



Public Defense Backup Center REPORT

Volume XXXVI Number 2 September-December 2021

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

“Litigating in Color”: Helping Family Defenders Address Racism in the System

NYSDA partnered with the Black Public Defender Association, a section of the National Legal Aid & Defender Association, to present “Litigating in Color,” a joint statewide training/CLE program on racial justice in family court. This all-day intensive training program consisted of materials and workshops designed to enhance the capacity of family defenders to advocate for their clients through a racial justice lens. The topics addressed were examining racial bias in family court, challenging racial bias in family court, and anti-racism litigation skills. There was no cost for this program, presented with the support of [The New York Bar Foundation](#). Approximately 200 family court practitioners registered from across the state for this virtual program. The program was not recorded, but those looking for written program materials can contact our Family Court Staff Attorney, Kim Bode, at Kbode@nysda.org.

Suit Claims NYS Disciplinary Procedures Protect Prosecutors, Violate Civil Rights

The attorney grievance system’s protection of prosecutors and consequent failure to end prosecutorial misconduct is now the subject of a federal lawsuit. The [November 29th edition](#) of News Picks noted a [media release](#) by Civil Rights Corps, which filed the suit with a group of law professors, noting the harm done over many years by prosecutors’ illegal conduct that remained unchecked because disciplinary entities did not act. Ellen C. Yaroshefsky and Bennett L. Gershman [discussed](#) the

suit in the *New York Law Journal* in November. Among their comments: “[w]hat makes this lawsuit so unique is that the professors publicly disclosed on the Internet the complaints they made to the Departmental Disciplinary Committee against nearly two dozen Queens County prosecutors identified by name who had been criticized by New York appellate courts for their misconduct but had not been subject to professional discipline. In a shocking turn, the professors themselves have been threatened with professional discipline by the City’s Corporation Counsel for violating New York’s confidentiality rule.”

Named as defendants in the suit, in their official and personal capacities, are the Corporation Counsel of the City of New York; District Attorney for Queens County; Chair of the State of New York Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts; and Chief Counsel of the State of New York Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts. Also named, in his official capacity, is the Presiding Justice of the Appellate Division, Second Department.

Prosecutorial Conduct Commission Edges Toward Existence

In the article noted above, Yaroshefsky and Gershman refer to the “newly-enacted New York State Commission on Prosecutorial Conduct,” expressing fears that “if disciplinary bodies continue to look the other way, the Commission’s efforts to hold errant prosecutors accountable may be futile.” That Commission’s creation has been hindered by litigation and political maneuvering; amendments to its enacting legislation were signed this year ([L 2021, ch 153](#))—see the [June 21st edition](#) of News Picks. As was said in a [December 11th article](#) on *NewYorkDailyNews.com* about successful wrongful

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INSIDE—Pull-Out:
New York Lesser Included Offenses
October 2021

conviction lawsuits involving the Queens District Attorney's office:

A 2018 state law established a commission with subpoena power to investigate and recommend discipline in prosecutorial misconduct cases. District attorneys have fought the measure at every step. After a judge ruled the commission was unconstitutional, legislators passed another law. That commission has not yet been set up.

On Dec. 13, 2021, the Chief Judge [announced](#) her appointments to the Commission. One is Michael J. Obus, who is retired from the bench and served from 2009 through 2017 as Administrative Judge for the New York State Supreme Court's Criminal Term in New York County. Another, also a retired judge, is Randall T. Eng, who served as Administrative Judge of the Queens County Supreme Court's Criminal Term and later became Presiding Justice of the Appellate Division, Second Department. The third appointee, Michael A. Simons, is the Dean of St. John's University School of Law. Four other appointments must come from the Governor, with the four legislative majority and minority leaders having one appointment each.

2021 into 2022: Working to Implement, Retain, and Expand Vital Reforms

NYSDA continues to inform and assist attorneys and defender programs regarding implementation of reform statutes passed this year. And threats to earlier reforms were intensifying and widening as the *REPORT* went to press. For example, as [reported](#) by *WNYPapery.com* on December 10th, the New York State Association of Chiefs of Police wrote to legislators about proposed changes to address "concerns shared by law enforcement, prosecutors and crime victims regarding bail, discovery, juvenile offenders and appearance tickets." Descriptions of some of the legislative issues affecting criminal practice appear immediately below; family law issues are discussed separately.

Ending Incarceration for Technical Parole Violations

After years of advocacy for the Less is More bill, NYSDA was able to report in the [September 24th edition](#) of News Picks that the bill has been signed into law. Intended to end the reincarceration of people for technical violations of their parole, this statute ([L 2021, ch 427](#)) came too late to prevent many people from being locked in jails or prisons where COVID-19 raged or lingered, and its primary effective date is not until Mar. 1, 2022. But it does allow the Governor to implement parts or all of the law immediately, and rumors and reports circulated when the

bill was signed that some parole detainers had been lifted. The law should have a beneficial effect both on clients' lives and the number of people locked up in New York State. Like many legal changes, Less is More presents challenges to practitioners. The [primer](#) that NYSDA [published](#) in October was included in materials offered for a CLE session held on the new law, as part of NYSDA's "Criminal and Family Defense Update 2021"; the primer will be updated as needed.

Like other criminal system reforms that preceded it, Less is More has been the subject of immediate pushback. The *Chief Leader* [reported](#) that "[t]he Public Employees Federation and Parole Officers" claim Less is More "represents a danger to the public." The coalition LessIsMoreNY, which [promoted](#) the new law and includes NYSDA as a member, issued a [statement](#) in October calling out misinformation in an [op-ed](#) that attacked the law. Sponsors of the bill published a November 21st guest column in the *Rochester Democrat and Chronicle* about the law's importance. Justice reform activist Ashish Prasher wrote an [op-ed](#) that highlighted, among other points, the need to decarcerate in the face of continuing COVID-19 infections in jails and prisons.

Assignment of Appellate Counsel Streamlined by New Law

A new law amending CPL 380.55 directs New York's appellate courts to presume the financial eligibility of individuals who are defendants who are appealing their criminal cases if they were represented by public defense counsel at the trial level and such counsel provides a sworn representation that the individual remains eligible.

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[L 2021, ch 616](#). NYSDA joined others in advocating for this bill and submitted a [Memorandum in Support](#). The memo noted that “[t]he same certification process is already in use for the assignment of counsel in family court appeals and will be easy to apply in criminal court appeals,” and that the law will ensure equitable access to the right to appeal while also saving court resources.

Certain IAC Claims No Longer Barred in 440.10 Motion

An amendment to CPL 440.10 to “[p]ermit[] the court to grant post-conviction motions to vacate a judgment when the issue raised upon such motion is ineffective assistance of counsel in certain cases in which the court would otherwise be required to deny the motion” became effective on October 25th. [L. 2021, ch 501](#). This and other bills were noted in the News Picks [edition](#) of Oct. 28, 2021.

New Laws Aim at Opioid Crisis

A package of bills intended to remove barriers to substance abuse treatment and widen the availability of prevention resources became law on Oct. 7, 2021, as noted in the [October 12th edition](#) of News Picks. Possession of drugs that block opioids and are used to prevent overdoses has been decriminalized, as has possession and sale of syringes and hypodermic needles. The term “substance use” has been substituted for “substance abuse,” and the number of crimes that may be considered for diversion to a treatment program for substance use disorder has been increased. And for people who are incarcerated, a new law calls for medication-assisted treatment to be made available in correctional facilities. As noted in an [October 7th statement](#) by Glenn Liebman, CEO of the Mental Health Association of New York State, not only will this law “help combat substance use in prison but it will also help lessen overdose upon re-entry into society.”

Legislative efforts to combat substance use disorder in non-punitive ways may be seen as tacit acknowledgment that the criminal legal system cannot solve addiction issues. That, in turn, may be seen as consistent with the Court of Appeals decision in [People v Gaworecki](#) (37 NY3d 225 [2021]). The Court upheld the dismissal of a count of the indictment charging second-degree manslaughter against a man who sold drugs to someone who then died of an overdose. That the drugs sold were potent, which the defendant knew, did not “equate to a substantial and unjustifiable risk that death would result from” their use. The prosecution “failed to present any evidence of defendant’s awareness of any real threat to the decedent’s life ‘beyond the general knowledge of the injuriousness of drug-taking,’” the Court said, “and failed to establish that defendant’s conduct was a ‘gross deviation from the standard of care that a reasonable person would observe in the

situation,’ as required for both second-degree manslaughter and criminally negligent homicide”

LGBTQ+ and Survivors of Trafficking Gain Protections; Issues Remain

A bill intended to strengthen protections for people who have been subjected to sex trafficking, labor trafficking, and compelled prostitution was signed into law during Transgender Awareness Week, [highlighting](#) the particular vulnerability of trans people and others in the LGBTQ+ community to trafficking. It provides for vacating convictions for offenses that resulted from trafficking. [L 2021, ch 629](#). It builds on the so-called “Walking While Trans” bill that repealed provisions relating to loitering for purposes of prostitution, signed on Feb. 2, 2021. [L 2021, ch 23](#).

Court opinions as well as statutes may have a significant impact on people in particular communities. The U.S. Supreme Court decision in [Fulton v Philadelphia](#), allowing a faith-based foster care agency to refuse to certify a same-sex couple, may directly affect not only LGBTQ+ couples but also unmarried ones, as noted in the News Picks [coverage](#) of *Fulton* on July 2, 2021. And the Appellate Division case of [Matter of Crawford v Ally](#), which requires hearings on temporary orders of protections (as discussed in several News Picks from July 2 to Oct. 12, 2021), appears to have involved a heterosexual couple. Still, the issue involved attracted *amici* support from three organizations serving LGBTQ+ clients.

NYSDA strives to help defenders understand how clients in some groups may be particularly impacted by a given law. Materials for a training this year on the Domestic Violence Survivors Justice Act (DVSJA) included an NYS State Bar publication that noted, “[w]hile covering people of all genders, the DVSJA is expected to benefit mainly women and transgender individuals, because of the highly disproportionate impact of domestic violence on them.”

Other Bills Signed Addressing Double-Bunked Prison Dorms, YO

“Double-bunked housing” in prison dormitory settings will be banned under a new law signed by the Governor. [L 2021, ch 570](#). Effective next February, it is aimed at reducing the number of people held in a given dorm, apparently with the dual goals of slowing the rate of prison closures and increasing corrections officers’ ability to deal with “disturbances,” as noted in the [Nov. 12, 2021, edition](#) of News Picks. Also noted there is a law that will provide eligible youth with an additional opportunity to be designated youthful offenders. [L 2021, ch 552](#).

As Opponents of Bail Reform Press for Consideration of “Dangerousness,” RAIs Are Again Criticized

At the time that current bail reform laws were being considered, passed, and revised, New York had long declined to allow judges to consider the future “dangerousness” of an accused person when determining if and how they should be released pending resolution of their case. Unfortunately, attacks on bail reform have continued unabated since the reforms took effect, despite evidence showing that bail reform has been a success. Opponents of bail reform are pushing not just for a return to prior law but for a fundamental change that would allow judges to make decisions about the risk that an accused person will commit criminal acts if not locked up while awaiting resolution of the case. NYSDA opposes efforts to add a dangerousness standard into our bail law, which would result in increases in pretrial jailing around the state and would have a disproportionate impact on Black and brown people. The New York State Association of Criminal Defense Lawyers (NYSACDL) noted in a statement [released](#) on December 21st that “[t]he suggestion that judges should be able to assess a person’s ‘danger to society’ when determining whether they should be released pretrial is racist, ineffective, and flies in the face of our constitutional right to the presumption of innocence.” As NYSACDL pointed out, “[s]tudies continue to demonstrate how ineffective and [racist](#) ‘dangerousness’ determinations, which are often made via [Risk Assessment Tools](#), are for communities.”

NYSDA has previously warned of the dangers of using algorithmic instruments known as risk assessment tools (RAIs) in determining the risk of future offending. For example, see the [July-October 2017 issue](#) of the *REPORT* at page 5, discussing training presented at the annual conference and other information.

NYSDA also has a long history of opposing preventive detention. The [annual report](#) in 2020 celebrated that roll-backs of bail reform had been limited and did not include consideration of future dangerousness. It pointed out that a 2015 *Times Union* op-ed by then-Executive Director Jonathan E. Gradess cited the 1970 Criminal Procedure Law revision, in which “the state Legislature, after 10 years of careful study, rejected preventive detention. Indeed, even district attorneys rejected it” In 1973, the Association’s Board of Directors resolved that NYSDA oppose preventive detention in any form, and in 1980 resolved to maintain complete opposition to preventive detention.

Acute Legislative Need: Amend Assigned Counsel Compensation

The importance of lawsuits in the last fight for a legislative fee increase as also stressed in the News Picks

item, citing history recounted in the [May-June 2002 REPORT](#) (p 13) and noted in an [article](#) in *The Imprint* highlighting representation in family matters. Achieving a statutory rate hike *and* provision for adjusting the rates as circumstances change will be among the legislative priorities for NYSDA, the NY State Bar Association, and many others during the upcoming legislative session. It may be crucial to educate legislators and the public about both the vital role of assigned counsel and the fact that per hour compensation is not salary. Compensation must cover lawyers’ overhead costs as well as their livelihood. As costs escalate, the current rates in County Law 722-b make accepting appointments to represent eligible clients less and less feasible.

The unreasonableness of current rates was also stressed in a November Kings County Supreme Court decision regarding privately-paid fees to an attorney for the child:

The amount of reimbursement from the State of New York for attorneys appointed pursuant to statute in Family and Matrimonial cases is \$75.00 per hour. The last time they received an increase in the statutory amount was in 2004. The statutory amount is woefully inadequate and has been inadequate for quite some time. If the court system is going to attract attorney’s [sic] to be members of our panels or to remain on the panels with the depth and breadth of experience that this Attorney for the Child has, to pay the \$75.00 an hour rate that counsel requests on a private pay basis would be detrimental to the role of Attorney for the Child. This rate is not sufficient or reasonable for government paid counsel.

[Goldman v Abramova-Goldman](#),
2021 NY Slip Op 21303 (11/4/2021).

Family Law Matters

Reforms and changes in the legal system affecting families are pending or have occurred in several different arenas. NYSDA works to keep family defenders informed and empowered.

Important Family Law Reforms Supported

Several reforms are needed to bring about fairness and justice in the state systems that impact families. Proposed legislative reforms that NYSDA supports, in addition to the increase in assigned counsel rates discussed above, include the Preserving Family Bonds Act ([S6357/A6700](#)). Highlighted repeatedly in News Picks, including in the [November 12th edition](#), this bill would, if signed into law, give family court judges the discretion to order post-adoption contact between children and their

biological parents and siblings, if it is determined to be in the best interests of the children.

Other proposed reforms include mandating “Family Court *Miranda*” warnings. Such legislation (*see, e.g.*, pending bill [S5484-A](#)) “would require child protective services (CPS) workers to disclose information about the rights of parents and caretakers at the initial point of contact with them during an investigation,” as noted in the [October 28th edition](#) of News Picks.

As also discussed in that edition, the NYS Assembly Standing Committee on Children and Families held a public hearing on October 21st. The stated purpose was “to examine the child welfare system, including ways in which families initially interact with and enter the system, as well as potential outcomes, services and supports that may be available.” Many family defense advocates spoke, trying to impress upon the Committee the need for impactful legislation to protect poor Black and brown families from the intrusive family regulatory system. A related News Picks item noted an [op-ed](#) in the *Daily News* by a staff attorney in the Manhattan Office of Legal Services NYC, which said that “struggling families need direct assistance from New York State in the form of emergency rental assistance, school programs to help their children catch up, extended eviction moratoriums, and other protections—not more family regulations, policing and unnecessary intervention.”

The edition of News Picks published on [October 12th](#) cited critiques of the family regulatory system and various calls for change, though specific legislative reforms were not described. Other News Picks coverage of reports on the failed foster care/family regulatory system can be found on NYSDA’s Family Defense Resources [Articles and News of Interest](#) webpage.

Title IV-E: Federal Money Available

Good news was announced this year for public defense providers of representation in Family Court Act article 10 and 10-a abuse, neglect, and Termination of Parental Rights (TPR) matters. Federal Title IV-E funding, which had previously been limited to support of youth in foster care, is now available for direct representation of parent clients. NYSDA provided information on this change and ILS resources for those interested in applying in the News Picks editions of [August 10th](#) and [September 24th](#). Background information about the change in funding is included in the [minutes](#) of the ILS Board meeting on Sept. 24, 2021. ILS resources include a [chart](#) of the various responsibilities of different entities regarding Title IV-E funding.

Parents Win in 3 Third Department Cases

The Third Department held in August that a challenged determination of neglect must be reversed for improper reliance on hearsay, *i.e.*, what the mother told a caseworker. The non-hearsay evidence adduced did not establish that the respondent had placed the subject children at risk of harm. A summary of the case, [Matter of Aiden J.](#) (197 AD3d 798 [3rd Dept 8/5/2021]), appears at p. 27.

In another Third Department case, an order terminating a mother’s parental rights was reversed based on insufficient evidence of abandonment. Among facts discussed in the opinion were instances in which the caseworker who testified walked back some damaging claims about the mother’s inactions. Also, the mother was precluded from making attempts to contact the child outside of scheduled parenting time, and an injury that required emergency brain surgery had prevented one of her scheduled visits. Even if a *prima facie* case was assumed to be established, the Appellate Division said, the petitioner failed to controvert the mother’s testimony, which included statements that she provided the child with many items during visits, attended service plan reviews, notified the petitioner of her injury, and attempted to reschedule certain missed visitation, and repeatedly tried to contact caseworkers about getting scheduled visits. Failures on the part of the attorney for the child were also noted. The court was left with “little, if any, insight into the quality of respondent’s visitations with the child,” the nature of their relationship/bond, or the preferences of the eight-year-old child regarding respondent. A summary of [Matter of Khavonye FE.](#) (2021 NY Slip Op 05753 [3rd Dept 10/21/2021]) appears at p. 30.

A Family Court Judge’s order requiring the Department of Social Services to file a neglect petition was reversed in [Matter of Donald QQ. v Stephanie RR.](#) (198 AD3d 1155 [3rd Dept 10/21/2021]), as noted in the [November 12th edition](#) of News Picks. By statute, “primary responsibility for such proceedings” belongs to “child protective services agencies which may file a petition whenever in their view court proceedings are warranted,” and Family Court Act 1032 authorizes courts to direct a “person” to so file, the decision said. A case summary appears at p. 29.

Host Family Rules Adopted

Despite many critical comments, the Office of Children and Family Services (OCFS) has adopted rules relating to “host family homes.” The [Notice of Adoption](#) acknowledged that 85 comments were received, including NYSDA’s, and that several objected to the “regulations on a variety of grounds including that the revised proposed regulations created a quasi-foster care system, the lack of assigned counsel, objection to the use of the person in

parental relation set forth in Article 15-A of the General Obligations Law, lack of necessity for the program, and others.” OCFS did not amend the proposed regulations in response to these comments. NYSDA’s concerns about these regulations were noted in the [September 9th edition](#) of News Picks.

Child Support Obligations Interact with Reintegration

Unduly high child support obligations continue to be an obstacle for many clients. As reported in the [Oct. 12, 2021, edition](#) of News Picks, “the National Institute of Justice has issued a report, entitled ‘[Child Support and Reentry](#).’ According to the Executive Summary, ‘[t]his paper focuses on what social scientists and policy analysts have learned about how child support, criminal justice, and reentry are related: How do child support obligations affect reintegration? How does incarceration affect child support repayment and debt? What policies exacerbate the debt-recidivism link? Which policies show promise in ameliorating it?’”

Several recommendations for policy reforms on the state, local, and federal levels are included in the report. They address two main barriers facing indebted parents: the accumulation of support debt and related enforcement measures. Some of the most important recommendations were noted in News Picks.

Clients unable to pay their child support obligation should immediately file a modification petition. [The Empire Justice Center](#) website has information about this. And for clients who are respondents in child support contempt proceedings, there are defenses. On Nov. 8, 2021, NYSDA presented a CLE on representing parents in child support contempt proceedings. Attorneys who would like a copy of the training materials can contact Family Court Staff Attorney Kim Bode at kbode@nysda.org.

Court Pressure to Restrict Discovery Reform

An order of the supervising judge of Brooklyn’s criminal court relating to discovery practice set off a controversy, as reported in the [December 10th edition](#) of News Picks. Defense attorneys criticized the “pilot initiative” stemming from the order, saying it undermined discovery reforms. At the same time, court officials reportedly defended it as a way to cut down on delays allegedly resulting from changes in discovery. An Office of Court Administration spokesperson, after referring to “the crushing motion practice that has been occurring after” prosecution certificates of compliance are filed, added, “[t]he result is a pile of motions. The parties are supposed to try and work out discovery differences but, neither

alacrity nor flexibility has been a defense bar characteristic’” That statement led to further comments, including one by NYSDA Board member and former Assemblymember Joseph Lentol, who said the law he crafted and long fought for should be followed.

Court of Appeals: Denying Expert Testimony on False Confessions was OK

The Court of Appeals upheld, over a lengthy dissent, a trial court’s preclusion of testimony by an expert on false confessions proffered by the defense. The opening line recognizes that “[f]alse confessions elicited during custodial interrogations do exist.” The Court then explains why it finds the trial court did not abuse its discretion as a matter of law when it precluded the testimony of a proffered defense expert. The decision recounts in detail the *Frye* hearing held in the case, and repeats what was recognized in [People v Bedessie](#) (19 NY3d 147), *i.e.*, that “awareness of the phenomenon of false confessions has evolved to the point of ‘common knowledge, if not conventional wisdom’” While this “does not mean that expert testimony on the theories behind the reasons for false confessions is rendered unnecessary” and “[c]ertain aspects of the scientific study of the phenomenon might well be outside the ken of the typical juror,” the testimony proffered here “would not have aided the jury.” The *Frye* hearing testimony of the “impressively credentialed researcher, properly qualified by the trial court as an expert in her field,” the Court says, “revealed her difficulty in linking her research on the possible causes of false confessions to the case at hand.” Without equivocating “as to the existence of the phenomenon of false confessions or the ‘evils’ that can result from the ‘interrogation atmosphere,’” the Court says, “the scientific principles involve more complexity than the general conclusion that false confessions do occur, and the expert is supposed to articulate those principles so a jury can apply the information to the actual evidence in the case—not merely speculate in the absence of that evidence,” and affirms.

The dissent says, “[t]he majority misapprehends our precedent and the role of the court in determining the admissibility of expert testimony.” The dissent also disagrees with the majority on a separate expert-witness issue, *i.e.*, whether eyewitness identification expert testimony should have been allowed. [People v Powell](#), 2021 NY Slip Op 06424 (11/18/2021). This and other Court of Appeals decisions are summarized beginning on p. 12.

Sex Trafficking Counts Vacated Due to Bad Jury Instructions

In a memorandum opinion on December 16th, the Court of Appeals vacated convictions for sex trafficking

because the trial court's supplemental instruction, given in response to a jury note, severed the link between two elements. Those elements in Penal Law 230.34 are that the accused "must advance or profit from prostitution" and do so "by one of the enumerated coercive acts" in the statute. The decision, *People v Lamb* (NY Slip Op 07057), relied on *People v Brown* (87 NY2d 950 [1996]), a burglary case. Judge Singas and Judge Wilson each wrote a concurring opinion and Judge Fahey dissented on the primary issue. It may be that questions about jurisdiction over out-of-state behavior, unaddressed by the majority, will continue to arise.

The Center for Appellate Litigation, which represented the defendant, had [described](#) the issue as "[w]hether, in a sex-trafficking prosecution, where defendant is charged with trafficking a particular victim based on coercive conduct wholly outside New York, the People can establish jurisdiction in New York to prosecute that victim-specific conduct by showing that defendant participated in internet-related sex business in New York unrelated to the trafficking victim." Judge Singas noted that the defendant had not questioned "the grant of territorial jurisdiction under the CPL article 20 statutory scheme but rather ... its particular application" in the case. To find that trafficking as charged here is not a "single-element" crime, and that the two elements in question are "linked," the Singas concurrence noted the history and purpose of the statute and said, "[c]ollapsing sex trafficking into a single-element crime would cast too small a net, unjustifiably limiting the jurisdiction of this State to prosecute only those cases where the entire crime occurred in New York."

The case facts were complicated, involving more than one person named as the target of actions by the defendant. The improper instructions occurred after the jury sought supplemental instruction as to whether the conduct said to advance or profit from prostitution had to relate to the person named as having been the subject of coercive acts. "[T]he jurors were given an erroneous instruction which was prejudicially misleading and confusing, risking an improper resolution of both jurisdiction and defendant's guilt of sex trafficking," according to Singas.

Judge Wilson wrote separately to emphasize the jurisdictional question. "[I] would hold that the error in the supplemental instruction is patent and does not in any way turn on the jury's potential confusion. Rather, the instruction was substantively wrong and had the potential to arrogate to New York jurisdiction over crimes over which we have no jurisdiction."

Judge Fahey said in dissent that "the majority's conclusion that the trial court's supplemental instruction, in response to the jury's note regarding the elements of sex trafficking, was erroneous cannot be reconciled with the majority's implicit conclusion that New York had jurisdiction to prosecute defendant for sex trafficking." The decision "leaves trial courts with no direction as to how to

define the elements of sex trafficking for deliberating juries," he concluded.

Recapping Important Association News

A recap for those who may have missed items in the "Association News" segment of News Picks in 2021: the year saw the designation of a Deputy Director as well as the hiring of a new Backup Center Staff Attorney and a new Veterans Defense Program Staff Attorney, receipt of The Bar Foundation grant that helped make possible the "Litigating in Color" training noted above, plus the presentation of a wide range of CLE events since the Annual Conference.

Selection of Natalie Brocklebank as Deputy Director was announced in the [July 2nd](#) edition of News Picks; she had first joined NYSDA as a Staff Attorney in 2019. Maxwell Kampfner, formerly of The Bronx Defenders, became a NYSDA Staff Attorney in the fall, coming from a legislative counsel position with the City Council in New York, as reported in the [September 24th edition](#) of News Picks. Elyse Sheehan joined the Veterans Defense Program as a Staff Attorney on Long Island, as noted in the [October 12th edition](#). These welcome additions to NYSDA's legal staff will help ensure the continuation and growth of many services. Congratulations to all three, and to NYSDA!

NYSDA also provided, often in cooperation with others, extensive training opportunities for defenders providing criminal defense. These included a DWI Master Class; a three-part training on DNA; CAFA [Counsel at First Appearance] and Bail Advocacy; a Criminal Defense Update; Article 245 Discovery Review and Update on Emerging Practice Issues; RTA [Raise the Age] Review and Update, and Whose Witness Is It Anyway? Ethical Issues in Communicating With Witnesses.

For defense lawyers with clients who are or were serving in the military, NYSDA's Veterans Defense Program presented CLE training on Veterans Treatment Court; Collateral Consequences: Military Impacts of Civilian Justice; PTSD, TBI, and Suicide Within the Veteran Community; and a two-part training on the Fundamentals of Veteran Representation. ☞

As We Turn to 2022, Remember to Renew Your NYSDA Membership!

Renewing is simple and can be done online, www.nysda.org/page/Join_NYSDA, by phone (518-465-3524), or by mail (194 Washington Avenue, Suite 500, Albany, NY 12210). We greatly appreciate your membership and support of our Association's mission to improve the quality and scope of public defense representation in New York.

The following are short summaries of recent appellate decisions relevant to the public defense community. These summaries do not necessarily reflect all the issues decided in a case. A careful reading of the full opinion is required to determine a decision's potential value to a particular case or issue. Some summaries were produced at the Backup Center, others are reprinted with permission, with source noted.

For those reading the REPORT online, the name of each case summarized is hyperlinked to the slip opinion. For those reading the REPORT in print form, the website for accessing slip opinions is provided at the beginning of each section (Court of Appeals, First Department, etc.), and the exact date of each case is provided so the case may be easily located at that site or elsewhere.

United States Supreme Court

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

[Dunn v Reeves](#), __ US __, 141 Sct 2405 (7/02/2021)

MOTION TO VACATE JUDGMENT OF CONVICTION - RIGHT TO COUNSEL VIOLATION

LASJRP¹: Years after being convicted of murder and sentenced to death, petitioner sought state postconviction relief, arguing that his trial counsel should have hired an expert to develop sentencing-phase mitigation evidence of intellectual disability. But despite having the burden to rebut the strong presumption that his attorneys made a legitimate strategic choice, petitioner did not call any of them to testify. The Alabama Court of Criminal Appeals denied relief, stressing that lack of evidence about counsel's decisions impeded petitioner's efforts to prove that they acted unreasonably. On federal habeas review, the Eleventh Circuit interpreted the Alabama court's opinion as imposing a simple per se prohibition on relief in all cases where a prisoner fails to question his counsel.

In a 6-3 decision, the Supreme Court reverses. Federal habeas courts must defer to reasonable state court decisions. The Alabama court's treatment of the spotty record in this case was consistent with this Court's recognition that "the absence of evidence cannot overcome the strong

presumption that counsel's conduct fell within the wide range of reasonable professional assistance.

Justice Sotomayor's dissenting opinion (joined by Justice Kagan) asserts that the Court of Criminal Appeals of Alabama applied a categorical rule that petitioner's failure to call his attorneys to testify was fatal to his claim as a matter of law. Finding no relevant factual analysis in the state court's decision, this Court attempts its own, speculating as to what petitioner's counsel might have said had they been called to testify. "Today's decision continues a troubling trend in which this Court strains to reverse summarily any grants of relief to those facing execution.... This Court has shown no such interest in cases in which defendants seek relief based on compelling showings that their constitutional rights were violated."

[James v Bartelt](#), No. 20-997 (10/4/2021)

CERT. DENIED | QUALIFIED IMMUNITY

ILSAPP²: Justice Sotomayor dissented from the denial of certiorari in this case. The defendant was shot and killed by a police officer who knew he was suffering from mental illness and was holding a gun to his own temple. The Third Circuit improperly resolved factual disputes in the respondent's favor and overlooked precedent in concluding that the officer did not violate a clearly established constitutional right. Obviously, qualified immunity did not protect an officer who inflicted deadly force on a person who was a threat only to himself.

[Gann v United States](#), No. 20-7701 (10/4/2021)

ACCA | VIOLENT FELONIES

ILSAPP: In this case, Justice Sotomayor made a statement regarding the Supreme Court's denial of cert. The Armed Career Criminal Act mandated a minimum 15-year prison term for an individual convicted of being a felon in possession of a firearm who had at least three prior violent felony convictions. The petitioner argued that his Tennessee convictions lacked the element of intent. The Sixth Circuit rejected his contention, reasoning that its prior decisions left no room for raising still more arguments about aggravated burglary. But questions that merely lurked in the record and were not brought to the attention of the court, nor ruled upon, were not precedent. Full and fair consideration of the salient issue by the Sixth Circuit would assist the Supreme Court's analysis in a future case.

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US Supreme Court *continued***Thomas v Payne**, No. 20-7480 (10/4/2021)**CAPITAL MURDER | FAIR NOTICE**

ILSAPP: Justice Sotomayor filed another statement regarding the denial of cert., this time in a case involving a petitioner convicted of capital murder and sentenced to death. District Court granted habeas relief based on ineffective assistance. The Eighth Circuit reversed, citing a procedural default argument the state had not raised on appeal, thus depriving the petitioner of fair notice. Before adopting an argument on the state's behalf, the Eighth Circuit should have given him the opportunity to respond and be heard.

Buntion v Lumpkin, No. 20-8043 (10/4/2021)**DEATH PENALTY | UNCONSTITUTIONAL**

ILSAPP: Justice Breyer filed a statement regarding the denial of cert. in another death penalty case. The petitioner, who was convicted of capital murder, had been on death row for 30 years, with the last 20 years in solitary confinement. Excessive delay undermined the death penalty's penological rationale and was cruel because it subjected the inmate for years to severe, dehumanizing conditions. On top of that, lengthy isolation bore "a further terror and peculiar mark of infamy." Confinements like the petitioner's called into question the constitutionality of capital punishment.

Rivas-Villegas v Cortesluna, No. 20-1539 (10/18/2021)**SEARCH AND SEIZURE - EXCESSIVE FORCE**

LASJPR: In this § 1983 excessive force action, the Supreme Court concludes that the officer is entitled to qualified immunity.

To show a violation of clearly established law, Cortesluna must identify a case that put Rivas-Villegas on notice that his specific conduct was unlawful. In LaLonde, the case cited by the Ninth Circuit, officers were responding to a mere noise complaint, whereas here they were responding to a serious alleged incident of domestic violence possibly involving a chainsaw. LaLonde was unarmed, while Cortesluna had just previously appeared to reach for a knife protruding from his left pocket. Rivas-Villegas placed his knee on Cortesluna for no more than eight seconds and only on the side of his back near the knife that officers were in the process of retrieving, while LaLonde testified that the officer deliberately dug his knee into his back when he had no weapon and had made no threat when approached by police.

City of Tahlequah v Bond, No. 20-1668 (10/18/2021)
[revised slip opinion]**SEARCH AND SEIZURE - EXCESSIVE FORCE**

LASJRP: After the officers responded to a 911 call from Rollice's ex-wife, who stated that Rollice was in her garage and was intoxicated and would not leave, Rollice began fidgeting with something in his hands and the officers noticed that he appeared nervous. An officer asked if he could pat Rollice down for weapons, and Rollice refused. Rollice turned around and walked toward the back of the garage where his tools were hanging over a workbench. The officers, none of whom were within six feet of Rollice, ordered Rollice to stop, but he kept walking. He grabbed a hammer from the back wall over the workbench and turned around to face the officers. He grasped the handle of the hammer with both hands, as if preparing to swing a baseball bat, and pulled it up to shoulder level. The officers backed up, drawing their guns. The officers yelled at Rollice to drop the hammer, but he did not. Instead, he took a few steps to his right, coming out from behind a piece of furniture so that he had an unobstructed path to one of the officers. He then raised the hammer higher back behind his head and took a stance as if he was about to throw the hammer or charge at the officers. In response, the officers fired their weapons, killing Rollice.

In this § 1983 action commenced by Rollice's estate, the officers moved for summary judgment, on the merits and on qualified immunity grounds. The district court granted their motion, concluding that the officers' use of force was reasonable, and that, in any event, the qualified immunity doctrine applied. A Tenth Circuit panel reversed, concluding that a jury could find that the officer's initial step toward Rollice and the officers' subsequent "cornering" of him in the back of the garage recklessly created the situation that led to the fatal shooting, and that several cases clearly established that the officers' conduct was unlawful.

The Supreme Court reverses, concluding that the officers did not violate any clearly established law, and thus qualified immunity applies.

New York State Court of Appeals

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People v Walls, 37 NY3d 987 (9/2/2021)**SUPPRESSION | GRANTED**

NY Court of Appeals *continued*

ILSAPP¹: The defendant appealed from a Fourth Department order affirming a judgment convicting him of 2nd degree CPW. The Court of Appeals reversed and dismissed the indictment, finding error in the denial of suppression of a firearm. The People failed to justify the vehicle stop. They relied on the testimony of the police officer who identified the van using information from the dispatcher (the license plate and travel direction) and who did not observe traffic infractions or conduct suggestive of criminality. The officer's only justification for the stop was the dispatcher's report that a 911 caller asserted that a van occupant possessed a "long gun." The reliability of the tip was not shown; there was no relevant information as to circumstances surrounding the call. The People erroneously argued that an appellate court could consider evidence admitted at trial to justify the denial of suppression. The Monroe County Public Defender's Office (A. Vincent Buzard, of counsel) represented the appellant.

[People v Guevara](#), 37 NY3d 1014 (9/9/2021)

PSYCHIATRIC EXAM | RIGHT TO COUNSEL

ILSAPP: The defendant appealed from a First Department order affirming a manslaughter conviction. The Court of Appeals reversed. After providing notice that he intended to present a psychiatric defense, the defendant was twice interviewed by the People's psychologist. Defense counsel was present at the first examination but denied admittance to the second one. Over the defense objection, the expert's testimony was admitted at trial. The Sixth Amendment right to counsel applied at pretrial psychiatric examinations—a critical stage of the prosecution—to make a defendant's right of cross-examination more effective. The People bore the burden of showing that there was no reasonable possibility that the verdict was affected by the trial court's admission of the part of the expert's testimony that was based on the uncounseled examination. The error was not harmless. The Office of the Appellate Defender (Gabe Newland, of counsel) represented the appellant.

[Matter of Miller](#), 37 NY3d 996 (9/9/2021)

INMATE NOTICE – UNTIMELY FILING

ILSAPP: The respondent successfully moved to dismiss the petitioner's appeal to the Third Department, asserting that his notice of appeal was not timely served or filed. The Court of Appeals reversed and remitted. The

petitioner urged that, under the pro se inmate "mailbox rule," the notice should have been deemed timely filed upon delivery to prison authorities. However, by its express terms, CPLR 5515 (1) indicated that filing occurred when the clerk's office received the notice of appeal. The COA could not endorse an exception to relevant CPLR provisions not adopted by the Legislature. *Houston v Lack*, 487 US 266 (pro se prisoner's notice of appeal filed within the meaning of FRAP when delivered to prison officials), was inapt. The Supreme Court's authority to interpret Federal Rules promulgated by the Court itself exceeded the COA's power in construing the CPLR. It was not clear whether the Third Department considered its discretion to excuse untimely filing of a notice of appeal under certain circumstances, pursuant to CPLR 5520. The appellant represented himself.

[Veloz v Garland](#), 37 NY3d 1006 (9/9/2021)

CERTIFICATION – DECLINED

ILSAPP: The Second Circuit certified to the New York Court of Appeals the question of whether an intent to "appropriate" property under Penal Law § 155.00 (4) (b) required an intent to deprive the owner of his or her property permanently or under circumstances where the owner's property rights were substantially eroded—which is how the Board of Immigration Appeals defined a theft involving moral turpitude. The issue was relevant to the petitioner's application for review of a BIA order finding him removable based on his petit larceny convictions. The NY COA respectfully declined the certification. *See* COA Rule 500.27 (d) (on its own motion, COA shall examine merits presented by certified question to determine whether to accept certification).

[People v Dogan](#), 37 NY3d 1007 (9/14/2021)

MOTION TO VACATE JUDGMENT OF CONVICTION - RIGHT TO COUNSEL VIOLATION - RIGHT TO HEARING/MOTION PAPERS

LASJRP²: In a 3-2 decision, the Fourth Department (181 A.D.3d 1343) upheld the summary denial of defendant's CPL § 440.10 motion, noting that defendant did not aver in his initial motion papers that he would have rejected the favorable plea deal and insisted on proceeding to trial had he been made aware of the potentially viable affirmative defense concerning the operability of the firearm used in the robberies. The dissenting judges asserted that defendant did aver that he did not knowingly enter his guilty plea; that defense counsel failed to advise him regarding the affirmative defense; that his

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NY Court of Appeals *continued*

knowledge of this affirmative defense was essential to a knowing guilty plea; that he “entered the guilty plea based on” counsel’s errors; and that “it would defeat the purpose of the statute to insist that a pro se defendant use certain magic words when his intention is clear from the totality of the motion.”

The Court of Appeals affirms, concluding that defendant failed to sufficiently allege a reasonable probability that, but for counsel’s alleged errors, he would not have pleaded guilty and would have insisted on going to trial.

People v Carmona, 37 NY3d 1016 (10/7/2021)**IDENTIFICATION - CONFIRMATORY
APPEAL - RECORD ON APPEAL**

LASJRP: The Court of Appeals concludes that the court below erred in denying defendant’s pretrial request for a hearing pursuant to *People v. Rodriguez* (79 N.Y.2d 445) where the prosecutor offered only bare assurances that the witness was familiar with defendant. The Appellate Division erroneously relied on testimony adduced at trial to overcome the error.

**People v Gaworecki, 2021 NY Slip Op 05392
(10/7/2021)****MANSLAUGHTER | DISMISSED**

ILSAPP: The defendant appealed from a Third Department order, which held that the evidence before the Grand Jury established a prima facie case of 2nd degree manslaughter. In an opinion by Judge Fahey, a unanimous Court of Appeals reversed and granted the defendant’s motion to dismiss. The proof showed that the defendant sold five bags of heroin to the decedent, who died of a heroin overdose five days later. The People did not establish that the defendant acted with the recklessness required for manslaughter or criminally negligent homicide. He knew the heroin was potent and required caution but not that the drugs posed a substantial and unjustifiable risk of death. Veronica Gorman represented the appellant from defendant and survived those encounters.

People v Timko, 37 NY3d 1030 (10/7/2021)

As the prosecution concedes, the accusatory instrument was insufficient where “[t]he allegations in the factual part of the instrument and in the supporting depositions did not provide reasonable cause to believe that defendant communicated ‘a threat to cause physical harm to, or unlawful harm to the property of, [the complainant], or a member of such person’s same family or household’”

People v Shanks, 2021 NY Slip Op 05450 (10/12/2021)**WAIVER OF APPEAL | RIGHT TO COUNSEL**

ILSAPP: In the trial court, the defendant did not validly waive the right to appeal or forfeit his Sixth Amendment right to counsel. A unanimous COA reversed a Third Department order affirming the defendant’s conviction of 3rd degree grand larceny and ordered a new trial. The plea colloquy and written waiver did not indicate that some rights to appeal would survive the waiver, and the written document erroneously indicated that the waiver was an absolute bar to taking a direct appeal. The COA did not decide whether a valid appeal waiver would extinguish a defendant’s claim that his right to counsel was violated at trial. As to the counsel issue, this was not a rare case where a defendant forfeited the right to assigned counsel. The two attorneys who had asked to be relieved due to difficulties with defendant did not say that his conduct was egregious. Other attorneys were relieved due to a conflict of interest, illness, or departure from the state—all factors beyond the defendant’s control. Thus, he should not have been forced to face trial without counsel. Judge Fahey wrote the opinion. Kathy Manley represented the appellant.

People v Torres, 2021 NY Slip Op 05448 (10/12/2021)**STATUTES - VAGUENESS/PREEMPTION**

LASJRP: In response to traffic-related fatalities that included many pedestrians and bicyclists, New York City launched a “Vision Zero” initiative in 2014 that included the enactment of Administrative Code of the City of New York § 19-190, known as the “Right of Way Law.” The law makes it a misdemeanor for a driver, while “fail[ing] to exercise due care,” to make “contact with” a pedestrian or bicyclist who has the “right of way” and thereby cause “physical injury.”

The Court of Appeals rejects defendants’ due process claim that the State and Federal Constitutions require more than ordinary negligence as a culpable mental state when imposing criminal liability. The mens rea standard also is not void for vagueness.

The Court rejects defendants’ preemption claim that the City was prohibited from enacting a law that imposes criminal liability based on a mens rea not specifically enumerated in Article 15 of the Penal Law. Even if Article 15 can be interpreted as limiting the culpable mental states that may be used to impose criminal liability, that purported constraint would apply only to crimes defined within the Penal Law itself. The Court also rejects defendants’ claims that the legislature intended that the Vehicle and Traffic Law occupy the field of motor vehicle regulation, and that the Right of Way Law conflicts with state law by punishing more harshly the same conduct as Vehicle and Traffic Law § 1146.

NY Court of Appeals *continued*

[People v Blandford](#), 2021 NY Slip Op 05619 (10/14/2021)

SEARCH AND SEIZURE - AUTO STOP/CONTINUED DETENTION AND CANINE SEARCH

LASJRP: After a lawful traffic stop, defendant consented to a search of the backseat of his vehicle. Instead of conducting that search, the officer walked his canine around the exterior of the vehicle and, in mere seconds, the canine alerted to the trunk.

In a 4-3 decision, the Court of Appeals concludes that the evidence presented at the suppression hearing provides record support for the determination that a founded suspicion of criminal activity was afoot and justified the canine search.

The dissenting judges assert that unless the Court is prepared to say that the police may detain anyone who hugs or shakes hands outside of a store known to the police to have been the site of drug transactions, those facts cannot be a basis for stopping defendant. Although defendant's "slow roll" and "furtive movements" around the floorboards made the Trooper suspicious, by the time the Trooper decided to continue the stop and fetch his drug-sniffing dog defendant already had consented to a search of the passenger section of his car and the Trooper had found no contraband. Despite the majority's conclusion to the contrary, defendant did preserve his contention that the Trooper was not permitted to prolong the stop and conduct the canine search under the federal constitutional standard requiring reasonable suspicion, and that this Court's application of the state level two standard is therefore unconstitutional. Defendant, by arguing that the canine search violated both New York and federal constitutional standards, necessarily raised the question of whether our state standard is preempted by the federal constitution and is therefore unconstitutional.

[People v Ibarguen](#), 2021 NY Slip Op 05617 (10/14/2021) SUPPRESSION | HEARING

ILSAPP: The Court of Appeals affirmed an Appellate Division order challenged by the defendant. CPL 710.60 required a motion to suppress physical evidence to state the grounds of the application and to contain sworn allegations of fact. The suppression court did not abuse its discretion in summarily denying the motion where the defendant failed to sufficiently allege standing to challenge the search of the premises. In a dissenting opinion, Judge Wilson explored the privacy interest of social guests. Judge Rivera joined the dissent.

[People v Hargrove](#), 2021 NY Slip Op 06427 (1/18/2021)

As the prosecution concedes, "the sentencing court failed to make any appropriate on-the-record determination" as to youthful offender treatment for the defendant. The matter is reversed and remitted. The footnote in the decision says, "Defendant makes no argument that he is automatically eligible for youthful offender treatment. We therefore have no occasion to consider whether defendant's conviction of criminal possession of a weapon in the second degree was an 'armed felony offense' (see CPL 720.10 [2] [a])."

[People v Jennings](#), 2021 NY Slip Op 06428 (11/18/2021)

"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 the appeal to that Court. Counsel's failure to challenge the verdict as repugnant did not render the representation ineffective because the issue was not clear-cut and dispositive given the jury charge (see [People v Rodriguez](#), 31 NY3d 1067 [2018])."

[People v Mendoza](#), 2021 NY Slip Op 06429 (11/18/2021)

"On review of submissions pursuant to section 500.11 of the Rules, order reversed and case remitted to the Appellate Division, Second Department, for further proceedings. Under the totality of the circumstances and upon the People's concession, defendant's appeal waiver was invalid and therefore did not foreclose consideration of his harsh and excessive sentence claim (see [People v Bisono](#), 36 NY3d 1013, 1017-1018 [2020])."

[People v Powell](#), 2021 NY Slip Op 06424 (11/18/2021)

FALSE CONFESSIONS | EXPERT PRECLUDED

ILSAPP: The defendant appealed from a Second Department order, sustaining a judgment convicting him of 1st degree robbery. A sharply divided Court of Appeals affirmed, in an opinion authored by Chief Judge DiFiore. The trial court's preclusion of expert testimony on false confessions, after holding *Frye* and *Huntley* hearings, was not an abuse of discretion as a matter of law. Judge Rivera wrote a dissent in which Judges Fahey and Wilson joined. Proof at the *Frye* hearing established the expert's undisputed credentials. The phenomenon of false confessions was generally accepted in the relevant scientific community, and there was consensus in the literature on factors that increase the likelihood of a false confession. The general public did not fully understand the factors, several of which were present in this case. Preclusion of the expert testimony was not harmless. The defendant presented

NY Court of Appeals *continued*

strong evidence of innocence based on differences in his age and physical appearance as compared to the victim's description of the robber, and the confession was critical to the case. The trial court also erred in denying the defendant's request to present expert testimony on cross-racial eyewitness identification.

**People v Romualdo, 2021 NY Slip Op 06430
(11/18/2021)**

Where physical evidence of sexual assault was found on the decedent's body and linked to the defendant, who lived nearby and who lied about not knowing or having sex with her, the Appellate Division erred by reversing the defendant's conviction on both legal sufficiency and weight of the evidence grounds. Review of the weight of the evidence determination was authorized where the Appellate Division's failure to apply the correct legal standard amounted "to an error 'as a matter of law,' requiring reversal and remittal 'for a proper assessment of the weight of the evidence'" Reversing for both weight of the evidence and legal sufficiency grounds based on the "'same reasons'" constituted an error of law.

People v Williams, 2021 NY Slip Op 06426 (11/18/2021)

SUPPLEMENTAL INSTRUCTIONS | CONSENT

ILSAPP: The defendant appealed from a Fourth Department order, convicting him of drug and weapon possession charges. The Court of Appeals affirmed. Pursuant to CPL 310.30, when the jury requests a supplemental instruction with respect to a statute, the court may "give to the jury copies of the text of any statute," but only with the consent of the parties. The defendant argued that the consent provision was violated by the trial judge's use of a "visualizer" (projector) to display statutory text to the jury, over defense objection. The Court of Appeals held that the trial judge did not "give" the jurors copies of the relevant text, and the approach employed fell within the judge's discretion to provide requested information or instruction. Judge Garcia authored the unanimous opinion.

People v Buyund, 2021 NY Slip Op 06529 (11/23/2021)
SORA | SENTENCE

ILSAPP: The People appealed from a Second Department order, which held that burglary in the 1st degree as a sexually motivated felony was not a registerable sex offense and vacated so much of the sentence as required the defendant to register as a sex offender. The Court of Appeals reversed. SORA certification was not part of the sentence. Therefore, the preservation exception for an ille-

gal sentence did not apply to a challenge to sex-offender certification raised for the first time on an intermediate appeal. Judge Cannataro wrote for the majority. In dissent, Judge Wilson stated that certification as a sex offender was part of a defendant's sentence. Thus, the issue of the illegality of the instant sentence required no preservation, and the matter was reviewable by the COA. Judge Rivera concurred in the dissent.

People v Dukes, 2021 NY Slip Op 06532 (11/23/2021)

"On review of submissions pursuant to section 500.11 of the Rules, order affirmed, without costs. Defendant's argument that portions of the presentence report were inadmissible and should not have been considered is unpreserved for our review."

People v Wortham, 2021 NY Slip Op 06530 (11/23/2021)

PEDIGREE EXCEPTION | FST DNA

ILSAPP: The defendant appealed from a First Department order affirming a judgment of conviction. The Court of Appeals held that suppression was properly denied. The *Miranda* pedigree exception applied. A defendant's response to questions reasonably related to police administrative concerns was not suppressible—even if incriminating. The exception would not apply, though, where an officer posed purported pedigree questions to an un-Mirandized defendant as a guise for an investigative inquiry. Reversal was warranted based on the erroneous denial of a *Frye* hearing regarding the admissibility of FST DNA evidence. *People v Williams*, 35 NY3d 24, and *People v Foster-Bey*, 35 NY3d 959, controlled. Those cases held that a *Frye* hearing was required with respect to both LCN DNA and statistical DNA evidence derived from the FST. Judge Fahey wrote the majority decision. Judge Rivera dissented. The instant situation did not fit within the pedigree exception. The detective's question about where the defendant lived was likely to elicit an incriminating response since the defendant appeared to be at home in an apartment targeted for a drugs and weapons search. In a separate dissent, Judge Wilson opined that the remedy for the *Frye* error was not to remit for a hearing, as the majority directed, but to vacate the conviction. The Legal Aid Society, NYC (Angie Louie, of counsel) represented the appellant.

First Department

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First Department *continued*

[People v Marte](#), 197 AD3d 411 (1st Dept 8/5/2021)

DISSENT | UNTIMELY MOTION

ILSAPP¹: The defendant appealed from a judgment of NY County Supreme Court, convicting him of operating a motor vehicle while under the influence of alcohol. The First Department affirmed. One justice dissented, opining that the trial court improperly rejected the defendant's mid-trial motion to suppress an Intoxilyzer test result. The merits should have been reviewed based on good cause and the interests of justice. The defendant expressly consented to the test only after expiration of the statutory two-hour period and an inaccurate warning. The test result was subject to suppression as a matter of law. Counsel did not timely act because he did not understand the law—an omission that may have constituted ineffective assistance. The dissenter would have remanded for a hearing on the voluntariness of the Intoxilyzer test. (Supreme Ct, New York Co)

[People v Brown](#), 197 AD3d 433 (1st Dept 8/19/2021)

EAVESDROPPING | VALID WARRANTS

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 4th degree conspiracy and other crimes. The First Department affirmed. Justices of both the Second Department and the citywide Special Narcotics Court issued valid eavesdropping warrants to intercept cell phone calls and electronic messages. CPL 700.10 (1), providing that “a justice may issue an eavesdropping warrant,” encompassed the jurists here. The subject calls and messages were made and received in North Carolina, but heard and recorded in a Brooklyn NYPD office. A warrant was “executed” when and where a law enforcement officer intentionally recorded or overheard phone communications and accessed electronic communications targeted by the warrant. Execution depended on the officers’ actions vis-à-vis the communications—not the target’s location or communication devices, or the participants engaged in the call. (Supreme Ct, New York Co)

[People v Dixon](#), 197 AD3d 1053 (1st Dept 9/28/2021)

SEX OFFENDER | FEE

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 1st degree sodomy, upon his plea of guilty. The First Depart-

ment vacated the supplemental sex offender victim fee since the crime was committed before the effective date of Penal Law § 60.35 (1) (b). The Center for Appellate Litigation (Robert Dean, of counsel) represented the appellant. (Supreme Ct, New York Co)

[People v Gerard](#), 197 AD3d 1045 (1st Dept 9/28/2021)

PROBABLE CAUSE | SUPPRESSION

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of attempted 2nd degree robbery and other crimes, upon his plea of guilty. The First Department affirmed. The hearing court properly denied suppression of a show-up identification and property recovered upon arrest. The defendant argued that the People failed to demonstrate probable cause as to the underlying theft of services arrest that led to the testifying Transit Bureau officer’s discovery of him, because they did not present testimony from officers possessing firsthand knowledge of the fare-beating offense. It is true that the People cannot meet their burden of coming forward with evidence showing probable cause when they rely on hearsay evidence and the defense challenges the sufficiency of the evidence by cross-examining prosecution witnesses or putting on a defense case. This defendant, however, did not present proof nor elicit statements on cross that undercut the veracity of the officers’ account, as relayed by the testifying officer. (Supreme Ct, New York Co)

[Matter of Mercedes E.H. v Dexter R.N.](#), 197 AD3d 1038 (1st Dept 9/28/2021)

JUDGES - EX PARTE COMMUNICATIONS

LASJRP²: In this visitation proceeding, the First Department finds no error in the court’s denial of the father’s recusal motion, noting that the father’s argument based on purported ex parte communications ignores his counsel’s refusal to participate in the conference at issue despite the court’s repeated efforts to ensure that counsel knew of the conference and would participate. (Family Ct, Bronx Co)

[People v Sneed](#), 199 AD3d 90 (1st Dept 9/28/2021)

SECURITY GUARD | POLICE AGENT SEARCH AND SEIZURE - MOTION PAPERS/ PRIVATE ACTORS

LASJRP: The First Department concludes that defendant is entitled to a hearing on the factual issue of whether or not the store security guard involved in his detention

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First Department *continued*

was licensed to exercise police powers, or acting as an agent of the police. Under *People v Mendoza* (82 N.Y.2d 415), defendant is entitled to a hearing on that factual issue.

The felony complaint provided no information regarding defendant's arrest, and the voluntary disclosure form simply indicated that the arrest took place on "May 27, 2027," at "9:04 PM," "Inside Bergdorf Goodman at 754 Fifth Avenue." The individual who allegedly recovered the stolen material from defendant's handbag was neither identified by name nor as an employee of Bergdorf. This information could not have helped defendant further investigate whether the security guard was a private or state actor status. (Supreme Ct, New York Co)

Matter of Matthew P. v Linnea W., 197 AD3d 1070
(1st Dept 9/30/2021)

**VISITATION - SUPERVISED
ORDERS OF PROTECTION**

LASJRP: The First Department concludes that the father failed to show good cause for an extension of a temporary order of protection issued against the mother on behalf of the child where any risk of the mother abandoning or absconding with the child was sufficiently mitigated by a referee temporarily granting sole custody to the father.

However, the family court erred in permitting the mother to have unsupervised access to the child. The mother endangered the welfare of the child by leaving her alone, and, prior to that incident, the mother threatened to leave the child unsupervised and to take the child to Italy without the father's permission. (Family Ct, New York Co)

People v Cruz, 2021 NY Slip Op 05297
(1st Dept 10/5/2021)

RESENTENCING | PRESENCE

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree CSCS and another crime, upon his plea of guilty, and sentencing and then resentencing him. The First Department remanded. The defendant should not have been resentenced in his absence. *See* CPL 380.40 (1). The record was insufficient to establish that he was informed of the right to be present and then decided not to appear. Arza Feldman represented the appellant. (Supreme Ct, New York Co)

Matter of Francisco A. v Amarilis V.,
2021 NY Slip Op 05281 (1st Dept 10/5/2021)
CUSTODY - ORDER OF PROTECTION/APPEAL
- VIRTUAL HEARINGS

LASJRP: In this appeal from an order which granted the father sole legal and physical custody and a final order of protection against the mother, the First Department first concludes that even if the order of protection has expired, the appeal is not moot, given the order's enduring consequences.

The mother has failed to demonstrate that either the order of protection or the custody order should be disturbed. Her contention that technological issues at the virtual hearing precluded her from adequately presenting her case is unpreserved and conclusory. Her counsel objected at one point to being rushed by the court, but the mother failed to show that counsel was prevented from asking questions or otherwise hampered by the court's time constraints, which were imposed in an even-handed manner against all parties and in consideration of the extraordinary circumstances presented by the Covid-19 pandemic. (Family Ct, Bronx Co)

Matter of Haoxuan X., 2021 NY Slip Op 05316
(1st Dept 10/5/2021)

ABUSE/NEGLECT - MOTION TO TERMINATE PLACEMENT
- DISMISSAL/AID OF COURT NOT REQUIRED

LASJRP: The First Department affirms an order denying respondent mother's application to terminate the child's foster care placement pursuant to FCA § 1062 and dismiss the neglect petition pursuant to FCA § 1051(c).

The mother's application for the return of the child pursuant to FCA § 1028 was denied where there was proof that she repeatedly sought invasive, unnecessary medical care for the child, despite being advised by doctors that the child was a well child; and, since then, she has refused to engage in any services, has behaved inappropriately and violently during visits, and has expressed her intention to continue to seek invasive and unnecessary medical care for the child if the child were returned to her care.

The motion to dismiss was premature.

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

People v Little, 2021 NY Slip Op 05310
(1st Dept 10/5/2021)

IDENTIFICATION - MOTION PAPERS/CONFIRMATORY

LASJRP: The First Department concludes that a Wade hearing is required where the People failed to meet their burden of offering sufficient information, in nonconcluso-

First Department *continued*

ry fashion, to enable the suppression court to determine whether a detective's identification was, in fact, confirmatory. (Supreme Ct, New York Co)

Oustatcher v Clark, 2021 NY Slip Op 05295 (1st Dept 10/5/2021)

FREEDOM OF INFORMATION LAW

LASJRP: In this matter involving FOIL requests directed at the District Attorney of Bronx County, the First Department grants CPLR article 78 relief by remitting the requests to respondents for further administrative proceedings.

The Court rejects respondents' contention that the Governor's Executive Order 202.8 tolled all FOIL deadlines. By its terms, EO 202.8 tolled legal "process[es] or proceeding[s] as prescribed by the procedural laws of the state." The FOIL framework and deadlines for agency responses to requests are not "prescribed by procedural laws" such as the CPLR and CPL. In the context of FOIL requests, legal "proceedings" ensue only when parties are unable to agree on a response to a request, and resort to the courts via CPLR article 78 proceedings.

The Court also rejects respondents' fallback contention that the broader Covid-19 crisis, and the accompanying EOs and Administrative Orders limiting operations and mandating remote work, have made it practically impossible for them to respond to the subject FOIL requests. Respondents have not met their burden of establishing that the continuing crisis prevents them from setting a "reasonable time" to respond, let alone prevents them indefinitely from even attempting to respond. (Supreme Ct, Bronx Co)

People v Jimenez-Gomez, 2021 NY Slip Op 05400 (1st Dept 10/7/2021)

CPL 30.30 | PRESERVATION

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of forcible touching and related crimes. The First Department affirmed. The defendant did not preserve his speedy trial claims, and the appellate court declined to review them in the interest of justice. A CPL 30.30 motion asserted the People's lack of readiness, but the defendant did not challenge their claimed exclusions, by a reply or otherwise. *See People v Allard*, 28 NY3d 41 (where defendant

mistakenly believed People failed to conclusively refute his motion and did not reply, he risked summary denial of motion and did not preserve claim). The trial court properly admitted the victim's texts, which were precipitated by a traumatic incident. The victim's demeanor indicated that she was still under the influence of stress after a lapse of time. (Supreme Ct, New York Co)

People v Whitfield, 2021 NY Slip Op 05402 (1st Dept 10/7/2021)

PLEA | MAX TERM

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of aggravated assault on a police officer or peace officer. The First Department affirmed. The defendant's plea was knowing, intelligent, and voluntary—notwithstanding the court's statement that the maximum sentencing exposure was 30 years, when it was really 25 years. Incorrect information about a potential sentence may invalidate a guilty plea, but the record showed that the defendant was ready to accept the plea before the court misspoke. (Supreme Ct, Bronx Co)

Matter of Adonis H., 2021 NY Slip Op 05627 (1st Dept 10/14/2021)

ABUSE/NEGLECT - DRUG MISUSE

- HEARSAY EVIDENCE/ACS PROGRESS NOTES

- INFERENCE FROM FAILURE TO TESTIFY

LASJRP: The First Department finds sufficient evidence of neglect where the father admitted to being addicted to Percocet; and he was taking the drug in excess of what was prescribed and was purchasing it illegally after his doctor became suspicious and stopped prescribing it. The father failed to rebut ACS's prima facie case by showing that he was regularly participating in treatment.

When the father, while present at the hearing, did not testify, the court properly drew a negative inference and inferred that he implicitly admitted that his out-of-court statements were true.

The Court finds no error in the admission of ACS's investigative progress notes as business records, and also concludes that although the father was not under a business duty to report his behavior to ACS, his out-of-court statements are admissible as a party admission against interest. Any error in the admission of a statement that the Child Protective Specialist had concerns regarding the father's protective capacity was harmless. (Family Ct, Bronx Co)

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

First Department *continued***Matter of M.S., 2021 NY Slip Op 05795**
(1st Dept 10/21/2021)**ABUSE/NEGLECT - CORROBORATION**

LASJRP: The First Department finds sufficient corroboration of the child's out-of-court statements regarding sexual abuse, noting, inter alia, that some corroboration was provided by the testimony of the investigating child protective specialist that the child reported she was happier and felt better when respondent's belongings were removed from the home and the sofa where some of the abuse occurred was replaced, and respondent's own testimony confirming certain details of his interactions with the child, including tickling each other.

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

Matter of Tsoede L., 2021 NY Slip Op 05667
(1st Dept 10/19/2021)**ABUSE/NEGLECT - DISPOSITION/MOTION TO VACATE**

LASJRP: On consent of the mother without admission, the family court entered a finding that the mother neglected the eight-year-old child by inflicting excessive corporal punishment - that is, by scratching the child with her nails, and by beating the child with a phone charger cord and a belt, leaving marks, scratches, large welts and bruises on the child's face, shoulders, abdomen and thighs, in various stages of healing. As a result of the severe beating, the child was diagnosed with Post-Traumatic Stress Syndrome and had an ongoing need for therapy.

The First Department upholds the family court's determination denying the mother's motion to amend the dispositional order to include a suspended judgment and for a consent order vacating the finding of neglect and dismissing the petition. The family court acknowledged that the mother had completed court-ordered services and engaged in therapy, but found that, while she apologized to the child, she failed to acknowledge, specifically, how her behavior affected the child or to show real insight into the behavior that precipitated the incident. The mother also failed to come up with a plan to address the child's resulting issues. (Family Ct, New York Co)

People v Dula, 2021 NY Slip Op 05465
(1st Dept 10/12/2021)**PEOPLE'S APPEAL | NO SUPPRESSION**

ILSAPP: The People appealed from an order of New York County Supreme Court, which granted the defen-

dants' motions to suppress physical evidence. The First Department reversed and remanded. Supreme Court found that police observed a moving vehicle with a New Jersey license plate on which "Garden State" was obscured by a frame, in violation of the VTL. That specific finding was not adverse to the People, so it was not reviewable on the People's appeal. Concerns about allowing police to make pretextual traffic stops based on trivial violations did merit consideration. However, the finding that the police officers reasonably believed that a traffic violation occurred was dispositive as to the existence of probable cause to stop the car. (Supreme Ct, New York Co)

People v Williams, 2021 NY Slip Op 05467
(1st Dept 10/12/2021)**DVSJA | AFFIRMED**

ILSAPP: The defendant appealed from an order of New York County Supreme Court, which denied her CPL 440.47 motion for resentencing under the DVSJA. The First Department affirmed. The evidence did not show that the crime victim's behavior toward the defendant constituted substantial abuse. While abuse "at the time" of the offense need not occur simultaneously, there must be a temporal nexus between the abuse and the offense. (Supreme Ct, New York Co)

People v Grosso, 2021 NY Slip Op 05640
(1st Dept 10/14/2021)**ATTEMPTED ASSAULT | DISMISSED**

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of attempted 1st and 2nd degree robbery and other crimes. The First Department vacated the convictions of attempted 1st degree assault and 2nd degree assault. Such counts, charged under an acting-in-concert theory, were not supported by legally sufficient evidence. The People failed to prove that, when the codefendant stabbed the victim, the defendant shared his intent to do so. There was no proof that the defendant knew that the codefendant had a knife or was planning to use it; or that, when the defendant became aware of the use of the knife, he continued to participate in the assault. The Center for Appellate Litigation (Carola Beeney, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Lantigua, 2021 NY Slip Op 05671
(1st Dept 10/19/2021)**DOUBLE JEOPARDY - PROSECUTION AFTER MISTRIAL
APPEAL - PRESERVATION**

LASJRP: The First Department concludes that the retrial after a mistrial violated double jeopardy rules where defendants made general motions for a mistrial,

First Department *continued*

but on the next day they expressly limited their motions to requests for a mistrial with prejudice. When the court declared a mistrial shortly afterwards, it did not obtain defendants' unequivocal consent. Defendants' double jeopardy claim does not require preservation. (Supreme Ct, Bronx Co)

**People v Perry, 2021 NY Slip Op 05826
(1st Dept 10/26/2021)**

PRO SE | COLLOQUY

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 3rd degree CPW. The First Department reversed. The colloquy regarding the defendant's request to go pro se was insufficient to waive his right to counsel. The trial court did not do the required searching inquiry or explain the charges—despite the defendant's apparent confusion about them—or his sentencing exposure. The matter was remanded for a new suppression hearing and a new trial. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant. (Supreme Ct, New York Co)

Second Department

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

People v Coulibaly, 198 AD3d 84 (2nd Dept 8/4/2021)

SEALING DENIAL | CIVIL APPEAL

ILSAPP¹: The defendant appealed from a Suffolk County Court order, which denied his CPL 160.59 motion to seal his conviction of 3rd degree criminal possession of a controlled substance. The Second Department affirmed. The CPL did not provide for an appeal from an order like this one. However, the proceeding was civil in nature, so the court had jurisdiction to consider the appeal under CPLR 5701 (a) (2) (v) (appeal of right is available from order resolving motion on notice and affecting substantial right). County Court properly denied the motion since the requisite 10-year had not passed. (County Ct, Suffolk 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.

Haik v Haik, 197 AD3d 465 (2nd Dept 8/4/2021)

CHILD SUPPORT | RECITALS

ILSAPP: The wife appealed from a judgment of divorce entered in Nassau County Supreme Court. The Second Department modified and remitted. The child support provisions contained in the stipulation of settlement did not include any of the recitals required by statute. Thus, the court should have granted the motion to vacate such provisions, as well as a related provision allocating unreimbursed health care expenses. However, the defendant had failed to show any reason to disturb the agreement regarding equitable distribution. Mary Ellen O'Brien represented the appellant. (Supreme Ct, Nassau Co)

People v Hollman, 197 AD3d 484 (2nd Dept 8/4/2021)

PLEA WITHDRAWAL | DISSENT

PLEAS - VOLUNTARINESS

LASJRP²: Second Department, with one judge dissenting, upholds the denial of defendant's motion to withdraw his plea.

Defendant made it clear that he was unhappy that he would be remanded upon pleading guilty, and had expected to be released for several weeks and then remanded at sentencing. Nevertheless, he unequivocally indicated: "I do want to take the plea." Defendant contended in his motion that he did not have an adequate opportunity to speak with his counsel regarding the case and any defenses. However, when the plea court inquired in response to an equivocal statement by defendant that he was able to discuss "some" of the facts of the case with his counsel, defendant terminated that inquiry and confirmed that he had sufficient time to speak with counsel. Defendant was feeling pressure to decide whether to plead guilty and be remanded or face greater charges if the People presented the matter to the grand jury. But such pressure does not render a guilty plea involuntary. The imposition of these difficult choices is an inevitable and permissible attribute of a legitimate system which tolerates and encourages the negotiation of pleas. (Supreme Ct, Nassau Co)

People v Mosquito, 197 AD3d 504 (2nd Dept 8/4/2021)

SEARCH AND SEIZURE - AUTO SEARCH/

PROBABLE CAUSE

- PLAIN VIEW DOCTRINE

LASJRP: The hearing court denied defendant's motion to suppress physical evidence and statements he

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

Second Department *continued*

made to law enforcement officials, concluding that the officer's testimony that he smelled an odor of marihuana coming from the vehicle, and observed a small bag of marihuana on the floor between the driver's seat and the door, provided probable cause to believe the vehicle contained more contraband.

The Second Department concludes that the officer had probable cause to search the center console of the vehicle, and the small zippered wallet contained within it, for the presence of marihuana. However, the People failed to demonstrate that the three credit cards found during the search of the zippered wallet were lawfully seized under the plain view doctrine. The officer did not testify that the names and signature pads on the cards were inadvertently exposed during his search for marihuana, or that he determined the cards were illicit before he removed them from the zippered wallet or otherwise manipulated them in order to expose them to his view. (Supreme Ct, Queens Co)

People v Jamison, 197 AD3d 569 (2nd Dept 8/11/2021)**PREDICATE | HEARING**

ILSAPP: The defendant appealed from a Dutchess County Court judgment, convicting him of 2nd degree CPW upon his plea of guilty. The Second Department vacated the second violent felony offender adjudication and remitted. Under the circumstances of the case, resort to the Florida accusatory instrument, among other things, would be needed to ascertain the particular acts underlying the defendant's convictions for robbery and possession of a weapon by a felon to determine whether those acts were equivalent to a violent felony in New York. The matter was remitted for a hearing. Salvatore Adamo represented the appellant. (County Ct, Dutchess Co)

People v Juin, 197 AD3d 571 (2nd Dept 8/11/2021)**DRUG TERM CUT | DISSENT**

ILSAPP: The defendant appealed from a sentence imposed by Rockland County Court upon his convictions for drug sale and possession. The Second Department reduced the periods of imprisonment, while two justices would have affirmed. Trial evidence belied the claim that the defendant sold drugs only to support his cocaine habit. Further, he had several recent drug-related misdemeanor convictions, the dissenters noted. The Second Department decision also affirmed the defendant's appeal from a conviction of 2nd degree criminal possession of a forged instrument. The appellate court reached the merits of the excessive sentence argument because the purported waiver of the right to appeal was invalid. County Court's

oral colloquy and the written document mischaracterized the waiver as an absolute bar to taking a direct appeal and a forfeiture of the right to counsel and poor person relief. The sentence was upheld. The periods of post-release supervision merged by operation of law. Warren Hecht represented the appellant. (County Ct, Rockland Co)

People v Montello, 197 AD3d 575 (2nd Dept 8/11/2021)**TESTIMONY | NARRATIVE**

ILSAPP: The defendant appealed from a Suffolk County Court judgment, convicting him of 1st degree burglary and other crimes. The Second Department affirmed. A police detective's testimony about conversations with a cooperating witness did not constitute inadmissible hearsay or a Confrontation Clause violation, where the proof was admitted to complete the narrative, the jury was properly instructed, and the defendant had the opportunity to cross-examine the cooperating witness. (County Ct, Suffolk Co)

People v Veeney, 197 AD3d 578 (2nd Dept 8/11/2021)**SUMMATION | MISCONDUCT**

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of several crimes. In the interest of justice, the Second Department vacated the conviction of attempted 1st degree assault and remitted for a new trial on that count. The prosecutor made numerous improper comments in summation. For example, she misrepresented the evidence in explaining why no shell casings were recovered, and referred to stricken testimony indicating that the defendant could have shot a witness. Further, the People's misconduct included erroneously advising the jury that credibility determinations should be based in part on what they "felt" and that the criminal history of a prosecution witness was not relevant to credibility. The errors were not harmless, because proof of guilt was not overwhelming. Legal Aid Society, NYC (Ellen Dille, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Matter of Aida T.M. v Manuel R. T.M., 197 AD3d 596 (2nd Dept 8/17/2021)**GUARDIANSHIP - JURISDICTION**

LASJRP: The mother commenced this guardianship proceeding and also moved for the issuance of an order making special immigrant juvenile-related findings. The child, who came to the United States from Ecuador in April 2021, executed an affidavit consenting to the petition, and the father executed an affidavit waiving service of process and his appearance at the hearing, and consenting to the petition. The family court, after a hearing, dismissed the petition for lack of subject matter jurisdiction.

Second Department *continued*

The Second Department affirms. The mother concedes that New York is not the home state since the child has not been residing in the state for at least six consecutive months immediately before commencement of the proceeding, and she failed to preserve her contention that the court should have exercised jurisdiction pursuant to Domestic Relations Law § 76(1)(b) (no home state, or court of home state has declined to exercise jurisdiction on ground that this state is more appropriate forum; and child and parents, or child and at least one parent or person acting as parent, have significant connection with this state other than mere physical presence; and substantial evidence is available in this state concerning child's care, protection, training, and personal relationships). (Family Ct, Queens Co)

People v Bugge, 197 AD3d 653 (2nd Dept 8/18/2021)

SEALING | REVERSED

ILSAPP: The defendant pro se appealed from a Suffolk County Court order, which summarily denied his CPL 160.59 motion to seal his conviction of the crime of unlawful possession of examination questions, in violation of the Civil Service Law, and related offenses. The Second Department reversed and remitted. In 1999, the defendant pleaded guilty to the subject charges and was sentenced to probation. County Court thereafter granted his application for a certificate of relief from disabilities. After a prior sealing application was denied, in the instant motion, the defendant explained that he was the owner of a security guard training school; he would like to extend training to religious institutions; and sealing would enable him to apply for various government grants. The People opposed the motion. The defendant properly appealed as of right pursuant to CPLR 5701 (a) (2) (v). Under the plain terms of the sealing law, the defendant was entitled to a hearing. A remedial statute, CPL 160.59 was to be interpreted broadly to accomplish its goals. (County Ct, Suffolk Co)

People v Davis, 197 AD3d 659 (2nd Dept 8/18/2021)

CORAM NOBIS | GRANTED

ILSAPP: Based on ineffective assistance of appellate counsel, the appellant applied for a writ of error coram nobis to vacate a prior appellate decision, which affirmed a Suffolk County Court judgment convicting him of 1st and 2nd degree murder. The Second Department vacated the 2nd degree murder convictions and dismissed those counts. Former counsel was ineffective in failing to seek dismissal of those lesser counts as inclusory concurrent

counts of the 1st degree murder conviction. Richard Herzfeld represented the appellant. (County Ct, Suffolk Co)

People v McPhee, 197 AD3d 665 (2nd Dept 8/18/2021)

JUDGES - BIAS/RECUSAL

LASJRP: The Second Department orders re-sentencing before a different judge, concluding that the sentencing judge should have recused himself where the judge's law clerk was a former Assistant District Attorney who, in that capacity, had worked on this case in its early stages. (Supreme Ct, Queens Co)

Matter of Tyler L., 197 AD3d 645 (2nd Dept 8/18/2021)

CONFESSIONS - VOLUNTARINESS/KNOWING AND INTELLIGENT WAIVER OF RIGHTS

LASJRP: In a 3-2 decision, the First Department upholds the denial of suppression of 15-year-old respondent's videotaped statements to law enforcement officials.

The majority notes that Miranda warnings for juveniles were read and written copies of the warnings were given to respondent and his grandfather, and, while the written form was not signed, respondent and his grandfather waived the Miranda rights; that, contrary to the characterization of the dissenting judges, the Miranda warnings were not "pro forma" and were read in a manner that was clear and deliberate; that respondent's expert in juvenile forensic psychology noted in his report that respondent tested as having an IQ of 74 and was in the "borderline range" of certain verbal comprehension, perceptual reasoning, reading comprehension, and expressive vocabulary tests, but also stated that respondent had a basic comprehension and understanding of Miranda rights at the time of his testing that was consistent with other 15-year-old adolescents of comparable abilities; that the expert's conclusion that respondent could not have made an intelligent, knowing, and voluntary waiver was undermined by evidence of respondent's completion of a test that required answers to 189 written questions in 20 minutes; and that the expert acknowledged that a 2015 individualized education plan rated respondent as a "strong reader" and indicated that he could "retell a story and is able to answer questions based on his reading."

The dissenting judges note respondent's young age, low IQ scores, and limited intellectual functioning; that the expert's conclusions were confirmed by educational records showing that respondent had been selected for an individualized education plan and had consistently been evaluated as having intellectual disabilities, including a low IQ with reading, listening, and comprehension difficulties; that "it is unclear how the fact that [respondent] gave unidentified responses to a specific number of unidentified questions within a certain period of time during the forensic examination bears any relevance to

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the issue of whether [respondent] had the ability to comprehend the Miranda warnings under the circumstances"; that the IEP records indicated that respondent, who was in ninth grade, was reading at a fourth-grade level, and the fact that he was in an IEP program suggests that he had educational disabilities consistent with the analysis and conclusions of the expert; that the grandfather had a conflict of interest since he was also the guardian of the alleged victim, respondent's sister, and he provided no advice or assistance, and made a comment that was intended to assist the officers' attempts to deceive respondent into making a self-incriminating statement; and that respondent was arrested at school instead of his home, placed in handcuffs during intervals prior to the interrogation, separated from a guardian for hours between his arrest and the interrogation, and unable to privately consult with his grandfather before the interrogation, and was seated in the corner of a very small interrogation room next to his grandfather and directly across from two police interrogators.

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

People v Costan, 197 AD3d 716 (2nd Dept 8/25/2021)**SEARCH AND SEIZURE - CELL PHONES****- INCIDENT TO ARREST/INVENTORY****ROBBERY - DISPLAY OF WHAT APPEARS TO BE FIREARM**

LASJRP: The Second Department rejects defendant's contention that the police were required to secure a warrant in order to obtain defendant's real-time Cell Site Location Information. The Supreme Court's decision in *Carpenter v. United States* (138 S.Ct. 2206), requiring law enforcement, in the absence of exigent circumstances, to obtain a warrant supported by probable cause before acquiring a person's historical CSLI, specifically does not encompass the acquisition of real-time CSLI. Even if *Carpenter* were to be applied, the order containing an express finding of probable cause, which was supported by the People's evidentiary showing, was effectively a warrant for *Carpenter* purposes.

However, defendant's wallet was improperly searched at the time of arrest rather than later as part of a station-house inspection of an arrestee's personal effects.

The Court reduces defendant's first-degree robbery conviction to a third-degree robbery conviction, concluding that there was no legally sufficient evidence that defendant displayed what appeared to be a gun and that the victim perceived such display where the witness, whose dry-cleaning store had been robbed on an earlier occasion, testified that defendant threatened to use the

"gun again" but denied seeing him make any motions with his hands. (Supreme Ct, Kings Co)

People v Johnson, 197 AD3d 725 (2nd Dept 8/25/2021)**GRAND JURY TESTIMONY | EXCULPATORY**

ILSAPP: The defendant appealed from a Dutchess County Court judgment, convicting him of 2nd degree murder. The Second Department reversed and ordered a new trial. County Court erred in denying a defense request to introduce the grand jury testimony of a witness who was unavailable to testify at trial. The proffered proof was material and exculpatory, since the description of the shooter was inconsistent with the defendant. The prosecutor had a full and fair opportunity to examine the witness. The error was not harmless. Eric Renfro represented the appellant. (County Co, Dutchess Co)

People v Parker, 197 AD3d 732 (2nd Dept 8/25/2021)**JUDGES - EXCESSIVE INTERFERENCE IN TRIAL
POSSESSION OF A WEAPON - CONSTRUCTIVE
POSSESSION**

LASJRP: The Second Department finds legally sufficient evidence that defendant constructively possessed a firearm where the evidence showed, inter alia, that defendant resided in the premises for six years; that defendant was aware of the presence of the firearm in the kitchen cabinet above the refrigerator; that defendant received mail at the premises; and that defendant's DNA was found on the firearm.

A 3-judge majority rejects defendant's contention that the trial court unduly interfered in the proceedings by engaging in excessive questioning of witnesses, noting that the court questioned a detectives involved in the search warrant execution to clarify why another occupant of the residence was listed as the owner of certain items seized and vouchered, and that the court intervened to facilitate the orderly and expeditious progress of the trial and to assist in posing questions of witnesses. The fact that more than 200 questions were asked by the court during trial is not dispositive. The conduct of the court did not prevent the jury from arriving at an impartial judgment on the merits.

The dissenting judges assert that the trial judge engaged in extensive questioning of witnesses, usurped the role of the prosecutor, elicited significant testimony from the People's witnesses, made statements summarizing and characterizing the testimony of witnesses, undermined the defense's cross-examination, and generally created the impression that he was an advocate for the People. The court elicited testimony which had been stricken, afforded an explanation to what otherwise would have been a hole in the People's theory that the gun belonged to defendant, and undermined the

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defense's theory that the firearm belonged to another individual and had no connection to defendant. (Supreme Ct, Queens Co)

[People ex rel. Ferro v Brann](#), 197 AD3d 787
(2nd Dept 8/27/2021)

WRIT | REDUCED BAIL OR RECOGNIZANCE

ILSAPP: The Second Department sustained a writ of habeas corpus to set reasonable bail or to release the defendant and remitted to Queens County Supreme Court. The Certificate of Compliance could not be deemed complete until all material and information identified as subject to discovery and electronically shared with the defendant were produced, pursuant to CPL 245.50. The substitution of a different ADA was not an exceptional circumstance that would render certain time excludable. Since more than 90 days were chargeable to the People, CPL 30.30 (2) (a) required the defendant's release on bail or upon his own recognizance. Shane Ferro represented the defendant/petitioner. (Supreme Ct, Queens Co)

[People v Crispino](#), 2021 NY Slip Op 04918
(2nd Dept 9/1/2021)

RIGHT TO COUNSEL - WAIVER/ PRO SE REPRESENTATION

LASJRP: The Second Department finds reversible error where the trial court failed to conduct the requisite inquiry before allowing defendant, a disbarred attorney, to proceed pro se, and the record does not demonstrate that defendant was aware of the dangers and disadvantages of representing himself or the benefits of having trial counsel. (Supreme Ct, Kings Co)

[People v Slide](#), 197 AD3d 1184 (2nd Dept 9/15/2021)

CORAM NOBIS | GRANTED

ILSAPP: Based on ineffective assistance of counsel, the defendant sought a writ of error coram nobis to vacate an order affirming his conviction. The Second Department granted the application and remitted. Former appellate counsel failed to contend that County Court erred in not determining if the defendant should be adjudicated a youthful offender. Shortly before the brief was filed, *People v Rudolph* (21 NY3d 497) held that, in every case in which the defendant was eligible, CPL 720.20 (1) required a YO determination—even where the defendant failed to request it or agreed to forgo it in a plea deal. (County Ct, Suffolk Co)

[Matter of Edmond v Suffolk County](#), 197 AD3d 1297
(2nd Dept 9/29/2021)

POLICE FOILED COST OF RESISTANCE

ILSAPP: The petitioners appealed from a judgment of Suffolk County Supreme Court, which denied attorney's fees and litigation costs in a CPLR Article 78 proceeding regarding FOIL requests. The Second Department reversed and remitted. The petitioners sought Suffolk County and Police Department records related to an investigation into their criminal complaint. A typical FOIL runaround ensued. The respondents did not timely determine the FOIL appeal; they provided an incomplete response; they belatedly provided particularized justifications for denying access to enumerated requests. Only because of the litigation did they ultimately comply with most requests. Thus, the petitioners were substantially prevailing parties. Corey Morris represented the appellants. (Supreme Ct, Suffolk Co)

[People v Gerald](#), 197 AD3d 1324 (2nd Dept 9/29/2021)

PLEA WITHDRAWAL | HEARING

ILSAPP: The defendant appealed from a judgment of Suffolk County Court, convicting him of attempted 2nd degree CPW. The Second Department reversed, vacated the plea, and remitted. Prior to sentencing, the defendant made a written motion to withdraw his plea. He asserted that he had pleaded guilty because of misunderstandings about constructive possession and the People's evidence of his guilt and that his confusion was due to the ineffective assistance of prior counsel. County Court summarily denied the motion. At sentencing, the defendant alleged that he was innocent and re-asserted his motion, which was denied. That was error. The defendant had promptly sought to take back the plea. The lower court made no inquiry, even after the defendant asserted his innocence. The People did not claim prejudice. One justice dissented in part. Matthew Muraskin represented the appellant. (County Ct, Suffolk Co)

[People v Singh](#), 197 AD3d 1332 (2nd Dept 9/29/2021)

DEADLY FORCE | NEW TRIAL

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree assault. The Second Department reversed and ordered a new trial. The codefendant and Gibson fought. The defendant came to the codefendant's aid. Gibson—who was much bigger than the defendant and had a BAC that was 2½ times the legal limit—punched the defendant. According to Gibson's testimony, the men then tussled on the floor, with Gibson on top. The defendant struck Gibson in the head with a hammer and a meat cleaver. At

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least that was Gibson's story. However, medical records indicated that it was unlikely that his injuries were caused by such weapons; and the defendant suffered a fractured ankle and other significant injuries. An eyewitness said in a 911 call that the men were fighting with knives and referred to the defendant as "the guy who was assaulted." Given such proof, Supreme Court erred in denying the defendant's request for a justification charge on deadly physical force. A rational jury could have found that the defendant reasonably believed that such force was necessary to defend himself or the codefendant. One justice dissented. Randall Unger represented the appellant. (Supreme Ct, Queens Co)

**Matter of Tarahji N., 197 AD3d 1317
(2nd Dept 9/29/2021)**

**ABUSE/NEGLECT - CREDIBILITY OF CHILD
- EXCESSIVE CORPORAL PUNISHMENT**

LASJRP: The Second Department, reversing the family court, finds sufficient evidence of sexual abuse, and derivative neglect, noting, inter alia, that inconsistencies in the child Shyla's testimony as to peripheral details, such as timing and the presence of other individuals in the home at the time of the abuse, did not detract from her consistent and credible description of the core conduct constituting the abuse, particularly considering Shyla's age at the time of the events. Shyla's previous, out-of-court recantation was sufficiently explained by the indirect threats she received from her own family members.

The Court also upholds a neglect and derivative neglect findings where, on one occasion, the mother struck Shyla with her hands multiple times and bit her finger, leaving marks and injuries that necessitated medical treatment.

The Court reverses a finding of neglect where there was a single instance in which the mother hit the child Amir's arm with a belt to discipline him after he was caught shoplifting, and ACS failed to prove that marks observed on the child were the result of being hit with the belt by the mother. (Family Ct, Queens Co)

**People v Thompson, 197 AD3d 1347
(2nd Dept 9/29/2021)**

**CORAM NOBIS
NOTICE OF APPEAL**

ILSAPP: The defendant made a motion for a writ of error coram nobis, seeking leave to file a late notice of appeal from two judgments of Kings County Supreme Court, both rendered February 14, 2013. The Second Department deemed the defendant's application to be a timely notice of appeal. The defendant had established his

entitlement to relief pursuant to *People v Syville*, 15 NY3d 391. Levitt & Kaizer (Richard Ware Levitt and Zachary Segal, of counsel) represented the defendant. [NOTE (in original summary): Counsel's memo of law reveals that, at the time of the offenses, the defendant was 18 and had no record. He pleaded guilty to 1st degree manslaughter and attempted 2nd degree murder in satisfaction of two indictments and was sentenced to concurrent 25-year terms. The colloquy regarding the waiver of appeal was misleading, and there was no written waiver. The defendant asked his attorneys (one retained and one assigned), to file a notice of appeal from the judgments, but neither one did so. New counsel was retained but failed to pursue any relief. Upon direct appeal, the defendant would have been entitled to remand for consideration of youthful offender treatment, pursuant to *People v Rudolph*, 21 NY3d 497, the memo contended. In response to the motion, the District Attorney asserted that the coram nobis application should be granted.] (Supreme Ct, Kings Co)

**People v Adeyeye, 2021 NY Slip Op 05347
(2nd Dept 10/6/2021)**

FST | FRYE

ILSAPP: The defendant appealed from a Kings County Supreme Court judgment, convicting him of 2nd degree murder and other crimes. The Second Department reversed. Prior to trial, the defendant moved to preclude the People from introducing DNA testing results derived from use of the Forensic Statistical Tool (FST) or, in the alternative, to conduct a *Frye* hearing. Supreme Court improvidently exercised its discretion in denying the motion without a hearing. The error was not harmless. Without the FST evidence, the proof of the defendant's guilt was not overwhelming. Appellate Advocates (Michael Arthus, of counsel) represented the appellant. (Supreme Ct, Kings Co)

**People v Bohn, 2021 NY Slip Op 05350
(2nd Dept 10/6/2021)**

MISLEADING | OPENING THE DOOR

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree murder and other crimes. The Second Department affirmed, rejecting the defendant's contention that he was deprived of a fair trial by the People asking the defense expert about the sentencing range for 1st degree manslaughter. The defendant opened the door to the testimony by eliciting incomplete information from the expert witness relating to the sentence for that crime. (Supreme Ct, Queens Co)

Second Department *continued*

[Matter of Christopher L. v Colon,](#)

2021 NY Slip Op 05344 (2nd Dept 10/6/2021)

VISITATION - BARRED BY ORDER OF PROTECTION

LASJRP: The Second Department concludes that the court properly denied, without a hearing, the mother's motion for supervised parental access where there were criminal court temporary orders of protection barring such contact and the orders did not state that they were subject to subsequent court orders pertaining to custody and parental access. (Supreme Ct, Orange Co)

[People v Ellis,](#) 2021 NY Slip Op 05353

(2nd Dept 10/6/2021)

COMPLAINANT | UNAVAILABLE

ILSAPP: The defendant appealed from a Nassau County Supreme Court judgment, convicting him of 1st degree burglary and 1st degree robbery. The Second Department affirmed. The complainant's grand jury testimony was introduced during the People's case. At a *Sirois* hearing, the People established that the defendant had acted to prevent the witness from testifying. The Supreme Court providently exercised its discretion in admitting testimony as to the complainant's out-of-court statements indicating that he went to the defendant's home after the burglary and shot at him. The People satisfied the four prerequisites for admission of statements of a non-testifying third party as a declaration against penal interest. The complainant was unavailable to testify; his statement was a declaration against his penal interest; he had competent knowledge of the matter; and sufficient evidence independent of the declaration tended to support facts asserted and ensure its trustworthiness. *See People v Brensic*, 70 NY2d 9. (Supreme Ct, Nassau Co)

[Matter of Jarlin M.,](#) 2021 NY Slip Op 05339

(2nd Dept 10/6/2021)

TERMINATION OF PARENTAL RIGHTS

- FAILURE TO PLAN

LASJRP: The Second Department agrees with the family court's determination that petitioner did not establish that the mother failed to plan for the child's future where the mother provided the names of five potential resources for the child, and petitioner failed to demonstrate that it took steps to meaningfully investigate all of the potential resources. (Family Ct, Kings Co)

[Matter of Madeleine B.,](#) 2021 NY Slip Op 05332

(2nd Dept 10/6/2021)

ABUSE/NEGLECT - ALCOHOL MISUSE/ DOMESTIC VIOLENCE - DERIVATIVE NEGLECT

LASJRP: The Second Department upholds findings of neglect and derivative neglect where the father, while in an intoxicated state, perpetrated acts of domestic violence against the mother while the children were present in the home, and one child witnessed the father choking the mother and was crying and urinated on herself; and the father was intoxicated during an earlier incident of domestic violence involving the mother.

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

[People v Telfair,](#) 2021 NY Slip Op 05355

(2nd Dept 10/6/2021)

UNCHARGED CRIMES EVIDENCE - PROBATIVE OF DEFENDANT'S INTENT/REBUTTAL OF DEFENSE

LASJRP: The Second Department, with one judge dissenting, finds no error in the admission of Molineux evidence that was probative of defendant's knowing possession of guns.

Although the dissent asserts that defendant's intent could be easily inferred from the circumstances of the incident, defendant placed his state of mind squarely in issue in his opening statement and throughout the trial by pursuing the defense that "[h]e didn't know" the guns were in the truck and that the People would be unable to prove his intent to possess the guns beyond a reasonable doubt. (Supreme Ct, Kings Co)

[People v Amos,](#) 2021 NY Slip Op 05577

(2nd Dept 10/13/2021)

PLEAS - MOTION TO VACATE/KNOWING AND INTELLIGENT

LASJRP: Defendant moved to withdraw his plea prior to sentencing, contending that he had a viable defense he had not understood at the time he agreed to plead guilty. He asserted that he did not reside at his mother's home prior to the execution of the warrant, and that the weapons recovered from his mother's residence did not belong to him. He asserted that the weapons belonged to another individual who had been residing at his mother's home and had placed the weapons inside a closet without defendant's knowledge or consent.

The Second Department concludes that the court below erred in denying the motion without a hearing. The court was required to either grant the application or conduct a hearing to determine whether the application has merit. Defendant was not required to affirmatively demonstrate his actual innocence in this procedural pos-

Second Department *continued*

ture. His submissions provided tenable support for his assertion of innocence. (Supreme Ct, Kings Co)

People v Anarbaev, 2021 NY Slip Op 05578
(2nd Dept 10/13/2021)

SENTENCES | CONCURRENT

The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of multiple offenses. The Second Department modified. The sentences imposed for aggravated criminal contempt, and the count of 1st degree burglary premised on the infliction of physical injury to a non-participant to the crime, would run concurrently with the sentence for 2nd degree murder. The physical injury element of the contempt and burglary counts was subsumed in the act of causing death. Appellate Advocates (De Nice Powell, of counsel) represented the appellant. (Supreme Ct, Richmond Co)

People v Brown, 2021 NY Slip Op 05579
(2nd Dept 10/13/2021)

SUPPRESSION | FOUNDED SUSPICION

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of criminal possession of a firearm, upon his plea of guilty. The appeal brought up for review the denial of a motion to suppress physical evidence and certain statements. The Second Department reversed, suppressed, and remitted. The testifying officer failed to articulate any reason for approaching the defendant, other than that he seemed nervous and the officer wanted to see why the defendant went into the store. That did not provide an objective, credible reason for the officers to approach the defendant and request information. Further, police had no basis for immediately engaging the defendant in a pointed inquiry regarding a bag found inside the store. The People adduced no evidence that the defendant was ever observed in possession of the bag, and the officers never asked anyone else in the store if the bag belonged to them. The defendant's actions were too vague and generic to support a level-two inquiry. Two justices dissented. Appellate Advocates (Skip Laisure, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Matter of Mehmeti v Dautaj, 2021 NY Slip Op 05569
(2nd Dept 10/13/2021)

CUSTODY - STANDING

LASJRP: The Second Department concludes that the biological mother, who, following her incarceration in October 2007, voluntarily surrendered her parental rights

and was released from prison in 2019, has no standing to seek custody from the children's paternal uncle and paternal grandmother, who adopted them. (Family Ct, Richmond Co)

Matter of Nina M.T. v DeSabato, 2021 NY Slip Op 05574
(2nd Dept 10/13/2021)

CUSTODY - HEARING/NOTICE OF ISSUES TO BE DETERMINED

LASJRP: While the attorney for the child requested an award of temporary custody to the mother and a temporary suspension of the father's parental access, the court issued an order that superseded the prior order of custody and any orders that incorporated the prior order of custody, and awarded sole legal and physical custody to the mother and supervised therapeutic parental access to the father.

The Second Department reverses. The petition filed by the attorney for the child sought temporary relief, and thus the father was not on notice that the court would issue a final custody determination on that petition. The court erred in, sua sponte, granting such relief. (Family Ct, Nassau Co)

People v Wolfe, 2021 NY Slip Op 05597
(2nd Dept 10/13/2021)

ANDERS | NEW COUNSEL

The defendant appealed from a Dutchess County Court judgment, convicting him of 1st degree course of sexual conduct against a child, upon his plea of guilty. Assigned counsel submitted an *Anders* brief, and the Second Department appointed new appellate counsel. Potentially nonfrivolous issues existed, including whether the defendant's plea was knowing, voluntary, and intelligent, given that the lower court did not specify the period of post-release supervision to be imposed or the maximum potential duration. (County Ct, Dutchess Co)

Matter of Jenny M., 2021 NY Slip Op 05701
(2nd Dept 10/20/2021)

ABUSE/NEGLECT - JURISDICTION

LASJRP: In this Article Ten proceeding alleging domestic violence, the petition indicated that the child and the mother resided in Connecticut and that the father resided in Westchester County; and that a criminal proceeding had been commenced against the father in Connecticut based upon some of the same allegations contained in the petition. The family court dismissed the petition for lack of subject matter jurisdiction.

The Second Department remits the matter for a determination regarding jurisdiction, noting that the family

Second Department *continued*

court failed to make any determinations under the UCC-JEA. (Family Ct, Westchester Co)

Matter of Osher W., 2021 NY Slip Op 05706 (2nd Dept 10/20/2021)

ABUSE/NEGLECT - CORROBORATION
- SEXUAL ABUSE
- EVIDENCE/CONSCIOUSNESS OF GUILT
- DERIVATIVE ABUSE

LASJRP: In this sexual abuse proceeding, the Second Department concludes that the family court properly determined that the child's out-of-court statements were sufficiently corroborated.

The child's disclosure to his grandmother, when he was approximately four years old, included age-inappropriate knowledge of sexual matters. The child's accounts of that incident, and descriptions of other abuse, were detailed and consistent. Although the mere repetition of an accusation does not, by itself, provide sufficient corroboration, some degree of corroboration can be found in the consistency of the out-of-court repetitions. The child's allegations were further corroborated by certain changes in his behavior observed by his grandmother soon after he stayed with his father, and by the fact that, when the child was interviewed by the ACS caseworker, he said he had been asked to leave a school in upstate New York because he was "touching his private parts ... in front of other kids." The father's acquiescence to a Rabbinical Court ruling restricting his contact with the child for nearly a decade was, in essence, indicative of a consciousness of guilt.

The Court also upholds the family court's finding of derivative abuse of three other children, one of whom apparently walked in during one of the sexual abuse episodes. (Family Ct, Kings Co)

People v Warren, 2021 NY Slip Op 05736 (2nd Dept 10/20/2021)

SEXUAL ABUSE - FORCE
ACCUSATORY INSTRUMENTS - MULTIPLICITOUS COUNTS

LASJRP: The Second Department reverses defendant's conviction for sexual abuse in the first degree, noting that the evidence at trial established that no force separate from the contact itself was used to compel the contact.

The Court also dismisses a count as multiplicitous where two counts involved sexual contact to two distinct parts of the body, but there was but a single, uninter-

rupted occurrence of forcible compulsion. (Supreme Ct, Queens Co)

People v Areizaga, 2021 NY Slip Op 05864 (2nd Dept 10/27/2021)

ANDERS | NEW COUNSEL

ILASPP: The defendant appealed from a judgment of Westchester County Court, convicting him of 3rd degree burglary. Appellate counsel filed an *Anders* brief. The Second Department assigned new counsel because the brief had several flaws. (1) It did not show that counsel reviewed the presentence report. (2) Apparently, counsel did not scrutinize the transcript of the proceeding during which the defendant purportedly admitted violating the plea agreement. (3) Regarding the appeal waiver, the brief made only a conclusory statement. (4) Finally, potential issues that would survive a valid appeal waiver were not analyzed. (County Ct, Westchester Co)

People v Arellano-Venegas, 2021 NY Slip Op 05865 (2nd Dept 10/27/2021)

PEQUE | COMPLIANCE

ILASPP: The defendant appealed from a judgment of Westchester County Court. The Second Department affirmed. The defendant contended that her plea of guilty to 2nd degree bail jumping was not validly entered because County Court failed to properly advise her of the immigration consequences. Such issue was unpreserved for appellate review and, in any event, without merit. A trial court must alert a noncitizen defendant that she may be deported upon a plea of guilty. *See People v Peque*, 22 NY3d 168. County Court stated: "The plea of guilty will subject you to deportation," and "neither your attorney, nor I, nor anyone else can guarantee that you will not be deported" as result of the plea. (County Ct, Westchester Co)

Matter of Kelly v Cairo, 2021 N.Y. Slip Op. 05855 (2nd Dept 10/27/2021)

VISITATION - GRANDPARENTS

LASJRP: The Second Department affirms an order summarily dismissing, for lack of standing under DRL § 72(1), the petition for grandparent visitation where the petition alleged that the paternal grandmother developed a relationship with the child in her first few years of life before a dispute led the parents to cease contact with the grandmother, but the grandmother undertook no efforts to communicate with the child for approximately two years prior to commencing this proceeding. (Family Ct, Suffolk Co)

Second Department *continued*

[Matter of Luciano Q.](#), 2021 NY Slip Op 05857
(2nd Dept 10/27/2021)

TERMINATION OF PARENTAL RIGHTS - DEFAULTS

LASJRP: The Second Department affirms an order that denied the father's motion to vacate an order which, upon his failure to appear at a fact-finding hearing, determined that he was only entitled to notice of the proceedings and that his consent to the child's adoption was not required under DRL § 111.

The father, who was incarcerated, alleged that the day before the hearing, he was transferred to a different prison. However, he did not provide an affidavit attesting to this fact or any documentation substantiating it, relying instead on an affirmation by his counsel, who had no personal knowledge of the relevant facts. Moreover, assuming the father was transferred as alleged, he did not provide an explanation for his failure to communicate that fact to his attorney or the family court so that arrangements could have been made to coordinate production with his new facility.

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

[People v McCurdy](#), 2021 NY Slip Op 05880
(2nd Dept 10/27/2021)

SORA | OVERRIDE

ILASPP: The defendant appealed from an order of Kings County Supreme Court, designating him a level-three sex offender. The Second Department affirmed. The People established the existence of a 2007 felony conviction of a sex crime and thus the applicability of the relevant override. Supreme Court properly found that the defendant was presumptively a level-three offender. He could have, but did not, seek a downward departure. (Supreme Ct, Kings Co)

[People v Rosales](#), 2021 NY Slip Op 05874
(2nd Dept 10/27/2021)

ORDER OF PROTECTION | VACATED

ILASPP: The defendant appealed from Kings County Supreme Court judgments, convicting him of 2nd degree criminal trespass (two counts). The appeal brought up for review an order of protection entered at the time of sentencing. The Second Department vacated the order in the interest of justice. Supreme Court lacked authority to issue the order in favor of a person who was not a victim of, or witness to, the crimes to which the defendant pleaded guilty. Also, surcharges and fees were vacated in the

interest of justice. See CPL 420.35 (2-a). Appellate Advocates (David Goodwin, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Third Department

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

[Matter of Aiden J.](#), 197 AD3d 798 (3rd Dept 8/5/2021)

NEGLECT | REVERSED

ILSAPP¹: The respondent appealed from an order of Ulster County Family Court finding neglect. The Third Department reversed. Separate petitions were filed against the mother. Prior to the respondent's hearing, the mother admitted neglect. In reaching the challenged determination, Family Court improperly relied on hearsay—i.e. what the mother told the caseworker. The error was not harmless. The nonhearsay evidence did not establish that the respondent placed the children at risk of harm. While not ideal, his conduct did not fall below a minimum degree of care. MariAnn Connolly represented the appellant, and Michelle Rosien was the AFC. (Family Ct, Ulster County)

[People v Crosse](#), 197 AD3d 792 (3rd Dept 8/5/2021)

WARRANTLESS | NO EXIGENCY

ILSAPP: The defendant appealed from a Clinton County Court judgment, convicting him of criminal possession of forged devices. The Third Department reversed and remitted. The lower court erred in admitting a skimmer (device to read, decode, store data from magnetic strips) seized in a warrantless search. The cooperative defendant was pat-frisked and handcuffed. He was incapable of grabbing the seized fanny pack and backpack. No exigent circumstances existed, and there was no indication that the packs contained a weapon or dangerous instrument. Mark Schneider represented the appellant. (County Ct, Clinton Co)

[Matter of Kai G.](#), 197 AD3d 817 (3rd Dept 8/12/2021)

SUMMARY JUDGMENT | ERROR

ILSAPP: The parents appealed from an order of Schenectady County Family Court, which granted summary

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

Third Department *continued*

judgment motions, finding the six subject children abused and neglected. The Third Department modified and remitted. Two weeks before her 12th birthday, the eldest child gave birth to the youngest child. The petition alleged that the father had impregnated the eldest child; that the mother knew, or should have known, that he had sexual intercourse with the child; and that the mother failed to provide the eldest child and the baby with necessary medical care. A DNA report submitted at a § 1028 hearing found a 99.99% probability of the father's paternity. The appellate court sustained summary relief as against him, but reversed as to the mother. The non-hearsay § 1028 hearing evidence did not conclusively establish that she should have known about sexual abuse or that she allowed the children to live in a "sexually charged household." The mother said that she believed the eldest child's claim that a teenage boy had impregnated her. Material factual issues also existed regarding medical neglect. Veronica Reed represented the mother. (Family Ct, Schenectady Co)

Matter of Josiah P., 197 AD3d 1365 (3rd Dept 9/2/2021)

**ABUSE/NEGLECT - DOMESTIC VIOLENCE/
ALCOHOL MISUSE
- FINDINGS OF FACT
- CORROBORATION**

LASJRP²: The Third Department concludes that the finding that the children are neglected is not supported by a sound and substantial basis in the record.

With respect to the April 2018 incident, petitioner did not prove the presence of the children during the parents' altercation. During the January 2019 incident, all of the children except the oldest child were asleep during the altercation, and petitioner failed to prove that the oldest child was visibly upset or frightened.

The oldest child's out-of-court statements that the father gave her two to three shots of alcohol were not corroborated, and petitioner's witnesses conceded that such a level of alcohol consumption was not evidenced by their observations of the oldest child's demeanor and her .01 blood alcohol content. There was insufficient evidence that respondents misused alcoholic beverages to the extent that they lost self-control of their actions.

The Court states in a footnote that the family court failed to specify the factual findings supporting its neglect determination, and only indicated that petitioner proved the facts alleged that supported a finding of neglect, this

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

practice. This is not the best practice, but the procedure did apprise respondents of the relevant factual findings, and thus satisfied the statutory requirement in FCA § 1051(a) that the court state the grounds for its neglect finding. (Family Ct, Greene Co)

People v Kwiatkowski, 197 AD3d 1363 (3rd Dept 9/2/2021)

SORA | REVERSED

ILSAPP: The defendant appealed from an Albany County Court order, which classified him as a level-two sex offender. The Third Department reversed. The Board found the defendant to be a presumptive level-one risk. The SORA court credited the People's proof and classified the defendant as a level-two offender. The challenged written order and hearing transcript failed to set forth the required findings of fact and conclusions of law. The scant record was not sufficiently developed for the appellate court to make its own findings/conclusions. Bruce Knoll represented the appellant. The matter was remitted. (County Ct, Albany Co)

Brown v Board of Parole, 197 AD3d 1424 (3rd Dept 9/16/2021)

PAROLE | DENIED

ILSAPP: The petitioner appealed from a judgment of Sullivan County Supreme Court, which upheld the denial of parole release. The Third Department affirmed. The respondent did emphasize the petitioner's crime, as the petitioner asserted, but equal weight need not be given to each statutory factor considered. The deportation order against the petitioner was simply another factor to consider. No matter that a disciplinary determination against him was reversed after the parole hearing, given his other disciplinary violations. (Supreme Ct, Sullivan Co)

Ryan P. v Sarah P., 197 AD3d 1393 (3rd Dept 9/16/2021) **NEGLECT | CUSTODY**

ILSAPP: The mother appealed from Tioga County Family Court orders, which found that she neglected her children and granted the father's custody modification petition. The Third Department affirmed. The mother failed to preserve her arguments that Family Court erred in hearing the Article 10 and 6 petitions together and in awarding custody before the dispositional hearing. She also argued that Family Ct Act § 1052 was violated by the single order both granting custody to the father and placing her under DSS supervision. However, custody was ordered before the dispositional hearing. At oral argument, the mother's attorney argued ineffective assistance of trial counsel, but the unbriefed issue was not properly before the Court. (Tioga County Family Ct)

Third Department *continued***People v Beach, 197 AD3d 1440 (3rd Dept 9/23/2021)****APPEAL WAIVER | INVALID**

ILSAPP: The defendant appealed from a Sullivan County Court judgment, convicting him of 3rd degree CPCS. The Third Department affirmed. The defendant did not validly waive the right to appeal. He signed a written waiver to forfeit his right to seek state or federal post-conviction relief, including via CPL Article 440 motions and writs of habeas corpus and error coram nobis. County Court did not overcome the overbroad waiver by explaining that some appellate review survived. Upon review, the sentence was affirmed. The defendant also argued ineffective assistance, based on counsel's response to the People's question, during the plea colloquy, as to whether the plea and waiver of appeal were entered knowingly, intelligently, and voluntarily. Counsel's affirmation made prior to *People v. Thomas*, 34 NY3d 545, did not constitute him becoming a witness against, or taking a position adverse to, the defendant. Moreover, County Court did not rely on counsel's affirmation. (County Ct, Sullivan Co)

People v Gary, 197 AD3d 1445 (3rd Dept 9/23/2021)**SENTENCE | ILLEGAL**

ILSAPP: The defendant appealed from a County Court judgment, convicting him of DWI and sentencing him to five years' probation. The Third Department remitted. The sentence was illegally low. Given the defendant's previous 2019 conviction of DWI, the relevant statute required an additional penalty of five days in jail or 30 days of community service. The proper remedy was to vacate the sentence and give the defendant the opportunity to withdraw the plea. The Albany County Alternate Public Defender (Steven Sharp, of counsel) represented the defendant. (County Ct, Albany Co)

People v West, 197 AD3d 1436 (3rd Dept 9/23/2021)**ANDERS | NEW COUNSEL**

ILSAPP: The defendant appealed from an Albany County Court judgment, convicting him of 1st degree gang assault. The Third Department assigned new counsel. Appellate counsel sought to be relieved on the ground that there were no nonfrivolous issues to be raised. The appellate court disagreed, finding an issue of arguable merit as to the appeal waiver that could potentially impact other issues that might be raised, such as the denial of a youthful offender adjudication and the severity of the sentence. (County Ct, Albany Co)

People ex rel. Valenzuela v Keyser, 197 AD3d 1484 (3rd Dept 9/30/2021)**HABEAS CORPUS | DENIED**

ILSAPP: The defendant appealed from an order of Sullivan County Supreme Court, summarily denying his application for a writ of habeas corpus in a CPLR Article 70 proceeding. The Third Department affirmed. The petitioner, who was convicted of 2nd degree murder and other crimes, was not eligible for parole until 2075. He failed to demonstrate that his detention at the Sullivan Correctional Facility during the pandemic was unconstitutional under a due process or Eighth Amendment analysis. To the extent that the appellate court could consider post-order events, it noted that the respondent had stated that all incarcerated persons at the facility had been offered full vaccination. (Supreme Ct, Sullivan Co)

People v Vanderhorst, 199 AD3d 119 (3rd Dept 9/30/2021)**CPL 440.20 GRANT | REVERSED**

ILSAPP: The People appealed from an order of Albany County Supreme Court, which granted a CPL 440.20 motion and ordered resentencing as to the defendant's manslaughter conviction. The Third Department reversed. On direct appeal, the defendant, who was 16 at the time of the crime, did not argue that his sentence should be vacated because the court failed to determine if he was a youthful offender. In his 440 motion, the defendant made such argument, based on *People v Rudolph*, 21 NY3d 497, which was decided before he perfected his direct appeal from the judgment of conviction. *Rudolph* foreclosed retroactive application of the new rule to collateral proceedings. Further, there was nothing substantively illegal about the sentence imposed. The instant appeal did not concern the legality of the sentence, but instead the sentencing court's failure to consider YO status—which went to the judgment of conviction. Thus, CPL 440.20 did not authorize the challenged order. The appellate court observed that the defendant could pursue an application for a writ of error coram nobis. (Supreme Ct, Albany Co)

Matter of Donald QQ. v. Stephanie RR.,**2021 NY Slip Op 05760 (3rd Dept 10/21/2021)****ABUSE/NEGLECT - PETITIONS/COURT'S AUTHORITY TO DIRECT FILING**

LASJRP: The father commenced a proceeding seeking to modify an order of custody. After reviewing the petition, the family court issued an order directing, inter alia, that an investigation under FCA § 1034 be conducted. Prior to a hearing on the modification petition, DSS submitted reports of its investigation. The court, sua sponte,

Third Department *continued*

directed DSS to commence a neglect proceeding against the father and the mother.

Upon DSS's appeal, the Third Department holds that the family court lacked authority to order a child protective agency, such as DSS, to commence a neglect proceeding against a parent. Under FCA § 1032(b), the court has authority to direct only that a "person" file a petition. Primary responsibility for initiating such proceedings has been assigned by the Legislature to child protective agencies, which may file a petition whenever in their view court proceedings are warranted. (Family Ct, Clinton Co)

Matter of Khavonye FF, 2021 NY Slip Op 05753 (3rd Dept 10/21/2021)

TERMINATION OF PARENTAL RIGHTS

- ABANDONMENT

- RIGHT TO COUNSEL/CHILD

LASJRP: In this termination of parental rights proceeding, the Third Department reverses an order terminating the mother's parental rights, finding insufficient evidence of abandonment.

The caseworker testified that, in the relevant period, the mother had only three supervised visits, and did not provide the caseworker with any letters or gifts to give to the child. However, the caseworker observed only two of the visits for a limited period of time, and acknowledged that the mother brought snacks for the child. The mother was precluded from making attempts to contact the child—i.e., telephone calls—outside of scheduled parenting time. She was hospitalized with an injury that required emergency brain surgery, which prevented her from exercising one of her scheduled visits. Although the caseworker initially indicated that she had not had any contact with the mother after a certain date, during cross-examination she indicated that the mother had, in fact, called her one or two times during the relevant time period. Petitioner offered no documentary evidence memorializing any of the attempts made to contact the mother.

Even assuming, without deciding, that petitioner presented a prima facie case, petitioner failed to controvert the mother's testimony that, during visits, she provided the child with shoes, clothing, toys, coloring and educational books and cards; she attended service plan reviews; she notified petitioner of her injury and attempted to reschedule certain missed visitation as a result; and she repeatedly, albeit unsuccessfully, attempted to contact caseworkers in an effort to secure scheduled visits.

The Court also notes that "the attorney for the child provided no opening statement, did not present a case and declined the opportunity to submit a written closing statement following conclusion of the hearing." As a

result, the family court "had little, if any, insight into the quality of respondent's visitations with the child, the nature of the relationship/bond between respondent and the child or the preferences of the child—who was eight years old at the time of the hearing—regarding respondent." (Family Ct, Schenectady Co)

Matter of Nicholas L., 2021 NY Slip Op 05746 (3rd Dept 10/21/2021)

ABUSE/NEGLECT - DISPOSITION/VIOLATIONS

- APPEALS/MOOTNESS

LASJRP: The family court found that even though respondents were in "technical" compliance with the order of supervision, they willfully violated the order because parents are expected to actually gain insight and modify their behaviors to ensure compliance with a court's order of supervision, and respondents failed to acknowledge the trauma their actions have caused the children, and failed to comprehend the risks associated with openly continuing a relationship with a person who has been ordered to have no contact with the children. The court found that "compliance with an order of supervision pursuant to Family Ct Act §§ 1052 [and] 1055 both require more than mere participation in services allowing a parent to simply check off the term as done, i.e., technical compliance," and that respondents lacked insight into the reasons why the terms and conditions were ordered."

The Third Department concludes that the family court erred in finding that respondents were in "technical" compliance with the order of supervision but were nonetheless in violation of the order. Such a distinction may assist in determining whether reunification is appropriate, or whether the order of supervision needs to be extended to allow the respondents to gain insight into the reasons for the children's removal and to ameliorate those conditions, but the quantum of proof required to establish a willful violation under FCA § 1072 is clear and convincing evidence, which was not presented here.

Although the children have been returned to respondents from foster care, the appeal is not moot inasmuch as a finding of a willful violation may have enduring consequences with regard to future custody and visitation matters. (Family Ct, Montgomery Co)

Matter of Sarah OO. v. Charles OO., 2021 NY Slip Op 05758 (3rd Dept 10/21/2021)

CUSTODY - CHANGE IN CIRCUMSTANCES/

HEARING REQUIREMENT

- RIGHT TO COUNSEL/CHILD

LASJRP: The Third Department holds that the mother alleged a change in circumstances sufficient to require a hearing on her custody modification petition. The mother alleged that the fourteen-year-old child had a strong

Third Department *continued*

desire to relocate with the mother to New Jersey; and that there was a recent breakdown in the child's relationship with the father.

The family court discounted the mother's allegation that the relationship between the father and the child had recently broken down, stating that such "information was not relayed through the child's attorney" and that "[t]he child ha[d] not reported dissatisfaction with living with [the] father." The court failed to adequately take into account the fact that more than four years had passed since the court's denial of the mother's relocation request.

The Court, "[e]ver mindful of the importance that the child's position be heard, under these circumstances," directs that the family court should not reappoint the trial attorney for the child. (Family Ct, Montgomery Co)

**People v Banch, 2021 NY Slip Op 05894
(3rd Dept 10/28/2021)**

SHACKLES | HARMLESS ERROR

ILSAPP: The defendant appealed from a judgment of Chemung County Court, convicting him of aggravated harassment of an employee by an incarcerated individual. The Third Department affirmed, while stating that County Court erred in allowing the defendant to be shackled during a portion of the trial. A defendant had a right to be free of visible restraints during criminal proceedings, unless the trial court stated a specific reason for their use, such as for security or to prevent disruption or escape. Here, County Court considered the nature of the crime, correction officers' suggestions, and the defendant's outbursts. Those reasons were inadequate, but the error was harmless. (County Ct, Chemung Co)

**Matter of Celinda JJ., 2021 NY Slip Op 05900
(3rd Dept 10/28/2021)**

CUSTODY - RELOCATION

LASJRP: The Third Department upholds an order granting the mother's request to relocate to South Carolina with the children and directing that the father could send the children letters four times per year, with such letters subject to the mother's review.

The mother's primary motivation was her desire to be closer to the maternal grandparents, who planned to build an addition on their home to accommodate the mother and the children and offered to purchase the mother and the children a mobile home to live in on their property while the addition was being completed. The mother hoped to save money to eventually purchase a home in South Carolina, where the cost of living is significantly lower than in Broome County. The grandparents also

offered to provide free child care. The mother stated that she had reached her maximum earning capacity as a licensed practical nurse in Broome County and would have a greater earning potential were she to become a registered nurse.

The father was serving an extended period of incarceration and there had been little contact between the father and the children following his arrest and conviction. The mother maintains contact with the children's half siblings' mothers and they would coordinate visitation. (Family Ct, Broome Co)

**People v Logan, 2021 NY Slip Op 05893
(3rd Dept 10/28/2021)**

MOTION TO DISMISS | UNPRESERVED

ILSAPP: The defendant appealed from a judgment of Schenectady County Supreme Court, convicting him of multiple crimes. The Third Department affirmed. The defendant contended that his conviction of 2nd degree CPW should be reversed because he was not shown to have knowledge that he had a prior conviction when he possessed the gun. In moving to dismiss, the defendant did not set forth that specific argument, so it was unpreserved for appellate review. In any event, the defendant's knowledge of his prior conviction was not a necessary element of the crime. Supreme Court also properly admitted a recording of a phone call placed by the defendant from jail using his PIN—an indicium of reliability. Since the defendant knew that his calls were being monitored and recorded, an expectation of privacy in the content of the calls was lost. (Supreme Ct, Schenectady 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 Austen, 197 AD3d 861 (4th Dept 8/26/2021)

DISCOVERY REFORM | PROSECUTIVE

ILSAPP¹: The defendant appealed from a judgment of Monroe County Supreme Court, convicting him of 1st degree rape and another crime. The Fourth Department affirmed. The video-recorded statement of the victim, which was provided one week before the start of trial, was

¹ 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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timely within the meaning of CPL former Article 240, but untimely under Article 245. In concurring, a justice opined that discovery reforms should not be applied retroactively. The eight-month delay between enactment and effective date indicated that they were meant to apply prospectively; and implementing the new provisions retroactively would severely impact the criminal justice system. (Supreme Ct, Monroe Co)

People v Barthel, 199 AD3d 32 (4th Dept 8/26/2021)

CONSECUTIVE SENTENCE | JUMPING THE GUN

ILSAPP: The defendant appealed from a Monroe County Court order, convicting him of 2nd degree CPW after a nonjury trial. The Fourth Department modified. County Court erred in directing that the CPW sentence would run consecutively to whatever term Supreme Court imposed the next day at a sentencing proceeding regarding a burglary conviction. When the latter punishment was imposed, no direction was given as to whether it would run concurrently or consecutively to the CPW term. Sentencing discretion under Penal Law § 70.25 belonged to the last judge in the sentencing chain. Vacating the illegal directive was the only proper remedy. Bridget Field represented the appellant. (County Ct, Monroe Co)

People v Fudge, 199 AD3d 16 (4th Dept 8/26/2021)

COUNSEL | REPROVED

ILSAPP: The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of 4th degree criminal possession of a controlled substance, upon his plea of guilty. The Fourth Department affirmed. The appeal brought up for review an order denying suppression of cocaine discovered during a vehicle search. The appellate court observed that both prosecutors and defense attorneys must strictly adhere to relevant ethical standards, but appellate counsel failed to do so in this case. The People were admonished for stating in their brief that a sentence that falls within the statutory range is generally not considered unduly severe—thus conflating the legality and the excessiveness of a sentence. Scathing criticism was leveled at defense counsel for failing to confront the weight of unfavorable precedent as to the suppression issue raised; advancing arguments based on sources dehors the record; and baselessly impugning the integrity of a police officer involved in the search. (Supreme Ct, Onondaga Co)

Matter of Katalina M., 197 AD3d 948 (4th Dept 8/26/2021)

ABUSE/NEGLECT - MEDICAL NEGLECT/ DERIVATIVE NEGLECT

LASJRP²: The Fourth Department upholds findings of medical and derivative neglect where the mother failed to take certain steps necessary to address the youngest child's serious health challenges; and, when offered day-care assistance for her two older children, which would have enabled her to address the medical needs of her youngest child, she refused that assistance. (Supreme Ct, Onondaga Co)

McDevitt v State, 197 AD3d 852 (4th Dept 8/26/2021)

PRISON | NEGLIGENT

ILSAPP: The claimant appealed from a Court of Claims judgment dismissing his case after trial. The Fourth Department reversed and granted judgment in favor of the claimant. While serving a prison term, the claimant cooperated with a DOCCS investigation into illegal sexual relationships between a female C.O. and several male inmates. Due to careless acts by State officials, a gang leader implicated in the sordid affairs learned of the claimant's cooperation and instigated a brutal attack against him. The trial proof amply demonstrated the State's grave breach of its duty to use reasonable care to protect the claimant. The intentional conduct at issue did not supersede the State's negligence, which was at least an equal proximate cause of the claimant's injuries. Two justices dissented.

People v Ross, 197 AD3d 905 (4th Dept 8/26/2021)

CPL 440.10 | INEFFECTIVE COUNSEL

ILSAPP: The defendant appealed from an order of Erie County Supreme Court, which summarily denied his CPL 440.10 motion to vacate a judgment convicting him of attempted 2nd degree murder and other crimes, following a jury trial. The Fourth Department reversed. The defendant asserted that trial counsel failed to interview or call two exculpatory witnesses he had identified. Both witnesses submitted affidavits attesting to their willingness to testify, the nature of their exculpatory information, and the fact that defense counsel did not contact them. Such submissions raised factual issues requiring a hearing, even in the absence of an affidavit from trial counsel. Legal Aid Society of Buffalo (Alan Williams, of counsel) represented the appellant. (Supreme Ct, Erie Co)

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

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[People v Royal-Clanton](#), 197 AD3d 966
(4th Dept 8/26/2021)

GRAND JURY | RIGHT TO TESTIFY

ILSAPP: The defendant appealed from an Onondaga County Court judgment, convicting him of 1st degree criminal sexual act and another crime, upon a jury verdict. The Fourth Department reversed. The defendant was deprived of his right to testify before the grand jury, and the lower court erred in denying his motion to dismiss the amended indictment. Since the defendant's request was received after the grand jury voted but before the filing of the indictment, under CPL 190.50 (5) (a), he was entitled to a reopening of the grand jury proceeding. The amended indictment was dismissed without prejudice to the People to re-present any appropriate charges to another grand jury. Hiscock Legal Aid Society (J. Scott Porter, of counsel) represented the appellant. (County Ct, Onondaga Co)

[People v Ruiz](#), 197 AD3d 915 (4th Dept 8/26/2021)

INSTRUCTION | FIREARM POSSESSION

ILSAPP: The defendant appealed from a Chautauqua County Court judgment, convicting her of 2nd degree CPW. The Fourth Department reversed and granted a new trial. County Court erred in denying a request for a jury instruction on the defense of temporary and lawful possession of a firearm. The defendant testified that she discovered the firearm when someone (her estranged husband, she then believed) tried to forcibly enter her home, and she searched for an object to protect herself. Then she shot through the door to scare away the intruder, who turned out to be her boyfriend. Legal Aid Society of Buffalo (James Specyal, of counsel) represented the appellant. (County Ct, Chautauqua Co)

[People v Britt](#), 2021 NY Slip Op 05227
(4th Dept 10/1/2021)

**ETHICS - CONFLICT OF INTEREST
RIGHT TO COUNSEL**

LASJPR: Before trial, defense counsel learned that the Public Defender's Office (his employer) was representing another individual who was charged with murder and that defendant had information relevant to that crime. Defendant wanted to use that information to secure an advantageous plea bargain. As a result of the conflict of interest, the PD's Office sought to be relieved of representing that other individual as well as defendant. The court presiding over the murder case granted that request, but the court in this case denied it, stating that "there was

going to be no plea bargaining or any disposition short of a trial. This case was given to me for trial, and I'm going to try the case."

The Fourth Department concludes that even assuming, arguendo, that there was an actual conflict of interest, it was resolved when the court presiding over the murder case relieved the PD's Office from its representation of the other individual. (Supreme Ct, Monroe Co)

[People v Faison](#), 2021 NY Slip Op 05184
(4th Dept 10/1/2021)

ACCUSATORY INSTRUMENTS**- AMENDMENT/CHANGE OF THEORY AT TRIAL****APPEAL - PRESERVATION**

LASJRP: The Fourth Department finds reversible error where the People's theory of depraved indifference murder in the bill of particulars was limited to defendant's infliction of head injuries by shaking or hitting the child, but the court's instruction also allowed the jury to consider defendant's "inaction" after the assault ended.

A dissenting judge would dismiss the murder count with prejudice on the ground that the evidence at trial was legally insufficient to establish guilt under the charged theory set forth in the bill of particulars. Although the majority does not address this question because defendant failed to preserve his sufficiency contention, the Court has held that preservation is not required for a sufficiency of the evidence contention in a change of theory context because a defendant has a fundamental and non-waivable right to be tried only on the crimes charged. (County Ct, Onondaga Co)

[People v Johnson](#), 2021 NY Slip Op 05217
(4th Dept 10/1/2021)

**JUDGES - PARTICIPATION IN PLEA BARGAINING
SEARCH AND SEIZURE - STOP AND FRISK**

LASJPR: The Fourth Department concludes that the police had reasonable suspicion supporting a stop and frisk where the officer testified that he received a radio dispatch reporting a robbery, providing a description of two suspects who were armed with handguns, and providing the global position system tracking location of a cellular phone taken from a victim during the robbery; and, within seconds of the radio dispatch, the officer arrived at that location and stopped defendant, who matched the general description.

However, the court committed reversible error when it negotiated and entered into a plea agreement requiring the co-defendant to testify against defendant in exchange for a more favorable sentence. (Supreme Ct, Monroe Co)

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**People v Minwalkulet, 2021 NY Slip Op 05195
(4th Dept 10/1/2021)**

**SPEEDY TRIAL - UNAVAILABLE DEFENDANT/
DUE DILIGENCE**

LASJRP: The Fourth Department upholds the denial of defendant's statutory speedy trial motion, concluding that the State Police acted with due diligence in attempting to locate defendant. Investigators routinely checked law enforcement databases and social media, investigated addresses formerly associated with defendant, sought information about defendant's whereabouts from the FBI and the authorities in Canada, and interviewed defendant's wife and mother-in-law. After the investigation yielded evidence that defendant had fled to his native Ethiopia, the State Police continued to look for defendant by repeatedly checking the same law enforcement databases and social media, contacting local police in Massachusetts and motor vehicle departments in Massachusetts and Florida after receiving information connecting defendant to those states, and putting defendant's photograph in the newspaper, listing him as a person who was wanted by the police on felony charges.

Eventually a search of a law enforcement database yielded information that defendant had been jailed in Pennsylvania. Although the People would have learned of defendant's location more quickly if they had performed more frequent searches of the database, defendant had been on the run for 14 years, and the police are not obliged to search for a defendant indefinitely as long as they exhaust all reasonable investigative leads. (County Ct, Ontario Co)

**Matter of Annastasia P., 2021 NY Slip Op 05420
(4th Dept 10/8/2021)**

ABUSE/NEGLECT - DRUG MISUSE

LASJRP: The Fourth Department finds sufficient evidence of neglect where the mother admitted to using cocaine during her pregnancy; hospital records indicated that she tested positive for cocaine during her pregnancy and had a history of polysubstance abuse; she tested positive for cocaine less than three months after the child's birth; and she refused to provide a urine sample on four occasions.

There is no evidence that the mother's participation in a treatment program is voluntary. The Court cites *Matter of Amber DD.* (26 AD3d 689), where it was held that the mother's participation due to her desire to avoid prison could not be considered voluntary under the statute. (Family Ct, Erie Co)

**People v Santy, 2021 NY Slip Op 05439
(4th Dept 10/8/2021)**

**SEARCH AND SEIZURE - AUTO STOP/
FRISK OF DEFENDANT**

LASJRP: The Fourth Department orders suppression, concluding that, after a lawful traffic stop, defendant's "non-compliant and erratic behavior"—his flat affect and partial disrobement was odd—did not give rise to reasonable suspicion that he was armed or posed a threat to the officer's safety. "If anything, the officer's ability to peer unobstructed into defendant's open pants should have assuaged, rather than heightened, any concerns that defendant was concealing a weapon." (County Ct, Onondaga Co)

People v Smith, 197 AD3d 1012 (4th Dept 8/26/2021)

VIOLENT PREDICATE | REMITTED

ILSAPP: The defendant appealed from an Onondaga County Court judgment, convicting him of attempted 1st degree assault. The Fourth Department modified. County Court erred in sentencing the defendant without determining whether he had a predicate violent felony offense. At the time of sentencing, it appeared that the defendant might be a second violent felony offender, but the People failed to file the required CPL 400.15 statement. The matter was remitted for further proceedings. If the negotiated sentence was found to be illegally low, defendant would be given the opportunity to withdraw his plea. (County Ct, Onondaga Co)

People v Tillmon, 197 AD3d 956 (4th Dept 8/26/2021)

FOR-CAUSE CHALLENGE | NO ASSURANCE

ILSAPP: The defendant appealed from Cayuga County Court judgments, convicting him of 2nd degree assault, 1st degree criminal contempt, and other crimes. The Fourth Department reversed and granted a new trial. County Court erred in denying the defense challenge for cause to a prospective juror who was not sure he could be fair and impartial, due to his family's experiences with domestic violence. The trial court failed to thereafter obtain the requisite unequivocal assurance. The defendant exhausted all peremptory challenges before the end of jury selection. David Elkovitch represented the appellant. (County Ct, Cayuga Co)

**People ex rel. Brown v Dept. of Corr.,
2021 NY Slip Op 05423 (4th Dept 10/8/21)**

HABEAS | EFFECTIVE COUNSEL

ILSAPP: The petitioner appealed from a judgment of Orleans County Supreme Court, which dismissed a habeas corpus petition seeking his release based on

Fourth Department *continued*

Covid-related risks. Assuming that the petitioner was entitled to effective assistance, considering his having had the benefit of assigned counsel, he received meaningful representation. (Supreme Ct, New York Co)

**People v Ealahan, 2021 NY Slip Op 05438
(4th Dept 10/8/2021)**

ASSAULT | ANGRY CHEF

ILSAPP: The defendant appealed from an Onondaga County Court judgment, convicting him of 2nd degree assault. The Fourth Department affirmed, rejecting the contention that the trial court erred in denying a request to charge the lesser included offense of 3rd degree assault. There was no reasonable view of the evidence that the defendant failed to perceive a substantial and unjustifiable risk of physical injury and thus acted with mere criminal negligence. After his shift as a chef ended, the defendant started a heated verbal exchange with the unarmed victim on the street. When he ran into the victim again moments later, the defendant brandished a particularly sharp, professional culinary knife, in response to the victim's stance hinting that a physical altercation was imminent. (County Ct, Onondaga Co)

**People v Freeland, 2021 NY Slip Op 05441
(4th Dept 10/8/2021)**

PLEA | INQUIRY DUTY

ILSAPP: The defendant appealed from a judgment convicting her of 3rd degree grand larceny, upon a plea of guilty. She did not preserve her challenge to the voluntariness of her plea, and the narrow exception did not apply. Nothing the defendant said during the plea colloquy cast doubt on her guilt and triggered County Court's duty to inquire further. Even if the defendant's statements at sentencing could give rise to such duty, a conclusory claim of innocence was belied by statements in the plea colloquy. (Supreme Ct, New York Co)

**People v Myers, 2021 NY Slip Op 05435
(4th Dept 10/8/2021)**

DETAINEE | CALLS

ILSAPP: The defendant appealed from an Onondaga County Court judgment, convicting him of leaving the scene of an incident that resulted in death without reporting the incident. He contended that County Court erred in refusing to suppress statements made during a three-way phone call initiated by another inmate, given the lack of an eavesdropping warrant. But the governing statute did not cover a call recorded with the consent of one party.

Detainees told of the monitoring and recording of calls had no reasonable expectation of privacy in the content of the calls. (County Ct, Onondaga Co)

**People v Osborn, 2021 NY Slip Op 05426
(4th Dept 10/8/2021)**

RESTITUTION | HEARING

ILSAPP: The defendant appealed from an Onondaga County Court judgment, convicting him of 2nd and 3rd degree grand larceny, upon his plea of guilty. The Fourth Department vacated a restitution order and remitted. County Court erred in denying a hearing as to the amount of restitution. Under Penal Law § 60.27 (2), when a court requires restitution, a hearing must be conducted upon the defendant's request. Hiscock Legal Aid Society (Philip Rothschild, of counsel) represented the appellant. (County Ct, Onondaga Co)

**People v Smith, 2021 NY Slip Op 05414
(4th Dept 10/8/2021)**

CERTIFICATE | ERRORS

ILSAPP: The defendant appealed from a Niagara County Court judgment, convicting him of attempted 2nd degree CPW (two counts), upon a plea of guilty. The Fourth Department affirmed but ordered amendments to the certification of disposition to clarify that: (1) the defendant was charged with two counts of 2nd degree CPW under counts two and four; (2) such counts were reduced to attempted 2nd degree CPW; and (3) upon his pleas of guilty to the attempt counts, the defendant was sentenced to determinate terms of seven years, to run concurrently. Connie Lozinsky represented the appellant. (County Ct, Niagara Co)

**People v Thigpen-Williams, 2021 NY Slip Op 05429
(4th Dept 10/8/2021)**

PLEA | COERCED

ILSAPP: The defendant appealed from a Genesee County Court judgment, convicting him of 5th degree CPCS, upon his plea of guilty. The Fourth Department reversed and remitted. The plea was coerced and involuntary. During the colloquy, the court warned the defendant that, if he were convicted at trial, he would receive the maximum, to run consecutively to a previously imposed sentence. A defendant must not be induced to plead guilty by the threat of a heavier sentence if he is convicted after trial. The unpreserved issue was reached in the interest of justice. Legal Aid Bureau of Buffalo (Allyson Kehl-Wierzbowski, of counsel) represented the appellant. (County Ct, Genesee Co) ♫

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