



Public Defense Backup Center REPORT

Volume XXXIII Number 1

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Defender News

Court Can't Impute Income When Determining Financial Eligibility for Counsel

The Fourth Department has ruled that a court lacks authority to inquire into an individual's potential capacity to earn or to impute income when determining the individual's eligibility for the assignment of counsel under County Law 722, Family Court Act 262, and Judiciary Law 35.

In *Carney v Carney* (2018 NY Slip Op 02034 [3/23/2018]), the trial judge hearing a motion to hold a father in criminal contempt in the course of a child custody matter refused to assign counsel after the public defender office qualified the father as eligible. The trial court then undertook a fact finding hearing to examine the father's earning potential based on his level of education and other factors. The court also made findings as to the legislative intent and public policy of the statutes guaranteeing the right to counsel and a purported interplay between that right and Domestic Relations Law and Family Court Act provisions permitting the imputation of income potential in making child support and spousal maintenance determinations.

The Appellate Division ruled that the trial court's analysis fusing the legal principles involved was flawed and unauthorized. It found the trial court's public policy rationale unsound, and underscored the legislative intent to have eligibility determinations made considering only a person's *current* financial status. As to the latter, the opinion stated: "Indeed, the legislature has specifically

recognized that, in proceedings such as those in this case, [c]ounsel is often indispensable to a practical realization of due process of law and may be helpful to the court in making reasoned determinations of fact and proper orders of disposition"

A brief note at the end of the opinion refers to the public defender's assurance that, in the event the father's financial circumstances changed for the better, the defender would request the court order repayment or terminate the representation under County Law 722-d. NYSDA and others have long pointed out that recoupment after the conclusion of a case is not statutorily authorized. NYSDA's 1994 report, *Determining Eligibility for Appointed Counsel in New York State*, set forth this position. At page 16 it says that requiring eligible defendants to reimburse counties for the cost of their representation after their cases conclude is not only unauthorized but improper: it can chill the exercise of the right to counsel, interfere with rehabilitation, and hinder efforts to gain financial independence. NYSDA and others have also noted that lawyers revealing confidential information about their clients' finances may face ethical issues. See e.g. New York State Bar Association, *2015 Revised Standards for Providing Mandated Representation*, Rule D-1, footnote 4. In *Carney*, it appears that counsel's invocation of 722-d was a strategic move to ensure that the father was not denied counsel outright and was limited to changes in the father's financial circumstances while the representation was ongoing.

The very limited permissible use of 722-d is noted in the 2016 *Criteria and Procedures for Determining Assigned Counsel Eligibility* of the Office of Indigent Legal Services Office (ILS). See Procedure XI.A and the Commentary thereto. While these ILS standards were written for mandated

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representation in criminal matters, and ILS intends to issue separate eligibility standards regarding mandated representation in family law matters, ILS indicated in the email announcing the 2016 standards the hope that “they will provide guidance also ... to Family Court judges statewide.”

Helping Defense Lawyers Protect People from Unnecessary and Injurious Welfare Fraud Prosecutions

On Friday, Mar. 9, 2018, NYSDA cosponsored with the Cayuga County Assigned Counsel Program a daylong conclave of assigned counsel attorneys handling Intentional Program Violation charges in Cayuga County. Julie Morse and Jim Murphy from Legal Services of Central New York (LSCNY), along with seasoned local practitioner Charles Thomas, led a comprehensive presentation and interactive discussion with local lawyers about potentially harsh prosecution practices in public benefits fraud cases.

Cayuga County, like others around the state, has access to special funding awards to investigate and prosecute alleged welfare fraud. The Crimes Against Revenue Program, begun in 2004, has been funded for \$13.5 million in the newly-passed State budget. These investigations lead to tapping public benefits recipients for alleged violations in income reporting, which in turn lead to people in need accepting “deals” to pay back alleged overpayments while at the same time agreeing not to apply for future benefits for a specified period of time. These “deals” are too often negotiated without the assistance of a lawyer to review and advise regarding the legitimacy of the allegations.

Many times the allegations of fraud are misplaced because the claimed misrepresentations of income have in fact been reported to another arm of the Department of Social Services on a prior occasion. It requires a careful investigation and examination of all records to determine whether a person has in fact committed a fraud. Many of the attorneys in attendance noted that the cost and time consumed investigating many of the cases eclipses the amount supposedly taken fraudulently or ever recouped. And in the meantime, the agreements entered into deprive families and children of food and shelter.

The day was spent reviewing the relevant law and identifying sources of information to ensure that people are not wrongfully accused or convicted of misconduct of which they are not guilty. Every county has its own idiosyncratic practices and procedures when it comes to information collection, maintenance, and sharing. The group discussed practical tips for finding the needed information in local agencies and identified best practices for

approaching law enforcement and prosecution entities in developing fair dispositions.

NYSDA and LSCNY hope to bring this type of intensive, interactive training program to other counties to ensure that practitioners handling such cases are armed with salient law and useful tools to interdict unfair public benefits prosecutions that deny people in need important human rights assistance.

Facebook Decision Highlights Liberal Discovery in Civil Cases; Different Developments Affect Criminal Discovery

The Court of Appeals has reaffirmed and applied a “liberal discovery” policy with respect to interpreting civil discovery law in New York State. Meanwhile, defenders seek to maximize every means available to obtain vital information in criminal cases while, with other advocates, they continue to press for changes in the “blindfold law” that keeps people accused of crime, and their lawyers, in the dark about prosecution evidence.

Chief Judge DiFiore’s opinion for a unanimous court in *Forman v Henkin* (2018 NY Slip Op 01015 [2018]), a personal injury suit, addressed “a dispute concerning disclosure of materials from plaintiff’s Facebook account.” As described in a *New York Law Journal* [article](#) on March 5, “[t]he court made it simple, and stated that ‘there is nothing so novel about [social media] materials that precludes application of New York’s longstanding disclosure rules[.]’” Trial courts dealing with social media requests in civil cases must tailor disclosure orders “to the particular controversy,” identifying “the types of materials that must

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Julie Morse [far l] and Jim Murphy [second from l] from Legal Services of Central New York, along with private practitioner Charles M. Thomas [not pictured] lead a discussion about defense of public benefits fraud cases in Cayuga County.

be disclosed while avoiding disclosure of nonrelevant materials.” Defense lawyers in civil practice were said in an [earlier](#) *Law Journal* article to be “celebrating this decision.”

While “[d]isclosure in civil actions is generally governed by CPLR 3101(a),” so public defense lawyers in criminal matters do not benefit from the case, public defense lawyers providing parental representation in family court may. Parental representation in custody disputes, or abuse and neglect cases, may involve instances where another party’s Facebook page or similar social media contains information that contradicts information in a petition, shifts blame for an alleged incident, or casts light on another party’s ability to care for the children in question. The ILS *Standards for Parental Representation in State Intervention Matters* (2015) require attorneys to “[o]btain, on an ongoing basis, all relevant documentation regarding the case, including information that might shed light on the allegations, the service plan, the child’s circumstances, and the client’s parenting ability.” Information not available through informal means must be sought using formal discovery methods. Standards N-2 and N-3.

As for discovery in criminal matters, defenders attending the 32nd Annual New York Metropolitan Trainer, below, heard about ways to use the new *Brady* orders now being issued in every criminal case. These orders are mandated by new rules discussed at page 2 of the [November-December 2017 REPORT](#).

And as for discovery reform, the recent budget legislation did not include any provisions to take off the blindfold. But it is expected to be a topic of continued discussion through the rest of the legislative session.

Judge Karen Peters to Chair Chief Judge DiFiore’s Commission on Parental Legal Representation

During the State of the Judiciary address on February 6, Chief Judge Janet DiFiore announced the appointment of Judge Karen Peters, the former Presiding Justice of the Appellate Division, Third Department, to chair the newly-formed Commission on Parental Legal Representation. DiFiore noted that the Commission will “examine the current state of mandated Family Court representation and determine how best to ensure the future delivery of quality, cost-effective parental representation.” Encouragingly, the Chief Judge emphasized the importance of “supporting the well being of children by supporting the legal needs of their parents.” [The State of Our Judiciary 2018](#) (at p. 14-15).

Shortly after that announcement, Judge Peters was also [appointed](#) as Chair of [New York’s Permanent Commission on Justice for Children](#).

Confusing Decision Reaffirms Recent Ignition Interlock Sentencing Case

The Third Department ruled in November that a defendant who had completed a sentence of imprisonment for felony DWI could not then be sentenced to further imprisonment for violating the ignition interlock device requirement of the statutorily required consecutive conditional discharge that followed the initial imprisonment. The decision in [People v Coon](#) (156 AD3d 105) was noted in the [Nov. 30, 2017 News Picks](#). *Coon* was recently reaffirmed by the Third Department in an opinion that

has led to some confusion among practitioners. In *People v Arvidson* (2018 NY Slip Op 01682 [3/15/2018]), the Court quoted *Coon* in a way that seems to imply that some statutory change has occurred: “[T]he sentence of imprisonment imposed upon defendant’s violation of the terms of his conditional discharge must be vacated.’ A defendant must be sentenced according to the law as it existed at the time that he or she committed the offense and, at the time defendant operated a vehicle without an ignition interlock device, the applicable law did not allow for the imposition of an additional period of imprisonment’” But given the absence of any statutory change, the quotation appears to mean simply that the sentence in *Arvidson*, like that in *Coon*, could not stand.

Recent Criminal Law Developments from SCOTUS

The US Supreme Court issued a number of decisions affecting criminal defendants. Summaries of recent cases begin on p. 6. Notable decisions include:

- *District of Columbia v Wesby*, 138 SCt 577 (1/22/2018), holding that police officers reasonably searched a vacant building without a warrant;
- *Class v United States*, 138 SCt 798 (2/21/2018), holding that a federal criminal defendant may challenge the constitutionality of the statute of conviction despite a guilty plea; and
- *Ayestas v Davis*, No. 16-6795 (3/21/2018), a win for a habeas petitioner seeking funds to investigate his claim.

Chief Defenders Convene in Albany

NYSDA hosted Chief Defenders from around the state on Feb. 9, 2018, to discuss pressing issues facing the defender community. Over 45 practitioners met in Albany to discuss Raise the Age, centralized arraignment plans, the rates of reimbursement for expert witnesses, and other topics. The meeting opened with an update by staff from the Office of Indigent Legal Services (ILS) on the statewide expansion of the *Hurrell-Harring* settlement. They highlighted recent success stories from the settlement’s implementation, singling out Suffolk and Onondaga counties as examples of the effectiveness of recent reforms. ILS also stressed the need to focus on family court representation in the coming year.

Chiefs were reminded that under Correction Law 606, the state should pay for all expenses in cases where a prisoner in State custody litigates their parole status. It was further noted that technical parole violations are increasing local jail populations. And attending defenders discussed the different ways centralized arraignments are being implemented around the state.

A good portion of the convening was spent discussing the impending implementation of the legislation raising the age of criminal responsibility, the first step of which begins on Oct. 1, 2018. Raise the Age was also the topic of a presentation at NYSDA’s New York Metropolitan Trainer, below. NYSDA will remain involved in the issue as developments unfold.

NYSDA’s 32nd Annual Metropolitan Trainer

On Mar. 10, 2018, NYSDA once again held its annual Metropolitan New York Trainer at NYU Law School. Toussaint Romain, a public defender from North Carolina, offered a dramatic presentation on implicit bias in the criminal justice system. Timothy Murphy, head of the Appellate and Post-Conviction Unit of the Buffalo Legal Aid Bureau, gave an update on recent cases from the Court of Appeals. A panel with Nina Morrison and Barry Schek of the Innocence Project and Peter Mitchell and John Schoeffel of The Legal Aid Society provided an array of suggestions for using new model court orders to compel compliance with *Brady v Maryland* (373 US 83 [1963]). And Elsie Chandler and Libby Fischer of the Neighborhood Defender Service of Harlem provided an introduction to the Raise the Age legislation passed last year.

Among the many positive comments received in the evaluations was this: “Wonderful program. Wish this was twice a year or more. Very helpful materials; very organized.”

Ubiquitous Cell Phones Yield Evidence— and Challenges to that Evidence

Lawyers know that with the increased use and capabilities of smartphones come defense challenges to evidence law enforcement officials recover from use of these devices. Current issues include questions about what constitutes a “search” requiring a warrant.

Acquiring Historical Cell Site Location Information is Not a Search in the 4th Department

One form of information generated by cell phones is historical cell site location information that reveals what cell phone tower a particular phone was in contact with at a given time. An Appellate Division panel held near the end of last year that acquiring such information from cell service providers is not a search requiring a warrant under the state or federal constitutions. The court relied on the theory that use of a cell phone constitutes voluntary disclosure of one’s general location to the service provider—a third party—which vitiates any reasonable

expectation of privacy in that information. The court distinguished such historical information from the information gained by direct surveillance of an individual using a GPS device. The court also distinguished the location information at issue from information obtained by directly inspecting the contents of a phone. *People v Jiles*, 158 AD3d 75 [4th Dept 12/22/2017] [summary on p. 22].

The *Jiles* decision recognized that some “other states have afforded cell site location information greater protection under their state constitutions than what is afforded under the” federal Constitution. Those other state decisions provide a basis for arguing that the Fourth Department panel was wrong.

The real-time cell site locator information distinguished in *Jiles* was raised but not addressed in a recent federal case. The Tenth Circuit noted in *United States v Banks* (No. 16-6322; 2018 US App LEXIS 5647 [3/6/2018]) that “whether tracking a cell-phone’s real-time location is a search” would constitute an issue of first impression in that court, but declined to address the defendant’s claim about the “ping order” because “neither party adequately brief[ed] the issue”

Analogies to Other Technologies Are Weak

In *Jiles*, the court looked at the Court of Appeals’ treatment of “roughly analogous telephone billing records” in

People v Di Raffaele (55 NY2d 234 [1982]). Not addressed are any *differences* between location information and billing records. For example, there is an expectation that billing records may be shared with others by the third party for legitimate, non-law-enforcement reasons, such as a collection agency in the event of non-payment. This results in a lower expectation of privacy. Nothing similar exists as to information about the location of a subscriber when using a cell phone.

A similar argument can be made should courts analogize cell site location information to the information contained in the magnetic strip of credit cards that is obtained by use of “bank card readers.” That issue was briefly addressed early this year in *People v Sankara* (157 AD3d 495 [1st Dept 1/11/2018]) [citing *People v Dent* (57 Misc3d 300 (6/22/2016) and several federal cases].

Cell Site Simulator Issues Continue

Another type of cell-phone-generated information is that harvested by cell site simulators, often called StingRays. These devices mimic cell towers and trick cell phones into transmitting various types of information. StingRays can be and often are used by law enforcement officials to track cell phones and remotely access content generated on the device; some of them may even allow

(continued on page 23)

CONFERENCES & SEMINARS

Sponsor: New York State Defenders Association
Theme: Families Matter: Statewide Family Defender Conference
Dates: April 20-21, 2018
Place: Albany, NY
Contact: NYSDA: tel 518-465-3524; fax 518-465-3249; email alexandra@nysda.org; website www.nysda.org

Sponsor: American Bar Association and National Legal Aid and Defender Association
Theme: 2018 Equal Justice Conference
Dates: May 9-12, 2018
Place: San Diego, CA
Contact: ABA: email ejc@americanbar.org; website www.americanbar.org/cle

Sponsor: National Association of Criminal Defense Lawyers
Theme: 11th Annual Forensic Science & the Law Conference: “Making Sense of Science”
Dates: May 9-11, 2018
Place: Las Vegas, NV
Contact: NACDL: tel 202-872-8600 x 632 (Viviana Sejas); fax 202-872-8690; email vsejas@nacdl.org; website www.nacdl.org/cle/

Sponsor: American Bar Association
Theme: 13th Annual Summit on Indigent Defense Improvement
Date: April 20, 2018
Place: Chicago, IL
Contact: ABA: tel 202-662-1584 (Malia Brink); email malia.brink@americanbar.org; website www.americanbar.org/cle

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Upstate Criminal Defense Seminar 2018
Date: June 1, 2018
Place: Albany, NY
Contact: NACDL: tel 518-443-2000 (Jennifer Van Ort); email jlvanort@nysacdl.org; website www.nysacdl.org

Sponsor: National Legal Aid and Defender Association
Theme: 2018 Holistic Defense & Leadership Conferences
Dates: June 4-8, 2018
Place: Philadelphia, PA
Contact: NLADA: tel 202-452-0620; email training@nlada.org; website www.nlada.org/conferences-and-training

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. 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.

[Tharpe v Sellers](#), __ US __, 138 S Ct 545 (1/8/2018)

The federal District Court, which denied the capital petitioner's motion to reopen his habeas corpus proceedings, found that the black petitioner had failed to produce clear and convincing evidence that he was prejudiced by the presence on his jury of a white person who acknowledged, in an affidavit, racial attitudes that included wondering after Bible studies "if black people even have souls" and said some jurors voted for death to make the petitioner an "example to other blacks who kill blacks." The Court of Appeals' denial of a certificate of appealability should not have, "on the unusual facts of this case[,] ... rested on the ground that it was indisputable among reasonable jurists that" the juror's service did not prejudice the petitioner. On remand, several other grounds for the District Court's denial that were not mentioned in the denial of the certificate of appealability are to be considered; it may be that no certificate of appealability will be issued.

Dissent: [Thomas, J] The majority's action will not stop the petitioner's execution or erase the "'unusual fac[t]' of the [juror's] affidavit," but will delay justice for the black victim killed by the petitioner. The juror's affidavit indicated that the victim was of the "'good black folks'" category and that if she had not been, deciding about life or death for the petitioner would not have mattered so much. The affidavit was followed by a second one saying that statements in the first were taken out of

context and not accurate, and the petitioner's counsel did not question the affiant about the first at the hearing. The petitioner only sought a certificate of appealability on the basis of the juror-bias claim after Supreme Court decisions in *Buck v Davis* (137 SCt 759 [2017]) and *Pena-Rodriguez v Colorado* (137 SCt 855 [2017]); the latter does not apply retroactively in collateral proceedings. The Court of Appeals decision considered the procedural ruling that rested on cause for procedural default as well as prejudice. This is not a case warranting per curiam remand by this Court. The majority's ruling "plows through three levels of deference."

[District of Columbia v Wesby](#), __ US __, 138 S Ct 577 (1/22/2018)

The Circuit Court's holding that officers lacked probable cause to arrest individuals found in a vacant house and that the officers were not entitled to qualified immunity in the 42 USC 1983 suit brought by the arrested individuals is reversed on both grounds. The officers reasonably inferred that the individuals "were knowingly taking advantage of a vacant house as a venue for their late-night party" where, among other things, the only furniture was "a few padded metal chairs and a bare mattress," there were no possessions like clothes suggesting someone resided there, and the few signs of inhabitation, such as toiletries in the bathroom and food in the kitchen, could have been brought by the individuals themselves. Further, the conduct of the persons on the premises, including a make-shift strip club in the living room and the presence of several men and one naked woman in the room with the mattress, supported the officers' common-sense conclusions that most homeowners did not live like that and therefore the partygoers knew their presence was not authorized. These conclusions were strengthened by the efforts of the occupants to run or hide when police arrived and the vague and implausible answers offered to the officers' questions, including by the woman who initially said she had the owner's permission to use the house and had invited the others. The court below failed to view the circumstances in totality and wrongly believed that any circumstances that might have an innocent explanation should be ignored rather than viewed as part of the whole.

As for qualified immunity, even if the officers had lacked actual probable cause they would be entitled to qualified immunity because they reasonably, if mistakenly, believed probable cause existed. The court below wrongly found that uncontroverted evidence of an invitation to enter would vitiate probable cause to arrest for unlawful entry regardless of other circumstances, *ie* that police could not disbelieve the partygoers' stories. That was not settled law, and the officers were entitled to qualified immunity.

US Supreme Court *continued*

Concurrence in Part: [Sotomayor, J] The officers are entitled to qualified immunity. The majority apparently reaches the probable cause question to ensure that its decision will resolve not only the 1983 action but also state claims of false arrest and negligent supervision.

Concurrence in Part: [Ginsburg, J] Under the view of the sergeant who ordered the arrests, the people in the house could be arrested for unlawful entry even if they believed they had been invited by a lawful occupant. In some future case, the Court should reexamine precedent that holds an arresting officer's state of mind to be irrelevant to probable cause.

Class v United States, __ US __, 138 S Ct 798 (2/21/2018)

A guilty plea by itself does not bar "a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal." While appeal of many claims is barred, challenges to the very power of the government to prosecute the defendant are not. The defendant here challenges, based on the Second Amendment and the Due Process Clause, the government's power to prosecute him under 40 USC 5104(e)(1) for his admitted conduct of possessing firearms in his vehicle parked on the federal Capitol Grounds. These challenges do not fit in the categories of constitutional guarantees relating to trial procedures, case-related government action occurring before the plea was entered, or claims that would contradict the requisite admissions made as part of the plea, all of which are relinquished by a guilty plea. Nor does Rule 11(a)(2) of the Federal Rules of Criminal Procedure, governing "'conditional' guilty pleas," bar the claims here, which the defendant did not reserve in writing or raise in the District Court. Finally, the statement by the judge at the plea, that the defendant was giving up the right to appeal the plea-based conviction, "does not expressly refer to a waiver of the appeal right here at issue." The defendant "may pursue his constitutional claims on direct appeal."

Dissent: [Alito, J] The Court provides no clear understanding of what claims may be raised on appeal following an unconditional guilty plea. It also "fails to make clear whether its holding is based on the Constitution or some other ground." The Constitution does not prohibit waiver of rights the defendant asserts, nor does any federal statute or rule. Whether the defendant waived the right to appeal the claims in question was not clearly raised in the Court of Appeals and "is not within the scope of the question of law on which we granted review" The so-called "*Menna-Blackledge* doctrine" that is the only exception recognized in Rule 11 stems from cases that diverged, without clear explanation, from prior precedent that had held a guilty plea to surrender all non-

jurisdictional defects and all defenses. The Court, rather than clarifying the law under *Menna-Blackledge*, "sows new confusion"

Murphy v Smith, __ US __, 138 S Ct 784 (2/21/2018)

Under 42 USC 1997e(d)(2), a prisoner who wins a civil right suit must pay some part of any attorney's fee award before the responsibility for those fees shifts to the defendant, with the question here being how much. As a matter of statutory construction, "we hold that district courts must apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney's fees." [Footnote omitted.]

Dissent: [Sotomayor, J] The text of the governing provision "and its statutory context make clear that the provision permits district courts to exercise discretion in choosing the portion of a prisoner-plaintiff's monetary judgment that must be applied toward an attorney's fee award, so long as that portion is not greater than 25 percent."

Jennings v Rodriguez, __ US __, 138 S Ct 830 (2/27/2018)

The judgment is reversed because, in interpreting three immigration provisions that authorize governmental detention of noncitizens during immigration proceedings, the Ninth Circuit "adopted implausible constructions" of the statutes to find that persons detained thereunder had "a statutory right to periodic bond hearings." The primary issue here is the interpretation of 8 USC 1225(b) and 1226(a) and (c). The Ninth Circuit read *Zadvydas v Davis* (533 US 678 [2001]) "as essentially granting a license to graft a time limit onto the text of §1225(b)," but the case, "a notably generous application of the constitutional-avoidance canon," provides no such authority. The statute in *Zadvydas* left the permissible length of detention unclear, while 1225(b) plainly means that detention must continue until a detainee's asylum application has been fully considered or removal proceedings have concluded; "a series of textual signals distinguishes the provisions" here from the interpretation in *Zadvydas*. And the meaning of the word "for," raised here for the first time, comports in context to "'throughout'" rather than "'in ... anticipation of.'" As for 1226(c), its language is even clearer, and an overlapping provision of the PATRIOT Act is not made superfluous by reading 1226(c) as mandating detention until the conclusion of removal proceedings absent a need for release for witness-protection purposes. Finally, noncitizens detained under 1226(a) receive bond hearings at the outset—"see 8 CFR §§236.1(d)(1), 1236.1(d)(1)"—but nothing in the text of 1226(a) even hints at the periodic hearings and burden of proof that the Ninth Circuit found to be required. "The dissent's utterly implausible inter-

US Supreme Court *continued*

pretation of the statutory language cannot support the decision of the court below.” The matter is remitted for consideration of the respondent’s constitutional arguments not considered below and, before that, of whether this can continue as a class action.

Concurrence in Part and in the Judgment [Thomas, J] The respondents did not bring their claims in the posture of a petition for review from a final removal order and no court has jurisdiction over this case. *See* 8 USC 1252(b)(9). The “respondents’ lack-of-meaningful-review argument does not allow us to ignore the jurisdictional limitations that Congress has imposed.” As habeas relief as understood by precedent was not invoked, application of 1252(b)(9) cannot be said to violate the Suspension Clause. Because the majority find there to be jurisdiction “and I agree with the Court’s resolution of the merits, I join Part I and Parts III-VI” of the” decision.

Dissent: [Breyer, J] Reading the statute in question as forbidding bail, and hence a bail hearing, likely renders it unconstitutional. Construing it to avoid such a result, “I would interpret the statute as requiring bail hearings, presumptively after six months of confinement.” The key characteristics of the groups of noncitizens who appear here are important to the conclusion, particularly the asylum-seekers and those who have finished serving sentences of incarceration for crimes. Thousands of people are involved; their detention is often lengthy; and many eventually obtain relief. The legal fiction that arriving noncitizens are not held within the US because they have “never entered” its territory cannot be used to authorize arbitrary detention. The right to seek bail was settled at the time of the American Revolution. Risk of flight was initially the sole consideration, with Congress gradually adding community safety as a factor. Equivalent rights exist for persons involuntarily confined due to mental illness. Bail can be sought during extradition proceedings; in the absence of statutory authority, bail proceedings can be presumed authorized. There is no reasonable basis for treating confined noncitizens worse.

Ayestas v Davis, No. 16-6795 (3/21/2018)

The lower courts applied the wrong standard in evaluating the petitioner’s claim “that he was wrongfully denied funding for investigative services needed to prove his entitlement to federal habeas relief.” After a fourth set of defense attorneys sought to show in a habeas corpus action that trial counsel had failed to raise mitigating evidence of mental illness and substance abuse in the penalty phase of this death penalty case, issues of procedural default were raised. To develop the claim and overcome the procedural bar, petitioner unsuccessfully sought, *ex parte*, funding for investigative and other services to find

evidence regarding the claimed ineffective assistance. The respondent’s jurisdictional argument that the District Court’s denial of funding was an unappealable administrative decision is rejected. As for the denial of investigative funds under 18 USC 3599(f), which covers services “reasonably necessary for the representation of the [applicant],” the Fifth Circuit placed a more demanding burden—“substantial need” rather than “reasonably” necessary—on the petitioner. The Court exacerbated that by invoking an outdated test barring funding for applicants whose claims are procedurally defaulted; a showing of ineffective assistance of state habeas counsel can overcome default. The matter is remanded for further proceedings.

Not decided here is the respondent’s argument that funding is never “reasonably necessary” in habeas cases involving “a procedurally defaulted ineffective-assistance-of-trial-counsel claim that depends on facts outside the state court record” under 28 USC 2254(e)(2).

Concurrence: [Sotomayor, J] “[T]he troubling failures of counsel at both the trial and state postconviction stages of Ayestas’ case are exactly the types of facts that should prompt courts to afford investigatory services to ensure that trial errors that go to a ‘bedrock principle in our justice system’ do not go unaddressed.”

Marinello v United States, No. 16-1144 (3/21/2018)

The last phrase of the clause in Internal Revenue Code 7212(a) that “makes it a felony ‘corruptly or by force’ to ‘endeavo[r] to obstruct or imped[e] the due administration of this title’” is not so broad that it covers “routine administrative procedures that are near-universally applied” The clause, as a whole, “refers to specific interference with targeted governmental tax-related proceedings, such as a particular investigation or audit.”

Dissent: [Thomas, J] The clause “does what it says: forbid corrupt efforts to impede the IRS from performing any of” the activities in Title 26, which contains the entire Tax Code and the IRS’s authority. While the majority may prefer a statute written to limit “‘this title’ to mean ‘a particular [IRS] proceeding,’” such a statute “is not what Congress enacted.”

New York State Court of Appeals

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

People v O’Kane, 2018 NY Slip Op 00859 (2/8/2018)

Defense counsel did not render ineffective assistance by consenting to the annotated verdict sheets provided to

NY Court of Appeals *continued*

the jury in this case, which involved 14 counts (aggravated harassment, stalking, and criminal contempt) covering over 300 acts during 12 distinct time periods. Each count on the four-page verdict sheet was given “a date or date range and a short description of the alleged criminal conduct” such as “‘emailing approximately 15 times’” The consent was not among the conduct alleged on appeal as ineffective assistance. But on appeal, County Court erroneously “held, *sua sponte*, that the annotations were ‘extraneous, and highly inflammatory information’ that ‘effectively marshalled and bolstered the People’s proof.’” That counsel’s consent was based on a sound strategic reason—encouraging the jury to think independently about the evidence as to each count—is clear from both counsel’s summation and common sense.

People v Sposito, 2018 NY Slip Op 00860 (2/8/2018)

The defendant’s challenge on direct appeal to alleged constitutional deficiencies in his attorney’s performance fails on the record. As has been previously stated, “‘in the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10’”

People v Francis, 2018 NY Slip Op 01017 (2/13/2018)

Consideration of a Youthful Offender (YO) adjudication by the State Board of Examiners of Sex Offenders when assessing a defendant’s risk level under the Sex Offender Registration Act (SORA) is not prohibited by statute and does not undermine the legislative policy against stigmatizing a youth with a criminal record. The Board’s expertise and experience, on which it based the decision to consider the defendant’s YO adjudications, is entitled to judicial deference, and the Board did not unreasonably construe SORA as permitting it access to YO records. Nor did the Board violate CPL article 720; a YO adjudication replaces a conviction, but not the offense itself. The Legislature intended to give the Board the authority “to consider the full spectrum of an offender’s prior unlawful conduct” It is the defendant’s adult criminal acts, not the acts underlying his YO adjudication or status, that triggered registration requirements. The defendant failed to develop a record as to his arguments that science disproves the Board’s finding that youthful acts are indicative of a risk of recidivism; that claim was not reviewable by the SORA court, and the Board had no opportunity to respond to it, so it is not properly before this Court.

People v McCain, 2018 NY Slip Op 01018 (2/13/2018)

The factual allegations of each misdemeanor complaint here “establish reasonable cause to believe that each defendant possessed a ‘dangerous knife’ (Penal Law § 265.01 [2]), triggering the statutory presumption of unlawful intent arising from such possession (Penal Law § 265.15 [4]).” As each accusatory instrument was therefore sufficient to support the charge of fourth-degree possession of a weapon, the alternative jurisdictional argument put forward in *People v Edward* need not be addressed.

Concurrence: [Stein, J] “I concur on constraint of our prior precedent.”

Concurrence in *McCain*, Dissent in *Edward*: [Wilson, J] In *McCain*, “the officer’s sworn statement attached to the complaint specifies that the ‘knife was activated by deponent to an open and locked position through the force of gravity,’ which meets the statutory definition of ‘gravity knife’ in Penal Law § 265.00 (5), and therefore *a fortiori* is a ‘dangerous knife’ under Penal Law § 265.01, when subsections (1) and (2) thereof are read together.”

“I dissent from the result in *People v Edward* for the reasons set out in Judge Simons’ dissent in *Matter of Jamie D.* (59 NY2d 589 [1983]).”

People v Reyes, 2018 NY Slip Op 01113 (2/15/2018)

The Appellate Division correctly found in this second-degree conspiracy case that on the record there was “no valid line of reasoning and permissible inferences from which a rational jury could have found the” requisite element of agreement beyond a reasonable doubt. That the defendant was present at gang meetings where other gang members discussed the intended crime was not sufficient, as the law contains no presumption of agreement based on sheer presence where a conspiracy is discussed. As federal courts have noted, one is not made a coconspirator by mere knowledge of a conspiracy’s existence and goals. The decision here does not define the circumstances that would give rise to an agreement; doing so would be to “fix boundaries with respect to the circumstances that may give rise to an agreement,” and the very nature of conspiracy does not lend itself to transparency.

Dissent: [Garcia, J] The defendant’s membership in the gang was uncontroverted, and the prosecution provided proof of the gang’s leadership structure and gang members’ roles and responsibilities, along with evidence of the defendant’s participation in an earlier attack on a residence associated with the target of the conspiracy and of the defendant’s attendance at meetings where the arson plan underlying the instant charge was discussed. While the defendant was arrested before the planned firebombing occurred, making his post-arrest claim to have been

NY Court of Appeals *continued*

present for that untrue, his statement makes clear he knew details of the plan before it was executed by others.

People v Wiggins, 2018 NY Slip Op 01111 (2/15/2018)

The defendant’s right to a speedy trial was violated where he, then 16 years old, was arrested on May 28, 2008, and pleaded guilty to first-degree manslaughter on Sept. 23, 2014. The Appellate Division correctly found that the six-year delay was extraordinary, but erred in finding that the adjournments relating to the co-defendant’s case, primarily to help strengthen the case against the defendant, should not be chargeable to the prosecution in the defendant’s case under CPL 30.30. That statute is not applicable in this murder case and in any event it would allow only reasonable delay for the purpose of obtaining the co-defendant’s cooperation and is not coextensive with constitutional speedy trial rights.

The Appellate Division also erred in finding that it could not “second guess” the prosecution’s “significant amount of discretion” as to prosecution of an indictment. In cases involving post-charge delay rather than deferred commencement of prosecution, a good-faith determination to delay trial cannot continue indefinitely, even if the offered justification would excuse a reasonable delay preindictment. The factors to be considered regarding constitutional speedy trial rights do not include whether a defendant asserted those rights, and in any event there is no showing here that the defendant “intentionally acquiesced in the delay” While the severity of the charges against the defendant weighs in favor of the prosecution, the defendant’s pretrial incarceration of over six years favors the defendant. That he was also incarcerated for unrelated charges for much of that time did not diminish the fact of the pretrial detention here and could not provide good cause for the delay. Finally, a showing of specific prejudice to the defense from the delay is not necessarily required; the defendant suffered presumptive prejudice and this factor favors finding a speedy trial violation.

Dissent: [DiFiore, CJ] The focus of the defendant’s speedy trial issue is the delay caused by prosecution efforts to resolve the co-defendant’s case first. The length of the delay and the defendant’s pretrial detention weigh in favor of finding unconstitutional delay—although the latter not determinately so, given other indictments lodged during the pendency of this case. However, the nature of the charge weighs against such a finding, as does the lack of any allegation of actual prejudice other than the pretrial detention, which was already taken into account. The facts as to the reason for the delay are in dispute, and since there is record support for the Appellate Division’s finding of reasonable cause, the issue is beyond review here. Based on a careful balancing of all of the fac-

tors, the courts below did not err in refusing to dismiss the indictment based on a speedy trial violation.

First Department

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

People v Swinson, 154 AD3d 533, 61 NYS3d 885 (1st Dept 10/19/2017)

The evidence at trial was legally insufficient to support the first-degree burglary conviction because, when viewed in the light most favorable to the prosecution, the evidence did not prove that the defendant intended to assault the complainant at the time the defendant refused to leave. His argument, that “he could not be deemed to have committed burglary where the request to leave and subsequent assault was part of an escalating dispute,” is correct, and the reasonable inference from the evidence is that the “defendant spontaneously committed violence, which does not fall within the intended scope of the burglary statute” (Supreme Ct, New York Co)

People v Watson, 154 AD3d 627, 62 NYS3d 790 (1st Dept 10/31/2017)

The defendant is entitled to a new hearing on the violation of probation for failure to complete anger management treatment, because he was given no opportunity to be heard before the court’s initial determination. “While the court subsequently allowed defendant to speak, it did not conduct a sufficient inquiry into whether defendant sought in good faith to comply with programming directives, but was prevented, as he contends, from doing so primarily by circumstances outside his control” (Supreme Ct, New York Co)

People v Cintron, 155 AD3d 502, 65 NYS3d 139 (1st Dept 11/21/2017)

The defendant’s third-degree drug possession conviction is reversed and his guilty plea vacated because “the court did not make any inquiry to ensure that the plea was knowing and voluntary, even though defendant had made statements casting significant doubt upon his guilt and calling into question his understanding of the nature of the charges against him” Before the plea allocution, the defendant said he “never possessed anything,” and the court did not clarify that he understood the charges and was retracting his claim of innocence.

First Department *continued*

In his post-conviction challenge to the denial of his speedy trial motion in the criminal facilitation case, the defendant met his initial burden, but it is unclear whether the prosecution “satisfied their burden in response, or merely raised issues of fact requiring a hearing” The court improperly relied only on its “‘notes’ and ‘recollection’” and failed to review the prosecutor’s submissions when denying the motion. The appeal is held in abeyance and the matter remanded for further proceedings. (Supreme Ct, New York Co)

People v Sanchez, 155 AD3d 511, 65 NYS3d 38
(1st Dept 11/21/2017)

The court improperly advised the defendant that he could pursue his CPL 30.30 claim on appeal. In reliance on the misstatement, the defendant accepted a longer sentence and declined to replead to an offense with a shorter prison sentence. Preservation was not required because the defendant was sentenced on the same date as the court’s misstatement and he “had no practical ability to object to the error” The defendant’s guilty plea to first-degree assault is vacated. (Supreme Ct, New York Co)

People v Southall, 156 AD3d 111, 65 NYS3d 508
(1st Dept 11/28/2017)

A juror’s failure to disclose her application to work at the New York District Attorney’s Office, submitted two days before being sworn as a juror but after completing the juror questionnaire in voir dire, deprived the defendant of his right to a fair trial, and the court abused its discretion by denying the defendant’s CPL 440.10 motion to vacate. At the 440 hearing, the juror said she was inspired to apply for a position with the prosecutor’s office after being called for jury service, and that “‘it didn’t occur to [her] that ... submitting an application was something that [she] was supposed to disclose to the court.’” Defense counsel testified that had he known about the juror’s application, he would have moved to strike for cause, and if unsuccessful, he would have used a peremptory challenge. While the juror did not lie when questioned as a prospective juror, she subsequently concealed material information, and an objective view of her failure to inform the court of her application to the prosecutor’s office demonstrated actual bias and created an appearance of impropriety. The juror’s knowledge that she had applied for the job, and her crafting of the “argument in her cover letter ... that she would be an excellent prosecutor there, created a relationship between her and the DA’s office, which raised a high likelihood that she would be inclined to favor the People, and which was ‘likely to preclude

[her] from rendering an impartial verdict’” (Supreme Ct, New York Co)

People v Peters, 157 AD3d 79, 66 NYS3d 238
(1st Dept 12/5/2017)

The defendant’s drug sale conviction is reversed because his right to effective assistance of counsel was infringed by an actual conflict where defense counsel simultaneously represented the defendant and the buyer, who, as part of his plea allocution, identified the defendant as the seller. The buyer “had an interest in avoiding a criminal conviction by allocuting to identify defendant as one of the people who had sold him drugs. Defendant had an interest in not being so identified. Counsel was thus placed in the ‘very awkward position of a lawyer subject to conflicting demands’” Defense counsel acted against the defendant’s interest by pursuing a strategy in the buyer’s case that was adversarial to the defendant. The buyer’s allocution is entwined with the violation of the defendant’s right to effective assistance of counsel and the prosecution is precluded from using the buyer’s testimony at a new trial. (Supreme Ct, New York Co)

People v Sanchez, 157 AD3d 107, 68 NYS3d 45
(1st Dept 12/21/2017)

The jury’s verdict was not against the weight of the evidence, and the defendant’s convictions for second-degree murder and second-degree criminal possession of a weapon are affirmed. Weighing the defendant’s incredible statements and other defense evidence against the “probative force of the” prosecution’s evidence and inferences therefrom provides “‘no reason to disturb the jury’s rejection of the’” defendant’s justification defense. There were irreconcilable inconsistencies in the defendant’s account, and the record supports the jury’s determination to credit the statements of three objective, third-party witnesses over the defendant’s videotaped statement and the testimony of two of the defense witnesses, and forensic evidence supported the prosecutor’s version of the events. (Supreme Ct, Bronx Co)

Dissent: The jury’s verdict was against the weight of the evidence and the judgment should be reversed and dismissed. The prosecution did not meet its burden of proving beyond a reasonable doubt that the defendant’s action was not justified. The prosecution’s evidence did not directly refute the defendant’s justification claim, and the evidence corroborating the defendant’s account outweighed evidence to the contrary. The majority did not accurately recount the pathologist’s testimony. For example, regarding the distance between the shooter and the deceased when the head injury was inflicted, she said she could not opine because the deceased was wearing a hat.

First Department *continued*

[People v Mebuin](#), 158 AD3d 121, 68 NYS3d 68 (1st Dept 12/28/2017)

The court abused its discretion by summarily denying the defendant's CPL 440.10 motion based on ineffective assistance of counsel where the defendant claims that counsel misadvised him of the immigration consequences of his plea. The defendant was granted asylum based on a finding that, if he returned to Cameroon, he had a well-founded fear of prosecution, and was a permanent resident when he was indicted on first-degree sexual abuse. Seeking to overturn the resulting conviction, he swore that his attorney advised him that if he pleaded guilty to endangering the welfare of a child, "there would be no deportation consequences to the plea and that, if there were, counsel would simply 'get defendant out of' them" This was sufficient to allege that his lawyer's performance "fell below an objective standard of reasonableness" and prejudiced the defendant, warranting a hearing.

Absence of an affidavit from trial counsel does not support summary denial of the motion because the defendant's allegations are "adverse and hostile" to counsel, the defendant explained that he attempted to get an affidavit from his attorney but received no response, and his allegations are supported by the record. The court "allocated defendant as to whether he had touched the children inappropriately," establishing the elements of first-degree sexual abuse, which was not a part of the plea agreement. In mentioning deportation and immigration status, the court failed to affirmatively state that deportation was a possible consequence of accepting the plea. The defendant's allegations sufficiently established that deportation was a determinative issue in accepting his plea. (Supreme Ct, New York Co)

[People v Montgomery](#), 2018 NY Slip Op 00351 (1st Dept 1/18/2018)

Where "the facts of the unindicted robberies reflect a 'modus operandi' connecting a third party to the charged crimes," the court erred by precluding reverse *Molineux* evidence. This included surveillance videos taken from three uncharged robberies, which did not depict the defendant, as well as evidence that the witnesses from those robberies did not identify the defendant in a lineup. Evidence indicated that all but one of the charged and uncharged robberies occurred on June 8 and June 9 in close geographical proximity, providing strong evidence that the same person committed them all. "Since the prosecutor was permitted to use surveillance video and eyewitness testimony from one robbery to prove that defendant had committed another, to satisfy due process,

defendant must be permitted to use such evidence to prove that he did not commit the other robberies."

The court also erroneously concluded that the defendant did not lay a foundation for introducing his fingerprint card to show he lacked a mark on his palm described by a complainant. An NYPD latent print examiner testified that he received the card in the normal course of business, and that he relied on it in making his assessment. These errors were not harmless; other than two cross-racial eye witness identifications, and one surveillance video, nothing else connected the defendant to the crime. That the previous jury was unable to render a verdict indicated that the evidence was not overwhelming. (Supreme Ct, New York Co)

Second Department

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[People v Hang Bin Li](#), 154 AD3d 960, 64 NYS3d 224 (2nd Dept 10/25/2017)

The prosecution's evidence established that the defendant had "one-on-one access" to his infant daughter during relevant time periods prior to her hospitalization and eventual death. "Further, the record is replete with evidence, including strong medical expert evidence, that [the] death was a homicide caused by violent shaking and forceful impacts to the head. This proof, coupled with the defendant's devastating admission that he 'carelessly bump[ed] her head on the night stand,' was both legally and factually sufficient to sustain the jury's verdict." (Second alteration in original.) (Supreme Ct, Queens Co)

Dissent: "[T]he evidence showed that there were two adults present in the subject apartment during the relevant time period, i.e., the defendant and his wife. And there was no evidence establishing which of these adults administered the fatal shaking. ... [T]he People's expert witness testified that a bump of a head on a night stand could not have been the cause of [the] injuries."

[People v Vargas](#), 154 AD3d 971, 65 NYS3d 535 (2nd Dept 10/25/2017)

The prosecution failed to establish, by clear and convincing evidence, that a prosecution witness "had been made unavailable due to threats made at the initiative or acquiescence of the defendant," so that allowing into evidence the witness's grand jury testimony violated the defendant's confrontation rights. The court also erred in allowing the witness to testify that he had been threatened

Second Department *continued*

by a third party where “there was no evidence linking the defendant to the threat.” Even if the evidence against the defendant had been overwhelming, there was a reasonable possibility that the introduction of the testimony in question contributed to the guilty verdict. Only after its admission did the witness “testify consistently with his grand jury testimony that he observed the defendant wielding a knife.” (Supreme Ct, Kings Co)

Dissent: While the court erred in admitting the threat testimony, the error was harmless, as the other evidence was overwhelming and there was no reasonable possibility it contributed to the verdict.

**People v Estevez, 155 AD3d 650, 64 NYS3d 236
(2nd Dept 11/1/2017)**

Because the court “repeatedly and prejudicially questioned the defendant,” and also disrupted the questioning of prosecution witnesses, the judgment is reversed in the interest of justice. The court “effectively took over the direct examination of one of the complaining witnesses at key moments in her testimony where she was describing how the defendant shot the victim ...” and “repeatedly highlighted apparent inconsistencies in the defendant’s testimony.”

The prosecutor improperly elicited from the defendant the fact that he was incarcerated pending trial, as no legitimate interest was served by disclosure of that information. (Supreme Ct, Kings Co)

**People v Wilson, 155 AD3d 656, 62 NYS3d 814
(2nd Dept 11/1/2017)**

The defendant, eligible for resentencing pursuant to CPL 440.46, was entitled to an appearance before the court regarding his motion under that statute, and a hearing if necessary. Failure to follow the required procedure requires reversal of the order denying the motion. (Supreme Ct, Queens Co)

**People v Andrews, 155 AD3d 764, 64 NYS3d 282
(2nd Dept 11/8/2017)**

In the interest of justice, the defendant’s unpreserved claim that the prosecution did not present sufficient evidence to convict him of resisting arrest is considered and accepted. When the complainant pointed to the defendant and another individual and stated “that’s them,” the arresting officers “had only been informed that one individual pointed a firearm at the complainant.” The police could not have determined from the information they had whether the defendant or the other individual pointed the gun at the complainant. Thus, evidence was insufficient to

show that the arrest for which the defendant was convicted of resisting was “authorized,” which is an element of the resisting arrest statute. (Supreme Ct, Queens Co)

**Matter of Delilah D., 155 AD3d 723, 64 NYS3d 67
(2nd Dept 11/8/2017)**

The court erred in making a finding of derivative neglect against a father in a new action that relied on an adjournment in contemplation of dismissal (ACD) in a previous action that was based on an admission made by the father. The local department of social services filed the current action immediately after the birth of the subject child and during the pendency of the adjournment period, but failed to seek reopening of the previous case alleging any noncompliance with the father’s service plan. Despite the father’s admission, “[a]n ACD is emphatically not a determination on the merits. It is not akin to a finding of parental neglect, but, rather, it leaves the question unanswered’ (*Matter of Marie B.*, 62 NY2d 352, 359 [1984] ...).” The order of fact-finding is reversed, the petition is denied, and the proceeding is dismissed. (Family Ct, Orange Co)

**People v Newson, 155 AD3d 768, 64 NYS3d 248
(2nd Dept 11/8/2017)**

Where the defendant was pulled over for traffic violations, including speeding and running a red light, with no suspicion that his vehicle or occupants were connected with an earlier radio run, and the officer’s suspicion upon seeing the passenger that he might match the person described on the radio call was speculative, the officer lacked the “founded suspicion that criminality was afoot” required to justify “his question to the defendant as to whether there was anything illegal in the vehicle” The defendant’s response—“No, officer. You can check”—was followed by further police actions culminating in the search of a handbag and camera on the back seat revealing them to be stolen property and an inventory search of the car that yielded a gun. These are fruits of the unlawful inquiry and must be suppressed.

The suppression record did not show attenuation of the causal connection between the illegal search and the defendant’s subsequent statements, which must also be suppressed. (Supreme Ct, Queens Co)

Dissent: “These high-speed traffic violations, committed with abandon in the wee hours of the morning on a Saturday, would provide a reasonable officer with grounds not only to make a traffic stop, but also to develop reasonable suspicion that something more sinister may be afoot” The defendant validly consented to a search of the vehicle. “[T]he inventory search was valid because it was conducted pursuant to established police procedures”

Second Department *continued*

People v Tavarez, 155 AD3d 783, 64 NYS3d 260 (2nd Dept 11/8/2017)

A man who was present at the incident and identified the defendant at a show-up never appeared to testify at trial, but two police witnesses testified about him in the context of police investigative efforts; this deprived the defendant “of his constitutional right to confront the witnesses against him” When the man did not appear, the defense unsuccessfully “moved for a mistrial, alleging a ‘Trowbridge violation,’ but without specifically alleging any violation of the defendant’s” confrontation rights. It is clear that the court understood the jury might conclude that a non-testifying witness had identified the defendant; that danger was demonstrated by a jury note requesting a readback of testimony regarding what the man told police about the perpetrator’s identification. The unpreserved error is reached in the interest of justice and the judgment reversed. (Supreme Ct, Kings Co)

People v Williams, 155 AD3d 787, 64 NYS3d 294 (2nd Dept 11/8/2017)

The defendant’s conviction for first-degree robbery, which requires forcible stealing and the use or threat of use of a dangerous instrument, is upheld, because the duct tape used to cover the complainant’s mouth and eyes, and bind his hands, constituted a dangerous instrument.

The second-degree kidnapping and first-degree unlawful imprisonment convictions did not merge with the robbery convictions.

Actual physical injury need not occur to sustain a conviction for first-degree unlawful imprisonment, only the exposure to the risk of serious physical injury. The complainant, with tape on mouth, eyes, and binding his hands, was placed in a storage unit. (Supreme Ct, Queens Co)

Dissent: “[T]here was no evidentiary basis supporting the conclusion that the duct tape was readily capable of killing or maiming the complainant, or of causing any of the other severe harms described in Penal Law 10.00(10)’; the evidence was not legally sufficient to support the first-degree robbery conviction.

The restraint of the complainant occurred almost simultaneously with the robbery and “was essentially incidental to and inseparable from the” robbery counts. The second-degree kidnapping and first-degree unlawful imprisonment convictions “are precluded by the merger doctrine.”

People v Oquendo, 155 AD3d 894, 63 NYS3d 734 (2nd Dept 11/15/2017)

The court erred in summarily denying the defendant’s motion to vacate his conviction based on a claim of ineffective assistance of counsel. He submitted evidence sufficient to raise a triable issue of fact as to whether he believed, before pleading guilty and based on the advice of counsel, that his state sentence for possessing gravity knives would run concurrent with a federal sentence. At sentencing, the court acknowledged that, at the plea, the court had granted the defense request to set bail nunc pro tunc to “the date the defendant was taken into custody on the federal charges.” (Supreme Ct, Nassau Co)

Matter of Singas v Engel, 155 AD3d 877, 63 NYS3d 695 (2nd Dept 11/15/2017)

The denial of the CPLR article 78 petition to prevent a judge from compelling the prosecution to disclose documents related to a breathalyzer test is affirmed. The prosecution was required to disclose such information or, at least, make a good faith, diligent effort to discover and disclose such information, and the respondent judge did not exceed his jurisdiction or authority in directing the prosecutor to do so. (Supreme Ct, Nassau Co)

People v Prokop, 155 AD3d 975, 63 NYS3d 892 (2nd Dept 11/22/2017)

The defendant failed to preserve his claim that his due process rights were violated when the trial court said during voir dire “that if [the prospective jurors] were excused from jury service due for lack of English language proficiency, they ‘may have to take an English course,’ as required by the court.” While the misconduct was not a mode of proceedings error and reversal is not warranted under the circumstances, “we take this opportunity to express our strong disapproval of the court’s conduct in issuing these remarks.” (Supreme Ct, Queens Co)

People v Smith, 155 AD3d 977, 65 NYS3d 233 (2nd Dept 11/22/2017)

It is clear that the defendant pleaded guilty upon assurance from the court that “he would retain the right to appeal the denial of his motion to dismiss the indictment pursuant to CPL 30.30.” As such a claim is forfeited by a guilty plea, that promise was illusory and the defendant is entitled to withdraw his plea. (Supreme Ct, Nassau Co)

Matter of Elizabeth C., 156 AD3d 193, 66 NYS3d 300 (2nd Dept 11/29/2017)

Second Department *continued*

The court erred in determining that an order excluding a parent from the family home does not trigger the same due process rights of the parent as does a removal of a child from that home; “the temporary severance of a parent-child relationship under article 10 of the Family Court Act triggers the right to a section 1028 hearing.” The petition claimed derivative abuse because the father of five children allegedly sexually abused a 14-year-old niece 5 months prior. The court ordered a “full stay-away” temporary order of protection which prohibited him from residing with his children in the home. The matter was then scheduled for a 1028 hearing to determine “the propriety of the exclusion of the father from the family home.” The court commenced a hearing but, after several legal procedures, advised counsel that proceeding on the 1028 hearing was “inappropriate” because the court didn’t “consider this a removal ... and the standard to be applied is not imminent risk.” The court then signed the father’s order to show cause to demonstrate why the father’s exclusion was necessary. The mother and the Attorney for the Children supported the father’s position that he should return to the home, but ACS opposed it. On appeal, ACS conceded that a section 1028 hearing should have been held. The denial of the hearing is reversed. (Family Ct, Queens Co)

**People v Conklin, 156 AD3d 650, 64 NYS3d 602
(2nd Dept 12/6/2017)**

The defendant’s adjudication as a second felony offender is vacated and remitted for a new second felony offender hearing and resentencing. “At the sentencing proceeding, the defendant admitted that he had a prior felony conviction in 2008 of burglary in the second degree. However, he indicated that he was challenging his 2008 felony conviction on constitutional grounds.” Under the circumstances, the court had an obligation to conduct a further inquiry into those challenges and a hearing thereon. (County Ct, Orange Co)

**People v Lawrence, 156 AD3d 652, 66 NYS3d 286
(2nd Dept 12/6/2017)**

While “[c]ourts should not arbitrarily interfere with the attorney-client relationship,” they “must protect the defendant’s right to effective assistance of counsel”; the court improperly denied the prosecution’s motion to relieve defense counsel, “especially in light of the defendant’s refusal to waive any conflict” Defense counsel had interviewed the main prosecution witness alone, and was “the only person who could testify to the witness’s recantation of his identification of the defendant as a shooter,” creating an actual conflict of interest. Such con-

flict overcomes the presumption in favor of clients having the attorney of their choice. The defendant is entitled to a new trial. (County Ct, Suffolk Co)

**Matter of Salami, 157 AD3d 37, 66 NYS3d 44
(2nd Dept 12/6/2017)**

The respondent attorney failed to timely report a New Jersey criminal conviction to the Appellate Division pursuant to Judiciary Law 90(4)(c), though it was reported promptly to New Jersey authorities. Simple assault, the crime that led to the respondent’s censure in New Jersey, is essentially similar to New York’s class A misdemeanor of third-degree assault, “for which this Court has previously imposed discipline.” Despite some mitigating factors, the nature of the offense and the aggravating factor of the failure to notify New York of the New Jersey conviction warrant a six-month suspension from the practice of law.

**People v Eulo, 156 AD3d 720, 67 NYS3d 279
(2nd Dept 12/13/2017)**

A single reference in the transcript of plea proceedings indicating that the defendant signed a waiver of indictment is insufficient to satisfy the New York Constitution’s requirement that such waiver be written and signed. Since this requirement is jurisdictional, review is available even where the defendant agrees to be prosecuted on a Superior Court Information, pleads guilty, and waives the right to appeal. The judgment is reversed, the information dismissed, and the matter remitted for further proceedings on the felony complaint. (Supreme Ct, Nassau Co)

**Matter of State of New York v Kerry K., 157 AD3d 172,
67 NYS3d 227 (2nd Dept 12/13/2017)**

Admitting unreliable hearsay testimony regarding a conviction for which the appellant was exonerated constituted error requiring a new trial on the issue of mental abnormality.

The court’s failure to timely hold the probable cause hearing and trial on a petition to impose Mental Hygiene Law (MHL) article 10 strict and intensive supervision and treatment “did not deprive the court of jurisdiction or, under the circumstances, violate Kerry K.’s due process rights.” The probable cause hearing was held 37 days past the statutory limit, and the bench trial on the issue of mental abnormality began after the specified 60-day period. However, there is no language in article 10 that states or implies a loss of jurisdiction based on a failure to observe these timelines. Further, there was significant process afforded prior to the hearing. Finally, the appellant consented to certain adjournments and was not ready for trial

Second Department *continued*

prior to the month in which trial began, so dismissal was not warranted due to this delay.

The appellant’s contention under MHL 10.08(c) “that the statutory phrase “any agency, office, department or other entity of the state” operates to prevent local government entities, such as county police departments and probation departments, from disclosing sealed records” is rejected. (Supreme Ct, Suffolk Co)

**People v Collins, 156 AD3d 830, 67 NYS3d 248
(2nd Dept 12/20/2017)**

Defense counsel’s failure to litigate any part of the defendant’s Sex Offender Registration Act risk assessment adjudication deprived him of the effective assistance of counsel. Further, counsel’s comments indicated a misunderstanding of the law regarding downward departures. These facts, as well as “counsel’s failure to seek a downward departure under the circumstances of this case,” deprived the defendant of meaningful representation. (County Ct, Suffolk Co)

**Matter of Darrell J.D.J., 156 AD3d 788, 67 NYS3d 49
(2nd Dept 12/20/2017)**

The court erred by ordering termination of parental rights based on abandonment when the father, once he had reason to believe he was the father of a child in foster care, took action to establish paternity, sought contact with the child, filed for custody, visited the child and supplied snacks, toys, clothes, and child support for six months prior to the filing of the petition. The order of fact-finding and disposition is reversed on the facts, the petition is denied and the proceeding is dismissed. (Family Ct, Dutchess Co)

**People v Francois, 156 AD3d 812, 67 NYS3d 70
(2nd Dept 12/20/2017)**

The court’s failure to obtain an unequivocal assurance that a prospective juror could render an impartial verdict requires a new trial. The “prospective juror indicated in response to questioning by defense counsel that she felt ‘you are never in the right if you respond to aggression with physical violence’ and should ‘always turn the other cheek,’ and that it was possible her belief could influence how she would decide the case.” The court’s follow-up question about the prospective juror’s ““religious beliefs”” affecting her verdict on a previous criminal jury, yielding the response, “‘I’m an atheist,’” was insufficient. The court’s collective question to the panel about ““everybody here”” being fair and impartial did not yield “an unequivocal

declaration of impartiality from the prospective juror at issue” (Supreme Ct, Kings Co)

**People v Curry, 158 AD3d 52, 68 NYS3d 483
(2nd Dept 12/27/2017)**

That the defendant scored lower on sex offender risk assessments not used by the New York Board of Examiners of Sex Offenders (Board) is not sufficient, on its own, to be considered a mitigating factor under New York’s risk assessment regime. One alternate risk assessment instrument (RAI) does not consider ““the nature of the sexual contact with the victim or the potential harm that could be caused in the event of reoffense’....” Neither alternate RAI takes into account the full range of factors specified in New York’s RAI. Here, even if these alternate RAI determinations could constitute a mitigating factor, the defendant did not sustain his burden of proof. (Supreme Ct, Kings Co)

**Matter of Edmunds v Fortune, 156 AD3d 880,
65 NYS3d 782 (2nd Dept 12/27/2017)**

The court erred “when it, without a hearing, in effect, denied the father’s petition for increased visitation and indefinitely suspended his visitation.” Where a facially sufficient petition has been filed, the court must conduct a “full and comprehensive hearing at which a parent is to be afforded a full and fair opportunity to be heard.” The court instead relied on assertions made at court conferences and assertions by experts whose conclusions and credibility were not tested. The father’s attorney tried to make a record with respect to the court’s decision to indefinitely suspend contact between the father and child, “but was interrupted, first by the court and then again when the electronic recording of the proceeding was abruptly ended.” The order is reversed on the law and remitted for a hearing. (Family Ct, Kings Co)

**People v Rong He, 156 AD3d 907, 68 NYS3d 130
(2nd Dept 12/27/2017)**

“Since the [court] ruled in favor of the defendant on the issue of whether he was illegally arrested in violation of *Payton* [*v New York* (445 US 573 [1980])], we may not review that issue on the defendant’s appeal”

The court’s “determination that the defendant’s statement was attenuated from his illegal arrest is supported by the record.” The police interview took place 4.5 hours after the arrest, in a different location than the arrest, by police personnel not involved in the arrest. There was no flagrant misconduct in the record and no indication of bad faith on the part of police. (Supreme Ct, Kings Co)

Dissent: “I believe that the court erred in determining that the causal connection between the illegal arrest and

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the defendant's statement was sufficiently attenuated so as to purge the taint of the illegal arrest." There was no intervening event between the arrest and the statement, as required by case law. Further, the police misconduct was flagrant.

[*Ed. Note: this decision did not discuss People v Garvin (30 NY3d 174 [10/24/2017], dealing with an arrest under Payton; Garvin is summarized in the prior issue of the REPORT.*]

**People v Scott, 156 AD3d 913, 65 NYS3d 803
(2nd Dept 12/27/2017)**

The defendant's sentence is reduced from one year to 364 days' imprisonment. Because the one-year term of imprisonment may have immigration consequences, the question of whether her sentence should be reduced is not academic despite the fact that she completed it. (Supreme Ct, Kings Co)

**People v Thomas, 156 AD3d 915, 68 NYS3d 127
(2nd Dept 12/27/2017)**

The court erred in instructing the jury on Penal Law 35.27 because Emergency Medical Service personnel are not part of the uniformed force of the New York Fire Department, and thus are not protected by 35.27 as "peace officers" as defined in CPL 2.10. The court's charge effectively removed the defendant's justification defense to an assault charge, where the defendant allegedly bit a paramedic attempting to transport her father to the hospital against her wishes. The defendant is entitled to a new trial on that count, but since she has already served the sentence imposed for that crime the count is dismissed from the indictment. (Supreme Ct, Kings Co)

**Matter of Lenich, 157 AD3d 201, 68 NYS3d 526
(2nd Dept 12/29/2017)**

Under Judiciary Law 90(4)(e), the respondent prosecutor was immediately disbarred and ceased to be an attorney upon her conviction of federal illegal interception of communications under 18 USC 2511(1)(a) and (4)(a) for using the Kings County District Attorney's equipment and facilities to intercept and record communications from two cellular telephones, as that conviction constitutes a felony within the meaning the statute. Convictions need not be for statutes that are mirror images of New York law; it is enough that the conviction here is essentially similar to the New York class E felony of eavesdropping (Penal Law 250.05).

**Matter of Boston G., 157 AD3d 675, 66 NYS3d 628
(2nd Dept 1/10/2018)**

The court did not err in granting the mother's Family Court Act 1061 motion to vacate a previous order of fact-finding, entered on consent but without admission, that she neglected her child. The court properly determined that the mother established "good cause" to warrant vacatur based on "the particular circumstances of this case, including the mother's lack of any prior child protective history, her strict compliance with court-ordered services and treatment, and her commitment to ameliorating the issues that led to the finding of neglect, the mother demonstrated good cause to vacate the finding of neglect." (Family Ct, Kings Co)

**People v Butler, 157 AD3d 727, 69 NYS3d 66
(2nd Dept 1/10/2018)**

The defendant's counsel at the Sex Offender Registration Act (SORA) hearing was not ineffective for failing to argue that for purposes of risk assessment there was insufficient evidence of more than two victims, where the argument would have had little or no chance of success due to an investigator's report that was credited by the court. Nor was counsel ineffective for failing to argue the insufficiency of the evidence of a victim's age, as there was both testimony from the defendant, although relating to acts other than those underlying the current conviction, and the credible hearsay of the investigator's report that established this fact by clear and convincing evidence. (Supreme Ct, Kings Co)

Dissent: "Defense counsel was admittedly unfamiliar with the case upon which he expressly relied at the SORA hearing, *People v Gillotti* (23 NY3d 841 [2014])" The Court of Appeals in *Gillotti* held precisely opposite to defense counsel's characterization of the case. Further, counsel was not sufficiently familiar with the investigator's report about the defendant's own actions, which rendered counsel's argument "patently absurd." Further, counsel did not contest the age factor when the prosecution relied on "an unavailable witness's estimate of an unknown victim's age range"

**Matter of Coleman v New York State Dept. of Corr. & Community Supervision, 157 AD3d 672, __ NYS3d __
(2nd Dept 1/10/2018)**

There is no record support in this Article 78 proceeding for "[t]he Parole Board's findings that there was a reasonable probability that, if released, the petitioner would not remain at liberty without violating the law, and that his release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law" The record

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shows that the petitioner took full responsibility for his criminal actions and expressed deep regret for the damage that his admitted actions cause to the victim, her family, and his own family. Further, the petitioner's exemplary educational record while incarcerated, along with other factors including aiding others, render the Parole Board's decision to deny parole release irrational. (Supreme Ct, Dutchess Co)

**Matter of Royster v Murray, 157 AD3d 701, __ NYS3d __
(2nd Dept 1/10/2018)**

The court erred in determining that the respondent and petitioner had an intimate relationship within the meaning of Family Court Act 812(1)(e) and consequently lacked subject matter jurisdiction to entertain the family offense petition. Respondent was the sister of the petitioner's boyfriend and lived in the same building, but did not reside with the petitioner at any point in time. The fact-finding and disposition is reversed on the law and facts, the petition is denied, and the proceeding is dismissed. (Family Ct, Westchester Co)

**People v Hernandez-Beltre, 2018 NY Slip Op 00307
(2nd Dept 1/17/2018)**

"[A] finding of not responsible by reason of mental disease or defect would have been reasonable" in this case. The defendant's expert's opinion was "more convincing, and entitled to more weight" and "better accounted for the witnesses' testimony regarding their observations of the defendant's increasingly bizarre behavior and onset of mental illness which began to exhibit itself just weeks before the incident, and continued during and after the incident until the defendant was hospitalized" Contrary to the finding below, "the defendant met his burden of proving the affirmative defense of mental disease or defect by the preponderance of evidence." (Supreme Ct, Queens Co)

**People v Metellus, 2018 NY Slip Op 00312
(2nd Dept 1/17/2018)**

The court's dismissal of the first jury panel, upon application of the prosecutor, warrants reversal. "[A]s people were waiting outside the courtroom to reenter, one of the potential jurors approached and hugged the defendant's brother. The two chatted briefly until defense counsel interceded and directed them to stop. The two, however, continued to talk until both defense counsel and one of the prosecutors stopped them." The court should have conducted an inquiry of potential jurors to see what they had seen and whether they could remain impartial. Full

dismissal of the jury panel prevented the defendant from receiving a fair cross-section of the community in his venire.

Since a new trial is required, the issue raised on appeal about the admission of DNA profiles and reports is addressed. Permitting this evidence violated the defendant's right of confrontation. The profiles and reports produced are testimonial because they "were generated in aid of a police investigation of a particular defendant," referred to the defendant by name, and labelled him a "suspect." (Supreme Ct, Kings Co)

**People v Sanabria, 2018 NY Slip Op 00316
(2nd Dept 1/17/2018)**

As courts may not explicitly threaten to sentence defendants to the maximum term of imprisonment should they be convicted after trial, the court's comments here were improper. When the defendant initially rejected the prosecution's plea agreement, the court stated: "[t]hat's fine. ... A case like this I would almost rather have a trial than have a plea bargaining. If this is all true there is no [sentence] short of the maximum that's appropriate that's the problem with this case. If it isn't true then the jury will so decide. That's not up to me." The court also referred more than once to a total maximum of 60 years in prison, though acknowledging once that by statute that would be reduced. Appellate counsel was ineffective by failing to raise the issue that the defendant's subsequent plea of guilty was coerced by the court. (County Ct, Dutchess Co)

**Matter of Skyler G., 157 AD3d 787, 69 NYS3d 106
(2nd Dept 1/17/2018)**

The court erred by failing to properly consider the best interests of the children in relation to a motion to revoke suspended judgment and terminate the mother's parental rights. While the evidence supports a finding that the mother violated the terms of the suspended judgment, particularly relating to a particular parenting class, the court failed to take into consideration her successes in relation to all the other terms and conditions of the suspended judgment in addition to the bond between the mother and children. After the court determined the mother violated the suspended judgment, the mother did complete the parenting class. The order is modified and remitted for a new dispositional hearing to determine the best interests of the children. (Family Ct, Dutchess Co)

**People v Freire, 157 AD3d 963, 67 NYS3d 487
(2nd Dept 1/31/2018)**

"Defense counsel, by taking a position adverse to that of his client on the motion to set aside the verdict pur-

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suant to CPL 330.30, deprived the defendant of effective assistance of counsel” when he indicated that he did not adopt the motion and stated that “I don’t think it’s correct.” No opinion is expressed as to the merits of the defendant’s motion. (Supreme Ct, Queens Co)

**People v McCullum, 2018 NY Slip Op 00570
(2nd Dept 1/31/2018)**

The defendant failed to establish that he had standing to challenge the search of what had been his bedroom prior to what was effectively an eviction; a New York City Marshal executed a “legal possession,” changing the locks on the apartment, leaving all personal property inside. While the “Marshal’s Legal Possession” letter provided to the landlord after the eviction did not establish that possession had been legally taken, “it likewise did not establish that the legal possession had been obtained illegally.” The defendant’s further argument, that he retained a reasonable expectation of privacy in the bedroom and his personal possessions in it under a theory that the landlord became the evicted occupants’ bailee, lacks merit. That what occurred was a “legal possession” and not an eviction “is a distinction without a difference.” Occupants who have been removed or locked out of premises while their belongings remain have no objective expectation of privacy in those premises and no right to exclude other persons from access. “Therefore, the defendant lacked standing to challenge the police entry into and search of his bedroom” following a report of trespassing in the apartment. (Supreme Ct, Kings Co)

**People v Orama, 2018 NY Slip Op 00571
(2nd Dept 1/31/2018)**

Counsel failed to provide meaningful representation by failing to request a lesser-included offense instruction of criminal trespass in this second-degree burglary prosecution during which the defense of mistaken identity was offered. “Although there was sufficient evidence to establish that the defendant intended to commit a crime in the basement” of the complainant’s house, “a reasonable view of the evidence ... supported a finding that the defendant intended to commit” second-degree criminal trespass but not burglary. Upon being discovered, the defendant waved his arms in circles and repeated “hal-lalujah” before fleeing, and the evidence that he stole something from the house was “less than compelling.” Given the facts, the court would have been required to submit the lesser-included offense instruction upon request. Failure to request it “cannot be considered part of a legitimate all-or-nothing strategy.” (Supreme Ct, Richmond Co)

**People v Serrano, 157 AD3d 971, __ NYS3d __
(2nd Dept 1/31/2018)**

While the evidence “was legally sufficient to establish the defendant’s identity as the perpetrator beyond a reasonable doubt,” the guilty verdict was against the weight of the evidence. The only witness that identified the defendant prior to trial failed to do so at trial, admitting to being intoxicated at the time of the incident. The three witnesses who identified the defendant at trial did not identify him at any point prior to the trial, even though they were at the scene when he was apprehended and “they appeared at a police precinct for questioning later that day.” Among other disparities, two of those witnesses offered descriptions of the defendant’s clothing that “varied significantly” from the clothing he wore upon arrest minutes after the incident. (Supreme Ct, Kings Co)

Third Department

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

**People v Coon, 156 AD3d 105, 65 NYS3d 279
(3rd Dept 11/22/2017)**

Where the defendant “served and completed the one-year definite sentence imposed for” DWI, then violated the three-year conditional discharge that followed his incarceration, the court “was not authorized to impose an additional term of imprisonment” for the violation. The DWI conviction requires that a consecutive period of probation or conditional discharge be imposed with any term of incarceration, along with the requirement of installing an ignition interlock device on any vehicle operated by the defendant. Had the violation of that condition occurred while the defendant was serving a split sentence, or a conditional discharge or probation term standing alone, the court’s imposition of an additional term of imprisonment of two to six years and three years of conditional discharge would have been lawful. But the defendant had “served the one-year jail term and, more critically, he served it first.” New York’s sentencing framework does not cover these facts. The added term of imprisonment amounts “to an impermissible second irrevocable sentence for his DWI conviction and would be in excess of the maximum allowable.” (County Ct, Ulster Co)

**People v Rose, 155 AD3d 1322, 65 NYS3d 323
(3rd Dept 11/22/2017)**

The police officer lacked the founded suspicion necessary to stop the defendant, where the defendant was seen

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walking quickly away from the location of a previously stolen vehicle. There is no indication the officer had information that would lead to a reasonable inference that the thief might still be in the area, nor did the officer possess information describing the suspected thief. The officer's approach, with the overhead lights of the marked police vehicle activated while telling the defendant to stop, constituted a level two inquiry under *De Bour*; at most a level one request for information was warranted. Even if the officer's encounter with the defendant was only a level one stop, or the officer had grounds for a level two stop, the "defendant had the constitutional right to be let alone"; by disregarding the command to stop, he did not create "a reasonable suspicion that a crime had been, was being or was about to be committed" that would justify the level three pursuit, forcible stop, and detention that followed. (County Ct, Broome Co)

Matter of Montoya v Davis, 156 AD3d 132, 66 NYS3d 350 (3rd Dept 11/30/2017)

The court erred in granting the father's petition to modify custody and awarding him physical custody because the court improperly relied on the opinion of an expert who failed to remain objective. On review, the record demonstrates that the expert "abdicated her role as a neutral evaluator and, ultimately, became an overly zealous advocate of the father." The "stark contrast" between the recommendations in the evaluator's first report and her updated report were not explained. "In short, given Family Court's wholesale adoption of the forensic evaluator's tainted recommendation, without any perceivable independent consideration given to the multitude of factors that inform a determination as to which custodial arrangement will serve the best interests of the child, we find that Family Court's determination is not supported by a sound and substantial basis in the record."

"[W]e need not reach the issue of whether Family Court improperly conditioned the mother's future visits with the child upon her participation in counseling, we briefly note that such a condition is patently improper." (Family Ct, Columbia Co)

People v Morrison, 156 AD3d 126, 66 NYS3d 682 (3rd Dept 11/30/2017)

Even if it were constitutional for the prosecution to use collateral estoppel in the grand jury, and even if all the elements of collateral estoppel were deemed satisfied, it is inappropriate as used in this case. The prosecution, seeking to indict the defendant for murder after he had been convicted of attempted murder and the victim subse-

quently died, invoked collateral estoppel to dispense with proof that the defendant had shot the victim with the intent to cause death. Allowing this use of the doctrine—dispensing with the need to prove the elements of a felony that carries a potential life sentence—would undermine, if not violate, "fundamental principles of due process and the presumption of innocence." That a defendant might invoke the doctrine to preclude a murder trial following an earlier acquittal of attempted murder is different, as that "implicates and protects constitutional rights—to a jury trial, to present a defense, to due process and to not be placed twice in jeopardy, among others" The use here "is for matters of expediency and economy and lacks a constitutional imperative" The prosecution did not put forth sufficient evidence to satisfy the defendant's statutory right to dismissal of a legally insufficient indictment. (County Ct, Albany Co)

People v Kiah, 156 AD3d 1054, 67 NYS3d 337 (3rd Dept 12/14/2017)

The court erred when it declined to order production of the complaining witness's mental health records for in camera review. The prosecution disclosed that the complainant had received treatment for bipolar disorder and depression. "Without conducting an in camera review, a trial court lacks knowledge of whether the witness's mental health records contain any information relevant and material to the determination of guilt or innocence."

As there is to be a new trial, the court erred in denying the defendant's motion to suppress evidence obtained from a search of his cell phone that was not executed within the ten-day limit imposed by statute. (Supreme Ct, Albany Co)

Matter of Christy T. v Diana T., 156 AD3d 1159, 66 NYS3d 746 (3rd Dept 12/21/2017)

The court erred by dismissing the mother's custody petition upon its finding that she failed to demonstrate a change of circumstances from a prior consent order that awarded custody to the maternal grandmother. Additionally, "[a]s the mother consented to the prior custody order and there was no prior finding therein of extraordinary circumstance, she was not required to demonstrate a change of circumstances in the first instance." As a parent, the mother has a custody claim to her child that is superior to all other persons. The court did not err in determining the grandmother had established extraordinary circumstances, but the record is not developed enough to determine the best interests of the child in relation to custody. The matter is restored and remitted. (Family Ct, Madison Co)

Third Department *continued***People v Saunders, 156 AD3d 1138, 67 NYS3d 351
(3rd Dept 12/21/2017)**

In this Sex Offender Registration Act (SORA) case, the court “improperly assigned 20 points to risk factor 8, addressing defendant’s young age at the time of the commission of the crime.” A maximum of ten points is allowed to be assessed under this factor.

The court further erred in assessing 15 points for a history of drug or alcohol abuse. Social or occasional drug or alcohol use is not sufficient to trigger the addition of points under this risk factor. While the defendant first used alcohol and marijuana at 17 and tested positive for the latter when on probation, nothing indicates “that he has a history of drug or alcohol abuse as contemplated by the SORA risk assessment guidelines” (County Ct, Madison Co)

**People v Sumter, 2018 NY Slip Op 00354
(3rd Dept 1/18/2018)**

The defendant’s prior federal drug conspiracy conviction could not serve as a predicate felony allowing him to be sentenced as a second felony drug offender. His federal conviction of conspiracy to distribute marijuana does not meet the “‘strict equivalency’ standard for convictions rendered in other jurisdictions” This claim is reviewable, though unpreserved, because the illegality is clear from the record. (County Ct, Albany Co)

Fourth Department

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

**People v Barber, 155 AD3d 1543, 64 NYS3d 430
(4th Dept 11/9/2017)**

Where the defendant was charged with second-degree assault on the theory that, in the furtherance of first-degree unlawful imprisonment, he caused physical injury to the complainant by striking her, the court’s response to a jury question improperly contained an additional theory. The jury asked, “‘If the victim suffers injuries in trying to escape, out of credible fear for her own safety, do these injuries, from a legal perspective, amount to assault by the defendant?’” In response, the court repeated the jury charge that stated, “‘If you find that physical injury was caused by the defendant, then it does not matter that the physical injury was caused unintentionally or accidentally rather than with an intention to cause physical injury, or that it resulted from the victim’s

fear or fright.’” This, in effect, said the jury could consider injuries sustained by jumping from the moving vehicle, not by the defendant’s blow.

As to the unlawful imprisonment charge, the court erred in refusing to charge the jury on the lesser included offense of second-degree unlawful imprisonment. The jury could accept the complainant’s testimony that the defendant restrained her in the vehicle, which was corroborated by eye witnesses, but reject the complainant’s assertion that the defendant threatened to kill her. (Supreme Ct, Erie Co)

**People v Drake, 155 AD3d 1584, 64 NYS3d 441
(4th Dept 11/9/2017)**

The defendant could not receive jail time credit on his conviction of fourth-degree criminal possession of a controlled substance as negotiated in the plea agreement because jail time credit cannot be applied to a subsequent sentence when such time has already been applied to time served on a previous sentence. The defendant here was serving a sentence with which the new sentence was to run concurrently. The sentence is vacated and remitted for the court to impose a sentence that comports with the defendant’s legitimate expectations or, alternatively, to afford him the opportunity to withdraw his guilty plea. (Supreme Ct, Erie Co)

**People v Priest, 155 AD3d 1599, 64 NYS3d 445
(4th Dept 11/9/2017)**

The “defendant was still ‘charged’ with a class A felony when he waived indictment and consented to be prosecuted by” a superior court information (SCI) following an appellate reversal and remittal of a conviction in this case. A defendant charged with a class A felony cannot validly waive indictment or consent to be prosecuted by an SCI. The plea is vacated and the matter remitted for further proceedings; again, the prosecution may present the case to the grand jury. (County Ct, Jefferson Co)

**People v Matowski, 155 AD3d 1624, 65 NYS3d 388
(4th Dept 11/17/2017)**

“Counts two and three charging driving while intoxicated, must be dismissed as lesser inclusory counts of count one, charging” first-degree vehicular manslaughter.

The defendant only objected to one prosecutorial comment in summation, *ie* that the defendant had lied to police about his consumption of alcohol, and that constituted fair comment on the evidence. Other errors were unpreserved; “[w]e nevertheless take this opportunity to admonish the prosecutor ‘and remind him that prosecutors have ‘special responsibilities ... to safeguard the

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integrity of criminal proceedings and fairness in the criminal process”” (Supreme Ct, Monroe Co)

**People v Pace, 155 AD3d 1669, 64 NYS3d 825
(4th Dept 11/17/2017)**

The court erroneously denied without a hearing the defendant’s CPL 440.10 motion to vacate the judgment based on ineffective assistance of counsel where defense counsel failed to seek dismissal of the felony charges against the defendant based on violation of the double jeopardy provisions of CPL 40.20. The defendant was charged with three felonies and three misdemeanors based on the same criminal transaction. He pled guilty to three misdemeanor charges at initial arraignment, which the prosecutor learned of just before jury selection; the trial on the felonies then proceeded without objection by defense counsel. The determination as to whether separate prosecutions were permitted could not have been made on direct appeal because the paperwork from the lower court necessary to analyze the elements and acts constituting the charges was not available to include in the record. (County Ct, Herkimer Co)

**People v Smith, 155 AD3d 1661, 65 NYS3d 615
(4th Dept 11/17/2017)**

The defendant’s second-degree burglary conviction must be reversed and his plea vacated because he was not advised of the sentencing consequences of his plea. The plea was not knowing, voluntary, and intelligent where “the record supports defendant’s ... contention that he was not advised that the sentence to which he agreed when pleading guilty was fixed without regard to the outcome of the second violent felony offender hearing” (County Ct, Monroe Co)

**People v Blauvelt, 156 AD3d 1333, 68 NYS3d 784
(4th Dept 12/22/2017)**

Evidence before the grand jury was legally sufficient to establish that the complainant had sustained serious physical injury, but the prosecutor impaired the integrity of the grand jury proceeding by engaging in a pervasive pattern of misconduct. The prosecutor asked his witnesses leading questions, introduced hearsay evidence, asked defense witnesses whether other witnesses were lying, questioned the defendant about the use of illicit drugs and steroids without any apparent good faith basis, and stated his personal opinion on material issues during his instructions to the grand jury. “We remind the People that a prosecutor owes ‘a duty of fair dealing to the accused’ at a grand jury proceeding and, more generally,” must not just

seek convictions but must also “see that justice is done’” The prosecution is granted leave to resubmit the charges to another grand jury. (County Ct, Cayuga Co)

**Matter of Damone H., Jr., 156 AD3d 1437,
65 NYS3d 845 (4th Dept 12/22/2017)**

The court erred by finding that a father had inflicted excessive corporal punishment on his child. The evidence at trial demonstrated, in the first instance, that the child sustained two small bruises on his head as a result of roughhousing with his siblings. In the second instance, the child maintained he was struck by the father for misbehaving at school but the father said that when the father was summoned to the school by the child’s teachers, the father had to physically restrain the child in the classroom and accidentally caught the child in the face with his hand, leaving red marks. The petitioner failed to show intentional harm or a pattern of excessive corporal punishment; it did not meet its burden of showing the child was in imminent danger. (Family Ct, Erie Co)

**People v Givans, 156 AD3d 1470, 65 NYS3d 889
(4th Dept 12/22/2017)**

The court erred by summarily denying the defendant’s request for a *Darden* hearing when the prosecutor failed to establish that an exception to the *Darden* rule was applicable. There was “insufficient evidence to establish probable cause supporting a search warrant without the statements of [the] confidential informant,” requiring the prosecution to make that informant available for in-camera questioning. While the prosecutor may establish the existence of an informant through extrinsic evidence when the informant is unavailable, an unsworn letter from a California drug treatment facility purporting that the informant required uninterrupted care was insufficient to demonstrate that he was legitimately unavailable. (County Ct, Jefferson Co)

**People v Hall, 156 AD3d 1475, 68 NYS3d 241
(4th Dept 12/22/2017)**

The judgment is reversed and a new trial granted because the court failed to make findings on the record showing a need for the defendant to wear a stun belt during trial. The prosecutor contends that the Court of Appeals decision in *People v Buchanan* (13 NY3d 1, [2009]) “should not be applied retroactively to allow a collateral attack on the judgment.” But although the defendant was convicted before *Buchanan*, this appeal is decided in accordance with the law as it exists now. (County Ct, Steuben Co)

**People v Jiles, 158 AD3d 75, __NYS3d__
(4th Dept 12/22/2017)**

Fourth Department *continued*

Acquisition of historical cell site information was not a search requiring a warrant under the state or federal constitution. The “defendant’s use of the phone constituted a voluntary disclosure of his general location to his service provider, and a person does not have a reasonable expectation of privacy in information voluntarily disclosed to third parties” The instant case is distinguishable from *United States v Jones* (565 US 400 [2012]) which involved direct surveillance of the defendant using a GPS device, and *Riley v California* (134 S Ct 2473 [2014]) where investigators inspected the contents of the defendant’s phone, not location information. “[C]onsistent with the determination of the Court of Appeals with respect to roughly analogous telephone billing records, ... there is ‘no sufficient reason’ to afford the cell site location information at issue here greater protection under the state constitution than it is afforded under the federal constitution” The conviction is affirmed. (County Ct, Monroe Co)

**People v Pottinger, 156 AD3d 1379, 67 NYS3d 746
(4th Dept 12/22/2017)**

The defendant made factual allegations requiring a hearing where his CPL 440.10 motion, based on ineffective assistance of counsel and actual innocence, was supported by a police report confirming that interviewed alibi witnesses supported the defendant’s alibi. The defendant also made a prima facie showing of actual innocence by submitting “competent evidence establishing an alibi through, inter alia, witnesses who, although identified before trial in a police report attached to the People’s 710.30 notice, did not testify at trial.” The judgment is reversed. (County Ct, Monroe Co)

**People v Solivan, 156 AD3d 1434, 68 NYS3d 253
(4th Dept 12/22/2017)**

The court erroneously refused to suppress physical evidence recovered from the defendant’s person and his vehicle after the officer observed the defendant sitting in a vehicle lacking valid inspection. Although the officer saw a kitchen knife on the floorboard of the car, once the defendant was outside the vehicle, the officer lacked reasonable suspicion that the defendant was armed or posed a threat. Even assuming that a protective frisk was justified, it is limited to a pat down to discover concealed weapons. There is no evidence that the officer believed the defendant’s pocket contained a weapon. The officer’s assertion that “he searched ‘everybody’ and ‘anybody’ that was going to be placed inside his vehicle,” does not justify the pocket search as no legitimate reason for placing the defendant in the patrol car was shown. In addition, the prosecutor did not establish the existence of a

departmental policy on inventory searches and that the officer’s conduct comported to such policy. The indictment is dismissed since all supporting evidence is suppressed. (Supreme Ct, Monroe Co) ⚡

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law enforcement to record phone conversations and text messages. The American Civil Liberties Union (ACLU) [website](#), noted in the January-April 2015 issue of the *REPORT*, states that “[I]aw enforcement agencies all over the country possess Stingrays, though their use is often shrouded in secrecy.” The ACLU has published a [map which tracks the use of StingRay](#) devices by state. Updated in March 2018, the map identifies “73 agencies in 25 states and the District of Columbia that own stingrays,” but admit that the map “dramatically underrepresents” the actual use of these devices.

In her late 2017 article, “[StingRay Technology, the Exclusionary Rule, and the Future of Privacy: A Cautionary Tale](#),” Indiana University School of Law Professor Shawn Marie Boyne cautioned readers: “Although both the FBI and the Department of Homeland Security currently require their employees to obtain a search warrant before using the StingRay technology, in many states, law enforcement agencies use the technology without a warrant.” Earlier in 2017, at a NYSDA CLE training, Jerry Grant and Anne Burger conducted an interactive presentation on cross examining cell phone experts. While focused mainly on the popular data extraction and analysis program Cellebrite, the presenters also suggested lawyers keep in mind that law enforcement officials often fail to disclose the use of cell site simulators like StingRays.

In November, Kings County Supreme Court Judge Martin P. Murphy ruled that the use of a cell site simulator without a warrant is unconstitutional. The decision, [People v Gordon](#) (2017 NY Slip Op 27364 [Supreme Ct, Kings Co 11/3/2017]), specifically noted that although pen registers and trap and trace warrants are authorized under CPL article 705, the statute “does not authorize the gathering of location information using a cell phone’s global positioning system (GPS), nor does it authorize the gathering of additional information, that might include the content of a phone’s calls or text messages by the use of a pen register and/or trap and trace order.” And it is therefore “improper under New York Law to authorize the obtaining of any information from a suspect’s phone other than the phone numbers dialed or otherwise transmitted in outgoing and incoming calls and/or an originating phone number.” The use of a cell site simulator should be considered an intrusion on an individual’s reasonable expectation of privacy which requires a warrant supported by probable cause.

Lawyers with these or other issues arising from evidence related to cell phones are invited to contact the Backup Center. ⚡

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