



Public Defense Backup Center
REPORT

Volume XXXII Number 4 November–December 2017

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Instructions About Cross-Race Effect in Identification Required Upon Request

Defense attorneys whose clients were identified by a witness of another race have new caselaw to support a request for an instruction on cross-racial identification. In *People v Boone* (2017 NY Slip Op 08713 [12/14/2017]), the Court of Appeals said the trial court abused its discretion in denying the defense request for such a charge. The phenomenon known as the cross-race effect or own-race bias, which shows that people are more likely to falsely identify someone who is of another race in comparison to their accuracy when identifying someone from their own race, is generally accepted among cognitive and social psychologists. Noting that fact, the decision requires trial courts to issue a cross-racial identification charge, if requested, regardless of whether that issue was raised by presentation of expert testimony or cross-examination of the identifying witness at trial. Judge Garcia, concurring, expressed concern about the majority’s unprecedented approach. The charge is not required when the identity of the offender is not at issue, or when neither party requests the charge. A summary of *Boone* is available on page 15.

As noted in the News Picks from NYSDA Staff [edition](#) informing readers about *Boone*, the majority cited an amicus brief that said issues of race are not easily discussed in our society, making a jury instruction on the cross-racial effect particularly important. NYSDA seeks to recognize and promote examination of racial issues that confront clients and lawyers. Efforts include publishing information about caselaw, like *Boone* and the cases headlining the [January-March 2017](#) issue of the *REPORT*, and providing CLE training on race issues.

As of January 1, New York State Continuing Legal Education (CLE) providers were authorized to begin issuing credit under the new “[Diversity, Inclusion and Elimination of Bias](#)” category. Experienced attorneys are required to complete at least one credit under the new category in each biennial reporting cycle. Look for upcoming NYSDA training programs that fulfill this requirement.

Using Boone Beyond IDs Involving Race

The Center for Appellate Litigation (CAL) focused on *Boone* in its January 2018 issue of [Issues to Develop at Trial](#). CAL uses the case as “a jumping off point for requesting a jury charge that includes other factors that have been shown to affect the accuracy of eyewitness identifications.”

Third Department Clarifies Sentencing Issue for Ignition Interlock Violations

In *People v Coon* (2017 NY Slip Op 08216 [3rd Dept 11/22/2017]), the defendant had been convicted of felony DWI and was sentenced to a one-year determinate sentence and a consecutive conditional discharge to facilitate the ignition interlock requirement, as provided in Penal Law 60.21. When the defendant later violated the ignition interlock requirement, the court sentenced the defendant to two to six years’ incarceration. The Third Department reversed, holding that the trial court lacked the authority to sentence the defendant to an additional prison term because he had served the original one-year irrevocable sentence. “[W]e cannot sanction nor can we countenance a term of imprisonment when no sentencing statute specifically permits such result for an individual who has already served a definite irrevocable sentence and subsequently violates the terms of a conditional discharge that ran consecutively to that sentence.” Presumably, the court’s analysis would apply to fully served indeterminate sentences with consecutive conditional discharges or periods of probation. The Third Department noted that violators could be separately prosecuted for the Class A misdemeanor of operating a motor vehicle without a required interlock device (VTL 1198 [9][d] and [e]).

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Coming in 2018: Changes and Challenges

Public defense lawyers across New York State begin 2018 amid complex systemic changes and recurring challenges affecting both their clients and their work.

OCA Increases Hourly Expert Fee Guidelines

A change that may help public defense lawyers secure needed experts for their cases went into effect on Jan. 1, 2018. Under new guidelines from the Chief Administrative Judge of the Courts, the hourly compensation rates for experts used in public defense cases are:

- \$250/hour for physicians and psychiatrists,
- \$150/hour for certified psychologists,
- \$75/hour for certified social workers, and
- \$55/hour for licensed investigators.

But Administrative Order AO/446/17, issued Dec. 19, 2017, will not by itself solve the problem of experts declining such work for lack of adequate compensation. The caps on compensation remain in County Law 722-c and Judiciary Law 35. When the rate increases were proposed, the [Request for Public Comment](#) said, “[i]t is anticipated that the Unified Court System will seek legislative amendment of those provisions ... which currently cap the compensation of court-appointed experts in various proceedings absent a finding of ‘extraordinary circumstances.’” NYSDA noted that an amendment to the compensation caps is required for any increase in the guidelines to be meaningful.

In addition to advocating for adequate compensation for defense experts, NYSDA seeks in other ways to help public defense lawyers get the expert assistance they and their clients need. For example, see our publication, “Getting the Expert Funds You Need Under County Law § 722-c,” [available](#) on our website. When issues arise that are not addressed in the publication, please contact the Backup Center.

Quality representation requires the use of experts in a variety of cases. [Standards](#) from the Office of Indigent Legal Services (ILS) require that public defense lawyers “[h]ave access to and use as needed the assistance of experts in a variety of fields including mental health, medicine, science, forensics, social work, sentencing advocacy, interpretation/translation, and others.” The ILS [standards for parental representation](#) contain similar, specific requirements.

Of course, these required actions take time—time for which counsel should be adequately compensated. And hourly compensation for assigned counsel has not increased since the current rates became effective in 2004. Attorneys are to be paid \$60/hour when representing a client facing misdemeanor charges and \$75/hour in other mandated representation matters. It would take over \$98.00 to buy today what \$75 could purchase in 2004, according to the US Bureau of Labor Statistics Consumer Price Index Calculator.

Orders to Prosecutors and Defense Lawyers to Be Issued in All Criminal Cases

New provisions of the Uniform Rules for Courts Exercising Criminal Jurisdiction (sections 200.16 and 200.27), effective Jan. 1, 2018, require judges in criminal actions to issue orders confirming prosecutors’ disclosure duties and defense counsel’s duties to provide effective assistance of counsel and meet statutory notice obligations. The new provisions were announced in a Unified Court System [press release](#).

The model order approved for use in implementing the provisions misstates the law concerning the timeliness of *Brady* disclosures. The [Nov. 30, 2017, edition](#) of News Picks urged defense lawyers to consider advocating judicial use of the model order with the following sentence in the second bullet point on page 2 crossed out: “Disclosures are presumptively ‘timely’ if they are completed no later than 30 days before commencement of trial in a felony case and 15 days before commencement of trial in a misdemeanor case.” Lawyers encountering issues stemming from the new rules can contact the Backup Center.

Raise the Age Begins in 2018

Planning is underway for the many changes needed to implement the Raise the Age [legislation](#) (L 2017, ch 59, part WWW, starting on p. 209) that passed last April and becomes effective as to 16-year-olds on Oct. 1, 2018. NYSDA published a description of the law in the [April-June 2017](#) issue of the *REPORT*; included a “Preliminary Roadmap of the Raise the Age Law” in the CLE program at its 2017 Annual Conference; and began developing ways to aid public defense programs and lawyers in the transition and ensure the quality representation of youth

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throughout the new procedures and courts being created under the statute.

In 2018, the Backup Center will offer training on new procedures as they come into being and participate in their development with other justice system entities. A major goal is to strengthen client-centered representation, ensuring that the particular needs of adolescents are addressed. The issues confronting counsel and clients include the law and procedures applicable in new Youth Parts in superior court and conditions of confinement for young clients who are incarcerated.

Many players have a role in Raise the Age implementation—not only those who perform defense, prosecution, and judicial functions, but also those who provide treatment and social services to youth, funders at all levels, youth advocates and families, and others. The Unified Court System’s Office for Justice Initiatives has announced a workgroup on implementing the legislation, as noted on its [webpage](#).

State Budget and Raise the Age

The State’s budget process will greatly affect and be affected by Raise the Age. The Unified Court System noted in its proposed [2018-2019 budget](#) both the fiscal implications and complexities of Raise the Age: “[T]here are a host of complex operational and legal issues (e.g., legal representation, housing of detained defendants, training and new patterns of data delivery) that must be addressed.”

The proposed Judiciary budget provides additional funding for the Attorney for the Child program to cover anticipated increases resulting from the representation of youth whose cases would formerly have been in adult court. A decrease in funding is reflected in the portion of the budget covering assigned counsel expenses under Judiciary Law 35, as well as funding to support caseload limits of public defense providers in New York City criminal matters; this decrease is attributed to the shift of representation for 16-year-old offenders whose cases will be heard in Family Court under Raise the Age.

Outside New York City, some funding to support caseload limits for defenders in criminal cases (and parent representation in Family Court, not affected by Raise the Age) comes from the State through ILS. Given the enormity of the caseload problem that ILS must address—an ILS [report in 2016](#) indicated that the caseloads of upstate institutional providers exceeded national standards by 52%—the transfer of 16-year-olds to Family Court will not alleviate the need for continued, and increased, state funding to curtail excessive caseloads. Thus, despite the assumption in the Judiciary budget that Raise the Age would lead to “a reduction in county-borne expenses for adult indigent criminal defense,” the best that can be said is that the movement of some cases to Family Court may lessen ever so slightly the amount of *additional* funding needed to

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

achieve the caseload relief and quality improvement required for a constitutional public defense system.

The New York Association of Counties (NYSAC) [Legislative Priorities](#) for 2018 include having the State “[m]aintain commitment to prefund expansion of indigent defense services to all counties.” NYSAC’s priorities list also contains a number of Raise the Age funding issues, from removing “fiscal caps for foster care and youth detention” to prefunding “county capital costs for building specialized juvenile detention facilities.”

New Rules on Secure Juvenile Detention Facilities for Older Youth

As to those facilities, the State Commission of Correction (SCOC) has issued a Notice of Emergency Adoption and Proposed Rule Making concerning “regulations for the construction, renovation and certification of specialized secure juvenile detention facilities for older youth.” Its [Finding of Necessity](#) discusses Raise the Age and notes that “the City of New York and numerous counties are already well underway in developing plans to establish such facilities,” making necessary immediate adoption of an SCOC rule to guide approval of facility construction and renovation.

One reported instance of local planning efforts reflects, by omission, the need for public defense providers to be involved in the planning of all aspects of changes necessitated by Raise the Age. A *Watertown Daily Times* article on Dec. 22, 2017, said that renovation of a closed St. Lawrence County jail to create a regional center to “house 16- and 17-year-olds charged with crimes” had been proposed. Not only does the article miss the point that (most of) those teens will not be charged with adult “crimes,” it also fails to mention concerns such as how defense lawyers would be able to visit and establish a client-attorney relationship with teens housed one or more counties away.

NYSDA welcomes inquiries and information from around the state on issues regarding Raise the Age, and will be providing on-going training for defense lawyers and opportunities for Chief Defenders to share strategies and concerns in the coming months, as well as participating in a variety of planning discussions.

Implementing Hurrell-Harring Statewide, Maintaining Independence

One example of potential change coming in 2018 is the plan developed by the State Indigent Legal Services Office (ILS) to implement in every county the settlement conditions of the *Hurrell-Harring (H-H)* class action lawsuit. Completed as of the Dec. 1, 2017, deadline contained in the legislation extending *H-H* statewide, the ILS plans for counties were [not otherwise disclosed](#) pending review by the State Division of the Budget (DOB). As [noted](#) in the *REPORT* earlier this year, a key issue in the legislation was maintaining independence of the defense function; DOB approval of the ILS plan is required “but only as to ‘the projected fiscal impact of the required appropriation for the implementation of such plan.’”

The need for independence is vital at the state and local level. The American Bar Association (ABA), with a broad membership that includes not only prosecutors, judges, and defense lawyers but lawyers from all areas of practice, [wrote](#) Governor Andrew Cuomo about the importance of defense independence when the 2017 legislation was under consideration. The letter referred to the ABA’s [Ten Principles of a Public Defense Delivery System](#), which are used to evaluate the quality of programs nationwide and list independence as the first principle. Similarly, the [ILS standards](#) applicable to all trial level representation require counties to “ensure ... that attorneys and programs providing mandated legal services ... are free from political and other influences that erode the ability to provide quality representation.” (Standard 1.) Increased state funding accompanied by increased, independent oversight should lessen threats to the independence of public defense programs posed by local financing and control.

Among the functions that must be independent of improper influence is the selection of public defense program heads. The ILS [standards](#) mentioned above require that the selection of Chief Defenders “be made solely on the basis of merit.” NYSDA’s own [Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State](#) call for the hiring of Chief Defenders to be “insulated from political influence and conflicts of interest”

In 2018, as always, the independence of public defense providers must be protected.

Lawyers, Advocates Calling Bail Practices into Question

The new year will see continuing defense efforts to systematically challenge bail set too high for clients to afford. In November 2017, the Brooklyn Defender Service started an initiative to systematically challenge bail orders that leave clients incarcerated. A [Nov. 24, 2017 article](#) in *The Atlantic* described it this way:

The goal of the project is to begin to repair New York City’s long-criticized bail system by persuading and incentivizing judges to focus on bail’s essential purpose: It’s collateral meant to guarantee a criminal defendant’s return to court, not punishment for a person accused of a crime.

Pro bono assistance from Kramer Levin Naftalis & Frankel makes the initiative possible. Facts about clients’ finances, backgrounds, and community ties will be collected and presented to a judge with a request to reduce bail or find it unnecessary; bail orders that remain too high for clients to meet will be challenged.

BDS is not the only defender program systematically challenging the bail status quo. “Building on the successful launch of the Decarceration Project in June, 2016, the Legal Aid Society [LAS] continued its bail reform efforts with a pilot project in its Manhattan office that added an additional attorney, paralegal and a social worker dedicated to systematically challenging bad bail decisions,” Josh Norkin, LAS attorney in the Criminal Practice Special Litigation Unit and Director of the Project, told the *REPORT*. “That initiative concluded in November, with 64 of the 140 clients the Project worked with released, and will expand to every borough in 2018,” he added.

These systematic approaches to bail practices that needlessly keep far too many public defense clients in pretrial detention are in addition to ongoing efforts to improve bail advocacy in individual cases on the one hand and to reform the bail system itself. Since the [previous issue](#) of the *REPORT*, in which bail was discussed at p. 5, a number of developments have occurred. These include:

- A lawsuit challenging “the imposition of cash bail when a judge has not considered a person’s ability to pay or alternatives to money bail,” filed in Dutchess County by the New York Civil Liberties Union (NYCLU). The NYCLU [press release](#) describes the suit.
- On the same day, the District Attorneys in Manhattan and Brooklyn announced policy changes to curtail the request for bail in misdemeanor and non-violent felony cases, a move [lauded](#) by Gov. Andrew Cuomo.
- Cuomo included bail reform, as well as discovery and speedy trial, in the [criminal justice policy issues](#) set forth in his State of the State address.

Scrutinizing Lawyers’ Actions: Personal Choices, Systemic Flaws

One lawyer’s failure to ensure that a client secured the right to appeal was decried by dissenting Court of Appeals judges but led to no relief for the client. Another lawyer’s preparation of a document by signing the client’s name outside his presence, then notarizing it, led the Second Department to publicly censure the attorney.

These decisions, in *People v Arjune* (2017 NY Slip Op 08159 [11/20/2017]) and *Matter of Dittakavi* (155 AD3d 10 [2nd Dept 10/18/2017]), respectively, appear in the Case Digest beginning at p. 8. Both cases invite discussion of not just legal points but, more deeply, lawyers' duties to their clients and systemic barriers to ensuring that people financially unable to hire a lawyer receive proper representation.

Arjune: Failure to Meet Rules and Standards Not Ineffective Enough

In *Arjune*, a client who was not a citizen of the United States retained trial counsel and, although acquitted of attempted murder and assault charges, was convicted of tampering with physical evidence and weapons possession. Counsel filed a notice of appeal, but no further action was taken and the appeal was dismissed as abandoned. The client was later placed in deportation proceedings. Represented by an appellate public defense provider, the client—who asserted literacy and cognitive limitations—sought to reinstate his appeal through a writ of coram nobis based on ineffective assistance of trial counsel for failing to help seek poor person relief to ensure the appeal proceeded. The Court of Appeals rejected the claim, declining to expand in this case the slight extension of coram nobis relief availability set out in *People v Syville* (15 NY3d 391 [2010]). The *Arjune* majority noted the lack of any constitutional right to counsel in preparing a poor person application and of any support for the contention that *trial* attorneys have a constitutional duty regarding an appeal years after the notice of appeal was filed.

Judge Rivera dissented, saying that the majority's holding "runs afoul" of constitutional precedent and state jurisprudence, and deprived the client in question "of fundamental due process rights." She noted, among other things, the lawyer's failure to comply with an Appellate Division rule requiring that trial counsel advise a client in writing of the right to apply for poor person relief and to submit such application for the client if requested to do so. Judge Wilson joined Rivera's dissent and wrote separately to say that the "'duty to consult'" with a client means advising the client "'about the advantages and disadvantages of taking an appeal,'" which had not occurred.

Timothy P. Murphy, Chief Attorney of the Appeals and Post-Conviction Unit at the Legal Aid Bureau of Buffalo and a frequent presenter at NYSDA training events, called *Arjune* "one of the most disappointing decisions in years." The majority ignored "the limitations of many unsophisticated inmates" and showed "no recognition of the realities of how crucial the motion for poor person status really is," Murphy said.

Such justified criticism of *Arjune* illustrates the need to educate courts, lawyers, and others about the needs of

public defense clients. NYSDA, whose mission is to improve the quality and scope of public defense representation, works to do that, from its annual, highly-praised Defender Institute Basic Trial Skills Program that includes ways that racism and poverty affect clients' cases to the "[Client-Centered Representation Standards](#)" created by NYSDA's Client Advisory Board. Along with the standards cited in Rivera's *Arjune* dissent, these standards point the way to quality representation of clients.

"Poor Person" Appellate Procedures

The client in *Arjune*, who was represented by retained trial counsel, would not have been aided by the legislation passed in 2016 intended to streamline the process for people convicted of crime to obtain counsel on appeal. As noted in the [Apr. 28, 2017](#), edition of News Picks from NYSDA Staff, that law—CPL 380.55—gives trial courts the discretion to grant poor person status for appeal to a convicted person already represented by assigned counsel. Attorneys with information about CPL 380.55 applications and judges' responses to these requests are asked to contact Staff Attorney Mardi Crawford at the Backup Center (518-465-3524 ext. 23, mcrawfor@nysda.org).

Procedures for poor person status were included in proposed Statewide Appellate Division Rules made public in a [Request for Public Comment](#) on May 25, 2017. NYSDA was among those who responded. As of this issue of the *REPORT*, neither comments received nor any action on the proposal had been posted.

Barriers to Client Access, Shortage of Time: Not Valid Reasons to Cross the Line

The lawyer in *Matter of Dittakavi* had seen a client in the Bronx County Criminal Court holding facility, where the client signed the signature page of a petition to vacate an acknowledgment of paternity. The lawyer later realized that the client had not signed the verification page of the petition that requires a notarized signature. But the client had been transported back to Rikers Island. The lawyer signed the client's name and notarized the false signature. Later, the lawyer, a staff attorney at the institutional public defense program that was assigned to represent the client in Family Court, disclosed the behavior. While she was not fired—because she was young, had her client's consent to file the petition, and did not obtain anything personally from her actions—the Grievance Committee charged her with professional misconduct, resulting in the discipline by consent of public censure.

The Second Department did not discuss in its opinion the notorious, and notoriously hard to reach, jail to which the client had been returned after meeting with the lawyer. Those who determined the professional fate of the lawyer may or may not have had knowledge of how hard it is to visit a client on Rikers. One attorney has [blogged](#)

that visiting there can take an entire day. Journalist Jennifer Gronnerman told the Juvenile Justice Information Exchange in a 2014 [interview](#): “I think it’s not unusual for an 18-B lawyer to never visit their client on Rikers” given the time and effort required.

Whether to take an inordinate amount of time to go to Rikers to obtain an overlooked signature—time away from substantive work on the case or from other clients—or sign the client’s name is not, of course, really a choice. Signing and notarizing the signature was “conduct involving dishonesty, fraud, deceit, or misrepresentation, and conduct that is prejudicial to the administration of justice, in violation of rule 8.4 (c) and (d) of the Rules of Professional Conduct (22 NYCRR 1200.0), respectively.” But a system that imposes unreasonable barriers to client visits should also be publicly censured—and changed.

Challenges to Conditions of Confinement Continue

Representation of incarcerated clients may bring lawyers face-to-face with more than just issues regarding client-attorney communication. As one example, clients subjected to solitary confinement, also known as isolated confinement or segregation, may suffer harm that affects not only their physical and mental well-being but also their ability to work with counsel. The next 12 months promise continuing demands to end isolated confinement in New York jails and prison or, minimally, to curtail and regulate its use.

State Commission of Correction Proposes Rules on Solitary

A proposed rule with the stated purpose of requiring “local correctional facilities to record, review and report inmate cell confinement and essential service deprivation” was [published](#) in the New York State Register at page 6 on Nov. 1, 2017. The Regulatory Impact Statement concerning the proposal noted “prevalent misuse of solitary confinement and deprivation of essential services in county jails,” especially as to 16- and 17-year-olds.

The Campaign for Alternatives to Isolated Confinement (CAIC) encouraged comments against the regulation, noting that it would, among other things, “codify some of the worst practices in local jails like allowing 24-hour solitary and allowing any time out of cell to be in another solitary space.”

CAIC advocates passage of the Humane Alternatives to Long-Term [\(HALT\) Solitary Confinement Act](#), which would address solitary confinement in both jails and prisons in New York State. Despite a lawsuit settlement at the end of 2015 and touted reforms, many people in state prisons remain in solitary confinement according to a recent [article](#) on the Solitary Watch website.

DRNY Finds DOCCS and OMH Violate the SHU Exclusion Law

Advocacy regarding solitary confinement, and alternatives, is likely to continue in 2018 on a number of fronts. As a [report](#) from Disability Rights New York (DRNY) last September shows, a victory such as the creation of residential mental health treatment units (RMHTUs) to provide an alternative to solitary confinement cannot be celebrated and then ignored. The report found multiple violations of the RMHTU law at Attica Correctional Facility.

Vera Releases NY Incarceration Data Tool

The [Vera Institute](#) recently released an interactive tool to show the statistics of mass incarceration throughout New York on a county-by-county basis, called “[Empire State of Incarceration](#).” The site pulls the reader through the various reasons and history of how disparate the NY justice system has become.

Save the Date! Families Matter: Enhancing Parental Representation in New York, April 20-21, 2018

The 2018 Family Matters conference—Enhancing Parental Representation in New York—will be held in Albany on April 20-21. Save the date and book your hotel room now. The conference rate at the Hilton Garden Inn (Albany Medical Center) is \$125 until March 2, 2018. Call 1-877-782-9444 with the special code “NYSDA.” Conference details and registration will be available soon. If you have questions, please contact Lucy McCarthy, NYSDA Family Court Staff Attorney (518-465-3524 ext. 24, lmccarthy@nysda.org) or Angela Burton at ILS (518-474-4859, angela.burton@ils.ny.gov).

Visitation for Parents of Children in Foster Care is “Visitation” No More

The [NYS Office of Children and Family Services](#) (OCFS) issued an Administrative Directive ([17-OCFS-ADM-14](#)) to local departments of social services and voluntary authorized agencies that required development of a written policy addressing parenting time and other visitation with family for children in foster care. The Directive recognizes the importance of immediate and ongoing contact between children and parents if removal is contemplated or achieved. “Regularly scheduled parent-child interaction when safe and appropriate, in as natural an environment as possible, can lessen the impact of the separation; help improve parenting skills; and maintain and strengthen the parent-child bond. Moreover, ongoing and increasingly frequent parent-child interaction is critical for the well-being of a child who is in foster care.”

The Directive also corrects the common misconception that “biweekly visitation,” as required by 18 NYCRR 430.12(d)(1), is adequate parenting time for parents after their children enter foster care. Instead, the Directive asserts that “biweekly” is the minimum amount of “visitation” that should be immediately afforded to parents. OCFS offers other detailed suggestions such as visits commencing within 2 or 3 days after separation of child and parent, regular telephone calls or contact by other technology, the least restrictive level of supervision in the most natural setting available, and resolution in favor of a parent if a conflict between a foster parent’s schedule and a parent’s schedule exists. The Directive took effect on Oct. 5, 2017, and recommended that a written policy should be developed with all stakeholders. The Directive required local DSS offices to produce and distribute a written policy on parenting time and visitation by Jan. 3, 2018. Parent attorneys are encouraged to contact their respective agency heads and make inquiries as to the status of written policy if they were not already involved in the process of creating policy.

In response to this new Directive, NYSDA and the New York State Office of Indigent Legal Services (ILS) produced the first-ever New York State Parent Attorney

Perspectives Podcast: **Podcast #1: Statewide Family Visiting Policy for Children in Foster Care, 17-OCFS-ADM-14.** It features special guest Adele Fine, the Family Court Bureau Chief of the Monroe County Public Defender’s Office; Lucy McCarthy, NYSDA Family Court Staff Attorney; and Angela Burton, Director of Quality Enhancement for Parent Representation at ILS.

The discussion in the podcast covers what the Directive contains as well as strategy to immediately use the recommendations in the Directive to craft more expansive parenting time for clients and quality visitation with other family members. The Directive offers support for family defense attorneys when advocating that agencies and courts dramatically amend existing default practices with regard to contact between children in foster care and their families to minimize removal trauma for children and hasten reunification of the child with family.

This podcast can be accessed from the [ILS website](#) (on the right-hand side under “Announcements”) and on NYSDA’s [Family Defense Resources](#) page (scroll down to “Links of Interest”). More information about the new directive is available in the [Oct. 23, 2017 edition](#) of News

(continued on page 27)

CONFERENCES & SEMINARS

Sponsor: National Association of Criminal Defense Lawyers
Theme: 2018 Midwinter Meeting & Seminar: “Jazzin’-Up Your Jury: Selection, Connection, and Persuasion”
Dates: February 14-17, 2018
Place: New Orleans, LA
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/cle/

Sponsor: **New York State Defenders Association**
Theme: **32nd Annual Metropolitan New York Trainer**
Date: **March 10, 2018**
Place: **New York City**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email DDuBois@nysda.org; website www.nysda.org**

Sponsor: National Association for Public Defense
Theme: Investigators and Social Workers & Sentencing Advocates’ Conference
Dates: March 26-29, 2018
Place: Denver, CO
Contact: NAPD: tel (859) 629-9152 (Jeff Sherr); email JeffSherr2000@yahoo.com; website www.publicdefenders.us/calendar_list.asp

Sponsor: National Association of Criminal Defense Lawyers
Theme: 2018 Spring Meeting & Seminar: “Search, Seizure & Criminal Litigation”
Dates: April 18-21, 2018
Place: New York, NY
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/cle/

Sponsor: **New York State Defenders Association**
Theme: **Families Matter: Enhancing Parental Representation in New York**
Dates: **April 20-21, 2018**
Place: **Albany, NY**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email DDuBois@nysda.org; website www.nysda.org**

Sponsor: National Association of Criminal Defense Lawyers
Theme: 11th Annual Forensic Science & the Law Conference: “Making Sense of Science”
Dates: May 10-11, 2018
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/cle/ ⚖️

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

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

United States Supreme Court

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

[Dunn v Madison](#), 17-193 (11/6/2017)

The trial court found that the habeas petitioner failed to show, as required by *Ford v Wainwright* (477 US 399 [1986]) and *Panetti v Quarterman* (551 US 930 [2007]), that he lacked the mental capacity to rationally understand he is to be executed as punishment for a criminal offense. The court's finding was not an unreasonable application of those cases. Evidence at the hearing to determine his competency to be executed following recent strokes indicated that, while he suffered memory loss as to the events that led to his conviction, he still understands that: he was tried for murder; that the State is seeking retribution for the murder he was convicted of; that he was sentenced to death; and that he will die when he is executed. "Neither *Panetti* nor *Ford* 'clearly established' that a prisoner is incompetent to be executed because of a failure to remember his commission of the crime, as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case." Under the deferential standard that applies to federal habeas review of a state court decision, the petitioner's claim for relief must fail. "We express no view on the merits of the underlying question outside of the AEDPA [Antiterrorism and Effective Death Penalty Act] context."

Concurrence: [Ginsburg, J.] While AEDPA restricts the Court's decision here, an appropriate case raising the issue of "whether a State may administer the death penal-

ty to a person whose disability leaves him without memory of his commission of a capital offense" would warrant a full hearing.

Concurrence: [Breyer, J.] Given the trend of aging prisoners remaining on death row for increasing periods of time, "we may well have to consider the ways in which lengthy periods of imprisonment between death sentence and execution can deepen the cruelty of the death penalty while at the same time undermining its penological rationale."

[Kernan v Cuero](#), 16-1468 (11/6/2017)

No prior decision of this Court clearly establishes that a state court must impose the lower sentence that was agreed to by a state and a defendant where, as here, the prosecution successfully sought to amend the criminal complaint to which the respondent had already pleaded guilty so as to provide for a higher sentence under the state's three-strikes law based on the respondent's record. The respondent opposed the motion to amend, withdrew his plea when the court allowed the amendment, and later pleaded guilty to the charge in the amended complaint, receiving a higher sentence. Even "assuming for argument's sake that the State violated the Constitution when it moved to amend the complaint," no clearly established federal law demands specific performance to remedy the violation. The ultimate relief for a prosecutorial breach of an enforceable provision of a plea agreement was left to the discretion of the state court in the opinion written for the Court in *Santobello v New York* (404 US 257 [1971]). The Ninth Circuit's reliance on its own precedent to find that specific performance of the initial plea sentence was error; "as we have repeatedly pointed out, 'circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court,"' for purposes of federal habeas review of state court decisions.

New York State Court of Appeals

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

[People v Every](#), 29 NY3d 1103, 61 NYS3d 194 (9/5/2017)

The defendant failed to show as to his ineffective assistance of counsel claim that there were no strategic or other legitimate reasons for his attorney's alleged failures. The claims that County Court erred in its jury instructions and by excluding certain evidence are not preserved for review. The remaining arguments lack merit.

NY Court of Appeals *continued*

Myers v Schneiderman, 30 NY3d 1, 62 NYS3d 838 (9/7/2017)

To interpret the assisted suicide statutes, Penal Law 120.30 and 125.15 (3), to exclude doctors who provide aid-in-dying “would run counter to our fundamental tenets of statutory construction, and would require that we read into the statutes words and meaning wholly absent from their text”

As to the plaintiffs’ constitutional claims, while “New York has long recognized a competent adult’s right to forgo life-saving medical care, we reject plaintiffs’ argument that an individual has a fundamental constitutional right to aid-in-dying,” defined “as the right of a mentally competent and terminally ill person to obtain a prescription for a lethal dosage of drugs from a physician, to be taken at some point to cause death.” Our state constitution’s equal protection guarantees are coextensive with the federal ones, and the US Supreme Court has held that “New York State’s laws banning assisted suicide do not unconstitutionally distinguish between individuals...”; all competent individuals can refuse unwanted lifesaving treatment, and no one may legally assist a suicide. Our state due process protections are greater, in some areas, than their federal counterparts, but “we have never defined one’s right to choose among medical treatments, or to refuse life-saving medical treatments, to include any broader ‘right to die’ or still broader right to obtain assistance from another to end one’s life.” As no fundamental right has been asserted, the challenged statutes “need only be rationally related to a legitimate government interest,” which here include preserving life and preventing suicide, and guarding against abuse and mistakes.

Concurrence: [Rivera, J] “I agree, on constraint of ... prior case law, that the right of a patient to determine the course of medical treatment does not, in general, encompass an unrestricted right to assisted suicide, and the State’s prohibition of this practice in the vast majority of situations is rationally related to its legitimate interests.” But, “this conclusion does not support the State’s position that its interests are always superior to and outweigh the rights of the terminally ill.” Given that “terminally-ill patients may exercise their liberty interest by choosing to be terminally sedated, the State has no compelling rationale, or even a rational interest, in refusing a mentally-competent, terminally-ill patient who is in the final stage of life the choice of a less intrusive option—access to aid-in-dying—which may better comport with the patient’s autonomy and dignity.” Aid-in-dying is practiced in other jurisdictions without compromising the medical profession.

Concurrence: [Fahey, J] It is reasonable for the Legislature to criminalize assisted suicide to avoid opening the door to voluntary and non-voluntary euthanasia,

and to prevent expanding a right to suicide for people who are terminally ill to those who are not. Accepting physician-assisted suicide could come to be viewed as a cheaper alternative to medical treatment for the terminally ill, and some arguments put forward here for aid-in-dying put people who are disabled at risk, conveying “a societal value judgment that such ‘indignities’ as physical vulnerability and dependence mean that life no longer has any intrinsic value.”

Concurrence: [Garcia, J] “[T]o the extent plaintiffs[] assert a ‘more particularized’ challenge to the assisted suicide statutes ... I would expressly reach—and reject—those claims.”

[*Ed. Note:* Chief Judge DiFiore and Judge Feinman took no part.]

People v Lee, 29 NY3d 1119, 61 NYS3d 522 (9/12/2017)

The inventory search here met the constitutional minimum where the prosecution met its burden to show that “the primary objectives of the search were to preserve the property located inside the vehicle and to protect police from a claim of lost property....” There was record support for the lower courts’ conclusion in this regard, placing the issue beyond further review.

In re Winchester, 29 NY3d 1121, 61 NYS3d 523 (9/14/2017)

“On consideration of the continuation of this Court’s June 27, 2017 suspension of the Honorable Lurlyn A. Winchester from the office of Justice of Monroe Town Court, Orange County (*see* 29 NY3d 1044 [2017]), it is determined that the Honorable Lurlyn A. Winchester is suspended, without pay, effective immediately, from the office of Justice of Monroe Town Court, Orange County, pursuant to New York Constitution, article VI, § 22 and Judiciary Law § 44.”

People v Campbell, 30 NY3d 941, __ NYS3d __ (10/12/2017)

The defendant has not met the burden of establishing, by demonstrating the absence of strategic or other legitimate reasons for alleged failures of defense counsel below, that counsel’s performance was constitutionally deficient. The claims here “are ‘of the type where “it ... [is] essential ... that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10””

NY Court of Appeals *continued***People v Wright**, 30 NY3d 933, __ NYS3d __ (10/12/2017)

The defendant's conviction must be reversed where a "prospective juror's statements raised serious doubt regarding her ability to be unbiased, and the trial court did not inquire further to obtain unequivocal assurance that she could be fair and impartial" before denying the defense challenge for cause. The defendant exhausted his peremptory challenges as is required to preserve the error.

Matter of Ayres, 30 NY3d 59, __ NYS3d __ (10/17/2017)

The determination of the State Commission on Judicial Conduct that the petitioner, a non-lawyer town court justice, should be removed from office is accepted. For the petitioner "to use his judicial position to interfere in the disposition of his daughter's traffic ticket" and "to tell the prosecutor that in his opinion and that of his colleagues the matter should be dismissed" was improper. His "imperious and discourteous manner towards the prosecutor on the case undermined 'the integrity ... of the judiciary.'" He demonstrated continued lack of insight into the impropriety of his conduct, using "paternalistic and infantilizing terms, referring to the prosecutor as 'girl' and 'kid,' colloquialisms that were disrespectful and inappropriate."

He also improperly engaged in "several *ex parte* communications to County Court advocating for dismissal of" appeals from restitution orders he entered in a matter before him, even after that court explained in a letter "why his arguments were misplaced, his conduct inappropriate, and his words and actions ill-suited to his judicial post." In those communications he unacceptably disparaged County Court, the defendant, and defense counsel. He fails to recognize his breaches of ethical standards and the public trust, minimizes his actions, and "misses the essential point: that, as a judge, his conduct had to both be and appear to be impartial."

People v Simmons, 30 NY3d 957, __ NYS3d __ (10/17/2017)

As there is record evidence to support the Appellate Division's determination that founded suspicion existed for police to require the defendant to show his hands, a determination that involves a mixed question of law and fact, the issue is beyond review here. Among factors considered were the officer's experience in gun cases, the gang violence and high crime rate in the area where the encounter occurred, reports of recent gunshots nearby, and the defendant's clutching of his waistband.

People v Austin, 30 NY3d 98, __ NYS3d __ (10/19/2017)

"[T]he introduction of DNA evidence through the testimony of a witness who had not performed, witnessed or supervised the generation of the DNA profiles" violated the defendant's Sixth Amendment right of confrontation. The evidence was used to prove an essential fact—that the defendant was the person who committed the charged burglaries. A criminalist from the Office of the Chief Medical Examiner (OCME) offered testimony about DNA test results generated by others in the office. Samples from the two crime scenes were tested and one DNA profile generated was submitted to the Combined DNA Index System (CODIS), leading to a match with the defendant's DNA profile stored in CODIS; the profile from the second scene was later linked to his profile as well. A buccal swab was then taken from the defendant and tested, and the resulting profile compared to the numerical identifiers from the crime scenes, and just before trial were said to match. Over repeated objection, the criminalist testified "in a general and conclusory manner to the DNA evidence without personal knowledge of many matters he asserted to be true—including the DNA profile generated from defendant's post-accusatory 2012 buccal swab," which he said matched the profile from the 2009 crime scenes. The 2012 postindictment evidence was testimonial and the testimony about it was inadmissible hearsay. No hearsay exception was proffered that would have allowed the witness to relay the content of unadmitted laboratory reports.

Concurrence: [Garcia, J] "On constraint of *People v John* (27 NY3d 294 [2016]), I agree with the majority that defendant's conviction must be reversed, and a new trial granted." While the facts here mirror those in *Williams v Illinois* (567 US 50 [2012]), where no confrontation violation was found, "[u]nless and until the Supreme Court provides much-needed clarity on whether DNA reports 'lie outside the perimeter of the [Confrontation] Clause' (see *Williams*, 567 US at 99 [Breyer, J., concurring]), we have no choice but to continue."

People v Bautista, 30 NY3d 935, __ NYS3d __ (10/19/2017)

The prosecutor's remarks in summation reflected arguments fairly inferable from the trial evidence and did not deprive the defendant of a fair trial. The courts below correctly found that notes taken when an unindicted alleged coconspirator was interviewed were not exculpatory as to the first-degree criminal tax fraud and first-degree offering a false instrument for filing.

NY Court of Appeals *continued*

[People v Carr](#), 30 NY3d 945, __ NYS3d __ (10/19/2017)

Denial of the defendant's motion to vacate the judgment was not error, as the prosecution was not required under the circumstances here "to seek court permission under CPL 190.75(3) before presenting additional charges to a second grand jury." The question of whether a CPL 440.10 motion lies to bring this claim is not presented here.

[People v Andujar](#), 30 NY3d 160, __ NYS3d __ (2017) (10/24/2017)

The statute that prohibits equipping a vehicle with a police scanner, or knowingly using a vehicle that has been so equipped (Vehicle and Traffic Law [VTL] 397) "does not require that the prohibited device be physically attached to the motor vehicle." As used here, "equip" means to provide something with a particular feature or ability," outfitting it "to prepare for the ready" with an item regardless of whether that item "has permanent or temporary connection to the object equipped." Other sections of the VTL use terms like "fastened" or "attached" when a physical connection is required, reserving "equips" and "equipped" for broader circumstances. It is irrelevant in light of the purpose of the statute—to prevent lawbreakers from receiving police information—whether the device is mounted, lying on a seat in the vehicle, or, as here, on the person of the vehicle's driver.

A fair, not overly restrictive technical reading of the allegations in the superseding information shows it was facially sufficient where it "set forth sworn allegations that the deponent officer observed defendant operating a tow truck on a public roadway while carrying a device in his jacket pocket, easily accessible and ready for use, that was capable of receiving police radio signals from two precincts."

Dissent: [Stein, JJ] In the statute, the direct object of "equip[]" is a vehicle, not the vehicle's operator. Holding that mere possession of an item while operating a vehicle is the equivalent of "equipping" the vehicle with that item strains credulity. The majority's expansive interpretation is inconsistent with the statute's language and effectively amends and broadens the statute's scope.

[Matter of State of New York v Floyd Y.](#), 30 NY3d 963, __ NYS3d __ (10/24/2017)

The evidence at the respondent's retrial "was legally sufficient to establish by clear and convincing evidence that he had 'serious difficulty in controlling' his sexual conduct within the meaning of Mental Hygiene Law § 10.03 (i)." The testimony of the prosecution's expert about his diagnosis of the respondent and opinion that the

combination of pedophilia and antisocial personality disorder made it more likely that the respondent would act on his urges towards children without remorse, "was supported by evidence from the relevant scientific community." The expert also testified that the "respondent had made minimal progress in treatment," wasn't really involved in it, and had been removed from it, and as a result lacked the skills necessary to manage his pedophilic disorder and a viable plan for preventing relapse. "[N]o expert at respondent's trial testified that a diagnosis of pedophilia alone would demonstrate 'serious difficulty in controlling' sexual conduct, and the State concedes that it has never 'advocated for any such rule.'"

Dissent: [Wilson, JJ] To justify continued civil management of the respondent based "on the fiction that he has some sort of mental condition other than a tendency to commit the crimes for which he was convicted (and has served his time) is and should be constitutionally unacceptable'" The truth that emerges from ten years of experience with this statute "is that the question of whether human behavior is volitional or predetermined is no more tractable that it was thousands of years ago." The necessary proof is that the respondent's mental abnormality causes "serious difficulty in controlling his sexual offending behavior, not that people with his diagnoses sometimes, generally, or more often than not, have such serious difficulty." Mental health groups have criticized laws using a "mental abnormality" test as scientifically unsound; it is time to recognize that this is "too imprecise a category to offer a solid basis for concluding that civil detention is justified"

[People v Garvin](#), 30 NY3d 174, __ NYS3d __ (2017) (10/24/2017)

The longstanding rule that a warrantless arrest in the threshold of a residence is not improper under the Fourth Amendment where the person arrested voluntarily answered the door and the police did not cross the threshold is reaffirmed. The decision in *United States v Allen* (813 F3d 76 [2d Cir 2016]) is not binding here and is also distinguishable, as it was undisputed that while police went to arrest the defendant but remained outside, the defendant was *inside* the threshold when he was arrested after complying with police directives to come to the door. The current rule is clear and easy to understand; warrantless arrests are not constitutionally permitted in a home's interior but are permissible on the home's threshold or exterior. The rules proposed by the defendant and the dissenters, to close a "loophole" said to allow police to circumvent an accused's right to counsel, would lead to confusion.

The issues of where this defendant was at the time of his arrest, and whether he was there voluntarily, are mixed questions of law and fact. The Appellate Division's

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finding that he “was arrested ‘in the doorway’ after he ‘voluntarily emerged’” has record support and is binding here.

The defendant’s challenge to his adjudication as a persistent felony offender is governed by the decision in *People v Prindle* (29 NY3d 463 [2017]).

Dissent in Part: [Fahey, J] “New York’s persistent felony offender sentencing scheme is unconstitutional under *Apprendi v New Jersey* (530 US 466 [2000]).” To make the requisite finding that extended incarceration and lifetime supervision are warranted based on the defendant’s history and character, and the nature and circumstances of the criminal conduct, a judge must make findings of fact; but under *Apprendi*, factual findings must be made by a jury. Controlling New York precedent should be overruled. “Exposing defendants to criminal penalties more severe than could be imposed based upon the jury verdict and prior convictions alone, without a jury making the factual determinations necessary for the enhancement in punishment, is abhorrent not only to the Federal Constitution but also to basic justice.”

Dissent: [Rivera, J] The prosecution did not rebut the presumption that a warrantless entry into a home for purposes of making an arrest is unreasonable. Further, the prosecution “also failed to justify the police visit to defendant’s home for the sole purpose of making a warrantless arrest, as this action undermined defendant’s constitutionally protected indelible right to counsel (NY Const, art I, § 6; *People v Lopez*, 16 NY3d 375, 377 [2011]).” The defendant was arrested on the second floor of a two-family house; even under the majority’s analysis, it should not be held in that situation that constitutional protections apply only to “that space which is not commonly shared by the residents of the house or invited guests.” *Payton* should apply “where, as here, the sole reason the police went to defendant’s home was to effect his arrest, and in doing so without a warrant, they undermined defendant’s indelible right to counsel.”

Dissent: [Wilson, J] “[T]he protections of the Federal and State constitutions and the prospect of a life behind bars should not turn on the vagaries of a prepositional phrase,” such as “at the doorway” or “inside the doorway.” The current federal rule “implicates defendants in a high-stakes game of inches that they do not know they are playing.” To fix that, “I would therefore go further than *Allen* and prohibit purposeful warrantless arrests of suspects who are induced to leave their homes by the actions (be they direct or furtive, and however noncoercive) of the police.”

People v Novak, 2017 NY Slip Op 07384 (10/24/2017)

Where the judge deciding a criminal appeal as of right is the same one who presided over pretrial motions and a

bench trial in the same case, due process, which requires recusal of the judge in this situation, is violated. Because the law grants defendants the right to challenge criminal judgments on direct appeal, they are entitled upon appeal “to the minimum safeguards of due process under the federal and state constitutions.” Here, the City Court Judge who convicted the defendant after denying his motion to dismiss was elected to County Court, and then adjudicated the defendant’s single-judge appeal, upholding the conviction. This was an abrogation of the structure that guarantees a level of independent factual review as a matter of right, and a facial appearance of impropriety that impermissibly conflicted with the idea of fundamental fairness. The argument that no statutory violation occurred does not save the conviction. No opportunity existed for a new decision-maker to engage in independent scrutiny and the appellate process was therefore compromised.

People v Estremera, 2017 NY Slip Op 08036 (11/16/2017)

The statute providing that a defendant must be personally present when sentence is pronounced, CPL 380.40, applies to the re-imposition of an original prison sentence under Penal Law 70.85 unless the defendant validly forfeits or waives the right. The defendant here moved to vacate his guilty plea and sentence because he was not told about a term of post-release supervision that would follow his prison sentence. At proceedings attended by the district attorney and defense counsel, but not the defendant, the trial court denied the motion to vacate the plea and re-imposed the original sentence, with no post-release supervision, as provided for by Penal Law 70.85. This was unquestionably a proceeding at which sentence was pronounced, under CPL 380.40. “Furthermore, section 70.85 works in tandem with Correction Law § 601-d, which contemplates defendant’s presence at proceedings held to correct” the type of error that had occurred at the original proceedings. Even where a sentence is pre-ordained a defendant has the right to hear the terms of the sentence directly from the court.

People v Flores, 2017 NY Slip Op 08037 (11/16/2017)

Failure to file the affidavit of errors required by CPL 460.10 when taking an appeal from a judgment that was rendered in a local criminal court following proceedings that were not recorded by a court stenographer deprives the intermediate appellate court of jurisdiction. Here, there was no stenographer, but the trial proceedings were electronically recorded. Defense counsel tried to get the recordings to have them transcribed, and, within five months of filing the notice of appeal, moved for an order extending the time in which to perfect the appeal. Counsel also asked the intermediate court to find that transcripts made from a recording would be the equivalent of steno-

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graphic minutes. The court granted the request for an extension and did not reach the alternative application for leave to file a late affidavit of errors under CPL 460.30. Because the filing of an affidavit of errors is a jurisdictional prerequisite for an appeal, and the defendant did not take the appeal as the statute dictates, the intermediate appellate court lacked jurisdiction to review the issues. In the unusual circumstances here—County Court granted an extension of time to obtain the transcripts, but did not rule on the alternative motion to file a late affidavit of errors—the matter is remitted to permit that court’s exercise of discretion as to the defendant’s motion to file a late affidavit of errors.

People v Hardee, 2017 NY Slip Op 08038 (11/16/2017)

There was record support for the Appellate Division’s determination that circumstances existed creating a substantial likelihood that there was a weapon in the defendant’s car and that there was an actual and specific danger to the safety of the officers present, justifying a limited search of the car. As that issue constitutes a mixed question of law and fact, the defendant’s challenge to the denial of his motion to suppress is beyond further review.

Dissent: [Stein, J] Accepting the undisputed facts found below, the prosecution did not make the requisite minimum showing needed to justify a protective search of the defendant’s car, which is a question of law. The defendant did not evade police, but rather immediately complied with signals to pull over; his nervousness was not sufficient to justify the search, nor did he take actions such as moving to secrete an object in the car or moving toward any area to retrieve anything; his refusal to get out of the car was brief and not hostile; and he was honest about alcohol being present. That he later resisted being handcuffed is of no moment where the searching officer did not know of that when the search began. Under controlling precedent, suppression should have been granted.

Matter of Ruth Joanna O.O., 30 NY3d 985, __ NYS3d __ (11/16/2017)

“On review of submissions pursuant to section 500.11 of the Rules ... order affirmed, without costs, and certified question answered in the affirmative. Record support exists for the affirmed findings that Melissa O. committed acts constituting child neglect and the child is a neglected child as defined in Family Court Act § 1012.”

People v Arjune, 2017 NY Slip Op 08159 (11/20/2017)

The narrow ruling in People v Syville (15 NY3d 391 [2010]), allowing defendants in some circumstance to seek

coram nobis relief after failing to move for more time to file a notice of appeal under CPL 460.30, is not expanded to cover a case where “retained trial counsel filed a timely notice of appeal but allegedly failed to advise the defendant of his or her right to poor person relief, or to take any action when served with a motion to dismiss the appeal years after the notice of appeal was filed.” The dissenters argue that the defendant is entitled to a writ of coram nobis for ineffective assistance, citing Appellate Division directives and bar association standards requiring trial counsel to tell convicted clients of their right to appeal and give them basic information about pursuing appeal. However, there is no constitutional right to counsel in preparing a poor person application. And no support is offered for the contention that *trial* attorneys have a constitutional duty regarding an appeal years after the notice of appeal was filed. The defendant failed to meet his burden of proof on the ineffectiveness claim.

Dissent: [Rivera, J] Counsel here ignored rules imposed to ensure that defendants are well-represented, depriving the defendant of his right to appeal and violating the holding of *Roe v Flores-Ortega* (528 US 470 [2000]). Defendants should not be made to suffer for their attorneys’ failings, and a court’s instructions cannot substitute for counsel’s burden to ensure the client understands their rights. The majority’s holding takes away incentive for lawyers to comply with rules regarding representation of clients upon conviction.

Dissent: [Wilson, J] Here as in *Roe*, “counsel’s alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself’”

People v Helms, 2017 NY Slip Op 08160 (11/20/2017)

The Appellate Division erroneously posited that in determining whether the defendant’s prior Georgia burglary conviction could serve as a predicate felony conviction for New York sentencing purposes, there must be a comparison of the statutory elements of the foreign and New York crimes in question; the court found that the Georgia statute did not include the element of knowing that entry or a decision to remain is unauthorized. But the strict equivalency test allows the sentencing court to look not only at the foreign statute under which the prior conviction was obtained but also at “any foreign statute or case law that informs the interpretation of the foreign code breached by the defendant.” Applied here, the test supports a conclusion that the Georgia burglary conviction is equivalent to a violent felony conviction in New York. While the Georgia burglary statute does not include a “knowing” component, “Georgia statutory and case law establish[es] that the unauthorized entry element of the Georgia burglary statute contains a culpable mental state at least commensurate with that of its New York counter-

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part.” And the illegality element in the respective statutes—in Georgia, “without authority,” in New York, “unlawfully”—is equivalent. The defendant’s sentence as a second violent felony offender is reinstated.

Concurrence: [Rivera, J] There is no need to compare the lesser-included statutes of New York and Georgia to address the question of whether Georgia requires knowing unauthorized entry, given that “the Georgia Supreme Court construed *sub silentio* Georgia’s burglary statute to require that a defendant make a knowingly unauthorized entry of another’s dwelling”

Matter of Jamie J., 2017 NY Slip Op 08161 (11/20/2017)

When an underlying article 10 neglect petition is dismissed for failure to prove neglect, Family Court’s subject matter jurisdiction is terminated and the child must be returned to their parent or parents. Even if this appeal was moot due to subsequent proceedings to terminate parental rights, the exception to that doctrine plainly applies. The Department of Social Services’ claim of continuing jurisdiction would subvert the statutory scheme and “provide an end-run around the protections of article 10.” This result does not prevent the Department from taking alternative steps to place children in foster care if warranted.

People v Dodson, 2017 NY Slip Op 08171 (11/21/2017)

Where the defendant’s request for a new attorney to advise him about seeking to withdraw his plea before sentencing was supported by specific allegations concerning his attorney’s performance, the court had a duty to inquire into the request before imposing sentence. “Accordingly, defendant must be afforded the opportunity to decide whether to make a motion to withdraw his guilty plea upon the advice of counsel.”

Matter of Friedman v Rice, 2017 NY Slip Op 08167 (11/21/2017)

A government entity may rely on the Freedom of Information Law (FOIL) exemption protecting confidential sources and confidential information “only if the agency establishes (1) that an express promise of confidentiality was made to the source, or (2) that the circumstances of the particular case are such that the confidentiality of the source or information can be reasonably inferred.” The Second Department erred in applying its precedent, unique among the Departments and dating from a former, superseded FOIL provision, holding that “information and statements gathered in the course of a police investigation from witnesses who do not testify at trial are presumptively confidential” The inquiry

should be case-specific, and the court may consider “such factors as the nature of the crime, the source of the information in relation to the crime, and the content of the statements or information.”

This appeal, the latest effort to overturn the petitioner’s decades-old, high-profile conviction for child sex crimes, stems from denial by the prosecutor to release to the petitioner documents that had been shared with a review panel convened to oversee a reinvestigation of the case by a team in the prosecutor’s office. The respondent’s argument that the petitioner failed to include the specific demand in question in his FOIL request is rejected; the request “reasonably described, and therefore clearly sought, all documents that would be part of the reinvestigation process” Furthermore, the prosecutor’s denial of the FOIL request clearly established that nothing from the case file would be released absent a court order, rendering any effort to secure administrative review futile.

This decision does not answer whether disclosure of the requested documents may be denied. Given the length of time since the request, which was made to support a claim of actual innocence, “[i]t is our intention that enunciation of the proper standard and our remittal to Supreme Court should facilitate the timely adjudication of petitioner’s claims.”

Dissent in Part: [Whalen, J] The Appellate Division did read the confidentiality exemption too broadly, but I disagree with the conclusion that the petitioner was not required to exhaust his administrative remedies and do not fully agree with the discussion of how an agency can meet its burden of showing that information was meant to be treated as confidential. More weight should be given to the sensitive nature of the crime involved.

People v Kisowski, 2017 NY Slip Op 08169 (11/21/2017)

The defendant was found to have violated a probation condition prohibiting him from having contact with convicted criminals when, on four occasions, he “picked up and walked the dog he once shared with his former intimate partner, who had a DWI misdemeanor conviction.” The amended petition setting out the violation was facially insufficient; it gave four dates on which he “allegedly ‘had contact with’ a convicted criminal,” but did not comport with the statutorily required provision to the defendant of time, manner, and place of the alleged violation.

People v Smith, 2017 NY Slip Op 08165 (11/21/2017)

The defendant’s request for substitute counsel “was supported by specific factual allegations of serious complaints about counsel” [internal quotation marks omitted], warranting a “‘minimal inquiry’ into ‘the nature of the disagreement or its potential for resolution’” Failure to con-

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duct such an inquiry into the “seemingly serious request[]” for substitute counsel was an abuse of discretion.

People v Boone, 2017 NY Slip Op 08713 (12/14/2017)

“We hold that when identification is an issue in a criminal case and the identifying witness and defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification.” Mistaken eyewitness identification is the single greatest cause of wrongful convictions. And there is a “near consensus among cognitive and social psychologists that people have significantly greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own” But many uninstructed jurors are not aware of that, making evident the need for a charge on the cross-race effect. Expert testimony on cross-racial identifications “does not render a charge regarding the cross-race effect superfluous” and “the absence of expert testimony on cross-racial identification does not preclude” such a charge. Nor must there have been cross-examination of prosecution witnesses about their identifications before a cross-race charge is given. Developments in understanding about the cross-race effect and wrongful convictions demand a new approach, so the general approach to eyewitness identification instructions set out in earlier precedent does not govern determination of whether a cross-race effect instruction is appropriate in an individual case.

Concurrence in Result: [Garcia, J] Denial of a cross-racial identification charge here was an abuse of discretion, but “I would reaffirm, in no uncertain terms, the longstanding principle that the decision to deliver a cross-racial identification charge—like any other identification charge—remains in the sound discretion of the trial court.” Courts have “a critical gatekeeping role in shielding the jury from instructions that are misleading, irrelevant, or otherwise unwarranted,” and there have been mixed findings in studies of the effectiveness of instructions on eyewitness identification. The purported caveats to the majority’s new rule—where a “witness and the defendant do not ‘appear to be of different races’” or where “the witness’s identification of the defendant is not ‘at issue’”—will be meaningless in practice, requiring that a cross-racial charge be given upon request regardless.

Matter of Lisa T. v King E.T., 2017 NY Slip Op 08800 (12/19/2017)

Family Court maintains jurisdiction to enter a final order of protection upon finding violation of temporary orders of protection even though the family offense petition that led to the temporary orders was dismissed for insuffi-

cient evidence. The plain language of sections 846 and 846-a of the Family Court Act provide the court with such jurisdiction; there is no basis in the text for drawing a distinction between violations of final orders of protection after a finding of a family offense and violations of temporary orders of protection entered while the family offense petition is pending. “[O]ur reading gives effect to, and does not render superfluous, the reference to Family Court Act [] 842 found in section 846-a, whereas the dissent’s reading strains the plain language of that statutory provision.”

Dissent: [Wilson, J.] “Violating a temporary order of protection by conduct that does not constitute a family offense is an affront to the court’s authority, and is subject to sanction. It is a fundamentally different matter from offending conduct that constitutes a new family offense.” Family Court should have utilized its contempt powers to sanction any violations of its orders.

People v Smith, 2017 NY Slip Op 08798 (12/19/2017)

The Appellate Division properly found that the trial court denied the defendant’s right to counsel on the prosecution’s motion to require a buccal swab where, after granting retained counsel’s motion to be relieved and knowing that the defendant was unrepresented, the court engaged the defendant in an extensive colloquy that included telling the defendant that the order for the swab had been signed and that there was no basis for challenging the order for a DNA swab. The court rejected the defendant’s request for an attorney to advise him on the matter. There was no express consent to the request for DNA and no act by the defendant or retained counsel, before he was relieved, from which implied consent could be inferred. Under the circumstances, the failure to reply to the prosecution’s motion does not support a finding of consent. But dismissing the indictment was error, as the denial of counsel, “although serious, occurred post-indictment and did not retroactively infect the grand jury proceedings.”

Dissent: [Garcia, J] The trial court’s failure to adjourn the proceedings until new counsel was appointed did not amount to constitutional error. The defendant was never unrepresented during a critical stage of the proceedings. Counsel was served with the motion and agreed that if his client was not inclined to agree to give the DNA sample, counsel would put in an answer. No opposition to the motion was ever presented. Retained counsel had known that the order was signed. The defendant’s claims that he did not know about the motion and did not consent to the sample constitute a classic ineffective assistance of counsel claim based on matters outside the record.

First Department

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

People v Bell, 153 AD3d 401, 60 NYS3d 12 (1st Dept 8/1/2017)

The verdict convicting the defendant of attempted second-degree murder was not against the weight of the evidence although the complainant's testimony was inconsistent, and his primary physician acknowledged that the type of injury he suffered can affect memory, because there was other evidence including DNA evidence and the testimony of the codefendant. But the conviction must be reversed because the employment time sheets of a third person were admitted as business records without laying the proper foundation, and the court did not instruct the jury that the time sheets could not be considered for the truth of their content. There was substantial dispute as to whether the third person was in the apartment at the time of the crime, and the argument the defense offered was that another person was in the apartment and shot the complainant. (Supreme Ct, Bronx Co)

People v Hill, 153 AD3d 413, 60 NYS3d 23 (1st Dept 8/1/2017)

Although the court erred in determining that the defendant did not have standing to challenge the search of the apartment where he had stayed "on and off" since he was a child and stored his clothes and received mail, the defendant's uncle, who owns the apartment, gave consent. While he testified that his consent was involuntary, "[t]he suppression court's credibility determinations are entitled to great deference on the question of voluntariness" The defendant did not have a reasonable expectation of privacy in his aunt's vehicle, and the searches of the apartment and vehicle were attenuated from the illegal search of the defendant's clothing bags at the hospital. Since the defendant fit the description of the perpetrator, "black male who had a gunshot wound to the leg," even if the illegal search had produced no evidence linking the defendant to the crime a continued investigation of him was likely, including "the routine and natural investigatory step of interviewing" the defendant and his girlfriend, leading to information about the car and the apartment. (Supreme Ct, Bronx Co)

Dissent: The physical evidence should have been suppressed as it was obtained as the fruit of an illegal search. After hearing a radio report about a man at the hospital with a gunshot wound to the leg, the detective

interviewed the defendant there, then, without his permission, searched the bags under his bed, and recovered an ID and a ring later identified as the complainant's. This "was the direct result of and not sufficiently attenuated from the illegality itself" and led to the discovery of the other challenged evidence.

People v Renvill, 153 AD3d 420, 60 NYS3d 36 (1st Dept 8/1/2017)

The court erroneously denied the defendant's motion to withdraw his guilty plea where the defendant lacked adequate information about the potential scope of sentencing. The court stated on multiple occasions "that defendant's sentence would involve 'jail' time"; its failure to clearly let the defendant know "that he could receive a state prison sentence, and the potential maximum term thereof, if he violated the plea agreement," rendered the plea unknowing and involuntary. (Supreme Ct, Bronx Co)

People v Ricart, 153 AD3d 421, 60 NYS3d 30 (1st Dept 8/1/2017)

The prosecution failed to exercise due diligence in securing their witness's presence at trial, so the period between July 23 and Aug. 22, 2013 was not excludable as an exceptional circumstance and the prosecution exceeded their speedy trial time. Although the prosecutor knew about the witness's planned vacation on July 25, 2013 and was told to contact him the next day to discuss the trial schedule, the DA's office did not contact the witness until July 30, 2013 after he had already left the country. "Under the People's interpretation, they should be permitted to turn a blind eye to a witness's proposed vacation, and then, once the witness has left the country, assert that the time was excludable as an 'exceptional circumstance.' This is gamesmanship we surely ought not to endorse." The record does not support the prosecution's assertion that the defense requested a one-week adjournment on July 30, 2013 to accommodate a defense witness, as the defense did not have a witness, and it was the prosecution's witness who was unavailable. The defendant's sentence is reversed, his CPL 30.30 motion is granted, and the indictment is dismissed. (Supreme Ct, New York Co)

Dissent: "There is no legal support for the argument, as set forth by the majority, that the failure of the People to subpoena the witness, obtain a material witness order or apparently to direct his immediate return from the Dominican Republic constituted a failure on their part to exercise due diligence. Further, contrary to the majority's assertion, this finding of due diligence is not permitting the People to turn a blind eye to a witness's proposed vacation or condoning 'gamesmanship.'" Even if this time period is included, the prosecution did not exceed the speedy trial time.

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[*Ed. Note: Leave to appeal was granted on Oct. 3, 2017 (2017 NY Slip Op 87746 [U] [1st Dept].*)]

**Matter of Daniella A., 153 AD3d 426, 60 NYS3d 116
(1st Dept 8/8/2017)**

For the reasons set out in *Matter of Leenasia C.* (154 AD3d 1 [2017]), decided simultaneously, the petitioner agency's argument that the court exceeded its authority in modifying the dispositional order is rejected. The court properly substituted a suspended judgment, vacated a finding of neglect, and dismissed the petition. "We also find that the mother's strict compliance with the dispositional order, and her clear dedication to ameliorating the conditions that led to the neglect finding, constituted 'good cause' warranting the relief requested" (Family Ct, Bronx Co)

**Matter of Leenasia C., 154 AD3d 1, 59 NYS3d 355
(1st Dept 8/8/17)**

As a matter of first impression, the court correctly assumed the authority to retroactively order a suspended judgment and dismiss a neglect petition after the mother ably demonstrated her ability to care for her children. The mother previously consented to a neglect finding and the court postponed the dispositional hearing. The court then issued a dispositional order that released the children to the mother, under the supervision of petitioner, Administration for Children Services (ACS), for 12 months. At the end of this period, after satisfying the requirements of the dispositional order, the mother made a post-disposition motion to modify the dispositional order. The court issued the order now challenged on appeal as being consistent with the children's best interest. "[P]ursuant to Family Court Act § 1061, the Family Court retains jurisdiction to consider a motion by any party to enforce, modify, or vacate an article 10 fact-finding order or dispositional order at any time, upon a proper factual showing of compliance or noncompliance with the order's terms and conditions and a showing of good cause"

The objections of ACS are rejected. The concern that affirming the decision would create 'bad precedent' is "nothing more than exaggerated hyperbole to argue that the floodgates will open with the rare grant," and, "[u]ltimately, where children's welfare is at stake, public policy militates toward enabling the Family Court greater dexterity to fashion relief, not less, in accordance with the intent and purpose of Family Court Act § 1061." (Supreme Ct, Bronx Co)

**People v Bonilla, 154 AD3d 160, 60 NYS3d 148
(1st Dept 9/5/2017)**

Reversal is required because the court did not charge the jury on temporary lawful possession of a weapon and the matter is remanded for a new trial. The defendant obtained the gun from the decedent during a struggle that occurred approximately three minutes before the defendant shot the decedent, who had just approached with two other men and grabbed the defendant. There is no evidence that the defendant could have turned the gun over to authorities in that short period of time, and case law does not support the proposition that the defendant was required to take the gun to his home and seek refuge. "[T]he lawfulness of defendant's possession presented a factual issue to be resolved by the jury." (Supreme Ct, Bronx Co)

**People v Doumbia, 153 AD3d 1139, 60 NYS3d 157
(1st Dept 9/5/2017)**

"[C]ounsel is under a duty to provide clear advice as to" deportation consequences and it was ineffective assistance of counsel to fail to advise the defendant that his guilty plea to an aggravated felony would result in mandatory deportation. The dissent's position that, since the deportation consequences could have been avoided by pursuing youthful offender status or the use of other strategies, counsel was only obligated to advise the defendant of the risk or possibility of deportation, "seriously undermine[s] the Sixth Amendment protection to which noncitizen defendants are entitled," and "conflict[s] with the concept of a truly informed plea agreement" The appeal is held in abeyance and the case is remitted to give the defendant an "opportunity to vacate his plea upon a showing that there is a 'reasonable probability' that he would not have pleaded guilty" if he was properly advised of the deportation consequences. (Supreme Ct, New York Co)

Dissent: The record reflects that counsel advised the defendant that he "'could be deported'" and the majority ignores the uncertain nature of deportation consequences. "[S]ince counsel potentially knew that the [Convention Against Torture], youthful offender treatment, or 8 USC § 1231 (b) (3) (A) could help defendant avoid deportation, on this record it cannot be expected that counsel would advise defendant it was certain that he would be deported."

**People v Flores, 153 AD3d 1186, 62 NYS3d 47
(1st Dept 9/26/2017)**

Based on a videotaped exchange with the prosecutor at the precinct, it is evident that the defendant did not understand his right to an attorney before waiving his *Miranda* rights and giving oral and written statements. He

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repeatedly said words to the effect of “I cannot pay a lawyer” when expressing confusion about whether to mark “yes” or “no” on the form. Because the motion to suppress statements made to the police at the scene of the incident must be granted and there is a reasonable possibility that denial of suppression contributed to the defendant’s guilty plea, his first-degree manslaughter conviction is reversed, the plea vacated, and the matter remanded for further proceedings. (Supreme Ct, New York Co)

People v Whitefield, 153 AD3d 1177, 61 NYS3d 12
(1st Dept 9/26/2017)

The court erroneously denied the defendant’s challenge for cause when a prospective juror, a former police officer, “clearly showed a predisposition to believe that police officers testify truthfully” by stating during voir dire that police would testify accurately except when relaying erroneous information provided by others. When asked “whether he thought it was possible for a police witness to lie, exaggerate, or be mistaken, the prospective juror allowed that there was ‘a little room’ for this and stated that he ‘suppose[d]’ it was possible.” He did not “expressly state that his prior state of mind [would] not influence his verdict’” A new trial is required. (Supreme Ct, Bronx Co)

People v Ortiz, 154 AD3d 448, 60 NYS3d 827
(1st Dept 10/5/2017)

Preservation of a challenge to the defendant’s guilty plea was not required where he consistently said during the plea allocution that he only committed commercial burglaries, which “tended to negate the ‘dwelling’ element of second-degree burglary.” The court’s follow up questions did not clarify that the defendant knew he was admitting that the dwelling element was satisfied and he was forgoing his right to litigate that issue. The fact that the defendant raised the issue in an unsuccessful CPL 440 motion and did not obtain leave to appeal does not foreclose review on direct appeal, but does limit review to the plea allocution record, which is sufficient here. (Supreme Ct, New York Co)

People v Robinson, 154 AD3d 490, 63 NYS3d 310
(1st Dept 10/12/2017)

The third-degree criminal possession of a controlled substance conviction is reversed because the court erred by precluding defense counsel from posing questions to a detective about allegations in a pending civil law suit that were relevant to the detective’s credibility; counsel laid the proper foundation for impeachment. The error was

harmless with respect to the sale conviction, but not harmless with respect to the possession conviction because the detective was the only testifying witness alleging that cocaine was found on the defendant’s person.

Since the court considered a conviction that was subsequently reversed, the defendant must be resentenced on the third-degree criminal sale of a controlled substance conviction. (Supreme Ct, New York Co)

People v F.B., 155 AD3d 1, 63 NYS3d 314
(1st Dept 10/17/2017)

The court’s order granting a prosecution motion to unseal the defendant’s records is reversed because a prosecutor acting as an agency authorized by local law to demand an eviction proceeding is not a “law enforcement agency” within the meaning of CPL 160.55(1)(d)(ii). In a case dealing with identical statutory language, CPL 160.50(1)(d)(ii), the Court of Appeals said courts are authorized to make sealed records available to prosecutors only if a criminal proceeding has commenced. The district attorney’s attempt to unseal the documents for use by the landlord in a civil action against the defendant “runs counter to the Legislature’s intent in drafting the sealing statutes and their narrow exceptions.” (Supreme Ct, Bronx Co)

Second Department

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Matter of Nixon v Ferrone, 153 AD3d 652,
60 NYS3d 256 (2nd Dept 8/9/2017)

Despite the allegation that the mother summarily refused the father all his parenting time, a fact that necessitated a hearing on the father’s motion for physical custody, the court erred by suspending the mother’s parenting time with the child for a period of three months. The mother’s request for a stay of the suspension of visits was granted after the court issued the order, pending the hearing and determination of the appeal. The order is modified based on the facts and law by deleting the provision of the suspension of visits and replacing it with a requirement that the court, after consulting with the parties, “designate a therapist to conduct therapeutic visitation to commence immediately” The modification of the pre-existing custody agreement with physical custody to the father was supported by the record. But, “[g]enerally, absent exceptional circumstances, which we do not find present here, some form of visitation by the noncustodial parent is always appropriate” The matter is remitted

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for designation of a family therapist and determination of the appropriate therapeutic visitation schedule. (Family Ct, Suffolk Co)

**People v Newman, 153 AD3d 639, 57 NYS3d 412
(2nd Dept 8/9/2017)**

“Certain remarks made by the sentencing court demonstrate that it improperly considered a crime of which the defendant was acquitted as a basis for sentencing. Accordingly, the matter must be remitted ... for resentencing” And as the prosecution failed to establish that the acts underlying the first-degree assault conviction “were separate and distinct from the acts underlying the” attempted first-degree robbery conviction, “the sentences imposed on remittal are to run concurrently” (Supreme Ct, King Co)

**People v Vazquez, 153 AD3d 643, 60 NYS3d 254
(2nd Dept 8/9/2017)**

The evidence was not legally sufficient to establish the defendant’s guilt of first-degree criminal possession of a weapon “because it did not demonstrate that the Molotov cocktails constituted an ‘explosive substance’ within the meaning of Penal Law § 265.04(1) ...”, but it was sufficient to establish the lesser-included offense of third-degree criminal possession of a weapon.

The court erred in permitting an investigator to testify as an expert regarding the general hierarchy of the defendant’s gang and as to relationships between specific gang members. The detective’s only knowledge of these issues came from his own participation in the investigation and the testimony usurped the jury’s function. Further, it was improper to admit “a summary chart depicting the gang hierarchy and membership of the gang, which identified the gang’s members by name and their associated arrest photos” However, the errors were harmless. (Supreme Ct, Kings Co)

**People v Blacks, 153 AD3d 720, 61 NYS3d 66
(2nd Dept 8/16/2017)**

The defendant was subjected to custodial interrogation where he was “in handcuffs and surrounded by numerous police officers” The defendant’s pre-*Miranda* statement disclosing the combination to a safe in a room of the apartment in which he was arrested was testimonial. The handguns collected and written statements later made about them were fruit of the poisonous tree. (Supreme Ct, Kings Co)

**People v Garcia, 153 AD3d 735, 59 NYS3d 783
(2nd Dept 8/16/2017)**

The defendant’s history of substance abuse and his prison disciplinary record were not proper bases for an upward departure from his presumptive risk level under the Sex Offender Registration Act, because they were accounted for in the initial risk assessment. Despite the fact that the prosecution proved by clear and convincing evidence that the defendant committed a theft while the underlying prosecution was pending, the court “improvidently exercised its discretion in upwardly departing from the presumptive risk level on that basis.” The incident was “an opportunistic nonviolent theft committed while the defendant was house-sitting for a friend,” and as such did not indicate an underassessment of the risk of sexual re-offending. (Supreme Ct, Westchester Co)

**People v Madison, 153 AD3d 737, 59 NYS3d 755
(2nd Dept 8/16/2017)**

The court erred in assessing 15 points under risk factor 11 in determining the defendant’s risk level under the Sex Offender Registration Act. The prosecution “offered evidence that the defendant used drugs after the time of the offense” but “failed to prove by clear and convincing evidence that the defendant used alcohol or drugs in excess either at the time of the offense or repeatedly in the past” (Supreme Ct, Kings Co)

**People v Morris, 153 AD3d 729, 60 NYS3d 322
(2nd Dept 8/16/2017)**

Where the defendants, whose vehicle matched the description of one involved in a shooting incident, had been removed from their car and handcuffed to await the arrival of eyewitnesses to the shooting and additional officers had arrived, there was no immediate threat to the officers’ safety, making it unlawful for the police “to invade the interior of” the defendants’ vehicle. An officer who noticed that the center console was ajar opened it before the eyewitnesses identified the defendants; at that point “the police lacked probable cause for a warrantless search of [the car’s] center console, and the weapons found as a result were properly suppressed” (Supreme Ct, Nassau Co)

**People v Murrell, 153 AD3d 730, 58 NYS3d 162
(2nd Dept 8/16/2017)**

The court erroneously “fail[ed] to advise the defendant at the time of his pleas that both his sentence on the burglary conviction and his sentence on the assault conviction would include a period of postrelease supervision,” preventing his pleas to those offenses from being

Second Department *continued*

knowing, voluntary, and intelligent. The defendant's conviction for third-degree criminal mischief, however, did not require such advice as it entailed an indeterminate term of imprisonment. (Supreme Ct, Nassau Co)

People v Webster, 153 AD3d 733, 60 NYS3d 306 (2nd Dept 8/16/2017)

The court committed a mode of proceedings error requiring reversal without regard for preservation when it mishandled notes from the jury. "The court did not provide defense counsel with notice of the content of either note, but rather stated, in the presence of defense counsel, the prosecutor, and the jury, 'We've received your notes. We are ready for the read back.'" The court should have provided the defendant with the "'precise contents' of the notes" before responding to them. (Supreme Ct, Kings Co)

People v Amorosano, 153 AD3d 849, 60 NYS3d 377 (2nd Dept 8/23/2017)

"The defendant's contention that counsel who represented him during the plea proceedings was ineffective for failing to move for a forfeiture hearing to contest the seizure of one of his vehicles ... is not properly before this Court. By pleading guilty, the defendant forfeited appellate review of any claim of ineffective assistance of counsel during the plea proceedings that does not directly involve the plea bargaining process" (County Ct, Dutchess Co)

People v Brown, 153 AD3d 850, 61 NYS3d 101 (2nd Dept 8/23/2017)

The race-neutral reasons for the prosecution's peremptory challenges of two black prospective jurors "were not applied equally to exclude other jurors who were not black, even though those other jurors had answered the subject hypothetical questions in the same way" that the two prospective black jurors had answered them, violating the rule from *Batson v Kentucky* (476 US 79 [1986]). The prosecution could not articulate other legitimate reasons to justify their challenges, and the nonracial justifications offered were pretextual.

The defendant was incorrectly sentenced as a second felony offender because the out-of-state conviction offered as a predicate did not have elements equivalent to a New York felony. (Supreme Ct, Queens Co)

People v Braithwaite, 153 AD3d 929, 60 NYS3d 403 (2nd Dept 8/30/2017)

The court erred by failing to instruct the jury that, if they found the defendant not guilty of a greater charge based on the defendant's justification defense, it could not consider any lesser count. "[T]he verdict sheet, which made no reference to justification, [erroneously] instructed the jury that, if it found the defendant not guilty on count one or count two, the jury must 'deliberate next on' the following count." The court similarly erred by later instructing the jury along the same lines. The combination of these errors "may have led the jurors to conclude that deliberation on each crime required reconsideration of the justification defense, even if they had already acquitted the defendant of the previous count based on justification." (Supreme Ct, Kings Co)

People v Chazbani, 153 AD3d 930, 60 NYS3d 433 (2nd Dept 8/30/2017)

Where the trial court denied suppression of the firearm found in the defendant's vehicle on the basis that the defendant lacked standing to challenge that seizure, the defendant appealed after conviction, and the trial court's decision on standing was reversed, the prosecution's argument "on appeal that the existence of probable cause provided an alternative basis for upholding the ruling on the suppression motion and affirming the judgment of conviction" could not be reviewed "because the Supreme Court did not decide that issue adversely to the defendant" The trial court's finding upon remittal that there was no probable cause for the search, requiring suppression of the physical evidence and the defendant's later statement regarding it, was a decision in the defendant's favor and cannot be reviewed upon his appeal. The matter is remitted for entry of an order granting suppression, from which the prosecution may appeal. (Supreme Ct, Queens Co)

People v Middleton, 153 AD3d 937, 60 NYS3d 401 (2nd Dept 8/30/2017)

Where the prosecution's witness denied at trial that she had been present at the scene of the charged shooting, the court erred in ruling, following a hearing under *People v Sirois* (92 AD2d 618 [1983]), that the prosecution could present at trial the witness's grand jury testimony. At the hearing, the prosecution offered phone conversations between the defendant and the witness that contained no threats or efforts to prevent the witness from testifying; the witness denied having been threatened; a detective testified that the witness had expressed concern that the father of her child, a friend of the defendant, would be upset if he found out she was testifying, but the witness and her child's father denied having discussed the testimony; and an assistant prosecutor testified that the witness had said her decision about testifying was due to

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“everyone on Facebook” saying she was a snitch and one friend refusing to talk to her. The prosecution failed to meet their burden of showing that the witness’s action was due to a threat made by the defendant.

The court also erred by denying defense counsel’s request to be relieved without making any inquiry. (Supreme Ct, Kings Co)

**People v Prince, 153 AD3d 940, 60 NYS3d 438
(2nd Dept 8/30/2017)**

Where the defendant had been found in possession of a loaded, operable gun for which he had no license or permit, in an apartment that was not his home or business, “[a] witness’s testimony as to the illegal nature of the activity allegedly occurring in the apartment had only slight probative value” that was outweighed by the evidence’s prejudicial effect. Despite its admission, however, the defendant received a fair trial, as there was overwhelming evidence of his guilt. (Supreme Ct, Kings Co)

**People v Ridenhour, 153 AD3d 942, 60 NYS3d 449
(2nd Dept 8/30/2017)**

The court erred by determining that the prosecution could cross-examine the defendant regarding a prior uncharged crime if he chose to testify at his trial for allegedly stabbing someone in the throat. “Specifically, the People sought to cross-examine the defendant regarding an attempted murder investigation” into an incident in which “the same victim had been slashed across the throat with a knife,” but “never identified his attacker and [] consistently refused to cooperate with law enforcement officials.” The prior charges were so similar to the present ones that they were more prejudicial than probative. The error was not harmless because the evidence of guilt was not overwhelming and the erroneous ruling affected the defendant’s decision not to testify, depriving “the jury of potentially significant material evidence” (County Ct, Westchester Co)

**People v Narine, 153 AD3d 1280, 61 NYS3d 585
(2nd Dept 9/13/17)**

To resolve the defendant’s claim “that her counsel’s failure to call a medical expert in support of her defense, and counsel’s failure to confront the People’s expert witnesses with certain authoritative medical and scientific literature on cross-examination,” would require considering evidence outside the record. The appropriate vehicle for the relief the defendant seeks is proceeding under CPL 440.10.

The court erred by allowing the prosecution to show the jury pictures of an injured child, as the extent of the child’s injuries is not an element of endangering the welfare of a child. However, the error was harmless in light of the extensive and uncontroverted evidence presented. (Supreme Ct, Queens Co)

**People v O’Neal, 153 AD3d 1281, 60 NYS3d 460
(2nd Dept 9/13/17)**

The defendant was not immune from prosecution for second-degree criminal possession of a forged instrument and first-degree offering a false instrument for filing. For immunity to attach based on compelled grand jury testimony, the testimony must be substantially connected to the criminal charges. The defendant’s testimony as to ownership of a piece of real property was “not relevant to establishing her knowledge that the deed to the real property was forged, her intent to use that deed to defraud another person, her presentment of the deed to the City Register, or her belief that the deed would be accepted for filing” The ownership testimony did not “tend to a conviction [for those offenses] when combined with proof of other circumstances which others may supply.”

However, the testimony as to the property’s ownership would be relevant to the defendant’s second-degree grand larceny charge, as it could establish her intent to deprive the rightful owner of said property. She was properly found to be entitled to immunity as to that charge. (Supreme Ct, Kings Co)

**People v Santeramo, 153 AD3d 1286, 61 NYS3d 295
(2nd Dept 9/13/2017)**

Review of the defendant’s sentence under the interest of justice jurisdiction is not precluded by the defendant’s waiver of appeal, which was invalid, where: the court at the plea proceeding “improperly suggested that waiving the right to appeal was mandatory rather than a right which the defendant was being asked to voluntarily relinquish, and the court never elicited an acknowledgment that the defendant was voluntarily waiving his right to appeal ...[;] the record does not demonstrate that the defendant understood the distinction between the right to appeal and other trial rights forfeited incident to his pleas of guilty”; and while the record “reflects that the defendant executed written appeal waiver forms, the transcript of the plea proceedings shows that the court did not ascertain on the record whether the defendant had read the waivers or discussed them with defense counsel, or whether he was even aware of their contents” The defendant’s sentence was not excessive. (County Ct, Dutchess Co)

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[People v Abdallah](#), 153 AD3d 1424, 61 NYS3d 618 (2nd Dept 9/27/17)

Defense counsel's performance was unreasonable under *Strickland* and *Padilla* when he advised the defendant that pleading guilty to second-degree grand larceny "would preserve his eligibility to apply for a cancellation of removal, when, in fact, his conviction constituted an aggravated felony, rendering him mandatorily deportable" This was so despite counsel's attested reliance on a consultation "with an attorney at the Immigra[nt] Defense Project, who informed him that the defendant would be eligible to apply for and receive a cancellation of removal." Further, the defendant was prejudiced by the deficiency because "there was a reasonable probability that the defendant could have negotiated a plea agreement that did not affect his immigration status or at least preserved his eligibility for cancellation of removal" (Supreme Ct, Queens Co)

[People v Bacquie](#), 154 AD3d 648, 62 NYS3d 425 (2nd Dept 10/4/2017)

The gun found during an inventory search of the defendant's car must be suppressed because the prosecution failed to establish the lawfulness of that search. At the suppression hearing, no testimony was given as to "evidence of the policy as to inventory searches [or] that the particular inventory search at issue complied with that policy," which it was the prosecution's burden to produce. (Supreme Ct, Queens Co)

Concurrence in Part, Dissent in Part: "I agree ... that the Supreme Court should have suppressed the gun that was recovered from the defendant's car. However, ... the court also should have suppressed the gravity knife that was recovered from the defendant's person, as the People failed to establish that the stop of the defendant's vehicle was lawful." That it is difficult to see into a moving vehicle after dark "is not sufficient to support a reasonable suspicion that the vehicle's windows had a light transmittance of less than 70% in violation of Vehicle and Traffic Law 375(12-a)(b)."

[People v Franzese](#), 154 AD3d 706, 61 NYS3d 661 (2nd Dept 10/4/2017)

The court properly admitted a YouTube video that "showed the defendant making gang signs and taunting and threatening a rival member" The video was authenticated "by a YouTube certification, which indicated when the video was posted online, by a police officer who viewed the video at or about the time that it was posted online, and by the defendant's own admissions

about the video made in a phone call while he was housed at Rikers Island Detention Center" The video was probative of the defendant's motive and its probative value was not outweighed by prejudice to the defendant. "[S]ee *People v Molineux*, 168 NY 264, 293 [1901]; *People v Bailey*, 148 AD3d 547 [2017], *lv granted* 29 NY3d 1075 [2017]" (Supreme Ct, Queens Co)

[People v Johnson](#), 154 AD3d 777, 62 NYS3d 455 (2nd Dept 10/11/2017)

The defendant was denied the right to be present at his trial during the testimony of two prosecution witnesses. The court "failed to conduct a sufficient inquiry as to the circumstances surrounding the defendant's absence" where it received information from defense counsel that law enforcement officials' stated reason for the defendant's absence—that he refused to leave his cell because he had no clothes for court—was inaccurate but proceeded with the trial anyway. (Supreme Ct, Kings Co)

[People v Owoaje](#), 154 AD3d 781, 63 NYS3d 399 (2nd Dept 10/11/2017)

The court erred in denying the defendant's peremptory challenges to two prospective jurors. When the prosecutor raised a reverse-*Batson* challenge to the peremptory challenges, the defendant properly articulated a non-discriminatory reason for striking the potential jurors (*ie* that defense counsel had a practice of striking jurors who had previously served on a jury that reached a verdict). The prosecution offered no response to the reasoning of the defense, failing to demonstrate that the facially race-neutral explanation was pretextual. (Supreme Ct, Kings Co)

[Matter of Dittakavi](#), 155 AD3d 10, 62 NYS3d 463 (2nd Dept 10/18/2017)

An attorney committed professional misconduct when she signed her client's name to an unsigned petition to vacate acknowledgment of paternity, notarized the false signature, and then filed the petition with the Family Court. Despite curative measures taken by her employer, the request for discipline by consent should be granted and a public censure is warranted.

[People v Keith](#), 154 AD3d 877, 62 NYS3d 483 (2nd Dept 10/18/2017)

The judgment is modified by reducing the sentence imposed on the conviction for second-degree manslaughter from an indeterminate term of 3 1/3 to 10 years to a term of 2 to 6 years, and by reducing the sentence imposed on the second-degree assault conviction from a determinate term of 3 years' imprisonment and 3 years'

Second Department *continued*

postrelease supervision to a term of 2 years' imprisonment and 2 years' postrelease supervision. (Supreme Ct, Kings Co)

Dissent: "Although this Court is nevertheless empowered to reduce the defendant's sentence if it deems it unduly harsh or excessive, I cannot agree that this is the case here While the defendant had no prior criminal history and had been steadily employed for more than 10 years, these considerations must be weighed against the larger societal interests at stake in the sentencing process."

**People v Noble, 154 AD3d 883, 63 NYS3d 401
(2nd Dept 10/18/2017)**

The arresting officer's action of reaching into the defendant's running vehicle and turning off the ignition was a forcible stop that implicates constitutional search and seizure law. The court erred in failing to suppress the defendant's statements and evidence that he refused to submit to a chemical test, as the officer could not lawfully conduct such a stop "on the basis of merely a founded suspicion that criminal activity was afoot." (Supreme Ct, Westchester Co)

**People v Hodge, 154 AD3d 963, 63 NYS3d 448
(2nd Dept 10/25/2017)**

The defendant's "sentence of seven years' imprisonment raises the inference that the defendant was penalized for exercising his right to a jury trial" where: he has no prior felony convictions; "was offered a sentence of a definite term of imprisonment of one year as part of a plea agreement"; had a codefendant who received a determinate sentence of six years after pleading guilty; and was admonished by the sentencing court "for putting the elderly complaining witness through the 'ordeal' of a trial even though the defendant was caught 'red-handed.'" (Supreme Ct, Westchester Co)

**People v Driver, 154 AD3d 958, 64 NYS3d 222
(2nd Dept 10/25/2017)**

Where a defendant used ten of 20 peremptory challenges, a sworn juror was discharged before opening statements, and the court allowed the parties to select a replacement juror from a new panel of prospective jurors with four peremptory challenges each, "the court did not err in refusing to give the defendant 10 peremptory challenges." A jury had been selected and sworn, placing the administration of the discharged juror's replacement under CPL 270.35, not CPL 270.25, and the defendant waived compliance with the statutory procedures that

require replacing a discharged juror with the first alternate. (Supreme Ct, Kings Co)

Third Department

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

**People v Darrah, 153 AD3d 1528, 61 NYS3d 390
(3rd Dept 9/28/17)**

Remittal is required in this case under the Sex Offender Registration Act with respect to the defendant's request for a downward departure where the request was not addressed in the written order classifying him at level two nor at the hearing. The defendant had requested classification at risk level one based on, among other things, psychological evaluations done on his behalf. (County Ct, Saratoga Co)

**People v Hlatky, 153 AD3d 1538, 61 NYS3d 395
(3rd Dept 9/28/17)**

A Washington state court order cannot relieve the defendant from the obligation to register under New York's Sex Offender Registration Act. The order relieved his duty to register in Washington, but under New York's Correction Law 168-a(2)(d)(i) "a person convicted in another state of a sex offense that includes all of the essential elements of a crime in this state must register as a sex offender" Whether a defendant must register here for a sex offense in another state should be resolved as a matter of New York law. The Full Faith and Credit Clause of the US Constitution is not implicated because the determinations required for the Washington court order and New York risk assessments are separate matters. (County Ct, Sullivan Co)

**Matter of Kathleen NN., 154 AD3d 1105, 62 NYS3d 587
(3rd Dept 10/15/17)**

The court properly dismissed Family Court Act article 10 petitions against a mother and her partner, but erred in failing to find the father neglected the child when he engaged in conduct that was not merely "extremely poor parental behavior." The father appeared unexpectedly at a doctor's appointment for the infant, grabbed the child, attempted to leave the building, and apparently intentionally dropped the child into a bush to engage in physical conflict with the partner. As for the partner, DSS failed to establish that he was a "person legally responsible" for

Third Department *continued*

the child’s care as required by FCA § 1012 and so did not meet its burden of proof against him with regard to the altercation with the father. An action was commenced against the mother and her partner when DSS learned they did not comply with a condition of a DSS safety plan, imposed after the doctor’s office event, which recommended, but did not require, that the partner should stay away from the infant. DSS had learned the partner was named in child protective reports, but DSS failed to produce evidence that would contradict his claim that injury to a child in the reports had been accidental. The mother allowed contact after the safety plan was imposed until advised against it by a caseworker who threatened court proceedings if she did not comply. The court reiterated that “a finding of neglect must be based upon ‘a showing of imminent—rather than merely possible—danger of impairment to the child[,]’ which petitioner failed to demonstrate.” The matter is remitted for a dispositional hearing for the father. (Family Ct, Sullivan Co)

Matter of Monroe v Monroe, 154 AD3d 1110, 62 NYS3d 592 (3rd Dept 10/15/17)

The court erred in dismissing a grandparent’s petition for visitation without a hearing. The mother claimed the grandparents did not have a close relationship with the children and thereby did not have standing to petition for visitation. The grandparents conceded that they did not have a close relationship with the children but claimed that was the result of the mother “willfully and deliberately” denying any access “without any reasonable cause for doing so—since their respective births.” Because the grandparents filed the visitation petition a short period after the birth of the second child, “equity dictates that we not allow the lack of an established relationship be used as a pretext to prevent the grandparents from otherwise exercising their right to seek visitation.” The father does not oppose the relief sought and the matter is remitted to conduct a hearing on whether visits with the grandparents are in the children’s best interests. (Family Ct, Saratoga Co)

Matter of Alberino v Alberino, 154 AD3d 1139, 62 NYS3d 612 (3rd Dept 10/19/17)

The court abused its discretion by dismissing as untimely the father’s objections to the support magistrate’s determination on the mother’s modification petition. The objections had been filed the morning after the filing deadline, counsel having relied on incorrect information about the hours of court operation when seeking to file them at 4:36 on the day of the deadline, and the court refused to consider them. The objections were time-

ly served on the mother and her lawyer; they did not complain about the late filing. “Family Court has discretion to overlook a minor failure to comply with the statutory requirements regarding filing objections and address the merits’” (Family Ct, Rensselaer Co)

People v Atkins, 154 AD3d 1064, 63 NYS3d 532 (3rd Dept 10/19/17)

The court erred by conducting the defendant’s trial in his absence. It was improper to consider, over objection, hearsay statements as direct evidence of the defendant’s unavailability. The court did not properly consider requisite factors, including the time that had been spent trying to locate the defendant and the effort needed to find him. “The record contains no evidence that any difficulty would result from rescheduling the trial, and there was little chance that an adjournment would cause evidence to be lost or witnesses to disappear because the primary witnesses were law enforcement officers and the evidence included defendant’s admission to possession of the firearms that were seized.” (County Ct, Madison Co)

People v Ball, 154 AD3d 1060, 63 NYS3d 117 (3rd Dept 10/19/17)

The court erred by denying the defendant’s request for a justification charge regarding her claim of self-defense. The evidence, including statements by the defendant to police and during the 911 call and testimony by witnesses of injuries to the defendant and jealous behavior by the decedent, “could lead a jury to conclude that the victim was the initial aggressor and that defendant reasonably believed that the victim was using or about to use deadly physical force against her in her own home,” where she had no duty to retreat.

While “the court correctly ruled that it would permit defendant to call her former paramour to present evidence of the victim’s alleged prior bad act” involving the defendant, it erred when it ruled that the prosecutor could then present evidence as to the defendant’s own prior bad acts that were “unrelated to the victim, having occurred roughly two or more years prior to the day in question, and would serve only to demonstrate that defendant had a propensity to initiate and/or engage in physical altercations.” (County Ct, Franklin Co)

People v Best, 154 AD3d 1069, 63 NYS3d 122 (3rd Dept 10/19/17)

The defendant’s aggregate sentence did not conform to the terms of the plea agreement. While the plea agreement’s express terms indicated that an aggregate sentence of no more than ten years was the outcome expected and understood by the parties, “[t]he court’s imposition of

Third Department *continued*

consecutive sentences resulted in an aggregate prison term of 11 years.” The matter is remitted for imposition of sentences consistent with the range specified in the plea agreement or to allow the defendant to withdraw the plea because, “[w]here a guilty plea is induced by an unfulfilled promise, it either must be vacated or the promise honored” (County Ct, Broome Co)

Matter of Buck v Buck, 154 AD3d 1134, __ NYS3d __
(3rd Dept 10/19/17)

The court erred in dismissing the father’s custody modification and violation petitions without holding a hearing. To make a determination regarding parenting time between the father and the child, the court relied on off-the-record discussions with mental health professionals. “Generally, where a facially sufficient petition has been filed, ‘modification of a Family Ct Act article 6 custody order requires a full and comprehensive hearing at which a parent is to be afforded a full and fair opportunity to be heard’ The Court of Appeals recently reaffirmed the principles ‘that, as a general matter, custody determinations should be rendered only after a full and plenary hearing,’ and ‘should be based on admissible evidence’” The father was deprived “of his due process right to a hearing at which he could cross-examine the mental health providers and submit his own proof” (Family Ct, Chenango Co)

Matter of Cori Xx., 155 AD3d 113, 62 NYS3d 578
(3rd Dept 10/19/17)

In a Family Court Act article 10 proceeding, the court did not abuse its discretion when it committed a father to six months in jail for violating a court order. The court applied the proper standard of beyond a reasonable doubt. It has been held in article 8 cases that the level of proof must be elevated when imposition of a punitive, incarcerative remedy renders the proceeding one involving criminal, rather than civil contempt. It is now held that “where, as here, a definite term of incarceration is imposed pursuant to Family Ct Act § 1072, as a punitive remedy and without the possibility of purging the contempt, the requisite finding that a willful violation of a court order has occurred must be established beyond a reasonable doubt.” The father’s willful violation of the order of protection was established under that standard when, after being served with a stay-away order, he passed by the mother on the sidewalk and threatened to kill her. (Family Ct, Otsego Co)

People v Wyrick, 154 AD3d 1181, 63 NYS3d 563
(3rd Dept 10/26/17)

The defendant’s concurrent sentences of 8 years’ imprisonment for second-degree criminal possession of a controlled substance was “unduly severe and should be reduced to three years” due to “defendant’s admission from the outset that he perpetrated the robbery..., the correlation between the illness that he contracted while serving in Afghanistan and an opioid addiction that precipitated [the] event, his duly expressed remorse and his lack of any prior criminal record” (County Ct, Clinton Co)

Dissent: The eight-year sentence was not an abuse of the trial court’s discretion; in the absence of such abuse or other extraordinary circumstances, sentences imposed below should not be disturbed. The trial court gave due consideration to the defendant’s military record, lack of criminal history, and other factors noted by the majority.

Fourth Department

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

Matter of Brockel v Martin, 153 AD3d 1654,
61 NYS3d 413 (4th Dept 9/29/2017)

When granting sole custody to the father, “the court failed to ‘set forth the essential facts of its best interests determination, either orally or in writing,’ and the record is insufficient for an independent determination with respect to the child’s best interest.” While the court had before it the allegations against the mother in an ongoing neglect proceeding, “the record is silent on the issue of the well-being of the subject child and, specifically, the impact that the actions of the mother and her paramour as alleged by DSS had on the subject child.” The matter is remitted for a hearing on the best interests of the child. (Family Ct, Cattaraugus Co)

People v Davis, 153 AD3d 1631, 62 NYS3d 641
(4th Dept 9/29/2017)

The defendant, an African-American, met his initial burden on his *Batson* application where the prospective juror at issue was the only African-American person on the panel, and questions by the prosecutor, defense counsel, and the court during voir dire did not raise any issues that would distinguish this juror from other prospective jurors. Since “there is a basis in the record to infer that the People exercised the peremptory challenge in a discrimi-

Fourth Department *continued*

natory manner, the burden shifted to the People to articulate a nondiscriminatory reason for striking the juror, and the court then should have determined whether the proffered reason was pretextual” The matter is remitted for that purpose. (County Ct, Onondaga Co)

Matter of Kameron V., 153 AD3d 1623, 60 NYS3d 892 (4th Dept 9/29/2017)

“We agree with respondent that the evidence does not support Family Court’s determination that he is a person legally responsible for the child (see § 1012 [g]), and the court therefore erred in determining that he neglected the child (see § 1012 [f] [i]).” There was no testimony suggesting that the respondent, who had resided in the same home for a time, had assumed any parental duties with regard to the child or lived with the child and its mother as a family. The petition is dismissed. (Family Ct, Erie Co)

People v Lewis, 153 AD3d 1615, 62 NYS3d 661 (4th Dept 9/29/2017)

The defendant’s statements to the detective at the police station must be suppressed because there is no relevant distinction between *People v Stroh*, 48 NY2d 1000 (1980), where the Court found that the defendant asserted his right to counsel when he “told the police that ‘he would like to have either an attorney or a priest to talk to, to have present,’” and the instant case where the defendant told the detective that he “would not go ‘without a family member or a lawyer present.’” The defendant spoke to his family member alone and subsequently made incriminating statements to the detective who then advised him of his *Miranda* rights. The defendant waived his rights, made additional oral statements, and signed a written statement. The waiver is invalid because there was no break in the interrogation. (County Ct, Jefferson Co)

People v Saraceni, 153 AD3d 1559, 61 NYS3d 748 (4th Dept 9/29/2017)

The defendant’s consent to “waive his Fourth Amendment right protecting him from unreasonable searches and seizures of his person, home, and personal property, and to submit to chemical tests of his breath, blood, or urine, is not enforceable because it was not related to the probationary goal of rehabilitation” The waiver and consent were based on the defendant’s admission of a history of drug and alcohol abuse, but there is no evidence of drug or alcohol use at the time of the crime. The special condition of the conditions of probation which requires the defendant “to abstain from the use or possession of alcoholic beverages and to submit to appropriate

alcohol testing, is also not enforceable and must be stricken.” (County Ct, Genesee Co)

People v Vadell, 153 AD3d 1638, 62 NYS3d 643 (4th Dept 9/29/2017)

The judgment is reversed and the defendant’s plea is vacated because “the court failed to fulfill its obligation to advise him at the time of his plea that the sentence imposed upon his conviction would include a period of postrelease supervision” (County Ct, Monroe Co)

People v Ayala, 154 AD3d 1293, 63 NYS3d 162 (4th Dept 10/6/2017)

The evidence that the defendant had constructive possession of the drugs and paraphernalia found in his girlfriend’s apartment was wholly circumstantial, and the court was required to provide a circumstantial evidence instruction to the jury. The defendant’s girlfriend testified that he was not involved in the drug trade and the drugs and most paraphernalia were not in plain view, so that an additional inference was required to find that the defendant had control over the contraband. The defendant’s presence in the apartment and items found there bearing his name were evidence of dominion and control over the apartment but not over the contraband; that required an additional inference. There must be a new trial. (County Ct, Monroe Co)

People v Bradley, 154 AD3d 1279, 63 NYS3d 159 (4th Dept 10/6/2017)

Where the prosecution specifically narrowed their theory of recklessness in this case involving the defendant’s vehicle striking two children after he suffered a seizure, the court was “obliged to hold the prosecution to this narrower theory alone,” and the conviction on lesser included offenses is reversed and the indictment dismissed. In response to a demand for a bill of particulars, the prosecution stated “only that [t]he ingestion of marijuana and a failure to take medication were both factors that contributed to the defendant’s recklessness.” The prosecution presented evidence at trial of additional behaviors. They presented no evidence that marijuana causes seizures, or that the defendant neglected to take prescribed anti-seizure medication. The prosecution’s trial evidence varied from “the indictment as amplified by the bill of particulars” and was insufficient to support the theories set out there; the “defendant was essentially tried and convicted on charges for which he had not been indicted” (County Ct, Monroe Co)

People v Jones, 154 AD3d 1333, 63 NYS3d 174 (4th Dept 10/6/2017)

Fourth Department *continued*

The defendant's sentence as a second felony offender is illegal and the judgment is vacated and remitted for resentencing as a first felony offender. The defendant's "two prior felony convictions do not qualify as predicate offenses for second felony offender purposes inasmuch as defendant was sentenced on those predicate felony convictions after he had begun, and while he was still in the midst of committing, the present felony" (County Ct, Erie Co)

Matter of McDuffie v Reddick, 154 AD3d 1308, 61 NYS3d 802 (4th Dept 10/6/2017)

The court violated CPLR 4403 by immediately confirming a Court Attorney Referee's report on a father's petition for custody and/or visitation, instead of allowing the father a 15-day period to confirm or reject the report. The father's petition was referred to the referee "to hear and report," pursuant to CPLR 4212. By participating in the proceeding without objection, the father waived his claim that the court erred in referring the matter to a referee in the absence of exceptional circumstances. The father's argument that the reference order is invalid

because it did not comply with the requirements of 22 NYCRR 202.43(d) is also rejected: "the provisions of 22 NYCRR part 202 apply only to 'civil actions and proceedings in the Supreme Court and County Court,' not to proceedings in the Family Court" The matter is remitted to give the parties and the Attorney for the Child an opportunity to file any appropriate motions pursuant to CPLR 4403. (Family Ct, Erie Co)

People v Trotman, 154 AD3d 1332, 61 NYS3d 803 (4th Dept 10/6/2017)

The court erred in denying the defendant's request for a missing witness charge. The unsubstantiated assertion made by the prosecutor under oath, that the uncalled witness, who was walking behind the victim moments before the altercation, "claimed to have no recollection of the pertinent events is insufficient to establish that the witness was not available or that he was not knowledgeable about any pending material issue'" But the court's error is harmless because the evidence of the defendant's guilt is overwhelming. The first-degree assault and second-degree criminal possession of a weapon convictions are affirmed. (Supreme Ct, Onondaga Co) ♪

Defender News *(continued from page 7)*

Picks. Practitioners experiencing any problems in how or whether the Directive has been implemented are invited to contact Lucy McCarthy, NYSDA Family Court Staff Attorney (518-465-3524 ext. 24, lmccarthy@nysda.org).

Family Court Jurisdiction Ends When the Agency Fails to Prove Neglect or Abuse

In a unanimous decision, the Court of Appeals concluded that where a Family Court Act (FCA) article 10 proceeding does not survive a merits determination, the Family Court no longer has jurisdiction to retain a child in foster care under FCA article 10-A. Matter of Jamie J. (2017 NY Slip Op 08161 [11/20/2017]) (as noted in the [Nov. 30, 2017](#) News Picks from NYSDA Staff). A local department of social services (DSS) removed an infant and placed the child in foster care under FCA 1022. But before the court commenced a merits hearing on the neglect petition, the Family Court commenced a permanency hearing as required by FCA article 10-A and issued a permanency order that continued the child in foster care. When the neglect proceeding finally went to trial, the local DSS failed to prove the abuse or neglect, and the Family Court dismissed the petition. But the Family Court incorrectly concluded that the permanency hearing (the FCA 10-A order) afforded it jurisdiction to continue custody with

DSS. On appeal, the Fourth Department affirmed with two judges dissenting.

The Court of Appeals reversed:

[T]he Department seizes on a hyperliteral reading of section 1088, divorced from all context, to argue that Family Court's pre-petition placement of Jamie J. under section 1022 triggered a continuing grant of jurisdiction that survives the eventual dismissal of the neglect petition. In other words, even if the Family Court removes a child who has not been neglected or abused, it has jurisdiction to continue that child's placement in foster care until and unless it decides otherwise.

"Section 1088 and article 10-A must be construed not in isolation, but (as the '-A' implies) together with the other provisions of the FCA on which their triggering facially depends." The Court agreed with the dissenting Appellate Division justices that "adopting the Department's interpretation of section 1088 would permit a temporary order issued in an ex parte proceeding to provide an end-run around" the heightened protections for children and parents found in FCA article 10, because permanency hearing determinations are not based on the FCA article 10 imminent risk of harm standard, "but 'in accordance with the best interests and safety of the child' under article 10-A (FCA § 1089 [d])." The Court vacated the permanency order. ♪

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