



Public Defense Backup Center  
**REPORT**

Volume XXXII Number 1

January–March 2017

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**Defender News**

**Race Issues Addressed by U.S. Supreme Court, Others**

Issues stemming from racism permeate the caseloads of public defense lawyers across the country and the state. Recent high court decisions addressed race issues, and efforts to ensure that racial bias does not harm clients continue in varied forums.

**Racism Can Override Rule Against Impeaching Jury Verdicts**

The U.S. Supreme Court recently held that trial courts must be free to consider evidence of a juror’s “clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant” despite the general, long-standing rule that jury verdicts, once entered, cannot later be challenged based on comments or conclusions expressed by jurors during deliberations. The opinion by Justice Anthony Kennedy for the five-justice majority highlights both the importance of juries in our system and the “imperative to purge racial prejudice from the administration of justice” embodied in the Civil War Amendments to the Constitution and continuing today. A summary of [Pena-Rodriguez v Colorado](#), (No. 15-606 [3/6/2017]), including the dissents, appears at p. 7.

A political science professor at the University of Wisconsin-Madison [noted](#) that while “the court sought to limit the impeachment of jury deliberations to claims of racial bias only ... [c]lever lawyers surely will test the boundaries of the court’s decision, raising challenges of jury biases over sex, sexual orientation, religion and other issues,” resulting in “a new Sixth Amendment jurisprudence.” On the other hand, Justice Kennedy’s opinion stressed “that racial bias implicates unique historical, constitutional, and institutional concerns.”

**Case Clears Obstacles to Review of Testimony on Black Men and Violence**

As noted on a [Findlaw.com blog post](#), the high court’s decision in *Pena-Rodriguez*, above, “marks the second case in as many weeks to decry the insidious effects of racism on the justice system.” In *Buck v Davis* (No. 15-8049 [2/22/2017]), Chief Justice John Roberts noted that expert testimony to a sentencing phase jury on the increased statistical likelihood of future violence by black men “appealed to a powerful racial stereotype—that of black men as ‘violence prone’—coinciding “precisely with a particularly noxious strain of racial prejudice ....” While the primary legal issues in *Buck* revolved around procedural limitations and changing precedent regarding collateral review, the underlying question was stark—could Texas kill Duane Buck after the jury that sentenced him to death heard expert testimony relating to the “dangerousness” of black men? The Court did not decide the issue, but reversed lower court decisions finding Buck’s challenge to his lawyer’s presentation of such evidence unreviewable. [The Marshall Project](#) highlighted the Chief Judge’s concise statement in response to the argument that the racial testimony had been “‘de minimis’”; Roberts wrote that “‘Some toxins can be deadly in small doses.’” The majority opinion and Justice Clarence Thomas’s dissent are summarized at p. 6.

**Federal Judge Instructs Juries on Implicit Bias**

Senior Judge Mark W. Bennett of the Northern District of Iowa instructs juries on implicit bias, and his instructions were posted on the [Juries](#) blog on Feb. 23, 2017. The link to the instructions was provided in the [Mar. 1, 2017 edition](#) of News Picks from NYSDA Staff along with

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additional information including the American Bar Association's [Resolution 116](#), adopted last August, calling for judges to instruct juries on implicit bias that may impact the decision-making process.

### **Batson Challenges Can be Based on Skin Color**

In December the Court of Appeals held that skin color of prospective jurors is a cognizable classification for challenging peremptory strikes as unconstitutional under *Batson v Kentucky* (476 US 79 [1986]) and the Equal Protection Clause of the State Constitution. The defendant met his prima facie *Batson* burden of showing discrimination "by alleging that the prosecutor was excluding dark-colored female prospective jurors ...." The Court rejected the procedural argument that any question about whether the defendant made out a prima facie case was moot, because the trial court did not reach the ultimate issue of purposeful discrimination and pretext as to the juror in question. Judge Garcia, concurring, would have found the issue moot because the prosecution claimed to have race-neutral reasons for striking all contested jurors but then failed to recall a specific reason for the juror in question on appeal, at which point the trial court should have seated that juror. Judge Garcia then noted that "the majority dramatically expands our *Batson* jurisprudence" without providing guidance to lower courts on how to make the necessary determinations. [People v Bridgeforth](#) (28 NY3d 567 (12/22/2016)) is summarized on p. 13. The Center for Appellate Litigation highlighted the case in its January 2017 edition of *Issues to Develop at Trial*, available [online](#).

### **Fighting Racism and Injustice Called the Best Tribute to Lynne Stewart**

In 2002, Lynne Stewart gave the keynote speech at NYSDA's Annual Conference. Facing federal charges that would eventually lead to her being disbarred and imprisoned, Stewart spoke passionately about the dangers of government intrusion into attorney-client conversations. While acknowledging that she went further than most lawyers would in confronting what she believed to be wrong, she urged audience members to confront injustice; she received a standing ovation, as reported in the [July-August 2002 issue](#) of the *REPORT*. Her death on Mar. 7, 2017, was reported widely, by the [New York Times](#), [Fox News](#), and a host of other media outlets. At the *National Review*, former assistant U.S. attorney for the Southern District of New York Andrew C. McCarthy III reposted his [2005 ruminations](#) on how a woman he liked and in some ways admired could take positions he despised. Just days before Stewart's death, Ralph Poynter accepted an award on her behalf from the Malcolm X Commemoration Committee that "honored a large group of lawyers and doctors who have supported U.S. political prisoners," as

noted on WBAI's [Justice and Unity webpage](#). Tributes to Stewart are posted at <http://lynnestewart.org/category/tributes/>. Among them is this from solo practitioner Robert J. Boyle, who helped secure Stewart's compassionate release from federal prison three years ago based on the breast cancer that ultimately killed her:

Since her release and especially in the last few months of her life, Lynne and her husband and partner Ralph Poynter increasingly urged those of us in the activist-lawyer community to dedicate ourselves to fighting racism and injustice. Our finest tribute to Lynne will be to make that a reality.

### **Change in Federal Child Support Regulations Allows Reduction of Payment Based on Incarceration**

In December of 2016 the federal Health and Human Services' [Administration for Children and Families](#) announced a change intended to make state child support enforcement programs more effective and flexible. Touted as "a more realistic approach to calculating child support payments," the change requires consideration of the non-custodial parent's circumstances and, notably, the new rule prohibits "excluding incarceration from consideration as a substantial change in circumstances ...."

As noted in the [Federal Register announcement](#), states *may* comply with the rule any time after the rule's effective dates (January 19, 2017 generally). For more specificity on dates by which states *must* comply, see the Register.

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THE REPORT IS PRINTED ON RECYCLED PAPER

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## **“Repeated Judicial Errors” Necessitate Assignment of New Judge on Remand**

Two decisions from the Third Department detail various Family Court missteps and errors in Family Court Act article 6 and 10 proceedings for a particular mother and her children. [\*Matter of Angela F. v St. Lawrence County Dept. of Social Services\*](#), 2017 NY Slip Op 00513 (3rd Dept 1/26/2017); [\*Matter of Angela F. v Gail WW.\*](#), 2017 NY Slip Op 00514 (3rd Dept 1/26/2017). “Given the extraordinary history of this saga,” the Third Department directed that a new judge be assigned to preside over all further proceedings.

The first decision details the family court’s delays and errors, which were partly responsible for the lack of contact between the mother and two of her children for a period of roughly five years. Despite a 2013 Third Department order reversing the 2011 termination of the mother’s parental rights, the family court failed to understand that the appellate court’s action had, in effect, “reinstate[d] the mother’s parental rights and restored her to the position that she was in prior to the erroneous termination.”

The second decision involves the article 6 proceeding regarding the third child. Previously, the Third Department modified a family court order that reduced the mother’s visitation because the record did not support the reduction. Upon remand, the family court failed to acknowledge the lack of record and instead focused exclusively on whether the mother’s husband could serve as a visitation supervisor. Again, the appellate court found that there was no record to support the order reducing visitation or the disqualification of the mother’s husband as a visit supervisor.

## **New York Statewide Central Register of Child Abuse and Neglect; Indicated Report Appeals**

### **Third Department Modifies Maltreatment Report to Unfounded for Domestic Violence Victim**

In a CPLR article 78 proceeding requesting review of an indicated report of child maltreatment, the Third Department modified the report to unfounded, granted the mother’s application entirely, and expunged and sealed the record. [\*Matter of Elizabeth B. v New York State Off. of Children & Family Servs.\*](#), 2017 NY Slip Op 01424 (3rd Dept 2/23/2017). The Ontario County Department of Social Services (DSS) filed an indicated report with the Office of Children and Family Services (OCFS), concluding that the mother failed to provide adequate guardianship to her children based on two incidents where her

children were present when the mother was attacked by her partner. The incidents occurred on two consecutive days and the mother reported the incidents to the police three days later, the first day she had access to a vehicle. On review, OCFS denied the mother’s request to amend the report.

The Third Department held that OCFS “misconstrue[d]” the “minimum degree of care standard” in the context 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 before reporting the abuse to the police. She was not required to engage in counseling services suggested by DSS, especially since she had already sought counseling elsewhere. The mother’s request to modify the protection order to allow her to communicate with her partner concerning finances and child care “amounts to no more than ‘undesirable parental behavior,’” not a failure to exercise a minimum degree of care. And finally, speculation about whether the mother and her partner might reconcile does not amount to a failure to address the safety needs of her children. While the children suffered adverse consequences as a result of the attacks, “neither the danger nor the impairment were the consequences of petitioner’s actions.”

### **First Department Affirms the Supreme Court Annulment of ALJ Decision That Denied a Mother’s Request to Amend and Seal a Child Abuse Report**

The First Department affirmed a Supreme Court order that annulled the decision of an administrative law judge (ALJ) denying a mother’s application to change an indicated child abuse report to unfounded. [\*Matter of Natasha W. v New York State Off. of Children & Family Servs.\*](#), 2016 NY Slip Op 08099 (1st Dept 12/1/2016). The petitioner was shoplifting with her child and later pleaded guilty to disorderly conduct; the criminal record was sealed. The New York City Administration for Children’s Services investigated the allegation of child maltreatment that was made to the Statewide Central Register of Child Abuse and Maltreatment (SCR) based on this incident and “concluded that ‘there is no child[] likely to be in immediate or impending danger of serious harm.’” Nevertheless, the report was closed as indicated. The First Department agreed with the Supreme Court that: 1) the undisputed facts do not, as a matter of law, show that the petitioner put the child in “imminent danger,” which is the requisite standard for a finding of maltreatment; and, 2) where what is at issue is the inclusion of the mother’s name on a list that would make it hard to get a job in her chosen profession of childcare, the ALJ erred by failing to consider the 10 Guideline factors for determining whether the acts giving rise to the report were relevant and rea-

sonably related to employment in childcare, provision of foster care, or adoption. [Those are set forth in the OCFS publication, "[Guidelines](#) for Determining Whether Indicated Instances of Child Abuse and Maltreatment are Reasonably Related to Employment or Licensure"].

The First Department decision offers a helpful review of the appropriate standard for SCR administrative review and fair hearings, a "fair preponderance of the evidence."

## **Issues Affecting Public Defense Raised in State Budget Process**

The early months of 2017 saw issues relating to public defense included in the Executive Budget, legislation introduced in the beginning months of 2017, and advocacy groups' concerns. The state budget process was in full swing as the *REPORT* went to press.

### **Vetoed Justice Equality Act Garnered Support**

The bipartisan Justice Equality Act, which passed the Legislature unanimously in June of 2016 and would have required the State to phase in, over several years, full reimbursement of localities' public defense costs, was vetoed by the Governor on New Year's Eve. His subsequent budget proposal included much more limited public defense reform—extension of the *Hurrell-Harring* settlement provisions to all localities, no inclusion of Family Court representation costs, and a requirement that plans devised by the Indigent Legal Services Office (ILS) for improving public defense be approved by the Director of the Division of the Budget. Assemblymember Patricia Fahy reintroduced the Justice Equality Act with only minor changes and the coalition advocating for its passage continued its campaign. A core aspect of that campaign was a focus on the need for public defense independence; this was stressed by [NYSDA](#) and a wide array of others including the [American Bar Association](#), the New York State Association of Criminal Defense Lawyers, the [New York Civil Liberties Union](#) (NYCLU), the Chief Defenders Association of New York, and the [New York Times](#). Justice Equality was among the demands made during an NYCLU-sponsored rally in Albany on Mar. 13, 2017. The event coincided with the beginning of National Public Defense Week, leading up to the anniversary of *Gideon v Wainwright* on March 18.

As the *REPORT* went to press, the budget bills from each house of the state Legislature became available. The Assembly version modifies the Executive proposal to extend the provisions of the *Hurrell-Harring* settlement statewide, removing a Division of Budget approval requirement; the Assembly bill would also phase in, over a period of seven years, a state assumption of local costs related to public defense services in criminal cases, beginning in 2018. The Senate version also would remove the

Division of Budget oversight and approval authority provision of the plan for statewide compliance with the *Hurrell-Harring* Settlement standards, extend the deadlines for implementation of county plans, and, most disturbingly, limit reimbursement to costs associated with criminal defense representation provided to individuals with a federally adjusted gross income at or below 150% of the Federal Poverty Guidelines.

### **Executive Budget Mixed on Other Public Defense Funding**

The Governor proposed cuts to NYSDA's budget and other public defense spending such as Aid to Defense, including elimination of the Indigent Parolee Program, while increasing money to flow to localities through ILS.

### **Article VII Bills Included Several Criminal Justice Proposals**

The Executive Budget proposal included a number of substantive provisions relating to criminal justice and public safety, from flawed requirements that interrogations be recorded and identification procedures be improved to a change to the marijuana laws that would make only possession of marijuana *burning* in public a class B misdemeanor. Among the many other proposals were:

- **extension of a number of sentencing laws currently scheduled to "sunset" on September 1**—this is a recurring ritual, as the "repeal" provisions of those laws have routinely been delayed since they were first enacted, and
- **a reduction in the number of days visitors would be allowed at maximum security correctional facilities**, which NYSDA has opposed. The Senate and Assembly bills do not accept this reduction.

### **Defense Resources**

Through "[News Picks from NYSDA Staff](#)," the website at [www.nysda.org](http://www.nysda.org), responses to attorneys who call for direct defender services, and this newsletter, the Backup Center provides information on resources helpful to public defense lawyers. Below are some resources newly available in the last few months.

### **NACDL Primers**

The increased use of surveillance technology in criminal cases creates new Fourth Amendment concerns. The National Association of Criminal Defense Lawyers (NACDL) released [three primers](#) developed to familiarize defense attorneys with surveillance programs and techniques and provide strategies and resources for defense attorneys to challenge them. The primers on:

Automated License Plate Readers, Cell Phone Location Tracking, and Cell Site Simulators were the first released as part of an ongoing project.

### **Trial Manual**

The sixth edition of the [Trial Manual for the Defense of Criminal Cases](#), authored by the legendary [Anthony G. Amsterdam](#) and [Randy A. Hertz](#) of NYU Law School, and published by The American Law Institute (ALI) Continuing Legal Education, is available for free download. According to the authors, the manual “covers information a defense attorney has to know, and the strategic factors s/he should consider, at each of the stages of the criminal trial process.” The previous edition was published in 1988 as a joint project of the American College of Trial Lawyers,

National Defender Project of the National Legal Aid and Defender Association, and the American Law Institute ABA Committee on Continuing Professional Education.

### **Speedy Trial Manual**

Also available is the 2016 edition of the [Criminal Procedure Law Section 30.30\(1\) Manual](#) by Drew R. DuBrin, Special Assistant Public Defender in Monroe County. The manual explores the intricacies of New York’s speedy trial statute providing information on: time period, commencing the 30.30 clock, excludable time, post-readiness delay and other relevant issues. On behalf of the many who use this valuable resource, NYSDA is grateful for the opportunity to share it.

*(continued on page 35)*

## CONFERENCES & SEMINARS

**Sponsor:** New York State Defenders Association  
**Theme:** Family Court Update  
**Dates:** April 29, 2017  
**Place:** Rochester, NY  
**Contact:** NYSDA: tel (518) 465-3524; fax (518) 465-3249; email [dgeary@nysda.org](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** Making Sense of Science X: Forensic Science & the Law  
**Dates:** May 3-6, 2017  
**Place:** Las Vegas, NV  
**Contact:** NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email [vsejas@nacdl.org](mailto:vsejas@nacdl.org); website [www.nacdl.org/cle/](http://www.nacdl.org/cle/)

**Sponsor:** New York State Defenders Association  
**Theme:** Cutting Edge Criminal Defense  
**Date:** May 5, 2017  
**Place:** Binghamton, NY  
**Contact:** NYSDA: tel (518) 465-3524; fax (518) 465-3249; email [dgeary@nysda.org](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)

**Sponsor:** New York State Bar Association  
**Theme:** DWI on Trial – Big Apple XVII  
**Date:** May 11, 2017  
**Place:** New York, NY  
**Contact:** NYSBA: tel (800) 582-2452 or (518) 463-3724; fax (518) 463-5993; website [www.nysba.org/CLE/Continuing\\_Legal\\_Education/Home/](http://www.nysba.org/CLE/Continuing_Legal_Education/Home/)

**Sponsor:** American Bar Association  
**Theme:** 8th Annual Prescriptions for Criminal Justice Forensics  
**Date:** June 2, 2017  
**Place:** New York, NY  
**Contact:** ABA: tel (800) 285-2221; website [www.americanbar.org/cle.html](http://www.americanbar.org/cle.html)

**Sponsor:** National Defender Training Project  
**Theme:** 2017 Public Defender Trial Advocacy Program  
**Dates:** June 2-7, 2017  
**Place:** Dayton, OH  
**Contact:** Ira Mickenberg: tel (518) 583-6730; email [imickenberg@nycap.rr.com](mailto:imickenberg@nycap.rr.com)

**Sponsor:** National Legal Aid and Defender Association  
**Theme:** 2017 Holistic Defense and Leadership Conferences  
**Dates:** June 7-9, 2017  
**Place:** Baltimore, MD  
**Contact:** NLADA: tel 202-452-0620; fax (202) 872-1031; website [www.nlada.org/2017-holistic-defense-and-leadership-conferences](http://www.nlada.org/2017-holistic-defense-and-leadership-conferences)

**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](mailto:dgeary@nysda.org)

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

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

## United States Supreme Court

In the online version of the *REPORT*, the name of each case summarized is hyperlinked to the opinion on the US Supreme Court's website, [www.supremecourt.gov/opinions/opinions.aspx](http://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](http://www.law.cornell.edu).

### [Bravo-Fernandez v United States](#), 580 US \_\_, 137 Sct 352 (11/29/2016)

In the circumstances here, the issue-preclusion component of constitutional double jeopardy does not bar retrial on the charge for which a guilty verdict was rendered where a jury returned irreconcilably inconsistent verdicts of conviction on one count and acquittal on another count. Both counts turned on the same issue of ultimate fact, but the guilty verdict was vacated on appeal due to erroneous jury instructions unrelated to the verdicts' inconsistency. "[W]e do not know what the jury would have concluded had there been no instructional error," and a new trial on the overturned conviction is in order. Acquittals remain inviolate.

**Concurrence:** [Thomas, J] "As originally understood, the Double Jeopardy Clause does not have an issue-preclusion prong."

### [White v Pauly](#), 580 US \_\_, 137 Sct 548 (1/9/2017)

In this suit alleging a violation of the Fourth Amendment right to be free from excessive force, qualified immunity attaches as to the police officer who, upon arriving at a home where other officers had already responded, shot an armed occupant of the home without first giving a warning because the officer's action did not violate clearly established law. The Court of Appeals panel majority that found qualified immunity not to

apply misunderstood the necessary analysis. An asserted "clearly established law must be 'particularized' to the facts of the case. ... Otherwise, [p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'" Here, no clearly established federal law prohibits an officer arriving late to an ongoing police situation "from assuming that proper procedures, such as officer identification, have already been followed." No opinion is expressed as to potential alternative grounds for denying qualified immunity.

**Concurrence:** [Ginsburg, J] "I join the Court's opinion on the understanding that it does not foreclose" denying summary judgment given factual disputes not at issue in the majority opinion.

### [Buck v Davis](#), No. 15-8049 (2/22/2017)

Because the petitioner's constitutional ineffective assistance of counsel claim was not raised in the first state postconviction proceeding, it has not been heard on the merits. The case has been in "a labyrinth of state and federal collateral review, where it has wandered for the better part of two decades." At issue is trial counsel's introduction, during the penalty phase of this capital trial, of expert testimony that included a statement that the petitioner's race made him statistically more likely to act violently. While the petitioner's first state habeas corpus petition was pending, the state confessed error in other cases where the same expert testified similarly, but in those cases the prosecution, not defense counsel, introduced the evidence. Further, federal habeas corpus law changed so that attorney failure to raise an ineffectiveness claim became grounds for excusing procedural default in some instances. "It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race" and "[n]o competent defense attorney would introduce such evidence about his own client." The petitioner demonstrated both ineffective assistance of counsel and entitlement to relief under Federal Rule of Civil Procedure 60(b)(6), entitling him to a certificate of appealability. The matter is remanded for further proceedings.

**Dissent:** [Thomas, J] To reach its desired outcome, the majority "bulldozes procedural obstacles and misapplies settled law to justify it," but this fact-specific decision "leaves entirely undisturbed the black-letter principles of collateral review, ineffective assistance of counsel and Rule 60(b)(6) law that govern day-to-day operations in federal courts."

### [Beckles v United States](#), No. 15-8544 (3/6/2017)

The United State Sentencing Commission's advisory Sentencing Guidelines are not subject to constitutional

## US Supreme Court *continued*

challenges based on vagueness; the petitioner’s challenge to a residual clause of those Guidelines therefore fails. While the language is the same as language in the Armed Career Criminal Act of 1984 that this Court found unconstitutionally vague in 2015, and the government, as respondent, agrees with the petitioner that the Guidelines may be challenged on vagueness grounds, the challenged Guideline does not fall within the types of criminal laws that have been found void for vagueness. The Guidelines “do not fix the permissible range of sentences” but “merely guide the exercise of a” sentencing court’s discretion. Since purely discretionary sentencing is not unconstitutionally vague, the present system of guided discretion surely is not. Further, the advisory Guidelines “do not implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement.” This holding does not render the Guidelines immune from all constitutional scrutiny; they are, for example, subject to *ex post facto* analyses.

**Concurrence:** [Kennedy, J] While “cases may arise in which the formulation of a sentencing provision leads to a sentence, or a pattern of sentencing, challenged as so arbitrary that it implicates constitutional concerns,” the “existing principles for defining vagueness cannot be transported uncritically to the realm of judicial discretion in sentencing. Some other explication of the constitutional limitations likely would be required.”

**Concurrence:** [Ginsburg, J] As the official commentary to the Sentencing Guideline in question specifically designated the petitioner’s “offense of conviction—possessing a sawed-off shotgun as a felon—a ‘crime of violence,’” there is no claim that the residual clause was vague as applied to him. No more encompassing ruling is required here.

**Concurrence:** [Sotomayor, J] Today’s holding, that the “Sentencing Guidelines as a whole are immune from vagueness challenges,” is unnecessary to resolve the case and is “deeply unsound.” In most cases, the Guidelines are the basis for whatever sentence is imposed; they should be susceptible to vagueness challenges.

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### [Pena-Rodriguez v Colorado](#), No. 15-606 (3/6/2017)

The general, centuries-old rule that jury verdicts, once entered, cannot be called into question based on comments or conclusions expressed by jurors during deliberations must give way “where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant ....” The Sixth Amendment requires this exception to the no-impeachment rule. Trying to rid the jury of every anomalous behavior “would be to expose it to unrelenting scrutiny,”

and “[i]t is not at all clear . . . that the jury system could survive such efforts to perfect it.” But given “that racial bias implicates unique historical, constitutional, and institutional concerns . . . [a]n effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.” Further, safeguards to protect the right to an impartial jury may fail to disclose racial bias, and “there is a sound basis to treat racial bias with added precaution.” While jurors are free not to discuss the case after they serve, they may choose to do so, as in this case when two jurors approached defense counsel after the verdict to relay concerns about another juror’s deployment of a dangerous racial stereotype to conclude the petitioner was guilty and his alibi witness unworthy of belief, and to encourage other jurors to join him in convicting on that basis. A racial-bias exception to the no-impeachment rule has been utilized in 17 jurisdictions “with no signs of an increase in juror harassment or a loss of juror willingness to engage in searching and candid deliberations.” The experience in those jurisdictions, and future experience under this decision, “will inform the proper exercise of trial judge discretion in these and related matters.”

**Dissent:** [Thomas, J] The majority’s holding under the Sixth Amendment is incompatible with that provision’s text and with precedent. While the states at the time of the founding took mixed approaches to the issue of impeaching a verdict, the “no-impeachment rule had become firmly entrenched in American law” by the time the Fourteenth Amendment was ratified, and while some states have curtailed or abandoned the no-impeachment rule, the question “should be left to the political process ....”

**Dissent:** [Alito, J] The majority, “with the admirable intention of providing justice for one criminal defendant,” today “rules that respecting the privacy of the jury room, as our legal system has done for centuries, violates the Constitution.” In saying that the processes used to protect defendants’ Sixth Amendment rights are less effective when racial bias is involved, the Court addresses only two of the four identified in precedent—voir dire and pre-verdict reporting by other jurors of inappropriate statements during deliberation—and “fails to make a sustained argument about either.” Nothing in the Sixth Amendment’s text or history, or the inherent nature of the right to a jury trial, “suggests that the extent of the protection provided . . . depends on the nature of a jury’s partiality or bias.” Nor would recasting this as an equal protection case provide a ground for limiting the exception to cases involving racial bias. The decision “will invite the harms that no-impeachment rules were designed to prevent.”

## US Supreme Court *continued*

### Rippo v Baker, No. 16-6316 (3/6/2017)

The Nevada Supreme Court did not ask the required questions with regard to the petitioner's motion to disqualify the judge presiding over his case on the grounds that the district attorney's office prosecuting the petitioner was playing a role in a federal bribery investigation of the judge. The state high court reasoned that the petitioner had not made allegations that would support an assertion that the "judge was actually biased in this case," but actual bias is not required. Due process may require recusal "when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" The case is remanded for further proceedings not inconsistent with this decision.

## 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](http://www.nycourts.gov/reporter/Decisions.htm).

### People v Aragon, 28 NY3d 125, 42 NYS3d 646 (11/1/2016)

The accusatory instrument, reviewed under the standard for that of a misdemeanor complaint because the defendant waived prosecution by information, was facially sufficient in alleging that the defendant illegally possessed "brass metal knuckles ...." The term, under its common as well as its dictionary definition, gave the defendant "a clear description of the object recovered from his pocket at a specific time and place." The accusatory instrument did not have to indicate that the arresting officer had training and experience in identifying brass knuckles.

### People v Bank, 28 NY3d 131, 42 NYS3d 651 (11/1/2016)

The record supports the Appellate Division's findings that, while trial counsel incorrectly advised the defendant that he was subject to mandatory consecutive sentences, there was no possibility of the defendant being offered a plea carrying a reduced sentence and therefore the incorrect advice could not have affected the outcome of the defendant's case.

Defense reliance on the expert testimony of a clinical pharmacist rather than a forensic psychiatrist as to the effect of the defendant's medications on his mental health

was a reasonable strategy that cannot be questioned in hindsight.

### People v Chery, 28 NY3d 139, 42 NYS3d 655 (11/1/2016)

It was not improper to allow the prosecutor to impeach the defendant on cross-examination at trial with his omission during a postdetention statement to police of information about events he testified to in his direct examination. The constitutional rights to remain silent and to due process were not implicated as the prior statement in which the omissions occurred was spontaneous, not the product of interrogation. The defendant had "elected to provide some explanation of what happened at the scene, and it was unnatural to have omitted the significantly more favorable version of events to which he testified at trial ...."

**Concurrence:** [Rivera, JJ] The error in allowing the prosecution to impeach the defendant on cross-examination, using his selective silence during "a non-exculpatory, spontaneous, pre-Miranda statement to police at the scene of the arrest," was harmless.

### People v Ocasio, 28 NY3d 178, \_\_ NYS3d \_\_ (11/1/2016)

"[T]he accusatory instrument[,] alleging that defendant possessed a metal, extendable striking weapon with a handle grip, was sufficient to charge him with possessing a 'billy' under Penal Law § 265.01 (1) ...." The statute does not define the term, and while billies at the time of enactment were generally wooden, the well-understood character of the term also encompasses an extendable, metal baton.

**Dissent:** [Rivera, JJ] "While both billies and extendable batons have been used as police batons at different points in history, they are distinct objects." If the latter "is to be treated as a per se weapon, imposing criminal liability without proof of intent, that decision must be made by the legislature. As is obvious from the statute's exclusion of other dangerous weapons, the legislature chooses which weapons are per se illegal under Penal Law § 265.01 (1), and which weapons require the People to establish a defendant's possession was with the intent to use unlawfully, as provided under Penal Law § 265.01 (2)."

### People v Pabon, 28 NY3d 147, 42 NYS3d 659 (11/1/2016)

The indictment charging the defendant with first-degree course of sexual conduct was not time-barred; CPL 30.10(3)(f) tolled the statute of limitations until the accuser reached age 18. The defendant's contention, that the provision did not apply because applying it would render superfluous the five-year limitations period in CPL for-

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mer 30.10(3)(e), was properly rejected. His “proposed construction can neither be squared with the text, legislative purpose, and history of the relevant statutory provisions, nor can he find support in logic and reason.”

While the trial court should not have admitted over objection an investigator’s testimony expressing the opinion that the defendant had lied during an interview, and it cannot be presumed that a judge sitting as fact-finder knows that testimony must be disregarded despite erroneous admission of that testimony, the error here was harmless. The court stated on the record that it did not rely on the investigator’s judgment.

The defendant’s contention that a judge sitting as fact-finder “may not look at unadmitted documents, take notes, or use electronic devices during the proceedings” is rejected. A judge may take notes and use computers and other technological instruments in discharging judicial duties attendant to overseeing a trial while also fulfilling the role of factfinder.

**Concurrence:** [Pigott, J] “I would affirm for reasons stated in the memorandum of the Appellate Division (126 AD3d 1447 [2015]).”

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**People v Smith, 28 NY3d 191, 43 NYS3d 771  
(11/1/2016)**

The holding in *People v Catu* (4 NY3d 242 [2005]) does not apply retroactively in enhanced sentence proceedings. Under *Catu*, courts accepting guilty pleas to offenses for which imposition of postrelease supervision (PRS) is required must ensure that the defendants are aware of the PRS requirement. The defendants here challenged use of prior convictions resulting from pre-*Catu* guilty pleas to adjudicate them second violent felony (Smith) and persistent violent felony (Fagan) offenders following post-*Catu* convictions. The defendants’ pre-*Catu* convictions were not obtained in violation of the law as it existed at the time of those convictions. The holding in *Catu*, a new rule not dictated by precedent, falls within no applicable recognized exception to federal or state retroactivity principles governing the application of constitutional rights to convictions predating the announcement of such rights.

**Concurrence:** [DiFiore, CJ] “In my view, defendants’ original convictions were constitutionally obtained under this Court’s jurisprudence and permissibly used as predicate convictions to enhance defendants’ sentences.”

**Dissent:** [Rivera, J] Distinguishing the convictions here from prior holdings “belies case law, legislation, and fairness ....”

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**People v Brewer, 28 NY3d 271, \_\_\_ NYS3d \_\_\_  
(11/17/2016)**

The trial court did not err, in this case involving sexual abuse of two minors, by allowing the prosecution to elicit evidence about the distinctive manner in which the defendant and consenting adult women engaged in sexual acts. That the evidence corroborated the accusers’ narrative “does not render it propensity evidence, because corroboration and propensity are distinct concepts.”

Allowing the minors’ mother to testify about the disclosure one of them made about the abuse was admissible under the prompt outcry and excited utterance exceptions to the hearsay rule.

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**People v Francis, 28 NY3d 1034, 42 NYS3d 676  
(11/17/2016)**

There is no basis for disturbing the defendant’s guilty plea where the “Supreme Court had jurisdiction over the case when it corrected an error in a decision issued one day prior based on an objective fact and thereby reinstated certain counts of defendant’s indictment.”

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**People v Gayden, 28 NY3d 1035, 42 NYS3d 667  
(11/17/2016)**

The issue of whether a second officer, arriving at the scene of a first officer’s encounter with the defendant and another man, had reasonable suspicion to pursue the defendant upon seeing him yell an expletive and flee is a mixed question of law and fact. There is record support for the lower courts’ determination, requiring affirmance.

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**People v Johnson, 28 NY3d 1048, \_\_\_ NYS3d \_\_\_  
(11/17/2016)**

“There is record support for the conclusion that the nearly 4½ year delay between the crime and the indictment ‘did not deprive defendant of his due process right to prompt prosecution’ ... [and] [t]his is not a circumstance where ‘a lengthy and unjustifiable delay in commencing the prosecution . . . require[s] dismissal even though no actual prejudice to the defendant is shown’ ....”

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**Matter of Odunbaku v Odunbaku, 28 NY3d 223,  
43 NYS3d 799 (11/17/2016)**

Where a party is represented by an attorney, the time requirements set out in Family Court Act 439 (e) “for objections to a support magistrate’s final order, when the order is served by mail, do not begin to run until the order is mailed to counsel.” Here, the Family Court Clerk mailed to the parties, but not their lawyers, orders granting a petition to modify a child support order and denying a cross petition. Because the attorney for the mother did not learn of the orders until later, and was not immediately given all of the papers upon going to the Family Court’s

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record room, the mother's objections to the orders were filed 41 days after the orders were mailed. The statute's 35-day time limit runs from mailing "to a 'party or parties,'" but it was enacted after the decision in *Matter of Bianca v Frank* (43 NY2d 168 [1977]), so that the Legislature is presumed to have been aware of that case's requirement that "once counsel has appeared in a matter a Statute of Limitations or time requirement cannot begin to run unless that counsel is served with the determination or the order or judgment sought to be reviewed' ...."

**People v Davis, 28 NY3d 294, \_\_ NYS3d \_\_ (11/21/2016)**

The evidence was legally sufficient to support findings that the defendant's assault on the decedent was an actual contributory cause of death, induced by the stress of the assault, and was a reasonably foreseeable result of the defendant's actions. The medical examiner's testimony noted the decedent's obesity and hypertensive cardiovascular disease as the causes of death, and while the manner of death in the written autopsy report was given as "undetermined" the medical examiner opined that but for the violent struggle, the decedent would not have died when he did. And the jury could conclude that heart failure, induced by trauma and stress, was a directly foreseeable consequence of the defendant's acts of breaking the decedent's jaw and leaving him on the floor amid blood spatters in his home.

Surveillance video clips showing a man who resembled the defendant and detailed phone records of the accomplices sufficiently corroborated the testimony of the accomplice as to burglary and robbery. And questions about image-overlap in the video clips culled from the surveillance system went to the weight, not the admissibility, of that evidence.

**Dissent in Part:** [Rivera, JJ] The prosecution did not establish that the death of the 6-foot one inch, 270-pound, 41-year-old decedent, who was able to engage his attacker, was a foreseeable consequence of the defendant's acts.

**People v Jones, 28 NY3d 1037, 42 NYS3d 669 (11/21/2016)**

The trial court properly admitted hearsay evidence of a woman's questions to police as to whether they had seen the defendant trying to get into a truck and whether they were "going to get him," posed at the scene after an officer saw the defendant, carrying a tile cutter and duffle bag, enter an open FedEx delivery truck, rummage through its front compartment, walk around to the back, and walk away as the officer approached. The woman's comments met the present sense impression exception to

the hearsay rule. The defendant's Confrontation Clause challenge to admission was not preserved.

**People v Stephens, 28 NY3d 307, \_\_ NYS3d \_\_ (11/21/2016)**

The Syracuse Notice Control Ordinance (Ordinance), prohibiting "the creation of 'unnecessary noise' emanating beyond 50 feet from a motor vehicle operated on a public highway," is not unconstitutionally vague. This case is distinguishable from that in *People v New York Trap Rock Corp.* (57 NY2d 371 [1982]), as the ordinance here defines "unnecessary noise" using an objective standard and tailors the prohibition to a specific context, *ie* audibility of a radio or similar device at least 50 feet from the vehicle on a public highway.

**People v Tardi, 28 NY3d 1077, \_\_ NYS3d \_\_ (11/21/2016)**

The police towing of the defendant's vehicle from the parking lot of the store where the defendant was arrested for shoplifting was consistent with the police department's written policy. The decision to tow met criteria including ensuring the safety of the vehicle, which would otherwise remain unattended indefinitely in a lot often the site of vandalism, against the expressed desire of the store. There is no indication that the police suspected the vehicle contained evidence of further criminal activity, and the defendant's challenge to the inventory search is unpreserved.

**Dissent:** [Rivera, JJ] The tow and search of the vehicle were unreasonable and therefore unconstitutional. The car was not related to the underlying arrest, was not impeding traffic or implicating public safety, was not of a luxury type at "appreciable risk of vandalism or theft," and was registered to the defendant's mother. "[T]here was no community caretaking justification for impounding" it.

**People v Aviles, 28 NY3d 497, \_\_ NYS3d \_\_ (11/22/2016)**

The Spanish-speaking defendant's claims, that he was denied equal protection and due process where pursuant to police department practice the Intoxicated Driver Testing Unit that administered a breathalyzer test did not also administer a physical coordination test because of a language barrier, are rejected. A suspect's inability to comprehend and speak English does not, by itself, implicate the existence of a "suspect class" entitled to strict scrutiny of alleged acts of intentional discrimination. The determination here was made solely on the basis that the officer was prevented from administering the test due to the language differences and the practice withstands rational basis review.

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No denial of due process occurred because there is no right to have police assist a defendant in preparing a defense or to perform a certain investigative step that may provide helpful defense information, and no right to have a qualified interpreter during the pre-arrest investigation of possible intoxicated driving.

**Dissent:** [Rivera, J] That denying coordination tests to non-English speakers ensures that tests given are reliable, and that requiring it would be “administratively impracticable and burdensome,” does not justify “a policy that potentially places certain individuals in a better position than others to defend against criminal charges ....” An informal policy of giving English speakers access to potentially exculpatory evidence while denying the same process to those with limited language skills stemming from national origin “is unconstitutional and counter to our sensibilities of fairness.”

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### People v Couser, 28 NY3d 368, \_\_ NYS3d \_\_ (11/22/2016)

Where the defendant and others approached five people, the defendant pulled a gun and told the five to get on the ground or he would kill them, then kicked a purse belonging to one of the five toward a companion, who took it before the defendant fired a gun, shooting one of the five, the completed robbery of the purse was a separate and distinct act against one person, warranting a sentence consecutive to that for using the gun to attempt robbery of the other four.

The defendant claims that his *Alford* plea to the first-degree attempted murder charge relating to the person who was shot was involuntary because his attorney erroneously advised him that a sentence on that count could be made consecutive to that for the underlying robbery and attempted robbery convictions. Under caselaw in other Appellate Divisions extant at the time of the plea, the consecutive sentence was not legal, but the Fourth Department reached the opposite conclusion in this case. “Under these circumstances, ... counsel’s advice . . . , even if erroneous,” did not render the representation ineffective.

The *Alford* plea was valid despite the defendant’s claim that the court improperly failed to perform a factual allocution. The *Alford* plea was taken because the defendant would not admit – and testified at the trial that led to a hung jury as to the attempted first-degree murder count that he did not have – the intent to kill the person who was injured. The extensive trial evidence described by both the prosecutor and defense counsel was sufficient to support the finding that the plea was appropriate.

**Dissent in Part, Concurrence in Part** [Fahey, J] The majority’s decision as to the consecutive sentences

imposed for various crimes of which the defendant was convicted at trial “will result in an irrational parsing of the actions of defendants.” The majority fails to resolve definitively the issue of whether the sentence imposed following the plea to attempted first-degree felony murder was required to run concurrently with that imposed for the underlying felony; concurrent sentences are required. However, because the prosecution could have corrected their failure to specify which robbery count underlies the attempted felony murder count, the defendant’s decision to enter an *Alford* plea to obtain the minimum concurrent sentence was knowing and rational.

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### Matter of Henry v Fischer, 28 NY3d 1135, \_\_ NYS3d \_\_ (12/15/2016)

Where the appellant, a prison inmate, “plainly requested access to specific documents and witnesses” during a tier III disciplinary hearing and “the Hearing Officer denied some of those requests,” the appellant “cannot be deemed to have waived his challenges simply because he failed to make specific objections at the hearing.” [Footnote omitted.] The order dismissing the appellant’s CPLR article 78 proceeding brought to challenge the tier III guilt finding is reversed and the matter remitted to the Supreme Court for further proceedings in accordance with this decision.

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### People v Hernandez, 28 NY3d 1056, \_\_ NYS3d \_\_ (12/15/2016)

In this sexual abuse case, the trial court did not err by admitting as an excited utterance statements made by the child to her parents immediately upon getting off the bus about alleged touching by the defendant bus driver. “The evidence established that the child was in a highly emotional state when she first stepped off the bus and that she continued to cry inconsolably as she uttered the phrase ‘Señor Bus’ to her mother and father at home and made” demonstrative gestures. Any error in admitting evidence that the child repeated the phrase and gesture three hours later at a hospital was harmless in light of physical and circumstantial evidence.

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### People v Morales, 28 NY3d 1087, \_\_ NYS3d \_\_ (12/15/2016)

The Appellate Term erred by granting the prosecution’s motion to dismiss the defendant’s direct appeal based on the defendant’s involuntary deportation from the country. The prosecution relied on an intermediate appellate court decision that has now been reversed. The reversing opinion in *People v Harrison* (27 NY3d 281, 284 [2016]) stated that direct appeals may not be dismissed due to involuntary deportation, regardless of the issues

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raised on appeal, without regard for whether there was any causal relationship between the conviction being appealed and the deportation. The matter is remitted to the Appellate Term for further consideration.

**People v Pastor, 28 NY3d 1089, \_\_ NYS3d \_\_ (12/15/2016)**

The defendant had an opportunity to move to withdraw his guilty plea based on an alleged justification defense and failed to do so, leaving his challenge to the plea’s validity unpreserved and unreviewable.

He also failed to preserve his contention that the trial court failed to advise him of the immigration consequences of the plea. The court told him during the plea colloquy that he could face deportation as a result of pleading guilty if he was not a citizen “and if he was confused about that issue, he was obligated to move to withdraw his plea on that ground before the sentencing court ....”

**People v Stewart, 28 NY3d 1091, \_\_ NYS3d \_\_ (12/15/2016)**

The issue framed by the prosecution, “that an inmate who wishes to waive his right to be present at resentencing should not be required to convey that waiver by personal appearance in court, and that defendant properly waived his right to be present by having his counsel speak on his behalf,” is not presented by the record here. No express waiver, oral or written, appears, nor “can waiver or forfeiture of the right to be present be inferred from defendant’s actions or inaction” here.

**People v Brown, 28 NY3d 392, \_\_ NYS3d \_\_ (12/20/2016)**

A prosecutor’s off-calendar statement of readiness under CPL 30.30 is presumed truthful and accurate; that presumption can be rebutted by a defendant’s demonstration that the prosecution was not, in fact, ready when the statement was filed. If the prosecution says they are not ready after filing an off-calendar statement of readiness and the defense challenges such statement, the prosecution “must establish a valid reason for their change in readiness status to ensure that a sufficient record is made for the court to determine whether the delay is excludable.” As the defendant bears the ultimate burden of showing that the prior readiness statement was illusory, there is not a rule requiring the prosecution “to establish that exceptional facts or circumstances arose after they filed their off-calendar statement of readiness causing their present unreadiness for trial.” In two cases here, dis-

missal on 30.30 grounds was not warranted. In the third, the record is insufficient to determine whether a statement of readiness was illusory, requiring remittal.

**Dissent in Part, Concurrence in Part:** [Rivera, J] “The law requires more than an ephemeral declaration of readiness susceptible to being rendered meaningless during the course of a defendant’s prosecution.” Requiring the prosecution to show “some exceptional fact or circumstance” to avoid being charged with time between announced readiness and unreadiness at the next court appearance would not absolve the defendant of the ultimate burden. But the prosecution cannot ignore its responsibility of being ready on time.

**People v Bryant, 28 NY3d 1094, \_\_ NYS3d \_\_ (12/20/2016)**

The Appellate Division erred in finding that the defendant’s waiver of the right to appeal was invalid where the trial court separately explained the rights forfeited by pleading guilty, had the defendant allocute to the facts of the offenses, and only after that allocution turned to the waiver of the right to appeal. The detailed written waiver, which “stated, among other things, that ‘the right to appeal is separate and distinct from other rights automatically forfeited upon a plea of guilty,’” accompanied a verbal waiver. During that colloquy, the defendant said he understood the following statements by the court: that “‘you are waiving your right to appeal’ ...[and] ‘that this conviction, or these convictions will be final, that a court will not review what we have done here, other than some residual rights that remain ....’” This record sufficiently demonstrates that the defendant “knowingly and intelligently waived his right to appeal.”

**People v Clark, 28 NY3d 556, \_\_ NYS3d \_\_ (12/20/2016)**

The defendant’s claim that his lawyer was ineffective for pursuing a misidentification defense as the defendant insisted rather than a justification defense, including when the jury inquired whether acting defensively negated an intent to kill, is rejected under the circumstances presented. Evidence, including surveillance video footage, eyewitness testimony, and some physical evidence, showed that the defendant was attacked on the street; the defendant and codefendant entered his apartment building and came back out with an object said to be a gun; shots were fired and one person was struck as he ran away; the defendant was chased by others into his building; and as the defendant and another struggled, that person was shot dead. Some evidence indicated that the defendant had a gun and was the shooter, but at least one witness could not identify the defendant as the shooter. Offering a misidentification defense here was not “self destructive,” and if successful would have resulted in

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acquittal of all charges, while a justification defense would have resulted in acquittal only of the murder charge, not as to the assault charge that was based on the shooting of the person who was running away. “[W]e cannot say that counsel’s representation was constitutionally deficient at the time because he vigorously pursued the defense defendant approved rather than the one defendant rejected outright.”

Given the state of the law at the time of the defendant’s trial, failure to object to the court ordering the courtroom cleared during voir dire to make room for prospective jurors did not constitute ineffective assistance of counsel.

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**People v Morgan, 28 NY3d 516, \_\_ NYS3d \_\_  
(12/20/2016)**

The trial court’s supplemental instructions, given after polling the jurors and discovering that the jury had not reached a unanimous verdict as to all counts, was not coercive. The judge “stressed that the jurors should ‘attempt’ to reach a verdict,” which left open the possibility of principled disagreements that would prevent unanimity, and did not overemphasize the need to return a verdict, suggest that they would be “failing in their duty” if they did not reach a verdict, or indicate they “would be subject to ‘prolonged deliberations’ ....” Instructions just two hours prior to the supplemental charge included ample cautionary language about not surrendering honest views of the evidence, and the continuation of deliberations for a full day after the supplemental instructions indicates the jury was not coerced.

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**People v Perkins, 28 NY3d 432, \_\_ NYS3d \_\_  
(12/20/2016)**

The lower courts’ finding that two of four lineups in this case were not unduly suggestive lacks record support. Three weeks after choosing the defendant’s picture from a photo array in which all fillers as well as the defendant were depicted in visible dreadlocks, each of four complainants viewed a physical lineup in which the defendant was the only participant with long dreadlocks, and all identified the defendant as the robber. The trial court granted the defendant’s motion to suppress the lineup as to two complainants who had described the assailant as having dreadlocks, and denied it as to the two who had not. But a bright line rule that the suggestiveness of a lineup turns on whether a distinctive feature figured prominently in a witness’s prior description of the individual in question is unworkable and unwise. “Rather, a witness’s prior description is but one factor a court should consider in determining whether the lineup is one that

“create[s] a substantial likelihood that the defendant would be singled out for identification’ ....” The lineup identification by the two complainants who had not mentioned dreadlocks should have been suppressed too. As one of them did not identify the defendant at trial, leaving only the lineup identification to link him to that incident, that count must be dismissed. An independent source hearing must be held as to the other complainant.

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**People v Bridgeforth, 28 NY3d 567, \_\_ NYS3d \_\_  
(12/22/2016)**

The courts below erred in holding that the defendant failed to make a prima facie showing of unconstitutional discrimination in the prosecutor’s use of peremptory strikes during jury selection to exclude dark-skinned women. The Equal Protection Clause of the New York State Constitution prohibits discrimination based on “‘race, color, creed or religion,’” research and analysis reveal the existence of “[d]iscrimination on the basis of one’s skin color—or colorism” and here “we acknowledge color as a classification separate from race for *Batson* purposes ....” As defense counsel alleged that the prosecutor was excluding dark-skinned women, and the prosecutor gave no non-discriminatory reason for excluding one of those women, the trial court erred by not seating that juror.

**Concurrence:** [Garcia, J] The well-established mootness doctrine precludes consideration here of whether the defendant met the “step-one burden of identifying a pattern of discrimination against a cognizable group,” because the trial court did not rule on that issue before the prosecution moved on to the question of race-neutral reasons for the challenges. Having disregarded the mootness doctrine, the majority “dramatically expands our *Batson* jurisprudence beyond what any court has done before ....” The analysis here should begin and end with the prosecution’s failure to provide a race-neutral reason for striking the juror in question.

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**People v Finkelstein, 28 NY3d 345, \_\_ NYS3d \_\_  
(12/22/2016)**

The lower courts’ finding in this first-degree coercion case that a jury instruction on the lesser included offense of second-degree coercion was not warranted is affirmed. While the two crimes can be identical when based on actions instilling fear of physical injury or properly damage, as in this case, the lesser charge is warranted only in the unusual situation where the actions lack “‘the heinousness ordinarily associated with this manner of commission of the crime’ ....” The defendant’s threats to drive away his former girlfriend’s clients, hurt her physically, and even kill her have the heinous quality contemplated by the statute for the higher degree offense.

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The defendant forfeited his right to proceed pro se in pre-trial proceedings by abusing his phone and law library access privileges while incarcerated in a way that jeopardized his ability to prepare for trial. He was allowed to represent himself at trial.

**Dissent:** [Rivera, J] “I would reverse defendant’s conviction because the court assumed the jury’s fact-finding role and mistakenly denied defendant’s request for a lesser included offense charge.” The majority perpetuates an error in our law. Since the Court has read “into the statutes a fact-based difference between the two crimes, it was incumbent upon the judge to submit the misdemeanor and felony charges to the jury and to explain that the misdemeanor is appropriate if the defendant’s conduct is not heinous.” [Footnote omitted.]

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### [People v Flowers](#), 28 NY3d 536, \_\_ NYS3d \_\_ (12/22/2016)

Reimposition of the same sentence, following the defendant’s successful appeal based on the improper consideration of a crime dismissed for lack of legally sufficient evidence, did not amount to a mode of proceedings error making preservation unnecessary. Defense counsel’s failure to object at resentencing did not constitute ineffective assistance of counsel as the “[d]efendant’s claim concerning his resentencing is not a winning argument.” That claim, “that the court’s failure to reduce his sentence raised a presumption that the court relied on improper criteria,” is novel and, as the Appellate Division determined, “had no chance of success’ ....” While a defendant may obtain relief without a presumption by showing “actual vindictiveness or continued reliance on improper criteria at resentencing,” that is not apparent on the record here. “[T]he resentencing court provided on-the-record, permissible, and wholly nonvindictive reasons substantiating defendant’s sentence.” Those included the defendant’s criminal history of three prior felonies, a parole violation, and a probation report describing him as a significant risk to community safety.

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### [People v Miller](#), 28 NY3d 355, \_\_ NYS3d \_\_ (12/22/2016)

The trial court abused its discretion by precluding all defense inquiry of prospective jurors regarding their views on involuntary confessions, based in part on the prosecution’s uncertainty as to whether the defendant’s inculpatory statements would be introduced at trial. Jurors’ “ability to follow the law and disregard an involuntary confession went to the heart of determining whether those jurors could be impartial and afford defendant a fair trial.” As for the prosecution’s uncertainty

about whether the statement would be introduced, the court had ways to address potential speculation and prejudice without violating the defendant’s right to adequate jury voir dire, such as telling prospective jurors that, while it was not known if any statements would be put into evidence, the law required that statements found to be involuntary be disregarded.

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### [People v Patterson](#), 28 NY3d 544, \_\_ NYS3d \_\_ (12/22/2016)

Where subscriber information in prepaid cell phone records was not introduced for the truth of the matters asserted in that information, it was admissible as non-hearsay evidence. The complainant provided to police a cell phone number used by an accomplice who was at the complainant’s home by invitation at the time of the burglary/robbery. Records showed that the cell phone had been used to send and receive calls to a phone registered to a person with the same last name as, and an address and date of birth associated with, the defendant. That subscriber information was introduced not to prove who had activated the phone’s account but to show that the account had some connection, however tenuous, to the defendant, which would be helpful to the jury in assessing the reliability of the complainant’s identification of the defendant as one of the assailants whose faces were partially obscured at the time of the incident. As the subscriber information was not hearsay, the defendant’s arguments relating to the business records exception are misplaced.

**Concurrence:** [Rivera, J] “Based on our existing case law, the subscriber information was admissible for the nonhearsay purpose of completing the narrative leading to defendant’s arrest. To the extent the court erroneously permitted use of the evidence beyond this limited purpose, the error was harmless.”

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### [People v Warrington](#), 28 NY3d 1116, \_\_ NYS3d \_\_ (12/22/2016)

The Appellate Division erred by finding that the trial court should have excused for cause a prospective juror who said “I feel the same” after another potential juror said he could not be impartial where the case involved the death of a child. The juror who said he could not be impartial was dismissed after “the court was unable to elicit an unequivocal assurance of impartiality from him,” but the juror who said, “I feel the same,” was not excused for cause and defense counsel exercised a peremptory challenge to remove her. That juror, during the court’s further examination of her, was rehabilitated when she made unequivocal assurances of impartiality.

The defendant’s alternative challenge to his conviction with respect to the legal sufficiency of the evidence,

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which was rejected by the Appellate Division, cannot be considered here, as crediting it would provide the defendant more relief than provided by the Appellate Division. The case is remitted to the Appellate Division for consideration of the defendant's alternative challenges not specifically addressed there.

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**Matter of Corrigan v New York State Off. of Children & Family Servs., 2017 NY Slip Op 01020 (2/9/2017)**

No statutory procedure exists for obtaining early expungement of reports alleging child abuse "when the parents are not formally investigated but are instead assigned to the Family Assessment Response" (FAR) track created under Social Services Law 427-a. This provision, unlike Social Services Law 422, includes no reference to early expungement, or any expungement, although there is a statutory obligation to maintain a sealed record of a FAR-assigned report for 10 years. And the FAR track is geared toward provision of social services, not investigating allegations to assess blame. It is for the Legislature, not the courts, to provide any resolution of the criticism raised here, that "'a person not suspected of child abuse' and placed on the FAR track has fewer remedies than one 'who was suspected of child abuse, which suspicion was later determined unfounded' upon investigation."

The claim that the absence of early expungement is unconstitutional as applied is unpreserved for review.

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**People v Flanagan, 2017 NY Slip Op 01018 (2/9/2017)**

The Appellate Division properly affirmed the defendant's convictions for sixth-degree conspiracy and two counts of official misconduct for actions the defendant took, while working at a police department, to effectuate the return of unvouchered stolen property with the goal of terminating without an arrest the investigation of a friend's son for theft. On an issue of first impression, "[w]e now hold that when a conspirator subsequently joins an ongoing conspiracy, any previous statements made by his or her coconspirators in furtherance of the conspiracy are admissible against the conspirator pursuant to the coconspirator exception to the hearsay rule." Further, where there is no argument that any unequivocal intent to withdraw from the conspiracy was communicated to the coconspirators, statements made by them after the defendant ceased alleged active involvement were also admissible.

There was legally sufficient evidence of an agreement to commit official misconduct given the coconspirators' testimony, the defendant's admissions in emails, and abundant circumstantial evidence. As to official miscon-

duct for malfeasance, the evidence supported the conviction; return of the stolen property without informing the prosecutor that an investigation was underway and without contacting the attorney for the son "was not an authorized exercise of official functions, that defendant knew that the official actions taken were unauthorized, and that these actions were undertaken with the intent to obtain a benefit." As for official misconduct by nonfeasance, the evidence supports a finding that termination of the felony investigation was not attributable to a failure "to perform a discretionary duty, but a disavowal of a sworn duty ...." To hold that the officers here did not refrain from performing duties as required by Penal Law 195.00(2) "would upset the balance in the criminal justice system that exists between the duty of the police officer and that of the District Attorney ...."

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**People v Guerin, 2017 NY Slip Op 01022 (2/9/2017)**

"Defendant Zachary T. Guerin challenges his conviction for trespassing on private property in violation of Environmental Conservation Law § 11-2113 (1). The law requires that the property be posted with warning signs bearing the name and address of the property owner (ECL § 11-2111 [2]). Since defendant did not raise below his specific challenge that the People's evidence of the location of 32 compliant signs is deficient, this claim is unpreserved and beyond our review (*see People v Hines*, 97 NY2d 56, 62 [2001]). To the extent defendant argues that evidence of one noncompliant sign undermined the People's case, the claim is similarly not within our powers of review ...."

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**People v Then, 2017 NY Slip Op 01021 (2/9/2017)**

Where the court stated on the record that it was unlikely that prospective jurors could see the orange correctional pants worn by the defendant for a half-day of jury selection, nothing on the record indicates the pants were visible to the jurors, and the clothing that was visible could not be readily identified as correctional wear, compelling him to wear the pants rather than grant an adjournment until civilian pants could be obtained did not deny him a fair trial.

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**People v Fisher, 2017 NY Slip Op 01143 (2/14/2017)**

"The courts below properly rejected defendant's claims that his plea is constitutionally infirm and that his codefendant's acquittal of the underlying felony renders defendant innocent. Neither claim is supported by existing precedent, and his innocence theory is counter to this Court's" precedents. The defendant's admission in an eve-of-trial guilty plea that he criminally assisted a codefendant who he knew and believed to have committed second-degree murder was not rendered a nullity by the

**NY Court of Appeals** *continued*

codefendant's subsequent acquittal of the murder. The prosecution's burden in first-degree hindering prosecution cases, to prove the commission of the underlying felony, also applies as to the lesser offense of second-degree hindering prosecution, but can be met by reliance on the defendant's admission that the assisted person did commit the crime. Collateral estoppel could not apply even if there was an identity of the parties, which is not decided here, because the guilty plea occurred prior to the codefendant's acquittal.

Notes of a police interview with the prosecution's major witness, provided to the defense only after the defendant's plea, "are not exculpatory and, regardless, would not have materially affected defendant's decision to plead."

**People v Pena, 2017 NY Slip Op 01142 (2/14/2017)**

The Appellate Division's affirmance of the consecutive sentences in this case involving three counts of predatory sexual assault, where the three separate and distinct criminal sexual acts occurred during a single transaction, is affirmed. The defendant failed to preserve his claim that the aggregate sentence violated the constitutional proscription against cruel and unusual punishment.

**People v Vining, 2017 NY Slip Op 01144 (2/14/2017)**

"The trial court did not abuse its discretion as a matter of law in admitting a phone call between defendant and his ex-girlfriend as an adoptive admission. ... That the call was recorded while defendant was incarcerated does not change our analysis." The court instructed the jury, pursuant to a detailed, defense-submitted charge, that the conversation between the defendant and the accuser was admitted for the limited purpose of having the jury decide if the defendant's failure to respond to accusations during the conversation constituted admissions by silence, and, if the jury so found, to give that admission whatever weight the jury deemed appropriate. The instruction included specific cautions in determining admission by silence, such as the possibility that the silence was attributable to reasons such as "his knowledge that anything he says may be used against him" or a belief "that efforts to exonerate himself under the circumstances would be futile." Given the evidence before the jury, which included the rocky relationship between the accuser and the defendant and several reasons to question the accuser's credibility, "the jurors could, in the simple exercise of their common sense, understand the significance of the call."

**Dissent:** [Rivera, J] "The majority's reasoning is contrary to both our law and principles of fairness because any inference of an admission from an inmate's silence during these recorded conversations is presumptively unsound ...." "Given defendant's awareness of his rights under *Miranda* and the multiple Rikers' warnings, an inference that defendant adopted the victim's accusatory statements is unjustified."

**People v Hao Lin, 2017 NY Slip Op 01253 (2/16/2017)**

The defendant's rights under the Confrontation Clause were not violated by trial testimony regarding the defendant's breath test where the testifying police officer "directly observed the test, but did not personally administer it." The testifying officer "testified based on his own observations and conclusions, rather than as a surrogate for his partner who actually administered the test" and who had retired and moved away. Further, "none of the nontestifying officer's hearsay statements were admitted ...." That the testifying officer did not personally perform or observe verification of the simulator solution temperature on the machine being used to analyze the defendant's breath for alcohol related only to whether there was a proper foundation for his testimony, not to a Confrontation Clause violation. The record does not support the Appellate Term's finding that an essential step in the testing procedure was missed.

**People v Maldonado, 2017 NY Slip Op 01254 (2/16/2017)**

"We agree with the Appellate Division that, to the extent preserved, defendant's legal sufficiency challenges to this trial record lack merit. However, we hold that counsel's overall performance fell below the 'meaningful representation' standard and defendant is entitled to a new trial ...."

**People v Staton, 2017 NY Slip Op 01257 (2/16/2017)**

"The Appellate Division's finding that the array was not unduly suggestive is supported by the record, and therefore beyond our further review .... Consequently, defendant's contention that the photo array tainted the lineup after his arrest, to the extent this argument is preserved, is without merit. Additionally, defendant's argument that he was denied the right to counsel is belied by the record ... and he has failed to demonstrate the absence of any strategic or legitimate explanation for counsel's silence and inaction at sentencing ...."

## First Department

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### [People v Brown](#), 142 AD3d 769, 37 NYS3d 111 (1st Dept 9/1/2016)

The defendant's conspiracy conviction was not supported by legally sufficient evidence. While there is sufficient evidence that a person by the same name as the defendant participated in the conspiracy, there is no record evidence that the defendant was identified as the same person. (Supreme Ct, New York Co)

### [People v Simmons](#), 142 AD3d 884, 39 NYS3d 128 (1st Dept 9/27/2016)

The court erroneously interfered with the deliberation process when it incorrectly instructed the jury that a verdict of guilty of third-degree grand larceny but not guilty of third-degree possession of stolen property was impermissible, and after further deliberation, the jury found the defendant guilty on both counts. A comparison of the elements of the crimes shows it is theoretically possible to have the mental state required to be guilty of third-degree grand larceny and lack the mental state necessary to be guilty of third-degree possession of stolen property. While it might be "permissible for a court to 'point out' what it sees as factual inconsistency in a mixed verdict and urge further deliberation, it may not, as the court did here, effectively mandate a factually consistent verdict in advance." (Supreme Ct, Bronx Co)

### [People v Gumbs](#), 143 AD3d 403, 38 NYS3d 169 (1st Dept 10/4/2016)

A new trial is required where the court erred by admitting the complainant's statements that merely conveyed his suspicion that the defendants were involved in his shooting as dying declarations, over the defendants' timely and specific objection. "Although the dying declaration may accuse his or her killer in conclusory language, '[t]he declaration is kept out if the setting of the occasion satisfies the judge, or in reason ought to satisfy him [or her], that the speaker is giving expression to suspicion or conjecture, and not to known facts'...." The prosecution did not allege that the defendants shot the complainant or that they were present when he was shot, but that they hired the shooter and provided the weapon and other help. (Supreme Ct, Bronx Co)

### [People v Samuels](#), 143 AD3d 401, 38 NYS3d 541 (1st Dept 10/4/2016)

The defendant is entitled to a hearing on his CPL 440.10 motion challenging the validity of his guilty plea on ineffective assistance of counsel grounds because counsel failed to advise the defendant that he could be deported based on the plea. The defendant alleged that if he was advised about deportation, he would have stood trial, even though he faced a possible lengthy prison sentence. The court erred in finding that the defendant's claim was "not 'credible,'" considering how long the defendant had lived lawfully in the United States and other factors. (Supreme Ct, Bronx Co)

### [People v Wiggins](#), 143 AD3d 451, 39 NYS3d 395 (1st Dept 10/6/2016)

The court correctly denied the defendant's speedy trial claim. While the six years between the shooting and the defendant's guilty plea was "extraordinary," there were many causes for the delay other than the prosecutor's strategic decision to secure the co-defendant's testimony by trying him first, and the record does not suggest that the prosecution acted in bad faith to gain a tactical advantage over the defendant. The defendant was charged with a very serious offense, and during a significant portion of his pretrial incarceration, he was also under indictment on unrelated charges. And the defendant does not claim that his incarceration prevented him from participating in his defense. (Supreme Ct, New York Co)

**Dissent:** The majority fails to consider that only five of the more than 50 adjournments were at the defendant's request and all other delays were caused by the prosecutor's "insistence on delaying defendant's trial in order to seek his codefendant's cooperation." Even if the prosecutor did not intend to gain a tactical advantage, it is "certainly foreseeable that a teenager at Rikers Island for a number of years would be likely to plead guilty ...."

### [People v Turner](#), 143 AD3d 582, 40 NYS3d 369 (1st Dept 10/20/2016)

The defendant's aggravated criminal contempt conviction is vacated and a new trial ordered because the court expanded the scope of the indictment, which was based on intentionally causing injury, by instructing the jury that the defendant "could be convicted if he acted intentionally or recklessly." The jury found the defendant not guilty of related charges requiring intent, so it is unclear if the conviction was based on a finding of intentional or reckless conduct. (Supreme Ct, New York Co)

**First Department** *continued*

**Matter of Athena H.M. v Samuel M., 143 AD3d 561,  
38 NYS3d 898 (1st Dept 10/20/2016)**

The court erred by granting a father’s motion to dismiss the mother’s custody petition without meeting with the subject child or considering new allegations of previous domestic abuse. The mother presented “sufficient evidence to warrant a plenary hearing to determine whether the totality of the circumstances warrants a modification of the custody order.” The changes of circumstance asserted by the mother included “the expressed preference of the younger child,” “his growing apprehension about staying with [the father] and evidence that she had sought treatment for issues relating to a history of domestic violence and that she had obtained new living quarters for herself and the younger child.” The matter is remitted for a hearing. (Family Ct, New York Co)

**Matter of Melinda M. v Anthony J.H., 143 AD3d 617,  
41 NYS3d 15 (1st Dept 10/25/2016)**

The court impermissibly deprived the father of his statutory right to assigned counsel where, during proceedings on the mother’s motion for modification of custody, the court dismissed the father’s attorney when the father was absent, failed to reassign counsel, and conducted several hearings, including a final award of custody to the mother, without the father present. The court “improperly determined that the father had defaulted on his vacatur motion” as the “father provided a reasonable excuse for his failure to appear” since there was no indication he received notice of the hearing and he “moved promptly to vacate his default,” and “there was no showing his intent to abandon the action, and there was no showing of prejudice to the mother.”

The court subsequently erred in determining the father was also in default for the motion hearing. When the case was called nearly two hours after the scheduled time, the father’s counsel said he believed the father was in the bathroom. The court allowed counsel to argue the motion without the father but subsequently found the father in default in contravention of caselaw about attorneys proceeding in their clients’ absence. The matter is reinstated and remitted “to a different jurist” for a full hearing. (Family Ct, Bronx Co)

**People v Lee, 143 AD3d 626, 40 NYS3d 80  
(1st Dept 10/27/2016)**

The court properly denied the defendant’s motion to suppress evidence found during an inventory search of his vehicle following his arrest where the police complied

with the New York Police Department Patrol Guide’s inventory search guidelines. That the items removed were “not on an ‘inventory’ form does not undermine the evidentiary value of the list, nor alter the conclusion that the procedures employed effectively limited the discretion of the officers conducting the search ....” (Supreme Ct, New York Co)

**Dissent:** The motion should have been granted where the police involved in the search testified that the search was investigatory, they did not comply with established search procedures, the prosecution “failed to establish that the search was not a ruse for general rummaging in order to discover incriminating evidence,” and there was no reasonable basis for a warrantless search of the vehicle.

**People v Williams, 145 AD3d 100, 40 NYS3d 94  
(1st Dept 10/27/2016)**

Review of the defendant’s challenge to the validity of his plea in the interest of justice is not appropriate where the sentence ultimately imposed, after the defendant was arrested between plea and sentencing, was within the sentencing range stated by the court when the defendant accepted a conditional plea, the defendant admitted he understood the terms of the plea, and this case does not present extraordinary or special circumstances. That the initial promised sentence was illegal does not change the analysis. “The Court of Appeals has implied that the illegality of the promised sentence does not, in itself, render a defendant’s guilty plea unknowing and involuntary ....” (Supreme Ct, New York Co)

**Dissent:** The court should exercise interest of justice review as “[t]his is one of those rare cases that not only presents a meritorious claim of a violation of due process during the plea process, but also raises a claim of significant public policy concerns.” “[B]ecause illegal sentencing promises can bear no assurance of enforcement, they undermine public confidence in plea bargains, and discourage defendants from entering these agreements.” “[C]ontrary to the majority’s suggestions, neither the CPL nor case law has established any rigid litmus test as to when we should exercise our interest of justice jurisdiction.”

**People v Bruno, 144 AD3d 413, 40 NYS3d 113  
(1st Dept 11/1/2016)**

The evidence was legally insufficient to establish the defendant’s accessorial liability for attempted murder where the prosecution failed to establish that the defendant shared the codefendant’s intent to kill the complainant. “The evidence did not support an inference that defendant’s presence [when the shooting occurred] could only be explained by his participation in a planned murder.” (Supreme Ct, Bronx Co)

**First Department** *continued***People v Hoey, 145 AD3d 118, 41 NYS3d 477  
(1st Dept 11/1/2016)**

The conviction is reversed because the defendant was “absent from colloquies before the trial judge relating to the admissibility of evidence of uncharged crimes and bad acts allegedly committed by defendant ....” While the defendant was present during initial arguments on admissibility a year earlier, conducted before a different judge, “it cannot be said with any degree of certainty that defendant’s presence at the pretrial *Molineux/Ventimiglia* hearing before the trial court would have been ‘useless, or the benefit but a shadow’ ....” Further, the record does not reflect that the defendant had an opportunity to review and discuss the *Molineux* summary with defense counsel before it was marked as an exhibit. On remand, the court should conduct a de novo *Molineux/Ventimiglia* hearing and place on the record its findings, including which, if any, exception applies to the uncharged crimes and bad acts and its balancing of the probative value and prejudice to the defendant. (Supreme Ct, New York Co)

**People v Crespo, 144 AD3d 461, 40 NYS3d 423  
(1st Dept 11/10/2016)**

The defendant is entitled to a new trial where the court summarily denied, without inquiry, the defendant’s requests to proceed pro se. The requests, made during jury selection, were timely. They were also clear and unequivocal; the defendant expressed repeatedly that proceeding pro se was “‘exactly’ what he wanted to do,” and making a request after the court refuses to appoint new counsel does not render it equivocal. And the record does not show that the defendant was disruptive before his requests were denied nor did the court find that the defendant would not comply with its directives if he was allowed to proceed pro se. (Supreme Ct, New York Co)

**Matter of Rossakis v New York State Bd. of Parole,  
146 AD3d 22, 41 NYS3d 490 (1st Dept 11/10/2016)**

The court correctly found that the Parole Board’s “decision was so irrational as to border on impropriety and was therefore arbitrarily and capriciously rendered” where it “focused exclusively on the seriousness of petitioner’s conviction and the decedent’s family’s victim impact statements ... without giving genuine consideration to petitioner’s remorse, institutional achievements, release plan, and her lack of any prior violent criminal history.” However, the court’s order directing the Board to focus on certain statutory factors over others is vacated.

The petitioner’s apology for her actions while maintaining that she was an abused victim does not indicate a lack of remorse for her actions because she might legitimately view herself as a battered woman even though the jury did not find that she met the exacting requirements for the defenses of justification and extreme emotional disturbance. The Board’s summary listing the petitioner’s institutional achievements and its use of language directly from Executive Law 259-i(2) violates that statutory ban on “making conclusory assertions ....” Also, “the Board inappropriately relied on claims in decedent’s family’s victim impact statements that were affirmatively rebutted by the objective evidence [including her COMPAS score showing a low risk for violence or substance abuse] supporting petitioner’s release.” Repeated parole denials undermine this Court’s prior decision to reduce the petitioner’s sentence from 23 to life to 15 to life. (Supreme Ct, New York Co)

**People v Mobley, 144 AD3d 477, 40 NYS3d 426  
(1st Dept 11/15/2016)**

The court properly dismissed the defendant’s felony assault charges on the basis that the felony of unauthorized practice of medicine, a strict liability crime with no mens rea, cannot serve as a predicate felony to support a felony assault charge. A crime lacking a mens rea element cannot satisfy the doctrine of constructive malice. (Supreme Ct, New York Co)

**Matter of Michael B., 145 AD3d 425, 42 NYS3d 141  
(1st Dept 12/1/2016)**

In this article 6 matter, the court “erred in several respects.” First, the court gave improper weight to the time the father had temporary custody, when he delegated most of the child care to the grandmother and the child retained a strong bond with the mother. Second, the court erred by weighing the father’s income favorably against the mother’s Social Security income in light of the mother’s superior capability to meet the child’s intellectual and emotional needs. Third, the record does not support the court’s conclusion that the neutral evaluator was not, in fact, neutral in his recommendation that favored the mother. Fourth, the court disregarded crucial evidence that the mother’s mental illness was in remission and ignored that she had continuous custody and care of three other children throughout the history of this matter and “there was no evidence that she was unable to care for them.” Lastly, the court improperly determined this to be a relocation case; as there was no prior custody order, relocation was only one factor to be considered. Even if it had been a relocation case, the record supports awarding custody to the mother. The case is remanded for entry of an

## First Department *continued*

order encompassing specific provisions set out in this decision. (Family Ct, New York Co)

### Matter of Natasha W. v New York State Off. Of Children and Family Servs., 145 AD3d 401, 42 NYS3d 126 (1st Dept 12/1/2016)

An administrative law judge (ALJ) made an error of law by denying a mother's application to change an indicated child abuse report to unfounded, and the Supreme Court's order annulling the ALJ's decision is affirmed. The petitioner mother, who was caught shoplifting with her child in her custody, later offered an admission and the record was sealed. The investigation of child maltreatment based on this incident concluded that "there is no child[] likely to be in immediate or impending danger of serious harm" and no neglect proceeding was filed. Nevertheless, the report was closed as indicated and the Office of Children and Family Services (OCFS) denied the mother's request to change it to unfounded. The undisputed facts do not show that the petitioner put the child in "imminent danger," which is the requisite standard for a finding of maltreatment. Additionally, "the ALJ's determination that petitioner's actions were reasonably related to a position in childcare, the field of study petitioner is pursuing, was not rational." The ALJ failed to consider the 10 factors for determining whether the acts giving rise to the report were relevant and reasonably related to employment in childcare, provision of foster care, or adoption, set forth in the OCFS publication "Guidelines for Determining Whether Indicated Instances of Child Abuse and Maltreatment are Reasonably Related to Employment or Licensure." (Supreme Ct, New York Co)

**Dissent:** The "petitioner's utilization of her five-year-old son to steal two coats and a pair of boots ... constituted maltreatment and was sufficiently egregious so as to create an imminent risk of physical, mental and emotional harm to the child" and "the ALJ's determination that petitioner's actions were reasonably related to employment in childcare was rational."

### People v Santos, 145 AD3d 461, 44 NYS3d 14 (1st Dept 12/6/2016)

The defendant is entitled to a hearing on his CPL 440.10 motion because there are factual issues regarding whether he was deprived of effective assistance of counsel. The defendant's allegation that counsel advised him that a guilty plea to a drug sale count with a sentence of probation would not subject him to deportation, but losing at trial would result in a prison sentence and deportation, is somewhat corroborated. The hearing should also

address the issue of when the defendant recognized the actual consequences of his conviction. Whether the defendant "could have rationally rejected the plea offer under all the circumstances of the case, including the serious consequences of deportation and his incentive to remain in the United States" is another issue of fact that must be considered in the hearing. (Supreme Ct, New York Co)

### People v Small, 145 AD3d 478, 43 NYS3d 283 (1st Dept 12/8/2016)

The court committed reversible error by denying the defendant's challenge for cause of a juror who expressed doubt about her ability to be impartial given that two of her siblings were crime victims. Upon further inquiry regarding her statement that the fact that her siblings were victims would "probably" prevent her from being impartial, the juror told the court that she could set aside what happened to them and there was no reason she would not be fair and impartial. However, the following day she expressed that her experiences "probably will" impact her ability to be fair, and the court did not conduct further inquiry. "[A] prospective juror's statements during voir dire must be taken in context and as a whole" and the totality of her responses did not indicate the ability to be impartial. Although the juror told defense counsel that she would not have trouble returning a not guilty verdict if she had doubts, that was "insufficient to elicit an unequivocal assurance of her impartiality, as this questioning failed to confront the very issue she had raised: that her siblings' experiences would affect her, thus making it less likely that she might have any reasonable doubt." (Supreme Ct, Bronx Co)

**Dissent:** The court properly denied the defendant's challenge for cause based on the totality of the responses by the juror during voir dire. This court should defer to the trial court, which had the opportunity to observe the juror's demeanor, when determining whether her assurance of impartiality was credible.

### People v Delin, 145 AD3d 566, 43 NYS3d 47 (1st Dept 12/15/2016)

The court erroneously failed to convey to the jury that an acquittal on the top count of attempted murder based on a justification defense would preclude consideration of additional charges. The court also erred by omitting a significant portion of the charge on excessive force, namely that the prosecution must prove that the defendant unnecessarily used additional force after the assailant no longer posed a threat and that the additional force caused serious physical injury. The omission allowed the jury to convict the defendant on the basis that, although he was justified in the initial attack, the defendant was not justified in inflicting subsequent wounds on the fleeing com-

**First Department** *continued*

plainant, even if those wounds did not constitute serious physical injury. (Supreme Ct, New York Co)

**People v Durham, 145 AD3d 545, 44 NYS3d 33  
(1st Dept 12/15/2016)**

The defendant's suppression claim is barred because he pleaded guilty before the court ruled on his motion to suppress. However, there is merit to the defendant's claims regarding the strip and visual body cavity searches. "The police officers' generalized knowledge that drug sellers often keep drugs in their buttocks, and the fact that no drugs were found in a search of defendant's clothing" did not provide the requisite reasonable suspicion to strip search the defendant. Moreover, the searches were not conducted in a reasonable manner where the defendant's clothes were torn from his body and the search was conducted in the presence of four or five officers. "The violence of the search—which resulted in physical injury to defendant requiring transfer to the hospital—was unnecessary particularly given that defendant was not being charged with a violent offense." (Supreme Ct, New York Co)

**People v Moore, 145 AD3d 552, 44 NYS3d 27  
(1st Dept 12/15/2016)**

The defendant is entitled to a new trial because the court improperly excluded the defendant's family members from the courtroom during an undercover officer's testimony. The prosecution did not show that the defendant's family members needed to be excluded and the court failed to make a specific allowance for the family members, even though defense counsel asserted the right of the family members to be present. (Supreme Ct, New York Co)

**Second Department**

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**People v Neree, 142 AD3d 1026, 37 NYS3d 562  
(2nd Dept 9/14/2016)**

The Sixth Amendment and the NYS Constitution afford a defendant the right to counsel or self-representation, but not both. Defendants that elect to represent themselves do not have the right to standby counsel.

Thus, the County Court was within its discretion to deny the defendant's request for hybrid representation and his right to self-representation was not violated. The defendant was not prejudiced by the handling of evidence related to a charge of which he was acquitted. (County Ct, Suffolk Co)

**People v Drinkwine, 142 AD3d 1101, 37 NYS3d 622  
(2nd Dept 9/21/2016)**

Where the defendant contested the amount of his restitution at the time of plea and sentencing and the record is insufficient to establish the proper amount, the defendant is entitled to a hearing for the determination of the proper amount of restitution. A presentence report prepared almost a year before sentencing and without probation contacting the complainants is not a sufficient record of the proper amount of the complainants' actual out-of-pocket losses. (Supreme Ct, Kings Co)

**People v Alfonso, 142 AD3d 1180, 38 NYS3d 566  
(2nd Dept 9/28/2016)**

A detective's statements undermined the *Miranda* warnings where the detective told the defendant that he had "an opportunity now to tell [his] side of the story, if [he] want[ed] to," indicated that in his "younger days" he would have bounced the defendant off "about...five walls," stated he was giving the defendant an opportunity to give his side of the story, and that the defendant "potentially [could] help [himself]." When the defendant began to give a statement, the detective stopped him and referred to the *Miranda* warnings as a "bullshit form that [he] had to get past" and did so to "downplay" it and "minimize [its] importance." The detective began to read the defendant his *Miranda* rights, but then qualified by saying "obviously, anything that you say can also help you and benefit you in certain ways, you know what I mean," then added "potentially." However, the failure to suppress the defendant's statements to police was harmless where evidence presented at trial included testimony from multiple witnesses, the defendant was identified by both complainants and three accomplices, another witness testified that the defendant had confessed one of the crimes to her and showed her the gun used, and surveillance video showed the defendant entering the building where the crime occurred shortly before the report of the shooting. (County Ct, Dutchess Co)

**Matter of N'Zion H., 142 AD3d 1170, 38 NYS3d 243  
(2nd Dept 9/28/2016)**

The court erred in determining that the mother had neglected her child by taking a quantity of baby aspirin resulting in hospitalization. The Department of Social

**Second Department** *continued*

Services failed to show “that the child’s physical, mental, or emotional condition was in imminent danger of becoming impaired ....” While DSS may have had concern about the mother’s parental behavior, “it is undisputed that the mother made arrangements for the care of the subject child during the period that she was hospitalized.” The finding of neglect is reversed, the petition is denied, and the proceeding is dismissed. (Family Ct, Westchester Co)

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**People v Thomas, 142 AD3d 1191, 38 NYS3d 65  
(2nd Dept 9/28/2016)**

The court did not err in dismissing certain counts in an indictment based on the expiration of the statute of limitations. The counts dismissed charged first-degree offering a false instrument for filing, violations of Administrative Code of City of NY § 3-711(3), second-degree falsifying business records, tampering with public records, making a punishable false written statement, and second-degree perjury. The counts were based on activity that occurred more than five years before the filing of the felony complaint and the subject counts did not constitute “continuing crimes” for purposes of the statute of limitations for felonies and misdemeanors. Further, an audit by the NYC Campaign Finance Board did not operate to toll the limitations period for the counts at issue, nor did the statements the defendants allegedly made or their grand jury testimony. Finally, any delay in the appointment of a special prosecutor did not affect the limitations period. (Supreme Ct, Richmond Co)

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**People v Dhillon, 143 AD3d 734, 39 NYS3d 181  
(2nd Dept 10/5/2016)**

Where the defendant was convicted of first-degree manslaughter, which is not an armed felony under CPL 1.20 [41], the trial court erred in determining, in effect, that the defendant was not an eligible youth pursuant to CPL 720.10 (3) and in failing to determine whether the interest of justice would be served by adjudicating the defendant a youthful offender. The defendant’s sentence must be vacated and remitted for resentencing after a determination as to whether the defendant should be afforded youthful offender status. (Supreme Ct, Queens Co)

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**People v Houston, 143 AD3d 737, 38 NYS3d 259  
(2nd Dept 10/5/2016)**

The warrantless search of the defendant’s briefcase was not justified as a search incident to a lawful arrest because the circumstances did not support a reasonable belief that the briefcase contained a weapon. The officer’s

testimony at the suppression hearing contained no statements that he acted out of concern for his safety or that of the public, or to prevent the destruction of evidence. The error was not harmless. That said, there was no reasonable possibility that the evidence supporting the tainted charge had a “spillover effect” on the defendant’s other charge, so that charge stands. (Supreme Ct, Kings Co)

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**People v Rifino, 143 AD3d 741, 39 NYS3d 37  
(2nd Dept 10/5/2016)**

The sentencing court erred in running the defendant’s sentences for three counts of third-degree criminal possession of a controlled substance and one count of fourth-degree criminal possession of a controlled substance under a superior court information (SCI) consecutively with his sentence for second-degree conspiracy under an indictment. Consecutive sentences cannot be imposed absent a showing that the charges in question were separate and distinct acts, and here the plea-based convictions under the SCI were for offenses based on the same acts as those serving as overt acts underlying the conspiracy charged in the indictment. (County Ct, Suffolk Co)

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**Matter of Smith v McCarthy, 143 AD3d 726,  
38 NYS3d 588 (2nd Dept 10/5/2016)**

The court erred by failing to grant a father’s objection to the order of the Support Magistrate that denied a downward modification of his child support obligation. The father had lost his employment by no fault of his own and “made diligent good faith efforts to obtain new employment” where, unable to find local employment commensurate with his skills and former income locally, he had taken a job out of state. Leaving that job when the mother of his other children refused relocation that would have allowed for adequate parenting time with those children did “not preclude a finding that he diligently sought employment in his field ....” The father then took a job with much lower pay. Both the Support Magistrate and the court failed to take into account the father’s efforts and position, and the matter is remitted to determine a reduced obligation for the father. (Family Ct, Nassau Co)

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**People v Sotomayer, 143 AD3d 686, 38 NYS3d 271  
(2nd Dept 10/5/2016)**

For purposes of sex offender risk assessment, lengthy periods during which the defendant has been at liberty following the offense are an appropriate mitigating factor, allowing for a permissible downward departure from the presumptive risk level. Here, the defendant was at liberty for approximately 15 years without re-offense after a previous incarceration for a sex offense; accordingly, a downward departure was warranted. However, a two-level

**Second Department** *continued*

departure was not appropriate in light of the seriousness of the defendant's offense. (Supreme Ct, Richmond Co)

**Matter of State of New York v Stanley D., 143 AD3d 832, 38 NYS3d 808 (2nd Dept 10/5/2016)**

The prosecution "failed to establish by clear and convincing evidence that the appellant had 'serious difficulty in controlling' himself from committing sex offenses within the meaning of" the Mental Hygiene Law, where the only evidence in the record indicated that, despite a long history of sex offenses, the appellant had committed no offense since 2002, had complied with all requirements of his strict and intensive supervision and treatment (SIST), and had been successful in treatment. Accordingly, his petition to terminate his SIST should have been granted. (Supreme Ct, Westchester Co)

**People v Flores, 143 AD3d 840, 38 NYS3d 805 (2nd Dept 10/12/2016)**

"The defendant was sentenced as a predicate felon on the basis of a prior conviction in Pennsylvania for the offense of burglary.... However, as correctly conceded by the People, there is no element in the Pennsylvania statute comparable to the element in the analogous New York statute that an intruder 'knowingly' enter or remain unlawfully in the premises (Penal Law § 140.20). The absence of this scienter requirement from the Pennsylvania burglary statute renders improper the use of the Pennsylvania burglary conviction as the basis of the defendant's predicate felony adjudication ...." (Supreme Ct, Kings Co)

**People v Roberts, 143 AD3d 843, 38 NYS3d 618 (2nd Dept 10/12/2016)**

The defendant was entitled to a hearing and new determination of his motion to vacate his conviction for second-degree possession of marijuana on the grounds that his counsel was ineffective in advising him on the immigration consequences of his guilty plea. The defendant's attorney allegedly told him that there would be no immigration consequences to his guilty plea if he received a sentence of one year or less in jail, and that immigration authorities would not seek him out in a neighboring state where he resided, because his case was in New York. Such specific advisements from defense counsel cannot be ameliorated by a general admonishment from the prosecutor at the plea allocution, without any regard to the defendant's specific circumstances, that a guilty plea could result in deportation. And the defendant's averral that he

had been a lawful permanent resident for 24 years, has a 7-year-old child, has close family in the U.S., and held the same job for 10 years, adequately raised a question of fact as to whether he would have pleaded guilty absent the alleged ineffective advice. (Supreme Ct, Westchester Co)

**People v Gray, 143 AD3d 909, 39 NYS3d 239 (2nd Dept 10/19/2016)**

That the police used handcuffs to detain the defendant did not transform the detention into "a full-blown arrest" where the defendant was observed near the site of the crime and a short time had passed since its commission.

However, the court "committed reversible error when, after the jury sent a verdict sheet indicating an impasse as to two counts, the court, without the defendant present, sent the verdict sheet back to the jury with a message, through a court officer, that the jury was to send a note indicating its issues." Such an instruction constitutes a rejection of the verdict and, in effect, an instruction to continue deliberations, which is a material stage of the trial at which the defendant must be present. The action is an impermissible delegation of a judicial duty to a nonjudicial staff member and warrants a reversal and new trial. The error was per se reversible. (Supreme Ct, Queens Co)

**People v Thomas, 143 AD3d 923, 39 NYS3d 214 (2nd Dept 10/19/2016)**

Two evidentiary errors, both compounded by improper remarks made during the prosecution's summation, warrant a new trial. The court "allowed the prosecutor to impeach one of her own witnesses, who testified at trial that it was dark at the time of the shooting and she 'couldn't really see' the shooter," by reading that witness's grand jury testimony, "in which she stated that she recognized the shooter as a person going by the nickname E-Villian." During summation the prosecutor used the prior inconsistent statement as evidence in chief and urged the jury to disbelieve the witness's trial testimony. The court further "erred in allowing another witness to testify that a 'little girl said that [the defendant] shot [the victim]"; the prosecutor repeated the improper hearsay on summation and misrepresented the defendant's statements. These errors deprived the defendant of a fair trial. (Supreme Ct, Kings Co)

**People v Rivera, 143 AD3d 1002, 40 NYS3d 155 (2nd Dept 10/26/2016)**

The defendant was not required to raise at sentencing his claim that his sentencing as a persistent violent offender violated CPL 400.15 and 400.16; he preserved his claims for appellate review by raising them in his CPL 440.20 motion.

**Second Department** *continued*

The defendant's sentence as a persistent violent felony offender was unlawfully imposed where the prosecution never submitted a formal statement pursuant to CPL 400.16 and the court, at sentencing, did not ask the defendant whether he had seen the prosecutor's submission, nor did it give the defendant an opportunity to controvert allegations about his prior felony convictions and said nothing about the defendant's status as a persistent violent felony offender until it actually imposed sentence. (Supreme Ct, Kings Co)

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**People v Martinez, 144 AD3d 708, 39 NYS3d 810  
(2nd Dept 11/2/2016)**

The sentencing court erred in summarily ordering restitution absent a proper factual record from which the amount of medical expenses actually incurred by the injured accuser could be inferred. The defendant's argument that the restitution order was not lawfully imposed is not subject to the preservation rule, nor is it foreclosed by the defendant's appellate waiver. The defendant was entitled to a hearing as to whether and how much restitution should be made.

The court further erred in imposing a surcharge in excess of five percent of the total restitution, "as the record contains no affidavit from the official or organization responsible for collecting the surcharge demonstrating that the actual cost of collection and administration will exceed five percent ...." (County Ct, Orange Co)

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**People v Balcerak, 144 AD3d 833, 40 NYS3d 554  
(2nd Dept 11/9/2016)**

The defendant was entitled to a hearing to determine whether he received ineffective assistance of counsel where his CPL 440.10 motion to vacate his conviction alleged that he was not informed of the Sex Offender Management and Treatment Act (SOMTA) consequences of his guilty plea. It was error to summarily deny the defendant's motion to vacate where the evidence "was sufficient to raise a question of fact as to whether he was unaware of SOMTA prior to pleading guilty and as to whether he would have rejected the plea agreement if he had been aware of SOMTA ...." (Supreme Ct, Nassau Co)

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**People v Chazbani, 144 AD3d 836, 40 NYS3d 513  
(2nd Dept 11/9/2016)**

The trial court erroneously found that the defendant lacked standing to challenge a search. The defendant's statement to police that he owned the vehicle they want-

ed to search was, without contrary proof, sufficient to establish the defendant's standing.

Because the Appellate Division has no power to review issues decided in an appellant's favor or not ruled upon by the trial court, the prosecution's argument that police had probable cause for the search cannot be reached here, and the case must be remitted for further proceedings. Because resolution of the issue raised by the prosecution on appeal could affect the determination of the suppression motion, it is appropriate to hold the defendant's appeal in abeyance and remit the case for consideration of the alternative issue. (Supreme Ct, Queens Co)

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**People v Henry, 144 AD3d 940, 41 NYS3d 527  
(2nd Dept 11/16/2016)**

The hearing court's determination that the defendant's statements to law enforcement officials as to his robbery charges were obtained in violation of his Fifth Amendment rights and must be suppressed cannot be reviewed on appeal. The admission of other statements regarding a factually interwoven murder charge must also be precluded. First, questioning about the shooting would almost certainly lead to responses regarding the robbery given the prosecution's theory that each crime involved the same modus operandi (*ie* the defendant used a specific vehicle when acting as a getaway driver in both cases); "[a]ny statement by the defendant that he drove an individual in the black Sonata to and from the scene of the shooting would tend to incriminate him with respect to the robbery." Second, the record shows that the impermissible questioning of the defendant on the robbery charges was calculated to induce admissions on the murder charge and "was not fairly separable from questioning on" that charge. Under either theory, the court should have granted suppression of statements relating to the murder charge. (Supreme Ct, Nassau Co)

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**Matter of Justin L., 144 AD3d 915, 41 NYS3d 277  
(2nd Dept 11/16/2016)**

Where the evidence showed a child to be "healthy, athletic, and doing well in school while in the mother's care," the court erred in determining that the mother had neglected the child "because her behavior indicated that she suffered from a mental illness that placed the child at risk of emotional harm." While a neglect finding may be predicated on imminent danger to a child's condition resulting from a parent's mental illness, "proof of mental illness alone will not support a finding of neglect." The order is reversed on the facts, the petition denied, and the proceeding dismissed. (Family Ct, Kings Co)

**Second Department** *continued***People v Enoe, 144 AD3d 1052, 42 NYS3d 48  
(2nd Dept 11/23/2016)**

In a trial on the charge of second-degree criminal possession of a weapon, the court erred in preventing defense counsel from cross-examining a police officer in regards to a federal lawsuit against him for falsely arresting a man on made-up weapons charges. There is no prohibition against cross-examining a law enforcement witness as to prior bad acts; rather, “the same standard for good faith basis and specific allegations relevant to credibility applies, as does the same broad latitude to preclude or limit cross-examination ....” The error was not harmless, as the officer-witness’s testimony was the key evidence establishing the defendant’s possession of the weapon. (Supreme Ct, Kings Co)

**People v Davydov, 144 AD3d 1170, 43 NYS3d 74  
(2nd Dept 11/30/2016)**

The cumulative effect of defense counsel’s failure to seek a severance of the defendant’s trial from that of one of his codefendants and “the failure to request a missing witness charge for an eyewitness who was not called to testify” deprived the defendant of effective assistance of counsel. Where the codefendant’s counsel pursued an antagonistic defense and strategy that was irreconcilable with the defense put forth by the defendant’s counsel, there was no legitimate strategic reason for defendant’s counsel not to request a severance. And where the prosecution failed to call a witness who was “knowledgeable about a material issue in the case, could have provided first-hand noncumulative testimony regarding the subject incident, and was available to be called as a witness,” there was no legitimate strategic reason not to seek an instruction that an unfavorable inference could be drawn from the prosecution’s failure to call that witness. (Supreme Ct, Queens Co)

**People v Reyes, 144 AD3d 1178, 43 NYS3d 79  
(2nd Dept 11/30/2016)**

The defendant correctly contends that the evidence was legally insufficient to support his conviction of second-degree conspiracy, an unpreserved challenge reached in the exercise of our interest of justice jurisdiction. The second-degree conspiracy charge was based on the defendant’s alleged agreement to engage in the crime of second-degree criminal possession of a controlled substance, which requires the knowing and unlawful possession of drugs of an aggregate weight of four or more ounces. “Here, there was legally insufficient evidence that the

defendant agreed to possess four or more ounces of cocaine ....” (Supreme Ct, Kings Co)

**People v Shen Chao Chen, 144 AD3d 1119,  
42 NYS3d 284 (2nd Dept 11/30/2016)**

For purposes of a sex offender risk assessment, possession of a BB gun was insufficient to warrant the assessment of 30 points under risk factor 1 for being armed with a dangerous instrument during the incident, absent evidence that the gun was loaded and operable, that it was used as a bludgeoning object, or that the defendant threatened to use the gun against the accuser. (Supreme Ct, Queens Co)

**People v Cobb, 145 AD3d 738, 42 NYS3d 342  
(2nd Dept 12/7/2016)**

That count three, third-degree robbery, is an inclusory concurrent count of second-degree robbery, count two, is not a basis for dismissing count three, because the defendant pleaded guilty to the entire indictment as provided for in CPL 220.10(2). The defendant’s reliance on CPL 300.40(3)(b), which calls for dismissal of lesser counts upon conviction of the greater, is misplaced, as it applies only to trials. (County Ct, Suffolk Co)

**People v Jean-Bart, 145 AD3d 690, 41 NYS3d 906  
(2nd Dept 12/7/2016)**

“[T]he Supreme Court did not err in determining the defendant’s risk level, for purposes of the Sex Offender Registration Act, based on a risk assessment instrument prepared by the District Attorney’s office instead of the Board of Examiners of Sex Offenders,” where the defendant was classified as a “sex offender” after he had been released from prison. The court’s assessment of the defendant’s risk factors was proper. (Supreme Ct, Nassau Co)

**People v McEachern, 145 AD3d 741, 43 NYS3d 425  
(2nd Dept 12/7/2016)**

At resentencing, the court failed to state any reason for not adjudicating the defendant as a youthful offender. The record also did not reflect the court’s independent consideration of youthful offender treatment. Thus, the matter is remitted “for resentencing after a determination of whether the defendant should be adjudicated a youthful offender.” (Supreme Ct, Kings Co)

**Matter of Tralisa R. v Max S., 145 AD3d 727,  
43 NYS3d 427 (2nd Dept 12/7/2016)**

In this paternity proceeding, the court erred by directing the parties to submit to genetic marker testing without

**Second Department** *continued*

resolving the attorney for the child’s request that the court address the issue of equitable estoppel first. When equitable estoppel is raised the court must make a determination about the child’s best interests before ordering genetic testing. (Family Ct, Kings Co)

**People v Darius B., 145 AD3d 793, 43 NYS3d 471  
(2nd Dept 12/14/2016)**

Where the defendant was 14 at the time of the alleged crime and had no juvenile or criminal record, the interest of justice is served by treating him as a youthful offender, thereby relieving him of the onus of a criminal record, despite noncompliance with his “Project Redirect” diversion program. (Supreme Ct, Kings Co)

**Matter of Cavalry v Simpson, 145 AD3d 885,  
44 NYS3d 112 (2nd Dept 12/21/2016)**

In this matter involving a petition for grandparent visitation, the court “improvidently exercised its discretion in precluding [the grandfather] from presenting the testimony of the children’s maternal aunt, with whom the children resided after their mother became ill, on the basis that the testimony was irrelevant.” Even without that testimony, the maternal grandfather “demonstrated, prima facie, that it would be in the children’s best interests to have visitation with him.” The grandfather established that he had a loving and meaningful relationship with the children and had continued that relationship until his daughter’s death. The record does not support the contention that the grandfather had only petitioned for visitation after the mother’s death to antagonize the children’s father. The order is reversed; the matter is remitted for “a continued fact-finding hearing to determine whether visitation with the petitioner would be in the best interests of the children and for a new determination of the petition thereafter.” (Family Ct, Queens Co)

**People v Brisco, 145 AD3d 1028, 45 NYS3d 474  
(2nd Dept 12/28/2016)**

The cumulative effect of the prosecutor’s improper comments during summation deprived the defendant of a fair trial, where the prosecutor created a hypothetical defense argument that “invited the jury to reject defense counsel’s argument not on the merits, but merely because it was raised by defense counsel”; referenced facts not in evidence; alleged that certain disputed facts were undisputed; “appealed to the jury’s sympathy and generalized fear of crime”; and argued that “the jury should not be fooled into considering [the defendant] a ‘gentleman’”

and that the defendant’s precinct photo showed his “true colors.” (Supreme Ct, Queens Co)

**People v Lippe, 145 AD3d 1035, 44 NYS3d 199  
(2nd Dept 12/28/2016)**

The defendant sought to introduce his confession to police to discredit his prior confession to a friend, but “a defendant’s confession may be excluded as hearsay when the defendant offers it as exculpatory proof of a different fact.” (County Ct, Westchester Co)

**People v Mohamed, 145 AD3d 1038, \_\_ NYS3d \_\_  
(2nd Dept 12/28/2016)**

The defendant was denied a fair trial when, after a *Sandoval* hearing that limited the prosecutor’s questioning regarding prior convictions to whether he had been convicted of a misdemeanor and a felony on the relevant dates, the trial court allowed the prosecutor to elicit testimony from the defendant about the underlying facts of a previous burglary conviction over defense counsel’s repeated objections. The court’s failure to properly limit the prosecutor’s cross-examination as stated in its *Sandoval* ruling amounted to an implicit change in that ruling after the defendant had taken the stand in good-faith reliance on it. (Supreme Ct, Queens Co)

**People v Ringel, 145 AD3d 1041, 44 NYS3d 152  
(2nd Dept 12/28/2016)**

Physical evidence and statements should have been suppressed and the indictment dismissed because the police did not have an objectively reasonable belief that entering the defendant’s parents’ home was necessary to prevent immediate harm to an occupant. The police responded to a notification that was usually a false alarm, the defendant had a key to the house, and his sister was able to corroborate his explanation of his connection to the house via telephone. “[A]n impermissible entry is not rendered retroactively permissible when the police find evidence of criminality inside.” (Supreme Ct, Nassau Co)

**Third Department**

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**Matter of Chloe N., 143 AD3d 1114, 39 NYS3d 286  
(3rd Dept 10/20/16)**

The court denied the father an opportunity to meaningfully participate in the hearing on accusations he had

**Third Department** *continued*

abandoned his child. A resident of another state, the father was allowed to participate in hearings by phone. After the parties agreed to engage in “permanency mediation” to determine if they could agree on terms of a surrender, and before a backup trial date, they informed the court that an agreement had been reached. A new court date was subsequently set, which was not denoted as a trial date. On that date the court demanded that the case be tried despite the father’s absence and counsel’s representations that counsel had understood that court date to be a pre-trial conference, and was not prepared to try the case having not communicated with the father for that purpose. The court denied counsel’s request to be removed, indicated its decision would be reserved for 30 days, and took testimony; but before the date to which decision had been reserved, the court issued a decision regarding abandonment and terminated the father’s rights. An order staying that order was apparently not served on the father or his attorney. On appeal the father contends that he communicated with and made efforts to visit his child and foster family and demonstrated his intent to continue a relationship with the child. Because the father was denied notice and opportunity to participate, the order terminating the father’s parental right is reversed and the matter is remitted. (Family Ct, Broome Co)

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**People v Drouin, 143 AD3d 1056, 39 NYS3d 302**  
(3rd Dept 10/20/2016)

The evidence was insufficient to show that the defendant landlord had the intent to permanently deprive his tenant of an ATV where the defendant contemporaneously expressed a plan to temporarily hold the ATV in order to force the tenant to return tools that the defendant believed the tenant had stolen and made no effort to use or sell the ATV. The defendant’s intent to benefit from temporary possession of the ATV in order to secure the return of his tools is not sufficient to support a larceny conviction. Because mens rea refers to the defendant’s mental state, not the mental state of “an objectively reasonable hypothetical defendant,” the fact that that the defendant may have been incorrect in his belief that the tenant had or could have had the tools is irrelevant. (County Ct, Franklin Co)

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**People v Griest, 143 AD3d 1058, 40 NYS3d 576**  
(3rd Dept 10/20/2016)

In this Sex Offender Registration Act proceeding, the court violated the defendant’s statutory and constitutional due process right to notice of points to be assigned against him by initially indicating that it was not assign-

ing points for the use of violence risk factor and then assigning ten points for that category after the defendant no longer had a meaningful opportunity to respond. Because he did not have a chance to object, he did not need to take further action to preserve the issue for review. (County Ct, Cortland Co)

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**People v Hakes, 143 AD3d 1054, 39 NYS3d 299**  
(3rd Dept 10/20/2016)

“While County Court can require a defendant to submit to the use of an electronic monitoring device if it determines that such a condition would advance public safety ..., it could not require a defendant to pay the costs associated with such monitoring since such costs do not fall within the category of restitution, but are more in the nature of a law enforcement expense ....” The court erred in imposing conditions of the defendant’s post-release supervision at sentencing; only the Board of Parole has the authority to impose such conditions. (County Ct, Sullivan Co)

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**People v Marquis A., 145 AD3d 61, 40 NYS3d 609**  
(3rd Dept 10/27/2016)

The first-degree robbery conviction was not contrary to the weight of the evidence. To satisfy the “display” requirement, the object displayed does not need to be a firearm; the defendant need only consciously display “something that could reasonably be perceived as a firearm, with the intent of forcibly taking property,” and the accuser actually perceives the display.

The court’s summary denial of youthful offender status was insufficient to satisfy the statutory mandate of CPL 720.10. Where the only barrier to youthful offender eligibility is an armed felony conviction, the court must determine on the record whether the defendant is an eligible youth by considering the factors set forth in CPL 720.10(3), even where the defendant has not asked for youthful offender treatment. Where there was no physical harm or injury, the defendant did not brandish or even touch the object the accuser believed was a weapon, and the display was fleeting and unaccompanied by threatening statements or gestures, sufficient mitigating factors that bear directly on the manner in which the crime was committed exist to render the defendant an “eligible youth” for purposes of youthful offender treatment. (Supreme Ct, Albany Co)

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**People v Brett W., 144 AD3d 1314, 42 NYS3d 362**  
(3rd Dept 11/17/2016)

Defense counsel was ineffective where counsel failed to inform the defendant about the prosecution’s initial plea offer before that offer expired, the defendant subse-

**Third Department** *continued*

quently accepted a less favorable plea offer, the defendant's uncontroverted testimony indicates she would have accepted the initial favorable plea offer, and there is no evidence that the court or prosecutor would have blocked the initial offer. The record indicates that there were means by which defense counsel could have contacted or met with the defendant and the defendant did not have an opportunity to meet with counsel before the offer expired and could not reach counsel by phone despite making at least one attempt after her initial court appearance. The prosecution is directed to reoffer the initial plea agreement. (County Ct, Franklin Co)

**Matter of Choice I., 144 AD3d 1448, 43 NYS3d 526**  
(3rd Dept 11/23/2016)

A finding of derivative neglect as to a newborn must be reversed because of the remoteness of hotline reports as to other children that, additionally, did not result in findings of neglect against the father. In the older of the reports, the subject father (age 18) had been staying with the parents of a child who was the subject to an indicated report, but the report did not specify which adult in the home was responsible for the reported events. Further, "the conduct that formed the basis for each of the indicated reports failed to demonstrate that respondent's understanding of the responsibilities accompanying parenthood were fundamentally flawed at the time of this proceeding ...." The orders are reversed, the petition dismissed, and orders of protection and supervision vacated. (Family Ct, Schenectady Co)

**People v Whyte, 144 AD3d 1393, 42 NYS3d 370**  
(3rd Dept 11/23/2016)

In a prosecution for tampering with physical evidence, the court erred in failing to charge the jury that a prosecution witness was an accomplice as a matter of law and that the jury could not convict the defendant on the witness's testimony without corroborative evidence. The defendant allegedly disposed of the jacket he was wearing during an alleged shooting and directed the witness to dispose of his boots. The witness testified that she had picked the defendant up at the same location as the jacket was later found and she disposed of the boots at his direction. She was arrested for a felony on the same day as the defendant, and entered into a cooperation agreement that allowed her to plead guilty to a misdemeanor in exchange for her truthful testimony. The error was not harmless as the defendant's guilt was largely based on the witness's testimony. (County Ct, Tompkins Co)

**People v Zeh, 144 AD3d 1395, 42 NYS3d 373**  
(3rd Dept 11/23/2016)

The defendant was deprived of the effective assistance of counsel where counsel failed to move to suppress statements made during an interrogation and physical evidence seized during execution of six search warrants. "[C]ounsel had everything to gain and nothing to lose by moving to suppress" both the statements and the physical evidence and no reasonable strategic basis existed for failing to do so. A colorable basis existed to challenge the statements as illegally coerced where the interrogation lasted 26 hours, the defendant was questioned by successive teams of investigators, and he was handcuffed and wearing a prison jumpsuit, and obtained in violation of his right to counsel where he already had counsel in a related pending case, the same officers were involved in questioning the defendant in both cases, and when he requested an attorney, he was told that it was "too late." Suppression of the statements not only would have excluded the inconsistent statements that were damaging to the defendant, but would have also provided a basis to exclude the physical evidence because the search warrants were obtained, in part, using information disclosed during the interrogation. (County Ct, Ulster Co)

**People v Waite, 145 AD3d 1098, 42 NYS3d 437**  
(3rd Dept 12/1/2016)

The court properly exercised its discretion in disqualifying the defendant's attorney and assigning new counsel where the attorney previously represented the mother of the alleged victim. While the attorney stated that he had not obtained confidential information from the mother that could affect his representation and objected to the disqualification, and the defendant was willing to waive the potential conflict, the mother testified at a hearing that she had shared information with the attorney that she considered secret, she would not waive confidentiality or agree to the representation, and the attorney's representation of the defendant would make it more difficult to testify at trial. (County Ct, Warren Co)

**People v Driscoll, 145 AD3d 1349, 44 NYS3d 269**  
(3rd Dept 12/29/2016)

The court erred in denying the defendant's motion to suppress evidence found during a traffic stop because the prosecution failed to meet its initial burden of showing that the stop was lawful. The deputy stopped the defendant's car because it had a temporary inspection sticker, but testified he had no idea whether the sticker was valid at the time and did not indicate that the sticker provided any other reason for him to be suspicious; instead, it was the deputy's "general practice" to stop vehicles with tem-

**Third Department** *continued*

porary stickers to ensure that the stickers had not expired. The display of a temporary inspection sticker “does not constitute grounds for a traffic stop absent a ‘specific articulable basis’ to believe that illegality is afoot ....” (County Ct, Chemung Co)

**People v Katsafaros, 145 AD3d 1343, 44 NYS3d 250 (3rd Dept 12/29/2016)**

Where the defendant pleaded guilty, in part, because the court specifically promised that the post-release supervision (PRS) part of his sentence would not exceed three years, that period was in the authorized range for the offense, the record does not suggest that the three years “had become improvident as a result of changed circumstances or new information,” and the defendant was not given a chance to withdraw his plea before the court imposed a 10-year period of PRS nor did he wish to do so, the defendant is entitled to specific performance of his plea agreement. Pursuant to the written plea agreement, the defendant retained the right to appeal his sentence where, as here, the sentence was not jointly recommended. (County Ct, Columbia Co)

**People v Montford, 145 AD3d 1344, 44 NYS3d 250 (3rd Dept 12/29/2016)**

The court erred in denying the defendant’s challenge for cause to a juror who stated that he knew several members of the prosecution staff, including an investigator with whom the juror and his wife had been friends for over 30 years, who was working on the defendant’s case, and who had already appeared in the courtroom and might have been present at trial. Further, the juror was working as a part-time patrol officer at the time of trial, had worked for a local police department in the county for almost 20 years, and was “the career fire chief” in a village in the county. The juror’s assurances of impartiality were inadequate under the circumstances; “[t]his juror’s long-established relationship could have ‘create[d] the perception that the accused might not receive a fair trial before an impartial finder of fact’ ....” (County Ct, Schenectady Co)

**Fourth Department**

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**People v Carter, 142 AD3d 1342, 38 NYS3d 855 (4th Dept 9/30/2016)**

Defense counsel’s failure to seek suppression of a gun, the defendant’s oral statements to the police, and the complainant’s identification testimony on the basis of unlawful police action constitutes ineffective assistance of counsel and survives the defendant’s guilty plea because the suppression error tainted the plea bargaining process. “With respect to the police encounter, the record on appeal contains only the arresting officer’s report. Based upon that report, we conclude that the suppression ‘issue is [a] close [one] under [the] complex *De Bour* jurisprudence’ ....” Suppression of the gun would have been dispositive of the criminal possession of a weapon count to which the defendant pleaded guilty. The defendant is entitled to a suppression hearing to determine the legality of the police action. (County Ct, Onondaga Co)

**People v Houston, 142 AD3d 1397, 38 NYS3d 368 (4th Dept 9/30/2016)**

The sentence is illegal where the court directed that the defendant’s sentence on the criminal possession of a weapon count run consecutively to sentences imposed for attempted murder and assault stemming from the same act. The prosecution did not prove that the defendant’s possession of a loaded firearm “‘was separate and distinct from’” the act of shooting the complainant. The judgment is modified such that the sentences will run concurrently. (County Ct, Niagara Co)

**People v Hutchings, 142 AD3d 1292, 38 NYS3d 863 (4th Dept 9/30/2016)**

The defendant is entitled to a reduction in restitution because the record evidence does not support the amount imposed for lost interest. The court imposed \$10,000 for lost interest, but the record reflects lost interest in the amount of \$7,281.42. The restitution is modified to reflect the amount on record plus the 5% surcharge. (County Ct, Cayuga Co)

**People v McKenzie, 142 AD3d 1279, 38 NYS3d 330 (4th Dept 9/30/2016)**

The defendant was deprived of the right to counsel where defense counsel allowed the defendant to choose a member of the jury. During peremptory challenges defense counsel stated, “[f]or the record, my client is insisting over my objection to keep juror number 21. So, jurors 20 and 21 will be on the jury.” Defense counsel did not merely take input from the defendant, but was “‘guided solely by defendant’s choice in the matter,’” and since jury selection is a tactical decision left to the judgment of

## Fourth Department *continued*

counsel, the defendant is entitled to a new trial. (County Ct, Monroe Co)

**Dissent:** “[T]hat defense counsel took defendant’s views into account in making the determination does not invalidate defense counsel’s choice.” The record does not indicate that the court permitted the defendant to override defense counsel’s decision, nor is there any indication that counsel’s decision to permit the juror was involuntary.

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### [People v Lane](#), 143 AD3d 1277, 38 NYS3d 869 (4th Dept 10/7/2016)

The court properly granted the defendant’s motion to suppress when it found that the testimony of a police witness was “unworthy of belief” and concluded that the prosecution did not meet the burden of establishing that the police action was legal. The court did not err by attempting to clarify issues when testimony provided by a police officer was confusing and contradictory. (Supreme Ct, Onondaga Co)

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### [People v Leubner](#), 143 AD3d 1244, 38 NYS3d 672 (4th Dept 10/7/2016)

Defense counsel did not waive the defendant’s right to a speedy trial under CPL 30.30 when he sent a letter requesting an opportunity to discuss a plea bargain before the case was presented to the grand jury. The speedy trial clock began running when the defendant was arraigned on Aug. 13, 2013. “Defense counsel did not explicitly state or even suggest in his letter that he was waiving his client’s rights to a speedy trial under CPL 30.30 ....” Therefore, the 166 days between Oct. 6, 2013 (the date of defense counsel’s letter) and Mar. 21, 2014 when an indictment was filed, should have been charged to the prosecution. The defendant’s motion to dismiss the indictment is granted because the statutory six-month period had passed when the prosecution announced readiness on Aug.19, 2014. (County Ct, Cayuga Co)

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### [People v Moss](#), 143 AD3d 1269, 39 NYS3d 346 (4th Dept 10/7/2016)

The court erred by denying the defendant’s motion to dismiss because he was denied the right to testify before the grand jury. The prosecutor’s Apr. 8, 2013 letter notifying the defendant of his right to testify did not inform the defendant of the time and place of the grand jury presentation as was required by CPL 190.50(5)(b) given the defendant’s written notice of Mar.1, 2013 stating his intent to testify. And “the prosecutor’s oral statement to defense counsel on Apr. 10, 2013 that ‘he will be presenting the

matter to the Erie County Grand Jury the next day’ was insufficient to satisfy the notice requirement inasmuch as it did not provide defendant with the requisite notice of the time and place of the grand jury presentation ....” (County Ct, Erie Co)

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### [People v Rozier](#), 143 AD3d 1258, 39 NYS3d 340 (4th Dept 10/7/2016)

The prosecutor’s blatant exaggeration of DNA evidence during summation was misconduct, and defense counsel’s failure to object to the statements denied the defendant effective assistance of counsel. A DNA expert testified that her analysis of the DNA mixture revealed that the “defendant was among 1 in 15 Americans who could not be excluded as a contributor.” However, “on summation, the prosecutor grossly exaggerated the DNA evidence as ‘overwhelming’ proof establishing defendant’s ‘guilt beyond all doubt’ and posited: ‘If the defendant had not possessed the gun, wouldn’t science have excluded him?’” The judgment is reversed and a new trial ordered. (County Ct, Erie Co)

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### [People v Smith](#), 143 AD3d 1236, 39 NYS3d 334 (4th Dept 10/7/2016)

The defendant is entitled to a hearing with regard to her CPL 440.10 motion to vacate the judgment convicting her of second-degree attempted murder and second-degree assault on the basis of ineffective assistance of counsel. The defendant asserted at trial that she was stabbed by the complainant from behind and his injuries occurred during a struggle for the knife. Her motion is supported by an expert’s opinion that the wound on her left arm pit could not have been self-inflicted. Defense counsel’s admitted failure to examine clothing said to contain holes matching a wound behind the defendant’s armpit, call a medical expert to explain the wound, and present such evidence to the jury, absent strategic explanation, would be “egregious and prejudicial,” denying the defendant a fair trial. The matter is remitted for a hearing limited to the location of holes in the clothing at issue. (County Ct, Oneida Co)

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### [People v Bailey](#), 144 AD3d 1562, 41 NYS3d 625 (4th Dept 11/10/2016)

The defendant was properly granted a new trial pursuant to a motion to vacate the judgment based on newly discovered evidence; advances in medicine and science established that the injuries sustained by the toddler could have been caused by a short-distance fall and another child purportedly witnessed the child’s fall or jump from a chair. The “defendant established, by a preponderance of the evidence ..., that ‘a significant and

**Fourth Department** *continued*

legitimate debate in the medical community has developed in the past ten years over whether infants [and toddlers] can be fatally injured through shaking alone, ... and whether other causes [such as short-distance falls] may mimic the symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome' ...." Information on "the cumulative effect of the research and findings on retinal hemorrhages, subdural hematomas or hemorrhages and cerebral edemas as presented" in similar cases might well change the outcome at trial. (County Ct, Monroe Co)

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**People v Buza, 144 AD3d 1495, 42 NYS3d 486  
(4th Dept 11/10/2016)**

The court erroneously allowed an investigator to testify that when police searched a house, the defendant "explained where his [own] room was,' referring to another of the bedrooms" a statement not covered by the police report attached to the CPL 710.30 notice provided to the defendant. The defendant's statement was not exempt from the notice requirement because the prosecution did not establish that it was "elicited through routine administrative questioning." The statement was likely prompted by a question during the police search process, and the consent to search form "alone was not overwhelming evidence that defendant exercised dominion and control over the premises" because while he signed it, the deputies inserted his name and address into the form that already contained standard language. Since the testimony was essential to the prosecutor's case establishing the defendant's constructive possession of the drugs, it was not harmless error. (County Ct, Livingston Co)

**Dissent:** The error was harmless because the defendant acknowledged dominion and control over the residence through his execution of the detailed consent form.

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**People v DeJesus, 144 AD3d 1564, 40 NYS3d 831  
(4th Dept 11/10/2016)**

The defendant's plea was not shown to be knowing, intelligent, and voluntary where the court accepted the defendant's plea without inquiring as to whether the defendant was aware of the potential affirmative defense that the gun displayed by the codefendant was unloaded. "The codefendant's allocution, which in this case was intertwined with that of defendant, raised a potentially viable affirmative defense to the charge, giving rise to a duty on the part of the court, before accepting the guilty plea, to ensure that defendant was aware of that defense and was knowingly and voluntarily waiving it ...." (County Ct, Oneida Co)

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**People v Gardner, 144 AD3d 1546, 40 NYS3d 843  
(4th Dept 11/10/2016)**

Dismissal is required where the court erroneously conducted a *Sandoval* hearing in the defendant's absence. "The court's *Sandoval* ruling in this case was not wholly favorable to defendant, and thus 'it cannot be said that defendant's presence at the hearing would have been superfluous' ...." Later reading of the *Sandoval* ruling into the record in the defendant's presence did not cure the error. While the defendant was acquitted of the charges in the indictment and has already served the sentence for the lesser offense for which he was convicted, "under the circumstances we dismiss the indictment without prejudice to the People to file any appropriate charge ...." (Supreme Ct, Monroe Co)

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**Matter of Jamie J., \_\_ AD3d \_\_, 41 NYS3d 810  
(4th Dept 11/10/2016)**

As a matter of first impression, held that Family Court retains subject matter jurisdiction to continue placement of a child with the County Department of Social Services (DSS) and conduct permanency proceedings when a neglect petition has been denied and dismissed. After the court concluded that DSS "failed to prove by a preponderance of the evidence that the child's physical, mental or emotional condition was impaired or in imminent danger of being impaired" the mother unsuccessfully "sought by order to show cause an order dismissing the permanency petition and vacating the temporary order placing the child with the petitioner." The court allowed DSS to present evidence at a permanency hearing. The mother then consented to an order continuing the child's placement with DSS "on the ground that the best interests and safety of the child would be served by continued placement because the child would be at risk of neglect if returned to the mother" but reserved for appeal the issue of subject matter jurisdiction. The addition of a statutory provision in 2005 (specifically, Family Court Act 1088) confers jurisdiction until the child is "discharged from placement." The only trigger that would allow termination of placement occurs "upon proof adduced [at the permanency hearing] ... and in accordance with the best interests and safety of the child ...." "[T]here is no provision in Family Court Act article 10-A that provides for the termination of the child's placement with petitioner when a neglect or abuse petition is dismissed." (Family Ct, Wayne Co)

**Dissent:** "We cannot agree with the majority that the enactment of Family Court Act article 10-A abrogated ... settled law and extended the subject matter jurisdiction of Family Court beyond the dismissal of the neglect petition."

**Fourth Department** *continued*

**People v Owens, 144 AD3d 1510, 40 NYS3d 871  
(4th Dept 11/10/2016)**

“[A] mode of proceedings error occurred and reversal is required because the record fails to show that defense counsel was advised of the contents of a jury note requesting, inter alia, further instruction on reasonable doubt, murder in the second degree and manslaughter in the first degree ....” Absent record evidence, “we cannot assume that the court complied with its” obligation under CPL 313.30 and *O’Rama*. (County Ct, Onondaga Co)

**Matter of Otrosinka v Hageman, 144 AD3d 1609,  
41 NYS3d 182 (4th Dept 11/10/2016)**

The court erred “in sua sponte imposing conditions restricting ... filing new petitions.” There was no evidence in the record from which the court could determine that “the father had engaged in meritless, frivolous, or vexatious litigation, or that he had otherwise abused the judicial process.” The paragraph prohibiting future filing is vacated and the order is otherwise affirmed. (Family Ct, Erie Co)

**People v Thomas, 144 AD3d 1596, 40 NYS3d 688  
(4th Dept 11/10/2016)**

The court erred in denying without a hearing the defendant’s motion to vacate his conviction on the basis that he received ineffective assistance of counsel when counsel neglected to inform him that after a trial conviction he would be sentenced as a persistent violent felony offender as opposed to a second violent felony offender. The defendant asserts that he would have accepted a plea deal if so informed, and the record indicates that defense counsel, the court, and the prosecutor failed to realize that a conviction would result in persistent felony offender status until trial began and there were no further plea negotiations. The matter is remitted for a hearing. (County Ct, Onondaga Co)

**People v Watkins, 144 AD3d 1565, 40 NYS3d 832  
(4th Dept 11/10/2016)**

The defendant was not properly designated a persistent felony offender “because he had not been sentenced to a period of more than one year on two of the three proposed predicate felonies ....” The defendant’s second-degree robbery and second-degree burglary convictions are predicate violent felonies that satisfy the persistent violent felony offender requirements, but “the record does not establish whether those convictions meet the criteria

of [Penal Law] section 70.08(1)(b) ....” (County Ct, Onondaga Co)

**People v Williams, 144 AD3d 1529, 41 NYS3d 638  
(4th Dept 11/10/2016)**

The court erred by denying the defendant’s motion to withdraw his guilty plea where the plea was coerced. “During discussions over the plea offer, the court addressed the possibility of a jury convicting defendant of the lesser included offense of manslaughter in the first degree by stating: ‘[Y]ou wouldn’t get any better than 25 [years] if you get a manslaughter. That’s a big “if.”’ These “statements do not amount to a description of the range of potential sentences but, rather, they constitute impermissible coercion, rendering the plea involuntary and requiring its vacatur’ ....” (County Ct, Onondaga Co)

**People v Freeman, 144 AD3d 1650, 42 NYS3d 506  
(4th Dept 11/18/2016)**

Evidence of drugs found on the defendant’s person, and his statements to the police, should be suppressed because they were a result of improper accusatory questioning. The officers improperly escalated the traffic stop of the defendant for riding a bicycle without a light at night in violation of Vehicle Traffic Law 1236 (a) to a level two inquiry by asking the defendant why he was nervous and whether he was carrying drugs. The defendant’s apparent nervousness “did not give rise to a founded suspicion that criminal activity was afoot ....” (County Ct, Monroe Co)

**People v Kuzdzal, 144 AD3d 1618, 42 NYS3d 507  
(4th Dept 11/18/2016)**

The judgment must be reversed because the court failed to conduct a proper *Buford* inquiry of two jurors when the defendant’s friend reported hearing the jurors make disparaging comments about the defendant. The observer testified that the jurors were “outside smoking a cigarette talking about [defendant being] a scumbag ... [and] in the back row laughing and making faces.” “The court’s ruling that an inquiry was not ‘necessary or appropriate’ was conclusory and, contrary to the People’s contention, did not constitute an implied determination that the observer’s testimony was incredible.” Both the failure to conduct the jury inquiry and the failure to place reasons for the ruling on the record constitute reversible error. (Supreme Ct, Erie Co)

**Dissent:** The court was not required to conduct an inquiry of the jurors because the court determined that the witness’s testimony was not sufficiently credible to warrant a *Buford* inquiry.

**Fourth Department** *continued***Matter of Trinity E., 144 AD3d 1680, 41 NYS3d 817  
(4th Dept 11/18/2016)**

Where, following a finding of permanent neglect as to the father, the father threatened the court, the police, the Attorney for the Child, and the caseworker, resulting in a criminal charge and an order of protection as to the judge, the court abused its discretion by refusing to recuse itself and conducting a dispositional hearing. The matter is remitted for a new dispositional hearing before a different judge. (Family Ct, Monroe Co)

**People v Coleman, 145 AD3d 1641, 44 NYS3d 316  
(4th Dept 12/23/2016)**

The court erred where it issued an order of protection with an expiration date that fails to account for the defendant's jail time credit. This unreserved issue is reviewed in the interests of justice, and the matter is remitted for the court to determine the appropriate amount of jail time credit and the resulting appropriate expiration date for the order. (County Ct, Cayuga Co)

**People v Collins, 145 AD3d 1479, 44 NYS3d 830  
(4th Dept 12/23/2016)**

Reversal is required because the court erroneously denied the defendant's challenge for cause of a prospective juror whose son is married to the District Attorney's daughter and who shares a grandchild with the District Attorney. The defendant exercised a peremptory challenge against the juror and exhausted peremptory challenges before completion of jury selection. A challenge for cause was warranted because the relationship with the District Attorney would likely preclude the juror from rendering an impartial verdict.

The court also erred by excluding testimony by a defense witness that the complainant said she did not think the defendant committed the offense. On cross examination of the complainant "defense counsel had laid an adequate foundation for the admission of that prior inconsistent statement by eliciting testimony that the victim had never discussed the matter with the defense witness and had never told the defense witness that the alleged occurrence 'between [her] and [defendant] might not have happened' ...." (County Ct, Ontario Co)

**People v Ford, 145 AD3d 1454, 45 NYS3d 720  
(4th Dept 12/23/2016)**

Neither the defendant's nervousness during a proper traffic stop, that the vehicle was in a high crime area, nor

the defendant's refusal or request for an explanation of why he was being asked to exit the vehicle were factors that created a reasonable suspicion for the officers to believe the defendant was armed or posed a threat to their safety warranting a pat down of the defendant. The judgment is reversed, plea vacated, motion to suppress cocaine recovered as a result of the pat down and statements made is granted, the indictment is dismissed, and the matter remitted. (Supreme Ct, Onondaga Co)

**People v Griffin, 145 AD3d 1551, \_\_ NYS3d \_\_  
(4th Dept 12/23/2016)**

The court erroneously denied the defendant's challenge for cause when juror No. 13 expressed that she would be precluded from being fair and impartial because of her relationship with police officers. The juror said that her ex-husband was a police officer as were two nephews, and stated that "she would 'probably go towards the officers.'" When asked: "'Can you be fair and impartial; yes or no?' ... she replied, 'No.'" The juror "responded affirmatively to the court's question whether she could base her decision in the case on what she heard and saw in the courtroom and the general question whether she could be fair and impartial," but "she did not provide an 'unequivocal assurance that ... [she could] set aside [her] bias' toward police officers who would testify at the trial ...." (Supreme Ct, Monroe Co)

**People v Henderson, 145 AD3d 1554, \_\_ NYS3d \_\_  
(4th Dept 12/23/2016)**

The court erred by failing to determine at sentencing whether the defendant should be afforded youthful offender status. "[T]he court's statements during the plea proceeding to the effect that it was not inclined to grant defendant youthful offender status do not obviate the need for remittal .... Moreover, inasmuch as a youthful offender determination must be made 'in every case where the defendant is eligible,'" the prosecution is incorrect "that remittal 'would be futile and pointless' here." The matter is remitted for the court to state on the record its determination regarding whether the defendant should be granted youthful offender status. (Supreme Ct, Onondaga Co)

**People v Horton, 145 AD3d 1575, 43 NYS3d 654  
(4th Dept 12/23/2016)**

The court abused its discretion by precluding the defendant from submitting evidence or cross-examining the complainant on her engagement in a criminal enterprise and purchase of drugs, essentially denying the defendant the right to present a defense. The defense the-

**Fourth Department** *continued*

ory was that the gun was the complainant's and it was the complainant who pulled the gun on the defendant. "[T]hat evidence, if credited by the jury, would demonstrate that the complainant had every reason to fabricate the story that the gun belonged to defendant and not her ...." Furthermore, the defendant was denied a fair trial because the defendant's failure to voluntarily turn herself in to the police was raised in prosecution witnesses' testimony, the defendant's cross examination, and the prosecutor's summation, and the prosecutor also elicited testimony that the defendant was a "drug dealer." These unpreserved issues are reviewed as a matter of discretion in the interest of justice and a new trial is ordered. (County Ct, Monroe Co)

**People v Kennedy, 145 AD3d 1577, 43 NYS3d 657  
(4th Dept 12/23/2016)**

The verdict is against the weight of the evidence as to the defendant's conviction of criminal possession of stolen property because the prosecution's evidence that the gun was stolen 15 months before the incident, and that the defendant purchased the shotgun shortly before the incident for twenty dollars does "not establish defendant's knowledge that the gun was stolen ...." (County Ct, Monroe Co)

**People v Memon, 145 AD3d 1492, 44 NYS3d 285  
(4th Dept 12/23/2016)**

The judgment is reversed and a new trial granted because the court improperly permitted the prosecutor to cross-examine the defendant on prior uncharged bad acts when the prosecutor did not advise the defendant that he would be cross-examined on uncharged acts if he decided to testify, and the court failed to make a pretrial inquiry or determination. Since a proper pretrial inquiry could have affected the defendant's decision to testify, the error is not harmless.

The court also erred by allowing the prosecutor, over an objection, to elicit testimony bolstering the complainant. The complaining witness's credibility was essential because the evidence was "not overwhelming and, '[a]lthough the trial court in a nonjury trial is presumed to have considered only competent evidence in reaching its verdict ..., here, this presumption was rebutted' by the court's written decision, which establishes that the court considered the inadmissible evidence ...." (Supreme Ct, Erie Co)

**People v Noce, 145 AD3d 1456, 43 NYS3d 626  
(4th Dept 12/23/2016)**

The matter is remitted for an evidentiary hearing because it was an abuse of discretion when the court denied the defendant's motion to withdraw his guilty plea without an evidentiary hearing when the defendant alleged in his motion that his attorney inaccurately informed him that a psychiatric defense was not available to him. The defendant alleges in his motion that his attorney said the psychiatric defense was not available because the neurosurgeon refused to testify, but the defendant also submitted an affidavit from his neurosurgeon that he did not speak to the prior attorney and did not refuse to testify. Since the motion was not "patently insufficient on its face" the court should have conducted an evidentiary hearing. (County Ct, Monroe Co)

**People v Paris, 145 AD3d 1530, 45 NYS3d 726  
(4th Dept 12/23/2016)**

The judgment is reversed, declaration of delinquency vacated and probation reinstated because the court's finding that the defendant violated the condition of probation that he successfully complete treatment at an out-of-town residential substance abuse program was not supported by a preponderance of the evidence. The prosecution produced "hearsay statement of a counselor [made] to defendant's probation officer that defendant was not compliant with his treatment and had been unsuccessfully discharged from the program" but failed to "present facts of a probative character, outside of the hearsay statements, to prove the violation' ...." (Supreme Ct, Erie Co)

**People v Rodas, 145 AD3d 1452, 43 NYS3d 624  
(4th Dept 12/23/2016)**

The court correctly granted the defendant's motion to suppress statements and letters made to a Yates County Department of Social Services caseworker obtained in violation of the defendant's right to counsel because the caseworker was acting as an agent of the police when she interviewed the defendant. The caseworker was told that the investigator could not accompany her to interview the defendant because the defendant was represented by counsel on an unrelated charge. However, the "investigator specifically asked her not to 'focus on' certain letters that might be possessed by defendant at the jail, to avoid defendant's destruction of those letters before the investigator could obtain a warrant for their seizure." She also told the defendant she was "'working together' with 'law enforcement'" and later shared letters she obtained from the defendant with the investigator in exchange for letters the investigator retrieved from the defendant's girlfriend and notified the investigator where to locate other letters. (County Ct, Yates Co)

**Fourth Department** *continued*

**People v Streber, 145 AD3d 153, 44 NYS3d 652  
(4th Dept 12/23/2016)**

The defendant's plea was not knowingly, intelligently, and voluntarily made because during the plea colloquy, the court did not state the sentence the defendant would receive if he was unsuccessful in the Judicial Diversion Program. In addition, the Judicial Diversion Program Contract signed by the defendant, said he would receive "felony probation" if unsuccessful, which was inconsistent with the arraignment record where the court said "if unsuccessful, a cap of one and a half to three. If successful, a cap of five years probation." The amendment of the contract a week later was not a "ministerial or clerical matter" because the record does not sufficiently reflect that the amendment met the expectations of the court, prosecutor, and the defendant at the time the plea was entered. (County Ct, Monroe Co) ⚖️

**Defender News** (continued from page 5)**New "Court of Appeals Update" Available**

The Center for Appellate Litigation (CAL) has posted its "Court of Appeals Update – March 15, 2017" online at [www.appellate-litigation.org/court-of-appeals/](http://www.appellate-litigation.org/court-of-appeals/). The Update tracks selected criminal cases in the Court of Appeals from the initial leave grant to the argument date.

**Organizing Coordinator Rabe Latest  
NYSDA Staff Member Honored**

The Shirley Chisholm Women of Excellence Award, named for the first African-American woman elected to Congress and sponsored by Senator Jesse Hamilton (D-Brooklyn, Chisholm's home), "honors women who have made extraordinary contributions to our community." On Mar. 17, 2017, NYSDA's Organizing Coordinator, Anne Rabe, received this award in recognition of her work in support of NYSDA's Veterans Defense Program (VDP) and the Justice Equality Act.

VDP Deputy Director Art Cody (Captain, USN [Retired]) joined Anne for the final moments of the award presentation. Cody himself was honored last year, receiving the national Four Chaplains Legion of Honor Humanitarian Award. And VDP Director Gary Horton received the National Alliance for Mental Illness-NYS's first-ever Criminal Justice Award in November 2016.

NYSDA Executive Director Jonathan E. Gradess accepted a Lifetime Achievement Award presented at the New York State Association of Criminal Defense Lawyers Foundation Annual Dinner on Jan. 26, 2017. Find additional NYSDA [Accomplishments and Awards](#) on the website.



When Art Cody, Deputy Director of NYSDA's Veterans Defense Program, received the Four Chaplains Award in November 2016, he (center, with award) was joined by NYSDA Organizing Coordinator Anne Rabe (far left). In March 2017 Rabe herself was recognized, receiving the Shirley Chisholm Women of Excellence Award sponsored by State Senator Jesse Hamilton.

**VDP Issues Annual Report**

NYSDA's Veteran's Defense Program (VDP) has published its 2016 Annual Report. Available on the NYSDA [website](#), the report notes that last year, the VDP assisted over 200 veterans and trained more than 620 public defenders representing veterans in criminal and family court matters. In an encouraging 62% of the 164 cases in which VDP provided direct representation or substantial legal assistance, the veteran clients received treatment. The report also contains case studies detailing human stories behind the VDP statistics, information on the training conducted by VDP in 2016, and testimonials from veterans and others. One example: "I had the pleasure to work closely with the VDP on behalf of one of my clients and I declare without hesitation that this program is an invaluable resource for criminal defense attorneys with veteran clients ...." ⚖️



During a New York State Civil Liberties Union Advocacy Day, Executive Director Jonathan E. Gradess stressed the need for New York State to enact the Justice Equality Act. The occasion coincided with national Public Defense Week, March 13-18, marking the anniversary of the 1963 right to counsel decision in *Gideon v Wainwright*.

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