



Public Defense Backup Center  
**REPORT**

Volume XXXIII Number 2

April–July 2018

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## Defender News

### News from the High Courts

While the US Supreme Court and NY Court of Appeals issued a number of decisions in April, May, and June that are narrow in application and may not affect public defense practice in state court, other cases call for attention. Referring to one group of Court of Appeals cases, a blawgger filed a [post](#) entitled, “NYCOA: June 14 Hand Downs—Dissents, Disappointments, and Open Questions (Part 1: Actual Innocence).” The final phrase refers to the Court of Appeals June 14 decision [People v Tiger](#), in which a divided Court found that a freestanding claim of “actual innocence” cannot be raised in an effort to vacate a guilty-plea-based conviction under 440.10 (1)(h). Like several other decisions below, *Tiger* was noted in an edition of [News Picks from NYSDA Staff](#).

The US Supreme Court addressed criminal constitutional law in only a few decisions as it approached the end of its term, while analyzing federal Sentencing Guidelines and federal statutes in several opinions, as well as taking on civil liability issues arising from criminal matters in a couple. What follows here are a few decisions that stand out among the recent High Court opinions summarized beginning at p. 14.

### Warrant Required to Obtain Cell Site Location Information

In a major Fourth Amendment ruling, the Supreme Court found a legitimate expectation of privacy in cell site location information (CSLI), holding that police may not obtain CSLI from third parties without a warrant supported by probable cause. [Carpenter v United States](#), No. 16–402 (6/22/2018). Readers of the *REPORT* will recall that the last issue discussed a pre-*Carpenter* Fourth Department case, [People v Jiles](#) (158 AD3d 75 [4th Dept 12/22/2017]), which found obtaining CSLI did not constitute a search requiring a warrant.

### Warrant Required to Search Vehicle in a Private Driveway

A defense search and seizure victory emerged from the Supreme Court in [Collins v Virginia](#) (138 SCt 1663 [5/29/2018]). An eight-justice majority rejected an argument that the rationale of the automobile exception to the Fourth Amendment’s warrant requirement outweighs the protections offered by that Amendment to the curtilage of a home. A police officer may not search a vehicle parked in a driveway within the curtilage when the officer is uninvited and lacks a warrant. Justice Alito, dissenting, found an officer’s action in walking up the driveway and removing the tarp covering a motorcycle to determine if it was stolen to be entirely reasonable. Justice Thomas, concurring, agreed with the majority’s analysis but wrote separately to note his “serious doubts about” the Court’s authority to impose the exclusionary rule on states.

A number of *amicus* briefs were filed in *Collins*. Among them was [one](#) by Restore the Fourth, Inc., which succinctly noted that “[t]his case is not about the ‘automobile exception’ to the Fourth Amendment” because the “automobile exception legitimizes warrantless searches of vehicles—not warrantless searches for vehicles that are stolen property or contraband.” As [noted](#) by the Federal Defender Services Offices Training Division, *amicus* briefs and other merits briefings filed in *Collins* are [available](#) on the Court’s website.

### Rental Car Driver May Expect Privacy Even If Not Included in Contract

The Court issued another decision involving the application of the Fourth Amendment to a vehicle, finding that “as a general rule, someone in otherwise lawful possession and control of a rental car has a reason-

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able expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver.” However, the defense victory was a narrow one, with the matter being remanded for consideration of whether, under the circumstances of the case, the driver had “no greater expectation of privacy than a car thief.” *Byrd v United States*, 138 SCt 1518 (5/14/2018).

### **Admitting Guilt is a Decision for Clients, not Counsel**

In *McCoy v Louisiana* (138 SCt 1500 [5/14/2018]), the Supreme Court settled a division among state courts by holding “that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel’s experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.” Dissenters pointed out that counsel in *McCoy* did not admit that the client was guilty of first-degree murder, only that he had committed one element of that crime, *i.e.* killing the victims, which should not be found to violate any fundamental right. The dissent also noted the extremely narrow set of cases in which the issue is likely to arise, *i.e.* capital cases.

### **Court of Appeals Examines Hearsay**

The Court of Appeals found error in two narrow hearsay cases, serving perhaps as reminders that careful examination of statements offered by the prosecution may pay off. In *People v Brooks* (31 NY3d 939 [3/22/2018]), the Court held in an unanimous memorandum opinion that a trial court erred in admitting double hearsay that did not meet any hearsay exception when a witness was allowed to testify that the decedent had said that the defendant threatened the decedent’s life during an argument more than a month before the killing. In rejecting prosecution arguments in support of admissibility, the Court specifically noted that there is no “blanket hearsay exception providing for use of such statements as ‘background’ in domestic violence prosecutions ....”

In another unanimous decision, the Court found it was error to admit “a statement, heard in the background of a 911 call and spoken by an unidentified person, under the excited utterance exception to the hearsay rule.” Because the issue presented was a mixed question of law and fact, the Court considered only whether there was record support for the ruling, and found there was none. Among the facts considered: the lack of identification of the speaker and the arrival of many people on the scene after the shooting at issue and before the statement was made. Concurring, Judge Rivera said that the excited utterance exception, “while longstanding, warrants serious reconsideration.” *People v Cummings*, 31 NY3d 204 (5/8/2018).

### **4th Department Assails “Pyramid of Hearsay”**

Beyond the “double hearsay” condemned in *Brooks*, defense lawyers may encounter a “pyramid of hearsay,” such as that denounced recently by the Fourth Department in *People v Searight* (2018 NY Slip Op 04466 [6/15/2018]). In *Searight*, the prosecution sought to show probable cause to arrest from police officers’ suppression hearing testimony. After a traffic stop, the officers obtained information through the NYS Police Information Network about a warrant issued in another jurisdiction. One officer then called the 911 Center, where someone reported that the police department in the other jurisdiction “had confirmed that there was an active warrant” and asked that the defendant be held until that department could pick him up. But while one officer may rely in making an arrest on information communicated by another officer that a warrant exists, fruits of the arrest must be suppressed if the warrant turns out not to exist or to have been vacated. By failing to produce the warrant itself, instead relying on the layers of hearsay in the officer’s testimony, the prosecution failed to meet the burden of establishing that the arrest was based on probable cause.

### **Parental Issues Addressed**

An incarcerated parent whose parental rights were terminated for having “abandoned” the child saw the termination reversed by the Court of Appeals in a brief memorandum decision in *Matter of Mason H.* (2018 NY Slip Op 04384 [6/14/2018]). A caseworker’s testimony that the parent had not visited with the child or communicated with the caseworker or others in the agency for six months did not establish by clear and convincing evi-

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dence that the “respondent failed to communicate with the child, directly or through the child’s foster parent, during the relevant time period” and the record was devoid of such evidence.

A parent who challenged an “indicated” designation that resulted in the parent’s name being added to the Child Abuse Register did not fare as well. In another memorandum decision, the Court found in *Matter of Natasha W. v New York State Off. of Children & Family Servs.* (2018 NY Slip Op 04379 [6/14/2018]) that using a child “as a pawn in a shoplifting scheme,” which offered “imminent potential for physical confrontation” during theft from a store monitored by security, “was sufficiently egregious so as to create an imminent risk of physical, mental[,] and emotional harm to the child,” warranting the Administrative Law Judge’s finding of maltreatment. The opinion added that using the child to commit a crime, thereby teaching that such behavior is acceptable, would have an immediate effect on the young child’s emotional and mental well-being. In dissent, Judge Wilson noted that the Administration for Children’s Services (ACS) found the child was not likely to be in immediate danger of serious harm and that no interventions were necessary. Supreme Court, in an Article 78 proceeding, rejected “ACS’s conclusion that the shoplifting incident would doom the child to a life of crime ....” In pointing out the boundless reach of the majority’s decision, Wilson suggested that he might be placed on the Register for opining, while reading *Les Misérables* to his children, that it is morally acceptable for a starving person to steal bread.

## ***NYSDA CLE: Trial Skills, Families Matter, and More***

In a three-month span, NYSDA provided a range of continuing legal education programs relevant to public defense work, some of which are described below. These events will be followed by the two-day Annual Meeting in Saratoga in July. And watch for future events on the [NY Statewide Public Defense Training Calendar](#) on the NYSDA website.

### ***Local DWI Trial Skills Program Offered***

At the turn of the year the Backup Center was contacted by Jill Paperno, First Assistant and Training Director at the Monroe County Public Defender’s Office, about creating a three-day trial skills workshop in DWI defense for their local court staff attorneys. Paperno developed a fact pattern and created a discovery packet, and together we designed a program that provided the attendees an opportunity to learn skills in case assessment, jury selection, cross-examination, and closing argument.

**JOB LISTINGS  
are available on  
NYSDA’s website at  
[www.nysda.org/?page=Jobs](http://www.nysda.org/?page=Jobs)**

The program, held at the Rochester Institute of Technology May 4-6, 2018, utilized community members as the venire for the jury selection exercise. Defense investigators—some former police officers—played the role of Breath Test Operator and Arresting Officer/Field Sobriety Test Administrator to enhance the cross-examination exercises. The coaching faculty for the program was drawn from notable DWI defense firms across the state and local seasoned trial attorneys.

NYSDA hopes to develop more regional basic and advanced skills training programs with Monroe and other public defense programs to provide opportunities for defenders to hone skills in immersive, interactive settings. These programs will build on the experiences gained during the Western New York Advanced Trial Skills Program that some *REPORT* readers will recall, and on NYSDA’s long-standing Basic Trial Skills Program (BTSP).

### ***BTSP: New Campus Location, Same High Marks***

After three decades at RPI in Troy, BTSP moved this year to Skidmore College in Saratoga Springs. A new campus provided opportunities and challenges for the week-long program. NYSDA staff responsible for the program, along with the excellent coaches—lawyers and communications experts who worked with attending attorneys in honing their skills—received well-deserved positive feedback.

### ***Families Matter: Statewide Family Defender Conference***

The third statewide Families Matter conference cosponsored by NYSDA drew nearly 200 lawyers and other advocates who provide parent representation to Albany on April 20-21, 2018. The presentations and information provided at the conference addressed particular issues from and for both upstate and downstate providers. This intentional collaboration provides the network of family defenders a broader range of skills to continue to improve outcomes for families.

Succinct praise for Families Matter included, “Learned so much”; “A+”; “Excellent CLE with excellent presentations”; and (more than one) “Great!” While some comments reflected a new understanding of a day in the life of Albany Law School students—“ALS is beautiful but

navigating it is like getting out of a corn maze”—others expressed appreciation of the space provided by cosponsor Albany Law School: “superior to when in a crowded hotel session room.” Other cosponsors, as in past years, were the NYS Office of Indigent Legal Services (ILS) and the NYS Unified Court System Child Welfare Court Improvement Project. During the conference, ILS presented its Ella B. Family Justice Award to Nancy Farrell and Amanda McHenry of the Hiscock Legal Aid Society in Syracuse, NY. NYSDA congratulates them!

### **VDP Director Horton Receives 2018 Kutak-Dodds Defender Prize**

The National Legal Aid and Defender Association (NLADA) honored Gary Horton, Director of NYSDA’s Veterans Defense Program (VDP) in June. Noting his “strong commitment to litigation and advocacy on behalf of justice-involved veterans and low-income individuals,” NLADA stated it was “proud to recognize Gary’s achievements for the rights of veterans and those who cannot afford legal representation in his state and nationally with the 2018 Kutak-Dodds Defender Prize.” More information about the award and VDP is available on the [NLADA website](#). The most recent Annual Report about VDP’s activities is [available](#) on NYSDA’s website.

As in 2017, NYSDA announced the availability of the VDP Director and Deputy Director during lunch breaks at the upcoming Annual Conference to consult with attending lawyers about the cases of clients with military backgrounds. Advice topics include how to get the client’s military and VA records, piece together the client’s military experience, and use it in the case.

### **Limited Criminal Justice Reform at End of Legislative Session**

The current session of the State Legislature ended with few criminal justice reforms. A bill creating a Commission on Prosecutorial Conduct now awaits the Governor’s signature ([S02412](#)), but bail reform and many other changes failed to pass both houses. NYSDA is joining others in urging the Governor to sign the Prosecutorial Conduct Commission measure. In addition to the prosecutorial conduct bill, a provision passed that will allow courts to take judicial notice of online web mapping or global imaging websites, with notice to other parties who can challenge the use ([S09061](#)). Both bills must be sent to the Governor for his signature.

NYSDA staff have begun compiling and analyzing legislation relevant to public defense providers that passed in 2018. Meanwhile, a final 2017 Legislative Review appears in this issue, beginning at p. 6.

Bail reform, which engendered a great deal of support and publicity in the last weeks of the session, ultimately did not pass. NYSDA and other organizations dedicated to ensuring that people who are presumed innocent are not locked up because they are poor will continue to advocate for reform of bail practice in New York State not only through advocacy for legislative change but through training and other assistance to lawyers fighting for their clients’ freedom.

### **Info on Forensics from Fingerprints to Gait Analysis**

As NYSDA has reported for years, much of what seeks to be called “forensic science” is really “junk science”—not science at all. While some forensic fields have validity, human error or corruption can lead to erroneous evidence and wrongful convictions. And new fields of alleged expertise arise with disconcerting frequency. As an example of the latter, note the news below that an alert member brought to the Backup Center’s attention.

#### ***Is Gait Analysis a Thing?***

In what may be a first in the country, Tennessee authorities made an arrest based on a “gait analysis” in which surveillance videos of a robbery and of a customer’s visit to the store a day earlier were compared. The podiatrist who viewed the recordings proclaimed “a 100 percent match between the videos,” according to a [report](#) on Patch Media. In another [article](#), the District Attorney expressed support for this law enforcement “tool,” saying “[t]he one thing you’re not going to be able to disguise is the way you walk ....” While apparently the “gait analysis” was the basis for a grand jury indictment, this incident back in February may not lead to decisional law, as the suspect reportedly confessed. Whether this reported confession is a false one is another matter.

Should the practice spread to New York, defense attorneys may want to turn to a 2016 law review article entitled “[Cinderella Story? The Social Production of a Forensic ‘Science.’](#)” The authors urge courts to “disavow any new forensic technique that espouses an approach that is based on outdated early twentieth century techniques or that appears ignorant about the insights of authoritative scientific and medical research bodies” and thereby push proponents of such proposed pattern analysis to “evolve towards a more rigorous paradigm.” The article was published in Northwestern Pritzker School of Law’s *Journal of Criminal Law and Criminology*, but the authors are from the United Kingdom. Forensic gait analysis is apparently recognized in the UK as one of four areas of practice in an acknowledged specialist area of podiatry, according to an article [posted](#) on the Juniper Publishing website.

Should forensic gait analysis take hold in New York, defense practitioners may find themselves discussing arcane matters such as shoe size. One *Forensic Magazine* [article](#) from several years ago—which appeared to accept the validity of gait analysis—described a study intended to answer the question, “Would wearing shoes sized within a three full size differential also affect the parameters of gait or would the gait pattern remain consistent regardless of shoe size?”

### ***A Smorgasbord of Other Forensic News***

The following list of news items, studies, and resources on a variety of forensic topics is intended to help lawyers striving to keep up on the latest forensic news. The list, neither exhaustive nor organized in particular order, is culled from what has come into the Backup Center in the past few months. In some instances, the information was then disseminated in News Picks. As with all forensic evidence, the value of these items should not be presumed; approach them critically.

- [Appendix to ‘Fingerprints and Miscarriages of Justice: ‘Other’ Types of Error and a Post-Conviction Right to Database Searching.’](#) Simon A. Cole and Barry Scheck, *Albany Law Review*, Vol. 81, No. 3, 2017-2018; UC Irvine School of Law Research Paper No. 2018-48, posted June 21, 2018.
- [New Software Improves Rigor of Latent Fingerprint Examination](#), Justice Technology Information Center, techbeat.justnet.org, Mar. 31, 2018.
- [Approved Uniform Language for Testimony and Reports for the Forensic Latent Print Discipline](#), US Department of Justice, February 2018.

- [FTCoE Report Provides Insights, Information on Portable Drug Testing Devices](#), Becky Lewis, techbeat.justnet.org, June 26, 2018.
- [The Coming Wave of Murders Solved by Genealogy](#), Sarah Zhang, *The Atlantic*, May 19, 2018.
- [DNA Data From 100 Crime Scenes Has Been Uploaded To A Genealogy Website - Just Like The Golden State Killer](#), Peter Aldhous, *Buzzfeed*, May 17, 2018.
- [Flaws in Breathalyzers Cast Doubt on DUI Convictions](#), Jon Ibanez, Lawrence Taylor’s DUI blog, May 11, 2018.
- [Facial Recognition Tech Is Creepy When It Works- And Creepier When It Doesn’t](#), Lily Hay Newman, *Wired*, May 9, 2018.
- [Forensic Confusion: ICE testing for age of purported juvenile detainees not done according to its own rules](#), *FORENSICS and LAW in FOCUS @ CSIDDS | News and Trends*, May 3, 2018.
- [Evidence on Fire](#), Jennifer D. Oliva and Valena Elizabeth Beety, *North Carolina Law Review*, Vol. 97, Forthcoming, April 4, 2018.
- [The Hairy Problem With Drug Testing](#), Ellen Airhart, *Wired*, April 1, 2018.

### ***Correction: Description of Wesby***

In the last issue of the *REPORT*, the decision in *District of Columbia v Wesby* (138 SCt 577 [1/22/2018]) was correctly summarized at p. 6, but the short blurb on p. 4 was incorrect. The case is about the legitimacy of the arrest of people in a searched house, not the search itself. ☹

## **CONFERENCES & SEMINARS**

**Sponsor:** New York State Defenders Association  
**Theme:** 51st Annual Meeting & Conference  
**Dates:** July 22-24, 2018  
**Place:** Saratoga Springs, NY  
**Contact:** NYSDA: tel (518) 465-3524; fax (518) 465-3249; email [DDuBois@nysda.org](mailto:DDuBois@nysda.org); website [www.nysda.org](http://www.nysda.org)

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** 2018 Presidential Summit and 17th Annual State Criminal Justice Network Conference: Shattering the Shackles of Collateral Consequences”  
**Dates:** August 23-25, 2018  
**Place:** Atlanta, GA  
**Contact:** NACDL: tel (202) 872-8600 or (202) 465-7641 (fax (202) 872-8690; email [tkalacevic@nacdl.org](mailto:tkalacevic@nacdl.org); website [www.nacdl.org/cle/](http://www.nacdl.org/cle/)

**Sponsor:** Brooklyn Law School  
**Theme:** Prof. Robert M. Pitler Program on Criminal Law, Procedure, Evidence & Ethics  
**Dates:** October 10 and October 26, 2018  
**Place:** Brooklyn, NY  
**Contact:** Details TBA. [www.brooklaw.edu/newsandevents/events/2018/](http://www.brooklaw.edu/newsandevents/events/2018/)

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** 2018 Fall Meeting & Seminar: “Decoding & Litigating Mental Health Issues”  
**Dates:** October 24-27, 2018  
**Place:** Savannah, GA  
**Contact:** NACDL: tel (202) 872-8600 or (202) 465-7641 (fax (202) 872-8690; email [tkalacevic@nacdl.org](mailto:tkalacevic@nacdl.org); website [www.nacdl.org/cle/](http://www.nacdl.org/cle/) ☹

# 2017 Legislative Review

By Susan Bryant, Mardi Crawford, and Jacob Drum\*

## Criminal Procedure Law

- **Chapter 91 (A2806)** Adds certain animal fighting conduct as a designated offense for an eavesdropping or video surveillance warrant [Effective: July 24, 2017]

This law amends CPL 700.05(8) by adding paragraph (v) to place those animal fighting acts listed in Agriculture & Markets Law 351 on the list of crimes for which law enforcement can seek a warrant to eavesdrop or conduct video surveillance.

- **Chapter 96 (A7646-A)** Relates to the jurisdiction of St. Regis Mohawk tribal police officers [Effective: July 24, 2017]

This legislation adds paragraph (e) to CPL 1.20(34-a) and makes permanent provisions of Indian Law 114.8 that, under certain conditions, expand the jurisdiction of police officers from the St. Regis Indian reservation to an area of Franklin County commonly known as the “Bombay Triangle.” The law is intended to “reduce tensions between members of the St. Regis Tribe and State authorities” and “avoid what has been determined to be unconstitutional vehicle stops resulting in the dismissal of criminal cases in a specific area of Franklin County.”

- **Chapter 194 (A7442)** Relates to waiver of pre-sentence reports [Effective: August 21, 2017]

This chapter amends CPL 390.20(4)(a)(ii) to allow for the waiver of a pre-sentence investigation and report where the sentence to be imposed is a conditional discharge. This would require the consent of both parties and the court. The legislation is meant to streamline case management practices; “where no probation oversight of [a] defendant is deemed necessary by the court or parties, requiring the probation department to conduct an investigation and prepare a pre-sentence report needlessly wastes public resources.”

- **Chapter 195 (A7446)** Relates to procedures for taking an appeal from a court that is not designated a court of record [Effective: October 20, 2017]

This chapter amends CPL 460.10 and 460.70 to extend the amount of time that defendants appealing from convictions in local court have to file an affidavit of errors. Previously, appellants had thirty days from the filing of their notice of appeal; this legislation extends that timeline to sixty days from the date that they receive a transcript of the electronic recording of the proceeding. Under the previous system, appellate practitioners were often

required to file their affidavit of errors before they could secure a transcript of the electronic recording.

- **Chapter 494 (S6042-B)** Relates to the jurisdiction of University of Rochester peace officers [Effective: December 18, 2017]

This chapter amends CPL 2.10(83) to become 2.10(84) and extend the jurisdiction of University of Rochester peace officers to “any public street and sidewalk that abuts the grounds, buildings or property” of the university. Further, it removes a subdivision that limited the powers of university peace officers assigned to Strong Memorial Hospital. Finally, the chapter changes the title of such peace officers from “security services” to “public safety” officers.

## Penal Law

### A. Definitions

- **Chapter 167 (A7198-A)** Includes community centers in the definition of “public place” [Effective: November 12, 2017]

This chapter adds “community centers” to the list of defined “public places” in Penal Law 240.00(1) for purposes of prosecutions for offenses against public order.

### B. Amendments

- **Chapter 124 (S1022)** Relates to when a person is guilty of obstructing firefighting operations [Effective: November 1, 2017]

This chapter amends Penal Law 195.15 to employ gender-neutral designations and include the obstruction of a “firefighter performing emergency medical care on a sick or injured person” in the crime of obstructing firefighting operations.

- **Chapter 371 (S724-A)** Relates to authorizing the sale and possession of sparkling devices outside of cities with a population of one million or more [Effective: January 21, 2018]

This chapter amends Penal Law 270.00(1)(c)(iv) and (3)(b)(v) and 405.00(5) to allow for the lawful sale and possession of “sparkling devices” outside of cities with a population of one million or more (*i.e.* New York). Counties may still enact local laws prohibiting the sale and use of sparklers, provided that the offense for use of a sparkler is not greater than a violation and the offer for sale of sparklers is not greater than a class B misdemeanor.

## Alcohol and Controlled Substances: Definitions, Treatment, Diversion

- **Chapter 2 (A373)** Relates to requiring certain persons providing substance abuse treatment or counseling to complete training in medication assisted treatment

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[Effective: January 1, 2017 (same as the effective date of L 2016, ch 493)]

This legislation amends Mental Hygiene Law (MHL) 19.31 to remove health care professionals and those who provide treatment or counseling services at a school or pursuant to the Drug Addiction Treatment Act (DATA) of 2000 from the list of individuals required to complete medication-assisted treatment (MAT) training, as provided for in [Chapter 493](#) of the Laws of 2016. That chapter requires MAT training for credentialed alcohol and substance abuse counselors who provided counseling services at a substance abuse facility, school, or pursuant to DATA.

➤ [Chapter 88](#) (A8509) **Relates to inspection and sale of industrial hemp seeds; includes industrial hemp as a crop** [Effective: July 12, 2017]

This law includes “industrial hemp” as an agricultural commodity for purposes of the Agriculture and Markets Law, and creates several programs to monitor and encourage the growth of hemp in New York State, including efforts to ensure that seeds “are stable with respect to the concentration of delta-9 tetrahydrocannabinol” (THC).

➤ [Chapter 403](#) (A7006) **Includes PTSD as a condition permitting the use of medical marijuana** [Effective: November 11, 2017]

This chapter adds post-traumatic stress disorder to the list of conditions in Public Health Law 3360 that can be treated under New York’s medical marijuana program.

➤ [Chapter 438](#) (S5627) **Disclosure of practitioners registered to certify patients for the use of medical marijuana** [Effective: January 28, 2018]

This law amends Public Health Law 3369 to provide that information identifying practitioners of medical marijuana will be public information maintained by the state. However, practitioners can opt to have their name and other information not disclosed publicly by sending a written request to the Department of Health.

#### Sex Offenses

➤ [Chapter 6](#) (S980) **Relates to the processing and maintenance of sexual offense evidence kits** [Effective: February 26, 2017 (same as the effective date of L 2016, ch 500)]

This legislation amends Executive Law 838-a to require police and prosecuting agencies to conduct an inventory of the sexual offense evidence kits in their custody and report them to Division of Criminal Justice Services (DCJS) and the Legislature by March 1, 2017 and update the report monthly. Failure to comply with the timelines in the statute will not, alone, constitute a basis for a motion to suppress pursuant to CPL 710.20. Police and

prosecuting agencies will provide DCJS with quarterly reports on the processing of such evidence kits, and DCJS will then report that information to legislative leaders.

➤ [Chapter 17](#) (S976) **Relates to sex offender notification requirements for DCJS** [Effective: January 27, 2017 (same as the effective date of L 2016, ch 456)]

This chapter changes the period of time (in Correction Law 168-j) wherein DCJS is required to notify local law enforcement of a registered sex offender’s change in address or relationship to an institution of higher learning from “forty-eight hours” to “two business days.”

#### Criminal History and Employment

➤ [Chapter 60](#) (S6782) **Relates to criminal history of transportation network drivers and juvenile justice** [Effective: June 29, 2017]

This chapter amends several sections of the VTL, Correction Law, and CPL, to provide that ridesharing permits will not be issued to individuals listed on the sex offender registry pursuant to Correction Law 6-C. It also provides methods for companies to identify whether one of their drivers or applicants is on the registry.

#### Evidence

➤ [Chapter 229](#) (S2058) **Relates to out-of-state hospital records produced pursuant to subpoena** [Effective: August 21, 2017]

This law amends CPLR Rule 4518(c) to provide for the admissibility of out-of-state medical records by “certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state or by an employee delegated for that purpose, or by a qualified physician.”

#### Prosecutors

➤ [Chapter 113](#) (A5670) **Authorizes assistant prosecutors in Sullivan County to live in an adjoining county** [Effective: July 25, 2017]

This law amends Public Officers Law 3 by adding subdivision 66 [there are several numbered 66] to provide authorization for Sullivan County assistant district attorneys (other than the first assistant district attorney or chief assistant district attorney) to live in an adjoining county.

➤ [Chapter 193](#) (A7439) **Relates to the duties of the district attorney in cases in which the final disposition includes convictions of certain felonies** [Effective: August 21, 2017]

This chapter amends CPL 440.50(1) to instruct the district attorney to provide the parole board with a copy of the letter they are currently obligated to provide to victims of certain felonies. It also extends the victim notifica-

## 2017 Legislative Review *(continued)*

tion requirements to all felonies under article 130 of the Penal Law.

### Prisons and Parole

- **Chapter 9 (A368) Relates to the appointment of interpreters to be used in parole board proceedings [Effective: March 8, 2017 (same as the effective date of L 2016, ch 473)]**

This legislation amends Executive Law 259-I to provide that interpreters appointed to assist in parole board hearings will be appointed from the Office of General Services statewide administrative services contract, and deletes language requiring that such interpreter be certified by a national or state credentialing authority. This amendment was agreed upon at the signing of Chapter 473 of the laws of 2016.

- **Chapter 120 (A7568) Updates terminology and corrects citations in the Executive Law relating to parole and corrections institutions [Effective: July 25, 2017]**

This law updates references in Executive Law 259-i(7) to the former Division of Parole with references to the Department of Corrections and Community Supervision (DOCCS) or Board of Parole.

- **Chapter 122 (A7985-A) Relates to health care services for county jail inmates [Effective: July 25, 2017]**

This chapter amends Correction Law 501 to allow local jails to contract with medical corporations to provide health care services for their inmates. It was enacted in response to a perceived difficulty among county governments to find individuals to serve as jail physicians.

- **Chapter 130 (S4087) Relates to the residency of correction officers employed by the county of Chenango [Effective: July 25, 2017]**

This chapter amends Public Officers Law 3 by adding subdivision 66 [there are several numbered 66] to allow correctional officers in Chenango County to reside in an adjoining county.

- **Chapter 148 (S5894) Extends the expiration of provisions authorizing local correctional facilities to enter into agreements to take custody of out-of-state inmates [Effective: July 25, 2017]**

This chapter extends the expiration date for the authority of local jails under Chapter 573 of the laws of 2011 to contract to house out-of-state inmates to September 1, 2020. Some counties that have vacant space in their jail facilities due to decreasing numbers of people incarcerated locally offset the cost of operating the facilities by housing inmates from other jurisdictions. The practice can provide mandate relief for counties with the capacity to accept out of state inmates.

- **Chapter 160 (S6623) Relates to authorizing the Otsego County jail to also be used for the detention of persons under arrest being held for arraignment in any court located in Otsego County [Effective: July 25, 2017]**

This law amends Correction Law 500-a and 500-c by adding subdivision 2-r and 24, respectively, to permit the Otsego County jail to be used as a holding center for inmates awaiting arraignment in any court in the county.

- **Chapter 234 (S3504) Permits the Oneida County sheriff and correctional facility to hold detained persons between arrest and arraignment [Effective: August 21, 2017]**

This law amends Correction Law 500-a and 500-c by adding subdivision 2-q and 23, respectively, to permit the Oneida County Correctional Facility to be used as a holding center for inmates awaiting arraignment in any court in the county.

- **Chapter 254 (S5682) Relates to allowing telephone calls for inmates after transfer from correctional facilities [Effective: September 20, 2017]**

This chapter amends Correction Law 23(1) to allow inmates who have been transferred from one prison to another to make one personal phone call within 24 hours of their arrival in the new facility. If security concerns prevent the call, a designated staff member can make the call on the inmate's behalf unless the inmate declines.

- **Chapter 361 (A7687) Authorizes the study of parole officer staffing [Effective: October 23, 2017 (shall expire and be deemed repealed thirty days after the delivery of the required report to the Governor and Legislature)]**

This legislation requires DOCCS to study parole staffing based on standards set by the American Correctional Association, national parole standards, and other best practices, to determine "whether such staffing is sufficient to achieve the public safety goals of DOCCS and the reentry objectives of community supervision." The Commissioner will report the study's findings to the Governor and specified legislative leaders six months after the effective date of the act.

- **Chapter 379 (S3498) Requires that rehabilitation programs for female inmates in state correctional facilities be equivalent to those provided to male inmates of correctional facilities elsewhere in the state [Effective: December 22, 2017]**

This chapter amends the Correction Law to add a section 114 to require that prison rehabilitation programs for women be "commensurate to those afforded men ...

including but not limited to vocational, academic and industrial programs.”

- **Chapter 412 (A3053) Requires parole decisions to be published on a publicly accessible website within 60 days of such decisions [Effective: November 29, 2018]**

This chapter amends Executive Law 259-I(4) by adding paragraph c to provide that administrative appeal decisions made by the Board of Parole will be published online at a publicly accessible website within 60 days. The decisions will be indexed by subject matter and the index will be distributed to all correctional facility libraries, and copies of individual decisions available upon request.

- **Chapter 476 (A6353-B) Requires that an inmate who has appeared before the Board of Parole prior to having completed any program required by DOCCS, and has been denied release, shall be immediately placed into the required program [Effective: December 18, 2017]**

This law amends Correction Law 137(1) and Executive 259-I(1) to provide that inmates in DOCCS facilities will be placed in required programs “as soon as practicable.” Any inmate who has been denied parole before completing an assigned program will be prioritized for placement in the program.

### Crime Victims

- **Chapter 117 (A7281) Relates to eligibility for the reimbursement of crime scene cleanup [Effective: January 21, 2018]**

This law amends Executive Law 624(1)(k) to expand the eligibility for state funding for crime scene cleanup from spouses, children, and stepchildren of victims to grandparents, parents, step-parents, guardians, siblings, step-siblings, and grandchildren.

- **Chapter 248 (S5394) Relates to adding members to the advisory council and the domestic violence fatality review team [Effective: August 21, 2017]**

This chapter amends Executive Law 575(4)(b) and (10)(d) to add the Superintendent of the State Police to New York’s Domestic Violence Advisory Council and a member from the Office of Victim Services to the Domestic Violence Fatality Review Team.

- **Chapter 280 (A2394) Directs the Office of Victims Services to consult with the Office for the Aging in establishing a program for home visitation for elderly and invalid victims of violent crime [Effective: September 12, 2017]**

This law amends Executive Law 623(9) to enable the State Office for the Aging (SOFA) to be consulted in pro-

moting the establishment of a volunteer home visitation program for senior citizen and invalid victims.

- **Chapter 328 (S6676) Relates to developing and publishing guidelines for the identification and reporting of suspected self-neglect, elder abuse, and maltreatment in healthcare settings [Effective: September 13, 2017]**

This chapter adds article 3 to the Elder Law and defines various terms related to the maltreatment of older adults. It instructs the director of SOFA to develop guidelines to assist health care providers in identifying self-neglect, abuse, and maltreatment of elders, in conjunction with the Office of Children and Family Services (OCFS) and the Department of Health (DOH). The guidelines must include: “common signs and symptoms of self[-]neglect, abuse and maltreatment”; tools for determining whether self-neglect, abuse, or maltreatment may be occurring; training materials for healthcare workers and others in healthcare settings; and information regarding reporting options. The chapter further provides for the publication of the guidelines via department websites.

- **Chapter 396 (A7793-A/S6749) Relates to the confidentiality of registration records for victims of domestic violence [Effective: October 23, 2017]**

This law amends Election Law 5-508(2) to allow victims of domestic violence to apply for a protective order protecting not only their voter registration information but other records from public access and to permit such orders to be obtained in County and Family Court, as well as in Supreme Court as under prior law.

- **Chapter 416 (A6857) Defines “necessary court appearance” for purposes of the determination of a crime victim’s award [Effective: November 29, 2017]**

This legislation amends Executive Law 631(8), (10), and (12) to define “necessary court appearance” for the purposes of crime victim’s awards as including but not limited to “any part of a trial from arraignment through sentencing, pre and post trial [sic] hearings and grand jury hearings.” “Necessary court appearance” needed to be defined to determine the amount of compensation victims receive for travel costs.

- **Chapter 422 (A8251) Relates to requiring policies and procedures for certain facilities and agencies for reporting possible crimes against service recipients by custodians [Effective: November 29, 2017]**

This chapter amends Social Services Law 691 by adding subdivision 5 to require state oversight agencies to ensure that policies and procedures are in place at the facilities they operate for the identification and reporting of crimes against service recipients by their custodians. It

## 2017 Legislative Review *(continued)*

further requires the oversight agencies to provide guidance for those facilities that do not currently have such policies and procedures in place.

- **Chapter 423 (A8286-B) Requires the transmission of reports of missing persons to the National Missing and Unidentified Persons System when such person has been missing for 30 days [Effective: November 29, 2017]**

This legislation amends Executive Law 837-e and 837-f-2 to require reports of missing persons to be transmitted to the National Missing and Unidentified Persons System (NamUs) within thirty days of their reported disappearance.

- **Chapter 459 (A2702) Relates to death and felony crime reports in certain adult care facilities [Effective: February 16, 2018]**

This law amends Social Services Law 461-m to include enriched housing programs in reporting requirements and to require reporting of death or attempted suicide of adult care facility residents to the DOH within 24 hours. The programs are further required to report felonies they believe to have been committed against residents to law enforcement. Finally, the programs must report such events “involving residents who at any time received mental hygiene services to the Justice Center for the Protection of People with Special Needs.”

### Courts

- **Chapter 99 (A8127) Relates to the use of electronic means for the commencement and filing of papers in certain actions and proceedings [Effective: July 24, 2017]**

This legislation amends Judiciary Law 212(2)(t)(i)(A), CPLR 2112, and Chapter 237, section 11, of the laws of 2015. It eliminates the previous exclusions from mandatory e-filing in the Appellate Divisions. Previously, certain proceedings including CPLR article 70 and 78 proceedings and MHL proceedings required consent for e-filing rules to apply. Further, the law changes the date on which the Chief Administrative Judge reports on the operation of e-filing programs from April 1 to February 1.

- **Chapter 74 (S4076) Waives the residency requirement for the town justice in the town of Boylston, in Oswego County [Effective: June 29, 2017]**

This chapter, amending Town Law 23 and Public Officers Law 3, provides that town justices in Boylston, Oswego County, no longer need to be an elector of that town; the exemption does not apply to justices of other towns unless the Legislature has otherwise provided. The justice must, however, reside in a town in Oswego County that adjoins Boylston.

- **Chapter 270 (S6770) Relates to the establishment of a single town court to serve the towns of Erin and Chemung [Effective: August 21, 2017]**

This statute provides that, notwithstanding the fact that the towns of Erin and Chemung, in Chemung County, failed to comply with the legal provisions for establishing a single town court to serve both towns and the provisions for election of a single town justice for the two towns, the actions they took are deemed sufficient to establish a single town court through December 31, 2017. Erin and Chemung may still establish a single town court through legally compliant measures, but not before January 1, 2018.

### Family Court

- **Chapter 97 (A8064) Relates to the Rockland Society for the Prevention of Cruelty to Children [Effective: July 24, 2017]**

This chapter amends Chapter 329 of the laws 2009 to extend the operations of the Rockland County Society for the Prevention of Cruelty to Children (SPCC) for two years and those of the Erie County SPCC until the end of 2017.

- **Chapter 153 (S6081) Extends certain provisions of law relating to the foster family care demonstration programs [Effective: July 25, 2017]**

This chapter, amending Chapter 942 of the law of 1983, Chapter 541 of 1984, and Chapter 256 of 1985, extends certain provisions relating to Foster Family Care Demonstration programs until December 31, 2021.

- **Chapter 281 (A2965) Relates to sharing reports of child abuse with agency charged with care, custody, or guardianship of child [Effective: September 12, 2017]**

This legislation amends Social Services Law 424(6), “to require Child Protective Services to ascertain whether a child named in a report of suspected child abuse or maltreatment or any other child in the same home” is in foster care. It is intended to prevent the placement of children in foster homes that may potentially be abusive environments.

- **Chapter 359 (A7553) Relates to contact by siblings in foster care, surrender, destitute child and permanency proceedings [Effective: January 21, 2018]**

This legislation enacts a number of reforms to promote visitation and access between siblings involved in the child protective system. Inter alia, it amends Family Court Act articles 1081 and 1095 to provide procedures for children in article 10-A and 10-C permanency and destitute minor proceedings to gain access and/or communication with their siblings. It also amends article 10-A to “articu-

late the presumption in favor of keeping siblings together or, where inappropriate, for the court order to include a directive for the [child protective] agency to arrange regular visitation or contact.” Further, it creates a motion procedure for sibling access and communication in permanency hearings and a similar procedure in the voluntary foster care placement statute, Social Services Law 358-a(11). Finally, the law amends the surrender statutes (Social Services Law 383-c and 384) to ensure that when parental rights are voluntarily surrendered, judicial acceptance of that surrender “shall not be construed to terminate any rights of the child to contact with his or her siblings.” For purposes of the statute, “siblings” includes “half-siblings and those who would be deemed siblings or half-siblings but for the surrender, termination of parental rights or death of a parent.” The standard to be applied for determining whether to order co-placement or communication with siblings will be the best interests of the child and his or her siblings.

- **Chapter 481 (S233-A) Establishes a temporary commission on child abuse and neglect prevention [Effective: December 18, 2017; expires two years after that date]**

This chapter establishes a nine-member temporary state commission “to examine, evaluate, and make recommendations concerning child abuse and neglect prevention efforts in the state with the goal of preventing child removals, lowering foster care placements, and increasing family reunification.” Three members will be appointed by the governor, three by the temporary president of the Senate, and three by the Assembly Speaker. The commission will report its findings to the Executive and Legislature within one year of the statute’s effective date.

#### Vehicle and Traffic Law

- **Chapter 138 (S5370) Extends provisions relating to the enforcement of support through the suspension of driving privileges [Effective: July 25, 2017 and deemed to have been in full force and effect on and after August 31, 2017]**

This chapter amends Subdivision 19 of section 246 of chapter 81 of the laws of 1995 to extend the enforcement of support obligations through the suspension of driving privileges through August 31, 2019.

- **Chapter 157 (S6456) Relates to the adjudication of traffic infractions in Monroe County [Effective: April 21, 2018]**

This chapter amends VTL 155, 225, 227, 510, 514, and 1690; General Municipal Law 370, 370-a, 371 and 374-b; State Finance Law 99-a; and CPL 350.20. It creates a Rochester traffic violations agency and a traffic prosecutor within that agency who will prosecute traffic infractions

in Rochester city court, eliminates provisions relating to how traffic violations were handled before creation of that agency, and sets out the procedures for prosecuting traffic infractions in the new agency and for selecting the traffic prosecutor and officers of the agency.

- **Chapter 489 (S5562A) Provides for mandatory testing of breath, blood, or urine in the event of a motor vehicle collision resulting in death or injury; provides immunity from liability for those health care providers who comply with the provisions of law requiring testing [Effective: January 17, 2018]**

This chapter amends VTL 603-a(1) regarding the procedure for police investigation of an accident in which death or serious injury has occurred. In addition to investigating the facts and circumstances of the accident, officers present at the scene will now be required to administer field sobriety tests and/or chemical tests on all drivers involved in the accident if there are reasonable grounds to believe the driver committed a serious traffic infraction during the accident. VTL 1194(2)(b) and (c) are amended to require that the refusal of a driver to comply must be reported and refusal procedures followed.

#### Mental Health

- **Chapter 67 (A7688) Extends the expiration of Kendra’s Law [Effective: June 29, 2017]**

This law amends Section 18 of chapter 408 of the laws of 1999 to extend the sunset clause of the framework for court-ordered assisted outpatient treatment for individuals with mental illnesses to June 30, 2022.

- **Chapter 114 (A5974) Adds Prader-Willi syndrome to the definition of developmental disorder [Effective: July 25, 2017]**

This legislation amends MHL 1.03(22)(a)(1) to add Prader-Willi syndrome, a rare genetic condition that, among other things, causes those who have it to overeat because they cannot tell when they are full, to the legislative definition of “developmental disability.” The intent is to streamline the process and make it easier for people with the condition to receive services from the Office for People with Developmental Disabilities (OPWDD).

- **Chapter 196 (A7569) Relates to transfer of certain inmates to secure mental health facilities [Effective: December 19, 2017]**

This chapter amends Correction Law 508 to clarify that sheriffs do not retain custody of inmates of local correctional facilities who are taken to secure Office of Mental Health (OMH) facilities. It authorizes public safety officials to transfer custody of an inmate to OMH for mental health care and defines what facilities constitute a secure OMH facility for purposes of such a transfer. “Secure facil-

ities” for purposes of the statute are only those that have been approved and designated by the Commissioner based upon a review of the physical and internal security of the facility.

➤ **Chapter 198 (A7604) Relates to involuntary care and treatment and to whom an application for such admission is made [Effective: August 21, 2017]**

This law amends MHL 15.01 to expressly require that a determination that a person is in need of involuntary care and treatment in a school must be based on a finding that the person represents “a real and present threat of substantial harm to himself or herself or others.” This conforms the statute to administrative and judicial interpretations. See *In Re Scopes*, 59 AD2d 203 (3d Dept. 1977) and *Matter of Harry M.*, 96 AD2d 201 (2d Dept. 1983). Further, the law amends MHL 15.27 to provide that the OPWDD Commissioner, rather than the director of a school, makes the determination of whether to involuntarily retain in a school for care and treatment a person alleged to have a developmental disability.

➤ **Chapter 233 (S2933-A) Adds adult siblings to those who may have access to clinical records [Effective: August 21, 2017]**

This chapter amends MHL 33.16(a)(6) to add “adult sibling” to the definition of “qualified person” for the purpose of determining who may be entitled to access to clinical records from mental health facilities.

➤ **Chapter 247 (S5314) Relates to clarifying certain references to DOCCS [Effective: August 21, 2017]**

This legislation amends MHL 29.28(b) to clarify terminology regarding processing of vouchers for certain costs for prosecution of inmate-patients.

### Coroners

➤ **Chapter 184 (A5780) Requires certain training for coroners and coroner’s deputies [Effective: February 17, 2018]**

This legislation creates County Law 679, which requires that coroners and coroner’s deputies complete state-approved courses in medical-legal investigation. The coroner or coroner’s deputy will pay for the courses but their counties may reimburse them. The courses must conform to rules promulgated by the Department of Health, in consultation with the Department of State, DCJS, the State Police, the Commissioner of Education, and the chair of the Commission on Forensic Science.

### Marriage

➤ **Chapter 35 (S4407) Increases the age of consent for purposes of marriage [Effective: July 20, 2017]**

This chapter amends Domestic Relations Law 15 to change some of the requirements and language related to

certification of birth and age records for the purpose of obtaining a marriage license, including substituting gender-neutral terms. It also raises the age for marital consent from sixteen to seventeen. Additional requirements for the training and conduct of judges approving minor party marriages (individuals who are at least seventeen but under eighteen), are included.

### Freedom of Information

➤ **Chapter 453 (A2750-A) Regarding attorney’s fees in FOIL proceedings [Effective: December 13, 2017]**

This law amends Public Officers Law 89(4)(c) to provide for courts to award reasonable attorney’s fees and other litigation costs when an agency fails to respond to a request or appeal within the statutory time when the requester “substantially prevail[s] and the court finds that the agency had no reasonable basis for denying access.”

### Environmental Conservation Law

➤ **Chapter 66 (A7186) Regarding spearfishing in New York marine and coastal waters [Effective: June 29, 2017]**

This legislation amends Section 3 of chapter 435 of the laws of 2014 to extend the effectiveness of provisions relating to defining spearguns and allowing recreational spearfishing in New York’s marine and coastal waters to June 1, 2020.

➤ **Chapter 125 (S1129-A) Relates to hunting in Broome County west of the Susquehanna River [Effective: July 25, 2017]**

This chapter amends Environmental Conservation Law 11-0907(2) to set hunting season dates for Broome County west of the Susquehanna River and excluding the city of Binghamton. These dates apply to hunting for deer and bear using pistols, shotguns, crossbows, muzzle-loaders, rifles, or long bows.

➤ **Chapter 133 (S5064-A) Makes permanent provisions relating to hunting in Genesee County [Effective: July 25, 2017 (see section 4 for details on effective date of specific provisions)]**

This legislation amends Section 3 of chapter 68 of the laws of 2015 to make permanent hunting season dates for deer and bear in Genesee County using pistols, shotguns, crossbows, muzzle-loaders, rifles, or long bows.

➤ **Chapter 143 (S5506) Makes permanent provisions of law relating to hunting in Schenectady County [Effective: July 25, 2017]**

This law amends Section 5 of chapter 75 of the laws of 2015 to permanently authorize hunting big game with rifles in Schenectady County.

➤ **Chapter 178 (A4027) Relates to youth pheasant hunting days on Long Island [Effective: August 21, 2017]**

This law amends Chapter 366 of the laws of 2011 and extends, to December 31, 2019, provisions allowing for youth-only pheasant hunts on Long Island.

➤ **Chapter 203 (A7742) Extends authorization for angling by a single individual with up to three lines in freshwater [Effective: August 21, 2017]**

This chapter extends, to December 31, 2019, the authorization of Section 2 of chapter 455 of the laws of 2011 for individual anglers to use up to three lines when fishing in freshwater. The statute is intended to boost the economic impact associated with angling, an increase that has been seen in other states with a three-rod rule.

➤ **Chapter 204 (A7766) Makes provisions authorizing big game hunting in Seneca County permanent [Effective: August 21, 2017 (see section 4 for details on effective date of specific provisions)]**

This legislation amends Environmental Conservation Law 11-0907(2) to make permanent provisions that allow the use of rifles for big game hunting in Seneca County.

➤ **Chapter 243 (S4825) Authorizes hunting of big game with rifles in Orleans County [Effective: August 21, 2017 (see section 5 for details on effective date of specific provisions)]**

This chapter amends Environmental Conservation Law 11-0907(2) to extend provisions for the hunting of deer and bears in Orleans County with the use of pistols, shotguns, crossbows, muzzle-loaders, rifles, or long bows.

➤ **Chapter 408 (A556) Relates to the illegal taking of deer [Effective: March 29, 2018]**

This chapter amends Environmental Conservation Law 71-0921(1) to increase certain penalties for illegal big game hunting and illegal taking of deer, and establishes penalties for repeat offenders.

#### Education Law

➤ **Chapter 170 (S5273-A) Prohibits the alteration of a student's official records, files, and/or data [Effective: July 1, 2018]**

This law amends Education Law 225(9-a) to make the knowing, willful, unauthorized and false alteration or representation of any official school or college records related to a student a misdemeanor.

#### Public Health Law

➤ **Chapter 102 (S750) Prohibits use of e-cigarettes on school grounds [Effective: July 25, 2017]**

This legislation amends PHL 1399-o by adding subdivision 5 to prohibit the use of electronic cigarettes or "e-cigarettes" on school grounds. "Electronic cigarette" or

"e-cigarette" is defined in PHL 1399-aa(13). "School grounds" is defined in PHL 1399-n(6). The authority for imposing civil penalties for violation are found in PHL 12(1), 309(1)(f), and 1399-v.

#### Social Services Law

➤ **Chapter 384 (S4833-A) Clarifies the definition of "prospective relative guardian" for purposes of subsidized kinship guardianship assistance [Effective: October 23, 2017 provided that certain administrative steps be taken. According to OCFS Administrative Directive 18-OCFS-ADM-03, the effective date is Mar. 12, 2018, and amendment of relevant regulations is in process.]**

This chapter amends Social Services Law 458-a(3) to redefine "prospective relative guardian" for purposes of subsidized kinship guardianship assistance as a person who: "(a) is related to the child through blood, marriage, or adoption;" (b) is related to a half-sibling of the child through one of those means "and where such person or persons is or are also the prospective or appointed relative guardian or guardians of such half-sibling; or (c) is an adult with a positive relationship with the child, including, but not limited to, a step-parent, godparent, neighbor or family friend." It further provides that kinship guardian payments can be made until the child's twenty-first birthday with the child's consent upon turning eighteen years old.

#### Administrative Law

➤ **Chapter 295 (A7092) Relates to the electronic distribution of rule-making information [Effective: November 1, 2017]**

This law amends State Administrative Procedure Act (SAPA) 6-a to allow for electronic requests for copies of proposed, adopted, or emergency rules, any associated analyses, and any amendments. Unlike written requests, electronic requests will not expire until the person submits a request to discontinue notification about the rule. No fee will be charged for electronic notifications. As an alternative to electronically sending a document, the agency can send a link to a section of its website containing the full text of the document.

➤ **Chapter 455 (A8408) Relates to the comment period for proposed rules [Effective: October 1, 2017]**

This legislation amends a number of provisions and extends the minimum period for public comment on proposed rules of state agencies from 45 to 60 days. According to the bill memo, "[t]he comment period changes would apply to SAPA [State Administrative Procedure Act], to notices of proposed rules to the legislative leaders (for non-SAPA agencies), and to the ECL [Environmental Conservation Law]," though the comment periods for air pollution regulations and other environmental regulations would remain the same. ♪

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

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

## United States Supreme Court

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

### [Kisela v Hughes](#), 584 US \_\_, 138 SCt 1148 (4/2/2018)

The police officer who shot a woman within a minute or so of responding to a 911 call about erratic behavior by someone with a knife was entitled to qualified immunity for his use of force. Upon arrival, he found the woman inside a high chain link fence near another person, holding a large kitchen knife that she had been seen hacking a tree with, and failing to acknowledge at least two police commands to drop the knife. This is not a situation in which any competent police officer would know that firing at the woman to protect the other person would violate the Fourth Amendment. The woman sued the officer for use of excessive force, and the Ninth Circuit reversed a grant of summary judgment to the officer, finding a constitutional violation to be obvious and relying on circuit precedent it perceived as analogous. But “immunity protects all but the plainly incompetent or those who knowingly violate the law ....” Courts—particularly the Ninth Circuit—have been told “not to define clearly established law at a high level of generality” when determining whether police conduct violated “clearly established statutory or constitutional rights” that a reasonable officer would have known about. And the Court of Appeals further erred in relying on its own precedent, where other precedent favored the officer; this Court has said that one case relied on should not be read so broadly, another case was decided after the shooting in question and so could not have provided notice to the officer, and reliance on another “does not pass the straight-face test.”

**Dissent:** [Sotomayor, J] A jury could find, from the facts known at the time of summary judgment and viewed in the light most favorable to the plaintiff, that the officer violated clearly established constitutional rights “by needlessly resorting to lethal force.” The majority omits “critical facts and draws premature inferences”; two other officers on the scene refrained from firing. And the “‘clearly established’ prong of the qualified-immunity analysis” is not as onerous as the majority indicates. Other circuits’ decisions “illustrate that the Fourth Amendment clearly forbids the use of deadly force against a person who is merely holding a knife but not threatening anyone with it.” And the decision below was not so “manifestly incorrect as to warrant” summary reversal. The majority “tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.”

### [Sessions v Dimaya](#), \_\_ US \_\_, 138 SCt 1204(4/17/2018)

The residual clause found in 18 USC 16(b), which refers to a crime of violence and is used in the definition of what constitutes an “aggravated felony” rendering noncitizens deportable under the Immigration and Nationality Act (INA), is unconstitutionally vague. The respondent was convicted under the first-degree burglary statute in California, which was found by an Immigration Judge and the Board of Immigration Appeals to address a “crime of violence” constituting an aggravated felony warranting removal. After a similar definition of “‘violent felony’” was found impermissibly vague in *Johnson v US* (576 US \_\_, 135 SCt. 2551 [2015]), the Ninth Circuit ruled that the provision here was likewise unconstitutional. The government’s argument that a lesser standard applies is rejected, as “we long ago held that the most exacting vagueness standard should apply in removal cases.” The residual clause in question cannot withstand review under *Johnson*.

**Concurrence in Part:** [Gorsuch, J] The void for vagueness doctrine, properly conceived, can claim roots in the principles recognized by the framers of the Constitution. The doctrine has due process underpinnings. That clause “sought to ensure that the people’s rights are never any less secure against governmental invasion than they were at common law,” and fair notice is perhaps the most basic of due process protections. The vagueness doctrine also owes a debt to the separation of powers. Legislators cannot “set a net wide enough to catch all possible offenders, and leave it to the courts,” police, and prosecutors to shape “a vague statute’s contours ....” That the residual clause in question is being applied in a civil context does not exempt it from vagueness review, for “today’s civil laws regularly impose penalties far more severe than those found in many criminal statutes ....” There are limits on the holding here. “I remain open to different argu-

**US Supreme Court** *continued*

ments about our precedent” and note that the “[v]ague-ness doctrine represents a procedural, not a substantive, demand.”

**Dissent:** [Roberts, CJ] “Because §16(b) does not give rise to the concerns that drove the Court’s decision in *Johnson*, I respectfully dissent.”

**Dissent:** [Thomas, J] By ignoring the limitation in *Johnson* that “the residual clause was vague due to the “sum” of its specific features,” the Court “jettisons *Johnson’s* assurance that its holding would not jeopardize ‘dozens of federal and state criminal laws.’” In addition to the Chief Judge’s persuasive points as to why the respondent should not prevail under our precedents, I also continue to doubt that “striking down statutes as unconstitutionally vague is consistent with the original meaning of the Due Process Clause.” If the residual clause is unconstitutional under the “categorical approach,” that approach should be abandoned. “In my view, §16(b) is not vague as applied to respondent.”

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**United States v Microsoft Corp., \_\_ US \_\_, 138 S Ct 1186 (4/17/2018)**

This case must be dismissed as moot, due the enactment of the Clarifying Lawful Overseas Use of Data Act (CLOUD Act). The CLOUD Act amended the Stored Communications Act (SCA) at issue here (18 USC 2701 *et seq*) to require that an email services provider produce information pursuant to a warrant under the SCA regardless of whether the information is stored inside or outside this country. Here, the challenged warrant issued under 18 USC 2703 before the CLOUD Act has been replaced with a new one.

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**Wilson v Sellers, \_\_ US \_\_, 138 S Ct 1188 (4/17/2018)**

When the relevant state court decision being reviewed on the merits in a federal habeas corpus court does not contain reasons for the decision, “the federal court should ‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale.” A presumption that the unexplained decision rests on the same reasoning is subject to being rebutted by the State. The matter is remanded “for further proceedings consistent with this opinion.”

**Dissent:** [Gorsuch, J] “The statute governing federal habeas review permits no such ‘look through’ presumption. Nor do traditional principles of appellate review.” To disregard a final summary decision of a state court, a federal habeas court “must determine what arguments or theories . . . could have supporte[d] the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories

are inconsistent with the holding in a prior decision of this Court.” For a habeas petitioner to overcome that standard is intentionally difficult. The “look through” presumption will lead to needless work, “inducing more state supreme courts to churn out more orders restating the obvious fact that their summary dispositions don’t necessarily rest on the reasons given by lower courts.”

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**Byrd v United States, \_\_ US \_\_, 138 S Ct 1518 (5/14/2018)**

“[A]s a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver.” The matter is remanded for consideration of the government’s claims that the defendant “had no greater expectation of privacy than a car thief,” in which case there would be no legitimate privacy expectation, and of the question of whether police had probable cause to search the car. Police stopped the driver, who had been given the car keys by a friend who did not put the defendant on the rental agreement. The stop for a possible traffic infraction occurred after the police began following the driver because of the rental car and his posture (“hands at the ‘10 and 2’ position on the steering wheel, sitting far back from the steering wheel”). Although they asked for consent to search, police also said they did not need it given the driver’s lack of authorization. They rejected his offer to get from the car a “blunt” he disclosed could be found there; the subsequent search revealed other contraband. As freedom from unreasonable searches and seizures is essential to individual liberty, practices that give police “unbridled discretion to rummage at will among a person’s private effects” are disfavored. A per-se rule that drivers “not listed on rental agreements always lack an expectation of privacy in the automobile” is too restrictive, while a per-se rule that a “sole occupant of a rental car always has an expectation of privacy in it based on mere possession and control” also goes too far.

**Concurrence:** [Thomas, J] The majority opinion “correctly navigates our precedents, which no party has asked us to reconsider.” In an appropriate case, briefing and argument of three questions glossed over by the parties here would be welcome: 1) “what kind of property interest do individuals need before something can be considered “their ... effec[t]” under the original meaning of the Fourth Amendment?”; 2) “what body of law determines whether that property interest is present ...?”; and 3) “is the unauthorized use of a rental car illegal or otherwise wrongful under the relevant law, and, if so, does that illegality or wrongfulness affect the Fourth Amendment analysis?”

**Concurrence:** [Alito, J] “The Court holds that an unauthorized driver of a rental car is not always barred

US Supreme Court *continued*

from contesting a search of the vehicle.” Many questions are relevant to the ability to contest such a search. “On remand, the Court of Appeals is free to reexamine the question whether petitioner may assert a Fourth Amendment claim or to decide the appeal on another appropriate ground.”

**Dahda v United States, \_\_ US \_\_, 138 Sct 1491 (5/14/2018)**

The federal statute providing for suppression of evidence obtained through a wiretap conducted under an order of approval that is insufficient on its face does not bar evidence obtained under wiretap orders that included an authorization to intercept communications outside the issuing judge’s jurisdiction where the evidence used at trial was not actually intercepted outside that jurisdiction. This decision assumes that obtaining evidence outside the judge’s jurisdiction is improper. The orders in question authorized interceptions from targeted phones that were transported out of the court’s territory; the parties now agree that if a listening post from which interceptions occurred was also outside the court’s territory, the interception would be unlawful. Certain assertions by the government and the petitioners as to the application of 18 USC 2518(10)(a)(ii) are rejected. “Our interpretation of subparagraph (ii) makes sense of the suppression provision as a whole.” Because the wiretap orders here were otherwise legally sufficient, they “were not ‘insufficient’ on their ‘face.’”

[*Ed. Note:* Justice Gorsuch took no part.]

**McCoy v Louisiana, \_\_ US \_\_, 138 Sct 1500 (5/14/2018)**

“We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel’s experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.” Certiorari was granted to settle a division among state courts. Obtaining the assistance of counsel does not require entirely surrendering control; autonomy to decide that the defense objective is to assert innocence belongs in the category of decisions reserved to the client. Admitting guilt before a jury when the client says not to do so negates the client’s autonomy; this is different from plying such a strategy in the face of the client’s failure to respond to proposals about it. That the client wants to assert innocence and rely on an alibi that counsel disbelieves does not present counsel with the ethical problem presented when counsel *knows* a client plans to present perjured testimony. Violating client autonomy is a structural error, the

prejudice requirement in ineffective-assistance-of-counsel cases does not apply.

**Dissent:** [Alito, J] Defense counsel did not admit that the client was guilty of first-degree murder, only that he had committed one element of that crime, *ie* killing the victims. Cases presenting the constitutional right set out by the majority will be rare, with the issue “most likely to arise in cases involving irrational capital defendants” who either “disagree with their attorneys’ proposed strategy yet continue to retain them” or unsuccessfully seek to have them removed as court appointed counsel. The question more likely to arise is, “[w]hen guilt is the sole issue for the jury, is it ever permissible for counsel to make the unilateral decision to concede an element of the offense charged?” Or, can counsel concede that a client is guilty of a lesser included offense? Those are left for another day. As for the situation here, the lawyer “did not violate any fundamental right by expressly acknowledging that petitioner killed the victims instead of engaging in the barren exercise that petitioner’s current counsel now recommends.” By making the right it establishes a “structural” one, the majority compounds its error.

**United States v Sanchez-Gomez, \_\_ US \_\_, 138 Sct 1532 (5/14/2018)**

The Ninth Circuit improperly relied on class action precedents to find the mootness doctrine did not bar consideration of the instant challenge, which concerns a blanket policy of using full restraints on all in-custody criminal defendants during pretrial proceedings, once the criminal cases of the four challengers were resolved. The contention that *Gerstein v Pugh* (420 US 103 [1975]) “supports a freestanding exception to mootness outside the class action context” is rejected. This case involves no formal mechanism for aggregating claims; there is no statutory mechanism establishing a collective action for criminal cases comparable to the Fair Labor Standards Act litigation in *Gerstein*. “And we have never permitted criminal defendants to band together to seek prospective relief in their individual criminal cases on behalf of a class.” The decision below “to recast respondents’ appeals as petitions for ‘supervisory mandamus’” does not affect the conclusion here. There is no precedent exempting mandamus cases from normal mootness rules.

That the defendants who pleaded guilty to illegal entry into the country may again violate immigration laws does not provide a basis to depart from the settled rule. The case or controversy requirement is not met by the possibility that a party will be prosecuted in the future. Civil cases resting on litigants’ inability to prevent themselves from facing challenged conduct for reasons beyond their control, arising in contexts such as child support arrears and school suspensions of children with disabilities for uncontrollable behavior, are not apposite here.

**US Supreme Court** *continued*

No position is taken on other possible avenues of relief touched on in the course of this litigation.

**Collins v Virginia**, \_\_ US \_\_, 138 S Ct 1663 (5/29/2018)

The automobile exception to the Fourth Amendment does not permit a police officer to search a vehicle parked in the curtilage of a home when the officer is uninvited and lacks a warrant. Here, investigation led police who were looking for a certain motorcycle to a house where what appeared to be a motorcycle covered with a tarp could be seen parked at the top of the driveway; an officer walked onto the residential property, uncovered the motorcycle, and confirmed that it was stolen. Based on different reasoning, the Court of Appeals and Supreme Court of Virginia affirmed the resulting conviction. The search here was improper because “the automobile exception extends no further than the automobile itself.” This case is distinguishable from one where police followed on public streets a vehicle suspected of containing contraband, approached the curtilage of a home only when the vehicle’s driver turned into the garage, and searched the car only after the driver admitted it contained contraband. And a rule that the automobile exception ends only at the threshold of a “fixed, enclosed structure inside the curtilage” would unnecessarily complicate matters.

**Concurrence:** [Thomas, JJ] The Court correctly resolves the search issue in this case. “I write separately because I have serious doubts about this Court’s authority to impose” the exclusionary rule, which is not part of the Constitution, on a State.

**Dissent:** [Alito, JJ] The police action here was entirely reasonable and so was not a prohibited search.

**Lagos v United States**, \_\_ US \_\_, 138 S Ct 1684 (5/29/2018)

As used in the Mandatory Victims Restitution Act of 1996, “the words ‘investigation’ and ‘proceedings’ are limited to government investigations and criminal proceedings”; they do not include private investigations and civil proceedings. The petitioner, who was convicted of using a company that he controlled to defraud a lender of tens of millions of dollars, is not required to pay the ordered restitution to the lender for its own investigation of the fraud and participation in bankruptcy proceedings involving the petitioner’s company. This conclusion rests largely on the statute’s wording, as well as the practical fact that a “broad reading would create significant administrative burdens.” Victims such as the one here can sue for their losses, and while collection difficulties may ensue, “there is no reason to think that collection efforts related to a criminal restitution award would prove any

more successful.” That the lender later shared the results of its own investigation with the government does not justify restitution for expenses generated by the investigation and not by the sharing of the results.

**City of Hays v Vogt**, \_\_ US \_\_, 138 S Ct 1683 (5/29/2018)

“The writ of certiorari is dismissed as improvidently granted.”

**[Ed. Note: Justice Gorsuch took no part. Among amicus briefs filed was one by the National Association of Criminal Defense Lawyers and American Civil Liberties Union arguing that the Fifth Amendment’s self-incrimination bar applies at preliminary hearings.]**

**Hughes v United States**, No. 17-155 (6/4/2018)

Where a federal trial court, after considering the federal Sentencing Guidelines, accepted a guilty plea bargain involving a “Type-C agreement” specifying a particular sentence under Federal Rule of Criminal Procedure 11(c)(1)(C), and the Guidelines were then amended to reduce the applicable base offense level, the defendant is eligible to seek a reduced sentence under 18 USC 3582(c)(2). That statute “authorizes a district court to reduce a defendant’s sentence if the defendant “has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” Questions about its applicability have been addressed differently in different courts following the plurality decision in *Freeman v United States* (564 US 522 [2011]). The instant opinion “should give the necessary guidance to federal district courts and to the courts of appeals with respect to plea agreements of the kind presented here and in *Freeman*.” No view is expressed as to whether the sentencing court should exercise its discretion to reduce the instant sentence. In instances where “the Guidelines range was not ‘a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement,’” 3582(c)(2) relief is not available.

**Concurrence:** [Sotomayor, JJ] While continuing to believe that my concurrence in *Freeman* presents the most convincing interpretation of 3582(c)(2), I join the majority here in full because the divided decisions in *Freeman* have caused discord and confusion.

**Dissent:** [Roberts, CJ] The sentence of a defendant entering into a “Type-C” plea agreement is dictated by the agreement, not a Guidelines calculation. The defendant should not get a windfall benefit if the Guidelines range is later changed. Going forward, the government may “be able to limit the frustrating effects of today’s decision” by adding a provision to all Type-C agreements requiring defendants to waive any right to seek a future sentence reduction based on amendments to the Guidelines.

US Supreme Court *continued***Koons v United States, \_\_ US \_\_, 138 SCt 1783 (6/4/2018)**

Where the petitioners, “convicted of drug offenses that carried statutory mandatory minimum sentences,” received sentences below those mandatory minimums pursuant to another statute for substantially assisting the government in other drug prosecutions, their “sentences were ‘based on’ their mandatory minimums and on their substantial assistance ..., not on sentencing ranges” later lowered by the United States Sentencing Commission. The petitioners are therefore ineligible for sentence reductions under 18 USC 3582(c)(2).

**Chavez-Meza v United States, No. 17–5639 (6/18/2018)**

The sentencing court adequately explained why a sentence of 114 months rather than a lesser sentence was imposed at resentencing after the Sentencing Commission lowered the applicable Federal Sentencing Guidelines range subsequent to imposition of the original 135-month sentence. Sentencing courts are statutorily required to “state in open court the reasons for [the] imposition of the particular sentence” under 18 USC 3553(c). No law or convincing reason requires a resentencing court to “choose a point within the new lower Guidelines range that is “proportional” to the point previously chosen in the older higher Guidelines range.” Review of a modified sentence need not ignore the record from the initial sentencing; this record as a whole shows that the judge had a reasoned basis for exercising his legal decision-making authority and did consider the parties’ arguments.

**Dissent:** [Kennedy, J] The terse form used to enter the order reducing the petitioner’s sentence did not explain why the court chose the particular sentence imposed. A slight expansion of the form would generally answer the concerns expressed in this dissent. While a proportional reduction of a sentence suggests that the reasons for the sentence are the same as those that informed the initial sentence, a nonproportional reduction suggests that the reasons for the sentence may be different, so a more specific explanation is needed. “[D]istrict courts must provide enough reasoning for appellate courts to review their decisions when they exercise discretion” and “would be wise to say more than the court said in this case, even in the absence of a holding requiring it to do so on the specific facts at issue here.”

**Lozman v Riviera Beach, No. 17–21 (6/18/2018)**

The petitioner brought a lawsuit under 42 USC 1983 claiming that the City of Riviera Beach, FL, illegally retaliated against him for exercising his free speech rights

when he was arrested at a public City Council meeting after being directed to stop speaking and leave the podium. Charges of disorderly conduct and resisting arrest without violence were later dismissed at the behest of the State’s attorney, although probable cause for the arrest was determined to exist. The question presented is whether the existence of probable cause bars the retaliatory arrest claim here, a case far afield from typical retaliatory arrest claims. The petitioner alleges that the City acted “against him pursuant to an ‘official municipal policy’ of intimidation,” having “formed a premeditated plan to intimidate him in retaliation for his criticisms of city officials and his open-meetings lawsuit.” There is “little risk of a flood of retaliatory arrest suits against high-level policymakers,” and the petitioner’s criticisms of public officials and lawsuit were “high in the hierarchy of First Amendment values.” For these reasons, he “need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City.” This is not to say that he will ultimately be entitled to a new trial or the relief he seeks.

**Dissent:** [Thomas, J] The Court should not have gone out of its way “to fashion a complicated rule with no apparent applicability to this case or any other.” I would hold “that plaintiffs must plead and prove a lack of probable cause as an element of a First Amendment retaliatory-arrest claim.”

**Rosales-Mireles v United States, \_\_ US \_\_, 138 SCt 1897 (6/18/2018)**

A miscalculation of the United States Sentencing Guidelines range that has been determined to be plain error and to affect the substantial rights of a defendant will, in the ordinary case, “seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief” even though raised for the first time on appeal. While federal sentencing courts are not bound by the Guidelines, they must begin their analysis with them and be cognizant of them throughout. Given the complexity of calculating the Guidelines range, courts sometimes make mistakes that go undetected until an appeal. Here, a double counting error was found to be without remedy by the Fifth Circuit because error and resulting sentence did not “shock the conscience.” That test conflicts with the practice of other circuits and too narrowly confines the discretion of appellate courts.

**Dissent:** [Thomas, J] “The Court’s decision goes far beyond what was necessary to answer the question presented. And it contravenes long-established principles of plain-error review.” [Footnote omitted.] It creates the opportunity for “sandbagging.” Pure procedural errors do not satisfy the fourth prong of plain-error review. The sentence here was in the bottom half of the properly calculated Guidelines range as well as the improper one, and

**US Supreme Court** *continued*

the sentencing court emphasized his prior record in imposing the challenged sentence. “Leaving that reasonable sentence in place would not seriously affect the fairness, integrity, or public reputation of judicial proceedings.” [Internal quote marks omitted.]

**Pereira v Sessions, No. 17–459 (6/21/2018)**

If the Government serves a noncitizen in removal proceedings with a document labeled “notice to appear,” but the document fails to specify either the time or place of the removal proceedings, the notice does not trigger the “stop-time rule” of 8 USC 1229b(d)(1)(A). That rule relates to the length of “continuous physical presence” in the US necessary to be eligible for the form of discretionary relief under 8 USC 1229b(b)(1) known as cancellation of removal. Notices to appear are statutorily required to include “[t]he time and place at which the [removal] proceedings will be held.” 8 USC 1229(a)(G)(i). A regulation promulgated in 1997 indicated that notices to appear needed to provide time, place, and date of initial removal hearings only “when practicable,” which has led to the practice of generally serving notices without such specifications. The Board of Immigration Appeals (BIA) concluded that such incomplete notices to appear trigger the stop-time rule. The petitioner, who was admitted to the US at age 19 as a “non-immigrant visitor” in 2000 and overstayed his visa, was arrested in 2006 for driving under the influence and was served with a “Notice to Appear” that did not specify a date and time for a removal hearing. Over a year later, an Immigration Court sent a more specific notice to the petitioner’s street address rather than post office box and was returned as undeliverable; he of course failed to appear at the hearing and was ordered removed in absentia. Arrested in 2013 for driving without headlights, he was detained, his removal proceedings reopened and deemed ineligible for cancellation of removal because he did not meet the 10-year requirement. The language of 1229b(d)(1) is sufficient to resolve this case. Attempts to inject ambiguity into the statute are not persuasive, nor are alleged “practical concerns.”

**Concurrence:** [Kennedy, J] Agreeing in full with the Court opinion, I write separately “to note my concern with the way in which the Court’s opinion in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), has come to be understood and applied.” As the Court finds, the BIA’s interpretation of the statutes in question has little support in the text of the relevant provisions; the “reflexive deference exhibited in some of these cases is troubling.”

**Dissent:** [Alito, J] “Here, a straightforward application of *Chevron* requires us to accept the Government’s

construction of the provision at issue. But the Court rejects the Government’s interpretation in favor of one that it regards as the best reading of the statute. I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*.”

**Carpenter v United States, No. 16–402 (6/22/2018)**

The Court of Appeals affirmance of the petitioner’s robbery and firearms convictions, which followed a trial at which cell-site location information (CSLI) records obtained by the government by way of court orders under the Stored Communications Act were introduced, is reversed. “[W]e hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.” Wireless carriers collect and store CSLI for their own business uses while providing cell phone service, but “the fact that the information is held by a third party does not by itself overcome the user’s claim to Fourth Amendment protection.” People today “compulsively carry cell phones with them all the time,” away from public thoroughfares and into a variety of “potentially revealing locales.” Government tracking of a cell phone can achieve “near perfect surveillance,” and the retrospective quality of stored CSLI data “gives police access to a category of information otherwise unknowable.” And the accuracy of CSLI is increasing, “rapidly approaching GPS-level precision.” A government request for such records cannot be considered “a garden-variety request for information from a third-party witness,” but is rather a significant extension of the third-party doctrine “to a distinct category of information.” Given the way CSLI is generated, “in no meaningful sense does the user voluntarily ‘assume[] the risk’ of turning over a comprehensive dossier of his physical movements.” This opinion expresses no view on “real-time CSLI or ‘tower dumps’ (a download of information on all the devices that connected to a particular cell site during a particular interval);” “other business records that might incidentally reveal location information”; or “other collection techniques involving foreign affairs or national security.” As acquisition of CSLI records constitutes a search, “the Government must generally obtain a warrant supported by probable cause before acquiring such records” covering more than six days. “[T]his Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy.”

**Dissent:** [Kennedy, J] The Court’s departure from relevant precedents and principles puts criminal investigations of serious cases at risk and unduly restricts the lawful and necessary enforcement powers of federal and state law enforcement. Cell phone service customers like the petitioner have no reasonable expectation that the type of records in question cannot be disclosed through compul-

US Supreme Court *continued*

sory process. Those records are kept because they have value to the providers. They also have investigative value, as here, where the government had arrested four co-conspirators, one of whom disclosed the petitioner's name and cell phone number and said the petitioner and others were planning more armed robberies soon. CSLI records for the petitioner's phone connected him to several of the prior robbery times and locations. The Stored Communications Act requirements mitigate concerns about overly-permeating police surveillance. It would be wise to defer to legislative judgments about use of technology. The decision here will create confusion and have dramatic law enforcement consequences.

**Dissent:** [Thomas, J] The case should turn on whose property was searched. The records in question belonged to the service providers. More fundamentally, the "'reasonable expectation of privacy' test" lacks any basis in Fourth Amendment text or history. That "the Telecommunications Act generally bars cell-phone companies from disclosing customers' cell site location information to the public" does not give the petitioner a property right in those records.

**Dissent:** [Alito, J] The Court's decision "fractures two fundamental pillars of Fourth Amendment law ...." It "ignores the basic distinction between an actual search ... and an order merely requiring a party to look through its own records and produce specified documents." It also "allows a defendant to object to the search of a third party's property." The order here was the equivalent of a subpoena *duces tecum*, which were not regarded as searches at the founding. The Fourth Amendment regulates only unreasonable "'searches and seizures' of 'persons, houses, papers, and effects' ...." "Holding that subpoenas must meet the same standard as conventional searches will seriously damage, if not destroy, their utility."

**Dissent:** [Gorsuch, J] Rather than looking at the third-party doctrine cases or using the "'reasonable expectation of privacy'" jurisprudence that produced those cases, we could turn to the traditional approach to Fourth Amendment claims, which is tied to the law, not "a judge's personal sensibilities about the 'reasonableness' of your expectations or privacy." Determining what legal interest "is sufficient to make something *yours*," and what source of law to use to do so, needs much work. Under this approach, it seems that third-party access or possession would not necessarily eliminate your interest, and complete ownership or exclusive control would not always be necessary to a Fourth Amendment claim. Further, "positive law may help provide detailed guidance on evolving technologies without resort to judicial intuition," but in some circumstances "cannot be used to defeat it." And in some instances, a constitutional floor may "bar efforts to circumvent the Fourth Amendment's

protection through the use of subpoenas." While it seems entirely possible that "a person's cell-site data could qualify as his papers or effects under existing law," there is not information on which to determine that, as the petitioner forfeited that promising line of argument to pursue only a "reasonable expectation" claim.

**Currier v Virginia, No. 16-1348 (6/22/2018)**

The state courts properly rejected the Double Jeopardy claim of a defendant who agreed to the severance of a charge of unlawful possession of a firearm by a felon from other charges to avoid having the evidence of his prior convictions prejudice a jury's consideration of the remaining charges and, then, after being acquitted of those charges, sought to stop the trial on the firearm charge.

**Concurrence in Part:** [Kennedy, J] The Double Jeopardy principle that the State should not be able to make repeated attempts to convict a person cannot be expanded to situations in which the defendant is the one responsible for a second prosecution.

**Dissent:** [Ginsburg, J] Under Virginia practice, a trial court must sever possession of a firearm by a felon charges from others absent agreement by the prosecution and defense to proceed otherwise. "I would hold that Currier's acquiescence in severance of the felon-in-possession charge does not prevent him from raising a plea of issue preclusion based on the jury acquittals of breaking and entering and grand larceny." The Double Jeopardy Clause prohibits multiple trials for the "'same offense'" and shields "the issue-preclusive effect of an acquittal." Consenting to severance did not waive the "right to rely on the issue-preclusive effect of an acquittal" because "'every reasonable presumption against waiver of fundamental constitutional rights'" is to be indulged. The prosecution could have sought to prove Currier's possession of the guns in question outside the context of the break-in and theft of which he was acquitted. "[T]he plurality would take us back to the days before the Court recognized issue preclusion as a constitutionally grounded component of the Double Jeopardy Clause."

**Trump v Hawaii, No. 17-965 (6/26/2018)**

Assuming "without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue," it is held "that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim." "[T]he case is remanded for further proceedings consistent with this opinion." The plaintiffs assert that the President lacked the authority under the Immigration and Nationality Act (INA) to issue a Proclamation imposing entry restrictions on nationals of certain countries that "do

**US Supreme Court** *continued*

not share adequate information for an informed entry determination, or that otherwise present national security risks.” The INA, by the plain language of 18 USC 1182(f), “grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest.” The statutory prohibition on discrimination on the basis of nationality or other traits applies to the issuance of visas—which do not guarantee admissibility—and not to determinations of admissibility.

The plaintiffs who assert that the Proclamation keeps them separated from relatives seeking to enter the country have standing to claim that the Proclamation violates the constitutional prohibition against preferring one religious faith over another by disfavoring Muslims. As a candidate, the President made statements such as “the United States was ‘having problems with Muslims coming into the country.’” As President, he has, among other things, “retweeted links to three anti-Muslim propaganda videos.” The issue here is not whether to denounce such statements but to determine their significance as to the Proclamation, which itself is facially neutral as to religion. Assuming that review can extend beyond the face of that document, “we may consider plaintiffs’ extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.” [Footnote omitted.] “The Proclamation is expressly premised on legitimate purposes,” and “the Government has set forth a sufficient national security justification to survive rational basis review.” Likening this facially neutral policy to the forcible relocation of US citizens to concentration camps (see *Korematsu v United States*, 323 US 214 [1944]), is inapt; that decision was gravely wrong and has no place in law.

**Concurrence:** [Kennedy, J] “There may be some common ground between the opinions in this case, in that the Court does acknowledge that in some instances, governmental action may be subject to judicial review to determine whether or not it is “inexplicable by anything but animus’ ....” Government officials whose statements or actions are not subject to judicial review are not free to disregard constitutional rights, and “[i]t is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs.”

**Concurrence:** [Thomas, J] There are problems with the plaintiffs’ claims in addition to those set out in the Court’s opinion. The remedy they sought, the increasingly common “‘universal’ or ‘nationwide’ injunctions[ ],” are starting to “take a toll on the federal court system ....” I am skeptical of the authority of district courts to issue

them. “If federal courts continue to issue them, this Court is dutybound to adjudicate their authority to do so.”

**Dissent:** [Breyer, J] Members of the Court principally disagree here as to whether the Proclamation’s “promulgation or content was significantly affected by religious animus against Muslims” or whether “its sole *ratio decidendi* was one of national security ....” There is evidence to support the possibility that the Proclamation is not being applied as written. The District Court is free to explore those issues on remand; “I would leave the injunction in effect while the matter is litigated.” Without further litigation, there is on balance sufficient evidence of antireligious bias to set the Proclamation aside.

**Dissent:** [Sotomayor, J] The Court’s decision fails to safeguard the First Amendment’s fundamental principle of religious neutrality. A reasonable observer would readily conclude from the full record “that the Proclamation was motivated by hostility and animus toward the Muslim faith.” And the plaintiffs have shown they are likely to suffer irreparable harm without the preliminary injunction; the injunction is also in the public interest. “Today’s holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu* ....”

**Sexton v Beaudreaux, No. 17–1106 (6/28/2018)**

In reversing a denial of federal habeas relief, the Ninth Circuit majority “ignored well-established principles. It did not consider reasonable grounds that could have supported the state court’s summary decision, and it analyzed respondent’s arguments without any meaningful deference to the state court.” The majority opinion contained a *de novo* analysis of the motion to suppress identification testimony that trial counsel did not bring, found deficient representation in the failure to bring it, and concluded that the failure had prejudiced the defendant, then “asserted that the state court’s denial of this claim was not just wrong, but objectively unreasonable under [28 USC] §2254(d).” At least one theory exists that could lead a fairminded jurist to find the suppression motion would have failed, *ie* that where the state habeas petition did not even address the reliability of the identification, the state court could reasonably conclude that that the totality of circumstances tipped against the habeas petitioner. The Circuit Court’s opinion was not only wrong, but “committed fundamental errors that this Court has repeatedly admonished courts to avoid.”

**Dissent:** [Breyer, J] “Justice Breyer dissents.”

**Sause v Bauer, No. 17–742 (6/28/2018)**

Dismissal of the petitioner’s 42 USC 1983 action for failure to state a claim on which relief can be granted is reversed and the matter remanded for further proceed-

**US Supreme Court** *continued*

ings. The petitioner claimed violations of her rights to free exercise of religion and to freedom from unreasonable searches and seizures based on allegations that two town police officers responding to a noise complaint engaged in “strange and abusive conduct,” including ordering her to stop when she knelt to pray, and the police chief failed to investigate, while successive mayors of the town knew of unlawful police conduct. On appeal, the petitioner argued only the free exercise rights violation by the two officers and the Circuit Court affirmed on the basis of qualified immunity. On the record here, the free exercise claim cannot be analyzed because information is not available as to the basis for the officers’ presence in the petitioner’s apartment or what they wanted her to do. “When an officer’s order to stop praying is alleged to have occurred during the course of investigative conduct that implicates Fourth Amendment rights, the First and Fourth Amendment issues may be inextricable.”

**New York Court of Appeals**

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

**People v Brooks, 31 NY3d 939, 73 NYS3d 110 (3/22/2018)**

The trial court erred in admitting testimony regarding the defendant’s alleged threat to kill the decedent during an argument a month before the decedent’s death. The witness’s testimony about what the decedent said the defendant said constituted double hearsay. There is no blanket hearsay exception for using such statements as “background’ in domestic violence prosecutions,” and statements offered under a *Molineux* theory must be in admissible form. However, the error was harmless.

“To the extent that the trial court improperly employed the *Frye* procedure to rule on the foundation of the defense expert’s testimony, any such error was [also] harmless.” A *Frye* inquiry looks into whether proposed expert testimony deals with accepted techniques that, properly performed, “generate results accepted as reliable within the scientific community generally ....” *People v Wesley*, 83 NY2d 417 (1994). That is a question “separate and distinct from the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case ....”

The defendant’s other contentions are also rejected, including a challenge to “character testimony” from 11

witnesses. The trial court instructed the jury as to the limited purpose for which the testimony could be considered—establishing the nature of the defendant’s relationship with the decedent, not propensity.

**People v Johnson, 31 NY3d 942, 73 NYS3d 113 (3/22/2018)**

“On the facts of this case, assuming without deciding that the trial court erroneously denied defendant’s motion to suppress,” any error was harmless. All other claims of trial error and prosecutorial misconduct lack merit.

**People v Sanchez, 31 NY3d 949, 73 NYS3d 497 (3/22/2018)**

“Viewing the evidence in the light most favorable to defendant ..., the trial court properly declined to charge the jury on the justification defense because, even assuming that the jury could rationally find that defendant subjectively believed he had been threatened with the imminent use of deadly physical force, ‘the jury could not rationally conclude that his reactions were those of a reasonable [person] acting in self-defense ...’” There is no reasonable view of the evidence on this record that the defendant could not safely retreat when deadly physical force was used.

**Dissent:** [Wilson, J] “Lurking somewhere beneath the majority’s opinion is the thought that you mustn’t bring a gun to a knife fight. We should keep in mind that, although there is no evidence that the group threatening Mr. Sanchez and his friends was armed with guns, courts of this state have held that the threat of deadly force may exist when a group of people attacking an individual is not armed at all ....” The defense adduced sufficient evidence to require a justification instruction, which the jury would have been free to reject.

**People v Boyd, 31 NY3d 953, 73 NYS3d 500 (3/27/2018)**

Where the “[d]efendant was alleged to have unlawfully possessed both a BB gun and a Taurus firearm,” the court’s dismissal of the non-inclusory charge of possessing an air pistol or rifle, related to the BB gun, did not remove from consideration the defense that he never possessed the Taurus, only the BB gun.

The defendant’s other contentions regarding a third-party culpability defense and comments made during the prosecution’s summation are without merit or unpreserved.

**Dissent:** [Rivera, J] By submitting to the jury only the more serious counts relating to the handgun and not the unlawful possession of an air pistol, the court “allowed the jury to consider highly prejudicial testimony completely irrelevant to the counts submitted, including

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defendant's admission of guilt to the possession of the air pistol," thereby encouraging "reverse jury nullification" and injecting confusion into the fact-finder's deliberative process. Knowing that the defendant admitted possessing the BB gun, the jury could have believed that its only option to hold him accountable for that was to convict on the submitted handgun charges.

**People v Perez, 31 NY3d 964, 73 NYS3d 508 (3/27/2018)**

The issue of whether the police interaction with the defendant during a vertical patrol of a Housing Authority building conformed to the *De Bour* requirements is a mixed question of law and fact, limiting review in this court to whether record evidence supports the lower courts' determinations. The circumstances testified to by the arresting officer, found credible by the trial court, "provided the requisite level of support to satisfy the applicable level of intrusion."

Any error in admitting a statement made by the defendant prior to receiving *Miranda* warnings was harmless.

**Dissent:** [Rivera, JJ] Nothing about the encounter between the police and the defendant "supports the erosion of his 'right to be left alone' ...." Reasonable suspicion that someone "has committed, is committing, or is about to commit a crime" does not follow from "a person's failure to answer police questions," like the question here as to whether the defendant lived in the building, "absent other indicia of criminal activity." And forcible police action cannot "be based on a person's efforts to avoid confrontation, which defendant clearly sought to do here by turning around and facing the wall." The defendant chose not to tell the police whether he lived in the building; the law protects that choice.

This appeal does not present a mixed question of law and fact. "We must be especially careful not to minimize our role in setting forth the proper legal standards in cases challenging the propriety of police encounters with the public ...." Recent decisions, including this one, risk "authorizing the escalation of police-initiated encounters where a person exercises the right to be left alone, giving license to violations of the right to privacy."

**Matter of Abdur-Rashid v New York City Police Dept., 2018 NY Slip Op 02206 (3/29/2018)**

"[A]n agency may decline to acknowledge that requested records exist in response to a Freedom of Information Law request (Public Officers Law § 84 *et seq.* [FOIL]) when necessary to safeguard statutorily exempted information." A law enforcement agency that "was asked to disclose records relating to a police investigation

and surveillance activities involving two specific individuals and associated organizations—information protected under the law enforcement and public safety exemptions of Public Officers Law § 87—" could permissibly "neither confirm nor deny the existence of responsive documents—a so-called Glomar response ...." The petitioners each separately asked for New York Police Department (NYPD) records relating "to any 'surveillance' and 'investigation' of them as individuals and of certain specified entities with which they were associated (including a mosque and a university student association respectively) ...." Agencies invoking the law enforcement and public safety exemptions need not make specific factual showings as to how disclosure "would pose any unique or unusual danger of interference" with the case about which the request is made, but rather can simply identify "the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of [those] categories of documents' ...." It is not contested that the exemptions would be rendered meaningless if FOIL compelled disclosure of "records relating to an ongoing criminal investigation of a particular individual or organization to the target, the press or anyone else"; what is argued is that the agency must say whether responsive materials exist. But that would result in the same harm. Precedent under the federal statute on which FOIL was modeled is instructive here, and there is no textual basis in the FOIL statute for requiring an agency to do so. In the rare case when acknowledging that responsive records exist would reveal information linked to a narrow FOIL exemption, a Glomar response is consistent with the statute's purpose and structure. The unusual FOIL requests here, seeking to ascertain the petitioners' connection if any to investigations or surveillance, implicate the core concerns of the relevant exemptions. The NYPD has provided a factual basis for applying the exemptions, explaining how its preemptive counterterrorism efforts would be imperiled by granting such requests. There was no abuse of discretion in declining to order in camera review of agency materials here, a safeguard that may be warranted in other circumstances. And tools other than FOIL exist to check government overreach, such as post-use notice requirements regarding eavesdropping warrants and complaints of unconstitutional actions such as racial and religious profiling.

**Concurrence in Part, Dissent in Part** [Wilson, JJ] All members of the Court agree that FOIL is a strong policy command for making government documents available subject to limited exceptions, that FOIL is more powerful than its federal counterpart, and that FOIL may not be used to disrupt law enforcement. But the majority and dissent each offer unsupportable positions. A process should be followed that does not require confirming or denying existence of records if confirming or denying would be protected by an exemption, but the Glomar doc-

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trine is inappropriate here in light of unique foreign policy concerns not applicable outside the federal arena. The specific terms of each request should be evaluated and, where appropriate, partial responses made that are “differentiated by the scope of the request and the nature of documents the agency possesses.” The procedural safeguards offered by the agency here, and others, should be part of the Article 78 process challenging a refusal to confirm or deny the existence of records. Here, because the NYPD has failed “to justify its wholesale nonresponse” or overcome the petitioners’ objections, there should be a remittal for presentation of evidence in line with the process suggested here.

**Dissent:** [Stein, J] “[T]his Court must look to New York’s FOIL statute, as it is written and has been interpreted by our prior case law, to answer the question of whether Glomar responses are permissible and, if so, under what circumstances. In my view, authorization for such responses cannot be found in, or reconciled with, the language of FOIL ....” Concerns of the NYPD and amici warrant legislative attention, as do compelling policy arguments raised by the petitioners and other amici, but because the existing statute “does not accommodate Glomar responses, weighing these competing interests is a matter for the legislature ....”

**People v Teri W.**, 31 NY3d 124, 73 NYS3d 777 (3/29/2018)

While, under Penal Law 60.02(2), “the sentence for a youthful offender adjudication replacing a felony conviction must be a sentence ‘authorized to be imposed upon a person convicted of a class E felony,’” the defendant’s 10-year probation sentence was legal. The version of Penal Law 65.00(2)(a)(i) in effect at the time of this offense provided that felony probation terms were to be five years with certain exceptions, including an exception for a sexual assault. Probation for a felony sexual assault is required to be 10 years. Since the enactment of the youthful offender (YO) statute in 1971, the legislature has created various designations and mandated sentences for violent, sex, and drug class E felonies. The language requiring 10 years’ probation for felony sexual assault “does not conflict facially with any other statutory provision” and the legislature is presumed to have acted with knowledge of the effect of that provision on other statutes. Allowing the 10-year probationary sentence to stand “is fully compatible with the youthful offender statute,” as the defendant will not have to register as a sex offender, received a more lenient sentence than if she had not received YO status, and her probation can be terminated early by a court upon satisfaction of certain conditions.

**People v Silburn**, 31 NY3d 144, \_\_ NYS3d \_\_ (4/3/2018)

While the defendant used the words “‘standby counsel’” when requesting to proceed pro se, and said he wanted not to represent himself but to have “limitation” with his lawyer, it was clear that he was requesting dual, or hybrid, representation, which is not constitutionally mandated. The defendant wanted counsel to do more than relieve the court “‘of the need to explain and enforce basic rules of courtroom protocol or assist the defendant in overcoming routine obstacles,’” which are the roles of standby counsel. He wanted counsel to question prospective jurors and witnesses, but to stand aside when the defendant wished to ask additional questions. The defendant’s request to represent himself was therefore equivocal, and the trial court was not required to make a further, in-depth inquiry, although the better practice would be to ask again about the defendant’s position after an explanation of the scope of the right to act pro se.

The defendant contends that the notice rule of CPL 250.10(2) applies only “to psychiatric evidence offered in support of a complete defense to an element of the crime, such as mens rea,” not to evidence offered in support of his challenge to the voluntariness of his confession. That contention is rejected based on both the words of the statute and the history reflecting “‘the spirit and purpose of the act and the objects to be accomplished ....” Allowing the use of unnoticed psychiatric evidence absent good cause would contravene “the ‘legislative intent . . . to ensure the prosecution sufficient opportunity to obtain the psychiatric and other evidence necessary to refute the proffered defense of mental infirmity’” and to avoid delay. This holding does not impinge on defendants’ right to present a defense; the statute just gives the prosecution “pretrial access to generally unavailable evidence for the limited purpose of rebuttal” if and when the defendant presents a psychiatric defense. That the prosecution knew the defendant had a mental illness was not notice that he intended to use evidence of that to attack the voluntariness of his confession; the defendant’s medical records were privileged in the absence of a waiver. Finally, no good cause was shown for the untimeliness in providing the required notice.

**Dissent:** [Wilson, J] The majority denies the defendant his “‘chance to present his case in his own way’ by calling witnesses” and examining them through counsel or “his own faculties ....” The majority rejects requiring “‘any particular catechism’” for courts but imposes “a precise one on defendants ....” The approach taken amounts to punishment for requesting something that is understandably assumed to be available, as standby counsel is often provided. And the trial court “also erred in refusing to contemplate even the possibility of assigning standby counsel.”

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While the CPL 250.10(2) ruling should be held to be error, it was harmless.

### [People v Britton](#), 31 NY3d 1019, \_\_ NYS3d \_\_ (4/26/2018)

The defendant's acquittal of criminal charges relating to alleged sexual behavior did not foreclose a finding, by clear and convincing evidence, for purposes of determining his Sex Offender Registration Act (SORA) risk level, that he did engage in such acts.

**Dissent:** [Rivera, J] The prosecution did not satisfy their heavy burden of establishing "by clear and convincing evidence that the conduct of which defendant was acquitted had in fact occurred." Acquitting him of first-degree rape and first-degree criminal sexual act for oral sexual conduct, a jury convicted him of second-degree sexual abuse. The courts below erroneously found that the defendant could be assessed 25 points for penetrative and oral sexual conduct of which he was acquitted based on unreliable evidence.

### [People v Epakchi](#), 31 NY3d 1007, \_\_ NYS3d \_\_ (5/1/2018)

"On review of submissions pursuant to section 500.11 of the Rules, order reversed, and case remitted to the Appellate Term, Second Department, Ninth and Tenth Judicial Districts, for further proceedings. Because the case originated in a local criminal court and the proceedings were not transcribed by a court stenographer, the appeal was not properly taken due to the failure to serve or file an affidavit of errors (*see* CPL 460.10[3])."

### [People v Gates](#), 31 NY3d 1028, \_\_ NYS3d \_\_ (5/1/2018)

The appellate court did not err by rejecting the prosecution's contention that the "defendant could not challenge on appeal a suppression ruling that was not reduced to writing." Because record evidence supports the Appellate Division's determination regarding suppression, it is beyond further review. "To the extent the dissent questions the continued utility of the *De Bour* paradigm for analyzing encounters between police and members of the public (*People v De Bour*, 40 NY2d 210 [1976]) and suggests that *People v Garcia* (20 NY3d 317 [2012]) was wrongly decided, those questions are not presented here where the parties litigated this case within the framework of our existing precedent."

**Dissent:** [Garcia, J] New York's *De Bour* framework for evaluating police-citizen encounters varies significantly from the federal approach. In practice, the *De Bour* approach "has created 'inconsistency in the evaluation of

markedly similar police encounters'" and its "'hyperstringent' rule ... serves as a barrier to legitimate, effective, and minimally-intrusive law enforcement practices designed to detect and ward off threats at their earliest stages ...." And regardless of whether *De Bour* should be reevaluated, "I disagree with the conclusion that a Trooper who approaches a vehicle with a sagging trunk, alone and at night, and finds three male passengers behaving nervously cannot ask the driver about the contents of a number of large, unusually-shaped bags piled on the floor and back seat."

### [People v Aleynikov](#), 2018 NY Slip Op 03174 (5/3/2018)

"[A] statute that criminalizes the making of a tangible reproduction or representation of secret scientific material by electronically copying or recording applies to the acts of a defendant who uploads proprietary source code to a computer server." The defendant uploaded quantities of his employer's source code, "i.e., computer instructions written in a human-readable programming language." After federal charges resulted in a conviction that was overturned on the basis that "the source code was 'intangible property' and therefore not a 'good' under the National Stolen Property Act," a state prosecution ensued. The defendant was charged "with two counts of unlawful use of secret scientific material (Penal Law § 165.07) and one count of unlawful duplication of computer related material in the first degree (Penal Law § 156.30 [1])." After a jury trial, Supreme Court granted a trial order of dismissal on the grounds that the source code was not "tangible." The evidence was also found legally insufficient to show intent to appropriate the use of the source code. The prosecution appealed from the dismissal of one count of unlawful use of secret scientific material; the Appellate Division's reversal is affirmed. "[A] rational jury could have found that the "reproduction or representation" that defendant made of Goldman's source code, when he uploaded it to the German server, was tangible in the sense of "material" or "having physical form." "[T]here is legally sufficient evidence that defendant created a tangible copy of the source code on the German server in violation of Penal Law § 165.07."

That the defendant left the original source code on his employer's network when he made a copy that he intended to permanently retain does not preclude a finding that he had the "'intent to appropriate ... the use of secret scientific material'" required under 165.07. "[A]ppropriation may involve depriving another of rights or benefits of property ownership that do not rise to the level of actual physical possession."

NY Court of Appeals *continued***People v Odum, 2018 NY Slip Op 03173 (5/3/2018)**

“[B]ecause the breathalyzer test was not administered in accordance with the requirements of section 1194 and defendant’s consent to take the test was not voluntary, as required by *Atkins*, the results of the test were properly suppressed.” The Legislature has placed limits on the authority of police to administer, in the absence of voluntary consent, a chemical test to determine the alcohol or drug content of a driver’s blood. The limits include the requirement that a test given on the basis of statutory deemed consent under Vehicle and Traffic Law (VTL) 1194(2)(a) be performed within two hours after the driver’s arrest. Where more than two hours had passed, and the defendant consented to the chemical test only after being told, inaccurately, that evidence of his refusal to take the test would be admissible at trial, the record supports the finding below that his consent was involuntary. The refusal could not have been admitted into evidence at trial under VTL 1194(2)(f) because the test was refused more than two hours after arrest. The rights asserted by the defendant here are not constitutional in nature; “[t]he Legislature is free to amend the statute to clarify the scope of the statutory rights ....”

**Concurrence:** [Wilson, J] The warning given to the defendant that his license would be suspended or revoked if he refused the test was correct, and giving that warning—even after expiration of the two-hour limit—would not render subsequent consent involuntary.

**Dissent:** [DiFiore, CJ] The two-hour rule in VTL 1194(2)(a), governing deemed consent, should not be found to apply to refusal warnings. The purpose of the two-hour rule was to limit the collection of blood samples from unconscious or incapacitated drivers, not to “automatically suppress evidence of the circumstances surrounding requests of a motorist to expressly consent to a breath test ....” And “the position that advising defendant that his refusal could be used as evidence is somehow coercive is also without merit.”

**People v Roberts, 2018 NY Slip Op 03172 (5/3/2018)**

New York’s identity theft statute “defines the use of personal identifying information of another as one of the express means by which a defendant assumes that person’s identity.” The defendants’ contention “that the use of personal identifying information does not automatically establish that a defendant assumes another’s identity,” so that the prosecution must establish independently both the “use of protected information and assumptive conduct,” is rejected. A defendant who uses the credit card number of a real person, while presenting a fictitious name as that of the card holder, commits conduct covered

by the statute. So does a defendant who engages in “the unauthorized and surreptitious use of the victim’s name to open a bank account” into which the defendant deposits stolen checks and from which the defendant subsequently withdraws cash. “The statute expressly limits the manner by which a defendant assumes the identity of another to three types of conduct: by presenting oneself as that other person, acting as that other person, or using that other person’s personal identifying information. Contrary to defendants’ argument, the requirement that a defendant assumes the identity of another is not a separate element of the crime.” [Footnote omitted.]

One defendant’s argument, that her conviction is invalid because “the statute requires that the felony must be subsequent to and enabled by the assumption of the identity” and the prosecution failed to establish a causal link, lacks merit. While she possessed the forged check well before assuming another’s identity, she “uttered” the check by depositing it by means of assuming that other identity.

One defendant’s claim that the courtroom was improperly closed during voir dire, violating the right to a public trial, lacks merit and is partially unreserved. The defendant’s family member was excluded due to lack of space but not during voir dire questioning, and the claim that his exclusion during the court’s preliminary remarks to prospective jurors is unreserved.

**Dissent in Part, Concurrence in Part:** [Wilson, J] One case here constituted identity theft, one did not. An attempt “to use someone else’s credit card number, attached to a name of a fictional person, to buy a bunch of sneakers” is an ordinary sort of larceny, not an example of the “rampant new form of crime called ‘identity theft’” addressed by the legislation. The majority violates four fundamental rules of construction and renders nugatory the Legislature’s words, “assumes the identity of another person by ....” While “many ordinary people misstate some bit of [personal identity information] with the intent to deceive and thereby obtain something of value,” and some of their behaviors are criminal, many such examples should not be considered identity theft “because they do not involve the assumption of someone else’s identity.”

**People v Cummings, 31 NY3d 204, \_\_ NYS3d \_\_ (5/8/2018)**

Admission of “a statement, heard in the background of a 911 call and spoken by an unidentified person, under the excited utterance exception to the hearsay rule,” was error. “[T]he record contains no evidence from which a trier of fact could reasonably infer that the statement was based on the personal observation of the declarant.” That the defendant’s fingerprint was found on the vehicle that left the scene did not corroborate the statement that “‘It was Twanek,’” as it “does not help us determine whether

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the declarant personally observed the shooting or was passing on hearsay several times removed.” The applicable non-constitutional standard for harmless error was not met. No one identified the defendant as the shooter. The cell-phone records that place the defendant near the scene also indicate he called the vehicle’s driver, which is inconsistent with his presence in the same vehicle. The prosecutor’s “‘heavy reliance’ on the statement during summation underscores its importance” in the prosecution’s case.

The defendant’s alternate argument that a substitute Supreme Court Justice could not revisit a prior Justice’s decision to exclude the statement is rejected. Such a discretionary evidentiary decision can be considered anew on retrial, and “[t]here is no reason to apply a different rule to a successor judge within the same trial ....” The defendant did not assert lack of sufficient notice or the taking of “irremediable steps in reliance on” the ruling excluding the contested statement.

**Concurrence:** [Rivera, J] The justification for the excited utterance exception to the hearsay rule warrants serious reconsideration “in light of advances in psychology and neuroscience that demonstrate an individual’s inability to accurately recall facts when experiencing trauma, and, in turn, to create falsehoods immediately.” “Science, fact, and common sense suggest that we should cabin, if not outright abandon, the exception.”

**People v Kuzdzal, 2018 NY Slip Op 03304 (5/8/2018)**

The Appellate Division erred in opining about what remedy was warranted by a courtroom spectator’s allegation that two sworn jurors had referred to the defendant using a derogatory term without first determining whether the spectator’s allegation was credible. The matter is remitted for the Appellate Division “to exercise its own fact-finding power to consider and determine whether the trial court’s finding as to the spectator’s credibility was supported by the weight of the evidence.” The spectator, a friend if not girlfriend of the defendant, gave inconsistent testimony about when the alleged language was used, and was, separately, told by a court officer to leave the courtroom for the day. The trial court’s determination to examine the spectator “before proceeding to a *Buford* inquiry of the sworn jurors based on the mere reporting of the allegation itself is within the discretion of the trial court and is, indeed, a procedure that has been found to be reasonable ....” Only if “[i]f the Appellate Division finds that the credibility determination was not supported” must it further “determine whether the trial court abused its discretion in not taking further action ....”

**Concurrence:** [Wilson, J] “I concur in the result, but believe that both the Appellate Division majority and dis-

sent have evaluated this case under the wrong prong of CPL 270.35—‘grossly unqualified to serve’—instead of the prong applicable here: ‘engaged in substantial misconduct.’” A juror who has formed opinions based on evidence presented during trial, including an opinion that the defendant is a “scumbag,” is not unqualified to sit on the jury due to bias. Where the juror expressed the opinion to another juror in violation of the directive not to discuss the case, evaluation of whether to remove the juror should be on whether the “premature deliberation” amounted to substantial misconduct.

**Dissent:** [Rivera, J] “[R]emittal to the Appellate Division is unnecessary, as there is no error by that court within our authority to correct.” The determination about whether credible information had been presented before the court “was a purely factual determination based on its review of the record. The Appellate Division decision “is predicated on it having assessed the record before it” and our power to review such a determination is strictly limited. That the allegations warranted an inquiry of the jurors is a conclusion of law, one with which I agree. “What the majority intends the Appellate Division to do differently when it receives this case on remand is unclear.”

**People v Wallace, 2018 NY Slip Op 03305 (5/8/2018)**

The “place of business” exception to Penal Law 265.03(3), regarding possession of an unlicensed firearm, applies to someone who “is a merchant, storekeeper, or principal operator of a like establishment,” not to someone who is simply employed at a business. Legislative history indicates a desire to standardize previously “‘scattered,’ ‘inconsistent or flatly contradictory’ provisions on licensing and criminal use of weapons” and a “‘special emphasis on *stricter control of guns* ....” Looking at this statute and Penal Law 400.00 together, “the ‘merchant or storekeeper’ qualifier for the ‘place of business’ phrase in the licensing statute, must be equally applied to the exception in” 265.03(3). The terms generally mean the operator of a retail business. The exception applies to those who would qualify for a license at their “‘place of business,’” who “have a greater interest in protection of their premises, principal control over said premises, and a strong tie to the continued safety and security of their establishment and the goods and services they offer.” It does not “extend to every employee who chooses to carry a weapon to and from work, engaging in felonious behavior and endangering the public on their daily commute.”

**Concurrence in Result:** [Stein, J] “[I]t is unlikely that employees or managers of retail establishments, without more, would ever fall within the exemption.”

NY Court of Appeals *continued***People v Berrezueta, 2018 NY Slip Op 04032 (6/7/2018)**

The attempted fourth-degree possession of a weapon count of the accusatory instrument filed after the defendant was found with a switchblade knife was not jurisdictionally deficient, as it was supported by nonhearsay allegations that provided sufficient notice of the asserted conduct “to prepare a defense and avoid double jeopardy ...: The evidence at trial, “which included the police officer’s testimony and his demonstration of the operability of the knife, was sufficient to support the factfinder’s conclusion that the knife ... met the statutory definition of a switchblade” under Penal Law 265.00(4).

**Dissent:** [Rivera, JJ] The narrow issue here is whether the knife met the definition of a per-se weapon, which it did not. The officer’s description of a spring-loaded portion of the blade “protruding from the handle of the knife” or “in the blade” does not meet the statutory definition of a blade that automatically opens by hand pressure on a device “in the handle of the knife’ ....” Per se weapon statutes should be interpreted narrowly. “Since the knife as described in the accusatory instrument does not fit the statutory definition, the instrument is jurisdictionally defective.” And the trial evidence was insufficient.

**People v Rodriguez, 2018 NY Slip Op 04031 (6/7/2018)**

Even if defense counsel failed to assert a meritorious issue of the right to confront witnesses, the omitted issue was not so clear that “no reasonable defense counsel would have failed to assert it,” nor did the defendant show on the record that counsel’s inaction “could not have been grounded in a legitimate trial strategy’ ....”

**People v Sanabria, 2018 NY Slip Op 04033 (6/7/2018)**

The defendant did not preserve the contention “that the trial court infringed on his right to present a defense by limiting his expert’s testimony regarding the procedural history of defendant’s prior conviction’ ....” Nor did the court “otherwise abuse its discretion by restricting the expert’s testimony or by admitting some, but not all, evidence related to defendant’s prior period of incarceration ....”

**People v Henry, 2018 NY Slip Op 04275 (6/12/2018)**

In holding that the defendant’s statements during an uncounseled interrogation about a murder should have been suppressed, the Appellate Division misapplied CPL 470.15 and the standard in *People v Cohen* (90 NY2d 632 [1997]), warranting reversal. The defendant was repre-

sented on a marijuana charge stemming from the discovery of contraband in his car following a traffic stop. He was driving a vehicle of the same description as one used in an earlier robbery and a separate shooting; an inventory search turned up a cell phone later found to have been stolen during the robbery. After a subsequent stop while on bail, the defendant was questioned about the robbery and the murder by police who had learned about the stolen phone. Supreme Court suppressed statements regarding the robbery, reasoning that those charges were related to the marijuana offense because the phone was obtained as a result of that arrest. Supreme Court did not suppress statements regarding the murder, finding that offense completely unrelated to the marijuana charges. The Appellate Division held that under CPL 470.15 it was bound by the Supreme Court’s determination as to the robbery statements, and, as the murder and robbery charges were related, the statements about the murder should have been suppressed as well. But 470.15 did not require that the appellate court be bound by the trial court’s findings as to the robbery statements for purposes of evaluating the legality of the statements regarding the murder. The only link between the murder and the marijuana charges is the vehicle; that does not meet the test under *Cohen*, ie whether offenses are so related that questioning about one will almost certainly elicit responses about the other.

**People v Silvagnoli, 2018 NY Slip Op 04276 (6/12/2018)**

“[T]he impermissible questioning of defendant on a represented matter was so brief, flippant, and minimal that it was discrete and fairly separable as a matter of law from the interrogation of defendant on an unrepresented matter ....”

**People v Bailey, 2018 NY Slip Op 04383 (6/14/2018)**

Counsel for the defendant did not preserve for appeal an objection to the trial court’s failure “to inquire as to a juror’s impartiality and fairness as required by *People v Buford* (69 NY2d 290 [1987]) ....” A juror angrily interrupted counsel’s repeated questioning of the accuser in this assault case about whether he had been provoked by being called an “old n\*\*\*\*\*” into attacking the defendant and two codefendants. Defendant’s attorney moved for a mistrial, arguing that the juror’s outburst regarding the derogatory phrase not only showed animosity toward counsel, which could carry over to the defendant, but also poisoned the jury. Counsel for a codefendant argued for the remedy of striking the juror. When the trial court chose instead to instruct the jury, a codefendant’s counsel requested that the court ask the juror in question whether she could remain fair and impartial. The court denied this request. The failure of counsel for the defendant to join the

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request for a *Buford* inquiry or minimal inquiry of the juror shows counsel “was locked into the sole remedy of a mistrial.” His use of the phrase “grossly unqualified” in relation to the juror related solely to that goal. That counsel for a codefendant preserved the *Buford* issue is without effect; failure to join a codefendant’s request may reflect a strategic choice. The language of CPL 470.05(2) that reads “in response[] to a protest by a party, the court expressly decided the question raised on appeal,” is not to the contrary. It covers “a situation where the party has made a general or technically incorrect objection, but the court has made an express determination on the question of law raised on appeal in response ....”

The defendant’s claim that testimony about the Bloods gang was wholly inadmissible is without merit. The evidence was probative of the defendant’s motive and intent, and provided needed background information to place the charged conduct in context.

**Dissent:** [Wilson, J] No one contends that the juror acted appropriately. Counsel for each of the codefendants requested that the juror be replaced, and the prosecutor said she had no objection. Counsel for defendant said that the juror “not only put herself in a position where she should be removed, but I think she has poisoned the entire jury as well.” The “‘grossly unqualified’ standard of CPL 270.34, on which counsel and the court focused, “pertains to removal of a juror, not mistrials.” The type of behavior demonstrated by the juror poses a serious threat to defendants’ constitutional rights and should not be countenanced. Further, the trial court misinterpreted *People v Mejias* (21 NY3d 73 [2013]).

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**Matter of Lemma v Nassau County Police Officer Indem. Bd., 2018 NY Slip Op 04382 (6/14/2018)**

A determination that the conduct of a police officer was not within “the ‘proper discharge of his duties,’” so that he was not entitled under General Municipal Law 50-1 to defense and indemnification for civil damages arising from that conduct, was not arbitrary and capricious. The officer kept to himself information that an accused person was in jail on the date of a charged robbery; the accused person remained in pretrial detention for four months. When the accused person was released and filed suit in federal court, the county initially offered to represent and indemnify the officer, but after he revealed in a deposition years later that he had known of the accused person’s alibi within days of the arrest and did not reveal it, the county’s Police Officer Indemnification Board revoked the defense and indemnification. The Appellate Division’s affirmance of that decision in this Article 78 proceeding, holding among other things that the word “‘proper’ was

‘added [to 50-1] ... to exclude indemnification of intentional misconduct,’” is affirmed.

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**Matter of Mason H., 2018 NY Slip Op 04384 (6/14/2018)**

The order terminating the respondent’s parental rights for having “abandoned” the child under Social Services Law 384-b(4)(b) is reversed because the petitioner agency did not meet its burden of demonstrating abandonment by clear and convincing evidence. While the petitioner’s caseworker testified that the incarcerated respondent had not visited with the child or communicated with the caseworker or others in the agency for six months, there is no record evidence establishing that the “respondent failed to communicate with the child, directly or through the child’s foster parent, during the relevant time period.”

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**Matter of Natasha W. v New York State Off. of Children & Family Servs., 2018 NY Slip Op 04379 (6/14/2018)**

Using a child “as a pawn in a shoplifting scheme,” which offered “imminent potential for physical confrontation” during theft from a store monitored by security, “was sufficiently egregious so as to create an imminent risk of physical, mental[,] and emotional harm to the child,” warranting the finding of maltreatment by the Administrative Law Judge (ALJ). Further, using the child to commit a crime, teaching that such behavior is acceptable, must have an immediate effect on the emotional and mental well-being of the child, especially a young child “‘just learning to differentiate between right and wrong’ ....”

**Dissent:** [Wilson, J] The mother, who had no prior criminal or family court involvement, was arrested for attempted shoplifting after she outfitted herself and the child with clothes and cell phones in a store. While the arrest was resolved by an adjournment in contemplation of dismissal, the Administration for Children’s Services (ACS) investigated. Finding the child was not likely to be in immediate danger of serious harm and no interventions were necessary, ACS nonetheless marked the report of the matter “indicated,” resulting in the mother’s name being added to the Child Abuse Register where it would be seen by potential employers. On appeal, the ALJ declined to annul the “‘indicated’ designation,” but in an Article 78 proceeding Supreme Court rejected “ACS’s conclusion that the shoplifting incident would doom the child to a life of crime ....” The majority and ACS “have read “imminent” out of the statute.” The mother’s actions do not fall within the statutory categories for “‘failure ... to exercise a minimum degree of care’ ....” The per se rule that this ruling creates—that a parent who engages in crime meets the definition of neglect—is not merely

## NY Court of Appeals *continued*

incompatible with the legislature's requirement of 'imminent' injury, but also with *Nicholson* [*v Scoppetta*, 3 NY3d 357 (2004)]." The logical extension of the majority's affirmation is boundless.

### [People v Thibodeau](#), 2018 NY Slip Op 04378 (6/14/2018)

Considered as a collective whole, the newly-discovered evidence offered by the defendant in his motion to vacate his 1995 kidnapping conviction "was comprised of uncorroborated hearsay that the hearing court was entitled to reject, within its discretion, as untrustworthy in nature and inadmissible at a trial based on its assessment of witness credibility and factual findings."

**Dissent:** [Rivera, JJ] The law affords the defendant an opportunity to present to a jury his evidence of third-party culpability to a jury. "I disagree with the entirety of the majority's analysis of the admissibility of the inculpatory statements of" the three people allegedly responsible for the crime. That they were available to testify and deny making inculpatory statements against penal interest does not bar admission of those statements. All the statements evinced awareness that they were against penal interest when made. Contrary to the majority's reference to "a 'speculative theory' lacking any independent support ... defendant presented an exhaustive amount of corroborating evidence for the confessions." [Footnote omitted.] "There is no evidence that the witnesses concocted these powerful third-party statements of guilt for defendant's benefit, nor of a motive for the declarants to inculcate themselves in a kidnapping and murder or exculpate defendant ...." And the hearing court improperly considered "its own conclusion that the statements were false," a conclusion that often lacked a rational basis. Nor was the belief of one witness that a declarant was not speaking truthfully relevant to the admissibility of the declaration against interest.

### [People v Tiger](#), 2018 NY Slip Op 04377 (6/14/2018)

The claim of actual innocence brought by the defendant, who pleaded guilty, is not a ground for relief under CPL 440.10(1)(h). "Allowing a collateral attack on a guilty plea obtained in a judicial proceeding that comported with all of the requisite constitutional protections on the basis of a delayed claim of actual innocence would be inconsistent with our jurisprudence and would effectively defeat the finality that attends a constitutionally obtained guilty plea." [Footnote omitted.] The statutory framework makes clear that the Legislature accorded different treatment to convictions resulting from a trial and those resulting from a guilty plea in order "to adhere to the principle that a voluntary and solemn admission of

guilt in a judicial proceeding is not cast aside in a collateral motion for a new factual determination of the evidence of guilt." A plea-based conviction is "'presumptively voluntary, valid and not otherwise subject to collateral attack'" in the absence of a motion to withdraw the plea or motion to vacate the plea as involuntary. Allowing a collateral attack on a plea that comported with the required constitutional protections on the basis of an actual innocence claim "would be inconsistent with our jurisprudence and would effectively defeat the finality that attends a constitutionally obtained guilty plea." [Footnote omitted.] The defendant's collateral attack is not based on newly discovered evidence and "will necessarily be addressed as part of her ongoing ineffective assistance of counsel claim."

**Concurrence:** [Garcia, JJ] "A 'so-called 'actual innocence' claim under CPL 44.10(h) is not" among the appellate avenues at the defendant's disposal. "Allowing a defendant to strategically relitigate culpability—at a time when the prosecution's evidence has grown stale, or may be entirely undeveloped—would undermine critical notions of fairness, finality, and sanctity of the legal process, and would 'turn the solemn act' of pleading guilty into a mere device for maintaining innocence while avoiding trial' ...." Even absent the defendant's parallel ineffective assistance of counsel claim, the "'freestanding' claim" of actual innocence could not proceed.

**Dissent:** [Wilson, JJ] "The majority believes that the hearing should not encompass Ms. Tiger's actual innocence claim, because it does not believe such a claim exists in the face of Ms. Tiger's guilty plea, but that question is not yet here, and may never be." Only after the lower courts make a determination based on an evidentiary hearing, if ever, will the issue addressed by the majority actually reach here. "I would do no more than recognize the Appellate Division's discussion as dicta in view of the near-total overlap of the factual record needed for the two purported claims, and would avoid deciding issues — particularly novel ones — until necessary and with a full record." And "I disagree with the general thesis of the majority's opinion: that, short of legislative or gubernatorial mercy, no innocent person who pleads guilty, lest exonerated by DNA evidence, may vacate a conviction."

### [People v Wilson](#), 2018 NY Slip Op 04380 (6/14/2018)

The defendant, convicted of depraved indifference assault under Penal Law 120.10(3), contends that the evidence was insufficient to prove the requisite mental state "because he intentionally inflicted the injuries and therefore could not have possessed, as a matter of law, the requisite mens rea." A finding of depraved indifference requires "both (1) recklessness creating a grave risk of death and (2) a depraved indifference to the" complainant's life. Here, the prosecution offered expert testi-

## NY Court of Appeals *continued*

mony that the complainant “suffered a ‘protracted continuous injury pattern over months,’ suggesting a prolonged period of domestic abuse” and a trauma surgeon’s opinion that the complainant would have died within a matter of hours without medical intervention. Evidence of the “[d]efendant’s ‘failure, over some [time], to seek medical attention’ for the gravely-injured, brain-damaged victim, coupled with the brutal and repetitive trauma inflicted on her, established the requisite level of depraved indifference to human life ....” “[A] rational juror could conclude that defendant was indifferent to whether his victim lived or died, and that he recklessly engaged in conduct creating a grave risk of death—notwithstanding the fact that he may have also intended to inflict harm on any given occasion.” Both intentional and depraved indifference assault could be properly charged insofar as a defendant “‘acted intentionally *as to* causing serious physical injury, but recklessly *as to* causing a grave risk of death’ ....” The jury here convicted the defendant of second-degree intentional assault and first-degree depraved indifference assault, finding he had intended to cause serious physical injury while “simultaneously finding that his abuse had recklessly created a grave risk of death.”

The defendant argues that “‘one-on-one crimes generally cannot be charged under a depraved indifference theory and this case does not fit within the very limited exception to this rule.’” But the legal sufficiency must be viewed in light of the unobjected-to jury charge given in accordance with *People v Suarez* (6 NY3d 202 [2005]). And depraved indifference assault need not fit into one of the narrow exceptions for bringing depraved indifference murder charges in one-on-one homicides; “there is no inconsistency in finding an intent to cause serious physical injury and a reckless indifference as to whether the victim lives or dies” nor is a jury likely to “infer that depraved indifference assault is a lesser degree of intentional assault ....”

**Concurrence:** [Rivera, J] While agreeing that the evidence in this case was sufficient, “I disagree with the majority’s suggestion that cases of depraved indifference assault are neither rare nor limited to a narrow subset of assaults ....”

**Concurrence in the Result:** [Wilson, J] “[T]he simplest basis on which to uphold the convictions is that Mr. Wilson acted with separate mental states, not regarding separate outcomes, but on separate occasions: attacking his victim at some times with the intent to cause serious physical injury and at others under circumstances evincing a depraved indifference to human life.” A “dual mens rea is likely exceedingly rare; to sustain Mr. Wilson’s conviction, we need not surmise he harbored it.”

## First Department

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### [People v Palmer](#), 159 AD3d 118, 69 NYS3d 638 (1st Dept 2/1/2018)

That the defendant said on the record that he was a US citizen did not negate the court’s responsibility to warn the defendant before accepting his guilty plea that, if he was not a citizen, he might be deported as a result of pleading guilty. “[I]t cannot be seriously alleged here” that the defendant deliberately misrepresented his immigration status. His “persistent symptoms of mental illness, which were recognized even by the examining psychiatrists who found defendant competent to stand trial, warranted a more probing inquiry concerning his immigration status” and court records indicated he was “undocumented.” The appeal is held in abeyance pending a prejudice hearing on remand. (Supreme Ct, Bronx Co)

**Dissent:** Found competent to proceed after becoming compliant with his medication schedule, the defendant received a “highly favorable” plea and sentence agreement requiring him to plead guilty to only one of several sex crimes charged and a sentence to time he had already served in detention. He did not manifest symptoms of mental illness during the colloquy. Given his affirmative representation that he was a citizen, the failure to warn him of the risk of deportation provides no ground for relief. To say the court could not trust the defendant’s claim to be a citizen but could accept his other statements in support of the plea “makes no sense.”

### [People v Pequero](#), 158 AD3d 421, 67 NYS3d 813 (1st Dept 2/1/2018)

The “[d]efendant was deprived of effective assistance when his counsel advised him that his plea would have ‘potential immigration consequences,’ where it is clear that his drug-related conviction would trigger mandatory deportation under 8 USC §1227 (a) (2) (B) (i) ....” Counsel’s remarks on the record “are sufficient to permit review on direct appeal ....” The matter is held “in abeyance to afford defendant the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea.” (Supreme Ct, New York Co)

### [People v Weber](#), 158 AD3d 498, 69 NYS3d 54 (1st Dept 2/13/2018)

**First Department** *continued*

At the defendant's sex offender adjudication, the prosecution failed to establish by clear and convincing evidence that he should be assessed points for abusing drugs. Evidence was presented showing that he "possessed bags of marijuana" when he was arrested and on a prior occasion. But "he was not convicted of marijuana possession in either instance, and there was no evidence that he had smoked marijuana at the time of the offense. There was also no evidence that he had ever been screened or treated for substance abuse. Even assuming he could be found to have been a marijuana user, such use was not established to be more than occasional social use, and thus would not warrant the assessment of points under the risk factor for drug abuse ...." The defendant's remaining contention is not addressed as subtracting the points for drug abuse reduces his classification level to a level one. (Supreme Ct, New York Co)

**People v Garay, 158 AD3d 508, 71 NYS3d 40**  
(1st Dept 2/15/2018)

The evidence was legally insufficient to establish the "serious physical injury" element of first-degree gang assault. The evidence that the victim continued to have "some physical effects" by the time of trial was limited, but "the record before the jury did not show that the injury was such that a reasonable observer would find the victim's appearance distressing or objectionable" and it was undisputed that the injuries "did not impair his general health ...." The charge is reduced to attempted first-degree gang assault and the matter remanded for resentencing. (Supreme Ct, New York Co)

**People v Brown, 160 AD3d 39, 71 NYS3d 422**  
(1st Dept 2/20/2018)

The court's failure to give a justification charge in this homicide case was error where a jury, viewing the trial evidence in the light most favorable to the defendant, "could conclude that defendant feared for his life, and reasonably believed deadly physical force was necessary to defend himself against the deceased's imminent use of deadly physical force." The testimony of the only eyewitness to the shooting supports a conclusion that the defendant, a correction officer, reasonably believed that the younger, taller decedent would take control of and use against him the gun that the defendant had drawn but not pointed at the decedent as the decedent approached him, swinging his fists at the defendant's face, during their argument. The case law relied upon by the trial court and the dissent is distinguishable from the facts here. (Supreme Ct, Bronx Co)

**Dissent:** The record supports the court's denial of a justification charge. The defendant's drawing of his weapon during the confrontation with the decedent "constituted the threatened use of physical force" at a time when there is no evidence that "he actually believed he was in danger of being subjected to deadly physical force by" the deceased. Law enforcement officers like the defendant are trained to de-escalate confrontations without resort to a gun. That the defendant did not immediately point his gun at the deceased is of no moment; the gun was fired shortly after the defendant first displayed it, "making clear his prior intent ...." The defendant failed to preserve his argument that the prosecutor erred in stating during summation, after denial of the justification charge, "that justification was not 'a part of this case' ...."

**People v Hubel, 158 AD3d 539, 71 NYS3d 453**  
(1st Dept 2/20/2018)

The defendant's conviction for violating probation must be reversed as having been improperly based on hearsay alone. "[O]n several occasions during the probation revocation hearing, the court indicated that its determination that defendant had violated probation by traveling outside the jurisdiction without permission, and by failing to lead a law abiding life, was based solely on the grand jury minutes related to his 2012 indictment (which was dismissed for lack of jurisdiction and did not result in a conviction)." [Footnote omitted.] (Supreme Ct, New York Co)

**People v Kyser, 158 AD3d 544, 69 NYS3d 649**  
(1st Dept 2/20/2018)

Having denied defense counsel's request to preclude the complainant's testimony, the court should have granted the alternate request to select a new jury. The complainant had been omitted from the prosecution's witness list during the two years between the incident and the trial because the complainant could not be located. The complainant was located after the jury was selected and after defense counsel had detrimentally relied on the complainant's absence. During voir dire, the defense asked about jurors' ability to evaluate videotape evidence on the assumption that this would constitute the primary case, and had said that no complainant would appear; this strategy was totally unsuited to a trial at which the complainant testified. (Supreme Ct, New York Co)

## Second Department

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### [Matter of Banks v Stanford](#), 159 AD3d 134, 71 NYS3d 515 (2nd Dept 2/7/2018)

The December 2015 order holding the appellant Chairperson of the Board of Parole (Chair) in civil contempt is reversed upon examination of the distinction between a “parole hearing” and a “parole interview” in Executive Law §259-I. The May 2015 order directing the Chair to hold “a *de novo* hearing on the matter of Petitioner’s release to parole supervision” was not clear and unambiguous, making a contempt finding based on the holding of a *de novo* “interview” rather than a “hearing” inappropriate. Further, “the court was without authority to order a *de novo* evidentiary “hearing,” as the petitioner was only entitled to a *de novo* parole release “interview” and review under the Executive Law.

Alternatively, the contempt finding was in improvident exercise of discretion under the circumstances, where the Parole Board sought to comply with the May order by using a *de novo* procedure that followed statutory law and “resulted in a renewed consideration of the petitioner’s request for parole release.”

Additionally, the Supreme Court exceeded its authority when it annulled the Parole Board’s denial of parole after the *de novo* interview; no administrative appeal or CPLR article 78 proceeding having been commenced. (Supreme Ct, Putnam Co)

### [People v Giuca](#), 158 AD3d 642, 71 NYS3d 111 (2nd Dept 2/7/2018)

The order denying the defendant’s CPL 440.10 motion to vacate his conviction is reversed and the motion granted where the prosecution failed to disclose to the defense impeaching evidence about one of the witnesses who testified at the defendant’s trial about inculpatory statements by the defendant. In addition to its duty to disclose that information, which related to the witness’s interactions with the police and prosecution from which a tacit agreement of a benefit accruing to the witness from his testimony could be inferred, the prosecution was “further required to clarify ‘the record by disclosing all the details of what had actually transpired’ between the District Attorney’s office and” the witness. There is a reasonable possibility that the errors affected the jury’s verdict, even if the nondisclosure resulted from “negligence and not by design ....” (Supreme Ct, Kings Co)

### [Matter of Law Offs. Of Cory H. Morris v County of Nassau](#), 158 AD3d 630, 72 NYS3d 95 (2nd Dept 2/7/2018)

The denial of the petitioner’s effort in the CPLR article 78 proceeding to compel disclosure under the Freedom of Information Law (FOIL) “of certain specified records of the Nassau County Traffic and Parking Violations Agency” (TPVA) pertaining to the County’s photo speed monitoring system is reversed; the documents are to be produced in camera for inspection. While the TPVA is considered “an arm of the District Court” for certain jurisdictional purposes, it is not entirely a judicial entity, exempt from FOIL, but is a hybrid agency, exercising both prosecutorial and adjudicatory functions. A TPVA record that concerns nonadjudicatory responsibilities is not exempt; examination is required to determine the nature of the records (Supreme Ct, Nassau Co)

### [Matter of Bella S.](#), 158 AD3d 703, 70 NYS3d 571 (2nd Dept 2/14/2018)

The court erred in finding that the mother had neglected her child by failing to obtain mental health treatment other than taking her prescribed medication. The petitioner failed to establish that the mother received inadequate psychiatric treatment or that her mental illness placed the child at imminent risk. Despite being homeless when the child was conceived, the mother obtained appropriate housing, sought out prenatal care, and complied with her medication assisted addiction treatment program. The finding of neglect is reversed and the petition is dismissed. (Family Ct, Kings Co)

### [Matter of State of New York v Hilton C.](#), 158 AD3d 707, 70 NYS3d 565 (2nd Dept 2/14/2018)

The order finding that the appellant suffers from a mental abnormality and that he is a sex offender requiring civil confinement is reversed. This appeal having been held in abeyance pending a *Frye* hearing regarding “whether the diagnosis of “unspecified paraphilic disorder” has achieved general acceptance in the psychiatric and psychological communities so as to make expert testimony on that diagnosis admissible,” such hearing has been held. The matter is remanded for a new trial on mental abnormality at which evidence of unspecified paraphilic disorder is to be excluded. At the *Frye* hearing, both the expert witnesses who testified for the State and the expert who testified for the appellant agreed that forensic use of that diagnosis is problematic given the lack of any clear definition or criteria for it and absence of “research demonstrating the reliability of the unspecified paraphilic disorder diagnosis after its introduction in the DSM-5 [Diagnostic and Statistical Manual of Mental Disorders]

**Second Department** *continued*

in 2013.” The State failed to meet its burden of proving general acceptance. (Supreme Ct, Nassau Co)

**People v Lijo, 158 AD3d 725, 71 NYS3d 129  
(2nd Dept 2/14/2018)**

“[A] new trial is required because the trial court erroneously declined the defendant’s request that the jury be instructed that it could consider the actions of the complainant’s husband in determining whether the defendant’s use of force was justified ....” The evidence to establish the lack of justification for the defendant’s striking of the complainant with a cane during an altercation that also involved the husband was not overwhelming, so the error is not harmless as “the jury may have reached a different conclusion had a proper and complete justification instruction been given ....” (Supreme Ct, Kings Co)

**Matter of State of New York v Richard S., 158 AD3d 710,  
70 NYS3d 562 (2nd Dept 2/14/2018)**

The record supports the Supreme Court’s conclusion on remand “that the State failed to establish that the diagnosis of paraphilia NOS (nonconsent) is generally accepted in the psychiatric and psychological communities.” Evidence of the diagnosis should not have been admitted at the trial to determine if the appellant is a dangerous sex offense requiring civil confinement. “The evidence at the *Frye* hearing showed that there was no clear definition or criteria for the diagnosis, the diagnosis could not be reliably distinguished from other motivations for rape, the articles offered in support of the diagnosis did not reflect a wide, significant, or well-rounded body of research supporting the validity of the diagnosis, and the diagnosis was repeatedly rejected for inclusion in the Diagnostic and Statistical Manual of Mental Disorders (hereinafter DSM) or in the DSM appendix ....” (Supreme Ct, Queens Co)

**People v Laoiza, 158 AD3d 775, 72 NYS3d 112  
(2nd Dept 2/21/2018)**

The defendant’s motion to withdraw his guilty plea to fourth-degree drug possession should have been granted under “the highly unusual circumstances presented,” where the defendant, who is not a US citizen, filed a notice of appeal but the appeal was dismissed upon a prosecution motion as abandoned. The judgment of conviction was not yet final and the defendant is entitled to assert on appeal that trial counsel was ineffective where the record shows that counsel advised “only that pleading guilty to a drug felony “*may* affect his [immigration] status” when the conviction involving cocaine made deportation

mandatory. The court that, on remand, heard further proceedings on the motion to withdraw found the record “evinced a reasonable probability that the defendant would not have pleaded guilty but for counsel’s incorrect advice regarding the immigration consequences of his plea” and no reason is shown to disturb that determination. (Supreme Ct, Queens Co)

**Matter of Essence R., 158 AD3d 806, 68 NYS3d 890  
(2nd Dept 2/28/2018)**

The court did not err in granting the mother’s Family Court Act 1028 motion to return the child where the record contains a sound and substantial basis “since the risks to the child were mitigated by the conditions imposed by the court on the granting of the mother’s application.” The order included, among other things, that the mother participates in therapy, and continues to bring the child to visit her siblings and to her medical appointments. (Family Ct, Kings Co)

**Third Department**

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**People v Lavalley, 158 AD3d 993, 71 NYS3d 688  
(3rd Dept 2/22/2018)**

The jury could rationally find from the evidence that the defendant hunter “was aware that he would create a substantial and unjustifiable risk of serious physical injury to others in general and the victim in particular if he opened fire without being sure of his target” and that he consciously disregarded that risk. The evidence was legally sufficient to support the second-degree assault conviction.

However, the court’s failure to instruct the jury on the lesser included offense of third-degree assault warrants reversal of the second-degree assault conviction. “[T]he jury could have reasonably found that defendant did not disregard, but instead failed to perceive, an unjustifiable risk of injury to the victim when he opened fire without sufficient observation....” (County Ct, Essex Co)

**People v Lee, 158 AD3d 982, 71 NYS3d 696  
(3rd Dept 2/22/2018)**

County Court erred when it failed to refer the defendant’s application for judicial diversion to the judge designated as the court for drug treatment in the county.

**Third Department** *continued*

County Court was not designated to preside over drug treatment court and there is no indication that the designated judge recused himself, nor was there evidence in the record that it was impractical for the designated judge to preside over the judicial diversion application. The matter is remitted for further proceedings to the Superior Court designated by the Administrative Judge as a Drug Treatment Court. (County Ct, Sullivan Co)

**People v Maricle, 158 AD3d 984, 71 NYS3d 211  
(3rd Dept 2/22/2018)**

The evidence was not sufficient to convict the defendant of second-degree criminal possession of a controlled substance or third-degree unlawful manufacture of methamphetamine. “[M]ere presence in the same location as contraband is insufficient to establish constructive possession....” Nor is knowledge of the contraband sufficient, standing alone, to show constructive possession. “There was no evidence that defendant lived in the house or garage, kept any of his personal belongings there or had keys to the property.... No contraband was recovered from defendant himself, nor did the proof establish that he owned or had even touched any of the contraband.” The prosecution did not establish that the defendant knew what smells were associated with methamphetamine production, *ie* a chemical odor like paint thinner, nor did it eliminate the possibility that actual paint thinner was stored in the garage. All of the items located haphazardly through the garage were “legal to possess and not necessarily indicative of drug manufacturing.” (County Ct, Cortland Co)

**Matter of Richard T. v Victoria U., 159 AD3d 1071,  
72 NYS3d 197 (3rd Dept 3/1/2018)**

The court erred in granting the father’s custody petition without conducting an evidentiary hearing; “[t]he record reveals that Family Court’s ultimate custody and visitation determination was made only after a few preliminary court appearances in which no witness gave sworn testimony or documentary evidence was received, and there is no indication that Family Court considered the various factors relative to the best interests of the children.” While “the mother’s actions in frustrating the purpose of the court’s prior orders” were relevant and irksome, they “are not solely dispositive in this case on the issues of custody and visitation ....” The (corrected) order is reversed and “remitted for a full evidentiary hearing on the father’s custody petition.” The corrected order remains in effect on a temporary basis. (Family Ct, Saratoga Co)

**People v Silcox-Mix, 159 AD3d 1060, 72 NYS3d 628  
(3rd Dept 3/1/2018)**

The defendant’s conviction was not against the weight of the evidence. For purposes of a conviction for first-degree promoting prison contraband, contraband is dangerous “if it ‘is capable of such use as may endanger the safety or security of a detention facility or any person therein’ (Penal Law § 205.00 [4]).” Corrections officers testified that a realistic-looking fake gun, with removable magazines, made out of soap, and found in the defendant’s cell in the special housing unit (SHU) could have been used to facilitate an escape and that any display of it would likely lead to the use of deadly force in response. Despite the defendant’s contention that he could not have removed the replica from the SHU, so that it could not be used in a dangerous manner, the officers testified that their searches of SHU inmates are not failsafe, and belongings that inmates take upon return to regular housing are not always searched. (County Ct, Washington Co)

**People v Friday, 160 AD3d 1052, \_\_ NYS3d \_\_  
(3rd Dept 4/5/2018)**

Any “‘credible, vigorous activity’” by the prosecution to make a witness available—which would make the trial delay excludable under CPL 30.30—was “totally lacking here.” The mandatory training said to make the witness unavailable could have been worked around. Further, defense counsel did not consent to the adjournment “when he offered his condolences to the prosecutor for a recent loss in her family and told her to ask if her family situation required accommodation.... [A]n offer to consider accommodating the People for one reason did not ‘clearly express[]’ defense counsel’s consent to an adjournment sought without his knowledge for an unrelated reason....” (County Ct, Albany Co)

**People v Hall, 160 AD3d 210, 74 NYS3d 143  
(3rd Dept 4/5/2018)**

By limiting the evidence the defendant could present to the jury concerning her own statements to the police, the court violated her constitutional right to present a defense. Allowing in only a redacted version of post-*Miranda* statements, which included the defendant’s admission that drugs found in her house were hers, prevented the defendant from “effectively argu[ing] that her statements were involuntarily made.” The excluded, pre-*Miranda* portion of the recorded interview was not inadmissible hearsay. “It consists of statements by the detective to defendant concerning her son’s gang membership, extensive criminal behavior and suspected involvement in the shooting that took place the night before. Defendant did not seek to introduce this portion of the recording to

### Third Department *continued*

prove the truth of any of the statements therein.” Rather, this evidence was meant to establish the defendant’s state of mind upon hearing the detective’s comments. (County Ct, Albany Co)

**People v Pettus, 160 AD3d 1049, 74 NYS3d 149  
(3rd Dept 4/5/2018)**

The court erred in failing to instruct the jury that the principal prosecution witness, who testified he was present for the purpose of buying cocaine at the second-floor apartment where a raid revealed drugs, was an accomplice as a matter of law. The failure to do so deprived the defendant of a fair trial, “given that the case against defendant rested substantially—if not exclusively—upon the testimony of” the accomplice, who was arrested and charged along with the defendant and others based on the same facts or conduct. While the issue was unreserved, it is reached in the interests of justice. (County Ct, Albany Co)

**People v Snowden, 160 AD3d 1054, \_\_\_ NYS3d \_\_\_  
(3rd Dept 4/5/2018)**

The order granting the defense motion to dismiss the indictment in the interest of justice is reversed because the court improvidently exercised its discretion where the case presents no “extraordinary and compelling circumstances” crying out for fundamental justice. The charges alleged that the defendant Code Enforcement Officer and the codefendant Mayor “executed a plan to demolish a building that had contained asbestos without proper abatement” or village approval, and agreed to a discounted demolition fee by contractors in exchange for funneling more demolition work to them. No hearing was required as the record was sufficiently developed, but the factors militating in favor of the defendant—his clean record and loss of position—were not wholly dispositive. Contrary to the court’s finding that the record was unclear on harm to the environment or individuals, the record evidence demonstrates that the demolition caused asbestos to become friable, creating dust to which workers were exposed. And the finding that dismissal “would have a minimal impact upon the confidence of the public in the criminal justice system” was incorrect.

“[P]ermitting a public servant to elude prosecution for an alleged abuse of his or her position’s power cannot be said to foster public confidence....” Further, that a codefendant pleaded guilty “does not affect or trivialize the allegations against defendant.” (Supreme Ct, Sullivan Co)

### Fourth Department

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

**Matter of Adams v Annucci, 158 AD3d 1091,  
70 NYS3d 671 (4th Dept 2/2/2018)**

The respondent concedes that the Hearing Office violated the right of the petitioner in the CPLR article 78 proceeding, a prison inmate, to call other inmates as witnesses as provided in 7 NYCRR 254.5. Only that regulatory right, not a constitutional right, is at issue given that a good-faith reason for the denial appears in the record; therefore, the remedy is a new hearing.

**People v Keith B.J., 158 AD3d 1160, 70 NYS3d 291  
(4th Dept 2/2/2018)**

While the court implicitly resolved the issue of youthful offender (YO) eligibility in the defendant’s favor, we agree with the defendant that he should be afforded YO status where the only factor weighing against YO treatment is the seriousness of the crime. While convicted of second-degree possession of a weapon, the 17-year-old defendant had no prior record or history of violence, accepted responsibility, and expressed genuine remorse. The trial court did not abuse its discretion, but the judgment is reversed and the conviction vacated in the exercise of our interest of justice jurisdiction, and the matter remanded for sentencing on the YO adjudication. (County Ct, Monroe Co)

**Matter of Buttiglieri (Ferrel J.B.), 158 AD3d 1166,  
70 NYS3d 639 (4th Dept 2/2/2018)**

The Supreme Court erred in directing the petitioner, Upstate University Hospital of the State University of New York, to pay the fees of counsel assigned for an alleged incapacitated person unable to afford counsel in proceedings for appointment of a guardian for personal needs or property management under Mental Hygiene Law article 81. It is well settled that by implication, the Legislature intended for appointed counsel in such matters to be compensated in accordance with County Law article 18-B. (Supreme Ct, Onondaga Co)

**People v Cannon, 158 AD3d 1123, 70 NYS3d 656  
(4th Dept 2/2/2018)**

The defendant did not reaffirm his waiver of his right to appeal with respect to the amended plea agreement, so review of claims arising out of the amended agreement is

**Fourth Department** *continued*

not precluded. The determinate sentence of 23 years, with two and a half years of postrelease supervision, is unduly harsh and severe, and is reduced in the interest of justice to 20 years and the two and a half years of postrelease supervision.

After the defendant refused to testify about details of the decedent's death at a codefendant's trial, a *Sirois* hearing was held and the court determined that the defendant was unavailable to testify due to the codefendant's conduct, making the defendant's prior statements admissible against the codefendant. But the court did not determine after the *Sirois* hearing that the defendant "could not perform his end of the plea bargain because of impossibility, and we therefore conclude that defendant has not met his burden of establishing that collateral estoppel was applicable inasmuch as defendant failed to establish that the issue decided in the *Sirois* hearing and the issue whether he breached the plea agreement were identical ...." (Supreme Ct, Onondaga Co)

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**People v Carter, 158 AD3d 1105, 70 NYS3d 661  
(4th Dept 2/2/2018)**

The verdict in the second-degree murder case was against the weight of the evidence. While evidence established beyond a reasonable doubt that the defendant entered the hotel with the decedent, who was later found dead there, it did not establish beyond a reasonable doubt that the defendant committed the homicide. No time of death was established; evidence including DNA from other males found on a drinking cup in the room suggested that someone else may have been in the room with the decedent that night; evidence also indicated the decedent, who communicated with many others about meeting for sexual activity, may have left the hotel after checking in with the defendant; and there were many possible explanations for the admittedly suspicious location of the decedent's car near the defendant's residence. That the defendant lied about knowing the decedent could be explained by his desire not to be identified as gay. (County Ct, Monroe Co)

**Dissent:** "[W]e cannot conclude that the verdict is against the weight of the evidence ...."

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**People v Jones, 158 AD3d 1103, 70 NYS3d 669  
(4th Dept 2/2/2018)**

There must be a new trial on two counts in this attempted petit larceny and second-degree possession of a forged instrument case due to improper admission of two categories of hearsay. The prosecution failed to show that a printout of electronic data displayed on a bank computer screen following the defendant's presentation of a

check fell within the business records exception; while initially admitted for a limited purpose, the evidence was presented to the jury in the court's instruction as something that could be considered for the truth of what was asserted in it. And no foundation was laid for testimony by an investigator regarding the results of his search of a credit bureau's commercial database. (Supreme Ct, Onondaga Co)

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**People v McDonald, 158 AD3d 1065, 70 NYS3d 683  
(4th Dept 2/2/2018)**

As even a valid waiver of appeal does not bar appellate review of an illegal sentence, the determinate term of imprisonment for failure to register internet identifiers cannot stand. That offense is contained in the Correction Law, at section 168-f (4), and only someone convicted of a felony defined in the Penal Law can be sentenced as a second felony offender to a determinate term. While the issue was not raised below or on appeal, the sentence cannot stand, and the matter is remanded for resentencing on that count. (County Ct, Niagara Co)

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**People v Roberts, 158 AD3d 1141, 70 NYS3d 688  
(4th Dept 2/2/2018)**

The court erred by denying the part of the defendant's omnibus motion seeking to suppress tangible evidence seized from him by police. While officers responding to a radio run of a shooting at a bar had an objective, credible reason to approach a group of five people in the bar parking lot, the forcible detention and patdown of the defendant constituted a level three encounter under *De Bour* for which the police lacked a reasonable suspicion that the defendant was involved in a crime. And there was no evidence that the officer believed the defendant, who he frisked first because the defendant was standing closest to him, had a weapon, which would justify the officer's action as being in the interest of safety. (County Ct, Monroe Co)

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**People v Swick, 158 AD3d 1131, 70 NYS3d 651  
(4th Dept 2/2/2018)**

Because it is impossible to commit fourth-degree grand larceny under Penal Law 155.30(8) without concomitantly committing third-degree unauthorized use of a vehicle under Penal Law 165.05(1), the counts charging the latter crime must be dismissed as lesser inclusory concurrent counts. (County Ct, Livingston Co)

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**People v Tarbell, 158 AD3d 1215, 71 NYS3d 768  
(4th Dept 2/2/2018)**

## Fourth Department *continued*

The order granting a motion to suppress statements made by the defendant in response to questions asked by a State Trooper without first giving *Miranda* warnings is affirmed. The trooper found the defendant walking some distance from, and about an hour after, an accident involving the defendant's vehicle; after the defendant denied operating the vehicle involved in the accident, police placed him in a police vehicle and continued questioning him until the defendant made admissions. The evidence at the suppression did not establish a basis for an objective reasonable belief that continued questioning was needed to allow the police to render emergency assistance to someone who was injured or prevent imminent injury. (County Ct, Onondaga Co)

### **People v Taylor, 158 AD3d 1095, 72 NYS3d 256 (4th Dept 2/2/2018)**

The defendant's conviction of second-degree arson is reduced to third-degree arson and the matter remitted for resentencing on that offense, because there was no evidence that the decedents were alive at the time the fires were set, as needed to meet the statutory requirement of another person being present who was not a participant in the offense.

The court properly refused to suppress historical cell site location information related to the defendant's cell phone. The defendant's other issues, including a *Sandoval* ruling and claims that the evidence was legally insufficient, are also rejected. (County Ct, Wayne Co)

[*Ed. Note: This decision predates the US Supreme Court decision concerning cell site location information, Carpenter v United States, summarized at p. 19.*]

### **Matter of Vichinsky, 159 AD3d 84, 70 NYS3d 263 (4th Dept 2/2/2018)**

By pleading guilty to first-degree attempted falsifying business records, the "respondent admitted that she filed a false assigned counsel voucher with the requisite fraudulent intent" and cannot relitigate that issue in these grievance proceedings. She is suspended from the practice of law for one year.

### **People v Willingham, 158 AD3d 1158, 70 NYS3d 644 (4th Dept 2/2/2018)**

The evidence was not legally sufficient to support the defendant's conviction of second-degree possession of a weapon, as no evidence directly connected the defendant to the weapons found at approximately the location where officers lost sight of a vehicle that a codefendant

was seen entering with a long gun shortly before. No evidence was admitted that the defendant owned or operated the vehicle or engaged in other activity that would support a finding that he constructively possessed the weapon in question. The statutory presumption that all persons occupying a vehicle at the time a weapon is found there constructively possess the weapon is not applicable where the weapon was not found in the vehicle and only the codefendant was seen holding it when entering the vehicle. (County Ct, Monroe Co)

### **Matter of Soldato v Feketa, 158 AD3d 1303, 68 NYS3d 372 (4th Dept 2/9/2018)**

In a child support violation matter, the mother, father, and petitioner all agreed to a settlement at the Magistrate's findings confirmation hearing before the Family Court. Nonetheless, the court refused to allow the parties to enter into a settlement agreement and directed that the father be incarcerated for six months despite the father's recent acquisition of a construction job. Given that as a general matter, open court stipulations, which "promote efficient dispute resolution, timely management of court calendars, and the 'integrity of the litigation process'" are especially favored, under the circumstances of this case, we conclude that the court erred .... The order is reversed and the matter remitted for further proceedings. "If the parties no longer wish to settle, we direct the court to hold a new confirmation hearing." (Family Ct, Oneida Co)

### **Matter of Ellie Jo L.H., 158 AD3d 1232, 70 NYS3d 732 (4th Dept 2/9/2018)**

While the trial court did not err in directing the attorney for the child to file a petition on behalf of the child, the court did err in determining that evidence adduced at the neglect hearing supported a finding of neglect. "Here, the court concluded that, 'on one hand, [the mother] may simply be a mother determined to protect her child. On the other hand, she may be a woman determined to cause emotional harm to the father of their child. In either case, the consequence of this course of action may be emotional harm to [the child]' ...." While the mother's conduct may have been "troubling" at times, the record does not support a finding of imminent risk. (Family Ct, Jefferson Co)

### **People v Barnett, 158 AD3d 1279, 71 NYS3d 775 (4th Dept 2/9/2018)**

The court erred in charging the entire 22-day period beginning on Jan. 11, 2017 to the prosecution in deciding the defendant's speedy trial motion under CPL 30.30(1)(a). The prosecution sought a one-day continu-

**Fourth Department** *continued*

ance due to a witness's unavailability while a family member underwent heart surgery, but the court directed the parties to "work out a middle ground" and return to court on February 2. The 21-day adjournment was attributable to the court, and there is no dispute that 19 days had remained on the speedy trial clock when the prosecution announced readiness for trial. While the court erroneously determined that eight days between dismissal of the original indictment and the prosecution's declaration of readiness on the superseding indictment was excluded from the time chargeable to the prosecution, 11 days still remained in the statutory period. (County Ct, Erie Co)

**People v Chase, 158 AD3d 1233, 71 NYS3d 293  
(4th Dept 2/9/2018)**

There was not legally sufficient evidence to sustain the part of the judgment convicting the defendant of endangering the welfare of a child, and that count of the indictment is dismissed. The prosecution failed to establish that riding in the car with the body of the decedent "was likely to result in harm to the physical, mental, or moral welfare of the child" where there was no evidence that the child knew the body was in the car or "was upset or bothered by any smells or sights in the car or later at his grandmother's house" where the defendant took the body. "The actions of defendant in this case are beyond repugnant, but the dissent's reliance on the child's "inevitable knowledge and understanding of the actual events" in concluding that harm is likely to occur is entirely speculative."

**Dissent:** The jury could reasonably conclude, based on "common human experience and commonsense understanding of the nature of children," that transporting the child in a car with the "severely decomposed, dismembered corpse of the man the child knew to be his father was 'likely to' cause harm to the child and that the defendant knew her actions were likely to do so. (County Ct, Ontario Co)

**People v Hobbs, 158 AD3d 1308, 71 NYS3d 284  
(4th Dept 2/9/2018)**

Because the record does not establish that the defendant's request for youthful offender (YO) status was denied "on any basis other than that it was not part of the agreed-upon sentence," and there is no dispute that the defendant was YO eligible in both cases now on appeal, a new sentencing proceeding must be held in both matters. (County Ct, Ontario Co)

**Matter of State of New York v George N., 160 AD3d 28,  
70 NYS3d 699 (4th Dept 2/9/2018)**

Under Mental Hygiene Law 10.03(2), "[t]he State may not civilly confine a sex offender in a locked treatment facility unless it proves that he or she has an 'inability' to control sexual misconduct," and as the proof here "falls short of that threshold," the order appealed from is reversed. After the respondent, "diagnosed with antisocial personality disorder (with psychopathic traits) and alcohol abuse disorder," was released under strict and intensive supervision and treatment (SIST), he violated his SIST conditions by consuming alcohol and was determined to be a dangerous sex offender requiring confinement. But while an "inability to control sexual misconduct" can be found based on evidence other than evidence of sexually inappropriate behavior while on SIST, the State cannot "confine any sex offender who drinks a beer, smokes marijuana, or jumps a turnstile while on SIST." Only a nonsexual violation that bears a "close causative relationship to sex offending" will satisfy the standard. Such relationship is missing here; the "respondent has not offended sexually for years despite a chronic inability to remain sober." (Supreme Ct, Erie Co)

**People v Rowe, 158 AD3d 1265, 71 NYS3 270  
(4th Dept 2/9/2018)**

Where the defendant pleaded guilty, then sought to withdraw the plea because by pleading "he had ostensibly forfeited certain appellate challenges he wanted to make regarding the integrity of the underlying grand jury proceedings and the prosecutor's duty of fair dealing in connection therewith," the plea need not be vacated based on the appellate contention that the court misled the defendant about the forfeiture of his claims and prompted him to abandon his motion to withdraw. Contrary to the defendant's claim, the court never advised him that his grand jury claims were not forfeited, saying only "that such claims were 'subject to appeal.'" This was not a guarantee that the claims "would be reviewable on the merits." Further, the type of claims the defendant mentioned in seeking to withdraw the plea were the type of claims that are not forfeited by a guilty plea because they would implicate the integrity of the grand jury proceedings. Since the defendant had already pleaded guilty when the court advised him on these points, any purported misadvice could not have induced the plea. (Supreme Ct, Monroe Co) ⚖

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