



Public Defense Backup Center REPORT

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Defender News

Court of Appeals Issues Decisions While Awaiting Selection of New CJ

Since the resignation of Chief Judge Janet DiFiore in July, effective in August, was [reported](#) in the *New York Times* and elsewhere, interest in the appointment of her successor has swirled. NYSDA's Executive Director, Susan C. Bryant, along with others, urged the Governor and Senate to consider appointing someone with public defense experience, a perspective currently lacking on the court; see the [August 31st edition](#) of News Picks from NYSDA Staff. As noted in a July 31st *Times Union* [article](#), Bryant hopes more members of the public defense bar apply for positions on the high court. A group called [The Court NY Deserves](#) formed to advocate for "a Chief Judge who will safeguard New Yorkers' rights, defend our democracy, and protect the most vulnerable New Yorkers."

Meanwhile, the Court issued decisions in two criminal cases and a family matter in October. In [People v Baines](#), 2022 NY Slip Op 05919 (10/20/2022), the Court remitted a case so that certain pretrial proceedings, in which the defendant had acted pro se, could be repeated. The trial court had failed to properly describe for the defendant the role of counsel in the adversarial system and warn him of the risks of representing himself. In [People v Murray](#), 2022 NY Slip Op 05916 (10/20/2022), the Court reversed a conviction because an alternate juror who had been discharged was seated and deliberated in the place of a trial juror who became unavailable shortly after the alternate jurors were discharged.

In [Matter of D.L. v S.B.](#), 2022 NY Slip Op 05940 (10/25/2022), the Court held that the Interstate Compact on the Placement of Children (ICPC) does not apply "to out-of-state, noncustodial parents seeking custody of their children who are in the custody of New York social services agencies." When a child was removed from the mother's custody and placed in the custody of the local Department of Social Services (DSS) due to allegations of neglect, the father appeared and sought placement of the child with him in North Carolina. North Carolina denied a request for approval of the placement under the ICPC;

the Family Court in New York dismissed the father's petitions without a hearing, reasoning that the requirements of the ICPC applied to out of state parents. The trial court and the Second Department were unpersuaded by the father's argument that applying these requirements to a parent is unconstitutional. In a rebuke to both courts, the Courts of Appeals reversed. Acting Chief Judge Cannataro wrote the opinion, which stressed the language of the ICPC that says a sending agency shall not send children to another state *for placement in foster care* without complying with all requirements of the statute. Placing a New York child with an out-of-state parent does not involve foster care. The Court said its holding "comports with the intent reflected in the Compact's legislative history and the underlying statutory purpose." To apply the ICPC to parents "would be inconsistent with other components of New York's statutory framework governing child protection" that reflect "the preeminence of the biological family" and embrace "a policy of keeping biological families together" whenever safely possible," in accordance with the "fundamental social policy choice[.] ... binding on this Court" to structure New York's foster care scheme around the right of parents 'to the care and custody of a child, superior to that of others, unless the parent has abandoned that right or is proven unfit'...." Note that the Court of Appeals determination comports with the First Department interpretation of the law. Unfortunately, this decision comes too late for the appellant-father whose parental rights were terminated prior to this decision being issued. NYSDA urges family defenders to use the language in this case, particularly the parts that refer to the strong public policy in favor of biological parents raising their own children, absent unfitness, to defend in state and out of state parents alike.

Summaries of these cases will appear in the next issue of the *REPORT*.

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US Supreme Court: Bruen and Dobbs Filled the News Cycles

The end-of-term cases from the U.S. Supreme Court, summarized beginning at p. 12, include two that overshadowed the others in state and national news: *New York State Rifle & Pistol Association v Bruen* and *Dobbs v Jackson Women's Health Organization*.

Bruen Developments

NYSDA noted *Bruen*, and the quickly-enacted state legislation passed in response to the striking down of New York's concealed carry licensing gun law, in the [July 6th edition](#) of News Picks. Defenders with current or recent gun possession cases were (and are) encouraged to contact Staff Attorney Max Kampfner at the Backup Center for information, including on motions to dismiss and motions to withdraw pleas. The Center for Appellate Litigation created a [Bruen-specific "Issues to Develop at Trial"](#) that was noted in the [July 22nd edition](#) of News Picks. It includes model papers; while the focus is on Penal Law 265.03(3), sample language should be applicable to most firearm offenses. Kent Moston covered *Bruen* along with other U.S. Supreme Court cases during his presentation at this year's Annual Conference, below at p. 4. And the [September 23rd edition](#) of News Picks noted that most of the new gun laws had gone into effect at the first of the month and also mentioned some decisions of note, including *Bruen*-related decisions in other states.

NYSDA will continue to monitor post-*Bruen* developments. These include the decision from a Queens Supreme Court rejecting a plea withdrawal in a firearm possession case: "the issuance of *Bruen* subsequent to the defendant's guilty plea, irrespective of the merits of the constitutional challenge, does not have any effect on the plea's validity and enforceability." [People v Caldwell](#), 2022 NY Slip Op 22281 (9/14/2022). The *New York Law Journal* [reported](#) on Aug. 5, 2022, that "Associate Judge Jenny Rivera granted a motion for leave for the court to hear the appeal of a Bronx man[s] conviction on a gun-possession charge that landed him a sentence of 16 years to life in prison." See *People v Pastrana*, 38 NY3d 1135 (table) (7/27/2022), appeal from [People v Pastrana](#), 205 AD3d 461 (5/5/2022) [summary on p. 25]. Lawsuits challenging the constitutionality of New York's new gun laws are ongoing, as [reported](#) by *Syracuse.com* on October 12th.

Enforcement of the so-called "red flag law" (CPLR article 63-a), which provides for Extreme Risk Protection Orders (ERPO) to prohibit gun possession by individuals found after a hearing to pose a danger and which was expanded after *Bruen*, is said to have increased. That, along with defense concerns, was noted in the [August 31st News Picks](#). Concerns include the lack of a right to appointed counsel for individuals facing an ERPO pro-

ceeding; counsel, including those representing the client in pending matters, may appear but are not required. Gov. Hochul and Attorney General James stressed the increased red flag law use in a *New York Daily News* [article](#) on October 24th, and addressed a different concern about the appearance of attorneys in ERPO matters. Funding to the tune of \$4.6 million is being provided "to support a new unit of lawyers and staffers dedicated to assisting State Police with requests for extreme-risk protection orders." As discussed further below, alleged connections between mental illness and violence have led some advocates to speak out against the red flag law and other proposals.

Dobbs Reverberated Through the Community

The *Dobbs* decision overturning *Roe v Wade*'s constitutional protection of abortion rights reverberated in the public defense community. While *Dobbs* might seem to have few direct effects on the work of public defense lawyers in New York, where criminalization of abortion is unlikely at least for now, the decision contained broader threats to civil and human rights. The National Legal Aid and Defender Association [stated](#) (as reported in the [July 6th News Picks](#)), *Dobbs* "indicates a willingness to revisit longstanding fundamental rights that historically protected low-income and minority communities in this country." Additionally, the emotional impact of *Dobbs* on many who work in the legal system was captured by comments made by participants at NYSDA's Basic Trial Skills Program, which was in progress when *Dobbs* was decided. Asked how a skills exercise held on June 24th could be improved, one said, "[t]ry not to schedule heartbreaking

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SCOTUS decision releases beforehand” and another said, “this was hard to continue, knowing the SCOTUS decision....”

Miranda Curtailed: Doesn’t Apply in 1983 Cases

The Court revisited a longstanding right the day before *Dobbs* was issued, and found that use of an un-Mirandized statement in a trial that resulted in an acquittal does not provide a valid basis for a 42 USC 1983 constitutional tort claim. *Vega v Tekoh*, No. 21-499 (6/23/2022). As a [comment](#) published in *Esquire* about the decision noted, “[t]he U.S. Court of Appeals ruled in favor of Tekoh, but the Supreme Court reversed that decision by a vote of six to three, in effect negating the position that Miranda is part of the Fifth Amendment.” To the extent that constitutional tort claims have been touted as an alternative to suppression in at least some types of cases (see, e.g., *Hudson v Michigan*, 547 US 586 [6/15/2006]), *Tekoh* takes away that alternative, at least for *Miranda* violations that did not result in conviction. The *Esquire* commentator, Mitchell S. Jackson, makes clear that the *Tekoh* ruling is particularly concerning in light of ongoing racism in the criminal legal system.

Innocence Project Decries Shinn Decision

“The United States Supreme Court decision in the case of *Shinn v. Ramirez and Jones* closed the federal courthouse doors to evidence of ineffective assistance of counsel that was not first presented to the state courts. This decision will leave thousands of people in the nightmarish position of having no court to hear their very real claims of innocence.” So begins a [statement](#) from Innocence Project Executive Director Christina Swarns decrying the decision. It held “that, under §2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state post-conviction counsel.” Three dissenters pointed out that “the Court understates, or ignores altogether, the gravity of the state systems’ failures in these two cases. To put it bluntly: Two men whose trial attorneys did not provide even the bare minimum level of representation required by the Constitution may be executed because forces outside of their control prevented them from vindicating their constitutional right to counsel.” *Shinn v Martinez Ramirez*, [No. 20-1009 (5/23/2022)]. A June 29th [opinion](#) piece posted on *TheHill.com* decried “[t]he majority’s rationale, ... that state sovereignty and legal expediency must be protected at all costs,” and also lamented “[t]he silence on social media and in our public discourse about this ruling”

International Child Abduction, Habeas Corpus, and More Addressed

Other end-of-term cases included the following.

Golan v Saada, No. 20-1034 (6/15/2022), looked at how federal courts apply the Hague Convention on the Civil Aspects of International Child Abduction. According to a *SCOTUSblog.com* [post](#) quoted in the [July 6th News Picks](#), the decision “‘gave federal trial courts more discretion over whether children in some international custody disputes must be returned to their home countries.’”

Johnson v Arteaga-Martinez, No. 19-896 (6/13/2022), and *Garland v Gonzalez*, No. 20-322 (6/13/2022), dealt with claims by people who are not U.S. citizens, detained pending removal, as to bond hearings.

Shoop v Twyford, No. 21-511 (6/21/2022), like *Shinn v Martinez Ramirez*, above, was a death penalty case. In *Shoop*, the Court held that “[a] transportation order [for medical testing] that allows a prisoner to search for new evidence is not ‘necessary or appropriate in aid of’ a federal court’s adjudication of a habeas corpus action, 28 U. S. C. §1651(a), when the prisoner has not shown that the desired evidence would be admissible in connection with a particular claim for relief.” Among other capital cases were *Andrus v Texas*, No. 21-6001 (6/13/2022), in which Justices Sotomayor, Breyer, and Kagan dissented from the denial of certiorari, and *Nance v Ward*, No. 21-439 (6/23/2022), which said that 42 USC 1983 remains a proper vehicle for condemned people to make a method-of-execution claim proposing an alternate method of execution, “even if the alternative route necessitates a change in state law.”

The cases above were noted in News Picks along with others dealing with matters rarely if ever encountered by state public defense attorneys.

Basic Trial Skills Program is Back!

After a two-year hiatus due to COVID-19, NYSDA’s well-known Basic Trial Skills Program (BTSP) resumed. Held at Skidmore College in late June, the program offered public defenders embarking on their trial careers a week of hands-on training in preparing and trying a criminal case. Coaches—attorneys and communications experts—from across the state and the country provided the 45 graduating participants opportunities to consider a variety of approaches and helped them develop their own style. NYSDA thanks the coaches, the public defense programs from around the state that sent lawyers to be trained, the Skidmore and NYSDA staff members who made it all possible, and of course the participants themselves.

Dedication Practiced, Dedication Praised: 2022 Annual Conference

NYSDA's 55th Annual Conference, the first held in person since 2019, allowed online attendance as well. The event's success grew from the hard work of dedicated staff dealing with a new venue, technology challenges, and continuing COVID-19 concerns. Thank you to all who made a great event at the Saratoga Hilton happen!

Commending Defenders Dedicated to Clients

Defenders praised for their client-centered work received accolades during the Awards Banquet. Lorraine McEvelley, Director of The Parole Revocation Defense Unit at The Legal Aid Society, Criminal Defense Practice, in New York City accepted NYSDA's Jonathan E. Gradess Service of Justice Award. As set out in the [media release](#), the presentation highlighted Lorraine's work to secure passage and implementation of the Less is More Act, while also acknowledging other actions born of her concern for the well-being of people incarcerated during the height of the pandemic.

Timothy P. Murphy, a member of the Appellate Unit at the Federal Public Defender's Office for the Western District of New York, was the 2022 recipient of the Wilfred R. O'Connor Award. Tim's willingness to share his time and expertise with others by presenting excellent Continuing Legal Education (CLE) training was stressed in the [media release](#). This was illustrated at the conference; rather than just attending to bask in Monday night's praise, he presented New Developments in Criminal Law and Procedure first thing Monday morning.

In addition to the two NYSDA awards above, described in the respective media releases, the conference was also the venue at which the Genesee County Public Defender Office presented its 2022 Kevin M. Andersen Memorial Award. This year's awardee was Jonathan Rothermel; the [media release](#) about the awards evening describes Jonathan and the award bestowed on him.

Congratulations to all!

Twelve and a Half Credits Worth of Worthwhile CLE

The conference provided 12.5 CLE credits to lawyers who attended the full training. Along with updates like Tim Murphy's look at Court of Appeals decisions, Kent Moston's presentation on U.S. Supreme Court cases, and The Bronx Defenders' review of 2022 legislation, the schedule included an ethics presentation by Yung-Mi Lee focused on criminal discovery practice. (NYSDA has since developed a Discovery Checklist for VTL 1192 cases, see p. 5.)

Other sessions provided information about representing clients who present particular issues or circumstances.

The latest information on representing clients charged with offenses under the Sex Offender Registration Act was presented by Alan Rosenthal; the new, second edition of his manual, *Defending Against the New Scarlet Letter*, was provided. Mark Mahoney offered the insights he has gained in a decade of research and experience in representing people on the autism spectrum; he is the only attorney in North America exclusively representing individuals with autism spectrum disorder who are accused of crimes. Deanna Glickman presented Trans Competency for Public Defenders; the session sought to help lawyers unfamiliar with some of the issues transgender people face to recognize those issues, which can affect trans clients' interactions with their lawyers as well as legal proceedings.

All sessions were offered in hybrid format. This allowed many to enjoy the camaraderie that blossoms between CLE sessions, at meals, and after hours, while those unable to be physically present due to time constraints, COVID-19 concerns, etc. could learn (and earn credits) remotely.

Some of this year's conference sessions no doubt benefitted family defenders. NYSDA plans to include a specific family track at next year's conference (7/30-8/11/2023). Meanwhile, NYSDA continues to provide CLE training in both criminal and family law. Check the Association News portion of the current [News Picks from NYSDA Staff](#) for upcoming events.

Chief Convening, Board Meetings, and Membership Meeting Held

The Chief Defender Convening held during the Annual Conference gave defender program heads from around the state an opportunity to share information and concerns. Attendance was approximately 50 in person and 15 via zoom. Among the topics discussed: "Social workers on criminal defense team; duty to report as mandated reporter vs privileged communication"; recruitment and retention of lawyers; technology in courts and COVID lessons; and an update on client eligibility. Staff from the NYS Office of Indigent Legal Services presented updates from that agency.

NYSDA's Board met twice during the conference, as is traditional, once before and once after the Annual Meeting

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are available on NYSDA's website at
www.nysda.org/?page=Jobs

of the Membership, which included the election of Board members. The membership meeting was also held in a hybrid format.

Assigned Counsel Rates: An Unresolved, Critical Issue

The State's failure to raise statutory assigned counsel fees as part of this year's budget along with pending litigation on the issue, noted in the [last issue](#) of the *REPORT*, continue. In July, an interim preliminary injunction in the lawsuit raised rates in New York City from \$75 to \$158 an hour, retroactive from February 2022; as discussed in the [August 10th edition](#) of News Picks. The need for the rate increase grows, and NYSDA continues its advocacy in support as preparations for next year's budget—for counties as well as the State—get underway. *The Evening Sun* (Chenango County newspaper) [reported](#) on August 18th about local concerns and noted the State's assertion that the court should "refrain from entering any order that may interfere in the legislature's role in setting assigned counsel rates." That is what the State said during the last budget season.

Discovery Checklist for VTL 1192 Cases Available

The [NYSDA Discovery Reform Implementation](#) page now includes a [checklist](#) of items defense attorneys should be receiving in discovery for cases under Vehicle and Traffic Law 1192 or where allegations of intoxicated or impaired driving are elements of another charge. Of course, as every case is unique, not all cases will result in the creation of each of the documents and audio/visual materials listed. And this list is not exhaustive; some cases may have documents not included. Attorneys with questions about discovery in a VTL 1192 case, or with questions or comments on the checklist itself, can reach out to Staff Attorney Max Kampfner at mkampfner@nysda.org.

Military Veterans Present Unique Needs and Challenges

A recent case prompted a lengthy *Times Union* [story](#) on August 7th that discussed some of the many difficulties faced by veterans in accessing mental health treatment. A spokesperson for the Stratton Veterans Administration (VA) Medical Center in Albany reportedly said that lawyers in the state legal system sometimes fail to look to VA services when dealing with veterans.

NYSDA's VDP Can Help

When veterans and military service members become entangled in the criminal or family court systems, NYSDA, through its Veterans Defense Program ([VDP](#)), can provide assistance. VDP, which promotes trauma-informed, effective representation in a variety of ways, recently received a grant from DVS. The three-year grant will be used to add an additional part-time Peer-to-Peer Case Manager who will be a veteran who can focus on assisting female veteran clients. See the NYSDA Jobs [web-page](#). Meanwhile, DVS [tweeted](#) "thank you" to VDP for the October 27th "presentation to more than a 100 State, County, & City Veterans Benefits Advisors & Veterans Service Officers!" Attorneys representing veterans are encouraged to contact VDP at 585-219-4862 or through the [VDP contact form](#) on our website.

Other Veterans Resources

The State, alone or in partnership with the federal government, provides a variety of programs for veterans. The 2022 [budget testimony](#) of the NYS Division of Veterans Services (DVS), which lauded Gov. Hochul's agenda to help veterans, noted some such programs. One was the Expiration of Term of Service (ETS) [Sponsorship Program](#). Community members trained as sponsors connect with service members nearing discharge to assist them with the challenging stresses associated with that dramatic life change. But many veterans, especially those who experienced combat or other trauma during their service, have not received help like that offered by ETS, and many face difficulty in post-service civilian life.

This year's state budget included increased funding for the well-regarded Joseph P. Dwyer Peer Support Program to ensure that the program is available to veterans across the state, as noted in a May 2022 [article](#) on *Patch.com*.

The new national 988 Suicide and Crisis Lifeline rolled out in July 2022, discussed in more detail below, reflects the need for veteran-specific services. A *Military Times* [account](#) noted that "[v]eterans who call the new 988 hotline or the old 1-800-273-8255 number can select option 1 after connecting to reach a VA staffer. In addition, Veterans, troops or their family members can also text 838255 or visit [VeteransCrisisLine.net](https://www.veteranscrisisline.net) for assistance."

Counsel Failed to Properly Pursue Military-Based Disability Defense

A case summarized in the [prior issue](#) of the *REPORT* is now noted in 82 Am Jur Trials 1: "[d]efense counsel's failure to obtain defendant's social-security and military records or to have defendant evaluated by an independent psychiatrist, in preparation of extreme-emotional disturbance defense, fell below the objective standard of

meaningful representation and thus was ineffective assistance of counsel” where “defense counsel attempted to establish defense theory through the testimony of defendant and his girlfriend, and counsel thought she might have opted not to introduce military records at trial because she was uncertain how to lay a foundation for their admissibility.” *People v Jackson*, 202 AD3d 1483 (4th Dept 2/4/2022). The decision’s recognition that failure to fully investigate and present the mental health effects of service can constitute ineffective assistance is welcomed by NYSDA’s VDP, which aids defense lawyers in understanding how to get records and how to use them. VDP staff have been teaching attorneys about the need to fully investigate clients’ military service, as noted in [Porter v McCollum](#) (558 US 30 [2009]), since VDP’s [launch](#) in 2014.

988—To Recommend or Not Recommend Someone Call?

In July, the new national [988 Suicide and Crisis Lifeline](#) was rolled out. The [Aug. 31, 2022, edition](#) of News Picks noted some history of the service, and the optimism of officials like NYS Office of Mental Health (OMH) Commissioner Ann Sullivan about the new service; OMH has a [webpage](#) with 988 information. But, as the News Picks item pointed out, concerns exist, with some advocates warning people not to call 988 largely out of fear that police will respond to crisis calls, with deadly results. An [NPR story](#) said that, according to “[John Draper](#), executive director of the hotline and a vice president at Vibrant Emotional Health, the company [tasked with administering it](#),” emergency services will be called “[o]nly when the caller cannot or will not collaborate on a safety plan and the counselor feels the caller will harm themselves imminently” But while emergency services may be mobile crisis teams, an item [posted](#) on [KHN.org](#) notes that “in many rural and suburban communities, [it is often police](#).” The conclusion about whether or not to use 988 seems to be, as the [KHN.org](#) article said, “it depends.”

A [piece](#) on [WBFO](#) [NPR station in Buffalo] noted that in Erie County, Crisis Services (one of over 200 agencies across the country that make up the 988 network) has a mobile crisis unit in the same organization. Therefore, the article said, when a counselor realizes more intervention is needed, the outreach team becomes involved, and “continues that evaluation assessment while also dispatching out a team into the community to meet that family or that individual in crisis to help evaluate their safety.”

As noted in News Picks, NYSDA advocates for non-criminalizing, non-carceral approaches to situations involving people with mental illness, substance use disorders, and similar challenges.

Mental Illness and the Legal System: A Fraught Relationship

The concerns noted above about the new 988 hotline are just one example of the dangers that threaten people with mental illness when they encounter the criminal legal system. Strengthening of the red flag law, discussed above, poses danger as well. As a June 6th [article](#) in the *Times Union* noted, “expansion of the state’s red flag laws [in the wake of the mass shooting in Buffalo, said to be racially-motivated] ... did not hone in on how to screen for white supremacy, but rather focused on a potential intersection between mental illness and violence—a conflation that mental health advocates said concerns them about possible overreach on those subject to an emergency-risk protection order.” Harvey Rosenthal, longtime CEO of the New York Association of Psychiatric Rehabilitation Services (NYAPRS) expressed concern for people evaluated for mental illness; “[t]his [legislative] session has been rife with totally unsubstantiated connections between mental illness and violence and this is yet another one,” he was quoted as saying.

NYAPRS [posted](#) a Statement on Gun Violence Prevention Policy and Mental Health Disabilities by the Coalition for Smart Safety, detailing the dangers of suggesting that people with mental health disabilities be the primary target of efforts to prevent gun violence. Calling it “an act of prejudice to use people with disabilities as scapegoats for the increased incidences of mass shootings and acts of mass violence in this country,” the statement says that “[e]ffective reform can and should be accomplished without compromising the civil rights of people with disabilities” and opposes “legislation that sacrifices the civil rights of people with disabilities in exchange for the appearance of action on gun violence.” Similarly, an article on [Spectrum LocalNews.com](#) reported the comments of Glenn Liebman of the Mental Health Association in New York State, who said that rather than stigmatizing people who are living with illness, a variety of societal factors should be considered: “Are there guns involved in this issue? What about the echo chamber of social media?”

The mental health of potential and actual shooters should not dominate discussions about policies and actions after events like the Buffalo shootings, advocates say; there are many other mental health aspects to the problem. The impact of worry about being threatened or attacked because of one’s race or ethnicity can lead to mental health issues, “but the likelihood of someone of color reaching out for help is much less in comparison to a white counterpart,” according to a [news report](#) headlined “Exploring the need for mental health services in NY’s Black communities.” Financial barriers—lack of adequate health insurance, transportation, etc.—as well as

cultural barriers make it difficult for many to obtain effective services.

A [column](#) in the *New York Times* on October 16th, focused on bias attacks on people of Asian descent. While “talking openly about the role that mental illness may play in racially motivated violence seems overdue and necessary,” Eyal Press wrote, such discussions are fraught with dangers like reinforcing stereotypes about people with mental illness being violent when they are more likely to be victims and deflecting “attention from the speech and ideas that inspire acts of violent extremism.” Press says that “determining who should be classified as a mentally ill offender is not easy, not only for diagnostic reasons but also for moral and political ones.” Incendiary language “can seep into the culture and eventually help trigger an angry, mentally unstable individual to act violently.” Press asserts that “[i]t’s only by breaking down the binary between the medical and the political that we can begin to make sense of individuals’ actions—and to think about how to reform them.”

Imposing harsh criminal sanctions on people with mental illness who commit hate crimes “is indeed likely to be ineffective. A better approach would be to invest resources in the broken mental health systems that leave so many highly unstable people with no access to long-term care,” Press writes. Other social problems must also be addressed, Press adds: “[a] growing body of research suggests that people with severe mental illnesses are more likely to engage in violence when exposed to other risk factors, like traumatic childhood experiences, financial precariousness and living in high-crime neighborhoods. Treatment alone won’t solve these problems, just as locking people up won’t make them go away.”

Public defenders may find themselves simultaneously challenged by many aspects of this morass. Will a client be better off taking a not-responsible plea that could mean a life spent in a forensic hospital than go to trial for a hate crime? Can a mental health court help the client if the charges in question would allow that possibility (and if one is available)? Is a client whose actions are rooted in mental illness tied to racial trauma likely to obtain justice or mercy from a local jury made up of white people?

NYSDA is committed to helping lawyers deal with these difficult issues and to working to end racism and other barriers to justice.

News About Family Defense

In a variety of ways, NYSDA keeps family defenders apprised of legal and policy developments affecting parental representation. NYSDA also advocates, and supports others who advocate, for needed systemic reforms.

Fighting Racism in the Systems Affecting Families

Advocacy groups continue to challenge the systemic racism in the family regulatory/child welfare system, and NYSDA continues to highlight these efforts. After reports of rampant discrimination throughout that system (see the [June 14th edition](#) of News Picks), the New York Advisory Committee to the U.S. Commission on Civil Rights voted to initiate an investigation into the NYS child welfare system and its practices. Also, as featured in the [July 22nd edition](#) of News Picks, a [report](#) signed by 25 advocacy organizations and issued by [Children’s Rights](#) and the [Human Rights Institute at Columbia Law School](#), asks the United Nations to hold the United States accountable for what it calls a failure to address longstanding racial discrimination in the child welfare system, in violation of Article II of the International Convention on the Elimination of All Forms of Racial Discrimination. Additionally, the American Bar Association adopted a resolution calling on “Bar Associations throughout the county to educate attorneys and other legal professionals on how the experience of separating Black children from their parents in the child welfare system is intimately linked to the history of slavery in our country as well as subsequent approaches to over-surveillance of and under-investment in Black families” (See the News Picks [edition of August 31st](#).)

Financial Eligibility Rule Promulgated

Of significance to parents who find themselves the subject of an ACS/CPS investigation anywhere in New York State, “the Chief Administrative Judge issued an [order](#) on Sept. 28, 2022, promulgating a new section of the Uniform Rules for the Family Court. The new rule, [205.19](#) Financial Eligibility for Publicly Funded Counsel, was effective immediately. Its provisions include “[t]imely access to counsel,” including “prior to initiation of a proceeding which may result in detention [and] in removal of children from their care” In such cases, someone seeking counsel prior to the filing of a petition is to be given information on how to contact the primary provider of representation in their county as noted in the News Picks [edition of October 17th](#).

Training Events Past and Future

Because a key to keeping families together under the current system is to keep parents’ attorneys updated on the law, NYSDA provides Continuing Legal Education (CLE) programs aimed at family defenders. For example, September 30, 2022, saw web training entitled *Stepping It Up: Strategies for Successful Family Defense*. This all-day program covered cross-examination skills, how to conduct a permanency planning hearing, the effects of mari-

juana legalization on family court practice, and best practices for representing clients who are not present in court. Joyce McMillian, Founder and Executive Director of JMacForFamilies, gave an address on child welfare from the parent's perspective. For additional Family Court CLE's this fall and in the future, see NYSDA's [Training Calendar](#) under the Training menu on NYSDA's homepage.

Family Defenders can find information that may be helpful to their practice by looking for Family Defense on the Resources [webpage](#). Materials include sample discovery [motions](#) generously provided by the Family Defense Practice at the Bronx Defenders.

Remote Proceedings Toolkit Available from NCSC

The National Center for State Courts (NCSC) has developed a [toolkit](#) "to help courts consider what the best practices are for remote hearings." As noted in the [October 31st edition](#) of News Picks from NYSDA Staff, the toolkit encourages the development of clear state or jurisdiction-wide policies to "promote fairness and transparency for all court users" and "improve performance, reduce costs, decrease errors, and ... help courts process cases more efficiently." This toolkit encompasses all types of courts, including criminal and family, and sets out six key guiding principles: Equal Access; Due Process; Transparency; Fairness; Standardization; and Safety. Noting that virtual proceedings are still "new territory," which means "we don't know if there are unintended harms to litigants or promising practices that we haven't yet identified," it calls for evaluation of policies "periodically but at least once a year."

The News Picks item also noted that NYSDA's Executive Director testified about issues regarding remote proceedings at the June 7, 2022, public hearing of the Pandemic Practices Working Group (PPWG) of the [Commission to Reimagine the Future of New York's Courts](#). The *New York Law Journal* [posted](#), on November 1st, an article on the PPWG's progress. Many of the problems with—and positive aspects of—virtual proceedings are noted there. The PPWG has received comments both favorable and unfavorable about virtual criminal proceedings.

Two years ago, NYSDA issued a [statement](#), Virtual/Remote Court Appearance at a Critical Stage of Criminal Proceedings Is Not the Correct Answer to Any Long-Term Question. The latter cited, among other things, a [statement](#) by the National Association for Public Defense on virtual court technology. Discussions about virtual versus in-person proceedings have appeared periodically in News Picks, including a [June 14th](#) note about a University of Illinois' Institute for Government and Public

Affairs report on the impact of COVID-19 on state courts; attorneys reported there that gauging the credibility of witnesses and communicating effectively with clients were the hardest things to do online. Other items appeared in News Picks for [April 1st](#) and [March 22nd](#) of this year and [October 12th](#) of 2021.

In 2021, the New York State Bar Association created a Task Force on Post-Pandemic Future of the Profession. It will look at, among other things, "the remote practice of law, the increased use of technology, [and] the efficacy of virtual courts and tribunals," according to the [webpage](#).

NYSDA's statement, along with the new NCSC toolkit, can be found on a new NYSDA resources webpage, [Virtual/Remote Proceedings](#). As research and experience around remote proceedings grows, more items will be added. Defenders with questions or information regarding virtual proceedings are encouraged to contact the Backup Center.

NYSDA Announces New Staff

Two staff members have been hired for the statewide Defender Discovery & Forensic Support Unit announced in the last issue of the *REPORT*. Lucy Larkins is a Staff Attorney with the Unit, which is an integral part of the Backup Center. Beyond her advocacy work in New York, Lucy has experience working as a public defender in a variety of jurisdictions, including Maryland and California, and has also worked providing resources and support to capital defenders in Louisiana. She holds her LLM from New York University School of Law and her law degree from the University of Melbourne Law School.

Staff Attorney Ashley Hart has also been hired as part of the new Unit. She brings to NYSDA an extensive legal background working with experts and reviewing large volumes of discovery in her previous civil practice. Prior to law school, Ashley was a Senior Research Specialist and Lecturer at the Northeast Regional Forensic Institute where she worked on matters relating to DNA analysis, laboratory procedures, and associated technologies. Ashley holds a J.D., an M.S. in Forensic Biology, and a B.S. in Biochemistry. She has also assisted in post-conviction representation.

Caitlin Connelly has joined the Backup Center as a Staff Attorney and will be helping NYSDA expand its appellate support and resources. She is an experienced appellate defender who represents clients in both criminal and family court appeals; she previously worked at the Legal Aid Bureau of Buffalo. In addition to her law degree, Caitlin has a Master's in Library Science. She is based in Buffalo.

These new staff members will increase the Backup Center's capacity to assist public defense lawyers in a variety of ways. Welcome, Lucy, Caitlin, and Ashley!

Public Availability of Court and Judiciary Records in the News

The Unified Court System website includes a [page](#) about access to court records and proceedings. It notes that court records are not subject to the Freedom of Information Law (FOIL) but are governed by the Judiciary Law, and provides details. But questions can arise as to what are “court records” and what are FOILable records, and what requestors must provide to obtain public records.

NYCLU Obtains Order for OCA Records Disclosure

The New York Civil Liberties Union (NYCLU) posted a [press release](#) on October 20th headlined, “NYCLU Granted Access to Undisclosed Memos to Judges from Office of Court Administration” (OCA). At issue are “all memos and directives issued since 2011 related to OCA’s practice of providing guidance to state court judges on how to interpret court decisions and statutes.” As [reported](#) on *Law360.com*, OCA has 180 days to comply. The *New York Law Journal* reported that NYCLU took action “to vindicate the public’s right to know how the New York state court system operates and how [OCA] influences judicial decision-making.” Links to the [Decision and Order on Motion](#), the NYCLU’s [Art 78 petition](#), and their original [FOIL](#) request can be found through the press release.

One of the instances referenced in the FOIL request and the petition related to [Matter of Crawford v Ally](#). The controversial [memorandum](#) circulated by OCA about this case was previously covered in the [Aug. 10, 2021, edition](#) of News Picks and was also a topic of NYSDA training this past year. As the *Law360.com* article noted, NYCLU asserted that “this memorandum instructed judges that the Appellate Division’s decision should not be interpreted as requiring live witness or nonhearsay testimony and encourages judges to ‘resist—unless absolutely necessary and appropriate—anything approaching a full testimonial hearing.’” As was reported in the [January-August 2021 issue](#) of the *REPORT*, the OCA memo could give “judges the option of holding a hearing that simply uses the evidence prosecutors already presented in their case,” in the words of the *New York Focus* [article](#) noted there.

Request for Local Court Recordings Heard in Third Department

Oral argument on October 14th in a Third Department case about provision on request of recorded proceedings in town court was covered in a *Times Union* (TU) [article](#), as noted in the [October 31st edition](#) of News Picks. The question presented is whether the Colonie Town Court clerk must provide records requested by Albany

County’s Public Defender. The case is *Matter of Herrick v Town of Colonie*, No. 534162.

The TU noted that in 2018 the same clerk had denied a reporter’s request for “all public information” about a second-degree burglary case. The newspaper also published an [editorial](#) on October 20th decrying the clerk’s insistence that a docket number must be provided, not just a reasonable description of what records are sought.

Issues around local court records have arisen before. A convoluted decision from the Third Department in 2015 set out efforts by Columbia County District Attorney Paul Czajka to obtain recordings and/or transcripts of proceedings in a town court; procedural and jurisdictional questions resulted in a remand of the matter and no further reported history of the case appears. [Czajka v Dellehunt](#), 125 AD3d 1177 (2/19/2015). (As noted in the [Feb. 27, 2015, edition](#) of News Picks, the Appellate Division’s decision focused on apparent use of altered court documents in the Article 78, not the availability of court proceeding records.) A *New York Law Journal* article from two years earlier (1/4/2013) indicated that an acting Supreme Court Justice ordered that Czajka be given both an audio disk and a transcript of requested proceedings, but the Office of Court Administration (OCA) had sought to intervene. According to the article, OCA “does not normally make the actual recording available” and indicated that doing so “is contrary to court practice and policy, and would give rise to substantial operational and fiscal problems for the courts”

The record for the Third Department appeal in the Czajka matter included a 2011 memorandum from the Administrative Judge for the Third Judicial District to the town and village courts in that district. It directed them to follow a 2008 memo that dealt with “mechanical” recordings sought for appeal. The earlier memo said that recordings had to be transcribed. The 2011 memo said that procedures were being reviewed, but in the meantime, local courts should not provide electronic copies, but forward the recordings of requested proceedings for transcription. Also, courts were to allow the public to make appointments to listen to the recordings and to take notes.

Defenders experiencing problems obtaining local court records are encouraged to contact the Backup Center. If the problems involve dispositions not being reported to the Division of Criminal Justice Services (DCJS) for inclusion in criminal history because outstanding surcharges were not paid, note the item in the October 31st News Picks, above, about the [memo](#) from the Office of Justice Court Support reminding courts they cannot hold or fail to report a conviction on those grounds.

Language Continues to Matter

Lawyers daily contend with the importance of appropriate language in a variety of areas, from the way experts

describe certain conditions to the way individual clients want to be addressed or described. Language changes—sometimes organically and sometimes through deliberate efforts—and keeping up is challenging. Some developments of note follow.

“Inmates” No Longer Used in State Law

In August of this year, the Governor [announced](#) signing of a bill requiring that state laws use the phrase “incarcerated individuals” rather than the word “inmate” to refer to people inside the state prison system. News outlets picked it up, including publication of an [article](#) at *FingerLakes1.com*. It quoted the bill’s Assembly sponsor, Jeffrion L. Aubry, who (like many other advocates) criticizes “the use of terms like felon, inmate, prisoner, offender and convict as well” and says that such outdated terminology “adversely impacts an individual’s transition back into their community” The new law is a follow-up to one last year replacing “inmate” in a long lists of statutes; the new law covers laws that were still only bills at that time. See the [last issue](#) of the *REPORT* for an item about the prior law.

Efforts to change language that refers to a person or group of people who are incarcerated reflect a more basic problem. As Rafiq J. Salim, Peer Advocate at Western New York Independent Living, said to the *REPORT* in response to the new law: “[l]abel denotations accrete negative connotations from the social circumstances in which they are used.” He went on to say that “[t]he systemic dehumanization of people within the ‘crime & punishment’ system paradigm so eloquently described by Dostoyevsky is not altered by changing the labels of the actors.” These statements serve as a reminder that not all impacted people, or their advocates, share exactly the same view about approaching the problem that they all recognize: current practices are harmful and must be changed.

Best Practice Generally: Ask What Term A Person Uses

Terms used to refer to individuals and groups matter in many contexts, not just the criminal legal arena. Dee Glickman’s presentation at NYSDA’s Annual Conference, mentioned above, included information useful not only to defenders with trans clients but to anyone working to be inclusive and avoid inflicting harm when talking or writing. Other sources of information are available as well, such as the Center of Excellence’s “[Language Guidance When Serving LGBTQ+ Populations](#).” The key advice there: the best practice is to honor the language individuals use to identify themselves.

This applies in a number of contexts. See for example the Statewide Autism Resources & Training Project of Grand Valley State University (Michigan) which notes on

a “Language Matters” [webpage](#) the difference between “people-first” and “identity-first” language, and says, “[w]henever possible, ask the individual or a family member what they prefer.” And training materials from a 2017 NYSDA Annual Conference presentation on Representing Clients with Intellectual and Developmental Disabilities included this:

It’s important to ask the person up front how they would like others to refer to their disability or disabilities. Depending on the type of disability a person has, he or she may prefer the use of certain terminology. For example, while many people with I/DD prefer people first language, people in the Deaf community may or may not use people first language, depending on their type of disability.

Defense lawyers may find choosing terminology for use in a case to be particularly complicated. Scientific or medical terms used to describe people with certain characteristics or conditions may differ from the words or phrases a given person uses for themselves. For example, materials from Mark Mahoney’s July presentation at the Annual Conference contain much information about “ASD”—autism spectrum disorder. But a table in “The use of language in autism research,” [published](#) on Sept. 29, 2022, by *Trends in Neuroscience*, includes ASD in a “potentially offensive” column because “disorder” is “unnecessarily medicalised and reinforces negative discourses that autism is wrong or needs curing.” In preparing and offering a defense that requires reference to medical literature, lawyers could find themselves caught between a client’s desire to avoid the stigmatizing word “disorder” and the need to use the literature to show a jury, court, or prosecutor that the client’s autism helps explain the client’s actions.

Further complications are presented by questions being raised about how person-first language is used. Some have observed that it “seems to be used more often for persons with disabilities than for persons without disabilities; more often for children with disabilities than for adults with disabilities; and most often for disabilities ‘deemed by most people to be undesirable’” Morton Ann Gernsbacher, Editorial Perspective: [The use of person-first language in scholarly writing may accentuate stigma](#) (2017).

Consider the Place and Purpose of the Language

The above discussion is a reminder that the use of language may vary depending on the situation. Consider this, from a December 1981 article in NYSDA’s early publication, *The Defender*:

One of the first rules taught in both writing and speaking is, “Know your audience.” In a criminal trial, your audience consists of twelve jurors, one

or two alternates, and a judge. Clear, inoffensive communication with them is paramount. If, during a trial, for example, you utter the statement, “Everybody in this city owns his own home,” you will be speaking properly. Some women on the jury, however, might take offense at your use of the masculine possessive pronoun. An attempt to be gender neutral sounds terribly stilted even though it is correct: “Everybody in this city owns his or her own home.” The best solution to this problem is probably to choose the grammatically incorrect construction, “Everybody in this city owns their own home.” Was any harm done?

While some things have changed since 1981, whether in grammar or in what language is considered socially appropriate, the advice to “know your audience” remains solid.

Bail Reform: Rollbacks Not Enough for Opponents

The limited rollbacks of bail reform reported in the [last issue](#) of this newsletter did not satisfy those who would overturn all reforms and go further. A blatant campaign to heighten public fear of crime and jail more people for the crime of lacking money continued. In response, the *Buffalo News* noted in an October 11th [editorial](#), “with the political season in full fury, it’s more important than ever to maintain a factual, data-based approach to any future action—or inaction—on bail reform.” A day later, the *Times Union* similarly [called out](#) politicians who “keep exploiting New Yorkers’ fears about crime and to propose deceptive, simplistic solutions like repealing bail reform.” The release of arrested people—who are presumed innocent—has been decried without acknowledgment that in some instances prosecutors’ charging decisions set up the release. Some elected officials maintained support of bail reforms intended to end discrimination on the basis of wealth in the face of demagoguery, like State Senate Deputy Majority Leader Michael Gianaris, who was attacked in a *New York Post* [article](#) on October 2nd. Others, like Attorney General Letitia James, [reportedly](#) said she was “[now open to](#) changes to the measures.”

Data accruing on the impact of bail reform was discussed in the [Oct. 17, 2022, edition](#) of News Picks. A *Gotham Gazette* [article](#) on October 19th noted that data is being collected and discussed, but that there is disagreement over what it shows. The article faults the legislative leadership for not convening “even a single dedicated hearing to try to set the record straight” and suggests a legislative hearing could “delve into data, dispel myths, and debunk outright lies about the law’s impact on crime, while serving as an accountability measure for all three branches of government for their roles in the passage, execution, and interpretation of the law.” Supporters

of the reform said no legitimate purpose would be served by hearings.

NYSDA supports bail reform and works to train and inform defenders about bail issues. See the [Bail Reform Implementation](#) webpage or contact the Backup Center for assistance.

HALT Solitary: Opponents Criticize Even as Implementation Lags

The Albany County Sheriff joined the chorus of complaints about the Humane Alternatives to Long-Term Solitary Confinement Act (HALT), the legislation intended to “address the impact solitary confinement has on a person’s mental and physical health,” as a [story](#) on *cbs6albany.com* noted on October 20th. The head of the New York City Department of Correction has asked to extend from 10 hours to 17 the number of hours per day that people incarcerated at Rikers Island can be locked down, according to a [report](#) in *The City*. An October 24th [article](#) posted on *NYFocus.com* as part of a series on HALT in prisons said that despite the limits set out in the statute, “the New York state prison system has been using its own criteria, illegally sending hundreds of people to solitary for lesser infractions” And a *TruthOut.org* said back in a June 20, 2022, article, as to the RRUs called for by HALT, “advocates are concerned that these new Residential Reentry Units will replicate the problem of alternatives that are still punitive rather than therapeutic.” Clearly, HALT implementation problems, discussed in the [October 17th edition](#) of News Picks, are myriad, and continue. NYSDA supports the full implementation of the HALT Act. ♪



NYSDA's 2022 Annual Meeting of the Membership was attended by members present in Saratoga Springs and by Zoom. (More conference photos on p. 67.)

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 Martinez Ramirez](#), No. 20–1009 (5/23/2022)

FEDERAL HABEAS CORPUS | IAC

ILSAPP¹: The U.S. Supreme Court held that federal habeas courts may not hold evidentiary hearings to assess claims that post-conviction counsel was ineffective. Justice Thomas wrote for the majority. In dissent, Justices Breyer and Kagan joined Justice Sotomayor. The majority's decision would curtail federal courts' power to safeguard the Sixth Amendment right to effective assistance of counsel. The petitioners, two death-row inmates in Arizona, were penalized for their attorneys' failures to develop evidence to support their claims. One attorney did not explore proof suggesting that the client could not have committed the crime, and the other failed to investigate the client's intellectual disability. The majority had hollowed out precedent by reviving an argument previously relegated to a dissent. In AEDPA, Congress struck a balance between respecting state court judgments and preserving the vital role of federal courts in guarding against egregious system failures. The majority created an imbalance by fixating on finality.

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

[Egbert v Boule](#), No. 21–147 (6/8/2022)

BIVENS | REMEDY

ILSAPP: The owner of a Washington State inn, located at the Canadian border, brought a Bivens action against a border control agent who allegedly used excessive force against him when investigating a suspected illegal border-crossing. The U.S. Supreme Court held that *Bivens* did not provide for such Fourth Amendment claim. Justice Sotomayor dissented, joined by Justices Breyer and Kagan. Lawsuits for damages played a critical role in deterring unconstitutional conduct by federal law enforcement officers and providing meaningful relief to victims. The majority rewrote a legal standard so as to deny a remedy to many persons injured by federal officers. The only possible special factor here was that the petitioner's property abutted an international border. No national-security concerns were raised by a federal officer's physical assault of a U.S. citizen on U.S. soil. The majority eschewed judicial restraint.

[Andrus v Texas](#), No. 21–6001 (6/13/2022)

RIGHT TO COUNSEL - EFFECTIVE ASSISTANCE HABEAS CORPUS

LASJRP²: In this death penalty case, Justice Sotomayor, joined by Justices Breyer and Kagan, dissent from the denial of a petition for a writ of certiorari, noting, inter alia, that this Court previously found deficient performance by defense counsel and remanded for a determination of prejudice under the second prong of *Strickland*; that, on remand, the Texas Court of Criminal Appeals denied relief, finding no prejudice "because the mitigating evidence offered at the habeas stage was relatively weak ... and because the aggravating evidence was strong"; that the Texas court rejected or ignored this Court's conclusions as to the childhood mitigation and mental-health mitigation evidence adduced on habeas review, and also rejected this Court's analysis of the evidence on the performance prong to deny relief on the prejudice prong; that summary correction is particularly necessary where, as here, a lower court clearly and directly contravenes this Court's settled precedent and relied upon analysis "too much of which too closely resembles what we previously found improper"; and that "such defiance of vertical stare decisis, if allowed to stand, substantially erodes confidence in the functioning of the legal system."

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

US Supreme Court *continued***Denezpi v United States, No. 20-7622 (6/13/2022)**

The double jeopardy clause, which by its terms, “prohibits separate prosecutions for the same offense ... does not bar successive prosecutions by the same sovereign” for acts that violated laws of both that sovereign and another. A member of the Navajo Nation was twice prosecuted for acts on the Ute reservation. The first prosecution was by way of a criminal complaint filed by an officer with the Bureau of Indian Affairs in a “CFR” court (established under what is now the Code of Federal Regulations), for offenses under the Ute Mountain Code and the CFR. The second was by way of indictment in federal district court under the federal Major Crimes Act.

Dissent: [Gorsuch, J] The dual-sovereignty doctrine invoked by the majority “is at odds with the text and original meaning of the Constitution.” In any event, the doctrine cannot sustain the conclusion here. Questions not raised here as to the Court of Indian Affairs remain for another day.

Johnson v Arteaga-Martinez, No. 19-896 (6/13/2022)

The text of 8 USC 1231(a) does not require “the Government to offer detained noncitizens bond hearings after six months of detention in which the Government bears the burden of proving by clear and convincing evidence that a noncitizen poses a flight risk or a danger to the community.” The text of 8 USC 1231(a)(6), which “provides that certain noncitizens who have been ordered removed ‘may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision,’” does not even hint at a requirement for a bond hearing in those matters. Also, see the companion case, Garland v Gonzalez, No. 20-322 (6/13/2022).

Kemp v United States, No. 21-5726 (6/13/2022)

A judge’s error of law falls within Federal Rule of Civil Procedure 60(b)(1), which “allows a party to seek relief from a final judgment based on, among other things, a ‘mistake.’” Rule 60(b) was amended in 1946; “[t]he preamendment Rule 60(b) covered only a party’s mistakes ... and for that reason could not be grounds to correct a judge’s legal mistake. By eliminating that party specific qualifier, the 1946 amendments opened Rule 60(b)(1) to judicial mistakes of law previously remediable only by bills of review.”

Concurrence: [Sotomayor, J] “I join the Court’s opinion with the understanding that nothing in it casts doubt on the availability of Rule 60(b)(6) to reopen a judgment in extraordinary circumstances, including a change in con-

trolling law.” Further, “I do not understand the Court’s opinion to break any new ground as to Rule 60(c)(1), which requires that all Rule 60(b) motions be ‘made within a reasonable time.’”

Dissent: [Gorsuch, J] This case “presents a policy question about the proper balance between finality and error correction.” This type of question is “best resolved not through a doubtful interpretive project focused on a pronoun dropped in 1946, but through the rulemaking process.”

Golan v Saada, No. 20-1034 (6/15/2022)**CUSTODY - HAGUE CONVENTION**

LASJRP: Under the Hague Convention on the Civil Aspects of International Child Abduction, if a court finds that a child was wrongfully removed from the child’s country of habitual residence, the court ordinarily must order the child’s return. Under one of the exceptions to that rule, a court has discretion and is not bound to order a child’s return if it finds that return would put the child at a grave risk of physical or psychological harm.

In exercising this discretion, courts often consider whether any “ameliorative measures” undertaken by the parents or by the authorities of the state having jurisdiction over the question of custody could reduce the risk associated with a child’s repatriation. The Second Circuit has made this a requirement, mandating that district courts examine the range of options that might make possible the safe return of a child before denying return due to grave risk.

The Supreme Court concludes that the Second Circuit’s categorical requirement is inconsistent with the text and other express requirements of the Hague Convention. A district court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings, and exercise its discretion to consider ameliorative measures in a manner consistent with its general obligation to address the parties’ substantive arguments and its specific obligations under the Convention.

George v McDonough, No. 21-234 (6/15/2022)

A statutory exception permits veterans to seek collateral review at any time of denial of benefits for disabilities connected to their military service, subject to certain requirements, “on grounds of ‘clear and unmistakable error.’” That exception does not allow relief from a final decision based on a regulation later deemed contrary to law.

Dissent: [Sotomayor, J] Where the Board of Veterans’ Appeals “clearly and unmistakably violated a statutory

US Supreme Court *continued*

command” in denying benefits, the denial should not be shielded from review.

Dissent: [Gorsuch, JJ] The majority decision “risks insulating countless other decisions in which the Department has wrongly denied veteran benefits based on self-serving regulations inconsistent with Congress’s instructions.”

Shoop v Twyford, No. 21-511 (6/21/2022)

HABEAS | DISSENT | INTERLOCUTORY

ILSAPP: A transportation order that allowed a prisoner to search for new evidence was not “necessary or appropriate in aid of” adjudication of a habeas corpus proceeding, within the meaning of the All Writs Act, where the prisoner had not shown that the desired evidence would be admissible in connection with a claim for relief. Chief Justice Roberts wrote for the majority. Justice Breyer authored a dissent, in which Justices Kagan and Sotomayor joined. The majority had addressed a pretrial order to transport the defendant prisoner to a hospital for medical testing to develop evidence to support his habeas petition. The merits should not have been reached, because the Fourth Circuit lacked jurisdiction to hear the interlocutory appeal. The collateral order doctrine, a narrow exception, did not apply. Such exception applied only to orders that were conclusive; resolved important questions separate from the merits; and would render such questions unreviewable on appeal from final judgment in the underlying action. The majority had extended that doctrine. Transportation orders were ordinary and were not very important, and the question here was not distinct from the merits of the habeas claims. Justice Gorsuch filed a separate dissenting opinion.

United States v Taylor, No. 20-1459 (6/21/2022)

ATTEMPTED ROBBERY | CRIME OF VIOLENCE

ILSAPP: In a federal habeas proceeding, the Supreme Court affirmed a Fourth Circuit order vacating the defendant’s sentence. Justice Gorsuch wrote for the majority. The Court held that attempted Hobbs Act robbery did not qualify as a “crime of violence” under 18 USC § 924 (c) (3) (A) because no element of the offense required proof that the defendant used, attempted to use, or threatened to use force. Accordingly, while the defendant could face up to 20 years in prison for violating the Hobbs Act, he could not lawfully be convicted and sentenced under § 924 (c) to still another decade in federal prison. Justices Thomas and Alito filed separate dissents.

New York State Rifle & Pistol Assn., Inc. v Bruen, No. 20-843 (6/23/2022)

Consistent with D.C. v Heller (554 US 570 [6/26/2008]) and McDonald v City of Chicago, Ill. (561 US 742 [6/28/2010]), “the Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home.” “New York’s proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.”

Concurrence: [Alito, JJ] “Much of the dissent seems designed to obscure the specific question that the Court has decided ...” which is that a state may not enforce a law that effectively prevents law-abiding citizens from carrying a gun outside the home for the purpose of self-defense.

Concurrence: [Kavanaugh, JJ] The decision does not bar states “from imposing licensing requirements for carrying a handgun for self-defense.” The Second Amendment, properly interpreted, “allows a ‘variety’ of gun regulations.”

Concurrence: [Barrett, JJ] Two methodological points: “[t]he Court does not conclusively determine the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution,” and the Court avoids the “ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868’ or when the Bill of Rights was ratified in 1791.” The Reconstruction-era history offered by New York, is simply too late (as well as too little).

Dissent: [Breyer, JJ] The Court purports to deal with “the extent to which the Second Amendment prevents democratically elected officials from enacting laws to address the serious problem of gun violence” but does not address “the nature or severity of that problem.” States are left without the ability to address significant dangers. “[A]pplying means-end scrutiny to laws that regulate the Second Amendment right to bear arms would not create a constitutional anomaly Rather, it is the Court’s rejection of means-end scrutiny and adoption of a rigid history-only approach that is anomalous.”

Nance v Ward, No. 21-439 (6/23/2022)

A method-of-execution claim can still be brought under 42 US 1983. A challenge that necessarily implies the invalidity of a conviction or sentence must proceed in habeas corpus, while a prison-conditions suit may proceed under 1983. Nance has met the requirement that an alternative form be proposed to replace a form of execution said to be unconstitutional; that Georgia would have to change its statutes to implement that alternative does

US Supreme Court *continued*

not mean Nance's challenge, if successful, necessarily prevents the sentence of death from being carried out.

Dissent: [Barrett, J] "Nance must proceed in habeas because a judgment in his favor would "necessarily bar" the State from executing him."

Vega v Tekoh, No. 21-499 (6/23/2022)**CIVIL RIGHTS ACTIONS****CONFESSIONS - MIRANDA WARNINGS**

LASJRP: A Supreme Court majority holds that a plaintiff may not bring a § 1983 action against a police officer based on the allegedly improper admission of an "un-Mirandized" statement in a criminal prosecution.

Section 1983 provides a cause of action against any person acting under color of state law who "subjects" a person or "causes [a person] to be subjected ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Miranda* imposed prophylactic rules which are constitutionally based, but at no point did the *Miranda* Court state that a violation of its new rules constituted a violation of the Fifth Amendment right against compelled self-incrimination. Instead, it claimed only that those rules were needed to safeguard that right during custodial interrogation. The Court's post-*Miranda* cases have acknowledged the prophylactic nature of the *Miranda* rules and engaged in cost-benefit analysis to define the scope of these prophylactic rules.

Although it may be argued that the *Miranda* rules constitute federal "law" and that an abridgment of those rules can therefore provide the ground for a § 1983 claim, allowing the victim of a *Miranda* violation to sue a police officer for damages under § 1983 would have little additional deterrent value, and would cause many problems.

Dobbs v Jackson Women's Health Organization**No. 19-1392 (6/24/2022)**

"We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment." "[T]o ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."

Concurrence: [Thomas, J] "[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Oberge-*

fell. Because any substantive due process decision is "demonstrably erroneous," ... we have a duty to "correct the error" established in those precedents After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated."

Concurrence: [Kavanaugh, J] "I agree that constitutional rights apply to situations that were unforeseen in 1791 or 1868—such as applying the First Amendment to the Internet or the Fourth Amendment to cars. Moreover, the Constitution authorizes the creation of new rights—state and federal, statutory and constitutional. But when it comes to creating new rights, the Constitution directs the people to the various processes of democratic self-government contemplated by the Constitution" "[M]ay a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before today's decision takes effect? In my view, the answer is no based on the Due Process Clause or the Ex Post Facto Clause."

Concurrence: [Roberts, CJ] "[T]here is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all."

Dissent: [Breyer, J] "The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does casts "doubt on precedents that do not concern abortion." "Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. ... The same could be said, though, of most of the rights the majority claims it is not tampering with." "How much risk to a woman's life can a State force her to incur, before the Fourteenth Amendment's protection of life kicks in?" "Finally, the majority's ruling today invites a host of questions about interstate conflicts." "The reasons for retaining *Roe* and *Casey* gain further strength from the overwhelming reliance interests those decisions have created."

[**Ed. Note:** This summary of *Dobbs* highlights discussions in the various opinions relating to what if any effect the decision may have on other rights and legal issues that could affect public defense practice, such as substantive due process, the right to travel, interstate conflicts, and questions of reliance.]

Concepcion v United States, 20-1650 (6/27/2022)**DRUGS | FIRST STEP ACT | REHABILITATION**

ILSAPP: In an opinion delivered by Justice Sotomayor, the U.S. Supreme Court held 5-4 that the First Step Act

US Supreme Court *continued*

(authorizing District Courts to reduce sentences of defendants convicted of certain offenses involving crack cocaine) allowed courts to consider intervening changes (such as rehabilitation) in exercising their discretion to reduce a sentence. Several Circuits had limited the discretion of resentencing courts to consider only the change in the statutory range. Even before the American colonies became a nation, sentencing judges could exercise wide discretion in the sources and types of evidence used to determine the punishment to be imposed. Nothing in the First Step Act overcame the tradition of broad federal District Court sentencing discretion.

Ruan v United States, No. 20-1410 (6/27/2022)

"A provision of the Controlled Substances Act, codified at 21 U. S. C. §841, makes it a federal crime, '[e]xcept as authorized[,] ... for any person knowingly or intentionally ... to manufacture, distribute, or dispense ... a controlled substance,' such as opioids." "We now hold that §841's 'knowingly or intentionally mens rea applies to the "except as authorized" clause. This means that once a defendant meets the burden of producing evidence that his or her conduct was 'authorized,' the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner."

Concurrence: [Alito, J] "[T]he Court recognizes a new hybrid that has some characteristics of an element and some characteristics of an affirmative defense. The consequences of this innovation are hard to foresee, but the result may well be confusion and disruption." "I would thus hold that a doctor who acts in subjective good faith in prescribing drugs is entitled to invoke the CSA's authorization defense. ... A doctor who knows that he or she is acting for a purpose foreign to medicine—such as facilitating addiction or recreational drug abuse—is not protected by the CSA's authorization to distribute controlled substances by prescription."

Concepcion v United States, No. 20-1650 (6/27/2022)

Where a convicted person seeks a reduction in their sentence under the First Step Act of 2018, which authorizes imposition of a reduced sentence "'as if' the revised penalties for crack cocaine enacted in the Fair Sentencing Act of 2010 were in effect at the time the offense was committed," the court adjudicating the motion may also consider other intervening changes of law or fact.

Dissent: [Kavanaugh, J] "The text of the First Step Act authorizes district courts to reduce sentences based only on changes to the crack-cocaine sentencing ranges, not

based on other unrelated changes that have occurred since the original sentencing."

Kennedy v Bremerton School Dist., No. 21-418

(6/27/2022)

FIRST AMENDMENT - FREE SPEECH/EXERCISE OF RELIGION IN SCHOOL CONTEXT

LASJRP: In a 6-3 decision, the Supreme Court finds a violation of the First Amendment's Free Speech and Free Exercise Clauses where petitioner lost his job as a high school football coach after he knelt at midfield after games to offer a quiet personal prayer.

The District burdened petitioner's sincere religious practice pursuant to a policy that is not neutral or generally applicable, and petitioner was not engaged in speech ordinarily within the scope of his duties as a coach. Although the District insists petitioner's rights to religious exercise and free speech must yield to the District's interest in avoiding an Establishment Clause violation, a natural reading of the First Amendment suggests that the Clauses have complementary purposes, not warring ones that result in one Clause always prevailing over the others. Here, a government entity sought to punish an individual for engaging in a personal religious observance, based on a mistaken view that it has a duty to suppress religious observances even as it allows comparable secular speech.

Oklahoma v Castro-Huerta, No. 21-429 (6/29/2022)

"[T]he Court today holds that Indian country within a State's territory is part of a State, not separate from a State. Therefore, a State has jurisdiction to prosecute crimes committed in Indian country unless state jurisdiction is preempted. With respect to crimes committed by non-Indians against Indians in Indian country, the Court today further holds that the General Crimes Act does not preempt the State's authority to prosecute; that Public Law 280 does not preempt the State's authority to prosecute; that no principle of tribal self-government preempts the State's authority to prosecute; that the cited treaties do not preempt Oklahoma's authority to prosecute; and that the Oklahoma Enabling Act does not preempt Oklahoma's authority to prosecute (indeed, it solidifies the State's presumptive sovereign authority to prosecute)."

Dissent: [Gorsuch, J] "Oklahoma's courts exercised the fortitude to stand athwart their own State's lawless disregard of the Cherokee's sovereignty. Now, at the bidding of Oklahoma's executive branch, this Court unravels those lower-court decisions, defies Congress's statutes requiring tribal consent, offers its own consent in place of the Tribe's, and allows Oklahoma to intrude on a feature of tribal sovereignty recognized since the founding. One can only hope the political branches and future courts will do

US Supreme Court *continued*

their duty to honor this Nation's promises even as we have failed today to do our own."

Torres v Texas Department of Public Safety,
No. 20-603 (6/29/2022)

States may not invoke sovereign immunity to block suits against them by military veterans asserting a right under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (38 USC 4301 et seq.) to reclaim their prior state jobs, with accommodation for service-related injuries, upon returning from deployment. "Text, history, and precedent show that the States, in coming together to form a Union, agreed to sacrifice their sovereign immunity for the good of the common defense."

Concurrence: [Kagan, J] "Much more than eminent domain, war powers lie at the heart of the [Constitutional] Convention's plan." The decision in *PennEast Pipeline Co. v New Jersey* (6/29/2021) requires a finding that "[a]t the Convention, the States waived their sovereign immunity to any suit Congress authorized under the war powers."

Dissent: [Thomas, J] We held in *Alden v Maine* (527 US 706, 743 (1999)) "that 'the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.'" Even if we consider "'our 'plan of the Convention' precedents applicable to private actions in federal court, I would still conclude that the States have not waived their immunity to private damages actions authorized by the war powers."

Biden v Texas, No. 21-954 (6/30/2022)

The Migrant Protection Protocols (MPP) issued in 2019, which "provided for the return to Mexico of non-Mexican aliens who had been detained attempting to enter the United States illegally from Mexico," was suspended in 2021 by a new administration that then sought to terminate it. Rescission of the MPP did not violate the Immigration and Nationality Act (INA). "[S]ection 1225(b)(2)(C) means what it says: 'may' means 'may,' and the INA itself does not require the Secretary to continue exercising his discretionary authority under these circumstances." The Government's second termination of the policy, following judicial ruling, was a valid final agency action. The District Court must consider on remand whether the second termination comports with the Administrative Procedures Act.

Concurrence: [Kavanaugh, J] "The larger policy story behind this case is the multi-decade inability of the political branches to provide DHS with sufficient facilities to

detain noncitizens who seek to enter the United States pending their immigration proceedings. But this Court has authority to address only the legal issues before us."

Dissent: [Alito, J] The majority "unnecessarily resolves difficult jurisdictional questions ... contrives a way to overlook the clear statutory violations that result from DHS's decision to terminate the use of its contiguous-territory return authority ... [and] unjustifiably faults the Court of Appeals for rejecting the Government's last-minute attempt to derail the ordinary appellate process."

Dissent: [Barrett, J] "I agree with the Court's analysis of the merits—but not with its decision to reach them. ... I would vacate and remand for the lower courts to reconsider their assertion of jurisdiction in light of *Aleman Gonzalez*."

New York 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 McKenzie-Smith, 38 NY3d 1048 (5/19/2022)

"On review of submissions pursuant to section 500.11 of the Rules, order reversed and case remitted to the Appellate Division, Fourth Department, for consideration of the facts and issues raised but not determined on appeal to that Court. The Appellate Division erred in holding that defendant's *Antommarchi* claim (*People v Antommarchi*, 80 NY2d 247 [1992]) entitled him to a new trial (*see People v Wilkins*, 37 NY3d 371, 380 [2021])."

People v Rodriguez, 38 NY3d 151 (5/19/2022)

SEXTING | AUTHENTICATION

ILSAPP¹: Upon the defendant's appeal from a judgment convicting him of attempted use of a child in a sexual performance and 1st degree disseminating indecent material to a minor, the Second Department reversed. The People appealed, and the Court of Appeals reversed and remitted. There was no abuse of discretion as a matter of law in the determination that screenshots purporting to depict selected portions of text messages with sexual content between the defendant coach and a 15-year-old athlete were sufficiently authenticated. For digital photographs, the proper foundation may be established through testimony that the photographs accurately represented the subject matter depicted. Testimony of the

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

NY Court of Appeals *continued*

victim sufficed to authenticate the screenshots taken by her boyfriend. Even if the best evidence rule applied in this context, the trial court properly admitted the screenshots. Upon remittal, the Appellate Division was to consider arguments raised by the defendant but not previously determined on appeal.

People v Deverow, 38 NY3d 157 (5/24/2022)

The trial court erred in precluding the defense from presenting testimony from a prosecution witness's girlfriend that would have contradicted the witness's testimony that he was at the scene with her. This "would have directly contradicted a significant portion" of the witness's account, undermining his "testimony as to how and where he encountered" the defendant and others just before they fired their guns. Because the prosecution's own theory placed the girlfriend on the scene just before the shooting, "her testimony cannot be characterized as collateral." The court also erred in excluding three 911 calls, which were admissible as present sense impressions. The calls satisfied the requirement that the statements be contemporaneous, coming from the scene of the incident at the time it occurred, and were each sufficiently corroborated by independent evidence. "That certain details of the 911 calls conflict with the People's evidence and their theory of the case does not render the statements in the calls unreliable. Indeed, that potential conflict supports defendant's argument that the precluded testimony, the "substance and content" (*Vasquez*, 88 NY2d at 576) of which was consistent with other record evidence, denied him his right to present a defense."

People v Garcia, 38 NY3d 1137 (5/24/2022)

The defendant, convicted of public lewdness and acquitted of other charges after a bench trial following reduction of initial Class A misdemeanor charges to Class B misdemeanors, asserted that he was denied his right to a jury trial. The Appellate Term correctly found that his "conclusory allegation that he was deportable if convicted 'on any of the charged B misdemeanors,' supported by a bare citation to 8 USC § 1227 (a) (2) (A) (ii), under which an alien is deportable if 'convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct,' was insufficient to establish his right to a jury trial."

Dissent: [Wilson, JJ] While believing *People v Suazo* was wrongly decided, under *stare decisis* I have a duty to follow it. "[T]he majority's creation of an ambiguous and heightened burden to invoke a defendant's Sixth Amendment right to a jury in this context is incompatible with *Suazo*."

People v Wideman, 38 NY3d 1067 (5/24/2022)

"A determination of reasonable suspicion is a mixed question of law and fact which we review for record support justifying the officer's action (see *People v Parker*, ...). On the unique facts of this case, there is record support for the Appellate Division's finding of reasonable suspicion to conduct the pat frisk for officer safety (see generally *People v Batista*, 88 NY2d 650, 654-655 [1996]). Defendant's remaining claim also lacks merit, as he failed to establish that he was prejudiced by the suppression of allegedly material evidence in violation of *Brady v Maryland* (373 US 83 [1963]) (see e.g. *People v Garrett*, 23 NY3d 878, 892 [2014])." Footnote: "We have no occasion to consider whether a search for weapons is reasonable when it is solely justified by a missing or endangered person report."

People v Huertas, 38 NY3d 1129 (6/14/2022)

"Under the unique circumstances presented, Supreme Court did not abuse its discretion in reserving decision on the People's pre-trial *Molineux* application which sought to cross-examine defendant regarding the underlying facts of his prior gun-related convictions until after defendant's testimony, at which time the court could determine whether, and to what extent, defendant opened the door to such inquiry (see *People v Molineux*, 168 NY 264, 294 [1901]; *People v Ingram*, 71 NY2d 474, 479 [1988]). In any event, any error that may have occurred in the court's *Molineux* rulings was harmless (see *People v Grant* ...)."

People v Laboriel, 38 NY3d 1109 (6/14/2022)

"Defendant's challenge to the validity of his plea is not properly raised on this appeal from an Appellate Division order affirming a sentence, pursuant to 22 NYCRR § 670.11 (b) (see CPL 450.30 [1]; 470.35 [1]; *People v Pagan*, 19 NY3d 368, 370-371 [2012]). Defendant's sentence—an authorized prison term with post-release supervision—is not illegal, and any excessive sentence claim is beyond the scope of this Court's review (see *People v Veale*, 78 NY2d 1022, 1023-1024 [1991]). The many dissenting opinions cited by the dissent provide no support for a different result ...)."

Dissent: [Rivera, JJ] "When the government fails to keep its promises to a defendant by continuing to deny that defendant's liberty beyond their agreed-upon release date, the defendant has established that their sentence is unlawful and that they are entitled to relief for that breach."

NY Court of Appeals *continued***People v Stroud, 38 NY3d 1130 (6/14/2022)**

“A determination of reasonable suspicion is a mixed question of law and fact which is beyond our further review if there is legally sufficient record support for the determinations of the courts below (*see People v Parker*, 32 NY3d 49, 55 [2018]). The record contains support for the lower courts’ finding of reasonable suspicion to stop the car in which defendant was a passenger (*see People v Chestnut* ...).”

People v Galindo, 38 NY3d 199 (6/16/2022)**PEOPLE’S APPEAL | NO RETROACTIVITY**

ILSAPP: CPL 30.30 (1) (e), made effective while the defendant’s direct appeal was pending, did not apply here. The amendment required the application of maximum times for prosecutorial readiness to accusatory instruments charging traffic infractions jointly with a felony, misdemeanor, or violation. Generally, retroactive operation of laws was disfavored, and nothing in the instant statutory amendment called for such operation. The Appellate Term order granting the defendant’s motion to dismiss the accusatory instrument was reversed. Judge Rivera wrote for a unanimous court.

People v Hill, 38 NY3d 460 (6/16/2022)**POSSESSION OF DRUGS - SYNTHETIC CANNABINOID**

LASJRP²: The Court of Appeals finds facially deficient a count charging defendant with criminal possession of a controlled substance in the seventh degree for allegedly possessing an illegal synthetic cannabinoid.

To meet the jurisdictional standard for facial sufficiency, a misdemeanor complaint must set forth facts that establish reasonable cause to believe that the defendant committed the charged offense. Standing alone, a conclusory statement that a substance was a particular type of controlled substance does not meet the reasonable cause requirement.

Here, an officer alleged that he saw defendant possess one “clear ziplock bag containing a shredded dried plant-like material with a chemical odor”; and “based upon [his] training and experience, which includes training in the recognition of controlled substances, and their packaging,” the officer also alleged that the “substance is alleged and believed to be synthetic cannabinoid/synthetic marijuana (K2).”

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

The Public Health Law criminalizes possession of some, but not all, synthetic cannabinoids. The complaint made no reference to Public Health Law § 3306(g), or its schedule which lists ten proscribed synthetic cannabinoid substances by specific chemical designation, and gave no basis for concluding that the substance defendant possessed was an illegal synthetic cannabinoid listed in § 3306(g).

People v Serrano, 38 NY3d 1180 (6/16/2022)

“The order of the Appellate Division should be affirmed. County Court properly denied defendant’s request to charge assault in the third degree (Penal Law § 120.00 [1]) as a lesser included offense of assault in the first degree (*see People v Almonte*, 33 NY3d 1083, 1084 [2019]). Furthermore, defendant received effective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 712-715 [1998]). Defendant’s remaining contentions, in particular his challenges to the admission of certain testimony, are unpreserved or waived.”

People v Hemphill, 2022 NY Slip Op 04663 (7/21/2022)**APPEAL - HARMLESS ERROR**

LASJRP: The Court of Appeals holds that the admission of a third party’s plea allocution in violation of defendant’s Sixth Amendment Confrontation Clause rights is harmless beyond a reasonable doubt.

Given, inter alia, testimony by eyewitnesses identifying defendant as the shooter, DNA evidence linking defendant to a blue sweater that matched eyewitness descriptions of the shooter’s attire, and proof of defendant’s flight from New York shortly after the shooting and his evasion of authorities by use of an alias, the evidence of guilt was overwhelming.

Further, there is no reasonable possibility that the erroneously admitted plea allocution might have contributed to defendant’s conviction. The plea allocution neither exculpated the other individual nor inculpated defendant as the shooter, which allowed defendant to argue to the jury that the other individual was the perpetrator.

First Department

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People v Diaz, 203 AD3d 611 (1st Dept 3/24/2022)**SEARCH AND SEIZURE - AUTO SEARCH
- MOTION PAPERS**

First Department *continued*

LASJRP¹: The First Department concludes that the court correctly applied the automobile exception to the warrant requirement. The mere fact that a GPS tracking device was installed on defendant's car does not suggest that the predicates for the automobile exception do not apply.

The court properly allowed the People to rely on the automobile exception even though they had not raised it in their response to defendant's omnibus motion. There is nothing in CPL § 710.60(1) to suggest that the People's answer to a suppression motion limits the evidence and arguments they may present at a hearing. This initial hearing took place upon remand from this Court; it was not a reopened suppression hearing. Moreover, given the information provided in the People's brief and in discovery materials, defendant was not unfairly surprised by the People's arguments. (Supreme Ct, New York Co)

Matter of Kyng F., 203 AD3d 597 (1st Dept 3/24/2022)

**ABUSE/NEGLECT - REMOVAL/IMMINENT RISK
- VISITATION**

LASJRP: The First Department upholds the family court's finding under FCA § 1028 that the child would face imminent risk of harm if returned to the father's care where the petition charged that the father had committed acts of domestic violence against the non-respondent mother in the child's presence, and the case worker testified concerning the father's aggressive and uncooperative behavior during supervised visits and in dealings with the agency. Although the father was being treated for his mental health issues, he refused referrals for anger management and continued to show a lack of insight into the issues that gave rise to the proceedings.

The family court also properly found no good cause under FCA § 1061 to modify the release order to allow unsupervised visits by the father. (Family Ct, Bronx Co)

People v McDonald, 203 AD3d 636 (1st Dept 3/29/2022)

SPEEDY TRIAL - CONSTITUTIONAL

LASJRP: The First Department finds a violation of defendant's constitutional right to a speedy trial, noting that the pretrial delay of almost six years was unreasonably long and defendant was incarcerated throughout that time, and, as a result, defendant suffered presumptive prejudice; that defendant allegedly shot two people, killing one and wounding the other, but this was a rela-

tively simple case that did not warrant such an extraordinary delay; that following arraignment, the case was reassigned to successive Assistant District Attorneys, and the third and final ADA waited about one year before seeking to obtain a DNA sample from defendant to be compared with DNA recovered from a plastic cup found outside the garage in which the shootings occurred at a party, and that motion was denied because there was no nexus between the cup and the shootings and because defendant's attendance at the party was undisputed; and that although the People argue that the delay was justified by the reluctance of a retired detective to testify, the detective ultimately did not testify at the suppression hearing or trial and was not a necessary witness. (Supreme Ct, Bronx Co)

People v Meredith, 203 AD3d 633 (1st Dept 3/29/2022)

IMPEACHMENT - POLICE MISCONDUCT/BAD ACTS

LASJRP: In this drug sale prosecution, the First Department finds error, albeit harmless, where the court did not allow defendant to cross-examine the undercover officer about the underlying facts of a pending lawsuit alleging that the officer and other officers falsely claimed that the plaintiff had sold drugs. (Supreme Ct, New York Co)

People v Bowman, 203 AD3d 670 (1st Dept 3/31/2022)

CHALLENGE FOR CAUSE | NEW TRIAL

ILSAPP²: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd and 3rd degree robbery after a jury trial. The First Department reversed and ordered a new trial. During jury selection, the court advised the panel that the trial could last until April 17, 2018. The panelist at issue stated that she "absolutely" could not serve on April 18, because she had irrevocable travel plans for that day. When defense counsel said, "We are starting to get closer to the 16th, 17th," and asked whether she "may not be able to give [her] best attention if we started moving in that direction," the panelist said, "Yes." Defense counsel challenged the juror for cause or, in the alternative, sought further inquiry. The trial court denied the challenge, and counsel used his final peremptory challenge against the panelist. Given the impression conveyed—that the prospective juror would have difficulty focusing on the trial and might have leaned toward reaching a verdict quickly—the court should have probed to determine her ability to serve. The Center for Appellate Litigation (Allison Kahl, of counsel) represented the appellant. (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 Brown, 203 AD3d 666 (1st Dept 3/31/2022)**BURGLARY - DWELLING
- TRESPASS NOTICE

LASJRP: The First Department reverses defendant's burglary convictions regarding the thefts of laptop computers from the Physicians & Surgeons Building at Columbia University Medical Center, finding insufficient evidence that the building is a "dwelling." There was no evidence that patients stayed overnight, and although the building was part of a large campus covering several blocks, there was insufficient evidence that this building provided defendant with ready access, via connecting elevators, stairwells, or corridors, to other buildings a considerable distance away where hospital patients stayed overnight.

Although other buildings that were dwellings were open to the public, defendant defied a trespass notice excluding him from Columbia University property. This form did not infringe on defendant's right to medical treatment because a patient subject to such a notice would not be turned away for emergency treatment and would be able to complete ongoing medical treatment. (Supreme Ct, New York Co)

People v Headley, 204 AD3d 417 (1st Dept 4/5/2022)

ATTEMPT | NOT DANGEROUSLY NEAR

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court. The First Department modified. The defendant argued that he was merely present in the front passenger seat of a car that was also occupied by the primary conspirator. In a police sting operation, this car was leading a convoy of cars containing conspirators en route to commit what they thought would be an armed robbery involving a large shipment of drugs, following two months of planning. Such evidence sufficiently supported the conviction of 4th degree conspiracy. However, the police stop of conspirators' vehicles heading to a robbery location several miles away—which had yet to be identified to the conspirators by the sting operators—was insufficient to prove attempted 1st degree robbery. The defendant and the others were not dangerously near to committing robbery. The Office of the Appellate Defender (Alba Morales and Alyssa Barnard-Yanni, of counsel) represented the appellant. (Supreme Ct, New York Co)

Matter of Kamonie U., 204 AD3d 433 (1st Dept 4/5/22)

FCA § 1091 | DENIED

ILSAPP: The AFC appealed from an order of Bronx County Family Court, which denied a Family Ct Act § 1091 motion. The First Department affirmed. The statute

allowed reentry into the foster care system of youth between age 18 and 21 who were discharged from care due to their failure to consent to the continuation of placement. As the AFC argued, a return to care could serve the child—by providing housing, and services. But the AFC only speculated about when the child might be released, and it was not clear that the child would be discharged from jail if Family Court ordered a return to foster care. (Family Ct, Bronx Co)

People v Ledezma, 204 AD3d 420 (1st Dept 4/5/2022)

CHALLENGE FOR CAUSE | REVERSAL

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 3rd degree sexual abuse. The First Department reversed and remanded for a new trial. The trial court improperly denied the defendant's for-cause challenges against prospective jurors who indicated that they were inclined to believe the alleged victims because they had proceeded to trial. The court should have made further inquiries to elicit an unequivocal assurance of the panelists' impartiality and their ability to follow the court's instructions. Steven Lynch represented the appellant. (Supreme Ct, New York Co)

People v Woodley, 204 AD3d 422 (1st Dept 4/5/2022)

IMPEACHMENT - MENTAL HEALTH HISTORY

LASJRP: The First Department finds no error in the imposition of reasonable limits on defendant's cross-examination of the victim regarding his psychiatric history where the court reviewed the victim's recent psychiatric records in camera; there is no reason to believe that ordering older records from a previous provider would have added anything; there was no indication of any serious mental health problems, or anything relevant to the victim's credibility or defendant's justification defense; and defense counsel was permitted to inquire into such matters as the victim's anxiety and panic attacks, as well as any side effects from his use of Xanax. (Supreme Ct, New York Co)

People v Coachman, 204 AD3d 449 (1st Dept 4/7/2022)

DEADLY FORCE | HARMLESS ERROR

ILSAPP: defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1st degree manslaughter. The First Department affirmed. The defendant's theory was that he only used nondeadly force and was defending himself against the victim's nondeadly force. At counsel's request, the court instructed the jury on the justifiable use of ordinary, nondeadly physical force. Over defense objection, the court also instructed the jury on the justifiable use of deadly force. That was error.

First Department *continued*

There was no reasonable view of the evidence that the victim was using, or was about to use, deadly physical force against the defendant. Nevertheless, any error was harmless. (Supreme Ct, Bronx Co)

People v Silva, 204 AD3d 450 (1st Dept 4/7/2022)

IMPEACHMENT - PRIOR INCONSISTENT STATEMENT BY DEFENDANT/STATEMENT BY DEFENSE COUNSEL AT ARRAIGNMENT

LASJRP: The First Department holds that the court properly permitted the People to impeach defendant with statements made in his presence by his counsel at arraignment. It was reasonable to infer that defendant was the source of the statements regarding his actions before and during the stabbing of the victim. (Supreme Ct, New York Co)

People v Jones, 204 AD3d 476 (1st Dept 4/12/2022)

ARREST | HEARING

ILSAPP: The defendant appealed from a judgment of New York County Court, convicting him of 3rd degree CPCS and 2nd degree CPW. The appeal brought up for review the denial of his motion for a suppression hearing regarding an arrest warrant allegedly executed in violation of CPL 120.80. The First Department remanded and held the appeal in abeyance. The motion papers were sufficient to warrant a hearing, where the defendant's assertions were specific, and the People responded with conclusory denials. *See People v Hightower*, 85 NY2d 988. The Office of the Appellate Defender (Kami Lizarraga, of counsel) represented the appellant. (County Ct, New York Co)

Mark R. v Kimberly V., 204 AD3d 481 (1st Dept 4/12/2022)

ESTOPPEL | INAPPLICABLE

ILSAPP: Bronx County Family Court denied the mother's motion to dismiss the petitioner's paternity petition based on equitable estoppel. The First Department affirmed. While the mother's current husband had assumed the role of father, the petitioner had consistently asserted paternity, had planned for the child, had lived with him for a time, and had not acquiesced in the formation of the husband-child bond. Further, there was no indication that providing the DNA test results to the petitioner would harm the young child. (Family Ct, Bronx Co)

Mastrocola v Alcoff, 204 AD3d 471 (1st Dept 4/12/2022)

COORDINATOR | TERMINATED

ILSAPP: The mother appealed from an order of New York County Supreme Court, which denied her motion to enforce the parties' custody stipulation. The First Depart-

ment reversed. The mother's proposed access schedule adhered to the agreement, the father did not submit a proposal, and the parent coordinator recommended access that violated the stipulation. Thus, the mother's schedule should have been adopted, and the coordinator should have been replaced, as requested by the mother. Dawn Cardi represented the appellant. (Supreme Ct, New York Co)

Matter of Sapphire A.W., 204 AD3d 488 (1st Dept 4/12/2022)

MARIJUANA | NEGLECT

ILSAPP: The mother appealed from an order of disposition rendered by Bronx County Family Court in an Article 10 proceeding. The First Department modified. The appeal brought up for review an order finding neglect based on marijuana use. Such finding was vacated. Evidence that the mother smoked marijuana while pregnant, and that mother and child tested positive at the time of birth, was insufficient to sustain the neglect finding. There was no proof that the drug impacted the mother's behavior or otherwise harmed the child or placed her at imminent risk. The neglect finding was inconsistent with the legalization of marijuana. Thomas Villecco represented the appellant. (Family Ct, Bronx Co)

People v Gaccione, 204 AD3d 503 (1st Dept 4/14/2022)

MOLINEUX | "MADE" MAN

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree murder. The First Department affirmed. The trial court properly allowed evidence of the defendant's conviction of witness tampering for an incident committed two years before the instant homicide. The evidence was probative of his desire to become a "made" member of the Genovese crime family—the alleged motive for his participation in the homicide—and of his relationship with a cooperating non-accomplice witness involved in the 1990 incident. Further, the proof tended to explain why the defendant confessed his role in the homicide to this witness. (Supreme Ct, Bronx Co)

Matter of Sandra M. v Che M., 204 AD3d 491 (1st Dept 4/14/2022)

CUSTODY - STANDING/APEALS

ABUSE/NEGLECT - INTERVENTION BY GRANDPARENT/APEALS

LASJRP: The First Department dismisses appeals from an order which dismissed the maternal grandmother's petition for custody, and an order which rejected the grandmother's motion pursuant to FCA § 1035(f) to intervene in the proceedings for the purpose of seeking custody.

First Department *continued*

The petition for custody was rendered moot by the child's adoption, and, in any event, the grandmother lacked standing, as the child was already free for adoption by virtue of the death of her mother. No appeal lies from the rejection of the grandmother's motion to intervene, and, in any event, the appeal was rendered moot by the adoption.

The JRP appeals attorney was Claire Merkin. (Family Ct, New York Co)

**Matter of Maridas A., 204 AD3d 511
(1st Dept 4/19/2022)**

**ABUSE/NEGLECT - ALLOWING ABUSE
- RESPONDENT/PERSON LEGALLY RESPONSIBLE**

LASJRP: The First Department finds sufficient evidence that respondent, the child's adult brother who was adopted by respondent mother, was a person legally responsible for the child where he lived in the same household from when the child was placed in the home when she was young until the allegations of abuse came to light when the child was about fifteen years old; the mother routinely left the child in the brother's care when she left for work or to go to a casino; the brother acted as the functional equivalent of a parent by feeding the child, allowing the child to watch television, and disciplining the child; and the court properly drew a negative inference from the brother's failure to testify.

The evidence was sufficient to support the abuse finding against the mother where she became aware of the allegations that the brother had been sexually abusing the child for years, asked him if they were true, and accepted his denials without taking any steps to protect the child.

The JRP appeals attorney was Diane Pazar, and the trial attorney was Demetra Frazier. (Family Ct, New York Co)

People v McBayne, 204 AD3d 549 (1st Dept 4/21/2022)

**EVIDENCE - COURTROOM DEMONSTRATION
IDENTIFICATION - CONFIRMATORY**

LASJRP: The First Department finds no error in the admission into evidence of a peephole detached from the identifying witness's door, which the deliberating jury was permitted to look through. The witness testified that the peephole was in the same condition as it was at the time of the crime when he looked through it and saw defendant entering the apartment where the fire occurred. The difference between looking through a detached peephole and one that is part of a door, and any differences in lighting conditions, affected the weight to be accorded this evidence rather than its admissibility.

The prosecution established that the identifying witness had sufficient familiarity with defendant to render

his single-photograph identification of defendant confirmatory. A fire marshal testified that the witness knew defendant's first name and the floor and location of his apartment in the building in which they both lived, and that the witness had seen defendant two or three times a week in or outside the building for the past year. (Supreme Ct, New York Co)

People v Patterson, 204 AD3d 548 (1st Dept 4/21/2022)

FST | FRYE

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree CPW. The First Department held the appeal in abeyance and remitted. The motion court should have granted the defense request for a *Frye* hearing on the Forensic Statistical Tool (FST) for DNA evidence. The factors cited by the People—including the removal of barriers to access the FST and its use by defense attorneys—were insufficient to show consensus in the scientific community as to the methodology's reliability. The error was not harmless, given the significance of the DNA evidence derived from use of the FST. The Legal Aid Society of NYC (Tomoe Murakami Tse, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Cooper, 204 AD3d 575 (1st Dept 4/26/2022)

HEARSAY EVIDENCE - PAST RECOLLECTION RECORDED

LASJRP: The First Department finds no error in the admission, as a past recollection recorded, a detective's notes of date and time stamps that appeared on screens as he downloaded videotapes, but which did not appear on the downloaded videos. The detective made the notes as he was viewing the videos, and the fact that he later added defendant's name to his notes does not render them any less contemporaneous. (Supreme Ct, New York Co)

**Matter of Empress B., 204 AD3d 562
(1st Dept 4/26/2022)**

**ABUSE/NEGLECT - EXCESSIVE CORPORAL PUNISHMENT
- DERIVATIVE NEGLECT**

LASJRP: The First Department upholds findings of neglect and derivative neglect, noting that whether or not respondent had a valid reason for disciplining her then fourteen-year-old child, who had left the home with an older cousin without permission for two days, the testimony describing her violence toward the child and the child's resulting injuries reflect that the discipline far exceeded any reasonable force that she had a common-law right to use.

The child's younger siblings were home during the incident. The youngest child witnessed it, and both siblings saw the eldest child's bloody lip afterwards.

First Department *continued*

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

[People v Ferguson](#), 204 AD3d 614 (1st Dept 4/28/2022)

BURGLARY | AGAINST WEIGHT

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of attempted 2nd degree murder and 1st degree burglary. The First Department dismissed the burglary count, finding the conviction against the weight of the evidence. The People failed to prove that the entry into the victim's apartment was unlawful. Their theory was that the victim's estranged wife allowed the defendant to enter the premises to kill the victim. Given that the victim's wife co-owned the building and had a key to the apartment, the People failed to prove that the defendant did not obtain the owner's consent to enter. The Center for Appellate Litigation (Alexandra Mitter, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

[People v Jagnandan](#), 204 AD3d 617 (1st Dept 4/28/2022)

NO CONFLICT | NOT SAME FIRM

ILSAPP: The defendant appealed from an order of Bronx County Supreme Court, which denied his CPL 440.10 motion to vacate a judgment of conviction, after a hearing. The First Department affirmed. The defendant claimed that the attorney who represented him at trial had a conflict of interest because he was a member of the same de facto law firm as codefendant's counsel. While the attorneys—a father and son—may have held themselves out as members of the same firm and they did share some expenses, they were separately incorporated, had separate offices in the same complex, did not share client confidences, and in virtually all respects operated independently of each other. (Supreme Ct, Bronx Co)

[People v Novas](#), 204 AD3d 613 (1st Dept 4/28/2022)

LEAVING SCENE | CONVICTION REINSTATED

ILSAPP: The People appealed from an order of New York County Supreme Court, which granted the defendant's CPL 330.30 (1) motion to set aside a jury verdict convicting him of leaving the scene of an incident without reporting and dismissed the indictment. The First Department reinstated the verdict. The conviction was supported by legally sufficient evidence that, when leaving the scene, the defendant had cause to know that his car caused personal injury. As the victim ran into the street, the front bumper struck him on the leg. He hit the side-view mirror and front bumper and then fell to the ground.

Medical records showed that the pedestrian sustained fractures caused by a significant force. Shortly after the accident, the defendant asked a passenger "to push back out" the side-view mirror. Photographs showed damage to the car and marks on the front bumper. (Supreme Ct, New York Co)

[People v Garcia](#), 205 AD3d 432 (1st Dept 5/3/2022)

CPL 440.20 | CONSTITUTIONAL

ILSAPP: The defendant appealed from an order of NY County Supreme Court denying his CPL 440.20 motion to set aside a sentence imposed for 2nd degree CPW. The First Department affirmed. The defendant, who received the minimum term, sought a sentence of time served. But he had not shown that, if infected with Covid, his medical conditions could cause an extreme risk of serious illness or death, thus rendering his sentence unconstitutional. The matter was remitted for surrender proceedings. (In a previous decision, the sentence was stayed pending appeal based in part on the Covid risks.) (Supreme Ct, New York Co)

[People v McGrier](#), 205 AD3d 431 (1st Dept 5/3/2022)

ASSAULT - INTENT

- DANGEROUS INSTRUMENTS

IDENTIFICATION - SHOWUPS/SUGGESTIVENESS

- VIDEOTAPE OF CRIME

EVIDENCE - COURTROOM DEMONSTRATION

EXPERT TESTIMONY

LASJRP: The First Department concludes that the trial court properly declined to submit assault in the third degree as a lesser included offense of assault in the first degree and gang assault in the first degree where there was no reasonable view of the evidence that defendant, who repeatedly hit the victim in the face with a belt that had a sharp buckle as defendant and his accomplices beat and kicked the victim, intended only to cause physical injury or did not use a dangerous instrument.

The Court also upholds denial of defendant's motion to suppress, concluding that the fact that officers shined flashlights toward the general area in which defendant and other suspects were standing, in response to the witness's complaint of difficulty in seeing, did not render the identification unduly suggestive.

The Court finds no error in the admission of an experiment conducted by the People's investigator regarding color distortion in videotapes. A videotape of the crime showed the man identified as defendant wearing what appears to be a gray sweatshirt, but he was wearing a black sweatshirt when arrested immediately thereafter. The experiment, accompanied by expert testimony, demonstrated that an infrared camera could cause a distortion of color that would explain this discrepancy. The experi-

First Department *continued*

ment used the same cameras, at the same location and time of day as the surveillance video. Although defendant's sweatshirt was unavailable, it was made clear to the jury that the sweatshirts could have been made of different materials, and that goes to weight and not admissibility. (Supreme Ct, New York Co)

**Tatyana M. v Mark R., 205 AD3d 420
(1st Dept 5/3/2022)**

FAMILY OFFENSE | JUDICIAL ESTOPPEL

ILSAPP: The father appealed from an order of disposition of New York County Family Court, which found that he committed certain family offenses and granted the mother an order of protection. The appellate court rejected the argument that she was judicially estopped from testifying about a 2016 incident. The mother's withdrawal of a 2016 petition did not constitute a position contrary to her testimony—particularly since the father threatened to post nude photos of her if she did not drop the matter. Also rejected was the argument that the OP should not have included the child. The father committed the offenses in the child's presence, and the order preserved his visitation rights. (Family Ct, New York Co)

People v Traylor, 205 AD3d 434 (1st Dept 5/3/2022)

**SEARCH AND SEIZURE - STOP OR ARREST/
REASONABLE SUSPICION**

LASJRP: The First Department holds that the police had reasonable suspicion for a stop of defendant where an anonymous call about a fight, which stated the caller's firsthand basis of knowledge, was corroborated by what the officers saw at the scene and heard from witnesses - defendant was holding a golf club and a broken bottle, and the golf club corresponded to the metal object mentioned in the 911 call. The police properly approached defendant, told him to drop the golf club and broken bottle he was holding, and detained him, uncuffed, for approximately ten minutes while an officer spoke to the victim to learn what had transpired.

The fact that the officer briefly pointed his taser at defendant when he initially failed to drop the club and bottle did not elevate the stop to an arrest. (Supreme Ct, New York Co)

Levin v Levin, 205 AD3d 452 (1st Dept 5/5/2022)

PENDENTE LITE | CHILD SUPPORT

The husband appealed from a child support order issued pendente lite by NY County Supreme Court. The First Department modified. Temporary support orders were rarely modified; generally the remedy was a speedy

trial. However, such awards may be modified where, as here, the trial court ordered a double-shelter allowance, i.e. payment of both support under the CSSA and carrying costs on the marital residence. Neither party sought the carrying-costs directive, and Supreme Court did not explain its order. The matter was remitted. Kevin McDonough represented the appellant. (Supreme Ct, New York Co)

People v Pastrana, 205 AD3d 461 (1st Dept 5/5/2022)

**SEARCH AND SEIZURE - AUTO SEARCH
APPEAL - RETROACTIVITY OF LEGISLATION**

LASJRP: After concluding that the People satisfied their burden to establish the elements of a valid check-point stop, and that there was probable cause to search a locked glove box where the officer detected a "very strong" odor of marijuana emanating from the car and observed a "twist" of marijuana on the passenger side floor, the First Department holds that Penal Law § 222.05(3), which affects whether a finding of probable cause may be made based on evidence of the odor of cannabis, should not be applied retroactively. (Supreme Ct, Bronx Co)

[Ed. Note: Leave to appeal was granted 7/27/2022 (38 NY3d 1135)]

Stevens v DCJS, 206 AD3d 88 (1st Dept 5/5/2022)

FAMILIAL DNA | REGS

ILSAPP: The petitioners appealed from a judgment of New York County Supreme Court, which denied their CPLR Article 78 petition seeking to annul Familial DNA Search Regulations set forth in 9 NYCRR 6192. The First Department reversed and vacated the challenged regulations. The petitioners' biological brothers were convicted offenders with genetic profiles in the State DNA database, and the respondents were DCJS and the State Commission on Forensic Sciences. The regulations expanded the use of the State DNA database to allow for familial DNA searches in investigations of crimes, pursuant to a comprehensive protocol. The petitioners were at risk of being targets due to their criminal relatives. Because the petitioners were Black, the risk was intensified. Thus, they had standing. The decisions respondents made in promulgating the regulations were policy-driven and inherently legislative. Since the respondents exceeded their authority, the regulations could not stand. The Legal Aid Society of NYC (Terri Rosenblatt and James Pollock) and Gibson Dunn represented the appellants. (Supreme Ct, New York Co)

First Department *continued*

**Bernadette R. v Anthony V.L., 205 AD3d 490
(1st Dept 5/10/2022)**

SUPPORT VIOLATION | COUNSEL FEES

ILSAPP: The father appealed from an order of New York County Family Court directing him to pay \$62,000 in counsel fees. The First Department affirmed. The lower court properly concluded that the mother's retainer agreement was not fatal to her counsel fees motion. By statute, such fees for willfully violating a child support order were mandatory. To deny this fees request would allow the father to avoid adverse consequences for his violation. (Family Ct, New York Co)

People v Fall, 205 AD3d 482 (1st Dept 5/10/2022)

SEARCH AND SEIZURE - STANDING/EXPECTATION OF PRIVACY - CONSENT

LASJRP: The First Department upholds the denial of defendant's motion to suppress a surveillance video from the store where the homicide occurred, noting that defendant, an employee at his mother's store, lacked a legitimate expectation of privacy in the store's DVR system.

Moreover, defendant's father voluntarily consented to the police taking the DVR system, and had at least apparent authority to do so. The police saw the father unlock and open the store, and he cooperated and affirmatively helped the police to access the DVR box. (Supreme Ct, New York Co)

Matter of New York Civil Liberties Union v New York City Police Department, 205 AD3d 482 (1st Dept 5/10/2022)

FREEDOM OF INFORMATION LAW

LASJRP: The First Department concludes that respondent NYPD met its burden of articulating a particularized and specific justification for denying access to information regarding which New York City public schools used metal detectors, which schools requested the removal of metal detectors, whether those requests were granted, the number of school safety agents assigned to each school and borough, and the types of weapons seized in public schools citywide during certain time periods.

Notwithstanding partial disclosures of some of the information sought, respondent established that disclosing comprehensive statistics covering the time periods at issue would undermine the deterrent effect of maintaining confidentiality. (Supreme Ct, New York Co)

**Rosilyn J. v Charise J., 205 AD3d 480
(1st Dept 5/10/2022)**

SUA SPONTE | NO APPEAL AS OF RIGHT

ILSAPP: The petitioner appealed from an order of Bronx County Family Court, which dismissed her petition for guardianship. The First Department dismissed the appeal and granted counsel's application to withdraw. Since the order appealed from was issued sua sponte—not to resolve an application made on notice—it was not appealable as of right. *See* CPLR 5701 (a) (3); *see also* Family Ct Act § 165 (a) (where method of procedure is not set forth in Family Court Act, CPLR shall apply to extent appropriate); Family Ct Act § 1112 (a) (if no appeal as of right lies, order may be appealed in Appellate Division's discretion). No nonfrivolous issues existed. The children were placed in Social Services' care for the purpose of adoption before the pleading was filed. (Family Ct, Bronx Co)

Sarah L. v Pnina P., 205 AD3d 503 (1st Dept 5/12/2022)

PRIVATE SCHOOL | EXPENSES

ILSAPP: The respondent appealed from a child support order of New York County Family Court. The First Department modified. The court rejected the petitioner's argument that the appellate court lacked jurisdiction to hear the appeal. The notice of appeal was timely filed. If the respondent failed to timely serve the notice, the petitioner was not prejudiced so the defect was excused, pursuant to CPLR 2001 and 5520 (a). The award of educational expenses for private school was vacated. While the parties had anticipated that their five-year-old child would attend private school, the respondent's income was limited, and he was responsible for supporting the child's two half-sisters. Further, the petitioner had greater income. Nicole Trivlis represented the appellant. (Family Ct, New York Co)

**Sun Surety Ins. v People, 205 AD3d 508
(1st Dept 5/12/2022)**

BAIL FORFEITURE | AFFIRMED

ILSAPP: The surety appealed from an order of New York County Supreme Court, which denied its CPLR 5015 motion to vacate bail forfeiture judgments. The First Department affirmed. After the surety's client—the defendant in an underlying proceeding—failed to appear at his sentencing, Supreme Court found his absence unexcused and issued two written bail forfeiture orders. The People duly proceeded against the surety pursuant to CPL 540.10. Thus, the motion to vacate was properly denied. (Supreme Ct, New York Co)

People v Rosario, 205 AD3d 581 (1st Dept 5/24/2022)

10 SKIN CELLS | CONVICTION

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree assault and other crimes. The First Department

First Department *continued*

affirmed. Unless the only innocent explanation for a person's DNA at a crime scene was implausible, the People had to present something more to secure a conviction, the defendant urged. In this case, only 10 skin cells were found on an airbag, and two other people contributed to some of those cells. The appellate court reasoned that, if the defendant occupied the vehicle at some time before it collided with a police car, injuring three officers, the airbag would not have been accessible to him then. Further, if he was operating the car at the time of the incident, the force of the airbag would have caused the transfer of skin cells to the bag. (Supreme Ct, New York Co)

Bowden v Tingling, 205 AD3d 604 (1st Dept 5/26/2022)**MANDAMUS | MOOT**

ILSAPP: The petitioner appealed from an order of Bronx County Supreme Court, which denied her CPLR Article 78 petition seeking mandamus relief compelling the respondent Family Court judge to timely rule on objections to a support order. The First Department affirmed. The petition was properly dismissed as moot since the court had ruled. The mootness exception did not apply, given that the statutory period was mandatory and the issue was not novel. The CPLR 8601(a) application for counsel fees was properly denied. While the court ruled hours after the petition was served, the comprehensiveness of the decision indicated that it had been in the works. The petition was not a catalyst for the ruling; the petitioner was not a "prevailing party." (Supreme Ct, Bronx Co)

People v Cisneros, 205 AD3d 624 (1st Dept 5/26/2022)**SORA | REVERSED**

ILSAPP: The defendant appealed from an order of Bronx County Supreme Court, which adjudicated him a level-two sexually violent offender. The First Department reversed. The Bronx County proceeding should have been dismissed on the defendant's motion. New York County Supreme Court had entered a SORA adjudication based on the defendant's criminal conduct in both counties, which constituted the "current offenses" under the risk assessment instrument. Legal Aid Society, NYC (Arthur Hopkirk, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

Lauren S. v Alexander S., 205 AD3d 632 (1st Dept 5/26/2022)**CUSTODY | CONFIDENTIAL**

ILSAPP: The father appealed from a custody order rendered by New York County Supreme Court. The First

Department affirmed. The appeal from such final order brought up for review an order quashing subpoenas served by the father on the mother's therapists. See [CPLR 5501 \(a\) \(1\)](#). Disclosure or in camera review of the mother's confidential treatment records was not required to decide custody. The forensic report was properly admitted, and any inadmissible hearsay was not a ground for reversal because the conclusions were based on non-hearsay sources. (Supreme Ct, New York Co)

People v Holmes, 205 AD3d 653 (1st Dept 5/31/2022)**PRO SE | ISOLATED REMARK**

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree burglary, upon his plea of guilty. The First Department affirmed. There was no violation of the defendant's right to represent himself. The need for a searching inquiry by the court was not triggered by the defendant's isolated remark, which was followed by his apparent agreement with the court's statement that going pro se was not a good idea. (Supreme Ct, New York Co)

People v Salley, 205 AD3d 651 (1st Dept 5/31/2022)**PUNGENT POT | PROBABLE CAUSE**

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree CPW, upon his plea of guilty. The First Department affirmed. The appeal brought up for review the denial of suppression. During a lawful stop for a traffic infraction, the police noticed the odor of marijuana. Under the law at the time, that mere aroma justified the search of the vehicle and its occupants. Penal Law § 222.05 (3) (eff. 3/21/31) [*sic*], regarding whether a finding of probable cause may be based upon evidence of the odor of cannabis, should not be applied retroactively. (Supreme Ct, New York Co)

People v Shepherd, 205 AD3d 652 (1st Dept 5/31/2022)**PROSECUTOR AS JUROR | CHALLENGE**

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree burglary. The First Department affirmed. The trial court properly denied the defendant's challenge for cause to a Bronx prosecutor. The record did not show that such prospective juror had a relationship to the instant prosecuting office that was likely to preclude her from rendering an impartial verdict, and her answers otherwise established that she could be impartial. (Supreme Ct, New York Co)

People v Sidbury, 206 AD3d 413 (1st Dept 6/2/2022)**ARSON | SENTENCE SLASHED**

First Department *continued*

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree arson after a jury trial, and sentencing him as a second violent felony offender. He intentionally caused damage to a building by setting fire in the cuffing port of the door of his jail cell (an integral part of the door that allowed items to be transferred in and out). The First Department reduced the sentence from 25 to 10 years. The Office of the Appellate Defender (Stephen Strother) represented the appellant. (Supreme Ct, Bronx Co)

[People v Weinstein](#), 207 AD3d 33 (1st Dept 6/2/2022)

SEX ASSAULT VICTIMS | BEHAVIOR

ILSAPP: The defendant movie mogul appealed from a judgment of New York County Supreme Court, convicting him of 1st degree criminal sexual act and 3rd degree rape. The First Department affirmed. The trial court properly permitted expert testimony about rape trauma syndrome to explain behavior that might seem counterintuitive. In a similar vein, Molineux evidence was correctly permitted to help jurors understand victim behavior that might otherwise seem incongruent. The *Sandoval* ruling allowed the People to refer to 32 separate bad acts. The amount of the material was troublingly large, but the acts were relevant to credibility and a willingness to place one's interests about those of others. (Supreme Ct, New York Co)

[Albertina C. v Kim C.](#), 206 AD3d 423 (1st Dept 6/7/2022)

CUSTODY | GRANDMOTHER | PRESUMPTION

ILSAPP: The grandmother appealed from an order of New York County Family Court, which dismissed her custody petition. The First Department affirmed. A grandparent had no presumptive right superior to that of persons whom the agency selected as suitable adoptive parents. The grandmother did not acknowledge the mother's culpability for the beating death of the older brother; did not reveal her income; and had no plan for the child. Thus, the child would remain in the foster home, where he had lived most of his life, had bonded with the other children, and had foster parents who wishes *[sic]* to adopt him. (Family Ct, New York Co)

[Matter of Amara C.](#), 206 AD3d 424 (1st Dept 6/7/2022)

ABUSE/NEGLECT - MENTAL ILLNESS

LASJRP: The First Department finds sufficient evidence of neglect where the evidence showed, inter alia, that respondent suffers from untreated bipolar disorder; specifically, respondent collapsed on the sidewalk while

pushing the child in her stroller, which rolled toward the street, and then was so agitated at the hospital that she had to be sedated. Respondent's use of drugs before the child was born was relevant to her long-standing substance abuse problems and mental health conditions.

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

[People v Cortorreal](#), 206 AD3d 431 (1st Dept 6/7/2022)

POSSESSION OF DRUGS - CONSTRUCTIVE POSSESSION/ ROOM PRESUMPTION

LASJRP: The First Department finds legally sufficient evidence of constructive possession, including evidence that only trusted members of the drug operation would be permitted to enter the apartment in question, which was being used exclusively to process and package heroin.

The evidence also established guilt under the statutory room presumption where the drugs and paraphernalia were in open view and defendants were sufficiently near the drugs even if they were not apprehended in the room with the drugs. (Supreme Ct, New York Co)

[People v Fabien](#), 206 AD3d 436 (1st Dept 6/7/2022)

MRTA | SUPPRESSION

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 22 counts of 2nd degree criminal possession of a forged instrument after a jury trial. The First Department affirmed. The lower court properly denied suppression. Under the law in effect at the time, the odor of marijuana was sufficient to support a finding of probable cause. The MRTA (effective March 31, 2021), provided that in any criminal proceeding, no finding of reasonable cause to believe a crime has been committed may be based solely on the odor of marijuana. The MRTA was inapplicable here, since it did not have retroactive effect, as prior decisions of the First, Second, and Fourth Departments have held. (Supreme Ct, New York Co)

[Kessler v Charney](#), 206 AD3d 450 (1st Dept 6/7/2022)

RELOCATION | HEARING

ILSAPP: The father appealed from an order of NY County Supreme Court, which granted the mother's motion for permission to relocate with the child from Manhattan to a suburban community. The First Department affirmed. This was one of those rare cases where relocation could be decided without a hearing. There was no dispute that the schools in the suburb were excellent; and the father's parenting time would not decrease, given the mother's pledge to take on extra travel to accommodate his schedule. (Supreme Ct, New York Co)

First Department *continued***People v Thorne, 207 AD3d 73 (1st Dept 6/7/2022)****NO REASONABLE SUSPICION | SUPPRESSION**

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of attempted 1st degree robbery. The First Department reversed and dismissed the indictment. The appeal brought up for review the denial of suppression. The issue was reviewable because the waiver of appeal was unenforceable. The defendant fit a vague description of a robbery suspect only in that he was a Black male in the vicinity of the crime. Key parts of the description did not match him, and he had distinctive features—a goatee and tattoos—not included in the description. Further, his behavior in walking quickly and hiding his face was susceptible of an innocent interpretation. Thus, police had no reasonable suspicion, yet they conducted a level-three stop, ordering the defendant to put his hands against a wall, grabbing his arms, and forcing him to the ground. Legal Aid Society, NYC (Ronald Zapata), represented the appellant. (Supreme Ct, New York Co)

People v Ocampo, 206 AD3d 454 (1st Dept 6/9/2022)**NO DELEGATION | JUDICIAL AUTHORITY**

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of certain sexual offenses against a six-year-old girl. The First Department affirmed. At the trial court's direction and upon the parties' consent, the court clerk made a preliminary inquiry to identify prospective jurors to be brought into the courtroom for questioning by the court into their fitness, in light of the nature of the charges and the graphic evidence. The clerk was merely a messenger for a ministerial act; there was no improper delegation of a judicial proceeding and thus no mode-of-proceedings error. (Supreme Ct, Bronx Co)

People v Padilla, 206 AD3d 456 (1st Dept 6/9/2022)

Where the defendant answered affirmatively, under oath, that his identity was that of a U.S. citizen born in Puerto Rico, he should not now be allowed to benefit from a claim that he is in fact another person, a native of the Dominican Republic, and therefore benefit from the fact that he was not advised of potential deportation consequences of his plea. The period of postrelease supervision must be reduced to the three-year statutory maximum allowed on a class D felony. (Supreme Ct, Bronx Co)

People v Cabrera, 206 AD3d 479 (1st Dept 6/14/2022)**HANDCUFFS | NO ARREST**

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree CPW, upon his plea of guilty. The First Department affirmed. The appeal brought up for review the denial of suppression. Based on reliable information that the defendant was illegally transporting firearms into New York, police stopped him as he exited his car. In checking his ID, police noticed that he had a Florida concealed carry permit. When they asked the defendant if he had any firearms in the car, police did not have to *Mirandize* him, even if he was wearing handcuffs. While the detention was a seizure for 4th Amendment purposes, it did not constitute custody for *Miranda* purposes. (Supreme Ct, Bronx Co)

**Matter of Genesis Q., 206 AD3d 473
(1st Dept 6/14/2022)****ABUSE/NEGLECT - ALCOHOL MISUSE
- DISMISSAL/AID OF COURT NOT REQUIRED**

LASJRP: The First Department upholds a finding of neglect where respondent became so intoxicated that the children could not rouse her, causing one child to fear she had died and the other to suffer a panic attack so severe that relatives called emergency services and the child was taken to the hospital; and a finding of neglect had been made two years earlier based in part on alcohol misuse.

The Court rejects respondent's contention that the petition should have been dismissed because the aid of the court was no longer required. Respondent did not request dismissal until several weeks after the fact-finding had been made, and did not seek vacatur, and, by that time, the mother and children had moved to Tennessee, the Interstate Compact on the Placement of Children process had not yet been completed, and the family court stated that it had little information about the family's status since the move to Tennessee. The order of disposition was issued over a year later on consent, and no one renewed the motion for dismissal.

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

Matter of Francis O., 208 AD3d 51 (1st Dept 6/16/2022)**JD | DNA EXPUNGEMENT**

ILSAPP: In a juvenile delinquency proceeding, the appellant appealed from an interlocutory order of New York County Family Court denying his motion for expungement of DNA records. The First Department reversed. The appellant, then age 16, was arrested for stealing a credit card. Police interrogated him for two days without an adult present. An officer offered him a drink and then surreptitiously took a DNA sample. No DNA was collected from the incident; the sample taken

First Department *continued*

from the appellant had no connection to the underlying incident. Under the Executive Law, Family Court had jurisdiction to order expungement. *See Matter of Samy F. v Fabrizio*, 176 AD3d 44. The proof did not establish that the appellant abandoned the cup; that he was aware that it would be used to collect a DNA sample, pursuant to an NYPD practice used against minors suspected of crimes; or that he waived his expectation of privacy. Maintaining the DNA profile in OCME's database in perpetuity was incompatible with the statutory purpose of JD proceedings—to focus on rehabilitation over punishment and afford youths a fresh start—and would result in substantial injustice to this appellant. Stephen Forbes represented the appellant. (Family Ct, New York Co)

People v J.E., 206 AD3d 496 (1st Dept 6/16/2022)

SEX OFFENDER | NO RELIEF AVAILABLE

ILSAPP: The defendant appealed from an order of New York County Supreme Court, which denied his petition to modify his sex offender classification. The First Department affirmed. The defendant was ineligible for modification of his status. He had been adjudicated a level-one offender. There was no lower risk level, so his petition was really an application to be relieved of any further duty to register. But no provision in SORA allowed for such relief. Correction Law § 168-a (2) (3) did authorize the trial court to determine that a conviction of 2nd degree unlawful surveillance—the crime at issue here—did not require sex offender registration. However, that provision did not apply to modifications. It applied at the time of sentencing, and the defendant did not appeal from the judgment of conviction. (Supreme Ct, New York Co)

People v Rivera, 206 AD3d 498 (1st Dept 6/16/2022)

MISSING WITNESS INFERENCE DEFENSES - JUSTIFICATION

LASJRP: In this murder prosecution involving a beating of the victim with a pipe and a justification defense, the First Department finds no error in the court's denial of defendant's request for a missing witness charge regarding the person who recorded the video admitted into evidence. The video depicted the same events the witness's testimony would have addressed, and, although defendant argues that the witness may have observed events that occurred before he started videotaping the incident, such as violent behavior by the victim, this would have had little or no relevance to the issue of whether defendant was justified in beating the victim with the pipe after any threat had abated.

The court also did not err in precluding defendant from introducing hearsay evidence purportedly demon-

strating his knowledge that the victim had a reputation for violence or had committed violent acts. Although evidence of a defendant's awareness of the deceased's violent reputation or history normally has a bearing on a justification defense, here it would not have supported a claim that defendant was justified in beating his disarmed and helpless victim. The Court rejects on the merits defendant's unpreserved claim that the ruling violated his constitutional right to present a defense. (Supreme Ct, Bronx Co)

People v Bradshaw, 206 AD3d 518 (1st Dept 6/21/2022)

SEX OFFENDER FEE | VACATED

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1st degree criminal sexual act. The First Department modified. Because the defendant committed the crime before the effective dates of relevant fees legislation, the supplemental sex offender fee was vacated, the mandatory surcharge was reduced from \$300 to \$250, and the crime victim assistance fee was reduced from \$25 to \$10. The Center for Appellate Litigation (Abigail Everett, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

People v Allen, 206 AD3d 539 (1st Dept 6/23/2022)

CONSTITUTIONAL CHALLENGE | AG

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 3rd degree CPW and another crime, upon his plea of guilty. The First Department held the appeal in abeyance. The defendant's constitutional challenges to Correction Law § 168-f (3) were unpreserved, but would be reached in the interest of justice. First the defendant had to notify the State Attorney General about the pending appeal and the constitutionality question. *See* Executive Law § 71 (1). The AG was granted permission to appear in the appeal. (Supreme Ct, New York Co)

Krishna S. v Claire A., 206 AD3d 544 (1st Dept 6/23/2022)

INTIMATE RELATIONSHIP | FACTUAL ISSUES

ILSAPP: The respondent appealed from an order of New York County Family Court, which denied her motion to dismiss a family offense petition based on a lack of subject matter jurisdiction. The First Department affirmed. The petitioner alleged that, after meeting through an online dating site, the parties were in a "intimate relationship," within the meaning of Family Ct Act § 812 (1) (e). The respondent's affidavit in support of the motion raised issues of fact warranting a hearing regarding whether the parties were more than mere casual acquaintances and were, in fact, in an intimate relationship. (Family Ct, New York Co)

First Department *continued***People v Ventre, 206 AD3d 542 (1st Dept 6/23/2022)****DEFENSES - INTOXICATION**

LASJRP: The First Department finds no error where the trial court redacted from medical records defendant's statements regarding the types and quantities of alcohol he habitually drank, which were not relevant to his defense of intoxication and did not establish his level of intoxication when he damaged the computers. Defendant was allowed to present evidence about the specific types and amounts of alcohol he consumed on the day of the incident. (Supreme Ct, New York Co)

People v Aguilar, 206 AD3d 572 (1st Dept 6/28/2022)**DEFENSE EXPERT | UNQUALIFIED**

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree murder and other crimes. The First Department affirmed. The trial court properly declined to qualify a defense psychiatrist as an expert on the effects of ketamine—a drug the victims had used at the time of the incident. The proposed expert, who had limited clinical experience with a few patients who had taken the drug, had not done research, written articles, or given lectures on ketamine. (Supreme Ct, New York Co)

Matter of Esther N., 206 AD3d 564 (1st Dept 6/28/2022)**NEGLECT | DOMESTIC VIOLENCE**

ILSAPP: The father appealed from an order of Bronx County Family Court, finding that he neglected his four children. The First Department affirmed. A single instance of domestic violence may support a finding of neglect. The proof showed that the father punched the mother during an argument, in the presence of two children, who feared for her safety and summoned police. Further, the younger two children, who were in their bedroom when the incident occurred, were in imminent danger of physical impairment. (Family Ct, Bronx Co)

Jeter v Poole, 206 AD3d 556 (1st Dept 6/28/2022)**INDICATED REPORT | COUNSEL**

ILSAPP: In an Article 78 proceeding, the petitioner sought review of an OCFS determination, denying her request to amend and seal an indicated report finding that she maltreated her adopted child. The First Department confirmed the determination. The petitioner's due process rights were not violated by the failure to assign counsel to her. She was only entitled to an adequate opportunity to obtain legal representation. While the administrative proceedings might impact her job status, they did not impli-

cate the liberty of the child or her care. *See Matter of Ella B.*, 30 NY2d 352. The ACOD in Family Court did not create a presumption that maltreatment was not proven by a fair preponderance of the evidence. The indicated report was relevant and reasonably related to childcare employment. As to the child's recantation, that was a common reaction among abused children and need not be credited here. The change in the Social Services Law did not impact this case since the fair hearing was held and the decision rendered before the amendment's effective date. There was no basis to give the new law retroactive effect.

People v Pruden, 206 AD3d 574 (1st Dept 6/28/2022)**SEARCH AND SEIZURE - COMMON LAW RIGHT TO INQUIRE**

LASJRP: In the Port Authority Bus Terminal, officers saw defendant and another man engaging in a transaction involving money, after which the officers heard defendant talking on his phone, saying he had just sold some "sneakers." Based on his experience, an officer recognized this as code for narcotics, which was corroborated by the fact that neither defendant nor the other man was holding sneakers or any packages. Defendant was in a part of the terminal that, according to posted signs, at least appeared to be restricted to ticket holders. Defendant responded to the officers' lawful request for information by admitting that he was not a bus passenger.

The First Department concludes that, at that point, the police had, at least, a founded suspicion of criminality that justified a common-law inquiry in which the officers asked defendant whether he had anything that he should not have, which led to defendant's admission that he had narcotics. (Supreme Ct, New York Co)

**Sara D. v Lassina D., 206 AD3d 553
(1st Dept 6/28/2022)****SIJS | REVERSED**

ILSAPP: The petitioner appealed from an order of Bronx County Family Court, which declined to make a special finding that her reunification with her father was not viable, thus rendering her ineligible for special immigrant juvenile status (SIJS). The First Department reversed. The petitioner, age 17, was born in the Ivory Coast and had lived with a cousin in the U.S. since 2019. Her mother was deceased. While she was in her home country, her father had not provided for her medical and emotional needs. Further, he had not contributed to her financial support or maintained regular contact with her since she had been in this country. The petitioner's uncontroverted testimony also supported a finding of neglect based on his father's excessive use of corporal punishment. The Door Legal Services Center (Hannah Weichbrodt, of counsel) represented the appellant. (Family Ct, Bronx Co)

First Department *continued*

[People v Sulayman](#), 206 AD3d 574 (1st Dept 6/28/2022)

PHOTO ARRAY | SUGGESTIVE

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 1st degree robbery and another crime. The First Department reversed, suppressed a photo identification, and ordered a new trial, preceded by an independent source hearing. The photo array was unduly suggestive because the defendant was the only person wearing distinctive clothing that fit the description of the suspect. The witness fixated on an unusual garment the robber wore—a white shirt with a distinctive black design. The fillers wore solid-colored shirts without designs. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant. (Supreme Ct, New York Co)

[People v Williams](#), 208 AD 65 (1st Dept 6/28/2022)

RIGHT TO COUNSEL - WAIVER/RIGHT TO PROCEED PRO SE TRIAL IN ABSENTIA - RIGHT TO BE PRESENT AT MATERIAL STAGES

LASJRP: The First Department concludes that the trial court did not err in terminating defendant's self-representation and directing counsel to proceed with the trial where, during the examination of the People's witnesses, defendant was repeatedly told by the court to "calm down," to not get agitated, to not argue and be combative with the witnesses, and to not argue with the court regarding its rulings; defendant stated he understood and would then immediately engage in the same conduct; during defendant's testimony, the court repeatedly admonished him to stop making arguments to the jury, and, when asked twice by the court to sit down, he refused to do so and repeatedly ignored the direction of the court officer to sit down and instead remained standing, continued his argument and questioned the court's ruling; and defendant made reference to his over one-year period of pretrial detention as well as the fact that he had a teenage son.

Defendant's absence from a colloquy conducted by the court did not violate his right to be present at a material stage in the proceedings where the court made no ruling and took no action regarding its ruminations as to whether a psychiatric examination of defendant should be ordered. (Supreme Ct, New York Co)

[Matter of Mahkayla W.](#), 206 AD3d 599

(1st Dept 6/30/2022)

ABUSE/NEGLECT - DERIVATIVE NEGLECT - ALLOWING NEGLECT - FAILURE TO PLAN

LASJRP: The First Department concludes that the agency established a prima facie case of derivative neglect where there were prior findings that the mother had neglected her four older children; the dispositional order with respect to the mother's fourth child was entered approximately six months prior to the birth of the subject child; none of the older children were ever returned to the mother's care; and the mother failed to comply with the requirements of the outstanding orders of disposition, which included mental health and substance abuse treatment. The reasons for removal of the older children included the mother's longstanding use of marijuana, but the prior petitions also alleged that she medically neglected one child and failed to provide adequate and healthy shelter for the children.

The Court also upholds the neglect finding against the father. Before the child's birth, the father participated in two safety conferences with the mother where her extensive child protective history, and her failure to address her mental health and substance abuse issues, were discussed. He testified that he understood that the child would not be released to the mother upon birth and conceded that he did not make any efforts to plan until after the agency filed a neglect petition against him.

The JRP appeals attorney was Polixene Petrakopoulos, and the trial attorney was Brad Martin. (Family Ct, New York Co)

[People v Hatchett](#), 207 AD3d 401 (1st Dept 7/5/2022)

CPW 3 | VACATED

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd and 3rd degree CPW. In the interest of justice, the First Department dismissed the 3rd degree count, where both convictions were based on the defendant's possession of the same weapon. The trial court properly denied suppression of a cartridge recovered from the defendant's pants pocket. Police acted in their public service function when searching for identification in the clothing of the defendant—who was treated as an injured victim, not a suspect, at that point. Based on the lack of CPL 710.30 notice, the trial court should have precluded proof of the defendant's false statement that someone had shot him. However, any error was harmless, given overwhelming evidence of his knowing and unlawful possession of the pistol with which he accidentally shot himself. The Center for Appellate Litigation (Barbara Zolot, of counsel) represented the appellant. (Supreme Ct, New York)

[People v Martin](#), 207 AD3d 403 (1st Dept 7/5/2022)

440.10 | IAC | DENIED

ILSAPP: The defendant appealed from an order of New York County Supreme Court denying his CPL

First Department *continued*

440.10 motion after a hearing; and from a judgment convicting him of 2nd degree murder, aggravated vehicular homicide (two counts), and other crimes after a nonjury trial. The First Department affirmed both the order and the judgment. As to the 440 motion, the defendant did not establish that counsel was ineffective in: (1) making a strategic decision to refrain from calling an expert regarding whether drugs prevented the defendant from forming the mental state of depraved indifference; or (2) the general handling of the intoxication aspect of the defense. As to the direct appeal, to the extent that depraved indifference could be negated by intoxication, the proof showed that the defendant was not rendered incapable of forming the requisite mental state and that his conduct was a sufficiently direct cause of death. (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.

Matter of Destiny B., 203 AD3d 1042
(2nd Dept 3/23/2022)

ABUSE/NEGLECT - FAILURE TO PLAN/PROVIDE CARE

LASJRP¹: The petition alleged that respondent father of a child who had been in foster care since her birth in May 2019 neglected the child by failing to appropriately and effectively plan for her care. After a hearing, the court made a finding of neglect.

The Second Department affirms. The evidence, together with the adverse inference the court drew against the father based upon his failure to testify, supported the court's finding that the child was at imminent risk of harm as a result of the father's failure to work with the agency or follow through on any of his parental obligations, including his responsibility to adequately plan for the child's care. (Family Ct, Dutchess Co)

People v Coleman, 203 AD3d 1175
(2nd Dept 3/30/2022)

DEHORS RECORD | STRUCK

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

ILSAPP²: The defendant appealed from a resentence of Queens County Supreme Court, upon his conviction of attempted 2nd degree burglary. The Second Department affirmed. In conjunction with such appeal, the defendant moved to strike portions of the respondent's brief referring to matters dehors the record. The motion was granted, and references in the DA's brief to a 2015 felony complaint were stricken and were not considered in deciding the appeal. (Supreme Ct, Queens Co)

M/O Khaleef M. S.-P., 203 AD3d 1160
(2nd Dept 3/30/2022)

ABUSE/NEGLECT - MENTAL ILLNESS

LASJRP: The Second Department reverses an order that, after a fact-finding hearing, dismissed the neglect petition, and makes a finding of neglect. The mother had previously been diagnosed with schizophrenia and had not been taking her medication for the three years leading up to the filing of the petition. In the presence of the child, the mother made rude and bizarre comments to employees at the shelter where they lived. After one employee asked the mother to leave her office, the mother got close to the employee and swung her hands at the employee's face. The mother was thereafter involuntarily hospitalized for two weeks. During and after her hospitalization, the mother continued to display bizarre and delusional behavior, including in court and during supervised visits with the child, and continued to lack insight into her illness.

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

People v Passantino, 203 AD3d 1180
(2nd Dept 3/30/2022)

ANDERS | NEW COUNSEL

ILSAPP: The defendant appealed from a Westchester County Court judgment, convicting him of DWI in violation of VTL § 1192 (2), upon his plea of guilty. Assigned counsel submitted an *Anders* brief. The Second Department assigned new appellate counsel. Nonfrivolous issues included whether the appeal waiver was valid and whether the sentence was excessive in requiring the defendant, for three years, to install an ignition interlock device on any vehicle he owned or operated. (County Ct, Westchester Co)

Matter of Walker v Sterkowicz-Walker, 203 AD3d 1167
(2nd Dept 3/30/2022)

VISITATION - DENIAL OF IN-PERSON VISITS

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*

LASJRP: The Second Department upholds a determination limiting the mother's parental access to letters, and weekly one-hour telephone or video sessions as consented to by the child. There was evidence establishing the child's fear and anxiety surrounding parental access, including evidence of physical symptoms of that fear and anxiety, and the child's therapist testified that visitation would be "very damaging" to the child. (Family Ct, Kings Co)

Matter of Conklin v New York State Office of Children and Family Services, 204 AD3d 668 (2nd Dept 4/6/2022)

ABUSE/NEGLECT - LEAVING CHILD ALONE

LASJRP: The Second Department upholds a determination of the New York State Office of Children and Family Services denying petitioner's application to amend and seal an indicated report where petitioner left his child home alone in a crib for an undetermined amount of time. Petitioner's maltreatment of the child also was relevant and reasonably related to childcare employment, the adoption of a child, or the provision of foster care.

People v Kagan, 204 AD3d 695 (2nd Dept 4/6/2022)

JUDGE | BIAS

ILSAPP: The defendant appealed from an order of Kings County Supreme Court, which denied his CPL 440.10 motion to vacate a 1999 judgment convicting him of 2nd degree murder. The Second Department reversed, vacated, and remitted for a new trial. The defendant, who is white, was charged with shooting a Black man. In 2011, the judge who had presided over the nonjury trial reviewed the trial transcript and realized that his experiences as a civil rights activist had improperly influenced his analysis and decision-making. Given such hearing proof, the defendant's fundamental right to a fair trial before an unbiased fact-finder was violated. Richard Mischel represented the appellant. (Supreme Ct, Kings Co)

People v Kahrone H., 204 AD3d 693 (2nd Dept 4/6/2022)

FEES | VACATED

ILSAPP: The defendant appealed from three judgments of Kings County Supreme Court, adjudicating him a youthful offender. The Second Department modified by vacating fees. DNA databank fees may not be imposed upon a YO. Further, New York repealed statutes authorizing imposition of a mandatory surcharge and crime victim assistance fee upon a YO. The 2020 amendments applied retroactively to cases pending on direct appeal on the effective date of the legislation. Appellate Advocates

(Lynn W.L. Fahey, of counsel) represented the appellant. (Supreme Ct, Kings Co)

McFadden v McDonald, 204 AD3d 672 (2nd Dept 4/6/2022)

FOIL | ART. 78 | RELIEF

ILSAPP: The petitioner appealed from an order/judgment of Nassau County Supreme Court, which denied his CPLR Article 78 petition against the Nassau County Police Department. The respondent had denied his FOIL request relating to the criminal investigation underlying his convictions. The Second Department modified and directed the release of certain documents. The NCPD had denied the request on a specious basis—that the document descriptions were not specific enough. In affirming the denial, Supreme Court had improperly relied on grounds that the NCPD did not assert in its administrative denial. A reviewing court was powerless to affirm an administrative action by substituting a basis deemed more adequate or proper. (Supreme Ct, Nassau Co)

Salim v Freeman, 204 AD3d 677 (2nd Dept 4/6/2022)

UIFSA | REVERSED

ILSAPP: The mother appealed from an order of Suffolk County Family Court, denying her dismissal of the father's child support petition, filed in New York pursuant to the Uniform Interstate Family Support Act. The Second Department reversed. The mother sought dismissal based on a support order issued in Virginia. Under UIFSA, the state issuing a support order retained continuing jurisdiction over such orders so long as a litigant continued to reside in the issuing state. Since the father lived in Virginia, that state had jurisdiction, and NY could not modify support. Jessica Sparacino represented the appellant. (Family Ct, Suffolk Co)

Felgueiras v Cabral, 204 AD3d 790 (2nd Dept 4/13/2022)

DELEGATION | REMITTAL

ILSAPP: The mother appealed from a custody order issued by Rockland County Family Court. The Second Department modified. Family Court erred in allowing the father to determine whether the mother's parental access should be suspended and not giving her a right to judicially challenge his determinations concerning her compliance with the Personalized Recovery Oriented Services program. The provisions constituted an improper delegation of authority to the father. Warren Hecht represented the appellant. (Family Ct, Rockland Co)

Second Department *continued***Fitzsimmons v Fitzsimmons, 204 AD3d 792
(2nd Dept 4/13/2022)****MICHAEL B. | REMITTAL**

ILSAPP: The father appealed from custody orders issued by Suffolk County Family Court. The Second Department (which had stayed enforcement of one challenged order, which modified parental access) reversed and remitted. Family Court granted sole residential custody to the mother. In their briefs, the AFCs had reported new developments. Changed circumstances may have particular significance in custody matters and may render the record insufficient to review whether a decision served the children's interests. See *Matter of Michael B.*, 80 NY2d 299. The matter was remitted to reopen the hearing, including conducting in camera interviews with the children. Del Atwell represented the appellant. (Family Ct, Suffolk Co)

People v Gomez, 204 AD3d 843 (2nd Dept 4/13/2022)**SORA | REVERSED**

ILSAPP: The defendant appealed from an order of Westchester County Supreme Court, which designated him a level-three predicate sex offender. The Second Department reversed and designated him a level-two offender. Supreme Court erred in assessing 30 points under risk factor 5 (30 points for victim aged 10 or less; 20 points for victim aged 11 to 16). The current offense was committed when the victim was 14. Further, the SORA court should not have imposed 30 points under risk factor 9 concerning prior convictions. The instant offense occurred in 2004, and the defendant did not plead guilty to the other crimes until 2011. Legal Aid Society of Westchester County (Debra Cassidy, of counsel) represented the appellant. (Supreme Ct, Westchester Co)

People v Jones, 204 AD3d 831 (2nd Dept 4/13/2022)**VOP | HEARING**

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, summarily revoking probation and imposing a sentence of imprisonment. The Second Department reversed. The defendant did not admit to violating probation, so the lower court was required to hold a hearing. See CPL 410.70 (1). Legal Aid Society, NYC (Hilary Dowling, of counsel) represented the appellant. (Supreme Ct, Kings Co)

**Matter of Jose F. M. P., 204 Ad3d 801
(2nd Dept 4/13/2022)****SIJS | REVERSED**

ILSAPP: In a Family Ct Act Article 6 guardianship proceeding, the child appealed from an order of Nassau County Family Court. The Second Department reversed. The order denied an application seeking findings that reunification of the child with his father was not viable due to parental neglect and that it would not be in the child's best interests to return to Guatemala. The findings were sought to enable the child to petition for special immigrant juvenile status. The father mistreated the child and prevented him from attending school for more than one year. In Guatemala, the child had no viable caregiver. The Door's Legal Services Center (Svitlana Kobtseva) represented the appellant. (Family Ct, Nassau Co)

People v Rice, 204 AD3d 834 (2nd Dept 4/13/2022)**SUPPRESSION | TRESPASSER**

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree CPW, upon his plea of guilty. The Second Department affirmed. The appeal brought up for review the denial of suppression. The defendant failed to establish that he had a legitimate expectation of privacy in the curtilage of a vacant house where he was a trespasser. To the extent that he relied on the fact that the driveway was shared with the house next door, he was merely a guest there. Further, the defendant left his backpack alongside the vacant house, and when an officer asked about it, the defendant did not claim the backpack. Thus, he purposefully divested himself of it. (Supreme Ct, Queens Co)

People v Smith, 204 AD3d 838 (2nd Dept 4/13/2022)**ANDERS | NEW COUNSEL**

ILSAPP: The defendant appealed from a judgment of Westchester County Supreme Court, convicting him of DWI and AUO of a motor vehicle, upon his plea of guilty. Appellate counsel submitted an *Anders* brief. The Second Department assigned new counsel. There was no indication that counsel communicated with the defendant to see whether he wanted to withdraw his plea of guilty, even though a client's express consent was needed to seek vacatur of the plea. Counsel also failed to argue excessive sentence. (Supreme Ct, Westchester Co)

**Corcoran v Liebowitz, 204 AD3d 910
(2nd Dept 4/20/2022)****CUSTODY | MODIFIED**

ILSAPP: The father appealed from a custody order issued by Westchester County Family Court. The Second Department modified. A stipulation of settlement incorporated in the divorce judgment provided for joint custody. An ensuing order gave the mother sole physical custody. In the instant order, without holding a hearing, the

Second Department *continued*

lower court granted her application for sole legal custody and awarded the father unsupervised parental access with the youngest child, once a month for five hours. The record suggested that the award to the mother served to punish the father, not benefit the children. Initially, Family Court had granted the mother only decision-making authority as to the youngest child's education. But after the father called that decision "ridiculous," the court made the legal custody award. The father's disrespect for the court was not a proper basis to modify custody. Helen Greenberg represented the appellant. (Family Ct, Westchester Co)

[People v Cortes](#), 204 AD3d 939 (2nd Dept 4/20/2022)

FOR CAUSE | IMPLIED BIAS

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree criminal contempt and another crime. The Second Department reversed. Supreme Court erred in denying the defense for-cause challenge to a prospective juror who had a relationship that was likely to preclude her from rendering an impartial verdict. *See* CPL 270.20 (1) (c). During jury selection, the panelist informed the trial court that she was presently working as an ADA at the Queens County DA's Office—the very agency prosecuting the defendant. This "implied bias" mandated exclusion. *See People v Furey*, 18 NY3d 284. Given the defendant's challenge for cause and ensuing exhaustion of all peremptory challenges, the error required reversal and a new trial. Appellate Advocates (Alice Cullina, of counsel) represented the appellant. (Supreme Ct, Queens Co)

[Pescalles v OCFS](#), 204 AD3d 915 (2nd Dept 4/20/2022)

MALTREATMENT | CONFIRMED

ILSAPP: In an Article 78 proceeding, the petitioner appealed from an OCFS determination denying his application to amend and seal an indicated report maintained by State Central Register of Child Abuse and Maltreatment. The Second Department confirmed the determination. The instant report was based on an incident in which the petitioner allegedly hit his wife in the presence of their children. ACS investigated and found the report indicated. The determination was supported by substantial evidence presented at the fair hearing, including the petitioner's hearing testimony and progress notes from the OCFS investigation. Moreover, the dismissal of criminal charges against the petitioner did not have res judicata effect with respect to the administrative proceeding.

[People v Thompson](#), 204 AD3d 942 (2nd Dept 4/20/2022)

JURY CHARGE | LESSER INCLUDED | COUNSEL'S DECISION

ILSAPP: The defendant appealed from a judgment of Westchester County Court, convicting him of 2nd degree murder and another crime. The Second Department affirmed, rejecting the argument that the defendant received ineffective assistance when counsel deferred to his wishes in declining to seek a jury charge on the lesser included offense of 1st degree manslaughter. The decision regarding whether to request such an instruction was indeed a matter of strategy that ultimately rested with defense counsel. *See People v Colville*, 20 NY3d 20. However, counsel's exchange with the trial court was ambiguous as to her reasoning for declining to request the charge. Thus, the defendant's contention was based in part on matters outside the record, and a CPL 440.10 motion was the proper vehicle for reviewing the claim in its entirety. (County Ct, Westchester Co)

[People v Aponte](#), 204 AD3d 1031 (2nd Dept 4/27/2022)

JUDGE AS ADVOCATE | UNFAIR 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 and ordered a new trial. The judge took on the appearance of an advocate and impeded the pursuit of a defense of third-party (the codefendant) culpability by limiting cross-examination of an officer about unfair line-up procedures. Further, the trial judge erred in informing the jury that he had determined that the identification procedure was fair, erroneously intimating that those facts were not within the jury's province to determine. The lower court also impaired the defendant's right to make an effective closing argument by its sua sponte admonishments regarding identification procedures and other matters. Moreover, the defense should have been allowed to introduce photographs of the defendant and the alleged shooter (the codefendant) to allow the jury to compare their likenesses. In the interest of justice, the reviewing court held that the cumulative effect of the errors deprived the defendant of a fair trial. Appellate Advocates (Cynthia Colt, of counsel) represented the appellant. (Supreme Ct, Kings Co)

[People v Burgess](#), 204 AD3d 1036 (2nd Dept 4/27/2022)

SENTENCES | CONSECUTIVE

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of various crimes. The Second Department modified. The sentence imposed on the conviction of 2nd degree CPW should not

Second Department *continued*

run consecutively to the concurrent sentences imposed for 1st degree manslaughter and attempted 2nd degree murder. The evidence did not establish that the defendant's possession of a gun was separate and distinct from his shooting at the two victims. Thus, all the sentences must run concurrently. Appellate Advocates (Melissa Lee, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Gardner, 204 AD3d 1039 (2nd Dept 4/27/2022)**CONSTITUTIONAL SPEEDY TRIAL | 21 YEARS**

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree rape upon his plea of guilty. The Second Department affirmed. Supreme Court properly denied the defendant's statutory speedy trial motion. A recent amendment to CPL 30.30 did not affect forfeiture of his claim, as the amendment was not retroactive and did not go into effect until after the judgment was entered. Although the defendant's constitutional speedy trial claim was reviewable, it lacked merit. The 21-year delay between crime and arrest was substantial. However, there was good cause for most of the delay, since the defendant's DNA profile was not developed and uploaded to law enforcement databases until 19 years after the crime. (Supreme Ct, Kings Co)

Matter of Skylar P.J., 204 AD3d 1001 (2nd Dept 4/27/2022)**TERMINATION OF PARENTAL RIGHTS**

- MOTION TO VACATE/RIGHT TO HEARING
- RIGHT TO COUNSEL

LASJRP: In this permanent neglect proceeding, respondent mother moved in the family court to vacate the order of disposition, arguing, among other things, that her admission was legally insufficient to support a finding, and that she received ineffective assistance of counsel in that she was not made aware of the burdens or standard of proof at trial before she entered her admission and that she "made the statements ... because [she] was advised that it was necessary in order to have [her] children returned." The court, without a hearing, denied the motion.

The Second Department reverses and remits for an evidentiary hearing. The right to a hearing upon a motion to vacate made pursuant to CPLR 5015 is predicated upon the existence of a fact not appearing on the face of the record which, if true, would entitle the party to the relief sought.

Here, the family court did not ameliorate counsel's alleged deficiencies in its colloquy with the mother, and also omitted any reference to the possible consequences of the finding, including termination of the mother's pa-

rental rights. Without information regarding the off-the-record communication between the mother and her counsel, it is impossible for this Court to determine whether the mother has a viable claim for ineffective assistance of counsel. (County Ct, Suffolk Co)

People v Buyund, 205 AD3d 729 (2nd Dept 5/4/2022)**NOT SEX OFFENSE | SORA**

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree burglary as a sexually motivated offense, upon his plea of guilty. In the interest of justice, the Second Department modified, vacating the defendant's certification as a sex offender, since the instant crime was not a registerable offense under SORA. Appellate Advocates (Patricia Pazner, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Gray v Tyson, 205 AD3d 720 (2nd Dept 5/4/2022)**PARENTAL ACCESS | COSTS**

ILSAPP: The mother appealed from an order of Queens County Family Court in an Article 6 proceeding. The Second Department modified. Family Court should not have directed the parties to equally share the costs of the mother's supervised parental access without evaluating the parties' finances, including the cost of visits and her ability to pay. The matter was remitted. Diana Kelly represented the appellant. (Family Ct, Queens Co)

People v Miranda, 205 AD3d 734 (2nd Dept 5/4/2022)**NOT SEX OFFENSE | SEALING**

ILSAPP: The defendant appealed from an order of Queens County Supreme Court, which denied his CPL 160.59 motion to seal his conviction of attempted 3rd degree promoting prosecution. The Second Department reversed. When the defendant was convicted, "sex offense" as defined in SORA did not include the instant crime. Thus, the motion to seal was not subject to mandatory denial. A hearing was required under CPL 160.59 (6). Randall Unger represented the appellant. (Supreme Ct, Queens Co)

People v Robinson, 205 AD3d 737 (2nd Dept 5/4/2022)**PREDICATE | HEARING**

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of attempted 2nd degree CPW, upon his plea of guilty, and sentencing him as a second felony offender. The Second Department modified. The predicate felony was a Connecticut larceny conviction under a statute that defined the crime differently in several subdivisions, some of

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which were not felonies under NY law. The CT accusatory instrument was not in the record so it was not clear which subdivision applied. In the interest of justice, the defendant's adjudication as a second felony offender was vacated, and the matter was remitted. Appellate Advocates (Sarah Cohen, of counsel) represented the appellant. (Supreme Ct, Queens Co)

Aponte v Jagnarain, 205 AD3d 800 (2nd Dept 5/11/2022)

EVIDENCE - PRIOR TESTIMONY

LASJRP: The Second Department finds no error where the family court incorporated into the record of the custody and parental access proceeding the testimony of the witness who had testified at the hearing in the family offense proceeding.

A witness's testimony may be incorporated into a later proceeding if it was given under oath, referred to the same subject-matter, and was heard in a tribunal where the other side was represented and allowed to cross-examine. Here, the prior testimony referred to the same subject matter, and the mother was allowed to cross-examine the witness at the earlier hearing, but declined to avail herself of that opportunity when she voluntarily absented herself from that hearing. In addition, the mother had the opportunity to call the witness to testify at the hearing in the custody and parental access proceeding, and, if necessary, to request that the court deem her to be a hostile witness so that the mother could impeach her. (Family Ct, Nassau Co)

Grace E. W.-F. v Zanoia W., 205 AD3d 812 (2nd Dept 5/11/2022)

TERMINATION OF PARENTAL RIGHTS - ABANDONMENT

LASJRP: In this termination of parental rights proceeding, the Second Department finds insufficient evidence of abandonment where the mother visited with the children on two occasions and saw the children on at least one additional occasion at a family gathering; purchased clothing for the children; spoke with the case worker on the phone multiple times; and objected to the goal changing to kinship adoption rather than return of the children to the mother.

The Court also notes that there was testimony from a case worker that, during family visits subsequent to the filing of the petitions, the mother's interactions with the children were "very positive." While a parent's conduct outside the abandonment period is not determinative, it may be relevant to assessing parental intent. (Family Ct, Kings Co)

People v Samaroo, 205 AD3d 822 (2nd Dept 5/11/2022)

PADILLA | HEARING

ILSAPP: The defendant appealed from an order of Queens County Supreme Court, which summarily denied his CPL 440.10 motion to vacate a judgment convicting him of 4th degree criminal sale of marihuana. The Second Department remitted for a hearing regarding whether the defendant was deprived of effective assistance by counsel's misadvice regarding immigration consequences. As to prejudice, the defendant's prior conviction of a removable offense and strong prosecution evidence were not dispositive. His rejection of the plea offer would have been rational, where he had lived in this country since age 10, was married, had two children, was employed, and was the family's sole financial support. Mark Diamond represented the appellant. (Supreme Ct, Queens Co)

People v Bloome, 205 AD3d 1045 (2nd Dept 5/25/2022)

DEFECTIVE INDICTMENT | SANDOVAL ERROR

ILSAPP: The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of various crimes. The Second Department vacated 1st degree robbery and 1st degree burglary convictions and dismissed those counts. The defendant was accused of forcibly stealing a cell phone, but the People did not prove his larcenous intent. As to the burglary, the indictment was jurisdictionally defective in alleging that the defendant was "armed with a dangerous weapon, to wit: a knife." Only specified knives qualified as a deadly weapon. The People's motion to amend the count was not authorized. After a *Sandoval* hearing, the trial court improperly ruled that, if the defendant testified, the prosecutor could cross-examine him as to facts underlying a 2004 assault conviction and 2012 robbery conviction. Potential prejudice outweighed probative value. But the error was harmless. Appellate Advocates (Skip Laisure and Mark Vorkink) represented the appellant. (Supreme Ct, Richmond Co)

Lavery v O'Sullivan, 205 AD3d 1013 (2nd Dept 5/25/2022)

RELOCATION | IRELAND

ILSAPP: In a divorce action, the father appealed from an interlocutory judgment of Rockland County Supreme Court, awarding the mother sole custody and permitting her to relocate with the child to Ireland. Pending appeal, the Second Department had stayed enforcement as to the relocation. See CPLR 5519 (c); cf. Family Ct Act § 1114 (b). In the instant decision, the appellate court affirmed the challenged judgment. The mother was the primary caregiver, and the father abused alcohol and committed domestic violence. Relocation would improve the child's

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life. The mother could live with the child for free in a guest house on the maternal grandparents' property and could accept a job offer at a nursing home. In addition, her extended family would be nearby to lend support. While relocation would disrupt the father's regular contact with the child, lengthy vacations could compensate for such loss. The father was a citizen of Ireland and had often visited his family there. Quatela Chimeri represented the appellant. (Supreme Ct, Rockland Co)

**People v Rodriguez, 205 AD3d 1053
(2nd Dept 5/25/2022)**

VERDICT | REPUGNANT

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of multiple crimes. The Second Department vacated 2nd degree robbery and 4th degree grand larceny convictions and dismissed those counts, with leave to the People to submit to another grand jury. A verdict is repugnant when, evaluated in terms of the elements of the crimes as charged to the jury and without regard to the evidence as to what occurred, acquittal on one count necessarily negated an element of a crime of which the defendant was convicted. Here, given the acquittal of 3rd degree unauthorized use of a vehicle, the guilty verdict on the above convictions was repugnant. Appellate Advocates (Sam Feldman, of counsel) represented the appellant. (Supreme Co, Queens Co)

People v Allen, 206 AD3d 669 (2nd Dept 6/1/2022)

YO | ARMED FELONY

ILSAPP: The defendant appealed from a sentence imposed by Kings County Supreme Court for his convictions of 1st degree robbery and 2nd degree CPW, upon his plea of guilty. The Second Department vacated the mandatory surcharges and fees imposed upon resentencing. Supreme Court properly declined to make a youthful offender adjudication. Having been convicted of an armed felony, the defendant was eligible for YO treatment only if mitigating circumstances bore directly on the way the crime was committed or his participation was minor. Neither test was not [sic] met. Appellate Advocates (Jonathan Schoepp-Wong and Sarah Cohen) represented the appellant. (Supreme Ct, Kings Co)

People v Jones, 206 AD3d 671 (2nd Dept 6/1/2022)

TRIAL IN ABSENTIA - RIGHT TO BE PRESENT AT TRIAL

LASJRP: The Second Department finds no violation of defendant's right to be present at all material stages of trial where defendant was present at the initial proceeding where the parties presented their Molineux argu-

ments and the court made a ruling, but was absent when the court and counsel discussed the previous Molineux ruling. The better practice would have been to wait to have that discussion until defendant was present, but defendant had an opportunity for meaningful input regarding the uncharged crimes, and the court did not change its original ruling. (Supreme Ct, Kings Co)

**Katie M. T.-J. v Jemel D. T., 206 AD3d 651
(2nd Dept 6/1/2022)**

PATERNITY | ADJOURNMENT

ILSAPP: The respondent appealed from an order of filiation of Queens County Family Court, which adjudicated him the father of the child. The Second Department affirmed. The notice of appeal was deemed to be an application for leave to appeal, and leave was granted. *See* Family Ct Act § 1112 (a); *Matter of Caroline D. v Travis S.*, 168 AD3d 410 (no appeal lies as of right from order of filiation where order of support has been requested). The appeal brought up for review the denial of an adjournment of an equitable estoppel hearing. Family Court properly denied the respondent's request and allowed him to participate by phone, while his attorney represented him in the courtroom. The trial court had accommodated several requests for new counsel. Further, the respondent had a history of nonappearance and did not give a satisfactory explanation for this absence. (Family Ct, Queens Co)

**Matter of Skkyy M. R., 206 AD3d 660
(2nd Dept 6/1/2022)**

ABUSE/NEGLECT - REMOVAL/IMMINENT RISK

LASJRP: The petition alleged that the child suffered injuries while in respondent father's care, and that the father perpetrated acts of domestic violence against the mother in the presence of the child.

The Second Department upholds the denial of the father's application pursuant to FCA § 1028 for the return of the child to his custody. The father failed to acknowledge the circumstances which led to removal of the child.

The JRP appeals attorney was Susan Clement, and the trial attorney was Maria Chiu. (Family Ct, Queens Co)

**Matter of Soumare v White, 206 AD3d 661
(2nd Dept 6/1/2022)**

CUSTODY/VISITATION - HEARING REQUIREMENT

LASJRP: In this proceeding in which the father's petition alleged that the mother failed to drop off the child for parental access as required by a custody order, the court addressed the petition by conducting two conferences, at which both parties made statements under oath.

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The Second Department holds that the court was not required to hold a hearing since the petition did not involve a custody determination, which, as a general matter, should be rendered only after a full and plenary hearing and inquiry. (Supreme Ct, Kings Co)

People v Adolph, 206 AD3d 753 (2nd Dept 6/8/2022)

PREDATORY ASSAULT | INSUFFICIENCY

ILSAPP: The defendant appealed from a judgment of conviction of Queens County Supreme Court. The Second Department dismissed one count of predatory sexual assault against a child. The crime required that the course of conduct occurred over a period of at least three months. However, no trial proof was adduced as to the period of alleged abuse. Appellate Advocates (Sean Murray) represented the appellant. (Supreme Ct, Queens Co)

People v Berry, 206 AD3d 755 (2nd Dept 6/8/2022)

RESENTENCING | PRESENCE

ILSAPP: The defendant appealed from a sentence imposed by Suffolk County Court upon his convictions of multiple offenses. The Second Department reversed. A defendant had a fundamental right to be personally present when sentence was pronounced. This defendant was not produced at his resentencing proceeding, and the record did not establish that he expressly waived his right to be present. Steven A. Feldman represented the appellant. (County Ct, Suffolk Co)

Matter of Daniella G., 206 AD3d 730 (2nd Dept 6/8/2022)

ABUSE/NEGLECT - REMOVAL/IMMINENT RISK

LASJRP: The Second Department upholds an order granting petitioner's application for removal of the children pursuant to FCA § 1027 where the evidence demonstrated that the mother suffers from mental illness but is not committed to treatment on a consistent basis, which results in her erratic and manic behavior, episodes of extreme hyperactivity and depression, and aggressive conduct toward the children. The evidence also established that the mother frequently hit, screamed at, and cursed at the children.

The JRP attorney was Riti Singh, and the trial attorney was Alexander Turbin. (Family Ct, Queens Co)

People v Golding, 206 AD3d 759 (2nd Dept 6/8/2022)

GRAND LARCENY | INSUFFICIENCY

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court. The Second Department

vacated convictions of 3rd and 4th degree grand larceny and 3rd and 4th degree criminal possession of stolen property and dismissed those counts. The defendant took keys to a U-Haul van, sat in the vehicle for two minutes, and then exited without ever moving it. The evidence did not show that he intended to cause permanent loss to the vehicle owner. The People urged that the defendant stepped out of the van because he was startled by a police sergeant who pulled alongside the vehicle. A video belied such theory, since the defendant exited before the police vehicle parked beside the van. Appellate Advocates (Caitlyn Carpenter, of counsel) represented the appellant. (Supreme Ct, Queens Co)

Matter of Lexis B., 206 AD3d 725 (2nd Dept 6/8/2022)

HOME VISITS | COUNSEL PRESENT

ILSAPP: In Article 10 proceedings, the mother took an interim appeal (see Family Ct Act § 1112 [a]) from an order of Queens County Family Court, which granted ACS' motion to preclude her attorney from being present, in person or virtually, during home visits. The Second Department reversed. The Family Court Act did not prohibit a respondent from having counsel present during such visits. Further, the respondent was not required to show that her attorney's presence would not impair the visits. Instead, ACS had the burden to justify exclusion. During one visit, counsel had been present via FaceTime, triggering the instant motion. Exclusion was not warranted based on any conduct of counsel, as described in the affidavit of a child protective specialist. Michael Discioarro represented the appellant. (Family Ct, Queens Co)

Thomas v Mobley, 206 AD3d 743 (2nd Dept 6/8/2022)

RELOCATION | ACCESS

ILSAPP: The father appealed from an order of Suffolk County Family Court, which granted the mother's petition to modify custody and permit her to relocate to Georgia and granted certain parenting time to the father. The Second Department modified. Family Court should have set forth a detailed schedule for the father's parental access and specified how the parties would pay for travel. The distance between New York and Georgia would prevent the continuation of spontaneous father-child visits. The parties needed to plan for visits. Heather Fig represented the appellant. (Family Ct, Suffolk Co)

People v Dancy, 206 AD3d 823 (2nd Dept 6/15/2022)

INTERLOCK DEVICE | PROBATION

ILSAPP: The defendant appealed from a Dutchess County Court judgment, convicting him of 1st degree vehicular manslaughter, upon his plea of guilty. The Second Department modified. County Court violated the

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VTL by directing that the defendant install and maintain an ignition interlock device for a three-year period, without imposing a sentence of probation or a conditional discharge. The matter was remitted for resentencing. Steven A. Feldman represented the appellant. (County Ct, Dutchess Co)

Hogan v Smith, 206 AD3d 808 (2nd Dept 6/15/2022)**CUSTODY | DEFAULT | VACATUR**

ILSAPP: The mother appealed from a Dutchess County Family Court order, which denied her motion to vacate an order modifying custody upon her default. The Second Department reversed. When the mother failed to appear, the father moved to amend his petition to seek sole custody, and his wish was granted. In child custody proceedings, the law favored resolution on the merits, and defaults in such cases were more liberally opened than in other matters. Family Court erred in granting the father relief that far exceeded what he requested in his petition—without receiving any proof as to whether modification was required to protect the children's best interests. Further, the lower court abused its discretion in denying the motion to vacate. Carol Kahn represented the mother. (Family Ct, Dutchess Co)

Safir v Safir, 206 AD3d 842 (2nd Dept 6/15/2022)**CHILD SUPPORT | PENDENTE LITE**

ILSAPP: In a divorce action, the husband appealed from an order of Nassau County Supreme Court granting temporary child support. The Second Department affirmed. Modifications of pendente lite awards should rarely be made by an appellate court and then only under exigent circumstances. Perceived inequities in such awards can generally best be remedied by a speedy trial, where the parties' financial circumstances can be fully explored. The husband failed to establish any exigent circumstances. (Supreme Ct, Nassau Co)

Sorscher v Auerbach, 206 AD3d 813 (2nd Dept 6/15/2022)**CHILD SUPPORT | IMPUTED INCOME**

ILSAPP: The mother appealed from an order of Kings County Family Court, which directed the father to pay certain child support. The Second Department reversed and remitted. Upon the father's objections, Family Court had correctly found that, to impute income, the Support Magistrate improperly conducted her own research estimating the value of free housing and vehicle use he received. Rather than sustaining the elimination of such imputed income in an amended order, Family Court

should have remitted the matter for the Support Magistrate to properly determine the appropriate amounts, if any, to be imputed. Philp Kamaras represented the appellant. (Family Ct, Kings Co)

Smith v Francis, 206 AD3d 914 (2nd Dept 6/22/2022)**PARENTAL ALIENATION | REVERSAL**

ILSAPP: The mother appealed from (1) a decision, and (2) an order issued by Nassau County Family Court, which denied her custody modification petition. The Second Department dismissed the first appeal since no appeal lies from a decision. *See* Family Ct Act § 1112 (a); CPLR 5512 (a). The order was reversed, the mother was awarded custody of the parties' son, and the matter was remitted regarding parental access for the father. Family Court failed to identify facts supporting its conclusions, but the record was sufficient for independent review. The finding of no change in circumstances was unsound, given proof of parental alienation. The father actively thwarted the mother-child relationship. He denigrated her, failed to make the child available for calls, and violated the parental access schedule. Further, the father refused to have the child evaluated for learning disabilities. Amy Colvin represented the appellant. (Family Ct, Nassau Co)

Charter v Allen, 206 AD3d 994 (2nd Dept 6/29/2022)**FAMILY OFFENSES – INTIMATE RELATIONSHIP**

LASJRP: The Second Department concludes that the Family Court erred in dismissing the family offense petition for lack of subject matter jurisdiction, and that there was sufficient evidence of an intimate relationship, where the record demonstrated that petitioner knew respondent for more than 20 years and respondent and petitioner's sister held themselves out as husband and wife; during that period of time, petitioner and respondent engaged in general social activities at each other's homes, attended holiday and birthday celebrations together, and traveled together; petitioner's sister and respondent had a daughter together who identified petitioner as her aunt; petitioner resided in one of the units of a three-family home, and petitioner's sister, respondent, and their daughter, who was approximately 18 years old at the time of the hearing, resided in one of the other units; and the home was owned by the mother of petitioner and petitioner's sister. (Family Ct, Kings Co)

People v Corr, 208 AD3d 136 (2nd Dept 6/29/2022)**SORA | OUT-OF-STATE | REGISTRATION**

ILSAPP: The defendant appealed from an order of Kings County Supreme Court, designating him a level-one sex offender under SORA. The Second Department

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affirmed. Correction Law § 168-h (1) provided, in relevant part: “The duration of registration and verification for a sex offender *** who is classified as a level one risk *** shall be annually for a period of twenty years from the **initial date** of registration [emphasis added].” The defendant urged that the 20-year period must be reduced by the time he was registered as a sex offender in Massachusetts. In a matter of first impression, the appellate court held that “initial date” referred to registration with DCJS. SORA did not mention registration under any other state’s laws, and the section addressing an offender’s relocation to New York did not provide that the duration of registration here was impacted by registration elsewhere. (Supreme Ct, Kings Co)

People v Miles, 206 AD3d 1011 (2nd Dept 6/29/2022)

SENTENCES | CONCURRENT

ILSAPP: The defendant appealed from a Putnam County Court judgment, convicting him of 3rd degree CSCS (three counts) and 3rd degree CPCS (three counts), upon a jury verdict. For each sale conviction, the defendant was sentenced to consecutive eight-year terms followed by two years’ post-release supervision. Such terms were to run concurrently to concurrent eight-year terms plus PRS imposed for possession counts. The Second Department ordered that all sentences would run concurrently with each other. Thomas Keating represented the appellant. (County Ct, Putnam Co)

Chukwuemeka v Chukwuemeka, 207 AD3d 432 (2nd Dept 7/6/2022)

TEMPORARY CUSTODY | HEARING

ILSAPP: In an interlocutory appeal filed amidst divorce proceedings, the father challenged an order of Dutchess County Supreme Court, granting the mother’s motion for temporary custody of the child. *See* CPLR 5701 (a) (appeal as of right from Supreme Court order deciding motion on notice involving some part of merits or affecting substantial right); *cf.* Family Ct Act § 1112 (a) (no appeal as of right from Family Court’s Article 6 interim custody order). The Second Department reversed. Even in a pendente lite context, where disputed factual issues existed, it was error as a matter of law to rule on custody without a full hearing. The matter was remitted for an expedited hearing and a new decision on custody. Annette Hasapidis represented the appellant. (Supreme Ct, Dutchess Co)

People v Echols, 207 AD3d 478 (2nd Dept 7/6/2022)

SORA | LEVEL THREE | IAC

ILSAPP: The defendant appealed from an order of Queens County Supreme Court, designating him a level-three sex offender. The Second Department reversed and remitted. The defendant had pleaded guilty to attempted 1st degree criminal sexual act. At the SORA hearing, counsel rendered ineffective assistance by: (1) waiving a viable argument regarding risk factor 4; (2) not knowing applicable law; and (3) failing to articulate any argument supporting the downward departure sought. Appellate Advocates (Ava Page, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Franklin, 207 AD3d 476 (2nd Dept 7/6/2022)

CONFRONTATION | TESTIMONIAL PROOF

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree CPW, based on allegations that police recovered a silver gun following a search of the basement of the home where he allegedly lived. The Second Department reversed and ordered a new trial. The trial court erroneously admitted a Criminal Justice Agency form through a CJA employee who did not create the form where it was not shown that the creator of the form was unavailable. In the document, the defendant’s address was listed as the basement of the home where police searched and recovered the silver gun. The admission of the testimony and document to establish an essential element of the charges of 2nd and 3rd degree CPW violated the defendant’s constitutional right of confrontation. The error was not harmless beyond a reasonable doubt. Appellate Advocates (Hannah Kon, of counsel) represented the appellant. (Supreme Ct, Queens Co)

Matter of Shermel M., 207 AD3d 468 (2nd Dept 7/6/2022)

SEARCH AND SEIZURE - AUTO SEARCH/PROBABLE CAUSE

LASJRP: During a canvas conducted to locate a vehicle that had been reported stolen, the officers located the vehicle, which was parked on a street corner and unoccupied. After observing the vehicle for approximately 45 minutes, one of the officers noticed the vehicle’s headlights turn on, as if someone had unlocked the vehicle with a key fob. The lights remained illuminated for approximately two to three minutes, and then turned off. No one entered the vehicle. Approximately 10 to 15 minutes later, the officer again observed the headlights flash on, and, within seconds, respondent ran to the vehicle and got into the driver’s seat, carrying a fanny pack. The officers approached and arrested respondent. An officer patted respondent’s pockets, but was unable to locate keys or a key fob. Upon inspection of the ignition and the center console, again the officer was unable to locate keys or a key fob. The officer then observed respondent’s fanny

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pack in the front passenger seat area. The officer opened the fanny pack and discovered a loaded .32 caliber revolver.

The Second Department upholds the denial of suppression. Respondent had no legitimate expectation of privacy in the vehicle, which was owned by and had been stolen from another individual. In any event, the officer had probable cause to believe that the vehicle, including the fanny pack, contained evidence of a crime - i.e., the keys or key fob.

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

Statini v Reed, 207 AD3d 471 (2nd Dept 7/6/2022)**ADOPTION | CONSENT**

ILSAPP: The mother and her husband appealed from an order of Dutchess County Family Court, which determined that the father's consent to the adoption of the subject child was required. The Second Department reversed and reinstated the adoption petition. The father provided no support for the child and presented no evidence that he lacked the means to do so. Further, during substantial periods when out of prison, the father did not petition for contact with the child. Thus, he failed to establish that his consent was required under DRL § 111 (1) (d). Ronna DeLoe represented the appellants. (Family Ct, Dutchess Co)

People v Wolbert, 207 AD3d 483 (2nd Dept 7/6/2022)**SORA | LEVEL THREE | NO IAC**

ILSAPP: The defendant appealed from a Suffolk County Court order, designating him a level-three sex offender. The Second Department affirmed. The defendant had been convicted of 1st degree sexual abuse. At the SORA hearing, defense counsel was not ineffective in declining to argue that the defendant's response to the sex-offender treatment program he completed while incarcerated was exceptional and constituted a mitigating factor warranting a downward departure. The argument had little chance of success. (County Ct, Suffolk Co)

People v Drago, 207 AD3d 559 (2nd Dept 7/13/2022)**PROSECUTORIAL MISCONDUCT - CONFLICT OF INTEREST**

LASJRP: The charge of criminally negligent homicide arose from an incident in which defendant, while operating her motor vehicle, struck the deceased, who had been standing next to defendant's vehicle. Additional charges involved allegations that defendant removed and damaged certain personal property that was part of a memorial to the deceased's daughter, who had been murdered

two years earlier and whose body had been discovered on defendant's mother's property.

The Second Department, which reverses defendant's conviction because of the prosecutor's improper summation, finds no error in the denial of defendant's motion for disqualification of the District Attorney, which was based on the existence of a professional relationship between the deceased and the District Attorney. (County Ct, Suffolk Co)

People v Medina, 207 AD3d 570 (2nd Dept 7/13/2022)**ASSAULT - PHYSICAL INJURY**

LASJRP: The Second Department dismisses a charge of third-degree assault, concluding that the evidence was legally insufficient to establish physical injury where the complainant was attacked and suffered bruises to his face and neck that lasted a couple of weeks, but testified that he was not in pain during the attack; and did not testify that he was in pain after the attack or that he took any medication or sought medical attention. (Supreme Ct, Queens Co)

Matter of Serena G., 207 AD3d 543**(2nd Dept 7/13/2022)****ABUSE/NEGLECT - DOMESTIC VIOLENCE****- HEARING REQUIREMENT/CONSOLIDATION**

LASJRP: The Second Department upholds a finding of neglect where the mother engaged in acts of domestic violence against the maternal grandmother while holding the child.

However, the family court erred in finding derivative neglect, and respondent was denied due process, where, during the hearing held in connection with the other petition, the court made no reference on the record to the newly-filed derivative neglect petition, and the only reference in the record to a joint hearing or consolidation of the two petitions occurred at the commencement of the dispositional hearing, when the court confirmed that it had consolidated the petitions for purposes of its decision. (Family Ct, Suffolk Co)

People v Tiger, 207 AD3d 574 (2nd Dept 7/13/2022)**RIGHT TO COUNSEL - EFFECTIVE ASSISTANCE****MOTION TO VACATE JUDGMENT OF CONVICTION**

LSJRP: The Second Department vacates defendant's conviction on the ground of ineffective assistance of counsel where, despite references in hospital records indicating that a skin biopsy was ordered, counsel failed to obtain the skin biopsy pathology report, which would have supported the conclusion that the child's skin condition was caused not by thermal burns, but by toxic epidermal necrolysis (TEN), a condition associated with an allergic reaction to a medication the child had been taking.

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Counsel also failed to consult a medical expert, or take steps to secure a court-appointed or retained medical expert before counseling defendant to plead guilty.

Defendant credibly testified that, had she known there was a pathology report diagnosing the child with TEN, she would not have pleaded guilty since “that was the proof that I needed to show that I did not burn” the child. (County Ct, Orange Co)

VanDunk v Bonilla, 207 AD3d 552 (2nd Dept 7/13/2022)

FAMILY OFFENSE | VENUE

ILSAPP: The mother appealed from an order of Rockland County Court dismissing her family offense petition. The Second Department reversed and remitted. Family Court erred in finding that the mother commenced the proceeding in an improper venue. A family offense petition could be originated in the county in which the acts occurred or any party resided. The mother lived in Rockland County. In any event, if she had initiated the proceeding in the wrong county, the proper action would have been a transfer pursuant to Family Ct Act § 174. Salvatore Adamo represented the appellant. (County Ct, Rockland Co)

People v Holiday, 207 AD3d 658 (2nd Dept 7/20/2022)

HEARSAY - PRIOR TESTIMONY

LASJRP: The Second Department rejects defendant’s contention that he was deprived of his right to a fair trial where the People, after admission into evidence of the testimony of two witnesses from defendant’s first trial who were unavailable, had the lead prosecutor read to the jury the question portions, and a prosecutor from his office read the answers. The better practice would have been for nonjudicial court personnel unaffiliated with the prosecutor’s office to read the answers and thereby avoid any risk of creating a misperception in the minds of the jurors. (Supreme Ct, Kings Co)

People v Noel, 207 AD3d 661 (2nd Dept 7/20/2022)

HEARSAY - ADOPTIVE ADMISSION BY SILENCE

LASJRP: The Second Department, while reversing defendant’s conviction because of the trial court’s failure to instruct the jury that a certain witness was an accomplice and subject to the statutory corroboration requirement, also concludes that the court erred in admitting, as an adoptive admission by silence, testimony from defendant’s mother-in-law concerning a telephone conversation in which defendant allegedly remained silent when the mother-in-law accused her of having killed the hus-

band. The People failed to establish that defendant actually heard the mother-in-law’s accusations or that defendant had an opportunity to respond prior to the mother-in-law disconnecting the phone call. (Supreme Ct, Kings Co)

People v Cardona, 207 AD3d 737 (2nd Dept 7/27/2022)

CRIMINAL NEGLIGENCE | INSUFFICIENT PROOF CRIMINALLY NEGLIGENT HOMICIDE RECKLESS DRIVING

LASJRP: The Second Department concludes that the evidence was legally insufficient to establish defendant’s guilt of criminally negligent homicide and reckless driving beyond a reasonable doubt. The evidence established only that defendant attempted to navigate the curved profile of the exit ramp at an excessive speed, and was late in attempting corrective measures by manually steering the wheel. While this conduct reflected poor judgment given the roadway environment, it failed to establish that defendant engaged in an affirmative act aside from driving faster than the posted speed limit, which is required to support a finding of criminal negligence or recklessness. (County Ct, Orange Co)

Dubose v Jackson, 207 AD3d 719 (2nd Dept 7/27/2022)

GRANDPARENT | VISITATION

ILSAPP: The paternal grandmother appealed from an order of Queens County Family Court denying her petition to modify visitation. The Second Department reversed and remitted. A prior court order provided for visitation “as arranged between the parties.” That did not work—the mother refused to allow the grandmother to visit with the child. Such refusal constituted a change in circumstances. Animosity between the mother and grandmother did not mean that a resumption of visitation would be contrary to the best interest of the child. Geanine Towers represented the appellant. (Family Ct, Queens Co)

People v Hay, 207 AD3d 748 (2nd Dept 7/27/2022)

MARIJUANA CONVICTION | NULLITY

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of multiple crimes. Pursuant to CPL 160.50 (5), his conviction of unlawful possession of marihuana became a nullity by operation of law—independent of any appeal and without any action by the appellate court. The conviction of 2nd degree burglary was vacated and that count was dismissed; it was an inclusory concurrent count of 2nd degree burglary as a sexually motivated felony. Appellate Advocates (Tammy Lin, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Second Department *continued*

People v Mayancela, 207 AD3d 752
(2nd Dept 7/27/2022)

ASSAULT - SERIOUS PHYSICAL INJURY

LASJRP: The Second Department reduces defendant's gang assault, assault and robbery convictions, concluding that the evidence was not legally sufficient to establish serious physical injury. Although the complainant was stabbed multiple times, there was no evidence of serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ. (Supreme Ct, Queens Co)

Uzamere v Idehen, 207 AD3d 729 (2nd Dept 7/27/2022)

FAMILY OFFENSE | CASUAL RELATIONSHIP

ILSAPP: The petitioner appealed from orders of Kings County Family Court, dismissing family offense proceedings. A casual acquaintance or ordinary fraternization between two individuals in a business or social context did not establish an intimate relationship. The respondent merely functioned as the petitioner's counsel. Thus, Family Court had properly dismissed the Article 8 petition based on a lack of subject matter jurisdiction. (Family Ct, Kings Co)

People v Wolfe, 207 AD3d 757 (2nd Dept 7/27/2022)

PRS DURATION | PLEA VACATED

ILSAPP: The defendant appealed from a Dutchess County Court judgment, convicting him of 1st degree course of sexual conduct against a child. The Second Department reversed, vacated the plea, and remitted. To plead knowingly, voluntarily, and intelligently, a defendant must be informed of the specific period of post-release supervision to be imposed or the maximum potential duration. Salvatore Adamo represented the appellant. (County Ct, Dutchess 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.

Anne MM. v Vasiliki NN., 203 AD3d 1476
(3rd Dept 3/31/2022)

**VISITATION - GRANDPARENTS
- VISITING SCHEDULE**

LASJRP¹: The Third Department concludes that the maternal grandparents have standing to seek visitation pursuant to Domestic Relations Law § 72 where the grandparents, the mother and the child resided together in Massachusetts from August 2015 to December 2015; in December 2015, the mother and the child moved to a nearby apartment to live with the father following his release from prison, and, between December 2015 and April 2017, the grandparents cared for the child several days every week; the parties gathered together for holidays, birthdays and other family events; following an argument in April 2017, the mother and the father moved from Massachusetts to New York with the child, and the grandparents did not have contact with the child until February 2018, but the grandparents attempted to contact the mother numerous times by telephone, email and through Facebook; the grandparents have a loving relationship with the child, spent substantial time with her, and have appropriately cared for her; and although the grandparents did not have contact with the child for almost one year prior to filing the petitions, due to the mother ceasing all communication with them, they made repeated efforts to continue their relationship with the child.

The family court properly found that visitation is warranted, but the extensive visitation ordered lacks a sound and substantial basis. The grandparents have visitation with the child every weekend from Friday evening until Sunday during the school year and every Thursday until Sunday during the summer. The grandparents' residence is located in Massachusetts, four hours from the mother's residence. This schedule is extremely disruptive, deprives the mother of significant quality time with the child, and does not allow the child to become involved in activities which take place on the weekend. The matter must be remitted for a hearing to determine an appropriate visitation schedule. (Family Ct, Saratoga Co)

People v Irizarry, 203 AD3d 1471 (3rd Dept 3/31/2022)

YO | OFF-THE-RECORD REMARKS

ILSAPP²: The defendant appealed from a County Court judgment, convicting him of 2nd degree robbery, upon his plea of guilty. The Third Department reversed. At sentencing, defense counsel asked that the defendant, who was age 17 at the time of the crime, be adjudicated a youthful offender. County Court found that the defendant was an eligible youth but stated that YO treatment was "not an option" because the People had said during plea

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.

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negotiations that, if such relief was granted, they would withdraw consent to the plea deal. Off-the-record promises made in plea bargaining will not be recognized where, as here, they are contradicted by the record. The sentence was vacated. The Albany County Alternate Public Defender (Steven Sharp, of counsel) represented the appellant. (County Ct, Albany Co)

Louie v Louie, 203 AD3d 1520 (3rd Dept 3/31/2022)

DIVORCE | EFFECTIVE ASSISTANCE

ILSAPP: The wife appealed from a judgment of divorce rendered by Franklin County Supreme Court. The Third Department modified by awarding maintenance. Supreme Court had erred in adopting verbatim the husband's proposed findings of fact and conclusions of law, without articulating the factors considered or providing a reasoned analysis. The appellate court rejected the wife's contention that she received ineffective assistance of counsel. In the context of [most] civil litigation, counsel's errors or omissions were generally binding on the client. Absent extraordinary circumstances, a claim of ineffective assistance of counsel would not be entertained. Robert Rosborough represented the appellant. *See Bailey v Ayoug*, 2022 WL 8523059 (2nd Dept March 12, 2022) (right to counsel in Family Court under Family Court Act § 262 affords protections equivalent to constitutional standard of effective assistance applicable to defendants in criminal proceedings); *Brandel v Brandel*, 197 AD3d 1287 (divorce litigant has statutory right to counsel—and to meaningful representation—for custody portion of litigation). (Supreme Ct, Franklin Co)

Matter of Makayla NN., 203 AD3d 1489 (3rd Dept 3/31/2022)

ABANDONMENT | DUE PROCESS

ILSAPP: The mother appealed from an order of Saratoga County Family Court, which found her child to be abandoned and terminated her parental rights. The Third Department reversed and remitted. In its written decision, Family Court claimed to have advised the mother's counsel that, if requested medical documentation was not timely provided, the mother would be found in default and the trial would become an inquest. However, the record showed that no such warning was given. Significantly, the mother and counsel attended the fact-finding hearing. Family Court abused its discretion in finding the mother in default and precluding her from participating in the hearing. As a matter of due process, she was entitled to be heard on abandonment. The fact that the child had turned 18 did not moot the challenge to the abandonment finding, given the stigma that might

indirectly affect the mother's status in future proceedings. But any challenge to the termination of parental rights was moot, and parental consent was not required for an adoption to proceed. Alexandra Buckley represented the appellant. (Family Ct, Saratoga Co)

People v Roberts, 203 AD3d 1465 (3rd Dept 3/31/2022)

PREJUDICIAL JAIL CALL | NEW TRIAL

ILSAPP: The defendant appealed from a Schenectady County judgment, convicting him of 2nd degree CPW. The Third Department reversed and ordered a new trial in the interest of justice. The defendant was deprived of a fair trial based on the admission of a jail phone call where-in he stated that he might as well "cop out to...the five years or whatever." Such statement would have made it difficult for the jury to accept the presumption of innocence and to evaluate the evidence fairly. The defendant was further prejudiced by the prosecutor's comment on summation that, in the phone conversation, the defendant said that he needed to get a paid lawyer to see if he could get less time—thus improperly using against him his constitutional right to counsel. The errors were not harmless. Matthew Hug represented the appellant. (County Ct, Schenectady Co)

People v Solomon, 203 AD3d 1468 (3rd Dept 3/31/2022)

SCI | JURISDICTIONAL DEFECT

ILSAPP: The defendant appealed from a Sullivan County Court judgment, convicting him of EWC upon his plea of guilty. The Third Department reversed. The Superior Court Information was jurisdictionally defective, and the issue survived the unchallenged appeal waiver and was not subject to preservation rules. The SCI indicated that the victim was age 17 at the time of the offense, but the offense charged required that the victim be *less than* 17 at that time. Leopold Gross represented the appellant. (County Ct, Sullivan Co)

[*Ed. Note: Leave to appeal was granted 7/21/2022, 38 NY3d 1136 {table}.*]

Streety v DOCCS, 203 AD3d 1509 (3rd Dept 3/31/2022)

CERTIFICATE | GOOD CONDUCT | REVERSAL

ILSAPP: The petitioner appealed from a judgment of Albany County Supreme Court, which dismissed his CPLR Article 78 petition to review a DOCCS determination denying his request for a certificate of good conduct. The Third Department reversed and remitted. In finding that it would be inconsistent with the public interest to grant a CGC permitting the petitioner to seek to work as a school bus driver, DOCCS failed in its duty to articulate a factual basis beyond the conviction itself for such con-

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clusion. Legal Aid Society, NYC (Robert Newman, of counsel) represented the appellant. (Supreme Ct, Albany Co)

People v Casatelli, 204 AD3d 1092 (3rd Dept 4/7/2022)**CPL 60.42 | PROOF EXCLUDED**

ILSAPP: The defendant appealed from a judgment of Albany County Supreme Court, convicting him of 1st degree rape, 2nd degree burglary, and another crime. The Third Department affirmed. Pursuant to CPL 60.42, the trial court properly prevented counsel from cross-examining a physician assistant regarding the fact that the victim had HPV, a sexually transmitted disease. The People agreed to redact medical records to eliminate reference to such diagnosis, and counsel agreed not to cross-examine about it. But counsel then tried to do so, arguing that the People opened the door by introducing photos of the complainant depicting redness that might have been caused by HPV. No expert medical proof supported such contention, and counsel was given the chance to explore whether explanations other than nonconsensual sex could explain the condition. Two justices dissented in part, opining that the sentence imposed on the defendant as a second felony offender—an aggregate prison term of 37 years plus post-release supervision—should be modified by directing that the sentences would run concurrently. (Supreme Ct, Albany Co)

People v Maloy, 204 AD3d 1090 (3rd Dept 4/7/2022)**440.20 MOTIONS | NO COURT APPROVAL**

ILSAPP: The defendant appealed from a Sullivan County Court order, which denied his CPL 440.20 motion. The Third Department modified. The challenged order stated that the arguments made were decided or could have been raised in the defendant's prior motion and precluded him from filing additional applications without prior court approval. If Penal Law § 70.30 (limitations on length of multiple consecutive sentences) applied, CPL 440.20 was not the proper vehicle to seek relief; it was up to correctional authorities to determine how sentences should be executed. County Court did not err in denying the assignment of counsel. A criminal defendant did not have an unqualified right to counsel in collateral proceedings, and the instant motion lacked merit. However, County Court erred in requiring court approval for further motions. The rule invoked applied to civil matters. Jane Bloom represented the appellant. (County Ct, Sullivan Co)

People v Escobales, 204 AD3d 1157 (3rd Dept 4/8/2022)**DISCOVERY - PROTECTIVE ORDERS**

LASJRP: The Third Department remits for a new hearing upon the People's application for a protective order following further disclosure to defense counsel. The better practice would have been to permit defense counsel access to the protective order application and discovery materials prior to the hearing so that counsel could participate to the fullest extent practicable.

While, in an appropriate case, the court may permit ex parte or in camera submissions and proceedings, defense counsel should be permitted to view the application and the materials at issue—with an appropriate caveat barring disclosure to or discussion with the defendant regarding the contents pending determination of the application—and be excluded from participation only to the extent necessary to preserve the confidentiality of sensitive information.

Here, it appears that the exclusion of defense counsel was not only excessive, but entirely unnecessary. (County Ct, Saratoga Co)

People v Faublas, 204 AD3d 1165 (3rd Dept 4/14/2022)**ANDERS | NEW COUNSEL**

ILSAPP: The defendant appealed from a judgment of Schenectady County Supreme Court, convicting him of drug sale and possession crimes. Appellate counsel submitted an *Anders* brief. The Third Department assigned new counsel. There was an issue of arguable merit regarding the appeal waiver that could potentially impact the reviewability of an argument on excessive sentence. (Supreme Ct, Schenectady Co)

People v Gertz, 204 AD3d 1166 (3rd Dept 4/14/2022)**MENTAL ILLNESS | CROSS**

ILSAPP: The defendant appealed from a judgment of Ulster County Court, convicting him of 1st degree sexual abuse. The Third Department affirmed. The trial court did not deprive the defendant of his right to confront a witness when it limited his cross-examination of the mother regarding her mental illness. He was permitted to question her about whether, at the time of the incident, she was experiencing any symptoms related to her mental illness that could have affected her recollection of our incident. (County Ct, Ulster Co)

**People v Sherwood, 204 AD3d 1162
(3rd Dept 4/14/2022)****BRADY MATERIAL - PREJUDICE/TIMELINESS OF DISCLOSURE
IMPEACHMENT - PRIOR FALSE ALLEGATIONS**

LASJRP: In this child sex crime prosecution, the Third Department upholds the denial of defendant's motion to set aside the verdict, finding no deprivation of defendant's right to a fair trial where, four days prior to trial, defendant, via a subpoena, learned that a physical exami-

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nation of the victim, performed three months after the incident, was “normal” and did not reveal any corporeal injury; and that the victim, during an interview related to the physical examination, made allegations of prior sexual abuse by two different individuals which, defendant asserts, were fabricated.

Defendant had a meaningful opportunity to review the *Brady* materials and use, or at least attempt to use subject to a ruling on admissibility, the information in his defense. Defendant’s contention that he could have done further investigation and possibly produced other witnesses had he obtained the records sooner is speculative.

The trial court did not err in preventing defendant from cross-examining the victim regarding her allegations of prior sexual abuse. Defendant asserted that, “as best [as he] determined,” one of the allegations was false because it was reported to the police but there was no indictment or conviction. He asserted that the other allegation—that the victim’s brother committed abuse more than ten years prior to the trial—was false because the victim had since gone to live with her brother and saw him as “a trusted figure.” Defendant pointed to nothing else to demonstrate the falsity of these allegations.

A dissenting judge asserts that defendant was denied the opportunity to investigate and interview potential defense witnesses well in advance of trial, or develop a more detailed argument regarding application of the Rape Shield Law. (County Ct, Sullivan Co)

People v Catalan, 204 AD3d 1240 (3rd Dept 4/21/2022)

CHARACTER EVIDENCE

LASJRP: The Third Department finds no error where the trial court prevented defendant from calling a coworker as a witness to testify generally as to his reputation for good character in the workplace.

Defendant’s offer of proof lacked any indication that the evidence concerned a particular character trait that was related to the charges, and evidence of defendant’s reputation for good character in the workplace was not relevant to the accusations of sexually abusing minors in secret, outside the workplace. (County Ct, Saratoga Co)

People v Heiserman, 204 AD3d 1249 (3rd Dept 4/21/2022)

DEFENSES - JUSTIFICATION

LASJRP: Defendant was charged by indictment with assault in the second degree stemming from allegations that, while being processed in jail for harassment, he struck a police sergeant and caused him injury. After a jury trial, defendant was convicted as charged.

In a 3-2 decision, the Third Department agrees with defendant that the trial court erred in denying his request for a jury charge on the defense of justification. The officer deployed pepper spray because defendant was refusing to take off his shoes and change into footwear provided by the jail so that an officer could finish searching him before bringing him into the jail. However, the video depicts a very brief time period between the initial directive for defendant to remove his footwear and the deployment of the pepper spray. The circumstances as a whole permit a reasonable view of the evidence suggesting that the use of the pepper spray constituted excessive force.

The dissenting judges assert that “the officers did not know what potentially dangerous items might be concealed in defendant’s boots; items such as knives, needles and drugs have been removed from footwear in the past.” (County Ct, Franklin Co)

[Ed. Note: Leave to appeal was granted on 6/7/2022 at 38 NY3d 1075 {table}.]

People v Lende, 204 AD3d 1224 (3rd Dept 4/21/2022)

SUPPRESSION | FORFEITED

ILSAPP: The defendant appealed from a Schoharie County Court judgment, convicting him of 1st degree criminal possession of marijuana, upon his plea of guilty. The Third Department affirmed. As to the defendant’s suppression arguments, an order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction, even where the judgment was entered upon a plea of guilty. See CPL 710.70 (2). However, such review was precluded here because of the defendant’s guilty plea before a suppression decision was rendered and because of the unchallenged waiver of the right to appeal. (County Ct, Schoharie Co)

People v Slivienski, 204 AD3d 1228 (3rd Dept 4/21/2022)

SEARCH AND SEIZURE - CELL PHONE/TEXTING RECORDS

LASJRP: An employee of TextNow testified that TextNow is an application that can be downloaded on smartphones or tablets or by computer, and provides a real phone number picked by the user that allows the person to text for free. The TextNow employee provided records for an unidentified phone number indicating that, around the time of the murder, the unidentified phone number connected to the Internet using two IP addresses—one registered to Time Warner Cable and the other registered to Verizon Wireless. Pursuant to a subpoena Time Warner provided information indicating that the IP address belonged to defendant’s stepfather, and the stepfather’s residence address, which police learned he shares with defendant’s mother. As a result of the Verizon Wireless

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subpoena the police learned that the phone number that most frequently used the Verizon Wireless IP address was registered to defendant, and a search warrant was issued to Verizon Wireless.

The Third Department rejects defendant's contention that the search warrant served on TextNow seeking defendant's cell phone records, including IP address information, was unlawful and that the records disclosed should be suppressed. Defendant concedes that one has no reasonable expectation of privacy in an IP address that a person uses to access the Internet when a third party holds that information. Although defendant argues that he sought to preserve his identity as private by choosing TextNow, rather than an ordinary texting service via his normal cell phone carrier that would associate his name with his phone number, and thus may have established a subjective expectation of privacy, society would not accept this expectation as reasonable. (Supreme Ct, Albany Co)

People v Sykes, 204 AD3d 1244 (3rd Dept 4/21/2022)**PLEA | VOLUNTARY**

ILSAPP: The defendant appealed from a Clinton County Court judgment, convicting him of multiple crimes, upon his plea of guilty. The Third Department modified. The crimes of conviction were committed through a single act. Thus, once a fine was imposed upon the 1st degree burglary conviction, County Court erred in also ordering separate fines for each of the remaining crimes. The defendant challenged the voluntariness of his plea based on counsel's alleged failure to turn over supporting depositions by two police detectives, which indicated that the victims identified someone else as the likely perpetrator. However, such claim was unpreserved for review, given the absence of an appropriate post-allocation motion. The defendant's generalized statements at the time of sentencing were insufficient to trigger the exception to the preservation requirement. The reviewing court also rejected the defendant's argument regarding the denial of his request for new counsel at sentencing. Counsel may be said to take a position adverse to his client by stating that a motion lacks merit. At County Court's behest, this defense counsel outlined the course of his representation. But counsel did not create an actual conflict in that he did not affirmatively state that the request for new counsel lacked a factual or legal basis. Edward Graves represented the appellant. (County Ct, Clinton Co)

Matter of Alexis TT., 204 AD3d 1311**(3rd Dept 4/28/2022)****ABUSE/NEGLECT - DOMESTIC VIOLENCE
- MENTAL HEALTH ISSUES**

LASJRP: The Third Department upholds a finding of neglect, noting with respect to one incident that a reasonable and prudent parent would not encourage her children to commit acts of domestic violence and thereafter coach them to lie about it to police; that a reasonable and prudent parent would not react to a disagreement with the oldest child by telling the children that she would kill herself and taking multiple medications while driving, and stating that it would be the child's fault; and that the children were experiencing anxiety due to respondent's behavior and were visibly upset and scared when respondent threatened to commit suicide. (Family Ct, Schoharie Co)

Matter of Frank Q., 204 AD3d 1331**(3rd Dept 4/28/2022)****AGENCY APPEAL | TPR**

ILSAPP: The Department of Social Services appealed from an order of Delaware County Family Court, which dismissed a permanent neglect petition on the ground that the child had not been in the care of an authorized agency for one year prior to the filing of the petition. The Third Department reversed. During the pendency of the appeal, the mother's parental rights were terminated based on abandonment, but the exception to the mootness doctrine applied. The issue presented—regarding Family Court's authority to find a child in a direct placement to be under the care of an authorized agency—raised a substantial and novel issue that was likely to recur yet evade review. Direct placement with a suitable person under Family Ct Act § 1055 fell within the purview of Social Services Law § 384-b. Further, the agency proved permanent neglect by clear and convincing evidence. (Family Ct, Delaware Co)

Jereline Z. v Joseph AA., 204 AD3d 1346**(3rd Dept 4/28/2022)****APPEAL - RECORD ON APPEAL/GAPS IN TRANSCRIPT
FAMILY OFFENSES**

LASJRP: In this family offense proceeding, the Third Department concludes that gaps in the record make meaningful review on appeal an impossibility where the transcript of the hearing reflects that respondent's counsel posed over 80 questions to respondent's mother and that the parties and the court could hear her answers, the transcript provides the witness's answer to only four of those questions, with 77 answers reported as "[i]naudible."

The family court should use a court reporter upon remittal in order to avoid the unintended results that

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arose from the electronic recording of the first hearing. (Family Ct, Rensselaer Co)

Joshua KK. v Jaime LL., 204 AD3d 1345
(3rd Dept 4/28/2022)**VISITATION | NO CHANGE**

ILSAPP: The AFC appealed from an order of Tioga County Family Court, which granted the father's modification petition and awarded him additional parenting time. The Third Department reversed. The father sought expanded time with the child so they could enjoy additional activities together. Family Court found that a change in circumstances existed—namely that existing parental access was inadequate for the father to develop a closer relationship with the child. But mere dissatisfaction with parenting time did not constitute a change in circumstances. Thus, the modification petition should have been dismissed. Carman Garufi represented the child. (Family Ct, Tioga Co)

Matter of Riley XX., 204 AD3d 1315
(3rd Dept 4/28/2022)**VISITATION - POST-ADOPTION CONTACT AGREEMENT**

LASJRP: In this proceeding seeking enforcement of a post-adoption contact agreement, the Third Department first concludes that although petitioners moved for a preliminary injunction, which is available only in the context of a pending action or proceeding (see CPLR 6301), the family court apparently recognized that petitioners should have proceeded via a petition for enforcement of the post-adoption contact agreement pursuant to Domestic Relations Law § 112-b(4), and, indeed, petitioners met the underlying statutory requirements and respondent's due process rights were protected. Accordingly, the Court deems petitioners' filings to be an application for enforcement of the post-adoption contact agreement.

The Court upholds the family court's determination that the child's best interests would be served by prohibiting respondent from contacting the child and that an order of protection was necessary. As respondent was attempting to inappropriately initiate contact with the child and repeatedly posting her pictures in public spaces despite the stated objections of petitioners, the family court also did not err in refusing to enforce the condition of the agreement requiring petitioners to provide respondent with pictures and updates. (Family Ct, Washington Co)

Matter of Annaleigh X., 205 AD3d 1109
(3rd Dept 5/5/2022)**ABUSE/NEGLECT - LEAVING CHILD IN CARE OF DRUG USER**

LASJRP: The Third Department upholds a determination by the family court that respondent mother neglected the child by consenting to the guardianship of a friend known to the mother to be a heroin user. (Family Ct, Ulster Co)

Matter of Jacob V., 205 AD3d 466 (3rd Dept 5/5/2022)**ABUSE/NEGLECT - CORROBORATION OF OUT-OF-COURT STATEMENTS**

LASJRP: The Third Department upholds findings of sexual abuse and derivative abuse, concluding that the child Jacob's out-of-court statements in a videotaped interview and to an agency caseworker were corroborated by the testimony of respondent's adult daughter, who disclosed that she too was sexually abused by respondent several times over the course of two years when she was Jacob's age; and respondent's guilty plea in a criminal prosecution involving a sexual offense against another child. (Family Ct, Bronx Co)

Nathan PP. v Angela PP., 205 AD3d 1082
(3rd Dept 5/5/2022)**CUSTODY | MODIFICATION**

ILSAPP: The father appealed from an order of Tompkins County Family Court, which granted the mother's motion to dismiss his custody modification petition. The Third Department affirmed. The parties had properly stipulated that custody could be altered without a threshold showing of a change of circumstances. However, the father still had to demonstrate that modification was needed to serve the children's best interests. He failed to make such showing. While asserting that the mother was too controlling as to scheduled access, he did not connect such complaints to the children's well-being. Further, he failed to substantiate that, due to his unemployment, he could provide additional care for the children and that they would thereby benefit. (Family Ct, Tompkins Co)

People v Boodrow, 205 AD3d 1134 (3rd Dept 5/12/2022)**ADVERSE POSITIONS | AFFIRMED**

ILSAPP: The defendant appealed from an Albany County Court judgment, convicting him of 3rd degree larceny. The Third Department affirmed, rejecting the defendant's claim that counsel took positions adverse to his interests and thereby created a conflict necessitating new counsel. The trial court's decision to deny a conclusory pro se motion was not influenced by a brief, arguably adverse remark by counsel. Further, in requesting a 730

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exam over defendant's objection, counsel sought to act in the client's interest. (County Ct, Albany Co)

People v Manson, 205 AD3d 1150 (3rd Dept 5/12/2022)**HARSH SENTENCE | APP DIV DUTY**

ILSAPP: The defendant appealed from a Washington County Court judgment, convicting him of attempted 1st degree promoting prison contraband. The Third Department affirmed. On appeal, excessive sentence was the only issue raised. The People erroneously urged that the appeal should be dismissed pursuant to CPL 450.10 (1). That statute did purport to disallow an appeal as of right where the sole issue was excessiveness of the agreed-upon sentence imposed upon a guilty plea. However, decades ago, such provision was found to contravene the State Constitution. Absent an appeal waiver, the intermediate appellate court had a constitutional duty to entertain all criminal appeals from final judgments. Defendants who pleaded guilty did not lose their right to invoke the Appellate Division's interest-of-justice jurisdiction to reduce their sentence. However, the instant sentence was sustained. (County Ct, Washington Co)

People v Velett, 205 AD3d 1143 (3rd Dept 5/12/2022)**MOLINEUX | HARMLESS**

ILSAPP: The defendant appealed from a Fulton County Court judgment, convicting him of 1st degree sexual abuse and EWC. The Third Department affirmed. After a *Molineux* hearing, County Court found inadmissible the defendant's 1999 sexual abuse conviction. However, a detective testified about such conviction and revealed that the victim was age 6. County Court told the jury to disregard the testimony. The improper disclosure was highly prejudicial, because it could have led the jury to believe that the defendant had a propensity for committing the instant crime. But the error was harmless, given the overwhelming proof of guilt and the limiting instruction. (County Ct, Fulton Co)

Matter of Andreija N., 206 AD3d 1081 (3rd Dept 6/2/2022)**SEXUAL ABUSE | FLAWED CASE**

ILSAPP: The Department of Social Services appealed from an order of Montgomery County Family Court, which dismissed an abuse/neglect petition. The Third Department affirmed. The mother was not a proper party upon appeal. As a nonrespondent, she had a limited role under Family Ct Act § 1035 (d). Since her arguments did not pertain to a custody decision made within the child protective proceeding, her appeal was dismissed. Where

the petitioner had repeatedly failed to move to amend its petition prior to the close of proof, Family Court properly excluded evidence offered to prove conduct not alleged in the petition. The trial court correctly refused to qualify the child's counselor as an expert, given her lack of expertise in diagnosing child sexual abuse. Many deficiencies contaminated the interview in which purported disclosures were made, including egregious deviations from guidelines for forensic interviews of children. (Family Ct, Montgomery Co)

Matter of James JJ., 206 AD3d 1091 (3rd Dept 6/2/2022)**DISMISSAL IN FURTHERANCE OF JUSTICE**

LASJRP: Petitioner filed a juvenile delinquency petition charging respondent, who was 17 years old, with assault in the third degree. An initial appearance was scheduled, but, before it was held, the family court sua sponte dismissed the petition in the furtherance of justice.

The Third Department reverses. The court had authority to dismiss the petition pursuant to FCA § 315.2 "at any time," including prior to the initial appearance, and a motion to dismiss in the furtherance of justice is excluded from the list of pretrial motions that are to be made after the initial appearance (see FCA §§ 332.1; 332.2 [1]). Petitioner was given an opportunity to be heard prior to the dismissal, since the court set a deadline for the parties to file written submissions but it appears that petitioner did not take advantage of this opportunity.

However, dismissal was not justified. On the date in question, the complainant, the mother of respondent's child, asked him to feed the child, who was crying. Respondent allegedly threw a full, eight-ounce baby bottle at the complainant which hit her in the face. She alleged that, although she was bleeding heavily, respondent and his father discouraged her from seeking medical attention. When she eventually did go to the hospital the next day, a cut on her face was glued shut by a doctor and she was told to return for X rays after the swelling had abated. Although the court placed emphasis on the fact that respondent was charged only with a misdemeanor, this was nevertheless a violent act, and the complainant's allegations referenced an escalation in respondent's propensity towards violence. (County Ct, Warren Co)

Matter of Micah S., 206 AD3d 1086 (3rd Dept 6/2/2022)**NEGLECT | NO HARM**

ILSAPP: The father appealed from Saratoga County Family Court orders, which found that he neglected his daughter and derivatively neglected his son. The Third Department reversed. Imminent risk of harm to the girl was not shown by: (1) the father's hostility toward a case-worker during a visit; (2) a single instance of domestic violence; (3) the father having opened a car door as a vehi-

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cle in which his daughter was a passenger was slowly beginning to pull away; and (4) his use of marijuana. The appellate court noted with disfavor that Family Court assigned a single AFC for both children even though their interests significantly diverged. Cheryl Sovern represented the appellant. (Family Ct, Saratoga Co)

Neil VV. v Joanne WW., 206 AD3d 1097 (3rd Dept 6/2/2022)

CUSTODY | CHANGE OF CIRCUMSTANCES

ILSAPP: The father appealed from an order of Franklin County Family Court sua sponte and summarily dismissing his custody modification petition. The Third Department reversed. The pleading set forth sufficient allegations that, if established at a hearing, could support the relief sought. The AFC and Social Services agency agreed that the father alleged a change in circumstances warranting a hearing, and the grandmother had conceded that point in court, but changed her tune upon appeal. Lisa Burgess represented the appellant. (Family Ct, Franklin Co)

People v Robbins, 206 AD3d 1069 (3rd Dept 6/2/2022)

STATUTES - RETROACTIVITY

LASJRP: The Third Department concludes that the provisions of CPL Article 245 and related reforms to CPL § 30.30 and other statutes, which took effect on January 1, 2020, are procedural changes deemed applicable to proceedings in pending actions after the effective date. (County Ct, Tompkins Co)

People v Roshia, 206 AD3d 1057 (3rd Dept 6/2/2022)

JUDGES - BIAS/LAW CLERK'S PRIOR ROLE AS PROSECUTOR

LASJRP: The Third Department agrees with defendant that where, at the time defendant's CPL Article 440 motion was decided, the former District Attorney who had prosecuted defendant was the judge's law clerk, the judge should have recused himself from deciding defendant's motion. (County Ct, St. Lawrence Co)

People v Smith, 206 AD3d 1058 (3rd Dept 6/2/2022)

ROBBERY | INSUFFICIENT PROOF

ILSAPP: The defendant appealed from a judgment of Albany County Supreme Court, convicting him of several crimes. The Third Department dismissed 1st and 2nd degree robbery counts. There was legally insufficient evidence to prove intent for accessorial liability. Indeed, considerable evidence suggested that the defendant was not one of the masked individuals who robbed the victim. The

defendant maintained that he merely brokered a drug deal between the victim and a perpetrator and was unaware of a plan to attack and rob the victim; and the sparse circumstantial evidence did not support the People's theory. Steven Sharp represented the appellant. (Supreme Ct, Albany Co)

Matter of Timothy RR. v Peggy SS., 206 AD3d 1123 (3rd Dept 6/2/2022)

VISITATION - INTERFERENCE WITH CONTACTS/PHONE ACCESS - VIOLATIONS

LASJRP: The family court found that the mother willfully violated the provisions of a visitation order by failing to ensure that the children were able to speak with the father every other day while in the mother's care and failing to respond to the father's communications regarding the children within a reasonable period of time. The court ordered, among other things, that the children be permitted to use their cell phones at the mother's house for the purpose of communicating with the father.

The Third Department affirms. The mother's belief that the children, born in 2005 and 2008, should not be allowed to own cell phones at their age has limited the father's means of contacting the children, when in her care, to the home's landline or the mother's cell phone. Whenever the father attempts to call the children at either of these phone numbers, the mother consistently refuses to answer or otherwise ignores his calls. (Family Ct, Sullivan Co)

Jeremy RR. v Olivia QQ., 206 AD3d 1195 (3rd Dept 6/9/2022)

MOTION TO DISMISS | WRONG STANDARD

ILSAPP: The father appealed from an order of Ulster County Family Court, which granted the mother's motion to dismiss his custody modification petition at the close of his proof. The Third Department affirmed. By finding the father's testimony incredible, Family Court applied an improper standard. The court was supposed to accept his testimony as true and afford him every favorable inference. However, independent review of the record revealed that the father failed to show a change in circumstance. (Family Ct, Ulster Co)

People v Minaya, 206 AD3d 1161 (3rd Dept 6/9/2022)

DISCOVERY SUBPOENAS

LASJRP: Defendant argues that the CPL Article 440 court's denial of his request for a judicial subpoena for the victim's statements was error because the facts alleged in the victim impact statement were inconsistent with the crime for which he was charged and, therefore, any simi-

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lar statements made prior to defendant's plea would have constituted Brady material.

The Third Department disagrees. Defendant's Article 440 motion did not raise this argument in support of the request for a judicial subpoena. In any event, that process may not be used to circumvent CPL discovery rules. (County Ct, Columbia Co)

People v Newhall, 206 AD3d 1144 (3rd Dept 6/9/2022)**DEFENDANT'S TESTIMONY | HARMLESS ERROR**

ILSAPP: The defendant appealed from a Sullivan County Court judgment, convicting him of 2nd degree rape and other crimes. The Third Department affirmed. Stating that the question of guilt was for the jury, County Court sustained objections to the defendant's testimony asserting that he was on trial for a false accusation of sexual assault, as well as to counsel's follow-up question as to whether the defendant was innocent of these charges. That was error. The testimony and question were not meant to usurp the jury's function but to alert the jury to the defendant's claim that the crimes had not occurred. However, the precluded testimony was cumulative, and the error was harmless. (County Ct, Sullivan Co)

Nicole J. v Joshua J., 206 AD3d 1186 (3rd Dept 6/9/2022)**FAMILY OFFENSE | HARASSMENT**

ILSAPP: The father appealed from an order of Broome County Family Court regarding the mother's custody and family offense petitions. The Third Department affirmed. There was insufficient evidence to establish the requisite culpable mental state for the family offense of disorderly conduct. The father's behavior was not public in nature. The incident took place in a private room with a partially closed door at a location dedicated to visitation with young children, and there was no proof about the number of people near the room at the time. However, upon independent review, the appellate court found that the father committed 2nd degree harassment and was not entitled to a defense based on using reasonable force to discipline the toddler. His severe acts were meant to alarm the child. (Family Ct, Broome Co)

People v Starnes, 206 AD3d 1133 (3rd Dept 6/9/2022)**VOIR DIRE MINUTES | NO REQUEST**

ILSAPP: The defendant appealed from a Broome County Court judgment convicting him of predatory sexual assault against a child and other crimes. The Third Department affirmed. The failure to transcribe the attorneys' questioning of prospective jurors did not deprive

the defendant of his right to appellate review. A verbatim recording of the trial proceedings was the better practice. But reversal was not mandated where there was no defense request and court denial as to the missing piece of the stenographic record and no showing of prejudice. (County Ct, Broome Co)

People v Backus, 206 AD3d 1298 (3rd Dept 6/16/2022)**PEOPLE'S APPEAL | DISMISSED**

ILSAPP: The People appealed from an Essex County Court order, which granted the defendant's motion to withdraw her guilty plea and vacate a judgment of conviction of 5th degree CPCs. The Third Department dismissed the appeal. No appeal lies from a determination made in a criminal proceeding unless provided for by statute. No judgment had been entered, and no right to appeal was available under CPL 450.20. The Legislature's policy to limit appellate proliferation in criminal matters was to be strictly honored. (County Ct, Essex Co)

People v Bowes, 206 AD3d 1260 (3rd Dept 6/16/2022)**SEARCH AND SEIZURE - COMMON LAW RIGHT TO
INQUIRE/PROBABLE CAUSE
CONFESSIONS - NOTICE OF INTENT TO OFFER**

LASJRP: The Third Department upholds the denial of preclusion where the People's CPL § 710.30 notice contained the wrong name for the officer to whom defendant allegedly made statements.

The Court holds that the police had an objective and credible reason for approaching defendant and another man after observing them walking on a trail that was known as a methamphetamine dumping site with the other man "cradling" a plastic bag and seeing the men speed up upon noticing the marked patrol vehicle. Since the officer testified that "cradling" a plastic bag in that manner—"holding it almost like someone would hold a baby"—was suspicious, particularly given the bags discarded in that area that contained soda bottles used for producing methamphetamine - the officer was permitted to inquire about the contents of the bag. Upon observing a "whiteish-blue" substance within the bottle defendant's companion exposed, there was probable cause to arrest both men, as the circumstances suggested that they were acting in concert. (County Ct, Chemung Co)

People v Cook, 206 AD3d 1236 (3rd Dept 6/16/2022)**PINGING | NO TAIN**

ILSAPP: The defendant appealed from an Ulster County Court judgment, convicting him of 3rd degree robbery, upon a jury verdict. The Third Department affirmed. The defendant argued that warrantless pinging of his cellphone was an illegal search and that any state-

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ments made to police after they located him should have been suppressed. Even if the pinging constituted an illegal search, the defendant's statements were sufficiently attenuated. Information gleaned from the pings was not exploited during the interview. Rather, the statements were obtained independently through other available evidence. Further, the statements were given hours after the defendant was identified by officers who knew him and he consented to going to the station and waived his *Miranda* rights. Thus, the statements were not tainted by the pinging. (County Ct, Ulster Co)

[People v Kerrick](#), 206 AD3d 1268 (3rd Dept 6/16/2022)

SENTENCE DISPARITY | REDUCED

ILSAPP: The defendant appealed from a Franklin County Court judgment, convicting him of various crimes, upon a jury verdict. The Third Department modified. The other intruder's involvement in the crimes was substantial, but he cooperated and received a five-year term. Another cooperating perpetrator who played a lesser role received probation and six months in jail. Although the defendant was being sentenced as a second violent felony offender, considering the significant disparity in the sentences, the term for 1st degree burglary was reduced from 20 years to 12 years, plus post-release supervision. Catherine Barber represented the appellant. (County Ct, Franklin Co)

[Ed. Note: Justice Clark concurred in part and dissented as to the sentence reduction.]

[People v Pointer](#), 206 AD3d 1232 (3rd Dept 6/16/2022)

SEARCH AND SEIZURE - EXPECTATION OF PRIVACY/ ABANDONMENT

LASJRP: The Third Department upholds the denial of defendant's motion to suppress DNA evidence recovered from a cup defendant had used while in a police station interview room. Defendant lacked standing given that he had no legitimate expectation of privacy over the cup. (County Ct, Albany Co)

[People v Williams](#), 206 AD3d 1282 (3rd Dept 6/16/2022)

MURDER - DEPRAVED INDIFFERENCE

LASJRP: In this vehicular homicide prosecution, the Third Department, with one judge dissenting, reduces defendant's conviction for depraved indifference murder to manslaughter in the second degree.

Defendant was extremely intoxicated, but his driving prior to police pursuit demonstrated that he was aware of his surroundings, obeyed multiple traffic signals and

responded to the alerts of other drivers. He was traveling at an exceptionally high rate of speed during the pursuit, but did so on a roadway designed to accommodate greater rates of speed than residential roads, at an hour when lighter traffic conditions predominated. There is no evidence that he failed to abide by any traffic signals while he fled or that any vehicles were forced to pull over or move out of his way. He did partially enter the lane of oncoming traffic for brief periods of time, but such episodic conduct stands in stark contrast to cases where the defendant traveled in an oncoming lane as part of a deadly game. Defendant largely chose to evade police not by weaving in and out of the oncoming lane, but instead by driving on a wide, paved shoulder, and, even if his attempted escape was carried out in a reckless manner, he may simultaneously intend to flee police and avoid striking other cars. The limited evidence of his proximity to other vehicles prior to the collision falls short of establishing the sort of disregard of narrow misses that could be some evidence of depraved indifference.

The circumstantial evidence permits only the inference that defendant, while reckless, consciously avoided risk, which is the antithesis of a complete disregard for the safety of others. (County Ct, Ulster Co)

[People v Abdullah](#), 206 AD3d 1340 (3rd Dept 6/23/2022)

CONFESSIONS - CUSTODY - FRUITS/SEARCH WARRANT

LASJRP: The Third Department suppresses un-Mirandized statements made by defendant at the crime scene—a sporting goods store—because defendant was questioned while in custody. Throughout most of the interaction, four police officers were present at the store, with at least one officer positioned between defendant and the exit. Shortly after the police arrived, defendant had been told to empty his pockets and place all of his personal property on the counter. Defendant did so. While being detained by the police, defendant asked the police multiple times if he could retrieve his possessions. They denied each of these requests. Additionally, the questions posed by the police to defendant exceeded what was necessary for investigation. Many of their inquiries were not limited to the alleged petit larceny, but instead focused on firearms that defendant may have possessed and their location and caliber, and defendant's intent as to his usage of the firearms.

Since the application for a search warrant was based upon these statements, the warrant is invalid and the firearms and slungshots recovered from the storage unit should be suppressed. (County Ct, Broome Co)

Third Department *continued***People v Boyd, 206 AD3d 1350 (3rd Dept 6/23/2022)**SEARCH AND SEIZURE - STANDING/EXPECTATION OF PRIVACY
RIGHT TO COUNSEL - ATTACHMENT OF RIGHT IN RELATED
MATTER

STATUTES - RETROACTIVITY

LASJRP: In support of defendant's motion for suppression, defense counsel stated, "[u]pon information and belief," that defendant's statements to the police "were the basis of a search warrant for his home, wherein it is alleged a weapon was found." After the People argued that defendant failed to provide sworn allegations of fact supporting standing, defendant filed a supplemental affidavit containing factual allegations relating to his expectation of privacy in the vehicle, but he did not address the apartment. The court reserved decision until the time of the suppression hearing and ultimately ruled that defendant lacked standing.

The Third Department concludes that defendant failed to demonstrate that he had a legitimate expectation of privacy in the apartment. The court had defendant's grand jury testimony, wherein defendant was asked where he lived on the date that the apartment was searched and gave two different addresses, neither of which was the address of the subject apartment, and defendant was given multiple opportunities when testifying to clarify whether he lived at the subject apartment, but did not do so. Also before the court was a sworn affidavit from defendant claiming that he did live at the subject apartment, but the court credited the grand jury testimony.

The Court also finds no right to counsel violation where the police also questioned defendant about a matter in which he was represented. The two matters were not closely related transactionally or in space or time. The mere fact that the police told defendant that he might potentially help himself in the "represented matter" if he cooperated in the "unrepresented" matter did not violate his right to counsel.

The Court rejects defendant's contention that Penal Law § 222.05, enacted as part of the Marijuana Regulation and Tax Act, should be applied retroactively to negate the finding that there was probable cause for the search of defendant's vehicle. (County Ct, Albany Co)

**People v Burnham, 206 AD3d 1368
(3rd Dept 6/23/2022)**

GUILTY PLEA | PRESERVATION

ILSAPP: The defendant appealed from a St. Lawrence County Court judgment, convicting him of attempted 2nd degree aggravated sexual abuse, upon his plea of guilty. The Third Department affirmed. Regarding the defen-

dant's contention that the plea was defective, the narrow exception to the preservation requirement did not apply. During the plea colloquy, the defendant made no statements inconsistent with guilt. His unsworn statements to the Probation Department were insufficient to trigger further inquiry where he did not reiterate his claim at sentencing and rejected the opportunity offered to withdraw his plea. (County Ct, St. Lawrence Co)

People v Colter, 206 AD3d 1371 (3rd Dept 6/23/2022)

The defendant failed to preserve the claim that the court erred in discharging a juror, as well as the claim that the court erred in including the automobile presumption in its final charge to the jury in this weapons possession case. The weight and sufficiency of the evidence claims fail.

Dissent: The court did not satisfy the requirements of CPL 270.35(2)(a) when it discharged juror No. 1. A new trial should be ordered as corrective action taken in the interest of justice. Here, when the juror in question was observed to be absent about 30 minutes after the scheduled start of the trial, the court noted the juror had left sick the day before and would have to be replaced. A defense inquiry as to whether the juror had provided any notification to the court was answered in the negative; the court said the juror who was absent had left ill shortly after being selected and that the proceedings had to move forward. This did not meet the standard of a reasonably thorough inquiry, and the court did not ascertain prior to discharging the juror when the juror would return. (County Ct, Chemung Co)

People v Dennis, 206 AD3d 1369 (3rd Dept 6/23/2022)

SPEEDY TRIAL | RETROACTIVITY | WAIVER

ILSAPP: The defendant appealed from a St. Lawrence County Court judgment, convicting him of attempted 1st degree disseminating indecent material to minors. The Third Department affirmed. The defendant's claim that he was denied his statutory right to a speedy trial was forfeited by his guilty plea. CPL 30.30 (6) (statutory speedy trial claim shall be reviewable upon appeal from ensuing judgment that was entered upon plea of guilty) (eff. Jan. 1, 2020) did not apply retroactively. In any event, this claim was precluded by the valid waiver of appeal. (County Ct, St. Lawrence Co)

People v Rivera, 206 AD3d 1356 (3rd Dept 6/23/2022)

GROSSLY UNQUALIFIED JUROR | CPL 270.35 | DISSENT

ILSAPP: The defendant appealed from a St. Lawrence County Court judgment, convicting him of 1st degree rape and another crime. The Third Department affirmed. One justice dissented, opining that the trial court had

Third Department *continued*

failed to conduct a “probing and tactful inquiry” into whether a juror was grossly unqualified and should be discharged. *See* CPL 270.35 (1); *People v Buford*, 69 NY2d 290. A new trial was warranted in the interest of justice. During deliberations in this rape case, the juror revealed that she was a victim of rape. The foreperson reported that, in the jury room, the juror verbally attacked another juror, revealed the rape, was very upset, and was in tears. The juror had not disclosed the rape during voir dire or on the jury questionnaire. After her belated disclosure, the court asked the juror if she was a victim of a crime but did not specify rape. The juror asked to speak in private with the court, which did not occur. (County Ct, St. Lawrence Co)

People v Buckley, 206 AD3d 1470 (3rd Dept 6/30/2022)

440 | IAC | HEARING

ILSAPP: The defendant appealed from a Broome County Court order, which summarily denied his CPL 440.10 motion. A special prosecutor advised the trial court that he was withdrawing an agreement based on the defendant’s failure to fully cooperate in the prosecution of another perpetrator. The defendant was entitled to a hearing to delve into whether counsel was ineffective in failing to demand a hearing regarding the alleged lack of cooperation. Kathy Manley represented the appellant. (County Ct, Broome Co)

People v Castro, 206 AD3d 1444 (3rd Dept 6/30/2022)

ASSAULT RIFLE | REGISTRATION

ILSAPP: The defendant appealed from a Saratoga County Court judgment, convicting him of 1st degree assault and several other crimes arising from a shooting. The Third Department modified. The conviction for failure to register an assault rifle was based on legally insufficient evidence. The firearm was owned by the defendant’s brother and was only in the defendant’s possession, so he had no registration obligation. The trial court did not err in precluding a psychiatric defense based on the defendant’s prescription medications. The court allowed him to file a late notice, given belated disclosure of a video of him exhibiting disturbing behavior during a police interview. But the defendant then failed to timely execute releases for prosecution access to his medical records. Rural Law Center of New York (Kelly Egan, of counsel) represented the appellant. (County Ct, Saratoga Co)

Erick RR. v Victoria SS., 206 AD3d 1523 (3rd Dept 6/30/2022)

CUSTODY | ACCESS EXPANDED

ILSAPP: The father appealed from an order of Broome County Family Court regarding custody and visitation. Family Court correctly sustained the mother’s physical custody of the child, rather than ordering the child to relocate to North Carolina, where the father lived. However, his parenting time had to be expanded to include four weeks in the summer to facilitate the deeper bond and more significant relationship he sought with the child. Barrett Mack represented the father. (Family Ct, Broome Co)

People v Faucett, 206 AD3d 1463 (3rd Dept 6/30/2022)

CRIMINALLY NEGLIGENT HOMICIDE

LASJRP: The Third Department reverses defendant’s conviction for criminally negligent homicide, finding legally insufficient evidence.

The Court of Appeals has held that the unexplained failure of a driver to see the vehicle with which he or she subsequently collided does not, without more, support a conviction. Here, defendant did not slow down and did not change lanes, as required due to the victim’s vehicle displaying flashing lights while sitting on the shoulder. But, if defendant failed to see the victim’s vehicle, he would not have been aware of the necessity to slow down and move left. Even if defendant failed to maintain his lane, such conduct does not establish the moral blameworthiness required. And, travelling at 70 miles per hour in a 65 mile-per-hour zone was not the type of dangerous speeding that would support a conviction. (County Ct, Tioga Co)

People v Felli, 206 AD3d 1452 (3rd Dept 6/30/2022)

PEOPLE’S APPEAL | NO AUTOMATIC STAY

ILSAPP: The defendant appealed from a judgment of Schuyler County Court, convicting him of 2nd degree promoting prison contraband and 7th degree CPCS. The Third Department modified, vacating the contraband charge. Previously, the defendant had successfully moved to dismiss count one of an indictment charging him with 1st degree promoting prison contraband, based on legally insufficient proof before the grand jury. When the People appealed, County Court stayed the dismissal order and proceeded to a bench trial on the full indictment. There was no statutory authorization for the stay; and absent a stay, there would have been no occasion for the defendant to be convicted of the subject lesser included offense. Christopher Hammond represented the appellant. (County Ct, Schuyler Co)

Matter of Hakeem S., 206 AD3d 1537 (3rd Dept 6/30/2022)

NEGLECT | REVERSED

Third Department *continued*

ILSAPP: The mother appealed from an order of Schenectady County Family Court, which found that she neglected her children. The Third Department reversed and dismissed the petition. The record was devoid of proof that the children suffered emotional harm when their mother was drinking and then was asleep in the bathroom at a homeless shelter. Although there was a period when she was taken to the hospital, shelter staff watched them. While the mother's conduct was far from ideal and things could have turned out differently, the petitioner did not establish that the children were ever in imminent danger. One justice dissented. Michelle Rosien represented the appellant. (Family Ct, Schenectady Co)

[People v Michalski](#), 206 AD3d 1443 (3rd Dept 6/30/2022)

WAIVER OF INDICTMENT | INVALID

ILSAPP: The defendant appealed from a judgment of Albany County Supreme Court, convicting him of 2nd degree criminal contempt. The Third Department reversed and dismissed. The waiver of indictment was invalid—a jurisdictional claim not forfeited by the plea of guilty. CPL 195.10 provided that a defendant could waive indictment and consent to be prosecuted by an SCI, under certain circumstances, prior to the filing of an indictment. When the defendant agreed to be prosecuted by an SCI, he had already been indicted. Clea Weiss represented the appellant. (Supreme Ct, Albany Co)

[People v Reese](#), 206 AD3d 1461 (3rd Dept 6/30/2022)

GUILTY PLEA | ELEMENT NEGATED | AT SENTENCING

ILSAPP: The defendant appealed from an Ulster County Court judgment, convicting him of 2nd degree CPW. The Third Department reversed and remitted. The crime required a loaded firearm. The defendant negated that element—at sentencing—when he said the handgun was in his bedstand drawer and was not loaded. The narrow exception to the preservation requirement was implicated. County Court failed to conduct a further inquiry or give the defendant the chance to withdraw his plea. Eric Galarneau represented the appellant. (County Ct, Ulster Co)

[People v Santiago](#), 206 AD3d 1466 (3rd Dept 6/30/2022)

MAKING A TERRORISTIC THREAT

LASJRP: The Third Department reverses defendant's conviction for making a terroristic threat, concluding that the verdict was against the weight of the evidence where defendant made threatening phone calls alleging harassment of his brother by correction officers, but no one took any actions to warn the correctional facility or any other

agency or individuals of the threat. While a notice was eventually issued, this was not done until well after the initial threat was made, and none of the witnesses testified that they or anyone else had a reasonable expectation or fear that the threat would be imminently carried out, nor did their actions indicate any such belief. (Supreme Ct, Albany Co)

[Matter of Thomas SS. v Alicia TT.](#), 206 AD3d 1534 (3rd Dept 6/30/2022)

CUSTODY - RELOCATION

LASJRP: The Third Department finds no error where the mother was permitted to relocate with the child to Pennsylvania, where they live with the mother's husband. The mother and the stepfather had decided to move because the stepfather had a job opportunity that carried the possibility of a significantly higher salary. The mother had started a job as a substitute teacher at the child's new school in Pennsylvania, which paid more than her previous job and allowed her to spend more time with the child. She testified that her new home was only approximately 15 minutes farther away from the father than her previous home. The father testified as to the increased driving distance and the fact that he was unsure if he would be able to continue to coach the child's T-ball team, but the Family Court correctly found that that the move would not have a significant impact on the father's parenting time. (Family Ct, Tioga Co)

[William V. v Christine W.](#), 206 AD3d 1478 (3rd Dept 6/30/2022)

CUSTODY | ACCESS REINSTATED

ILSAPP: The mother appealed from an order of Otsego County Family Court regarding visitation. The Third Department modified. The mother's supervised visitation should not have been suspended—a drastic remedy. The record did not show that the mother caused bent glasses and marks on the son's leg. While the mother-son relationship was rocky, there were positive aspects. Rural Law Center of New York (Kristin Bluvas, of counsel) represented the mother. (Family Ct, Otsego Co)

[Amber B. v Scott C.](#), 207 AD3d 847 (3rd Dept 7/7/2022)

CUSTODY - EXTRAORDINARY CIRCUMSTANCES

- APPEAL/AFC STANDING

LASJRP: The Third Department upholds a determination that the grandmother did not prove extraordinary circumstances where, although the child has primarily resided with the grandmother since he was approximately one year old, the mother has maintained a continuous presence in the child's life by retaining control of impor-

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tant decision-making, including the child's medical care, health insurance and enrollment in school.

The AFC is authorized to take this appeal. Although the grandmother did not appeal, she has submitted a letter brief in support of the AFC's position. (Family Ct, Sullivan Co)

People v Dowling, 207 AD3d 799 (3rd Dept 7/7/2022)

MISSING WITNESS | NO CONTROL

ILSAPP: The defendant appealed from a judgment of Albany County Supreme Court, convicting him of attempted 2nd degree murder and other crimes. The Third Department affirmed. The trial court did not err in refusing to give a missing witness charge concerning the victim. The defendant showed that the witness had material knowledge and was expected to give non-cumulative testimony. Further, as to availability, the People acknowledged that they knew the victim was housed in the local jail. However, he was not under prosecution control, in that he was wholly uncooperative during the investigation. (Supreme Ct, Albany Co)

Katie R. v Peter Q., 207 AD3d 844 (3rd Dept 7/7/2022)

VISITATION - PETITION/AMENDED TO CONFORM TO PROOF

LASJRP: The Third Department agrees with the family court that the mother failed to demonstrate that a change in circumstances has occurred since entry of the 2015 order warranting an analysis of the child's best interests with respect to the father's parenting time. However, the Court does agree with the mother that her petition should be conformed to the proof adduced at the fact-finding hearing regarding the child's recent behavior, which began after these proceedings were commenced.

Although there was no motion to that effect, the family court appropriately exercised its prerogative to extend consideration of the proof to relevant matters occurring after the filing of the mother's petition because the father had ample opportunity to respond to these events and was not prejudiced. (Family Ct, Sullivan Co)

Matter of Olivia RR., 207 AD3d 822 (3rd Dept 7/7/2022)

ABUSE/NEGLECT - CORROBORATION/ ADMISSIONS BY RESPONDENT

LASJRP: In this sexual abuse case, the Third Department concludes that the child's out-of-court statements were adequately corroborated where a State Police investigator testified that, during the course of an interview, respondent admitted that he had previously had sexual thoughts about the child "touching his penis and him touching her sexually," and admitted that he had become

erect while the child sat and wiggled on his lap and that he would leave her on his lap for a few seconds when that occurred; and respondent testified and maintained that any touching of the child's private parts was accidental or incidental to playing with the child, but admitted during his testimony that he did get an erection once or twice when the child was climbing on his lap, although he insisted that his arousal was not intentional. (Family Ct, Warren Co)

Webster v Larbour, 207 AD3d 825 (3rd Dept 7/7/2022)

FAMILY OFFENSES - RECORD ON APPEAL

LASJRP: In this family offense proceeding, the Third Department finds that respondent has not been deprived of the right to meaningful appellate review where, due to an audio equipment malfunction, a portion of the cross-examination and all of the redirect examination of respondent were not recorded.

The Court notes that the full direct examination, including testimony concerning respondent's theory as to his wife's motivation for commencing the proceeding, is contained in the record. Respondent has not identified the substance of the missing testimony, nor has he demonstrated its relevance to the issues he raises on appeal. (Family Ct, Saratoga Co)

People v Alleyne, 207 AD3d 554 (3rd Dept 7/13/2022)

PROTECTION | DURATION

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 3rd degree robbery, upon his plea of guilty. The appeal brought up for review two orders of protection. The defendant failed to preserve his contention that the duration of the orders exceeded the statutorily permissible period, since he did not raise the matter at sentencing or move to amend the orders. In the interest of justice, the Second Department vacated the durational directives and remitted. Legal Aid Society of New York City (Simon Greenberg, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Drago, 207 AD3d 559 (3rd Dept 7/13/2020)

SUMMATION | PREJUDICIAL

ILSAPP: The defendant appealed from a Suffolk County Court judgment, convicting her of multiple crimes. The Second Department reversed. The prosecutor's improper comments during summation deprived the defendant of a fair trial—an issue that was partially unpreserved. The prosecutor mischaracterized the evidence relating to the charge of criminally negligent homicide and suggested that the defendant's conduct was intentional or reckless. In addition, closing remarks deni-

Third Department *continued*

grated defense theories as “excuses” and “garbage” and evoked sympathy for the defendant in strong emotional terms. The People argued that such improper comments did not deprive the defendant of a fair trial because a video depicted her striking the victim with her vehicle. However, the jury was called upon to determine whether such conduct was sufficiently “blameworthy” to rise to the level of criminally negligent homicide. Legal Aid Society of Suffolk County (Felice Milani) represented the appellant. (County Ct, Suffolk Co)

People v Medina, 207 AD3d 570 (3rd Dept 7/13/2022)**NO PHYSICAL INJURY | SUMMATION | HARMLESS**

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of multiple crimes. The Second Department vacated the conviction of 3rd degree assault and dismissed that count. The evidence did not establish that the victim sustained a physical injury where he did not testify that he was in pain after the attack or that he took any medication or sought medical attention. In addition, the defendant asserted that certain comments made by the prosecutor during summation were improper. Although references to race generally should be avoided, here the prosecutor’s comment—that the defendant did not like the fact that one of the complainants, a white man, was dating a Black woman—was not improper. The statement was relevant to show the basis for the altercation at issue. Remarks about the work one complainant did to serve disabled children—elicited without objection—were improper and designed to appeal to the jury’s sympathy. But any error was harmless. Appellate Advocates (Anna Jouravleva, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Songster, 207 AD3d 579 (3rd Dept 7/13/2022)**SORA | PROCEDURE**

ILSAPP: The defendant appealed from an order of Kings County Supreme Court, designating him a level-three sex offender. The Second Department affirmed, while finding fault with the procedures followed. Upon the defendant’s impending release from prison, the Board of Examiners prepared a single case summary but three separate risk assessment instruments for convictions under three different indictments. Supreme Court held one hearing, but issued three separate orders, rendering different SORA adjudications as to each indictment. Where convictions under multiple indictments came up for disposition at the same SORA hearing, the Board should instead prepare a single RAI based on all the crimes that were the subject of the disposition, considering them all together as the “Current Offense(s).” The

SORA court should then render a single risk determination. (Supreme Ct, Kings Co)

People v Agan, 207 AD3d 861 (3rd Dept 7/14/2022)**MURDER ONE | REDUCED**

ILSAPP: The defendant appealed from a judgment of Columbia County Court, convicting him of multiple crimes. The Third Department modified, reducing the conviction of 1st degree (witness elimination) murder to 2nd degree murder. The evidence did not establish that the deceased victim (the defendant’s wife) witnessed the defendant’s sex offenses with the minor victim. At most, she may have been a coincidental witness. Further, there was no evidence that the defendant feared that his prosecution was imminent or that his wife might be called to testify against him. Two separate concurring opinions were filed. Matthew Hug represented the appellant. (County Ct, Columbia Co)

People v Alexander, 207 AD3d 878 (3rd Dept 7/14/2022)**WARRANT | OVERBROAD**

ILSAPP: The defendant appealed from [sic] a Schenectady County Court judgment, convicting him of 1st degree rape and 1st degree sexual abuse. The Third Department affirmed. The appeal waiver was invalid, so the appellate court addressed the contention that the warrant authorizing the police search of his cell phone was unconstitutional. The affidavit was insufficient to establish probable cause to search the phone and seize evidence related to all Penal Law Article 130 crimes. However, probable cause existed to search and seize photographic and video evidence relating to the alleged June 2018 commission of sexual abuse. The overbroad portion of the warrant was severed. Such severance did not require exclusion of May 2018 videos allegedly depicting the defendant committing rape, because they were properly seized under the plain view doctrine. Police could search the phone pursuant to the valid part of the warrant, and thumbnail images in an extraction report would have made the character of the May 2018 videos apparent. (County Ct, Schenectady Co)

People v Corrodore, 207 AD3d 893 (3rd Dept 7/14/2022)**PERSISTENT FELON | SIX DWIS**

ILSAPP: The defendant appealed from a judgment of Albany County Supreme Court, convicting him of DWI (two counts) and other crimes. The Third Department affirmed. The defendant urged that the determination to sentence him as a persistent felony offender was unduly severe, in that he had remained crime-free for 10 years, was gainfully employed, and had not caused injury in the subject crime. The sentencing options were stark—a max-

Third Department *continued*

imum of 1½ to 4 years as a first felony offender or a minimum of 15 years to life as a persistent felon. (Second felony offender sentencing was not permitted based on the distant prior convictions.) At the sentencing hearing, the defendant conceded that he qualified as a persistent felon. Supreme Court considered that he had committed five prior felony convictions (four for DWI) over a 25-year period; concluded that a non-recidivist sentence was inappropriate; and imposed a term of 15 years to life. (Supreme Ct, Albany Co)

People v Devoe, 207 AD3d 896 (3rd Dept 7/14/2022)

SENTENCE - PROBATION/VIOLATIONS

LASJRP: The Third Department concludes that recent amendments to Executive Law § 259-I that disallow incarceration for certain technical parole violations do not apply in the probation violation context. (County Ct, Clinton Co)

Jeffrey O. v NYS OCFS, 207 AD3d 900 (3rd Dept 7/14/2022)

MALTREATMENT | UNSEALING

ILSAPP: In an Article 78 proceeding, the petitioner appealed from an OCFS order denying his application to have a report maintained by the Statewide Central Register amended to be unfounded and expunged. The Third Department confirmed. The petitioner's due process rights were not violated by the ALJ's consideration of sealed charges. A party who affirmatively placed in issue the underlying criminal conduct by bringing a civil suit thereby waived the protection afforded by CPL 160.50. Further, the defendant's due process rights were not violated by the six-month delay in issuance of the indicated report. The failure of the agency to comply with the 60-day statutory deadline did not warrant vacatur where there was no showing of substantial prejudice.

Kutzin v Katz, 207 AD3d 911 (3rd Dept 7/14/2022)

MARITAL AGREEMENT | MALPRACTICE

ILSAPP: The plaintiff appealed from an order of Ulster County Supreme Court, granting summary judgment dismissing his complaint, which legal malpractice based on the purportedly defective drafting of a marital settlement agreement. The Third Department affirmed. To succeed on his claim, the plaintiff was required to demonstrate that the defendant failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; that the failure was the proximate cause of actual damages to the plaintiff; and that the plaintiff would have succeeded on the merits of

the underlying action but for such negligence. The defendant made a prima facie showing that his actions were not the proximate cause of the plaintiff's alleged damages, and the plaintiff did not raise any questions of fact. (Supreme Ct, Ulster Co)

Benjamin V. v Shantika W., 207 AD3d 1017 (3rd Dept 7/28/2022)

VISITATION - SUPERVISION REQUIREMENT

LASJRP: The Third Department upholds a determination awarding sole legal and primary physical custody to the mother, but concludes that the Family Court erred in limiting the father to six hours of supervised parenting time in Pennsylvania every other week.

This determination was based entirely on allegations of sexual abuse of the father's niece nearly 30 years ago. None of the parties advocated for supervised parenting time to the father or otherwise opposed a schedule of expanded parenting time. The mother knew of the sexual abuse allegations prior to agreeing to a July 2017 consent order. Despite ultimately concluding that the father's parenting time must be supervised, the Family Court left the children in the father's unsupervised care over the summer of 2021; that is, from the conclusion of the fact-finding hearing in June 2021 until the Family Court entered the order in September 2021. (Family Ct, Ulster Co)

People ex rel. Jones v Collado, 207 AD3d 1005 (3rd Dept 7/28/2022)

SARA | DECLARATORY JUDGMENT

ILSAPP: The petitioner appealed from an Ulster County Court judgment, which dismissed his habeas corpus petition. The Third Department reversed. During incarceration for rape, the petitioner became paralyzed and was then housed in a wheelchair-accessible unit at Shawangunk Correctional Facility. After being adjudicated a level-three sex offender, the petitioner was prohibited from residing within 1,000 feet of school grounds, pursuant to SARA. Upon reaching his maximum release date, the petitioner could not find SARA-compliant housing in New York City, and he was not released to an assigned RTF because the facility was not wheelchair-accessible. During the pendency of the appeal, the petitioner was released. But the mootness exception applied, and the appellate court converted the proceeding to a declaratory judgment action. County Court should not have dismissed the petition based on the lack of an affidavit by a person possessing personal knowledge. The statute did not contain such requirement. The respondents erred in not releasing the petitioner to an RTF and in asserting that he was in RTF status at Shawangunk because he was given a workbook for a therapeutic course designed for RTF participants; had access to a resource room with

Third Department *continued*

employment and housing materials; and had an assigned parole officer. The petitioner wrongly remained confined in the maximum-security prison for eight months past the expiration of his determinate sentence. When a level-three offender reached his maximum expiration date, DOCCS had to release him to an approved residence or an RTF. Legal Aid Society, NYC (Laura Jones) represented the appellant. (County Ct, Ulster Co)

People v McGill, 207 AD3d 996 (3rd Dept 7/28/2022)

DISSENT | SENTENCE

ILSAPP: The defendant appealed from a judgment of Rensselaer County Supreme Court, convicting him of 1st degree robbery, upon his plea of guilty. The Third Department affirmed. Two dissenters would have reduced the sentence from 12 years to time served. The shotgun used by the defendant was unloaded, and he was not in the victim's room when the stabbing took place. The defendant was 18 at the time of the incident. Months after sentencing, he had a malignant brain tumor removed; and doctors said that the tumor could recur. (Supreme Ct, Rensselaer Co)

Fourth Department

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

People v Bradford, 204 AD3d 1483 (4th Dept 4/29/2022)

DISSENT | STUN BELT

ILSAPP¹: The defendant appealed from an order of Steuben County Court, denying his CPL 440.10 motion to vacate a judgment convicting him of various crimes. The Fourth Department affirmed. Two justices dissented. The defendant was required to wear a stun belt during trial, but County Court did not specify a security reason for such restraint, as required by *People v Buchanan*, 13 NY3d 1. A hearing was warranted regarding the claim that counsel was ineffective in not objecting to the stun belt. (County Ct, Steuben Co)

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

People v Brown, 204 AD3d 1519 (4th Dept 4/29/2022)

POST-PLEA | NEGATING CRIME

ILSAPP: The defendant appealed from an Onondaga County Court judgment, convicting him of 1st degree hindering prosecution. The Fourth Department affirmed. During the plea colloquy, the defendant did not negate an element of the crime. Absent a post-plea motion, County Court had no duty to inquire as to the voluntariness of the plea based on the defendant's comments during sentencing. The Fourth Department declined to follow Third Department decisions misreading *People v Pastor*, 28 NY3d 1089, which did not expand *People v Lopez*, 71 NY2d 662 (where defendant's factual recitation during plea proceedings negated essential element of crime, court must make further inquiry to ensure defendant understood nature of charge and was intelligently entering guilty plea). (County Ct, Onondaga Co)

People v Gardner, 204 AD3d 1509 (4th Dept 4/29/2022)

JURY CHARGE | ACCOMPLICE

ILSAPP: The defendant appealed from an Allegany County Court judgment, convicting him of 2nd degree burglary. The Fourth Department granted a new trial. County Court erred in admitting as a past recollection recorded the written statement of a prosecution witness. The statement was not accurate, according to the witness, and was made many months after the alleged events recorded. The lower court also erred in charging the jury on accomplice liability, referring to a person who "potentially"—rather than "intentionally"—aided another. In the interest of justice, the appellate court concluded that the mistaken term prejudiced the defendant, who was alleged to have aided the principal by driving him to and from the crime scene. David Abbatoy represented the appellant. (County Ct, Allegany Co)

People v Ginty, 204 AD3d 1487 (4th Dept 4/29/2022)

DISSENT | REASONABLE SUSPICION

ILSAPP: The defendant appealed from an Onondaga County Court judgment, convicting him of 2nd and 3rd degree CPW, upon his plea of guilty, and from a judgment revoking a sentence of probation and imposing imprisonment. The Fourth Department affirmed. One justice dissented. The People did not show that the officer who made the traffic stop had a reasonable suspicion that the defendant was armed and posed a threat to his safety. The initially cooperative defendant became fidgety and moved his hand in the waistline area. The officer did not observe a telltale bulge in the clothing nor see the defendant (the only Black occupant of the vehicle) reach into his pants. His actions were innocuous. (County Ct, Onondaga Co)

Fourth Department *continued*

[People v Hartsfield](#), 204 AD3d 1502 (4th Dept 4/29/2022)

DISSENT | PRIOR INCARCERATION

ILSAPP: The defendant appealed from a judgment of Monroe County Supreme Court, convicting him of 1st degree rape and other crimes, upon two jury verdicts. The Fourth Department affirmed. Two justices dissented. It was error to let the People elicit from the rape complainant testimony about her knowledge of the defendant's prior incarceration. Evidence of the victim's state of mind, i.e. her fear of the defendant, was not probative on the issue of forcible compulsion. The error was not harmless. (Supreme Ct, Monroe Co)

[People v Lopez](#), 204 AD3d 1529 (4th Dept 4/29/2022)

SENTENCE ILLEGAL | PREDICATE

ILSAPP: The defendant appealed from a Supreme Court judgment, convicting him of 1st degree sexual abuse, upon his plea of guilty. The Fourth Department modified. Supreme Court improperly sentenced the defendant as a second felony offender. The issue was unpreserved, but the illegality of the sentence was readily discernible from the record. A federal conviction for conspiracy to commit a drug crime may not serve as a predicate felony. The Monroe County Public Defender (Shirley Gorman) represented the appellant. (Supreme Ct, Monroe Co)

[People v Palombi](#), 204 AD3d 1481 (4th Dept 4/29/2022)

SPEEDING | ASSAULT | AGAINST WEIGHT

ILSAPP: The defendant appealed from a County Court judgment convicting him of 3rd degree assault. The Fourth Department reversed. Driving with only a learner's permit, the defendant lost control and crashed into a utility pole while rounding a curve. The verdict, that a passenger was seriously injured due to the defendant's criminal negligence, was against the weight of evidence. Expert proof about a speed of 92 mph was speculative, and the theory that the defendant tried to "flatten out the curve" by crossing the double line did not show moral blameworthiness. The Ontario County Public Defender (Cara Waldman) represented the appellant. (County Ct, Ontario Co)

[People ex rel. Steinagle v Howard](#), 204 AD3d 1491 (4th Dept 4/29/2022)

BAIL | HABEAS GRANTED

ILSAPP: The petitioner appealed from an order of Erie County Supreme Court dismissing her habeas corpus petition, which challenged a bail decision to remand her

to custody. The Fourth Department reversed and remitted. A bail decision may be reviewed in a habeas proceeding if it appears that there was a violation of constitutional or statutory standards against excessive bail or that the refusal of bail was arbitrary. Here the bail-fixing court failed to explain its decision on the record or in writing, as required by statute. Barry Covert represented the appellant. (Supreme Ct, Erie Co)

[People v Young](#), 204 AD3d 1511 (4th Dept 4/29/2022)

SENTENCE HARSH | SEX ASSAULT

ILSAPP: The defendant appealed from a judgment convicting him of predatory sexual assault against a child, upon a guilty plea. The sentence was reduced from 14 years to life to 10 years to life, given the defendant's lack of a criminal history, abusive upbringing, resulting mental health issues, and remorse. John Cirando represented the appellant. (County Ct, Onondaga Co)

[Matter of Akol v Afet](#), 206 AD3d 1647 (4th Dept 6/3/2022)

CUSTODY | DEFAULT | COUNSEL

ILSAPP: The father appealed from a custody order of Onondaga County Family Court. The Fourth Department vacated the part of the order stating that it was entered upon default based on the father's failure to appear in court. He was represented by counsel, so the order was not entered on the default of the aggrieved party, and the appeal was not precluded. The hearing was properly held in his absence, and proof supported the challenged order. (Family Ct, Onondaga Co)

[People v Bovio](#), 206 AD3d 1568 (4th Dept 6/3/2022)

PLEA | MURDER | ELEMENT NEGATED

ILSAPP: The defendant appealed from a Seneca County Court judgment, convicting him of 2nd degree murder, upon a plea of guilty. The Fourth Department vacated the plea. The defendant pushed his toddler stepson, causing him to strike his head on the floor and die days later. During the plea colloquy, when stating through counsel that he did care for the victim, the defendant negated the mens rea element of depraved indifference. Before accepting the plea, County Court had a duty to inquire further. But the court failed to probe to reestablish that the defendant did not care whether the victim lived or died. Caitlin Connelly represented the appellant. (County Ct, Seneca Co)

[People v Davis](#), 206 AD3d 1603 (4th Dept 6/3/2022)

PLEA | IAC | HEARING

Fourth Department *continued*

ILSAPP: The defendant appealed from a Wayne County Court judgment, convicting him of attempted 2nd degree gang assault (two counts), upon his plea of guilty. The Fourth Department reserved decision. Counsel had advised the defendant that he was likely to be convicted at trial of attempted 2nd degree assault. That was erroneous, since such offense was a legal impossibility for trial purposes. The record raised a genuine factual issue as to the voluntariness of the plea, so County Court erred in summarily denying the defendant's motion to withdraw his pleas. Bridget Field represented the appellant. (County Ct, Wayne Co)

People v DeJesus, 206 AD3d 1554 (4th Dept 6/3/2022)**MOLINEUX | NEW TRIAL**

ILSAPP: The defendant appealed from a Cattaraugus County Court judgment, convicting him of 1st and 2nd degree robbery and other crimes. The Fourth Department granted a new trial. It was error to permit *Molineux* evidence of the defendant's alleged involvement in a burglary of the victim's home three days prior to the instant offenses to show intent. Intent could be inferred from the victim's testimony that, while wielding a baseball bat, the defendant directed him to comply with demands of a masked shooter to turn over money and property. The error was not harmless. The Legal Aid Bureau of Buffalo (Allyson Kehl-Wierzbowski) represented the appellant. (County Ct, Cattaraugus Co)

People v Franklin, 206 AD3d 1610 (4th Dept 6/3/2022)**SEX OFFENSE | SENTENCE SLASHED**

ILSAPP: The defendant appealed from an Oneida County Court judgment, convicting him of four counts of predatory sexual assault against a child. The Fourth Department reduced the aggregate term from 80 years to life to 30 years to life. Although the defendant's conduct was heinous and despicable, he had no prior criminal record, and the reduced sentence would provide an opportunity for him to demonstrate rehabilitation in the future. The Oneida County Public Defender (Patrick Marthage, of counsel) represented the appellant. (County Ct, Oneida Co)

People v Hill, 206 AD3d 1616 (4th Dept 6/3/2022)**ATTEMPTED MURDER | INSUFFICIENT PROOF**

ILSAPP: The defendant appealed from a Supreme Court judgment convicting him of multiple crimes arising from a home burglary and robbery. The Fourth Department dismissed the count of attempted 2nd degree murder. A video of an encounter between the defendant and a victim revealed that the gun may have accidentally

discharged. The Monroe County Public Defender (Brian Shiffrin, of counsel) represented the appellant. (Supreme Ct, Monroe Co)

People v Jones, 206 AD3d 1566 (4th Dept 6/3/2022)**PARTIAL PRINT | INSUFFICIENT PROOF**

ILSAPP: The defendant appealed from a County Court judgment, convicting him of 2nd degree burglary. The Fourth Department dismissed the indictment, finding that the verdict was against the weight of evidence. After a residence was burglarized, police found several fingerprints on a piece of paper near the point of entry. A fingerprint examiner opined that the print was made by the defendant's index finger—even though the print matched only 22% of the characteristics of his inked print. There was no indication that a second examiner made a positive verification. The People's expert had acknowledged on cross-examination that a second examiner, particularly a blind verification, significantly increased the accuracy of fingerprint analysis. No other proof linked the defendant to the crime. Monroe County Public Defender (William Clauss) represented the appellant. (County Ct, Monroe Co)

Matter of Kennell v Trusty, 206 AD3d 1578 (4th Dept 6/3/2022)**CUSTODY | CHANGE IN CIRCUMSTANCES**

ILSAPP: The mother appealed from an order of Steuben County Family Court awarding physical custody to the nonparent petitioner. The Fourth Department affirmed. Once the petitioner established extraordinary circumstances, Family Court was required to decide if a change of circumstances had occurred since the prior order. The trial court failed to do so, but the reviewing court had the authority to independently review the record, and it found extensive changes. The child's expressed strong preference to live with the petitioner was among the salient factors. The proof also supported a finding that the modification was in the child's best interests. (Family Ct, Steuben Co)

People v King, 206 AD3d 1576 (4th Dept 6/3/2022)**PLEA | SUPPRESSION | REASONABLE SUSPICION**

ILSAPP: The defendant appealed from an Onondaga County Court judgment, convicting him of 3rd degree CPCS and another crime. The Fourth Department dismissed the indictment. Police saw the defendant's vehicle in the parking lot of an apartment complex known for drug activity, and they knew of his prior drug convictions. When police stopped their vehicle in front of his parked car so he could not drive away—thereby seizing him—they lacked a reasonable suspicion regarding criminal activity. Hiscock Legal Aid Society (Piotr Banasiak, of

Fourth Department *continued*

counsel) represented the appellant. (County Ct, Onondaga Co)

People v King, 206 AD3d 1593 (4th Dept 6/3/2022)**CPW | INSUFFICIENT PROOF**

ILSAPP: The defendant appealed from a judgment of Monroe County Supreme Court, convicting him of 2nd degree CPW. The Fourth Department dismissed the indictment, finding the evidence legally insufficient. The defendant's mere presence in the house where the weapon was found did not establish constructive possession. True, that night, the defendant was the only person in the residence whose DNA profile matched that of a major contributor to DNA found on the gun. However, that did not support an inference of his constructive possession when the weapon was discovered. One justice dissented. Gary Muldoon represented the appellant. (Supreme Ct, Monroe Co)

**People v Muhammad, 206 AD3d 1580
(4th Dept 6/3/2022)****COURTROOM | INADVERTENT CLOSING**

ILSAPP: The defendant appeal from an Onondaga County Court judgment convicting him of 2nd degree murder and another crime. The Fourth Department affirmed. Concerned about distracting the jurors, the court had an ill-advised standing policy that prohibited anyone from entering while a witness was testifying. A misunderstanding led to a group of people waiting in the hallway for the doors to open while the jury was hearing testimony. They were not excluded by an affirmative act of the court. The brief, inadvertent closing did not violate the defendant's right to a public trial. (County Ct, Onondaga Co)

People v Williams, 206 AD3d 1625 (4th Dept 6/3/2022)**440 | IAC | HEARING**

ILSAPP: The defendant appealed from an Onondaga County Court order, which, following a hearing, denied his CPL 440.10 motion to vacate a judgment convicting him of 2nd degree and other crimes upon a jury verdict. The Fourth Department reversed. Trial counsel had failed to interview a witness who was present during the shootings and could provide potentially exculpatory evidence. The defense investigator and trial counsel said they did not pursue the matter because the witness' version of events was inconsistent with other accounts and he had a criminal history. But without delving into the information, counsel could not make an informed decision. John Lewis represented the appellant. (County Ct, Onondaga Co)

People v Bunton, 206 AD3d 1724 (4th Dept 6/10/2022)**INJURY | INSUFFICIENT**

ILSAPP: The defendant appealed from a County Court judgment, convicting him of 2nd degree assault (two counts) and other crimes. The Fourth Department dismissed one assault count, finding the proof legally insufficient as to the element physical injury. There was only a vague description of the injury and no testimony about any pain medications. Further, the prosecution produced no medical records, and the officer did not miss work. The Monroe County Public Defender (Janet Somes) represented the appellant. (County Ct, Monroe Co)

People v Freeman, 206 AD3d 1694 (4th Dept 6/10/2022)**YO | DETERMINATION**

ILSAPP: The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of attempted 1st degree robbery and 2nd degree assault, upon a jury verdict. The Fourth Department reserved decision and remitted. The trial court erred in failing to determine if the defendant should be afforded youthful offender status. Because he was convicted of an armed felony offense, the court had to first determine if he was an eligible youth and, if so, whether YO treatment was warranted. Hiscock Legal Aid Society (Philip Rothschild, of counsel) represented the appellant. (Supreme Ct, Onondaga Co)

People v Hodge, 206 AD3d 1682 (4th Dept 6/10/2022)**SUPPRESSION | DISMISSAL**

ILSAPP: The defendant appealed from an Onondaga County Court judgment, convicting him of 2nd degree CPW and another crime, upon his plea of guilty. The Fourth Department reversed. The appeal brought up for review the denial of suppression. Police lawfully stopped the petitioner and did not inordinately prolong his detention. However, after ordering the defendant to exit the truck, they unlawfully tried to pat frisk him without a reasonable suspicion that he posed a threat to their safety. Further, when the defendant threw his coat onto an officer and fled to a grassy area along the highway, police lacked probable cause to arrest him for obstructing governmental administration, because their conduct was not authorized. Two justices dissented. Hiscock Legal Aid Society (Philip Rothschild) represented the appellant. (County Ct, Onondaga Co)

**Matter of McKinley H.-W., 206 AD3d 1726
(4th Dept 6/10/2022)****ABUSE/NEGLECT - MEDICAL NEGLECT
- INFLECTING PHYSICAL HARM**

Fourth Department *continued*

LASJRP²: The Fourth Department finds sufficient evidence of neglect where the father cut the bottom of the child's toe with a sword.

However, the evidence did not establish that the father neglected the child by failing to obtain medical care and treatment after the child was cut. The mother testified that she and the father tended to the child's injury by washing the area with a washcloth, putting ointment on the cut, and bandaging the area. The caseworker testified that she instructed the mother two days after the incident to have the child seen by a doctor, who treated the injury the same way the parents had. (Family Ct, Genesee Co)

**Matter of McNair v McNamara, 206 AD3d 1689
(4th Dept 6/10/2022)**

DOUBLE JEOPARDY | PROHIBITION

ILSAPP: Seeking to prohibit his criminal prosecution on double jeopardy grounds, the petitioner initiated a CPLR Article 78 in the Fourth Department. The appellate court prohibited the Oneida County DA from retrying him on weapons charges. A trial had commenced, the jury was selected and sworn, and three witnesses testified. Then the trial judge felt sick and thought he might have Covid. Before being tested, he declared a mistrial. Jeopardy had attached. There was no manifest necessity. The judge should have considered alternatives, such as a continuance or substitution of another judge. Rebecca Wittman represented the petitioner. (County Ct, Oneida Co)

**People v Mountzouros, 206 AD3d 1706
(4th Dept 6/10/2022)**

MOLINEUX | NEW TRIAL

ILSAPP: The defendant appealed from a County Court judgment, convicting him of 1st degree sexual abuse and other crimes, arising from his alleged abuse of a son. The Fourth Department granted a new trial. The trial court erred in allowing testimony about the defendant's sexual abuse of another son, under the *Molineux* modus operandi exception. If, arguendo, the defendant's identity as the perpetrator was not conclusively established, the similarities between the uncharged acts and charged crimes were not sufficiently unique. The error was not harmless. The Livingston County Conflict Defender (Bradley Keem, of counsel) represented the appellant. (County Ct, Livingston Co)

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

Matter of William, 206 AD3d 1696 (4th Dept 6/10/2022)

CUSTODY - MILITARY PERSONNEL/HOUSING ISSUES

ADOPTION - CONSENT/UNWED FATHER

LASJRP: The Fourth Department, with one judge dissenting, upholds a determination that the father's consent to adoption was required, and that he is entitled to custody.

The father publicly acknowledged his paternity from the outset of the pregnancy, and, although he did not pay any expenses in connection with the pregnancy or the birth, he testified that all of those expenses were paid by the military. Prior to the child's birth, he pursued paternity testing and requested and received from the mother a commitment that he could have custody of the child, and actively began purchasing "items" in anticipation of obtaining custody of the child upon birth. He enlisted the help of his military commanding officers in attempting to obtain custody of his child, and made plans for relatives or family friends to help care for the child until his enlistment in the military ended.

The father reasonably and sincerely believed that the mother would not surrender the child for adoption, and she frustrated his efforts to become involved with the child. She lied to the father, telling him that she would give him custody of the child; misled petitioners into believing that the father did not want the child, even though she knew that he was aggressively pursuing custody; and misled the courts by filing a false affidavit stating that no one was holding himself out as the father.

A parent who lacks housing for a child is not legally precluded from obtaining custody. Many parents enlist the aid of family members to help them provide housing, including single parents who serve in the military. That temporary inability to provide housing should not preclude them from asserting their custodial rights to the children where, as here, they have established their intent to embrace their parental responsibility. (Family Ct, Jefferson Co)

People v Baek, 207 AD3d 1086 (4th Dept 7/1/2022)

INDICTMENT | DUPLICITOUS

ILSAPP: The defendant appealed from an Allegany County Court judgment, convicting him of 3rd degree rape. The Fourth Department reversed. The sole count of the indictment charged only one offense. On its face, the indictment was not duplicitous. However, as amplified by the bill of particulars, it was. The bill of particulars alleged that the defendant engaged in two separate and distinct acts of nonconsensual sexual intercourse with the victim. The jury heard proof about both acts, with no instructions as to which act to consider when rendering a verdict. The defendant was entitled to pretrial notice of the charges so he could adequately prepare a defense. The indictment was dismissed with leave to the People to re-present the

Fourth Department *continued*

charge to another grand jury. Emily Stoufer-Quinn represented the appellant. (County Ct, Allegany Co)

[People v Go](#), 207 AD3d 1081 (4th Dept 7/1/2022)

440 HEARING | IAC | IMMIGRATION

ILSAPP: The defendant appealed from an Erie County Court order, which denied his CPL 440.10 motion to vacate a judgment convicting him of attempted 3rd degree arson. The Fourth Department reversed. The defendant contended that counsel rendered ineffective assistance regarding immigration consequences of his guilty plea. Counsel did not inform him that the subject crime was an aggravated felony. Further, counsel erroneously stated that the risk of deportation diminished because the crime occurred more than five years before the defendant obtained a green card. The matter was remitted for a hearing on prejudice—whether there was a reasonable probability that, but for counsel’s misadvice, the defendant would not have pleaded guilty and would instead have gone to trial. Matthew Borowski represented the appellant. (County Ct, Erie Co)

[People v Jackson](#), 207 AD3d 1080 (4th Dept 7/1/2022)

STATUTORY SPEEDY TRIAL | NOT FORFEITED

ILSAPP: The defendant appealed from a judgment of Onondaga County Supreme Court, which convicted him of 2nd degree CPW and other crimes. The Fourth Department affirmed. The defendant’s challenge to the denial of his statutory speedy trial motion was reviewable pursuant to subdivision (6) of CPL 30.30, which became effective January 1, 2020, before the instant judgment was rendered. However, the argument lacked merit. (Supreme Ct, Onondaga Co)

[People v Piasta](#), 207 AD3d 1054 (4th Dept 7/1/2022)

SENTENCE - RESTITUTION

LASJRP: The Fourth Department orders a new hearing regarding restitution where the amount ordered by the court deviated from the loss claimed by the restaurant manager in his testimony; the sole evidence supporting the actual amount of out-of-pocket loss calculated by the court was an undetailed, vague letter ostensibly from the restaurant franchisee’s insurer; and the calculation and accuracy of the amount of loss cited in the letter was unknown to the People. (County Ct, Greene Co)

[People v Stefanovich](#), 207 AD3d 1047 (4th Dept 7/1/2022)

CONSTITUTIONAL SPEEDY TRIAL | DISSENT

ILSAPP: The defendant appealed from a judgment of Oswego County Supreme Court, convicting him of 1st degree rape. The Fourth Department affirmed. One judge dissented, based on the unreasonable preindictment delay. There was no good cause for the delay, which was based on inadvertence by the People. They did not seek to indict the defendant until six years after they came into possession of DNA evidence linking him to the crime. The delay deprived him of his right to due process, so the indictment should have been dismissed, the dissenter opined. (Supreme Ct, Oswego Co)

[Matter of Jiryan S.](#), 207 AD3d 1247 (4th Dept 7/8/2022)

TPR | ADJOURNMENT DENIED | VACATED

ILSAPP: The mother appealed from an order of Onondaga County Family Court, which terminated her parental rights based on permanent neglect. The Fourth Department vacated the order. When the mother failed to appear at the fact-finding hearing, Family Court wrongly denied counsel’s request for an adjournment. The mother had not previously sought such relief, and there was no indication that a delay would have adversely affected the child. Further, when the mother defaulted, she was experiencing Covid-like symptoms and was prohibited from entering the courthouse. Veronica Reed represented the appellant. (Family Ct, Onondaga Co)

[People v Lopez-Sarmiento](#), 207 AD3d 1210 (4th Dept 7/8/2022)

ASSAULT - PHYSICAL INJURY

LASJRP: The Fourth Department agrees with defendant that the evidence is legally insufficient to establish that he caused physical injury to the victim by means of a dangerous instrument where defendant attempted to stab the victim and the two struggled over the knife, but the victim suffered no more than minor cuts to her hands that did not require bandaging and caused only transient pain. (County Ct, Yates Co)

[Matter of Silas W.](#), 207 AD3d 1234 (4th Dept 7/8/2022)

ABUSE/NEGLECT - LEAVING CHILDREN ALONE/UNSUPERVISED
- APPEAL/ORDERS

LASJRP: The Fourth Department first rejects petitioner’s contention that the appeal from an intermediate order finding neglect must be dismissed on the ground that no appeal lies from a decision. The paper appealed from meets the essential requirements of an order.

The Court agrees with the mother that petitioner failed to establish neglect. There was nothing intrinsically dangerous about leaving two of the children to eat and watch television while the mother was in the bathroom with the door open. The mother knew that one of her chil-

Fourth Department *continued*

dren was sometimes aggressive towards his younger siblings, but there is no evidence in the record that she was aware that he might open a locked window, remove the screen, and drop his sibling from a height of two stories. The window was not deemed dangerous by a caseworker during a home visit less than a month before the incident. (Family Ct, Onondaga Co)

S.P. v M.P., 207 AD3d 1247 (4th Dept 7/8/2022)

RIGHT TO FILE/ACCESS TO COURTS

LASJRP: The Fourth Department finds no error

where the court precluded plaintiff mother from filing any new application for legal relief without leave of court or approval of an attorney.

Although public policy mandates free access to the courts, a party may forfeit that right if she or he abuses the judicial process by engaging in meritless litigation motivated by spite or ill will. The mother has made multiple motions, many of which are repetitive, and each motion is accompanied by voluminous and mostly irrelevant exhibits. When her requests for relief are denied, the mother ignores the court's ruling and continues making the same meritless arguments. She also is sending copies of her papers, which contain sensitive matter, to people who have no involvement at all in the case. (Supreme Ct, Niagara Co) ⚖️



Timothy P. Murphy presented his now-annual update on Court of Appeals cases during NYSDA's Annual Conference—and received the Wilfred R. O'Connor Award (presented by Executive Director Susan C. Bryant).

Genesee County Public Defender Office presented its 2022 Kevin M. Andersen Memorial Award to Jonathan Rothermel, Senior Assistant Public Defender in the Broome County Public Defender's Office, during NYSDA's 55th Annual Conference.



Lorraine McEvilly (l) accepted NYSDA's Jonathan E. Gradess Service of Justice Award from Executive Director Susan C. Bryant during this year's Annual Conference.



Offices from around the state were represented—in person and via Zoom—at the Chief Defender Convening held in Saratoga Springs during NYSDA's 2022 Annual Conference.

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