



Public Defense Backup Center REPORT

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Defender News

Amid Causes to Celebrate, Much Remains to be Done

Over halfway through 2021, reasons to celebrate exist even as public defense clients confront continuing horrors in the family and criminal legal systems. Items in this issue demonstrate that good news has often accompanied or been followed by a “but” that signifies more work to be done. From legislative actions and appellate opinions to the waxing and waning of COVID-19, clients and lawyers have experienced changes both transitory and permanent in 2021. NYSDA has worked to help defenders maneuver through these changes, and will continue to do so.

Active Legislature and Resistant Opponents Provide Challenges

Pushback against reform by law enforcement and others on one hand, and on the other hand an appetite for more reform in the wake of continuing revelations about structural racism and discrimination against individuals based on gender identity, etc., have created ongoing challenges in legal procedures and in legislative advocacy. This has left clients sometimes adrift at the far end of change and reformers sometimes caught in maelstroms circling unwelcome legislative and regulatory status quos.

Continuing Assistance as to DLSRA, Discovery, and More

The [last issue](#) of the *REPORT* in 2020 described a number of new laws, including the Driver’s License Suspension Reform Act (DLSRA). It also discussed continuing implementation issues with earlier reforms, particularly discovery, the opening up of police disciplinary records, and bail. NYSDA has continued to provide information and training on these issues. Many editions of [News Picks from NYSDA Staff](#) contained at least mention of some aspect of discovery—from litigating certificates of compliance to suspension of deadlines due to the COVID-19 emergency.

NYSDA provided information on the DLSRA, including a chapter amendment, as it became available. The act went into effect on June 29th. The July 2nd edition of News Picks included links to a [Practice Advisory](#) on the DLSRA from Ranit Patel at The Bronx Defenders; [Monthly Installment Payment Plans for Vehicle & Traffic Offenses](#) on the NYS Unified Court System website; [Traffic Ticket Payment Plans](#) from the NYS Department of Motor Vehicles; and a [press release](#) issued by the Fines and Fees Justice Center. CLE webinars during the Annual Meeting and Conference, described further below, covered this and other legislation.

Important Bills Were Awaiting Signature When Governor Resigned

As the *REPORT* went to press, Governor Andrew Cuomo had announced his resignation amid growing scandals; Lt. Governor Kathy Hochul was poised to take the reins of the State. At that time, bills that had passed the Legislature, as described in the [June 21st edition](#) of News Picks, were awaiting gubernatorial action. NYSDA and other advocates for justice continue to call for bills they support to be signed.

54th Annual Conference: Sharing Information and Collegiality Remotely

NYSDA held its 54th Annual Conference the last week in July 2021. A full menu of continuing legal education (CLE) credits, awards, NYSDA’s meeting of the membership, and a Chief Defender Convening were presented, all via Zoom as the COVID-19 threat continued.

The theme, “Reform, Reentry & Reunification: Public Defense in a Watershed Moment,” was reflected in CLE sessions

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like Creative Antiracist Litigation Strategies in the Courtroom; Being Good Allies: Supporting our Colleagues from Impacted Communities; Strategies to Keep and Return Children Home in Family Court Article 10 Cases; and 2021 Legislative Update: Marijuana Legalization, Parole Justice, and More. The program included annual staples, like Tim Murphy's summary of criminal law and procedure developments in the New York Court of Appeals and Kent Moston's U.S. Supreme Court update.

Public Defense Community, Lawyers and Offices, Recognized

NYSDA's 2021 Jonathan E. Gradess Service of Justice Award [recognized](#) the entire Public Defender Community. Named to represent the many defenders—offices, staff lawyers, and assigned counsel serving clients unable to afford counsel in criminal and family matters—who went above and beyond during the pandemic were:

- [Chelsea Carter](#), Assistant Public Defender, Ontario County Public Defender's Office;
- [Tracey Chance](#), Schenectady County Conflict Defender;
- [Adele Fine](#), Family Court Bureau Chief, Monroe County Public Defender's Office;
- [Yung-Mi Lee](#), Legal Director, Criminal Practice, Brooklyn Defender Services;
- [The Legal Department](#), The Bronx Defenders;
- [Miriam Mack](#), Policy Counsel, Family Defense Practice, The Bronx Defenders;
- [Nila Natarajan](#), Supervising Attorney & Policy Counsel, Family Defense Practice, Brooklyn Defender Services; and
- [St. Lawrence County Public Defender's Office](#).

Also during the July 28th award presentations, [Arline L. Hanna](#), Second Assistant Public Defender in the Wayne County Public Defender Office, received the 2021 Kevin M. Andersen Memorial Award. This honor, created by the Genesee County Public Defender Office, goes to an attorney in practice less than fifteen years who practices in public defense and "exemplifies the sense of justice, determination, and compassion" that were its namesake's hallmarks.

New and Incumbent Members Elected to Board of Directors

The NYSDA membership elected a slate of 15 people to the Board of Directors, including eight individuals new to the Board, on July 28, 2021.

- Pamela Zimba, a Program Assistant within the Gender, Racial, and Ethnic Justice Department of the Ford Foundation whose current areas of focus are reproductive justice and mass incarceration, received



Arline L. Hanna (l) received the 2021 Kevin M. Andersen Award; it was presented virtually by Jerry Ader, Genesee County Public Defender (not pictured), whose office created the award, and delivered by Wayne County Public Defender Andrew Correia (r), who nominated Hanna, who is Second Assistant Public Defender in that office.

her Associate's Degree in Liberal Arts from Bard College through the Bard Prison Initiative (BPI); she began her work at the Ford Foundation in a fellowship position in partnership with BPI shortly after her release.

- Courtney S. Radick, a partner in the Oswego law firm of Amdursky, Pelky, Fennell & Wallen, P.C., has a general practice of law with concentrations in workers' compensation, matrimonial and family law, criminal defense, criminal and civil appeals, and adoption. She teaches the Pro Se Divorce Clinic through the Legal Aid Society of Mid-New York and is active in several organizations, including currently representing the Fifth Judicial District as a member of the New York State Bar Association House of Delegates.

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THE REPORT IS PRINTED ON RECYCLED PAPER

- Scott D. Levy, Chief Policy Counsel at The Bronx Defenders, oversees the office's public policy agenda, coordinating and advancing policy reform work across the criminal, family, social work, immigration, and civil practices, supervising an interdisciplinary team of advocates working on legislative and policy campaigns at the federal, state, and city level. He was the 2016 recipient of the Kevin M. Andersen Memorial Award.
- Kevin Kelly runs FLXLaw.com in Ithaca, doing mostly criminal defense, DWI, and student affairs, and is on several assigned counsel and attorneys for children panels. He is the Tompkins County Bar Association President and the New York State Bar Association's Criminal Justice Section Sixth District Representative, and has other relevant experiences including work at Prisoners' Legal Services of New York, Legal Assistance of Western New York, and eight years as Board President of Opportunities, Alternatives & Resources of Tompkins County.
- Izel Fortunato, litigator and public defender with The Legal Aid Society, has served as an Administrative Law Judge for the Board of Parole adjudicating parole revocation hearings and has advocated for Black and brown people from underserved communities in a number of ways, including with Big Brothers Big Sisters of America, iMentor, Students First NY, the Parole Preparation Project, and proponents of the HALT (Humane Alternative to Long-Term) Solitary Confinement Act.
- Nancy J. Farrell, an assistant public defender in Ontario County who was previously Supervising Attorney for the Family Court Program at the Hiscock Legal Aid Society in Syracuse and has presented many CLE programs on family court topics, has also represented individuals in Veterans Treatment Court and engages in volunteer work including at her local volunteer fire department.
- Carrie W. Bleakley, Conflict Defender and Assigned Counsel Administrator in Ontario County, began work in public defense shortly after graduating from law school; she chairs the Assigned Counsel Committee of the Chief Defenders Association of New York and is active in community organizations, such as the Boys & Girls Club of Geneva, for which she is currently Vice-Chair.
- Zamir Ben-Dan, staff attorney with the Community Justice Unit at The Legal Aid Society in New York City and a Representative of the Black Attorneys at Legal Aid caucus, also teaches law and writes law review articles; his emerging scholarship focuses on issues surrounding criminal justice, racism, and the courts.

Criminal and family defense training programs are listed on NYSDA's Statewide Public Defense Training Calendar at www.nysda.org/page/NYStatewideTraining

Members reelected to the Board include Joseph R. Lentol, who was initially appointed at the end of his long career in the NYS Assembly; he chaired the NYS Assembly Codes Committee for many years and supported many justice reforms and NYSDA efforts during his legislative tenure. Other Board members entering new terms are: Marsha C. Weissman, John C. Turi, Jared M. Trujillo, Steven J. Hyman, Susan R. Horn, and Richard M. Greenberg. A full [list](#) of Board members can be found on the NYSDA website.

Board Resolution Honors William J. Leahy

At a meeting held just prior to the Annual Conference, NYSDA's Board passed a Resolution Commending William J. Leahy Following His Retirement as Director of the Office of Indigent Legal Services. Leahy, who announced in February that he was retiring effective June 1st, was the inaugural ILS Director. As the resolution noted, he "oversaw the explosive growth of ILS following its designation as the implementing authority for the historic *Hurrell-Harring* settlement in which New York State acknowledged its duty to ensure effective assistance of counsel in criminal matters" and its continuing growth as additional state funds were made available for distribution to improve public defense in criminal matters. Leahy also "steadfastly worked to implement and expand state oversight and funding of public defense representation in the family legal system"; just two days before he announced he would step down when his term expired, he provided testimony at a legislative budget hearing that included a request for funding for parental representation (and support for NYSDA's budget, which was greatly appreciated). While the \$5 million requested for family defense was not appropriated, the budget did include family defense for the first time, in the amount of \$2.5 million. NYSDA again congratulates Bill on his successes and wishes him well!

Convening Was Just One Form of Assistance to Chief Defenders

A Chief Defender Convening was held, as is traditional, during the Annual Conference. These gatherings provide an opportunity for those who head public defender, legal aid, and assigned counsel programs to hear information from NYSDA and other Chiefs and to share information and strategies. During the pandemic,

NYSDA intensified its efforts to assist Chief Defenders. The Backup Center initiated blast emails and digital discussions about COVID-19 developments affecting clients, law, and/or attorneys; participated whenever possible in meetings of the Chief Defenders Association of New York; and responded to an increased number of individual chief requests for information or assistance.

Bail and COVID-19 Intersect

As public defense advocates struggled to deal with both procedural changes resulting from the pandemic and implementation of bail law changes, issues relating to stopping the spread of COVID-19 and pretrial release issues intersected in a variety of ways. Clients held on bail, legally or otherwise, could not communicate with their attorneys if COVID-19 restrictions deprived them of access to in-person visits, or even to phones or other means of communicating that ensured both privacy and protection from the virus.

Claims were made that COVID-19 and bail reform together created a “perfect storm” of releases that fueled a rise in gun violence, but a *Gothamist* [article](#) showed data did not back up those claims. The former President of the District Attorneys Association of the State of New York has claimed that only bail reform, not COVID-19, is at the root of gun violence; others dispute the connection, as noted in a *Times Union* on July 25, 2021. Among those quoted in defense of bail reform was NYSDA Board member Jared Trujillo. Meanwhile, days earlier and across the state, as [reported](#) in the *Lockport Journal*, groups representing sheriffs and police chiefs called for the State to “produce a comprehensive evaluation of recent modifications to the bail statutes to determine the impacts on public safety,” claiming the lack of number-crunching showed “they don’t want you to see what is there” A spokesperson for the Division of Criminal Justice Services (DCJS) “maintained the reasons for the surge in shootings are more complex than the bail changes.” The Office of Court Administration’s [webpage](#) on pretrial release data advised that COVID-19 required the rescheduling of arraignments for a significant number of Desk Appearance Ticket cases, which therefore were not included in the data file until arraignment had occurred. Earlier in July, a national news agency looking at varying research reports, [said](#) that “[d]espite these disagreements, CNN has seen no clear evidence to support [U.S. Sen. Lindsey] Graham’s insinuation that the small number of bail reforms in the US have played a role in the increase in violent crimes throughout major cities in the country.”

An August 4th [item](#) in *The Batavian* seeking to rebut an article published by *The Marshall Project* about the propriety of a delayed sentence included debate about the effect of bail reform and COVID-19 on initially-declining jail population numbers. An [op-ed](#) in *City Limits* by

Jonathan Lippman and Courtney Bryan calling for reduction in the number of people jailed and the closing of New York City’s Rikers Island said that links between bail reform and gun violence increase had been debunked, and that the number of people held at Rikers while awaiting trial “(about 85 percent of the current population)” could be safely reduced by providing services or utilizing supervised release. As for COVID-19 having increased the population, they said, policymakers should “work together to swiftly end the enormous (and understandable) case backlogs”

Recently, the *New York Law Journal* [reported](#) that a federal judge had “ordered a criminal defendant to be vaccinated as a part of her bail package.” The judge said that while “he had no authority to ‘second-guess’ the Bureau of Prisons’ apparent policy of allowing detainees to forgo vaccination if they so choose,” he “had a ‘responsibility’ to set bail conditions that will ‘prevent a danger to the community, in this case, an increased risk of infecting other, innocent people’”

NYSDA continues to monitor developments and advise the state public defense community about these issues.

Avoid Complacency About Risk Assessment Algorithms

“Predicting human behavior is tricky, and the use of risk assessment instruments has been the topic of debate among policy makers, community advocates, academics, and formerly incarcerated persons.” So says Olin Moyd in “Racial Disparities Inherent in America’s Fragmented Parole System,” in the Spring 2021 issue of *Criminal Justice* (American Bar Association magazine). This is not news to long-time readers of the *REPORT* and News Picks from NYSDA Staff. NYSDA has repeatedly noted studies and observations raising concerns about supposedly neutral, only sometimes “well-validated,” actuarial instruments used in whole or in part to make decisions about individuals’ liberty based on predictions of future behavior. See e.g. the [July 31, 2015, edition](#) of News Picks. And questions about the tools keep arising.

Risk Assessment Instruments Affect Immigrants’ Release

A recent example of risk assessment problems is discussed in a June 30, 2021, [article](#) entitled “the Danger of Rigged Algorithms: Evidence from Immigration Detention Decisions.” The author’s examination of data showed that a change to the algorithmic tool used to help US Immigration and Customs Enforcement (ICE) officials make decisions about detention or release of immigrants in ICE proceedings reduced release decisions from around 10% to around 5% of all decisions. The findings are said to

“advance the growing literature on human-algorithmic, or algorithm-in-the-loop’ decisionmaking ..., as well as the literature on managerial control of law enforcement officers.” [Footnote omitted.] Humans may blatantly rig algorithms, as in the ICE changes noted above, and may fail to “calibrate their reliance on the risk assessment based on the risk assessment’s performance,” the article says. People using instruments may selectively ignore predictions in biased ways or, as the new study is said to show, may “continue to follow the recommendation of the algorithm even if the managers of the tool uncouple the recommendation from any meaningful risk prediction.” Managers may exploit human tendencies by rigging algorithms to achieve desired results.

The article appears to underscore the already-known need for lawyers to seek to access, and to understand and challenge, the algorithms underlying actuarial risk assessment tools used to make decisions about clients. But there are also times when use of a tool, even perhaps a flawed one, may be advantageous, as noted in a different article about release of immigrants.

This [article](#) in Bender’s Immigration Bulletin concerns federal bail decisions. It posits that pretrial services officials are failing in their duty to timely collect, verify, and report information relevant to the risk of flight or dangerousness, resulting in delays that coerce waivers of rights by immigrants. The article “recommends early screening of equities favoring pretrial release, active participation by attorneys in initial appearances in order to obtain timely pretrial interviews, and utilizing Pretrial Services’ own risk assessment tool to establish the low risks undocumented immigrants pose when released.” [Emphasis added.] While recognizing that actuarial risk assessment instruments “are not without their critics,” the article says that the Pretrial Services Risk Assessment Tool (PTRA) “does not treat undocumented immigrants any differently than documented immigrants, and only slightly different from citizens,” and “gives greater consideration to youth, lack of education, and multiple prior failures to appear than to immigration status” so that attorneys advocating for clients’ pretrial release may want to “assert the PTRA, which strongly favors the release of undocumented immigrants, against pretrial services officers’ blanket recommendations for detention.”

SORA Risk Assessment System and Instrument Need Reform

Earlier this year, Judge Daniel Conviser set out in the *New York Law Journal* a clear case for reforming New York’s system for evaluating, under the Sex Offender Registration Act (SORA), the risk that a person convicted of a sex offense will reoffend. The two-part article outlines “the significant flaws of the sex offender risk assessment instrument” [RAI] and explains why those “deficiencies

NYSDA CLE Remains Virtual

In light of the ongoing issues presented by COVID-19, NYSDA is continuing to offer CLE training programs in webinar format.

Future webinars will be noted on our [NY Statewide Public Defense Training Calendar](#).

are not adequately corrected by court departure determinations.” In [Part I](#), Conviser notes his own extended decision in the Supreme Court case of [People v McFarland](#), 29 Misc 3d 1206(A) [2010], as well as a [report](#) from New York City Bar on proposed legislation to amend SORA with regard to risk assessment. Describing how valid sex offender risk assessments are made, and how the RAI works—it looks like an actuarial risk assessment instrument but is not—he calls out in great detail the lack of correlation between RAI scores and risk data. Conviser notes the “distorted impacts” of “suggested departures” included in the Sex Offender Risk Assessment Guidelines and Commentary, which have been found mandatory. The lack of validation studies, the essential lack of amendments to the RAI since its creation in 1996, and the RAI’s lack of most significant actuarial factors that do correlate to risk are among other critiques offered in Part I. The Static-99R risk assessment instrument is discussed but not criticized; a [validation study](#) released through Frontiers in Science as the article was being published and a [field study](#) of the Static-99R and another instrument, released in August, may be of interest.

[Part II](#) of Conviser’s article elaborates on problems with “departures” under the RAI’s guidelines and commentary. One example is age, “perhaps the most robust of all actuarial risk factors,” which is poorly addressed in the RAI (and statutory language); courts have failed to address that, consistently upholding rejections of downward departure motions made by offenders in their 50s through 70s. Another example is how offenses against family members are considered. While offenses being of this nature indisputably reduces actuarial risk of reoffending, courts have consistently considered them aggravating rather than mitigating factors and rejected consideration of them in support of downward departures, sometimes on moral grounds.

Conviser says that all three government branches could take steps to improve current SORA risk assessment policy. The Board of Examiners of Sex Offenders, which created the RAI, could unilaterally modify it to correct problems. The Legislature could require development of a “‘validated risk instrument’ under SORA and study how well it predicts recidivism.” Court deference is another problem that needs to be solved, he notes. He concludes

that the only way to correct the system is “by using qualified experts, one for each side in a contested SORA proceeding, to make risk assessments; combine that with a system which allows judges to assess the harm an offender would cause by re-offending and have judges make final decisions which incorporate both their value judgments and the science reflected in expert evaluations.” Whether one agrees with the ultimate conclusion of this article or not, it may provide information and inspiration for lawyers representing SORA clients.

An [ethics opinion](#) from the Unified Court System’s [Advisory Committee on Judicial Ethics](#) on Sept. 10, 2020, addressed a question about the propriety of a full-time judge presenting such an article. Citing prior opinions about judicial writing, the Committee said in Opinion 20-136 that, subject to generally applicable limitations on judicial speech and conduct, writing and seeking publication of such an article was permissible.

News Picks: Information in the Inbox (and on the Web)

During the pandemic, procedures and applicable law changed frequently. NYSDA’s Backup Center has responded by providing more information via the electronic newsletter News Picks from NYSDA Staff. During the official state emergency, News Picks provided the most recent Executive Orders, memos from the Chief Judge, and other directives and developments, including news about COVID-19 in jails and prisons. All public defense programs and NYSDA members who provide email addresses receive News Picks via email. Each edition is also posted on the [News Picks webpage](#). Preparing the enlarged editions and other pandemic issues eroded the time available for the *REPORT*, as the dates on this issue show.

Below are summaries or updates of some non-pandemic-related News Picks items.

NYSDA Launches DVSJA Attorney Support Project

NYSDA announced its Domestic Violence Survivors Justice Act (DVSJA) Attorney Support Project, created with the support of the DVSJA Statewide Task Force and Brooklyn Law School’s Survivor Justice Project. Direct support services for attorneys working on DVSJA cases, including PL § 60.12 sentencing cases and CPL § 440.47 resentencing cases, are available. Contact Stephanie J. Batcheller, NYSDA Senior Staff Attorney, at (518) 465-3524 x41 or sjbatcheller@nysda.org. For more information, please see the [Attorney Support Project flyer](#) and DVSJA web [resources](#).

Among cases included on the resources page is [People v Addimando](#) (2021 Slip Op 04364 [2nd Dept 7/14/2021]).

As reported in News Picks, the appellate court reduced the sentence of Nicole Addimando, who had been convicted of killing her abusive partner, rejecting the lower court’s “methodology, approach, application, and analysis of the three factors, as set forth under Penal Law § 60.12(1).”

News Picks Includes Items Relevant to Parental Defense

Court Decisions Affecting Family Defense

Among decisions of interest to family defenders this year was [Matter of Messiah RR.](#), 190 AD3d 1055 (3rd Dept 1/7/2021), in which the Appellate Division affirmed a Sullivan County family court’s dismissal of neglect and derivative neglect petitions against the mother, and ordered the subject child returned because the county failed to meet its burden. The decision is a reminder that “[a] finding of neglect is premised upon a finding of serious or imminent harm to the child, not just on what might be deemed undesirable parental behavior’”

Another family law related decision was [Matter of Renee S. v Heather U.](#) (195 AD3d 1170 [3rd Dept 6/10/2021]), in which a Family Court Act (FCA) article 6 custody proceeding was remitted, based on the court’s failure to advise the respondent grandmother of her statutory right to counsel in violation of FCA 262. Following remittitur, the Appellate Division said that while the court below “has now inquired into the grandmother’s financial circumstances as of March 2017 and has determined that she was eligible for assigned counsel as of that date,” which “determination would ordinarily compel us to reverse the amended order on appeal and remit the matter for a new fact-finding hearing on the grandmother’s petition, with counsel assigned to represent her thereat,” the appeal had meanwhile become moot.

The decision by the U.S Supreme Court in [Fulton v Philadelphia](#) (___ US ___, 141 SCt 1868 [6/17/2021]), while troubling, was narrowly drawn. The high court found that Philadelphia’s refusal to renew the foster care contract of Catholic Social Services (CSS), because CSS would not certify same-sex couple as foster parents, unconstitutionally burdened CSS’s free exercise of religion in violation of the First Amendment. As was stated in the News Picks discussion of the case, “[w]hile the decision was unanimous, two concurring opinions—one of which concurred only in the judgment—demonstrate that the court is not unified in its approach to the issue; three concurring conservative justices, as the AP [article](#) notes [hyperlink added], would have gone farther.” NYSDA advised that “[f]amily defenders with clients in same-sex relationships (or in unmarried relationships, which CSS also refused to certify), may want to familiarize themselves with *Fulton* even if local agencies do not currently have policies like CSS’s, as the decision may spark more.”

The Appellate Division, in [Matter of Calvin L.W.](#) (196 AD3d 1181 [4th Dept 7/16/2021]), unanimously reversed a decision on default to terminate the mother's parental rights, saying, "[b]ecause there is no indication in the record that the mother's attorney informed her that he was seeking to withdraw as counsel, the court should not have relieved him as counsel" NYSDA reminds all attorneys that the New York Rules of Professional Conduct, [Rule 1.16](#), provides that withdrawal should not have a material adverse effect on clients' interests and that "even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client"

In addition to providing information on selected opinions, News Picks also noted that those with access to the internet can find online the New York Appellate Digest's 2020 "[Year in Review](#)" of select family court appellate cases.

Considering Making a Parental "Designation"

Jessica Prince, Policy Counsel for the Family Defense Practice at the Bronx Defenders, suggested an option for attorneys whose clients are wondering what options are available to them if they are unable to temporarily care for their children, whether it be because of illnesses, or some other unexpected reason. See the Jan. 5, 2021, *Rise Magazine* [article](#), "Parental Designation: A Way of Planning for the Expected and Unexpected."

NYSDA Receives TNYBF Grant for Family Court Training

NYSDA was awarded a grant in early 2021 from The New York Bar Foundation (TNYBF) to assist in providing no-cost trainings to family court public defense practitioners. This is the final year of a three-year grant intended to help defenders improve the quality of family court mandated representation. In keeping with the commitment NYSDA made in its Black Lives Matter to the New York State Defenders Association [statement](#), "to expose and end the overt racism and implicit biases that traumatize and re-traumatize entire communities," the third year of the grant will be used to help defenders address the pervasive problem of systemic racism and social injustice embedded within the family court and family regulatory systems.



ILS Caseload and Eligibility Standards for Family Court Released

The New York State Indigent Legal Services (ILS) Office released its [Criteria and Procedures for Determining Assigned Counsel Eligibility](#) on February 16th. These

standards combine the standards issued in [2016](#) and new standards applicable in Family Court.

Some months later, ILS also released its long-anticipated [Caseload Standards for Parents' Attorneys in New York State Family Court Mandated Representation Cases](#). As noted in the [announcement](#) of the standards, which were approved by the ILS Board on June 11, 2021, they "were developed in accordance with the recommendation of *The Commission on Parental Legal Representation – Interim Report to Chief Judge DiFiore* (February 2019)" Also noted was that approval of the standards "is contingent upon the availability of the State funding needed to implement the standards" and that "[t]he Family Court caseload standards build upon the criminal caseload standards ILS developed in 2016 pursuant to the *Hurrell-Harring v New York State* settlement. State funding is available to effectuate the criminal caseload standards, but not the parental representation standards."

More Family Resources on NYSDA's Website

Visit [NYSDA's Family Defense Resources Articles and News of Interest page](#) for additional resources.

Due Process Requires an Evidentiary Hearing When Issuing a TOP

[Matter of Crawford v Ally](#) (2021 NY Slip Op 04082 [1st Dept 6/24/2021]) is a case that should interest criminal and family court attorneys alike in this era of COVID-19 that has seen unprecedented delays in court cases being resolved, causing temporary orders of protection (TOP) to be extended far past their intended use. The petitioner in *Crawford* successfully appealed the denial of a writ of mandamus based on mootness; she sought to compel a Bronx County Criminal Court Judge to hold an evidentiary hearing concerning the appropriateness and scope of a TOP that had been issued against her. As reported in News Picks, "[t]he First Department determined 'that the Criminal Court's initial failure to hold an evidentiary hearing in accordance with petitioner's due process rights after being informed that petitioner might suffer the deprivation of a significant liberty or property interest upon issuance of the TOP falls within the exception to the mootness doctrine'" and said that "to issue a TOP, and thereby deprive a defendant of significant liberty and property interests, there must be an articulated reasonable basis for its issuance."

But as noted in the August 10th edition of News Picks, "a very disturbing and troubling [internal memo](#) was circulated within the court system soon after the *Crawford* decision that seems to violate the intent and purpose of the Court's ruling." The memo was discussed in a *New York Focus* article entitled "[New York Judges Lock the Accused Out of Their Homes, Skirting Review Required by Landmark Ruling, Critics Charge](#)." The article says,

“[a]ddressed to court administrators by a counsel for the court system, the memo emphasizes—using bold type—that the decision ‘**should not be read** as to require live witnesses and/or non-hearsay testimony.’ That gives judges the option of holding a hearing that simply uses the evidence prosecutors already presented in their case.”

Attorneys who encounter problems obtaining a proper *Crawford* hearing are encouraged to contact the Backup Center.

Court Decisions of Interest

Among decisions of interest to criminal defense lawyers (and others) highlighted in News Picks so far this year were the following:

- [Matter of Kurtzrock](#) (192 AD3d 197 [2nd Dept 12/30/2020]). [Former prosecutor suspended from practice of law for two years based on violations of the prosecutorial obligations to produce *Brady* and *Rosario* materials in a murder and burglary case.]
- [Jewish Press, Inc. v New York City Police Dep’t](#) (190 AD3d 490 [1st Dept 1/12/2021]). [New York City Police Dept. failed to meet its burden of showing a particularized justification for not providing records related to a traffic accident that were requested under the Freedom of Information Law.]
- [People v Cordon](#) (191 AD3d 1376 [4th Dept 2/5/2021]). [Consecutive sentences imposed on Army veteran for convictions on multiple burglary counts and possession of stolen property were modified to run concurrently, citing mitigation relating to the defendant’s military service.]
- [Uniformed Fire Officers Association et al v de Blasio et al](#) (846 FedAppx 25 [2nd Cir 2/16/2021]). [Affirmed district court order that largely refused to enjoin publication of law enforcement disciplinary records following the repeal of Civil Rights Law 50-a.]
- [State v Pickett](#) (246 A3d 279 [NJ Super Ct App Div 2/3/2021] [Review denied 4/6/2021]). [State ordered to turn over TrueAllele source code. See editorial, *New Jersey Law Journal*, Apr. 11, 2021, “[Court Got It Right On DNA Evidence](#).”]
- [People v Franklin](#) (72 Misc 3d 210 [County Ct, Clinton Co 4/20/2021]). [Conviction overturned on 440.10 motion based on *Brady* violation where prosecutor did not disclose that the co-defendant made inconsistent statements, including a recantation of a statement that inculpated the accused.]
- [People ex rel Molinaro v Warden](#) (195 AD3d 885 [2nd Dept 6/16/2021]). [Criminal court lacked authority under CPL 730.20 to remand accused person, otherwise entitled to release, pending a CPL article 730 examination.]

Many Decisions Added to Discovery Implementation Webpage

Information on cases concerning challenges to prosecutors’ certificates of compliance (COCs) under the discovery law (CPL article 245) was provided in News Picks, including the [June 21, 2021, edition](#). Nearly 20 decisions regarding COC’s were added to the [Discovery Reform Implementation](#) page in the first eight months of 2021. The most recent cases there include [People v Knorr](#) (2021 NY Slip Op 21218 [Henrietta Town Ct, Monroe Co 8/16/2021]) [Discovery not complete where complete Drug Recognition Expert Log (Log), statutorily deemed to be in the prosecution’s possession, was not produced and the defense, while belatedly, did request that the Log be produced before obtaining it independently] and [People v Figueras](#) (2021 NY Slip Op 50703[U] [Poughkeepsie City Ct, Dutchess Co 7/26/2021]) [prosecution failed to show delay in filing any COC or statement of readiness was excludable or not chargeable to them, making only conclusory claims that adjournments were on consent].

News Picks and Resource Webpages: Complementary Sources

While News Picks provides timely information on a variety of topics, various Resources webpages under a dropdown menu on the NYSDA website provide specific topical information of continuing interest to defenders. One example is the page on discovery reform noted above. These information sources complement one another. For instance, News Picks readers encountering an item about a court decision on the repeal of Civil Rights Law 50-a may want to turn to the [Law Enforcement Disciplinary Records](#) page for more comprehensive news. And while the resource pages cover specific topics, some of the information has more general application. The [Law Enforcement FOIL](#) page, for instance, includes basic Freedom of Information Law material that would be of interest to those seeking data or other information from many government agencies.

Both in News Picks and on the [Racial Justice and Equity](#) webpage, NYSDA provides facts, analyses, and resources relevant to ongoing efforts to identify and end systemic racism in the criminal and family legal systems. Recent developments noted in one or both resources include:

- A ten-minute [video](#) regarding implicit bias is now to be shown to all prospective jurors, effective immediately. It can be accessed via a Jury Service and Fairness link on the Unified Court System [website](#); there is also a link to a written [transcript](#).
- During July, “Black, Indigenous, and People of Color (BIPOC) Mental Health Month,” the Mental Health

(continued on p. 47)

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.

[Shinn v Kayer](#), __ US __, 141 S Ct 517 (12/14/2020)

RIGHT TO COUNSEL - EFFECTIVE ASSISTANCE
SENTENCE - DEATH PENALTY

LASJRP¹: In this death penalty case, the district court denied habeas relief, rejecting petitioner's ineffective assistance claim. The court noted that petitioner's mitigation evidence fell short of the type of information that would have influenced the sentencing decision. A divided Ninth Circuit panel reversed, concluding that petitioner's attorneys should have begun to pursue mitigation evidence promptly after their appointment, and that trial counsel's alleged failings likely affected the sentence.

In a 6-3 decision, the Supreme Court reverses. When a state court has applied clearly established federal law to reasonably determined facts in the process of adjudicating a claim on the merits, a federal habeas court may not disturb the state court's decision unless its error lies beyond any possibility for fair-minded disagreement.

Here, there was ample room for reasonable disagreement. Perhaps the most probable reason for the state judge's no prejudice determination is that the new mitigation evidence offered in the post-conviction proceeding

did not create a substantial likelihood of a different sentencing outcome. The Ninth Circuit generally considered that possibility, but in so doing impermissibly substituted its own judgment for that of the state court instead of applying deferential review.

The record reveals that petitioner had extensive opportunities to consider his actions—planning the murder in advance, driving his victim to a remote area, and subsequently returning to the murder scene and shooting the victim in the head a second time. He made efforts to hide the body, and attempted to profit from his crimes using an alias. A fair-minded jurist reasonably could conclude that the evidence of mental impairment was hardly overwhelming.

[Facebook v Duguid](#), __ US __, 141 S Ct 1163 (4/1/2021)

CANON / CONTEXT

ILSAPP²: In a U.S. Supreme Court appeal involving the meaning of "automatic telephone dialing system" as used in the Telephone Consumer Protection Act, Justice Alito's concurrence discussed reliance on the "series-qualifier" canon of statutory interpretation—when there is a parallel construction involving all nouns or verbs in a series, a modifier at the end generally applies to the entire series. Canons may be useful but can lead courts astray when applied rigidly, without considering caveats. Context reveals meaning in most cases, Alito said, citing examples that go against the above canon. "He went forth and wept bitterly." "At the Super Bowl party, she ate, drank, and cheered raucously." "On Saturday, he relaxes and exercises vigorously."

[Brown v Polk County](#), __ US __, 141 S Ct 1304 (4/19/2021)

CAVITY / CERT. DENIED / STATEMENT

ILSAPP: Justice Sotomayor issued a statement regarding the denial of certiorari in this case. The petitioner asked the Court to decide what degree of suspicion was required to justify the physically invasive cavity search of a pretrial detainee. This was an important question, but further consideration by other courts of the ramifications of the issue would enable the Supreme Court to deal with the matter more wisely later. The degree of suspicion required should be substantially informed by the availability of less intrusive alternatives.

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

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

US Supreme Court *continued*

[Whatley v Warden](#), __ US __, 141 SCt 1299 (4/19/2021)

ILSAPP: Justice Sotomayor dissented from the denial of cert. in this case, in which a jury sentenced the petitioner to death. When the Government called the petitioner to the stand during sentencing, defense counsel waved away the prosecutor's concerns about the visible shackles, and sat silently when the prosecutor handed the petitioner a fake gun and asked him to reenact the crime for which he had just been convicted. Counsel was ineffective in ignoring the ways in which visible shackling was likely to distort to outcome. Reasonable jurors would assume that the chains meant that the petitioner posed an immediate threat, so restraints were needed to prevent him from escaping or attacking people in the courtroom. There should have been a grant of certiorari, summary reversal, and remand for a new sentencing proceeding.

[Jones v Mississippi](#), 593 US __, 141 SCt 1307 (4/22/2021)

The defendant, at age 15, killed his grandfather and ultimately received a mandatory LWOP sentence that was affirmed by the state's Court of Appeals in 2006. *Miller v Alabama* was decided while this case was awaiting consideration of review by the state's Supreme Court, and a new sentencing hearing was held. The judge acknowledged that he could impose a sentence less than LWOP and found LWOP to be the appropriate sentence. Certiorari was granted to resolve conflicts about how to interpret *Miller* and its progeny. Any requirement that there be "a separate factual finding of permanent incorrigibility before sentencing" a defendant under 18 to LWOP for murder was rejected in *Miller* and the case following: "Because *Montgomery* directs us to 'avoid intruding more than necessary' upon the States," and also "because a discretionary sentencing procedure suffices to ensure individualized consideration of a defendant's youth, we should not now add still more procedural requirements." "This case does not properly present—and thus we do not consider—any as-applied Eighth Amendment claim of disproportionality regarding Jones's sentence." He may present to "state officials authorized to act on them" his moral and policy arguments against his spending his entire life in prison.

[Alaska v Wright](#), __ US __, 141 SCt 1467 (4/26/2021)

The federal statute that "permits a federal court to entertain an application for a writ of habeas corpus on behalf of a person 'in custody pursuant to the judgment of a State court,'" does not apply to a case such as this, in

which a state conviction serves as a predicate for a federal conviction.

[Caniglia v Strom](#), __ US __, 141 SCt 1596 (5/17/2021)

CARETAKING / HOME SEARCH

ILSAPP: In holding that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment, *Cady v Dombrowski* addressed police officers' roles in patrolling highways and performing noncriminal "community caretaking" functions. The instant case asked whether a standalone doctrine on such caretaking functions justified warrantless searches and seizures in the home. The answer was no, as set forth in an opinion by Justice Thomas. When the petitioner's wife could not reach her possibly suicidal husband, she asked police to do a welfare check, and they found weapons in the home. The core of the Fourth Amendment was the right of a person to retreat into his/her own home and be free from unreasonable governmental intrusion. The challenged First Circuit decision exceeded the scope of *Cady*.

[Edwards v Vannoy](#), __ US __, 141 SCt 1547 (5/17/2021)

RAMOS / RETROACTIVITY

ILSAPP: *Ramos v Louisiana*, 590 US __ (state jury verdict must be unanimous to convict criminal defendant of serious offense) does not apply retroactively to overturn final convictions on federal collateral review, because the rule announced there did not fit the "watershed" exception. Indeed, that exception retained no vitality. Justice Kavanaugh wrote for the majority. Justices Kagan, Breyer, and Sotomayor dissented, opining that *Ramos* declared a watershed rule regarding issues of jury unanimity and racial justice. The majority gave sketchy reasons for departing from precedent and curtailing *Ramos*'s impact by preventing retroactivity for habeas corpus proceedings. For the first time in decades, those convicted under rules that did not yield fair, reliable verdicts would have no recourse in federal courts.

[United States v Palomar-Santiago](#), __ US __, 141 SCt 1615 (5/24/2021)

IMMIGRATION CONSEQUENCES

LASJRP: In 1998, respondent was removed from the United States based on a conviction for felony driving under the influence. He later returned to the United States and was indicted on one count of unlawful reentry. Between respondent's removal and indictment, the Supreme Court held that offenses like his DUI conviction do not in fact render noncitizens removable. Respondent now seeks to defend against his unlawful-reentry charge by challenging the validity of his 1998 removal order. By

US Supreme Court *continued*

statute, defendants “may not” bring such collateral attacks “unless” they “demonstrat[e]” that they “exhausted any administrative remedies that may have been available to seek relief against the [removal] order,” that the removal proceedings “improperly deprived [them] of the opportunity for judicial review,” and that “entry of the order was fundamentally unfair.”

The Ninth Circuit held that respondent is excused from making the first two of these showings, because his prior removal order was premised on a conviction that was later found not to be a removable offense.

The Supreme Court reverses, holding that the statute does not permit such an exception. The Court notes, *inter alia*, that an immigration judge’s error on the merits does not excuse a noncitizen’s failure to comply with a mandatory exhaustion requirement if further administrative review, and then judicial review if necessary, could fix that very error.

United States v Cooley, __ US __, 141 SCt 1638 (6/1/2021)

An Indian tribe’s police officer has the “authority to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation, based on a potential violation of state or federal law, prior to transport of that person “to the proper nontribal authorities for prosecution.” Precedent holding that tribes may not exercise criminal jurisdiction over individuals who are not Indian did not create an absolute rule; exceptions exist, such as for exercising civil authority over conduct of such individuals when the conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” That encompasses authority to search and detain for a reasonable time someone an officer “believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats.” The standards set out by the Ninth Circuit are of doubtful workability, and other contentions by the defendant are not convincing.

Garland v Dai, __ US __, 141 SCt 1669 (6/1/2021)

IMMIGRATION / CREDIBILITY

ILSAPP: SCOTUS found erroneous a Ninth Circuit special rule as to immigration disputes, providing that a reviewing court had to treat a petitioning alien’s testimony as credible and true in the absence of an explicit adverse credibility determination by an immigration judge or the Board of Immigration Appeals. That outlier appellate view could not be squared with the Immigration

and Nationality Act and had no proper place in a reviewing court’s analysis. Justice Gorsuch wrote for a unanimous Court.

Van Buren v United States, __ US __, 141 SCt 1648 (6/3/2021)

LICENSE-PLATE SEARCH / FOR PROFIT

ILSAPP: A Georgia police officer did not breach a federal computer fraud law by taking a bribe to run a license-plate check. In an opinion authored by Judge Barrett, the court rejected the DOJ’s broad reading of the Consumer Fraud and Abuse Act. Justice Thomas, joined by Chief Justice and Justice Alito, dissented. The defendant had permission to retrieve license-plate information from a government database—only for law enforcement purposes, not personal gain. Without a valid purpose, the defendant was forbidden to use the computer to obtain the information. The majority’s interpretation was at odds with the plain text, property law, and statutory history.

Sanchez v Mayorkas, No. 20-315 (6/7/2021)

The conferral of Temporary Protected Status (TPS) on the petitioner years after he entered the United States illegally does not enable him to become a lawful permanent resident (LPR) despite his unlawful entry. While TPS may be obtained despite unlawful entry, it does not provide a way around the bar to LPR status that illegal entry creates. “The TPS program gives foreign nationals nonimmigrant status, but it does not admit them.”

[Ed Note: This brief summary is provided to illustrate the complexities of immigration law. Public defense attorneys representing clients who were born outside the U.S. are encouraged to contact their [Regional Immigration Assistance Center](#) to confer as to possible immigration consequences of the criminal or family case.]

Borden v United States, No. 19-5410 (6/10/2021)

RECKLESS / NOT ACCA VIOLENT FELONY

ILSAPP: The U.S. Supreme Court, [bold omitted] Justice Kagan writing for the majority, held that violent felonies involving a mens rea of recklessness did not count in deciding whether 15-year terms were required under the Armed Career Criminal Act (which applied to firearm possession crimes where the offender committed three prior violent felonies). In footnotes, Kagan pointedly dismissed the three-justice dissent, authored by Kavanaugh. The dissenters would upend the Court’s consistent views by treating as ACCA predicates not just knowing and purposeful acts of violence, but also disregard-of-risk offenses, and would blur salient distinctions on the ground that reckless criminal acts can cause great

US Supreme Court *continued*

harm. Yet ACCA—as many states’ sentencing schemes—recognized that an act done recklessly often should not receive as harsh a punishment as one done purposefully. In the majority opinion, Justice Gorsuch joined the three-member liberal wing. Justice Thomas voted with that plurality on different grounds.

[Terry v United States](#), No. 20–5904 (6/14/2021)

CRACK OFFENSES / NO RESENTENCING

ILSAPP: People convicted of certain low-level crack-cocaine offenses are not eligible for sentencing reductions. The Fair Sentencing Act reduced the sentencing disparity between crack and powder cocaine, and certain provisions of that law were made retroactive under the First Step Act, which allowed some people to seek reduced sentences. But low-level offenses were not covered. Justice Sotomayor’s concurrence urged Congress to pass a law providing a chance for reduced terms for such offenses.

[Greer v United States](#), No. 19–8709 (6/14/2021)

POSSESSION OF A WEAPON - KNOWLEDGE

LASJRP: In *Rehaif v. United States* (139 S.Ct. 2191), the Supreme Court clarified the mens rea requirement for firearms-possession offenses, including the felon-in-possession offense. In felon-in possession cases after *Rehaif*, the Government must prove not only that the defendant knew he possessed a firearm, but also that he knew he was a felon when he possessed the firearm.

The Court now holds that unpreserved *Rehaif* error is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon. When a defendant advances such an argument or representation on appeal, the court must determine whether the defendant has carried the burden of showing a reasonable probability that the outcome of the district court proceeding would have been different.

[Fulton v Philadelphia](#), No. 20–5904 (6/17/2021)

FOSTER CARE - FIRST AMENDMENT/SAME-SEX COUPLES

LASJRP: Catholic Social Services (CSS) is a foster care agency in Philadelphia. The City stopped referring children to CSS upon discovering that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage. The City will renew its foster care contract with CSS only if the agency agrees to certify same-sex couples.

The Supreme Court, applying strict scrutiny, holds that the City’s actions violate the First Amendment’s Free Exercise Clause. The practice is not generally applicable as required by *Employment Division, Department of Human Resources of Oregon v. Smith* (494 U. S. 872). The inclusion of a formal system of entirely discretionary exceptions renders the contractual nondiscrimination requirement not generally applicable. The City may not refuse to extend that exemption system to cases of religious hardship without compelling reason.

[Lange v California](#), No. 20-18 (6/23/2021)

HOT PURSUIT / MISDEMEANOR

ILSAPP: The pursuit of a fleeing misdemeanor suspect does not categorically qualify as an exigent circumstance, the U.S. Supreme Court [bold omitted] held. When a minor offense is involved, police officers do not usually face an emergency justifying a warrantless home entry. Adding flight is not enough to supply exigency. When the nature of the crime and the flight and surrounding facts do not present an emergency, officers must respect the sanctity of the home by obtaining a warrant. In this case, the petitioner drove past a highway patrol officer while listening to loud music with his windows down and honking his horn. The officer tailed the petitioner and turned on his overhead lights, but the petitioner continued home and entered his attached garage. He was thereafter charged with driving under the influence of alcohol. The denial of suppression was affirmed on appeal. Because the California Court of Appeal erred in applying the categorical rule, the challenged judgment was vacated and the case remanded. Justice Kagan wrote for a seven-justice majority.

New York State Court of Appeals

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

[People v Allen](#), 36 NY3d 1033 (2/11/2021)

Legal sufficiency review requires viewing “the evidence ‘in the light most favorable to the prosecution’” and assuming that the jury credited the prosecution’s witnesses and gave its “evidence ‘the full weight it might reasonably be accorded’” Viewing the evidence—including the testimony of a forensic consultant who was qualified, without objection, by the trial court as an expert in crime scene reconstruction and bloodstain pattern analysis—in that light, we conclude that there is a valid line of reasoning and permissible inferences from which a rational jury

NY Court of Appeals *continued*

could have found that the People disproved the defense of justification beyond a reasonable doubt.”

People v Badji, 36 NY3d 393 (2/11/2021)**GRAND LARCENY - CREDIT CARDS**

LASJRP¹: A Court of Appeals majority holds that the definition of credit card for purposes of Penal Law § 155.00(7) includes the credit card account number, and thus the People need not prove that a defendant physically possessed the tangible credit card in order to support a conviction of grand larceny based upon credit card theft. Under § 155.00(7), the definition of credit card in General Business Law § 511(1), as supplemented by General Business Law § 511-a, is the controlling definition.

Although ambiguity in a criminal statute should be construed in the defendant’s favor, underpinning this rule of lenity is the concern that an individual should have “fair warning” of conduct that is deemed criminal and that activity that will result in criminal punishment be clearly defined by the legislature, rather than the courts. Lenity is warranted where the courts have the task of discerning the undeclared will of the legislature in an ambiguous statute. There is no such ambiguity here. Defendant offers no reasonable argument why the theft of a credit card bearing the account number to enable a purchase would constitute larceny, while theft of the credit card account number itself used to enable the purchase would not.

People v Duval, 36 NY3d 384 (2/11/2021)**SEARCH AND SEIZURE - MOTION PAPERS
- SEARCH WARRANTS**

LASJRP: The Court of Appeals upholds the summary denial of defendant’s suppression motion where the warrant’s description of the target premises—“a private residence,” located at a unique, specified street address - clearly commanded a search of “a” single residence, not a multi-unit building, and thus satisfied the constitutional requirement that the warrant particularly describe the place to be searched.

The motion court did not rely on unincorporated warrant application materials to cure a facial deficiency in the warrant. When defendant challenged the warrant on the ground that the building identified actually comprised multiple residences, the court properly reviewed the supporting documents to determine whether they established

that the building was a single residence, as described in the warrant. Defendant failed to proffer evidence suggesting that the building’s outward appearance indicated that it was not a single-family residence. It had one street address, one front door, and one side door.

Although defendant lacked access to the materials that were before the warrant court, he had ready access to information about the actual conditions of the premises. Defendant tendered city records that purport to show that it would have been lawful to use the house as a three-family residence, and an affidavit from his mother, the owner of the house, saying that on the date of the search, “[defendant] was living at” the specified address, “Third Floor, Bronx NY.” But none of the proffered materials show that the house was, in fact, divided into three separate residential units or that defendant did not reside in, or lacked access to, other portions of the house.

People v Gordon, 36 NY3d 420 (2/18/2021)**SEARCH WARRANT / NOT VEHICLES**

ILSAPP²: In this People’s appeal, the issue was whether a search warrant regarding a particular house at a certain address covered two vehicles not described, but located on the property. The Court of Appeals answered “no” and affirmed a Second Department order upholding suppression. The warrant authorized a search of the defendant’s “person” and the “entire premises.” The factual materials did not allege that vehicles associated with the defendant or the premises were involved in criminal activity. But police searched a vehicle in the driveway and another in the backyard and found drugs and a weapon. The People relied on federal precedent. But the COA had independent authority to follow existing State constitutional jurisprudence—even if federal constitutional doctrine had changed—in order to properly safeguard fundamental rights. The mere presence of vehicles on the subject premises did not provide probable cause to search them. CPL 690.15 (1) and case law differentiated between searches of premises, vehicles, and persons. Specific descriptions, backed by particularized probable cause, were required for a search in each category. Judge Wilson wrote the majority opinion. Judge Feinman dissented in an opinion in which the Chief Judge and Judge Garcia concurred. Jonathan Manley represented the respondent.

People v McGhee, 36 NY3d 1063 (3/25/2021)**PEOPLE’S APPEAL / BRADY**

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

² 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*

ILSAPP: In a People's appeal, the Court of Appeals held that the First Department erred in finding that a witness statement, disclosed by the People after the defendant's trial, was material for purposes of his *Brady* claim. Since the defendant made a specific request for the evidence, the "reasonable possibility" standard applied. Such standard was not met, where the undisclosed witness's description of the shooter and his flight path did not differ in any material respect from that of the eyewitness who identified the defendant in court as the perpetrator. Considerable other evidence supported the verdict, and the undisclosed statement lacked sufficient impeachment value to cast doubt on the fairness of the trial.

[People v Vasquez](#), 36 NY3d 1066 (3/25/2021)

730 EXAM / DENIED

ILSAPP: The COA upheld the lower courts' determination that the defendant was not entitled to a third CPL Article 730 examination to determine his competency to proceed. The First Department correctly held that the prosecutor's questioning of a defense witness and summation remarks improperly associated the defendant with uncharged crimes, but were harmless; and correctly denied a request for an adjournment to interview a defense witness before the witness testified.

[Matter of State of New York v Donald G.](#), 36 NY3d 1090 (3/30/2021)

"On review of submissions pursuant to section 500.11 of the Rules of the Court of Appeals (22 NYCRR 500.11), order reversed, without costs, and order of Supreme Court, Cayuga County, reinstated. Under these circumstances, Supreme Court did not abuse its discretion as a matter of law in ordering a new trial in the interest of justice on the ground of juror misconduct. Respondent's remaining contentions have been considered and are without merit."

[People v Viviani](#), 36 NY3d 564 (3/30/2021)

EXEC LAW § 552 / UNCONSTITUTIONAL

ILSAPP: The Court of Appeals found unconstitutional Executive Law § 552 provisions creating a special prosecutor, possessing authority concurrent with that of District Attorneys, to prosecute individuals accused of crimes against certain vulnerable adults. The law was enacted to protect against abuse or neglect of persons with special needs in residential facilities operated under the State aegis. In each of the three subject cases, the special prosecutor obtained an indictment against a defendant

accused of sexually abusing a person in his/her care. The discretionary power to determine whom, whether, and how to prosecute was the essence of a DA's authority. The law under review impermissibly gave an essential function of a constitutional officer to a different officer chosen in a different manner. The COA left in force statutory provisions empowering the special prosecutor to perform non-prosecutorial functions and cooperate with DAs to combat mistreatment of vulnerable persons in residential care. Judge Garcia wrote for the Court, which affirmed the challenged orders. Judge Stein wrote a concurrence; Judge Rivera concurred in the result; Chief Judge DiFiore took no part.

[People v Perez](#), 36 NY3d 1093 (3/30/2021)

"The order of the Appellate Division should be affirmed. Any error was harmless because, in the circumstances presented, the proof of defendant's guilt was overwhelming, even after excising the disputed evidence. Further, no reasonable possibility exists that admission of that evidence contributed to defendant's conviction (*see People v Mairena*, 34 NY3d 473, 484-485 [2019]; *People v Crimmins*, 36 NY2d 230, 237, 241-242 [1975]). Defendant's arguments concerning the weight of the evidence and the harshness of his sentence are not reviewable, and his other assertions are unavailing."

[People v Epakchi](#), 2021 NY Slip Op 02018 (4/1/2021)

DISSENT / BROADEN COA POWER

ILSAPP: The Appellate Term for the 9th and 10th Judicial Districts adopted a rule under which, absent special circumstances, re-prosecution of traffic tickets was not permitted when the original prosecution was dismissed due to lack of a supporting deposition requested by the defendant. In this People's appeal, the Court of Appeals found no basis in the CPL for such rule and reversed. Judge Wilson dissented. The Appellate Term had not created a rule of law reviewable by the COA, but instead had adopted a presumption to guide the exercise of discretion in the interest of justice. The broader issue was that the COA was not empowered to make decisions in the interest of justice, as intermediate appellate courts were under CPL 470.15 (3) (c) and case law. This restriction interfered with the COA's ability to further the development of the law, ensure statewide legal standards, do substantial justice in each case, and foster public confidence in the system.

[People v Olds](#), 36 NY3d 1091 (4/1/2021)

VINDICTIVE SENTENCE / UNPRESERVED

ILSAPP: After a trial, the defendant received a sentence of three years' probation. Upon reversal of the judgment of conviction, he entered a plea of guilty to a differ-

NY Court of Appeals *continued*

ent offense before a different judge and was sentenced to the maximum term of one year in jail. The defendant did not preserve his argument that the sentence was presumptively vindictive and imposed without State due process protections. Further, the record did not support a claim that the sentence—which was within the range for a class a misdemeanor—was illegal in any discernable respect.

People v Anderson, 36 NY3d 1109 (5/4/2021)**TEEN PSYCHE / NO EXPERT**

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder and attempted 2nd degree murder. At age 14, he shot at members of a rival gang and killed a bystander. Without holding a *Frye* hearing, the trial court precluded expert testimony regarding adolescent brain development. The Second Department affirmed the conviction, finding that the expert proof was not necessary to aid the jury in deciding whether the People disproved justification, because adolescent impulsiveness was not an issue beyond the ken of the typical juror. The Court of Appeals affirmed. Deciding whether an expert would aid a jury in reaching a verdict was within the sound discretion of the trial court. Here the judge properly exercised that discretion.

People v Brown, 2021 NY Slip Op 02867 (5/6/2021)**SENTENCING / DEFENDANT'S STATEMENT**

ILSAPP: The defendant's contention, that there was a violation of his CPL 380.50 (1) right to an opportunity to make a personal statement at sentencing, did not survive the valid appeal waiver. An enforceable unrestricted waiver could preclude appellate review of claims arising during sentencing. Judge Wilson dissented. The defendant had the right to speak his mind at sentencing and did not waive that right, which implicated the fundamental fairness of our criminal justice system. The sentencing allocution provided the one unfettered opportunity for a convicted defendant to address the court and make a public statement. Such statements had the potential to influence the length of sentence and the terms of reentry. The instant issue survived the waiver of appeal. The record unequivocally demonstrated that the defendant did not bargain away his right to allocute, and everyone understood that he had not done so. Judge Rivera joined the dissent.

People v Slade, 2021 NY Slip Op 02866 (5/6/2021)**ACCUSATORY INSTRUMENTS****- LANGUAGE/TRANSLATION ISSUES**

LASJRP: In these three appeals, defendants challenge the facial sufficiency of the accusatory instruments, arguing that participation of a translator in the process of documenting the information from first-party witnesses with limited-English proficiency created a hearsay defect requiring dismissal.

In *Slade and Brooks*, the Court holds that no facial defect was evident within the four corners of the accusatory instrument. And in *People v. Allen*, where the participation of a translator was documented within the witness's supporting affidavit, the Court also concludes that no additional layer of hearsay was created by the use of a translator, and therefore that accusatory instrument too was facially sufficient.

Defects that do not appear on the face of the accusatory instrument are latent deficiencies that do not require dismissal. In *Slade and Brooks*, certificates of translation were created, but were not incorporated into the accusatory instrument.

In *Allen*, the complainant stated in her supporting deposition that she had the one-page English-language statement read to her in Spanish by a police officer. However, no hearsay defect exists where the four corners of the instrument indicate only that an accurate, verbatim translation occurred, and the witness or complainant adopted the statement as their own by signing the instrument after the translation.

Nothing precludes a defendant who discovers a specific translation-related latent hearsay defect in the accusatory instrument before trial from using other options available under the Criminal Procedure Law to ensure that the supporting deposition meets statutory requirements.

Judge Rivera and Judge Wilson dissent. Judge Rivera asserts that "[t]he accusatory instrument is a legal nullity without proof that the deponent understood and adopted the allegations ascribed to them. This fundamental flaw is not subject to our prior 'latent defects' analysis because the instrument is void ab initio." "A defendant is unlikely to 'discover' the inadequacy of the translation or the translator's skills when, according to the majority, the prosecutor is under no obligation to provide a certificate of translation or any statement of accuracy."

Judge Wilson notes: "The witness's signature is sufficient to establish the truth, even if the witness has no idea what the document says, so long as a reader cannot tell that from the document itself. Even if other evidence available to the court or parties conclusively shows that the witness does not understand English, or that the translator was inept or unable, it is of no moment. Indeed, the prosecution is not required to show that the translator interpreted for the witness the affirmations regarding per-

NY Court of Appeals *continued*

jury and false statements that are critical to the sufficiency of an information or complaint....” “The majority deprives defendants of the CPL’s core procedural protections. It eviscerates the efforts of our trial courts to require some minimal assurance that statements verified in a language unintelligible to the affiant are true, knowing that those statements will, in almost every case, never be tested for veracity. And it does so based upon a skewed vision of victim’s rights in which inadequate or unknown translation is preferred to the truth.”

[People v Iverson](#), 2021 NY Slip Op 03347 (5/27/2021)

DEFAULT / NOT AUTHORIZED

ILSAPP: The two defendants were charged with traffic infractions. Each pleaded not guilty and demanded a trial but failed to timely appear for trial. A judicial hearing officer at the Traffic and Parking Violations Agency rendered default judgments against them. Appellate Term reversed. In *People’s* appeals, the Court of Appeals affirmed, finding that VTL § 1806-a did not authorize the judgments. The court may render a default judgment only when the defendant failed to enter a plea by the date specified in the ticket. If the defendant entered a plea of not guilty and demanded a hearing, a default judgment was prohibited.

[People v Mabry](#), 2021 NY Slip Op 03348 (5/27/2021)

SEARCH AND SEIZURE - INCIDENT TO ARREST

LASJRP: The Court of Appeals reverses the denial of suppression, concluding that the *People* failed to establish that the warrantless search of defendant’s backpack was a valid search incident to arrest. The record does not support a determination that the backpack was in defendant’s immediate control or grabbable area, or even indicate where the bag was in relation to defendant immediately prior to the search.

[People v Schneider](#), 2021 NY Slip Op 03486 (6/3/2021)

SEARCH AND SEIZURE - EAVESDROPPING WARRANTS

LASJRP: In a 4-2 decision, the Court of Appeals holds that eavesdropping warrants are executed in the geographical jurisdiction where the communications are intentionally intercepted by authorized law enforcement officers within the meaning of CPL Article 700.

Once the jurisdictional predicate for prosecution of a crime in a particular county is established, as it was here, “a justice may issue an eavesdropping warrant ... upon ex parte application of an applicant who is authorized by law to investigate, prosecute or participate in the prosecu-

tion of the particular designated offense which is the subject of the application” (CPL § 700.10[1]). Here, the authorized prosecutor - the Kings County District Attorney - was the proper warrant applicant (see CPL § 700.05[5]). Under CPL § 700.35(1), “[a]n eavesdropping ... warrant ... must be executed according to its terms by a law enforcement officer who is a member of the law enforcement agency authorized in the warrant to intercept the communications” The law enforcement officers here were competent to execute the warrants because they were authorized to investigate and arrest defendant in the jurisdiction where the interception occurred (see CPL 700.05[6]).

Defendant challenges the jurisdiction of a Supreme Court Justice presiding in Kings County to issue the eavesdropping warrants on the theory that the warrants were not “executed” in Kings County as required by CPL § 700.05(4) because his cell phones were not physically located in New York and his communications occurred outside of New York. However, the statutory scheme supports the Court’s holding that the Kings County Supreme Court Justice presiding in the jurisdiction where defendant’s communications were overheard and accessed, and therefore intercepted by authorized law enforcement agents, had the authority to issue the warrants. No language in the statutory scheme equates the place of interception with the variable points where cell phones or call participants are located.

The dissenting judges (Wilson and Rivera) assert that neither the text nor the legislative history of CPL Article 700 suggests that the legislature authorized our courts to issue warrants commanding the diversion of purely out-of-state telephone calls between nonresidents so that they could be listened to by New York law enforcement agents.

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.

NOTE: Due to pandemic-related delays, the *REPORT* has fallen behind in summaries of cases from the Appellate Divisions; what appear here are from a year ago. To provide timely information to our readers going forward, the next issue will contain summaries beginning in mid-2021. On-line sources of information about cases not summarized in the *REPORT* may be found at p. 47.

[People v Alston](#), 184 AD3d 415 (1st Dept 6/4/2020)

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

First Department *continued*

LASJRP¹: Noting that the People have consented to relief, the First Department vacates defendant's third-degree weapon possession conviction under the particular circumstances, and in light of recent legislation effectively decriminalizing simple possession of gravity knives, notwithstanding that this law does not apply retroactively. (Supreme Ct, New York Co)

People v Conner, 184 AD3d 431 (1st Dept 6/4/2020)**IMPEACHMENT - BAD ACTS/POLICE MISCONDUCT**

LASJRP: The First Department finds reversible error where the trial court denied defendant's request to cross-examine a police Sergeant regarding allegations of misconduct in a civil lawsuit in which it was claimed that the officer and a detective arrested the plaintiff without suspicion of criminality and lodged false charges against him, and the civil complaint contained allegations of falsification specific to this officer which bore on his credibility at the trial. (Supreme Ct, New York Co)

In re Lavdie H., 184 AD3d 409 (1st Dept 6/4/2020)**SPECIAL IMMIGRANT JUVENILE STATUS**

LASJRP: In this guardianship proceeding, the First Department grants the child's motion for an order of special immigrant juvenile findings, noting, inter alia, that the child had had no contact with his parents, and received no support from them, since at least September 2014, which established that reunification was not viable due to neglect or abandonment; that the parents' consent to the appointment of a guardian and waiver of service also demonstrate an intent to relinquish parental rights; that in determining whether reunification was viable, the family court should not have refused to consider evidence of events that occurred after the child's 18th, but before his 21st, birthday; and that the child suffered political persecution in Albania that his parents were unable to prevent, and had had no recent contact with his parents and was not sure if they would accept him if he returned. (Family Ct, Bronx Co)

In re Mateo M.S.J., 184 AD3d 415 (1st Dept 6/4/2020)**ABUSE/NEGLECT - DOMESTIC VIOLENCE**

LASJRP: The First Department upholds a finding of neglect where, during an altercation, the father struck the mother in her arm with her cell phone while he was hold-

ing the child. The mother testified that during the incident the child was paralyzed and appeared afraid, and that the child later refused to eat dinner.

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

People v Tavaréz, 184 AD3d 416 (1st Dept 6/4/2020)**CREATIVE PLEA ARGUMENT / UNPRESERVED**

ILSAPP²: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 1st degree attempted rape. The First Department affirmed. The defendant claimed that his guilty plea under a valid count of the indictment was impacted by a more serious, jurisdictionally defective charge. The plea court had advised the defendant that he was facing a life sentence, if convicted after trial. Such information was inaccurate, because the only class A felony count was defective. The appellate court held that a claim that a defective count impacted a decision to plead guilty was not exempt from the requirement for preservation, such as via a plea withdrawal motion. In any event, there was no basis to reverse here. The record did not show that the allegedly defective count influenced the defendant's choice to plead guilty under a valid count. At the time of his plea, he was aware that the People had recognized a problem with the language of the predatory sexual assault count and were taking steps to cure the defect. The defendant was correctly advised of his potential sentencing exposure. (Supreme Ct, New York Co)

People v Crum, 184 AD3d 454 (1st Dept 6/11/2020)**APPEAL - PRESERVATION**

LASJRP: Upon appeal from defendant's conviction and the denial of his CPL § 440.10 motion, the First Department concludes that defendant did not preserve any claim relating to cell site location information obtained without a warrant, and was properly barred from raising the issue by way of a post-conviction motion. (Supreme Ct, New York Co)

Although the Supreme Court had not yet decided *Carpenter v. United States* (138 S.Ct. 2206) until after defendant's direct appeal was pending, defendant had an opportunity to advocate for a change in the law at the trial level. The Court of Appeals has rejected the argument that an appellant should not be penalized for his failure to anticipate "the shape of things to come." (Supreme Ct, New York Co)

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

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

First Department *continued*

[People v Lesane](#), 184 AD3d 461 (1st Dept 6/11/2020)

SEARCH AND SEIZURE - "STRIP SEARCH"

LASJRP: The First Department upholds the denial of suppression, concluding that the officer did not conduct something "akin" to a strip search, or a highly invasive search, when the officer pulled defendant's waistband back, without pulling his pants down, and reached into defendant's underwear to retrieve a bag containing drugs. Defendant was not disrobed in any way, and his genitals were not exposed to the view of the officer or anyone else. (Supreme Ct, New York Co)

[People v Person](#), 184 AD3d 447 (1st Dept 6/11/2020)

PLEAS - WAIVER OF APPELLATE REVIEW SPEEDY TRIAL

LASJRP: The First Department holds that a recent amendment to Criminal Procedure Law § 30.30 which grants a defendant who has pleaded guilty the right to raise a statutory speedy trial claim on appeal does not also preclude a waiver of the right to appeal.

The phrase "shall be reviewable" in § 30.30(6) unequivocally directs that appellate review of a § 30.30 claim shall no longer be forfeited by a guilty plea, but neither that phrase, nor any other language in the statute, precludes a voluntary waiver. (Supreme Ct, Bronx Co)

[In re Donna F.T. v Renee G.-T.](#), 184 AD3d 496 (1st Dept 6/18/2020)

VISITATION - GRANDPARENTS - HEARING REQUIREMENT - RIGHT TO COUNSEL/CHILD

LASJRP: The First Department finds reversible error where the family court awarded the paternal grandparents visitation without conducting a full trial. The decision was based only on the grandmother's partial testimony. The mother was not present due to a medical procedure she was undergoing in North Carolina.

Even if the court was justified in drawing a negative inference from the mother's failure to give testimony, the court failed to afford the attorney for the child an opportunity to ascertain the seven-year-old child's position. "Although the Family Court appropriately appointed an AFC, he did not let her do her job. The child's position in this case was particularly important because of the mother's representations that the child did not want to see the grandparents so soon following her father's death and would be traumatized by such visitation."

If after a full hearing the family court determines awards visitation, it should clarify the award vis-a-vis

each grandparent, given that they filed separate petitions and were not jointly represented by counsel, and may be separated.

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

[People v Guillermo P.](#), 184 AD3d 481 (1st Dept 6/18/2020)

DISSENT / HARSH YO SENTENCE

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him upon his plea of guilty of 3rd degree robbery and sentencing him as a youthful offender to a term of 60 days' incarceration and five years' probation. The Second Department vacated the DNA databank fee, which was not authorized for a YO, and otherwise affirmed. One justice dissented, opining that the probation term should be reduced to a period of three years, based on several factors. The defendant's actions were minor—at a Dunkin Donuts, he took a sandwich without paying for it. The record did not indicate what his forcible actions were, and there were no allegations that anyone suffered harm. Three years was the maximum probation period for the original misdemeanor charges—which would have applied, had the People not elevated this minor incident to a felony. The defendant was only 18 at the time of his impulsive actions. Aside from a minor drug offense, he did not have any other contact with the criminal justice system; and he faithfully came to all court appearances, except one. His decision to plead guilty was likely influenced by 81 days served at Rikers Island, after the court set bail that his family struggled to pay. Under bail reform, the lower court would not have had the authority to set bail. (Supreme Ct, New York Co)

[In re Khan v Shahida Z.](#), 184 AD3d 506 (1st Dept 6/18/2020)

LASJRP: The First Department grants the motion by the guardian and the child for an order of special findings enabling the child to petition for Special Immigrant Juvenile Status, noting, inter alia, that, with no prior warning, the child's father left him in the United States with his uncle (petitioner), his parents later told him they could not support him and did not want him back, and the child had only occasional contact with his parents, and received no gifts or support from them, since coming here; that in determining whether reunification was viable, the family court should not have refused to consider events which occurred after the child's 18th, but before his 21st, birthday; and that the child presented evidence that his parents would not accept him if he returned to Thailand, that his Thai visa was on the verge of expiring and he had no way to renew it, and that he had no other place to live

First Department *continued*

or way to support himself in Thailand or Bangladesh. (Family Ct, Bronx Co)

**Michael R. v Pamela G., 184 AD3d 507
(1st Dept 6/18/2020)**

CUSTODY / INSUFFICIENT REASONING

ILSAPP: The mother appealed from an order of Bronx County Family Court, which awarded sole custody of the subject child to the father. The First Department reversed and remanded. In her decision, the referee failed to address alleged domestic violence by the father against the mother. The appellate court could not determine whether the referee found that the mother was not credible, or that DV did occur but custody to the father was nevertheless in the child's best interest. Further, there were no findings regarding allegations that the father interfered with the mother's parental access. Andrew Baer represented the appellant. (Family Ct, Bronx Co)

People v Arnold, 184 AD3d 524 (1st Dept 6/25/2020)

IDENTIFICATION - NOTICE OF INTENT TO OFFER

LASJRP: The First Department finds that, on the particular record, the detective's testimony identifying defendant in a surveillance video based on prior familiarity did not require CPL § 710.30 notice. (Supreme Ct, New York Co)

In re Ayanna P., 184 AD3d 542 (1st Dept 6/25/2020)

ABUSE/NEGLECT - DERIVATIVE ABUSE

LASJRP: The First Department upholds a determination that respondent sexually abused his 15-year-old granddaughter, but overturns a finding that he derivatively abused his son, who is situated so differently from the granddaughter that the sex abuse is insufficient to demonstrate that he is at risk of harm. There is no evidence that he was aware of the abuse.

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

People v Badillo, 184 AD3d 517 (1st Dept 6/25/2020)

**UNCHARGED CRIMES EVIDENCE - PROBATIVE OF
DEFENDANT'S INTENT**

SEARCH AND SEIZURE - PROBABLE CAUSE

LASJRP: The First Department finds no error where, in a case involving the alleged use of force to retain stolen merchandise, the court permitted the People's expert to testify that defendant told him he had previously shoplifted, and that he thought he could get away with it. This limited and non-prejudicial evidence of uncharged crimes

explained the expert's opinion that defendant, despite his schizophrenia, had the ability to form an intent to forcibly steal.

The police had probable cause to arrest defendant when a citizen informant (later identified as a store employee) pointed to defendant and yelled that he had a knife. The witness's excited demeanor suggested criminal activity involving the knife rather than innocuous possession of a possibly legal item. (Supreme Ct, New York Co)

People v Hasquins, 184 AD3d 529 (1st Dept 6/25/2020)

**RIGHT TO BE PRESENT - MATERIAL STAGES OF
PROCEEDING**

Defendant was not present when his attorney was relieved after stating to the court that he and defendant disagreed over defendant's desire to testify before the grand jury, that defendant wanted new counsel, and that the attorney joined the motion. However, defendant had been present at an earlier proceeding when this attorney first alerted the court to the disagreement, and did not dispute the attorney's statement that defendant "rejected" the idea that the attorney would ultimately decide whether defendant should testify before the grand jury. The day after the first attorney's motion to be relieved, defendant's newly appointed second attorney also moved to be relieved. Defendant confirmed that he had been dissatisfied with the first attorney's intention to withdraw grand jury notice, and insisted that he still wanted to testify. The second attorney confirmed that communication between defendant and the first attorney over the issue had broken down.

The First Department finds no reversible error, concluding that the violation of defendant's statutory right to be present was de minimis because defendant's statements at other proceedings corroborate the first attorney's claims when he made the motion, and the outcome of the motion to be relieved would not have been any different. (Supreme Ct, New York Co)

In re Jayden J., 184 AD3d 527 (1st Dept 6/25/2020)

TERMINATION OF PARENTAL RIGHTS - DEFAULTS

LASJRP: In this termination of parental rights proceeding, the First Department upholds the denial of respondent mother's motion to vacate an order of disposition terminating her parental rights and freeing the child for adoption where, on each of the two successive days of the fact-finding and dispositional hearings, the mother arrived at family court, checked in, but then left before her case was called; respondent argued that she was ill, but, on the first day, she left without telling her counsel she was leaving, her explanation for not appearing was unsupported by any evidence, and she did not seek medical treatment for any illness that day; and, on the second

First Department *continued*

day, she did not go to the hospital until approximately four hours after she was required to appear in court, and was diagnosed with only mild symptoms. (Family Ct, New York Co)

People v Johnson, 184 AD3d 545 (1st Dept 6/25/2020)

ASSAULT - DANGEROUS INSTRUMENT

LASJRP: The First Department upholds a second degree assault conviction, concluding that the evidence, including expert testimony, established that the taser defendant used constituted a dangerous instrument because it was readily capable of causing serious physical injury under the circumstances of its use. (Supreme Ct, New York Co)

People v Morales, 184 AD3d 532 (1st Dept 6/25/2020)

CONFESSIONS - FRUITS/SUBSEQUENT STATEMENTS

LASJRP: The First Department concludes that defendant's videotaped statement at the District Attorney's Office was attenuated from earlier statements the court had suppressed after finding a Miranda violation.

The taint was dissipated by the brevity of the statement made without Miranda warnings, the passage of at least 45 minutes, the change of location, the administration of a second set of Miranda warnings by a new interrogator, the minimal involvement in the interrogation by the detective who had questioned defendant at the precinct, and the general absence of coercive circumstances. (Supreme Ct, New York Co)

People v Qinghua Ni, 184 AD3d 541 (1st Dept 6/25/2020)

RIGHT TO COUNSEL - Effective Assistance

LASJRP: The First Department finds error in the summary denial of defendant's CPL § 440.10 motion, and orders a hearing, where defendant complains that his counsel overstated the immigration consequences of pleading guilty to petit larceny by advising him that it would "definitely" result in deportation, when in fact it would only have rendered him deportable with the possibility of discretionary relief. Defendant asserts that he rejected a favorable plea offer based on this erroneous advice. (Supreme Ct, New York Co)

Veronica C. v Ariann D., 184 AD3d 531 (1st Dept 6/25/2020)

FAMILY OFFENSE / NO INTIMATE RELATIONSHIP

ILSAPP: The respondent appealed from an order of NY County Family Court, which found that he committed certain family offenses and issued an order of protection. The First Department reversed. The proceeding was initiated by the foster mother of the respondent's biological children. The parties were not members of the same family or household, and the petitioner did not establish that they had an intimate relationship. Indeed, the petitioner's contact with the respondent was very limited. Thus, Family Court lacked subject matter jurisdiction over the proceeding. Thomas Villecco represented the appellant. (Family Ct, New York Co)

People v Hickman, 185 AD3d 407 (1st Dept 7/2/2020)

SEARCH AND SEIZURE - STOP AND FRISK/ REASONABLE SUSPICION

LASJRP: Officers received a radio run of shots fired, describing the suspects as two black males, one of whom was wearing a red t-shirt, on bicycles, going northbound on Lenox Avenue. Minutes later, approximately three blocks north of the location of the shooting, the officers observed defendant, a black male wearing a red t-shirt and riding a bicycle, who was the only individual in the immediate area who matched the description.

The First Department concludes that the police had reasonable suspicion justifying a stop and patdown. Any discrepancy as to defendant's attire was minor. (Supreme Ct, New York Co)

People v Laverpool, 185 AD3d 431 (1st Dept 7/2/2020)

PROSPECTIVE JUROR / FOR-CAUSE CHALLENGE

ILSAPP: The defendant appealed from a NY County Supreme Court judgment, convicting him of 4th degree larceny. The First Department reversed and ordered a new trial. The trial court should have granted a defense challenge for cause as to a panelist who stated that he could not be "fully fair" if the defendant did not testify and "defend himself," and that it might be difficult for him to acquit an accused person who did not testify, because then "we only get one side." Given the bias expressed, the panelist's subsequent statements to the court did not constitute the requisite unequivocal assurances. The prospective juror said that, if the defendant did not take the stand, he would "not hold it against him, but—I don't know." The panelist also stated, "I think I'll be able to give him a fair trial." The Center for Appellate Litigation (Molly Schindler and Hyun Bin Kang, of counsel) represented the appellant. (Supreme Ct, New York Co)

First Department *continued***People v Patillo, 185 AD3d 46 (1st Dept 7/2/2020)****PLEAS - VOLUNTARINESS**

LASJRP: The First Department vacates defendant's plea where the evidence showed defendant to be suffering from significant intellectual disability, and thus the court was under an obligation to engage in a more probing colloquy to ensure that defendant understood the ramifications of entering a guilty plea and waiving his right to appeal.

The Court describes the traits of individuals suffering from an intellectual disability, and notes that these traits render them uniquely vulnerable to injustice within criminal proceedings. They are more likely to give false confessions and less able to meaningfully assist their counsel.

Here, Department of Education records showed that defendant had been diagnosed as mentally retarded and suffered from "severe academic delays," and, with an IQ of only 56, had "extremely low" "general cognitive ability," with "overall thinking and reasoning abilities" in the bottom 0.2%. His verbal comprehension, perceptual reasoning, working memory, and processing speed were "extremely low," in the bottom 0.2 to 2%. Doctors at Bellevue observed that defendant suffered from an intellectual disability with "extremely low" intellectual functioning, that his IQ placed him in the bottom one percentile as compared to his peers, and that his limited cognitive abilities placed him at increased risk of impulsive behavior without regard to the consequences of his actions.

The court below commented on defendant's refusals to appear in court and "difficult" behavior, and believed this to be indicative of defendant's sociopathy. But defendant's refusal to participate was likely reflective of his diminished mental capacity. The court should have known that the standard plea allocution would be near incomprehensible to defendant, but made no effort to translate the standard litany into simple language. The allocution was not salvaged by defendant's mechanistic recitation of "yes" in response to the court's questions. People with intellectual disabilities are, by virtue of their disability, easily confused, suggestible, and susceptible to manipulation. (Supreme Ct, Bronx Co)

In re Yumara I., 185 AD3d 429 (1st Dept 7/2/2020)**ABUSE/NEGLECT - PRESUMPTION OF ABUSE
- EVIDENCE/POST-PETITION EVENTS**

LASJRP: The First Department upholds findings that respondent abused and neglected the child Y.S.T. and derivatively abused and neglected the other children.

The findings were based on medical records from June through August 2017, which, although they post-date the petition, document the wrongdoing alleged in the petition, i.e., sexual abuse of Y.S.T. Respondent was aware of these records when petitioner moved them into evidence, and was aware of the court's theory of the case when his motion to dismiss was denied. Fact-finding was then adjourned for more than six months before respondent presented his case.

A presumption of abuse was supported by proof that Y.S.T. had chlamydia, and the testimony of the child's mother that respondent lived in their home for twelve years. Respondent's contention that since Y.S.T. reached the age of puberty, and attended an inner city public school, she must have engaged in sexual activity with peers is rank speculation.

The JRP appeals attorney was Susan Clement, and the trial attorney was Judy Ocasio. (Family Ct, Bronx Co)

Matter of Avrie P., 185 AD3d 444, (1st Dept 7/9/2020)**NEGLECT / REVERSED**

ILSAPP: The mother appealed from a Bronx County Family Court order, which found that she neglected the subject children. The First Department reversed and dismissed the petitions. The 10-year-old daughter fled the apartment because she was bored and wanted to play in the park. The mother chased her and caught up, but the child refused to go home. As a last resort, the mother pulled her by the arms and grabbed her hair. Under the circumstances presented, such force did not constitute excessive corporal punishment, nor did the mother neglect her son by leaving him unsupervised when she ran after her daughter. Bryan Greenberg represented the appellant. (Family Ct, Bronx Co)

**Claudia B. v Darrin N., 185 AD3d 453
(1st Dept 7/9/2020)****PATERNITY - EQUITABLE ESTOPPEL**

LASJRP: The First Department affirms an order that denied respondent's motion to dismiss the paternity petition on equitable estoppel grounds and ordered him to submit to DNA testing.

There was no binding and enforceable oral or written agreement between the parties, either before or after respondent donated his sperm. An unsigned, non-final preconception agreement cannot be used to equitably estop a mother from asserting paternity as to a known sperm donor. (Family Ct, New York Co)

People v Collins, 185 AD3d 447 (1st Dept 7/9/2020)**SUPPRESSION / GRANTED**

First Department *continued*

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him upon his guilty plea of 3rd degree CPW and criminal possession of a firearm. The First Department reversed and dismissed the indictment. The appeal from the judgment brought up for review an order denying suppression. Police pursuit significantly impeded freedom of movement and thus required reasonable suspicion, whereas such a predicate was not needed for mere surveillance. The actions here began as permissible observation, but then police turned on their lights and sirens to cross the street against traffic and pull up ahead of the defendant. The maneuver was intimidating and conveyed an attempt to intrude upon his freedom of movement. Since there was no reasonable suspicion, such actions were unlawful. When the defendant discarded a handgun during the illegal pursuit, he did not voluntarily abandon it. The Legal Aid Society of NYC (Rachel Pecker, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Gardine, 185 AD3d 500 (1st Dept 7/16/2020)

CPL 440.10 / DENIED

ILSAPP: The defendant appealed from an order of NY County Supreme Court, which summarily denied his CPL 440.10 motion to vacate a judgment of conviction. The First Department affirmed. The defendant supplied the affidavit of an investigator recounting phone conversations with two eyewitnesses to the homicide, but not their affidavits. Further, he failed to explain the long delay in investigating these matters and the reliability issues arising from the fact that the witnesses were recalling events from 1994. Finally, the defendant did not satisfy requirements for newly discovered evidence: due diligence and materiality. (Supreme Ct, New York Co)

People v Jenkins, 186 AD3d 31 (1st Dept 7/16/2020)

No error occurred when the prosecutor sought a “mail cover order” allowing the incarcerated defendant’s mail to be seized after an identification witness ceased cooperating with the prosecution and the defendant had been heard to say he wanted to discuss his lineup with someone but could do it by mail because phone calls were monitored, the court issued a sealed order for all mail not involving counsel to be provide to the prosecution, but the mail thus obtained was suppressed, and the court denied a defense motion to disqualify the prosecutor. There was no confidential relationship, and the interception of the mail did not give rise to an appearance of impropriety. Nor did reversible error occur when the prosecutor improperly demonstrated different ways to

open the knife alleged to have been used in the stabbing at issue, relating to its “flickability,” and the court found that, while the action had been inappropriate and instructed the jury accordingly, denied the defense motion for a mistrial. The deliberating jury’s notes concerning the knife did not concern its operability, and the court officer’s display of the knife to the jury upon its request without the court’s knowledge did not require reversal where the court had told the jury they could have the knife displayed to them; the officer’s act, which was exactly as the court had said would occur, was a ministerial act of providing an exhibit. (Supreme Ct, New York Co)

Property Clerk, NYPD v Nurse, 185 AD3d 459

(1st Dept 7/9/2020)

CIVIL FORFEITURE / HEARING

ILSAPP: The plaintiff appealed from an order of NY County Supreme Court, which sua sponte dismissed a civil forfeiture complaint. The First Department vacated the dismissal and remanded for a hearing. Following the defendant’s arrest, his vehicle was impounded. He pleaded guilty to criminal possession of a firearm and was sentenced to five years’ probation. The forfeiture action was not precluded by the determination at a *Krimstock* hearing (*Krimstock v Kelly*, 306 F3d 40)—that the defendant’s retention of his vehicle pending resolution of a forfeiture action did not pose a heightened risk to public safety. Here the distinct issue was whether the vehicle was subject to forfeiture because the defendant used it to commit his crime. The plaintiff established that the defendant did so use it, but the defendant presented evidence that the vehicle was needed for work and to pick up his children from school. Forfeiture would impose excessive hardship, particularly given that this was the defendant’s sole criminal offense. On this record, an issue of fact existed as to whether civil forfeiture was proper, warranting an evidentiary hearing. (Supreme Ct, New York Co)

People v Moore, 185 AD3d 472 (1st Dept 7/16/2020)

IMPEACHMENT - BAD ACTS/POLICE MISCONDUCT

- CHARACTER WITNESS

LASJRP: The First Department finds no error where the court limited cross-examination of police witnesses regarding civil lawsuits in which they were named as defendants, and prior adverse judicial rulings on their credibility. With regard to lawsuits, the court precluded questions that were in improper form, or that lacked specificity as to particular officers’ acts of misconduct, whether committed personally or by aiding other officers. With regard to adverse judicial credibility findings, the court correctly found that defendant’s proposed questions were in improper form, and defendant never attempted to cure the defect.

First Department *continued*

The Court finds harmless error where, after a defense witness testified that defendant was not known to him as someone from whom he could buy drugs, which was not character evidence regarding defendant's reputation, the court allowed the People to impeach that testimony by asking the witness if he was aware of prior drug sales by defendant. (Supreme Ct, New York Co)

People v Singh, 185 AD3d 480 (1st Dept 7/16/2020)**PEQUE VIOLATION / NO PREJUDICE**

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd and 4th degree criminal possession of stolen property. The plea court did not advise the defendant that, if he was not a U.S. citizen, he could be deported as a result of his plea, as later required in *People v Peque*, 22 NY3d 168. Generally, the question of prejudice was determined by a hearing. However, there was no reasonable possibility that this defendant could make the requisite showing. When he pleaded guilty in 2009, he had a 2005 grand larceny conviction, which rendered him deportable. Moreover, after the instant plea, he was convicted in federal court of an aggravated felony. Thus, his status as a deportable non-citizen would not have been affected, regardless of whether he pleaded guilty in 2009, had been found guilty after trial, or had been acquitted. (Supreme Ct, New York Co)

People v Spinac, 185 AD3d 498 (1st Dept 7/16/2020)**REDUCED SENTENCE / AGE AND HEALTH**

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him after a jury trial of 2nd degree assault and other crimes and sentencing him to an aggregate term of 3½ years plus three years' post-release supervision. The First Department reduced the prison term to time served. The charges arose from a 10-month campaign of harassment, during which the defendant terrorized the attorneys and female staff at the law firm representing his wife in a divorce. He called the firm 1,500 times, engaged in "vile" communications, and physically injured one victim. While not deeming the defendant to be deserving of leniency, the reviewing court nevertheless "extend[ed] to him the compassion and consideration he neglected to show the four women simply doing their jobs." Factors cited were his age and chronic health conditions and the fact that he had only a few months to serve before his release date. The Center for Appellate Litigation (Hunter Haney, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Blue, 185 AD3d 510 (1st Dept 7/23/2020)**SPEEDY TRIAL / REMAND**

ILSAPP: The defendant appealed from a 2018 order of NY County Supreme Court, which denied his CPL 440.10 motion. In the motion, he urged that his CPL 30.30 and constitutional rights to a speedy trial were violated, based on the passage of more than two years between the filing of the indictment and the People's certificate of readiness. Supreme Court analyzed only the statutory speedy trial issue. Therefore, the First Department remanded for consideration of the constitutional argument. Pending the outcome, the appellate court held in abeyance the defendant's appeal from the underlying 2015 judgment, convicting him of 2nd degree burglary (five counts) and sentencing him to an aggregate term of 25 years. The Office of the Appellate Defender (Christina Swarns and Joseph M. DaSilva, of counsel) represented the appellant. (Supreme Ct, New York Co)

**Matter of People ex rel. Stoughton v Brann,
185 AD3d 521 (1st Dept 7/23/2020)****HABEAS CORPUS / INDIVIDUALIZED ASSESSMENTS**

ILSAPP: The First Department affirmed orders of NY and Bronx County Supreme Court, denying petitions for writs of habeas corpus. The two "mass" proceedings were brought on behalf of defendants incarcerated on Rikers Island, some of whom were awaiting trial, while others had been convicted and were alleged to have violated conditions of parole. The appellate court held that the petitioners failed to establish any violations under the U.S. or State Constitution and concluded: "It would be the better practice for habeas courts reviewing future cases while the pandemic persists to perform individualized assessments of those who petition the court for release [and] ... consider, at the very least, each petitioner's risk of flight as assessed by the state, the particular health factors asserted by the petitioner as documented by appropriate medical records and physician affirmations where practical, the specific conditions of the petitioner's confinement at the time the petition is filed, and the environment into which the petitioner will be released and whether there is a plan in place to protect that person from contracting the virus and to monitor their health. With that data, courts hearing similar petitions will be in a good position to balance the competing interests at issue, and make decisions that recognize the potentially serious implications of confinement on detainees with underlying health conditions, but at the same time ensure the State's ability to enforce the law against those who might not return to face justice once released." (Supreme Ct, New York Co)

People v Fernandez, 185 AD3d 521 (1st Dept 7/30/2020)

CPL 440.10 / IAC / REVERSAL

ILSAPP: Previously, the defendant appealed from a NY County Supreme Court judgment, convicting him after a jury trial of certain drug possession crimes and other offenses and sentencing him to an aggregate term of 8 to 21 years. In the prior appeal, the defendant contended that defense counsel rendered ineffective assistance with regard to suppression proceedings. The First Department affirmed the judgment of conviction (158 AD3d 462), finding the IAC claim unreviewable because the record on direct appeal did not establish that counsel's alleged deficiencies flowed from a misunderstanding of the law. Thereafter, the defendant filed the instant CPL 440.10 motion, which was supported by motion counsel's affirmation detailing many unsuccessful attempts to obtain a statement from trial counsel as to his actions/inactions regarding suppression. The motion court summarily denied the 440 motion. That was error. The First Department reversed and remanded for a hearing, for which trial counsel could be subpoenaed to present evidence as to whether there were strategic reasons for his decisions regarding suppression. The Center for Appellate Litigation (John Vang, of counsel) represented the appellant. (Supreme Ct, New York 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.

NOTE: Due to pandemic-related delays, the *REPORT* has fallen behind in summaries of cases from the Appellate Divisions; what appear here are from a year ago. To provide timely information to our readers going forward, the next issue will contain summaries beginning in mid-2021. On-line sources of information about cases not summarized in the *REPORT* may be found at p. 47.

Matter of Bryce L., 184 AD3d 563 (2nd Dept 6/3/2020)

CONTEMPT - SERVICE OF OTSC

LASJRP¹: In this Article Ten proceeding, the Second Department reverses an order that, after a hearing, found that the father willfully violated a temporary order of protection and committed him to a three-month term of incarceration. The failure of the family court to personally serve the father with the order to show cause upon initiation of the contempt proceeding was a jurisdictional defect.

The JRP appeals attorney was Judith Stern, and the trial attorney was Aurora Curtis. (Family Ct, Kings Co)

Matter of Carter R., 184 AD3d 575 (2nd Dept 6/3/2020)

ABUSE/NEGLECT - REMOVAL/IMMINENT RISK

LASJRP: The Second Department reverses an order that, after a hearing, granted the mother's FCA § 1028 application for return of two of the children.

The evidence at the hearing demonstrated that, after one of the children reported to the mother that her older brother had been sexually abusing her since she was ten years old, the mother did not address the sexual abuse or provide increased supervision for the children. The mother also left one of the children in the older brother's care for a period of time, in violation of a court order, while she gave birth to the third child.

The JRP appeals attorney was John Newbery, and the trial attorney was Sara Reisberg. (Family Ct, Kings Co)

People v Hussain, 184 AD3d 585 (2nd Dept 6/3/2020)

**RIGHT TO COUNSEL - DECISION-MAKING AUTHORITY
APPEAL - RECORD ON APPEAL**

LASJRP: Where defendant contends that his constitutionally protected autonomy right to assert his innocence was violated when defense counsel conceded guilt of manslaughter in the second degree or, in the alternative, manslaughter in the first degree, the Second Department declines to review the claim, noting that the claim is to be proved, if at all, by facts outside the trial record in a CPL § 440.10 proceeding. (Supreme Ct, Kings Co)

Jayne v Smith, 184 AD3d 557 (2nd Dept 6/3/2020)

**DISCOVERY - ORAL DEPOSITIONS
PHYSICIAN-PATIENT PRIVILEGE**

LASJRP: Plaintiff, a nurse, was seriously injured when he was assaulted by a patient at a psychiatric facility. Plaintiff commenced this consolidated action to recover damages for personal injuries against, among others, the patient's treating psychiatrists. After defendants indicated at a compliance conference that they would not answer any questions at their depositions regarding the patient, plaintiff moved pursuant to CPLR 3124 to compel them to appear for depositions and to answer questions seeking non-privileged information. Defendants cross-moved pursuant to CPLR 3103(a) for a protective order. The court ruled for defendants.

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*

The First Department reverses. Plaintiff is entitled to inquire into any non-privileged information regarding the patient. The “prospect that a witness may be asked questions at a deposition as to which an objection based on privilege may be asserted is not a proper reason for declining to appear for a deposition. Rather, the proper procedure is for the witness to appear and for counsel to interpose objections to particular questions which call for the disclosure of privileged information (see 22 NYCRR 221.2).” (Supreme Ct, Suffolk Co)

People v Jemmott, 184 AD3d 586 (2nd Dept 6/3/2020)**PROBATION / TERM NOT PRONOUNCED**

ILSAPP²: The defendant appealed from a sentence imposed by Kings County Supreme Court upon his plea of guilty. The Second Department reversed. The lower court did not pronounce the length of the term of probation in open court. The matter was remitted for resentencing in accordance with CPL 380.20. The Legal Aid Society of NYC (Desiree Sheridan, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Matter of Rosa Y. A. P., 184 AD3d 573 (2nd Dept 6/3/2020)**PATERNITY - EQUITABLE ESTOPPEL**

LASJRP: The Second Department upholds application of equitable estoppel where respondent had long-assumed the role of a parent, led the children to believe he was their father, and provided financial support to the children for most of their lives.

Neither the rumor allegedly perpetrated by the mother that respondent was not the father, nor the deterioration of his relationship with the children beginning around the time these petitions were filed, militate against application of equitable estoppel. (Family Ct, Queens Co)

Matter of Blauman-Spindler v Blauman, 184 AD3d 636 (2nd Dept 6/10/2020)**ETHICS - CONFLICT OF INTEREST****CUSTODY - RIGHT TO COUNSEL OF CHOICE**

LASJRP: In this custody proceeding, the Second Department finds no error in the disqualification of the attorney for the grandmother where the attorney had previously represented the father on an assault matter and a drug charge. The prior representation created the ap-

pearance of a conflict of interest and a substantial risk of prejudice. (Family Ct, Nassau Co)

People v Butts, 184 AD3d 660 (2nd Dept 6/10/2020)**IMPEACHMENT TESTIMONY / NO FAIR TRIAL**

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder and other crimes. The Second Department reversed, finding that the defendant was deprived of a fair trial. The right to present a defense is a fundamental element of due process. Trial courts have broad discretion to curtail exploration of collateral matters, but must honor the defendant’s constitutional rights to present a defense and confront his or her accusers. Here a victim testified that he recognized the defendant, because at some point a scarf no longer covered the defendant’s face. The victim was the only witness who identified the defendant as one of the intruders. After the victim’s testimony, his brother contacted defense counsel to report that the victim had told him repeatedly that he had not seen the intruders’ faces. Supreme Court should not have precluded the proffered testimony, which went directly to the victim’s credibility and to the defendant’s guilt. The preclusion of such material and exculpatory evidence deprived the defendant of a fair trial. Appellate Advocates (Yvonne Shivers, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Christopher B., 184 AD3d 657 (2nd Dept 6/10/2020)**APPEAL - WAIVER OF RIGHT**

LASJRP: The Second Department finds no valid waiver of defendant’s right to appeal where the court, after describing the function of an appellate court, stated that “[w]hat all this means, though, is that this plea and the sentence I am going to impose are final and that higher court will not have a chance to review it”; the court did not include clarifying language indicating that appellate review remained available for certain issues or that the right to take an appeal was retained; and, although defendant had prior experience with the criminal justice system, he was only 19 years old at the time of the plea and sentence, and had not completed high school. (Supreme Ct, Kings Co)

People v Chy, 184 AD3d 664 (2nd Dept 6/10/2020)**SUPPRESSION / REVERSAL**

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 4th degree grand larceny (two counts), upon his plea of guilty. The appeal brought up for review the denial of suppression. The Second Department reversed. An officer arrested the defendant for criminal trespass, searched his back-

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

Second Department *continued*

pack at the scene, and recovered two credit cards and a driver's license—all not bearing his name—along with a new laptop computer. The purported waiver of the right to appeal was invalid and thus did not preclude review of suppression issues. The search was not justified as incident to a lawful arrest. The officer did not act out of concerns for safety or evidence preservation. The People contended that, even if the search was unlawful, the defendant's statements were admissible, because they were sufficiently attenuated so as to purge the taint of the illegal search. Since Supreme Court did not rule on that issue, appellate review was precluded, and remittal was required. *See* CPL 470.15 (1). Appellate Advocates (Mark Vorkink, of counsel) represented the appellant. (Supreme Ct, Queens Co)

Matter of Judah S., 184 AD3d 645 (2nd Dept 6/10/2020)

ABUSE/NEGLECT - FAILURE TO OBTAIN/ COOPERATE IN OBTAINING THERAPY

LASJRP: The Second Department upholds findings of neglect and derivative neglect where two of the three children suffered from behavioral issues at home and at school, the father was made aware of these issues on many occasions and was advised to engage the children in therapy, but the father failed to do so despite the children's worsening behavior; and the father refused to consent to preventative services, failed to utilize ACS's referrals for therapy, and failed to provide ACS with the information necessary to receive assistance in paying for the therapy.

The JRP appeals attorney was Riti Singh, and the trial attorney was Benjie Acunis. (Family Ct, Queens Co)

Matter of Luis V. v Laisha P. T., 184 AD3d 648 (2nd Dept 6/10/2020)

PATERNITY - EQUITABLE ESTOPPEL

LASJRP: The Second Department concludes that the doctrine of equitable estoppels should not have been applied against petitioner in this paternity proceeding where the only evidence of an operative parent-child relationship with another man, Joseph T., came from the child's foster mother, who testified that the child called the Joseph T. "daddy" during weekly supervised visits, and that they were affectionate with each other at the visits. Joseph T. did not appear in court and did not testify at the hearing.

Moreover, petitioner did not acquiesce in the establishment of any relationship. He testified that, until the child was removed from the mother's care, he did not know she was married to Joseph T. He commenced this

proceeding approximately one month after he learned that his paternity was not established.

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

People v Mann, 184 AD3d 670 (2nd Dept 6/10/2020)

IDENTIFICATION - SUFFICIENCY OF EVIDENCE - LINEUPS/SUGGESTIVENESS

LASJRP: The Second Department concludes that the verdict was against the weight of the evidence where the complainant described the perpetrator to the police as balding with no facial hair, and, although the lineup participants wore hats to conceal their hairlines, defendant's significant facial hair was visible; the perpetrator had worn a yellow shirt, defendant was the only lineup participant wearing a yellow shirt, and, although the other participants' shirts were covered with a cloth, defendant's shoulders remained visible; and, after viewing the lineup, the complainant told the officer that the yellow shirt was the most significant visible similarity between the perpetrator and defendant. (Supreme Ct, Queens Co)

People v Pelt, 184 AD3d 672 (2nd Dept 6/10/2020)

FST / FRYE HEARING NEEDED

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree CPW. The Second Department reversed and ordered a new trial. Prior to trial, the defendant moved to preclude evidence regarding DNA testing derived from the use of the Forensic Statistical Tool (hereinafter FST), or for a *Frye* hearing. Supreme Court denied the motion. Based on recent Court of Appeals decisions, the trial court erred in not holding a *Frye* hearing. There was uncertainty regarding whether the FST had been generally accepted in the relevant scientific community at the time of the motion. Appellate Advocates (Dina Zloczower, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Petrizzo, 184 AD3d 673 (2nd Dept 6/10/2020)

O'RAMA ERROR / REVERSAL

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of resisting arrest. The Second Department reversed and dismissed the indictment. Supreme Court failed to comply with CPL 310.30 and *People v O'Rama*, 78 NY2d 270. In a note, the jury asked about the elements of resisting arrest. Twice when reading the note, Supreme Court substituted the word "initially" in place of "intentionally," and the record did not establish that the note was shown to counsel. There was mode of proceedings error. In addition, another note seeking clarification regarding requested read backs was not read into the record or revealed to the par-

Second Department *continued*

ties. Since the defendant was acquitted of the two most serious charges and had already served the misdemeanor sentence, dismissal of the indictment was appropriate. Appellate Advocates (Samuel Feldman, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Pfail, 184 AD3d 675 (2nd Dept 6/10/2020)**DISMISSAL IN FURTHERANCE OF JUSTICE**

LASJRP: The First Department reverses an order that, without a hearing, granted defendant's post-trial motion to dismiss a charge of criminal mischief in the third degree in the furtherance of justice.

The motion was untimely and defendant failed to show good cause for seeking that relief more than 45 days after arraignment. In any event, the court erred in substituting its own judgment concerning the credibility of the witnesses and defendant's culpability for that of the jury. (Supreme Ct, Nassau Co)

People v Verneus, 184 AD3d 678 (2nd Dept 6/10/2020)**ABHORRENT / NOT DEPRAVED INDIFFERENCE**

ILSAPP: The Second Department reduced a Queens County conviction for assault from 1st to 3rd degree and a conviction for reckless endangerment from 1st to 2nd degree in connection with injuries sustained by her then 20-month-old foster child. The child suffered 2nd and 3rd degree burns on 12% of his body. The defendant said that the child was accidentally scalded while unattended in the bathtub, and she then treated him with ointment and bandages. While her actions were abhorrent and must have caused great suffering, the People failed to prove depraved indifference to human life based on her failure to obtain proper medical care. The defendant took measures, albeit woefully inadequate ones, to care for the child. One justice dissented in part. Appellate Advocates (David Goodwin, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Butler, 184 AD3d 704 (2nd Dept 6/17/2020)**DISCOVERY - COMPLAINANT'S MENTAL HEALTH RECORDS****IMPEACHMENT****ACCUSATORY INSTRUMENTS****- MULTIPICITOUS COUNTS**

LASJRP: Prior to the commencement of trial, defendant requested copies of the complainant's confidential records relating to mental health counseling the complainant had engaged in approximately a year after she disclosed that, when she was younger, defendant had

raped and sexually abused her. After an in camera review, the court redacted most of the records, determining that the bulk of the records were not relevant and material. The court provided to the parties 10 heavily redacted pages of the 32 pages of records.

The Second Department finds reversible error. The complainant and defendant each testified and presented sharply divergent accounts. A determination of credibility was key to the jury's determination, as the jury acquitted the defendant of rape in the first degree but convicted him of sexual abuse in the first degree. The redacted portion of the complainant's mental health records which contains the statement "[s]exual abuse denied," and the portion of a checklist reflecting that "[s]exual abuse (lifetime)" was not checked off, could be viewed by the jury as exculpatory and materially relevant.

The Court also concludes that the allegation that defendant touched the complainant's breast and vagina and the allegation that he thereafter had her touch his penis involve a continuous interaction on the same day and are multiplicitous. Upon retrial, one of the counts must be dismissed. (Supreme Ct, Queens Co)

**Matter of Maximo M., 184 AD3d 780
(2nd Dept 6/17/2020)****JD / ACOD**

ILSAPP: The appellant appealed from an order of disposition of Queens County Family Court adjudicating him a JD, based on his admission to acts constituting 2nd degree sexual abuse. The Second Department reversed. While the term of probation had expired, the appeal was not academic; there could be collateral consequences. Family Court abused its discretion in denying an ACOD given that: this was the appellant's first contact with the court system; he took responsibility for his actions and expressed remorse; he voluntarily participated in counseling; and he maintained a strong academic record. The Legal Aid Society of NYC (Dawne Mitchell and Susan Clement, of counsel) represented the appellant. (Family Ct, Queens Co)

Matter of Noah N., 184 AD3d 733 (2nd Dept 6/17/2020)**ABUSE/NEGLECT - DOMESTIC VIOLENCE**

LASJRP: The Second Department upholds a finding of neglect against the father where the children observed the aftermath of the father's acts of domestic violence, which included seeing the mother bleeding from her head and crying, as well accompanying her in an ambulance to the hospital.

The JRP appeals attorney was Judith Stern, and the trial attorney was Yuval Sheer. (Family Ct, Kings Co)

Second Department *continued*

[People v Perkins](#), 184 AD3d 776 (2nd Dept 6/17/2020)

SEARCH AND SEIZURE - BORDER SEARCH/ ELECTRONIC DEVICES - CONSENT

LASJRP: Defendant, an airline pilot, was arrested after flying from Montreal to JFK airport, where a manual search of his iPad revealed still images of child pornography. A later forensic search of the iPad conducted pursuant to a warrant revealed two video files.

The Second Department upholds the denial of defendant's motion to suppress, noting, inter alia, that a Department of Homeland Security Agent in Texas had executed a search warrant on a residence associated with defendant's family in relation to child pornography that was downloaded to the IP address for that residence; that the Agent had been unable to find child pornography, but believed that defendant may have had child pornography on electronic devices he was carrying since he had access to the residence's wi-fi; that federal circuit courts are split as to whether reasonable suspicion or something less is required to justify a manual search of an electronic device for contraband at the border, but no court has required a warrant or probable cause, and there was reasonable suspicion here; that defendant was not in custody when he was asked to enter the iPad password, and the fact that the iPad would be detained if he did not enter the password did not mean that he was subjected to the coercive atmosphere of a custodial confinement; and that since the Agents had reasonable suspicion, they could perform a forensic search without a warrant, and their threat to retain the device for a forensic examination if defendant did not unlock it was not a false assertion of authority that would render defendant's act of inputting the password involuntary. (Supreme Ct, Queens Co)

[People v Rice](#), 184 AD3d 744 (2nd Dept 6/17/2020)

MOTIONS TO SUPPRESS - FINDINGS OF FACT AND CONCLUSIONS OF LAW

LASJRP: The Second Department holds the appeal in abeyance and remits the matter for the hearing court to articulate the basis or bases for its denial of defendant's motion to suppress. Criminal Procedure Law § 710.60(6) states that the court "must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination." (Supreme Ct, Queens Co)

[People v Sabirov](#), 184 AD3d 714 (2nd Dept 6/17/2020)

INTOXICATION / CHARGE WARRANTED

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of certain

sexual offenses. The Second Department reversed and ordered a new trial. An intoxication instruction should have been given. The complainants testified that the defendant did not appear drunk at the time of the incident, and the arresting officer did not recall how the defendant appeared upon arrest. However, the officer's notes and the defendant's testimony supported the requested charge. In addition, the trial court improperly excluded as a business record a Desk Appearance Ticket form, containing the notation, "intox," and a checked box, indicating that the defendant was "under the influence of drugs/marihuana to the degree that he may endanger himself or others." Steven Feldman represented the appellant. (Supreme Ct, Kings Co)

[People v Sutton](#), 184 AD3d 236 (2nd Dept 6/17/2020)

APPEAL - WAIVER OF RIGHT

LASJRP: The Second Department concludes that defendant's purported waiver of the right to appeal is unenforceable because it was the court itself, as opposed to the People, that insisted upon the waiver, without setting forth any reason for doing so, and because defendant received no discernible benefit in exchange.

The Court notes, inter alia, that this case involves a resolution predicated upon defendant's plea to an unreduced charge and defendant's understanding as to the court's anticipated sentence; that trial courts' effectiveness in safeguarding the integrity of the appeal waiver process may be compromised when the court itself has initiated the process; and that there may be circumstances where the trial court has a legitimate interest in conditioning its acceptance of a plea and determination of a sentence upon an appeal waiver the prosecution has not requested, but the court should articulate on the record its reasons for doing so in order to dispel any concern that the court's demand is solely a means of avoiding appellate review. (Supreme Ct, Kings Co)

[Matter of Augliera v Araujo](#), 184 AD3d 824 (2nd Dept 6/24/2020)

The order of disposition finding the father in willful violation of an order of child support and sentencing him to 40 days in the Orange County jail is modified to remove the order of commitment. Although the court can order someone incarcerated for up to 6 months for their willful failure to obey an order of support, it is improper to do so in this situation where it was undisputed at the hearing that the father paid his arrears in full. "Accordingly, since the court imposed a sentence of incarceration in contravention of Judiciary Law §774 (1), that provision of the ... order must be deleted." (Family Ct, Orange Co)

Second Department *continued***People v Banuchi, 184 AD3d 881 (2nd Dept 6/24/2020)****SORA / HEARING NEEDED**

ILSAPP: The defendant appealed from an order of Queens County Supreme Court, which denied his petition to modify his SORA risk-level classification. The Second Department reversed and remitted. Supreme Court denied the petition without holding a hearing. That was error. *See* Correction Law § 168-o (4). The Legal Aid Society of NYC (Rachel Pecker, of counsel) represented the appellant. (Supreme Ct, Queens Co)

**People v Churaman, 184 AD3d 852
(2nd Dept 6/24/2020)****EXPERT TESTIMONY - FALSE CONFESSIONS**

LASJRP: The Second Department finds reversible error where the court denied defendant's request to present testimony from his expert witness on the issue of false confessions. The expert's report was sufficiently detailed to establish its relevance to this defendant. The report referred to, *inter alia*, characteristics that heightened defendant's vulnerability to manipulation, the detectives' interrogation techniques, and the improper participation of defendant's mother during the interview. (Supreme Ct, Queens Co)

Matter of Elijah G., 184 AD3d 825 (2nd Dept 6/24/2020)**ABUSE/NEGLECT - DERIVATIVE NEGLECT/
SUMMARY JUDGMENT**

LASJRP: The Second Department upholds the family court's findings via summary judgment, based on a 2012 neglect proceeding and subsequent events, that the mother and the father derivatively neglected the two youngest children. In support of its motion, ACS submitted prior orders finding that the mother and the father neglected the three oldest children, and suffered from mental health issues and continually failed to comply with recommended mental health services; and the orders demonstrated that the none of the three oldest children were returned to the care of the mother and the father, and that the conditions that resulted in the removal of those children continued to exist.

The JRP attorney was John Newbery, and the trial attorneys were Kimberly Wong and Jess Rao. (Family Ct, Queens Co)

People v Illis, 184 AD3d 859 (2nd Dept 6/24/2020)**DEPRAVED INDIFFERENCE / DISMISSED**

ILSAPP: The defendant appealed from an order of Kings County Supreme Court, which denied his CPL 440.10 motion. The Second Department reversed. By a 2002 judgment, the defendant was convicted of depraved indifference murder, based on evidence that he repeatedly struck the victim in the head with a concrete slab, causing his death. At trial, Supreme Court denied a motion to dismiss, which was based on the argument that the defendant's actions were intentional, not reckless. The conviction was affirmed, and leave to appeal was denied. Before the conviction became final, *People v Payne*, 3 NY3d 266, set forth a new standard for depraved indifference murder. In the instant appeal, the Second Department held that the motion court erred in equating the leave denial to a rejection of arguments based on the changed law. *See Matter of Calandra v Rothwax*, 65 NY2d 897. Further, the denial of the defendant's federal habeas corpus petition was not a procedural bar, since NY law was in flux at the time. Because the trial evidence was not legally sufficient to support the verdict, the murder count was dismissed. Appellate Advocates (Joshua Levine, of counsel) represented the appellant. (Supreme Ct, Kings Co)

**Matter of Ivy R.Q.M., 184 AD3d 833
(2nd Dept 6/24/2020)****ABUSE/NEGLECT - EXPOSING CHILDREN TO
NEGLECTFUL PARENT**

LASJRP: The Second Department upholds a finding of neglect where the father failed, or refused, to prevent the mother from visiting the residence, despite his knowledge of the mother's long and continuing history of substance abuse, and despite the existence of an order of protection against the mother in favor of the children, which the father failed, or refused, to enforce. (Family Ct, Westchester Co)

People v Khan, 184 AD3d 864 (2nd Dept 6/24/2020)**SENTENCES / CONCURRENT**

ILSAPP: The defendant appealed from an order of Queens County Supreme Court, which denied his CPL 440.20 motion to set aside the sentences imposed upon his 1991 convictions of 2nd degree kidnapping and 2nd degree murder (three counts). The Second Department reversed. Consecutive sentences for the kidnapping and felony murder convictions were unlawful, since the kidnapping was the underlying felony in the felony murder. Thus, those sentences had to run concurrently. The defendant further argued that running the kidnapping sentence consecutively to the sentences for the other murder convictions violated his equal protection rights, in that a codefendant received concurrent sentences for such counts. Since the motion court failed to address that issue, remittal was required. Appellate Advocates (Anders

Second Department *continued*

Nelson, of counsel) represented the appellant. (Supreme Ct, Queens Co)

[People v Mabry](#), 184 AD3d 867 (2nd Dept 6/24/2020)

SEARCH AND SEIZURE - REASONABLE SUSPICION - INCIDENT TO ARREST

LASJRP: The Second Department concludes that the police had reasonable suspicion to pursue and stop defendant based on the description of the perpetrator - a black male wearing a black hat and carrying a backpack - which matched defendant's appearance, the close proximity to the crime scene, and the short passage of time between the commission of the crime and the observation of defendant. The police had probable cause to arrest defendant based on the complainant's spontaneous identification near the crime scene.

The Court, with one judge dissenting, also finds that the police were justified in searching defendant's backpack incident to his arrest. When the complainant arrived, defendant was standing up and had not yet been handcuffed. Immediately after the complainant's identification, defendant was placed under arrest. Approximately two minutes after the arrest, the police searched the backpack which was "on the street, at the location of the arrest." Thus, the arrest and search were for all practical purposes conducted at the same time and in the same place, and the backpack could have been accessed by defendant and had not yet been reduced to the exclusive control of the police.

The facts support a reasonable belief that the search was necessary to ensure the safety of the arresting officers and the public. The police responded to and arrested defendant for a burglary, a violent crime, and he was arrested after a police chase, following his flight on a bicycle. (Supreme Ct, Queens Co)

[People v Mitchell](#), 184 AD3d 875 (2nd Dept 6/24/2020)

JUDGES - IMPROPER INTERFERENCE AT TRIAL

LASJRP: Reaching the unpreserved claim in the interest of justice, the Second Department finds reversible error where, after the two robbery complainants, in response to questions by the prosecutor, were unable to positively identify defendant, the court assumed the appearance or the function of an advocate by questioning the complainants until it elicited a positive in-court identification of defendant from each of them. (Supreme Ct, Queens Co)

[People v Murray](#), 184 AD3d 882 (2nd Dept 6/24/2020)

SORA / LEVEL REDUCED

ILSAPP: The defendant appealed from a Supreme Court order designating him a level-two sex offender. The Second Department reversed and reduced his status to level one. The SORA court should not have granted an upward departure. The People failed to establish that the defendant's conduct was an aggravating factor not adequately taken into account by the Guidelines. The Legal Aid Society of Westchester County (Salvatore Gaetani, of counsel) represented the appellant. (Supreme Ct, Westchester Co)

[Matter of Nevetia M.](#), 184 AD3d 836 (2nd Dept 6/24/2020)

DERIVATIVE NEGLECT / NOT PROVED

ILSAPP: The mother appealed from an order of Kings County Family Court, which found that she neglected her older child and derivatively neglected her younger child. The Second Department reversed the finding of derivative neglect. The proof established educational neglect as to the older child. In one school year, she was absent 48 days and late 78 days. There was no likelihood that neglect of the eight-year-old harmed the four-month-old. Cheryl Charles-Duval represented the appellant. (Family Ct, Kings Co).

[People v Carmona](#), 185 AD3d 600 (2nd Dept 7/1/2020)

IDENTIFICATION - CONFIRMATORY PHOTO ID BY WITNESS

APPEAL - RECORD ON APPEAL

LASJRP: When defendant requested a Wade hearing regarding single-photograph identifications made by the complainant soon after the shooting, the People responded that the complainant and defendant were well known to each other, and defendant requested a Rodriguez hearing. The court denied the request, relying on the People's assurances that the complainant was familiar with defendant, but the court stated that, if it became clear at trial that defendant was not well known to the complainant, an "appropriate remedy" would be fashioned.

The Second Department concludes that the court erred in relying on the People's mere assurances of familiarity in denying defendant's pretrial request for a Rodriguez hearing. However, a hearing was ultimately unnecessary since the complainant's trial testimony and other evidence demonstrated that the complainant knew defendant by his street name and had had numerous contacts with him, and thus the identification was confirmatory.

A dissenting judge asserts that, in relying solely upon the complainant's trial testimony as the basis for its refusal to order a post-trial Rodriguez hearing, the major-

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ity contravenes clear and binding precedent from the Court of Appeals. (Supreme Ct, Kings Co)

Matter of Dallas P., 185 AD3d 589 (2nd Dept 7/1/2020)

The order of disposition finding that the mother abused the child is affirmed. “Here, ACS established a prima facie case of child abuse against the mother by presenting evidence that the injury sustained by the child would ordinarily not occur absent an act or omission of a parent or caregiver, and that the mother was a caregiver of the child during the 24-hour period prior to his hospitalization when the injury occurred” Once ACS established its case, the mother failed to rebut the presumption that she was not the cause of the child’s injuries. The appeal from the order of protection and the portion of the order of disposition that placed mother under the supervision of ACS was dismissed, as “no appeal lies from an order entered upon the consent of the appealing party” (Family Ct, Queens Co)

People v Grant, 185 AD3d 608 (2nd Dept 7/1/2020)**RESTITUTION / EXCESSIVE**

ILSAPP: The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 2nd degree manslaughter and other crimes, upon a jury verdict. The sentence included a direction that the defendant make restitution of \$39,374 to the Crime Victims Board for the victim’s family. The Second Department modified. The amount violated the \$15,000 cap set forth in Penal Law § 60.27 (5) (a). In addition, the sentencing court should not have ordered payment of the mandatory surcharge by civil judgment, rather than pursuant to P.L. § 60.35 (5). Arza Feldman represented the appellant. (Supreme Ct, Nassau Co)

Matter of Nicholas O., 185 AD3d 587 (2nd Dept 7/1/2020)**ABUSE/NEGLECT - REMOVAL/IMMINENT RISK**

LASJRP: The Second Department reverses an order that, after a hearing, granted the parents’ FCA § 1028 application for the return of the child to their custody.

The Court notes that the child’s sibling, Michael, has special needs that require him to be under constant supervision, and, on a prior occasion, the parents’ inability to control Michael resulted in serious physical injuries to one of his siblings; that, notwithstanding the parents’ willingness to comply with court-ordered services, they and Michael had not yet completed those services at the time of the hearing; and that the parents’ inability to adequately

ly control Michael would present an imminent risk to the subject child. (Family Ct, Kings Co)

Matter of Raven B., 185 AD3d 587 (2nd Dept 7/1/2020)**ABUSE/NEGLECT - DERIVATIVE ABUSE
- PRESUMPTION OF ABUSE**

LASJRP: The Second Department upholds derivative abuse findings with respect to respondent’s own children where he abused his girlfriend’s then two-year-old son. Respondent and his girlfriend were caregivers during the 24-hour period when the girlfriend’s son sustained a ruptured bowel requiring emergency surgery—an injury that would ordinarily not occur absent an act or omission of a parent or caregiver.

The JRP appeals attorney was Diane Pazar, and the trial attorney was Karen Levit. (Family Ct, Queens Co)

Matter of Ross v Ross, 185 AD3d 595 (2nd Dept 7/1/2020)**CUSTODY TRANSFER / PUNISHMENT**

ILSAPP: The mother appealed from a Queens County Family Court order, which granted the father’s violation petition and directed that custody would be transferred to him if the mother did not return to NYC from Sweden within 30 days. The Second Department reversed and remitted. The conditional directive was meant to punish the mother, rather than to serve the child’s best interests. Since no party had sought modification, the court should not have ordered such outcome without notice to the mother. Further, transferring custody to the father was improper on the merits. The mother had always been primary caretaker; the father did not have overnight visits; and the court had expressed concerns about his ability to care for the child for an extended period. Keith Ingber represented the mother. (Family Ct, Queens Co)

Matter of Sebastian Y., 185 AD3d 597 (2nd Dept 7/1/2020)**ABUSE/NEGLECT - DERIVATIVE NEGLECT**

LASJRP: The Second Department upholds a finding of derivative neglect where the child’s older sibling was adjudged neglected after an incident of domestic violence between the parents, and the father failed to complete a mental health assessment with an anger management component and follow through with any and all recommendations from the treatment provider, as required by the order of fact-finding and disposition issued in the older sibling’s case. (Family Ct, Orange Co)

People v Sutki S., 185 AD3d 610 (2nd Dept 7/1/2020)**YO / NOT CONSIDERED**

Second Department *continued*

ILSAPP: The defendant appealed from judgments of Kings County Supreme Court, convicting him of 3rd degree burglary and another crime. The Second Department held the appeals in abeyance. The lower court imposed the promised sentences without considering whether the defendant should be afforded youthful offender treatment. *See People v Rudolph*, 21 NY3d 497. Supreme Court was directed to determine whether the defendant, who had served his sentences, should be afforded YO and to thereafter submit a report to the appellate court. In addition, the duration of orders of protection issued on the burglary conviction exceeded the statutory time limit. Thus, a new determination was needed. The Legal Aid Society of NYC (Laura Boyd, of counsel) represented the appellant. (Supreme Ct, Kings Co)

[Ed. Note: *Following remand, judgments reversed, convictions vacated and replaced with finding that the defendant is a youthful offender.* 188 AD3d 1270 (11/25/2020).]

People v Alman, 185 AD3d 714 (2nd Dept 7/8/2020)

MISTRIAL / MANIFEST NECESSITY

ILSAPP: The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 2nd degree obstructing governmental administration and resisting arrest. The Second Department affirmed. After summations at the first trial, defense counsel informed the court that the defendant would not consent to any alternate jurors replacing a juror. The alternates were discharged. During deliberations, Juror No. 6 had to be discharged because she did independent research, told jurors what she learned, and discussed the case with her husband. The court stated that it would declare a mistrial “upon necessity.” A second trial and the instant appeal ensued. The defendant contended that Supreme Court had improperly declared a mistrial. However, when the trial court stated that it planned to do so, he had failed to object. In any event, there was a manifest necessity. (Supreme Ct, Nassau Co)

Matter of Brian M., 185 AD3d 691 (2nd Dept 7/8/2020)

ADJOURNMENT IN CONTEMPLATION OF DISMISSAL

DISPOSITION - LEAST RESTRICTIVE ALTERNATIVE

LASJRP: The Second Department reverses an order of fact-finding and disposition, made upon respondent’s admission to criminal mischief in the fourth degree (damaging parked vehicles), that adjudicated him a juvenile delinquent, placed him on probation for a period of 12 months, and directed restitution. The Court remits the matter for entry of an order adjourning the matter in con-

templation of dismissal on condition that respondent pay restitution in the sum of \$750 within six months of the date of the ACD order.

This was respondent’s first contact with the court system. He took responsibility for his actions, and the record demonstrates that he had learned from his mistakes. (Family Ct, Suffolk Co)

People v Campbell, 185 AD3d 717 (2nd Dept 7/8/2020)

EXPERTS / NO FOUNDATION

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of two counts each of 5th and 7th degree criminal possession of a controlled substance and other crimes. The Second Department modified by vacating the 5th degree possession counts and ordered a new trial as to those counts. The People relied on the testimony of a [sic] NYPD criminalists who performed testing upon the subject substances. Their opinion testimony was inadmissible, because the People failed to lay a foundation. Each criminalist tested the purity of a sample of the substance recovered from the defendant by using tests which relied on comparison to a known standard. However, the People failed to introduce evidence as to the accuracy of the standard. The Legal Aid Society of NYC (William Carney, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Hobbs, 185 AD3d 720 (2nd Dept 7/8/2020)

HEARSAY - PROMPT OUTCRY

LASJRP: The Second Department finds no error in the admission of prompt outcry testimony from the child victim’s mother regarding the victim’s statement that defendant had raped her. (Supreme Ct, Westchester Co)

Matter of Nicholas G., 185 AD3d 685 (2nd Dept 7/8/2020)

ABUSE/NEGLECT - REMOVAL/IMMINENT RISK - ADJOURNMENT IN CONTEMPLATION OF DISMISSAL - MEDICAL NEGLECT

LASJRP: The Second Department affirms orders granting petitioner DSS’s application pursuant to FCA § 1027 to temporarily remove the child; finding that the mother and father had failed substantially to observe the terms and conditions of a FCA § 1039 adjournment in contemplation of dismissal order; and granting DSS’s application to restore the proceedings to the calendar for a fact-finding hearing on the underlying abuse petitions.

At the § 1027 hearing, DSS proved that the standard treatment protocol for a child with leukemia included chemotherapy even after the child went into clinical remission; that this treatment was necessary because even

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in remission there remained a substantial number of malignant cells in the body; that leukemia cells start multiplying as soon as you stop the chemotherapy; and that if the bone marrow was filling with abnormal cells, the likelihood of getting the child back into remission and a cure dramatically dropped and it was much more likely he would die.

The mother testified as to alternative treatments the child could receive through Utopia Wellness Center, where she had brought him following issuance of the ACD order. But the medical doctor there specialized in anesthesiology and holistic treatment and was not a pediatric oncologist, and the mother submitted no testimony contradicting DSS's evidence that chemotherapy was the only effective treatment for leukemia and that vitamin and other alternative therapies did not effectively treat cancer or prevent its recurrence.

The family court also properly determined that the mother and father failed substantially to comply with the requirement in the ACD order that they ensure that the child receive appropriate continued care for his leukemia.

The court did not err in holding the § 1027 hearing before holding the hearing on the issue of whether to restore the proceedings to the calendar. The court may decide an application pursuant to § 1027 at any time prior to dismissal of a petition under FCA § 1039. (Family Ct, Suffolk Co)

People v Taylor, 185 AD3d 724 (2nd Dept 7/8/2020)**BATSON / DISSENT**

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting her of 2nd and 3rd degree assault and petit larceny. The Second Department modified by vacating the 3rd degree conviction and dismissing it as an inclusory concurrent count of 2nd degree assault. Two justices voted to reverse based on a *Batson* issue. At step one of the *Batson* protocol, the trial court found that the defendant made out a prima facie case of race-based discrimination as to the prosecutor's use of peremptory challenges against six prospective jurors. At step two, the prosecutor addressed the basis for each such challenge. Regarding one prospective juror, the prosecutor stated that she "was from Trinidad. She's not African-American." To the extent that the prosecutor was arguing that, as a Trinidadian, the panelist was not African-American, such was not an appropriate argument at step two. At step one, the court had already determined that the panelist was a member of the cognizable racial group. The People failed to carry their minimal burden of proffering a facially nondiscriminatory reason, and Supreme Court erred by not seating the prospective juror.

Appellate Advocates (Sam Feldman, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People ex. rel. Wadia v George R. Vierno Center,**185 AD3d 713 (2nd Dept 7/8/2020)****DETENTION/PRISONERS RIGHTS****- COVID-19 ISSUES**

LASJRP: The Second Department affirms an order dismissing this habeas corpus proceeding, noting, inter alia, that the court did not err in rejecting the claim based on the COVID-19 pandemic since the prisoner is 27 years old, has no underlying medical conditions, and has shown no symptoms of COVID-19. (Supreme Ct, Kings Co)

People v Wilkinson, 185 AD3d 734 (2nd Dept 7/8/2020)**SENTENCES / CONCURRENT**

ILSAPP: The defendant appealed from a judgment of Westchester County Supreme Court, convicting him of 2nd degree murder, 1st degree robbery, 1st degree burglary, and 2nd degree assault. The Second Department modified, finding that the sentences imposed for burglary and assault must run concurrently to each other, since those crimes did not involve disparate or separate acts. Thomas Keating represented the appellant. (Supreme Ct, Westchester Co)

People v Cagan, 185 AD3d 836 (2nd Dept 7/15/2020)**CONFESSIONS - MIRANDA WARNINGS**

LASJRP: The Second Department holds that detectives did not need to re-administer Miranda warnings before questioning defendant about the instant offenses even though they arrived several hours into an ongoing interrogation about other crimes. (Supreme Ct, Queens Co)

Matter of Deyanira P. v Rodolfo P.-B., 185 AD3d 829**(2nd Dept 7/15/2020)****SUPPORT - SERVICE OF PAPERS**

LASJRP: The Second Department concludes that the family court erred in summarily rejecting the mother's objections to the Support Magistrate's order on the ground that she failed to properly serve the father.

The mother served her objections upon the father at an address in Brooklyn, which was the same address she listed for the father in her petition. While the mother was generally aware that the father represented to the court that his address was in Delaware, there was no evidence in the record that the address was ever disclosed to the mother. Moreover, following the mailing of the original summons to the father's Brooklyn address, he filed an Address Confidentiality Affidavit in which he failed to specify an agent for service, and there was no evidence

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that the mother received notice of an agent for service as required by FCA § 154-b(2)(c).

Under these circumstances, service upon the father at the address last known to the mother was proper. (Family Ct, Kings Co)

People ex rel. Rolls v Brann, 185 AD3d 836 (2nd Dept 7/15/2020)

PRELIMINARY HEARING / DATE

DETENTION/PRELIMINARY HEARINGS

LASJRP: The Second Department concludes that the People demonstrated good cause for the delay in conducting a preliminary hearing or obtaining an indictment, and notes that grand juries are scheduled to begin reconvening in Kings County on August 10, 2020, and that disposition of this felony complaint or a preliminary hearing should occur no later than August 17, 2020.

[*Ed. Note: Writ of habeas corpus denied.*]

People v Savillo, 185 AD3d 840 (2nd Dept 7/15/2020)

JUDGES - BIAS/INTERFERENCE AT TRIAL

LASJRP: The Second Department, while ordering a new trial due to errors in the court's charge on justification, directs that a different judge hear the case where the trial judge engaged in extensive questioning of witnesses, usurped the roles of the attorneys, elicited and assisted in developing facts damaging to the defense on direct examination of the People's witnesses, bolstered those witnesses' credibility, and generally created the impression that the judge was an advocate for the People. (Supreme Ct, Queens Co)

Matter of Miller v Annucci, 185 AD3d 932 (2nd Dept 7/22/2020)

A letter written by a person incarcerated in state prison, urging vendors who were excluded from a pilot program giving certain vendors exclusive rights to supply packages to people in prison to oppose the new policy by filing lawsuits related to one his mother was purportedly filing to overturn it, did not violate 7 NYCRR 270.2 [B] [4] [ii]. The letter did not solicit goods or services. Further, writing such letter "was insulated from discipline by Correction Law § 138, which provides that '[i]nmates shall not be disciplined for making written . . . requests involving a change of institutional conditions, policies, rules, regulations, or laws affecting an institution'"

[*Ed. Note: Leave to appeal was granted on 9/15/2020 (35 NY3d 1072).*]

Amira v Amira, 185 AD3d 996 (2nd Dept 7/29/2020)

VISITATION / SUPERVISION

ILSAPP: The children appealed from a County Supreme Court order, which awarded the mother alternate weekend parental access, to be supervised by the maternal grandparents. The Second Department reversed and remitted. Supreme Court did not ascertain whether the grandparents were able and willing to supervise the mother's expanded access and could ensure that the children would receive appropriate care during visits. The Children's Law Center represented the children. (Supreme Ct, Kings Co)

Matter of Ednie v Haniquet, 185 AD3d 1029 (2nd Dept 7/29/2020)

ANTI-VAXXER / NO DECISION POWER

ILSAPP: The child appealed from a Kings County Family Court custody order. The Second Department modified, providing that the father, not the mother, would have medical decision-making authority. The mother opposed vaccinating the child. Because the father supported vaccinations and that stance was safer for the child, the forensic evaluator recommended that he be awarded the medical-decision power. The Children's Law Center (Janet Neustaetter, of counsel) represented the child. (Family Ct, Kings Co)

Silverman v Silverman, 186 AD3d 123 (2nd Dept 7/29/2020)

AFC KNOWS BEST / REVERSAL

ILSAPP: The mother appealed from an award of residential custody to the father. The Second Department reversed. The AFC improperly substituted her judgment for her clients' wishes for custody to remain with the mother; failed to advocate on their behalf; and in fact vigorously opposed their position. In addition, the AFC did not take an active role by presenting evidence on behalf of her clients, which was particularly troubling in light of allegations of serious domestic violence by the father against the mother. At oral argument, the AFC stated that the children were not doing well, but she hoped they would improve. Nevertheless, she continued to argue in support of residential custody to the father, in opposition to the wishes of her clients, who were 15 and almost 13 at the time. The AFC utterly failed to fulfill her duty to zealously advocate the children's position. *See* 22 NYCRR 7.2 (d). Exceptions to that rule did not apply here. *See* Rule 7.2 (d) (3) (AFC may advocate position contrary to child's wishes when convinced that child lacks capacity for knowing, voluntary, considered judgment; or that following child's wishes was likely to result in substantial risk of imminent, serious harm to child). Thus, it was improper

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for the AFC to substitute her judgment, and the children did not receive meaningful assistance. Further, Supreme Court failed to consider the preferences of the children, despite their age, and to order an updated forensic evaluation. The matter was remitted for appointment of a new AFC and a de novo hearing. Eyal Talassazan represented the appellant. (Supreme 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.

NOTE: Due to pandemic-related delays, the *REPORT* has fallen behind in summaries of cases from the Appellate Divisions; what appear here are from a year ago. To provide timely information to our readers going forward, the next issue will contain summaries beginning in mid-2021. On-line sources of information about cases not summarized in the *REPORT* may be found at p. 47.

**People ex rel. Carroll v Keyser, 184 AD3d 189
(3rd Dept 6/4/2020)**

HABEAS RELIEF / REVERSED

ILSAPP¹: The respondents appealed from an order of Sullivan County Supreme Court, which granted the petitioner's CPLR Article 70 habeas corpus application on behalf of inmate Jalil Muntaqim, who was discharged to a private residence to serve his sentence under DOCCS jurisdiction. The Third Department reversed. The inmate was a 68-year-old black inmate at Sullivan Correctional Facility, where he was serving concurrent terms of 25 years to life following his 1975 murder convictions. The petitioner alleged that Muntaqim's advanced age, race, and medical conditions left him in significant danger, due to Covid-19, and violated federal and state constitutional proscriptions against cruel and unusual punishment. During the pendency of this appeal, Muntaqim became infected and was currently hospitalized; but the appellate court found that the appeal was not moot or that the exception to the mootness doctrine applied. The petitioner failed to meet the ultimate burden of showing that Muntaqim's detention was illegal. While the petitioner

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

arguably established that facility conditions posed a substantial risk of serious harm, there was no showing of deliberate indifference by prison officials, who detailed many steps taken to prevent the spread of the virus. One could infer from actions taken subsequent to the challenged order that DOCCS had failed to initially grasp the severity of the COVID-19 threat and was now adapting to the situation. But deliberate indifference meant more than being caught flat footed. Failures to promptly alleviate significant risks—while no cause for commendation—could not be equated with unconstitutional punishment. The petitioner further alleged that, although the sentence was lawful when imposed, it became grossly excessive due to the risks created by the pandemic. The reviewing court found it doubtful that a sentence proper that was at the time of imposition could become grossly disproportionate as a result of changed conditions, and opined that such a challenge should be raised in a post-conviction motion to the sentencing court. In any event, Muntaqim's punishment was not so grossly disproportionate to his offense as to amount to cruel and unusual punishment. (Supreme Ct, Sullivan Co)

People v McCray, 184 AD3d 912 (3rd Dept 6/4/2020)

AP[P]ELLATE DELAY / DUE PROCESS

ILSAPP: The defendant appealed from a judgment of Essex County Supreme Court, which revoked his probation and imposed a sentence of imprisonment. The Third Department affirmed. The defendant argued that he was deprived of his right to due process by 14 months of stenographic delays. Further, because his release from custody mooted a challenge to the resentencing, the appellate court should vacate with prejudice the finding that he violated parole, the defendant urged. The reviewing court held that the defendant had not established that the unfortunate appellate delay resulted in prejudice so as to warrant the remedy sought. He was not entitled to leniency just because he admitted to violating probation; and it was within the trial court's discretion to impose the maximum resentencing. (Supreme Ct, Essex Co)

**Matter of Terry PP. v Domiyon PP., 184 AD3d 914
(3rd Dept 6/4/2020)**

**CUSTODY - GRANDPARENTS/
EXTRAORDINARY CIRCUMSTANCES
- SEPARATION OF SIBLINGS**

LASJRP²: In the maternal grandmother's appeal, the Third Department upholds an order awarding the paternal grandmother sole legal and physical custody of the

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

Third Department *continued*

child, with the parents having indicia of joint custody, and dismissed the maternal grandmother's petition.

The family court erred in determining that the maternal grandmother failed to show extraordinary circumstances given the parents' consent to a finding of neglect, their incarceration and drug use, and the fact that the child tested positive for drugs when he was born.

Although the child will be separated from his brother and half-brother, who reside with the maternal grandmother, the child has never resided with either sibling, and the record indicates that both the paternal grandmother and the maternal grandmother would foster contact between the siblings. (Family Ct, Schenectady Co)

Matter of James TT. v Shermaquae UU.,
184 AD3d 975 (3rd Dept 6/18/2020)

CUSTODY - RELOCATION

LASJRP: The Third Department upholds an order that granted the mother's application to relocate with the child to North Carolina, noting, inter alia, that the mother testified that she was terminated from her hourly employment because she had to frequently miss work when the child was sick and could not attend day care, and was unable to pay her living expenses and was on the verge of being evicted from her one-bedroom apartment; that the mother stated that she could not rely on the father to provide backup child care, and did not have family in the area who could help; that the mother testified that, in North Carolina, she would have greater support from her family, and had secured salaried employment and could afford a two-bedroom apartment; and that the mother repeatedly testified as to her intention and willingness to foster a meaningful relationship between the father and the child, and the child and her half-sister, through regular periods of parenting time and liberal phone and video contact, and offered to assist with transporting the child to the father and defray transportation costs incurred by the father. (Family Ct, Albany Co)

People v Kaminski, 184 AD3d 951 (3rd Dept 6/18/2020)

SORA MOD / PROCEDURAL ERROR

ILSAPP: The defendant appealed from a Chemung County Court order, denying his petition to reduce his sex offender risk level. The Third Department reversed. The SORA court did not consider an updated recommendation from the Board of Examiners of Sex Offenders. *See* Correction Law § 168-o (2). John Cirando represented the appellant. (County Ct, Chemung Co)

Matter of Nicole R. v Richard S., 184 AD3d 978
(3rd Dept 6/18/2020)

CUSTODY/VISITATION - RIGHT TO COUNSEL/CHILD ETHICS - ADVOCATE-WITNESS RULE

LASJRP: In this visitation proceeding, the attorney for the child stated in a summation letter to the family court that, in interviews, the child did not "express any fear of [the] father" and "indicated a willingness to visit with [the] father." In its decision, the court directly referenced this letter, and used this language within its findings.

The Third Department rejects the mother's contention that the court improperly relied on the position of the attorney for the children, as set forth in his summation letter. The court's thorough written decision reviewed the evidence presented at the fact-finding hearing, and did not improperly adopt the AFC's stated position. (Family Ct, Ulster Co)

Matter of Paul JJ. v Heather JJ., 184 AD3d 956
(3rd Dept 6/18/2020)

CUSTODY/VISITATION - JURISDICTION/ FOREIGN JUDGMENTS - ENFORCEMENT AND MODIFICATION

LASJRP: The Third Department holds that under the UCCJEA, New York, which has jurisdiction, is required to recognize and enforce a 2007 Connecticut judgment where it included a delegation of authority that was apparently proper in Connecticut but would not be proper if ordered by a New York court.

When courts of this state uphold the validity of a foreign divorce decree, they must recognize all provisions of the decree except in the rare instance where a provision violates the public policy of this state. Although courts in our state cannot delegate authority to decide whether, or under what terms, a noncustodial parent may visit with his or her child, New York does not deem an order containing such a delegation to be inherently vicious, wicked, shocking to our moral sense or obnoxious to this state's public policy.

Although the UCCJEA provides jurisdiction for New York courts to modify an out-of-state order, it does not prescribe the standard to be used. A court must look to the substantive law of New York, and thus, in this case, the father was required to demonstrate a change in circumstances. The family court properly found that the father failed to do so. After the child moved from Connecticut to New York, she was approximately the same distance from the father in Virginia and had the same amount of contact with him that she had before the move.

The family court did not violate its fiduciary obligation under Domestic Relations Law § 240(1)(a). Although the father was incarcerated for failing to pay support and has not paid any support since 2012, there is no indication

Third Department *continued*

in the record that the child's needs are not being met. (Family Ct, Washington Co)

Matter of Alan VV, 184 AD3d 1031**(3rd Dept 6/25/2020)****TERMINATION OF PARENTAL RIGHTS****- APPEAL/NOTICE OF APPEAL**

LASJRP: Respondent contends that the affidavit submitted with her notice of appeal demonstrates that she intended to appeal a November 2016 order terminating her parental rights, rather than an April 5, 2018 permanency hearing order, and asks the Court to "construe [her appeal] as such, and deem it timely filed."

The Third Department dismisses the appeal. The order terminating respondent's parental rights was entered and mailed to respondent in November 2016, 18 months before her May 2018 notice of appeal. Thus, even if the Court were to construe the notice of appeal as respondent requests, it was not filed and served within 35 days after the order was mailed to respondent, and thus was untimely and the Court lacks jurisdiction to hear the appeal.

Although the Court may treat a notice of appeal which contains an inaccurate description of the judgment or order appealed from as valid, it may not amend a notice of appeal so as to insert therein an order from which no appeal has in fact ever been taken. (Family Ct, St. Lawrence Co)

People v Anderson, 184 AD3d 1020**(3rd Dept 6/25/2020)****NEOPHYTE / FLAWED APPEAL WAIVER**

ILSAPP: The defendant appealed from a Schenectady County Court judgment, convicting him of attempted 2nd degree murder. The Third Department affirmed, but found unenforceable the waiver of the right to appeal. The plea court advised the defendant that the appellate rights being relinquished were listed on the written waiver he signed. That document contained overbroad language, stating that the defendant was giving up all appeal rights, including any collateral attack on the conviction. There was no indication that the defendant—a first-time felony offender—understood that he retained the right to some appellate review. (County Ct, Schenectady Co)

People v Bush, 184 AD3d 1003 (3rd Dept 6/25/2020)**BRADY MATERIAL - WITNESS'S PRIOR CONVICTION**

LASJRP: The Third Department finds no Brady violation where the People failed to timely disclose that a wit-

ness had a violation for driving while ability impaired. This traffic infraction is not considered a criminal conviction for impeachment purposes. (County Ct, Franklin Co)

Matter of William MM. v Sullivan, 184 AD3d 1035**(3rd Dept 6/25/2020)**

The petitioner's argument, in this proceeding seeking termination of his strict and intensive supervision and treatment (SIST), that Metal Hygiene Law 10.11(f) allows him to file a termination petition two years after the SIST regimen began, regardless of his incarceration during that period, is rejected. To be affected by a SIST regimen, a person must be living in the community under conditions set by the Department of Corrections and Community Supervision and the court. Legislative history confirms a distinction between confinement and a SIST regimen. (Supreme Ct, St. Lawrence Co)

Matter of Jill Q. v James R., 185 AD3d 1106**(3rd Dept 7/2/2020)****CUSTODY / CHILD'S DISTRESS**

ILSAPP: The parents filed cross appeals from a custody order of Broome County Family Court. The Third Department reversed as to the father's parenting time. At age 8, the child met the father for the first time. Months later, based on the child's distress, the mother sought to modify the custody order, and the father filed a competing petition. Hearing testimony showed that the child's mental health had declined after visits with the father. The appellate court found that Family Court erred in precluding a mental health counselor from testifying as to statements made by the child that were germane to diagnosis and treatment. It was also error to deny an AFC request to adjourn the fact-finding hearing to present testimony from a mental health professional who evaluated the child during the pendency of the hearing. Such proof was critical. The matter was remitted for a new hearing before a new judge. Michelle Rosien represented the mother, and Allen Stone represented the child. (Family Ct, Broome Co)

People v Mathis, 185 AD3d 1094 (3rd Dept 7/2/2020)**AMENDMENT OF INDICTMENT / IMPROPER**

ILSAPP: The defendant appealed from a judgment of Columbia County Court, convicting him of 2nd degree assault. The Third Department reversed. As a result of an amendment of the indictment, the defendant was charged with a different crime than the one voted on by the grand jury. The People did not submit grand jury minutes to support the amendment. The record established only that the grand jury indicted the defendant for violating Penal Law § 120.05 (7), not subdivision (3), as was charged in the amended instrument. Thus, the defendant was deprived

Third Department *continued*

of his constitutional right to be prosecuted only by an indictment filed by a grand jury. *See* NY Const, Art. I, § 6; CPL 210.05. Such a claim was not waived by the guilty plea and could be raised for the first time on appeal. Marlene Tuczinski represented the appellant. (County Ct, Columbia Co)

People v Oliver, 185 AD3d 1099 (3rd Dept 7/2/2020)

GUILTY PLEA / DEFECTIVE

ILSAPP: The Third Department reversed. The defendant's guilty plea was not knowing, voluntary, and intelligent; review of the issue was not precluded by the appeal waiver; and it was preserved by a motion to withdraw the plea. County Court did not advise the defendant that he was giving up the privilege against self-incrimination and did not ascertain whether he had conferred with counsel regarding the constitutional rights waived. The Rural Law Center of NY (Kelly Egan, of counsel) represented the appellant. (County Ct, Fulton Co)

People v Pizarro, 185 AD3d 1092 (3rd Dept 7/2/2020)

GUILTY PLEA / BELATED DISCOVERY

ILSAPP: The defendant appealed from a January 2018 judgment of Warren County Court, convicting him of attempted 2nd degree burglary. The Third Department affirmed. Days after the defendant pleaded guilty, the People provided a forensic report revealing that he was excluded as a donor of DNA found inside a window of the burglarized residence and that a DNA profile could not be detected from prints outside the window. The appellate court declined to retroactively apply discovery reform provisions and find that disclosure of the DNA report was untimely. *See* CPL 245.25 (2). The report did not negate guilt; and the defendant was aware of the pending report when he pleaded guilty. Assuming, without deciding, that the law should be retroactively applied, the alleged violation did not materially affect the defendant's decision to plead guilty. (County Ct, Warren Co)

Burnett v Andrews-Dyke, 185 AD3d 1196 (3rd Dept 7/9/2020)

SUPPORT - VIOLATIONS/HEARING

LASJRP: The Third Department first concludes that although FCA § 433 does not expressly require that telephonic testimony be sworn, it is axiomatic that unsworn testimony, except in certain instances not applicable here, is generally inadmissible.

Here, the family court's order granting the mother's application to appear telephonically did not condition her

appearance upon testifying from a location where a notary would be available to swear her in. At the hearing, the court permitted the mother, who was facing up to six months' incarceration for a failure to pay child support, to be questioned without indicating that her answers would later be considered incompetent based upon the lack of an oath.

The family court then erred when, in its written decision, it found fault with the unsworn testimony methodology it had permitted to occur. The correct course of action would have been for the court to explain up front that, if the mother wished to testify, she would have to do so under oath, and then administer the oath itself if the mother had not made other suitable arrangements. (Family Ct, Ulster Co)

People v Chambers, 185 AD3d 1141 (3rd Dept 7/9/2020)

SENTENCES / ILLEGAL

ILSAPP: The defendant appealed from a judgment of Albany County Court, upon a verdict, convicting him of multiple crimes, including two counts of 2nd degree criminal sale of a controlled substance. The Third Department modified the judgment. The sentences imposed upon the above-named counts—15 years in prison plus five years' post-release supervision—exceeded the statutory range and were thus illegal. *See* Penal Law § 70.71 (2) (b) (ii). The sentences were vacated and the matter remitted for resentencing. Henry Meier III represented the appellant. (County Ct, Albany Co)

Deborah H. v Alana AA., 185 AD3d 1174 (3rd Dept 7/9/2020)

GRANDMOTHER / VISITATION

ILSAPP: The mother appealed from an order of Ulster County Family Court, which granted the maternal grandmother's application for visitation with the subject child. The Third Department affirmed. The parents stipulated that the grandmother had standing, which was also fully supported by the record. Visitation was in the best interests of the child, age seven, who had lived with the grandparents for nearly half her life. Testimony established that the child and grandmother enjoyed a loving relationship, the grandmother had nurturing skills, and the mother's objections were unfounded. The visitation schedule, calling for weekday overnight visits and one weekend visit each month, properly provided the child with regular contact with the grandmother. (Family Ct, Ulster Co)

Donna E. v Michael F., 185 A.D.3d 1179 (3rd Dept 7/9/2020)

VISITATION - DELEGATION OF COURT'S AUTHORITY

Third Department *continued*

LASJRP: The Third Department finds error in the trial court's order granting the husband the right to exercise parenting time with the child at the end of the school day if he is available and the wife cannot pick up the child.

The parties were unable to agree on how the child should spend time with each parent, and this provision would necessitate much communication and cooperation between them. The provision also delegates to the husband the authority to determine parenting time, which the court could not do. (Supreme Ct, Albany Co)

People v Jones, 185 AD3d 1159 (3rd Dept 7/9/2020)**INVENTORY SEARCH / IMPROPER****SEARCH AND SEIZURE - AUTO SEARCH/INVENTORY**

LASJRP: The Third Department orders suppression where, although the police vehicle inventory policy was reasonable, the officer did not comply fully with the inventory list requirement.

A dissenting judge asserts that the policy does not require the police to literally recover and inventory every single item within a vehicle, including those without value, prior to the vehicle being towed. (Supreme Ct, Albany Co)

**Kimberly H. v Daniel I., 185 AD3d 1170
(3rd Dept 7/9/2020)****CUSTODY / CLAIM STATED**

ILSAPP: The mother appealed from an order of Saratoga County Family Court, which dismissed her pro se custody modification petition, finding that she failed to state a cause of action. The Third Department reversed. The mother alleged that the father took the child to visit an inmate convicted of murder, causing the child significant distress; that he refused to allow requested additional parenting time, as contemplated by a 2018 order on consent; and that he threatened to take away the mother's court-ordered parenting time. In addition, the mother averred that she had completed therapeutic counseling, was continuing with further therapy, and was a fit parent. These allegations were sufficient to warrant an evidentiary hearing. The matter was remitted. The Rural Law Center of NY (Keith Schockmel, of counsel) represented the appellant. (Family Ct, Saratoga Co)

People v Perez, 185 AD3d 1156 (3rd Dept 7/9/2020)**CPL 440.10 MOTION / HEARING NEEDED**

ILSAPP: The defendant appealed from an order of Schenectady County Court, which summarily denied his CPL 440.10 motion to vacate a judgment convicting him of

attempted 3rd degree criminal sale of a controlled substance. The Third Department reversed. The defendant raised the same issue regarding ineffective assistance of counsel that he had in a prior 440 motion, except that the instant motion contained an affidavit from his plea counsel. The attorney admitted that he did not do an investigation, seek discovery, or attack arguably fatal deficiencies in the People's case. Further, counsel had erroneously advised the defendant—whom he knew was an immigrant from the Dominican Republic and a lawful permanent resident—that he would not be deported as a result of a guilty plea. The defendant asserted that, but for the IAC, he would not have pleaded guilty. A hearing was needed; the matter was remitted. Derek Andrews represented the appellant. (County Ct, Schenectady Co)

**Matter of Christina R. v James Q., 185 AD3d 1240
(3rd Dept 7/16/2020)****FAMILY OFFENSE / NO INTIMATE RELATIONSHIP**

ILSAPP: The mother appealed from an order of Tompkins County Family Court, which granted the motion by the respondent, the child's paternal uncle, seeking to dismiss her family offense petition against him. The Third Department affirmed. The parties were connected only by the child, and their interaction was limited to family events during the mother's one-year marriage to the respondent's brother. Thus, Family Court properly concluded that the parties did not have an intimate relationship within the meaning of Family Ct Act § 812 (1) (e). (Family Ct, Tompkins Co)

**Matter of Samah DD. v Mohammed EE., 185 AD3d 1241
(3rd Dept 7/16/2020)****FAMILY OFFENSE / OUT OF STATE**

ILSAPP: The father appealed from an order of Albany County Family Court regarding custody and related matters. The Third Department affirmed. The appellate court rejected the father's contention that Family Court lacked jurisdiction over the mother's family offense petitions because the abuse occurred largely in Arizona. Family Court's subject matter jurisdiction over family offenses was not limited by geography; the court could consider events that occurred outside its jurisdiction, including incidents that were not relatively contemporaneous with the date of the petition. (Family Ct, Albany Co)

**Matter of Sandra DD., 185 AD3d 1259
(3rd Dept 7/16/2020)****PERMANENCY HEARINGS****- AGE-APPROPRIATE CONSULTATION**

LASJRP: The Third Department finds error where the family court failed to conduct an age-appropriate consul-

Third Department *continued*

tation with the child at the permanency hearing. Although the statute does not require a young child to be personally produced in court, the family court must find some age-appropriate method of consultation with the child.

Here, the attorney for the child informed the court of the reasons why it was inappropriate for the child to be present, and offered his opinion that remaining in foster care was best for the child, but did not articulate the child's wishes to the court. (Family Ct, Delaware Co)

People v Smith, 185 AD3d 1203 (3rd Dept 7/16/2020)

SEARCH AND SEIZURE - REASONABLE SUSPICION/PROBABLE CAUSE

LASJRP: The Third Department finds lawful the stop of defendant where, although there were inconsistencies between the officer's observations of defendant and the descriptions of the male suspect's race and skin tone, the information about the male suspect's height and build, the detailed description of his clothing, and the description of the vehicle in which he had left the scene were adequate to provide reasonable suspicion that defendant was one of the individuals involved in the robbery.

Given this information, there was probable cause to arrest defendant when a store clerk positively identified the female suspect who was with defendant, and stated that defendant's clothes and build were "very similar" to those worn by one of the suspects but that she was not "a hundred percent sure" because the suspect's face had been covered. (County Ct, Rensselaer Co)

People v Burt, 185 AD3d 1301 (3rd Dept 7/23/2020)

ANDERS BRIEF / NEW COUNSEL

ILSAPP: The defendant appealed from a judgment of Schenectady County Court, convicting him of attempted 3rd degree criminal sale of a controlled substance. Appellate counsel filed an *Anders* brief. The Third Department found at least one issue of arguable merit regarding the validity of the appeal waiver, which might impact other issues that could be raised, such as the severity of the sentence. Thus, the appellate court assigned new counsel. (County Ct, Schenectady Co)

People v Persen, 185 AD3d 1288 (3rd Dept 7/23/2020)

SENTENCE REDUCED / MINIMAL HISTORY, STEADY JOBS SEARCH AND SEIZURE - PROBABLE CAUSE/ DISORDERLY CONDUCT

RIGHT TO COUNSEL - EFFECTIVE ASSISTANCE

LASJRP: The Third Department suppresses a knife recovered from defendant, concluding that there was no

probable cause to arrest defendant for disorderly conduct where the officer testified that he heard defendant yelling and swearing when he approached defendant and advised him to calm down; that he and defendant "had a short exchange," during which he "reached out [and] stopped" defendant from walking toward his son, who was being treated by emergency responders; that he "warned [defendant] about his language and yelling" and implored him to "just let EMS tend to his son," as further distraction "would just make matters worse"; that defendant started walking toward his own car, but turned around, walked past the officer and, after being directed to stop, "took three more steps"; that defendant "turned around, clenched his fist, took a few steps towards [the officer] and told me ... he was going to see his son"; and that he then grabbed defendant and, "[d]ue to his aggressive nature[,] ... escorted him to the ground" and placed him under arrest for disorderly conduct.

This evidence fell far short of establishing the public harm element. Defendant was visibly upset following the stabbing of his son, was intent on being with his son and directed the allegedly disruptive statements and conduct primarily at the officer, who was trained to defuse situations involving angry or emotionally distraught persons. There was no evidence that the situation extended beyond a tense exchange between defendant and the officer, or any proof regarding the number of people in the vicinity or whether any were drawn to the incident.

The Court also finds that defendant received ineffective assistance of counsel at the suppression hearing. Counsel asked a total of four questions, waived closing argument, and declined the court's offer to accept a post-hearing memorandum. The only argument defense counsel made was included in the motion papers and it was premised upon factually inaccurate information, and defendant did not seek to suppress his statements as the product of an illegal arrest. (County Ct, Fulton Co)

People v Rodriguez, 185 AD3d 1296 (3rd Dept 7/23/2020)

RESTITUTION / VACATED

ILSAPP: The defendant appealed from a judgment of Schenectady County Supreme Court, convicting him of attempted 3rd degree criminal sale of a controlled substance. Under the terms of the plea agreement, the defendant was required to serve time and to pay restitution. The appeal waiver was invalid. The plea court did not ensure that the defendant appreciated the rights he was relinquishing or understood the consequences of doing so. The written waiver stated that he was foreclosed from pursuing collateral remedies. However, the sentence was not harsh and excessive. During sentencing, Supreme Court did not mention the amount of restitution, and in its order, the court committed a clerical error as to the

Third Department *continued*

amount. To correct the error, and because the court failed to set forth the time and manner for payment, the restitution order was vacated and the matter remitted for a new order. Martin McGuinness represented the appellant. (Supreme Ct, Schenectady Co)

People v Sanders, 185 AD3d 1280 (3rd Dept 7/23/2020)**SEARCH AND SEIZURE - COMMON LAW RIGHT
TO INQUIRE**

LASJRP: Prior to stopping defendant's vehicle, the officer had noticed tinted windows and, when he activated his emergency lights, defendant "rapidly accelerated" and "squared the block." Defendant cut through a parking lot against one-way markers and then proceeded to "slow roll" for a block before actually stopping. When the officer approached defendant and questioned him, defendant was contentious and evasive in his responses.

The Third Department agrees with the hearing court's conclusion that the officer possessed a founded suspicion of criminal activity that justified his request to search defendant's vehicle, and, when defendant refused, allowed him to employ his K-9 partner. (County Ct, Broome Co)

People v Gravell, 185 AD3d 1354 (3rd Dept 7/30/2020)**RESTITUTION / VACATED**

ILSAPP: The defendant appealed from a judgment of Schenectady County Supreme Court, convicting him of 2nd degree burglary. The Third Department modified by vacating the restitution order. Under the plea deal, the defendant was to pay restitution in an amount not to exceed \$100. However, at sentencing, the lower court directed restitution of \$169. The defendant failed to preserve his claim by requesting a hearing or objecting at sentencing to the restitution amount; but the appellate court took corrective action in the interest of justice. The matter was remitted to give the defendant the opportunity to accept the sentence with the enhanced restitution award or to withdraw his guilty plea. Supreme Court failed to set forth the time and manner of the payment of restitution, and that omission also had to be addressed. Mitchell Kessler represented the appellant. (Supreme Ct, Schenectady Co)

People v Tomko, 185 AD3d 1356 (3rd Dept 7/30/2020)**WAIVER OF APPEAL / FIRST FELONY**

ILSAPP: The defendant appealed from a Warren County Court judgment, convicting him of 1st degree robbery and 2nd degree burglary. The Third Department

affirmed, but found that the waiver of the right to appeal was not knowing, intelligent, and voluntary. The plea court's brief colloquy with the defendant—a first-time offender—failed to ensure that she understood the terms and/or consequences of the appeal waiver. (County Ct, Warren 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.

NOTE: Due to pandemic-related delays, the *REPORT* has fallen behind in summaries of cases from the Appellate Divisions; what appear here are from a year ago. To provide timely information to our readers going forward, the next issue will contain summaries beginning in mid-2021. On-line sources of information about cases not summarized in the *REPORT* may be found at p. 47.

People v Taglianetti, 183 AD3d 1233 (4th Dept 5/1/2020)**EED CHARGE / HARMLESS ERROR**

ILSAPP¹: The defendant appealed from a Chautauqua County Court judgment, which convicted him of 2nd degree murder upon a jury verdict. The Fourth Department affirmed. The trial court erred in deciding, prior to trial, not to charge the jury on the affirmative defense of extreme emotional disturbance. Based solely on the People's proof, a defendant may be entitled to such an instruction. However, the error was harmless. The defendant was not entitled to such a charge where, viewed in the light most favorable to him, the evidence was not sufficient for the jury to find by a preponderance of the evidence that the elements of EED were satisfied. (County Ct, Chautauqua Co)

People v Allen, 184 AD3d 1076 (4th Dept 6/12/2020)**RIGHT TO COUNSEL - EFFECTIVE ASSISTANCE
SEARCH AND SEIZURE - AUTO STOP**

LASJRP²: The Fourth Department finds a violation of defendant's right to the effective assistance of counsel where counsel failed to argue at the suppression hearing

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.

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that the Vehicle and Traffic Law provision that prohibits unsafe backing did not apply to a housing complex's parking area, which is not a "parking lot" as defined by VTL § 129-b.

It would not be an objectively reasonable mistake of law for the officers to conclude that the initial vehicle stop was justified. (Supreme Ct, Onondaga Co)

People v Borcyk, 184 AD3d 1183 (4th Dept 6/12/2020)

RIGHT TO COUNSEL - EFFECTIVE ASSISTANCE

LASJRP: In a 3-2 decision, the Fourth Department grants defendant's motion to vacate his conviction where defense counsel spoke, prior to trial, with a witness who represented that she would testify that her former boyfriend had admitted to her that he killed the victim; counsel informed the court that he had subpoenaed the witness and would pursue the testimony only if the witness appeared as directed; and, when the witness did not appear, counsel inexplicably failed to pursue available means for securing her attendance.

Although the dissent focuses on the determination of the court below that the witness was not credible, an assessment of credibility after a lengthy passage of time does not alter the fact that counsel, at the time of trial, believed the witness was credible enough to testify.

The dissenting judges also note that there was other available evidence that supported the defense theory. (County Ct, Monroe Co)

People v Boyd, 184 AD3d 1151(4th Dept 6/12/2020)

Because the defendant failed at step one of the Batson inquiry regarding a Black prospective juror to establish the required prima facie case of racial discrimination, the erroneous reasoning of the trial court, that a discriminatory pattern of strikes had to be shown, does not warrant reversal for denial of the Batson application without further inquiry.

The court erred in refusing to instruct the jury as to cross-racial identification. The error was harmless.

Dissent: The court's ruling was based on the lack of a showing of a discriminatory pattern. The record contains no support for the majority's suggestion that the court found a failure to make a prima facie case. (Supreme Ct, Monroe Co)

People v Carlson, 184 AD3d 1139 (4th Dept 6/12/2020)

PROSECUTOR / ADMONISHED

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

rape and other sexual offenses. The Fourth Department affirmed, but disapproved of a closing comment by the People, characterizing defense counsel's summation as evincing "a Brock Turner mentality"—thus inflaming the passions of the jury by referring to a sexual assault case of nationwide notoriety that involved allegations similar to those made here. Viewed in the context of the entire summation, however, that comment was not so egregious as to prevent a fair trial. Nevertheless, the appellate court reminded the People that a defendant is entitled to a full measure of fairness; and the prosecutor must search for the truth, ensure that justice is done, and safeguard the integrity and fairness of criminal proceedings. (County Ct, Cattaraugus Co)

Matter of Coia v Saavedra, 184 AD3d 1127 (4th Dept 6/12/2020)

CUSTODY - JURISDICTION - RIGHT TO COUNSEL/CHILD

LASJRP: The family court granted respondent mother's motion to dismiss the father's petitions for, inter alia, modification of a prior order of custody on the ground that New York is an inconvenient forum under Domestic Relations Law § 76-f. The father filed the petitions after the mother moved to California with the parties' five-year-old child without informing the father, who was incarcerated at the time.

The Third Department concludes that California is an appropriate forum and New York is an inconvenient forum. The father filed the modification petition just two weeks after the mother relocated to California, and thus the additional time it took to dispose of this proceeding does not militate in favor of finding that New York is an inconvenient forum.

However, although evidence of the father's criminal history is available in New York, and the court here is familiar with the parties and the allegations of domestic violence, the circumstances have changed. Evidence that the father abused the mother in front of the child, that an order of protection had previously been entered against the father in New York for domestic violence, and that the mother moved to California to avoid any further abuse, weighs heavily in favor of California. Although California is a great distance from New York, the greater financial burden would be placed on the mother. The majority of the relevant evidence is located in California, and it does not appear that the child has any connection with New York other than the father and a paternal grandmother.

The attorney for the child in New York was having trouble providing effective representation inasmuch as it was difficult to communicate with the child by telephone.

The family court erred in dismissing the petitions instead of staying the proceedings pending the com-

Fourth Department *continued*

mencement of proceedings in California. (Family Ct, Monroe Co)

People v Garno, 184 AD3d 1106 (4th Dept 6/12/2020)**PERSISTENT FELON / TOO HARSH**

ILSAPP: The defendant appealed from a Yates County Court judgment, convicting him 3rd degree arson, menacing a police or peace officer (four counts), 2nd degree criminal mischief, and 2nd degree reckless endangerment. The Fourth Department vacated the persistent felony offender adjudication and reduced the sentence. Twenty years to life was too harsh in light of the defendant's record of only two prior felonies (in 1981 and 2002) and the pretrial plea offer of 6 to 9 years. J. Scott Porter represented the appellant. (County Ct, Yates Co)

People v Holz, 184 AD3d 1156 (4th Dept 6/12/2020)

On remittitur from the Court of Appeals, which found that the Appellate Division may review denial of a motion to suppress where the contested evidence pertained to a count satisfied by the plea and contained in the same accusatory instrument as the count pleaded to, denial of suppression is found to have been error. (Supreme Ct, Monroe Co)

People v Hyde, 184 AD3d 1121 (4th Dept 6/12/2020)**POST-RELEASE / CONCURRENT**

ILSAPP: The defendant appealed from a Livingston County Court judgment, convicting him of reckless assault of a child and 2nd degree assault. The Fourth Department ordered that the periods of post-release supervision run would concurrently. The consecutive periods imposed were illegal. See Penal Law § 70.45 (5) (c). The defendant failed to preserve the issue, but the appellate court could not allow an illegal sentence to stand. Steven Sessler represented the appellant. (County Ct, Livingston Co)

Matter of Najuan W., 184 AD3d 1111 (4th Dept 6/12/2020)**TERMINATION OF PARENTAL RIGHTS****- ABANDONMENT**

LASJRP: In this termination of parental rights proceeding, the Fourth Department upholds a finding of abandonment, concluding that the father failed to prove circumstances that prevented contact with the child or agency or that the agency discouraged such contact.

Although the mother removed the child from the father's care and took the child to an undisclosed location in violation of their custody arrangement, the father did not report that violation, make any attempt to locate the child, or attempt to file a modification petition after his unsuccessful filing in Pennsylvania about six years after the mother left with the child.

Even assuming, arguendo, that the agency was required to do more than serve the father by publication with the neglect petition that resulted in the child's placement in foster care, the father's lack of awareness of that petition was not the reason the father failed to communicate with the child. even after the father was served with the termination petition, he failed to contact the child even though the agency told him he could write letters to the child. (Family Ct, Jefferson Co)

People v Ramos, 184 AD3d 1203 (4th Dept 6/12/2020)

The case is held, decision reserved, and matter remitted to afford the defendant "a reasonable opportunity to present contentions in support of his motion to withdraw his plea" where it is unclear from the record whether the grounds were ineffective assistance of counsel or other. The defendant sought at sentencing to withdraw the plea because he "had done his own legal research and determined that the appeal waiver encompassed issues that he wanted to raise on appeal"; defense counsel, who "asked to be relieved due to an unspecified conflict of interest" and, in hypothetical terms, "argued that withdrawal of the plea may be justified if defendant did not receive meaningful representation"; and the court refused, upon counsel's objection to an inquiry, to allow the defendant to explain. (Supreme Ct, Erie Co)

Dissent: The defendant was given ample opportunity but failed to present grounds for his motion. Counsel did not take a position adverse to the client's.

Ritchie v Ritchie, 184 AD3d 1113 (4th Dept 6/12/2020)**SUA SPONTE RELIEF / IMPROPER**

ILSAPP: Upon the mother's appeal from an order of Monroe County Supreme Court, the Fourth Department modified and remitted. After the mother initiated a Family Court Act Article 8 seeking an order of protection, the father had the matter removed to Supreme Court and sought to modify custody. Supreme Court awarded him sole custody for 60 days with limited visitation to the mother. Sua sponte, the trial court also ordered the mother to pay the father's counsel fees and a fine for perjury and prohibited the older child from using a cell phone or electronic devices doing extracurricular activities without the father's consent. The order was stayed in part pending appeal. Supreme Court erred in so many ways. The father did not even allege a change in circumstances, and the

Fourth Department *continued*

trial court did not consider best interests, so the custody/visitation order was reversed. Moreover, there was no legal basis for the devices/activities fiat; the fine was clearly improper; and remittal was needed as to counsel fees. Gary Muldoon represented the mother. (Supreme Ct, Monroe Co)

People v Simmons, 184 AD3d 326 (4th Dept 6/12/2020)

PROMOTING PRISON CONTRABAND

LASJRP: The Fourth Department reduces the conviction of promoting prison contraband in the first degree to promoting prison contraband in the second degree, concluding that the only evidence of the dangerousness of the cocaine is the testimony of a correction officer that “[d]rugs in the facility can cause overdoses, fights and trips to the hospital that are unnecessary.”

Although the dissent suggests that cocaine is classified as a narcotic because it is inherently dangerous, and cocaine may be unhealthy, it is classified by law as a narcotic for economic reasons, not because of any specific danger to users. “Americans have all kinds of ideas about what certain drugs are and what those drugs do. Those ideas are informed by the news, television, Hollywood films, personal experience, politics, parental advice, and the anecdotes of friends. We must be careful not to leave determinations of dangerousness to the preconceptions of the fact-finder.”

Although the dissent notes that correction officers were concerned that defendant might swallow the cocaine, the People offered no evidence of the quantity of cocaine found on defendant’s person, much less the effect that cocaine would have on defendant’s health.

Finally, since anyone caught possessing cocaine in prison is already subject to criminal liability and rather severe penalties for possession, a charge of promoting prison contraband in the first degree under those circumstances is largely superfluous.

Two concurring judges “do not address or rely on a distinction between narcotic and non-narcotic controlled substances or the characteristics or dangerousness of cocaine generally; we rely instead on the insufficiency of the People’s proof of dangerousness in this specific case.” (County Ct, Jefferson Co)

People v Thomas, 184 AD3d 1118 (4th Dept 6/12/2020)

SHOOTER / SPECULATION

ILSAPP: The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of 1st degree reckless endangerment, menacing a police officer or peace officer, and another crime. The Fourth Depart-

ment held that the verdict as to the above-named counts was against the weight of evidence. At trial, the People’s evidence consisted of one officer’s testimony that, while pursuing the defendant on foot, he heard a gunshot from about 10’ feet away, and a second officer’s testimony that he heard a shot from his northwest and believed that the defendant had fired at the officers. Only sheer speculation could have led to the verdict. Hiscock Legal Aid Society (J. Scott Porter, of counsel) represented the appellant. (Supreme Ct, Onondaga Co)

Matter of Amber W. v Erie County Children’s Services, 185 AD3d 1445 (4th Dept 7/17/2020)

CUSTODY - STANDING/POST-TPR

LASJRP: The Fourth Department upholds an order dismissing the aunt’s post-termination custody petition, noting that after a court has terminated parental rights, and committed custody and guardianship to an authorized agency and freed the child for adoption, adoption becomes the sole and exclusive means to gain care and custody of the child. (Family Ct, Erie Co)

Matter of Byler v Byler, 185 AD3d 1403 (4th Dept 7/17/2020)

NON-PARENT / EXTRAORDINARY CIRCUMSTANCES

ILSAPP: The father appealed from an order of Chautauqua County Family Court, dismissing his custody modification petitions. The Fourth Department reversed and remitted. In this contest between a parent and a non-parent, Family Court failed to find extraordinary circumstances. A prior consent order did not constitute such a finding. Linda Campbell represented the appellant. (Family Ct, Chautauqua Co)

Matter of Carmella H., 185 AD3d 1460 (4th Dept 7/17/2020)

OBJECTION / PRESERVED

ILSAPP: The parents appealed from an Onondaga County Family Court order terminating their parental rights. The Fourth Department affirmed, but noted that, contrary to the assertions of the petitioner and the AFC, the parents preserved challenges to the admission of certain caseworker notes. When they objected to the notes of the first caseworker on the grounds raised on appeal, the trial court overruled their objections, definitively rejecting their challenges. Thus, the respondents were not required to repeat the same arguments to preserve their contentions as to the second caseworker’s notes. However, the appellate court rejected their arguments on the merits. In a TPR proceeding, CPLR 4518 governed the admission of agency records. Such reports were admissible if a sufficient foundation was laid. The agency had to show that:

Fourth Department *continued*

contemporaneously recording the subject acts was within the scope of an employee's duties, and each participant in the chain producing the record acted within the course of regular business conduct. Anthony Belletier and Todd Monahan represented the parents. (Family Ct, Onondaga Co)

People v Cobb, 185 AD3d 1432 (4th Dept 7/17/2020)**JUROR CHALLENGE / ERRANT DENIAL**

ILSAPP: The defendant appealed from a Cayuga County Court judgment, convicting him of 1st degree promoting prison. The Fourth Department reversed and granted a new trial. The trial court erred in denying the defense challenge for cause to a prospective juror who stated that her friendship with a prosecution witness might affect her ability to be fair and that serving as a juror might be awkward. The panelist did not give an unequivocal assurance of impartiality in stating that she would not feel compelled to "answer" to the witness for her verdict. A person could be unable to judge a case impartially while feeling confident that she would not have to answer for the verdict to anyone. The defendant preserved the issue by peremptorily challenging the prospective juror and exhausting all of his peremptory challenges. David Elkovitch represented the appellant. (County Ct, Cayuga Co)

Matter of Cordero v District Attorney of Erie County, 185 AD3d 1450 (4th Dept 7/17/2020)**FREEDOM OF INFORMATION LAW****CONFIDENTIALITY - IDENTITY OF SEX CRIME VICTIM**

LASJRP: Post-conviction and appeal, petitioner made a FOIL request to respondent District Attorney seeking a copy of two photographs of the victim and a copy of the victim's medical records. Respondent denied the request, and petitioner commenced this CPLR Article 78 proceeding to compel production.

The Fourth Department affirms a judgment dismissing the petition. The requested materials are exempt from disclosure pursuant to Civil Rights Law § 50-b(1), which provides that "[n]o report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies . . . a victim [of a sex offense defined by Penal Law Article 130] shall be made available for public inspection." This exemption applies despite petitioner's contention that he needs the material to support his application for post-conviction relief. Moreover, because the medical records are exempt from disclosure, respondent is not obligated to provide the records in redacted form even though redac-

tion might remove all details which tend to identify the victim. (Supreme Ct, Erie Co)

Matter of Cousineau v Ranieri, 185 AD3d 1421 (4th Dept 7/17/2020)**FAMILY OFFENSES - PETITION/AMENDMENT TO CONFORM TO PROOF**

LASJRP: In this family offense proceeding, the Fourth Department rejects respondent's contention that the family court erred in basing its determination, in part, on incidents not alleged in the petition. Since respondent has failed to make any showing of prejudice, the Court exercises discretion pursuant to CPLR 3025(c) to deem the petition amended to conform to the proof presented at the hearing. (Family Ct, Onondaga Co)

People v Hernandez, 185 AD3d 1428 (4th Dept 7/17/2020)**PLEAS - ALLOCUTION/ELEMENTS OF CRIME**

LASJRP: The Fourth Department holds that the court erred in accepting defendant's plea where defendant negated the "intent to commit a crime therein" element of burglary by indicating that he entered the premises to use the bathroom.

The court, which stated, "I think you understand ... [t]hat your defense of you going to the bathroom may be a difficult sell to a jury," failed to clarify the nature of the crime. (Supreme Ct, Monroe Co)

People v Jeffords, 185 AD3d 1417 (4th Dept 7/17/2020)**SENTENCE REDUCED / REMORSE AND NO HISTORY**

ILSAPP: The defendant appealed from an Erie County Court judgment, convicting him of 1st degree manslaughter. The Fourth Department reduced the determinate term from 24 to 19 years, plus post-release supervision. Factors cited were his background, show of remorse, and lack of prior criminal history. The Legal Aid Bureau of Buffalo (Barbara Davies, of counsel) represented the appellant. (County Ct, Erie Co)

People v Mineccia, 185 AD3d 1408 (4th Dept 7/17/2020)**JUDGES - BIAS/PRIOR PROSECUTION OF DEFENDANT BY LAW CLERK
JURY TRIAL - WAIVER OF RIGHT/KNOWING AND INTELLIGENT**

LASJRP: The Fourth Department grants defendant's motion to vacate the judgment of conviction, concluding that defendant's waiver of his right to a jury trial was not knowing and intelligent.

Fourth Department *continued*

The prosecutor who appeared for over six months during preliminary proceedings was subsequently appointed to serve as the trial court's confidential law clerk. The court, recognizing the conflict, screened the law clerk off from any participation in this case. When defendant sought to waive his right to a jury trial and be tried by the court, the court failed to inform defendant that its law clerk had previously prosecuted defendant in this case. Defense counsel was aware of the conflict and also failed to inform defendant, and later admitted that, had he recalled the problem, he would have advised defendant to retain his right to a jury trial, and defendant testified at the post-trial hearing that he would not have waived his right to a jury trial had he been aware. (County Ct, Monroe Co)

[People v Romeiser](#), 185 AD3d 1431 (4th Dept 7/17/2020)

The contention that there was not legally sufficient evidence of recklessness to support the conviction of third-degree assault is unpreserved because the "motion for a trial order of dismissal" was not specifically directed at "that ground. The matter is reviewed in the interest of justice and the conviction is reversed on that ground. (County Ct, Ontario Co)

[People v Snow](#), 185 AD3d 1400 (4th Dept 7/17/2020)

DEFENSE CURTAILED / REVERSAL

ILSAPP: The defendant appealed from a Supreme Court judgment, convicting him of 3rd degree robbery (two counts). The Fourth Department reversed. A cross-examining party could not call witnesses to contradict another witness's answers concerning collateral matters solely for the purpose of impeaching his or her credibility. However, that rule had no application where the testimony was relevant to core issues. The proposed testimony related to the content of the note the defendant presented to the bank employee in the first robbery incident. The note contained language that purportedly did not threaten the immediate use of force—contrary to the testimony of the bank employee. The testimony was material; disallowing it was error. A new trial was ordered as to the first robbery. The Monroe County Public Defender (Thomas Smith, of counsel) represented the appellant. (Supreme Ct, Monroe Co)

[People v Williams](#), 185 AD3d 1456 (4th Dept 7/17/2020)

YO / NOT CONSIDERED

ILSAPP: The defendant appealed from a Niagara County Court judgment, convicting him of attempted 1st degree assault. The Fourth Department reserved decision. County Court erred in failing to determine whether the defendant should be afforded youthful offender status. Because he was convicted of an armed felony offense, he was ineligible, unless the court determined that one of two mitigating factors was present. Upon remittal, County Court must make findings about whether the defendant was eligible and, if so, whether he should be afforded YO status. The Legal Aid Bureau of Buffalo (Allyson Kehl-Wierzbowski, of counsel) represented the appellant. (County Ct, Niagara Co)

[People v Gillie](#), 185 AD3d 1539 (4th Dept 7/24/2020)

"[T]he aggregate sentence of incarceration of 25 years to life is unduly harsh and severe under the circumstances of this case." All three incidents in the defendant's criminal history within the year of the killing here stemmed from the onset of his documented schizophrenia and were dismissed due to his mental incapacity. The prosecution's own expert acknowledged the defendant's diminished capacity to understand the wrongfulness of the action here, which "was a product of his symptoms of mental illness." (County Ct, Erie Co)

[People v Hunt](#), 185 AD3d 1531 (4th Dept 7/24/2020)

POSSESSION OF A WEAPON

- CONSTRUCTIVE POSSESSION

LASJRP: The Fourth Department finds that the jury's gun possession verdict is against the weight of the evidence where the driver owned both the vehicle and the duffle bag that was in the locked trunk and contained the gun; the People, who did not rely on the automobile presumption, relied on evidence that defendant's DNA profile matched that of the major contributor to DNA found on the handgun and that the driver was excluded as a contributor, but, although an inference could be made that defendant had physically possessed the gun at some point, that evidence alone does not establish that he possessed the gun at the time alleged in the indictment; and that even if defendant's statement to the police constituted an admission that he knew about the gun's presence in the duffle bag, mere knowledge would not establish constructive possession. (County Ct, Erie Co)

[Matter of Mya N.](#), 185 AD3d 1522 (4th Dept 7/24/2020)

ABUSE/NEGLECT - SEVERE ABUSE

- PRESUMPTION OF ABUSE

- APPEAL/FACT-FINDING AUTHORITY OF APPELLATE DIVISION

Fourth Department *continued*

LASJRP: The Fourth Department, citing the presumption in FCA § 1046(a)(ii), upholds findings that the older child was severely abused and the younger child was derivatively neglected by the parents.

The Court notes that there were two incidents in which the father found the older child at the bottom of the basement stairs in the morning; that the older child suffered severe injuries, including cuts to her throat that required a significant amount of medical attention, and serious bruising; that the act of cutting the child's throat twice demonstrates that the actor did so because he or she simply did not care whether grievous harm would result; that, despite the fact that the father was aware of the injuries sustained by the older child after the first incident, he took no additional precautions with respect to the child's care, and failed to seek immediate medical care after observing two severe lacerations on the child's neck at the time of the second incident; and that, after the mother testified, petitioner presented in rebuttal the testimony of a victim witness coordinator, who testified that the older child informed her that the mother had cut the child's throat with a knife.

Although the family court erred in failing to set forth the clear and convincing evidence forming the basis for its determination, this Court has the authority to independently review the record and make such a finding.

One judge dissents. (Family Ct, Livingston Co)

**Matter of Skyler D., 185 AD3d 1515
(4th Dept 7/24/2002)**

**ABUSE/NEGLECT - SEXUAL ABUSE/
SPECIFICATION OF PENAL LAW OFFENSE**

LASJRP: The Fourth Department concludes that although the court failed to comply with FCA § 1051(e) by specifying the sex offense, the error is technical in nature and harmless. Because the child was seven years old at the time of the contact, the offense could only be sexual abuse in the first degree. (Family Ct, Steuben Co)

People v Watkins, 185 AD3d 1521 (4th Dept 7/24/2020)

The resentence is reversed because the defendant was improperly sentenced as a persistent violent felony offender. The sentences for his two prior violent felony convictions having been imposed more than 10 years before the instant offense, the prosecution was required to demonstrate facts meeting the tolling provisions of Penal Law 70.04(1)(b)(v). The prosecution claims substantial compliance, but the absence of the required information—dates of commencement and termination of the prior terms of incarceration and the place of incarceration for

each—deprived the defendant of “reasonable notice and an opportunity to be heard” with respect to the tolling period” that is required. (County Ct, Onondaga Co) ☞

**ONLINE SOURCES OF INFORMATION ON
APPELLATE DIVISION DECISIONS**

Several websites provide access to information on opinions from the Appellate Division (and other courts), such as the [New York Appellate Digest](#) and the [Most Recent Decisions](#) page of the New York Official Reports [Slip Opinion Service](#). Summarized [Decisions of Interest](#) prepared by the NYS Office of Indigent Legal Services (ILS) appear on the ILS website some time after they are emailed to subscribers to the ILSAPP listserv. Timothy P. Murphy, Assistant Federal Public Defender (Appeals) in the Western District of New York, periodically posts Court of Appeals summaries on that listserv and is a frequent CLE presenter for NYSDA as to recent decisions. The *REPORT* reprints some ILS summaries, as well as summaries from The Legal Aid Society's Juvenile Rights Project and Criminal Defense Practice as well as some summaries produced in house. NYSDA thanks all those entities for sharing their information. Some, but not all, digests indicate dissenting and concurring opinions.

Attorneys should, of course, examine the full decision for any case before relying on it.

Defender News (continued from page 8)

Association of New York State's [School Mental Health Resource and Training Center](#) issued an e-flyer that provided information and links illustrating that a “one mental health system fits all” approach does not reach everyone. One [article](#) noted there highlights “Top 7 Social Emotional Learning Programs for Youth of Color.” Also listed was information from We R Native on [building mental resilience](#), BEAM (Black Emotional and Mental Health) [toolkits](#), and a Work2BeWell [module](#) on Structural Racism & Intergenerational Trauma.

- On [May 17, 2021](#), Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks noted steps being taken to carry out the recommendations of the Special Adviser on Equal Justice in the Courts, Jeh Johnson, that were outlined in a comprehensive report in October 2020.
- The Brennan Center issued a report in April on “[How Punitive Excess is a Manifestation of Racism in America](#).”
- In [March](#), the Center for Appellate Litigation (CAL) began a *Racial Justice Series* of its [Issues to Develop at Trial](#) resource. ☞

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