NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

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Defender News

Charles F. O'Brien, NYSDA's former Executive Director and long-time Managing Attorney, died on Mar. 26, 2020. [See p. 3] He is pictured here accepting the 2011Award for Outstanding Achievements in Promoting Standards of Excellence in Mandated Representation of the NYS Bar Association.

Crisis upon Crisis: The Budget, Rollbacks of Pretrial Reforms, and COVID-19

As 2020 commenced, NYSDA, like others, concentrated on implementation of the 2019 pretrial justice legislation. Nearly all of the January 17 edition of News Picks from NYSDA Staff was dedicated to bail, discovery, and CPL 30.30 provisions—including efforts to prevent rollback of the reforms in the face of statewide attacks. Much of the February 12 edition was similarly focused. In early March, bail and discovery updates were prominent but were also joined by information on NYSDA's budget testimony and other issues.

A week later, NYSDA pivoted in a Special Edition of News Picks to the effects of the novel coronavirus pandemic on justice systems as cases of COVID-19, the disease caused by the virus, spread across New York. With information developing and changing constantly, NYSDA created a webpage to address the challenges presented. The page was soon subdivided, and then reorganized, to make more information more accessible, as set out in the April 21 edition of News Picks. To borrow a phrase from a court decision releasing some individuals from Rikers Island due to the danger posed to them by the virus, this issue of the *REPORT* will not describe COVID-19 in detail, "as it is far too familiar to New Yorkers already."

The March 26 edition of News Picks was all but a one-issue document also, again focused on COVID-19. Throughout this period, Backup Center staff assisted individual public defenders in criminal and family courts with COVID-19 questions as well as continuing to provide information online about the avalanche of executive orders, changes in court procedures, and revised procedures for prevention of infection. NYSDA publicized the growing threat to clients and others who are detained, and efforts to secure their release or at least increase the protection of people held in a variety of facilities with medically dangerous environments. These include local jails and state facilities, including forensic hospitals, and federal facilities, both penal and those related to immigration proceedings.

At the same time, NYSDA continued to advocate against erosion or repeal of bail and discovery reforms, and for its budget and public defense funding in general. The efforts to ensure defense funding, in the face of an already-predicted shortfall in state funds that increased along with the pandemic, were largely successful. However, that comes with a large caveat: the Director of the Division of the Budget (DOB) has been given authority to make certain decisions. This includes, if the budget becomes "unbalanced" during the fiscal year, to withhold some or all appropriations in the Director's sole discretion, to respond to direct or indirect effects of the pandemic. A report from DOB was expected as this issue of the *REPORT* went to press.

NYSDA thanks the legislators who supported public defense funding, including appropriations for the Backup Center and the Veterans Defense Program.

Public Defense Budgets Largely Static, H-H Expansion Again Funded

At least for the moment, NYSDA's budget

Contents

and several other defense-related programs like Aid to Defense are set to receive the same amount as last year. Appropriations to the Indigent Legal Services funds increased in keeping with the statewide Hurrell-Harring expansion, and funding for the Indigent Legal Services (ILS) Office increased as well. Unfortunately, that did not include the $5 million the ILS Office sought for parental representation caseload reduction and quality improvements.

While Aid to Prosecution and prosecution support through the NYS Prosecutors Training Institute and the District Attorneys Association of the State of New York remained flat funded, $40 million were also appropriated to a new Criminal Justice Discovery Compensation Fund to assist with added costs of providing discovery and pretrial services.

Reform Amendments

A brief summary of the bail and discovery amendments passed in the budget were included in the April 8 edition of News Picks. Information is being posted on our Bail and Discovery (including 30.30) implementation webpages as it becomes available. The bail amendments can be found in Part UU, and the discovery amendments in Part HHH, of L 2020, Ch 56.

Even partially rolling back bail reform in the midst of the COVID-19 pandemic constituted deep irony. As noted in news items including an article on Filter, another on The Appeal, and more, the Governor signed the bill at the same time many were calling for decarceration to slow the spread of the disease that threatens the health and lives of people incarcerated in jails, those who work there, and the communities into which both groups return. The bail amendments—which did *not* add consideration of dangerousness—become effective 90 days from the law's enactment, while the discovery amendments became effective in only 30 days.

NYSDA presented a webinar, with CLE credit, on "Discovery Practice Updates: The New 2020 Amendments," on April 29. This was one of various topics to be addressed in webinars as the Backup Center embarked on presentation of remote CLEs. Additional training on the reform amendments and other topics is in the works, to be presented through more webinars or at in-person trainings once they resume.

SCR Changes—The Good, The Bad, and The Ugly

For family court defenders there is one ray of light from an otherwise disappointing state budget. It is an amendment to the Social Services Law that provides increased protections to people who become the subject of a child protective services investigation. It raises the standard of proof before someone can be placed on the State's Central Register (SCR) for an "indicated" case of child maltreatment or abuse. The bare minimum standard of "some credible evidence" will be replaced by the more substantial "preponderance of the evidence." Defenders should note that the time frame to challenge an "indicated" finding has not changed. If you have a client who has been placed on the SCR they will continue to only have 90 days to request a fair hearing to challenge this finding. The good news is that any decision on a request to amend an "indicated" report will be automatically stayed during the pendency of a Family Court Act article 10 case arising from the same allegations, until the conclusion of that proceeding. If the child welfare case is resolved in your client's favor because "child protective service withdraws such petition with prejudice, where the family court dismisses such petition, or where the family court finds on the merits in favor of the respondent, there shall be an irrebuttable presumption in a fair hearing ... that said allegation as to that respondent has not been proven by a fair preponderance of the evidence." This should result in the indicated report being amended to unfounded. On the flip side, if a finding of neglect or abuse is established against your client, this continues to create an irrebutable presumption that the allegations have been proven by a preponderance of the evidence, likely resulting in an "indicated" finding being upheld at a fair hearing.

If your client is unable to successfully challenge an "indicated" finding, there may still be good news on the horizon. Perhaps, most consequential, is the effective sealing of "indicated" reports of child maltreatment reports after 8 years from the date the "indication" occurred: "any such indication of child maltreatment shall be deemed to be not relevant and reasonably related to employment."

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Charlie O'Brien Mourned

With the deepest sadness, NYSDA has announced the death of its former Executive Director and long-time Managing Attorney Charles F. O'Brien. The obituary here highlights Charlie's dedication to and love for his family, who gathered for the final weeks of his long illness and were present when he died at home on Mar. 26, 2020. Charlie's obvious love of his family, along with descriptions of his professional acumen, features prominently in comments from the many colleagues who sent condolences to NYSDA.

Those comments came from across New York State and beyond. The remarks here are emblematic of Charlie's widespread influence.

Christie Hedman, Executive Director of the Washington (State) Defender Association (WDA), wrote that she had known Charlie since the 1990s. Charlie "was a great resource for me especially in the early years," Christie wrote. WDA is one of the few other statewide nonprofit public defense resource centers in the country, and Christie noted that Charlie "always was available when I had any questions and was a positive, helpful and caring presence."

Ernie Lewis, Executive Director of the National Association for Public Defense (NAPD), observed that Charlie was "always willing to look at issues from a different perspective." Many who worked with Charlie will recognize that seeking factual and analytical information before embarking on a new project, rather than assuming he already knew the best way to proceed, was a Charlie hallmark. He displayed it at NYSDA and in the many groups and committees he ably served, such as NAPD's Education Committee, the Indigent Defense Organization Oversight Committee, Appellate Division, First Department, the Office of Court Administration's Advisory Committee on E-Filing in Criminal Court and, over the years, many more.

April Frazier Camara, Chief of Lifelong Learning at the National Legal Aid and Defender Association, said that Charlie's "work and humble spirit" had been "so encouraging to me personally." Mary Deaett, Human Resources & Program Manager of the Vermont Office of the Defender General, said, "Charlie was a wonderful man, who was always willing to cooperate across state boundaries. He will be missed."

Here in New York State, people responding to Charlie's death similarly set out his enduring legacy in warm, personal terms. Executive Director Susan C. Bryant observed, in announcing the news, that "Charlie's impact on public defense, while not necessarily well known (he was incredibly humble), is immense." He was, she said, one of a kind—"intelligent, unassuming, dedicated, funny, kind, and passionate." Her statement that "[w]e at NYSDA miss him terribly" remains painfully true.

NYSDA Board member and Wayne County Public Defender Andrew D. Correia wrote a tribute that was circulated with the news of Charlie's death. Andy's remarks capture the Charlie that so many knew and admired.

Charlie cared about public defense work of every type. Adele M. Fine, Special Assistant Public Defender at the Monroe County Public Defender's Office, recalled that Charlie contacted her after hearing a candid comment years ago about NYSDA's shortcomings in support of family defense. She said Charlie "tasked himself with learning about Family Court and the issues assigned counsel were regularly dealing with in trying to preserve poor families against a monolithic child welfare system." After he traveled to a national conference in Washington, DC, "to find out what parental representation was all about," he worked with Adele to create "the first full day family law CLEs in Rochester." She recalled that "he was very interested in seeing that we got the best and the brightest from around the country to give presentations." That was a hallmark of Charlie's approach to training.

Charlie worked to improve quality in all areas of the state. Michele Cortese, Executive Director of the Center for Family Representation (CFR) in New York City, said: "Charlie helped CFR establish ourselves in so many ways and contexts. … Charlie taught me and so many of our staff incredibly important lessons about being high quality defenders and about keeping clients front and center." Adele Fine noted that, at a time when there was a lot of downstate activity between family defense organizations, Charlie made sure "we upstate people had a way to talk to each other and our colleagues downstate."

Immigrant clients also benefitted from Charlie's work. Manny Vargas, Senior Counsel at the Immigrant Defense Project, which began as an initiative at NYSDA's Public Defense Backup Center, recalled approaching Charlie and Jonathan E. Gradess, NYSDA's founding Executive Director, in 1997. Manny sought "to make sure that immigrants accused of crimes were properly advised and provided effective representation to avoid [the] harsh consequences" set out in then-new federal laws. Charlie and Jonathan understood the importance of creating an initiative to fill this need, Manny said. The same careful, professional approach noted earlier was fully apparent in this instance too. Charlie "was professional about it, setting up the meeting to go carefully over the details of the project to make sure it made sense and would work," Manny said.

He added, reflecting the memories of so many others about Charlie, that "while doing his due diligence, he received me in the warm and welcoming way that we all know so well."

This photo of Charlie O'Brien, with his signature smile, was taken at the Backup Center. Rochester attorney Brian Shiffrin said, in reminiscing about Charlie following his death, "I remember the first time I saw Charlie's small office at NYSDA, I was initially surprised and then very moved. The combination of humility and sense of priorities that led him to accept a small office explains why he is so beloved by attorneys throughout New York."

Please keep in mind, that while this will undoubtedly be a positive for many in the future, who will not have to face the prospect of having their employment prospects squashed for up to 28 years based on often unproven allegations, many will not benefit from this change.

The bad news: those who have either been "indicated" or have a judicial finding of child abuse will remain on the state's register for 10 years past the 18th birthday of the youngest child named in the report, unless they are able to overcome the difficult hurdle of expungement. Arguably, the biggest disappointment is that **these changes do not go into effect until Jan. 1, 2022**. Therefore anyone who is the subject of a child protective services investigation commenced prior to that date is still subject to being "indicated" based on the minimal standard of "some credible evidence." It is unclear how those placed on the State's Central Register prior to Jan. 1, 2022, will be affected by the new law. NYSDA is analyzing the new law with an eye to what arguments might be made to assist clients in the nearly two-year interim.

Attorneys are encouraged to contact Family Court Staff Attorney Kimberly Bode at the Backup Center regarding the new law.

Conducting Advocacy, Investigations, and More During the Shutdown

Physical distancing, whether government-mandated or by personal choice, has curtailed but not ended activities vital to public defense. From educating government officials about justice issues to investigating individual cases, the work necessary to quality representation of clients continues across New York and the nation.

Investigators Work the Phones, Feel the Isolation

The National Defender Investigator Association had to cancel its 2020 National Conference, but its members and other investigators "are figuring out ways to get the job done," notes a recent blog post. The post also links to a Law360 article about investigators' efforts to secure information vital to clients' cases during the COVID-19 shutdown. Whether seeking medical information to support applications to release clients vulnerable to the spread of the virus in jail or retail store tapes that could show clients were not near an alleged theft, investigators keep investigating. They work the phones, dig deeper into existing complex case files—and ponder what investigation will look like when restrictions ease but people they need to talk to are, perhaps, more reluctant to answer a stranger's knock on the door.

Sign-on Letters, Car Rallies: Advocacy at a Distance

Issues arising from the state budget and the dangers of COVID-19 are just the most obvious subjects confronting justice advocates as 2020 unfolds. During budget negotiations and after, advocates working together via social media, email, and phone calls have made their voices—and those of people endangered—heard. Opposing rollbacks of reform, advocating expansion and acceleration of releases from prisons and jails, demanding recognition of forgotten groups like people with mental illness during the crisis, advocates have written and submitted joint letters to government officials, planned car parades past government buildings, and submitted op-eds and letters to editors.

NYSDA was among the signatories of a letter to Governor Andrew Cuomo on Apr. 3, 2020, offering "a blueprint for a structured release program that will not compromise public safety" and an "extensive network of law firm partners and public defenders who stand ready to provide legal and logistical assistance to implement a program that you approve." This and other documents are available on the Coronavirus 2020 webpage covering Efforts to Seek Release.

Local and statewide groups have held car rallies and other forms of visible advocacy seeking release of incarcerated people. For example, Release Aging People in Prison announced a vigil and press conference at Sing Sing, in response to the first death of a person in New York state custody, held on April 3. And three local groups have obtained media coverage of their car rallies and socially-distanced advocacy seeking release of people from the Broome County Jail. The efforts of Justice and Unity for the Southern Tier (JUST), Truth Pharm, and Citizen Action are recounted on the JUST blog.

Defenders Call for Due Process for People Held without Preliminary Hearings

NYSDA, along with the Chief Defenders Association of New York, NYS Association of Criminal Defense Lawyers, and several defender offices across the state, co-signed a May 5, 2020, letter submitted to Chief Administrative Judge Lawrence Marks concerning indefinite pretrial detention based on untested allegations. As noted in the May 8 edition of News Picks from NYSDA Staff, the letter expressed due process concerns in light of the suspension of laws relating to CPL 180.80 and related provisions. The defenders stressed the urgency presented by having "hundreds of New Yorkers indefinitely detained throughout the State on mere allegations contained in a misdemeanor or felony complaint." It also countered a

letter from the District Attorneys of New York State focused on securing "the impaneling of grand juries and the continued suspension of discovery and speedy trial rights."

Since then, steps have been taken to expand virtual court proceedings in regions across the state. Chief Judge Janet DiFiore noted in a message on May 18 that some courts had begun "holding virtual preliminary hearings in criminal cases, to protect the rights of defendants being held in jail on felony charges." NYSDA, with defenders around the state, is seeking to ensure that detained clients receive due process. Check the Coronavirus 2020 Preliminary Hearing Resources webpage for updates

Lawyering via Video Creates Challenges Virtually Everywhere in NYS

The Unified Court System announced that, effective May 25, courthouses were beginning to reopen for some filing purposes. But "virtual court proceedings—in which judges, other court personnel, counsel and parties attend audio-visual conferences through Skype for Business—" were continuing for the time being. That announcement and other information are available on the Virtual Court Resources section (see the drop-down menu) of NYSDA's Coronavirus2020 webpage. (Obviously, things may well have changed by the time this issue is printed.)

Particularly thorny problems have arisen around preliminary hearings. While touted in the headline of a *Times Union* column as the resumption of "a staple of justice," a lack of uniformity exists in how, or even whether, virtual preliminary hearings are being held. Defenders face a host of logistical questions, some of which may affect the utility and even outcome of the hearing, such as where witnesses must go to "appear" for the hearing. Defense lawyers may face difficult choices, *e.g.*, urging compliance with requirements that clients not be held overlong on untested charges or participating in virtual preliminary hearings that lack elements of due process. And how these emergency measures work is complicated by already-existing differences in preliminary hearing practice. One positive aspect of the emergency may be that it provides an opportunity to examine preliminary hearing practice with an eye to improving outcomes and enhancing client-centered representation.

Virtual arraignments similarly challenge defenders to simultaneously address immediate client needs and resist long-term changes that will work to the disadvantage of future clients. Logistical questions arise in this context too, such as where counsel is and where the client is, and how can they communicate privately. But there are more fundamental reasons to continue long-standing objections to virtual arraignments when the pandemic wanes.
NYSDA issued a Statement in Opposition to Audio-Visual Arraignments in 2012. It cites, among other things, a reported study from a decade ago showing that defendants in Cook County, IL, "were significantly disadvantaged by" videoconferenced bail hearings over the prior 10 years. The Statement notes that the relationship between client and attorney can be hampered by virtual proceedings. And it goes on to say that

> The defendant's presence is not a mere formality that can or should be routinely dispensed with. Physical presence in the courtroom has its own significance and meaning. Under our justice system, the accused must be turned over by his captors and allowed to stand, as a person presumed innocent, before a court of law. While accused persons may be in custody, they are in the hands of the court and its officers. Family and loved ones can see the accused and be reassured that he or she has not been harmed, and will be treated with respect by the court. From this small event, public respect for the law and for our system of justice flows.

Lawyers dealing with problems related to virtual court appearances are encouraged to call the Backup Center.

NYSDA CLE Goes Virtual

Responding to the COVID-19 ban on gathering in person, NYSDA has begun presenting webinars that can be viewed for CLE credit under current Mandated Continuing Legal Education provisions. **Future webinars will be noted on our NY Statewide Public Defense Training Calendar.**

Senior Staff Attorney Batcheller Lauded

Stephanie Batcheller, a Senior Staff Attorney with NYSDA's Backup Center, is a recipient of the 2020 Wells College Alumnae and Alumni Association (WCA) Award. As the announcement in the WCA newsletter notes, Stephanie's distinguished public defense career has spanned multiple jurisdictions. She was the first female chief public defender in Georgia's Middle Judicial District, where her first argument was on behalf of a client facing the death penalty; an assistant federal public defender in Maryland; an assistant public defender in Monroe County, NY; and a member of NYSDA's legal staff for over two decades. Always focusing on providing client centered representation, she is particularly known

(continued on p. 43)

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.

Hernández v Mesa, __ US __, 206 LEd2d 29 (2/25/2020)

The invitation to create a damages remedy for constitutional violations arising from a cross-border shooting by a federal Border Patrol Agent is refused. In the years since *Bivens* v *Six Unknown Fed. Narcotics Agents* (403 US 388 [1971]), "we came to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power" and expansion of *Bivens* has become "'a "disfavored" judicial activity ….'" And "[u]nlike any previously recognized *Bivens* claim, a cross-border shooting claim has foreign relations and national security implications. In addition, Congress has been notably hesitant to create claims based on allegedly tortious conduct abroad."

Dissent: [Ginsburg, J] "[I]t is all too apparent that to redress injuries like the one suffered here, it is *Bivens* or nothing.…

I resist the conclusion that 'nothing' is the answer required in this case. I would reverse the Fifth Circuit's judgment and hold that plaintiffs can sue Mesa in federal court for violating their son's Fourth and Fifth Amendment rights."

McKinney v Arizona, __ US __, 206 LEd2d 69 (2/25/2020)

While the aggravating circumstance that makes a defendant death eligible must be found by a jury, "a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." Therefore, "state appellate courts may conduct a *Clemons* reweighing of aggravating and mitigating circumstances, and may do so in collateral proceedings as appropriate and provided under state law."

Dissent: [Ginsburg, J] "[T]he pivotal question: Is McKinney's case currently on direct review, in which case *Ring* applies, or on collateral review, in which case *Ring* does not apply? I would rank the Arizona Supreme Court's proceeding now before this Court for review as direct in character. I would therefore hold McKinney's death sentences unconstitutional under *Ring* …."

Monasky v Taglieri, __ US __, 206 LEd2d 9 (2/25/2020)

No "actual-agreement requirement" exists in determining a child's "habitual residence" under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention or Convention). Under the Hague Convention, a child wrongfully removed from her country of "habitual residence" ordinarily must be returned to that country." "No single fact, however, is dispositive across all cases. Common sense suggests that some cases will be straightforward: Where a child has lived in one place with her family indefinitely, that place is likely to be her habitual residence." Other cases may not be so straightforward but the finder of fact must look at the "totality of the circumstances" when determining the child's country of residence. The determination of the fact-finding court shall not be disturbed absent clear error, thus giving maximum deference to thats court's finding.

Concurrence in Part and Concurrence in the Judgment: [Thomas, J] "The Court correctly concludes that an actual agreement between parents is not necessary to establish the habitual residence of an infant who is too young to acclimatize. I also agree with the Court's conclusion that the habitual residence inquiry is intensely fact driven, requiring courts to take account of the unique circumstances of each case. [Footnote omitted.] However, this case should be decided principally on the plain meaning of the treaty's text.

Concurrence in Part and Concurrence in the Judgment: [Alito, J] Since "habitual residence" is not a pure question of fact, and involves a heavily factual inquiry, the standard of review on appeal should be abuse of discretion, not clear error. "As a practical matter, the difference may be no more than minimal. The important point is that great deference should be afforded to the District Court's determination."

US Supreme Court *continued*

Holguin-Hernandez v United States, No. 18–7739 (2/26/2020)

The question arising under the Federal Rules of Criminal Procedure "whether the defendant's district-court argument for a specific sentence (namely, nothing or less than 12 months) preserved his claim on appeal that the 12-month sentence was unreasonably long. We think that it did." The rulemakers "intended to dispense with the need for formal "exceptions" to a trial court's rulings," so that no particular language is required, nor is waiting for a court's ruling. A defendant advocating for a particular sentence, communicating the view "that a longer sentence is 'greater than necessary' has thereby informed the court of the legal error at issue in an appellate challenge to the substantive reasonableness of the sentence," without referring to the standard of review.

Concurrence: [Alito, J] We do not decide here what is sufficient to preserve claims of improper procedures used to arrive at chosen sentences. Nor do we decide what is sufficient to preserve a "'particular' substantive-reasonableness argument" or "suggest that a generalized argument in favor of less imprisonment will insulate all arguments regarding the length of a sentence from plain-error review." And we do not decide if the petitioner properly preserved his particular arguments; the Fifth Circuit can decide on remand whether those specific arguments were preserved "and whether the sentence was substantively unreasonable."

Shular v United States, No. 18–6662 (2/26/2020)

The "'serious drug offense' definition" of the Armed Career Criminal Act (ACCA), 18 USC 924(e) (2)(A)(ii) does not call for a comparison to a generic offense but "requires only that the state offense involve the conduct specified in the federal statute …." The parties agree that a categorical approach is required; a court must look at a state offense's elements, not the facts of "or labels pinned to the state conviction." But there are two types of categorical approaches. We are persuaded that Congress chose "application of ACCA to all offenders who engaged in certain conduct" rather than "all who committed certain generic offenses (in either reading, judging only by the elements of their prior convictions)."

Concurrence: [Kavanaugh, J] "I write separately to elaborate on why the rule of lenity does not apply here." It rarely comes into play because it comes into operation only after all the traditional tools of statutory interpretation have been tried, and only apples "in cases of "'"grievous"' ambiguity …."

Kansas v Garcia, No. 17–834 (3/3/2020)

In these three cases, individuals from other countries not authorized to work here secured employment by using the identity of others on federally-required work-authorization (I-9) forms. They also used false Social Security numbers on tax-withholding forms. They were prosecuted under Kansas statutes that make "it a crime to commit 'identity theft' or engage in fraud to obtain a benefit." Charges based on the I-9s were dismissed when the defendants raised a preemption objection, but the charges as to the tax-withholding forms were sustained. The Supreme Court of Kansas found that "a provision of the Immigration Reform and Control Act of 1986 (IRCA)" expressly preempts" the remaining charges; that finding is rejected. The preemption provision, 8 USC §1324a(b)(5), "broadly restricts any use of an I–9, information contained in an I–9, and any documents appended to an I–9" but does not mean that no information placed on an I-9, such as name, address, birthdate, or email address, can be used for any other purpose. Similarly, the prosecutions were not encompassed by the preemption provisions regarding the federal employment verification system. Nor are the Kansas laws preempted by implication, *ie* field preemption. "The submission of taxwithholding forms is f*undamentally unrelated* to the federal employment verification system …."

Nor do the Kansas laws conflict with federal law. The mere facts that the laws "overlap to some degree with federal criminal provisions does not even begin to make a case for conflict preemption."

Concurrence: [Thomas, J] "[W]e should explicitly abandon our "purposes and objectives" pre-emption jurisprudence." "We must use the accepted methods of interpretation to ascertain whether the ordinary meaning of federal and state law 'directly conflict.'"

Concurrence in Part, Dissent in Part: [Breyer, J] Nothing in IRCA expressly preempts the state laws as applied here, but " I do not agree with the majority's conclusion about implied preemption."

Davis v United States, No. 19-5421 (3/23/2020)

The Fifth Circuit erred in refusing to conduct a plain-error review of the convicted appellant's claim that the District Court erred by ordering the sentence on his federal offenses of possessing drugs with the intent to distribute and being a felon in possession of a firearm to run consecutively to any sentences that state courts might impose for pending 2015 charges. Almost all other circuits conduct "plain-error review of unpreserved arguments, including unpreserved factual arguments." No opinion is expressed as to whether the plain-error standard has been satisfied.

US Supreme Court *continued*

Guerrero-Lasprilla v Barr, No. 18-776 (3/23/2020)

The phrase "questions of law" in the Immigration and Nationality Act (INA), 8 USC 1252(a)(2)(D) "includes the application of a legal standard to undisputed or established facts." The petitioners, who sought to reopen removal proceedings after the time to do so had passed and they had become eligible for discretionary relief due to legal decisions, argued that the time limit should be equitably tolled. The Board of Immigration Appeals denied equitable tolling, concluding that, among other things, the petitioners had failed to demonstrate required due diligence. The Fifth Circuit erred in finding that it lacked jurisdiction to consider the petitioners' due diligence claims because they presented a factual claim. Statutory construction principles do not lead to the conclusion that the INA provision excludes from judicial review all mixed questions.

Dissent: [Thomas, J] The majority goes beyond the narrow question of whether denial of equitable tolling for lack of due diligence may be reviewed as a question of law, and "categorically proclaims that federal courts may review immigration judges' applications of any legal standard to established facts in criminal aliens' removal proceedings." I dissent.

Kahler v Kansas, No. 18-6135 (3/23/2020)

The Due Process Clause does not compel the acquittal of a defendant who could not tell right from wrong when committing an offense due to mental illness. Kansas law, which provides for the invocation of mental illness to show lack of the requisite intent (and to justify a reduced term of imprisonment or commitment to a mental health facility), uses the "cognitive capacity" prong of the landmark English ruling in *M'Naghten's Case*. That Kansas otherwise disallows mental illness as a defense, so that the "moral incapacity" prong of *M'Naghten* cannot preclude a conviction (though it can be raised at the sentencing phase of a case) does not violate due process. Within broad limits, states may set standards of criminal responsibility, crafting the "'doctrines of actus reus, mens rea, insanity, mistake, justification, and duress'" in a process of balancing and rebalancing "complex and oft-competing ideas about 'social policy' and 'moral culpability'—about the criminal law's 'practical effectiveness' and its 'ethical foundations.'" *Powell v Texas*, 392 US 514. Kahler's claim that the moral-incapacity standard has such a history in law as to be ranked fundamental, and that Kansas has abolished the insanity defense, is rejected. The state does have an insanity defense, just not the type Kahler invokes, and does permit any mental health evidence to be offered at sentencing. "That choice is for Kansas to make …."

Dissent: [Breyer, J] Kansas has not just redefined the insanity defense, "it has eliminated the core of a defense that has existed for centuries," which offends principles of justice that must be ranked as fundamental.

New York State Court of Appeals

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

Matter of Seedorf, 34 NY3d 1023 (12/20/2019)

"On the Court's own motion, it is determined that the Honorable Marc A. Seedorf is suspended, without pay, effective immediately, from the office of Justice of the Lewisboro Town Court, Westchester County, pursuant to New York Constitution, article VI, § 22 and Judiciary Law § 44."

People v Muhammad, 2020 NY Slip Op 00180 (1/9/2020)

The record supports the Appellate Division's finding that the defendant's attorney impliedly consented to having written copies of the court's full final instructions distributed to the jury. Counsel did not object to the distribution or when the court's oral instructions included reference to the written copies, and said outside of the jury's hearing that he took no exception to the final instructions, which allowed the jurors to take the copies into deliberations.

The court's granting of the jury's request for "additional time to deliberate because it had reached a 'critical juncture' in its deliberations" was a meaningful response to the jury's note.

People v Anonymous, 2020 NY Slip Op 01113 (2/18/2020)

The court lacked authority to consider erroneously unsealed records that established a violation by the defendant of a pre-sentence condition of his plea. Sentencing had been adjourned after the defendant was arrested for allegedly committing another crime, and the defendant was acquitted by a jury of that new charge. The prosecutor argued that justice required unsealing of the action that terminated in acquittal as the defendant's trial testimony made clear that he had engaged in criminal conduct during the sentencing adjournment. Under CPL 160.50 and precedent thereunder, a person charged but not convicted is restored to pre-arrest status as to that arrest and conviction. An expansive reading of the exception relied

NY Court of Appeals *continued*

on by the prosecution was rejected in *Matter of Katherine B. v Cataldo* (5 NY3d 196 [2005]). Here, "as in *Katherine B.*, it was error for the court here to unseal the criminal proceeding records for the noninvestigatory purpose of presenting a sentencing recommendation and determining defendant's sentence." Adopting the arguments of the prosecution or dissents would render the sealing statute ineffective and turn sealing into the exception rather than the rule. Upon resentencing, the prosecution may present evidence that the defendant violated the pre-sentence plea conditions so long as that evidence is not obtained from the sealed record.

Dissent: [DiFiore, CJ] The sealing statute provides a clear path for the prosecution and court to obtain records in the interest of justice, and if a violation of the statute did occur, the "defendant is not entitled to the drastic remedy of suppression."

People v Diaz, 2020 NY Slip Op 01114 (2/18/2020)

The court that adjudicated the defendant a risk level two under the Sex Offender Registration Act (SORA) did not err in relying on information from the presentence investigation report (PSI) that indicated use of physical force to coerce the accuser into cooperation. Reliable hearsay is permissible in SORA adjudications, and PSIs meet that standard. Defendants can review and challenge the accuracy of any facts in the PSI prior to sentencing, and have strong incentive to do so, as the PSI may impact the sentencing determination. If not altered in that process, factual statement in PSIs can supply an evidentiary basis for imposing points in a SORA determination. The defendant here could have challenged the accuracy of the claimed use of force "by offering contradictory documentary evidence or testimony and, if he had, the court might have credited his proof," but did not.

Dissent: [Rivera, J] No record evidence, hearsay or otherwise, supports the unattributed, conclusory hearsay sentence in the PSI. Accepting the statement as "'reliable hearsay' … extends *Mingo* beyond the analytic boundaries of its holding, absolves the People of their burden of persuasion, and renders the SORA proceeding a farce."

Matter of Miller, 2020 NY Slip Op 01950 (3/18/2020)

"On the Court's own motion, it is determined that Honorable Richard H. Miller, II is suspended, with pay, effective immediately, from the office of Judge of Family Court, Broome County, … pending review of a determination of the State Commission on Judicial Conduct."

People v Tsintzelis, 2020 NY Slip Op 02026 (3/24/2020)

DNA Evidence / Confrontation Clause

ILSAPP[1]: The admission of DNA lab reports through the testimony of an analyst who did not perform or supervise the DNA testing violated the defendants' confrontation clause rights. When confronted with testimonial DNA evidence at trial, a defendant is entitled to cross-examine an analyst who witnessed, performed or supervised the generation of the defendant's DNA profile or who used his or her independent analysis on the raw data. *People v Jones*, 27 NY3d 294; *People v Austin*, 30 NY3d 98. The instant records did not establish that the testifying analyst had such a role. Further, her hearsay testimony as to the DNA profiles developed from post-arrest buccal swabs satisfied the primary purpose test for determining whether evidence was testimonial. Finally, the errors were not harmless, since the People relied on the DNA profiles to prove guilt. The challenged Appellate Division orders were reversed and new trials were ordered. In concurring, Judge Rivera rejected the People's argument that, in the admitted Forensic Biology (FB) files, the listing of the analyst's name as a reviewer or analyst on some testing reports, and the appearance of her initials on each page of the files, sufficed. On several documents related to the final stages of DNA typing, the analyst was not listed at all as a reviewer or analyst. Further, her name or initials on any FB file document, including as a reviewer, was meaningless without testimony about what such a designation meant. Legal Aid Society of NYC (Tomoeh Murakami Tse, of counsel) and Appellate Advocates (Yvonne Shivers, of counsel) represented appellants Tsintzelis and Velez, respectively.

People v Hymes, 2020 NY Slip Op 02097 (3/26/2020)

IAC / 440 Needed

ILSAPP: The defendant asserted that County Court erroneously admitted certain testimony regarding the victim's out-of-court disclosures of sexual abuse and failed to instruct the jury that such evidence could be considered only to explain the investigative process and complete the narrative as to events leading to the defendant's arrest. These arguments were unpreserved and unreviewable. Further, the defendant did not demonstrate the absence of strategic or other legitimate explanations for trial counsel's failure to object to the testimony challenged on appeal or seek a limiting instruction. Thus, the claim of ineffective assistance on direct appeal was rejected. To the extent the defendant wished to advance such a claim based on matters outside the record, he could commence

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

NY Court of Appeals *continued*

a proceeding pursuant to CPL 440.10. (NOTE: Under Administrative Order AO/78/20, www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf, it would appear that such proceedings cannot be commenced until the emergency order is lifted.)

People v Perez, 2020 NY Slip Op 02096 (3/26/2020)

SORA / RISK FACTOR 9 / DISSENT

ILSAPP: The SORA hearing court did not err in assessing 30 points for risk factor 9 (prior conviction for misdemeanor sex crime or endangering welfare of child or any adjudication for sex offense) based on a prior NJ conviction for lewdness. It was proper to rely on the underlying conduct of the foreign conviction, which included the defendant knowingly exposing himself to the 12-year-old victim and making sexual and offensive gestures. Judge Wilson dissented, joined by Judge Rivera. The only argument preserved by the People—that the defendant's *conduct* warranted 30 points—could not be considered under risk factor 9, which required a *conviction* or *adjudication*. The People failed to preserve any argument based on the lewdness conviction; and there was not a "considerable overlap" in the elements of the NJ lewdness statute and the NY crime of endangering the welfare of a minor, notwithstanding the majority's analysis.

People v Delorbe, 2020 NY Slip Op 02126 (3/31/2020)

***PEQUE* CLAIM / UNPRESERVED / CONCURRENCE**

ILSAPP: Due process compels a trial court to apprise a defendant that, if he or she [is] not a U.S. citizen, the defendant may be deported as a consequence of a guilty plea to a felony. *People v Peque*, 22 NY3d 168. The instant defendant failed to preserve his *Peque* claim. A year before the plea proceeding, the People provided him with a generic notice of immigration consequences. The notice adequately alerted the defendant about immigration consequences. When he pleaded guilty to attempted 2nd degree burglary, Supreme Court did not mention immigration consequences, and he made no inquiry about the matter. At sentencing, the defendant did not seek to withdraw his plea or inquire about a possible immigration impact. Judge Garcia wrote the majority opinion. Judge Wilson concurred in the result via an opinion in which Judges Rivera and Fahey joined. The trial court's *Peque* responsibility could not be met by a prosecutor providing a form to the defendant. The instant plea proceedings violated *Peque.* The only issue was preservation. The generic notice did not permit an assessment as to the defendant's salient knowledge at the time of his plea. However, his own motion papers conclusively proved that he knew that his plea carried the possibility of deportation. That awareness was sufficient. Knowledge was not required as to the specific adverse consequence that would definitely or likely result from the plea.

People v Foster-Bey, 2020 NY Slip Op 02124 (3/31/2020)

"This case was argued with *People v Cadman Williams* (__ NY3d __ [decided herewith]) and, although the underlying facts of the respective matters are different, the analysis and the result are the same."

People v Williams, 2020 NY Slip Op 02123 (3/31/2020)

LCN AND FST / ERRANT *FRYE* DENIAL

ILSAPP: The trial court abused its discretion as a matter of law in refusing to hold a *Frye* hearing to assess the general acceptance within the scientific community of Low Copy Number (LCN) DNA evidence and the Forensic Statistical Tool (FST) used by the Office of the Chief Medical Examiner of NYC, a unanimous COA held. But the error was harmless. At trial, the People presented evidence as to DNA testing conducted to provide a link between the defendant and a gun. The testing revealed that there was a mixture of DNA from at least two contributors on the firearm. The statistical analysis conducted using the FST yielded the conclusion that it was millions of times more likely that the DNA mixture contained contributions from the defendant and one unknown, unrelated person, rather than from two unknown, unrelated persons. A defense expert stated that there were no generally accepted guidelines for the testing, analysis, or interpretation of LCN evidence and that the FST had not been adequately subjected to validation or peer review.

Judicial caution should govern the admission of developing scientific evidence in criminal proceedings, the COA declared. The motion court relied on unsound trial court opinions. Scientific community approval—not judicial fiat—was the litmus test. However, *sound* prior judicial opinions regarding general acceptance of scientific evidence could validate a trial court's decision to admit evidence without a *Frye* inquiry. The People ignored the defense expert opinion that LCN's enhancements of very minute amounts of genetic material could result in inaccurate results; and the motion court disregarded scholarly skepticism about LCN testing. A *Frye* hearing should also have been held as to the FST, a proprietary program developed and controlled by the OCME—an invitation to bias. OCME's secretive approach did not reflect proper quality assurance standards. Judge Fahey authored the majority opinion. Chief Judge DiFiore wrote a concurrence in which Judges Garcia and Feinman joined. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant.

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.

Arthur v Galletti, 176 AD3d 412 (1st Dept 10/1/2019)

RELOCATION TO ITALY / NO AUTOMATIC RETURN TO NY

ILSAPP[1]: The parents took cross appeals from a NY County Supreme Court order, which awarded the father custody of the children and permission to relocate to Lodi, Italy. The First Department modified by vacating a directive that the children relocate to NY when the youngest child reached age eight. The children's best interests would be served by custody in the father, who acted as their primary caregiver, while the mother often absented herself from home. Allowing relocation was also sound. Since this was an original custody order, the *Tropea* factors did not govern, and relocation was merely one factor to weigh. The children had spent much of their childhood in Lodi, where they attended school and were surrounded by the father's family. However, the provision about a return to NY was improper. The disruption was not warranted; and prior decisions observed that custody orders should not alter an arrangement automatically upon the happening of a specified future event, without considering best interests at that time. *See e.g. Matter of Eason v Bowick*, 165 AD3d 1592. Bruce Wagner represented the father. (Supreme Ct, New York Co)

People v Correa, 176 AD3d 411 (1st Dept 10/1/2019)

DRUG SALE / AGAINST WEIGHT

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree criminal sale of a controlled substance. The First Department reversed and dismissed the indictment, finding the verdict against the weight of evidence. Two police officers testified that they observed the defendant, in a drug-trafficking area, approach and talk to another man, who gave the defendant money. There was allegedly an exchange, but the officers did not see what was exchanged. Shortly thereafter, one officer saw a woman approach the defendant, speak to him, and touch his hand. But the officer did not observe any exchange of money or drugs. After the defendant and the woman separated, the officer approached the woman and heard her chewing on something—a bag containing $10 worth of crack cocaine. The officer did not see the woman even bring her hand to her mouth. The defendant did not have any drugs on him, but had $10 in one pocket and cash in other denominations in another pocket. The appellate court concluded that the People did not prove that the defendant sold cocaine to the woman. There was no observation of an exchange or the woman putting the bag in her mouth. The People's theory, that the defendant sold two $10 bags, one to the man and the other to the woman, was inconsistent with the cash found on his person. The Center for Appellate Litigation (Ben Schatz and Maria Ortiz, of counsel) represented the appellant. (Supreme Ct, New York Co)

In re Edward L. v Jasmine M., 176 AD3d 436 (1st Dept 10/3/2019)

VISITATION - SCHEDULING/DELEGATION OF COURT'S AUTHORITY

LASJRP[2]: The First Department affirms an order granting the father four annual supervised visits with the children approximately three months apart for two hours each, and providing that the children may have additional visits in their discretion.

The father has a history of being unable to control his anger, using corporal punishment on the children and screaming and speaking poorly of their mother during phone calls, causing the children distress. The court did not improperly delegate its authority to the children.

The JRP appeals attorney was Diane Pazar, and the trial attorney was Michelle Jacobs. (Family Ct, Bronx Co)

Jonathan R.F.-C., 176 AD3d 416 (1st Dept 10/1/2019)

ABUSE/NEGLECT
- DERIVATIVE ABUSE/SUMMARY JUDGMENT
- VISITATION

LASJRP: The First Department upholds a finding of derivative abuse via summary judgment where, before the subject child was born, respondent was convicted upon a jury trial of raping the subject child's then seven-year-old half-sister and filming the sexual assault, and was sentenced to 25 years to life in prison.

The presumption in favor of parental visitation was rebutted where the now five-year-old child has never met respondent, who has been incarcerated for the entirety of the child's life; and respondent continues to deny his guilt following his conviction, and has failed to attend a sex offender program and contends that he does not need sex offender treatment. While respondent has suggested that visitation could be facilitated by the child's paternal grandmother, she is a complete stranger to the child.

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

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

First Department *continued*

The JRP appeals attorney was Diane Pazar, and the trial attorney was Holly Graham. (Family Ct, Bronx Co)

Matter of Lenora D. v Richard J.R., 176 AD3d 432 (1st Dept 10/3/2019)

CUSTODY - GRANDPARENTS/EXTRAORDINARY CIRCUMSTANCES

LASJRP: The First Department affirms an order granting custody [to] the maternal grandmother, concluding that, given the child's need for stability in the aftermath of her mother's sudden death, the grandmother demonstrated extraordinary circumstances, and standing to seek custody, where, for about four years before the mother's death, the mother and the child had lived in the grandmother's household and the mother and grandmother together provided for all the child's financial and other needs; and the father, who resided with the child for about two years after her birth until the mother moved out with the child, thereafter saw the child sporadically and provided minimal financial support. (Family Ct, Bronx Co)

People v Aleynikov, 176 AD3d 444 (1st Dept 10/8/2019)

Double jeopardy was not violated by pursuit of a conviction of the state offense of unlawful use of secret scientific material after a conviction, which was overturned, of violating a federal stolen property law. Both convictions were based on the same conduct, ie uploading proprietary source codes to a server outside the country. The federal law makes "it a crime to transport, transmit, or transfer 'in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud.'" The federal conviction was overturned for failure to prove the "goods" element. The Second Circuit held that the source codes were purely intangible when transmitted—ie "'at the time of the theft'"—but did not hold they were intangible as they existed on the server. "[T]here is no inconsistency between the Second Circuit's determination that the codes were intangible when transported and this Court's determination that defendant made a tangible reproduction when he uploaded them to the German server, where they resided within a physical medium." (Supreme Ct, New York Co)

People v Tomczyk, 176 AD3d 456 (1st Dept 10/8/2019)

DEFENSES - TEMPORARY LAWFUL POSSESSION

LASJPR: The First Department finds no error in the denial of defendant's request for a charge on the defense of temporary lawful possession of a firearm where the jury apparently credited defendant's testimony that he took possession of the handgun in a struggle with an assailant, whom he shot in self-defense, but, after the shooting, defendant took the gun into a cab, into a store, and to his apartment, where he concealed it in a closet; and, during the six to eight hours the gun remained in his possession after the shooting, he made no effort to report it to the police, even when he saw police officers outside his apartment building and when police officers and his parole officer arrived at his apartment while investigating the shooting. (Supreme Ct, Bronx Co)

People v Wilkins, 176 AD3d 460 (1st Dept 10/8/2019)

STRANGULATION

LASJRP: The First Department finds no error where the court defined "impairment" in connection with second-degree strangulation by reading to the jury a definition stated in a medical dictionary. The Penal Law does not define the word impairment. (Supreme Ct, New York Co)

People v Brunson, 176 AD3d 488 (1st Dept 10/10/2019)

ORDER OF PROOF - RE-OPENING SUPPRESSION HEARING

LASJRP: The First Department finds no error where the hearing court reconsidered its suppression ruling and denied suppression after permitting the People to establish that there had been a typographical error in a grand jury transcript relied upon by the court when it had made its initial ruling.

The court had discredited an officer's testimony because of a purported one-word inconsistency between the officer's hearing and grand jury testimony. Proof that the grand jury stenographer had inaccurately transcribed the single word at issue increased the likelihood that the motion to suppress would be decided correctly based on the best available evidence of what really happened. There was no new evidence presented on the underlying suppression issues. (Supreme Ct, New York Co)

Matter of Raymond S.H. Jr. v Nefertiti S.M., 176 AD3d 467 (1st Dept 10/10/2019)

RELOCATION DENIED / AFFIRMED

ILSAPP: The father appealed from a New York County Family Court order, which denied his petition for permission to relocate with the parties' child to Florida. The First Department affirmed. The father, who had been the custodial parent since 2015, ostensibly sought to move to improve his son's life. However, he offered no proof regarding how life in Florida—including employment, housing, schools, and therapy for the child—would be better than in New York. Petitioner did not have a relocation plan, only an amorphous idea. The mother's failure

First Department *continued*

to pay child support did not warrant a grant of relocation. Further, she had a well-founded concern that, if relocation were granted, she would rarely see the child, given the father's resistance to any visitation. The mother could not afford to go to Florida; and her relationship with the child was fraught, requiring consistent therapeutic visitation to repair it. While the child was thriving with the father, those positive developments occurred in NY. The record also showed that the child's former therapist opined that the father may have coached the child to impugn the mother. Finally, the father did not address the child's visitation with his siblings, with whom the child enjoyed a positive relationship. (Family Ct, New York Co)

People v Serrano, 176 AD3d 476 (1st Dept 10/10/2019)

DOUBLE JEOPARDY - PREVIOUS DMV PROCEEDING

LASJPR: The First Department holds that defendant's prosecution for aggravated unlicensed operation of a motor vehicle was not barred by double jeopardy protections after defendant's conviction for the lesser included offense of unlicensed operation, a traffic infraction, before the New York State DMV Traffic Violations Bureau.

The administrative adjudication was not a criminal punishment that triggers the federal and state constitutional protections against multiple criminal punishments for the same offense. The prosecution also was not barred by CPL § 40.20(2), which states that a defendant "may not be separately prosecuted for two offenses based upon the same act or criminal transaction." Defendant was not previously "prosecuted." The administrative agency is not a criminal court, and a traffic infraction may be established by clear and convincing evidence, and only fines, but not imprisonment, may be imposed. (Supreme Ct, Bronx Co)

In re Vance v Roberts, 176 AD3d 492 (1st Dept 10/10/2019)

SEVERANCE/JOINDER
ADOLESCENT OFFENDERS

LASJRP: In this adolescent offender prosecution, the People successfully moved to prevent removal of one charge involving a February 9th incident, but the People's motion to prevent removal was denied with respect to a February 23rd incident. When the clerk advised the court that the February 23rd charges could not be sent directly to Family Court because they had been combined in one indictment with the February 9th charges, defense counsel moved to sever, the People opposed, and the court eventually granted the motion.

In this Article 78 proceeding in which the People seek a writ of prohibition, arguing that the court exceeded its authority and acted in excess of its powers in ordering severance of charges properly joined in a single indictment, the First Department denies relief. There is no question that the court had the authority to make the determination as to whether the charges were properly joinable, and, finding that they were not, had the authority to sever those charges.

People v Carrasco, 176 AD3d 503 (1st Dept 10/15/2019)

NO WARNING RE VIOLATION / VACATUR

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1st degree robbery. The First Department reversed, vacated the plea, and remanded for further proceedings. The appellate court declined to exercise its discretion to dismiss the appeal. *See* CPL 470.60 (1) (at any time after appeal has been taken and before its determination, on motion of respondent or sua sponte, appellate court may dismiss appeal on ground of failure of timely perfection). The People conceded that, if the instant appeal was not dismissed, the defendant's guilty plea should be vacated, because he was not informed before sentencing that, if he violated plea agreement conditions, the enhanced sentence would include post-release supervision. *See People v McAlpin*, 17 NY3d 936. The Center for Appellate Litigation (Anjali Pathmanathan, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

People v Burden, 176 AD3d 524 (1st Dept 10/17/2019)

SORA / REVERSED

ILSAPP: The defendant appealed from an order of Bronx County Supreme Court, which adjudicated him a level-two sex offender. The First Department reversed and vacated the adjudication. The defendant was not required to register in NY on the basis of his Connecticut misdemeanor conviction for 4th degree sexual assault. The physical helplessness element of that crime would make it the equivalent of NY 1st degree sexual abuse, a registrable offense. However, there was no indication that either victim was physiologically incapable of speech, drugged into a stupor, or otherwise unable to communicate her unwillingness to submit to the sexual contact. In the absence of the helplessness element, the CT crime was equivalent to NY's 3rd degree sexual abuse, which was not registrable. The issue was reviewable, notwithstanding the defendant's failure to raise it in the SORA court. Preservation concepts relating to civil appeals applied. The appeal was reviewable because it presented a pure question of law that could not have been avoided if raised previously (*see Chateau D'If Corp. v City of NY, 219 AD2d 205); and because* [italics sic] the hearing court expressly ruled on the issue. The doctrine of laches did not warrant dismissal, despite the lapse of 13 years, where the People failed to show

First Department *continued*

prejudice. Lloyd Epstein represented the appellant. (Supreme Ct, Bronx Co)

People v Caviness, 176 AD3d 522 (1st Dept 10/17/2019)

APPEAL - DISMISSAL IN THE INTEREST OF JUSTICE
POSSESSION OF A WEAPON - GRAVITY KNIFE

LASJRP: With respect to defendant's weapon conviction involving a gravity knife, the First Department endorses the People's decision, "in the exercise of their broad prosecutorial discretion," to agree that the indictment should be dismissed under the particular circumstances of this case, and in light of recent legislation that effectively decriminalizes simple possession of gravity knives even though the law does not apply retroactively. (Supreme Ct, New York Co)

Cobb v NYS Dept. of Corr. & Community Supervision, 176 AD3d 507 (1st Dept 10/17/2019)

PAROLE CONDITION / RIGHT TO TRAVEL

ILSAPP: The petitioner appealed from a judgment of Bronx County Supreme Court, which denied vacatur of a parole condition prohibiting him from traveling anywhere in the borough of Queens (where the victim lived) and dismissed his CPLR Article 78 proceeding. The First Department reversed. In 2010, the petitioner pleaded guilty to 2nd degree assault and was sentenced to six years' imprisonment, to be followed by five years' post-release supervision, and the court issued a full order of protection. After his release, the petitioner was arrested based on the victim's allegation that he approached her in Far Rockaway, Queens. He was acquitted, but was required to sign several new conditions of release, including the travel condition. Release conditions that implicate certain fundamental rights, such as the right to travel, must be reasonably related to a petitioner's criminal history and future chances of recidivism. The instant categorical ban was not thus reasonably related. Thus, the matter was remanded for issuance of a new travel restriction, which had to specify that any such restriction was subject to case-by-case exceptions for legitimate reasons. The Center for Appellate Litigation (Molly Schindler and Cathy Liu, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

People v Fermin, 176 AD3d 539 (1st Dept 10/17/19)

CONFESSIONS - FRUITS - SUBSEQUENT STATEMENTS

LASJRP: The First Department upholds a determination that defendant's post-Miranda statements were sufficiently attenuated from earlier, inadmissible pre-Miranda statements where the statements were obtained by the same detective, but there was a 4½-hour break, different officers transported defendant to the precinct, and the initial interaction with defendant was brief. (Supreme Ct, New York Co)

In re Giselle H.G., 176 AD3d 510 (1st Dept 10/17/2019)

TERMINATION OF PARENTAL RIGHTS - DEFAULTS

LASJRP: In this termination of parental rights proceeding, the First Department upholds the denial of the mother's motion to vacate where she failed to provide any details or documentation to support her claim that she was incarcerated on the date of the hearing, or, with respect to another hearing, to support her claim of illness. She also failed to explain her failure to notify her attorney or the court. (Family Ct, New York Co)

People v Maynard, 176 AD3d 512 (1st Dept 10/17/2019)

RIGHT TO COUNSEL - DECISION-MAKING

LASJPR: The First Department rejects defendant's claim that defense counsel improperly conceded his guilt without his consent where counsel focused on persuading the jury to accept the non-frivolous proposition that there was reasonable doubt as to whether the robbery occurred in a dwelling, and did not concede that defendant was the perpetrator.

Even though counsel did not probe deeply into the question of the robber's identity and asked only perfunctory questions along those lines, the right to counsel is not violated when a defense lawyer advocates for the defendant's claim of complete innocence with what the defendant might consider insufficient zeal. (Supreme Ct, New York Co)

In re S.H., 176 AD3d 515 (1st Dept 10/17/2019)

ABUSE/NEGLECT
- LEAVING CHILDREN UNSUPERVISED
- MEDICAL NEGLECT

LASJRP: The First Department upholds a finding of neglect where the mother placed her then eighteen-month-old daughter in the control of her nine-year-old son for brief periods of time when the children were sent to retrieve mail from the lobby of their building. Her son had a history of emotional and behavioral issues that made this particularly inappropriate.

The mother was aware that he had engaged in dangerous and destructive behavior, including attempting to set fires, and had expressed extreme jealousy of his sister and written a letter to the mother stating that he felt unloved. Her daughter was still learning to walk on stairs, and, on numerous occasions, she encouraged her son to walk with her daughter down multiple flights of stairs without adult supervision. On at least one occasions, her

First Department *continued*

son engaged in sexual behavior with his sister while alone with her in the building's elevator.

The mother failed to continue with recommended therapy for her son after his school disciplined him for offering to give a female classmate money for sex. Her failure to adequately address his emotional and psychiatric needs adversely affected his mental health and posed a risk to other children.

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

People v Carter, 176 AD3d 552 (1st Dept 10/22/2019)

HEARSAY - EXCITED UTTERANCE

LASJRP: The First Department finds no error in the admission of the victim's 911 call as an excited utterance where the victim made two brief intervening phone calls, but the violent and shocking nature of the incident, the short amount of time that passed between the incident and the 911 call, the fact that the victim was still in the vicinity and still feared her attacker when she made the call, and the court's observation regarding her agitated state during the call, established that the statements were not made under the impetus of studied reflection. (Supreme Ct, New York Co)

People v Carter, 176 AD3d 564 (1st Dept 10/22/2019)

POSSESSION OF A WEAPON - INTENT TO USE UNLAWFULLY AGAINST ANOTHER

LASJRP: The First Department finds legally sufficient evidence that defendant possessed a razor with intent to use it unlawfully against another when he used it to cut the sleeping victim's pocket in order to effectuate a larceny. Clothing actually being worn is considered part of one's person. (Supreme Ct, New York Co)

In re Cindy F. v Aswad B.S., 176 AD3d 549 (1st Dept 10/22/2019)

CUSTODY - RELOCATION

LASJRP: The First Department upholds an order permitting the mother to relocate with the child to Edison, New Jersey where the mother and the child are living in a cramped one-bedroom apartment with the maternal grandmother in an area the mother believes is not child-friendly and is potentially dangerous; the move will allow the child to attend a good public school that provides busing, and the mother will be able to maintain full-time employment without having to transport the child to and from school; and although FaceTime contact is not an equal substitute for physical contact, the child wishes to move the short distance and the mother testified that she would assume the burden of transporting the child to and from visits with the father. (Family Ct, Bronx Co)

People v Calderon, 176 AD3d 594 (1st Dept 10/24/2019)

TRIAL IN ABSENTIA - RIGHT TO BE PRESENT AT MATERIAL STAGES

LASJRP: The First Department holds that defendant's absence from a pretrial Ventimiglia proceeding deprived him of his right to be present at all material stages of trial, including ancillary proceedings.

Defendant was present to address the prosecution's initial Molineux application. However, when the court was about to rule in defendant's absence on another date, the People sought to include new factual details not mentioned at the earlier proceeding. This expanded the Molineux application and involved factual matters of which defendant may have had peculiar knowledge. (Supreme Ct, New York Co)

Matter of Jessica M. v Julio G.R., 176 AD3d 584 (1st Dept 10/24/2019)

CONSENT ORDER / NO APPEAL

ILSAPP: The respondent appealed from an order of Bronx County Family Court, which awarded the petitioner sole custody of the child and granted him certain visitation. The Second Department dismissed the appeal. Since the respondent consented to the order, he was a not an aggrieved party. *See* CPLR 5511 (an aggrieved party may appeal from any appealable judgment or order). Although the respondent maintained that his consent was not knowingly or voluntarily given, his remedy was to move to vacate or resettle the order in Family Court. (Family Ct, Bronx Co)

In re J.R.M.-C., 176 AD3d 623 (1st Dept 10/29/2019)

ABUSE/NEGLECT – DOMESTIC VIOLENCE

LASJRP: The First Department upholds a finding of neglect where, at about 3:00 a.m., the father grabbed the mother by the throat, pushed her against the wall and choked her. All three children were present in the apartment at the time and the eldest child saw what was transpiring and "yelled, stop, poppy, stop."

The children were in imminent danger of physical impairment due to their proximity to the violence.

The JRP appeals attorney was Riti Singh, and the trial attorney was Stacy-Ann Suckoo. (Family Ct, Bronx Co)

People v Moco, 176 AD3d 644 (1st Dept 10/31/2019)

BAD *SANDOVAL* RULING / BUT HARMLESS ERROR

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 1st degree

First Department *continued*

stalking and other crimes. The First Department affirmed, but observed that the People should not have been permitted to cross-examine the defendant about the underlying facts of two prior arrests that resulted in dismissals. The prosecutor had not ascertained whether the charges had been dismissed on the merits, which would have negated any good-faith basis for inquiry. Nevertheless, any prejudice from the brief questioning was minimized by the trial court's statement to the jury that the charges were dismissed and by the defendant's testimony to that effect. In any case, any error was harmless. (Supreme Ct, New York Co)

People v Alexander, 176 AD3d 598
(1st Dept 10/29/2019)

When the jury sent out a note indicating that three jurors could not continue, and the court determined by speaking with each individually that all were concerned because their employers were not paying them for the days they were serving, the court erred in declining despite repeated defense requests to ask if their financial concerns would affect their ability to fairly deliberate. A new trial is required. (Supreme Ct, Bronx Co)

People v Rosario, 177 AD3d 417 (1st Dept 11/7/2019)

IDENTITY THEFT - FINANCIAL LOSS

LASJRP: The First Department upholds a conviction for identity theft in the first degree, concluding that the trial court correctly advised the jury that "financial loss is not the ultimate harm suffered by the victim, but is rather the value of what was taken. Loss includes the value of all property taken even though all or part of it was returned."

The Court rejects defendant's reading of the statute that would result in no criminal liability in the event the perpetrator, or a collateral source such as a bank or insurance company, made the victim whole. (Supreme Ct, Suffolk Co)

In re Jermaine K.R., 176 AD3d 648
(1st Dept 10/31/2019)

ABUSE/NEGLECT - DOMESTIC VIOLENCE

LASJRP: The First Department finds sufficient evidence of neglect where respondent father punched respondent mother in the face, causing a black eye; during the same fight, the father pushed the mother, and the mother hit the father in the back of the head with a drinking glass; the five extremely young children were in close proximity to the violence; and one child began crying as a result of the fight they witnessed. (Family Ct, Bronx Co)

In re Kimora D., 176 AD3d 638 (1st Dept 10/31/2019)

ABUSE/NEGLECT - DOMESTIC VIOLENCE

LASJRP: The First Department upholds a finding of neglect where the police officer called to the scene concluded that respondent and the mother were aggressors and arrested them both; respondent himself testified that when the mother pushed him he pushed her back, and he continued to engage with her even after the child repeatedly asked them to stop fighting; respondent may have been involved in telling the child to stay in the bathroom, but "this was in any event a dubious protective measure, given the extremely small size of the apartment … and the child's almost certain ability to hear the screaming and struggling over a knife even from behind the bathroom door;" respondent entered the bathroom with his fingers lacerated and bloodied by the mother's use of a kitchen knife, and exposed the child to the full extent of the violence; and although respondent cites the child's use of the word "sad," the child said she was "scared," and she was in close physical proximity to the altercation, which involved screaming, pushing, biting, and lacerations by knife.

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

In re Ece D. v Sreeram M., 177 AD3d 450
(1st Dept 11/12/2019)

CUSTODY/VISITATION - RELOCATION/TRAVEL

LASJRP: The First Department finds no basis in the record for the strict relocation provision prohibiting the mother from moving out of her apartment with the children without first obtaining the father's written consent or the court's permission. Given the parenting schedule established by the court, the ten mile radius proposed by the mother is an appropriate distance for relocation without the need for the father's consent or court approval.

Although the mother contends that the father should not be allowed to travel with the children to India because India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, the court's implicit finding that the father is likely not an abduction threat has a sound basis in the record since the father has substantial real estate holdings, which he manages, in the New York area, holds a TLC license, has family in New York, and testified that he wants the children, who are United States citizens, to remain in the United States. (Family Ct, New York Co)

Matter of Krystal R. v Kriston L., 177 AD3d 445
(1st Dept 11/12/2019)

NEGLECT / AFFIRMANCE

First Department *continued*

ILSAPP: The father's appeal from an order of disposition rendered by Bronx County Family Court brought up for review a fact-finding order, holding that he neglected the subject child. In addition, the father appealed from an order denying his motion to vacate an order of protection entered against him, after an inquest, upon his default. The First Department affirmed. The neglect finding was supported by the evidence: the father had multiple altercations with the mother in the child's presence, and on at least one occasion, injured them. Regarding the vacatur motion, the father had no reasonable excuse for his failure to appear at the family offense hearing. See CPLR 5015 (a) (1). Although he contended that he had just been evicted, he admitted that he simply forgot the date. The lower court properly denied the counsel's adjournment request, where no explanation was provided for the father's absence. (Family Ct, Bronx Co)

People v Jones, 177 AD3d 445 (1st Dept 11/12/2019)

MARIJUANA CONVICTION A NULLITY AFTER 8/28/2019

LASCDP[3]: Citing the new sealing statute (CPL §160.50(5)), the First Department vacated defendant's conviction of unlawful possession of marijuana. The conviction became a "nullity" after August 28, 2019, the law's effective date. (Supreme Ct, New York Co)

People v McGregor, 179 AD3d 26 (1st Dept 11/14/2019)

AMOROUS JUROR'S MISCONDUCT / REVERSAL

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted 2nd degree murder, 2nd degree conspiracy, and other crimes, following a six-week trial involving nearly 100 witnesses. He was acquitted of substantive charges arising from three out of four gang-related shooting incidents. The First Department reversed and ordered a new trial, because the lower court erred in denying the defendant's postconviction motion. After the verdict, but before sentencing: (1) a rival gang member/cooperating witness informed the prosecutor that he had been corresponding with Juror 6, who was currently visiting him jail; (2) the juror sent the prosecutor a letter requesting that the witness's sentence be reduced, in light of his cooperation; and (3) the witness sought the court's assistance in obtaining a license to marry the juror. An investigation by the prosecutor revealed that the romance was sparked while deliberations were underway. At that time, juror 6 wrote to the witness in jail, because she felt for him and wanted to speak to him, and she provided her phone number. After the verdict, the juror and witness communicated by phone several times a day, and the juror wrote 50 letters to the witness.

At the CPL 330.30 hearing, juror 6 testified that she contacted the cooperating witness because she felt bad for a person who had tried to change his life and then found that his "history caught up" with him; and "obviously, there was a physical attraction." Supreme Court found that the juror's conduct, while "unwise," did not affect the fairness of the proceedings. That was error. CPL 330.30 (2) authorizes a court to set aside a verdict on the ground of juror misconduct that may have affected a substantial right of the defendant and was not known to him prior to the verdict. Here the misconduct was willful and blatant. Assertions of impartiality by juror 6 had to be taken with a grain of salt; the actual and implied bias present here indicated a predisposition to credit the witness's testimony. The juror misconduct undermined the defendant's right to a fair trial. Debevoise and Plimpton represented the appellant. (Supreme Ct, New York Co)

People v Ramirez, 177 AD3d 460 (1st Dept 11/14/2019)

SEARCH AND SEIZURE - PROBABLE CAUSE

LASJPR: After hearing over the radio a report, based on an anonymous tip, that there had been a shooting and that the shooter was an Hispanic male wearing a black and white White Sox baseball cap and a green jacket, the officer observed defendant, an Hispanic male wearing a black and white White Sox baseball cap and a green jacket, about 5 blocks from the shooting location. Defendant slowed down behind the police vehicle, momentarily stopped walking, took out a cell phone and put it to his ear, and then walked along the street. The officer and another officer exited their vehicle and stopped defendant, who was not handcuffed or arrested. The officers searched defendant, but recovered no weapons or other evidence and released him. Shortly thereafter, police officers found a gun approximately one foot away from where defendant had momentarily stopped walking and taken out his phone. Defendant was located about one block away, stopped for a second time and arrested.

The First Department upholds the hearing court's determination that there was probable cause to arrest. (Supreme Ct, Bronx Co)

People v Richards, 177 AD3d 469 (1st Dept 11/14/2019)

RIGHT TO COUNSEL - EFFECTIVE ASSISTANCE - PLEAS/IMMIGRATION CONSEQUENCES

LASJRP: The First Department vacates the judgment of conviction, concluding that defendant was denied effective assistance of counsel in connection with his third degree robbery plea where defense counsel mistakenly

[3] 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*

believed that defendant's already-existing youthful offender adjudication, which is not considered a criminal convictions for purposes of immigration law, already rendered him deportable, and did not know that defendant's negotiated sentence of one to three years rendered the conviction an aggravated felony under immigration law.

As a result, counsel focused primarily on ensuring that defendant did not serve extra time on the violation of probation in the YO case rather than on obtaining a sentence of less than one year in connection with the plea, which would have prevented the conviction from being an aggravated felony and subjecting defendant, who is in removal proceedings, to mandatory deportation. When the court advised defendant that his guilty plea would subject him to deportation, defendant did not know there was a way in which a disposition involving the same offenses and aggregate term could be structured to avoid deportation. There was a reasonable probability that the People would have agreed to a different, immigration-favorable disposition resulting in the same aggregate prison time. (Supreme Ct, Bronx Co)

People v Johnson, 177 AD3d 484 (1st Dept 11/19/2019)

RIGHT TO COUNSEL - EFFECTIVE ASSISTANCE

LASJRP: The First Department holds that defendant was deprived of effective assistance when his counsel stated on the record that because of his plea, defendant "will most likely be deported," since it is clear that defendant's drug-related conviction would trigger mandatory deportation. The remarks made by counsel to the judge on the record regarding what he advised defendant are sufficient to permit review on direct appeal. The plea may be vacated if defendant can show a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea.

A dissenting judge asserts that defendant must raise his claim via a CPL § 440.10 motion because, without an expansion of the record, it is impossible to determine what advice counsel actually gave to defendant. During a plea colloquy with the court and the prosecutor, counsel evinced his awareness of automatic deportation. Counsel's use of the phrase "most likely" needs to be explored, but that was an informal discussion between counsel and the court in which defendant did not participate. Moreover, the People served defendant with a notice of immigration consequences, the court provided immigration warnings, and during the plea colloquy defendant confirmed that he wanted to plead guilty regardless of any adverse immigration consequences. (Supreme Ct, New York Co)

Matter of Kwesi P., 177 AD3d 495 (1st Dept 11/19/2019)

JD ALLOCUTION DEFECTIVE / REVERSED

ILSAPP: The respondent appealed from an order of disposition of NY County Family Court, which adjudicated him a juvenile delinquent upon his admission to acts constituting 4th degree criminal facilitation. The First Department reversed. The allocution of the mother failed to advise her of the rights the respondent was waiving and the dispositional consequences, as required by Family Court Act § 321.3 (1). However, because the respondent violated probation—which was extended and remained in effect—the petition was not dismissed. The matter was remanded for a new fact-finding determination. Lewis Calderon represented the respondent JD. (Family Ct, New York Co)

People v Leonard Narducci, 177 AD3d 511 (1st Dept 11/19/2019)

VENUE

LASJRP: In this prosecution for larceny by false pretenses, the First Department concludes that the People met their burden of establishing by a preponderance of the evidence that venue was proper in New York County where the element of making a false representation is deemed to have occurred in Manhattan, where a government agency received defendant's application for benefits containing false statements.(Supreme Ct, New York Co)

People v Delacruz, 177 AD3d 541 (1st Dept 11/21/2019)

GANG ASSAULT - ATTEMPTS

LASJRP: The First Department finds unpersuasive the People's arguments in favor of revisiting the Court's previous holding that attempted gang assault in the second degree is a legal impossibility. One cannot attempt to create an unintended result. (Supreme Ct, New York Co)

People v Lora, 177 AD3d 518 (1st Dept 11/21/2019)

1ST DEPT. REVERSES 30.30 DISMISSAL FOR PEOPLE'S LATE RESPONSE

LASCDP: Where the People submitted a late response (15 days) to a 30.30 motion, the lower court granted 30.30 dismissal on default grounds.

The First Department majority (3-2) reversed the dismissal. The majority cited the seriousness of the case (several weapons charges) and noted that less drastic remedies were available, such as charging the People 15 days for the untimely response.

The two dissenters would have affirmed the dismissal for the People's untimeliness without requesting an extension. (Supreme Ct, Bronx Co)

First Department *continued*

People v Shu Ng, 177 AD3d 534 (1st Dept 11/21/2019)

ASSAULT - INTENT

LASJRP: In this second degree assault prosecution in which defendant was found guilty of punching the victim in the face with such force that the victim was knocked back onto the pavement, causing permanent catastrophic brain injuries, the First Department finds no error in the admission of limited evidence of defendant's athletic and martial arts abilities, consisting of an Instagram photo posted by defendant and a document in which he reported his martial arts skills. This evidence was relevant to intent in that it tended to show that serious physical injury was a natural consequence of defendant's act and that defendant was aware of this. (Supreme Ct, New York Co)

People v Duval, 177 AD3d 518 (1st Dept 11/26/2019)

SEARCH WARRANT UPHELD OVER SPECIFICITY OBJECTION

LASCDP: The place searched was an individual unit in a private residence in the Bronx. The First Department majority (3-2) held that the warrant was adequately specific in referring to the building as a whole as the location to be searched; the police had submitted materials to the warrant court indicating that the home was a family residence occupied by defendant, his mother, and other family members.

The dissent objected that the warrant did not describe the location to be searched with sufficient specificity. It relied on the Supreme Court decision of Groh v Ramirez, 540 U.S. 551, 557-58 (2004), which states that a warrant must be evaluated within its four corners, and may not rely on extraneous materials. The dissenters would have suppressed. (Supreme Ct, Bronx Co)

Second Department

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

Matter of Cassissa v Solares, 176 AD3d 697 (2nd Dept 10/2/2019)

The decision to grant the father sole custody of the parties' child, while denying the mother's petition for the same, is affirmed despite the court's failure to consider the mother's allegations that the father committed domestic violence against her. In any custody proceeding the court is obliged to consider whether allegations of domestic violence have been established by a preponderance of the evidence. If such a determination is made, it then must consider the effect the domestic violence had on the best interests of the child. In the absence of such a finding by the lower court, the appellate court elects to make its own credibility assessment. Based on the evidence elicited at trial, namely that the mother did not seek medical or police intervention for domestic violence, no incidents occurred since the parties stopped living together in 2016, and the mother voluntarily lifted the order of protection against father, there was a sound and substantial basis to grant the father's custody petition. (Family Ct, Richmond Co)

People v Castello, 176 AD3d 730 (2nd Dept 10/2/2019)

IDENTIFICATION - PHOTOS/ FAILURE TO PRODUCE ARRAY

LASJRP[1]: The Second Department concludes that the People rebutted the presumption of suggestiveness arising from their failure to produce the photographic arrays displayed through use of the photo manager system where the detective testified that she utilized the databases applying the description of the perpetrator supplied by the complainant; the complainant was shown the computer-generated photo arrays a day after the incident occurred and then again three days later, and 700 to 1,000 photographs were generated by the photo manager system, which were displayed in smaller arrays of photographs from which, during the third viewing session, the complainant identified defendant; and the complainant eventually identified defendant in a lineup. (Supreme Ct, Kings Co)

Matter of Carter V. v Administration for Children's Services, 176 AD3d 696 (2nd Dept 10/2/2019)

CUSTODY - GRANDPARENTS/POST-TPR

LASJRP: The Second Department upholds an order dismissing the maternal grandparents' custody petition where the mother had executed a conditional surrender of her parental rights freeing the child for adoption by the foster parents, and the grandparents did not seek to adopt.

The JRP appeals attorney was Patricia Colella, and the trial attorney was Alexander Turbin. (Family Ct, Queens Co)

Matter of David v LoPresti, 176 AD3d 701 (2nd Dept 10/2/2019)

10-YR-OLD / PREFERENCE UNKNOWN

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

Second Department *continued*

ILSAPP[2]: The mother appealed from an order of Queens County Family Court, which denied her custody modification petition, seeking permission to temporarily relocate with the parties' child, and awarded physical custody to the father. The Second Department reversed and remitted. The record was insufficient to determine whether relocation was proper. The AFC failed to fulfill the duty to advise the Family Court of, much less advocate for, the position of the then 10-year-old child. Further, despite not being made aware of the child's position through counsel, the court did not meet in camera with the child. Denial of the petition without ascertaining the child's preference was unsound, where the mother had been the primary caregiver since birth, and relocation would only be temporary. In addition, the mother was improperly prevented by the Court Attorney Referee from presenting evidence regarding her reasons for the move and the impact it would have on the child. Family Court further erred in awarding the father permanent custody, given that the mother sought only temporary relief, and he withdrew his cross petition for custody. In light of intemperate remarks made by the Referee, a different Referee was needed for the de novo hearing. (Family Ct, Queens Co)

People v Delano F., 176 AD3d 736 (2nd Dept 10/2/2019)

NO APPEAL / "NOT RESPONSIBLE" PLEA WITHDRAWAL DENIAL

ILSAPP: The defendant appealed from an order of Suffolk County Supreme Court, which denied his CPL 220.60 (3) motion to withdraw his plea of not responsible by reason of mental disease or defect as to two counts of 3rd degree arson. The Second Department dismissed the appeal. The plea court found that the defendant suffered from a dangerous mental disorder and committed him to the custody of the Commissioner of Mental Health. Then the defendant made the plea withdrawal motion, which was denied. Unless authorized by the CPL, no appeal lies from an order arising out of a criminal proceeding. Appellate review is available where the defendant pleaded guilty—as opposed to "not responsible"—then a motion to withdraw that plea was denied, the defendant was sentenced, and an appeal was taken from the judgment the conviction. However, in the instant scenario, there was no authority for an appeal from denial of the plea withdrawal application. No avenue for appeal was created when the Legislature amended CPL 220.60 to permit motions to withdraw "not responsible" pleas. (Supreme Ct, Suffolk Co)

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

Matter of Liriano v Hotaki, 176 AD3d 710 (2nd Dept 10/2/2019)

VISIT CANCELLATION / LIMITS

ILSAPP: The mother appealed from certain aspects of a Queens County Family Court order resolving her custody modification petition. She contended that the Family Court should not have limited her ability to cancel a scheduled visit to instances of "substantial medical reason involving the child." The Second Department affirmed. The provision was a standard limitation (Parenting Plan, ¶2.12, at www.nycourts.gov/forms/matrimonial/ParentingPlanForm.pdf). The proof showed that it was in the child's best interests to limit the mother's ability to cancel scheduled visits. (Family Ct, Queens Co)

Matter of McNichol v Reid, 176 AD3d 713 (2nd Dept 10/2/2019)

It was improper for the Court to grant the mother's petition for summary judgment, which dismissed the father's petition for modification of child support and terminated the mother's support obligation on the grounds of parental alienation without first conducting a hearing on the merits. Under limited circumstances a non-custodial parent's obligation to support his/her child may cease prior to the child's 21st birthday, based on parental alienation, "where the noncustodial parent establishes that his or her right of reasonable access to the child has been unjustifiably frustrated by the custodial parent …."

Here the mother failed to meet her burden, and the court improperly relied on inadmissible evidence from conferences and prior court proceedings in making its decision. The matter is therefore remanded for a hearing on the father's petition. (Family Ct, Rockland Co)

People v Santiago, 176 AD3d 744 (2nd Dept 10/2/2019)

PEOPLE'S APPEAL / SUPPRESSION UPHELD

ILSAPP: The People appealed from a Queens County Supreme Court order, which suppressed physical evidence and statements as to two defendants. The Second Department affirmed. In 2014, at the apartment of his aunt and his cousin (defendant Santiago), defendant Soto was apprehended by NJ parole officers for parole violations. While conducting a protective sweep of the apartment, the officers found Santiago in a bedroom and what they suspected to be heroin in a closet. They notified NYPD, and officers responded promptly. Soto, who was not *Mirandized*, admitted that a safe in the bedroom was his and contained two guns. He signed a consent form and opened the safe, where the officers found the weapons and ammunition. The defendants were charged with weapons and drug possession crimes. While Soto failed to establish that he had a reasonable expectation of privacy

Second Department *continued*

in the apartment, he had standing to challenge the search of his locked safe. A parolee possesses constitutional rights against unreasonable searches and seizures, albeit with a reduced expectation of privacy. Although Soto had consented to searches by NJ parole officers as a condition of parole, it was NYPD officers who searched the safe. The People could not rely on such consent to justify the search. Further, since the NYPD officers failed to *Mirandize* Soto, his statements and consent were not voluntary. The People offered no argument as to why the warrantless search was proper as to Santiago. (Supreme Ct, Queens Co)

Matter of Sophia W., 176 AD3d 723 (2nd Dept 10/2/2019)

ABUSE/NEGLECT - DISPOSITION/MOTION TO VACATE OR MODIFY

LASJRP: The neglect petition filed against the mother alleged that the child Sophia W., then age seven months, was treated at a hospital after ingesting marijuana, and that there were incidents of domestic violence perpetrated by the father against the mother in the presence of the children. The mother consented to a finding of neglect, and the dispositional order placed the child in ACS custody and directed that the children be released to the custody of the mother on a trial basis by a date certain. The mother subsequently moved to vacate the fact-finding and for a retroactive suspended judgment. The family court denied the motion.

The Second Department affirms. The mother has complied with services including parenting-skills courses and therapy, and has planned for the housing, educational, and medical needs of the children, and she is a public school employee, but the family court did not err given the grave medical harm to Sophia W., and the young age of the children.

The JRP appeals attorney was John Newbery, and the trial attorney was Mikos Theodule. (Family Ct, Queens Co)

Matter of Tevin W., 176 AD3d 725 (2nd Dept 10/2/2019)

CONFESSIONS - FRUITS/SUBSEQUENT STATEMENT

LASJRP: The Second Department upholds the denial of suppression, concluding that respondent was not in custody when questioned briefly by an officer in the presence of an adult administrator at the group home where respondent resided, and that, in any event, his statement several hours later at the police station, which was preceded by Miranda warnings, is not tainted fruit.

The second statement was made during questioning by a different police officer and was far more detailed and incriminating. The statements were not part of a single, continuous chain of events, and the second statement was not made on constraint of the first statement. (Family Ct, Kings Co)

People v Yegutkin, 176 AD3d 748 (2nd Dept 10/2/2019)

REBUTTAL PROOF / PROPER

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 72 sexual offenses. The Second Department modified the judgment by vacating the convictions of 3rd degree sexual abuse under five counts of the indictment. His challenge to the legal sufficiency under those counts was unpreserved for appellate review, but in the interests of justice, the appellate court found the proof legally insufficient. As to other counts, the trial court properly permitted the prosecutor to introduce rebuttal testimony from a male witness, who stated that the defendant had previously propositioned him to engage in sexual conduct with him. The evidence was highly probative to counter defense testimony that, because of his religious beliefs and life as an observant Jewish person, the defendant would not have engaged in homosexual or masturbatory acts. Richard Mischel represented the appellant. (Supreme Ct, Kings Co)

People v Clavell, 176 AD3d 844 (2nd Dept 10/9/2019)

MURDER / GUILT NOT PROVEN

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree murder. The Second Department reversed and dismissed the indictment. In 2000, Barbara Perez was found shot dead on the floor of a gym where she worked. Eleven years later, the defendant was indicted. The People's theory was that he was motivated to kill Perez because he was angry about his child support obligation for their son, and he had the opportunity to commit the crime. No direct evidence of guilt was produced. No forensic evidence linked the defendant to the crime. None of the fingerprints or hair fibers recovered were his. The defendant's DNA was not found on a broken fingernail. Police canines did not detect his scent at the crime scene. Thus, the People's case rested on inferences to be drawn from the circumstantial evidence, but an inference of guilt must be the only one fairly and reasonably drawn. The inferences here at most created a suspicion that the defendant might have committed the murder. Mischel & Horn represented the appellant. (Supreme Ct, Queens Co)

People v Cruz, 176 AD3d 852 (2nd Dept 10/9/2019)

SALE OF DRUGS - INTENT
DEFENSES - AGENCY
VERDICT - REPUGNANCY

LASJRP: The Second Department reverses a conviction for criminal sale of a controlled substance in the third

Second Department *continued*

degree, concluding that the guilty verdict is against the weight of the evidence where defendant procured drugs at the request of the officer and with the officer's funds; the two were known to each other from a prior interaction of the same nature; defendant was not promised a reward in advance and was not engaged in acts suggesting he had sold drugs to anyone else, and defendant testified that he was panhandling; there was no evidence that defendant received consideration other than a small portion of crack cocaine from the bag he bought for the officer; the supplier was different from the supplier for the previous transaction; there was no evidence that defendant had pre-marked buy money or other drugs on his person; and defendant's salesman-like "touting" of the quality of the drugs after they had been purchased failed to establish, beyond a reasonable doubt, that he was not acting solely as an agent of the buyer.

The Court also concludes that the jury's finding of guilt on a count charging criminal possession of a controlled substance in the seventh degree is irreconcilable with its acquittal of defendant on the count charging him with criminal possession of a controlled substance in the third degree (possession with intent to sell). While, in other circumstances, a jury could find that defendant possessed the drugs but did not intend to sell them, that possibility is foreclosed in this case by the jury's finding of guilt on the third-degree sale count. (County Ct, Rockland Co)

Matter of Do'Naisha L. E. B., 176 AD3d 804
(2nd Dept 10/9/2019)

TERMINATION / REVERSED

ILSAPP: The mother appealed from a Kings County Family Court order terminating her parental rights based on permanent neglect. The Second Department reversed. The agency did not establish that, during the relevant period of time, the mother failed to maintain contact with, or plan for the future of, the child. The evidence consisted of the mother's testimony, as well as orders in companion proceedings involving the child's siblings. The mother testified credibly that: she had complied with all of the requirements for return of the child, including participating in therapy and parenting classes; she did not believe that she was neglectful or suffered from serious mental health issues; she benefitted from therapy; and parenting classes addressed matters of common sense. On such subjects, the petitioner failed to adduce any other evidence. Jill Zuccardy represented the appellant. (Family Ct, Kings Co)

Matter of Grover S., 176 AD3d 828
(2nd Dept 10/9/2019)

ABUSE/NEGLECT - DISCOVERY

LASJRP: In this proceeding alleging sexual abuse, neglect, and derivative abuse and neglect, respondent, the father of one of the subject children, served subpoenas upon the non-party mother and the non-party father of two of the children seeking their depositions and the production of all written documents referencing, inter alia, allegations of child abuse and neglect and domestic violence. The non-party father moved, and the mother cross-moved, to quash the subpoenas. The court granted the motion and the cross motion.

The Second Department reverses, noting that under CPLR 3101(a)(4), there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action by a nonparty, upon notice stating the circumstances or reasons such disclosure is sought or required; that the words "material and necessary" are to be interpreted liberally to require disclosure of any facts which will assist preparation for trial by sharpening the issues and reducing delay and prolixity; that if there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered material; that the crux of respondent's defense is that the mother has a history of fabricating allegations against him, including an allegation that he tried to murder or harm her and the children; and that the nonparties failed to sustain their burden of demonstrating that the requested disclosure was "utterly irrelevant" to the proceeding or that the futility of the process to uncover anything legitimate is inevitable or obvious. (Family Ct, Kings Co)

People v Hightower, 176 AD3d 865
(2nd Dept 10/9/2019)

ID AND STATEMENT / SUPPRESSED

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st and 2nd degree robbery. The appeal brought up for review the denial of suppression. The Second Department reversed and suppressed identification evidence and a statement by the defendant. A new trial was to be preceded by an independent source hearing. At the suppression hearing, Police Officer Gorman had testified that, soon after the robbery, he interviewed the complainant and showed him a photo array including the defendant. After the complainant identified the defendant, the officer activated an investigation card. The next day, Officer Gorman learned that the defendant had been arrested on a different matter and was in the station house. The officer then conducted a lineup including the defendant. The complainant identified the defendant, who provided a statement to police.

Second Department *continued*

The appellate court found that there was insufficient evidence from which to infer that the police arrested the defendant pursuant to the I-Card or that the officer who actually arrested the defendant had probable cause to do so. The People did not present any testimony from the arresting officer as to what information he possessed or how he received it or any proof regarding the circumstances of the arrest or the charges on which the defendant was arrested. Appellate Advocates (Ronald Zapata, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Legall, 176 AD3d 867 (2nd Dept 10/9/2019)

IDENTIFICATION - PHOTOS/PRESERVATION - LINEUPS

LASJRP: The Second Department concludes that the presumption of undue suggestiveness arising from the People's failure to preserve the photo array was rebutted through a detective's testimony that the complainant viewed approximately 570 photographs divided into three different sets of photographs, and the detective's testimony about the complainant's certainty in making the identification.

The Court also concludes that the detective's statement after the photo identification that "when we bring the person in, we have to conduct a lineup," did not render the lineup procedure, which occurred approximately 13 months later, unduly suggestive. (Supreme Ct, Kings Co)

People v Palant, 176 AD3d 872 (2nd Dept 10/9/2019)

ASSAULT - SERIOUS PHYSICAL INJURY

LASJRP: The Second Department reduces first and second degree assault convictions to a third degree assault conviction, concluding that the verdict was against the weight of the evidence regarding serious physical injury.

The victim sustained a cut on her lip and experienced extreme pain in her left eye. She was treated by an eye surgeon who, among other things, numbed her eye with drops and picked out shards of glass using tweezers. Her pain was treated with Motrin. Upon her release from the hospital, she was directed to wear an eye patch for a week, and, during that week, she had consistent blurry vision in her left eye; after a week, her vision "got better" but was still intermittently blurry. She returned to the hospital every other day for two weeks for continued treatment. At the time of trial, "[m]aybe like twice a week," she still experienced blurry vision, felt "mild discomfort" in her left eye and would treat her eye with drops. Her overall vision worsened since the incident, and she has a permanent scar on her cornea.

But she acknowledged that before the incident, she wore eyeglasses, and medical records indicated that she had been diagnosed and treated for an eye condition, blepharitis. Medical records further indicated that, in a follow-up visit, the victim reported no pain or change in vision. The People did not proffer any medical testimony interpreting and explaining the medical records, or addressing the nature, severity, and prognosis of the injury or whether any preexisting eye condition or conditions were affected by the incident or was a cause of any of the complainant's current complaints. (Supreme Ct, Nassau Co)

Suarez v Suarez, 176 AD3d 830 (2nd Dept 10/9/2019)

CUSTODY / ERRANT TEMPORARY ORDERS

ILSAPP: The mother appealed, by permission, from a Suffolk County Family Court order which modified temporary custody orders. The Second Department reversed. Although a psychologist testified that the children were alienated from their father, she did not conduct a forensic evaluation; acknowledged having continued to provide therapy to the father regarding his relationship with the children; and did not indicate that the ordered therapy program was necessary. Additionally, the court should not have considered the social worker's report, where the parties were not given an opportunity to review it or to cross-examine the author. The court improperly delegated its decision-making authority to the social worker. Michael J. Miller represented the appellant. (Family Ct, Suffolk Co)

People v Ellison, 176 AD3d 969 (2nd Dept 10/16/2019)

WAIVER OF APPEAL / VITIATED

ILSAPP: The defendant contended that a sentence imposed by Queens County Supreme Court was harsh and excessive. He had pleaded guilty to 3rd degree burglary and waived his right to appeal in return for a sentence of three years. When the defendant appeared for sentencing, Supreme Court stated that the promised sentence was not legal, and he opted to plead to a reduced charge that included post-release supervision. The modification of the material terms of the original plea agreement vitiated the waiver of the right to appeal, yet the plea court failed to elicit the defendant's continuing consent to waive appeal rights. Thus, he was not precluded from arguing that the sentence imposed was unduly severe. Nevertheless, the sentence was not excessive. (Supreme Ct, Queens Co)

People v Hubsher, 176 AD3d 972 (2nd Dept 10/16/2019)

The prosecutor was under no obligation to present certain evidence to the grand jury "since it was not entire-

Second Department *continued*

ly exculpatory and would not have materially influenced the grand jury's investigation …." Where text messages of the accuser were disclosed to the defense more than a year before the trial, and were used during cross-examination of the accuser, there is no indication that any delay in disclosure prejudiced the defense, so no Brady violation was shown. The defense failed to show that the identities of those with whom the accuser was communicating in the emails, which were not disclosed, were exculpatory or impeaching, or even admissible. (Supreme Ct, Nassau Co)

Matter of Melody M., 176 AD3d 942 (2nd Dept 10/16/2019)

ABUSE/NEGLECT - Removal/Imminent Risk - Domestic Violence

LASJRP: The Second Department affirms an order that, upon a FCA § 1027 hearing, granted petitioner's application for the temporary removal of the children from the custody of the mother and placed the children in the custody of petitioner.

The evidence demonstrated that the mother, despite her awareness of a full stay-away order of protection barring the father from being near the children, had asked and allowed him to care for the children on more than one occasion. Her conduct minimized the seriousness of the father's domestic violence against her in the presence of the children, and exhibited a significant lack of awareness of and insight into the impact that witnessing such violence would have upon the children.

The JRP appeals attorney was Polixene Petrakopoulos. (Family Ct, Kings Co)

People v Matos, 176 AD3d 976 (2nd Dept 10/16/2019)

Plea Withdrawal / Denied

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree attempted robbery. The First Department affirmed. The decision to permit a defendant to withdraw a plea of guilty rests within the sound discretion of the plea court. Such a motion must be premised on evidence of possible innocence or of fraud, mistake, coercion or involuntariness in the taking of the plea. Only in rare instances will a defendant be entitled to an evidentiary hearing. Defense counsel's representation—that a private investigator had spoken to unnamed witnesses who allegedly recanted—was insufficient to warrant a hearing. Also, by pleading guilty, the defendant forfeited review of his argument that the Supreme Court erred in restricting his access to certain discovery. The valid waiver of the right to appeal precluded appellate review of the defendant's challenge to a suppression determination. (Supreme Ct, Queens Co)

People v Schneider, 176 AD3d 979 (2nd Dept 10/16/2019)

SEARCH AND SEIZURE - Eavesdropping Warrants

LASJRP: The Second Department rejects defendant's contention that the supreme court lacked jurisdiction to issue eavesdropping warrants to intercept cellular telephone calls and electronic messages which were made and received outside of New York State.

Any justice of the supreme court of the judicial district in which the warrant is to be executed may issue the warrant as authorized under CPL § 700.10(1). An eavesdropping warrant is "executed" when a communication is intercepted—that is, when the communication is intentionally overheard or recorded by law enforcement officers.

The Court also concludes that the warrants, which were authorized for the purpose of investigating crimes that were occurring in New York, did not constitute an unconstitutional extraterritorial application of New York State law. (Supreme Ct, Kings Co)

People v Watts, 176 AD3d 981 (2nd Dept 10/16/2019)

Cross-exam re Lawsuits Did Not Permit Uncharged Conduct Redirect

LASCDP[3]: In a case involving alleged sex abuse of students, defense counsel raised the issue of pending civil actions about the allegations. The trial court then allowed the prosecution to introduce evidence of uncharged conduct in the form of sex abuse complaints against the defendant by 10 other students.

The Second Department ruled that it was reversible error to permit this "extraneous" testimony that was highly prejudicial, and it ordered a new trial. The Court cited the Molineux principles that seek to avoid any conviction based on collateral matters and the accused's supposed propensity to commit the crimes that were charged. (Supreme Ct, Queens Co)

Matter of Anthony V., 176 AD3d 1079 (2nd Dept 10/23/2019)

The order of fact finding establishing the father neglected the subject child by attempting to forcibly rape the child's mother, in the presence of the child, is affirmed. A single act of domestic violence may be sufficient to establish a neglect, where, as here, it was demonstrated by a preponderance of the evidence that the child's physical, mental or emotional condition has been or is in imminent danger of becoming impaired, and that the actual or threatened harm is a result of the parent's failure to pro-

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

Second Department *continued*

vide a minimum degree of care. Contrary to the father's argument otherwise, the mother's testimony as to the attempted rape is credible, and supported by the record. (Family Ct, Suffolk Co)

People v Ash, 176 AD3d 1090 (2nd Dept 10/23/2019)

MURDER - FELONY MURDER

LASJRP: The Second Department finds legally sufficient evidence of felony murder where the victim suffered a fatal cardiac arrest induced by emotional stress resulting from the gunpoint robbery on the street, and by the physical exertion involved in running from the scene. The court could rationally conclude that the fatal cardiac arrest was a reasonably foreseeable consequence of defendant's conduct. (Supreme Ct, Kings Co)

Matter of Barcene v Parrilla, 176 AD3d 1050 (2nd Dept 10/23/2019)

CUSTODY - HEARING REQUIREMENT - APPEAL/MOOTNESS

LASJRP: The Second Department reverses an order dismissing, without a hearing, the mother's custody petition, which was filed more than a year after the family court found that the mother neglected the children and placed them. There are no facts in the record that would bring this case within the narrow exception to the general right to a hearing. The petition for custody may be heard jointly with any permanency hearing.

This appeal was not rendered academic by a permanency hearing order which apparently changed the permanency goal from legal guardianship with the maternal grandmother to guardianship with a different relative.

The JRP appeals attorney was Judith Stern, and the trial attorney was Alison Reisner. (Family Ct, Queens Co)

People v Blount, 176 AD3d 1092 (2nd Dept 10/23/2019)

IDENTIFICATION - PHOTOS/SUGGESTIVENESS

LASJRP: The Second Department upholds the denial of suppression where a detective prepared arrays by entering information about defendant's appearance into a computer program and then selecting from the results, and the fact that defendant's photo was cropped closer than the others and he was wearing a hoodie was not enough to render the arrays unduly suggestive. (Supreme Ct, Westchester Co)

People v Hernandez, 176 AD3d 1100 (2nd Dept 10/23/2019)

SPEEDY TRIAL / FALSE ASSURANCE

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of attempted 2nd degree murder and 1st degree assault. The Second Department reversed, vacated the plea, and remitted. After the defendant's CPL 30.30 motion was denied, he entered a plea of guilty, induced in part by the promise that, on appeal, he would retain the right to challenge the denial of his statutory speedy trial motion. However, a defendant who pleads guilty forfeits such right. The defendant was entitled to withdraw his guilty plea, since it was predicated on a false assurance. Appellate Advocates (A. Alexander Donn, of counsel) represented the appellant. (Supreme Ct, Queens Co)

[Eff. Jan. 1, 2020, CPL 30.30 claims will survive guilty pleas. For a memo on the topic: https://www.ils.ny.gov/files/Appellate/Resources/Reviewability%20of%2030.30%20Claims%20in%20Plea%20Appeals.pdf*]*

Matter of Louie L. V., 176 AD3d 1081 (2nd Dept 10/23/2019)

NEGLECT / REVERSED

ILSAPP: The mother appealed from an order of Kings County Family Court, which found neglect and placed her under the supervision of ACS. The Second Department reversed and remitted for a new fact-finding hearing. The child was removed after ACS filed a neglect petition alleging that the mother used excessive corporal punishment. The mother sought the return of the child, and a hearing was held. Although finding no imminent risk, Family Court determined that it would be in the child's best interests to remain in the father's custody. During the neglect fact-finding hearing, the court admitted transcripts of § 1028 hearing testimony. Family Court Act § 1028 hearings are not intended to replace fact-finding hearings. The evidentiary standards are different. Under § 1046, only competent, material, relevant evidence may be admitted at a fact-finding, whereas § 1028 hearing proof need not be competent. A § 1028 determination should not be deemed an indication of whether abuse or neglect will be found based on a preponderance of the evidence. CPLR 4517, which governs the admissibility of prior testimony in a civil action, was applicable. *See* Family Court Act § 165. Prior trial testimony of a witness may be used by any party for any purpose against another party if the witness is dead or otherwise unavailable. In this matter, Family Court did not make the requisite finding and thus should not have admitted the § 1028 hearing transcripts. The error was not harmless, where the opinion rested on the caseworker's testimony, which contained hearsay statements. Lewis Calderon represented the appellant. (Family Ct, Kings Co)

Second Department *continued*

People v Peloso, 176 AD3d 1107 (2nd Dept 10/23/2019)

Convictions on several counts are dismissed upon review in the interest of justice of the unpreserved issue of legal sufficiency of the evidence in this matter arising from a police chase resulting in several collisions. As to some assault and reckless endangerment counts, the evidence did not establish the required mens rea, and as to criminal mischief counts, the evidence failed to establish that the defendant intended to damage the police vehicle and that the amount of damage exceeded the statutory dollar amount. There must be a new trial on the remaining counts, as the court deprived the defendant of his right to counsel by instructing him not to discuss his trial testimony with counsel during a two-day adjournment. (County Ct, Orange Co)

Matter of Sincere S., 176 AD3d 1072 (2nd Dept 10/23/2019)

ABUSE/NEGLECT - HEARSAY EVIDENCE - BUSINESS/MEDICAL RECORDS

LASJRP: The Second Department, while finding no error in the admission of hospital records that were properly certified and contained the requisite delegation of authority, agrees with the family court's determination that the hair follicle testing records also were admissible.

While the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records, such records may be admitted into evidence if the recipient can establish personal knowledge of the maker's business practices and procedures, or establish that the records were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business.

Here, the DSS presented testimony from a case manager from the Family Court Treatment Alternatives for Safer Communities program that the hair follicle test results provided by an outside laboratory were incorporated into her office's reports and routinely relied upon when issuing hair follicle test reports. The DSS also established that each participant in the chain that produced the reports acted in the regular course of business. (Family Ct, Suffolk Co)

People v Smith, 176 AD3d 1114 (2nd Dept 10/23/2019)

MISTRIAL WRONGLY ORDERED; THERE WERE OTHER ALTERNATIVES

LASCDP: A deliberating juror was dismissed for discussing the case with an outside lawyer and telling the other jurors about it. The defense was agreeable to a verdict of the 11 remaining jurors. Over defense objection, the judge declared a mistrial.

The Second Department held that declaring a mistrial was error; there was no manifest necessity at that point. The judge could have tried other alternatives first. The jury could have been polled, to see if there were any prejudice left over from the dismissed juror's statements and if they could render an impartial verdict. The judge also should have considered whether an instruction could have cured any impropriety. (Supreme Ct, Queens Co)

People v Torres, 176 AD3d 1125 (2nd Dept 10/23/2019)

SORA / ERRANT UPWARD DEPARTURE

ILSAPP: The defendant appealed from an order of Queens County Supreme Court, designating him a level-three sex offender. The Second Department reversed and adjudicated him a level two. Where the People seek an upward departure, the SORA court must determine whether the alleged aggravating circumstances are not adequately taken into account by the SORA Guidelines and whether the People proved the circumstances by clear and convincing evidence. If so, the SORA COURT must exercise its discretion to upwardly depart or not. In the instant case, the People contended that a departure was warranted, because a few months before the charged crime, the defendant committed an uncharged sex offense against a different victim who allegedly was 15 years old at the time. But the only evidence of age was a statement in a police report; and such proof of age was not supported by a detailed victim statement or otherwise corroborated. Appellate Advocates (Kathleen Whooley, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Ward, 176 AD3d 1117 (2nd Dept 10/23/2019)

SEARCH AND SEIZURE - SEARCH WARRANTS

LASJRP: The Second Department rejects defendant's contention that the search warrant was invalid on its face because it was addressed, in part, to a Special Operations Group that included not only police officers, but also corrections officers who were not authorized to execute search warrants. The warrant was properly addressed to police officers, and the inclusion of members of the Group who were not police officers was analogous to a clerical omission which did not invalidate the warrant.

With respect to the execution of the warrant, the Court notes that although the Criminal Procedure Law authorizes only a police officer to execute a search warrant, participation by an individual who is not a police officer is not inherently improper; that the Group merely secured entry to the residence for the benefit of the police officers who actually conducted the search and recovered evidence; and that there is no indication that the police officers were acting as agents of the Group, nor is there

Second Department *continued*

any allegation that the Group performed any act that the police officers could not have properly undertaken. The limited participation of the Group constituted no greater intrusion on defendant's privacy than that which had already been authorized by the warrant. (Count Ct, Orange Co)

People v Williams, 176 AD3d 1122
(2nd Dept 10/23/2019)

DISCOVERY - SANCTION FOR FAILURE TO TIMELY DISCLOSE

LASJRP: As a sanction for the People's failure to disclose before trial certain evidence pertaining to latent fingerprints found at the crime scene, which the People contend match the fingerprints of defendant's accomplice, the court precluded the People from using the evidence in their case-in-chief and allowed the People to introduce it on their rebuttal case after defendant testified to his nonparticipation in the crime.

The Second Department concludes that this was an appropriate sanction, noting that the evidence did not directly contradict the defense theory of non-participation, and that the court afforded the defense time to prepare for the testimony regarding the fingerprint evidence and granted defendant's application to retain a fingerprint expert. (Supreme Ct, Nassau Co)

Matter of Albert James G., 176 AD3d 1206
(2nd Dept 10/30/2019)

TERMINATION OF PARENTAL RIGHTS - APPEAL/MOOTNESS

LASJRP: The Second Department concludes that respondent mother's appeal from the denial of her motion to vacate an order terminating parental rights must be dismissed as academic since the child was legally adopted. (Family Ct, Kings Co)

Matter of Cox v Cruz, 176 AD3d 1200
(2nd Dept 10/30/2019)

RELOCATION DENIAL / TEEN'S WISHES

ILSAPP: The child appealed from an order of Kings County Family Court, which denied the mother's petition to modify a prior order granting custody to the paternal great-aunt upon the parents' default. The Second Department reversed. The mother sought sole custody and permission to relocate with the child to North Carolina. Family Court properly found a change of circumstances, but improperly found that the proof did not support a grant of the petition in the best interests of the child. The challenged decision lacked a sound and substantial basis in the record in light of the proof; the position of the attorney for the child; and the stated preferences of the child, who was now almost 15. Thus, the appellate court granted the mother custody and permission to relocate with the child and remitted for determination of a visitation schedule for the paternal great-aunt and the father. The Children's Law Center (Eva Stein and Janet Neustaetter, of counsel) represented the non-party appellant child. (Family Ct, Kings Co)

Matter of Hamrahi v Brock, 176 AD3d 1208
(2nd Dept 10/30/2019)

INTIMATE RELATIONSHIP / HEARING

ILSAPP: The petitioner appealed from an order of Nassau County Family Court, which granted the respondent's application to dismiss an Article 8 petition based on a lack of subject matter jurisdiction. The Second Department reversed. The petitioner alleged that she and the respondent were in an intimate relationship in that the petitioner was the paternal great-grandmother of the respondent's child, and the parties had lived together in the past. As to the family offense, the petitioner alleged that, when the respondent dropped off the child at her home, and during daily phone calls, she harassed the petitioner. In her motion to dismiss, the respondent asserted that there was no "intimate relationship" within the meaning of Family Court Act § 812 (1) (e). The term "members of the same family or household" encompasses persons not related by consanguinity or affinity who have been in an intimate relationship. Relevant factors include the nature and duration of the relationship and the frequency of interaction. In light of the parties' conflicting allegations, Family Court should have conducted a hearing. Steven A. Feldman represented the appellant. (Family Ct, Nassau Co)

People v Lambey, 176 AD3d 1232
(2nd Dept 10/30/2019)

SEARCH AND SEIZURE - MOTION PAPERS

LASJRP: The Second Department holds that the court erred in denying defendant's motion to controvert the search warrant without holding a hearing where defense counsel did not have access to even a redacted copy of the search warrant applications at the time the motion was made, and thus was not required to make precise factual averments. (County Ct, Dutchess Co)

People v Morales, 176 AD3d 1235
(2nd Dept 10/30/2019)

IDENTIFICATION - SHOWUP/COURTROOM ID

LASJRP: The Second Department holds that defendant's due process rights were not violated when the

Second Department *continued*

court permitted a witness to make a first-time, in-court identification during trial. In these circumstances, defense counsel is able to explore weaknesses and suggestiveness in the identification in front of the jury. (Supreme Ct, Queens Co)

People v Fisher, 177 AD3d 615 (2nd Dept 11/6/2019)

SORA / REVERSED/ DOWNWARD DEPARTURE

ILSAPP: The defendant appealed from an order of Kings County Supreme Court, which designated him a level-two sex offender. The Second Department reversed and reduced his status to level one. The defendant was convicted of sexual misconduct. When he committed the offense, he was 19 and the victim was 13. It was undisputed that lack of consent was solely based on her age. The court declined the defendant's request to downwardly depart. But in statutory rape cases, strict application of the Guidelines may result in risk overassessments. That was the case here, where the instant crime was the defendant's only sex offense, and his overall score was near the low end of level two. Appellate Advocates (William Kastin, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Matter of Gregoire v Yadram, 177 AD3d 616 (2nd Dept 11/6/2019)

VISITATION - SCHEDULE

LASJRP: The Second Department deletes from an order a provision directing that the parties "may add school vacation and summer vacation [parental access] if they are off from work" where, given the parties' inability to cooperate, the family court should have set forth a more detailed parental access schedule for the child's school holiday and vacation time. (Family Ct, Kings Co)

People v Hollander, 177 AD3d 683 (2nd Dept 11/6/2019)

***MOLINEUX* / SUMMATION / NEW TRIAL**

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of the unauthorized practice of a profession in violation of Education Law § 6512 (1). The Second Department reversed and ordered a new trial. There was evidence that, while inside a dental office, on one occasion, the defendant stated that he was a dentist, and, on another occasion, appeared to examine a patient and prescribe treatment. The defendant claimed that he merely acted as the office clinical director. Certain *Molineux* evidence should not have been admitted. Proof that the defendant had voluntarily surrendered his license to practice dentistry was proper. But prosecution evidence went too far in indicating that the defendant had been investigated for fraud and moral turpitude. Probative value was outweighed by prejudice. Moreover, during summation, the People misled the jury by intimating that the instant crime was similar to the prior one—which involved fraudulent billing practices. Supreme Court added insult to injury via a jury instruction erroneously indicating that the prior crime may have been part of a common scheme—an unpreserved claim reviewed in the interest of justice. Aidala, Bertuna & Kamins represented the appellant. (Supreme Ct, Kings Co)

People v Kennedy, 177 AD3d 628 (2nd Dept 11/6/2019)

LIMITED CROSS / NEW TRIAL

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st and 2nd degree assault, reckless driving, and leaving the scene of an incident without reporting. The Second Department reversed and ordered a new trial. The trial court's limitation of defense counsel's cross-examination regarding DNA transfer was an abuse of discretion, since the testimony sought would have been relevant and would not have confused or misled the jury. The error was not harmless. Further, the defendant's right to a fair trial was violated. Defense counsel attacked the credibility of certain police officers regarding wanted posters; and an errant jury instruction indicated that the jury was bound to accept the officers' explanations. Richard Willstatter represented the appellant. (Supreme Ct, Queens Co)

People v Moses, 177 AD3d 619 (2nd Dept 11/6/2019)

POSSESSION OF A WEAPON - CONSTRUCTIVE POSSESSION

SEARCH AND SEIZURE - PROBATION SEARCH

LASJRP: During a search by probation officers, accompanied by police officers, inside a bedroom of a house where defendant resided with his girlfriend, the officers found two firearms inside an unlocked safe. Defendant, who was not in the house when the guns were found, was convicted under a theory of constructive possession.

The Second Department finds the evidence legally sufficient and that the verdict was not against the weight of the evidence, noting that the officers discovered, defendant's driver license, the title to his vehicle, and his birth certificate inside the same bedroom safe in which the firearms were found, and that while jurors could have reasonably concluded that defendant's girlfriend also had access to the firearms, and might at some point have had possession of them, mere access by others does not preclude a finding of constructive possession.

Second Department *continued*

The Court, in upholding the denial of suppression, notes, inter alia, that the fact that the information regarding the presence of firearms in defendant's home was provided to the probation department by the police department did not establish that the home visit was initiated by the police department, rather than the probation department, or render the search a police operation. (Supreme Ct, Nassau Co)

Matter of Aaliyah T., 177 AD3d 748 (2nd Dept 11/13/2019)

The Court improvidently exercised its discretion by denying the mother's motion made pursuant to Family Court Act (FCA) 1061 to vacate an order of fact-finding and disposition of the same court, which found that she neglected the subject children by failing to address her mental health issues. Based on the record the mother demonstrated the requisite "good cause" to have the finding of neglect, entered against her on consent pursuant to FCA 1051(a), vacated. The record reflects that she successfully completed the court ordered services and that the vacatur of the finding of the neglect was in the best interests of the children. (Family Ct, Kings Co)

People v Benn, 177 AD3d 759 (2nd Dept 11/13/2019)

IDENTIFICATION - SHOWUPS/CONFIRMATORY
BURGLARY - DWELLING

LASJRP: The Second Department holds that after the complainant identified defendant while riding in a vehicle with police officers who were canvassing the area shortly after the crime occurred, the complainant's subsequent identification, which occurred about four minutes later after defendant had been apprehended upon a brief foot chase, was merely confirmatory.

The evidence was sufficient to demonstrate that defendant knowingly entered a locked storage room, which was a separately secured area within the dwelling and therefore constituted a "separate building" under the burglary statute. (Supreme Ct, Queens Co)

People v Brown, 177 AD3d 763 (2nd Dept 11/13/2019)

CONFESSIONS - CUSTODY

LASJRP: The Second Department concludes that defendant was not in custody for Miranda purposes when he agreed to accompany two detectives to the police station for an interview, noting, inter alia, that the fact that the detectives confronted defendant prior to the interview with evidence that he had pawned the victim's rings, and identified inconsistencies in defendant's explanation of how he obtained the rings, did not render the interview custodial in nature. (Supreme Ct, Nassau Co)

People v Buyund, 179 AD3d 161 (2nd Dept 11/13/2019)

SORA: FIRST-DEGREE BURGLARY NOT A REGISTERABLE OFFENSE

LASCDP: The Second Department held that first-degree burglary as a "sexually motivated offense" is not a registerable offense under the Sex Offender Registration Act (SORA). Although including that offense might have been the Legislature's intent, the opinion said, the language of SORA (Correction Law §168-a(2)(a)(iii)) does not unambiguously provide for that result. (Supreme Ct, Kings Co)

Matter of Cerise M., 177 AD3d 743 (2nd Dept 11/13/2019)

ABUSE/NEGLECT - DOMESTIC VIOLENCE

LASJRP: The Second Department upholds a finding of neglect where, during one incident, respondent father ran at the mother screaming, causing the child to cry and say, "Daddy, stop;" the mother locked herself and the child in a bedroom to escape the father's verbal abuse; the father then broke down the door, causing a piece of molding to fly across the room, landing near the child; and, once in the room, the father pushed the mother out of the way, grabbed the child, and walked out of the room, and the child became upset and screamed, "Mommy. Mommy, come back;" and, during another incident, the father ran up to the mother as she was playing with the child, pressed his forehead against the mother's forehead, and screamed profanities at her, causing the child to cry, and, following that incident, the child started to repeat the father's insults to the mother.

The JRP appeals attorney was Claire Merkine, and the trial attorney was Travis Johnson. (Family Ct, Kings Co)

Matter of Pinto v Pinto, 177 AD3d 746 (2nd Dept 11/13/2019)

CUSTODY / REVERSAL

ILSAPP: The father appealed from a Westchester County Family Court order. The Second Department reversed and remitted. There were many controverted issues. Yet prior to the completion of the hearing, Family Court awarded the mother sole custody of the parties' daughter and permitted her to relocate with the daughter. That was error. The father had no opportunity to present a case or cross-examine a key witness. Moreover, the trial court failed to consider the effect relocation would have on the sibling relationships. Joan Iacono represented the father. (Family Ct, Westchester Co)

Second Department *continued*

People v Walton, 177 AD3d 786 (2nd Dept 11/13/2019)

NO PRS NOTICE / REVERSAL

ILSAPP: The defendant appealed from a judgment of Rockland County Court, convicting him of 2nd degree CPW. The Second Department reversed, vacated the guilty plea, and remitted. At the plea proceeding, the court informed the defendant that the promised sentence was conditioned upon him not being arrested before the imposition of sentence. But the defendant was arrested, so County Court imposed an enhanced sentence, which included post-release supervision. Since PRS was not previously mentioned, the defendant's plea was not knowing, voluntary, and intelligent. See *People v Turner*, 24 NY3d 254. Gary Eisenberg represented the appellant. (County Ct, Rockland Co)

People v Williams, 177 AD3d 787 (2nd Dept 11/13/2019)

PERSISTENT VIOLENT FELONY OFFENDER / MODIFICATION

ILSAPP: The defendant appealed from a Queens County Supreme Court judgment, convicting him of 2nd degree attempted CPW and sentencing him as a persistent violent felony offender (PVFO). The Second Department vacated the sentence, because the defendant should not have been sentenced as a PVFO. In 2006, he pleaded guilty to attempted 3rd degree CPW as the sole count of an SCI. Such crime did not constitute a violent felony offense, unless pleaded to as a lesser included offense under an indictment charging a greater offense. See Penal Law § 70.02 (1) (d); People v Dickerson, 85 NY2d 870. Thus, the defendant's conviction of that prior crime was not a violent felony, and he was not a PVFO. Appellate Advocates (Paul Skip Laisure, of counsel) represented the appellant. (Supreme Ct, Queens Co)

Williston v Jack Resnick & Sons, Inc., 177 AD3d 822 (2nd Dept 11/13/2019)

Denial of the defendants' motion to dismiss the complaint is reversed because, while evidence submitted by the defendants did not constitute the documentary evidence statutorily required to dismiss the complaint, the matter should have been dismissed for failure to state a cause of action. Civilian defendants who merely furnish information to law enforcement authorities without affirmatively inducing law enforcement action "will not be held liable for false arrest or malicious prosecution …." The plaintiff's complaint and affidavit in opposition to the motion alleged only that the defendants provided false information. (Supreme Ct, Kings Co)

Matter of Abbygail G., 177 AD3d 878 (2nd Dept 11/20/2019)

ABUSE/NEGLECT - APPEAL/MOOTNESS - ICPC

LASJRP: The Second Department dismisses as moot an appeal that raises the issue of whether the child's temporary out-of-state placement pursuant to FCA § 1017 in the custody of a non-party who was planning to relocate to New York, without compliance with the Interstate Compact on the Placement of Children, constituted a violation of the ICPC. The child has returned to New York and DSS has regained custody, and the case does not merit invocation of an exception to mootness. (Family Ct, Orange Co)

People v Ferguson, 177 AD3d 900 (2nd Dept 11/20/2019)

As the prosecution concedes, the sentence of probation imposed on the defendant after his guilty plea to second-degree assault and completion of a two-year residential mental health treatment program and three months in jail was illegal. A term of imprisonment, whether determinate, definite, or intermittent, is required. The defendant, a first-time felony offender, asks for a sentence equivalent to the time he has already served, which would be legal if the sentencing court deems it proper upon considering the circumstances of the crime and the defendant's character. Further, the court "had no authority to issue an order of protection in favor of an individual who was neither a victim of nor a witness to the crime …." (County Ct, Richmond Co)

People v Houston, 177 AD3d 902 (2nd Dept 11/20/2019)

SEARCH AND SEIZURE - COMMON LAW RIGHT TO INQUIRE

LASJRP: After observing defendant in the subway urinating on the platform, the officer approached, displaying his shield, and defendant began walking toward him with his hands in his pockets. Feeling "uncomfortable," the officer asked defendant to identify himself and remove his hands from his pockets. The officer then asked defendant whether he had ever been arrested, and defendant replied that he was on parole for robbery. The officer, for safety reasons, asked defendant whether he had "anything on him" that the officer should know about, and defendant produced a "short knife" from his right pocket and handed it to the officer. The officer handcuffed defendant and, upon frisking him, found a larger kitchen knife in a different pocket.

The Second Department concludes that defendant's voluntary relinquishment of the first knife was in response to a common law inquiry that was justified by a

Second Department *continued*

founded suspicion of criminality or a reasonable fear for the officer's safety. (Supreme Ct, Kings Co)

Matter of Javaris K. C., 177 AD3d 875
(2nd Dept 11/20/2019)

ABUSE/NEGLECT - DERIVATIVE NEGLECT

LASJRP: The Second Department upholds a finding of derivative neglect in light of the prior neglect finding, the father's failure to address his substance abuse and domestic violence issues, and the vulnerable age of the subject child, who was days old at the commencement of this proceeding. The father's acts of domestic violence and drug use in 2014 were sufficiently proximate in time to warrant the court's conclusion that the conditions persisted.

The JRP appeals attorney was Claire Merkine, and the trial attorney was Jaclyn Goodman. (Family Ct, Kings Co)

Matter of New York Times Company v District Attorney of Kings County, 179 AD3d 115 (2nd Dept 11/20/2019)

FREEDOM OF INFORMATION LAW/ SEALED RECORDS

LASJRP: The Second Department holds that the final reports of the Kings County District Attorney's Conviction Review Unit, which have led to numerous exonerations, are exempt from disclosure under the Freedom of Information Law unless the individual who was the subject of the report consents to its release pursuant to CPL § 160.50(1)(d). CRU's final reports constitute "official records" relating to a prosecution that are subject to sealing. The mere vacatur of a conviction does not erase the stigma from being subjected to the criminal justice process, and the fact that the CRU's reports might assist in the reform of police agencies or prosecutors' offices is not a basis for overlooking sealing protections for the individuals exonerated.

The *New York Times* may seek CPL § 160.50 waivers from exonerated individuals, but challenges to redactions cannot be resolved without an in camera review to determine whether the redacted material falls within statutory exemptions. (Supreme Ct, Kings Co)

Matter of Rodriguez v Sabbat, 177 AD3d 889
(2nd Dept 11/20/2019)

***ANDERS* BRIEF / NEW COUNSEL**

ILSAPP: The mother appealed from an order denying her violation petition and sua sponte curtailing her parental access. Assigned counsel submitted an *Anders* brief, and the Second Department assigned new counsel, finding that non-frivolous issues included whether Family Court properly found that the father did not willfully violate a prior order and whether the modification of the order of parental access was supported by the record. The mother was entitled to "the single-minded advocacy of appellate counsel." (Family Ct, Richmond Co)

People v Steele-Warrick, 177 AD3d 906
(2nd Dept 11/20/2019)

The guilty plea must be vacated where the defendant admitted during the allocution only an intent to inflict physical injury and conduct that caused physical injury. First-degree assault requires intent to inflict, and infliction of, *serious* physical injury. (Supreme Ct, Queens Co)

Matter of Vetrano v Vetrano, 177 AD3d 890
(2nd Dept 11/20/2019)

CHILD SUPPORT / REVERSED

ILSAPP: The father appealed from an order of Suffolk County Family Court, which dismissed his petition seeking to reduce child support. The Second Department reversed and remitted for a new hearing. The appellate court agreed with the Support Magistrate's determination that the father failed to establish that the reduction in his income was involuntary, and that he made diligent attempts to secure employment commensurate with his education, ability, and experience. However, the father's loss of assets and the mother's significant increase in income warranted a new determination. In addition, the judgment of divorce and stipulation of settlement failed to set forth the presumptively correct amount of support and to articulate reasons for deviating from CSSA guidelines. Jonathan Tatun represented the appellant. (Family Ct, Suffolk Co)

Third Department

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

Matter of McFarlane v Annucci, 176 AD3d 1277
(3rd Dept 10/3/2019)

On review of the determination finding the petitioner guilty of certain prison disciplinary rule violations, the part of the determination finding him guilty of possessing drugs is annulled as not supported by substantial evidence. The petitioner requested documents regarding the scientific principles and validity of materials and procedures used in testing the substances in question, but no documents or testimony were produced, over his objec-

Third Department *continued*

tions. As 7 NYCRR 1010.5(d), which directs inclusion of certain documents regarding drug tests that are relied on, is not applicable to the smuggling charge, the evidence of guilt thereon is supported by substantial evidence, ie the misbehavior report indicating that substances and a plastic bag were found mixed into the petitioner's food. Matter remitted for redetermination of the penalty related to that charge. (Transferred from Supreme Ct, Albany Co)

People v Waldron, 176 AD3d 1260 (3rd Dept 10/3/2019)

ENHANCED RESTITUTION / REMITTAL

ILSAPP[1]: The defendant appealed from a judgment of Franklin County Court, convicting him of 2nd degree burglary and other crimes. He pleaded guilty with the understanding that he would be required to pay $4,100 in restitution. At sentencing, the People requested an additional $500 in restitution to reimburse the victims for the insurance deductible paid. On appeal, the defendant contended that County Court erred in imposing the enhanced restitution without giving him an opportunity to withdraw his guilty plea. The issue was unpreserved, but the Third Department vacated the restitution award in the interest of justice and remitted. A sentencing court may not impose a more severe sentence than one bargained for, without giving the defendant an opportunity to withdraw his or her plea. Two justices dissented, for three reasons. (1) The increase in the amount was small; (2) the defendant failed to object at sentencing; and (3) this was not the type of "rare and unusual case that cries out for fundamental justice beyond the confines of conventional considerations" so as to warrant the exercise of interest-of-justice jurisdiction. Lisa Burgess represented the appellant. (County Ct, Franklin Co)

Matter of Cody RR. v Alana SS., 176 AD3d 1372 (3rd Dept 10/17/2019)

UCCJEA / REVERSED

ILSAPP: The father appealed from an order of Broome County Family Court, which dismissed his custody modification petition. The Third Department reversed and remitted. Family Court erred in summarily relinquishing jurisdiction. Pursuant to the UCCJEA, the court had exclusive continuing jurisdiction over the matter. No consideration was given to statutory requirements for finding that NY was an inconvenient forum and Florida was a more appropriate forum. The sparse record did not permit the appellate court to conduct an independent review. Lisa Miller represented the father. (Family Ct, Broome Co)

People v Coss, 178 AD3d 25 (3rd Dept 10/17/2019)

SCI / JURISDICTION DEFECT

ILSAPP: The defendant appealed from a judgment of Delaware County Court, convicting him of DWI and 1st degree AUO of a motor vehicle. The Third Department reversed and dismissed the SCI. The jurisdictional challenge was not precluded by the guilty plea or waiver of the right to appeal and was not subject to the preservation requirement. DWI was a class D offense where, as here, the defendant was convicted of that offense twice in the preceding 10 years. Thus, it was a greater offense than the class E felony charged in the felony complaint. The constitutional considerations regarding the right to prosecution by indictment—that an SCI may not charge greater offenses than charged in the felony complaint—applied with equal force to a joinable offense in a higher grade than charged in the felony complaint. A joinable offense may not be included in a waiver of indictment and SCI unless that offense, or a lesser included offense, was charged in a felony complaint and the defendant was therefore held for the action of a grand jury upon that charge. The Rural Law Center of NY (Kelly Egan, of counsel) represented the appellant. (County Ct, Delaware Co)

Matter of Elijah X., 176 AD3d 1356 (3rd Dept 10/17/2019)

JD / REVERSED

ILSAPP: The respondent juvenile delinquent appealed from an order of Rensselaer County Family Court, which found him in willful violation of probation. The Third Department reversed and dismissed the petition. On appeal, the respondent argued that his allocution did not comply with the mandates of Family Court Act § 321.3—a claim that did not require preservation. Although the respondent's mother was present, Family Court did not question her about his waiver of the fact-finding or failure to attend counseling. Further, the court did not determine whether the respondent and his mother understood the possible dispositional orders. Although the placement had expired, the appeal was not moot, given the potential collateral consequences. Sandra Colatosti represented the appellant. (Family Ct, Rensselaer Co)

Matter of Hayley QQ., 176 AD3d 1343 (3rd Dept 10/17/2019)

ABUSE/NEGLECT - DISPOSITION/VIOLATIONS - EDUCATIONAL NEGLECT

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

Third Department *continued*

LASJRP[2]: In this Article Ten proceeding, the Third Department upholds an order which determined that respondent willfully violated a dispositional order by failing to, among other things, ensure that the child (born in 2004) attend school; and that modified the dispositional order by temporarily placing the child pending respondent's completion of necessary services.

The Court notes that notwithstanding her academic achievement, the child's rate of absenteeism adversely affected her ability to qualify for and participate in certain advanced or accelerated programs; that any student who fails to attend at least 75% of his or her class time risks not earning sufficient credit to move on to the next grade level, regardless of the student's overall academic performance; that the child's high rate of absenteeism could impair her ability to form peer relationships and her social and emotional growth; and that respondent rejected mental health treatment and otherwise failed to provide any insight into why the child was not able to timely and regularly attend school, and failed to articulate any plan addressing the problem. (Family Ct, Tioga Co)

People v Jackson, 176 AD3d 1312 (3rd Dept 10/17/2019)

CHALLENGE FOR CAUSE / REVERSED

ILSAPP: The defendant appealed from a judgment of Albany County Supreme Court, convicting him of 1st degree rape and 1st degree sexual assault. The Third Department reversed and ordered a new trial. The trial court erred in denying challenges for cause to two prospective jurors. Based on her status as a teacher and mother of five children, one juror expressed sympathy for the victim, who she guessed was around age 20. The prospective juror thought that she could be unbiased, though she added, "I do lean toward sympathy with the youth. That's where my life is." Another juror said that, during voir dire, he was having a hard time listening to the subject matter of the case because he had four younger sisters and a daughter. It was difficult to say whether he could be impartial, he added. Despite the absence of unequivocal assurances, Supreme Court did not pose questions to rehabilitate the prospective jurors, and denied the defense challenges. The defendant exhausted his peremptory challenges, thus preserving the issue. Paul Connolly represented the appellant. (Supreme Ct, Albany Co)

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

Matter of Jordyn WW., 176 AD3d 1348 (3rd Dept 10/17/2019)

ABUSE/NEGLECT - CREATING RISK OF INJURY

LASJRP: Respondent discharged a firearm from inside the home that he shared with the child and the child's mother. The shots were fired through the front door and into the driveway. Neither the child nor the mother was home at the time of the incident. The court made a finding of neglect, noting that the child could have been present in the driveway and that a reasonable and prudent parent would not have engaged in such behavior.

The Third Department reverses. Although petitioner and the attorney for the child argue that the child and the mother could have returned to the home at any time and traveled through the likely path of the shotgun pellets, that did not occur and the danger was only hypothetical rather than near or impending. The problem with the proof is not that, fortuitously, nothing happened to the child, but rather that nothing could have happened because the child was not home. (Family Ct, Ulster Co)

Matter of Justin M. v Valencia N., 176 AD3d 1331 (3rd Dept 10/17/2019)

The order granting the respondent mother's motion to dismiss the incarcerated putative father's custody/parenting time petition was improper. That the putative father has an order of protection from criminal court prohibiting any contact with the mother should not be an impediment to seeking contact with the child, especially when the order of protection is not on behalf of the child. The matter is remitted for a determination as to whether it is proper to grant the putative father an order of filiation and then whether or not it is in the child' s best interests to have parenting time that does not contradict the order of protection in favor of the mother. (Family Ct, Albany Co)

Rebekah R. v Richard R., 176 AD3d 1340 (3rd Dept 10/17/2019)

PARENTING TIME / MODIFIED

ILSAPP: The father appealed from an order of Otsego County Family Court, which granted the mother's application for permission to relocate to Arizona with the children. The Third Department held that the grant of permission was proper, but that the parenting-time provision was wholly inadequate. The father was to continue to have parenting time with the children "as the parties may reasonably agree." While they had previously agreed on a schedule, the relocation presented geographic and financial obstacles that did not exist before. Thus, Family Court should have included specific parameters for the father's parenting time to ensure that he would receive meaningful time with the children and should also have addressed

Third Department *continued*

the parties' respective financial obligations regarding transportation. The matter was remitted for consideration of such issues. The Rural Law Center of NY (Kristin Bluvas, of counsel) represented the father. (Family Ct, Otsego Co)

People v Roberts, 176 AD3d 1318 (3rd Dept 10/17/2019)

VOP PLEA UNDER DA JAIL THREAT WAS INVOLUNTARY

LASCDP[3]: In the violation of probation setting, the People had stated that they would recommend a higher prison sentence if defendant rejected their plea offer and was found guilty after the hearing. Defendant accepted the offer and admitted the violation.

The Third Department said the People's threat was "inappropriate," and rendered the plea involuntary. It ruled that defendant was thus entitled to vacatur of the plea.

The Court also pointed out that the sentencing court was incorrect in stating that it could not "override" the People's recommended prison sentence. The lower court thereby had abdicated its responsibility to consider all the facts and to fashion an appropriate sentence. (County Ct, Broome Co)

Matter of Ronelli-Dutcher v Dutcher, 176 AD3d 1358 (3rd Dept 10/17/2019)

SUPPORT - DEFAULTS

LASJRP: In this support proceeding, the Third Department upholds the denial of respondent's motion to vacate an order issued on default where respondent asserts, inter alia, that his military service prevented him from attending the fact-finding hearing.

The father was present in court when the hearing was scheduled and did not indicate that he was unable to attend, nor did he assert that he had any work or military commitments. The purpose of Military Law § 303 is to prevent default judgments from being entered against military personnel without their knowledge. (Family Ct, Sullivan Co)

Matter of Shanna O. v James P., 176 AD3d 1334 (3rd Dept 10/17/2019)

CUSTODY - STANDING

- EXTRAORDINARY CIRCUMSTANCES/BEST INTERESTS

LASJRP: The Third Department upholds an award of custody to the stepmother and visitation to each parent.

The family court erred in concluding that the stepmother was a de facto parent with standing to seek custody under the Court of Appeals decision in Matter of Brooke S.B. v. Elizabeth A.C.C. (28 N.Y.3d 1). Leaving the child with three parents who would all simultaneously have standing to seek custody does not comport with Brooke S.B.

However, the stepmother demonstrated extraordinary circumstances and the award of custody was in the child's best interests. The Court notes, inter alia, that the mother had little contact with the child for five years, including not seeing him at all for three continuous years, while the child was at a formative age and being raised by the father and stepmother; that starting in 2012, the mother began to consistently visit and has continued to do so, but remained uninvolved in the child's medical and educational life and was only minimally involved in his extracurricular activities, and took little initiative to learn about the child's life outside of her parenting time; that the child, who was 12 years old at the time of the hearing, had lived with the stepmother since he was 2½ years old, and she provided day-to-day care and they formed a close bond; that the mother cannot be faulted for allowing the child to remain with the stepmother while the custodial father was also present in the household, but when the father informed her in 2016 that he no longer lived with the stepmother and the child, the mother waited approximately 10 months to seek custody. (Family Ct, Broome Co)

People v Turner, 178 AD3d 70 (3rd Dept 10/17/2019)

SEARCH AND SEIZURE - STRIP SEARCH

LASJRP: The Third Department suppresses the bag of cocaine recovered from defendant's clothing during a strip search where the People concede that the search warrant did not authorize a search of defendant, but argue that the police had probable cause to arrest defendant and strip-search him incident to that lawful arrest.

The Court notes, inter alia, that a strip search must be founded on a reasonable suspicion that the arrestee is concealing evidence underneath clothing; and that the proof of defendant's participation in a drug trafficking conspiracy, and an itinerary suggestive of wrongdoing, did not establish reasonable suspicion. (County Ct, Albany Co)

Matter of Adam OO. v Jessica QQ., 176 AD3d 1418 (3rd Dept 10/24/2019)

CUSTODY - RELOCATION/CHANGE IN CIRCUMSTANCES

- DOMESTIC VIOLENCE

- BEST INTERESTS

VISITATION

LASJRP: An order was issued upon consent awarding the parties joint legal custody of the children, with the mother having primary physical placement and the father

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

Third Department *continued*

having set parenting time. Subsequently, the father relocated to South Dakota and sought physical custody and permission to move the children. Following a trial and a Lincoln hearing, the family court granted the father's petition, and afforded the mother parenting time that included almost all of the children's summer vacation.

The Third Department, finding a change in circumstances, affirms, noting, inter alia, that the father has been the children's primary caregiver for long stretches of time; that he moved to South Dakota to take a steady job after failing to find one in New York and has secured appropriate lodging for himself, his soon-to-be wife and their children; that he testified that the school in South Dakota had programs to address the son's special educational needs, and that he and his fiancee could provide the structured environment the son needed and lacked in New York; that the family court found that the father was candid in discussing his domestic violence history and credited his claim that he had finally obtained an accurate mental health diagnosis and was in active treatment; and that the mother had a chaotic household, a succession of boyfriends with criminal backgrounds and/or substance abuse issues, a lack of steady employment and deficits of parental supervision and judgment. (Family Ct, Delaware Co)

Matter of Amy TT. v Ryan UU., 176 AD3d 1426
(3rd Dept 10/24/2019)

CONSENT ORDER / NO APPEAL

ILSAPP: The father appealed from an order of Ulster County Family Court, regarding modification of a custody/visitation order and issuance of an order of protection, all of which were entered consistent with a stipulation by the parties. The Third Department dismissed the appeals, since no appeal lies from an order entered upon consent. To the extent that the father claimed that his consent was involuntary, such a claim could be raised and addressed in Family Court in the context of a motion to vacate the underlying consent orders. (Family Ct, Ulster Co)

Matter of Damien D., 176 AD3d 1411
(3rd Dept 10/24/2019)

TERMINATION OF PARENTAL RIGHTS - ABANDONMENT/DISCOURAGING CONTACT

LASJRP: The Third Department upholds an order terminating the father's parental rights on the ground of abandonment, noting, inter alia, that the family specialists did not discourage contact with the children by raising the possibility of a judicial surrender.

They discussed all potential options with the father, including the possibility of a surrender because of the length of time the children had been in foster care and the father's incarceration. Petitioner cannot be faulted for attempting to pursue a permanency plan that would afford the children some measure of stability. (Family Ct, Broome Co)

People v Johnson, 176 AD3d 1392
(3rd Dept 10/24/2019)

HEARSAY - PRIOR CONSISTENT STATEMENT

LASJRP: The Third Department finds error (albeit harmless) in the admission of evidence of a prior consistent statement made by one of the identification witnesses, noting that defendant has asserted that he did not challenge the witness's testimony as a recent fabrication, and instead utilized a prior statement to show the inconsistency in her explanations as to how the shooter fled the scene.

Mere impeachment by proof of inconsistent statements does not constitute a charge that the witness's testimony is a fabrication. Even if there was an implicit suggestion of recent fabrication, the consistent grand jury testimony did not predate the witness's motive to testify against defendant. (Supreme Ct, Schenectady Co)

People v Jones, 176 AD3d 1397 (3rd Dept 10/24/2019)

The court did not abuse its discretion in refusing to compel trial testimony from an accomplice of the defendant, where the accomplice, who had pleaded guilty but was awaiting sentencing, indicated outside the jury's presence that he would exercise his privilege against self-incrimination. The invocation was based on the possibility of further incriminating himself, exposing himself to perjury charges, and/or providing information that might adversely affect his sentence. The defendant's rights to call witnesses and present a defense did not include any "'right to compel testimony over a claim of recognized privilege' …." (Supreme Ct, Albany Co)

Matter of Aree RR. v John SS., 176 AD3d 1516
(3rd Dept 10/31/2019)

VISITATION - DELEGATION OF COURT'S AUTHORITY - ORDER DIRECTED AT NON-PARTY

LASJRP: The Third Department finds error where the family court delegated authority to the father to determine whether visitation would take place under certain circumstances. Although the father can choose to temporarily suspend visitation while the mother is hospitalized for a mental health condition, the court went too far in giving the father, who is not a doctor or otherwise trained in recognizing and treating mental health conditions, that same authority in vaguely-defined situations where the mother is "decompensating or otherwise having an issue with her bipolar condition," and in permit-

Third Department *continued*

ting him to require supervision of visitation in the aftermath of those situations without further court intervention. The Court has no doubt that if the father believes or is informed that the mother is unstable, he will seek court permission to withhold or limit visits to protect the child.

The court also erred in directing the mother's boyfriend—a nonparty, over whom the court had not obtained jurisdiction—to advise the father of any medical or mental issues the mother may experience "as they are occurring or as soon as practicable thereafter." (Family Ct, Ulster Co)

Matter of Barber v Annucci, 176 AD3d 1557 (3rd Dept 10/31/2019)

The determination that the petitioner violated prison rules by making threats, engaging in violence, extortion, and other conduct, was not supported by substantial evidence. The hearing officer's inquiry about the confidential information relied upon "was not thorough and specific enough to afford him an adequate opportunity to assess the confidential informant's knowledge and reliability." The officer did not explain why he found the informant reliable, nor does the record show the hearing officer tried to personally interview the informant. (Transferred from Supreme Ct, Albany Co)

Benson v NYS Board of Parole, 176 AD3d 1548 (3rd Dept 10/31/2019)

PAROLE RESCISSION / AFFIRMED

ILSAPP: The petitioner appealed from a determination of the respondent rescinding a grant of parole release. The Third Department affirmed. The law on rescission did not require submission of new information—only information that was significant and not known at the time of the original determination. The majority rejected the argument that the grief and trauma of a victim's family is always known by the respondent. Victim impact statements are significant in parole decisions; and the respondent was presented with previously unknown information in the form of belated, compelling statements from the murder victim's mother and brother. Two justices dissented. (Transferred from Supreme Ct, Albany Co)

Karimzada v NYS Board of Parole, 176 AD3d 1555 (3rd Dept 10/31/2019)

PAROLE DENIAL / INACCURATE INFO

ILSAPP: The petitioner appealed from a judgment of Sullivan County Supreme Court, which dismissed his CPLR Article 78 petition to review a determination of the Board of Parole denying parole release. The Third Department reversed. The petitioner, who was serving a lengthy sentence for rape and related crimes, contended that the denial was based in part on inaccurate information. The respondent had stated that, on the COMPAS Risk and Needs Assessment instrument, the petitioner was rated "high" for factors related to a history of violence and risk of absconding. In fact, the assessment level was "medium." Since such error may have affected the challenged decision, remittal for proper administrative review was ordered. Jocelyne Kristal represented the appellant. (Supreme Ct, Sullivan Co)

People v Urtz, 176 AD3d 1485 (3rd Dept 10/31/2019)

IAC CLAIM / LEGITIMATE STRATEGY

ILSAPP: The defendant appealed from a Columbia County Court judgment, convicting him of four counts of possessing a sexual performance by a child. The Third Department rejected the argument that defense counsel was ineffective in conceding that the 10 subject items depicted a sexual performance by underage children. Counsel will not be found to be ineffective for failing to make an argument or motion that had little or no chance of success. In the instant case, the jury had to determine whether the pornographic material represented actual children. But that fact was apparent from the videos and images of sexual acts involving children. Moreover, the defense theory was that the People failed to prove that the defendant knowingly possessed the images and the videos. Thus, the defendant failed to show the lack of a legitimate strategy. Viewing counsel's performance in totality and mindful that there was an acquittal as to six of 10 charges, the reviewing court held that the defendant received meaningful representation. (County Ct, Columbia Co)

People v Walley, 176 AD3d 1513 (3rd Dept 10/31/2019)

SCI / JURISDICTIONAL DEFECT

ILSAPP: The defendant appealed from a judgment of Schenectady County Court, convicting him of 2nd degree CPW (two counts). As part of a global disposition, the defendant pleaded guilty to one count of CPW 2 in satisfaction of a six-count indictment; waived his right to be indicted on other charges; pleaded guilty to another count of CPW 2, as set forth in an SCI; and waived the right to appeal. The Third Department reversed. The failure to state the approximate time of the offense rendered the waiver of indictment invalid and the SCI jurisdictionally defective. The challenge was not precluded by the guilty plea or waiver of appeal and was not subject to the preservation requirement. A waiver of indictment must be executed in strict compliance with CPL 195.20. Although the statutory requirements may be satisfied by reading the waiver and SCI as a single document, neither document

Third Department *continued*

stated the relevant time. Further, this was not a situation where the time of the offense was unknown or unknowable. Indeed, the felony complaint contained information as to the time of the offense. Reference in the waiver of indictment to the felony complaint was insufficient. Thus, the plea was vacated and the SCI dismissed. Because the conviction was part of a global disposition calling for concurrent sentences and that promise could no longer be kept, the plea in satisfaction of the indictment also had to be vacated. G. Scott Walling represented the appellant. (County Ct, Schenectady Co)

People v Armento, 177 AD3d 404 (3rd Dept 11/7/2019)

CONFESSIONS - NOTICE OF INTENT TO OFFER

LASJRP: The Third Department finds adequate CPL § 710.30 notice where aspects of defendant's statement appeared on two pages from a police officer's notepad that by inadvertence were not physically attached to the formal notice.

The part of the statement in the notepad was made to the same officer in the same location and at the same time as the formally noticed statement; was part of the same communication as and was consistent with the formally noticed statement; and was even less inculpatory than the formally noticed statement. (Supreme Ct, Bronx Co)

People v Bowden, 177 AD3d 1037 (3rd Dept 11/7/2019)

APPEAL WAIVER / HARSH SENTENCE

ILSAPP: The defendant appealed from a judgment of Ulster County Court, convicting him of 2nd degree murder. He contended that the waiver of the right to appeal did not preclude his challenge to the severity of the sentence because, at the time of the plea, the court did not specifically advise him of the maximum possible sentence. The Third Department agreed. Because of the plea court's omission, the waiver did not encompass the defendant's right to appellate review of his argument that the sentence was harsh and excessive. However, the reviewing court did not find the sentence unduly severe, and it affirmed the judgment. (County Ct, Ulster Co)

People v Abelove, 179 AD3d 39 (3rd Dept 11/21/2019)

AG AUTHORITY / PROSECUTING DA

ILSAPP: The AG appealed from an order of Rensselaer County Supreme Court, which granted a motion to dismiss the indictment. The Third Department reversed. A 2015 Executive Order (EO) provided for the appointment of the AG as special prosecutor where a police officer caused the death of an unarmed citizen or there was a significant question as to whether the civilian was armed and dangerous. In 2016, a Troy police sergeant shot and killed an unarmed DWI suspect. Two days later, the AG's office wrote to the Rensselaer County DA seeking information to determine if the AG had exclusive jurisdiction. The DA responded that his office had decided that the EO did not apply, because the victim was driving a vehicle, and that made him an armed civilian. Three days after that, a grand jury returned a no true bill against the sergeant shooter. A 2017 EO empowered the AG to investigate misconduct arising from those grand jury proceedings. The DA was charged with official misconduct, for withholding material evidence from the grand jury and allowing the sergeant to testify without waiving immunity from prosecution; and 1st degree perjury, for giving false testimony regarding his misconduct. The DA moved to dismiss the indictment based on the AG's lack of authority to prosecute. The appellate court held that the AG had the requisite power, pursuant to Executive Law § 63 (2), (13) and the 2017 EO. The entire indictment against the former DA was reinstated. (Supreme Ct, Rensselaer Co)

People v Cole, 177 AD3d 1096 (3rd Dept 11/21/2019)

The court abused its discretion in allowing the prosecution to inquire into the defendant's 1991 conviction, the latest of several, for which he had been incarcerated until 1995, after which he was released from parole in 1998 and had no further convictions. He had an unblemished record for 23 years, and the conviction was simply too remote. However, the error was harmless. There was differing testimony about the events in question here, including multiple witnesses who testified as to the defendant's sobriety, so "we cannot say that the jury was deprived of significant material evidence as to the happening of the accident by defendant's decision not to testify …." (County Ct, Saratoga Co)

People v Colon, 177 AD3d 1086 (3rd Dept 11/21/2019)

SEVERANCE IN DRUG CASE SHOULD HAVE BEEN ORDERED

LASCDP: Drug possession charges were prosecuted against the passenger and driver in the car in which drugs were found. The defense of each was to implicate the other. In view of the antagonistic defenses, a joint trial was error, and defendant's motion to sever should have been granted. (Supreme Ct, Albany Co)

Matter of Kathleen K. v Daniel L., 77 AD3d 1130 (3rd Dept 11/21/2019)

ABUSE/NEGLECT - FINDINGS OF FACT
CUSTODY

LASJRP: The Third Department concludes that the family court, at a joint hearing addressing the mother's custody modification petition and the dispositional phase

Third Department *continued*

of a neglect proceeding brought against the father, erred by failing to make findings of fact as required by CPLR 4213(b) where the court merely credited and adopted statements made by the attorneys in their closing statements. The facts recited in a closing statement reflect the position of a particular party, not the evidence from a hearing. (Family Ct, Ulster Co)

People v Tromans, 177 AD3d 1103 (3rd Dept 11/21/2019)

EVIDENCE TAMPERING / REVERSED

ILSAPP: The defendant appealed from an Albany County Supreme Court judgment, convicting him of leaving the scene of an incident and tampering with physical evidence. At the trial, the court dismissed the criminally negligent homicide count. Upon appeal, the Third Department dismissed the tampering count as against the weight of evidence. The proof did not establish efforts to conceal, alter or destroy incriminating evidence, where: (1) the defendant did not hide or throw away broken vehicle parts; (2) when bringing the damaged vehicle to a friend who could order parts, the defendant let the friend use the vehicle's VIN to obtain quotes—which led the police to the defendant; (3) while the defendant repaired the vehicle himself, he often worked on cars; and (4) he did not wash the car, which allowed police to obtain the victim's DNA from the hood. Lee Kindlon represented the appellant. (Supreme Ct, Albany Co)

People v Vanhyning, 177 AD3d 1095 (3rd Dept 11/21/2019)

SENTENCE - PROBATION/VIOLATIONS

LASJRP: Defendant was sentenced to five years of probation, the statutory maximum. Approximately one year later, in September 2016, the court issued a declaration of delinquency and defendant was charged with violating the conditions of probation. Defendant admitted to violating his probation with the understanding that, if he completed certain substance abuse treatment programs, the court would continue his probation sentence. Defendant successfully completed the programs and, in September 2017, the court resentenced defendant to five years of probation until September 2022.

The Third Department concludes that defendant was unlawfully sentenced to six years of probation. Although, when a probation violation is sustained and the court continues probation, the court may extend the sentence for the period from when a defendant is declared delinquent to when a determination is made, doing so in this case impermissibly expanded the term of probation beyond the statutory maximum. (County Ct, St. Lawrence Co)

People v Mack, 177 AD3d 1155 (3rd Dept 11/27/2019)

TEMPORARY LAWFUL POSSESSION INSTRUCTION WAS WARRANTED

LASCDP: Defendant was charged with gun possession; when he was stopped by police, the sweatshirt he was carrying had a pistol in its pocket. Defendant testified that the sweatshirt was not his, but had been discarded by a robber who dropped it when chased by defendant.

The Third Department ruled that a jury instruction of temporary lawful possession was warranted, in view of the facts in the record. Defendant's testimony, if believed, enabled the jury to have a lawful basis for finding that defendant's possession of the pistol was temporary and lawful, thus justifying acquittal. The trial court committed reversible error in denying the requested instruction, and a new trial was ordered. (County Ct, Chemung Co)

Fourth Department

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

People v Dibble, 176 AD3d 1584 (4th Dept 10/4/2019)

ATTEMPTED MENACING NOT A CRIME

LASCDP[1]: The Fourth Department reversed a conviction of attempted menacing a police officer. The crime of menacing encompasses an attempt to place another in reasonable fear of physical injury. With attempt already an element of the completed offense, an attempt to commit an attempt is not a cognizable crime. (County Ct, Ontario Co)

Matter of Fredericka S., 176 AD3d 1624 (4th Dept 10/4/2019)

TERMINATION OF PARENTAL RIGHTS - EXPERT TESTIMONY/HEARSAY BASIS

LASJRP[2]: In this termination of parental rights proceeding, the Fourth Department holds that the admission of certain testimony by petitioner's expert did not violate the mother's right to due process under the two-part test stated in Matter of Floyd Y. (22 N.Y.3d 95) (hearsay basis testimony by expert may be admitted at Mental Hygiene Law Article Ten commitment hearing if hearsay is reliable

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

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

Fourth Department *continued*

and probative value in assisting jury to evaluate expert's opinion substantially outweighs prejudicial effect).

In the TPR context, a court may apply the professional reliability hearsay exception to the foundational requirements for expert testimony without addressing Floyd Y. (Family Ct, Erie Co)

Matter of Jack S., 176 AD3d 1643 (4th Dept 10/4/2019)

ABUSE/NEGLECT - DRUG/ALCOHOL MISUSE

LASJRP: The Fourth Department upholds a neglect finding based on the presumption in FCA § 1046(a)(iii) where respondent mother lost a job due to her drug use; she appeared intoxicated due to drugs or alcohol on one occasion when police officers arrived to check on respondent father; the mother admitted that she used cocaine during the relevant time period; and she took prescription drugs in a suicide attempt that left her hospitalized. (Family Ct, Erie Co)

People v Kniffin, 176 AD3d 1601 (4th Dept 10/4/2019)

ACCUSATORY INSTRUMENTS - DUPLICITOUS COUNT

LASJRP: In this criminal mischief prosecution in which defendant was charged with damaging a newly resurfaced road that was under repair by spinning the tires of his vehicle on the road, the Fourth Department concludes that the single-count indictment was rendered duplicitous at trial where the indictment alleged that defendant damaged "the road surface at the intersection of Woolhouse Road and County Road #32," but the evidence established that defendant committed two distinct offenses by damaging two different portions of the road at that intersection at two different times. (County Ct, Ontario Co)

People v Morris, 176 AD3d 1635 (4th Dept 10/4/2019)

NO DECISION / NOT DENIAL

ILSAPP[3]: The defendant appealed from a judgment of Onondaga County Court, convicting him of attempted 1st degree murder and 1st degree assault. The Fourth Department reserved and remitted. The defendant contended that County Court erred in failing to grant that part of his post-plea pro se motion that sought substitution of counsel. However, there was no indication that the court ruled on that part of the motion. Upon an appeal from a criminal judgment or order, the intermediate appellate court may determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant. CPL 470.15 (1). The Court of Appeals has construed such provision to preclude review of issues decided in the appellant's favor or not ruled on by the trial court. *See People v LaFontaine*, 92 NY2d 470. (County Ct, Onondaga Co)

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

Matter of Smith v Ballam, 176 AD3d 1591 (4th Dept 10/4/2019)

VISITATION - APPEAL/MOOTNESS

LASJRP: While this appeal was pending, the Family Court granted the grandmother's subsequent petition seeking visitation. The mother moved to dismiss this appeal as moot insofar as the grandmother contends that the court erred in failing to grant her visitation. The Fourth Department concludes that the exception to the mootness doctrine applies, and affirms.

A dissenting judge asserts that cases like this in which the Court has concluded that an issue such as visitation is moot and that the exception to the mootness doctrine does not apply are practically legion. The majority cryptically asserts only that the exception applies "[u]nder the circumstances presented here[.]" The majority's approach creates a confusing incongruence in the Court's jurisprudence on this issue. Even assuming that similar visitation issues are likely to recur between the parties, such issues can easily be addressed via new petitions based on new allegations. (Family Ct, Steuben Co)

People v Turner, 176 AD3d 1623 (4th Dept 10/4/2019)

NO TRAFFIC VIOLATION / BUT REASONABLE BELIEF

ILSAPP: The defendant appealed from a judgment, convicting him upon his plea of guilty of 2nd degree CPW. The Fourth Department rejected his contention that Erie County Court erred in refusing to suppress evidence obtained as a result of a traffic stop. Hearing testimony established that a patrol officer stopped the vehicle in which the defendant was a passenger after observing it make a left turn from a two-way road into the right-most of three lanes in the intersecting road. The officer said that he believed that the vehicle was required to complete the turn in the lane closest to the center line. That was incorrect. Vehicle & Traffic Law § 1160 (b) does not specify how close to the center line a vehicle must be when it completes a left turn, nor does it designate a specific lane within which the vehicle must complete the turn. However, suppression was not required because the stop was the result of an objectively reasonable belief. An officer's misreading of a statute susceptible of multiple interpretations may amount to a reasonable mistake justifying a stop. The ambiguity in the subject provision had not previously been definitively construed by a NY appellate court. (County Ct, Erie Co)

Fourth Department *continued*

People v Valerio, 176 AD3d 1625 (4th Dept 10/4/2019)

440 MOTION / GRANTED

ILSAPP: The defendant appealed from an Onondaga County Court order, which summarily denied his CPL 440.10 motion to vacate a judgment of conviction of 2nd degree criminal possession of a controlled substance. The Fourth Department reversed, granted the motion, and remitted. The defendant pleaded guilty in exchange for a determinate sentence to run concurrently with a sentence imposed on a prior unrelated conviction in Massachusetts. During the plea colloquy, Supreme Court assured the defendant that, due to such concurrency, he would have to serve no more than 1½ years of additional prison time for the NY crime. Four years later, the defendant's Massachusetts term was reduced in exchange for his cooperation in an unsolved homicide. Thus, it became impossible to fulfill the NY court's promise. Generally, when a guilty plea has been induced by an unfulfilled promise, the plea must be vacated or the promise honored. Hiscock Legal Aid Society (Nathaniel Riley, of counsel) represented the appellant. (Supreme Ct, Onondaga Co)

People v Weber, 176 AD3d 1631 (4th Dept 10/4/2019)

SORA / REVERSED

ILSAPP: The defendant appealed from a County Court order, which determined that he was a level-three risk. The Fourth Department reversed. The SORA County Court erred in assessing 10 points, under risk factor 1, for the use of forcible compulsion. The defendant pleaded guilty to 1st degree criminal sexual act under a subdivision that did not require evidence of forcible compulsion. When the 10 points were subtracted, the defendant was a presumptive level two. However, because an upward departure might be warranted, the matter was remitted to County Court. The Monroe County Public Defender (David Juergens, of counsel) represented the appellant. (County Ct, Monroe Co)

People v St Denis, 177 AD3d 1311 (4th Dept 11/8/2019)

WAIVER OF INDICTMENT / DEFECTIVE

ILSAPP: The defendant appealed from a Supreme Court judgment, convicting him of attempted 2nd degree assault. The waiver of indictment was found jurisdictionally defective because it did not contain the approximate time of the offense. The judgment was reversed and the SCI dismissed. The Ontario County Public Defender (Rebecca Konst, of counsel) represented the appellant. (Supreme Ct, Ontario Co)

Matter of Destiny S., 177 AD3d 1314 (4th Dept 11/8/2019)

TERMINATION OF PARENTAL RIGHTS
- PETITION/CONFORM PLEADINGS TO PROOF
- APPEAL/PRESERVATION

LASJRP: The Fourth Department concludes that although the petitions did not allege mental illness as a ground for termination of parental rights, the mother did not object to the evidence relating to that ground and thus the family court did not err in sua sponte conforming the petitions to the proof. (Family Ct, Cattarugus Co)

People v Ferguson, 177 AD3d 1247 (4th Dept 11/8/2019)

PSR / REMITTAL

ILSAPP: The defendant appealed from a judgment of Oneida County Court, convicting her of 1st degree manslaughter and other charges. The Fourth Department affirmed, except for relief as to the presentence report (PSR). The defendant sent a letter to County Court objecting to certain portions of the PSR, including references to her failure to cooperate with law enforcement and invocation of the right to counsel. At sentencing, the court said that it agreed with some of the objections, but did not specify which portions of the PSR should be redacted. Because the defendant was not afforded a proper opportunity to challenge the PSR, the reviewing court remitted for further proceedings. The appellate court rejected assertions that the defendant was entitled to be resentenced based on PSR errors; there was no indication that the sentencing court relied on the improper information. Peter DiGiorgio represented the appellant. (County Ct, Oneida Co)

Gonzalez v Bebee, 177 AD3d 1274 (4th Dept 11/8/2019)

CONTEMPT / RIGHT TO COUNSEL

ILSAPP: In a proceeding pursuant to Family Court Act Article 4, the father appealed from a Wayne County Family Court order that sentenced him to jail for contempt of court. The Fourth Department reversed. The appeal was not moot, given the enduring consequences flowing from a civil contempt finding. The Support Magistrate erred in allowing the father's attorney to withdraw as counsel and proceeding in the father's absence. An attorney may withdraw as counsel only upon a showing of good cause and reasonable notice to the client. The father's attorney did not make a written motion, and there was no proof of notice to the father. The matter was remitted for a new hearing and new counsel for the father. Robert Dinieri represented the appellant. (Family Ct, Wayne Co)

Fourth Department *continued*

People v Hines, 177 AD3d 1282 (4th Dept 11/8/2019)

"[T]there is no basis in the record to conclude that the loss prevention officers who gave testimony identifying defendant as an individual depicted in the surveillance video were more likely to correctly identify defendant from the video than the jury," but the defendant failed to show that counsel's failure to object to the testimony lacked strategic or other legitimate explanation. (Supreme Ct, Onondaga Co)

Matter of Heinsler v Sero, 177 AD3d 1316 (4th Dept 11/8/2019)

CUSTODY / REVERSED

ILSAPP: The mother appealed from orders of Genesee County Family Court, which dismissed her custody modification petitions. The Fourth Department reversed, reinstated the petition, and remitted. A prior order granted the great aunt custody of the three children, and there had been a determination of extraordinary circumstances. Family Court erred in granting a motion to dismiss on the ground that the mother failed to show a change in circumstances. At the time of the prior order, the mother did not have a car or job, and she lived with a man prohibited from having contact with the children. By the time of the hearing, she owned a car, worked full-time, and no longer lived with the objectionable man. Indeed, the court noted that the mother had made impressive progress. Because the petitions were dismissed before the presentation of the respondent's case, the reviewing court lacked an adequate record to make a determination in the interest of judicial economy. Thus, the matter was remitted for a hearing on the children's best interests. (Family Ct, Genesee Co)

People v Richards, 177 AD3d 1280 (4th Dept 11/8/2019)

IAC CLAIM / REJECTED

ILSAPP: The defendant appealed from a judgment of Ontario County Court, convicting him of attempted 2nd degree arson and 2nd degree aggravated harassment. The Fourth Department affirmed, rejecting the defendant's claim of ineffective assistance. Counsel did not retain a fire expert; but the defendant did not establish that expert testimony was available and would have assisted the jury or that he was prejudiced by its absence. Also found unpersuasive was the assertion that the defense was defective in waiving opening and closing statements at the suppression hearing. The omnibus motion set forth a cogent theory, and counsel ably cross-examined the People's witnesses. Further, counsel was not ineffective in failing to object with respect to the alleged bias of a sworn juror based on comments by the court. The defendant failed to demonstrate the absence of strategic explanation, and the record did not indicate juror bias. (County Ct, Ontario Co)

People v Williams, 177 AD3d 1312 (4th Dept 11/8/2019)

SUPPRESSION / REVERSAL

ILSAPP: The defendant appealed from a judgment of Erie County Court, convicting him of 2nd degree CPW and 3rd degree criminal possession of a controlled substance. The Fourth Department reversed and vacated the plea. The weapons conviction arose from a police encounter triggered by an anonymous 911 call to an officer regarding drugs being sold out of a vehicle. The officer observed a legally parked vehicle matching the description by the caller and saw the defendant in the driver's seat. The patrol car was parked so as to block the defendant, thus effectively seizing the vehicle. Police, who did not make confirmatory observations of the criminal behavior reported, lacked the requisite reasonable suspicion. At most, they had a founded suspicion that criminal activity was afoot, which permitted only a common-law inquiry of the vehicle occupants. Therefore, County Court erred in refusing to suppress the weapon and marihuana found in the vehicle and the statements the defendant made upon arrest. The counts relating to the weapon and the marijuana were dismissed. Further, although the CPCS conviction arose from a separate search of the defendant's home, the plea of guilty was expressly conditioned on the negotiated agreement that he would receive concurrent sentences. Thus, the plea was vacated in its entirety. The matter was remitted for further proceedings on the remaining counts. The Legal Aid Bureau of Buffalo (Deborah Jessey, of counsel) represented the appellant. (County Ct, Erie Co)

Matter of Oneida County Dept. of Social Servs. v Abu-Zamaq, 177 AD3d 1412 (4th Dept 11/15/2019)

It was improper for the court to deny the mother's objections to the support magistrate's order that granted her petition for an upward modification of child support, but only retroactive to the filing date on the petition. Since father failed to notify the support collection unit of the change in his employment status, as he was obliged to do, the court should have made the new support order retroactive to the earlier date that his new employment started. (Family Ct, Oneida Co)

Fourth Department *continued*

Matter of Carmellah Z., 177 AD3d 1364
(4th Dept 11/15/2019)

ABUSE/NEGLECT - FINDINGS OF FACT
- CORROBORATION
- ALLOWING ABUSE OR NEGLECT

LASJRP: The Fourth Department first concludes that the family court failed to satisfy its obligation to set forth the facts essential to its decision with respect to the mother's motion to dismiss and the ultimate fact-finding and dispositional determinations. The verbatim repetition of allegations from the petition in spaces on the preprinted order is insufficient.

After noting that the record is sufficient to enable the Court to address the merits, the Court concludes that petitioner failed to establish a prima facie case of neglect based on an incident involving age-inappropriate sexual conduct between the youngest child and a non-family member. The then five-year-old child's out-of-court statements to two caseworkers were not sufficiently corroborated. Although the disclosure reflected age-inappropriate knowledge of sexual matters, there was no other evidence tending to support the reliability of the statements. Although the caseworkers asserted that they utilized forensic interviewing techniques to avoid leading the child, there is no evidence establishing that either caseworker was qualified to give expert validation testimony.

In addition, petitioner did not prove that the mother became aware of the incident at a time when she could have acted to avoid harm or the risk of harm. (Family Ct, Onondoga Co)

People v Cleveland, 177 AD3d 1382
(4th Dept 11/15/2019)

The defendant asserts on appeal, and the prosecution concedes, that the defendant's confession of judgment as to restitution must be voided because the amount differs from that in the plea bargain. The sentence must be vacated in its entirely because, though not raised by the parties, the court "failed to pronounce the sentencing of restitution in open court …." (County Ct, Erie Co)

Matter of Green v Lafler, 177 AD3d 1380
(4th Dept 11/15/2019)

It was an error to find the father in willful violation of his order of support without first holding the requisite hearing. Although no specific requirement exists for the format of a hearing, it must consist of something more than a colloquy between a respondent and the court, as was the case here. At a bare minimum a hearing must consist of evidence with an opportunity at rebuttal. Additionally, the record does not reflect that the mother provided any admissible evidence of the father's alleged failure to pay his support. Although the appeal of the order of commitment is dismissed as moot, since the father already served the six month sentence, the part of the appeal that challenges the willfulness finding is not moot because of the enduring consequences of a judicial determination of civil contempt. This matter is reversed and remanded to the family court for a hearing on the merits. (Family Ct, Cayuga Co)

People v Kerce, 177 AD3d 1384 (4th Dept 11/15/2019)

The waiver of indictment was jurisdictionally defective as it did not contain the "approximate time" of the offense. This is not an instance where the time is unknown or perhaps unknowable. (Supreme Ct, Onondaga Co)

People v Laws, 177 AD3d 1404 (4th Dept 11/15/2019)

The written waiver of indictment did not state the approximate time the defendant was said to have committed each offense. In light of this failure to comply with CPL 195.20, we "reverse the judgment, vacate the plea and waiver of indictment, dismiss the SCI, and remit the matter" for proceedings under CPL 470.45. (County Ct, Wayne Co)

People v McDermid, 177 AD3d 1412
(4th Dept 11/15/2019)

APPEAL WAIVER / INVALID

ILSAPP: The defendant appealed from a Lewis County Court judgment, convicting him of 1st degree manslaughter and other crimes. The Fourth Department held that his oral waiver of the right to appeal from his "conviction" did not encompass his challenge to the severity of the sentence and thus did not foreclose review of the sentence. See People v Maracle, 19 NY3d 925. Although the defendant also executed a written waiver of appeal, that document also failed to state that he was waiving his right to appeal the severity of the sentence. However, the sentence was upheld. (County Ct, Lewis Co)

Matter of Nevaeh L., 177 AD3d 1400
(4th Dept 11/15/2019)

ABUSE/NEGLECT - ALCOHOL MISUSE

LASJRP: The Fourth Department finds sufficient evidence of neglect where, in one incident, the mother consumed alcohol in the middle of the day and, after seeing her then fourteen-year-old child pour out the remaining alcohol, she locked him out of the house before falling into a sleep from which she could not be awakened, and the two other children, who were under the age of ten, were

Fourth Department *continued*

thus without supervision; in another incident, the mother consumed alcohol and the oldest child observed her "passed out" on the couch with empty beer cans next to her; the children had been removed in 2013 and placed with the maternal grandmother and stepfather due to the mother's substance abuse issues, she had relapsed twice before, and the children had only recently been returned to her custody; and the oldest child testified that he and his siblings were afraid of the mother when she consumed alcohol and this testimony was corroborated by the testimony of the caseworker who interviewed the younger siblings. (Family Ct, Niagra Co)

People v Schmidinger, 177 AD3d 1397 (4th Dept 11/15/2019)

The court's promise to "consider" imposing a sentence lower than the statutory maximum, a mere restatement of the court's statutory and common-law obligation to impose a legal, appropriate sentence, could not supply the necessary consideration for creating an enforceable waiver of the right to appeal. However, the imposed sentence was not unduly harsh or severe. (County Ct, Onondaga Co)

People v Tripp, 177 AD3d 1409 (4th Dept 11/15/2019)

CONSECUTIVE TERMS / MODIFICATION

ILSAPP: The defendant appealed from a judgment of Onondaga County Court, convicting him of 2nd degree CPW (two counts) and 2nd degree assault. The Fourth Department modified the judgment. The sentence was illegal insofar as County Court directed that the CPW 2 sentences would run consecutively to the assault term. The People failed to meet their burden of establishing that the crimes were committed through separate acts or omissions. The issue did not require preservation. All sentences would run concurrently. Linda Campbell represented the appellant. (County Ct, Onondoga Co) ⚖

Defender News *(continued from p. 5)*

for her expertise in trauma-informed advocacy. She brings her breadth and depth of experience and knowledge, and her passion for justice, to NYSDA's training program and daily work. Her colleagues congratulate her on the well-earned WCA recognition!

Also receiving a 2020 WCA award is college mate Gwen Wilkinson, former District Attorney of Tompkins County. She and Stephanie will join the company of Ann Taber Pfau, former Chief Administrative Judge of the State of New York, who received the award in 2011.

Charlie O'Brien had strongly supported Stephanie's designation as a WCA Award recipient, calling her an "unsung hero" to others in the public defense system. He would have been pleased to hear about the WCA recognition.

US High Court: Unanimous Juries Required, Owner's Revoked License May Justify Traffic Stop

On April 6, the U.S. Supreme Court held in *Kansas v Glover* (140 SCt 1183) that where a police officer learned that the driver's license of a vehicle's owner had been suspended, and had no information that would negate an inference that the owner was the current driver of the vehicle, a stop of the vehicle was not unreasonable. The opinion states that it is a narrow decision. Concurring, Justices Kagan and Ginsburg noted that the inference was reasonable in light of Kansas law.

In *Ramos v Louisiana* (No. 18-5924), the Court stated on Apr. 20, 2020 that "[t]here can be no question … that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally." The laws of Louisiana and Oregon—the only two states to allow other than unanimous jury verdicts—arose in circumstances where the clear intention was to maintain white supremacy by diluting the influence of minorities on juries, according to Justice Gorsuch's opinion. But a history of the constitutional jurisprudence on the issue, leading back to "a badly fractured set of opinions" in *Apodaca v Oregon* (406 US 404) concerning the incorporation doctrine, has left the law in a state that "no one has found a way to make sense of," in Justice Gorsuch's words. The substantive issue—unanimous juries—is now resolved, but the path to that outcome was not smooth. The recounting in the syllabus of the multiple decisions illustrates the measure of difficulty:

> GORSUCH, J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II–A, III, and IV–B–1, in which GINSBURG, BREYER, SOTOMAYOR, and KAVANAUGH, JJ., joined, an opinion with respect to Parts II–B, IV–B–2, and V, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, and an opinion with respect to Part IV–A, in which GINSBURG and BREYER, JJ., joined. SOTOMAYOR, J., filed an opinion concurring as to all but Part IV–A. KAVANAUGH, J., filed an opinion concurring in part. THOMAS, J., filed an opinion concurring in the judgment. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., joined, and in which KAGAN, J., joined as to all but Part III–D. ⚖

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