Death of Ken Strutin Leaves Many Grieving

NYSDA’s long-time Director of Legal Information Services, Ken Strutin, died on Nov. 30, 2018, following an illness. He will be long remembered by the countless individuals he assisted professionally as well as by the family, friends, and colleagues who mourn and miss him.

Ken earned a master’s degree in library science in 1994 after working as a legal aid lawyer for several years, and put his own stamp on the knowledge and skills of the two fields. He published over 70 articles on LLRX, and added an astonishing amount of information to the Backup Center’s clearinghouse, which is used to assist public defense lawyers, their clients, and others. He provided research assistance to NYSDA’s legal staff and to those who rely on NYSDA’s services. He oversaw library interns, a few of whom stayed on at NYSDA beyond their initial term. Directly and indirectly, Ken contributed to the REPORT, our website, and other NYSDA publications. His book, The Insider’s Guide: Criminal Justice Resources on the Internet 2002, was one of the first of its kind.

As NYSDA’s Director of Legal Information Services, Ken hired a number of library interns at the Backup Center. He is pictured here in 2006 with Sheila Cui, who became a Legal Information Specialist for NYSDA after her internship.

Ken’s extensive work to help attorneys move into the Information Age included writing the “Technology Today” column for the New York Law Journal. That periodical noted his passing in a Dec. 4, 2018 obituary that included a quote from NYSDA’s Executive Director, Charlie O’Brien, on the broad reach of Ken’s “trenchant legal commentary.”

Others who commented on Ken’s passing include NYSDA Board Member Rick Greenberg. He observed that Ken’s NYLJ columns “were always cutting-edge, well-researched, and cogently written.” Rick also said, “I found Ken to be a wonderful colleague and a brilliant lawyer. … His passing is a loss and we will miss him.”

Ken offered assistance and insight on the legal listservs he followed. In the words of Greg Lubow, a member of the New York State Association of Criminal Defense Lawyers (NYSACDL) Board of Directors, “It does not need saying that his ‘take’ on issues was spot on.” Greg added, “What I truly liked was that he was not content with the way the law was, especially since it usually maintained an unacceptable status quo. Ken was always looking to push the envelope – to make the law and its application by courts ‘better’ for the people whose lives it affects.” NYSACDL published an In Memoriam about Ken in its Winter 2019 issue of Atticus.

Over the years, Ken responded to thousands of letters from people in prison who needed legal help. His compassion for those incarcerated—and frustration that they were denied the legal representation they so desperately needed—often shone from his legal writings. Lawyers, he noted in his May 14, 2018 column, “have been upgraded by technology.” But people in prison lack access to the computerized research on
which today’s lawyers and courts rely. Therefore, he said, “the right to counsel needs upgrading as well.” Currently, incarcerated people denied representation must “rely on law books arranged by Nineteenth Century salesmen,” Ken wrote. “Chained to antiquity, they are denied the technology and advice to sway modern decision-makers.” Many wrongly incarcerated people remain in prison due to lack of representation; they are, Ken concluded, the victims “of unfinished justice and unkept promises, for no matter how people end up in prison, it is want of counsel that keeps them there.”

NYSDA member, attorney, and exoneree Martin Tankleff noted the impact of Ken’s death. Marty’s tweet speaks for many: “This is a tragedy. I have known Ken since I joined NYSDA when I was in prison. He was always helpful and a kind soul. #thegoodalwaysdieyoung.”

Ken often stayed in the background, as in this candid shot from the 2011 Annual Conference, but colleagues noted, and valued, his presence.

**Clients on Probation May be Ordered to Wear and Pay for Electronic Monitoring Devices**

The Court of Appeals held in December that “as a condition of probation, sentencing courts can require a defendant to wear and pay for a Secure Continuous Remote Alcohol Monitoring (“SCRAM”) bracelet that measures their alcohol intake.” People v Hakes, 2018 NY Slip Op 08538 (12/13/2018). The Court noted that Penal Law 65.10(4) authorizes the requirement to wear an electronic monitoring device, and found that the costs associated with the requirement “are part and parcel of satisfaction of the condition itself.” The court acknowledged that if people on probation demonstrate an inability to afford these costs, “the sentencing court must attempt to fashion a reasonable alternative to incarceration.” But willful refusal to pay the costs when able to do so justifies revocation of probation and imposition of incarceration. The Appellate Division has reversed on lack of statutory authority to impose the payment condition and not having reviewed the lower court’s finding that Hakes was in willful violation of that condition, the case was remanded for such review. A summary of Hakes appears at page 9.

Judge Jenny Rivera dissented. In her extensive opinion, she included a number of the points raised by NYSDA in an amicus brief.

As Judge Rivera and NYSDA noted, the statute at issue in Hakes does not state an intent to impose costs on defendants. In contrast, the Legislature expressly provided in Vehicle and Traffic Law 1198(5) that the costs of installing and maintaining ignition interlock devices (IID) be borne by those subject to IID conditions. The majority’s decision to find imposition of costs included in the statute allowing electronic monitoring conditions may affect many people on probation; the Hakes ruling is not limited to SCRAM bracelets.

**Hakes is the Latest in Long Line of Financial Consequences.**

Financial consequences of a criminal conviction, including costs associated with probation, constitute a critical part of what defense lawyers must know to counsel their clients. In 2004, the Center for Correctional Alternatives (CCA) compiled a “Sentencing for Dollars” list. While now dated, the publication still illustrates the breadth of monetary consequences stemming from involvement in the criminal justice system, and reminds lawyers of the need to address fiscal ramifications when counseling clients about their cases. CCA’s “pioneering effort to consolidate these financial penalties in one place” was noted in 2006 by the New York State Bar Association’s Special Committee on Collateral Consequences of Criminal Proceedings. In its report, “Re-entry and Reintegration: The Road to Public Safety,” the committee pointed out that “professional standards require that defense counsel be familiar with all of the collateral consequences of the sentence including fines, forfeiture, restitution, and court costs,” citing the National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation, Guideline 8.2.

(continued on page 59)
The following are short summaries of recent appellate decisions relevant to the public defense community. These summaries do not necessarily reflect all the issues decided in a case. A careful reading of the full opinion is required to determine a decision's potential value to a particular case or issue. Some summaries were produced at the Backup Center, others are reprinted with permission, with source noted.

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

United States v Stitt, No. 18-56 (1/7/2019)

The Sixth Circuit’s reliance on Moore v Texas, which this Court did not hand down until long after the state-court decisions in this case involving claims that the defendant is ineligible for the death penalty due to his intellectual disability, was improper under the federal habeas corpus statute, 23 USC 2254(d)(1). “[W]e therefore vacate that decision and remand so that Hill’s claim regarding intellectual disability can be evaluated based solely on holdings of this Court that were clearly established at the relevant time.”

New York State Court of Appeals

People v Harris, 31 NY3d 1183, 82 NYS3d 321 (6/26/2018)

The claim that the trial court’s denial of summation at the defendant’s bench trial violated the right to counsel is reviewable here. “The trial court, in specifically ruling that defendant’s permission to deliver a summation was rescinded and concomitantly rendering a verdict, deprived defense counsel of a practical ability to timely and meaningfully object to the court’s ruling of law ...” The defendant had a right to counsel in “this single judge trial on a class B misdemeanor” in which the court imposed a 90-day jail sentence, and “that right was violated when the court denied defense counsel the opportunity to present summation ....” As the defendant did not raise the constitutionality of CPL 350.10 in the trial court, “the
constitutionality of the statute as applied to other nonjury trials that may not involve a deprivation of liberty” is not addressed. The defendant also did not argue that the denial violated his statutory right to counsel under CPL 170.10.


As Supreme Court’s order denying a nonparty’s “motions to quash certain subpoenas served on her was issued in a criminal action,” and CPL article 450 does not authorize direct appellate review of such an order, no appeal lies from the denial. The policy underlying the bar to appeals in criminal matters not specifically set out in statute is to avoid proliferation of appeals that are “sometimes to the seeming detriment of the defendant and sometimes to the detriment of the People.” While an order resolving a motion to quash a subpoena issued before an accusatory instrument does not arise in a criminal action, so review of such order does not undermine that policy, the order here was issued after the accusatory instrument was filed and so “plainly arose in a ‘criminal action’ within the meaning of that term as prescribed by” statute. The argument that nonparties cannot appeal following a conviction has not resulted in statutory change, and nonparty motions to quash a subpoena remain unappealable.

**Dissent:** [Rivera, J] “The victim is now deceased.” Where the defendant had raised the jury note claim for the first time eight years after his trial, in a coram nobis application. “The court’s holding that denial of a motion to quash a subpoena issued in furtherance of a grand jury investigation is appealable. And the nonparty here, a journalist, “has invoked a strong countervailing policy in her favor ….” Because, on the merits, the prosecution has “failed to establish that the unpublished materials obtained by the reporter in the course of her newsgathering are ‘critical or necessary to the maintenance’ of the” prosecution’s case, I would affirm. Further, “the strict formalism that the majority seeks to impose here is not supported by sound policy.”

**Dissent:** [Fahey, J] “In its current form, the ‘mode of proceedings’ doctrine ignores basic notions of fairness and common sense. It enables gamesmanship, encouraging litigants to ‘manipulate the system by remaining silent while error is committed, only to complain of it later’” and “serves only to undermine the important, fundamental purposes of our preservation rule.” We should no longer be bound by the “sweeping rule of O’Rama.” The defendant here raised the jury note claim for the first time eight years after his trial, in a coram nobis application. “The victim is now deceased.” Where the defendant had reason and opportunity to object to the O’Rama departure here, failure to do so should not be excused; minimally, what is warranted is remittal for a reconstruction hearing.

**People v Myers, 32 NY3d 18, 84 NYS3d 406 (6/27/2018)**

Because the defendant and the trial court followed the procedure permitted by the State Constitution for waiving the right to be indicted by a grand jury, the conviction is affirmed. However, the better practice “is for courts to elicit defendants’ understanding of the significance of the right being waived, to minimize future challenges to the effectiveness of the waiver” as set out in the model colloquy. “Absent record evidence suggesting that a defendant’s waiver was involuntary, unknowing or unintelligent, the prima facie showing” of validity established by compliance with the Constitutional procedures is conclusive.

**Dissent:** [Rivera, J] “[T]hat our Constitution provides for a written waiver as a safeguard against uninformed and invalid waivers does not eliminate a court’s duty to ensure that a defendant understands the contents of the writing and the right being waived.” As “the only way for a court to confirm that a defendant understands what is being waived, and that it is being waived freely, to ask the defendant,” and the court below failed to ask the defendant even one question to ascertain that, the conviction should be reversed.

**People v Morrison, 32 NY3d 951, 84 NYS3d 819 (6/28/2018)**

While the record shows that defense counsel was made aware of the existence of a substantive jury note, there is no indication that the entire contents of the note were shared; the prosecution’s argument that knowing of the note and the “gist” of it constituted meaningful notice is rejected. Since failure to provide the defense with meaningful notice is a mode of proceedings error requiring reversal notwithstanding failure to preserve the issue, the Appellate Division’s order is affirmed. The note, which revealed that a decision had been reached on some counts but not another, was not merely ministerial even if the request was for instruction on whether to keep deliberating or return the next morning.

**Dissent:** [DiFiore, CJ] “I would not apply a per se rule of reversal where there is sufficient ambiguity in the record as to whether defense counsel received meaningful notice of the content of [the] jury note ….”

**Dissent:** [Garcia, J] “In its current form, the ‘mode of proceedings’ doctrine ignores basic notions of fairness and common sense. It enables gamesmanship, encouraging litigants to ‘manipulate the system by remaining silent while error is committed, only to complain of it later’” and “serves only to undermine the important, fundamental purposes of our preservation rule.” We should no longer be bound by the “sweeping rule of O’Rama.” The defendant here raised the jury note claim for the first time eight years after his trial, in a coram nobis application. “The victim is now deceased.” Where the defendant had reason and opportunity to object to the O’Rama departure here, failure to do so should not be excused; minimally, what is warranted is remittal for a reconstruction hearing.
People v Parker, 32 NY3d 49, 84 NYS3d 838 (6/28/2018)

“[B]ecause the record fails to establish that the trial court provided counsel with meaningful notice of the precise contents of two substantive jury notes in discharge of a core obligation under CPL 310.30, a mode of proceedings error occurred and a new trial must be ordered.” The deliberating jury sent out three substantive notes within an hour, which the court said on the record outside the jury’s presence had been received and would be read into the record when the jury was seated.

People v Sanchez, 32 NY3d 1021, __ NYS3d __ (9/13/2018)

The Appellate Division, while citing to certain decisions containing language inconsistent with recent Court of Appeals guidance regarding weight of the evidence determinations, stated the correct standard in its conclusion: “viewing the evidence presented at trial in a neutral light …, and weighing the relative probative force of the conflicting testimony and evidence, as well as the relative strength of the conflicting inferences to be drawn therefrom, and according deference to the jury’s opportunity to view the witnesses, hear their testimony and observe their demeanor, the jury was justified in finding that the People sustained their burden of disproving defendant’s justification defense beyond a reasonable doubt’ ….” The appellate court applied the correct standard from People v Garvin (7 NY3d 633 2006) and People v Bleakley (69 NY2d 490 [1987]). Decisions inconsistent with that authority should not be followed. Weight of the evidence determinations involve a “two-step approach”—determining whether an acquittal would not have been unreasonable based on all credible evidence, and weighing “the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony’ …”

Dissent: [Wilson, J] Given the complex factual record and intermingling of correct and incorrect legal propositions below, I would remit to the Appellate Division, which was split in its initial determination, for application of “the unambiguously correct legal standard.” [Footnote omitted.]

People v Xochimitl, 32 NY3d 1026, __ NYS3d __ (9/13/2018)

“The order of the Appellate Division should be affirmed. The determination as to whether police received voluntary consent to enter the apartment is a mixed question of law and fact …. “Although the voluntariness of the consent is open to dispute, our power to review affirmed findings of fact is limited. Since the finding of the trial court is supported by the record, we are precluded from upsetting it’ …. As our concurring colleagues acknowledge, defendant did not contend below and does not contend on this appeal that his arrest was unlawful because the police went to his home with the intent of making a warrantless arrest.”

Concurrence: [Rivera, J] “For the reasons I have previously explained in People v Garvin, a home visit by law enforcement for the sole purpose of making a warrantless arrest which leads to the defendant’s involuntary consent to the arrest, and is not justified by another exception to the warrant requirement, violates a defendant’s constitutionally protected indelible right to counsel ....”

People v Drellich, 32 NY3d 1032, __ NYS3d __ (10/11/2018)

TM: This unanimous memorandum reversed the Appellate Term in this successful People’s appeal. The accusatory instrument was not jurisdictionally defective for the charge of patronizing a prostitute in the third degree pursuant to PL §130.00 (10). Giving the allegation a fair and “not overly restrictive or technical reading” (People v Casey, 95 NY2d 354, 360 [2000]) and drawing reasonable inferences therefrom, the allegations herein established the reasonable cause standard. See CPL 100.40(4)(b). Apparently Mr. Drellich was said to have requested “manual stimulation” from a woman on a street corner for a specific amount of money at 2:25 am. The evidentiary defense that defendant was actually seeking to pay for nonsexual activity in the middle of the night on a street corner could be presented to a jury (likely one with a sense of humor), but these allegations were sufficient to survive the motion to dismiss stage.

Matter of Astacio, 32 NY3d 131, __ NYS3d __ (10/16/2018)

Where the petitioner City Court Judge does not challenge the findings of fact and determination to sustain all misconduct charges, and her challenges to the propriety of her hearing lack merit, the determined sanction of removal from office is accepted. The misconduct included driving while intoxicated resulting in a misdemeanor conviction; behaving in a way that appeared to invoke her judicial office to prevent the processing of her arrest; violating the terms of her conditional discharge; failing to disqualify herself from presiding over a former client’s

1 Summary courtesy of Timothy P. Murphy, Chief Attorney, Appeals and Post-Conviction Unit, The Legal Aid Bureau of Buffalo, Inc. and the NY State Office of Indigent Legal Services appellate listserv, where it appeared.
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People v Crespo, 2018 NY Slip Op 06849 (10/16/2018)

RIGHT TO GO PRO SE / TIMELINESS CHANGE

ILSAPP: During jury selection, the defendant made requests to proceed pro se. The trial court summarily rejected the unequivocal requests as untimely. The defendant was convicted of 1st degree assault and 3rd degree CPW, but acquitted of attempted 2nd degree murder. The First Department reversed, finding that the defendant’s requests, made before the prosecution’s opening statement, were timely pursuant to People v McIntyre, 36 NY2d 10. The Court of Appeals reversed, in an opinion authored by Chief Judge DiFiore, holding that a jury trial commences with the selection of the jury, and a motion to proceed pro se after jury selection has commenced may be denied as untimely as a matter of law. Judges Fahey and Wilson concurred in a dissenting opinion by Judge Rivera. The dissenters opined that the denial of the defendant’s application was clear error. Forty years of jurisprudence made this a straightforward case. There was no proof that the McIntyre rule was unworkable or that the rule advanced by the People was needed to avoid disruption.


ADA / REASONABLE EFFORTS / PERMANENCY

ILSAPP: Bronx County Family Court correctly held that, as required by Family Court Act § 1089, the petitioner agency made reasonable efforts to achieve the permanency goal of returning the subject child to the mother. ACS must comply with the ADA, but a failure to provide certain services when a six-month permanency reporting period ends does not necessarily mean that the agency failed to make reasonable efforts. Family Court tried to meet the disabled mother’s need for services. Judge Rivera dissented, opining that ACS did not provide the mother with services required by the ADA, and it took two years and the efforts of her counsel, a social worker, and Family Court’s continued prodding, before the mother obtained some appropriate services.

People v Baisley, 2018 NY Slip Op 07039 (10/23/2018)

“Defendant’s challenge to the authority of Justice Court over criminal charges arising from his noncompliance with a child support order is not properly before this Court. Contrary to the parties’ mistaken representation below, the underlying support order was not issued by Family Court but by Supreme Court in the context of defendant’s contested matrimonial proceeding. As defendant concedes, Supreme Court has constitutional authority to issue such an order (see NY Const Art VI, § 7; Family Court Act § 114; see generally Merrill Sobie, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Family Court Act § 411 [“Family Court is powerless to determine those issues which comprise a [pending] matrimonial action, including child support, unless the matter is specifically referenced to the Family Court by the Supreme Court’’]). As a consequence, we have no occasion to opine on defendant’s claim that, pursuant to the Family Court Act, Family Court has exclusive and continuing jurisdiction over any criminal charges based on violations of its own support order.”


NO STATE CONST. RIGHT / LEAVE APP / SHARP DISSENT

ILSAPP: For an intermediate appeal as of right, the coram nobis procedure is available to a criminal defendant seeking to “bypass” the CPL 460.30 one-year grace period because counsel did not comply with his timely request. See People v Syville, 15 NY3d 391. But as to a criminal leave application (CLA) seeking review by the Court of Appeals, a defendant does not have the same right. The COA previously held that counsel’s failure to file a timely CLA or seek a CPL 460.30 extension does not constitute ineffective assistance in violation of the 6th and 14th Amendments. See People v Andrews, 23 NY3d 605. The instant case holds that the same rule applies under the State Constitution. Due process does not mandate counsel for meaningful review of CLAs. Resolution of such motions turns not on whether there was a correct adjudication of guilt, but on whether issues of “significant public interest” or legal principles of “major significance” are implicated. Even if counsel’s CLA failure violates ethical duties, it does not constitute ineffective assistance. Chief Judge DiFiore authored the majority opinion. In dissent, Judge Wilson opined that the majority had “veered sharply off course.” The real issue was whether, given the statutory right to file a CLA and to counsel for that purpose, counsel must be competent. Effectiveness should be judged the same for a CLA as for an appeal as of right. The majority was right that lower courts are “governed by intricate rules that to a layperson would be hopelessly forbidding.” But that is equally true for the COA. “Try Karger for bedtime reading,” the dissenter advised. The

2 Summaries marked with these initials are courtesy of the New York State Office of Indigent Legal Services; prepared by Cynthia Feathers, Director of Quality Enhancement For Appellate and Post-Conviction Representation and appearing on the ILS appellate listserv.
slim odds for CLAs do not justify denying the right to effective representation. The majority’s conclusions are “anathema to...our centuries-old conviction that the right to counsel matters more in New York than elsewhere.” Judge Rivera concurred in the dissent.


**BULLET IN LEG / SERIOUS INJURY / DISSENT**

ILSAPP: The defendant challenged 1st degree assault convictions based on legally insufficient evidence of serious physical injury. He fired five shots into a crowd and struck a 15-year-old bystander in the leg. The victim had crutches for two months; bullet fragments were never removed; and he could not participate in competitive sports. The majority concluded that the jury acted rationally in finding that the wound constituted a serious physical injury. Judge Wilson dissented. The victim was not at substantial risk of dying; he had no serious disfigurement or protracted health impairment; and he had not lost the function of any bodily organ. The Legislature has determined that the degree of actual injury to the victim is a crucial determinant of the punishment to be meted out—even if the insubstantiality of the injury is the result of pure dumb luck.

_People v Manragh_, 2018 NY Slip Op 07924 (11/20/2018)

**EXCLUSION OF WITNESS / NO GRAND JURY DEFECT**

ILSAPP: The defendant contended that his guilty plea was entered involuntarily because the prosecutor failed to notify the grand jury of his request to call a particular witness and to allow the grand jury to vote whether to hear that witness, in violation of CPL 190.50 (6). The Court of Appeals disagreed. Even after entering a valid guilty plea, a defendant may not forfeit a claim of a constitutional defect implicating the integrity of the grand jury process. However, in the instant case, the proffered testimony was largely inadmissible and would have inculpated the defendant. Since the exclusion of such testimony did not implicate the integrity of the grand jury process, the claimed violation did not survive the guilty plea.

_People v Watts_, 2018 NY Slip Op 07926 (11/20/2018)

**COUNTERFEIT TICKETS / FORGED INSTRUMENT**

ILSAPP: Based on the sale of counterfeit concert tickets, the defendant was charged with 2nd degree criminal possession of a forged instrument. He contended that the tickets were merely revocable licenses and thus did not affect a legal right, interest, obligation or status. The Court of Appeals disagreed. Even a revocable license generally has considerable legal significance in that it gives the holder permission to do what would otherwise be a crime. To the extent that the defendant suggested that event tickets are not essential to the functioning of New York’s economic system, the Court of Appeals noted the commercial significance of concert and sports event tickets.


**SARA / NO “SUBSTANTIAL ASSISTANCE” DUTY**

ILSAPP: The primary issue on appeal was whether the Appellate Division erred in holding that the Department of Corrections and Community Supervision (DOCCS)—which must “assist” inmates on, or eligible for, community supervision to secure housing pursuant to Correction Law § 201 (5)—has an obligation to provide sex offenders residing in a residential treatment facility (RTF) with substantial assistance in identifying appropriate housing. The Court of Appeals held that it was error to impose a heightened duty on DOCCS and concluded that the agency met its statutory obligation to assist the petitioner in this case. DOCCS had properly interpreted its obligation under the statute as satisfied when it actively investigated and approved residences identified by inmates and when it provided adequate resources to allow inmates to propose residences for investigation and approval. In its discretion, the agency was free to provide additional assistance in locating SARA-compliant housing—particularly where an inmate was nearing the maximum expiration date or residing in an RTF with the associated restrictions on the ability to conduct a comprehensive search. But there was no statutory basis for imposing such an obligation. Judge Rivera concurred in part and dissented in part. Judge Wilson dissented.


**ENTREPRISE CORRUPTION / NO MENS REA**

ILSAPP: The defendant was convicted of enterprise corruption. The Court of Appeals assumed, without deciding, that the People established the existence of a criminal enterprise. On the mens rea element, the People were required to prove that the defendant intentionally conducted, or participated in, the affairs of an enterprise. The proof was legally insufficient. The defendant’s participation in the three requisite criminal acts included in the pattern did not establish his knowledge of the enterprise and the nature of its activities. In addition, trial testimony demonstrated that he was isolated from the enterprise and acted independently with the singular purpose of serving his own interests. Judge Rivera wrote a concurring opinion. Scott Danner represented the appellant.
**People v Suazo, 2018 NY Slip Op 08056 (11/27/2018)**

**NONCITIZEN DEFENDANTS / JURY TRIAL RIGHTS**

ILSAPP: A noncitizen defendant who demonstrates that a charged crime carries the potential penalty of deportation is entitled to a jury trial. This guarantee applies to such defendants who are facing class B misdemeanor charges, notwithstanding CPL 340.40 requiring nonjury trials in NYC Criminal Court for such crimes. To the extent that the statute denies jury trials to noncitizens facing potentially deportable offenses, it is unconstitutional. Writing for the majority, Judge Stein observed that the Sixth Amendment requires that defendants accused of serious crimes be afforded the right to trial by jury; the most relevant criteria as to seriousness is the severity of the maximum penalty; and the penalty refers to more than prison time. The Court agreed with the defendant that the penalty of deportation, one of utmost severity, rebuts the presumption that the class B misdemeanors he faced were petty for Sixth Amendment purposes. Although the People were correct that deportation—a federally imposed penalty—is technically a collateral consequence of a state conviction, deportation is intimately related to the criminal process and virtually inevitable for a vast number of noncitizens convicted of crimes. New York courts will now have to determine potential immigration consequences as to pending charges in the narrow context of cases involving CPL 340.40-mandated nonjury trials of lesser misdemeanors in NYC. But in weighing harms and benefits on a constitutional scale, the possibility of some lost judicial efficiency is not a determinative factor. Further, it is the defendant’s burden to overcome the presumption that the crime charged is petty and to establish a right to a jury trial. Judges Garcia and Wilson filed dissenting opinions. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant.

**People v Diaz, 2018 NY Slip Op 08424 (12/11/2018)**

**PEOPLE’S APPEAL / SORA AND OUT-OF-STATE CONVICTIONS**

ILSAPP: The defendant had a Virginia murder conviction for killing his 13-year-old sister, a crime for which there was no sexual component. After being paroled, he was required to register in Virginia under its sex registry act. The issue on this People’s appeal was whether, upon moving to New York, the defendant was required to register under SORA. In an opinion authored by Judge Feinman, the Court of Appeals answered “no” and affirmed the challenged order. SORA, which primarily seeks to provide law enforcement with information to prevent sexual victimization, requires registration of sex offenders from other jurisdictions. Virginia—which requires registration for various nonsexual violent crimes against minors, such as the instant crime—did not consider the defendant a sex offender. Thus, he was not required to register here. “Blind deference” to another jurisdiction’s registry would contravene the statute. The holding in this case merely required a determination as to whether the out-of-state registrant was considered a sex offender by the foreign jurisdiction. Judge Fahey wrote a dissenting opinion in which Chief Judge DiFiore and Judge Stein concurred, stating: the “majority supplanted the legislature’s straightforward method with an impractical invention that will obstruct officials every time they are faced with the question whether an offender from another state must register here.” The Center for Appellate Litigation (Abigail Everett, of counsel) represented the respondent.


“The order of the Appellate Division should be affirmed, without costs. Respondent Luis P.’s challenge to the admission of his statements—insofar as preserved (see People v Panton, 27 NY3d 1144, 1145 [2016])—presents a mixed question of law and fact (see Matter of Jimmy D., 15 NY3d 417, 423 [2010]). Inasmuch as there is record support for the lower courts’ determination that respondent’s statements were voluntary, that issue is beyond further review by this Court (see id.). Further, any hearsay error in the admission of certain medical records relating to the complainant was harmless.”

Dissent: [Rivera, J] “I would reverse and remit for a new fact-finding hearing for the reasons set forth in the dissent below ….” The decision in Matter of Jimmy D. (15 NY3d 417 [2010]) should be revisited in light of US Supreme Court decisions addressing the consideration of a youth’s age during interrogation while in custody and other legal and scientific developments relating to juvenile development. Current understanding leads “to the inescapable conclusion that minors should not be interrogated outside the presence of their adult legal guardians.”


Police officer personnel records protected by Civil Rights Law 50-a are exempt from disclosure under the Freedom of Information Law (FOIL). The New York Civil Liberties Union (NYCLU) sought from the New York Police Department (NYPD) all final opinions arising from referral to the NYPD by the Civilian Complaint Review Board (CCRB) of complaints against officers “substantiated” by the CCRB. “Contrary to the NYCLU’s claim, the protection afforded by Civil Rights Law § 50-a is not limited to the context of actual or potential litigation ….”
The internal NYPD disciplinary records sought contain material ripe for degrading, embarrassing, harassing, or impeaching the integrity of the officers involved. The Legislature was aware of the policy arguments raised in favor of disclosure when 50-a was passed. ‘The alternative ‘redacted disclosure’ regime proposed by the parties would eviscerate the Legislature’s mandate.” No statutory exemption exists for redaction.

**Concurrence:** [Stein, J] While agreeing that the requested records are protected under 50-a, “in my view, it is not necessary to rely on Matter of Short v Board of Mgrs. of Nassau County Med. Ctr. (57 NY2d 399 [1982]) in order to reach that conclusion.”

**Dissent:** [Rivera, J] “According to the majority, redaction is unavailable even where it may be the sole method to effectuate the statutory goal of promoting government transparency ‘to hold the governors accountable to the governed’ ....” By using a “constrained reading of FOIL and a decontextualized analysis of the Civil Rights Law,” the majority reaches an erroneous conclusion that is contrary to prior case law.

**Dissent:** [Wilson, J] The majority ignores the fact that the disciplinary hearings in question are open to the public. “Having decided to make the Trial Room hearing public, the NYPD cannot reasonably claim that those portions of the final decision that reveal only what was publicly revealed in the hearing are exempt under section 50-a.” A proper resolution of this matter “would recognize the three-way interplay among FOIL, Civil Rights Law § 50-a, and the City’s disciplinary hearing procedures, which make the Trial Room hearings public ....” Information deemed confidential at the time of the Trial Room hearing could be redacted.

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**People v Yelich, 2018 NY Slip Op 08426 (12/11/2018)**

“The order of the Appellate Division should be affirmed, without costs. On the record before us, there is no reason to disturb the determination of the Appellate Division that petitioner was not entitled to the relief sought (see Penal Law §§ 70.45 [5] [d]; 70.40 [3] [c]). As petitioner concedes, the Department of Corrections and Community Supervision was not bound by the New Jersey sentencing court’s recommendation (see Jake v Herschberger, 173 F3d 1059 ....)”

**People v Allen, 2018 NY Slip Op 08537 (12/13/2018)**

**GRAND JURY ERROR / NO REVERSAL REQUIRED**

**ILSAPP:** The defendant was the getaway driver during a shooting that resulted in a death. He and two co-defendants were indicted. In the first indictment, the defendant was charged with 1st degree manslaughter and attempted murder (two counts) as to surviving victims. The first grand jury deadlocked on a charge of 2nd degree murder. After the deadlock, the People filed a second indictment containing a murder count. Because the People failed to obtain permission to resubmit the matter to a new grand jury, the defendant moved to dismiss the murder count. Supreme Court denied the motion, and the defendant proceeded to trial on both indictments. He was convicted of the manslaughter count and acquitted of the other charges contained in the first indictment, as well as the murder count in the second indictment. The Appellate Division granted a new trial on manslaughter. The Court of Appeals reversed. The improper murder count did not require a new trial on the manslaughter count. CPL 190.75 (3) provides that, if a grand jury has dismissed a charge, it “may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the people to resubmit such charge to the same or another grand jury.” The People violated the statute, and Supreme Court erred in denying the defendant’s motion to dismiss. However, the error did not require reversal; there was no reasonable possibility that the presence of the murder count during trial influenced in any meaningful way the jury’s decision to convict the defendant of manslaughter. Judge Rivera wrote a concurring opinion.

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**People v Flores, 2018 NY Slip Op 08540 (12/13/2018)**

**ANONYMOUS JURY / NO JUSTIFICATION**

**ILSAPP:** In a People’s appeal, the Court of Appeals held that Orange [County] Court had committed reversible error by empaneling an anonymous jury in violation of CPL 270.15. Assuming that, under certain circumstances, the trial court may anonymize jurors, the trial court acted without any factual predicate for the extraordinary procedure. Indeed, the court expressly based its decision on anecdotal accounts from jurors in unrelated cases and took no steps to lessen potential prejudice.

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**People v Hakes, 2018 NY Slip Op 08538 (12/13/2018)**

**SCRAM / DEFENDANT REQUIRED TO PAY**

**ILSAPP:** As a condition of probation, sentencing courts can require defendants to wear—and pay for—Secure Continuous Remote Alcohol Monitoring (SCRAM) bracelets that measure alcohol intake, the Court held. Penal Law § 65.10 (4) authorizes sentencing courts to require defendants to wear such devices. The associated costs are part and parcel of satisfaction of the condition itself. In the instant case, the defendant made several payments for the SCRAM bracelet, but then stopped, resulting in the revocation of probation after a hearing. The defendant contended that the payment requirement was punitive and served no public safety goal. But nothing in
the legislative history of Penal Law § 65.10 supported that position. Instead, defendants are required to pay many costs understood to be necessary to satisfy conditions. If a defendant claims financial inability, a hearing is needed to resolve the issue. Judge Rivera dissented.

**People v Perez, 159 AD3d 432, 71 NYS3d 476 (1st Dept 3/1/2018)**

The prosecutor’s argument in summation in this bench trial rendered the first count of the indictment duplicitous. The prosecutor argued that even if the court did not find that force was used to retain the phone that was the subject of the second-degree robbery count, it could still find force was used to retain the bicycle said in the second count, which charged fifth-degree possession of stolen property, to have been stolen from another accuser. “The lesser included offense of petit larceny, of which defendant was ultimately convicted, suffered from the same infirmity.” The argument did not render the second count duplicitous, as the prosecutor never suggested that proof regarding the phone was relevant to that charge. (Supreme Ct, New York Co)

**Matter of Kellogg v New York State Bd. of Parole, 159 AD3d 439, 73 NYS3d 139 (1st Dept 3/6/2018)**

The determination to deny the petitioner parole “manifested ‘irrationality bordering on impropriety,’ warranting granting the petition to vacate the denial of parole,” for which the remedy is a new hearing, not an order directing the respondent to grant parole to the petitioner. There should be a new parole hearing before commissioners who have not sat on the petitioner’s previous hearings. The commissioners who denied the petitioner release failed to appreciate that her conviction “was not for intentional murder, but rather for second-degree felony murder.” The petitioner’s testimony at the parole hearing, accepting “responsibility for her ‘choices and decisions that led to a chain of events that led to the death of [her] husband,’” far from showing lack of insight into her crime, “was truthful, accurate, and consistent with what the jury found happened in 1991.” (Supreme Ct, New York Co)

**People v Knupp, 159 AD3d 510, 72 NYS3d 74 (1st Dept 3/15/2018)**

**PEOPLE’S APPEAL / SUPPRESSION SUSTAINED**

**ILSAPP**: Bronx County Supreme Court granted the motions of defendants Knupp and McCants to suppress physical evidence, as well as Knupp’s motion to suppress his statement. The People appealed, and the First Department affirmed. There was no basis for disturbing the suppression court’s credibility determinations. The arresting officer’s conclusory and contradictory testimony failed to establish that he stopped the defendants’ vehicle because he reasonably believed that McCants was guilty of reckless driving. The officer testified that the car turned left across double yellow lines. But action was lawful. Further, the officer failed to explain the danger McCants purportedly presented to other drivers. It appeared that the defendants’ car was really stopped because of an encounter, on the street 20 minutes earlier, among the vehicle’s occupants and the same officer. Since the People did not produce credible evidence establishing the legality of the stop, suppression was properly granted. Moreover, the arresting officer’s testimony was insufficient to establish the voluntariness of Knupp’s statement to a non-testifying officer. The Officer of the Appellate Defender (Kami Lizarraga, of counsel) represented Knupp. The Center for Appellate Litigation (Rachel Goldberg and Jesse Feitel, of counsel) represented McCants. (Supreme Ct, Bronx Co)

**People v Thomas, 159 AD3d 499, 69 NYS3d 803 (1st Dept 3/15/2018)**

The matter is remitted for a hearing in accordance with *Bearden v Georgia* (461 US 660 [1983]). The sentencing court did not rule on the defendant’s claim of inability to pay the restitution that is a condition of her plea agreement before imposing a six-month jail term for failing to pay, and it is unclear from the present record whether the failure to pay was willful and whether an adequate alternative to imprisonment exists. (Supreme Ct, New York Co)

**People v Steinbergin, 159 AD3d 591, 73 NYS3d 547 (1st Dept 3/27/2018)**

While the suppression court found that police made an investigatory stop of the defendant based on reasonable suspicion and that probable cause to arrest was then provided by a confirmatory identification, the defendant

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1 Summaries marked with these initials are courtesy of the New York State Office of Indigent Legal Services; prepared by Cynthia Feathers, Director of Quality Enhancement For Appellate and Post-Conviction Representation and appearing on the ILS appellate listserv.
was handcuffed before the identification, warranting reversal of the conviction, suppression of evidence, and a new trial preceded by an independent source hearing. While the use of handcuffs is not dispositive as to whether a stop has escalated to an arrest, handcuff use must be justified by the circumstances. Here, the defendant was suspected of nothing more than a street-level drug sale, and no reason was shown to believe he was armed, dangerous, likely to flee, or had offered any resistance; that he was “‘a little irate’” did not justify the handcuffing. (Supreme Ct, New York Co)

**People v Darryl T., 161 AD3d 47, 74 NYS3d 190 (1st Dept 3/29/2018)**

Where defense counsel conceded the defendant’s status as a person with a dangerous mental disorder and effectively waived the defendant’s right to an initial hearing on civil confinement under CPL 330.20(6) “before any reports were issued and before any hearing was held,” the order denying the defendant a new initial hearing “in connection with his plea of not responsible by reason of mental disease or defect” is reversed and the matter remanded for a new initial hearing. During the proceedings at which the defendant entered his plea, the defendant’s extensive medical records were admitted, and counsel agreed that the defendant understood the proceedings, had discussed the case with counsel, understood the consequences of the plea, and lacked other viable defenses. After the defendant answered affirmatively questions regarding his understanding of the charges, counsel confirmed the prosecutor’s statement that counsel conceded that the defendant was a danger to himself and society when he was not on his medication. After steps under 330.20, including examinations of the defendant, the defendant sought to take back his plea, saying among other things that counsel had told him the deal was one to thirty days in a civil hospital. In denying the defendant’s request, “the court said that attorneys were not required to challenge unanimous documented psychiatric findings that a defendant was a danger to him or herself or others, especially where arguments would be futile ….‘” The initial hearing, at which the “‘track,” ie level of the defendant’s confinement and treatment, is determined, is a “‘critical stage’ of proceedings”; counsel’s performance here did not constitute effective assistance. (Supreme Ct, Bronx Co)

**People v Suero, 159 AD3d 656, 73 NYS3d 57 (1st Dept 3/29/2018)**

Allowing the prosecution to introduce a text exchange after the crime that infringed the defendant’s right to counsel was error. The defendant’s text had “‘indicated that he needed money ‘just in case for a lawyer.’” The overwhelming evidence of guilt adduced at trial made the error of allowing the evidence, and the summation comment on it, harmless. (Supreme Ct, New York Co)

**People v Simono, 160 AD3d 408 (1st Dept 4/3/2018)**

In determining the defendant’s Sex Offender Registration Act (SORA) risk level, the court properly assessed points under risk factors 9 and 10 relating to prior criminal history including a burglary for which the defendant received youthful offender (YO) treatment. The Criminal Procedure Law specifically provides the State Board of Examiners of Sex Offenders access to YO records, and neither SORA nor the CPL prohibit “‘consideration of YO adjudications for the limited public safety purpose of accurately assessing an offender’s risk level ….’”

**People v Douglas, 160 AD3d 436, 74 NYS3d 206 (1st Dept 4/5/2018)**

The unpreserved issue of the lack of an accomplice corroborating charge, reached in the interest of justice, warrants a new trial where the case against the defendant “was based almost entirely on the testimony of three witnesses, each of whom was either an accomplice as a matter of law or a person who could reasonably be viewed by the jury as an accomplice as a matter of fact” and the nonaccomplice evidence was far from extensive. Further, “counsel’s admittedly nonstrategic failure to request the instruction constituted ineffective assistance under all the circumstances of the case ….”(Supreme Ct, Bronx Co)
The issues raised, being capable of repetition and likely to evade review, are not moot although the order appealed from was superseded by a final order. “[T]he Support Magistrate acted outside the bounds of his authority when, after issuing a written fact-finding order in which he determined that the father had willfully violated a child support order, he deferred the issue of a recommendation as to the father’s incarceration to a “post-dispositional hearing” in contravention of the Uniform Rules for Family Court (22 NYCRR § 205.43[g][3] and 205.43[f]). That review lasted several months, during which time the father continued to violate the support order. The Support Magistrate’s actions “essentially constituted a recommendation against incarceration,” since the mother could not seek the incarcerative remedy without a recommendation.

The Family Court compounded the error of the Support Magistrate by denying as premature the mother’s objection. The mother “made a prima facie showing that she suffered irreparable harm.” (Family Ct, Bronx Co)

**People v Tino-Santos, 160 AD3d 465, 74 NYS3d 216 (1st Dept 4/10/2018)**

**NO ARGUMENT TO SUPPRESS / STRATEGIC DECISION**

**ILSAPP:** In a Bronx County murder prosecution, the defendant contended that trial counsel was ineffective because, at the Huntley hearing, he made no suppression arguments, even though the People called no witnesses with personal knowledge of the taking of his statement. The First Department stated that trial counsel might have decided that the defendant’s statement would help the defense. In any event, the proof against the defendant was overwhelming. Appellate counsel criticized trial counsel on a second ground. After the jury submitted two deadlock notes as to the murder charge, trial counsel declined the court’s offer to depart from the acquit-first rule (People v Boettcher, 69 NY2d 174) and allow the jury to consider the lesser-included manslaughter count, without first reaching a verdict of not guilty on the higher count. Counsel faced a choice that was “quintessentially a judgment call, involving a significant measure of instinct and intuition,” the reviewing court observed.

**People v Findley, 160 AD3d 492, 74 NYS3d 218 (1st Dept 4/12/2018)**

**STANDBY COUNSEL / PROPER TO NOT REPLACE OR DISMISS**

**ILSAPP:** After permitting the defendant to represent himself at trial, New York County Supreme Court properly declined to dismiss or replace standby counsel, the First Department held. Proceeding with no counsel would have risked a mistrial if the defendant’s pro se status ended—a real concern based on his history of disruptiveness. There was no good cause to replace counsel, the defendant’s third assigned attorney. Substitution was not warranted by the defendant’s unjustified hostility toward counsel. While the attorney’s negative comments about the defendant in a newspaper article should have been avoided, they did not constitute an irreconcilable conflict. In requesting another Article 730 competency examination over the defendant’s objection, the legal advisor sought to act in his client’s interest.

**People v Johnson, 160 AD3d 516, 76 NYS3d 18 (1st Dept 4/17/2018)**

The defendant’s “plea must be vacated as involuntary, unknowing and unintelligent because it was based on the court’s incorrect statements regarding her sentencing exposure and the parties’ mutual misunderstanding as to the sentencing range.” The 15-year-old defendant was told at the plea proceedings in this first-degree robbery case that if for a year she abided by certain conditions “she would be adjudicated a youthful offender and sentenced to a conditional discharge” but if she failed, “she ‘could get up to five to 25 years State prison’” when
in fact as a juvenile offender she could get only three and a third to ten years in a juvenile facility. The extremely beneficial plea offer does not detract from the fact that she was misinformed. (Supreme Ct, New York Co)

People v Colson, 160 AD3d 579, 75 NYS3d 172 (1st Dept 4/26/2018)

Defense counsel’s comment when asked by the court if she had any comment on the defendant’s motion to withdraw his guilty plea, “‘I don’t think that there … is a basis for it,’ and that defendant had not wanted to proceed to trial,” amounted to taking a position adverse to that of her client, warranting assignment of new counsel. Counsel’s additional comments after denial of the motion, appearing to bear on the advice she gave to the defendant about taking the plea, were unnecessary, adverse to the defendant’s position, and “‘went beyond a mere explanation of her performance’ ….” Remitted for further proceedings on the motion, with new counsel. (Supreme Ct, New York Co)

People v Johnson, 160 AD3d 573, 76 NYS3d 132 (1st Dept 4/26/2018)

While the search of the apartment where the defendant was arrested was lawful, where parole officers came there to arrest another person and conducted a protective sweep in which they saw the defendant and apparent drugs and paraphernalia, the jury instruction on the “drug factory presumption” under Penal Law 220.25(2) was error. The amount of drugs found—about “one gram of crack cocaine divided between 26 ‘twists,’” did not show circumstances meeting 220.25(2), nor did the untested white residue seen on a kitchen counter, which was as consistent with cooking or cleaning products as with drugs, justify the charge. The error was not harmless. (Supreme Ct, New York Co)

People v Anonymous, 161 AD3d 401, 77 NYS3d 10 (1st Dept 5/1/2018)

The prosecution was not entitled to an order unsealing, for use at sentencing in the instant matter, the record of a trial at which the defendant had been acquitted. The sealed record related to an incident for which the defendant was arrested following his guilty plea in the instant matter, but before sentencing. The prosecution sought unsealing for the purpose of using at sentencing here the defendant’s testimony that he had not committed robbery, but had committed a drug crime, in the case being tried. The prosecution’s contention, that the testimony sought should be unsealed because it related not to the acquitted conduct (robbery) but to commission of an uncharged drug offense, is rejected. While the unsealing was improper, resentencing is not required; violation of the statutory rights conferred by CPL 160.50(1)(d)(ii) does not justify invocation of the exclusionary rule. (Supreme Ct, New York Co)

Concurrence: It is unnecessary to determine whether the prosecution was entitled to the unsealing order here as, regardless of that determination, the defendant is not entitled to a new sentencing. Further, the parties disagree as to “whether the sentencing court’s mandate to determine whether defendant complied with the plea conditions (see CPL 400.10 [1]-[4]) warranted the unsealing.” The Court of Appeals has recognized authority aside from 160.50 allowing access to sealed records; “we cannot state whether the Court of Appeals would find that the sentencing court’s legal mandate to determine whether a defendant complied with plea conditions would permit the court to access sealed criminal records for that purpose.”

[Ed. Note: Leave to appeal was granted Oct. 24, 2018 (2018 NY Slip Op 98943[U])]

People v Alston, 161 AD3d 472 (1st Dept 5/8/2018)

The court’s denial of the defendant’s request to participate in a judicial diversion program, based on the defendant’s failure to show that his drug dependence or abuse was a contributing factor to the crime, was an improvident exercise of discretion. The cost of the defendant’s use of marijuana and other circumstances indicate that his need for drug money “evidently contributed to his criminal behavior of selling cocaine.” Drug abuse or dependence need not be the exclusive or primary factor in criminal behavior to warrant participation in judicial diversion. (Supreme Ct, New York Co)

People v Villalon, 161 AD3d 486, 73 NYS3d 422 (1st Dept 5/10/2018)

“The criminal contempt count was duplicitous because defendant’s acts of violating an order of protection by regularly but briefly showing up at the victim’s apartment, over the course of about a month and 20 days, constituted distinct crimes that were required to be alleged in separate counts ….” (Supreme Ct, New York Co)

People v Vinson, 161 AD3d 493, 77 NYS3d 26 (1st Dept 5/10/2018)

Where the defendant had entered a small, single-use restroom at an adult film and novelty store, which is comparable to closed bathroom stalls in public restrooms where an expectation of privacy exists, police entrance
into the restroom was a search for Fourth Amendment purposes. As the hearing court did not rule on the prosecution’s alternative argument, that the police entrance “was reasonable because it was based on probable cause to suspect that there was drug use occurring inside,” the appeal in held in abeyance and the matter remanded for a determination of that issue based on the hearing minutes. (Supreme Ct, New York Co)

People v Espinal, 161 AD3d 556, 77 NYS3d 371 (1st Dept 5/17/2018)

New York law governs the determination of the legality of police actions in entering the common area of the New Jersey apartment building where the defendant was staying by using the key lawfully obtained from the defendant after his arrest outside. That the outer door was locked did not create an expectation of privacy. And even if the police entry into the building itself was unlawful, the valid consent of the defendant’s mother for a police search of the apartment attenuated any initial illegality. (Supreme Ct, New York Co)

People v Ayarde, 161 AD3d 630, 78 NYS3d 107 (1st Dept 5/24/2018)

The court erred in denying suppression of evidence found on the defendant’s person because the record lacks proof of the sequence of events necessary to support the prosecution’s theory. The theory “is that nontestifying officers lawfully detained defendant based on reasonable suspicion provided by a testifying detective’s radioed communication, that the testifying detective then acquired probable cause for an arrest, that he then identified defendant to the other officers, and that these officers then searched defendant incident to a lawful arrest.” That a detective saw one man later said to be the defendant hand another man a bag containing two small white objects and then walk away provided reasonable suspicion to detain the defendant but not to arrest and search him. The claim that the search occurred only after a confirmatory identification is not supported by the record. (Supreme Ct, New York Co)

People v Robinson, 161 AD3d 608, 78 NYS3d 39 (1st Dept 5/24/2018)

Reversal is warranted where, over objection, the prosecution was allowed to peremptorily strike a juror after defense counsel had begun voir dire and struck several jurors by peremptory challenge. The statutory rules for selecting a jury are clear that the prosecution must exercise its peremptory challenges first, and the order of peremptory challenges is a “matter of substance.” “We decline to follow People v Levy (194 AD2d 319 [1st Dept 1993], appeal dismissed 82 NY2d 890 [1993]) and its progeny,” which cannot be reconciled with People v De Conto (80 NY2d 943 [1992]). (Supreme Ct, New York Co)

People v Cabassa, 161 AD3d 671, 78 NYS3d 58 (1st Dept 5/29/2018)

The prosecution has conceded that, if the issue of the defendant’s request for submission of third-degree robbery as a lesser included offense is reached, the conviction should be reduced to third-degree robbery; therefore no new trial is required.

Severance was properly denied. The defendant’s theory—that he was with the accuser but the accuser fabricated his account of the incident and no robbery occurred—“was not irreconcilable with the codefendant’s defense that the victim’s account was not credible and that, even if there had been a robbery, it occurred after the codefendant was no longer present ....” (Supreme Ct, New York Co)

People v Deyvone C., 161 AD3d 648, 74 NYS3d 486 (1st Dept 5/29/2018)

YO Status Granted / Limited Role in Crime

ILSAPP: Upon a plea of guilty, the defendant was convicted in New York County of second-degree robbery. The First Department modified the judgment as a matter of discretion in the interest of justice, adjudicating the defendant as a youthful offender and reducing the sentence from 3½ years to 1 to 3½ years. The reviewing court cited: (1) the defendant’s limited role in the crime, in which his older cousin displayed what appeared to be a firearm; (2) the defendant’s lack of a criminal history; and (3) the recommendation of YO treatment by both the prosecutor and the presentence report. New York County Defender Services (Jessica Horani, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Herbin, 161 AD3d 672, 78 NYS3d 110 (1st Dept 5/29/2018)

The court’s failure to engage in the “‘searching inquiry’” required when a defendant asks to proceed pro se requires reversal. A court must communicate both the risks of acting as one’s own counsel and “‘the singular importance of the lawyer in the adversarial system of adjudication’ ....” Neither “a defendant’s strong desire to proceed pro se, nor elicitation of information demonstrating the defendant might be relatively capable of doing so” substitutes for the two required components. The court here did little more than warn the defendant that self-rep-
First Department continued

resentation is “a ‘big mistake’ and that the court had seen many pro se defendants convicted after trial.” The defendant’s requests before a calendar court were denied “without reaching the stage of the required pro se inquiry at issue on appeal.” That the defendant has served his sentence does not warrant dismissal of the indictment; a new trial is ordered. (Supreme Ct, New York Co)

**Matter of Elijah Manuel V., 161 AD3d 665, 78 NYS3d 312**

ADOPATION / CONSENT NOT REQUIRED

ILSAPP: Bronx County Family Court found that the respondent’s consent to the child’s adoption was not required under Domestic Relations Law § 111 (1) (d) and in the alternative, that he had abandoned the subject child. The First Department affirmed. The father challenged the constitutionality of the statutory financial support requirement, contending that it violated equal protection guarantees by imposing on unwed fathers, but not unwed mothers, a threshold requirement to make payments toward support of the child. But the U.S. Supreme Court has upheld such gender-based distinctions. See *Lehr v Robertson*, 463 US 248. The father had failed to maintain substantial and continuing contact after his son entered foster care; and he had taken no steps to manifest his parental responsibility. His incarceration alone was no excuse for the failure to maintain contact or pay support. For those reasons, his consent was not required under Domestic Relations Law § 111 (1) (d) and in the alternative, that he had abandoned the subject child. The First Department affirmed. The father challenged the constitutionality of the statutory financial support requirement, contending that it violated equal protection guarantees by imposing on unwed fathers, but not unwed mothers, a threshold requirement to make payments toward support of the child. But the U.S. Supreme Court has upheld such gender-based distinctions. See *Lehr v Robertson*, 463 US 248. The father had failed to maintain substantial and continuing contact after his son entered foster care; and he had taken no steps to manifest or establish his parental responsibility. His incarceration alone was no excuse for the failure to maintain contact or pay support. For those reasons, his consent was not required. Further, there was no basis to disturb the alternative finding of abandonment. The father did not rebut the finding that, for at least six months before the petition was filed, he did not visit the child or communicate with him or the agency. (Family Ct, Bronx Co)

**Matter of Ezequiel L.-V. v Inez M., 161 AD3d 689, 74 NYS3d 490**

PATERNITY PETITION / REINSTATED

ILSAPP: Without a hearing, New York County Family Court dismissed a paternity petition by the respondent mother’s ex-husband, based on the existence of a valid acknowledgment of paternity executed by her and another man. However, such acknowledgment did not bar a claim of paternity by petitioner. Moreover, the petition was not necessarily doomed based on the judgment of divorce, which held that the petitioner abandoned the mother. The judgment did not state when the petitioner constructively abandoned her by not having sexual relations with her for a year, nor whether there was an attempt at reconciliation during the period of abandonment. Thus, the petitioner was entitled to a hearing. Larry Bachner represented the appellant. (Family Ct, New York Co)

**People v Lopez, 161 AD3d 698, 78 NYS3d 70**

(1st Dept 5/31/2018)

O’RAMA INVOKED / NO MODE OF PROCEEDING ERROR

ILSAPP: In a New York County trial on criminally negligent homicide, during a readback of certain testimony given through an interpreter, a juror interjected, “The Spanish was not put in the transcript, correct?” The court immediately replied, “Correct.” Defense counsel objected on O’Rama (People v O’Rama, 78 NY2d 270) grounds, requested the declaration of a mistrial, and declined the court’s offer to deliver an additional instruction. The First Department held that there was no mode of proceedings error. See generally People v Nealon, 26 NY3d 152. The defendant had notice of the unambiguous question; the matter was plainly ministerial and non-substantive; the court gave the only suitable answer; and defense counsel requested inappropriate relief. (Today [6/5/2018] the Court of Appeals will hear oral arguments in People v Morrison, regarding whether certain jury notes were merely ministerial, so that O’Rama protocols did not apply.)

**People v De Los Santos, 162 AD3d 506, 75 NYS3d 182**

(1st Dept 6/14/2018)

FLAWED PLEA / NO PEQUE WARNING

ILSAPP: During the plea proceeding, New York County Court said to defense counsel, “I’m assuming based on his criminal history … we have no immigration issues.” Counsel said that he had discussed immigration consequences with the client. The court thus failed to advise the defendant that, if he was not a U.S. citizen, he could be deported as a result of his plea, as required under People v Peque, 22 NY3d 168. The defendant was to be afforded an opportunity to move to vacate his plea upon a showing that there was a reasonable probability that he would not have pleaded guilty if the court had properly advised him. The Center for Appellate Litigation (Allison Kahl, of counsel) represented the appellant. (Supreme Ct, New York Co)

**People v Henriquez, 162 AD3d 520, 80 NYS3d 56**

(1st Dept 6/19/2018)

PEQUE HEARING / NO PREJUDICE SHOWN

ILSAPP: Previously, this appeal was held in abeyance (145 AD3d 543) and remanded for further proceedings pursuant to People v Peque, 22 NY3d 168. On remand, New York Supreme Court determined that the defendant had failed to show that he was prejudiced by the trial court’s failure to advise him about possible deportation. There was no reasonable probability that, if properly
advised, he would not have pleaded guilty. The First Department upheld such determination and thus the underlying grand larceny convictions. The fact that the defendant had significant ties to the United States was outweighed by other factors. At the time he pleaded guilty, the defendant knew that a prior grand larceny conviction in another county had rendered him deportable and that deportation proceedings based on that conviction were in progress. The earlier conviction ultimately led to the defendant’s removal, independent of this matter. Further, the disposition in the present case was favorable, given the strength of the proof and the defendant’s prior record. Finally, while trial counsel did not recall advising the defendant of immigration consequences, he said that it was his custom to do so. (Supreme Ct, New York Co)

**Matter of Madison Mia B.,** 162 AD3d 547, 80 NYS3d 26 (1st Dept 6/21/2018)

**DEFAULT ORDER / NO APPEAL**

**ILSAPP:** The mother appealed from an order of New York County Family Court which, upon her default, terminated her parental rights based on mental illness. The First Department dismissed the appeal. An order entered on default is not an appealable paper. See CPLR 5511. In any event, clear and convincing evidence showed that the mother suffered from severe bipolar disorder, refused to appear for several mental health evaluations, and had exhibited increasingly violent and self-injurious behaviors. Despite some progress in treatment, and positive interactions with the child during supervised visitation, the mother never experienced a sustained period of improvement, according to expert testimony. (Family Ct, New York Co)

**Matter of Anonymous v Poole,** 162 AD3d 598, 80 NYS3d 245 (1st Dept 6/26/2018)

**CHILD ON CAR HOOD / INDICATED REPORT**

**ILSAPP:** During a domestic dispute, the mother drove down the street while the father held their one-year-old child on top of her car’s hood. The Office of Children and Family Services properly found that the mother maltreated the child, resulting in an indicated report. An evaluation of the reasonableness of a driver’s reaction to an emergency was for the trier of fact. OCFS had properly determined that the mother’s judgment fell short of acceptable standards. (Transferred from Supreme Ct, New York Co)

**Matter of Jisselle F v Jose T,** 162 AD3d 572, 80 NYS3d 32 (1st Dept 6/26/2018)

**FATHER-IN-LAW ACTS OUT / HARASSMENT**

**ILSAPP:** New York County Family Court found that the respondent—the petitioner’s father-in-law—committed a family offense and ordered him to stay away from the petitioner and her dog for one year. The First Department affirmed. Although the trial court did not specify the degree of harassment, the evidence supported a second-degree offense. For an extended period, the respondent had been staying in the apartment of the petitioner and her husband (the respondent’s son). The living situation became strained, and the son asked his father to vacate the apartment. The respondent reacted by threatening the petitioner, propositioning her, and trying to poison her dog; breaking items in the apartment; and walking around naked. Although the respondent ostensibly vacated the apartment, he returned there to shower, nap, and dress—even though his son had never given him a key. Because of such conduct, the petitioner felt threatened and feared for her safety. (Family Ct, New York Co)

**People v Perez,** 162 AD3d 571, 79 NYS3d 154 (1st Dept 6/26/2018)

**FUGITIVE FOR 20 YEARS / APPEAL DISMISSED**

**ILSAPP:** The defendant absconded during trial, was tried, and was convicted in absentia of drug and weapon charges. Defense counsel filed a notice of appeal. But the defendant did nothing to perfect the appeal while he remained a fugitive for nearly 20 years, until he was returned on a warrant. The People sought to dismiss the appeal based on the failure of timely perfection. New York County Supreme Court granted the application. The First Department affirmed. Under standards set forth in People v Taveras, 10 NY3d 227, dismissal was proper. The delay of 27 years—from the filing of the notice of appeal to the application for poor person relief and assignment of counsel—was caused by the defendant’s actions. He was returned involuntarily. Certain record documents had been lost. The delay would severely prejudice the People if they had to retry the case. The decision was made after appellate counsel was assigned and permitted to review the record, as required by People v Reynaldo Perez, 23 NY3d 89. (Supreme Ct, New York Co)

**People v Ross,** 163 AD3d 428, 80 NYS3d 258 (1st Dept 7/5/2018)

**BENT METROCARDS / NO POSSESSION OF FORGED INSTRUMENT**

**ILSAPP:** The evidence in a New York County trial failed to establish the knowledge element of criminal possession of a forged instrument. Two MetroCards, bent in a
manner known to permit unpaid rides, qualified as forged instruments. But the evidence was consistent with an innocent explanation for the defendant’s possession, such as that he picked up the discarded cards in the hope that they might have fares remaining on them. The Office of the Appellate Defender (Daniel Lambright, of counsel) represented the appellant. (Supreme Ct, New York Co)

**First Department continued**

**Matter of Dayon G. v Tina T., 163 AD3d 461, 82 NYS3d 387 (1st Dept 7/19/2018)**

**CPLR 5015 MOTION / IMPROPERLY DENIED**

**ILSAPP:** In 2001, the mother Tina T. gave birth to a son. She agreed with Dayon G. that he was not the father. In 2007, the parties separated, and the mother moved to Georgia with the son. In 2009, she returned to New York with the boy, and the parties resumed their relationship. The mother gave birth to a girl in 2011. The father stated that he was her biological father, but the mother asserted that he was not. In 2016, Family Court issued a default order granting custody of the daughter to Dayon G. Bronx County Family Court denied the mother’s CPLR 5015 (a) (1) motion to vacate the order. The First Department reversed and granted the motion. Default orders are disfavored in cases involving child custody, and thus the rules with respect to vacating such orders are not to be applied rigorously. The mother demonstrated a reasonable excuse for her default, in that there was only equivocal evidence that she was ever served with the custody petition. She asserted a meritorious defense by alleging that the girl had resided primarily with her, that the petitioner was not the biological father, and that she never signed the acknowledgment of paternity. The custody petition was remanded for further proceedings. Larry Bachner represented the appellant. (Family Ct, Bronx Co)

**Matter of Barbara T. v Acquinetta M., 164 AD3d 1, 82 NYS3d 416 (1st Dept 8/9/2018)**

**CHILD SUPPORT / AFC OBJECTIONS**

**ILSAPP:** The Children’s Law Center (CLC) appealed from an order of New York County Family Court which dismissed, for lack of standing, its objections to a Support Magistrate’s order. The First Department held that Family Court erred in determining that CLC did not have standing. Family Court may appoint attorneys for children where appointments are not mandatory, when doing so would serve the purposes of the Family Court Act. See Family Ct Act § 249. AFCs are often indispensable in making reasoned determinations of fact and proper orders of disposition. See Family Ct Act § 241. The record did not support the determination that CLC was appointed to represent the child solely regarding constructive emancipation and abandonment. The adoptive mother argued that Family Ct Act § 439(e) restricted the filing of objections to a “party or parties.” But such terms were used in the general sense of persons served with a support order. It would make little sense for Family Court to appoint AFCs in support cases and then not permit those attorneys to file objections. Thus, CLC had standing to file objections to the Support Magistrate’s order. Family Court properly determined that an adoption subsidy should be considered as a resource of the child when determining support, but erred in failing to consider the mother’s eligibility for the subsidy in determining whether her basic support obligation was unjust or inappropriate. Child support should have been set at no less than the amount of the adoption subsidy for so long as the adoptive mother was eligible to receive the subsidy. (Family Ct, New York Co)

**Matter of Alexander Z., 164 AD3d 446, 82 NYS3d 19 (1st Dept 8/23/2018)**

**NEGLECT UPHeld / PRECEDENT CLARIFIED**

**ILSAPP:** The mother appealed from a Family Court Act Article 10 order of disposition of New York County Family Court. The appeal brought up for review a fact-finding order, which held that she had neglected the subject children. The First Department held that a preponderance of the evidence supported the finding of neglect. Contrary to the mother’s contention, she did not negate neglect by participating in rehabilitative programs after the petitions were filed. In any event, the mother had absented herself from the fact-finding hearing and failed to present any evidence on her own behalf, permitting the court to draw the strongest negative inference against her. Letters attesting to her participation in outpatient therapy and counseling were submitted to the court after it had already issued its neglect finding, but were properly considered in the dispositional order. The First Department’s holding in Matter of Iris B., 304 AD2d 301, upon which the mother relied, was inapplicable. In Iris B., the appellate court cited the respondent’s voluntary, regular participation in a rehabilitative program at the time of the fact-finding hearing in finding that there was no indication of imminent danger to the child’s welfare by reason of her drug abuse. Although not reflected in the Iris B. decision, that respondent was a resident of a rehabilitative facility at the time the neglect petition was filed, as revealed by a review of that record by the Alexander Z. court. Moreover, the Iris B. fact-finding hearing occurred within two months of the filing of the petition, not two years later, as in the instant case. (Family Ct, New York Co)
First Department continued

People v Pinilla, 164 AD3d 452, 82 NYS3d 20  
(1st Dept 8/30/2018)

IMMIGRATION MISADVICE / NO PREJUDICE

ILSAPP: At the time of his guilty plea to a drug sale crime, the defendant was a legal resident of the U.S. In a CPL 440.10 motion filed 17 years later—after immigration authorities initiated deportation proceedings—the defendant claimed that trial counsel had erroneously advised him that a guilty plea would have no adverse immigration consequences. New York Supreme Court found that the defendant had thereby established that counsel’s representation fell below an objective standard of reasonableness. A hearing was held to determine whether there was a reasonable probability that, but for counsel’s bad advice, the result would have been different. The hearing court denied the motion, finding that the defendant was not credible and that he had not “met his burden and has not proved by a preponderance of the evidence” that he was unduly prejudiced. The defendant was deported to Panama. On appeal, he argued that the only relevant inquiry was whether there was a “reasonable probability” that he would have proceeded to trial had he known about the immigration consequences, and that it was error to refer to a burden based on a “a preponderance of the evidence.” The First Department agreed, citing United States v Benitez, 542 US 74, 83 n 9. However, the reviewing court affirmed, deferring to the hearing court’s finding that the defendant was not credible. (Supreme Ct, New York Co)

Dissent: It was only after the police improperly continued to question the defendant following his invocation of the right to counsel that he admitted striking the decedent with a baseball bat; he had earlier acknowledged only punching the decedent, causing him to fall down. The DNA from the swab was determined to match that on a bat recovered at the scene. The defendant was convicted of first-degree manslaughter (causing death with the intent to cause serious physical injury) and third-degree weapons possession. The errors cannot be deemed harmless beyond a reasonable doubt. Only one witness said he saw the defendant use the bat, and that witness had been drinking; the evidence that should have been suppressed “was arguably the most damaging evidence that was presented to the jury.”

People v Fonerin, 159 AD3d 717, 72 NYS3d 172  
(2nd Dept 3/7/2018)

Where the evidence showed that the defendant did not assist his codefendant in dosing the complainant with lighter fluid and setting it alight, but only spoke words of encouragement to the codefendant and filmed the incident for a minute before getting water and dousing the flames, the defendant’s conviction of first-degree assault is not supported beyond a reasonable doubt. (Supreme Ct, Kings Co)

Dissent: The defendant’s commanding words, “Do that shit, man,” were clearly heard on the cell phone video showing the codefendant squeezing a bottle of lighter fluid, and the evidence established that the complainant was thereafter set on fire, causing severe burns. It is clear, as the jury found, “that the defendant importuned the codefendant to commit this reprehensible act and fully shared the codefendant’s intent,” making the defendant an accessory to the crime, not a mere reporter of it.

People v Spratley, 159 AD3d 725, 71 NYS3d 582  
(2nd Dept 3/7/2018)

The verdict of guilt, a finding that the defendant failed to establish the affirmative defense of lack of responsibility by reason of mental disease or defect, was against the weight of the evidence. A psychiatrist opined that the defendant had schizoaffective disorder at the time shot the decedent in a grocery store. Other defense evidence showed that the defendant began hearing voices in the mid1990s, around age 15, near the time that his mentally ill mother stabbed his father to death; his parents were severely drug addicted; the defendant was imprisoned as a juvenile offender and treated punitively for complaining that his food was being poisoned; he received numerous disciplinary citations; and he spent a great time in isolated confinement while incarcerated almost continuously from 1995 to 2010, being finally...

Second Department

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

People v Bethea, 159 AD3d 710, 71 NYS3d 589  
(2nd Dept 3/7/2018)

The court erred in declining to suppress the evidence resulting from a buccal swab and the statement elicited from the defendant after the defendant invoked his right to counsel. His statements that “I think I need a lawyer” constituted unequivocal invocation of his right, but the police continued to question him and took the swab at some point, taking no steps to comply with the defendant’s request for a lawyer. However, the error was harmless. (County Ct, Orange Co)
diagnosed with bipolar disorder in 2008, after which he was medicated and his behavior underwent a positive change. Upon parole release, he was medicated for schizoaffective disorder until treatment stopped, for reasons not clear from the record, in 2013, about three months before the shooting. He sought antipsychotic medication several times after an auto accident that he believed to have been an assassination attempt, including the day before the shooting, but could not get the prescription filled despite an evaluation of “being at ‘the highest lethality risk for hurting someone else and hurting himself’ ….” (County Ct, Dutchess Co)

Dissent: The prosecution’s psychologist rebutted the defense expert’s testimony and opined that the defendant did not lack substantial capacity. The jury’s verdict should not be disturbed.

People v Troche, 159 AD3d 735, 72 NYS3d 126 (2nd Dept 3/7/2018)

The admission of evidence regarding the defendant’s gang affiliation was not reversible error, as the error was unpreserved. To the extent that some of the evidence may have been improperly admitted, any error was harmless. (County Ct, Suffolk Co)

Dissent: While the defendant did not preserve his contention that the gang evidence presented exceeded the scope of the court’s ruling at the outset of trial limiting what evidence could come in, by opposing the prosecutor’s intention to elicit such evidence, he preserved his contention that it should not have been admitted at all. In the circumstances of this case, no gang evidence should have been admitted.

People v White, 159 AD3d 741, 71 NYS3d 568 (2nd Dept 3/7/2018)

The circumstances described by the one officer who testified at the suppression hearing did not establish the founded suspicion required for a level two De Bour encounter between police and an individual. That the defendant acted nervous, shaking his legs up and down, and leaned forward with his hands in his lap and arms tight to his side, did not justify the inquiry, “what do you have,” made after having him step out of the vehicle. No furtive gesture was described, nor indication that the defendant had or reached for anything at his waistband, from which he removed a gun after the question was asked. In context, the question was not a level one DeBour inquiry but a clear question of whether the defendant had a weapon. There is no need to address whether defense counsel was ineffective for failing to move to reopen the suppression hearing after another officer testified at trial that the defendant was texting on his cell phone when leaning forward. (Supreme Ct, Queens Co)

Dissent: The question was no more than a level one inquiry requiring only an objective, credible reason; even if considered a level two inquiry, sufficient evidentiary building blocks were set out to support the suppression court’s ruling.

People v Cole, 159 AD3d 829, 69 NYS3d 829 (2nd Dept 3/14/2018)

Because the record does not show that the court apprised the defendant that deportation could be a consequence of his guilty plea, the matter is remitted to give the defendant an opportunity to move to vacate his pleas. The defendant has the burden of “establishing that there is a ‘reasonable probability’ that he would not have pleaded guilty had the court” so advised. The Supreme Court is to report to this Court following the motion as to whether or not the requisite showing was made, if the defendant does move to vacate. (Supreme Ct, Kings Co)

People v Williams, 159 AD3d 844, 69 NYS3d 818 (2nd Dept 3/14/2018)

The matter is remitted for a new Sex Offender Registration Act (SORA) hearing and risk level determination. “[D]uring the SORA hearing, the Supreme Court improperly, sua sponte, curtailed the defendant’s testimony and arguments in support of, inter alia, his request for a downward departure. Accordingly, we reverse the order appealed from, and remit for a new hearing and a new determination in accordance herewith.” (Supreme Ct, Kings Co)

Matter of Almaguer v Almaguer, 159 AD3d 897, 70 NYS3d 68 (2nd Dept 3/21/2018)

In this family offense proceeding, the court erred “in considering and relying upon statements made by the husband during a preliminary conference and in proceedings prior to the hearing. Statements made during a preliminary conference are not admissible at a fact-finding hearing ….” The final order of protection is reversed, and the matter is remitted for a new hearing on the petition. (Family Ct, Kings Co)

People v Drayton- Archer, 159 AD3d 919, 73 NYS3d 218 (2nd Dept 3/21/2018)

Where both police officers pursuing the vehicle that the defendant was driving testified that the gun thrown out the rear passenger side window was seen only in the possession of the passenger, the automobile presumption
was rendered inapplicable. Instructing the jury on that presumption was error where the clear-cut evidence showed the gun was observed exclusively in the possession of another occupied occupant. The error is not harmless as it cannot be determined whether the verdict was based on the improper instruction rather than on proper instructions pertaining to the prosecution’s alternate theories of constructive possession and acting in concert. (Supreme Ct, Queens Co)

**Matter of Jason**, 159 AD3d 905, 72 NYS3d 170 (2nd Dept 3/21/2018)

The court erred in determining that the separation agreement between a grandmother hoping to adopt her grandson and the grandmother’s spouse who is unrelated to the child was insufficient to comply with the requirements of Domestic Relations Law 110. The conclusion of the court, that the agreement was inadequate because it was merely an agreement by the parties to live separately and apart and did not contain any substantive provisions settling marital issues, failed to acknowledge that it satisfies “the statutory requirement in respect to a separation agreement” in providing grounds for a conversion divorce under Domestic Relations Law § 170 (6)’” and the requirement of the adoption statute. The petition to adopt is reinstated and remitted for a determination on the merits. (Family Ct, Queens Co)

**People v Poullard**, 159 AD3d 924, 70 NYS3d 73 (2nd Dept 3/21/2018)

The unpreserved contention that the defendant’s Virginia conviction of credit card fraud did not qualify as a predicate felony pursuant to Penal Law § 70.06(1)(b)(i), reviewed in the interest of justice, has merit. The prosecution failed to satisfy its burden of establishing that the defendant “‘was convicted of an offense in a foreign jurisdiction that is equivalent to a felony in New York’”’, the second-felony offender adjudication is vacated and the matter remitted for resentencing. (Supreme Ct, Kings Co)


As the prosecution correctly concedes, the court erred by letting the defendant represent himself during sentencing proceedings “‘without conducting a searching inquiry to ascertain whether the defendant appreciated the dangers and advantages of giving up the fundamental right to counsel’ …. Assigned counsel representing the defendant in plea proceedings was unavailable at sentencing for health reasons, and the defendant refused to meet with successor counsel, saying that lawyer was not his attorney and he did not know who the lawyer was. (Supreme Ct, Rockland Co)


A determination that the petitioner had violated prison rules against smuggling and failure to comply with staff guidelines and instructions concerning facility correspondence procedures is reversed. A typed letter addressed only to “brother,” containing inspirational religious comments by the petitioner, was found among religious publications addressed to a prisoner from the facility’s “Nation of Islam ‘Chaplain’s Office,’” where the petitioner was the inmate facilitator. The evidence established that the petitioner’s duties included sending religious materials to other inmates from the office, and no particular prison policy or staff guideline or instruction concerning correspondence procedures was identified as being violated by inclusion of the letter.

**People v Wahaab**, 160 AD3d 654, 73 NYS3d 604 (2nd Dept 4/4/2018)

The court erroneously ruled that the defendant could be cross-examined about a prior robbery conviction that was the subject of a pending appeal at the time; as the prosecution concedes, defendants may not be cross-examined for impeachment purposes on the underlying facts of an unrelated conviction that is on appeal. In this case, the error cannot be considered harmless. (Supreme Ct, Kings Co)

**People v Wright**, 160 AD3d 667, 74 NYS3d 302 (2nd Dept 4/4/2018)

The defendant’s conviction of second-degree possession of a weapon subjected him to double jeopardy where, before the trial in this case, he pleaded guilty in Nassau County to possessing the same gun used in this robbery. “There was no evidence offered at trial to show that the defendant’s possession of the gun was not continuous,” so his possession of the same gun in this county on Dec. 14, 2011, in connection with the instant robbery, and on Dec. 20, 2011, in Nassau County, constituted a single offense. He could be prosecuted only once for that offense; the possession of a weapon conviction for the incident of Dec. 14, 2011, must be vacated.

Evidence of the Nassau County conviction, its underlying facts, and related evidence was properly admitted here, as it “was probative of the defendant’s intent to commit the instant robbery in the complainant’s home, was inextricably interwoven with the instant robbery, and was
necessary to complete the narrative of events leading to the defendant’s arrest in the instant robbery case ....” The limiting instruction served to alleviate any prejudice, and the evidence was more probative than prejudicial. (Supreme Ct, Kings Co)

**People v Parker**, 160 AD3d 767, 75 NYS3d 204 (2nd Dept 4/11/2018)

Contrary to the court’s decision, the defendant was eligible for conditional sealing of his drug related convictions. “County Court erroneously interpreted CPL 160.58 as prohibiting sealing in light of the DWAI conviction. CPL 160.58 does not contain a ‘clearly expressed’ limitation on a court’s authority to order sealing in cases in which a defendant pleads guilty to an accusatory instrument that contains an offense that does not qualify for sealing. Indeed, the fact that the statute refers to the sealing of an ‘offense’ suggests that discrete offenses may be sealed even if an accusatory instrument to which a defendant pleads guilty contains other offenses.” Further, “by successfully completing court-ordered Shock incarceration and further treatment during his period of P[ost] R[lease] S[upervision], the defendant successfully completed a ‘judicially sanctioned drug treatment program of similar duration, requirements and level of supervision’ as judicial diversion and drug treatment alternative to prison.” Remitted for a hearing at which relevant evidence may be offered by either party to assist in the decision whether to seal the defendant’s records. (County Ct, Nassau Co)

**People v Robinson**, 160 AD3d 774, 75 NYS3d 199 (2nd Dept 4/11/2018)

The resentence must be reversed because where “a court’s promise of a specific term or range of postrelease supervision ‘is the product of a negotiated plea agreement, and the sentencing court is unable to fulfill its ... promise due to the illegality of that [portion of the] sentence, the appropriate remedy is to give the defendant the opportunity to either accept an amended lawful sentence or withdraw his plea of guilty and be restored to pre-plea status ...” Here, the defendant entered guilty pleas under two separate indictments, with a promise of a determinate five-year prison term for each conviction and concurrent periods of postrelease supervision of between one and a half and three years. At initial sentencing, the court said that one sentence was required to run consecutively but the terms of imprisonment would be adjusted to approximate the promised sentence; such sentence was imposed without consent and without offering an opportunity for the defendant to withdraw his plea. No appeal was taken from the judgments under either indictment. The defendant was later resentenced on one conviction, and was told that the original postrelease supervision period was illegal; without offering an opportunity to withdraw the plea, the court imposed a longer period of postrelease supervision. The defendant must be afforded the opportunity to withdraw his pleas under both indictments. (County Ct, Orange Co)

**People v Hargrove**, 162 AD3d 25, 75 NYS3d 551 (2nd Dept 4/18/2018)

The prosecution, in appealing from the Supreme Court’s grant of a new trial based on newly discovered evidence, focuses on procedural and evidentiary arguments and largely ignores the major underlying issues. But rules of procedure and evidence “exist so that truth may emerge from their considered application.” The court “acted appropriately when it vacated the conviction and ordered a new trial. For the gravest manner of injustice that we know is the imprisonment of a fellow human being for a crime that he or she did not commit.” The Supreme Court, in vacating the conviction here, noted: other convictions that had been “compromised ‘by the intentional acts of Detective Scarcella’”; the involvement of Scarcella in this case including his “‘false, misleading, and non-cooperative’” testimony at the CPL article 440 hearing; and weaknesses and omissions in the trial evidence. On appeal, the prosecution argues that the evidence submitted at the 440 hearing was insufficient to meet the statutory standard for a new trial. The six-part test commonly used derives from common-law criteria, not all of which are included in the statutory language; the “‘not ... merely impeaching’” factor has been inconsistently applied and the Court of Appeals view that deciding newly-discovered evidence motion is “a purely discretionary determination” undercuts the notion that such factor is a legal prerequisite. Courts should construe only the core elements of the statutes as strict requirements in newly-discovered evidence cases. Here, “evidence showing that Detective Scarcella had engaged in a pattern of falsifying evidence and facilitating false identification testimony would have had a powerful effect at the suppression hearing” and, even if suppression was not granted, “the jury could have nevertheless found that the questionable police procedures surrounding” the identification in this case created reasonable doubt, as the prosecution’s case “was exceptionally weak.” While “we conclude that the Supreme Court providently exercised its discretion in granting the defendant’s motion for a new trial,” vacatur of the conviction here “does not mandate any particular result in future cases involving Detective Scarcella.” (Supreme Ct, Kings Co)
People v Hinds, 160 AD3d 983, 76 NYS3d 99 (2nd Dept 4/25/2018)

“[T]he court’s improper interference with the conduct of the trial deprived the defendant of a fair trial, and a new trial is warranted” where the court “interjected itself into the questioning of witnesses more than 50 times, asking more than 400 questions[,] elicited step-by-step details from several officers regarding their observations and actions” in apprehending the defendant; elicited and helped develop damaging facts, bolstering the credibility of prosecution witnesses; and interrupted cross-examination and generally created the impression that it was an advocate on behalf of the People.” (Supreme Ct, Queens Co)

People v Grubert, 160 AD3d 981, 76 NYS3d 101 (2nd Dept 4/25/2018)

The defendant’s valid waiver of appeal precludes review of his contention that the imposition of an enhanced term of postrelease supervision upon resentencing was improper, but not the issue of whether he is a second child sexual assault felony offender. The latter issue relates to the legality of his sentence. As the prosecution correctly concedes, “the defendant’s prior conviction of possessing a sexual performance by a child did not require sexual contact, and therefore, the defendant is not a second child sexual assault felony offender.” (Supreme Ct, Queens Co)

People v James, 160 AD3d 984, 72 NYS3d 493 (2nd Dept 4/25/2018)

The record does not clearly show that “at the time the defendant entered his plea, he was aware that the terms of the … promised sentence included a period of postrelease supervision ….” While the proposed plea agreement placed on the record two weeks before the plea proceedings included a year of postrelease supervision, and on the day of the plea an off-the-record conference was held during which the court indicated what promise was being made as to plea and sentence, which the defendant acknowledged on the record he had heard and understood, during the plea proceedings themselves no mention was made of postrelease supervision. (County Ct, Westchester Co)

People v Rovinsky, 160 AD3d 992, 72 NYS3d 492 (2nd Dept 4/25/2018)

As the prosecution agrees, the court “erred in failing to consider the defendant’s oral pro se application at the resentencing proceeding to withdraw his plea of guilty.” As the failure to rule precludes review, the appeal is held in abeyance and the matter is remitted “for further proceedings on the defendant’s motion to withdraw his plea of guilty, for which the defendant shall be appointed new counsel, and thereafter a report to this Court on the motion and whether the defendant established his entitlement to withdrawal of his plea of guilty.” (County Ct, Suffolk Co)

People v Balcerak, 161 AD3d 764, 77 NYS3d 76 (2nd Dept 5/2/2018)

The defendant’s motion to vacate his plea-based conviction for attempted first-degree sexual abuse was properly granted after a new hearing where the defendant showed that “he had already been adjudicated a level three predicate sex offender pursuant to the Sex Offender Registration Act” and would not have taken the plea had he known that he was subject to the Sex Offender Management and Treatment Act (SOMTA); the prosecution did not dispute the finding that the defendant had not been informed about SOMTA prior to the plea. (Supreme Ct, Nassau Co)

Matter of Cumberland v Annucci, 161 AD3d 859, 77 NYS3d 101 (2nd Dept 5/9/2018)

Where the defendant contended at a prison disciplinary hearing that the item found in his cell must have been placed there by someone else, and asked to have as a witness the superior officer who provided the information used by a sergeant to authorize the cell search that revealed it, the hearing officer incorrectly found that the superior officer’s testimony was not needed. That the sergeant testified that the superior officer had previously provided reliable information did not justify depriving the petitioner of the opportunity to inquire as to the basis of the knowledge that contraband could be found in his cell. Prison rules allow people in prison to call witnesses for disciplinary hearings absent countervailing considerations not shown here, such as that doing so would jeopardize institutional safety or correctional goals.


The Family Court orders denying the mother’s petition to be appointed guardian of the child and her motion for issuance of an order with specific findings to enable the child to petition for special immigrant juvenile status (SIJS) are reversed. Reunification of the child and his father is not possible, as the father has died, and it would not be in the child’s best interests to return to “his previous country of nationality and last habitual residence.”
This court may make its own factual determinations where the record is sufficiently complete, and the record shows that the child meets the requirements for SIJS, there is no one in Honduras able to care for him, and he was threatened with violence should he return. (Family Ct, Nassau Co)

**People v Ryan**, 161 AD3d 893, 77 NYS3d 411 (2nd Dept 5/9/2018)

While there was legally sufficient evidence that the defendant’s actions set in motion the events leading to the highway death of a police officer, the jury verdict as to the manslaughter and homicide counts was against the weight of the evidence. The officer’s death at the scene of two crashes involving the defendant’s vehicle was not “temporally proximate” to the defendant’s conduct; it occurred after another driver, failing to pay attention to roadway conditions including multiple stopped vehicles and debris, approached at a speed higher than other vehicles were traveling and struck the defendant’s stopped vehicle and then the officer. (Supreme Ct, Nassau Co)

Dissent: The defendant, having caused two accidents involving two separate vehicles, did not attempt to position his vehicle off to the right, and the incident that resulted in the officer’s death “occurred at the precise location where the defendant’s vehicle stopped in the roadway, and within approximately seven to ten minutes of that stop.” The defendant was brought within the chain of causality by his vehicle, a direct instrumentality in the events leading to the death, “and his conduct at the scene rendered it foreseeable that such results could arise ...”

**Matter of Tyriek L.**, 161 AD3d 864, 73 NYS3d 445 (2nd Dept 5/9/2018)

“[I]t was an improvident exercise of discretion for the Family Court to direct the mother to submit to a psychological examination prior to a fact-finding hearing” after the mother consented to temporary removal of the child following a neglect petition. “The record is devoid of any indication that the mother may suffer from a mental illness. Nor did the petition contain any allegations which placed the mother’s mental health at issue ...” (Family Ct, Suffolk Co)

**People v Vasquez**, 161 AD3d 902, 73 NYS3d 449 (2nd Dept 5/9/2018)

Where the defendant was convicted of endangering the welfare of a child under a count that limited the prosecution to a particular theory, *ie* that the defendant subjected the minor accuser to sexual contact involving her vagina, anus, and breasts, the court erred by allowing the prosecutor to argue, and permitting the jury to consider, “a theory not charged in the indictment—that kissing endangered the complainant’s welfare ....”

The appellant’s motion to strike portions of the respondent’s brief on the ground they refer to matter dehors the record, which was held in abeyance, is granted; the portions of the brief referring to and relying on the grand jury minutes are deemed stricken. (Supreme Ct, Kings Co)

**Matter of Worsoff v Worsoff**, 161 AD3d 879, 75 NYS3d 525 (2nd Dept 5/9/2018)

The court properly concluded that the mother established that a 2014 California custody order granting custody to the father had been modified by a 2016 Israeli court determination awarding custody to the mother. Domestic Relations Law 77-d, providing for the registering and contesting of out-of-state custody decrees, obligates New York courts that receive custody determinations for registration to serve notice on affected persons and provide an opportunity to contest the determination in question. Where the father received notice of the Israeli custody order and did not contest registration thereof, he cannot now contest the Israeli court’s authority to render the determination. (Family Ct, Nassau Co)

**People v Davis**, 161 AD3d 1003, 77 NYS3d 434 (2nd Dept 5/16/2018)

The participation of an alternate juror in deliberations with 11 sworn members of the jury while the other sworn juror was absent “not only violated CPL 270.30 and 310.10, but it deprived the defendant of his fundamental right to a trial by a jury of 12,” requiring a new trial. The court’s instructions to the full, sworn jury to disregard all deliberations that had occurred with the alternate and start anew did not cure the error. (Supreme Ct, Queens Co)

**People v Hungria**, 161 AD3d 1007, 77 NYS3d 107 (2nd Dept 5/16/2018)

The order summarily denying the defendant’s motion to vacate his guilty-plea based conviction is reversed and the matter remanded for a hearing and a new determination. The defendant, a lawful permanent resident, sufficiently alleged that defense counsel failed to fully inform him that the plea was to an aggravated felony that exposed him to mandatory removal from this country and that had he been so advised, it would have been rational to reject the plea. In opposing the defendant’s CPL 440.10 motion, the prosecution argued that the defendant was never offered a plea to a non-aggravated felony. The affi-
davit of defense counsel stated that the plea offer was to fifth-degree drug sale, but also acknowledged that counsel “did not request a plea to a non-aggravated felony or discuss with the defendant that there was a difference for immigration purposes between pleading guilty to an aggravated felony as opposed to a non-aggravated felony.” (Supreme Ct, Nassau Co)

**Matter of Weiss v Weiss**, 161 AD3d 992, 76 NYS3d 212 (2nd Dept 5/16/2018)

The order appealed from is modified by deleting provisions denying the maternal grandmother’s petition for visitation, granting the petition, and awarding supervised visitation; remitted for further proceedings before a different judge. The court incorrectly found, on remittitur, that the maternal grandmother lacked standing to seek custody or visitation. The grandmother had standing to seek custody of the child, but “the court providently exercised its discretion in determining that the child’s best interests would not be served by an award of custody to the grandmother” where the child resided with the foster parents nearly her entire life and is thriving. A grandparent may seek visitation even after termination of parental rights. Here, the evidence showed that the grandmother developed a relationship early in the child’s life and made repeated efforts to continue it, that the attorney for the child supported visitation conditioned on the mother not being present, and that continued visitation was in the child’s best interests. (Family Ct, Orange Co)


The matter is remitted for a hearing and new determination, by a different judge, of the guardianship petition and motion by the mother for an order making specific findings to enable the child to petition for special immigrant juvenile status. There is no express statutory requirement in such guardianship proceedings for fingerprinting or for submitting documentation relating to the Office of Children and Family Services, and “the court erred in dismissing the petition and denying the motion for ‘failure to prosecute’ based upon the mother’s failure to submit documentation regarding, inter alia, the child’s enrollment in school . . . .” Certain remarks made by the judge “were inappropriate and cannot be countenanced,” including: “that the child should ‘make some friends who speak English’” and that “the child ‘[c]an’t speak English, doesn’t go to school, it’s wonderful. It’s a great country America.’” (Family Ct, Nassau Co)

**People v Charles,** 162 AD3d 125, 77 NYS3d 130 (2nd Dept 5/30/2018)

While the plain language of Correction Law 168-o(2) does not provide “an ‘as of right’ appeal from an order denying the petition” for a downward modification of a sex offender risk level classification, that statute “does not diminish, detract, or disturb this Court’s jurisdiction to consider the instant appeal under CPLR 5701 (a).” The prosecution’s contention that the defendant’s appeal must be dismissed is rejected; “we hold that a sex offender may appeal from an order denying a petition for a downward modification of his risk level.”

On the merits, the court properly denied the defendant’s petition. That the defendant is in his 70s does not alone warrant a modification; he was already in his 50s when he committed the instant offenses. He has not shown that his poor physical health, reflected in medical records relating to disc herniation and cardiac catheterization, renders him less likely to sexually offend. That “he has purportedly not committed any additional sex crimes and has been compliant in his registration requirements under SORA, while commendable, is outweighed by the extreme seriousness and nature of the underlying sex crimes,” and he has failed to complete a sex offender treatment program and to accept responsibility for his offenses. (Supreme Ct, Kings Co)

**Matter of Menghi v Trotta-Menghi,** 162 AD3d 771, 79 NYS3d 238 (2nd Dept 6/13/2018)

**DEFAULT ORDER / REVERSAL**

**ILSAPP:** On the adjourned date for a hearing on the father’s petition to modify a prior custody order, the mother did not appear. Suffolk County Family Court relieved her attorney, proceeded to an inquest, and granted the father’s petition. Generally, no appeal lies from an order made upon the default of an appealing party. The proper procedure is instead to move to vacate the default and, if necessary, appeal from the denial of such motion. In the instant case, however, no proper order was entered upon default, the Second Department held. An attorney of record may withdraw as counsel only upon sufficient cause and upon notice to the client. There was no indication that the mother’s attorney informed her that he was seeking to withdraw. Thus, the attorney should not have been relieved. Since no order was properly ordered upon default, the mother’s appeal was not precluded. The challenged order was reversed, and the matter was remitted.

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1 Summaries marked with these initials are courtesy of the New York State Office of Indigent Legal Services; prepared by Cynthia Feathers, Director of Quality Enhancement For Appellate and Post-Conviction Representation and appearing on the ILS appellate listserv.
for a new hearing. Steven Feldman represented the appellant. (Family Ct, Suffolk Co)

**People v Dilillo, 162 AD3d 915, 81 NYS3d 56 (2nd Dept 6/20/2018)**

**SORA / REDUCTION TO LEVEL TWO**

**ILSAPP:** Upon a plea of guilty in Kings County, the defendant was convicted of sex trafficking and designated a level-three sex offender. On appeal, he challenged the assessment of points under certain categories. As to risk factor 4, it was improper to assess 20 points for a continuing course of sexual misconduct, the Second Department held. There was never any sexual contact between the defendant and the victim. Ten points should not have been assessed under risk 13 for unsatisfactory conduct while confined, including sexual misconduct. The physical contact at issue did not constitute inappropriate sexual behavior and was irrelevant to the defendant’s potential for recidivism. His designation was thus reduced to level two. Appellate Advocates (Golnaz Fakhimi, of counsel) represented the appellant. (Supreme Ct, Kings Co)

**People v Jones, 182 AD3d 902, 79 NYS3d 91 (2nd Dept 6/20/2018)**

**ATTEMPTED ASSAULT IN 2ND DEGREE / NO SUCH CRIME**

**ILSAPP:** The defendant appealed from a Suffolk County judgment convicting him, upon a plea of guilty, of several crimes based on a vehicular accident. The Second Department modified by vacating the conviction of attempted assault in the second degree and dismissing that count. Such crime was a legal impossibility. See People v Campbell, 72 NY2d 602 (there can be no attempt to commit assault second, pursuant to P.L. § 120.05 [3]; one cannot have a specific intent to cause an unintended injury). Inclusion of the non-existent crime in the SCI constituted a non-waivable jurisdictional defect. Laurette Mulry represented the appellant. (County Ct, Suffolk Co)

**People v Mattison, 162 AD3d 905, 79 NYS3d 274 (2nd Dept 6/20/2018)**

**COLD CASE / NO DUE PROCESS VIOLATION**

**ILSAPP:** A murder occurred in 1980. The investigation stalled. In 2008, the defendant’s fingerprints were found to match prints recovered from the crime scene. The defendant, a high school student at the time of the murder, was absent from school that day. Following further investigation, he was arrested in 2012—more than 31 years after the crime—and was convicted of second-degree murder. The Second Department held that Queens County Supreme Court properly denied a motion to dismiss based on pre-indictment delay, a significant portion of which was due to a lack of evidence identifying a viable suspect. The extent of the delay was outweighed by the good cause established by the People, the nature of the crime, and the lack of pre-indictment incarceration. (Supreme Ct, Queens Co)

**People v Pino, 162 AD3d 910, 78 NYS3d 408 (2nd Dept 6/20/2018)**

**CRIMINALLY NEGLIGENT HOMICIDE / FOUR DEATHS / DISMISSAL**

**ILSAPP:** The evidence before a Suffolk County grand jury established that the defendant limousine driver picked up eight passengers at a winery; made a U-turn at an intersection; turned left, despite a partially obstructed view; and was broadsided by a pickup truck, resulting in the death of four passengers and injuries to the four surviving passengers. An indictment charged the defendant with criminally negligent homicide and other crimes. Supreme Court dismissed all counts based on legally insufficient evidence. The People appealed, and the Second Department affirmed. The carelessness required for criminal negligence was appreciably more serious than that required for ordinary civil negligence. Non-perception of a risk was not enough. Viewed most favorably to the People, the grand jury evidence did not establish the kind of seriously condemnatory behavior that the Legislature envisioned. Leonardo Lato represented the respondent. (Supreme Ct, Suffolk Co)

**Matter of Spicer v Spicer, 162 AD3d 886, 80 NYS3d 328 (2nd Dept 6/20/2018)**

**MANDATE NOT CLEAR / NO CONTEMPT**

**ILSAPP:** Pursuant to a Nassau County Family Court order, the parties had joint legal custody, with primary residential custody in the father. The mother sought to hold the father in contempt for violating the joint custody provisions, citing his actions in taking the child to a hospital for a psychiatric evaluation and not informing her until the next day. The father moved to dismiss the petition based on the lack of a clear mandate. The violation petition was dismissed, and the appellate court affirmed, albeit for reasons other than those relied on by the motion court. Family Court should not have dismissed the mother’s petition because it failed to state a cause of action, since the father’s motion did not cite that ground. At argument, the parties and the court discussed another possible basis to dismiss—a related Supreme Court proceeding pending between the parties. A court has broad discretion in determining whether an action should be dismissed, where: (1) there is a substantial identity of parties; (2) the two actions are sufficiently similar; and (3) the relief
sought is substantially the same. Here, the relief being sought in each forum was different. However, the ground invoked by the father did provide a sound basis for dismissal. An essential element for a contempt finding was missing here: that the alleged contemnor violated a lawful order of the court clearly expressing an unequivocal mandate. The subject order contained no mechanism for joint decision-making, nor did it set forth a time frame for communicating about medical issues. Further, upon learning that the child was suicidal, the father had promptly texted the mother asking for a meeting. She refused and thereby forfeited her right to notice of the emergency evaluation. (Family Ct, Nassau Co)

**Matter of Suffolk County DSS v Dominick C., 162 AD3d 1053, 81 NYS3d 66 (2nd Dept 6/27/2018)**

**Paternity / Equitable Estoppel**

**ILSAPP:** The petitioner commenced a paternity proceeding to adjudicate the respondent to be the father of the subject child. When the AFC asserted that the child considered another individual his father, the respondent moved to dismiss the petition based on equitable estoppel. Without a hearing, Family Court granted the motion. The mother appealed, and the Second Department reversed. The individual the child saw as a father should have been joined as a necessary party, and a hearing on equitable estoppel should have been held. The matter was remitted. (Family Ct, Suffolk Co)

**Matter of Ledbetter v Singer, 162 AD3d 1031, 80 NYS3d 142 (2nd Dept 6/27/2018)**

**Temporary Custody / Full Hearing**

**ILSAPP:** In Kings County Family Court, the father sought sole custody of the parties’ children. Prior to completion of the hearing, Family Court granted temporary custody to the father. The Second Department stayed enforcement of the order pending appeal. See Family Ct Act § 1114. It was error to make the custody order based on controverted allegations without the benefit of a full and fair hearing, the reviewing court held. The matter was reversed and remitted. Schulte Roth & Zabel LLP represented the appellant. (Family Ct, Kings Co)

**People v Vasquez, 162 AD3d 1078, 80 NYS3d 122 (2nd Dept 6/27/2018)**

**Sexual Performance by Child / Against Weight**

**ILSAPP:** The defendant was charged with multiple counts of possessing and promoting a sexual performance by a child. Prior to a nonjury trial, he withdrew his request for a Huntley hearing, opting to challenge the voluntariness of his statements during trial. However, Orange County Court held that the statements were deemed to have been made voluntarily. The defendant was convicted of multiple counts. The Second Department reversed and dismissed the indictment. County Court had erred in its ruling regarding the voluntary statement issue; and the verdict was against the weight of evidence. Testifying through a Spanish interpreter, the defendant had stated that he made many mistakes during the interrogation, which was conducted in English. The defendant further testified that he was not the sole user of the subject computer, and he had made an incriminating statement to protect a family member. Indeed, at trial, a family member acknowledged having downloaded the illicit materials. Benjamin Ostrer and Marissa Tuohy represented the appellant. (County Ct, Orange Co)

**People v Latham, 162 AD3d 1068, 80 NYS3d 128 (2nd Dept 6/27/2018)**

**Waiver of Appeal / Invalid**

**ILSAPP:** In this appeal from a Kings County weapon conviction, the Second Department held that the sentence was not harsh and excessive. However, in finding that the purported waiver of the right to appeal was invalid, the reviewing court provided an unusually detailed discussion of the flaws in the waiver and the requirements for a valid waiver. (Supreme Ct, Kings Co)

**Matter of Rose v Simon, 162 AD3d 1048, 80 NYS3d 345 (2nd Dept 6/27/2018)**

**Court Attorney Referee / Power Exceeded**

**ILSAPP:** In Queens County Family Court, the parties’ custody and family offense matters were heard and decided by a Court Attorney Referee. The mother appealed, and the appellate court reversed. The court’s order of reference did not authorize the referee to hear and report or determine the mother’s family offense petition. The parties had purportedly stipulated that the referee could hear and determine the father’s custody petition, but they did not comply with CPLR 2104. Thus, the referee had the power only to hear and report findings. Both matters were remitted to a Family Court Judge. Larry Bachner represented the appellant. (Family Ct, Queens Co)

**People v Ishtiaq, 162 AD3d 1067, 78 NYS3d 413 (2nd Dept 6/27/2018)**

**Taxi/Limo Licenses / Not “Property”**

**ILSAPP:** A Queens County conviction of grand larceny in the third degree was based on the alleged theft of licenses from the New York City Taxi and Limousine Commission. The defendant had used forged documents...
to obtain insurance for his car service company vehicles, and then had used the insurance to procure the licenses from the TLC. The licenses were not “property” within the meaning of Penal Law § 155.35, the appellate court ruled. See People v Sansanese, 17 NY2d 302. Although the defendant’s legal insufficiency claim was unpreserved, in the interest of justice, the count was dismissed. Appellate Advocates (Mark Vorkink, of counsel) represented the appellant. (Supreme Ct, Queens Co)

**People v Geddes, 162 AD3d 1065, 79 NYS3d 665 (2nd Dept 6/27/2018)**

**YET ANOTHER O’RAMA ERROR / REVERSAL**

**ILSAPP:** The Second Department reversed a Kings County conviction of murder and other crimes based on an O’Rama error. The trial court did not read the contents of several jury notes into the record, and there was no indication that the entire contents were shared with counsel. Even in the absence of an objection, reversal was required. A new trial was ordered. The Legal Aid Society of New York City (Steven Berko, of counsel) represented the appellant. (Supreme Ct, Kings Co)


**MURDER CONVICTION / LESSER OFFENSE / NEW TRIAL**

**ILSAPP:** The defendant killed the victim by shooting him in the head. He told police that he pointed the gun at the victim, and it fired while the two men struggled for the weapon, but he did not intend to pull the trigger. After a jury trial, the defendant was convicted of second-degree intentional murder. On appeal, he contended that Queens County Supreme Court erred in denying his request for an instruction on the lesser included offense of reckless manslaughter. The Second Department reversed. Reckless manslaughter was a lesser included offense. See People v Rivera, 23 NY2d 112, 120. Moreover, there was a reasonable view of the evidence that the defendant did not intentionally pull the trigger. Appellate Advocates (Denise Corsi, of counsel) represented the appellant. (Supreme Ct, Queens Co)

**People v Cunny, 163 AD3d 708, 80 NYS3d 457 (2nd Dept 7/11/2018)**

**SANDOVAL ERROR / HARMLESS**

**ILSAPP:** The defendant was convicted in Kings County of attempted assault in the first degree. After a Sandoval hearing, Supreme Court granted the People’s application to cross-examine the defendant about the underlying facts of his 2006 conviction for attempted coercion. The defendant did not testify at trial. The reviewing court agreed with the defendant that the trial court erred in its Sandoval ruling, and it set forth a detailed discussion of the relevant standards. The facts underlying the 2006 conviction—which involved the threatened use of a hammer as a blunt force weapon—may have had some probative value as to the defendant’s credibility. But any such value was outweighed by the potential prejudicial effect. There was no reasonable possibility that the error might have contributed to the conviction, however, the Second Department concluded. (Supreme Ct, Kings Co)

**Matter of Denise V. E. J., 163 AD3d 667, 82 NYS3d 140 (2nd Dept 7/11/2018)**

**APPEAL ACADEMIC / VACATUR MOTION was REMEDY**

**ILSAPP:** In permanency proceedings, Westchester County Family Court denied the motion of the child to participate in person at the hearing. Although the child was aggrieved by the order, the appeal was academic, the Second Department held. Where a dispositional order has been issued after a permanency hearing and a child was erroneously deprived of his or her statutory right to participate in person at that hearing, the remedy would be to vacate the order, grant the motion to participate in person, and remit the matter for a new permanency hearing pursuant to Family Ct Act § 1090-a. In the instant case, the appellate court was unable to grant such relief because the permanency hearing and dispositional order at issue were superseded by later hearings and orders, and the child was permitted to participate in person at those proceedings. The appeal was dismissed. (Family Ct, Westchester Co)

**People v Geddes-Kelly, 163 AD3d 716, 81 NYS3d 414 (2nd Dept 7/11/2018)**

**ILICIT SEARCH OF WALLET / INDICTMENT DISMISSED**

**ILSAPP:** One evening, based on traffic infractions, the police pulled over a vehicle driven by the defendant. During the stop, while looking through the window, police observed a bag of marihuana on the floor. The defendant was asked to step out of the vehicle. After frisking the defendant, an officer handcuffed him and then took his wallet from his pocket to search for pedigree information. In doing so, the officer found three credit cards, which he concluded were forged. Following a jury trial in Queens County, the defendant was convicted of criminal possession of a forged instrument in the second degree and marihuana possession. The Second Department held that suppression of the credit cards should have been granted, modified the judgment, and dismissed the indictment as to the forged instrument count. While the search of the defendant’s pockets was justified since it arose from a search incident to a lawful arrest, the subse-
Second Department continued

quent search of the wallet was unlawful. The proof adduced at the suppression hearing failed to support a reasonable belief that the suspect might have gained possession of a weapon or been able to destroy evidence. Appellate Advocates (Hannah Zhao, of counsel) represented the appellant. (Supreme Ct, Queens Co)

**Matter of Luna V.**, 163 AD3d 689, 81 NYS3d 422 (2nd Dept 7/11/2018)

**FCA § 1028 APPLICATION GRANTED / REVERSAL**

**ILSAPP:** The petitioner agency appealed from an order of Richmond County Family Court that granted the mother’s application pursuant to Family Ct Act § 1028 for the return of the subject children. The Second Department stayed enforcement of the order. On appeal, the appellate court reversed. The record did not provide a sound and substantial basis for the determination that: (1) the mother’s condition had been mere temporary drowsiness, resulting from her use of newly prescribed medication, and (2) the petitioner had failed to prove that an imminent risk would be presented by the return of the children, who were then age seven months and eight years. The mother was the only adult at home with the children when she locked herself in the bathroom for an extended period of time, and she did not answer when the older child repeatedly knocked. When the mother finally emerged, her speech was slurred, and she could not maintain her balance. The frightened child summoned her grandfather. He found the mother lying face down on the child’s bed and called 911. The attending physician at the hospital testified that the mother appeared to have taken a large quantity of opiates. (Family Ct, Richmond Co)

**People v Moulton**, 163 AD3d 724, 80 NYS3d 418 (2nd Dept 7/11/2018)

**UNSWORN WITNESS RULE / NEW TRIAL**

**ILSAPP:** The defendant was convicted of first-degree rape by a Queens County jury. His argument, that the prosecutor violated the unsworn witness rule during the cross-examination of a witness, was unpreserved. However, in the interest of justice, the appellate court reversed the judgment. The prosecutor repeatedly injected her own credibility into the trial while examining the only defense witness other than the defendant. Given the importance of the witness’s testimony to the defense, the defendant was deprived of a fair trial. Barry Kamins and John Esposito represented the appellant. (Supreme Ct, Queens Co)


**IMPLIED INCOME INFLATED / CHILD SUPPORT REDUCED**

**ILSAPP:** Orange County Supreme Court improvidently exercised its discretion by imputing to the defendant mother income of $66,000. She had a high school diploma, and at various times during the marriage, worked at a delicatessen, as a medical assistant, and as a dental assistant. Since the defendant left the marital residence, her mother had been giving her $1,800 to $2,000 a month. Family Court should have imputed income in the sum of $30,000, based on the mother’s educational background, past earnings, and family gifts. Her support obligation was thus reduced. William Larkin III represented the appellant. (Supreme Ct, Orange Co)

**People v Trotter**, 163 AD3d 729, 81 NYS3d 410 (2nd Dept 7/11/2018)

**RISK FACTOR PROOF LACKING / REDUCTION TO LEVEL ONE**

**ILSAPP:** Queens County Supreme Court designated the defendant a level-two sex offender. An assessment of points under risk factor 11 may be appropriate if the offender has a history of substance abuse or was abusing drugs and/or alcohol at the time of the offense. The People did not make the requisite showing. The presentence report contained only ambiguous information about the extent of the defendant’s use of alcohol and marijuana between the ages of 16 and 20, and no information was presented about his use of those substances in the seven years before the sex offense. Moreover, the evidence at the hearing did not establish that, at the time of the offense, the defendant abused, or was under the influence of, alcohol or marijuana. Thus, he should not have been assessed points under risk factor 11, and he should have been designated a level-one sex offender. The Legal Aid Society of NYC (Nancy Little, of counsel) represented the appellant. (Supreme Ct, Queens Co)

**Maddaloni v Maddaloni**, 163 AD3d 792, 82 NYS3d 53 (2nd Dept 7/18/2018)

**CPLR 5015 MOTION / PROPERLY DENIED**

**ILSAPP:** In a Suffolk County matrimonial action, the defendant appealed from an order denying his CPLR 5015 (a) (2), (3) motion. Under such provisions, the court that rendered a judgment may relieve a party from it on the ground of newly discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial; and/or on the ground of fraud, misrepresentation or other misconduct of an adverse party. Newly discovered evidence is evidence that was in existence, but was undiscoverable with due
Second Department continued

diligence at the time of the original judgment. The defendant failed to establish that the information offered could not have been timely discovered. In any event, he did not demonstrate that, if introduced at trial, the “new” evidence would probably have produced a different result. Moreover, he did not establish fraud, misrepresentation or misconduct on the part of the plaintiff. (Supreme Ct, Suffolk Co)

**Matter of Mayra C., 163 AD3d 808, 811 NYS3d 488**
(2nd Dept 7/18/2018)

**ARTICLE 10 / AGENCY APPEAL / ABUSE PROVEN**

**ILSAPP:** The petitioner commenced Family Court Act Article 10 proceedings alleging that the respondent sexually abused Daniela C. and derivatively abused the other subject children. After a hearing, Kings County Family Court dismissed so much of the petitions as alleged that the respondent abused Daniela C. and derivatively abused the other subject children. The petitioner appealed. The Second Department found that the evidence established sexual abuse. Daniela C.’s testimony as to multiple instances of such abuse was sufficient. Out-of-court statements regarding the abuse—made to a counselor, a therapist, a psychiatrist, and an emergency medical technician—constituted adequate proof. Such statements were corroborated by Daniela C.’s testimony, as well as testimony by one of the other children, that she once saw the respondent in bed with Daniela C. Any inconsistencies in the victim’s testimony did not render her testimony unworthy of belief. The petitioner also established that the other children were derivatively abused; the abuse of Daniela C. while the other children were asleep in the same room indicated a fundamental defect in the respondent’s understanding of the duties of a person legally responsible for their care. (Family Ct, Kings Co)

**People v Watson, 163 AD3d 855, 81 NYS3d 449**
(2nd Dept 7/18/2018)

**WEAPON POSSESSION CONVICTION / VIGOROUS DISSENT**

**ILSAPP:** At a Richmond County trial on weapon possession charges, the People presented evidence that two officers became suspicious of the defendant when he entered a livery cab. After they stopped the vehicle for a traffic violation, an officer noticed the butt of a gun protruding from the defendant’s waistband. The defendant said that he was enroute to a precinct station house to surrender the firearm as part of the City’s Gun Buyback Program. See Penal Law § 265.20 (a) (1) (f). At trial, he sought to call witnesses regarding pre-arrest conversations about such intent. One such witness—the defendant’s mother-in-law—was a senior police administrative aide at the station house. Sua sponte, the trial court precluded such testimony on hearsay grounds. The Second Department affirmed the conviction, concluding that conversations regarding the surrender were properly excluded. Moreover, several trial errors were deemed harmless: admitting photographs of guns found on the defendant’s cell phone; precluding cross-examination of an officer about a federal lawsuit against him; and allowing the prosecutor’s comment that defense counsel “can’t lie to a jury.” One justice dissented, opining that the cumulative impact of the errors denied the defendant of a fair trial. The defendant had properly sought to introduce pre-arrest conversations as probative of his state of mind. During summation, the prosecutor had improperly accused defense counsel of lying to the jury and falsely insinuated that the People possessed information about the absence of a permit for the guns depicted in the cell phone photos, the dissenter stated. (Supreme Ct, Richmond Co)

**Matter of Ashley G., 163 AD3d 963, 82 NYS3d 592**
(2nd Dept 7/25/2018)

**NEGLECT PETITIONS DISMISSED / AFFIRMED**

**ILSAPP:** In child neglect proceedings, the petitioner agency appealed from an order of Kings County Family Court, which dismissed the petitions against the father after a fact-finding hearing. The Second Department affirmed. The father was accused of neglecting one child, Amy G., by committing sexual abuse; neglecting another child, Sharman S., by inflicting excessive corporal punishment; and derivatively neglecting the other children. Siblings’ out-of-court statements may be used to cross-corraborate one another; but they must describe similar incidents of abuse and be sufficiently detailed to support their reliability. Such standard was not met in the instant case. (Family Ct, Kings Co)

**People v Augustus, 163 AD3d 981, 83 NYS3d 281**
(2nd Dept 7/25/2018)

**IMPROPER SEARCH WARRANT FOR SALIVA / REVERSAL**

**ILSAPP:** The defendant’s appeal from a judgment of Kings County Supreme Court convicting him of second-degree murder brought up for review the denial of his motion to controvert a search warrant authorizing the taking of a saliva sample from him and to suppress the evidence seized. The Second Department held that the trial court should have granted the motion. A search warrant application must support a reasonable belief that evidence of a crime may be found in a certain place. The supporting affidavit of the detective was conclusory and insufficient. He stated that he believed that evidence relat-
ed to the murder might be found in the defendant’s saliva, based on his interview of witnesses, information from fellow officers, and a review of police department records. However, the detective did not identify the witnesses, indicate what information was obtained, or specify what records were reviewed. The error was not harmless. Thus, the judgment of conviction was reversed, and a new trial was ordered. Appellate Advocates (Alexis Ascher, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Crawford, 163 AD3d 986, 82 NYS3d 68 (2nd Dept 7/25/2018)

ELICITING INCRIMINATING RESPONSE / BUT HARMLESS

INALSAPP: The defendant was convicted, following a Westchester County jury trial, of the murder of a woman who was stabbed 31 times and found in his bed. His pre-Miranda statements were the product of improper custodial interrogation by a detective whose questions were likely to elicit an incriminating response. In the 25-minute interview, the detective did not just seek mere pedigree information when asking about the defendant’s family and criminal history and about whether he knew why he was being questioned. However, the error in denying suppression was harmless. Further, the record supported the denial of a request to charge manslaughter in the first degree as a lesser included offense. Given the nature and brutality of the slaying, there was no reasonable view of the evidence that the defendant intended to inflict serious physical injury, rather than death. (County Ct, Westchester Co)

People v Smith, 163 AD3d 1005, 82 NYS3d 453 (2nd Dept 7/25/2018)

CONSECUTIVE TERMS / MUST RUN CONCURRENTLY

INALSAPP: The sentence imposed as to the defendant’s Richmond County conviction of CPW in the second degree, for possessing a loaded firearm with intent to use it unlawfully against another, had to run concurrently with the term imposed for murder. The People did not prove that the defendant had unlawful intent that was separate from his intent to shoot the victim. Appellate Advocates (Jenin Younes, of counsel) represented the appellant. (Supreme Ct, Richmond Co)

People v Loney, 164 A3d 523, 77 NYS3d 879 (2nd Dept 8/1/2018)

YO-ELIGIBLE DEFENDANT / SENTENCE VACATED

INALSAPP: The defendant paid $100 to stay in a bedroom of a Brooklyn basement apartment. While sitting in the kitchen, he was shot by unknown persons. Police entered the apartment to search for the assailants and found firearms and marijuana. The defendant, age 17 at the time, was charged and convicted of 3rd degree CPW and unlawful possession of marijuana. Supreme Court denied his application for youthful offender status, based on the mistaken belief that he was convicted of an armed felony. The Second Department held that the weapons offense did not require proof that the firearm was loaded, so the defendant was eligible for YO treatment without a finding of mitigation. The matter was remitted for a new determination as to YO status and resentencing. Appellate Advocates (Caitlin Halpern, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Reddick, 164 AD3d 526, 82 NYS3d 79 (2nd Dept 8/1/2018)

COURT CLOSURE PROPER / DETECTIVE OPINION IMPROPER

INALSAPP: During a Kings County trial on CPW and assault charges, Supreme Court excluded the defendant’s family members from the courtroom while the complainant testified. On appeal, the defendant contended that he was denied his right to a public trial. The Second Department observed that closure of the courtroom is an exceptional measure that must be sparingly taken and concluded that an overriding interest was demonstrated: the victim feared testifying in the presence of the excluded persons. The closure was limited, and the trial court properly determined that no lesser alternative would protect the interests at stake. However, the court erred in permitting a police detective to testify that, in his opinion, the defendant was the person depicted in surveillance video footage. Generally, lay witnesses must testify only to facts, and not to their opinions and conclusions drawn from facts. There was no showing that the detective was more likely than the jury to correctly determine whether the defendant was depicted in the video. But the error was harmless. (Supreme Ct, Kings Co)

People v Ross, 164 AD3d 528, 77 NYS3d 876 (2nd Dept 8/1/2018)

MODIFICATION / CONCURRENT SENTENCES

INALSAPP: In Kings County, the defendant was convicted of 2nd degree murder and 2nd degree CPW and sentenced to consecutive terms. The Second Department modified. The sentences had to run concurrently, where no evidence established that the defendant’s possession of the gun was separate and distinct from his shooting of the victim. Appellate Advocates (Samuel Brown and Leila Hull, of counsel) represented the appellant. (Supreme Ct, Kings Co)
**Second Department continued**

**Matter of Rudder v Garber, 164 AD3d 511, 77 NYS3d 886 (2nd Dept 8/1/2018)**

**NAME CHANGE / INFANT’S INTERESTS SERVED**

**ILSAPP:** In a proceeding pursuant to Civil Rights Law Article 6, the father appealed from a Suffolk County Supreme Court order granting the mother’s petition to change the infant’s surname from Garber to Rudder-Garber. The Second Department affirmed. When the infant was born in 2012, he was given the father’s surname. The parties, who never married, lived together for one year and then ended their relationship. Civil Rights Law § 63 authorized an infant’s name change if there was no reasonable objection to the proposed name and the infant’s interests would thereby be substantially promoted. *See Matter of Eberhardt,* 83 AD3d 116. Supreme Court correctly held that the father’s objections were not reasonable and that the infant would benefit from the change. *See Matter of Siira,* 7 AD3d 803. (Supreme Ct, Suffolk Co)

**People v Dimon, 164 AD3d 600, 78 NYS3d 683 (2nd Dept 8/8/2018)**

**ANDERS BRIEF REJECTED / NONFRIVOLOUS ISSUES**

**ILSAPP:** The defendant appealed from a judgment of Suffolk County Court convicting her of 3rd degree criminal mischief and 2nd degree reckless endangerment. Assigned counsel submitted an *Anders* brief, moving leave to withdraw as counsel. The Second Department granted the motion, but assigned new counsel. The brief failed to adequately analyze potential issues or highlight facts that might arguably support the appeal. Upon independent review of the record, the appellate court concluded that nonfrivolous issues existed, including whether: (1) the appellant’s plea was knowing, voluntary, and intelligent; (2) her right to a hearing, to determine whether she violated the conditions of the plea, was honored; and (3) she was competent at the time of sentencing. (County Ct, Suffolk Co)

**People v Rosario, 164 AD3d 625, 81 NYS3d 566 (2nd Dept 8/8/2018)**

**SORA / REFUSAL TO PARTICIPATE IN TREATMENT**

**ILSAPP:** The defendant appealed from a Kings County Supreme Court order designating him a level-three sex offender. The Second Department affirmed. In establishing an offender’s appropriate risk level, the People bear the burden of proof by clear and convincing evidence. Evidence may be derived from (1) the defendant’s admissions; (2), the victim’s statements; (3) evaluative reports completed by the supervising probation officer, parole officer, or corrections counselor; (4) case summaries prepared by the Board of Examiners of Sex Offenders (Board); or (5) any other reliable source, including reliable hearsay. The Second Department agreed with the assessment of 15 points under risk factor 11. The defendant’s history of drug or alcohol was demonstrated by his presentence report and the Board’s case summary, and he was abusing drugs and alcohol at the time of the offense. Further, the People established that assessing 15 points under risk factor 12 was appropriate based on the defendant’s refusal to participate in a sex-offender treatment program. Such a refusal automatically demonstrated an unwillingness to accept responsibility for the crime. Although the defendant contended that he refused treatment because he was afraid of another inmate, the risk assessment guidelines did not contain exceptions with respect to the reasons for refusing treatment. (Supreme Ct, Kings Co)
| **People v Sands**, 164 AD3d 613, 82 NYS3d 500  
(2nd Dept 8/8/2018) |
| --- |
| **SENTENCES ILLEGAL / CLASS D NONVIOLENT FELONIES**  
**ILSAPP:** The defendant appealed from a Queens County judgment convicting him of 2nd degree murder, 1st and 2nd degree robbery, 3rd degree CPW, and 3rd degree criminal possession of stolen property. The Second Department held that the sentences imposed on the convictions for CPW and possession of stolen property were illegal. Both crimes were class D nonviolent felonies. The appropriate sentencing range for such felonies, committed by a defendant who was a second violent felony offender, was between 2 to 4 years and 3½ to 7 years. The sentence of 4 to 8 years was therefore illegal. Appellate Advocates (De Nice Powell, of counsel) represented the appellant. (Supreme Ct, Queens Co) |

| **People v Sturges**, 164 AD3d 616, 82 NYS3d 85  
(2nd Dept 8/8/2018) |
| --- |
| **330.30 MOTION / ERRONEOUS GRANT / FACTUAL INCONSISTENCY**  
**ILSAPP:** The People appealed from a Kings County Supreme Court order which granted defendant’s CPL 330.30 motion to set aside his conviction of endangering the welfare of a child and dismissed the indictment in its entirety. The Second Department reversed and reinstated the indictment and verdict. The defendant was charged with various offenses, based on certain sexual acts allegedly perpetrated by him against a 10-year-old complainant. The Supreme Court submitted 27 counts to the jury. After the jury convicted the defendant of EWC and acquitted him of all other charges, he moved to set aside the conviction. The trial court granted the motion on the ground of legally insufficient evidence, reasoning that the defendant’s recitation clearly casts significant doubt upon his guilt or otherwise calls into question the voluntariness of the plea, the plea court has a duty to inquire further to ensure that the defendant understands the nature of the charge and that the plea has been intelligently entered. Where the court failed in its duty to inquire further, a defendant may raise a claim regarding the validity of the plea, even without having moved to withdraw the plea. The Legal Aid Society of Suffolk County (Alfred Cicale, of counsel) represented the appellant. (County Ct, Suffolk Co) |

| **People v DeFelice**, 164 AD3d 697, 82 NYS3d 90  
(2nd Dept 8/15/2018) |
| --- |
| **BRADY ISSUE / REMITTAL TO RECONSTRUCT**  
**ILSAPP:** The defendant was convicted of 2nd degree murder in the shooting death of his girlfriend. During the Suffolk County trial, defense counsel informed County Court that, according to the notes of an investigating detective, the police had interviewed witnesses to whom the codefendant had made statements regarding his involvement in the shooting. Defense sought the statements, arguing that they constituted Brady material. Alternatively, counsel asked the court to review the material in camera to determine whether it should be disclosed. The trial court agreed to do so, and ultimately no material was disclosed. On appeal, the defendant argued that a Brady violation occurred. The People were unable to provide to the Second Department, or even describe, the material reviewed in camera by the trial court. Yet they asserted that the defendant’s Brady claim was based on matter dehors the record and could not be reviewed on direct appeal. The appellate court rejected such stance. The matter was remitted for a hearing to reconstruct the record as to what, if any, material was provided to the trial court for in camera review and thereafter to report to the appellate court “with all convenient speed.” The appeal was held in abeyance in the interim. Judah Serfaty represented the appellant. (County Ct, Suffolk Co) |

| **People ex rel Curdy v Warden, Westchester County**,  
164 AD3d 692, 83 NYS3d 520 (2nd Dept 8/15/2018) |
| --- |
| **SEX OFFENDER HOUSING**  
**ILSAPP:** In an Article 78 proceeding, the Second Department held that, where the petitioner/level-three
sex offender had already completed more than six months of post-release supervision and could not find SARA-compliant community housing, until he found such housing, DOCCS had the authority to place him into residential treatment facility. In such ruling, the appellate court reversed a judgment of Westchester County Supreme Court directing DOCCS to arrange for the petitioner’s transfer to the Queensboro Correctional Facility and to assign him to a wait list for a SARA-compliant NYC facility. (Supreme Ct, Westchester Co)

**People v Bailey, 164 AD3d 815 (2nd Dept 8/22/2018)**

**ANONYMOS TIP / SUPPRESSION**

ILSAPP: An anonymous tipster told police about a man with a gun. That led police to stop a vehicle and order the defendant out of the car at gunpoint. A firearm was recovered during a frisk of the defendant. Following a jury trial, he was convicted of weapon possession charges. The Second Department held that police lacked reasonable suspicion to stop the vehicle based only on the anonymous tip from an individual who did not say how he knew about the gun and did not supply any basis for police to believe that he had inside information about the defendant. Thus, the firearm should have been suppressed. The Queens County convictions were reversed, and the charges were dismissed. Appellate Advocates (Michael Arthus, of counsel) represented the appellant. (Supreme Ct, Queens Co)

**People v Carlson, 164 AD3d 823, 81 NYS3d 558 (2nd Dept 8/22/2018)**

**MANSLAUGHTER OVERTURNED / JURY POOL TAINTED**

ILSAPP: For several months prior to his death, the victim occupied a cabin near the defendant’s rural Orange County farm, and the men became acquainted. After a night of drinking, the victim confessed to the defendant that there was a warrant for his arrest in connection with the rape of a minor. Subsequently, the defendant was asked to help police apprehend the victim. When the victim appeared at the defendant’s home and accused him of assisting the police, an altercation ensued. The defendant shot the victim fatally in the head and was indicted on murder and manslaughter charges. During jury selection, the prosecutor repeatedly used the term “statutory rape” to describe the victim’s alleged criminal conduct. The defendant objected. His defense was based on justification, and he was concerned that the term “statutory rape” may have been interpreted by jurors to imply that the victim was not violent. County Court failed to issue curative instructions to the entire jury pool, and the defendant was subsequently convicted of 1st degree manslaughter. The Second Department held that the failure to properly instruct the jury pool deprived the defendant of his fundamental right to a fair trial. Thus, the conviction was reversed, and a new trial was ordered. Benjamin Ostrer represented the appellant. (County Ct, Orange Co)

**Matter of Malachi M., 164 AD3d 794, 83 NYS3d 150 (2nd Dept 8/22/2018)**

**VERBAL ABUSE / NO NEGLECT**

ILSAPP: The Second Department disagreed with a finding by Kings County Family Court that the father neglected a child for whom he was legally responsible by verbally abusing the mother. While it was inappropriate for the adults to argue in the boy’s presence, the evidence was insufficient to establish that, because of the verbal abuse, the child’s physical, mental, or emotional condition was impaired or in imminent danger becoming impaired. Additionally, the child’s out-of-court statement that he did not feel safe being alone with the father was not corroborated by additional evidence and was insufficient to support the finding of neglect. Catherine Bridge represented the appellant. (Family Ct, Kings Co)

**People v Novotny, 164 AD3d 836, 79 NYS3d 554 (2nd Dept 8/22/2018)**

**SENTENCE / SIGNIFICANT REDUCTION**

ILSAPP: In Putnam County, the defendant was charged under two SCI’s with 3rd degree criminal possession of a controlled substance. Upon his pleas of guilty, he was sentenced to two consecutive seven-year terms, plus two years’ post-release supervision, and a $5,000 fine as to one of the counts. The Second Department found that the defendant’s purported waivers of his right to appeal were unenforceable. In light of his age and lack of experience with the criminal justice system, the colloquies were insufficient. Thus, the appellate court reviewed the defendant’s contention that his sentence was excessive. After he violated his plea agreements by failing to successfully complete drug treatment, the County Court was required to impose appropriate sentences. However, given the plea offers originally extended, the defendant’s personal circumstances, the nature of his crimes, and the Probation Department’s recommendation of probation, the sentence was excessive. The appellate court reduced the determinate terms to four years, served concurrently, and vacated the fine. Yasmin Daley Duncan represented the appellant. (County Ct, Putnam Co)
Matter of Puyi Tam v Lubatkin, 164 AD3d 802, 79 NYS3d 564 (2nd Dept 8/22/2018)

RELIEF SOUGHT / DEFECTIVE SERVICE WAIVED

ILSAPP: The mother commenced a UIFSA proceeding in Kings County Family Court seeking an order of filiation and support. The NYC Corporation Counsel effectuated personal service on the respondent prior to and at the first appearance in Family Court. The copies of the petition served omitted several attachments. At the first appearance, the respondent affirmatively waived jurisdictional defenses. He later became aware of the apparent defect and requested missing exhibits. Although he did not receive the exhibits, he continued to participate in the proceedings without objecting. The personal jurisdiction issue did not emerge until more than a year later, when the court sua sponte halted an evidentiary hearing and directed the parties to submit briefs on the matter. The respondent then sought to dismiss the petition, and Family Court granted the motion. The mother and the child appealed. The Second Department reversed and remitted. By affirmatively seeking relief and participating in the proceedings, despite his awareness of the defect in service, the respondent waived his claim regarding personal jurisdiction. (Family Ct, Kings Co)

Matter of La Niyah M., 164 AD3d 902, 83 NYS3d 189 (2nd Dept 8/29/2018)

RETURN OF CHILD / IMPROPER GRANT

ILSAPP: ACS filed a petition alleging that the mother neglected her six-year-old child by inflicting excessive corporal punishment. As a result, he was placed in a foster home. The following month, the mother gave birth to another child, who was removed, and ACS commenced the instant proceeding charging derivative neglect. The mother sought a Family Ct Act § 1028 hearing and return of the child. After the hearing, Kings County Family Court granted return of the child. ACS appealed. The Second Department observed that a § 1028 application must be granted unless Family Court finds that the return of the child would present an imminent risk to the child’s life or health. Family Court’s determination will not be disturbed if supported by a sound and substantial basis in the record. The trial court must balance the risk to the child, if returned, against the harm removal might cause. Here, Family Court erred in ordering the infant’s return to the mother’s care. The evidence demonstrated the mother’s long history of neglect and abuse toward the older child and her failure to substantially comply with recommended services and to fully cooperate with ACS. (Family Ct, Kings Co)

People v Marín, 164 AD3d 916, 84 NYS3d 495 (2nd Dept 8/29/2018)

CONVICTIONS REVERSED / NO RECKLESSNESS

ILSAPP: The defendant inadvertently shot his friend, Fernando Morales, in the leg. At trial, Morales testified that he found a gun on a park bench wrapped inside a paper bag, was concerned about the safety of children in the park, and intended to bring the gun to a police station. Before doing so, he stopped at the defendant’s home, placed the bag on a shelf, and told the defendant about the gun. Morales fell asleep and awoke when he felt a burning pain in his leg. The defendant was holding the gun and saying, “I’m sorry.” In his statement to police, the defendant explained that he was curious about the gun, so he picked it up, and it went off accidentally. A Queens County jury found the defendant guilty of 2nd degree reckless endangerment and 3rd degree assault. On appeal, the defendant argued that the verdict was against the weight of evidence because the element of recklessness was not adequately proven as to both crimes. The Second Department agreed. The People did not introduce evidence that the defendant: (1) was familiar with weapons; (2) knew that the gun was loaded or knew how it operated; or (3) was aware of, and consciously disregarded, a risk that the weapon might misfire. The judgment was reversed and the indictment was dismissed. One justice dissented. Appellate Advocates (Benjamin Litman, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Wisdom, 164 AD3d 928, 82 NYS3d 97 (2nd Dept 8/29/2018)

NO SUPPRESSION / RIGHT TO SILENCE NOT INVOKED

ILSAPP: In its review of a Kings County murder conviction, the Second Department upheld Supreme Court’s order denying suppression of a statement by the defendant at the police station. After waiving her Miranda rights, she freely and voluntarily made a videotaped statement. The interview ended after half an hour, not because the defendant unequivocally invoked her right to remain silent, but rather because she needed to compose herself. She remained in custody, and questioning resumed the following morning. At that time, the defendant was reminded of her rights, agreed to continue answering questions, and admitted stabbing the victim. The Second Department held that the police were free to resume their questioning of the defendant within a reasonable time without repeating Miranda warnings. (Supreme Ct, Kings Co)
Further, defendant was not deprived of effective assistance of counsel for failing to raise the constitutional argument, as the issue in question was, and is, far from clear-cut.

The court did not err in denying the defendant’s suppression motion and the sentence delivered was not an abuse of discretion. (County Ct, Sullivan Co)

Dissent: This court has the inherent authority to remit the case for further proceedings to develop the factual record on the issue of consent. “Whether the Special Prosecutor was actually authorized to prosecute this matter presents just such a concern that enables us to remit for further development of the record. … I would withhold decision and remit the matter to determine whether the District Attorney consented to defendant’s prosecution.”

People v Holton, 160 AD3d 1288, 76 NY3d 248 (3rd Dept 4/26/2018)

Despite the prosecution’s claims, the defendant was subjected to a manual body cavity search; the item of contraband found did not fall from the defendant’s body of its own accord but only dislodged after a correction officer touched it in some manner. There was probable cause for a visual cavity inspection, but no showing or claim of emergency to justify a warrantless body cavity search. Further, no effort was made to secure medical help in securing the visible item in a safe, hygienic manner and the record is unclear even as to whether gloves were worn; the manner of the search was not reasonable. The search violated the Fourth Amendment. (County Ct, Broome Co)

Concurrence: I agree with the majority that the search violated the Fourth Amendment. However, I would solely apply the reasonableness test set out in Bell v Wolfish, 441 US 520 (1979), because neither a warrant nor exigent circumstances are required for a cavity search of a pretrial detainee. See eg Florence v Board of Chosen Freeholders of County of Burlington, 566 US 318 (2012).

Dissent: “[W]e would defer to County Court’s factual findings and credibility determinations with regard to the nature and reasonableness of this search....”

People v Cubero, 160 AD3d 1298, 75 NYS3d 658 (3rd Dept 4/26/2018)

The defendant’s arguments that the statute authorizing creation of the Justice Center for the Protection of People with Special Needs (“Justice Center”) is unconstitutional are unpreserved. Even if the purely legal contention, that the statute unconstitutionally usurps the power of the District Attorney and the Attorney General, could be reached, the alternative argument—that the statute can only be constitutional if the District Attorney grants the special prosecutor appointed under the statute authority prosecute and oversees their actions—cannot be reached because no factual record was made on the topic.

DiBella v DiBella, 161 AD3d 1239, 75 NYS3d 371 (3rd Dept 5/3/2018)

A new trial on the issues of custody, visitation, and child support is required in this divorce proceeding because the record does not indicate that the court advised the mother of her right to have counsel assigned if she was financially unable to obtain legal services. See Judiciary Law 35(8) and Family Court Act 262. Represented by counsel for the first four days of trial in mid-2014, the mother appeared in October 2014 asking for time to hire replacement counsel as she was discharging...
the lawyer. No notice of appearance was ever filed, and after adjournments until June 2015, the court informed the mother she must proceed pro se. No showing of prejudice is required from a deprivation of the fundamental right to counsel, but the record indicates prejudice did occur.

(Supreme Ct, Ulster Co)  

People v Gerbino, 161 AD3d 1220, 76 NYS3d 653 (3rd Dept 5/3/2018)

The stipulated facts on which the defendant was prosecuted in a nonjury trial for criminally negligent homicide did not constitute evidence legally sufficient to sustain the conviction. The defendant did not engage in any conduct that “created or contributed to a substantial and unjustifiable risk of death” where his hunting party agreed to hunt from separate, stationary tree stands specifically positioned so that “that no one would be shooting in the direction of another hunter.” The victim, dressed in camouflage and mistaken by the defendant for a deer, had failed to heed advice to take a path that would keep him out of the line of fire. The defendant did not consume alcohol or drugs and was not aware that the victim had consumed cocaine and opiates. The defendant’s actions did not rise to the level of criminal negligence, despite his tragic mistake.

(County Ct, Otsego Co)  

Matter of Matheson KK., 161 AD3d 1260, 76 NYS3d 645 (3rd Dept 5/3/2018)

The respondent was denied meaningful representation at the initial hearing held to determine his mental condition pursuant to CPL 330.20 following his plea of not responsible by reason of mental disease or defect. Counsel called no witnesses, presented no evidence, and said that, having reviewed the psychiatric reports with her supervisor, she was not contesting the findings of the psychiatric examiners that the respondent has a dangerous mental disorder requiring confinement at a secure facility. The “track status” determined by the initial commitment order governs the future level of supervision, making the initial hearing a critical stage of proceedings. The record does not provide any basis for concluding that cross-examination of the psychiatrists or other possible avenues of challenge to their findings would have been futile; no plausible strategy or legitimate explanation for complete acquiescence at that stage can be discerned.

The respondent’s waiver of appeal in conjunction with the plea does not preclude review of this issue. The respondent was not informed “that the waiver of appeal had any application to the distinct, postplea civil commit-

ment proceedings that would follow his plea ....”  

(County Ct, Ulster Co)  

Matter of Bottom v Annucci, 161 AD3d 1362, 76 NYS3d 658 (3rd Dept 5/10/2018)

The evidence at the petitioner’s tier III disciplinary hearing does not establish that he violated prison rules against “organizing a demonstration, engaging in gang-related activity and engaging in violent conduct.” His comments about the Black Panther Party and “Damu,” the Swahili word for “blood” that may be used in referring to the Bloods gang, were made in the context of “discussing African-American organizations from an historical, cultural and political perspective” consistent with the subject matter of the approved African-American history class that the petitioner was facilitating. Upon review in this CPLR article 78 proceeding, the determination of guilt is annulled.

Prag v Prag, 161 AD3d 1364, 77 NYS3d 530 (3rd Dept 5/10/2018)

The court properly denied the plaintiff wife’s motion in this divorce action to unseal records regarding criminal charges against the defendant husband alleging domestic violence in 2015. Those records were sealed after an adjournment in contemplation of dismissal. The wife’s contention that the husband “waived the statutory bulwark against disclosure” by denying the alleged behavior now fails; while a defendant might waive the protections of CPL 160.50 by affirmatively raising some issues, simply denying allegations in the complaint does not constitute such a waiver. Nor can the wife “invoke the inherent authority of the courts to unseal criminal records in the interest of justice, as that authority is confined to attorney disciplinary matters ....”  

(Supreme Ct, Schenectady Co)  

People v Stein, 161 AD3d 1389, 77 NYS3d 579 (3rd Dept 5/17/2018)

As the prosecution concedes and review of the record confirms, “consecutive sentences for possession of a sexual performance by a child were not authorized” here because the “defendant’s conduct amounted to a single criminal act.” [Footnote omitted.] The prosecution had to establish that the defendant obtained the images at “separate and distinct times” to justify consecutive sentences, but the counts to which the defendant pleaded guilty each “contained identical language as to the time, date and place of possession.”  

(County Ct, Sullivan Co)
People v Ellis, 162 AD3d 161, 77 NYS3d 231  
(3rd Dept 5/31/2018)

The defendant’s indictment for failure to register a Facebook account under the restrictions placed on him by the Sex Offender Registration Act is jurisdictionally defective. The key statutory phrase to be interpreted is whether the defendant changed an internet access provider or internet identifier that he uses. “Inasmuch as Facebook does not provide its customers with Internet access, it is not an Internet access provider.” Further, due to the ambiguous language used to define “internet identifiers,” the defendant was not required under the statute to register the social networking accounts or applications he uses, but only the email addresses and screen names used in connection with such accounts, and he complied with those restrictions. (County Ct, Essex Co)

[Ed. Note: Leave to appeal was granted on Aug. 17, 2018 (2018 NY Slip Op 98601[U])]

People v Lockrow, 161 AD3d 1492, 78 NYS3d 736  
(3rd Dept 5/31/2018)

SORA DECISION NOT FILED / APPEAL DISMISSED  
ILSAPP: The defendant appealed from a decision of Rensselaer County Court classifying him as a level-three sex offender with a sexually violent offender designation. The Third Department dismissed the appeal. The standard SORA form signed by County Court did not contain the “so ordered” language required for an appealable paper. Further, a superseding SORA order was not entered and filed in the office of the clerk of the court, and no notice of appeal was filed therefrom. (County Ct, Rensselaer Co)

People v Osborne, 161 AD3d 1485, 77 NYS3d 774  
(3rd Dept 5/31/2018)

QUARTER MILLION IN RESTITUTION / FALLEN PASTOR  
ILSAPP: The defendant, a Baptist church pastor, pleaded guilty in Columbia County to third-degree grand larceny. Following a restitution hearing, he was ordered to pay $256,488. On appeal, he challenged such amount. The Third Department affirmed. Because there were no records regarding the church’s finances during the defendant’s 18-year tenure, an accounting firm conducted an audit. It revealed a $40,000 loan; cash withdrawals and checks payable to the defendant and his wife with no receipts to substantiate a church purpose for such funds; and credit card payments for unauthorized personal expenses, including a car for the pastor’s wife. The appellate court noted that the defendant could apply at any time for resentencing upon the ground that he was unable to pay the restitution amount. See CPL 420.10 (5). (County Ct, Columbia Co)

People v Brewington, 162 AD3d 1105, 78 NYS3d 495  
(3rd Dept 6/7/2018)

The instant plea of guilty must be vacated where the defendant pleaded guilty on the understanding that any sentence imposed would run concurrently to a 16½-to-life sentence in an Albany County case, and that conviction has now been reversed and a new plea arrangement made resulting in “a much shorter term of six years.” The “reduction of the preexisting sentence [in Albany County] nullified a benefit that was expressly promised and was a material inducement to the guilty plea’ here,” and “we cannot say that defendant would have foregone pretrial and trial rights and pleaded guilty’ had he known that his guilty plea in Albany County would be vacated ....” (Supreme Ct, Schenectady Co)

Matter of Madison County Support Collection Unit v Campbell, 162 AD3d 1146, 78 NYS3d 470  
(3rd Dept 6/7/2018)

The court erred in revoking the suspended judgment of an order finding the respondent in willful violation of his child support obligation where payments that had been being made directly from the respondent’s employer stopped and the court refused to allow the respondent to call a subpoenaed witness to testify about why payments were no longer being made. The respondent “was entitled to present witnesses on the issue of whether good cause existed to revoke the suspended judgment ....” Matter remitted for further proceedings. (Family Ct, Madison Co)

People v Haggray, 162 AD3d 1106, 78 NYS3d 494  
(3rd Dept 6/7/2018)

PEOPLE’S VIDEO EXHIBITS / ACCESSIBLE FORMAT  
MANDATED  
ILSAPP: In challenging an Albany County conviction, the defendant contended that the People deprived him of an opportunity to effectively present his appeal by failing to provide video and photographic exhibits in easily viewable form. The defendant had a fundamental right to appellate review, and the People were required to provide record documents sufficient to enable him to present his
arguments on appeal, the Third Department declared. Based on its own efforts to view the exhibits, the appellate court sided with the defendant. The court withheld decision and directed the People to provide exhibits in a format readily accessible by modern personal computer equipment, along with the necessary instructions. Further, the defendant could file a supplemental brief. Theodore Stein represented the appellant. (County Ct, Albany Co)

**People v Holmes**, 162 AD3d 1117, 78 NYS3d 751 (3rd Dept 6/7/2018)

**BAD PLEA / REVERSAL**

ILSAPP: Broome County Court made only passing reference to the rights the defendant was giving up by pleading guilty to coercion in the first degree; did not mention the privilege against self-incrimination; and failed to ascertain whether the defendant had conferred with counsel regarding the rights forfeited. The plea was therefore invalid and had to be vacated. Christopher Hammond represented the appellant. (County Ct, Broome Co)

**People v Horton**, 162 AD3d 1118, 78 NYS3d 748 (3rd Dept 6/7/2018)

**CHALLENGE FOR CAUSE DENIED / REVERSAL**

ILSAPP: The denial of a challenge for cause deprived the defendant of a fair trial in Tompkins County. A physician the People intended to call as a witness had been the prospective juror’s primary care physician for 15 years. Moreover, the juror’s husband had been the victim of a robbery; and because the perpetrator “got off,” she was a bit cynical about the criminal justice system. The juror’s general equivocality was problematic. Since the court failed to make further inquiry, denial of the defense challenge was error. The defense had exhausted its peremptory challenges. Thus, the judgment was reversed. Danielle Reilly represented the appellant. (Supreme Ct, Tompkins Co)

**People v Marshall**, 162 Add 1110, 78 NYS3d 753 (3rd Dept 6/7/2018)

**NO SERIOUS PHYSICAL INJURY / CHARGE REDUCED**

ILSAPP: Upon review of a Tompkins County conviction of first-degree assault, a divided Third Department held that the weight of the evidence did not support a finding of serious physical injury. At close range, the defendant shot the victim in the leg, resulting in a shattered tibia, two surgeries, and insertion of pins. The injuries did not create a substantial risk of death, protract-
People v Diaz, 163 AD3d 110, 78 NYS3d 792
(3rd Dept 6/14/2018)

STRATEGIC DECISIONS / BY DEFENSE COUNSEL

ILSAPP: In the defendant’s appeal from multiple convictions, he presented arguments relating to the division of final decision-making authority between a represented defendant and his attorney. The defendant contended that: (1) Washington County Court impermissibly allowed counsel to overrule his preference to pursue a psychiatric defense at trial; and (2) following certain prejudicial testimony, counsel abdicated strategic decision-making authority to the defendant by ceding to him the choice as to whether to forgo a mistrial application. On both points, the Third Department disagreed. A defendant retained authority over whether to plead guilty, waive a jury trial, testify in his own behalf, and take an appeal. In contrast, with respect to tactical decisions concerning the conduct of trials, defendants were deemed to have reposed authority in their lawyers. Whether to present a psychiatric defense was a strategic decision involving the exercise of professional judgment, over which defense counsel retained ultimate power. Counsel fully explored a possible defense and made a reasonable decision, which resulted in the defendant’s acquittal of attempted second-degree murder. The choice to seek a mistrial or not was also one for the lawyer. After prejudicial testimony, the defendant had moved for a mistrial. Upon conferring with the defendant, counsel withdrew the application and sought a strong curative instruction. The trial court confirmed with the defendant that he wished to proceed with the trial. The record thus reflected that counsel had properly consulted with the defendant before opting to withdraw the motion. Under these circumstances, the defendant was not deprived of his Sixth Amendment right to the expert judgment of counsel. (County Ct, Washington Co)

People v Maus, 162 AD3d 1415, 80 NYS3d 509
(3rd Dept 6/28/2018)

SORA / SUA SPOONTE DEPARTURE / REVERSAL

ILSAPP: Rensselaer County Court classified the defendant as a level-two sex offender. The court’s sua sponte assessment of 20 points under risk factor 4, without prior notice, deprived the defendant of a meaningful opportunity to respond to that assessment. The Third Department reversed and remitted the matter for a new hearing that complied with Correction Law § 168-n (3) and due process. Arthur Dunn represented the appellant. (County Ct, Rensselaer Co)

Matter of Cecilia P., 163 AD3d 1095, 81 NYS3d 289
(3rd Dept 7/5/2018)

SUSPENDED JUDGMENT REVOKED / REMITTAL

ILSAPP: In permanent neglect proceedings in Delaware County, numerous violations of the terms of a suspended judgment were established. However, the bests interests of the child had to be considered to arrive at an appropriate disposition. Family Court did not make the requisite findings, and the record lacked evidence relating to the child’s present circumstances and relationship to the respondent and the potential effect on that child of the termination of parental rights and adoption. Thus, the matter was remitted for a full dispositional hearing. Teresa Mulliken represented the appellant. (Family Ct, Delaware Co)

People v Croley, 163 AD3d 1056, 80 NYS3d 534
(3rd Dept 7/5/2018)

MURDER / ACCESSORY / DISMISSAL

ILSAPP: During a joint Albany County jury trial, the People argued that the codefendant shot the victim with the intent to kill, and the defendant aided him with the knowledge of such intent. Surveillance video and cell phone records were introduced to support the theory that the defendant assisted in the crime by tracking the victim’s whereabouts, driving the codefendant to the scene, and acting as a getaway driver. The defendant was convicted of second-degree murder. The Third Department held that the evidence did not prove that, before the
shooting, the defendant knew that the codefendant planned to kill the victim and shared such intent. The defendant could have had other plausible reasons for wanting access to the victim, such as robbery or assault. The judgment was reversed, and the indictment was dismissed. Matthew Hug represented the appellant. (County Ct, Albany Co)

**Matter of Hensley v DeMun**, 163 AD3d 1100, 81 NYS3d 282 (3rd Dept 7/5/2018)

**RIGHT TO COUNSEL VIOLATION / NEW HEARING**

**ILSAPP:** The father appealed from an order of Chenango County Supreme Court awarding sole custody to the mother and finding that he had violated a prior custody order. The Third Department reversed and remitted for a new hearing. When the father appeared at the hearing unrepresented, the trial court erred in proceeding without first ascertaining that he was unequivocally waiving the right to counsel and conducting a searching inquiry. The violation of his right required reversal without regard to the merits of his position. Larisa Obolensky represented the appellant. (Supreme Ct, Chenango Co)


**CIVIL MANAGEMENT / CLOSED COURTROOM**

**ILSAPP:** Clinton County Supreme Court denied the motion by the respondent to close the courtroom from press during a high-profile trial of his Mental Hygiene Law article 10 civil management proceedings. Both parties asserted that good cause existed for closure. The respondent sought to protect the confidentiality of his mental health records, whereas the petitioner asserted that the victims’ anonymity should be protected. The Third Department embraced the latter rationale in reversing the challenged order. Mental Hygiene Legal Service (Charles Bayer, of counsel) represented the appellant. (Supreme Ct, Clinton Co)

**People v Lentini,** 163 AD3d 1052, 80 NYS3d 678 (3rd Dept 7/5/2018)

**PROOF RE SEEKING COUNSEL / ERROR TO DENY MISTRIAL**

**ILSAPP:** In the early morning hours, the defendant was driving on a dark road when she struck and killed a pedestrian in her lane of traffic. An investigation revealed that the accident was unreported for more than an hour and that, for part of that period, the defendant might have left the area. At trial, the defendant contended that she did not immediately contact authorities because she was in shock after the victim’s body was propelled through her windshield. In response to a defense motion, the trial court precluded proof regarding the defendant’s efforts to consult with counsel on the night of the accident. A Saratoga County jury convicted the defendant of leaving the scene of an incident without reporting a personal injury, in violation of Vehicle & Traffic Law § 600 (2). On appeal, she contended that County Court should have declared a mistrial after a deputy sheriff testified that she did not feel comfortable answering questions without her lawyer present, and after her boyfriend testified that she called him for his attorney’s number shortly after the accident. Both times, the offending testimony was stricken, a curative instruction was given, and a mistrial was denied. In the view of the appellate court, a mistrial should have been declared. Finding that the People did not deliberately provoke the mistrial, the Appellate Division remitted the matter for a new trial. James Knox represented the appellant. (County Ct, Saratoga Co)

**Richard HH. v Saratoga County Dept. of Social Services,** 163 AD3d 1082, 81 NYS3d 296 (3rd Dept 7/5/2018)

**FCA § 1017 VIOLATION / CUSTODY TO UNCLE**

**ILSAPP:** Two children were removed from their mother’s care and placed with Saratoga County Social Services. There was a violation of Family Ct Act § 1017, which required the agency to do an immediate investigation to locate relatives who might be a placement resource and to give such persons notice and the opportunity to seek custody. Yet DSS and Family Court faulted the uncle for not seeking custody until a year after placement. The Third Department sharply criticized the agency and the court for violating the statute and creating the harm it was meant to prevent—long-term placement in foster care, rather than with a suitable relative. The reviewing court further observed that DSS had ignored the uncle’s initial expression of willingness to be a custodial resource and, along with the trial court, had treated him as an unwelcome intervenor when he filed for custody. The dismissal of his petition was error. Contrary to Family Court’s determination, the record established that the uncle and his wife could provide a suitable home. The opinion of the younger’s therapist, relied on by Family Court, was belied by the record. The uncle was granted custody of the younger child. (The uncle withdrew his petition as to the older child, who reached the age of majority during the pendency of the proceedings.) Pamela Babson represented the appellant. (Family Ct, Saratoga Co)

**People v Wilson,** 163 Add 1049, 80 NYS3d 539 (3rd Dept 7/5/2018)

**JURY DEADLOCK / ERROR TO DECLARE MISTRIAL**
**Third Department continued**

**ILSAPP:** After a controlled-buy operation in Clinton County, the defendant was charged with drug sale and possession counts. The jury had deliberated for only two hours when the court received a jury note stating, “There appears not to be any way to a unanimous decision,” and seeking guidance on how to proceed. Without consulting the parties, the trial court summoned the jury into the courtroom and delivered an *Allen* charge. Fifty-one minutes later, County Court recalled the jury and asked whether they were still deadlocked. The foreperson confirmed that they were. Without seeking input from counsel, County Court declared a mistrial. The defendant entered an *Alford* plea. The Third Department dismissed the indictment, concluding that County Court had erred in declaring a mistrial, jeopardy attached, and the People were precluded from reprosecuting the defendant. Lisa Burgess represented the appellant. (County Ct, Clinton Co)

**People v Yerian,** 163 AD3d 1045, 78 NYS3d 814  
(3rd Dept 7/5/2018)  
**DRUG POSSESSION / NO CONTROL / DISMISSAL**  
**ILSAPP:** After receiving a tip, police obtained a warrant, searched a residential garage, and found drugs and various household items used to manufacture meth. The defendant and two other persons were there. A Cortland County jury found the defendant guilty of second-degree criminal possession of a controlled substance based on a theory of constructive possession. The Third Department held that the proof—the defendant’s presence in the garage/meth lab, knowledge of the existence of an illegal substance there, and prior drug use—did not establish her dominion or control over the drugs. The judgment of conviction was reversed, and the indictment was dismissed. The Rural Law Center of New York (Kelly Egan, of counsel) represented the appellant. (County Ct, Clinton Co)

**People v Smart,** 163 AD3d 1039, 80 NYS3d 687  
(3rd Dept 7/5/2018)  
As the prosecution concedes, the “defendant was deprived of meaningful representation as a consequence of his attorney’s failure to make a pretrial motion to dismiss the action on statutory speedy trial grounds.” The prosecution declared readiness 19 days after arraignment but then expressly stated at the next court appearance that they were not ready, seeking an adjournment to prepare for trial. They did not declare ready until beyond the 90-day period established for misdemeanors under CPL 30.30(1)(b). (Supreme Ct, Clinton Co)

**Matter of Debra SS,** 163 AD3d 1199, 81 NYS3d 621  
(3rd Dept 7/12/2018)  
**EXTRAORDINARY CIRCUMSTANCES / GRANDMOM CUSTODY**  
**ILSAPP:** Broome County Family Court properly found that extraordinary circumstances existed and then awarded joint legal custody of the child to the grandmother, father, and mother, with primary physical custody to the grandmother. Notwithstanding Family Court’s failure to address best interests, the Third Department could review the record and make its own independent determination. The appellate court concluded that the challenged order was indeed in the best interests of the child. The grandmother had been the child’s primary caregiver since 2009 and had fostered the parents’ relationship with the child. The father had not maintained a stable home or addressed his mental health problems. The mother, who had supported primary custody in the grandmother, did not appeal from the challenged order. (Family Ct, Broome Co)

**Matter of Lee v Lee,** 163 AD3d 1217, 77 NYS3d 319  
(3rd Dept 7/12/2018)  
**EXPOSURE TO PEANUTS AND CAT / MOOT APPEAL**  
**ILSAPP:** In Saratoga County Family Court, the mother filed a modification petition alleging that there had been a change in circumstances. In violation of the recommendation of the pediatrician, the father had taken the oldest child to an Asian restaurant where peanuts were an ingredient in the food. Further, the father had exposed the youngest child to his pet cat, even though the child was allergic to cats. Family Court dismissed the petition. While the mother’s appeal was pending, the father filed a modification petition seeking additional visitation. An order on consent granted him expanded access. Although the order did not specifically address the issues raised in the mother’s petition, it did impose restrictions on the conduct of the parties. Since the order dealt with the father’s conduct during visitation—the same issue raised in the mother’s petition—her appeal was moot, the Third Department held. (Family Ct, Saratoga Co)

**People v Hulstrunk,** 163 AD3d 1177, 79 NYS3d 397  
(3rd Dept 7/11/2018)  
**SCI / JURISDICTIONAL DEFECT**  
**ILSAPP:** In Saratoga County, the defendant was charged in felony complaints with menacing a police officer and criminal possession of a weapon in the second degree. He agreed to waive indictment and plead guilty to a SCI charging him with reckless endangerment in the first degree. The plea agreement included a waiver of the right to appeal. On appeal, the defendant contended that the waiver of indictment and SCI were jurisdictionally
defective. The Third Department agreed and noted that the issue was not precluded by the defendant’s guilty plea or appeal waiver and was not subject to the preservation requirement. The crime charged in the SCI, reckless endangerment, was not an offense for which the defendant was held for action of a grand jury, nor was it a lesser included offense of the crimes charged in the felony complaints. The plea was vacated, and the SCI was dismissed. Brian Quinn represented the appellant. (County Ct, Saratoga Co)

**People v Myers,** 163 AD3d 1152, 80 NYS3d 727 (3rd Dept 7/12/18)

**ORDER OF PROTECTION / WITNESS DID NOT SEE CRIME**

**ILSAPP:** After taking pictures of a fight outside his home, the victim was shot in the head, and he lapsed into a vegetative coma. One of the victim’s neighbors, Frank Galaska, said that on the date in question outside his apartment, he saw people screaming and arguing and the victim taking pictures, but he did not see who shot him. Another neighbor, Frank McGivern, saw the victim taking photos, then observed someone’s arm rising, heard a pop, and saw a flash. McGivern then saw the victim fall to the ground. He identified the defendant as the shooter. The defendant was convicted by a Rensselaer County jury of first-degree assault and second-degree criminal possession of a weapon. The Third Department held that County Court erred in failing to suppress photographs of Galaska. An order of protection may be entered for the benefit of a witness who actually witnessed the offense for which the defendant was convicted. Thus, the order of protection for Galaska’s benefit was vacated. Dennis Lamb represented the appellant. (County Ct, Rensselaer Co)

**People v Carey,** 163 AD3d 1289, 82 NYS3d 642 (3rd Dept 7/19/2018)

**SUPPRESSION DENIED / VIGOROUS DISSENT**

**ILSAPP:** At 3:30 a.m. one night, an officer stopped a vehicle after running its license plate and learning that the registration was suspended. The driver told the officer that he did not have his driver’s license. The officer asked the defendant passenger for identification, which he provided. A computer search revealed that the defendant was on parole. The officer asked the defendant why he was on parole, and he responded, “sales.” When the officer detected the odor of alcohol, he asked the defendant if he had been drinking. The defendant said no. Then the officer did a protective pat frisk, purportedly for his own safety. Upon opening the defendant’s backpack, the officer found a bag containing ammunition, handcuffed the defendant, and searched his person. The officer observed the handle of a handgun in the defendant’s front pocket, alerted another officer at the scene, and gave her the weapon. The defendant moved to suppress. Following a hearing, Ulster County Court denied the motion. The defendant pleaded guilty to criminal possession of a weapon in the second degree. The Third Department affirmed. The defendant was a parolee in apparent violation of his curfew and the standard no-alcohol prohibition. On the night in question, the hour was late, the driver was unlicensed, and the vehicle unregistered. Further, the defendant’s “sales” response and denial of alcohol use “heightened the volatility of the situation.” A single justice dissented. In her view, the proof did not show that the defendant posed a safety concern. He was not combative, and he followed instructions. There was no proof that the officer observed any bulges suggesting a weapon. The defendant did not make suspicious movements. No proof indicated that the officer felt threatened by the defendant’s terse remark about his parole status or established that a volatile situation existed. (County Ct, Ulster Co)

**Franza v State of New York,** 164 AD3d 971, 83 NYS3d 361 (3rd Dept 8/2/2018)

**PAROLE DENIED / ARTICLE 78 REVIEW**

**ILSAPP:** Claimant, an inmate, commenced an action seeking damages for an alleged violation of his due process rights by the Board of Parole in declining to release him following a hearing. He complained about the Board’s failure to promulgate written procedures that incorporated risk and needs principles, as required by 2011 amendments to Executive Law § 259-c (4). The Court of Claims granted a motion to dismiss, and the appellate court affirmed. Executive Law Article 12-B did not authorize a private right of action for damages. Since Article 78 proceedings allowed for judicial review of parole release decisions, it was fair to infer that, had the legislature intended to create a private right of action, it would have done so. (Court of Claims)

**People v Jemmott,** 164 AD3d 953, 82 NYS3d 657 (3rd Dept 8/2/2018)

**DEFECTIVE WARRANT / HARMLESS ERROR**

**ILSAPP:** The defendant was convicted of 2nd and 3rd degree CPW. On appeal, he maintained that Ulster County Court erred in failing to suppress photographs of a gun retrieved during a search of his cell phone. The Third Department agreed. The warrant was based on a detective’s affidavit discussing the underlying incident and detailing the affiant’s knowledge of gang activity in the area of the arrest. County Court reasoned that, as a
matter of “common sense and every day experience,” the application was sufficient. Recent U.S. Supreme Court decisions have emphasized the significant privacy interest in information stored in one’s cell phone, the reviewing court observed. Here the allegations did not indicate that the search would yield salient evidence. However, the photographs did not reveal that the gun depicted was the one seized. Given the overwhelming proof linking the defendant to the gun, the error was harmless. (County Ct, Ulster Co)

**People v Lang, 164 AD3d 963, 82 NYS3d 229**

**(3rd Dept 8/2/2018)**

**PLEA VOLUNTARY / WORSE RESULT AFTER TRIAL**

**ILSAPP:** The defendant, then age 70, fatally shot his brother outside their Essex County farmhouse. He pleaded guilty to manslaughter in the first degree and was sentenced to a determinate term of 15 years, followed by five years’ post-release supervision. The Third Department reversed, finding that the plea was coerced. 127 AD3d 1253. Following a trial, the defendant was convicted of murder and 4th degree CPW and sentenced to an aggregate term of 17 years to life. The Third Department sustained denial of a motion to suppress the defendant’s statements to police. Generally, a person in custody cannot be questioned without receiving Miranda warnings. An exception exists where the questions are a reasonable response to an exigent situation. At the hearing, a State trooper testified that he went to the defendant’s house in response to a 911 call. While en route, he was advised that the defendant reported that he shot his brother, was inside the house, and had left a gun on the porch. Another trooper arrived. When the defendant emerged, he was not holding anything. Upon arrest, he was asked where the victim and the gun were. Once the gun was secured, a trooper placed the defendant in his police car and Mirandized him. The questions about the location of the victim and gun were meant only to help the victim and to secure the area, the reviewing court stated. An acquittal would not have been unreasonable—the jury could have determined that the defendant was too intoxicated to intend to kill the victim. However, the defendant admitted that he acted purposefully after an argument. Thus, the appellate court concluded that the verdict was not against the weight of the evidence. (County Ct, Essex Co)

**People v Tschorn, 164 AD3d 970, 77 NYS3d 914**

**(3rd Dept 8/2/2018)**

**RECKLESS ENDANGERMENT / MAXIMUM TERM**

**ILSAPP:** Charges against the defendant for reckless endangerment, criminal mischief, and prohibited use of weapons stemmed from an incident that occurred when he and his wife were staying at a relative’s residence in Washington County. They awoke late at night to an alarm triggered on the driveway. The defendant admitted firing multiple rounds from his rifle toward a truck in his driveway. He agreed to plead to the entire indictment without any promise as to sentencing, and County Court imposed the maximum term. On appeal, the defendant urged that the punishment was harsh and excessive. The Third Department affirmed. Notwithstanding mitigating factors, the defendant fired without any regard for the truck’s occupant. A letter from the 71-year-old victim revealed that, even as the truck sped away, the defendant continued to fire. (County Ct, Washington Co)

**People v Gretzinger, 164 AD3d 1021, 82 NYS3d 253**

**(3rd Dept 8/9/2018)**

**SENTENCE REDUCED / EXTRAORDINARY CIRCUMSTANCES**

**ILSAPP:** The parties had one child, born in 2009. The judgment of divorce incorporated a stipulation providing for joint legal custody with primary physical custody to the mother and parenting time to the father. He sought sole custody, and she cross-petitioned to end overnight stays on school nights. Family Court granted the mother’s motion to dismiss and conducted a fact-finding hearing on her petition. Concluding that the child’s Lincoln hearing testimony was coached, the court ordered a psychological evaluation and then denied the cross-petition, but issued an anti-disparagement order. The attorney for the child appealed. The evidence established that the parties’ acrimonious relationship, not mid-week visits, adversely affected the child, the Third Department held. A witness for the mother had testified about the father’s hatred and disparagement of the mother. A change in circumstances was established by such bad-mouthing of the mother in the child’s presence and the child’s declining academic performance. However, the unartfully written order failed to accurately implement the intention to continue the existing visitation schedule. The challenged order was modified accordingly. Pamela Doyle Gee was the attorney for the child. (Family Ct, Chemung Co)
time when they were engaged in tumultuous divorce proceedings. When the husband later learned of the check’s existence, he reported the matter to authorities. On appeal, the defendant argued that jail time was inappropriate. She had no prior criminal record, and County Court had admitted its struggle to fashion an appropriate sentence, citing the unusual nature of the case, the effect that the defendant’s incarceration might have on her children, and her sincere remorse. Yet, the sentencing court concluded that four months’ incarceration, plus five years’ probation, was warranted due to the defendant’s delay in accepting responsibility for her actions. In the view of the Third Department, the circumstances were extraordinary. The defendant has already served 13 days in jail. As a matter of discretion in the interest of justice, the reviewing court reduced the jail component of her sentence to time served. Robert Cohen represented the appellant. (County Ct, Saratoga Co)

People v Rodriguez, 164 AD3d 1024, 83 NYS3d 701 (3rd Dept 8/9/2018)

VIOLATION OF COOPERATION AGREEMENT / DIVIDED COURT

ILSAPP: The defendant appealed from a Schenectady County Court judgment convicting him on his plea of guilty of 1st degree assault. He and his family were the victims of a home invasion burglary that occurred due to a dispute with Jose Sanchez over a minivan. Sanchez and three accomplices, one later identified as Victor Marin, were armed. After threatening the defendant and his family, they left with the minivan. Later the defendant spotted the minivan nearby, and he and the accomplices went to Sanchez’s residence. The defendant confronted Sanchez at gunpoint, and his accomplices stabbed Sanchez’s brother. Sanchez was stabbed and shot, and he died. The defendant was charged with 2nd degree murder and 1st degree assault. He accepted a plea bargain to: (1) plead guilty to 2nd degree murder and 1st degree assault, with proposed sentences of 20 years to life and (2) cooperate fully and truthfully with the District Attorney’s office. He waived his right to appeal. During the plea allocation, the defendant executed an agreement requiring him to “cooperate completely and truthfully with law enforcement authorities, including the police and the District Attorney’s Office, on all matters in which his cooperation is requested.” After the defendant refused to testify at Marin’s trial, the sentencing court imposed consecutive sentences. On appeal, the defendant contended that the agreement only required him to cooperate in the prosecution of accomplices involved in Sanchez’s murder. The majority disagreed. Two judges dissented because the cooperation agreement lacked any language referring to the home invasion or Marin. The focus of the investigation was to identify and prosecute the accomplices involved in the homicide event. Further, the defendant refused to testify at Marin’s trial over concerns for the safety of his family, the dissenters stated. (County Ct, Schenectady Co)

People v Wilson, 164 AD3d 1012, 83 NYS3d 705 (3rd Dept 8/9/2018)

NO FRYE HEARING / INEFFECTIVE ASSISTANCE

ILSAPP: The defendant appealed from judgments of Chemung County Court convicting him, upon a verdict, of burglary, robbery, and several sexual offenses; and, upon a guilty plea, of 2nd degree burglary. On appeal from the judgment on the verdict, the defendant asserted that trial counsel should have requested a Frye hearing to challenge the reliability of the TrueAllele Casework System (System)—a proprietary computer program that used mathematics and statistics to interpret the electronic data generated from the DNA mixtures taken. The System was used in this case to determine the statistical probability of a match between the defendant’s DNA and that found on the inside of a glove found near the apartment of a victim. The Third Department held that this was one of those rare cases where the sole failure of defense counsel—who rendered otherwise proficient representation—constituted ineffective assistance. At the time of the pre-trial proceedings in 2014, no reported New York State decisions established that the reliability of the System had been assessed through a Frye hearing. (Subsequently, a decision was rendered in People v Wakefield, 47 Misc 3d 850.) Thus, a request for a Frye hearing would have been colorable, and the reviewing court could discern no reasonable legitimate explanation for the failure to request a hearing. The expert testimony presented by the People provided the only DNA evidence connecting the defendant to the crimes. Counsel had everything to gain and nothing to lose by challenging the expert’s testimony. Thus, the matter was remitted for a post-trial Frye hearing, and a decision was withheld.

As to the appeal from the judgment entered on the guilty plea, the appellate court held that the defendant did not knowingly, voluntarily, and intelligently enter his plea, since County Court failed to advise him about post-release supervision. Catherine Barber represented the appellant. (County Ct, Chemung Co)
**People v Pendell, 164 AD3d 1063, 82 NYS3d 257**  
(3rd Dept 8/23/2018)

**SEXUAL OFFENSES DISMISSED / DISSENT ON PHOTOS**

The defendant, then 48 years old, was charged with various crimes based on sexual contact with a 14-year-old girl he met through an online adult dating service. While awaiting prosecution, he approached another inmate about having the victim murdered. A second indictment ensued, and the indictments were consolidated. Following a jury trial in Columbia County Court, the defendant was convicted of 2nd degree rape (nine counts), 2nd degree criminal sexual act, possessing a sexual performance by a child (four counts), and 2nd degree criminal solicitation. On appeal, he argued that the convictions for possessing a sexual performance were not supported by legally sufficient evidence because the underlying photographs did not depict genitalia. Pursuant to the relevant statutory provision, sexual conduct means the lewd exhibition of the genitals. Since the photographs relevant to three counts depicted only the victim’s bare chest, the Third Department dismissed such counts. The majority rejected arguments that consolidation of the indictments was improper; the evidence of crimes in each indictment was material and admissible in the trial on the charges in the other indictment. In a lengthy dissent, one justice observed that the People failed to establish that the photographs admitted were true, accurate, and unaltered reproductions of those recovered from the defendant’s cell phone and computer. Such testimony was crucial, given that photographs are vulnerable to manipulation. By not demanding strict adherence to foundational requirements, County Court abdicated its role as gatekeeper. The rules of evidence were meant to protect the criminally accused from prejudice and to safeguard the integrity of the truth-finding process. The photographs played a central role in the People’s overall case, since the substantive questioning of all of witnesses was “shockingly minimal,” the dissenter stated. Matthew Hug represented the appellant. (County Ct, Columbia Co)

[Ed. Note: Leave to appeal was granted on Oct. 23, 2018 (32 NY3d 1069)]

**People v Carrigan, 159 AD3d 1385, 73 NYS3d 689**  
(4th Dept 3/16/2018)

The court “erred in denying his motion for a trial order of dismissal with respect to counts one and two of the indictment, both charging him with use of a child in a sexual performance, on the ground that the indictment failed to provide defendant with sufficient notice of the time periods during which he allegedly committed those acts ....” (County Ct, Onondaga Ct)

**People v Cooper, 159 AD3d 1446, 71 NYS3d 126**  
(4th Dept 3/16/2018)

Reversal is required where the record shows that the defendant was excluded from the court’s *Sandoval* conference, and it cannot be said that his presence would have been superfluous given that the court’s *Sandoval* ruling was not wholly favorable to the defendant. (Supreme Ct, Monroe Co)

**People v Freeman, 159 AD3d 1334, 72 NYS3d 660**  
(4th Dept 3/16/2018)

The court erred in refusing to give a justification defense charge to the jury on certain counts, where the defendant had earlier been shot by members of a family and testified that others connected to that family were at his home when he arrived on the date in question, and one of them approached him aggressively while holding something, making the defendant fear he was about to be shot again. While his claim that he shot that person in self-defense is dubious, a trial court is required to give the justification charge even where the defendant’s version of events is “extraordinarily unlikely” .... The jury deliberated for over two days and requested readbacks of much testimony, indicating it struggled with the case. (County Ct, Monroe Co)

**People v Hardy, 159 AD3d 1485, 72 NYS3d 312**  
(4th Dept 3/16/2018)

No rule requires that new counsel be assigned whenever defendants file a grievance against their lawyer, but some inquiry must be made. Here, where the defendant asked the court “to substitute his second assigned attorney,” the judge “should have ‘made at least some minimal inquiry in light of defense counsel’s statement that the defendant had filed a grievance against him’” to determine whether counsel “was properly able to continue to represent” the defendant. The defendant’s right to counsel was violated, requiring a new trial. (County Ct, Orleans Co)
Fourth Department continued

People v Henry, 159 AD3d 1477, 72 NYS3d 688 (4th Dept 3/16/2018)

Because “no rational trier of fact could have found beyond a reasonable doubt that the defendant shot the victim” when viewing the evidence in the light most favorable to the prosecution, the defendant’s conviction of first-degree murder is not supported by legally sufficient evidence. The defendant and his girlfriend were both present when the decedent is believed to have been shot, but only scant and weak circumstantial evidence was offered as to the actual shooting. As the defendant concedes, the evidence was sufficient to support either form of second-degree murder charged as lesser included offenses of first-degree murder. (Supreme Ct, Monroe Co)

Dissent: While the defendant’s girlfriend was present, there is no evidence to suggest that she, unlike him, had a plan to kill the decedent or had even touched the murder weapon found in the defendant’s possession at his arrest.

People v Owens, 159 AD3d 1349, 72 NYS3d 285 (4th Dept 3/16/2018)

As the prosecution concedes, the court abused its discretion in refusing to reopen the proof after the defendant noted images in a surveillance video, which was admitted into evidence but played in court only during summation, that could be used to impeach the testimony of the accuser. To the extent that the defendant failed to preserve for appeal the constitutional aspects of his contentions, concerning his rights to present a defense and confront his accuser, they are reviewed in the interest of justice.

The video had been in trial defense counsel’s possession for months, but due to technical difficulties counsel had only viewed portions of it, and did not review the camera angles with the defendant despite the defendant’s insistence before trial that he be provided the footage. The defendant was denied meaningful representation. (Supreme Ct, Monroe Co)


Here, “an indeterminate term of imprisonment of 25 years to life as a persistent violent felony offender, is unduly harsh and severe,” where the defendant “did not fire or even directly possess the weapon, and there is no evidence that he knew that his codefendant intended to use it unlawfully.” While the defendant has multiple prior felony convictions, including several for weapon offenses, he has no history of violence and his conduct here does not warrant the maximum allowable sentence. As a matter of discretion in the interest of justice, the sentence is reduced to 16 years to life. (Supreme Ct, Erie Co)

People v Ruiz, 159 AD3d 1375, 73 NYS3d 308 (4th Dept 3/16/2018)

The defendant’s unpreserved “contention that the testimony of the expert was improperly utilized to prove that the charged crimes occurred and to bolster the victim’s testimony” warrants reversal in the interest of justice as the error operated to deprive him of a fair trial. While expert testimony concerning child sexual abuse accommodation syndrome (CSAAS) “and similar psychological syndromes has long been admissible to explain the behavior of a victim that might be puzzling to a jury,” the expert here went beyond educating “the jury on a scientifically-recognized ‘pattern of secrecy, helplessness, entrapment [and] accommodation’ experienced by the child victim” “… .” The expert explained behaviors associated with perpetrators of child sexual abuse, including “‘grooming,’” using descriptions that closely tracked the accuser’s testimony about the defendant’s conduct; on summation the prosecutor urged the jury to find that that the interactions of the defendant with the accuser fit the typical conduct described by the expert. (County Ct, Genesee Co)

Matter of Ruth H., 159 AD3d 1487, 72 NYS3d 694 (4th Dept 3/1/2018)

FOSTER CARE OKAY FOR KIDS, BUT NOT CAT

ILSAPP\(^1\): After a Family Ct Act § 1027 hearing, Oswego County Family Court found that temporary removal of the children was in their best interests, based upon the parents’ failure to provide adequate nutrition and their uninhabitable home. The trial court also determined that the petitioner agency had failed to make reasonable efforts to prevent the removal; and the court ordered the agency to find a foster home for the family cat. The agency appealed. The Fourth Department concluded that the agency did make reasonable efforts by providing considerable assistance during the months prior to the filing of the neglect petition. The support to the parents included public assistance for rent, medical treatment, food stamps, and weekly caseworker meetings. Further, the trial court erred in ordering the petitioner to find a home for the cat. Family Court lacks jurisdiction over personal property. (Family Ct, Oswego Co)

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\(^1\)Summaries marked with these initials are courtesy of the New York State Office of Indigent Legal Services; prepared by Cynthia Feathers, Director of Quality Enhancement For Appellate and Post-Conviction Representation and appearing on the ILS appellate listserv.
Fourth Department continued

**Matter of Sorrentino v Keating, 159 AD3d 1505, 71 NYS3d 793 (4th Dept 3/16/2018)**

CUSTODY / WRONG TO MAKE MOTHER MOVE

ILSAPP: Monroe County Family Court granted the parents joint legal custody and shared physical custody of their child and required the mother to relocate and maintain a residence within 35 minutes’ drive of the father’s residence, rather than her current distance of 90 miles. The mother and AFC appealed. The Fourth Department agreed with them that the mother should have primary physical custody and not be required to relocate. The father traveled extensively for work and was absent from his home—an apartment in the dormitory on a college campus where he worked—for five to six weeks at a time. The mother had a job with no travel obligations and a support system in her community, and she had always been the primary caregiver for the child. Kathryn Friedman and Tanya Conley represented the mother and child, respectively. (Family Ct, Monroe Co)

**People v Sweat, 159 AD3d 1423, 72 NYS3d 684 (4th Dept 3/16/2018)**

The court’s determination on remittal, that the defendant lacks standing to challenge the warrantless search of the home where the gun involved here was found, was error. Unrefuted testimony at the suppression hearing established that the defendant had lived there until two months before the incident; maintained that address as his permanent mailing address; continued to keep clothes there; came back often to care for his young relatives, was entrusted to care for the home when his relatives were away; visited often; and slept overnight there five to 12 times per month. He had a reasonable expectation of privacy in the house. Matter again remitted, for determination of whether a lessor of the home consented to the search. (Supreme Ct, Erie Co)

**People v Anderson, 159 AD3d 1592, 72 NYS3d 741 (4th Dept 3/23/2018)**

The claim that alleged propensity evidence was improperly admitted at trial is not preserved. The defendant was not denied effective assistance of counsel where the unobjected-to evidence was used to support the defense claim to the jury that the defendant’s admissions about the killing in question constituted no more than “‘talking tough’ because he was afraid of being in jail.” (County Ct, Monroe Co)

**Dissent:** The “defendant was denied a fair trial by the admission of egregious and prejudicial propensity evidence, and was also denied effective assistance of counsel by his attorney’s failure to seek appropriate redaction of that evidence.” The majority wrongly asserts that redaction—of material in which the defendant discussed killing people, other people’s observations that he tended toward homicidal behavior, and “his prolific use of guns”—would have highlighted the legally admissible confession. “If history is any guide, the propensity evidence more likely led the jury to conclude that, even if defendant was being untruthful about having killed someone at the early age of 14, he had almost certainly killed someone in the intervening years and therefore deserved to be imprisoned for murder in this case.”

**People v Carey, 159 AD3d 1529, 73 NYS3d 709 (4th Dept 3/23/2018)**

While the defendant objected to the jury instruction on the theory of larceny by trick because the theory was not alleged in the indictment or bill of particulars, he did not object on the grounds that the evidence did not support the instruction. He further failed to preserve the insufficient evidence claim as to larceny by trick in his motion for a trial order of dismissal, arguing therein only that the evidence did not establish that money was taken from the accuser or that the defendant exercised dominion and control over the accuser’s money. But the contention that the verdict is against the weight of the evidence as to whether some trick or artifice was used to obtain property from the victim has merit; conviction on that count is reversed and the count dismissed. (County Ct, Ontario Co)

**Carney v Carney, 160 AD3d 218, 73 NYS3d 694 (4th Dept 3/23/2018)**

“We agree with defendant and the amici public defender organizations that the court had no authority to deprive defendant of his constitutional and statutory right to counsel on the basis of imputed income, and it therefore lacked the authority to conduct a hearing on that issue ....” “[T]here is no statutory authority for imputing income in determining eligibility for assigned counsel,” and the phrase “‘is financially unable to obtain’ counsel (Family Ct Act § 262 [a]) ... evinces that the requisite inquiry must relate to the person’s present financial ability to pay for counsel.” The court’s public policy rationale is unsound; a child support obligation is an ongoing responsibility, which may be paid over a period of time, while “the immediate need for representation” cannot be fulfilled “by paying a private attorney with hypothetical, imputed income.” Concerns about an imbalance between requiring a party in a better financial position to pay for counsel when seeking to enforce compliance with prior orders or defend against petitions while the opposing
party is assigned counsel do not warrant denying the defendant counsel to assist him in defending against potential jail time for willful violation of court orders. (Supreme Ct, Monroe Co)

**People v Cator, 159 AD3d 1583, 72 NYS3d 736 (4th Dept 3/23/2018)**

A deputy driving to the defendant’s home on an unrelated matter, who saw “an ‘hysterical’ woman waving and pointing at a black sedan that was entering the roadway from a driveway,” lacked a reasonable suspicion that the occupants of that car had committed, were committing, or were about to commit a crime. The court’s order suppressing physical evidence and statements by the defendant obtained after the deputy stopped the defendant’s car is affirmed and the indictment dismissed. (County Ct, Yates Co)

**People v Conway, 159 AD3d 1555, 73 NYS3d 720 (4th Dept 3/23/2018)**

The defendant failed to preserve his contention that the court acted contrary to Judiciary Law 390(1), as amended in 2015, when it discharged a deaf juror after making reasonable but unsuccessful efforts to obtain sign language interpretation services. The law became effective several months after jury selection here.

The court’s error in allowing the prosecution to introduce “the photograph of a handgun taken with a camera that had been seized by the police from defendant’s storage unit,” where the prosecutor had said before trial that nothing seized at the unit would be offered, was harmless. (County Ct, Onondaga Co)

**People v Daniels, 159 AD3d 1582, 73 NYS3d 343 (4th Dept 3/23/2018)**

The “defendant’s statements throughout the plea proceeding called his guilt into question and suggested that his plea was not voluntary.” He said during the colloquy that he had possessed cocaine with the intent to sell but had not sold it, then after being told the court would not accept his plea answered “yes” when asked if he sold the cocaine, but added that he was only pleading guilty “because he could ‘no longer go forward to proceed to trial with the level of corruption and maliciousness being used to prosecute’ him.” The recitation of facts on the allocution record permit review of the issue despite the absence of a motion to withdraw the plea, and warrant a finding that the court failed to insure that the defendant knowing, intelligently, and voluntarily entered the plea. (County Ct, Jefferson Co)

**People v Davis, 159 AD3d 1531, 73 NYS3d 711 (4th Dept 3/23/2018)**

Where the prosecution failed to provide the required CPL 710.30(1)(b) notice, the court erred by summarily refusing to preclude police identification testimony. While the prosecution asserted in response to the defendant’s omnibus motion that nothing had occurred that would require a notice, the record established “that the officer and his partner may have engaged in showup identification procedures ….” The officer who unsuccessfully chased the defendant, who fled from a parked vehicle when the police approached, knew the defendant had been apprehended because the officer saw him after another officer took him into custody; the initial officer then identified the defendant at the station where the other officer had brought him. “[I]n the absence of a hearing on the identification issue, the record is insufficient to support the conclusion that the partner did not perform an identification procedure.” The court did not rule on whether the identification was merely confirmatory; that issue must be resolved after a hearing. Decision reserved, matter remanded. (Supreme Ct, Monroe Co)


The court erred in dismissing the CPLR article 78 petition seeking to annul a determination that the petitioner violated various inmate rules where “the Hearing Officer erroneously refused to consider evidence of petitioner’s mental condition.” The mental state of an inmate is deemed to be at issue when the hearing has been delayed because the inmate became an inpatient at a psychiatric center. The passage of nearly three years since the incident heightens the difficulty of ensuring a due process hearing to the petitioner now, and the petitioner has already served the time in a special housing unit imposed in this tier III disciplinary matter, making a new hearing unwarranted. The determination is annulled and all references to the asserted violation of rules must be expunged from the petitioner’s institutional record. (Supreme Ct, Wyoming Co)

**Matter of Kelley v Fifield, 159 AD3d 1612, 72 NYS3d 754 (4th Dept 3/23/2018)**

The court erred by dismissing the father’s custody petition sua sponte having “determined that it could not grant supervised visitation to which the father was already entitled ....” Although the father did not seek leave to appeal and the order dismissing the petition did
not determine a motion made on notice and so is not appealable as of right, the notice of appeal is treated as an application for leave to appeal and granted in the interest of justice. The previous order required supervised visitation with the child “under such circumstance and conditions as the parties can mutually agree” and the mother had subsequently failed to allow any contact for three years. In the petition seeking modification, not filed as a motion to enforce, the father “requested ‘correspondence with the child’ and ‘supervised visitation to reconnect with the child.’” The court erred in taking a view that modification of the previous order was not available. Because the father made a sufficient evidentiary showing of change of circumstance the court should have commenced a hearing. The order is reversed, the petition reinstated, and the matter is remitted for a hearing. (Family Ct, Onondaga Co)

People v Miller, 159 AD3d 1608, 72 NYS3d 750
(4th Dept 3/23/2018)

BURGLARY / DISSENTERS SAY DEFENDANT WANTED TO WALK DOG

ILSAPP: The appellate court affirmed the Wyoming County conviction of second-degree burglary and petit larceny based on proof that the defendant entered an ex-girlfriend’s residence with the intent to steal her dogs. Two dissenting justices concluded that the verdict was against the weight of evidence. The complainant conceded that the defendant was a joint owner of the dogs. He helped buy the pets and paid toward their continuing care. Moreover, there was no dispute that the complainant had previously consented to the defendant using a window to enter her house and gain access to the dogs. It appeared that, prior to arrest, he simply intended to take the dogs for a walk and then return them. (County Ct, Wyoming Co)

People v Petrangelo, 159 AD3d 1559, 70 NYS3d 438
(4th Dept 3/23/2018)

“Although not raised by the parties, we note that the judgment must be modified by vacating the sentence and the matter must be remitted to County Court for resentencing because the court did not specify the length of the term of probation ....” This renders the defendant’s challenge to his sentence academic. (County Ct, Onondaga Co)

People v Pressley, 159 AD3d 1619, 70 NYS3d 439
(4th Dept 3/23/2018)

Upon reargument, the following is added to the memorandum and order entered Dec. 22, 2017. The court also erred in requiring the defendant to proceed pro se on the prosecution’s motion to compel a buccal swab to obtain a DNA sample for testing. The error was not harmless where “the evidence apart from the DNA evidence is not overwhelming, and there is a reasonable possibility that the error contributed to the conviction ....” Decision reserved, matter remitted for further proceedings on the prosecution’s motion after counsel is assigned for the defendant. (Supreme Ct, Monroe Co)

[Ed. Note: The decision in People v Pressley (156 AD3d 1384 [2017]) said that “the court erred in requiring him to proceed pro se at the Huntley hearing inasmuch as defendant did not waive his right to counsel at the hearing ....”]

People v Reed, 159 AD3d 1551, 73 NYS3d 339
(4th Dept 3/23/2018)

The court erred in denying the defendant’s CPL 440 motion without a hearing. A law enforcement officer testified at a suppression hearing that, in investigating an alleged assault by the defendant on a minor, the police had sought the minor’s location by “pinging” a cell phone belonging to the minor; the court ruled the defendant lacked standing to challenge the “pinging.” In support of his 440 motion, the defendant submitted police reports showing that police had pinged a phone belonging to the defendant along with affidavits indicating that the minor’s phone was broken at the time and that this was known to police. This constitutes credible evidence that the officer’s suppression hearing testimony was false, the prosecution knew or should have known it was false, and failed to disclose material, exculpatory evidence to the defense. (Supreme Ct, Erie Co)

Matter of Reynolds v Evans, 159 AD3d 1562, 72 NYS3d 722 (4th Dept 3/23/2018)

NJ SUPPORT MODIFICATION / PETITION REINSTATED

ILSAPP: The father sought to modify a New Jersey child support order. He resided in New York, and the mother and child had relocated to Tennessee. Ontario County Family Court erred in dismissing the petition based on a lack of subject matter jurisdiction. While the father could not bring the petition under the Uniform Interstate Family Support Act, he could do so under the Full Faith and Credit for Child Support Orders Act, which preempted UIFSA. See Matter of Bowman v Bowman, 82 AD3d 144. The challenged order was reversed, the petition reinstated, and the matter remitted for further pro-
ceedings. The Ontario County Public Defender (Mollie Dapolito, of counsel) represented the appellant. (Family Ct, Ontario Co)

People v Wilson, 159 AD3d 1600, 72 NYS3d 748 (4th Dept 3/23/2018)

The court erred in summarily denying the defendant’s motion to withdraw his plea; the defendant contended in that motion that the prosecution failed to disclose the autopsy and toxicology reports of the motorcyclist killed in the motor vehicle accident underlying the charges of against the defendant. “[W]e conclude that it would undermine the prosecutor’s Brady obligations if a defendant is deemed to have forfeited his or her right to raise an alleged Brady violation by entering a plea without the knowledge that the People possessed exculpatory evidence ....” To the extent that prior decisions hold a guilty plea forfeits the right to raise Brady claims, they are not to be followed. The prosecution’s contention that the reports do not contain exculpatory material is rejected. (County Ct, Seneca Co)

People v Wilson, 159 AD3d 1542, 73 NYS3d 715 (4th Dept 3/23/2018)

The court did not have authority to amend a previously dismissed count and elicit a guilty plea to the amended count. The defendant had pleaded guilty to count 14 of the indictment, along with one count in each of two other indictments, but the court was then informed that the agreed-upon plea to count 14 was illegal. At further proceedings, the plea to count 14 was vacated and, at the prosecutor’s suggestion, count three—which had previously been dismissed as the result of a superseding indictment—was purportedly amended and a plea taken to the amended count. That conviction is reversed and the plea vacated. (County Ct, Jefferson Co)

People v Zirbel, 159 AD3d 1545, 73 NYS3d 337 (4th Dept 3/23/2018)

As the facts of People v Coon (156 AD3d 105 [2017]) are nearly indistinguishable from those here, the court lacked the authority to sentence the defendant to more prison time for violation of probation where he served all four years of the one and one-third to four year prison term imposed for his driving while intoxicated and related convictions before beginning the probation portion of the sentence with its ignition interlock device requirement. That the term of incarceration was an indeterminate sentence rather than the definite one-year jail term in Coons is immaterial. (County Ct, Cayuga Co)

People v Boykins, 161 AD3d 183, 75 NYS3d 386 (4th Dept 4/27/2018)

The 2004 and 2009 Drug Law Reform Acts (DLRA) removed the court’s “discretion to sentence a defendant convicted of a drug felony as a persistent felony offender [PFO].” While the illegally of the defendant’s PFO sentence issue, raised in his 440.20 motion, could have been raised on direct appeal from his 2012 sentence, it was not raised or decided on the merits, and he is not barred from asserting it. An analysis of the relevant statutes makes clear that a defendant convicted of a drug offense must be sentenced under the provisions of Penal Law 60.04, notwithstanding any other provisions of law. The motion to vacate the sentence should be granted, the sentence set aside, and the matter should be remitted for resentencing. (County Ct, Yates Co)

People v Case, 160 AD3d 1448, 76 NYS3d 696 (4th Dept 4/27/2018)

The court erred in denying the defendant’s request for a restitution hearing following her conviction upon a retrial. Reversal of the prior judgment and grant of a new trial made irrelevant the restitution hearing held after the first trial. Upon a defendant’s request, Penal Law 60.27(2) requires a hearing “irrespective of the level of evidence in the record’ ....” The restitution amount is vacated and the matter remitted for the required hearing. (County Ct, Genesee Co)


The prosecution’s CPLR article 78 petition to prohibit the County Court from enforcing a disclosure order is granted. The respondent could have viewed in camera the video of a child victim’s interview by child advocacy center staff to determine whether it constitutes exculpatory evidence, but declined to do so and ordered disclosure to the defense, noting that “only defense counsel, with full knowledge of the defendant’s case[, could] make the proper assessment.” As the respondent acknowledged, he lacked authority to order early disclosure of the video as potential Rosario material, as the witnesses involved are not to testify at a pretrial hearing and Rosario need not otherwise be disclosed before the jury has been sworn (or commencement of a bench trial) and the prosecutor’s opening address (or before submission of evidence). There has been no determination that the video contains exculpatory evidence.
**Fourth Department continued**


The part of the determination finding that the petitioner violated inmate rules that relate to rules against fighting, violent conduct, and creating a disturbance “is not supported by substantial evidence” where the videotape of the incident in question shows that the petitioner “was defending himself from an unprovoked, surprise attack from another inmate” and did not engage in conduct beyond what was necessary to defend himself. The part of the determination finding the petitioner to have violated rules charged in that misbehavior report is annulled. While there is no need to remit for reconsideration given that the petitioner has served the penalty imposed, the record is not clear as to the relationship between this part of the determination and a recommended loss of good time; the matter is remitted for reconsideration of that recommendation in light of this decision.

**People v Grant, 160 AD3d 1406, 76 NYS3d 226 (4th Dept 4/27/2018)**

The court erred in summarily denying the defendant’s motion to vacate his second-degree arson conviction where the motion was supported by a prosecution witness’s affidavit recanting her trial testimony that the defendant had admitted starting a certain house fire which was the basis for the defendant’s conviction. No police affidavits were submitted opposing the witness’s claim that police said her children would be removed if she testified for the defendant. If the witness’s trial testimony was false, it was “extremely prejudicial” given that there was no other evidence to support the defendant’s conviction for the particular fire. (Supreme Ct, Monroe Co)

**People v Heideman, 160 AD3d 1480, 72 NYS3d 873 (4th Dept 4/27/2018)**

“Contrary to defendant’s contention, the court ‘was not required to explain that the waiver of the right to appeal would specifically encompass the court’s discretionary determination on youthful offender status’ ....” (County Ct, Genesee Co)

**People v Hoffman, 160 AD3d 1485, 76 NYS3d 706 (4th Dept 4/27/2018)**

The prosecution properly concedes that the court erred when determining the defendant’s risk level under the Sex Offender Registration Act by assessing 30 points under the factor dealing with age of the victim. In 2014, the defendant pleaded guilty to first-degree sexual abuse involving a person who was 13 or 14 years old. The court’s consideration under risk factor five of a 2002 Family Court determination that the defendant had abused that same victim when she was four was improper. Risk factor five concerns “the ‘Current Offense’” and “there is no clear and convincing evidence that the conduct underlying the 2002 determination constitutes part of the current offenses.” (County Ct, Ontario Co)


The court erred by reversing and vacating an order of the Support Magistrate without: remanding one or more issues of fact; making the court’s own finding of fact and order with or without a hearin; or denying the objections of the party challenging the Support Magistrate’s order. Order reversed, matter remitted “to Family Court to review the mother’s objections to the Support Magistrate’s determination in accordance with Family Court Act § 439 (e).” (Family Ct, Cattaraugus Co)

**People v Hymes, 160 AD3d 1386, 76 NYS3d 679 (4th Dept 4/27/2018)**

Where the court reserved decision and never ruled on the portion of the defendant’s trial order of dismissal relating to the resisting arrest charge, the failure to rule can not be deemed a denial subject to appeal. The case is held, decision reserved, and the matter remitted for a ruling on that portion of the motion. (Supreme Ct, Monroe Co)

**Matter of Jones v Jones, 160 AD3d 1428, 75 NYS3d 400 (4th Dept 4/27/2018)**

While the evidence was insufficient to establish that the father should be relieved of his child support obligation based on the mother’s conduct, the court properly relieved the father of that obligation on the ground that the daughter, of employable age, forfeited her right to support. Both she and the mother “testified unequivocally that the daughter refused to have anything to do with the father by her own choice and for her own reasons,” and “[n]either the conflicting evidence concerning an incident when the daughter was eight or nine, nor the daughter’s vague complaints about the father’s personality, is sufficient to establish that the father caused the breakdown of the relationship ....” (Family Ct, Monroe Co)
People v Lloyd, 160 AD3d 1479, 75 NYS3d 405 (4th Dept 4/27/2018)

Imposition of the maximum term of incarceration for each offense here, to run consecutively, was excessive. The defendant was on probation for nonviolent crimes; had only one other conviction, a misdemeanor nearly contemporaneous with this one; the sole basis for revocation of his probation in this case was his failure to pay restitution, which he admitted; and he paid $2,500 of the $17,775 owed by the time of sentencing. The judgment is modified to direct the sentences run concurrently. (County Ct, Niagara Co)

People v Morales, 160 AD3d 1414, 76 NYS3d 682 (4th Dept 4/27/2018)

The jury may have convicted the defendant on the count of second-degree harassment based on an unindicted theory. The indictment alleged that the defendant slapped the complainant with intent to harass, annoy, or alarm her, but the court instructed that the jury could convict him if they found he shoved the complainant or subjected her to other forms of physical contact; the evidence could have supported either theory. That part of the judgment must be reversed.

The sentence imposed for first-degree rape is unduly harsh and severe. “The alleged incident occurred in the context of an intimate relationship that lasted several months between two otherwise consenting adults who were close in age,” the complainant chose not to report the incident immediately, and in recorded conversations months later, “the complainant repeatedly expressed satisfaction with her relationship, and a willingness to use the criminal justice system to gain the upper hand in it.” The defendant’s criminal history is not extensive, and the court erred in granting the prosecution’s request for an upward departure in the defendant’s risk level under the Sex Offender Registration Act based on the defendant’s “alleged diagnosis of schizophrenia.” Even if the defendant has schizophrenia, there is no record evidence that it is causally related to any re-offense risk. That the defendant “exhibits many symptoms of schizophrenia does not supply the necessary clear and convincing evidence that the disorder is causally related to an increased risk of future sex offending ….” (County Ct, Monroe Co)

People v Roman, 160 AD3d 1492, 72 NYS3d 899 (4th Dept 4/27/2018)

The defendant’s challenge to the voluntariness of her plea due to the court’s failure to advise her of the potential deportation consequences of pleading guilty survives the waiver of the right to appeal, and preservation was not required where “the record bears no indication that defendant knew about the possibility of deportation ….” The prosecution correctly concedes that the court failed to properly advise the defendant about the deportation consequences. Case held, decision reserved, and the matter remanded to provide the defendant an opportunity to show in a motion to vacate the plea that a reasonable probability exists that she would not have taken the plea had she known of the deportation risk it creates. (County Ct, Oneida Co)


Where the father, mother, and grandparents entered into a consent order giving joint legal custody to the mother and grandparents, primary physical residence to the grandparents, and increasing visitation to the father, the court erred in dismissing before trial the father’s amended petition insofar as it sought custody. As there had been no finding of extraordinary circumstances, the father need not prove a change in circumstances as a threshold matter to seeking custody. And while the record shows that extraordinary circumstances exist, in that there has been a prolonged separation of the father and child, the child has lived in the grandparents’ household, and the father voluntarily relinquished care and control of the child during that period, “we nevertheless conclude that the amended petition must be reinstated in its entirety and the matter remitted to Family Court for a hearing to determine whether an award of primary physical custody to the father is in the child’s best interests ….”

As for visitation, “we agree with the father on his cross appeal that the court’s determination to deny that request in part was not based on a sound and substantial basis in the record inasmuch as the court’s written decision is riddled with misstatements and incorrect assertions of fact ….” (Family Ct, Monroe Co)
Fourth Department continued

**People v Smith**, 160 AD3d 1475, 72 NYS3d 910 (4th Dept 4/27/2018)

The judgment is reversed as a matter of discretion in the interest of justice, the plea vacated, and the matter remitted for further proceedings where the record shows that the court, wrongly believing it had the authority to grant the defendant admission into a shock program as part of his sentence for first-degree falsifying business records, made shock admission a condition of the guilty plea. The court lacked such authority, the defendant was not admitted into a shock incarceration program, and the defendant relied on the court’s promise that cannot, as a matter of law, be honored. (County Ct, Monroe Co)


The prosecution failed to establish a prima facie case of discrimination when it made a Batson application to block the defense exercise of a peremptory challenge to a female prospective juror. As the defendant argued, the assertion that the defense had used peremptories only against women was inaccurate; the defense had peremptorily excused two men. Therefore, the court erred in proceeding to the second step of the Batson inquiry and ultimately seating the challenged juror. The issue would be moot if the court had proceeded through step two to step three and found intentional discrimination, but is not moot where the court stopped at step two, wrongly finding the proffered reason for the challenge—that as a hospital nurse, the juror would see potential victims of domestic violence—was not gender neutral. While the remedy would generally be a new trial, the charges were relatively minor and the defendant has served his sentence. The judgment is reversed and the indictment dismissed. (Supreme Ct, Monroe Co)

**People v Bacon**, 161 AD3d 1533, 76 NYS3d 720 (4th Dept 5/4/2018)

The defendant “incorrectly concedes that he did not preserve his challenge to the legal sufficiency of the evidence for our review because, while his motion for a trial order of dismissal was specifically directed at certain alleged deficiencies in the proof ..., the renewed motion was not so directed. Contrary to defendant’s concession, defense counsel’s renewal, directly referencing the earlier motion, is sufficient to preserve for our review his contention that the evidence is legally insufficient to establish that defendant intended to cause serious physical injury to the victim ....” [Internal quotation marks omitted.]

However, viewed in the light most favorable to the prosecution, “the evidence is legally sufficient to establish such intent ....” (Supreme Ct, Onondaga Co)


The court, which declined to exercise jurisdiction and dismissed the father’s custody petition, erred by not following the procedures required by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The father had returned to New York State after the mother and children relocated within Pennsylvania, where all had lived together, without him. The mother began a Pennsylvania proceeding after the father filed in New York. While the court properly communicated with the Pennsylvania court, it failed to allow the parties to participate in that communication or to give them an opportunity to present facts and legal arguments. The record lacks sufficient facts to make a determination as to which state is the most convenient forum; the petition is reinstated and the matter remitted for further proceedings. (Family Ct, Erie Co)

**People v Boryck**, 161 AD3d 1529, 77 NYS3d 242 (4th Dept 5/4/2018)

The court erred in denying without a hearing the defendant’s motion to vacate the judgment against him. The information about a potential witness’s statement that another person admitted to the crime for which the defendant was convicted does not constitute newly discovered evidence; the record shows that the information was provided to police in 2004 and to defense counsel prior to the defendant’s trial. But the trial record indicates that defense counsel said the witness had been subpoenaed and is silent as to why the witness did not appear to testify; a hearing is required to determine whether counsel’s failure to seek to secure the witness’s appearance was the result of a strategic decision. The defendant’s failure to raise this claim in his earlier CPL 440.10 motions was due to the witness’s change of name and residence out of state. The defendant “made a prima facia showing of actual innocence sufficient to warrant a hearing on the merits ....” (County Ct, Monroe Co)


The court “erred in failing to set a specific and definitive visitation schedule” with the mother when it granted the father’s petition for primary physical custody of the child. The order is modified by striking the words “and subject to periods of visitation with the Mother and the Father shall encourage [the child] to visit with her...”
People v Perri, 162 AD3d 1487, 77 NYS3d 815 (4th Dept 6/8/2018)

The court erred in suppressing only a portion of the defendant’s videotaped statement where the portion that was not suppressed was also obtained before Miranda warnings were administered. “[T]he facts indicated that an interrogational environment existed’ from the start of the interview . . . .”

The court also erred in refusing to preclude use of the defendant’s grand jury testimony, as the defendant rebutted the presumption of competency of grand jury witnesses. The “defendant’s grand jury testimony, a rambling, delusional and bizarre narrative of government conspiracy, prompted one grand juror to inquire of defendant whether he had any psychiatric diagnoses,” and the defendant was referred for examination pursuant to CPL article 730 just days later. He was found to lack the requisite capacity due to a diagnosis of Delusional Disorder, Paranoid Type. A new trial is granted. (County Ct, Monroe Co)

People v Williams, 162 AD3d 1544, 77 YS3d 592 (4th Dept 6/8/2018)

The evidence was legally insufficient to establish that the defendant constructively possessed the heroin found in the apartment where she was arrested. Her presence when the search warrant was executed, in the absence of any evidence that she was an occupant of, or regularly frequented, the apartment, was not enough. A police investigator testified that the police “records management system” listed the defendant as a resident there, but he did not know how that information was obtained and acknowledged that the system was not always current or accurate. In the “‘hundreds of times’” the apartment building was surveilled, the defendant was observed at the location only twice. A police assertion that “‘typical women’s clothing’ was found in the apartment” was not supported by the photographic evidence of clothing admitted into evidence. (County Ct, Oneida Co)

People v Wilson, 162 AD3d 1591, 78 NYS3d 819 (4th Dept 6/8/2018)

Denying the defendant’s motions to vacate the judgment against him in this rape and sexual abuse case, on the basis that the allegations of ineffective assistance of counsel (IAC) were procedurally barred, was error. “(Mixed claims)” of IAC, which relate to issues both within and outside of the record, may be brought under CPL 440 whether or not they could have been raised on direct appeal. Here, there were questions of fact as to why counsel failed to pursue on cross-examination certain lines of defense or to call an expert witness regarding, for example, evidence in the medical records tending to disprove that penetration had occurred. The defendant’s sworn allegation that a DNA buccal swab was obtained through the use of excessive force would warrant, if true, a suppression motion that was never made. The matter is remanded for a single hearing on all the defendant’s IAC claims. (County Ct, Onondaga Co)

People v Graves, 163 AD3d 16, 78 NYS3d 613 (4th Dept 6/15/2018)

While the prosecution “never definitively established Bill Cram Chevrolet’s precise corporate form,” the testimony of the enterprise’s employees as to “the structure of the auto dealership and the damages it suffered as a result of the vandalism” acts underlying the defendant’s second-degree criminal mischief conviction sufficiently proved that the damaged property was that of “‘another person’” as required by Penal Law 145.10. The defendant “concedes that Bill Cram Chevrolet is a nonhuman person under section 10.00(7)” of the Penal Law, but asserts that the court’s failure to read that definition to the jury required the prosecution to prove the property belonged to “‘another human being.’” That nonhuman entities like corporations may be said to have personhood is common knowledge. The jury can be presumed to have “sufficient intelligence” to make the basic, logical inferences presupposed by the court’s charge. (County Ct, Seneca Co)

People v Mcintosh, 162 AD3d 1612, 78 NYS3d 856 (4th Dept 6/15/2018)

Based on the evidence at trial, the court erred in refusing to charge the jury on second-degree manslaughter and criminally negligent homicide as lesser included offenses of the highest charged offense. While the prosecution “never definitively established the defendant’s grand jury testimony, a rambling, delusional and bizarre narrative of government conspiracy, prompted one grand juror to inquire of defendant whether he had any psychiatric diagnoses,” and the defendant was referred for examination pursuant to CPL article 730 just days later. He was found to lack the requisite capacity due to a diagnosis of Delusional Disorder, Paranoid Type. A new trial is granted. (County Ct, Monroe Co)

Dissent: The court’s error in refusing the defense request to charge second-degree manslaughter and criminally negligent homicide as lesser included offenses of the highest charged offense was error. The defendant’s first-degree manslaughter conviction must be reversed as a lesser inclusory concurrent count of the highest charged offense. (County Ct, Monroe Co)
second-degree murder was not harmless. It was compounded by the court’s failure to instruct the charged offenses in the alternative, which led to the conviction of both second-degree murder and first-degree manslaughter; we cannot determine whether to deem the lesser count dismissed or deem there to be an acquittal on the greater.  

[Ed. Note: Leave to appeal was granted Aug. 15, 2018, 32 NY3d 943.]

**People v Nichols, 163 AD3d 39, 78 NYS3d 590**

(4th Dept 6/15/2018)

After examining in the instant case “the murky relationship between factually inconsistent verdicts and legal sufficiency review in criminal cases,” no error is found in the judgment “[e]xcepting a minor technical problem with the final order of protection issued at sentencing ....” The defendant was convicted of first-degree criminal contempt for violating by physical menace an order of protection and of second-degree reckless endangerment. The crux of the evidence against him was that he threatened his wife “with a ‘long metal object’ and that he used that object to knock out the windows of her car” while the order of protection was in force. He was acquitted of the remaining charges stemming from the same incident, i.e., first-degree criminal contempt (placing in fear of statutorily-defined injury by displaying a dangerous instrument, third-degree possession of a weapon, and third-degree criminal mischief. On appeal, the defendant all but concedes the sufficiency of the trial evidence but argues that the convictions are legally insufficient due to the acquittals on the other counts. This “masked repugnancy” argument is rejected. Acquittals on related counts may bolster a reviewing court’s conclusion about the insufficiency of evidence underlying a convicted count, or help identify the legal theory underlying the convicted count, but such acquittals do not undercut the general rule that inconsistent verdicts are not inherently incorrect.

The final protective order issued against the defendant contains an improper expiration date. The date must be re-calculated. (County Ct, Steuben Co)

**People v Perkins, 162 AD3d 1641, 79 NYS3d 783**

(4th Dept 6/15/2018)

The court erred in changing the sentence of incarceration after the defendant left the courtroom, and in imposing a five-year conditional discharge for monitoring of an ignition interlock device where only a three-year period is authorized. The sentence of conditional discharge on count one and the incarceration imposed on count two are vacated, and the matter remitted for resentencing on those counts. (Supreme Ct, Erie Co)

**People v Searight, 162 AD3d 1633, 79 NYS3d 445**

(4th Dept 6/15/2018)

Because the arrest of the defendant following a traffic stop could not be justified by the “fellow officer rule,” the evidence seized as a result of the arrest should have been suppressed. The officers who stopped the defendant for traffic infractions relied “‘on a pyramid of hearsay,’” arresting the defendant on the basis of an alleged active warrant reported to them by unidentified 911 Center personnel who passed on information from unidentified Cortland Police Department personnel. The prosecution failed to meet its burden of showing that the arrest was based on probable cause. (Supreme Ct, Onondaga Co)

**People v Colbert, 162 AD3d 1714, 80 NYS3d 593**

(4th Dept 6/29/2018)

The verdict finding the defendant guilty of third-degree criminal mischief for property damage exceeding $250 for the destruction by fire of a motorcycle valued at over $4,000 is against the weight of the evidence where the prosecution established that the defendant, angry with her husband, set fire to a part of the garage other than where the husband’s cycle was stored, with no indication that the defendant intended to damage the cycle. (County Ct, Jefferson Co)

**Matter of Jerrett v Jerrett, 162 AD3d 1715, 80 NYS3d 768**

(4th Dept 6/29/2018)

**SHARED CUSTODY / NO PROPORTIONAL OFFSET**

**ILSAPP:** Onondaga County Family Court should have granted the mother’s objection to a Support Magistrate’s order deviating from the presumptive child support obligation. The parents shared custody, and the mother was the primary custodian. Shared custody arrangements did not alter the methodology of the CSSA. See *Bast v Rossoff*, 91 NY2d 723. The Court of Appeals has rejected the proportional offset formula, whereby the noncustodial parent’s obligation would be reduced based on the amount of time that he or she spent with the child. Instead, a court had to calculate the basic obligation and order the noncustodial parent to pay his or her pro rata share, unless that figure was unjust or inappropriate. The Support Magistrate erred in determining that the child was spending sufficient time with the father to warrant a downward deviation. That was merely another way of applying the proportional offset method. Although “extraordinary expenses” incurred in exercising visitation may support a deviation, the father’s costs of housing, clothing, and food did not qualify. There was no support
for finding that the mother’s expenses were substantially reduced due to the father’s visitation expenses. The mother represented herself on appeal. (County Ct, Onondaga Co)

**People v Neulander, 162 AD3d 1763, 80 NYS3d 791**
(4th Dept 6/29/2018)

**TEXTS, LIES, AND CONVICTION / REVERSAL**

Following a jury trial, the defendant was convicted in Onondaga County of murdering his wife. The Fourth Department reversed. The trial court erred in denying the defendant’s CPL 330.30 motion. Juror 12 engaged in text messaging about the proceedings. After being selected to serve, she received a text message from her father stating: “Make sure he’s guilty!” During trial, she got a text from a friend asking if she had seen the “scary person”—that is, the defendant. Another friend texted: “I’m so anxious to hear someone testify against the defendant’s daughter.” The juror defied court admonitions to report such communications. The illicit messages were revealed by a discharged alternate juror. An inquiry ensued. The errant juror concealed her misdeeds and lied under oath. The motion court found no likelihood of prejudice to the defendant. The Fourth Department disagreed, declaring that the Sixth Department reversed. In response to defense objections, the prosecutor offered facially race-neutral explanations for five of the six challenges and asserted that the sixth prospective juror was not African-American. That juror stated that his parents were of Caribbean descent and he considered himself “black culturally.” The trial court found that the juror was not African-American; and the prosecutor did not offer a race-neutral reason for that challenge. The Fourth Department observed that a Batson challenge may be based on color. Further, with respect to another Batson claim, the trial court failed to determine whether the race-neutral explanation was pretextual. The Monroe County Public Defender (Janet Somes, of counsel) represented the appellant. (County Ct, Monroe Co)

[Ed. Note: Leave to appeal was granted Aug. 7, 2018, 32 NY3d 943.]

**People v Oliver, 162 AD3d 1722, 79 NYSD3d 812**
(4th Dept 6/29/2018)

**INEFFECTIVE ASSISTANCE / BUM STEER / REVERSAL**

**ILSAPP:** The defendant pleaded guilty to one count of sex trafficking in satisfaction of an indictment charging him with several prostitution-related offenses. Following his conviction, he appealed from an order of Onondaga County Supreme Court denying his CPL 440.10 motion. The Fourth Department reversed. The defendant had leaned toward going to trial. Then defense counsel misadvised him that, if convicted after trial, he faced the possibility of 75 years of imprisonment—versus the true exposure of 15 to 30 years—and that sex trafficking was not a sex offense for SORA purposes. Counsel’s erroneous advice deprived the defendant of the ability to make an intelligent choice between pleading guilty or proceeding to trial. The Hiscock Legal Aid Society (Piotr Banasiak, of counsel) represented the appellant. (Supreme Ct, Onondaga Co)

**People v Pescara, 162 AD3d 1772, 79 NYS3d 827**
(4th Dept 6/29/2018)

**BATSON VIOLATION / NEW TRIAL**

**ILSAPP:** The defendant was convicted of attempted aggravated assault upon a police or peace officer and other crimes. On appeal, he contended that peremptory challenges to six African-American prospective jurors constituted Batson violations. The Fourth Department agreed and granted a new trial. In response to defense objections, the prosecutor offered facially race-neutral explanations for five of the six challenges and asserted that the sixth prospective juror was not African-American. That juror stated that his parents were of Caribbean descent and he considered himself “black culturally.” The trial court found that the juror was not African-American; and the prosecutor did not offer a race-neutral reason for that challenge. The Fourth Department observed that a Batson challenge may be based on color. Further, with respect to another Batson claim, the trial court failed to determine whether the race-neutral explanation was pretextual. The Monroe County Public Defender (Janet Somes, of counsel) represented the appellant. (County Ct, Monroe Co)

**Matter of Raven F., 162 AD3d 1699, 80 NYS3d 585**
(4th Dept 6/29/2018)

**ARTICLE 10 / NO ABUSE BASED ON DV**

**ILSAPP:** Erie County Family Court erred in finding that the father neglected the subject child on the ground that he engaged in misconduct constituting a pattern of domestic violence when the child was “presumably present.” See Matter of Ilona H. (Elton H.), 93 AD3d 1165. However, the father did neglect the child based on his long history of mental illness and erratic behavior. Summary judgment finding derivative neglect was properly granted as to the younger child. The movant’s submissions established an impairment of parental judgment creating a substantial risk of harm for any child left in the father’s care. The neglect of the older child was sufficiently proximate in time to support a reasonable conclusion that the problematic conditions continued to exist. The father failed to raise an issue of fact. (Family Ct, Erie Co)

**People v Smith, 162 AD3d 1586, 80 NYS3d 577**
(4th Dept 6/29/2018)

**MISSING WITNESS CHARGE / DIVIDED COURT**
Fourth Department continued

**ILSAPP:** Upon a jury verdict in Monroe County, the defendant was convicted of attempted murder in the second degree and other crimes. On appeal, he contended that the trial court erred in refusing to deliver a missing witness charge. The Fourth Department held that the defendant failed to meet his initial prima facie burden of showing that the testimony would not be cumulative. Two justices dissented, stating that, under *People v Gonzalez*, 68 NY2d 424, the initial burden was satisfied by showing that an uncalled witness, believed to be knowledgeable about a material issue, could be expected to testify favorably to the opposing party, who could then show cumulativeness. Prior decisions had misapplied the *Gonzalez* framework and should not be followed. Aside from the victim and the uncalled witness, there were no other witnesses. The victim initially told the police that she could not identify the shooter, and her description was vague. Although at trial she identified the defendant as the shooter, he was a stranger to her and she did not know why he shot her. Considering the questions as to identification, the error in refusing to give the charge was not harmless, in the dissenters’ view. (Supreme Ct, Monroe Co)

[Ed. Note: Leave to appeal was granted Aug. 17, 2018, 32 NY3d 943.]

**Matter of deMar v Goodyear**, 163 AD3d 1430, 80 NYS3d 818 (4th Dept 7/6/2018)

**TWO MOTHERS / FIVE CHILDREN / STANDING ISSUE**

**ILSAPP:** The petitioner alleged that she and the respondent had been involved in a romantic relationship and had entered into an agreement to raise and co-parent the respondent’s child, and that they further agreed that the respondent would conceive additional children and they would jointly raise them. The respondent did indeed have more children—four, who were conceived by the implantation of fertilized eggs. The petitioner commenced a proceeding seeking joint custody of the five children. Following a hearing on standing, the referee granted the respondent’s motion to dismiss the petition as a matter of law. That was error. The referee made credibility determinations and weighed evidence, which was not proper under CPLR 4401. The matter was remitted for a new hearing regarding standing. At such hearing, an attorney for the children was to be appointed. Michael Steinberg represented the appellant. (Family Ct, Onondaga Co)

**People v Spinks**, 163 AD3d 1452, 79 NYS3d 455 (4th Dept 7/6/2018)

**SUPPRESSION GRANTED / NEW TRIAL**

**ILSAPP:** Police responded to a 911 dispatch regarding the robbery of a cab driver, and a short time later, the defendant was stopped and detained. After a jury trial, he was convicted of robbery in the first and second degrees. The Fourth Department held that the information available to the detaining officer did not provide a reasonable suspicion to stop and detain the defendant. The suppression court failed to give adequate consideration to the half-mile distance between where the dispatcher said the suspects were observed running and where the defendant was stopped. Further, no search occurred in the area where the suspects were originally observed. The victim’s identification of the defendant at a showup procedure was suppressed as the unattenuated product of the illegal stop and detention. The defendant was entitled to a new trial, preceded by a hearing as to whether there was an independent basis for the identification testimony. Brian Shiffrin represented the defendant. (Supreme Ct, Monroe Co)

**Matter of Smith v Lopez**, 163 AD3d 1406, 80 NYS3d 836 (4th Dept 7/6/2018)

**NON-BINDING STIPULATION / INTEMPERATE REMARKS**

**ILSAPP:** The Fourth Department affirmed an order of Onondaga County Family Court awarding primary custody to the father. In doing so, the court rejected the mother’s contention that the trial court erred in failing to limit its determination to the issues to which the parties did not stipulate. Where the parties stipulated to certain issues relating to custody and visitation, the court was not bound by that stipulation and could indeed consider proof relating to the child’s best interests in resolving the issues. In response to the mother’s contentions that Family Court made comments demonstrating prejudice against her, the reviewing court noted that the court’s “intemperate remarks” reflected a lack of patience that was inappropriate to this delicate matter, but discerned no indication of bias. (Family Ct, Onondaga Co)

**People v Williams**, 163 AD3d 1418, 80 NYS3d 608 (4th Dept 7/6/2018)

**COLLATERAL ESTOPPEL / NEW TRIAL**

**ILSAPP:** In trial #1, the defendant was acquitted of criminal conduct involving two checks (“A” and “B”), and on appeal, he was granted a new trial as to another allegedly forged check (“C”). At trial #2, the People used checks A and B as evidence of the defendant’s criminal intent and motive with respect to check C. Ontario County Court referred to the defendant’s alleged involvement with checks A and B as “uncharged conduct.” The Fourth Department held that the trial court was collaterally estopped from presenting any evidence relating to checks A and B at trial #2. Thus, yet another trial was...
granted. The defendant represented himself upon appeal. (County Ct, Ontario Co)

**Burns v Burns, 163 AD3d 210, 81 NYS3d 846 (4th Dept 7/25/2018)**

**AGREEMENT SILENT ON TERM / DRL FILLS GAP**

**ILSAPP:** Unless the parties clearly provide otherwise in a divorce settlement agreement, the payor’s obligation to pay maintenance ends upon the payee’s remarriage. Here, the parties’ agreement was silent on the matter. Thus, the husband’s maintenance obligation terminated upon the wife’s remarriage. Monroe County Supreme Court properly denied her motion to hold him in contempt and recover unpaid maintenance, the Fourth Department held. The appellate court invoked the principle that the law in force at the time an agreement was made becomes part of the agreement if it does not otherwise provide. The parties are presumed to have contemplated such law when the contract was made. Domestic Relations Law § 236 includes this caveat: any maintenance award shall terminate upon the death of either party or upon the payee’s remarriage. Further, in this case, no extrinsic evidence indicated that a remarriage clause was purposefully omitted from the parties’ agreement. (Supreme Ct, Monroe Co)


**VERMONT CIVIL UNION / COMITY**

**ILSAPP:** In 2003, the parties entered into a civil union in Vermont. In 2006, they were married in Canada. When the plaintiff commenced the instant action seeking dissolution of the marriage in 2014, the defendant counter-claimed for dissolution of the civil union and equitable distribution of property acquired during the union, and she moved for summary judgment. Monroe County Supreme Court dissolved the civil union and held that the property acquired during the union and before the marriage was not subject to equitable distribution. The Fourth Department disagreed. The trial court should have applied principles of comity and recognized that both parties had property rights. The Court of Appeals has held that a Vermont civil union creates parental rights which should be recognized under New York law. See Matter of Debra H. v Janice R., 14 NY3d 576, cert denied 562 US 1136. The Fourth Department concluded that comity also required the recognition of property rights arising from such a civil union. Under the laws of both Vermont and New York, property acquired during a legal union of two people was subject to equitable distribution, with similar factors governing distribution determinations. The Empire Justice Center and the Legal Aid Society of Rochester represented the appellant. (Supreme Ct, Monroe Co)

**People v Wood, 163 AD3d 1485, 82 NYS3d 286 (4th Dept 7/25/2018)**

**JURY NOTES / DEFECTIVE RESPONSE**

**ILSAPP:** After the defendant ate at a Rochester restaurant, he belligerently complained about the cost of the meal and was asked to leave. According to trial testimony, he returned weeks later, pulled out a gun, and pointed it at the complainant, who asked him to leave. When police apprehended the defendant nearby, they found a loaded antique pistol in his waistband. In two counts, he was charged with second-degree CPW on the grounds that he possessed a loaded firearm and (1) was not in his home or place of business and (2) had the intent to use the weapon unlawfully against another. The third count charged the defendant with second-degree menacing on the ground that, by displaying the firearm, he intentionally placed another person in reasonable fear of physical injury. The defendant testified that the gun had belonged to his grandfather, a veteran; he was transporting it to another family member; and he did not display it at the restaurant. During deliberations, the jury requested clarification of the terms “intent” and “unlawfully” and a read back of testimony about the interaction in the restaurant. The prosecutor asked the court to respond in part by instructing the jury that possession of a loaded firearm is presumptive evidence of intent to use the weapon unlawfully. Over objection, the court gave the instruction; and within two minutes, the jury reached a verdict. The Fourth Department held that the trial court did not provide a meaningful response to the jury notes, and the defendant was prejudiced. However, the error did not compel reversal as to the first CPW count, which did not require intent. Danielle Wild represented the appellant. (Supreme Ct, Monroe Co)

**Matter of Nevin H., 164 AD3d 1090, 83 NYS3d 390 (4th Dept 8/22/2018)**

**DOMESTIC VIOLENCE / NO NEGLECT**

**ILSAPP:** The mother appealed from an order of Onondaga County Family Court, which found that she neglected the subject children. She contended that the evidence was legally insufficient, and the Fourth Department agreed. The petitioning agency alleged that the mother neglected the children by exposing them to domestic violence. She allowed her paramour into her house several times, despite his history of violence against her; and in the presence of the children, she was again subjected to domestic violence. While exposure of children to domes-
tic violence may form the basis for a neglect finding, there must be proof of actual harm, or imminent danger of harm, to the children. See Nicholson v Scoppetta, 3 NY3d 357. In this case, the proof only showed that the children were present when the domestic violence occurred, but did not prove impairment, or imminent danger of impairment, of the children. The appellate court reversed and dismissed the petition. Hiscock Legal Aid Society (Philip Rothschild, of counsel) represented the mother. (Family Ct, Onondaga Co)

The Special Committee made a series of recommendations, including that New York consolidate all financial penalties into one fee. Unfortunately, no such logical reform has occurred. Defense counsel, and their clients, continue to confront a scattered host of mandated and potential monetary conditions in criminal cases.

The difficulty in knowing what statutory financial requirements clients on probation face is compounded by the different approaches used by county probation offices. Some county probation offices post little or no information online. More helpful sites include that of the Erie County Probation Department, which includes “FAQ’s About Financial Obligations” that provides information on at least some potential charges and the mechanics of paying.

The latter can pose additional barriers to people on probation, with restrictions such as “no personal checks” or limiting payments to in-person or by mail. St. Lawrence County allows payment of at least some fees online through a private company, GovPayNet. The Albany County Probation Department webpage indicates that there are processing fees for using GovPayNet for online or phone payments. Onondaga County Probation has its own Online Fee and Restitution Payment page.

**VDP’s Cody Receives State Bar David S. Michaels Memorial Award**

Art Cody, Deputy Director of NYSDA’s Veterans Defense Program, was honored on Jan. 16, 2019, during the New York State Bar’s Annual Meeting. He received the David S. Michaels Memorial Award, which recognizes “courageous efforts in promoting integrity, justice, and fairness in the criminal justice system.” The awards program noted Art’s work, including presentations nationally on veterans’ defense. Art, whose active and reserve military career spanned over three decades, joined NYSDA in 2014. As a civilian, he has represented people charged with crimes for over twenty years, including assisting veterans under sentence of death. NYSDA congratulates Art on this recognition, which is but the latest in a list of military and civilian honors.

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