



Public Defense Backup Center REPORT

Volume XXXI Number 3

August–December 2016

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Bailey Affirmed, Other SBS and Forensic Evidence News

“Was the conviction based on junk science that was not challenged by the defense? (e.g. ‘shaken baby syndrome ...).” So begins one slide from a recent NYSDA training on challenging convictions via CPL article 440 motions. “For the first time, a New York appellate court has ruled that evidence once used to convict people in shaken-baby cases may no longer be scientifically valid,” begins a [Nov. 16, 2016 article](#) in the Rochester *Democrat and Chronicle* reporting on the Fourth Department decision upholding the trial court determination that Rene Bailey’s murder conviction must be overturned.

These are just two examples of the continuing upheaval in the world of forensic medicine—and forensic evidence in general. Nearly two years ago, the *REPORT* (p. 9) covered challenges to the so-called “Shaken Baby Syndrome” (SBS), calling the Monroe County *Bailey* case a guidepost, and at the 2015 NYSDA Annual Conference, the attorney handling that post-conviction matter presented information on defending SBS cases. The November 10 memorandum [affirmance](#) of the defense victory on a CPL 440 motion notes that “In general, advancements in science and/or medicine may constitute newly discovered evidence ... and we conclude that defendant established, by a preponderance of the evidence ... that ‘a significant and legitimate debate in the medical community has developed in the past ten years’” about medical assumptions concerning the cause of head injuries to young children.

Concern about SBS extends beyond courtrooms and individual cases. Conferences, blogs, and other venues put SBS issues into the mainstream. For example, see a November 20 post entitled “[Shaking debate back in the courts and in the news](#)” on the “On Shaken Baby” blog. It reports not only the *Bailey* decision but also an acquittal in a South Dakota jury trial centered on SBS evidence, Minnesota press coverage of SBS issues, and a footnote in the new report on forensic science from the President’s Council of Advisors on Science and Technology (PCAST). The footnote cites “an ‘urgent’ need to examine shaken baby theory”

NYSDA works to keep attorneys informed about SBS and other forensic news. The e-newsletter “News Picks from NYSDA Staff,” emailed to members and posted on the website, often includes such information; see for instance the July 29 edition item on “[Expert Testimony is Vital In Shaken Baby Syndrome](#) (Abusive Head Trauma) Cases and Others.” The Backup Center’s clearinghouse of information includes a variety of SBS materials, both recent and archival, such as those from a training on “Shaken Baby Syndrome Defense Strategies” at the 2005 Annual Conference. Attorneys whose clients face charges based on SBS evidence are encouraged to contact the Backup Center.

PCAST Report Questions Most Types of Forensic Evidence

The [PCAST report](#) mentioned above questions the scientific underpinnings of most forensic disciplines, as noted in an [article](#) on the National Judicial College website. It focuses on “‘forensic feature-comparison methods,’” referring to “the wide variety of methods that aim to

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INSIDE — Pull-Out:
Getting the Expert Funds You Need
Under County Law § 722-c
November 2016

determine whether an evidentiary sample (e.g., from a crime scene) is or is not associated with a potential source sample" Release of the report, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*, and earlier information leaked about it, were included in "News Picks" on September 19 and 30. These and all other archived News Picks editions are available on the NYSDA website at a link on the home page, or directly at www.nysda.org/?page=NewsPicks.

New Public Defense Measures Signed Into Law

Off-Hours Arraignment Bill

The Governor has signed two important public defense measures into law. The first bill, [chapter 492 \(S7209-A\)](#), gives the Chief Administrator of the Courts the authority to adopt, after consultation with the New York State Office of Indigent Legal Services, institutional providers of criminal defense services and other members of the criminal defense bar, the district attorney, the local magistrates association, and others, a plan for establishing off-hours arraignment parts in select local criminal courts of a county "where the use of such parts will facilitate the availability of public defenders or assigned counsel for defendants in need of legal representation at such proceedings." The law specifically provides that, "[t]o the extent practicable, and notwithstanding that any such plan shall designate off-hours arraignment parts in fewer than all of the local criminal courts of a county, each plan ... shall provide for the periodic assignment of all of the judges and justices of all the local criminal courts in the affected county to the off-hours arraignment parts designated therein." The bill takes effect on Feb. 26, 2017 (the 90th day after Nov. 28, 2016).

Streamlined Appellate "Poor Person" Application Process

The second bill, [chapter 459 \(A9522\)](#), authorizes sentencing judges to grant an application for poor person status on appeal where the defendant has been represented by appointed counsel in the trial court. The new CPL 380.55 requires counsel to "represent that the defendant continues to be eligible for assignment of counsel and that granting the application will expedite the appeal." Denial of the application is without prejudice to the defendant seeking poor person status in the appellate court. The law is effective Nov. 28, 2016.

Governor Urged to Sign Justice Equality Act

Groups across the state have called on the Governor to sign the unanimously-passed, bipartisan bill requiring

the State to reimburse counties for county public defense service costs. The [last issue](#) of the *REPORT* described the bill's passage.

A diverse coalition of over 75 organizations (list in formation) is advocating the enactment of the Justice Equality Act (S.8114/A.10706); they include the American Bar Association, NAACP, New York State Association of Counties, NYS Catholic Conference, and Veterans of Foreign Wars. Among those who penned op-ed columns about the measure are NYS Legislative Black, Puerto Rican, Hispanic & Asian Legislative Caucus members Nick Perry (Amsterdam News) and Jeffrion Aubry (New York Law Journal). The Justice Equality Facebook page—bit.ly/JusticeForNY—has a factsheet, supporters list, and a compelling 30-second video urging the Governor to sign the bill.

49th Annual NYSDA Conference: Reform, CLE, and Camaraderie

Offering 12 hours of mandatory continuing legal education (CLE), NYSDA provided training sessions on a variety of topics at its 49th Annual Conference in July 2016. Recurring topics like updates on U.S. Supreme Court decisions were on the program along with extremely timely topics like asserting clients' right to addiction medicine as the opioid epidemic continues. Faculty included frequent Annual Conference presenters and others new to this event, which was attended by over 300 people. Formal and informal opportunities to discuss issues affecting public defense abounded, from the Chief Defender Convening to receptions and eating together between CLE morning and afternoon sessions.

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THE REPORT IS PRINTED ON RECYCLED PAPER

Recognizing Public Defense Reform Efforts and Client-Centered Representation

Both public defense policy work and client-centered practice received attention at the annual Awards Luncheon. Scott Levy, Director of the [Fundamental Fairness Project](#) at The Bronx Defenders, who received the Kevin M. Andersen Memorial Award created by the Genesee County Public Defender Office, was recognized for work of both types. [Levy](#) has developed “creative public policy advocacy and impact litigation strategies informed by individual representation,” according to Executive Director Robin Steinberg, who nominated him.

Joanne Macri, former Director of NYSDA’s Criminal Defense Immigration Project and now Director of Regional Initiatives for the [New York State Office of Indigent Legal Services](#) received the Wilfred R. O’Connor Award for 2016. She was the first woman to get the O’Connor award, which recognizes an attorney in practice fifteen or more years who practices in the area of public defense and exemplifies a client-centered sense of justice, persistence, and compassion.

Finally, the 2016 Service of Justice Award was presented to three elected officials for their roles in the unanimous passage of public defense reform legislation now called the Justice Equality Act (S.8114/A.10706), which is discussed above. The sponsors of the bipartisan bill, Assemblymember Patricia Fahy and Senator John A. DeFrancisco, along with former St. Lawrence County Public Defender and current County Attorney Stephen D. Button, who worked tirelessly to build support for the bill, were the recipients. Details of all the awards can be found in the [press release](#).

NYSDA Executive Director Honored as NYSDA 50th Nears

Looking back at NYSDA’s accomplishments as its 50th anniversary approaches necessarily highlights the work of its first and only Executive Director, Jonathan E. Gradess. And it is not just NYSDA colleagues taking note of his work. New York Nonprofit Media presented him an inaugural [Cause Award](#) for Overall Sector Support on Nov. 2, 2016. The Capital Region Chapter of the New York Civil Liberties Union made Gradess the 2016 recipient of the Carol S. Knox Award for his untiring support and promotion of the Justice Equality Act, which is still awaiting the Governor’s signature (see p. 2). And on a national level, he [received](#) the Reginald Heber Smith Award on November 11 at the annual conference of the National Legal Aid and Defender Association (NLADA). Bill Leahy, Director of the New York State Indigent Legal Services Office, who nominated Gradess, presented the award.

In his NLADA acceptance speech, Gradess noted that he had been offered the job of NYSDA Executive Director

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detailed information

at the 1977 NLADA conference in Detroit. The focus of his speech, however, was offering hope and solace to those fearful for the future of defender and civil legal services clients, lawyers, and programs. He reminded long-time NLADA attendees, and advised newer ones, that there have been other periods of political attacks on our client and professional communities, and we have persevered.

Gradess Retirement Announced, Search for New ED Underway

In early November, NYSDA began a national search for the Association’s second Executive Director. Gradess has announced his intention to resign following the 50th Annual Meeting and Conference in 2017. Those interested in applying for this demanding and rewarding position can find information here: www.nysda.org/page/EDSearch.

Family Court News

Highlighted below are some recent developments relating to Family Court matters, particularly those relevant to representation of adult respondents.

De Facto Parents May Now Seek Custody, Visitation

In *Matter of Brooke S.B. v Elizabeth A.C.C.* (2016 Slip Op 05903 [8/30/2016]), the Court of Appeals held that persons who have acted as a parent to a child may petition for custody and visitation even if they are not married to a biological parent of the child and have no formalized adoptive relationship to the child, where they have agreed to the conception and rearing of the child. The opinion overrules the prior precedent set in *Matter of Allison D.* (77 NY2d 651 [1991]).

Second Families Matter Conference a Success

The Families Matter: Parent Defense in New York conference held on Oct. 14-15, 2016 in Albany offered a variety of training sessions to the nearly 170 participants. The topics included Article 10 and Domestic Violence; Overcoming Barriers to Reunification; Working with Clients with Intellectual Disabilities and Utilizing the Americans with Disabilities Act as an Advocacy Tool;

Dismantling and Rebuilding “Best Interests”; and Fundamentals in Action: Discovery in Neglect Proceedings. Attorneys seeking the materials from these and other sessions from this successful conference should contact Family Court Staff Attorney Lucy McCarthy at the Backup Center. The brochure listing the full program is available on the conference website at www.nyparentdefense.com.

DOJ Civil Rights Division Issues Guidance Letter on Title VI

The federal Department of Justice Civil Rights Division, reacting to complaints alleging discrimination in the child welfare system on the bases of race, color, and national origin, issued a Guidance Letter in October 2016 addressing Title VI of the Civil Rights Act in the context of child welfare. <https://www.justice.gov/crt/page/file/903901/download>

Statutory Speedy Trial Issues Addressed by Various State Appellate Courts

A number of appellate decisions summarized in this issue (starting at p. 6) address statutory speedy trial questions, including interpretation of statutory exceptions in Criminal Procedure Law 30.30 and procedural matters. Those decisions include:

Court of Appeals

- *People v Allard*, 2016 NY Slip Op 06853 (10/20/2016) (preservation of motion claims). The [November 2016 edition](#) of the Center for Appellate Litigation’s *Issues to Develop at Trial* discusses the *Allard* decision and offers practice tips on incorporating the decision into speedy trial motions.
- *People v Clarke*, 2016 NY Slip Op 06939 (10/25/2016) (due diligence in obtaining DNA exemplar)
- *People v Henderson*, 2016 NY Slip Op 06938 (10/25/2016) (due diligence in DNA testing, facts outside the record)

Second Department

- *People v Cox*, 139 AD3d 1083 (2nd Dept 5/25/2016) (due diligence in obtaining DNA sample)

Third Department

- *People v Mandela*, 142 AD3d 81 (3rd Dept 7/7/2016) (calculation of speedy trial period)

Fourth Department

- *People v Williams*, 137 AD3d 1709 (4th Dept 3/25/2016) (absence or unavailability of the defendant, preservation of claim for appeal)

Representing Non-Citizen Clients: Regional Centers Now Open

Regional Immigration Assistance Centers are now available around New York State to provide training and assistance to public defense lawyers representing non-citizen clients in criminal and family court proceedings. The Centers, funded by grants from the New York State Office of Indigent Legal Services, are operating in six regions: Western New York (Region 1); Central New York (Region 2); Northern New York (Region 3); Hudson Valley (Region 4); New York City (Region 5); and Long Island (Region 6). Additional information about each Center, including contact information, is available on NYSDA’s website at www.nysda.org/page/CrimImmResources.

Recent Decisions on Advising Non-Citizens in Criminal Proceedings

The Case Digest in this issue of the *REPORT* includes summaries on advice provided to non-citizens in criminal proceedings, including information provided by the court pursuant to *People v Peque* (22 NY3d 168 [2013]). Relevant summaries include *People v Belliard* (135 AD3d 437 [1st Dept 1/7/2016]), *People v Dennis* (140 AD3d 789 [2nd Dept 6/1/2016]), and *People v Moore* (141 AD3d 604 [2nd Dept 7/13/2016]), as well as the decisions cited in the Editor’s Note after the summary of *Belliard*.

Revised Parole Release Regulations Proposed

In 2011, the Legislature directed the Parole Board to modernize its release decision-making process. By Oct. 1, 2011 the Board was directed to establish new written procedures incorporating “risk and needs principles” to measure a person’s “rehabilitation” and “likelihood of success upon release.” But the Board failed to act until July 2014 and the regulation it belatedly adopted—calling for mere unguided and indiscriminate “use” of the COMPAS risk assessment instrument—was roundly criticized as meaningless. Court challenges to the regulation were complicated by procedural issues. See *Matter of Linares v Evans*, 26 NY3d 1012 (2015) (declining to rule on legality of regulation for prudential reasons). Nevertheless, the issue gained traction with a highly critical [New York Times editorial](#), and parole decision-making reform was mentioned in Governor Cuomo’s 2016 State of the State address.

A few months ago, the Parole Board filed a new proposed regulation for public comment that was published in the [Sept. 28, 2016 issue](#) of the *State Register* (pp.7-8). The proposed rule would require Board members to be “guided” by the COMPAS risk and needs assessment instru-

ment when making release decisions. Importantly, the proposed regulation provides that “[i]f a Board determination, denying release, departs from the COMPAS scores, an individualized reason for such departure shall be given in the decision.” Other regulatory changes include a direction that all statutory parole release factors be discussed during a parole release interview, and that reasons for parole release denials shall be explained in “factually individualized and non-conclusory terms.”

The proposed rule also includes new parole release criteria for persons serving sentences for crimes commit-



NYSDA Executive Director Jonathan E. Gradess (l) received the National Legal Aid and Defender Association's Reginald Heber Smith Award on Nov. 11, 2016. It was presented by Bill Leahy, Director of the NYS Indigent Legal Services Office (r), who nominated him. (Photo courtesy of NLADA.)

ted as a minor (under 18). See *Matter of Hawkins v NYS Dept. of Corr. & Comm. Supervision*, 140 AD3d 34 (3rd Dept 4/28/2016) [summarized at p. 25]. Board members would be directed to consider “the diminished culpability of youth” and a person’s “growth and maturity.” In addition, Board members must consider whether certain “hallmark features of youth” (“immaturity, impetuosity, a failure to appreciate risks and consequences, and susceptibility to peer and familial pressures”) were “causative” or “contributing factors” to the crime of conviction.

Board members discussed the language of the proposed rule at their Aug. 22, 2016 meeting; the meeting video is available on YouTube at <https://www.youtube.com/watch?v=EyZ4g9cBDH0>. Comments on the proposed regulation were due in mid-November and the final rule should be published in the *State Register* in the next couple of months.

Defendants Not Ineligible for Judicial Diversion when Charged with Non-Specified “Neutral” Offenses

The First Department has held that a defendant is not automatically disqualified from applying for judicial diversion under Criminal Procedure Law article 216 when that person is charged with both statutorily qualifying offenses and other offenses that are not defined as qualifying or disqualifying offenses. See *People v Smith*, 139 AD3d 131 (1st Dept 4/5/2016) [summarized at p. 12]. As noted in *Smith*, the Court of Appeals has not addressed this specific issue and trial courts have reached conflicting conclusions. ⚖

CONFERENCES & SEMINARS

Sponsor: National Association of Criminal Defense Lawyers
Theme: Advanced Criminal Law: Winning Strategies for the Defense
Dates: January 15-18, 2017
Place: Aspen, CO
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/cle/

Sponsor: National Association of Criminal Defense Lawyers
Theme: 2017 Midwinter Meeting & Seminar: The VooDoo of Voir Dire
Dates: March 1-4, 2017
Place: New Orleans, LA
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/cle/

Sponsor: New York State Defenders Association
Theme: 31st Annual Metropolitan New York Trainer
Date: March 11, 2017
Place: New York City
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Sponsor: New York State Defenders Association
Theme: 50th Annual Meeting & Conference
Dates: July 23-25, 2017
Place: Saratoga Springs, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org ⚖

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.supremecourt.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.

[Bosse v Oklahoma](#), No. 15–9173 (10/11/2016)

The Oklahoma Court of Criminal Appeals erred in concluding that this Court had, in *Payne v Tennessee* (501 US 808 [1991]), implicitly overruled *Booth v Maryland* (482 US 496 [1987]) with regard to the ban on a capital sentencing jury's consideration of victim impact evidence relating to "characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence" This Court alone can overrule one of its precedents. The State's contentions that the error did not affect the sentencing determination and that Oklahoma's mandatory sentencing review protected the defendant's rights "may be addressed on remand to the extent the court below deems appropriate."

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.

[Matter of Brooke S.B. v Elizabeth A.C.C.](#), 2016 NY Slip Op 05903 (8/30/2016)

"We agree that, in light of more recently delineated legal principles, the definition of 'parent' established by

this Court 25 years ago in *Alison D.* [77 NY2d 651] has become unworkable when applied to increasingly varied familial relationships. Accordingly, today, we overrule *Alison D.* and hold that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70." "We will no longer engage in the 'deft legal maneuvering' necessary to read fairness into an overly-restrictive definition of 'parent' that sets too high a bar for reaching a child's best interest and does not take into account equitable principles"

[People v Sosa](#), 2016 NY Slip Op 06054 (9/20/2016)

Because "[t]he record here evidences that defendant was aware that he had the right to a trial, had the benefit of his counsel's efforts and guidance, spoke with counsel, and chose to forgo trial in favor of entering a guilty plea," the Appellate Division order should be reversed; "the totality of the circumstances establish the voluntariness of the plea"

[People v Allard](#), 2016 NY Slip Op 06853 (10/20/2016)

A defendant would be well advised to file a reply to the prosecutor's opposition to a motion for dismissal on speedy trial grounds under CPL 30.30. Under the well-established procedure for preserving 30.30 errors, the defendant bears the initial burden of alleging the prosecution was not ready for trial within the statutory period, the prosecution must generally identify any exclusions on which they intend to rely, and the defense preserves challenges to those exclusions by identifying impediments to application of them. Here, the defendant did not file a reply but correctly contends that he was not required to do so because (1) he was statutorily entitled to a hearing under CPL 210.45 because the prosecution's opposition did not conclusively refute the defendant's motion "by unquestionable documentary proof," and, (2) at that hearing he argued, among other things, the prosecution's lack of due diligence, adequately preserving that issue for appeal.

[People v Brown](#), 2016 NY Slip Op 06858 (10/20/2016)

The "[d]efendant's new argument on this appeal—contrary to his assertion to the plea court—that his status as a first felony offender is erroneous; that, thus, his sentence is illegal as a matter of law; and that he must be resentenced as a second felony offender, is not established on this record. Accordingly, his request for resentencing, made for the first time on this direct appeal, fails, without

NY Court of Appeals *continued*

prejudice to defendant, if he be so advised, moving pursuant to CPL 440.20 for re-sentencing.”

People v Kangas, 2016 NY Slip Op 06857 (10/20/2016)

Denial of the defendant’s objection to admission of a record that the simulator solution used in the breath test administered to the defendant had been tested was properly affirmed. The defendant based his objection on CPLR 4539(b), which requires proof of some manner of preventing tampering or degradation of the image of any writing, etc., that is offered as an original, but that provision applies when a document that was created in hard copy is later scanned to create a digital image and the image is printed in the ordinary course of business. The provision in question does not apply to documents that originated in electronic format.

People v Roshia, 2016 NY Slip Op 06859 (10/20/2016)

The county court did not err in granting the prosecution’s application for the defendant to provide a buccal swab for DNA testing where the order directing him to provide a DNA sample was authorized by CPL 240.40(2)(b)(v).

Matter of Simon, 2016 NY Slip Op 06855 (10/20/2016)

The recommendation of the State Commission on Judicial Conduct that the petitioner Justice be removed from office is accepted. The petitioner violated several Rules Governing Judicial Conduct: he improperly used a sanction “to punish a legal services organization for a perceived slight”; used his office to bully and intimidate; repeatedly threatened to hold various village officials and employees “in contempt without cause or process”; and, outside the courtroom, “willfully injected himself into the political process involving the election of an office other than his own.”

People v Speaks, 2016 NY Slip Op 06856 (10/20/2016)

The order of the Appellate Division affirming the defendant’s conviction is affirmed. All but one of the defendant’s challenges to the testimony of a detective about descriptions of the perpetrators given by one testifying witness and one nontestifying witness were unpreserved and the court did not abuse its discretion in allowing the testimony as background information. The ineffective assistance of counsel claim “ignores the entirety of the representation defendant received at trial and further, is not supported on this record.”

People v Wiggs, 2016 NY Slip Op 06860 (10/20/2016)

The trial court provided counsel “with meaningful notice of the jury’s notes by reading the notes verbatim into the record in the presence of counsel, defendant, and the jury” Thus, the court’s failure to respond to the jury request for readback of testimony prior to accepting the verdict did “not constitute a mode of proceedings error”

People v Clarke, 2016 NY Slip Op 06939 (10/25/2016)

The Appellate Division properly found that the prosecution failed to exercise due diligence in obtaining a DNA exemplar from the defendant. The motion for an oral swab was made almost nine months after the indictment, and a medical examiner’s report dated about six months before the indictment had indicated that DNA was found on the gun recovered in the matter. That the medical examiner did not affirmatively notify the prosecution of DNA evidence available for comparison or of technology available to test the gun swabs did not constitute exceptional circumstances justifying a delay in seeking the defendant’s DNA, so the 161 days needed to test the DNA and produce a report was not excludable.

Matter of Cortorreal v Annucci, 2016 NY Slip Op 06943 (10/25/2016)

While, “as a general rule, when a requested inmate witness refuses to testify, a simple statement by the inmate on a refusal form that he or she does not want to be involved or does not wish to testify is sufficient to protect the requesting inmate’s right to call that witness,” a claim that coercion was used to secure the refusal requires inquiry. “A hearing officer presiding at an inmate’s disciplinary hearing violates the inmate’s right to call witnesses by failing to undertake a meaningful inquiry into a requested witness’s allegation that the witness had been coerced into refusing to testify in a related proceeding.” Where a refusing witness was transferred before a rehearing at which the witness still refused to testify, “[w]e cannot accept that a transfer from one DOCCS facility to another would eliminate the taint of any coercion that occurred.”

People v Henderson, 2016 NY Slip Op 06938 (10/25/2016)

The record does not support the ineffective assistance of counsel claim based on counsel’s failure to seek statutory speedy trial relief for adjournments granted to allow the medical examiner to conduct additional testing of DNA samples obtained before the indictment. The claim relies on assumptions as to protocols for successive DNA

NY Court of Appeals *continued*

testing that are outside the record, making the issue one appropriate for collateral or post-conviction proceedings. Nothing in the record demonstrates that the prosecution was not diligent in requesting DNA testing or that the manner in which the medical examiner conducted the testing was inconsistent with standard protocols.

People v Joseph, 2016 NY Slip Op 06945 (10/25/2016)

A building need not be large to fall within the exception, discussed in *People v McCray* (23 NY3d 621 [2014]), to the general rule that a burglary in any part of a building containing a dwelling is burglary of a dwelling, which elevates the crime to second-degree burglary under Penal Law 140.025(2). In *McCray*, the burglaries had occurred in nonresidential areas of a hotel and connected museum; the large size of the overall building was one factor considered. Here, the burglarized building was small but the deli basement that the defendant entered “was both entirely disconnected from the building and completely inaccessible to the residences in that building,” was not used by the residents for any purpose, and lacked any “close contiguity” with the dwellings.

Dissent: [Stein, J] “[A]lthough the residential portions of the building were inaccessible from the basement, they were not remote,” so the judicially-created exception to the statute’s definition of a dwelling, which has never been found applicable by an appellate court in this state, does not apply here either.

Villar v Howard, 2016 NY Slip Op 06944 (10/25/2016)

Because Erie County had no statutory obligation under General Municipal Law 50-e(1)(b) to indemnify the defendant Erie County Sheriff, the plaintiff did not need to serve a notice of claim. And the County’s passage of a resolution agreeing to act as insurer for the Sheriff specifically provided that it was not agreeing to be responsible for the Sheriff’s acts.

The Sheriff is required to safely keep inmates who cannot protect themselves like persons at liberty may do. The Sheriff may be liable for the alleged sexual assaults by other inmates even if he was he was not personally present and did not know that the plaintiff was particularly vulnerable to assault.

Resolution of a claim of governmental immunity, which is an affirmative defense, is not appropriate at this stage.

People v Wilson, 2016 NY Slip Op 06942 (10/25/2016)

The defendant’s invitation for this Court to adopt a bright-line rule precluding the prosecution from using “on cross-examination or rebuttal *any* statement provided by the defendant to the police after the defendant refuses to waive his *Miranda* rights” is declined. Such a rule would effectively allow perjury by permitting testimony at odds with prior statements to go unchallenged. The officer who took the statement testified at the hearing that he knew that statements taken after *Miranda* was invoked could be used for impeachment though not in the prosecution’s case-in-chief, but nothing in the record supports the contention that he consciously circumvented the defendant’s invocation of his right against self-incrimination or that the defendant’s statements were rendered involuntary as a matter of law.

Matter of Jamal S., 2016 NY Slip Op 07045 (10/27/2016)

The dissent below was on a question of law; jurisdiction exists here to review the appeal. Reversal of the Appellate Division’s reversal of the juvenile delinquency adjudication is warranted. Removing and searching the defendant’s shoes once he told police he was 15 years old, rather than 16 as initially claimed, was a reasonable protective measure taken while he was held awaiting notification and arrival of his parents.

Dissent: [Rivera, J] “The appeal should be dismissed for lack of jurisdiction under CPLR 5601(a) because the Appellate Division’s two-justice dissent was not on a question of law.” The reasonableness of police conduct is a mixed question of law and fact that is generally beyond review here.

People v Guerrero, 2016 NY Slip Op 07044 (10/27/2016)

By pleading guilty to all counts of an amended indictment, the defendant “forfeited his right to challenge both the underlying ‘DNA indictment’ and the amended indictment that named him.” Failure to identify an accused person by name is not a jurisdictional defect and so does not survive a guilty plea for purposes of appeal. The defendant also forfeited by his plea the argument that certain hearsay statements were improperly used to link the defendant’s DNA and the DNA profile in the DNA indictment.

Dissent: [Rivera, J] The conviction should be reversed and the indictment dismissed because “a Grand Jury has never accused defendant specifically of the crime for which he stands convicted, and the amended indictment that substituted his name for the DNA profile of the unknown perpetrator was not the product of a Grand Jury’s deliberative process” The defendant’s claim—that substituting his name for the DNA identifier in the

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original indictment required grand jury action, not merely a court order to amend—“concerns who may accuse defendant based on evidence of a match to the inculpatory DNA, and therefore goes to the essential role of the Grand Jury and the ‘integrity of the process’” Such issue was not forfeited by the guilty plea.

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.

**People v Colasuonno, 135 AD3d 418, 23 NYS3d 179
(1st Dept 1/5/2016)**

The defendant’s attempted first-degree assault conviction is reversed and the matter remanded for a new trial. The court’s charge was defective where, “[c]onsidered as a whole, the court did not adequately convey the principle that, if the jury found defendant not guilty of the top count of attempted murder in the second degree on the basis of justification, it should not consider any lesser counts to the extent based on the same conduct” The prosecution and defense presented contradictory versions of events and “there is no way of knowing whether acquittal of the top count was based on a finding of justification.” (Supreme Ct, Bronx Co)

**People v Belliard, 135 AD3d 437, 22 NYS3d 425
(1st Dept 1/7/2016)**

The appeal is held in abeyance and the matter remitted to give the defendant “the opportunity to move to vacate his plea upon a showing that there is a ‘reasonable probability’ that he would not have pleaded guilty had the court advised him of the possibility of deportation” Despite references to immigration consequences during the plea proceeding, the court failed to advise the defendant that if he is not a citizen, he could be deported based on his plea, as required under *People v Peque* (22 NY3d 168 [2013]). (Supreme Ct, Bronx Co)

[*Ed. Note: For additional First Department decisions addressing issues related to People v Peque, see People v Corporan* (135 AD3d 485 [1st Dept 1/12/2016]); *People v Diakite* (135 AD3d 533 [1st Dept 1/14/2016]); *People v Manon* (135 AD3d 586 [1st Dept 1/21/2016]); *People v Pastor* (136 AD3d 493 [1st Dept 2/11/2016]); *People v Lovejoy* (136 AD3d 513 [1st Dept 2/16/2016]); *People v Teron* (139 AD3d 450 [1st Dept 5/5/2016]); and *People v Tejada* (141 AD3d 444 [1st Dept 7/14/2016]).]

**People v Kindell, 135 AD3d 423, 23 NYS3d 65
(1st Dept 1/7/2016)**

The record is sufficient to establish that the defendant received ineffective assistance of counsel where defense counsel failed to move to reopen the suppression hearing based on trial testimony by a prosecution witness that, “if credited, would have undermined the ruling that the tools were admissible because they were in plain view. This was not a minor or routine inconsistency; the superintendent’s version was completely at odds with a plain view theory.” The defendant met the reasonable diligence requirement because, even if the defendant is assumed to know whether the bag containing the tools was closed or open, he could not have known that the prosecution’s “witness would completely contradict the police officers on the critical suppression issue. Moreover, if at the hearing, he had taken the stand to present his account of the arrest, his credibility would have been subject to impeachment because [of] his status as an interested witness and his lengthy criminal record.” (Supreme Ct, New York Co)

Dissent: The defendant should be required to raise his ineffective assistance claim in a CPL 440.10 motion because it “involves matters that are not fully explained by the record, including matters of strategy”

**People v Siler, 135 AD3d 453, 21 NYS3d 893
(1st Dept 1/7/2106)**

The court was statutorily required to grant the prosecution’s request that the crime of attempted first-degree rape be submitted as a lesser included offense of first-degree rape where “[t]here was ample evidence to support a reasonable view” that the conduct only constituted an attempt. The prosecution’s request did not constitute an impermissible change of the theory of prosecution and to the extent that the defense sought to establish that only an attempt was committed, the defendant assumed the risk that the prosecution would request submission of the attempt charge. (Supreme Ct, Bronx Co)

**Matter of Williams v Department of Corr & Community Supervision, 136 AD3d 147, 24 NYS3d 18
(1st Dept 1/12/2016)**

New York’s Sexual Assault Reform Act (SARA), “which prohibits sex offender parolees from residing or traveling near schools or other institutions where minor children congregate,” does not violate the Ex Post Facto Clause of the United States Constitution or substantive due process rights under the federal and state constitutions. “Because SARA meets the tests of constitutionality, issues regarding whether there are better or wiser ways to achieve the law’s stated objectives are policy decisions

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belonging to the legislature and not the courts” (Supreme Ct, New York Co)

Dissent in Part: “[T]he 1,000-foot buffer zone constitutes a retroactive punishment imposed on petitioner and other sex offenders who committed their crimes before the amendment of Executive Law § 259-c(14), in violation of the Ex Post Facto Clause of the United States Constitution, because the civil intent of SARA is negated by the statute’s punitive effect”

**People v Ortiz, 135 AD3d 649, 25 NYS3d 81
(1st Dept 1/28/2016)**

The court erred in allowing the prosecution “to introduce, under the prompt outcry exception to the hearsay rule, the fact that the 15-year old complainant sent a text message discussing the alleged sexual assault to her friends two or three months after the alleged assault occurred.” The message does not constitute a prompt outcry where, although there was evidence that the accuser “experienced confusion, shock, embarrassment, and fear of not being believed, as well as concern about her mother and grandmother’s reactions, there is no evidence that she was threatened by defendant or was under his control” or that she feared retribution. (Supreme Ct, Bronx Co)

**Matter of Chastity O.C., 136 AD3d 407, 24 NYS3d 610
(1st Dept 2/2/2016)**

The petitioner failed to establish, by a preponderance of the evidence, that the respondent mother educationally or medically neglected her teen daughter. The teen’s behavior and other obstacles “made it exceedingly difficult for” the mother to get her daughter to go to school, and there was no evidence that when the petition was filed, the teen was in imminent danger because of any failure by the mother to meet the teen’s medical needs. The mother was unable to get the teen into drug treatment, but believed the teen stopped using drugs and alcohol while she was pregnant and she attended therapy with her daughter.

The court properly granted the neglect petition against the teen where the teen admitted she used drugs while pregnant and she tested positive for marijuana when her daughter was born. And the teen failed to rebut the presumption of neglect that was triggered by the evidence of her substantial drug and alcohol abuse history for which she did not receive treatment. The court properly refused to sever the fact-finding hearing in the neglect proceeding concerning the teen and her daughter

from the hearing regarding the teen and her mother as the actions are related, have common facts and witnesses, and the teen failed to demonstrate any prejudice. (Family Ct, New York Co)

**People v McGee, 136 AD3d 580, 26 NYS3d 38
(1st Dept 2/25/2016)**

The court erred in denying a *Wade* hearing where the prosecution alleged that the identification of the defendant “was the product of an ‘inadvertent observation’” “The question whether the coincidence of the victim’s presence in a police car outside the precinct and defendant’s arrival at the precinct in police custody constituted a police-arranged procedure was a fact question that defendant was entitled to have resolved at a hearing” (Supreme Ct, New York Co)

**People v Rahman, 137 AD3d 523, 27 NYS3d 127
(1st Dept 3/10/2016)**

The court violated the defendant’s right of confrontation by admitting a witness’s grand jury testimony under the past recollection recorded hearsay exception where “the witness asserted his Fifth Amendment rights and refused to answer questions that had a direct bearing on testing the truth of his grand jury testimony.” However, the constitutional error was harmless given that “[t]here was overwhelming direct and circumstantial evidence establishing all the elements of the crimes, and no reasonable possibility that the error contributed to the conviction.”

The defendant’s right to be present at a material stage of the trial and his right to counsel were not violated when the court excluded the defendant and his attorney from an unrecorded proceeding, from which the prosecutor was apparently also excluded, at which it discussed with the witness and the witness’s attorney the invocation of his Fifth Amendment rights. “The proceeding concerned legal matters and dealt only with the rights of the witness” (Supreme Ct, Bronx Co)

**Matter of Chigusa Hosono D. v Jason George D.,
137 AD3d 631, 28 NYS3d 49 (1st Dept 3/24/2016)**

In this family offense proceeding, the referee improperly concluded that the respondent’s acts constituted second-degree assault as there was no record evidence of serious physical injury. There was also no evidence of physical injury to support a third-degree assault finding. The referee erred in finding that the respondent’s acts constituted disorderly conduct. Disorderly conduct is not an enumerated family offense. And there was no evidence to support a finding that the respondent intended to cause public inconvenience, annoyance, or alarm, or that he

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recklessly created such a risk. But there was sufficient evidence that the respondent's acts constituted second-degree harassment where his conduct during two incidents "evinced an intent to harass, annoy or alarm petitioner," and the two-year order of protection was appropriate. (Family Ct, New York Co)

**People v Ulerio, 137 AD3d 629, 27 NYS3d 558
(1st Dept 3/24/2016)**

The court erred in denying the defendant's CPL 330.30(3) motion for a new suppression hearing and trial without a hearing. Between the verdict and sentencing, the prosecution disclosed that a sergeant and an officer involved in the defendant's arrest were indicted for perjury and other crimes arising out of vehicle stop cases with fact patterns that are similar to the defendant's case. A hearing must be held on remand to determine what the prosecutor and the prosecutor's office knew about the veracity of the perjury complaint before the defendant's trial was over, whether the prosecution had earlier, specific information about the misconduct that should have been disclosed, and whether the prosecution's investigation of the alleged perjury included the facts underlying the defendant's case. (Supreme Ct, New York Co)

**Matter of David B. v Katherine G., 138 AD3d 403,
30 NYS3d 5 (1st Dept 4/5/2016)**

The referee erred in granting the father's modification petition seeking sole custody and denying the mother's cross-petition to modify custody and permit her to relocate with the children to Katonah. The father failed to show "that he had the same degree of attention to the children's emotional, academic and social needs as the mother" and the evidence shows that his personal life is in flux. The hearing evidence showed "that the mother was the more competent parent," the children had a stronger emotional attachment to her, and the children unequivocally stated that they wanted to live with their mother and attend school in Katonah. The mother presented evidence that she was evicted from the former family home by the paternal grandfather and had to move to Katonah because she could not find affordable housing in New York City. The referee erred in denying the mother's cross-petition to relocate where a review of the relevant factors shows that it is in the children's best interests. The matter is remanded to determine an appropriate visitation schedule for the father. (Family Ct, New York Co)

**People v Smith, 139 AD3d 131, 30 NYS3d 19
(1st Dept 4/5/2016)**

"The issue before us on this appeal is whether a defendant is eligible for judicial diversion when charged with both statutorily qualifying offenses as well as other offenses, including misdemeanors, which are not defined as qualifying or disqualifying offenses. We hold that a defendant so charged is not automatically disqualified from applying for judicial diversion." Trial courts have reached conflicting conclusions on the issue; this decision should provide some clarity. (Supreme Ct, New York Co)

**People v Roberts, 138 AD3d 461, 29 NYS3d 305
(1st Dept 4/7/2016)**

The defendant's identity theft conviction was not supported by legally sufficient evidence where, although it was clear that the defendant used the accuser's personally identifying information, "there was no proof he assumed her identity. Instead, he assumed the identity of a fictitious person." The court's instructions to the jury were defective in the same respect. (Supreme Ct, New York Co)

**People v Hechavarria, 138 AD3d 543, 29 NYS3d 355
(1st Dept 4/19/2016)**

The court erred in granting the prosecution's reverse-Batson challenge (alleging gender-based discrimination) to defense counsel's exercise of two peremptory challenges. Defense counsel offered facially gender-neutral reasons for striking two male prospective jurors and there is no record support for the court's finding that the reasons were pretextual. The prosecutor offered no specific basis as to one juror, and while the court did not observe the "'smirking' demeanor" that was part of counsel's reason for striking the other, the colloquy with that juror tended to corroborate "that the juror's assurance of his ability to be fair was hesitant or insincere." (Supreme Ct, Bronx Co)

**People v Singleton, 139 AD3d 208, 29 NYS3d 358
(1st Dept 4/19/2016)**

"In this prosecution for criminal possession of a weapon in the second degree, the trial court improperly admitted highly prejudicial photographs showing defendants making gang signs while holding a gun different from the one they were charged with possessing. The trial court also erred in allowing the [prosecution] to introduce Facebook messages sent by defendant Hawkins three months after the charged crime in which he boasted about firing various types of guns during a separate unrelated shooting incident. These photographs and messages were classic propensity evidence and lacked probative value. Even if we were to accept the [prosecution]'s claim that they had some relevance, the trial court abused its discretion in admitting them because the prejudicial impact on

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the jury greatly outweighed any probative value. Therefore, we reverse defendants' convictions and remand for a new trial." (Supreme Ct, New York Co)

People v Rowley, 138 AD3d 577, 28 NYS3d 601
(1st Dept 4/21/2016)

The first-degree manslaughter conviction must be vacated in the interest of justice where the court failed to convey to the jury, either directly or indirectly, that acquittal of second-degree murder based on justification would preclude consideration of the two lesser homicide charges. Because it is unclear whether the jury acquitted the defendant of murder based on a finding of justification, a new trial is ordered. (Supreme Ct, Bronx Co)

People v McKinney, 138 AD3d 604, 28 NYS3d 860
(1st Dept 4/26/2016)

The court properly denied a *Mapp/Dunaway* hearing for insufficient sworn allegations of fact to support suppression. The indictment was not jurisdictionally defective where the original indictment alleged cocaine possession and it is undisputed that the drug was heroin. The defendant pleaded guilty so there was no issue such as variance between the indictment and the proof. Amending the indictment to reflect possession of heroin was proper where there was a clerical error, the grand jury proof dealt with heroin, and the defendant did not object and was not prejudiced or surprised. (Supreme Ct, New York Co)

People v Newland, 138 AD3d 611, 28 NYS3d 865
(1st Dept 4/26/2016)

The defendant's speedy trial arguments are unpreserved where the three time periods at issue were litigated before the trial court, but the specific arguments raised on appeal were not articulated; the appellate arguments also fail on the merits. (Supreme Ct, New York Co)

People v Guillorly, 138 AD3d 630, 28 NYS3d 882
(1st Dept 4/28/2016)

The matter is remitted for a new trial where the court committed a mode of proceedings error by paraphrasing two substantive jury notes rather than reading them into the record verbatim and the record did not show that the defendant otherwise received notice of the specific content of the jury notes. (Supreme Ct, New York Co)

People v Mora, 138 AD3d 641, 28 NYS3d 880
(1st Dept 4/28/2016)

"The crime of attempted endangering the welfare of a child is not a legal impossibility, because the underlying crime is not result-based, but instead involves acts that can be attempted (*see People v Vargas*, 8 Misc 3d 113 [App Term, 2d & 11th Jud Dists 2005], *lv denied* 5 NY3d 795 [2005]; ... *see also People v Aponte*, 16 NY3d 106, 109 [2011]). *People v Prescott* (95 NY2d 655 [2001]) is distinguishable because the definition of the crimes at issue in that case did not contemplate an attempted offense." (Supreme Ct, Bronx Co)

People v Moya, 138 AD3d 620, 29 NYS3d 368
(1st Dept 4/28/2016)

"In conducting a colloquy on defense counsel's request to be relieved, the court erred in failing to permit defendant to provide any input, or to even be present. At least by the time that the substance of counsel's ex parte application became clear, defendant should have been included in the proceeding." The defendant had been critical of defense counsel persistently, requested new counsel, and filed a disciplinary complaint against his attorney while the case was pending. During trial, counsel had an ex parte colloquy with the court in which he expressed concern that the defendant was trying to set counsel up for an IAC claim and he shared with the court a letter from the defendant that contained accusations about counsel's relationship with the judge. The defendant may have had something valuable to contribute to this colloquy, including on the fact that counsel had revealed a privileged communication to the court. The court also had an obligation to make a minimal inquiry about whether substitution of counsel was justified. (Supreme Ct, New York Co)

People v Smith, 138 AD3d 628, 28 NYS3d 881
(1st Dept 4/28/2016)

"It was error for the court not to have precluded, on the ground of lack of CPL 710.30(1)(a) notice, defendant's statement that he 'may have been a little inappropriate' with the victim, since the 'sum and substance' (*People v Lopez*, 84 NY2d 425, 428 [1994]) of that statement was not provided by the noticed statements, which were considerably less inculpatory (*see People v Greer*, 42 NY2d 170, 179 [1977]). Nevertheless, the error in admitting the statement was harmless" (Supreme Ct, New York Co)

First Department *continued***People v Wilson, 138 AD3d 637, 28 NYS3d 877**
(1st Dept 4/28/2016)

“The court properly exercised its discretion in replacing absent jurors in two instances” where “each juror’s absence would have far exceeded two hours, and would have unduly disrupted a trial already plagued by delays.” The court properly charged the jury, over defense counsel’s objection, that no adverse inference should be drawn from the defendant’s exercise of his right not to be present. (Supreme Ct, Bronx Co)

Myers v Schneiderman, 140 AD3d 51, 31 NYS3d 45
(1st Dept 5/3/2016)

“In light of the plain meaning of the term suicide, we hold, as a matter of statutory construction, that Penal Law sections 120.30 and 125.15 prohibit aid-in-dying.” The trial court correctly rejected the plaintiffs’ claim that “the ban on physician assisted suicide, which they call ‘aid-in-dying’ ... violates the Equal Protection and Due Process Clauses of the State Constitution.” “Considering the complexity of the concerns presented here, we defer to the political branches of government on the question of whether aid-in-dying should be considered a prosecutable offense.” (Supreme Ct, New York Co)

People v Harleston, 139 AD3d 412, 31 NYS3d 41
(1st Dept 5/3/2016)

A new sentencing proceeding is required. After his conviction at trial, the “[d]efendant was not produced for a probation interview, and the presentence report accordingly contain[ed] no social history.” The record does not indicate that he intentionally avoided the interview and, at sentencing, counsel requested an adjournment so an interview could be held. The court’s offer to allow the defendant to make a statement at sentencing was not a sufficient substitute for an interview, and his decision not to make a statement does not alter this conclusion. (Supreme Ct, New York Co)

People v Moreno, 139 AD3d 401, 30 NYS3d 97
(1st Dept 5/3/2016)

The court properly precluded the defendant from offering alibi testimony for failure to comply with CPL 250.20(1). Defense counsel advised the court and prosecutor of the alibi testimony during trial, after the prosecution rested, and the record suggests that a relative of the defendant made a belated disclosure about the potential witness, which indicates that the proposed testimony was

the product of a recent fabrication and warrants a finding of willful conduct by the defendant. (Supreme Ct, New York Co)

People v Quinones, 139 AD3d 408, 30 NYS3d 101
(1st Dept 5/3/2016)

In connection with the defendant’s ineffective assistance of counsel claim, “regardless of whether counsel misadvised defendant of his predicate offender status and true sentencing exposure, the record shows that the court gave defendant timely and accurate advice on this subject, and defendant nevertheless proceeded to trial. Defendant has not shown that the outcome of the plea process would have been different with different advice from counsel (*see Lafler v Cooper*, 566 US __, 132 S Ct 1376, 1384-1385 [2012]).” (Supreme Ct, New York Co)

People v Coronado, 139 AD3d 452, 30 NYS3d 628
(1st Dept 5/5/2016)

The court should have granted the suppression motion and the accusatory instrument charging operation of a vehicle while under the influence of alcohol is dismissed because proof of the defendant’s intoxication depended on the fruits of the unlawful stop. There was no testimony that the police believed the defendant committed a crime “until after one of the officers forcibly stopped him, by grabbing him by the shoulder to stop him from moving away, and the police then observed signs that he was intoxicated” The officers’ reasonable belief that the defendant was a crime victim authorized them to ask him questions and follow him while attempting to speak to him, but not to seize him to do so. (Supreme Ct, Bronx Co)

Matter of Grabell v New York City Police Dept., 139 AD3d 477, 32 NYS3d 81 (1st Dept 5/10/2016)

The order granting the CPLR article 78 petition to compel the NYC Police Department to disclose, pursuant to FOIL, records regarding its use of Z-backscatter vans is modified by denying the petition except as to those records seeking information about the health and safety effects of the vans. (Supreme Ct, New York Co)

People v Hichez, 139 AD3d 453, 29 NYS3d 787
(1st Dept 5/10/2016)

“[T]he court erred in finding that the People were not required to provide CPL 710.30(1)(b) notice with regard to the identification testimony of a police officer. His brief observation of defendant leaving the scene of the crime, approximately an hour before the identification, was not ‘so clear that the identification could not be mistaken,’

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thereby obviating the risk of undue suggestiveness (*People v Boyer*, 6 NY3d 427, 432 [2006] ...).” (Supreme Ct, New York Co)

**People v Cates, 139 AD3d 455, 29 NYS3d 790
(1st Dept 5/10/2016)**

The suppression motion was properly denied where the defendant failed to allege facts raising an issue as to state action by a store security guard who found store merchandise in the defendant’s possession. Discovery provided to the defendant included the guard’s identity and employment status and a statement that the detective was not acting as an agent of the police. The defendant could have subpoenaed the records of the store or the security company to obtain facts to support his otherwise “speculative allegations that the guard appeared to have been trained in police procedures and was acting in furtherance of police objectives” (Supreme Ct, New York Co)

**People v Watson, 141 AD3d 23, 31 NYS3d 478
(1st Dept 5/10/2016)**

Remand is required where the court failed to follow the proper three-step *Batson* protocol. Defense counsel made a prima facie showing that the prosecution exercised its peremptory challenges in a discriminatory manner by striking all the African American males from the panel of prospective jurors. While the U.S. Supreme Court has not ruled that *Batson* applies to combined race-gender groups, “[i]t would indeed be incongruous to consider race and gender as cognizable statuses, but not a combined race and gender status.” The record is insufficient to assess the prosecution’s putatively neutral explanations for each of the strikes and the court failed to give defense counsel the opportunity to show that the explanations were pretextual. (Supreme Ct, Bronx Co)

Dissent: The *Batson* claim is unreserved; no such unreserved claim has been reviewed in the 30 years since *Batson* was decided.

**People v Evans, 141 AD3d 120, 32 NYS3d 119
(1st Dept 5/19/2016)**

The court erred in denying the defendant’s application to present expert testimony on the general phenomenon of false confessions or how the defendant’s specific individual personality traits may have contributed to a false confession. A psychological examination showed the defendant to have traits linked to false confessions and conditions of the interrogation suggest that he could have been induced to falsely confess. And while corroborating

evidence was stronger as to the 2009 shooting than as to the one in 2006, the defendant was tried for both in a consolidated trial; the jury was entitled to hear expert testimony on false confessions. (Supreme Ct, New York Co)

Dissent: “Substantial evidence corroborating defendant’s confession to each of the two shootings removes any doubt regarding its reliability and obviates any legitimate concern that defendant gave a confession to a crime he did not commit.”

[*Ed. Note:* Leave to appeal was granted on Sept. 9, 2016 (28 NY3d 975).]

**People v Nevaro, 139 AD3d 525, 31 NYS3d 498
(1st Dept 5/19/2016)**

The second-degree kidnapping conviction must be vacated. “Since there was no evidence that defendant threatened to use deadly physical force against the victim if she tried to leave her apartment, he did not abduct her within the meaning of the statute In context and under the circumstances, defendant’s threat to set fire to the apartment if the victim left him there can only be understood as one to damage her property, in her absence and without endangering her safety. Although defendant separately threatened to kill the victim’s son if she failed to pay him money, that threat was not related to the confinement of the victim in the apartment.” (Supreme Ct, New York Co)

**People v Agola, 139 AD3d 584, 32 NYS3d 133
(1st Dept 5/24/2016)**

“The trial court’s failure to comply with CPL 320.20(5) by not notifying the parties that it intended to consider a lesser included offense until after it rendered the original verdict, constitutes reversible error.” The court, having rendered a verdict, could not legally consider its verdict anew after allowing a new summation. Double jeopardy bars a new trial on the original indictment; the prosecution must obtain a new indictment if it wishes to pursue prosecution on the lesser charge. (Supreme Ct, New York Co)

**People v Krieg, 139 AD3d 625, 32 NYS3d 161
(1st Dept 5/31/2016)**

The defendant was denied his constitutional right to be present at trial where the court incorrectly believed that the prosecution must consent to the defendant’s appearance by videoconference. The court accepted that the defendant’s serious medical conditions made his physical appearance at trial extremely painful and physically distressing and was able to arrange for the defendant to appear by video from the jail where he was being held.

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The state constitution and Judiciary Law 2-b(3) give the court broad discretion “to use appropriate innovative procedures to fulfill the court’s functions” and CPL article 182 “does not address a defendant’s appearance at trial by videoconferencing for valid and exceptional medical reasons.” The defendant’s waiver of his right to be present was not voluntary, knowing, and intelligent where the alternative accommodations did not reasonably accommodate the defendant’s medical needs. (Supreme Ct, New York Co)

**People v Alcivar, 140 AD3d 425, 33 NYS3d 227
(1st Dept 6/7/2016)**

Admission of a blood test report stating that the defendant tested positive for a sexually transmitted disease without giving the defendant a chance to cross-examine the technician who operated the machine that conducted the test and automatically generated the report was not a violation of the right of confrontation. The “machine generated” report was not testimonial and the prosecution was not required to provide testimony regarding the accuracy of the testing device. Further, the report did not directly link the defendant to the crimes charged. (Supreme Ct, New York Co)

**People v Rios, 142 AD3d 28, 33 NYS3d 262
(1st Dept 6/21/2016)**

There was legally insufficient evidence to establish the physical injury element of second-degree robbery where the photographs in evidence show only slight redness on the accuser’s neck and hands, without cuts, abrasions, or lacerations; the accuser did not get medical treatment; and because the accuser did not testify, there was no evidence about his subjective experience of pain. The police officer’s testimony about the accuser’s state of shock and nervousness after the fact is not a sufficient substitute for the accuser’s testimony, medical corroboration, or photos objectively demonstrating more than apparently insubstantial injuries. The legal sufficiency issue was clearly raised where the defendant made a general motion to dismiss at the close of the prosecution’s case, the prosecution argued that the jury could infer physical injury based on the photos, and the court denied the motion, but noted that there was a reasonable view of the evidence that the defendant committed third-degree robbery, which has no physical injury element. (Supreme Ct, New York Co)

Dissent: The defendant’s general motion to dismiss did not provide any grounds for dismissal, so the legal sufficiency challenge was not preserved. In any event, the tes-

timony of an eyewitness that the defendant put the accuser in a choke hold and punched him repeatedly, the police testimony about the accuser’s condition after the incident, and the photos satisfy the physical injury element.

**People v Jiminez, 142 AD3d 149, 37 NYS3d 225
(1st Dept 7/21/2016)**

“We agree with the Second Department that CPL 440.10(1)(h) embraces a claim of actual innocence. If depriving a defendant of an opportunity to prove that he or she has not committed a crime for which he or she has been convicted is not a ‘violation of a right ... under the constitution of this state or of the United States,’ then that section of the statute is virtually hollow. Both constitutions guarantee liberty through their due process clauses, and a wrongful conviction represents the ultimate deprivation of liberty.” The evidence presented by the defendant, however, is insufficient to warrant a hearing. The defendant based his claim on the existence of two proposed witnesses, but one witness’s statement is unsworn and the affidavit offered regarding the other witness contains hearsay and there is no assurance that the witness, who was outside the court’s jurisdiction, would voluntarily appear at a hearing or a new trial. And the witnesses’ statements do not negate the evidence that the jury already relied on to convict the defendant.

A hearing is required on the defendant’s claim that the prosecutor violated *Brady* by failing to disclose that a prosecution witness was given a specific quid pro quo for his testimony. Assuming the defendant is able to show that the prosecution was aware of the deal, there is a reasonable possibility that, had the jury known that fact, it would have rendered a different verdict. While this witness was not the only one to inculcate the defendant, “applying this standard is consistent with the goal of providing a meaningful remedy for *Brady* violations that suggest prosecutorial misconduct” (Supreme Ct, Bronx Co)

**People v Perez, 142 AD3d 410, 37 NYS3d 243
(1st Dept 8/4/2016)**

The “defendant is entitled to vacatur of his sentence for the earlier assault conviction and to resentencing that considers whether he qualifies for youthful offender status” However, he is not entitled to vacatur of his later robbery sentence; “a remand for adjudication of youthful offender status is, for purposes of determining [predicate felony] sequentiality, analogous to a remand for the imposition of postrelease supervision under *People v Sparber* (10 NY3d 457 [2008]).” If, on remand, the court finds that the defendant should receive youthful offender status on the earlier conviction, he will be entitled to challenge the sentence on the later conviction by way of a CPL 440.20 motion.

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The police had the right to inquire of the defendant where they were conducting a “vertical patrol” of a public housing building, there was a history of trespassing at the building, and the defendant attempted to avoid contact with them by getting in an elevator and pressing the elevator button to close the doors before the police could get in with him. The police were also justified in searching him for a weapon when they found him on another floor and the defendant refused to say whether he lived in the building and whether he was armed and did not show his hands when directed. An officer’s testimony that he was concerned for his safety was justifiable based on the bulge observed in the defendant’s sleeve, the awkward manner in which the defendant held his arm, and his failure to respond to questions and directives regarding a weapon. (Supreme Ct, Bronx Co)

Dissent: From the beginning of the police encounter, the “defendant’s conduct was consistent with his constitutional right to avoid contact with the police” and the later observation of an undefined bulge in his sleeve did not provide reasonable suspicion or a basis for believing that he was armed and potentially dangerous.

**People v Taylor, 142 AD3d 465, 36 NYS3d 651
(1st Dept 8/18/2016)**

“The indictment sufficiently charged first-degree criminal contempt under Penal Law § 215.51(c), which involves violation of a certain kind of order of protection, committed by a person with a prior conviction of a similar crime.” The required proof that the defendant’s prior second-degree contempt conviction involved a violation of a stay-away order is “satisfactorily alleged by citation, in the indictment and the special information, to that particular statute” And the statute does not require proof that the prior conviction involved an order that protected the same person named in the order at issue in the current case. “The statutory phrase ‘as described herein’ plainly refers to the type of order, i.e., a stay-away order, not the identity of the protected person.” (Supreme Ct, New York Co)

**People v Smith, 143 AD3d 31, 37 NYS3d 4
(1st Dept 8/25/2016)**

“We find defendant’s right-to-counsel claim to be meritorious. The court here pressured defendant into giving a buccal swab for DNA testing, incorrectly advised him that he had no arguments against the prosecutor’s untimely discovery, and ignored defendant’s explicit and repeated requests for a lawyer during the critical pretrial stage of the proceedings. Proceeding without counsel under the circumstances violated defendant’s Sixth

Amendment rights.” The order for the swab “was based on the putative consent of former counsel However, defendant’s protests put the court on notice that defendant had never communicated with his former attorney about the issue, nor did he wish to consent to the test. Defendant was unrepresented not only in the sense that he had been denied an attorney for the proceeding, but insofar as his former attorney evidently had never discussed the matter with him.” (Supreme Ct, Bronx Co)

Dissent: The defendant was represented by counsel when the court granted the motion to compel the saliva sample. That the defendant was without counsel when the court asked the defendant to provide a sample does not amount to a constitutional violation; counsel does not need to be present for the administration of the already-ordered sample collection and the collection of the sample is not a “critical stage” of the proceedings.

[*Ed. Note: Leave to appeal was granted on Sept. 29, 2016 (28 NY3d 976).*]

Second 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 Pearce, 135 AD3d 722, 22 NYS3d 575
(2nd Dept 1/13/2016)**

The defendant’s designation as a level three sex offender is reversed and he is designated a level two sex offender because the prosecution failed to prove by clear and convincing evidence that he was armed with a dangerous instrument during the offense. The case summary accompanying the risk assessment instrument (RAI) indicated that the defendant told the accuser that “if she did not calm down, his accomplice would ‘put a gun down her back,’” but no evidence was submitted that either the defendant or his accomplice displayed anything even resembling a weapon. The proper number of points on the RAI renders the defendant a presumptive level two offender. (Supreme Ct, Queens Co)

**People v Shawn B., 135 AD3d 782, 23 NYS3d 306
(2nd Dept 1/13/2016)**

After accepting the defendant’s plea of not responsible by reason of mental disease or defect, the court erroneously issued an order committing him to a secure facility without conducting “an ‘initial hearing’ pursuant to CPL 330.20(6)” While the order for a six-month commitment “has expired by its own terms, there is no indication in the record that the defendant has been released from the secure facility ... [and t]he appeal is not academ-

Second Department *continued*

ic” The determination underlying the order, that the defendant has a dangerous mental disorder, has lasting consequences. (County Ct, Dutchess Co)

**Matter of Molloy v Molloy, 137 AD3d 47, 24 NYS3d 333
(2nd Dept 1/20/2016)**

The court erred by denying the petitioner’s request, pursuant to Family Court Act (FCA) 842, to extend a family court order of protection for five years because a criminal court had granted the petitioner a two-year order of protection. The criminal court order of protection “did not negate or otherwise render superfluous the petitioner’s request for an extension of her Family Court order of protection.” Courts must view an extension request “in the context of the facts of the case, including present circumstances, past abuse by the respondent, threats of abuse by the respondent and relevant information concerning the safety and protection of the protected persons with the primary goal to prevent a recurrence of abuse’....” The family court, “which has the benefit of seeing and hearing the witnesses, and may even be familiar with the parties, is in the best position to make this fact-specific determination.” While it may be necessary to hold an evidentiary hearing, FCA 842 does not mandate a hearing. A review of the record shows good cause for the extension. (Family Ct, Queens Co)

**People v Francis, 137 AD3d 91, 25 NYS3d 221
(2nd Dept 1/27/2016)**

The defendant received a presumptive risk level three designation based on points assessed pursuant to the Sex Offender Registration Act [SORA]: Guidelines and Commentary (2006), including points based on his criminal history. While juvenile delinquency adjudications many not be considered, pursuant to *People v Campbell* (98 AD3d 5 [2012]), consideration of the defendant’s youthful offender adjudication was proper. Important distinctions exist between juvenile delinquency and youthful offender adjudications, and while Correction Law 168-l(5) contains no specific authority for consideration of youthful offender adjudications, it calls for the governor to appoint five employees of the Department of Corrections and Community Supervision as members of the Board of Examiners of Sex Offenders, and those employees have access to youthful offender records, which relate to a sex offender’s prior conduct. (Supreme Ct, Kings Co)

Dissent: There is no specific statutory authority allowing the Board to consider youthful offender adjudications when making recommendations regarding an offender’s risk level. Youth are different from adults, and

the defendant’s youthful offender adjudication should not constitute a crime for SORA purposes.

[**Ed. Note:** *Leave to appeal was granted on June 9, 2016* (27 NY3d 908).]

**Matter of Gabriel B.S.-P., 136 AD3d 619, 25 NYS3d 250
(2nd Dept 2/3/2016)**

The court erred in terminating the father’s parental rights based on a finding of permanent neglect where the petitioner Department of Social Services (DSS) failed to satisfy “its initial burden of demonstrating that it exercised diligent efforts to strengthen the parental relationship between the father and his children” DSS removed the children from the parents’ home based on the mother’s drug use and brought Family Court Act article 10 proceedings against the mother. Although he was not named as a respondent, the court issued an order of protection against the father requiring that his visits with his children be supervised. Despite evidence that those visits were positive and that caseworkers encouraged the father to pursue unsupervised visits, DSS did not support the father’s petitions for unsupervised visitation, which DSS had encouraged him to file and which the court dismissed without a hearing. DSS focused on the mother’s relationship with the children and while it did schedule supervised visits and notified the father of permanency hearings and service plan reviews, “it did little more to determine the particular problems facing the father with respect to the return of his children and did not make affirmative, repeated, and meaningful efforts to assist him in overcoming these handicaps” The father met all of DSS’s requirements. (Family Ct, Suffolk Co)

**Matter of Isaiah T.F.-C., 136 AD3d 687, 23 NYS3d 914
(2nd Dept 2/3/2016)**

In this Family Court Act article 10 proceeding, the court erred in denying the father’s motion to prevent a foster care agency from dispensing psychotropic drugs to his child without a full evidentiary hearing, which would allow it to determine whether the treatment was “narrowly tailored to give substantive effect to the child’s liberty interest, taking into consideration all relevant circumstances, including the child’s best interests, the benefits [of] treatment, the adverse side effects [of] treatment, and any less intrusive alternative treatments” (Family Ct, Kings Co)

**People v Owens, 136 AD3d 841, 24 NYS3d 717
(2nd Dept 2/10/2016)**

The court erred in sua sponte discharging a sworn juror without giving the parties an opportunity to be

Second Department *continued*

heard after the court spoke to the juror in camera with the parties' assent. The juror, who said she did not know if she could be fair after learning that the defendant was related to a coworker with whom the juror had had discussions about kids doing stupid things, was very emotional during the discussion, and the court made little effort to determine whether the juror "could, in fact, deliberate fairly and render an impartial verdict." (Supreme Ct, Nassau Co)

**People v Dobson, 136 AD3d 941, 25 NYS3d 313
(2nd Dept 2/17/2016)**

The court in this nonjury trial lacked authority to grant a trial order of dismissal, upon which the court had reserved decision, once the court rendered a guilty verdict on the count in question. In the context of a bench trial, the power to set aside a verdict as against the weight of the evidence theory lies with the Appellate Division. Only legal sufficiency could be considered in deciding the motion after the court had rendered a verdict. (Supreme Ct, Kings Co)

**People v Souverain, 137 AD3d 765, 25 NYS3d 683
(2nd Dept 3/2/2016)**

The defendant's due process rights were violated when the court proceeded with the hearing to determine his Sex Offender Registration Act (SORA) risk level classification in his absence, based on the defendant's indication to his original counsel that he wanted to waive his appearance at the next court date, when the SORA hearing was scheduled to be held. Prior to the hearing, new counsel was assigned and there was no record indication that the defendant had spoken to replacement counsel or even knew of the change in lawyers. (Supreme Ct, Kings Co)

**People v Reyes, 137 AD3d 1060, 27 NYS3d 220
(2nd Dept 3/16/2016)**

"[T]hat the defendant was present at gang meetings where the plan to commit the arson was discussed and that he knew the details of that plan ... was legally insufficient to prove that the defendant entered into a conspiratorial agreement." The second-degree conspiracy conviction must be vacated. (Supreme Ct, Kings Co)

**People v Shim, 139 AD3d 68, 28 NYS3d 87
(2nd Dept 3/16/2016)**

That the defendant, an undocumented immigrant, was involuntarily deported did not render academic this

appeal from his designation as a level two sex offender under the Sex Offender Registration Act (SORA), an upward departure from the presumptive level one risk. While the appeal is not from a judgment of conviction, a SORA designation has a profound impact on a defendant's liberty interest, the outcome of the appeal would not require the defendant's continued legal participation, and consequences of the defendant's designation, including the posting of information about the defendant online, continue in his absence. The court did not improvidently exercise its discretion in granting the upward departure on the basis of the particularly violent and prolonged nature of the offense. (Supreme Ct, Queens Co)

**People v Haskins, 137 AD3d 1298, 29 NYS3d 409
(2nd Dept 3/30/2016)**

There must be a new trial, to be preceded by a hearing to determine whether there is an independent source for the accuser's identification of the defendant as one of the three people who robbed him. Before asking the accuser whether he could identify any of the suspects, including the defendant, held for the showup soon after the robbery, a police officer showed the accuser a wallet recovered from one of them. The accuser said it was his, then identified all of the suspects as the robbers. This procedure was unduly suggestive. An independent source hearing is required because the accuser did not testify at the suppression hearing. (Supreme Ct, Queens Co)

**People v Carter, 138 AD3d 706, 30 NYS3d 141
(2nd Dept 4/6/2016)**

The Board of Examiners of Sex Offenders has recognized that assessment of 25 points under risk factor two (sexual contact) in determining a defendant's risk level under the Sex Offender Registration Act (SORA), may result "in an overassessment of the defendant's risk to public safety" where, as here, lack of consent is due only to inability to consent due to age. Under all the circumstances here, including that the defendant's risk assessment score was near the low end of the range for a level two presumption and, especially, that there was only a five-year age difference between the defendant and the person with who he had contact, a downward departure is appropriate. (County Ct, Nassau Co)

**People v Garramone, 138 AD3d 756, 29 NYS3d 72
(2nd Dept 4/6/2016)**

On Aug. 26, 2008, the sentencing court, using the colloquial "time served," effectively imposed six months' incarceration and five years' probation on the defendant. As the defendant had already spent at least six months in custody, and the period of probation ran concurrently

Getting the Expert Funds You Need Under County Law § 722-c

November 2016

§ 722-c Motions for Expert Funds

Ex Parte

Sealed

In Writing

Motion
and Order

Necessity

Financial Need
[Assignment Order or
Client Affidavit]

Relevance - Materiality- Purpose
[Investigative or Evidentiary]

Amount

Expert Identity
and
Qualifications

Projected
Services and Fees
[Support for
Extraordinary
Fees]

RIGHT TO EXPERT FUNDS

The right to expert and auxiliary services for those charged with crimes and unable to secure these services on their own is a matter of due process, fundamental fairness, and equal protection. *See Ake v Oklahoma*, 470 US 68 (1985); *Tyson v Keane*, 96 Civ 8044 (SAS) (AJP) (SDNY 1997) (Magistrate's Report and Recommendation) *adopted by* 991 F Supp 314 (SDNY 1998). It has been held that the assistance of experts and other ancillary services may be considered among the "basic tools" needed for meaningful representation. *Tyson*, 96 Civ 8044 (*citing Britt v North Carolina*, 404 US 226, 227 [1971]). In *People v Caldavado*, 26 NY3d 1034 (2015), the Court of Appeals reversed a conviction for ineffective assistance of counsel for defense counsel's lack of a strategic basis to forgo the calling of an expert on Shaken Baby Syndrome. The *Caldavado* court held that defense counsel's reasoning that calling a defense expert would be "futile" due to the high number of experts testifying for the prosecution was not a legitimate or reasonable tactical choice. Despite the challenges, it is likewise imperative that we not succumb to the concept of futility in seeking public funds to hire experts where fiscal forbearance has long been an obstacle.

* By Public Defense Backup Center Staff Attorneys Stephanie Batcheller, Mardi Crawford, and Ziadanne Lewis.

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NOT LIMITED TO CRIMINAL CASES

In New York, the right to access public funds to cover the cost of retaining expert assistance is governed by provisions of County Law § 722-c. This section does not limit funding to litigation in criminal cases. It also applies to the application for funds for expert assistance for persons described in Family Court Act §§ 249 (minors represented by Attorneys for the Child) and 262 (adult respondents in Family Court); Corrections Law article 6-c (litigants in Sex Offender Registration Act proceedings); and Surrogate's Court Procedure Act § 407 (respondents in proceedings involving the voluntary or involuntary surrender of children into foster care; parents in adoption proceedings; parents in custody proceedings). While many of the cases discussed herein are criminal cases, and therefore the text used to describe some issues centers on criminal defense, this article is intended to help lawyers and litigants in all applicable cases and courts.

§ 722-c funding is not limited to criminal cases; it also applies to cases encompassed by Family Court Act §§ 249 and 262; Correction Law article 6-c; and Surrogate's Court Procedure Act § 407.

NOT LIMITED TO DEFENDANTS WITH APPOINTED COUNSEL

Nothing in the statute restricts the availability of funds for expert services only to those defendants represented by appointed counsel. Any defendant who cannot afford supplemental services, even those represented by retained counsel, may receive funding under § 722-c with the proper showing. *See People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982); *see also* ABA Standards for Criminal Justice, Providing Defense Services, Standard 5-1.4 and commentary at 22 (3d Ed 1992).

I. STANDARDS OF REVIEW

The threshold for obtaining funds is the need for the services and financial inability to pay. *Johnson v Harris*, 682 F2d 49 (2nd Cir 1982); *People v Dove*, 287 AD2d 806 (3rd Dept 2001). Applications for § 722-c services are left to the discretion of the trial court. *Johnson*, 682 F2d 49; *but see People v Christopher*, 65 NY2d 417, 425 (1985) [in most circumstances, the number of experts on an issue to be heard will be a matter of discretion, but refusal to hear any expert witness on behalf of the defendant in competency hearing is a violation of the statutory requirement, not a matter of discretion].

Denials of applications for expert services are reviewable on appeal for abuse of discretion. *People v Cronin*, 60 NY2d 430 (1983); *People v Mooney*, 76 NY2d 827 (1990). There are no published New York court decisions regarding the application of harmless error on appeal. However, the federal district court in *Tyson, supra*, held that a trial court's error in denying a § 722-c application is subject to harmless error analysis in a habeas proceeding. Denial of access to an expert is not necessarily reversible under the federal constitution. *Tyson v Keane*, 159 F3d 732, 738 (2nd Cir 1998) *affg* 991 F Supp 314.

Generally, CPLR article 78 proceedings for orders mandating the granting of a motion for § 722-c funds will not lie. *Brown v Rohl*, 221 AD2d 436 (2nd Dept 1995) [mandamus will not lie to compel a trial court to grant funds in excess of the statutory limit]; *De Jesus v Armer*, 74 AD2d 736 (4th Dept 1980) [review on direct appeal is an adequate remedy for propriety of denial of § 722-c funds, therefore action under article 78 will not lie].

Given these constraints on review it is crucial that applications for § 722-c funds be carefully and exhaustively drafted.

II. THE APPLICATION PROCESS

The procedure for authorizing funding for expert or other auxiliary services in New York is set forth in County Law § 722-c:

Upon a finding in an ex parte proceeding that investigative, expert or other services are necessary and that the defendant or other person described in section two hundred forty-nine or section two hundred sixty-two of the family court act, article six-c of the correction law or section four hundred seven of the surrogate's court procedure act, is financially unable to obtain them, the court shall authorize counsel, whether or not assigned in accordance with a plan, to obtain the services on behalf of the defendant or such other person. The court upon a finding that timely procurement of necessary services could not await prior authorization may authorize the services nunc pro tunc. The court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement. Only in extraordinary circumstances may the court provide for compensation in excess of one thousand dollars per investigative, expert or other service provider.

Each claim for compensation shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.

The basic requirements are that the application:

- A. is made in an ex parte proceeding;
- B. must be in writing and should be prior to engagement of services, when possible;
- C. must demonstrate the financial inability of the person to pay for the expert services;
- D. must demonstrate the necessity of the requested services; and
- E. should identify the projected costs of obtaining expert assistance, including hourly rates or full cost, as well as extraordinary circumstances if it is anticipated that funds over the statutory cap will be required.

Each of these factors is discussed below.

A. THE IMPORTANCE OF EX PARTE APPLICATIONS

The statute specifically authorizes an ex parte application for expert and auxiliary services. Take full advantage of this feature! Do not put § 722-c applications in omnibus motion filings. These motions must be carefully detailed and the District Attorney should not have any input into whether it is appropriate to grant funds to hire a defense expert. An accused cannot be forced to choose between obtaining services needed to prepare an adequate defense and safeguarding the confidentiality of emerging defense strategy. See *Marshall v United States*, 423 F2d 1315, 1318 (10th Cir 1970) ["The

manifest purpose of requiring that the inquiry be ex parte is to insure that the defendant will not have to make a premature disclosure of his case."].

Ex parte applications generally take the form of a motion, with a Notice and Affirmation of Counsel supported by any other pertinent documentation, such as a statement of the client's financial qualification where required, an affidavit from the expert or the expert's curriculum vitae, and/or documentation that could be used to support the need for expert assistance, where available. Where the court expresses concern or hesitation, counsel should request an ex parte hearing at which issues can

be further addressed. Counsel may also wish to ask the court to seal the application and order in the court's files to protect the continuing confidentiality of the defense strategy. Judiciary Law § 2-b(3).

B. THE APPLICATION MUST BE IN WRITING AND SHOULD BE PRIOR TO ENGAGEMENT OF SERVICES

Applications for funds under § 722-c must be made in writing and oral requests may be denied. *Dove*, 287 AD2d at 807; *Matter of Brittenie K.*, 50 AD3d 1203 (3rd Dept 2008). Written applications are not only required by the statute, but also ensure that the application is complete and preserves all issues for later review if such application is denied. Samples of applications are available from the Backup Center.

****Timing is Everything****

More importantly, although the statute provides for the availability of nunc pro tunc authorization where circumstances require, attorneys should seek authorization prior to hiring the expert or risk the denial of compensation. *Matter of Tiarra D.*, 124 AD3d 973 (3rd Dept 2015) [court did not abuse its discretion in denying respondent's application for expert funds under County Law § 722-c, not made until after hearing had begun and sought amount in excess of statutory limit without establishing necessity or extraordinary circumstances]; *People v Barber*, 60 AD2d 747 (4th Dept 1977) [absent showing that expenses incurred for expert witnesses and investigation were necessary and that the timely procurement of such services could not await prior authorization, the court did not err in denying defendant's post-trial application for the payment of such expenses by the county].

****Don't Give Up, Develop****

Despite possible resistance to applications for expert assistance by courts seeking to

safeguard funds or expedite proceedings, counsel should not be discouraged from moving for funds by presuming that an application will fail. Just as an assertion of futility in consulting a defense expert to challenge a host of prosecution experts is not an acceptable basis for a strategy decision [*Caldavado, supra*], an assertion of futility in asking a parsimonious court for ancillary funds is not an acceptable strategic basis to forgo a § 722-c application. Much of the case law related to denials presents situations where the applications were inadequate or abandoned. Perseverance and carefully drawn pleadings will often overcome perceived obstacles, as well as preserving a denial as an abuse of discretion on appellate review.

When a court denies an application, try to establish precisely why the funds are being denied; demand that the court explain or justify the denial. Judges exercising discretionary power know that a denial for no stated reason is easy; a denial for a bad reason will be scrutinized on review. Often, the application is missing the requisite details as to the issues giving rise to the need for expert assistance or the projected costs and services to be rendered. There is no prohibition against successive applications, especially where the need is critical and the costs can be verified. Dig, rewrite, and develop the details in support of the need for expert assistance. Failure to pursue requests, especially where an initial denial is based on an inadequate showing, will ensure that the appellate court will find that the court did not abuse its discretion. For example, in *People v Roman*, 125 AD3d 515 (1st Dept 2015) the Appellate Division ruled that the trial "court properly denied [the] defendant's motion to present expert testimony on false confessions, as [the] defendant's motion papers, which contained no expert affidavit, did not establish that the proposed expert's testimony would be 'relevant to the defendant and interrogation before the court'" Had counsel renewed the application providing the trial court

with the missing information, the request may very well have been granted.

C. SPECIFIC SHOWING OF FINANCIAL INABILITY TO OBTAIN SERVICES

The right to funds under § 722-c is not limited to defendants who have appointed counsel. Any defendant who cannot afford the services may invoke the statutory mechanism for obtaining them. *People v Ulloa*, 1 AD3d 468 (2nd Dept 2003); *Smith*, 114 Misc 2d 258. It is necessary to demonstrate that the client's financial status is such that the client cannot afford to pay for the services of the expert, even if counsel may have been retained or is representing the client pro bono. *People v Pinney*, 136 AD2d 573 (2nd Dept 1988); *People v Hatterson*, 63 AD2d 736 (2nd Dept 1978).

When counsel has been assigned, presenting the court with a copy of the Order of Assignment may suffice in demonstrating financial inability. However, the assignment of counsel may not always suffice to establish financial need as required by the statute. *People v Jackson*, 80 Misc 2d 595 (County Ct, Albany Co 1975); *People v Lowery*, 7 Misc 3d 1032(A) (White Plains City Ct 2005); *but see* ABA Standards for Criminal Justice, Providing Defense Services, Standard 5-1.4 and commentary at 23 (3d Ed 1992) ("Inability to afford counsel necessarily means that a defendant is unable to afford essential supporting services, such as investigative assistance and expert witnesses.").

Local rules and practice may impact what the court requires for applications for § 722-c services by assigned counsel and whether it is necessary to file any supplemental financial information. Where counsel has been retained, a financial statement that demonstrates the client's lack of additional funds to hire an expert is an absolute necessity. Be aware that the application must include a verified statement of financial need submitted by the client; some courts have found that an affirmation of counsel asserting the client's financial ability is not sufficient. *See Matter of Cynthia H. v James H.*,

117 Misc 2d 474 (Family Ct, Queens Co 1983); *People v Powell*, 101 Misc 2d 315 (County Ct, Tompkins Co 1979); *Jackson*, 80 Misc 2d 595. In this regard, it should be the defendant's financial status that is dispositive in assessing ability to afford auxiliary services, not the resources of friends or relatives: "[I]ndigence is personal. The State is not entitled to treat the funds of others, over which a defendant has no control, as assets of the defendant." *Fullan v Commissioner of Corrections*, 891 F2d 1007, 1011 (2nd Cir 1989); *Ulloa*, 1 AD3d 468.

Whether institutional assigned counsel may apply for § 722-c funding is somewhat unclear. Most public defender offices and legal aid societies will have funds budgeted for the hiring of experts, but if the occasion arises where the funds are depleted or a provider does not have such a budget item, the wording of the statute is open to some interpretation. The issue presented itself in *People v Stott*, 137 Misc 2d 896 (County Ct, Sullivan Co 1987) with mixed results. The County Court initially granted § 722-c funds to the local Legal Aid Society to obtain a transcript for an appeal, but when the allotted amount proved to be too little and the Court was asked for additional funds to meet the difference, the Court reversed itself finding that the section was directed only at attorneys working with an Assigned Counsel Plan and that the Legal Aid Society was required to pay the expense from their own budget.

The statute provides that where a defendant is financially unable to obtain necessary services "the court shall authorize counsel, whether or not assigned in accordance with a plan" to procure such services. This language is not as clear as the Sullivan County Court suggests in *Stott*. If an institutional provider is unable to independently pay for a needed expert, it would seem to be a matter for the attorney-in-charge to seek the funds either directly from the county administration or the court. If the county fails to grant the funds, the court should protect the defendant's rights by

authorizing the funds under § 722-c. Public defenders have succeeded in obtaining funds via § 722-c when institutional budgets could not cover the cost of hiring a necessary expert.

D. SHOWING OF NECESSITY: RELEVANCE, MATERIALITY AND PURPOSE

A thorough knowledge of the case is key to making the requisite showing of necessity. The most common reason for the denial of a § 722-c motion, and the affirmance of such denials on review, is the failure to demonstrate necessity for the particular expert. To avoid denial based on failure to establish necessity, papers must be carefully and thoroughly drafted, and should provide “specific factual details which show to a reasonable probability that the forensic services would aid in the defense or produce relevant evidence.” *Lowery*, 7 Misc 3d 1032(A). In drafting applications, be sure to consider relevance and materiality of the issues and the purpose of the expert assistance in the development and presentation of the defense.

It has been held that to be effective, defense counsel is obligated to investigate and “collect the type of information that a lawyer would need in order to determine the best course of action for his or her client.” People v Oliveras, 21 NY3d 339 (2013); see also People v Bennett, 29 NY2d 462 (1972). This obligation presents a strong argument for a § 722-c application where the information to be collected is extensive and/or is of such a nature that qualified assistance is necessary to identify exactly what must be sought and examined.

RELEVANCE

The pleadings must show that the need for the expert assistance is relevant to a significant issue at trial. See *People v Lewis*, 93 AD3d 1264 (4th Dept 2012) [defense counsel's failure to call ballistics expert was not ineffective assistance of counsel given failure to demonstrate that the expert's testimony would have assisted the trier of fact or that the

defendant was prejudiced by the absence of such testimony]; *People v Oquendo*, 250 AD2d 419 (1st Dept 1998) [denial of the application for an expert to testify at trial regarding hand-to-hand drug transactions upheld where the request failed to establish that the testimony was relevant to a significant issue at trial].

Bare bones allegations of relevance or helpfulness to the defense are not sufficient to establish necessity. *People v Rockwell*, 18 AD3d 969 (3rd Dept 2005) [no error in denying funds for an investigator where the defendant only asserted that an investigator would be helpful]; *Matter of Jack McG.*, 223 AD2d 369 (1st Dept 1996) [denial of funds to hire a defense psychiatrist affirmed where the claim that such testimony might “add insight” into the court-appointed psychiatrist’s evaluation was insufficient to require granting of request]; *People v Gallow*, 171 AD2d 1061 (4th Dept 1991) [the fact that proposed testimony would be relevant to an issue in the case is not by itself sufficient; a showing must be made that expertise is necessary for resolution of the issue]; *People v Moore*, 125 AD2d 501 (2nd Dept 1986) [“Since the defendant did not demonstrate the necessity for the appointment of a fingerprint expert on his behalf under County Law § 722-c, the trial court did not abuse its discretion in denying his request to appoint such expert.”]; *People v Pride*, 79 Misc 2d 581 (Supreme Ct, Westchester Co 1974) [The “defendant's moving papers are of little help to the court in the resolution of [the] question [of necessity].”].

MATERIALITY

Pleadings must establish that there are challengeable conclusions made by witnesses or to be drawn from evidence that is material to the defense. In *Hatterson, supra*, the Appellate Division held that the denial of funds under § 722-c for a physician and a psychiatrist was an improvident exercise of discretion where the prosecution offered expert psychological testimony in the case in chief and on rebuttal

regarding duress the complainant endured and the defense sought to hire an expert to challenge these assertions.

Denials have been authorized where the issue is determined to be not significant or material to warrant the funding of an independent expert. *See, e.g., Johnson*, 682 F2d 49 [The prosecution's expert testimony on hair identification was brief, communicated in non-technical language, and readily understandable by the defense and the jury. In addition, upon cross-examination by the defense, the prosecution's expert stated that no hair comparison can prove identity positively.]; *People v King*, 111 AD2d 1043 (3rd Dept 1985) [since the prosecution called a witness who saw the defendant endorse the check, there was no error in denial of funds for a handwriting expert]; *People v Stamp*, 120 Misc 2d 48 (Starkey Town Ct 1983) [request for expert to testify as to inadequacies of breath test machine denied where issues raised of improperly tested breathalyzer instrument, outdated ampoules, and inaccuracies attendant to low readings are not uncommon and counsel is fully capable of thoroughly exploring any anomalies which may have been present during the breathalyzer test and to bring them to the attention of the jury through cross-examination].

In *People v Jones*, 210 AD2d 904 (4th Dept 1994) *affd* 85 NY2d 998 (1995), the Appellate Division held that the trial court abused its discretion in denying the defendant's application for authorization to have neurological testing conducted based on reports that, as a child, the defendant sustained a traumatic head injury that caused permanent brain damage such that the defendant's expert physician recommended tests based upon his belief that the defendant's cognitive limitations were a result of brain damage and a 30-year history of alcoholism. In that case such testing was crucial to the defendant's asserted defense of justification. In *People v Tyson*, 209 AD2d 354 (1st Dept 1994), the Appellate Division held that the trial court

erred in denying the defendant's application to hire an expert in voice identification because expert testimony proving that the defendant was not the person heard on the tape admitting to the crime would seriously damage the complainant's credibility, obviously a key issue in a date rape case.

In any § 722-c application, be sure to state the issue subject to expert analysis clearly and establish its importance to the case and the theory of defense. Then explain how the expert will be employed to assist in the development and presentation of the defense case. Since the application is *ex parte*, these details can be confidentially revealed to the court; requesting a sealing order at the conclusion of the process ensures that the information remains confidential.

PURPOSE

The need for the engagement of an expert takes many forms, from reviewing and helping counsel understand complex evidence, to performing independent testing of particular evidence, to offering testimony that the prosecution's conclusions about certain evidence are in error. Indeed, there may be occasions where an expert consultation is needed to make the threshold determination of whether expert testing and testimony are required.

The defense is entitled to the engagement of expert services to refute the prosecution's evidence that tends to contradict a theory of defense. In *People v Salce*, 124 AD3d 923 (3rd Dept 2015), the Appellate Division held that the defendant was entitled to have an expert—"a police officer with expertise in assaults and knives"—testify that the wounds on the defendant and the accuser were "not inconsistent with defensive action by defendant" where the prosecution elicited police testimony that the extensive nature of the accuser's injuries was considered in deciding to charge the defendant and the proof on this key factual issue conflicted sharply. *See also People v Hernandez*,

125 AD3d 885 (2nd Dept 2015) [the defendant was entitled to a Criminal Procedure Law (CPL) 440.10 hearing for a determination on the merits of the defendant's motion to vacate his conviction based on trial counsel's failure to hire or consult with an expert witness concerning child sexual abuse syndrome in an effort to refute testimony in the prosecution's case.]

Denials of requests for expert assistance have been affirmed based on findings that there already exists sufficient information to proceed without employing another expert. *See, e.g., People v Brand*, 13 AD3d 820 (3rd Dept 2004) [it is not necessary to provide a second defense expert where the defendant was able to challenge prosecution's assertions through testimony of the first defense psychiatric expert]; *c.f. People v Seavey*, 305 AD2d 937 (3rd Dept 2003); *People v Paro*, 283 AD2d 669 (3rd Dept 2001).

OTHER CONSIDERATIONS

Admissibility may become an issue in determining necessity, although the ultimate admissibility of, or the intent to introduce, expert testimony should not be dispositive of the request. Since expert assistance may be critical to the evaluation of evidence and counsel's understanding of the import of evidence in preparation of the defense case, not just to secure testimony at trial, funding should not be denied simply because particular evidence ultimately may be deemed inadmissible at trial or because the use of the expert is not necessarily intended to develop evidence to be admitted at trial. *But see People v Brown*, 136 AD2d 1 (2nd Dept 1988) (court did not err in denying the defendant's request to retain expert services on eyewitness identification at public expense where it appropriately exercised discretion in a contemporaneous determination that the desired expert testimony on the defendant's behalf would be inadmissible); *People v Hinson*, 2001 NY Slip Op 40357(U) (Supreme Ct, Kings Co 2001) [denial of funds for polygraph expert based

on the defendant's failure to establish that lie detector tests have gained general scientific acceptance].

Consider using admissibility criteria as support for necessity. One element both considerations share is materiality, and while ultimately admissibility is a separate question, where the materiality of the evidence can be identified, the need for expert assistance in making use and confrontation determinations may be clarified.

Likelihood of success is similarly an erroneous standard for deciding § 722-c applications. In *People v Vale*, 133 AD2d 297 (1st Dept 1987), the Appellate Division reversed the defendant's conviction, deeming the denial of the defendant's § 722-c application for psychiatric assistance "most improvident." Citing the U.S. Supreme Court's decision in *Ake*, the court stated:

[W]hen a state undertakes to prosecute an indigent defendant, it must also take whatever measures are necessary to assure that the defendant is able to participate meaningfully in the proceeding. The proceeding will otherwise be fundamentally unfair and offensive to the due process guarantees of the Fourteenth Amendment ... [A]n indigent need not show that an insanity defense "might succeed" to obtain access to expert psychiatric assistance, but only that the issue of the defendant's sanity will be an important factor at trial.

Vale, 133 AD2d at 299-300. The more critical the forensic evidence is to proving the case, the greater the need for expert assistance to help the defense interpret and assess the evidence, which are indispensable steps before the questions of

admissibility and likelihood of success can be addressed.

E. INVESTIGATORS AND NECESSITY

Establishing necessity can be an especially arduous task when seeking funds to employ an independent defense investigator. Many judges take the position that it is part of assigned counsels' responsibility to conduct their own investigations, a position that has been upheld to some extent in federal court habeas review where the investigation needed is not complicated. *See Thomas v Kuhlman*, 255 F Supp 2d 99, 112 (EDNY 2003) [even if no funds were forthcoming either from the defendant, defendant's family or the county pursuant to § 722-c, counsel still had a professional, ethical obligation to conduct the investigation himself.]

When seeking funds for an independent defense investigator, the application should explain the circumstances supporting necessity, including that there are no reasonable alternatives or that all other reasonable alternatives have been exhausted. *See, e.g., Rockwell*, 18 AD3d at 971 [denial of funds not an abuse of discretion where the "defendant only asserted that an investigator would be helpful.... Moreover, County Court adjourned the impending trial to allow defense counsel additional time to conduct whatever investigation he deemed necessary."]; *People v Allen*, 28 Misc 3d 1226(A) (Albany City Ct 2010) [affidavit failed to demonstrate that the defense has exhausted other investigative avenues]; *People v Baker*, 69 Misc 2d 882 (Supreme Ct, New York Co 1972) [Applications for funds to cover the services of an investigator should include information as to the nature and difficulty of the problems and issues involved, the nature and difficulty of the services to be conducted, the anticipated time to be spent, the professional and/or educational qualifications of the investigator, and whether or not the investigator is licensed in the State of New York.].

The decision in *Thomas v Kuhlman, supra*, offers further insight on this point. In that case, the court held that defense counsel had been ineffective for failing to conduct his own investigation of the crime scene after the trial court had refused to grant § 722-c funds to hire a private investigator. The District Court found that "[t]his is not a circumstance in which the investigation would have been unduly expensive and time consuming. No plane flights were necessary, no technical, medical or psychiatric experts were required. A simple subway or taxi ride to the crime scene and the expenditure of several hours of investigation were all that would be minimally necessary." *Thomas v Kuhlman*, 255 F Supp 2d at 112.

Based on *Baker* and *Thomas v Kuhlman*, to establish the requisite necessity for the services of an investigator, a successful application might include the fact that there are too many witnesses to be located and interviewed by counsel; or that it is important that counsel has independent corroboration of witness interviews; or there is evidence that must be located and retrieved and counsel does not have time, resources, or investigative expertise to do so; or there are witnesses and/or evidence outside the jurisdiction that require an independent defense investigator to travel and investigate. A showing that the hiring and deploying of an independent investigator will be more cost-effective than compensating counsel for the work at assigned counsel rates should go a long way toward convincing a judge to grant § 722-c funds.

F. FORENSIC CONSULTANTS AND NECESSITY

Counsel may need an expert to assist in reviewing and understanding evidence or records to prepare for cross examination or effective investigation; this is a legitimate request under § 722-c. In *Matter of Rosalie S.*, 172 Misc 2d 176, 177 (Family Ct, Kings Co 1997), the court stated that "the ability to consult with experts to prepare a complete defense is a key element of

due process. To undermine the ability of litigants freely to engage experts in a confidential manner would have a chilling effect on their use and, therefore, impair the fundamental fairness of the litigation process.” See also *Matter of Lisa W. v Seine W.*, 9 Misc 3d 1125(A) (Family Ct, Kings Co 2005) (§ 722-c application granted to hire expert to act as consultant and conduct peer review of the opposing party’s expert report); *People v Roraback*, 174 Misc 2d 641 (Supreme Ct, Sullivan Co 1997) [§ 722-c order authorized consult with an expert in infrared microscopy in preparation for *Frye* hearing challenging the prosecution’s expert]; *People v Santana*, 80 NY2d 92, 99 (1992), quoting *Ake*, 470 US at 82 [“[W]ithout the assistance of a psychiatrist to ... present testimony, and to assist in preparing the cross-examination of a State’s psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high’”].

This is especially true in regard to forensic fields. For example, when a case involves medical reports of physical injuries or an autopsy report in a homicide, the defense should be entitled to an expert to help interpret the full import of the details of the records. See, e.g., *People v Bryce*, 287 AD2d 799 (3rd Dept 2001) [“[T]he failure of the defense experts to timely examine this critical evidence prevented timely disclosure of ‘a serious flaw’ in the prosecution’s case”]. Similarly, when a case involves DNA evidence, the defense should be entitled to consult with an expert who can review, interpret, and prepare the attorney to confront the prosecution’s evidence, even if the expert may not be called as a defense witness. But see *People v Robinson*, 70 AD3d 728 (2nd Dept 2010) [denial was proper where the defendant failed to demonstrate the necessity of the appointment of a DNA expert].

In *Tyson v Keane*, *supra*, the Second Circuit discussed the nature of expert assistance in cases where forensic analysis is the basis for seeking expert assistance. Citing *Ake v Oklahoma* and *United States v Durant*, 545 F2d 823, 829 (2nd Cir 1976), the court acknowledged that the

importance of providing such experts rests on the fact that experts in these circumstances offer information and analysis that a non-expert cannot provide:

Although the jury remains the ultimate judge of sanity, without expert assistance ‘the risk of an inaccurate resolution of sanity issues is extremely high.’ *Ake*, 470 U.S. at 82. Similarly, a jury cannot discern whether a fingerprint from the scene matches defendant’s prints without expert assistance.

Tyson, 159 F3d at 738.

Where forensic viability has not been settled under *Frye*, especially in circumstances where the issue is new, or where forensic validity has been called into question through the evolution of scientific understanding, it may be helpful to submit a Memorandum of Law setting forth the fundamental elements of the forensic issues and ask for a hearing to establish the necessity of the expert assistance in the circumstances presented by the case. In recent years, traditional forms of forensic evidence that have been accepted virtually without challenge for decades have received some judicial scrutiny, and the number of successful defense challenges is starting to grow. See, e.g., *Maryland v Rose*, Case No. K06-0545 (Circuit Ct, Baltimore Co 2007); *Commonwealth v Patterson*, 445 Mass 626 (Mass 2005) [fingerprints]; *United States v Green*, 405 F Supp 2d 104 (D Mass 2005) [ballistics]; *United States v Hines*, 55 F Supp 2d 62 (D Mass 1999) [handwriting analysis]; *People v Bailey*, 2016 NY Slip Op 07490 (4th Dept 11/10/2016) [shaken baby syndrome].

In the wake of the National Academy of Sciences study and report, *Strengthening Forensic Science in the United States: A Path Forward* (2009) [“NAS report”], and the recent President’s Council on Science and Technology Report issued September 16, 2016, [“PCAST report”], in any case where so-called “forensic sciences” are at

issue, the defense should seek the assistance of an expert to determine whether the science involved is truly valid and to scrutinize whether proper procedures and best practices were followed in order to establish the reliability of the evidence.

G. THE RATE AND PROJECTED COST OF RETAINING THE EXPERT

A § 722-c application is not statutorily required to include the amount of funds necessary, but be aware that there is a statutory cap, currently set at \$1,000. If the final compensation will exceed that cap, extraordinary circumstances must be established, if not at the outset then at the end when a voucher is submitted. Local practice will dictate whether an initial application must include the actual amount requested if it is anticipated to be less than the statutory cap. If it is anticipated from the outset that more funds will be required, or simply to strengthen the application, the best practice would be to include as much information as possible about the exact amount needed and to explain any attendant extraordinary circumstances. *People v Dearstyne*, 305 AD2d 850 (3rd Dept 2003) [“In order to prevail on a motion pursuant to County Law § 722-c, a defendant must show both necessity and, if the compensation sought is in excess of [the statutory limit], extraordinary circumstances”].

The statute does not define extraordinary circumstances, nor is there any case law on point. By common usage of the term, extraordinary circumstances may include factors such as the need for a great amount of time to review and assess complex evidence, that the expertise is unique and specialists are rare, or that the only available expert is from a distant jurisdiction. See *Dove*, 287 AD2d at 807 [The “application was oral and failed to address details concerning the necessity for the expert, the time to be expended by the expert, the precise services to be rendered by the expert, or the extraordinary circumstances

which would warrant expenditure in excess of [the statutory limit].”].

Working with a circumspect court to satisfy lingering concerns should increase the likelihood of ultimately gaining the needed funds. There are cases in which the trial court’s initial denial without prejudice or leave to renew was affirmed, the issue being lost on appeal because the defense failed to follow up. *Id.* [“[A]lthough the initial application was denied, defendant failed to seek an adjournment of the trial in order to locate an expert who could examine the recordings at a more reasonable sum”]; see also *Brittenie K.*, 50 AD3d 1203; *People v Graves*, 238 AD2d 754 (3rd Dept 1997); *People v Lane*, 195 AD2d 876 (3rd Dept 1993).

Where a court is hesitant to grant funds, obtaining more information to satisfy the prongs of materiality and necessity and thereafter renewing a request can often turn the tide. Locating an expert closer to the jurisdiction, providing more details as to a particular expert’s credentials where a specialty is in question, better defining how the expert will be used; any of these may be enough to persuade a court to grant an application previously denied. See *People v Koberstein*, 262 AD2d 1032 (4th Dept 1999) [“At the time of his prior trial ..., defendant received \$1,150 to retain an odontologist who was never called as an expert witness at that trial. Although the court initially denied defendant’s request for funds [in the amount of \$4,200], when defense counsel renewed his request for the lesser amount of \$3,000, the court noted that it was ‘receptive’ and told defendant to confer with the court prior to making any expenditures. Defendant never raised the issue again. In the circumstances of this case, the court did not abuse its discretion in denying defendant’s inflated request to retain a new expert after the court had previously allocated funds to obtain the services of an expert who did not testify at defendant’s prior trial Moreover, defendant never pursued the matter after the

court expressed its receptiveness to the retention of an expert at a more reasonable cost”].

If the assistance sought is outside the bounds of reasonableness, the court will likely deny the § 722-c application. In *People v Thomas*, 139 Misc 2d 158 (County Ct, Schoharie Co 1988), the defense sought an order directing the county to pay for costs associated with transporting the defendant to Ottawa for a particular examination to obtain an expert opinion relative to his culpability, including having the sheriff provide transportation over a 72-hour period. The court found that “[t]he cost would not only be extraordinary, but phenomenal ..., [and the] application fails to sufficiently convince the court that such expert services are truly necessary within the meaning and intent of County Law § 722-c. In addition, because of the logistics, security risk, and huge expense involved, this court holds and determines that the defendant's application should be and is hereby denied in all respects.” *Id.* at 159-160.

This type of situation presents the opportunity for counsel to persevere and

persuade the court to reconsider where the expertise is critical and there are no other available alternatives. Some issues where an expert is needed may be novel or complex and therefore qualified experts may not be readily accessible. Counsel should not abandon efforts in this regard, but rather continue to seek assistance and return to the court with renewed and updated requests where it can be shown that costs can be reduced or qualified experts have refused to accept the case because the fees are unacceptably low. Making a complete record to establish on appeal the importance of the expertise and diligent efforts to secure assistance will avoid findings of abandonment of the issue and may help to gain a reversal where the expert was denied.

The U.S. Supreme Court has held that the defendant received ineffective assistance of counsel where counsel did not know that state law allowed the defense to seek additional funds for an expert. Hinton v Alabama, 134 S Ct 1081 (2014).

III. STAGES OF PROCEEDINGS

Section 722-c does not limit expert or other assistance to certain types of cases, levels of seriousness, or to any particular stage of the proceedings (*e.g.*, only after arraignment on indictment). *But see Stamp*, 120 Misc 2d 48 [request for expert assistance on breath test machine inadequacies denied in non-felony DWI case]. *Stamp* stands alone and in the years since that decision, the collateral consequences of even less serious convictions such as non-felony DWI can be devastating. Where an application is resisted because of an asserted lack of importance of the case or potential conviction, it is incumbent upon counsel to press the issue as a matter of due process and fundamental fairness to ensure that a person does not suffer undue consequences for the lack of ability to thoroughly examine the evidence and present a defense.

The importance of being allowed to hire experts in the early stages of a case relates to their use as consultants: the need for assistance in evaluating evidence to make reasonable strategic decisions, including whether to accept or reject a plea offer. *See Bennett*, 29 NY2d 462 [It is well settled that the defendant's right to effective representation entitles him to have counsel “conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial.”]; *People v Reed*, 152 AD2d 481 (1st Dept 1989) [noting counsel's obligation to convey accurate information in consideration of plea negotiation]. The United States Supreme Court's 2012 decisions in *Lafler v Cooper*, 566 US 156 (2012) and *Missouri v Frye*, 566 US 133 (2012), regarding the critical nature of effective assistance counsel in

plea cases, underscores how important it is that attorneys seek to use every available resource to investigate and properly counsel clients in the disposition of their cases.

Similarly, the use of mitigation experts has been accepted in cases where a defendant's history presents issues requiring evaluation. *See People v Louis*, 161 Misc 2d 667 (Supreme Ct, New York Co 1994) [approval of fees in excess of statutory amount based on extraordinary circumstances for mitigation expert in pre-plea investigation].

Funds for expert assistance may be available for post-conviction practice in the discretion of the court. Experts may be necessary in order to establish compelling issues to vacate a judgment or sentence. In *People v Bailey*, 47 Misc 3d 355 (County Ct, Monroe Co 2014), the motion court ultimately granted § 722-c funds to cover fees of a slate of experts that presented evidence related to the state of the science in Shaken Baby Syndrome cases that had dramatically changed in the years following a prosecution and conviction on that basis. The CPL article 440 proceedings were brought challenging conviction on the basis of a dramatic shift in the science related to Shaken Baby Syndrome requiring a full re-examination of the judgment of conviction. The expert testimony established that the medical and scientific understanding of injuries long attributed to the inappropriate shaking of infants was not as concrete as previously believed, and that upon careful review of the evidence in the *Bailey* case, there was significant doubt that the infant's death was reasonably attributable to shaking as opposed to a fall. At the conclusion of the hearing, the court wrote a carefully detailed opinion reviewing the experts' analysis of the science and evidence and vacated the conviction. The court had reserved on the initial § 722-c application but ultimately granted the request for funds. It was fortuitous that the experts in *Bailey* were willing to pursue their investigation and offer testimony while the funding issue remained unresolved, but in the end the case stands for the proposition that post-conviction courts should consider granting expert funds in cases of merit that otherwise may result in a continuing miscarriage of justice. The Fourth Department affirmed the trial court's decision granting the post-conviction motion. *Bailey*, 2016 NY Slip Op 07490.

IV. TYPES AND INDEPENDENCE OF EXPERTS

The defense entitlement to funding for experts is not limited to the same types of experts being used by the prosecution. In *Smith*, 114 Misc 2d 258, the court granted § 722-c funds to the defense in accordance with the Special Prosecutor's intent to use experts in particular fields. This case does not stand for the proposition that the defense is *only* entitled to the same types of experts that the prosecution intends to use. The need for expertise must be determined in accordance with the evidence and demands of the defense case, which may include assistance in refuting expert testimony presented by the prosecutor, but may also include exploring other issues that the defense can identify. Prosecutors may not seek experts relating to potential defenses until after the defense makes these defenses known. Examples include mental health defenses, challenges to eyewitness testimony, and challenges to the prosecution's theory of how an incident unfolded (which may require a scene reconstruction expert, an expert on the physical limitations imposed by a defendant's disability, or one of many other types of experts).

Ample support exists for the proposition that the right to experts to assist the defense can only be meaningful if the experts employed have sole allegiance to the defense. "The essential benefit of having an expert in the first place is denied the defendant when the services ... must be shared with the prosecution." *United States v Sloan*, 776 F2d 926, 929 (10th Cir 1985); *Cowley v Stricklin*, 929 F2d 640, 644 (11th Cir 1991); *Smith v McCormick*, 914 F2d 1153 (9th Cir 1990); *Marshall*, 423 F 2d at 1319

[an expert who shares "both a duty to the accused and a duty to the public interest" is burdened by an "inescapable conflict of interest"]; *People v McLane*, 166 Misc 2d 698 (Supreme Ct, New York Co 1995).

There is some case law that holds where the issues have been addressed by court-ordered experts or by experts previously engaged in the matter, the court may refuse funds to hire an additional expert solely for use by the defense. *Matter of Garfield M.*, 128 AD2d 876 (2nd Dept 1987) [The court did not abuse its discretion in concluding that there was no need to provide an independent psychological expert because of "the extensive evaluation and psychological examination of the appellant by the Family Court Mental Health Services and the Probation Department."]. However, it is critical to review such evidence carefully to determine whether independent expertise is necessary to assess the reliability of previous expert review and challenge the conclusions if appropriate.

Sometimes it is not possible to find an independent expert who has the expertise needed. In such instances, a court may order public experts to assist the defense as a matter of due process. In *People v Evans*, 141 Misc 2d 781 (Supreme Ct, New York Co 1988), the trial court ordered the New York Police Department Auto Crimes Unit experts to assist the defense in examining non-public Vehicle Identification Numbers. Finding that the expertise did not widely exist elsewhere and that the defense had exhausted efforts to obtain cooperation from private sources, the court held that "[w]hether or not [the defendant] has funds to hire an expert, if the only source of expertise that may reasonably be necessary to his defense resides with the government, the government must give him access. This is the essence of fairness. Due process mandates no less." *Id.* at 784.

V. PROTECTING THE PUBLIC TREASURY CANNOT BE SOLE BASIS FOR DENYING § 722-c APPLICATIONS

Courts may cite the desire to preserve government funds as a basis for denying applications for services under § 722-c. *See, e.g., Pride*, 79 Misc 2d at 583 [stating that the defense should not be allowed to "raid the public treasury"]. The federal District Court noted in *Thomas v Kuhlman, supra*, with some apparent consternation in regard to the denial of public funds for the employment of a defense investigator, that "[i]t is admittedly somewhat unpalatable to the court to lay responsibility for the expense of such an investigation on defense counsel where the government itself refuses to acknowledge its responsibility to make funds available in order to achieve a fair trial. In this court [US District Court], such funds would be made available in such a case." *Thomas v Kuhlman*, 255 F Supp 2d at 112.

The law is clear: where the defense makes the appropriate showing of financial inability and necessity, budgetary constraints cannot form the sole basis for denial of funds. *See Ake*, 470 US at 78-80; *Matter of Director of Assigned Counsel Plan of the City of New York*, 159 Misc 2d 109, 123 (Supreme Ct, New York Co 1993) *affd sub nom. People v Townsend*, 207 AD2d 307 (1st Dept 1994) *affd* 87 NY2d 191 (1995) [Economic issues "cannot be the overriding concern when the ability of the court to carry out its essential function of assuring justice and due process is implicated."].

VI. § 722-c AND SYSTEMIC REFORM

From a systemic standpoint, § 722-c motions for auxiliary services can be utilized as a means of developing authority supporting parity of resources for the defense. In the area of forensics, the NAS and PCAST reports decrying the scientific validity of forensic evidence as a whole should lay the groundwork for a standard practice of obtaining expert assistance in any case where the prosecution intends to use forensic evidence. Prosecutors have access to state forensic services and law enforcement databases to assist in the preparation of cases. To ensure that a person accused of a

crime has a fair opportunity to meet and challenge this wide range of evidence, defenders must be diligent in seeking similar qualified assistance.

Where counsel cannot adequately perform the required investigation because time and resources prevent it, an application for investigative assistance should be made and renewed as necessary. Defenders in offices without investigators, and other assigned counsel working under onerous conditions of limited resources and overly burdensome caseloads, should cite overall constraints of time and resources as part of the showing of necessity.

This strategy serves a twofold purpose. First, it makes a solid record on appeal if the lack of investigative assistance plays a part in preventing the preparation and presentation of a defense. Second, the regular filing of such applications will help establish the systemic need to ensure that clients in need and assigned counsel have investigators and other expert assistance available to fulfill their constitutional rights and obligations.

The ability to secure qualified expert assistance to examine, assess, and prepare a defense is bound with the constitutional right to present a defense. As careful investigation is undertaken and evidence is reviewed, and definitive theories and themes of defense are developed, § 722-c applications for experts virtually write themselves. It then becomes the task of defenders to encourage judges and the trial and appellate courts to fulfill the demands of due process and fundamental fairness by granting these applications.

CASELAW ON USE AND ENGAGEMENT OF EXPERTS

The following cases, while not exclusively dealing with § 722-c funding, should help inform motion practice with respect to specific types of experts.

CONFESSIONS

Ability to understand *Miranda* *People v Knapp*, 124 AD3d 36 (4th Dept 2014)

False confessions *People v Bedessie*, 19 NY3d 147 (2012); *People v Days*, 131 AD3d 972 (2nd Dept 2015)

Hypnotic expert *Little v Armontrout*, 835 F2d 1240 (8th Cir 1987); *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982); *People v Tunstall*, 133 Misc 2d 640 (Supreme Ct, Richmond Co 1986)

Involuntariness *People v Oliveras*, 21 NY3d 339 (2013) (ineffective assistance of counsel for failing to review psychological records related to voluntariness)

Linguistic Discourse Analysis *People v Tyson*, 227 AD2d 322 (1st Dept 1996); *Tyson v Keane*, 991 F Supp 314 (SDNY 1998)

EYEWITNESS EVIDENCE

Admission of expert testimony *People v McCullough*, 27 NY3d 1158 (2016)

Eyewitness reliability: passage of time *People v LeGrand*, 8 NY3d 449 (2007)

- **Cross-Racial Identification** *People v Abney*, 13 NY3d 251 (2009)
- **Event Stress, Weapons Focus [Frye Hearing Decision and Order]** *People v Abney*, 31 Misc 3d 1231(A) (Supreme Ct, New York Co 2011)
- **Perception and memory, correlation between confidence and accuracy** *People v Lee* 96 NY2d 157 (2001); *People v Young*, 7 NY3d 40 (2006)

Jury Instructions regarding expert testimony *People v Drake*, 7 NY3d 28 (2006)

FORENSIC SCIENCES

Arson *People v Rivers*, 18 NY3d 222 (2011); *People v Chase*, 8 Misc 3d 1016(A) (County Ct, Washington Co 2005) [changes in science of arson investigation amounted to newly discovered evidence]

Blood spatter evidence *People v Whitaker*, 289 AD2d 84 (1st Dept 2001); *People v Barnes*, 267 AD2d 1020 (4th Dept 1999) [Frye hearing denied, "evidence has long been deemed reliable"]

Fingerprint expert *United States v Patterson*, 724 F2d 1128 (5th Cir 1984); *United States v Durant*, 545 F2d 823 (2nd Cir 1976)

Handwriting expert *People v Mencher*, 42 Misc 2d 819 (Supreme Ct, Queens Co 1964) (authorized under former Code of Criminal Procedure § 308)

Hair analysis *People v Allweiss*, 48 NY2d 40 (1979)

Infrared Microscopy [Fourier Transform Infrared Spectrophotometry or FTIR] *People v Roraback*, 174 Misc 2d 641 (Supreme Ct, Sullivan Co 1997)

Narcotics *People v Mencher*, 42 Misc 2d 819 (Supreme Ct, Queens Co 1964) (authorized under former Code of Criminal Procedure § 308)

Photogrammetry experts *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982)

Voice spectrography *People v Tyson*, 209 AD2d 354 (1st Dept 1994)

INVESTIGATIONS AND MITIGATION

Investigator *People v Irvine*, 40 AD2d 560 (2nd Dept 1972); *Marshall v United States*, 423 F2d 1315 (10th Cir 1970)

Prepleading report preparer *People v Louis*, 161 Misc 2d 667 (Supreme Ct, New York Co 1994)

Social worker *Matter of Director of Assigned Counsel Plan of the City of New York*, 159 Misc 2d 109 (Supreme Ct, New York Co 1993) *affd sub nom. People v Townsend*, 207 AD2d 307 (1st Dept 1994) *affd* 87 NY2d 191 (1995)

INTERPRETERS

Right to assistance at any stage of criminal proceeding *People v Robles*, 86 NY2d 763 (1995)

Right to assistance to review documents in preparation for trial *People v Rodriguez*, 247 AD2d 841 (4th Dept 1998) (denial of adjournment was an abuse of discretion)

Right to meaningfully participate in trial and assist in defense *People v Ramos*, 26 NY2d 272 (1970)

MISCELLANEOUS

Jury consultant *People v Pike*, 63 AD3d 1692 (4th Dept 2009) [funds denied for failure to establish necessity under circumstances of case]

Transcript in lieu of testimony to avoid fee *Matter of Palma S. v Carmine S.*, 134 Misc 2d 34 (Family Ct, Kings Co 1986) (court denied funds to pay witness fees to compel opinion testimony but granted § 722-c funds to order and admit transcript of expert's testimony in a prior proceeding.)

[**Ed. Note:** The decision in this case disappointingly, but unequivocally expresses the trial court's lack of interest in the particular expert testimony, but the holding is worthy in its support for the granting of funds for transcripts and the statement that "this court will not penalize a party for whom it has appointed counsel for her financial inability to pay a witness' fee"]

SORA *People v Linton*, 94 AD3d 962 (2nd Dept 2012) [The defendant in SORA proceeding may be entitled to the appointment of expert upon finding that services are necessary; necessity not established in instant case]

Street-level drug dealing *People v Gonzalez*, 99 NY2d 76 (2002); *People v Brown*, 97 NY2d 500 (2002); *but see People v Smith*, 2 NY3d 8 (2004) and *People v Colon*, 238 AD2d 18 (1st Dept 1997) *app dms* 92 NY2d 909 (1998)

VIN Inspection by Auto Crime Division of New York City Police Department to assist in defense of car arson case *People v Evans*, 141 Misc 2d 781 (Supreme Ct, New York Co 1988)

PROCEDURAL

Access to evidence for testing *People v Nunez*, 155 Misc 2d 160 (Supreme Ct, New York Co 1992)

Expert testimony at pretrial hearings on admissibility of Ventimiglia/Molineux evidence *People v Denson*, 26 NY3d 179 (2015)

Expert presence in courtroom during witness testimony *People v Novak*, 41 Misc 3d 737 (County Ct, Sullivan Co 2013); *People v Medure*, 178 Misc 2d 878 (Supreme Ct, Bronx Co 1998); *People v Santana*, 80 NY2d 92 (1992)

Extent of non-record evidence admissible to support opinion *People v Angelo*, 88 NY2d 217 (1996)

PHYSICAL MEDICINE

Bitemarks: Odontologist *People v Koberstein*, 262 AD2d 1032 (4th Dept 1999)

- **Admissibility of Evidence** *People v Bethune*, 105 AD2d 262 (2nd Dept 1984)

EEG examination *United States v Hartfield*, 513 F2d 254 (9th Cir 1975) (to determine if the defendant has epilepsy)

Forensic medicine *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982)

Forensic pathologist *Williams v Martin*, 618 F2d 1021 (4th Cir 1980) (on cause of death); *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982)

Physician and psychotherapist *People v Hatterson*, 63 AD2d 736 (2nd Dept 1978)

Shaken Baby Syndrome *People v Bailey*, 47 Misc 3d 355 (County Ct, Monroe Co 2014) *affd* 2016 NY Slip Op 07490 (4th Dept 11/10/2016); *but see People v Thomas*, 46 Misc 3d 945 (County Ct, Westchester Co 2014) (denial of Frye hearing on SBS)

PSYCHIATRIC/PSYCHOLOGICAL/NEUROLOGICAL/TRAUMA-INFORMED

Battered woman's syndrome *Dunn v Roberts*, 963 F2d 308 (10th Cir 1992); *People v Seeley*, 186 Misc 2d 715 (Supreme Ct Kings Co 2000)

Child Sex Abuse Accommodation Syndrome *People v Spicola*, 16 NY3d 441 (2011)

Complainant testimony: capacity to lie, developmental disability *People v Brown*, 7 AD3d 726 (2nd Dept 2004)

Memory impairment of the defendant *People v Segal*, 54 NY2d 58 (1981) (to admit defense evidence must submit to examination by prosecution expert)

Neonatacide Syndrome *People v Wernick*, 89 NY2d 111 (1996)

Neurological testing for Traumatic Brain Injury *People v Jones*, 210 AD2d 904 (4th Dept 1994) *affd* 85 NY2d 998 (1995); *People v Phillips*, 16 NY3d 510 (2011)

Psychological automatism *People v Brand*, 13 AD3d 820 (3rd Dept 2004)

Intoxication and intent *People v Cronin*, 60 NY2d 430 (1983); *People v Donohue*, 123 AD2d 77 (3rd Dept 1987)

Second neurologist *People v McClane*, 166 Misc 2d 698 (Supreme Ct, New York Co 1995) (to assist defense counsel and psychiatrist who admitted he lacked ability to evaluate relationship between brain structure, behavior, and emotions)

Second validator in child sex abuse case *Matter of Tiffany M.*, 145 Misc 2d 642 (Family Ct, Queens Co 1989)

TOXICOLOGY

Driver impairment *People v Heidgen*, 22 NY3d 259 (2013)

Narcotics: chemical analysis, odor *People v Darby*, 263 AD2d 112 (1st Dept 2000)

Poison: administration and effects *People v Feldman*, 299 NY 153 (1949)

Radioimmunoassay [RIA]: human hair *Matter of Adoption of Baby Boy L.*, 157 Misc 2d 353 (Family Ct, Suffolk Co 1993)

WEAPONS

Ballistics expert *People v Jenkins*, 98 NY2d 280 (2002) (preclusion of prosecution ballistics evidence not warranted where the defense declined opportunity to retain an expert)

Bullet trajectory *People v Dewey*, 23 AD2d 960 (4th Dept 1965); *People v Hamilton*, 127 AD3d 1243 (3rd Dept 2015); *United States v Durant*, 545 F2d 823 (2nd Cir 1976)

Firearms expert *People v Hull*, 71 AD3d 1336 (3rd Dept 2010)

Knives: assault *People v Salce*, 124 AD3d 923 (3rd Dept 2015)

Toolmarks *People v Givens*, 30 Misc 3d 475 (Supreme Ct, Bronx Co 2010)

QUICK REFERENCE LIST: STATE AND NATIONAL STANDARDS ON DEFENSE ACCESS TO AND FUNDING FOR EXPERTS

Below is a list of New York and national standards regarding public defense access to independent experts, including investigators, interpreters/translators, forensic scientists, and medical and mental health professionals, and funding to retain such experts.

NEW YORK STANDARDS

New York State Office of Indigent Legal Services, *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest*

(eff. July 1, 2012, January 1, 2013 [standards and criteria made applicable to all mandated representation])

<https://www.ils.ny.gov/files/Conflict%20Defender%20Standards%20and%20Criteria.pdf>

"Counties must ensure, through their plans for providing public defense representation and other provisions, that attorneys and programs providing mandated legal services in conflict cases: ... 4. Have access to and use as needed the assistance of experts in a variety of fields including mental health, medicine, science, forensics, social work, sentencing advocacy, interpretation/translation, and others. See *NYSBA Standard H, Support Services/Resources*."

New York State Office of Indigent Legal Services, *Standards for Parental Representation in State Intervention Matters (2015)*

<https://www.ils.ny.gov/files/Parental%20Representation%20Standards%20Final%20110615.pdf>

"O-7. Expert witnesses. Identify, secure, prepare, and qualify any expert witness. Prepare to cross-examine the opposition's experts, including, when possible, interviewing them.

Commentary

State intervention cases often require multiple experts in different fields, such as physical and mental health, drug and alcohol use, parenting or psychosexual assessments, and others. Experts may be used by either party for ongoing case consultation as well as for providing testimony at trial. See Standard G-2."

See also Standard D-1 commentary and G-2 commentary.

Indigent Defense Organization Oversight Committee (First Department), *General Requirements for all Organized Providers of Defense Services to Indigent Defendants (July 1, 1996 [as amended May 2011])*

[www.nycourts.gov/courts/ad1/Committees&Programs/IndigentDefOrgOversightComm/general%20 requirements.pdf](http://www.nycourts.gov/courts/ad1/Committees&Programs/IndigentDefOrgOversightComm/general%20requirements.pdf)

"VII.B.3.a: Lawyers should have access to the professional services of psychiatrists, forensic pathologists and other experts at all stages of the case, and should be able to rely upon such experts not only to serve as trial witnesses, but also to provide pre-trial analysis and advice. Quality representation requires that defense lawyers have the services of interpreters to assist in communicating with their non-English speaking clients and witnesses at all stages of the case."

New York State Bar Association, *Revised Standards for Providing Mandated Representation (2015)*

<http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=44644>

"H-5. Assigned counsel plans shall ensure that assigned counsel have the investigatory, expert, and other support services, including, but not limited to, social work, mental health and other relevant social services, and facilities necessary to provide quality legal representation...."

"H-6. Because persons eligible for mandated representation have the right to all appropriate investigatory and expert services, courts should routinely grant requests for such services made by assigned counsel. In Family Court expert services, including social worker, family treatment, and forensics, are often crucial at the outset and should be requested by counsel prior to fact finding...."

See also Standard H-1.

New York State Defenders Association, *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004)*

http://66.109.34.102/ym_docs/04_NYSDA_StandardsProvidingConstitutionallyStatutorilyMandatedRepresentation.pdf

VII. "E. Publicly-funded services, including but not limited to transcription of court proceedings, investigators, interpreters, and experts, should not be denied to a person who is financially eligible for publicly-provided legal services but is

represented by counsel acting pro bono or paid by a third person. Nor should publicly-funded auxiliary services be denied to a person whose financial condition after payment of a reasonable fee to retained counsel makes that person unable to obtain necessary auxiliary services without substantial hardship to themselves or their families."

VIII.A. "6. Unless inconsistent with the best interest of the client, counsel should conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible. Counsel should secure the assistance of investigators and/or other experts, including providers of social services, whenever needed for preparing any aspect of the defense, including but not limited to bail applications, pretrial motions, plea negotiations, defense at trial including developing an understanding of or rebuttal of the prosecution's case, and sentencing."

VIII.A.8. "c. Should fully prepare for pretrial proceedings and trial Counsel should obtain expert assistance whenever it is needed for any aspect of case preparation and presentation, including but not limited to the assistance of mental health experts, forensic scientists, and persons knowledgeable about any aspect of the case that counsel cannot adequately understand or present without assistance."

See also Standards VIII.B.6 and VIII.B.8.c, which are Family Court counterparts to the two standards immediately above. And see also Standard III "C. ...Salaries and fees should be sufficient to compensate attorneys, other professionals (such as investigators, social workers, sentencing experts, expert witnesses, and consultants), and support staff commensurate with their qualifications and experience, and should be at least comparable to compensation of their counterparts in the justice system"

NATIONAL STANDARDS

American Bar Association (ABA), *Ten Principles of a Public Defense Delivery System* (2002)

www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf

"8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system." *See* Commentary to this standard, which says in relevant part: "There should be parity of workload, salaries and other resources (such as ... access to forensic services and experts) between prosecution and public defense" [Endnote omitted]

ABA, *Standards for Criminal Justice: Providing Defense Services*, 3d ed., (1990, 1992)

www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_blk.html#1.4

"Standard 5-1.4 Supporting services

The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process. In addition, supporting services necessary for providing quality legal representation should be available to the clients of retained counsel who are financially unable to afford necessary supporting services."

See also Standard 5-3.3 Elements of the contract for services, subparagraph (x).

National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976)

http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf

Guideline "3.1 Assigned Counsel Fees and Supporting Services.... Funds should be available in a budgetary allocation for the services of investigators, expert witnesses and other necessary services and facilities...."

See also Guidelines 1.5, 3.4, 4.3, and 5.8.

National Advisory Commission on Criminal Justice Standards and Goals - *Courts, Chapter 13, The Defense* (1973)

http://www.nlada.net/sites/default/files/nac_standardsforthedefense_1973.pdf

"Standard 13.14 Supporting Personnel and Facilities.... The budget of a public defender for operational expenses other than the costs of personnel should be substantially equivalent to, and certainly not less than, that provided for other components of the justice system with whom the public defender must interact, such as the courts, prosecution, the private bar, and the police. The budget should include:

3. Funds for the employment of experts and specialists, such as psychiatrists, forensic pathologists, and other scientific experts in all cases in which they may be of assistance to the defense"

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with the period of incarceration, the sentence had expired almost six months before filing of the delinquency petition alleging violation of probation on Aug. 15, 2013. (County Ct, Suffolk Co)

**People v McDonald, 138 AD3d 1027, 30 NYS3d 241
(2nd Dept 4/20/2016)**

The court erred in denying suppression of identification testimony under the totality of circumstances, including that the prosecution failed to preserve the photo array from which one witness initially identified the defendant; the testimony at the suppression hearing—that the computer displaying those arrays was not connected to a printer—did not dispel any inference of suggestiveness; and two detectives, one who conducted the photo array with one witness and one who supervised lineup procedures with another witness, were not produced at the hearing. The court also improperly curtailed cross examination of one detective at trial as to how one photo array, only recently disclosed to the defense, had been generated. (Supreme Ct, Kings Co)

Dissent: The prosecution met the initial burden of establishing the reasonableness of police conduct, and the defendant failed to prove undue suggestiveness.

**People v Velez, 138 AD3d 1041, 30 NYS3d 218
(2nd Dept 4/20/2016)**

The search of a shed in the yard exceeded the scope of the warrant, which authorized a search of the yard and residence of a specific address. The police found marijuana in the yard and packaged cocaine and money hidden in the shed. Defense counsel had nothing to lose and much to gain by seeking suppression of the evidence found in the shed; failure to do so vitiated a viable defense, prejudicing the defendant, requiring a new trial. (Supreme Ct, Kings Co)

**People v Wells, 138 AD3d 947, 30 NYS3d 198
(2nd Dept 4/20/2016)**

The court in this Sex Offender Registration Act (SORA) matter did not err in assessing 20 points under risk factor six on the basis that the accuser was asleep and therefore physically helpless when the sexual abuse by the defendant began. Counsel did not argue during the SORA hearing that the court improperly relied on grand jury testimony submitted in camera; the evidence was in any event cumulative. (Supreme Ct, Queens Co)

Dissent: The court erred by receiving and relying “upon ex parte evidence that was submitted in camera

over the defendant’s objection.” To allow the process followed here will “ensure that this species of due process violation will flourish.”

The defendant was acquitted of first-degree sexual abuse at a non-jury trial, a count based upon the accusation that the defendant undressed the accuser and began sexual contact while she was asleep. New counsel argued at the hearing, held a month beyond the defendant’s open release date, that the grand jury minutes should not be considered; “failure to explicitly refer to a constitutional subdivision did not render his objections void”

**People v Staton, 138 AD3d 1149, 31 NYS3d 136
(2nd Dept 4/27/2016)**

“We do not agree with ... our dissenting colleague ... that the characteristics of [the defendant’s] picture draw the viewer’s attention toward it” when viewing the photo array. (Supreme Ct, Queens Co)

Dissent: The court erred in declining to suppress identification testimony where the defendant’s picture in the photo array is the only one showing someone with salt and pepper hair, a feature mentioned by a complainant, and contained many other aspects not shared by other pictures.

[*Ed. Note: Leave to appeal was granted on Aug. 10, 2016 (28 NY3d 939 [2nd Dept]).*]

**People v Worrell, 138 AD3d 1154, 30 NYS3d 318
(2nd Dept 4/27/2016)**

In the search warrant application that led to discovery of evidence on a computer seized from the defendant’s home, a police detective averred that he had used certain law enforcement software to investigate peer-to-peer file sharing networks that, with other computer-based investigation, identified an internet address registered to the defendant’s home as having shared child pornography files. The defendant’s motion challenging the warrant raised a factual dispute as to whether the detective’s actions prior to obtaining the warrant constituted a search of the defendant’s computer. A hearing should have been held. The lateness of the motion, which was based on facts that the defendant had not known earlier, did not delay the proceedings so as to warrant denial on those grounds. (Supreme Ct, Queens Co)

**People v Reid, 139 AD3d 760, 30 NYS3d 335
(2nd Dept 5/4/2016)**

Where the parties in this robbery case agreed that portions of the defendant’s statement relating to his girlfriend’s saying he raped her would be redacted, and that the parties would return to court before the jury received

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the admitted statement, the court erred in denying the defense motion for mistrial when the unredacted statement was provided to the jury without notifying the attorneys. The court's instruction was ineffectual in curing the resulting prejudice. (Supreme Ct, Queens Co)

[Matter of Savas v Bruen](#), 139 AD3d 736, 30 NYS3d 673 (2nd Dept 5/4/2016)

The court erred in holding the appellant in civil contempt for failing to comply with the order of protection mandate that required him to pay the petitioner's attorney's fees and pay for a batterer's education program without conducting a hearing on the appellant's financial ability to pay. The documentation from the appellant's psychiatrist, which stated that the appellant could not work due to severe anxiety, "was sufficient to raise a factual dispute" (Supreme Ct, Rockland Co)

[People v Singh](#), 139 AD3d 761, 31 NYS3d 168 (2nd Dept 5/4/2016)

Where the prosecution's case included testimony that the decedent had brandished a large knife in the defendant's home and threatened to kill a codefendant, who testified for the prosecution at trial under a cooperation agreement, the court erred in denying the defendant's request for a charge regarding the justified use of deadly physical force to defend himself or another. A justification defense, while ordinarily injected by a defendant, may be raised by an issue of fact arising in the prosecution's case. (Supreme Ct, Queens Co)

[Matter of Morgan v Spence](#), 139 AD3d 859, 31 NYS3d 556 (2nd Dept 5/11/2016)

The court erred in confirming the finding that the father willfully violated an order of support. The father successfully rebutted the presumption that the violation was willful by demonstrating that had had been laid off from his job, collected unemployment benefits and then secured a job that paid far less than his previous employment, received public assistance, and had actively been seeking better-paying employment. The court also erred in denying the father's request for a downward modification where the father's evidence regarding his employment situation demonstrated a change of circumstances that warrants a reduction of his obligation. The matter must be remitted for a hearing to determine the amount of the father's reduced obligation. (Family Ct, Suffolk Co)

[People v Johnson](#), 139 AD3d 967, 34 NYS3d 62 (2nd Dept 5/18/2016)

The delay of up to 33 hours between the defendant's arrest and arraignment "was attributable to a thorough and necessary police investigation" of, among other things, the extent to which the defendant used false identities and counterfeit money, before presenting these matters to a judge who would be considering for bail purposes the likelihood the defendant would return to court. The lead detective's failure to document that the defendant ate, drank water, and had access to a bathroom over the 25-28-hour period before he gave his partially self-serving statement does not demonstrate that the statement was involuntary.

The defendant's other issues, including the claim that he was prejudiced by a delay in disclosure of information about a cooperating witness, lack merit. (Supreme Ct, Queens Co)

Dissent: The cumulative effects of certain errors at the suppression hearing and at trial require reversal. The majority effectively places the burden on the defendant to show that basic necessities were not provided during an interrogation period. And it cannot be determined from the record that the court providently exercised its discretion when issuing a protective order authorizing delayed disclosure of the cooperating witness's existence and related discovery materials.

[Ed. Note: Leave to appeal was granted on Aug. 6, 2016 (28 NY3d 939 [2nd Dept]).]

[People v McElroy](#), 139 AD3d 980, 31 NYS3d 593 (2nd Dept 5/18/2016)

The court properly reduced the conviction of second-degree assault to third-degree assault. The prosecution's contention that Penal Law 120.05(4) "does not require that the serious physical injury be recklessly caused by the use of a dangerous instrument" is rejected. Where the defendant punched the accuser in the face, causing the accuser to fall and hit his head on the sidewalk resulting in severe brain injuries, it cannot be said that the defendant "'used' the sidewalk such that he was 'aware of and consciously disregard[ed] a substantial and unjustified risk' ... that the sidewalk was 'readily capable of causing ... serious physical injury'" (Supreme Ct, Kings Co)

[People v Cox](#), 139 AD3d 1083, 31 NYS3d 597 (2nd Dept 5/25/2016)

The court erroneously denied the defendant's motion for dismissal of the indictment on speedy trial grounds under CPL 30.30. The prosecution did not seek a DNA sample from the defendant until 19 months after the

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felony complaint, 15 months after the indictment, and four months after a hearing at which the court denied suppression of physical evidence and the defendant's statements. It took 121 days for the prosecution to produce a complete report of the DNA testing and the defendant did not consent to that delay. The prosecution "did not establish that the defendant expressly sought the DNA test results as part of a discovery request" And the prosecution did not show due diligence in obtaining the DNA so that the delay was not excludable based on excusable, exceptional circumstances. (Supreme Ct, Queens Co)

**People v Cantoni, 140 AD3d 782, 34 NYS3d 454
(2nd Dept 6/1/2016)**

Where the evidence as to attempted second-degree robbery showed that the defendant, while attempting to evade police, crashed his car, approached another car and put his hand into a partially opened window but then withdrew it and fled, the prosecution failed to establish that the defendant intended to take the car not only to escape but also to exert permanent or almost permanent control over it or to dispose of it in a way that would make recovery of the car by its owner unlikely. The conviction is reversed.

Further, the court erred in summarily denying the defendant's motion to dismiss the indictment for violation of his statutory speedy trial rights, requiring reversal as to the other counts. (Supreme Ct, Queens Co)

**People v Dennis, 140 AD3d 789, 30 NYS3d 893
(2nd Dept 6/1/2016)**

Because the record does not show that the court mentioned possible deportation as a consequence of the non-citizen defendant's guilty plea, the matter is remitted to allow the defendant a chance to move to vacate his plea and, if the defendant does so move, for the court to set forth its findings as to whether the defendant made the requisite showing of a reasonable possibility that he would not have pleaded guilty had the court warned him about deportation. (Supreme Ct, Nassau Co)

**People v McCray, 140 AD3d 794, 32 NYS3d 316
(2nd Dept 6/1/2016)**

The defendant was deprived of the effective assistance of counsel where the accuser in this robbery case did not testify on direct examination as "to any affirmative act taken by the defendant in furtherance of the crimes charged," but on cross-examination responded to coun-

sel's request that she confirm she did not know who grabbed her from behind by saying she was sure it was the defendant who grabbed her face. Counsel sought to show that the accuser's grand jury testimony was consistent with counsel's question, but court review showed that no such testimony was given and counsel did not ask the accuser about her grand jury testimony. Counsel also failed to object to multiple improper statements made by the prosecutor in summation. (Supreme Ct, Queens Co)

**People v Paulin, 140 AD3d 985, 33 NYS3d 459
(2nd Dept 6/15/2016)**

A new trial is required due to erroneous denial of the right to self-representation. The defendant made three timely applications to proceed pro se, dispelling any misunderstanding of his intention or lack of sincerity in his request and the court made sufficient inquiry and gave sufficient warnings as to the dangers of proceeding without counsel. The record does not indicate that the defendant was severely mentally ill at the time of his requests, despite his prior hospitalizations for mental illness. Further, he had represented himself in prior civil matters; the record does not show that his behavior was disruptive or otherwise unacceptable; and the court refused to either relieve defense counsel even after counsel took positions plainly adverse to the defendant's or allow the defendant to proceed pro se. (County Ct, Dutchess Co)

**People v Cleverin, 140 AD3d 1080, 34 NYS3d 136
(2nd Dept 6/22/2016)**

The totality of the circumstances surrounding the police interrogation of the defendant establish that there was no proper waiver of the defendant's *Miranda* rights, where the defendant's expert testified to the defendant's IQ of 53, his kindergarten reading level, his prior history of evaluations showing his intellectual deficits, his inability to speak anything but Creole after he immigrated from Haiti at about age 13, and the expert's opinion that the defendant could not understand the *Miranda* warnings. (Supreme Ct, Kings Co)

**People v Loiseau, 140 AD3d 1190, 33 NYS3d 471
(2nd Dept 6/29/2016)**

The unpreserved claim that the defendant was deprived of a fair trial by the court allowing the prosecutor to cross examine him as to whether he made admissions to his lawyer that contradicted his trial testimony is reviewed in the interest of justice. Reversal is granted because the error, questioning the defendant about statements made to his lawyer, was not harmless; instructions to the jury that questions themselves are not evidence and the jury should not infer facts from the asking of a ques-

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tion “cannot be deemed to have obviated any prejudice” (Supreme Ct, Kings Co)

People v Redd, 141 AD3d 546, 35 NYS3d 402 (2nd Dept 7/6/2016)

A new trial is required due to pervasive prosecutorial misconduct, “including misstating the evidence, vouching for the credibility of witnesses with regard to significant aspects of the [prosecution’s] case, calling for speculation by the jury, seeking to inflame the jury and arouse its sympathy, and improperly denigrating the defense” Because there must be a new trial, it is also noted that the court erred in allowing the prosecution to elicit extensive evidence of the decedent’s personal and family life that was not probative of any trial issue and was prejudicial. (Supreme Ct, Queens Co)

People v Moore, 141 AD3d 604, 35 NYS3d 435 (2nd Dept 7/13/2016)

The defendant established that he was denied the effective assistance of counsel where defense counsel failed to advocate for a sentence that would have resulted in the same prison time imposed on the defendant but “would have resulted in no mandatory immigration consequences” (Supreme Ct, Queens Co)

People v O'Neill, 141 AD3d 606, 36 NYS3d 157 (2nd Dept 7/13/2016)

“[T]he rational inferences which can be drawn from the evidence presented at trial do not support the conviction [of second-degree possession of a weapon and fifth-degree possession of marijuana] beyond a reasonable doubt” The arresting officer failed to record or call in the arrest of the defendant and did not voucher bandanas or masks allegedly recovered from the defendant and a companion, and the case folder containing the originals of the defendant’s written statement and signed *Miranda* warning was lost, all casting doubt on the officer’s credibility, while the defendant’s credibility was unchallenged and was supported by three character witnesses. (Supreme Ct, Queens Co)

People v Smart, 142 AD3d 513, 36 NYS3d 197 (2nd Dept 8/3/2016)

The court properly denied suppression of lineup identification evidence as no evidence at the *Wade* hearing indicated that witnesses relied on the defendant’s tattoo,

visible on his neck, and shirt color. (Supreme Ct, Kings Co)

Dissent: While defense counsel did not point out the age difference between the defendant and the lineup fillers, the court expressly considered that. When the age difference, the distinctive tattoo, and other factors like skin tone and height, are considered, the lineup was unduly suggestive.

Matter of Weiss v Orange County Dept. of Social Servs., 142 AD3d 505, 35 NYS3d 726 (2nd Dept 8/3/2016)

In the Family Court Act article 6 proceeding, the court improperly dismissed the grandmother’s petition for visitation with her grandchild based on the termination of the mother’s parental rights. “A biological grandparent may seek visitation with a child even after parental rights have been terminated or the child has been freed for adoption” The grandmother’s petition alleges “a sufficient relationship with the child to confer standing upon her to seek visitation” pursuant to Domestic Relations Law 72(1). The matter is remitted for a hearing on the standing issue and, if warranted, a best interests hearing. (Family Ct, Orange Co)

People v Lessane, 142 AD3d 562, 36 NYS3d 231 (2nd Dept 8/10/2016)

The defendant was unduly prejudiced by being tried jointly with the person said to have handed him the gun used to shoot the decedent, as their defenses were antagonistic. The defendant here repeatedly sought severance, preserving the issue; a party who seeks a particular ruling is deemed to have protested the ultimate ruling on it. The defendant claimed that his statements to police were induced by police promises and were false; the codefendant’s defense relied almost entirely on the truth of the defendant’s statements. The full trial record makes clear that the defendant was prejudiced by the conflict of defenses and the aggressive, adversarial conduct of the co-defendant’s lawyer against the defendant. (Supreme Ct, Kings Co)

People v Holiday, 142 AD3d 625, 36 NYS3d 520 (2nd Dept 8/17/2016)

The cumulative effect of several errors, preserved and unpreserved, cannot be deemed harmless. The prosecutor’s elicitation of testimony from the decedent’s mother that the decedent’s wife was pregnant, after which the prosecutor expressed sympathy for the witness’s loss, was calculated to appeal to the jury’s passion and sympathy and unduly prejudicial. This was compounded by comments in summation regarding the decedent’s family and the tragedy that the decedent’s life was taken by the defen-

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dant. Also in summation the prosecutor repeatedly identified barely visible figures in a surveillance video as the defendant and decedent, even after the court told the jury it alone should assess the video. (Supreme Ct, Kings Co)

**People v Gough, 142 AD3d 673, 37 NYS3d 280
(2nd Dept 8/24/2016)**

The court failed to comply with required procedure when it failed to show a jury note to the lawyers or read it into the record before deciding how to respond, and advised counsel only that the jury wanted reinstruction on “acting in concert,” without mentioning that the jury note specified they wanted the court to “define clearly acting in concert.” [Internal quotation marks omitted.] That was not a request for a ministerial readback, and counsel was deprived of the opportunity to participate in formulating a response. This mode of proceedings error requires reversal. (Supreme Ct, Queens Co)

**People v Anderson, 142 AD3d 713, 37 NYS3d 151
(2nd Dept 8/31/2016)**

The evidence at the suppression hearing did not establish circumstances that justified a warrantless search of the messenger bag taken from the defendant’s person. The defendant was properly stopped after coming out of an apartment and going to the lobby of a building to which police had been called because someone had been seen climbing into a rear window, but the officer who stopped the defendant expressed no concern for his safety or that of the public, approximately six officers were present, and the defendant had been cooperative, with no indication that he resisted the bag’s removal.

Given that there will be a retrial on some counts, it should be noted that certain comments in the prosecutor’s summation were improper. The prosecutor made inflammatory statements designed to appeal to the jury’s sympathy, despite the trial court’s repeated admonitions, denigrated the defense, and referred to the defendant’s pre-arrest silence. (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.

**Matter of Daniel W. v Kimberly W., 135 AD3d 1000,
24 NYS3d 232 (3rd Dept 1/7/2016)**

The court erred in issuing an order of protection against the respondent mother in this Family Court Act (FCA) article 8 proceeding where the mother did not consent to the order and the court did not comply with the due process protections in FCA 154-c(3)(ii). The mother did not admit to any relevant allegations in the father’s family offense petition nor did the court “conduct an examination of the factual basis of the parties’ family offense petitions or make a finding that the terms objected to by the mother were ‘reasonably necessary’ to protect the parties or their children” Further, the court failed to conform to the procedure in FCA 154-(c)3 when issuing the order, which required the mother to keep her boyfriend a distance away from the father at public events despite the absence of allegations by the father that there was tension between them at public functions. (Family Ct, Saratoga Co)

**People v Magee, 135 AD3d 1176, 23 NYS3d 468
(3rd Dept 1/21/2016)**

The defendant was denied his right to a fair trial due to a *Molineux* error where the court allowed the defendant’s acquaintance to testify to prior suspected drug activity. The charge of second-degree drug sale stemmed from an incident in which the defendant remained in the car he was driving while his passenger offered cocaine to an undercover investigator, did not touch the money nor speak with regard to the transaction, but was implicated by the passenger as the mastermind. At trial, a prosecution witness testified to going with the defendant, who owed her money, to the City on a prior occasion and being asked to count \$6,000 that the defendant handed over to a man; the defendant complained later that the man was “bothering him to repay a debt” that he was unable to repay as he was unemployed and needed money to pay a lawyer. This testimony was meant to demonstrate a financial motive for the charged sale. While prior bad acts or uncharged crimes may be admissible to show motive if the probative value exceeds its prejudicial effect, “there is usually no issue of motive in a drug sale case, as the seller’s motivation is nearly always financial gain’” The testimony here was “highly suggestive of an illicit drug transaction, and it is difficult to discern any relevant impact other than to show defendant’s criminal propensity.” As the credibility of the defendant’s accomplice was at issue, the error in permitting testimony suggesting prior drug involvement was not harmless. (County Ct, Warren Co)

**People v Stedge, 135 AD3d 1174, 24 NYS3d 775
(3rd Dept 1/21/2016)**

The court did not err in denying the defendant’s motion to dismiss an indictment for failure to register as a

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sex offender where the defendant moved from his registered address in Chemung County without reporting a new address to the Division of Criminal Justice Services, as required under the Sex Offender Registration Act. A criminal court has geographical jurisdiction under CPL 20.40(3) when “[t]he offense committed was one of omission to perform a duty imposed by law, which duty either was required to be or could properly have been performed in such county. In such case, it is immaterial whether such person was within or outside such county at the time of the omission....” Chemung County “had a continuing interest and duty to protect its residents by enforcing the terms and requirements of the Sex Offender Registration Act and ... defendant’s failure to register his new address hindered Chemung County law enforcement’s efforts to protect its community.” This omission “had or was likely to have, a materially harmful impact” (County Ct, Chemung Co)

Matter of Desirea F., 136 AD3d 1074, 25 NYS3d 385
(3rd Dept 2/4/2016)

After the termination of parental rights order was reversed in these Family Court Act articles 10 and 10-A proceedings, the court failed to have an “age[-]appropriate consultation” with the children and the new hearing itself was “lacking in both form and substance.” The record lacks “a sound and substantial basis to support Family Court’s determination to change the permanency goal to adoption.” The petitioner agency did not allow contact between the respondent and the children and subsequently changed the goal, once again, from return to parent to adoption. The caseworker who testified at the permanency hearing “stated that, in following the direction of Family Court, no real efforts had been made to further the goal of return to parent.” [Footnote omitted.] “Most concerning, however, is that no real inquiry was made into respondent’s current situation or her willingness or ability to correct the conditions that led to the initial removal,” with the court instead relying on a permanency hearing report that contained irrelevant information and testimony at a prior hearing regarding a child who was not the subject of the proceeding. The matter must be remitted for further proceedings. “In so doing, we note our concern with Family Court’s decision to grant the motion by respondent’s attorney to be relieved as counsel and respondent proceeding pro se” (Family Ct, St. Lawrence Co)

Dissent: While “the record should have been more fully developed and clearer,” a sound and substantial basis exists in the record to support the court’s determination.

Matter of Blake I., 136 AD3d 1190, 26 NYS3d 793
(3rd Dept 2/18/2016)

The court properly concluded that a father’s consent was not required for adoption, but it erred by failing to address the first step of the two-part process in Domestic Relations Law 111, i.e., determining “whether the biological father has established a right to consent to the adoption by ‘maintain[ing] a substantial and continuous or repeated relationship with the child by means of financial support according to the father’s means and either monthly visitation, when physically and financially able to do so, or regular communication with the child or the child’s caregiver’” An independent review of the record shows that the father failed to meet these criteria. (Family Ct, Washington Co)

People v Banks, 137 AD3d 1458, 29 NYS3d 73
(3rd Dept 3/24/2016)

The court erred by denying the defendant an opportunity to withdraw his guilty plea absent record evidence that the plea was made knowingly and intelligently. The defendant’s plea to second-degree rape and waiver of his right to appeal was made on the condition that the defendant would receive a sentence of five years and up to 15 years post-release supervision. While a court is not required to engage in a factual recitation to establish the elements of a lesser offense being pleaded to as part of a plea bargain, and may even allow a defendant to plead guilty to crimes that do not exist, the court here elicited a factual recitation from the defendant that “was inconsistent with the crime to which he was pleading and, in fact, negated an element of that crime, namely that the victim be ‘incapable of consent by reason of being mentally disabled or mentally incapacitated’” as required under Penal Law 130.30(2). (County Ct, Sullivan Co)

People v Kocsis, 137 AD3d 1476, 28 NYS3d 466
(3rd Dept 3/31/2016)

The defendant, convicted of second-degree possession of a forged instrument and sentenced to 1-1/3 to 4 years in prison, was not deprived of his right to a fair trial on the basis of prosecutorial misconduct where the prosecutor said “‘checks’” though the defendant was accused of forging only one check and the Assistant District Attorney (ADA) clarified by saying that he “‘misspoke’... ‘I said checks, it’s [a] check.’” However, the court erred by conducting a number of sidebars to “among other things, explain[] the nature of defense counsel’s objections, outline[] the questions that the ADA needed to ask of the testifying witnesses, refer[] the ADA to a certain evidentiary treatise and afford[] him a recess in order to consult and review the appropriate section thereof” when the ADA

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had trouble laying the foundation for admitting evidence during trial. (County Ct, St. Lawrence Co)

**People v Love, 137 AD3d 1486, 28 NYS3d 479
(3rd Dept 3/31/2016)**

The court violated the defendant's due process rights by failing to inquire further regarding the defendant's claim that dismissal from a court ordered substance abuse treatment program was a result of an inadvertent rule violation. When a defendant is discharged from a program for alleged misconduct "the court must carry out an inquiry of sufficient depth to satisfy itself that there was a legitimate basis for the program's decision, and must explain, on the record, the nature of its inquiry, its conclusions, and the basis for them'" The court here merely "referenced a 'discharge summary,'" which made no mention of the defendant's claim, before determining that the court was no longer required to fulfill the probation aspects of the plea agreement and imposing an enhanced sentence. (County Ct, St. Lawrence Co)

**People v Miller, 137 AD3d 1485, 29 NYS3d 586
(3rd Dept 3/31/2016)**

The court improperly ordered the defendant to sell his property to pay restitution in this fourth-degree larceny guilty plea case. The payment of restitution was included as part of the negotiated plea, but forfeiture of the defendant's property to fulfill such payment was not. (County Ct, St. Lawrence Co)

**Matter of Hawkins v New York State Dept. of Corr. & Community Supervision, 140 AD3d 34, 30 NYS3d 397
(3rd Dept 4/28/2016)**

The court properly granted the petitioner's CPLR article 78 petition to, among other things, annul the Parole Board's decision denying the petitioner parole. The petitioner was convicted of second-degree murder and sentenced to 22 years to life in the strangling death of his girlfriend when he was 16 years old. At the time of the ninth denial by the Board, the subject of this appeal, the petitioner had served 36 years. Both the transcript and the Board's written decision are devoid of any indication "that the Board met its constitutional obligation to consider petitioner's youth and its attendant characteristics in relationship to the commission of the crime." [Footnote omitted.] The petitioner is entitled to a de novo parole release hearing for such consideration. The court did err by prohibiting a Board commissioner from participating in further parole proceedings concerning the petitioner

when no such relief was sought, and nothing in the record suggests that the commissioner is "unqualified or biased." (Supreme Ct, Sullivan Co)

Concurrence: "We write separately to emphasize that review of the record as a whole reveals 'irrationality bordering on impropriety,' a degree of arbitrary and capricious conduct permitting judicial intervention" The petitioner would be deported immediately upon release; the Board is obliged to review and consider this and other statutory factors. The petitioner's minimal disciplinary history, excellent record of participation in programs, and other positive factors viewed together, suggest that "judicial intervention is required here."

Concurrence in Part and Dissent in Part: The defendant's rights under the Eighth Amendment were not violated because "New York's sentencing and parole procedures afford petitioner a 'meaningful opportunity to obtain release' (*Graham v Florida*, 560 US [48,] 75), which is all that *Graham*, *Miller*, *Montgomery* and the Eighth Amendment itself require."

**Matter of Stephen G. v Lara H., 139 AD3d 1131,
31 NYS3d 266 (3rd Dept 5/5/2016)**

The court erred in granting the mother's petition for sole legal custody of the children. The parents had cross-petitioned to modify the existing joint custody order to obtain sole custody and increased parenting time and the court ordered an evaluation by a clinical/forensic psychologist. In her report, the psychologist "opined that the mother 'views [the father] as an irresponsible father ... and ... feels it is appropriate that he be marginalized in their lives.'" However, she also opined that both parents were "highly capable of parenting the children" There was substantial trial testimony that the mother and father are both dedicated to the children and the attorney for the children supported joint custody.

"Although Family Court was not required to adopt [the psychologist's] opinions ..., we are troubled that it did not address her conclusions without offering any explanation as to why it found them to be lacking in credibility or otherwise contradicted by the record" The parents have had a contentious relationship, including five Child Protective Services investigations, none of which has led to a finding of abuse or neglect, but "there is a 'modicum of communication and cooperation' such that joint legal custody is in the best interests of the children" (Family Ct, Montgomery Co)

**People v Victor, 139 AD3d 1102, 31 NYS3d 257
(3rd Dept 5/5/2016)**

The court committed a mode of proceedings error where, as to one jury communication, it failed to follow the procedure for handling jury notes outlined in *People v*

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O’Rama. The note in question “stated that ‘we have reach[ed] agreement on 9 of the 10 charges # 8G 4NG.’” While discussing the note with counsel off the record, the court received another jury note that said, “‘Ready.’” Both defense counsel and the prosecutor agreed that if the jury reached only a partial verdict they should be asked to continue deliberations, but if they had a complete verdict, both sides were ready to proceed. However, there is no indication that the court read the note verbatim into the record and it would be improper to assume that the defendant was informed that the note included the text “# 8G 4NG.” “[A] failure to apprise counsel about the specific contents of a substantive note from a deliberating jury violates the fundamental tenants of CPL 310.30 and ... does not require preservation.” [Internal quotation marks omitted.] (County Ct, Chenango Co)

People v Wright, 139 AD3d 1094, 31 NYS3d 633
(3rd Dept 5/5/2016)

The prosecution failed to prove that the defendant sold more than half an ounce of heroin, warranting reversal of his conviction of second-degree sale of drugs, where the police failed to recover any narcotics and there was no independent basis for proving the weight of those sold. While the defendant and the co-accused discussed a sale of 16 grams, in the same conversation, the co-accused stated he “might purchase ‘something like that’ or ... might ‘get something lower.’” While “[a] statutory sale may be proven by evidence of an offer or agreement to sell drugs, [] ‘the weight of the material must be independently shown’” and “when a sale is based upon an offer or an agreement ... there must be some form of independent evidence from which the total weight can be extrapolated” No such evidence was offered here.

An overt act in furtherance of the conspiracy is a statutorily required element. As the overt act alleged here stemmed from the sale itself, the reversal of the drug sale conviction necessarily warrants reversal of the second-degree conspiracy conviction. (County Ct, Albany Co)

People v Daniels, 139 AD3d 1256, 32 NYS3d 676
(3rd Dept 5/19/2016)

The court erred by failing to determine on the record if the defendant, who pleaded guilty to second-degree possession of a weapon and was 17 years old at the time of the offense, was an “‘eligible youth’ due to the existence or absence of mitigating circumstances or other factors set forth in CPL 720.10(3) and, if so, whether such treatment should be granted” The court must expressly consider this determination notwithstanding the defen-

dant’s failure to request youthful offender treatment or his voluntary waiver of the right to appeal. (Supreme Ct, Albany Co)

People v White, 139 AD3d 1260, 31 NYS3d 669
(3rd Dept 5/19/2016)

The court wrongfully ordered the defendant, who pleaded guilty to second-degree robbery and third-degree grand larceny, to pay restitution to cover the cost of the complainant’s armed security guards for a three month period. Although the complainant hired security as a result of the defendant’s offenses, the decision to do so was voluntary and cannot be considered an out-of-pocket cost, which is all that a court is authorized to order restitution for. Therefore, the restitution order is modified to omit that cost. (County Ct, Chemung Co)

People v Rupnarine, 140 AD3d 1204, 33 NYS3d 494
(3rd Dept 6/2/2016)

Reversal is warranted where the prosecution improperly shifted the burden of proof to the defendant by repeatedly making remarks during summation to the effect that the “defendant failed to provide an ‘innocent explanation’ for his actions or that it was necessary for him to do so.” The court’s instructions to the jury that the prosecution has the burden of proving the defendant’s guilt beyond a reasonable doubt did not remedy the error, as evidenced by the jury’s request for the court to read back the “portion of the summation ‘that refer[red] to innocent explanations and lack of innocent explanations.’” While the court declined to read back the summation and reminded the jury that the summation was not evidence, the jury’s fixation on the improper comments, coupled with the lack of further instruction regarding the burden of proof, show the defendant was prejudiced. (Supreme Ct, Schenectady Co)

People v Cuevas, 140 AD3d 1313, 34 NYS3d 212
(3rd Dept 6/9/2016)

The defendant’s convictions are reversed where the court erroneously denied the defendant’s challenge for cause against a juror who expressed bias without eliciting an unequivocal assurance that the juror could remain impartial, thereby forcing the defendant to use a peremptory challenge, all of which were exhausted before the completion of jury selection. Juror No. 15 stated he would be “‘influenced ‘greatly’” by a witness’s criminal record. The court notified the juror that he is permitted to take the witness’s prior convictions into consideration when evaluating the reliability of their testimony. When asked whether he could follow that instruction, the juror replied “‘Oh, yes, yes.’” On further inquiry by defense counsel, however, juror No. 15 indicated that he “‘might be

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swayed” by a witness’s “continuous track record” of criminal behavior. The court made no attempt to illicit an unequivocal assurance of juror No. 15’s ability to remain impartial. (County Ct, Albany Co)

**Matter of Demetria FE, 140 AD3d 1388, 33 NYS3d 570
(3rd Dept 6/9/2016)**

The court erroneously denied the uncle’s application for intervenor status, which was filed after the court found that the mother neglected her child and continued the children’s placement in the petitioner’s custody. “There is no question that the uncle is authorized to seek intervention under the statute; he is one of the enumerated relatives permitted to pursue such relief, and both respondent and the child’s father (among others) consented to his appearance in the proceeding. Nor does Family Ct Act § 1035 (f) limit the right of intervention to only the fact-finding and dispositional hearings held on a pending Family Ct Act article 10 neglect petition.” “[T]he mandatory permanency hearings that follow an adjudication of neglect constitute ‘phases’ of the dispositional proceedings for purposes of Family Ct Act § 1035 (f).” The matter is sent back for a permanency hearing in which the uncle will participate and the court “should consider the matter de novo.” (Family Ct, Saratoga Co)

**People v O’Brien, 140 AD3d 1325, 32 NYS3d 741
(3rd Dept 6/9/2016)**

Charges against the defendant included aggravated driving while intoxicated and refusal to submit to field testing; the court erred by precluding the defendant from offering medical records to corroborate his testimony that injuries suffered on military duty hindered his ability to perform field sobriety tests. The defendant testified during the suppression hearing that he did not have a physical condition that affected his ability to perform the field sobriety test, but testified at trial that he informed the arresting officer that he was unable to perform the test due to hip and back injuries. Just before jury selection, defense counsel notified the court and the prosecutor that he planned to introduce the defendant’s medical records and would make them available the following day; no objection was made. The following day defense counsel attempted to introduce 99 pages of medical records and the prosecution objected on the basis that the “defendant failed to timely respond to a discovery demand for documentation” Defense counsel argued that he had no intent to use the defendant’s medical records until hearing the arresting officer’s testimony during the suppression hearing. Because less drastic remedies than outright

preclusion were available, such as a one-day continuance to review the medical records and/or to pare down the submissions, which counsel agreed to reduce to three pages, and defense counsel provided a plausible explanation for the late submission, outright preclusion was an abuse of discretion. The error, along with comments by the prosecutor in summation, prejudiced the defendant. (County Ct, Montgomery Co)

**People v Spósito, 140 AD3d 1308, 32 NYS3d 736
(3rd Dept 6/9/2016)**

The court erred by denying without a hearing the defendant’s motion to vacate the judgment based on ineffective assistance of counsel. The non-record facts set forth in the CPL article 440 motion were material and, if established, would entitle him to relief. The defendant alleged that defense counsel did not watch the recorded police interview in its entirety or read the full transcript before waiving the right to challenge the admissibility of the recording and making assurances to the jury regarding its contents. Further, if the defendant’s allegations regarding the factual circumstances of the interview are founded, it was at least in part a custodial interrogation; counsel would need to be familiar with the contents of the recording to make an informed strategic decision regarding whether or not to seek a suppression hearing. Other deficiencies in representation were also alleged, including counsel’s failure to timely convey a plea offer, and making assurances of a favorable trial outcome and of the sentence that would be imposed if there was a conviction. The defendant contends that, but for these actions and assurances, he would have accepted the plea deal. (County Ct, Albany Co)

**People v Wilkerson, 140 AD3d 1297, 33 NYS3d 523
(3rd Dept 6/9/2016)**

The court properly denied the defendant’s motion to dismiss the indictment; the defendant was not deprived of his right to testify before the grand jury where the prosecution served the defendant with notice on April 25, 2012 and notified the Conflict Defender’s Office on April 26, 2012 at 10:51 am, that the grand jury proceeding on the matter was scheduled for April 27, 2012 at 1:00 pm. The defendant and his counsel’s office received the notices but failed to provide written notice that the defendant intended to testify. An audio recording of the arraignment does not corroborate the claim that the defendant gave oral notice of his intent to testify, nor would oral notice be sufficient absent a prosecution waiver of the statutory written notice requirement. The defendant’s claim that he had insufficient time to confer with counsel is without merit as both he and his counsel had notice of the impending grand jury presentation; that they were unable to confer

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prior to return of the indictment neither rendered the prosecution's notice unreasonable nor amounted to denial of the assistance of counsel. (County Ct, Schenectady Co)

**People v Smith, 140 AD3d 1403, 34 NYS3d 247
(3rd Dept 6/16/2016)**

The defendant was denied effective assistance of counsel where defense counsel permitted long, non-responsive answers from the prosecution's police witnesses and the court noted his repeated failure to object or move to strike improper testimony. Defense counsel explained that he did not want to emphasize the testimony of the testifying detective that the confidential informant (CI) purchased crack cocaine from the defendant 15 times prior, but counsel also failed to object when the prosecutor referenced the prejudicial comment during summation. Worse, defense counsel did not address the CI's absence at trial, the record does not indicate that he requested a missing witness charge, and he did not mention the CI's absence during summation. Given the overwhelming evidence against the defendant, "the only strategy pursued by—and perhaps available to—defense counsel was to attack the credibility and reliability of the CI," so there was no legitimate reason for defense counsel to forego requesting the missing witness charge. (County Ct, Ulster Co)

**People v Green, 141 AD3d 746, 35 NYS3d 534
(3rd Dept 7/7/2016)**

The erroneous admission of a drug recognition evaluation (DRE), a breathalyzer yielding negative results, and blood tests revealing the presence of depressants in the defendant's system, conducted after the defendant was read his *Miranda* rights and unequivocally expressed that he "wanted to 'talk to [his] attorney'," cannot be considered harmless error. The defendant's convictions of second-degree manslaughter and second-degree reckless endangerment are reversed. (County Ct, Warren Co)

**People v Mandela, 142 AD3d 81, 36 NYS3d 248
(3rd Dept 7/7/2016)**

"[W]e find that when the last day of the six-month period specified by CPL 30.30 (1) (a) falls upon a Saturday, Sunday or legal holiday, the expiration of the period in which the People must declare readiness is extended to the next succeeding business day" under General Construction Law 25-a. (County Ct, Ulster Co)

**People v Tucker, 141 AD3d 748, 34 NYS3d 744
(3rd Dept 7/7/2016)**

The defendant's failure to answer questions posed by a police officer did not "give[] rise to a reasonable suspicion that she had committed or was about to commit a crime" and her conviction of second-degree assault must be reversed because the officer was not performing a lawful duty when he was injured. Officers responding to a call for assistance found a vehicle abandoned in an intersection and observed the defendant "struggling with a male over a purse" about a block away. After about 30 seconds of trying to illicit a response from the defendant regarding what happened, an officer "decided to detain and handcuff defendant 'to gain [her] full attention and to actually have [defendant and the male] separated.'" The defendant told the officer she had a back injury, that she didn't do anything, and did not need to be detained. She pulled away when the officer tried to handcuff her; a scuffle ensued, and the defendant, who was forced to the ground, was charged based on a knee injury and facial lacerations suffered by the officer. (Supreme Ct, Albany Co)

**People v Green, 141 AD3d 837, 35 NYS3d 766
(3rd Dept 7/14/2016)**

The defendant's argument that his guilty plea was not knowingly, intelligently, and voluntarily made survives his waiver of appeal, and though not preserved, "the narrow exception to the preservation rule is applicable, as statements were made during the plea colloquy that 'clearly cast[] significant doubt upon the defendant's guilt or otherwise call[ed] into question the voluntariness of the plea' and required further inquiry on the part of County Court" During the plea colloquy, defense counsel notified the court of significant concerns about the defendant's mental state at the time of the crime that had prompted a psychiatric assessment; according to counsel, the defendant accepted the plea bargain because "the psychiatrist opined that an insanity defense could properly be raised at trial, but that he would be unable to testify to a reasonable degree of medical certainty that defendant 'did not understand the nature and consequences of his actions or that his conduct was wrong'...." The court erred in accepting the plea after doing no more than "confirming that defendant had heard the representations of defense counsel, discussed those issues with him and believed that the plea agreement was 'a fair resolution.'" (County Ct, Albany Co)

**Matter of Leighann W. v Thomas X., 141 AD3d 876,
34 NYS3d 771 (3rd Dept 7/14/2016)**

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The court erred by entering an order of protection in the family offense proceeding and an order in a custody modification proceeding on the father's default. The father was present for the first part of the fact-finding hearing and his attorney was present for the final day of the hearing. His attorney declined the court's offer to let him not participate so that the father's absence would be a "pure default" and then engaged fully in the hearing. Because the father did not default, he may appeal the orders.

Regarding the custody modification, the mother failed to establish a change in circumstances where the evidence that the father sexually abused the child was in the form of the child's out-of-court statements, which were not sufficiently corroborated, and the child did not testify. "The proof here did not rise above repetition to include additional evidence such as expert testimony that the child's behavior or her statements were consistent with abuse, physical evidence of abuse, or the sworn testimony or in camera statements of the child herself" (Family Ct, Delaware Co)

**People v Ward, 141 AD3d 853, 35 NYS3d 557
(3rd Dept 7/14/2016)**

The defendant in this sexual assault case was deprived of his right to a fair trial due to the court's erroneous *Molineux* ruling that permitted the prosecution to introduce evidence during their case-in-chief that the defendant committed a previous sexual assault. The prosecution argued that the information was relevant to the "issues of identity, modus operandi, intent and lack of consent" but defense counsel "contend[ed] that such proof did not fall within any of the recognized *Molineux* exceptions and ... that the probative value of such evidence was vastly exceeded by its prejudicial effect." The previous accuser's "testimony was highly prejudicial, as it related to a relatively recent prior bad act that was nearly identical to the incident underlying the crimes for which defendant was on trial," and there were factual inconsistencies in the current accuser's testimony that the jury may have discounted when looking at it along with the testimony of the prior accuser. As this case largely centered on the accuser's credibility, the error cannot be characterized as harmless despite the court's limiting instruction. (County Ct, Schenectady Co)

**People v Ortiz, 141 AD3d 872, 35 NYS3d 536
(3rd Dept 7/14/2016)**

The court improperly rejected the defendant's motion to suppress physical evidence found when detectives illegally searched and seized contents of a duffel bag. The

defendant was justifiably arrested when the detective entered the home at the owner's consent and discovered after an inquiry that was "neither custodial nor interrogatory" that the defendant had an active warrant in Warren County. The detective then noticed a duffel bag behind a couch and asked the defendant whether the bag belonged to him and whether it should be taken to the police station. The defendant acknowledged owning the bag, but did not address whether the bag should be transported. The prosecutor cannot establish exigent circumstances justifying the warrantless search where the defendant was in handcuffs when the detective noticed the duffel bag, and there was neither a threat to the safety of the public and the arresting officer nor a need to protect evidence from destruction or concealment. Since the defendant was already under arrest, questions regarding the bag and its contents qualify as a custodial interrogation and must be suppressed. But as to post-arrest statements made at the police station, the court's finding that the defendant made an implicit waiver of his *Miranda* rights will not be disturbed. (County Ct, Washington Co)

**People v Ramsaran, 141 AD3d 865, 35 NYS3d 549
(3rd Dept 7/14/2016)**

The defendant's second-degree murder conviction is reversed because defense counsel failed to object to inappropriate characterizations made by the prosecution in summation and to irrelevant and prejudicial statements by witnesses, and also confused the jury by stating the incorrect burden of proof during summation. During summation the prosecutor mischaracterized the testimony of a forensic expert. The expert had said that a relevant bloodstain contained a mixture of DNA profiles, the major source being the defendant, and that the deceased could not be excluded as a possible donor, but there was not enough DNA data to conclude that the deceased's DNA was present. In summation the prosecutor made improper statements, including that "'on that sweatshirt is [defendant's] wife's DNA.'" Given the purely circumstantial nature of this case, and the powerful influence of DNA evidence on juries, failure to object to these statements that created the opportunity for juror confusion regarding the qualified nature of the test results rendered counsel ineffective. Counsel caused further harm in his own summation by confusing legal principles and misstating the burden of proof, such as saying "'[t]he prosecutor must fulfill his promises in his opening,'" that the jury must "be sure beyond an absolute doubt as to defendant's guilt," and that while the defendant could have done it, a question counsel had asked himself "'a million times,'" that possibility was not enough and the jury must be "'absolutely convinced of everything that [it] heard here that [defendant was] guilty.'" The combined errors

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support a conclusion that the defendant was deprived of a fair trial. (County Ct, Chenango Co)

[People v Harris](#), 141 AD3d 1024, 34 NYS3d 798 (3rd Dept 7/28/2016)

The defendant is entitled to vacatur of his plea because the court erred by denying his motion to suppress physical evidence found in his bedroom and the erroneous denial may have contributed to his decision to plead guilty to third-degree possession of a controlled substance. The officers properly entered the defendant's apartment when they heard sounds of a physical altercation while responding to a call reporting a disturbance in the apartment. They could legally carry out a "protective sweep ... 'a quick and limited search of premises'" to protect their safety or that of others, but could not expand beyond "'a cursory visual inspection of those places in which a person might be hiding'" absent "'articulable facts' upon which to believe that there is a person present who may pose a danger to those on the scene" Observation of a glass pipe and suspected narcotics in one room, and a chemical smell observed when the defendant's wife exited the room, did not support the officer's belief that a threat existed.

The court also erred by denying the defendant's motion to suppress oral and written statements made when officers conducted a custodial interrogation without providing *Miranda* warnings and the "written statement was part of a 'single continuous chain of events' requiring its suppression...." The questioning was interrogatory and not merely investigatory where it was conducted upon discovery of a meth lab in his room that, along with the presence of multiple officers, made it unlikely that a reasonable person would have believed that he or she was free to leave. Although three hours had passed between the police entry into the defendant's residence, and another officer provided *Miranda* warnings before the defendant executed the written statement, the prosecution did not establish "that there was a 'pronounced break in [the] interrogation adequate to justify a finding that the defendant was no longer under the sway of the prior [unwarned] questioning when the warnings were [subsequently] given'...." (County Ct, Chemung Co)

Fourth 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 Porter](#), 136 AD3d 1344, 24 NYS3d 470 (4th Dept 2/5/2016)

Reversal is warranted where the defendant passenger was unlawfully detained by a police officer when the driver was arrested for suspended registration, and evidence discovered as a result should be suppressed. Before the police started an inventory search, they refused the defendant's requests to leave. After that search began, the defendant told officers that there was a rifle in the vehicle. While the initial traffic stop for a suspended vehicle registration was valid, "the justification for that stop ended once the driver had been arrested for that offense" The prosecution presented no evidence of "'articulable facts'" from the encounter to establish reasonable suspicion that the defendant posed any danger to the police.

Multiple instances of prosecutorial misconduct during trial and during summations also warrant reversal. In response to the driver's denial on cross examination that the defendant "[tried] to get [her] to come and take the blame for the gun,' ... the prosecutor rhetorically asked, '[b]ut you were the one who was convicted of Scheme to Defraud, correct?'" This both improperly interjected the prosecutor's "personal opinion as to the truthfulness of the testimony and suggested to the jury that his own, unsworn version of events should be credited" The prosecutor also denigrated the defendant's arguments as "[a]ll this nonsense," accused the defense of "'twisting things' and employing 'tricks,'" and referred to defense witnesses as "'a cast of characters,' 'people com[ing] out of the woodwork,' and specifically refer[red] to one witness as 'a piece of work.'" (Supreme Ct, Monroe Co)

[People v Wooten](#), 136 AD3d 1305, 24 NYS3d 550 (4th Dept 2/5/2016)

The defendant, convicted of child pornography, was properly classified as a level two risk under the Sex Offender Registration Act where the court attributed points based on the number of victims and relationship with victim risk factors although the defendant had no contact with the victims. (Supreme Ct, Monroe Co)

[Matter of Mandile v Deshotel](#), 136 AD3d 1379, 24 NYS3d 828 (4th Dept 2/11/2016)

The court properly confirmed the support magistrate's finding that the respondent mother willfully violated the child support order where the undisputed evidence showed that the mother failed to make the required payments and the mother failed to submit competent, credible evidence that she was unable to pay despite making reasonable efforts to find employment before the violation petition was filed. However, the matter must be remitted because the court did not consider

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the mother's objections to the support magistrate's denial of her cross petition for a downward modification of child support, as required by Family Court Act 439(e). (Family Ct, Monroe Co)

**People v Stefanovich, 136 AD3d 1375, 25 NYS3d 492
(4th Dept 2/11/2016)**

Defense counsel was ineffective and the defendant is entitled to reversal of his conviction of first-degree rape because counsel took "an inexplicably prejudicial course of action by allowing the jury to know that defendant is a registered sex offender" [Internal quotation marks omitted.] The rape investigation of the defendant began when his DNA profile in CODIS matched semen collected from the accuser through a rape kit. The judge ruled in a *Sandoval* hearing that the prosecutor could cross-examine the defendant regarding his prior felony without specifying that the conviction was for sexual abuse. Defense counsel could have requested that portions of a recording referencing the defendant's status as a sex offender be redacted, but "did not object to the recording being played in its entirety for the jury" thinking that the prosecution "would 'probably introduce' documents pertaining to the testing of defendant's DNA that refer to his status as a sex offender." Defense counsel mentioned on many occasions, from voir dire through summation, the defendant's prior conviction for a sex offense and status as a registered sex offender. Counsel could have presented the plausible theory offered—that the complainant was raped by someone else and the defendant's semen was present because they had consensual intercourse hours prior to her being raped—while avoiding letting the jury learn the defendant's prejudicial history. (County Ct, Oswego Co)

**People v Thomas R.O., 136 AD3d 1400, 25 NYS3d 766
(4th Dept 2/11/2016)**

The defendant's waiver of the right to appeal was invalid. He was between the ages of 16 and 19 when he committed the acts resulting in convictions of second-degree burglary and first-degree robbery. At the time of the plea, he was 19, had no prior experience with the criminal justice system, and had a history of mental illness and psychiatric hospitalizations. After the court advised the defendant that waiving appeal was a condition of the plea, the defendant rambled and asked incoherent questions mentioning his sentence and doctors. The court said it seemed the defendant was "'hearing, but [he was] not understanding.'" When the defendant asked to return to the question of waiver, the court responded by "asking

defendant simply if he agreed to give up his right to appeal in exchange for the agreed-upon sentence, and defendant replied, 'Yes.'" This exchange could be considered valid for other defendants "of a different 'age, experience and background'" but here "we 'cannot be certain that ... defendant comprehended the nature of the waiver of appellate rights'"

The defendant is also entitled to youthful offender (YO) status. Of the factors a court must consider in determining YO, the only factor weighing against the defendant is the seriousness of the crime. Furthermore, the presentence report, reports from a psychologist and a psychiatrist, and a memorandum from the Center for Community Alternatives recommend youthful offender status, suggesting that the crimes were a departure from the defendant's character and a result of his mental illness. (County Ct, Oneida Co)

**People v James, 137 AD3d 1587, 27 NYS3d 756
(4th Dept 3/18/2016)**

Because the court erred by failing to issue a justification charge, based on the defense of a third party, regarding the second-degree assault count of the indictment, the defendant is entitled to reversal and a new trial on all counts including the first-degree manslaughter conviction. During a fight with several people, the defendant cut one complainant in the forehead with broken glass and fatally stabbed another. One could conclude from "a reasonable view of the evidence, viewed in the light most favorable to defendant, that the [complainant] was using deadly physical force by striking defendant's brother with a champagne bottle when defendant assaulted her" Therefore, the jury should have been given a justification charge in the second-degree assault count. Although the justification charge was given on the manslaughter count, since there was a "'significant factual relationship'" between both counts, reversal of the assault conviction necessarily requires reversal of the manslaughter conviction. (Supreme Ct, Monroe Co)

**People v King, 137 AD3d 1572, 28 NYS3d 151
(4th Dept 3/18/2016)**

The court did not err in summarily denying the defendant's motion to suppress heroin recovered by a police officer during a traffic stop, nor in denying his trial motion to renew that part of his motion, because the stop was legal. The officer observed the defendant's failure to stop at a stop sign while talking on a cellphone, and arrested him when he told the officer his license was suspended. The heroin was discovered during the search incident to arrest, "in the inside flap of defendant's long underwear, near his waistband" *People v Smith* (134 AD3d 1453 [2015]) is distinguishable; there, the officer

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“pulled open the front of defendant’s underwear’ and ‘looked at his genital area,’” which did not occur here.

However, the count charging the defendant with seventh-degree possession of a controlled substance must be dismissed because it is an inclusory concurrent count of third-degree possession of a controlled substance. (County Ct, Onondaga Co)

People v Palmer, 137 AD3d 1615, 26 NYS3d 904 (4th Dept 3/18/2016)

The court committed reversible error when it failed to notify the defendant at the time of the plea that a period of post-release supervision would be imposed at sentencing. (County Ct, Ontario Co)

People v Parker, 137 AD3d 1625, 27 NYS3d 305 (4th Dept 3/18/2016)

Contrary to the prosecution’s contention, a sentence can be found on appeal to be unduly harsh and severe without finding “some demonstrated need to impose a different view of discretion than that of the sentencing” court. However, the sentence of 15 years plus post-release supervision for multiple counts including second-degree kidnapping, second-degree assault, possession of a weapon, and second-degree strangulation, was not unduly harsh or severe. Imposition of a \$300 mandatory surcharge and \$25 crime victim assistance fee is not part of the sentence and the issue was not preserved by objection and lacks merit where the defendant failed to give credible and verifiable information showing that the surcharge and fee would work an unreasonable hardship that is greater than the ordinary hardship that inmates who are indigent suffer.

In the interest of justice, the defendant’s 10% collection surcharge is reduced to 5% as the prosecution acknowledged that they “failed to file an affidavit from an official enumerated in CPL 420.10(8).” (County Ct, Ontario Co)

People v Dettelis, 137 AD3d 1722, 28 NYS3d 216 (4th Dept 3/25/2016)

The defendant did not violate the probation term requiring that he “notify [a] [p]roba[ti]on [o]fficer within 48 hours if [he was] arrested or questioned by any law enforcement official” where he spoke to an officer, who disclaimed “conducting an investigation,” following an incident in which the defendant was asked to leave the courthouse due to an argument with a clerk. The officer visited the defendant’s home to tell the defendant that he should not visit the courthouse and that the defendant’s

attorney should contact the court. The officer then escorted the defendant to the courthouse so the defendant could vote. The terms of probation did not require that the defendant disclose “any contact’ with the police” This interaction with the officer did not qualify as the defendant being “questioned,” and therefore he did not have a duty to report. (County Ct, Cattaraugus Co)

People v Hudgins, 137 AD3d 1645, 27 NYS3d 770 (4th Dept 3/25/2016)

The court properly granted the defendant’s motion to dismiss the count charging him with third-degree possession of drugs as there was insufficient evidence to prove that the defendant had intent to sell the 1.6 grams of cocaine found after a traffic stop. While possession of a “substantial’ quantity of drugs can be cited as circumstantial proof of an intent to sell ..., it cannot be said as a matter of law that the quantity of uncut and unpackaged [cocaine]” here “permitted an inference that” the defendant intended to sell it because more than mere possession of a modest amount of drugs, unaccompanied by packaging or any other sales-like conduct, is required. (Supreme Ct, Onondaga Co)

People v Moxley, 137 AD3d 1655, 28 NYS3d 514 (4th Dept 3/25/2016)

The court properly suppressed evidence recovered during execution of a search warrant at a Lincoln Avenue residence. The police learned that the defendant had been driven to a Grafton Street address on the day of a murder there. They also legally observed that the defendant’s phone pinged in the vicinity of 283-285 Lincoln Avenue, the defendant was meeting people in the driveway there, and he was Facebook friends with the person who registered the utilities at that address. This information did not constitute sufficient evidence from which to form a reasonable belief that the Lincoln Avenue residence contained evidence related to the Grafton Street murder. And the warrant application contained no specific factual allegations tying the Lincoln Avenue residence to the evidence being sought; failed to establish that the defendant had dominion and control of the site; did not tie the defendant to the murder; and did not show that the defendant possessed evidence related to the murder. (Supreme Ct, Monroe Co)

People v O’Dell, 137 AD3d 1744, 28 NYS3d 222 (4th Dept 3/25/2016)

The defendant’s convictions of second-degree assault and resisting arrest are reversed and a new trial ordered where the court removed elements of the indicted crime that were not conceded by the defendant from the jury’s consideration. The defendant did not concede that the

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officers were performing a lawful duty when they responded to a report that the defendant had threatened to kill a woman with whom he was fighting in the driveway and forced their way into the house to check on the welfare of the woman who was in the house with the defendant when police arrived. When defense counsel sought to cross-examine an officer regarding the need for a warrant “to enter the home, the court sua sponte instructed the jury that ‘[t]he [c]ourt has ruled that no search warrant was required under these circumstances,’” removing from consideration whether the police were performing a lawful duty and official function. (Supreme Ct, Monroe Co)

**People v Williams, 137 AD3d 1709, 27 NYS3d 781
(4th Dept 3/25/2016)**

The court should have dismissed the indictment for violation of statutory speedy trial provisions. The prosecution argues that the defendant was out of the jurisdiction from May 1, 2006 to Mar. 9, 2011 and that period should be excluded from the calculation. However, the prosecution “failed to prove either that the defendant was attempting to avoid apprehension or that his location could not be determined by due diligence, a necessary predicate for an exclusion based upon the defendant’s absence’” The prosecution’s contention that their CPL 30.30 duty was discharged on March 7 was not preserved, depriving this Court of the power to review it. (County Ct, Monroe Co)

**Matter of Dominic B., 138 AD3d 1395, 30 NYS3d 769
(4th Dept 4/29/2016)**

In this Family Court Act article 10 proceeding, the court erred by relying heavily on a psychological evaluation of the respondent mother that was never admitted into evidence, and which was performed after the parties stipulated that it would not be used as evidence in any fact-finding. The court violated the mother’s due process rights by relying on that evaluation and failing to allow the mother to cross-examine a caseworker. (Family Ct, Cattaraugus Co)

**People v Hall, 138 AD3d 1407, 30 NYS3d 422
(4th Dept 4/29/2016)**

The defendant is entitled to an evidentiary hearing where defense counsel asserted in a motion to withdraw the defendant’s plea that counsel had told the defendant the court would impose consecutive sentences amounting to a term exceeding 20 years if the defendant was convict-

ed after a trial on first- and second-degree assault and weapons possession charges. Such advice “did not simply ‘amount to a description of the range of the potential sentences’” The record raises substantial questions as to the voluntariness of the plea, but does not establish whether the defendant would have entered a guilty plea if he was properly informed. The matter is remitted for an evidentiary hearing. (County Ct, Niagara Co)

**People v Rivers, 138 AD3d 1446, 30 NYS3d 442
(4th Dept 4/29/2016)**

The court abused its discretion by granting the jury’s request for a readback of the prosecutor’s summation, and denying the defendant’s request for a readback of defense counsel’s summation. Here, evidence of guilt was not overwhelming, and the jury was divided, as evidenced by their numerous requests for guidance and a notice accompanying the readback request that they were deadlocked on one charge. “Under such circumstances, ‘[b]y rereading only the prosecutor’s summation, the court permitted the People an additional opportunity to present their arguments, and their view of the evidence, creating the potential for distracting the jurors from their own recollection of the facts and from the arguments of defense counsel’”

In the interest of judicial economy, given that a new trial is required, it is also noted that the court improperly precluded 911 calls that qualified as excited utterance and/or present sense impression exceptions to the hearsay rule. (County Ct, Onondaga Co)

**People v Barnes, 139 AD3d 1371, 30 NYS3d 787
(4th Dept 5/6/2016)**

The defendant’s conviction of third-degree grand larceny is reduced to petty larceny because there is insufficient evidence that the value of the stolen property was \$3,000 or more. And “the language ‘and family’” is removed from the order of protection because it is overly broad.

The court did not commit a mode of proceedings error where the court gave counsel an opportunity to read a jury note and respond while the jury was absent from the courtroom. The jury note requesting testimony about surveillance raised an issue of fact that could be resolved by the jury without instruction from the court. (County Ct, Ontario Co)

**People v Tucker, 139 AD3d 1399, 31 NYS3d 377
(4th Dept 5/6/2016)**

The defendant’s right to counsel was violated and a new trial is ordered because the trial court summarily dismissed the defendant’s request for new assigned counsel

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without “conduct[ing] a sufficient inquiry into [the defendant’s] complaint regarding a conflict of interest with defense counsel.” Defense counsel raised the issue before commencement of a suppression hearing, and acknowledged that there was a breakdown in the communication in their attorney-client relationship. The court failed “to make an inquiry to determine whether defense counsel [could] continue to represent defendant in light of the grievance” filed against counsel by the defendant and, without allowing the defendant to explain his complaint, the court opined that counsel provided competent representation, and suggested that the defendant retain counsel and asked whether he could afford to do so. (Supreme Ct, Erie Co)

Matter of Daniels v Davis, 140 AD3d 1688, 34 NYS3d 287 (4th Dept 6/10/2016)

The court erred in disposing of the family offense proceeding based on the respondent’s purported default. “As we have repeatedly held, a respondent who fails to appear personally in a matter but nonetheless is represented by counsel who is present when the case is called in not in default in that matter” Further, the court erred in determining that the petitioner established that the respondent committed second-degree harassment. “[T]he brief colloquy between the court and petitioner, who merely ‘re-verif[ied]’ the allegations of the petition, was insufficient to establish respondent’s commission of the family offense.” (Family Ct, Monroe Co)

People v Fuentes, 140 AD3d 1656, 32 NYS3d 779 (4th Dept 6/10/2016)

The court correctly denied the defendant’s CPL 440.20 motion to set aside the sentence, which argued that the court erred in determining that he was a second felony offender. The defendant was not barred from raising the issue because it was not previously decided on the merits on his direct appeal. However, while the prosecutor failed to file a statement indicating that the defendant has a predicate felony offense and the court failed to make such a finding pursuant to CPL 400.21(4), defense counsel admitted that the defendant was previously convicted of third-degree burglary, so the error was harmless. The defendant’s contention that the court did not comply with CPL 390.20(1) by relying on an insufficient presentence report (PSR) after the probation officer terminated the interview when the defendant refused to discuss his sentence is without merit because the court had the benefit of a PSR that was prepared two years earlier. (Supreme Ct, Onondaga Co)

People v Haigler, 140 AD3d 1680, 33 NYS3d 631 (4th Dept 6/10/2016)

The defendant’s conviction of second-degree promoting prison contraband is reversed and the indictment dismissed because there was not a valid accusatory instrument at the time of the plea. The defendant was indicted for first-degree promoting prison contraband, but the court determined that the evidence before the grand jury could not support a first-degree conviction but did support the lesser included offense of second-degree promoting prison contraband. The prosecution failed to take any of the three actions provided for in CPL 210.20(6), i.e., accepting the order and filing a prosecutor’s information with the reduced charge, re-presenting the first-degree charge to a grand jury, or appealing the order. (County Ct, Wyoming Co)

People v James, 140 AD3d 1628, 32 NYS3d 769 (4th Dept 6/10/2016)

The defendant was improperly resentenced as a second felony drug offender where the predicate felony sentence was not imposed until after commission of the instant crime. While the presentence report mentions that the defendant has at least one other conviction that would qualify as a predicate felony, the prosecution did not rely on that offense when they filed the predicate felony statement, and it cannot be considered harmless error because the defendant did not have an opportunity to challenge the conviction nor did he admit it in court. The matter is remitted for the filing of a new predicate felony statement and resentencing. Since the defendant was not yet sentenced on the felony improperly used as a predicate when he committed the instant offense, the court has the discretion to impose a sentence here that runs concurrently with the defendant’s current sentence. (County Ct, Cattaraugus Co)

People v Symonds, 140 AD3d 1685, 33 NYS3d 632 (4th Dept 6/10/2016)

The prosecution failed to disclose *Brady* material in a timely manner. However, the *Brady* violation does not warrant reversal because the prosecution turned over the information as “*Rosario* material prior to jury selection, thus affording defendant a ‘meaningful opportunity’ to use the information during cross-examination” (County Ct, Livingston Ct)

People v Tisdale, 140 AD3d 1759, 32 NYS3d 427 (4th Dept 6/17/2016)

The court erred by denying the defendant’s motion to suppress crack cocaine found when he was strip searched during an arrest for unlawful possession of marijuana.

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The officer approached a vehicle because it was illegally parked more than 12 inches from the curb on a city street. Upon noticing two open bottles of beer in the center console, the officer told the defendant, who was in the passenger seat, to exit the vehicle. Once out, the defendant complied with the officer's request to open his clenched fist revealing a dollar bill with marijuana residue. The defendant was handcuffed and admitted that he had a bag of marijuana in his front pant pocket but denied having any other drugs. The officer untied the defendant's sweatpants, pulled his clothing away from his body to look past his genitals to his thighs, then had the defendant lean over the back of the vehicle while the officer performed the same check at the rear of the defendant's body where he observed a bag "'underneath' his buttocks" that was later determined to contain cocaine. There was no reasonable suspicion that the defendant was concealing anything beneath his clothing other than the marijuana he already admitted he had, and the record reflects that he became nervous only after the strip search began. (Supreme Ct, Monroe Co)

**People v Cobb, 141 AD3d 1174, 34 NYS3d 923
(4th Dept 7/8/2016)**

The court effectively ignored the defendant's request for a downward departure in determining his risk level under the Sex Offender Registration Act (SORA) when it incorrectly applied the clear and convincing evidence burden of proof rather than the correct preponderance of the evidence. The matter is remitted for consideration of the defendant's request for a downward departure. The record is not clear whether the court had, at the time of its decision, information that was provided to this court. (County Ct, Erie Co)

**People v Freeman, 141 AD3d 1164, 35 NYS3d 617
(4th Dept 7/8/2016)**

The court did not err by denying the defendant's motion to suppress property and statements obtained by the police during a warrantless entry into his home. The defendant voluntarily consented to the entry because although he "was in custody at the time he gave consent, he cooperated with the police and assisted them in gaining entry by indicating which of his keys opened the front door" Upon entering the house, the police observed marijuana in plain view and read the defendant his *Miranda* rights, which he waived, and then he gave verbal and written consent to search the home.

His contention that the scope of consent did not extend to the search of a duffle bag in his closet is without

merit. Under the standard of "objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?," the police could conclude that the defendant's affirmative response when asked for permission to search both the room and the house for drugs, weapons, or contraband, encompassed any location where drugs or guns might be found. The "defendant signed a written consent that included the 'premises' and his 'personal property.'" (County Ct, Monroe Co)

Dissent: The prosecution failed to prove that the defendant voluntarily consented to the entry of his residence. After observing that the defendant's vehicle windows were "excessively tinted in violation of Vehicle and Traffic Law § 375 (12-a) (b) (3)," police followed him and approached him in his driveway. He was unable to produce his license or any identification and officers conducted a frisk that revealed his house keys. He was handcuffed and placed in the patrol car, after which a record check showed that his license was suspended, which resulted in his arrest. The officer asked the defendant to accompany him into the home to retrieve his identification, and upon viewing drugs in plain sight the officer had the defendant sign a written consent to search form that misstated important details like the defendant's name and the place to search. None of the factors guiding an assessment of the voluntariness of a defendant's consent weighs in favor of a finding of voluntariness in this case.

[Ed. Note: Leave to appeal was granted on Sept. 16, 2016 (2016 NY Slip Op 99200(U) [4th Dept].]

**People v George, 141 AD3d 1177, 35 NYS3d 625
(4th Dept 7/8/2016)**

"[W]e conclude in the exercise of our own discretion that the assessment of 25 points under the second risk factor, for sexual contact with the victim, results in an overassessment of defendant's risk to public safety" particularly in view of the close age between the 19-year-old defendant and the 14-year-old acquaintance with whom he engaged in non-forcible sexual intercourse, and that the victim's lack of consent was based on her inability to consent based on her age. (County Ct, Monroe Co) ♪

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