So Much to Learn, Learning from the Best: NYSDA’s Annual Meeting and Conference 2019

A record number of attorneys attended the continuing legal education (CLE) program at NYSDA’s 52nd Annual Meeting and Conference to learn about the context and practical effects of major legislative changes in the past two years, particularly pretrial discovery, raising the age of criminal responsibility, and bail reform. Among the presenters were John Schoeffel and Peter Mitchell of The Legal Aid Society, each of whom also received a 2019 Service of Justice Award. NYSDA lauded both for, among other things, their generous sharing of their “expertise with NYSDA and the public defense community through exceptional training presentations, reference materials, and practice resources.”

Claudia Schultz of the Legal Aid Bureau of Buffalo, Inc., received NYSDA’s 2019 Wilfred R. O’Connor Award; she was lauded for, in part, her career-long work in training and inspiring lawyers “to provide broad-based, high-quality representation.” On a similar theme, Rebecca Town, also of Buffalo Legal Aid, was recognized for work including not only training and mentoring of new attorneys but also being “at the forefront of efforts to educate the marginalized populations of the City of Buffalo on their rights and obligations in dealing with police.” She accepted the 2019 Kevin M. Andersen Award, presented by the Genesee County Public Defender Office. Read more about the work of these expert lawyers and trainers in the press release.

Legislative developments, including those discussed below and in the last issue of the REPORT, could have filled the entire conference program, but there was much more. Training on “crimmigration” law preceded an ethics session on issues arising in the representation of clients who are not US citizens; these back-to-back presentations recognized the escalating importance of immigration issues in the client community. Lawyers’ roles in dealing with other issues in clients’ lives that affect their legal matters were also addressed, in “Working with Social Workers, Mitigation Specialists, and Case Managers.” Appellate updates, a staple of every annual conference, appeared on the program as well. NYSDA extends appreciation to all the excellent presenters and to all who attended this year’s record-breaking event.

Legislative Changes Offer Opportunity and Challenges

In addition to focusing a major part of its Annual Conference CLE program on legislative changes as noted above, NYSDA has been working in other ways to help public defense lawyers adjust to a host of substantive and procedural changes. Examples include cosponsoring a Sept. 13, 2019, CLE training in Syracuse on the new discovery law; noting other...
relevant CLEs on the NY Statewide Public Defense Training Calendar; and assisting lawyers who request direct defender services on specific aspects of the new laws affecting their work and their clients. Legal staff responding to such requests refer not only to materials from NYSFDA trainings but other materials in its clearinghouse and those identified using its online and in-house research capacity.

NYSFDA appreciates the collaborative work of other defense entities in efforts to update defense lawyers statewide on legal changes. For example, The Legal Aid Society has made its paper, “CPL 245 “Discovery” – Issues and Advocacy,” available to Chief Defenders. Public defense lawyers seeking these materials can contact the Backup Center.

Other sources of information include the “Annual Review of New Criminal Justice Legislation” by Barry Kamins in the Oct. 4, 2019 New York Law Journal. That column lists a number of laws passed and signed, including the creation of several new crimes, expansion of others, and changes in procedures, including a tweak to Raise the Age legislation [juvenile offenders and adolescent offenders can be immediately removed to Family Court at first appearance before an accessible magistrate, with the consent of the district attorney. L 2019, ch 240].

Some bills passed at the end of session had not yet been signed when this issue of the REPORT was finalized. These include the Preserving Family Bonds Act (S 4203-A/A 2199-A); Child Abuse State Central Register Reform Act (S 6427/A 8060-A); the qualified agencies bill allowing defender access to criminal history reports (S 2198/A7644); and the Charitable Bail Fund Reform Act (S494/A 6980). As the REPORT went to press, the Governor signed the Wrongful Conviction Prevention Act (L 2019, ch 446), which authorizes payment to assigned appellate counsel for post-conviction work.

NYSFDA is working collaboratively with many others to encourage the signing of these bills, and to counter some negative myths being circulated about the bail and discovery reforms before they even take effect. For more information, contact Executive Director Susan C. Bryant at the Backup Center.

Below is a description of some other legislation passed and signed this year.

CPLR Amended as to Judicial Notice of Internet Materials

Former Civil Practice Law and Rules (CPLR) 4511(c) has been repealed and similar text moved to a new CPLR 4532-b. The changes are considered technical amendments. The statute deals with admission into evidence of an “image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool,” requiring that such evidence include the date it was created and be subject to a challenge that it does not fairly and accurately portray what it is being offered to prove. Notice of intent to offer the evidence must be given at least 30 days before the trial or hearing, and an objection may be raised no later than 10 days before such proceeding. Absent objection, judicial notice is to be taken and the evidence admitted.

This legislation is relevant to public defense representation in both family and criminal matters, as CPL 60.10 provides that unless otherwise provided, “the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal proceedings.”

Statutory Changes Relating to Domestic Violence

The Domestic Violence Survivors Justice Act (DVSJA) resentencing provisions became effective on Aug. 12,
Passing of Former NYSADA Executive Director Jonathan E. Gradess

Jonathan E. Gradess, NYSADA’s first and long-time Executive Director, died on Oct. 2, 2019. Jonathan was known for his indefatigable advocacy on behalf of people ensnared in unjust systems. A New York State Assembly resolution, sponsored by Assemblymember Joseph R. Lentol (who wrote an affecting testimonial in the New York Law Journal after Jonathan’s death) and others, commended Jonathan on the occasion of his retirement two years ago; it noted some of his many achievements. “[H]e has served all New Yorkers as an advocate and public policy leader on public defense and criminal justice issues, including the establishment of the Capital Defender Office, successful opposition to the death penalty, groundbreaking establishment of the Office of Indigent Legal Services in 2010, and the landmark state funding of public defense quality improvements in 2017.”

For decades leading up to 2017, Jonathan demanded that the State take responsibility for providing high-quality public defense representation. He continued that fight long after most others would have given up. Assemblymember Patricia Fahy, who was the lead Assembly sponsor of the 2017 historic legislation, said this when she heard of Jonathan’s death: “He was an unrelenting, passionate advocate. He galvanized support in all corners of the state by ensuring anyone who didn’t understand public defense or our bill came to realize—and appreciate—its importance. Now it’s up to us all to protect and expand upon his tremendous life’s work.”

Jonathan himself, reflecting on that work, once wrote that “persistence tied to moral principle is virtually impossible to defeat. Guarding against the corrosion of principle is the hard task, persistence the exhausting one.” NYSADA and others strive to follow this guidance in continuing Jonathan’s work.

He sought to move practitioners to the cutting edge of public defense. After listening to clients, and to those with expertise in representing people whose circumstances create particular legal and life challenges, he brought into being a number of initiatives at NYSADA. One, designed to blunt the harm being done by harsh federal laws to people who were not U.S. citizens, grew into the now-independent Immigrant Defense Project. Another, NYSADA’s ongoing Veterans Defense Program, is helping lawyers across New York State effectively defend those who defended their country.

Jonathan had no patience with lawyers or entities that failed to put the good of clients first, or that paternalistically thought lawyers know best what clients need. In 1987, he established NYSADA’s Basic Trial Skills Program (BTSP), which is rooted in client-centered representation and teaches participants to truly listen to their clients. This renowned program has trained hundreds of defenders over the past thirty years, and many graduates apply BTSP principles in their practices across the state.

To ensure that clients have a voice in discussions about justice reform and systemic needs, Jonathan and the NYSADA Board of Directors established the Client Advisory Board, the first such entity in the country. Jonathan enlisted that Advisory Board in creation of the Client-Centered Representation Standards.

As to another client-centered move, opening NYSADA’s membership to clients, Jonathan credited his mentor, the late Wilfred R. (Bill) O’Connor, NYSADA’s first African-American Board President. Jonathan once wrote that “[Bill] believed in making a difference one life at a time—through mercy, justice, and compassion.” When Jonathan retired, NYSADA presented him with its premier award, which became thereafter the Jonathan E. Gradess Service of Justice Award.

The plaque for that award always includes the words “Justice – Mercy – Compassion.” Jonathan used these words to praise those he esteemed; he also embodied those tenets, in his own fervent and unique way. As Derrell Capes, a former BTSP communications faculty member said on word of Jonathan’s death, it was a privilege to work “with this man who could turn the notion of compassion into a Martial Art ….”
2019, as announced in the May 17 edition of News Picks from NYSDA Staff. Lawyers with clients who are domestic violence survivors and have upcoming sentencing proceedings—whether resentencing or initial sentencing—may refer to charts created by Alan Rosenthal to help determine the parameters of what their client faces. A link to the three charts was published in the October 18 News Picks from NYSDA Staff. NYSDA is working with defenders and advocates on implementation of the DVSJA. Attorneys who represented clients who may be eligible for resentencing, or who currently represent clients who may qualify for an alternative sentence under Penal Law 60.12, may contact the Backup Center for assistance.

The definition for “victim of domestic violence” in Social Services Law 459-a(1) has been amended, effective Oct. 7, 2019. The list of offenses qualifying as acts of domestic violence when committed by a family or household member and resulting in physical or emotional injury (or a substantial likelihood of such harm) will now include identity theft, grand larceny, and coercion. L 2019, ch 153.

An amendment to Exec Law 646 allows a person who is the victim of a family offense (CPL 530.11 or Family Court Act 8012) to, upon alleging that making a complaint in the local jurisdiction where the incident occurred would create a hardship, make a complaint “to any local law enforcement agency in the state ….” The agency receiving the complaint is to take a police report, prepare a domestic violence incident report, provide the complainant with a copy, and promptly forward a copy to the agency with jurisdiction over the reported location. This measure, L 2019, ch 152, took effect Oct. 7, 2019.

An “address confidentiality program” designed to protect domestic violence victims was expanded to cover victims of human trafficking, sexual offenses, and stalking. L 2019, ch 141. The program, under Exec Law 108, authorizes use of addresses designated by the Secretary of State for such victims and their minor children instead of their actual addresses. The Department of State then forwards legal process and mail to program participants at a confidential address.

The statute of limitations for an action to recover damages for injury arising from domestic violence, as defined in Social Services Law 459-a, was extended from one to two years by amending CPLR 215. L 2019, ch 245. The change was effective Sept. 4, 2019.

**Presumption Against Child Custody or Unsupervised Visits for Some Felony Sex Offenders**

Chapter 182 of the Laws of 2019 modifies Domestic Relations Law 240 to include a rebuttable presumption that it is not in the best interests of the child to have custody or unsupervised visits with a person who has com-

**Right to Effective Assistance of Counsel in Family Court Recognized**

The Second Department, in Matter of Ricardo T. (172 AD3d 732 [2nd Dept 5/1/2019]; summary on p. 24), correctly recognized that Family Court litigants involved in cases under Family Court Act 262 are entitled to the same protection of effective assistance of counsel afforded to defendants in criminal proceedings. The right to counsel in cases that involve the loss of parental rights, as well as the possibility of incarceration, is “too fundamental an interest and right … to be relinquished to the State without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer. To deny legal assistance under such circumstances would … constitute a violation of [the parent’s] due process rights and … a denial of equal protection of laws as well.” In re Ella B., 30 N.Y2d 352 (1972). The Court of Appeals Ella B. case, followed by Family Court Act 261 and 262, cemented a parent’s right in New York State to the assistance of counsel in a variety of cases involving state intervention, loss of custody, and the risk of incarceration. Despite these protected rights, there are some who believe that the liberty interests at stake in family court are not as important as those in criminal court. NYSDA welcomes the ruling in Ricardo T.

**Family Court Public Defense Convening in Albany**

NYSDA sponsored a Family Court Public Defense Convening in Albany on Oct. 3, 2019. The Convening was attended by Family Court defenders and Chief Defenders from both public defense offices and assigned counsel plans from around the state. The Convening, which was made possible by a grant from the New York Bar Foundation, gave Family Court attorneys from 30 counties a rare opportunity to have an open discussion among colleagues about the state of mandated adult representation in New York. It also provided an opportunity to sit down with NYSDA Executive Director Susan Bryant, and Family Court Attorney Kimberly Bode, to explain what additional resources NYSDA’s Backup Center can provide to assist defenders in providing outstanding representation to their clients.
In the coming weeks, NYSDA will be distributing a survey to both defenders who were able to attend the Convening and those who were not, in hopes of getting an even better understanding of the needs of family defenders. NYSDA will prepare a report of our findings and take steps to meet the needs identified by providers and to help improve the state of family defense in New York.

Family Court defenders are always welcome to contact Kim Bode with legal questions or concerns: email kbode@nysda.org or phone (518) 465-3524.

Family Defense Skills Training Held

Among the family defense services that the Backup Center provides is CLE training. On Oct. 11, 2019, NYSDA held its fourth installment of the ongoing Family Court Article 10: Intensive Skills Module program in Canandaigua, NY. This event, which was co-sponsored by the Ontario County Public Defender’s Office, covered the tumultuous topics of permanency and dispositional hearings, as well as termination of parental rights and judicial surrenders. NYSDA greatly appreciates the generosity of the presenters in sharing their expertise: Kate Woods, Deputy Director at Legal Assistance of Western NY and Adele Fine, Family Court Bureau Chief at Monroe County Public Defender’s Office.

If you have an idea for a family defense training topic, or your office would like to co-sponsor a CLE program, please contact Family Court Staff Attorney, Kim Bode, above.

Mental Health and Justice System Issues Intersect

Clients with mental illness face particular perils in encounters with people working in law enforcement or child protective services, jails, criminal and family courts, prisons, and community supervision. Psychiatric diagnoses can play a role in many cases, at many stages. Discussions about the need for systemic change in a variety of contexts can encompass mental health treatment and other concerns.

Lawyers face particular challenges in maintaining client-attorney relationships and providing client-centered representation when mental illness is or may be a factor in clients’ lives. NYSDA works to help lawyers learn about these challenges and find the resources needed to meet them.

Decisions Touch on Mental Health Issues

A number of the appellate decisions summarized in this issue reflect the intersection of mental illness and court cases, including the following.

- **Matter of State of NY v Jerome A.**, 172 AD3d 446 (1st Dept 5/7/2019) (p. 15). A Mental Hygiene Law article 10 petition was reinstated in a decision holding, contrary to the Second Department and consistent with the Fourth Department, that the diagnosis of unspecified paraphilic disorder is generally accepted in the psychiatric and psychological communities.

- **Matter of Giovanni H.B.**, 172 AD3d 489 (1st Dept 5/9/2019) (p. 16). The special needs of a child with autism spectrum disorder, among other factors, overcomes in this case the presumption that parental visitation is in the child’s best interests.

- **People v Pelige**, 172 AD3d 1407 (2nd Dept 5/29/2019) (p. 29). Lack of information at the plea and sentencing about the defendant’s psychiatric history and current psychological condition, treatment, and prognosis were among the factors for an appellate finding that the court below did not have sufficient information to exercise its sentencing discretion.

- **Matter of Jamie R.**, 174 AD3d 623 (2nd Dept 7/10/2019) (p. 36). A Supreme Court order denying a CPL 330.20 application for continued retention of the respondent, who had been found not guilty by reason of mental disease or defect, at a psychiatric center was reversed because an attending psychiatrist’s uncontroverted testimony established that the respondent was not prepared to function in the community in a less-supervised environment and the evidence showed he lacked insight into his mental illness and the need for further treatment.
• **People v Bakayoko**, 174 AD3d 730 (2nd Dept 7/17/2019) (p. 37). Failure to consider documented mental health issues was among the factors used to find the record insufficient to demonstrate that the defendant’s waiver of appeal was valid; his sentences were then reduced.

• **Joan HH. v Maria II.**, 174 AD3d 1189 (3rd Dept 7/18/2019) (p. 49). Where a stipulation as to custody included placing the mother on probation for one year, but that option was no longer viable and the parties disagreed on how to address mental health and drug issues, the court below erred in issuing a “resettlement order” as a consent order and the matter was remitted.

• **People v Adamo**, 174 AD3d 1228 (3rd Dept 7/25/2019) (p. 50). A hearing should have been held on whether to vacate the conviction where the defendant submitted evidence that mental health issues existed at the time of the offense and the time of his plea and that defense counsel said there was “absolutely no defense” despite knowledge of those issues.

The following decision that will appear in a future issue of the *REPORT* also addresses questions about mental health.

• **People v Johnson**, 2019 NY Slip Op 06444 (1st Dept 9/3/2019). Cross examination of a defense expert concerning the defendant’s ability to cooperate with counsel was properly permitted to refute the claim about delusions that was at the heart of a proffered insanity defense. The defendant’s claim that he was entitled to jury instructions on the insanity defense going beyond the pattern instructions was also rejected.

**Outcry Arises Over Targeting of People with Mental Illness in Debate About Mass Violence**

Media stories connecting mental illness and mass shooting incidents have heightened concerns about how the justice system acts toward people with mental illness.

Recent op-eds of possible interest include: “**Mental illness doesn’t trigger carnage**” by Mental Health Association of New York CEO Glenn Liebman, in the Albany *Times Union* and “**Don’t Scapegoat, Institutionalize People Like Me After Shootings**” by Harvey Rosenthal, CEO of New York Association of Psychiatric Rehabilitation Services, in *USA Today*.

**It is Not Just Clients Who Face Mental Health Issues**

People suspected or convicted of crimes, and people struggling with custody and other parental rights issues are not the only ones in the system who may have mental illness. Lawyers must also be aware of their own mental health needs. Some may be directly related to attorneys’ practice.

At the Family Court Public Defense Convening described above, NYSDA Senior Staff Attorney Stephanie Batcheller led a presentation and discussion on a “Trauma Informed Approach to Representing Clients,” needed to “enhance our client-centered representation and protect ourselves, our colleagues and the system from the escalating negative impact of unrecognized and unaddressed trauma.” Lawyers may experience secondary and vicarious trauma and compassion fatigue; it is crucial recognize this to prevent or treat resulting mental illness.

Other participants in the system may experience trauma as well; situations that re-traumatizes clients can also harm those tasked with maintaining the system. A recent *Detroit News* item noted studies showing a mental health crisis among Michigan prison staffers. And *Newsday* reports that Nassau County police and corrections officers will be getting increased access to mental health services; new county legislation provides for enhanced assistance including “confidential peer support, training, and other resources, including a smartphone app and website that provides information for officers on the signs of depression and suicidal behavior,” the *Newsday* article (subscription required) noted.

*Defender News* continued —

Red Flag Law Allows Denying Individuals Otherwise Lawful Weapons

As discussed in the Kamins review of legislation mentioned above, a new law—CPLR article 63-A—provides a way to ask a court to issue an “extreme risk protection order” that bars possession and use of weapons by an individual upon a finding of probable cause to believe that person is likely to engage in conduct that would result in serious harm to themselves or others, as set out in the Mental Hygiene Law. Respondents must be informed that they may seek the advice of an attorney, but no right to counsel is provided. L 2019, ch 19.

In addition to the lack of any right to counsel for respondents, this civil statute raises other concerns, including some that may affect public defense cases. Legal staff at NYSDA are examining the statute, and concerns about it were aired at the last meeting of the New York State Bar Association’s Committee on Mandated Representation.

The statutory limitations on the use of extreme risk findings in other proceedings are vague. Could the findings, or at least information that a client is the subject of an extreme risk order, be used against the client in pretrial release proceedings or custody and other family law proceedings? Is the existence of an extreme risk order against a complainant or witness subject to discovery under the new law? Are there any limits to the criminal immunity that the statute provides if a respondent voluntarily surrenders weapons? And if a search pursuant to an extreme risk order results in the discovery of alleged contraband and subsequent charges, what challenges might exist to the legality of the search, including possible challenges to the statute?

Other potential issues that may develop, with possible ramifications for public defense cases, include how the statute does or does not interact with the Mental Hygiene Law.

Lawyers who encounter Red Flag Law issues are encouraged to contact the Backup Center.

Court of Appeals Reverses on Brady Violation

Discussion about discovery issues in 2019 has focused on the new statute discussed above (p. 1); the constitutional requirement that prosecutors turn over exculpatory evidence should not, however, fall into the background. A recent Court of Appeals decision stands as a reminder of the continuing importance of Brady v Maryland and its New York application. In People v Rong He, 2019 NY Slip Op 07477 (10/17/2019), the Court quoted Brady’s holding that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution’ … [emphasis added].” The decision then repeated the succinct requirements of a successful Brady claim on appeal: “that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material” (People v Giuca, 33 NY3d 462 473 [2019] …).” The Court also noted that the New York standard for materiality is less demanding than the federal test.

The prosecution in Rong He had objected to a defense request for the contact information of certain witnesses, offering only to provide to the witnesses defense counsel’s contact information. Because this did not provide adequate means for the defense to investigate the witnesses’ statements about the alleged offense, and because the prosecution did not make any showing that the defendant presented a risk to the witnesses in question (who arguably had identified a different individual as the assailant), there was “no apparent reason” for insulating the witnesses’ contact information from disclosure.

So, while as of January first the defense is entitled under the new discovery law to automatic discovery (subject to prosecution efforts, on notice to the defense, of certain information), the Rong He decision is a reminder that making comprehensive Brady demands can ensure preservation of constitutional claims for appeal. It may be a good idea to cite Brady v Maryland (373 US 83 [1963]) and People v Vilardi (76 NY2d 67 [1990]), as well as the relevant CPL article 245 provisions—245.20(1)(k), (l). Also keep in mind that the new 245.35(3) gives the court discretion to order the prosecution to provide an additional certificate of compliance related to 245.20(1)(k).

Continuing Issues with Unfair Fines and Fees

The online publication The Appeal recently posted on Oct. 28, 2019, a lengthy article, about NY judges jailing people who can’t afford fines imposed on them. It cited the April report by the Fund for Modern Courts about numerous violations of the constitutional bar on locking up people who cannot afford to pay imposed fines. That publication, along with other fines and fees issues, was noted in the February-April issue of the REPORT. The article in The Appeal indicated that the New York State Magistrates Association disputes the Fund for Modern Courts’ conclusions; the New York Law Journal had noted the magistrates’ response.

Discussing one person’s experience, The Appeal said that at one point her lawyer sought to convert to a civil judgment the amount she owed, which “would have meant her debt would still show up on credit reports, but jail would be off the table.” The court instead scheduled an ability-to-pay hearing; transportation to that hearing would have cost more than the monthly payment on the debt.
Advising and Assisting Clients with Court-imposed Financial Obligations

The anecdote above is but one example of the difficulties of advising and advocating for clients with regard to financial consequences of their cases. Legal staff at the Backup Center periodically receive requests for information from public defense lawyers about the intricacies and legality of efforts to collect fines and fees. For those with clients who are prison-bound, one reference is Department of Corrections and Supervision Directive 2788, Collection and Repayment of Inmate Advances and Obligations. And clients and lawyers concerned with court-imposed obligations made in the past have to know about CPL 420.10(3), which allows imprisonment for failure to pay court-imposed costs including restitution: “Such provision may be added at the time sentence is pronounced or at any later date while the fine, restitution or reparation or any part thereof remains unpaid ....” [emphasis added].

These are just some examples of the many laws and issues defense lawyers need to know. Other examples include subdivision 5 of CPL 420.10 regarding requests for resentencing when a client is unable to pay court imposed obligations and increasingly-available information about fines and fees. See eg The Steep Costs of Criminal Justice Fees and Fines from the Brennan Center and Thousands of New Yorkers Face Arrest Each Year for Not Paying Fines and Fees, Report Finds from The Appeal, noted above. Lawyers with questions about financial obligations facing their clients are encouraged to contact the Backup Center.

John Turi Steps into NYSDA Presidency, Ed Nowak Steps Down After 29 Years

Edward J. Nowak’s resignation as President of NYSDA’s Board of Directors, a position he held for 29 years, was announced at the Annual Meeting and Conference. He received an outpouring of appreciation for his service as President and the 10 years he served on the Board prior to that. Ed worked closely with the late Jonathan E. Gradess and greatly assisted his successors as NYSDA Executive Director. He also, in his 29 years as Monroe County Public Defender, modeled ways to provide client-centered representation and worked to dismantle barriers to best practices at the state and local levels.

Succeeding Nowak as NYSDA’s President is Rensselaer County Public Defender John Turi, who has been on the Board since 2015. NYSDA expresses its deep thanks to John for his willingness to take on this role.

Staff Comings and Goings

Executive Director Susan C. Bryant has announced a number of staff changes at the Backup Center in Albany, New faces include Megan (Meegan) O’Toole, Training Manager and Operations Specialist; Rebecca Murphy, Legal Research Librarian; and Roy M. Diehl, Deputy Director of the Veterans Defense Program (VDP). In addition, Juan Sosa has joined the Long Island VDP office as a Case Manager.

Megan is working with the NYSDA staff attorneys responsible for the criminal and family court training programs, and is helping to improve and streamline training planning, outreach, and other processes. Among the previous positions in her nearly 14 years of experience working in the association realm was that of Associate Director, Member Outreach and Development, at the New York State Bar Association.

Rebecca worked for the past 16 years at the law library at Albany Law School, and previously worked at Whiteman Osterman & Hanna LLP. She provides legal research services to NYSDA's legal staff, manages the extensive print and electronic resources that make up our Clearinghouse, and helps with the website and electronic publications. She has her work cut out for her, as NYSDA has not had the services of a librarian since the untimely death of Ken Strutin in late 2018.

Roy, a Lieutenant Colonel, US Army (Retired), will be based at the Backup Center in Albany. This will upgrade VDP’s ability to provide statewide its services to improve the representation of military veterans and active personnel who become involved in the criminal or family justice systems. VDP has an office in Batavia as well as the one on Long Island. Roy takes the place of Art Cody.

Juan provides direct support to attorneys, staff and veteran clients. He holds a Biology degree from Mercy College. In 1993 Juan joined the Army Reserves as a Motor Transport Operator and was deployed to Iraq in 2002 and 2006. Juan has witnessed the struggles of veterans and is committed to making a difference in the lives of those he helps. Juan is currently completing 20 years as an Active Army Reservist.

After many years of stellar service at NYSDA, Al O’Connor has left his position as Litigation Counsel to bring his many legal, policy, and training skills to Brooklyn Defender Services. NYSDA wishes these former colleagues the best.

Death of Client Advisory Board Member Helga Schroeter

Helga A. Schroeter, a member of NYSDA’s Client Advisory Board, died on Aug. 20, 2019. She had held the posts of Judicial Chair of the League of Women Voters of Schenectady County and Judicial Specialist for the League of Women Voters of New York State, and joined the Client Advisory Board as NYSDA Liaison to the State League. That was in 2013, the year after she retired from The Fund for Modern Courts, where she was a court monitor and lobbyist. Her obituary appears online. As a League col-
Conferences & Seminars

| Sponsor: New York State Bar Association Criminal Justice Section and Committee on Continuing Legal Education |
| Theme: Being Heard at Hearings: Local Criminal Court Practice |
| Date: November 15, 2019 |
| Place: Utica, NY |
| Contact: tel (518) 463-3200; email ssmith@nysba.org or bdonlon@nysba.org; web http://www.nysba.org/store/events/registration.aspx?event=0GE7U |

| Sponsor: The Legal Aid Society |
| Theme: The Criminal Justice Reforms of 2019 |
| Date: November 16, 2019 |
| Place: Brooklyn, NY |
| Contact: email smainor@legal-aid.org; web: https://www.eventbrite.com/e/the-criminal-justice-reforms-of-2019-a-one-day-training-tickets-71838243119 |

| Sponsor: New York State Association of Criminal Defense Lawyers |
| Theme: Weapons for the Firefight 2019: The Trial – The Space Between |
| Date: December 6, 2019 |
| Place: New York, NY |
| Contact: tel (518) 443-2000; email jvanort@nysacdl.org; web https://calendar.google.com/calendar/event?eid=MzdyNDJmaDy30YxxMz49cmU4bnVhVzJn0aTEqOGRmNzJlJnRwY2VvbHVbmQyazRtc2VtZzBAZw&ctz=America/New_York |

| Sponsor: New York State Association of Criminal Defense Lawyers, Monroe County Public Defender’s Office, and Legal Aid Bureau of Buffalo |
| Theme: New Bail Laws |
| Date: December 6, 2019 |
| Place: Buffalo, NY |

| Contact: tel (518) 443-2000; email jvanort@nysacdl.org; web https://nysacdl.site-ym.com/events/EventDetails.aspx?id=1285691&group= |

| Sponsor: National Legal Aid and Defender Association |
| Theme: 2020 Appellate Defender Training |
| Dates: January 16-19, 2020 |
| Place: New Orleans, LA |
| Contact: tel (202) 452-0620; fax (202) 872-1031; web http://www.nlada.org/2020ADT |

| Sponsor: National Association of Criminal Defense Lawyers |
| Theme: 2020 Advanced Criminal Law Seminar |
| Dates: January 19-22, 2020 |
| Place: Aspen, CO |
| Contact: https://www.nacdl.org/Event/20ASPEN |

| Sponsor: New York State Association of Criminal Defense Lawyers, Monroe County Public Defender’s Office, and Legal Aid Bureau of Buffalo |
| Theme: New Bail Laws |
| Date: December 6, 2019 |
| Place: Buffalo, NY |

| Contact: tel (518) 465-3524; email training@nysda.org; web https://www.nysda.org |

| Sponsor: National Association for Public Defense |
| Theme: Women in Public Defense: Have Gender Bias and the Glass Ceiling Been Shattered in the #MeToo Era? |
| Date: November 26, 2019 |
| Contact: https://www.publicdefenders.us/ev_calendar_day.asp?date=11/26/2019&eventid=162 |

For more conferences and seminars, see the NY STATEWIDE PUBLIC DEFENSE TRAINING CALENDAR on NYSDA’s website at: https://www.nysda.org/page/NYStatewideTraining

NYSDA is Hiring! See details on the Jobs webpage.

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Concurring, Justice Thomas addresses at length the issue of stare decisis, noting, inter alia, that the Court’s historical arguments must overcome numerous major decisions of the Court spanning 170 years.

Justice Ginsburg and Justice Gorsuch dissent in separate opinions, with Justice Gorsuch asserting that “[a] free society does not allow its government to try the same individual for the same crime until it’s happy with the result.”

**Gund y United States, __ US __, 139 SCt 2116 (6/20/2019)**

The nondelegation doctrine that “bars Congress from transferring its legislative power to another branch of government” is not violated by 34 USC 20913(d), a provision of the Sex Offender Registration and Notification Act (SORNA) enacted in 2006. The statute required that “the Attorney General [AG] must apply SORNA’s registration requirements as soon as feasible to offenders convicted before the statute’s enactment”; the AG issued an interim rule in February 2007 and a final rule in December 2010, saying that SORNA’s registration requirements apply in full to those convicted before the Act of an offense requiring registration. The provision in question did not grant the AG power to determine SORNA’s applicability to pre-Act offenders but required the AG to apply it to all pre-Act offenders as soon as possible. The directive that the AG “specify the applicability” of the Act to pre-Act offenders means only how, not whether, the registration requirements were to be applied. If this were unconstitutional delegation, “then most of Government is unconstitutional ....”

**Concurrence:** [Alito, J] If a majority of the Court was willing to reconsider the approach taken to nondelegation arguments, I would join that effort.

**Dissent:** [Gorsuch, J] Allowing the person charged with enforcing criminal laws to also write them would “mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority ....” Therefore, “[i]n a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it

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1 Summaries marked with these initials, LASJRP, are courtesy of The Legal Aid Society’s Juvenile Rights Practice, from their weekly newsletter.
may never hand off to the nation’s chief prosecutor the power to write his own criminal code.”

[Ed. Note: “Justice Kavanaugh took no part in the consideration or decision of this case.”]

### McDonough v Smith, __ US __, 139 Sct 2149  
(6/20/2019)

#### CIVIL RIGHTS ACTIONS – STATUTE OF LIMITATIONS

LASJRP: A Supreme Court majority holds that the limitations period for petitioner’s fabricated-evidence § 1983 claim began to run when petitioner was acquitted and not when the evidence was used against him.

### Flowers v Mississippi, __ US __, 139 Sct 2228  
(6/21/2019)

#### JURY TRIAL – DISCRIMINATORY JUROR CHALLENGES

LASJRP: In 1996, defendant, who is black, allegedly murdered four people. He has been tried six separate times before a jury. The same lead prosecutor represented the State in all six trials. In the first trial, defendant was convicted, but the Mississippi Supreme Court reversed the conviction due to “numerous instances of prosecutorial misconduct.” In the second trial, the trial court found that the prosecutor discriminated on the basis of race in the peremptory challenge of a black juror, and seated the black juror. Defendant was then convicted, but the Mississippi Supreme Court again reversed the conviction because of prosecutorial misconduct at trial. In the third trial, defendant was convicted, but the Mississippi Supreme Court yet again reversed the conviction, this time because the court concluded that the prosecutor had again discriminated against black prospective jurors in the jury selection process. The fourth and fifth trials ended in mistrials due to hung juries.

In his sixth trial, defendant was convicted. The State struck five of the six black prospective jurors. In a 5-4 decision, the Mississippi Supreme Court affirmed the conviction.

The Supreme Court reverses. In the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors it could have struck. In the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors, apparently sought to find pretextual reasons to strike black prospective jurors by engaging in dramatically disparate questioning of black and white prospective jurors, and struck at least one black prospective juror who was similarly situated to white prospective jurors who were not struck by the State. The Court does not decide that any one of these facts alone would require reversal. The Court simply enforces and reinforces the Batson decision by applying it to the extraordinary facts of this case.

### Rehaif v United States, __ US __, 139 Sct 2191  
(6/21/2019)

To convict a person of violating 18 USC 922(g), which makes it unlawful for certain individuals to possess firearms, the prosecution “must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.” The statutory term “‘knowingly’ in the statute ‘modifies the verb ‘violates’ and its direct object, which in this case is §922(g).” Possessing a gun can be an entirely innocent act; it is a defendant’s status, and not conduct alone, that creates a crime, so that without knowledge of the status, a defendant could lack the intent needed to make behavior unlawful. Someone who does not know they are illegally in the country does not have the necessary guilty state of mind required to violate the proscriptions against firearm possession by someone of that status.

Dissent: [Alito, J] The Court overturns a long-established interpretation of an important criminal statute that has been used in thousands of cases over 30 years.

### United States v Davis, __ US __, 139 Sct 2319  
(6/24/2019)

In this case involving a claim of unconstitutional statutory vagueness the real question is one of pure statutory interpretation. At issue is the residual clause of 18 USC 924(c), which calls for long prison sentences for those who use a firearm in connection with certain federal “felonies ‘that by [their] nature, involv[e] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.’” The government, acknowledging that this is unconstitutionally vague if read as has long been understood using the categorical approach, proposes a new reading. That alternative, offered in the aftermath of decisions regarding other, similar residual clauses, “cannot be squared with the statute’s text, context, and history” and is rejected. Reading the statute as the government suggests to avoid the canon of constitutional avoidance “would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine itself rests.” The matter is remanded for the court below to address the rehearing petitions.

Dissent: [Kavanaugh, J] Finding a key provision of a statute aimed at reducing violent crime unconstitutional, “after 33 years and tens of thousands of federal prosecutions” and a drastic reduction in violent crime, will make it harder to prosecute gun crimes in the future and “also will likely mean that thousands of inmates who committed violent gun crimes will be released far earlier than
Congress specified when enacting §924(c).” The decisions underlying the Court’s action involved statutes imposing additional penalties based on prior convictions, not, as here, conduct during the charged offense.

**United States v Haymond, __ US __, 139 SCt 2369 (6/26/2019)**

**RIGHT TO JURY TRIAL**

**SENTENCE**

LASJRP: After defendant was convicted of possessing child pornography, a crime that carries a prison term of zero to 10 years, the judge sentenced defendant to a prison term of 38 months, followed by 10 years of supervised release. Subsequently, during the period of supervised release, a judge acting without a jury found by a preponderance of the evidence that defendant knowingly downloaded and possessed child pornography. Under a federal statute, the judge was required to impose an additional prison term of at least five years and up to life without regard to the length of the prison term authorized for defendant’s initial crime of conviction. The judge imposed an additional prison term of 5 years.

A Supreme Court majority—four Justices in an opinion by Justice Gorsuch, and Justice Breyer relying on different reasoning in a concurring opinion—holds that application of the statute in this case violated defendant’s right to trial by jury.

**Mitchell v Wisconsin, __ US __, 139 SCt 2525 (6/27/2019)**

**SEARCH AND SEIZURE – EXIGENT CIRCUMSTANCES/BAC TESTS**

LASJRP: The Supreme Court has previously held that an officer may conduct a warrantless blood alcohol concentration test if there are exigent circumstances, and that if an officer has probable cause to arrest a motorist for drunk driving, the officer may conduct a warrantless breath test (but not a blood test) as a search incident to arrest.

Four Justices now hold that when the driver is unconscious and therefore cannot be given a breath test, the exigent circumstances rule almost always permits a blood test without a warrant.

When a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and that his blood would be drawn for diagnostic purposes even if the police were not seeking BAC information. In addition, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and the officers’ many responsibilities—such as attending to other injured drivers or passengers and preventing further accidents—may be incompatible with the procedures that would be required to obtain a warrant. The Court does not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Because defendant did not have a chance to attempt to make that showing, a remand for that purpose is necessary.

Justice Thomas departs from the plurality’s “difficult-to-administer” rule. The plurality’s presumption will rarely be rebutted, but will nevertheless burden both officers and courts who must attempt to apply it. The better and far simpler way to resolve this case is to apply the per se rule providing that “[t]he natural metabolization of alcohol in the blood stream [‘’]creates an exigency once police have probable cause to believe the driver is drunk[,]’’ regardless of whether the driver is conscious.[”]

**People v Lopez-Mendoza, 33 NY3d 565 (6/13/2019)**

**RIGHT TO COUNSEL – EFFECTIVE ASSISTANCE**

LASJRP: The Court of Appeals rejects defendant’s challenge to his first-degree rape conviction where defendant asserts that counsel failed to review, or failed to comprehend the significance of, surveillance video evidence that contradicted defendant’s grand jury testimony describing a consensual sexual encounter with the victim, and therefore proceeded at trial as if the grand jury testimony were true.

Although counsel promised in his opening statement that defendant would take the stand, and then failed to call defendant and closed with a new version of events, the decision not to call a witness after promising to do so does not establish ineffective assistance of counsel as a matter of law. The record does not address counsel’s strategic trial decisions, if any, and the question of whether counsel viewed the entirety of the surveillance footage was never addressed head on and the record does not indicate whether counsel reviewed the video before

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determining a trial strategy. A CPL § 440.10 proceeding could answer the questions left open on this record.

[Ed. Note: Justice Rivera dissented in a lengthy opinion supporting her finding that “The record establishes that counsel pursued a theory explicitly contradicted by video evidence and there can be no strategic reason for adoption of a course of action with no hope of success.”]

People v Mendoza, 33 NY3d 565 (6/13/2019)

APPEAL TO JURY NULLIFICATION WAS NOT INEFFECTIVE ASSISTANCE

LASCDP: Defendant stole two packages from an apartment lobby. They contained dog training pads and two pairs of pants. Evidence against him included a surveillance video and defendant’s admission. Defense counsel in summation argued that, in view of the property taken, defendant had been “overcharged,” and asked the jury to show leniency.

The Court of Appeals held that the virtual concession of guilt and de facto appeal to jury nullification did not, in view of the overwhelming evidence, amount to ineffective assistance of counsel. Defendant was not deprived of meaningful representation by counsel’s appeal to the jury to be lenient in view of the prosecution’s overcharging of burglary.

People v Malloy, 33 NY3d 1078 (6/25/2019)

Great deference is accorded to the Supreme Court’s resolution of a Batson challenge, and the court’s credibility determination in accepting as race-neutral the prosecution’s explanation that an African-American prospective juror was subjected to a peremptory challenge because the juror “was ‘dismissive and rude’” is supported by the record. “[W]e cannot say as a matter of law that the proffered reason was ‘pretext for race-based discrimination’....”

The court did not impose unlawful consecutive sentences for the murder and weapon possession counts as the record shows the “defendant in possession of the gun several minutes before approaching” the decedent, so that the possesory crime could be found to be completed before the specific intent to kill was formed.

Matter of Tyrell FF, 33 NY3d1063 (6/25/2019)

“On review of submissions pursuant to section 500.11 of the Rules, appeal dismissed, without costs, upon the

2 Summaries marked with these initials, LASCDP, are courtesy of The Legal Aid Society’s Criminal Defense Practice, from their CDD case summaries.
injuries were inflicted when he was “pistol-whipped against [a] pole” and kneed in the head by defendant, and when the co-defendant hit him with a gun while he held onto the railing. The treating physician stated that she could not identify the object that caused the lacerations on the complainant’s head. No gun was recovered. The jury acquitted defendant of first-degree robbery allegedly involving a gun, and sent a note to the court during deliberations asking whether the railing or stairs could be a dangerous instrument. The jury had ample reason to question the complainant’s credibility and his motive for claiming that he was assaulted at gunpoint.

**People v Ellis, 33 NY3d 582 (6/27/2019)**

**SEX CRIMES – SEX OFFENDER REGISTRATION**

**LASJRP:** The Court of Appeals holds that defendant, a level three sex offender, was not required to register his Facebook account as an “internet identifier” pursuant to Correction Law § 168-f(4).

“Internet identifiers” are defined as “electronic mail addresses and designations used for the purposes of chat, instant messaging, social networking or other similar internet communication.” Failure to register with DCJS is a class E felony for the first offense and a class D felony for subsequent offenses.

Neither Facebook nor the account is an email address or a “designation[] used for the purposes of chat, instant messaging, social networking or other similar internet communication.” Defendant did disclose the email address he uses to access his Facebook account. Similarly, the name one uses to interact with other users on Facebook—such as a screen name, pseudonym or alias—may be an internet identifier. The indictment accuses defendant of performing acts that simply do not constitute a crime and is jurisdictionally defective.

**People v Hill, 33 NY3d 1076 (6/27/2019)**

“The order of the Appellate Division should be affirmed. We conclude that, on this record, there is no basis to disturb the suppression determination. Contrary to the dissent, the Appellate Division did not run afoul of our decision in People v LaFontaine (92 NY2d 470 [1998]) or its progeny ....”

**Dissent:** [Fahey, J] The Appellate Division exceeded its jurisdiction in reaching the issue of whether an illegal search of the defendant’s belongings tainted the later searches of a vehicle and his apartment where the Supreme Court did not rule adversely to the defendant on that issue, having found that the defendant lacked standing to raise it.  

**People v McIntosh, 33 NY3d 1064 (6/27/2019)**

If the trial court erred in denying the defendant’s request for submission of second-degree manslaughter and criminally negligent homicide as lesser included offenses of second-degree murder and first-degree manslaughter, the error was harmless. Under the circumstances of this case, the rendering of a guilty verdict on the highest count despite the availability for jury consideration of the next lesser included offense forecloses a challenge to the denial of a charge on the remote lesser included offenses.

**People v Sipp, 2019 NY Slip Op 06432 (8/29/2019)**

**ASSAULT – SERIOUS PHYSICAL INJURY**

**LASJRP:** The Court of Appeals upholds defendant’s conviction for second degree assault, finding no error in the denial of defense counsel’s request for a jury charge on third degree assault where defendant slashed his former girlfriend’s face and neck with a sharp instrument and repeatedly stomped on her head with his boot-clad foot.

Ten months after the attack, the victim’s face was disfigured with scars above one eyebrow, under the other eye, on her lip and across her neck, and her facial structure and appearance had changed significantly. She suffered at least five displaced fractures around her eye sockets and nose, which were left to heal as displaced. No reasonable view of the evidence could support a finding that the victim sustained anything less than a serious physical injury.

**People v Monforte, 2019 NY Slip Op 06451 (9/5/2019)**

**WAIVER OF INDICTMENT / DEFECTIVE**

**ILSAPP:** The defendant challenged his Schenectady County conviction of 1st degree manslaughter. He was arrested and arraigned upon a felony complaint charging 1st degree manslaughter. He was arrested and arraigned upon a felony complaint charging 2nd degree murder and 1st degree criminal use of a firearm. After being held for action of the grand jury, he waived indictment and agreed to be prosecuted by an SCI charging 1st degree manslaughter. On appeal, the defendant argued that his waiver of indictment was improper and County Court lacked jurisdiction to accept his plea. The COA agreed and reversed. The Court could consider the claim, despite the defendant’s guilty plea and his failure to raise the claim in County Court or the Appellate Division. When an accused is held for Grand Jury action upon a felony complaint charging a class A felony punishable by life imprisonment, he or she may not waive indictment and agree to be prosecuted for a lesser includ-
ed offense in order to facilitate a plea bargain. People v Trueluck, 88 NY2d 546. Craig Meyerson represented the appellant.

**Brito v Gomez, 2019 NY Slip Op 06452 (9/10/2019)**

**PHYSICIAN-PATIENT PRIVILEGE – WAIVER**

LASJRP: The Court of Appeals concludes that plaintiff affirmatively placed her child into controversy through allegations that the underlying accident caused difficulties in walking and standing that affect her ambulatory capacity and resultant damages, and thereby waived the physician-patient privilege with respect to the prior treatment of her knees.

**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.

**In re Alisha A., 172 AD3d 403 (1st Dept 5/2/2019)**

**ABUSE/NEGLECT – RESPONDENT/PERSON LEGALLY RESPONSIBLE**

LASJRP1: The First Department upholds a determination that respondent was a person legally responsible for the child where he cared for her and assumed other household duties during the period in which the abuse occurred; held her out as his daughter; and arranged a family outing that included her with his then-girlfriend and her family. The fact that he may not have lived with the child consistently does not preclude a finding that he was legally responsible for the child’s well-being during the relevant period.

The JRP appeals attorney was Susan Clement, and the trial attorney was Brian Lamb. (Family Ct, New York Co)

**Matter of State of NY v Jerome A., 172 AD3d 446 (1st Dept 5/7/2019)**

**AG APPEAL / MHL ART. 10**

ILSAPP2: The State appealed from an order of NY County Supreme Court, which dismissed the MHL Article 10 petition and ordered the respondent released from custody, upon a determination that he did not suffer from a mental abnormality. The appeal brought up for review a ruling that the diagnosis of unspecified paraphilic disorder (USPD) was not generally accepted in the relevant community. The First Department reversed and reinstated the petition. A 2018 Second Department case held the diagnosis of USPD had not achieved general acceptance. The First Department disagreed. Consistent with the Fourth Department, the reviewing court found that the evidence presented at the instant Frye hearing satisfied the State’s burden. (Supreme Ct, New York Co)

**People v Peralta, 172 AD3d 457 (1st Dept 5/7/2019)**

**WRITTEN JURY INSTRUCTIONS / NEW TRIAL**

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree assault. The First Department reversed. As the People conceded, the defendant was entitled to a new trial, because the trial court provided written instructions to the jury at its request, but over the defendant’s objection. See People v Johnson, 81 NY2d 980 (CPL 310.30 prohibits giving copies of text of any statute to deliberating jury without consent of parties; court committed reversible error in providing material to jury over defendant’s objection). The Legal Aid Society of NYC (David Crow and Randall Adams, of counsel) represented the appellant. (Supreme Ct, New York Co)

**People v Teran, 172 AD3d 447 (1st Dept 5/7/2019)**

**CONCURRENCE / BATSON CONCERNS**

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of drug sale charges. The First Department affirmed, finding that the trial court properly denied a Batson application. One justice wrote a concurring opinion. Whether Batson succeeded in ending racial discrimination in jury selection was an open question. Here the challenges against two African-American jurors were the product of the questionable assumption that social service workers who volunteered in soup kitchens and worked in HIV clinics were unduly sympathetic to criminal defendants. When explanations were based on absurd stereotypes, they should be rejected. During jury selection, the ADA said that a soup kitchen coordinator was challenged because such persons were often drug addicts. Batson must not be applied so as to blindly accept implausible reasons for exercising peremptory challenges. (Supreme Ct, New York Co)

**In re Timothy F. v. Melissa V., 172 AD3d 454 (1st Dept 5/7/2019)**

**VISITATION/PARENTAL CONTACT**
LASJRP: The First Department affirms an order that permitted the father to write letters to the 12-year-old child that she may read, and answer, at her discretion. The father saw the child once during a 10-year period and waited until the child was approximately 11 years old to file a petition to establish contact. The child has no recollection of ever meeting the father, who is a virtual stranger to her. (Family Ct, New York Co)

**Matter of Zavion O., 173 AD3d 28 (1st Dept 5/7/2019)**

LASJRP: Family Court Act § 153 allows the Family Court to issue “in a proper case a warrant or other process to secure or compel the attendance of an adult respondent or child ... whose testimony or presence at a hearing or proceeding is deemed by the court to be necessary....”

In these foster care review proceedings, the First Department holds that § 153 does not authorize the issuance of a warrant for the protective arrest of a child who is neither a respondent nor a witness in the proceeding, for purposes of ensuring the child’s health and safety rather than to compel his or her attendance in court.

Family Court Act § 718, a provision addressed to PINS runaways, cannot be the basis for an arrest warrant “by a statutory sleight of hand.” Family Court Act § 1037, which authorizes a warrant to bring a child’s parent or guardian rather than the child before the court, provides no authority relevant to these cases. The Referee in Zavion’s case relied in part on the general parens patriae responsibility to “do what is in the best interests of the children,” but the parens patriae doctrine cannot create jurisdiction for Family Court that is not provided by statute. The “absence of interpretable caselaw supporting the issuance of a warrant [under § 153] for what in effect is a protective arrest is telling.”

“It seems clear that ACS, with effective judicial backing, needs tools in cases such as this to maintain children, who have not been adjudicated juvenile delinquents but who chronically abscond, in controlled settings where they can be administered medically prescribed medication and receive appropriate therapeutic and other services without which there is the significant and demonstrated likelihood that they will be a danger to themselves or others but who, by regularly absconding, are likely to end up on the streets vulnerable and unprotected.” However, “Family Court is constitutionally and statutorily constrained from undertaking what may seem to be a middle ground of issuing an arrest warrant under § 153 for protective purposes in what is essentially a civil context.” The appropriate vehicle would seem to be a statutory amendment, “and we would encourage that undertaking.” But the Court also notes that an arrest record could have future adverse ramifications for employment or other-wise, and that there is also the potential trauma that an arrest, especially if coupled with handcuffs or other restraints, may pose for an already fragile child. Thus, even if an arrest warrant were to be legislatively authorized for cases such as these, it should be carefully conditioned so as to be sensitive to these concerns.

The JRP appeals attorney in both cases, and the trial attorney in Zavion O., was Israel Appel. The trial attorney in Serenity R.L. was Brian Lamb. (Family Ct, New York Co)

**Giovanni H.B., 172 AD3d 489 (1st Dept 5/9/2019)**

ILSAPP: The incarcerated father appealed from an order of Bronx County Family Court, which denied him visitation with his son. The First Department affirmed. The father was serving a 12-year sentence for raping his then six-year-old daughter. Since age two, the son had not seen or spoken to the father, and he never asked to see him or inquired about his whereabouts. The boy had been diagnosed with autism spectrum disorder and suffered from anxiety. The appellate court found that the presumption that parental visitation was in the best interests of a child was overcome, given the father’s heinous crime; the impact visitation would have on the abused daughter and her relationship with her brother; and the disruption the boy would suffer in connection with traveling to and from the prison. Family Court reasonably allowed the father to send letters that would be kept in agency files until mental health professionals provided more guidance on that issue. (Family Ct, Bronx Co)

**In re Lela G. v Shoshanah B., 172 AD3d 472 (1st Dept 5/9/2019)**

VISITATION – EXPERT MENTAL HEALTH TESTIMONY

LASJRP: The First Department affirms an order which eliminated respondent’s weekly overnight visits and modified the parties’ holiday and parenting schedule.

While the better practice would have been for the court to appoint a neutral forensic examiner where the circumstances included different views as to the reasons for the child’s psychological difficulties, it was not reversible error to allow the child’s treating psychiatrist, who was retained and paid by petitioner, to testify and make recommendations for modification of the access schedule. Respondent’s expert disagreed with and criticized the treating psychiatrist’s separation anxiety diagnosis, but his testimony was based solely on his review of trial transcripts, and he did not have the benefit of in-person interviews with the child or his parents. (Family Ct, New York Co)

**In re Myracle N.P., 172 AD3d 479 (1st Dept 5/9/2019)**

ABUSE/NEGLECT – DERIVATIVE NEGLECT
The JRP appeals attorney was Amy Hausknecht, and the trial attorney was Jessica Thomas. (Family Ct, New York Co)

People v Munroe, 172 AD3d 480 (1st Dept 5/9/2019)
PLEAS – WAIVER OF CLAIMS ON APPEAL
LASJRP: The First Department concludes that defendant forfeited appellate review of his motion to controvert a search warrant where he pleaded guilty before the court finally denied his suppression motion. Even if the court decided the particular issue defendant seeks to raise on appeal, the order was contingent on the outcome of a hearing. (Supreme Ct, New York Co)

People v Rodriguez, 172 AD3d 509 (1st Dept 5/14/2019)
CHALLENGE FOR CAUSE / REVERSAL
ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of failure to verify registration information as a sex offender. The First Department reversed and remanded for a new trial. The trial court erred in denying the defendant’s challenge for cause to a prospective juror. The panelist made a statement reflecting a state of mind likely to preclude the rendering of an impartial verdict; and the court did not elicit an unequivocal assurance that the panelist could set aside any bias. The juror stated that he was “not sure” that he could be impartial in a case involving a registered sex offender. His general statement about needing to hear the facts did not address his ability to overcome the specific bias he had expressed. When there is any doubt about a prospective juror’s impartiality, trial courts should err on the side of excluding the juror, since at worst the court will have replaced one impartial juror with another. The Legal Aid Society of NYC (Lorraine Maddal, of counsel) represented the appellant. (Supreme Ct, New York Co)

Matter of Royal P, 172 AD3d 533 (1st Dept 5/16/2019)
ABUSE/NEGLECT – DRUG/ALCOHOL MISUSE
LASJRP: The First Department reverses a neglect finding where, even assuming petitioner established a prima facie case of drug misuse under FCA § 1046(a)(iii), respondent father rebutted the inference of neglect. The evidence failed to establish that the physical, mental or emotional condition of the child was impaired or placed at imminent risk of impairment.

The child was well cared for, healthy, and well fed and clothed, and his medical needs were addressed. Although respondent tested positive for alcohol and cocaine on several occasions, the child was in the care of a resident babysitter on those occasions, and he never used or was under the influence of drugs or alcohol in the child’s presence. There is no evidence in the record that respondent was under the influence of drugs or alcohol when visited by caseworkers when the child was in his care.

The JRP appeals attorney was Amy Hausknecht, and the trial attorney was Elana Roffman. (Family Ct, New York Co)

People v Cuevas, 172 AD3d 567 (1st Dept 5/21/2019)
CONFESSIONS – HUNTLEY HEARING/BURDEN OF PROOF
LASJRP: The First Department holds that the People were not required to produce officers who interacted with defendant before the detective elicited the confession, because defendant presented no bona fide factual predicate demonstrating that the uncalled officers possessed material evidence on the question of voluntariness. (Supreme Ct, New York Co)

People v Swails, 172 AD3d 579 (1st Dept 5/23/2019)
SPEEDY TRIAL / UNPRESERVED
ILSAPP: The defendant appealed from judgments of NY County Supreme Court, convicting him of certain robbery charges, upon his pleas of guilty. His constitutional speedy trial claim was unpreserved; in a CPL 30.30 motion, defense counsel made only a perfunctory constitutional claim without making any of the arguments raised on appeal. The First Department declined to review the issue in the interest of justice, for a few reasons: most of the delay cited occurred after the defendant’s motion and was not the subject of any further motion; the defendant abandoned his constitutional claim by pleading guilty without obtaining any ruling on that part of his motion; and his claim was unreviewable, because he did not provide minutes necessary to determine the reasons for certain delays. (Supreme Ct, New York Co)

ABUSE/NEGLECT – LEAVING CHILD UNSUPERVISED
LASJRP: The First Department upholds the denial of pro se petitioner’s request for annulment of an indicated report where a four-year-old child fell from a bathroom window at the daycare facility where petitioner worked. Approximately an hour passed between the last time petitioner saw the child and when the child was admitted to a hospital after being found unconscious on the ground outside the facility. (Supreme Ct, Bronx Co)

In re Justin E., 172 AD3d 613 (1st Dept 5/28/2019)
ABUSE/NEGLECT – DOMESTIC VIOLENCE/DERIVATIVE NEGLIGENCE
LASJRP: The First Department upholds findings of neglect and derivative neglect based on a domestic incident in the child’s presence, noting, inter alia, that the child’s statement that she was afraid of respondent demonstrated an imminent risk of emotional and physical impairment.

The JRP appeals attorney was Patricia Colella, and the trial attorney was Heather Saslovsky. (Family Ct, New York Co)

People v Mercedes, 172 AD3d 599 (1st Dept 5/28/2019)
BURGLARY/CRIMINAL TRESPASS – LICENSE OR PRIVILEGE/APARTMENT BUILDING EVIDENCE – VIDEO RECORDINGS
LASJRP: The First Department upholds defendant’s burglary conviction where, at a building with a no-trespassing sign and a gated courtyard and lobby that were both secured by locks and buzzer systems, defendant passed through both entrances by following a resident who entered by means of a key, and attempted to use an elevator that had been out of service for more than a year. The jury reasonably could have found that a witness’s courteous act of stopping the door from slamming on defendant gave defendant no reason to believe the witness had conferred a license to enter that did not otherwise exist.

The Court finds no error in the admission of a brief portion of a surveillance videotape that, unlike the rest of the videotapes in evidence, could not be authenticated. The evidence, including the relationship of the videotapes at issue to the admitted videotapes, supported the inference that the videotapes at issue depicted the relevant events, and any uncertainty went to weight and not admissibility. (Supreme Ct, New York Co)

People v Coulibaly, 172 AD3d 647 (1st Dept 5/30/2019)
RIGHT TO COUNSEL – EFFECTIVE ASSISTANCE/SPEEDY TRIAL ISSUE

LASJRP: The First Department concludes that defendant was denied the effective assistance of counsel, and dismisses the indictment, where defense counsel’s miscalculation as to chargeable time resulted in the denial of defendant’s meritorious speedy trial dismissal motion. (Supreme Ct, New York Co)

In re Eliani M.-R., 172 AD3d 636 (1st Dept 5/30/2019)
ABUSE/NEGLECT – DRUG POSSESSION/SALE
LASJRP: The First Department upholds a finding of neglect where respondent mother placed the child in close proximity to narcotics and narcotics trafficking.

The mother, carrying cocaine and ecstasy, drove to New Jersey with her thirteen-year-old daughter to engage in a drug transaction, dropped off her husband and the child in a parking lot to wait for her, drove to an adjoining parking lot, sold cocaine to a male and gave him an ecstasy tablet, and then drove around the corner of the motel to pick up her child and husband, and, before she could exit the parking lot, the police arrested her in front of the child, who began to cry hysterically.

The JRP appeals attorney was Susan Clement, and the trial attorney was Catherine Wise. (Family Ct, New York Co)

In re Shelley H. v Melvin Jermaine R., 172 AD3d 638 (1st Dept 5/30/2019)
VISITATION – CONTEMPT
LASJRP: The First Department concludes that the court properly denied the mother’s motion to hold the father in civil contempt for disobeying a temporary visitation order where the mother’s right to visitation time was not ultimately affected, but erred in denying the motion on the ground that the father acted “per the instructions of counsel.” (Family Ct, New York Co)

Rolando A.G. v Marisol R.M., 172 AD3d 631 (1st Dept 5/30/2019)
ANDERS / MOOTNESS/ DISMISSAL
ILSAPP: The father appealed from [ ] an order of Bronx County Family Court, which denied his application to suspend the mother’s overnight and unsupervised visits with the subject child. The First Department dismissed the appeal as moot and granted an application of assigned counsel to withdraw as counsel. There were no nonfrivolous issues. The interim order was not appealable as of right, since it was issued in an Article 6, not 10, proceeding. The father did not seek leave to appeal. Furthermore, the challenged order was moot, since it was superseded by a subsequent order granting the mother overnight visits, and the father did not allege any further incidents of inadequate care of the child. (Family Ct, Bronx Co)
People v Adrian, 173 AD3d 431 (1st Dept 6/6/2019)

OPERATING AS A MAJOR TRAFFICKER

LASJRP: A person is guilty of operating as a major trafficker when, as a “profiteer” (Penal Law § 220.00[20]), the person “knowingly and lawfully possesses, on one or more occasions within six months or less, a narcotic drug with intent to sell the same,” and the drugs have a total aggregate value of $75,000 or more (Penal Law § 220.77[3]).

The First Department rejects defendant’s contention that the major trafficker statute is unconstitutionally vague on its face and as applied, noting, with respect to the requirement that the drugs be worth at least $75,000, that the value of illegal drugs is ascertainable and a person of ordinary intelligence would be able to determine what the statute prohibits. Here, defendant had fair notice that a drug transaction involving 43 kilograms of cocaine, with each kilogram being worth at least $30,000, was forbidden by the statute, and that his conduct in managing or arranging drug transactions constituted being a profiteer. (Supreme Ct, New York Co)


FAMILY OFFENSE / NO ASSAULT

ILSAPP: The respondent appealed from an order of NY County Family Court, which after a fact-finding hearing, found that he committed the family offenses of 2nd degree harassment and 2nd degree assault and issued a one-year order of protection. The First Department modified, vacating the finding of assault. Although the order of protection has expired by its own terms, it still imposed enduring consequences, and therefore the appeal was not moot. The evidence did not establish assault. The petitioner testified that, while the respondent was on top of her in bed, he caused some bruising to her legs, which she treated at home with an ice pack. There was no proof of intent to cause serious physical injury. Nor did the proof support a finding of assault 3. Even assuming that the bruising would support a finding of physical injury, the evidence failed to demonstrate the intent to cause such injury. The petitioner testified that the respondent said that he was play fighting and that she accepted this explanation. The finding as to harassment was sustained, however. The petitioner testified that the respondent made several threatening phone calls to her and followed her around the neighborhood, which alarmed her and served no legitimate purpose. She and her then eight-year-old daughter also testified to an incident in which the respondent forced the child to consume a pack of gum, which caused her to vomit, and then to eat her own vomit. Larry Bachner represented the appellant. (Family Ct, New York Co)

Matter of Puah B., 173 AD3d 422 (1st Dept 6/6/2019)

INADEQUATE SHELTER / DISSENT RE EDUCATIONAL NEGLECT

ILSAPP: The mother appealed from an order of fact-finding and disposition rendered by Bronx County Family Court in a neglect proceeding. The First Department modified. Family Court erred in finding neglect and derivative neglect, based on the mother’s failure to provide adequate food, clothing and shelter. The caseworker’s progress notes, and the police officer’s testimony about her observations from a single visit to the home, were insufficient to support such determination. The record presented no basis for a conclusion that the children’s condition had been impaired or was in imminent danger of becoming impaired. However, the evidence supported the finding of educational neglect as to the two older children, and derivative neglect as to the younger children. One justice dissented as to the issue of educational neglect. The mother attempted to follow DOE regulations, but did not receive responses to her letters, which were necessary to proceed with the process of submitting her Individual Home Instruction Plans (IHIPs). Moreover, there was no showing of impairment. The mother, a college graduate, had familiarized herself with IHIP standards. She was providing the children with a well-rounded education at home and had developed a curriculum consistent with the DOE’s regulations. In addition to teaching the basic common core subjects, the mother provided instruction in computer skills; enrolled the children in online classes which used state-of-the-art adaptive technology; and exposed them to NY’s cultural institutions. No testing established that the children were not performing at age-
appreciate levels. Randall Carmel represented the appellant. (Family Ct, Bronx Co)

**People v Hemphill, 173 AD3d 471 (1st Dept 6/11/2019)**
**MURDER / DISSENT / VERY REASONABLE DOUBT AND MISLED JURY**

**ILSAPP:** The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree murder. The First Department affirmed. One justice dissented, opining that the defendant’s identity as the shooter was not proven beyond a reasonable doubt. In a lineup after the shooting, three witnesses ID’d as the shooter another man, Nicholas Morris, who was initially charged with the murder. The defendant—not arrested until seven years after the murder—was not ID’d as the shooter by any of the initial eyewitnesses. The only witness to ID him was the accomplice, who was cooperating to avoid a murder sentence and who changed his story repeatedly. At a minimum, the defendant was entitled to a new trial. He was denied the right to effectively cross-examine a witness who had testified before the grand jury in 2006 and 2007 and had ID’d Morris as the shooter the latter time. Yet at trial, the witness falsely maintained that she never identified Morris. Defense counsel tried to impeach her, but mistakenly referred to the 2006 testimony. Thereafter, the trial court would not allow corrective action concerning the witness’s 2007 ID of Morris. Further, the court allowed the prosecutor to affirmatively mislead the jury into believing that the witness never ID’d Morris and that defense counsel had been disingenuous. The defendant was thus deprived of a fair trial, the dissenter stated. (Supreme Ct, Bronx Co)

**People v Disla, 173 AD3d 555 (1st Dept 6/20/2019)**
**MANDATORY DEPORTATION / BUT NO ADVICE**

**ILSAPP:** The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree criminal possession of a controlled substance. The First Department held the appeal in abeyance. Although the defendant did not file a CPL 440.10 motion, the record was sufficient to review his ineffective assistance claim, based on counsel’s failure to advise the defendant that his guilty plea to an aggravated felony would result in mandatory deportation. The appellate court directed that the defendant should have the opportunity to move to vacate his plea, upon a showing that there was a reasonable probability that he would not have pleaded guilty, had he been made aware of the deportation consequences. While the defendant requested that his conviction be replaced by a conviction under a subdivision of Penal Law § 220.16 that might entail less onerous immigration consequences, the appellate court found such remedy inappropriate and remitted for a hearing. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant. (Supreme Ct, New York Co)

**People v Bermudez, 173 AD3d 579 (1st Dept 6/25/2019)**
**PEQUE / REVERSED**

**ILSAPP:** The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree robbery. The First Department reversed and vacated the plea. Previously, the reviewing court had remitted the matter for a hearing on Peque grounds. See 154 AD3d 410. The remittal court found a reasonable possibility that the defendant would not have pleaded guilty, had the court advised him of the possibility of deportation. The Center for Appellate Litigation (Arielle Reid, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

**People v Harris, 174 AD3d 185 (1st Dept 6/25/2019)**
**CONTAINER SEARCH / EXIGENT CIRCUMSTANCES / DISSENT**

**ILSAPP:** The defendant appealed from a judgment of NY County Supreme Court, convicting him upon his plea of guilty of 4th degree criminal possession of stolen property. The First Department affirmed, but two justices dissented. The majority credited the People’s argument that suppression was proper based on exigent circumstances validating the warrantless search. But the dissenters would have found that the People failed to establish such circumstances. When the suitcase was searched, the defendant and his companion had already been handcuffed and placed under arrest. The two men were surrounded by 10 armed officers; they could not realistically have threatened the officers’ safety, nor gained access to the suitcase. (Supreme Ct, New York Co)

**FAMILY OFFENSE / MODIFIED**

**ILSAPP:** The respondent appealed from an order of NY County Family Court, which granted an order of protection in favor of the petitioner. The First Department vacated the finding of 2nd degree assault. When the respondent bit the mother’s ear during sex, his teeth did not constitute a dangerous instrument. Nor did the evidence show criminal obstruction of breathing or blood circulation. The petitioner testified that she had difficulty breathing when the respondent covered her nose or mouth during sex, but he stopped when she told him to do so. The findings that the respondent committed 2nd degree harassment and 2nd degree coercion were supported. The
respondent threatened the petitioner that, if she stopped prostituting herself to him, he would cause her to lose her immigration status and custody of her child. The five-year order of protection was appropriate in view of the aggravating circumstances. Paul Matthews represented the appellant. (Family Ct, New York Co)

People v Cook, 173 AD3d 633 (1st Depr 6/27/2019)

HEARSAY – CONSTITUTIONAL RIGHT TO PRESENT RELIABLE EVIDENCE

LASJRP: The First Department finds reversible error where the trial court denied defendant’s application, expressly made under Chambers v. Mississippi (410 U.S. 284), to present testimony that one of the robbery victims, who was unavailable to testify at trial, failed to identify defendant at a lineup.

Although there were reasons to suspect that this victim may have falsely claimed to be unable to identify anyone in the lineup, the non-identification plainly bore sufficient indicia of reliability under the applicable standard, which hinges upon reliability rather than credibility. Where the proponent is able to establish this possibility of trustworthiness, it is the function of the jury alone to determine whether the declaration is sufficient to create reasonable doubt. (Supreme Ct, New York Co)

In re Mehki L.W., 173 AD3d 629 (1st Depr 6/27/2019)

TERMINATION OF PARENTAL RIGHTS
- CONDITIONAL SURRENDERS
- APPEAL

LASJRP: The First Department dismisses as moot an appeal from the denial of the mother’s motion to vacate her conditional surrender, on the ground that there was a substantial failure of a material condition, where the adoption of the child was finalized during the pendency of this appeal.

In any event, although petitioner complied with the statutory notice requirements, the mother waited over a year in moving to vacate the surrender after she knew or should have known that the foster father would no longer be an adoptive resource for the child. Moreover, the mother failed to provide petitioner with her updated contact information, as required under the judicial surrender.

The JRP appeals attorney was Marcia Egger, and the trial attorney was Brian Lamb. (Family Ct, New York Co)


VISITATION – CHANGE IN CIRCUMSTANCES

LASJRP: The First Department reinstates the mother’s petition for modification of visitation, concluding that a change in circumstances was sufficiently alleged where the mother alleged that the father had been making baseless accusations that she was neglecting the child to sexual abuse, and that the almost nine-year-old child’s position on visitation had changed and she wanted to be able to spend one weekend per month with the mother. (Supreme Ct, New York Co)

Matter of Sandra Y. v Jahi J.Y., 174 AD3d 406 (1st Depr 7/2/2019)

CUSTODY / REVERSED

ILSAPP: The AFC appealed from an order of NY County Family Court, which granted the father temporary custody of the subject children. The First Department reversed and remanded for a hearing. Modification of custody on a temporary basis requires a hearing, absent an emergency. The court’s determination was based on school records, allegations of educational neglect, and other matters set forth in a court-ordered investigation. But no emergency was articulated. Lawyers for Children (Shirim Nothenberg, of counsel), represented the children. (Family Ct, New York Co)

Matter of Elijah M., 174 AD3d 423 (1st Depr 7/9/2019)

NEGLECT / REVERSAL

ILSAPP: The respondents’ appeal from an order of disposition of Bronx County Family Court brought up for review a fact-finding order, which held that they neglected their child. The First Department reversed. The agency filed the petition after a physical altercation between the teenage child and respondent father, which resulted in an order of protection against the child. The parents refused to allow the child to return home, and the agency tried to schedule a child safety conference with them. When their attorney insisted on communicating on their behalf and being present at the meeting, the instant proceeding was initiated. While often a child’s disciplinary issues will not justify exclusion from the home, such cases typically do not involve an order of protection against the child. The respondents were wrongly prevented from presenting evidence that: (1) they acted reasonably and were unable to care for their son; and (2) their attorney conveyed their willingness to meet, and plan with, the agency. Stephen Preziosi represented the appellant. (Family Ct, Bronx Co)

In re Caleah C.M.S., 174 AD3d 457 (1st Depr 7/11/2019)

ABUSE/NEGLECT – ALCOHOL MISUSE/POSSESSION OF FIREARM

LASJRP: The First Department reverses a neglect finding premised on respondent’s abuse of alcohol where
there is no evidence that he lost self-control during repeat-
ed bouts of excessive drinking and thus the presumption
of neglect is not triggered by FCA § 1046(a)(iii).

However, the Court upholds a finding where respond-
ent was in possession of a firearm when the police
arrived to stop an altercation he was having with his girl-
friend, and hospital staff indicated that he “smelled like
alcohol.” (Family Ct, Bronx Co)

In re Emmanuel E., 175 AD3d 49 (1st Dept 7/16/19)

CUSTODY/INTERSTATE COMPACT ON THE
PLACEMENT OF CHILDREN

LASJRP: In the context of an Article Ten proceeding
during which the non-respondent father, who resides in
New Jersey, filed a custody petition, the First Department
holds that compliance with the Interstate Compact on the
Placement of Children (Social Services Law § 374-a) is not
required in connection with the father’s application for
custody.

The Court first rejects ACS’s contention that the
appeal has been rendered moot because, post-ICPC
approval, the child is residing with the father in New
Jersey. This case meets the criteria for the mootness excep-
tion. In addition, ambiguity exists as to the applicability of
the ICPC to an out-of-state noncustodial parent, and this
appeal raises important issues, such as whether applying
the ICPC here is contrary to the plain meaning and leg-
islative history of the statute, and whether it conflicts with
a parent’s right to substantive and procedural due
process.

There is nothing in the statute or the legislative histo-
ry to indicate that the ICPC was ever intended to apply to
situations other than foster care or adoptive placements.
Although the Association of Administrators of the
Interstate Compact on the Placement of Children, the offi-
cial body charged with implementing the ICPC, amended
Regulation 3(2)(a) to include placements with out-of-state
noncustodial parents, the regulation does not carry the
force of law. An administrative agency cannot use its
rule-making authority to extend statutory language to
apply to situations not intended to be embraced within
the statute. The AAICPC contravened the legislature’s
intent to provide more opportunities for children in need
of placements.

The Second Department’s rulings to the contrary rely
on a fundamental misreading of Matter of Shaida W. (85
N.Y.2d 453), which involved a kinship foster care place-
ment in California and a retention of legal custody by the
Commissioner.

The Court rejects ACS’s argument that FCA §
1017(1)(a) provides an independent statutory basis for
implementing ICPC procedures because it directs ACS to
perform background checks to determine whether a non-
respondent parent is someone with whom the “child may
appropriately reside.” There are other ways to ensure a
child’s safety, such as directing a hearing or requesting
courtesy background checks from the other state, and,
once a child is temporarily released into a non-respondent
parent’s care, § 1017(3) requires that the parent submit to
the court’s jurisdiction and thus comply with court
orders.

Also, presupposing a parent is unfit pending comple-
tion of the ICPC infringes upon that parent’s constitution-
ality rights, and, here, ACS suggested that but for the ICPC
protocol, which reportedly can take months, or even years
to complete, the child would have been released to the
father. Delegation of the Family Court’s parens patriae
role to an ICPC administrator, who is empowered to
decide the father’s suitability without providing support-
ing evidence or the possibility of judicial review, violates
the father’s right to procedural due process.

Finally, the Court acknowledges the arguments of the
amicus curiae that, given the possibility that the process
could keep a child in foster care, and apart from a loving,
competent parent, applying the ICPC to out-of-state par-
ents harms children.

The JRP appeals attorney was Claire Merkine, and the
trial attorney was Felicia Winder. Family Ct, New York Co

People v Jennings, 174 AD3d 478 (1st Dept 7/31/2019)

SEARCH AND SEIZURE – PAROLE SEARCHES

LASJRP: The First Department reverses a suppres-
sion order, concluding that the parole officer acted lawfully
in retrieving a firearm from defendant’s jacket pocket
where, while executing a valid parole warrant, and in the
course of searching for defendant, the parole officer inadvert-
ently felt an object, that she and her supervisor
believed to be a gun, in the jacket pocket. Because parolees
are not permitted to possess firearms and thus defendant
was in further violation of the conditions of his supervi-
sed release, the minimally invasive step of retrieving the
gun from the pocket was rationally and reasonably relat-
ed to the performance of her duty as defendant’s parole
officer.

The suppression court mistakenly concluded that the
parole officer’s removal of the gun from the pocket was
not related to her duty at the time because the only pur-
pose of searching the apartment was to locate defendant,
not to find contraband.

Although the Court of Appeals has rejected a “plain
touch” exception to the search warrant requirement, the
Court relies not on the “plain touch” doctrine, but rather
on the entirely separate framework for evaluating the
lawfulness of searches by parole officers. (Supreme Ct,
New York Co)
Matter of Ferrante v Stanford, 172 AD3d 31 (2nd Dept 5/1/2019)

PAROLE BOARD HEAD HELD IN CIVIL CONTEMPT FOR BOARD’S REPEATED WRONG ANALYSIS

LASCDP: After appeal of a denial of parole to someone convicted of murder in the 1970s, Supreme Court remanded the case for a new parole hearing that did not rely solely on the seriousness of the offense factor. On a rehearing, the panel of the Board again denied parole, ignoring the many positive “statutory” factors and stressing again the seriousness of the offense.

For this refusal to comply with Supreme Court’s order compelling a different analysis, Supreme Court held the chairman of the Parole Board in civil contempt. The Second Department here upholds that contempt finding. Despite the Board’s ostensible compliance with the previous court order, it once again failed to give genuine consideration to the factors listed in Executive Law §259-i and denied release exclusively on the basis of the underlying conviction. (Supreme Ct, Dutchess Co)

[Ed. Note: The decision also states: “[F]ollowing the petitioner’s death, this Court granted the appellant’s application, inter alia, to substitute Danielle Ferrante, as administrator of the petitioner’s estate, for the deceased petitioner, and to amend the caption accordingly. Since the questions raised on this appeal concern the civil contempt finding rendered against the appellant and the amount of the fine imposed for that contempt, the petitioner’s death does not render this appeal academic. … Here, where actual damages were not established, the petitioner may recover reasonable costs and expenses, including attorney’s fees, plus a statutory fine in the sum of $250 ….” NYSDA noted the death of John MacKenzie by suicide in the Aug. 31, 2016 edition of News Picks from NYSDA Staff.]

People v Leon, 172 AD3d 765 (1st Dept 5/1/2019)

SORA / REDUCTION

ILSAPP: The defendant appealed from an order of Queens County Supreme Court, which designated him a level-three sex offender. The Second Department found him to be level two. To support the assessment of points under risk factor 11, the People must establish that the offender used drugs or alcohol in excess at the time of the crime or repeatedly in the past. Insufficient evidence was presented as to such factor. The Legal Aid Society of NYC (Amy Donner, of counsel) represented the appellant. (Supreme Ct, Queens Co)

Matter of Leslie T., 172 AD3d 730 (2nd Dept 5/1/2019)

ABUSE/NEGLECT/INDIAN CHILD WELFARE ACT

LASJRP: In this FCA Article Ten proceeding, the Second Department rejects the Indian Nation’s contention that the family court was required to conduct a hearing under the Indian Child Welfare Act prior to removing the child from the temporary custody of the paternal uncle and returning the child to the mother’s custody.

The statute [25 U.S.C. § 1912(e)] provides that “[n]o foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” Here, the child had been placed temporarily with the paternal uncle upon the application of the Indian Nation, and was not being removed from the mother or an Indian custodian for placement in foster care. (Family Ct, Suffolk Co)

Matter of Saunders v Scott, 172 AD3d 724 (2nd Dept 5/1/2019)

CUSTODY – RIGHT TO COUNSEL

LASJRP: In this custody proceeding, the Second Department concludes that the family court did not err in permitting the father to proceed pro se. The court explained the dangers and disadvantages of proceeding without counsel, and the father clearly, unequivocally, and repeatedly acknowledged that he understood the right he was waiving and stated that he wished to proceed without counsel.

The JRP appeals attorney was Susan Clement, and the trial attorney was Jess Rao. (Family Ct, Queens Co)

1 Summaries marked with these initials, LASCDP, are courtesy of The Legal Aid Society’s Criminal Defense Practice, from their CDD case summaries.

2 Summaries marked with these initials, ILSAPP, are courtesy of the New York State Office of Indigent Legal Services, from the ILS appellate listserv.

3 Summaries marked with these initials, LASJRP, are courtesy of The Legal Aid Society’s Juvenile Rights Practice, from their weekly newsletter.
Second Department continued

Matter of Markel C., 172 AD3d 709 (2nd Dept 5/1/2019)

SUSPENDED JUDGMENT / REVERSAL

ILSAPP: The mother failed to comply with certain conditions of a suspended judgment. However, the Second Department held that the evidence did not support Nassau County Family Court’s order terminating the mother’s parental rights. She had done so much right, in that she: (1) learned how to provide the special care needed; (2) was emotionally attuned to the child’s needs; (3) obtained stable housing and engaged in counseling; (4) took responsibility for the initial neglect that led to removal; (5) had cooperated with services and providers; (6) had positive visits with the child; and (7) had a support system in place. The matter was remitted for a dispositional hearing to determine the best interests of the child. Steven Feldman represented the appellant. (Family Ct, Nassau Co)

Onorina C.T. v Ricardo R.E., 172 AD3d 726 (2nd Dept 5/1/2019)

Paternity / Equitable Estoppel

ILSAPP: The challenged order of Kings County Family Court denied the mother’s petition to adjudicate the respondent Ricardo R.E. to be the father of the subject child. The Second Department reversed and granted the petition, which alleged that: (1) the child was conceived and born while the petitioner was married to another man, her sex trafficker, who played no role in the child’s life; (2) Ricardo R.E. was the biological father, was named on the birth certificate, and had supported and raised the child since birth. The presumption that the child was the legitimate child of the petitioner and the husband was not rebutted, but equitable estoppel should have been considered. The record proved that it was in the child’s best interests to equitably estop the husband’s paternity claim. The Children’s Law Center (Laura Solecki, of counsel) represented the child-nonparty-appellant. (Family Ct, Kings County)

People v Palmer, 172 AD3d 755 (2nd Dept 5/1/2019)

Bad Waiver / But Affirmed

ILSAPP: The defendant appealed from a sentence imposed upon his plea of guilty in Queens County Supreme Court. The purported waiver of the right to appeal was invalid, the Second Department held. The plea court’s terse colloquy failed to advise the defendant of the nature of the right to appeal and to ensure that he grasped the concept of the appeal waiver and the nature of the right he was forgoing. Although the defendant signed a written waiver, the court did not ascertain whether he read the document or was aware of its contents. Since the purported waiver was invalid, the Court was not precluded from reviewing the issue of excessive sentence. However, the appellate court affirmed. (Supreme Ct, Queens Co)

Matter of Raees T.B.L., 172 AD3d 707 (2nd Dept 5/1/2019)

JD / Robbery / Legal Insufficiency

ILSAPP: A respondent in a termination of parental rights proceeding has the right to effective assistance of counsel. Family Court Act § 262 affords protections equivalent to the constitutional standard for criminal defendants. Further, certain Family Court proceedings implicate constitutional due process considerations. The father demonstrated that assigned counsel’s failure to timely file a notice of appeal constituted ineffective assistance. The Second Department vacated the challenged order and directed the remittal court to issue a replacement order, so the time to appeal would run anew. Geoffrey Chanin represented the appellant. (Family Ct, Orange Co)

Saunders v Scott, 172 AD3d 724 (2nd Dept 5/1/2019)

Custody / Right to Counsel / Waived

ILSAPP: The father appealed from a Queens County Family Court order granting sole custody to the mother. The Second Department affirmed. Parties in custody proceedings have a right to counsel. A party may waive that right and proceed without counsel, provided he or she makes a knowing, voluntary, and intelligent waiver. The trial court must conduct a searching inquiry to ensure that the waiver has been made validly, and that the party was aware of the dangers and disadvantages of self-representation. Here, the Family Court provided the requisite explanation, and the father unequivocally acknowledged that he understood the right he was waiving and that he wished to proceed without counsel. (Family Ct, Queens Co)
People v Torres, 172 AD3d 758 (2nd Dept 5/1/2019)

CUSTODIAL INTERROGATION / NEW TRIAL
ILSAPP: The defendant appealed from a judgment of Rockland County Supreme Court, convicting him of 4th degree criminal possession of stolen property (six counts), upon a jury verdict. The Second Department reversed. The statements that the defendant made to detectives were the product of a custodial interrogation without the benefit of *Miranda* warnings. He was clearly in custody: he was handcuffed in the backseat of a police vehicle; bargaining with the police for his freedom; and not free to leave, according to an officer’s testimony. Further, the defendant’s statements were the result of the functional equivalent of interrogation. The failure to suppress the statements and a wallet was not harmless. The evidence of guilt was not overwhelming, and there was a reasonable possibility that the admission of the illicit evidence might have contributed to the conviction. A new trial was ordered. Ellen O’Hara Woods represented the appellant. (Supreme Ct, Orange Co)

People v Ali-Williams, 172 AD3d 890 (2nd Dept 5/8/2019)

RUDOLPH ERROR / REMITTAL
ILSAPP: The defendant appealed from a judgment of Orange County Court, convicting him of 1st and 2nd degree robbery and other crimes, upon his plea of guilty, and imposing sentence. The Second Department vacated the sentence and remitted. CPL 720.20 (1) requires a court to make a youthful offender determination in every case where the defendant is eligible, even where such adjudication was not requested. See *People v Rudolph*, 21 NY3d 497, 501. As to the instant robbery, an armed offense, the court was required to determine whether the defendant was eligible based on statutory facts. The statements that the defendant made to detectives were the result of the functional equivalent of interrogation. The failure to suppress the statements and a wallet was not harmless. The evidence of guilt was not overwhelming, and there was a reasonable possibility that the admission of the illicit evidence might have contributed to the conviction. A new trial was ordered. Samuel Coe represented the appellant. (County Ct, Rockland Co)

People v Arevalo, 172 AD3d 891 (2nd Dept 5/8/2019)

PEOPLE’S APPEAL / NO GRAND JURY DEFECT
ILSAPP: The People appealed from an order granting the defendant’s motion pursuant to CPL 210.20 to dismiss the indictment, with leave to re-present. The Second Department reversed and remitted. A grand jury indicted the defendant for 2nd degree murder and other charges. He was accused of striking a victim with his vehicle; driving fast with the victim on the hood; and then braking suddenly, causing the victim to be propelled onto the street. An indictment should be dismissed where the integrity of the grand jury proceeding is impaired and prejudice to the defendant may result. The extraordinary remedy of dismissal was available in rare cases. Here the prosecutor was not obligated to present evidence that the defendant claimed to be favorable, since such proof was not entirely exculpatory and would not have materially influenced the investigation. Further, the prosecutor properly presented expert testimony as to a matter beyond the ken of the average juror. Finally, the defendant was not entitled to pre-indictment discovery of *Brady* material. (Supreme Ct, Nassau Co)

People v Crupi, 172 AD3d 898 (2nd Dept 5/8/2019)

IMPEACHMENT – BAD ACTS/POLICE WITNESSES
LASJRP: The Second Department finds no error where the trial court prohibited defendant from cross-examining a police witness with respect to allegations of false arrest and/or police brutality in four federal lawsuits filed against that witness. The complaints contain only allegations of unlawful police conduct by large groups of officers, and do not allege specific acts committed by the police witness individually. (Supreme Ct, Richmond Co)


CUSTODY – RIGHT TO FILE/CHANGE IN CIRCUMSTANCES
LASJRP: The Second Department concludes that the family court should not have dismissed the mother’s custody petition “with prejudice.” The Court also rejects the father[‘s] request that, because of the extensive litigation history, the mother should be prohibited from filing further petitions without prior court approval. Child custody and parental access orders are not entitled to res judicata effect and are subject to modification based upon a showing of changed circumstances. On the other hand, a disappointed litigant may not file successive custody modification petitions alleging only the same operative facts, and modification hearings are generally limited to events occurring after the conclusion of the last hearing or proceeding, although trial courts have discretion to hear evidence of prior conduct in appropriate circumstances. (Family Ct, Kings County)


SENTENCE/PAROLE – JUVENILE CRIMES
LASJRP: The Second Department overturns a Parole Board determination and orders a new interview, noting, inter alia, that petitioner was 16 years old when he committed the subject crimes and that neither the transcript of the September 2016 interview nor the Parole Board’s
Second Department continued

September 2016 determination shows that the Parole Board considered petitioner’s youth and “its attendant characteristics” in relationship to the crimes he committed. Also, petitioner acknowledged that his crimes were not excused by his difficult upbringing by a mother with mental health issues who was abusive and suicidal and an abusive stepfather who was addicted to heroin, all of which required petitioner, as a very young child, to act as a parent to his seven younger siblings. (Supreme Ct, Dutchess Co)


Paternity – Acknowledgment Of Paternity – Defaults

LASJRP: In a proceeding in which petitioner seeks to vacate an acknowledgment of paternity, the Second Department upholds the vacatur of an order, issued upon respondent’s default, that directed genetic marker testing. Respondent was traveling by train from New Jersey and encountered delays that caused her to arrive slightly more than one hour late for the scheduled hearing. She had appeared at a majority of the prior court appearances, and she demonstrated the existence of a potentially meritorious defense.

The family court also did not err in dismissing the petition since petitioner failed to meet his prima facie burden to prove that the acknowledgment was signed by reason of fraud, duress, or material mistake of fact. (Family Ct, Nassau County)

People v Walters, 172 AD3d 916 (2nd Dept 5/8/2019)

Impeachment – Sandoval/Violation of Pretrial Ruling

LASJRP: The Second Department finds reversible error where, during defendant’s testimony, the court deviated from its Sandoval ruling that the People would be permitted to ask whether defendant had two prior felony convictions but not elicit the underlying facts.

In one instance, after asking defendant to confirm that he was charged in this case with burglary in the second degree, the prosecutor remarked, in effect, that the charged crime was “the same type of DNA hit that happened back in 2008.” Defendant’s motion for a mistrial should have been granted.

If the prosecutor believed that defendant’s testimony on direct examination opened the door, the prosecutor could have asked the court to expand its ruling, but did not do so.

The error was not harmless. It “would be difficult for the jury in this residential burglary case involving DNA evidence to ignore the fact that the defendant had a prior arrest and conviction for a residential burglary involving DNA evidence.” (Supreme Ct, Queens Co)

People v Aniano, 172 AD3d 1083 (2nd Dept 5/15/2019)

Inclusory Counts / Dismissed

ILSAPP: The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of aggravated vehicular homicide (two counts) and other crimes. As the People conceded, the counts for vehicular manslaughter, reckless driving, and operating a motor vehicle while under the influence of drugs, had to be dismissed as inclusory concurrent counts. Jonathan Edelstein represented the appellant. (Supreme Ct, Nassau Co)

People v Delvalle, 172 AD3d 1090 (2nd Dept 5/15/2019)

The defendant failed to preserve a claim that improper remarks by the court during voir denied him a fair trial. The alleged misconduct did not constitute a mode of proceedings error, and the comments do not warrant reversal, but “we express our strong disapproval of the court’s conduct in issuing certain remarks . . . .” The court commented that those dismissed prospective jurors who lacked an ability to speak or understand English should take, or be required to take, English classes, and appeared to make an official record as to one, telling the court clerk to note the language issue. The court also made unwarranted comments about prospective jurors who were excused for cause because of an inability to be impartial, including “we will indicate that [the prospective juror] should only serve on civil matters for the next several weeks’ . . . .” (Supreme Ct, Queens Co)

People v Grose, 172 AD3d 1092 (2nd Dept 5/15/2019)

Judges – Bias/Interest

LASJRP: The Second Department finds no error where the trial judge declined to recuse herself from determining defendant’s motion to controvert a warrant the judge herself had issued. (Supreme Ct, Kings Co)

People v Hill, 172 AD3d 1095 (2nd Dept 5/15/2019)

Conflict of Interest / Reversal

ILSAPP: The defendant appealed from a judgment of Westchester County Court, convicting him of 1st degree manslaughter and 2nd degree CPW. The Second Department reversed and vacated the plea. The defendant was charged under another indictment with assault. Defense counsel represented the defendant as to both indictments. Following a pretrial hearing on the murder case, counsel
Second Department continued

learned that he had a conflict of interest. On unrelated charges, his law office represented the prosecution’s witness, who was to testify that he saw the defendant shoot the instant homicide victim. The Second Department held that the defendant was denied effective assistance of counsel when the attorney—who was relieved as counsel in the murder case because of the conflict of interest but remained on the assault case—made a plea offer with respect to the murder indictment. See People v Solomon, 20 NY3d 91, 96. Gary Eisenberg represented the defendant. (County Ct, Westchester Co)

**People v King**, 172 AD3d 1098 (2nd Dept 5/15/2019)

The sentences imposed upon the defendant’s convictions of second-degree possession of a weapon should not run consecutively to the sentence for second-degree murder; trial evidence did not “establish that the defendant possessed the gun for an unlawful purpose unrelated to shooting at the intended victim, resulting in the death of the victim … or that his possession of a gun was separate and distinct from his shooting of the victim ….” The judgment is modified by providing that the sentences run concurrently.

While the court should not have allowed the prosecution “to introduce into evidence, as an adoptive admission of guilt, a recording of a telephone call that he made to his mother while he was incarcerated at Rikers Island Correctional Facility,” where it was not shown that the defendant assented to his mother’s statements. However, the error was harmless. (Supreme Ct, Kings Co)

**People v Nettles**, 172 AD3d 1102 (2nd Dept 5/15/2019)

SEARCH AND SEIZURE – DARDEN HEARING / PROBABLE CAUSE

LASJRP: The Second Department orders a Darden hearing, concluding that the detective’s on-the-scene observations during two controlled drug buys fell short of probable cause without the information provided to him by the confidential informant. Although the detective observed the CI enter and exit the building, the detective was unable to confirm that the CI had actually purchased narcotics he possessed from the subject apartment. (Supreme Ct, Kings Co)

**People v Taylor**, 172 AD3d 1110 (2nd Dept 5/15/2019)

The defendant’s unpreserved claims have merit warranting review. The court order requiring release of historical cell site location information (CSLI) under the Stored Communications Act, with no express finding of probable cause, was not effectively a warrant. The prosecution’s introduction of evidence that the defendant invoked his rights to counsel and to remain silent was likewise error. But both errors were harmless.

Imposition of consecutive sentences was error where first-degree criminal sexual act “constituted one of the offenses and a material element of the other offense,” first-degree criminal impersonation. The sentences must run concurrently. (Supreme Ct, Kings Co)

**Matier of Victor R.C.O.**, 172 AD3d 1071 (2nd Dept 5/15/2019)

**SIJS / REVERSAL**

**ILSAPP:** In a guardianship proceeding pursuant to Family Court Act Article 6, Nassau County Family Court granted the child’s petition to have his brother appointed as his guardian, but denied the motion for SIJS relief. The child appealed. The Second Department reversed. The record showed that reunification with one or both parents was not viable due to parental neglect, and that it would not be in the child’s best interests to return to Honduras. On many occasions, gang members there assaulted the boy, once causing a broken rib and scar on his head; and he had witnessed a drive-by shooting at his school that resulted in a schoolmate’s death. Gang members tried to recruit the child, he refused to join, and gang members sometimes killed persons who would not join. (Family Ct, Nassau Co)

**People v Juarez**, 172 AD3d 1231 (2nd Dept 5/22/2019)

**THIRD-PARTY PERCEIVED THREAT / ERROR BUT HARMLESS**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder. The Second Department upheld the conviction, but noted that the trial court should not have allowed the People to elicit certain testimony from an eyewitness. The eyewitness stated that, while testifying at trial, he felt intimidated by a courtroom spectator who allegedly was a member of the codefendant’s gang. See People v Vargas, 154 AD3d 971 (evidence that third party threatened witness with respect to testifying at a criminal trial is admissible as to consciousness of guilt—where such evidence links defendant to threat). However, the error was harmless. (Supreme Ct, Kings Co)

**Matier of Lew v Sobel**, 172 AD3d 1208 (2nd Dept 5/23/2019)

**CHILD SUPPORT / LAW OF THE CASE**

**ILSAPP:** The father appealed from an order of Nassau County Supreme Court, which denied his motion to terminate or decrease child support. The Second Department granted modification and remitted. One of the children was under age 21, so support was properly not terminat-
ed. However, the other child had turned 21, and the application for a downward modification should have been granted. A prior order provided that the father was not required to pay support after the older child turned 21 and would pay reduced support under the CSSA until the younger child’s 21st birthday. Such order was law of the case, in the absence of any changed circumstances. A judge may not review or overrule an order of another judge of coordinate jurisdiction in the same proceeding. Jennifer Goody represented the appellant. (Supreme Ct, Nassau Co)

**People v Robertson**, 172 AD3d 1239  
(2nd Dept 5/22/2019)

**Molineux Error / But Harmless**

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree robbery and other crimes. The Second Department affirmed, but observed that the trial court erred in letting the People recall the arresting officer to testify that he was informed that fingerprints taken from the defendant, Erick Robertson, matched a NYSID number in the state database for an Eric Robinson. The officer repeated the number to the jury. The People used such testimony to link the defendant to certificates of disposition showing that Eric Robinson had been twice convicted of criminal possession of stolen property—which the court allowed into evidence in its *Molineux* ruling. The officer’s testimony was inadmissible hearsay, since the information source did not testify and thus was not subject to cross-examination. However, the error was harmless, since there was overwhelming evidence of guilt and no significant probability that the error contributed to the conviction. (Supreme Ct, Queens Co)

**People v Gunther**, 172 AD3d 1403  
(2nd Dept 5/29/2019)

**Hearsay – Business Records/Digital Reproduction of Original**

LASJRP: The Second Department concludes that computer reproductions of bank withdrawal slips were properly admitted into evidence. The original withdrawal slips were scanned to store a digital image of the hard copy document, which is admissible where is it authenticated via testimony or affidavit that includes information about the manner or method by which tampering or degradation of the reproduction is prevented. The reproductions were properly authenticated by the testimony of a document review specialist. (County Ct, Westchester Co)

**Matter of Jennifer P.**, 172 AD3d 1377  
(2nd Dept 5/29/2019)

**Abuse/Neglect – Respondent/Person Legally Responsible – Corroboration**

LASJRP: The Second Department reverses an order that dismissed the sexual abuse and derivative abuse petitions on the ground that respondent was not a person legally responsible for the children. Respondent was the long-term boyfriend of the mother of the allegedly abused child Jennifer and the father of Jennifer’s half-sister, and, during the second year of the relationship between respondent and the mother, respondent lived in the household as a father figure. Respondent engaged in family activities with the mother and children, and at times was the only adult in the home with Jennifer. When arrested for the conduct alleged in the petitions, respondent gave the police the family’s apartment address as his own,
and he received mail at the apartment. The mother testified that she and respondent acted as the parents of the children.

The Court finds no error in the family court’s refusal to admit records from an unrelated criminal case reflecting that respondent pleaded guilty to the sexual abuse of two unrelated children, since the records did not corroborate the allegations of sexual abuse made by Jennifer. (Family Ct, Kings Co)

**People v Pelige, 172 AD3d 1407 (2nd Dept 5/29/2019)**

**Sentence / Insufficient Info**

**ILSAPP:** Upon the defendant’s appeal from a sentence of Kings County Supreme Court, the Second Department vacated the sentence. The record did not reflect that the defendant validly waived his right to appeal. Given his inexperience with the criminal justice system, the colloquy at the plea allocution was insufficient to advise him of the nature of the right to appeal. There was no indication that the defendant understood the distinction between the right to appeal and the other trial rights forfeited by a plea of guilty. He signed a written waiver, but required a Sinhala interpreter and the record did not show that the waiver was translated. The defendant agreed to plead guilty to attempted 2nd degree murder in exchange for 15 years, followed by post-release supervision. However, there were some problems regarding the sentence. For one thing, the trial court did not inquire about the defendant’s mental status at the time of the plea and sentence, even though he had been found unfit to proceed prior to the plea proceeding and then found fit after treatment. For another thing, the sentencing court lacked sufficient information regarding the sentence, since the Department of Probation did not interview the defendant when it could not secure an interpreter. The appellate court invoked People v Farrar, 52 NY2d 302 (court must exercise discretion at sentencing, even where sentence was negotiated at plea; must be free to impose lesser penalty, if warranted by facts available upon sentencing; but court should hear People’s request to withdraw consent to plea in response to less severe sanction). The matter was remitted for resentencing upon submission of a new PSR, which must include an interview with the defendant for which an interpreter was provided. Appellate Advocates (Skip Laisure, of counsel) represented the appellant. (Supreme Ct, Kings Co)

**Matter of Helmeyer v Setzer, 173 AD3d 740 (2nd Dept 6/5/2019)**

**CUSTODY/VISITATION – JURISDICTION**

**LASJRP:** In this custody modification/violation proceeding, the Second Department overturns a Queens County Family Court determination that New York’s exclusive continuing jurisdiction ended. Although the child moved to Connecticut in August 2015, and attends elementary school and has a pediatrician there, the child retains a significant connection with New York, where the father and maternal and paternal family members reside, two of the child’s physicians are located, and the child frequently visits with the father. Substantial evidence was available in New York concerning the child’s present and future welfare.

The Family Court also erred in its alternative holding that, even if it had jurisdiction, it would decline to exercise it on the ground that New York is an inconvenient forum. The father promptly commenced a violation proceeding in Putnam County shortly after the mother relocated with the child without his knowledge or the Family Court’s permission. The distance between the Queens County Family Court and the Connecticut courts does not present any inconvenience to the father, the mother, or the child. The evidence relating to the father’s claim that the mother has willfully denied him access to the child is located primarily in New York, where the majority of his access takes place. Any testimony by persons located in Connecticut could be presented by telephone, or audiovisual or other electronic means. The Family Court has already exercised jurisdiction over the father’s contempt motion and has access to the records and files of the Putnam County Family Court, which handled this matter since its inception. The New York courts are more familiar with the case than a Connecticut court would be, and have greater ability to expeditiously resolve it. The child has an attorney appointed in New York who is familiar with the proceedings, and continuity of that representation would be preserved. (Family Ct, Queens Co)

**Matter of Newton v McFarlane, 174 AD3d 67 (2nd Dept 6/5/2019)**

The Court erred by granting the mother’s custody modification petition and transferring custody from the father to the mother, without a sound and substantial basis in the record, or a finding of change of circumstances. Before “plunging full-bore” into a custody trial, the Court first should have considered whether the mother’s petition contained the requisite change of circumstances to warrant an inquiry into the existing custody arrangement. Additionally, the scope of the testimony should have been limited to what is alleged to have changed between the determination of the second modification petition and the filing of the current one. The court failed in its duty when it upended the status quo without explaining its reasoning as to changes of circumstances and best interest. The court’s decision cannot be given
deference when neither a written or oral decision setting forth its findings of fact and conclusion of law are ever set forth. Therefore, the decision is reversed as having no sound and substantial basis in the record. Rather than remanding the case to the lower court, which would not be in the interests of the child or the parties, and since this Court’s authority is as broad as the hearing court, and since the record is adequate to permit a review, this Court will issue its own order transferring custody back to the father.

Additionally, the court erred by not giving due consideration to the wishes of the child who was 14 and 15 years old. While not determinative, the child’s expressed wishes is a relevant factor in a best interest determination. Finally, contrary to the assertion of the mother, the attorney for the child had standing conferred by FCA 1120(b) to commence this appeal. An attorney assigned to represent the child in a custody case has an obligation and a duty to zealously represent the child, including fully and appearing and participating in litigation, the right to call witnesses at trial and cross examine witnesses when necessary. Also included is the right and obligation to file and perfect an appeal on behalf of the child, in order to preserve their rights. Additionally, since the child expressed a wish through her attorney to remain with the father, the court’s decision to the contrary caused the child to be aggrieved. For the mother to suggest otherwise is contrary to the policy reasons underlying the appointment of an Attorney for the Child. (Family Ct, Kings Co)

**Matter of DiSisto v Dimitri, 173 AD3d 863 (2nd Dept 6/12/2019)**

**CUSTODY / HEARING NEEDED**

**ILSAPP:** The father appealed from a Westchester County Family Court order, granting the mother’s petition for sole custody of the parties’ child and denying his petition. The Second Department reversed and remitted for a hearing before a different judge. Family Court denied the father a hearing, even though the record did not demonstrate the absence of unresolved factual issues, so as to render a hearing unnecessary. Custody determinations should generally be made only after a plenary hearing. This rule furthered the substantial interest in ensuring that custody proceedings generated a just and enduring result that served the best interest of a child. Daniel Pagano represented the appellant. (Family Ct, Westchester Co)

**People v Durrant, 173 AD3d 890 (2nd Dept 6/12/19)**

**EVIDENCE – CHARACTER**

**LASJRP:** In this child sex abuse prosecution, the Second Department finds no error where the court granted the People’s motion to strike the testimony of defendant’s character witness.

Although the court erred in ruling that evidence that a character witness never heard anyone say anything negative about the defendant is inadmissible, defendant’s reputation in the workplace for lack of sexual impropriety was in no way relevant to whether he sexually abused a child in secret and outside of the workplace. (Supreme Ct, Queens Co)

**People v Folkes, 173 AD3d 893 (2nd Dept 6/12/2019)**

The court did not err in sending the jury back to deliberate further after cautionary instructions where the jury initially returned a unanimous verdict convicting the defendant of multiple counts of five offenses relating to withdrawal of cash from a bank account he did not own, one juror hesitated when affirming the verdict as the jury was polled and said outside the presence of the other jurors that he felt pressured as to certain counts, the defendant sought a mistrial which was denied after further inquiry during which the juror said he felt pressured but not threatened, and the verdict ultimately reached by the jury after further deliberation and viewing of video footage from the bank that was the subject of the counts the hesitant juror had mentioned was the same as the original verdict.

The contention that the defendant was denied a fair trial by admission of evidence concerning counts relating to events in Queens County, which were dismissed at the close of evidence at the prosecution’s request, was not preserved, lacks merit, and in any event was harmless. (Supreme Ct, Kings Co)

**People v Goondall, 173 AD3d 896 (2nd Dept 6/12/2019)**

**RIGHT TO COUNSEL – EFFECTIVE ASSISTANCE**

**LASJRP:** The Second Department concludes that defendant was deprived of the effective assistance of counsel where, at the robbery trial, defense counsel contended that the complainant had mistakenly identified defendant as one of two assailants; the complainant twice failed to identify defendant before finally stating that defendant “look[ed] like” the second assailant; counsel then continued to pursue the misidentification defense throughout the trial; and then, on summation, counsel changed course and argued that the complainant had merely been drawn into a physical altercation with the assailants after they made an offensive remark to him and that there was no forcible taking of property, and concealed that defendant was the second assailant.

Counsel abandoned his chosen defense in favor of a nebulous and contradictory argument that was devoid of
any possibility of success; it did not even rise to the level of trial strategy. (Supreme Ct, Queens Co)

**Matter of Innocence A. M.-F., 173 AD3d 869**
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**TERMINATION OF PARENTAL RIGHTS – JURISDICTION**

LASJRP: The Second Department rejects the mother’s contention that the family court lacked jurisdiction to make a finding of permanent neglect because the related FCA Article Ten child protective proceeding remained unresolved. (Family Ct, Kings Co)

**People v Lewis, 173 AD3d 913 (2nd Dept 6/12/2019)**
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**SORA / REDUCTION**

ILSAPP: The defendant appealed from an order of Kings County Supreme Court, designating him a level-three sex offender. The Second Department reversed and classified him as level two. The lower court erred in granting the People’s application to depart from the presumptive level-two designation. The SORA court must: (1) decide whether the aggravating or mitigating circumstances alleged are not adequately taken into account by the Guidelines; (2) then determine whether the proponent established that the subject circumstances exist; and (3) finally, make a discretionary determination as to a departure. Here, the People failed to establish that the subject circumstances existed, that is, that the defendant attempted to flee with the child. Instead, relevant grand jury testimony belied damning statements contained in the case summary and presentence report. Appellate Advocates (Joshua Levine, of counsel) represented the appellant. (Supreme Ct, Kings Co)

**Matter of Ralph E. B. v Jovonna K. F., 173 AD3d 854**
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**UCCJEA / REVERSAL**

ILSAPP: The [father] appealed from an order of Kings County Family Court, which dismissed his custody modification petition. The Second Department reversed and remitted. Family Court should not have summarily determined that it lacked jurisdiction, on the ground that the child had resided in Florida since October 2016. The trial court had made previous custody determinations as to the subject child, and the court would ordinarily retain exclusive continuing jurisdiction. Family Court should have afforded the parties an opportunity to present evidence as to whether: (1) the child had maintained a significant connection with NY; and (2) substantial evidence was available here concerning the child’s care. Richard Herzfeld represented the appellant. (Family Ct, Kings Co)

**People v Ramirez, 173 AD3d 904 (2nd Dept 6/12/2019)**
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**ANOTHER YO GOOF / SENTENCE VACATED**

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree robbery, upon his plea of guilty. The Second Department vacated the sentence and remitted. CPL 720.20 requires the sentencing court to determine whether an eligible defendant is to be treated as a youthful offender, even where the defendant failed to request such treatment, or agreed to forgo it as part of a plea agreement. See People v Rudolph, 21 NY3d 497. The defendant’s waiver of appeal was invalid, because the plea court failed to confirm that he understood the nature of the right to appeal and the consequences of waiving it. In any event, a valid waiver would not bar his contention that the court failed to consider YO treatment. The Legal Aid Society of NYC (Justine Luongo and Nancy Little, of counsel) represented the appellant. (Supreme Ct, Queens Co)

**Matter of Jane Doe v New York State Office of Children and Family Services, 173 AD3d 1020**
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**ABUSE/NEGLECT – CENTRAL REGISTER REPORTS**

LASJRP: An indicated report was based upon an incident in which petitioner allegedly hit her then five-year-old son in the face accidentally, causing bleeding, during a physical altercation with her husband; and, approximately three weeks thereafter, an arrest for driving while intoxicated with her then three- and five-year-old children in the vehicle. Petitioner pleaded guilty to driving while intoxicated, and, in a neglect proceeding, admitted that she neglected her children by having “[m]isused drugs and/or alcohol to the extent that [she] lost self control of [her] actions and was therefore unable to properly supervise the child(ren),” and that she used “alcohol excessively and to the point of intoxication.”

The Second Department upholds a determination by OCFS denying petitioner’s application to seal the report, concluding that there is substantial evidence in the record that the acts are relevant and reasonably related to petitioner’s employment as a childcare provider. (Family Ct, Suffolk Co)

**Matter of Emma R., 173 AD3d 1037**
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**ABUSE/NEGLECT – MOTION TO VACATE**

LASJRP: The Administration for Children’s Services filed petitions alleging that the mother neglected her son through inadequate supervision and derivatively neglect-
ed her daughter. In an order of fact-finding and disposition that followed the mother’s consent without admission pursuant to FCA § 1051(a), the family court found that she neglected the children, and released the children to her under ACS supervision for twelve months upon certain conditions, such as compliance with recommended services.

After expiration of the dispositional order, the mother moved pursuant to FCA § 1061 to vacate the fact-finding/dispositional order. The family court denied the motion.

The Second Department reverses, and grants the motion. The mother demonstrated that she had successfully fully complied with the conditions of the order of disposition, and that the requested modification of the order of fact-finding and disposition was in the best interests of the children.

The JRP appeals attorney was Marcia Egger, and the trial attorney was Marjan Daftary. (Family Ct, Queens Co)

People v Jones, 173 AD3d 1062 (2nd Dept 6/19/2019)
IDENTIFICATION – POLICE-ARRANGED CELL PHONE VIDEO IDENTIFICATION
APPEAL – HARMLESS ERROR
LASJRP: The complainant’s landlord gave a detective a cell phone the landlord found in front of the building. After the detective conducted two photo identification procedures using the photo manager computer system, with defendant’s photograph included in one of the procedures, but the complainant did not identify anyone, the detective showed the complainant the cell phone, told him that it was recovered from the scene of the robbery, and asked if it was his. The complainant responded that the cell phone was not his. The detective had him view videos that were on the cell phone, one of which portrayed a male tasing an individual who was sleeping on a staircase. The complainant identified the male as one of the individuals who robbed him. The detective submitted a still photograph of the male to a facial recognition software program containing photographs of criminal offenders, and defendant was a match. The complainant identified defendant from a photo array, and, approximately a week later, identified defendant in a lineup. The court suppressed the lineup identification, but found an independent source for an in-court identification. The court denied suppression of evidence that the complainant identified defendant as the male in the cell phone video, finding that there was no police-arranged procedure.

The Second Department suppresses the cell phone video identification, which was police-arranged, and unduly suggestive. By showing the complainant the cell phone and telling him that it was recovered from the scene of the robbery, the detective suggested that the phone may belong to one of the perpetrators, and the video was similar to the complainant’s description of the robbery.

The error was not harmless. (Supreme Ct, Kings Co)

Matter of Joseph Z., 173 AD3d 1052 (2nd Dept 6/19/2019)
NEGLECT / TRIABLE ISSUES
ILSAPP: The mother appealed from an order of Kings County Family Court, which granted the petitioner agency’s motion for summary judgment against her on the issue of neglect. The Second Department reversed and ordered a hearing. In an appropriate case, Family Court may summarily find neglect. Here, the agency’s motion included evidence submitted at a 1028 hearing. At that hearing, the mother—who was deaf and communicated through a sign-language interpreter—gave explanations for the scratches on the child. She said that she struggled to control the child, who had been diagnosed with ADHD and oppositional defiant disorder. The hearing evidence thus revealed triable issues of fact. Melissa Chernosky represented the appellant. (Family Ct, Kings Co)

Matter of Najaie C., 173 AD3d 1011 (2nd Dept 6/19/2019)
ABUSE/NEGLECT – DOMESTIC VIOLENCE
LASJRP: The Second Department reverses an order that, after a fact-finding hearing, dismissed neglect charges, and makes a neglect finding, where respondent mother attacked her pregnant sister, the children’s aunt, with a knife, causing lacerations to her ear that required medical treatment, while the children were in the home.

Although the family court cited the absence of evidence that the children witnessed the incident, an imminent danger of physical, mental or emotional impairment should be inferred from the mother’s egregious conduct while the children were in the home, and impairment or imminent danger of physical impairment should be inferred from the children’s proximity to the violence. (Family Ct, Kings Co)

Matter of Peter T., 173 AD3d 1043 (2nd Dept 6/19/2019)
ABUSE/NEGLECT – MENTAL HEALTH ISSUES
LASJRP: The Second Department upholds findings of neglect where the evidence demonstrated that although the mother and father loved the child and were willing to participate in services that would assist them in meeting his needs, due to their respective intellectual disabilities they were unable to acquire sufficient skills to do so. There is also a history of domestic violence perpetrated by the father against the mother. (Family Ct, Westchester Co)
Florida offense was not equivalent to a NY felony. Appellate Advocates (Alice Cullina, of counsel) represented the appellant. (Supreme Ct, Queens Co)

**Matter of Baby Boy W.**, 173 AD3d 1194
(2nd Dept 6/26/2019)

**ABUSE/NEGLECT – JURISDICTION**
**INDIAN CHILD WELFARE ACT**

**LASJRP:** In this Article Ten proceeding, the Second Department rejects the mother’s contention that the Indian Child Welfare Act deprived the Family Court of jurisdiction, where the mother failed to identify any Indian tribe of which she or either child is a member, and thus failed to meet her burden of providing sufficient information to put the Family Court on notice that the children may be “Indian children.” (Family Ct, Westchester Co)

**Matter of Ethan L.**, 173 AD3d 1186
(2nd Dept 6/26/2019)

**ABUSE/NEGLECT – DOMESTIC CONFLICT/VERBAL THREATS**

**LASJRP:** The Second Department upholds a finding of neglect where, in the presence of the two-year-old child, the father verbally threatened to kill the child and the child’s mother and specifically threatened to throw the child off an apartment balcony.

The JRP appeals attorney was Susan Clement, and the trial attorney was Norah Bowler. (Family Ct, Queens Co)

**People v James**, 173 AD3d 1207 (2nd Dept 6/26/2019)

**SEARCH AND SEIZURE – AUTO SEARCH/PROBABLE CAUSE**
**EVIDENCE – CONSCIOUSNESS OF GUILT**

**RIGHT TO COUNSEL**

**LASJRP:** The robbery complainant told the officers that the perpetrators were three black men, one of whom was heavyset, that one of the men had a gun, and that the men had fled in a green minivan traveling eastbound on Kosciusko Street. Other officers to whom these facts were transmitted saw a green minivan traveling eastbound on Kosciusko Street. The officers followed the minivan, which eventually stopped. The front seat passenger, a heavyset black man, exited the vehicle, and an officer approached with his gun drawn and handcuffed the man. Officers then removed the two remaining occupants, including defendant, from the minivan. About a minute later, the complainant arrived and identified the three men as the perpetrators. An officer approached the minivan and observed a firearm between the front seats.

The Second Department upholds the denial of suppression, concluding that there was probable cause to
The trial court erred in admitting defendant’s statement to his mother during a recorded telephone call that, with the assistance of an attorney, he could “get around” the fact that he had touched the gun earlier in the day. Evidence which has the jury infer guilt from the fact that a defendant exercised his or her right to counsel should not be admitted. However, the error was harmless beyond a reasonable doubt. (Supreme Ct, Kings Co)

**Matter of John, 174 AD3d 89 (2nd Dept 6/26/2019)**

**ADOPTION – STANDING/BIOLOGICAL PARENT SURROGATE PARENTING AGREEMENTS**

**LASJRP:** The Second Department concludes that the biological father of a child conceived with an anonymous egg donor and born to a gestational surrogate may adopt the child and thereby terminate any parental rights held by the gestational surrogate. Such an adoption advances the purpose of the adoption statute and should be permitted where adoption is in the best interests of the child.

The Legislature, while rendering all surrogate parenting agreements void as against public policy, has drawn a distinction between commercial surrogacy contracts and noncommercial surrogacy contracts such as this one. While commercial surrogacy contracts subject participants, and those who assist in the formation of the contract, to civil penalties or felony conviction, the only sanction against unpaid surrogacy contracts is treating them as void and unenforceable. The Legislature recognized that parties might still enter into unpaid contracts; where, as here, there is no dispute because the genetic and gestational parents agree as to legal parentage, the protection of the gestational mother contemplated in the Domestic Relations Law is not implicated. The Legislature also made provision for the gestational surrogate to validly terminate her parental rights to a child born of a surrogate parenting contract.

The Family Court also erred in ruling that a biological parent may not adopt his or her own child. An order of filiation, primarily aimed at ensuring that the children have adequate financial support, would be a “shallow” remedy. To obtain judicial authorization to make decisions on behalf of the child, the father would also have to initiate a custody proceeding against the gestational surrogate who had already renounced any tie to the child. A fictitious family structure leaving a gestational surrogate with no genetic ties or intention to be a parent as a legal parent is not in a child’s best interests. The Court’s conclusion is consistent with legislation recently passed by the State Senate and Assembly. (Family Ct, Queens Co)

**People v Lopez, 173 AD3d 1213 (2nd Dept 6/26/2019)**

**RIGHT TO COUNSEL – EFFECTIVE ASSISTANCE**

**LASJRP:** The Second Department holds that the court should have assigned new counsel when, on the date of sentencing, defendant referred to a letter he had sent to the court and he and counsel conferred; counsel then stated that there was a language barrier, and that she had explained the case to the defendant many times but he wanted clarification of the charges again; defendant complained that the promised sentence was too long and that his attorney was not helping him; and counsel interjected that she had explained the case to defendant on numerous occasions through a Spanish language interpreter, and that “[t]his is all news to me.”

Defendant’s right to counsel was adversely affected when his attorney took a position adverse to him with respect to his application, in effect, to withdraw his plea of guilty at sentencing. (Supreme Ct, Nassau Co)

**People v Morris, 173 AD3d 1220 (2nd Dept 6/26/2019)**

**DISCOVERY – NOTICE OF PSYCHIATRIC EVIDENCE**

**LASJRP:** In this burglary prosecution, the Second Department finds reversible error where the trial court refused to grant defendant permission in the interest of justice to submit a late notice of his intent to introduce psychiatric evidence. The trial court failed to exercise any discretion.

Evidence that defendant previously had suffered auditory hallucinations would have corroborated defendant’s testimony that he entered the home intending to aid a woman who was yelling, rather than damage the house. Preclusion of testimony regarding portions of defendant’s conversation with the officer which involved his past auditory hallucinations, and his resultant hospitalization, deprived the jury of the full context.

Any prejudice to the People was substantially outweighed by defendant’s extremely strong interest in presenting the evidence. (County Ct, Dutchess Co)

**People v Powell, 173 AD3d 1228 (2nd Dept 6/26/2019)**

**SORA / REVERSED**

**ILSAPP:** The defendant appealed from an order of Kings County Supreme Court, which designated him a level-two sex offender. The Second Department reversed and remitted. At the SORA hearing, the court found premature the defendant’s request for a downward departure. However, as the People correctly conceded, the SORA court should have addressed the merits. Appellate Advocates (Nao Terai, of counsel) represented the appellant. (Supreme Ct, Kings Co)
Second Department continued

**Matter of Argila v Edelman, 174 AD3d 521**  
(2nd Dept 7/3/2019)

**CUSTODY – EXAMINATION OF WITNESSES/LEADING QUESTIONS**

**LASJRP:** The Second Department finds no error where the family court restricted the mother’s examination of the father during her direct case by refusing to permit her to use leading questions. The mother already had the opportunity to cross-examine the father using leading questions when he testified as part of his direct case.

In any event, the father was not reluctant or evasive in answering questions, the mother’s counsel asked many leading questions despite the court’s ruling, and to the extent objections were sustained, the mother identifies no instance in which she was unable to elicit necessary information without the use of leading questions. (Family Ct, Suffolk Co)

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**Matter of Christopher M.S., 174 AD3d 535**  
(2nd Dept 7/3/2019)

**ABUSE/NEGLECT – VISITATION**

**LASJRP:** ACS alleges in this abuse proceeding that the parents, the paternal grandmother, and the maternal grandfather abused the child, who suffered a fracture of his left arm while in their care.

The Second Department, relying on FCA § 1030, concludes that the family court did not err in awarding the paternal grandmother, who has completed her service plan and has acted properly when observed with the child, unsupervised access with the child on Saturdays from 10:00 a.m. until 12:00 p.m., to be followed by supervised access with the child, his three siblings, and their mother from 12:00 p.m. until 2:00 p.m., to be followed by further unsupervised access with the child from 2:00 p.m. until 7:00 p.m.; and, on Sundays, unsupervised access with the child.

The two hours of supervised access on Saturday affords ACS the opportunity to address any concerns that may come up and constitutes a sufficient safeguard.

The JRP appeals attorney was Riti Singh, and the trial attorney was Kimberly Schertz. (Family Ct, Richmond Co)

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**People v Covington, 174 AD3d 548**  
(2nd Dept 7/3/2019)

**SORA / DIAZ MANDATES REVERSAL**

**ILSAPP:** The defendant appealed from an order of Westchester County Court, designating him a level-three offender. The Second Department reversed and dismissed. In 2002, the defendant was convicted in Virginia of 2nd degree murder. For the offense, involving a victim under age 15, he was required to register as a sex offender in Virginia upon his release. In 2017, the defendant moved to NY, where the SORA court determined that the Virginia registration made him a sex offender. The Second Department reversed, as required under People v Diaz, 32 NY3d 538 (mandatory registration as murderer under Virginia Code, under provision regarding nonsexual violent crimes against minors, did not qualify defendant as sex offender in NY). The Westchester County Legal Aid Society (Debra Cassidy, of counsel) represented the appellant. (Supreme Ct, Westchester Co)

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**Matter of Cuccia-Terranova v Terranova, 174 AD3d 526**  
(2nd Dept 7/3/2019)

**VISITATION – SCHEDULE**

**LASJRP:** The Second Department modifies the family court’s order by deleting a provision granting the father parental access on the third weekend of every month from Saturday at 12:00 p.m. until Sunday at 12:00 p.m., and substituting an award of parental access on Thursdays from release from school or, if no school, from 12:00 p.m., until 5:00 p.m., and on alternate weekends from Saturday at 10:00 a.m. to Sunday at 6:00 p.m.; deleting a provision directing pick up and drop off at the police precinct station house closest to the mother’s residence, and substituting a provision directing pick up and drop off curbside at the mother’s residence or such other location agreed upon by the parties; deleting a provision directing that parental access not adversely affect the children’s school, religious, or extracurricular activities; deleting a provision directing that if parental access had to be cancelled by the father for any reason, he could not make up that access unless the parties agreed otherwise; and adding a provision granting parental access in odd years on Christmas Eve from the earlier of 12:00 p.m. or release from school to 9:00 p.m.

The Court notes, inter alia, that the father has previously exercised weeknight and overnight alternating weekend parental access without the mother raising any serious issues or concerns; that the Christmas-time provision fails to take into account the importance of the children’s relationship with the father and his extended family; and that because the mother can unilaterally determine the children’s non-school activities without prior consultation with the father, and had asserted that the children were so busy that establishing a fixed schedule would be difficult, the provision giving primacy to other activities could result in an undue curtailment of the father’s parental access. (Family Ct, Richmond Co)
Second Department continued

**People v Dimon**, 174 AD3d 540 (2nd Dept 7/3/2019)

**Plea Terms Violation / Hearing Needed**

**ILSAPP:** The defendant appealed from a judgment of Suffolk County Court, convicting her of 3rd degree criminal mischief and 2nd degree reckless endangerment. She pleaded guilty in exchange for a promise that she would be placed in a Mental Health Court program. If the defendant succeeded in treatment, her convictions would be dismissed or reduced. If she failed, she would be sentenced to jail time. Based merely on the prosecutor’s representation at sentencing, the defendant was sentenced to one year. The Second Department reversed and remitted. The defendant was entitled to a hearing regarding whether she violated the plea conditions. Steven Feldman represented the appellant. (County Ct, Suffolk Co)

**People v Wright**, 174 AD3d 547 (2nd Dept 7/3/2019)

**Registration Crime / Reversed**

**ILSAPP:** The defendant appealed from a Dutchess County Court judgment, convicting him of failure to register or verify as a sex offender, upon his plea of guilty. The Second Department reversed and vacated the plea. In his factual allocution, the defendant indicated that he provided DCJS with his address at a homeless shelter, where he stayed unless all beds were taken, in which case, he stayed with a friend. Such statements demonstrated that the defendant did not change his address and was not required to notify DCJS. Steven Feldman represented the appellant. (County Ct, Dutchess Co)

**People v Alvarez**, 174 AD3d 638 (2nd Dept 7/10/2019)

**Challenge For Cause / Reversal**

**ILSAPP:** The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 3rd degree burglary and other crimes. The Second Department reversed and ordered a new trial. Three prospective jurors demonstrated a state of mind likely to preclude an impartial verdict. The trial court failed to obtain the requisite assurances that they could set aside any bias, and erred in denying the defense challenges for cause. Such failure constituted reversible error, because the defendant exhausted his peremptory challenges. Appellate Advocates (Paul Skip Laisure, of counsel) represented the appellant. (Supreme Ct, Kings Co)

**People v Gooding**, 174 AD3d 642 (2nd Dept 7/10/2019)

**Protective Order / Too Long**

**ILSAPP:** The defendant appealed from a judgment of Kings County Supreme Court, convicting him of criminal possession of a firearm. The Second Department vacated so much of the order of protection as directed that it remain in effect until January 4, 2029. The duration of the order exceeded the maximum statutory period and failed to take into account jail-time credit. Appellate Advocates (Alice Cullina, of counsel) represented the appellant. (Supreme Ct, Kings Co)

**Matter of Jamie R.**, 174 AD3d 623 (2nd Dept 7/10/2019)

**Defendant / Mental Defect**

**ILSAPP:** The State Commissioner of Mental Health appealed from [a] Rockland County Supreme Court order, which denied a CPL 330.20 application for continued retention of the respondent. The Second Department reversed and granted the application. After a trial on a charge of 2nd degree assault, the respondent was found not responsible by reason of mental disease or defect. An attending psychiatrist’s testimony established that the respondent was not prepared to function in the community in a less-supervised environment. Moreover, he lacked insight into his mental illness and the need for further treatment. (Supreme Ct, Rockland Co)

**People v Ramsey**, 174 AD3d 651 (2nd Dept 7/10/2019)

The court’s excessive and prejudicial questioning of trial witnesses, an issue unpreserved but reviewed in the interest of justice, requires reversal. The court “engaged in extensive questioning of witnesses, usurped the roles of the attorneys, elicited and assisted in developing facts damaging to the defense on direct examination of the People’s witnesses, bolstered the witnesses’ credibility, interrupted cross-examination, and generally created the impression that it was an advocate on behalf of the People. The court’s improper interference deprived the defendant of a fair trial, and a new trial before a different Justice is warranted …. ” (Supreme Ct, Queens Co)

[Ed. Note: This constituted the fifth time in about two years that the Second Department ordered such relief due to excessive questioning of trial witnesses by the same justice. See **People v Sookdeo**, 164 AD3d 1268 (9/12/2018); **People v Hinds**, 160 AD3d 983 (4/25/2018), **People v Robinson**, 151 AD3d 758 (6/7/2017), and **People v Davis**, 147 AD3d 1077 (2/22/2017).]
Second Department continued

**Matter of Raymond v Raymond, 174 AD3d 625 (2nd Dept 7/10/2019)**

CUSTODY – EXPERT WITNESSES/DISCOVERY

LASJRP: The Second Department affirms an order awarding sole custody to the mother, concluding that the family court did not err in denying the request of the father, who proceeded pro se, for a copy of the forensic report prepared by the court-appointed evaluator.

The court provided the father with liberal access to the report over an extended period of time during which he could review the report upon request and take notes with regard to its contents. The father has failed to show that his ability to prepare for the hearing was prejudiced because he did not have his own physical copy of the report. (Family Ct, Kings Co)

**People v Robles, 174 AD3d 653 (2nd Dept 7/10/2019)**

The defendant’s unpreserved contention that a trial witness’s testimony did not meet the foundational requirements of CPL 60.25, reviewed in the interest of justice, is correct and requires reversal. The witness, who “was unable to identify the defendant during two pretrial identification procedures,” testified that, when asked “whom she would ‘lean toward’” in a lineup, she had chosen the defendant. The prosecutor then asked if the witness recalled what it was that had made her lean toward the defendant and the witness said, “‘the jaw.” Admission of such testimony was improper, as it did not constitute a prior identification, and was highly prejudicial.

Multiple instances of inappropriate and unacceptable advocacy by the prosecutor throughout summation are disapproved of but were not preserved for review. (Supreme Ct, Kings Co)

**Matter of State of New York v Ted B., 174 AD3d 630 (2nd Dept 7/10/2019)**

CIVIL MANAGEMENT / REVERSAL

ILSAPP: In a proceeding pursuant to MHL article 10, the appellant challenged an order of Orange County Supreme Court, which found that he suffered from a mental abnormality and was a dangerous sex offender requiring civil confinement. The Second Department reversed and remitted. The State failed to prove by clear and convincing evidence that the respondent had such an inability to control his behavior that, if not confined to a secure treatment facility, he was likely to be a danger to others and commit sex offenses. Mental Hygiene Legal Service represented the appellant. (Supreme Ct, Orange Co)

**Matter of Aliyah T., 174 AD3d 722 (2nd Dept 7/17/2019)**

ABUSE/NEGLECT – DISPOSITION/HEARING

**TERMINATION OF PARENTAL RIGHTS – DISPOSITION/SUSPENDED JUDGMENT

LASJRP: The Second Department affirms an order terminating parental rights where the mother complied with the literal terms of the suspended judgment, but failed to gain insight into the problems which led to the child’s removal. (Family Ct, Westchester Co)

**People v Bakayoko, 174 AD3d 730 (2nd Dept 7/17/2019)**

BAD APPEAL WAIVER / REDUCTION TO 364 DAYS

ILSAPP: Following pleas of guilty, the defendant was convicted in Queens County Supreme Court of 3rd degree robbery and attempted 3rd degree robbery and sentenced to concurrent terms of 2 to 6 years and 1½ to 4 years. Upon appeal, he challenged the sentences as excessive. The Second Department found the waiver of the right to appeal invalid. The terse colloquy was insufficient to show that the defendant appreciated the consequences of the waiver, given that: he was age 20, had dropped out of high school in 11th grade, had mental health issues, and had limited experience in the criminal justice system. The written waiver could not cure the defects. Although the defendant had served the sentences, the excessiveness question was not academic, in light of the potential immigration consequences. Thus, the appellate court reduced the sentences to concurrent definite terms of 364 days. Appellate Advocates (Erica Horwitz, of counsel) represented the appellant. (Supreme Ct, Queens Co)
**Second Department continued**

**Matter of Ramos v Ramos, 174 AD3d 718**
* (2nd Dept 7/17/2019)

**FAMILY OFFENSES – DEFAULTS**

**LASJRP:** In this family offense proceeding, the Second Department upholds the denial of respondent’s motion pursuant to CPLR 5015(a)(1) to vacate an order of protection that was entered after an inquest upon his default, noting that the motion was supported solely by an affirmation from respondent’s counsel, who did not have personal knowledge of the facts constituting respondent’s proffered excuse for not appearing. (Family Ct, Dutchess Co)

**People v Rose, 174 AD3d 743**
* (2nd Dept 7/17/2019)

**ADVERSE POSITION / NEW COUNSEL**

**ILSAPP:** The defendant appealed from a judgment of Suffolk County Court, convicting him of 3rd degree criminal sale of a controlled substance and 2nd degree conspiracy. At sentencing, the defendant made a pro se application to withdraw his plea. He asserted that the prosecutor had coerced him into pleading guilty by threatening to prosecute his father, and that his attorney had failed to provide effective assistance. Defense counsel said that he had told the defendant that he was willing to try the case, but that the defendant had decided to take the plea deal. Further, counsel said that the defendant had accused everyone but himself and had refused to accept responsibility for his actions. Then counsel asked the trial court go forward with the imposition of sentence. The Second Department held that the defendant’s right to counsel was violated when his counsel took an adverse position as to his plea withdrawal motion. Thus, the appellate court directed that new counsel be assigned and held the matter in abeyance pending remittal. Steven Feldman represented the appellant. (County Ct, Suffolk Co)

**People v Delcid, 174 AD3d 818**
* (2nd Dept 7/24/2019)

**DWI AND AUO / INCLUSORY COUNTS**

**ILSAPP:** The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of DWI as a felony and 1st and 2nd degree AUO of a motor vehicle, upon a jury verdict. The Second Department vacated the DWI and 2nd degree AUO convictions and dismissed those counts, since they were inclusory concurrent counts of 1st degree AUO. The defendant’s further contention, that the mandatory surcharge and crime victim assistance fee had to be reduced, could be raised before Supreme Court. Nassau Legal Aid Society (Tammy Feman and Marquetta Christy, of counsel) represented the appellant. (Supreme Ct, Nassau Co)

**People v Burke, 174 AD3d 915**
* (2nd Dept 7/31/2019)

While the court did not improvidently exercise its discretion in considering the defendant’s motion to dismiss in the interest of justice, where good cause was shown for the motion being made more than 45 days after arraignment, it was error to decide the motion without a hearing. As the essential facts were in dispute, a hearing is statutorily required. (Supreme Ct, Kings Co)

**Matter of Connor, 174 AD3d 896**
* (2nd Dept 7/31/2019)

**ADOPTION – MOTION TO VACATE – INDIAN CHILD WELFARE ACT**

**LASJRP:** The Second Department upholds an order that, while a divorce action was pending, denied the mother’s motion to vacate the order of adoption in favor of respondent on the ground that the child is an Indian child and the adoption proceeding was not held in compliance with the Indian Child Welfare Act of 1978. The mother lacks standing. Only the child, the parent or Indian custodian from whose custody the child has been removed, and the Indian child’s tribe have standing.

In addition, the mother’s allegations of domestic violence during her marriage to respondent, and her claim that respondent “never intended to be a decent and loving parent to [the child] as promised,” do not amount to fraud. (Family Ct, Orange Co)

**People v Hanniford, 174 AD3d 921**
* (2nd Dept 7/31/2019)

**AN OOP COULD NOT REACH NON-VICTIMS OR NON-WITNESSES**

**LASCDP:** The sentencing judge lacked authority to issue an order of protection in favor of individuals who were neither victims of, nor witnesses to, the crime of conviction. (County Ct, Putnam Co)

**Matter of Jaire C., 174 AD3d 894**
* (2nd Dept 7/31/2019)

**ABUSE/NEGLECT – DISPOSITION/ORDERS – APPEAL**

**LASJPR:** The Second Department concludes that the family court’s neglect finding is not supported by a preponderance of the evidence and dismisses the proceedings. Although the order stated that the mother consented to the entry of an order of fact-finding without admission, the record shows that the mother did not do so. Where there is a conflict between an order or judgment and the court’s decision, the decision controls.

The JRP appeals attorney was John Newbery, and the trial attorney was Emily Kaplan. (Family Ct, Kings Co)
**People v Rodgers**, 174 AD3d 924 (2nd Dept 7/31/2019)

**POSSSESSION OF A WEAPON – RAZOR/INTENT TO USE UNLAWFULLY**

Lasjrp: The Second Department reverses a conviction for criminal possession of a weapon in the third degree, concluding that the jury verdict was against the weight of the evidence. The People failed to establish beyond a reasonable doubt that defendant possessed a weapon, instrument, appliance or substance designed, made or adapted for use primarily as a weapon, which is presumptive evidence of intent to use the same unlawfully against another.

There was no testimony by the detectives indicating that they knew based on their experience that the primary use of the razor possessed by defendant, by virtue of being wrapped in black tape, was as a weapon, or that they attempted to ascertain from defendant the manner in which he utilized the blade. There was no evidence from which it could be inferred that defendant considered the instrument to be a weapon. Defendant, who was socializing in front of a building with two men, was not brandishing the instrument in a threatening manner, and made no attempt to flee the scene or discard the blade when approached by the detectives. (County Ct, Westchester Co)

**People v Smith**, 174 AD3d 928 (2nd Dept 7/31/2019)

**REVERSED / NEW TRIAL**

ILSapp: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree assault. The Second Department reversed and ordered a new trial. The defendant cut the victim’s face with a piece of glass during an altercation. He was charged with five counts and asserted a justification defense. The jury acquitted him on all but one count. When a defendant asserts self-defense, the trial court must instruct the jurors that a finding of not guilty based on justification precludes a guilty verdict on lesser included offenses. Here, the verdict sheet did not mention justification, and it instructed the jurors to continue to the following count if they found the defendant not guilty of counts one to four. Justin Bonus represented the appellant. (Supreme Ct, Kings Co)

**Matter of Baby Girl XX**, 172 AD3d 1476 (3rd Dept 5/2/2019)

**ADOPTION – REVOCATION OF CONSENT**

Lasjrp: The Third Department, noting that the mother revoked her extrajudicial consent to a private-placement adoption within 45 days of its execution, and that the prospective adoptive parents timely opposed revocation, concludes that the adoption should go forward.

The adoptive parents can provide a loving, two-parent home that better supports the child’s emotional and intellectual development. The child was placed with them within days of her birth, has continued to reside continuously with them, and has been accepted as a member of their families.

Although the mother and the biological father made the difficult decision to place the child up for adoption because they were concerned that their separation and their respective living arrangements impaired their ability to adequately provide for the child, and “issues of this nature involve the emotions and sincere intentions of” the mother, the record supports the Surrogate’s Court’s determination that allowing completion of the adoption is in the child’s best interests. (Surrogate’s Ct, Albany Co)

**Matter of Marotta v Casler**, 172 AD3d 1480 (3rd Dept 5/2/2019)

**ARREARS PAID / COMMITMENT ERROR**

ILSapp: The father appealed from an order of Clinton County Family Court which committed him to jail for 20 days for willfully violating a prior child sup-
port order. The Third Department, which stayed the challenged order pending appeal, held that since the father paid the support arrears in full prior to imposition of the sentence, Family Court erred in ordering jail time. Lisa Burgess represented the appellant. (Family Ct, Clinton Co)

Mauro NN. v Michelle NN., 172 AD3d 1493 (3rd Dept 5/2/2019)

CUSTODY / REVERSED

ILSAPP: The father appealed from an order of Rensselaer County Family Court, which sua sponte dismissed his custody modification petition. That was error. A prior order stated that either party could seek to modify without a change in circumstances, so the sole issue was best interests. Custody decisions should generally be made after a plenary hearing. At trial, the father submitted evidence concerning the middle child’s “illegal tardies” and disciplinary issues. He also testified about the denial of visitation with the children. In dismissing the petition, Family Court erroneously treated as dispositive the father’s failure to complete required counseling. A new hearing was ordered. Philip Vecchio represented the father. (Family Ct, Rensselaer Co)

People v Moseley, 172 AD3d 1461 (3rd Dept 5/2/2019)

SUPERSEDING INDICTMENT / NULLITY

ILSAPP: The defendant appealed from a judgment of Ulster County Court. In March 2014, he was charged by indictment with 2nd and 3rd degree CPW for his alleged involvement in a shooting in January 2014. Before trial, the People obtained a superseding indictment that charged him with 3rd degree CPW. After the jury was sworn, a mistrial was granted, and County Court did not dismiss the superseding indictment or authorize the People to re-present new charges to a grand jury. However, the People obtained a second superseding indictment, charging the defendant with 2nd and 3rd degree CPW. County Court dismissed the 3rd degree count before submitting the case to the jury. The defendant was convicted on the remaining count. The Third Department held that the People had been limited to retrying the defendant upon the superseding indictment; the second superseding indictment was a nullity—as was any action that flowed from its filing. Thus, the judgment was reversed. Mitch Kessler represented the appellant. (County Ct, Ulster Co)

Matter of Nahlaya MM., 172 AD3d 1482 (3rd Dept 5/2/2019)

SUSPENDED JUDGMENT / REVERSAL

ILSAPP: The respondents appealed from an order of Chemung County Family Court which revoked a suspended judgment and terminated their parental rights. The Third Department modified. Although Family Court properly intended to give the mother a short leash, based on her history of noncompliance with programs, most allegations against her relied on conduct that predated issuance of the underlying SJ. Moreover, the mother was making genuine progress, and the agency failed to show that she violated the terms of the SJ during the grace period. As to the father, a dispositional hearing was needed to discern the best interests of the children. Lisa Miller represented the mother, and Christopher Hammond the father. (Family Ct, Chemung Co)

Matter of Prisoners’ Legal Services of New York v NY State Dept. of Corrections and Community Supervision, 173 AD3d 8 (3rd Dept 5/2/2019)

FOIL: DOCCS INCIDENT REPORTS NOT EXEMPT

LASCDP: The FOIL petitioners sought unusual incident reports, use of force reports, and misbehavior reports from prison officials. After receiving such documents with the correction officers’ names redacted, the petitioners filed an Article 78 petition to obtain the documents in unredacted form.

The Third Department, granting the petition, rejected DOCCS’s argument that the documents were exempt from unredacted disclosure as personnel records. The documents, rather, as the memorialization of an event that occurred at a DOCCS facility, were akin to arrest reports or accident reports, and were not used to judge an officer’s job performance. Hence, the redactions were not required by Civil Rights Law §50-a. (Supreme Ct, Albany Co)

Partridge v State of New York, 173 AD3d 86 (3rd Dept 5/9/2019)

The claimant, seeking damages stemming from a State Police press conference about an initiative to pursue online sexual exploitation of children, in which his photograph was displayed among about 60 individuals, made the requisite showing for defamation by implication. “[W]e now adopt a two-part test to determine whether the first element is met in causes of action alleging defamation by implication, requiring proof (1) that the language of the communication as a whole reasonably conveys a

3 Summaries marked with these initials, LASCDP, are courtesy of The Legal Aid Society’s Criminal Defense Practice, from their CDD case summaries.
The dissenting judges note, inter alia, that the parole officer had not previously used the informant as a source of information, and that there was no indication that the informant had purchased drugs at the residence. (Supreme Ct, Rensselaer Co)

**People v Briscoe, 172 AD3d 1788 (3rd Dept 5/23/2019)**

**SORA / MODIFICATION**

**ILSAPP:** The defendant appealed from an order of Sullivan County Court, which classified him as a risk level-three sex offender and designated him a sexual predator. He had pleaded guilty to two counts of 3rd degree rape. The RAI presumptively classified him as level three. Following a hearing, County Court adjudicated the defendant as level three and further designated him as a sexual predator. In such designation, the SORA court erred, because the conviction did not meet the statutory criteria. Thus, the Third Department modified the order. Adam Parisi represented the appellant. (County Ct, Sullivan Co)

**People v Diego, 172 AD3d 1776 (3rd Dept 5/23/2019)**

**SCI DEFECTIVE / REVERSED**

**ILSAPP:** The defendant appealed from a judgment of Schenectady County Court, convicting him of 2nd degree CPW. The Third Department reversed. The defendant was initially charged in felony complaints with 2nd degree CPW (P.L. § 265.03 [3]), 4th degree criminal possession of stolen property, and five drug-related counts, and was held for grand jury action. Pursuant to a plea agreement, he waived indictment and consented to prosecution by a SCI charging him with 2nd degree CPW (P.L. 265.03 [1] [b]). The waiver of indictment and SCI were jurisdictionally defective, because they did not charge an offense for which the defendant was held for action of a grand jury. See CPL 195.20. Since the SCI did not contain an offense charged in the underlying felony complaints or a lesser included offense of the original charges, it was jurisdictionally defective. Martin McGuinness represented the appellant. (County Ct, Schenectady Co)

**People v Jones, 172 AD3d 1786 (3rd Dept 5/23/2019)**

**SORA / IAC**

**ILSAPP:** The defendant appealed from an order of Rensselaer County Court, which classified him as a risk level-three offender under SORA. In 2006, he pleaded guilty to attempted 1st degree rape and was sentenced as a second violent felony offender. Such prior conviction triggered the application of an automatic override that resulted in a presumptive level-three classification, yet defense counsel mistakenly believed that level three was automatic. Counsel’s failure to seek a downward depar-
was born during the marriage, but the mother and husband had lived apart since 2003. For a decade, the mother was involved in an intimate relationship with the petitioner. In 2015, following the petitioner’s assault conviction stemming from a domestic incident, the mother obtained an order of protection against him, and he moved to California. When the mother died in 2018, the child lived with Jillian KK., her older half-sister. Without a hearing, Family Court dismissed the sister’s and the husband’s custody petitions, granted the petitioner’s custody petition, and issued an order of filiation declaring him to be the father. In addition to the petitioner, the husband and sister appealed, but had not yet perfected their appeals. The Third Department stated that, since the three appeals had to be decided together, a decision was withheld. An expedited briefing schedule was set forth. (Family Ct, Saratoga Co)

People v Robertucci, 172 AD3d 1782
(3rd Dept 5/23/2019)

YO NOT CONSIDERED / SENTENCE VACATED

ILSAPP: The defendant appealed from a judgment of St. Lawrence County Supreme Court, convicting him of 1st degree rape. A plea agreement arose out of an offense that the defendant committed when he was age 17. At sentencing, County Court did not determine the defendant’s eligibility for youthful offender status, and it imposed the agreed-upon term of imprisonment. Therefore, the Third Department vacated the sentence and remanded. The Rural Law Center of NY (Kristin Bluvas, of counsel) represented the appellant. (County Ct, St. Lawrence Co)

Matter of Sade J. v Schenectady Co. DSS, 172 AD3d 1831
(3rd Dept 5/30/2019)

ANDERS / MOOTNESS / DISMISSAL

ILSAPP: The petitioner mother appealed from an order of Schenectady County Family Court, which granted the respondent’s motion to dismiss her petition. In a previous order, Family Court terminated her parental rights on the ground of abandonment, and she did not appeal from that order. Four years later, petitioner commenced the instant proceeding, pursuant to Family Ct Act § 635, seeking to restore her parental rights. Appellate counsel sought to be relieved of his assignment on the basis that there were no nonfrivolous issues upon appeal. By letter, the AFC advised the court that the children’s adoption has been finalized. Thus, the appeal was moot, and no exception to the mootness doctrine applied. The appeal had to be dismissed, and there was no need to address counsel’s application to be relieved of his assignment. (Family Ct, Schenectady Co)

People v Colon, 173 AD3d 1255 (3rd Dept 6/6/2019)

The court, which indicated during the plea proceedings that it was not inclined to accord the defendant, who was 17 at the time of the incident, youthful offender (YO) status, acknowledged that at sentencing it would have to review the issue. After stating at sentencing that YO treatment “was ‘absolutely inappropriate,’” the court imposed a 10-year sentence to be followed by five years of postrelease supervision. The record does not conclusively show that the court reached the required determination of the defendant’s eligibility, and it cannot be discerned whether the court’s finding that YO was inappropriate was an expression of ineligibility or a determination that the underlying circumstances did not warrant granting YO
treatment. Matter remitted for a determination of YO eligibility. (Supreme Ct, Albany Co)

**People v Cutler, 173 AD3d 1269 (3rd Dept 6/6/2019)**

**SENTENCE IN ABSENIA / VACATUR**

**ILSAPP:** The defendant appealed from a judgment of Columbia County Court, convicting him of 4th degree larceny. The Third Department vacated the sentence and remitted for resentencing, finding that the lower court abused its discretion in sentencing the defendant in absentia. County Court did not conduct the requisite inquiry into the reason for the defendant’s absence and consider whether he could be located within a reasonable period of time. Instead, the sentencing court rejected defense counsel’s request for an adjournment. The day after sentencing, counsel learned that the defendant had been absent because of an accidental drug overdose that led to his hospitalization. The Columbia County Public Defender (Jessica Howser, of counsel) represented the appellant. (County Ct, Columbia Co)

**People v Eggleston, 173 AD3d 1252 (3rd Dept 6/6/2019)**

The defendant’s waiver of indictment and the superior court information (SCI) are jurisdictionally defective. The defendant pleaded guilty to second-degree weapons possession five months after a grand jury indicted him on that offense after he was charged by felony complaint with third-degree weapons possession. After the plea to the indictment, the court, with defense consent, granted a prosecution motion to amend the indictment to say the defendant did not possess the weapon at his home or business, and the defendant again pleaded guilty. After another recess, the parties agreed the indictment would be dismissed and replaced with an SCI; the defendant was arraigned on the original felony complaint, waived indictment and his right to appeal, and yet again pleaded guilty. At sentencing, the court declined to impose the agreed-upon sentence or provide defendant with an opportunity to withdraw his plea. There is no apparent strategic explanation for counsel’s failure. (County Ct, Sullivan Co)

**People v Marshall, 173 AD3d 1257 (3rd Dept 6/6/2019)**

**RIGHT TO COUNSEL – EFFECTIVE ASSISTANCE**

**ETHICS – CONFLICT OF INTEREST**

**LASJRP:** The Third Department finds reversible error where, prior to defendant’s guilty plea, defense counsel informed the court that the prosecutor had advised him that a number of counsel’s former and current clients may be witnesses against defendant and that, if the case were to go any further, he would have a conflict.

The court informed defendant that if the matter went to trial, counsel would probably have a conflict and would not be able to continue representing him because counsel’s office had represented witnesses who would testify against him. However, the court had a duty to inquire whether defendant understood the risks of counsel’s continued representation and, knowing those risks, was choosing to waive the conflict. (County Ct, Broome Co)

**Matter of Michael BB. v Kristen CC., 173 AD3d 1310 (3rd Dept 6/6/2019)**

**CUSTODY – RELOCATION**

**LASJRP:** The Third Department affirms an order granting the father’s application for permission to temporarily relocate with the parties’ child to Texas for a period of two years so he could attend an Army Intersective Physician Assistant Program.

The father is an active duty military service member and his attendance at the program will allow him to earn a greater income. Although other programs may be available in New York, the program in Texas will allow the father to earn his degree free-of-charge and without incurring debt.

It “is highly significant that the father specifically asserted that the requested relocation was not intended to be permanent, and that he promised to return to New York to again reside with the child, in proximity to the mother and the child’s extended family members, follow-
Third Department continued

**Matter of Nathaniel V. v Kristina W., 173 AD3d 1308 (3rd Dept 6/6/2019)**

Custody / Dad in Jail / Hearing Needed

**ILSAPP:** The father appealed from an order of Saratoga County Family Court, which dismissed his custody modification petition. The Third Department reversed, finding that the trial court should have held a hearing. The father’s pro se petition alleged that he was incarcerated and, as a result, had not had contact with the child for a year. If established, such facts would constitute a change in circumstances, triggering a “best interests” inquiry. Further, his allegations raised a question as to whether his incarceration inhibited his ability to comply with a prior order directing him to arrange for therapeutic parenting time and attend specified treatment programs. Thus, Family Court erred in dismissing the petition based on the father’s noncompliance with such directives. Finally, the trial court failed to address the father’s request to at least receive information about the child’s well-being or some form of contact or connection.

Alexandra Buckley represented the appellant. (Family Ct, Saratoga Co)

**People v Carlin, 173 AD3d 1363 (3rd Dept 6/13/2019)**

People’s Appeal / Dismissal Proper

**ILSAPP:** The People appealed from an order of St. Lawrence County Court. The defendant was charged with two counts each of 3rd degree criminal sale and possession of a controlled substance. County Court concluded that the grand jury proof did not sufficiently establish that the substances were cocaine. The People appealed, and the Third Department affirmed. As to the first transaction, the CI believed the substance to be crack cocaine, but did not describe it or explain the basis for his belief. Regarding the second transaction, the CI did not express any belief as to the nature of the substance. In testifying about testing chunky white substances, the investigator did not describe it or explain the basis for his belief. The defense challenge at oral argument to the omission of any time of the offense in the superior court information and waiver of indictment is reviewed and the conviction reversed. A claim of lack of jurisdiction can be raised at any time, and this is not an instance were the time is unknown or perhaps unknowable. (County Ct, Madison Co)

**People v Vaughn, 173 AD3d 1260 (3rd Dept 6/6/2019)**

People’s Appeal / Dismissal Proper

**ILSAPP:** The father appealed from an order of Saratoga County Court, which dismissed his motion to dismiss for lack of jurisdiction. The defendant was charged with committing a class B felony while on parole. The People made a pre-indictment offer more lenient than the one the later accepted. The defense said that he did not know about the offer and would have accepted it. The Third Department found that there was a reasonable possibility that the defendant’s allegations were true, and thus County Court should have conducted a hearing. Remittal was ordered. (County Ct, St. Lawrence Co)

**People v Nitchman, 173 AD3d 1261 (3rd Dept 6/6/2019)**

IAC / 440.10 Hearing Ordered

**ILSAPP:** The defendant appealed from an order of Saratoga County Court, denying his CPL 440.10 motion to vacate a judgment convicting him of 1st and 2nd degree criminal sexual act. The People made a pre-indictment plea offer more lenient than the one the later accepted. The defendant said that he did not know about the offer and would have accepted it. The Third Department found that there was a reasonable possibility that the defendant’s allegations were true, and thus County Court should have conducted a hearing. Remittal was ordered. Brian Quinn represented the appellant. (County Ct, Saratoga Co)

**Matter of Stephen N. v Amanda O., 173 AD3d 1280 (3rd Dept 6/6/2019)**

Paternity / Dad in Jail / Equitable Estoppel Error

**ILSAPP:** The petitioner and the mother appealed from an order of Albany County Family Court, which dismissed the petitioner’s application to adjudicate him to be the father of the subject child. The Third Department reversed and remitted. Family Court erred in applying equitable estoppel, and it would be in the best interests of the child for DNA testing to occur. The child understood that William P. was her legal father and that there was a significant chance that the petitioner was her biological father. She had a tumultuous relationship with William P. and had communicated with the petitioner. If he was found to be the biological father, his lengthy prison term would impact the parent-child relationship. However, the potential benefit to the child of establishing paternity outweighed any potential negative impact. On appeal, Eric Gee represented the petitioner, and Aaron Louridas represented the mother. (Family Ct, Albany Co)

**Matter of Mario WW. v Kristin XX., 173 AD3d 1392 (3rd Dept 6/13/2019)**

The petitioner sought genetic testing to determine the paternity of a child born to a married woman with whom the petitioner had an affair. The court did not err in determining, after a fact-finding hearing upon remittal, “that the presumption of legitimacy and the doctrine of equitable estoppel applied and that the evidence submitted at the hearing demonstrated that it would be detrimental to the child’s best interests to order genetic testing.” The child’s best interests are paramount in a paternity pro-
ceeding. The matter had been remitted because, in earlier proceedings, the court erred by dismissing the paternity petition based solely on the presumption of legitimacy that existed because the mother was married to another man when the child was born. The presumption of legitimacy is a rebuttable one. Presentation of a non-frivolous controversy as to paternity shifted the burden to respondents to establish why genetic testing would not serve the best interest of the child. In making its determination that genetic testing was not in the child’s best interests, the court considered among other factors, that the husband has taken an active parenting role, and has developed a strong and loving bond with the child, his presence at the birth of the child and that he is listed on the birth certificate as the father, also the mother’s belief that her husband is the child’s biological father, and the only father the child has known. Additionally, the Court properly considered the disruption that the granting of the petitioner’s application would cause to the child’s stable life, especially, given the hostility the petitioner harbors toward the respondents.

Additionally, the issuance of an order of protection in favor of respondents until the child’s eighteenth birthday was not an error, given the hostile relationship between petitioner and respondents. (Family Ct, Tompkins Co)

**People v Wager, 173 AD3d 1352 (3rd Dept 6/13/2019)**

**ATVs / NOT MOTOR VEHICLES**

**ILSAPP:** The defendant appealed from a judgment of Saratoga County Court, convicting him of 1st and 2nd degree vehicular manslaughter (two counts each); aggravated driving while intoxicated; and DWI (two counts). The underlying incident involved an ATV. The Third Department held that an ATV is not a motor vehicle under Penal Law § 125.13 (1), and dismissed a conviction for 1st degree vehicular manslaughter (count 1), as well as other inclusory concurrent counts. Brian Quinn represented the appellant. (County Ct, Saratoga Co)

**People v Henry, 173 AD3d 1470 (3rd Dept 6/20/2019)**

The defendant’s conviction for second-degree murder must be reversed and that count of the indictment dismissed where the deliberating jury sent out a note regarding that count and the record does not specifically indicate that defense counsel was informed of the note’s precise contents. Such information is necessary to provide an opportunity to participate in the formation of the court’s response.

Admission into evidence of a letter from the defendant to his lawyer, which the defendant sent to his girlfriend with instructions to forward it to counsel, keeping a copy, was not error. The court resolved differing testimony about the letter’s disclosure to the girlfriend’s mother by determining that the defendant had authorized such disclosure. While the girlfriend was serving as an agent of the defendant in delivering the letter to the attorney, disclosure to a third party defeated the claim of attorney-client privilege. (County Ct, Warren Co)

**People v Johnson, 173 AD3d 1446 (3rd Dept 6/20/2019)**

**SENTENCE – PROBATION/VIOLATIONS**

**LASJRP:** Where a violation of probation is alleged, a written statement must be filed with the court and provided to the defendant “setting forth the condition or conditions of the sentence violated and a reasonable description of the time, place and manner in which the violation occurred.”

The Third Department finds improper the court’s findings with respect to violations that were referenced in a section of the uniform court report summarizing defendant’s probation supervision, where the details of the alleged violations did not include those violations.

The Court also holds that the probation officer’s testimony that defendant had been arrested on two occasions, without additional proof as to the underlying acts, did not establish a violation of a condition that, inter alia, required defendant to obey all federal, state and local laws. (County Ct, Cortland Co)

**People v Morehouse, 173 AD3d 1458 (3rd Dept 6/20/2019)**

**ANDERS / REJECTED**

**ILSAPP:** The defendant appealed from a judgment of Washington County Supreme Court, convicting him of 3rd degree criminal possession of a controlled substance and 3rd degree CPW. He waived his right to appeal. Under the terms of the plea agreement, he was to be sentenced as a SFO. At sentencing, County Court realized that the agreed-upon sentence for CPW was illegal. Defense counsel indicated that the slightly greater sentence was acceptable to the defendant. Appellate counsel filed an *Anders* brief. The Third Department found at least one issue of arguable merit, with respect to the validity of the appeal waiver, which could impact the reviewability of the issue of excessive sentence. In his brief, appellate counsel failed to even mention the sentence change. The appellate court withheld decision and assigned new counsel. (Supreme Ct, Washington Co)

**Matter of Torres v Stanford, 173 AD3d 1537 (3rd Dept 6/20/2019)**

As the respondents concede, the CPLR article 78 petition should not have been dismissed as untimely where
the timely filed petition was returned due a mistake in the filing process, any error was subsequently corrected, and no prejudice resulted. The petitioner’s claim that the administrative appeals unit relied on inaccurate information about the petitioner’s criminal history was preserved “as it could not have been raised upon administrative appeal.” The judgment is reversed and the “matter remitted to the Board of Parole for further proceedings not inconsistent with this Court’s decision.” (Supreme Ct, Washington Co)

Matter of Cherokee C., 173 AD3d 1573  
(3rd Dept 6/27/2019)  
TERMINATION OF PARENTAL RIGHTS – DISPOSITION  
LASJRP: The Third Department finds no error where the Family Court terminated the father’s parental rights and freed the child for adoption even though no termination proceeding had been filed against the mother. The child was being cared for by relatives, and petitioner had a compelling reason for determining that filing against the mother would not be in the best interest of the child as the mother consented to the child being freed for adoption. Petitioner and the attorney for the child have informed the Court that the mother has been awaiting the outcome of this appeal before surrendering her parental rights. (Family Ct, Schenectady Co)

People v Jones, 173 AD3d 1569 (3rd Dept 6/27/2019)  
As the prosecution concedes, “the waiver of indictment is invalid and the SCI is jurisdictionally defective for failure to set forth the approximate time of the offense in accordance with CPL 195.20 ….” This “jurisdictional challenge is not precluded by either his guilty plea or his waiver of the right to appeal, and further, is not subject to the preservation requirement’ ….” (County Ct, Saratoga Co)

People v Palmer, 173 AD3d 1560 (3rd Dept 6/27/2019)  
CONFlict / REVERSED  
ILSAPP: The defendant appealed from a judgment of Broome County Court, convicting him of 1st degree assault (two counts). The Third Department reversed. Midway through his plea allocution, the defendant asserted that he was not guilty and that “everything was an accident,” prompting County Court to adjourn the matter. The following day, the defendant pleaded guilty. When he returned for sentencing, the defendant expressed remorse, stating that, on the day in question, he had overdosed on medications while intoxicated; was not in his right state of mind; was not trying to hurt anyone; and did not recall what happened. Such statements raised the possibility of an intoxication defense, triggering the narrow exception to the preservation requirement and imposing a duty on the trial court to inquire further or to give the defendant an opportunity to withdraw the plea. William Reddy represented the appellant. (County Ct, Clinton Co)

People v Skyes, 173 AD3d 1565 (3rd Dept 6/27/2019)  
NARROW EXCEPTION / REVERSED  
The defendant appealed from a judgment of Clinton County Court, convicting him of 1st degree assault (two counts). The Third Department reversed and remitted. Midway through his plea allocution, the defendant asserted that he was not guilty and that “everything was an accident,” prompting County Court to adjourn the matter. The following day, the defendant pleaded guilty. When he returned for sentencing, the defendant expressed remorse, stating that, on the day in question, he had overdosed on medications while intoxicated; was not in his right state of mind; was not trying to hurt anyone; and did not recall what happened. Such statements raised the possibility of an intoxication defense, triggering the narrow exception to the preservation requirement and imposing a duty on the trial court to inquire further or to give the defendant an opportunity to withdraw the plea. William Reddy represented the appellant. (County Ct, Clinton Co)

Matter of Carmine GG., 174 AD3d 999  
(3rd Dept 7/3/2019)  
The Court is empowered under FCA 1029, upon a showing of good cause, to issue a temporary order of protection in an Article 10 proceeding, imposing reasonable conditions of behavior that are “necessary to further the purposes of protection,” over a litigant’s objection and without a hearing. However, the conditions of behavior the court imposed on the father, such as submitting to random urine, breath, and other tests upon the petitioner’s request, alcohol and drug evaluations, parent education services, and recommended treatment plans, bore no connections to his parenting time and so were not appropriate. Although this appeal would ordinarily have been rendered moot by the subsequent dismissal of the underlying neglect petition, the substantial and novel issue that is likely to recur, yet evade review, namely the scope of the court’s authority to issue FCA 1029 orders, provides an exception to the mootness doctrine. (Family Ct, Delaware Co)

Matter of Cheryl HH. v Benjamin II., 174 AD3d 983  
(3rd Dept 7/3/2019)  
VISITATION – APPEAL/STANDING  
LASJRP: The Third Department holds that respondent non-custodial father has no standing to pursue an appeal from an order awarding the paternal grandmother supervised visitation with the children once a month for two hours. The father was not aggrieved by the order, which did not affect his legal rights or direct interests. Although he was a party, he did not seek affirmative relief. (Family Ct, Delaware Co)
### People v Daniels, 174 AD3d 955 (3rd Dept 7/3/2019)

**Justification Charge / Reversal**

The defendant appealed from a judgment of Schenectady County Supreme Court, convicting him of attempted 1st degree assault and 3rd degree CPW. The Third Department reversed in the interest of justice. The trial court failed to convey that, if the jury found the defendant not guilty of attempted 2nd degree murder based on justification, it was not to consider the lesser counts to which that defense applied. The failure may have led the jury to conclude that deliberation on the remaining counts required reconsideration of justification. A new trial was ordered. Carolyn George represented the appellant. (Supreme Ct, Schenectady Co)


**CUSTODY – ORDERS/DECISIONS**

LASJRP: In this custody proceeding, the Third Department concludes that although issuing a decision subsequent to the entry of a final custody order is not preferable, reversal is not required where the court issued a decision setting forth its findings of fact and conclusions of law after issuing an order granting the father’s petitions. The order stated that the court made its custody determination “having considered testimony and evidence … and having heard arguments from counsel.” (Family Ct, Chemung Co)

### People ex rel. Johnson v Superintendent, 174 AD3d 992 (3rd Dept 7/3/2019)

**SARA Quagmire / Concurrence Concerns**

ILSAPP: The petitioner appealed from a judgment of Essex County Supreme Court, which denied his application regarding SARA-compliant housing. The Third Department affirmed. Two justices wrote separately to address conundrums created by mandatory conditions prohibiting certain sex offenders from residing within 1,000 feet of school grounds. Much of NYC is within the buffer zone and off limits to sex offenders. The petitioner, who was granted parole in June, awaited placement in a SARA-compliant homeless shelter in NYC. Since SARA restrictions may do more harm than good, a reexamination by the Legislature is needed. Legal Aid Society of NYC (Denise Fabiano, of counsel) represented the appellant. (Supreme Ct, Essex Co)

### People v Johnson, 175 AD3d 14 (3rd Dept 7/3/2019)

**JURY NOTE / RECONSTRUCTION**

ILSAPP: The defendant appealed from a judgment of Sullivan County Supreme Court, convicting him of predatory sexual assault against a child. The record lacked critical information about three jury notes. The Third Department invoked People v Meyers (reconstruction hearing to determine whether purported jury note was request within ambit of CPL 310.30[j]) and People O’Rama, 78 NY2d 270. Here the scanty and ambiguous record precluded resolution of the issue. Remittal was ordered. Paul Connolly represented the appellant. (Supreme Ct, Sullivan Co)

### Matter of Lilliana K., 174 AD3d 990 (3rd Dept 7/3/2019)

It was appropriate for the court to grant the County’s motion for summary judgment and adjudicate the subject children to be neglected by the respondent due to improper supervision. Although not frequently used, summary judgment is an appropriate procedural device to establish a neglect where, as in this case, no triable issue of fact is found to exist. Here the respondent’s conviction of endangering the welfare of a child was based on the same incident that gave rise to the neglect proceedings, establishing the requisite “factual nexus between the underlying criminal conviction and the allegations made in the petition ….” The respondent did not challenge the validity of his guilty plea, or question the underlying facts of the criminal case, or raise any other triable issue of fact that required a hearing. (Family Ct, Washington Co)

### Matter of Liska J. v Benjamin K., 174 AD3d 966 (3rd Dept 7/3/2019)

**CUSTODY / NEW HEARING**

ILSAPP: The father appealed from an order of Albany County Family Court, which granted the mother’s custody applications. The Third Department reversed and remitted. Family Court erroneously held that, because the father did not file a custody petition, it could not consider much of his proof. At trial, the father did not object to the evidentiary limitations. However, the trial court’s failure to give him a full and fair opportunity to present evidence was a due process violation requiring a new hearing. Alexandra Buckley represented the father. (Family Ct, Albany Co)


**MODIFICATION / JOINT LEGAL CUSTODY**

ILSAPP: The father appealed from an order of Ulster County Family Court, which modified a prior order and
awarded the mother sole physical and legal custody. The Third Department modified. There was no proof that the parties’ relationship was acrimonious; and there was proof that they communicated about how to care for the child. Thus, joint legal custody was reinstated. The father did not preserve his contention that the AFC improperly substituted judgment. But the reviewing court reiterated that joint legal custody was appropriate.

**People v Saxe, 174 AD3d 958 (3rd Dept 7/3/2019)**

**Molineux Error / Reversal**

ILSAPP: The defendant appealed from a judgment of Cortland County Court, convicting him of 1st degree criminal sexual act and another crime. The Third Department reversed, based on an erroneous Molineux ruling. The People should not have been allowed to present detailed testimony from two female relatives regarding alleged sexual abuse by the defendant seven years before the instant victim’s disclosure. The testimony was not necessary to complete the narrative; and the prior acts did not bear sufficient similarity to the charged crimes so as to constitute a common scheme or show intent or motive. The evidence was not probative, and even if it were, the prejudicial effect was too great. The Rural Law Center of NY (Kelly Egan, of counsel) represented the appellant. (County Ct, Ulster Co)

**People v Espinoza, 174 AD3d 1062 (3rd Dept 7/11/2019)**

**SEARCH AND SEIZURE – AUTO SEARCH/INVENTORY**

LASJRP: The Third Department agrees with the hearing court that the People failed to satisfy their initial burden of establishing a valid inventory search where the People failed to put the relevant policy into evidence, or establish through testimony that the policy was sufficiently standardized and reasonable and that the deputy sheriff followed it in this case; the deputy sheriff indicated in the impound inventory report that the search began at 9:55 a.m., but testified that the search began prior to that time and did not provide any explanation for the discrepancy; and there was contradictory testimony as to where the deputy sheriff found defendant’s wallet—inside the vehicle or on defendant’s person—and the wallet was not included in the vehicle impound inventory report.

Moreover, the hearing court properly concluded that the alleged inventory search was a “pretext” to locate incriminating evidence. The court found that the deputy sheriff seized the wallet, which contained credit cards that did not bear defendant’s name, prior to the alleged inventory search and believed that the vehicle might have contained additional contraband. (County Ct, Columbia Co)

**People v Gannon, 174 AD3d 1054 (3rd Dept 7/11/2019)**

All the defendant’s contentions on appeal are rejected, including the claim that the court improperly denied, without a hearing, a motion to suppress items seized from the public defender office that represented the defendant. The bare allegation that the search warrant for the office lacked probable cause was insufficient to require a hearing, and review of the warrant application and accompanying sworn statements shows that probable cause was properly found. The crime-fraud exception to the attorney-client privilege applied “because there was reasonable cause to believe that the items seized pursuant to the search warrant constituted physical evidence of a crime and that their delivery to counsel was for the purpose of concealing evidence, not for seeking legal advice ....” (County Ct, Saratoga Co)


**WRIT OF PROHIBITION**

LASJRP: The Third Department holds that a writ of prohibition does not lie where petitioner challenges the preclusion of evidence in a criminal proceeding on grounds of attorney-client privilege. Prohibition will not lie as a means of seeking collateral review of mere trial errors of substantive law or procedure, however egregious the error may be, and however cleverly the court’s conduct may be characterized by counsel as being in excess of jurisdiction or power.

**People v Hodgdon, 175 AD3d 65 (3rd Dept 7/11/2019)**

**EXECUTIVE LAW § 552 / DA CONSENT NEEDED**

ILSAPP: The People appealed from an Albany County Supreme Court order, which granted the defendant’s motion to dismiss. The defendant—a counselor at a state-licensed residential substance abuse treatment—allegedly had sexual contact with a 16-year-old patient. The Justice Center for the Protection of People with Special Needs obtained an indictment for various offenses. The defendant contended that Executive Law § 552 is facially unconstitutional, because it purports to grant prosecutorial authority to an officer other than the Attorney General or a District Attorney. Supreme Court agreed and dismissed the indictment. The Third Department affirmed, adopting the reasoning of Judge Rivera’s dissent in People v Davidson, 27 NY3d 1083, 1086-1096: the Legislature may not grant independent, “concurrent authority with district attorneys” to prosecute individuals accused of crimes against vulnerable persons. The review-
The Third Department continued

ing court further held that the constitutionality of the Act may be preserved by construing it to limit the Special Prosecutor to conducting prosecutions only upon DA consent. Here consent was not validly obtained. The Albany County Public Defender (Jessica Gorman, of counsel) represented the appellant. (Supreme Ct, Albany Co)

Matter of Nicole TT v Rickie UU, 174 AD3d 1070 (3rd Dept 7/11/2019)
DEFAULT / NO APPEAL
ILSAPP: The mother appealed from an order of Saratoga County Family Court, which granted the petitioner aunt’s applications to modify a prior custody order. Family Court found the mother in default, awarded the aunt sole custody, and vacated all prior custody orders. The Third Department dismissed the appeal. CPLR 5511 states that an aggrieved party may not appeal from an order entered upon his or her default. The mother was personally served with the relevant pleadings, as well as with an application for electronic testimony and waiver of physical presence. Yet she failed to appear, file an application, or contact Family Court. On a prior petition, the mother had appeared telephonically, so she understood that option. To seek relief, she could make a CPLR 5015 (a) motion to vacate the default order. (Family Ct, Saratoga Co)

People v Brinkle, 174 AD3d 1159 (3rd Dept 7/18/2019)
RIGHT TO COUNSEL – PROBATION PRESENTENCE INTERVIEW
LASJRP: In this prosecution for aggravated cruelty to animals, the Third Department rejects defendant’s contention that the court should have disregarded the presentence report in its entirety and ordered a new one because the Probation Department did not abide by counsel’s request to be present for the presentence interview. In light of the non-adversarial nature of a routine presentence interview by a probation officer, such an interview does not constitute a critical stage of the proceedings. (County Ct, Saratoga Co)

People v Gaworecki, 174 AD3d 1143 (3rd Dept 7/18/2019)
MANSLAUGHTER – RECKLESSNESS
LASJRP: In a 3-2 decision, the Third Department concludes that there was sufficient evidence of manslaughter in the second degree presented to the grand jury where, given defendant’s knowledge of the potency of the heroin he was distributing and its potential lethality, his failure to perceive the risk of death constituted a gross deviation from the standard of care that a reasonable person would observe in the situation, and his actions were a sufficiently direct cause of the victim’s death.

The dissenting judges note that there was no evidence presented that the victim overdosed on the heroin defendant sold him; that the testimony of the deceased’s ex-girlfriend regarding the strength of the heroin is nothing more than mere speculation, and another user’s warning to defendant about the heroin did not occur until after defendant had sold the heroin to the deceased; and that it is not enough that defendant warned the victim to “be careful.” (County Ct, Broome Co)

Joan HH v Maria II, 174 AD3d 1189 (3rd Dept 7/18/2019)
RESETTLEMENT / NO BIG CHANGES
ILSAPP: The mother appealed from an order of Cortland County Family Court, which resettled a prior order. After the father died, the paternal grandmother filed a custody petition as to the child, born in 2009. After multiple court appearances, the parties entered into a stipulation on the record, designating the mother as the sole custodian and according the grandmother extensive visitation. It was further agreed that the mother, who had since relocated to Monroe County, would be placed on probation for one year, based on allegations of substance abuse and mental health problems. An order on the stipulation was entered. When [Monroe] County Probation declined to accept a transfer of the case, Family Court issued a resettled order, terminating the probation provision and substituting a directive that the mother submit to drug/alcohol and mental health evaluations. The Third Department reversed. Probation was a material term of the original order. Resettlement was designed to correct errors as to form, not to make a substantive change in a prior decision. Lisa Miller represented the appellant. (Family Ct, Cortland Co)

Matter of Nicole TT v David UU, 174 AD3d 1168 (3rd Dept 7/18/2019)
CUSTODY / REVERSED
ILSAPP: The mother appealed from an order of Rensselaer County Court. After a 13-day trial, the court dismissed her custody petition, awarded the father sole custody, and granted her two hours’ supervised visitation per week. The Third Department reversed. The appellate court found that the challenged decision mischaracterized the evidence and included “unfortunate and bizarre commentary.” The mother was the primary caretaker of the child, born in 2010. The father had spent much time at home playing with video games, rather than caring for the child. In 2015, a CPS report was indicated for abuse, after an investigation validated a claim that the father punched...
the mother in the face in the child’s presence. Family Court wholeheartedly credited the father’s testimony; viewed the evidence in a light least favorable to the mother; and diminished the evidence of domestic violence. While the proof showed that the father did not sexually abuse the child during one visit, that did not validate the determination that another allegation regarding abuse was a fabrication. To the contrary, an investigation supported the mother’s concerns and actions. Given the passage of time, an updated fact-finding hearing was ordered; and given the trial court’s undue bias in favor of the father, such hearing would be heard before a different judge. Matthew Hug represented the appellant. (Family Ct, Rensselaer Co)

**People v Shanks**, 174 AD3d 1142 (3rd Dept 7/18/2019)

**JURY TRIAL / WAIVER OF APPEAL**

ILSAPP: The defendant appealed from a judgment of Otsego County Court, convicting him of 3rd degree grand larceny. The defendant represented himself at trial and had an assigned legal advisor. At the conclusion of that trial, the jury found the defendant guilty as charged. The defendant thereafter retained counsel, and pursuant to an agreement, withdrew his motions and waived his right to appeal, in return for a sentence of time served and the resolution of unrelated criminal charges. The Third Department affirmed. A defendant may waive the right to appeal from a jury verdict. The appellate court was satisfied that, notwithstanding isolated uses of language more appropriate for a waiver as part of a plea agreement, the defendant knowingly, voluntarily and intelligently waived his right to appeal. The defendant argued that he was improperly found to have forfeited his right to counsel at trial. Assuming that this argument survived his valid appeal waiver, the reviewing court rejected the argument, due to the defendant’s persistent pattern of threatening, abusive, obstreperous, and uncooperative behavior with successive assigned counsel. (Family Ct, Otsego Co)

**People v Adano**, 174 AD3d 1228 (3rd Dept 7/25/2019)

**PLEAS – KNOWING, INTELLIGENT, VOLUNTARY MOTION TO VACATE JUDGMENT OF CONVICTION**

LASJPR: The Third Department concludes that the court below should have conducted a hearing to determine whether defendant was entitled to vacatur of the judgment of conviction. Defendant submitted evidence that, at the time of the crime and when he pleaded guilty, he was suffering from mental health issues and had been prescribed various antidepressants and antipsychotic medications, and produced two expert affidavits to establish that he has a genetic deficiency that negatively affects his ability to metabolize antidepressants and antipsychotic medications and has been scientifically linked to increased rates of drug-induced psychiatric symptoms.

Defendant also established that although defense counsel was well aware of defendant’s mental health issues, counsel stated to defendant on multiple occasions that he had “absolutely no defense” to the charged crimes, and thus there is a question as to whether defendant knowingly, voluntarily and intelligently waived any potential defenses, including an involuntary intoxication defense or the defense of not responsible by reason of mental disease or defect.

In addition, there is a question as to whether defendant’s guilty plea was voluntary and not coerced since counsel told defendant, among other things, that if he refused to plead guilty, counsel would no longer agree to represent him, and, in attempting to dissuade defendant from proceeding to trial, invoked the potential disgrace to his family. (County Ct, Rensselaer Co)

**People v Campagna**, 172 AD3d 1904 (4th Dept 5/3/2019)

**SENTENCE / ILLEGAL**

ILSAPP: The defendant appealed from a judgment of Cayuga County Court, convicting him upon his plea of guilty of several crimes. The Fourth Department modified. The mandatory term of probation with an ignition interlock device under Penal Law § 60.21 did not apply to the aggravated vehicular homicide and aggravated vehicular assault counts, and thus the term of probation was vacated. Although the issue was not raised before the sentencing court or on appeal, the appellant court could not allow an illegal sentence to stand. (County Ct, Cayuga Co)

**People v Chrisley**, 172 AD3d 1914 (4th Dept 5/3/2019)

**SORA / REVERSED**

ILSAPP: The defendant appealed from an order of Genesee County Court, which determined that he was a

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1 Summaries marked with these initials, ILSAPP, are courtesy of the New York State Office of Indigent Legal Services, from the ILS appellate listserv.
level-three risk. The Fourth Department reversed and remitted. The SORA court violated the defendant’s right to due process by assessing points on a theory not raised by the Board or the People. A court’s sua sponte departure from the Board’s recommendation at the hearing, without prior notice, deprived the defendant of a meaningful opportunity to respond. Despite the lack of preservation, the appellate court reviewed the issue in the interest of justice, because of the substantial infringement on the defendant’s due process and statutory rights. The Legal Aid Bureau of Buffalo (James Specyal, of counsel) represented the appellant. (County Ct, Genesee Co)

**People v Hector, 172 AD3d 1913 (4th Dept 5/3/2019)**

**GUILTY PLEA / VACATED**

**ILSAPP:** The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him, upon his plea of guilty, of 1st degree offering a false instrument for filing. The Fourth Department reversed and remitted, finding that the plea was not entered knowingly, intelligently, and voluntarily. Although the defendant failed to preserve the contention for review and the case did not fall within the narrow exception to the preservation rule, the appellate court considered the issue in the interest of justice. After Supreme Court accepted the guilty plea, the defendant said that he was confused by the plea proceeding, and the court asked him if he had any questions about the consequences of pleading guilty. The ensuing remarks by the defendant indicated that he did not understand the nature of the crime to which he had entered his guilty plea. Although he was obviously confused, the court made no further inquiry. Hiscock Legal Aid Society (William Clauss, of counsel) represented the appellant. (Supreme Ct, Onondaga Co)

**People v Lee, 172 AD3d 1925 (4th Dept 5/3/2019)**

**CPL 440.10 / HEARING ORDERED**

**ILSAPP:** The defendant appealed from an order of Monroe County Supreme Court, which denied his CPL 440.10. The Fourth Department reversed. Following a jury trial, the defendant was convicted of 10 charges, including 1st degree robbery, and such conviction was upheld upon appeal. In support of the instant motion, the defendant submitted credible evidence—which the People did not counter—indicating that he was absent from the **Sandoval** hearing. Thus, Supreme Court erred in denying a hearing. Jeffrey Wicks represented the appellant. (Supreme Ct, Monroe Co)

**People v McDonald, 172 AD3d 1900 (4th Dept 5/3/2019)**

**MURDER – ACTING IN CONCERT**

**ILSJRPP:** The Fourth Department overturns defendant’s second degree murder conviction, concluding that the People failed to present legally sufficient evidence establishing that defendant shared the co-defendant’s intent, and, in any event, the verdict was against the weight of the evidence, where defendant was inside a bar shortly after 1:30 a.m. on the night of the shooting. At the victim and his girlfriend; defendant owned a silver Infinity sedan, and a silver Infinity was observed near the bar prior to and after the shooting; the co-defendant shot the victim at approximately 2:10 a.m.; defendant and the co-defendant exchanged phone calls shortly after the shooting, and the co-defendant was picked up in a silver Infinity and driven to his home; defendant lied to the police regarding her and the co-defendant’s whereabouts on the evening of the shooting; and, within days after the shooting, defendant obtained a new cell phone and got rid of the Infinity.

The court notes that the People offered no motive; that there was no proof that defendant was inside the Infinity prior to the shooting, and, although defendant was the recognized owner, two witnesses associated the Infinity with the co-defendant and not defendant; and that the co-defendant also made two other phone calls, the recipients of which are unknown. (County Ct, Monroe Co)

**People v Ballowe, 173 AD3d 1666 (4th Dept 6/7/2019)**

**GRAND JURY / FAILURE TO RULE**

**ILSAPP:** The defendant appealed from a judgment of Erie County Supreme Court, convicting him of leaving the scene of an incident resulting in serious injury without reporting. The Fourth Department reserved decision, held the case, and remitted. The defendant contended that Supreme Court erred in granting the People leave to re-present the case to a second grand jury after the first one returned a “no bill.” Supreme Court properly granted the People’s application to re-present the charges, based on the availability of a witness who would provide new evidence. However, there was no ruling on the defense application for the court to discern whether the prosecutor had presented the promised new evidence. The Legal Aid Bureau of Buffalo (Nicholas DiFonzo, of counsel) represented the appellant. (Supreme Ct, Erie Co)

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2 Summaries marked with these initials, LASJRP, are courtesy of The Legal Aid Society’s Juvenile Rights Practice, from their weekly newsletter.
Right to Counsel – Choice of Counsel

People v Edwards, 173 AD3d 1615 (4th Dept 6/7/2019)

The Fourth Department finds reversible error where the court failed to conduct the required inquiry after defendant asked for new counsel because, among other things, defense counsel had failed to file omnibus motions. Instead, the court proceeded under the mistaken belief that they had been filed. (Supreme Ct, Onondaga Co)

People v Green, 173 AD3d 1690 (4th Dept 6/7/2019)

The case is held, decision reserved, and the matter remitted “for a determination of whether the officer possessed the requisite justification to conduct a search of defendant” where the driver of the car in which the defendant was a passenger pulled over before the officer initiated a traffic stop, the officer saw the defendant moving around as if putting something in his coat or pants as the police approached, and the officer smelled marihuana coming from the car. The court’s finding that the officer had a founded suspicion of criminality before ordering the defendant from the car is insufficient to justify a pat search; the court failed to address whether the officer’s observations provided probable cause to search the defendant’s person. An appellate court cannot affirm based on a theory not reached by the court below. (Supreme Ct, Erie Co)

People v Hardy, 173 AD3d 1649 (4th Dept 6/7/2019)

The defendant is foreclosed from pursuing on appeal his contention that he was denied his constitutional right to a speedy trial. When he entered his guilty plea, the court had decided only the statutory speedy trial claim; to a speedy trial. When he entered his guilty plea, the court had decided only the statutory speedy trial claim; among other things, defense counsel had failed to file omnibus motions. Instead, the court proceeded under the mistaken belief that they had been filed. (Supreme Ct, Onondaga Co)

Abuse/Neglect – Respondent/Person Legally Responsible – Defaults/Appeal

Matter of Heavenly A., 173 AD3d 1621

(4th Dept 6/7/2019)

The father appealed from an order of the family court, which terminated his parental rights. The Fourth Department held that the petitioner agency failed to establish by clear and convincing evidence that he abandoned the child. The record established that the father definitively established his paternity, while incarcerated, less than two months into the six-month period preceding the filing of the petition. Throughout the relevant period, the father initiated communications with the child’s caseworker; sent letters inquiring about the child; and participated in a service plan review. His contacts were not minimal, sporadic or insubstantial. Thus, the finding of abandonment was error. However, permanent neglect was adequately proven. Mary Davison represented the appellant. (Family Ct, Oswego Co)

Matter of Jarrett P., 173 AD3d 1692 (4th Dept 6/7/2019)

Abandonment / Reversed

The father appealed from an order of Ontario County Family Court, which terminated his parental rights. The Fourth Department held that the petitioner agency failed to establish by clear and convincing evidence that he abandoned the child. The record established that the father definitively established his paternity, while incarcerated, less than two months into the six-month period preceding the filing of the petition. Throughout the relevant period, the father initiated communications with the child’s caseworker; sent letters inquiring about the child; and participated in a service plan review. His contacts were not minimal, sporadic or insubstantial. Thus, the finding of abandonment was error. However, permanent neglect was adequately proven. Mary Davison represented the appellant. (Family Ct, Oswego Co)

IAC / Sub Counsel Request / Vacatur

People v Jones, 173 AD3d 1628 (4th Dept 6/7/2019)

The defendant appealed from a County Court judgment, convicting him of 1st degree burglary. The Fourth Department reversed, vacated the plea, and remitted. The plea court violated the defendant’s right to counsel when it failed to conduct a sufficient inquiry into his complaint regarding defense counsel’s representation. During the plea colloquy, the defendant attempted to inform the court that he was pleading guilty only because...
he was not receiving effective assistance. The court refused to accept the defendant’s pro se letter regarding the matter and did not otherwise allow him to expand on his claim. The court had no basis to completely cut off the discussion without hearing any explanation. The appellate court rejected the People’s contention that the defendant abandoned his request when he decided to plead guilty, while still represented by the same attorney. After refusing to allow the defendant to articulate his argument, the court gave him an ultimatum to plead guilty or go to trial—in either case, with present counsel. The defendant’s contentions implicated the voluntariness of the plea. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the appellant. (County Ct, Monroe Co)

**Matter of Mcnerlin v Argento, 173 AD3d 1646 (4th Dept 6/7/19)**

**DOUBLE JEOPARDY**

**LASJRP:** The Fourth Department denies relief in this Article 78 proceeding challenging prosecution on double jeopardy grounds, concluding that the constitutional double jeopardy analysis is the same under federal and state law.

**Matter of Montgomery v List, 173 AD3d 1657 (4th Dept 6/7/2019)**

**IMPUTED INCOME / AFFIRMED**

**ILSAPP:** The father appealed from a Monroe County Family Court order increasing support. The Fourth Department found that the trial court erred when it stated that it could not reduce his child support obligation, even if the father reasonably decided to take a lower-paying job, when he moved because his new wife accepted a job in North Carolina. A court’s failure to exercise its discretion is, in itself, an abuse of discretion. However, the reviewing court found that the income imputed was appropriate. The father’s earnings in the three years before he left his position in NY showed that he had the potential to earn $64,819. Further, a portion of his wife’s salary could be imputed as his income, where his decision to leave his prior job resulted in an improvement in his overall financial condition. (Family Ct, Monroe Co)

**People v Reid, 173 AD3d 1663 (4th Dept 6/7/2019)**

**HARSH SENTENCE / REDUCED**

**ILSAPP:** The defendant appealed from a judgment, convicting him upon a jury verdict of 3rd degree criminal sale of a controlled substance (two counts) and sentencing him to consecutive determinate terms of seven years, fol-

owed by two years’ post-release supervision. On appeal, the defendant contended that the sentence was unduly harsh and severe. The Fourth Department directed that the sentences would run concurrently to each other, but consecutively to a prior sentence. The defendant, age 35 at the time of the crimes, had previously committed only misdemeanors. He was convicted in Oneida County Court of a similar offense, arising from an incident that occurred contemporaneously with the instant crimes, which involved sales of small amounts of cocaine. Further, there was no indication that the defendant was a large-scale drug dealer. Finally, prior to trial, the court had agreed that, if the defendant pleaded guilty, it would impose a sentence of four years on each count, to run concurrently with each other and to the Oneida County sentence. John Herbowy represented the appellant. (County Ct, Herkimer Co)

**People v Simpson, 173 AD3d 1617 (4th Dept 6/7/2019)**

**SENTENCE ILLEGAL / SUA SPONTE MODIFICATION**

**ILSAPP:** The defendant appealed from a judgment of Jefferson County Court, convicting him of 3rd degree CPW and other crimes. The Fourth Department modified, by reducing the sentence imposed for the CPW count to 2½ to 7 years. The lower court imposed an illegal sentence of 3½ to 7 years for that conviction. Because the defendant was not sentenced as a predicate felon, the minimum period of her sentence had to be one-third, not one-half, of the maximum. Although the issue was not raised by either party, the court could not allow an illegal sentence to stand. (County Ct, Jefferson Co)

**Matter of Addison M., 173 AD3d 1735 (4th Dept 6/14/2019)**

**ABUSE/NEGLECT – INJURIES CONSTITUTING ABUSE – POST-PETITION EVIDENCE**

**LASJRP:** The Fourth Department upholds a finding of abuse, finding sufficient evidence where the twenty-one-month-old child sustained approximately twenty-five distinct bruises, including a black eye, a bruise on her forehead, a bruise on her right ear, and a bruise under her left eye; the child had an identifiable adult-sized bite mark on her arm and was missing large clumps of hair, and the pattern of hair loss and the child’s reaction to having a doctor examine her scalp were consistent with the child’s hair having been forcefully pulled from her head; the family court found that the mother’s explanations—e.g., that the hair condition was related to a fungal infection and that the child would sometimes bite herself—were not credible; and the physicians who testified asserted that the bruises and other injuries were inflicted and not accidental. The family court did not err in refusing to admit into evidence certain educational and medical records con-
concerning the child’s behavior approximately one year after the child was first removed from the mother’s custody in this case. (Family Ct, Erie Co)

**People v Antonio L., 173 AD3d 1743 (4th Dept 6/14/2019)**

In these appeals from adjudications of the defendant as a youthful offender, the prosecution correctly concedes “in each appeal that the surcharge and crime victim assistance fee must be vacated because defendant is a juvenile offender,” that “the aggregate duration of the two consecutive sentences, i.e., 2 to 6 years, is illegal (see Penal Law §§ 60.02 [2]; 70.00 [2] [e]; [3] [b],” and “that defendant’s challenge to the illegal sentence in each appeal survives his waiver of his right to appeal and does not require preservation” so that the adjudication in each appeal is modified by vacating the sentence and remitting for resentencing. The incorrect statement in the certificate of conviction in one adjudication, making the duration of the order of protection eight years, is amended to reflect the seven years recited by the court at the sentencing proceeding. (County Ct, Genesee Co)

**People v Burman, 173 AD3d 1727 (4th Dept 6/14/2019)**

**ASSAULT / NO MENS REA AS TO VIC’S AGE**

**ILSAPP:** The defendant appealed from a judgment of Oswego County Court, which convicted him of 2nd degree assault. The Fourth Department affirmed. The conviction arose out of a fight that occurred when the defendant was 31 and the victim was 69. Penal Law § 120.05 (12) elevated, from a class A misdemeanor to a class D violent felony, the crime of intentionally causing physical injury to a person 65 years of age or older by a defendant more than 10 years younger. The Legislature did not attach any culpable mental state to the aggravating circumstance. Thus, the People did not need to prove that the defendant knew that the victim was 65 or older. (County Ct, Oswego Co)

**People v Castaneda, 173 AD3d 1791 (4th Dept 6/14/2019)**

While the defendant failed to preserve for review his contention regarding unlawful conditions of probation, review is permitted where an illegality is readily discernible from the record, including probation conditions that are not reasonably related to rehabilitation or are beyond the court’s authority to impose. The condition barring all use of the internet is modified to allow use related to education, lawful employment, or searching for lawful employment. (County Ct, Genesee Co)

**Matter of Daniel K., 173 AD3d 1732 (4th Dept 6/14/2019)**

**ABUSE/NEGLECT – SUMMATION**

**LASJRP:** The Fourth Department rejects the mother’s contention that she was denied a fair hearing because the attorney for the children made prejudicial remarks on summation, noting that the court in a nonjury case is presumed to have considered only competent evidence in reaching its determination. (Family Ct, Onondaga Co)

**People v Geddis, 173 AD3d 1724 (4th Dept 6/14/2019)**

**ANTOMMARCHI VIOLATION / NEW TRIAL**

**ILSAPP:** The defendant appealed from a judgment of the Cattaraugus County Court, convicting him of 2nd degree assault and other charges. The Fourth Department reversed and ordered a new trial. There was a violation of the defendant’s right to be present during questioning of prospective jurors regarding bias, etc. See People v Antommarchi, 80 NY2d 247. The defendant was not present when a prospective juror advised the court that her son was a convicted felon. The question about crime was relevant to potential bias; the interaction was a material stage of the proceedings; and the defendant did not waive his right to be present. Legal Aid of Buffalo (Benjamin Nelson, of counsel) represented the appellant. (County Ct, Cattaraugus Co)

**People v Lamagna, 173 AD3d 1772 (4th Dept 6/14/2019)**

The defendant’s valid waiver of appeal forecloses a challenge to the amount of restitution imposed at sentencing, and he failed to preserve any such challenge. But the defendant’s contention that the court’s failure to direct the manner of payment of restitution, in violation of CPL 420.10 (1), is a challenge to the legality of the sentence. As the prosecution correctly concedes, the restitution component of the sentence must be vacated and the matter remitted for the court to set the manner in which restitution is to be paid. (County Ct, Genesee Co)

**People v Parris, 173 AD3d 1745 (4th Dept 6/14/2019)**

**MURDER / NO DEPRAVED INDIFFERENCE**

**ILSAPP:** The defendant accosted the decedent, who had purportedly been sent by another man to injure the defendant. Then the defendant fired at the victim around eight times. At least six bullets struck the victim. The defendant was charged with felony murder, intentional murder, depraved indifference murder (DIM), and other crimes. At the 2003 trial, in a motion for a trial order of dismissal with respect to DIM, counsel argued that the defendant’s conduct was intentional or it was nothing at all. The defendant was acquitted of felony murder and inten-
tional murder and other charges, but was convicted of DIM and other crimes. He appealed to the Fourth Department, which affirmed in a 2006 decision (30 AD3d 1108). Before leave to appeal was denied (7 NY3d 816), the Court of Appeals decided People v Feingold, 7 NY3d 288 (2006), and held definitively for the first time that the depraved indifference element of DIM is a culpable mental state, rather than the circumstances under which the killing is committed.

More than a decade later, in the case at bar, the Fourth Department granted a coram nobis application and vacated its decision sustaining the conviction (153 AD3d 1673), on the ground that appellate counsel had failed to argue that the DIM conviction was not supported by legally sufficient evidence. In the instant appeal, the People conceded that the Feingold standard applied, since the direct appeal was pending when Feingold was decided. Moreover, before Feingold, the Court of Appeals had repeatedly stated that DIM was not committed where the defendant perpetrated “a quintessentially intentional attack directed solely at the victim” (see e.g. People v Hafeez, 100 NY2d 253, 258 [2003]); and that “the use of a weapon can never result in DIM when there is a manifest intent to kill” (see e.g. People v Payne, 3 NY3d 266, 271 [2004]). In the instant appeal, the Fourth Department held that the evidence unequivocally established that the defendant intended to kill the victim, and thus the evidence was insufficient to support the conviction of DIM. The appellate court thus reversed that part of the challenged judgment and dismissed that count. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the appellant. (Supreme Ct, Monroe Co)

**People v Partridge, 173 AD3d 1769 (4th Dept 6/14/2019)**

**PREDATORY SEXUAL ASSAULT / DISMISSED**

ILSAPP: The defendant appealed from a judgment of the Onondaga County Court, which convicted him of predatory sexual assault against a child and other crimes. The Fourth Department dismissed the predatory assault count, based on legally insufficient evidence as to the relevant time frame. It was possible that the instances of anal sexual conduct occurred before the statute’s effective date or after the victim turned 13. Hiscock Legal Aid Society (Philip Rothschild, of counsel) represented the appellant. (County Ct, Onondaga Co)

**People v Patterson, 173 AD3d 1737 (4th Dept 6/14/2019)**

As to the count of fifth-degree criminal possession of a controlled substance (CPCS), the court erred in refusing to instruct the jury on the lesser included offense of sev-enth-degree CPCS. There is a reasonable view of the evidence that would support a finding that the defendant committed the lesser but not the greater offense. He denied possessing a large rock of crack cocaine but admitted possessing several dime bags, all allegedly recovered from his person; an expert testified that the weight of the rock was greater than the aggregate weight of the pure cocaine in the rock and bags combined. If the jurycredited the defendant’s testimony, it could have found that the prosecution failed to show possession of cocaine weighing 500 milligrams or more. (Supreme Ct, Monroe Co)

**Dissent:** The court erred in denying the defendant’s challenge for cause to the prospective juror who, during voir dire, expressed a bias. That the juror, who responded “yes” when the panel was asked if they needed to hear the defendant testify, later said she could assess the elements of the offense and render a decision without the defendant’s testimony “does not establish that she would be uninfluenced by the defendant’s failure to testify.”

**People v Bloodworth, 173 AD3d 1838 (4th Dept 6/28/2019)**

**RIGHT TO COUNSEL – EFFECTIVE ASSISTANCE**

PLEAS – WAIVER OF CLAIM

LASJRP: The Fourth Department concludes that defendant was denied the effective assistance of counsel where, although defense counsel raised a statutory speedy trial claim, counsel failed to alert the court that it had inaccurately calculated the delay. Defendant’s contention survives his plea since the plea bargaining process was infected by the ineffective
Fourth Department continued

assistance and defendant entered the plea because of it. (Supreme Ct, Onondaga Co)

Ferratella v Thomas, 173 AD3d 1834 (4th Dept 6/28/19)
ORDER OF PROTECTION / DUE PROCESS
ILSAPP: The mother appealed from an order finding that she willfully violated an order of protection when she left a voicemail for the father regarding a non-emergency issue. She contended that her due process rights were denied because the court considered conduct not alleged in the violation petition. The court addressed the issue in the interest of justice. While Family Court proceedings are permitted to be informal, due process considerations require that an order of commitment be based on facts alleged in the petition. However, reversal was not required, given evidence of another violation alleged in the petition and addressed at the fact-finding hearing. (County Ct, Steuben Co)

ABUSE/NEGLECT – DRUG MISUSE
LASJRP: The Fourth Department concludes that petitioner activated the presumption of neglect in FCA § 1046(a)(iii) by presenting evidence that respondent father had used cocaine nearly non-stop for the week preceding the removal of the children, that he admitted being addicted to drugs, that respondent mother called the police who arrived while the father was in the midst of injecting cocaine, and that dozens of hypodermic needles were found in respondents’ house.

The presumption was not rebutted by evidence that the father is voluntarily and regularly participating in a recognized rehabilitative program. Although there was evidence suggesting that the father had enrolled in a treatment program at some prior time, the evidence does not establish that he was regularly participating in that program where there is evidence establishing that he continued using drugs. (Family Ct, Erie Co)

People v Richardson, 173 AD3d 1859 (4th Dept 6/28/2019)
RIGHT TO COUNSEL / RESTITUTION
ILSAPP: The defendant appealed from an order of Monroe County Court, convicting him of 1st degree robbery and other crimes. The defendant contended that he was deprived of his right to counsel in connection with his decision to testify before the grand jury. The Fourth Department found the issue forfeited by the waiver of appeal, where the defendant did not contend that the violation tainted the voluntariness of the plea. The court explicitly declined to follow People v Trapani, 162 AD3d 1121 (3rd Dept) (where violation of statutory right to testify before grand jury purportedly occurred due to deprivation of right to counsel, issue survived guilty plea and appeal waiver). The appellate court further found that County Court erred in ordering restitution, since it was not part of the plea bargain. The court should have given the defendant a chance to withdraw his plea. As the People requested, the restitution order was vacated. Bridget Field represented the appellant. (County Ct, Monroe Co)

CUSTODY / REVERSED
ILSAPP: The defendant appealed from an order of Onondaga County Family Court which granted the grandparents sole custody of the subject child. The Fourth Department reversed and remitted. The trial court abused its discretion in denying the mother’s request to adjourn the hearing, where she presented a valid reason for her inability to attend the hearing and supported her request with a letter from her inpatient provider. The mother was prejudiced in not having the opportunity to testify. Hiscock Legal Aid Society (Philip Rothschild, of counsel) represented the appellant. (Family Ct, Onondaga Co)

People v Thomas, 173 AD3d 1845 (4th Dept 6/28/2019)
FAILURE TO RULE / REMITTAL
ILSAPP: The defendant appealed from a County Court judgment, convicting him of 2nd degree CPW. Prior to trial, he moved to dismiss the indictment, including on the ground that the grand jury proceedings were defective under CPL 210.35. On appeal, the defendant contended that the trial court erred in refusing to dismiss the indictment. However, the record did not contain any ruling on the relevant part of the motion. The failure to rule could not be deemed a denial of the motion. Therefore, the Fourth Department reversed decision and remitted to County Court. The Niagara County Public Defender (Theresa Prezioso, of counsel) represented the appellant. (County Ct, Niagara Co)

People v Tucker, 173 AD3d 1817 (4th Dept 6/28/2019)
The court erred in allowing into evidence the defendant’s oral statement about his address where no CPL 710.30 notice had been given and the statement was made to a principle police investigator who executed a search warrant at the defendant’s parents’, “because, under the circumstances of this case, the investigator’s question was likely to elicit an incriminating admission and had a necessary connection to an essential element of the [posse-
sory] crime[ ] charged’ …” The error was harmless. (Supreme Ct, Monroe Co)

**People v Brown**, 174 AD3d 1329 (4th Dept 7/5/2019)

The imposition of persistent felony offender status on the defendant is unduly harsh and severe, and the Appellate Division may vacate such a sentence in its discretion. While the “defendant’s extensive criminal record provided a basis for sentencing him as a persistent felony offender,” the presentence report contains nothing that “indicates that he has ever been violent or involved in drugs, and he has never been convicted of any crime more serious than a class D felony.” The 15 years to life sentence is particularly harsh in view of the prosecution’s “final pretrial plea offer of 2½ to 5 years’ incarceration,” a disparity that militates in favor of a sentence reduction. “The aggregate sentence as modified is 9 to 18 years.” (County Ct, Steuben Co)

**People v Grimes**, 174 AD3d 1341 (4th Dept 7/5/2019)

JURY NOTE / NO MEANINGFUL NOTICE

ILSAPP: The defendant appealed from a judgment of Genesee County Court, which convicted him of 2nd degree burglary. The Fourth Department reversed, as a result of the absence of record proof that, in response to two substantive jury notes, the trial court complied with its CPL 310.30 obligation to provide meaningful notice in response to two substantive jury notes. The stenographer was unable to transcribe the final day of trial; due to a snafu, the electronic stenographic notes were unrecoverable. A reconstruction hearing failed to establish the court’s on-the-record handling of the notes. The reviewing court could not assume that the proper procedure was used, where the record was devoid of information as to how the jury notes were handled. A new trial was granted. The Legal Aid Bureau of Buffalo (James Speystal, of counsel) represented the appellant. (County Ct, Genesee Co)

**People v Herrod**, 174 AD3d 1322 (4th Dept 7/5/2019)

BATSON / RACE-NEUTRAL REASON

ILSAPP: The defendant appealed from a judgment convicting him of 2nd degree murder. The trial court determined that the People offered a nonpretextual, race-neutral reason for excluding the prospective juror at issue. The Fourth Department affirmed. At a remittal hearing, the prosecutor testified the prospective juror was stricken because he was a crime victim who expressed dissatisfaction with the manner in which the crime against him had been prosecuted. Further, his statements suggested that he might be receptive to a potential justification defense. The remittal court’s findings were entitled to great deference. (County Ct, Erie Co)

**Matter of Rapp v Horbett**, 174 AD3d 1315 (4th Dept 7/5/2019)

SHARED CUSTODY / SUPPORT MODIFIED

ILSAPP: The mother appealed from an Erie County Family Court order, which denied her objections to the Support Magistrate’s child support order. In this case of shared physical custody, the father should have been deemed the noncustodial parent for the purpose of support, given his higher income. The mother was entitled to a credit against any arrears. Although there is a strong public policy against recoupment of overpayments, the credit was appropriate. The mother received certain public assistance, whereas the father received pension benefits and had significant assets; and the credit would not prevent him from meeting the child’s needs. The mother represented herself. (Family Ct, Erie Co)

**People v Ayotunji A.**, 174 AD3d 1503 (4th Dept 7/31/2019)

REVISED / REMITTED

PROBATION REVOCATION HEARING

ILSAPP: The defendant was adjudicated a YO upon his plea of guilty to 3rd degree robbery and was sentenced to probation. He appealed from a subsequent County Court order revoking probation and imposing a term of imprisonment. The Fourth Department reversed and remitted. County Court erred in finding a VOP without holding a hearing or securing an admission. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the appellant. (County Ct, Monroe Co)

**People v Blunt**, 174 AD3d 1504 (4th Dept 7/31/2019)

DECISION RESERVED / REMITTED

HEARING ON 330.30 MOTION

ILSAPP: The defendant appealed from a County Court judgment, convicting him of 2nd degree murder and other crimes. The Fourth Department reserved decision. The trial court erred in summarily denying a CPL 330.30 motion to set aside the verdict. Sworn allegations indicated that a juror may have had an undisclosed, potentially strained relationship with the defendant’s mother, resulting from attending high school and working together; he possibly knew about the defendant’s criminal history; he purportedly tried to speak with the mother’s husband during a break at trial; and the misconduct was not known to the defendant before the verdict. A hearing was needed. The Monroe County Public Defender (Drew DuBrin, of counsel) represented the appellant. (County Ct, Monroe Co)
People v Gonzalez, 174 AD3d 1542 (4th Dept 7/31/2019)  
REVERSED / DISMISSED  
MANSLAUGHTER AGAINST WEIGHT  
ILSAPP: The defendant appealed from a judgment of Erie County Supreme Court, convicting him of 1st degree manslaughter, based on the alleged unintentional killing of his girlfriend’s infant son. The Fourth Department found the verdict against the weight of evidence and dismissed the indictment. The People’s theory was that the person who inflicted the victim’s fatal injuries did so within 24 hours of death the morning of May 3, 2010. The defendant was alone with the victim for an hour on May 2. But on cross-examination, the Medical Examiner said that a delay in the onset of symptoms was common with a brain injury; that such an injury could occur up to 24 hours before symptoms; and that vomiting is a symptom. There was evidence that the victim vomited on the afternoon of May 2. Thus, the injuries could have been sustained the afternoon of May 1, when the defendant was not with the victim, but four other people were—none of whom was interviewed by police. When the mother called 911 the evening of May 2, she said that the baby had been vomiting all day. Legal Aid Bureau of Buffalo (Erin Kulesus, of counsel) represented the appellant. (Supreme Ct, Erie Co)

People v Hernandez, 174 AD3d 1352 (4th Dept 7/31/2019)  
REVERSED / NEW TRIAL  
CHALLENGE FOR CAUSE / SUPPRESSION  
ILSAPP: The defendant appealed from a Seneca County Court judgment, convicting him of 2nd degree assault and other crimes. The Fourth Department reversed and ordered a new trial. County Court erred in denying a challenge for cause. By insisting that officers were unlikely to lie under oath because that would endanger their pensions, the prospective juror cast doubt on his ability to render a fair verdict. The court failed to obtain required assurances. The defense exhausted peremptory challenges. The defendant’s statements to police should have been suppressed, the appellate court ruled. He was ordered out of his bedroom in the middle of the night, directed to remain in a vestibule, not Mirandized, but subjected to pointed questions for an hour. Then at the station, the defendant said, “I think I need a lawyer,” but questioning continued. J. Scott Porter represented the appellant. (County Ct, Seneca Co)

People v Johnson, 174 AD3d 1510 (4th Dept 7/31/2019)  
REVERSED / DISMISSED  
STATUTORY SPEEDY TRIAL VIOLATION  
ILSAPP: The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of a drug possession charge. The Fourth Department reversed and dismissed the superseding indictment. The People should have been charged with 87 days of post-readiness delay for the period between when they “implicitly requested” an adjournment to seek a superseding indictment and when they secured that indictment. When the 87 days were added to the pre-readiness delay chargeable to the People, the total exceeded the authorized period. Hiscock Legal Aid Society (Brittney Clark, of counsel) represented the appellant. (Supreme Ct, Onondaga Co)

People v Jones, 174 AD3d 1532 (4th Dept 7/31/2019)  
SEARCH AND SEIZURE – REASONABLE SUSPICION – FRUITS/ABANDONMENT  
LASJRP: The Fourth Department finds no reasonable suspicion justifying police pursuit where the officer observed defendant walking in the general vicinity of reported gun shots, and defendant matched the vague, generic description of the suspect as a black male, which could have applied to any number of individuals in the area of the large apartment complex with hundreds of residents.

The court below erred in determining that defendant’s act of discarding the handgun was a calculated act not provoked by the unlawful pursuit. There was an ongoing, continuous pursuit of defendant. (Supreme Ct, Onondaga Co)

Matter of Kelly v Brown, 174 AD3d 1523 (4th Dept 7/31/2019)  
VISITATION – INCARCERATED PARENT  
Contrary to the incarcerated father’s contention, the court did not abuse its discretion by denying him visitation with his two and a half year old child, as the mother successfully rebutted the presumption that visitation was in the child’s best interest. It was established by a preponderance of the evidence that under all circumstances, such contact would be harmful to the child’s welfare, at this time. The court properly considered the effects and trauma that might be caused to a young child by exposure to a prison, and that the best interest of a young child may not be served by in person prison visits. Additionally, the court did not delegate the issues of best interests to the mother. The court relied on the entire record in making its final determination. (Family Ct, Monroe Co)
Fourth Department continued

People v Lloyd, 174 AD3d 1389 (4th Dept 7/31/2019)

The defendant’s constitutional rights were violated by the warrantless parole search of his residence because the term of postrelease supervision (PRS) he was serving at the time of the parole search had been improperly imposed administratively. But suppression of the evidence found during the search would not serve as a deterrent to future illegal state action where the legality of administratively-imposed PRS was not settled at the time of the parole search, such PRS imposition being held illegal only later. “[T]here is little or no danger that DOCCS or other non-court entities will hereafter sua sponte impose an unpronounced term of PRS on an inmate that might facilitate a subsequent warrantless search of the inmate after being released to the purported term of PRS.” While the court denying the defendant’s 440.10 motion to vacate the judgment erred in referring to the good faith effort of those conducting the search, as the Court of Appeals has not adopted the good-faith exception to the exclusionary rule, “the court also concluded more broadly that the deterrent effect of the exclusionary rule did not justify its application in this case,’’ and the denial is affirmed. (Supreme Ct, Erie Co)

People v McCoy, 174 AD3d 1379 (4th Dept 7/31/2019)

Harsh Term Cut / Mental Health

ILSAPP: The defendant appealed from an Erie County Supreme Court judgment, convicting him upon a nonjury verdict of 1st degree burglary and other crimes. The Fourth Department reduced the term for burglary from 12 to five years. Before indictment, the defendant was offered probation; and after indictment, five years. At that time, all relevant facts were known, including the defendant’s history of mental illness. The victims were [the] defendant’s parents, who opposed lengthy incarceration. Moreover, her prior convictions—none for felonies—were committed within three years of the instant offenses and only after the defendant began to suffer from serious mental health issues. The Legal Aid Bureau of Buffalo (Erin Kulesus, of counsel) represented the appellant. (Supreme Ct, Erie Co)

People v Vail, 174 AD3d 1365 (4th Dept 7/31/2019)

Kidnapping – Restraint/Intent

LASJRP: The Fourth Department reverses defendant’s conviction for kidnapping in the first degree where the trial court instructed the jury that “intent does not require advanced planning, nor is it necessary that the intent be in the person’s mind for any particular period of time,” but the statute should be read to require that a defendant both restrain a victim for more than 12 hours and possess, for more than 12 hours during the period of restraint, the intent to violate or abuse the victim sexually.

However, a majority concludes that the weight of the evidence supports a determination that defendant did not innocently acquiesce to the request of a 14-year-old acquaintance to drive her to Florida, but rather took advantage of the child’s age and inexperience, by driving her across multiple state lines, away from her family, in order to engage in an unlawful sexual relationship.

Two judges assert that there was insufficient evidence of the restraint element. One judge notes that “unlike the majority, I am not prepared to rule that a person who voluntarily enters a vehicle and who expresses no desire to leave is being ‘secreted or held’ by the driver, or that such a driver is intending to prevent the passenger’s ‘liberation.’” The fact that defendant might have misled the child’s mother about her daughter’s whereabouts cannot, by itself, constitute the “secretling” to which the statute refers. The notion of “secretling” necessarily assumes that the person being “secreted” would want to be located, and that is not the case here. And, the victim’s age has dispositive significance only as to the lack of consent sub-element of the element of restraint. (Supreme Ct, Ontario Co)

Defender News (continued from page 9)

National Public Defense Caseload Expert Norman Lefstein Remembered

Norman Lefstein, known across the nation for his work on public defense standards, and especially on workload limits, died in August at the age of 82. He was Professor of Law and Dean Emeritus at Indiana University Robert H. McKinney School of Law, Indianapolis, IN. His work on many committees and organizations, including the American Bar Association (ABA) Standing Committee on Legal Aid and Indigent Defendants (SCLAID) and the National Association for Public Defense (NAPD), spanned over a half-century. As noted in a tribute posted on the NAPD blog, Norm “testified as an expert witness for scores of public defenders all over the country for decades, decrying the plague of excessive public defender caseloads.” Among the public defense cases in which he submitted affidavits or testified was the New York County Lawyers Association (NYCLA) suit filed in 2000 challenging stagnant assigned counsel fees, a suit that was part of a broad effort to raise 18-B compensation rates. Lefstein’s book, Securing Reasonable Caseloads: Ethics and Law in Public Defense, is cited in, among many other places, the Indigent Legal Services Office 2016 report on caseload standards pursuant to the Hurrell-Harring settlement.
NYSDA MEMBERSHIP APPLICATION

I wish to join the New York State Defenders Association and support its work to uphold the constitutional and statutory guarantees of legal representation to all persons regardless of income and to advocate for an effective system of public defense representation for the poor.

Enclosed are my membership dues:

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