



Public Defense Backup Center REPORT

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Defender News

2019 Justice Legislative Reform, Act II

The state legislative session that ended in June brought about justice system reforms in both criminal and family court. Criminal justice reforms passed in the FY 2020 State Budget ([Laws of 2019, Ch 59](#)) were noted in the [last issue](#) of the *REPORT*. Some reforms have already been signed into law; others will not reach the Governor’s desk for some time. Efforts to roll back portions of the historic bail reform law failed, thanks to the work of 65 groups including NYSDA and many public defense programs. Law enforcement opposition to some reforms continues, as described in a *Finger Lakes Times* [article](#) on June 24, 2019.

NYSDA worked with others to successfully advocate for passage of several important bills this session and will continue to advocate for the reforms to be signed into law. NYSDA also remains committed to passage of other, still-needed changes important to clients, defenders, and justice. The Backup Center is also working to ensure full implementation of enacted reforms, many of which require changes in the tasks defenders must perform. The program for July’s [52nd Annual Meeting and Conference](#) includes Continuing Legal Education (CLE) sessions on some of the new laws, especially discovery (Ch 59, Part LLL) and bail (Ch 59, Part JJJ).

Three Criminal Justice Bills Pass at End of Session

Three criminal justice bills that passed in the closing days of the session will, if signed by the Governor: add defenders to the list of qualified agencies able to obtain criminal history reports; authorize payment of assigned appellate lawyers for some collateral post-conviction work done during a direct appeal; and eliminate many restrictions on nonprofit charitable bail funds. NYSDA thanks the sponsors and supporters of these bills and the family justice reform bills described further below.

Public Defenders Obtain Direct Access to Client’s Criminal Histories, [S.2198](#) (Bailey) & A.7644 (Lentol)—

This bill, if signed, will add “public defenders, legal aid societies, and assigned counsel administrators” to the list of qualified agencies, giving defenders direct access to criminal history report information; it amends Executive Law 835(9). NYSDA will be working with defenders across the state and the NYS Division of Criminal Justice Services to address implementation questions that arise. Defenders, like other qualified agencies, will have to comply with stringent requirements to obtain criminal histories. See 9 NYCRR 6051.2. The need for this reform is long-standing; NYSDA’s [testimony](#) (at p. 13) in 2005 before the Commission on the Future of Indigent Legal Services raised the injustice of the defense lacking access to criminal histories, particularly outside New York City.

Post-Conviction Work to be Included in Appellate Counsel’s Assignment, [S.3672](#) (Bailey) & A.748 (Cook)—This bill, sometimes called the “Wrongful Conviction Prevention Act,” seeks to amend County Law 722 to authorize assigned appellate lawyers to prepare and proceed upon (and to be paid for) CPL article 440 motions and motions for a writ of error coram nobis. The Indigent Legal Services Office (ILS) [Appellate Standards and Best Practices](#) already require appellate counsel to file 440 motions when warranted (Standard XX); this bill, by assuring payment, should make compliance by assigned counsel easier.

Charitable Bail Fund Reform Act, [S.494](#) (Rivera) & A.6980 (Blake)—With cash bail remaining an option for a number of offenses despite reforms passed in the budget, a need continues for viable Charitable Bail Organizations (CBOs), which are justice-focused alternatives to commercial bail bond companies. This bill will remove harsh restrictions that currently hamper CBOs’ ability to provide bail to persons who are charged with a felony for the first time and unable to afford bail. It will end

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the geographical restriction that a CBO may only offer bail in one county outside of New York City so that more efficient regional CBOs can be established; raise the monetary amount that such organizations may provide from \$2,000 to \$10,000; and reduce the non-profit group certification fee from \$1,000 to \$500. This should assist existing bail funds, particularly those upstate like [OAR of Tompkins County](#) and [Jail Ministry](#) in Onondaga County, and make creation of new ones more feasible.

Family Court Reform Bills Providing Parental Justice Pass Legislature

Two Family Court bills, if signed by the Governor, will provide significant justice to parents who find themselves in child welfare proceedings.

The Preserving Family Bonds Act, [S.4203](#) (Savino) & A.2199 (Joyner), would modify the Family Court Act to give Family Court judges the discretion to order contact between a child and biological parent (and siblings) post termination of parental rights, if the court finds it to be in the child's best interest. Courts do not currently have the authority to order any contact between a child and biological parents under these circumstances. This is significant for parents whose children have been placed in foster care pursuant to a neglect proceeding, and then had their parental rights terminated as a result.

The Child Abuse Central Register Reform Act, [S.6427-A](#) (Montgomery) & A.8060-A (Jaffee), would modify the Social Services Law to raise the standard of proof before someone can be placed on the State's Central Register (SCR) for an "indicated" case of child maltreatment. It changes the bare minimum standard of "some credible evidence" to a "preponderance of the evidence." It would also eliminate the 90-day time limit to request a fair hearing to challenge such a finding, and allow evidence of parental rehabilitation to be considered. Most importantly, it would automatically seal indicated reports of neglect after 8 years in most cases, assuming there are no subsequent indicated cases. This law would not affect parents found to have abused their children, who would still have their names on the SCR for up to 28 years, depending on the age of the youngest child named in the indicated report. Currently anyone who has been "indicated," regardless of the type of case, will remain on the registry until 10 years after the 18th birthday of the youngest child named in the report, unless they are able to meet the difficult standard to gain expungement at a fair hearing.

It is important for practitioners to remember that not only current and future clients would be affected, but past as well. Defenders should consider contacting former clients when these bills become law.

Repeal of Gravity Knife Ban in Effect

Governor Cuomo [signed](#) into law provisions eliminating the term "gravity knife" from several provisions in Penal Law article 265, Firearms and Other Dangerous Weapons, specifically 265.00(5-c); 265.01(1); 265.10(1) and (2); 265.15(3); and 265.20(2) and (6), as well as the general definition of "deadly weapon" in 10.00(12). In his May 30, 2019, memorandum, the Governor commented that "the legal landscape has changed" since his vetoes of prior repeal bills. He was referring to the federal court decision [Cracco v Vance](#) (14 Civ. 8235 [PAC] [US Dist Ct, SDNY 3/27/2019]), the "unconstitutional as applied" case discussed in the [April 17, 2019](#), edition of News Picks. The repeal was reported by [NY State of Politics](#), the [Democrat and Chronicle](#) (Rochester), the [New York Daily News](#), [CBSNewYork](#), and others. Supporters of the change, including public defense organizations like The Legal Aid Society and [VOCAL-NY](#), applauded the Governor and Legislature for this action.

The repeal was effective immediately. While it is hoped that prosecutors will dismiss charges pending under the now-repealed provision, the issue of retroactivity must be litigated if that does not happen. Attorneys facing that situation or other questions under the repeal are encouraged to contact the Backup Center.

Reform Efforts Not Complete

Despite the many successes noted above, additional legislative changes crucial to justice failed this session. As [noted](#) by City and State New York, bills that have not yet passed include the HALT Solitary Confinement Act ([S.1623/A.2500](#)) to place constraints on the use of solitary

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confinement in jails and prisons across the state; Repeal 50-a ([S.3695/A.2513](#)) to allow access to personnel records of law enforcement now almost wholly hidden behind Civil Rights Law 50-a, as discussed in the [last issue](#) of the *REPORT* (p. 7); and parole reform including the Less is More bill, to end reincarceration of people for technical violations, and creation of parole opportunities for people over age 55, at least those with serious medical conditions.

The [Fines and Fees Justice Center](#) (FFJC) described in its June newsletter the end-of-session-position of its “bill that would end driver’s license suspensions for failure to pay and failure to appear.” FFJC anticipates that the bill, which passed the Senate and the Assembly Codes Committee, will move forward in 2020. A [June 19 article](#) in the *Democrat and Chronicle* about how such suspensions impact poor people quoted FFJC’s Executive Director Joanna Weiss, Monroe County Public Defender Timothy Donaher, and others. The last issue of the *REPORT* (at p. 2) discussed other problems involving fines and fees.

Not All Penal Law Changes Favor Defendants

Not every bill passing the Legislature benefitted people accused or convicted of crimes. The statutes of limitations for certain sex crimes will be extended if [A.8412/S.6574](#) is signed as anticipated. First-degree incest is added to first-degree rape as an offense that can be charged at any time; rape, criminal sexual act, and incest, all in the second degree, are made chargeable within 20 years after commission of the acts in question or within 10 years from when the offenses are first reported to law enforcement, whichever comes first.

News for Family Court Defenders

A new study has “found that for parents represented by interdisciplinary law offices (ILO)—which include lawyers, social workers and parent advocates—youth spend about four fewer months in foster care than in cases represented by panel-appointed ‘solo practitioner’ lawyers.” As [announced](#) on the website of the Chronicle of Social Change, the New York City Study did not show that ILO representation yielded a reduction in the removal of children, but did correlate to faster returns without risk to their safety.

Also in New York City, the primary providers of parental representation in child welfare proceedings issued a joint [statement](#) applauding a \$1.3 million allocation by the City Council for the Right to Family Advocacy Initiative, “which provides pre-petition advocacy for families involved in the child welfare system and parents who are on the Statewide Central Register of Child Abuse and Maltreatment.”

At the state level, ILS announced a [Request for Proposals](#) for an Upstate Model Family Representation

Office Grant to create an ILO outside New York City that will comply with the ILS *Standards for Parental Representation in State Intervention Matters* and will provide representation “from the earliest stages of a state intervention case....”

NYSDA Provides Support for Family Court Representation

On May 10, 2019, NYSDA presented, with the Ontario County Public Defender’s Office, a CLE training, Family Court Article 10: Intensive Skills Module 3. Two earlier modules were presented in 2018. Presenters were Adele Fine, Bureau Chief of the Family Court Bureau of the Monroe County Public Defender’s Office; Saul Zipkin, Supervising Appellate Attorney in the Family Defense Practice at The Bronx Defenders; and Linda Gehron, President and CEO of the Frank H. Hiscock Legal Aid Society in Syracuse. They provided insights on pursuing relief for Family Court Act Article 10 clients on appeal and in CPLR article 78 proceedings as well as these two topics: 1027 or 1028? Strategizing your case for a timely return of the child and Defaults- How to preserve your client’s rights when they don’t appear.

On April 5, 2019, NYSDA presented a CLE in Poughkeepsie entitled The Intersection of Family Court and Immigration. The program was aimed at making Family Court attorneys aware of the consequences that can happen to their non-citizen clients from routine Family Court dispositions, and providing them with suggestions on how to minimize these risks. The presenters were Robert Horne, Supervising Attorney of the Regional Immigration Assistance Center (RIAC), Region 4; Evelyn Kinnah, Acting Director of the Capital District RIAC, and Roshell Amezcua, Staff Attorney at the Bronx Defenders. Defenders with non-citizen clients are reminded to contact the RIAC for their area; a [list](#) is available on NYSDA’s website.

The [May 31, 2019, edition](#) of News Picks From NYSDA Staff included information on resources for family defenders. Among the information provided is a recap of recently-announced posts by the New York State Unified Court System, including the page for the [Advisory Council on Immigration Issues in Family Court](#). The page includes [Advisory Memos](#) to Family Court Judges and others on topics ranging from applications for Special Immigrant Juvenile Findings to adverse consequences to dispositions. Also found there is the protocol governing law enforcement agencies’ activities in court-houses, which includes the limitations on arrests by US Immigration and Customs Enforcement agents noted in the last edition of News Picks.

The court website also provides information about the [Commission on Parental Legal Representation](#), including the Commission’s February [Interim Report](#) noted in an

earlier News Picks and comments from the [hearings](#) that preceded the report. Financial eligibility was one of the topics the Commission addressed, calling for uniform standards to be developed by a proposed State Office of Family Representation. As noted in the [last edition](#) of News Picks, the NYS Office of Indigent Legal Services (ILS) has [announced](#) public hearings in preparation for issuing criteria and procedures for determining eligibility for representation in family court. Written submissions are due July 19, 2019, and requests to testify orally are due 14 days before the hearing; the final hearing will be on August 14, 2019, in Rochester. NYSDA encourages family defenders to provide testimony.

OCFS Updates Child Protective Services Manual

The NYS Office of Children and Family Services (OCFS) [advised](#) local commissioners on April 16, 2019, of updates to its [Child Protective Services Manual](#). The announced changes include the addition of information on “Working with Immigrant Families.” The manual notes that in New York, “a caregiver’s lack of proper immigration status is neither an allegation of abuse or neglect nor a violation of the minimum degree of care,” but is something that Child Protective Services “must be alert and sensitive to” and that drafting reports in which such “status is an element in the family home require[s] CPS to use critical thinking skills.” CPS may need different intervention strategies for families dealing with immigration issues, such as preparing a safety plan to prevent “the unnecessary placement of children into foster care if their parents or caretakers are detained by Immigration Customs Enforcement or deported to their countries of origin.”

Defenders with questions about representing parents or other respondents in family court proceedings are invited to contact NYSDA’s Family Court Staff Attorney Kim Bode at 518-465-3524 or kbode@nysda.org.

Progress of Justice Reforms from Two Years Ago

Front-page news in the [April-June 2017 issue](#) of the *REPORT* included passage of two bills. One, Justice Equality legislation “to incrementally implement state funding of public defense improvements in all of New York’s counties” over six years. Two, “to raise the age of criminal responsibility for some crimes and establish a new Youth Part to preside over juvenile offender and adolescent offender cases that are not removed to Family Court.” Since then, NYSDA has worked with ILS, local providers, counties, and many others to help ensure that these laws are fully implemented.

Keeping Up with RTA

With the great assistance of Nancy Ginsburg of The Legal Aid Society and others, NYSDA has provided information about Raise the Age (RTA) through News Picks from NYSDA Staff, news items in the *REPORT*, Chief Defender Convenings, and multiple CLE presentations. The latest on RTA, presented by Ginsburg and Nora Christenson of ILS, is part of the program for the upcoming Annual Meeting and Conference.

The Association also signed on to an amicus brief in an article 78 proceeding in the First Department that unsuccessfully sought to terminate proceedings in Supreme Court and transfer jurisdiction of the underlying criminal proceeding to Family Court pursuant to Raise the Age where the Supreme Court had retained jurisdiction over an Adolescent Offender’s charges based on a theory of accessorial liability. The Appellate Division found that the article 78 proceedings did not lie, concluding that a direct appeal from any conviction could provide full judicial review of the claim. [Matter of A.P., Jr. v Roberts](#), 2019 NY Slip Op 04030 (5/23/2019).

Defenders and their clients are not the only ones with interest in RTA, of course. The New York Association of Counties (NYSAC) has issued a [report](#) that describes RTA, including: actions taken by a variety of state agencies to implement it (including the Division of Criminal Justice Services, Office of Children and Family Services, and the State Commission on Correction) and state funding issues. The report also addresses specific questions, including reimbursement issues, training of “Accessible Magistrates,” availability of specialized secure detention facility (SSD) beds and other placement issues, and more. NYSDA also includes a set of recommendations that not only call for continued and full state funding of RTA costs but also address other issues, such as raising the age for charging a child as a juvenile delinquent from seven to twelve. Raising the Age of Criminal Responsibility in NYS: A County Impact Update (June 2019).

On June 19, 2019, the *Wall Street Journal* reported [online](#) (subscription required) that arrests of teens in New York City dropped drastically after RTA went into effect. The story, [picked up](#) on The Crime Report, indicates that “the reduction was driven by the use of juvenile reports, which are internal records kept by police as an alternative to arrests or summonses for minor crimes such as marijuana possession or low-level assault.” A drop in arrests was similarly noted in Raise the Age NY’s [Implementation Brief No. 1](#) back in April, one of several resources noted in the [May 17, 2019](#), edition of News Picks.

And as reported in the [May 31, 2019](#), edition of News Picks From NYSDA Staff, Disability Rights New York (DRNY) is monitoring SSDs. DRNY seeks to learn more about the treatment of youth with disabilities held in SSDs.

ILS Issues Standards for Assigned Counsel Programs

The New York State Indigent Legal Services Office (ILS) and the ILS Board operate under Executive Law 832 and 833, respectively, to monitor, study, and work to improve the quality of public defense services across New York State, including representation provided by private lawyers acting as assigned counsel. On June 14, 2019, the Board approved [*ILS Standards for Establishing and Administering Assigned Counsel Programs*](#), with an effective date of July 1, 2019.

In [announcing](#) the standards' adoption to Chief Defenders and others, ILS Director William J. Leahy noted that many of the standards have already been, or are beginning to be, "implemented in New York's counties, under the 2015 court-approved *Hurrell-Harring* Settlement and the 2017 statewide expansion of those reforms pursuant to Executive Law § 832 (4), at state expense." The *New York Law Journal* published an [op-ed](#) by Leahy about the new Standards on June 27, 2019.

The new standards "draw from existing national, state, and local standards; developments in ACPs [Assigned Counsel Programs] over the last half-century; and the experience and knowledge of the Standards Working Group and ILS staff." NYSDA Senior Staff Attorney Mardi Crawford participated in the Working Group.

The purpose of the standards is to "set out the structure and components of ACPs necessary to ensure quality representation." Divided into three parts—Introduction, County Responsibilities, and ACP Responsibilities—the standards provide a guide for creating and evaluating programs. The standards become effective exactly three months after the effective date of last year's legislation giving ILS the responsibility of approving assigned counsel plans. See County Law 722(3)(b) and (c).

The standards are coming into effect at a time of change in criminal and family court defense. The role of ACP Administrators, Standard 3.3.d.ii and iv make clear, includes acting as a policy spokesperson. Like other Chief Defenders, ACP Administrators can and should bring a client-centered perspective to discussions about the justice system.

To help ensure the independence of the defense function, vital to quality representation, the standards require that ACPs operate under the guidance of a governing board. Board members cannot hold positions as prosecutors, law enforcement, or government officials. The blackletter, in Standard 3.2.a, does vary from other, long-established standards in allowing judges to serve as board members so long as they do not constitute a majority. The Commentary "acknowledges valid concerns, including that, especially in small programs serving in small communities, a local judge can exert undue influence on poli-

cy issues; and that the presence of a judge on the Board can affect the perception of the Program as being committed solely to the provision of quality defense services." The Commentary also contains the assurance that ILS will revisit this provision "[i]f future experience raises valid concerns regarding judicial participation on Boards" This essentially places the burden on ACP Administrators, other board members, and others, to let ILS know if and when such problems arise. Note that such problems will not arise if sitting judges are excluded from local boards; the ILS standards certainly do not require judicial participation, and other standards can be cited in opposition to such participation. See e.g., National Legal Aid and Defender Association, [*Standards for the Administration of Assigned Counsel Systems*](#) (1989), Standard 3.2.1.

ILS has issued several sets of standards and criteria regarding public defense, beginning in 2012 with [standards and criteria](#) relating to the provision of trial-level public defense representation. [Hearings](#) are currently underway seeking information to assist ILS in fulfilling its statutory obligation "to issue criteria and procedures for determining whether a person is financially unable to hire a lawyer and therefore eligible for publicly-funded legal representation ("assigned counsel") in certain family law matters" NYSDA provided [testimony](#) at similar hearings, held in 2015 as a result of the *Hurrell-Harring* settlement regarding eligibility determinations, which resulted in a set of standards "written for criminal court proceedings in the counties outside of New York City." When moving on to create eligibility criteria and procedures specific to Family Court, ILS said, it would "build upon and be consistent with these criteria and procedures, but will be tailored as needed to Family Court realities."

Race and Criminal Law: New Looks at Old Issues

The pervasive, persistent effect of racism and racial bias on the criminal justice system in this country surfaced in different forms and forms recently. Disproportionate police stops, searches, arrests, incarceration, and supervision of people of color continue to make news.

Racial Disparity Cited in Decriminalization of Marijuana

Law reforms short of legalization of marijuana (spelled, in accordance with New York legislative style, "marihuana") passed the Legislature at the end of its session. The measure, ([S.6579-A/A.8420-A](#)), was accompanied by a legislative memorandum that justified the new provisions in part by pointing out that racial inequalities are "still rampantly obvious in the application of" marijuana laws. If signed by the Governor, the legislation will:

Amend Penal Law 221.10 to create the offense of first-degree unlawful possession of marijuana, involving more than an ounce of marijuana or substances containing marijuana, and make such possession a violation punishable only by a fine of up to \$200. This provision would also no longer include an exception for marijuana in public view. Provisions criminalizing possession of aggregate amounts over two ounces (Penal Law 221.15 et seq) remain in effect.

Amend Penal Law 221.05 to create the offense of second-degree unlawful possession of marijuana, also a violation, punishable only by a fine of no more than \$50. This provision addresses behavior that was already a violation and no longer contains higher fines for those with prior marijuana offenses.

Amend provisions of CPL article 440 to direct courts to grant motions to vacate judgments for convictions under Penal Law 221.05 or 221.10 entered prior to the new amendments.

Amend CPL 160.50, dealing with sealing of arrest records, to include among actions to be considered terminated in favor of the person at whom the actions were directed any action in which the accusatory instrument alleged a violation of Penal Law article 220 or section 240.36 (first-degree loitering) that involved marijuana violations prior to the current amendments.

US Supreme Court Reverses on Batson Error

A seven-justice majority of the nation's highest court reversed the Mississippi murder convictions of Curtis Flowers based on multiple violations of the *Batson* ban on discriminatory exercise of peremptory jury challenges. Flowers had been tried six times by the same lead prosecutor, with three initial convictions being overturned for prosecutorial misconduct; *Batson* violations were among issues raised. Two prosecution efforts ended in mistrials. In reversing, the Court pointed to the State's challenge of 41 out of 42 black prospective jurors in all trials combined, and five of the six in the instant case, along with significantly more extensive questioning of black prospective jurors and the peremptory challenge of at least one black prospective juror who was similarly situated to whites who were not struck. Justice Kavanaugh wrote the majority opinion.

Justice Alito concurred, stressing the unique combinations of circumstances involved in the multiple efforts to convict Flowers, while Justice Thomas, joined in part by Justice Gorsuch, dissented. Thomas alone expressed continuing doubt about *Batson's* viability: "the Court continues to apply a line of cases that prevents, among other things, black defendants from striking potentially hostile white jurors." A summary of the decision in [Flowers v Mississippi](#) (No. 17-9572 [6/21/2019]), will appear in a future issue of the *REPORT*.

Race of Suspect Predicts "High Crime Area" Finding

Nearly twenty years ago, the US Supreme Court decided *Illinois v Wardlow*, 528 US 119 (1/12/2000). *Wardlow* allows police to consider someone's presence in a "high-crime area" in determining whether there is reasonable suspicion to support an investigative stop. Now, the authors of a new empirical analysis have found "evidence that officers often assess whether areas are high crime using a very broad geographic lens; that they call almost every block in the city high crime; that their assessments of whether an area is high crime are nearly uncorrelated with actual crime rates; that the suspect's race predicts whether an officer calls an area high crime as well as the actual crime rate; that the racial composition of the area and the identity of the officer are stronger predictors of whether an officer calls an area high crime than the crime rate itself; and that stops are less or as likely to result in the detection of contraband when an officer invokes high-crime area as a basis of a stop." Ben Grunwald and Jeffrey Fagan, "[The End of Intuition-Based High-Crime Areas](#)," 107 Cal LRev 345 (2019). Lawyers whose clients of color are being stopped partly on the basis of their presence in a "high-crime area" may want to check out this article, noted in the Onondaga County Assigned Counsel Plan's newsletter of June 24, 2019.

Developments in Forensics, Science, and Social Science Relevant to Defense

Defenders may confront prosecution evidence that involves or can be challenged by experts in a variety of fields; courts must deal with the resulting issues. For example, in the *People v Easley* decision summarized at p. 40, the Second Department found no error in the trial court's denial of "the defendant's request to conduct a hearing pursuant to [Frye v United States](#) (293 F 1013 [DC Cir]) to determine the admissibility of testimony relating to the forensic statistical tool (hereinafter FST) used to evaluate the likelihood that the DNA mixture found on the trigger of the subject firearm originated from the defendant." In a different realm, the Third Department recognized "that recent social science research strongly supports the legal presumption that children benefit from continuing contact with an incarcerated parent" *Matter of Benjamin OO. v Latasha OO.*, 170 AD3d 1394 (summarized on p. 49). Discussed below are developments in some of these fields.

DNA: Fundamentals and Fine Points

Like weather, DNA has been around forever but human understanding of it is still tenuous in many regards. Technological advances purporting to explain it

or change how we deal with it can produce uneven or unpredictable results. When DNA evidence is or may be making an appearance in a client's case, the lawyer has to know a lot, be prepared to learn more, and anticipate the unexpected. NYSDA works to help lawyers keep up with DNA issues, from providing CLE training on Fundamentals of DNA, as occurred in Washington County on March 14, to alerting lawyers to DNA-related news here in the *REPORT*.

DNA Mixtures Remain a Challenge

The late Ken Strutin, in a 2017 [article](#) on the LLRX website, referred to an [op-ed piece](#) on Bloomberg.com entitled "How DNA Evidence Went From Airtight to Error-Prone." Under discussion was the 2016 report of the President's Council of Advisors on Science and Technology (PCAST), "which called into question the increasingly common practice of analyzing mixtures of DNA from several individuals." As was noted in the [Jan. 12, 2017](#), edition of News Picks from NYSDA Staff, PCAST published an Addendum to its initial report, and included further discussion about analysis of complex DNA mixtures, "focusing on probabilistic genotyping (PG), 'which uses mathematical models (involving a likelihood-ratio approach) and simulations to attempt to infer the likelihood that a given individual's DNA is present in the sample.'" The Addendum called for validation of specific PG software and judicial consideration of the adequacy of validation when PG results are offered as evidence.

But challenging validation, and PG in general, was complicated and potentially futile. A Wired [article](#) noted in late 2017 that, "[a]s technology progresses forward, the law lags behind." Last year, the Third Department found a lawyer to have been ineffective for failing to request a *Frye* hearing on the PG system known as TrueAllele. *People v Wilson*, 164 AD3d 1012 (3d Dept 2018). But by the time of that decision there were signs that success in challenging PG software was unlikely. A competitor of TrueAllele, STRmix, was approved for casework by the NYS Commission on Forensic Science on the recommendation of its DNA Subcommittee. This heralded acceptance of PG evidence in New York trial courts, both state and federal, two years before *Wilson* was decided. See *People v Bullard-Daniel*, 54 Misc 3d 177 (Niagara Co Ct 3/10/2016) and *United States v Pettway*, No. 12-CR-103S (1) (WDNY 10/21/2016). New York's administrative acceptance of STRmix was also among reasons that STRmix evidence was accepted in Michigan last year. See *People v Muhammad*, 326 Mich App 40 (10/2/2018).

If PG evidence cannot be kept from the fact-finder, counsel may still challenge its viability in the particular case. This can involve demanding the raw data that informs the PG analysis. See *People v Seepersad*, 58 Misc 3d 1227[A] (Supreme Ct, NY Co 2018). It can also involve demanding the right to review and evaluate the source

code of the software program in question. A [press release](#) from the Electronic Frontier Foundation (EFF) on May 20, 2019, noted that a California court is considering this issue as to TrueAllele. The release includes a link to EFF's [amicus brief](#) in the case, which includes examples of errors found in source codes, such as that for FST (the program at issue in *People v Easley*, above).

Dealing with DNA evidence requires securing the assistance of an expert as early as possible to consult with counsel about possible DNA issues. The Backup Center works to help lawyers in finding such assistance in a rapidly changing field.

CODIS Glitch: No Details Revealed

Given the effect that the NYS Commission on Forensic Science and its DNA Subcommittee can have on the use of forensic evidence, as noted above, the defense community has an interest in those bodies' activities. The Subcommittee was recently in the news in a follow-up to a February [report](#) in *Bronx Justice News* concerning a software glitch in CODIS (Combined DNA Index System), the FBI's national DNA database. The glitch was causing incorrect DNA information to show up on crime lab computers. The DNA Subcommittee requested an FBI bulletin about the glitch. The request was denied, according to *Bronx Justice News* on [May 17](#). At a DNA Subcommittee meeting that day, distribution of a software patch to address the glitch was noted. Apparently, the New York State Police Crime Lab now has the patch. It was stated at the meeting that the glitch affects only the *display* of information, not the integrity of the information in the system. CODIS-approved labs in New York include the New York City Office of the Chief Medical Examiner's lab and labs in Westchester and Nassau Counties.

Note that observing the meeting, via video available [here](#) (the discussion starts at 15:00) provides much more information than appears in the meeting [minutes](#) under Old Business.

Change in Forensic Lab Oversight, at Least in Name

The accrediting authority for forensic labs in New York, including DNA labs, may be changed by consensus rule making to "ANSI-ASQ National Accreditation Board." As announced in the NYS Register for [May 22, 2019](#) (pp. 5-6), the change "revises the name of the current accrediting lab from ASCLD/ LAB (American Society of Crime Laboratory Directors/Laboratory Accreditation Board) to ANAB (ANSI National Accreditation Board)," as "ANAB has signed an affiliation agreement with ASCLD/LAB, merging ASCLD/LAB into ANAB."

The merger was [announced](#) back in 2016. In 2017, during a [public hearing](#) on oversight of forensic labs, defense lawyer Marvin Schechter, a frequent critic of

ASCLAD/LAB, noted that with ANAB being the “new sheriff in town,” it remained “to be seen what ANAB will do in terms of setting forward new rules and regulations as an accrediting agency.” Barry Scheck of the Innocence Project expressed hope that ANAB would be “stronger.” Given the importance of DNA evidence in many cases, NYSDA seeks to bring to the attention of defense lawyers any information that might challenge the reliability of lab work presented by the prosecution.

Poverty’s Impact: Breaking Out Details of How Violence, Lead, and Parental Incarceration Affect Children’s Later Success

A study by Harvard social scientists looking for specifics as to how poverty undercuts achievement “points to a handful of key indicators, including exposure to high levels of lead, violence, and incarceration as key predictors of children’s later success,” according to an [article](#) in the Harvard Gazette. Greater exposure to these factors “has intergenerational consequences,” according to Prof. Robert Sampson. He also said he “hopes the study will spur similar research in other cities and expand to include other environmental contamination, including so-called brownfield sites.” Such studies may provide criminal defense teams with valuable mitigation information.

How the study might affect parental representation is perhaps more complicated. Attorneys representing clients in child neglect proceedings may find corroboration of what they have long observed, which is that child removals happen at a disproportionately higher rate in poorer communities. The study begs the question of how to handle the systemic problem of removal of children from homes affected by the factors in question, where there is minimal familial support and community resources and a high rate of violence and incarceration. The adversaries in removal cases may argue that foster care placement is the only viable safe placement for these children. Helping clients find or build supports needed to offset the poverty-related challenges described in the report can be key. And that calls for the interdisciplinary, or multi-disciplinary, approach to parental representation discussed above (p. 3).

NYSDA has long demonstrated that the poverty in which many public defense clients live is relevant to their legal situation. Their poverty may affect how they interact with, and react to, counsel, the court, and others in the system. That in turn can affect assumptions made by counsel, the court, a jury, or other important players. The annual Basic Trial Skills Program, held this June at Skidmore College, is one forum in which NYSDA works to help lawyers understand the role of poverty in their clients’ lives and cases.

Exposure to Lead and Other Metals Linked to Crime and Behavior

That childhood lead exposure may contribute to behavioral issues—a point made in the study discussed above—has been known for some time. The March 1998 issue of the *REPORT* included an item about the possible connection between certain common metals in the body, including lead, and severe behavioral problems. Five years ago, an [article](#) about lead and crime appeared on the Chemical and Engineering News site, with a subhead that said “Research on the toxic metal’s effects on the brain bolsters the hypothesis that childhood exposure is linked to criminal acts.” In 2016, a [lengthy article](#) about lead exposure and crime appeared in Mother Jones. In 2018, The Flint Community Resilience Group (Flint, Michigan USA) and the federal Centers for Disease Control and Prevention e-published a report on their Assessment of Behavioral Health Concerns in the Community Affected by the Flint Water Crisis. The [abstract](#) indicates that, of the households contacted in that city hit by a highly-publicized lead contamination crisis, a majority “self-reported that at least one member experienced more behavioral health concerns than usual.” In January of this year, a study—Childhood lead exposure linked to poor adult mental health—was [announced](#); it is to be published in *JAMA Psychiatry*.

Another possible source of information about the effect of lead poisoning is an [Aug. 21, 2018 post](#). While perhaps useful for basic information, note that it is on a [website](#) that touts a specific [treatment](#) for lead exposure and other medical issues, and that the past studies and articles noted therein are largely dated 2007 or earlier.

Prosecutorial Conduct Commission on Hold, Misconduct Issues Continue

Back in August 2018, Governor Cuomo signed legislation creating a Prosecutorial Conduct Commission. Opposition by prosecutors to this watchdog entity continued, as noted in the [Aug. 30, 2019](#), News Picks from NYSDA Staff item announcing the Governor’s action. Earlier this year, the Governor signed a [chapter amendment](#) to the Commission law and issued an Approval Memorandum. An [article](#) on Syracuse.com noted that the Governor said, “The creation of this commission rightfully drew praise by most, but swift scorn and a legal challenge by those who would be subject to its oversight,” but also expressed continuing concerns about the constitutionality of the commission. On June 2, 2019, the *New York Law Journal* published an [article](#) saying that the Governor and some legislative leaders had agreed to halt creation of the Commission “pending the outcome of a lawsuit challenging its constitutionality.” According to the article, “[t]he only lawmaker that has agreed to stay in the

lawsuit and defend the commission is Assembly Speaker Carl Heastie,” while the Senate Majority Leader and the two Minority Leaders, along with the Governor, have agreed not to name appointees to the Commission until the litigation is resolved. They were therefore to be dropped as defendants in the suit brought by the District Attorneys Association of the State of New York.

While the Commission lingers in limbo, prosecutorial misconduct issues keep showing up in legal news in New York and the nation, sometimes exposing sharp divisions in how some misconduct claims are viewed. The US Supreme Court’s term-end decision in *Flowers v Mississippi*, discussed above (p. 6), provides an extreme example of long-standing prosecutorial violations of the

Batson ban on race-based exercise of peremptory challenges. But dissenting Justice Thomas avers that the *Batson* rule itself is “suspect” and, by forcing equal protection principles onto an inherently discretionary decision, has actually “blinded the Court to the reality that racial prejudice exists and can affect the fairness of trials.”

The Court of Appeals decision in *People v Giuca*, summarized on p. 13, deals with the perennial issue of the prosecutorial duty to disclose favorable information. *Giuca* might be called an example of defense “stretching” a *Brady* complaint; the Court noted factually that the defendant’s own hearing witnesses proved that there was no agreement, tacit or otherwise, between an informant
(continued on p. 59)

CONFERENCES & SEMINARS

Sponsor: National Association for Public Defense
Theme: Team Mitigation Institute
Dates: August 19-21, 2019
Place: Boise, ID
Contact: www.publicdefenders.us/ev_calendar_day.asp?date=8/19/2019&eventid=154

Sponsor: National Association for Public Defense
Theme: Social Worker/Sentencing Advocate Conference, at same time and location as the Investigator Conference
Dates: September 10-13, 2019
Place: Seattle, WA
Contact: www.publicdefenders.us/ev_calendar_day.asp?date=9/10/2019&eventid=150

Sponsor: National Association of Criminal Defense Lawyers
Theme: Defending Modern Drug Cases Seminar, in conjunction with DWI Means Defend with Ingenuity Seminar
Dates: September 18-21, 2019
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x630; email: aathanason@nacdl.org; website: <https://members.nacdl.org/event-details?id=1a1b8ca2-e3e4-4a22-a66a-f4a88c93f293>

Sponsor: National Child Abuse Defense and Resource Center
Theme: Child Abuse Allegations: Scientific Fact & Reason vs. Myth & Emotion
Dates: October 17-19, 2019
Place: Las Vegas, NV
Contact: Fax: (419) 865-0526; email: ncadrc@aol.com; website: <http://www.falseallegation.org/wp-content/uploads/2019/04/2019-Conference-Brochure-web.pdf>

Sponsor: Brooklyn Law School Center for Criminal Justice
Theme: Save the Date: Criminal Law, Procedure, Evidence & Ethics
Dates: October 25 and Nov. 1, 2019
Place: Brooklyn, NY
Contact: https://calendar.google.com/calendar/event?eid=NWtxYzI0amM1MDYzbzExNnE2cGc3anR1ajIjOGRnNzJlNnRwY2VvbHVibmQyazRtc2VtZzBAZw&ctz=America/New_York

Sponsor: National Legal Aid and Defender Association
Theme: 2019 Annual Conference
Dates: November 6-9, 2019
Place: Detroit, MI
Contact: NLADA: tel (202)452-0620; fax (202)872-1031; website www.nlada.org/node/22536

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

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

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 Supreme Court

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

Dunn v Price, __ US __, 139 SCt 1312 (4/12/2019)

SENTENCE – EIGHTH AMENDMENT/DEATH PENALTY

LASJRP¹: In a 5-4 decision, the Supreme Court vacates a stay of execution. The majority notes that, in June 2018, death-row inmates in Alabama whose convictions were final before June 1, 2018 had 30 days to elect to be executed via nitrogen hypoxia. Price, whose conviction became final in 1999, did not do so, even though the record indicates that all death-row inmates were provided a written election form, and 48 other death-row inmates elected nitrogen hypoxia. Price waited until February 2019 to file this action, and submitted additional evidence a few hours before his scheduled execution time.

In dissent, Justice Breyer, joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan, notes that there is evidence that death by nitrogen hypoxia would be substantially less painful than death by the existing lethal injection protocol; that the District Court found that Price had not timed his motion in an effort to manipulate the execution; that it is possible that Price was given no more than 72 hours to decide how he wanted to die, notwithstanding the 30-day period prescribed by state law; and

¹ Summaries marked with these initials, LASJRP, are courtesy of The Legal Aid Society's Juvenile Rights Practice, from their weekly newsletter.

that "(t)o proceed in this matter in the middle of the night without giving all Members of the Court the opportunity for discussion tomorrow morning is, I believe, unfortunate."

Herrera v Wyoming, No. 17-532 (5/20/2019)

A member of the Crow Tribe properly invoked as a defense to charges of off-season hunting on National Forest land in Wyoming the provisions of an 1868 treaty allowing the Tribe to hunt on unoccupied lands of the United States where game can be found. "The Crow Tribe's hunting right survived Wyoming's statehood, and the lands within Bighorn National Forest did not become categorically 'occupied' when set aside as a national reserve." On remand, the State may litigate whether the specific site on which the defendant hunted elk was "occupied" within the meaning of the treaty and whether the State may apply regulations necessary for conservation to tribal members.

Dissent: [Alito, J] The Court's opinion is contrary to construction of identical language in a related treaty and violates the doctrine of issue preclusion; members of the tribe are bound by the judgment in *Crow Tribe of Indians v Repsis*, 73 F3d 982, 992-993 (CA10 1995) "(holding that the hunting right conferred by that treaty is no longer in force)."

Nieves v Bartlett, No. 17-1174 (5/28/2019)

**SEARCH AND SEIZURE – FIRST AMENDMENT ISSUES/
RETALIATORY ARREST**

LASJRP: In this § 1983 action, a United States Supreme Court majority holds that probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment.

If a plaintiff establishes the absence of probable cause, and that the retaliation was a substantial or motivating factor behind the arrest, the defendant can prevail by showing that the arrest would have been initiated without respect to retaliation.

The no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.

Mont v United States, No. 17-8995 (6/3/2019)

The period of supervised release is tolled under 18 USC 3624(e) by pretrial detention for a new offense if the later imposed sentence credits the period of pretrial detention as time served for the new offense.

Dissent: [Sotomayor, J] "I cannot agree that a person 'is imprisoned in connection with a conviction' before any conviction has occurred"

US Supreme Court *continued***Quarles v United States, No. 17-778 (6/10/2019)**

For purposes of the federal Armed Career Criminal Act, remaining-in burglary occurs when a defendant “forms the intent to commit a crime at any time while unlawfully remaining in a building or structure.” The defendant’s argument, rejected below, was that his Michigan home invasion conviction should not be considered because that statute encompassed situations where the intent to commit a crime could occur at any time while remaining unlawfully, not *at the exact moment* when the defendant is *first* unlawfully present in a dwelling.” Given the body of state law in existence when the Act was passed, it is unlikely Congress meant to include burglars whose intention to commit a crime exists at the exact moment they first unlawfully remain but to exclude those who form the intent at any time while unlawfully remaining. The narrow interpretation presented by the defendant would thwart the Act’s stated goals.

Concurrence: [Thomas, J] The court correctly applies the “precedent requiring a categorical approach’ to the enumerated-offenses clause of the” Act. I question the approach altogether. It is “difficult to apply and can yield dramatically different sentences depending on where a burglary occurred”

New York State Court of Appeals

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

People v Brown, 2019 NY Slip Op 03404 (5/2/2019)

440 MOTION / HEARING NEEDED

ILSAPP¹: The defendant’s CPL 440.10 motion to set aside a murder conviction, based on a violation of his right to conflict-free representation, was summarily denied. The COA held that a hearing was warranted to address allegations regarding counsel’s concurrent representation, in an unrelated manner, of another suspect who was with the defendant at the scene of the murder. Judge Stein dissented. The Center for Appellate Litigation (David Klem, of counsel) represented the appellant.

People v Hill, 2019 NY Slip Op 03405 (5/2/2019)

TAKING ID AWAY WENT BEYOND LEVEL ONE REQUEST

¹ Summaries marked with these initials, ILSAPP, are courtesy of the New York State Office of Indigent Legal Services, from the ILS appellate listserv.

LASCDP²: Police observed defendant entering and exiting a Housing Authority building several times. As a response to the officers’ inquiry, he explained that he was visiting a friend. To verify the statement, the police took defendant’s identification into the building and instructed defendant to “stand right there” outside the building. The occupant of the apartment did not know defendant, who was arrested for trespass. At the precinct, drugs were found on his person.

The Court of Appeals ruled that the drugs should be suppressed. The action taken by the police went beyond a simple “request for information” permitted by a level one intrusion.

People v Brown, 2019 NY Slip Op 03529 (5/7/2019)

PEOPLE’S APPEAL / REVERSED

ILSAPP: The defendant shot his pregnant daughter’s boyfriend and was indicted for 2nd degree murder and 1st degree manslaughter. Defense counsel’s request for a justification instruction was denied, and the defendant was convicted of manslaughter. The First Department reversed. However, finding that no reasonable view of the evidence warranted a justification charge, the COA reversed and remitted the matter to the Appellate Division for a determination of the facts and issues raised but not determined on appeal to that court. The defendant was the initial aggressor as a matter of law. Before drawing his gun, he was not threatened by the victim with the imminent use of deadly force. The defendant placed his gun in a position where he could fire it imminently. After taking out the gun, the defendant did not withdraw.

People v Rkein, 2019 NY Slip Op 03528 (5/7/2019)

DEFENSES – JUSTIFICATION

LASJRP³: The Court of Appeals concludes that the trial court appropriately determined that, if the jury convicted defendant of second-degree assault by means of a dangerous instrument, it necessarily determined that defendant employed deadly, rather than ordinary, physical force by striking the complainant on the head with a pint glass.

The court also properly determined that no reasonable view of the evidence supported a deadly force justification charge where the complainant had merely pushed defendant, albeit with “pretty strong force,” and then rested his hands at his sides while a female attempted to sep-

² Summaries marked with these initials, LASCDP, are courtesy of The Legal Aid Society’s Criminal Defense Practice, from their CDD case summaries.

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

NY Court of Appeals *continued*

arate the two men. Defendant could not have reasonably believed that the complainant was using or about to use deadly physical force.

[People v Towns, 2019 NY Slip Op 03527 \(5/7/2019\)](#)

JUDICIAL BIAS / REVERSAL

ILSAPP: The defendant was denied a fair trial when the trial court negotiated and entered into a cooperation agreement with a codefendant, requiring him to testify against the defendant in exchange for a more favorable sentence. In so doing, the trial court abandoned the role of a neutral arbiter and created a high risk of bias. The COA so held in a unanimous opinion authored by Judge Stein. The court reversed the Fourth Department order, which affirmed a judgment convicting the defendant of six counts of 1st degree robbery and ordered a new trial before a new judge. At trial, the defendant moved to preclude the codefendant’s testimony and, upon conviction, sought to set aside the verdict based on the agreement and the codefendant’s testimony. Although this case presented unique circumstances, a basic principle applied: the bench must be scrupulously free from even the appearance of partiality. The trial court’s conduct violated concepts of fundamental fairness. The Monroe County Public Defender (Dianne Russell, of counsel) represented the appellant.

[People v Vega, 2019 NY Slip Op 03530 \(5/7/2019\)](#)

DEFENSES – JUSTIFICATION

LASJRP: Defendant was charged with several crimes for beating the victim with a belt with a metal buckle. Defendant raised a justification defense based on his alleged defense of a third person. The trial court instructed the jury on the justified use of non-deadly physical force in connection with a charge of assault in the third degree. At the People’s request, the court also instructed the jury that if it found beyond a reasonable doubt that defendant used a dangerous instrument, it should apply the legal rules pertaining to the justified use of deadly physical force. Defendant argues that the statutory definitions, while similar, are not identical and that a jury may convict a defendant of a crime containing a dangerous instrument element without necessarily concluding that the defendant used deadly physical force.

The Court of Appeals finds no error. Although it would be a rare case—particularly where, as here, the charge is assault in the second degree—the Court does not rule out the possibility that a defendant may be entitled to a jury instruction on the justified use of non-deadly physical force with respect to a crime containing a dangerous instrument element. There is no per se rule regarding

which justification instructions are appropriate when the defendant has been charged with second-degree assault with a dangerous instrument.

Here, viewing the record in the light most favorable to defendant, there is no reasonable view of the evidence that defendant merely “attempted” or “threatened” to use the belt in a manner readily capable of causing death or serious physical injury, but did not “use” it in that manner.

[People v Meyers, 2019 NY Slip Op 03658 \(5/9/2019\)](#)

JURY NOTE / MERE DRAFT

ILSAPP: While preparing the defendant’s appeal, counsel discovered a purported jury note in the court file. The Appellate Division directed Supreme Court to conduct a reconstruction hearing to determine if the exhibit reflected a jury request for further instruction. The trial court concluded that the exhibit was a draft or derelict note that was never submitted to the court. Such finding was supported by the record, the COA held. Therefore, the CPL 310.30 jury note procedures were not triggered. Judge Garcia concurred in the result.

[People v Esposito, 2019 NY Slip Op 04448 \(6/6/2019\)](#)

“The factual allegations in the accusatory instrument were sufficient to support the inference that defendant was the operator of the vehicle involved in the accident and, thus, Appellate Term erroneously dismissed the accusatory instrument on that ground.”

[People v Gregory, 2019 NY Slip Op 04450 \(6/6/2019\)](#)

“The trial court concluded—based upon, among other things, its own observations of defendant’s conduct throughout these lengthy proceedings and the testimony of defendant’s attending physician—that defendant engaged in malingering insofar as he was competent to proceed but persisted in his efforts to avoid trial. Inasmuch as defendant ‘engaged in conduct which would prevent the fair and orderly exposition of the issues,’ we conclude that the trial court did not abuse its discretion in denying defendant’s request to proceed pro se Moreover, the existence of record support for the determination of the courts below that the pursuit of defendant by the police was justified by a ‘reasonable suspicion’ of criminal activity forecloses our further review of that issue”

[People v Smith, 2019 NY Slip Op 04447 \(6/6/2019\)](#)

MISSING WITNESS CHARGE / REVERSAL

ILSAPP: The defendant appealed from a judgment of conviction of attempted 2nd degree murder and other crimes. The Fourth Department affirmed, and a dissenting

NY Court of Appeals *continued*

justice granted leave. A unanimous Court of Appeals ordered a new trial, because of reversible error in a ruling on a missing witness charge. As explained in *People v Gonzalez*, 68 NY2d 424, the missing witness instruction allows a jury to draw an unfavorable inference, based on a party's failure to call a witness who would normally be expected to support that party's version of events. As established in *Gonzalez*, initially, the proponent must demonstrate that: (1) there is an uncalled witness believed to be knowledgeable about a material issue in the case; (2) such witness can be expected to testify favorably to the opposing party; and (3) such party has failed to call the witness to testify. The party opposing the charge can defeat the initial showing by accounting for the witness's absence or demonstrating that the charge would be inappropriate, for example, because the testimony would be cumulative. The Court of Appeals has never required the proponent to negate cumulativeness to meet the prima facie burden; Appellate Division decisions placing that burden on the proponent have misapplied precedent. After all, the proponent of the missing witness charge typically lacks the information necessary to know what the uncalled witness would have said and, thus, whether the testimony would have been cumulative. The instant defendant met his initial burden, but the People failed to rebut the defense showing. Their conclusory argument, that the testimony would be cumulative, was insufficient and unsupported by the record. The error was not harmless because the evidence against the defendant was not overwhelming. The Monroe County Public Defender (Drew DuBrin, of counsel) represented the appellant.

People v Giuca, 2019 NY Slip Op 04642 (6/11/2019)

To the extent that there was any suppression of impeachment material relating to the circumstances of a jailhouse informant's pending criminal matter, "there is no reasonable possibility that the verdict would have been different if the information at issue had been disclosed" and the conviction is affirmed. The purpose of the *Brady* rule "is not to displace the adversary system as the primary means" of uncovering the truth but to ensure a fair trial. Here, the defendant's own witnesses at the 440 hearing proved that the informant had no agreement to receive a benefit from his testimony. "A witness's wholly subjective hope of favorable treatment, in the absence of any objective circumstances that reasonably substantiate the witness's expectation, cannot unilaterally form the basis of a tacit understanding—particularly where, as here, the only credible evidence in the record is that the witness was given no promises or assurances by, and communicated that he did not request or expect any

favorable treatment" Even absent an express or tacit agreement, the prosecution has a broader responsibility to disclose information tending to show an incentive for a witness with an open criminal case to curry favor by testifying falsely, and here "[t]here was undisclosed evidence that would have enabled defense counsel to deepen his argument" that the informant testified falsely to favorable treatment. But the undisclosed evidence "was more of the same evidence that" counsel used to impeach the informant at the trial where strong evidence of guilt was presented.

Dissent: [Rivera, JJ] "I would affirm the Appellate Division order which granted" the defendant's 440.10 motion and a new trial. That defense counsel impeached the informant to some extent cannot excuse the prosecution from its constitutional obligations.

First Department

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

Caroline D. v Travis S., 168 AD3d 410 (1st Dept 1/3/2019)**PATERNITY / MAGISTRATE OVERSTEPPED**

ILSAPP¹: The respondent appealed from an order of filiation of New York County Family Court, which adjudged him to be the father of the subject child. The First Department reversed and remanded. Although no appeal lies as of right from an order of filiation entered in a support proceeding, the appellate court deemed the notice of appeal to be a motion for permission to appeal and granted leave. The order under review—which resolved issues of contested paternity involving claims of equitable estoppel—was outside of the scope of the Support Magistrate's statutory authority. Moreover, when the respondent appeared without his attorney, the Magistrate gave him technical instructions to convey to counsel about filing a motion to be heard by a judge, regarding a request for a DNA test. The denial of a request for an adjournment needed to file the motion was an abuse of discretion. Lewis Calderon represented the appellant. (Family Ct, New York Co)

People v Allende, 168 AD3d 464 (1st Dept 1/10/2019)**ROBBERY CONVICTION / COUNT DISMISSED**

¹ Summaries marked with these initials, ILSAPP, are courtesy of the New York State Office of Indigent Legal Services, from the ILS appellate listserv.

First Department *continued*

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicted him after a jury trial of 1st and 2nd degree robbery. The First Department vacated the robbery one conviction and dismissed that count. The robbery was accomplished by assaulting the victim and taking his wallet. Although an eyewitness saw what appeared to be a firearm, there was no evidence that the victim saw it. Two justices dissented as to the sentence, opining that the term of eight years should have been reduced to five years. The defendant was only 21 at the time of the crime, his first felony conviction. After his mother died when he was 16, the defendant struggled with untreated depression and bipolar disorder. Further, the codefendant was the one who violently punched the victim, yet he received only five years. The defendant’s sentence appeared to be an unnecessarily harsh response to his exercise of the right to go to trial. The Center for Appellate Litigation (Megan Byrne, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Ataroua, 168 AD3d 466 (1st Dept 1/10/2019)

ATT. ROBBERY / BAD JURY CHARGE / NEW TRIAL

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW. The First Department reversed and ordered a new trial. In connection with the larceny element of attempted robbery—the offense underlying the felony murder charge—upon the defense request, the trial court should have instructed the jury on the definition of “deprive.” The failure to do so constituted reversible error, since such omission could have misled the jury into thinking that *any* withholding, permanent or temporary, constituted larceny. It was the function of the jury to determine whether the defendant intended to rob the victim and permanently keep the property taken from him. The court usurped that function. The Center for Appellate Litigation (David Klem, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

People v Watson, 169 AD3d 81 (1st Dept 1/10/2019)

BATSON RECONSTRUCTION / INDICTMENT DISMISSED

ILSAPP: On a prior appeal, the First Department held that Bronx County Supreme Court failed to follow the *Batson v Kentucky* protocol and remanded for a reconstruction hearing to recreate a record of the prosecutor’s justifications for striking certain venire persons. At such a hearing, it is typical to rely on the contemporaneous notes of the prosecutor and to elicit testimony from him or her. That did not happen here. The ADA who conducted the voir dire did not appear, and no testimony or notes were

offered. The procedure was insufficient. The People noted that seated venire persons who expressed hostility toward police had not been the victims of police harassment. The appellate court observed that refusing to seat potential jurors who had been unfairly stopped or otherwise been victims of police harassment was a pretext for excluding a protected group. There was no basis to remand for a second *Batson* hearing. The judgment convicting the defendant of 2nd degree assault and other charges was reversed, and the indictment was dismissed. Two judges dissented. The Center for Appellate Litigation (Jody Ratner, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

People v Ortiz, 168 AD3d 482 (1st Dept 1/15/2019)

ERROR SMORGASBORD / NEW TRIAL

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court convicting him of 1st degree assault and 1st degree burglary. The First Department reversed and remanded for a new trial. During trial, the court permitted a T-Mobile subpoena compliance agent to opine about the coverage area of a cell phone tower. That was error. Such testimony must be offered by an expert witness. The trial court also erred in permitting a police officer to testify about the victim’s previous identification of the defendant. Furthermore, the jury charge improperly highlighted identification evidence favorable to the prosecution. Supreme Court also erroneously failed to give a missing witness charge as to two lead detectives who possessed knowledge highly material to the case. Nor should the court have referenced the defendant’s failure to testify. Moreover, a juror had revealed that an interaction with a court officer deeply upset him, yet the record contained no resolution regarding whether the juror was grossly unqualified to serve. The combined effect of the errors deprived the defendant of a fair trial. The Office of the Appellate Defender (Victorien Wu, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

People v Jiggetts, 168 AD3d 507 (1st Dept 1/17/2019)

BOONE ERROR / HARMLESS

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree robbery and other crimes. The First Department affirmed. The trial court erred in denying the defendant’s request for a charge on cross-racial identification. When identification is at issue, and the identifying witness and the defendant appear to be of different races, a party is entitled to a charge on cross-racial identification, and the trial court must give the charge if it is requested. *People v Boone*, 30 NY3d 52. However, the instant error was harmless. The key identifying feature was a red cloth that the victim stated the robber had been holding. The defendant appeared on a videotape holding such a cloth, as he tried

First Department *continued*

to use the victim's credit card shortly after the robbery; and he admitted that he regularly carried such a cloth. Further, the evidence—which included the recovery of the victim's Social Security card from the defendant's apartment—was overwhelming; and the defendant provided an implausible explanation for his recent possession of the fruits of the crime. The Center for Appellate Litigation (Benjamin Wiener of counsel) represented the appellant. (Supreme Ct, New York Co)

Matter of Luongo v Records Access Appeals Officer,
168 AD3d 504 (1st Dept 1/17/2019)

FOILED AGAIN

ILSAPP: The petitioner appealed from a judgment of New York County Supreme Court, denying a petition to compel the respondent to disclose documents requested pursuant to FOIL, and dismissing the Article 78 proceeding. The First Department affirmed. The NYPD personnel documents at issue contained information used to evaluate officers' performance, such as the dispositions of disciplinary charges. Moreover, these records were material ripe for degrading, embarrassing, harassing or impeaching the integrity of the officers, the First Department stated, citing the Court of Appeals decision in *Matter of NYCLU v NYPD* (12/11/18). Thus, Supreme Court properly found that the records sought were exempt from disclosure under Civil Rights Law § 50-a. (*The Legal Aid Society of NYC has stated its intention to appeal the decision and continue a campaign to repeal § 50-a.*) (Supreme Ct, New York Co)

People v Alston, 169 AD3d 1 (1st Dept 1/22/2019)

CPL 200.60 VIOLATION / DISSENT

**ERROR TO DO "SPECIAL INFORMATION" PROCEDURE
 BEFORE JURY SELECTION**

LASCDP²: CPL §200.60(3) requires that the trial judge give defendant the choice to admit or dispute an alleged prior conviction that would raise the level of the trial offense. The trial court erred in arraignment the defendant on the "special information" before jury selection. The plain language of the statute required that arraignment occur after commencement of the trial; the judge's belief that his action comported with the principle of the statute did not excuse avoiding the plain language of the statute.

The majority, however, upheld the conviction on the ground that the record showed no prejudice to defendant

² Summaries marked with these initials, LASCDP, are courtesy of The Legal Aid Society's Criminal Defense Practice, from their CDD case summaries.

from the statutory violation. The dissenter argued that the error was "inherently harmful" and that harmless error doctrine was inapplicable. (Supreme Ct, New York Co)

People v Mitchell, 168 AD3d 531 (1st Dept 1/22/2019)

SENTENCED REDUCED / DISSENT

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court convicting him of 1st degree criminal possession of a forged instrument and sentencing him, as a second felony offender, to 4 to 8 years. A homeless 53-year-old, the defendant tried to buy food and toothpaste with a counterfeit \$20 bill. Five counterfeit \$20 bills were recovered from him. The First Department reduced the sentence to 3 to 6 years. Despite being charged with five counts, the defendant was convicted of only a single count. The immediate object of his crime was to purchase basic human necessities. In consideration of such factors, as well as the defendant's medical and substance abuse issues, leniency was appropriate. His extensive criminal history did not preclude such relief. The most recent felony occurred nine years earlier and was nonviolent. One justice dissented. The Legal Aid Society, NYC (David Crow and Kathrina Szymborski, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Muhammad, 168 AD3d 549
 (1st Dept 1/22/2019)

FOREIGN PREDICATE FELONY / NOT EQUIVALENT

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court convicting him, upon his plea of guilty, of attempted 2nd degree murder and another crime and sentencing him as a second felony offender. The First Department vacated the SFO adjudication and remanded for resentencing. The Florida predicate was not the equivalent of a New York felony. The knowledge element of the Florida statute was that a defendant knew of the illicit nature of the items in his possession; and that was broader than the knowledge requirement under Penal Law § 220.16. The Center for Appellate Litigation (Benjamin Wiener, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

Vargas v City of New York, 168 AD3d 529
 (1st Dept 1/22/2019)

TRANSIT RECIDIVIST / CONCURRENCE

ILSAPP: The plaintiff appealed from an order of New York County Supreme Court which denied his motion for a declaration that a NYPD practice—stops of subway passengers who committed transit infractions for "transit recidivist" checks—violated the State Constitution. The First Department affirmed. A concurring opinion ob-

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served that the transit database was likely contaminated by sealed arrests and summons histories, and undercut the presumption of innocence insofar as persons were threatened with punishment on account of allegations that may have been unsubstantiated or dismissed. Further, the database had a disproportionately negative effect on black and Hispanic communities. (Supreme Ct, New York Co)

Matter of Pahyttene Uriah V.A.J.C., 168 AD3d 599
(1st Dept 1/29/2019)

SUSPENDED JUDGMENT / UPHELD

ILSAPP: The AFC appealed from an order of New York County Family Court, which suspended for one year a judgment that the respondent mother permanently neglected the subject child. The First Department affirmed. The trial court providently exercised its discretion in ordering such disposition in the child's best interests. The AFC did not cite a single case in which the First Department had reversed an order suspending the termination of parental rights as an abuse of discretion. Moreover, the respondent Catholic Guardian Services, which had been involved with this family for many years, strongly recommended a suspended judgment. The mother had complied with her service plan by attending and completing required services, testing negative for drugs, and maintaining consistent visitation. (Family Ct, New York Co)

People v Robinson, 168 AD3d 605 (1st Dept 1/29/2019)

KIDNAPPING / SENTENCE CUT / 25 TO 10 YEARS

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, which convicted him after a jury trial, of 2nd degree kidnapping, 3rd degree witness tampering, and other crimes, and sentenced him as a second felony offender to an aggregate term of 29 to 33 years. The First Department modified in the interest of justice to the extent of reducing the sentence for kidnapping from 25 years to 10 years, resulting in an aggregate term of 14 to 18 years. The evidence established that the defendant intended to prevent his five-year-old niece's liberation by holding her where she was unlikely to be found. Seeking revenge against the victim's mother, he took the child to stay at his girlfriend's motel and did not disclose her whereabouts when family members repeatedly contacted him. The Center for Appellate Litigation (Alexandra Mitter, of counsel) represented the appellant. (Supreme Ct, New York Co)

Matter of Selena O. v Administration for Children's Servs., 168 AD3d 590 (1st Dept 1/29/2019)

NEGLECT / NOT TO BE LIGHTLY FOUND

ILSAPP: The mother appealed from an order of Bronx County Family Court which found that she neglected the subject children. The First Department reversed and dismissed the petition. The petitioner agency, ACS, failed to establish that any of the subject children were neglected. Although Mariana was struggling in school, she had a good attendance record, and a special needs teacher was assigned to her. Some of the chronic communication difficulties between the school and the parents arose because of the school's practice of communicating with the mother through Mariana, despite her learning issues. In addition, with respect to Jesus, ACS did not prove that the mother, who was hearing impaired, failed to exercise a minimum degree of care in not addressing the toddler's speech delays. ACS only presented evidence of one conversation between its caseworker and the mother regarding the speech problems. The caseworker did not make any recommendations or referrals. True, the parents had a history of neglect, and their parental rights had been terminated as to an older child with extensive unmet medical needs. However, a finding of neglect should not be made lightly, nor should it rest upon past deficiencies alone. Geoffrey Berman represented the appellant. (Family Ct, Bronx Co)

People v Barnar, 168 AD3d 623 (1st Dept 1/31/2019)

MANSLAUGHTER / NEW TRIAL / INTEREST OF JUSTICE

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1st degree manslaughter and sentencing him to 25 years. The First Department reversed in the interest of justice and remanded for a new trial, based on the principles set forth in *People v Velez*, 131 AD3d 129, which was decided after the defendant's trial. In *Velez*, a jury found the defendant guilty of lesser included offenses arising out of a stabbing incident, but acquitted him of the top count, attempted 2nd degree murder. Justification was a central issue. The trial court's instructions did not convey that acquittal of the greater charge based on justification precluded consideration of the lesser offenses. Thus, the verdict was ambiguous and reversal was warranted. The Legal Aid Society of NYC (Denise Fabiano, of counsel) represented the *Barnar* appellant. (Supreme Ct, Bronx Co)

People v Lee, 169 AD3d 404 (1st Dept 2/5/2019)

The defendant's conviction is affirmed where a detective's suppression hearing testimony established that an eyewitness's knowledge of the defendant was sufficient to make the identification at issue confirmatory, and the

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defendant's request for the eyewitness to testify at the *Rodriguez* hearing was insufficient to preserve a Confrontation Clause claim. That claim is not reviewed in the interest of justice, and alternatively is rejected on the merits "in light of the fundamental difference between a suppression hearing, where hearsay is generally admissible, and a trial" (Supreme Ct, Bronx Co)

People v Cabrera, 169 AD3d 435 (1st Dept 2/7/2019)**PEOPLE'S APPEAL / COUNSEL'S IMMIGRATION ERROR**

ILSAPP: The People appealed from an order of Bronx County Supreme Court which granted the defendant's CPL 440.10 motion and vacated a 2006 conviction for a domestic violence felony. The First Department affirmed. The motion court properly granted the defendant's application on the ground of ineffective assistance, consisting of counsel's affirmative misadvice about the deportation consequences of the defendant's guilty plea. *See People v McDonald*, 1 NY3d 109 (2003). The motion court conducted a hearing that included testimony from the defendant and prior counsel. Evidence credited by the court established that counsel advised that the defendant would not become deportable and would likely be granted citizenship five years after he completed probation, if he stayed out of trouble. Counsel's affirmative misrepresentations fell below an objective standard of reasonableness. Although the People disputed whether, at the time of the plea, the defendant's conviction rendered him deportable, they established at most that deportability was less clear in 2006 than today. Further, counsel's errant advice was not that defendant *might* avoid deportation, but that he *would* do so. The People did not challenge the finding that the defendant was prejudiced, that is, he would not have pleaded guilty had he received correct immigration advice. Jonathan Edelstein represented the respondent. (Supreme Ct, Bronx Co)

Matter of Kaiyeem C., 169 AD3d 419 (1st Dept 2/7/2019)**TERMINATION / ANDERS BRIEF**

ILSAPP: The mother appealed from an order of New York County Family Court which terminated her parental rights based on a finding that she suffered from a mental illness. An application by the mother's assigned counsel to withdraw as counsel was granted. The First Department had reviewed the record and agreed that there were no nonfrivolous issues that could be raised on appeal. *Cf. Ulster County SCU v McManus* (ILS Decisions of Interest, 2/4/19) (rare that *Anders* brief will reflect effective advocacy in contested Family Court case where

evidentiary hearing occurred; new counsel assigned in that case in response to *Anders* brief).

In re Kayla C., 169 AD3d 495 (1st Dept 2/14/2019)**ABUSE/NEGLECT – VISITING**

LASJRP³: The First Department upholds the family court's determination to grant two respondent mothers unsupervised visitation with their respective children, subject to compliance with precautionary measures specifically tailored to protect the children from harm.

There is no evidence in the record that either of the mothers had perpetrated the sexual abuse or posed any other safety risk to the children. The court prohibited other people from being present during visits, required that visits take place in the community, prohibited the children from being left with anyone other than their mothers during visits, and limited visits to twice weekly for a three hours a visit.

The JRP appeals attorney was Marcia Egger, and the trial attorney was Kristen Calabrese. (Family Ct, Bronx Co)

In re Kayo I. v Eddie W., 169 AD3d 491 (1st Dept 2/14/2019)**CUSTODY – TRAVEL ISSUES**

LASJRP: The First Department finds no error where the court permitted the mother, the custodial parent, to travel to Japan with the child for one month each year, upon six weeks' notice to the father but without obtaining his prior consent. The provision of the 2010 stipulation that requires the father's consent is inconsistent with the mother's sole legal custody. (Family Ct, New York Co)

People v Knight, 169 AD3d 493 (1st Dept 2/14/2019)**POSSESSION OF A WEAPON****– GRAVITY KNIFE****– SECOND AMENDMENT**

LASJRP: The First Department rejects defendant's contention that the statutes defining and prohibiting possession of gravity knives are unconstitutionally vague, either facially or as applied to defendant. The Court notes that to establish this strict liability offense, the People were not required to prove that defendant knew that the knife in his possession met the statutory definition of a gravity knife.

The Court also concludes that defendant lacks standing to claim that the absolute prohibition of possession of gravity knives, by anyone, violates the Second Amendment, since defendant was convicted under the

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

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statutory provision which criminalizes possession of weapons by persons previously convicted of crimes. States are broadly empowered to prohibit convicted criminals from possessing weapons. (Supreme Ct, New York Co)

People v Soto, 169 AD3d 534 (1st Dept 2/19/2019)

SORA REMAND / DISCRETION NOT EXERCISED

ILSAPP: The defendant appealed from order of New York County Supreme Court, which adjudicated him a level-two sex offender. The First Department held the appeal in abeyance, and remanded for a [] hearing regarding a downward departure. A three-step process applied: (1) The hearing court determined whether mitigating circumstances were not adequately considered by the Guidelines; (2) If so, the court applied a preponderance of the evidence standard to determine whether the defendant had proven the existence of the circumstances; and (3) If the first two steps were satisfied, the court exercised its discretion by weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warranted a downward departure. The instant decision suggested that, in this case of statutory rape, the court considered itself bound to conclude that mitigating circumstances were adequately accounted for. That was erroneous. In such cases, the Board has recognized that strict application of the Guidelines may result in overassessment of risk to public safety. The Center for Appellate Litigation (Abigail Everett and Stephanna Sotkowski, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Gray, 169 AD3d 560 (1st Dept 2/21/2019)

CONFESSIONS – INTERROGATION/PEDIGREE EXCEPTION

LASJRP: The police responded to a woman’s report that defendant was trespassing in her apartment. The police woke defendant up and arrested him in the bedroom. Because defendant was nude and the police could not tell what articles of clothing belonged to him, an officer asked him where his clothes were. When defendant pointed to a shirt and shorts, the police recovered evidence from the shorts.

The First Department upholds the denial of suppression, concluding that the question about where defendant’s clothes were was reasonably related to administrative concerns because it would have been impossible to process the arrest properly without dressing defendant.

Even if the answer was reasonably likely to be incriminating, the pedigree exception applies because, in light of the woman’s statement that defendant had heroin in his shorts, the officer’s intent was to address an administra-

tive need rather than to elicit an incriminating response. (Supreme Ct, New York Co)

Matter of Ja’Dore G., 169 AD3d 544 (1st Dept 2/21/2019)

The order finding that the father and paternal grandparents neglected the subject child is affirmed. It was proven, by the requisite preponderance of the evidence, that the father and paternal grandparents were aware of the 16-year-old cousin abusing the subject child’s six-year-old half-brother, and did not intervene. Additionally, there was sufficient evidence to support the finding that the grandparents were persons legally responsible for the child within the meaning of Family Court Act Sec. 1012(g), as the child visited with the grandparents every other weekend, and often spent the night. However, the court incorrectly found that the father derivatively abused the child based on the cousin[’]s uncorroborated statements that the father sexually abused him years earlier. The petitioner and the attorney effectively concede this point by failing to raise any arguments in opposition. (Family Ct, New York Co)

In re Samantha F., 169 AD3d 549 (1st Dept 2/21/2019)

ABUSE/NEGLECT

– APPEALS

– EXPERT TESTIMONY/BASIS OF OPINION

LASJRP: The First Department rejects the agency’s contention that respondent’s appeal is not properly taken from an appealable paper where, although denominated a decision, the paper bears the standard language advising that any appeal from the “order” must be taken within thirty days, and is, in substance, an order finding that the children have been abused/neglected, which is appealable as of right.

The Court also concludes that an expert’s opinion that the child’s behavior and demeanor were consistent with a child who has been sexually abused was properly based on the testimony of another social worker who was subject to cross-examination, whose testimony was in evidence and found to be reliable, and whose credibility is not challenged by respondent.

The JRP appeals attorney was Diane Pazar, and the trial attorney was Cynthia Rivera.

People v Alexander, 169 AD3d 571 (1st Dept 2/26/2019)

UNCHARGED CRIMES – PROBATIVE AS TO IDENTITY

LASJRP: The First Department finds no error where the court admitted a photograph, taken less than two months before the shooting, showing defendant holding a revolver of the type used in the crime. This evidence was relevant to identification since it showed that defendant

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had access to such a weapon. (Supreme Ct, New York Co)

People v Bloise, 169 AD3d 594 (1st Dept 2/26/2019)**REVERSE BATSON / NEW TRIAL**

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW. The First Department reversed and remanded for a new trial. The trial court erred in granting the prosecution's reverse-Batson challenge to defense counsel's exercise of two peremptory challenges. There was no record support for the rejection of counsel's race-neutral reasons for striking the two panelists—that they were crime victims or relatives of crime victims. The People failed to show that racial discrimination was the motivating factor. There was no evidence of disparate treatment by defense counsel of similarly situated panelists; and the record otherwise failed to support the finding that the reasons cited for the challenges were pretextual. The Legal Aid Society of NYC (Harold Ferguson, Jr., of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Martinez, 169 AD3d 587 (1st Dept 2/26/2019)**STALKING / MENACING**

LASJRP: The First Department concludes that the stalking and menacing statutes under which defendant was convicted are not unconstitutionally vague as applied to him. The Court rejects defendant's contention that the requirement that he intentionally engaged in a course of conduct likely to cause a person to reasonably fear specified forms of harm does not provide sufficient notice where, as here, a defendant lives with the alleged victim without "intruding" on the victim's life. Moreover, nothing in the language or legislative history of the statutes suggests that they would not apply in a domestic abuse setting. (Supreme Ct, New York Co)

People v Reed, 169 AD3d 573 (1st Dept 2/26/2019)**EVIDENCE – HEARSAY/STATE OF MIND**

LASJRP: The First Department finds no error where the court admitted testimony that, during an argument at a party in defendant's building (not attended by defendant) shortly before the homicide, a non-testifying declarant stated to the victim and others that the declarant could make a phone call to have them killed. This testimony was admitted to show the declarant's state of mind—that is, her anger at the victim on that occasion, which was relevant because there was other evidence supporting an inference that the declarant conveyed her anger to defen-

dant in a phone call, which in turn supplied a possible motive for an otherwise unexplained shooting. (Supreme Ct, Bronx Co)

People v Tatis, 170 AD3d 45 (1st Dept 2/28/2019)**POSSESSION OF AMMUNITION HAS EXCEPTION,
NOT PROVISO**

LASCDP: New York City Administrative Code 10-131(i)(3) makes possession of ammunition illegal if one is not authorized to possess a gun in the city. Whether the exclusion for authorized persons is an exception or a proviso determines which party has the burden of proof: if an exception, then the People have the burden to plead and prove the absence of authorization; if a proviso, then the defendant has the burden to prove authorization as a defense.

The First Department determined that the authorization language of AC 10-131(i)(3) is an exception, based on the language of the statute. Therefore, the People have the burden to plead and prove that the possession of ammunition here was not within the exception for authorized persons. (The reasoning is that it is within the government's ability to prove that the exception does or does not apply.) For failure of the government to plead and prove the exception, the conviction was vacated. (Supreme Ct, Bronx Co)

People v Dorsey, 170 AD3d 417 (1st Dept 3/5/2019)**CPL 440.30 (1-A) / MOTION DENIED**

ILSAPP: The defendant appealed from orders [of the] New York County Supreme Court that denied his CPL 440.30 (1-a) motion for DNA testing and his CPL 440.10 to vacate a 1998 conviction of 1st and 2nd degree sodomy (two counts each). After the First Department affirmed his convictions, a petition for a federal writ of habeas corpus was granted based on ineffective assistance. Counsel did not introduce results of serological testing performed on the complainant's underwear. The habeas court found that the testing showed the presence of two types of antigens at the site of the semen stain, both of which could have come from the victim, but only one of which could have come from defendant. At the second trial, the People informed the court that the physical evidence had been destroyed. The defendant was convicted again; and the conviction was affirmed. Thereafter, he moved for DNA testing of the complainant's underwear, arguing that the People had failed to establish that the NYPD destroyed the evidence. The 440.10 motion asserted that, if the NYPD did destroy the semen sample, it did so in bad faith and in violation of the defendant's due process rights. The motions were denied. In the instant appeal, the First Department affirmed. Notwithstanding systemic problems in how the NYPD tracked whether evidence had been destroyed, the People proved that the subject evi-

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dence could not be located. Further, the defendant did not show that, had he been able to secure the original evidence and test it, the verdict would likely have been different. As to due process, with due diligence, the defendant could have adduced supporting facts that would have provided an adequate basis for review on direct appeal. (Supreme Ct, New York Co)

People v Bilal, 170 AD3d 83 (1st Dept 3/7/2019)

**DESCRIPTION TOO GENERIC TO JUSTIFY PURSUIT
ABANDONMENT MUST BE VOLUNTARY, NOT
PRECIPITATED BY PURSUIT**

LASCDP: After a radio run about a shooting by a black man wearing a black jacket, police saw two black men, one of whom wore a black jacket, leaving the Dunbar Houses, several blocks away. Defendant, one of the two, fled at their approach; during the pursuit, he discarded a gun.

The First Department majority ruled that a question from the police might have been justified, but that the equivocal circumstances did not supply the reasonable suspicion so as to justify the pursuit. The description of the shooter was vague, and the defendant did not even match it.

The majority, in suppressing, emphasized that the doctrine of abandonment did not save the recovery of the gun. Here it was provoked by the unlawful pursuit. As such, it was not intentional or voluntary, but precipitated by the illegal police pursuit. (Supreme Ct, New York Co)

People v Cartagena, 170 AD3d 451 (1st Dept 3/7/2019)

TEXTS ABOUT MURDER / HARMLESS ERRORS

ILSAPP: The defendant appealed from a judgment of New York County Court, convicting him after a jury trial of 2nd degree murder and other crimes. The codefendant’s text message that the murder was about to be committed, and his Facebook post that it was done, exceeded the proper bounds of state-of-mind proof. While that evidence should have been excluded, the errors were harmless. The trial court properly permitted the People to introduce text messages between the defendant and his girlfriend, while redacting a portion of the messages in which he denied having committed the murder. There was no violation of the rule of completeness; the messages that were introduced did not contain anything that needed to be explained by way of the redacted self-exculpatory messages. The messages in evidence tended to establish other matters, such as a timeline of events. In any event, any error was harmless. (Supreme Ct, New York Co)

In re Tiara Dora S., 170 AD3d 458 (1st Dept 3/7/2019)

TERMINATION OF PARENTAL RIGHTS

– ABANDONMENT

LASJRP: The First Department, while upholding termination of the mother’s parental rights based on abandonment, rejects the mother’s claim that the agency, by threatening her with kidnaping charges after she failed to disclose the children’s whereabouts while they were out on a trial discharge with her, discouraged her from contacting the agency.

The JRP appeals attorney was John Newbery, and the trial attorney was Jennifer Smith. (Family Ct, Bronx Co)

People v Perez, 170 AD3d 495 (1st Dept 3/14/2019)

ID AND BUY MONEY / SUPPRESSED / NEW TRIAL

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him after a jury trial of 3rd degree criminal sale of a controlled substance. The First Department reversed. The suppression court determined that reasonable suspicion supported the defendant’s detention. However, the appellate court stated that handcuffing the defendant was inconsistent with an investigatory detention and elevated the intrusion to an arrest. Probable cause was needed, but did not exist until the undercover identified the defendant. There was no reason to conclude that the defendant was armed or likely to flee. Therefore, the ID and the buy money should have been suppressed. The defendant was entitled to a new trial, preceded by an independent source hearing. The Legal Aid Society, NYC (David Crow and Lindsay Schare, of counsel) represented the appellant. (Supreme Ct, New York Co)

**Smith v City of New York, 170 AD3d 499
(1st Dept 3/14/2019)**

The complaint states a cause of action under 42 USC 1983. It alleges that the plaintiffs were stopped while driving in a luxury sports car in a law-abiding manner and subjected to removal from the car and a search at a time when the police department had a “‘stop and frisk’ policy” that led to stops and searches of “hundreds of thousands of overwhelmingly minority persons” At this point, the plaintiff need not allege that any individual defendant “did more than participate in his unlawful arrest.” (Supreme Ct, Bronx Co)

First Department *continued***In re Jaylyn Z., 170 AD3d 516 (1st Dept 3/14/2019)****ABUSE/NEGLECT****– HEARSAY/CHILD’S PRIOR TESTIMONY**

LASJRP: The fourteen-year-old child refused to continue with her testimony at a FCA § 1028 hearing regarding her allegations of sexual abuse after she already had been cross-examined for three days by respondent’s counsel. According to a letter from the child’s therapist submitted to the court, it would be detrimental for her to return to testify.

The First Department holds that the child’s incomplete testimony at the § 1028 hearing, which was stricken at that hearing, could be considered at the fact-finding hearing pursuant to FCA § 1046(a)(vi), subject to a statutory corroboration requirement. In § 1046(a)(vi), the Legislature intended to address the reluctance or inability of victims to testify. Respondent’s arguments regarding the timing and circumstances of the incomplete testimony go to its weight, not its admissibility. In light of the corroboration requirement, respondent’s due process concerns are unsupported.

The JRP appeals attorney was Claire Merkiné, and the trial attorney was Hayley Lichterman. (Family Ct, Bronx Co)

People v Golden, 170 AD3d 528 (1st Dept 3/19/2019)**UNFULFILLED PROMISE / PLEA VACATED**

The defendant appealed from a judgment of New York County Supreme Court convicting him of attempted 2nd degree assault. The First Department reversed. The defendant was entitled to vacatur of the plea because a promise of shock incarceration could not be honored. *See* Penal Law § 60.04 (7). The Center for Appellate Litigation (Claudia Trupp, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Holmes, 170 AD3d 532 (1st Dept 3/19/2019)**SEARCH AND SEIZURE****– STANDING/POLICE ALLEGATION OF POSSESSION****IMPEACHMENT****– BAD ACTS/POLICE MISCONDUCT**

LASJRP: The First Department notes that the parties correctly agree that the hearing court erred when it denied defendant’s motion to suppress based on a lack of standing where the pistol was recovered from the ground but two officers testified at the hearing to the effect that the pistol was recovered immediately after it fell from defendant’s person.

Defendant is also entitled to a new trial because the court improperly precluded his counsel from cross-exam-

ining the only police officer who allegedly saw the pistol falling about allegations in a federal civil action against the officer, which had settled. Counsel had a good faith basis for seeking to impeach the officer’s credibility by asking him about allegations that he and other officers approached and assaulted the plaintiff in that case without any basis for suspecting him of posing a danger and filed baseless criminal charges against him. (Supreme Ct, New York Co)

People v Gonzalez, 170 AD3d 558 (1st Dept 3/21/2019)**APPEAL – PRESERVATION BY CO-DEFENDANT’S COUNSEL**

LASJRP: The First Department holds that defendant did not preserve his claim that the court erred in failing to excuse a prospective juror for cause because his counsel did not join in the challenge for cause to that juror made by another defendant’s attorney.

That attorney never stated that he was speaking for all three defendants, and his later statement that, as to peremptory challenges, he was speaking for all three did not preserve defendant’s arguments about the challenge for cause. (Supreme Ct, New York Co)

**In re Toussaint Thoreau E., 170 AD3d 551
(1st Dept 3/21/2019)****TERMINATION OF PARENTAL RIGHTS –****DISPOSITION/TERMINATION ONLY AS TO ONE PARENT**

LASJRP: The First Department affirms an order terminating the father’s parental rights based on abandonment, rejecting the father’s contention that the court erred in terminating his parental rights while the mother received a suspended judgment and thus her parental rights remained intact. The petitions against the parents were predicated upon different facts, and the father never requested that disposition be delayed while the mother’s case was still pending and did not oppose entry of the order or seek to vacate it once the mother received a suspended judgment.

The JRP appeals attorney was Diane Pazar. (Family Ct, New York Co)

People v Arias, 170 AD3d 576 (1st Dept 3/26/2019)**PEQUE / PRESERVATION REQUIREMENT**

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 3rd degree criminal possession of marijuana. The First Department affirmed. The defendant did not establish that the narrow exception to the preservation requirement applied to his claim pursuant to *People v Peque*, 22 NY3d 168. The record established that he was informed of the potential for deportation when he was served with a notice of immigration consequences in the presence of his

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attorney long before his guilty plea. See *People v Delorbe* 165 AD3d 531, *lv granted* 32 NY3d 1125 (issue presented: whether First Department properly grafted preservation requirement onto *Peque* error, simply because one year earlier, prosecution handed defendant generic form advising of potential immigration consequences). (Supreme Ct, New York Co)

People v Benjamin, 170 AD3d 566 (1st Dept 3/26/2019)

RESENTENCE DATE / PREDICATE FELONY

ILSAPP: The defendant appealed from an order of New York County Supreme Court, which denied his CPL 440.20 motion to set aside a 1997 sentence. The First Department affirmed. In 2016, the defendant was resentenced on a 1991 conviction. He then sought to be relieved of his persistent violent felony offender status on the ground that the resentencing had upset the sequentiality of his convictions. However, such request was foreclosed by *People v Thomas*, [33] NY3d [1] (2/19/19), which held that, for predicate felony purposes, the relevant date is that on which sentence was first imposed on a prior conviction. (Supreme Ct, New York Co)

Matter of Camille L., 170 AD3d 580 (1st Dept 3/26/2019)

PROTECTIVE ORDER / MOOT

ILSAPP: The mother, a respondent in an Article 10 proceeding, appealed from a temporary order of protection entered in Bronx County Family Court, which directed her to refrain from certain conduct against the subject child. The First Department dismissed the appeal as moot, since the order had expired by its own terms and was superseded by an order of fact-finding and disposition. The court rejected the mother’s arguments regarding mootness, pursuant to *Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, and *Matter of Hearst Corp. v Clyne*, 50 NY2d 707. In any event, good cause shown supported the order. (Family Ct, Bronx Co)

People v Dunham, 170 AD3d 569 (1st Dept 3/26/2019)

MOLINEUX ID EXCEPTION / NOT JUST UNIQUE MO

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court convicting him of 2nd degree CPW and resisting arrest. The First Department affirmed. The offenses for which the defendant was being tried included a gunpoint robbery, of which he was ultimately acquitted. At trial, the defendant contended that he did not commit the robbery and that he did not possess the silver pistol allegedly found in his possession upon

arrest. A witness’s testimony, that the defendant broke her car window with a silver metal object shortly after the robbery, was not admitted to demonstrate propensity and was probative of his identity as the robber and possessor of the weapon, the appellate court held. The *Molineux* identity exception was not limited to a unique modus operandi. (Supreme Ct, Bronx Co)

Natalya M. v Chanan M., 170 AD3d 587 (1st Dept 3/26/2019)

DIAMOND TRADER / INDIGENCY INCREDIBLE

ILSAPP: The father appealed from orders of New York County Family Court finding that he willfully violated a child support order entered on default and denying a downward modification. The First Department affirmed. The father never apprised the court or counsel that he would be unable to appear at trial. While he claimed that a serious illness prevented his attendance, he did not miss a single visit with his daughter before or after the court date. The father asserted that he was indigent, but Family Court found him incredible. By the father’s own account, at the time of the hearing, he earned minimum wage, even though he had been an experienced trader and diamond dealer. (Family Ct, New York Co)

In re Francois B. v Fatoumata L., 170 AD3d 617 (1st Dept 3/28/2019)

CUSTODY – JURISDICTION

LASJRP: The First Department holds that the family court properly determined that it did not have jurisdiction, and enforced a French custody order by returning the child to the father in France. Although the child wished to remain in New York with the mother, and suffered extreme anxiety at the idea of leaving, such evidence did not rise to the level of an “immediate threat” warranting invocation of emergency jurisdiction. (Family Ct, Bronx Co)

Cristian M-B. v Rosalba S., 171 AD3d 425 (1st Dept 4/2/2019)

FAMILY OFFENSE / FACTS NOT ALLEGED

ILSAPP: The respondent appealed from an order of Bronx County Family Court, which issued a one-year order of protection based on findings that he committed several family offenses. The First Department observed that the expiration of the protective order did not moot the appeal, in light of the significant enduring consequences. Family Court erred in determining that the respondent’s actions constituted the family offense of 3rd degree assault as to a specified incident, where the necessary facts were not alleged in the petition. (Family Ct, Bronx Co)

First Department *continued*[In re O’Ryan Elizah H.](#), 171 AD3d 429

(1st Dept 4/2/2019)

**ABUSE/NEGLECT – DOMESTIC VIOLENCE/IMPAIRMENT
OF CHILDREN’S CONDITION**

LASJRP: The First Department upholds a finding of neglect based on repeated incidents of domestic violence between the father and mother where impairment could be inferred because the children were in close proximity to violence directed against a family member, even absent evidence that they were aware of or emotionally impacted by it. (Family Co, New York Co)

[People v Almonte](#), 171 AD3d 470 (1st Dept 4/4/2019)**DISCOVERY – NOTICE OF ALIBI**

LASJRP: The First Department finds error, albeit harmless, where the court precluded defendant’s alibi evidence. The notice of alibi was untimely, and defective in that it only stated the location of the alibi without naming any witnesses, but the record does not support a finding of willfulness. (Supreme Ct, New York Co)

[People v Burroughs](#), 171 AD3d 482 (1st Dept 4/4/2019)**PLEAS – VACATED BY COURT WITHOUT
DEFENDANT’S CONSENT**

LASJRP: The First Department concludes that, under the “unusual procedural circumstances,” the court did not exceed its authority in vacating defendant’s first guilty plea without his consent where defendant’s continued litigation of the validity of the charges before the plea court was incompatible with the plea. (Supreme Ct, Bronx Co)

[People v Gentles](#), 171 AD3d 471 (1st Dept 4/4/2019)**CHANGED THEORY / NEW TRIAL**

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of overdriving, torturing, and injuring animals. The First Department found that an unpreserved error warranted reversal in the interest of justice. The jury charge constructively amended the indictment, which was limited to a theory that the defendant personally mistreated his dog. The errant instruction allowed the jury to convict the defendant if he permitted another person to abuse the animal. The error was not harmless, because there was evidence from which the jury could have inferred that the defendant took the blame for his dog’s condition to cover for his uncle. The fact that the defendant had completed his sentence did not warrant dismissal of the indictment, given

the serious abuse at issue. Thus, a new trial was ordered. The Center for Appellate Litigation (Alexandra Mitter, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

[People v Herrera](#), 2019 NY Slip Op 02631

(1st Dept 4/4/2019)

DOUBLE JEOPARDY

LASJRP: The First Department finds no double jeopardy violation where defendant was prosecuted for conspiracy to commit murder after a prior prosecution for the actual murder. Where the same act or transaction violates two distinct statutory provisions, the test for determining whether there are two offenses or only one is whether a provision requires proof of an additional fact which the other does not. (Supreme Ct, New York Co)

[People v Muhammad](#), 2019 NY Slip Op 02609

(1st Dept 4/4/2019)

NO JURY COERCION / DISSENT

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 1st degree sexual abuse. The First Department affirmed. Two judges dissented, opining that the trial court created a substantial risk of jury coercion during deliberations. On a Friday—knowing that the jury remained deadlocked after two *Allen* charges and having been informed that three jurors had extended travel plans starting the following Monday—the court granted the jury’s request to continue deliberations that afternoon. Hours later, a verdict was reached. The dissenters opined that the majority failed to discern the impact of a supplemental instruction not addressing the scheduling conflict. The constitutional guarantee of trial by jury contemplates a jury free of coercion; and there was a real possibility that jurors were coerced by the improper instruction. (Supreme Ct, New York Co)

[People v Washington](#), 171 AD3d 458 (1st Dept 4/4/2019)**SEARCH AND SEIZURE – INCIDENT TO ARREST**

LASJRP: The Court finds error, albeit harmless, in the denial of defendant’s motion to suppress a knife recovered by the police during a warrantless search of defendant’s bag. Although at the time of the search the bag was on the floor within the “grabbable area” next to defendant, he was standing with his arms handcuffed behind his back, and the circumstances do not support a reasonable belief that defendant could have either gained possession of a weapon or destroyed evidence located in the bag. (Supreme Ct, New York Co)

First Department *continued*

People v Smith, 171 AD3d 523 (1st Dept 4/11/2019)

PRECLUDING CROSS / HARMLESS ERROR

ILSAPP: The defendant appealed from a NY County Supreme Court judgment, convicting him of drug sale/possession crimes. The First Department affirmed. The trial court should have permitted the defense to cross-examine a detective about a lawsuit in which he was accused of fabricating evidence. The defendant had a valid basis for impeaching the detective regarding such purported misdeed, which was specific to him and relevant to his credibility. The court’s rationales for precluding impeachment were that such questioning would be “incendiary” and that the detective denied the misconduct when questioned out of the presence of the jury. The first ground was inconsistent with the satisfied requirement that cross-examination be based on specific, good faith allegations that implicated the officer’s credibility. The second rationale was also insufficient, since jurors should have been given the opportunity to assess the officer’s credibility for themselves. But the error was harmless. (Supreme Ct, New York Co)

People v Taylor, 171 AD3d 538 (1st Dept 4/16/2019)

**UNEXCUSED ONE-YEAR DELAY IN SENTENCING,
CASE DISMISSED**

LASCDP: Before sentencing, defendant was in custody in another state. The excessive delay of more than one year was counted from when the prosecution received a communication from defense counsel that defendant was in custody in other state and wished to be produced for sentencing on this case.

The First Department found the unexcused delay of more than one year to be unreasonable and dismissed the indictment. (Supreme Ct, New York Co)

In re Aliyah N., 171 AD3d 563 (1st Dept 4/18/2019)

**ABUSE/NEGLECT
– DISCOVERY**

– EXPERT WITNESSES/ORAL DEPOSITIONS

LASJRP: The First Department reverses an order denying respondent father’s motion to subpoena and depose petitioner ACS’s medical expert witness, and grants the motion.

The father met his burden of demonstrating special circumstances. ACS failed to oppose the application and conceded that it does not know whether the doctor’s testimony at the fact-finding hearing will support its allegations of child abuse. The excerpts from the child’s medical records did not indicate the substance of the expert’s

expected testimony, including her expert opinion as to the extent of the child’s injuries, her future prognosis, or the facts supporting her conclusion that the child’s injuries were non-accidental. (Family Ct, Bronx Co)

People v Simmon, 171 AD3d 557 (1st Dept 4/18/2019)

**SEARCH AND SEIZURE – INCIDENT TO ARREST/
REASONABLENESS OF SEIZURE**

LASJRP: After the police entered defendant’s apartment after obtaining the voluntary consent of another occupant, a detective told defendant that he would “probably be coming back” from the precinct and that he could bring his cell phone with him if he wished to do so. This was deceptive, because the detective actually intended to arrest defendant and hoped defendant would have the phone on his person so it could be seized.

The First Department denies suppression of the contents of the phone, concluding that the deception was not so fundamentally unfair as to deny due process because the detective only suggested that defendant might want to bring his phone, and the deception was not of a type that would compel him to do so. (Supreme Ct, New York Co)

People v Goldman, 171 AD3d 581 (1st Dept 4/23/2019)

**SEARCH AND SEIZURE – SALIVA SAMPLE/
SEARCH WARRANT
EVIDENCE – VIDEO RECORDING**

LASJRP: In this homicide prosecution, the First Department finds reversible error where the hearing court precluded defense counsel from reviewing the People’s application for a search warrant to obtain a sample of defendant’s saliva in connection with the homicide investigation, and from participating in the substantive portion of the hearing on the application. Counsel had received notice of the People’s application because he represented defendant in an unrelated case in which he was in custody.

The hearing court erred in concluding that the notice requirement discussed in *Matter of Abe A.* (56 N.Y.2d 288) applied only to the seizure of the person, and not to notice and opportunity to be heard on the question of whether there was probable cause.

The Court also concludes that the People failed to adequately authenticate a YouTube video where there was testimony that the video in court was the same as the one posted on YouTube and another website, and that defendant appears in the video. (Supreme Ct, Bronx Co)

**In re Serenity G v Modi K., 171 AD3d 588
(1st Dept 4/23/2019)**

ABUSE/NEGLECT – DOMESTIC VIOLENCE

First Department *continued*

LASJRP: The First Department holds, inter alia, that the family court properly found that respondent father neglected the two youngest children, who were in the two-bedroom apartment in close proximity to the domestic violence incidents, and in danger of physical or emotional impairment.

The JRP appeals attorney was Diane Pazar. (Family Ct, Bronx Co)

People v Suarez, 171 AD3d 612 (1st Dept 4/23/2019)**UNCHARGED CRIMES EVIDENCE**

LASJRP: The First Department finds no error in the admission of a wanted poster containing still photographs from a surveillance video, as background information that completed the narrative of the events leading up to defendant's apprehension. However, the court committed error, albeit harmless, when it refused to redact the written description of the suspect.

The court properly admitted a photograph of defendant from a prior arrest, depicting him wearing a distinctive jacket that matched the jacket worn by the suspect in the surveillance video. (Supreme Ct, New York Co)

People v Wah, 171 AD3d 574 (1st Dept 4/23/2019)**VELEZ JURY CHARGE ERROR / ANOTHER REVERSAL**

ISLAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree assault. The First Department reversed. In People v. Velez, 131 AD3d 129, the court held that, where justification is a central issue, the jury charge must convey that acquittal of a greater charge precludes consideration of lesser offenses based on the same conduct. That principle was violated in this case, and the error was not harmless. The court noted that the instant trial was conducted before *Velez* was decided. One justice dissented. The Legal Aid Society of NYC (Tomoeh Murakami Tse, of counsel) represented the appellant. (Supreme Ct, New York Co)

In re Kaeyden H., 171 AD3d 627 (1st Dept 4/25/2019)**FAMILY CT TRANSCRIPTS / DEFENSE COUNSEL**

ILSAPP: The appellant challenged an order of Bronx County Family Court which precluded him from disseminating certain transcripts from a Family Court proceeding. The First Department modified, to the extent of allowing the appellant to share the transcripts with his attorney in a related criminal proceeding. An individual facing parallel proceedings may provide to criminal defense counsel documents that were lawfully obtained in

the Family Court matter. *See Matter of Sean M. (Yanny M.)*, 151 AD3d 636. There was no meaningful distinction between the ACS investigative reports in *Sean M.* and the transcripts at issue here. David Elbaum represented the appellant. (Family Ct, Bronx Co)

People v Stewart, 171 AD3d 625 (1st Dept 4/25/2019)**SPEEDY-TRIAL MISCALCULATION WAS INEFFECTIVE ASSISTANCE**

LASCDP: Counsel's speedy-trial motion included periods that were not properly chargeable, so that the motion was denied. However, if counsel had waited 10 more days to file the motion, and not stopped the clock with the motion, the threshold of 183 chargeable days would have been passed. The First Department ruled the premature filing of the motion to be ineffective assistance and remitted for a hearing, pursuant to CPL Section 440, on the merits of the speedy-trial issue.

On remand, the lower court found that it had been "objectively unreasonable" to make the 30.30 motion in a manner that failed to include the amount of chargeable days that had accumulated, under a proper analysis. The lower court then granted dismissal on 30.30 grounds. The First Department here affirms that decision. (Supreme Ct, New York Co) (Supreme Ct, New York Co)

People v Brown, 2019 NY Slip Op 03305 (1st Dept 4/30/2019)**ANONYMOUS TIP ALONE DID NOT JUSTIFY FRISK**

LASCDP: Police received an anonymous tip that a black man wearing a fur cap in a bodega had a gun and drugs in his pocket. When they arrived at the bodega, they saw one man fitting that description; they observed no furtive or other suspicious behavior on the part of defendant or the others present.

The tip was thus reliable only in its tendency to identify a specific person, but not in its "assertion of illegality," both of which are necessary showings where an anonymous tip leads to police intrusion. *See Florida v. J.L.*, 529 U.S. 266, 271 (2000).

In the absence of sufficient corroboration of the anonymous tip, the frisk of defendant was thus illegal, and the evidence should have been suppressed. (Supreme Ct, Bronx Co)

Matter of Patrolmen's Benevolent Assn. of the City of N.Y. v De Blasio, 171 AD3d 636 (1st Dept 4/30/2019)

That Civil Rights Law 50-a does not provide a private right of action does not preclude review of the request for injunctive relief sought by the petitioner, Patrolmen's Benevolent Association of the City of New York, in an article 78 proceeding—but the petition must be denied.

First Department *continued*

“[G]iven its nature and use, the body-worn-camera footage at issue is not a personnel record covered by the confidentiality and disclosure requirements of § 50-a The purpose of body-worn-camera footage is for use in the service of other key objectives of the program, such as transparency, accountability, and public trust-building.” To preclude release of the footage here would defeat the purpose of the camera program. The decision and order entered on Feb. 19, 2019, is recalled and vacated. (Supreme Ct, New York Co)

[*Ed. Note: The order granting the motion for reargument, M-1112, decided simultaneously with this decision, denied both continuation of a preliminary injunction and leave to appeal to the Court of Appeals. The vacated decision was discussed in the last issue of the REPORT, at p. 8.*]

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 Alexander, 168 AD3d 755 (2nd Dept 1/9/2019)

ANOTHER BATSON ERROR / NEW TRIAL

ILSAPP¹: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree manslaughter and 2nd degree CPW. The Second Department reversed and ordered a new trial. Supreme Court should not have granted the prosecutor’s peremptory challenge to a prospective black juror. The trial court did not rule on the defendant’s initial BATSON challenge relating to the prosecutor’s view that the potential juror was too young and inexperienced to serve on a jury for a murder trial. Appellate Advocates (Sean Murray, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Andre, 168 AD3d 757 (2nd Dept 1/9/2019)

ENHANCED SENTENCES ERROR / VACATED

ILSAPP: The defendant appealed from three judgments of Kings County Supreme Court, convicting him of 2nd degree burglary and other crimes upon his pleas of guilty. In the interest of justice, the Second Department vacated the sentences and remitted for resentencing. The

¹ Summaries marked with these initials, ILSAPP, are courtesy of the New York State Office of Indigent Legal Services, from the ILS appellate listserv.

defendant entered pleas of guilty under three separate indictments and was promised concurrent sentences. After he did not appear on the sentencing date, Supreme Court directed that two sentences would run consecutively. Since the court did not warn the defendant that his return for sentencing was a condition of the plea/sentencing commitments, enhanced sentences should not have been imposed. Appellate Advocates (Lynn Fahey, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Barney, 168 AD3d 774 (2nd Dept 1/9/2019)

SORA / RIGHT TO BE PRESENT

ILSAPP: The defendant appealed from an order of Queens County Supreme Court, which designated him a level-two sex offender. The Second Department reversed and remitted for a new hearing. Though unpreserved, the defendant’s contention that he did not waive his right to be present at the SORA hearing was reached, in the interest of justice. A sex offender facing SORA risk-level classification has a due process right to be present at the hearing. To establish that the right was waived, evidence must show that the defendant was advised of the hearing date; the right to be present; and the fact that the hearing would be conducted in his absence, if he did not appear at the scheduled time. Reliable hearsay evidence was admissible. Here the sole evidence that the defendant waived his rights was a statement by the court that the NYPD informed it off-the-record that the defendant resided at a Manhattan address and that a hearing notice was sent there and was not returned as undeliverable. There was no evidence that the defendant expressed a desire to forgo his presence at the hearing. Jeffrey Cohen represented the appellant. (Supreme Ct, Queens Co)

People v Griffith, 168 AD3d 760 (2nd Dept 1/9/2019)

PEQUE VIOLATION / REMITTAL

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him, upon his plea of guilty, of 2nd degree criminal sale of a controlled substance and 2nd degree conspiracy. The Second Department remitted to allow the defendant to move to vacate his plea. The plea court had failed to make a statement on the record about the possibility of deportation. In order to withdraw or obtain vacatur of the plea based on a violation of *People v PEQUE*, the defendant would have to show that there was a reasonable probability that he would not have pleaded guilty and would have gone to trial, had Supreme Court provided the required information regarding potential deportation. Kristina Schwarz represented the appellant. (Supreme Ct, Kings Co)

Second Department *continued***Matter of Johnson v Griffin, 168 AD3d 734
(2nd Dept 1/9/2019)**

Where the record of the Tier II disciplinary hearing contained testimony that a group of inmates gathered in the prison yard and refused to go back to their cells, but the testifying sergeant did not see the petitioner in the yard, only heard his name in conversation about the incident and saw it on a list of who was in the yard that evening, there was not the substantial evidence required for a determination of guilt. Another officer only saw the petitioner returning to his cell after the incident, and while the petitioner admitted being in the yard when it started, he denied involvement and said he left the yard when directed to do so.

**Matter of Lintao v Delgado, 168 AD3d 739
(2nd Dept 1/9/2019)****CUSTODY / REVERSAL**

ILSAPP: The mother appealed from an order of Kings County Family Court which denied her custody application. The Second Department reversed. Family Court awarded the father sole custody with specified parental access to the mother. The trial court's determination lacked a sound and substantial basis in the record. Contrary to the court's conclusion, the parties had not been sharing custody equally. Instead, the mother had been the primary caregiver and, unlike the father, had been proactive in addressing the child's medical, education, and social needs. The court also failed to take into account the 50/50 arrangement requested by the father. The matter was remitted for entry of an order awarding sole custody to the mother and establishing parental access for the father. Molly Zamoiski represented the appellant. (Family Ct, Kings Co)

**Matter of Mensch v Mensch, 168 AD3d 741
(2nd Dept 1/9/2019)**

The support magistrate's order denying attorneys' fees to the mother and the Family Court's denial of her objections to the order constituted an improvident exercise of the discretion set out in Family Court Act 438(a). The mother filed an enforcement petition alleging that the father failed to pay \$1635 in back child support. The father, who had been disputing whether he should be credited for certain payments prior to the judgment of divorce, paid the arrears shortly after the filing of the petition. He was not authorized to engage in self-help, and there was no dispute over what was due and owing. (Family Court, Suffolk Co)

**Matter of Pecoraro v Ferraro, 168 AD3d 748
(2nd Dept 1/9/2019)****DEFAULT ORDER / VACATUR APP / REVERSAL**

ILSAPP: The father appealed from an order of Westchester County Family Court which denied his motion to vacate a default order. The Second Department reversed. After the father filed a petition seeking to reduce child support, a hearing was scheduled. When the father failed to appear at 9 a.m., the Support Magistrate dismissed his petition by 9:30 a.m. The father arrived at 9:40 a.m. and explained that he had miscalendared the time. Denial of the vacatur motion was an abuse of discretion, in light of: (1) the relatively short delay; (2) the proceedings that had already taken place; (3) the absence of prejudice to the mother; and (4) the public policy in favor of resolving cases on the merits. Moreover, the father showed that he had a potentially meritorious petition. (Family Ct, Westchester Co)

People v Young, 168 AD3d 771 (2nd Dept 1/9/2019)

As the prosecution concedes, the court "was not authorized to adjudicate the defendant a second violent felony offender since the instant conviction was for a class A felony rather than a class B, C, D, or E felony"; that adjudication must be vacated. "However, since the statutory sentencing parameters for a second violent felony offender do not include any specifications as to proper sentences for a class A felony because that crime is more serious than the crimes specified in those parameters, the error could not have affected the sentence imposed to the defendant's detriment"

While admitting into evidence two photographs of the decedent taken before her death was an improvident exercise of discretion, the error was harmless; some of the prosecutor's unobjected-to remarks in summation were also improper, but their cumulative effect was not enough to deprive the defendant of a fair trial. (Supreme Ct, Richmond Co)

**Matter of Agustin E. v Luis A.E.S., 168 AD3d 840
(2nd Dept 1/16/2019)****SIJS / REVERSED**

ILSAPP: In a guardianship proceeding pursuant to Family Court Act article 6, the petitioner appealed from an order of Nassau County Family Court that denied a motion for an order making specific findings so as to enable the subject child to petition for special immigrant juvenile status. The Second Department reversed, granted the motion, and found that it would not be in the child's best interests to be returned to El Salvador. Testimony indicated that the father drank heavily and became aggressive and that he eventually returned to El Salvador

Second Department *continued*

on his own. Since the presumption of neglect created by the proof was not rebutted, Family Court should have found that reunification of the child with the father was not viable due to parental neglect. The record also established that gang members in El Salvador had threatened the father in the presence of the child, made the father do favors for them, and murdered the child's cousin. Alexandra Rivera represented the appellant. (Family Ct, Nassau Co)

Matter of Alisah H., 168 AD3d 842
(2nd Dept 1/16/2019)

FCA § 1061 MOD / REVERSED

ILSAPP: The petitioner appealed from an order of Kings County Family Court which granted the father's Family Court Act § 1061 order to modify an order of disposition to grant a suspended judgment and to vacate an order which found that he neglected the subject children. The Second Department reversed and denied the motion. Despite successful completion of certain court-ordered programs, the father failed to establish good cause to modify the order of disposition and to vacate the finding of neglect. His misconduct was serious and repeated, and he showed no remorse for his actions. (Family Ct, Kings Co)

Matter of Jose S.J., 168 AD3d 844 (2nd Dept 1/16/2019)

SIJS / REVERSED

ILSAPP: The mother appealed from an order of Suffolk County Family Court which denied her motion to amend a prior fact-finding order. The Second Department reversed and remitted for a hearing. The mother's SIJS petition was granted. Thereafter, the child submitted an I-360 petition to USCIS, which notified the child that the petition would be denied, due to several deficiencies in the specific findings order: Family Court had failed to consider the child's alleged involvement with the MS-13 gang, and thus the court did not make an informed decision that it would not be in the child's best interests to be returned to El Salvador. The mother moved to amend the specific findings order to address the deficiencies. Family Court erred in denying the motion on the basis that the mother failed to state a sufficient reason to amend the order. The trial court should have considered the merits of the motion. Karen La Grega represented the appellant. (Family Ct, Suffolk Co)

Matter of Mia C., 168 AD3d 836 (2nd Dept 1/16/2019)

CHILDREN' APPEAL / BAD DAD KEPT AWAY

ILSAPP: The subject children appealed from an order of Kings County Family Court which denied their motion to suspend supervised visitation with their father. The Second Department reversed and granted the motion. At the hearing, the children's therapists testified that they were suffering from PTSD because of physical and sexual abuse they witnessed by the father against the mother and their half-siblings. The therapist recommended that there be no contact between the subject children and the father. The record showed that parental access with the father, even if supervised, would not be in the children's best interests. Janet Sabel represented the children. (Family Ct, Kings Co)

People v Dessasau, 168 AD3d 969 (2nd Dept 1/23/2019)

CPW2 CONVICTION / SUPPRESSION / DISMISSAL

ILSAPP [amended]: The defendant appealed from a judgment of Queens County Supreme Court convicting him of 2nd degree CPW. The appeal brought up for review the denial of his motion to suppress a gun. The Second Department reversed, granted suppression, and dismissed the indictment. When the defendant pleaded guilty, he did not waive his right to challenge the suppression ruling. The appellate court disagreed with the hearing court's sua sponte determination that the defendant lacked standing to challenge the search of the minivan where the gun was found. The defendant, who had been sitting in the front passenger seat, told the police that the van was his work vehicle. No evidence was presented to contradict his testimony. The defendant exercised sufficient dominion and control over the van to demonstrate his legitimate expectation of privacy. Under the circumstances, where the defendant already had been removed from the van and no one else was in the vehicle, the police lacked probable cause to conduct a warrantless search. The Legal Aid Society of NYC (Rachel Pecker and Lawrence Hausmen, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Gross, 169 AD3d 159 (2nd Dept 1/23/2019)

The prosecution failed to present evidence legally sufficient to support the convictions of first-degree grand larceny and attempt to commit that offense based on the theory that the defendant, acting in concert with others, wrongly took money from a pharmacy company by falsely representing that the medications being sold "were lawful to sell, transfer, and dispense." A high managerial employee of the pharmacy knew that the medications in question were not lawful for those purposes. The pharmacy by imputation also knew it. Therefore, there was a failure to prove that any false representation as to the lawfulness of the medications was made. The adverse interest exception to imputation does not apply where the high

Second Department *continued*

managerial employee received payment from the defendant, but his conduct also benefitted his employer, which was not the intended target of the fraud and obtained medications for resale at lower than market price. That the pharmacy was harmed by discovery of the fraud does not affect application of the exception.

Legally sufficient evidence was also lacking as to first-degree criminal diversion of prescription medications and prescriptions and attempt to commit that offense, under Penal Law article 178. That law covers transactions in which individuals sell their medications to recipients who have “no medical need for it ...”[B]y its terms, the statute cannot apply to a transfer of prescription medications to a corporation, as opposed to a person capable of having medical needs.”

Where an original recording of intercepted phone calls obtained by wiretap were properly sealed and preserved as required by statute, the trial court did not err by admitting into evidence an unsealed compilation of the calls that was otherwise properly authenticated. (County Ct, Suffolk Co)

People v Krivak, 168 AD3d 979 (2nd Dept 1/23/2019)**440 DENIAL / REVERSED**

ILSAPP: The defendant appealed from an order of Putnam County Court which denied his CPL 440.10 motion seeking to vacate a judgment of conviction of 2nd degree murder and 1st degree rape. The Second Department reversed and remitted for a hearing. In his motion, the defendant argued that a new trial should be ordered based on newly discovered evidence relating to the culpability of a third party. The Second Department held that the motion court improvidently exercised its discretion in denying the motion without conducting a hearing. Following a full evidentiary hearing, the motion court could make its final decision based upon the likely cumulative effect of the new evidence, had it been presented at trial. Adele Bernhard represented the appellant. (County Ct, Putnam Co)

People v Stephans, 168 AD3d 990 (2nd Dept 1/23/2019)**BRIBERY CONVICTION / RIGHT TO COUNSEL**

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court convicting her of charges of [f] bribery and falsely reporting an incident. The Second Department reversed and ordered a new trial. The police improperly questioned the defendant, in the absence of counsel, about the false reporting. They were aware that she was represented by counsel as to the bribery. The two offenses were so inextricably interwoven as to make it

clear that an interrogation concerning the false report would elicit incriminating responses about the bribery. The error was not harmless beyond a reasonable doubt. A new trial was also warranted based on ineffective assistance of counsel. Defense counsel stipulated to the admission of a recording of the entire interview between the defendant and police, and failed to object to police testimony recounting the interview. One justice dissented. Danielle Muscatello represented the appellant. (Supreme Ct, Queens Co)

Matter of Tatih E., 168 AD3d 935 (2nd Dept 1/23/2019)

Based on the severity of the physical abuse inflicted on the child, and the fact that the mother has not taken any steps to address the mental health issues that led to the abuse, the decision to return the child pursuant to Family Court Act 1028 lacked a sound and substantial basis. A return to the mother would put the child at imminent risk to his life and health, and is not in his best interests. Pending further proceedings, the mother shall have supervised parenting time. (Family Co, Kings Co)

Matter of Granzow v Granzow, 168 AD3d 1049 (2nd Dept 1/30/2019)**TEEN’S WISHES / GREAT WEIGHT**

ILSAPP: The mother appealed from an order denying her application to modify a prior custody order. In affirming, the Second Department stated: “To the extent that the court relied upon the in camera interview of the then 14-year-old child, it was entitled to place great weight on his expressed wishes (see Matter of Rosenblatt v. Rosenblatt, 129 AD3d 1091, 1093; Matter of Nicholas v. Nicholas, 107 AD3d 899, 900; Matter of Mera v. Rodriguez, 73 AD3d 1069, 1070.” (Family Ct, Orange Co)

People v Keller, 168 AD3d 1098 (2nd Dept 1/30/2019)**BAD INFO RE MAXIMUM / PLEA VACATED**

ILSAPP: The defendant appealed from a Queens County Supreme Court judgment convicting him of criminal possession of a firearm. The Second Department reversed, vacated the plea, and remitted. The defendant was charged with criminal possession of a firearm and 2nd degree criminal contempt. During the plea proceeding, defense counsel stated that he had advised the client that he could face consecutive sentences, if convicted at trial. The defendant was not presented with legitimate alternatives about the maximum. The firearm count was a class E felony, and the longest sentence a SFO could receive was 2 to 4 years. The criminal contempt charge was a class A misdemeanor, punishable by one year. Pursuant to Penal Law § 70.35, the sentences had to run concurrently. The erroneous threat of the higher sentence rendered the plea

Second Department *continued*

involuntary. Appellate Advocates (Lynn Fahey, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Akbar, 169 AD3d 708 (2nd Dept 2/6/2019)

NO “STOP DELIBERATIONS” CHARGE / NEW TRIAL

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree assault. The Second Department reversed and ordered a new trial. The defendant slashed his roommate’s neck and stabbed him in the abdomen during a fight in their apartment. At trial, Supreme Court submitted to the jury attempted 2nd degree murder, two counts of 1st degree assault, and other charges; and delivered instructions on the justification defense. The jury acquitted the defendant of attempted murder and found him guilty of 1st degree assault (intent to cause serious physical injury with a dangerous instrument). Supreme Court erred in not instructing the jurors that, if they found the defendant not guilty of the greater charge based on justification, they were not to consider the lesser counts. *See People v Velez*, 131 AD3d 129; *People v Barnar* (ILS Decisions of Interest, 2/4/19). That was reversible error. Appellate Advocates (Meredith Holt, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Alleyne, 169 AD3d 710 (2nd Dept 2/6/2019)

YO NOT CONSIDERED / VACATED

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him 1st degree course of sexual conduct. The Second Department vacated the sentence and remitted. CPL 720.20 mandates that the sentencing court determine whether an eligible defendant is to be treated as a youthful offender, even where the defendant fails to request such treatment or agrees to forgo it as part of a plea bargain. *See People v Rudolph*, 21 NY3d 497. As the People conceded, the record failed to show that the plea court considered the defendant’s YO eligibility. Appellate Advocates (Nao Terai, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Matter of Avery M., 169 AD3d 684 (2nd Dept 2/6/2019)

VACATUR MOTION / GRANTED

ILSAPP: The appellant appealed from an order of Kings County Family Court which denied her motion to vacate an order of fact-finding and disposition, and found that she neglected the subject child, Avery M. The Second Department reversed and remitted for a reopened fact-finding hearing. ACS alleged that the appellant—Avery’s sister and guardian—neglected the boy by using excessive

corporal punishment; making negative statements as to his sexual orientation; and bathing him in bleach. When appellant’s counsel appeared on the fact-finding hearing date, the appellant was not present. The ACS attorney said that the parties had agreed to a voluntary placement agreement. Subsequently, in adjourning the matter, Family Court told ACS to send the appellant a written notice stating that, if she failed to appear on the date set forth, an inquest would be held in her absence. When the appellant thereafter was not present in court, the court concluded that her failure to appear was willful; held the inquest; and entered an order finding neglect. The appellant moved to vacate pursuant to Family Court Act § 1042, which provides:

If the parent or other person legally responsible for the child’s care is not present, the court may proceed to hear a petition under this article only if the child is represented by counsel. The parent or other person legally responsible for the child’s care shall be served with a copy of the order of disposition ... Within one year of such service ... the parent or other person legally responsible for the child’s care may move to vacate the order of disposition and schedule a rehearing. Such motion shall be granted on an affidavit showing such relationship or responsibility and a meritorious defense to the petition, unless the court finds that the parent or other person willfully refused to appear at the hearing...

The instant record did not establish that the appellant was served with a notice of inquest; and she had a potentially meritorious defense. Charles Lawson represented the appellant. (Family Ct, Kings Co)

People v Gordon, 169 AD3d 714 (2nd Dept 2/6/2019)

SEARCH AND SEIZURE – SEARCH WARRANTS

LASJRP²: The Second Department upholds an order suppressing physical evidence seized from two vehicles during execution of a search warrant where the warrant did not specify that a search of the vehicles was permitted and probable cause for such a search had not been established in the warrant application. (Supreme Ct, Suffolk Co)

People v Hor, 169 AD3d 713 (2nd Dept 2/6/2019)

REMITTAL / COURT’S IMMIGRATION ERROR

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree assault. He contended that the plea court never advised him of the possibility that he would be deported

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

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as a consequence of his guilty plea. The Second Department agreed and held that the plea court violated *People v Peque*, 22 NY3d 168 (due process requires that court apprise noncitizen pleading guilty to felony of possibility of deportation). To vacate a plea based on such defect, a defendant must demonstrate that there was a reasonable probability that, had the plea court given the deportation warning, he or she would not have pleaded guilty and would have gone to trial. The Second Department remitted to give the defendant an opportunity to move within 60 days to vacate his plea. Appellate Advocates (Jenin Younes, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Mejia, 169 AD3d 715 (2nd Dept 2/6/2019)**MERGER / KIDNAPPING DISMISSED**

ILSAPP: The defendant and Domingo Mateo were indicted for 2nd degree murder, 1st and 2nd degree kidnapping, and burglary and robbery charges, in connection with a home invasion that resulted in the death of a home occupant. They were tried separately and convicted on all counts. On Mateo's appeal, the Second Department dismissed the 2nd degree kidnapping conviction pursuant to the merger doctrine, which precludes a conviction for kidnapping based on acts which were so much a part of another substantive crime that the latter crime could not have been committed without the kidnapping acts. *See People v Mateo*, 148 AD3d 727. Merger generally occurs where there is minimal asportation immediately preceding the other crime or the restraint and the underlying crime are simultaneous. In the instant appeal, the defendant contended that his conviction of 2nd degree kidnapping was similarly precluded. In the interest of justice, the appellate court vacated the conviction and dismissed that count. The Legal Aid Society of NYC (Jonathan Garelick and Harold Ferguson, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Carryl, 169 AD3d 818 (2nd Dept 2/13/2019)**ORDER OF PROTECTION / ADJUSTMENT**

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 3rd degree burglary, upon his plea of guilty. The Second Department affirmed. The defendant's contentions regarding the final order of protection issued at sentencing survived his appeal waiver. However, the contentions were unpreserved, since the defendant did not raise the issues at sentencing or move to amend the final order of protection. The appellate court declined to invoke its interest of justice jurisdiction, since a defendant seeking

an adjustment of an order of protection should first request relief from the issuing court and resort to the appellate courts only if necessary. (Supreme Ct, Kings Co)

People v Costan, 169 AD3d 820 (2nd Dept 2/13/2019)**DENIAL OF ADJOURNMENT / ERROR**

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree robbery and other crimes, upon a jury verdict. The appeal brought up for review the denial of a motion to suppress. The Second Department remitted for consideration of suppression issues. The appeal implicated the defendant's constitutional right to effective assistance at the suppression hearing—a crucial step in a prosecution that often spells the difference between conviction or acquittal. Supreme Court erred in denying an adjournment. Prior to the hearing, counsel had acted as advisor to the pro se defendant. At the court's urging, counsel agreed to represent the defendant at the suppression hearing, but said that he had not had an adequate opportunity to review voluminous discovery material. Appellate Advocates (Kathleen Whooley, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Harbison, 169 AD3d 826 (2nd Dept 2/13/2019)**ANDERS BRIEF / NEW COUNSEL ASSIGNED**

ILSAPP: The defendant appealed from a judgment of Suffolk County Supreme Court, convicting him of 1st degree vehicular manslaughter and another crime, upon his plea of guilty. Assigned appellate counsel submitted an *Anders* brief and moved to withdraw as counsel. The Second Department granted the motion, but concluded that nonfrivolous issues existed (including whether the sentence was lawful) and assigned new counsel. (Supreme Ct, Suffolk Co)

People v Murray, 169 AD3d 227 (2nd Dept 2/13/2019)

Assigned appellate counsel's failure to acknowledge, discuss, or analyze the defendant's waiver of the right to appeal, or the enforceability of that waiver, did not render counsel's *Anders* brief deficient so as to require the assignment of new counsel, because the waiver's validity "can make no practical difference to the eventual *Anders* outcome." A two-step process for evaluating *Anders* briefs was set out in *Matter of Giovanni S.*; jurisprudence since then has sometimes been unforgiving even where missed issues were inconsequential. About one-quarter of all *Anders* briefs filed in this Department have been failing to satisfy either step one or step two. The refinement here of *Matter of Giovanni S.* safeguards the indelible right to conscientious, effective, and zealous advocacy while recognizing that as a matter of practicality, courts should "not

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be required to engage in Sisyphean efforts” A brief that is not deemed deficient under step one for a missing issue that would be inconsequential must still be evaluated under step two to determine whether counsel’s assessment that no nonfrivolous issues exist is correct. (Supreme Ct, Queens Co)

People v Ward, 169 AD3d 833 (2nd Dept 2/13/2019)

**SEARCH AND SEIZURE – CELL PHONES/
INCIDENT TO ARREST**

LASJRP: The Second Department holds that *Riley v California* (134 S.Ct 2473), in which the Supreme Court declined to apply the search incident to arrest exception to the warrant requirement to a search of the defendant’s cell phone, does not control where the police opened the back of defendant’s cell phone and looked under the battery to obtain the phone’s serial number.

This intrusion on defendant’s privacy was limited to the fact of his ownership of the phone, and did not implicate any of the factors that distinguish a digital search from a search of any other physical object. (County Ct, Nassau Co)

Cabano v Petrella, 169 AD3d 901 (2nd Dept 2/20/2019)

PARENTS CAN’T AGREE / ON TIME OF DAY

ILSAPP: The mother appealed from custody orders issued by Suffolk County Family Court. The Second Department agreed with her that Family Court should have set forth a more precise parental access schedule as to birthdays. The order required the parties to cooperate in reaching an agreement regarding the details, but given the acrimonious relationship here, that was not in the cards. The matter was remitted. (Family Ct, Suffolk Co)

People v Clark, 169 AD3d 916 (2nd Dept 2/20/2019)

**COURT HAS AUTHORITY TO REINSTATE DISMISSED
FELONY COUNTS**

LASCDP³: The prosecutor offered a plea to unauthorized use of a vehicle, as an A misdemeanor, and moved to dismiss the felony counts. Later in the day, the People withdrew the dismissal and retained the original docket. Defendant then accepted the original offer, agreed to be prosecuted by Superior Court Information, and pled guilty to the A misdemeanor of unauthorized use of a vehicle.

³ Summaries marked with these initials, LASCDP, are courtesy of The Legal Aid Society’s Criminal Defense Practice, from their CDD case summaries.

The Second Department upheld the conviction despite the changing status of the charges. The Supreme Court had the authority to reinstate the felony counts that had previously been dismissed. (Supreme Ct, Kings Co)

People v Dyson, 169 AD3d 917 (2nd Dept 2/20/2019)

**RIGHT OF CONFRONTATION – HEARSAY/
BASIS OF EXPERT’S OPINION**

LASJRP: The Second Department finds harmless Confrontation Clause error where the trial court admitted the testimony of the People’s DNA expert, who testified that he conducted a “technical review” of the reports prepared by another criminalist whom he supervises, but did not establish that such review entailed using his own independent analysis on the raw data. (Supreme Ct, Kings Co)

People v Farrell, 169 AD3d 919 (2nd Dept 2/20/2019)

WAIVER INVALID / SENTENCE REDUCED

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting her of 2nd degree kidnapping and 1st degree criminal sexual act, and imposing concurrent determinate terms of imprisonment of 20 years and post-release supervision of 20 years. The Second Department found that the purported appeal waiver was invalid, given the skeletal colloquy and the defendant’s youth, inexperience with the criminal justice system, and mental health history. The codefendant had anal sex with the victim, while the defendant held her down. The defendant was 22 at the time of the plea and had no prior felonies, whereas the codefendant was 33 and had committed a prior violent felony. Her prison time was reduced to 15 years, the period imposed on the codefendant. Appellate Advocates (Caitlyn Halpern, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Lappe, 169 AD3d 927 (2nd Dept 2/20/2019)

While the evidence was legally sufficient to support the convictions of first-degree falsifying business records, first-degree endangering the welfare of an incompetent or disabled person, and willful violation of the Public Health Law, and the convictions were not against the weight of the evidence, the sentence imposed was excessive. The prosecution presented evidence that the defendant and others ignored for over two hours alarms that indicated a resident in the nursing home where they were employed was in respiratory distress after another codefendant failed to follow a doctor’s orders to place the resident on a ventilator. The six- and nine-month terms of incarceration are reduced to three months, and the probationary term is deleted. (Supreme Ct, Suffolk Co)

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[*Ed. Note: Similar results were reached on the same date in People v Joseph (169 AD3d 926) and People v Fassino, (169 AD3d 921).*]

People v Jeffery, 169 AD3d 924 (2nd Dept 2/20/2019)**PLEAS – MOTION TO WITHDRAW****RIGHT TO COUNSEL – EFFECTIVE ASSISTANCE**

LASJRP: The Second Department remits the case for a hearing on defendant's application to withdraw his guilty plea, and assignment of new counsel, where, on the sentencing date, defendant informed the court that he wanted to "take this plea back" because, inter alia, his attorney had not consulted with him adequately, and defense counsel "disagree[d]" with that assertion.

Defendant was not afforded a reasonable opportunity to present his contentions, and his right to counsel was adversely affected. (Supreme Ct, Kings Co)

Matter of Wright v Perry, 169 AD3d 910 (2nd Dept 2/20/2019)**TRIAL JUDGES / AVOID ADVOCATING**

ILSAPP: A mother appealed from custody modification orders rendered by Queens County Family Court. The Second Department upheld custody to the father. The appellate court did agree with the mother that the trial court's intervention in questioning her was inappropriate, but found that she was not deprived of a fair hearing. The appellate court reminded the trial judge to avoid acting as, or appearing to be, an advocate. Family Court had also erred in enjoining the mother from filing petitions without prior court approval. (Family Ct, Queens Co)

R.K. v R.G., 169 AD3d 892 (2nd Dept 2/20/2019)**WEEKEND TIME / FOR BOTH PARENTS**

ILSAPP: Both parties appealed from orders of Westchester County Supreme Court regarding parental access. The Second Department disagreed with the trial court's determination regarding the father's access. A parenting schedule that deprived the custodial parent of any significant quality time with the child was excessive. Here, the schedule gave the father access with the school-aged child three weekends per month, thus depriving the mother of any significant quality time with the child. Every other weekend and one overnight per week for the father was more appropriate. Further, Supreme Court should have been more specific and clear about holiday and summer parental access. Remittal was needed. Since the record contained no indication that either party was less culpable, they would equally share parenting coordi-

nator costs. Finally, the reviewing court deleted the provision authorizing the parenting coordinator to resolve issues between the parties; that was an improper delegation of judicial authority. (Supreme Co, Westchester Co)

People v Terry, 169 AD3d 938 (2nd Dept 2/20/2019)**ATTEMPTED KIDNAPPING / NOT EVEN CLOSE**

ILSAPP: The defendant appealed from a judgment of Suffolk County Supreme Court, convicting him of attempted 2nd degree kidnapping and other crimes. The Second Department dismissed the attempted kidnapping conviction. The defendant had retained an attorney to represent him in a personal injury action, agreed to a settlement, had second thoughts, and aggressively urged his attorney to reopen the case. Years later, the defendant drove to the attorney's parking lot, stayed an hour, and returned to his nearby hotel. That same day, when police stopped the defendant for traffic infractions as he left his hotel, they found a Taser, gun, handcuffs, and other items. The proof was legally insufficient, since it did not establish that the defendant came "dangerously near" to committing the completed crime. Roger Adler represented the appellant. (Supreme Ct, Suffolk Co)

Matter of Zahir W., 169 AD3d 909 (2nd Dept 2/20/2019)

The mere fact that the mother made arrangements to leave the subject children with the aunt from June until October 2016, and then failed to retrieve them as agreed, is not sufficient to establish a finding of neglect. That the mother may have engaged in undesirable parental behavior is irrelevant to this proceeding. A prerequisite to a finding of neglect is an, "actual or imminent danger of impairment" to the child. Since there was no evidence that the children were not being well-cared for by the aunt, or that they were in any danger, the finding of neglect must be reversed. (Family Co, Queens Co)

Matter of Kevin D., 169 AD3d 1034 (2nd Dept 2/27/2019)**ABUSE/NEGLECT – RESPONDENT/PERSON LEGALLY RESPONSIBLE**

LASJRP: The Second Department upholds a determination that respondent was a person legally responsible for the care of the children where he transported one child to and from the paternal grandmother's home for weekend and summer break visits, where he also stayed overnight, fed the child, and performed other related tasks at the request of the grandmother, who was visually impaired; he came to visit at the family home and watched the children when their parents were out of the home; and the sexual abuse is alleged to have occurred

Second Department *continued*

during these visits to the grandmother’s house and when respondent watched the children at the family home.

The JRP appeals attorney was Riti Singh, and the trial attorney was Marisa Filupeit. (Family Co, Richmond Co)

Mark A.M. v Lesley R. S., 169 AD3d 1046
(2nd Dept 2/27/2019)

PATERNITY / ERRANT VACATUR

ILSAPP: The child was the nonparty-appellant as to an order which vacated an acknowledgment of paternity. The Second Department reversed. A party seeking to challenge such an acknowledgment more than 60 day after execution must prove fraud, duress or material mistake of fact. The Second Department held that the petitioner did not meet his burden. Hani Moskowitz represented the child. (Family Co, Nassau Co)

Matter of Rina M.G.C., 169 AD3d 1031
(2nd Dept 2/27/2019)

SPECIAL IMMIGRANT JUVENILES

LASJRP: The family court granted the father’s guardianship petition, but denied the father’s motion for the issuance of an order making findings that would enable the child to petition for Special Immigrant Juvenile status on the ground that the child “no longer lives with either parent.” The father again moved for the issuance of such an order, and the court denied the second motion.

The Second Department makes the SIJ-related findings, noting, inter alia, that although the father had previously moved unsuccessfully for the issuance of an order, the law of the case doctrine does not bind appellate courts; that the issuance of a SIJ order is not dependent on the child living with either parent; and that the child is in danger of being harmed by gang members if she returned to El Salvador. (Family Co, Nassau Co)

People v Rosario, 169 AD3d 1066 (2nd Dept 2/27/2019)

JUSTIFICATION / BAD CHARGE/ NEW TRIAL

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree assault and 1st degree reckless endangerment. The Second Department reversed and ordered a new trial. The case arose from an altercation that culminated with the defendant stabbing his cousin in the head, neck, and chest. The trial court instructed the jury on justification with respect to charges of attempted 2nd degree murder and the other counts. The instruction, in conjunction with the verdict sheet, failed to adequately convey that, if the jury found the defendant not guilty of attempted murder

based on justification, then it must cease deliberations and acquit him of the lesser counts. Since there was no way of knowing whether the acquittal of attempted murder was based on a finding of justification, a new trial on the remaining charges was necessary. Appellate Advocates (Hannah Zhao, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Matter of Schiavone v Mannese, 169 AD3d 1052
(2nd Dept 2/27/2019)

SUPPORT – VIOLATIONS

LASJRP: Upon the father’s admission to a willful violation of a support order and his representation that he was employed, an order of disposition was entered upon consent finding the father to be in willful violation of the support order and committing him to a term of incarceration of five months, but suspending his commitment on the condition that he complied with the support order.

Shortly after the consent order was entered, the family court received a telephone call, ostensibly from the father’s purported employer, informing the court that the father was not, in fact, employed. The court, over the father’s objection, sua sponte issued an order vacating the consent order, and proceeded to a willfulness hearing, at the conclusion of which it issued the second order of disposition, finding the father to be in willful violation of the support order and directing that he be committed to jail for a period of six months unless he paid the purge amount of \$19,839.

The Second Department reverses the sua sponte order, concluding that the court lacked authority to issue the sua sponte order. Moreover, the court issued the sua sponte order on the basis of unsworn statements made during a telephone call. (Family Ct, Orange Co)

Matter of Shakira M.S., 169 AD3d 1050
(2nd Dept 2/27/2019)

**TERMINATION OF PARENTAL RIGHTS –
DILIGENT EFFORTS**

LASJRP: The Second Department upholds an order terminating the father’s parental rights on grounds of permanent neglect, noting that although petitioner did not make arrangements for parental access, petitioner’s diligent efforts must not be detrimental to the best interests of the child. Both children refused to visit with the father and, eventually, an order prevented petitioner from scheduling parental access. Petitioner was not obligated to seek modification of the order suspending parental access, and, moreover, the father did not oppose the motion that resulted in that order and never sought modification of the order.

The JRP appeals attorney was Marcia Egger, and the trial attorney was Amy Serlin. (Family Ct, Kings Co)

Second Department *continued***People v Sheldon O., 169 AD3d 1062
(2nd Dept 2/27/2019)****Y.O. STATUS SHOULD HAVE BEEN GRANTED**

LASCDP: The lower court abused its discretion in denying youthful offender status to an 18-year-old defendant who had participated in a robbery. He had played only a minor role; his older brother was the major actor who wielded the gun. Defendant had no juvenile record, cooperated with the authorities, and was graduating from high school. Moreover, he had spent two years in pre-trial detention. (Supreme Ct, Kings Co)

People v Torres, 169 AD3d 1068 (2nd Dept 2/27/2019)**SANCTION REQUIRED FOR FAILURE TO DISCLOSE TAPES**

LASCDP: Defendant's drug sale conviction was reversed because of the trial court's failure, in a non-jury trial, to impose a sanction for the prosecution's failure to turn over tape recordings and other police records related to conversations between the undercover and a co-defendant. The Second Department said the trial court should have granted the permissive adverse inference requested by the defense. (Supreme Ct, Queens Co)

Matter of Aaliyah B., 170 AD3d 712 (2nd Dept 3/6/2019)

The order of fact-finding and disposition, establishing that the mother neglected the subject child by use of corporal punishment, was supported by the evidence. The court did not abuse its discretion by denying the mother's subsequent motion to grant a suspended judgment and to vacate the finding of neglect. Although Family Court Act 1061 does permit such relief for good cause shown, it was contrary to the best interest of the child to do so in this case. The mother's fear of losing her job as a result of the neglect finding is outweighed by the fact that the finding of neglect could be significant in any future court proceedings. (Family Ct, Kings Co)

People v Anderson, 170 AD3d 739 (2nd Dept 3/6/2019)**INVALID APPEAL WAIVER / SENTENCE UPHELD**

ILSAPP: The defendant appealed from judgments [of] conviction of weapons possession charges upon pleas of guilty. He did not validly waive the right to appeal. In light of his age (19 at the time of the plea), ninth grade education, and lack of experience with the criminal justice system, the cursory colloquy regarding the appeal waiver was insufficient. It was also relevant that counsel did not participate in the colloquy and did not sign the written waiver form. (Supreme Ct, Kings Co)

People v Davis, 170 AD3d 745 (2nd Dept 3/6/2019)**SURCHARGE / VACATED**

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree manslaughter upon his plea of guilty. The Second Department held that the mandatory surcharge, DNA databank fee, and crime victim assistance fee had to be vacated. The defendant was previously convicted of 1st degree assault for the injuries he caused to the victim in the instant matter, and a mandatory surcharge and fees were imposed. The manslaughter conviction arose from the victim's subsequent death from the injuries suffered in the assault. Under these circumstances, the imposition of a second mandatory surcharge and fees was improper. Appellate Advocates (Jonathan Schoepp-Wong, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Lugo, 170 AD3d 748 (2nd Dept 3/6/2019)**RESTITUTION / VACATED**

ILSAPP: The defendant appealed from a judgment of Orange County Court, convicting him of 1st degree assault upon his plea of guilty and imposing sentence, including restitution of \$73,000, plus a surcharge of \$7,300. The Second Department vacated the restitution and surcharge order. The defendant's purported waiver of his right to appeal was invalid. In any event, the contentions that the restitution order and surcharge were not lawfully imposed survived a valid waiver. County Court should not have summarily ordered restitution absent a proper factual record from which the amount of medical expenses incurred by the injured victim could be inferred. Philip Schnabel represented the appellant. (County Ct, Orange Co)

People v Maiwandi, 170 AD3d 750 (2nd Dept 3/6/2019)**SUPPRESSION GRANTED / INDICTMENT DISMISSED**

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 3rd degree criminal possession of a controlled substance (four counts) and other drug crimes, upon a jury verdict. The appeal brought up for review the denial of the defendant's suppression motion. The Second Department reversed, grant[ed] suppression, and dismissed the indictment. The People failed to establish the legality of the police conduct. The detective's testimony was patently tailored to meet constitutional objections. His version of events strained credulity and defied common sense. The detective claimed that he observed an alleged transaction through his rearview mirror with sufficient clarity to identify as Suboxone an object passed between the defendant and another occupant of the car. Obviously, the dashboard of the defendant's vehicle would have obscured the detective's view of a hand-to-hand transaction. Without the

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suppressed evidence, there would not be legally sufficient evidence to prove the defendant’s guilt. Thus, the indictment was dismissed. Appellate Advocates (Cynthia Colt, of counsel) represented the appellant. (Supreme Ct, Queens Co)

**Matter of Parris v Wright, 170 AD3d 731
(2nd Dept 3/6/2019)**

DAD SHOULD GET VISITS / NEW HEARING

ILSAPP: The father appealed from an order of Westchester County Supreme Court which denied him parental access to the children. The Second Department reversed and ordered a new hearing. The evidence did not demonstrate that supervised parental access with the father would be harmful to the children or that he forfeited his right to access. The order was improper to the extent that it directed counseling and/or compliance with prescribed medication as a pre-condition for future parental access or re-application for parental access. Since more than a year has passed since the order was issued, a new hearing was needed as to the father’s petition. (Supreme Ct, Westchester Co)

People v Garcia, 170 AD3d 883 (2nd Dept 3/13/2019)

DLRA RESENTENCES / REDUCED BY 15 YRS

ILSAPP: For convictions of 1st degree criminal possession and criminal sale of a controlled substance, Orange County Supreme Court sentenced the defendant to consecutive indeterminate terms of 17½ years to life. He moved for resentencing pursuant to the DLRA. The aggregate determinate term of the proposed resentences was 35 years, to be followed by post-release supervision. On appeal, the defendant contended that such punishment was unduly severe, given his positive institutional record. He had done vocational educational programs to become a residential electrician and learn computer repair; earned a GED; successfully completed drug and violence rehabilitation programs; worked for eight years as a janitor; and earned the high regard of his teachers, work supervisors, and correctional personnel. A modification by the Second Department resulted in an aggregate term of 20 years. Thomas Vilecco represented the appellant. (County Ct, Orange Co)

**People v Gonsalves, 170 AD3d 886
(2nd Dept 3/13/2019)**

**HEARSAY – ADMISSION BY THIRD PARTY
RIGHT OF CONFRONTATION – HEARSAY**

LASJRP: In this robbery/assault prosecution, the Second Department holds that the trial court erred in admitting the complainant’s testimony that, several days after the robbery, defendant’s stepfather said he was “sorry” for what defendant had done, returned the complainant’s keys, and offered the complainant a replacement cell phone. There was no showing that defendant participated in or was in any way connected to his stepfather’s actions.

The court also violated defendant’s right of confrontation when it admitted the testimony of a detective recounting a conversation with an anonymous informant who reportedly was an eyewitness and identified defendant by name. The testimony went beyond the permissible bounds [of] background evidence regarding how and why the police pursued defendant. (Supreme Ct, Kings Co)

**Matter of Rizzo v Pravato, 170 AD3d 860
(2nd Dept 3/13/2019)**

ARTICLE 8 / “INTIMATE RELATIONSHIP” QUESTION

ILSAPP: The petitioner appealed from a Kings County Family Court order which dismissed her petition based on a lack of subject matter jurisdiction. The Second Department reversed. Family Court should not have determined, without a hearing, the issue of intimate relationship. Courts must resolve such issue on a case-by-case basis, considering the nature of the relationship—regardless of whether it was sexual in nature; the frequency of interaction; and the duration of the relationship. In light of the conflicting allegations, Family Court should have conducted a hearing. (Family Ct, Kings Co)

People v Robinson, 170 AD3d 893 (2nd Dept 3/13/2019)

**ADMISSIONS RECORDED ON RIKERS TELEPHONE WERE
UNFAIRLY PREJUDICIAL**

LASCDP: The prosecution introduced at defendant’s trial for gun possession evidence of admissions on the telephone made during his confinement at Rikers Island. The Second Department held their admission against him to be error, not on Fourth Amendment grounds but on traditional evidentiary principles.

The statements on the calls did not in fact refer to the case for which defendant was on trial, but to an unrelated gun possession charge. Their introduction risked misleading the jury that they referred to the first charge. Their probative value thus was outweighed by the risk of unfair prejudice. (Supreme Ct, Queens Co)

People v Smith, 170 AD3d 896 (2nd Dept 3/13/2019)

ANDERS BRIEF / NEW COUNSEL

Second Department *continued*

ILSAPP: The defendant appealed from a judgment of Suffolk County Supreme Court convicting him of 3rd degree assault and another crime. After counsel submitted an Anders brief, the Second Department assigned new counsel. Upon independent review of the record, the appellate court concluded that there were nonfrivolous issues, including whether the purported waiver of the right to appeal was valid, which was relevant to determining if review of the denial of suppression was available. (Supreme Ct, Suffolk Co)

Matter of Tanisha M.M., 170 AD3d 841
(2nd Dept 3/13/2019)

**GUARDIANSHIP/CUSTODY – EXTRAORDINARY
CIRCUMSTANCES**

LASJRP: Upon the father’s appeal, the Second Department upholds orders granting the maternal aunt’s kinship guardianship petitions, concluding that she demonstrated extraordinary circumstances, and that the award of guardianship was in the children’s best interests.

The father was incarcerated when the children were very young, and remained incarcerated at the time of the hearing. The mother was found to have neglected the children, and did not oppose the aunt’s petitions. The aunt assumed full responsibility for the children’s care for at least three years, and the children had lived with her for most of their lives.

With respect to best interests, the Court notes that the aunt provided for the children’s medical, educational, and special needs, and provided a stable home.

The JRP appeals attorney was Raymond Rogers, and the trial attorney was Briana Fedele. (Family Ct, Kings Co)

Matter of Vasquez v Mejia, 170 AD3d 841
(2nd Dept 3/13/2019)

SIJS / REVERSAL

ILSAPP: The mother filed a petition for custody of her son. After Nassau County Family Court granted the application, the mother then moved for an order that would enable the child to petition for SIJS. The motion was denied on the ground that the child was 18. The mother appealed, and the Second Department found error. Since the custody petition was granted prior to the child’s 18th birthday, the trial court should not have denied the motion based on the lack of jurisdiction. Remittal was ordered, because the record did not reveal whether reunification of the child with the father was viable and whether returning to Honduras would be in the child’s best interests. Bruno Bembi represented the appellant. (Family Ct, Kings Co)

People v Kostyk, 170 AD3d 1042 (2nd Dept 3/20/2019)

PEQUE VIOLATION / REMITTAL

ILSAPP: The defendant appealed from judgments of Kings County Supreme Court, convicting him of two counts each of 2nd degree burglary and 2nd degree criminal trespass. *People v Peque*, 22 NY3d 168, requires the plea court to apprise noncitizens pleading guilty to a felony of the possibility of deportation as a consequence of the plea. A defendant seeking to vacate a plea, based on a lapse by the court in this regard, must demonstrate that there is a “reasonable probability” that, had the court warned of the possibility of deportation, he or she would not have pleaded guilty. In the instant case, the record did not show that Supreme Court fulfilled its Peque duty. The Second Department remitted so the defendant could move to vacate his pleas within 60 days. Appellate Advocates (Kathleen Whooley, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Matter of Cano v Bussey, 170 AD3d 1001
(2nd Dept 3/20/2019)

AMENDING PETITION / LIBERAL LEAVE

ILSAPP: The mother appealed from an order of Westchester County Family Court which dismissed her custody modification petition without a hearing. That was error. The Second Department reversed and granted the mother’s application to amend the petition. Leave to amend should be freely given, pursuant to CPLR 3025 (b), provided that the amendment is not palpably insufficient, does not prejudice the opposing party, and is not patently devoid of merit. None of those factors existed here. Maria Frank represented the mother. (Family Ct, Westchester Co)

Matter of Aracelis L., 170 AD3d 1019
(2nd Dept 3/20/2019)

NO REMOVAL / AFFIRMED

ILSAPP: The petitioner agency appealed from an order of Kings County Family Court, which denied its Family Court Act § 1027 application to remove the child from the mother’s custody. The Second Department affirmed. Family Court properly found that ACS failed to prove imminent risk. The trial court must engage in a balancing test of imminent risk and best interests and, where appropriate, reasonable efforts to avoid removal. Denial of the application was sound, where any risks were mitigated by conditions imposed on the mother. Brooklyn Defender Services represented the mother. (Family Ct, Kings Co)

Second Department *continued*

**Matter of Jaylhon C., 170 AD3d 999
(2nd Dept 3/20/2019)**

NEGLECT / SUMMARY JUDGMENT

ILSAPP: The mother appealed from an order of Queens County Family Court, which granted the petitioner’s motion for summary judgment on a neglect petition. The Second Department affirmed. While Family Court Act Article 10 contains no provision regarding summary judgment, such relief may be granted when no triable issue of fact exists, pursuant to CPLR 3212 and FCA § 165 (a). ACS established prima facie that the mother neglected the older children and derivatively neglected the youngest child. The agency submitted recent prior orders finding neglect, directing the mother to have a mental health evaluation and comply with treatment, and indicating that she failed to do so. The affirmation of the mother’s attorney failed to raise a triable issue. (Family Ct, Queens Co)

**Gandham v Gandham, 170 AD3d 964
(2nd Dept 3/20/2019)**

COERCION / NO SUMMARY JUDGMENT

ILSAPP: The defendant appealed from an order granting the plaintiff’s motion for summary judgment dismissing her counterclaim to enforce a stipulation of settlement. The Second Department reversed. The plaintiff met his prima facie burden via evidence that the defendant coerced him to sign the stipulation by threatening to commit suicide. However, in opposition, the defendant raised a triable issue of fact. Radhika Nagubandi represented the appellant. (Supreme Ct, Queens Co)

**Fortgang v Fortgang, 170 AD3d 963
(2nd Dept 3/20/2019)**

OVERPAYMENT REIMBURSEMENT / REVERSED

ILSAPP: The mother appealed from an order which granted the father’s motion for a money judgment reimbursing him for overpaid child support. The Second Department reversed. There is strong public policy against recoupment of support overpayments, which are deemed to have been used for support. The father could have requested a modification, but failed to do. Christopher Chimeri and Glenn Jersey represented the appellant. (Supreme Ct, Suffolk Co)

**Matter of Jordin B., 170 AD3d 996 (2nd Dept 3/20/2019)
ABUSE/NEGLECT – EXPOSURE TO SEX OFFENDER**

LASJRP: In 2015, ACS filed a petition alleging, inter alia, that respondent mother and respondent Cecil R. neglected the subject child by failing to maintain adequate shelter; that Cecil R. neglected the child by presenting an imminent danger based on a prior sexual abuse finding in an unrelated 2012 proceeding involving two other children, and his failure to complete a sex offender treatment program in connection with that prior finding; and that the mother failed to protect the child from Cecil R. Following a fact-finding hearing, the family court dismissed the above-mentioned charges.

The Second Department affirms. Although the 2012 findings were binding, petitioner failed to establish that Cecil R. still posed an imminent danger to the child, and thus failed to establish that the mother neglected the child by allowing Cecil R. to live in the home. Petitioner also failed to establish that Cecil R. and the mother neglected the child by failing to maintain adequate shelter.

The JRP appeals attorney was Marcia Egger, and the trial attorney was Kelly Ballinger. (Family Ct, Kings Co)

People v Williams, 170 AD3d 1046 (2nd Dept 3/20/2019)

**POSSESSION OF A WEAPON –
CONSTRUCTIVE POSSESSION**

LASJRP: Officers executing a search warrant to look for firearms in a house where defendant resided found a loaded 40 caliber semiautomatic pistol lodged between a mattress and a wall in a bedroom, and a .32 caliber revolver and two bullets underneath the mattress. In the same bedroom, the officers found in a nightstand numerous documents, including Social Security cards, a recent paystub, a W-2 form, a credit union card, a union ID card, an Empire Blue Cross/Blue Shield card, and a driver’s license renewal form, all in defendant’s name with the house’s address. Keys to a Mercedes Benz were found in the nightstand, and papers with defendant’s name were recovered from a Mercedes Benz parked in front of the house. The officers did not find any items in that bedroom bearing a name other than defendant’s and did not find any items with defendant’s name in other areas of the house.

The Second Department finds legally sufficient evidence of constructive possession. While jurors could have reasonably concluded, based on DNA evidence, that persons other than defendant had access to the guns and ammunition, and might at some point have possessed them, mere access by others does not preclude a finding of constructive possession; joint possession is possession. (Supreme Ct, Nassau Co)

People v Worrell, 170 AD3d 1048 (2nd Dept 3/20/2019)

**SEARCH AND SEIZURE – SEARCH WARRANTS/
EXPECTATION OF PRIVACY – COMPUTERS**

Second Department *continued*

LASJRP: Defendant was charged with, inter alia, promoting a sexual performance by a child based on evidence obtained from a computer seized from his home upon the execution of a search warrant. A detective averred in the warrant application that he had used certain software tools to search peer-to-peer file sharing (P2P) networks, and ultimately identified an Internet Protocol address registered to defendant's home as having shared files that depicted child pornography on a P2P network. Defendant moved to controvert the warrant and for suppression, arguing that the detective's act of searching for and downloading files from defendant's computer using a P2P network, before applying for a warrant, constituted an unlawful search. The court summarily denied the motions.

Having already remitted the matter for a hearing, upon which the court denied the motions, the Second Department affirms. The People met their burden of going forward by presenting evidence that defendant had no reasonable expectation of privacy in the downloaded files. The People demonstrated, through testimony regarding P2P networks and software, that the files were accessible to anyone who had downloaded P2P software for free off of the Internet. Although the detective used a version of P2P software available only to law enforcement officials, the People established how P2P networks and software function, and that the files were available for download by any user of the P2P network, including those using publicly available P2P software. (Supreme Ct, Queens Co)

**People v Hollmond, 170 AD3d 1193
(2nd Dept 3/27/2019)**

LACK OF ACCESS TO COUNSEL JEOPARDIZED PLEA

LASCDP: Defendant was held right before trial at a prison 100 miles from the court. Despite court orders to move him closer to trial, prison officials were non-compliant, and five hours' travel each way was required for each court appearance. Counsel argued that access to consultation with counsel was being denied. Defendant pleaded guilty. Two weeks later, he moved to withdraw his plea as involuntary, as "effectively coerced" by the circumstances.

The Second Department acknowledged that the record substantiated the claim and remitted the case to the trial court to conduct a hearing into the voluntariness of the plea and submit a report. (Supreme Ct, Kings Co)

People v McLean, 170 AD3d 1196 (2nd Dept 3/27/2019)

**ERROR TO ALLOW INDICTMENT AMENDMENT OF
DATE OF INCIDENT**

LASCDP: The gun possession case against defendant was originally based on his bringing a gun to his girlfriend's apartment on October 20. A gun was discovered in defendant's residence on October 22. On the eve of trial, the court allowed the prosecution to amend the indictment's dates to include the period covering October 22.

The Second Department held the amendment to be reversible error. It changed the theory of the case from charging defendant's *actual* possession of the gun on October 20 at his girlfriend's apartment to *constructive* possession at his residence, where a gun was found. Done on the eve of trial, the amendment prejudiced defendant, in part by forcing him to forgo the alibi-type defense that had been prepared. (Supreme Ct, Nassau Co)

People v Sauri, 170 AD3d 1201 (2nd Dept 3/27/2019)

**POSSESSION OF A WEAPON – GRAVITY KNIFE
APPEAL – WEIGHT OF EVIDENCE REVIEW**

LASJPR: The Second Department, noting that although defendant failed to preserve his legal insufficiency claim, weight of the evidence review includes an evaluation of whether the evidence proved all the elements of the charged crime, reverses defendant's conviction for possession of a gravity knife.

Although an officer demonstrated the operation of the knife, the record contains no contemporaneous description of what the jury saw, nor is there other evidence in the record establishing whether or how the blade locked. (Supreme Ct, Queens Co)

People v Brooks, 171 AD3d 778 (2nd Dept 4/3/2019)

OBSTRUCTING GOVERNMENTAL ADMINISTRATION

LASJPR: Defendant reported to his probation office with his infant daughter. The probation officer directed him to return the following day as she did not "normally ... see probationers who [came] in with their children." Defendant remarked that he had seen female probationers report with their children, and, as he walked away and towards the exit, "threatened to blow [the probation officer] the fuck up."

The Second Department overturns the court's finding that defendant violated a condition of his probation by obstructing governmental administration. Although the probation officer was at work, there was no evidence showing that defendant attempted to prevent her from performing a specific function. (Supreme Ct, Richmond Co)

**Matter of Dupree M., 171 AD3d 752
(2nd Dept 4/3/2019)**

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

Second Department *continued*

LASJRP: The Second Department affirms an order granting the application of the Unkechaug Indian Nation to dismiss the FCA Article Ten proceeding and transfer jurisdiction to it pursuant to the Indian Child Welfare Act of 1978.

The Court first notes that although the ICWA applies only to federally recognized tribes, and the Unkechaug do not appear to be so recognized, the “New York ICWA” includes recognition of “[a]ny Indian tribe designated as such by the state of New York” (Social Services Law § 39), as well as federally recognized tribes and tribes recognized by the State of New York or by any other state (18 NYCRR § 431.18). The Unkechaug is so recognized by the State of New York.

Pursuant to the ICWA, an Indian tribe shall have jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Federal ICWA regulations of the Department of the Interior, Bureau of Interior Indian Affairs define the term “child-custody proceeding” as “any action, other than an emergency proceeding, that may culminate in” foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement. The DOI has stated that ICWA would apply to an action in which a court was considering a foster care placement, but ultimately decided to return the child to the parents, because the action could have culminated in such a placement. The New York regulations, as amended on March 15, 2017, mirror the definition of child custody proceedings under the ICWA and the federal regulations. The fact that the definition of “child custody proceedings” under 18 NYCRR § 431.18(4) was not amended to include the language “may culminate in” until March 2017, approximately one month after the filing of this petition, is of no consequence. The ICWA and the federal regulations explicitly state that “where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.” (Family Ct, Suffolk Co)

People v Easley, 171 AD3d 785 (2nd Dept 4/3/2019)

DISCOVERY – DNA TESTING EXPERT TESTIMONY

LASJRP: The Second Department finds no error in the denial of defendant’s request for a Frye hearing to determine the admissibility of testimony relating to the forensic statistical tool used to evaluate the likelihood that the

DNA mixture found on the trigger of the subject firearm originated from defendant. At the time of the court’s ruling, a court of coordinate jurisdiction had determined that the FST was not a new or novel scientific technique, while noting that the FST had been peer reviewed, accepted in professional journals, presented at numerous scientific conferences, and admitted in several criminal trials in this State.

The court also did not err when it denied defendant’s request for disclosure of the source code, algorithm, and validation studies of the FST. These materials were “made by, or at the request or direction of” the Office of the Chief Medical Examiner, which is not “a public servant engaged in law enforcement activity” within the meaning of CPL § 240.20(1)(c). (Supreme Ct, Queens Co)

People v Floyd, 171 AD3d 787 (2nd Dept 4/3/2019)

SEARCH AND SEIZURE – AUTO STOP/ REASONABLE SUSPICION

LASJRP: At the suppression hearing, a police sergeant testified that he received an anonymous tip of a possible larceny/burglary involving four to five males “suspiciously” going in and out of a U-Haul truck. The individuals were described as black and Hispanic males ages 15 to 22, their clothing included a “[b]rown hoodie, [a] red hoodie and a black sweatshirt.” The sergeant arrived at the reported location and did not observe a U-Haul truck, but later saw a U-Haul truck being driven by a black male wearing a brown hoodie. The sergeant and his partner pulled over the truck, in which defendant was a passenger, and later recovered the gun from the truck.

The Second Department orders suppression, noting, inter alia, that the tipster failed to identify what made the behavior suspicious, and that the U-Haul truck was not at the reported location when the officers arrived. (Supreme Ct, Kings Co)

J. A. H. v E. G. M., 171 AD3d 710 (2nd Dept 4/3/2019)

DIVORCE / AGREEMENT / REVERSAL

ILSAPP: The plaintiff appealed from an order of Queens County Supreme Court which modified the parties’ separation agreement so as to reduce the defendant’s child support obligations and entitle him to a credit based on payments for college room and board. The Second Department reversed. Since the parties executed the agreement prior to 2010 amendments to Family Court Act § 451, the defendant had to show an unreasonable and unanticipated change in circumstances. His change in employment was not unreasonable, because he voluntarily left his law firm; and the return to full-time employment of the plaintiff, also a lawyer, was not unanticipated, given that the agreement provided for only two years’ maintenance. Further, it was clear that the parties did not

Second Department *continued*

intend that the defendant receive the subject credit. Dorothy Courten represented the appellant. (Supreme Ct, Queens Co)

People v Mohamed, 171 AD3d 796 (2nd Dept 4/3/2019)**PLEAS – ALLOCATION/DEPORTATION CONSEQUENCES
APPEAL – PRESERVATION**

LASJRP: The Second Department concludes that defendant’s guilty plea was not knowing, voluntary, and intelligent where the court asked defense counsel if he had discussed with defendant the potential “immigration consequences” of pleading guilty, and counsel responded: “He is here on a Green Card. We have discussed the immigration consequences.” The record does not demonstrate that the court mentioned, or that defendant was otherwise aware of, the possibility of deportation.

Although defendant did not move to withdraw the plea or otherwise object to its entry prior to the imposition of sentence, a narrow exception to the preservation requirement exists in rare cases where the defendant lacks a reasonable opportunity to object to a fundamental defect in the plea which is clear on the face of the record and to which the court’s attention should have been instantly drawn. (Supreme Ct, Queens Co)

**Verfenstein v Verfenstein, 171 AD3d 841
(2nd Dept 4/3/2019)****BIRACIAL CHILD / EDUCATION**

ILSAPP: The mother appealed from an order of Nassau County Supreme Court which denied her motion for permission to enroll the parties’ child in a Manhattan private school. The Second Department affirmed. The boy, born in 2009, was biracial. When the parties separated in 2010, they agreed that their son would live with the mother in Queens. When the child began attending kindergarten, the parties agreed that he would attend public school near the father’s home in Port Washington. In 2016, the mother sought permission to enroll the child at the U.N. International School (UNIS). While a diverse academic environment was desirable, no evidence showed that the child had been denied his biracial identity in the Port Washington school or that his status had hindered his development. Indeed, he had excelled academically. (Supreme Ct, Nassau Co)

**Petrosino v Petrosino, 171 AD3d 960
(2nd Dept 4/10/2019)****DIVORCE / VACATUR**

ILSAPP: The defendant moved to vacate a judgment of divorce, pursuant to CPL 5015 (a) (3). Kings County Supreme Court denied the application without an evidentiary hearing. That was error, the Second Department held. The defendant produced proof indicating that the plaintiff may have led her to believe that she did not need to defend the matrimonial action. Although the defendant signed an affidavit waiving her right to answer the complaint, that had to be considered in light of possible deceptions perpetrated by the plaintiff. The matter was remitted for a hearing regarding whether the plaintiff fraudulently induced the defendant into acquiescing in terms that were unconscionable or the product of fraud and overreaching. Howard File represented the appellant. (Supreme Ct, Kings Co)

**Matter of Preston v Hormadaly, 171 AD3d 926
(2nd Dept 4/10/2019)****CUSTODY/VISITATION - STIPULATIONS**

LASJRP: The Second Department affirms an order that, after a hearing, granted the mother’s petition to enforce a stipulation of settlement to the extent of directing the father to refer to the parties’ child by the child’s English legal name when addressing the child or introducing the child to others, or when the father is in conversation with others with the child present.

The family court properly credited the mother’s testimony regarding the parties’ intent in entering into the stipulation, and determined that it was in the child’s best interests to enforce the provision, which was added to the stipulation because the father’s practice of referring to the child by a name other than the English legal name had been distressing and confusing to the child. (Family Ct, Queens Co)

**Matter of Chimienti v Perperis, 171 AD3d 1047
(2nd Dept 4/17/2019)****CUSTODY/VISITATION – STANDING/
EQUITABLE ESTOPPEL**

LASJRP: Nicole P., the biological mother of the two subject children, who were born via artificial insemination in September 2014 and May 2016 respectively, entered into a consent order with her former domestic partner, Jennifer C. The parties agreed to share joint custody, with physical custody and final decision-making authority to Nicole and a parenting time schedule for Jennifer. The parties entered into the consent order after the family court determined upon a hearing that Jennifer established standing, via equitable estoppel, to seek custody or visitation. Nicole appeals from the determination as to standing.

The Second Department affirms. Equitable estoppel analysis is not precluded by the legal presumption arising

Second Department *continued*

because the older child was born when Nicole was still married to her former wife. The presumption was rebutted by clear and convincing evidence that there were no children of the marriage.

During the parties' relationship, they lived together with the children, splitting time as a unit between each other's homes. Jennifer participated in the prenatal care and births of both children, participated in raising the children as her children, and was held out by Nicole to others as the co-parent. Although the younger child is an infant, the older child regards Jennifer as her mother, calling her "mommy" and calling Nicole "momma." Nicole allowed Jennifer to have significant access to the children for approximately four months after their relationship ended, until Nicole then refused to allow access and these proceedings ensued. (Family Ct, Nassau Co)

**Matter of Hersh v Cohen, 171 AD3d 1062
(2nd Dept 4/17/2019)**

**FAMILY OFFENSES/CPLR – DISMISSAL WITH
PREJUDICE/DISCONTINUATION OF PROCEEDING**

LASJRP: In this family offense proceeding, the Second Department finds no error where the family court dismissed the proceeding with prejudice after granting petitioner's motion pursuant to CPLR 3217(b) for leave to discontinue the proceedings.

Petitioner moved to withdraw her petitions approximately three years after they were filed, on the date of a hearing on the merits. There were lengthy delays occasioned, in part, by adjournments granted in connection with petitioner's successful application for newly assigned counsel, and opportunities the court gave petitioner to amend her petitions. The court gave petitioner an opportunity to be heard on her allegations prior to dismissal. (Family Ct, Kings Co)

**Matter of Hughes Hubbard & Reed, LLP v Civilian
Complaint Review Bd., 171 AD3d 1064
(2nd Dept 4/17/2019)**

The Freedom of Information Law (FOIL) petition for New York City Civilian Complaint Review Board (CCRB) documents relating to retired detective Louis Scarcella, filed by a law firm representing a defendant seeking to vacate a conviction, was properly denied. The exemption to disclosure of police personnel records, in Civil Rights Law 50-a(1), applies to the CCRB. And the exemption continues after an officer departs from public service. (Supreme Ct, Kings Co)

**Arma v East Islip Union Free Sch. Dist., 171 AD3d 1122
(2nd Dept 4/24/2019)**

A young defendant in this personal injury suit, who had been adjudicated a youthful offender (YO) based in the incident in question, was properly denied a protective order precluding the taking of her deposition by the plaintiff. The defendant "cannot be compelled to divulge the contents of the confidential records underlying her youthful offender adjudication, [but] she can be compelled to answer questions about the facts underlying the incident" (Supreme Ct, Suffolk Co)

**Matter of Jahzir Barbee M., 171 AD3d 1181
(2nd Dept 4/24/2019)**

ARTICLE 10 / NO EDUCATIONAL NEGLECT

ILSAPP: The mother appealed from an order of Kings County Family Court finding educational neglect. The petitioner agency failed to prove that she had not furnished the child with an adequate education. Neither the mother's refusal to consent to an IEP for the 2016–2017 school year, nor her failure to follow up with independent neuropsychological testing, constituted educational neglect. Moreover, the petitioner failed to establish medical neglect. While the evidence demonstrated that the mother delayed in scheduling an evaluation and the child missed doses of Adderall at his father's home, that did not cause impairment or imminent danger thereof. Thus, the petition was dismissed. Joel Borenstein represented the appellant. (Family Ct, Queens Co)

People v Carpio, 171 AD3d 1206 (2nd Dept 4/24/2019)

ARTICLE 78 / REVIEW JAIL-TIME CREDIT

ILSAPP: The defendant's argument, that the post-release supervision component of his sentence should be reduced because he was never credited with 11 months of time served, was based on matters de hors the record. The proper vehicle to pursue a remedy was a CPLR Article 78 proceeding to review the prison authorities' calculation of his jail-time credit. Contrary to the defendant's contention, the fact that he was no longer in prison did not prevent him from commencing such a proceeding to challenge the PRS period. (County Ct, Dutchess Co)

**Matter of Crowe v Guccione, 171 AD3d 1170
(2nd Dept 4/24/2019)**

The judgment granting production by the District Attorney's office under the Freedom of Information Law (FOIL) "of all medical records that related to the petitioner or to any person who testified at his criminal trial and all medical records that were introduced into evidence at the trial" is reversed and the proceeding dismissed. The

Second Department *continued*

records in question are exempted from disclosure by Public Health Law 2803-c(3)(f) and 2805-g(3) and by Civil Right Law 50-b, which prevents any public officer from disclosing documents that would identify a sex offense victim. (Supreme Ct, Rockland Co)

**People v Cunningham, 171 AD3d 1207
(2nd Dept 4/24/2019)**

IMPROPER SUMMATION / BUT AFFIRMANCE

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree burglary and other crimes. His contention that the prosecutor made improper remarks during his opening statement and summation was largely unpreserved. In any event, the Second Department agreed that certain remarks were improper, including those which denigrated the defense and were intended to evoke the jury's sympathy. But the errors did not deprive the defendant of a fair trial. The appellate court emphasized that summation is not an unbridled debate, and counsel must not employ all the rhetorical devices at his or her command. Instead, the prosecutor must stay within the four corners of the evidence and avoid irrelevant and inflammatory comments having a tendency to prejudice the jury against the accused. (Supreme Ct, Queens Co)

**Matter of Haims v Lehmann, 171 AD3d 1176
(2nd Dept 4/24/2019)**

CUSTODY TO AUNT / REVERSAL

A custody order issued by Westchester County Family Court granted sole physical custody to the maternal aunt and joint legal custody to her and the father. The Second Department modified. The aunt demonstrated extraordinary circumstances. The father had abused alcohol for 20 years and had many relapses. Given the antagonism between the parties, the court should have awarded sole legal custody to the aunt. Lisa Zeiderman and Matthew Marcus represented the aunt. (Family Ct, Westchester Co)

**Matter of Lopez v Reyes, 171 AD3d 1179
(2nd Dept 4/24/2019)**

REMITTAL HEARING FAIL / REDO ORDERED

The father and children appealed from an order of Orange County Family Court, which awarded sole custody of the children to the mother. A previous appellate decision had ordered Family Court to conduct a remittal hearing regarding new developments. However, as to those developments, the court failed to conduct an evi-

dentary hearing. Instead, it relied on unsworn statements of the mother's counsel and the AFC and took no testimony. The court compounded its error by declining to conduct new in camera interviews of the children. The matter was thus remitted for a reopened hearing, including in camera interviews with the children. The father represented himself. Theoni Stamos-Salotto represented the children. (Family Ct, Orange Co)

Third Department

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

**Matter of Jahvani Z., 168 AD3d 1146
(3rd Dept 1/3/2019)**

TERMINATION / STANDING QUESTION

ILSAPP¹: The respondent mother appealed from Broome County Family Court orders which terminated her parental rights based on permanent neglect. During the proceedings, the child was placed with the maternal great uncle, pursuant to Family Ct Act § 1055. The Third Department affirmed the challenged orders. Initially, to the extent that the respondent appealed from the fact-finding order, that appeal had to be dismissed, since no appeal lies as of right from a non-dispositional order in a permanent neglect proceeding (unlike in a Family Ct Act Article 10 matter). *See* Family Ct § 1112 (a). Nonetheless, the appeal from the dispositional order brought up for review the fact-finding order. *See* CPLR 5501 (a) (1); Family Ct Act § 165 (a). As a threshold matter, the respondent argued that the great uncle lacked standing to commence the termination proceeding. The appellate court disagreed. Social Services Law § 384-b (3) (b) authorized a relative with custody of the child to initiate such a proceeding. Further, legislative history supported such power. Provisions cited by the respondent—regarding who may petition to terminate parental rights when the agency has failed to do so—did not override the authority granted to a relative custodian. On the merits, the record supported the challenged order. (Family Ct, Broome Co)

People v Madsen, 168 AD3d 1134 (3rd Dept 1/3/2019)

SEX OFFENSES / AGAINST WEIGHT AND DUPLICITOUS

ILSAPP: The defendant appealed from a judgment of Montgomery County Court convicting him, upon a jury

¹ Summaries marked with these initials, ILSAPP, are courtesy of the New York State Office of Indigent Legal Services, from the ILS appellate listserv.

Third Department *continued*

verdict, of multiple counts of various sexual offenses. One conviction was against the weight of the evidence, the Third Department held. Three counts charged him with 2nd degree criminal sexual act, based on oral sexual conduct with victim 4 during summer 2010. That victim testified that he did not remember how often the defendant had oral sexual contact with him that summer but that it happened “more than once,” and he described two locations. Since the evidence did not establish the illicit conduct on more than two occasions, one of the three convictions had to be reversed. Moreover, multiple counts were duplicitous. They charged the same crimes against the same victims during the same time periods, and the victims’ testimony could not be matched to the respective counts. Further, the jurors were not instructed to relate each count to a specific act and told that they could not use any single act of sexual conduct to support a guilty verdict on more than one count. Thus, numerous convictions were reversed, with leave to the People to re-present any appropriate charges to a new grand jury. Matthew Hug represented the appellant. (County Ct, Montgomery Co)

Matter of Pedro A. v Gloria A., 168 AD3d 1152 (3rd Dept 1/3/2019)

It was reversible error to summarily dismiss the incarcerated father’s petition for visitation without making a best interest determination. Contrary to the court’s ruling, it was not necessary for the father to allege a change of circumstances since he was not seeking to modify a prior order. Additionally, it was an error in the prior neglect proceeding to issue an order of protection, forbidding contact between the father and his children, in excess of one year. The order of protection is hereby modified to retroactively expire one year from the date it was issued, and the visitation matter is remitted for a best interest determination. (Family Ct, Sullivan Co)

People v Degnan, 168 AD3d 1224 (3rd Dept 1/17/2019)

BURGLARY / INSUFFICIENT EVIDENCE

ILSAPP: The defendant appealed from a judgment of Broome County Court convicting him of 2nd degree burglary and other crimes. The burglary required proof that the defendant knowingly and unlawfully entered a dwelling with intent to commit a crime therein and that, at the time of the unlawful entry, the defendant harbored a contemporaneous criminal intent other than criminal trespass. The People argued at trial that the defendant unlawfully entered the dwelling to evade arrest and that sometime thereafter he formed an intent to steal several articles of clothing. Yet the prosecution failed to present

any evidence that, at the time of entry, the defendant had a larcenous intent. The proof was legally sufficient, though, to establish 2nd degree criminal trespass. Without permission, the defendant entered a fully furnished residence with working utilities that was used for lodging in warmer months. William Morrison represented the appellant. (County Ct, Broome Co)

People v Demkovich, 168 AD3d 1221 (3rd Dept 1/17/2019)

DEFICIENT PLEA / REVERSED / DIVIDED COURT

ILSAPP: The defendant appealed from a judgment of Broome County Court convicting him upon his plea of guilty of attempted 2nd degree kidnapping and 3rd degree criminal possession of a controlled substance. He contended that his plea was not knowing, voluntary, and intelligent because County Court failed to advise him of the constitutional rights he was waiving. Although he failed to preserve this contention, the reviewing court exercised its interest of justice jurisdiction to take corrective action and reverse. During the brief plea colloquy, County Court did not advise the defendant that he had a right to a jury trial or that he would be waiving the privilege against self-incrimination. Further, the court failed to obtain any assurance that the defendant had discussed with counsel the rights automatically forfeited by pleading guilty or the constitutional implications of a guilty plea. In the absence of an affirmative showing that the defendant understood and voluntarily waived his constitutional rights, the plea was invalid. Two justices dissented. There was nothing compelling about the case that cried out for fundamental justice, and interest of justice jurisdiction should be used sparingly. John Cirando represented the appellant. (County Ct, Broome Co)

People v Glover, 168 AD3d 1217 (3rd Dept 1/17/2019)

SIMILAR PLEA / BUT AFFIRMANCE / DIVIDED COURT

ILSAPP: The defendant appealed from a judgment of Broome County Court convicting her upon her plea of guilty of attempted 3rd degree criminal possession of a controlled substance. The defendant made a pro se motion to withdraw her guilty plea, but withdrew the motion before it was decided. Thereafter, in accordance with the terms of the plea agreement, she was sentenced as a second felony offender. The Third Department affirmed. Two justices dissented. The plea colloquy was nearly identical to the deficient colloquy in *People v Demkovich, supra*. The majority relied on the possibility that, upon vacatur of the guilty plea, the defendant might ultimately be convicted of the original charge and serve an additional period of incarceration. But such risk-benefit assessment was for the defendant to make, and he had requested corrective action. (County Ct, Broome Co)

Third Department *continued***People v Hakes, 168 AD3d 1214 (3rd Dept 1/17/2019)****SCRAM BRACELET / NO WILLFUL VIOLATION**

ILSAPP: The defendant appealed from a judgment of Sullivan County Court which revoked his probation. As conditions of his probation, defendant was required to wear a SCRAM bracelet and to pay the associated costs. The bracelet was removed when the defendant could not pay. After a VOP petition was filed against the defendant and a hearing was held, County Court found that he knowingly violated probation and sentenced him to one to three years. The Third Department reversed, the People appealed, and the Court of Appeals reversed, holding that sentencing courts can require defendants to pay electronic monitoring costs. Upon remittal, the Third Department held that County Court erred in finding that the People established a willful violation, since the defendant provided extensive proof demonstrating that he could not afford to pay the \$11/day cost. The appellate court reversed the judgment revoking the defendant's probation and imposing a sentence of imprisonment. Donna Lasher represented the appellant. (County Ct, Sullivan Co)

Matter of Schenectady County Dept. of Social Servs. v Joshua BB., 168 AD3d 124 (3rd Dept 1/17/2019)**PATERNITY / REVERSAL**

ILSAPP: The respondent appealed from an order of Schenectady County Family Court which ordered genetic marker testing to establishing the paternity of a child. The petitioner commenced the proceeding on behalf of the grandmother of the child (born 2012), seeking an order of filiation against the respondent. The child's mother was not married at the time of birth and, a year later, married her current husband. At the time that the petition was filed, the child was living with the grandmother. In 2018, Family Court ordered a genetic marker test of the child, the mother, and the respondent. The respondent appealed. The order appealed from was not final and, therefore, not appealable as of right. However, the Third Department deemed the notice of appeal to be a leave application and granted leave. In addition, the appellate court granted a stay pending appeal. On the merits, the Third Department reversed and remitted. The mother told Family Court that the child believed that her husband was the father. The record did not indicate that the AFC discussed with the child his belief as to who his father was. There was no substantive evidence of who had a parent-child relationship with the child and whether, due to equitable estoppel, a genetic marker test would not be in his best interests. Further, the child did not receive the effective assistance. There was no proof that the AFC consult-

ed with the child, who was from 4½ to 6 years old during the litigation. Sandra Colatosti represented the appellant. (Family Ct, Schenectady Co)

People v Kaplan, 168 AD3d 1229 (3rd Dept 1/17/2019)**NO TERRORIST THREAT / REVERSED**

ILSAPP: The defendant appealed from a judgment of Warren County Court convicting him of making a terroristic threat. He was arrested for an incident in the Town of Horicon. Items in his possession upon arrest (a cell phone, a police scanner, \$2,707 in cash, and rolling papers) were held as evidence. A certificate of disposition did not identify the charges or the disposition; rather, it reported that the record was sealed. The defendant sought the return of his personal property, and when the request was denied, he reportedly became angry. As he turned to leave the County Sheriff's Office Building, he was heard mumbling that he was going to "come back and shoot the place down." The defendant was arrested, charged with making a terroristic threat, convicted after a jury trial, and sentenced to five years plus post-release supervision. The Third Department reversed. The record contained no evidence that the defendant intended to affect the conduct of a unit of government by murder, assassination or kidnapping. His imprudent statement reflected his vented anger that his property had not been returned to him. Mitch Kessler represented the appellant. (County Ct, Warren Co)

People v Barr, 168 AD3d 1282 (3rd Dept 1/24/2019)**CONSECUTIVE SENTENCES / MADE CONCURRENT**

ILSAPP: The defendant appealed from a judgment of Albany County Supreme Court convicting him, upon his plea of guilty, of 4th degree grand larceny (two counts) and 5th degree conspiracy, all hate crimes. The Third Department held that [Supreme] Court lacked the authority to impose consecutive sentences as to one of the grand larceny counts and the conspiracy count. The People failed to establish that the act underlying the grand larceny was separate and distinct from the actus rei of the conspiracy charged. Thus, the sentences were ordered to run concurrently to each other and consecutively to the remaining sentence imposed. Marshall Nadan represented the appellant. (Supreme Ct, Albany Co)

Matter of Pinney v Van Houten, 168 AD3d 1293 (3rd Dept 1/24/2019)**SPECIAL PROSECUTOR / PROHIBITION DENIED**

ILSAPP: The complainant alleged that she had been sexually assaulted by a deputy sheriff. Due to his close working relationship with the deputy sheriff, the Tompkins County District Attorney sought an order appointing a special DA. The order was granted, and

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thereafter the special DA's authority was expanded to investigate any other individuals who may have committed an offense against the complainant, including the petitioner. Pursuant to CPLR Article 78, the petitioner sought an order prohibiting the Special DA from prosecuting him. Prohibition was an appropriate remedy to void a court's improper appointment of a special prosecutor, the Third Department stated, but the appellate court denied the instant application. The appearance that a DA would prosecute an individual in a selective manner discouraged public confidence and justified recusal. However, the appellate court cautioned that recusal applications by DAs must be reviewed on a case-by-case basis and that the instant decision did not require recusal in all cases in which a DA was called upon to investigate or prosecute a police officer.

People v Faulkner, 168 AD3d 1317 (3rd Dept 1/31/2019)

ADVERSE POSITION / NEW COUNSEL REQUIRED

ILSAPP: The defendant appealed from a Schenectady County Court judgment convicting him of 3rd degree rape. At a court proceeding following his plea of guilty, the defendant made an oral pro se motion to withdraw the plea, and defense counsel repeatedly asserted that there was no basis for the motion. Yet County Court did not assign new counsel, and it denied the pro se motion on the merits. On appeal, the defendant contended that his right to effective assistance was violated, and new counsel should have been assigned. The People and the Third Department agreed. Counsel may not become a witness against the client; make remarks that affirmatively undermine a client's arguments; or otherwise take a position adverse to the defendant. When counsel does so, a conflict of interest arises. The matter was remitted for assignment of new counsel and reconsideration of the defendant's motion. Robert Gregor represented the appellant. (County Ct, Schenectady Co)

Ulster County SCU v McManus, 168 AD3d 1325 (3rd Dept 1/31/2019)

ANDERS BRIEF REJECTED

ILSAPP: The father appealed from orders of Ulster County Family Court, which, after fact-finding and dispositional orders, held him in willful violation of two prior orders of support for the parties' three children; two money judgments; and two orders of commitment. Appellate counsel filed an *Anders* brief. The Third Department observed that it is rare that such a brief will reflect effective advocacy in a contested case where a full evidentiary hearing has occurred. A review of the record

revealed issues of arguable merit related to the father's ability to pay and whether he was deprived of effective assistance. Thus, the reviewing court granted counsel's request to withdraw and assigned new counsel to address the issues identified and any others the record might disclose. (Family Ct, Ulster Co)

People v Mudd, 169 AD3d 1166 (3rd Dept 2/21/2019)

CATU ERROR / REVERSAL

ILSAPP: The defendant appealed from a judgment of Clinton [County] Court, convicting him of drug sale and possession crimes. When he appeared in court, the People made an offer, which included a prison term of six years with post-release supervision. Two weeks later, the same offer was extended, the defendant did not accept, and it was withdrawn. Later, he pleaded guilty, with a promise from the court to not sentence him to more than the time offered by [the] People. During the plea proceeding, the court said that it would not be bound by the six-year cap if the defendant committed a crime before sentencing. At sentencing, the defendant admitted his predicate felony, and the court imposed concurrent six-year terms plus PRS. The Third Department reversed, since County Court had failed to advise the defendant that the sentence would include PRS. *See People v Catu*, 4 NY3d 242. Preservation of the claim was not required, as the defendant had no practical ability to object to the PRS. Rebecca Fox represented the appellant. (County Ct, Clinton Co)

People ex rel. Negron v Superintendent, 170 AD3d 12 (3rd Dept 2/21/2019)

SCHOOL-GROUND RESTRICTION / INAPPLICABLE

ILSAPP: In 1994, the petitioner was convicted of 1st degree sexual abuse. He served his sentence and was adjudicated a level-three offender. In 2005, he was convicted of attempted 2nd degree burglary. Upon release to parole supervision, he was subject to various terms and conditions, including compliance with SARA provisions. The petitioner maintained that the Executive Law § 259-c (14) school-ground restriction was inapplicable to him, since the attempted burglary was not an offense enumerated in the statute. The Third Department agreed. The mandatory school-ground condition applied to an offender serving a sentence for an enumerated offense (1) whose victim was under age 18, or (2) who was designated a level-three offender. Because the petitioner was not serving a sentence for a delineated offense, the statute did not apply. The Third Department thus disagreed with the Fourth Department. *See People ex rel. Garcia v Annucci*, 167 AD3d 199. The Legal Aid Society (Elon Harpaz, of counsel) represented the appellant. (Supreme Ct, Sullivan Co)

Third Department *continued***People v Newman, 169 AD3d 1157 (3rd Dept 2/21/2019)****RIGHT TO COUNSEL – EFFECTIVE ASSISTANCE**

LASJRP²: In this drug possession prosecution, the Third Department finds a violation of defendant's right to the effective assistance of counsel where counsel failed to redact irrelevant and prejudicial hearsay from the search warrant application before introducing it for the limited purpose of revealing the officer's errors when he obtained the warrant and failed to request a limiting instruction that would have advised the jury of that purpose; and failed to object to the prosecutor's repeated exhortations to the jury to rely on the warrant application's hearsay information as proof of defendant's guilt.

The information in the application directly contradicted counsel's theory of defense, which was that defendant's girlfriend, and not defendant, possessed and sold the drugs found in the apartment. (County Ct, Broome Co)

**Matter of Richard GG. v M. Carolyn GG.,
169 AD3d 1169 (3rd Dept 2/21/2019)****CUSTODY/VISITATION – CONTEMPT/VIOLATIONS**

LASJRP: The Third Department upholds a finding of civil contempt where the father asserts that he never prevented his daughter from visiting with her mother, but he vested the daughter with the authority to determine whether she wanted to visit and made no efforts to facilitate compliance with court-ordered visitation. (Family Ct, Broome Co)

People v Stone, 169 AD3d 1165 (3rd Dept 2/21/2019)**REDUCED COUNT STANDS, ABSENT ACTION BY
DA WITHIN 30 DAYS**

LASCDP³: When the court ordered the reduction of a charge in the indictment, the People had 30 days within which to either file an instrument containing the reduced charge or obtain permission to re-present the matter to a grand jury. They did neither within 30 days, so the reduced charge that remained was jurisdictionally invalid. The Third Department reversed the judgment of conviction on that count. (County Ct, Broome Co)

² Summaries marked with these initials, LASJRP, are courtesy of The Legal Aid Society's Juvenile Rights Practice, from their weekly newsletter.

³ Summaries marked with these initials, LASCDP, are courtesy of The Legal Aid Society's Criminal Defense Practice, from their CDD case summaries.

**Matter of Melissa MM. v Melody NN., 169 AD3d 1290
(3rd Dept 2/28/2019)****CUSTODY – EXTRAORDINARY CIRCUMSTANCES**

LASJRP: The Third Department upholds an order awarding the mother and the aunt joint legal custody and the aunt primary physical custody of the child, concluding that the aunt established extraordinary circumstances.

The Court notes that since 2007, when the mother consented to a finding of neglect, the child has resided with the aunt while the mother has had parenting time that was supervised until 2010; that due to the dysfunctional relationship between the mother and the aunt, the years have been incredibly litigious and stressful for the child, the mother and the aunt; that the mother, who has been treated for mental health issues in the past, denied any current need for treatment, and was largely unaware of the nature and purpose of services the child was receiving at school; that the mother works part time, has remarried, had a second child and moved into a new residence where the subject child would have his own room, but the child was "challenging," and the mother often had a difficult time parenting, would terminate parenting time early, attributed much of the blame to the child and his mental health issues, and had little insight into her own responsibility to deescalate situations with the child. (Family Ct, Clinton Co)

People v Sumter, 169 AD3d 1275 (3rd Dept 2/28/2019)**ETHICS – CONFLICT OF INTEREST**

LASJRP: The Third Department agrees with defendant that the Albany County Public Defender's office was precluded, as a matter of law, from representing him at a resentencing hearing because the Public Defender, prior to being appointed to that position, was the County Judge who presided over and initially sentenced defendant. (Supreme Ct, Albany Co)

**Melissa KK. v Michael LL., 170 AD3d 1293
(3rd Dept 3/7/2019)****PARENTAL SURRENDER / CUSTODY DISMISSED**

ILSAPP: The grandmother appealed from an order of Clinton County Court dismissing her application for custody of the subject children. The Third Department affirmed. Once parents have voluntarily surrendered their children, adoption is the exclusive means to gain custody; courts are without authority to entertain custody proceedings commenced by a member of the child's extended family. Regardless of the quality of the grandmother's proof, Family Court was divested of authority to entertain her custody petitions when the parents surrendered their parental rights to the Department of Social Services. Further, since the grandmother's notice of appeal was

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limited to the order dismissing her custody petitions, her contentions regarding related child protective proceedings were not properly before the appellate court. (Family Ct, Clinton Co)

People v Rosario, 170 AD3d 1275 (3rd Dept 3/7/2019)

CONFLICT / DEFENSE COUNSEL BECOMES JUDGE

ILSAPP: The defendant appealed from an order of Sullivan County Supreme Court which denied his CPL 440.10 motion to vacate a judgment of conviction for certain sexual crimes. When he was Chief Assistant and Director of the Legal Aid Panel, the judge who denied the instant motion had represented the defendant in the underlying criminal case. Pursuant to Judiciary Law § 14, a judge must not take any part in deciding a matter in which he was counsel. This statutory disqualification deprived the court of jurisdiction. Thus, the order under review was void, and the matter was remitted for review before a different justice. Aaron Louridas represented the appellant. (Supreme Ct, Sullivan Co)

People v Rudolph, 170 AD3d 1258 (3rd Dept 3/7/2019)

NO CONFLICT / DA BECOMES DEFENSE COUNSEL

ILSAPP: The defendant appealed from a judgment of Albany County Court, convicting him upon his pleas of guilty of drug possession crimes; and from an order denying his CPL Article 440 motions. The Third Department affirmed. There was an inherent conflict of interest where a defense attorney who initially represented a defendant joined the DA's office during the pendency of the criminal proceeding—but not when the reverse occurred. In the instant case, an ADA became defense counsel. The defendant set forth no information that counsel obtained about him during his prior employment that compromised the representation provided. Further, there was no evidence that the potential conflict operated on the defense; counsel did not make any statements of substance at sentencing, and the agreed-upon sentence was imposed. (County Ct, Albany Co)

People v Vega, 170 AD3d 1266 (3rd Dept 3/7/2019)

KILLING OF MOTHER / ILLEGAL ABORTION

ILSAPP: The defendant appealed from a judgment of Rensselaer County Court convicting him, following a jury trial, of 1st degree manslaughter, 2nd degree arson, and 1st degree abortion. The Third Department affirmed. The abortion conviction was not against the weight of the evidence; the intentional strangulation of the victim necessarily resulted in the death of the unborn child. Although

Penal Law § 125.45 was recently repealed, the instant decision may affect prosecutions for acts committed prior to the repeal's effective date. In that regard, the appellate court observed that its conclusion did not raise the specter of criminalizing justifiable abortifacient acts. (County Ct, Rensselaer Co)

Matter of Ulster County Support Collection Unit v Beke, 170 AD3d 1347 (3rd Dept 3/14/2019)

DISSENT / APPEARANCE BY PHONE

ILSAPP: The respondent appealed from an order of Ulster County Family Court which found him in willful violation of a support order. The Third Department held that the trial court properly found the respondent in default, and he should have moved to vacate, rather than taking an appeal. One justice dissented. There was no default and the order was appealable, given the appearance by assigned counsel at the confirmation hearing and his explanation that the respondent could not afford to travel from his Florida home to attend. The respondent had been allowed to appear by phone at three prior appearances. The dissenter opined that it was an abuse of discretion to deny his final request to appear by phone, pursuant to Family Court Act § 433 (c) (Family Court may allow testimony by phone where party lives in another county or it would be an undue hardship for such party or witness to testify in court). (Family Ct, Ulster Co)

People v Dorsey, 170 AD3d 1325 (3rd Dept 3/14/2019)

RECANTATION / UNRELIABLE

ILSAPP: The defendant and codefendant Riddick were charged with attempted 2nd degree murder, 1st degree assault, and other crimes in connection with the firing of six shots at a victim who was struck by one bullet. The instant appeal was from a judgment of Albany County Supreme Court convicting the defendant, upon his plea of guilty, of attempted 2nd degree CPW in that matter. The Third Department affirmed. The trial court did not err in denying the defendant's motion to withdraw his guilty plea, based on the victim's recantation of statements incriminating the defendant. The appellate court had been unimpressed by same recantation statement when codefendant Riddick submitted it. *See People v Riddick*, 136 AD3d 1124 (recantation proof inherently unreliable, particularly where, as here, recanting victim was in custody in the facility with codefendants; plea proceeding reflected valid plea). [*For a different result in another recent recantation case, see Fernandez v Capra*, {916 F3d 215 (2nd Cir 2/22/2019)}]. (Supreme Ct, Albany Co)

People v Smith, 170 AD3d 1339 (3rd Dept 3/14/2019)

IN ABSENTIA / NEW TRIAL

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ILSAPP: The defendant appealed from a judgment of Tioga County Court convicting him of 3rd degree rape and another crime. He did not appear for trial. The Third Department held that County Court abused its discretion in conducting the trial in the defendant's absence. Even where, as here, the defendant was warned of the consequences of nonappearance, trial in absentia is not automatic. In the instant case, several factors militated against that outcome. (1) The defendant had been present at all prior appearances. (2) His attorney detailed efforts to locate him and requested an adjournment. (3) There was no indication of difficulty in rescheduling the trial. (4) There was no fear that evidence would be lost or that further efforts to locate the defendant would be futile. (5) Commencement of trial immediately after issuance of a bench warrant showed a minimal effort to locate the defendant before trial. John Trice represented the appellant. (County Ct, Tioga Co)

**People v Vandegrift, 170 AD3d 1327
(3rd Dept 3/14/2019)**

COMPETENCY TO STAND TRIAL

LASJRP: The Third Department finds error where, after receiving conflicting examination reports, the court failed to conduct a competency hearing. Defense counsel's representation that the psychiatric examiner who filed a report stating that defendant was not competent had changed his mind, this representation and subsequent withdrawal of the request for a hearing did not relieve the court of its statutory duty to conduct a hearing.

The case is remanded since, given the circumstances, reconstruction of defendant's mental capacity at the time of his probation violation hearing should be possible by means of contemporaneous observation and records. (County Ct, Chemung Co)

People v Hinson, 170 AD3d 1385 (3rd Dept 3/21/2019)

SORA / ERRONEOUS ASSESSMENT

ILSAPP: The defendant appealed from an order of Albany County Supreme Court which classified him as a level-three sex offender. The Third Department held that he should not be assessed 20 points for continuing course of sexual misconduct, since there was no indication as to when the second sexual contact occurred. The defendant was thus a level-two offender. In the SORA court, the People had asked for consideration of an upward departure, in the event of a level-two finding. Therefore, the matter was remitted. Kathy Manley represented the appellant. (Supreme Ct, Albany Co)

**Matter of Benjamin OO. v Latasha OO., 170 AD3d 1394
(3rd Dept 3/21/2019)**

VISITATION – INCARCERATED PARENT/FREQUENCY OF VISITS

LASJRP: The Third Department affirms an order awarding the incarcerated father visits with the children twice per year—once in April and once in October—with weekly telephone contact with the children each Wednesday.

The family court failed to make fact findings but this Court may reach an independent determination. As the father argues, recent social science research strongly supports the legal presumption that children benefit from continuing contact with an incarcerated parent. Nonetheless, the best interests of a child, and particularly a young child, may not be served by imposing in-person visits to a correctional facility. The atmosphere and setting of such visits may be traumatic to the child and his or her view of the parent. Other means of contact, such as frequent phone calls and letters, can provide children and incarcerated parents meaningful communication and ways to continue and strengthen their relationships, without subjecting young children to unnecessary distress.

Here, the children were six and seven years old at the time of the hearing. The mother described a history of domestic violence that had occurred in front of at least one of the children, and she remained concerned for both her safety and the mental well-being of the children, who were exhibiting behavioral difficulties following contact with the father. The father is serving a lengthy sentence and is not eligible for release until, at the earliest, 2021.

A dissenting judge would order that visits take place four times a year. (Family Ct, Delaware Co)

**Matter of Aaron OO. v Amber PP., 170 AD3d 1436
(3rd Dept 3/28/2019)**

CUSTODY/VISITATION – RIGHT TO COUNSEL/EFFECTIVE ASSISTANCE

LASJRP: In this visitation proceeding brought by the incarcerated father, the Third Department orders a new hearing and assignment of new counsel to the father, concluding that he was deprived of his right to the effective assistance of counsel.

Counsel for both the father and the mother appeared to be unaware that there is a presumption favoring visitation that may be rebutted by demonstrating, by a preponderance of the evidence, that visitation with the incarcerated parent would be harmful to the children's welfare or contrary to their best interests. Although the father did not bear the burden of proof, his counsel failed to elicit basic testimony relevant to the best interests issue. Counsel also spent an inordinate amount of time questioning the mother about her finances, engaged in an

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exhaustive and irrelevant inquiry regarding the mother’s child from a different relationship, and, generally, displayed an overall lack of focus and purpose.

Also, the father and his counsel were at odds more often than not, which eventually caused the court to relieve counsel, but not until after summations began. (Family Ct, Schenectady Co)

**Matter of Aerobella T., 170 AD3d 1453
(3rd Dept 3/28/2019)**

ABUSE/NEGLECT – FAILURE TO SUPPLY ADEQUATE CARE/HOUSING

LASJRP: The Third Department upholds the family court’s neglect determination against the father where the court found, among other things, that the home was in a “deplorable, unsanitary condition[], with food strewn throughout the home, feces on the floor, and visibly soiled and stained mattresses provided for the children,” and that father could not be awoken, “for an extended period of time, in spite of people pounding on the door, the children yelling and trying to rouse [him], a phone call being placed to [him], and a police officer forcefully entering the home.” (Family Ct, Sullivan Co)

**Karla FF. v Robert FF., 170 AD3d 1476
(3rd Dept 3/28/2019)**

NONFINAL ORDER / NO APPEAL AS OF RIGHT

ILSAPP: The respondent husband appealed from an order of Sullivan County Family Court, which denied his motion to dismiss the petitioner wife’s family offense petition against him. Generally, family court litigants may only appeal as of right from a final order. *See* Family Ct Act § 1112 (a). The order denying the husband’s motion to dismiss was an intermediate order, and an appeal as of right did not lie. Thus, the Third Department dismissed the appeal. While the instant appeal was pending, a hearing was held and the wife’s petition was granted. An appeal from that dispositional order would bring up for review the denial of the motion to dismiss, the appellate court noted. (Family Ct, Sullivan Co)

**Matter of Lionel PP. v Sherry QQ., 170 AD3d 1460
(3rd Dept 3/28/2019)**

**CUSTODY
– RELOCATION
– EDUCATION ISSUES
– APPEAL**

LASJRP: The father is married and lives in New York City with his four other children. The mother, who has

taken care of the subject child since his birth, is also married and lives in Saratoga County. Pursuant to a December 2014 order, the parties had joint legal custody with the mother having primary physical custody and the father having parenting time on three weekends of each month, as well as during school vacations.

Following a trial and a Lincoln hearing, the family court, among other things, granted the father’s petition and awarded him physical custody and permitted him to relocate the child to New York City contingent upon his enrollment in Harlem’s Children Zone, Promise Academy for the 2017-2018 school year.

The Third Department reverses and orders a new hearing. By imposing the Promise Academy condition, the court erroneously elevated the child’s matriculation at Promise Academy from one factor to be considered to the sole dispositive factor.

Although the Court was advised at oral argument by the attorney for the child that the child is presently on a waitlist for Promise Academy but that there are other schools in New York City where the child could be enrolled, and the Court’s authority is as broad as that of family court, the record is not sufficiently developed to make independent findings as to the other schools. (Family Ct, Saratoga Co)

**Matter of Russell J. v Delaware County DSS.,
170 AD3d 1433 (3rd Dept 3/28/2019)**

**TERMINATION OF PARENTAL RIGHTS –
UNWED FATHER**

LASJRP: The Third Department rejects the father’s contention that the issue of whether he was a consent parent was not properly before the family court, noting that this Court has characterized that as a threshold issue when a petition seeks to terminate parental rights based on alleged abandonment.

The family court properly determined that the father was not a consent father, notwithstanding his filing of a custody petition a week prior to DSS filing its petition, and dismissed DSS’s petition to terminate parental rights. (Family Ct, Delaware Co)

People v Jones, 171 AD3d 1249 (3rd Dept 4/4/2019)

The defendant’s plea-based conviction following a successful appeal must be reversed. By the time the defendant perfected, in 2015, his appeal from the original 2001 assault conviction, he had served the maximum sentence that could be imposed; under double jeopardy principles, he could only be sentenced to time served. The bargained for sentence of five years plus five years of postrelease supervision, imposed on the defendant as a second violent felony offender upon remittal, was made concurrent to a sentence for a separate 2003 murder conviction.

Third Department *continued*

“[D]efense counsel’s failure to recognize and advise defendant that double jeopardy principles prohibited the imposition of any additional prison time on the pending assault charge, as was included in the negotiated plea agreement and ultimately imposed at sentencing, constituted ineffective assistance of counsel” The information necessary to reach that conclusion was available in a 2016 motion to reargue, which demonstrated that the defendant had “served his full sentence.” There is a reasonable probability that but for counsel’s errors, the defendant would not have pleaded guilty. (Supreme Ct, Albany Co)

People v Titus, 171 AD3d 1256 (3rd Dept 4/4/2019)**WAIVER OF INDICTMENT / DEFECTIVE**

ILSAPP: The defendant appealed from a judgment of Broome County Court. He executed a waiver of indictment and was charged in a SCI with 3rd degree burglary. As part of a global disposition, he pleaded guilty to attempted 3rd degree burglary. The Third Department held that, because there was not strict compliance with statutory mandates, the defendant’s waiver of indictment was invalid. The jurisdictional challenge was not precluded by the guilty plea, nor was it subject to the preservation requirement. CPL 195.20 requires that a waiver of indictment include the date and approximate time of the charged offense. When filed together, the waiver and SCI may be read as a single document to satisfy the statutory requirements. However, here neither document indicated the time of the charged offense. Thus, the waiver of indictment was invalid, and the SCI was jurisdictionally defective, thereby requiring vacatur of the guilty plea, reversal of the judgment, and dismissal of the SCI. G. Scott Walling represented the appellant. (County Ct, Broome Co)

People v Montague, 171 AD3d 1306 (3rd Dept 4/11/2019)**SFO / BEYOND LOOK-BACK PERIOD**

ILSAPP: The defendant appealed from an order of Albany County Court, which denied his CPL 440.20 motion to set aside a sentence following a February 2014 drug sale conviction. That was error. County Court unlawfully sentenced the defendant as a second felony offender. The controlling date as to the prior felony was that of the April 2002 original sentencing, not the March 2005 resentencing. See *People v Thompson*, 26 NY3d 678. The People conceded that the days of incarceration during the relevant period were not enough to bring the prior felony within the 10-year look-back period. The matter was remitted for resentencing. The Albany County Public

Defender (Jessica Gorman, of counsel) represented the appellant. (County Ct, Albany Co)

People v Secor, 171 AD3d 1314 (3rd Dept 4/11/2019)**SORA / MODIFICATION**

ILSAPP: The defendant appealed from an order of Albany County Court which found him to be a level-two offender. The Third Department reduced the classification to risk level one. The SORA court should have granted a downward departure, based on the victim’s consent to engage in sexual intercourse when she was nearly age 17. The Board recommended the departure, based on the mitigating factors, which were not taken into account by the guidelines. Yet County Court declined to grant the relief sought, citing the defendant’s light sentence based on the victim’s consent. That was an inappropriate factor to consider; the SORA court abused its discretion. Thus, the appellate court placed the defendant at risk level one. Paul Connolly represented the appellant. (County Ct, Albany Co)

People v Edwards, 171 AD3d 1402 (3rd Dept 4/25/2019)**SCI DEFECTIVE / DISMISSAL**

ILSAPP: The defendant appealed from a judgment of Broome County Court, convicting him of attempted 2nd degree CPW. He waived indictment and pleaded guilty as charged in a SCI. On appeal, he contended that the waiver of indictment was deficient, because it did not set forth the approximate time of the offense, nor did the record establish that he signed the waiver in open court. Since the waiver was not procured in strict compliance with statutory provisions, it was invalid, requiring vacatur of the guilty plea and dismissal of the SCI. G. Scott Walling represented the appellant. (County Ct, Broome Co)

People v Sanford, 171 AD3d 1405 (3rd Dept 4/25/2019)**PLEAS – ALLOCATION/COLLATERAL CONSEQUENCES**

LASJRP: The Third Department, noting that an order of protection is not punitive and is instead an ameliorative measure intended to safeguard the rights of the victims and witnesses, concludes that the order and its terms are not a direct consequence of a guilty plea of which a defendant must be advised. (County Ct, Chemung Co)

[Ed. Note: *The Indigent Legal Services Standards call for counsel to “[i]nvestigate potential consequences that can arise from cases, advise each client about those consequences, and advocate for case dispositions that limit negative consequences as much as possible.”* [Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest](#), Standard 8. And see NYSDA’s [Client-Centered Representation Standards](#), Standard 16, which

Third Department *continued*

includes a call for lawyers to advise clients on all the consequences of a conviction.]

Fourth Department

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

[Matter of Alger v Jacobs](#), 169 AD3d 1415 (4th Dept 2/1/2019)

CUSTODY / EMERGENCY JURISDICTION

ILSAPP¹: The father appealed from (1) an order of Ontario County Family Court which directed him to stay away from mother and the subject child, issued upon a finding that he committed a family offense; and (2) an order granting sole custody to the mother. On appeal, the father contended that the mother’s petitions should have been dismissed based on a lack of subject matter jurisdiction. The Fourth Department rejected his arguments. Pursuant to the UCCJEA, Domestic Relations Law §76-c, NY had temporary emergency jurisdiction, where the child was present in this State, and jurisdiction was necessary in an emergency to protect the child and parent. Such statutory provision was enacted with the intent of protecting victims of domestic violence. The allegations in the petitions were sufficient to establish the requisite emergency. The pleadings alleged acts of physical violence by the father against the mother. She suffered a subdural hematoma and other serious injuries, resulting in her hospitalization in an intensive care unit for several days. The mother had no knowledge as to when the father would be released from jail in Florida. To be safe in the event of his release, she relocated to New York, where her family lived. (Family Ct, Ontario Co)

[Matter of Amiracle R.](#), 169 AD3d 1453 (4th Dept 2/1/2019)

ABUSE/NEGLECT – MENTAL ILLNESS – DEFAULTS

LASJRP²: The Fourth Department agrees with respondent mother that she did not default where she

¹ Summaries marked with these initials, ILSAPP, are courtesy of the New York State Office of Indigent Legal Services, from the ILS appellate listserv.

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

appeared at the two-day fact-finding hearing and was present when petitioner rested, and, although she failed to appear on the next hearing date, the court merely issued its fact-finding determination.

However, there was sufficient evidence of neglect based on mental illness. Although the mother voluntarily sought treatment, she missed many follow-up appointments. Because of her delusions and paranoia, she often stayed at home with the shades drawn and refused to let her children go outside. Her second oldest child did most of the cooking because the mother was too depressed to do so, and she yelled at the children and called them names to keep from hitting them. She admitted being irritable and having a violent past, and continued to exhibit such behavior when she screamed at and threatened a caseworker in front of the children and struck the youngest child during a psychiatric assessment. (Family Ct, Erie Co)

[People v Dean](#), 169 AD3d 1414 (4th Dept 2/1/2019)

SORA / NO FINDINGS OR CONCLUSIONS

ILSAPP: The defendant appealed from a Supreme Court order which determined that he was a level-three sex offender. The Fourth Department held that the SORA court failed to comply with Correction Law § 168-n (3), requiring the trial court to set forth the findings of fact and conclusions of law upon which it based its determination. Although Supreme Court provided a list of the risk factors for which points were assessed, and held that the defendant failed to rebut the presumption that he was a level-three risk, the court did not provide findings/conclusions supporting denial of the request for a downward departure. The reviewing court therefore held the case, reserved decision, and remitted the matter. The Legal Aid Bureau of Buffalo (Alan Williams, of counsel) represented the appellant. (Supreme Ct, Erie Co)

[Matter of Lakeya P. v Ajja M.](#), 169 AD3d 1409 (4th Dept 2/1/2019)

CUSTODY / MODIFIED

ILSAPP: The mother appealed from an order of Onondaga County Family Court which granted custody of the children to the petitioners, an aunt and great aunt. The Fourth Department held that Family Court erred in granting the mother only so much supervised contact as was “deemed appropriate” by the petitioners. The court may not delegate such authority to a party. The appellate court therefore remitted the matter to Family Court to determine the supervised visitation schedule. Family Court also erred in ordering that any petition, filed by the mother to modify or enforce the custody orders, must have a judge’s permission to be scheduled. Public policy mandates free access to the courts, and such access must

Fourth Department *continued*

not be restricted without a finding that the restricted party engaged in meritless, frivolous, or vexatious litigation, or otherwise abused the judicial process. There was no such finding here. (Family Ct, Onondaga Co)

People v Tchiyuka, 169 AD3d 1398 (4th Dept 2/1/2019)**UNFULFILLED PROMISE / VACATUR**

ILSAPP: The defendant appealed from a judgment of Oneida County Court convicting him of 2nd degree robbery. He contended that his plea was induced by a promise of jail time credit that could not legally be fulfilled. The Fourth Department agreed. Where a guilty plea was induced by an unfulfilled promise, the sentencing court must vacate the plea or honor the promise. If the promised sentence cannot be imposed, the sentencing court may impose another lawful sentence that comports with the defendant's legitimate expectations. The appellate court vacated the sentence and remitted the matter. Matthew Hug represented the appellant. (County Ct, Oneida Co)

People v Thomas, 169 AD3d 1451 (4th Dept 2/1/2019)**YO / PROCEDURE NOT FOLLOWED**

ILSAPP: The defendant appealed from a Supreme Court judgment convicting him, upon a jury verdict, of 2nd degree robbery (five counts). The Fourth Department held that the trial court erred in failing to determine whether the defendant should be afforded youthful offender status. *See generally People v Rudolph*, 21 NY3d 497. Where, as here, the defendant has been convicted of an armed felony offense, the court is required to determine whether he or she is an eligible youth by considering the statutory factors. If the court determines that one or more of the relevant factors is present and the defendant is an eligible youth, it must determine whether the defendant is a youthful offender. The court failed to follow the proper procedure. Therefore, the appellate court ordered that the case be held, decision reserved, and the matter remitted. The Monroe County Public Defender (Timothy Davis, of counsel) represented the appellant. (Supreme Ct, Monroe Co)

Matter of William F.G. v Lisa M.B., 169 AD3d 1428 (4th Dept 2/1/2019)**CUSTODY / REVERSED**

ILSAPP: The mother and AFC appealed from a Family Court order which adjudged that the father's wife could supervise his visits with the parties' children. The Fourth Department reversed. The prior consent order—

entered after the father was convicted of sexually abusing the parties' then-four-year-old daughter—granted sole custody to the mother and required the father's visitation to be supervised by his therapist or the maternal grandmother. The father failed to establish a sufficient change in circumstances. An established arrangement should not be changed solely to accommodate the desires of the children. Moreover, in this case, the children were unaware that visitation with the father had been supervised by their grandmother for five years because of his sexual abuse conviction. Moreover, replacing the grandmother as visitation supervisor would not advance the children's best interests. She had a long history of successfully facilitating positive interaction between the children and the father, while providing meaningful protection to the children. The grandmother testified that she would be willing to allow the father's wife into her home. In addition, the record established that the wife did not know the real, sordid details of the sexual abuse and believed a fake, sanitized account. The Monroe County Public Defender (Janet Somes, of counsel) represented the appellant. (Family Ct, Monroe Co)

People v Brown, 169 AD3d 1488 (4th Dept 2/8/2019)**DEFENSES – JUSTIFICATION/INCONSISTENCY BETWEEN DEFENSES**

LASJRP: The Fourth Department finds reversible error where the trial court refused to charge the jury on the defense of justification. Although defendant denied assaulting the correction officer or possessing the pen used to injure the officer, a defendant's entitlement to a charge on a claimed defense is not defeated solely by reason of its inconsistency with some other defense raised or even with the defendant's outright denial that he was involved in the crime. A jury may believe portions of both the defense and prosecution evidence and find that the defendant acted justifiably. (County Ct, Seneca Co)

People v Colon-Colon, 169 AD3d 187 (4th Dept 2/8/2019)**WAIVER OF INDICTMENT / JURISDICTIONAL DEFECT**

ILSAPP: The defendant appealed from a judgment of Genesee County Court, which convicted him of attempted 2nd degree rape. The Fourth Department reversed, vacated the plea, and dismissed the Superior Court Information. A felony complaint filed in City Court charged the defendant with two counts of 2nd degree rape. The defendant waived his right to indictment and consented to prosecution by SCI. He signed a written waiver of indictment that did not contain the date, time, and place of each offense. The appellate court observed that a challenge to the validity of a waiver of indictment is not forfeited by a guilty plea, precluded by a valid waiver of

Fourth Department *continued*

the right to appeal, or subject to the preservation requirement. The State Constitution, Art. 1, § 6, allows for the waiver of indictment; and CPL Article 195 details the procedures that must be followed “to the letter.” Failure to strictly adhere to the statutory requirements is a jurisdictional defect. CPL 195.20 provides that the written instrument must contain the date, approximate time, and place of each offense to be charged in the SCI. All statutorily prescribed aspects of the process for waiving indictment are of equal jurisdictional significance. Since the instant waiver failed to comply with statutory commands, it was jurisdictionally defective. The Legal Aid Bureau of Buffalo (Caitlin Connelly, of counsel) represented the appellant. (County Ct, Genesee Co)

Matter of Faith B., 169 AD3d 1509 (4th Dept 2/8/2019)

ABUSE/NEGLECT – DISCOVERY/APPEAL

LASJRP: The family court reviewed the sex abuse victim’s psychiatric records and permitted disclosure to respondent father of material pertaining to the dates of the alleged abuse, but denied disclosure of any other records. The father’s asked the court to mark the records as an exhibit for appellate review. The court agreed to do so, but the exhibit has since been lost.

The Fourth Department concludes that the father has raised no appealable issue. It is not enough to merely allege that documentary evidence has been lost. The father does not contend that the court abused its discretion in refusing to disclose the exhibit.

(Family Ct, Erie Co)

People v Freeman, 169 AD3d 1513 (4th Dept 2/8/2019)

VOP / NOT MOOT / AFFIRMED

ILSAPP: The defendant appealed from a judgment of Monroe County Supreme Court which revoked probation and imposed a term of imprisonment. The Fourth Department affirmed. The defendant had served his sentence, and the maximum expiration date of his period of post-release supervision has passed. However, a determination that the defendant violated the conditions of his probation was a continuing blot on his record with potential future consequences. Thus, contrary to the People’s contention, the appeal was not moot. But the defendant’s arguments regarding the VOP determination were unreserved and, in any event, lacked merit. (Supreme Ct, Monroe Co)

Graves v Huff, 169 AD3d 1476 (4th Dept 2/8/2019)

CUSTODY / REVERSAL

ILSAPP: The father appealed from a Supreme Court order which dismissed his custody modification application. The Fourth Department reversed, reinstated the petition, and remitted. Supreme Court erred in dismissing on forum non conveniens grounds. In custody matters, before determining whether it is an inconvenient forum, a court must consider whether a court of another state could properly exercise jurisdiction, and must address factors enumerated in Domestic Relations Law § 76-f (2). The record failed to establish that the trial court had done so. The Monroe County Public Defender (James Hobbs, of counsel) represented the appellant. (Supreme Ct, Monroe Co)

People v Logsdon, 169 AD3d 1466 (4th Dept 2/8/2019)

SORA / LEVEL REDUCED

ILSAPP: The defendant appealed from an order of the Genesee County Court which determined that he was a level-two risk pursuant to SORA. The Fourth Department disagreed and held that the defendant was a level-one offender. Although the risk assessment instrument classified him as a presumptive level-one risk, County Court sua sponte ordered an upward departure based on the defendant’s history of PTSD and purported TBI, and his removal of the victim from the State to continue a sexual relationship. That was error. The defendant was indeed diagnosed with PTSD and may have sustained a TBI; but the record was devoid of evidence that any such mental impairments were causally related to a risk of re-offense. Moreover, the evidence at the SORA hearing included: (1) a letter from his psychotherapist, indicating that the defendant was cooperative, willing to engage in treatment, and remorseful; and (2) an assessment by his treatment counselor, opining that he had a low risk of recidivism. Further, the continuing nature of the crime did not support the upward departure. Even if additional points were assessed for that factor, the defendant’s total score would not result in a level-two risk. His actions in taking the victim across State lines did constitute an aggravating factor not taken into account by the risk assessment. However, under the circumstances of this case, such factor did not warrant an upward departure. The Legal Aid Bureau of Buffalo (Caitlin Connelly, of counsel) represented the appellant. (County Ct, Genesee Co)

People v Smart, 169 AD3d 1525 (4th Dept 2/8/2019)

ORDERS OF PROTECTION – SUBJECT TO CUSTODY/VISITATION ORDER

LASJRP: Noting that an order of protection is intended to safeguard the rights of victims and is not a form of punishment, the Fourth Department concludes that the order of protection barring all contact between defendant and his child should be subject to any subsequent orders of custody and visitation issued by the family or supreme

Fourth Department *continued*

court in a custody, visitation or child abuse or neglect proceeding. (County Ct, Genesee Co)

Matter of Eden S., 170 AD3d 1580 (4th Dept 3/15/2019)**TERMINATION OF PARENTAL RIGHTS
– DILIGENT EFFORTS/VISITATION****– FAILURE TO PLAN/REFUSAL TO ACKNOWLEDGE ABUSE**

LASJRP: The Fourth Department finds sufficient evidence that the mother permanently neglected the children. With respect to diligent efforts, the Court notes that after the mother failed to acknowledge the father's sexual abuse and instead prompted her oldest child to recant the allegations in a video that the mother later posted online, and her continued failure to acknowledge the abuse caused her two oldest children significant emotional and behavioral harm, petitioner was permitted to facilitate the mother's relationship with the children by means other than in-person visitation, which it did by arranging telephone contact, providing the mother with information from their school, and attempting to impress upon the mother the importance of emotionally supporting her children in light of the abuse. Despite the agency's diligent efforts, the mother failed to provide the children with appropriate emotional support by acknowledging the abuse.

The court did not err in admitting photographs depicting respondents' home at the time the children were initially removed. The photographs were relevant to support the service plans created for respondents. In any event, the court explicitly recognized their limited relevance. (Family Ct, Cayuga Co)

People v Fitch, 170 AD3d 1572 (4th Dept 3/15/2019)**SENTENCE – PROBATION CONDITIONS/
ELECTRONIC MONITORING**

LASJRP: The Fourth Department strikes a condition of probation requiring defendant to submit to surveillance via electronic monitoring and pay the fees associated therewith where the sentencing court did not find that defendant or his actions posed a threat to public safety. However, an electronic monitoring condition connected to probationer control or surveillance may be appropriate, and the case is remitted for consideration of such a condition.

The Court also concludes that the sentencing court had authority to require defendant to pay the costs associated with electronic monitoring, unless defendant could demonstrate that he is unable to afford such costs despite making a bona fide effort to do so. (Supreme Ct, Niagara Co)

**Matter of Jonathan L. v Poole, 170 AD3d 1515
(4th Dept 3/15/2019)****ABUSE/NEGLECT – EXCESSIVE CORPORAL
PUNISHMENT/IMPAIRMENT OF CHILD'S CONDITION**

LASJRP: The Fourth Department grants petitioner's request that an indicated report be amended to unfounded and sealed where, after confronting his ten-year-old son regarding the child's misbehavior, petitioner struck the child two to three times with a belt; at the fair hearing, petitioner testified that he struck the child over his clothing, and petitioner and the child's mother testified that the child seemed unfazed and did not appear to be in or complain of being in pain either immediately or the following morning; and, the day after the incident, school personnel observed marks on the child's legs and back, and a case worker noted marks on the child's legs but did not see a mark on the back.

Other than a general reference in DSS records that the child was "upset" by the incident, DSS did not present evidence that the incident had a physical, mental, or emotional impact on the child. (Transferred from Supreme Ct, Erie Co)

**Matter of Justin M.F., 170 AD3d 1514
(4th Dept 3/15/2019)****NEGLECT DISMISSAL / REVERSED**

ILSAPP: The petitioner agency and AFC appealed from an order of Monroe County Family Court dismissing an Article 10 petition. The Fourth Department reversed and found that the subject child was neglected. The agency established that the father inflicted excessive corporal punishment. Testimony and medical records indicated that, when the father struck him, the child sustained a bruised left temple, a bruised eye, and a bloody and swollen nose. (Family Ct, Monroe Co)

**Matter of Zackery S., 170 AD3d 1594
(4th Dept 3/15/2019)****ABUSE/NEGLECT - Hearsay Evidence/Statements
Relevant To Diagnosis And Treatment**

LASJRP: The Fourth Department concludes that, due to the mother's refusal or inability to inform hospital personnel of what had occurred, statements in the hospital records concerning how and why she was taken to the hospital were required for an understanding of her condition and thus were properly admitted as related to diagnosis and treatment and because they had the requisite indicia of reliability. (Family Ct, Monroe Co)

Fourth Department *continued*

**People v Lendof-Gonzalez, 170 AD3d 1508
(4th Dept 3/15/2019)**

MURDER – ATTEMPTS

LASJRP: The Fourth Department reverses convictions for attempted murder in the first and second degrees. Defendant, who had been arrested and jailed for allegedly attacking his wife and, while in jail, planned to have his wife and her mother killed and his children taken to a friend, only discussed the crimes with an inmate in the next cell and with that inmate’s girlfriend, and exchanged notes about the crimes. (County Ct, Niagara Co)

**People v Washington, 170 AD3d 1608
(4th Dept 3/15/2019)**

**REDACTION ORDERED FOR INFLAMMATORY STATEMENT IN
PSR**

LASCDP: The Fourth Department ordered the sentencing court to redact from the pre-sentencing report the arresting officer’s characterization of defendant as a “sociopath.” The statement was “inappropriate and inflammatory,” the Court said.

The opinion pointed out the broader problem posed by an inaccuracy in a pre-sentence report: it “could keep a defendant incarcerated for a longer duration of time, affect future determinations of his or her legal status in court, as well as affect other rights regulated by the state.” (Supreme Ct, Erie Co)

People v Givans, 170 AD3d 1638 (4th Dept 3/22/2019)

SEARCH AND SEIZURE – DARDEN HEARING

LASJRP: The Fourth Department concludes that the People failed at the Darden hearing to establish the existence of the informant by extrinsic evidence.

The evidence establishes only that a deposition was executed in the name of the alleged confidential informant, that the police obtained a search warrant using the deposition, and that a death certificate was later issued for a person having the same name as the confidential informant. There is no evidence that the alleged informant actually made the statements attributed to her. There is nothing to refute the possibility that the police fabricated the statements in the informant’s purported deposition in order to conceal the fact that information critical to the probable cause inquiry was instead obtained through illegal police action. (County Ct, Jefferson Co)

People v Knox, 170 AD3d 1648 (4th Dept 3/22/2019)

IDENTIFICATION – SHOWUPS

LASJRP: The Fourth Department suppresses a showup identification made by a witness in the hospital parking lot approximately ninety minutes after the crime and about five miles from the crime scene, while defendant was handcuffed and flanked by police, shortly after the victim’s showup identification in his hospital room.

Given the identification made by the victim, the non-victim witness’s identification is not rendered tolerable in the interest of prompt identification. The People have proffered no reason that a lineup identification procedure would have been unduly burdensome. (Supreme Ct, Monroe Co)

People v Hamell, 170 AD3d 1647 (4th Dept 3/22/2019)

ENHANCED SENTENCE / REDUCED FROM 16 TO 10 YRS

ILSAPP: The defendant appealed from a judgment of Oneida County Court, which convicted him of 3rd degree criminal sale and possession of a controlled substance. The Fourth Department reduced the sentence. Although the defendant pleaded guilty in exchange for a promised aggregate term of six years, County Court imposed an enhanced term of 16 years after he failed to appear for sentencing and remained at large for two years. The appeal waiver was unenforceable, and the enhanced sentence was too severe, even in light of the defendant’s criminal record and flight from justice. An aggregate term of 10 years was ordered. Anthony Brigano represented the appellant. (County Ct, Oneida Co)

**Matter of Liam M.J., 170 AD3d 1623
(4th Dept 3/22/2019)**

ADVERSE INFERENCE / HARMLESS ERROR

ILSAPP: The father appealed from an order of Genesee County Family Court, which found neglect and abuse. The Fourth Department affirmed, but said that the trial court erred in drawing a negative inference against the father, based on his failure to call his girlfriend as a witness. A missing witness charge is warranted when a party establishes that an uncalled witness, possessing information on a material issue, would be expected to provide noncumulative testimony favoring the opposing party and is available to that party. The proponent must set forth the basis for the request as soon as practicable. In its written decision, the court sua sponte drew a negative inference. The father did not have an opportunity to explain his failure to call his girlfriend. However, the error did not affect the result. (Family Ct, Genesee Co)

**People v Pendergraph, 170 AD3d 1630
(4th Dept 3/22/2019)**

440.10 MOTION DENIED / REVERSED

Fourth Department *continued*

ILSAPP: The defendant appealed from order of the Onondaga County Court which denied his CPL 440.10 motion seeking to vacate a judgment of conviction of 2nd degree murder and 2nd degree CPW. The Fourth Department reversed and remitted. A hearing was needed to determine whether counsel was ineffective in telling the jury that the defendant would testify. The defendant's affidavit stated that counsel never discussed with him whether taking the stand would be a good or bad idea, and the defendant never told counsel that he would testify at trial. This account was supported by the affirmation of appellate counsel, based on trial counsel's admission that the defendant did not tell him before trial that he would testify. The remittal hearing would afford the defendant an opportunity to prove that trial counsel did not discuss with him whether he would testify before informing the jury that the defendant would do so, and that there was no strategic or tactical reason for telling the jury that the defendant would testify. Hiscock Legal Aid Society (Piotr Banasiak, of counsel) represented the appellant. (County Ct, Onondaga Co)

Matter of Ricky A., 170 AD3d 1667 (4th Dept 3/22/2019)

The determination that respondent neglected the subject children (one of whom is her natural child) by leaving them unsupervised for more than 24 hours, exposing them to domestic violence in the home, and failing to protect them from the effects of the father's (also a respondent) unaddressed mental health and substance abuse issues is supported by a preponderance of the evidence, and must be upheld. (Family Ct, Wayne Co)

People v Sweat, 170 AD3d 1659 (4th Dept 3/22/2019)**SEARCH AND SEIZURE – FRUITS/CONSENT TO SEARCH**

LASJRP: The Fourth Department agrees with the hearing court that any consent did not attenuate an illegal entry into a private home for the purpose of recovering a gun the officer presumed was hidden inside.

The officer engaged in flagrant misconduct. Without having witnessed any illegality, the officer entered without permission, after midnight, while a woman was trying to feed her newborn child, and coerced her into consenting to a search of her home.

The Court also notes the temporal proximity of the consent; that the woman was not advised that she could refuse to consent; and that the intervening circumstances upon which the People rely—i.e., a conversation during which the officer informed the woman that an unidentified "individual" had come into the home and may have deposited an object that could hurt her children—was

designed to deceive the woman into giving her consent and weighs in favor of suppression. (Supreme Ct, Erie County)

**People v Albert, 2019 NY Slip Op 03227
(4th Dept 4/26/2019)****TWO DISSENTS / CPL 710.30 VIOLATION**

ILSAPP: "We respectfully dissent because we disagree with the majority's conclusion that the failure of the People to provide a CPL 710.30 notice with respect to statements defendant made to a private citizen who was acting as an agent of the police does not warrant preclusion of those statements." (County Ct, Monroe Co)

**People v Beebe, 2019 NY Slip Op 03230
(4th Dept 4/26/2019)**

The court properly granted the motion to dismiss on statutory speedy trial grounds where the defendant showed "that he was extradited to Pennsylvania days after the commencement of this criminal action and was not returned to this jurisdiction for either a felony hearing on the initial charges against him or an arraignment on the subsequently issued indictment prior to the time, more than six months later, that the court granted defendant's motion and dismissed the indictment." The defendant's unavailability was caused by the prosecution's actions in failing to hold a scheduled felony hearing, resulting in the defendant's release without a detainer; affirmatively seeking the defendant's waiver of extradition when award of the pending felony complaint here; and failing to demonstrate diligent efforts to facilitate the defendant's return from Pennsylvania. (County Ct, Erie Co)

**Matter of Brooks v Brooks, 2019 NY Slip Op 03164
(4th Dept 4/26/2019)****SUPPORT – ENFORCEMENT OF AGREEMENT**

LASJRP: A New Jersey court issued a judgment of divorce that incorporated the parties' separation agreement, which in pertinent part stated that, "[n]otwithstanding the future residence or domicile of either party, this Agreement shall be interpreted, governed, adjudicated and enforced in New Jersey in accordance with the laws of the State of New Jersey."

The Fourth Department declines to enforce the parties' choice of law provision, which violates strong New York public policies. Under New York law, child support obligations must be calculated pursuant to the Child Support Standards Act, and a duty of support cannot be eliminated or diminished by the terms of a separation agreement. In addition, whereas New Jersey law provides that child support obligations generally end when a child reaches the age of 19, in New York the duty to support a

Fourth Department *continued*

child until the age of 21 is a matter of fundamental public policy. (Family Ct, Ontario Co)

Matter of Carmela H., 2019 NY Slip Op 03177
(4th Dept 4/26/2019)

**ABUSE/NEGLECT – REASONABLE EFFORTS/ORDER
TERMINATING REQUIREMENT**

LASJRP: The Fourth Department holds that after the agency established that respondent mother’s parental rights to her older children had been terminated, the mother failed to establish that the statutory exception in FCA § 1039-b applies, and thus the family court properly determined that reasonable efforts were no longer required.

The mother had been living with the child’s father, which was a barrier to reunification due to issues with domestic violence. Although the mother moved out of his house during the proceedings, she did not do so of her own accord, and had never lived on her own before and still required parenting intervention. (Family Ct, Onondaga Co)

People v Clark, 2019 NY Slip Op 03231
(4th Dept 4/26/2019)

CHALLENGES FOR CAUSE / NEW TRIAL

ILSAPP: The defendant appealed from a judgment of Supreme Court convicting him of 1st degree assault. The Fourth Department reversed and granted a new trial. The trial court erred in denying challenges for cause to two prospective jurors. The first juror opined that the defendant’s presence in the courtroom meant that something had happened in which he was involved. The second prospective juror said that, while hearing evidence of the instant stabbing, she would probably think about a friend’s stabbing murder. Neither provided unequivocal assurances of impartiality. The Monroe County Public Defender (Benjamin Nelson, of counsel) represented the appellant. (Supreme Ct, Monroe Co)

Matter of Delgado v Vega, 2019 NY Slip Op 03160
(4th Dept 4/26/2019)

DEFAULT / VACATED

ILSAPP: The mother appealed from a custody order of Monroe County Family Court that denied her application to vacate an order entered upon her default, granting sole custody of the parties’ child to the father. The Fourth Department reversed. Default orders are disfavored in custody cases. The mother, who had physical custody of the child from birth until the father took custody pursuant

to the default order, established a meritorious defense to his petition and raised an issue of fact as to whether she was served with the petition, thus warranting a traverse hearing. David M. Abbatoy, Jr. represented the appellant. (Family Ct, Monroe Co)

People v Garrow, 2019 NY Slip Op 03238
(4th Dept 4/26/2019)

ONE DISSENT / RAPE NOT PROVEN

ILSAPP: “In my view, the People failed to prove defendant’s guilt beyond a reasonable doubt ... The four-year-old complainant was examined at the hospital within a day of when she alleged that defendant had raped her ... The examination of the victim revealed ... no damage ... [a result] not typical for such a young girl who has been raped by a grown man.” (County Ct, Onondaga Co)

People v Harrison, 2019 NY Slip Op 03173
(4th Dept 4/26/2019)

ADJOURNMENT FOR WITNESS VACATION CHARGEABLE

LASCDP: The People requested a six-day adjournment because their witness was unavailable due to a vacation. The Fourth Department ruled unavailability for that reason to be generally chargeable to the People. That ruling put the includable time over the 30-day limit, and the case was dismissed. The prosecution’s contention that it was ready because the witness was not a critical witness was belied by its basing the adjournment request on the witness’s absence.

People v Hickey, 2019 NY Slip Op 03165
(4th Dept 4/26/2019)

Because it is impossible to commit fourth-degree grand larceny (Penal Law 155.30[8]) without concomitantly committing third-degree unauthorized use of a vehicle (Penal Law 165.05[1]), count three, charging the latter, must be dismissed as a lesser inclusory component of count two, charging the former. (Supreme Ct, Onondaga Co)

People v Jackson, 2019 NY Slip Op 03162
(4th Dept 4/26/2019)

RIGHT TO COUNSEL - INVOCATION BY DEFENDANT

LASJRP: The Fourth Department suppresses defendant’s statements, concluding that he unequivocally asserted his right to counsel by asking, “May I have an attorney please, a lawyer?” (County Ct, Monroe Co)

People v McCullen, 2019 NY Slip Op 03180
(4th Dept 4/26/2019)

SENTENCE VACATED / UNFULFILLED PROMISE

Fourth Department *continued*

ILSAPP: The defendant appealed from a judgment of Erie County Court, convicting him of 1st degree scheme to defraud and other crimes. The Fourth Department vacated the sentence. The plea was induced by a promise that the defendant would receive credit for time served on the underlying indictment. Under the relevant statute, the court could not legally fulfill its promise, where the defendant was serving a sentence on a prior conviction throughout the instant proceedings. The issue survived the valid waiver of the right to appeal. The appellate court remitted for County Court to impose a sentence that met the defendant's legitimate expectations or to allow him to withdraw his plea. The Legal Aid Bureau of Buffalo (Robert Kemp, of counsel) represented the appellant. (County Ct, Erie Co)

People v Suttles, 2019 NY Slip Op 03158
(4th Dept 4/26/2019)

Police entering a parking lot in a manner that effectively seized the vehicle in which the defendant was an occupant lacked reasonable suspicion that a particular person there was involved in a crime. Therefore, the subsequent observation of the defendant in possession of a handgun could not justify the seizure of the weapon and the defendant; the gun and the defendant's statements, which should have been suppressed, constituted all the evidence in support of the charges and the indictment must be dismissed. (Supreme Ct, Erie Co)

Matter of Nemes v Tutino, 2019 NY Slip Op 03236
(4th Dept 4/26/2019)

The court incorrectly denied the father's motion to vacate the default judgment of custody to the mother, when he raised a valid jurisdictional defense. Contrary to the finding of the lower court, a jurisdictional defense cannot be waived even though the father had appeared in this case on six previous occasions, and filed his own cross petition, and didn't raise the defense until the motion to vacate. Additionally, the court incorrectly applied the law in determining that it had "home state" jurisdiction to hear this custody case. This lengthy decision explains why New York State was not the home state of the subject child, pursuant to the Domestic Relations Law. (Family Ct, Steuben Co)

People v Wassell, 2019 NY Slip Op 03187
(4th Dept 4/26/2019)

AG NO AUTHORITY / DISMISSAL

ILSAPP: The defendant appealed from a Chautauqua County Court judgment, convicting him of 3rd degree CPW and other crimes. The charges arose from his sale of a semi-automatic rifle to an undercover investigator. The defendant contended that the AG lacked authority to prosecute him. The Fourth Department agreed. The People asserted that the State Police asked the AG to prosecute the matter, but the record did not establish that the Superintendent of the State Police asked the AG to do so. *See* Executive Law § 63 (3). Thus, the judgment was reversed, and the indictment was dismissed. James Ostrowski represented the appellant. (County Ct, Chautauqua Co) ⚖️

Defender News (continued from p. 9)

and the prosecution. But the decision may also illustrate court reluctance to push *Brady* too far. The *Giuca* court said that, while the prosecution has a "responsibility to disclose favorable information tending to show that a witness had an incentive to testify falsely in order to curry favor with the prosecution on an open criminal case," the due-process-based *Brady* rule's "purpose is not to displace the adversary system as the primary means by which truth is uncovered," but to ensure that the accused receives a fair trial"

Another angle on confronting prosecutorial failure to disclose required information can be found in [Opinion 18-170](#) from the [Advisory Committee on Judicial Ethics](#) of the Unified Court System. A judge inquired about the judge's duties, if any, where the judge knew of a prosecutor's failure to disclose to the defense certain alleged connections between a local nonprofit organization and a frequent expert witness for the prosecution. The Advisory

Committee noted the requirement that judges take "appropriate action" when receiving information that an attorney may have committed a "substantial violation" of the Rules of Professional Conduct. But, the opinion goes on, "[w]e are unaware of any authority requiring a judge to 'remedy' an alleged deficiency in the prosecutor's disclosures concerning an expert witness by making those disclosures to defense counsel sua sponte." The opinion leaves to the judge's discretion whether action should be taken and if so, what and when. It specifically notes that the wide discretion judges have would allow the judge to "wait until the matter ends to take any such action," which in the context of a report to the grievance committee would "avoid the need for immediate disqualification in all matters involving the attorney." The opinion does not mention whether a disclosure order required under [22 NYCRR 200.16 and 200.27](#) had been issued in the case and what effect such an order might have on the ethics opinion. ⚖️

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