knowing or intentional) conduct” in domestic violence situations “trigger the statutory firearms ban”
The provision at issue here “corresponds to the ordinary misdemeanor assault and battery laws used to prosecute domestic abuse, regardless of how their mental state requirements might—or, then again, might not—conform to” the requirements of the common law, upon which the petitioners rely.

**Dissent:** [Thomas, J] The Maine provision in question here does not qualify as one having “use of physical force” as an element, and so a conviction under that statute is not one that “can strip someone of his right to possess a firearm.” The majority’s definition of the term is overbroad.

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**New York Court of Appeals**

In the online version of the REPORT, the name of each case summarized is hyperlinked to the opinion provided on the website of the New York Official Reports, www.nycourts.gov/reporter/Decisions.htm.

**People v Bilal**, 27 NY3d 961, 29 NYS3d 863 (3/31/2016)

The record and issues raised in connection with the defendant’s motion pursuant to CPL 440.10 show that the defendant was denied effective assistance of counsel where the attorney failed to move to suppress the gun recovered during the defendant’s encounter with the police. The matter is remanded for a suppression hearing and, if the defendant prevails there, a new trial.

**People v Gray**, 27 NY3d 78, 29 NYS3d 888 (3/31/2016)

Trial counsel did not deprive the defendant of effective assistance by failing to move to reopen the suppression hearing after a detective’s trial testimony diverged in part from his suppression hearing testimony. Counsel reasonably thought that the defendant’s second statement would be admitted under the circumstances and so used exculpatory parts of the first statement to undermine the credibility of the second.

**Dissent:** [Stein, J] The detective’s trial testimony included information about a second oral statement made by the defendant before the written statement that had been challenged; this substantially undermined the suppression determination, which was based on attenuation. Failure to seek reopening of the hearing constituted ineffectiveness.

**People v Badalamenti**, 2016 NY Slip Op 02556 (4/5/2016)

“We hold that the definition of consent, in the context of ‘mechanical overhearing of a conversation’ pursuant to Penal Law § 250.00 (2), includes vicarious consent, on behalf of a minor child.” A finding of such consent requires a parent or guardian’s good faith belief, having an objectively reasonable basis, that recording a conversation to which the child is a party is necessary to serve the child’s best interests. Any recording that does not meet this narrowly tailored objective test must be suppressed.

The concededly improper jury instruction on accessory liability was harmless; there is no possibility that the jury convicted the defendant based on an uncharged theory of failing to assist the child during an assault by another while possessing the requisite state of mind for assault.

**Dissent:** [Stein, J] The majority’s decision as to vicarious consent “disregards settled principles of statutory interpretation and encroaches on the province of the legislature.”

**People v Johnson**, 27 NY3d 199, __ NYS3d __ (4/5/2016)

Admission at trial of excerpts from phone conversations between the defendant at Rikers Island and non-lawyers on the outside, recorded at the jail and made available to the prosecution, was not error. That the conditions of pretrial detention may impose limits on communications that result in “the unwise and imprudent use of privileged telephone calls to communicate matters related to a detainee’s prosecution” does not overcome applicable law. This decision should not be interpreted as approval of the practices in question.

**Concurrence:** [Pigott, J] The arrangement between the City Department of Corrections and the prosecutor “creates a serious potential for abuse and may undermine the constitutional rights of defendants who are financially unable to make bail. Something needs to change.”


While displays depicting a decedent should be prohibited in the courtroom during trial, and the trial court should have taken action on defense counsel’s objection to the wearing by some spectators, during summations, of T-shirts bearing a photograph of the decedent, the defendant was not denied a fair trial. The defense failed to preserve for review earlier wearing of the shirts.

**Concurrence:** [Garcia, J] “I would adopt the standard the [U.S.] Supreme Court applies to state-sponsored courtroom practices that raise similar issues instead of the abuse of discretion standard applied by the majority ....”
People v Powell, 2016 NY Slip Op 02555 (4/5/2016)

Evaluating third-party culpability evidence using ordinary evidentiary principles requiring balancing of probative value against potential undue prejudice, delay, and confusion “does not infringe upon a defendant’s constitutional right to present a complete defense as set forth in the Sixth and Fourteenth Amendments.” A trial court’s determination concerning admissibility of third-party culpability evidence is reviewed under an abuse of discretion standard; the court here acted within its discretion in finding that the proffered evidence was speculative and would cause undue delay.

People v Williams, 27 NY3d 212, 32 NYS3d 17 (4/5/2016)

The defendant here had, but failed to take advantage of, reasonable opportunities “to attack the legality of his guilty plea in the court of first instance on the same grounds now advanced on appeal,” so that claim is not preserved for review. Even if the trial court’s error in saying it could sentence the defendant to three years in prison, when it could not legally do so given the defendant’s status as a second felony drug offender with a violent felony conviction, impacted the voluntariness of his plea and not just his expectations as to sentencing, the defendant could have raised the illegality before imposition of sentence. Opportunities to do so included the hearing on whether the defendant had violated the terms of his plea agreement. The Appellate Division may decide on remand whether to review the unpreserved claim in the interest of justice.

Dissent: [Rivera, J] We are not procedurally foreclosed from addressing the defendant’s claims on the merits. Trial courts have a constitutional duty to ensure that a defendant has a full understanding of a plea and its consequences before accepting the plea. Sentencing also is primarily a judicial responsibility. The court erroneously relied on the work of others as to the lawful minimum. The criminal justice system depends on the proper administration of plea bargains; illegal sentencing promises erode public confidence in plea bargains and discourage defendants from making plea agreements.


The defendant’s Sixth Amendment right to confront the witnesses against him was violated where the prosecution asserted that the defendant’s DNA was found on the gun he was charged with possessing and introduced DNA reports into evidence “without producing a single witness who conducted, witnessed or supervised the laboratory’s generation of the DNA profile from the gun or defendant’s exemplar” after the defendant moved to require testimony by the analysts. The analyst who did testify had done initial preparation but had not conducted, witnessed, or supervised any of the testing that followed; her testimony was that of a “surrogate witness ….” It is not necessary for every analyst involved to testify, but “an analyst who witnessed, performed or supervised the generation of defendant’s DNA profile, or who used his or her independent analysis on the raw data, as opposed to a testifying analyst functioning as a conduit for the conclusions of others, must be available to testify.”

Dissent: [Garcia, J] The result here “is not required by U.S. Supreme Court precedent, runs contrary to our own case law, and will cause unnecessary harm to the administration of the criminal justice system ….”

People v Romero, 27 NY3d 981, __ NYS3d __ (4/28/2016)

 “[T]here is record support for Supreme Court’s decision to deny defendant’s motion to suppress the showup identification …, and that decision is beyond our further review.”


“Honorable Alan M. Simon is suspended, with pay, effective immediately, from the offices of Justice of the Spring Valley Village Court, Rockland County, and the Ramapo Town Court, Rockland County, and the office of Acting Justice of the Hillburn Village Court, Rockland County, pursuant to Judiciary Law § 44 (8), pending disposition of his request for review of a determination by the State Commission on Judicial Conduct.”

[Ed. Note: The State Commission on Judicial Conduct’s determination is available at http://www.scjc.state.ny.us/Determinations/S/SimonAlanM.2016.03.29.DET.pdf ]


The defendant moved to suppress a statement made to police and the gun he ultimately produced. That he was never Mirandized is undisputed. He argued to the suppression court that he was in custody at all relevant times because a reasonable, innocent person would not have felt free to leave; the court denied suppression solely on the ground that the questioning was investigatory, not interrogatory. Here, the defendant argues that his admission to police that he struck the accuser placed him in custody.
so that his later statement and the gun should have been suppressed. This issue is unreserved and so not reviewable.

Also unreserved is the contention that the trial court erred in handling a jury request to take notes during a re-reading of a jury charge; this was not a substantive request that implicates the mode of proceedings rule excusing a lack of preservation.

**People v Howard, 2016 NY Slip Op 03415 (5/3/2016)**

The record discloses no abuse of discretion in the adjudication of the defendant as a level three sex offender based on his convictions of assault and unlawful imprisonment for tying up and beating the codefendant’s child over a period of five days. At the hearing, the defendant challenged only the absence of a sexual component of his crime. He characterizes the level three adjudication “as an ‘upward departure’ from the presumptive risk level one warranted by the 70 points he was assessed” on the risk assessment instrument, but the override for inflicting serious physical injury yielded a presumptive risk level three, and there was no abuse of discretion in declining to depart downward.

**Dissent:** [Rivera, J] The court determining the defendant’s risk level should have applied the less onerous standard of preponderance of the evidence, not clear and convincing, when deciding whether a downward departure was warranted, and the record is not clear as to how, if at all, the court weighed the defendant’s asserted mitigating factors including the non-sexual nature of the crime and the absence of a history of sexual violence.

**People v Joseph, 27 NY3d 1009, __ NYS3d __ (5/3/2016)**

Review of the Appellate Division’s determination of probable cause to arrest is unavailable where “[r]ecord support for probable cause may be found on the basis of ‘indicia of a drug transaction’ known to ‘an experienced officer . . . trained in the investigation and detection of narcotics,’ which include ‘hand[li]ng [an] unidentified object in a manner typical of a drug sale’ . . . .”

**People v Manor, 27 NY3d 1012, __ NYS3d __ (5/3/2016)**

The trial court did not abuse its discretion by denying without a hearing the defendant’s motion to withdraw his plea where the record of his plea allocution shows that the defendant understood the court’s explanation of the two plea options and the rights that would be given up by pleading guilty, the court fulfilled its duty to inquire further when the defendant’s statements raised a question as to his intent to kill the decedent, and affidavits to support the motion to withdraw came only from counsel and a psychiatrist, who noted family pressure on the defendant, but not from the defendant.

**People v Parrilla, 2016 NY Slip Op 03417 (5/3/2016)**

“[T]he mens rea prescribed by the Legislature for criminal possession of a gravity knife simply requires a defendant’s knowing possession of a knife, not knowledge that the knife meets the statutory definition of a gravity knife.”

**People v Harrison, 27 NY3d 281, __ NYS3d __ (5/5/2016)**

“We hold that [People v Ventura [(17 NY3d 675 [2011])] prohibits intermediate appellate courts from dismissing pending direct appeals due to the defendant’s involuntary deportation, regardless of the contentions raised by the defendant on appeal. We conclude, however, that, consistent with this Court’s authority to dismiss permissive appeals due to the defendant’s involuntary deportation, intermediate appellate courts retain their discretionary authority to dismiss permissive appeals on that ground . . . .” “[E]xercise of that discretion remains reviewable by this Court for abuse of discretion as a matter of law."

“We now clarify that Ventura applies to all direct appeals pending in intermediate appellate courts, regardless of the appellate contentions raised by the defendant.”

**Dissent in Harrison, Concurrency in Serrano:** [Rivera, J] “[T]he majority relies on a meaningless distinction between two classes of defendants who have had their respective appeals dismissed, solely on the grounds that they have been deported: one who files a direct appeal challenging the conviction, and another . . . who files a CPL 440.10 motion claiming the plea was not knowing, voluntary, and intelligent because defense counsel failed to properly explain the immigration consequences of the plea.”

**People v Connolly, 27 NY3d 355, __ NYS3d __ (5/10/2016)**

The requirements of Penal Law 60.27(2) and CPL 400.30 were met here. Imposition of restitution as part of the defendant’s sentence was overturned on appeal because the trial court erred by delegating its authority to a Judicial Hearing Officer. The court on remittal rejected the defendant’s argument that he was entitled to a de novo hearing and allowed the prosecution to introduce the transcript of the prior hearing but said the defense was free to bring in additional evidence. And the court found, based on the record of the prior hearing, that the
prosecution had satisfied its burden of showing the proper amount of restitution.

**People v Henderson, 2016 NY Slip Op 03649 (5/10/2016)**

The Appellate Division’s decision finding that the defendant was denied effective assistance of counsel when his attorney failed to provide to a psychiatric expert photographs of the extensive stab wounds inflicted on the accuser is reversed. Counsel raised a “cogent, albeit unsuccessful, multi-pronged defense,” and retained a reputable expert to whom a substantial amount of information was provided. No absence of a legitimate explanation of alleged shortcomings was shown.

**People v Hull, 2016 NY Slip Op 04252 (6/2/2016)**

The trial court did not err in submitting to the jury, at the prosecution’s request and over the defendant’s objection, the lesser included offense of first-degree manslaughter at the end of the defendant’s trial on second-degree murder. The defendant’s testimony that he had not aimed at anything but wanted to stop the decedent’s movement toward him could have led the jury to conclude the defendant did not intend to kill the decedent, who was shot in the forehead during a struggle with the defendant following a verbal altercation.

**People v Rossborough, 2016 NY Slip Op 04250 (6/2/2016)**

A defendant who has pleaded guilty to a felony may expressly waive the right to be present at sentencing so long as the waiver is knowing, voluntary, and intelligent. The plea was taken on the condition that the defendant would be sentenced as a second felony offender to an indeterminate prison term of 3 to 6 years to run concurrently with sentences for convictions in other counties; the defendant said he “absolutely” wanted to waive his personal appearance at sentencing; and he was sentenced in absentia in accordance with the plea agreement. Such express waiver is not prohibited by CPL 380.40.

**People v Carver, 2016 NY Slip Op 04322 (6/7/2016)**

The series of alleged errors raised by the defendant were properly rejected by the Appellate Division. Counsel was not ineffective for failing to challenge the traffic stop where the record is devoid of any indication of a colorable argument against its legality; there is no showing that counsel’s failure to challenge the legality of the frisk incident to arrest was not based on strategy; counsel had lit-
tion that he remain incarcerated for six more months before sentencing, should be overturned.

By sentencing the defendant to a prison term rather than allowing him to withdraw his plea and replead to a lesser offense after hearing testimony as to a post-plea arrest to determine whether the defendant violated the lawfully imposed no-arrest presentence condition, the court implicitly rejected the defendant’s version of events; the nature of the inquiry was sufficient.

Dissent: [Rivera, J] Preservation rules “do not apply to claims of unlawful ‘interim’ conditions,” and the six months of presentence incarceration lacked a statutory basis.

Matter of Columbia County Support Collection Unit v Risley, 2016 NY Slip Op 04325 (6/7/2016)

The family court was authorized to order three consecutive six-month sentences when revoking two prior suspended orders of commitment for willful failure to pay child support and imposing a third sentence for a current violation of a child support order.

People v Frankline, 2016 NY Slip Op 04441 (6/9/2016)

At the defendant’s trial for assault and attempted murder of his intimate partner, the testimony by the intimate partner about the defendant’s attack on her a week before the charged offenses was not admitted to show propensity to commit the charged crimes but to explain their relationship and the defendant’s motive, and the court gave limiting instructions to the jury. No error occurred that required reversal.

Concurrence: [Fahey, J] In its analysis concluding that defects necessary to reversal are not found here, the majority concludes that the court erred as to the amount of Molineux evidence admitted; “in my view, the trial court did not abuse its discretion with respect” to the volume of such evidence.

People v Wright, 2016 NY Slip Op 04440 (6/9/2016)

The defendant’s CPL 440.10 papers failed to substantiate an actual conflict of interest or any potential conflict as to one of his defense attorneys, where allegedly the retained attorney who represented him from February to September of 2009—before the November 2009 trial at which he was convicted—represented the District Attorney’s campaign in October 2008 and had represented the District Attorney in disciplinary proceedings in 2011-2012. The defendant did not seek information from the attorney so there is no indication of whether the attorney’s response would have supported the defendant’s claim. An assistant prosecutor’s affidavit said there had not been simultaneous representation and that no potential conflict had been in operation.

People v Barden, 2016 NY Slip Op 04659 (6/14/2016)

Dismissal under CPL 30.30 is required where the prosecution sought an adjournment to a specific date, defense counsel was unavailable on that date and requested a later date but the court was not available on that date. Defense counsel’s response to being advised of a later date was “[t]hat should be fine,” and the prosecution failed to announce readiness within the statutory time period. Court delays do not prevent the prosecution from being ready or declaring readiness. Delays resulting from defense counsel’s unavailability on some dates requested by the prosecution, due to “her own convenience, the demands of defendant’s case, and her court schedule for cases unrelated to this defendant,” can be chargeable to the defendant, but counsel’s accommodation of the court’s schedule did not constitute a clear expression of consent to the additional delay.

People v Berry, 2016 NY Slip Op 04656 (6/14/2016)

There was legally insufficient evidence to establish that the “defendant’s relation to the child or to the place, premises or establishment was of such a kind” to give the defendant some ability to control the children so as to permit them to enter or remain in the apartment in which cocaine was found in the kitchen. The evidence presented was that the defendant was found sleeping on a sofa bed with the target of a search warrant, the target’s children were in the living room of the apartment leased in the target’s name, and the defendant spent leisure time there or even “temporarily ‘lived’ there ....” The convictions of first-degree unlawfully dealing with a child are vacated and the indictment dismissed.

Dissent: [Pigott, J] “Viewing this evidence in the light most favorable to the People, the jury could have reasonably rejected [the] defendant’s claim that he was homeless.
and concluded that [the] defendant lived, or otherwise had control over, the apartment. [Footnote omitted].”

**People v Griggs, 2016 NY Slip Op 04655 (6/14/2016)**

The defendant’s claims were not preserved for review and none implicate a mode of proceedings error. The claims include: failure to make an adequate record showing the need for the shackles in which the defendant appeared before the grand jury; improper questioning of the defendant by the prosecutor in the grand jury as to the defendant’s awareness that conviction in this case could potentially increase penalties in an unrelated pending prosecution; and a challenge to the indictment based on the failure of the prosecution to tell the grand jury about a requested witness, which defense counsel knew about but did not have time to fully address before the defendant relieved him and proceeded pro se. An ineffective assistance of counsel claim also fails; the defendant received effective assistance as defined by precedent, certain of counsel’s challenged actions were reasonable, and the “defendant’s conduct substantially affected counsel’s ability to object and preserve arguments regarding the remaining issues.”

**Concurrence:** [Rivera, J] “To the extent the majority would shift blame for counsel’s failure to defendant for seeking to proceed pro se, I disagree that [the] defendant acted in such an obstructionist manner as to undermine his defense and his claims regarding his counsel’s representation.”

**People v Parson, 2016 NY Slip Op 04654 (6/14/2016)**

To find that defense counsel’s performance throughout the case, which ended with a plea, deprived the defendant of “meaningful representation” would require “engaging in the exact form of hindsight review that this Court has cautioned against in analyzing ineffective assistance of counsel claims,” including supposition and conjecture regarding “counsel’s cross-examination at the suppression hearing.”


“Because there was a basis in the record for the determination of the lower courts that the police established probable cause based on their own independent observations, without having to rely on the statements of the [confidential informant], a Darden hearing was not required.”

Police monitored the informant throughout two controlled drug sale encounters with the defendant, not to establish probable cause for arrest but to establish probable cause to search the defendant’s residence; the proof obtained through independent police observation was sufficient for that purpose.


The appeal is dismissed because “the reversal by the Appellate Division was not ‘on the law alone or upon the law and such facts, which, but for the determination of law, would not have led to reversal’ (CPL 450.90[2][a]).”

**People v Smith, 2016 NY Slip Op 04973 (6/23/2016)**

“[A]n affidavit of errors is a jurisdictional prerequisite for the taking of an appeal from a local criminal court where there is no court stenographer.” The statutory language of CPL 460.10(3), which requires such an affidavit, is plain; the 2008 order of the Chief Administrative Judge requiring the mechanical recording of proceedings in town and village justice courts “cannot amend or supplement the legislative scheme setting forth the requirements for taking an appeal.” While “[a]n electronic recording that fully captures the proceedings and is later transcribed may be incorporated in an affidavit of errors, or in the court’s return, and filed as a proposed record on appeal,” it does not fulfill the jurisdictional requirement of an affidavit of errors.

**People v McCullough, 2016 NY Slip Op 05060 (6/28/2016)**

The trial court “did not abuse its discretion as a matter of law when it precluded the introduction of the expert testimony” the defense sought to adduce as to eyewitness identification. The decision in People v LeGrand (8 NY3d 449 [2007]) should be read not as requiring “a strict two-part test that initially evaluates the strength of the requisite corroborating evidence” but as “enumerating factors for trial courts to consider in determining whether expert testimony on eyewitness identification would aid a lay jury in reaching a verdict ….” [Internal quotes omitted.]

**Dissent:** [Rivera, J] “A trial court cannot rest its determination to exclude expert testimony on alleged corroborating evidence that is itself unreliable ….”


In determining the defendant’s Sex Offender Registration Act risk level, the court did not err in assessing points in the risk assessment instrument (RAI) based on sworn allegations of the accuser and a prior misdemeanor conviction for endangering the welfare of a child. Nor did it abuse its discretion in declining to depart downward from the presumptive risk level three where the only mitigating factor presented by the defense was...
the non-sexual nature of the prior conviction and “there were numerous aggravating factors not adequately captured by the RAI that countered defendant’s argument for a downward departure.”

**Dissent**: [Rivera, J] The court abused its discretion by denying the defendant’s request for a downward departure “without proper consideration of the ground presented.”

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Because “law enforcement witnesses should be treated in the same manner as any other prosecution witness for purposes of cross-examination,” well-established rules governing impeachment should be applied to questioning about allegations made in an unrelated federal lawsuit about an officer’s prior misconduct. While legal outcomes other than adverse findings against an officer cannot be elicited, questioning based on specific allegations relevant to the witness’s credibility should be permitted, subject to judicial discretion in assessing whether the questioning “would confuse or mislead the jury, or create a substantial risk of undue prejudice to the parties …. Of the three appeals here, the trial courts in two abused their discretion, effectively imposing “an improper categorical prohibition against permissible cross-examination,” but in one case the error was harmless. In the other, the evidence of guilt was not overwhelming. The record there shows that defense counsel sought to cross-examine police witnesses, for impeachment purposes, about specific prior bad acts underlying lawsuits filed against them, and there is no indication that allowing the questioning would have obscured the main trial issues or confused the jury; a new trial is required. The third case presents a closer question but any error was harmless.

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**People v Daniel**, 2016 Slip Op 05180 (6/30/2016)

The appeal is dismissed because “the reversal by the Appellate Division was not ‘on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal’ (CPL 450.90[2][a]).”

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**People v Panton**, 2016 Slip Op 05181 (6/30/2016)

The defendant did not raise, in the suppression motion or at the hearing, her claim “that police engaged in improper pre-Miranda custodial interrogation” requiring suppression; the claim is therefore unpreserved for review.

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Where the respondents “have been diagnosed with conditions, diseases and/or disorders in addition to” antisocial personality disorder (ASPD), the ruling in Matter of State of New York v Donald DD. (24 NY3d 174 [2014]) does not require dismissal of the civil commitment proceedings brought against them under Mental Hygiene Law 10.06(a). Dennis K.’s diagnosis of ASPD and paraphilia NOS make his case similar to Matter of State of New York v Shannon S. (20 NY3d 99 [2012]). In Shannon S., this Court said a paraphilia NOS diagnosis could serve as “a viable predicate mental disorder or defect that comports with minimal due process’ …. “Anthony N.’s contention that a diagnosis of borderline personality disorder, like ASPD, cannot support a finding of mental abnormality is rejected; the State presented legally sufficient evidence to link that diagnosis to a predisposition to commit sex offenses. As to Richard TT., the State presented evidence including a psychologist’s testimony that his diagnosed conditions of “ASPD, borderline personality disorder and psychopathic conditions, in combination, established that respondent has a ‘congenital or acquired disease, condition or disorder’ that ‘predispose[s]’ him to commit sex offenses.” The trial court found Richard TT. to be a “dangerous sex offender requiring civil confinement’” but then vacated its orders on the basis of Donald DD.; the trial court relied on a misinterpretation of Donald DD. in vacating its orders.

**Concurrence in Dennis K., Dissent in Anthony N. and Richard TT.: [Rivera, J]** “[I]n my opinion a diagnosis of borderline personality disorder (BPD) may not establish, as a legal matter, the basis for civil management, and the records in these cases are otherwise devoid of facts sufficient to support civil confinement.” In the cases of Anthony N. and Richard TT., the “respondents’ criminal records and the expert testimony presented in their cases were insufficient to establish they suffer from a mental abnormality as defined by article 10, and within the constitutional limits delineated by the United States Supreme Court.”

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**First Department**

In the online version of the REPORT, the name of each case summarized is hyperlinked to the opinion provided on the website of the New York Official Reports, www.nycourts.gov/reporter/Decisions.htm.

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**People v Morel**, 131 AD3d 855, 17 NYS3d 102 (1st Dept 9/22/2015)

The court properly denied the defendant’s CPL 330.30 motion to set aside the verdict and dismiss the indictment in this first-degree assault case as untimely, and a review of the record “establishes that this matter does not present
one of the ‘rare cases of prosecutorial misconduct’ entitling a defendant to ‘the exceptional remedy of dismissal [of the indictment]’ … Here, defendant chose not to testify before the grand jury, and, absent his testimony, there was no evidence before the grand jury to support a claim of justification, a defense that was ultimately presented to the trial jury and rejected.” (Supreme Ct, New York Co)

**Matter of State of New York v Kenneth W.,** 131 AD3d 872, 16 NYS3d 733 (1st Dept 9/29/2015)

The court erred in finding that the defendant is a dangerous sex offender requiring confinement in a secure treatment facility because there is insufficient evidence to find that sexual preoccupation is an independent mental abnormality as required to establish a mental abnormality within the meaning of Mental Hygiene Law article 10. (Supreme Ct, New York Co)

**People v White,** 131 AD3d 891, 16 NYS3d 731 (1st Dept 9/29/2015)

The prosecution correctly concedes that the defendant, convicted on a guilty plea of second-degree conspiracy and first-degree assault and sentenced to concurrent terms of 4 to 12 and 10 years respectively, “is entitled to resentencing for an express consideration of a youthful offender determination on his assault conviction ....” (Supreme Ct, New York Co)

**People v Hemans,** 132 AD3d 428, 17 NYS3d 122 (1st Dept 10/6/2015)

The court improperly denied without a hearing the defendant’s CPL 440.10 motion to vacate a judgment of conviction where counsel failed to inform the defendant that a guilty plea to second-degree criminal possession of a weapon would have deportation consequences. It is clear that second-degree criminal possession of a weapon is a “‘crime of violence’ under 18 USC §16 and an aggravated felony triggering removal under 8 USC §1227 (a) (2) (A) (iii)” so counsel was obligated to advise the defendant of those consequences. The defendant raised sufficient factual questions as to counsel’s effectiveness to warrant a hearing. (Supreme Ct, Bronx Co)


The family court properly granted the incarcerated father one visit per year at the correctional facility where he was placed or “any other facility where he was incarcerated that is ‘within the same proximity’” as his current placement, provided he pay the mother $200 towards the costs of visiting within 90 days before the visit occurred as it was supported by the record. “The court properly took into consideration the totality of the circumstances, including the children’s position, as expressed through their attorney, as well as the burden and cost involved in the lengthy trip from Bronx County to an upstate facility, in determining that an annual in-person visit with the father was in the children’s best interests ....” (Family Court, Bronx Co)

**People v Scarlett,** 132 AD3d 473, 18 NYS3d 16 (1st Dept 10/13/2015)

The defendant acted recklessly by purposefully failing to take anti-seizure medication and driving a sanitation truck after obtaining a commercial driver’s license without disclosure of his epileptic history, but the evidence is insufficient to establish that he possessed the requisite depraved indifference to human life necessary to sustain a conviction for second-degree murder and first-degree assault. The murder conviction is reduced to second-degree manslaughter and the assault conviction is reduced to second-degree assault. (Supreme Ct, New York Co)

**People v Smith,** 132 AD3d 511, 17 NYS3d 701 (1st Dept 10/15/2015)

The court properly granted the defendant’s CPL 440.20 motion and vacated his sentence as a second violent felony offender on the ground that his previous conviction could not be counted given that CPL 400.15 (7) provides: “‘A previous conviction …which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate felony conviction ….’” Resentencing the defendant to a term of seven years with five years’ post release supervision is excessive in light of the defendant’s status as a first felony offender. (Supreme Ct, New York Co)

[Ed. Note: Leave to appeal was granted on Feb. 1, 2016 (26 NY3d 1150 (2016)).]

**People v Carrasco,** 132 AD3d 520, 17 NYS3d 853 (1st Dept 10/20/2015)

The defendant’s motion to suppress is properly granted when officers conduct a search of a car’s center console after the defendant is stopped on a traffic violation and arrested upon finding that his license is suspended. There is no evidence that “the officers could reasonably have concluded that ‘a weapon located within the vehicle present[ed] an actual and specific danger’ to their safety ....”
A five-second delay in responding to an officer’s instruction to roll down a window is not enough to create reasonable suspicion of criminal activity. Nor is there evidence that a standard inventory search protocol exists or has been followed here. (Supreme Ct, Bronx Co)

**People v Cruz**, 132 AD3d 554, 17 NYS3d 863  
(1st Dept 10/22/2015)

The prosecution failed to provide “the requisite 10-day notice that they sought an assessment of points, under the risk factor for duration of offense conduct with” the accuser, not included in the recommendation of the Board of Examiners of Sex Offenders. The typical remedy for such failure is an adjournment, but an adjournment cannot provide the defendant “a meaningful opportunity to respond” where the defendant is required to choose between adjournment and release from custody. Without the improper 20 point allocation the defendant qualifies as a level one offender and the adjudication is reduced accordingly. (Supreme Ct, New York Co)

**People v Murphy**, 132 AD3d 550, 18 NYS3d 51  
(1st Dept 10/22/2015)

The defendant, convicted of first-degree contempt under Penal Law 215.51(b)(iv), failed to preserve his challenge to the constitutionality of the statute. The issue is not reviewed in the interest of justice and alternatively the claim is rejected on the merits. While the aggravated harassment statute (former Penal Law 240.30[1][a]) was found to be unconstitutional in Golb, and the two statutes share the same intent standard—“with intent to harass, annoy, threaten or alarm”—the first-degree contempt statute is not unconstitutional because it proscribes conduct, not speech. (Supreme Ct, New York Co)

**People v Ties**, 132 AD3d 558, 18 NYS3d 54  
(1st Dept 10/22/2015)

The defendant’s waiver of his right to appeal was not valid and enforceable because the court’s cursory discussion of the waiver failed to establish that the defendant understood that the plea included a waiver of the right to appeal, the written waiver was executed at sentencing, not at the time of the plea, and “does not suffice to show that defendant knowingly and intelligently waived appeal at the time his plea was entered, as part of the plea agreement ....”

The court erred by denying the defendant’s motion to suppress where officers ordered the defendant to drop the bag he was carrying and detained him without the necessary founded suspicion that criminal activity was afoot. The defendant walking in and out of a store with what one officer essentially described as an ordinary shopping bag was not sufficient to “justify further interference to obtain explanatory information.” (Supreme Ct, New York Co)

**People v Nonni**, 135 AD3d 52, 20 NYS3d 345  
(1st Dept 11/5/2015)

The court did not err by denying the defendants’ motion to suppress. There is sufficient basis for suspicion of criminal activity, justifying a level-two inquiry, where the police found the defendants alone on a secluded, private, gated property following a report that a burglary was in process at that location five minutes before. Furthermore, the defendants’ flight after a request by police to stop so they could “ask them a question” elevated the level of suspicion and warranted pursuit and investigative detention. That one defendant had a knife protruding from his bag which cut one of the subduing officers, and the other had an open bag with a visible sledgehammer, justified placing the defendants in handcuffs while completing investigation of the burglary and did not amount to an arrest requiring probable cause. (Supreme Ct, Bronx Co)

**Dissent**: The officers were, at most, entitled to conduct a level-one inquiry and should not have pursued the defendants as the 911 call provided no information regarding the description or number of suspects and upon contact there was no indication that the defendants were engaged in illegal or suspicious activity. Entry and exit “from a commercial establishment during normal business hours cannot be deemed out of the ordinary ....”

**People v Perry**, 133 AD3d 410, 18 NYS3d 539  
(1st Dept 11/5/2015)

Reversal is required where the court improperly denied the motion to suppress identification of the defendant based on an “unduly suggestive” photo array and post-arrest lineup. The complainant described the perpetrator as having a distinctive physical feature—a “deformed right eye”—and the defendant was the only participant in the photo array and post-arrest lineup with that distinctive feature. The motion to suppress the photo and lineup identifications is granted and the matter remanded for a new trial. (Supreme Ct, New York Co)

**Matter of Kohler-Hausmann v New York City Police Dept.**, 133 AD3d 437, 18 NYS3d 848  
(1st Dept 11/10/2015)

The court erred by denying the petitioner’s request for consideration of attorney’s fees and litigation costs. Self-representation when making a FOIL request does not
preclude an award of attorney’s fees and litigation costs. While the voluntary disclosure by the NYPD, after a period of constructive denial, rendered the petition moot, the petitioner’s claim for attorney fees and litigation costs is not moot. (Supreme Ct, New York Co)

**Matter of State of New York v Floyd Y., 135 AD3d 70, 19 NYS3d 52 (1st Dept 11/10/2015)**

The trial court erred by setting aside a jury verdict concluding that the respondent suffers from a mental abnormality and requires sex offender civil management pursuant to Mental Hygiene Law article 10. The evidence is legally sufficient where an expert psychologist who evaluated the respondent concluded that the respondent has serious difficulty controlling his sex-offending misconduct; there is a lack of adequate treatment for his diagnosed pedophilia, antisocial personality disorder, and substance abuse disorders; the respondent does not have a clear relapse prevention plan; his ability to control his sexual desires for children is impaired; and he has an increased propensity to engage in impulsive behavior. (Supreme Ct, New York Co)

[Ed. Note: Leave to appeal was granted on Mar. 29, 2016 (27 NY3d 902).]

**People v Graves, 133 AD3d 451, 20 NYS3d 19 (1st Dept 11/12/2015)**

The defendant was deprived of his right to a public trial when the court partially closed the courtroom where the prosecution failed to prove that there was an “overriding interest that was likely to be prejudiced by the undercover police officer’s open-court testimony.” The officer’s testimony at the Hinton hearing only established general safety concerns. It specified neither a connection to the area where the defendant was arrested nor the courthouse where the trial occurred. Furthermore, the officer did not identify specific threats from the defendant, his family, or “establish that ‘associates of defendant or targets of investigation’ were likely to be present in the courtroom …. .” (Supreme Ct, New York Co)

**People v Acosta, 133 AD3d 506, 20 NYS3d 358 (1st Dept 11/17/2015)**

The court abused its discretion and implicated the defendant’s right to effective assistance of counsel by failing to comment on defense counsel’s request to adjourn sentencing for 19 days and proceeding with sentencing after being informed that newly-retained defense counsel had received the client’s file only the day before. The adjournment would have placed this sentencing after that in a related misdemeanor case and allowed counsel to prepare a sentencing memorandum.

The record does not establish that the defendant’s waiver of appeal was knowing, intelligent, and voluntary. While it is clear that the defendant understood that the waiver of a right to appeal was separate from other waivers, there is no record evidence that the defendant signed the written form and was aware of the content. (Supreme Ct, New York Co)

**People v Baron, 133 AD3d 516, 21 NYS3d 16 (1st Dept 11/19/2015)**

The defendant’s unsupervised challenge to his convictions on three counts of second-degree criminal possession of a forged instrument is reviewed in the interest of justice and his convictions are reduced to third-degree possession. The prosecution concedes that a forged letter of recommendation is not a forged instrument under the statute. The defendant failed to preserve his challenges to the legal sufficiency of the evidence as to the commercial bribe receiving and attempted falsification of business records counts and they are not reviewed in the interest of justice. Alternatively, they are rejected on the merits as those convictions are not against the weight of the evidence where the accuser suffered economic loss exceeding $250, the defendant acted in concert to sell academic transcripts, and the defendant’s possession of personal records and access to the college’s student information system are sufficient to establish that the defendant came “‘dangerously near commission of the completed crime’ …. .”

Pursuant to the co-conspirator exception to the hearsay rule, the court properly admitted out-of-court statements by the defendant’s intermediary regarding the defendant’s participation in the scheme to sell academic records. (Supreme Ct, New York Co)

**People v Madison, 133 AD3d 553, 20 NYS3d 62 (1st Dept 11/24/2015)**

The defendant’s Sixth Amendment right to be tried by a jury selected from a fair cross-section of the community was not violated where Brooklyn residents were excluded from a Manhattan jury; Brooklyn residents do not qualify as a “distinctive” group, required to establish a prima facie violation of the fair cross-section requirement. Furthermore, the census data the defendant provided does not show a significant racial disparity “between New York County, where the case was tried, and the City as a whole, given the undisputedly lawful citywide jurisdiction of the centralized narcotics parts …. .”

The court properly denied the defendant’s Batson motions where the record does not disclose the racial com-
position of the venire and the defendant fails to show that the prosecution’s challenge rate was disproportionate.

The court did not err by denying the defendant’s CPL 30.30 speedy trial motion based on delay in production of a redacted search warrant because the record does not reflect that the prosecution was ordered to disclose the warrant to the defendant’s new counsel; prior counsel had a duty to turn over the entire file to successor counsel. Even if the period that the defendant claimed to be chargeable is reduced, the speedy trial motion still fails. (Supreme Ct, New York Co)

**People v Smith**, 133 AD3d 548, 20 NYS3d 359
(1st Dept 11/24/2015)

Reversal is required where the court does not act in line with its responsibilities under People v O’Rama (78 NY2d 270, 277 [1991]) by failing to provide defense counsel with “meaningful notice” of a jury note. The court stated that defense counsel was “aware” of the note, but the record reflects that defense counsel was out of the courtroom and was not consulted before the court instructed the court officer to inform the jury “that the written documents they request are not available to a jury under any circumstances,” nor was defense counsel present when the court read the full note. Where the transcript does not show compliance with O’Rama, “we cannot assume that the omission was remedied at an off-the-record conference that the transcript does not refer to.”

The court failed to provide the jury with a “meaningful response” where the record does not show that it supplied the requested copies of the recorded telephone conversations or addressed this aspect of the jury’s request. (Supreme Ct, New York Co)

**People v Lane**, 134 AD3d 401, 19 NYS3d 727
(1st Dept 12/1/2015)

The court violated procedures established by People v O’Rama (78 NY2d 270, 277 [1991]) where it failed to read a jury note into the record verbatim resulting in a mode of proceedings error reviewable even though counsel failed to object to the court’s handing of the note. “A court does not satisfy its responsibility to provide counsel with meaningful notice of a jury’s substantive inquiry by summarizing the substance of the jurors’ note.” (Supreme Ct, Bronx Co)

**People v Flores**, 134 AD3d 425, 19 NYS3d 524
(1st Dept 12/3/2015)

The defendant’s waiver of his right to appeal is invalid where the court failed to ensure that the defendant understood that the waiver of a right to an appeal was separate from rights waived by the guilty plea. The defendant’s execution of a written waiver is not by itself sufficient to establish that “the defendant... knowingly, intelligently and voluntarily” gave up his right to appeal. “[T]he record indicates possible harm flowing from the court’s error” here; the court reimposed a nine year sentence based on the mistaken belief that it lacked the authority to reduce the defendant’s sentence after it concluded that the defendant was not entitled to youthful offender status, and the record contains mitigating factors on which the court might have based a sentence reduction. The matter is remanded for resentencing. (Supreme Ct, New York Co)

**People v DeJesus**, 134 AD3d 463, 21 NYS3d 217
(1st Dept 12/8/2015)

The verdict convicting the defendant, after a jury trial, of first-degree assault requires reversal and a new trial as the defendant was denied his right of confrontation when an officer was improperly permitted to testify to hearsay evidence from non-testifying informants or 911 callers that provided strong evidence on identification.

The defendant’s right to a fair trial was violated by several improper statements made by the prosecutor, including an argument that a third person engaged the defendant to shoot the accuser, in violation of a prior ruling. Further, the circumstances support a finding that the jury was improperly coerced into returning a verdict because the court prompted the jury to reach a verdict after being notified of a deadlock twice, and notified jurors they would likely continue deliberations into the following week despite personal scheduling conflicts for some jurors. The jury reached a verdict nine minutes later. (Supreme Ct, Bronx Co)

**People v Austin**, 134 AD3d 559, 23 NYS3d 17
(1st Dept 12/22/2015)

The court did not abuse its discretion by denying the defendant’s request that the jury be given an adverse inference charge based on the unavailability of blood evidence. One requirement for issuance of a permissive adverse inference charge is that the evidence has been lost or destroyed by agents of the State. Here, the evidence was destroyed or inaccessible as a result of a natural disaster (Hurricane Sandy) less than a month before trial. The defense did not take any steps in the two and a half years after indictment to enforce its right to production of documents and counsel stated in an on-the-record conference call that “he had ‘got[ten] all the DNA files from [the prosecutor]’ by email and had ‘already gone through everything so we are ready to go.’”
Although the DNA evidence was the lynchpin of the prosecution’s case, “placing before the jury the physical blood evidence ... would not have told them anything about the accuracy of the DNA match.” The court did not err by restricting defense counsel’s summation on the absence of the blood evidence because “the readily explained absence of the physical blood evidence at trial was not logically probative of the reliability of the DNA analysis on which the prosecution was based ...” (Supreme Ct, Bronx Co)

**Dissent:** By failing to give the requested permissive jury instruction, the judge usurped the jury’s role in deciding the weight attributed to the DNA evidence destroyed while in the prosecution’s custody. The prosecution did not disclose the DNA evidence to defense counsel prior to its destruction despite a court order that the defense was entitled to everything the prosecution had. While defense counsel could have been more diligent in demanding production the prosecution could have produced the evidence before it was destroyed.

[Ed Note: Leave to appeal was granted on Feb. 9, 2016 (2016 NY Slip Op 63709[U] [1st Dept]).]

**Second Department**

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**Matter of Coull v Rottman, 131 AD3d 964, 15 NYS3d 834 (2nd Dept 9/2/2015)**

The family court’s decision to deny the father’s petition to enforce his visitation rights and grant the mother’s cross petition to modify the prior custody and visitation order to suspend the father’s visitation has a sound and substantial basis in the record. “[D]espite the fact that the child had participated in therapy for several months in an effort to foster a relationship with his father, the child remained vehemently opposed to any form of visitation with the father. ... [F]urther attempts to compel the child, who was then 13 years old, to engage in visitation would be detrimental to the child’s emotional well being ....”

The court did err in denying the father’s alternative request for suspension of his obligation to make future child support payments. At the hearing “[t]he forensic evaluator testified that there was a ‘pattern of alienation’ resulting from the mother’s interference with a regular schedule of visitation.” The evaluator was not able to complete the report because the mother refused to allow the evaluator access to mental health providers and school officials and the child did not appear for an interview. The family court “noted in its decision that the mother stated ‘many times, that she will never allow [the father] to see the subject child and that she would do whatever it takes to keep the subject child away’ from him.” (Family Court, Westchester Co)

**People v Days, 131 AD3d 972, 15 NYS3d 823 (2nd Dept 9/2/2015)**

The court improvidently exercised its discretion by disallowing introduction by the defense of expert testimony regarding false confessions. Where the defendant had been in custody for nearly 14 hours and interrogated for about seven hours, a video shows him speaking slowly while in a slouched position, and the police repeatedly used suggestive and leading questions and gave the defendant details related to the crime scene. There was also a lack of physical or eyewitness evidence linking the defendant to the charged offense, and a psychologist opined as to his intellectual deficits, mental health diagnosis, and personality traits but was allowed to testify before the jury only as to his ability to understand Miranda warnings. “[I]t cannot be said that psychological studies bearing on the reliability of a confession are, as a general matter, ‘within the ken of the typical juror’ ....” (County Ct, Westchester Co)

**People v Ekwegbalu, 131 AD3d 982, 15 NYS3d 847 (2nd Dept 9/2/2015)**

The prosecution failed to show at trial that the gunshot wound sustained by the complainant met the requirements of Penal Law 10.00(10). As the evidence did establish that the defendant acted with intent to inflict serious physical injury, and came “dangerously near” commission of the completed crime, the first-degree assault conviction is reduced to attempted first-degree assault. (Supreme Ct, Queens Co)

**People v Malcolm, 131 AD3d 1068, 16 NYS3d 306 (2nd Dept 9/16/2015)**

Where the defendant took similar expensive electronic items from the same store on three separate occasions, under virtually the same circumstances including having the assistance of a minivan driver, the evidence sufficiently established that he “stole merchandise ‘with a single [ongoing] intent, carried out in successive stages,’” supporting a conviction of fourth-degree grand larceny based on the aggregate value of the items taken. (Supreme Ct, Queens Co)

**Dissent in Part, Concurrence in Part:** Unlike precedent cases upholding aggregation of value, this is a shoplifting case involving no fraudulent scheme.
People v Bookman, 131 AD3d 1258, 16 NYS3d 848 (2nd Dept 9/30/2015)

The record supports the suppression court’s credibility finding. While the dissent asserts that credibility is not at issue, much of the dissenting opinion implicitly challenges the credibility of the arresting officer, who said the initial stop of the defendant’s vehicle was based on items hung from the rearview mirror so as to interfere with or obstruct the driver’s view. (Supreme Ct, Queens Co)

Dissent: The prosecution failed to make the necessary prima facia showing that a legally sufficient basis existed for the vehicle stop. The conclusory testimony that the mirror items were an obstruction was not enough, especially when no traffic summons was issued and another person was allowed to drive the vehicle away from the station with the items still in place.

[Ed. Note: Leave to appeal was granted on Jan. 8, 2016 (26 NY3d 1112 [2nd Dept]).]

People v Smith, 131 AD3d 1270, 17 NYS3d 438 (2nd Dept 9/30/2015)

The dissent ignores the physical evidence that corroborated the witnesses’ testimony. While the court should not have denied the defense request to introduce evidence from a private investigator to refute a witness’s claim to have seen the shooting from a third floor window, the error was harmless. Defense counsel failed to seek an advance ruling on whether recorded calls by the defendant from jail, which the prosecution disclosed prior to its case-in-chief, could be used to impeach him if he testified as the prosecution gave notice it planned to do. And the court properly admitted those calls for impeachment purposes. (Supreme Ct, Kings Co)

Dissent: While the defendant’s participation in a fistfight with the complainant is undisputed, the evidence that he was involved in the shooting of the complainant at a later date came from interested witnesses and was not overwhelming. Multiple errors at trial were not harmless and deprived the defendant of a fair trial. In addition to precluding the defense from calling its private investigator as a witness on the erroneous basis that opinion testimony from lay witnesses is inadmissible, the court overruled objections to impeachment evidence that had been precluded, reprimanded defense counsel for objecting repeatedly during cross-examination of the defendant, and allowed prejudicial testimony; the prosecution made prejudicial comments in summation.

Matter of Milworm v Milworm, 132 AD3d 677, 17 NYS3d 194 (2nd Dept 10/7/2015)

The court erred in granting the family offense petition and issuing an order of protection as the record does not support its finding that the respondent, the petitioner’s father, committed a felony level harassment offense. The petitioner also failed to establish by a preponderance of the evidence that the respondent committed second-degree harassment where “the father’s two encounters with the petitioner on public sidewalks in his own neighborhood did not, in and of themselves, constitute ‘following’ the petitioner within the meaning of Penal Law § 240.26(2).” There was insufficient evidence of an intent to harass, annoy, or alarm the petitioner. Finally, the petitioner’s testimony that her father used a cell phone to record her for approximately one minute was speculative and unreliable and the father denied holding his phone during the incident, let alone recording the petitioner. (Family Court, Kings Co)

Matter of Endoran E. H., 132 AD3d 762, 18 NYS3d 637 (2nd Dept 10/14/2015)

The court had a record basis to find “that the father is a person whose consent is required in order for the child to be adopted ...” But the court erred in concluding that the petitioner did not make diligent efforts to encourage and strengthen the relationship between the father and child where the petitioner met with the father to review the service plan, discussed the importance of compliance, referred the father to various drug treatment programs, assisted the father in getting his Medicaid benefits reinstated, arranged for visitation, and changed the visitation schedule when it interfered with the father’s work. However, the court “properly, in effect, denied the petition to terminate the father’s parental rights, since the petitioner failed to establish, by clear and convincing evidence, that, during the relevant period of time, the father failed to maintain contact with or plan for the future of the child” where the record showed the father and child had a “strong and loving bond” and the father visited regularly and completed parenting skills, anger management, and drug treatment programs. His relapses and failure to complete another drug treatment program after a positive drug test are not enough to constitute a failure to plan for the child’s return. (Family Court, Kings Co)


The order of fact-finding and disposition must be reversed, the neglect petition denied, and the proceedings dismissed where, “[a]lthough DSS presented evidence indicating that the subject child had been left in the living
Second Department continued

Room of the shelter while the mother and father were in different areas of the shelter, DSS failed to demonstrate that the child was left alone for any more than a brief period of time … or that the child was otherwise left alone under circumstances that posed an ‘imminent danger’ to his physical, mental, or emotional well-being …. (Family Court, Suffolk Co)

**People v Manougian, 132 AD3d 746, 17 NYS3d 507 (2nd Dept 10/14/2015)**

In determining the defendant’s risk level under the Sex Offender Registration Act, the court erred by departing upward from the presumptive risk level as the prosecution did not meet its burden of showing by clear and convincing evidence that the defendant’s psychiatric history was related to his risk of reoffense and that the particular setting of the offense was an aggravating factor not taken into account under the Guidelines. The court further erred in sua sponte relying on the defendant’s parole violation 10 years before this offense and bench warrants even older to depart upward; the defendant was not given an opportunity to be heard and there was insufficient evidence that the violation and warrants were relevant to the risk of reoffense. (Supreme Ct, Nassau Co)

**People v Francis, 132 AD3d 893, 18 NYS3d 129 (2nd Dept 10/21/2015)**

The court did not err in issuing an amended decision the day after granting, as to all counts, the defendant’s motion to dismiss under the speedy trial statute, CPL 30.30, finding that the indictment counts relating to offenses contained in a later criminal complaint were timely, but the indictment counts that related back to an earlier complaint were not. Courts have inherent authority to rectify prior errors in dismissing indictments, the court acted well within the time for the prosecutor to seek reargument, and the error was clearly apparent from the contents of the court’s file. (Supreme Ct, Westchester Co)

**Dissent:** The court’s “sua sponte ‘do-over’ of its order” was not within its inherent power to correct its mistake; the court’s initial decision constituted a final disposition and “its inherent power to rethink its rulings terminated …. The defendant’s guilty plea rests on a jurisdictional defect reviewable despite the defendant’s waiver of the right to appeal.

[Ed. Note: Leave to appeal was granted on Feb. 9, 2016 (26 NY3d 1152 [2nd Dept]).]

**Matter of Gianna A., 132 AD3d 855, 18 NYS3d 658 (2nd Dept 10/21/2015)**

The family court erred in finding that the father neglected his child by engaging in domestic violence against the mother in the presence of the child because “[t]he evidence presented by DSS did not establish, by a preponderance of the evidence, that an incident of domestic violence occurred …. The only fact-finding hearing testimony came from a caseworker who testified that, after the incident, the father told the caseworker that, to retaliate against the father after he and mother fought, the mother called the police and reported that the father had a knife. The father allegedly made conflicting statements about the knife. There was also insufficient evidence that an act of domestic violence, if any, occurred in the child’s presence or that the child’s physical, mental, or emotional condition was impaired or in imminent danger of impairment. (Family Court, Suffolk Co)

**Matter of Tarnai v Buchbinder, 132 AD3d 884, 18 NYS3d 143 (2nd Dept 10/21/2015)**

The family court’s custody order must be reversed and the matter remitted for a new hearing where the court relieved the mother’s third assigned attorney, upon the attorney’s application that the mother did not join, but did not ask the mother whether she was waiving her right to counsel and the record shows that the court forced the mother to proceed pro se, even though she did not want to do so and was entitled to an assigned attorney. “[T]he statutory right to the assignment of counsel runs in favor of the indigent party and not the attorney” and the court was not obligated to decide whether there was good cause to relieve the attorney of the assignment where the attorney alone made the application. That the three attorneys who had been assigned to represent the mother “successfully sought to be relieved of their assignment did not serve to extinguish the mother’s right to have an attorney assigned to represent her.” (Family Court, Kings Co)

**People v Velez, 132 AD3d 916, 17 NYS3d 780 (2nd Dept 10/21/2015)**

The court wrongly denied the defense request for a charge on intoxication as the evidence could support a reasonable doubt based on intoxication as to an element of two of the charged offenses. The relatively low threshold was met by evidence including that, at the time the defendant was subdued at the second of two apartments he was charged with burglarizing, he had “bloody red eyes” and claimed that someone was following him, and that at the hospital “[a] triage nurse recorded that the defendant’s ‘chief complaint’ was alcohol intoxication, and that the defendant was uncooperative, anxious, agitated, and
had the smell of alcohol on his breath.” (Supreme Ct, Kings Co)

People v Hubbard, 132 AD3d 1013, 18 NYS3d 681 (2nd Dept 10/28/2015)

The court properly granted the defendant’s CPL 440.10 motion “to vacate the judgment for violation of Brady v Maryland ….” Where the eyewitness could not identify the defendant and no physical evidence connected him to the crime, the defendant’s statement to a detective was very important; evidence known to the prosecution that the detective had procured a false confession in an unrelated case was responsive to a defense discovery demand and may have resulted in a different trial outcome if produced. (Supreme Ct, Suffolk Co)

People v Sirico, 135 AD3d 19, 18 NYS3d 430 (2nd Dept 10/28/2015)

By pleading guilty, the defendant forfeited review of his claim that the court erred in ruling that the prosecution could introduce evidence at trial that the defendant “refused a chemical test pursuant to Vehicle and Traffic Law § 1194 (2) (f).”

As restitution was not part of the plea agreement, the matter is remitted for further proceedings. The court did not err in imposing a separate fine of $500 for each of three counts of first-degree aggravated unlicensed operation of a motor vehicle. (County Ct, Suffolk Co)

People v Clermont, 133 AD3d 612, 20 NYS3d 85 (2nd Dept 11/4/2015)

That police patrolling an area known for gang activity saw the defendant and another man walking down the street and the defendant making “constant adjustments” to the right side of his waistband” did not “establish the reasonable suspicion that was necessary” for them to lawfully pursue him, even when coupled with his flight when the police identified themselves. The gun discarded by the defendant during the unlawful police pursuit should have been suppressed. (Supreme Ct, Queens Co)

People v Goldring, 133 AD3d 684, 19 NYS3d 87 (2nd Dept 11/12/2015)

The court erred in finding that no intoxication instruction to the jury was warranted where the accuser’s wife, who was familiar with the defendant, testified that just before the behavior that led to the assault charge and others, she saw the defendant with a can of beer and observed alcohol on his breath, slurred speech, and the appearance of his not being “himself” and being drunk. (Supreme Ct, Queens Co)

People v Mais, 133 AD3d 687, 20 NYS3d 129 (2nd Dept 11/12/2015)

The evidence was legally insufficient to establish the count of attempted first-degree rape where the accuser said that she awoke to find an intruder in her bedroom, who demanded money and, after being told she had none, yelled for her to take off her clothes, and pulled back her bed covers, but did not touch her, demand that she have sexual intercourse with him, or undress, and the accuser’s clothes were not removed. Intent to engage in some type of criminal sexual conduct may reasonably be inferred from the evidence, but not attempted intercourse by forcible compulsion. (County Ct, Rockland Co)

Matter of State of New York v Richard S., 133 AD3d 672, 19 NYS3d 320 (2nd Dept 11/12/2015)

This appeal is held in abeyance and the matter remanded for a Frye hearing “to resolve the question of whether the diagnosis of paraphilia NOS, nonconsent, has achieved general acceptance in the psychiatric and psychological communities so as to make expert testimony on that diagnosis admissible, and thereafter to report to this Court with all convenient speed ….” (Supreme Ct, Queens Co)

Matter of Vincent M., 133 AD3d 662, 19 NYS3d 559 (2nd Dept 11/12/2015)

The family court lacked the authority to enter a neglect finding against the mother after “simply [taking] judicial notice at a conference of a certificate of disposition” from a criminal court that stated that the mother was convicted of seventh-degree criminal possession of a controlled substance for conduct that occurred on a particular date and the petition alleged neglect based on the mother’s purchase and use of drugs in her child’s presence on the same date. The Family Court Act allows for only three methods by which a court may make a neglect determination: a finding on consent of all parties or following a fact-finding hearing or “on a motion for summary judgment in lieu of holding a fact-finding hearing, upon the petitioning agency’s prima facie showing of neglect or abuse as a matter of law, and the respondent’s failure to raise a triable issue of fact in opposition to the motion ….” The court’s action followed none of these. (Family Court, Westchester Co)
People v Brown, 133 AD3d 772, 20 NYS3d 390 (2nd Dept 11/18/2015)

There was legally insufficient evidence of constructive possession of contraband found in a bedroom where no testimony was given by officers from the Emergency Services Unit (ESU) who handcuffed all the adults in an apartment and left before the searching officers entered, no evidence was presented as to where the defendant, who was left handcuffed in the hall leading to two bedrooms, had been found by ESU officers, and there was no evidence connecting the defendant to the bedroom or the contraband itself. (Supreme Ct, Kings Co)

People v Carrasquillo, 133 AD3d 774, 19 NYS3d 333 (2nd Dept 11/18/2015)

The defendant’s denial of guilt when interviewed by the probation department was not a violation of the plea condition that he cooperate with the department. His unpreserved claim that imposing an enhanced sentence based on the disclaimer of guilt, which was unaccompanied by any expressed intention to withdraw his guilty plea, is reviewed in the interest of justice and the sentence vacated. The matter is remitted for imposition of the originally promised sentence. (Supreme Ct, Kings Co)

People v Krut, 133 AD3d 781, 21 NYS3d 106 (2nd Dept 11/18/2015)

The court erred by admitting into evidence at trial the results of a preliminary breath test (PBT) and not instructing the jury that such evidence could not be used to prove intoxication. The results of PBTs are not generally accepted as reliable in the scientific community. Defense counsel’s brief remark about an officer disposing of the PBT “cap” during his opening statement was offered at least in part to support the defense theory that the defendant did not know he was being arrested, which would undermine the assault and resisting arrest charges; this did not open the door to admission of the PBT results. (Supreme Ct, Richmond Co)

People v Pinto, 133 AD3d 787, 21 NYS3d 115 (2nd Dept 11/18/2015)

The defendant was entitled to a hearing on his properly brought CPL 440.10 motion to vacate his conviction. He sufficiently alleged that counsel during plea negotiations and proceedings provided incorrect information about potential immigration consequences of the plea, i.e, that deportation was possible but not that it would be mandatory, and that this prejudiced the defendant. (Supreme Ct, Queens Co)

People v Scott, 133 AD3d 794, 21 NYS3d 121 (2nd Dept 11/18/2015)

Because the first prong of the People v Mitchell (39 NY2d 173 [1976]) test for whether a warrantless search was justified under the emergency doctrine was not met, the issue of whether the second prong (was the search “not primarily motivated by an intent to arrest and seize evidence”) remains viable under the state constitution is not reached. The warrantless search of the defendant’s home followed a long series of events that began with police inquiring about why he was speaking irately on a cell phone while walking in the street. This led to a chase during which the police thought they saw the handle of a gun at the defendant’s waist, and eventually ended with a police search of the residence to which he had fled before surrendering. The police searched the residence after checking it for other occupants and secured it. The prosecution’s claim of “hot pursuit” was not decided adversely to the defendant by the suppression court and cannot be reviewed here. The evidentiary search “exceeded the scope of any exigency” so no further proceedings upon remittal are required. (Supreme Ct, Queens Co)


The family court properly dismissed the petition to terminate the mother’s parental rights on the ground of permanent neglect where the petitioner agency failed to show, by clear and convincing evidence, that it made diligent efforts to strengthen and encourage the relationship between the mother and her child. After a finding of derivative neglect, the subject child was placed in the care of the Commissioner of Social Services and a private foster care agency with the permanency goal to return to the mother. The mother worked with the original agency to accomplish that goal and that agency was planning for unsupervised visits between the mother and child. But the child’s care was transferred to another foster care agency, which, despite the mother’s progress and the permanency plan, did not arrange for any unsupervised visits and “immediately focused its efforts on changing the goal to adoption.” At trial, the petitioner agency only produced documentary evidence in the form of “progress notes” to establish permanent neglect, but those notes did not show diligent efforts and “revealed that the mother completed all of the services demanded of her, and was consistent with her visits and attempted to plan for the child.” And the petitioner did not ask the court to draw an adverse inference from the mother’s failure to testify. (Family Court, Kings Co)
**Matter of Miguel G., 134 AD3d 711, 21 NYS3d 313**  
(2nd Dept 12/2/2015)

The family court properly concluded that “[t]he petitioner established a prima facie case of abuse” but erred in determining that the mother abused her child where “the mother presented sufficient evidence to rebut the petitioner’s case, through the testimony of her expert witness.” “Section 1046 (a) (ii) of the Family Court Act permits a finding of abuse based upon evidence of an injury to a child which would ordinarily not occur absent acts or omissions of the responsible caretaker, and ‘authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur’ ….” “The mother’s expert witness testified that the injuries sustained by the child Brandon G. … occurred during a period of time when the petitioner had not established that Brandon G. was in the exclusive care of the mother. Additionally, the expert opined that the injuries could have resulted from alternate mechanisms.” (Family Court, Kings Co)

**People v Vasquez, 134 AD3d 744, 19 NYS3d 771**  
(2nd Dept 12/2/2015)

The grounds for the defendant’s claim in his motion for a trial order of dismissal were adequately put forth and the court properly found that the evidence was insufficient to support conviction for first-degree assault where the injuries sustained, cuts on the arm and chest resulting in scarring, did not constitute “a ‘serious disfigurement’ ….” (Supreme Ct, Queens Co)

**People v Carrino, 134 AD3d 946, 22 NYS3d 116**  
(2nd Dept 12/16/2015)

Three separate times during an approximately three-hour interrogation, the defendant referred to seeking an attorney, including remarks that “I need an attorney, because this is ridiculous” and “I have to get [an attorney]. I have to call … and get one that’s New York barred up here, I guess.” While the investigator acknowledged “the attorney thing,” the interview was not stopped. After the defendant requested a bathroom break and was then left alone for nearly an hour, he was asked if he was going to call his lawyer, and he responded that he wanted to cooperate, further questioning ensued, yielding admissions. Failure to suppress the defendant’s statement was not harmless error. (County Ct, Dutchess Co)

**People v Mitchell, 134 AD3d 961, 21 NYS3d 339**  
(2nd Dept 12/16/2015)

The unpreserved contention that the defendant was improperly sentenced as a second felony offender is reviewed in the interest of justice; the prosecution properly concedes that the prior federal conviction of bank burglary is not a predicate felony because the federal crime can result from an entry that would not be unlawful under state law. (Supreme Ct, Kings Co)

**People v Graham, 134 AD3d 1047, 21 NYS3d 702**  
(2nd Dept 12/23/2015)

Suppression of physical evidence seized by the police during the encounter with the defendant should have been granted where the defendant was not arrested before the search and the “officer searched the defendant’s jacket pocket without any prior visual observations of a weapon and without first conducting a pat down of the outside of the pocket,” failing to confine the scope of the search to that reasonably necessary to protect himself. (Supreme Ct, Kings Co)

**Matter of Lallas v Bolin, 134 AD3d 1038, 21 NYS3d 699**  
(2nd Dept 12/23/2015)

The court properly denied the mother’s petition to modify a 2009 custody order, issued on the consent of the mother and grandmother, that awarded sole custody of the child to the grandmother where the grandmother met her burden of establishing extraordinary circumstances “based on an extended disruption of parental custody” and there was sufficient evidence that it was in the child’s best interests to remain in the grandmother’s custody. However, the court erred in declining to sign an order to show cause that accompanied the mother’s 2015 petition to hold the grandmother in contempt for willfully violating the visitation schedule and to modify the custody order. The allegations in the 2015 petition, if proven, “tend to establish that the grandmother interfered with the mother’s visitation rights. That interference may constitute a change in circumstances sufficient to warrant a change in custody ….” And the allegations, if proven, would support a civil contempt finding against the grandmother. The matter is remitted for the family court to sign the order to show cause. (Family Court, Suffolk Co)

**People v Montes, 134 AD3d 1083, 21 NYS3d 637**  
(2nd Dept 12/30/2015)

The prosecution failed to show by clear and convincing evidence that the defendant, a step-grandparent of the two accusers with access to them both before and after becoming their foster parent, established or promoted the
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foster parent relationship for the primary purpose of victimizing them. But while removing the points assessed for that risk factor reduced his presumptive risk level under the Sex Offender Registration Act to level two, the court properly determined, in the alternative, that an upward departure was warranted. (Supreme Ct, Kings Co)

People v Odle, 134 AD3d 1132, 21 NYS3d 727 (2nd Dept 12/30/2015)

The defendant must be afforded the opportunity to move to vacate his plea where the record shows that the court did not advise him of the possibility that the plea would result in his deportation; as People v Peque (22 NY3d 168 [2013]) involved federal constitutional principles, it retroactively applies to this direct appeal. The matter is remitted for a hearing and a report to this Court as to whether or not the defendant made the requisite showing. (Supreme Ct, Queens Co)

People v Rose, 134 AD3d 1135, 22 NYS3d 534 (2nd Dept 12/30/2015)

Where the prosecution did not object to a jury instruction that increased its burden—here, saying that there must be proof that property was stolen from accuser Brandt when the evidence showed that property was taken only from accuser Bishop—the prosecution is held to the burden as instructed, and the conviction of first-degree robbery is reduced to attempted first-degree robbery, which the evidence at trial was sufficient to establish. Because the court appeared to take the seriousness of the first-degree robbery conviction into consideration in imposing sentence on the second-degree robbery count, that sentence is vacated and the matter is remitted for resentencing; no opinion is expressed as to what the new sentence should be. (Supreme Ct, Kings Co)

Third Department

In the online version of the REPORT, the name of each case summarized is hyperlinked to the opinion provided on the website of the New York Official Reports, www.nycourts.gov/reporter/Decisions.htm.

People v Bedard, 132 AD3d 1070, 18 NYS3d 217 (3rd Dept 10/22/2015)

The court erred in denying the defendant’s challenge for cause of a prospective juror where the juror admitted “that her family was ‘good friends’ with the family of the District Attorney” and that she has socialized with the District Attorney, even though an assistant district attor-ney was prosecuting the case and the prospective juror stated that the relationship would not affect her verdict. Where a challenge for cause involves a juror’s relationship with a trial participant, an “implied-bias” may be implicated that requires automatic exclusion from jury service, even if the juror asserts that the relationship will not affect her ability to render an impartial verdict. Because the defendant exhausted his peremptory challenges before the end of jury selection, his conviction must be reversed and the matter is remitted for a new trial. (County Ct, Clinton Co)

People v Grafton, 132 AD3d 1065, 18 NYS3d 213 (3rd Dept 10/22/2015)

The defendant’s equal protection rights under Batson were violated when the court prematurely ruled on the inquiry at step two. As a race neutral explanation for a challenged black juror, the prosecution said the juror was challenged because her child’s father was prosecuted by the same office. However, the defendant pointed out that this reasoning conflicted with the prosecution’s acceptance of “a white juror whose sister had been in and out of trouble for years, felonies, in trouble with the law.” Furthermore, the defendant also pointed out that the prosecution made “significant factual errors embellishing on [the juror’s] actual comment…. Where there are factual and credibility issues at step two of a Batson inquiry, the trial judge must address the issues at step three before making a ruling. The defendant’s conviction is reversed and the matter remitted for a new trial. (County Ct, Schenectady Co)

People v Muhammad, 132 AD3d 1068, 18 NYS3d 461 (3rd Dept 10/22/2015)

The defendant’s guilty plea was not knowing, voluntary, and intelligent where the court specifically promised to order the defendant into the shock incarceration program, the defendant relied on the promise in accepting the plea agreement, and the court’s promise cannot be honored as a matter of law. This unpreserved issue is reviewed in the interest of justice and the defendant’s plea must be vacated. (County Ct, Broome Co)

People v Songa, 132 AD3d 1071, 19 NYS3d 108 (3rd Dept 10/22/2015)

The court erred by revoking the defendant’s probation and imposing a sentence of incarceration because a probation violation for failure to report is improper where it can be proven that the defendant “acted ‘in good faith in an attempt to carry out the [reporting] conditions of the imposed probation’ ....” The court made neither an inquiry into the defendant’s ability to pay required
restoration nor a determination that the defendant’s failure to pay was willful. (County Ct, Albany Co)


The court improperly ordered the Board of Parole to address the degree to which statements from the family of the deceased factored into their decision when the petitioner was denied his request for parole after his seventh appearance before the Board. Here, there is no indication that the Board “was influenced by, placed weight upon, or relied upon any improper matter,” in the family’s statements or otherwise, in making their decision. The judgment is modified by reversing the directive for the respondent Board of Parole to explicitly address the degree to which the statements impacted its decision. However, it was not error to direct the Board to conduct a de novo hearing to consider the sentencing minutes previously believed to be lost, which were later found. While the minutes do not explicitly reference a parole recommendation, the judge implicitly addressed the issue. This, combined with a failure to timely locate the minutes and that the Board’s determination rested primarily on the serious nature of the crime, supports the de novo hearing order. (Supreme Ct, Columbia Co)

**Dissent:** Sentencing minutes should not be considered at parole hearings where they do not specifically mention parole nor use words to “describe a future determination regarding petitioner’s release ....” While courts consider similar considerations as a parole board when making sentencing determinations, those considerations should not be construed as parole recommendations.

**People v Slocum**, 133 AD3d 972, 20 NYS3d 440 (3rd Dept 11/12/2015)

The court erred by admitting, at trial, statements made by the defendant to police officers and a child protective services case worker who acted as an agent of law enforcement, in the absence of counsel after his indelible right to counsel attached. While the right to counsel did not attach when the public defender sent a letter to the police department outlining his representation of the defendant in other cases and the intent to represent him on the present charge, the police should have accepted defendant’s response, “Yeah probably,” as an unequivocal response to whether he wanted to be represented by the public defender’s office on this case. A reasonable police officer would have understood that the defendant’s statement was an unequivocal request for counsel.

While violations of the right to counsel do not warrant automatic reversal, in light of the other evidence presented at trial, “it cannot be said that there is no reasonable possibility that the admission of defendant’s statements at trial affected the jury’s verdict ....” The defendant’s motion to suppress the statements he made to police officers after he invoked his right to counsel and all statements made to the child protective services case worker is granted. (County Ct, Washington Co)

[Ed. Note: Leave to appeal was granted on Mar. 2, 2016 (2016 NY Slip Op 97493[U]).]

**People v Stone**, 133 AD3d 982, 20 NYS3d 447 (3rd Dept 11/12/2015)

The court erred by applying the prompt outcry exception to hearsay in a predatory sexual assault case where the accuser’s disclosures were made four years after the abuse and two years after her last contact with the defendant, absent adequate explanation by the prosecution of the cause of the delay. The evidence of guilt was not overwhelming and consequently the verdict hinged on the credibility of the accuser. Therefore, the erroneous admission of the bolstering hearsay was not harmless. The judgment is reversed and a new trial ordered on count one of the indictment. (County Ct, Broome Co)

**People v Robinson**, 133 AD3d 1043, 20 NYS3d 454 (3rd Dept 11/19/2015)

The court correctly imposed restitution in the amount of the accuser’s lost wages where she was terminated from her place of employment solely due to the volatile situations caused by the defendant’s conduct. Before she was terminated, the accuser worked 29 hours per week at $7.40 per hour and, despite her efforts, she was unable to find employment for 12 weeks after termination. There is no reason to disturb the finding below that the lost wages were a direct consequence of the defendant’s conduct and that the restitution owed was reasonable. (County Ct, Tompkins Co)

**People v Updyke**, 133 AD3d 1063, 19 NYS3d 202 (3rd Dept 11/19/2015)

Reversal is compelled by the court’s erroneous use of juvenile delinquency adjudications to assess points for criminal history under risk factors 8 and 9 of the risk assessment instrument (RAI) used in determining the defendant’s risk level under the Sex Offender Registration Act. The underlying facts of the juvenile delinquency adjudication may be “considered when determining whether to depart from the recommended risk level,” but cannot be used to assess points for criminal history under the RAI. (County Ct, Otsego Co)
Third Department continued

**People v Justiniano**, 134 AD3d 1172, 20 NYS3d 714 (3rd Dept 12/3/2015)

The defendant’s waiver of a right to appeal was invalid because “the record is devoid of any indication that an appeal waiver was actually a component of the plea agreement,” the prosecution was not sure if the defendant was executing a waiver in the absence of a sentencing commitment, and it is unclear whether the defendant understood that he did not have to execute a waiver.

The sentence of consecutive four-year terms of incarceration for four counts of second-degree burglary was harsh and excessive. The defendant was 18 years old when he committed these nonviolent offenses and had no prior involvement with the justice system as an adult. He had been abusing alcohol and marijuana and received treatment for substance abuse and depression during the pendency of the matter. He also apologized to the victims. And even the prosecution recommended a lesser aggregate sentence of 12 years. The judgment is modified as a matter of discretion and in the interest of justice so that the defendant’s sentences run concurrently rather than consecutively. (County Ct, Sullivan Co)

**People v Ramsey**, 134 AD3d 1170, 21 NYS3d 736 (3rd Dept 12/3/2015)

The defendant received ineffective assistance of counsel where defense counsel failed to object to the prosecution’s improper references to a witness’s stricken testimony. The evidence was not overwhelming, particularly with regard to the intent element. Therefore, “no reasonable defense lawyer could have thought that ... an objection would not have been worth making.” “[T]he prosecutor’s comments were so substantially prejudicial that they deprived defendant of a fair trial,” and while defense counsel otherwise provided appropriate representation, his failure to object in this instance requires reversal. (County Ct, Chemung Co)

In the online version of the **REPORT**, the name of each case summarized is hyperlinked to the opinion provided on the website of the New York Official Reports, [www.nycourts.gov/reporter/Decisions.htm](http://www.nycourts.gov/reporter/Decisions.htm).

**People v Harper**, 132 AD3d 1230, 17 NYS3d 797 (4th Dept 10/2/2015)

Corroboration of the defendant’s confession to the underlying predicate felony was not required to sustain his felony murder conviction. However, where the defendant admitted that the homicide occurred during an attempted robbery, but there is no additional proof that there was an attempted robbery, the court erred by failing to dismiss the attempted robbery count. (County Ct, Erie Co)

**People v Heatherly**, 132 AD3d 1277, 17 NYS3d 220 (4th Dept 10/2/2015)

The court erred by refusing to dismiss the first-degree perjury count where the indictment “failed to ‘set forth the particular falsehood with clarity along with the government’s factual basis for asserting that it [was] false’....” The prosecution identified subject areas that they believed were perjurious, but did not identify any specific perjurious statements made by the defendant, despite numerous requests by defense counsel. As a result, the defendant was not given “‘fair notice of the accusations made against [her], so that [she would] be able to prepare a defense’....”

The defendant did not renew her motion to dismiss at the close of proof and failed to preserve her contention that the evidence is not legally sufficient to support conviction on the remaining counts. The defendant’s completion of the imposed sentence and period of post-release supervision renders her challenge to the severity of the sentence moot. (County Ct, Ontario Co)

**People v Richardson**, 132 AD3d 1239, 17 NYS3d 207 (4th Dept 10/2/2015)

There is insufficient evidence to support the second-degree assault conviction under Penal Law 120.05(3) because the police officer was not performing a lawful duty when he was injured. The police stopped the defendant for walking in the middle of the road in violation of VTL 1156(a) and “the officer was injured only after he attempted to perform [an] unlawful search”; even a limited pat-down search would not have been authorized unless there were reasonable grounds to suspect that the officer was in danger or there was probable cause to believe the defendant was guilty of a crime. (County Ct, Monroe Co)


The family court erred in determining that the mother neglected her children; because “the children were living with their father for over two months before the petition was filed, and thus they did not face ‘imminent danger of impairment,’” the petitioner had to prove “‘actual ... physical, emotional or mental impairment to the child[ren]’ that resulted in ‘serious harm ... to the child[ren], not just ... what might be deemed undesirable parental behavior’ (Nicholson v Scoppetta, 3 NY3d 357, 369).” While the Lewis County Department of Social Services was investigating the mother for neglect, the
father, who lived in Jefferson County, petitioned for and was granted custody and the children were living and thriving with their father. The petitioner moved to withdraw the petition soon after filing, asserting that child protective proceedings were unnecessary, but the court denied the motion and “directed petitioner to proceed with a fact-finding hearing.” At the hearing, the petitioner elicited testimony only from the father and a Lewis County caseworker. The caseworker testified only about the few weeks during which the children lived with the mother in Lewis County and asserted there was no effort to remove the children and the mother had improved the conditions of the home. And the father testified that he had no concerns while the children were living with the mother. (Family Court, Jefferson Co)

**People v Gardner, 132 AD3d 1349, 17 NYS3d 531 (4th Dept 10/9/2015)**

It was a federal constitutional double jeopardy violation to prosecute the defendant for second-degree criminal possession of a weapon in Oswego County after he pleaded guilty to second-degree criminal possession as to the same weapon in Onondaga County. The charges in both counties arose from an incident in which the defendant discharged a firearm into the bedroom window of an occupied residence in Oswego County, was arrested later that day in Onondaga County, and the handgun was found in his vehicle. (County Ct, Oswego Co)

**Matter of Heffner v Jaskowiak, 132 AD3d 1418, 17 NYS3d 556 (4th Dept 10/9/2015)**

The family court erred in confirming the support magistrate’s decision to impose a sentence of three months in jail and three years’ probation for the father’s willful failure to obey an order of child support. Family Court Act 454(3) requires that the sentencing court choose between probation or jail; “it does not authorize both probation and a jail term.” The probation sentence must be vacated because the father has already completed the jail term. (Family Court, Oswego Co)

**People v Landry, 132 AD3d 1351, 17 NYS3d 533 (4th Dept 10/9/2015)**

The defendant did not move to withdraw his plea or to vacate the judgment of conviction and so failed to preserve his claim under Boykin v Alabama (395 US 238 [1969]) that the court failed to advise him of the constitutional rights he was forfeiting by pleading guilty. The exception to the preservation rule recognized in People v Tyrell (22 NY3d 359 [2013]) does not apply because the defendant in Tyrell was sentenced immediately after his plea and had no opportunity to move to withdraw his plea but here the two-month period between plea and sentencing provided “ample time to bring a motion.” (County Ct, Onondaga Co)

**People v Ackerman, 133 AD3d 1196, 20 NYS3d 258 (4th Dept 11/13/2015)**

The court properly imposed an enhanced sentence where the defendant was informed at the time of the plea that the court could impose an enhanced sentence “in the event that he committed any new crimes or got into any ‘trouble,’” and there was a legitimate basis for his post-plea arrest. The defendant admitted he violated a no-contact order of protection by having repeated contact with the person in whose favor the order was issued and it is irrelevant that the contact was initiated by the protected person or that the parties did not have any physical or verbal disputes.

The court properly sentenced the defendant as a second-degree felony offender because his Florida conviction for third-degree felony battery (Fla Stat 784.041[1]) is equivalent to second-degree assault under Penal Law 120.05(1). “[T]he term ‘great bodily harm’ as used in the Florida statutes is ‘analogous to New York’s requirement of serious physical injury’ ….” (County Ct, Wyoming Co)

**People v Casey, 133 AD3d 1236, 20 NYS3d 768 (4th Dept 11/13/2015)**

The court erred by denying without a hearing the defendant’s CPL 440.10 motion to vacate a judgment convicting her of first-degree arson and two counts of second-degree murder where the defendant claimed “that defense counsel was deficient in failing to utilize alleged nationally recognized standards of fire investigation, either through the testimony of an expert or to aid in the cross-examination of the [prosecution’s] expert.” The prosecution’s expert presented a theory that the fire was intentionally set, but the defendant contends that the expert’s opinion was scientifically flawed based on information in the National Fire Protection Association 921 Guide for Fire and Explosion Investigations (NFPA 921 guide). “[A] hearing must be held to determine whether the NFPA 921 guide was generally accepted in New York State as authoritative at the time of the trial and whether expert testimony was available.” (County Ct, Steuben Co)

**People v Slade, 133 AD3d 1203, 20 NYS3d 763 (4th Dept 11/13/2015)**

The third-degree criminal possession of a controlled substance and second-degree criminally using drug paraphernalia convictions must be reversed because the court erred by admitting an oral statement made by the defen-
dant for which the defendant was not given a CPL 710.30 notice. During the execution of a search warrant, while the defendant was handcuffed and lying on the floor, the police asked him where he resided and he responded, “here.” The pedigree exception does not apply because the question was likely to elicit an incriminating response and the question was connected to an essential element of the charged crimes. The admission of the statement cannot be considered harmless error where, although the evidence presented was legally sufficient to establish that the defendant had constructive possession of the drugs and drug paraphernalia found in the residence, the prosecution relied heavily on the inadmissible statement to establish the defendant’s constructive possession. (Supreme Ct, Monroe Co)

**People v Yuson, 133 AD3d 1221, 20 NYS3d 263 (4th Dept 11/13/2015)**

By establishing that the defendant “used the personal identifying information” of the accusers, the prosecution established that the “defendant assumed their identities for purposes of [Penal Law 190.80(3) (first-degree identity theft)].” This Court declines to follow the First Department’s decision in *People v Barden* (117 AD3d 216, lv granted 24 NY3d 959 [2014]), “which conclude[d] that ‘assumption of identity is not necessarily accomplished when a person uses another’s personal identifying information’ …, and that the [prosecution] must prove both that a defendant used the personal identifying information of the victim and that he assumed the victim’s identity …. Instead, we conclude that the statute is unambiguous and defines the phrase ‘assumes the identity of another person’ by the phrase that immediately follows it, i.e., by, inter alia, using the personal identifying information of that other person ….” (County Ct, Monroe Co)

【Ed. Note: The Court of Appeals did not address this issue in People v Barden (2016 NY Slip Op 04659 [6/14/2016]).】

**People v Edmonds, 133 AD3d 1332, 20 NYS3d 802 (4th Dept 11/20/2015)**

In this Sex Offender Registration Act proceeding to determine the defendant’s risk level, the court erred in assessing 20 points under the risk factor for continuing course of sexual misconduct where the prosecution “presented evidence that defendant engaged in acts of sexual contact with the victim on more than one occasion, [but did not] establish ‘when these acts occurred relative to each other’ ….” (County Ct, Monroe Co)

**Matter of Martin v Flynn, 133 AD3d 1369, 20 NYS3d 812 (4th Dept 11/20/2015)**

In this family offense proceeding, the family court improperly required that the respondent obtain a mental health evaluation where “[t]he court did not order the evaluation as a condition ‘necessary to further the purposes’ of the order of protection …, and the court was not otherwise authorized to order the evaluation pursuant to Family Court Act § 841.” (Family Court, Erie Co)

**Matter of Underwood v Fiala, 133 AD3d 1319, 20 NYS3d 286 (4th Dept 11/20/2015)**

The court erred by granting the petition for relicensing and directing the New York State Commissioner of Motor Vehicles to restore the petitioner’s full driving privileges where the petitioner’s license was revoked after a conviction for driving while ability impaired and the Commissioner retroactively applied amended regulations in denying the petitioner’s application for a new license.
Fourth Department continued

A driver’s license is a privilege, not a vested right. “Thus, [the Commissioner] remained free to apply her most recent regulations when exercising her discretion in deciding whether to grant or deny petitioner’s application for relicensing.” (Supreme Ct, Monroe Co)

People v Smith, 134 AD3d 1453, 21 NYS3d 516 (4th Dept 12/23/2015)

Reversal is warranted where the court erred by denying the defendant’s motion to suppress evidence that a police officer retrieved from the defendant’s underwear during a traffic stop where the officer’s visual inspection of the defendant’s genital area, conducted on a city street, was not based upon reasonable suspicion that the defendant was concealing a weapon or evidence underneath his clothing. While the officer was entitled to conduct a pat search for weapons before transporting the defendant to the police station to charge him with traffic infractions, a person’s underwear “is not “a common sanctuary for weapons” ....” (County Ct, Monroe Co)

People v Kennard, 134 AD3d 1519, 23 NYS3d 522 (4th Dept 12/31/2015)

Reversible error occurred where the court denied the defendant’s motion to suppress statements made to an investigator after the defendant unequivocally invoked her right to counsel during a custodial interview, and “there is a ‘reasonable possibility that the error might have contributed to defendant’s conviction’ ....” While the defendant’s statement, “I think I need to talk to an attorney,” is not, by itself, unequivocal, her subsequent statement—whether it was “I need to” or “I’ll need to”—in response to the investigator’s statement, “Would you like to talk to one? If you think that, that’s fine. That’s up to you,” is an unequivocal request for counsel. (County Ct, Monroe Co)

People v Minemier, 134 AD3d 1551, 23 NYS3d 786 (4th Dept 12/31/2015)

The court did not abuse its discretion by failing to adjudicate the defendant a youthful offender, and while the court must determine on the record whether the defendant is a youthful offender, it is not required to provide reasons for denying youthful offender status. Where the court reviews at sentencing written statements that are not disclosed to a defendant, the court must identify the statements it reviewed and explain why it is refusing to disclosure them, but the defendant is not entitled to disclosure of confidential information. (County Ct, Monroe Co)

[Ed. Note: Leave to appeal was granted on Apr. 12, 2016 (27 NY3d 1003).]

People v Utley, 134 AD3d 1554, 21 NYS3d 913 (4th Dept 12/31/2015)

The defendant’s endangering the welfare of a child conviction must be reversed because the court improperly allowed the jury to consider conduct for which the defendant was not indicted. In response to a jury note, “the court instructed the jurors that they were not precluded from considering conduct other than the alleged rape and incest” that were originally part of the indictment. The defendant’s “right to have charges preferred by the grand jury rather than the prosecutor at trial was violated” since the instructions may have led the jury to convict the defendant of acts not listed in the indictment. It is impossible to determine whether the act of endangerment found by the jury was an act for which the defendant was indicted. (County Ct, Cattaraugus Co)

Defender News (continued from page 10)

Comptroller Audits Ignition Interlock Use

The same week as the enforcement initiative was announced, the State Comptroller released an audit of ignition interlock program monitoring, with a focus on six counties: Cortland, Erie, Montgomery, Otsego, Suffolk, and Wayne. The audit found that “[a]ll six counties ... had a process for monitoring installations and negative IID activities of operators, and generally worked with operators to ensure compliance. However, county-designated officials responsible for such monitoring did not consistently report operator violations to the appropriate court and district attorney as required.” County responses to the audit results noted that, in some cases, the court or district attorney instructed the monitor to stop reporting negative activity, and that in certain probation cases, probation officers used graduated sanctions instead of reporting the negative activity. County responses and corrective action plans appear in the individual county reports at the links above.

Proposed Increase in Impaired Driving Program Course Fee

The NYS Department of Motor Vehicles has proposed increasing by $15 the fee for the impaired driving program (IDP) course, formerly known as the Drinking Driver Program or DDP; the maximum fee would go from $300 to $315. The proposal appears in the July 13, 2016 issue of the State Register, starting at p. 19. According to
the rule making notice, the amended regulation requires
that IDP providers pay a maximum of $20 of the total pro-
gram fee to curriculum providers for curriculum enhance-
ments. The current curriculum enhancement rate, which
includes the cost of the student workbook, is $5. Comments on the proposal are due on Aug. 27, 2016.
Those who submit comments are asked to forward a copy
to the Backup Center.

NYS Domestic Incident Report Revised

The Division of Criminal Justice Services (DCJS) has
redesigned the Domestic Incident Report (DIR) form “to
improve its format and enhance its effectiveness and
usability by law enforcement professionals. These
improvements make it easier to complete the form accu-
rately and allow law enforcement to capture additional
information, making the form more useful to law enforce-
ment and enhancing the data included in the state’s
Domestic Incident Report Repository.” The DIR instruc-
tions also include “a list of some frequently seen offenses
in domestic violence incidents.” DCJS has produced an
online training program about using the new DIR, which
takes about 30 minutes to complete. Additional docu-
ments provided with the training include an overview of
the DIR Repository, a community action toolkit for
addressing intimate partner violence against transgender
people, and information about strangulation, including
symptoms, visible signs, and interview questions.

The safe contact information section of the new DIR
form now prompts investigating officers to ask the indi-
vidual identified as the victim for an email address.
According to the training, this will assist in the “timely
prosecution” of cases because prosecutors can use the
email address to obtain a supporting deposition or corrob-
orating affidavit from the complainant and such an elec-
tronic document has been accepted in court proceedings.
There are a few trial court decisions holding that, under
certain circumstances, a reply from the email address of
the complainant is sufficient to meet the subscribed
and/or verified requirements of CPL 100.20, 100.30. See, eg,
People v. Sanchez, 47 Misc 3d 612 (Criminal Ct, Queens Co
1/28/2015). However, it does not appear that there are any
appellate decisions directly on point. An email exchange
between the prosecution and an email address alleged to
be the complainant’s that is being used to meet the sub-
scription and verification requirements should be carefully
analyzed and challenges made where appropriate.

Court Rule Revised to Emphasize
Provision of Interpreter at No Expense

Part 217 of the Uniform Rules for the Trial Courts
have been amended, effective June 1, 2016, to specifically

Gradess Awarded Norman J. Redlich Award for Capital Defense Distinguished Service

On July 14, 2016, NYSDA Executive Director Jonathan
Gradess was honored by the Capital Punishment Com-
mittee of the New York City Bar Association with the 2016
Norman J. Redlich Award for Capital Defense Dis-
tinguished Service. This award is presented to a practi-
tioner in New York who has demonstrated outstanding
lifetime commitment to capital defense work, whether as
counsel for a capital defendant or as an advocate for the
abolition of the death penalty. For decades, Jonathan has
been a steadfast advocate for abolition of the death
penalty. He expressed gratitude for receiving an award in
Norman Redlich’s name whom he went on to speak of in
admiration. He also congratulated the new generation of
death penalty defense advocates who are necessary to
achieving abolition of the death penalty in the United
States of America and around the world. Enthusiastically,
he said this is a wonderful time to receive this award
because “abolition of the death penalty is just on the
horizon.”

Marc Shapiro accepted the Norman J. Redlich Pro
Bono Award on behalf of his firm Orrick, Herrington &
Sutcliff LLP. John Blume, Professor of Law and Director of
the Cornell Death Penalty Project, delivered a moving
keynote address in which he discussed three clients who
have intellectual disabilities who were wrongfully sen-
tenced to death, two of which were eventually exonerat-
ed. He was clear that there is significant racial disparity in
imposing a death sen-
tence, pointing out that
black defendants are
still more likely than
white defendants to be
sentenced to death; and
the “black male defen-
dant, white female vic-
tim” scenario accounts
for most cases that
result in a penalty of
death.

NYSDA’s Executive Director, Jonathan E. Gradess, receives the Norman J. Redlich Award for Capital Defense Distinguished Service.
NYSDA Membership Application

I wish to join the **New York State Defenders Association** and support its work to uphold the constitutional and statutory guarantees of legal representation to all persons regardless of income and to advocate for an effective system of public defense representation for the poor.

Enclosed are my membership dues:

- $75 Attorney
- $40 Defender Investigator
- $40 Non-Attorney
- $15 Student
- $15 Prisoner

Name ___________________________________________ Firm/Office _____________________________

Office Address __________________________________ City ___________________ State _____ Zip ________

Home Address __________________________________ City ___________________ State _____ Zip ________

County _______________ Phone (Office) ___________ (Fax) _______ (Home) ____________

E-mail (Office) __________________________________ (Home) _____________________________

At which address do you want to receive membership mail?  □ Office  □ Home

Please indicate if you are:

□ Assigned Counsel  □ Public Defender  □ Concerned Citizen

□ Defender Investigator  □ Legal Aid Attorney  □ Private Attorney  □ Student  □ Prisoner

**Attorneys and law students please complete:** Law School ___________________ Degree _______

Year of graduation _______ Year admitted to practice _______ State(s) ______________________

I have also enclosed a tax-deductible contribution: □ $500  □ $250  □ $100  □ $50  □ Other $ ____________

Checks are payable to **New York State Defenders Association, Inc.** Please mail coupon, dues, and contributions to: New York State Defenders Association, 194 Washington Ave., Suite 500, Albany, NY 12210-2314.

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