NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

Volume XXXII Number 2 April–June 2017

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

DMV Regulations Underlying Denials of Relicensing Upheld

The Court of Appeals has upheld Department of Motor Vehicles (DMV) regulations (15 NYCRR 136.5) that severely restrict relicensing following revocation of a driver's license under Vehicle and Traffic Law 1193 where the applicant has three or more alcohol- or drug-related driving convictions or incidents. As reported in the May 17, 2017 edition of News Picks from NYSDA Staff, all substantive claims raised by the petitioners failed. Those claims included arguments that the regulations conflict with statutory provisions, that they violate the separation of powers doctrine, that they are essentially arbitrary, and that they allow impermissible retroactive application. All five Court of Appeals judges who heard the case concurred in the recent decision. *Matter of Acevedo v NYS Dept. of Motor Vehs.*, 2017 NY Slip Op 03690 (5/9/2017). A summary of the opinion appears at p. 14. The *New York Law Journal* reported that, at the time *Acevedo* was decided, the DMV had denied about 13,600 license renewal applications under the regulations.

INSIDE—Pull-Out:
New York Lesser Included Offenses
May 2017

State Budget Brings Public Defense Reform, Raise the Age, and Other Legislative Changes

Public Defense Reform Offers Increased State Funding

The New York State 2017-2018 fiscal year budget enacted a plan to incrementally implement state funding of public defense improvements in all of New York's counties. When completed, the plan will provide to all counties the same assistance provided to the five counties named in the *Hurrell-Harring* lawsuit settled two years ago. The New York State Indigent Legal Services Office (ILS) must develop a set of plans to address the specific issues of counsel at arraignment, caseload relief, and initiatives to improve the quality of public defense. ILS will also monitor and report on the implementation of and compliance with the plans. The independence of ILS continues in the statute; approval of the plans by the Director of the Division of the Budget is required, but only as to "the projected fiscal impact of the required appropriation for the implementation of such plan." The statute also commands: "The state shall appropriate funds sufficient to provide for the reimbursement required by this section."

The statutory amendments needed to implement this reform appear in L 2017, ch 59, part VVV, sections 11-12 (pp. 207-209). NYSDA and the other over 200 organizations that supported the Justice Equality campaign applauded the legislation, with NYSDA Executive Director Jonathan E. Gradess noting:

> It places New York on an irreversible path toward equal justice; it makes the first genuinely tactical step toward reform of public defense services for those unable to afford counsel and it opens the door to an ongoing consensual dialogue on exactly what is needed to bring that about over the next seven years. The Governor and members of the Legislature are all to be congratulated on working through the thorns to find the roses of quality and defender independence.

Contents

New Laws Governing Identification Evidence and Video Recording of Interrogations

Legislation passed as part of the state budget makes certain kinds of photographic identification evidence admissible for the first time in New York and requires police to video record custodial interrogations in some types of cases. L 2017, ch 59, part VVV, sections 1-10 (pp. 202-207). A Practice Advisory, prepared by John Schoeffel, Staff Attorney with The Legal Aid Society's Special Litigation and Training Units, provides details on these legislative changes. NYSDA appreciates his sharing the information with public defense lawyers throughout the state.

Starting Apr. 1, 2018, law enforcement must video record custodial interrogations at detention facilities, including police stations, holding facilities, and prosecutor's offices, that "involve" class A-1 (non-drug) felonies, Penal Law 130.95 and 130.96 felonies, and felonies defined in Penal Law articles 125 and 130 that are defined as class B violent felony offenses in Penal Law 70.02. *See* CPL 60.45(3); Family Court Act (FCA) 344.2. However, a confession or admission is not subject to suppression based solely upon the failure to record the interrogation. The law outlines various situations in which there is a "good cause" for not recording an interrogation. Video recording must be conducted in accordance with standards promulgated by the NYS Division of Criminal Justice Services (DCJS).

As of July 1, 2017, the prosecution will be allowed to introduce evidence regarding photographic identifications of defendants where the identifications were administered using a blind or blinded procedure. *See* CPL 60.25, 60.30; FCA 343.3, 343.4. A blinded procedure is one in which the individual conducting the photo array "does not know where the suspect is in the array viewed by the witness." In a blind procedure, the individual conducting the photo array "does not know which person in the array is the suspect." Under an amendment to CPL 710.30(1), the prosecution must serve notice of photo identifications. Finally, the legislation directs DCJS to promulgate standardized and detailed written protocols for photographic array and lineup identification procedures, disseminate those protocols and procedures to all police departments, and implement training for current and new officers. *See* Executive Law 837(21), 840(4). DCJS promulgated identification procedures and forms, which were discussed at the June 7, 2017 meeting of the Municipal Police Training Council. Video of that meeting is currently available on the DCJS website at www.criminaljustice.ny.gov/pio/openmeetings.htm.

Raise the Age Legislation Enacted

The enacted budget includes legislation to raise the age of criminal responsibility for some crimes and establish a new Youth Part to preside over juvenile offender and adolescent offender cases that are not removed to Family Court. L 2017, ch 59, part WWW (starting on p. 209). The new law will apply to 16-year-olds on Oct. 1, 2018 and to 17-year-olds on Oct. 1, 2019. Family Court judges who receive training in specialized areas related to adolescent development and juvenile justice will preside over the Youth Part of the superior court in each county. *See* CPL 722.10. Some of the key provisions of the new law are:

- Misdemeanor charges (other than Vehicle and Traffic Law [VTL] misdemeanors) will be handled in Family Court pursuant to Family Court Act article 3 (juvenile delinquency).
- Violations and traffic infractions will continue to be adjudicated in local criminal court.
- VTL offenses will be adjudicated in the Youth Part with no opportunity for removal.
- Felony charges will begin in the Youth Part, but may be removed to Family Court under certain circumstances as detailed in the new CPL article 722.
  - —For 16- and 17-year-olds charged with a felony other than one listed below, their cases will be removed pursuant to CPL article 725 unless the prosecution files a written motion within 30 days of arraignment asking the Youth Part to retain the case and establishes extraordinary circumstances that warrant the case remaining in the Youth Part. *See* CPL 722.23(1). The felonies that are excluded from CPL 722.23(1) are: class A felonies, other than class A drug felonies, violent felonies listed in Penal Law 70.02, and felonies listed in CPL 1.20(42)(1) or (2).
  - —For violent felony offenses and class A felonies, other than class A drug felonies, the provisions of CPL 722.23(2) apply. Under subdivision 2, the court must first determine whether the prosecution has

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A PUBLICATION OF THE DEFENDER INSTITUTE
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proven, by a preponderance of the evidence, one or more of the following as set forth in the accusatory instrument: the defendant caused serious physical injury to a non-participant; the defendant displayed a gun or deadly weapon in furtherance of the offense; or the defendant engaged in unlawful sexual conduct. If these relevant facts are not established, the court must order the case to proceed under 722.23(1).

Regarding pretrial detention, children under 18 will be held in a facility certified by the Office of Children and Family Services (OCFS) as a juvenile detention facility and cannot be held in facilities used for adults without the approval of OCFS after consultation with the Commission of Correction. *See* CPL 510.15; Executive Law 502; County Law 218-a(A)(6). No later than Oct. 1, 2018 (and to the extent practicable by Apr. 1, 2018), no child under 18 may be placed or held on Rikers Island; children under 18 must be held in places certified by OCFS in conjunction with the Commission of Correction and operated by the NYC Administration for Children's Services in conjunction with the NYC Department of Corrections. *See* Correction Law 500-p. Adolescent offenders who are sentenced to a determinate or indeterminate term will be incarcerated in adolescent offender facilities established pursuant to Correction Law 77.

Law Authorizing Sealing of Criminal Histories in Limited Circumstances to Take Effect Oct. 7

Individuals who have been convicted of up to two eligible offenses, but not more than one eligible felony offense, may apply to have those convictions sealed under the new CPL 160.59, which takes effect on Oct. 7, 2017. L 2017, ch 59, part WWW, sections 48 and 48-a (pp. 232-236). Eligible offenses may be sealed only after at least 10 years have passed since the sentence was imposed on the latest conviction or, if the sentence included a period of incarceration, at least 10 years since release from incarceration. Offenses that are not eligible for sealing include sex offenses defined in Penal Law article 130 and offenses for which sex offender registration is required under Correction Law article 6-c, offenses defined in Penal Law article 263, violent felony offenses defined in Penal Law 70.02, Penal Law article 125 felony offenses, Penal Law class A felony offenses, and certain felony conspiracy and felony attempt offenses. Sealing is discretionary. Among other requirements, applicants must file a sworn statement detailing the reasons why sealing should be granted and provide notice to the prosecution.

Conditional Sealing Denial is Appealable Under the CPLR

The Third Department recently held that denial of a conditional sealing application made pursuant to CPL 160.58 is appealable under CPLR 5701(a)(2)(v) and affirmatively granted the defendant's application. *See People v Jihan QQ.*, 2017 NY Slip Op 04524 (3rd Dept 6/8/2017). Enacted as part of the 2009 Drug Law Reform Act, CPL 160.58 authorizes a court to conditionally seal a conviction for a drug, marijuana, or a specified offense defined in CPL 410.91(5) where the defendant completed a "judicially sanctioned" drug treatment program and served the underlying sentence. The court may also conditionally seal up to three prior misdemeanor drug or marijuana convictions.

JOB LISTINGS
are available on NYSDA's website at
www.nysda.org/?page=Jobs

New Law on Translation of Certain Orders of Protection

A new law requiring the translation of certain orders of protection was enacted as part of the budget. Part BB of L 2017, ch 55 amends Judiciary Law 212(2) to require the Chief Administrative Judge to make translation services available to all supreme and family courts to assist in the translation of orders of protection and temporary orders of protection, "where the person protected by and/or the person subject to the order of protection has limited English proficiency or has a limited ability to read English." Other provisions of the bill include the establishment of pilot programs in several criminal courts to develop best practices for translation and interpretation of orders or protection. Part BB takes effect on July 19, 2017.

O'Brien Will Step into Executive Director Role as NYSDA Celebrates 50 Years

The NYSDA Board of Directors has selected Managing Attorney Charles F. O'Brien to succeed Jonathan E. Gradess as Executive Director upon Gradess's retirement. As announced in a May 1 news release, the change in leadership comes at an intense and exciting time, exemplified by the legislative expansion of the *Hurrell-Harring* settlement conditions to all counties in the state, with funding of improvements becoming a state charge over the next few years. The legislation, which is discussed above, constitutes a legacy for Gradess, who has led NYSDA's advocacy for state funding of public defense services. Under O'Brien's leadership, NYSDA will continue providing backup services, assisting public defense providers as well as county and state officials in implementing reform—and advocating for additional changes to benefit clients.

50th Annual Meeting and Conference

Two full days of CLE training, a Chief Defender Convening, presentation of awards to inspiring individuals for their contributions to justice for all, and opportunities to share the joys and frustrations of public defense practice with colleagues—it must be another NYSDA Annual Conference. But not just any annual conference; this year, NYSDA will celebrate its half-century of helping lawyers help clients!

ILS Releases Caseload Standards for Hurrell-Harring *Counties*

As part of the settlement of the class action lawsuit regarding public defense deficiencies, the New York State Office of Indigent Legal Services (ILS) was tasked with creating caseload standards for five counties. The report fulfilling that duty, dated Dec. 8, 2016, was released on May 10 of this year. In the interim, as noted above, legislation passed as part of the 2017-2018 New York State budget calls for incremental implementation of a plan to extend to all other counties the *Hurrell-Harring* settlement conditions, including caseload relief. The ILS report on caseload standards should now be required reading for county officials and public defense providers as they, along with ILS, determine how to proceed.

Quality of Representation of Parents: Part of NYSDA's Mission

Improving the quality and scope of the representation provided at public cost to parents who cannot afford lawyers in family law matters is part of NYSDA's work. The Backup Center gathers innovative concepts for practice and systemic change and disseminates that information through training and materials supplied to defenders directly when they call the Backup Center. NYSDA is now a member of the Statewide Multidisciplinary Child Welfare Workgroup, sustained by the Office of Children and Family Services and the Unified Court System Child Welfare Court Improvement Project. NYSDA also continues to work with Office of Indigent Legal Services to identify and address the barriers to quality parent representation in family courts throughout the state.

As for training, family court practitioners should check the NYSDA training schedule for new fall events. Early planning is also underway for another Families Matter statewide conference, tentatively planned for the fall of 2018.

For information and assistance with family law matters, public defense lawyers should contact NYSDA Family Court Staff Attorney Lucy McCarthy at the Backup Center, at 518-465-3524 x24 or LMcCarthy@nysda.org. Useful resources can be found at Family Defense Resources on the website.

New Resources on Immigration Law, Social Media Ethics, and Securing Electronic Communications About Clients

NYSDA collects a wide range of information of potential interest to public defense providers, and disseminates it in a variety of ways, including publication here and in News Picks from NYSDA Staff. Some resources identified in the last few months are noted below.

Resources for Lawyers with Clients Who Are Not US Citizens

Practice Tips Concerning ICE at Courts

Responding to increased presence by Immigration and Customs Enforcement (ICE) personnel in family and criminal courts, and resulting arrests in or near courthouses, the Immigrant Defense Project (IDP) released a two-page guide, "Practical Tips for Defenders on ICE at Courts." The suggestions for protecting clients range from trying "to avoid calling their names aloud in the hallways" and "consider resolving the case off-calendar" to what to put on the record if ICE has detained your client before the case is called. In response to ICE's increased presence in and around courts, a coalition of legal services and other organizations has asked Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence Marks to take steps to stop ICE enforcement actions at state courthouses. NYSDA recently joined the coalition.

How Can Local Law Enforcement Legally React to Immigration Policies?

The New York State Sheriffs' Association issued a memorandum earlier this year on "Compliance with federal detainer warrants," which concludes that "[b]ecause of liability concerns, we cannot recommend that Sheriffs hold inmates for 48 hours (or longer) pursuant to such a federal detainer and order. Sheriffs should honor these federal detainers to hold inmates beyond their release date only after reviewing with their county attorney the potential for County and Sheriff liability, as was done recently in Suffolk County." The memorandum was reported in the Apr. 20, 2017 edition of News Picks from NYSDA Staff, available on the NYSDA website.

New York Attorney General Eric Schneiderman and other attorneys general have released a joint report, "Setting the Record Straight on Local Involvement in Federal Civil Immigration Enforcement: The Facts and The Laws." Schneiderman's press release says that localities are lawfully permitted to decline participation in most forms of federal immigration enforcement, that declining to participate can enhance public safety, and that recent ICE detainer reports have been flawed and inaccurate. A link to the full report is available in the press release.

NYSDA Works with RIAC Centers

NYSDA's long-standing commitment to help public defense lawyers provide quality representation to clients who are not U.S. citizens continues. Two ways that commitment is being met are cosponsoring CLE training with several Regional Immigration Assistance Centers (RIACs) and supporting a RIAC case management system. NYSDA has provided CLE credits for nine such training events since the beginning of the year. While "crimimm"—the intersection of criminal and immigration law—is an easily remembered phrase, there is an intersection between immigration law and family law matters as well. Two of the RIAC/NYSDA trainings focused specifically on that intersection. Defense lawyers needing assistance regarding immigration issues in their criminal or family cases should contact the RIAC for their region. Contact information is available at www.nysda.org/page/CrimImm Resources.

Modern Courts Website Offers Family Law Immigration Information

The Fund for Modern Courts website now offers "a series of legal reference guides on the complex intersection of family court issues and federal immigration laws, policy, and enforcement." http://immigrants.moderncourts.org/. Family Court Act article 6 (Permanent Termination of Parental Rights, Adoption, Guardianship and Custody) is briefly discussed in the Matrimonial and Domestic Violence section. Public defense attorneys representing noncitizens in family court proceedings should contact the local RIAC for assistance.

Information on Social Media Ethics For Lawyers and Judges

"Social media networks such as LinkedIn, Twitter and Facebook are becoming indispensable tools for legal professionals and the people with whom they communicate," begins the introduction to the updated "Social Media Ethics Guidelines." The updated guidelines, issued by the Commercial and Federal Litigation Section of the New York State Bar Association in May, include "new content on lawyers' competence, the retention of social media by lawyers, client confidences, potential positional conflicts of interest associated with social media posts, the tracking of client social media use, communications by lawyers with judges, and lawyers' use of social media platforms,

(continued on page 35)

Conferences & Seminars

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**

Sponsor: National Association of Criminal Defense Lawyers
Theme: 2017 Annual Meeting & Seminar: "The Golden Rules of Cross: Strategies for Avoiding Troubled Waters"
Dates: July 26-29, 2017
Place: San Francisco, CA
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/Annual2017/

Sponsor: American Bar Association
Theme: CJS Annual Meeting & Programs at the ABA Annual Meeting
Dates: August 10-13, 2017
Place: New York, NY
Contact: ABA: tel (800) 285-2221; website www.americanbar.org/cle.html

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Sponsor: National Association of Criminal Defense Lawyers
Theme: Presidential Summit & Seminar "Race Matters: The Impact of Race on Criminal Justice"
Dates: September 14-15, 2017
Place: Detroit, MI
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/PresidentialSummit/

Sponsor: National Legal Aid and Defender Association
Theme: 2017 New Leadership Training
Dates: September 14-17, 2017
Place: Las Vegas, NV
Contact: NLADA: tel 202-452-0620; fax (202) 872-1031; email registration@nlada.org; website http://www.nlada.org/2017-new-leadership-training ⚖

Additional criminal and family defense training programs are listed on NYSDA's Statewide Public Defense Training Calendar at **www.nysda.org/page/NYStatewideTraining**.

From My Vantage Point

By Jonathan E. Gradess

As I write, I am winding up my career as Executive Director of our Association making way for Charlie O'Brien who has been appointed by our Board to replace me. He will do so admirably and I couldn't feel better about leaving the Association in more competent hands. After a rigorous and well-designed national search, the Board landed a winning candidate from among the ranks of our dedicated, long-tenured staff.

There is something exciting about both the look backward and the look forward that emerges at a time like this.

Recently Judge Leonard Livote, one of NYSDA's original VISTA volunteers, was reappointed here in Albany by the Senate Judiciary Committee to another term on the Court of Claims. I also signed a petition for a candidate in a local election who, as a 16-year-old, had volunteered for NYSDA. And on the last Tuesday of this Legislative Session, I was blown away by the kindness of Assemblyman Joe Lentol and the Codes Committee who honored me at their final 2017 Codes Committee meeting.

That "time marches on" is no longer a cliché for me. I couldn't help but be reminded from these crossroad events of the distance this Association and the community of defenders and clients it represents has come. In the 39 years since Lenny started along with 6 other VISTA volunteers working out of a small office on Willis Avenue in Mineola, much has happened. And in the 50 years since NYSDA's founding, NYSDA has grown, with 1853 members, to become the largest criminal defense bar association in New York.

Our 29 staff members daily serve more than 6000 public defense attorneys in more than 120 plans throughout New York's 62 counties providing training, direct defender services, and technical assistance. We have staff members with more than 30 years' tenure and a total staff which in the aggregate has served your association for more than 200 years. We also now have younger devoted members of this staff who will help to carry NYSDA well into the future.

Hopefully you all at one time or another have met our wonderful legal and non-legal NYSDA staff members. Each person has an abiding commitment to client-centered practice and a devotion to helping NYSDA and all of you to improve the quality of public defense services. Every day they awake to new challenges and spend 8 or more hours serving all of you—with research, training, writing manuals, keeping our 100,000+ electronic/paper document library updated, finding experts, maintaining the Public Defense Case Management System, aiding parental defense advocates, answering pro se inquiries, litigating complex and important claims, filing amicus briefs, building restorative practice pathways, helping clients prepare for prison, and representing veterans in the criminal and family courts.

Recently, under the capable leadership of Staff Attorney Stephanie Batcheller, we completed our 2017 Basic Trial Skills Program—a wonderful training program begun thirty years ago, in 1987. Hundreds of New York public defense attorneys from legal aid societies, public defender offices, and assigned counsel programs have passed through the program's doors in Troy, gaining the tools for applying client-centered representation techniques in their everyday practice.

I can remember the early struggle for money and the prescient suggestion made by one of our longtime members, Adrienne Flipse Hausch, to approach the State and get in the then "Supplemental Budget." Fortunately for us Jerry Kremer, the chairman of the powerful Assembly Ways and Means Committee, was one of our loyal members from the South Shore of Long Island and he helped show the way.

When I was fortunate enough to marry Diane Geary, NYSDA's current Training Coordinator, and move to Albany, I fulfilled the initial dream of the Board to make NYSDA an Albany-based defender association. Then when we were finally funded by the State, in 1982, we found our appropriation vetoed. When the Legislature overrode that veto, we began to truly settle in.

We took on racism in ATI programming, did our part to help the national movement to end the death penalty, carried out a sustained opposition to cameras in court, and helped create the Capital Defender Office when the Pataki administration brought us capital punishment. We helped those in public defense services, and Prisoners' Legal Services of New York, sustain hope in the face of his administration's drastic cuts, formed the Gideon Coalition, and by 1997 came to see the need for our daily work to be accompanied by a full blown campaign to improve the public defense system, forcing the State to live up to its Constitutional responsibility.

In 1998 and 1999 NYSDA, its Client Advisory Board, and the League of Women Voters held hearings on public defense problems and assigned counsel fees. In 2000, we assisted with the suit in *New York County Lawyers' Association v. Pataki,* asserting that children and adults who were unable to afford counsel in the First Department lacked access to meaningful and effective legal representation as required by the New York and United States Constitutions.

In the ensuing seven years we published white papers and reports, held symposia, worked with the Office of Court Administration and the Chief Judge, aided the Kaye Commission, and worked with the New York Civil Liberties Union to bring the *Hurrell-Harring* lawsuit.

Beginning in 2007, as part of the Campaign for an Independent Public Defense Commission, along with 250 other groups statewide, we worked with two Governors and supported a bill that called for an Independent Public Defense Commission heading a statewide, fully and adequately state-funded public defense system.

The creation of Office of Indigent Legal Services in 2010, the ensuing collaboration with its staff and Board, and the remarkable consequences that have emerged from the interim relief granted in the *Hurrell-Harring* case and the formal settlement, all set the stage for the last couple of years in which we have all worked together to achieve a new beginning in New York for the improvement of public defense services.

None of these reforms could have been achieved without a membership that recognized the need to care for and serve clients, to fight for them to secure their rights, and to stand shoulder to shoulder with one another as client-centered advocates to do so.

It has been my honor to serve you and to lead this organization. I am grateful for all that you have done to make my tasks easier and fully rewarding and for making your clients' lives better all along the way. ⚖

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.

Manuel v City of Joliet, 580 US __, 137 SCt 911 (3/21/2017)

A lawsuit under 42 USC 1983 may be brought alleging liability for a pretrial detention that violated the Fourth Amendment not only when the detention precedes, but also when it follows, the start of legal process. "The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause," and that "can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements." Other disputed legal issues, including the accrual date of the Fourth Amendment claim on which a statute of limitations question hinges, are left to the consideration of the Court of Appeals on remand.

Dissent: [Thomas, J] The petitioner's claim accrued more than two years before he filed suit, whether the accrual date is the date of arrest or of first appearance for a judicial determination of probable cause. The claim is therefore untimely.

Dissent: [Alito, J] The Court "entirely ignores the question that we agreed to decide, *i.e.*, whether a claim of malicious prosecution may be brought under the Fourth Amendment. I would decide that question and hold that the Fourth Amendment cannot house any such claim." While the Court "purports to refrain from deciding any issue of timeliness," its opinion will "be read by some to mean that every moment of pretrial confinement without probable cause constitutes a violation of the Fourth Amendment." That does not square with the ordinary meaning of "'seizure.'" Nor would some forms of "'legal process'"—like a grand jury indictment—fit within the seizure concept.

Moore v Texas, 581 US __, 137 SCt 1039 (3/28/2017)

The capital defendant challenged his eligibility for a death sentence on the basis of intellectual disability. The Texas Court of Criminal Appeals (CCA) erred by rejecting a state habeas court's recommendation of a finding of intellectual disability based on current medical diagnostic standards and instead relying on a standard from prior CCA caselaw. The CCA analysis included "wholly non-clinical" factors which were "an invention of the CCA untied to any acknowledged source," were "[n]ot aligned with the medical community's information," drew no strength from Supreme Court precedent, and created "'an unacceptable risk that persons with intellectual disability will be executed' …." The factors used by the CCA "are an outlier, in comparison both to other States' handling of intellectual-disability pleas and to Texas' own practices in other contexts." "By rejecting the habeas court's application of medical guidance and clinging to" its prior caselaw, "the CCA failed adequately to inform itself of the 'medical community's diagnostic framework'" and its decision cannot stand.

Dissent: [Roberts, CJ] While the factors from prior Texas caselaw provided "an unacceptable method of enforcing the guarantee" against execution of the intellectually disabled, the CCA did not err in its determination of the petitioner's intellectual functioning, which created an independent basis for its judgment, and should therefore be affirmed. The majority crafted "a constitutional holding based solely on what it deems to be medical consensus about intellectual disability. But clinicians, not judges, should determine clinical standards; and judges, not clinicians, should determine the content of the Eighth Amendment."

Dean v United States, 581 US __, 137 SCt 1170 (4/3/2017)

Where a defendant is convicted of violating 18 USC 924(c), which "criminalizes using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime, or possessing a firearm in furtherance of such an underlying crime," and faces sentencing on both 924(c) and the predicate crime, the language of 924(c) does not restrict consideration of the sentence the defendant faces under that provision in determining a proper sentence for the predicate offense. The discretion that sentencing courts have long enjoyed has not been destroyed

US Supreme Court *continued*

by statutory requirements that certain factors be evaluated in the exercise of that discretion. That 924(c) says that any mandatory minimum under it must "be imposed 'in addition to' the sentence for the predicate offense, and to run consecutively to that sentence" does not preclude the court from considering the 924(c) mandatory minimum "when calculating an appropriate sentence for the predicate offense."

Manrique v United States, 581 US __, 137 SCt 1266 (4/19/2017)

Where an initial judgment is entered imposing certain aspects of a federal sentence, such as a prison term, while determination of an amount of restitution to be imposed is deferred and made later, two appealable judgments exist. A notice of appeal filed after the initial judgment but before the amended judgment is not sufficient to invoke appellate review of the restitution amount, at least where the government objects. Whether a notice of appeal is jurisdictional need not be determined here, as "[t]he requirement that a defendant file a timely notice of appeal from an amended judgment imposing restitution is at least a mandatory claim-processing rule."

Dissent: [Ginsburg, J] Under the circumstances here, where the court advised the defendant of his right to appeal at the initial sentencing and not upon amending the judgment to include restitution, and the court clerk transmitted the amended judgment to the Court of Appeals without awaiting a second appeal notice, the transmittal of the amended judgment should be held to confer appellate jurisdiction.

Nelson v Colorado, 581 US __, 137 SCt 1249 (4/19/2017)

Colorado's law allowing the State to retain conviction-related assessments (fees, court costs, and restitution) after a "conviction is invalidated by a reviewing court and no retrial will occur," requiring the prevailing defendant to prove innocence by clear and convincing evidence in a discrete civil proceeding, violates due process. Once a conviction is erased, the presumption of innocence is restored; the State may not presume former defendants "guilty *enough* for monetary exactions" due to invalidated convictions. What is sought is restoration of funds paid to the State, not compensation for temporary deprivation of them, so use of the Exoneration Act, designed to compensate for loss of liberty due to wrongful conviction, is inapposite. No equitable considerations are involved; "the State currently has zero claim of right" to the funds in question.

Concurrence: [Alito, J] Rather than the test set out in *Mathews v Eldridge* (424 US 319 [1976]), "[t]he proper framework for analyzing these cases is provided by *Medina v. California*, 505 U.S. 437 (1992)." The Court's *Mathews* analysis implies that reversal restored the defendants "to the *status quo ante*," but if that were so, they should be "compensated for all the adverse economic consequences" of the convictions. The legal system has long treated such compensation differently from refund of fines and other payments made pursuant to convictions. The Court's ruling "ignores the distinctive attributes of restitution"; the judgment in a successful civil suit by a complainant against a convicted defendant should not be undone by reversal of the criminal conviction based on trial error such as a Confrontation Clause violation. The Court "should have acknowledged that—at least in some circumstances—refunds of restitution payments made under later reversed judgments are not constitutionally required."

Dissent: [Thomas, J] "In my view, petitioners have not demonstrated that defendants whose convictions have been reversed possess a substantive entitlement, under either state law or the Constitution, to recover money they paid to the State pursuant to their convictions."

Esquivel-Quintana v Sessions, No. 16-54 (5/30/2017)

"[A] conviction under a state statute criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old" does not qualify as sexual abuse of a minor under the provisions of the Immigration and Nationality Act (INA) allowing removal of a noncitizen from the United States for that offense. The statutory provision in question, INA 1227(a)(2)(A)(iii), makes noncitizens "removable based on the nature of their convictions, not based on their actual conduct." Under the categorical approach used to determine if a conviction qualifies as "an aggravated felony" under the INA, a conviction qualifies "only if the least of the acts criminalized by the state statute falls within the generic federal definition of sexual abuse of a minor." The state statute here encompasses not only behavior involving minors under 16, which is required to meet the generic federal definition of sexual abuse of a minor, but also behavior involving older minors. "We leave for another day whether the generic offense requires a particular age differential between the victim and the perpetrator, and whether the generic offense encompasses sexual intercourse involving victims over the age of 16 that is abusive because of the nature of the relationship between the participants."

County of Los Angeles v Mendez, No. 16-369 (5/30/2017)

The Fourth Amendment provides no basis for a rule imposing liability under an excessive force claim on law enforcement officers for injuries resulting from force that

US Supreme Court *continued*

was reasonable at the time it was used against the injured party just because the officers committed a separate Fourth Amendment violation that led to the use of force. Where officers searching a property for a parolee-at-large entered a shack on the premises without a warrant, and failed to announce their presence before entering, only nominal damages resulted from the entry, for which the officers were liable; they were found entitled to qualified immunity as to the knock-and-announce claim. Their actions in then repeatedly shooting two people in the shack were reasonable because one of the people in the shack was holding a BB gun resembling a firearm when officers entered. The "provocation rule" established by the Ninth Circuit, which would allow recovery of damages in that situation, "is incompatible with our excessive force jurisprudence." Whether a proximate cause analysis would permit recovery for the shooting injuries based on the officers' failure to secure a warrant must be revisited on remand.

New York State Court of Appeals

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

People v Castillo, 29 NY3d 935, 51 NYS3d 1 (3/23/2017)

"The order of the Appellate Division should be affirmed in each case.... Codefendants' challenge to the trial court's general charge on causation is unpreserved, and there was no mode of proceedings error …. In addition, defense counsel's failure to object to the charge does not constitute ineffective assistance, as the jury instructions, viewed in totality, neither improperly shifted the burden to codefendants nor relieved the People of their burden to prove guilt beyond a reasonable doubt .... Additionally, co-defendants' remaining ineffective assistance of counsel claims are without merit as both codefendants received meaningful representation ...."

People v Freeman, 29 NY3d 926, 50 NYS3d 30 (3/23/2017)

"The order of the Appellate Division should be reversed, defendant's plea vacated, that portion of his motion which requested suppression of tangible property and statements obtained following the entry into defendant's residence granted, the first and second counts of the indictment dismissed, and the case remitted to County Court for further proceedings on the third count of the indictment. Applying the factors outlined by this Court in *People v Gonzalez* (39 NY2d 122, 127 [1976]), we hold, consistent with the reasoning of the Appellate Division dissent, that the record lacks support for the conclusion of the courts below that defendant voluntarily consented to the entry and search of his home."

People v Peguero-Sanchez, 29 NY3d 965, 52 NYS3d 62 (3/23/2017)

"The order of the Appellate Division should be affirmed. Defendant's arguments concerning the People's summation are unpreserved, and in any event, we reject defendant's contention that the People improperly offered evidence and argument concerning an uncharged sale of narcotics in violation of defendant's due process rights and the rule set forth in *People v Molineux* (168 NY 264 [1901]). Additionally, evidence of defendant's text messages was properly admitted to rebut defendant's version of the events surrounding his arrest, as the text messages were 'relevant to the very issues that the jury' was required to decide .... Finally, any error resulting from a detective's testimony that defendant invoked his right to counsel was harmless, particularly in light of the trial court's offer of a curative instruction."

People v Slocum, 29 NY3d 954, 51 NYS3d 485 (3/23/2017)

The prosecution's argument that the Appellate Division improperly conflated the two issues of whether the defendant unequivocally requested counsel and "whether a letter from defense counsel constituted an entry by counsel into the proceeding" cannot be reviewed. The Appellate Division made its decision on the former before discussing the latter. "Whether a request for counsel is unequivocal presents a mixed question of law and fact .... The Appellate Division's reversal therefore was not 'on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal' (CPL 450.90 [2] [a]). As a result, we have no jurisdiction over this appeal ...."

People v Jackson, 29 NY3d 18, 52 NYS3d 63 (3/28/2017)

In the trial court, the defendant opposed the prosecution's request to cross examine the defendant about a juvenile delinquency adjudication solely on the grounds that a youth's "mind and sense of values are not well formed," failing to preserve the issue raised on appeal, that allowing the prosecution to elicit evidence of the adjudication constituted legal error. The prosecution had only sought to go into the facts underlying the adjudication, but the court ruled as a compromise that the adjudi-

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cation and sentence, but not the underlying facts, could be elicited. Without an objection by the defendant, "the court had no way of knowing that defendant believed the court's ultimate decision was erroneous."

As to the claim that the defendant was denied his right to be present at conferences about prospective juror bias, held at sidebar, the defendant validly waived that right. To the extent that he argues on appeal that off-the-record conversations with his attorney insufficiently apprised him of his rights, "he relies on matters dehors the record and beyond review by this Court on direct appeal. Such claims are more appropriately considered on a CPL 440.10 motion ...."

Concurrence: [Fahey, J] While defense counsel's initial objections on the *Sandoval* issue were insufficient to preserve it for review, the prosecutor properly told the court that the delinquency adjudication could not be used for impeachment. The ruling was concededly erroneous, but harmless.

People v Leonard, 29 NY3d 1, 51 NYS3d 4 (3/28/2017)

The trial court erred by allowing the prosecution to introduce testimony from the accuser about a prior incident in which the defendant allegedly committed a similar sexual assault against her. Where the accuser and her boyfriend testified that they drank alcohol with the defendant at his home, and the defendant was accused of then touching the accuser's vagina after she passed out, evidence that two years earlier the defendant gave the accuser alcohol and she later awoke to find him sexually assaulting her with his finger was propensity evidence. It was not necessary background information, nor admissible to show intent, which could be inferred from the alleged act; to the extent it showed motive for providing the accuser with alcohol, its prejudicial nature far outweighed any probative value.

People v Smith, 29 NY3d 91, __ NYS3d __ (3/28/2017)

A person being robbed "may reasonably believe that a gun is being used, on the basis of conduct that makes it appear that the defendant is holding a gun, regardless of whether" there is a movement by the defendant while talking to the person or a concealing of the defendant's hand throughout the encounter in a way that suggests the presence of a gun. It is not required for first-degree robbery based on displaying a firearm that the defendant use the hand "to simulate a gun, rather than to simulate a hand holding a gun." The jury could infer from the testimony here that the defendant consciously intended to convey that he had a gun when he held one hand under his sweatshirt while saying he had a gun. The dissent focuses on the Legislature's concern with the evidentiary difficulty of proving that a gun "'was loaded and operable'"; the dissent's conclusion as to legal sufficiency would require overturning *People v Lopez* (73 NY2d 214 [1989]), which the defendant did not ask the Court to do. The defendant, charged with attempted first-degree robbery, could have asserted the affirmative defense that no loaded or operable firearm was involved. He failed to request a second-degree robbery instruction.

Concurrence: [Abdus-Salaam, J] "I concur in the result on constraint of *People v Lopez* .... I note, as do the majority and the dissent, that defendant has not asked this Court to overrule *Lopez*."

Dissent: [Wilson, J] The defendant seeks reversal on the ground "that an unarmed person who 'makes no movements' of his or her concealed hand while threatening the presence of a gun cannot be convicted for attempted robbery in the first degree." This Court's precedents have "erroneously broadened the scope of the aggravating factor, 'displays what appears to be a ... firearm,' without regard for the legislature's actual intent ...." *Stare decisis* does not compel affirmance; "I therefore respectfully dissent."

People v Whitehead, 29 NY3d 956, 51 NYS3d 486 (3/28/2017)

While the prosecution did not introduce any of the cocaine that the defendant was alleged to have possessed, other evidence was sufficient to support his drug conviction. This evidence included the "defendant's intercepted phone calls replete with drug-related conversations, visual surveillance, and the testimony of cooperating witnesses."

The prosecution did not misstate the statutory definition of the word "sell"; the trial court properly reasoned that "the unique facts of this case — involving 'an agreement' to sell rather than 'an actual transaction' — did not conform to the conventional meaning of a 'sale.'" Further, the prosecutor and judge both told the jury that the court, not the attorneys, would give instruction on the law.

People v Brahney, 29 NY3d 10, 51 NYS3d 9 (3/30/2017)

On this record, "we cannot say as a matter of law that the conduct resulting in defendant's conviction of intentional murder and the conduct underlying the elements of the burglary convictions was a single act for consecutive sentencing purposes ...." The first-degree burglary counts were based on causing physical injury and use or threatened use of a dangerous instrument. Evidence was admitted showing that the decedent's home was entered by smashing a window and tearing a screen and that a small amount of the decedent's blood and signs of a struggle were found upstairs at the scene. In contrast, a large amount was found downstairs, as was the body, which

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had sustained multiple stab wounds capable of causing death, and the defendant admitted dragging the decedent down the stairs and killing her. The Appellate Division's affirmance of the sentence, in a decision stating that the prosecution had established that the defendant committed separate and distinct acts as required for consecutive sentences, is affirmed.

People v Cook, 29 NY3d 114, __ NYS3d __ (3/30/2017)

Where, following a coordinated prosecution in two counties, the defendant pleaded guilty to sex offenses in both jurisdictions and was sentenced to prison terms imposed to run concurrently, and the Board of Examiners of Sex Offenders made a risk assessment recommendation based on reports from both counties, only one of the two sentencing courts could properly render a determination as to the defendant's Sex Offender Registration Act (SORA) risk level. "'[A] SORA risk-level determination is not part of a defendant's sentence'" but a collateral consequence designed to further the goal of protecting the public, not punishment, and a single SORA adjudication based on all relevant conduct fulfils the purpose of assessing the risk posed by the offender. Permitting multiple determinations "would result in redundant proceedings and constitute a waste of judicial resources." If the convictions in the county in which the SORA determination was made were to be overturned, the sentencing court in the other county "would be free to conduct a de novo hearing and render a determination based on the remaining SORA-qualifying offenses ...." Given this holding, "it is imperative that prosecuting offices coordinate their submissions to the sentencing court that is adjudicating an offender's risk level in order to ensure that all relevant information—from all relevant jurisdictions—is before that court ...."

People v Cook, 29 NY3d 121, 53 NYS3d 238 (3/30/2017)

In this Sex Offender Registration Act (SORA) risk level determination case, the prosecution failed to prove that the defendant "established or promoted his long-standing close relationships with the child" accusers "for the primary purpose of victimization." The accusers were all children of the defendant's childhood and family friends and the defendant had substantial non-sexual contact with the accusers, and socialized with their parents, for substantial periods of time before he began offending. "Grooming" must not be conflated with promoting a relationship for victimization purposes; the purpose of assessing points under factor seven for the latter conduct is "to require enhanced community notification where abuse occurs in more distant relationships, which indicate an increased risk of reoffending." [Footnote omitted.]

Dissent: [Garcia, J] "I cannot agree with the majority's conclusion—contrary to the plain language of factor 7—that defendant did not promote his relationship with any of his victims simply because those relationships were 'pre-existing' ...." Needlessly limiting risk factor seven will inhibit SORA courts from using the SORA Guidelines "in a manner that 'fully capture[s] the nuances of every case' so that 'the instrument will result in the proper classification,'" compelling courts to resort with increasing frequency to departure from recommendations under the Guidelines. This distorts the intended scheme and constrains appellate review as departures are meant to be the exception.

People v Sparks, 29 NY3d 932, 51 NYS3d 14 (3/30/2017)

The trial court properly refused to give a justification defense instruction because no reasonable view of the evidence in this case, considered in the light most favorable to the defendant, "would have permitted the factfinder to conclude that defendant's conduct was justified ...." After the complainant provoked the defendant in a bodega, leading to a verbal exchange after which the defendant punched the complainant, both left. A few minutes later, the defendant reentered the bodega and, when the complainant returned to the area outside the store, the defendant told the shopkeeper he was going to knock the complainant out again, then did so. "Put simply, the surveillance footage reflects that defendant's ambush of the victim with the milk crate cannot be considered self defense."

People v Valentin, 29 NY3d 57, 52 NYS3d 249 (3/30/2017)

"The trial court did not commit reversible error by including an initial aggressor exception in its justification charge. As there was a reasonable view of the evidence that defendant was the initial aggressor in the use of deadly physical force, this factual determination was properly before the jury." The instruction explained that the defendant was not required to wait until struck or wounded before using deadly physical force if he reasonably believed he was about to be subjected to deadly force; the instruction "did not imply or suggest that defendant was the initial aggressor."

Dissent: [Stein, J] "No reasonable view of the evidence could support a finding that defendant was the initial aggressor. Because this case hinged on a justification defense, defendant was prejudiced by the trial court's error of including the initial aggressor exception in its justification charge." The error was not harmless.

NY Court of Appeals *continued*

Matter of 381 Search Warrants Directed to Facebook, Inc., 2017 NY Slip Op 02586 (4/4/2017)

Because Facebook's appeals to the Appellate Division from trial court orders on motions relating to search warrants issued in a criminal proceeding were not authorized by the Criminal Procedure Law (CPL), the Appellate Division order dismissing the appeals must be affirmed. The warrants in question were issued in accordance with CPL article 690 and pursuant to the federal statute known as the Stored Communications Act (SCA), codified as 18 USC 2701 et seq. "That the SCA draws a distinction between warrants and subpoenas, and the content that may be obtained therewith, is of critical significance with respect to a determination of appellate jurisdiction over the appeal from the denial of Facebook's motion to quash." An order to vacate a search warrant is made in a criminal case and not appealable, while an order resolving a motion to quash a subpoena issued before a criminal action has begun is civil in nature, even if related to a criminal investigation, and may be appealed. While the method of compliance with SCA warrants bears some resemblance to responding to a subpoena, they are not to be treated as subpoenas.

The merits of the arguments sought to be raised on appeal are not reached, including "Facebook's standing to assert Fourth Amendment claims on behalf of its users, whether an individual has a reasonable expectation of privacy in his or her electronic communications, the constitutionality of the warrants at issue, or the propriety of the District Attorney's refusal to release the supporting affidavit," and "whether 18 USC § 2703 (d) authorizes a motion to quash an SCA warrant in the first instance."

Concurrence: [Rivera, J] Denial of the motion to quash the warrant is not appealable, on the narrow ground "that Facebook did not assert the grounds provided for under 18 USC § 2703 (d)," making the order subject to our state rules, and unreviewable, under section 2703 (a). The dissent correctly says that the SCA allows a Facebook appeal from "the denial of a motion to quash or modify the SCA warrants ...."

Dissent: [Wilson, J] Under today's ruling, "this Court is powerless to protect the business interests of a major company; return information seized from either the 381 individuals, many of whom were never suspected of wrongdoing, or the thousands of innocent individuals who communicated or simply happened to share an interest with a user named in the bulk warrants; prevent a patchwork of opposing jurisprudence on an emerging federal and constitutional issue from creeping across the state; and vindicate the rights granted to New Yorkers in article I, § 12." When "Congress granted service providers a statutory right to move to quash, it automatically provided standing and a right to appeal, absent a clear statement to the contrary." Furthermore, "federal law recognizes a fundamental difference between orders compelling a third party to produce information as part of an investigation, and orders compelling a third party to produce information once a criminal proceeding has commenced." The CPL cannot eliminate these federal rights, and "this appeal is the only opportunity to litigate fully the rights Congress granted to Facebook." Facebook could also appeal under the common law of this state. And "Facebook has standing to assert its own rights under the SCA, its own rights under the common law, and the rights of its users under the traditional test for third-party standing."

People v Anderson, 29 NY3d 69, 52 NYS3d 256 (4/4/2017)

"PowerPoint slides may properly be used in summation where, as here, the added captions or markings are consistent with the trial evidence and the fair inferences to be drawn from that evidence.... The court properly instructed the jury that what the lawyers say during summations is not evidence, and that in finding the facts, the jury must consider only the evidence. In this case, as was appropriate, the jury was told that the physical exhibits admitted into evidence would be made available to them, while the slides were not supplied to the jury during deliberations."

The "argument that defense counsel was ineffective for failing to object to" a slide showing the defendant's arrest photograph is rejected where the photograph had been admitted into evidence and the superimposed text summarizing the prosecution's theory that was added to the photograph accurately tracked testimony and fair inferences based on admitted evidence. The placement of the text boxes on the photo "was 'not simply an appeal to the jury's emotions' ...." Even if failure to object was error, it would not amount to ineffective assistance.

Dissent: [Rivera, J] "The prosecutor's use of digitally edited reproductions of exhibits to convey inferences and misinformation, as well as to project defendant's image as the 'face of death,' exceeded the bounds of proper summation." Evaluating a visual demonstration used in summation "'in the same manner as an oral statement'" ignores the differences, including "the impact of visual aids on the viewer," the independent effect that "the medium and manner by which ideas are communicated" has on how the "ideas are deconstructed and understood," and the "enhanced effect of combining imagery with oral commentary." Science has shown that "the medium of delivery has the potential to powerfully influence the way the message is heard and retained ...." Further, use of the images challenged here did not comply with the majority's own rule but rather "misrepresented the evidence, misled the jury, and appealed to emotion."

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People v Williams, 29 NY3d 84, 52 NYS3d 266 (4/4/2017)

Where the trial court "took prompt corrective action to ensure that the jury was not being misled and gave strong instructions concerning summation," the defendant was not denied a fair trial by the prosecution's PowerPoint presentation containing annotated images of trial exhibits. Many of defense counsel's objections were sustained, the court cautioned the jury about additional annotations, and ultimately curtailed the presentation. "[T]he long-standing rules governing the bounds of proper conduct in summation apply equally to a PowerPoint presentation." Here, in addition to the court's corrective measures, "the actual trial exhibits remained pristine for the jury's examination." Other claims as to the prosecutor's summation and counsel's failures regarding them are without merit.

People v McMillan, 29 NY3d 145, __ NYS3d __ (5/2/2017)

The record supports the suppression court's conclusion that the search of the defendant's car was lawful and reasonable because police "had a high degree of individualized suspicion based on a tip from a known individual" that the defendant had a firearm in his car, and the defendant had a reduced expectation of privacy based on his parolee status. When seeking to execute an arrest warrant for the defendant based on several parole violations, police contacted the defendant's former girlfriend, who later gave them a location where the defendant could be found in his car, but when police responded, the car was not there. When the girlfriend then called and said that the defendant was in his car with her son and a firearm, and officers responding to the same location found the car there, with its hood still warm, they arrested him in the apartment at that location, then legally searched his car, retrieving the gun.

People v Smalling, 29 NY3d 981, __ NYS3d __ (5/2/2017)

"Although we reject defendant's contention that the evidence presented at trial did not support a charge of constructive possession, we nevertheless conclude that defendant is entitled to a new trial. The trial court erred in that it agreed to the People's request at the charge conference not to charge the jury on constructive possession, but then ultimately provided a constructive possession charge to the jury, resulting in prejudice to defendant .... Under the unique circumstances of this case, the error is not harmless ...."

People v Valentin, 29 NY3d 150, __ NYS3d __ (5/2/2017)

Where the defendant pursues an agency defense supported solely by segments of the prosecution's case-in-chief, the trial court may in its discretion entertain a prosecution *Molineux* application and allow into evidence in the prosecution's direct case, on the issue of intent to sell, evidence of the defendant's prior drug sale conviction. Here, defense counsel gave notice after completion of jury selection of the "'possibility' that he would present an agency defense." In his opening statement, counsel asked the jury to consider whether the defendant's conduct "was typical of a seller or, rather, someone who was 'walk[ing] with his buddy.'" Counsel's cross-examination of prosecution witnesses were in the same vein. The prosecutor eventually asked, prior to resting, about the agency defense, and discussion ensued as to whether the prosecution could introduce evidence of prior conviction(s) where the defense presented no evidence but requested jury instructions on agency. The court conducted a proper balancing analysis and permitted introduction of only one of the defendant's prior convictions.

People v Bushey, 29 NY3d 158, __ NYS3d __ (5/4/2017)

Even without any suspicion of wrongdoing, "a police officer may run a license plate number through a government database to check for any outstanding violations or suspensions on the registration of the vehicle," and resulting information that indicates a registration violation may provide probable cause for a vehicle stop. Such a check "does not constitute a search." Where an officer checked the license plate number of a vehicle driving by during early morning hours without observing any traffic violations or unusual driving, stopped the car upon discovering that the registration was suspended, and upon stopping the defendant discovered that his drivers license was suspended and he showed signs of intoxication, suppression of the evidence derived from the stop was properly denied. Nothing in the record suggests the officer had an illegal motive or acted unreasonably.

Griffin v Sirva, Inc., 2017 NY Slip Op 03557 (5/4/2017)

The federal Court of Appeals for the Second Circuit certified three questions relating to liability under the state Human Rights Law (HRL) for discrimination against people with prior criminal convictions. The questions, which stemmed from a suit by former employees of a New York company that contracted with a national moving company to provide moving services, are answered as follows. 1) HRL 296(15), which prohibits employment discrimination on the basis of a criminal conviction, limits liability to an aggrieved party's employer. "No room exists under either the Correction Law or section 296 (15) to hold a nonem-

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ployer liable for employment discrimination." 2) The scope of "employer" in this context includes an employer who, while not the direct employer, does, "through an agency relationship or other means, exercise[] a significant level of control over the discrimination policies and practices of the aggrieved party's 'direct employer' ...." 3) "'[S]ection 296 (6) extends liability to an out-of-state non-employer who aids or abets employment discrimination against individuals with a prior criminal conviction.'"

Dissent: [Rivera, J] "The answer to the first certified question ... is that the proscriptions in [HRL 296(15)] are not limited to employers. That answer makes it unnecessary to consider the second certified question, but regardless, the majority's approach is too limited and excludes certain actors who serve as obstacles to employment opportunities for persons with criminal convictions. As to the third certified question of whether an out-of-state actor who requires an in-state agent to discriminate may be liable under the aiding and abetting provision of section 296 (6), I would not answer ... because the out-of-state actor would be subject to the prohibitions of section 296 (15)" and in any event, "the language and the extra-territorial reach of the HRL requires" an affirmative answer.

People v Stone, 29 NY3d 166, __ NYS3d __ (5/4/2017)

An instruction to disregard challenged testimony eliminated any prejudice to the defendant's case created by the prosecution's elicitation of that testimony. The challenged testimony, given by a police officer, was that the defendant's wife, who had been with the accuser when he was attacked but was unavailable at trial, spoke to an officer by phone, after which the officer did computer checks of the person who "had been indicated as a suspect, John Stone." The defendant has a right under the state and federal constitutions to confront witnesses against him, but violation of that right can constitute harmless error where, as here, "there is no reasonable possibility that the error contributed to the guilty verdict, even in this single eyewitness case, where the victim knew defendant and had no doubt that defendant was the attacker."

Matter of Acevedo v New York State Dept. of Motor Vehs., 2017 NY Slip Op 03690 (5/9/2017)

The petitioners' applications for relicensing to drive after their licenses were revoked under Vehicle and Traffic Law (VTL) 1193(b), which deals with drunk driving, were legally denied based on amendments to New York State Department of Motor Vehicles (DMV) regulations issued after the petitioners' offenses. 15 NYCRR 136.5(b). While each of the individual petitioners here cannot show harm based on regulatory provisions that do not apply to them, they collectively "have standing to challenge the most salient provisions of the Regulations implicated by these appeals ...." The substantive challenges raised by the petitioners are rejected. These include an alleged conflict between the regulations and provisions in the VTL; a separation of powers argument; a claim that the regulations so lack reason "that they are 'essentially arbitrary'"; and retroactivity and ex post facto questions.

Matter of Ayres, 2017 NY Slip Op 04322 (6/1/2017)

"On the Court's own motion, it is determined that Honorable J. Marshall Ayres is suspended, with pay, effective immediately, from the office of Justice of Conklin Town Court, Broome County, pending disposition of his request for review of a determination by the State Commission on Judicial Conduct."

People v Sivertson, 2017 NY Slip Op 04320 (6/1/2017)

Because there is support in the record for the Appellate Division's conclusion that exigent circumstances existed to justify police officers' warrantless entry into the defendant's home, a mixed question of law and fact, the issue is beyond review here.

Dissent: [Rivera, J] "As a matter of law, there is no record evidence to support the trial court's ruling that exigent circumstances justified the warrantless entry into defendant's home." [Footnote omitted.]

People v Viruet, 2017 NY Slip Op 04386 (6/6/2017)

The trial court erred in denying the defendant's request for an adverse inference charge regarding surveillance video of the incident underlying his conviction for a shooting at a club. Where the police obtained a copy of the video, but lost it, the original could not be located, and the defense did seek the evidence in discovery, the requested instruction must be given. But the prosecution's evidence, which included eyewitness accounts and evidence that the defendant had confessed, rendered the error harmless.

Dissent: [Wilson, J] The prosecution's evidence included the testimony of eyewitnesses who did not know the defendant and viewed the shooter only for a few seconds, and a cooperating witness whose demeanor could have indicated grief at giving of false testimony against a friend rather than at giving truthful testimony that would send the friend to prison. While substantial, the evidence was not overwhelming, so the error was not harmless, and the defendant is entitled to a new trial.

People v Bethune, 2017 NY Slip Op 04493 (6/8/2017)

"On this particular factual record Supreme Court did not act outside its discretion to resettle the transcript with-

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out a hearing," because, while courts may hold a reconstruction hearing in response to allegations of error in the record, especially allegations of error by the court itself, the court here "had sufficient information before it to resettle the transcript without the benefit of a hearing." The transcript as originally certified showed that supplemental jury instructions were given in which intentional murder was described as an *un*intentional crime. When this issue was raised, the prosecution approached the court reporter, who prepared a corrected certified transcript with an affirmation that her notes showed the word should have been transcribed as "intentional." There was no suggestion that any person present at the trial could recollect the words spoken; it is not clear what other evidence might have been obtained at a hearing.

Concurrence: [Fahey, J] Holding a reconstruction hearing is especially advisable when allegations are made of a judge's error, as a hearing avoids the appearance of impropriety in reconstructing portions of transcripts affected by human failures. And where a party believes that an adversary's issue relies on an inaccurate transcription, it is preferable to notify the court rather than the reporter, of the dispute.

Concurrence: [Garcia, J] "[T]he appropriate practice is best determined by the trial court on the facts and circumstances of a given case, with due regard for judicial resources."

People v Frumusa, 2017 NY Slip Op 04495 (6/8/2017)

A contempt order issued in a civil action concerning the same funds that the defendant was criminally charged with stealing was not *Molineux* evidence and the trial court did not err in concluding at a pretrial hearing "that the evidence was admissible because it was relevant to defendant's larcenous intent and its probative value was not substantially outweighed by the danger of undue prejudice to defendant." The common thread in *People v Molineux* (168 NY 264 [1901]) and cases following it "is that the evidence sought to be admitted concerns a *separate* crime or bad act committed by the defendant." There is no danger that a jury will draw an improper propensity inference from evidence relevant to the very same behavior for which the defendant is on trial. And the evidence that the defendant's businesses had failed to return funds after being ordered to do so was relevant to show the defendant's larcenous intent. The court did not err in finding that the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice. A limiting instruction may be used to minimize potential for undue prejudice even outside the *Molineux* context; no instruction was requested.

People v Honghirun, 2017 NY Slip Op 04496 (6/8/2017)

The defendant did not establish that he was denied the effective assistance of counsel by his trial attorney's failure to object to evidence that the accuser in this child sex abuse case disclosed the abuse three years and again seven years after it had ceased. The defense of recent fabrication was evident throughout the trial, with counsel noting in his opening statement that seven years was a long delay, and that even if the accuser had told friends about it earlier, the accuser had still waited four more years to tell an adult. Rather than make objections that had little chance of success, counsel chose to use the evidence to support the defense of recent fabrication. That the strategy failed does not alter the analysis.

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.

Matter of Dhanmatie G. v Zamin B., 146 AD3d 495, 45 NYS3d 40 (1st Dept 1/10/2017)

The trial court's dismissal of a family offense petition is affirmed since the petitioner failed to establish the elements. The petitioner had submitted only hearsay statements of the children that were not admissible because only proceedings under Family Court Act articles 10 and 10-A allow hearsay. Further, "[t]he mere repetition of the statements does not constitute corroboration ...." (Family Ct, Bronx Co)

People v Boone, 146 AD3d 458, 46 NYS3d 520 (1st Dept 1/10/2017)

The court properly denied the defendant's motion to admit expert testimony regarding false confessions, but did so based on a misinterpretation of *People v Bedessie*. In *Bedessie*, the Court of Appeals did not mandate that the expert testimony address both dispositional and situational factors. Denial of the motion is appropriate because the defendant failed to show "that the proposed expert testimony would be addressed to the circumstances of this defendant's interrogation." (Supreme Ct, New York Co)

People v Fagiolo, 146 AD3d 724, 46 NYS3d 80 (1st Dept 1/31/2017)

The evidence was legally insufficient to support an inference that the defendant shared her boyfriend's specific intent to shoot the complainant. Although the defen-

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dant admitted she knew her boyfriend carried a handgun, assisted her boyfriend in following the complainant's van by keeping track of the vehicle and giving directions from the front passenger seat, and "'[s]he assumed [that the boyfriend and the friend] were going to shoot someone,'" the evidence does not establish that the defendant did so with intent to assist him in shooting the complainant. The defendant's acquittal on charges that she acted in concert to commit other crimes against the complainant highlights the weakness of the inference that she shared her boyfriend's intent to shoot the complainant. The defendant's conviction for second-degree criminal possession of a weapon is reversed on the law. (Supreme Ct, New York Co)

Matter of Cayra M. v Fotis B.,147 AD3d 479, 47 NYS3d 276 (1st Dept 2/10/2017)

"Family Court properly dismissed respondent's initial objection to the order of filiation, because he failed to move to vacate his default. However, Family Court erred in dismissing the objection to the denial of respondent's subsequent motion to vacate his default. Respondent presented a reasonable excuse for his default—namely, his attorney's approximate 20-minute delay in appearing in Family Court due to an appearance in another court. Petitioners were not prejudiced by the slight delay, and disposition of cases on the merits is preferred as a matter of public policy ...."

The respondent's indication that his identical twin brother was prepared to testify to having sexual relations with the mother during the conception period constituted evidence of a meritorious defense that could rebut the DNA test results showing the respondent's paternity. (Family Ct, Bronx Co)

People v Kahson B., 147 AD3d 538, 47 NYS3d 290 (1st Dept 2/16/2017)

The verdict is not against the weight of the evidence. The defense's argument—that the complaining witness's loss of consciousness made his identification of the defendant questionable—did not sway the jury; inconsistencies in the complaining witness's testimony did not undermine his credibility because they were minor and may be attributed to his English language deficiencies.

The verdict cannot be impeached absent a showing of improper influence. "[J]urors' post-verdict assertions of escalating tempers, shouting, and bad conduct by jurors during deliberations" are insufficient. And the verdict may not be altered based on jurors' "change of heart" following the announcement of the verdict, nor jurors' subsequent realization that they convicted the defendant of a felony. (Supreme Ct, Bronx Co)

Dissent: The verdict was against the weight of the evidence because: the complainant was unable to definitively identify the defendant due to his dizziness and loss of consciousness; there was no "sound basis" for including the defendant's photograph in the photo array; and the inconsistencies in the complainant's statement and testimony, which, "[w]hen considered with the other evidence in the record, ... buttresses the doubts surrounding his identification of defendant," and they cannot be attributed to a language barrier.

Matter of Naomi S. v Steven E., 147 AD3d 568, 46 NYS3d 786 (1st Dept 2/16/2017)

The father's appeal from the court's order denying his objections is dismissed as waived and another order, same court, which denied the father's motion to renew, is affirmed. "The father's failure to file proof of service of his objections is a failure to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order, and consequently, a waiver of his right to appellate review ...." (Family Ct, New York Co)

Matter of Clark v Newbauer, 148 AD3d 260, 47 NYS3d 314 (1st Dept 2/21/2017)

A writ of prohibition is granted where the trial court erroneously concluded that collateral estoppel precludes the prosecution from introducing at trial any evidence about a firearm based on the grand jury's dismissal of the first-degree robbery charge. A grand jury vote is not entitled to collateral estoppel effect because it is not final. Also, rigid application of collateral estoppel is not appropriate in this case where "[t]he grand jury decision to indict on third-degree robbery but dismiss on first-degree robbery is inconsistent because the presence of the gun was offered to support each of the two charges." The third-degree robbery charge cannot withstand a claim of legal insufficiency because there were no other facts presented to the grand jury that would satisfy the element of force. Because the decision "effectively terminated" the prosecution's ability to prosecute the highest count in the indictment, it is reviewable by way of a writ of prohibition. (Supreme Ct, Bronx Co)

People v Mercado, 147 AD3d 613, 48 NYS3d 81 (1st Dept 2/23/2017)

The court erred in denying, without a hearing, the defendant's CPL 440.10 motion based on ineffective assistance of counsel. The defendant's motion raised factual issues regarding defense counsel's failure to ask the court to finish the *Sandoval* hearing and render a decision. The

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defendant's affidavit states that he told his attorney he wanted to testify, but could not make an informed decision because the attorney did not get a *Sandoval* ruling, "counsel threatened to 'leave the case'" if he testified, and counsel told him "that he should not testify because 'everything about [his] past would come up.'" While the court's written decision indicates that defense counsel told the court that the defendant would not testify, that statement does not appear in the record and it is unclear whether the defendant was present, had knowledge of, or consented to that statement. On remand, the motion hearing should also address whether defense counsel consulted a DNA expert, and if not, whether counsel had strategic or other reasons for his approach to the DNA evidence. That counsel's errors would not have affected the outcome of the trial is not the standard for reviewing claims of ineffective assistance under the state constitution. (Supreme Ct, New York Co)

Dissent: Assuming that defense counsel was ineffective for failing to obtain a *Sandoval* ruling and failing to address DNA evidence that did not match or exclude the defendant, any error by counsel or the court was "'harmless beyond a reasonable doubt' ...."

People v Ortega, 148 AD3d 467, 47 NYS3d 908 (1st Dept 3/9/2017)

Defense counsel was entitled to a 24-hour adjournment to review the presentence report which was not provided in advance of the sentencing date. The defendant's sentence is vacated and the matter remanded for resentencing. (Supreme Ct, Bronx Co)

People v Telesford, 149 AD3d 170, 49 NYS3d 414 (1st Dept 3/15/2017)

The court deprived the defendants of a fair trial by "merely rereading robbery and accessorial liability charges to the jury" where the jury repeatedly submitted notes indicating their confusion about the concept of intent, an essential element of robbery. The jury's confusion resulted from the addition of accessorial liability into an otherwise straightforward robbery case; "in the context of accessorial liability, it is factually and legally impossible to be an accomplice without being a principal in the commission of the crime ...." The court "should have made clear to the jurors that when two or more defendants are tried jointly for the commission of a robbery offense under an acting in concert theory, a defendant's conviction or acquittal depends on shared intent." "[U]nder an accessorial liability theory, it is not sufficient that each defendant's conduct may have aided the other in doing what constituted the robbery, where neither defendant had the intent required to be found guilty of the robbery offense ...."

Although the objections and requests of both defense attorneys regarding the charges could have been clearer, their statements were "adequate to put the court on notice of both defense counsel's concerns about the adequacy of the court's response to the jury inquiries." "Since the issue of each defendant's intent was the primary disputed issue at trial, as evidenced by the jury's repeated requests for clarification of the charge on intent, we find that the prejudicial effect of the court's inadequate supplemental instruction deprived defendants of a fair trial ...." (Supreme Ct, New York Co)

Dissent: The court's main and supplemental charges conveyed the required principles. And the record does not indicate that the jury was confused by the instructions "and the majority's finding to the contrary is conclusory and based in pure speculation."

People v Williams, 148 AD3d 540, 49 NYS3d 671 (1st Dept 3/21/2017)

In this rare case, a downward departure from the defendant's presumptive level three classification under the Sex Offender Registration Act to level two is appropriate where the risk assessment instrument (RAI) did not "'fully capture'" the defendant's 30 years of dedicated effort at rehabilitation and that his current medical condition significantly minimizes his risk of reoffending. "In this case, the RAI, by scoring defendant for his actions and characteristics from 30 years ago, as it was designed to do, fails to provide a complete picture of the extraordinary changes that defendant has made while incarcerated. Moreover, defendant's changes have directly addressed the factors leading to his level three score on the RAI: his substance use, use of violence, and prior criminal activity." As a level two offender, the defendant will be subject to many of the same registration requirements as a level three offender and he is subject to lifetime registration because of his classification as a sexually violent offender, "[h]owever, as a level two offender, defendant will not be precluded from being located within 1,000 feet of school grounds, which would likely impede his efforts to find stable housing, employment, or even attend law school as he hopes ...." (Supreme Ct, New York Co)

Matter of Jones, 148 AD3d 653, 49 NYS3d 300 (1st Dept 3/30/2017)

The court erroneously denied the petitioner's application for poor person relief in a statutory name-change proceeding on the ground that the common-law right to a name change invalidated the need for the statutory name-change proceeding. The common law right assumes freedom of action prisoners do not necessarily have, and a

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statutory right may be the only available remedy. Denial of all poor person relief pursuant to CPLR 1101 is unwarranted and the defendant's application is granted to the extent of waiving costs and fees under CPLR 1101(d). (Supreme Ct, Bronx Co)

Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd., 150 AD3d 13, 51 NYS3d 46 (1st Dept 3/30/2017)

The order directing the Civilian Complaint Review Board (CCRB) to disclose "information as to 'whether the CCRB substantiated complaints against Officer Pantaleo and, if so, whether there were any related administrative proceedings, and those outcomes, if any'" is reversed because CCRB complaints are a part of an officer's personnel records and are confidential pursuant to NYS Civil Rights Law (CRL) 50-a and NYC Charter 2604(b)(4). CRL 50-a does not define "personnel records," but the Court of Appeals has provided guidance regarding the types of records that fall into this category. "The threshold criterion ... is whether the document is 'of significance to a superior in considering continued employment or promotion'...." Complaints filed with the CCRB, regardless of the outcome, are part of an officer's NYPD personnel record and are considered by superiors when evaluating performance. Therefore, the documents are personnel records and are exempt from disclosure. And CRL 50-a does not distinguish between the actual records and a summary of records, as requested by the petitioner.

Nondisclosure of personnel records is limited and the agency or party opposing disclosure must show "'a substantial and realistic potential of the requested material for the abusive use against the officer' ...." Due to the notoriety of Eric Garner's death and Officer Pantaleo's role therein, coupled with the fact that there have been significant threats made against the officer warranting 24-hour protection for him and his family, there is a "'substantial and realistic potential' for harm" and the information should not be disclosed. (Supreme Ct, New York Co)

Matter of New York Civil Liberties Union v New York City Police Department, 148 AD3d 642, 50 NYS3d 365 (1st Dept 3/30/3017)

The order granting the CPLR article 78 petition to compel the respondents to disclose NYPD disciplinary records pursuant to the Freedom of Information Law is reversed. As the Court of Appeals held in *Matter of Short v Board of Mgrs. of Nassau County Med. Ctr.* (57 NY2d 399 [1982]), where "there is a 'specific exemption from disclosure by State ... statute,' an agency is not required to disclose records with identifying details redacted." *Short* was reaffirmed in *Matter of Karlin v McMahon* (96 NY2d 842 [2001]). Public Officers Law 87(2)(a) allows an agency to deny access to records that are exempted from disclosure by state statute, and Civil Rights Law (CRL) 50-a makes confidential the NYPD disciplinary records requested by the petitioner. NYPD trials are open to the public, but the resulting decisions and punishment imposed remain confidential under CRL 50-a. And the NYPD did not waive its objection to releasing redacted records by previously releasing other redacted records. While the public has a compelling interest in monitoring the discipline of police officers and redaction would likely protect the confidentiality principles of CRL 50-a, this court cannot overrule the Court of Appeals. The petitioner's remedy must come "from the legislature or the Court of Appeals." (Supreme Ct, New York Co)

Matter of Django K., 149 AD3d 405, 52 NYS3d 14 (1st Dept 4/4/2017)

The court did not err in dismissing a petition brought by the Administration for Children's Services (ACS) alleging that the respondent father sexually abused his child. The court "properly exercised its discretion in refusing to qualify" a witness as an expert child sexual abuse validator and, even if the witness was qualified, there was insufficient record proof. ACS had only submitted testimony from the child's mother and out-of-court video statements made by the child during questioning by a child advocacy center examiner. The child did not testify at the hearing, the father made no admissions, and there was no physical evidence suggesting that the child had been assaulted. "The out-of-court statements of the child were not sufficiently corroborated to establish abuse by a preponderance of the evidence," the mother's testimony and the child's statements contained inconsistencies, and the allegations cannot be separated from the parents' ongoing custody dispute. (Family Ct, New York Co)

People v Destin, 150 AD3d 76, 52 NYS3d 48 (1st Dept 4/11/2017)

The evidence is legally insufficient to support the defendant's first-degree identity theft conviction. Even assuming "a bank is a 'person' whose identity could be stolen," the prosecution failed to establish that, "by presenting for payment a check that showed the apparent issuing bank's routing number and account number, i.e., the bank's 'personal identifying information,'" the defendant assumed H&R Block's identity. The check was made payable to the defendant, who endorsed it using her real name and identification. The bank tellers were not under the impression that the defendant was anyone else. Furthermore, as decided by this Court in *People v Barden*,

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Penal Law 190.80(3) is ambiguous and could be reasonably interpreted in two different ways, and since the legislative history is inconclusive, the meaning of the phrase "'assumes the identity of another'" must be resolved in the defendant's favor. The legislature could have removed the phrase if it did not intend it to be an element of the crime. (Supreme Ct, New York Co)

Matter of Bethea v Poole, 149 AD3d 513, 51 NYS3d 503 (1st Dept 4/13/2017)

The petitioner foster parent brought an action under CPLR article 78 to have the indicated report against her amended to unfounded and sealed. The determination by respondent [Office of Children and Family Services Commissioner] Sheila Poole, that the petitioner had "committed maltreatment of a child and that such maltreatment is relevant and reasonably related to child-care employment, adoption of a child, or the provision of foster care" is confirmed by "substantial evidence ... showing that petitioner ... had maltreated the child by poking the child with her fist and verbally abusing the child ...." The petition is denied and the proceeding dismissed.

People v Diaz, 150 AD3d 60, 50 NYS3d 388 (1st Dept 4/13/2017)

The defendant's adjudication as a sex offender is annulled because Correction Law 168-a(2)(d)(ii), as applied in this case, violates the defendant's substantive due process rights under the federal and New York State Constitutions where the defendant was required to register as a sex offender in New York based on his conviction in Virginia of first-degree murder of a person under 15 years of age. Virginia's sex offender registration statute is broader than New York's statute and the federal Jacob Wetterling Act, which requires states to adopt registration requirements for sex offenders, because it covers crimes against minors that are not sexually motivated. Persons convicted of murdering juveniles are not required to register in New York, and the legislative purpose of New York's Sex Offender Registration Act (SORA), protecting the public from sex offenders, is not served by requiring the defendant to register. Requiring this defendant to register reduces the benefit of the registry because his crime is not related to SORA's purpose. Unlike kidnapping and false imprisonment, the record does not indicate that there is a statistical correlation between child homicide and sex offenses. (Supreme Ct, Bronx Co)

People v Pimentel, 149 AD3d 505, __ NYS3d __ (1st Dept 4/13/2017)

The defendant's challenge to the statute defining "'a crime of terrorism'" is unwaivable and survives the valid waiver of appeal. But the defendant's attempted first-degree criminal possession of a weapon as a crime of terrorism conviction was proper where he has not shown a "'clear and unambiguous' congressional intent to preempt state legislation in the field of counterterrorism ...." While the language in Penal Law 490.25(1) is substantially identical to the federal statutory definition of "domestic terrorism," the state statute applies to "enumerated state offenses." Federal policy encouraging state and federal government cooperation to combat terrorism refutes the defendant's argument that federal law impliedly preempts state counterterrorism laws. Use of the term "'unit of government'" and other terms does not render the statute unconstitutionally vague. Heightened punishment for attempting to influence the government's foreign policy by building and possessing a pipe bomb is not protected speech under the First Amendment or New York Constitution article I, § 8. The statute is sufficiently limited to prohibiting criminal conduct commonly associated with terrorism and is not overbroad. (Supreme Ct, New York Co)

People v Traylor, 149 AD3d 626, __ NYS3d __ (1st Dept 4/25/2017)

The court erroneously sentenced the defendant as a second violent felony offender where the defendant did not admit the prior felony and the court never adjudicated the defendant a second violent felony offender. As there is no record evidence that the prosecution filed the required predicate felony statement nor that the defendant was given a copy of the statement, the defendant did not receive adequate notice that a prior felony would be used to enhance his sentence, and he did not have an opportunity to challenge the validity of the prior conviction. "[B]rief, incidental and logistical comments" regarding the existence of a predicate felony statement are insufficient to meet the requirements of CPL 400.15. (Supreme Ct, New York Co)

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 Castaldo, 146 AD3d 797, 46 NYS3d 115 (2nd Dept 1/11/2017)

The defendant police officer's indictment must be reinstated on charges of offering a false instrument for his failure to file use of force paperwork and third-degree

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assault for kicking, punching, and using an unauthorized chokehold on a prisoner who had reached for another officer's gun while the defendant transported the prisoner from arraignment. The trial court had "determined that the grand jury was not properly instructed on the standards of proof because it was not instructed on the definitions of 'legally sufficient evidence' and 'reasonable cause to believe that a person has committed an offense' ...." However, the grand jury minutes (which were not available to the trial court) indicated that these standards were defined for the grand jurors during their impanelment. Further, the evidence presented to the grand jury was sufficient to support both charges. (Supreme Ct, Putnam Co)

Matter of Elijah W.L., 146 AD3d 782, 44 NYS3d 206 (2nd Dept 1/11/2017)

The orders of fact-finding and disposition in these termination of parental rights proceedings are reversed for both parents on separate grounds. In finding that the mother's mental illness prevented her from parenting, the court erred by failing to adhere to the requirement that there be testimony from an expert on the matter pursuant to Social Services Law 384-b[6][c] and terminating her parental rights. Further, the petitioner failed to satisfy the requirement that they made diligent efforts to encourage and strengthen the father's relationship with the children. The petitions are denied for both parents and the proceedings dismissed for the father and remitted to Family Court for a new fact-finding for the mother. (Family Ct, Queens Co)

People v Janelle, 146 AD3d 808, 45 NYS3d 500 (2nd Dept 1/11/2017)

A defendant charged with first-degree criminal possession of a controlled substance may not waive indictment and be prosecuted by superior court information because that offense is a class A-I felony punishable by an indeterminate sentence with a maximum term of life imprisonment. This challenge was not forfeited by the defendant's guilty plea and would not be precluded by any valid appellate waiver because failure to follow proper indictment waiver procedure is a mode of proceedings error. (Supreme Ct, Queens Co)

People v Lucifero, 146 AD3d 811, 45 NYS3d 166 (2nd Dept 1/11/2017)

The court erred in finding that a blood alcohol test was given in violation of the defendant's limited right to counsel. The police learned of the name and telephone number of the defendant's attorney but "the record does not establish that counsel contacted the police before the test was given to notify them that he represented the defendant" and thus "the record does not establish that counsel 'entered' the case before the test was given ...." (Supreme Ct, Nassau Co)

People v Walker, 146 AD3d 824, 45 NYS3d 153 (2nd Dept 1/11/2017)

The court abused its discretion in denying a downward departure from the presumptive sex offender risk assessment level. Because the accuser's lack of consent was only due to the inability to consent due to age, and since this offense is the only sex crime in the defendant's history, his behavior while incarcerated was acceptable, and he completed at least one treatment program, "the assessment of 25 points under risk factor 2 result[ed] in an overassessment of the defendant's risk to public safety ...." (Supreme Ct, Kings Co)

People v Williams, 146 AD3d 906, 48 NYS3d 405 (2nd Dept 1/18/2017)

While the initial search of the defendant's home for occupants and weapons was justified under the emergency doctrine, a subsequent search to make sure the officers "'didn't miss anything'" was not, as the police had the defendant in handcuffs and the emergency had abated, with all occupants of the home secure and children safeguarded. Accordingly, physical evidence acquired in the second search must be suppressed and the relevant counts of the indictment dismissed.

The evidence was legally insufficient to convict the defendant of second-degree assault because a "small cut" on the accuser's head would not allow a jury to infer that "substantial pain or impairment of physical condition" had occurred. The defendant's conviction is modified to third-degree assault and the matter remitted for resentencing on that charge. (Supreme Ct, Queens Co)

People v Calderon, 146 AD3d 967, 47 NYS3d 43 (2nd Dept 1/25/2017)

The court "improvidently exercised its discretion" in ruling that, if the defendant decided to testify, the facts underlying a prior conviction in which the defendant used a knife in a manner "identical to the complainant's allegation in this case" could be elicited on cross-examination. The error was not harmless, as the evidence of guilt was "far from overwhelming, and the defendant was the only available source of material testimony in support of his defense." In addition, the ruling "affected the defendant's decision whether to testify and denied the jury potentially significant material evidence ...." (Supreme Ct, Kings Co)

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Dissent: "I do not see what distinguishes this particular case from myriad other cases in which this Court, using its unique power to review the exercise of discretion by the trial court, upheld *Sandoval* rulings involving similar prior crimes or similar facts as provident exercises of discretion ...." The majority's differentiation of such prior cases "on the ground that 'each case requires a balancing of its own particular facts' offers precious little by way of guidance to future trial courts ...." The proper determination of prejudice to the defendant is not the strength of the prosecution's case but rather "whether a decision by the defendant not to testify will deprive the factfinder of significant, material evidence ...."

People v Howell, 146 AD3d 981, 45 NYS3d 552 (2nd Dept 1/25/2017)

"At sentencing, before the defendant was given an opportunity to present his pro se motion to withdraw his plea of guilty, defense counsel stated that he did not believe that there was any basis at that time for the defendant to withdraw his plea, and thus, neither he nor the defendant filed a motion. The defendant's right to counsel was adversely affected when his attorney took a position adverse to his ...." The judge should have assigned a new attorney when this occurred, before determining the motion to withdraw the plea; thus, the case must be remitted, new counsel appointed, and a report given to the Appellate Division on whether the defendant established that he should be allowed to withdraw the plea. (Supreme Ct, Nassau Co)

People v Thomas, 146 AD3d 991, 46 NYS3d 130 (2nd Dept 1/25/2017)

Reversal is required where the trial court failed to provide counsel with meaningful notice of a jury note that stated "Please clarify 1st degree assault; 2nd degree assault; 2nd degree manslaughter [and] 2nd degree murder." The court did not read the note into the record and did not communicate receipt of the note to the parties. "Instead, after a recess for deliberations, the court merely stated 'let us revisit these counts,' and then it gave the charges for those offenses." The defendant's weapon possession conviction must be vacated with the others because "given the evidentiary relationship between the tainted counts and the weapon possession count, it cannot be said that there is no reasonable possibility that the jury's decision to convict on the other counts did not influence its guilty verdict on the weapon possession count ...." (Supreme Ct, Kings Co)

People v Golden, 147 AD3d 780, 47 NYS3d 67 (2nd Dept 2/1/2017)

The court erred when it gave a constructive possession jury charge because "there was no evidence from which the jury could conclude that the defendant constructively possessed" a gun in accordance with the prosecution's theory of the case. The prosecution sought to prove that the defendant possessed a gun, found at the site of his arrest, during an alleged robbery of a nearby supermarket. The defendant was acquitted of the robbery. The error is not harmless because the jury could have applied the impermissible instruction to the evidence that the gun was recovered from the house where the defendant was found hiding and convicted on that basis, instead of finding that the possession occurred in the supermarket as charged. (Supreme Ct, Queens Co)

People v Robinson, 147 AD3d 784, 47 NYS3d 343 (2nd Dept 2/1/2017)

"The defendant's motion pursuant to CPL 440.30(1-a) for forensic DNA testing was not procedurally barred," because defendants may so move at any time regardless of whether they sought that relief in prior post-conviction motions. On the merits, the defendant established that if DNA testing had been conducted on two blood samples from a sweater and scrapings from decedent's fingernails, and the results had been admitted at trial, "there exists a reasonable probability that the verdict would have been more favorable to him ...." Moreover, the prosecution failed to meet their burden to show that the evidence did or did not exist and whether it was available for testing. (Supreme Ct, Queens Co)

People v Xochimitl, 147 AD3d 793, 47 NYS3d 339 (2nd Dept 2/1/2017)

The court properly denied suppression of the defendant's post-arrest statements where the evidence established that an elderly female relative who lived in the apartment with the defendant gave the police consent to enter "by opening the door and stepping aside in response to the officers' request to enter .... The evidence further established that the woman's consent was voluntarily given and was not the product of coercion ...." (Supreme Ct, Kings Co)

Dissent: Given "the number of officers present at the door, the early morning hour, the lack of any verbal communication between the officers and the elderly woman, and the testimony by the police that the woman only spoke Spanish and that she was spoken to in English," the prosecution failed to show that her act of backing away from the door was intended as an invitation to enter.

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People v Morris, 147 AD3d 873, 46 NYS3d 667
(2nd Dept 2/8/2017)

On remand from a Court of Appeals determination that there was no mode of proceedings error in the defendant's trial, we hold that the trial court's failure to meaningfully respond to a jury note requesting a readback deprived the defendant of a fair trial. "[The witness's] cross-examination testimony included testimony that was relevant to the defense, directly impeached significant portions of [the] direct examination testimony, and was detrimental to the prosecution." As a result, limiting the readback to the witness's direct testimony seriously prejudiced the defendant. (Supreme Ct, Queens Co)

People v Spangenberg, 147 AD3d 874, 47 NYS3d 370
(2nd Dept 2/8/2017)

The motion to withdraw as counsel is granted and the assignment of new counsel is warranted where, despite the sufficiency of assigned counsel's *Anders* brief, nonfrivolous issues were found upon independent review, such as the validity of the defendant's appeal waiver and whether the sentence imposed was excessive. (County Ct, Orange Co)

People v Davis, 147 AD3d 971, 47 NYS3d 399
(2nd Dept 2/15/2017)

In a trial on charges of second-degree murder and second-degree criminal possession of a weapon, the court erred when it submitted to the jury the lesser-included offense of first-degree manslaughter upon the defendant's request but failed to submit second-degree manslaughter and criminally negligent homicide. The defendant's testimony that the gun went off accidentally during a struggle with the decedent created "a reasonable view of the evidence that the defendant may have been guilty of the lesser crimes and not the greater ...." Further, the failure to charge second-degree manslaughter prejudiced the defendant with respect to the charge of second-degree criminal possession of a weapon because "[t]he defendant's possession of the weapon is factually related to the shooting ...." (Supreme Ct, Kings Co)

People v Singh, 147 AD3d 979, 47 NYS3d 437
(2nd Dept 2/15/2017)

The application for a writ of error coram nobis is granted where the court did not mention on the record the possibility of deportation as a consequence of the defendant's guilty plea and appellate counsel did not raise the issue. The matter is remitted to afford the defendant the opportunity to move to vacate the guilty plea and seek to show that there is a reasonable probability that he would not have pleaded guilty if he had been advised of the possibility of deportation. (Supreme Ct, Queens Co)

People v Davis, 147 AD3d 1077, 47 NYS3d 455
(2nd Dept 2/22/2017)

In the interest of justice, a new trial must be granted due to the court's "excessive and prejudicial questioning of trial witnesses ...." The court elicited numerous details regarding the recovery of a gun from the defendant by a security guard and a subsequent 911 call in which the same guard did not report recovery of the gun. Further, the court extensively questioned a defense witness, including as to whether the witness had made false statements to police and the grand jury regarding a prior robbery conviction, all of which deprived the defendant of a fair trial. "Since there must be a new trial, we note that the prosecutor made improper summation comments regarding the failure of the defendant to communicate certain information to the police at the time of his apprehension ...." (Supreme Ct, Queens Co)

People v Terranova, 147 AD3d 1086, 48 NYS3d 430
(2nd Dept 2/22/2017)

The prosecution did not offer any evidence at trial from which an inference of larcenous intent could be made, where the proof showed that defendant, visibly wounded, approached the accuser's car, asked to be taken to a hospital, and tried to open the driver's door. "From this evidence, a trier of facts could rationally infer that the defendant intended to take the vehicle in order to seek medical treatment." Thus, the proof did not show the intent to permanently or virtually permanently deprive the owner of the property and the guilty verdicts on the counts of attempted second- and third-degree robbery were against the weight of the evidence. (Supreme Ct, Queens Co)

People v Coleman, 148 AD3d 717, 48 NYS3d 478
(2nd Dept 3/1/2017)

The defendant's prior conviction of attempted third-degree criminal possession of a weapon by guilty plea did not constitute a class E violent felony under Penal Law 70.02(1)(d), because that charge was the sole count of the superior court information. The offense is only a violent felony offense when the defendant is convicted of the charge as a lesser included offense, as defined in CPL 220.20. Thus, as the prosecution concedes, the defendant was improperly sentenced as a second violent felony offender. (Supreme Ct, Queens Co)

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People v Ghee, 148 AD3d 721, 48 NYS3d 460 (2nd Dept 3/1/2017)

The court erred when it denied suppression of oral and written statements made by the defendant where the police interrogated the defendant without *Miranda* warnings, giving rise to a subsequent written statement that refers to statements made during the pre-warning questioning and was part of a continuous chain of events. (Supreme Ct, Queens Co)

People v Griffin, 148 AD3d 735, 47 NYS3d 739 (2nd Dept 3/1/2017)

Reversal of the defendant's designation as a level three sex offender is required because the court "failed to conduct the requisite searching inquiry to ensure that the defendant's waiver of the right to counsel was unequivocal, voluntary, and intelligent ...." Here, "[t]he court made only minimal inquiry into the defendant's age, experience, intelligence, education, and exposure to the legal system, and did not explain the risk inherent in proceeding pro se or the advantages of representation by counsel." (Supreme Ct, Kings Co)

Matter of State of New York v Jesus M., 148 AD3d 713, 48 NYS3d 254 (2nd Dept 3/1/2017)

The defendant did not validly waive his right to a jury trial in a Mental Hygiene Law article 10 civil commitment proceeding. Regardless of their content, off-the-record emails from the defendant's trial counsel were insufficient to meet the requirement that the defendant make a knowing, voluntary waiver of the right to a jury trial in an on-the-record colloquy, whether in person or via video conferencing. (Supreme Ct, Kings Co)

People v Mateo, 148 AD3d 727, 48 NYS3d 712 (2nd Dept 3/1/2017)

The conviction for kidnapping must be vacated under the merger doctrine, because the defendant's restraint of the accuser was "essentially simultaneous" with the commission of the underlying crimes. Contrary to the prosecution's argument, "the manner in which the victim was restrained did not preclude application of the merger doctrine ...." (Supreme Ct, Queens Co)

People v Tiger, 149 AD3d 86, 48 NYS3d 685 (2nd Dept 3/1/2017)

The defendant's guilty plea is not an absolute bar to maintaining an actual innocence claim pursuant to CPL 440.10(1)(h). The conviction of an innocent person "implicates a right of constitutional dimension that goes to the heart of the criminal justice process, and is not forfeited by a plea of guilty." The lack of statutory language limiting postconviction relief in such situations to defendants convicted after trial supports this conclusion, as does legislation allowing defendants to seek relief based on DNA testing even where the defendant pleaded guilty. Here, the defendant has made the requisite prima facie showing of actual innocence such that she is entitled to a hearing on her claim. It cannot be assumed that the defendant knew whether she scalded the child in her care during bathing where she had professed innocence and pleaded guilty only after being told that scientific evidence showed no other reason for the child's injuries, later said by an expert to have likely been caused by toxic epidermal necrolysis and to have been consistent with other potential causes such as Stevens-Johnson Syndrome or staphylococcus scalded skin syndrome. "[A]t the hearing, the defendant also should be afforded an opportunity to prove ... that her former attorney's representation was ineffective." (County Ct, Orange Co)

Matter of Kaliia F., 148 AD3d 805, 49 NYS3d 151 (2nd Dept 3/8/2017)

The court did not err in determining that the Administration for Children's Services failed to establish a prima facie case of neglect and dismissing the petitions. Alleging derivative neglect of the father's children based solely on his conviction for endangering the welfare of a different child, "the petitioner presented a caseworker as its only witness and documentation of the father's criminal offenses. The caseworker testified to previous statements allegedly made to her by a child complainant in one of the respondent's prior criminal cases. Family Court Act (FCA) § 1046 (a) (vi) provides that 'previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence' .... Such statements are admissible in a child protective proceeding, even when the child is not the subject of the proceeding ...." But because the respondent was neither a parent of nor a person legally responsible for the child whose statement was offered, as required by FCA 1012, the court properly found that the hearsay statements were not admissible under the statutory exception in FCA 1046. (Family Ct, Kings Co)

People v Sanchez, 148 AD3d 831, 50 NYS3d 83 (2nd Dept 3/8/2017)

There was sufficient evidence to support a justification defense charge where there was a reasonable view that the defendant reasonably believed that deadly force was about to be used against him. The duty to retreat does

Second Department *continued*

not arise when such use of force is actual or imminent, regardless of whether it may have been more prudent for the defendant's safety to do so. A justification defense is not precluded by whether a defendant intends that a companion use a gun provided by the defendant or knows that that person will use the gun, nor is it precluded by a codefendant's guilty plea. Further, it would be reasonable for the jury to reject testimony by the codefendant that contradicted the theory of justification, as the jury knew the testimony was a condition of the codefendant's plea agreement. However, the failure to provide a justification charge does not affect the criminal possession of a weapon conviction. (County Ct, Dutchess Co)

Concurrence in Part, Dissent in Part: "[T]here was no reasonable view of the evidence which would have permitted the jury to find that the defendant's conduct was justified." None of the individuals that allegedly posed a danger to the defendant prevented or interfered with the defendant or his friends from leaving the scene. "[E]ven assuming that the defendant could have reasonably believed that the use of deadly physical force was imminent, he could not have reasonably believed that there was no ability to safely retreat."

People v Henderson, 148 AD3d 929, 49 NYS3d 716 (2nd Dept 3/15/2017)

The imposition of consecutive sentences is improper where the prosecution fails to establish that the acts constituting the multiple convictions are separate and distinct from one another. Here, it is impossible to determine whether an act of disfigurement during an assault formed the basis for both first-degree assault guilty verdicts; thus, the judgment is modified to provide that the sentences for first-degree assault are to run concurrently with each other and the higher charges. (Supreme Ct, Queens Co)

People v Bowers, 148 AD3d 1042, 50 NYS3d 138 (2nd Dept 3/22/2017)

Tracking software used to find a stolen cell phone can provide a reasonable suspicion to stop and detain a car where the software led officers to the vehicle in question, and no other vehicles or people were nearby and the cell phone's tracked signal stopped moving when police pulled the car over. Since the defendant did not object to testimony regarding the software nor request a *Frye* hearing, the issue of whether a proper foundation was laid regarding the software's reliability is unpreserved. (Supreme Ct, Queens Co)

People v Casiano, 148 AD3d 1044, 50 NYS3d 439 (2nd Dept 3/22/2017)

The evidence is insufficient to support a guilty verdict on a count of third-degree criminal mischief as it did not establish beyond a reasonable doubt that the damage to the subject property exceeded $250.

Further, the cumulative effect of the prosecutor's improper comments during summation requires a new trial on the remaining charges. The prosecutor asserted that prosecution witnesses "'provided truthful testimony that makes sense,'" "gave the 'kind of truthful and credible testimony that you can rely on,' and that one witness had 'no reason ... to be anything but truthful with the 911 operator' ...." The prosecutor also vouched for the character of a complainant and used "the integrity of the District Attorney's office" to support the complainant's credibility, implied that the accusers were the "victims of an overly long cross-examination," referred to one witness as a "'saint' for answering so many" defense questions, and argued that the defendant could not be a victim because he did not call 911.

Moreover, the court erred in admitting a non-contemporaneous 911 call as a present sense impression, and the tenor of the call also did not qualify it as an excited utterance. The defendant had a good faith basis to cross-examine the prosecution witnesses as to their possible motive to fabricate testimony and exceeding the scope of the direct examination was appropriate to prove a justification defense. (Supreme Ct, Kings Co)

People v Egan, 148 AD3d 1048, 50 NYS3d 122 (2nd Dept 3/22/2017)

Because the defendant was deemed an incapacitated person and he was either acquitted of felony charges or had them dismissed, the remaining misdemeanors in those indictments must also be dismissed. Further, any higher charge predicated upon these underlying misdemeanors must also be dismissed. "[A]ny prejudice resulting from the introduction of evidence supporting the counts charged [in the dismissed indictments] was insufficient to nullify the independent, validly secured guilty verdicts on the separate counts charged under [an additional indictment]." However, due to the seriousness of the charges dismissed, it is appropriate to vacate those sentences and remit for resentencing. (County Ct, Suffolk Co)

People v Fews, 148 AD3d 1180, 50 NYS3d 523 (2nd Dept 3/29/2017)

The defendant's unpreserved contention that the evidence as to third-degree assault was legally insufficient, reviewed in the interest of justice, has merit. Proof that the accuser received a one-half-inch laceration on her toe,

Second Department *continued*

which ceased bleeding before medical responders arrived, and a lack of evidence that the accuser suffered more than trivial pain, along with testimony that she could not wear shoes for an unspecified period after the incident, failed to show that her foot was impaired by the wound, and therefore did not demonstrate that she "suffered a 'physical injury' within the meaning of Penal Law § 10.00 (9) ...." The evidence adduced at the persistent felony offender hearing did not warrant adjudication of the defendant as a persistent felony offender but did support adjudication as a second felony offender. Further, the court improperly considered at sentencing a crime of which the defendant had been acquitted. (Supreme Ct, Kings Co)

People v Sirabella, 148 AD3d 1186, 50 NYS3d 511 (2nd Dept 3/29/2017)

"The court improperly enhanced the defendant's sentence by imposing a fine in the sum of $1,000 that was not part of the negotiated plea agreement, without affording the defendant an opportunity to withdraw her plea.... However, vacatur of the provision ... imposing the fine, the remedy sought on appeal by the defendant and consented to by the People, would result in an illegal sentence," because under the relevant Vehicle and Traffic Law section a fine between $500 and $1000 must be imposed if imprisonment is not. Thus, the entire sentence is vacated and the matter remitted to permit the defendant to choose whether to accept the previously imposed sentence, including the $1000 fine, or withdraw her plea. (County Ct, Suffolk Co)

People v Cruz, 149 AD3d 774, 52 NYS3d 368 (2nd Dept 4/5/2017)

The prosecution "did not demonstrate a complete chain of custody for the evidence giving rise to those counts of the indictment" which charged third-degree criminal sale of a controlled substance and seventh-degree criminal possession of a controlled substance. (Supreme Ct, Queens Co)

Matter of State of New York v Wayne J., 149 AD3d 846, __ NYS3d __ (2nd Dept 4/12/2017)

Due to the severe nature of an adverse ruling and the respondent's statutory right to counsel in Mental Hygiene Law article 10 proceedings, a claim of ineffective assistance of counsel may be raised in such proceedings despite the general rule in civil proceedings that "an attorney's errors or omissions are binding on the client ...." The appellant here failed to show that he was denied the effective assistance of appellate counsel. (Supreme Ct, Westchester Co)

Matter of Zachariah W., 149 AD3d 853, 51 NYS3d 607 (2nd Dept 4/12/2017)

The court erred in determining that the mother had neglected her newborn based on the mother's lack of earned income and housing. "Here, ACS [Administration of Children's Services] failed to demonstrate, by a preponderance of the evidence, that the mother did not supply the child with adequate food, clothing, and shelter although financially able to do so or offered financial or other reasonable means to do so (see Family Ct Act § 1012 [f] [i] [A] ...." The mother, who provided appropriate care for the baby while in the hospital, was the recipient of public assistance and experienced housing insecurity after the birth of the child, which led ACS to seek removal of the child. "It is undisputed that no ACS worker provided the mother with housing information, including emergency housing information, or provided any supplies for the child." The matter is reversed on the facts. (Family Ct, Kings Co)

People v Diaz, 149 AD3d 974, __ NYS3d __ (2nd Dept 4/19/2017)

"[T]he defendant impliedly consented to the monitoring and recording of his telephone conversations by using the prison telephones despite being notified that such calls were being monitored ...." An express notification that non-privileged prison calls may be turned over to prosecutors can ameliorate a concern that notice to pretrial detainees is inadequate, but "the absence of such a warning does not render the calls inadmissible ...." Instead, courts must engage in the typical weighing of probative value versus prejudicial effect. (Supreme Ct, Kings Co)

Dissent: "[W]hile pretrial detainees are notified that telephone calls made from institutional telephone lines may be recorded and monitored, they are not informed that the recordings of such calls may be distributed to the prosecutors handling their cases, and that information in the calls can be used against them at their criminal trials." This arrangement "adds to the well-documented disparities between defendants who can afford to make bail and are at liberty while awaiting trial, and those who cannot afford to make bail and are in pretrial detention facilities." While the defendant impliedly consented to the monitoring and recording of the calls, he did not consent to their dissemination to the prosecutor handling his case. The correctional agency did not have a legitimate interest in "harvesting evidence for the prosecution ...."

Second Department *continued*

People v Furrs, 149 AD3d 1098, __ NYS3d __ (2nd Dept 4/26/2017)

The defendant's exit from a slow-moving vehicle while holding his waistband could not establish reasonable suspicion for the police to pursue him, even when he fled their approach. The prosecution "failed to adduce testimony showing, for example, that the police officers observed the defendant in possession of what appeared to be a gun or that the defendant's conduct in adjusting his waistband was indicative of gun possession ...." The defendant's effort to dispose of evidence during the pursuit was precipitated by the pursuit's illegality and not attenuated from it. (Supreme Ct, Queens Co)

Matter of Jackson v Annucci, 149 AD3d 1077, __ NYS3d __ (2nd Dept 4/26/2017)

In an Article 78 review of a Tier III DOCCS disciplinary hearing, there was insufficient evidence to support a finding that the inmate had used cannabinoids where the inmate produced uncontested evidence that his prescribed medication caused false positives for cannabinoids in urinalysis tests.

Matter of Raiser & Kenniff, P.C. v Nassau County Sheriff's Dept., 149 AD3d 1084, 52 NYS3d 472 (2nd Dept 4/26/2017)

In an Article 78 proceeding to prohibit the prosecution from obtaining jail recordings of inmate conversations without a subpoena issued with notice to defense counsel and submission of the requested recordings to a court or grand jury for review, "the petitioners failed to demonstrate that the conduct sought to be prohibited pertained solely to quasi-judicial action, as opposed to an investigative function performed in an executive capacity; thus, prohibition does not lie under the circumstances ...." (Supreme Ct, Nassau Co)

People v Sackey-El, 149 AD3d 1104, 52 NYS3d 492 (2nd Dept 4/26/2017)

Where the defendant testified that he attempted to defend against the accuser's attack with an object, "there was a reasonable view of the evidence that the [accuser] was the aggressor, that the defendant could not safely retreat, that the defendant's actions during the fight caused the complainant's injuries, and that the defendant's actions were justified. The fact that the defendant did not testify that he stabbed the [accuser] did not preclude a charge as to a justification defense, since the evidence, viewed as a whole, supported such a charge ...." (County Ct, Orange Co)

People v Tunit, 149 AD3d 1110, __ NYS3d __ (2nd Dept 4/26/2017)

In a prosecution for grand larceny based on alleged embezzlement, "there was a reasonable view of the evidence warranting instructions on the definition of joint or common owner and the defense of claim of right." Grand jury testimony indicated the defendant was a partner in the business, not an employee; partners may not be charged with stealing partnership assets from other partners. Failure to instruct the grand jury with respect to joint and common owners "and the defense of claim of right so substantially impaired the integrity of the proceedings as to require the dismissal of the indictment ...." (Supreme Ct, Kings Co)

People v Tzintzunfrias, 149 AD3d 1112, __ NYS3d __ (2nd Dept 4/26/2017)

Where substituted counsel filed for a withdrawal of the defendant's plea but stated "that the plea allocution was 'comprehensive,' and that the record indicated that the defendant pleaded guilty 'voluntarily and knowingly' and was satisfied with his prior attorney," it is "appropriate to remit the matter ... for further proceedings on the defendant's motion to withdraw his plea of guilty, for which the defendant should be appointed new counsel," and a report made as to whether the defendant established his entitlement to withdraw his plea. Among other factors warranting this relief is the agreement of the prosecution "that counsel was deficient and that the defendant was denied meaningful representation under the New York Constitution ...." No opinion is expressed as to the merits of the defendant's motion. (Supreme Ct, Richmond 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 Angela F. v St. Lawrence County Dept. of Social Services, 146 AD3d 1243, 45 NYS3d 691 (3rd Dept 1/26/2017)

Matter of Angela F. v Gail WW., 146 AD3d 1248, 16 NYS3d 709 (3rd Dept 1/26/2017)

In related matters, the court's "repeated judicial errors" necessitate assignment of a new judge upon remit-

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tal following a long "saga" of related Family Court Act (FCA) article 6 and 10 proceedings involving a mother and her three children.

In *St. Lawrence County Dept. of Social Services*, the court's extensive delays and various errors in the FCA article 10 matter were in part responsible for the lack of contact between the mother and two of her children for almost five years. After a 2013 appellate order reversing the 2011 termination of the mother's parental rights, the court incorrectly denied that the order "reinstate[d] the mother's parental rights and restored her to the position that she was in prior to the erroneous termination ...." Further, instead of reinstating visitation and requiring the respondent Department of Social Services to show that visitation would be detrimental or harmful to the children, the court erroneously denied visitation without making express findings.

In *Gail WW.*, an FCA article 6 proceeding regarding the mother's third child, an appellate ruling previously modified a court order reducing the mother's visitation because the record did not support the reduction. Upon remand, the court failed to address the lack of record support for the reduced visitation decision and instead focused exclusively on whether the mother's husband could serve as a visitation supervisor. Again, there was no support on the record for the order reducing visitation. Additionally, the court's finding that the husband could not supervise visitation is not supported by a sound and substantial basis in the record. (Family Ct, St. Lawrence Co)

Matter of Elizabeth B. v New York State Off. of Children & Family Servs., 149 AD3d 8, 47 NYS3d 515 (3rd Dept 2/23/2017)

The refusal of the Office of Children and Family Services (OCFS) to amend an indicated report is modified, the mother's application granted entirely, and the record sealed. In determining that the mother failed to provide adequate guardianship, the Ontario County Department of Social Services and then, on review, OCFS "misconstrue[d]" the "minimum degree of care standard" in relation to victims of domestic violence as a standard that "cannot be 'modified or excused because a parent is under stress or fear.'" The mother took reasonable steps to protect her children and herself and, while the children suffered adverse consequences as a result of the attacks underlying the petition, "neither the danger nor the impairment were the consequences of petitioner's actions." (Supreme Ct, Rensselaer Co)

Matter of Provost v Provost, 147 AD3d 1256, 46 NYS3d 923 (3rd Dept 2/23/2017)

The order committing the respondent to jail for willful violation of a child support order is reversed. "Upon a willful violation, Family Court is authorized to impose a sentence of incarceration of up to six months (see Family Ct Act § 454 [3] [a]). Such a sentence is in the nature of a civil contempt, which 'may only continue until such time as the offender, if it is within his or her power, complies with the support order' (*Matter of Martinez v Martinez*, 44 AD3d 945, 947 [2007]; *see* Family Ct Act § 156; Judiciary Law § 774 [1] ..... Since respondent cured the default prior to sentencing, we conclude that Family Court abused its discretion by issuing the order of commitment." (Family Ct, Clinton Co)

People v Current, 147 AD3d 1235, 47 NYS3d 758 (3rd Dept 2/23/2017)

In a sex offender risk assessment proceeding, the court improperly assessed 10 points for risk factor 8 (i.e., the defendant's "[a]ge at first sex crime") because the defendant was not convicted or adjudicated for the underlying incident, which the risk assessment instrument and the guidelines and commentary require. Such conduct "committed by an offender at age 20 or under" may be "relied upon to argue in favor of an upward departure," but the prosecution failed to request an upward departure in response to the defendant's opposition to their presumptive risk assessment level and they are not entitled to a second opportunity to request the departure. (County Ct, Saratoga Co)

People v Gaston, 147 AD3d 1219, 47 NYS3d 753 (3rd Dept 2/23/2017)

In this controlled substance possession case, the court erred in allowing the prosecution to impeach its own witness with his prior written statement and grand jury testimony where the witness's testimony "did not call defendant's connection to the heroin into question and only maintained that he had no knowledge of whatever connection there might be. This claimed lack of knowledge 'merely failed to corroborate or bolster the [prosecution's] case,' and did not affirmatively 'contradict or disprove' evidence presented by them ...." The error was not harmless and the interests of justice require reversal. Further, the court should have given a circumstantial evidence charge because there was no direct evidence of the defendant's dominion and control over the heroin and related items. (County Ct, Montgomery Co)

People v Herbert, 147 AD3d 1208, 47 NYS3d 500 (3rd Dept 2/23/2017)

The defendant's waiver of his right to appeal is invalid because the court failed to adequately convey to

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the defendant that the right to appeal is distinct from those rights automatically forfeited upon a plea of guilty. Thus, the defendant is not precluded from challenging the denial of his suppression motion. However, the court properly denied suppression because the defendant's sale of heroin to an undercover officer established probable cause for his arrest. Although the arresting officer did not have personal knowledge of the defendant's activities at the time of the sale and there was no direct evidence of communication between the officers, the arresting officer was present at the scene and the court could infer that information about the sale had been conveyed to the arresting officer.

The defendant's plea must be vacated because the court "made no effort to explain the consequences of a guilty plea, making only a passing reference to them by asking defendant if anyone was forcing him to give up his 'right[] to [a] jury trial' ...." (County Ct, Sullivan Co)

People v James, 147 AD3d 1211, 48 NYS3d 524 (3rd Dept 2/23/2017)

The defendant is entitled to a new trial due to the court's denial of his request for a wholly circumstantial evidence charge. While a DNA match can provide strong evidence that a person was present at and participated in a crime, the defendant's mere presence does not directly establish his identity as the perpetrator. Additionally, it is noted that "the prosecutor exceeded the bounds of permissible commentary when, during the course of his summation, he told the jury, '[Y]ou know that the blood [on the victim's car] belongs to the robber.'" (Supreme Ct, Albany Co)

People v Kemp, 148 AD3d 1284, 47 NYS3d 810 (3rd Dept 3/2/2017)

In this Sex Offender Registration Act risk assessment proceeding, the court erred by denying the defendant's request for a downward departure without considering "the potential overestimation of defendant's risk of reoffense and the danger to the public created by the assessment of" points under risk factor 7 (relationship to the victim) where the underlying crime involved child pornography. "Accordingly, the matter must be remitted for the court to determine whether such an overestimation was created and whether a downward departure is therefore warranted." (County Ct, Washington Co)

People v Banks, 148 AD3d 1359, 50 NYS3d 583 (3rd Dept 3/16/2017)

The defendant's inconsistent statements, parole status, and nervous demeanor gave the officers founded suspicion that justified both further inquiry and delay after the initial justification for the traffic stop ended and the exterior canine sniff, the result of which gave the police probable cause to search the vehicle. Although the defendant's parole status did not "constitute a 'surrender [of] his constitutional rights against unreasonable searches and seizures,'" it was relevant to an assessment of whether the officers' conduct was reasonable. (County Ct, Albany Co)

Dissent: "We dissent because [the] defendant's parole status and his response to the request for his parole officer's phone number did not give rise to a founded suspicion of criminality, and there was no adequate basis stated in the troopers' testimony to justify the further interrogation, delay at the roadside or the canine sniff, all of which occurred after the initial justification for the stop had expired ...." "Even taken together with his nervousness, the minimal inconsistency in [the defendant's] statements did not justify [his] prolonged detention, particularly because the statements were made only after the initial justification for the stop had been exhausted ...."

Matter of Burdick v Boehm, 148 AD3d 1439, 49 NYS3d 795 (3rd Dept 3/23/2017)

The court erred in determining, pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (Domestic Relations Law art 5-A), that it no longer retained jurisdiction over a custody matter and sua sponte dismissing the father's petition to modify a prior custody order. "A New York court that has previously made a child custody determination 'has exclusive, continuing jurisdiction over the determination until ... a court of this state determines that neither the child [nor] the child and one parent ... have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships' (Domestic Relations Law § 76-a [1] [a] ...." The mother and child moved several times subsequent to the prior consent order. The father had remained in New York and regularly exercised his right to visitation by caring for the child during school breaks in his New York home. The court should have allowed an opportunity to present evidence regarding the jurisdiction issue. The father's allegations, if credited, show the child has maintained "significant connections" to New York. The matter is remitted for further proceedings. (Family Ct, Cortland Co)

Matter of Gonzalez v Annucci, 149 AD3d 256, 50 NYS3d 597 (3rd Dept 3/23/2017)

Third Department *continued*

The court erred in dismissing the petitioner's challenge to his placement at Woodbourne Correctional Facility, an approved residential treatment facility (RTF), for his post-release supervision as moot. Although the petitioner had been released and moved to a homeless shelter that complied with the Sexual Assault Reform Act (SARA), the exception to the mootness doctrine applies. First, many convicted sex offenders, particularly those in the New York City area, are unable to find post-release housing that is SARA-compliant, creating a likelihood of repetition. Second, "[g]iven the transitory purpose of RTFs and considering the lack of appellate precedent regarding challenges to RTF placements and programming," the problem typically evades review. Third, the petitioner's challenges regarding whether RTFs are fulfilling their distinct purpose as opposed to confinement facilities generally present novel and substantial issues.

During placement at a residential treatment facility, the Department of Corrections and Community Supervision (DOCCS) has a legal duty to assist inmates in finding appropriate housing. Such duty is "affirmative and significant, not merely secondary to those imposed upon" the inmate. The practice DOCCS employed— waiting for the petitioner to suggest potential residences and then investigating them for approval or denial—was not sufficient to discharge its affirmative duty. (Supreme Ct, Albany Co)

Concurrence in Part, Dissent in Part: DOCCS's investigation of the 58 residences proposed by the petitioner, coupled with additional efforts such as placing him on one facility's waiting list and eventually securing the petitioner's current SARA-compliant housing, was sufficient to discharge its duty to assist him in finding post-release accommodations.

[***Ed. Note:*** *This case is currently pending before the Court of Appeals. For more information, go to www.nycourts.gov/ctapps/Filings/2017/IID1917.pdf*]

Matter of Donna SS. v Amy TT., 149 AD3d 1211, 52 NYS3d 515 (3rd Dept 4/6/2017)

The court erred in finding extraordinary circumstances that conferred standing to the maternal grandmother to petition for custody. Seeking to establish "an extended disruption of custody pursuant to Domestic Relations Law § 72(2)" that would constitute extraordinary circumstances, the grandmother asserted that the child had resided with her for two years prior to the mother's move to another state. But the evidence in the record "belied petitioner's claims that the there was any prolonged separation between the mother and the child prior to the mother's move or that the child continuously resided with her during that time frame." The grandmother had been providing overnight care while the mother worked nights and the mother had attended to all the common needs of the child during that time. Further, the mother "maintained consistent contact with the child throughout her 11-month residence in Florida." The grandmother's petition is dismissed for lack of standing, the mother's cross petition for custody is granted and the matter is remitted to court "so that it may facilitate a smooth transition of custody and address the issue of petitioner's visitation ...." (Family Ct, Tompkins Co)

People v Morgan, 149 AD3d 1148, 51 NYS3d 218 (3rd Dept 4/6/2017)

The court should have intervened to determine whether the defendant's failure to testify was the result of a knowing, voluntary, and intelligent waiver of the right to do so. At the conclusion of the evidence, but before summation, the defendant told the court that defense counsel did not want him to testify, but that he thought it was best to testify because he was innocent. The court replied that a "'determination ha[d] been made' and that the '[d]efense ha[d] rested.'" When the defendant asked if he had the right to testify, the court repeated its original statement that the decision was made and the defense had rested, and when the defendant asserted that he had never stated a desire to not testify, the court advised that that was a private matter between him and his attorney, "[u]nless there's going to be a request here to reopen the defense," which defense counsel denied. The defendant's statements were a "clear request to testify," which triggered the court's obligation to inquire directly as to whether the defendant had been properly advised that the ultimate decision belonged to him and whether his failure to testify was a valid waiver of the that right. (County Ct, Columbia Co)

Matter of Woodrow v Arnold, 149 AD3d 1354, __ NYS3d __ (3rd Dept 4/20/2017)

The court's modification of a custody order was not supported by a sound and substantial basis in the record. The mother and father, with cross-petitions pending, agreed that the only issue they had not resolved at the time of trial was a two and a half hour block of time one day a week. Despite repeatedly being informed by all counsel prior to the hearing that the parties had settled the key dispute as to where the child would attend school, the court insisted that if a hearing commenced, "'everything is opened up and I don't know what the other issues are.'" The court conducted a full custody hearing and then failed to make express findings relative to the first step in modifying custody: a change in circumstances. The court further failed to properly determine what was in the

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child's best interests as the record "was wholly insufficient on the issue" and the impact of a change in school enrollment on the child was not addressed in any way. The order granting custody to the father is reversed. Due to the court's troubling conduct, "further proceedings must be held before a different judge." (Family Ct, Rensselaer 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 Betances, 147 AD3d 1352, 45 NYS3d 750 (4th Dept 2/3/2017)

The defendant is entitled to a new trial because the court committed reversible error when it denied the defendant's challenge for cause to a prospective juror after the juror failed to express an unequivocal assurance of impartiality. Upon questioning by the prosecutor, the juror indicated that she could not be fair and impartial because she did not see the reason why anyone would drink and drive. In response to questions by the court, the juror said she could set those feelings aside, then later told defense counsel "that she had wondered what defendant did wrong when she first walked into the courtroom, and that 'obviously' she felt that 'he must have done something wrong or he wouldn't have' been in court." The court asked follow-up questions but cut the juror off before she responded to one of those questions and the court's final substantive question did not elicit the juror's state of mind. (Supreme Ct, Monroe Co)

People v Harris, 147 AD3d 1375, 47 NYS3d 540 (4th Dept 2/3/2017)

The court erroneously ordered that the defendant's definite sentences run consecutively to a separate two to four year indeterminate sentence. Because the illegal sentence cannot stand despite the defendant's failure to raise it below or on appeal, the judgment is modified such that the indeterminate sentence will run concurrently with the definite sentences. (Supreme Ct, Erie Co)

People v Kendrick, 147 AD3d 1419, 47 NYS3d 550 (4th Dept 2/3/2017)

The judgment is reversed and the motion to suppress is granted because the prosecution failed to meet the burden of establishing the voluntariness of the consent to search and the legality of police action. The officer who testified at the hearing obtained the driver's consent to search hours after the vehicle was stopped, while the driver was held in a police department interview room, and did not know whether the driver had been Mirandized, questioned, or allowed to make calls before telling the officer spontaneously that there was cocaine in the vehicle and then consenting to the search that revealed the drugs that the defendant passenger was charged with possessing. (Supreme Ct, Monroe Co)

People v Moss, 147 AD3d 1297, 46 NYS3d 740 (4th Dept 2/3/2017)

The sentence is vacated and the matter is remitted for resentencing despite the valid waiver of appeal because the defendant was erroneously sentenced as a second violent felony offender. "The predicate offense of criminal possession of a weapon in the third degree under the subdivision of which defendant was convicted (§ 265.02 [3]) is not a violent felony offense ...." (Supreme Ct, Erie Co)

People v Clay, 147 AD3d 1499, 47 NYS3d 609 (4th Dept 2/10/2017)

Reversal is required and the motion to preclude the officer's statement is granted because the court erroneously permitted the officer to identify the defendant as the person in the left rear seat of the vehicle when the prosecutor did not serve a CPL 710.30(1) notice. Police identifications are not exempt from the notice requirement and the officer engaged with all occupants of the vehicle while standing by the vehicle for approximately three minutes. This differs from a buy-and-bust scenario in which an officer is focused on face-to-face contact with the goal of identifying that person after a subsequent arrest. Under the circumstances of the officer's initial viewing here, it cannot be said "'that, as a matter of law, the subsequent identification could not have been the product of undue suggestiveness' ...." (Supreme Ct, Monroe Co)

People v Dukes, 147 AD3d 1534, 47 NYS3d 567 (4th Dept 2/10/2017)

The matter is remitted for the court to state the reason for determining that the defendant is not an eligible youthful offender where the defendant was convicted of first-degree robbery and first-degree criminal sexual act. The court failed to set forth "its reasons for determining that neither of the CPL 720.10(3) factors exists ... and it did not otherwise 'demonstrat[e] that it implicitly resolved the threshold issue of eligibility in ... defendant's favor'...." (Supreme Ct, Monroe Co)

Fourth Department *continued*

People v Hollis, 147 AD3d 1505, 46 NYS3d 467
(4th Dept 2/10/2017)

The court erroneously imposed consecutive periods of postrelease supervision when the defendant was convicted of first-degree sexual abuse and second-degree rape. The judgment is modified to comply with Penal Law 70.45(5)(c) which "'requires that the periods of postrelease supervision merge and are satisfied by the service of the longest unexpired term' ...." (County Ct, Erie Co)

People v Kraatz, 147 AD3d 1556, 47 NYS3d 817
(4th Dept 2/10/2017)

The defendant's second-degree robbery conviction was supported by legally sufficient evidence because the complainant's testimony that the defendant "kept 'squeezing and squeezing' while threatening to kill her" and "that she felt like the bones in her arm were going to break, that the resulting pain was 'excruciating' and 'like 9 to 10 to 11' on a scale of one to ten, and that her arm was bruised afterward" was sufficient to establish that she experienced substantial pain and therefore sustained a physical injury. (County Ct, Genesee Co)

Dissent: The prosecution failed to establish that the complainant suffered either "'impairment of physical condition or substantial pain.'" The majority's decision conflicts with *People v Coleman* (134 AD3d 1555 [2015]). The instant case is distinguishable from *People v Chiddick* (8 NY3d 445 [2007]), on which the majority relies, in which the complainant bled as a result of the defendant biting and breaking his finger and "'sought medical treatment for the wound defendant inflicted—an indication that his pain was significant'..." and "'the whole point of the bite was to inflict as much pain as [defendant] could'...." The majority here "endorses an entirely subjective standard for determining whether" there was a physical injury.

People v Romero, 147 AD3d 1490, 47 NYS3d 598
(4th Dept 2/10/2017)

The evidence was legally insufficient to convict the defendant of first-degree assault because there was insufficient evidence that the complainant suffered serious physical injury but there was sufficient evidence to support a conviction on the lesser included offense second-degree assault. The complainant showed the jury scars on his leg caused by the gunshot wound but "'the record does not contain any pictures or descriptions of what the jury saw so as to prove that these scars constitute serious or protracted disfigurement'" and the complainant's testimony that "he 'feel[s] pain in [his] leg' in cold weather, ... does not constitute evidence of persistent pain so severe as to cause 'protracted impairment of health'...." (County Ct, Onondaga Co)

People v Scerbo, 147 AD3d 1497, 47 NYS3d 607
(4th Dept 2/10/2017)

Reversal is required because the court abused its discretion by denying the defendant's request to exercise a peremptory challenge after the time had passed to do so where there was "'"no discernable interference or undue delay caused by [defense counsel's] momentary oversight ... that would justify [the court's] hasty refusal to entertain [the] challenge"' ...." Defense counsel briefly lost count of the number of jurors selected but when told that prospective juror 21 was the 12th juror seated immediately asked to exercise a peremptory challenge. The jury was not sworn, the panel of alternate jurors had not yet been selected, and prospective juror 21 was not told he had been selected. Furthermore, the prosecutor did not object to the request. (County Ct, Monroe Co)

People v Wallace, 147 AD3d 1494, 47 NYS3d 603
(4th Dept 2/10/2017)

The defendant was properly convicted of second-degree criminal possession of a weapon, a felony, because, contrary to his assertion, he did not fall within the "'place of business'" exception that would make the crime a misdemeanor when he took a loaded, operable, unlicensed gun with him to work at McDonald's and accidentally shot himself. The defendant was employed as a manager, but the place of business exception has been narrowly construed to apply to "'persons attempting to protect certain areas in which they have a possessory interest and to which members of the public have limited access'...." Furthermore the defendant was prohibited from having a gun at work. (Supreme Ct, Erie Co)

Dissent: The evidence is legally insufficient to support the conviction because it is undisputed that the defendant possessed the weapon at his "'place of business'" and the conviction should be reduced to fourth-degree criminal possession of a weapon, a misdemeanor. The statute is clear and unambiguous on its face; there is "no need to discern the legislature's intent." That the defendant was prohibited from having a gun at work is grounds for dismissal or other discipline by his employer, but it does not render his conduct illegal.

[***Ed. Note:*** *Leave to appeal was granted on Mar. 24, 2017 (29 NY3d 954 [4th Dept]).*]

People v White, 147 AD3d 1492, 47 NYS3d 601
(4th Dept 2/10/2017)

Because the defendant was deprived of his right to testify before the grand jury when his request to testify

Fourth Department *continued*

was received after the grand jury voted but before the indictment was filed, denial of the defendant's motion to dismiss the indictment was error. "CPL 190.50 (5) (a) provides that a defendant's request to testify is timely as long as it is made prior to the filing of the indictment ...." The defendant sent a letter properly notifying the prosecutor of his request to testify on Jan. 15, 2013. The prosecutor received the letter on Jan. 17, 2013 and the indictment was filed on Jan. 25, 2013. The defendant was entitled to a reopening of the proceeding so the grand jury could hear his testimony and revote. (County Ct, Monroe Co)

People v Brown, 148 AD3d 1705, 50 NYS3d 671 (4th Dept 3/24/2017)

The court inappropriately assessed 30 points under risk factor 9 for a sex crime adjudication as a juvenile delinquent and 10 points for a prior sex crime that occurred in another state when the defendant was under 16 and erroneously found that the defendant is a level two risk pursuant to the Sex Offender Registration Act. While the Board of Examiners of Sex Offenders risk assessment guidelines say a juvenile delinquency adjudication is a crime for the purpose for assessing points for criminal history, Family Court Act (FCA) 381.2(1) says "neither the fact that a person was before Family Court for a juvenile delinquency hearing, nor any confession, admission or statement made by such a person is admissible as evidence against him or her in any other court." And FCA 380.1(1) says "'[n]o adjudication under this article may be denominated a conviction and no person adjudicated a juvenile delinquent shall be denominated a criminal by reason of such adjudication.'" Therefore, the Board "'exceeded its authority by adopting that portion of the Guidelines'" that was applied here. (County Ct, Wayne Co)

People v Butler, 148 AD3d 1540, 52 NYS3d 586 (4th Dept 3/24/2017)

Because "the use or display of the firearm while committing the class C felony of attempted assault in the first degree cannot serve as the predicate for [the defendant's] conviction of criminal use of a firearm in the second degree inasmuch as the use or display of that same firearm satisfied an element of attempted assault in the first degree," the conviction of second-degree use of a firearm is reversed and that part of the indictment is dismissed in the interest of justice. (County Ct, Genesee Co)

People v Graham, 148 AD3d 1517, 50 NYS3d 196 (4th Dept 3/24/2017)

Reversal is required because the court denied the defendant's request for a jury instruction on the defense of temporary innocent possession of a weapon where there were sufficient facts in the record entitling the defendant to the instruction. The defendant's testimony that a man threatened him with a gun, they struggled, and after the man fled the defendant picked up the gun and gave it to his wife, who hid it at her house where it was later found by police, could support a finding that the defendant had a legal excuse for possession of the weapon and that he did not use the weapon in a dangerous manner. Further, as the prosecutor has a duty to inform the grand jury on the law related to the matter before it, failure to instruct the grand jury on the defense, one that could eliminate an unwarranted prosecution, renders the proceeding defective. The indictment is dismissed without prejudice. (Supreme Ct, Onondaga Co)

People v McFarland, 148 AD3d 1556, 50 NYS3d 694 (4th Dept 3/24/2017)

The court should have granted the defendant's motion to vacate the judgment of conviction following a hearing under CPL 440.10(1)(g). The motion was based on a claim that a third party, who was not available to testify, made a statement against penal interest that, if it had been admitted at trial, would have resulted in a verdict more favorable to the defendant. The third party's unavailability was established by his exercise of his right to remain silent. There was sufficient competent evidence establishing "the 'possibility of trustworthiness' of the third party's statement" needed "to satisfy the requirement that the statement was a declaration against penal interest." Such evidence included a defense witness's hearing testimony about statements made by the third party, a defense investigator's hearing testimony about the third party's statements to the investigator, and trial testimony that the third party had been engaged in a dispute with the decedent. While the hearing judge found the defense witness's testimony about the incriminating statement incredible, whether a court believes a statement is true is irrelevant; so long as the proponent of a third party's statement establishes the "'*possibility of trustworthiness*, it is the function of the jury alone to determine whether the declaration is sufficient to create reasonable doubt of guilt' ...." (Supreme Ct, Monroe Co)

People v McGuire, 148 AD3d 1578, 51 NYS3d 726 (4th Dept 3/24/2017)

The court erred by refusing to sever the defendant's trial when he was charged with third-degree criminal possession of a weapon stemming from the discovery of a handgun in the car the defendants occupied. The trial strategies of the defendants were "irreconcilable" given

Fourth Department *continued*

that they made statements implicating each other. And "the codefendants' respective attorneys 'took an aggressive adversarial stance against [defendant at trial], in effect becoming a second [and a third] prosecutor' ...." The "'essence or core of the defenses'" were in conflict; for the jury to believe the core of one defense required that it disbelieve the core of the other. "[T]here was 'a significant danger ... that the conflict alone would lead the jury to infer defendant's guilt,' and therefore severance was required ...." (County Ct, Monroe Co)

People v Morrison, 148 AD3d 1707, 50 NYS3d 673 (4th Dept 3/24/2017)

The court committed reversible error by failing to advise counsel on the record about the contents of a substantive jury note. The jury sent out two notes that said, "'[w]e have made decision on the Third Count we are having hard time with 1 and 2 just giving you are [sic] status'" and "'[w]e have arrived on decision on 2 and 3, but we have a lot of work to do on #1. I don['t see it being quick. Not sure what to do. We ars [sic] starting to make way.'" The record reflects that the jury was in the courtroom, but the judge neglected to read either note before advising the jury to continue working in an attempt to reach a unanimous verdict. While CPL 310.30 did not apply to the former note, the latter was substantive and required notice to defense counsel. Finally, media presence in the courtroom did not constitute "'special circumstances'" that would justify departure from *O'Rama* procedures. (County Ct, Oneida Co)

Dissent: The contested note was ministerial and the defendant's challenge to the court's handling of the note required preservation.

People v Parker, 148 AD3d 1583, 50 NYS3d 211 (4th Dept 3/24/2017)

The evidence is legally insufficient to support the defendant's conviction for tampering with physical evidence when the defendant threw bags of cocaine onto the floor in view of police officers. While actual suppression of evidence is not required, the defendant must have concealed evidence. That was not sufficiently proven where the officers observed the defendant throw the cocaine on the floor. There is however sufficient evidence to support a conviction for attempted tampering with physical evidence. (County Ct, Erie Co)

People v Pett, 148 AD3d 1524, 50 NYS3d 663 (4th Dept 3/24/2017)

The court erroneously accepted the defendant's guilty plea to second-degree robbery without conducting a competency hearing when, following a CPL article 730 exam, psychiatric examiners provided conflicting views regarding the defendant's competence to stand trial. This precise issue was not raised in a prior CPL 440.10 motion and although it could have been, the merits are reached in the exercise of discretion.

Generally, a reconstruction hearing is the proper remedy for CPL article 730 violations, but under the facts here a reconstruction hearing might not be feasible. The matter is remitted for determination on whether reconstruction of the defendant's competence at the time of the plea is practicable. If so, the hearing should be conducted and the 440.10 motion decided based on whether the prosecution meets it preponderance of the evidence burden. If holding the reconstruction hearing is impracticable, then the defendant's motion should be granted, the judgment and plea vacated, and further proceeding conducted on the indictment. (County Ct, Herkimer Co)

People v Robinson, 148 AD3d 1639, 50 NYS3d 223 (4th Dept 3/24/2017)

The defendant was improperly sentenced as a second felony offender because his 2005 federal drug conspiracy conviction cannot serve as the predicate felony. The federal charge is not equivalent to the New York felony when elements of each statute are compared as required. In New York, conspiracy requires an overt act in furtherance of the conspiracy by one conspirator, but that element is not included in the federal statute. (County Ct, Niagara Co)

People v Seabolt, 148 AD3d 1650, 50 NYS3d 724 (4th Dept 3/24/2017)

Reversal is required because the court erroneously applied the preponderance of the evidence standard when it granted the prosecution's request for an upward departure in determining that the defendant is a level three risk pursuant to the Sex Offender Registration Act. The matter is remitted for a determination based on the correct standard under Correction Law 168-n(3), which requires the prosecution to prove the existence of facts supporting risk level calculation by clear and convincing evidence. (County Ct, Monroe Co)

People v Vickers, 148 AD3d 1535, 50 NYS3d 668 (4th Dept 3/24/2017)

The court erred by amending the indictments at the close of proof, at the prosecution's request. The initial indictments charged, as relevant here, first-degree course of sexual conduct against a child and predatory sexual assault against a child based on committing first-degree

Fourth Department *continued*

course of sexual conduct against a child. Those counts were replaced with first-degree sodomy and first-degree criminal sexual act, respectively. Unlike the crimes in the amended indictment, the crimes they replaced "do not criminalize a specific act, and thus do not require jury unanimity with respect to a specific act" so the amendments led to an impermissible substantive change, changing the theory of the prosecution. The defendant's consent to the amendment is inconsequential "because he has '"a fundamental and nonwaivable right to be tried only on the crimes charged"' ...." Those counts are dismissed without prejudice. (County Ct, Genesee Co)

People v Williams, 148 AD3d 1701, 49 NYS3d 807
(4th Dept 3/24/2017)

The matter is remitted for a youthful offender determination where the defendant was convicted of an armed felony offense and the court failed "'to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3)' ...." (County Ct, Monroe Co)

People v Henderson, 148 AD3d 1779, 50 NYS3d 768
(4th Dept 3/31/2017)

Decision is reserved and the matter remitted for further proceedings because when the case was previously remitted for the lower court to resolve issues of credibility and render a decision, the court failed to rule on the defendant's motion to withdraw his guilty plea and precluded the defendant from testifying at the hearing. The defendant alleged that his former attorney erroneously advised him that he could withdraw his plea at any time before sentencing. The court heard testimony from the former attorney that contradicted claims in the defendant's motion. The court must afford the defendant a reasonable opportunity to advance his claims by testifying and then rule on the motion. (County Ct, Monroe Co)

People v Melvin, 148 AD3d 1753, 50 NYS3d 747
(4th Dept 3/31/2017)

The superior court information (SCI) is jurisdictionally defective and must be dismissed because it charges the defendant with committing two acts of second-degree assault on Dec. 3, 2014, but the special information attached say the assaults occurred on Dec. 23, 2014. The defendant waived his constitutional right to indictment on two counts of second-degree assault committed on Dec. 23, 2014 originally charged by a felony complaint, but did not waive indictment with regard to any acts on Dec. 3, 2014. It is neither "'obvious'" nor "'clear'" that the date discrepancy is a "ministerial typographical error" as the prosecution suggests and it cannot be ignored. Preservation of this issue is not required nor was it forfeited by the guilty plea. The defendant's conviction is reversed, the SCI dismissed and the case remitted for proceedings in compliance with CPL 470.45. (Supreme Ct, Erie Co)

People v Tan, 148 AD3d 1759, 50 NYS3d 756
(4th Dept 3/31/2017)

The prosecution has no statutory basis for appealing an order granting a motion for a trial order of dismissal where the order did not set aside a guilty verdict and dismissal was pursuant to CPL 290.10(1)(a). At the close of the second-degree murder trial the court reserved decision on the defendant's motion. The jury did not reach a verdict and the prosecution and defense consented to the jury's discharge. The court declared a mistrial but continued to reserve decision on the motion and subsequently granted it. CPL 450.20, the exclusive authority for the prosecution's appeal, does not authorize this appeal. Furthermore, permitting this appeal would violate the principles of double jeopardy because the "court's 'dismissal of a count due to insufficient evidence is tantamount to an acquittal for purposes of double jeopardy'" and the defendant, who was aware that retrial following the mistrial was not barred by double jeopardy, did not waive double jeopardy protections. (County Ct, Monroe Co)

People v Bloom, 149 AD3d 1462, __ NYS3d __
(4th Dept 4/28/2017)

The court abused its discretion by including provisions in the order of protection prohibiting the defendant, who was convicted of second-degree burglary and criminal obstruction of breathing or blood circulation, from communicating with the son he shares with the complainant. The order of protection is modified to delete the no contact provisions with respect to the child. (County Ct, Genesee Co)

People v Hall, 149 AD3d 1610, 51 NYS3d 478
(4th Dept 4/28/2017)

The defendant was wrongfully sentenced as a second felony offender because "'under New York's "strict equivalency" standard for convictions rendered in other jurisdictions, a federal conviction for conspiracy to commit a drug crime may not serve as a predicate felony for sentencing purposes'...." (County Ct, Cattaraugus Co)

People v Lopez, 149 AD3d 1545, __ NYS3d __
(4th Dept 4/28/2017)

Fourth Department *continued*

Officers did not have reasonable suspicion of criminality when they stopped the defendant's vehicle, so the guns recovered as a result should have been suppressed. Half an hour after receiving the last of two calls reporting incidents involving a suspect described as a "Hispanic male, five foot seven, with tattoos on his neck and arms, dark clothing, including a Yankees baseball cap, and crossed, 'Asian-type' eyes," responding officers arrived. They observed a Hispanic male, with tattoos on his neck and arms who stared straight ahead and did not make eye contact, enter the rear seat of a vehicle driven by the defendant. While that passenger matched the general part of the suspect's description, he was dressed in a white t-shirt and pajama pants and the officer could not tell if he had the distinctive eyes that were mentioned. The inconsistencies rendered the officer's suspicion less than reasonable. (Supreme Ct, Monroe Co)

People v Minckler, 149 AD3d 1526, __ NYS3d __ (4th Dept 4/28/2017)

The defendant was deprived of the right to effective assistance of counsel because the court allowed the defendant to decide about a jury charge when it is defense counsel who "'has ultimate decision-making authority over matters of strategy and trial tactics, such as whether to seek a jury charge on a lesser included offense'...." Although defense counsel stated that a charge on the lesser included offense of criminal trespass was in the defendant's best interest, he did not request the charge based on the client's choice and the court concurred, depriving the defendant of the expert judgment of counsel.

The court abused its discretion by failing to order a CPL article 730 examination where the prosecution's expression of concern regarding the defendant's competence to stand trial, the defendant's outbursts during trial, his belief that the government was injecting prisoners with diseases, and other behaviors and beliefs provided a "'reasonable ground for believing that a defendant is in such state of idiocy, imbecility or insanity that he is incapable of understanding the charge, indictment or proceedings or of making his defense ...." The defendant should be examined pursuant to CPL article 730 before a new trial. (County Ct, Oswego Co)

People v Prichard, 149 AD3d 1479, 52 NYS3d 595 (4th Dept 4/28/2017)

The court erroneously instructed the jury regarding the elements of first-degree burglary, requiring a new trial. The court instructed the jury that a "'dwelling is a building which is usually occupied by a person lodging therein at night. A bedroom in a home, where there is more than one tenant, may be considered independent of the rest of the house and may be considered a separate dwelling within a building[]'" but omitted the part of the definition that requires the jury to determine if the house consisted of multiple units and if the bedroom was "'separately secured or occupied' ...." The instruction did not properly convey the meaning of building to the jury and created a great likelihood of confusion. The court must also rule on the defendant's motion to suppress prior to a new trial; the findings of fact made below cannot be reviewed on appeal absent a decision. (Supreme Ct, Monroe Co)

People v Puskar, 149 AD3d 1548, 51 NYS3d 452 (4th Dept 4/28/2017)

The court's failure to advise the non-citizen defendant of the deportation consequences of her guilty plea to third-degree criminal possession of a controlled substance was erroneous and an opportunity to seek vacatur is required to allow the defendant to show there is a "'reasonable probability'" that she would not have pleaded guilty if she was aware of the risk of deportation. (County Ct, Oneida Co) ⚖

Defender News *(continued from page 5)*

such as LinkedIn, to communicate with selected audiences, or with the public in general."

Two months before the updated guidelines were published, the New York State Commission on Judicial Conduct cautioned judges that their ethical duties apply to the use of social media. In its 2017 Annual Report, the Commission addressed "The Proliferation and Perils of Social Media" (p. 23), citing among other things American Bar Association Formal Opinion 462 (2013) and New York Advisory Committee on Judicial Ethics Opinion 08-176 (2009).

Ethics Opinion on Securing Electronic Client Information

Email poses ethical challenges as well. In May 2017, the American Bar Association issued Formal Opinion 477R, a revision of the original Formal Opinion 99-477. The opinion addresses lawyers' duty to make "reasonable efforts to prevent inadvertent or unauthorized access" to information transmitted over the internet, and the need to "take special security precautions" when an agreement with the client or the law so requires, "or when the nature of the information requires a higher degree of security." *Daily Record* columnist and blogger Nicole L. Black posted discussions of the opinion and how to comply with it on May 15 and June 8. ⚖

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