



Public Defense Backup Center REPORT

Volume XXXVII Number 1

January-May 2022

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

2022 Budget: Good, Bad, (and Late) Big Ugly

The state budget for Fiscal Year 2022-2023 was passed and signed a week late.

It contained some good news. NYSDA's funding increased to allow the creation of a new statewide Defender Discovery & Forensic Support Unit at the Backup Center; watch for details! (The request for that funding was included in NYSDA's [budget testimony](#), available on the website.) The appropriation of state funds for family defense representation increased to \$4.5 million, more than double what was provided last year (though only half of what was requested by the Indigent Legal Services Office [ILS]). And some exceedingly bad provisions did not make it into the final substantive bills; specifically, no language was added to the law governing bail and other pretrial release conditions that would allow overt consideration of future dangerousness.

But final negotiations—which largely occurred behind closed doors as in past years, even as advocates and headlines trumpeted demands for input and transparency—produced a product greatly deserving of the moniker “big ugly.” Among the greatest travesties were partial rollback of bail and discovery reforms and the failure to increase compensation for assigned counsel lawyers, stagnant

since 2004, and failure to pass the [Clean Slate Act](#) relating to automatic sealing of certain convictions. NYSDA issued a statement, “[State Budget Takes Historic Criminal Justice Reforms Backwards, Harms Clients](#),” and continues to advocate for legislation and policies that benefit public defense clients and oppose those that are harmful.

Summaries of several new provisions were set out in the [April 13, 2022, edition](#) of News Picks from NYSDA Staff. Information was quickly posted on the Discovery Reform Implementation [webpage](#) (with appreciation for the willingness of The Legal Aid Society in New York City to share their new practice advisory). A link to the new law was similarly made available on the Bail Reform Implementation [webpage](#), with more information to follow. Planning for training on the new provisions began as soon as the budget was finalized; announcements will be coming!

Assigned Counsel Lawyers Demand Rate Increase

The disappointing failure to include an increase in the compensation of private attorneys for handling public defense cases was decried in many forums; the continuing call for an increase built on efforts earlier in the year. Those included the January 10th [op-ed](#) by Sen. Jamaal Bailey, the “State of Our Judiciary” [address](#) by Chief Judge Janet DiFiore, and lobby days sponsored by NYSDA, the Chief Defenders Association of New York, and the New York State Association of Criminal Defense Lawyers. In the weeks following the budget's passage, those groups and many other organizations increased advocacy for raising the fees. The rates now barely, if at all, cover overhead expenses, leaving little or nothing as pay for the lawyers' time. Protests and a “symbolic boycott” took place in April, and

NYSDA's 55th Annual Meeting and Conference in Downtown Saratoga Springs Saratoga Hilton and Saratoga Springs City Center July 24 to 26, 2022

Conference registration and the full training agenda will be available soon; we hope to be able to livestream the training sessions via Zoom. See NYSDA's homepage: www.nysda.org

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media coverage and opinion pieces abounded. Examples include [reporting](#) of Cayuga County activities in *The Citizen* (Auburn NY); a *New York Law Journal* [column](#) by Sherry Levin Wallach, president-elect of the New York State Bar Association and another [opinion piece](#) by attorney Philip Katz; and, in the *Post-Standard* (Syracuse), a [guest opinion](#) by Assigned Counsel Program Executive Director Kathleen Dougherty and an [article](#).

In addition to public protests and presswork, assigned counsel lawyers and their allies continue legal steps to ensure that the denial of clients' rights to counsel due to fee stagnation ends. As [reported](#) by *Law360.com* on Apr. 29, 2022, "[t]en New York bar associations are suing the city and state of New York to give assigned counsel for indigent defendants their first pay raise in 18 years, represented by three attorneys from [Kramer Levin Naftalis & Frankel LLP](#)." New York City and the State have repeatedly sought delays to allow for a political resolution of the problem, but with the budget finalized, it is hoped that the suit will begin to move. A decision on whether to issue an injunction is anticipated as the *REPORT* goes to press. Other media coverage of the suit includes an [article](#) on Apr. 22, 2022, in the *Democrat and Chronicle* (Rochester). The suit is mentioned in other coverage of the rate issues too, as in a May 15th [article](#) at *BuffaloNews.com*.

Other Developments Regarding Legislation Noted

Developments concerning legislation outside the budget bills were reported in News Picks earlier this year. The [January 14th edition](#) pointed to vetoes of the "qualified agencies" bill that would have helped ensure defense access to clients' criminal histories and the Preserving Family Bonds Act. It also noted several bills signed into law, including laws: relating to proceedings against young people in adult and/or family courts; ending the restriction on jury trials for B misdemeanors in New York City; making falsification of COVID-19 vaccination records a crime; and authorizing electronic notarization. Readers were referred to [Family Law, Domestic Violence And Juvenile Justice: 2021](#), authored by Janet Fink, Deputy Counsel, NYS Unified Court System, for information on other enacted family court bills.

Additionally, the [May 19th edition](#) of News Picks included a reminder that several of the laws and amendments passed as part of the budget became effective on May 9th. Those included changes to bail and discovery and also to criminal sale of a firearm provisions, reducing the number of firearms required to increase the severity of the charge.

As this issue of the *REPORT* went to press in June, the State Legislature ended its session. NYSDA will be examining the last-minute bills that passed, including the following:

On June 6, 2022, Governor Hochul [announced](#) she signed several bills relating to firearms and responding to recent mass shootings.

- S.9458/[A.10503](#) Bars Purchase of Semiautomatic Rifles by Anyone Under Age 21 by Requiring a License. Includes adding a new section to the Penal Law, "265.65 Criminal purchase of a semiautomatic rifle."
- S.9407-B/[A.10497](#) Prohibits Purchase of Body Vest with Exception of Those in Specified Professions
- S.9113-A/[A.10502](#) Expands List of People Who Can File Extreme Risk Protection Orders and Requires Law Enforcement to File ERPOs Under Specified Set of Circumstances
- The package also: strengthens gun-related reporting (S.4970-A/[A.1023-A](#)); closes "Other Gun" loophole (S.9456/[A.10504](#)); requires microstamping of new semiautomatic pistols (S.4116-A/[A.7926-A](#)); eliminates grandfathering of high-capacity feeding devices (S.9229-A/[A.10428-A](#)); requires social media companies to improve response to and reporting of hateful content (S.4511-A/[A.7865-A](#)), and creates the crimes of making a threat of mass harm and aggravated making a threat of mass harm (S.89-B/[A.6716-A](#)).

Other bills passed at the end of the session include the following.

- S.9466/[A.10505](#). Expands the number of supreme court judges in certain judicial districts and the family courts of New York City and Nassau and Saratoga counties. The NYS Association of Counties said in an e-newsletter that it took no position on the need for additional judges, but noted that "constructing new

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Managing Editor

Susan C. Bryant

Editor

Mardi Crawford

Staff Contributors

Stephanie Batcheller, Kimberly Bode,
Natalie Brocklebank, Maxwell Kampfner,
and Rebecca Murphy

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chambers will cost about \$21 million in additional capital costs.”

- S.6363-A/[A.8102-A](#). Requires the court to order the search for and immediate seizure of firearms, rifles, or shotguns when a defendant willfully refuses to surrender such firearms, rifles, or shotguns.
- S.6385-B/[A.2375-C](#). Requires that a court-ordered forensic evaluator involving child custody and visitation be a licensed psychologist, social worker, or psychiatrist who has completed a training program developed by the New York State Coalition Against Domestic Violence.
- S.2903-A/[A.9877-A](#). Requires courts, prior to accepting a plea, to provide notice to the defendant that such plea and the acceptance thereof could result in deportation, removal from the United States, exclusion from the United States, or denial of citizenship, if the defendant is not a citizen of the United States.

As [noted](#) by *The Gothamist* on June 3rd, legislation that didn’t pass included the Clean Slate Act, which “would automatically seal most misdemeanor and felony records (not including sex crimes) after a person has completed their sentence and a waiting period of three or seven years, respectively.” The Senate approved the measure, but the Assembly did not put it to a vote; the state Education Department and other entities raised concerns. NYSDA supports Clean Slate legislation.

Other legislation, good and bad, that did not pass included parole reforms, counsel for youth in interrogations, and “Kyra’s Law,” which would amend Domestic Relations Law 240 regarding custody and visitation proceedings involving allegations of child abuse or domestic violence by a parent, whether or not the allegations involve the subject child (see News Picks [March 22nd](#)).

Consideration of Dangerousness Held Off; Threat Remains

While consideration of future dangerousness was not included in the bail reform rollbacks passed in the budget, as noted above, the issue did not disappear. New York City Mayor Eric Adams continued to advocate for a “dangerousness standard” even after the session ended, as [reported](#) by the *Daily News*. Opponents of such a measure remained steadfast: “‘These proposals would roll back progress the state has made toward ending the criminalization of poverty and do nothing to advance public safety,’ Democratic Brooklyn Assemblywoman Latrice Walker, who went on a hunger strike in protest of Adams’ proposed bail law tweaks, said in a statement in April.” As a *New York Post* [article](#) on May 5th reported, “New York’s bail laws have prohibited using dangerousness as a standard in setting bail since 1971.” NYSDA has long opposed consideration of dangerousness in the determination of

pretrial release or detention; see, for example, the [September-December 2021](#) issue of the *REPORT*. We will continue to do so.

The Executive Director of the Innocence Project, Christina Swarms, wrote in a *Daily News* [op-ed](#) on March 7th on “Why the dangerousness standard is racist.” She noted that “because race often operates as a proxy for criminality and dangerousness, such an analysis will increase racial disproportionality and expand the incarceration rate at a time when policymakers are working to reduce the number of people in jail and our country is reckoning with the arbitrary role of race in the administration of justice.”

For those wanting a deeper look at dangerousness, in the context of algorithmic risk assessment instruments (RAIs), see the 2021 [article](#), “It’s COMPASlicated: The Messy Relationship between RAI Datasets and Algorithmic Fairness Benchmarks.” It contains a section on “Data Biases and Errors in Pretrial RAIs.” Among the points made there is that when recidivism is an outcome variable, and re-arrest data is used as a measure, the desired target of “re-offense” may be missed. Similarly, conflating “failure to appear” (which can result from scheduling, work, and transportation difficulties that “are correlated with race and class inequality”) and “flight” (which is deliberate absconding from the legal system) “introduces measurement error correlated with race and class.”

One of the authors of the above article is Kristian Lum, who presented at NYSDA’s 2017 Annual Conference on Bail Reform and Risk Assessment in New York State.

NYS Bar Association Addresses Racial Justice and Child Welfare

The New York State Bar Association’s House of Delegates [approved](#) in early April a [report](#) from the Committee on Families and the Law on racial justice and the so-called child welfare system. The report was noted in the [May 3rd edition](#) of News Picks from NYSDA Staff. While recognizing the need for government intervention when parental behavior results in or threatens substantial harm to children, the report addresses “the ongoing damage to Black families from inappropriate government intervention.” [Footnote omitted.] The report acknowledges “[t]he current impact of America’s history of racism and the underlying premise of white supremacy” and the existence of these cancers in virtually all institutions here. It discusses data that supports its painful conclusions. Among those: “The expansion of mandatory reporting to include poverty framed as ‘neglect’ has had a major impact on the surveillance of Black families and the removal of Black children into the foster system.” The damaging outcomes of federal and state policies and mandates are discussed. Racial disparity is noted

throughout child protective proceedings in family court – removals, findings of abuse or neglect, placements into foster care, “shadow placements,” and post-dispositional proceedings.

The approved State Bar resolution contains an extensive list of actions to be promoted, including advocacy at the federal and state levels for a variety of needed changes. NYSDA, which continues its own [commitment](#) to Black lives, commends the NYS Bar Association for this report. Information about racism and efforts to combat it appear frequently in News Picks from NYSDA Staff, including a list of several articles of interest in the [April 1st edition](#).

On a related note, as also pointed out in the [May 3rd edition](#) of News Picks, an April 29th *Associated Press* [article](#) described a growing trend across the nation of so-called child welfare agencies using statistical calculation tools and included references to research showing that at least some of these tools have been shown to disproportionately flag Black children for mandatory neglect investigation.

Law Review Article Discusses “Challenging Jurors’ Racism”

The [Abstract](#) of the above-named article dated Apr. 10, 2022, forthcoming in the *Gonzaga Law Review*, says it “[a]ttempts to assist judges and attorneys in their efforts to select an impartial jury by equipping them with a better understanding of different forms of racism (e.g., overt, covert, symbolic, aversive) as well as providing an introduction to insightful psychometric tools that can be used to prioritize the selection of anti-racist jurors, identify prospective jurors who may hold implicit and explicit biases, or identify those who are likely to be impartial in their assessment of the case.” The long-standing focus on achieving racial diversity on juries is not enough, the article posits. Rather, “the confluence of a juror’s attitudes and behaviors towards different races and racism should be the focus in creating an impartial jury rather than simply the juror’s race.” The authors include a law professor and others whose academic credentials range across psychology and even religious studies. After initial sections on the history of racism in the U.S. legal system and the mechanics of jury selection, the article presents psychological insights on racism and a final section on identifying racism, non-racism, and anti-racism in potential jurors.

The goal of the article is to assist “in the elimination of racism during the jury selection process in three ways.” First, it “offers a deeper understanding of which sort of validated psychological tools can help identify implicit, as opposed to explicit, racial bias” Second, it looks at for-cause and peremptory challenges, providing questions in

its appendices “to identify those jurors, of any race, who hold dominative and modern racist views.” And lastly, it presents research that “can serve as a starting point for statutory legal reform,” while acknowledging the need for even better tools.

A related paper, “A Call to Use Psychology for Anti-Racist Jury Selection,” published by the American Psychological Association, is also available [online](#). Other resources, as noted in the May 23, 2022, edition of News Picks, include the [March 2021](#) and [March 2022](#) editions of the Center for Appellate Litigation’s *Issues to Develop at Trial*. If defenders in the field use questions and concepts from these resources, NYSDA encourages them to provide feedback to the Backup Center.

Brain Injuries Relevant to Practice in a Variety of Ways

The [January 31st edition](#) of News Picks from NYSDA Staff sets out multiple contexts in which brain injury can affect people and issues in the legal system. A first-person [narrative](#) by Melissa Bickford, a domestic violence survivor, on *The Marshall Project* was among the references provided. Bickford calls attention to how someone with a brain injury may struggle with participation in legal processes. This raises the question, could a “difficult” client be exhibiting symptoms of brain injury?

TBIs Can Result from Domestic Violence, Sports, Combat, and More

The Bickford narrative above also points out that brain injury should not be overlooked as a possible contributing factor in behavior leading to criminal or family legal system involvement. Attorneys whose clients have been subjected to violence or other situations that could lead to head trauma should keep potential ramifications of brain injury in mind.

Awareness is growing about traumatic brain injury (TBI) among survivors of domestic violence. The *New York Times Magazine* carried an [article](#) on February 22nd on “The Hidden Epidemic of Brain Injuries From Domestic Violence.” And see the *Psychiatric Times* on [April 12, 2022](#), discussing acquired brain injuries and violence against women. Orientation materials for attorneys taking on cases affected by New York’s Domestic Violence Survivors Justice Act include the 2019 law review article, “[Discounting Women](#): Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences,” which includes a section on TBI.

Stories about TBIs possibly stemming from contact sports, particularly football, featured prominently in news cycles some time back. The potential for TBIs in youth arises in many situations, and can have legal system con-

sequences, as a 2017 article [posted](#) on the *Juvenile Justice Information Exchange* noted:

TBI that occurs during sporting events is only the tip of the iceberg. TBI also occurs frequently because of falls, motor vehicle accidents, fights and physical abuse perpetrated by adults. Hence, youth between the ages of 15 to 19 are one of the highest-risk groups to experience TBI, and the consequences of this high rate of TBI within youth are diverse and far reaching. TBI within youth have been shown to be associated with higher levels of anxiety, depression, attention deficit and hyperactivity disorder, attempted suicide, and abuse of alcohol and/or drugs.

Youth are not the only clients who may present with TBIs, of course. As a barrister in England [wrote](#) last September, Acquired Brain Injuries (ABIs) “are often the result of trauma (including road traffic accidents or severe falls), stroke, brain tumours, assault or domestic violence,” and may be important in representation. “As criminal practitioners well-versed in undertaking the extended roles of social workers or mental health nurses, we now need to expand our repertoire to include brain injury in our everyday mental and physical health assessment radar. ... Screening offenders young and old for traumatic brain injury is just as important as screening for physical or mental health difficulties.”

To acquire, understand, and use in court information about a client’s TBI will require expert assistance, as links between injury and behavior that puts clients into the legal system can be difficult to establish. The [abstract](#) of one 2019 study says that comparison of post-hospitalization arrests indicated that “TBI survivors do not appear to be at increased risk for criminality compared with injured individuals without TBI. However, injured persons with or without TBI may be at elevated risk of crime perpetration compared with those who are uninjured.” And a 2021 [study](#) of incarcerated women in Scotland yielded mixed data: “[t]he prevalence of head injury is estimated to be as high as 55% in women in prison and might be a risk factor for violent offending, but evidence is equivocal.”

NYSDA works to collect and disseminate information about this and other topics requiring expert assistance. General information on “[Getting the Expert Funds You Need Under County Law § 722-c](#)” is available on the website. Defenders who are even just wondering if a client might have a brain injury are encouraged to contact the Backup Center or, if the client is a veteran, the Veterans Defense Program.

VDP Helps in Cases Involving TBIs and Other Invisible War Wounds

NYSDA’s Veterans Defense Program (VDP) exists to help lawyers best represent clients whose military service

has played a role in their criminal or family legal matters. Often, TBIs or other “invisible wounds of war,” including post-traumatic stress disorder, are implicated. As [noted](#) in the VDP’s 2021 Annual Report, “[o]f the 718,000 Vietnam, Gulf, and Post-9/11 veterans in the state, approximately 215,670 are estimated to have PTSD, TBI, or depression” and “[s]tudies show up to 50% of those veterans are untreated.” VDP can help locate and understand military records that may help establish that an injury is service related or even help reveal an injury unknown or denied by the client. The science in this area is challenging. For an example, see “Military traumatic brain injury: a challenge straddling neurology and psychiatry,” [published](#) in January 2022 on *Military Medical Research*.

NYSDA Is Creating a Statewide Defender Discovery & Forensic Support Unit

Stay tuned for hiring announcements
www.nysda.org/page/NYSDAJobs

For other job opportunities in New York State and elsewhere, visit
<https://www.nysda.org/page/Jobs>

SBS/AHT Evidence: Call BS

As noted in the [May 19th edition](#) of News Picks, *The Appeal* published an article on May 4th about a New Jersey judge’s decision finding that “the diagnosis of Shaken Baby Syndrome, also known as Abusive Head Trauma, is ‘an assumption packaged as a medical diagnosis’ and ‘lacks scientific grounding.’” Before that, a [January 31st](#) News Picks item on brain injury included news on the New Jersey SBS/AHT decision, and urged defenders in criminal and family cases to seek expert help whenever allegations arise that a young child has died or been injured due to being shaken, with or without accompanying impact. The expertise of Chris Van Ee, a biomechanical engineer and accident reconstruction specialist is noted in some coverage; Ee was among those who presented “Defending Shaken Baby Cases” at NYSDA’s 2015 Annual Conference.

Information about SBS/AHT was included in the materials for the online training on Litigating Medically Complicated Abuse Cases: A Toolbox for Family Court Defenders presented by NYSDA on May 6, 2022. Among the documents shared was the “[Statement of the Innocence Networks on Shaken Baby Syndrome/Abusive Head Trauma](#).”

New DVSJA Resource Guide Available

NYSDA is proud to share a new Domestic Violence Survivors Justice Act (DVSJA) Resource Guide from The Survivors Justice Project (SJP), “a group primarily comprised of women who have experienced incarceration, many of whom fought for the passage of the DVSJA, and all of whom are advocates for ending mass incarceration and domestic violence.” The guide is intended for people applying for either sentencing or resentencing under the DVSJA, and is available on the SJP’s [website](#) and NYSDA’s [DVSJA webpage](#). The goals are to demystify the law; support survivors in identifying their needs and help them create and take ownership of their personal narrative; and provide links to resources that can strengthen the ability to use the DVSJA. SJP will be providing copies of the guide to people in prison thanks to the generous support of Davis Polk & Wardell LLP. To learn more about SJP’s work generally, or to contact them for information or assistance, visit their website [here](#).

Attorneys, judges, prosecutors, service providers/advocates, jail/prison staff and others should also find the new guide useful. It should help them learn more about the DVSJA and working with survivors of domestic violence who have been arrested, prosecuted, or sentenced. [NYSDA’s Attorney Support Project](#), as announced in the January-August 2021 [issue](#) of the *REPORT*, is available to assist. Contact Stephanie J. Batcheller, NYSDA Senior Staff Attorney, at (518) 465-3524 x41 or sjbatcheller@nysda.org.

DNA News

Two Court of Appeals cases dealing with DNA evidence were decided in April and reported in the [May 3rd edition](#) of News Picks from NYSDA Staff. In [People v Easley](#) (4/26/2022), the Court held on that “[i]t was an abuse of discretion for the trial court to admit the results of DNA analysis conducted using the Forensic Statistical Tool without first holding a *Frye* hearing” However, the Court found that the error was harmless; dissenting judges disagreed. In [People v Wakefield](#) (4/26/2022), the Court found no abuse of discretion in the trial court’s ruling after a *Frye* hearing “that TrueAllele’s use of the continuous probabilistic genotyping approach to generate a statistical likelihood ratio—including the use of peak data below the stochastic threshold—of a DNA genotype is generally accepted in the relevant scientific community.” Nor was it error to deny the defendant’s request for discovery of the TrueAllele software source code in connection with the *Frye* hearing or for the purpose of his Sixth Amendment right to confront the witness against him at trial.” Both decisions are included in the summaries beginning on p. 15.

A separate important DNA ruling was issued by the First Department in [Matter of Stevens v NYS Div. of](#)

[Criminal Justice Servs.](#) (2022 NY Slip Op 03062 [5/5/2022]), as noted in the [May 19th edition](#) of News Picks. At issue were the Familial DNA Search (FDS) Regulations, codified at 9 NYCRR 6192.1 and 6192.3, which were challenged in a CPLR article 78 proceeding by blood relatives of people whose genetic profiles are included in the statewide DNA database created by Exec Law 995 et seq. Respondents were three New York State entities: the Division of Criminal Justice Services (DCJS), the Commission on Forensic Sciences, and the New York State Commission on Forensic Science DNA Subcommittee. The State Legislature began considering bills at least by 2014 that would allow familial DNA searches—efforts to find “a close biological relative of someone in the databank in order to develop a lead to identify a person who may have left forensic DNA at [a] crime scene”—but passed none. The respondents also looked at the question and took actions that resulted in the promulgation of the contested regulations in October 2017. The First Department ruled “that the overwhelming policy issues inherent in authorizing the use and limitations upon familial match searches of DNA information collected in the New York State databank warrants a conclusion that it is an inherently legislative function and that the challenged regulation cannot stand.”

The opinion also dealt with the issue of standing, in which the issue of race was raised:

Petitioners have standing because the regulation subjects them to the peculiar risk that they will be targets of criminal investigations for no other reason than that they have close biological relatives who are criminals. They claim that because they are persons of color, their risk of being investigated is greater than the general population, based upon the disproportionate number of people of color in the databank. In this case, the heightened risk of police encounters, along with resulting fear and anxiety, establish a cognizable injury sufficient to confer standing. [Footnote omitted.]

Two judges, Singh and Oing, dissented, and would have reversed on the threshold determination that the petitioners had standing. The petitioners were represented by The Legal Aid Society (LAS) and Gibson, Dunn & Crutcher LLP. News about the decision is [posted](#) on the LAS website.

Other litigation regarding DNA was noted in the [April 1st edition](#) of News Picks: “The Legal Aid Society filed a federal class action lawsuit against the NYPD and the Office of the Chief Medical Examiner, claiming that the surreptitious collection and storage of people’s DNA—even without an accompanying arrest, let alone conviction—violates the Fourth Amendment.” Advocates for criminal legal system change in the City have included in The People’s Plan NYC a [call](#) to “Abolish the rogue Office of the Chief Medical Examiner DNA database.” The New

York Civil Liberties Union [objected](#) in 2020 to City practices “including surreptitious collection, the widespread collection of DNA from minors, and the maintenance of a rogue municipal database in violation of state law—run contrary to city, state, and constitutional law.”

Regs Amended to Comply with HALT Solitary—and Humanizing Language Law

The [April 20, 2022, issue](#) of the *NYS State Register* notes the promulgation of amendments to certain state regulations in NYCRR Title 7. The summary of the amended provisions, relating to the Department of Corrections and Community Supervision (DOCCS), says that “[r]evisions have been made to make the regulations compliant with the new HALT legislation regarding the removal of keeplock and limiting the use of segregated confinement for incarcerated individuals to 15 days and other applicable laws.” These revisions came on the heels of a March 21, 2022, [Chairman’s Memorandum](#) from the State Commission of Correction (SCOC) regarding “the adoption (on an emergency basis) of regulations regarding segregated confinement and residential rehabilitation units” to conform to HALT. The SCOC memo and other HALT news was noted in the [April 1st edition](#) of News Picks, the date after HALT became effective. The SCOC rules, like the DOCCS rules above, were issued on an emergency basis but are proposed to become permanent.

The HALT Solitary Campaign has identified several parts of DOCCS’s proposed regulations that are inconsistent with the HALT Act. For example, the HALT Act states that special populations include any person with a disability as defined in Executive Law 292(21)(a). However, when amending the regulations defining special populations, DOCCS failed to eliminate the requirement that “said disability impairs the individual’s ability to provide self-care within the environment of a correctional facility”

“Incarcerated Individuals,” not “Inmates”

The *State Register* announcement of the DOCCS rules discussed above indicates that other revisions were also made: “[t]he term ‘inmates’ was replaced with ‘incarcerated individuals’ or appropriate variations thereof throughout the regulations.” This change conforms the rules to a little-heralded law enacted last year, which amended a long list of statutory provisions by “replacing all instances of the words inmate or inmates with the words incarcerated individual or incarcerated individuals.” [L 2021, ch 322](#). It was noted on *Governing.com* but not widely discussed.

The importance of “people first” language was discussed in the [October-December 2020 issue](#) of the *REPORT* (page 7) and in the [June 21, 2021, edition](#) of News Picks, among other places. The signing of that law

was [noted](#), though not widely. While the language change implemented by last year’s law uses “individual” rather than “person,” it seems to be an improvement over “inmate.”

Sex Offender Registration Remains the New Scarlet Letter: New Manual Available

The Second Edition of “Defending Against the New Scarlet Letter: A Defender’s Guide to SORA Proceedings,” by Alan Rosenthal in cooperation with the Onondaga County Bar Association Assigned Counsel Program (OCBAACP), was released earlier this year. As announced in the [February 18th edition](#) of News Picks, the updated resource includes a new section on Autism Spectrum Disorder as a Mitigating Factor.

The Preface of the manual includes a powerful call for avoiding dehumanizing terms and using person-first language. “Whenever possible our clients should be referred to as people. People who have a sex offense conviction. People who have been imprisoned. But they are people.” Rosenthal cites with gratitude the Center for NuLeadership on Urban Solutions’ [document](#), “An Open Letter to Our Friends on the Question of Language.”

Family Court Contempt Proceedings Are Not Hopeless

As previously reported in News Picks and the *REPORT*, child support obligations continue to be obstacles for our clients. An unduly high order of support coupled with an unemployed or underemployed client could be a recipe for disaster, ending with a jailed client. The Third Department offers a glimmer of hope and a good framework for a defense for those defenders who represent respondents in support violations. [Matter of Wessels v Wessels](#), 200 AD3d 1178 (2021). The decision affirmed the family court’s ruling, which declined to confirm the findings of the support magistrate, who found the father in willful violation of his child support obligation. The Appellate Division reminds us that even though failure to make timely payments is a presumed willful violation, it is a rebuttable presumption that can be overcome if specific steps are taken.

It is best practice to advise a client who is behind in their support obligation to immediately start keeping a job log showing diligent efforts to find comparable employment, to make regular full or partial payments, and to apply for a downward modification immediately. Under certain circumstances, an attorney may advise a client to borrow money to bring themselves current, but the advantages and disadvantages have to be weighed carefully and for many clients, this will not be an option.

Although there is no entitlement to an assigned attorney in a support modification, providing such representation whenever possible is important, especially when there is a concurrent violation pending. It means extra work, but it makes a huge difference in whether the modification is granted and the outcome of a violation proceeding. (The Commentary to Standard H-1 of the Indigent Legal Services Office [standards on](#) Parental Representation in State Intervention Matters notes that “[a]dvising, providing guidance on self-advocacy, representing or obtaining representation, or informally advocating for the client in such matters can assist in attaining the client’s goals in” a state intervention case.)

News Picks featured two items on child support, both written by Matrimonial Attorney Joel Brandes and published in the *New York Law Journal*: Understanding the Support Magistrate Objection Process and a Guide to Downward Modifications. They are both valuable resources for any family court attorney. Late last year, 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. Additional resources can also be found on the Empire Justice Center’s [website](#).

Family Court Discovery

Although not as notorious as criminal court discovery, family court discovery is alive and well and can be used in any case, not just abuse and neglect proceedings. While potentially time-consuming, it is well worth the effort to go into trial with all your evidence in hand. Your professional obligation is to use this tool to gain the necessary information to enhance your clients’ chances of winning their cases. [CPLR 408](#) governs Discovery in special proceedings and requires leave of court for any disclosure. To save time, if there are certain documents that the opposing party possesses, there is nothing wrong with making a request orally, but if the answer is no, you may have to engage in motion practice, such as serving a discovery demand, or a motion to compel discovery. Sample discovery templates can be found on NYSDA’s [Family Defense Resources](#) webpage. Before doing anything, it is important to familiarize yourself with the relevant law.

As noted in *Matter of Stephen KK. V Kristina KK*, (69 Misc3d 186 [2020]), family court cases are special proceedings; therefore, discovery will only be granted where it is demonstrated that there is a demonstrated need for such relief.

As stated in *Town of Pleasant Valley v New York State Bd. of Real Prop. Servs.* (253 AD2d 8 [1999]):

When leave of court is given, discovery takes place according to [CPLR 3101\(a\)](#), which general-

ly provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action”. The Court of Appeals has ruled that “‘material and necessary’” should be “‘interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason’ [citation omitted].”

Discovery is not unlimited, and the family court has broad discretion in determining the scope of proof to be adduced. See *Ryan v Nolan*, 134 AD3d 1259 (3rd Dept 2015). Therefore, you should ask yourself and your client if the materials you are requesting will help you prove your case.

What about abuse and neglect cases? There are few places where discovery is more critical than in a child protective services (CPS) case. It is impossible to effectively defend your client against such serious allegations without knowing what information is in your client’s CPS file. Do not move forward with any CPS case, including a termination of parental rights, without discovery. It is a recipe for your client to lose legal rights to their child either temporarily or permanently. “[A]lthough Family Court Act Article 10 proceedings are special proceedings, the specific provisions of that article ‘override the general discovery limitations placed on special proceedings under CPLR 408’” *Matter of Ameillia RR*, 112 AD3d 1083 (3rd Dept. 2013). It is best practice to familiarize yourself with the following discovery-related statutes: [FCA 1038](#), [FCA 1038-A](#), [CPLR 3101](#), [CPLR 3102](#), and [CPLR 3120](#).

NYSDA has training materials and sample discovery demands and motions that you might find helpful; as noted above, some sample motions are posted on the [Family Defense Resources](#) webpage. If you need assistance or have any questions, please reach out to our Family Court Staff Attorney, Kim Bode. And note that the new statewide Defender Discovery & Forensic Support Unit, discussed in the budget news above, will be available to provide assistance for family defenders as well as those handling criminal matters.

Join or Renew Your NYSDA Membership Now!

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.

Lawsuit Filed Over Implementation of Host Family Homes Regulations

In the [Apr. 13, 2022](#), edition of News Picks, we reported on the filing of a lawsuit against the Office of Children and Family Services (OCFS) by three defender organizations that represent children in foster care over the implementation of the controversial host family homes rulemaking that went into effect Dec. 8, 2021. In a [press release](#) issued by counsel announcing the lawsuit, “the groups charge that the program unlawfully creates a shadow foster care system that strips away core protections afforded to children and parents in foster care under New York State law.”

NYSDA and numerous other advocacy and defense organizations have opposed these regulations since their introduction as proposed rulemaking in [March 2020](#). The opposition included allegations that these regulations were an attempt by the State to create a type of “back door” or “shadow foster care system.” (In the [Dec. 10, 2021](#), edition of News Picks, we highlighted a [story](#) by *ProPublica* and the *New York Times*, on such a system, saying: “[i]t is a heartbreaking story of what can happen to children when the agency tasked to care for the welfare of children completely shirks its responsibilities.”) In an attempt to quell criticism, OCFS had issued revised rulemaking in July 2021. In the [Aug. 10, 2021](#), edition of News Picks, we opined that “the revised rulemaking is short on substantive changes and fails to address the concern of inserting more governmental regulations into what should be private family matters.” The regulations are found at 18 NYCRR Part 444.

NYSDA Provides Information, Training, and Advocacy for Family Defense

Public defense lawyers who represent parents and those in parental roles in family matters work with too few resources in an environment that is often inhospitable to their clients and always challenging. NYSDA offers these family defenders resources including training and information, while also advocating for increased resources.

In the first months of 2022, many items in [News Picks from NYSDA staff](#) related to family defense, including the following. One noted that the SCR “will not register a report of suspected child abuse or maltreatment when the only reported concern is that” a newborn or their birthing parent tested positive for cannabis, and will continue its practice of not registering reports of cannabis use unless a “caller provides a reasonable cause to suspect that a child’s physical, mental, or emotional condition has been harmed or is at risk” (NP April 13th.)

Other [News Picks](#) items related to systemic issues affecting family defense and clients. These included an item on the “Crisis in Rural Family Court Defense,” describing the falling number of attorneys providing family defense in rural areas (NP March 22nd), and one on the joint report of the New York City Bar Association and The Fund for Modern Court highlighting fatal flaws in the family court system revealed by the COVID-19 pandemic. (NP February 18th). Chief Judge DiFiore’s State of Our Judiciary address outlining a plan to consolidate New York’s trial courts (other than local courts) was noted, with a focus on her observation about the “‘Absolutely Unacceptable State of Affairs’” in the state’s family courts. (NP February 28th.) Also reported were the report of the Governor’s Blue-Ribbon Commission on Forensic Custody Evaluations and the launch of a new quarterly publication, the Family Integrity and Justice Quarterly, by Jerry Milner and David Kelly, with an inaugural issue focusing on the traumatic consequences of the Adoption and Safe Families Act (NP January 31st.)

Caselaw was covered, too. The Pennsylvania Supreme Court held in a Dec. 23, 2021, [decision](#) that a mother faced with a social services demand for entry to inspect her home based on an unidentified source’s report of alleged neglect was entitled to the same protections that would apply if she was the subject of a criminal investigation. (NP January 14th). And New York’s Second Department conducted a thorough analysis of the law surrounding custody proceedings involving a parent versus a non-parent. In [Matter of Brittany N. v Anthony D.](#) (NP March 22nd.)

The Court of Appeals addressed a family court issue in March, in [Matter of Irelynn S.](#), summarized at p. 17. The majority affirmed the Appellate Division’s dismissal, on the grounds of default, of the appellant father’s appeal. Judge Rivera said in a lengthy dissent that the dismissal was error because the father had “appeared through counsel during the fact-finding and dispositional hearings, as acknowledged by Family Court, and in accordance with the Family Court Act and the CPLR (see Family Ct Act § 165; CPLR 3215 [a]).”

New York has No Death Penalty, but Capital Punishment Policy Looms Large

The U.S. Supreme Court cases summarized in this issue (beginning at p. 12) include appeals that arose in death penalty cases and address both procedural and substantive questions. Capital cases drove Congressional passage of the Antiterrorism and Effective Death Penalty Act of 1996; that law’s draconian filing deadlines for people seeking relief from state convictions involving federal constitutional questions continue to thwart justice in many cases, not just capital ones. An example is found

among the Supreme Court summaries, *infra* ([Brown v Davenport](#)).

There is no viable state death penalty in New York (due to outstanding work by the Capital Defender Office [CDO] in [People v LaValle](#), the 2004 case that ended capital punishment here, leading to the end of the CDO). But federal law providing for capital punishment could result in a death sentence within the state. Justice Department action a year ago removed the threat of execution in one case in this state; at least two capital cases [reportedly](#) remain pending in the Southern District. And the lessons to be learned from CDO-style representation should extend far beyond capital cases. As noted in a [review](#) of “End of its Rope: How Killing the Death Penalty can Revive Criminal Justice,” some want to extend “the lessons learned in capital cases, including team-based defense that strives to portray the fundamental humanity” of accused people and “divert an attitude of punitiveness to an orientation favoring rehabilitation” to non-capital cases. Issues that gain relevance system wide are sometimes first raised in the context of capital punishment. A July 21, 2001, [article](#) in the *New York Times* noted the work of psychiatrist Dorothy Otnow Lewis, who spent years documenting the brain damage found in people on death row.

U.S. Supreme Court Reinstates Death Penalty for Bomber

The death penalty imposed on Dzhokhar Tsarnaev for his role in the 2013 Boston Marathon bombing was [reinstated](#) by the nation’s highest court on March 4. The Court said that the district court “did not abuse its broad discretion by declining to ask about the content and extent of each juror’s media consumption regarding the bombings.” A concurring opinion discussed the unaddressed issue of whether the circuit court, which had vacated the death sentence, has supervisory authority of district courts. Three justices dissented. Earlier this year, a [report](#) from the Brennan Center about the Biden Administration’s first year noted that campaign pledges to eliminate capital punishment, and Department of Justice statements about the arbitrariness, racial disparity, and “troubling number of exonerations” involving the death penalty, are “difficult to square” with the Administration’s position that Tsarnaev’s death sentence should be upheld.

Mass Shooting in Buffalo Incites Calls for Capital Punishment

As a Buffalo community reeled from the deaths of 10 Black people and injuries to others from a mass shooting on May 14th, an outpouring of media comments about the white teenager accused of the racist actions in question

included calls for him to face federal execution, for him to receive a prison term of life without parole (LWOP), and for his case to be the catalyst for reinstating capital punishment in New York. A May 18th [article](#) in the *Rochester Democrat and Chronicle* focused on the possibility of federal charges leading to a death penalty. It noted that federal hate crimes charges, by themselves, would not offer the possibility of a death sentence “because the legislative intent and the desire of the family of Matthew Shepard, the gay college student killed in Wyoming in 1998 whose name is on the legislation—was that federal hate crimes laws not carry the ultimate punishment.” But other charges could, the article continued. A May 16th [post](#) on *WHEC.com* reported that “[t]he Republican minority leaders of the New York State Assembly and Senate Monday introduced legislation that would bring capital punishment back under certain circumstances that would include the deadly mass shooting that happened in Buffalo on Saturday.” Different responses included that of RAPP (Release Aging People in Prison), which released a statement in opposition to calls for capital punishment or expanded LWOP, as [reported](#) on *MyTwinTiers.com*.

NY Bar Foundation Awards Grant to VDP

The New York Bar Foundation (The Foundation) has awarded NYSDA’s Veteran’s Defense Program (VDP) a grant of over \$9,000, including some funds from the Veterans Campaign, to fund the VDP’s Case Manager Assistance Project (CMAP). As indicated in the VPD’s application for the grant, the goal of CMAP “is to greatly increase our capacity to provide wrap-around support and assistance to hundreds of justice-involved veterans and service members with mental health problems,” including post-traumatic stress disorder, traumatic brain injury, military sexual trauma, depression, and/or substance abuse. “Case Managers (CMs) will provide peer-to-



peer mentoring to holistically assist veterans and their families.” CMAP will help promote the rule of law, one of The Foundation’s grant goals, by helping “under-served veterans to obtain justice and improve their lives and the lives of their families.” For example, CMs can inform veterans of their rights in matters such as seeking a discharge status upgrade that will make them eligible for services and treatment and work with the VDP’s attorneys to help public defenders provide constitutional representation to veterans by investigating clients’ “military service and any related mental health issues that may have contributed to their offense, and to seek mitigation.” CMAP will also help promote racial justice, another grant goal of The Foundation, by educating veteran clients about strategies to help address socioeconomic inequities and developing action plans involving “VA treatment, counseling, job training, and educational programs.” And CMs will provide COVID-19 relief by providing assistance via phone, mail, Zoom, etc.

NYSDA thanks The Foundation and Veterans Campaign for this grant, which will help VDP help military veterans and active personnel who suffer invisible wounds of war.

Board Passes Resolution Commending Rosenbaum

At its Jan. 21, 2022, meeting, NYSDA’s Board of Directors passed a resolution “**COMMENDING** Marty I. Rosenbaum upon the occasion of his retirement after more than 25 years at the New York State Assembly,” where he long served as counsel for the Assembly Majority. His work there included participation in the creation of the legislation that created the CDO, discussed above. NYSDA had honored Rosenbaum with its Service of Justice Award in 1993; he was NYSDA’s Director of Judicial and Legislative Services for a number of years and, earlier, a staff attorney. As the resolution noted, he has “dedicated his career to criminal justice, protecting the rights of those accused of crimes, ensuring that public defenders have the resources and funding needed to uphold those rights, and working to make the criminal legal system more equitable and fair for all” Best wishes in retirement, Marty!



Find criminal and family defense training programs listed on NYSDA’s Statewide Public Defense Training Calendar at www.nysda.org/page/NYStatewideTraining

Charlie O’Brien Remembered

NYSDA’s longtime Managing Attorney and former Executive Director, Charles F. O’Brien, was among the lawyers recognized on Apr. 11, 2022, during the Rensselaer County Bar Association’s annual memorial service. Due to the COVID-19 pandemic, the event was not held last year, and this year’s event honored lawyers who died in 2020 as well as 2021. NYSDA Senior Staff Attorney Stephanie Batcheller presented a moving eulogy about Charlie, whose death was [reported](#) with sorrow in the first 2020 issue of the *REPORT* and noted in that year’s [annual report](#).

A private celebration of Charlie’s life was held in early May of this year, with many family members and friends in attendance. Charlie’s influence remains, and he is much missed. ☹️



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.

[Guerrant v United States](#), No. 21-5099 (1/10/2022)

SENTENCING COMMN. | NO QUORUM

ILSAPP¹: Judges Sotomayor and Barrett issued a statement regarding the denial of a cert. petition in this case. Defendants who have two prior felony convictions for a "controlled substance offense" qualify as career offenders under Federal Sentencing Guidelines and generally face far higher sentencing ranges. The instant petition implicated a split among the Circuits over the definition of "controlled substance offense." To ensure fair and uniform application of the Guidelines, the Sentencing Commission—which has not had a quorum for three years—must resume its key function in the criminal justice system and address this division.

[Hemphill v New York](#), No. 20-637 (1/20/2022, revised 1/21/2022)

RIGHT OF CONFRONTATION -
HEARSAY/OPENING THE DOOR

LASJRP²: The State charged Nicholas Morris with

murder, but after trial commenced, he agreed to a plea deal. Years later, the State prosecuted petitioner Darrell Hemphill for the same murder. At his trial, Hemphill blamed Morris, and he elicited undisputed testimony from a prosecution witness that police had recovered 9-millimeter ammunition from Morris' nightstand. Morris was outside the United States and not available to testify. The trial court allowed the State to introduce parts of the transcript of Morris' plea allocution as evidence to rebut Hemphill's theory that Morris committed the murder. The court reasoned that Hemphill's arguments and evidence had "open[ed] the door" to the introduction of these testimonial out-of-court statements because they were reasonably necessary to correct the misleading impression Hemphill had created.

The Supreme Court holds that the admission of the plea allocution violated Hemphill's Sixth Amendment right to confront the witnesses against him. Hemphill did not forfeit his confrontation right merely by making the plea allocution arguably relevant to his theory of defense.

For Confrontation Clause purposes, it was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the uncontroverted plea evidence, nor was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. The Confrontation Clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court. Courts may not overlook the Sixth Amendment's command, no matter how noble the motive.

The Court rejects the State's contention that the "opening the door" rule is a mere "procedural rule" that "treats the misleading door-opening actions of counsel as the equivalent of failing to object to the confrontation violation," and that the rule limits only the manner of asserting the confrontation right, not its substantive scope. States do have flexibility to adopt reasonable procedural rules governing the exercise of a defendant's right to confrontation. However, the door-opening principle is not a procedural rule; rather, it is a substantive principle of evidence that dictates what material is relevant and admissible in a case.

Moreover, if a court admits evidence before its misleading or unfairly prejudicial nature becomes apparent, it generally retains the authority to strike it, or issue a limiting instruction as appropriate.

In a concurring opinion, Justices Alito and Kavanaugh note that the traditional rule of completeness (i.e., if a party introduces all or part of a declarant's statement, the opposing party is entitled to introduce the remainder of that statement or another related statement by the same declarant, regardless of whether the statement is testimonial or there was a prior opportunity to confront the declarant), which has not been applied in this case, fits

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

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

US Supreme Court *continued*

comfortably within the concept of implied waiver. By introducing part or all of a statement made by an unavailable declarant, a defendant has made a knowing and voluntary decision to permit that declarant to appear as an unopposed witness.

Ortiz v Breslin, No. 20-7846 (2/22/2022)**SOTOMAYOR | SARA**

ILSAPP: In a statement regarding the denial of cert., Justice Sotomayor opined that New York's Sexual Assault Reform Act is constitutionally suspect, as ably observed by Judge Rivera's dissent in the underlying NY Court of Appeals decision. A level-three sex offender had to show that, upon release, he/she would not reside within 1,000 feet of a school. SARA thus led to indefinite incarceration for some indigent sex offenders, since finding compliant housing was practically impossible in NYC. At the very least, the petitioner held a liberty interest in release upon his maximum expiration date. No empirical support established the effectiveness of residency requirements in reducing recidivism. On the contrary, such mandates made it more difficult for sex offenders to find suitable housing and reintegrate into the community. The Constitution prohibited the deprivation of liberty based solely on speculation and fear.

Holcombe v Florida, No. 21-53 (2/28/2022)**ACTUAL CONFLICT | DISSENT**

ILSAPP: Justice Sotomayor dissented from the denial of cert. One attorney jointly represented four codefendants in a criminal case. Two defendants accepted plea deals and agreed to testify against the others—the petitioner and his father. That created a nonwaivable conflict of interest, yet the trial court refused to let counsel withdraw from representing the cooperating codefendants. Counsel's divided loyalties may have compromised his cross-examination of the cooperating witnesses, to the petitioner's detriment.

FBI v Fazaga, No. 20-828 (3/4/2022)

"In this case, we consider the relationship between the longstanding 'state secrets' privilege and a provision of the Foreign Intelligence Surveillance Act of 1978 (FISA), ... that provides a procedure under which a trial-level court or other authority may consider the legality of electronic surveillance conducted under FISA and may thereafter order specified forms of relief. See §1806(f). This case was brought in federal court by three Muslim residents of Southern California who allege that the Federal Bureau of Investigation illegally surveilled them and others under

FISA because of their religion. In response, the defendants (hereinafter Government) invoked the state secrets privilege and asked the District Court to dismiss most of respondents' claims because the disclosure of counterintelligence information that was vital to an evaluation of those claims would threaten national-security interests.

The District Court agreed with the Government's argument and dismissed the claims in question, but the Ninth Circuit reversed, reasoning that §1806(f) "displaced" the state secrets privilege. We now hold that §1806(f) has no such effect, and we therefore reverse."

United States v Tsarnaev, No. 20-443 (3/4/2022)

The Court of Appeals improperly vacated the capital sentences imposed when the defendant was convicted of participating in the Boston Marathon bombing. Neither the District Court's refusal to ask every prospective juror what they had learned about the case from the media nor its refusal to allow the defendant to introduce evidence about ideologically inspired murders tied to the defendant's dead brother to show that the brother had induced the defendant to participate in the bombing were error requiring a new sentencing phase.

Concurrence: [Barrett, JJ] The supervisory power under which the Circuit Court imposed a rule requiring district courts "to ask media-content questions on request in high-profile prosecutions" conflicts with district courts' broad discretion to manage jury selection.

Dissent: [Breyer, JJ] "[T]he Court of Appeals acted lawfully in holding that the District Court should have allowed" introduction in the sentencing phase of the evidence showing the brother's involvement in prior ideologically-inspired murders. This case provides just one more example of the problems inherent in death penalty cases.

United States v Zubaydah, No. 20-827 (3/4/2022)

The Government provided sufficient support for its claim that disclosure of information about the location of an overseas detention site would harm national security. The Ninth Circuit decision finding that public disclosure of the information placed it outside the state secrets privilege is reversed.

Wooden v United States, No. 20-5279 (3/7/2022)**SENTENCE - PREDICATE OFFENSES
STATUTES**

US Supreme Court *continued*

LASJRP: In the course of one evening, defendant burglarized ten units in a single storage facility. He pleaded guilty to ten counts of burglary—one for each storage unit he had entered. The courts below concluded that those convictions were enough to subject defendant to enhanced criminal penalties under the Armed Career Criminal Act, which mandates a 15-year minimum sentence for unlawful gun possession when the offender has three or more prior convictions for violent felonies like burglary “committed on occasions different from one another.”

The Supreme Court concludes that defendant’s prior convictions were not for offenses occurring on different occasions. Convictions arising from a single criminal episode, in the way these convictions did, can count only once under ACCA.

An “occasion” means an event or episode, which may include temporally discrete offenses. Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion, as opposed to offenses separated by substantial gaps in time or significant intervening events. Proximity of location is also important; the further away crimes take place, the less likely they are components of the same criminal event. And the character and relationship of the offenses may make a difference: The more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion. Here, every relevant consideration shows that defendant burglarized ten storage units on a single occasion, even though his criminal activity resulted in double-digit convictions.

Justice Gorsuch asserts that “the key to this case does not lie as much in a multiplicity of factors as it does in the rule of lenity. Under that rule, any reasonable doubt about the application of a penal law must be resolved in favor of liberty. Because reasonable minds could differ (as they have differed) on the question whether [defendant’s] crimes took place on one occasion or many, the rule of lenity demands a judgment in his favor.” Justice Sotomayor agrees with Justice Gorsuch generally about the role of the rule of lenity, while Justice Kavanaugh agrees with Justice Gorsuch about the importance of fair notice in federal criminal law but asserts that concern for fair notice is better addressed by other doctrines that protect criminal defendants against arbitrary or vague federal criminal statutes, such as *mens rea*.

Ramirez v Collier, No. 21-5592 (3/24/2022)

EXECUTION | PRAYER

The petitioner, a death-row inmate, brought a § 1983 action alleging that prison officials’ refusal to permit his pastor to lay hands on him and pray for him in the execution chamber violated his rights under the First Amendment and federal statute. A Texas District Court denied a stay of execution, and the Fifth Circuit affirmed. The U.S. Supreme Court (Chief Justice Roberts) granted cert. and stayed execution. The inmate was likely to succeed on the merits. Prayer was significant in the petitioner’s faith tradition and had for centuries been allowed at executions. Indeed, during the Revolutionary War, Washington ordered that prisoners under sentence of death be attended by a chaplain, and conspirators in Lincoln’s assassination were accompanied by spiritual advisors right before death. Absent injunctive relief, the petitioner would likely suffer irreparable harm because he would be unable to engage in protected religious exercise in the final moments of life.

Thompson v Clark, No. 20-659 (4/4/2022)

FAVORABLE TERMINATION | NO CONVICTION

ILSAPP: The defendant spent two days in jail after a relative mistook his infant daughter’s rash for signs of sexual abuse. Three months later, charges were dismissed without any explanation by the prosecutor or judge. District Court dismissed the ensuing civil rights action. The Second Circuit affirmed, but the Supreme Court reversed, in an opinion by Justice Kavanaugh. To establish favorable termination of a criminal prosecution in a 42 USC §1983 action asserting a Fourth Amendment claim for malicious prosecution, a plaintiff need only show that his prosecution ended without a conviction—not with some affirmative indication of innocence. Such holding was consistent with the meaning of “favorable termination” at the time of enactment of the § 1983 predecessor statute. The question of whether a defendant was wrongly charged could not depend on whether the prosecutor or court stated why the prosecution was terminated. That would paradoxically foreclose a claim when the prosecution case was weak and was dismissed without explanation before trial, but allow a claim when the evidence was strong and the case went to trial. On remand, the lower court was directed to determine whether malicious prosecution caused the government’s seizure of the defendant. Justice Alito dissented, joined by Thomas and Gorsuch.

Brown v Davenport, No. 20-826 (4/21/2022)

The Circuit Court erred in ruling that an individual seeking habeas relief from a state court conviction who meets the prejudicial effect test of *Brecht v Abrahamson* is entitled to relief without also meeting the test set out by Congress in the Antiterrorism and Effective Death Penalty Act of 1996.

US Supreme Court *continued***Patel v Garland, No. 20-979 (5/16/2022)**

“With an exception for legal and constitutional questions, Congress has barred judicial review of the Attorney General’s decisions denying discretionary relief from removal. We must decide how far this bar extends—specifically, whether it precludes judicial review of factual findings that underlie a denial of relief. It does.” “Federal courts lack jurisdiction to review facts found as part of discretionary-relief proceedings under [8 USC] §1255 and the other provisions enumerated in §1252(a)(2)(B)(i).”

Dissent: [Gorsuch, J] “Today, the Court holds that a federal bureaucracy can make an obvious factual error, one that will result in an individual’s removal from this country, and nothing can be done about it.” This “is such an unlikely assertion of raw administrative power that not even the agency that allegedly erred, nor any other arm of the Executive Branch, endorses it.”

**IMMIGRATION ISSUES
CRUCIAL TO CLIENTS!*****Talk to Your RIAC***

The *Patel* case above is a reminder of the vulnerability of people living in the U.S. who were born in other countries. If they come in contact with the criminal or family legal systems, their vulnerability increases. Defenders are reminded to ask all clients where they were born and to contact the Regional Immigration Assistance Center (RIAC) for their area if the client was not born in the U.S. RIAC Contact information is available on NYSDA’s [Criminal/Family Court Immigration Resources](#) webpage and the NYS Office of Indigent Legal Services [RIAC General Information](#) webpage.

New York State Court of Appeals

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

People v Lashley, 37 NY3d 1140 (12/14/2021)

“The order of the Appellate Division should be reversed and case remitted to that Court for consideration of the facts and issues raised but not determined upon appeal to that Court.

Because defendant failed to challenge the CPL 400.21 predicate felony statement filed by the People in the court of first instance, her claim that her sentence was illegal due to the failure to include the tolling periods in that document did not present a question of law for purposes of appellate review (*People v Pellegrino*, 60 NY2d 636 [1983]). Defendant’s claim was not reviewable under the narrow illegal sentence exception to the preservation requirement because it was not “readily discernible from the trial record” that the sentence the court imposed was not within the permissible range’ ...”

People v Pietrocarlo, 37 NY3d 1142 (12/14/2021)**ASSAULT - ACTING IN CONCERT**

LASJRP¹: The victim testified that defendant—the victim’s daughter—and several other members of the victim’s family repeatedly kicked him from “both sides” after he fell to the ground. Although the victim could not specifically identify who delivered each blow, he did identify the assailants at trial.

The Court of Appeals, with one judge dissenting, concludes that this evidence, and the circumstantial proof, was sufficient to permit a reasonable factfinder to infer that defendant shared a community of purpose with the other assailants, and was sufficient to support a verdict finding defendant guilty of assault in the second degree under a theory of accessorial liability.

People v Wilkins, 37 NY3d 371 (12/14/2021)**APPEAL - PRESERVATION**

LASJRP: When a defendant is not present at a sidebar conference during which the court actively solicits answers from a prospective juror which relate to issues of bias or hostility, *People v. Antommarchi* (80 N.Y.2d 247 [1992]) requires a new trial in the absence of the defendant’s waiver of the right to be present. The defendant’s protest in the trial court is generally not required.

In a 4-3 decision, the Court of Appeals holds that defendant, having explicitly waived his right to be present at sidebars in the middle of the voir dire proceeding involving a prospective juror who was ultimately struck when a co-defendant exercised a peremptory strike, is not entitled to a new trial based on his absence from a pre-waiver sidebar conference with that same prospective juror, given his acquiescence in the post-waiver voir dire after being invited to express any objection he may have had regarding the pre-waiver sidebar conference.

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

NY Court of Appeals *continued*

The dissenting judges assert that nothing defendant or his counsel said after the prior Antommarchi violation was brought to their attention constituted an express waiver of the Antommarchi violation that had already occurred; that the trial court could have obtained an express, retroactive waiver from defendant on the record, confirming that defendant was waiving the Antommarchi violation that had already occurred before he was informed of his right to attend sidebar conferences; that defendants are now expected to object to Antommarchi violations of which they are made aware in order to preserve their claims for appellate review; and that the Court's holding will no doubt be extended to other violations of a defendant's fundamental right to be present at material stages of trial, despite the majority's insistence that this is a "unique" case.

[Anderson v Anderson](#), 37 NY3d 444 (12/16/2021)

NUPTIAL AGREEMENT | TOO LATE

ILSAPP²: Under Domestic Relations Law § 236 (B) (3), the acknowledgment of a nuptial agreement must be contemporaneous—although not necessarily simultaneous—with the signing of the agreement. Permitting an unreasonably delayed commitment would be at odds with the purpose of having parties consider terms designed based on their lives at the time of execution and their predictions of their future together—not on events that transpired years later, including economic success or failure. This wife signed and acknowledged the agreement the month after the wedding, while the husband delayed nearly seven years. His acknowledgment was ineffective, and the agreement was unenforceable. The only remedy was for the parties to reaffirm the agreement's terms, which did not occur.

[People v Lamb](#), 37 NY3d 1174 (12/16/2021)

SEX TRAFFICKING | NEW TRIAL

ILSAPP: Upon the defendant's appeal from a First Department order, the Court of Appeals reversed his sex trafficking convictions and ordered a new trial. The sex trafficking statute had two distinct but linked elements—by an enumerated coercive act, the offender must advance, or profit from, prostitution. The trial court's supplemental instruction erroneously severed the link between the elements. Judge Singas concurred, opining that the incorrect instruction prejudiced the defendant,

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

and exploring the arguments regarding territorial jurisdiction. Judge Wilson wrote a separate concurrence, observing that the fundamental question was whether New York had jurisdiction to prosecute a defendant for sex trafficking without showing that the coercive conduct used against a particular victim resulted in advancing or profiting from prostitution in NY. Judge Fahey dissented. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant.

[People v Sposito](#), 37 NY3d 1149 (1/6/2022)

EFFECTIVE ASSISTANCE | NO SUPPRESSION | NO EXPERT

ILSAPP: The defendant appealed from a Third Department order, affirming Albany County Supreme Court's denial, after an extensive hearing, of his CPL 440.10 motion to vacate a judgment convicting him of 1st degree rape and another crime. The Court of Appeals affirmed. The defendant failed to prove that he received ineffective assistance. Reasonably, counsel had tried to disprove the element of consent and had waived a *Huntley* hearing. The defendant's statements showed that he consistently maintained that the acts in question were consensual. As to counsel's failure to use or call an expert, the COA majority discerned a reasonable strategic choice to focus the jury on the chosen defense and noted key concessions extracted from the People's experts. Judge Wilson dissented, invoking the reasoning of a Third Department dissenter, who opined that the defendant was deprived of meaningful representation. At the 440 hearing, defense counsel admitted that testimony about the victim's injuries from the sexual assault nurse examiner (SANE) was "particularly damaging." Yet counsel failed to consult or call any experts to undermine the proof. Among other things, he did not use a toxicologist to demonstrate that, at the time of the encounter, the victim's BAC was lower than stated and that she was thus not in a stupor or unconscious.

[People v Ortiz](#), 37 NY3d 1157 (1/11/2022)

PRE-MIRANDA ERROR | HARMLESS

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree CPW after a jury trial. The appeal brought up for review an order denying suppression. The First Department affirmed the judgment. After his arrest but before *Miranda* warnings, the defendant initiated a conversation with police and provided information about criminal activity by other persons in other matters in the hope of receiving lenient treatment. When the defendant spontaneously made a self-incriminating remark, he was *Mirandized*. On appeal, he contended that the police

NY Court of Appeals *continued*

engaged in an improper pre-*Miranda* custodial interrogation. The First Department held that the unwarned statement did not result from questioning likely to induce an inculpatory statement. That was error. In the instant decision, the Court of Appeals found that the defendant's unwarned statement should have been suppressed. However, given the overwhelming evidence of guilt, the error was harmless. The defendant also contended that his videotaped statement made 24 hours later was not attenuated from the earlier statement. But the issue was unpreserved for review. The COA affirmed the challenged Appellate Division order upholding the judgment of conviction.

People v Johnson, 37 NY3d 1166 (2/10/2022)

"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 that the appeal waiver was invalid because the plea court conflated the right to appeal with those rights automatically forfeited by a guilty plea, defendant's appeal waiver did not foreclose consideration of his suppression claim"

People v Duarte, 37 NY3d 1218 (2/15/2022)**RIGHT TO COUNSEL - WAIVER/PRO SE REPRESENTATION**

LASJRP: During a colloquy with the court, defendant renewed the unsuccessful application to relieve assigned counsel made at his prior appearance, claiming that counsel was "ineffective." The court denied the application, and defendant immediately responded, "I would love to go pro se." A Court of Appeals majority agrees with the Appellate Term that defendant did not clearly and unequivocally request to proceed pro se. In a footnote, the majority observes that the court did not clearly deny the purported request, and that neither defendant nor defense counsel sought any decision on that. "Both factors suggest that the request was not considered genuine in the first instance by those present in the courtroom who heard the statement."

Judge Rivera, joined by Judge Wilson, dissents, asserting that "[t]he import of these seven words"—"I would love to go pro se"—"is obvious: defendant wanted to represent himself." The fact that this request was made in the context of expressing defendant's dissatisfaction with counsel did not make the request any less clear or suggest equivocation on defendant's part.

Matter of Endara-Caicedo v Vehicles, 38 NY3d 20 (2/15/2022)**"SUCH CHEMICAL TEST" | TWO MEANINGS**

ILSAPP: The defendant appealed from a First Department order affirming the dismissal of his CPLR Article 78 petition. The Court of Appeals affirmed. In an administrative license-revocation hearing, the refusal of a motorist arrested for DUI to submit to a chemical test could be used against him—even if such refusal occurred more than two hours after arrest. *See* VTL § 1194 (2) (a) (1) (motorists deemed to consent to test under two-hour rule). The Chief Judge authored the majority opinion. Judge Rivera dissented. The chemical test authorized in § 1194 (2) (a) was the test cross-referenced in paragraphs (c) and (f) regarding administrative hearings and criminal proceedings, respectively. There was no textual basis to conclude that the "such chemical test" meant something different in those paragraphs. For decades, New York courts and the DMV found that the term had the same meaning in both provisions.

People v Burgos, 38 NY3d 56 (3/17/2022)**CONSTRUCTIVE SUSPENSION | REJECTED**

ILSAPP: The defendant appealed from a First Department order affirming the denial of his CPL 440.10 motion to set aside a judgment convicting him of 1st degree assault. In an opinion by Judge Troutman, a unanimous Court of Appeals held that the defendant was not deprived of effective assistance when his attorney failed to disclose that he was suspended in the Second Circuit for neglecting criminal cases. Defense counsel had no such duty of disclosure. Moreover, counsel was not constructively suspended from the practice of law in New York at the time of trial, where the First Department later imposed reciprocal discipline. Defenses and mitigation evidence in opposition to reciprocal discipline could be presented, so discipline in New York was not a foregone conclusion.

Matter of Irelynn S., 38 NY3d 933 (3/17/2022)**TERMINATION OF PARENTAL RIGHTS - DEFAULTS**

LASJRP: In this termination of parental rights proceeding, a Court of Appeals majority concludes that the father has failed to raise any basis for reversal and he does not dispute the Appellate Division's determination that his failure to appear constituted a default.

NY Court of Appeals *continued*

Judge Rivera, dissenting along with Judge Wilson, asserts that there was no default, and thus the family court's order is appealable, because the father appeared through counsel during the fact-finding and dispositional hearings. CPLR 3215(a) provides that a "default" occurs when a party "fail[s] to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed." With limited exceptions, under CPLR 321(a) "[a] party ... may prosecute or defend a civil action in person or by attorney." Thus, "it is unsurprising that the Family Court Act Practice Commentaries conclude that 'unless the party is ordered by the court to appear, a failure to appear in person for any reason at a hearing cannot legally be deemed a default' (Merril Sobie, 2017 Supp Practice Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 165)." Here, as permitted under CPLR 321(a), the father appeared at the fact-finding hearing through counsel. The Family Court proceeded to a fact-finding hearing on the disputed termination petition, rather than by inquest, and the agency did not move for entry of a default judgment, as would have been required for the Court to proceed by inquest (see CPLR 3215[b]). The fact that counsel stayed silent during the proceedings—a tactical choice—does not support a finding that the father defaulted. At the hearing, counsel did not seek to be relieved as attorney for the father, nor did counsel state that he was unable to diligently or competently represent the father.

The Fourth Department's opinion (188 A.D.3d 1744) states: "The father failed to appear at the dispositional hearing and his attorney, although present, elected not to participate in the father's absence. Under those circumstances, we conclude that the father's refusal to appear constituted a default, and we therefore dismiss the appeal...."

People v Bush, 2022 NY Slip Op 01956 (3/22/2022)

DISSENT | PLEA | PRESERVATION

ILSAPP: The defendant appealed from an order of the Second Department affirming a judgment convicting him of 7th degree CPCS. At issue was whether he was required to preserve his claim that his guilty plea was not knowing, voluntary, and intelligent where, until sentence was pronounced, he was not made aware that he would be subject to a one-year conditional discharge. The Court of Appeals affirmed, in an opinion by Chief Judge DiFiore. Judge Rivera dissented, joined by Judges Wilson and Troutman. The defendant had pleaded guilty to a reduced charge in exchange for 20 days' community service. In error, the lower court imposed additional year-long conditions that had not been mentioned. The defendant

had no chance to preserve his claim by objecting, prior to sentencing, that he was denied the benefit of the bargain. Since he had served his sentence, the indictment should be dismissed.

Ferreira v City of Binghamton, 2022 NY Slip Op 01953 (3/22/2022)

DISSENT | NEGLIGENCE | NO-KNOCK WARRANTS

ILSAPP: Answering a question certified by the Second Circuit, the New York Court of Appeals held that, when police planned and executed a no-knock search warrant at an identified residence, there arose a special duty to individuals there. The federal appellate court had sought guidance as to whether to reinstate a \$3 million jury verdict for the plaintiff, who was not the target of the raid and was shot in the stomach and seriously injured by officers serving a no-knock warrant. Judge Singas wrote for the majority. Judge Wilson authored a dissent in which Judge Rivera concurred. The special duty doctrine did not *restrict*, but instead *expanded* upon, when the government could be liable for negligence, absent an ordinary duty of care. Typically, the doctrine came into play when the government undertook a duty it would not otherwise have by acting to protect a specific individual from harm by a third party. Under settled negligence doctrine, municipalities had an ordinary duty of reasonable care in planning and executing no-knock warrants. The majority's opinion made New York a regressive outlier. Other states did not require a special duty where a governmental actor directly harmed the plaintiff.

People v Carman, 2022 NY Slip Op 02580 (4/21/2022)

"Assuming, without deciding, that defendant was entitled to the effective assistance of counsel in this proceeding pursuant to article 6-C of the Correction Law, defendant failed to demonstrate that he was deprived of meaningful representation (*see People v Benevento*, 91 NY2d 708, 712 [1998]). Defendant's remaining contentions have been considered and are without merit.

On review of submissions pursuant to section 500.11 of the Rules, order affirmed, without costs, and certified question not answered as unnecessary."

Matter of Mental Hygiene Legal Serv. v Delaney, 2022 NY Slip Op 02578 (4/21/2022)

MENTAL HEALTH/DEVELOPMENTAL DISABILITY SERVICES

NY Court of Appeals *continued*

LASJRP: The child, a 16-year-old with developmental disabilities, was admitted into the emergency room of respondent Champlain Valley Physicians Hospital after an incident at school during which she became unmanageable. When the hospital determined that the child did not require in-patient psychiatric or medical care and sought to discharge her, her mother declined to take her home because of concerns for the safety of the child's sibling. The school district sought to remedy the situation by placing the child in a residential school, but no such school could accommodate her at that time. Respondent New York State Office for People with Developmental Disabilities tried to find the child a temporary, residential placement at a suitable facility, but none had appropriate accommodations for children. OPWDD then increased the funds allocated to the child, who had previously been determined eligible to receive in-home services under the Medicaid waiver program, so that her mother could hire additional in-home services, but no qualified local providers were immediately available. During the several weeks that a placement or provider for in-home services was sought, the child remained in the emergency room.

Petitioner Mental Hygiene Legal Services, on behalf of the child, commenced this combined CPLR articles 70 and 78 special proceeding and declaratory judgment action against the hospital, OPWDD, and respondent New York State Department of Health. Petitioner sought the child's immediate discharge from the emergency room; a "safe discharge plan upon her release;" a determination that "it is arbitrary and capricious for OPWDD and DOH to fail to provide community habilitation and respite services" to the child; a declaration that the child's "confinement in a segregated, isolated emergency room" violated her statutory rights; to enjoin respondents from "segregat[ing]" the child in the emergency room and to require that the child be afforded community habilitation and respite services "with reasonable promptness" under the Medicaid Act to "enable her to be discharged from the emergency room;" and to seal the records of this proceeding. In essence, the petition alleged that OPWDD's service model and programs for children were inadequate.

The Court of Appeals, noting that the matter is moot because of the child's ultimate discharge and placement, declines to apply the exception to the mootness doctrine (as the Appellate Division did below), noting the intervening material alterations of the service programs challenged in the petition.

Judge Rivera dissents, asserting, *inter alia*, that "respondents cannot implement their policy choice—here, delivery of Medicaid services to children with complex developmental disabilities—by administering the program in such a way as to leave significant gaps in service delivery, a gap that results in the very confinement that federal and state law is designed to replace with community-based services."

People v Dawson, 2022 NY Slip Op 02772 (4/26/2022)

"[T]here is support in the record for the lower courts' determination that defendant—whose inquiries and demeanor suggested a conditional interest in speaking with an attorney only if it would not otherwise delay his clearly-expressed wish to speak to the police—did not unequivocally invoke his right to counsel while in custody. That mixed question of law and fact is therefore beyond further review by this Court (*id.*; see *Mitchell*, 2 NY3d at 276). Defendant's remaining contentions are without merit." [Footnote omitted.]

Dissent: [Wilson, JJ] "A week after an alleged sexual offense occurred, the police arrested 19-year-old Malik Dawson. It is clear from videotaped record of the interrogation that Mr. Dawson unequivocally and repeatedly asked to contact his lawyer. Instead, he was never given the chance to do so, and eventually consented to waive his Miranda rights. If the video were not part of a sealed record, you could see this for yourself. Instead, you will have to bear through what my transcription of the video shows. ... Mr. Dawson unequivocally invoked his right to counsel—the record supports no other conclusion. As is clear from the quoted portion of the colloquy with the detective, he twice said he wanted to call his lawyer, and the detective twice expressly stated that he understood Mr. Dawson had asked to call counsel and therefore the detective could no longer speak to Mr. Dawson. Additionally, the detective then told Mr. Dawson to wait while the detective retrieved Mr. Dawson's phone so he could call counsel. ... This Court has the power to advance police interrogation by eroding, and eventually wiping away, the right to counsel, but should we?"

NY Court of Appeals *continued*

[People v Easley](#), 2022 NY Slip Op 02770 (4/26/2022)

“The order of the Appellate Division should be affirmed. It was an abuse of discretion for the trial court to admit the results of DNA analysis conducted using the Forensic Statistical Tool without first holding a *Frye* hearing” The error here was harmless.

Dissent: [Rivera, JJ] “A unanimous Court agrees with defendant that, under our prior holdings ... the trial court abused its discretion as a matter of law in admitting the Forensic Statistical Tool (FST)-derived DNA results without first holding a *Frye* hearing. ... The evidence of defendant’s guilt of criminal possession of a weapon was not overwhelming and the FST DNA evidence was the strongest evidence of possession against him. Therefore, even under the nonconstitutional standard, there was a significant probability that the error infected the verdict and, accordingly, was not harmless.”

[People v Wakefield](#), 2022 NY Slip Op 02771 (4/26/2022)

“This appeal primarily concerns the admissibility of DNA mixture interpretation evidence generated by the TrueAllele Casework System. We conclude that Supreme Court did not abuse its discretion in finding, following a *Frye* hearing, that TrueAllele’s use of the continuous probabilistic genotyping approach to generate a statistical likelihood ratio—including the use of peak data below the stochastic threshold—of a DNA genotype is generally accepted in the relevant scientific community. We also hold that there was no error in the court’s denial of defendant’s request for discovery of the TrueAllele software source code in connection with the *Frye* hearing or for the purpose of his Sixth Amendment right to confront the witness against him at trial.”

Dissent: [Rivera, JJ] “Here, the court erred in admitting the TrueAllele results but the error, either alone or considered with defendant’s claims of other alleged errors, was harmless. ... Defendant is correct that TrueAllele’s proprietary algorithm was not generally accepted because its source code had not been tested and assessed as reliable by independent third parties within the relevant forensic scientific community. Although Dr. Perlin has since offered to release the source code in other criminal proceedings, at the time of the *Frye* hearing here he asserted that TrueAllele’s source code was a trade secret and refused to turn it over to defendant” [Footnote omitted.] “[I]t remains an open question in this Court whether a defendant should be granted access to a proprietary source code under a protective order.”

First Department

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

[Matter of R.B. v New York State Office of Children and Family Services](#), 199 AD3d 429 (1st Dept 11/4/2021)

ABUSE/NEGLECT - REQUEST TO AMEND INDICATED REPORT/RIGHT TO CALL WITNESSES

LASJRP¹: The First Department upholds an OCFS determination rejecting petitioners’ challenge to an indicated report finding abuse of their teenage daughter by the father and maltreatment by both parents, noting, inter alia, that petitioners were not deprived of their right to due process because their request to have the child testify was denied. They were allowed to present the child’s denials and alternative narratives given to ACS, and there are policy considerations that favor the avoidance of re-traumatization and coaching by family members.

[Coleman v Annucci](#), 199 AD3d 446 (1st Dept 11/9/2021)

PAROLE REVOCATION | EXCESSIVE

ILSAPP²: An Article 78 petition challenged the respondent’s determination revoking the petitioner’s parole. The First Department annulled the penalty and remitted. The respondent abused its discretion when it imposed an assessment that amounted to the full balance of the petitioner’s post-release supervision—more than two times greater than his underlying prison term. On this record, the maximum possible penalty was reincarceration for a period no greater than 30 months. The Legal Aid Society of NYC (Naila Siddiqui, of counsel) represented the appellant.

[People v Campanioni](#), 199 AD3d 474 (1st Dept 11/9/2021)

PREDICATE | NOT EQUIVALENT

ILSAPP: The defendant appealed from an order of New York County Supreme Court, which denied his CPL 420.20 motion to set aside his sentence. The First Department reversed. The defendant’s sentence as a second felony offender was based on a nonqualifying predicate.

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

First Department *continued*

His federal drug conviction under 21 USC § 841 (a) (1) was not equivalent to a conviction under Penal Law § 220.39, which required a particular knowledge of the drug type actually possessed. The Office of the Appellate Defender (Catherine Poor, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Rodriguez, 199 AD3d 469 (1st Dept 11/9/2021)**APPEAL | 40 YEARS LATE**

ILSAPP: The defendant appealed from a 1982 judgment of New York County Supreme Court, convicting him of attempted 1st degree murder and 2nd degree CPW and sentencing him to 20 years to life. The First Department reversed and dismissed the indictment. The defendant was deprived of his right to a meaningful appeal in light of the nearly 40-year delay in its perfection, during which time he remained incarcerated. He timely filed a notice of appeal and sought assignment of counsel. But appellate counsel took no steps to file the appeal, be relieved, or communicate with the defendant. The attorney was later removed from the panel for neglecting cases and was disbarred on other grounds. The defendant—a Cuban refugee with psychiatric issues—did not know of such events or that his appeal was never perfected until a fellow inmate delved into the matter. The trial court record had been destroyed, some transcripts were lost, and a reconstruction proceeding would be pointless. The Center for Appellate Litigation (Ben Schatz, of counsel) represented the appellant. (Supreme Ct, New York Co)

Matter of Liu v Ruiz, 200 AD3d 68 (1st Dept 11/9/2021)**CHILD SUPPORT | MANDAMUS**

ILSAPP: The petitioner appealed from a judgment of New York County Supreme Court dismissing as moot her petition against the respondent, the Administrative Judge of NYC Family Courts. The First Department reversed. Family Court Act § 439 (e) set forth a clear legal right to a Family Court ruling, within 15 days, as to objections to a Support Magistrate's child support order. When Family Court failed to rule 34 days after the father's rebuttal, the mother sought mandamus relief to compel a decision. The Article 78 proceeding was dismissed after Family Court rendered a decision. The *Hearst Corp. v Clyne* (50 NY2d 707) mootness exception applied in light of the significant issue presented, which was likely to be repeated and evade review. Moreover, having initiated a proceeding that catalyzed a favorable outcome, the mother was entitled to attorney's fees under the State EAJA. Rene Kathawala represented the appellant. (Supreme Ct, New York Co)

**Wiggins v City of New York, 201 AD3d 22
(1st Dept 11/16/2021)****CIVIL ACTIONS - NOTICE OF CLAIM**

LASJRP: After the Court of Appeals overturned plaintiff's conviction, plaintiff filed a notice of claim against defendant City of New York, and later sued the City, together with named and unnamed employees of the New York Police Department, asserting causes of action for false arrest, malicious prosecution and respondeat superior. The City moved to dismiss the complaint against the NYPD defendants, arguing that plaintiff failed to satisfy General Municipal Law § 50-e because he did not serve a notice of claim that named the NYPD defendants or John/Jane Doe placeholders. The court granted the motion.

The First Department, departing from its prior decisions, joins the three other departments in holding that § 50-e does not mandate the naming of individual municipal employees in a notice of claim. Providing the municipal defendant with the statutorily required elements—the nature of the claim, the time, place and manner in which the claim arose, and the alleged injury—without naming the individual municipal employees involved does not prevent the defendant from adequately investigating the claim. The municipal defendant is in at least as good a position as the plaintiff to identify and interview the individual municipal employees involved in the claim. (Supreme Ct, New York Co)

People v Santana, 199 AD3d 491 (1st Dept 11/16/2021)**VIDEO | GUILT BY ASSOCIATION**

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of attempted 1st degree robbery. The First Department reversed and ordered a new trial. The defense moved to set aside the verdict after a juror revealed that he and other jurors had seen a YouTube video of the codefendant punching a man, thereby causing his death. In denying the CPL 330.30 motion after a hearing, the trial court found that the defendant did not demonstrate that the recording had an impact. That was error. The video created a substantial risk of prejudice to the defendant by allowing jurors to perceive the codefendant—and by association, the defendant—as having a propensity for violence. The Legal Aid Society, NYC (David Crow and Matthew Vasilakos, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

**Whitfield v NYC ACS, 199 AD3d 548
(1st Dept 11/18/2021)****SEEING INJUSTICE | NO JOB**

First Department *continued*

ILSAPP: The petitioner appealed from a judgment of NY County Supreme Court, which denied his Article 78 petition to annul a determination by the NYC Administration for Children's Services declining to hire him as a youth development specialist. In a 2003 essay, the petitioner criticized unfairness in the criminal justice system, and such cynical views might have been disruptive in the job. Further, while possessing group counseling experience, the petitioner lacked a background in one-on-one sessions. He was not rejected because of his criminal conviction. Indeed, ACS regarded rehabilitated persons as credible messengers for at-risk youth and often hired them. (Supreme Ct, New York Co)

**Phillip D.S. v Shamel B., 199 AD3d 538
(1st Dept 11/18/2021)**

FAMILY OFFENSE | REINSTATED

ILSAPP: The petitioner, by his guardian, appealed from an order of New York County Family Court, which granted the respondent's motion to dismiss an Article 8 petition. The First Department reversed. The petitioner met his prima facie burden of showing that a family offense occurred through the child's testimony that he was beaten by "Shamel" with a belt on various occasions. However, the Referee found that there was no showing that the respondent in this case was the same person named "Shamel" who committed the alleged offenses. That was error, given the child's testimony stating that she lived with the mother and Shamel in Virginia and listing the names of Shamel's children. On appeal, the respondent did not challenge the Referee's determination that Family Court could exercise subject matter jurisdiction, notwithstanding that the offenses occurred out of state. The appellate court found no basis to depart from that finding. Rosemary Riviuccio represented the appellant. (Family Ct, New York Co)

People v Collins, 199 AD3d 580 (1st Dept 11/23/2021)

SUPPRESSION | NO EXIGENCY

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 4th degree CPCS and 2nd degree escape. The First Department modified. In a prior appeal, the appellate court found that the police had probable cause to arrest the defendant for criminal trespass, but remanded for a determination of whether exigent circumstances justified the search of a backpack. On remand, the lower court erred in concluding that the search was valid as incident to a lawful arrest. There was no reasonable basis to believe that the backpack's contents might pose a danger to the arresting officers or that the loss of evidence loss was a concern.

The Office of the Appellate Defender (Margaret Knight, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Delacruz, 199 AD3d 614 (1st Dept 11/30/2021)

VIDEO | DAMNING

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree CPW (two counts). The First Department affirmed, rejecting the argument that a videotape should have been excluded as evidence of an uncharged crime. Hours before a codefendant shot the victim, the defendant sent a video to a WhatsApp group chat. In the video, filmed in the home of the same codefendant, the defendant displayed a pistol, declared his intent to kill the victim, and received ammunition from the other codefendant. The video was not *Molineux* proof since it did not concern a separate crime; it was direct proof as to the defendant's criminal intent in the instant crime and the theory that he acted in concert with the codefendants. (Supreme Ct, New York Co)

**Matter of Jamee G. v John B., 200 AD3d 413
(1st Dept 12/2/2021)**

CUSTODY - RELOCATION

LASJRP: The First Department affirms a determination granting the mother's petition to relocate temporarily to Chicago with the children pending completion of the hearing on custody, visitation, and relocation.

The mother showed that relocation was in the children's best interests, given the father's failure to pay child support, and how the maternal grandparents would provide her and the children with stability, emotional support, and financial support, in the form of a place to live, free childcare, and paid-for private school tuition.

The father's accrual of approximately \$40,000 in support arrears, and failure to contribute to the children's educational or other expenses are a stark contrast to the economic and educational benefits to the children to be gained upon relocation, which justify relocation notwithstanding any disruption in frequency of contact between him and the children. (Family Ct, New York Co)

People v Baez, 200 AD3d 430 (1st Dept 12/2/2021)

SORA | NO SUBSTANCE ABUSE

ILSAPP: The defendant appealed from an order of Bronx County Supreme Court, which found him a level-two sexually violent offender. The First Department reduced the risk level. The People did not establish that the defendant should have scored 15 points for drug or alcohol abuse. There was no proof that he smoked marijuana at the time of the offense or that his use was more

First Department *continued*

than occasional. Bronx Defenders (Daniel Hamburg, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

**People v Chodakowski, 200 AD3d 437
(1st Dept 12/2/2021)**

DELIBERATIONS | ETHNIC ANIMUS

ILSAPP: The defendant appealed from an order of NY County Supreme Court, which denied his CPL 440.10 motion. The First Department held the appeal in abeyance and remanded for a hearing to determine if ethnic animus tainted deliberations and deprived the defendant of his Sixth Amendment right to a jury trial. An affidavit from the jury foreperson swore that another juror made “ethnic comments” about the defendant and the complainant, revealing overt bias that cast serious doubt on the fairness of the deliberations and the verdict. Mark Baker represented the appellant. (Supreme Ct, New York Co)

People v Hardware, 200 AD3d 431 (1st Dept 12/2/2021)

INDICTMENT | DEFECTIVE

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of persistent sexual abuse. The First Department reversed. The indictment was jurisdictionally defective because it did not specify which of three qualifying offenses the defendant allegedly committed and thus did not give him fair notice of the accusations against him. The indictment was dismissed. The Center for Appellate Litigation (Matthew Christiana, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Maglione, 200 AD3d 434 (1st Dept 12/2/2021)

SCI | DEFECTIVE

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted 3rd degree robbery. The First Department reversed. The waiver of indictment and subsequent SCI were jurisdictionally defective. The above crime, set forth in the SCI, was not named in the misdemeanor complaint and was a greater offense than the crimes charged therein; and the defendant, who was arraigned on the misdemeanor complaint, was not held for grand jury action. *See* CPL 195.10 (1), 195.20. Legal Aid Society of NYC (Naila Siddiqui, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Thompson, 200 AD3d 435 (1st Dept 12/2/2021)

DELIBERATIONS | PREMATURE

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree CPW. The First Department reversed and ordered a new trial. The trial court erred in discharging a juror and alternate as grossly unqualified. They had engaged in premature deliberations on the subway, but the court should have asked whether they were unable to render an impartial verdict. The Center for Appellate Litigation (John Vang and Sandhya Ramaswamy, of counsel) represented the appellant. (Supreme Ct, New York Co)

Matter of Jayson C., 200 AD3d 447 (1st Dept 12/7/2021)

JD DISCOVERY | EQUAL PROTECTION

ILSAPP: In a juvenile delinquency proceeding, the respondent appealed from an order of Bronx County Family Court, which declined to direct the presentment agency to provide certain discovery. *See* Family Ct Act §§ 365.1, 365.2, 1112 (a). The First Department reversed. The agency named 14 police officers involved in the respondent’s arrest on weapon possession charges and disclosed that nine of the officers were involved in a pending lawsuit. The respondent sought disclosure, as required under CPL 245.20 (1) (k) (iv) (prosecution shall disclose evidence and information that tends to impeach credibility of testifying prosecution witness). While not all CPL provisions are applicable to Family Court, in this case, the denial of disclosure deprived the respondent of equal protection of the laws. A respondent in a JD proceeding has the same right to cross-examine witnesses as a criminal defendant. There was no reason to allow more limited access to impeachment materials. The legislature was considering legislation that would amend the Family Court Act to provide for broad disclosure. Legal Aid Society, NYC (John Newbery, of counsel) represented the alleged JD. (Family Ct, Bronx Co)

People v Manley, 200 AD3d 471 (1st Dept 12/7/2021)

GANG GUNS | EXPERT

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree CPW and sentencing him as a second violent felony offender. The First Department reduced the sentence from 12 to 8 years and otherwise affirmed. The trial court properly allowed expert testimony on “community guns”—which gangs shared and kept outdoors in closed containers under constant observation—to explain the unusual behavior of the defendant and fellow gang members vis-à-vis a backpack containing the pistol. During summation, it was inappropriate for the prosecutor to squeeze the trigger to emphasize operability. However, this single impropriety did not deprive the defendant of a fair trial. The Center for Appellate Litigation (Matthew Christiana, of counsel) represented the appellant. (Supreme Ct, New York Co)

First Department *continued*

**Amber N. v Andrew S., 200 AD3d 466
(1st Dept 12/7/2021)**

PATERNITY | ESTOPPEL

ILSAPP: The respondent appealed from an order of NY County Family Court, which equitably estopped him from seeking genetic marker testing and declared him to be the father of the child. The First Department affirmed. The respondent was named on the child's birth certificate, was married to the mother, and assumed the role of parent for the first 11 years of the boy's life. In reliance on such conduct, the child, now almost 13, formed a familial relationship with his paternal grandfather and great-grandmother. (Family Ct, New York Co)

People v Spruill, 200 AD3d 475 (1st Dept 12/7/2021)

SENTENCE | NO RECORD

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree grand larceny and other crimes upon his plea of guilty, and sentencing him to an aggregate term of 3½ to 10½ years. The First Department reduced the sentence to 2 to 6 years and vacated surcharges and fees imposed. The sentence imposed was excessive, given the defendant's age, his lack of a criminal record, and the nonviolent nature of the crimes. The Center for Appellate Litigation (John Vang, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Challenger, 200 AD3d 500 (1st Dept 12/9/2021)

DETECTIVE | LAY OPINION

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree robbery and another crime. The First Department reversed. The trial court erred in allowing an arresting detective to offer lay opinion testimony that the defendant was the person depicted in two surveillance videos, where the jury was capable of making that determination. The error was not harmless. The Center for Appellate Litigation (John Palmer and Rita Maxwell) represented the appellant. (Supreme Ct, New York Co)

People v McDowell, 200 AD3d 502 (1st Dept 12/9/2021)

SNEAKERS | INCRIMINATING

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree robbery and other crimes. The First Department affirmed. The defendant wore certain sneakers to trial. The prosecutor believed they were the footwear the perpetrator was wearing in a surveillance video and asked the court to

sign an order allowing her to photograph them. During a lunch recess, the defendant changed his sneakers, and the trial court properly allowed the People to prove that fact as relevant to consciousness of guilty. (Supreme Ct, New York Co)

People v Gainey, 200 AD3d 497 (1st Dept 12/9/2021)

OUT-OF-STATE | NO TESTIMONY

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree robbery. The First Department affirmed. The lower court properly denied the defendant's application to take out-of-state testimony from the only identifiable person who spoke to the victim right after the robbery. The person had relocated to California, but the defendant did not show exceptional circumstances warranting invocation of CPL Article 680. He did not explain why the witness could not come to New York or establish the materiality of the testimony sought. (Supreme Ct, New York Co)

People v Lopez, 200 AD3d 537 (1st Dept 12/14/2021)

ILLCIT TESTIMONY | HARMLESS

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1st degree robbery and other crimes. The First Department affirmed. The People should not have elicited testimony from a detective suggesting that the non-testifying codefendant implicated the defendant in the crime, or testimony implying that the victim had identified the defendant in a lineup. However, the errors were harmless. (Supreme Ct, Bronx Co)

Cindy M. v Marisol M., 200 AD3d 526

(1st Dept 12/14/2021)

ARTICLE 8 | COUNSEL NOT RELIEVED

ILSAPP: The petitioner appealed from an order of Bronx County Family Court, which denied her family offense petition seeking an order of protection against the respondent on behalf of her child. The First Department held the appeal in abeyance. Counsel had filed a motion to be relieved but had not submitted a letter confirming that the petitioner received the brief and notice that she had a right to file a pro se brief. Therefore, the motion was denied without prejudice to renew, and counsel was directed to inform the petitioner of her rights. (Family Ct, Bronx Co)

[Ed. Note: Withdrawal of counsel granted, order affirmed, at 201 AD3d 592 (1/27/2022)]

First Department *continued***People v Robertson, 200 AD3d 540
(1st Dept 12/14/2021)****EXPERT | DOMESTIC VIOLENCE**

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree strangulation and 2nd degree assault. The First Department affirmed. The trial court properly allowed proof of two prior assaults by the defendant against the victim to provide background as to the nature of their relationship, as relevant to motive and intent. Also properly admitted was expert testimony on the dynamics of domestic violence—to aid the jury in evaluating the behavior of the victim after the assault. The expert testified in general terms, without expressing opinions on the facts of this case. Limiting instructions given as to the above proof mitigated any prejudice. (Supreme Ct, Bronx Co)

**Cleary-Thomas v Thomas, 200 AD3d 516
(1st Dept 12/14/2021)****CUSTODY - DECISION-MAKING/HEALTH CARE**

LASJRP: The First Department concludes that plaintiff's request that defendant obtain her consent before obtaining any "non-emergency medical care" for the children—specifically, COVID testing—is unnecessarily burdensome and unwarranted under the circumstances since a COVID test is diagnostic, not a treatment, and is routine and not so invasive as to require both parties' consent. (Supreme Ct, New York Co)

**Giovanni De M. v Nick W., 200 AD3d 517
(1st Dept 12/14/2021)****ARTICLE 8 | HARASSMENT | UNCONSTITUTIONAL**

ILSAPP: The respondent appealed from an order of New York County Family Court, which found that he had committed certain family offenses by his obnoxious actions against the man who had married his mother. The First Department modified. Vacatur was ordered as to the finding that the respondent committed the family offense of 2nd degree aggravated harassment, based on Penal Law § 240.30(1)(a) as it existed before its 2014 amendment. The statute was found unconstitutionally vague by *People v Golb*, 23 NY3d 455. (Family Ct, New York Co)

**People v Graham, 201 AD3d 143 (1st Dept 12/16/2021)
DEFENSE COUNSEL | MEA CULPA**

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW. The First Department affirmed. Defense counsel admitted ineffectiveness in failing to properly investigate and prepare for trial. Yet the defendant did not establish that he was deprived of meaningful representation by conflict-free counsel. Defense counsel moved for a suppression hearing, objected to a *Molineux/Sandoval* application, and raised a *Batson* challenge. At trial, defense counsel competently cross-examined witnesses and filed a CPL 330 motion. The defendant did not show that his defense was impaired by defense counsel's conduct. (Supreme Ct, Bronx Co)

Matter of T. S., 200 AD3d 569 (1st Dept 12/16/2021)**ABUSE/NEGLECT - CREATING RISK OF ABUSE
- DERIVATIVE ABUSE**

LASJRP: The First Department upholds a finding of abuse based on respondents' inaction in response to sexual abuse by the child's grandfather. After the child disclosed the abuse, respondents failed to protect her by removing the grandfather from the home and instead directed the child not to tell anyone about the abuse because it would bring shame upon the family; failed to ascertain why the child was hospitalized on two separate occasions; and failed to obtain help for her, even when notified that she was cutting herself and was clearly decompensating after the grandfather moved back into the home.

The fact that the grandfather did not abuse the child again does not preclude the finding of abuse, since respondents endangered the child by creating a substantial risk of physical injury likely to cause protracted impairment of her physical or emotional health.

However, the Court overturns a finding that respondents derivatively abused their then seventeen-year-old son, who was never abused by the grandfather and became aware of the abuse when the victim told him about it several years after the fact.

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

**Matter of Kamryn D., 200 AD3d 602
(1st Dept 12/28/2021)****ABUSE/NEGLECT - ALLOWING NARCOTICS ACTIVITY
IN HOME**

LASJRP: The First Department upholds a finding of neglect where respondent, the mother of one of the children and grandmother of the other, knew or should have known that her adult sons were engaged in narcotics trafficking in the apartment where they were living with her and the children. To the extent respondent was not

First Department *continued*

engaged in the sale of narcotics, she nevertheless placed the children in proximity to accessible narcotics and to narcotics trafficking, thereby creating an imminent danger to their physical, mental, and emotional condition.

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

[People v Solomon](#), 202 AD3d 88 (1st Dept 12/28/2021)

SORA | TAKING BLAME

ILSAPP: The defendant appealed from an order of New York County Supreme Court, which adjudicated him to be a level-three sexually violent offender. The First Department affirmed. Ten points were properly assessed for the defendant not having accepted responsibility for his sexual misconduct. Participation in sex offender treatment was not dispositive as to factor 12. A defendant must show that he genuinely takes the blame for committing a sexual offense. In statements to police and probation, the defendant minimized or denied responsibility. Further, in a recorded call to his rape victim (an acquaintance)—he said, “sometimes when a person says no, they mean yes.” (Supreme Ct, New York Co)

[People v Hubbard](#), 201 AD3d 414 (1st Dept 1/4/2022)

STABBING | DEMO

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1st degree manslaughter. The First Department affirmed. After a hearing, the trial court properly denied a CPL 330.30 motion to set aside the verdict based on juror misconduct. While cutting meat at home, the subject juror recalled testimony about how the victim had been stabbed in the neck; but he did not do a home experiment nor discuss the meat episode with other jurors. During deliberations, the juror used cardboard to simulate a knife and made a stabbing motion to mimic the crime. Reenactments or demonstrations were permitted where, as here, they applied common sense and experience to the proof and did not involve expertise or an expert opinion. The other jurors testified that the demonstration had no effect on their deliberations. (Supreme Ct, Bronx Co)

[People v Nelson](#), 201 AD3d 413 (1st Dept 1/4/2022)

STABBING | HEARSAY

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 3rd degree CPW. The First Department affirmed. The trial court properly admitted evidence that: (1) the defendant threatened to kill one victim hours before thrusting a knife through a bedroom door, injuring the second victim; and (2) both victims heard the defendant slap his companion right before the attack. This proof completed the narrative and provided background information to explain the victims’ behavior and the defendant’s intent. In a 911 call, the second victim made a statement to an EMT about how he came to be stabbed in the head through the bedroom door. The proof was permitted under the hearsay exception as to statements for medical diagnosis or treatment. The declaration was out of bounds in stating that the defendant was the assailant and that the victim pressed against the door to keep the defendant out. But the error was harmless. (Supreme Ct, New York Co)

[People v Gordon](#), 201 AD3d 443 (2nd Dept 1/6/2022)

ORDER OF PROTECTION | UNAUTHORIZED

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of endangering the welfare of a child (two counts). The First Department vacated the order of protection issued for the benefit of T.W. and otherwise affirmed. Supreme Court lacked the authority to issue that OP because T.W. was not a victim of, or witness to, any crimes. He did not testify, and the charges for which he was a complainant were dismissed. The Center for Appellate Litigation (Anjali Pathmanathan, of counsel) represented the defendant. (Supreme Ct, Bronx Co)

[People v Grant-Byas](#), 201 AD3d 479 (1st Dept 1/11/2022)

50-YR PROTECTION | JAIL-TIME CREDIT

ILSAPP: The defendant appealed from a May 2016 judgment of New York County Supreme Court, convicting him of sex trafficking (two counts) and another crime. The First Department modified, vacating the May 2066 expiration date of orders of protection because it did not take jail-time credit into account. The matter was remanded to set the proper duration of the orders. The trial court’s conduct toward defense counsel did not warrant reversal. The court’s sometimes caustic comments to counsel were permissible, given that counsel ignored court rulings, badgered witnesses, wasted time, and delivered a summation replete with irrelevant and incorrect statements. The Center for Appellate Litigation (John Palmer) represented the appellant. (Supreme Ct, Kings Co)

First Department *continued***People v Griffith, 201 AD3d 485 (1st Dept 1/11/2022)****NJ ROBBERY | NOT EQUIVALENT**

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree robbery. The First Department modified, vacating the second violent felony offender adjudication. The New Jersey robbery conviction did not qualify as the equivalent of a New York felony. See *People v Gilchrist*, 223 AD2d 382 (NJ statute punished knowing use of force in immediate flight from theft, while NY law punished only force with intent to compel person to give up property or prevent resistance). The Center for Appellate Litigation (John Palmer, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Felix, 201 AD3d 505 (1st Dept 1/13/2022)**TATTOO | PROOF**

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 1st degree rape (four counts). The First Department affirmed. The court providently admitted a photograph of a tattoo in the defendant's genital area to corroborate the victim's testimony that she saw the body art when the defendant first engaged in sexual conduct with her at age 12. It could not be said that the sole purpose of the photo was to arouse the emotions of the jury. The trial court erred in admitting a full body photo, which depicted not only the tattoo but also the defendant's torso and face, and which was published to the jury without first having been shown to defense counsel. But such error was harmless. The court also properly admitted proof of uncharged acts of sexual abuse for necessary background and to complete the narrative and explain the victim's delayed reporting and continued sexual contact. The probative value of the evidence outweighed its prejudicial effect, which was minimized by a limiting instruction. (Supreme Ct, New York Co)

People v Goodwin, 201 AD3d 529 (1st Dept 1/18/2022)**PRO SE REQUEST | NEW TRIAL**

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree burglary and another crime. The First Department reversed and ordered a new trial. At two appearances, the defendant asked to represent himself, and the judge neither granted nor denied either application. The second time, when the defendant pushed, the trial judge stated, "If it's up to me, I am denying your request." The judge explained that the defendant was disruptive and unable to conduct himself in an orderly manner. At an appearance before a second judge, the defendant again said that

he wanted to proceed pro se, and again a ruling was deferred. The defendant told a third judge that he had "tried to go pro se." The judge responded that his application had already been rejected. The calendar courts' denial of the defendant's repeated requests deprived him of his right to represent himself. His disruptiveness was not a sound rationale for rejecting his applications; his only outbursts flowed from frustration at not receiving a ruling. The defendant was fit to proceed to trial and to waive counsel. The Center for Appellate Litigation (Megan Tallmer) represented the appellant. (Supreme Ct, New York Co)

People v Simmons, 203 AD3d 106 (1st Dept 1/18/2022)**SEXUALLY MOTIVATED ASSAULT |
NOT REGISTERABLE**

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of two crimes, upon his plea of guilty. The First Department modified, vacating the SORA portion of the judgment. The defendant was improperly required to register as a sex offender based on his conviction of 1st degree assault as a sexually motivated felony. The issue was preserved by the parties' presentencing memoranda. In a matter of first impression, the reviewing court held that only sexually motivated felony offenses listed in Correction Law § 168-a (2) (a) (i), (ii) were included in the definition of "sex offense." The People's interpretation of the statute was inconsistent with the text and unsupported by vague remarks invoked from the legislative history. The First Department thus agreed with *People v Buyund*, 179 AD3d 161 (2nd Dept) (1st degree burglary as sexually motivated offense not registerable offense), rev on other grounds, 2021 WL 5451381 (SORA certification issue not within preservation exception for illegal sentence). The Office of the Appellate Defender (Karena Rahall & Emma Shreefter, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Fleming, 201 AD3d 552 (1st Dept 1/20/2022)**ABEYANCE | HEARING**

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree CSCS. The First Department held the appeal in abeyance and remanded for a Mapp/Dunaway hearing. In this buy-and-bust case, the factual allegations in the suppression motion were sufficient to entitle the defendant to a hearing regarding whether the arresting officer had probable cause to arrest him. The defendant's motion challenged the constitutional adequacy of any transmitted description on which the seizing officers relied in detaining and arresting him. He described how he looked at the time of the arrest and asserted that there was nothing par-

First Department *continued*

ticularly distinctive about his appearance that would tend to preclude the possibility of misidentification. This allowed for a comparison between the defendant's self-description and the transmitted one, once the People disclosed it. See *People v Jones*, 95 NY2d 721. Legal Aid Society–NYC (A. Alexander Donn, of counsel), represented the appellant. (Supreme Ct, New York Co)

People v Tingling, 201 AD3d 555 (1st Dept 1/20/2022)

SORA | HARMLESS ERROR

ILSAPP: The defendant appealed from an order of NY County Supreme Court, which adjudicated him a level-two sex offender. The SORA court erred in assessing 25 points under the risk factor for sexual contact, based on a theory of accessorial liability for promoting the prostitution of a 15-year-old girl. The People did not prove that the defendant assisted customers in obtaining the services of the victim or shared the necessary intent with his victim's customers. The defendant did not know the identity of the customers, was not present during the sexual conduct, and did not know if such conduct would occur. However, even absent the subject points, the defendant remained at level two, and there was no basis for a downward departure. (Supreme Ct, New York Co)

Matter of Tristian B., 201 AD3d 583 (1st Dept 1/27/2022)

ABUSE/NEGLECT - RESPONDENT/PERSON LEGALLY RESPONSIBLE

LASJRP: The First Department finds sufficient evidence that respondent was a person legally responsible for the subject child and his siblings where respondent and the children's mother were in a romantic relationship and lived together before the subject child was born, and they both represented to caseworkers that respondent was the child's biological father. Respondent failed to appear in court, allowing the court to draw a negative inference against him.

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

Matter of Briany T., 202 AD3d 408 (1st Dept 2/1/2022)

ABUSE/NEGLECT - DISCOVERY/ MENTAL HEALTH RECORDS

LASJRP: Respondent seeks disclosure of records relating to the prior and current mental health treatment of the thirteen-year-old child who reported that he sexually abused her, claiming that those records are material and necessary to his defense that the child is fabricating her allegations.

When the child was approximately four years old, she reportedly made allegations of inappropriate touching against another male and later recanted. Respondent alleges that the child has received mental health services in the past for unspecified "underlying mental health issues, which informed the earlier false allegation."

With respect to those mental health records, the Court concludes that, given respondent's need to prepare his defense, his right to impeach the child's credibility if, as is likely, she is a witness, and the child's diminished interest in the confidentiality of older records from an institution that is not currently providing services to her, the matter must be remanded to the Family Court to review the records. The Court notes that confidential mental health records may be disclosed only upon a finding by a court that the interests of justice significantly outweigh the need for confidentiality (Mental Hygiene Law § 33.13[c][1]), and that, pursuant to Family Court Act § 1038(d), the court must weigh the need of the moving party for the discovery to assist in the preparation of the case against any potential harm to the child arising from the discovery.

With respect to records related to the child's current relationship with her therapist, the Court concludes that given the potential harm to the child from disclosure, and the "thin showing" made by respondent, the Family Court properly denied respondent's request for those records. "Were a court to grant such a request on the sparse showing in this case, virtually every child's therapy records would be subject to exposure."

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

Matter of Jalisa C., 202 AD3d 432 (1st Dept 2/3/2022)

ABUSE/NEGLECT - LEAVING CHILD WITH INAPPROPRIATE CARETAKE/ALLOWING NEGLECT

LASJRP: The First Department upholds a finding of neglect where although the child told the mother that she feared the mother's boyfriend and did not want to be left in his care because he hit her, and the mother also knew that her boyfriend was an alcoholic who drank daily, at times in the child's presence, and suffered from mental health issues, the mother left the child alone with her boyfriend, who then subjected the child to physical and sexual misconduct.

The JRP appeals attorney was John Newbery, and the trial attorney was Melissa Friedman. (Family Ct, New York Co)

Matter of Saymone N. v Joshua A., 202 AD3d 507 (1st Dept 2/10/2022)

CUSTODY - VIRTUAL HEARING

First Department *continued*

LASJRP: In this custody proceeding, the First Department, citing the court's authority to modify its hearing procedures pursuant to Judiciary Law § 2-b, finds no error where the court conducted the hearing in a virtual courtroom. Because the case had been pending since August 2018, the court decided to proceed with minor limitations in a virtual courtroom rather than wait until court operations returned to "normal."

In a footnote, the Court notes that attorneys for both the mother and the father were strongly admonished in Family Court for their unprofessional behavior and were directed to review the Rules of Professional Conduct, which "remain in effect despite or perhaps because of the frustration that may arise from having to adopt to new court procedures, necessitated in these times by Covid-19." (Family Ct, Bronx Co)

People v Blue, 202 AD3d 546 (1st Dept 2/15/2022)**30 MONTHS | SPEEDY TRIAL**

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree burglary (five counts). The First Department affirmed. The defendant's constitutional right to a speedy trial was not denied. A substantial portion of the 30-month delay between arraignment and trial was caused by (1) the defendant's voluminous motion practice or other reasons not attributable to the People; and (2) the People's reasonable efforts to prepare and coordinate the prosecution of six separate serious felonies. Further, the defendant did not establish specific prejudice or that the delay was so egregious as to warrant dismissal, regardless of prejudice. The defendant, who represented himself and was ROR'd six months before trial, did not show that his defense was impaired by his 24 months of incarceration. (Supreme Ct, New York Co)

People v Perez, 202 AD3d 576 (1st Dept 2/17/2022)**REDUCED CHARGE | INTEREST OF JUSTICE**

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd and 3rd degree assault and EWC. The First Department reduced the 2nd degree offense to 3rd degree assault in the interest of justice. Under the plea agreement, if the defendant had completed a 12-week anger management program and satisfied other conditions, the People were to allow her to withdraw her guilty plea to 2nd degree assault, and she would be sentenced to conditional discharges on the two misdemeanors. Despite the defendant's diligent efforts, for legitimate reasons, she could not complete the course. Legal Aid Society, NYC (Laura Boyd of counsel) represented the appellant. (Supreme Ct, New York Co)

Kenneth A.S. v Jennice C., 202 AD3d 606**(1st Dept 2/22/2022)****CUSTODY | DEFAULT | VACATED**

ILSAPP: The mother appealed from an order of New York County Family Court, which denied her motion to vacate a default custody order granting the father's modification petition and awarding him sole custody of the parties' daughter. *See* CPLR 5015 (a) (1); Family Ct Act § 165 (a). The First Department reversed. Family Court should not have denied the motion, which was timely under Executive Order 202.67 (extending time limits for filing motions). The mother had a reasonable excuse for her default—she never received notice of the proceeding. A meritorious defense existed—the mother did not prevent the father from visiting the child, as alleged; he refused to return the child after a visit; and uprooting the child from her home would not be in her best interests. Sandra Colatosti represented the appellant. (Family Ct, New York Co)

Matter of Albert T., 202 AD3d 643 (1st Dept 2/24/2022)**CUSTODY | HABEAS | REVERSED**

ILSAPP: The child appealed from an order of Bronx County Family Court, which granted the father's habeas corpus petition and ordered the mother to return the child to him. The First Department reversed. In granting the petition to enforce an order awarding sole custody to the father, the trial court did not inquire into best interests. Based on grave concerns about the father expressed by the mother's counsel and the AFC, Family Court ordered ACS to do an investigation, but did not heed resulting intel regarding child protective proceedings against the father in New Jersey as to other children. The lower court should have sought more information and held a hearing in chambers with the child, who strenuously objected to returning to her father's care. The Children's Law Center (Janet Neustaetter, of counsel) represented the child. *[The decision does not indicate that appellant sought and received a Family Ct Act § 1114 (b) stay pending appeal.]* (Family Ct, Bronx Co)

People v Belle, 203 AD3d 443 (1st Dept 3/3/2022)**PREDICATE | EQUIVALENT**

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree CPW and another crime, and from an order denying a CPL 440.20 motion to set aside the sentence. The First Department affirmed. The plea court correctly adjudicated the defendant a second violent felony offender based on his Massachusetts weapon possession conviction. That was proper. The MA and NY definitions of "firearm" were

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equivalent for predicate felony purposes. (Supreme Ct, New York Co)

Reese v City of NY, 203 AD3d 448 (1st Dept 3/3/2022)

FALSE ARREST | TRIABLE

ILSAPP: The parties cross-appealed concerning an order of Bronx County Supreme Court denying summary judgment motions in a case involving false arrest, malicious prosecution, and other claims. The First Department affirmed. Triable issues existed as to whether the police officers had probable cause to arrest the plaintiff for an open-container violation. Surveillance video evidence undermined an officer's account. The drugs found on the plaintiff in the search incident to arrest could not be used to establish probable cause. (Supreme Ct, Bronx Co)

People v Pena, 203 AD3d 446 (1st Dept 3/3/2022)

PEQUE | UNPRESERVED

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted 2nd degree burglary. The narrow exception to the preservation requirement did not apply to his *Peque* claim. Months before the defendant's plea, the People announced in open court that they were serving a notice of immigration consequences, so the defendant had a reasonable opportunity to object to the plea court's failure to advise him of the potential deportation consequences. [NOTE: cf. *People v Amantecat*, {74 Misc3d 88}.] (Supreme Ct, New York Co)

Bryant v State, 2022 NY Slip Op 01380 (1st Dept 3/3/2022)

COURT OF CLAIMS ACT § 8-B | INAPPLICABLE

ILSAPP: The claimant appealed from Court of Claims order granting the defendant's motion to dismiss his claim seeking compensation for his unjust conviction and incarceration. The vacatur of his conviction was based on ineffective assistance of counsel, which was not a ground for relief under Court of Claims Act § 8-b. [NOTE: cf. *Smythe v State*, {74 Misc3d 851}.]

Matter of Jacob V., 203 AD3d 449 (1st Dept 3/3/2022)

ARTICLE 10 | AFFIRMED

ILSAPP: The respondents appealed from an order of Bronx County Family Court, which found that they abused the subject child. The First Department affirmed. Hospital records and expert testimony established that the two-year-old child sustained multiple, serious injuries which ordinarily would not occur absent an act or omission by his caretakers. No medical treatment was sought

for the painful injuries. The respondents did not produce evidence that the injuries suffered over a brief period were likely nonaccidental. (Family Ct, Bronx Co)

People v Reid, 203 AD3d 474 (1st Dept 3/8/2022)

SENTENCE | CONCURRENT

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW (two counts) and sentencing him as a persistent violent felony offender to an aggregate term of 50 years to life. The First Department modified. The sentence for possessing a loaded firearm with intent to use it unlawfully against another had to run concurrently with the term for murder, because there was no evidence that the defendant possessed the weapon with an unlawful intent distinct from his intent to kill the victim. The midtrial closure of the courtroom to all spectators was proper under the extraordinary circumstances presented, where the court made detailed findings regarding photos taken in the courtroom and posted online and spectators' intimidating behavior. Richard Greenberg represented the appellant. (Supreme Ct, New York Co)

Matter of Travis S., 203 AD3d 478 (1st Dept 3/8/2022)

ABUSE/NEGLECT - PRESUMPTION OF ABUSE

LASJRP: The First Department upholds a finding of abuse against the mother where medical records and expert medical testimony established that the six-week-old child presented to the hospital with a left eye injury, bruising, and a distended stomach, and was found to be underweight and to have healing rib fractures of multiple ages and a lacerated liver; and the mother was one of the child's caretakers from his birth.

Even crediting the evidence about an incident involving the grandmother's dog, the rib fractures and the child's eye condition remain unexplained. The mother's focus on the time the child spent at the paternal grandmother's home does not help her since the record supports a finding that she remained a caretaker during that time.

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

Hilary C. v Michael K., 203 AD3d 486 (1st Dept 3/10/2022)

FUGITIVE DISENTITLEMENT | INAPPLICABLE

ILSAPP: The father appealed from an order of New York County Family Court entered in proceedings under Articles 6 and 8 of the Family Court Act. The First Department modified. The father was in Japan, but the appellate court declined to dismiss the appeal pursuant to the

First Department *continued*

felony disentitlement doctrine. There was no nexus connecting the father's fugitive status and the instant proceedings. He had appeared virtually in court, communicated with counsel, and consented to relief sought by the mother. Further, the father had complied with probation terms and pledged to return to New York to comply with any court order. Upon his own admission, he had knowingly and willfully violated a court order directing him not to communicate with the attorneys of record in a disparaging way and to refrain from using profanity. Thus, Family Court properly found the father in civil contempt, but 30 days' incarceration was inappropriate. The disposition was vacated and replaced with time served. Philip Katz represented the appellant. (Family Ct, New York Co)

Matter of Levi L., 203 AD3d 490 (1st Dept 3/10/2022)**NY V TEXAS | TEMPORARY JURISDICTION**

ILSAPP: The mother appealed from an order of Bronx County Family Court, rendered in an Article 10 proceeding. The mother neglected her children, given her untreated mental illness, which caused her to threaten suicide in front of them and then to drive from her Texas home to the father's Bronx home with a loaded gun. Family Court properly exercised temporary emergency jurisdiction over the proceeding during the neglect proceedings, in the absence of any orders to safeguard the children from the Texas court assigned to the divorce proceeding there. Ultimately, the court in Texas—which remained the home state—did step in to protect the children. (Family Ct, Bronx Co)

People v Gideon, 203 AD3d 519 (1st Dept 3/15/2022)**VICTIM AND PROOF | ERROR NOT HARMLESS**

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree burglary as a sexually motivated felony and another crime, after a nonjury trial. The First Department reversed and granted a new trial. Supreme Court admitted, as excited utterances and prompt outcries, four hearsay statements made by the alleged victim after the incident. That was error. None of the statements was an excited utterance. Two were prompt outcries, so only the fact of a complaint, not its accompanying details, was admissible. Yet the trial court considered all four utterances for their substance. The error was not harmless for several reasons. There could be no presumption that the court as the trier of fact considered only competent evidence. Further, the People strongly relied on the hearsay statements to prove their case. Finally, the trial court indicated that it intended to review the written statement that was in evidence during deliberation. The Center for Appellate Litigation

(Hunter Haney, of counsel) represented the appellant. (Supreme Ct, New York Co)

Fern G. v Kim J., 203 AD3d 510 (1st Dept 3/15/2022)**NON-BIO PARENT | PARENTAGE**

ILSAPP: The respondent appealed from an order of New York County Family Court, which granted the petitioner's motion, finding that she had standing to seek custody/visitation of the subject child. The First Department affirmed. A nonbiological, nonadoptive parent had the legal status of a parent where clear and convincing evidence showed that he/she agreed with the biological parent to conceive and raise the child as co-parents. The hearing proof showed that the parties regarded the subject child as the newest member of their established family, which included the parties' son. (Family Ct, New York Co)

Matter of N.V., 203 AD3d 529 (1st Dept 3/15/2022)**PERMANENCY HEARINGS**

LASJRP: The First Department affirms an order which, after a permanency hearing, continued the kinship foster care placement of the child.

This neglect proceeding arose when the then thirteen-year-old child's stepfather allegedly engaged in an exchange of electronic messages which appeared to involve discussion of soliciting oral sex from the child and threats of rape or harm to the mother. When the child told respondent mother about the sexual advances, the mother initially reported it to authorities, but later accepted the stepfather's claim that the matter was just a "misunderstanding" and declined to exclude him from the family home.

At the time of the order of disposition, respondent stepfather, who had consented to a finding of neglect without admission pursuant to FCA § 1051(a), had taken very limited responsibility for his conduct and had not begun to participate in a sex offender program, which was a condition of the order, and, at the time of the permanency hearing, still had not meaningfully engaged in or completed a sex offender program. The mother had demonstrated little insight into the incident that precipitated this case and led to the child's removal, and claimed not to know the basis of the neglect finding against the stepfather and that his conduct had not emotionally harmed the child.

The JRP appeals attorney was Raymond Rogers, and the trial attorney was Rebecca Stegman-Hadar. (Family Ct, Bronx Co)

People v Ash, 203 AD3d 548 (1st Dept 3/17/2022)**DEFECTIVE COUNT | DISMISSED**

ILSAPP: The defendant appealed from a judgment of

First Department *continued*

New York County Supreme Court, convicting him of multiple crimes. The First Department modified. Without objection, the trial court submitted to the jury a count charging 1st degree coercion, although a motion court had reduced that charge to an attempt, after which the People failed to take steps required by CPL 210.20 (6). The defendant was entitled only to dismissal of the defective count. He did not show that prejudice from the omission spilled over to other counts. The Office of the Appellate Defender (Margaret Knight, of counsel) represented the appellant. (Supreme Ct, New York Co)

[People v Harvey](#), 203 AD3d 551 (1st Dept 3/17/2022)

VICTIM AND PROOF | ERRORS HARMLESS

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 1st degree aggravated sexual abuse and other offenses. The First Department affirmed. The trial court should have permitted the defendant to introduce evidence relating to text messages to counter the theory that the complainant was a powerless victim of domestic abuse. Further, the lower court should have excluded proof that the victim's teenage sister had a tattoo of the defendant's name. Family dynamics were established through other proof, and the tattoo suggested an inappropriate relationship. Finally, Supreme Court should have precluded cross-examination of the defendant about a trespass conviction, where the underlying facts raised an inflammatory inference. However, the errors were harmless, given that the victim's testimony was extensively corroborated; the defense theory was completely implausible; and the defendant's trial testimony was incredible. (Supreme Ct, New York Co)

[Matter of Evangelina C. v Maksim K.](#), 203 AD3d 536 (1st Dept 3/17/2022)

VISITATION - MENTAL HEALTH ISSUES CONTEMPT

LASJRP: The First Department upholds an order which, after a hearing, granted the mother's request for modification of a previous order and awarded the father virtual parental access for 30 minutes every two weeks and supervised in-person visitation for 90 minutes once per month.

The Court notes, *inter alia*, that the parties have an acrimonious relationship and inability to co-parent; that the father's behavior during visits included exhibiting symptoms of mental illness and an intractable pattern of coercive control of the mother and coercive parenting of the child; that the child expressed fears due to the violence the child witnessed while in his father's care, including

the father screaming and throwing objects at the paternal grandparents and throwing the grandfather's laptop computer from the apartment window or balcony, which caused the child to fear the father would throw him from the window or balcony as well; that the child could not sleep while at the father's home due to fear; and that the court-appointed psychiatrist concluded that the father's mental illness and his lack of insight about it interfered with his ability to parent, and expressed concern that the father's partial compliance with treatment and lack of insight into the severity of his mental illness and the impact of his behavior on others created a significant risk of a recurrence of an acute manic or psychotic episode.

The Court also upholds the denial of the father's motion for contempt, noting that at least certain visits failed to occur not because of the mother's intransigence, but because the child feared seeing the father in person.

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

[Adam N. v Darah D.](#), 203 AD3d 583 (1st Dept 3/22/2022)

FORUM NON CONVENIENS | CALIFORNIA NOT NY

ILSAPP: The mother appealed from a New York County Family Court order, granting the father's petition to dismiss her Article 6 petition on the ground of forum non conveniens. The Fourth Department affirmed. Family Court properly held that California, not NY, was the better forum to determine whether the child should live with the father in CA or the mother in Norway. The mother did not explain what proof from her eight years in NY would be probative as to her petition to relocate to Norway. Family Court properly considered that evidence as to the child's development and emotional well-being was present primarily in CA, where the child had lived since March 2020, pursuant to a court order. (Family Ct, New York Co)

[People v Lanzot](#), 203 AD3d 586 (1st Dept 3/22/2022)

PLEA VOLUNTARY | HEALTH

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree burglary. The First Department affirmed. Under the plea deal, the defendant was released pending sentence to enter a nursing home. There was no evidence that he was coerced into pleading guilty to obtain medical care. Further, at the time of the plea, evidence indicated that he was not terminally ill, and no promise was made that he would avoid prison even if his health improved. (Supreme Ct, New York Co)

First Department *continued*

People v Winston, 2022 NY Slip Op 02080
(1st Dept 3/24/2022)

INDICTMENT AMENDMENT | PREJUDICIAL

ILSAPP: The defendant appealed from a judgment of New York County Supreme Court, convicting him of 3rd degree assault, attempted 3rd degree assault, and two counts of 2nd degree aggravated harassment. The First Department modified. The defendant was charged with 2nd degree assault and attempted 2nd degree assault, both as hate crimes. Toward the end of the People's case, defense counsel contended that the factual statement of the indictment failed to allege a material element of the assault charges—that the victim's injuries were caused by a deadly weapon or a dangerous instrument. The trial court improperly amended the indictment by replacing the defective 2nd degree offenses with the lesser included offenses of 3rd degree assault and attempted 3rd degree assault, both as hate crimes. The defendant was prejudiced by the amendment, which changed the theory of the prosecution. While the People no longer had to prove that the defendant used a deadly weapon or a dangerous instrument, the jury was likely unduly influenced by the testimony about the weapon/instrument used. The assault convictions were vacated, and the counts were dismissed with leave to resubmit. The Center for Appellate Litigation (Lena Janoda and David Klem) represented the appellant. (Supreme Ct, New York County)

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 Rodriguez, 199 AD3d 712
(2nd Dept 11/3/2021)

PHYSICAL INJURY | LEGALLY INSUFFICIENT

ILSAPP¹: The defendant appealed from a Queens County Supreme Court judgment of conviction. The Second Department modified. The defendant was charged with crimes relating to four separate robberies committed on two days. The evidence was legally insufficient to support the convictions of 2nd degree robbery. The People failed to establish that a physical injury was

suffered by either complainant. Both testified that they were hit on the head. Neither sought medical attention. One said that he had pain for only two days, and the other indicated that his pain lasted for one week and was treated with ice and Advil. As to the crimes on February 28, 2016, the verdict was against the weight of evidence. Among other things, neither person robbed on that date was able to identify the defendant. The modus operandi of the crimes was not sufficiently distinctive to support an inference that, because evidence incriminated the defendant as to the February 29, 2016 crimes, he also committed the crimes the day before. Appellate Advocates (Martin Sawyer, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Santos, 199 AD3d 717 (2nd Dept 11/3/2021)

FACEBOOK: "GUILTY!!!!" | JUROR ASSURANCE

ILSAPP: The defendant appealed from a Suffolk County Court judgment, which convicted him of 2nd degree course of sexual conduct against a child and another crime. The judgment was affirmed by the Second Department. During jury deliberations, the defendant moved for a mistrial, contending that a juror was grossly unqualified or had engaged in substantial misconduct. County Court properly performed a probing inquiry of the juror, who acknowledged that she had posted on Facebook: "Jury Duty Update: We started deliberations this afternoon, we have to make decisions on 6 separate counts. Current score: 0/6." The juror said that she had inadvertently "liked" a Facebook friend's comment—"GUILTY!!!!." The court accepted the juror's assurances of impartiality. (County Ct, Suffolk Co)

People v Bazile, 199 AD3d 823 (2nd Dept 11/10/2021)

SENTENCES | CONCURRENT

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court. The Second Department held that sentences for 2nd degree CPW and 2nd degree manslaughter should not run consecutively. No proof established that the defendant's possession of a gun was separate and distinct from his participation in the shootout that resulted in the victim's death. John Lewis represented the appellant. (Supreme Ct, Kings Co)

People v Black, 199 AD3d 824 (2nd Dept 11/10/2021)

JURY TRIAL | NO WAIVER

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree manslaughter and 2nd degree CPW. The Second Department reversed and ordered a new trial. Defense counsel failed to preserve his contention that his waiver of the right to a jury trial was inadequate, but the appellate

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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court ruled in the interest of justice. Supreme Court failed to ensure that the defendant was fully aware of the consequences of the choice he was making, as required under CPL 320.10 (2). At the time of the purported forfeiture of the right to a jury trial, the defendant had no criminal history, but had a recent history of paranoid delusional thinking and possible early dementia and was being treated with anti-psychotic medication. Yet Supreme Court failed to ask the defendant a single question regarding the waiver. Appellate Advocates (Kathleen Whooley, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Brannon, 199 AD3d 826 (2nd Dept 11/10/2021)

SANDOVAL | WAY OFF FASE [sic]

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree murder and 2nd degree CPW. The Second Department reversed and ordered a new trial based on a *People v Sandoval* (34 NY2d 371) error. As to the defendant's prior convictions, Supreme Court did not balance probative value regarding his credibility vs. unfair prejudice to him. Prejudice was measured by the impact of such evidence if admitted upon a defendant's testimony and by the impact of possibly discouraging him or her from taking the stand. These considerations did not apply to witnesses other than the defendant. Cross-examination of such witnesses should be permitted with respect to any bad acts that might reflect on their character/credibility. Yet the instant *Sandoval* ruling was based on whether defense counsel would impeach the People's witnesses with their criminal histories during cross-examination. The error was not harmless. Appellate Advocates (Joshua Levine) represented the appellant. (Supreme Ct, Kings Co)

Matter of Chase P., 199 AD3d 807 (2nd Dept 11/10/2021)

ARTICLE 10 | REMOVAL

ILSAPP: The Administration for Children's Services appealed from an order of Kings County Family Court, which granted the parents' Family Ct Act § 1028 application for return of two children to their custody. The Second Department—which had granted ACS's motion for a stay—reversed. The challenged determination lacked a sound and substantial basis in the record. A medical expert testified that the then two-month-old baby had multiple fractures sustained at different times and a lacerated spleen, all caused by non-accidental trauma. The parents did not rebut the presumption of culpability, and they demonstrated such an impaired level of parental judgment as to create a substantial risk of harm to any

child in their care. The risk could not be mitigated by conditions imposed by the court. (Family Ct, Kings Co)

People v Lockley, 200 AD3d 117 (2nd Dept 11/10/2021)

CONFRONTATION | SAVVY DEFENDANT

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree murder (two counts) and other crimes. The Second Department reversed and ordered a new trial. The defendant's Sixth Amendment right to confrontation was violated when the People introduced testimony of a detective who recounted statements by a non-testifying accomplice incriminating the defendant. Defense counsel failed to object to the testimony, which the prosecutor emphasized in opening and closing statements. However, after the People rested, the defendant himself protested the People's failure to call the accomplice, asserting that he had the right to confront his accuser and citing *Crawford v Washington* (541 US 36). The argument was specific enough to draw the court's attention to the Confrontation Clause problems. The error was not harmless. The People presented a strong circumstantial case, but the accomplice's statement was the only direct evidence linking the defendant to the murder. Appellate Advocates (Michael Arthus, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Martinez, 199 AD3d 834 (2nd Dept 211/10/2021)

JUDGE | USURPER

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of attempted 1st degree assault and other crimes. The Second Department reversed and ordered a new trial before a different judge. The trial judge questioned witnesses extensively, usurped the roles of the attorneys, and created the impression that he was an advocate for the People. The unpreserved issue was reached in the interest of justice. Appellate Advocates (Anna Jouravleva, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Morris, 199 AD3d 835 (2nd Dept 11/10/2021)

ARMED FELONY | YO

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree CPW. The Second Department modified. During plea proceedings, the lower court found that the defendant was ineligible for youthful offender treatment. At sentencing, after receiving the presentence report, the court did not reconsider YO eligibility. That was error. Supreme Court was required to determine whether the defendant was an eligible youth. The defendant pleaded

Second Department *continued*

guilty to an armed felony offense in which he was the sole participant, but he could be eligible if mitigating circumstances bore directly on how the crime was committed, as set forth in CPL 720.10 (3). There was no indication that the defendant displayed the firearm found in his backpack, caused any injury, or intended to use the weapon against another person. The sentence was vacated. (Supreme Ct, Kings Co)

**Matter of Reyes v Munoz, 199 AD3d 813
(2nd Dept 11/10/2021)**

CUSTODY - SERVICE OF PROCESS/JURISDICTION

LASJRP¹: The Second Department reverses an order that dismissed the mother's custody petition on the ground that the court lacked jurisdiction over the father because of faulty proof of service. Service without New York State may be made in the same manner as service is made within the state. Here, the mother submitted an affidavit from a process server that established service upon the father in Honduras. Since the record contains no sworn denial by the father of receipt of service, with specific facts to rebut the statements in the process server's affidavit, no hearing on the validity of service was necessary. (Family Ct, Suffolk Co)

People v Sims, 199 AD3d 841 (2nd Dept 11/10/2021)

MERGER | COUNT DISMISSED

ILSAPP: The defendant appealed from an Orange County Court judgment, convicting him of several crimes. The Second Department modified. The defendant failed to preserve his claim that his conviction of 1st degree unlawful imprisonment should merge into rape and criminal sexual act counts for which he was acquitted. However, in the interest of justice, the appellate court concluded that the merger doctrine precluded the unlawful imprisonment conviction and dismissed that count. The confinement of the complaining witness in the defendant's car was only the incidental means to committing other crimes charged. David Gove and David Brodsky represented the appellant. (County Ct, Orange Co)

**Trazzera v Trazzera, 199 AD3d 855
(2nd Dept 11/10/2021)**

CUSTODY | HEARING

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

ILSAPP: The husband appealed from an order of Nassau County Supreme Court, modifying a custody provision of a stipulation of settlement incorporated in a judgment of divorce to give the mother final decision-making authority on child-related issues. The Second Department modified. Family Court erred in granting the award without a hearing. The determination that neither party had established a change in circumstances was incongruous with the awarding of final say to the mother. Since the court apparently believed that the parties made an evidentiary showing of a need for the revised provision, a hearing was required. Michael Gionesi represented the appellant. (Supreme Ct, Nassau Co)

**Weichman v Weichman, 199 AD3d 865
(2nd 11/10/2021)**

CUSTODY | RELIGION

ILSAPP: The mother appealed from an interlocutory judgment rendered by Kings County Supreme Court in a divorce action. The Second Department modified, vacating the direction that, during periods of parental access, the mother "shall not take the child to a place or expose the child to an activity that violates rules, practices, traditions and culture of the child's Orthodox Jewish Chasidic Faith." A court overstepped constitutional limitations when it purported to compel a parent to adopt a particular religious lifestyle. A parent had a due process right to express himself or herself. Here the mother would have to comply with all religious requirements of the child's faith during parental access periods. The father stressed that the child should not be exposed to persons in a "gay lifestyle," since that was inconsistent with his religious principles. Davis Polk represented the appellant. (Supreme Ct, Kings Co)

**Wondemagegehu v Edem, 199 AD3d 871
(2nd Dept 11/10/2021)**

CUSTODY | COUNSEL

ILSAPP: The defendant pro se appealed from a custody order in a judgment of divorce rendered by Richmond County Supreme Court. The Second Department modified. The parent of any child seeking custody or contesting its substantial infringement must be advised of the right to counsel of his/her own choosing; to an adjournment to confer with counsel; and to counsel assigned by the court where he/she was financially unable to obtain the same. *See* Family Ct Act § 262 (a) (v); Judiciary Law § 35 (8). A party may forfeit the right to counsel only if there is a knowing, voluntary, and intelligent waiver. The trial court did not conduct the requisite inquiry before allowing the defendant to proceed pro se. The matter was remitted. (Supreme Ct, Richmond Co)

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[People v Bamugo](#), 199 AD3d 928 (2nd Dept 11/17/2021)

PEQUE | REMITTAL

ILSAPP: The defendant appealed from two judgments of Kings County Supreme Court, convicting him of 1st degree sexual abuse and another crime. The Second Department remitted. The defendant contended that his due process rights were violated by Supreme Court's failure to warn him that his guilty pleas could result in deportation (*see People v Peque*, 22 NY3d 168). Such argument was excepted from the preservation requirement because the record did not show that the defendant was aware of possible immigration consequences. The defendant was entitled to a chance to seek to vacate his pleas by establishing that there was a reasonable probability that he would not have pleaded guilty if properly warned. Appellate Advocates (Mark Vorkink, of counsel) represented the appellant. (Supreme Ct, Kings Co)

[People v Campbell](#), 199 AD3d 933

(2nd Dept 11/17/2021)

ANDERS | NEW COUNSEL

ILSAPP: The defendant appealed from two judgments of Westchester County Court, convicting him of 2nd degree assault and other crimes. Assigned counsel submitted an *Anders* brief, and the Second Department assigned new counsel. The brief did not review, in any detail, the colloquies regarding the plea or the waiver of appeal and did not discuss the defendant's factual admissions to support his conviction. Further, whether the lower court improperly restitution was a nonfrivolous issue. (County Ct, Westchester Co)

[People v Sevaughn G.](#), 199 AD3d 936

(2nd Dept 11/17/2021)

WAIVER | SURCHARGES AND FEES

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, adjudicating him a youthful offender upon his plea of guilty to 2nd degree robbery. The Second Department modified. The defendant was convicted before the enactment of CPL 420.35 (2-a), which permits the waiver of surcharges and fees for individuals who were under age 21 at the time of the crime. This provision applies retroactively to cases pending on direct appeal on the effective date of the legislation. In the interest of justice and on the consent of the People, the appellate court vacated the surcharges and fees. Appellate Advocates (Lynn W. L. Fahey, of counsel) represented the appellant. (Supreme Ct, Queens Co)

[Matter of Tereza R.](#), 199 AD3d 921

(2nd Dept 11/17/2021)

ABUSE/NEGLECT - SUMMARY JUDGMENT/ COLLATERAL ESTOPPEL

- DISPOSITION/SEX OFFENDER PROGRAM

LASJRP: The Second Department upholds a finding of neglect made upon petitioner's motion for summary judgment where the father's conviction for endangering the welfare of a child was based upon the same acts alleged to constitute neglect. The slight discrepancy between the date range of the incidents alleged in family court and the date range of the incidents to which the father pleaded guilty did not raise a triable issue of fact as to whether the same incidents were involved in both proceedings. The family court did not err in requiring the father to engage in a sex offender program where the petition alleged sexual abuse but there was no sexual abuse finding. The JRP appeals attorney was Claire Merline, and the trial attorney was Briana Fedele. (Family Ct, Kings Co)

[People v Johnson](#), AD3d 1017 (2nd Dept 11/24/2021)

BATSON | VIOLATION

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 4th degree CPCS and related crimes. The Second Department reversed and ordered a new trial. The prosecutor exercised five peremptory challenges to exclude prospective black jurors, including S.K., a school counselor. She indicated that it did not make sense to her when "something doesn't follow logic or kind of like when your children tell you a story about what happened at school, something doesn't make sense, there seems to be a missing part. You are thinking, I am not sure if this is the truth." The defendant lodged a *Batson* challenge, and the trial court found that he made a prima facie showing. Regarding a race-neutral reason, the prosecutor said that S.K. indicated that she wanted to hear from both sides in settling disputes. Defense counsel pointed out that the prosecutor did not strike a prospective white juror—another school counselor who also said that she would need to hear both stories when resolving a conflict at work. Supreme Court erred in denying the defense challenge. The race-neutral reason was a pretext for discrimination. Appellate Advocates (White & Case, of counsel) represented the appellant. (Supreme Ct, Queens Co)

[People v Patterson](#), 199 AD3d 1022

(2nd Dept 11/24/2021)

PRS | EXCESSIVE

Second Department *continued*

ILSAPP: The defendant appealed from a judgment of Orange County Court, convicting her of sex trafficking (two counts), upon her plea of guilty, and imposing an enhanced sentence of concurrent determinate terms of 12 years in prison, followed by 20 years of post-release supervision. The Second Department modified. County Court could properly impose an enhanced sentence, but the period of PRS was excessive and was reduced to five years, as promised in the original plea agreement. Geoffrey Chanin represented the appellant. (County Ct, Orange Co)

People v Wright, 199 AD3d 1025 (2nd Dept 11/24/2021)**PRS | ILLEGAL**

ILSAPP: The defendant appealed from a Dutchess County Court judgment, convicting him of 2nd degree CPW and 3rd degree CPCS. The Second Department modified. The purported waiver of appeal was invalid. The oral colloquy erroneously stated the waiver barred the filing of a brief or the assignment of appellate counsel. The plea court failed to confirm that the defendant understood the written waiver, which failed to state that appellate review was available for certain issues. The three-year period of post-release supervision for the drug conviction was illegal and was reduced to two years, as authorized under the Penal Law § 70.45 (2) (b). Carol Kahn represented the appellant. (County Ct, Dutchess Co)

People v Downing, 200 AD3d 704 (2nd Dept 12/1/2021)**CORAM NOBIS | INEFFECTIVE COUNSEL**

ILSAPP: The Second Department granted a writ of error coram nobis to vacate an order affirming a judgment, which convicted the defendant of attempted 1st degree rape and other crimes. Former appellate counsel failed to file a supplemental brief contending that Supreme Court should have determined whether the defendant deserved youthful offender status, pursuant to *People v Rudolph*, 21 NY3d 497, decided soon after the appellant's brief was filed. The sentence was vacated and the matter remitted. Legal Aid Society of NYC (Ying-Ying Ma) represented the appellant.

People v Jones, 200 AD3d 713 (2nd Dept 12/1/2021)**PEQUE | REMITTAL**

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st and 2nd degree assault. The Second Department held the appeal in abeyance. Due process required that a plea court apprise a defendant that, if he/she was not an American citizen, deportation might flow from a plea of guilty to a felony. *People v Peque*, 22 NY3d 168. A defendant was ordinarily required to preserve the contention that, because of a *Peque* violation, the plea was invalid. However, preservation was not required where, as here, a defendant had no practical ability to object to an error that was clear on the record. While the court noted possible "negative immigration consequences," deportation was not mentioned, and the court's admonition was confusing. Thus, the defendant was entitled to a chance to move to vacate his plea. He would have to show a reasonable probability that, had the court properly advised him, he would not have pleaded guilty. Appellate Advocates (Paris DeYoung, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Matter of Mathew B.C., 200 AD3d 689**(2nd Dept 12/1/2021)****TERMINATION OF PARENTAL RIGHTS -
ADJOURNMENTS**

LASJRP: In this termination of parental rights proceeding, the Second Department finds no error in the denial of an adjournment where the mother had a history of missing court dates; she had previously been granted an adjournment based on her representation that she could not afford to travel from Pennsylvania to New York, and the court, conditioned upon the mother's compliance with petitioner's request for a verified permanent out-of-state address so the mother could receive transportation assistance, granted that adjournment on a final basis; and, when the mother failed to appear, her counsel proffered the same excuse, but conceded that the mother had failed to comply with the court's directive to provide petitioner with a verified permanent out-of-state address.

The JRP appeals attorney was Susan Clement. (Family Ct, Kings Co)

People v Thomas, 200 AD3d 723 (2nd Dept 12/1/2021)**CHALLENGE | FAVORING COPS**

ILSAPP: The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of 1st degree murder (two counts) and 2nd degree CPW. The Second Department reversed and ordered a new trial. The trial court erred in denying a defense challenge for cause to a prospective juror—a firefighter who worked in the neighborhood where the offenses occurred. He told the trial court that he saw "a lot that goes on in the area" and that police there "defended us, stuck up for us" and he would "lean a little bit more" toward what an officer

Second Department *continued*

had to say. Upon questioning by the court, the prospective juror offered no unequivocal assurance that he could set aside any bias and render an impartial verdict. Appellate Advocates (Cynthia Colt) represented the appellant. (Supreme Ct, Richmond Co)

People v Thompson, 200 AD3d 725 (2nd Dept 12/1/2021)

SENTENCE | MENTAL ILLNESS

ILSAPP: The defendant appealed from a Dutchess County Court judgment, convicting him of 2nd degree robbery. The Second Department reduced the determinate term from 7 to 3½ years, plus post-release supervision. The defendant had no prior convictions but did have a history of mental illness. While suffering a bipolar episode and armed with a BB gun, he robbed a bank. Right after the incident, the defendant sought mental health treatment. The presentence report noted that he was remorseful, paid full restitution, and presented a low risk of recidivism. Thomas Angell represented the appellant. (County Ct, Dutchess Co)

People v Acevedo-Lopez, 200 AD3d 788 (2nd Dept 12/8/2021)

AGE 6 | UNSWORN

ILSAPP: The defendant appealed from a Rockland County Court judgment, convicting him of predatory sexual assault against a child and other crimes. The First Department reduced the punishment and otherwise affirmed. County Court properly accepted unsworn testimony of the six-year-old complainant. The record demonstrated that the victim had sufficient intelligence and capacity to justify the reception of the testimony. The defendant's admissions and the unsworn testimony cross-corroborated each other. (County Ct, Rockland Co)

People v Alvarado, 200 AD3d 794 (2nd Dept 12/8/2021)

ORDER OF PROTECTION | DURATION

ILSAPP: The defendant appealed from a Nassau County Court judgment, convicting him of 2nd degree criminal contempt. The Second Department affirmed. The challenge to the duration of the order of protection was unpreserved for appellate review since the defendant did not raise the issue at sentencing or move to amend the order on such ground. A defendant seeking adjustment of an order of protection should request relief from the issuing court, resorting to the appellate courts only if necessary. (County Ct, Nassau Co)

People v Douglas, 200 AD3d 795 (2nd Dept 12/8/2021)

PLEA | NEGATED

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 4th and 5th degree criminal possession of stolen property. The Second Department reversed, vacated the plea, and remitted. As charged, the 4th degree offense required possession of "a motor vehicle ... other than a motorcycle." During his plea allocution, the defendant admitted to possession of a motorcycle. Where a defendant's factual recitation negated an essential element of the crime pleaded to, the court could not accept the plea without making further inquiry to ensure that the defendant understood the nature of the charge and that the plea was intelligently entered. Appellate Advocates (Samuel Barr, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Feddaoui, 200 AD3d 799 (2nd Dept 12/8/2021)

CHALLENGE | DENIED

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree robbery and another crime. The Second Department reversed and ordered a new trial. Supreme Court erred in denying the defendant's for-cause challenge to a prospective juror who stated that she would expect the defense to present evidence. Her subsequent responses fell short of providing unequivocal assurances of impartiality. Since the defendant exhausted his peremptory challenges, the denial of his challenge constituted reversible error. Appellate Advocates (Sean Nuttall and Chelsea Lopez, of counsel) represented the appellant. (Supreme Ct, Queens Co)

Matter of Kai'Ere D., 200 AD3d 778 (2nd Dept 12/8/2021)

ABUSE/NEGLECT - REMOVAL/IMMINENT RISK

LASJRP: The Second Department affirms an order that removed the child from the mother's custody pursuant to Family Court Act § 1027 where the child was initially removed from the mother's care on an emergency basis, but was later returned to her pursuant to orders conditioning the release of the child to the mother upon her compliance with various directives contained in those orders; and the child subsequently was admitted to the hospital with severe burns.

The JRP appeals attorney was Riti Singh, and the trial attorney was Taylor Poe. (Family Ct, Kings Co)

Matsui v Matsui, 200 AD3d 774 (2nd Dept 12/8/2021)

CUSTODY | NO ARBITRATION

Second Department *continued*

ILSAPP: The wife appealed from an order and a judgment of divorce rendered by Queens County Supreme Court. The Second Department dismissed the appeal from the order, reversed the judgment, and remitted. The right of direct appeal from the order terminated upon entry of the judgment. *See Matter of Aho*, 39 NY2d 241. However, the issues raised on appeal from the order were brought up for review on appeal from the judgment. *See* CPLR 5501 (a) (1). Supreme Court erred in not exercising jurisdiction over custody on the basis that the stipulation of settlement contained an arbitration clause. Custody matters are not subject to arbitration; the court's *parens patriae* role must not be usurped. Steven Forbes represented the appellant. (Supreme Ct, Queens Co)

Assad v Assad, 200 AD3d 831 (2nd Dept 12/15/2021)**DIVORCE | CHILD SUPPORT**

ILSAPP: The wife appealed from an order of Queens County Supreme Court entered in post-divorce proceedings. The Second Department modified. The trial court erred in summarily denying the plaintiff's motion to modify the parties' stipulation to increase child support. Three years had passed since the last support order was entered; and the husband's gross income had increased by 15%. *See* Domestic Relations Law § 236 (B) (9) (b) (2) (ii); Family Ct Act § 451 (3) (b). A hearing was needed. It was also error to impose counsel fees against the wife. Her motion was not so lacking in merit as to justify such award to the husband, the monied party. Finally, Supreme Court should not have restricted the wife's filing of future motions and imposed prospective sanctions. Jennifer Moran represented the wife. (Supreme Ct, Queens Co)

People v Fahey, 200 AD3d 978 (2nd Dept 12/22/2021)**WAIVER | INVALID**

ILSAPP: The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 1st degree rape and another crime. The Second Department affirmed but found the purported waiver of appeal invalid, considering the defendant's limited experience with the criminal justice system. The terse oral colloquy failed to advise him that the right to appeal was separate and distinct from other rights automatically waived in taking a plea bargain and that a waiver of appeal was not an absolute bar to an appeal. The written waiver did not clarify these matters. (Supreme Ct, Nassau Co)

Hogan v Max, 200 AD3d 1016 (2nd Dept 12/22/2021)**ARTICLE 8 | ANDERS**

ILSAPP: The father appealed from an order of Queens County Family Court, which summarily dismissed his family offense petition based on a failure to state a cause of action. Assigned counsel submitted an *Anders* brief. The Second Department assigned new counsel. The brief failed to analyze potential appellate issues with reference to the facts of the case and relevant legal authority. The contention that the appeal was academic was based on evidence *dehors* the record and therefore was not considered. (Family Ct, Queens Co)

People v Louis, 200 AD3d 1008 (2nd Dept 12/22/2021)**CORAM NOBIS | GRANTED**

ILSAPP: The defendant sought a writ of error *coram nobis* to vacate a Second Department order affirming a judgment of conviction. The appellate court granted the application and dismissed two counts of endangering the welfare of child, finding that the defendant was denied effective assistance. In the appellate brief, counsel failed to contend that trial counsel was incompetent in not moving to dismiss the misdemeanor counts as time-barred. The EWC counts were not lesser included offenses of the rape and burglary counts. There was no explanation for counsel's failure to raise a defense as clear-cut and dispositive as a limitations period. Counsel was not seeking a compromise verdict. The Legal Aid Society, New York City (Ronald Zapata, of counsel) represented the appellant.

People v Richardson, 200 AD3d 984

(2nd Dept 12/22/2021)

ID | SUGGESTION

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2nd degree murder. The Second Department affirmed. The appeal brought up for review the denial of suppression of identification testimony. When, as here, a crime was committed by a long-time acquaintance of a witness, there was negligible risk that comments by the police, however suggestive, would lead to a misidentification. Thus, when the protagonists knew each other, a hearing as to suggestiveness was not required. Testimony indicated that the victim and the defendant had been acquainted for three years through mutual friends. (Supreme Ct, Kings Co)

Matter of Trinity E., 200 AD3d 1015

(2nd Dept 12/22/2021)

CONSENT | NO APPEAL

The mother appealed from an order of Nassau County Family Court, finding that she neglected the subject child and, upon consent, placing her under the supervision of Social Services. The appeal from such disposition

Second Department *continued*

was dismissed, since no appeal lies from an order entered on the consent of the appellant. A preponderance of evidence supported the determination that the mother neglected the then-seven-month-old child by leaving him alone in the hotel room where she was living. (Family Ct, Nassau Co)

Vellios v Vellios, 200 AD3d 967 (2nd Dept 12/22/2021)

FAMILY OFFENSES - JURISDICTION/ GUARDIAN AD LITEM

LASJP: In this family offense proceeding petitioner filed on behalf of the parties' developmentally disabled, then 19-year-old child, the Second Department concludes that the family court was not divested of subject matter jurisdiction by virtue of the child attaining the age of 21. The question of subject matter jurisdiction is generally confined to whether a qualifying offense has been committed between parties in a qualifying relationship.

To the extent that respondent is challenging petitioner's ability to prosecute this matter in a representative capacity, there is no jurisdictional defect requiring dismissal of the proceeding. Rather, insofar as the record raises questions of fact as to whether the complainant may require the assistance of a guardian ad litem to protect her interests, the family court should have conducted a hearing to determine whether such an appointment was necessary pursuant to CPLR 1201. (Family Ct, Kings Co)

People v Wilson, 200 AD3d 1005 (2nd Dept 12/22/2021)

CHALLENGE DENIED | NEW TRIAL

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of leaving the scene of an incident without reporting and another crime. The Second Department reversed and ordered a new trial. The lower court erred in denying the defendant's challenges for cause to three prospective jurors. One juror would give more credence to a testifying police officer than a civilian witness, yet the court did not elicit the requisite unequivocal assurance. The two other jurors could not understand the People's burden of proof. Because the defendant exhausted his peremptory challenges, the error required reversal. Appellate Advocates (Anna Jouravleva) represented the appellant. (Supreme Ct, Queens Co)

DiNapoli v DiNapoli, 200 AD3d 1027 (2nd Dept 12/29/2021)

CUSTODY | SCARY DAD | REVERSED

ILSAPP: The mother and children appealed from a custody modification order entered by Suffolk County Supreme Court in post-divorce proceedings. The Second Department reversed. The record did not support custody to the father, given his poor relationship with the children, due in part to his dismissive attitude toward their feelings. Further, a neutral forensic examiner said the children feared the father and wanted nothing to do with him. The views of the children, then age 12 and 15, were entitled to some weight. The teens wept when told they had to live with their dad. (Fortunately, shortly after the challenged order, the mother moved for a CPLR 5519 [c] stay pending appeal, which the appellate court granted.) Quatela Chimeri, PLLC represented the appellant. (Supreme Ct, Suffolk Co)

Minor v Birkenmeyer, 200 AD3d 1044 (2nd Dept 12/29/2021)

ARTICLE 8 | RIGHT TO COUNSEL

ILSAPP: The petitioner appealed from an order of Kings County Family Court, which dismissed her petition without a hearing, based on a lack of subject matter jurisdiction. The Second Department reversed. A party in a Family Ct Act Article 8 proceeding had the right to be represented by counsel. For a valid waiver of such right, the trial court was required to conduct a searching inquiry. Family Court failed to do so and thus deprived the petitioner of her statutory right to counsel. Further, the lower court erred in not holding a hearing to determine whether the parties had an intimate relationship within the meaning of Family Ct Act § 812 (1) (e). The matter was remitted. Diana Kelly represented the appellant. (Family Ct, Kings Co)

People v Moody, 200 AD3d 1072 (2nd Dept 12/29/2021)

INQUIRY | ANXIOUS JUROR

ILSAPP: The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of 2nd degree CPW. The Second Department reversed and ordered a new trial. During deliberations, a note revealed that the jury had reached a verdict on one count but no consensus on the others. After a lunch break, one juror reported that she had had anxiety attacks, felt distraught, and wanted to stop serving. Denying a defense request, the court made no inquiry before accepting a partial verdict. That was error, under *People v Buford*, 69 NY2d 290. Supreme Court should have conducted an *in camera* "probing and tactful inquiry" of the anxious juror. As a result of the failure to do so, it was unknown whether she became unable to serve before or after the jury reached a partial verdict. Appellate Advocates (Anders Nelson) represented the appellant. (Supreme Ct, Richmond Co)

Second Department *continued***Silla v Silla, 200 AD3d 1091 (2nd Dept 12/29/2021)****CUSTODY | SUMMARY ORDER | REVERSED**

ILSAPP: The father appealed from a custody modification order summarily entered by Kings County Supreme Court in divorce proceedings. The Second Department reversed. A hearing was needed where, as here, [there are] facts material to best interests. Anthony Bramante represented the appellant. (Supreme Ct, Kings Co)

Sutton v Rivera, 200 AD3d 1048 (2nd Dept 12/29/2021)**CUSTODY | SUMMARY ORDER | REVERSED**

ILSAPP: The father appealed from an order of Kings County Supreme Court, which granted the mother's motion to dismiss his modification and enforcement petitions. The Second Department reversed. Supreme Court should not have summarily determined that it lacked exclusive continuing jurisdiction on the ground that the children had been residing in Florida and then Hawaii. The parties were entitled to an opportunity to present evidence under the UCCJEA, so a hearing was ordered. Austin Idehen represented the appellant. (Supreme Ct, Kings Co)

People v Martinez, 201 AD3d 658 (2nd Dept 1/5/2022)**CONCURRENT TERMS | EXCESSIVE QUESTIONING**

ILSAPP: The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of 2nd degree murder. The Second Department modified. The defendant had previously been convicted of murder and 2nd degree CPW, but the murder conviction was reversed and a new trial was ordered. After the second trial, Supreme Court imposed the murder sentence consecutively to the weapon possession term. That was error. The People did not establish that the defendant knowingly and unlawfully possessed a loaded firearm before forming the intent to cause a crime with that weapon. Two dissenters would have granted a new trial in the interest of justice. The defendant was deprived of a fair trial when the court improperly questioned witnesses, denigrated the affirmative defense, and advanced the prosecution's case. The reference to a "cold-blooded killer" may have contributed to the rejection of the defense of extreme emotional disturbance. Further, the court showed undue skepticism toward the defendant's expert. Appellate Advocates (Jonathan Schoepp-Wang) represented the appellant. (Supreme Ct, Richmond Co)

People v Rivera, 201 AD3d 673 (2nd Dept 1/5/2022)**BAD APPEAL WAIVER | FORFEITED ISSUE**

ILSAPP: The defendant appealed from an Orange County Court judgment, convicting him of 2nd degree gang assault. The Second Department affirmed. The purported waiver of appeal was invalid. County Court inaccurately stated that the waiver was an absolute bar to the taking of a direct appeal. The written document was similarly flawed. However, by pleading guilty, the defendant forfeited his right to contest the purported violation of his right to be present at all material stages of the proceedings. (County Ct, Orange Co)

People ex rel. Rankin v Brann, 201 AD3d 675 (2nd Dept 1/11/2022)**HABEAS | BAIL REVOCATION**

ILSAPP: The Second Department sustained the petitioner's habeas corpus petition to the extent of ordering an evidentiary hearing. CPL 530.60 (2) (a) states: "Whenever in the course of a criminal action ... a defendant charged with the commission of a felony is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this article, it shall be grounds for revoking such order that the court finds reasonable cause to believe the defendant committed one or more ... violent felony offenses." The provision applied here. Thus, Queens County Supreme Court was required to hold a hearing under CPL 530.60 (2) (c) (before revoking order of recognizance, release under non-monetary conditions or bail, court must hold hearing and admit relevant, admissible evidence). Douglas Rankin represented the petitioner. (Supreme Ct, Queens Co)

People v English, 201 AD3d 733 (2nd Dept 1/12/2022)**COUNSEL | SUBSTITUTION**

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree assault and other crimes, upon a jury verdict. The Second Department reversed. The defendant's right to counsel was not adequately protected. His request for a new attorney, made through assigned counsel, contained serious complaints about counsel and allegations as to the breakdown of communications. Supreme Court failed to meet its duty of inquiry to determine if there was good cause for the requested substitution. Instead, the trial court denied the request without speaking with the defendant. The matter was restored to pre-suppression-hearing status and remitted. Appellate Advocates (Ava Page, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Schlosser v Hernandez, 201 AD3d 724 (2nd Dept 1/12/2022)**CUSTODY | MODIFIED**

Second Department *continued*

ILSAPP: The mother appealed from an order of Suffolk County Family Court, awarding the parties joint legal custody of their child, sole residential custody to the father, and parenting time for the mother. The Second Department modified. Awarding primary physical custody to the father was not sound. The parties enjoyed relatively equal parenting time for most of their daughter's life. For years, the parties had been able to work together in sharing parenting time. Further, the hearing testimony raised significant questions about the father's willingness to foster the child's relationship with the mother. For all these reasons, the best interests of the child would be served by shared residential custody. Jennifer Goody represented the appellant. (Family Ct, Suffolk Co)

People v Lisene, 201 AD3d 738 (2nd Dept 1/12/2022)

REPUTATION | NEW TRIAL

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree criminal sexual act and another crime. The Second Department reversed and ordered a new trial because of the erroneous preclusion of certain witness testimony. A party had a right to call a witness to testify that a key opposing witness had a bad reputation in the community for truth and veracity. See *People v Fernandez*, 17 NY3d 70. This defendant sought to introduce testimony from Marie Anisca-Oral, a friend of his sister, regarding the reputation for truthfulness and veracity of the eight-year-old complainant's mother. To lay the foundation, Anisca-Oral described a community of eight friends and acquaintances, predominantly of Haitian nationality and living in certain neighborhoods in Brooklyn. Anisca-Oral said that she had known the mother since 1999; that almost everyone she knew also was familiar with the mother; and that every time she saw her acquaintances among this group, the mother's reputation for veracity was discussed. That constituted a proper foundation; the proffered testimony provided a reasonable assurance of reliability. The presentation of reputation evidence by a defendant is a matter of right if, as here, a proper foundation has been laid and the evidence is relevant to contradict the testimony of a key witness and is limited to the general reputation for veracity in the community. The mother was a key fact witness whose credibility was sharply contested and relevant both to the People's case and to the theory of defense. The error was not harmless. Appellate Advocates (David Goodwin, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Morancis, 201 AD3d 751 (2nd Dept 1/12/2022)

COUNSEL | INEFFECTIVE | SORA

ILSAPP: The defendant appealed from an order of Queens County Supreme Court, which designated him a level-three predicate sex offender. The Second Department reversed and remitted, based on ineffective assistance. Counsel made two arguments, both lacking in merit and revealing no understanding of the facts and the law. Even if the arguments had any viability, they would not have altered the presumptive risk level. There was no strategic decision to attack the assessment of points, while foregoing a request for a downward departure. Appellate Advocates (David Fitzmaurice, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Varghese, 201 AD3d 747 (2nd Dept 1/12/2022)

COUNSEL | ANDERS

ILSAPP: The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of aggravated DWI. In response to appellate counsel's *Anders* brief, the Second Department ordered that new counsel be assigned. The brief did not analyze potential appellate issues or highlight facts that might arguably support the appeal, including whether the appeal waiver was valid and the sentence was excessive. (Supreme Ct, Nassau Co)

People v Woodley, 201 AD3d 749 (2nd Dept 1/12/2022)

DUPLICITOUS | VACATED

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of two counts of 1st degree criminal contempt and eight counts of 2nd degree criminal contempt. The Second Department modified. Even if valid on its face, a count was duplicitous where the evidence made plain that multiple criminal acts occurred during the relevant period, rendering it nearly impossible to determine the act upon which the jury reached its verdict. Seven counts charged the defendant with 2nd degree criminal contempt, arising from his alleged violation of two orders of protection during two incidents on the same day. Neither the verdict sheet nor the jury charge explained how the proof applied to the counts. Thus, the counts were dismissed. Appellate Advocates (Nao Terai, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Green, 201 AD3d 814 (2nd Dept 1/19/2022)

440.10 | HEARING

ILSAPP: The defendant appealed from an order of Kings County Supreme Court, which summarily denied his CPL 440.10 motion to vacate a 1990 judgment, convicting him of 2nd degree murder, upon a jury verdict. The Second Department vacated the order denying the motion insofar as it was based on actual innocence. The defendant made a prima facie showing warranting a hearing. He

Second Department *continued*

submitted four supporting affidavits from alleged witnesses who described another individual as the shooter. A fifth witness stated that he saw that same person arguing with the victim, heard several gun shots, and saw the individual running away while stuffing a gun into his jacket. In addition, the sole witness who testified against the defendant at trial stated that she was not present during the shooting—which was consistent with what she initially told police. Supreme Court properly denied the branch of the defendant’s motion that was based on newly discovered evidence, since he did not show due diligence after the discovery of the new evidence. The motion court also properly denied the arguments based on ineffective assistance, since the defendant could have raised the issue in one of his prior 440 motions. However, Supreme Court had erroneously found the IAC claim to be procedurally barred by CPL 440.10 (2) (c) regarding matters that could have been brought on direct appeal. That provision no longer applied to IAC claims, eff. Oct. 25, 2021 (*NY State Assembly Bill A2653* (nysenate.gov)). Justin Bonus represented the appellant. (Supreme Ct, Kings Co)

People v Lundi, 201 AD3d 817 (2nd Dept 1/19/2022)**YO | NO DETERMINATION**

ILSAPP: The defendant appealed from an order of Kings County Supreme Court, convicting him of two counts of 1st degree robbery, upon his plea of guilty. The Second Department vacated the sentence. CPL 720.20 (1) required a youthful offender determination in every case where the defendant was eligible, even if he/she did not request it or agreed to forego it as part of a plea bargain. See *People v Rudolph*, 21 NY3d 497. Supreme Court was required to determine if the defendant, whose convictions were armed felonies, was an eligible youth under CPL 720.10 and, if so, whether he should receive YO status. Appellate Advocates (Priya Raghavan, of counsel) represented the defendant. (Supreme Ct, Kings Co)

People v Mitchell, 201 AD3d 818 (2nd Dept 1/19/2022)**WAIVER INVALID | FEES VACATED**

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree burglary and other crimes. The Second Department modified. The purported waiver of appeal was invalid. Supreme Court erroneously stated that the waiver constituted an absolute bar to taking a direct appeal and did not tell the defendant that review was available for certain issues. Further, the written waiver inaccurately stated that the defendant was forfeiting the right to the assignment of appellate counsel and the opportunity to

collaterally attack the judgment. With the People’s consent, the appellate court vacated the mandatory surcharges imposed at sentencing. Appellate Advocates (Lynn W. L. Fahey, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Smith, 201 AD3d 822 (2nd Dept 1/19/2022)**PLEA WITHDRAWAL | NO COERCION**

ILSAPP: The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 1st degree assault and other crimes. The Second Department affirmed. The plea court properly denied the defendant’s motion to withdraw his plea. The fact that counsel expressed pessimism about the defendant’s chances at trial did not constitute coercion. The lower court adequately warned the defendant about the impact a plea of guilty would have on a statutory speedy trial claim. See CPL 30.30 (6) (order finally denying motion to dismiss pursuant to subdivision [1] is reviewable on appeal from judgment of conviction, even where judgment was entered on guilty plea); *People v Person*, 184 AD3d 447 (appeal waiver may forfeit review of 30.30 claim), lv denied 35 NY3d 1069. (Supreme Ct, Nassau Co)

Matter of Spagnuolo v Anderson, 202 AD3d 698 (2nd Dept 2/2/2022)**CUSTODY - DEFAULTS**

LASJRP: The Second Department upholds the denial of the mother’s motion to vacate the final order of custody. The mother established a reasonable excuse for her default where her attorney was delayed by an appearance in another court and failed to provide her with a link to attend the virtual hearing, but she failed to establish a potentially meritorious defense. (Family Ct, Queens Co)

Everbank v Kelly, 203 AD3d 138 (2nd Dept 2/2/2022)**SERVICE OF PROCESS**

LASJRP: The Second Department holds that service of process upon defendant Bressler at an address that was not actually his dwelling place or usual place of abode was defective, notwithstanding contrary representations made to the process server at the doorstep by defendant’s daughter. While the process server’s testimony satisfied plaintiff’s prima facie burden to prove proper service, Bressler’s evidence established that process was not effectuated at a location authorized by CPLR 308(2).

For a defendant to be estopped from raising a claim of defective service, the conduct misleading the process server must be the defendant’s conduct, as distinguished from conduct of a third party. (Supreme Ct, Suffolk Co)

Second Department *continued*

Matter of Nila S., 202 AD3d 695 (2nd Dept 2/2/2022)

ABUSE/NEGLECT - MOTION TO VACATE DISPOSITIONAL/FACT-FINDING ORDERS

LASJRP: The Second Department reverses an order that, in effect, denied the mother's motion pursuant to FCA § 1061 to modify an order of disposition so as to grant a suspended judgment and vacate an order finding that she neglected the children, and grants the motion.

The mother demonstrated her lack of a prior child protective history, her remorse and insight into how her actions affected the children, her commitment to ameliorating the issues that led to the finding of neglect, and her compliance with court-ordered services and treatment.

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

Matter of O'Connor v O'Connor, 202 AD3d 689 (2nd Dept 2/2/2022)

FAMILY OFFENSES

LASJRP: In this family offense proceeding, the Second Department concludes that although the family court was correct in noting that the child's out-of-court statements regarding the father's alleged harassment could not be admitted under the statutory hearsay exception in FCA § 1046(a)(vi), and that the child could not be permitted to testify in camera outside the presence of respondent or his counsel, the court erred in concluding that there was no other way for petitioner to present competent evidence of the allegations—for instance, by having the child, who was 17 years old at the time the petition was filed, testify in open court – and in dismissing the petitions without hearing from the child. (Family Ct, Rockland Co)

Matter of Paige v Paige, 202 AD3d 794 (2nd Dept 2/9/2022)

CUSTODY - CHANGE IN CIRCUMSTANCES - INTERFERENCE WITH PARENT-CHILD CONTACT - CHILD'S WISHES - EDUCATION DECISIONS

LASJRP: In a 3-2 decision, the Second Department reverses an order awarding the father sole legal and physical custody, and reinstates the April 2018 award of sole legal and physical custody to the mother, concluding that the father failed to establish a change in circumstances.

The majority notes, inter alia, that although in August 2018 the child was removed from the mother's care during a neglect proceeding (the child has lived with the father since 2018), in March 2020 the ACS attorney submitted a progress report indicating that the mother had successfully completed all required services, including substance abuse counseling, that visits to the mother's home revealed "no concerns or issues," and that the mother "display[ed] a positive and a nurturing relationship" with the child; that the ACS attorney stated that ACS had no objections to the mother having sole custody of the child; that the family court placed undue weight on an alleged suicide attempt by the mother in 2013; that the father did not allow the mother to speak to the child by phone, Facetime, or other means while the child was at the father's home; that the father did not add the mother to the child's "blue card" at school for emergency contact information, despite the mother's repeated requests that he do so, and neglected to advise the mother of which school he had selected for the child to attend during the 2018-2019 school year; and that the child wished to reside with the mother and the child's half-siblings.

The dissenting judges assert that the circumstances leading to the finding of neglect established a change in circumstances; and that while the mother may have made strides in improving her circumstances, the father fosters a safe and stable environment for the child. (Family Ct, Queens Co)

Mansour v Mahgoub, 202 AD3d 961 (2nd Dept 2/16/2022)

FAMILY OFFENSE | MODIFICATION

ILSAPP: The respondent appealed from an order of Queens County Family Court, which found that he committed multiple family offenses and issued a five-year order of protection. The Second Department modified. The commission of the family offense of disorderly conduct was not established. There was no evidence that the respondent acted with the intent to cause, or recklessly posed a risk of causing, public inconvenience, annoyance or alarm. Allan Shafter represented the respondent. (Family Ct, Queens Co)

People v Manzano, 202 AD3d 994 (2nd Dept 2/16/2022)

JURY NOTE | INADEQUATE RESPONSE

ILSAPP: The defendant appealed from a judgment of Nassau County Court, convicting her of 1st degree offering a false instrument for filing, upon a jury verdict. The Second Department reversed and ordered a new trial. During jury deliberations, County Court failed to meaningfully respond to a jury note. Simply rereading the original instructions may sometimes constitute a meaningful response, but here it was error to do so in response to the

Second Department *continued*

jury's last question about the elements of one charge. The jury had previously sent a note about that charge, thus indicating initial confusion. At a minimum, the court should have asked the jurors to clarify their request. Since this error bore on an element of the charge, the defendant was prejudiced by it. Matthew Tuohy represented the appellant. (County Ct, Nassau Co)

People v Ortiz, 202 AD3d 1006 (2nd Dept 2/16/2022)**ANDERS BRIEF | NEW COUNSEL**

ILSAPP: The defendant appealed from an order of Suffolk County Supreme Court, designating him a level-three sex offender. Appellate counsel submitted an *Anders* brief. The Second Department assigned new counsel. Nonfrivolous issues existed, including whether points were properly assessed under risk factors 9 and 12 and whether the request for a downward departure from the presumptive risk level was properly denied. (Supreme Ct, Suffolk Co)

People v Shelton, 202 AD3d 1001 (2nd Dept 2/16/2022)**YO | NOT CONSIDERED**

ILSAPP: The defendant appealed from two judgments of Nassau County Supreme Court, convicting him of 1st degree robbery, attempted 1st degree assault, and 2nd degree CPW, upon his plea of guilty. The Second Department vacated the sentences. CPL 720.20 (1) required a youthful offender determination in every case where the defendant was eligible, even where he/she failed to request it, or agreed to forgo it as part of a plea bargain. See *People v Rudolph*, 21 NY3d 497. The instant convictions constituted armed felonies for which the Supreme Court was required to consider statutory factors to determine whether the defendant was an eligible youth and, if so, whether he should be afforded YO. The lower court did not do so. The defendant also appealed from a judgment convicting him of 2nd degree murder. The appellate court vacated the conviction and dismissed such count. Supreme Court was not authorized to accept a plea of guilty to this count. As a juvenile offender, the defendant could not be held criminally responsible for felony murder where the underlying felony, attempted robbery, was a crime for which he could not be held criminally responsible. Andrew MacAskill represented the appellant. (Supreme Ct, Nassau Co)

People v Smith, 202 AD3d 1003 (2nd Dept 2/16/2022)**MISSING WITNESS | CHILD**

ILSAPP: The defendant appealed from a judgment of Westchester County Supreme Court, convicting him of 2nd degree assault. The Second Department affirmed. The trial court properly denied the defendant's request for a missing witness charge as to a 12-year-old child eyewitness. The People made diligent efforts to locate the witness and explained the family's refusal to allow the child to speak to the prosecution or testify. (Supreme Ct, Westchester Co)

Matter of Angelina J. W., 202 AD3d 1091**(2nd Dept 2/23/2022)****TERMINATION OF PARENTAL RIGHTS - UNWED FATHER/CONSENT TO ADOPTION**

LASJRP: In this termination of parental rights proceeding, the Second Department upholds a determination that father's consent to adoption was not required under Domestic Relations Law § 111(1)(d).

The father did not establish that he provided financial support consistent with his means, nor did he establish that he visited the child monthly when able to do so or maintained regular communication with the agency when unable to visit the child. The agency was not required to make diligent efforts to encourage the father to comply with the statute. To the extent that the father raised his due process argument before the Family Court, it is without merit.

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

People v Austin, 203 AD3d 732 (2nd Dept 3/2/2022)**SEARCH AND SEIZURE - CREDIBILITY OF POLICE TESTIMONY**

LASJRP: The Second Department orders suppression where the officers' versions of events sharply conflicted with each other as to where defendant was sitting in the minivan, and what he was doing, when the officers arrived at the minivan's front windows. The accounts could not both have been true, since both officers acknowledged that they approached the minivan simultaneously and reached the front seats at the same time.

A belatedly disclosed search warrant affidavit indicated that one officer had seen defendant "pushing an unknown object," rather than a gun, under the front passenger seat of the minivan. If the officer had seen a gun, it is unlikely he would have waited several hours, until he drove the minivan back to the station house, to confirm his observation. The complaint report suggests that the minivan had been searched not because the officer had seen a gun, but, rather, incident to an arrest for a forged license plate.

Second Department *continued*

Given the inconsistencies, it is impossible to determine exactly what happened, and what the officers saw when they approached the minivan. (Supreme Ct, Kings Co)

People v Dyshawn B., 203 AD3d 739 (2nd Dept 3/2/2022)

FEES | VACATED

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, adjudicating him a youthful offender, upon his plea of guilty to 2nd degree CPW. The Second Department modified, given the retroactive application of amendments repealing mandatory surcharges and crime victim assistance fees for YOs. *See* Penal Law § 60.35 (1). Appellate Advocates (Lynn W.L. Fahey, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v David, 203 AD3d 739 (2nd Dept 3/2/2022)

PEOPLE'S APPEAL | SORA RESENTENCE REVERSED

ILSAPP: The People appealed from a resentence of Kings County Supreme Court, imposed upon the granting of the branch of the defendant's CPL 440.20 motion seeking to set aside his certification as a sex offender. The Second Department reversed and reinstated the original sentence. A defendant's certification as a sex offender was part of the judgment of conviction but not the sentence. The relief sought was not available under CPL 440.20. (Supreme Ct, Kings Co)

People v Dranchuk, 203 AD3d 741 (2nd Dept 3/2/2022)

PROBATION CONDITION | UNREASONABLE

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2nd degree assault, upon his plea of guilty, and imposing a sentence of community service and probation. The Second Department deleted a condition requiring the defendant to consent to a search of his person, vehicle, and home and to the seizure of drugs or weapons found. The issue did not require preservation and was not precluded by the appeal waiver. Probation conditions must be reasonably related to rehabilitation. The conviction arose from the defendant's assault of a taxicab driver and theft of her cell phone. When he committed the offense, the defendant was not armed. He told the probation department that he was under the influence of alcohol, but he was not found to need treatment. Appellate Advocates (David Goodwin) represented the appellant. (Supreme Ct, Kings Co)

People v Gough, 203 AD3d 747 (2nd Dept 3/2/2022)

SEARCH AND SEIZURE - EXPECTATION OF PRIVACY/PROBABLE CAUSE

LASJRP: The Second Department concludes that the court erred in denying defendant's motion to suppress DNA evidence obtained from defendant's clothing taken from the hospital on the night of the shooting. Defendant had a legitimate expectation of privacy even though the police perceived him as a victim rather than a suspect at the time his clothing was seized.

The People failed to establish that the detective knew the clothes would have covered the part of defendant's body where he was shot, as the detective admitted that he did not know what type of clothing was in the bag that was seized, and the People also failed to establish any exigent circumstances, as they provided no evidence that the clothing was in danger of being removed or destroyed. (Supreme Ct, Queens Co)

People v Hunter, 203 AD3d 752 (2nd Dept 3/2/2022)

YO | NO ELIGIBILITY RULING

ILSAPP: The defendant appealed from two judgments of Queens County Supreme Court. The Second Department modified. As to 2nd degree CPW, an armed felony, the plea court failed to determine whether the defendant was an "eligible youth" and, if so, whether he should be afforded youthful offender treatment. Regarding resisting arrest, the court similarly did not decide if the defendant deserved YO status. The sentences were vacated and the matter remitted. In the interest of justice, the surcharge and fees imposed were also waived, pursuant to CPL 420.35 (2-a), which applied to offenders who were under age 21 at the time of the crime and which was enacted after the instant conviction. Legal Aid Society, NYC (Lauren Jones, of counsel) represented the appellant. (Supreme Ct, Queens Co)

Nizen v Jacobellis, 203 AD3d 719 (2nd Dept 3/2/2022)

SUPPORT OBJECTIONS | DEFECTIVE EMAIL SERVICE

ILSAPP: The father appealed from an order of Suffolk County Family Court denying his objections to a Support Magistrate's child support order. The Second Department affirmed. The father had used email to serve his objections on the pro se mother. Family Court properly denied the objections based on improper service. Since Family Ct Act § 439 (e) did not set forth permissible methods of service, the CPLR applied. Under section 2103, service by email was not allowed upon a party who had not appeared by an attorney. (Family Ct, Suffolk Co)

Second Department *continued***People v Arevalo, 203 AD3d 943 (2nd Dept 3/16/2022)****SUPPRESSION | ERROR HARMLESS**

ILSAPP: The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of criminally negligent homicide. The Second Department affirmed. Supreme Court erred in concluding that the defendant was not under arrest when he was removed from his vehicle at gunpoint by officers, handcuffed, and placed in a police vehicle. Since the People failed to establish that the arrest was lawful, the court should have suppressed the blood sample evidence and the defendant's statements to police. However, the error was harmless. The People did not present the blood evidence at trial, and proof of guilt was overwhelming, without regard to his inculpatory statements. (Supreme Ct, Nassau Co)

Marin v Banasco, 203 AD3d 924 (2nd Dept 3/16/2022)**FAMILY OFFENSE | MENACING**

ILSAPP: The father appealed from an order of Queens County Family Court, which found that he committed family offenses, including 3rd degree menacing, and issued an order of protection. The Second Department modified. The mother's petition alleged, among other things, that in the presence of the child, the father knocked her cell phone out of her hand and threatened to hurt her. The evidence did not demonstrate that the father committed 3rd degree menacing. There was insufficient evidence that the father's conduct was intended to place the petitioner in fear of death or physical injury by physical menace. Robert Hausner represented the appellant. (Family Ct, Queens Co)

People v Forbes, 203 AD3d 949 (2nd Dept 3/16/2022)**30.30 CLAIM | FORFEITED**

ILSAPP: The defendant appealed from a 2016 judgment of Queens County Supreme Court, convicting him of 3rd degree CPW. The Second Department affirmed. The defendant forfeited his right to claim that he was deprived of his statutory speedy trial rights. CPL 30.30 (6) (such claim reviewable on appeal from ensuing judgment of conviction, notwithstanding that judgment was entered upon plea of guilty), did not go into effect until 2019 and did not apply retroactively. (Supreme Ct, Queens Co)

People v Moore, 203 AD3d 953 (2nd Dept 3/16/2022)**PEQUE VIOLATION | REMITTAL**

ILSAPP: The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of attempted 2nd degree criminal possession of a forged instrument. The Second Department held the appeal in abeyance. Supreme Court failed to warn the defendant of possible deportation consequences of his guilty plea, in violation of *People v Peque*, 22 NY3d 168. The matter was remitted to give the defendant an opportunity to move to vacate his plea and seek to establish that there was a reasonable probability that he would not have pleaded guilty had the lower court properly advised him. Stacy Albin-Leone represented the appellant. (Supreme Ct, Nassau Co)

People v Motta, 203 AD3d 968 (2nd Dept 3/16/2022)**ANDERS | NEW COUNSEL**

ILSAPP: The defendant appealed from an order of Nassau County Supreme Court, which designated him a level-three sex offender. Appellate counsel submitted an *Anders* brief. The Second Department assigned new counsel. Nonfrivolous issues existed, including whether the defendant was deprived of effective assistance at the SORA hearing to determine his risk level. (Supreme Ct, Nassau Co)

People v Stevens, 203 AD3d 958 (2nd Dept 3/16/2022)**APPEAL WAIVER | MODEL COLLOQUY**

ILSAPP: The defendant appealed from a Dutchess County Court judgment, convicting him of 2nd degree CPCS. The Second Department affirmed. The waiver of appeal was valid. The Model Colloquy regarding an appeal waiver was only a guide. In some cases, the plea court might find it appropriate to advise the defendant of a particular issue that survived an appeal waiver. But here County Court could reasonably have decided not to discuss certain issues. Further, a written waiver was not required. The enforceable waiver precluded review of the claim of an unduly severe sentence. (County Ct, Dutchess Co)

**People v Thompson, 203 AD3d 961
(2nd Dept 3/16/2022)****YO FINDING | REMITTAL**

ILSAPP: The defendant appealed from two judgments of Kings County Supreme Court, convicting him of attempted 2nd degree murder and 1st degree manslaughter, upon his pleas of guilty. The Second Department modified and remitted. CPL 720.20 (1) required a youthful offender determination in every case where the defendant was eligible, even where he/she failed to request such determination or agreed to forgo it as part of a plea bargain. The record did not show that Supreme Court made a YO determination, despite the defendant's eligibility. Richard Levitt and Zachary Segal represented the appellant. (Supreme Ct, Kings Co)

Second Department *continued*

People v Tumolo, 203 AD3d 961 (2nd Dept 3/16/2022)

ORDERS OF PROTECTION | DURATION

ILSAPP: The defendant appealed from a Suffolk County Court judgment, convicting him of EWC, upon his plea of guilty. The Second Department remitted. The appeal brought up for review two orders of protection issued at sentencing. The challenge to such orders survived the valid waiver of appeal. In the interest of justice, the appellate court held that the duration of the orders exceeded the maximum set forth in CPL 530.13 (4), since time served was not credited. Thus, the durational provisions were vacated. Mark Diamond represented the appellant. (County Ct, Suffolk Co)

People v Umar, 203 AD3d 964 (2nd Dept 3/16/2022)

SENTENCING | PRESENCE

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of several crimes, upon his plea of guilty. The Second Department modified. A defendant had a fundamental right to be personally present when sentence was pronounced. CPL 380.40 (1). This defendant was not produced at sentencing on two convictions, and the record did not reveal that he expressly waived his right to be present. The matter was remitted for resentencing on the subject convictions. Appellate Advocates (Emile Lurie and De Nice Powell, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Ellerbee, 203 AD3d 1068 (2nd Dept 3/23/2022)

CONFRONTATION CLAUSE | TRIAL PENALTY

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court. The Second Department modified. In the interest of justice, the appellate court held that the defendant's Confrontation Clause rights were violated by testimony used to establish an element of 3rd degree AUO of a motor vehicle. The defendant was not given a chance to cross-examine a DMV employee who was directly involved in sending out the suspension notices or who had personal familiarity with the mailing practices or his driving record. A new trial was ordered on the AUO count. In the interest of justice, the reviewing court also held that the defendant was penalized for exercising his right to a jury trial. Prior to trial, the Supreme Court offered 1½ years plus 2 years' post-release supervision, stating "You should understand the way I operate...before trial with me you get mercy; after trial you get justice." For his 4th degree CPCS conviction, the defendant was sentenced to 5 years in prison plus 2 years PRS. The reviewing court cut the prison term to 3 years. Appel-

late Advocates (Anders Nelson, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Ramunni, 203 AD3d 1076 (2nd Dept 3/23/2022)

BRADY | POLLING JURY

ILSAPP: The defendant appealed from a judgment of Richmond County Supreme Court. The Second Department reversed. The evidence was legally insufficient to establish 2nd degree assault. Although the defendant was present at the scene when complainant #2 was hit with a stun gun by an unknown individual, proof did not show that the defendant shared a community of purpose with that individual. The count was dismissed. A new trial was ordered on the charges of 1st degree gang assault and 1st degree assault, due to a *Brady* violation. A 911 caller who witnessed the brawl described an individual who did not match the defendant. The People failed to disclose the caller's identity and contact information. Defense counsel was also erroneously precluded from questioning a witness about a police report and an alleged prior inconsistent statement of complainant #1. Finally, Supreme Court committed reversible error in accepting the verdict after polling the jury. When asked if the verdict was hers, juror #9 said, "Um, I'm not sure, with some, but most of them, yes." The court's follow-up "yes or no" question was posed in the presence of the remaining jurors, despite evidence that #9 may have succumbed to pressure to vote with the majority, even though she did not agree on all counts. Appellate Advocates (Benjamin Welikson, of counsel) represented the appellant. (Supreme Ct, Richmond 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.

People v Gilbert, 199 AD3d 1048 (3rd Dept 11/4/2021)

AFFIRMATIVE DEFENSE | MENTAL DISEASE

ILSAPP¹: The defendant appealed from an Ulster County Court judgment, convicting her of 2nd degree murder. The Third Department affirmed. At trial, the defendant raised the affirmative defense of lack of criminal responsibility by reason of mental disease or defect. There was competing expert proof as to whether the defendant

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

had the capacity to know and appreciate that her conduct was wrong. Her evidence indicated that, at the time of the killing, she believed that God had ordained her to kill the victim, a demon. But the People presented equally plausible expert testimony that the defendant possessed the requisite capacity. Further, she hid in the bathroom when police arrived, told them that she felt bad about her actions, and received a positive test score for malingering. (County Ct, Ulster Co)

People v Hoffman, 199 AD3d 1080 (3rd Dept 11/4/2021)

SORA FINDINGS | REVERSAL

ILSAPP: The defendant appealed from an Ulster County Court order, which designated him a level-three sex offender and a predicate sex offender. The Third Department reversed. The defendant argued in the SORA court that a downward departure was warranted. In denying such request, County Court did not set forth findings or conclusions. Thus, the matter was remitted. John Ferrara represented the appellant. (County Ct, Ulster Co)

People v Regan, 199 AD3d 1067 (3rd Dept 11/4/2021)

UNFULFILLED PROMISE | PLEA VACATUR

ILSAPP: The defendant appealed from a St. Lawrence County Court judgment, convicting him of 3rd degree unlawful manufacture of meth. The Third Department reversed. The plea was based on a promise that could not be fulfilled—the defendant’s court-ordered participation in shock incarceration. The issue survived the unchallenged waiver of appeal, but was unpreserved. In the interest of justice, the court vacated the plea and remitted. The Rural Law Center of New York (Keith Schockmel, of counsel) represented the appellant. (County Ct, St. Lawrence Co)

People v Davis, 199 AD3d 1123 | (3rd Dept 11/10/2021)

APPEAL WAIVER | FAMILIAR STORY

ILSAPP: The defendant appealed from an Albany County Court judgment, convicting him of 2nd degree CPW. While affirming, the Third Department did find that the waiver of the right to appeal was unenforceable. County Court did not: (1) distinguish the waiver of appeal from other rights the defendant was forfeiting by pleading guilty; (2) fully explain the nature of the waiver; (3) ascertain the defendant’s understanding of the ramifications of the waiver; or (4) verify that the defendant had read and understood the written waiver or had discussed it with counsel. (County Ct, Albany Co)

**Edmonson v Annucci, 199 AD3d 1137
(3rd Dept 11/10/2021)**

FAMILY REUNION | DENIED

ILSAPP: The petitioner pro se appealed from a judgment of Albany County Supreme Court, which dismissed his Article 78 petition seeking review of the denial of his request to participate in the family reunion program. The petitioner applied with his spouse, whom he married in 2017. The request was properly denied based on his violent crimes, which included 2nd degree murder, and his extensive disciplinary record, which involved 30 disciplinary offenses. Participation in the FRP was a privilege, not a right, and the decision as to whether an inmate could participate was heavily discretionary. (Supreme Ct, Albany Co)

Matter of David Q. v. Schoharie County Department of Social Services, 199 AD3d 1179 (3rd Dept 11/18/2021)

CUSTODY/INTERSTATE COMPACT

LASJRP²: The Third Department declines to hear the father’s unpreserved (and also moot) claim that the application of the ICPC to his custody petitions posed a “bureaucratic barrier” to his efforts to obtain custody that “infringe[d] upon [his] substantive and procedural due process rights as a parent.” However, the Court notes that the father poses a “substantial and novel” question that could potentially implicate the exception to the mootness doctrine, and asserts in a footnote that, were it to address the issue, it “would find, for the reasons stated by the First Department in *Matter of Emmanuel B. (Lynette J.)* (175 AD3d at 55-60), that the ICPC does not apply to out-of-state parents.” (Family Ct, Schoharie Co)

People v Smith, 199 AD3d 1188 (3rd Dept 11/18/2021)

SORA | MISSOURI CRIME

ILSAPP: The defendant appealed from a Rensselaer County Court order, which classified him as a level-three sex offender and a sexually violent offender. The Third Department reversed. The SORA court added 15 points under risk factor 9 for the defendant’s 2008 Missouri felony drug conviction. The Missouri statute, requiring that a person knowingly possess a controlled substance, set forth no minimum drug quantity. New York’s felony provisions all contained a weight element or required an intent to sell or a predicate conviction. The conduct underlying the Missouri conviction was not revealed in the record, so it was unclear if the defendant’s acts there would constitute a felony here. Thus, the record only supported the assessment of 5 points under risk factor 9, resulting in presumptive level two. Dana Salazar represented the appellant. (County Ct, Rensselaer Co)

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

Third Department *continued*

People v Cota, 199 AD3d 1237 (3rd Dept 11/24/2021)

CONSTRUCTIVE POSSESSION | AGAINST WEIGHT

ILSAPP: The defendant appeal [sic] from a Chemung County Court judgment, convicting him of 3rd degree CPCS. The Third Department reversed and dismissed the indictment. The weight of evidence did not support the jury's determination that the defendant constructively possessed crack cocaine. Police responded to a domestic disturbance call at the apartment of the defendant's sister and found drugs in her bedroom under a pile of female clothes. There was no proof that any of the defendant's personal belongings were in that bedroom. Even if he was a daily visitor to the apartment, the defendant was not shown to have lived there or exercised control over any part of it. Further, a friend testified that the cocaine was his, he threw some out the window, and the defendant had no knowledge that drugs were in the apartment. Kathy Manley represented the appellant. (County Ct, Chemung Co)

Zachary C. v Janaye D., 199 AD3d 1267 (3rd 11/24/2021)

PARENTING TIME | UNWARRANTED REDUCTION

ILSAPP: The father appealed from an order of Fulton County Family Court, which dismissed his custody modification petition. The Second Department modified the order. The lower court significantly reduced the father's parenting time during the school year—a provision unsupported by the record. Family Court should have granted the father more parenting time on additional weekends or during breaks and holidays not accounted for in the parties' stipulation. Since nearly two years had elapsed since entry of the challenged order, the matter was remitted. Beth Lockhart represented the father. (Family Ct, Fulton Co)

Joseph II. v Luisa JJ., 201 AD3d 43 (3rd Dept 11/24/2021)

CUSTODY/SERVICE OF PROCESS - HAGUE CONVENTION

LASJRP: The Third Department agrees with the wife, who resides in Italy, that the court improperly authorized substituted service of the summons and complaint by email. Pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, requests for service of documents must be sent to a central authority within the receiving state, which then serves the documents "by a method prescribed by the internal law of the receiving state or by a method designated by the requester and compatible with that law." Here, the husband failed

to come forward with sufficient proof demonstrating an actual effort to effectuate service upon the wife at her residence in Italy.

The only proof submitted was an email, dated more than two months after commencement of the action, which estimated that service upon the wife in Italy in accordance with the Hague Convention would take roughly 18 to 20 weeks in total, which included "a few days" for Italian translation, 10 to 14 weeks for service and an additional two to four weeks for return of the proof of service. There was no indication in the email that the 18 to 20-week estimate was atypical or that the COVID-19 pandemic rendered service of process under the Hague Convention impracticable.

Given the husband's failure to make the requisite showing of impracticability, the court erred in authorizing service of the summons and complaint upon the wife via substituted service pursuant to CPLR 308(5). As the husband failed to effectuate proper service upon the wife within the requisite 120 days following commencement of the action (see CPLR 306-b), the complaint must be dismissed. (Supreme Ct, Washington Co)

People v McClendon, 199 AD3d 1233 (3rd Dept 11/24/2021)

COERCION | INSUFFICIENT PROOF

ILSAPP: The defendant appealed from a judgment of Albany County Supreme Court, convicting him of several crimes. The Third Department modified. The defendant's conviction of 1st degree coercion was not supported by legally sufficient evidence. Because the victim was able to call police, the People failed to establish that the defendant caused her to abstain from conduct that she was legally permitted to engage in due to fear of physical injury. Mitchell Kessler represented the appellant. (Supreme Ct, Albany Co)

People v Teixeira-Ingram, 199 AD3d 1240 (3rd Dept 11/24/2021)

MIRANDA | HEARSAY

ILSAPP: The defendant appealed from a Columbia County Court judgment, convicting him of 2nd and 3rd degree CPCS. The Third Department reversed, suppressed the defendant's statements, and vacated the plea of guilty. The appeal brought up for review the denial of suppression of cocaine found in a vehicle in which the defendant was a passenger. The defendant's statements, made in response to questioning by State Police at the barracks, were obtained during a custodial interrogation. He was not validly notified of his rights. The People relied on an inference that a trooper told an investigator that he had read the defendant his rights. However, the trooper said that he had no conversation with the defendant. Hearsay

Third Department *continued*

was admissible in suppression hearings, but the inference here was insufficient to prove that the defendant was advised of his *Miranda* rights. David Woodin represented the appellant. (County Ct, Columbia Co)

Elizabeth W. v Broome DSS, 200 AD3d 1153
(3rd Dept 12/2/2021)

NO DEFAULT | BUT NO MERIT

ILSAPP: The mother sought review of an order of OCFS denying her application to amend as unfounded and expunge a report maintained by the Central Register of Child Abuse and Maltreatment. The Third Department confirmed. Substantial evidence supported the finding that the mother placed the children at risk. Statements to a caseworker by two children, recorded in the indicated report, revealed that the mother twice drove with them after drinking; and she admitted that she relapsed and had a “buzz” while driving the children. One child reported to a caseworker that her mother was drunk and throwing up on another occasion, which a grandparent corroborated.

Patrick UU. v Frances VV, 200 AD3d 1156
(3rd Dept 12/2/2021)

NO DEFAULT | BUT NO MERIT

ILSAPP: The mother appealed from certain child custody orders entered in Ulster County Family Court. The Third Department affirmed. The father and AFC argued that the appeal from one order must be dismissed since it was entered on default. The reviewing court disagreed. The mother extensively participated in the subject proceedings before failing to appear on a hearing continuation date, when the court closed the proof. The order transferring custody to the father was sound. The mother’s refusal to have the child immunized and resulting decision to homeschool him, as well as the father’s release from jail, constituted a change in circumstances. The best interests of the child would be advanced by the structure of school and custody to the father, who had achieved stability. Family Court properly drew a negative inference against the mother for failing to bring the child to a *Lincoln* hearing, finding that the child would have confirmed the AFC’s stated position that he wished to return to school and to spend more time with his father. (Family Ct, Ulster Co)

People v Phillip, 200 AD3d 1108 (3rd Dept 12/2/2021)
ADVERSE POSITION | CONFLICT

ILSAPP: The defendant appealed from a judgment of Sullivan County Supreme Court, convicting him of 2nd degree conspiracy and another crime, and from an order denying his CPL 440.10 motion. The Third Department vacated the sentence and remitted. Defense counsel improperly took a position adverse to the defendant. When counsel stated that he did not believe that there was a factual or legal basis for the defendant’s motion to withdraw his plea, Supreme Court should have assigned a new attorney. As to the 440 motion, the defendant had not shown that counsel’s failure to pursue *Brady* materials constituted ineffective assistance, particularly in light of the very advantageous plea agreement secured. Jane Bloom represented the appellant. (Supreme Ct, Sullivan Co)

Harris v Schreiber, 200 AD3d 1117
(3rd Dept 12/2/2021)

DIVORCE | MAINTENANCE

ILSAPP: The parties cross-appealed from a judgment of divorce and certain orders. The Third Department modified. Among other things, the appellate court directed that the wife must contribute to the cost of the children’s health insurance and slightly reduced the husband’s child support obligation. Supreme Court properly awarded the wife maintenance pursuant to the statutory guidelines. Both parties substantially reduced their income to spend more time with the children. It would be unjust to penalize the wife for doing so, while rewarding the husband, who left his lucrative job as a NYC law firm partner to run for Ulster County Supreme Court. The trial court properly held that the husband violated automatic stay orders as to certain assets when he used \$38,000 to pay campaign debts. (Supreme Ct, Ulster Co)

Wessels v Wessels, 200 AD3d 1178 (3rd Dept 12/2/2021)

SUPPORT VIOLATION | NOT WILLFUL

ILSAPP: The father appealed from an order of Albany County Family Court, which found that he did not willfully violate a prior child support order. The Third Department affirmed. The father was hired, by his brother, as a purchasing agent at a salary of \$125,000. Through no fault of his own, the father lost the job. After diligent efforts to find similar work, he restarted his landscaping business and made \$42,000—close to what he previously earned. The father tried to modify support, made regular albeit reduced payments, and borrowed money to cover large support payments. (Family Ct, Albany Co)

Matter of Athena Y, 201 AD3d 113 (3rd Dept 12/9/2021)
**ABUSE/NEGLECT - COURT-ORDERED HEALTH CARE/
COVID-19 VACCINE**

Third Department *continued*

LASJRP: Several months after the family court denied respondent mother's FCA § 1028 application, the attorney for the children informed the court that the two oldest children, then thirteen and fifteen years old, wished to receive the COVID-19 vaccine, but respondent did not consent. After receiving the parties' written submissions, the court held that the children had the right to decide whether to receive the COVID-19 vaccine and ordered that they be given the vaccine if they still consent.

The Third Department reverses, noting the general preference toward conducting a hearing in this type of situation.

Even when the state obtains a temporary order of custody due to abuse or neglect, parents retain the right to make certain medical decisions for their children in foster care up until the moment that parental rights are terminated. The applicable state regulation requires the agency to obtain written authorization from the parent for medical care, including for immunizations, and, if such authorization cannot be obtained, permits the agency to provide consent where authorized by Social Services Law § 383-b. The state has carved out specific situations where parental consent is not required for minors, such as in emergency situations, and for family planning and reproductive services, and courts generally should not expand the rights of minors to make decisions in categories not included in existing statutes or regulations. However, the Court, citing FCA § 233, notes that the family court has wide discretion to order medical or surgical care and treatment. In determining whether to exercise this power, a court must carefully balance the potential benefits to be attained against the risks involved in the treatment and the validity of the parent's objections.

Due process generally requires notice and an opportunity to be heard before medical treatment is imposed upon a patient by court order. Hearings have routinely been required in the context of overriding parents' medical decisions for their children. Here, the factual findings were made without evidence and based solely on hearsay in unsworn letters containing representations by counsel. At the hearing, the court must focus on whether respondent's refusal to authorize vaccination constitutes an acceptable course of medical treatment for her children in light of all the surrounding circumstances, while recognizing that courts cannot assume the role of a surrogate parent. As the Office of Children and Family Services' guidance documents prohibit local agencies from administering a COVID-19 vaccine if the child refuses to consent, the hearing must address whether the children have been fully informed about COVID-19 and the vaccine and whether they have the capacity to consent. The court must carefully balance the risks and benefits of the potential vaccination to decide whether to authorize it. (Family Ct, Rensselaer Co)

Matter of Chloe L., 200 AD3d 1234 (3rd Dept 12/9/2021)

ABUSE/NEGLECT - SEXUAL ABUSE/ SEXUAL GRATIFICATION - EXPOSING CHILD TO SEXUAL BEHAVIOR AND PORNOGRAPHY

LASJRP: The Third Department upholds the dismissal of sexual abuse charges where the family court found that respondent mother shaved the child's pubic area, but that she did not do so for the purpose of sexual gratification.

However, the family court erred in dismissing neglect charges. The court found that respondent showed the child (born in 2007) how to use a sexual device for the purpose of intimacy education. According to the child, however, respondent told her to go into respondent's room, respondent was naked, and, while respondent showed her how to use a sexual device, made weird noises. Respondent also told the child to remain while respondent and the stepfather were naked and having sexual intercourse over the bed covers, and were making moaning sounds. The child felt "[v]ery uncomfortable" when she was told to remain. Respondent also showed the child pornographic videos that, according to the child, depicted people "having sex and stuff" with their "intimate parts" exposed, and made the child feel uncomfortable. (Family Ct, Schoharie Co)

People v Davis, 200 AD3d 1200 (3rd Dept 12/9/2021) 5TH AMENDMENT | WITNESS

ILSAPP: The defendant appealed from a judgment of Rensselaer County Court, convicting him of 4th degree grand larceny and other crimes. The Third Department affirmed. County Court properly permitted the People to call the defendant's brother as a witness after he expressed the intention to invoke his Fifth Amendment privilege against self-incrimination. The People believed that the brother could not plead the Fifth because he had already pleaded guilty, and they did not seek to build their case on the brother's assertions of privilege. The brother only used the privilege three times. Each time, County Court directed him to answer, thus rendering those responses subject to cross-examination. There was no danger of the jury drawing improper inferences. (County Ct, Rensselaer Co)

People v Gilmore, 200 AD3d 1184 (3rd Dept 12/9/2021) 440.10 | ACCESS TO COURTS

ILSAPP: The defendant appealed from an order of Schenectady County Supreme Court denying his CPL 440.10 motion. The Third Department affirmed. The defendant urged that his constitutional rights to meaningful

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access to the courts were violated because the jail used a “paging system” that required inmates to request case law by exact citation, thus preventing him from adequately researching the case law. However, the defendant did not submit sworn allegations substantiating such claims and alleging that shortcomings in the library or legal assistance program hindered his efforts to pursue non-frivolous legal claims. *See generally Lewis v Casey*, 518 US 343, 351. (Supreme Ct, Schenectady Co)

**People v Hajratalli, 200 AD3d 1332
(3rd Dept 12/16/2021)**

HARSH SENTENCE | NO PRIOR HISTORY

ILSAPP: The defendant appealed from a Saratoga County Court judgment, convicting him of 2nd degree burglary (two counts) and another crime, in connection with night-time break-ins at two residences. The Third Department modified. The maximum sentences, imposed consecutively, amounted to an aggregate prison term of 30 years. That was harsh and excessive. The defendant had no prior criminal history; his conduct did not result in any physical touching; and the presentence report set forth other mitigating circumstances. Thus, the burglary terms would run concurrently. One justice dissented. Kevin Luibrand represented the appellant. (County Ct, Saratoga Co)

People v Hansel, 200 AD3d 1327 (3rd Dept 12/16/2021)

SEX RELATIONS PROOF | REVERSIBLE ERROR

ILSAPP: The defendant appealed from a Broome County Court judgment, convicting him of predatory sexual assault against a child and 1st degree rape (three counts). The Third Department reversed and ordered a new trial. County Court erred in allowing the victim’s mother to testify that the defendant had a voracious sexual appetite, but then stopped having frequent sex with her. The proof—allowed as circumstantial evidence that the defendant’s sexual desires were being met elsewhere—permitted the jury to improperly speculate that he had turned to the victim. The error was not harmless. Thomas Saitta represented the appellant. (County Ct, Broome Co)

People v Serrano, 200 AD3d 1340 (3rd Dept 12/16/2021)

RIGHT TO COUNSEL | DISSENT

ILSAPP: The defendant appealed from a Schenectady County Court judgment, convicting him of 1st degree assault and other crimes. The Third Department affirmed. The People improperly elicited testimony, from the detective who interviewed the defendant, that he had invoked his rights to counsel and against self-incrimination. But the questioning was harmless. One justice dissented. The

rights to counsel and to remain silent are fundamental. The trial court failed to provide prompt curative instructions that the jury must not draw adverse inferences from the request for counsel. Reversal was required. (County Ct, Schenectady Co)

[Ed. Note: *Leave to appeal was granted on 2/21/2022 (38 NY3d 931).*]

**People ex rel. Rivera v Superintendent, 200 AD3d 1370
(3rd Dept 12/16/2021)**

SARA | EX POST FACTO

ILSAPP: The respondent appealed from a judgment of Sullivan County Supreme Court, which granted the petitioner’s CPLR Article 70 petition for release to parole supervision. The Third Department reversed. The defendant contended that, because SORA and SARA were enacted after the crimes, their application to him violated the Ex Post Facto Clause, but that constitutional prohibition applied only to penal statutes. SARA was enacted to protect children, not to further punish sex offenders. (Supreme Ct, Sullivan Co)

**People ex rel. Benjamin v Yetter, 200 AD3d 1458
(3rd Dept 12/23/2021)**

ABUSE/NEGLECT - HABEAS RELIEF

ILSAPP: The Third Department upholds the denial of habeas relief where the mother seeks the immediate return of a child who is the subject of a derivative neglect finding. The proper procedure was to take an appeal from the relevant FCA Article Ten orders. There are no extraordinary circumstances that would warrant a departure from traditional orderly procedure. (Supreme Ct, Tioga Co)

**Matter of Daniel OO., 200 AD3d 1418
(3rd Dept 12/23/2021)**

ADOPTION - ABANDONMENT

LASJRP: In the paternal grandparents’ adoption proceeding, the Third Department affirms an order granting petitioners’ application for a determination that the mother’s consent to adoption was not required due to her abandonment of the child.

Although the mother twice filed petitions for visitation, such conduct alone does not defeat the showing of abandonment, nor do her sporadic requests, during the course of the proceedings, for photographs of the child and information about his well-being. The mother’s incarceration does not constitute a reasonable excuse, and her purported inability to make collect calls to the grandmother while incarcerated does not account for her lack of communication during periods when she was not incarcerated. Although she did not know the grandparents’ new mailing address, that does not explain her failure to

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attempt to send letters to the mailing address she did know or to contact the child through other means. (Family Ct, Schenectady Co)

People v David, 200 AD3d 1394 (3rd Dept 12/23/2021)

WAIVER | INVALID

ILSAPP: The defendant appealed from a Clinton County Court judgment, convicting him of 2nd degree burglary. The Third Department affirmed but found the purported waiver of appeal invalid. County Court made no inquiry as to whether the defendant read the written waiver, nor if he understood it. The written document stated that the defendant waived his right to pursue all post-conviction remedies. This overbroad and inaccurate language was not cured by the limited colloquy. (County Ct, Clinton Co)

Cecelia BB. v Frank CC., 200 AD3d 1411 (3rd Dept 12/23/2021)

VISITATION - DELEGATION OF COURT'S AUTHORITY - CHILD'S WISHES - LINCOLN HEARINGS

LASJRP: The Third Department concludes that the family court improperly delegated its authority to the younger child when it ordered that the mother's visitation would be only as she and the younger child could agree. The court's rationale—that a teenager cannot be forced to do something he or she does not want to do—falls far short of satisfying its obligation to provide the mother with frequent and regular access to the child and does nothing to support a healthy, meaningful relationship between the two. There is nothing in the record demonstrating that visits would be harmful to the child, and, given his feelings toward the mother at that time, visitation conditioned upon his agreement was untenable.

The error has been amplified by the inherent length of the appellate process. The mother has now gone years without visits with the child, and he is now nearly eighteen years old and likely will reach the age of majority before the court has the opportunity to address its mistake. "This underscores the importance of enabling some form of visitation between a parent and child wherever possible."

Finally, in a footnote, the Court observes that, given the younger child's close relationship with his older brother—who had clashed with the mother long before the commencement of these proceedings and had already been residing with the father for some time—the better practice here would have been to hold separate Lincoln hearings for each child. It is impossible to know what the

younger child may have shared if provided a more appropriate, and truly confidential, forum. (Family Ct, Washington Co)

People v Lane, 202 AD3d 32 (3rd Dept 12/23/2021)

SORA | SNAFUS

ILSAPP: The defendant appealed from a County Court decision, which classified him as a level-two sex offender. The Third Department withheld decision. SORA courts often failed to comply with the statutory requirement that they render a written order setting forth the determination and the underlying findings of fact and conclusions of law. The People were supposed to ensure that a written order was entered by the County Clerk and that notice of entry, along with the written order, was served on the defendant. Failures of the trial court and the People to fulfill their duties should not harm a defendant who did not prevail at SORA hearings. Generally, when presented with an appeal from a SORA decision or order that was not properly entered, the Third Department would dismiss the appeal. Given unusual circumstances here—including steps taken, albeit imperfectly, by defense counsel to obtain a proper order—the appellate court directed the People to effectuate proper entry of the order to be challenged. The Columbia County Public Defender (Jessica Howser, of counsel) represented the defendant. (County Ct, Columbia Co)

Brian W. v Mary X., 200 AD3d 1439 (3rd Dept 12/23/2021)

ARTICLE 8 | DEFECTS

ILSAPP: The petitioner appealed from orders rendered by Washington County Family Court in Article 8 proceedings. The Third Department modified. Family Court erred in sua sponte amending its dismissal order from "without prejudice" to "with prejudice." Family Court had discretion to correct an order to cure defects that did not affect a substantial right of a party. See CPLR 5019 (a). However, absent a motion under CPLR 2221 (d) or 5015 (a), Family Court had no authority to issue a substantive change. Thus, the amended order was reversed to the extent that it dismissed the violation petition with prejudice. Bryan Racino represented the appellant. (Family Ct, Washington Co)

People v Bryant, 200 AD3d 1483 (3rd Dept 12/30/2021)

SEVERANCE DENIED | NEW TRIAL

Third Department *continued*

ILSAPP: The defendant appealed from an Albany County Court judgment, convicting him of 2nd degree CPW, 2nd degree menacing, and 3rd degree assault. The Third Department reversed and ordered new trials. County Court erred in denying a defense motion to sever the weapon charge from the remaining counts. The People asserted that the proof underlying those other counts was material and admissible as to the weapon count. Even if the proof completed the narrative, its probative value was minimal, and it was highly prejudicial. The court also erred in permitting the People to read the victim's grand jury testimony into evidence where the proof did not establish that the defendant orchestrated the victim's unavailability for trial. Two justices dissented in part. Paul Connolly represented the appellant. (County Ct, Albany Co)

[*Ed. Note: Leave to appeal was granted on 2/17/2022 (38 NY3d 931).*]

Pitt v Feagles, 202 AD3d 109 (3rd Dept 12/30/2021)**STATUTE OF LIMITATIONS - CIVIL ACTION BY
CRIME VICTIM**

LASJRP: CPLR 213-b ("Action by a victim of a criminal offense"), which was enacted in 1992 as part of comprehensive legislation to enhance the rights of crime victims, states that "an action by a crime victim ... may be commenced to recover damages from a defendant: (1) convicted of a crime which is the subject of such action, for any injury or loss resulting therefrom within seven years of the date of the crime."

The Third Department holds that this extended statute of limitations is not applicable where the defendant has been adjudicated a youthful offender because the defendant has not been "convicted of a crime" for purposes of 213-b. (Supreme Ct, Orange Co)

**Abigail Y. v Jerry Z., 200 AD3d 1512
(3rd Dept 12/30/2021)****CUSTODY PETITION | HEARING WARRANTED**

ILSAPP: The mother appealed from an order of Chenango County Family Court, which granted the AFC's motion to dismiss her custody modification application. The Third Department reversed. The petition was sufficient to warrant an evidentiary hearing based on the allegations that the father did not communicate with her to effectively co-parent; interfered with her relationship with the child; and failed to take advantage of his parenting time. The appellate court remitted the matter but rejected the mother's request that the case be assigned to a different judge. Although Family Court was impatient about failed negotiations, there was no showing of undue

bias or an inability to fairly determine the issues presented. Larisa Obolensky represented the appellant. (Family Ct, Chenango Co)

**Matter of Jaxxon WW., 200 AD3d 1522
(3rd Dept 12/30/2021)****ABUSE/NEGLECT - ALLOWING NEGLECT
- SMOKING/POSSESSION OF WEAPON**

LASJRP: The Third Department, while upholding a finding of neglect where the father failed to assist the mother by interceding with the children when she became overwhelmed, dismissed concerns regarding her mental health by maintaining that she needed to increase her medication dosage, and failed to take seriously a report to Child Protective Services that the mother had acted aggressively toward two of the children during a pediatrician appointment and alleged instead that the report was fake, also concludes that the father "made extremely poor parenting decisions of his own, including providing lax supervision to the children, smoking inside of his residence even though the middle child has breathing issues and failing to appropriately secure a hunting knife...." (Family Ct, Clinton Co)

People v Adams, 201 AD3d 1031 (3rd Dept 1/6/2022)**CRIMINAL SALE | NOT PROVEN**

The defendant appealed from a judgment of Schenectady County, convicting him of 2nd degree conspiracy, 1st degree CSCS, and another crime. The Third Department modified, finding the above-named convictions against the weight of the evidence. None of the co-defendants testified as to the defendant's involvement in their drug purchases; no cocaine was recovered; and the evidence did not satisfy the weight element. Kathryn Friedman represented the appellant. (County Ct, Schenectady Co)

People v Davidson, 201 AD3d 1025 (3rd Dept 1/6/2022)**COUNSEL'S STATEMENTS | CONFIDENTIALITY**

ILSAPP: The defendant appealed from a Broome County Court judgment, which revoked probation and imposed a sentence of imprisonment, after a hearing. The Third Department affirmed, rejecting arguments regarding ineffective assistance. Remarks of defense counsel—made when a plea offer resolving the probation violation and a contempt charge was placed on the record and rejected—did not violate the attorney-client privilege. After stating the plea terms, County Court asked counsel if he had discussed the offer with the defendant. Counsel responded that he had explained the deal, but he expressed concern about the defendant's understanding of issues relevant to each charge. The court then offered a

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further explanation about the charges and the potential sentencing exposure. No confidential information was disclosed by counsel's remarks, which were an appropriate effort to ensure that the defendant understood the proceedings before rejecting the plea offer. (County Ct, Broome Co)

People v Hewitt, 201 AD3d 1041 (3rd Dept 1/6/2022)

DISCOVERY FAIL | PLEA NOT IMPACTED

ILSAPP: The defendant appealed from a Warren County Court judgment, convicting him of promoting a sexual performance by a child. The Third Department affirmed. On appeal, the defendant argued that the People's failure to comply with statutory disclosure requirements prior to his February 2020 guilty plea, along with counsel's ineffective assistance, entitled him to withdraw his plea. Where, as here, the defendant made a plea withdrawal motion premised on the People's noncompliance with its discovery duties, the trial court had to consider the impact of any violation on his plea decision. However, before pleading guilty, the defendant waived arguments regarding the People's noncompliance with their disclosure duties. Even if the waiver was not sufficient, the People substantially complied with disclosure requirements. The record did not substantiate the defense claim that the nondisclosure of grand jury minutes—which did not negate guilt—affected the defendant's plea decision. (County Co, Warren Co)

People v Wassilie, 201 AD3d 1117 (3rd Dept 1/6/2022)

SORA | REVERSED

ILSAPP: The defendant appealed from a Columbia County Court order, which classified him as a level-three sex offender. The Third Department reversed and set the SORA risk level at two. County Court erred in assessing points in two categories. As to risk factor 4, the record did not reflect that the crimes of conviction, for 2nd degree unlawful surveillance, involved sexual contact. Regarding risk factor 10, the record lacked proof that the defendant committed a "prior felony or sex crime" within three years of the instant offenses. Angela Kelley represented the appellant. (County Ct, Columbia Co)

M/O Kaelani KK., 201 AD3d 1155 (3rd 1/13/2022)

HYPOTHERMIA | NEGLIGENCE

ILSAPP: The mother appealed from an order of Schenectady County Family Court, which found that she neglected her child. The Third Department affirmed. The proof showed that, when pursuing the father outside in extremely chilly weather at 3 a.m. one day, the mother

brought along their two-month-old baby, who was wearing only a onesie. The child's exposure to the cold for 45 minutes resulted in hypothermia. In addition, the mother left the hospital with the child before her temperature returned to normal, contrary to medical advice. While a friend testified that the mother appropriately cared for the child, neglect may be established through a single incident if actual or imminent harm is shown. (Family Ct, Schenectady Co)

People v Rivera, 201 AD3d 1132 (3rd Dept 1/13/2022)

WAIVER OF APPEAL | ISSUES PRECLUDED

ILSAPP: The defendant appealed from a Franklin County Court judgment, convicting him of attempted 1st degree promoting prison contraband, and an order denying his CPL 440.10 motion. The Third Department affirmed. The defendant's valid waiver of the right to appeal precluded his statutory speedy trial argument. His claim that his constitutional right to a speedy trial was violated survived his guilty plea and appeal waiver. However, the issue was unpreserved and, in any event, lacked merit. The alleged failure of defense counsel to pursue a post-judgment motion did not impact the voluntariness of the plea, so such challenge was precluded by the appeal waiver. (County Ct, Franklin Co)

Walter Q. v Stephanie R., 201 AD3d 1142 (3rd Dept 1/13/2022)

FAMILY OFFENSE | REVERSED

ILSAPP: The father appealed from [sic] an order of Tompkins County Supreme Court, which granted motions by the mother and the AFC to dismiss his family offense petition. The Third Department reversed. Supreme Court erred in dismissing the petition because it did not view any relief warranted even if the father alleged a viable claim. The salient question was whether the petition sufficiently alleged an enumerated family offense. It did. The father alleged that the mother struck him, grabbed him, yelled insults and obscenities at him, and chased him on foot, prompting him to contact police—acts constituting 2nd degree harassment. Thomas Kheel represented the appellant. (Supreme Ct, Tompkins Co)

Stephanie R. v Walter Q., 201 AD3d 1135 (3rd Dept 1/13/2022)

SUMMARY JUDGMENT | COLLATERAL ESTOPPEL

ILSAPP: The father appealed from an order of Tompkins County Supreme Court, which granted the mother's motion for summary judgment regarding her family offense petition against him. The Third Department affirmed. When the father violated a stay-away order, he was arrested and the mother commenced the

Third Department *continued*

instant proceeding. In a criminal prosecution arising from the instant conduct, the father was found guilty of the crime of 2nd degree criminal contempt, following a jury trial. The conviction was properly given preclusive effect in Family Court based on principles of collateral estoppel, notwithstanding that the father had not yet been sentenced when summary judgment was granted. The finality of the issue was clear. (Supreme Ct, Tompkins Co)

People v Johnson, 201 AD3d 1208 (3rd Dept 1/20/2022)**EFFECTIVE COUNSEL | NO SUPPRESSION**

ILSAPP: The defendant appealed from a Washington County Court judgment, convicting him of attempted 1st degree promoting prison contraband. The Third Department affirmed. The defendant argued that he was denied effective assistance of counsel. The preservation requirement was inapplicable since the defendant was sentenced immediately after his guilty plea, and thus he had no chance to move to withdraw his plea. Counsel's failure to request a suppression hearing did not show defective representation in the absence of a viable suppression claim. Further, counsel negotiated a favorable plea deal. (County Ct, Washington Co)

People v Moore, 201 AD3d 1209 (3rd Dept 1/20/2022)**WAIVER OF APPEAL | INVALID**

ILSAPP: The defendant appealed from a Fulton County Court judgment, convicting him of 1st degree assault. The Third Department affirmed. The waiver of the right to appeal was invalid. In the plea colloquy, the court did not explain the scope of the waiver. The written waiver misrepresented the law in stating that the defendant was waiving his rights to all state, federal, and collateral review. Finally, the waiver stated that the defendant was not under the influence of any drugs or medications. In fact, at the time of the plea proceedings, the defendant was taking various drugs and medications. The appellate court reviewed the challenge to the severity of the sentence imposed but found the defendant's argument unpersuasive. (County Ct, Fulton Co)

People v Stratton, 201 AD3d 1201 (3rd Dept 1/20/2022)**EFFECTIVE COUNSEL | NO PHONE RECORDS**

ILSAPP: The defendant appealed from an Albany County Court judgment, convicting him of 2nd degree CPW. The Third Department affirmed. The defendant contended that he was denied effective assistance. The claim was unpreserved since he did not make an appropriate post-allocation motion. Counsel's failure to subpoena certain cell phone records did not show defective

representation since there may have been a strategic reason. Further, counsel negotiated a favorable plea deal. (County Ct, Albany Co)

**Matter of Tammy OO. v New York State OCFS,
202 AD3d 1181 (3rd Dept 2/3/2022)****ABUSE/NEGLECT - FAILURE TO SUPPLY SHELTER/CARE**

LASJRP: In a 3-2 decision, the Third Department upholds the OCFS's determinations that the mother was guilty of child maltreatment and that the maltreatment was relevant and reasonably related to the mother's potential involvement in child care, adoption and foster care[.]

The child left the mother's home in 2017 when the child was fifteen, and moved in with her sister. The sister and the child relocated to Vermont in early 2018. The child left the sister's home after she confronted the child over concerns of promiscuous behavior and the use of marijuana. The child stayed with a friend for a few days but, after an argument, moved in with a neighbor. Subsequently, a caseworker arranged a meeting with the mother, the sister and the neighbor to discuss a plan for the child's care. The child was not enrolled in school and the mother, who had filed a person in need of supervision petition, declined to discuss the situation further. Five days later, the child left the neighbor's home to live with her boyfriend. During a home visit, the mother informed the caseworker that she had allowed the child's nineteen-year-old brother to move back into her home. At that time, the child had a stay away order of protection against the brother, who had threatened to harm her.

The majority notes that once the child left the sister's house, it was the mother's obligation to establish an alternative living arrangement. The child was experiencing the uncertainty and instability of transitioning from house to house. She tried to communicate with the mother, who was blocking her calls. The child was no longer welcome in the homes of the mother, the sister or the neighbor. The child had confided to the neighbor that she felt no one wanted her and was very upset.

The dissenting judges assert that the OCFS found only in a conclusory fashion that the child's physical, mental or emotional condition was impaired or in imminent danger of being impaired. Indeed, the OCFS's decision noted, and the record confirms, that the neighbor's residence was "safe" and posed "no concerns," and the OCFS also noted that the neighbor was approached about obtaining custody of the child.

**Matter of Damon v Amanda C., 202 AD3d 1333
(3rd Dept 2/17/2022)****VISITATION VIOLATION | NOT WILLFUL**

ILSAPP: The mother appealed from an order of Otsego County Family Court, which found her in willful

Third Department *continued*

violation of a visitation order. The Third Department reversed. Family Court erred in finding that the mother willfully violated the order. Any violation was not willful. Both parties testified to difficulties involved in having parenting time in a public venue during the pandemic; they shared confusion as to which order was in effect at the time; and the mother relied on her attorney's advice, which had a sound basis. Harpremejeet Kaur represented the appellant. (Family Ct, Otsego Co)

Matter of John D. v Carrie C., 202 AD3d 1355 (3rd Dept 2/17/2022)

PATERNITY - EQUITABLE ESTOPPEL

LASJRP: In this paternity proceeding commenced by petitioner John D., the Third Department rejects the equitable estoppel claim raised by respondent mother and the attorney for the child, who assert that a genetic maker test will cause the child, who is now over seven years old, irreparable harm, particularly as respondent John E. has held himself out as the child's father her whole life.

Although John E. has had a relationship with the child since birth, it does not equate to an operative parent-child relationship, particularly after the child moved out of John E.'s residence in the spring of 2016. The child knows that John E. is not her father and does not refer to him as dad, and has been told that petitioner is her father and calls him daddy and a parent-child relationship has evolved since their initial contact in early January 2020. Aside from John E.'s identification as the father on the birth certificate, there is no evidence in the record that he has been held out to the public as the father.

John E. was unable to testify to any fatherly activities related to the child's care or well-being, and testified only that he plays with her, colors with her and watches cartoons with her. The family court correctly concluded that he transitioned from a fatherly role to a friendly role upon discovering that he was not the biological father, but the court may have placed undue reliance on the appearance of John E.'s name on the birth certificate, his acknowledgment of paternity, his presence at the hospital when the child was born, and his significant participation in the care of the child for the first year and a half of her life. (Family Ct, Fulton Co)

People v Jones, 202 AD3d 1285 (3rd Dept 2/17/2022)

JURY ROOM | MODE OF PROCEEDINGS

ILSAPP: The defendant appealed from a Broome County Court judgment, convicting him of 2nd degree robbery (two counts). The Third Department reversed and ordered a new trial. The defendant was deprived of a fair trial when the trial court directed the People's investigator

to enter the jury room to show the jurors how to operate a digital recorder. The violation of CPL 310.10 (1) constituted a mode-of-proceedings error that did not require preservation. A deliberating jury must be under the supervision of a court officer or "an *appropriate* public servant." Except when authorized by the court or performing ministerial duties with respect to the jurors, such court officer or public servant may not communicate with the jurors or permit any other person to do so. The investigator here was not an appropriate public servant. It was troubling that there was no record of what transpired while he/she was in the deliberation room. The error was fundamental, and the entire trial was irreparably tainted. Marlene Tuczinski represented the appellant. (County Ct, Broome Co)

Matter of Tyler Y., 202 AD3d 1327 (3rd Dept 2/17/2022)

ABUSE/NEGLECT - REMOVAL/IMMINENT RISK

LASJRP: The Third Department upholds the family court's denial of the mother's FCA § 1028 application for return of the child where the child presented to the hospital with serious injuries in multiple locations—including a fractured left femur and eight rib fractures—and medical professionals found the parents' explanation to be implausible; the father made certain inconsistent remarks regarding the circumstances surrounding the femur fracture; and the dilemma, as the family court recognized, is that the infant was cared for by one or the other parent at essentially all times, but neither parent offered a plausible explanation and both denied any wrongdoing. (Family Ct, Schoharie Co)

People v VonRapacki, 204 AD3d 41 (3rd Dept 2/17/2022)

SORA | IAC

ILSAPP: The defendant appealed from a Chemung County Court order, which classified him as a level-two sex offender. The Third Department reversed. The challenged order did not set forth findings of fact/conclusions of law, so remittal was required. At the new hearing, the defendant would be entitled to different assigned counsel, given the ineffective assistance he had received. SORA defendants had a due process right to effective assistance. A fundamental aspect of the attorney-client relationship was communication, but counsel acknowledged that he had had no contact with the defendant. He made no arguments, agreed to the Board's recommendation, and failed to require the People to admit any proof or the SORA court to provide any reasoning. Clea Weiss represented the appellant. (County Ct, Chemung Co)

Third Department *continued***Jeffrey P. v Alyssa P., 202 AD3d 1409**
(3rd Dept 2/24/2022)**COUNSEL FEES | STIP & STATUTE**

ILSAPP: The husband appealed from a Supreme Court order, which, among other things, granted the wife counsel fees in a divorce action. The Third Department affirmed. On the one hand, where the parties have included a provision on counsel fees in a settlement agreement, such provision generally controlled. On the other hand, a party could seek recovery of fees under both the statute and an agreement where, as here, the agreement did not contain an express waiver of the right to apply under statute. (Supreme Ct, Saratoga Co)

Farideh P. v Ahmed Q., 202 AD3d 1391
(3rd Dept 2/24/2022)**PROSECUTION | FAMILY OFFENSE**

ILSAPP: The respondent appealed from an order of St. Lawrence County Family Court, finding that he committed certain family offenses and issuing an order of protection. The Third Department affirmed. Although perhaps Family Court should have adjourned the family offense proceeding until the criminal action was resolved, denying such requested relief did not constitute an abuse of discretion. (Family Ct, St. Lawrence Co)

Matter of Baby S., 202 AD3d 1417 (3rd Dept 2/24/2022)**PROPOSED FINDINGS | HOOK, LINE & SINKER**

ILSAPP: The biological mother appealed from an order of Columbia County Family Court, which granted the petitioners' application to adopt Baby S. The Third Department affirmed. The respondent asserted that Family Court improperly delegated its responsibility to make factual findings when it adopted the petitioners' proposed findings of fact in toto. *See* CPLR 4213; Family Ct Act § 165 (a). The wholesale copying of a party's proposal was rarely advisable, especially in a delicate case like this one. The trial court should have crafted its own decision, stating facts deemed essential. In any event, the instant record was sufficiently developed for the reviewing court to make independent findings consistent with the best interests of the child. (Family Ct, Columbia Co)

People v Turner, 202 AD3d 1375 (3rd Dept 2/24/2022)**SYNTHETIC POT | DANGEROUS**

ILSAPP: The defendant appealed from a Chemung County Court judgment, which convicted him of attempted 1st degree promoting prison contraband, upon his plea of guilty. The Third Department affirmed. While possession of a noncriminal, small amount of marijuana by an incarcerated person did not constitute possession of dangerous contraband (*People v Finley*, 10 NY3d 647), it was for the Legislature to determine whether synthetic marijuana was dangerous. Record evidence indicated that such substance could cause psychosis. (County Ct, Chemung Co)

Nelson UU. v Carmen VV., 202 AD3d 1414
(3rd Dept 2/24/2022)**COVID | PARENTING**

ILSAPP: The father appealed from a Sullivan County Family Court order, which, among other things, dismissed his violation petition. The Third Department affirmed. Regarding the mother's withholding of visitation from March to May 2020, the record supported the court's assessment that her actions were not willful but instead were premised on a desire to protect the children's health at the outset of the pandemic. At that time, access to the court was restricted to essential matters, making it unfair to fault the mother for not seeking judicial intervention. The lower court properly allowed the father a commensurate period of make-up parenting time. (Family Ct, Sullivan Co)

People v Crumedy, 203 AD3d 1240 (3rd Dept 3/3/2022)**SIX-YEAR PERIOD | COURSE OF CONDUCT |
TOO LONG**

ILSAPP: The People appealed from a Columbia County Court order, which granted the defendant's motion to dismiss eight counts of the indictment. The Third Department affirmed. On appeal, the People sought reinstatement of count 1, charging 2nd degree course of sexual conduct against a child. Such crime required that the conduct occurred over at least three months. While CPL 200.50 (6) did not define the outer parameters of the permissible period, the six-year interval charged in this indictment was too long to provide sufficient notice to the defendant, given that the charge was based on a few discrete acts not connected to any more particular time frames within the stated period. (County Ct, Columbia Co)

Appellate Advocates v DOCCS, 203 AD3d 1244
(3rd Dept 3/3/2022)**PAROLE | FOIL | DISSENTS**

Third Department *continued*

ILSAPP: The petitioner appealed from a judgment of Albany County Supreme Court, which dismissed an Article 78 petition. The Third Department affirmed. A FOIL request sought documents related to how the Board of Parole decided parole-release applications. The respondent partially complied. Two justices separately dissented in part. The first dissent opined that neither the attorney-client privilege nor the intra-agency exemption precluded the release of training materials prepared for the Board. Further, documents entitled “Board of Parole Interviews” and “Favorable/Unfavorable Court Decisions” contained no exempt material and should have been fully disclosed. (Supreme Ct, Albany Co)

People v Wimberly, 203 AD3d 1225 (3rd Dept 3/3/2022)

APPEAL WAIVER ISSUE | COURT IS IGNORED

ILSAPP: The defendant appealed from an Albany County Court judgment, convicting him of 2nd degree CPW. The Third Department affirmed, while expressing dismay with counsel. On appeal, the defendant contended that the court below abused its discretion in denying him youthful offender eligibility for the armed offense. In a prior decision in this case, the appellate court relieved former counsel and made it clear that new counsel should challenge the waiver of appeal. Inexplicably, current assigned appellate counsel failed to do so, and the unchallenged waiver foreclosed review of the YO claim. (County Ct, Albany Co)

People v Brown, 203 AD3d 1319 (3rd Dept 3/10/2022)

SENTENCE | REDUCED

ILSAPP: The defendant appealed from a judgment of Columbia County Court, convicting him of 1st degree criminal possession of marihuana, upon his plea of guilty. The Third Department modified. The defendant was sentenced to five years in prison plus two years’ post-release supervision, while his codefendant received a split sentence of six months in jail plus five years’ probation. The reviewing court stated that neither the codefendant’s lesser sentence nor the MRTA (repealing Penal Law § 221.30) warranted modification of the defendant’s sentence. However, in the interest of justice, his sentence was reduced to time served (three years), given his age, physical condition, and prior criminal history. Stephen Carney represented the appellant. (County Ct, Columbia Co)

People v Harris, 203 AD3d 1320 (3rd Dept 3/10/2022)

CAUSATION | MANSLAUGHTER

ILSAPP: The defendant appealed from a judgment of Albany County Supreme Court, convicting him of 2nd

degree manslaughter and other offenses. The Third Department affirmed. The defendant, Jodi Noisseau, and the victim drank and took drugs at a hotel one night. Upon checking out the next morning, the defendant and Noisseau could not awaken victim, who was foaming at the mouth and clearly needed medical care. Yet they transported her to the apartment of Noisseau, who continued taking drugs. Many hours later, the victim died in the apartment, and her body was then disposed of in the snow beside a residential street. The defendant’s conduct set in motion the events that foreseeably resulted in the victim’s death. Not obtaining medical help was a gross deviation from what a reasonable person would have done. (Supreme Ct, Albany Co)

Andrea II. v Joseph HH., 203 AD3d 1356

(3rd Dept 3/10/2022)

CUSTODY - APPEAL/RECORD ON APPEAL

LASJRP: The Third Department, while upholding the family court’s determination awarding primary physical custody to the father, rejects the attorney for the child’s assertion that the record is no longer sufficient where the AFC was advised of a subsequent incident in which the police responded to a mental health complaint made by the paternal grandfather against the father.

Although the Court may take notice of new facts and allegations to the extent that they indicate that the record is no longer sufficient for determining the father’s fitness and right to custody, the Court was advised at oral argument that no further proceedings were initiated based upon this alleged incident, and thus there is no reason to remit the matter for consideration of the new allegation. (Family Ct, Broome Co)

People v Parker, 203 AD3d 1341 (3rd Dept 3/10/2022)

SENTENCE | CONCURRENT

ILSAPP: The defendant appealed from a judgment of St. Lawrence County Court, revoking probation and imposing a term of imprisonment. The Third Department modified. The lower court should not have imposed consecutive sentences upon resentencing the defendant for two counts of 4th degree CPW. Sentences imposed for two offenses could not run consecutively where a single act constituted two offenses. The defendant’s convictions were based on his act of constructively possessing two rifles in a locked safe on a certain date. There was no proof of any separate act by him which constituted possession of one gun as opposed to the other. County Court also erred in issuing permanent orders of protection in favor of two persons who were not victims or witnesses to the conduct that formed the basis for the CPW convictions. The Rural Law Center of New York (Kelly Egan) represented the appellant. (County Ct, St. Lawrence Co)

Third Department *continued***People v Crispell, 203 AD3d 1393 (3rd Dept 3/17/2022)**
DVSJA | RESENTENCING

ILSAPP: The defendant appealed from a Chenango County judgment, convicting her of 1st degree robbery upon her plea of guilty. The Third Department affirmed. The defendant's challenge to her sentence was not precluded, given the invalid appeal waiver. Although at sentencing the defendant alluded to her domestic violence history, she failed to indicate how such history impacted her participation in the instant offense. To the extent that she sought a reduced sentence as a victim of domestic violence, she needed to make a CPL 440.47 application for resentencing. (County Ct, Chenango Co)

People v Johnson, 203 AD3d 1396 (3rd Dept 3/17/2022)
CPL ART. 450 | NO APPEAL

ILSAPP: The defendant was convicted of 2nd degree murder, and the judgment was affirmed in a prior appeal. In the instant case, the defendant appealed from a Madison County Court order that dismissed his motion to resettle a sentencing transcript and uniform sentence and commitment form, and an order amending the USCF to add the mandatory surcharge. The Third Department dismissed the appeal. A defendant's right to appeal to the Appellate Division was strictly limited by statute. *See* CPL Article 450. The challenged orders did not fit within the statute. (County Ct, Madison Co)

People v Moore, 203 AD3d 1401 (3rd Dept 3/17/2022)
PROSECUTOR | INNUENDO

ILSAPP: The defendant appealed from a judgment of Sullivan County Court, convicting him of 2nd degree CPW, upon his plea of guilty. The Third Department affirmed. The defendant contended that his right to due process was violated by prosecution remarks during sentencing. The prosecutor described law enforcement's knowledge of the defendant's purportedly sketchy past and alluded to an investigation of his possible role in a recent shooting. Defense counsel objected. The court disregarded the prosecutor's inflammatory and unsubstantiated remarks as "innuendo." The record did not establish that the sentence was based on materially untrue facts or misinformation. The appellate court rejected the contention that County Court erred in refusing to strike the offending remarks based on potential future prejudice. [NOTE: Not addressed was any potential for the subject statements to adversely impact corrections or parole determinations.] (County Ct, Sullivan Co)

People v Williams, 203 AD3d 1398 (3rd Dept 3/17/2022)

APPEAL WAIVER | MODEL COLLOQUY

ILSAPP: The defendant appealed from a Schenectady County Court judgment, convicting him of attempted 2nd degree robbery. The Third Department affirmed. The appeal waiver was invalid, since the written waiver was overbroad and inaccurate, and County Court did not overcome the overbroad language by ensuring that the defendant understood that some appellate and collateral review survived. The Third Department encouraged County Court to review the Model Colloquy for appeal waivers. (County Ct, Schenectady Co)

Jennifer JJ. v Jessica JJ., 203 AD3d 1444
(3rd Dept 3/24/2022)

DISSENT | SURRENDER | POST-ADOPTION

ILSAPP: The respondent biological mother appealed from an order of Otsego County Family Court, which granted the petitioner's Article 6 applications for modification of a prior order of visitation. The Third Department affirmed. Two justices dissented in part. The respondent executed voluntary judicial surrenders of two children, with a condition providing for post-adoption contact. There was inadequate support in the record for terminating the biannual supervised mother-daughter visits. Courts should adopt a careful and restrained approach in reviewing post-adoption contact agreements, since the resulting deprivation from a lack of enforcement is significant and substantial. Further, the challenged order failed to address the provision entitling the mother to photos and an update twice a year. Thus, the respondent remained entitled to those benefits. (Family Ct, Otsego Co)

People v Ortiz, 203 AD3d 1436 (3rd Dept 3/24/2022)

VICTIM STATEMENT | OMITTED

ILSAPP: The defendant appealed from a judgment of Ulster County Court, convicting him of 3rd degree rape, upon his plea of guilty. The Third Department modified. The defendant argued that County Court's decision to withhold the victim's statement violated CPL 390.50, which mandated disclosure of presentence reports to the parties for sentencing purposes. The information gathered during a PSI generally included a victim impact statement. County Court did not set forth reasons for excluding the victim's declaration. The defendant had no opportunity to review the statement, which was heavily relied upon by the sentencing court. The sentence was vacated. Given the information that County Court was privy to, remittal to a different judge was warranted. (County Ct, Ulster Co)

Third Department *continued*

**Corey O. v Angela P., 203 AD3d 1450
(3rd Dept 3/24/2022)**

DISSENT | AFC | CONFLICT

ILSAPP: The mother appealed from orders of Broome County Family Court, which granted the father's custody applications. Two justices dissented. The AFC was formerly a Family Court judge and had presided over a custody matter involving the mother. The instant matter should be remitted to develop the record and determine if Judiciary Law § 17 was violated based on a conflict that could not be waived. The question to be resolved was whether the "matter" over which the AFC presided in his judicial capacity was the same "matter" presently before the court. Too narrow a construction of "matter" would stifle the statute's purpose in Family Court matters. (Family Ct, Broome Co)

**Stephanie R. v Walter Q., 203 AD3d 1440
(3rd Dept 3/24/2022)**

FATHER | FORGOING VISITS

ILSAPP: The father appealed from an order of Tompkins County Family Court, which granted the mother's custody application. The Third Department affirmed. After the father was convicted of 2nd degree criminal contempt for violating an order of protection in favor of the mother, Family Court suspended his visitation until he completed a batterer's program. Although such order was not the subject of this appeal, the father's actions giving rise to such order should be considered in any future application for unsupervised visitation. In suspending parental access, Family Court had considered the father's decision to forgo visitation by remaining incarcerated rather than being released with an ankle bracelet. In addition, the appellate court was advised at oral argument that the father had not enrolled in a batterer's program. (Family Ct, Tompkins 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 Addison, 199 AD3d 1321
(4th Dept 11/12/2021)**

VEHICLE STOP | DISSENT

ILSAPP¹: The defendant appealed from a Supreme Court judgment, convicting him of 2nd degree CPW, upon a jury verdict. The Fourth Department affirmed. Two justices dissented. Two officers testifying at the suppression hearing were caught in a lie about the reason for their stop of the defendant's car. A VTL violation can serve as a lawful pretext for a stop motivated primarily by a hunch. But an officer's credibility was undermined by a decision to testify falsely about the main rationale for a traffic stop. The People did not show the legality of police conduct in initiating the stop. The defendant's motion to suppress should have been granted, and the indictment should have been dismissed. (Supreme Ct, New York Co)

People v Austin, 199 AD3d 1383 (4th Dept 11/12/2021)

ORDER OF PROTECTION | EXP. DATE

ILSAPP: The defendant appealed from an Erie County Court judgment, convicting him upon his plea of guilty of 2nd degree rape (four counts). The Fourth Department modified in the interest of justice. The end date of the order of protection exceeded that allowed by CPL 530.13 (4) (A). Where a defendant was convicted of a felony and his/her sentence did not include a term of probation for an enumerated felony sexual assault, the OP expiration date must not exceed the greater of eight years from the date of (1) such sentencing or (2) the expiration of the determinate term imposed. Legal Aid Bureau of Buffalo (Barbara Davies, of counsel) represented the appellant. (County Ct, Erie Co)

People v Bembry, 199 AD3d 1340 (4th Dept 11/12/2021)

FINES | ERROR

ILSAPP: The defendant appealed from a County Court judgment, convicting him of DWI as a class E felony, 1st degree AUO of a motor vehicle, and other offenses, upon his plea of guilty. The Fourth Department modified. A fine was mandatory for AUO but had not been imposed. The appellate court ordered the minimum amount of \$500. As modified, the sentence was unduly severe insofar as it imposed a \$1,000 fine for DWI, so that fine was vacated. The Appellate Term, Second Department has persuasively held that a defendant's refusal to submit to a breath test does not establish a cognizable offense. Therefore, such count was dismissed. The Monroe County Public Defender (James Hobbs, of counsel) represented appellant. (Supreme Ct, New York 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.

Fourth Department *continued***People v Douglas, 199 AD3d 1330
(4th Dept 11/12/2021)****SORA | REVERSED**

ILSAPP: The defendant appealed from an order of Onondaga County Supreme Court, which determined that he was a level-three risk. The Fourth Department reversed and remitted. The SORA court erred in treating a presumptive override as mandatory and not ruling on the defendant's downward departure application. Hiscock Legal Aid Society (Matthew Bellinger, of counsel) represented the appellant. (Supreme Ct, Onondaga Co)

**People v Getman, 199 AD3d 1318
(4th Dept 11/12/2021)****LESSER INCLUDED CHARGE | ERROR**

ILSAPP: Upon the defendant's appeal from a County Court judgment, the Fourth Department reversed, finding error in the grant of the People's request to charge 1st degree criminal sexual act as a lesser included offense of predatory sexual assault against a child. It was not impossible to commit the greater offense, as charged in the indictment, without committing the lesser offense. The predatory crime count was dismissed without prejudice to the People to re-present any appropriate charge with respect thereto to another grand jury. The prosecutor improperly stated in summation that he had a "significant advantage over" the jury because he had been working on the case for more than a year and had talked to witnesses and reviewed reports. The integrity of the DA's office should not have been injected into the case. The Livingston County Conflict Defender (Bradley Keem, of counsel) represented the appellant. (Supreme Ct, New York Co)

**People v Hughes, 199 AD3d 1332 (4th Dept 11/12/2021)
CUSTODY | NO MIRANDA**

ILSAPP: The defendant appealed from a judgment of Monroe County Supreme Court, convicting her of 2nd degree kidnapping. The Fourth Department reversed. The waiver of appeal was invalid. Misleading language in the written waiver purported to impose an absolute bar to taking a direct appeal and to deny the defendant's right to counsel and the opportunity to pursue post-conviction relief. Further, the plea court's oral statements about the waiver did not counter many inaccuracies. The defendant's unMirandized statements—made when she was questioned for hours at the police station—were the product of custodial interrogation. Questioning changed from investigatory to accusatory; and a reasonable person who was innocent of any crime would not have believed that

she was free to leave. Andrew Morabito represented the appellant. (Supreme Ct, Monroe Co)

**Matter of James D., 199 AD3d 1375
(4th Dept 11/12/2021)****TERMINATION OF PARENTAL RIGHTS
- DISPOSITIONAL HEARINGS
- SUSPENDED JUDGMENT/VIOLATIONS**

LASJRP²: The Fourth Department rejects the mother's contention that the court erred in failing to hold a separate dispositional hearing and terminating parental rights after finding that the mother failed to comply with several terms of a suspended judgment.

A hearing on a petition alleging that the terms of a suspended judgment have been violated is part of the dispositional phase of a permanent neglect proceeding. There was no need for an additional hearing since the court conducted a lengthy hearing that addressed both the alleged violations of the suspended judgment and the children's best interests. A parent's noncompliance with the terms of a suspended judgment constitutes strong evidence that termination of parental rights is in a child's best interests. (Family Ct, Oswego Co)

People v Roth, 199 AD3d 1380 (4th Dept 11/12/2021)**JURISDICTION | NO INJURED FORUM**

ILSAPP: Upon the defendant's appeal from an Ontario County Court judgment, the Fourth Department reversed convictions of 1st degree custodial interference and dismissed those two counts. The trial court lacked geographical jurisdiction since none of the elements of the offenses occurred in the county. The "injured forum" provisions of CPL 20.40 (2) (c) did not apply; the conduct alleged did not have a materially harmful impact on governmental processes or the community welfare in Ontario County. Indeed, the conduct affected only the mother and her two children, none of whom resided in Ontario County. The Public Defender's Office (Gary Muldoon, of counsel) represented the appellant. (County Ct, Orange Co)

Streiff v Streiff, 199 AD3d 1370 (4th Dept 11/12/2021)**CUSTODY/MOTION PRACTICE - TIMELINESS OF
MOTION**

LASJRP: On January 29, 2020, the mother filed a motion seeking, inter alia, to preclude the father from offering into evidence certain materials requested via discovery but not produced, and to strike the allegations in the father's custody/visitation petitions for modification

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

Fourth Department *continued*

and enforcement related to those materials. A return date was not initially provided, but the Family Court later advised the mother's counsel that the motion would be returnable on February 6, 2020, which was also the previously scheduled date for the hearing on the father's petitions. The father did not respond to the motion.

On February 6, 2020, the father's counsel asserted that the motion was untimely. The mother's counsel explained that she had mailed the motion to the father's counsel on January 29, 2020, and the court suggested that the eight-day period between mailing and the return date was sufficient. The father responded that he had not received the motion papers until February 3, 2020, but the court rejected the father's contention that the motion was untimely and stated that it was "going to entertain the motion."

The Fourth Department agrees with the father that the court erred in considering the mother's motion, which was untimely. Pursuant to CPLR 2214(b), "[a] notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard." Although service is complete upon mailing, five days must be added to any relevant time period measured from the date of service when service is made by mail (see CPLR 2103[b][2]).

Because the court's decision formed the basis for the request of the father's counsel to withdraw the petitions without prejudice and the court's decision to dismiss the petitions with prejudice, this Court reinstates the petitions (Family Ct, Onondaga Co).

Matter of Tony S.H., 199 AD3d 1347 (4th Dept 11/12/2021)

SURRENDER | REVERSED

ILSAPP: The birth mother appealed from an order of Onondaga County Family Court, which granted the petition of New Hope Family Services for approval of her extra-judicial surrender of the subject child. The Fourth Department reversed. The appeal brought up for review an order denying the birth mother's motion to vacate her surrender. Social Services Law § 383-c (6) allowed a birth parent to revoke an extra-judicial surrender within 45 days of its execution. Since the mother timely revoked, the surrender was a nullity, and Family Court erred in holding a best interests hearing—a proceeding not provided for in the relevant statute. As to the proper remedy, prior to executing the surrender, the birth mother voluntarily agreed to place the child in the adoption agency's foster care program. So the child should remain in the agency's care and custody pending further proceedings. Theodore Stenuf represented the appellant. (Family Ct, Onondaga Co)

People v Woodard, 199 AD3d 1377 (4th Dept 11/12/2021)

RACIAL BIAS | 330.30 HEARING

ILSAPP: The defendant appealed from a Supreme Court judgment, convicting him of 2nd degree conspiracy and other crimes. The Fourth Department reserved decision and remitted for a hearing. The trial court erred in summarily denying the defendant's CPL 330.30 motion. Setting aside the verdict was warranted where a juror had an undisclosed prejudice that would have resulted in disqualification if revealed during voir dire. In this case, two jurors' supporting affidavits indicated that racial bias may have influenced the verdict. The evening after the verdict, the same jurors had alleged in emails to the court that, during deliberations, certain other jurors directed racist comments at the defendant and that racial bias had played a role in the verdict. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Ashby, 200 AD3d 1723 (4th Dept 12/23/2021)

INDICTMENT AMENDED | PRESERVATION

ILSAPP: The defendant appealed from a judgment of Niagara County Supreme Court, convicting him of 3rd degree insurance fraud and another crime. The Fourth Department affirmed. The defendant contended that count one of the indictment was impermissibly amended. Although prior Fourth Department cases did not require preservation of such a contention, those decisions should not be followed. Here the defendant failed to preserve the issue, which the appellate court declined to review in the interest of justice. (County Ct, Niagara Co)

Matter of Brianna E., 200 AD3d 1735 (4th Dept 12/23/2021)

ABUSE/NEGLECT - CORROBORATION/ EXPERT TESTIMONY - DERIVATIVE NEGLECT

LASJRP: The Fourth Department concludes that the out-of-court statements of the child were sufficiently corroborated by, inter alia, the testimony of petitioner's validation expert, a psychologist who evaluated the child and opined that the child's consistent statements to the psychologist, an investigator, and a therapist were credible and consistent with those of a child who has been abused. By failing to object, respondent failed to preserve his contention that the court erred in allowing the expert to testify as to the credibility of the child's disclosure.

Respondent's sexual abuse of his stepdaughter supports the finding that he derivatively neglected his daughter. (Family Ct, Jefferson Co)

Fourth Department *continued***People v Defio, 200 AD3d 1672 (4th Dept 12/23/2021)****ASSAULT | NO SERIOUS INJURY**

ILSAPP: The defendant appealed from a judgment of Onondaga County Supreme Court, convicting her of aggravated vehicular assault and three counts of 2nd degree assault. The Fourth Department modified, dismissing one assault count as against the weight of the evidence. The People failed to prove serious physical injury. Although the victim testified that he sustained a skull fracture, the People's expert said otherwise. The victim also stated that he had ongoing memory problems, but he had suffered prior concussions that could also have caused those issues. Hiscock Legal Aid Society (Kristen McDermott, of counsel) represented the appellant. (County Ct, Onondaga Co)

**People v Edwards, 200 AD3d 1594
(4th Dept 12/23/2021)****SORA | DEPARTURE**

ILSAPP: The defendant appealed from an Onondaga County Court order determining that he was a level-two risk under SORA. The Fourth Department reversed and remitted. The SORA court erred in denying a downward departure. The defendant established a mitigating factor not adequately considered by the Guidelines. He had been sentenced to one year in jail with no post-release supervision and, due to an oversight, was not registered as a sex offender. Despite being unsupervised, he did not reoffend during the seven years between release and the SORA hearing. Hiscock Legal Aid Society (Thomas Leith, of counsel) represented the appellant. (County Ct, Onondaga Co)

**People v Goodwin, 200 AD3d 1711
(4th Dept 12/23/2021)****PLEA | COERCED**

ILSAPP: The defendant appealed from a Lewis County Court judgment, convicting him of predatory sexual assault against a child (two counts). The Fourth Department reversed in the interest of justice and remitted. During a court appearance, County Court offered a plea deal calling for 15 years to life imprisonment. The court said: "My policy is, if a defendant gets convicted at trial, that means that individual has not accepted responsibility ... and in all likelihood, the sentence after trial [in this case] would not even be close to the 20 years to life sought by the People, it would be ... many more years, and you are looking at a potential of 100 years to life." Such statements did not describe the potential sentence range, were coercive, and rendered the plea involuntary.

Caitlin Connelly represented the appellant. (County Ct, Lewis Co)

**Matter of Grayson R., 200 AD3d 1646
(4th Dept 12/23/2021)****ABUSE/NEGLECT - SEVERE ABUSE/
PRESUMPTION OF ABUSE**

LASJRP: The Fourth Department upholds a finding of severe abuse by clear and convincing evidence, noting that when the child was seven months old, he was diagnosed with, among other injuries, numerous broken ribs, a fractured skull, and numerous fractures to both of his legs, which had been inflicted over the course of several months; that petitioner offered testimony from the child's pediatrician that some of the fractures were the result of repeated violent shaking and that those types of fractures did not occur for any other reason; and that respondents failed to promptly seek medical attention for the child.

The presumption in FCA § 1046(a)(ii) extends to all three respondents, and does so despite the fact that the child had other caregivers, including individuals who occasionally babysat the child, during the months in which he sustained his injuries. Petitioner was not required to pinpoint the exact time when the injuries occurred and establish which respondent was the culpable caregiver. (Family Ct, Erie Co)

**People v Hidalgo-Hernandez, 200 AD3d 1681
(4th Dept 12/23/2021)****WARRENTLESS | NO EMERGENCY**

ILSAPP: The defendant appealed from an Onondaga County Court judgment, convicting him of 1st degree CPCS and 2nd degree CPW, upon his plea of guilty. The Fourth Department reversed and dismissed the indictment. The appeal brought up for review an order denying suppression of evidence seized in a warrantless search of the defendant's residence. Police responded to the home after a 911 call by a woman who found her roommate unconscious. Generally, a warrantless search of an individual's residence was unconstitutional. The emergency exception did not apply here. The police lacked reasonable grounds to believe there was an immediate need for their help to protect life or property. At the time of the search, the unconscious woman had been pronounced dead, and there was no indication that a crime had occurred or that there was an ongoing risk of harm. Bradley Keem represented the appellant. (County Ct, Onondaga Co)

**Matter of Kerri W.S. v Zucker, 202 AD3d 143
(4th Dept 12/23/2021)****VACCINATIONS**

Fourth Department *continued*

LASJRP: Following the repeal of the religious exemption in Public Health Law § 2164, defendants, exercising their statutory authority to adopt and amend rules and regulations to effectuate the provisions and purposes of the mandatory vaccination statute, enacted a package of regulatory amendments designed to ensure the appropriate use of medical exemptions going forward. Within that package was a new regulatory provision that defined the phrase “may be detrimental to a child’s health” in § 2164(8) to mean that “a physician has determined that a child has a medical contraindication or precaution to a specific immunization consistent with ACIP guidance or other nationally recognized evidence-based standard of care” (10 NYCRR 66-1.1[I]).

The Fourth Department holds that by promulgating 10 NYCRR 66-1.1(I), defendants merely implemented the legislature’s policy in a manner entirely consistent with the legislative design, and thus 10 NYCRR 66-1.1(I) is valid, and does not violate the separation of powers doctrine or exceed the authority of its promulgator. (Supreme Ct, Yates Co)

People v Lewis, 200 AD3d 1719 (4th Dept 12/23/2021)

CHALLENGE DENIED | NEW TRIAL

ILSAPP: The defendant appealed from a Supreme Court judgment, convicting him of 2nd degree CPW. The Fourth Department reversed and granted a new trial. The trial court erred in denying the defendant’s challenge for cause to a prospective juror whose statements as to the credibility of police as witnesses cast serious doubt on his ability to render an impartial verdict. He did not provide an unequivocal assurance that he could set aside any bias. Legal Aid Bureau of Buffalo (Jane Yoon) represented the appellant. (Supreme Ct, Erie Co)

People v Mosley, 200 AD3d 1664 (4th Dept 12/23/2021)

HARSH SENTENCE | AGE 17

ILSAPP: The defendant appealed from an Onondaga County Court judgment, convicting him of 2nd degree burglary and imposing the maximum sentence of 15 years, plus post-release supervision. The Fourth Department reduced the term of imprisonment to seven years, noting that the defendant was 17 at the time of the incident. Hiscock Legal Aid Society (Nathaniel Riley, of counsel) represented the appellant. (County Ct, Onondaga Co)

People v Moss, 200 AD3d 1662 (4th Dept 12/23/2021)

PRIOR PLEA COERCED | HEARING

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

ual abuse and EWC. The Fourth Department vacated the sentence and remitted. As the defendant contended in his pro se brief, Count Court erred in sentencing him as a second child sexual assault felony offender without a hearing. The defendant asserted that, in the prior proceeding, the court coerced him into pleading guilty to a reduced charge by threatening to impose the maximum if he were convicted after trial. Such a threat was coercive. Thus, the defendant was entitled to a hearing on the constitutionality of that prior guilty plea. (County Ct, Monroe Co)

Owens v State, 200 AD3d 1624 (4th Dept 12/23/2021)

WRONGFUL CONVICTION | CLAIM

ILSAPP: The claimant appealed from an order granting the State’s motion to dismiss his action for damages based on a wrongful conviction. After the prosecution rested at a retrial in the underlying criminal case, the claimant moved for a trial order of dismissal. The criminal court granted the motion, and the claimant was released from prison. Court of Claims Act § 8-b was enacted to compensate innocent persons who proved, by clear and convincing evidence, that they were unjustly convicted and imprisoned. A claimant may be eligible when the conviction was reversed or vacated, and where, if a new trial was ordered, the claimant was found not guilty. The Court of Claims erred in determining that a CPL 290.10 dismissal was not equivalent to a judicial acquittal. If believed, the allegations in the instant claim would establish that the claimant did not possess a gun or fire a weapon at the ex-wife, as alleged in the indictment, and that she fabricated the story of his involvement in a shooting. In finding otherwise, the Court of Claims improperly assessed the credibility of the proof. Elliot Shields represented the appellant. (Supreme Ct, New York Co)

Matter of Rigdon v Close, 200 AD3d 1562 (4th Dept 12/23/2021)

VISITS | DAD’S MODEST REQUEST

ILSAPP: The father appealed from a Family Court order, dismissing his petition seeking to communicate in writing and by phone with the subject children while he was incarcerated. The Fourth Department reversed. Family Court erred in summarily and sua sponte dismissing the petition without a hearing, based on the father’s failure to complete substance abuse treatment. The prior order required, as a prerequisite to seeking modification, that the father consistently engage in such treatment, which he did. The lower court also erred in finding that the communication sought would harm the children. The petition was reinstated, and the matter remitted. The Livingston County Public Defender (Bradley Keem, of counsel) represented the appellant. (Family Ct, Livingston Co)

Fourth Department *continued***People v Fudge, 199 AD3d 16 (4th Dept 1/13/2022)****RIGHTING A WRONG | OPINION VACATED**

ILSAPP: The Fourth Department has vacated an opinion that unfairly attacked appellate counsel.

Matter of Ayden D., 202AD3d 1455 (4th Dept 2/4/2022)**TERMINATION OF PARENTAL RIGHTS -
DILIGENT EFFORTS**

LASJRP: In this termination of parental rights proceeding, the Fourth Department rejects the father's contention that petitioner was required, as part of its diligent efforts obligation, to forgo requiring the father's participation in a sex offender program or to formulate an alternative plan to accommodate his refusal to admit his role in the events that led to the removal of the child. (Family Ct, Jefferson Co)

People v Jackson, 202 AD3d 1483 (4th Dept 2/4/2022)

The defendant moved under CPL 440.10 to vacate the judgment of conviction after his conviction was affirmed on appeal. The "defendant met his burden of establishing that he received less than meaningful representation" where he asserted that trial counsel was ineffective in failing to proffer evidence in support of a defense of extreme emotional disturbance (EED). While counsel had obtained the defendant's military records showing his diagnosis of posttraumatic stress disorder (PTSD), she did not seek records of the Social Security disability benefits he told her he received, nor did she seek an independent expert opinion on the PTSD, only accompanying the defendant to the interview with the prosecution's expert, who concluded that the "defendant was not 'suffering from active PTSD symptoms during the shooting'" As "[p]ursuing an EED defense was the best trial strategy for defendant, and defendant demonstrated the absence of any strategic or other legitimate explanation for defense counsel's failure to obtain certain records, her failure to introduce other records in evidence, and her failure to secure an expert to support an EED defense" reversal is warranted. (County Ct, Oneida Co)

Santana v Barnes, 203 AD3d 1561 (4th Dept 3/11/2022)**CUSTODY | NO AFC**

ILSAPP: The mother appealed from an order of Wayne County Family Court insofar as it granted the father certain parental access. The Fourth Department affirmed. Family Court did not err in declining to appoint an AFC. In a custody/visitation proceeding, the determination regarding the assignment of an AFC was discre-

tionary. Here the child was less than age one at the time of the proceedings. *But see* Sobie, 2021 Supp Practice Commentaries, McKinney's Cons Law of NY, Family Ct Act § 249 (failure to name AFC in contested custody case often results in reversal; depending on circumstances of case, appointment may be required, regardless of child's age). (Family Ct, Wayne Co)

Matter of Faith K., 203 AD3d 1568 (4th Dept 3/11/2022)**TERMINATION OF PARENTAL RIGHTS -
RIGHT TO COUNSEL**

LASJRP: In this termination of parental rights proceeding, the Fourth Department concludes that the mother was not deprived of effective assistance of counsel by her attorney's failure to present her as a witness. The mother failed to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcoming. (Family Ct, Ontario Co)

People v Griffin, 203 AD3d 1608 (4th Dept 3/11/2022)**CURTAILED CROSS | HARMLESS**

ILSAPP: The defendant appealed from an Onondaga County Court judgment, convicting him of 2nd degree murder and other crimes. The Fourth Department affirmed. The trial court erred in limiting defense counsel's cross-examination of a witness about his recent drug conviction. Curtailment of cross is improper where it keeps from the jury facts bearing on the trustworthiness of crucial testimony. However, the error was harmless. (County Ct, Onondaga Co)

People v Kilgore, 203 AD3d 1634 (4th Dept 3/11/2022)**CURTAILED CROSS | NEW TRIAL**

ILSAPP: The defendant appealed from an Onondaga County Court judgment, convicting him of various sexual and other offenses. The Fourth Department modified. County Court abused its discretion in curtailing the defendant's cross-examination of a police detective who took a statement from the victim. The defendant laid a proper foundation by eliciting from the victim testimony that was inconsistent with the detective's report. The error was not harmless; a new trial was granted on count one charging 3rd degree criminal sexual act. Hiscock Legal Aid Society (Nathaniel Riley) represented the appellant. (County Ct, Onondaga Co)

**Matter of Meyah E., 203 AD3d 1558
(4th Dept 3/11/2022)****TERMINATION | HEARSAY HARMLESS**

ILSAPP: The mother appealed from an order of Erie County Family Court, which terminated her parental

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rights based on mental illness. The Fourth Department affirmed. If arguendo admission of hearsay portions of an expert report was improper, the error was harmless. Family Court also relied on the testimony of the petitioner's expert, the mother, and her expert, as well as her treatment records, which were admitted without objection. Such admissible evidence was sufficient to support the challenged finding. (Family Ct, Erie Co)

People v Ozkaynak, 203 AD3d 1616 (4th Dept 3/11/2022)

CSLI SEARCH WARRANT | RESERVED

ILSAPP: The defendant appealed from a Livingston County Court judgment, convicting him of 2nd degree murder and another crime, upon a jury verdict. The Fourth Department withheld decision. The defendant had standing to challenge a search warrant issued for cell-site location information (CSLI). On the merits, the controlling decision was *Carpenter v U.S.*, 138 SCt 2206 (valid expectation of privacy in CSLI records revealing movements), decided after the instant conviction. Danielle Wild represented the appellant. (County Ct, Livingston Co)

People v Phillips, 203 AD3d 1636 (4th Dept 3/11/2022)

RIGHT TO BE PRESENT | NEW TRIAL

ILSAPP: The defendant appealed from a Monroe County Court judgment, convicting him of 2nd degree murder, upon a jury verdict. The Fourth Department ordered a new trial. County Court precluded the defendant from being present at a material witness hearing, at which the witness testified. Upon the People's request, the court then held a *Sirois* hearing, at which the material witness did not testify and the defendant was present. County Court found that the witness was rendered unavailable to testify at trial by threats attributable to the defendant. While a defendant generally had no constitutional right to be present at a material witness hearing, his absence from a *Sirois* hearing could impair his ability to defend. The *Sirois* court erred in using unchallenged testimony and its own observations from the material witness hearing in making its determination. Gary Muldoon represented the appellant. (County Ct, Monroe Co)

People v Ponce, 203 AD3d 1628 (4th Dept 3/11/2022)

SUPPRESSION | DISMISSAL

ILSAPP: The defendant appealed from a judgment of Onondaga County Supreme Court, which convicted him of attempted 2nd degree CPW, upon a plea of guilty. The Fourth Department reversed. Based on an anonymous tip that the defendant was in a specific vehicle at a specific

location, police were dispatched but did not find him or the vehicle. Hours later, they observed the vehicle with two persons inside. The ensuing stop was unlawful, since the police lacked a reasonable suspicion that the defendant was in the vehicle. Hiscock Legal Aid Society (Piotr Banasiak, of counsel) represented the appellant. (Supreme Ct, Onondaga Co)

People v Ritchie, 203 AD3d 1562 (4th Dept 3/11/2022)

SORA | DUE PROCESS

ILSAPP: The defendant appealed from a County Court order, which determined that he was a level-three SORA risk. The Fourth Department reversed and ordered a new hearing. Based on the defendant's prior felony conviction for a sex crime, the Board recommended an override to classify him as presumptive level three, not two. The prosecutor and defense agreed that the defendant should be designated level two. But in its order, the SORA court assessed 10 additional points under risk factor 12 and stated that, had it adhered to the Board's assessment, the court would still have found level three proper due to the override. The defendant was deprived of a meaningful opportunity to respond to the sua sponte assessment and the alternative finding as to an override. The Wayne County Public Defender (Bridget Field, of counsel) represented the appellant. (County Ct, Wayne Co)

People v Socciarelli, 203 AD3d 1642 (4th Dept 3/11/2022)

SENTENCE | HARSH

ILSAPP: The defendant appealed from a County Court judgment, convicting him of multiple sex offenses. The Fourth Department modified. The aggregate sentence of 32 years' imprisonment was unduly severe because the defendant had no prior sex offenses and the People offered 10 years pre-indictment and 15 years post-indictment. Thus, all terms were to run concurrently. The prosecutor's delay in disclosing a video that a witness had provided to an investigator constituted a *Rosario* violation. However, reversal was not required, where the trial court had given the defense time to review the proof and the opportunity to recall witnesses for further cross. The Ontario County Public Defender (Allyson Kehl-Wierzbowski, of counsel) represented the appellant. (County Ct, Ontario Co)

People v Witherow, 203 AD3d 1595 (4th Dept 3/11/2022)

RESTITUTION | ERROR

ILSAPP: The defendant appealed from a restitution and reparation order issued in conjunction with his Ontario County assault convictions. The Fourth Depart-

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ment held that it was error to impose more than the statutory cap for one victim's past lost earnings—a form of loss not covered by the exception to the cap. Cara Waldman represented the appellant. (County Ct, Ontario Co)

**People v Abughanem, 203 AD3d 1710
(4th Dept 3/18/2022)**

PHYSICAL INJURY | NOT PROVEN

ILSAPP: The defendant appealed from a County Court judgment, convicting him of multiple crimes. The Fourth Department modified. The evidence was legally insufficient to support a conviction of 3rd degree assault. The People failed to present evidence establishing that the victim sustained a physical injury when the defendant jumped on her back. Although she reported back pain, there were no photographs of injuries or any evidence of substantial back pain. The count was dismissed. The Legal Aid Bureau of Buffalo (Nicholas DiFonzo, of counsel) represented the appellant. (County Ct, Buffalo Co)

People v Adams, 203 AD3d 1684 (4th Dept 3/18/2022)

SENTENCE | NOT PRONOUNCED

ILSAPP: The defendant appealed from a County Court judgment, convicting him of 4th degree arson, upon a plea of guilty. The Fourth Department modified. During sentencing, the lower court failed to orally pronounce the definite term component of the defendant's sentence. *See* CPL 380.20 (court must pronounce sentence in every case where conviction is entered). The appellate court vacated the sentence and remitted for resentencing. The remittal court was directed to address the defendant's assertion that her probationary term must be reduced by the time served in jail and any objections to the conditions of probation. The Monroe County Public Defender (David Juergens, of counsel) represented the appellant. (County Ct, Monroe Co)

People v Douglas, 203 AD3d 1682 (4th Dept 3/18/2022)

BATSON | NEW TRIAL

ILSAPP: The defendant appealed from a Supreme Court judgment, convicting him of 2nd degree CPW and another crime. The Fourth Department granted a new trial. Supreme Court erred in denying a *Batson* challenge. Statements the prosecutor attributed to the prospective juror at issue were made by a different prospective juror, who was struck by the defendant. The Monroe County Public Defender (Helen Syme, of counsel) represented the appellant. (Supreme Ct, Monroe Co)

**Matter of Isabella S., 203 AD3d 1651
(4th Dept 3/18/2022)**

NEGLECT | NOT PROVEN

ILSAPP: The mother appealed from an order of Onondaga County Family Court finding neglect. The Fourth Department reversed. After acknowledging her mental health issues, the mother had been compliant with treatment. She acted appropriately with the child and was involved in a housing program that would allow her to care for the child. Thus, there was insufficient evidence that actual or imminent harm to the child was clearly attributable to any act or failure on the mother's part. (Family Ct, Onondaga Co)

**Matter of Juliette R., 203 AD3d 1678
(4th Dept 3/18/2022)**

**ABUSE/NEGLECT - MAKING UNFOUNDED
ALLEGATIONS OF ABUSE**

LASJRP: The Fourth Department finds sufficient evidence of neglect where the father made repeated unfounded allegations of sexual and physical abuse that led to medical examinations and interviews regarding intimate issues, and the father inappropriately questioned the child about the alleged abuse. (Family Ct, Erie Co)

People v Mighty, 203 AD3d 1687 (4th Dept 3/18/2022)

CONSTRUCTIVE POSSESSION | MERE PRESENCE

ILSAPP: The defendant appealed from a Supreme Court judgment, convicting him of two counts of 3rd degree CPCS. The Fourth Department dismissed the indictment. The evidence of possession was legally insufficient. The motion for a trial order of dismissal was not specifically directed at the alleged error raised on appeal, but the appellate court reached the issue in the interest of justice. There was no evidence that the defendant actually possessed the controlled substance, and his mere presence where contraband was found was insufficient to establish constructive possession. The Monroe County Public Defender (William Clauss, of counsel) represented the appellant. (Supreme Ct, Monroe Co)

Matter of Rajee T., 203 AD3d 1714 (4th Dept 3/18/2022)

**ABUSE/NEGLECT - CONFIDENTIALITY/
ACCESS TO COURT AND RECORDS**

LASJRP: Non-party appellant, an online-only local news outlet, attempted to cover a motion to disqualify a Deputy County Attorney, who was simultaneously serving as a part-time judge. The family court did not allow appellant's owner access to the courtroom, and appellant published an article describing how the court had excluded the press. After unsuccessfully seeking the transcript,

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appellant moved for permission to “intervene” in the neglect proceeding and for release of the transcript, even if redacted. The court denied the motion.

The Fourth Department first concludes that while there are cases characterizing similar motions as seeking a form of intervention, the motion is better understood as an application for release of the transcript pursuant to FCA § 166. The Court also agrees with appellant that the Deputy County Attorney, a non-party, did not have to be served with the motion [see 22 NYCRR § 205.11(b)].

The Court then holds that the family court violated appellant’s right to attend the disqualification hearing. Appellant is entitled to a transcript, the release of which, with appropriate redaction, would be consistent with 22 NYCRR § 205.5, which specifies certain persons and entities who are entitled to access to certain records, and FCA § 166, which permits discretionary disclosure to others.

The court failed to make findings prior to ordering exclusion, and there is no indication in the record that the court relied on supporting evidence or considered any of the relevant factors [see 22 NYCRR § 205.4(b)]. Moreover, appellant was not causing or likely to cause a disruption. There is no indication in the record that any party objected to appellant’s presence for a compelling reason. The hearing would not have required disclosure of the underlying neglect allegations, and, in any event, less restrictive alternatives to exclusion were available; the court could have, *inter alia*, conditioned appellant’s attendance upon the nondisclosure of confidential information.

Even if the hearing was no longer relevant because the attorney had already been elected to a full-time judgeship, the court improperly ignored both the continued importance of appellant’s role in reporting accusations of ethical violations or conflicts of interest on the part of a judge, and the principle that it was within appellant’s province to determine whether the hearing remained newsworthy. (Family Ct, Genesee Co)

People v Singleton, 203 AD3d 1646 (4th Dept 3/18/2022)

TAXI STOP | NO REASONABLE SUSPICION

ILSAPP: The defendant appealed from a County Court judgment, convicting him of 3rd degree CPCS. The Fourth Department dismissed the indictment. County Court erred in denying suppression. A taxi in which the defendant rode was stopped based on a belief that he was a suspect in a recent shooting. But the detective who ordered the stop had never seen an image of the suspect, and the defendant’s presence near the crime site did not support a reasonable suspicion that he was the shooter. The Ontario County Public Defender (John Cirando, of counsel) represented the appellant. (County Ct, Ontario Co)

People v Webber, 203 AD3d 1660 (4th Dept 3/18/2022)

RESTITUTION | SURCHARGE MODIFIED

ILSAPP: The defendant appealed from a Cattaraugus County Court judgment, convicting her of 1st degree assault and another crime, upon her plea of guilty. The Fourth Department modified. County Court erred in imposing the maximum restitution surcharge of 10%. Such issue would survive even a valid appeal waiver where, as here, the court failed to advise the defendant of the potential surcharge range. The appellate court reached the unpreserved issue in the interest of justice. The record contained no filing of an affidavit of an official or organization, designated pursuant to CPL 420.10 (8), demonstrating that the actual cost of the collection and administration of restitution exceeded 5% of the restitution amount or the amount collected. Ana Tupchik represented the appellant. (County Ct, Cattaraugus Co)

People v Alim, 204 AD3d 1418 (4th Dept 4/22/2022)

REFUSED BREATH TEST | NOT COGNIZABLE

ILSAPP: The defendant appealed from a County Court judgment, convicting him of DWI and several other crimes, upon a jury verdict. The Fourth Department modified. The defendant’s refusal to submit to a breath test did not establish a cognizable offense, so that count of the indictment was dismissed. The Monroe County Public Defender (William Clauss, of counsel) represented the appellant. (County Ct, Monroe Co)

People v Brown, 204 AD3d 1390 (4th Dept 4/22/2022)

ILLEGAL SENTENCE | CONSECUTIVE

ILSAPP: The defendant appealed from a judgment of Erie County Supreme Court, convicting him of various crimes, upon a jury verdict. The Fourth Department modified, finding that the terms for 1st degree assault and 1st degree robbery must run consecutively, where the robbery was the predicate felony for the assault. David Pajak represented the appellant. (Supreme Ct, Erie Co)

People v Burney, 204 AD3d 1473 (4th Dept 4/22/2022)

RIGHT TO COUNSEL - EFFECTIVE ASSISTANCE/CONFLICT OF INTEREST BURGLARY - INTENT

LASJRP: The Fourth Department rejects defendant’s contention that defense counsel’s brief denials of defendant’s open-court allegations that defense counsel used a racial slur or other language evincing racial animus in conversations with defendant did not, without more, establish that defense counsel took a position adverse to defendant on his requests for substitution of counsel or otherwise created a conflict of interest. Defense counsel

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did not take a position adverse to defendant by clarifying that he did not, in fact, inform defendant that the decision to call witnesses was up to defendant.

The Court reverses, as against the weight of the evidence, a second degree burglary conviction arising from an incident in which defendant, despite a stay-away order of protection in favor of his on-again, off-again girlfriend, was arrested by the police after the victim allowed him to enter her apartment, where he proceeded to take a shower and a nap. The jury was not justified in finding that guilt was proven beyond a reasonable doubt with respect to defendant's intent to violate the order of protection beyond the stay-away provision or commit a separate crime in the apartment. (County Ct, Genesee Co)

People v Ellis, 204 AD3d 1388 (4th Dept 4/22/2022)**SORA | RISK FACTOR 4**

ILSAPP: The defendant appealed from a Genesee County Court order finding that he was a level-three SORA risk. The Fourth Department modified, determining that he was a level two. The SORA court erred in assessing 20 points under risk factor 4 (continuous course of sexual misconduct). The People presented proof that the defendant engaged in acts of sexual contact with the victim on more than one occasion, but they failed to demonstrate that such instances were separated in time by at least 24 hours. The Legal Aid Bureau of Buffalo (John Morrissey) represented the appellant. (County Ct, Genesee Co)

Freeland v Erie County, (4th Dept 4/22/2022)**JAIL SUICIDE | ISSUES OF FACT**

ILSAPP: The defendants appealed from a Supreme Court order, denying their motion for summary judgment dismissing the wrongful death action. The action arose from the suicide of the decedent while incarcerated at the county holding center. The Fourth Department affirmed. The defendants did not make a prima facie showing that the mental health care at the jail was adequate or that the suicide was not reasonably foreseeable, nor did they submit evidence addressing charges that substandard housing at the holding center was a proximate cause of death. The calculation of pecuniary loss, which encompassed the loss of parental nurture and care, was within the province of the jury. The defendants did not demonstrate as a matter of law that the decedent's son had no reasonable expectation of future support from him. (Supreme Ct, Erie Co)

Matter of Kayla K., 204 AD3d 1412 (4th Dept 4/22/2022)**ABUSE/NEGLECT - DISPOSITION/ORDERS OF PROTECTION**

LASJRP: The Fourth Department concludes that the dispositional orders of protection issued against respondent stepmother in favor of the children with a duration of five years violate both FCA § 1056(1) because no other dispositional orders were issued, and § 1056(4) since the stepmother, although no longer living in the home, remains married to the children's mother.

Moreover, the court erred in issuing the orders of protection without first holding a dispositional hearing. (Family Ct, Steuben Co)

People v Lewis-Bush, 204 AD3d 1424 (4th Dept 4/22/2022)**HARSH SENTENCE | DISPARITY**

ILSAPP: The Fourth Department modified, finding the sentence unduly severe, given the disparity between the plea offer and the sentence imposed. All sentences would run concurrently. Bradley Keem represented the appellant. (County Ct, Onondaga Co)

People v Lollie, 204 AD3d 1430 (4th Dept 4/22/2022)**ILLEGAL SENTENCE | PREDICATE**

ILSAPP: The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of 1st degree assault, upon his plea of guilty. The Fourth Department affirmed. The defendant contended that he was improperly sentenced as a second felony offender because the federal predicate conviction was not the equivalent of a New York felony. While the challenge to the legality of the sentence was not foreclosed by the appeal waiver, the issue was not preserved and was not reached in the interest of justice. A CPL 440.20 motion was the proper vehicle to seek relief. (Supreme Ct, Onondaga Co)

People v Mothersell, 204 AD3d 1403 (4th Dept 4/22/2022)**PLEA INVALID | EMPTY PROMISE**

ILSAPP: The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of 3rd and 4th degree CPCS. The Fourth Department reversed, vacated the plea, and remitted. In the interest of justice, the appellate court found that the plea was not knowing, voluntary, and intelligent. The court told the defendant pro se that he would retain the right to appeal from all its orders and failed to advise him that, by pleading guilty, he forfeited review of his argument that two counts of the indictment were duplicitous. Hiscock Legal Aid Society (Piotr Banasiak) represented the appellant. (Supreme Ct, Onondaga Co) ♡

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