Historic Justice Reforms Included in NYS FY 2020 Budget

Many reforms sought by criminal justice advocates for decades materialized from the recent state budget process. Major changes in pretrial procedures—bail, discovery, and speedy trial—garnered the most attention, but bills also passed intended to remove barriers to successful reentry after incarceration, protect immigrants from draconian consequences for minor offenses, and more.

The tone and focus of initial media coverage varied. “Lawmakers Reshape NY Criminal Justice System, With Varied Reactions From DAs, Defenders,” noted the New York Law Journal. “Mugshots to be withheld from public as part of state budget deal,” specified WHAM-TV (Channel 13) in Rochester; a Spectrum News item on pushback to reform also led with the legislation that limits release of mugshots, which the New York State Sheriff’s Association has said does not apply locally.

The announcements by elected state officials celebrating the reforms also varied in emphasis. The Governor’s 2019 Justice Agenda webpage carried only a general headline. “Governor Cuomo Announces Highlights of FY 2020 Budget,” while the Assembly noted, “SFY 19-20 Budget Includes Critical Criminal Justice Reform Legislation and Funding.”

Groups involved in reform efforts, including NYSDA, released celebratory quotes in press releases like this one, “New York State Enacts Comprehensive Criminal Discovery Reform.” And then they turned to next steps. Some continue to seek additional reforms while others turn to efforts to implement those just achieved. Some are doing both.

For example, The Legal Aid Society (LAS) prepared a preliminary practice advisory about the reforms, and generously shared it with others, including NYSDA. At the same time, LAS and other defender organizations in New York City called on courts and prosecutors to act immediately on several of the measures that carry effective dates of Jan. 1, 2020. The New York Daily News reported in an Apr. 5, 2019, article about those demands.

Media from Cattaraugus County to Albany raised financial concerns about the reforms. The Olean Times Herald noted the Cattaraugus County District Attorney’s concern that “while part of the state budget, the bail reform provisions contain no funding for counties to comply with the new regulations ….” An article in the Albany Times Union set out similar concerns.

NYSDA is collecting, analyzing, and distributing information about the many reforms, and will present training on them during the Annual Conference CLE (July 22-23) and at other events. Information about the reforms, as well as public defense funding, discussed below, was circulated to Chief Defenders and to members and others through News Picks from NYSDA Staff on Apr. 17, 2019. Updates to defenders will continue for use in both representation and systemic advocacy; public defense voices must be heard in the implementation of the reforms. The Backup Center welcomes calls from defenders.

Few Surprises in Public Defense Spending

With a few exceptions, most public defense spending held steady or increased in the FY 2020 budget. L 2019, ch 53. NYSDA’s total funding remained $2,809,000, which includes the training and other services offered by the Public Defense Backup Center and the Veterans Defense Program. Also receiving the same appropriation as last year are the Indigent Parolee Program ($600,000) and the loan forgiveness program for defenders and prosecutors ($2,430,000).

The aid to localities appropriation for the Indigent Legal Services (ILS) Fund increased. The amount authorized for distribution is $204,810,000. This includes $81,000,000 general distribution for counties and New York
City, $23,810,000 for continued implementation of the settlement of the Hurrell-Harring (H-H) lawsuit in five counties, and $100,000,000 for statewide expansion of H-H, which began in 2017. The ILS Office also received an increase in operating funds, to $6,090,000. L 2019, ch 50. Prisoners’ Legal Services of New York received an increase from $2,950,000 to $3,300,000, to allow the opening of a Newburgh office.

Aid to Defense, which has been distributed to 25 counties and The Legal Aid Society, dropped from $8,099,000 to $7,658,000. Its counterpart, Aid to Prosecution, remained at $12,549,000.

**US Supreme Court: State Use of Forfeiture Subject to Excessive Fines Clause**

The State of Indiana sought civil forfeiture of Tyson Timbs’ Land Rover, purchased with life insurance money, after he pleaded guilty to drug dealing and conspiracy. Timbs had been sentenced to a year of home detention plus probation and fees and costs of $1,203. Forfeiture was denied because, while the vehicle had been used to transport heroin, its value was over four times the maximum fine for the drug conviction; the trial court found this was grossly disproportionate and a violation of the Eighth Amendment’s Excessive Fines Clause. The State’s Supreme Court reversed, holding that the Clause constrains only federal, not state, action. The US Supreme Court reversed. The decision in *Timbs v Indiana* (No. 17–1091 [2/20/2019]) is summarized on p. 12.

As noted in a SCOTUSblog post, Indiana argued at some points that “the ban applies only to payments imposed as punishment,” like fines, not to forfeiture, but failed to make that argument in the state high court. The Supreme Court therefore declined to consider the contention.

**Raising Revenue Via the Criminal Justice System**

The *Timbs* opinion sets out the long history of bans on imposition of excessive fines, traced back at least to the Magna Carta in 1215. The Great Charter failed, however, to end such excesses. In a description with very current overtones, the Court noted that “[t]he 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay.” Language from repeated efforts to ban excessive payments found its way to the colonies and then into the Eighth Amendment.

Some governmental entities in the US today might be said to be acting like Stuart kings. When USA Today reported on the *Timbs* decision, it noted that “[s]tate and local governments increasingly use funds collected in criminal and civil cases to pay for municipal services.”

One locality that has received scrutiny for such practices is Ferguson, Missouri. Relevant documents posted on the Fines and Fees Justice Center website include a document summarizing the 2015 report by Department of Justice (DOJ) on the Ferguson police department; one key finding was that revenue rather than public safety shaped its law enforcement practices. The summary of the consent decree entered after DOJ filed a complaint against the city notes that the provisions include: “the City will recommend to the judge fines that are not overly punitive, take into account the income of Ferguson residents and that are no greater than regional averages for the specific offense.” More recently, the ArchCity Defenders sued another Missouri municipality, Edmonton. According to a news item in the *St. Louis Post-Dispatch* in December, the suit claims the city, with a population of 832 people, raised $2.2 million via its municipal court from 2012 to 2016 by “over-policing,” and following up fines with “penalties, surcharges, and interest charges that pile up like debts to a loan-shark,” and “received 34.86% of its general revenue from fines and fees in 2013.”

New York State cannot point fingers at Missouri, however. An op-ed by the co-directors of the Fines and Fees Justice Center in the *Daily News* on Feb. 21, 2019, noted that over 1,200 towns and villages here have local courts, which are used to raise revenue. They also said “a 2016 analysis found that six New York municipalities rank among the top 100 American cities most reliant on fines and fees” and added that three localities on Long Island “are more reliant on fines and fees than Ferguson....” And they closed by saying that, following...
Celebrating Jay Coleman’s Life

NYSDA’s Client Coordinator and Client Advisory Board Chair, John G. (“Jay”) Coleman, left a legacy of inspiration and memories that extended from his family and close friends to a wide circle of people who benefitted directly or indirectly from his life and work. Jay, who died of cancer on Mar. 27, 2019, also left a final, written message for all who loved and were loved by him. Read at the celebration of Jay’s life on Mar. 30, the message included this: he felt blessed despite his pending death, “because I know something few are privileged to know; what my purpose in life is. And that is to love and to show others how to love.”

Jay fulfilled that purpose in many ways.

He spent 25 years in prison, and drew on his experience and capacity for love to help others while incarcerated and after he returned. That assistance took many forms. He engaged in positive interactions and assisted many individuals, both on his own and as part of programs. Before coming on staff at NYSDA in 2014, he worked at Re-entry Opportunities & Orientations Towards Success, Center for Employment Opportunities, and St. Charles Lwanga Homeless Shelter. At NYSDA, he developed and implemented the Prisoner Pre-Entry Mentoring Project (PPMP). Designed to help people about to enter prison set goal-oriented plans for a productive, educational life while incarcerated and plan for successful reentry, PPMP was envisioned as a pilot project. Jay made a PPMP presentation at the 2015 National Legal Aid and Defender Association (NLADA) annual conference, where he also received a Client Contribution Award. At the time Jay became ill, he was working with others on plans to replicate PPMP elsewhere.


Jay spent his last months living with his wife, Alison Coleman. As a Paul Grondahl column in the Albany Times Union explained on Jan. 1, 2019, Alison and Jay had separated after eight years together following his reentry. Each had “struggled to adjust—he to a life of freedom far different from prison culture and she to compromise after years as a single parent.” At the end, they had an “opportunity to resolve old disappointments and share these final months together.” Their love, and the love Jay had for his children, grandchildren, siblings, and other family members, as well as friends, glowed throughout the celebration of his life. In words and music, repeated hugs, laughter and tears, those present consoled one another for their loss. They recognized that Jay would always be a part of their lives. And they expressed gratitude for having known him.

Expressions of gratitude appeared elsewhere as well. The announcement of Jay’s death sent by NLADA to its community included this:

As we reflect on Jay’s remarkable life and contribution to our causes we are reminded that what we do as a justice community matters. No matter how hard the fight, how slow the progress can feel, or how exhausting the work, we need us to stay in the game. And when we do we leave a legacy of love that continues to inspire and motivate others to take care of each other, to fight for justice, after we are gone. We are thankful for Jay Coleman.
**Keeping up with Immigration Issues**

Attorneys with clients who are not citizens of the US confront a variety of ways in which immigration law issues can arise from proceedings in both family and criminal matters. NYSDA works to keep attorneys informed on these questions.

**Misdemeanor Sentencing Reform Will Help Immigrants**

The criminal justice reforms in the recently passed state budget, noted above, included a one-day change in the maximum sentence for Class A misdemeanors. As noted in a Legal Alert from the Immigrant Defense Project (IDP), reducing that sentence from 365 to 364 days “protects thousands of New Yorkers from being torn away from their communities due to immigration detention, denial of necessary immigration relief, and deportation.”

**Crim-Imm Information**

Early this year, NYSDA cosponsored a continuing legal education (CLE) event, “Crimes and Immigration Seminar in NYC,” with IDP, the NYU School of Law Immigrant Rights Clinic, and the National Immigration Project of the National Lawyers Guild. This is just one of many ways NYSDA continues to help lawyers help their immigrant clients.

NYSDA members, as well as all public defense lawyers, can obtain a discount when purchasing the Sixth Edition of the IDP manual, Representing Immigrant Defendants in New York (2017). See the online order form. A 2019 Edition of IDP’s New York Quick Reference Chart, which includes updates through 2018, is also available on the IDP website.

Finally, lawyers with clients who are citizens of countries other than the US are reminded to call the RIAC in their area. A list of the centers, which are funded by the Indigent Legal Services (ILS) Office, can be found on NYSDA’s website: https://www.nysda.org/page/CrimImmResources.

**Intersection of Family Court and Immigration**

On Apr. 5, 2019, NYSDA held a “soup-to-nuts” program on the “Intersection of Family Law and Immigration Law.” The training covered historical and ethical perspectives, and many immigration consequences of proceedings in family court, as well as mitigation arguments and techniques to help secure successful outcomes. NYSDA greatly appreciates the generosity of the presenters in sharing their expertise: Roshell Amezcua, Staff Attorney at the Bronx Defenders, and two RIAC attorneys—Evelyn Kinnah, Acting Director of the Capital District RIAC and Robert Horne, Supervising Attorney of RIAC Region 4.

Note that RIACs assist with immigration issues in family law matters as well as criminal matters.

**Parents or Others May Help Juveniles Obtain Lawful Permanent Residence Status**

A parent, regardless of their own immigration status, may be able to assist their child in obtaining lawful permanent resident status in the United States, if the child meets the requirements for Special Immigrant Juvenile Status (SIJS). Passed in 1990 as part of the Immigration Act of 1990, and modified several times since then, SIJS allows a qualifying, undocumented child the right to lawfully remain in the United States, if certain requirements are met. First, a judge, usually of the family court, must make “special findings orders” that the child is: a) under the age of 21; b) declared dependent on a juvenile court, or placed under the custody of an agency, or an individual or entity appointed by a state or juvenile court; and c) unable to be reunited with one or both parents due to abuse, neglect, abandonment; and that d) it is in the child’s best interests not to be returned to their country of nationality/their parent’s country of nationality or country of last habitual residence. 8 USC 1101(27)(J) and 8 CFR 204.11 (c)(1).

A SIJS proceeding can be brought by motion, in either a custody, guardianship, adoption, juvenile delinquency, or family offense proceeding. For a juvenile to be considered for SIJS status, an adult (does not have to be a parent) over the age of 21, must be willing to take on the responsibility of custodian or guardian. If the juvenile has been abandoned, neglected, or abused by one parent, the other parent may still qualify to act as guardian or custodian. Once the appropriate findings are made by the judge, the juvenile may apply to the United States Citizenship and Immigration Service (USCIS) for SIJS. A SIJS recipient cannot use their status to help their parent obtain legal immigration status.

In R.F.M. v Nielsen (18 cv 5068 [3/15/2019]), the Southern District of New York struck down a new “policy” from the Department of Homeland Security refusing to recognize the authority of New York Family Courts to make the requisite SIJS findings for anyone over the age of 18. The policy had the effect of the USCIS denying virtually all SIJS applications from New York for individuals between the ages of 18 and 21. The court determined this policy to be arbitrary and capricious, and in violation of the Administrative Procedures Act.

Attorneys representing parents may encounter SIJS issues. In Matter of Argueta v Santos (166 AD3d 608 [2d Dept 11/7/2018]), the father sought custody for the purpose of obtaining an order making the requisite findings, and the child then sought SIJS. When SIJS approval, initially granted, was revoked, the father sought to join the child’s motion to amend the special findings to address the deficiencies on which revocation was based. The Second Department found the father to be aggrieved by...
denial of the motion. The court also amended the special findings order. Argueta is summarized on p. 30.

**Assigned Counsel Rates an Issue from the North County to Queens**

The hourly rates for compensating assigned counsel lawyers, set in County Law Article 18-B, last rose in 2004. The resulting erosion in the ability to meet the costs of practice and living may be contributing to a scarcity of lawyers available to represent individuals unable to afford counsel in criminal and family court matters. North Country Public Radio said on November 30 that Assigned Counsel Coordinator for St. Lawrence County Scott Goldie and New York State Bar President Michael Miller believe the stagnation of fees may be driving lawyers away. On Feb. 4, 2019, the New York Law Journal highlighted the fees issue in a profile of Sarah Tirgay, President of the Assigned Counsel Association of the Queens Family Court. She spelled out the problem in the City, saying, “Stagnant pay results in a slowdown of hiring and a slowdown in recruiting experienced and qualified attorneys.” Because assigned counsel are the “safety net” when institutional providers cannot handle a case, she added, a shortage of 18-B lawyers means that courts, lacking “enough lawyers with flexible schedules to handle the cases,” experience a deepening crisis.

Such stories may cause many readers a distinct feeling of déjà vu.

**NYSDA’s Ongoing Advocacy for Appropriate Assigned Counsel Fees**

Eighteen years ago, the REPORT contained an item (at pp 3-5) about the dire need to raise assigned counsel rates. The piece noted agreement among the three branches of state government about the need to increase fees. Lawyers were declining new assignments. Litigation and discussion swirled around the issue, including efforts to deem the situation an “extraordinary circumstance” warranting awards of higher rates. The cautiously hopeful heading of that REPORT account was “18-B Rate Increase to Be, Maybe.” And the increase did occur—but not until the legislative session of 2003, two years later.

NYSDA actively supported that rate increase, and has consistently advocated for appropriate compensation for assigned counsel not only during that era but before and since. That support can be very targeted; the Annual Report for 2003 (at p 10) noted that NYSDA provided a statement to the New York City Council’s Committee on Fire and Criminal Justice Services as it considered a resolution seeking an increase to $90 per hour. But NYSDA’s support for proper compensation for public defense work is also embedded in its wider efforts to improve the quality and scope of public defense services.

Such a broader approach was reflected in NYSDA’s white paper published in 2001, *Resolving the Assigned Counsel Fee Crisis: An Opportunity to Provide County Fiscal Relief and Quality Public Defense Services*. And NYSDA’s Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State include assigned counsel compensation in a broad statement in Standard III.C. It says that everyone working in public defense, including assigned counsel, should receive compensation “commensurate with their qualifications and experience, and should be at least comparable to compensation of their counterparts in the justice system.”

Today, NYSDA remains committed to appropriate payment for assigned counsel, and specifically supports efforts to increase assigned counsel rates as part of a reform that will ensure that fees do not stagnate again in the future. As noted in News Picks From NYSDA Staff on July 5, 2018, NYSDA submitted a letter of support for a New York State Bar Association resolution calling for such legislation; the State Bar House of Delegates passed the resolution on June 16. On Jan. 29, 2019, NYSDA renewed its call for increased rates in its budget testimony (at p. 6).

**Addressing Fees for Assigned Counsel in Family Court Presents Unique Issues**

In the Law Journal article mentioned earlier, Sarah Tirgay noted “increasing recognition that there is a crisis in Family Court in particular” that is “escalating daily.” The early 2000s saw similar developments.

**Family Court Drove the Last Fee Increase**

The New York Times reported in 2001 that almost all the lawyers handling cases in New York City’s family courts were refusing new assignments, saying that they could no longer afford to do so after 15 years without an increase in their fees. Family court problems resulting from the inadequate fees helped drive the Legislature to act in 2003.

A federal judge said in 2002 that the “18-B compensation rules, as currently applied, systematically deprive indigents of effective counsel.” *Nicholson v Williams*, 203
Defender News continued

Art Cody (l), Deputy Director of NYSDA’s Veterans Defense Program, received the 2019 New York State Bar Association Criminal Justice Section David S. Michaels Memorial Award. He is pictured here with Queens veteran Peter Ivan.

FSupp 2d 153, 256 (EDNY 2002). Specifically, as to a “sub-class” of plaintiffs in the case—abused mothers separated from their children “because the mother has suffered domestic abuse and the children are for this reason deemed neglected by the mother”—the court found that “the 18-B compensation system violates the right to be appointed effective counsel, as guaranteed by the Fourteenth and Sixth Amendments of the United States Constitution.” That judge ordered fees of $90 per hour for lawyers those respondents in Family Court, which NYSDA’s then-Executive Director, Jonathan E. Gradess, pointed to the ruling in a REPORT column urging the Legislature to act on fees.

Nicholson was cited a year later by a New York City Supreme Court judge who found on the evidence presented “that (1) assigned counsel are necessary; (2) there are an insufficient number of them; (3) the insufficient number results in denial of counsel, delay in proceedings, excessive case loads, and inordinate intake and arraignment shifts, further resulting in rendering less than meaningful and effective assistance of counsel, and impairment of the judiciary’s ability to function; and (4) the current assigned counsel compensation scheme—the rates, the distinction between the rate paid for in- and out-of-court work, and the monetary caps on per case compensation—is the cause of the insufficient number of assigned counsel.” NY County Lawyers’ Assn. v State, 196 Misc2d 761, 764 (Sup Ct, NY County 2003).

Public Defense Costs in Family Court Remain a County Charge

While New York State has, admirably, begun accepting its responsibility for the costs of public defense in criminal matters, funding for representation of parents and other respondents in family law matters remains largely county based. In the current structure, any raise in assigned counsel fees—necessary to ensure the constitutional and statutory rights of litigants—will add to county burdens if the State does not increase its funding to cover the increase.

NYSDA, which continues to advocate for state funding of all mandated representation, noted in testimony before the Unified Court System’s Commission on Parental Legal Representation last year that “New York State needs to substantially increase the funding it provides for family defense.”

Parental Legal Representation

Commission Releases Interim Report

The State should assume “all costs associated with parental representation in child welfare proceedings to ensure quality representation and eliminate disparities among localities,” states the Interim Report of the Commission on Parental Legal Representation. Created by Chief Judge Janet DiFiore in 2018 and chaired by retired Justice Karen Peters, the Commission held four hearings around the state, conducting a survey and soliciting comments on a wide variety of systemic issues relating to family defense. DiFiore announced the Commission’s interim report in her State of Our Judiciary address. She noted that “[i]n total, the Commission’s recommendations—transferring to the state fiscal responsibility for representation in child welfare matters; increasing assigned counsel rates; and adopting caseload caps for attorneys in this area—will not be an easy lift, but we are fully committed to seeing them through.”

Also included in the Commission’s recommendations is a call for access to counsel during child protective agency investigations. Such early access to counsel is called for in the Standards for Parental Representation in State Intervention Matters promulgated by the Indigent Legal Services Office in 2015. More about the Commission’s report may be found in the lead item of the Mar. 15, 2019 edition of News Picks from NYSDA Staff.

A Relationship Need Not Be Sexual to Be “Intimate”

What constitutes an intimate relationship, sufficient to give the court jurisdiction in a family offense proceeding, is fact and case dependent. Despite the statutory language contained in section 812(1)(e) of the Family Court Act, giving a broad definition of what constitutes an “intimate relationship,” some courts are incorrectly dismissing petitions for lack of subject matter jurisdiction. In Raigosa v Zafirakopoulos (167 AD3d 748 [2nd Dept 12/12/2018]), the Second Department reversed a decision that dismissed a family offense petition on the basis that no intimate relationship existed because there was no allegation of a sexual relationship between the parties. This, despite the language in 812 that specifically states that a relationship need not be sexual in nature to be considered “intimate.” A summary of Raigosa v Zafirakopoulos can be found on p. 36. For an example of a court applying the statute correctly, see Matter of Kristina L. v Elizabeth M. (156
AD3d 1162 [2017]). There, the appellate court upheld a finding that an intimate relationship existed between the respondent and the petitioner, who was a friend of the respondent as well as a live-in nanny. The court emphasized the friendship aspect of the relationship.

Bernadette Hoppe, Attorney and More, Dies at Age 54

At NYSDA training events in 2016 and 2017, including the statewide “Families Matter” conference, the incomparable Bernadette Hoppe helped family defense lawyers learn the real science and legal impact of neonatal abstinence syndrome (NAS) so they could explain it to and in family court to assist mothers. In sharing her wisdom, she drew on her multiple academic qualifications (M.A., J.D., and M.P.H.), her experience, her passion, and her compassion. Hoppe became an attorney after working for 20 years in the arenas of reproductive health, perinatal health, and HIV/AIDS prevention and treatment activism. She practiced family law from the firm she founded in 2004 until taking medical retirement in 2018. Despite her terminal diagnosis, which inspired her to testify before the State Assembly Health Committee in support of the Medical Aid in Dying Act that April, she presented again for NYSDA on Aug. 22, 2018. She spoke to those present, and to a camera set to record her for future training, about “Opioids and Pregnancy: Applying the Science to Family Court Matters.” One attorney wrote in the evaluation for the training, “Thank you Berni! I came to this CLE to hear you speak (everyone says what an excellent speaker you are) …. I left with a fuller understanding of how systemic discrimination impacts the health and wellbeing of our nation’s children.”

Hoppe died six months later. An obituary in the Buffalo News sets out the breadth of Hoppe’s interests, her awards, and the love she shared with her wife, Mary Van Volkenburg. Former NYSDA Backup Center Family Court Attorney, Lucy McCarthy, said of Hoppe, “If you had the opportunity to know her, or even hear her speak, you know her character, her humor, her vast intelligence, and her profound engagement with her clients and concern for our clients leaves us all better counselors. My heart goes out to her friends, family, and wife. We are all made better from a commitment to justice like Bernadette’s.”

NYSDA Receives Bar Foundation Grant for Family Public Defense Project

The New York Bar Foundation awarded NYSDA a $6,820 grant to support a new initiative, the NYSDA Family Public Defense Project. The grant will help NYSDA take additional steps to fulfill in family court its mission to improve the quality and scope of public defense representation. More specifically, the grant will be used to assess and address public defense needs in family representation, in ways that complement the work of the Unified Court System’s Commission on Parental Legal Representation.

Fights for Release of Police Information Continue

To say that police actions seriously affect clients and client communities is to state the obvious. Efforts in a variety of forums by public defense providers and others to secure information about the police have been reported in recent months. Many, but not all, involved Civil Rights Law 50-a.

Personnel Records Remain Off Limits Under 50-a

The protection provided by Civil Rights Law 50-a to police personnel records led to a two-paragraph decision from the First Department finding that a Freedom of Information Law (FOIL) request by The Legal Aid Society was properly denied. Matter of Luongo v Records Access Appeals Officer (90 NYS3d 514 [1/27/2019]). The decision cited Matter of New York Civ. Liberties Union v New York City Police Dept. (2018 NY Slip Op 08423 [11/12/2018]), summarized in the last issue of the REPORT. Given the Court of Appeals holding there, work to repeal 50-a has taken on heightened urgency.

As a New York Times article noted at the time of the Court of Appeals ruling, supporters of such repeal include “a long list of judges, lawyers’ groups, public defenders and criminal justice reformers,” and New York City’s mayor. The New York Civil Liberties Union (NYCLU) submitted testimony to the New York City Council Committee on Public Safety and Committee on Justice System in February stating “full support for the resolution calling for repeal of New York Civil Rights Law Section 50-a,” noting that the provision has been manipulated “to shield abusive officers from all accountability …. The issue is neither new nor limited to New York City. For example, the broad application of 50-a was noted in an Investigative Post write up about Buffalo policing on Feb. 15, 2017. NYSDA has supported bills to curtail 50-a. Current repeal bills are A02513/S03695.

Others calling for repeal include advocates and family members of individuals killed by the police, as noted in a Dec. 24, 2018 article in the Times Union. According to that article, “New York is one of three states in the nation that specifically protect police officers’ records without judicial approval.” New York State is not the only one now wrestling with the issue. Bills introduced in the New Hampshire legislature would make certain police discipli-
nary records subject to that state’s “right-to-know” law, as noted in a Jan. 9, 2019 news interview. And in California, implementing repeal of a law protecting records regarding police use of force and misconduct has led to litigation about retroactivity, according to a Jan. 17, 2019 article in the Los Angeles Times.

In February, the New York City Police Commissioner said he would support legislation to make more disciplinary records public, according to a New York Times report. Those remarks came hours after an independent commission announced it had found “almost a complete lack of transparency and public accountability” in the department’s system for investigating misconduct.

**LAS Posts CAPstat Database**

As noted in the Mar. 15, 2019 edition of News Picks from NYSDA Staff, The Legal Aid Society (LAS) has created a web-based searchable database of federal civil rights lawsuits against police in New York City. The project began as an internal database for LAS lawyers, as a March 6 article in the New York Law Journal reported. Cynthia Conti-Cook of LAS’s Special Litigation Unit, a NYSDA board member, has presented information about development of the Cop Accountability Database at NYSDA’s Chief Defender Convenings and at forums like the National Legal Aid and Defender Association’s 2017 Annual Conference. As the press release on CAPstat notes, it “was initially intended to serve Legal Aid’s Criminal Defense Practice attorneys who must, due to Civil Rights Law 50-a, argue in the dark for disclosure of internally documented police misconduct.” Taking it public, for use by policymakers and others, is an example of how good public defense work can expand beyond the confines of traditional representation.

Similarly, the late Jeff Adachi, San Francisco Public Defender, said upon winning a Public Transparency Award from the Society of Professional Journalists in 2016: “The Public Defender’s office regularly exposes misconduct to the press and public because our clients are often ignored or disbelieved when they complain through official channels. In each case, sunlight proved the best disinfectant.”

**Body Camera Footage Not Exempt under 50-a**

At least some police records should not fall under the 50-a rubric of personnel records “used to evaluate performance toward continued employment or promotion,” as the First Department recently noted in Matter of Patrolmen’s Benevolent Assn. of the City of NY, Inc. v De Blasio (2019 NY Slip Op 01170 [2/19/2019]). A challenge to “the City’s public release of police department body-worn-camera footage without a court order or the relevant officers’ consent” was rebuffed. The Court found that while the “body-worn-camera program was designed, in part, for performance evaluation purposes, and supervisors are required, at times, to review such footage for the purpose of evaluating performance, the footage being released here is not primarily generated for, nor used in connection with any pending disciplinary charges or promotional processes.” The police union has said it plans to appeal.

Just weeks after the ruling, the New York Police Department (NYPD) announced that “all uniformed patrol officers have been equipped with body cameras, and that they plan to roll out even more.” And the advent of police-worn body cameras has raised the question of whether Civil Rights Law 50-a applies to footage from those; see, for example, a 2017 report from the Partnership for the Public Good. As reported by WKBW on Mar. 7, 2019, the Buffalo Police Department owns the video from the cameras, and has established a policy concerning the cameras’ use.

One upstate news item noted concerns about body cam recordings, such as cost of staff to process FOIL requests and release of footage of police officers talking to their spouses or others having “nothing to do with work.” Scott McNamara, Oneida County District Attorney made the latter point, adding, “[t]here are people out there unfortunately that hate police and would do anything to embarrass somebody.”

But “embarrassing” chats with spouses or lovers are not what many police agencies are failing to release. An Associated Press (AP) investigation for Sunshine Week 2019 revealed that, across the country, police “routinely withhold video of officer-involved shootings and other incidents by using a broad exemption to state open records laws . . . .” Exemptions allowing agencies to withhold records of “pending investigations” are frequently cited, the AP noted. In one extreme example, a “county claimed the exemption would allow it to keep the video of a motorist’s fatal shooting secret forever—even though the investigation has concluded and cleared the deputy involved.”

As an aside, the increase in body cam usage, like the growth in the number of surveillance cameras at potential crime scenes and other digital information, may impact defense lawyers’ computer needs. Defense offices need hardware and software able to open, display, and store footage obtained through discovery and investigation.

**50-a is Not a Total Bar to Disclosure**

Civil Rights Law 50-a is not a total bar to disclosure of police personnel records. Access to such records without the respective officer’s consent is barred “except as may be mandated by lawful court order.” To issue such an order, a court must find that there has been “a clear showing of facts sufficient to warrant” review. But upon mak-
ing that finding, “the court shall make those parts of the record found to be relevant and material available to the persons so requesting.” So, while personnel records cannot be the starting point when looking for information that could be used to impeach an officer, such records should be accessible upon a showing, based on independently-obtained information, of a likelihood that the records contain impeachment material.

The seminal case of People v Gissendanner (48 NY2d 543) discusses 50-a, though the statute was passed after the trial under review. The Gissendanner court noted the tension between a defendant’s confrontation rights and governmental and individual interests in keeping performance records confidential. It made clear that defendants don’t have to show that “the record actually contains information that carries a potential for establishing the unreliability of either the criminal charge or of a witness upon whose testimony it depends” but only a good-faith “factual predicate which would make it reasonably likely that the file will bear such fruit ….” While published caselaw since Gissendanner yields little assistance, defense lawyers continue the fight in individual cases as well as advocacy for legislative change. Dogged investigation, pursuit of Brady claims, and pooling of information about officers against whom lawsuits or other claims have been brought are ways in which counsel may gather the facts needed to secure a court order lifting the 50-a bar.

NYPD Is Denied Use of “Glomar” Response to FOIL Request

In other news regarding police information, FOIL requests for police records regarding the NYPD’s monitoring of protesters during the Millions March NYC yielded, as the initial response, a blanket statement that the Department “could ‘neither confirm nor deny’” that such records existed. This “Glomar response” was rejected by New York Supreme Court Arlene Bluth, the NYCLU announced in a Jan. 14, 2019 press release. The Glomar doctrine, “typically used for national security issues” as noted by the NYCLU, was allowed in another NYPD case by a divided Court of Appeals last year in Matter of Abdur-Rashid v New York City Police Dept. (31 NYS3d 217 [3/29/2018]), which was summarized in the April-July 2018 issue of the REPORT (p. 23).

Using FOILed Probation Info for Client Advocacy

One lawyer has put data obtained from the Division of Criminal Justice Services (DCJS) to work when advocating for clients as to sentences of probation. Looking at information obtained through a FOIL request, Brendan Rigby noted that in 2017 (the last year for which data was available at the time of his request):

Onondaga County resentenced 426 misdemeanor probation violators to jail. All the 5 boroughs of NYC combined only resentenced 382 to jail for VOPs. Suffolk County is next with 360 sentences, but that county has about 3 times as many people as we do.

As reported in the ACP Defender (weekly newsletter of the Onondaga County Bar Association [OCBA] Assigned Counsel Plan) on Mar. 4, 2019, Rigby suggested this to his colleagues. “[T]he next time the prosecutor or judge recommends a probation sentence on your misdemeanors, perhaps remind them that our reliance on probation and incarceration in this county is not normal as we lead the state in jail for misdemeanor VOPs.”

Laura Fiorenza of the OCBA ACP told NYSDA that information on how probationary sentences tend to play out can assist in advising clients about decisions such as whether to participate in a specialty court.

DCJS provided Rigby with a table showing, for each county in the state (and New York City both by county and in total), dispositions of probation cases where individuals were resentenced for violation of probation (in both felony and misdemeanor cases).

FOILing is not required to obtain some information from DCJS; the agency’s stated mission is to promote public safety “by providing resources and services that inform decision making and improve the quality of the criminal justice system.” A variety of criminal justice statistics are available on its website, from “Parolee/Probationer Arrests Percent of Total Arrests Within County (2008-2017)” to “Hate Crime Incidents in New York State by Reporting Agency.”

NYSDA can help defenders obtain and utilize data—from NYSDA’s own clearinghouse and research capabili-
ties, from outside sources, or through offices’ creative use of NYSDA’s Public Defense Case Management System (PDCMS). Now installed in 76 offices in 48 counties across New York State, PDCMS can help public defense offices collect and use a variety of data. Contact the Backup Center.

**Lawyers Need Current Info on Driving Privileges and Driving Records**

Many criminal charges can directly or indirectly affect a client’s driving privileges or be affected by the client’s driving record. The recently-passed State budget included driving-related items. For example, some barriers to reentry created by criminal records and related to driving were lifted, like the mandatory suspension of a driver’s license following conviction of a drug offense under Vehicle and Traffic Law 510(b)(v). See L 2019, ch 55, Part II, Subpart J. Watch for additional information from NYSDA going forward.

**Getting DMV Records: DIAL-IN Search Accounts**

When a client’s driving record is relevant to any aspect of a case, lawyers need to get that record. New defenders may not be aware that Department of Motor

(continued on page 54)

### Conferences & Seminars

| Sponsor: | New York State Defenders Association and Office of Indigent Legal Services Appellate Defense Council |
| Theme: | Criminal Appeals and Post-Conviction Practice |
| Date: | May 17, 2019 |
| Place: | Albany, NY |
| Contact: | NYSDA: tel (518) 465-3524; fax (518) 465-3249; email awalters@nysda.org; website [www.nysda.org](http://www.nysda.org) |

| Sponsor: | National Legal Aid and Defender Association |
| Theme: | 2019 Holistic Defense & Leadership Conferences |
| Dates: | June 3-7, 2019 |
| Place: | Baltimore, MD |
| Contact: | NLADA: tel (202)452-0620; fax (202)872-1031; website [www.nlada.org/node/22536](http://www.nlada.org/node/22536) |

| Sponsor: | New York State Bar Association, Committee on Mandated Representation and Committee on Continuing Legal Education. |
| Theme: | Innovations in Family Court Practice 2019 |
| Date: | June 7, 2019 |
| Place: | Albany, NY |
| Contact: | NYSBA: pbuland@nysba.org; website [https://www.nysba.org/store/events/registration.aspx?event=0GF11](https://www.nysba.org/store/events/registration.aspx?event=0GF11) |

| Sponsor: | New York Association of Criminal Defense Lawyers |
| Theme: | Southern Tier Criminal Defense Seminar – Binghamton 2019 |
| Date: | June 7, 2019 |
| Place: | Binghamton, NY |
| Contact: | NYSACDL: tel (518) 443-2000; email jivanort@nysacdl.org; website [https://nysacdl.site-y.com/events/event_list.asp](https://nysacdl.site-y.com/events/event_list.asp) |

| Sponsor: | New York State Defenders Association |
| Theme: | 2019 Basic Trial Skills Program |
| Dates: | June 9-14, 2019 |
| Place: | Saratoga Springs, NY |
| Contact: | NYSDA: tel (518) 465-3524; fax (518) 465-3249; email awalters@nysda.org; website [www.nysda.org](http://www.nysda.org) |

| Sponsor: | New York State Defenders Association |
| Theme: | 52nd Annual Meeting and Conference |
| Dates: | July 22-24, 2019 |
| Place: | Saratoga Springs, NY |
| Contact: | NYSDA: tel (518) 465-3524; fax (518) 465-3249; email awalters@nysda.org; website [www.nysda.org](http://www.nysda.org) |

| Sponsor: | National Association of Criminal Defense Lawyers |
| Theme: | 2019 Annual Meeting & Seminar: “Ringing Liberty’s Bell” |
| Dates: | July 31-August 3, 2019 |
| Place: | Philadelphia, PA |
| Contact: | NACDL: tel (202) 872-8600 x630; email: aathanason@nacdl.org; website: [https://members.nacdl.org/NACDL-events](https://members.nacdl.org/NACDL-events) |

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

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**Stokeling v United States, ___ US ___, 139 SCt 544 (1/15/2019)**

**Purse Snatching / Violent Felony**

**ILSAPP:** The defendant, who pleaded guilty to possessing a gun, had three earlier convictions, including a Florida robbery conviction for purse snatching. The prosecutor invoked the Armed Career Criminal Act. That federal statute mandates a 15-year term for a defendant convicted of possessing firearms who was previously convicted of three violent [felonies]. Writing for the majority, Justice Thomas concluded that the Florida robbery conviction counted as a violent felony, since the crime required proof that the victim resisted; and even if minimal, the force necessary to overcome a victim’s physical resistance is inherently violent. Justice Sotomayor dissented: “Under Florida law, ‘robbers’ can be glorified pickpockets, shoplifters, and purse snatchers,” she wrote. Chief Justice Roberts and Justices Ginsburg and Kagan joined the dissent.

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**Murphy v Collier, No. 18A985**

**PRISONERS RIGHTS/SENTENCE – FREEDOM OF RELIGION**

**LASJRP:** The facts, as described by the Supreme Court dissenters, are as follows: under prison policy, a Buddhist prisoner may have a minister of his own faith accompany him into the execution chamber to say his last rites. But if an inmate practices a different religion—whether Islam, Judaism, or any other—he may not die with a minister of his own faith by his side. The Eleventh Circuit concluded that there was a substantial likelihood that the prison’s policy violates the First Amendment’s Establishment Clause, and stayed a Muslim prisoner’s execution so it could consider his claim on its merits.

In a 5-4 decision, the Court vacates the Eleventh Circuit’s stay and allows the execution to go forward, noting that on November 6, 2018, the State scheduled the execution for February 7, 2019, but the prisoner waited until January 28, 2019 to seek relief. The majority cites a Court decision stating that “[a] court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.”

The dissent notes that although prison security is a compelling interest, the State has offered no evidence to show that its wholesale prohibition on outside spiritual advisers is necessary to achieve that goal. “This Court is ordinarily reluctant to interfere with the substantial discretion Courts of Appeals have to issue stays when needed.” The prisoner “has put forward a powerful claim that his religious rights will be violated at the moment the State puts him to death. The Eleventh Circuit wanted to hear that claim in full. Instead, this Court short-circuits that ordinary process—and itself rejects the claim with little briefing and no argument—just so the State can meet its preferred execution date.”

[Ed. Note: The Court later granted a stay in another death penalty case saying, “The State may not carry out Murphy’s execution pending the timely filing and disposition of a petition for a writ of certiorari unless the State permits Murphy’s Buddhist spiritual advisor or another Buddhist reverend of the State’s choosing to accompany Murphy in the execution chamber during the execution.” Murphy v Collier, No. 18A985 (3/28/2019).]

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**Moore v Texas, ___ US ___, 139 SCt 666 (2/19/2019)**

**INTELLECTUAL DISABILITY / NO DEATH PENALTY**

**ILSAPP:** In 2015, the Texas Court of Criminal Appeals held that the petitioner did not have an intellectual disability and thus was eligible for the death penalty. The U.S. Supreme Court vacated that decision in 2017, because the Texas court had erred in its analysis of the petitioner’s “adaptive deficits,” one of the relevant elements regarding intellectual disability. Upon reconsideration, the Texas
court adhered to its prior conclusion. The petitioner sought certiorari, and the prosecutor agreed that he was intellectually disabled and could not be executed. In a 10-page unsigned opinion, the Supreme Court granted the petition and rebuked and reversed the appeals court. The Texas court had reiterated its previous flawed analysis: overemphasizing the petitioner’s adaptive strengths; stressing his improved behavior in prison, despite the low probative value of such factor; and relying on fallacious factors that advanced lay stereotypes. Justice Alito dissented, joined by Justices Thomas and Gorsuch. If the Supreme Court believed that the Texas court erred, it should vacate the judgment, pronounce a clear standard, and remand for its application. The decision to instead issue a summary reversal belied the Court’s role as a tribunal of review, not of first view, the dissenters opined.

Timbs v Indiana, __ US __, 139 Sct 682 (2/20/2019)

The Eighth Amendment’s “protection against excessive fines guards against abuses of government’s punitive or criminal-law-enforcement authority”; this is “fundamental to our scheme of ordered liberty,” and is applicable to the States, being “incorporated by the Due Process Clause of the Fourteenth Amendment.” The unanimous decision in Austin v United States (509 US 602 [1993]), holding the Excessive Fines Clause applicable to the use of civil in rem forfeitures when they are at least partially punitive, was not challenged below. Indiana’s invitation to reconsider that case is declined.

Concurrence: [Gorsuch, J] While “the appropriate vehicle for incorporation may well be the Fourteenth Amendment’s Privileges or Immunities Clause, rather than … the Due Process Clause,” this case does not turn on that question. “[R]egardless of the precise vehicle, there can be no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment.”

Concurrence: [Thomas, J] “Instead of reading the Fourteenth Amendment’s Due Process Clause to encompass a substantive right that has nothing to do with ‘process,’ I would hold that the right to be free from excessive fines is one of the ‘privileges or immunities of citizens of the United States’ protected by the Fourteenth Amendment.”

Yovino v Rizo, __ US __, 139 Sct 706 (2/25/2019)

JUDGES – APPEALS COURT QUORUM

LASJR: The Ninth Circuit listed a judge as the author of an en banc decision issued 11 days after he passed away. Without the deceased judge’s vote, the opinion attributed to him would have been approved by only 5 of the 10 members of the en banc panel who were still living when the decision was filed.

The Supreme Court holds that the deceased judge’s vote was improperly counted. When the Ninth Circuit issued its opinion, the judge was neither an active judge nor a senior judge, and, by statute, was without power to participate in the en banc court’s decision at the time it was rendered. A court of appeals case may be decided by a panel of three judges, and, on such a panel, two judges constitute a quorum and are able to decide an appeal, provided that they agree. With the exception of one recent decision issued by the Ninth Circuit after this judge’s death, which was subsequently withdrawn, the Court is aware of no cases in which a court of appeals panel has purported to issue a binding decision that was joined at the time of release by less than a quorum of the judges who were alive at that time.

The Ninth Circuit effectively allowed a deceased judge to exercise the judicial power of the United States after his death. “But federal judges are appointed for life, not for eternity.”


“In Roe v. Flores-Ortega, 528 U. S. 470 (2000), this Court held that when an attorney’s deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed ‘with no further showing from the defendant of the merits of his underlying claims.’ Id., at 484. This case asks whether that rule applies even when the defendant has, in the course of pleading guilty, signed what is often called an “appeal waiver”—that is, an agreement forgoing certain, but not all, possible appellate claims. We hold that the presumption of prejudice recognized in Flores-Ortega applies regardless of whether the defendant has signed an appeal waiver.”

Dissent: [Thomas, J] The majority’s finding, that defense lawyers are always ineffective if they decline a client’s request to appeal an issue that the client has waived, “results in a ‘defendant-always-wins’ rule that has no basis in Roe v. Flores-Ortega …”

Madison v Alabama, __ US __, 139 Sct 718 (2/27/2019)

SENTENCE - Death Penalty/Eighth Amendment

LASJR: The Supreme Court has held that the Eighth Amendment prohibits the execution of a prisoner whose mental illness prevents him from rationally understanding why the State seeks to impose that punishment. In this case, defendant argued that his memory loss and demen-
US Supreme Court continued

...tia entitled him to a stay of execution, but an Alabama court denied the relief.

In a 5-3 decision authored by Justice Kagan, and joined by Justice Roberts, the Court now concludes that the Eighth Amendment applies similarly whether a prisoner is suffering from dementia, or is experiencing psychotic delusions, because either condition may, or may not, impede the requisite comprehension of punishment.

Being unsure about whether the Alabama court knew that a person with dementia, and not psychotic delusions, might receive a stay of execution, the Court returns the case to the state court for renewed consideration of defendant’s competency (assuming Alabama sets a new execution date).

Nielsen v Preap, No. 16-1363 (3/19/2019)

While noncitizens arrested because they are believed to be deportable can usually apply for release on bond, Congress has provided that those who have committed certain dangerous crimes or have connections to terrorism must be arrested when released from custody on criminal charges and detained without a bond hearing until a decision is made about their removal. The Ninth Circuit’s ruling that this mandatory-detention requirement only applies if the noncitizen was arrested immediately upon release from incarceration, and not if any time has passed, is rejected. Neither the statute’s text nor its structure supports the Circuit Court’s ruling.

Concurrence: [Kavanaugh, J] The question before us is entirely statutory, requiring interpretation of a strict illegal-immigration law. It is not about whether noncitizens can be removed based on criminal offenses, whether they may be detained during removal proceedings and before removal, how long they may be detained, or whether Congress can mandate detention during removal proceedings or before removal. The relevant text is relatively straightforward and “I agree with the Court’s careful statutory analysis ....”

Concurrence in Part, Concurrence in the Judgment: [Thomas, J] “I continue to believe that no court has jurisdiction to decide questions concerning the detention of aliens before final orders of removal have been entered.” Statutory provisions limit judicial review here, and I am skeptical as to the jurisdiction of the District Courts to certify the classes created here. I agree with the Court’s disposition on the merits.

Dissent: [Breyer, J] “The language of the statute will not bear the broad interpretation the majority now adopts.” To interpret the statutory language we must also consider “basic promises that America’s legal system has long made to all persons.” “I would have thought that Congress meant to adhere to these values and did not intend to allow the Government to apprehend persons years after their release from prison and hold them indefinitely without a bail hearing.”

Bucklew v Precythe, No. 17-8151 (4/1/2019)

No legal basis is found for overturning decisions below that rejected the petitioner’s claim that Missouri’s lethal injection protocol is unconstitutional as applied to him. He suffers from an unusual medical condition that he argues could interfere with the execution drugs causing him to experience pain. But precedent “tells us that the Eighth Amendment does not guarantee a prisoner a painless death ....” The requirement imposed on Eighth Amendment facial challenges to execution methods—to “show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason”—must also be met when the challenge is “as applied.” The petitioner has not provided sufficient evidence to avoid summary judgment.

The important interests in timely enforcement of a sentence have been frustrated here. “[F]ederal courts ‘can and should’ protect settled state judgments from ‘undue interference’ by invoking their ‘equitable powers’ to dismiss or curtail suits that are pursued in a ‘dilatory’ fashion or based on ‘speculative’ theories.”

Concurrence: [Thomas, J] “I adhere to my view that ‘a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain.’” Further, Justice Breyer’s dissent does not cast doubt on the precedents relied on by the majority.

Concurrence: [Kavanaugh, J] “I write to underscore the Court’s additional holding that the alternative method of execution need not be authorized under current state law—a legal issue that had been uncertain before today’s decision.”

Dissent: [Breyer, J] I disagree with the majority’s answers to all three questions raised here: whether the petitioner “established genuine issues of material fact concerning whether executing him by lethal injection would cause him excessive suffering”; whether a prisoner “with a rare medical condition must identify an alternative method by which the State may execute him”; and “how to minimize delays in executing offenders who have been condemned to death.” Mounting evidence indicates that “we can either have a death penalty that avoids excessive delays and ‘arguably serves legitimate penological purposes,’” or one that “seeks reliability and fairness” in its application and avoids cruel and unusual punishment. “It may well be that we ‘cannot have both.’”
The Mental Hygiene Law does not “mandate, upon a respondent’s request, the presence of assigned Mental Hygiene Legal Service (MHLS) counsel at treatment planning meetings for article 10 respondents placed in a Sex Offender Treatment Program at a secure treatment facility. We hold that MHLS counsel is not entitled to be given an interview and an opportunity to participate in treatment planning simply by virtue of an attorney-client relationship with an article 10 respondent.” However, a facility does have “the discretion to permit MHLS counsel to participate in treatment planning and, in a particular case, it is possible that counsel could develop and demonstrate a sufficient personal relationship with a patient such that counsel would qualify as a ‘significant individual ... otherwise concerned with the welfare of the patient,’ entitled to participate therein.” There was no demonstration here of such “a sufficient personal relationship with a patient such that counsel would qualify as a “significant individual ....” “

Dissent: [Wilson, J] While the attorney-client relationship alone does not qualify MHLS counsel for an interview and opportunity to participate in treatment planning, there is no basis in the statute or the record here to void the MHLS attorney’s designation by the client as a “significant individual.”

Mental Hygiene Legal Service (MHLS) lacks standing, in its own name, a proceeding seeking a writ of mandamus to vindicate a client’s rights under Mental Hygiene Law 9.31(b), “which sets forth the procedure that must be followed after a patient requests an admission or retention hearing.” Therefore, the underlying dispute—whether the record that must be sent to MHLS “includes a copy of the patient’s entire clinical chart”—is not reached.

Dissent: [Rivera, J] MHLS has established standing, and is also correct on the merits of its claim that the record of a patient involuntarily committed under Mental Hygiene Law article 9 “includes the clinical record, which, in turn, is defined broadly and encompasses the documents sought by MHLS.”

The Court of Appeals holds that Mental Hygiene Law § 33.13, which protects the confidentiality of a “clinical record” maintained by facilities licensed or operated by the Office of Mental Health or the Office for People with Developmental Disabilities, does not require automatic sealing of the entire court record of all proceedings involving insanity acquittees who have dangerous mental disorders within the meaning of Criminal Procedure Law § 330.20.

Interpreting § 33.13 to provide a blanket sealing requirement would disregard the State’s tradition of open court proceedings. In balancing the privacy rights of a defendant with the public’s right to know how dangerous mentally ill acquittees are managed by the courts, the legislature eschewed an automatic sealing requirement applicable to court records.

Mental Hygiene Legal Service v Daniels, 2019 NY Slip Op 01123 (2/14/2019)

Mental Hygiene Legal Service et al. v Sullivan, 2019 NY Slip Op 01122 (2/14/2019)

People v Thomas, 2019 NY Slip Op 01167 (2/19/2019)

SEALING – RECORDS OF PROCEEDINGS INVOLVING INSANITY ACQUITTEES

LASJRP*: The Court of Appeals holds that Mental Hygiene Law § 33.13, which protects the confidentiality of a “clinical record” maintained by facilities licensed or operated by the Office of Mental Health or the Office for People with Developmental Disabilities, does not require automatic sealing of the entire court record of all proceedings involving insanity acquittees who have dangerous mental disorders within the meaning of Criminal Procedure Law § 330.20.

Interpreting § 33.13 to provide a blanket sealing requirement would disregard the State’s tradition of open court proceedings. In balancing the privacy rights of a defendant with the public’s right to know how dangerous mentally ill acquittees are managed by the courts, the legislature eschewed an automatic sealing requirement applicable to court records.

1 Summaries marked with these initials, LASJRP, are courtesy of The Legal Aid Society’s Juvenile Rights Practice, from their weekly newsletter.
The dissent asserts, inter alia, that because the illegal sentences were vacated in their entirety, they ceased to exist.

**People v Diaz, 2019 NY Slip Op 01260 (2/19/2019)**

**INMATE CALLS / DA CAN USE RECORDINGS**

ILSAPP*: After his 2012 arrest for burglary and robbery, the defendant was held in a Rikers Island Correctional Facility for eight months until he posted bail. During that time, he made 1,100 calls. At trial, the prosecution introduced excerpts of four of the defendant’s phone calls, recorded by the NYC Department of Correction (DOC), that contained incriminating statements. The defendant was convicted, and the Second Department affirmed. On appeal, he asserted that consent to governmental intrusion can be no broader than the notice provided. The Court of Appeals disagreed. Detainees—having been informed of the monitoring and recording of their non-privileged calls—possessed no legitimate expectation of privacy in the calls. (DOC did not record calls made by inmates to their attorneys, doctors, clergy, and specified agencies.) A correctional facility may record calls and share the recordings with prosecutors. The majority rejected the argument that, once the calls were lawfully intercepted by DOC, the Fourth Amendment prevented DOC from releasing recordings to the DA’s Office. Judge Feinman wrote the majority opinion. Judge Wilson dissented in an opinion in which Judge Rivera joined. DOC recorded calls for security purposes, yet delivered recordings to the People for use in prosecution. The Fourth Amendment cannot permit that. The majority ignored crucial facts: (1) The defendant was not free to leave Rikers and for eight months, and other than phone calls, had no viable means of communication with the outside world; (2) Other persons accused of crimes, but out on bail, cannot be subjected to governmental recording without a warrant; (3) The defendant needed to prepare a defense; (4) He was told that the recording of his calls was for jail security; and (5) He was not informed that his calls would be provided to the DA to use against him. The majority enabled the government to circumvent the Fourth Amendment by collecting private information without a warrant for one purpose and then deeming it non-private for another purpose.

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

**People v Pendell, 2019 NY Slip Op 02152 (3/21/2019)**

**EVIDENCE – PHOTOGRAPHS**

LASJRP: The Court of Appeals concludes that certain photographs were sufficiently authenticated through the testimony of the complainant and the law enforcement agents who extracted the photographs from defendant’s cell phone and computers.

The pertinent facts are set forth in the Third Department’s decision (164 A.D.3d 1063) [http://nycourts.gov/reporter/3dseries/2018/2018_05899.html]:

“Although the foundational questioning here was brief, the controlling point is that the victim identified herself in all of the photographs. She confirmed that she took several of the photographs of herself in her room at home and sent those photographs to defendant. She also explained that defendant took some of the photographs of her at the motel, where he admitted he took her on multiple occasions. All of the photographs of the victim were obtained from either defendant’s cell phone or his home computer. We thus have the victim authenticating, as both photographer and subject, the pictures that she took of herself and that she provided to defendant. As for photographs taken by defendant at the hotel, the victim, as subject, confirmed that she was depicted in the photographs, without qualification. We also know from her testimony that these photographs were taken between October 2012 and March 2013. There was also explicit testimony from Constance Leege, a special agent with the United States Secret Service, explaining the process that she utilized to extract seven of the photographs from defendant’s cell phone, and testimony from her colleague, Robert Lupe, who performed a forensic analysis of defendant’s computer to extract the remaining photographic image.”

**Matter of Schoonmaker v New York State Department of Motor Vehicles,**


**SEARCH AND SEIZURE – AUTO STOP**

LASJRP: The Court of Appeals upholds a determination revoking petitioner’s driver’s license for refusing to submit to a chemical test, finding substantial evidence that the officer had probable cause to stop petitioner’s vehicle where he observed the vehicle “make an erratic movement off the right side of the road, crossing the fog line and [moving] off the shoulder [with the vehicle’s] right front tire;” the vehicle immediately moved left with the right-hand turn signal on, returning to its original lane of travel; and the officer observed that there was no animal or other obstruction that would have explained the “erratic jerking action.”
NY Court of Appeals continued


**Effective Appellate Rep.? / Two Dissents**

**ILSAPP:** Nineteen-year-old Omar Alvarez was convicted of conspiracy, murder, and other counts relating to activities of a drug trafficking gang. He was sentenced to 66 2/3 years. The Court of Appeals affirmed the denial of a coram nobis petition, which alleged that appellate counsel was ineffective in failing to seek a sentence reduction in the interest of justice. In addition, counsel filed a sub-petition and failed to communicate with the client and to notify him of the Appellate Division decision and to seek leave to appeal. The majority found that counsel provided meaningful representation and could have had a sound reason to forgo the sentence issue. The dissenters, Judges Wilson and Rivera, could discern no valid reason for refraining from raising that issue. Judge Wilson reflected that appellate counsel should have sought a reduction in the sentence to 40 years to life so that, decades hence, the Parole Board could consider whether the defendant had been rehabilitated. He noted the “atrocious quality” of the brief, which Judge Rivera said took four years for counsel to file and did not reflect a competent grasp of facts, law, or procedure. The essential inquiry was not whether a better result might have been achieved, Judge Rivera opined, but whether counsel’s actions were those of a reasonably competent appellate attorney. She also observed that the failure to communicate with the defendant was a basic violation of his professional obligation.


**Defendant’s Admission / Harmless If Error**

**ILSAPP:** The defendant challenged a judgment convicting him of drug possession crimes. The question presented by the appeal was whether the defendant’s admission to the police, that he lived in the apartment that was the subject of a search warrant for drugs, was properly found admissible under the pedigree exception to Miranda, even though the admission was the product of custodial interrogation that was likely to elicit an incriminating response. The Court of Appeals assumed, without deciding, that Supreme Court erroneously permitted such testimony, and it held that such error was harmless.

**People v Rodriguez, 2019 NY Slip Op 02444 (4/2/2019)**

County Court did not err in determining that the defendant’s refusal to testify against someone named Marin “violated the express terms of” the cooperation agreement into which the defendant entered after confessing his involvement in a murder and assault that were retaliation for an invasion of the defendant’s home by the decedent and others, including Marin. The agreement called for the defendant to “cooperate completely and truthfully with law enforcement authorities, including the police and the District Attorney’s Office, on all matters in which his cooperation is requested, including but not limited to the prosecution of [defendant’s accomplices] on charges related to the murder … and the assault……” The defendant refused to testify against Marin in connection with the home invasion that triggered the later crimes. “The plain language of the agreement was objectively susceptible to but one interpretation ….”

**Dissent:** [Rivera, J] The majority fails to tackle head on the open question presented: “what interpretive standards apply to the terms of a cooperation agreement when, as here, a defendant claims to have neither intended nor understood the agreement to include the People’s demand for assistance with an unspecified criminal investigation or prosecution?” Under traditional rules of contract interpretation, the cooperation agreement was limited to the crimes to which the defendant pleaded guilty. There was no mention of the home invasion or Marin in the cooperation agreement. The phrase “including but not limited to” is overbroad and vague. The defendant said when he confessed to the murder and assault that Marin had threatened to kill the defendant’s family if they reported the home invasion. He “surely would not have entered an agreement to plead guilty knowing at the time that he could never fulfill the promise without endangering his family …."

**People v Tapia, 2019 NY Slip Op 02442 (4/2/2019)**

The trial court did not err by admitting, as past recollection recorded, a portion of a testifying witness’s grand jury testimony where a proper foundation was laid. “[S]ince the declarant of that out-of-court statement was a live witness at trial, defendant’s Sixth Amendment right to confrontation was not violated.” The Confrontation Clause is satisfied when a witness is present for cross-examination and the defendant has the opportunity for a literal face-to-face encounter in the presence of the trier of fact. Here, the witness, a police lieutenant who had retired before the trial, was called and cross-examined at trial, but could not independently recall the incident. Defense counsel inconsistently asserted that if the lieutenant was not called, the defense would be entitled to a missing witness charge, but that if he was called, the grand jury testimony should not be admitted because he was “unavailable for confrontation purposes” due to his memory loss. The jury was instructed on considering the grand jury testimony as past recollection recorded.

**Dissent:** [Wilson, J] The admission of the lieutenant’s grand jury testimony, which was not subjected to cross-examination, when the lieutenant said at trial he remembered nothing of the incident in question, “violated CPL
670.10 and our decision in People v Green (78 NY2d 1029 [1991]).” Given the statute and the existence of common law precedent that forbade prosecution with even sworn out-of-court statements before the Constitution, “the Confrontation Clause is neither the starting nor ending place” for this appeal. The error was not harmless.

First Department

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

People v Francis, 164 AD3d 1108, 82 NYS3d 401 (1st Dept 9/6/2018)

There is no jurisdiction to reach the merits of the defendant’s claim, raised in a CPL 440.20 motion to set aside a sentence, that he was unlawfully sentenced in 1988 on his third-degree weapons possession conviction as a first felony offender rather than as a second felony offender based on a 1982 conviction. He was not adversely affected by the error, as is required by CPL 470.15(1). This case is distinguishable from People v Gould (131 AD3d 874) in that the jurisdictional bar was not raised there and the prosecution there conceded the necessity of a resentencing. The defendant acknowledges that his seeks resentencing relief as part of an effort “to ultimately move to withdraw his plea on the ground that the new, lawful sentence would be contrary to his original plea agreement.” (Supreme Ct, New York Co)

[Ed. Note: For a similarly-decided case regarding application of the aggrievement requirement to 440.20 motions see People v McNeil (164 AD3d 1006 [1st Dept 9/6/2018])]

People v Holmes, 164 AD3d 1118, 83 NYS3d 437 (1st Dept 9/13/2018)

ERRONEOUS BELIEF AS TO PRS / REMAND

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court convicting him of 2nd degree burglary (two counts). At the time of the plea, the court and counsel believed that the defendant was a predicate felony offender, and the plea offer contained the mandatory five-year term of PRS. At sentencing, upon learning that the defendant was a first felony offender, the court and counsel apparently incorrectly believed that five years was the minimum PRS period. The minimum was instead 2½ years. The First Department held that it was unclear how long a PRS term the sentencing court would have imposed, had it known that a lesser period was permissible. The case was thus remanded. One justice dissented. The Center for Appellate Litigation (Anokhi Shah, of counsel) represented the appellant. (Supreme Ct, New York Co)

Matter of Charles v Poole, 164 AD3d 1148, 83 NYS3d 36 (1st Dept 9/25/2018)

INDICATED REPORT / ANNULLED

ILSAPP: In an Article 78 proceeding, the petitioners appealed from a determination of the State Office of Children and Family upholding a finding that child maltreatment allegations were “indicated.” The First Department annulled the determination. The petitioners had complied with recommendations of the child’s pediatrician. There was no evidence that the child’s condition was impaired due to the petitioners’ failure to take the child to regular visits with a hematologist or to administer a daily dose of penicillin. Further, the decision not to further vaccinate the child did not violate the pediatrician’s directive. Carolyn Kubitschek represented the petitioners. (Transferred from Supreme Ct, New York Co)

People v Ramos, 164 AD3d 1154, 82 NYS3d 409 (1st Dept 9/25/2018)

ATTEMPTED ROBBERY REDUCED / NO FORCE

ILSAPP: In Bronx County Supreme Court, the defendant was convicted of attempted 2nd degree robbery, which the First Department reduced to attempted petit larceny based on legally insufficient evidence of force. There was no actual or threatened physical contact when an arrest was threatened by the defendant, a corrupt police officer. The Center for Appellate Litigation (Siobhan Atkins, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

State of NY ex rel Rischetti v Brann, 166 AD3d 29, 84 NYS3d 127 (1st Dept 9/25/2018)

ATTEMPTED MURDER / BAIL DENIED

ILSAPP: The petitioner and the victim, unmarried psychiatrists, had a child together. The petitioner’s cousin attacked the victim with a sledgehammer and knife, but did not inflict life-threatening injuries. Family Court found that the petitioner had masterminded the botched murder plot in order to obtain proceeds of a $1.5 million life insurance policy for which she was trustee, pursuant to a child custody agreement. The purported cohorts were
charged with attempted 2nd degree murder. He was convicted, and she has been in jail for nearly a year awaiting trial. After being denied bail, she sought habeas corpus review. When bail was again denied, she appealed. The First Department affirmed, rejecting the petitioner’s offer to pay for enhanced security to ensure her appearance. The appellate court cited the likelihood of conviction, potential sentencing exposure, the defendant’s financial resources, and the risk of flight. (Supreme Ct, New York Co)

People v Williams, 164 AD3d 1145, 84 NYS3d 123 (1st Dept 9/25/18)

DEFENDANT ABSCONDED / APPEAL DISMISSED

ILSAPP: In 1984, the defendant absconded during a rape trial and was convicted in absentia. His attorney filed a notice of appeal, but the defendant did not perfect his appeal, which was dismissed in 1998. Meanwhile, in 1986, he was convicted of crimes in North Carolina. Meanwhile, in 1986, he was convicted of crimes in North Carolina. Meanwhile, in 1986, he was convicted of crimes in North Carolina and served a lengthy sentence there. In 2015, the instant appeal was reinstated; and in 2017, it was perfected. The People renewed a dismissal application, which the First Department granted. Where an absconding defendant’s appeal remained pending for a lengthy period, the Appellate Division has broad discretion as to whether the appeal should be permitted to proceed. In this case, the appellate court observed that the three-decade delay was caused by the defendant’s own conduct. (Supreme Ct, Bronx Co)

Matter of Cornell S.J. v Altemease R.J., 164 AD3d 1184, 84 NYS3d 451 (1st Dept 9/27/18)

VISITATION / NOT UP TO PARENT OR CHILDREN

ILSAPP: Bronx County Family Court granted a grandfather’s guardianship applications. The children’s adoptive mother—their great-grandmother (GGM)—abandoned them for five days without any adult care; and after a brief return, she left again and failed to contact the children for 11 months. Exceptional circumstances existed, and it was in the children’s best interests to grant guardianship to the grandfather, who had been their primary caregiver during the GGM’s absence and had custody of their older sibling. Further, the children, ages 9 and 11, expressed their wish to remain with their grandfather. Family Court properly granted visitation to the GGM, but improperly delegated to the parties and the children its authority to set a schedule. Thus, the matter was remanded. Richard Herzfeld represented the appellant. (Family Ct, Bronx Co)

Matter of Heaven C.E., 164 AD3d 1177, 85 NYS3d 5 (1st Dept 9/27/18)

SEVERE ABUSE / AFFIRMED

ILSAPP: Bronx County Family Court held that the mother abused and severely abused Heaven C. and derivatively abused and severely abused Joseph C. The First Department affirmed. Expert testimony established that Heaven C. suffered non-accidental injuries, including brain trauma resulting in permanent damage. The treating physician credibly opined that the brain trauma was caused by partial strangulation. Even assuming that the mother’s boyfriend caused the injuries, she was, or should have been, aware of the abuse; and she delayed in summoning medical help when Heaven was found comatose. The finding of derivative severe abuse was proper since the mother had a fundamental defect in her understanding of her parental obligations. (Family Ct, Bronx Co)


IN CAMERA STATEMENTS / DUE PROCESS

ILSAPP: The mother appealed from an order of Bronx County Family Court awarding the father sole custody. The First Department affirmed. If properly corroborated, a child’s out-of-court statements regarding abuse or neglect are admissible. Here, in their in camera interviews, the children corroborated the father’s testimony and revealed their custody preferences. Requiring supervision of the mother’s access was proper, since she violated a prior order and maltreated the children. The appellate court rejected her contention that the children’s in camera statements were improperly obtained in a confidential setting. The court cited Matter of Heasley v Morse, 144 AD3d 1407, which explained that a Lincoln hearing may be used to ascertain the child’s wishes and may also result in corroboration of abuse or neglect. An Article 6 custody proceeding is to be contrasted to an Article 10 proceeding, which may involve an adversarial relationship between a child and the accused parent and the child’s testimony as the sole basis for a finding of abuse or neglect—thus implicating due process concerns. (Family Ct, Bronx Co)

People v Darryl T., 166 AD3d 68, 84 NYS3d 458 (1st Dept 10/4/2018)

IAC / CONCESSION RE MENTAL DISORDER

ILSAPP: The defendant was charged with 1st degree robbery and pled not responsible by reason of mental disease or defect. Before learning the conclusions of psychiatric reports, counsel conceded that the defendant had a dangerous mental disorder and waived an initial hearing, resulting in the severest classification and confinement/
treatment level. The defendant sought to withdraw his plea and have an initial hearing. Bronx County Supreme Court denied his application. The defendant appealed, and a First Department justice granted leave to appeal. In the instant decision, the appellate court reversed and remanded for an initial hearing. Such hearing is a critical stage of proceedings, at which a defendant is entitled to the effective assistance. No legitimate strategy could have warranted counsel’s concessions. Mental Hygiene Legal Service (Ana Vuk-Pavlovic and Dennis Feld, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

Matter of Kenneth J. v Lesley B., 165 AD3d 439, 85 NYS3d 42 (1st Dep't 10/4/2018)

ILSAPP: New York County Family Court granted the mother’s motion for summary judgment and suspended all contact between the father and the child. The First Department reversed and remanded. The trial court improperly determined the parties’ custody petitions without a hearing. Even temporary modification of custody requires at least an abbreviated hearing, except in emergency cases. The court granted drastic relief based largely on its in camera interview with the child, motion papers, and an unsworn report by Family Court Mental Health Services (MHS). A child’s expressed preference cannot be dispositive; and the court must consider the age and maturity of the child and potential influence exerted. Family Court improperly considered the MHS report, which was not referenced in the motion nor in admissible form. Moreover, the report did not recommend a suspension of father-child contact. The father represented himself on appeal. (Family Ct, New York Co)

Sehgal v DiRaimondo, 165 AD3d 435, 84 NYS3d 466 (1st Dep't 10/4/2018)

ILSAPP: A lawful permanent resident of the United States, the plaintiff pled guilty in 2014 to certain violations of federal election laws and was sentenced to one year of probation. In the instant legal malpractice action, the allegations included that the plaintiff’s attorneys/defendants erroneously said that after he entered a guilty plea, he was unlikely to be deported; and that if he was placed in removal proceedings, he could seek a waiver from inadmissibility. The plaintiff later traveled abroad. Upon his return to the U.S., he was detained, placed in removal proceedings, and incarcerated for four months. New York County Supreme Court granted the defendants’ motion to dismiss the complaint. The First Department modified, reinstating one claim. Generally, to state a legal malpractice claim arising from negligent representation in a criminal proceeding, the plaintiff must allege his innocence of the underlying offense. See Carmel v Lunney, 70 NY2d 169. However, the plaintiff stated one claim that did not dispute the validity of his conviction—his assertion that he traveled outside the U.S. in reliance on the defendants’ negligent legal advice. (Supreme Ct, New York Co)

Matter of Caron C.G.G., 165 AD3d 476, 85 NYS3d 430 (1st Dep't 10/11/2018)

GUARDIANSHIP / AUNT

ILSAPP: New York County Family Court granted kinship guardianship petitions filed by the maternal aunt. The First Department affirmed. The aunt demonstrated extraordinary circumstances, given that for seven years, the two children had been living with her, while the mother had only sporadic contact. The aunt’s guardianship was in the children’s best interests, since she offered stability and loving care. As required by statute, an age-appropriate consultation had been held with the children. Given that the older child was age 15, her wishes were entitled to some weight, and she wanted to stay with the aunt. The AFC relayed that the younger child was “okay” continuing to live with the aunt if the mother could visit, and the order provided for liberal visitation. (Family Ct, New York Co)

Matter of Dianna P. v Damon B.-D., 165 AD3d 470, 85 NYS3d 62 (1st Dep't 10/11/2018)

RELOCATION / AFFIRMED

ILSAPP: New York County Family Court granted the mother’s petition to relocate with the parties’ child to Atlanta, Georgia. The First Department affirmed. The proof showed that the move would enhance the child’s life. The mother was the sole source of financial support; the father failed to pay child support for several years. Despite an ongoing job search, the mother had been unable to find full-time work in her field in New York. But she obtained a full-time position as a sous-chef in Atlanta. The mother was better able than the respondent to provide a stable home for the child, whom she had primarily cared for since birth, and she had extended family in Georgia. Moreover, the school there offered extracurricular arts programs, and the AFC supported the relocation. While the father would lose weekend visitation, the new schedule allowed for a meaningful relationship. (Family Ct, New York Co)
People v Wong, 165 AD3d 468, 85 NYS3d 432 (1st Dept 10/11/2018)

**Shattered Kneecap Was “Serious Physical Injury”**

**LASCDP:** The First Department ruled that the victim’s injury, a shattered kneecap, met the definition of “serious physical injury” to support a conviction of Assault in the First Degree. (Supreme Ct, New York Co)

People v Allende, 165 AD3d 507, 83 NYS3d 898 (1st Dept 10/18/2018)

**1st Degree Robbery / Dismissed**

**ILSAPP:** The defendant appealed from a judgment of New York County Supreme Court convicting him of 1st degree robbery and two counts of 2nd degree robbery and sentencing him to concurrent terms of eight years. The First Department vacated the 1st degree robbery conviction and dismissed that count. The evidence did not establish the element of display of what appeared to be a firearm. 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 stated that, as to the 2nd degree counts, a sentence of five years would be more appropriate. The defendant was only 21 years old, and he struggled with depression and bipolar disorder. It was the codefendant who violently punched the victim, yet he received only a five-year term. The Center for Appellate Litigation (Megan Byrne, of counsel), represented the appellant. (Supreme Ct, New York Co)

Matter of New York State Off. of Mental Health v Marco G., 167 AD3d 49, 85 NYS3d 441 (1st Dept 10/18/2018)

**Mental Disease / Rehearing Required**

**ILSAPP:** The respondent appealed from an order of New York County Supreme Court, which denied his CPL 330.20 petition for a jury rehearing and review, and from an order of the same court recommitting him from non-secure to secure confinement. The First Department reversed. After a defendant is found not responsible because of mental disease or defect, the court must decide if he has a dangerous mental disorder or is mentally ill and must be committed to the custody of the Commissioner of Mental Health. An aggrieved defendant may request, as of right, a rehearing and review de novo before a jury. The defendant made such request, and his application was erroneously denied. While the CPL does not state that a defendant may appeal from an order denying rehearing and review, this appeal was properly before the Appellate Division, under CPLR 5701 (a) (2) (v), as an appeal as of right from an order resolving a motion on notice and affecting a substantial right. See People v Charles, 162 AD3d 125. Mental Hygiene Legal Service (Diana Goldstein Temkin and Sadie Zea Ishee, of counsel), represented the appellant. (Supreme Ct, New York Co)

People v Pinnacle, 165 AD3d 521, 86 NYS3d 35 (1st Dept 10/18/2018)

**No Defense Right to Be Present at DA’s Material Witness Proceedings**

**LASCDP:** A defendant has no right to be present at a material witness proceeding initiated by the prosecution. The hearing concerns only the continued appearance of the witness, not the content of the witness’s testimony or any issue in the underlying criminal case. (Supreme Ct, New York Co)

People v Johnson, 165 AD3d 556, 85 NYS3d 70 (1st Dept 10/23/2018)

**More Ineffective Assistance / Remittal**

**ILSAPP:** The defendant appealed from a judgment of Bronx County Supreme Court convicting him of 1st degree burglary and 1st degree robbery. The First Department held the appeal abeyance and remitted. Although the defendant did not file a CPL 440.10 motion, the record was sufficient to conclude that he was deprived of effective assistance when counsel failed to advise him that his guilty plea to an aggravated felony would result in mandatory deportation. Counsel merely told the defendant that his plea would have “immigration consequences,” would “impact his ability to stay in the country,” and “will probably very well end up with [defendant] being deported from this country.” The defendant was to be afforded the opportunity to move to vacate his plea upon a showing that there was a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea. The Center for Appellate Litigation, New York (Scott Henney, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

People v Rodriguez, 165 AD3d 546, 86 NYS3d 47 (1st Dept 10/23/2018)

**Ineffective Assistance / Flawed Immigration Advice**

**ILSAPP:** The defendant appealed from a judgment of New York County Supreme Court, convicting him of 1st degree criminal possession of a controlled substance. The

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

First Department held the appeal in abeyance and remitted. Although the defendant did not file a CPL 440.10 motion, the record was sufficient to conclude that he was deprived of effective assistance when counsel failed to advise him that his guilty plea to an aggravated felony would result in mandatory deportation and instead merely advised him that deportation was a possibility. The defendant was to be afforded the opportunity to move to vacate his plea upon a showing that there was a reasonable probability that he would not have pleaded guilty had he been made aware of deportation consequences. The Center for Appellate Litigation, New York (Barbara Zolot of counsel) represented the appellant. (Supreme Ct, New York Co)

**People v Brith**, 165 AD3d 592, 84 NYS3d 778
(1st Dept 10/30/2018)

**CHALLENGE FOR CAUSE / REVERSAL**

**ILSAPP:** The defendant appealed from a judgment of New York County Supreme Court convicting him of drug charges. The First Department reversed and ordered a new trial. The trial court erred in denying the defendant’s challenge for cause to a prospective juror who repeatedly expressed a predisposition to credit police testimony and a belief that innocent defendants would testify. The panelist did not give an unequivocal assurance as to his ability to be fair and impartial. The Legal Aid Society of NYC (Jonathan Garelick, of counsel) represented the appellant. (Supreme Ct, New York Co)

**People v Crovador**, 165 AD3d 610, 87 NYS3d 168
(1st Dept 10/30/2018)

**BOONE RETROACTIVE / REVERSAL**

**ILSAPP:** The defendant appealed from a judgment of Bronx County Supreme Court convicting him of 3rd degree robbery. The First Department reversed and remanded for a new trial. The trial court should have permitted the defendant to introduce expert testimony that witnesses are less likely to accurately identify persons of other racial groups than persons of their own race; and it should have granted the defendant’s request for a cross-racial identification charge. People v Boone, 30 NY3d 521, should be applied retroactively. Since Boone announced a new rule based on state law, its application to cases pending on appeal depended on three factors. See People v Mitchell, 80 NY2d 519. (1) Standards going to the heart of a reliable determination of guilt or innocence favored retroactive application. (2) Extent of judicial reliance on the old rule weighed for prospective application. (3) Retroactive application would not significantly affect the administration of justice. The Legal Aid Society of NYC (Katheryne Martone, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

**People v Jenkins**, 165 AD3d 583, 84 NYS3d 778
(1st Dept 10/30/2018)

**NJ DRUG FELONY A PREDICATE, DESPITE NO AGENCY DEFENSE**

**ILSAPP:** A drug conviction from New Jersey qualified as a predicate felony, despite the unavailability of an agency defense. (Supreme Ct, New York Co)

**Matter of Jolanda K. v Damian B.,** 166 AD3d 445, 88 NYS3d 153 (1st Dept 11/13/2018)

**DEFAULT ORDER / VISITATION DENIED**

**ILSAPP:** The father appealed from an order of Bronx County Family Court that denied his motion for visitation and for vacatur of a final order. Upon the father’s default, the trial court granted sole custody of the child to the mother. The First Department observed that default orders are disfavored in custody cases, and thus vacatur rules are not applied rigorously. While the father’s excuse was unreasonable, the final custody order could not stand, because it did not provide for visitation and offered no rationale for that drastic result. The hearing proof established that the father had regular unsupervised and overnight visitation with the child; and the AFC said that the child strongly wished to resume visits. In remanding, the appellate court cited Matter of Michael B., 80 NY2d 299, 318 (new developments may have particular significance in custody matters; appellate court may take notice of new allegations indicating record is no longer sufficient for a determination, requiring remittal). George Reed represented the appellant. (Family Ct, Bronx Co)

**People v Vasquez**, 166 AD3d 433, 85 NYS3d 755
(1st Dept 11/13/2018)

**NO PRS NOTICE / PLEA VACATED**

**ILSAPP:** The defendant appealed from a judgment of New York County Supreme Court convicting him of 2nd degree robbery. The First Department reversed. At no time before sentencing did the court inform the defendant that post-release supervision would be included in the enhanced sentence he would receive if he violated conditions of his plea agreement. The ADA’s and defense counsel’s references to PRS, immediately before sentence was imposed, did not provide notice that would require the defendant to preserve the claim. See People v Louree, 8 NY3d 541. The Office of the Appellate Defender (Victorien Wu, of counsel) represented the appellant. (Supreme Ct, New York Co)
Matter of Abass D., 166 AD3d 517, 88 NYS3d 162 (1st Dept 11/20/2018)
**VISITATION MOD / REVERSAL**

**ILSAPP:** The defendant appealed from an order of New York County Family Court which expanded the respondents’ visitation to unsupervised day visits on the condition that no other adults were present, unless cleared by petitioner. The First Department reversed. Family Court’s determination that the respondents should have unsupervised visitation with the children lacked a sound and substantial basis in the record. The respondents refused to even acknowledge the possibility that the children—who tested positive for sexually transmitted diseases (STD)—were sexually abused. (Family Ct, New York Co)

People v Brown, 166 AD3d 506, 89 NYS3d 29 (1st Dept 11/20/2018)

**PEOPLE’S APPEALS / SUPPRESSION UPHeld**

**ILSAPP:** The People appealed from orders of Bronx County Supreme Court which granted the defendant Salkey’s motion to suppress physical evidence and the defendant Salkey’s motion to suppress a lineup identification. The First Department affirmed. At the time of the gunpoint seizure of the defendants, the police had an anonymous tip that failed to provide reasonable suspicion to support immediate forcible seizure without any inquiry. Furthermore, the People did not provide credible evidence to validate a search of the bags incident to a lawful arrest. The record also supported the suppression of an officer’s lineup identification of Salkey, who had fled the scene, as the unattenuated fruit of the unlawful stop and frisk. The prosecution’s vague testimony provided no explanation of how Salkey came to be placed in a lineup and no basis for finding attenuation from the initial illegality. The Legal Aid Society of NYC (Jose Rodriguez-Gonzalez, of counsel) represented Brown. Kevin McLoone represented Salkey. (Supreme Ct, Bronx Co)

People v Mason, 166 AD3d 498, 87 NYS3d 2 (1st Dept 11/20/2018)

**ANALYST MORE THAN CONDUIT RE DNA / AFFIRMED**

**ILSAPP:** The defendant appealed from a judgment of New York County Supreme Court convicting him of 1st degree robbery and 4th degree CPW. The First Department affirmed. The testimony of an analyst from the Office of the Chief Medical Examiner, which linked the defendant’s DNA to a sample found on a firearm recovered from the crime scene, did not violate his right of confrontation. The analyst’s testimony amply established that she used her own independent analysis of the raw data to make the comparison, and the analysis was not merely a conduit for the conclusions of others. (Supreme Ct, New York Co)

People v Joe, 166 AD3d 514, 86 NYS3d 432 (1st Dept 11/20/2018)

**MOTION TO WITHDRAW PLEA / DENIAL UPHeld**

**ILSAPP:** The defendant appealed from a judgment of Bronx County Supreme Court convicting him of 2nd degree conspiracy. The First Department affirmed. The plea court providently exercised its discretion in denying his motion to withdraw his plea and in declining to appoint new counsel. The allegedly coercive conduct by defense counsel amounted to nothing more than frank advice about the consequences of going to trial. By correcting a factual misstatement by his client, counsel did not take an adverse position. The defendant’s pro se ineffective assistance of counsel claims were unreviewable on direct appeal because they involved matters outside the record. (Supreme Ct, Bronx Co)

Matter of Juliette S. v Tykym S., 166 AD3d 509, 88 NYS3d 164 (1st Dept 11/20/2018)

**CUSTODY MOD / FULL HEARING NEEDED**

**ILSAPP:** The mother appealed from an order of New York County Family Court which granted a motion to dismiss her custody modification petition. The First Department reversed and remanded. Family Court improperly dismissed the petition without a hearing. It was error to conclude that the child’s fear of the father was unfounded where the court did not have sufficient information to determine best interests. Elena Rizzo represented the appellant. (Family Ct, New York Co)

Matter of Michael B. v Latasha T.-M., 166 AD3d 480, 89 NYS3d 83 (1st Dept 11/20/2018)

**CUSTODY MOD / FULL HEARING NEEDED**

**ILSAPP:** The father appealed from order of Bronx County Family Court which denied his petition for modification of custody. The First Department reversed and remanded for a full hearing on the issue of whether it was in the child’s best interests to relocate with his mother to Florida on a permanent basis. Family Court held a brief hearing and correctly determined that the mother’s testimony about her unilateral relocation constituted a change in circumstances. However, the court abused its discretion in making a final determination without a full hearing at which the parties and the child’s attorney had an opportunity to present relevant evidence. Carol Kahn represented the appellant. (Family Ct, Bronx Co)
First Department continued

**Matter of Natalie A. v Chadwick P.,** 166 AD3d 528, 89 NYS3d 50 (1st Dept 11/27/2018)

**DOMESTIC VIOLENCE / ERRANT VENUE CHANGE**

ILSAPP: The mother appealed from an order of New York County Family Court which granted the father’s motion to change venue and transfer her family offense and custody petitions to Clinton County. The First Department held that Family Court had improvidently exercised its discretion, where the parties lived in Clinton County from 2011 to 2017, when the mother fled to escape a physical altercation in the home. The Family Court failed to consider the allegations of domestic violence against the father in Clinton County. In support of her intent to remain in New York County, the mother submitted an affidavit that she had secured a full-time job, health insurance, and a pediatrician. The allegations of domestic violence and the safety of the mother supported keeping New York County as the venue for these proceedings. Andrew Baer represented the appellant. (Supreme Ct, New York Co)

**People v Holmes,** 166 AD3d 559, 89 NYS3d 58 (1st Dept 11/29/2018)

**3RD DEGREE ROBBERY / LESSER INCLUDED OFFENSE**

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court convicting him of 1st degree robbery. The First Department reversed and ordered a new trial. The trial court should have granted his request to charge 3rd degree robbery as a lesser included offense. There was a reasonable view of the evidence that the defendant forcibly stole property from the victim, but did not use, or threaten to use, a knife while doing so. The court should also have granted his request for an adverse inference charge as to surveillance photos taken in the victim’s livery cab after other photos, introduced at trial, were taken. The defendant established that the missing photos were “reasonably likely to be material” since they might have shown what type of weapon or object was used by the perpetrator. This error was not harmless, and it compounded the failure to submit the lesser included offense. The Center for Appellate Litigation, (Allison Kahl of counsel) represented the appellant. (Supreme Ct, Bronx Co)

**People v Allison,** 167 AD3d 171, 89 NYS3d 143 (1st Dept 11/29/2018)

**FORGED INSTRUMENT / OUT-OF-STATE INVALID PREDICATE**

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court and an order denying his CPL 440.20 motion. The trial court erred in sentencing him as a second felony offender based on his prior conviction in New Jersey of the crime of uttering a forged instrument. The out-of-state crime did not require the same intent as the New York crime. Therefore, the defendant was entitled to resentencing. Davis Polk & Wardwell and the Legal Aid Society of NYC represented the appellant. (Supreme Ct, New York Co)

**People v Desselle,** 167 AD3d 418, 86 NYS3d 887 (1st Dept 12/4/2018)

**28-MONTH MOTION DELAY WAS MOSTLY DUE TO PEOPLE**

ILSAPP: The majority turned away a constitutional speedy-trial motion, despite a 28-month delay due to failure to disclose the victim’s medical records that was mostly the fault of the People. In light of the other Taranovich factors, seriousness of offense and lack of prejudice to the defense case, the Court found that the constitutional case for dismissal had not been met. (Supreme Ct, New York Co)

The judges noted that a statutory 30.30 claim might have succeeded, but was waived as part of defendant’s plea bargain.

**Matter of Michael G. v Katherine C.,** 167 AD3d 494, 91 NYS3d 7 (1st Dept 12/13/2018)

The order that granted the father’s custody modification petition, awarding him sole custody of the subject child, must be modified, and the matter is remanded for immediate proceedings. There were adequate allegations to support a finding of changed circumstances, and for the court to temporarily change custody. These included the father’s sworn testimony that the mother had unilaterally prevented his visitation, in violation of the parties court-ordered custody and visitation agreement, and that the mother had coached the three-year old child to make false allegations against the father. The court erred in not holding an evidentiary hearing, at which both sides and the attorney for the child would have an opportunity to present their respective cases, before issuing a final order of custody based on an examination of the “best interest” of the child given the totality of the circumstances.

As there was no basis to find that the child’s interest was served by having no contact for a year with the mother, who had been the primary caretaker, the mother’s contact must be reinstated. Where the mother did not have a history of engaging in frivolous litigation, prohibiting her from filing future petitions without court leave was error. (Family Court, New York Co)

**People v Carter,** 167 AD3d 513, 88 NYS3d 339 (1st Dept 12/20/2018)

**INEFFECTIVE ASSISTANCE NOT TO HIRE INTOX EXPERT**

ILSAPP: One reading of the Intoxilyzer showed intoxication, in contrast to an earlier reading that had
shown no intoxication. Given the conflicting readings on the central issue of the case—whether or not defendant was intoxicated—it was ineffective assistance for defense counsel not to consult an expert. (Supreme Ct, New York Co)

**People v Rivera**, 167 AD3d 517, 88 NYS3d 340 (1st Dept 12/20/2018)

**CHALLENGE FOR CAUSE DENIAL / REVERSED**

**ILSAPP:** The defendant appealed from a judgment of Bronx County Supreme Court convicting him of 1st degree assault and 4th degree CPW. The First Department reversed and ordered a new trial. Supreme Court erred in denying the defendant’s challenge for cause to a prospective juror who liked “hearing both sides of the story” and who would find it difficult to reach a verdict “without hearing from the defendant.” The prospective juror was unable to give the requisite assurance that she would follow the law as charged. The Office of the Appellate Defender (Katherine Pecore, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

**Matter of Abel A. v Imanda M.,** 167 AD3d 528, 91 NYS3d 429 (1st Dept 12/27/2018)

**DEFAULT CUSTODY ORDER / VACATED**

**ILSAPP:** The mother appealed from an order of Bronx County Family Court which denied her motion to vacate a default custody order. The First Department reversed. The father consented that the mother would have sole custody of their two children. A few months later, he sought custody, alleging that she was interfering with his parenting time. Upon her failure to appear at an inquest, his petition was granted. The mother’s vacatur motion was thereafter denied. The First Department reversed. Default orders are disfavored in custody cases, so vacatur rules are not applied rigorously. The mother did not show a reasonable excuse for her default. However, she had a meritorious defense: the children had resided primarily with her, and insufficient evidence was submitted regarding a change of circumstances. Also, the court should have sua sponte appointed an AFC. Thomas Villecco represented the appellant. (Family Ct, Bronx Co)

**People v Sookdeo**, 164 AD3d 1268, 82 NYS3d 114 (2nd Dept 9/12/2018)

**JUDGE OVERSTEPS / NEW TRIAL**

**ILSAPP:** A Queens County Supreme Court jury convicted the defendant of 2nd degree gang assault and other charges. The Second Department reversed, citing **People v Yut Wai Tom**, 53 NY2d 44. The Sookdeo trial judge interjected itself into the questioning of multiple witnesses, elicited step-by-step details about how the defendant was identified as a suspect, and created the impression that the court was an advocate for the People. Such actions deprived the defendant of a fair trial. A new trial before a different judge was ordered. Christopher Renfroe represented the appellant. (Supreme Ct, Queens Co)

**People v Spruill**, 164 AD3d 1270, 82 NYS3d 520 (2nd Dept 9/12/18)

**PEOPLE’S APPEAL / NO BRADY VIOLATIONS**

**ILSAPP:** The People appealed from an order of Kings County Supreme Court granting the defendant’s CPL 440.10 motion following a hearing, in part based on Brady violations. The Second Department reversed and reinstated the defendant’s 2nd degree murder conviction. The nondisclosure of a DOCCS record reflecting one eyewitness’s apparent suicide attempt was not a Brady violation.

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1 Summaries marked with these initials, ILSAPP, are courtesy of the New York State Office of Indigent Legal Services, from the ILS appellate listserv.
tion, since the subject information was not favorable to the defense: at the time of the suicide attempt, the inmate reported that he feared the defendant. Further, the record in DOCCS’s possession was not imputable to the People. The fact that the prosecutor had obtained a material witness order to secure the testimony of a second eyewitness was also not Brady material, where the record indicated that such witness feared the defendant. (Supreme Ct, Kings Co)

**People v Viera**, 164 AD3d 1277, 82 NYS3d 112 (2nd Dept 9/12/2018)

The court improperly denied a defense request to exercise a peremptory challenge, warranting reversal. The defendant and two codefendants had agreed that counsel for one codefendant would exercise peremptories on behalf of all, but when juror number eight was seated following exercise of defense peremptories as to the first subgroup of prospective jurors, counsel for the other codefendant indicated that one juror had been missed, saying, “We don’t want eight.” The court refused the challenge to juror number eight, saying, “You already—you told me what the preempts are ….” Whether to entertain a belated peremptory is left to the discretion of the court, but here the delay in the challenge was de minimis, and the momentary oversight by the defense caused no discernable interference or undue delay. (Supreme Ct, Kings Co)

[Ed. Note: For the reasons set forth in this opinion, reversal was also granted to a codefendant in People v Freeman (164 AD3d 1257, 81 NYS3d 563 [9/12/2018])]  

**People v Falls**, 164 AD3d 1361, 81 NYS3d 763 (2nd Dept 9/19/2018)

NEW COUNSEL APPOINTED FOR PLEA WITHDRAWAL

LASCDF: When defendant moved pro se to withdraw his guilty plea, his attorney told the court that there was no basis to withdraw the plea. The attorney’s position, because adverse to defendant’s, detracted from defendant’s right to counsel.

The lower court erred in not appointing new counsel to represent defendant on the motion to withdraw his plea. The case was remitted for appointment of new counsel and a report from the court on its disposition of the motion. (County Ct, Orange Co)

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

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**People v Jones**, 164 AD3d 1363, 85 NYS3d 75 (2nd Dept 9/19/2018)

NO REASONABLE SUSPICION / INCREDIBLE OFFICER

ILSAPP: After Queens County Supreme Court denied the defendant’s motion to suppress, he pleaded guilty to weapon possession charges. The Second Department reversed and dismissed the indictment. At the suppression hearing, a police officer testified that, at 1:50 a.m., he was on patrol in an unmarked police vehicle. The defendant was walking on the sidewalk 25 feet away, with his hand in his jacket pocket. The officer supposedly observed that the defendant had a slight bulge in his pocket and asked him to stop, but the defendant walked faster. The officer followed on foot, saw a firearm protruding from the defendant’s pocket, raced toward him, and recovered the weapon. The intrusion was not justified. The encounter escalated to a level-three intrusion, but the requisite reasonable suspicion was absent. A concurring justice found the officer’s testimony—that he could see a slight bulge from 25 feet away—to be incredible as a matter of law. Appellate Advocates (A. Alexander Donn, of counsel) represented the appellant. (Supreme Ct, Queens Co)

**Matter of Olga L.G.M.**, 164 AD3d 1341, 81 NYS3d 764 (2nd Dept 9/19/2018)

GUARDIANSHIP PETITION / ERRANT DISMISSAL

ILSAPP: Nassau County Family Court erred when it dismissed a petition by the mother to be appointed guardian of the subject child so that she could petition for special immigrant juvenile status. The mere fact that paternity had not been established for the putative father did not preclude the guardianship petition. The matter was remitted for an expedited hearing. Bruno Joseph Bembi represented the appellant. (Family Ct, Nassau Co)

**People v Ramirez**, 164 AD3d 1377, 83 NYS3d 666 (2nd Dept 9/19/2018)

ID BOLSTERING / REVERSAL

ILSAPP: Upon a jury verdict, the defendant was convicted in Queens County Supreme Court of 2nd degree robbery. The Second Department reversed and ordered a new trial. The prosecutor elicited improper testimony from a detective, who stated that he arrested the defendant after the complainant identified him in a lineup. Such testimony implicitly bolstered the complainant’s testimony by providing official confirmation of the identification. The instant error was not harmless and was compounded by improper comments regarding identification made during the People’s summation. Appellate Advocates (Jonathan Schoepp-Wong, of counsel) represented the appellant. (Supreme Ct, Queens Co)
Second Department continued

**People v Saqline K., 164 AD3d 1368, 84 NYS3d 187**
(2nd Dept 9/19/2018)

The defendant’s motion for a protective order enjoining use by the federal Department of Homeland Security (DHS) of a presentence report, from a New York matter in which he was adjudicated a Youthful Offender, was properly denied. Because DHS did not obtain the report in the course of any disclosure process pursuant to CPLR article 31, “there is no basis for the issuance of a protective order pursuant to CPLR 3103(c).” Further, under the US Constitution, a state has no power to interfere in federal immigration proceedings. (Supreme Ct, Queens Co)

**People v Cepero, 164 AD3d 1465, 83 NYS3d 220**
(2nd Dept 9/26/2018)

**INDECENT MATERIALS CHARGES / DISMISSAL**

**ILSAPP:** The defendant testified several nude photographs of his girlfriend to her son. In Orange County Court, following a jury trial, he was convicted of 2nd degree disseminating indecent material to minors, the attempt to commit such crime, and endangering the welfare of a child. Upon his appeal, the People sought dismissal of the indecent materials counts, given the finding in *American Libraries Assn. v Pataki*, 969 F Supp 160, that Penal Law § 235.21 (3) is unconstitutional. The Second Department dismissed the counts in the interest of justice. Anthony Iannarelli, Jr. represented the appellant. (County Ct, Orange Co)

**People v Tromp, 164 AD3d 1479, 83 NYS3d 622**
(2nd Dept 9/26/2018)

**CPW 2ND INDICTMENT / JURISDICTIONAL DEFECT**

**ILSAPP:** In Richmond County Supreme Court, upon a jury verdict, the defendant was convicted of 2nd degree CPW. The Second Department vacated the conviction. Penal Law § 265.03 exempts from criminal liability a person’s possession of a loaded firearm occurring in his/her home or place of business. The instant indictment failed to allege that possession occurred outside the defendant’s home or business. Such jurisdictional defect was not waivable. Appellate Advocates (Cynthia Colt, of counsel) represented the appellant. (Supreme Ct, Orange Co)

**People v White, 164 AD3d 1480, 84 NYS3d 210**
(2nd Dept 9/26/2018)

**MANSLAUGHTER INDICTMENT / NO JURISDICTIONAL DEFECT**

**ILSAPP:** The People appealed from an order of Suffolk County Supreme Court dismissing an indictment charging the defendant with 1st degree manslaughter. The Second Department reversed. According to the evidence before the grand jury, the victim confronted his former girlfriend and the defendant as they were leaving a bar together. The victim and the defendant fought. The victim fell to the ground and was not defending himself when the defendant stomped on him, resulting in his death. In his motion to dismiss, the defendant contended that the prosecutor failed to instruct the grand jury on the defense of justification. However, the appellate court held that a justification claim was precluded by the defendant’s use of deadly physical force after the threat against him ended. (Supreme Ct, Suffolk Co)

**People v Wood, 164 AD3d 1481, 84 NYS3d 208**
(2nd Dept 9/26/2018)

**O’RAMA VIOLATION / NEW TRIAL**

**ILSAPP:** The defendant appealed from a murder conviction rendered in Kings County Supreme Court. The Second Department reversed and ordered a new trial. The trial court’s handling of two jury notes violated CPL 310.30 and *People v O’Rama*, 78 NY2d 270. The notes requesting material evidence and a readback of witness testimony were substantive, not ministerial, inquiries. Yet Supreme Court failed to read the notes into the record and to afford counsel a full opportunity to suggest appropriate responses. The mode of proceedings error did not require preservation. The Legal Aid Society–NYC (Arthur Hopkirk, of counsel) represented the appellant. (Supreme Ct, Kings Co)

**Matter of Alana H., 165 AD3d 663, 85 NYS3d 108**
(2nd Dept 10/3/2018)

**BRUISING / NO NEGLECT**

**ILSAPP:** The parents appealed from a Dutchess County Family Court finding that they neglected Sophia H. and derivatively neglected Alana H. The Second Department reversed. The mother left the children with her boyfriend while she went to work. Upon return, she noticed bruising on Sophia’s buttocks, but both children said that Sophia fell, and the mother believed that no medical care was needed. When delivering the children to the father for a visit, the mother alerted him to the bruising. When it became darker, the parents agreed that Sophia should be seen by her pediatrician. An exam revealed that the pattern of bruises was indicative of spanking. Family Services filed petitions against the parents. At the fact-finding hearing, there was no evidence that the mother knew of the boyfriend’s propensity to hurt the children; and she could not be deemed to know the significance of the bruising pattern. Kelly Enderley and Christopher Montalto represented the mother and father, respectively. (Family Ct, Dutchess Co)
The court erred by dismissing the branch of the petition that alleged abuse and derivative abuse because the injuries sustained by the child Talia, while “clearly inflicted and not accidental,” were found not to meet the definition of abuse found in Penal Law 10.00(10). “Abuse” as used in that statute and Family Court Act 1012 is similar but “the definitions are not identical.” No serious injury is required for a finding of abuse if it is shown that a child was “sufficiently endangered” by the creation of
Second Department continued

“a substantial risk of serious injury’ …” The injury here required immobilization of the arm for over two weeks, caused pain and discomfort, could take months to heal, and raised concern about loss of function and growth potential. The respondents failed “to provide a reasonable and adequate explanation for the injuries” and the court’s assessment of conflicting expert testimony is supported by the record. A finding of derivative abuse should have been made as to the other children given the nature and severity of abuse inflicted on Talia, “even in the absence of direct evidence that the respondents had actually abused them ….” (Family Ct, Queens Co)

Matter of Jonah B. (Riva V.), 165 AD3d 790, 85 NYS3d 597 (2nd Dept 10/10/2018)

The finding that the maternal grandmother neglected the children was not rendered academic as such an adjudication “constitutes a permanent and significant stigma ….” The grandmother’s contention that she was not a person legally responsible for the children in question is rejected. She came to the home every day, slept over regularly, up to two or three times a week, performed care for the child Talia including feeding, changing diapers and clothing, and, with the mother, bathing her. The court’s crediting of the mother’s testimony over the grandmother’s efforts to minimize her role is entitled to deference. The grandmother’s “care was analogous to parenting and occurred in a household or family setting ….” (Family Ct, Kings Co)

People v Powell, 165 AD3d 842, 84 NYS3d 563 (2nd Dept 10/10/2018)

MURDER REVERSED / DNA PROOF MISREPRESENTED

ILSAPP: The defendant appealed from a Kings County Supreme Court judgment convicting him of 2nd degree murder and 2nd degree CPW. The Second Department reversed and ordered a new trial. A witness said that he saw the defendant shoot the victim; and an expert addressed DNA on the gun. Two unpreserved issues warranted reversal: prosecutorial misconduct and the lack of an accomplice-in-fact instruction. During summation, the prosecutor misrepresented the DNA analysis, thus depriving the defendant of a fair trial. Moreover, she encouraged inferences of guilt based on facts not in evidence and improperly injected her own credibility into the trial and vouched for a witness’ credibility. Further, counsel was ineffective in failing to object to the summation and to request an accomplice corroboration charge. Appellate Advocates (A. Alexander Donn, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Salako, 165 AD3d 846, 86 NYS3d 93 (2nd Dept 10/10/2018)

CALIFORNIA ROBBERY NOT NEW YORK EQUIVALENT

ILSAPP: Defendant’s adjudication as a second violent felony offender was vacated on appeal. The California first-degree robbery conviction that served as a predicate felony did not have an equivalent New York offense designated as a violent felony. (Supreme Ct, Queens Co)


Paternity / Equitable Estoppel

ILSAPP: Before resolving the issue of equitable estoppel in a paternity proceeding, Kings County Family Court directed the petitioner and the child to submit to genetic marker testing. The child appealed, and the Second Department stayed enforcement of the order pending appeal. The appellate court reversed the challenged order and remitted. Pursuant to Family Court Act § 532, if Family Court decided that equitable estoppel should not be applied based on the child’s best interests, the court should order genetic marker or DNA tests. (Family Ct, Kings Co)


SIJS / Not for JD

ILSAPP: Queens County Family Court held that the subject child was not an intended beneficiary of Special Immigrant Juvenile Status provisions, since he was not placed in the custody of the Commissioner of Social Services due to his status as an abused, neglected, or abandoned child. Instead, he was placed after committing acts which, if committed by an adult, would have constituted serious crimes. The Second Department affirmed, observing that allowing the child tried to use his wrongdoings and JD adjudication to meet the SIJS dependency requirement would subvert Congress’s intent in enacting the SIJS scheme. (Family Ct, Kings Co)

Matter of Miglior v Santiago, 165 AD3d 942, 86 NYS3d 533 (2nd Dept 10/17/2018)

CUSTODY / FULL HEARING REQUIRED

ILSAPP: Without a hearing, Westchester County Family Court granted the mother’s petitions by modifying a prior custody order and denying the father’s petitions. He appealed, and the Second Department reversed and remitted. Where a facially sufficient petition has been filed, modification of custody orders generally requires a comprehensive hearing. Family Court relied solely on information provided at court conferences and the
hearsay statements and conclusions of a forensic evaluator whose opinions were untested by either party. Nancy Nissen represented the appellant. (Family Ct, Westchester Co)

**People v Mota**, 165 AD3d 988, 84 NYS3d 569 (2nd Dept 10/17/2018)

**SORA / ERRANT UPWARD DEPARTURE**

**ILSAPP:** Westchester County Supreme Court designated the defendant a level-three sex offender. The Second Department reversed and reduced his adjudication to level two. The trial court erred in granting the People’s request for an upward departure. Such a departure is permitted only if the court concludes that an aggravating factor was not adequately accounted for by the Guidelines. A SORA court must engage in a three-step inquiry: (1) whether the People articulated, as a matter of law, a legitimate aggravating factor; (2) whether the People established, by clear and convincing evidence, facts supporting that factor; and (3) whether the presumptive risk level would result in an underassessment of the danger of re-offense. Here the People failed to identify an aggravating factor; the defendant’s abuse of trust within a family relationship was adequately accounted for by the Guidelines. Richard Willstatter represented the appellant. (Supreme Ct, Westchester Co)

**People v Breazil**, 165 AD3d 1159, 86 NYS3d 192 (2nd Dept 10/24/2018)

**RIGHT TO CONFRONTATION / NO VIOLATION**

**ILSAPP:** The defendant appealed from a judgment of Kings County Supreme Court convicting him of attempted 2nd degree murder, 1st degree robbery, and 1st degree burglary. The Second Department held that the testimony of an analyst from the Office of the Chief Medical Examiner did not violate his right to confrontation. That testimony established that: (1) the analyst used her independent analysis on raw data to conclude that the complainant’s DNA was on a wallet recovered from the defendant, as well as on a broken knife found near the arrest site; and (2) it was 157 billion times more likely than not that the defendant’s DNA was included in a mixture of skin cells on a sweatshirt found by the knife. The analyst did not act as a conduit for the conclusions of others. The reviewing court reduced the sentence for attempted murder from 25 to 20 years and for the other crimes from 25 to 10 years and ordered that they all run concurrently. Appellate Advocates (Jenin Younes, of counsel) represented the appellant. (Supreme Ct, Kings Co)

**People v Johnson**, 165 AD3d 1168, 85 NYS3d 585 (2nd Dept 10/24/2018)

**RIGHT TO COUNSEL AT LINEUP VIOLATED**

**LASCDP:** The detective who conducted the lineup knew that defendant had counsel but nonetheless did not notify the attorney of the impending lineup. In the absence of any exigent circumstances justifying this omission, defendant’s right to counsel at the lineup was violated. The Second Department suppressed the identification. (Supreme Ct, Kings Co)

**People v Medina**, 165 AD3d 1184, 84 NYS3d 376 (2nd Dept 10/24/2018)

Because “the record is sufficient for this Court to make its own findings of fact and conclusions of law,” the designation of the defendant as a level two sex offender is upheld despite the court’s erroneous suggestion that the defendant had to “prove the existence of mitigating circumstances by clear and convincing evidence, as opposed to a preponderance of the evidence ….” But “the Supreme Court erred in, sua sponte, designating the defendant a sexual predator. Neither the Board of Examiners of Sex Offenders nor the People had recommended such a designation, and the defendant was never afforded an opportunity to be heard on the issue of whether he should be so designated ….” (Supreme Ct, Kings Co)

**People v Stokeling**, 2165 AD3d 1180, 85 NYS3d 172 (2nd Dept 10/24/2018)

**DMV SUPERVISOR TESTIMONY LACKED PERSONAL KNOWLEDGE**

**LASCDP:** To establish defendant’s knowledge of his license suspension, a DMV supervisor, without personal
knowledge, testified as to the mailing of a notice of suspension. It was error to permit the testimony.

Relying on a Sixth Amendment rationale, the Second Department pointed out that such testimony failed to protect defendant’s right of confrontation. He had no opportunity to cross-examine a DMV official who had been directly involved in sending out license suspension notices. (Supreme Ct, Kings Co)

**Matter of Sult v Sult**, 165 AD3d 1152, 87 NYS3d 323 (2nd Dept 10/24/2018)

**FAMILY OFFENSE PETITION / REINSTATED**

**ILSAPP:** The father appealed from an order of Nassau County Family Court which dismissed his family offense petition on the ground that it failed to state a cause of action. The Second Department reversed, reinstated the petition, and remitted the matter. The petition stated that, following an argument over a Skype video call where the mother screamed and threatened the children, she went to the father’s house and damaged his doorbell, address number, and car. The petition also alleged that, on multiple occasions, the mother physically and verbally attacked the father, screamed at the children, and physically hurt them. Affording the petition a liberal construction, it adequately alleged that the mother committed criminal mischief and 2nd degree harassment. The father was not required to specify the value of the destroyed property. Furthermore, the petition adequately alleged that, with the intent to harass, annoy, or alarm another person, the mother engaged in a course of conduct which alarmed and seriously annoyed another person and served no legitimate purpose. The father represented himself upon appeal. (Family Ct, Nassau Co)

**People v Gerardi**, 165 AD3d 1281, 85 NYS3d 553 (2nd Dept 10/31/2018)

**SEXUAL OFFENSES DULCITOSUS / DISMISSAL**

**ILSAPP:** The defendant appealed from a judgment of Queens County Supreme Court convicting him of multiple sexual offenses. The Second Department vacated rape and criminal sexual act convictions under counts 28–47 and 49–58. The complainant’s testimony demonstrated that each of those counts was premised on multiple acts of rape and criminal sexual act, and the counts were thus void for duplicitousness. Appellate Advocates (Alexis Ascher, of counsel) represented the appellant. (Supreme Ct, Queens Co)

**People v Martinez**, 165 AD3d 1288, 86 NYS3d 143 (2nd Dept 10/31/2018)

**CHALLENGE FOR CAUSE / CONSOLIDATION / REVERSAL**

**ILSAPP:** The defendant appealed from a judgment of Kings County Supreme Court convicting him of 2nd degree burglary and other charges. The Second Department reversed and ordered new trials. In two separate indictments, the defendant was accused of committing four separate home burglaries. As the People conceded, the trial court erred in denying the defendant’s for-cause challenge to a prospective juror who indicated that, given his experience in a high-crime area, it was a “legitimate question” whether he could be fair. The prospective juror was not rehabilitated by a collective response. Since the defendant exercised a peremptory challenge to remove the prospective juror and later exhausted his challenges, the issue was preserved. Supreme Court also erred in granting the People’s motion to consolidate the indictments. There was a substantial disparity in the evidence tying the defendant to the offenses in the separate indictments. The jury may have convicted the defendant as to the charges in one of the indictments due to the cumulative effect of the evidence. Appellate Advocates (Anders Nelson, of counsel) represented the appellant. (Supreme Ct, Kings Co)

**People ex rel. Wells v DeMarco**, 168 AD3d 31, 88 NYS3d 518 (2nd Dept 11/4/18)

**NY OFFICERS / NO IMMIGRATION ARRESTS**

**ILSAPP:** New York law does not permit state and local law enforcement officers to effectuate civil immigration arrest orders for up to 48 hours after they would normally have been released. ICE warrants and detainers do not fall within CPL definitions of warrants, which do not apply to immigration violations. Since such warrants and detainers are not issued by courts and are administrative in nature, they are unenforceable by state and local agencies in New York.

**Matter of Argueta v Santos**, 166 AD3d 608, 88 NYS3d 76 (2d Dept 11/7/2018)

**SIJS PETITION / SPECIAL FINDINGS MODIFIED**

**ILSAPP:** The father appealed from an order of Nassau County Family Court that denied the motion of the subject child and the father to amend a prior special findings order. The Second Department modified. The father had filed a Family Court Act Article 6 petition for custody of the subject child to obtain an order making the specific findings needed to enable the child to apply for Special
Second Department continued

Immigrant Juvenile Status (SIJS). The child filed a motion seeking an order making the requisite special findings. Family Court granted the child’s motion, and thereafter, the child submitted a petition for SIJS. The petition was initially approved. However, USCIS then stated its intention to revoke the approval based on deficiencies in the special findings order. The child moved to amend the findings, and the father joined in the motion. Family Court denied the motion. The appellate court amended the special findings order to clarify that the basis for Family Court’s jurisdiction was Family Court Act § 651(a) and to specify that it would not be in the child’s best interests to be returned to El Salvador because the mother was unable to protect the child from harm by gang members there. Bruno Bembi represented the appellant. (Family Ct, Nassau Co)

People v Batista, 167 AD3d 69, 86 NYS3d 492
(2nd Dept 11/7/2018)

Sentence Upheld / Appeal Waiver Angst

ILSAPP: On appeal from a sentence imposed by Queens County Supreme Court on a 1st degree robbery conviction, the defendant contended that the term was excessive. The Second Department affirmed, finding that the appeal waiver was valid and precluded review of the sentence. However, the appellate court took the opportunity to urge trial courts to give greater attention to the colloquy used in taking a waiver of the right to appeal. People v Brown, 122 AD3d 133, described a proper colloquy. Moreover, the CJI & Model Colloquies include an apt model colloquy for an appeal waiver. While such a waiver is meant to advance finality and hold parties to their bargains, trial courts often conduct perfunctory waiver colloquies, which then serve as a pathway to future litigation. In concurrence, Justice Scheinkman expressed concern about the growing appeal waiver jurisprudence. In case after case, the same trial judges use flawed formulations, thus causing reviewing courts to devote countless hours to scrutinizing the inquiries. Use of a model colloquy would help. The “appeal waiver” was really an “appeal limitation.” Regardless of the label, appeal waivers have become part and parcel of plea bargaining. On the one hand, appeals are perfected in only a small fraction of plea cases; perhaps waivers cause many defendants to forgo appeals. On the other hand, in the past five years, waivers were found invalid in the First, Second, Third, and Fourth Departments in 15, 200, 75, and 90 cases, respectively. While waivers are part of the consideration for the plea deal, invalidating a waiver does not undo the plea, so prosecutors have an incentive to be proactive in ensuring judges ask the right questions. Appellate Advocates (A. Alexander Donn, of counsel), represented the appellant. [A Nov. 9 New York Law Journal article noted that this decision comes as reducing backlogs remains a top priority for New York judges, and that the Second Department is a prime example of an overburdened court.] (Supreme Ct, Queens Co)

Lueker v Lueker, 166 AD3d 603, 87 NYS3d 123
(2nd Dept 11/7/2018)

Inability to Pay / No Contempt

ILSAPP: In post-divorce proceedings, the plaintiff appealed from an order of Kings County Supreme Court which granted the defendant’s motion to hold him in contempt for failure to comply with a prior order. The Second Department reversed. The prior order directed the plaintiff to post a bond for $150,000, as security for payment of tuition for the parties’ daughter, as required by the judgment of divorce. In response to the defendant’s showing that she was prejudiced by the plaintiff’s knowing disobedience of a lawful order of the court expressing an unequivocal mandate, the plaintiff proffered credible evidence of a defense—inability to obtain the bond. The appellant represented himself on appeal. (Supreme Ct, Kings Co)

People v Malik, 166 AD3d 650, 85 NYS3d 454
(2nd Dept 11/7/2018)

Pre-Padilla Case / IAC Hearing Ordered

ILSAPP: The defendant appealed from a Queens County Supreme Court order which denied his CPL 440.10 motion without a hearing. The Second Department ordered a hearing. The defendant moved to the United States from Pakistan in 2003 as a lawful permanent resident. Upon a plea of guilty in 2007, he was convicted of 1st degree reckless endangerment. The defendant completed a program, and five years’ probation was imposed, consistent with the plea deal. His 440 motion alleged that he had been deprived of effective assistance by counsel’s incorrect statement that he would not be subject to deportation as a consequence of his plea. Padilla v Kentucky was inapplicable; but prior to Padilla, the Court of Appeals held that inaccurate advice about immigration consequences fell below an objective standard of reasonableness. See People v McDonald, 1 NY3d 109. The defendant affirmed that he rejected an initial plea offer that included incarceration because of the risk of deportation. Defense counsel did not dispute these facts. The defendant was entitled to a hearing regarding the errant advice and whether it was reasonably probable that, if correctly advised, he would have pleaded guilty. Labe Richman represented the appellant. (Supreme Ct, Queens Co)
Matter of Tyler D., 166 AD3d 612, 87 NYS3d 338  
(2nd Dept 11/7/2018)

PINS ORDER / REVERSED

ILLSAPP: In a Family Court Act article 7 proceeding, the appellant challenged an order rendered by Putnam County Family Court. The Second Department reversed. In 2015, the assistant principal at the appellant's high school filed a PINS petition based on persistent truancy. Represented by counsel, the appellant admitted to truancy and consented to an ACD order. The Probation Department alleged that the appellant violated the terms of the ACD order. Following a hearing, Family Court issued an order finding violations, restoring the matter to the calendar, vacating the ACD order, adjudging the appellant to be a PINS, and directing that he be placed in the custody of the local Social Services Department for up to 12 months. Although that term had expired, the order was not academic, in light of potential enduring consequences of a violation finding. Family Court Act § 741(a) provided that at the initial appearance of a respondent in a proceeding, and at the commencement of any hearing, the respondent and his parent must be advised of his right to remain silent. The failure to abide by such mandate constituted reversible error, even if a respondent consented to the disposition in the presence of counsel or failed to seek to withdraw his admissions. Here Family Court never apprised the appellant of his right to remain silent, and that error could not be considered harmless. William Horwitz represented the appellant. (Family Ct, Putnam Co)

Matter of Unity T., 166 AD3d 629, 87 NYS3d 330  
(2nd Dept 11/7/2018)

The order of fact finding and disposition that found Dennis T. abused an unrelated child, and derivatively neglected his own biological child, is affirmed, even though Dennis T. had only known the unrelated child for two weeks. That he was living with the child during that time, and assuming parental responsibilities, was sufficient to support a finding that he was a functional equivalent of a parent (parent substitute), and therefore a proper respondent here. Additionally, a finding of abuse against both the mother of the child and Dennis T was appropriate, even though it was never established who actually injured the child. As it was established that the child was abused, and the child’s mother and Dennis T. had access to the child at the time of the abuse, the burden shifted to them to prove they were not individually responsible for the abuse. That burden was not met. (Family Ct, Orange Co)

Matter of Berg v Berg, 166 AD3d 766, 88 NYS3d 414  
(2nd Dept 11/14/2018)

ORDER OF COMMITMENT / BIASED JUDGE

ILLSAPP: The father appealed from an order of commitment of Nassau County Family Court, which was based on his willful violation of spousal and child support obligations. On appeal, the father contended that the trial judge was biased. The Second Department agreed. The judge stated that the father: (1) “symbolize[d] everything that’s wrong with the world today;” (2) was “selfish, self-interested, and self-seeking” and “lazy and arrogant;” and (3) was “the last guy” that the Judge “would want to be in a fox hole with” because he would “fold like a cheap suit.” Further, the judge compared the father’s experiences to his own, describing his own past misfortune and how he picked himself up to become a judge. The father was ordered committed for four months—which was four times the incarceration period recommended by the Support Magistrate. The appeal as to the jail time was dismissed as academic; but the order was reversed insofar as it found a willful violation, and the matter remitted for further proceedings before a different Judge. Lisa Siano represented the appellant. (Family Ct, Nassau Co)

People v Caldavado, 166 AD3d 792, 88 NYS3d 236  
(2nd Dept 11/14/2018)

Denial of the defendant’s motion to vacate her conviction is upheld, where trial counsel, who did not call any expert witness, instead retained a consulting expert and elicited testimony on cross-examination of prosecution witnesses that supported the defense theory. Counsel provided meaningful representation notwithstanding the decision not to call an expert to counter the 13 medical professionals, including nine who testified as expert witnesses, called by the prosecution in this case involving shaken baby syndrome. (Supreme Ct, Queens Co)


People v Fletcher, 166 AD3d 796, 88 NYS3d 92  
(2nd Dept 11/14/2018)

JUSTIFICATION AND TEMPORARY LAWFUL POSSESSION

ILLSAPP: Defendant was acquitted of first-degree assault but convicted of lesser includeds based on a knife fight in an apartment. The acquittal could have been based on a justification defense. The Second Department reversed the lesser convictions. The trial judge should have instructed the jury to simply stop deliberating once it acquitted on the top assault count, since the defense rendered the use of force “entirely lawful.”
Second Department continued

In addition, the weapon possession conviction was reversed due to failure of the judge to give an instruction as to temporary lawful possession. There was evidence in the record to support such a defense, particularly in light of the justification defense. (Supreme Ct, Nassau Co)

**People v Ghingoree, 166 AD3d 799, 88 NYS3d 202**
(2nd Dept 11/14/2018)

**IMMIGRATION CONSEQUENCES / PLEA VACATED**

**ILSAPP:** The non-citizen defendant appealed from a judgment of Suffolk County Court convicting him of a drug possession charge. The Second Department reversed and vacated the plea. In a motion to withdraw the plea, the defendant said that counsel failed to inform him of immigration consequences. The appellate court held that the defendant had not received effective assistance and there was a reasonable probability that, if properly advised, he would not have pleaded guilty. He had lived in the U.S. since age four and had significant family ties here, including a wife, children, parents, and siblings. Alfred Cicale represented the appellant. (County Ct, Suffolk Co)

**People v Jones, 166 AD3d 803, 88 NYS3d 88**
(2nd Dept 11/14/2018)

**POLICE TESTIMONY RE GANG VIOLATED CRAWFORD**

**LASCDP:** Police witnesses testifying about gang behavior violated Crawford v. Washington by partially basing testimony on debriefings of gang members and Facebook posts. This evidence was testimonial hearsay that defendants were not able to cross-examine and that was wrongly conveyed to the jury for its truth.

In addition, to the extent that the police appeared as experts, they impermissibly acted as fact witnesses by interpreting and marshaling this gang-related evidence for the jury. (Supreme Ct, Queens Co)

**People v Lucas, 166 AD3d 810, 86 NYS3d 164**
(2nd Dept 11/14/2018)

**LEGALLY INSUFFICIENT EVIDENCE / CONSPIRACY**

**ILSAPP:** As to another defendant in the SNOW gang matter [People v Jones, 166 AD3d 803 is the other SNOW case summarized], the evidence was legally insufficient to establish the defendant’s guilt of 2nd degree conspiracy. No direct or circumstantial evidence tied this defendant to any plan specifically intended to kill either victim. The defendant was not present at an alleged planning meeting and was not listed as a participant in any social media discussions in which other SNOW gang members discussed the targets. Joseph DeFelice represented the appellant. (Supreme Ct, Queens Co)

**Matter of Majesty M., 166 AD3d 775, 89 NYS3d 96**
(2nd Dept 11/14/2018)

The order of disposition concluding that the mother neglected the subject children due to unsanitary conditions in the home, and narcotics trafficking, must be modified to remove the portion regarding unsanitary conditions in the home. While the house was in general disarray, the evidence does not support a finding, “that the child’s physical, mental, or emotional condition was impaired or in imminent risk of impairment,” (Family Ct, Orange Co)

**Matter of Thomas R.K. v Tamara S.K., 166 AD3d 773, 86 NYS3d 503**
(2nd Dept 11/14/2018)

**THERAPEUTIC VISITS / IMPROPER DELEGATION**

**ILSAPP:** The mother appealed from an order of Orange County Family Court granting her only limited supervised therapeutic parental access to the parties’ two children, while awarding sole custody to the father. The Second Department found that such determination was supported by a sound and substantial basis in the record, but that the trial court erred in failing to set forth a schedule to designate a provider for the mother’s parental access, and instead implicitly delegating those issues to the parties. Thus, the matter was remitted. Rhett Weires represented the appellant. (Family Ct, Orange Co)

**People v Andujar, 166 AD3d 893, 86 NYS3d 508**
(2nd Dept 11/21/2018)

**MANSLAUGHTER / AGAINST WEIGHT**

**ILSAPP:** The defendant appealed from a judgment of Queens County Supreme Court convicting him of 1st degree manslaughter. The Second Department dismissed the indictment finding the verdict against the weight of evidence. An acquittal would not have been unreasonable based on the testimony of a co-defendant, the sole eyewitness; several police detectives who interviewed him; and certain documentary evidence. On cross-examination, the co-defendant’s testimony was incredible and unreliable. The Legal Aid Society, NYC (Svetlana Kornfeind and Scott Thomson, of counsel) represented the appellant. (Supreme Ct, Queens Co)

**People v Wade, 166 AD3d 912, 88 NYS3d 239**
(2nd Dept 11/21/2018)

**POLICE MISCONDUCT NOT BRADY / ATTORNEY KNEW**

**ILSAPP:** The defendant appealed from a judgment of Queens County Supreme Court convicting him of 3rd degree CPW. The defendant asserted that the People committed a Brady violation by failing to disclose documents relating to IAB [Internal Affairs Bureau]
investigations and federal civil lawsuits regarding two police officers who testified against him. Such evidence was favorable to the defendant for impeachment purposes; but defense counsel knew of the documents; and there was no reasonable possibility that disclosure would have changed the outcome. (Supreme Ct, Queens Co)

**Krystle L.B. v Crystal L.W., 166 AD3d 876, 85 NYS3d 891 (2nd Dept 11/21/2018)**

**INCARCERATED PARENT / RIGHT TO BE PRESENT**

**ILSAPP:** After a hearing at which the incarcerated father was neither present nor represented, Dutchess County Family Court granted the petition of Krystle L.B. to be appointed permanent guardian of the subject child. The Second Department reversed and remitted. An incarcerated parent has a fundamental right to be heard in a proceeding impacting the care and control of his child. The father’s rights were violated when the Family Court elected to hear and determine the guardianship petition without producing him in court or affording him an opportunity to be heard. Dell Atwell represented the appellant. (Dutchess Co, Family Co)

**People v Ellis, 166 AD3d 993, 88 NYS3d 537 (2nd Dept 11/28/2018)**

**DISSENT / RIGHT TO COUNSEL OF OWN CHOOSING**

**ILSAPP:** The defendant appealed from a judgment of Queens County Supreme convicting him of attempted 2nd degree murder and other crimes. The Second Department affirmed. One justice dissented based on three distinct issues. (1) While an indigent defendant’s right to the assistance of counsel is not equated with a right to choose counsel, once an attorney-client relationship has been formed between assigned counsel and the defendant, the defendant enjoys a right to continue to be represented by that attorney. Supreme Court should have inquired as to whether the defendant’s prior counsel was ready, willing and able to accept the new assignment. (2) The defendant was deprived of a fair trial because he was compelled to wear the same prison clothing for three days of jury selection and five days of trial testimony. His complaints about the clothing were sufficient to preserve his claim. There was no rule that clothing constitutes identifiable prison garb only if it is orange or a jumpsuit. (3) The trial court erred in denying a for-cause challenge to a prospective juror based, inter alia, on his employment and familial relationships with the NYPD and allegations in another case that the defendant was involved in shooting an officer. (Supreme Ct, Queens Co)

**Matter of Gallousis v Gallousis, 166 AD3d 972, 89 NYS3d 213 (2nd Dept 11/28/2018)**

**SUPPORT VIOLATION / RIGHT TO COUNSEL VIOLATION**

**ILSAPP:** The father appealed from an order of Orange County Family Court finding a willful violation of support provisions and from an order of commitment. The Second Department reversed. The father was not advised of his right to assigned counsel, as required by Family Ct Act § 262 (a). Further, there was no indication that he validly waived his right to counsel; the court failed to conduct the required searching inquiry. Under these circumstances, the father was deprived of his right to counsel and reversal was required, without regard to the merits of his position in the enforcement proceeding. Richard Herzfeld represented the appellant. (Orange Co, Family Co)

**People v Richard, 166 AD3d 1014, 88 NYS3d 460 (2nd Dept 11/28/2018)**

**SENTENCE REDUCED / DISSENT**

**ILSAPP:** The defendant appealed from a judgment of Kings County Supreme Court convicting him of 1st degree manslaughter and sentencing him to 15 years followed by post-release supervision. The Second Department reduced the prison term to 10 years. A dissenting justice disagreed with such modification. At sentencing, Supreme Court had noted that it had read letters from the defendant’s family and friends; acknowledged that he did not have a prior criminal history; and stated that the presentence report indicated that the defendant had a difficult upbringing. The sentence imposed, which was in the middle of the statutorily permissible range, was a proper exercise of discretion, given the facts of the crime, the dissenter opined. The victim had gone to the wrong door of an unfamiliar apartment and jostled the door. There was no credible evidence of the victim’s attempt to commit a burglary. In any event, after any possibility of a burglary had terminated, the defendant set out on a “manhunt;” set upon the victim without allowing him to explain; and inflicted significant head trauma by kicking and stomping him. Appellate Advocates (Alexis Ascher of counsel) represented the appellant. (Supreme Ct, Kings Co)

**People v Drayton, 167 AD3d 646, 90 NYS3d 54 (2nd Dept 12/5/2018)**

**DUBARRY DECISION / NOT APPLIED RETROACTIVELY**

**ILSAPP:** In People v Dubarry, 25 NY3d 151, the Court of Appeals concluded that a defendant cannot be convicted of depraved indifference murder and intentional murder on a transferred intent theory where he or she killed one victim in the course of attempting to kill somebody else. In that case, it was error for the trial court to submit
both charges to the jury in the conjunctive, rather than in
the alternative. In the instant case, the Second Department
concluded that the Dubarry rule should not be applied
retroactively to the defendant’s collateral attack on the
judgment convicting him of 2nd degree murder and other
crimes. The appellate court thus affirmed the challenged
order of Dutchess County Court denying his CPL 440.10
motion. (County Ct, Dutchess Co)

Levitin v Levitin, 167 AD3d 589, 89 NYS3d 256
(2nd Dept 12/5/2018)

CUSTODY UPHeld / SHUNNING IN RELIGIOUS COMMUNITY

ILLSAPP: In a divorce judgment, Supreme Court proper-
ly considered allegations of domestic violence in award-
ing sole custody of the children to the mother. The deter-
mination, that her proposed relocation to California with
the children was in their best interests, was sound. The
mother demonstrated that the father ostracized her with-
in their Orthodox Jewish community in New York; that
she could not meet the family’s living expenses here; and
that if she were permitted to relocate, she would receive
financial assistance from her parents, as well as help with
child care and rent-free housing. Although relocation
would have an impact on the father’s parental access, a
liberal schedule would allow for the continuation of a
meaningful relationship. He should be given additional
holiday access, and his telephone contact should be mod-
ified to accommodate religious observances. (Supreme Ct,
Queens Co)

Matter of Montanez v Tompkinson, 167 AD3d 616,
90 NYS3d 62 (2nd Dept 12/5/18)

UCCJEA / INCONVENIENT FORUM

ILLSAPP: The father appealed from an order of Kings
County Family Court which declined jurisdiction on the
ground that New York was an inconvenient forum and
stayed the proceedings pending the reopening of the
mother’s custody proceeding in Hawaii. The Second
Department reversed. The parties’ child was born in New
York in 2016. The following year, the mother and child
moved to Hawaii, after the father allegedly committed
domestic violence against the mother in the child’s pres-
ence. The mother sought a temporary order of protection
in Hawaii, and the father initiated a custody proceeding
in New York. Both states have adopted the UCCJEA.
Family Court should not have declined to exercise juris-
diction and should not have designated Hawaii as a more
appropriate forum, without first being assured by the
Hawaii Court that its prior orders—issued without sub-
ject matter jurisdiction—were vacated. Moreover, any stay
of the father’s New York custody proceeding should have

been conditioned on proceedings being promptly recom-
med in Hawaii. Upon remittal, Family Court was to
determine whether New York was an inconvenient forum
and Hawaii was a more appropriate forum. Mark Brandys
represented the father. (Family Ct, Kings Co)

Matter of Phoenix, 167 AD3d 626, 89 NYS3d 720
(2nd Dept 12/5/2018)

ADOPTION GRANTED / REVERSAL

ILLSAPP: The petitioners and the child appealed from an
order of Suffolk County Family Court denying an
adoption petition. The Second Department reversed and
granted the petition. The subject child, born in 2008, was
removed from his mother’s care and placed in foster care
in 2011 and then placed with the petitioners in 2014. In
2017, they sought to adopt the child. A hearing estab-
ished that previous foster parents did not adopt him because
of behavioral problems. A psychologist testified that the
child was severely traumatized, had attachment disorder,
and could not control his emotions and behavior. The
petitioners were very capable parents; could manage the
child; and could provide for his emotional and intellectu-
al development and provide a safe, nurturing environ-
ment. (Family Ct, Suffolk Co)

Matter of Saad A., 167 AD3d 596, 89 NYS3d 249
(2nd Dept 12/5/2018)

FCA § 1028 ORDER / REVERSAL

ILLSAPP: The mother appealed from an order of
Queens County Family Court, which denied her Family
Ct Act § 1028 application for the return of her child to her
custody. The Second Department reversed. The petitioner
agency commenced a neglect proceeding against the par-
ents and made the § 1027 application for removal, which
was granted. The parents’ application for return of the
child was denied after a hearing. Although the child had
since been returned, the appeal was not academic, since
the removal created a permanent, significant stigma. An
application for the return of a temporarily removed child
must be granted, unless that would present an imminent
risk to the child’s life or health. The trial court must: (1)
weigh whether imminent risk could be mitigated by rea-
sonable efforts to avoid removal; (2) balance that risk
against the harm removal might bring; and (3) determine
what action is in the child’s best interests. The salient con-
cerns here—that the parents’ efforts to safety-proof their
home were inadequate and subjected the child to possible
risk of ingesting harmful substances—did not constitute
an imminent risk that could not have been mitigated. The
petitioner had been directed to assist the family in safety-
proofing the home and failed to do so. The Center for
Family Representation (Claibourne Henry, of counsel)
represented the appellant. (Family Ct, Queens Co)
Second Department continued

**People v Sarner**, 167 AD3d 663, 86 NYS3d 900 (2nd Dept 12/5/2018)

*COUNSEL’S ADVERSE POSITION / NEW COUNSEL NEEDED*

**ILSAPP:** The defendant appealed from a judgment of Nassau County Supreme Court convicting him of criminal contempt. The Second Department remanded for further proceedings on his motion to withdraw his plea of guilty, for which he would be appointed new counsel. At sentencing, the defendant had stated that he wished to withdraw his plea of guilty because he was innocent and was coerced into pleading guilty. His attorney stated that he did not want to be a party to the motion and added: “I fought long and hard to get this. I thought we had this.” The court advised the defendant not to say anything further; warned that he could be charged with perjury; denied the motion; and imposed sentence. The defendant’s right to counsel was denied when his attorney took a position adverse to him. Before determining the motion, the trial court should have assigned a new attorney. Moreover, in advising the defendant not to say anything further because he could be charged with perjury, the court denied the defendant the opportunity to present his contentions. Steven Feldman represented the appellant. (Supreme Ct, Nassau Co)

**Matter of Shaundell M. v Trevor C.,** 167 AD3d 615, 89 NYS3d 330 (2nd Dept 12/5/2018)

**PATERNITY / ESTOPPEL APPLIED**

**ILSAPP:** The putative father appealed from an order denying his application for DNA genetic marker testing and from an order of filiation. The Second Department affirmed. The mother commenced a paternity/support proceeding to adjudicate the appellant to be the father of the child, born in 2005. No father was named on the birth certificate, and the mother never married. Family Court conducted a hearing to determine if equitable estoppel should preclude DNA testing. The proof showed that the child considered the appellant to be her father, called him “dad,” and wanted a relationship with him; and he held himself out to be her father. Moreover, the child referred to the appellant’s older children as her sister and brother and had a relationship with them. (Family Ct, Queens Co)

**Matter of Dennis v Davis-Schloemer**, 167 AD3d 738, 90 NYS3d 89 (2nd Dept 12/12/2018)

The order denying the maternal grandmother’s petition that, among other things, requests a modification of a prior order to give her sole legal and physical custody of the subject child, is affirmed. There was a sound and substantial basis in the record to support the court’s decision. Given the totality of the circumstances, it was not in the child’s best interest to take custody away from the paternal grandmother. It was appropriate to grant the maternal grandmother bi-weekly “Facetime” calls and additional visitation as agreed by the parties. (Family Ct, Orange Co)

**Matter of Raigosa v Zafirakopoulos**, 167 AD3d 748, 89 NYS3d 322 (2nd Dept 12/12/2018)

The order that granted the respondent’s application to dismiss a family offense petition is reversed and the petition is reinstated. It was improper for the court to summarily conclude that the parties had not been involved in an intimate relationship, which would provide subject matter jurisdiction, based solely on the absence of a sexual relationship. The issue of whether an “intimate” relationship exists under section 812 of the Family Court Act is fact specific and must be determined on a case by case basis. The matter is remanded for a hearing. Other factors that must be considered are “the nature or type of relationship, regardless of whether the relationship is sexual in nature, the frequency of interaction between the persons, and the duration of the relationship.” (Family Ct, Queens Co)

**People v Ramos**, 167 AD3d 787, 88 NYS3d 513 (2nd Dept 12/12/2018)

**SORA / ERROR**

**ILSAPP:** The defendant appealed from an order of Kings County Supreme Court designating him a level-three sex offender. The Second Department reversed and remitted. At the SORA hearing, the court found to be premature the defendant’s request for a downward departure from the presumptive risk level. That was error; the trial court should have addressed the merits. A defendant seeking a downward departure has the initial burden of: (1) as a matter of law, identifying an appropriate mitigating factor—one which tends to establish a lower likelihood of re-offense or danger to the community and which is not adequately addressed by the Guidelines; and (2) establishing supporting facts by a preponderance of the evidence. If the defendant makes that showing, the court must determine whether a departure is warranted. Appellate Advocates (Jenin Younes, of counsel) represented the appellant. (Supreme Ct, Kings Co)

**Rudy v Rudy**, 167 AD3d 751, 91 NYS3d 267 (2nd Dept 12/12/2018)

**MAINTENANCE MOD / PROOF MISREAD**

**ILSAPP:** The father appealed from an order of Orange County Family Court denying his objections to an
order dismissing his petition for a downward modification of maintenance. The Second Department reversed and remitted. A stipulation of settlement incorporated, but not merged, into the judgment of divorce required the petitioner to pay maintenance until 2021. An extreme hardship standard applied. The Magistrate misconstrued the evidence of the father’s biweekly income as showing his weekly income. Further, he was denied an opportunity to submit proof as to diligent efforts to find a job. The father represented himself upon appeal. (Family Ct, Orange Co)

Matter of Williams v Jenkins, 167 AD3d 758, 90 NYS3d 81 (2nd Dept 12/12/2018)

CUSTODY / RASH RULING TO PUNISH FATHER

ILSAPP: The father appealed from an order of Kings County Supreme Court which granted the mother’s petition for sole custody and permission to relocate with the child to Illinois and suspended the father’s parental access. The Second Department reversed and remitted for a hearing before a different Judge. A prior order provided for joint legal custody, physical custody to the mother, and parental access to the father. Neither parent could relocate without consent or a court order. After the mother petitioned to relocate, the father purportedly appeared at the courthouse and screamed profanities at courthouse staff. The trial court then summarily made the challenged ruling, stating that, due to his obstreperous behavior, the father’s parental access was suspended. But a full hearing was needed to resolve factual issues. It appeared that the order served more as a punishment to the father than as a custody award in the child’s best interests. Russell Bloch represented the appellant. (Supreme Ct, Kings Co)

Matter of Alivia E., 167 AD3d 880, 89 NYS3d 714 (2nd Dept 12/19/2018)

RIGHT TO COUNSEL / REVERSED

ILSAPP: The father appealed from an order of Suffolk County Family Court finding that he neglected the subject children and releasing them to the custody of the non-respondent mother. The Second Department reversed. A respondent in an Article 10 proceeding has a right to counsel. He may waive that right, provided that he makes a knowing, voluntary, and intelligent waiver. The trial court must conduct a searching inquiry. Family Court failed to: (1) detail dangers and disadvantages of self-representation; (2) adequately apprise the father of the importance of having an attorney in a neglect proceeding, particularly where there was a related criminal matter; (3) adequately explore factors bearing on a competent waiver; and (4) ensure that he acknowledged his understand-
The order granting the application of the mother, to dismiss the father’s petition requesting modification of his supervised parenting time, and prohibiting the father from filing any further petitions without permission from the court, is reversed and the matter remitted for further proceedings. This petition, like a previous one also decided today, Matter of Gonzalez v Santiago (167 AD3d 885 [2018]), was dismissed for failure to state a change in circumstances. Here, the father affirmed in his petition that he now had a job, but due to a child support garnishment, he was still unable to afford the cost of professionally supervised parenting time. This was sufficient to entitle him to an opportunity for a full and fair hearing. It was also an improvident use of discretion to preclude the father from filing future petitions without permission, as there was no evidence that father had abused the process. (Family Ct, Orange Co)

People v Hernandez, 167 AD3d 936, 90 NYS3d 235 (2nd Dept 12/19/2018)

440 / DEPRAVED INDIFFERENCE / REVERSED

ILSAPP: The defendant appealed from an order of Queens County Supreme Court denying his CPL 440.10 motion without a hearing. The Second Department reversed; vacated a 2001 judgment convicting the defendant of 2nd degree murder upon a jury verdict; and dismissed the murder count, without prejudice to the People to re-pursue appropriate charges to another Grand Jury. People v. Payne, 3 NY3d 266, signaled a change in the law regarding depraved indifference murder. There the Court of Appeals first held that, absent unusual circumstances, a one-on-one shooting or knifing can almost never qualify as depraved indifference murder. The new law did not apply retroactively to convictions that became final prior to the change. The court agreed with the defendant’s legal insufficiency arguments. Jonathan Edelstein represented the appellant. (Supreme Ct, Queens Co)

Termination of Rights / REVERSED

Matter of Jaylen R.B., 167 AD3d 871, 90 NYS3d 139 (2nd Dept 12/19/2018)

ILSAPP: The mother appealed from orders of Kings County Family Court finding that she permanently neglected her child and terminating her parental rights. The Second Department reversed. The petitioner agency failed to establish that the mother failed to maintain contact with, or plan for, the future of the children. She testified that she complied with all requirements communicated to her, including visiting with the children, undergoing mental health evaluations, participating in treatment, undergoing drug testing, completing parenting skills classes, visiting the children’s school, and keeping up with their health status. Joel Borenstein represented the appellant. (Family Ct, Kings Co)

Matter of Poltorak v Poltorak, 167 AD3d 903, 91 NYS3d 125 (2nd Dept 12/19/2018)

The custody order regarding the subject child must be reversed and a hearing held to determine a custody arrangement that is in the child’s best interests. Where domestic violence is alleged, it must be considered as a factor when determining the best interests of the child; there were allegations here that the father beat the child and locked him out of the home. The court did not have sufficient evidence before it to make a sound conclusion. (Family Ct, Kings Co)

People v Smith, 167 AD3d 944, 90 NYS3d 112 (2nd Dept 12/19/2018)

CPW / CONCURRENT SENTENCES / MODIFIED

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court convicting him, upon a jury verdict, of multiple counts of 3rd degree CPW and other crimes. The Second Department modified by providing that the sentences imposed on three CPW counts would run concurrently. Such convictions were based on the defendant’s act of constructively possessing three guns in the same location at the same time. The mere fact that the defendant possessed three guns did not prove three separate acts of possession. To the extent that prior Second Department authority so held, those cases should no longer be followed. Appellate Advocates (Kendra Hutchinson, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Matter of Akeliah A., 167 AD3d 999, 88 NYS3d 904 (2nd Dept 12/26/2018)

There was sufficient evidence presented by Administration for Children Services (ACS) to support a finding of derivative abuse of the respondent’s child, namely that another child had suffered “extensive inflicted injuries” at the hands of the respondent. Article 10 of the Family Court Act states that, “proof of the abuse … of one child shall be admissible evidence on the issue of the abuse or neglect of any other child.” (Family Co, Queens Co)
**People v Holmes**, 167 AD3d 1039, 89 NYS3d 674 (2nd Dept 12/26/2018)

**Improper Bolstering / Harmless**

**ILSAPP:** The defendant appealed from a Kings County Supreme Court judgment of conviction of 2nd degree murder and another crime, upon a jury verdict. At trial, a police detective testified that the defendant was arrested after a lineup. The Second Department held that the testimony—which could have led the jury to believe that the lineup ID induced police action—constituted improper bolstering. But ID proof was strong. At the time of the shooting, an eyewitness had watched as the defendant approached him in a well-lit area. He recognized the defendant, whom he’d seen before. Further, physical evidence was consistent with the witness’ account. Given the strength of the ID testimony and the fleeting nature of the improper testimony, it was unlikely that the jury would have acquitted the defendant, if not for the bolstering. (Supreme Ct, Kings Co)

**People v Jordan**, 167 AD3d 1044, 91 NYS3d 159 (2nd Dept 12/26/2018)

Contrary to the prosecution’s contention, the holding in **People v Boone** (30 NY3d 521 [2017])—that a party is entitled to a requested charge on cross-racial identification when identification is an issue and the identifying witness appears to be of a race different from that of the defendant—applies retroactively to cases pending on direct appeal. The court’s error here in denying the defendant’s request for a jury instruction on cross-racial identification was harmless. (County Ct, Westchester Co)

**Matter of Meeya P.,** 167 AD3d 1018, 91 NYS3d 511 (2nd Dept 12/26/2018)

**Neglect Reinstated / Domestic Violence**

**ILSAPP:** The petitioner appealed from an order of Dutchess County Family Court finding that the agency had failed to establish neglect by the father. The Second Department reversed, found neglect, and remitted. Family Court correctly found that the mother’s out-of-court statements to police concerning domestic disputes were not admissible as excited utterances. However, neglect was established by her in-court admission that she and the father had physically fought in the child’s presence and by proof of the parents’ history of domestic violence. (Family Ct, Dutchess Co)

**People v Thomas**, 167 AD3d 1050, 91 NYS3d 157 (2nd Dept 12/26/2018)

**Suppression Denial / Rationale Unclear**

**ILSAPP:** The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree CPW and other crimes, upon a jury verdict. At a suppression hearing, a police officer testified that he observed the defendant exchange a carton of cigarettes for money. When approaching the defendant, the officer saw duffel bags in his vehicle. One was open and contained cigarette cartons bearing Georgia tax stamps. An officer designated to drive the defendant’s vehicle found a loaded gun in a closed drawer under a car seat. In a written decision, the Supreme Court denied suppression of the gun and the cigarettes “for the reasons stated on the record.” The suppression court ruled from the bench that the police recovery of the cigarettes was lawful under enumerated search warrant exceptions. But the court did not address the gun. The Second Department observed that the appellate court is limited to reviewing errors that may have adversely affected the appellant, and it has no power to review issues not ruled upon. The matter was therefore remitted as to suppression of the gun. Appellate Advocates (Sean Murray, of counsel) represented the appellant. (Supreme Ct, Queens Co)

**Matter of State of New York v Timothy R.,** 168 AD3d 146, 89 NYS3d 678 (2nd Dept 12/26/2018)

**MHL Art. 10 / Errant Note Response**

**ILSAPP:** The respondent appealed from an order of Westchester County Supreme Court which found that he suffered from a mental abnormality and was a dangerous sex offender requiring civil confinement. The Second Department reversed. A jury note indicated confusion as to the evidence required to find mental abnormality. The court’s response failed to clarify that, to make the finding, the jury had to conclude that at least one of the State’s experts clearly and convincingly established that the respondent had a condition that predisposed him to commit a sex offense. Mental Hygiene Legal Service represented the appellant. (Supreme Ct, Westchester Co)
Garner represented the appellant. (County Ct, Broome Co)

In Broome County Court, the defendant pleaded guilty to a drug charge with the understanding that he would be placed on interim probation to complete outpatient drug rehabilitation. If he was unsuccessful, sentencing would be up to County Court. Upon a VOP, the defendant was sentenced to three years in prison, plus two years’ post-release supervision. The Third Department held that the plea was defective, since the defendant had not been made aware that, if he failed in treatment, the sentence would include a PRS component. The judgment was reversed and the matter remitted. Thomas Garner represented the appellant. (County Ct, Broome Co)

People v Wooden, 164 AD3d 1575, 81 NYS3d 924 (3rd Dept 9/27/2018)

INTERIM PROBATION / FLAWED PLEA

ILSAPP: In Broome County Court, the defendant pleaded guilty to a drug charge with the understanding that he would be placed on interim probation to complete outpatient drug rehabilitation. If he was unsuccessful, sentencing would be up to County Court. Upon a VOP, the defendant was sentenced to three years in prison, plus two years’ post-release supervision. The Third Department held that the plea was defective, since the defendant had not been made aware that, if he failed in treatment, the sentence would include a PRS component. The judgment was reversed and the matter remitted. Thomas Garner represented the appellant. (County Ct, Broome Co)

Matter of Crisell v Fletcher, 165 AD3d 1426, 86 NYS3d 249 (3rd Dept 10/18/2018)

NO FAILURE TO PROSECUTE / REVERSAL

ILSAPP: Delaware County Family Court erred in dismissing the mother’s petition (seeking to direct the grandparents to facilitate court-ordered visitation) based on her failure to prosecute. Although the mother was not present on a hearing date, counsel explained her absence and was ready to call the grandparents as witnesses, as directed by the mother. Under these circumstances, there was no failure to prosecute. The matter was remitted to continue the fact-finding hearing. Monique McBride represented the appellant. (Family Ct, Delaware Co)

Matter of Ferguson v Weaver, 165 AD3d 1397, 86 NYS3d 274 (3rd Dept 10/18/2018)

GRANDPARENT VISITATION / HEARING NEEDED

ILSAPP: The maternal grandparents appealed from an order of Saratoga County Family Court, which granted the motion of the paternal grandmother to dismiss their petition. The Third Department reversed and remitted. The fact that the maternal grandparents could join the mother during her weekly parenting time was not dispositive. Family Court relied on information from prior proceedings that were not part of the record. Since the record presented a material factual dispute, an evidentiary hearing was needed to resolve standing and best interests. Elena Tastensen represented the appellants. (Family Ct, Saratoga Co)

Matter of Fisher v Perez, 165 AD3d 1419, 86 NYS3d 256 (3rd Dept 10/18/2018)

RELOCATION / ERROR TO DENY PERMISSION

ILSAPP: The mother appealed from an order of Broome County Family Court which denied her request to relocate with the parties’ child to Texas to live with and near family. The Third Department granted her sole legal custody and permission to relocate. Because Family Court had not yet issued an initial custody determination, strict application of Tropea was not required. The record included no evidence as to the father’s relationship with the child. Given his significant criminal history, including domestic violence against the mother, joint legal custody was improper. The matter was remitted to set a schedule for telephone calls and visits. Alena Van Tull represented the appellant. (Family Ct, Broome Co)

Matter of Hiles v Hiles, 165 AD3d 1394, 85 NYS3d 267 (3rd Dept 10/18/2018)

UCCJEA / HEARING NEEDED

ILSAPP: The mother appealed from an Albany County Family Court order dismissing her custody modification application. Since 2014, neither parent had resided in Mississippi, where a custody order had been entered. The father lived in Colorado, and the mother and child in New York. Family Court held conferences with counsel and the parties and with the Mississippi judge who presided over their matrimonial action. The court then dismissed the mother’s application, stating that Mississippi had retained jurisdiction. The Third Department reversed and remitted. Family Court failed to make a record of all communications and to give the parties the opportunity to present facts and legal arguments. If Mississippi determined that New York was a more appropriate forum, Family Court could exercise jurisdiction. Elena Defio Kean represented the appellant. (Family Ct, Albany Co)

Matter of Hoppe v Hoppe, 165 AD3d 1422, 86 NYS3d 252 (3rd Dept 10/18/2018)

RELOCATION PROPER / MORE VISITS TO DAD

ILSAPP: The father appealed from an order of Chemung County Family Court granting the mother’s petition to relocate with the parties’ two children. The Third Department modified. The mother had valid reasons to relocate 50 miles from the father’s home. Her new husband was contractually required to live near the hos-

1 Summaries marked with these initials, ILSAPP, are courtesy of the New York State Office of Indigent Legal Services, from the ILS appellate listserv.
pital where he worked as a psychiatrist. The relocation would reduce the mother’s daily commute and allow her to spend more time with the children. However, the challenged order reduced the father’s parenting time, so the appellate court granted additional summer vacation time. Matthew Hug, Albany, for appellant. (Family Ct, Chemung Co)

**Matter of Liana HH., 165 AD3d 1386, 86 NYS3d 278**
(3rd Dept 10/18/2018)

**ABUSE / PRESUMPTION OVERCOME**

**ILSAPP:** The father appealed from an order of Sullivan County Family Court adjudicating the subject children to be abused and neglected. When one of the children was alone with the father, she stopped breathing. Respondent tried to resuscitate her, and she was airlifted to a hospital for care. No fractures or bruising suggested abuse. The prima facie case presented by the petitioner established a rebuttable presumption of parental responsibility. The father presented the testimony of a pediatric neurologist, who found it unlikely that head trauma caused the child’s condition and opined that a venous thrombosis arose from undiagnosed thrombophilia. The presumption of abuse was overcome by the persuasive explanation as to how the child’s condition could reasonably have occurred without the father’s acts or omissions. Heather Abissi represented the appellant. (Family Ct, Sullivan Co)

**Matter of Pike v Bigelow, 165 AD3d 1399, 86 NYS3d 272**
(3rd Dept 10/18/2018)

**VIOLATIONS / NO NOTICE**

**ILSAPP:** The mother appealed from an order of Essex County Family Court which held her in willful violation of a visitation order. The Third Department reversed and remitted. The mother did not receive adequate notice of the allegation underly the decision. In granting the father’s petition, Family Court found violations not alleged and raised for the first time in court. Moreover, the trial court did not entertain any proof with respect to the actual allegations in his petition. The father did not move to amend his pleadings or conform the pleadings to the proof. The matter was remitted for a new hearing. Noreen McCarthy represented the appellant. (Family Ct, Essex Co)

**Matter of Police Benevolent Assn. of N.Y. State, Inc. v State of New York, 165 AD3d 1434, 86 NYS3d 246**
(3rd Dept 10/18/2018)

Upon remittal of this Freedom of Information Law (FOIL) matter for in camera review of records relating to hiring of certain people in high-ranking police positions, the court reviewed extensive documents sent by applicants and maintained that redaction, as an alternative to nondisclosure, was not possible. The requested records contain information specifically exempt from disclosure, and in some instances applications or components thereof may need to be redacted in their entirety to prevent identification of the applicant. “[H]owever, such circumstances with respect to a single, or even several, applicants cannot justify a blanket denial of the release of 1,344 pages of application information from numerous applicants ....” The four respondent entities must engage in the admittedly arduous task of reviewing the data again, deleting “identifying information while leaving nonidentifying metrics intact, and disclosing the same.” (Supreme Ct, Albany Co)

**People v Sears, 165 AD3d 1482, 86 NYS3d 645**
(3rd Dept 10/25/2018)

**ILSAPP:** Police received a call from an occupant of an apartment directly below the defendant’s. The caller, who thought that the defendant was incarcerated, heard noises suggesting that an interloper was present. The police learned that the defendant had been released from jail, and they found no evidence that the apartment had been forcibly entered. They heard a muffled sound heard from outside the apartment and saw faint light seen through the window—consistent with an occupant watching television. Without a warrant, they entered the apartment based on the emergency exception. The Third Department held that there was no basis to believe that there was an ongoing emergency. The court should have granted suppression of the evidence seized. Noreen McCarthy represented the appellant. (Supreme Ct, Franklin Co)

**People v Hernandez, 165 AD3d 1473, 86 NYS3d 784**
(3rd Dept 10/25/2018)

**ASSAULT / JUSTIFICATION / REVERSAL**

**ILSAPP:** The defendant appealed from a judgment of Albany County Court convicting him of 1st degree assault and 4th degree CPW. The victim was the paramour of the defendant’s estranged wife. These three individuals gave sharply conflicting accounts. The defendant asserted the defense of justification. The Third Department found that the People did not prove that the defendant could have retreated with complete personal safety before he used deadly physical force. The appellate court accepted the trial court’s implied finding that the victim was the first to use deadly physical force. Both the defendant and the victim agreed that the fight went on continuously after the knife emerged. Bloody prints on the defendant’s car provided objective support for his assertion that, as he tried to close the door and flee, the victim
Third Department continued

tried to pull it open. The victim’s multiple wounds were consistent with defendant’s testimony that he had to swing the knife repeatedly to defend himself as the victim continued to attack. The indictment was dismissed. Amanda FiggsGanter represented the appellant. (County Ct, Albany Co)


MHL ART. 10 / Frye Hearing Needed
ILSAPP: The petitioner appealed from an order of St. Lawrence County Supreme Court. In a Mental Hygiene Law article 10 proceeding, the petitioner moved to preclude all testimony regarding the psychiatric diagnosis of other specified paraphilic disorder (OSPD) (nonconsent) or for Frye hearing. Supreme Court denied the application, a hearing was held, and Supreme Court released the petitioner to a regimen of strict and intensive supervision and treatment. The Third Department noted that the Second Department and numerous trial courts have concluded that OSPD (nonconsent) does not meet the Frye standard. Given the controversial nature of the diagnosis, the denial of the Frye application was error. The matter was remitted. Mental Hygiene Legal Service, Albany (Matthew Bliss, of counsel), represented the appellant. (Supreme Ct, St. Lawrence Co)

People v Simon, 166 AD3d 1075, 86 NYS3d 333 (3rd Dept 11/1/2018)

The Supreme Court judgment convicting the defendant of drugs and weapons charges is reversed in the interest of justice where the defendant sought to withdraw his guilty plea but failed to assert the grounds raised on appeal. The plea was entered as a global disposition of charges contained in an indictment and in a superior court information stemming from a separate incident. After Supreme Court denied his motion to withdraw his plea, he was sentenced according to the plea agreement and executed two separate waivers of appeal. His challenge to the voluntariness of his plea survives a valid waiver of appeal, and the record of the plea proceedings held in County Court do not reflect the requisite affirmative showing that the defendant waived certain constitutional rights including the privilege against self-incrimination or the right to confront witnesses. Nor did County Court adequately establish that the defendant had consulted with his lawyer about the relinquishment of trial rights and consequences of pleading guilty. (Supreme Ct, Sullivan Co)

Matter of Telesford v Annucci, 166 AD3d 1155, 86 NYS3d 317 (3rd Dept 11/1/2018)

The determination that the petitioner was guilty of possessing gang-related material and violating prison correspondence procedures was not supported by substantial evidence where the documentary evidence did not contain “any features or content that could identify petitioner as the author or sender, and did not include the envelope in which the pages were allegedly discovered ....” The testifying corrections officer offered no personal knowledge that the pages in question, which were forwarded to him from the mail room, were the petitioner’s. (Transferred from Supreme Ct, Albany Co)

People v Blackman, 166 AD3d 1321, 87 NYS3d 395 (3rd Dept 11/21/2018)

Failure to Convey Offer / 440 Hearing Needed
ILSAPP: The defendant appealed from an order of Broome County Court which denied, without a hearing, his CPL 440.10 motion to vacate the judgment convicting him of the several drug possession crimes. He asserted an ineffective assistance claim based on the failure of defense counsel to apprise him of the potential immigration consequences of the subject charges and to explore, negotiate, and procure an immigration-friendly plea offer. The Third Department held that the defendant’s affidavit alleged sufficient facts which could establish ineffective assistance. The ADA’s submission demonstrated that the People offered defendant a plea deal that did not expose him to deportation and that there was a reasonable likelihood that, had defendant accepted the offer, neither the People nor County Court would have blocked the agreement. Instead, the defendant was convicted after a jury trial. There was nothing to controvert the claim that defense counsel did not present the client with any plea offer. A hearing was warranted. The defendant’s persistent claims of innocence did not undermine his claims. James Sacco represented the appellant. (County Ct, Broome Co)

People v Brassard, 166 AD3d 1312, 87 NYS3d 738 (3rd Dept 11/21/2018)

Defective Plea / Narrow Preservation Exception
ILSAPP: The defendant appealed from a Clinton County Court judgment convicting him of 1st degree predatory sexual assault against a child. He contended that his guilty plea must be vacated because he negated an essential element of the crime. At sentencing, the defendant stated that the sexual conduct started when the victim was 13, not 12, years old. Such statement did indeed negate the element that the victim was under age 13, yet County Court did not make any further inquiry or give
the defendant an opportunity to withdraw his plea. The appellate court reversed the judgment and vacated his plea. Adam Van Buskirk represented the appellant. (County Ct, Clinton Co)

**People v Busch-Scardino, 166 AD3d 1314, 88 NYS3d 294**

(3rd Dept 11/21/2018)

**SCI / JURISDICTIONAL DEFECT**

**ILSAPP:** The defendant appealed from a judgment of Schenectady County Court convicting [her] of aggravated criminal contempt. She agreed to be prosecuted by an SCI, but argued that the parties must strictly comply with the statutory requirements to waive indictment and that the waiver omitted the approximate time and place of the alleged offense. The Third Department held that the waiver was invalid, and the related SCI was jurisdictionally defective. The judgment of conviction was reversed, and the SCI was dismissed. Brian Callahan represented the appellant. (County Ct, Schenectady Co)

**Matter of DeMun v DeMun, 166 AD3d 1337, 86 NYS3d 811(3rd Dept 11/21/2018)**

The order granting the mother’s application to modify an existing order of custody, giving her sole custody of the subject child, with visitation to the father, is reversed. At the initial appearance, the court failed to make the required inquiry as to whether the father’s waiver of his right to counsel was unequivocally, knowingly, intelligently, and voluntarily made. This was a violation of the father’s right to counsel, requiring the underlying matter to be reversed and remitted to the lower court for further proceedings. (Supreme Ct, Chenango Co)

**People v Hilton, 166 AD3d 1316, 87 NYS3d 399**

(3rd Dept 11/21/2018)

Testimony at trial rendered the resisting arrest count duplicitous, where the jury was presented with two instances in which the defendant resisted arrest by an officer, one involving the officer identified as the victim of the defendant’s assault and one involving other officers who found the defendant hiding. During deliberation, the jury asked if it could consider the latter or only the former; the court’s rereading of the resisting arrest count “failed to dispel any confusion by the jury ….” The error was unpreserved but is reached in the interest of justice. All other contentions lack merit. (Supreme Ct, Schenectady Co)

**People v Matteson, 166 AD3d 1300, 87 NYS3d 740**

(3rd Dept 11/21/2018)

**NO SPEEDY TRIAL MOTION / 440 HEARING NEEDED**

**ILSAPP:** Clinton County Supreme Court’s denial of the defendant’s CPL 440.10 motion, without a hearing, was error. The defendant argued that he was deprived of
effective assistance because his counsel failed to move to dismiss the indictment based on a violation of his statutory speedy trial rights. There is ordinarily no strategic reason for counsel to fail to make a dispositive motion that would result in dismissal of the charges with prejudice. Because the People did not conclusively establish their entitlement to success on a speedy trial motion, a hearing was necessary to determine whether defense counsel consented to certain adjournments. The challenged order was reversed and the matter was remitted. Lisa Burgess represented the appellant. (Supreme Ct, Clinton Co)

Matter of Payne v Montano, 166 AD3d 1342, 88 NYS3d 630 (3rd Dept 11/21/2018)

AFC INEFFECTIVE / REVERSAL

ILSAPP: The mother appealed from an order of Broome County Family Court which dismissed her application to modify a visitation order. She sought to eliminate the father’s scheduled parenting time. Following a hearing, Family Court dismissed the mother’s petition. The AFC appealed. The appellate AFC argued that the record was not sufficiently developed to find that continued parenting time with the father was in the child’s best interests and that the trial AFC provided ineffective representation. The role of the AFC is: (1) to help the child express his or her wishes to the court, and (2) to take an active role in the proceedings. The Third Department concluded that the AFC should have presented witnesses or done a probing cross-examination of the mother. The dismissal was reversed and the matter remitted. Carman Garufi was the appellate AFC. (Family Ct, Broome Co)

People v Perkins, 166 AD3d 1285, 88 NYS3d 297 (3rd Dept 11/21/2018)

The court abused its discretion by precluding the defendant’s presentation of alibi evidence because no notice of alibi was filed. The record shows that the defendant did not intend to call an alibi witness until the prosecution, knowing that the defendant had testified about an alibi before the grand jury, elicited testimony from the mother of the defendant’s child about the defendant’s actions on the night of the charged incident. This opened the door, and preclusion of the alibi testimony the defense sought to provide in response implicated the Compulsory Process Clause of the Sixth Amendment and violated the defendant’s constitutional right to present a defense. (County Ct, Schenectady Co)

Matter of Boisvenue v Gamboa, 166 AD3d 1411, 89 NYS3d 397 (3rd Dept 11/29/2018)

The order suspending the father’s visitation lacked a sound a substantial basis in the record and must be reversed. While there may be enough evidence regarding the father’s mental health issues, missed visits, and abusive behavior towards the mother to warrant supervised visits, the record lacked direct evidence that visitation was detrimental to the child. Therefore the presumption that visitation is in the best interests of the child was not overcome. (Family Ct, Warren Co)

People v McGee, 166 AD3d 1390, 88 NYS3d 691 (3rd Dept 11/29/2018)

INEFFECTIVE ASSISTANCE IN PLEA / REVERSAL

ILSAPP: The defendant appealed from a judgment of Clinton County Court convicting him of drug and weapons charges. He asserted that he received ineffective assistance of counsel. Although the issue was unresolved by a post-allocution motion, the Third Department exercised its interest of justice jurisdiction and reversed and remitted. Before the defendant entered into the underlying plea agreement, defense counsel said that: (1) he had misconstrued what the defendant was willing to do relative to the plea offer on the table at that time; and (2) because of counsel’s conduct, a previous more favorable plea offer was no longer available. County Court failed to take appropriate action. Counsel’s statements disqualified him from continuing to represent the defendant. The plea court should have adjourned to allow for the substitution of counsel and then conducted a hearing to determine whether the defendant received ineffective assistance during the plea negotiations. County Court failed to appreciate that, if he made the requisite showing, it could direct the People to reoffer the purported prior more favorable plea. Rebecca Fox represented the appellant. (County Ct, Clinton Co)

Matter of Wood v Rebich, 166 AD3d 1416, 89 NYS3d 393 (3rd Dept 11/29/2018)

FAMILY OFFENSE / INEFFECTIVE ASSISTANCE

ILSAPP: The respondent appealed from an order of Broome County Family Court which granted the petitioner’s application finding that he committed a family offense and issued an order of protection. The Third Department found that the respondent was denied meaningful representation. Before the hearing, counsel did not engage in any discovery. At the hearing, counsel did not present an opening or closing statement; object when Family Court questioned the pro se petitioner and assisted her in establishing a foundation for photographic exhibits; object to many hearsay statements; or cross-
Third Department continued

examine the petitioner. The appellate court reversed and remitted for a new hearing. Catherine Stuckart represented the appellant. (Family Ct, Broome Co)

Matter of Shirreece AA. v Matthew BB., 166 AD3d 1419, 89 NYS3d 384 (3rd Dept 11/29/2018)

The order granting the father primary custody of the subject child while significantly limiting the mother’s parenting time to alternate weekends, a change from the 50/50 custody schedule previously in place, must be reversed because it lacks a sound and substantial basis in the record. This decision cannot be given the customary deference, as it contains numerous mischaracterizations and inaccuracies, and fails to adequately address the mother’s concerns regarding, among other things, the father’s history of substance abuse. The court did not fairly evaluate the evidence, minimizing unfavorable evidence against the father while looking at evidence against the mother in a light least favorable to her, thus ignoring the best interests of the child. Additionally, there was no basis for restricting the mother’s parenting time by not allowing it when her live-in boyfriend’s children are present. This unduly restricts the mother’s parenting time, and unnecessarily impedes the child’s relationship with his half sibling, who lives with the mother and boyfriend. The matter is remanded for a determination, by a different judge, that reflects the best interest of the child. (Family Ct, Essex Co)

People v Lavelle, 167 AD3d 1083, 87 NYS3d 525 (3rd Dept 12/6/2018)

FELONY SEX OFFENSE / SENTENCE VACATED

ILSAPP: The defendant appealed from a judgment of Schenectady County Court, convicting him, upon his plea of guilty, of 1st degree attempted dissemination of indecent material to a minor. On appeal, he contended that he was illegally sentenced as a felony sex offender. The Third Department agreed. Although a conviction of the crime charged could be considered a felony sex offense, the accusatory instrument must specify that the offense is charged as a sexually motivated felony. The instant accusatory instrument did not contain the requisite language. The issue survived a valid waiver of the right to appeal. The sentence was vacated and the matter remitted for resentencing. G. Scott Walling represented the appellant. (County Ct, Schenectady Co)

People v Richardson, 167 AD3d 1064, 89 NYS3d 458 (3rd Dept 12/6/2018)

TERRORISTIC THREAT / AGAINST WEIGHT

ILSAPP: A verdict convicting the defendant of the crime of making a terroristic threat was against the weight of evidence, the Third Department held. The judgment of conviction rendered in Chenango County Court following a jury trial was reversed, and the indictment was dismissed. When the defendant was in jail for violating an order of protection, he sent two letters to his estranged wife in envelopes addressed to her mother. In one letter, he expressed anger toward a judge and others involved in judicial proceedings impacting his family, and he said that he wanted to “put a 45 slug” between the judge’s eyes. In the second letter, the defendant wrote that he would deal with the judge when he got out of jail. While it was no defense that the statements were not made to the subject of the threat, missing from the prosecution’s case was evidence that the defendant intended to influence the judge’s policy or conduct. Indeed, between the two letters, the defendant was granted visitation by the judge. While the appellate court did not sanction the defendant’s actions, his statements did not comport with the court’s understanding of terrorism. John Trice represented the appellant. (County Ct, Chenango Co)

People v Gannon, 16 AD3d 1163, 88 NYS3d 720 (3rd Dept 12/13/2018)

SCI / JURISDICTIONAL DEFECT

ILSAPP: The defendant appealed from a judgment of Saratoga County Court convicting her upon a plea of guilty of 1st degree criminal sexual act and 1st degree sexual abuse. After police discovered that the defendant had assisted her husband in having inappropriate sexual contact with her two minor daughters, the defendant waived indictment and agreed to be prosecuted by an SCI. The Third Department held that the waiver and SCI were jurisdictionally defective with respect to 1st degree sexual abuse, because the relevant provision of the Penal Law was not in effect when the alleged criminal conduct occurred. The waiver of the right to appeal did not preclude the issue. The plea as to the errant count was vacated, and the count was dismissed. Brian Quinn represented the appellant. (County Ct, Saratoga Co)

Matter of Torres v Annucci, 167 AD3d 1191, 89 NYS3d 758 (3rd Dept 12/13/2018)

The part of the determination finding the petitioner guilty of violating a prison disciplinary rule regarding possession of unauthorized medication must be annulled. The record reflects that he may not have been allowed to observe the portion of the cell search that led to discovery of the single pill in question. (Transferred from Supreme Ct, Albany Co)
**Third Department continued**

**Matter of King v King**, 167 AD3d 1272, 91 NYS3d 283 (3rd Dept 12/20/2018)

**DEFAULT ORDER / VACATED**

**ILSAPP:** The wife appealed from an order of Warren County Family Court which denied her motion to vacate a default order of protection. The Third Department reversed. To vacate a default judgment, the movant is generally required to demonstrate a reasonable excuse for the failure to appear and a meritorious defense. No such showing is required where fundamental due process rights have been denied. In the instant case, the wife was not given notice that matters raised by Family Court sua sponte would be addressed at the hearing. Jeffrey McMorris represented the appellant. (Family Ct, Warren Co)

**Dissent:**

Steven Natoli was the AFC. (Family Ct, Chenango Co)

**Matter of Kristie GG. v Sean GG., 168 AD3d 25, 91 NYS3d 292 (3rd Dept 12/20/2018)**

**HEARSAY / NOT FOR ARTICLE 8**

**ILSAPP:** The father appealed from orders of Otsego County Family Court in a family offense proceeding. The Third Department reversed. Family Court erred in admitting hearsay testimony of the children in the fact-finding portion of the Article 8 proceeding. Family Ct Act § 1046 (a) (vi) applies only in hearings under Family Ct Act articles 10 and 10-A and in Article 6 proceedings involving abuse or neglect. Without the hearsay, there was an insufficient basis to find that the father committed a family offense. Dennis Laughlin represented the appellant. (Family Ct, Otsego Co)

**Dissent:**

“[C]onsistent community opposition” is not among the factors that the Board is statutorily directed to consider. Comments indicating community support for release may be considered, as they could relate to available community resources. The record does not show that the opposition comments were victim impact statements that could be considered.


**NEGLECT / AFFIRMED**

**ILSAPP:** The father appealed from an order of Chenango County Family Court, which adjudicated the subject child to be neglected. The respondents were parents of the child, born in 2015. The petition against the father was resolved with an ACD, when he admitted factual allegations. The petitioner moved to restore the neglect proceeding based on allegations that he had violated conditions. After a hearing, Family Court found violations and further found neglect. The Third Department held that the father’s waiver of the right to appeal was unenforceable, since Family Court did not address the waiver. Further, the appellate court possessed inherent authority to review any matter involving the welfare of a child. However, Family Court properly found neglect, based on the father’s admission plus evidence at the hearing. While aware of the mother’s drug addiction, the father neglected the child by failing to ensure that the mother did not abuse drugs during pregnancy. The father did not testify, which warranted the strongest inference against him. Steven Natoli was the AFC. (Family Ct, Chenango Co)

**Matter of Applewhite v New York State Bd. of Parole, 167 AD3d 1380, 91 NYS3d 308 (3rd Dept 12/27/2018)**

The Parole Board’s “consideration of certain unspecified ‘persistent community opposition’ to his parole release” was not outside the scope of statutory factors that may be considered. Crime victims, their representatives, or other persons may submit written statements concerning the release of a person in prison; the identity of persons who submit such a statement are kept confidential, allowing “private citizens to express freely their opinions for or against an individual’s parole” (9 NYCRR 8000.5 [C] [2] ....” These provisions demonstrate a clear legislative intent that community comments may be considered by the Board in rendering release decisions. Such comments are germane to certain statutory factors. (Supreme Ct, Sullivan Co)

**Dissent:**

“[C]onsistent community opposition” is not among the factors that the Board is statutorily directed to consider. Comments indicating community support for release may be considered, as they could relate to available community resources. The record does not show that the opposition comments were victim impact statements that could be considered.
provision of the Court of Claims Act that requires successful claimants to show that they “did not commit any of the acts charged in the accusatory instrument” should not have been applied literally where the single indictment encompassed charges arising from events now known to have been unrelated. The claimant and a codefendant were convicted and sentenced for crimes arising from a robbery in 1996 and a shooting death in 1997, under a theory that the killing was an attempt to intimidate witnesses to the robbery. In 2014, a third man confessed to the murder. The murder charges against the claimant were dismissed and he pleaded guilty to one count of first-degree robbery, receiving a sentence less than the time already served. (Court of Claims)

[Ed. Note: The decision in People v Dukes (167 AD3d 1360 [12/27/2018]) reversed the judgment of the Court of Claims in the codefendant’s case for the reasons stated in this decision.]

Fourth Department continued

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 Dupont, 164 AD3d 1649, 84 NYS3d 648 (4th Dept 9/28/2018)

INTERIM PROBATION / FLAWED SENTENCING

ILSAPP: The defendant appealed from a conviction of aggravated criminal contempt. When imposing one year of interim probation, County Court told the defendant that if he complied with interim probation terms, a five-year term of probation would be ordered, and otherwise a “severe sanction” would be ordered. The defendant violated the interim probation terms. Thereafter, the sentencing court erroneously indicated that it was constrained to impose the maximum, and it failed to exercise its discretion. The Fourth Department vacated the sentence and remitted for resentencing. The Monroe County Public Defender (James Hobbs, of counsel) represented the appellant. (County Ct, Monroe Co)

People v Farley, 164 AD3d 1633, 84 NYS3d 638 (4th Dept 9/28/2018)

The court erred in denying the defense challenge for cause to a prospective juror who said she knew a prospective witness—a trauma surgeon who treated the accuser and who had treated the jurors two years earlier. The juror said she saw the surgeon daily for the two weeks he treated her and she believed he did a good job and saved her life. Her testimony showed a likelihood that the relationship would interfere with the juror’s ability to render an impartial verdict. (Supreme Ct, Monroe Co)


INMATE RULES / “THREAT” OF LITIGATION

ILSAPP: DOCCS’s determination of the petitioner’s guilt of a disciplinary rule violation had to be annulled. An inmate rule prohibiting threats cannot be deemed violated unless the inmate conveys an intent to do something illegal or improper. The petitioner had simply said that he intended to file a law suit. The respondent’s interpretation of “threat” in this context would nullify protections under Correction Law § 138 (4), which allows inmates to seek changes in prison conditions and rules. Wyoming County-Attica Legal Aid Bureau (Leelah Nowotarski, of counsel) represented the petitioner. (Transferred from Supreme Ct, Wyoming Co)


HABEAS CORPUS / WRONG VEHICLE

ILSAPP: The petitioners initiated a CPLR article 70 proceeding, asserting that they were suitable persons with whom the children should be placed following their removal from parental care. The Fourth Department dismissed the petition. The preferred procedure for seeking custody was for the petitioner grandfather to move to intervene in the neglect proceedings or to commence a custody proceeding. No extraordinary circumstances warranted a departure from traditional orderly procedure. (Family Ct, Yates Co)

People v Bennett, 165 AD3d 1624, 85 NYS3d 662 (4th Dept 10/5/2018)

PLEA TO SCI WAS NOT TO PROPER CRIME

LASCDP: Defendant was charged with Kidnapping. He pleaded guilty to a Superior Court Information that charged Attempted Kidnapping in the Second Degree. The plea was jurisdictionally defective, as Attempted Kidnapping was neither charged in the felony complaint nor a lesser included offense of Kidnapping. The judgment was reversed, and the plea vacated. (County Ct, Oswego Co)

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, LASCDP, are courtesy of The Legal Aid Society’s Criminal Defense Practice, from their CDD case summaries.
**Matter of Bentley C.,** 165 AD3d 1629, 85 NYS3d 320 (4th Dept 10/5/2018)

**DRUGS / NO NEGLECT**

ILSAPP: The evidence did not support the finding by Yates County Family Court that the father neglected the child. The father tested positive for THC, oxycodone, and opioids on one occasion. That was insufficient to establish that he repeatedly misused drugs. His admission that he used marijuana was also inadequate to constitute neglect. The petitioner agency produced no evidence as to duration of frequency of use or whether the father was ever under the influence of drugs while in the presence of the child. Cara Waldman represented the appellant. (Family Ct, Yates Co)

**Matter of Chance C.,** 165 AD3d 1593, 85 NYS3d 310 (4th Dept 10/5/2018)

**CHILD’S STATEMENT / NO NEGLECT**

ILSAPP: The mother appealed from an Onondaga County Family Court order adjudging that the subject children were neglected by her. The Fourth Department reversed and dismissed the petition. Evidence of mental illness alone does not support a finding of neglect. Family Court determined that the mother neglected the children by forgetting to feed them; but the only evidence of such a danger was the out-of-court statement of one child. Since there was no corroboration of the statement, the trial court erred in relying on it to find neglect. The determination that the mother stopped taking her medication and that her mental health could rapidly deteriorate and endanger the safety was belied by her counselor’s testimony. Hiscock Legal Aid Society (Daniel Blackaby) represented the appellant. (Family Ct, Onondaga Co)

**Matter of Delanie S.,** 165 AD3d 1639, 85 NYS3d 325 (4th Dept 10/5/2018)

**DÉJÀ VU: DRUGS / NO NEGLECT**

ILSAPP: The evidence did not support the finding by Cattaraugus County Family Court that the respondents neglected the children. The mere use of illicit drugs was not enough. There was no evidence of drug use in the children’s presence nor any proof about the duration or frequency of use. David Pajak represented the appellants. (Family Ct, Cattaraugus Co)

**Matter of Driscoll v Mack,** 165 AD3d 1590, 85 NYS3d 305 (4th Dept 10/5/2018)

**CUSTODY / INCOMPLETE HEARING**

ILSAPP: The mother appealed from an order of Cayuga County Family Court awarding physical custody of the subject children to the maternal grandmother. The Fourth Department reversed and remitted for a full hearing. The trial court erred in granting the petition prior to the completion of the hearing. The mother’s testimony was not complete, the grandmother had not yet rested, the mother had not been afforded the opportunity to call witnesses, and controverted issues existed. Elizabeth Moeller represented the mother. (Family Ct, Cayuga Co)

**Matter of Eason v Bowick,** 165 AD3d 1592, 85 NYS3d 307 (4th Dept 10/5/2018)

**CUSTODY / NO AUTOMATIC MOD**

ILSAPP: Family Court denied the mother’s relocation petition, and she appealed. The appellate court held that the trial court erred in including a provision calling for the transfer of custody of the child to the father if the mother relocated outside of Monroe County. Such provision impermissibly purported to alter custody automatically upon the happening of a future event, without considering the child’s best interests at that time. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the mother. (Family Ct, Monroe Co)

**People v Feher,** 165 AD3d 1610, 85 NYS3d 656 (4th Dept 10/5/2018)

**PLEA TERMS / REDUCED SENTENCE**

ILSAPP: The defendant appealed from a judgment of Onondaga County Court convicting him, upon his plea of guilty, of 3rd degree burglary and 4th degree grand larceny. The Fourth Department modified in the interest of justice by reducing the sentence on one of the convictions to an indeterminate term of two to four years. The defendant’s valid waiver of appeal did not foreclose his contention that the sentence violated the terms of the plea bargain. Hiscock Legal Aid Society (Brittney Clark, of counsel) represented the appellant. (County Ct, Onondaga Co)

**People v Ott,** 165 AD3d 1601, 85 NYS3d 647 (4th Dept 10/5/2018)

**REVERSAL / O’RAMA**

ILSAPP: The defendant appealed from a Monroe County Court judgment convicting him, upon a jury verdict, of 2nd degree murder and 1st degree assault. The Fourth Department reversed and granted a new trial. The trial court violated CPL 310.30 and People v O’Rama, 78 NY2d 270, in failing to advise counsel on the record of the contents of a substantive jury note. Thomas Theophilos represented the appellant. (County Ct, Monroe Co)
Fourth Department continued

**People v Perez**, 165 AD3d 1628, 85 NYS3d 668 (4th Dept 10/5/2018)

SORA / REDUCED TO LEVEL ONE

ILSAPP: Supreme Court erred in assessing the defendant 20 points under risk factor seven, resulting in a level-two designation. The defendant’s conduct was not directed at a stranger. He met the teenage victim while they both worked at a local Red Cross, and they communicated through social media before sexual contact occurred. Moreover, the People presented no evidence that the defendant targeted the victim primarily to victimize her. The Monroe County Public Defender (Kimberly Duguay, of counsel) represented the appellant. (Supreme Ct, Monroe Co)

**People v Timmons**, 165 AD3d 1597, 84 NYS3d 662 (4th Dept 10/5/2018)

RECONSTRUCTION / O’RAMA

ILSAPP: The defendant appealed from a Monroe County Court judgment convicting him, upon a jury verdict, of 2nd degree murder. The Fourth Department reserved decision and remitted. A stenographic error may have resulted in a transcript that did not accurately reflect whether the trial court read the entire content of the note prior to responding. Thus, a reconstruction hearing was needed. Cf. People v Parker, [32] NY3d [49] (6/28/18) (no reconstruction hearing; trial court has duty to create record showing adherence to O’Rama). Bridget Field represented the appellant. (County Ct, Monroe Co)

**Matter of Valentin v Mendez**, 165 AD3d 1643, 82 NYS3d 918 (4th Dept 10/5/2018)

CUSTODY / NO FACTUAL FINDINGS

ILSAPP: In awarding sole legal custody to the mother, Family Court failed to set forth the facts supporting the determination of best interests. Effective appellate review required appropriate factual findings. The Fourth Department therefore reserved decision and remitted. The Monroe County Public Defender (James Hobbs, of counsel) represented the appellant. (Family Ct, Monroe Co)

**People v Davis**, 166 AD3d 1508, 86 NYS3d 690 (4th Dept 11/9/2018)

BATSON / PRETEXT REASON / REVERSAL

ILSAPP: The defendant appealed from a judgment of Onondaga County Court convicting him, upon a jury verdict, of two counts of 2nd degree rape and several other charges. On a prior appeal, the Fourth Department determined that the defendant met the initial burden on his Batson application, but reserved decision and remitted for the People to articulate a nondiscriminatory reason for striking an African-American prospective juror, and for the court to determine whether the proffered reason was pretextual. On remittal, the People failed to meet their burden. The ADA did not remember his reason for striking the prospective juror at issue; stated that it had “nothing to do with race;” and further recalled that “there was something” on the juror’s questionnaire that he “did not particularly like.” Such explanation was inadequate, since it was little more than a denial of discriminatory purpose and a general assertion of good faith. The reviewing court reversed the judgment and granted a new trial. Hiscock Legal Aid Society (Phil Rothschild, of counsel) represented the appellant. (County Ct, Onondaga Co)

**People v Funk**, 166 AD3d 1487, 87 NYS3d 419 (4th Dept 11/9/2018)

OUT-OF-STATE FELONY / IMPROPER PREDICATE

ILSAPP: The defendant appealed from a judgment of Ontario County Court convicting him, upon a jury verdict, of 2nd degree assault and other charges. The Fourth Department held that the defendant was improperly sentenced as a second felony offender. The predicate conviction—the Pennsylvania crime of burglary—was not the equivalent of a New York felony. Although the defendant failed to preserve that contention for review, the appellate court exercised its interest of justice jurisdiction. There is no element in the Pennsylvania statute, comparable to the element in the analogous New York statute, that an intruder knowingly entered or remained unlawfully in the premises. The sentence was vacated and the matter remitted for resentencing. The Ontario County Public Defender (Mary Davison, of counsel) represented the appellant. (County Ct, Ontario Co)

**People v Griffith**, 166 AD3d 1518, 88 NYS3d 325 (4th Dept 11/9/2018)

SORA / INEFFECTIVE ASSISTANCE

ILSAPP: The defendant appealed from an order of Onondaga County Court which denied his petition seeking a downward modification of his previously imposed classification as a level-three risk. The Fourth Department reversed, reinstated the petition, and remitted. The appellate court noted that the right to appeal was conferred by CPLR 5701. See People v Charles, 162 AD3d 125. The defendant was denied effective assistance of counsel. In response to his petition, assigned counsel wrote to the SORA court indicating that the petition lacked merit; counsel would not support it; and he had advised defendant to withdraw it so that he would not needlessly delay his right to file a new modification petition in two years. Thus, defense counsel essentially became a witness
against the defendant and took a position adverse to him. Further, a defendant may commence a Correction Law § 168-o (2) proceeding annually; thus, the advice was also incorrect. However, the SORA court did not err in refusing to allow the defendant to challenge his plea or other aspects of his underlying conviction, as the defendant asserted; a SORA proceeding may not be used to challenge the underlying conviction. William Clauss represented the appellant. (County Ct, Onondaga Co)

**People v Hackett**, 166 AD3d 1483, 87 NYS3d 413 (4th Dept 11/9/2018)

The contention that the US Supreme Court decision in Riley v California (134 SCt 2473 [2014]) constituted a change in the law that would provide the defendant relief and therefore justify filing a second motion to suppress, after expiration of the statutory time for pretrial motions, is rejected. Actions taken by the arresting officer with regard to the defendant’s phone, such as sending a text message to a number previously used to call the accuser and then observing that the defendant’s phone signaled the arrival of a text message, are not prohibited by the Riley ban on warrantless searches of cell phones incident to arrest. (County Ct, Genesee Co)

**People v Hemingway**, 166 AD3d 1524, 85 NYS3d 813 (4th Dept 11/9/2018)

“[R]eversal of the judgment and vacatur of the plea are required because County Court failed to advise him, at the time of the plea, of the period of postrelease supervision that would be imposed at sentencing.” (County Ct, Onondaga Co)

**People v Jones**, 166 AD3d 1479, 88 NYS3d 318 (4th Dept 11/9/2018)

**No YO Upheld / Sentence Reduced**

**ILSAPP:** The defendant appealed from a judgment of Onondaga County Supreme Court, which determined that he was ineligible for youthful offender status. The defendant had been convicted of the armed felony offenses of 1st degree assault and 2nd degree CPW; he was not a minor participant in the crimes; and there were no mitigating circumstances bearing directly on how the crimes were committed. The Fourth Department held that, although the trial court did not abuse its discretion as to the YO adjudication, the aggregate term of 35 years was too severe. The victim was a rival gang member who tried to rob members of the defendant’s gang when the defendant shot at the victim, who was struck by a bullet, but survived. The defendant had no prior criminal record; he was only 18 years old when he committed the crimes; and the People offered him 20 years prior to trial. Two justices dissented. Hiscock Legal Aid Society (Kristen McDermott, of counsel) represented the appellant. (Supreme Ct, Onondaga Co)

**People v Page**, 166 AD3d 1472, 87 NYS3d 409 (4th Dept 11/9/2018)

**Traffic Stop by Customs Agent Unauthorized**

**ILSCDP:** A customs agent with marine duties effectuated a traffic stop on a highway. The Fourth Department held that the stop was not justified, either as an agent acting outside his geographical authority or as a citizen’s arrest. The firearm seized as a result of the stop was suppressed. (Supreme Ct, Erie Co)


**Support / Quitting Job / Not Voluntary**

**ILSAPP:** The father appealed from an order of Onondaga County Family Court which denied his objection of petitioner to the Support Magistrate’s order. The Fourth Department reversed, granted the objection, reinstated the petition, and remitted. From 2013 to 2015, the parties resided together with their son in Virginia. In 2015, the mother relocated with the child to New York. Six months later, the father quit his [job] and moved to New York to be closer to the child. He then petitioned to reduce child support because his new job paid less than his prior position. The Support Magistrate dismissed the petition because the father voluntarily left his higher-paying job. Family Court upheld the order. Loss of employment may constitute a change in circumstances, justifying a modification of support, where the loss occurred through no fault of the petitioner and he diligently sought re-employment. The need to live closer to a child is a compelling reason to quit a job. That parent should not be deemed voluntarily unemployed or underemployed where he is a loving parent trying to do the right thing for the children. In such circumstances, to punish such a parent by requiring higher child support is neither good law nor good policy. Legal Aid Society of Mid-NY (Joseph Maslak, of counsel) represented the appellant. (Supreme Ct, Niagara Co)

**People v Rosario**, 166 AD3d 1498, 86 NYS3d 367 (4th Dept 11/9/2018)

**Plea Allocation Raises Doubt / Reversal**

**ILSAPP:** The defendant appealed from a judgment of Niagara County Court convicting him of 1st degree sexual abuse (two counts). The Fourth Department reversed, vacated the plea, and remitted. Although defendant’s con-
tention survived his valid waiver of the right to appeal, he failed to preserve that contention; did not move to withdraw the plea or to vacate the judgment of conviction on that ground. The case fell within the rare exception to the preservation requirement: the defendant made a statement during the plea allocution that raised a potentially viable affirmative defense, thereby giving rise to a duty on the part of the court to ensure that the defendant was aware of that defense and was knowingly and voluntarily waiving it. The appellate court concluded that the court’s inquiry was insufficient to meet that obligation. Legal Aid Bureau of Buffalo (Tim Murphy, of counsel) represented the appellant. (County Ct, Niagara Co)

**Fourth Department continued**

The mother appealed from an order of Steuben County Family Court which dismissed her custody modification petition and granted sole custody of the child to the father. The Fourth Department reversed and remitted. Pursuant to a consent order, the parents had joint legal custody and shared physical custody. After entry of the consent order, each parent filed a modification petition. The trial court failed to make factual findings to support the award of custody, as required by CPLR 4213 (b). Particularly in child custody cases, effective appellate review requires appropriate factual findings by the trial court—the court best able to measure the credibility of the witnesses. Upon remittal, findings were needed as to a court’s inquiry was insufficient to meet that obligation. Legal Aid Bureau of Buffalo (Tim Murphy, of counsel) represented the appellant. (County Ct, Steuben Co)

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**Matter of Brown v Orr, 166 AD3d 1583, 85 NYS3d 913 (4th Dept 11/16/2018)**

**NO CUSTODY FACTUAL FINDINGS / REVERSAL**

**ILSAPP:** The mother appealed from an order of Steuben County Family Court which dismissed her custody modification petition and granted sole custody of the child to the father. The Fourth Department reversed and remitted. Pursuant to a consent order, the parents had joint legal custody and shared physical custody. After entry of the consent order, each parent filed a modification petition. The trial court failed to make factual findings to support the award of custody, as required by CPLR 4213 (b). Particularly in child custody cases, effective appellate review requires appropriate factual findings by the trial court—the court best able to measure the credibility of the witnesses. Upon remittal, findings were needed as to a change in circumstances and the best interests of the child, following an additional hearing if necessary. Mary Benedict represented the appellant. (Family Ct, Steuben Co)

**People v Flagg, 167 AD3d 165, 87 NY&S3d 781 (4th Dept 11/16/2018)**

**TRAMADOL PILLS / NOT DANGEROUS CONTRABAND**

**ILSAPP:** The defendant appealed from a judgment of the Onondaga County Court convicting him of 1st degree promoting prison contraband and 7th degree criminal possession of a controlled substance. The Fourth Department modified by reducing the contraband conviction to the 2nd degree offense. The charges arose after correction officers recovered four Tramadol pills from the defendant. The appeal turned on the scope of “dangerous contraband,” that is, contraband “capable of such use as may endanger the safety or security of a detention facility or any person therein.” People v Finley, 10 NY3d 647, set forth the test: whether there was a substantial probability that the item would be used in a manner likely to cause death or other serious injury; to facilitate an escape; or to bring about other major threats to institutional safety or security. In the instant case, the focus belonged on the dangerousness of use of the drug at issue; and salient proof was lacking. Hiscock Legal Aid Society (Nathaniel Riley, of counsel) represented the appellant. (County Ct, Onondaga Co)

**People ex rel. Garcia v Annucci, 167 AD3d 199, 89 NYS3d 491 (4th Dept 11/16/2018)**

**SARA / LEVEL-THREE OFFENDERS**

**ILSAPP:** When an incarcerated person previously convicted of a sex offense is conditionally released or released on parole, the Board of Parole must under certain circumstances require, as a mandatory condition of such release, that he refrain from going within 1,000 feet of any school or other facility that primarily serves children. See Executive Law § 259-c (14). The condition must be applied to all level-three sex offenders, not only those serving a sentence for an offense enumerated in the above-cited statutory provision, the Fourth Department held. Thus, it affirmed the Erie County Supreme Court order denying the petitioner’s application seeking immediate release. The petitioner asserted that he was not subject to the mandatory condition since he was serving a sentence for 3rd degree robbery—a crime not set forth in Executive Law § 259-c (14). The case turned on the meaning of “such person,” which was ambiguous. Legislative history strongly supported the respondents’ interpretation. (Supreme Ct, Erie Co)

**People v Pearson, 166 AD3d 1586, 85 NYS3d 915 (4th Dept 11/16/2018)**

**SENTENCING COURT ERROR / REMITTAL**

**ILSAPP:** The defendant appealed from a Supreme Court judgment which convicted him of 2nd degree CPW and misdemeanor DWI. The Fourth Department modified by vacating the sentence for the DWI. Supreme Court failed to apprehend the extent of its sentencing discretion. The contention was not foreclosed by the waiver of the right to appeal and did not require preservation. During the plea colloquy, the court informed the defendant that the fine for the DWI was between $1,000 and $5,000, when it was actually between $500 and $1,000; and the fine was discretionary, not mandatory, if the court imposed a period of imprisonment. Additionally, the record did not establish that the court was aware of the possible periods of probation and the duration for the condition of the ignition interlock device. The matter was remitted for resentencing. Legal Aid Bureau of Buffalo (Kristin Preve, of counsel) represented the appellant. (Supreme Ct, Erie Co)
**Fourth Department continued**

**Villella v Villella**, 166 AD3d 1595, 85 NYS3d 920 (4th Dept 11/16/2018)

It was reversible error not to advise the father of his right to assigned counsel prior to proceeding with the willfulness hearing on the alleged violation of the order of support. Additionally, when the father advised the court he was preceding pro se, an inquiry should have been made as to whether the waiver of counsel was knowing, intelligent, and voluntary. The court erred again, on the second day of the hearing, when it denied the father’s request for an adjournment to get an attorney. The orders are reversed and the matter remitted for a new hearing. (Supreme Ct, Niagara Co)

**People v Vo**, 166 AD3d 1587, 88 NYS3d 743 (4th Dept 11/16/2018)

**MOTIVE TO LIE / PROBATIVE TO VICTIM’S CREDIBILITY**

ILSAPP: The defendant appealed from a Supreme Court judgment convicting him of 1st degree sexual abuse. The Fourth Department reversed and granted a new trial. The trial court improperly precluded the defendant from presenting evidence to establish that the complainant had a reason to fabricate the allegations against him. A victim’s motive to lie is not collateral—it is directly probative on the issue of credibility. The excluded evidence was not speculative or cumulative; and defense counsel offered a good faith basis for the excluded line of questioning. The error was not harmless. Defendant also correctly contended that the court erred in permitting the People to present prompt outcry testimony that exceeded the proper scope—i.e. only the fact of a complaint is allowed, not its accompanying details. The Monroe County Public Defender (David Juergens, of counsel) represented the appellant. (Supreme Ct, Monroe Co)

**People v Clause**, 167 AD3d 1532, 90 NYS3d 441 (4th Dept 12/21/2018)

**PROBATION REVOCATION / VACATED**

ILSAPP: The defendant appealed from a judgment of Niagara County Supreme Court which revoked the sentence of probation imposed following her plea of guilty of 1st degree vehicular manslaughter and other crimes. The Fourth Department vacated the revocation and continued probation with additional conditions. At the time of the crime, the defendant was 18 and had no other criminal history. She completed substance abuse counseling and complied with reporting requirements. A treating psychologist opined that incarceration would impede her progress toward a sober, productive lifestyle; and the probation officer recommended against incarceration. Further, the defendant was employed full-time, intended to re-enroll in college classes, and committed no crimes after the underlying conviction. Erin McCampbell represented the appellant. (Supreme Ct, Niagara Co)

**Matter of Dean v Sherron**, 167 AD3d 1521, 91 NYS3d 639 (4th Dept 12/21/2018)

**HOME STATE / REVERSAL**

ILSAPP: The mother appealed from an order of Onondaga County Family Court dismissing her custody petition. The Fourth Department reversed. It was error to dismiss the petition based on a lack of jurisdiction without holding a hearing. There were disputed issues of fact regarding: (1) whether the child’s five-month stay in North Carolina constituted a temporary absence from New York, in light of allegations that the respondent father withheld the child from the mother for purposes of establishing a home state in North Carolina; and (2) whether the mother’s absence from New York interrupted the child’s six-month pre-petition residency period, required by Domestic Relations Law § 76 (1) (a). Thus, the petition was reinstated and the matter remitted. Hiscock Legal Aid Society (Danielle Blackaby, of counsel) represented the appellant. (Family Ct, Onondaga Co)

**People v Ellison**, 167 AD3d 1552, 90 NYS3d 789 (4th Dept 12/21/2018)

**PERSISTENT FELONY OFFENDER / VACATED**

ILSAPP: The defendant appealed from a judgment of Monroe County Supreme Court, convicting him, upon a jury verdict, of 3rd degree burglary (two counts) and 4th degree criminal possession of stolen property. In the interest of justice, the Fourth Department vacated the finding that the defendant was a persistent felony offender. Although he had a lengthy criminal history, almost all of his offenses stemmed from stealing to support his drug habit; and he had not been violent. The People never requested a PFO adjudication. Before trial, they offered concurrent terms of 2 to 4 years; and ultimately, the defendant was sentenced to 20 years to life. Such a disparity militated in favor of a sentence reduction. The new aggregate sentence was 5½ to 11 years. Donald Thompson represented the appellant. (Supreme Ct, Monroe Co)

**People v Fick**, 167 AD3d 1484, 90 NYS3d 421 (4th Dept 12/21/2018)

**DISSENT / PROSECUTORIAL MISCONDUCT**

ILSAPP: The defendant appealed from a judgment of Livingston County Court convicting him of 1st degree burglary and other crimes. The Fourth Department affirmed. Two dissenting justices would have reversed in
Fourth Department continued

the interest of justice due to the fair trial rights implicated. The prosecutor caused substantial prejudice during the cross-examination of a defense witness in implying that, before the instant crimes, the defendant broke the windows of the witness’ vehicle in retaliation for his use of the defendant’s drugs. When the witness denied knowing who broke his windows, the prosecutor stated, “I would bet my career that person is in the courtroom.” The prosecutor thus made himself an unsworn witness and injected the integrity of his office into the case. Further, he referred to the defendant’s witnesses as “liars” and to the defendant as a “monster.” (County Ct, Livingston Co)

People v Holz, 167 AD3d 1417, 90 NYS3d 724 (4th Dept 12/21/2018)

DISSENT / SUPPRESSION

ILSAPP: The defendant appealed from a Monroe County Supreme Court judgment convicting him, upon his plea of guilty, of 2nd degree burglary. The Fourth Department affirmed. The P.J. dissented. The case turned on the interpretation of CPL 710.70 (2), which states: “An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.” In full satisfaction of a two-count indictment, the defendant pleaded guilty to count one, alleging that he committed a burglary. Count two alleged a second burglary at the same location two days later. The trial court denied suppression of physical evidence relevant to that count. In the view of the dissenter, the suppression issue was reviewable upon the instant appeal. For support, the dissent cited several Third Department cases rejecting a restrictive interpretation of the above-cited statute. (Supreme Ct, Monroe Co)


INCOMPETENT RESPONDENT / REVERSAL

ILSAPP: The mother appealed from an order of Family Court terminating her parental rights. The Fourth Department held that Family Court erred in failing to appoint a guardian ad litem. The public policy of this State is to provide rigorous protection to the mentally infirm. On its own initiative, the court should have held a hearing regarding the need to appoint guardian. The mother’s attorney informed the court that she could not assist in her own defense and moved to strike her incoherent testimony. Moreover, the mother had a long psychiatric history and, during the instant proceedings, was involuntarily committed. The Monroe County Public Defender (Timothy Davis, of counsel) represented the appellant. (Family Ct, Monroe Co)

People v Madonna, 167 AD3d 1488, 89 NYS3d 504 (4th Dept 12/21/2018)

According to the Sex Offender Registration Act Risk Assessment Guidelines and Commentary, risk factor 11 regarding substance abuse “is not meant to include occasional social drinking” and where substance abuse occurred in the distant past, a “court may choose to score zero points in this category” No assessment of points under this factor was warranted where the evidence showed that the defendant drank one can of beer a month, and had smoked marijuana in his early 20s but had then participated in drug treatment and not used marijuana for four years. (County Ct, Onondaga Co)
Vehicles (DMV) records can be searched remotely for free using a DMV DIAL-IN search account. While it is called a DIAL-IN search, it is a web-based service. To apply for the account, you need to complete form Motor Vehicle Record Search Account Application (MV-15D). The instructions are on the form. Send the form to: Data Services–New Search Account, NYS Department of Motor Vehicles, 6 Empire State Plaza, Albany, NY 12228.

Each electronic search of DMV records using a Motor Vehicle Record Search Account usually costs $7. However, searches conducted by a government agency are exempt from this fee as are public defender offices, legal aid societies, and other private entities when acting pursuant to County Law 722. (See Vehicle and Traffic Law 202). Search Account users will have to maintain business records documenting the searches performed. And DMV may contact you for information ensuring compliance with the DIAL-IN Terms of Service.

For lawyers who need DMV records with any frequency, the DIAL-IN Search Account is something to consider. Those without an account can use the MV-15 form discussed below.

Getting Lifetime Abstracts

Note that “lifetime abstracts” are not available through the DIAL-IN search account. Until fairly recently, those records had to be obtained by using the Freedom of Information Law (FOIL). Now, however, the FOIL form lists “driver history (‘lifetime abstract’) among the several types of records that are not to be requested using FOIL.

The form for requesting those records is the MV-15 as updated July 2018. Lawyers (and others) who use the form to order a record other than their own must also include a notarized MV-15GC form giving them permission to secure that other person’s record. Directions on the
form indicate how to receive the fee exemption for public defense providers; DMV advised the REPORT that the information should be provided on letterhead.

**2nd Circuit Finds 2nd Department Erred on Bruton Issue**

The Second Circuit recently granted habeas relief to a petitioner whose conviction had been upheld in the Second Department. *Orlando v Nassau County Dist. Attorney's Off.*, 915 F3d 113 (2d Cir 2/11/2019). The New York court had rejected the petitioner’s claim on appeal, saying that “the court did not violate his right to confront a witness when it permitted a detective to testify that he told the defendant that a codefendant gave details about the killing. ‘The court properly instructed the jury that the testimony was admitted for the limited purpose of explaining the detective’s actions and their effect on the defendant, and not for the truth of the codefendant’s statement ….’” *People v Orlando*, 61 AD3d 1001 (2d Dept 4/28/2009). The federal court found this “an unreasonable application” of *Bruton v United States* (391 US 123 [1968]), which “plainly instructs that the jury could not be presumed to disregard [the codefendant’s] statement for its truth, even with a limiting instruction.” That Orlando, unlike Bruton, had been tried separately from his codefendant did not matter; *Bruton* “applies equally to the testimonial and incriminating statements of non-testifying accomplices tried separately.” And to the extent that the Second Department applied *Tennessee v Street* (471 US 409 [1985]), in which the defendant testified and “there were ‘no alternatives [but allowing admission of the accomplice’s confession] that would have both assured the integrity of the trial’s truth-seeking function and eliminated the risk of the jury’s improper use of evidence,’” it extended *Street* unreasonably. A District Judge sitting by designation dissented.

*Bruton* will not keep out every statement by a codefendant. In *People v Villanueva* (AD3d 89 NYS3d 642 [2nd Dept 1/9/2019]), *Bruton* was found not applicable based on the limitation recognized in *People v Johnson* (NY3d 60 [2016]), which cites *Richardson v Marsh* (481 US 200 [1987]). That limitation is that for *Bruton* to apply, the challenged statement by a codefendant must be incriminating on its face, requiring no link to other evidence.

**Backup Center Staff Changes Announced**

As readers of News Picks from NYSDA Staff already know, NYSDA has a new Family Court Staff Attorney and a new member of the Public Defense Case Management System (PDCMS) team. A change in leadership has also been announced.

**Bryant Named Acting Director**

When Charles F. O’Brien decided, for medical reasons, to step down as Executive Director, Deputy Director Susan C. Bryant was appointed by the Board of Directors to serve as Acting Director. Charlie will continue his work at NYSDA as a Senior Staff Attorney. Susan, Charlie, and the entire NYSDA staff look forward to continuing NYSDA’s mission and serving the public defense community.

**Welcome Kim Bode, Family Court Staff Attorney**

Kimberly Bode is pleased to join the NYSDA team as its Family Court Staff Attorney, following 17 years of exclusive practice in the public interest sector. Kim spent over a decade of that time as a family court attorney with the Suffolk County Legal Aid Society, where she fought every day to preserve her clients’ parental rights. She is hopeful that her experience will allow her to be a valuable resource to family court attorneys and the clients they represent—she has represented litigants in virtually all types of family court matters, including neglect proceedings, custody and visitation matters, termination of parental rights, child support violations, and family offense proceedings. Attorneys with family court questions can reach Kim at 518-465-3524 or kbode@nysda.org.

**Asaph Ko Joins PDCMS Team**

More than 70 offices currently use PDCMS to aid in the efficient management of case information. Asaph Ko, NYSDA’s newest Information Systems Specialist, is looking forward to helping NYSDA support the PDCMS software statewide. He joins Director of Software Development Darlene Dollard, Systems Administrator Mike Mayer, and Information Systems Specialist Dandre Wheeler.
I wish to join the New York State Defenders Association and support its work to uphold the constitutional and statutory guarantees of legal representation to all persons regardless of income and to advocate for an effective system of public defense representation for the poor.

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