Building Alliances, Refining Strategies, Forging Ahead with Your Help

The end of 2020 found NYSDA engaged intensely—but remotely—with defenders, allies, and others on a variety of issues. Facing a future that we fervently hope will be better and we know will be challenging, we continue our work. That work includes maintaining existing alliances and forging new ones to strengthen the services and advocacy described in this newsletter and on our website. Our work includes refining strategies to confront monumental budget shortages for counties and the State, adjust to changes in the makeup of legislative bodies and the State, adjust to changes in the makeup of legislative bodies and consequent results, and adapt to still more COVID-19 disruptions. Our work includes providing information to busy public defense lawyers and sustaining our support for Black lives and an end to systemic racism.

As always, our work revolves around our mission to improve the quality and scope of public defense representation in its broadest sense, for clients and the client community. We invite everyone reading this to lend their support, through new or continuing membership (see the application form on the back) and other opportunities for joint action.

As the REPORT went to press, NYSDA and many allies were engaged in planning advocacy to maintain and expand long-needed reforms as well as support quality public defense representation. For example, a Defender Lobby Day was announced for January 12th by NYSDA, the Chief Defenders Association of New York, and the New York State Association of Criminal Defense Lawyers. Topics for advocacy that day include funding for NYSDA, the Indigent Legal Services Office (including money for the fourth year of the Hurrell-Harring statewide expansion), and the Indigent Parolee Representation Program; the need to increase statutory rates for assigned counsel lawyers, which have been stagnant since 2003; and passage of the Marijuana Regulation and Taxation Act.

Reforms Hailed, Urged, as 2020 Ended; More Work Remains

Several bills encompassing reforms in the criminal and family legal systems were signed in December, though some go into effect in modified form. That includes the important reform signed on the last day of 2020—the Driver’s License Suspension Reform Act (DLSRA), a key step in curtailing punishment of poverty and systemic racism. L. 2020, ch 382. Between the time the bill passed in July and was delivered to the Governor for his signature on Dec. 19, 2020, advocates urged that the bill become law; see the Nov. 20, 2020, letter by the Driven by Justice Coalition, which NYSDA joined. The final version of the law allows people on whom traffic violation fines are imposed to pay in monthly installments, calls for termination of existing suspensions, and permits judges to cut or waive traffic surcharges and fees.

While the bill as passed would also have curtailed suspensions for failure to answer a summons or appear at a hearing, Governor Cuomo stated in Approval Memo No. 71 that he had “reached a chapter amendment agreement with the Legislature to remove this provision, and allow the remaining provisions to take effect.” Other chapter amendments included removal of requirements that the Commissioner of Motor Vehicles provide notice other than by first class mail. Even while awaiting the final draft of the DLSRA, NYSDA began planning a training on the new law to be held on Jan. 28, 2021, and will continue providing information as implementation progresses, including in News Picks from NYSDA Staff. Although public defense lawyers are not involved in all initial traffic violation cases, they have many clients who face criminal charges for having continued to drive—often to work and necessary appointments—after

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suspension of their licenses for nonpayment of fines or fees.

Among other reform bills that became law in the latter part of 2020 were the following.

- Require the audio and video recording of interrogation of juveniles. L 2020, Ch 299 (Signed 11/27/2020);
- Provide the Correctional Association of New York access to state prisons for oversight purposes. L 2020, Ch 320 (Signed 12/2/2020);
- Limit arrests at state courthouses, designed to stop federal Immigration and Customs Enforcement from detaining immigrants there (Protect Our Courts Act). L 2020, Ch 322 (Signed 12/15/2020);
- Require reporting of information concerning youth placed in foster care. L 2020, Ch 321 (Signed 12/15/2020);
- Require data collection regarding child welfare preventive services authorized by the local district. L 2020, Ch 329 (Signed 12/15/2020);
- Allow youth discharged from foster care to reenter care without a motion, and placing a moratorium on aging out of care, during the COVID-19 emergency. L 2020, Ch 346 (Signed 12/15/2020);
- Require the Department of Corrections and Community Supervision to place incarcerated parents at correctional institutions closest to their children’s home. L 2020, Ch 355 (Signed 12/23/2020).

A reform at the federal level that may affect people in prison in New York was included in the government spending bill for 2021, attached to a pandemic relief bill. The measure will lift the long-standing ban on providing Pell grants—federal student aid—to people who are incarcerated. This was noted approvingly in an article posted on TheConversation.com on December 23rd and described in a New York Times article updated the same day. The President did not sign the bill until several days later, after a flurry of demands not involving the Pell grant restoration.

NYSDA DVSJA Project, Webpage, In Operation

A new Domestic Violence Survivors Justice Act (DVSJA) Support Project will allow NYSDA, with the support of the DVSJA Statewide Task Force and Brooklyn Law School’s Survivor Justice Project, to provide direct attorney support. Lawyers working on DVSJA cases, including Penal Law 60.12 sentencing cases and CPL 440.47 resentencing cases, are encouraged to contact Senior Staff Attorney Stephanie J. Batcheller at 518-465-3524, x 41 or sbatcheller@nysda.org. DVSJA Project resources are available on the NYSDA website at https://www.nysda.org/page/DVSJA. For more information about the Project, see the flyer.

Implementing Earlier Reforms Remains a Challenge

As 2020 drew to an end, defenders continued to face challenges in the implementation of the 2019 bail, speedy trial, and discovery reforms (including the 2020 partial rollbacks) and of added reforms like the repeal of Civil Rights Law 50-a. Resistance from prosecutors and police, and even some judges, was compounded by emergency measures due COVID-19, while favorable rulings and collaboration among defenders moved reforms forward.

Challenging Prosecution Certificates of Compliance

One major issue is the failure—or refusal—of prosecutors to comply with the discovery requirements of CPL article 245 before filing a certificate of compliance (CoC). As noted in the December 23rd edition of News Picks from NYSDA Staff, defenders across the state have shared with NYSDA their materials for challenging the validity of premature CoCs. One citation of note is the Albany County Court decision in People v Rosario (2020 NY Slip Op 20322 [11/20/2020]), emphasizing the presumption in favor of disclosure of discovery materials. Having found invalid the prosecutor’s CoC and related statement of readiness for trial under CPL 30.30, and also a lack of good faith for those filings, the court issued discovery compliance orders and adjourned the matter for argu-
ment as to sanctions. A follow-up opinion was issued a month later. That opinion stated that in light of further papers filed by the prosecution, including supplemental disclosure of over 100 pages of impeachment materials under CPL 245.20(1)(k)(iv) and ongoing efforts to comply with CPL 245.20(1)(k), an assessment of discovery sanctions would be premature and the matter was held in abeyance pending compliance with the November 20th orders. *People v Rosario* 2020 NY Slip Op 20347 (12/23/2020) [Rosario II].

In *Rosario II* the court noted its “appreciation” of the amount of time and tedious nature of reviewing law enforcement personnel records for potential impeachment material, having engaged in the process “many times over the years at the request of defendants because the People refused to exercise their authority to review personnel records under former Civil Rights Law § 50-a (4) ‘in the furtherance of their official function.’” The court adhered to its earlier finding that the CoC and statement of readiness were not filed in good faith. Among other things noted as to the lack of good faith were that prosecutors had nine months’ notice based on the effective date of the law following its enactment yet claimed to have made a mistake in the heat of the moment as to the statutory requirements, and that certain claims by the prosecutors in this case could not be easily reconciled with statements by a different prosecutor from the same office as to the discovery reform’s requirements in another case.

Defenders seeking information about contesting CoCs or having information to share with others are encouraged to contact the Backup Center. A training on CoCs was being planned as the REPORT was being completed.

### Law Enforcement Efforts Undermine Opening of Disciplinary Records

Some records regarding police misconduct, long protected from view by Civil Rights Law 50-a until its repeal in June, have been released publicly while others became the subject of ongoing legal battles across the state. And defense attorneys seeking records about police witnesses have had mixed success as law enforcement continues trying to limit both discovery reform and the 50-a repeal.

Police efforts to keep records out of view have included requiring high sums of money to cover alleged costs of finding and disclosing appropriate records. A Dec. 22, 2020, USA TODAY Network New York/MuckRock report posted by the Rochester Democrat & Chronicle noted that one police department billed MuckRock $47,504 for a records request, and that some other departments had responded similarly. In another tack, some departments have claimed to have no disciplinary records; yet others have said that release of at least some records is entangled in ongoing litigation. Still other police agencies have claimed that only records created since the repeal of 50-a may be provided, while others have not responded at all. Information about the status of requests made to over 400 entities is posted at https://www.muckrock.com/foi/list/?projects=778.

Such stonewalling has led to press calls for enforcement of the 50-a repeal. A Schenectady *Daily Gazette* editorial on Dec. 26, 2020, said, “Lawmakers need to investigate why the law is not being followed, and tighten the legislation to ensure that police can no longer hide bad officers and weak disciplinary policies from the citizens the police have pledged to serve and protect.” Another follow-up editorial on December 30th lauded the court ruling described below.

### Suit to Block Release of One Officer’s Record Rejected; Other Releases Blocked

A court rejected the Schenectady Police Benevolent Association efforts to block release of information about allegations of police misconduct found to be unfounded or unsubstantiated or that resulted in counseling rather than discipline. The suit involved the records of an officer who was seen in a video appearing to kneel on the neck of a man he was arresting; the union sought to establish privacy exceptions to the broad repeal of 50-a. The New York Civil Liberties Union, which had submitted a Freedom of Information Law (FOIL) request for the records, was permitted to intervene in the case, as reported in October by the Times Union [TU], which had also requested the records. The TU reported the decision to dismiss the suit with prejudice on the day it was issued, Dec. 29, 2020. The opinion is posted on Scribd.

But in Rochester, the end of the year saw a judge issue a temporary restraining order in another police union suit, stopping the planned public release of disciplinary records. According to a Democrat & Chronicle article on December 31st, the union claimed in initial filings that it is only seeking to delay, not prohibit, disclosure, to ensure internal review and redaction of personal information. Public release of personal information like an officer’s Social Security number was cited by the union as the reason more time and review was needed.

### Prosecutors’ Resistance to Repeal Meets Mixed Results

One form of prosecutorial resistance to the 50-a repeal has been assertions that defense counsel must seek police records from police entities themselves using a subpoena or FOIL rather than expect or demand that the prosecutor provide them. Some prosecutors have claimed to meet disclosure requirements with no more than a letter stating that substantiated acts of misconduct had occurred. The latter was rejected in a November 4th Bronx Criminal
Court decision published by the New York Law Journal on Dec. 4, 2020. In that case, People v Porter, the court noted that the prosecutor’s action was taken in good faith, as other trial courts had allowed it, but found that those other decisions “contravene both the plain mandates of the new discovery rules and the underlying intent of the revisions to ensure openness in criminal trial preparation.” The cases rejected in Porter include People v Gonzalez, 68 Misc 3d 1213[A] (Sup Ct, Kings County 8/19/2020).

While defense lawyers should contest any efforts by prosecutors or courts to put the burden on the defense to obtain discoverable material by way of subpoena or FOIL requests, those procedures remain in counsel’s arsenal when needed. For example, if a civilian complaint review board has not provided records to the relevant police department or prosecutor, and are deemed not to be in their control, the defense can seek such records via subpoena or FOIL.

Attorneys can find information about these issues on NYSDA’s “Resources” webpages, including Law Enforcement FOIL, Law Enforcement Disciplinary Records, and Discovery Reform Implementation. NYSDA presented training on FOIL and discovery on Dec. 9, 2020.

In addition to those efforts, the Backup Center has been working directly with line attorneys and chief defenders on a variety of discovery issues, including situations in which some prosecutors are requesting, and some courts granting, protective orders as a matter of course as to some discoverable information, and/or making “for attorney’s eyes only” becoming something of a default position as to information about witnesses.

Let Parents Know: Designation of Person to Care for Your Child Can Help Avoid CPS/ACS Involvement

What can I do if I am temporarily unable to care for my child? This is likely a question that some attorneys have been asked by a client, at some point in their career, and becomes even more relevant in light of the uncertain time we are all living through. If a parent is unable to care for their child, whether it be for days or months, there is a legal option available that does not necessitate the involvement of Child Protective Services/Administration for Children’s Services and the possibility of a child being placed into foster care. As Jessica Prince, Policy Counsel for the Family Defense Practice at the Bronx Defenders, explains in a recent item published in the online publication Rise Magazine, a parent can make a “parental designation” under General Obligations Law 5-1551. The article, entitled Parental Designation: A Way of Planning for the Expected and Unexpected, goes through the facts about this type of designation. It explains that, “[p]arental designation is a legal option in New York that allows a parent to designate someone you trust to temporarily take care of your child, while maintaining your parental rights and without ACS becoming involved.”

This is meant as a temporary option, as stated in the General Obligations Law, “for a period not exceeding twelve months provided that there is no prior order of any court in any jurisdiction currently in effect that would prohibit such parent from himself or herself exercising the same or similar authority ...” This option can offer a parent the peace of mind of temporarily placing their child with a person of their choosing, while still maintaining their parental rights, and without necessitating going to court, or getting the child welfare system involved. The specific requirements for drafting a valid “designation” can be found in General Obligations Law 5-1552. Additionally, for those preferring a pre-printed form, one can be found on the NYSTeaches website. NYSDA does not vouch for the accuracy of forms found on other websites. We encourage defenders to do their own independent research before advising their clients.

The Office of Children and Family Services (OCFS) has come up with its own proposal for parents who are unable to care for their child(ren). The proposed ruling would establish host family homes. If approved, the regulations would amend 18 NYCRR 444.1 (and add new sections 444.2-442.15), giving parents the option of placing their children with an approved host family pursuant to a voluntary placement agreement for up to 12 months and in some cases longer. As noted in the April 21, 2020 edition of News Picks, NYSDA opposed these proposed regulations in comments dated Mar. 30, 2020, (found on our family defense webpage) because, among other reasons, we did not see the necessity or justification for creating an entirely new administrative process and host family home industry, given the already existing options for parents. NYSDA is unaware of any decision being made by OCFS on the proposed regulations first introduced in January 2020.

Understanding the Support Magistrate Objection Process

The importance of the support magistrate objection process cannot be overstated. It is free to file in family court, and if successful, could save your client a considerable amount of money. It could even help avoid a support violation proceeding in the future, if the objection results in the lowering or reversal of an order of support. It is also a necessary step to preserve one’s right to appeal to the appellate division. “[N]o appeal lies from an order of a Support Magistrate where, as here, the appellant has not submitted objections to the order to a Family Court.
The objection process does have its pitfalls and, if not done correctly, can result in a denial. Attorney and author Joel R. Brandes published an instructional article in the New York Law Journal on Nov. 2, 2020 entitled “Understanding the Support Magistrate Objection Process.” It is meant to remind us that “[a]n attorney representing a client in a Family Court support matter must have a thorough understanding of the sometimes confusing objection process to prevent the dismissal of his clients’ objections and preserve her right to appeal.” Brandes refers attorneys to Family Court Act 439(e), which governs the filing of objections to a final order of a support magistrate, including the statutory requirements for service, and rebuttal. It is good practice to advise clients that pursuant to FCA 439(e) “pending review of the objections and the rebuttal the order of the support magistrate shall be in full force and effect and no stay of such order shall be granted.”

This edition of the REPORT contains two cases that demonstrate successful outcomes to objections from opposite ends of the spectrum. In Matter of Kathleen T.K. v Eric C.S. (182 AD3d 549 [2nd Dept 4/9/2020]), the respondent/father sought to have a support order that was issued nearly 20 years earlier vacated for lack of personal service of the order issued on default. That motion was denied by the support magistrate, as were the father’s objections. The Second Department reversed and remanded, stating that the court used the improper standard in determining whether proper service was effectuated. In the second case, Matter of Sultan v Khan (183 AD3d 829 [2nd Dept 5/20/2020]), the maternal grandfather, who was caring for the subject child after the custodial mother’s death, objected to an order awarding him support only retroactive to the date his petition was filed, which was over a year after he took custody of the child. The family court reversed the order since the support obligation was owed to the child, and therefore the order was properly retroactive to the date of the mother’s death. The Appellate Division affirmed.

It is important to note the objection process is not meant to be used to vacate an order entered on default. For that, the best remedy is a motion to vacate pursuant to CPLR 5015, provided your client meets one of the criteria for vacature pursuant to that statute (e.g. lack of personal jurisdiction or excusable default a meritorious defense on an order entered within one year). However, as demonstrated in Matter of Kathleen T.K. v Eric C.S., objections are an effective tool in challenging the denial of a motion to vacate.

Pro-se clients should be referred to the NYcourts.gov website at http://ww2.nycourts.gov/courts/nyc/family/objections.shtml for specific instructions on filing and serving objections.

NYSDA Helps Defenders Deal with COVID-19

New York continues to experience sometimes-daily changes in court procedures, prison and jail visiting policies, and community, county, and statewide pandemic-related mandates and trends. Due to the time it takes for printing, the REPORT cannot possibly provide current information. Defenders and others can watch for current editions of the electronic newsletter News Picks from NYSDA Staff, and turn to NYSDA’s several Coronavirus webpages for recent information. (As the REPORT went to press, those pages remained under headings that begin “Coronavirus 2020.” The length of the pandemic was not fully anticipated when those headings were created.)

Defenders with questions relating to COVID-19 issues, whether in individual cases or systemically, are encouraged to contact the Backup Center for assistance.

Addressing Systemic Failures in a Local Court

NYSDA’s Executive Director took action when she became aware that public defense clients and other local court litigants who lack cars were being forced to wait outdoors, sometimes for hours, including in inclement weather. A Dec. 6, 2020, Times Union (TU) editorial headline succinctly summed up the problem: “This system is all wet.” The publicity that sparked both a resolution of the problem and the editorial, and Bryant’s role in the exposure, along with Schenectady County Conflict Defender Tracey Chance’s efforts to have the situation resolved, were described in the Dec. 4, 2020 edition of News Picks. The TU editors castigated the court in question for not acting more quickly to accommodate litigants’ needs, and added: “Any other court that recognizes itself here, take note.” NYSDA circulated information about the situation to Chief Defenders statewide, revealing that clients in other courts, particularly small justice courts, had indeed been subjected to similar lack of care.

Condolences, Resources Offered to Those Struggling

NYSDA wishes to offer sympathy and hope to the many people throughout the family and criminal legal systems who have lost loved ones to COVID-19 and related causes or who are struggling with emotional, fiscal, and other problems from the blows the pandemic has struck. We hope that the resources on our Self-Care and Helping Others Coronavirus webpage can assist you.

October–December 2020
Court of Appeals Finds 10 Waivers of Appeal Unenforceable

The Court of Appeals reversed 10 Appellate Division orders on Dec. 15, 2020, saying in a three-paragraph opinion that the defendants’ purported waivers of appeal were unenforceable. In each case, the majority said, “among other infirmities, the rights encompassed by an appeal waiver were mischaracterized during the oral colloquy and in written forms executed by defendants, which indicated the waiver was an absolute bar to direct appeal, failed to signal that any issues survived the waiver.” Two judges dissented as to one case, and concurred in the result in the remaining nine. The majority went beyond the requirements of People v Thomas (34 NY3d 545 [2019]) in the one case, the dissenters said. As to the other cases, Judge Garcia decried the “sea change” that Thomas had caused, which has resulted in the undoing of 90 appeal waivers to date. They predicted that “[r]outine invalidation of appeal waivers will find not only renewed, but increased support from today’s majority decision, and will continue until trial courts fully adopt the appropriate catechism, namely the Model Colloquy ….” People v Bisono, 2020 NY Slip Op 07484 (12/15/2020). [A summary appears in the Case Digests at page 11.]

NYSDA joined in an amici curia brief filed in the matter. This is but the latest example of NYSDA’s long-standing commitment to protect appellate rights. Over 30 years ago, the Association submitted an amicus brief in the Court of Appeals asserting flatly that “waiver of the right to appeal is void as against public policy.” The Court of Appeals unfortunately did not agree. People v Seaberg, 74 NY2d 1 (6/15/1989).

Many Systemic Issues Affect Public Defenders and Clients

Funding shortages and other systemic challenges to the provision of quality public defense representation continued, and in many instances grew, in the last months of 2020. Defenders and their allies continue to confront those challenges.

NYSDA Provided Testimony on Judiciary Budget Cuts

Executive Director Susan C. Bryant testified at a Nov. 12, 2020, hearing before the Assembly Judiciary Committee on Budget and Staffing Reductions in the Judiciary Branch. She noted the need to respect due process while dealing with issues related to judiciary funding and the continuing pandemic, including growing backlogs; delays causing speedy trial issues and extended separation of parents from children; and the dangers of implicit bias infecting rushed life-altering judicial decisions. Bryant’s recorded oral testimony at the virtual hearing is available on the Assembly website (beginning at 1:48:01). Her written testimony is posted on NYSDA’s website.

NAPD Issues Statement on Physical Space and Practice Components


Conflict May Bar Public Defender from Appearing Before Judge Who Works for County Attorney

Conflicts of interest seem inevitable in smaller jurisdictions with limited numbers of attorneys to fill legal positions. An ethics opinion from the NYS Bar Association exemplifying the difficulty was described in the Dec. 23, 2020, edition of News Picks: “an attorney from a public defender’s office may have a personal conflict of interest when appearing in criminal cases before a part-time town justice who is also an assistant county attorney, where the county attorney’s office “advises and represents the public defender’s office to secure funding for its operations and with respect to other financial and administrative matters ….”

Public Defense Must Be Independent: MI Standard Finally Approved

Keeping public defense independent from improper outside influence and control is a bedrock principle for ensuring quality representation. In recognition of that, the statute creating the Michigan Indigent Defense Commission (MIDC) in 2013 required MIDC to “establish minimum standards, rules, and procedures to” effectuate, among other things, that “[t]he delivery of indigent criminal defense services must be independent of the judiciary ….” A standard mandating independence was the lead standard in a set of standards proposed by MIDC in 2018 and was approved by the Department of Licensing and Regulatory Affairs at the end of October 2020, as discussed in the Nov. 4, 2020, edition of News Picks. In New York State, the first set of standards approved the Indigent Legal Services Office (ILS) in 2012 call for independence in Standard 1. The ILS assigned counsel standards of 2019 likewise emphasize independence in Standard 2.3.
**Addressing Race Issues**

In the months since issuing its statement that Black lives matter to NYSDA and making the efforts to adhere to it that were set out in the June-September issue of the REPORT (at page 2), NYSDA has continued to offer information and take positions intended to combat systemic racism.

When the Special Adviser on Equal Justice in New York State Courts issued his report in October, NYSDA let defenders and others know about it and its recommendations for changes to be made by the court system. NYSDA also issued a statement welcoming the report. Both were cited in NYSDA’s testimony on the judiciary budget described noted above.

Also, NYSDA’s website now includes a Racial Justice and Equity page. It includes resources dealing with structural racism and implicit bias in the criminal and family legal systems and the broader community.

**Language Matters, as to Race and Beyond**

The legal profession is rife with jargon and labels. Some of the descriptive terms commonly used fail to “put people first” and are dehumanizing. In criminal law, these include “sex offenders” rather than people convicted of specific sexual behavior; “inmate” rather than people in prison or jail; “felons” rather than people with felony convictions; and more. Several resources regarding the importance of word choices are noted in the Dec. 23, 2020 edition of News Picks from NYSDA Staff. Presenters in the “Recognizing Implicit Bias” session of NYSDA’s 2020 Annual Conference mentioned using clients’ names in court, not “the defendant.” Over a year ago, a blog post that appeared on TheHill.com pointed out that repeated use of the word “inmates” in announcements of the “Ready to Work” initiative undercut the good intentions of the program. The author, Deanna R. Hoskins of JustLeadershipUSA, went on to note the importance of “[m]aking the distinction between the systems and conditions we are subjected to and retaining the fact that we are human beings …. The Client-Centered Representation Standards created by NYSDA’s Client Advisory Board begins with this: “Clients want a person who 1. Represents a person, not a case file; represents a client, not a defendant.”

Generic and damaging labels exist in more than phrases describing a person’s conviction status, and those labels matter. For example, how people with mental illness are described has been shown to affect reactions to them, as discussed in “Why you should never use the term ‘the mentally ill,’” posted on ScienceDaily.com in January 2016.

Language is of course complicated. Terms embedded in statutes or other legal authorities cannot be completely eschewed at the expense of specificity and clarity, but efforts to minimize their use (and to change the source language) can be made. And the propriety of terms used to describe or identify groups and people within those groups may not always be clear—preferences change and there may be disagreement among the people in question. Many examples of this appear in the Disability Language Style Guide from the Center on Disability and Journalism, including the preference of some people with disabilities for “identity first”—i.e. “disabled person”—rather than “person first” language. Whenever possible, the person or a representative of the group being described should be consulted. In this, as in much advocacy, the phrase “nothing about us without us” is a reminder that impacted people should have input into policies that affect them.

NYSDA strives to use language that reflects the humanity and preferences of people discussed in its writings. We are aware of certain failures in that regard and are working on them. Specifically, our membership categories reflect people with different experiences. People in prison are among those who have long had the opportunity to show their support for NYSDA’s mission by joining. The outdated title of that membership category—Prisoner—has been changed to “Impacted Person.”

**John Dunne’s Death a Loss to Justice**

People who struggle for justice, whether in their individual cases and lives or in the broader sense, lost a major ally with the death of John Dunne on Nov. 1, 2020. NYSDA, Prisoners’ Legal Services of New York (PLS), the NYS Office of Indigent Legal Services (ILS), and many more entities and individuals benefitted from Dunne’s commitment and effectiveness over a lifetime of service. His obituary lists many of the positions he held and reflects his fierce commitment to the rights of incarcerated people. A founding director of PLS, which was created following the 1971 Attica prison uprising, he was also a member of the ILS Board from its creation in 2010 until his death was announced by Director William Leahy. Dunne had been a founding member of the Committee for an Independent Public Defense Commission, established in 2001 and made up of prominent leaders seeking to change the New York State system for providing public defense service that the Committee’s founders had helped create and knew needed fundamental revision. NYSDA presented Dunne with its Service of Justice Award in 1998; his advice and assistance were invaluable to the Association over decades, and both Executive Director Jonathan E. Gradess and Managing Attorney Charles F. O’Brien, before preceding Dunne in death, turned to him regularly. NYSDA joins the many people who knew and loved John Dunne in mourning his passing.
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.

[Ed. Note: Justice Barrett took no part in the consideration or decision in the first four of the following cases.]

**McKesson v Doe**, No. 19-1108 (11/02/2020)

The Fifth Circuit should have sought guidance from the state’s supreme court as to state law regarding personal liability before ruling that a suit against an organizer of a protest about police conduct could proceed for damages based on injuries a police officer sustained when an unidentified person threw a rock-like object as officers moved in to arrest protesters blocking a highway. The circuit court’s “interpretation of state law is too uncertain a premise on which to address the question presented,” which is whether the theory of personal liability adopted violates the First Amendment. Judgment vacated, matter remanded for further proceedings consistent with this opinion.

**Taylor v Riojas**, No. 19-1261 (11/02/2020)

The Fifth Circuit erred in granting qualified immunity to corrections officers on the basis that there was no “fair warning” that the acts violated the constitutional prohibition of cruel and unusual punishment. No reasonable officer could conclude it was permissible to leave the petitioner in sewage-strewn and/or freezingly cold cells for six days in the absence of necessity or exigency.

Concurrence: [Alito, J] the question of what a reasonable corrections officer would know to be unconstitutional, turning on the interpretation of one particular case rather than whether the correct legal standard was applied, is the kind of question rarely reviewed here. While I would not have granted review, “I agree that summary judgement should not have been awarded on the issue of qualified immunity” given the conditions in question.

Dissent: [Thomas, J, dissented without an opinion.]

**Tanzin v Tanvir**, No. 19-71 (12/10/2020)

The right to seek “appropriate relief” for violations of the Religious Freedom Restoration Act (RFRA) includes claims for money damages against officials of the government in their official capacities. RFRA’s text makes clear persons may sue officials and other persons acting under color of federal law, and the legal backdrop to Congress’s enactment of RFRA “confirms the propriety of individual-capacity suits.” The statute draws on the language of 42 USC 1983, which provides for damages for clearly established violations of the First Amendment.

**United States v Briggs**, No. 19-108 (12/10/2020)

Prosecution for rape under the Uniform Code of Military Justice for offenses committed in the period of 1986 to 2006 can be brought at any time, based on the fact that rape was “punishable by death” under the Code even though a death sentence for rape of an adult woman was declared unconstitutional in 1977.

**Shinn v Kayser**, No. 19-1302 (12/14/2020)

The Ninth Circuit “erred in ordering issuance of a writ of habeas corpus despite ample room for reasonable disagreement about the prisoner’s ineffective-assistance-of-counsel claim,” in clear violation of this Court’s jurisprudence under the Antiterrorism and Effective Death Penalty Act (AEDPA). The AEDPA is of special importance when Strickland claims are involved, and the Circuit Court “resolved this case in a manner fundamentally inconsistent with AEDPA.” The trial judge found the defendant “had failed to show deficient performance and, assuming deficient performance, that he failed to show prejudice.” [Footnote omitted.] The most probable reason for the no-prejudice determination is that the new mitigation evidence created no substantial likelihood of a different sentencing outcome.

Dissent: [Justices Breyer, Sotomayor, and Kagan dissented without an opinion.]
People v. Easton, 307 N.Y. 336 (1952)

The Court of Appeals reversed, concluding that the petitioner’s conduct was not a violation of the prison disciplinary rule. The petitioner was entitled to a hearing on the charges, and the order of protection was lifted.

Prison Discipline / Witnesses Precluded

ILSAPP1: In an Article 78 proceeding, the petitioner appealed from a Third Department order, which confirmed an administrative determination finding him guilty of violating a prison disciplinary rule. The Court of Appeals affirmed, finding substantial evidence to support the decision. Judge Wilson dissented, joined by Judge Rivera. The petitioner was punished when, upon inspection, he did not possess a razor issued to him for shaving. He alleged that it was stolen, and the prison never issued a replacement. But he was then punished for the loss of the purported second razor. Prison officials produced no documentary proof that the petitioner actually received a replacement. The hearing officer improperly testified about razor protocols, thus functioning as both judge and fact witness; offered no explanation for the basis of her statements; and precluded the petitioner from calling clearly relevant witnesses, thus violating his due process rights.

CASE DIGEST

Matter of Zielinski v Venettozzi, 35 NY3d 1082 (9/15/2020)

The CPL permits amendments pertaining to “a matter as to date, time or place” only for a select subset of accusatory instruments, which does not include misdemeanor complaints or informations, for which the CPL licenses amendments to the nonfactual portion of the accusatory instrument only.

Defendant did not forfeit his right to challenge the legality of the amendment by pleading guilty to the charges in the amended complaint. Defendant was charged with violating a two-year order of protection, but the date of the alleged incident fell outside the bounds of the order of protection. Absent the challenged amendment, the accusatory instrument would have failed to state a crime. Because the amendment implicates a fundamental defect and purportedly converted a facially insufficient accusatory instrument into a facially sufficient instrument, its legality presents a nonwaivable jurisdictional issue.

Matter of Miller, 35 NY3d 484 (10/15/2020)

The broad pattern of misconduct by the petitioner, a judge in Broome County Family Court, warrants removal from office. The record does not support the petitioner’s contention that the Commission erred in its fact findings that differed from those made by a Referee, and the charges were properly sustained. As to the sanction, the petitioner’s prior history with the Commission was properly considered. While the petitioner’s improper conduct toward court employees did not occur numerous times, the nature as well as frequency of misbehavior determines appropriate sanctions. Further, even if unprofessional comments were intended as humor, they were entirely inappropriate and failure to acknowledge impropriety is “particularly relevant to the question of appropriate sanction’ ....” Having his secretary draft a letter seeking payment for work done while still in private practice was not “one lapse in judgment” but “part of a pattern of misconduct ....” And the petitioner’s years-long delay in filing required financial disclosure forms, along with the failure to amend tax returns and other documents until he was under investigation, is particularly troubling.

Chief Justice DiFiore and Judge Rivera took no part in the decision.

People v Battic, 2020 NY Slip Op 05840 (10/20/2020)

Juror Outburst / No Buford Inquiry

ILSAPP: The question presented was whether the judge erred in declining to conduct a Buford (69 NY2d 290) inquiry in response to a juror’s outburst during the cross-examination of a prosecution witness. The Court of Appeals answered “no.” The defendant and codefendants Bailey and Wiggins were tried jointly for assaulting the victim while all were incarcerated. To goad the victim...
during cross, Bailey’s counsel repeated a racial slur Wiggins had uttered. The fifth time, a juror stood and said: “Please, I am not going to sit here . . . and [have] you say that again. Don’t say it again or I’m leaving.... I find that very offensive.” Counsel for Batticks asked the trial court to conduct an inquiry to determine if the juror was grossly unqualified. The court denied such relief; admonished the juror and counsel; and delivered a curative instruction. The defendant was convicted of 2nd degree assault. In a 4-3 decision by the Chief Judge, the COA sustained a First Department order affirming the conviction. Judge Wilson dissented, joined by Judges Rivera and Fahey, opining that the majority wrongly concluded that the juror’s anger did not taint her view of the case. In no other NY case had a juror interrupted a cross-examination and threatened to walk out unless counsel stopped. Given this juror’s extraordinary eruption in open court, there was no issue about the existence of a credible allegation of unfitness. The required action was a Buford inquiry into the juror’s impartiality or, on consent, her replacement with an alternate. Our system must not tolerate outlandish behavior by jurors. The defendant’s right to a fair trial was violated.

People v Goldman, 2020 NY Slip Op 05977 (10/22/2020)  
SEARCH WARRANT FOR DNA / REDACTED VIDEO  
ILSAPP: In this People’s appeal, the issues presented were (1) whether pursuant to Matter of Abe A., 56 NY2d 288 (standards for court order to obtain suspect’s corporeal evidence), the hearing court properly precluded defense counsel from reviewing the People’s application for a search warrant to obtain a saliva sample for DNA purposes, where the defendant had not been charged and was in custody on an unrelated charge; (2) whether the People properly authenticated a music video posted on social media, where no one testified who was there during the filming or who participated in editing it. The majority answered “yes” to both questions and reversed a First Department order vacating the defendant’s conviction of 1st degree manslaughter. Judge Fahey concurred, sharing the majority’s view as to the warrant and opining that the video was not properly authenticated but the error was harmless. Judge Rivera dissented, joined by Judge Wilson. The majority had sanctioned the government’s ex parte request to remove genetic material from an uncharged suspect without a showing of a risk of flight or destruction of potential evidence. The defendant’s due process rights were violated. Abe A.’s safeguards applied because of the nature of the request—intrusion into the body to collect corporeal evidence—not because a defendant was at liberty. The majority had also erred by upholding the admission of an unauthenticated, redacted music video. The prosecutor argued that the YouTube video depicted the defendant singing lyrics to “Mobbin’ Out”—a rap song about gang violence—and further urged that the video mirrored the crime. The defendant contended that the singing was added after the video was recorded; and there was no testimony from anyone involved in the video’s creation, nor was there any expert testimony as to its unaltered state. The video tainted deliberations by depicting defendant as glorifying street violence and embracing gang life.

People v Balkman, 2020 NY Slip Op 06838 (11/19/2020)  
STOP / NO REASONABLE SUSPICION  
ILSAPP: The defendant appealed from an order of the Fourth Department, affirming a conviction of 2nd degree CPW, upon a plea of guilty. The Court of Appeals reversed in a unanimous opinion by Judge Feinman. While information generated by running a license-plate number through a government database may provide police with reasonable suspicion to stop a vehicle, the information’s sufficiency to establish reasonable suspicion is not presumed. Thus, when police stop a vehicle based solely on such information and the defendant challenges its sufficiency, the People must present evidence of the content of the information. The People failed to present such proof here. Thus, the suppression court could not independently evaluate whether the officer had reasonable suspicion to make the stop. The Monroe County Public Defender (Janet Somes, of counsel) represented the appellant.

People v Pena, 2020 NY Slip Op 06836 (11/19/2020)  
MISTAKE OF LAW / OBJECTIVELY REASONABLE  
ILSAPP: The People appealed from an order of the Appellate Term, First Department, affirming an order of Bronx Criminal Court, which granted the defendant’s motion to suppress physical evidence and statements. In a memorandum decision, the Court of Appeals reversed. The sole issue was whether the officer’s belief—that the defendant violated the VTL by operating a vehicle with a non-functioning center brake light—was objectively reasonable. The COA concluded that it was; Judge Feinman concurred; and Judge Wilson dissented, objecting that the plurality failed to state whether the officer’s interpretation of the VTL was a mistake of law. The stop was not supported by probable cause because the legislature had not authorized the stop of a vehicle with two working brake lights, one on each side, and the officer’s error was not objectively reasonable. Judge Rivera joined in the dissent and wrote separately. An ambiguous law was not a justification to relax constitutional protections. Mistaken, unlawful stops should not be incentivized.
**CASE DIGEST**

**People v Smith, 35 NY3d 1117 (11/19/2020)**

“On review of submissions pursuant to section 500.11 of the Rules of the Court of Appeals (22 NYCRR 500.11), order reversed and case remitted to Supreme Court, Bronx County, for a hearing on defendant’s CPL 330.30 motion. The motion court abused its discretion in denying defendant’s CPL 330.30 (2) motion without first conducting a hearing … .”


**SARA / INDEFINITE CONFINEMENT**

**ILSAPP:** The Court of Appeals found no constitution-al infirmity in temporary confinement in correctional facilities of level-three sex offenders, wait-listed for SARA-compliant shelter, after they would otherwise have been released to parole or PRS. Judge Fahey authored the majority decision. Judge Rivera dissented, decrying potentially indefinite confinement because offenders could afford not find suitable housing and the State wanted to reduce the burden on NYC’s homeless shelter system. In a separate dissent, Judge Wilson opined that the subject confinement violated the petitioners’ substantive due process rights and declared that sex offenders who served their time and were entitled to release could not constitutionally be detained.


**SARA / ENUMERATED OFFENSE**

**ILSAPP:** The provision of the Sexual Assault Reform Act restricting entry upon school grounds by certain offenders (Executive Law 259-c [14]) is mandatory only for level-three offenders serving a sentence for a crime enumerated in the statute. In an opinion by Judge Garcia, the Court of Appeals affirmed a Third Department order, entered in a habeas corpus proceeding initiated by a petitioner who was serving a sentence for attempted 2nd degree burglary when granted parole. The holding, which resolved a split in authority among the Appellate Division Departments, was based on the natural meaning of the text and the history of the statute’s 2005 amendment. Judge Fahey dissented in an opinion in which Chief Judge DiFiore concurred. The Legal Aid Society of NYC (Elon Harpaz, of counsel), represented the petitioner.


**SARA / PRS AND RTF**

**ILSAPP:** DOCCS had the authority to place a level-three sex offender who completed six months of PRS in a prison residential treatment facility when he could not find SARA-compliant housing, the Court of Appeals held in an opinion by Judge Stein. The Second Department properly rejected an argument based on an illusory conflict between Penal Law § 70.45 (3) and Correction Law § 73 (10). Judge Fahey dissented. By allowing DOCCS to ignore the six-month limitation of § 70.45 (3), the majority rewrote the statutory scheme. Judges Rivera and Wilson concurred in a dissent.


**ASSAULT - DEPRAVED INDIFFERENCE**

**ILSAPP:** Defendant, who was legally intoxicated, crashed his car after fleeing from a police officer at high speed, severely injuring his two passengers.

With one judge dissenting, the Court of Appeals concludes that the evidence presented to the Grand Jury was legally sufficient to demonstrate that defendant acted with depraved indifference to human life. Defendant fled down a local road at a speed of at least 119 miles per hour—more than three times the speed limit—and then abruptly swerved across the lanes of oncoming traffic into a parking lot and crashed into a wall.

**People v Lendof-Gonzalez, 2020 NY Slip Op 06940 (11/24/2020)**

**TRIAL / ATTEMPTED MURDER / INSUFFICIENT**

**ILSAPP:** A fellow jail inmate agreed with the defendant’s plan to kill his wife and mother-in-law, but did nothing to effectuate the crimes, instead contacting and aiding authorities. The Fourth Department found insufficient evidence of attempted murder. The Court of Appeals affirmed in an opinion by Judge Feinman. To find attempt, the defendant must come “dangerously close” to committing the intended crime. There was no proof that this defendant and his feigned confederate took any actual step, beyond mere conversations and planning, toward achieving the plan. The law did not punish evil thoughts —nor, generally, mere preparation. Judge Rivera dissent ed in an opinion in which Judges Fahey and Garcia concurred. Robert Graff represented the defendant upon appeal.

**People v Bisono, 2020 NY Slip Op 07484 (12/15/2020)**

**APPEAL WAIVERS / INV ALID**

**ILSAPP:** The Court of Appeals continued
ILSAPP: The Court of Appeals reversed 10 Appellate Division orders, finding unenforceable the purported waivers of appeal. In oral colloquies and written forms, the waivers mischaracterized the rights being ceded. In one case, *People v Daniels*, Judges Garcia and Stein dissented, complaining that the majority went beyond the requirements of *People v Thomas*, 34 NY3d 545. The majority disagreed with the dissent’s view that the Daniels colloquy was analogous to the one in *People v Ramos*, 7 NY3d 737. Further, they emphasized that the written waiver in Daniels had to be seen in the complete context, which included the errant oral colloquy and a vulnerable defendant with a serious mental health condition. Joined by Judge Stein, Judge Garcia otherwise concurred in the result and lamented that Thomas had caused a sea change, resulting in the voiding of 90 appeal waivers to date.

**People v J.L., 2020 NY Slip Op 07663 (12/17/2020)**

JURY CHARGE DENIED / REVERSED

ILSAPP: The trial court’s denial of the defendant’s request for a jury instruction on voluntary possession, in connection with a 3rd degree CPW count, constituted reversible error requiring a new trial. There was a reasonable view of the evidence that, to the extent the defendant possessed the weapon at all, such possession was not voluntary. A reasonable juror could have found that the defendant was shot in the neck while in someone else’s home. In the frantic moments afterward, while searching for a towel to stanch the bleeding, he came close enough to a drawer to see an object that looked like a gun and to transfer his DNA to the weapon by bleeding on it. Police officers corroborated much of the defendant’s testimony. Judge Rivera authored the majority opinion. Chief Judge DiFiore dissented in an opinion in which Judges Garcia and Feinman concurred. Appellate Advocates (Cynthia Colt, of counsel) represented the appellant.

**People v Williams, 2020 NY Slip Op 07664 (12/17/2020)**

JURY CHARGE DENIED / AFFIRMED

ILSAPP: The defendant was not entitled to a jury charge regarding temporary and lawful possession and was properly convicted for unlawfully possessing a firearm used in a shooting. He admitted that he accepted possession of the firearm when not facing any imminent threat to his safety. In anticipation of a potential confrontation, he then chose to retain possession of the firearm. Justification may excuse otherwise unlawful use, but not unlawful possession, of a weapon. Judge Stein wrote the majority opinion. Judges Rivera and Wilson wrote separate concurrences.

**People v Del Rosario, 2020 NY Slip Op 07688 (12/22/2020)**

The prosecution’s argument that the defendant’s appeal is rendered moot by his deportation is rejected. On the merits, the Appellate Division did not abuse its discretion in sustaining the upward departure based on proof that the defendant raped the accuser for the purpose of taking revenge on someone else, “a risk factor not adequately captured by the Guidelines.”

**People v Robinson, 2020 NY Slip Op 07690 (12/22/2020)**

“On review of submissions pursuant to section 500.11 of the Rules, appeal dismissed upon the ground that the issues presented have become moot.”

**People v Zaquan Valley, 2020 NY Slip Op 07691 (12/22/2020)**

WAIVER OF INDICTMENT / LANG CONTROLS

ILSAPP: The People appealed from a Third Department order, which reversed a Schenectady County Court judgment convicting the defendant of 2nd degree CPW, upon his plea of guilty. The Third Department found defective the waiver-of-indictment form, since it did not include the approx. time of the crime. The Court of Appeals reversed. After the challenged order was rendered, *People v Lang*, 34 NY3d 545, held that a guilty plea forfeited a claim as to omission of non-elemental factual information. The time of the incident was not an element of this crime. Lang controlled.

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](http://www.nycourts.gov/reporter/Decisions.htm).

**People v Rickertt, 181 AD3d 429 (1st Dept 3/3/2020)**

APPEAL - PRESERVATION

LASJRP: The First Department rejects defendant’s unpreserved claim that the order of protection imposed at sentencing was procedurally defective. The fact that the claims relate to procedures mandated by a statute does not exempt them from preservation requirements. (Supreme Ct, New York Co)

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

In re Solvin M. v New York State OCFS, 181 AD3d 412
(1st Dept 3/3/2020)
ABUSE/NEGLECT - CRIMINAL ACTIVITY IN PRESENCE OF CHILDREN

LASJRP: The First Department upholds an OCFS determination finding maltreatment where petitioner, in the presence of the children, stole a credit card and identification out of someone’s purse, attempted to use it and was caught, used her two-year-old child to shield herself from the victim and gave another one of her children stolen items to hide, and was arrested at the scene. There was also undisputed evidence of petitioner’s substantial criminal history of stealing in front of the children and evidence that this incident impacted the children. (Transferred from Supreme Ct, New York Co)

In re Stanley G.M. v Ivette B., 181 AD3d 434
(1st Dept 3/5/2020)
CUSTODY/VISITATION - LINCOLN HEARINGS

LASJRP: In the father’s visitation proceeding, the First Department finds no error in the court’s refusal to order an in camera interview of the children, who at the start of the hearing were 13 years old and 10 years old, where the children have significant medical and emotional needs and the court was aware of their preferences through the mother’s testimony and the attorney for the children’s statements in court. (Family Ct, Bronx Co)

People v Jamison, 181 AD3d 508 (1st Dept 3/19/2020)
NO PRS ADVISEMENT / REVERSAL

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of drug possession offenses. The First Department reversed, vacated the plea, and remanded. At the plea proceeding, the defendant agreed to plead guilty to 3rd and 5th degree possession, with the understanding that, if he complied with the terms of the agreement, he could withdraw his plea to the B felony and be sentenced solely on the D felony to 3½ years, followed by two years’ post-release supervision. The court stated that, if the defendant violated the agreement, he could be sentenced to up to 15 years on the B felony. The defendant violated the plea agreement, and the court imposed an enhanced sentence, including PRS. However, the court had failed to provide the required advisement that in the event of a violation of plea conditions, the defendant’s sentence would include PRS for a specified period. The Center for Appellate Litigation (Claudia Trupp, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Hernandez, 181 AD3d 530
(1st Dept 3/26/2020)
CONFESSIONS - CUSTODY EXPERT TESTIMONY - MEMORY

LASJRP: The First Department concludes that defendant was not in custody when he made pre-Miranda statements, noting, inter alia, that the detectives’ repeated assurances that defendant was free to leave were not undermined when, on several occasions, the detectives expressed their preference that defendant complete the interview before he left or spoke to his wife, and defendant voluntarily opted to continue.

The trial court did not err in precluding expert testimony on the effect on memory of a lengthy passage of time, because the proposed testimony was within the jurors’ ordinary experience and knowledge. (Supreme Ct, New York Co)

Shaun C.S. v Kim N.M., 181 AD3d 528
(1st Dept 3/26/2020)
REFEREE / OUT OF BOUNDS

ILSAPP: The mother appealed from an order of Bronx County Family Court, which issued a custody order. The First Department reversed for further proceedings before a Family Court judge. In 2018, the parents filed separate custody petitions, but then withdrew them. In those terminated proceedings, the parties stipulated that a Family Court referee would determine the matter, as well as any future petitions. When new petitions were filed, the mother made an application to have the case transferred from the referee to a Family Court judge. That request was improperly denied. An order of reference to a JHO to hear and determine a matter is permissible only with the consent of the parties. The consent of these parties to have the referee hear and determine their dispute in the prior proceedings did not remain effective after those proceedings were terminated. A Family Court judge may refer the parties to a referee for a hearing and report, even in the absence of their consent. CPLR 4001, 4201, 4212. In such case, the parties have the right to bring a motion to confirm or reject in order to seek review of the referee’s findings by a Family Court judge. CPLR 4320, 4403. Here, the referee exceeded her authority by determining the issues. A judicial determination was needed as to whether any further hearings were necessary and to give the parties an opportunity to seek confirmation or rejection of the referee’s findings and conclusions. Howard Gardner represented the mother. (Family Ct, Bronx Co)

2 Summaries marked with these initials, ILSAPP, are courtesy of the New York State Office of Indigent Legal Services, from the ILS appellate listserv.
Matter of Angel L., 182 AD3d 429 (1st Dept 4/2/2020)

ABUSE/NEGLECT - RESPONDENT/PERSON LEGALLY RESPONSIBLE - DOMESTIC VIOLENCE

LASJRP: The First Department reverses an order that granted respondent’s prima facie motion to dismiss the neglect petitions, concluding that the evidence in the record is sufficient to establish that respondent was a person legally responsible for the children, and that he committed acts of violence against the mother.

An ACS child protective supervisor testified that respondent exercised power over the children’s environment by controlling the family’s spending and exerting command over the mother’s food stamps and social security cards, leaving the family unable to purchase necessities such as food and clothes. The children reported that often they would not eat and would have to ask respondent if and when they could eat.

The children reported that they heard the mother and respondent yelling and screaming with items being thrown around in the bedroom, and that the mother would emerge from the bedroom crying and with marks on her. The children feared respondent and reported that he made sexual comments to them. (Family Ct, Bronx Co)

In re Jensli C., 182 AD3d 415 (1st Dept 4/2/2020)

ABUSE/NEGLECT - DISPOSITION/SUSPENDED JUDGMENT

LASJRP: The First Department upholds the denial of the mother’s application for a suspended judgment where the youngest child suffered severe and unexplained injuries; and the mother refused to draw logical inferences regarding the cause of those injuries and stated her belief that she could “co-parent” with the child’s father despite the fact that he had repeatedly perpetrated violence against the mother. Best interest analysis requires consideration of a parent’s ability to supervise a child and eliminate any threat of future abuse or neglect.

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

People v Melo, 182 AD3d 431 (1st Dept 4/2/2020)

SOCIAL MEDIA POSTS / ILL-ADEIVED

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 1st degree coercion, 3rd degree assault, and other crimes. The First Department affirmed. The trial court properly admitted the defendant’s social media posts, including a music video reenacting part of the crime and containing admissions to elements of crimes. If probative value outweighed potential prejudice, any error was harmless. Overwhelming evidence included the defendant’s recording of the incident and voice messages admitting that he threatened and punched the victim. (Supreme Ct, New York Co)

People v Ochoa, 182 AD3d 410 (1st Dept 4/2/2020)

YO / LOADED FIREARM / NOT ARMED FELONY

ILSAPP: The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree CPW, upon his plea of guilty. The First Department vacated the sentence and remanded for a further youthful offender determination. The lower court erred in finding the defendant presumptively ineligible for YO, based on his commission of an armed felony. Under CPL 720.10, an armed felony required possession of a deadly weapon. Since a loaded firearm was not always a deadly weapon, the defendant’s conviction for possessing a loaded firearm was not an armed felony. He was eligible for YO status without any presumption of ineligibility. The Office of the Appellate Defender (Kami Lizarraga, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

People v Trammell, 183 AD3d 155 (1st Dept 4/2/2020)

RIGHT TO COUNSEL - WAIVER/ PRO SE REPRESENTATION

LASJRP: The First Department finds reversible error in the denial of defendant’s repeated requests to proceed pro se.

The Court notes that a court may not foist an attorney on a defendant simply because it feels the defendant is better served by assigned counsel; that instead of conducting the requisite inquiry, the court ordered competency examinations and assigned successive defense counsel, notwithstanding defendant’s legitimate complaints about counsel’s deficiencies; that although the court belatedly found in December 2010 that defendant intended to “disrupt” the proceedings, defendant’s requests to proceed pro se were denied throughout 2008, 2009, and much of 2010, without mention of “disruption” as a basis; that it was hardly surprising that defendant expressed increasing frustration with the process, given that he had repeatedly been found fit to proceed but the court continued to deny his requests to proceed pro se and ignore his complaints regarding counsel; and that defendant’s occasional consent to the appointment of a new lawyer does not render his requests to proceed pro se equivocal, since a defendant who elects to proceed pro se is frequently motivated by dissatisfaction with trial strategy or a lack of confidence in counsel. (Supreme Ct, New York Co)
First Department continued

People v Vasquez, 182 AD3d 438 (1st Deft 4/9/2020)
APPEAL - HARMLESS ERROR/UNCHARGED CRIMES
EVIDENCE
RIGHT TO COUNSEL - EFFECTIVE ASSISTANCE
RIGHT TO PRESENT DEFENSE
LASJRP: The First Department finds no error where the trial court denied defense counsel’s request for time to speak to a defense witness who was incarcerated before he was called to the stand. In any event, any error was harmless because counsel already knew the content of the anticipated testimony, and the witness testified in accordance with the information he had already supplied to counsel. There is no indication that the witness was insufficiently prepared to testify.

The Court agrees with the dissent that the prosecutor improperly cross-examined the defense witness concerning three other crimes after which he had left the scene in a dark SUV, with some of the questions including a partial or complete recitation of the license plate number of the SUV used in the charged crime. This was a clear attempt to connect defendant to the uncharged crimes. And the prosecutor should not have made two references in her summation to the use of this “getaway vehicle” in other crimes when discussing the witness’s testimony. However, these errors were harmless.

The dissenting judge asserts that the improperly admitted testimony left the jury with the impression that defendant drove the witness to and from the other robberies in defendant’s SUV. (Supreme Ct, Bronx Co)

Matter of F.W., 183 AD3d 276 (1st Deft 4/23/2020)
ARTICLE 10 / EXPEDITED HEARING
ILSAPP: In a post-dispositional neglect proceeding, the father appealed from a Bronx County Family Court order, which denied his motion for an expedited hearing to determine whether the subject children, removed through a failed trial discharge, should be returned to him. The First Department reversed. When the matter arose, the AFC said that she was not ready to participate. The parties agreed to brief the expedited hearing issue. Two weeks later, the hearing commenced, but it took six months to complete. Meanwhile the children manifested negative effects from the family separation, and the father made repeated requests for earlier adjourn dates. Ultimately, the court ordered a conditional trial discharge. The issues raised on appeal fit the mootness exception. The government had an interest in ensuring a correct adjudication, even if that might lengthen the proceeding. Also to be weighed, though, was the significant emotional harm to the children due to separation from their parents. The lengthy delay was not needed to protect the children; it flowed from scheduling conflicts. In the post-dispositional phase, the father was entitled to the same due process safeguards as those afforded in underlying neglect proceedings. An expedited post-deprivation hearing should be measured in hours and days, not weeks and months. Bronx Defenders and NYU School of Law represented the appellant. (Family Ct, Bronx Co)

People v Jacobs, 182 AD3d 510 (1st Deft 4/30/2020)
APPEAL - PRESERVATION/SUPPRESSION ISSUES
LASJRP: The First Department, after concluding that the People met their burden of going forward with proof demonstrating reasonable suspicion for the initial stop, rejects as unpreserved defendant’s contention that, even if the initial stop was lawful, the search was not incident to an arrest and occurred before probable cause arose. Defendant did not make any specific arguments challenging the admissibility of the physical property.

Defendant’s argument that the showup was unduly suggestive is partially unpreserved. While defense counsel argued that the video established that the showup was unduly suggestive, counsel did not argue that statements made by the officer to the identifying witness rendered the procedure suggestive. (Supreme Ct, New York Co)

People v Lantigua, 184 AD3d 80 (1st Deft 4/30/2020)
MOTION TO VACATE JUDGMENT OF CONVICTION - INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM
RIGHT TO COUNSEL
LASJRP: The First Department, with one judge dissenting, reverses an order denying without a hearing defendant’s CPL § 440.10 motion claiming ineffective assistance of counsel regarding a guilty plea that subject-ed defendant to mandatory deportation.

Defendant asserted that counsel misadvised him, and, although counsel did not submit an affidavit, his letter stated that, at the time of the plea, he had a misconception about immigration consequences in a case like defendant’s, and also admitted that when a defendant inquired, he would either refer the defendant to an immigration lawyer, or convey the inaccurate information he possessed at the time.

With respect to prejudice, the Court notes that, when there is a claim of ineffective assistance of counsel in plea negotiations, a court does not ask whether, had the defendant gone to trial, the result would have been different than the result of the plea bargain, but rather whether a defendant would not have pleaded guilty if he had been correctly advised of the deportation consequences of the plea.
First Department continued

Defendant’s desire to remain with his immediate family required him to remain in the United States, and the plea calculus included defendant’s understanding that, if convicted at trial, he most likely faced a relatively short period of incarceration as a first felony offender. The lack of deportation in the 18 years between defendant’s guilty plea and his motion to vacate his conviction is of no moment since that played no part in defendant’s earlier decision. (Supreme Ct, New York Co)

In re Phyllis H. v Didier C., 182 AD3d 511 (1st Dept 4/30/2020)

FAMILY OFFENSES - INTIMATE RELATIONSHIP
LASJRP: The First Department upholds the family court’s exercise of jurisdiction over this family offense matter, noting that the parties previously had an intimate relationship and it does not matter that they were not romantically involved for a number of years preceding the filing of the petition. (Family Ct, New York Co)

In re Cochran v Olatoye, 183 AD3d 426 (1st Dept 5/7/2020)

SEALING OF RECORDS
LASJRP: In this Article 78 proceeding challenging termination of petitioner’s public housing tenancy, the First Department upholds the determination below, noting, inter alia, that although certain criminal charges against petitioner were dismissed, an administrative tribunal is permitted to consider evidence of the facts leading to such charges when they are independent of sealed records. (Supreme Ct, New York Co)

Matter of Jeanine N. v Mamadou O., 183 AD3d 426 (1st Dept 5/7/2020)

SUPERVISION OF VISITS / LIFTED
ILSAPP: The mother appealed from an order of Bronx County Family Court, which awarded sole custody to the father and required him to supervise her parental access. The First Department modified, granted certain interim unsupervised visitation, and remanded. The determination that the mother would be limited to two hours’ [sic] on Saturdays, supervised by the father at a location agreed upon by the parties, was not sound. Supervision is only appropriate where the child’s physical safety or emotional well-being would otherwise be at risk. There was no evidence that the mother acted improperly during visits. Even if supervision were necessary, the father should not oversee the mother’s parenting time, since the parties did not communicate with each other. Given the passage of time, further proceedings were needed to set a parental access schedule. Bruce A. Young represented the appellant. (Family Ct, Bronx Co)

People v Johnson, 183 AD3d 401 (1st Dept 5/7/2020)

RANGERS TICKETS / FORGED INSTRUMENTS
POSESSION OF A FORGED INSTRUMENT
LASJRP: The First Department dismisses charges of criminal possession of a forged instrument in the second degree, where defendant approached Rangers fans outside of Madison Square Garden before a game, and at one point said “tickets, tickets”; defendant was on a cell phone call for a few seconds with an unspecified caller; defendant then met a man who gave defendant an envelope, which he immediately passed to a co-defendant; and the envelope, which the police recovered from the co-defendant, contained a birthday card and four forged Rangers tickets.

The evidence suggested that defendant sought to buy or sell tickets, but did not show that he knew the tickets were forged or acted in concert with the co-defendant. Defendant’s flight from a plainclothes officer, whom defendant may have recognized, was too equivocal. There are other reasonable explanations for flight, such as defendant’s possible awareness that it is unlawful to sell tickets, even if genuine, in the vicinity of the Garden. (Supreme Ct, New York Co)

People v Nichols, 184 AD3d 1 (1st Dept 5/7/2020)

REMISSION OF FORFEITED BAIL / EXCEPTIONAL CIRCUMSTANCES
ILSAPP: The First Department held that Bronx County Supreme Court abused its discretion in denying the application of the nonparty appellant surety seeking remission of forfeited bail, pursuant to CPL 540.30. When the defendant was arraigned on burglary and other charges, the appellant posted cash bail of $15,000. The defendant failed to appear for his scheduled court appearance, and the court ordered the bail forfeited, pursuant to CPL 540.10. His ultimate disposition was a misdemeanor conviction. The appellant moved pro se for relief as to the bail. In an affidavit, she explained that she had appeared in court and advised the court that the death of the defendant’s brother caused him to suffer from a deep depression and miss his court date. She submitted an affidavit from the defendant and his psychiatrist regarding his mental breakdown. Since the appellant was representing herself, her papers were given a broad and liberal interpretation. She proved that the defendant’s nonappearance was not willful. The appellant apparently had a significant relationship with the defendant and an opportunity to observe his mental state. The psychiatrist’s letter was sufficiently specific to demonstrate the defendant’s dis-
First Department continued

abling mental illness at the relevant time. The People conceded that prejudice was not at issue. Exceptional circumstances included the hardship to the appellant if relief was denied and the fact that she reportedly posted bail because of her abusive relationship with the defendant. Megan Reilly and Sabrina Baig represented the appellant pro bono. (Supreme Ct, Bronx Co)

People v Pinneck, 183 AD3d 424 (1st Dept 5/7/2020)

PEQUE VIOLATION / REMITTAL

ILSAPP: The defendant appealed from a Bronx County Supreme Court judgment, convicting him of criminal possession of a firearm. The First Department reserved decision. The defendant, a noncitizen, had pleaded guilty. The plea court did not advise him that, if he was not a citizen, he could be deported as a consequence of his plea. Although the defendant did not move to withdraw his plea, there was no evidence that he knew about the possibility of deportation during the plea and sentencing proceedings. Thus, his claim fell within the narrow exception to the preservation doctrine. See People v Peque, 22 NY3d 168. The defendant was entitled to an opportunity to move to vacate his plea, upon a showing that there was a reasonable probability that he would not have pleaded guilty, had the court advised him. The appellate court also reversed a judgment of resentence, rendered the same day as the firearm conviction, which convicted the defendant upon his plea of guilty of a violation of probation, revoked probation, and resentenced him to incarceration. The plea of guilty to a VOP was defective because there was no allocution about whether the defendant understood that he was giving up his right to a hearing. The unpreserved claim was reviewed in the interest of justice. The Center for Appellate Litigation (Barbara Zolot, of counsel) represented the appellant. (Supreme Ct, Bronx Co)

In re Xzandria B., 183 AD3d 408 (1st Dept 5/7/2020)

ABUSE/NEGLECT - DERIVATIVE ABUSE - VISITATION/PARENTAL CONTACT

LASJRP: The First Department affirms a finding of derivative abuse where, although there was evidence that respondent had provided daily care for the subject children, the finding that respondent sexually abused his stepdaughter, the children’s half-sibling, demonstrated a fundamental defect in his understanding of the responsibilities of parenthood and placed his biological children at imminent risk of abuse. There was evidence of longstanding, extensive sexual abuse and excessive punishment of the stepdaughter.

The court did not err in placing restrictions on respondent’s contact with the children that included their mother’s monitoring of communications to ensure that respondent was complying with the court’s order not to discuss his court cases with the children.

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

People v George, 183 AD3d 436 (1st Dept 5/14/2020)

RIGHT TO COUNSEL - EFFECTIVE ASSISTANCE MOTION TO VACATE JUDGMENT OF CONVICTION

LASJRP: The crime to which defendant pled is an “aggravated felony” for immigration purposes, subjecting him to mandatory deportation and making him ineligible to seek asylum. He was arrested by ICE after serving his sentence and has been in immigration detention since then.

In his CPL § 440.10 motion, defendant alleged that he was denied effective assistance because his counsel failed to make any effort to negotiate a plea with less severe immigration consequences. Defendant’s appellate counsel submitted an affidavit alleging that plea counsel had told her: that he did not consider immigration consequences. Defendant submitted his own affidavit stating that plea counsel never discussed with him the possibility of seeking a plea with less severe immigration consequences, and that, had he known plea counsel could have done so, he would have rejected the offered plea.

The First Department concludes that defendant’s CPL § 440.10 motion was improperly denied without a hearing. The People agreed to a sentence of one year in prison and one year of post-release supervision to cover defendant’s drug offenses, which suggests a reasonable possibility that the People would have agreed to a different, immigration-favorable disposition resulting in the same aggregate prison time. Defendant also stated in his affidavit that he would have accepted a plea with less severe immigration consequences, and that, had he known plea counsel could have done so, he would have rejected the offered plea.

Defendant has no relatives or a place to live in the Dominican Republic, and fears that his mother’s ex-boyfriend would kill him. He submitted letters of support demonstrating his attachment to his community and relationships with community members. (Supreme Ct, New York Co)

Poppe v Poppe, 183 AD3d 503 (1st Dept 5/21/2020)

SUPERVISION / NOT NEEDED

ILSAPP: The mother appealed from an order of NY County Supreme Court, which denied her motion seeking to impose supervision of the father’s parenting time and
to set an amount of child support arrears due. The First Department affirmed. The trial court properly declined to require the supervision of visitation. The mother failed to establish that, in light of changed circumstances, it would not be in the children’s best interests to adhere to the parties’ settlement agreement. The father refuted allegations that his mental and physical impairments required supervision. His treating endocrinologist stated that his diabetes was well managed and did not impair him. In addition, the father submitted a U.S Tax Court opinion flowing from proceedings in which the mother represented him and raised as a defense to a tax deficiency that he suffered from Asperger’s Syndrome. Thus, she was well aware of his diagnosis before the parties executed their settlement agreement. The trial court also properly declined to appoint an AFC. Regarding support arrears, the relevant provisions of the parties’ agreement did not comply with the CSSA and thus were unenforceable. The mother did not include the issue of counsel fees in her notice of appeal, which limited the appeal to designated issues, so that issue was not properly before the appellate court. (Supreme Ct, New York Co)

**People v Shabazz, 183 AD3d 494 (1st Dept 5/21/2020)**

RUDOLPH / VACATUR

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted 1st degree assault (two counts), 2nd degree CPW (two counts), and 3rd degree criminal possession of a controlled substance, and sentencing him to an aggregate term of five years. The First Department modified to the extent of vacating the sentence and remanding for a youthful offender determination. As the People conceded, based on *People v Rudolph*, 21 NY3d 497, the defendant was entitled to resentencing for an express YO determination. Legal Aid Society of NYC (Paul Wiener, of counsel) represented the appellant. (Supreme Ct, New York Co)

**Matter of Shilloh M.J., 183 AD3d 540 (1st Dept 5/28/2020)**

TERMINATION OF PARENTAL RIGHTS - DISPOSITION

LASJRP: Although the record supports the court’s determination that adoption by the foster parents is in the children’s best interests, the First Department remands the matter for a new dispositional hearing with respect to one of children, whose attorney has reported that the child is no longer in the same pre-adoptive home, is now sixteen years old, and does not consent to being adopted.

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

**People v Urena, 183 AD3d 534 (1st Dept 5/28/2020)**

DETECTIVE OPINION / HARMLESS ERROR

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree murder and 1st degree gang assault. The First Department affirmed. The trial court erroneously received a detective’s opinion testimony that the object the defendant appeared to be holding in surveillance videos was a knife. However, there was no reasonable probability that the error contributed to the verdict, where the jurors—who were properly instructed about their role as triers of fact—were able to see and evaluate the videotapes for themselves. The defendant also objected to leading questions reviewed the fact-finding determination as to B.P., finding inextricably intertwined the issues of whether the father derivatively abused A.P. and M.P. and sexually abused B.P. Family Court correctly excluded the petitioner’s progress notes on a prior unfounded case against the father with respect to another child, B.P.’s half-sister. See Social Services Law § 422 (5) (b). In any event, the father’s counsel extensively cross-examined the witness about her allegations that the father sexually abused her when she was a child. (Family Ct, Bronx Co)
by the prosecutor, and to allegedly improper evidence of his gang activity. The reviewing court found nothing so egregious or prejudicial as to warrant reversal. Other claims of prosecutorial error were unpreserved: the defendant did not object, made only generalized objections or objections that did not articulate the grounds asserted on appeal, or did not request further relief after the court took curative actions. (Supreme Ct, New York Co)

**Second Department**

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

**Matter of Bruen v Merla-Proffenno, 181 AD3d 592**

(2nd Dept 3/4/2020)

CUSTODY - GRANDPARENTS/EXTRAORDINARY CIRCUMSTANCES

LASJRP:

In this custody proceeding, the parties are the father, and the maternal grandmother with whom the child has resided since June 2011. The child first resided with the grandmother while he was in his mother’s custody, and then in the grandmother’s temporary custody after the mother moved out and a neglect proceeding was commenced against her. The father then filed a custody petition, which was dismissed in December 2013 because he did not have a stable living situation or any way to support the child. In February 2015, the father filed this custody petition, and the grandmother filed a cross petition. The family court found extraordinary circumstances, and, after a best interests hearing, awarded custody to the grandmother.

The Second Department affirms, citing the separation of the father and the child for at least twenty-four continuous months. Although the mother was present and had custody during a portion of the period the child resided with the grandmother, the “reality” was that the grandmother cared for the child, with no financial contribution by the father. Even if the period when the mother resided with the grandmother is excluded, the father did not file this petition until more than two years after the mother moved out and the grandmother obtained temporary custody. (Family Ct, Rockland Co)

**People v Colsen, 181 AD3d 618**

(2nd Dept 3/4/2020)

IDENTIFICATION - LINEUPS/SUGGESTIVENESS

LASJRP: The Second Department finds reversible error in the admission of lineup identification evidence where defendant was the only person in the lineup with dreadlocks, and dreadlocks featured prominently in the description the complainant gave to the police. The dreadlocks were distinctive and visible despite the fact that defendant and the fillers all wore hats. (Supreme Ct, Kings Co)

**Matter of Leo A. G.-H. B., 181 AD3d 599**

(2nd Dept 3/4/2020)

ABUSE/NEGLECT - LEAVING CHILD ALONE ON STREET/DERIVATIVE NEGLECT

LASJRP: The mother, while driving the children to their Manhattan school from Queens, became angry with her eleven-year-old son, threw his cell phone out the window, stopped the car one block from an entrance ramp to the Queensboro Bridge, and ordered her son out of the car. After he exited, the mother drove away and brought the other two children to school. Her son took medication for ADHD, and had never taken the subway by himself and was not familiar with that area of Queens. He did not know his address, his mother’s phone number, or the address or phone number of his school. He wandered for several blocks before two bystanders became concerned and called the police. The mother returned to the area, but could not find her son, and returned home without contacting the police or taking further steps to ensure the child’s safety. Four hours after the initial incident, the police contacted the mother and told her that the child was in their care.

The Second Department upholds findings of neglect and derivative neglect. (Family Ct, Queens Co)

**People v Galan, 181 AD3d 708**

(2nd Dept 3/11/2020)

CPL 440.10 / IAC / HEARING

ILSAPP:

The People appealed from an order of Queens County Supreme Court, which summarily granted the defendant’s CPL 440.10 motion to vacate a judgment, convicting him of attempted 3rd degree criminal sale of a controlled substance. The Second Department reversed and remitted for a hearing. The defendant, a native of the Dominican Republic and a lawful permanent resident of the U.S., pleaded guilty in 1998 to the above-named offense. In 2010, removal proceedings were initiated. An order granting the defendant’s prior 440 motion

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

2 Summaries marked with these initials, ILSAPP, are courtesy of the New York State Office of Indigent Legal Services, from the ILS appellate listserv.
was reversed on appeal. The instant motion alleged—as the prior one had—that counsel misadvised the defendant concerning the deportation consequences of his plea. But the appellate court had already made an adverse determination on that issue, and the defendant did not show good cause for reconsideration. A hearing was needed as to another claim asserted in the second motion—that counsel failed to negotiate a plea preserving the defendant’s eligibility for discretionary relief from deportation. (Supreme Ct, Queens Co)

People v Giron, 181 AD3d 710 (2nd Dept 3/11/2020)

YO / REMITTAL

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree robbery, upon his plea of guilty. The Second Department vacated the sentence and remitted. The defendant’s contention that the trial court failed to consider youthful offender treatment was not barred by his failure to raise the issue at sentencing. Pursuant to CPL 720.20 (1), the sentencing court must determine whether an eligible youth is a YO. The defendant was an eligible youth, yet the mandated determination was not made. Legal Aid Society of NYC (Steven Berko, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Gunther, 180 AD3d 712 (2nd Dept 3/11/2020)

The defendant’s unpreserved contention concerning the court’s jury charge is reviewed in the interest of justice as there is a reasonable fear that injustice has been done. The court’s instruction “in conjunction with the verdict sheet failed to adequately convey to the jury that if it found the defendant not guilty of assault in the second degree based on justification, then it should cease deliberations and acquit him of the lesser count of obstructing governmental administration in the second degree.” While the jurors here were instructed to consider justification as to each count, and that a not-guilty verdict should be returned if the prosecution failed to disprove the justification defense, the verdict sheet lacked any mention of justification and the jurors were not told that if they found the defendant non guilty of second-degree assault on the basis of justification, they could not consider the lesser count of second-degree obstructing governmental administration. (Supreme Ct, Queens Co)

People v Jones, 181 AD3d 714 (2nd Dept 3/11/2020)

IAC / SENTENCING / REMITTAL

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of aggravated criminal contempt, 1st degree criminal contempt, and other charges. The Second Department vacated the sentence and remitted. The defendant was deprived of effective assistance of counsel at sentencing. Defense counsel made no substantive arguments on the defendant’s behalf and displayed no meaningful knowledge of the case or the defendant’s background. Appellate Advocates (Martin Sawyer, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Moore, 181 AD3d 719 (2nd Dept 3/11/2020)

SEVERANCE DENIED / NEW TRIAL

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree robbery and 2nd degree CPW. The Second Department reversed and ordered a new trial. The defendant, who was accused of committing two separate robberies, moved prior to trial to sever the counts as to each robbery. He argued that he had important testimony to give in the first case as to a duress defense and that he had a genuine need to refrain from testifying in the second case. Denial of the severance application deprived him of a fair trial. In his written statement to police, the defendant explained that a person to whom he owed money threatened to shoot him and made him rob a pizza delivery person to pay his debt. The statement did not mean that the defendant did not need to testify regarding the first robbery. His testimony might not have mirrored his statement, which was not enough to support the duress defense. As to the second robbery, if the defendant testified, the Sandoval ruling would allow the People to introduce underlying facts of two youthful offender adjudications involving similar robberies. Appellate Advocates (Tammy Lin, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Batiste, 181 AD3d 816 (2nd Dept 3/18/2020)

NO WAIVER / SENTENCE UPHELD

ILSAPP: The defendant appealed from a sentence imposed by Richmond County Supreme Court on the ground that it was excessive. The Second Department affirmed. The defendant pleaded guilty to 2nd and 3rd degree assault, in exchange for a promise that, if she successfully completed a mental health treatment program, her plea to the felony would be vacated and she would be sentenced to a conditional discharge on the misdemeanor. If the defendant failed to complete the program, she would be sentenced to two years. The defendant failed to complete the program, and the court imposed the promised sentence, plus two years of post-release supervision not previously mentioned. The valid waiver of appeal precluded review of the term of imprisonment as exces-
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sive. However, the waiver did not encompass the PRS period, since at the time of the waiver, the defendant was not told her about PRS. Nevertheless, the period of PRS was not excessive. (Supreme Ct, Richmond Co)

People v Lorenzo-Perez, 181 AD3d 823 (2nd Dept 3/18/2020)
APPELLATE IAC / ANDERS BRIEF
ILSAPP: The defendant appealed from a Rockland County Court judgment, convicting him of attempted 2nd degree murder. The court granted the motion of assigned appellate counsel to withdraw as counsel but assigned new counsel, because the Anders brief failed to: (1) evaluate whether the plea was advantageous in light of the potential availability of an intoxication defense; (2) explore whether the defendant was deprived of effective assistance of counsel; (3) provide the relevant facts concerning the purported waiver of appeal; and (4) argue that the sentence was excessive. (County Ct, Rockland Co)

People v Smith, 181 AD3d 826 (2nd Dept 3/18/2020)
ROSA RIO VIOLATION / NO PREJUDICE
ILSAPP: The defendant appealed from judgments of Nassau County Supreme Court, convicting him of sexual offenses and other crimes. The Second Department affirmed. The prosecutor committed a Rosario violation by not giving the defendant the supporting deposition of one complainant until after her direct testimony. When the prosecutor discovered the error, prior to the cross-examination of the witness, she turned over the statement. The trial court granted a continuance and issued a curative instruction. Thus, the delayed disclosure did not prejudice the defendant. (Supreme Ct, Nassau Co)

People v Smith, 181 AD3d 828 (2nd Dept 3/18/2020)
RIGHT TO COUNSEL - EFFECTIVE ASSISTANCE/APPELLATE COUNSEL
LASJRP: On defendant’s appeal, she stated that she joined “in any claims in the as yet un-filed brief of co-defendant Dylesha Robinson that are consistent with [defendant’s] interests and would afford her relief.” Robinson, on her appeal, claimed that she was deprived of a fair trial by the trial court’s unwarranted and pervative interference in the examination of witnesses, and the Second Department reversed the convictions on that ground and ordered a new trial.

The Second Department agrees with defendant’s contention in this application for a writ of error coram nobis that former appellate counsel was ineffective for failing to raise the trial court interference claim.

People v Tellado, 181 AD3d 830 (2nd Dept 3/18/2020)
BAD WAIVER / SENTENCE UPHELD
ILSAPP: The defendant appealed from a sentence imposed by Kings County Supreme Court on the ground that it was excessive. The Second Department affirmed after finding the purported waiver of the right to appeal invalid. Supreme Court stated that the waiver meant that no one would give the defendant a transcript or “any help whatsoever to appeal,” and no group of judges would review anything the trial judge had done. Such statements utterly mischaracterized the rights to be ceded. The written waiver form did not clarify that review was available for certain issues, and the plea court failed to confirm that the defendant understood the content of the form.

A Second Department Justice concludes that defendant waived his objections to the terms of the protective order. The People represented that the parties had agreed that defendant’s counsel would be able to view at the District Attorney’s office an unredacted version of the surveillance videotape at issue. Defendant’s counsel did not object, and then proffered a “reasonable compromise” as to outstanding issues, which the court included in the protective order.

The Court does note that to the extent that the court relied on the People’s contention that defendant’s counsel might inadvertently disclose identifying information about the witnesses to defendant, that concern, without more, did not constitute good cause for not providing to defendant’s counsel unredacted information, including witness statements, with instructions not to reveal identifying information to defendant. (Supreme Ct, Kings Co)

People v Thomas, 181 AD3d 831 (2nd Dept 3/18/2020)
SEARCH AND SEIZURE - AUTO SEARCH/PROBABLE CAUSE
LASJRP: After they observed defendant give a carton of cigarettes to an unidentified individual in exchange for money, the officers approached defendant, who was standing behind a minivan with the door open. The officers observed several duffel bags in the vehicle. One of the bags was open and contained additional cigarette cartons. One of the officers opened the carton of cigarettes that had been exchanged, and the packs had Georgia tax stamps and no New York tax stamps. The officers arrested defendant. Since one of the officers was going to drive defendant’s vehicle to the police station, that officer performed a quick check of the vehicle and found a loaded gun in a closed drawer under the front passenger seat.

The Second Department holds that the warrantless search of the vehicle was permissible under the automo-
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bile exception. There was probable cause to believe that the vehicle, including the closed drawer, contained contraband, a weapon, or evidence of a crime. (Supreme Ct, Queens Co)

People v Thompson, 181 AD3d 833 (2nd Dept 3/18/2020)

EXPERT TESTIMONY - EYEWITNESS IDENTIFICATION

LASJRP: The Second Department finds no error in the denial of defendant’s motion to present expert testimony regarding phenomena that could result in mistaken eyewitness identification where substantial corroborating evidence existed.

Video evidence established that defendant was involved in a dispute with the victim leading up to the shooting. Testimony established that defendant owed the victim money. Three eyewitnesses, two of whom were very familiar with defendant, testified that defendant, the victim, and another individual were arguing in the courtyard of the housing project just before the shooting. All three eyewitnesses stated that defendant, who was wearing a distinctive jacket and kept his hands in his pockets until he pulled out the gun, was the shooter. There was evidence of consciousness of guilt since defendant fled to Pennsylvania on the day of the shooting. (Supreme Ct, Queens Co)

People v Brown, 181 AD3d 958 (2nd Dept 3/25/2020)

The application to vacate or modify a protective order issued under CPL 245.70 is denied. The standard of review where the defendant’s interest in getting information must be balanced against concerns for the safety and protection of witnesses “is ‘whether the determination made by the trial court was a provident exercise of discretion’....” Here, the record shows that the court initially thought that the prosecution sought to bar only disclosure to the defendant, and when the prosecution indicated that delay in all disclosure to the defense of the otherwise discoverable material was sought until a jury was sworn, the court expressed concern about the breadth of such application. But the court immediately indicated an intent to preclude counsel’s access to witness names and contact information without apparent consideration of factors in CPL 245.70(1). “To the extent that the court relied on the People’s contention that the defendant’s counsel might inadvertently disclose identifying information about the witnesses to the defendant, such a basis, without more, did not constitute good cause pursuant to CPL 245.70 (1) for not providing to the defendant’s counsel, with instructions not to reveal to the defendant, unredacted information in the documents sought, including witness statements.” However, the defendant waived any objections to the protective order’s terms by not objecting and by professing a compromise that was granted. The documents submitted under seal continue to be sealed. (Supreme Ct, Nassau Co)

People v Derival, 181 AD3d 918 (2nd Dept 3/25/2020)

CRIMINALLY NEGLIGENT HOMICIDE

LASJRP: In a 3-2 decision, the Second Department concludes that a nonjury trial verdict finding defendant guilty of criminally negligent homicide was against the weight of the evidence.

The majority notes, inter alia, that in cases involving charges of criminally negligent homicide arising out of automobile accidents involving excess rates of speed, it takes some additional affirmative act by the defendant to transform speeding into dangerous speeding; and that from the testimony of the People’s eyewitnesses and expert witnesses, no single consistent version of how this accident occurred emerges. (County Ct, Rockland Co)

People v Shrayef, 181 AD3d 935 (2nd Dept 3/25/2020)

SEALING DENIAL / AFFIRMED

ILSAPP: The defendant appealed from an order of Queens County Supreme Court, which denied his CPL 160.59 motion to seal his conviction of 2nd degree money laundering. The Second Department affirmed. In 2004, the defendant pleaded guilty and was sentenced to three months’ imprisonment and probation. It was undisputed that the conviction was eligible for sealing and that the defendant satisfied the 10-year statutory period. The only issue was whether the Supreme Court improvidently exercised its discretion in denying the motion. The non-exhaustive list of relevant factors set forth in CPL 160.59 (7) was properly considered. Weighing in favor of sealing were the time since the defendant’s conviction and his lack of contacts, before or since, with the criminal justice system. However, weighing against relief were the circumstances and seriousness of the offense, including the defendant’s central role. Further, although he submitted evidence demonstrating his professional success, he failed to provide proof needed to aid the court in considering other aspects of his character and to determine the impact sealing would have on his rehabilitation and his successful reentry into society. (Supreme Ct, Queens Co)

Matter of Siegell v Iqbal, 181 AD3d 951 (2nd Dept 3/25/2020)

CUSTODY / BIAS / REVERSED JUDGES

- BIAS
Second Department continued

CUSTODY - INTERFERENCE WITH PARENT-CHILD RELATIONSHIP

LASJRP: The Second Department, reaching the mother’s unpreserved claim, reverses an order awarding sole legal custody to the father and remits the matter for a new hearing before a different judge, concluding that the family court was biased against the mother and deprived her of a fair and impartial hearing.

The court cross-examined the mother on matters irrelevant to a determination of custody, including referring to the mother as “emotionally excessive” and inquiring as to how many online dating websites the mother utilized at the time she met the father, and when the mother and the father became intimate. The court asked the mother, “so you were looking to start a relationship with someone?” and then commented, “And so you were married at the time?” Although the father was also married when he began his relationship with the mother, no such questions or comments were directed to him. The court’s inquiry of the mother exceeded 30 pages of transcript. Although the court also questioned the father, the first inquiry related to setting up a parental access schedule, and the second set of inquiries appeared designed to elicit testimony that was unfavorable to the mother, with the court intimating “extortion” against the father in order to gain an advantage in the proceedings.

However, since there is evidence that the mother interfered with the father’s parental access, temporary sole legal and physical custody shall remain with the father, with parental access to the mother. (Family Ct, Suffolk Co)


CUSTODY / CHANGE / REVERSAL

ILSAPP: The mother appealed from a Nassau County Family Court order, which dismissed her modification petition seeking sole custody of the parties’ children and supervision of the father’s access. The Second Department reversed and remitted. Family Court erred in finding no change in circumstances, where the children’s relationship with the father has deteriorated, he threatened to strike them with a belt, and he denigrated the mother in their presence. Further, the children, age 11 and 13, wanted to live with the mother. Amy Colvin represented the appellant. (Family Ct, Nassau Co)

Matter of Elliot P. N. G., 181 AD3d 961 (2nd Dept 3/25/2020)

ART. 10 / DISCOVERY DENIAL / REVERSIBLE ERROR

ILSAPP: The stepfather, a respondent in Article 10 proceedings, appealed from an order of Kings County Family Court, which denied his motion for the production of certain records by nonparties. The Second Department reversed provisions denying applications for records of certain nonparties. After the subject child made allegations of sexual abuse against the stepfather and the petitions were filed, he made motions pursuant to CPLR 3125 and Mental Hygiene Law § 33.13. It was error to deny disclosure of certain records from two different sources. Family Court Act § 1038 (d) provides that CPLR article 31 applies to abuse and neglect proceedings. CPLR 3101 (a) mandates full disclosure of all matter material and necessary in the defense of an action. The words “material and necessary” are to be interpreted liberally to require disclosure. The court must weigh (a) the need of the party for the discovery to assist in the preparation of the case and (b) any potential harm to the child from the disclosure. The crux of the instant defense was that Magnolia S.’s mother had a history of fabricating allegations against the stepfather. The records sought were material, as they bore on the truth or falsity of the allegations against him. The need for discovery was greater than the risk of harm to the children. They did not have an ongoing therapeutic relationship with a neutral forensic evaluator in previous custody litigation, whose records were sought. Further, the other records sought did not contain information from therapy sessions with the children. Jonathan Gordon represented the appellant. (Family Ct, Kings Co)

Matter of Nasir C., 181 AD3d 964 (2nd Dept 3/25/2020)

REMOVAL DENIAL / REVERSIBLE

ILSAPP: The petitioner agency appealed from an order of Kings County Family Court, which denied an application pursuant to Family Ct Act § 1027 to remove the subject child from the custody of the mother. The Second Department, which had stayed enforcement of the order pending appeal, reversed. ACS commenced this proceeding alleging that the mother neglected the subject child, who was born several days earlier. The subject child was the mother’s fifth. In 2006, her first child died at the age of two months after sustaining multiple head fractures as a result of blunt force trauma. In 2008, at the age of four months, the second child sustained rib fractures and other injuries, and the mother was found to have abused that child. In 2012 and 2013, she gave birth to a third and fourth child, who were removed from her care pursuant to Article 10 proceedings. Although those children were thereafter returned on a trial discharge, ACS
Second Department continued

ended the discharge when the mother failed to ensure that the children attended school and received mental health treatment. Since the evidence failed to establish that the mother addressed the circumstances that led to the death of her first child and the removal of other children, denial of removal was error. (Family Ct, Kings Co)

People v Harper, 182 AD3d 537 (2nd Dept 4/2/2020)
DISCOVERY - PROTECTIVE ORDERS/ WITNESS IDENTIFYING INFORMATION
LASJRP: A Second Department Justice grants the People’s application for a protective order, and directs that disclosure of the address and contact information of the complainant, and the name, address, and contact information of the complainant’s mother and the individuals identified as the first and second 911 callers, is delayed until 15 days before trial and shall only be made to defense counsel and counsel’s investigator, and disclosure of the last name, address, and contact information of the individual identified as the third 911 caller shall be made within 15 days of this decision and order and shall only be made to defense counsel and counsel’s investigator. Defense counsel and counsel’s investigator shall not disclose the above-referenced material to defendant or anyone else, aside from each other.

The Supreme Court improvidently exercised its discretion in directing immediate disclosure of these materials to defense counsel, counsel’s investigator, and defendant. (Supreme Ct, Kings Co)

People v Weeks, 182 AD3d 539 (2nd Dept 4/2/2020)
UNLAWFUL IMPOUNDMENT / SUPPRESSION
ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree CPW. The appeal brought up for review denial of a motion to suppress physical evidence. The Second Department reversed and dismissed the indictment. The defendant parked his vehicle in a visitor’s parking spot outside of a precinct station house and entered to recover the belongings of a previously arrested friend. After the defendant provided identification, an officer searched his name in a police database, saw that he had an outstanding bench warrant, arrested him, and impounded his vehicle. During an inventory search, police discovered two weapons. The defendant was charged with several crimes and moved to suppress the physical evidence on the ground that the impoundment of the vehicle was unlawful. The waiver of the right to appeal was unenforceable. The People failed to establish the lawfulness of the impoundment and inventory search. The vehicle was legally parked. While an officer testified that the vehicle was impounded to safeguard against burglary, there was no evidence as to a history of burglary in the area, nor any evidence as to an NYPD impoundment policy, what the policy required, or whether the arresting officer complied with the policy. Appellate Advocates (Leila Hull, of counsel) represented the appellant. (Supreme Ct, Queens Co)

Matter of Amira W. H., 182 AD3d 547 (2nd Dept 4/9/2020)
TERMINATION OF PARENTAL RIGHTS - RIGHT TO PRESENT EVIDENCE
LASJRP: The Second Department finds reversible error in this termination of parental rights proceeding where, when the mother failed to appear on a hearing date, her counsel stated that she would be participating in the proceeding on the mother’s behalf but the family court denied counsel’s request to place into evidence certain documentary evidence. This was not a default, and there was no showing that the mother waived her right to be heard.

The Court remits the matter to give the mother an opportunity to renew her proffer of the documents at a reopened fact-finding hearing and, if warranted, for new findings of fact and a new disposition. (Family Ct, Kings Co)

Cohen v Cohen, 182 AD3d 545 (2nd Dept 4/9/2020)
COMPELLING RELIGIOUS PRACTICE / UNCONSTITUTIONAL
ILSAPP: The father appealed from an order of Rockland County Supreme Court, which modified a judgment of divorce so as to direct that, during his parental access with the two children, he must comply with the cultural norms of the religion practiced during the marriage. The children had been raised in accordance with the practices of Satmar Hasidic Judaism. The hearing proof made it clear that the “cultural norms” reference in the challenged provision meant that each parent must comply with the religious requirements of Hasidic Judaism. The Second Department reversed. The subject provision unconstitutionally compelled the father to practice a religion, rather than merely directing him to provide the children with a religious upbringing. Morrison & Foerster represented the appellant. (Supreme Ct, Rockland Co)

People ex rel. Dieckmann v Warden, 182 AD3d 555 (2nd Dept 4/9/2020)
DETENTION - HABEAS CHALLENGE TO MEDICALLY UNSAFE CONDITIONS PRISONERS RIGHTS
LASJRP: The Second Department dismisses the writ, concluding that to the extent petitioner contends that Hughes’s detention is illegal because he is being detained
with a deliberate indifference to unsafe conditions and to his medical needs, the petition raises questions of fact that are more appropriately considered in the first instance by the supreme court, which can hold evidentiary hearings and whose findings of fact and conclusions of law may be reviewed on an appropriate appellate record.

**People ex rel. Grossfeld v Brann, 182 AD3d 556**
(2nd Dept 4/9/2020)

**DETENTION - HABEAS CHALLENGE TO MEDICALLY UNSAFE CONDITIONS PRISONERS RIGHTS**

LASJRP: In this habeas proceeding, petitioner contends that Petion is being detained with a deliberate indifference to unsafe conditions and to his medical needs.

Noting that it is unclear whether the District Attorney was given proper notice and that the District Attorney did not appear on the return date and did not submit opposition papers, and that the supreme court summarily dismissed the writ without addressing any of the factual assertions advanced by petitioner, the Second Department dismisses the writ, but states that if petitioner properly commences a successive proceeding, the court should render a decision containing its findings of fact and conclusions of law sufficient to permit meaningful appellate review.

**Matter of Kathleen T.K. v Eric C.S., 182 AD3d 549**
(2nd Dept 4/9/2020)

The court improperly denied the father’s objections to an order of the support magistrate from the same court, which denied his motion to vacate a 19-year-old order of support for lack of service on the original support petition. In determining whether or not service of the petition was proper, the support magistrate used the incorrect standard, when it determined that father did not establish that service was not effectuated. “It is well established that it is the plaintiff [or the petitioner] who bears the ultimate burden of proving by preponderating evidence that jurisdiction over the defendant [or the respondent] was obtained” (Powell v Powell, 114 AD2d 443, 444 [1985]). The matter is reversed and remanded for a new hearing.

(LASJRP) The family court conducted a fact-finding hearing over the course of several days, during which the mother was present. On the fifth day of the hearing, the mother was late in arriving to court because she allegedly was traveling by bus from Georgia to New York, and the bus was delayed. The mother’s counsel notified the court of the transportation issue, and of the mother’s intention to testify, and requested an adjournment. The court denied the adjournment request and directed that the hearing proceed as scheduled. The mother arrived shortly after summations, but the court did not reopen the hearing to afford the mother the opportunity to testify.

The Second Department reverses the neglect finding, concluding that the court should have exercised its discretion to reopen the hearing. The case is remitted for a continued hearing so the mother can present her case and for a new determination as to DSS’s petition. (Family Ct, Westchester Co)

**Matter of Lopez v Noreiga, 182 AD3d 551**
(2nd Dept 4/9/2020)

**CUSTODY - TIMELINESS OF PROCEEDING/HEARING DELAYS**

LASJRP: The Second Department upholds an order awarding sole physical custody of the child to the mother, and joint legal custody with final decision-making authority to the mother, but, “[a]s a final note, we express concern regarding the lengthy period of time that elapsed between the commencement of the custody hearing, which was held on 9 nonconsecutive days beginning in October 2016, and its conclusion nearly 1¼ years later in July 2018, and the additional 2 months that elapsed before the Family Court reached its determination in September 2018.” (Family Ct, Kings Co)

**Matter of Simone C.P., 182 AD3d 554**
(2nd Dept 4/9/2020)

**ABUSE/NEGLECT - MARIJUANA USE**

LASJRP: The Second Department concludes that the evidence of the father’s use of marijuana failed to demonstrate impairment or an imminent danger of impairment to the physical, mental, or emotional well-being of the child.

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

**People ex rel. Mulry v Franchi, (2nd Dept 4/23/2020)**

“The petitioner has not established that Dominick Mongardi is entitled to habeas corpus relief, as the People have demonstrated that Executive Order (Cuomo) No. 202.8 temporarily suspends the operation of CPL...
180.80 .... At this time, under the circumstances presented, we do not address the petitioner’s remaining contentions ....”

Matter of Aminata L., 182 AD3d 600
(2nd Dept 4/29/2029)
TERM INATION OF PARENTAL RIGHTS -
RESTORATION OF RIGHTS/APPEAL
LASJRP: The Second Department dismisses the mother’s appeal from an order denying her petition seeking restoration of parental rights, concluding that adoption has rendered academic the mother’s request. (Family Ct, Westchester Co)

Matter of Williamson v Williamson, 182 AD3d 604
(2nd Dept 4/29/2020)
CUSTODY - RELOCATION
- ROLE OF AFC
LASJRP: The Second Department affirms April 4, 2019 orders that, inter alia, awarded the father sole legal and physical custody and permitted him to relocate with the children to Kansas.

Although the attorney for the children advocated awarding custody to the mother, the children were too young (born in March 2016 and November 2017) to express their desires and the AFC relied on certain information which was not credited by the court.

Noting that this was an initial custody determination and thus strict application of the factors relevant to relocation is not required, the Court observes that the father had a strong support system in Kansas since the parties had previously lived there and the father had extended family in that area of Kansas, while the mother had no family or long-standing friends in the area where she resided. (Family Ct, Orange Co)

People v Butler, 183 AD3d 665 (2nd Dept 5/6/2020)
DNA TESTIMONY / REVERSAL
ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st and 2nd degree robbery. The Second Department reversed and ordered a new trial. When confronted with testimonial DNA evidence at trial, a defendant is entitled to cross-examine an analyst who witnessed, performed or supervised the generation of the defendant’s DNA profile or used his or her independent analysis on the raw data. The People failed to establish that the analyst who testified played such a role. See People v. Tsintzelis, 2020 NY Slip Op 02026. The error was not harmless. Appellate Advocates

People v Gonzalez, 183 AD3d 663 (2nd Dept 5/6/2020)
ESCAPE
LASJRP: The Second Department dismisses a charge of attempted escape in the second degree (escapes from “custody”) where the evidence was insufficient to establish that defendant was under arrest at the time he allegedly attempted to open the door of the police car in which he was being detained. “Custody” is defined as “restraint by a public servant pursuant to an authorized arrest” (Penal Law § 205.00[2]). (Supreme Ct, Queens Co)

Matter of Goodine v Evans, 183 AD3d 649
(2nd Dept 5/6/2020)
SUPPORT - RIGHT TO COUNSEL
LASJRP: At the initial appearance before a Support Magistrate, the father appeared pro se and requested assigned counsel[..] The Support Magistrate informed the father that if he was employed, he was ineligible for assigned counsel, and that he could either represent himself or the proceeding would be adjourned for him to hire private counsel. Although the father informed the Support Magistrate that he could not afford private counsel, the Support Magistrate repeated that he was not entitled to appointed counsel if he was working. The matter was adjourned for the father to retain private counsel. On the next court date, father failed to appear and the Support Magistrate immediately proceeded to an inquest and found the father to be in arrears and in willful violation of the support order, and recommended a period of incarceration. The Family Court confirmed the Support Magistrate’s finding and committed the father for a term of 30 days unless he paid the purge amount of $10,000.

The Second Department reverses. Where a party indicates an inability to retain private counsel, the court must make inquiry to determine whether the party is eligible for court-appointed counsel. The Support Magistrate should have inquired about, inter alia, the father’s expenses. (Family Ct, Nassau Co)

Matter of Laland v Bookhart, 183 AD3d 565
(2nd Dept 5/6/2020)
CUSTODY
INTERSTATE COMPACT
LASJRP: The Second Department adheres to its previous holdings that where a child is in the custody of a child protective agency pursuant to Family Court Act Article Ten, and a parent living outside of New York petitions for custody, the provisions of the ICPC apply.
Since the court could not grant the father’s petitions for custody absent approval from the relevant North Carolina authority, and that approval was denied, the court properly dismissed the petitions. (Family Ct, Suffolk Co)

Matter of Lluvia G., 183 AD3d 642 (2nd Dept 5/6/2020)

ABUSE/NEGLECT - DERIVATIVE ABUSE

LASJRP: The petitions filed in January 2017 alleged that respondent derivatively abused and/or neglected the children when, in December 2016, under the guise of helping his tenants’ seven-year-old child with her homework in the kitchen area of the shared apartment, respondent pulled the child’s pants down and touched her vagina. In connection with that incident, respondent pleaded guilty to forcible touching—admitting that he touched the girl’s vagina in the kitchen of the family home under the guise of helping the child with her homework—and was sentenced to 60 days’ imprisonment and three years’ probation. In March 2018, ACS moved for summary judgment based upon the conviction and respondent’s admissions. The Family Court granted the motion and found that the children were derivatively abused.

The Second Department affirms. The forcible touching incident established, prima facie, a fundamental defect in respondent’s understanding of his parental duties relating to the care of children and demonstrated that his impulse control was so defective as to create a substantial risk of harm to any child in his care.

The JRP appeals attorney was Susan Clement, and the trial attorneys were Mikos Theodule and Jessica Bash. (Family Ct, Queens Co)

People v Marcel G., 183 AD3d 667 (2nd Dept 5/6/2020)

YO / GRANTED

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2nd degree robbery. The Second Department adjudicated the defendant to be a youthful offender. The purported waiver of the right of appeal was invalid. The defendant’s youth, limited education, and lack of experience with the criminal justice system warranted a more thorough explanation; and there was no indication on the record that he read the written waiver. Denial of YO status was an improvident exercise of discretion. The defendant, who was 17 at the time of the offenses, admitted his guilt and took responsibility for his actions. As part of his plea conditions, he successfully completed a treatment program, passing every drug test administered; and he received positive reports from a second program. The PSI report recommended YO status. Although the defendant did not fully comply with all plea conditions, in view of his tender years and other mitigating factors, the interest of justice would be served by relieving him of the onus of a criminal record. Appellate Advocates (Sean Nuttall, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Tan, 183 AD3d 552 (2nd Dept 5/6/2020)

IMPEACHMENT - BAD ACTS

LASJRP: The Second Department finds error—albeit cured by the court’s instruction to the jury striking the testimony—where the court permitted the prosecutor to question a witness about the fact that the witness was accused of committing eight drug sales to undercover officers, and inquire as to whether that witness’s misdemeanor conviction was originally charged as an attempted robbery in the first degree. The court also sustained some of defendant’s objections and directed the prosecutor to “inquire into the facts, not what was alleged.” (Supreme Ct, Richmond Co)

Matter of Curcio v Curcio, (2nd Dept 5/13/2020)

ORDERS TO SHOW CAUSE/APPEALS - APPEAL FROM ORDER DENYING REQUEST TO SIGN

LASJRP: In this family offense proceeding, the Second Department, noting that an order denying an application to sign an order to show cause is not appealable (see CPLR 5704[a]), treats the notice of appeal as an application for review pursuant to CPLR 5704(a), and upholds the family court’s decision not to sign since there were insufficient allegations. (Family Ct, Putnam Co)

Matter of Eternity S., 183 AD3d 748 (2nd Dept 5/13/2020)

NEGLECT / MODIFIED

ILSAPP: The parents appealed from neglect orders issued by Queens County Family Court. The father Lamonte S. and mother Vanessa P. were the parents of Eternity S., Omari S., and Omere S. The father was also the parent of Lamonte S., who resided with his mother Victoria L. The parents were arrested for attacking Victoria outside their home while all four subject children were inside. At the time, Victoria had come to the home of the father and Vanessa to pick up Lamonte S. The neglect findings based on the incident were not supported by a preponderance of the evidence. There was no proof that the children witnessed the altercation. A police officer testified that, when he entered the home, the two older children were not emotional and did not seem to understand what was going on. There was insufficient evidence to reflect that the children were placed in imminent danger of impairment. Carol Kahn and Heath Goldstein repre-
sent the mother and father, respectively. (Family Ct, Queens Co)

People ex rel. Ferro v Brann, 183 AD3d 758
(2nd Dept 5/13/2020)

PRISONERS RIGHTS - MEDICAL CARE / COVID-19 ISSUES

LASJRP: In this habeas proceeding involving a sentenced prisoner who contracted the COVID-19 virus, the Second Department concludes that petitioner has not demonstrated that prison officials have been deliberately indifferent to the prisoner’s medical needs or that he is entitled to immediate release from custody as a remedy for any failure to address his medical needs. (Supreme Ct, Queens Co)

Matter of Lafayette P. v Tyrone C., 183 AD3d 745
(2nd Dept 5/13/2020)

CUSTODY - JURISDICTION

LASJRP: The Second Department upholds an order granting the attorney for the child’s motion to dismiss the mother’s custody petition where the family court had made previous custody determinations and would retain exclusive, continuing jurisdiction unless divested pursuant to Domestic Relations Law § 76-a(1).

The child and the paternal great grandmother moved to South Carolina approximately 16 months prior to the commencement of this proceeding, the child had not maintained a significant connection with New York, and substantial evidence concerning the child’s present and future welfare was no longer available in New York.

The JRP appeals attorney was Claire Merkine, and the trial attorney was Kimberly Wong. (Family Ct, Queens Co)

Matter of Linares-Mendez v Cazanga-Paves, 183 AD3d 738 (2nd Dept 5/13/2020)

SIJS / REVERSAL

ILSAPP: The mother appealed from an order of Dutchess County Family Court, which summarily dismissed her Article 6 petition. The Second Department reversed, reinstated the petition, and remitted. The mother sought sole custody of the subject child for the purpose of obtaining an order making specific findings so as to enable the child to petition for special immigrant juvenile status (SIJS). The petition alleged that the named respondent was the child’s father. Family Court should not have summarily dismissed the petition based on the mother’s failure to establish his paternity. A natural parent may seek legal custody of her own child. The fact that the respondent’s paternity had not been established did not preclude the mother’s petition. Insofar as the pleading contained allegations that were inconsistent with those in a prior custody petition, the court should have afforded her an opportunity to explain. (Family Ct, Dutchess Co)

People v Burns, 183 AD3d 835 (2nd Dept 5/20/2020)

MODIFIED / CONCURRENT

ILSAPP: The defendant appealed from a Queens County Supreme Court judgment, convicting her of three counts of 2nd degree manslaughter and two counts of 2nd degree assault, upon a jury verdict, and sentencing her to concurrent indeterminate terms of 5 to 15 years on the manslaughter convictions, to run consecutively to concurrent 7-year terms on the assault convictions, followed by post-release supervision. The Second Department modified. All sentences would run concurrently, since the assault and manslaughter crimes arose out of the same operative facts—the defendant’s act of recklessly driving her car into another vehicle. See Penal Law § 70.25 (2). Appellate Advocates (Anjali Biala, of counsel) represented the appellant. (Supreme Ct, Queens Co)

Matter of Hodge v Hodges-Nelson, 183 AD3d 835
(2nd Dept 5/20/2020)

The mother’s petition to modify an existing custody order of the same court was incorrectly dismissed for lack of subject matter jurisdiction, without first considering the relevant statutory factors. “Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, codified in article 5-A of the Domestic Relations Law, a court in this State which has made an initial custody determination has exclusive, continuing jurisdiction over that determination until it finds, as is relevant here, that it should relinquish jurisdiction because the child does not have a ‘significant connection’ with New York, and ‘substantial evidence is no longer available in this state concerning the child’s care, protection, training, and personal relationships’ ....” The matter is reversed and remanded for a determination of whether or not it is appropriate for the court to retain such jurisdiction. (Family Ct, Queens Co)

Matter of Sultan v Khan, 183 AD3d 829
(2nd Dept 5/20/2020)

SUPPORT / AFTER PAYEE’S DEATH

ILSAPP: The father appealed from an Orange County Family Court child support order. The Second Department affirmed. After the death of the mother, the local Support Collection Unit ceased collecting support from the father and returned wages previously garnished.

Thereafter, the maternal grandfather sought to be substituted as the support payee and enforce the support order. The Second Department reversed, reinstated the petition based on the mother’s failure to establish his paternity. A natural parent may seek legal custody of her own child. The fact that the respondent’s paternity had not been established did not preclude the mother’s petition. Insofar as the pleading contained allegations that were inconsistent with those in a prior custody petition, the court should have afforded her an opportunity to explain. (Family Ct, Dutchess Co)
Order. The Support Magistrate ordered that payments due were retroactive to the date of the petition. In objections, the grandfather urged that the date of the mother’s death should instead be used. Family Court agreed. Since the obligation was owed to the child, the death of the payee spouse did not terminate the obligation. It would be contrary to the statutory scheme and public policy for the father to no longer be liable for unpaid support accrued after the mother’s death, where he neither had custody nor sought to modify his support obligation. (Family Ct, Orange Co)

**People v Thorpe, 183 AD3d 844 (2nd Dept 5/20/2020)**

**SEARCH AND SEIZURE - PROBABLE CAUSE**

LASJRP: Approximately one hour after receiving a report of a burglary at a residence, during which $5,500 in cash was stolen, the officer stopped defendant, who matched a description in a police dispatch of “a suspect in dark clothing,” and was walking in the rain in the vicinity of the crime scene about an hour after the crime. Defendant also had earlier turned and walked away from a marked police car. When the officer asked defendant for identification, defendant began to put one or both of his hands into his pants pockets, at which point the officer asked defendant to put his hands on his head. The officer observed bulges in both of defendant’s pants pockets, but did not discern the outline of any particular object. The officer then patted the outside of defendant’s clothing, and it “just felt like a bulge.” The officer put his hands in defendant’s pants pockets and pulled out a large amount of cash, and arrested defendant for burglary. The hearing court suppressed physical evidence statements defendant made to law enforcement officials.

The Second Department affirms. The search of defendant’s pants pockets was not justified by probable cause. (County Ct, Orange Co)

**People v Ward, 183 AD3d 844 (2nd Dept 5/20/2020)**

**SEARCH AND SEIZURE - SEARCH WARRANTS**

LASJRP: While agreeing with defendant that the search warrant was improperly addressed to a Special Operations Group, which includes members who are not police officers within the meaning of the statute, the Second Department, upholding the denial of suppression upon reargument, notes that the partial invalidity of a search warrant does not necessarily require suppression. Here, the warrant was properly addressed to sworn police officers, and the inclusion of members of the Special Operation Group was analogous to a clerical omission.

Participation by members of the Special Operations Group in the execution of the warrant did not invalidate the search or otherwise require suppression. Although the Criminal Procedure Law only authorizes a police officer to execute a search warrant, participation by an individual who does not meet the statutory definition is not inherently improper, and courts have upheld the validity of a search where civilians participated in the execution of the warrant. Here, the Special Operations Group played a limited role, merely securing entry to the residence for the benefit of the police officers. (County Ct, Orange Co)

**People v Brown, 183 AD3d 910 (2nd Dept 5/27/2020)**

**CPL 440.10 DENIAL / AFFIRMED**

ILSAPP: The defendant appealed from an order of Westchester County Court, which summarily denied his CPL 440.10 motion to vacate a judgment convicting him of 1st degree assault and 3rd degree CPW, upon a jury verdict. The Second Department affirmed, finding no Brady violation by virtue of the People’s failure to disclose a fingerprint comparison report. Brady does not require a prosecutor to supply exculpatory evidence about which the defendant should reasonably have known. Pretrial disclosures in the instant case included supplementary incident reports and a receipt stating that police had recovered and submitted for analysis of 17 latent fingerprints from a car. Trial witnesses testified that the defendant obtained the weapon from the car. So he should have known of the possibility that analysis revealed that the latent fingerprints did not match his. (Supreme Ct, Westchester Co)

**People v Daniel A., 183 AD3d 909 (2nd Dept 5/27/2020)**

**ORDERS OF PROTECTION**

LASJRP: When a court is sentencing a defendant on a conviction for “any offense,” it may issue an order of protection directing the defendant to stay away from “any witness … of such offense.” CPL § 530.13(4)(a).

The Second Department, disagreeing with the Third Department’s narrower reading of the statute, holds that the court had authority to issue an order of protection in favor of an individual who did not witness, but had information that was relevant to, the offense to which defendant pleaded guilty. (Supreme Ct, Kings Co)

**Matter of Mumford v Milner, 183 AD3d 893 (2nd Dept 5/27/2020)**

**CUSTODY - GRANDPARENTS/EXTRAORDINARY CIRCUMSTANCES**

LASJRP: Under Domestic Relations Law § 72, an “extended disruption of custody,” which constitutes an extraordinary circumstance, includes a prolonged separation of the parent and child for at least twenty-four con-
tinuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the grandparent. A court must determine on a case-by-case basis whether the level of contact between the parent and child precludes a finding of extraordinary circumstances.

The Second Department upholds an award of sole legal and physical custody to the maternal grandmother where the child, who was born in 2006, lived with his mother and grandmother in the grandmother’s home from his birth until 2012, when the mother moved out after an argument; and, although the mother visited regularly, maintained daily telephone contact, resided with the grandmother and the child for approximately two months in 2016, and provided input with regard to some of the decisions affecting the child, the grandmother was the child’s primary caregiver, provided for him physically and financially, and made all major decisions regarding his health, education, and welfare. (Family Ct, Nassau Co)

**People v Sonds,** 183 AD3d 919 (2nd Dept 5/27/2020)

**RIGHT TO COUNSEL - EFFECTIVE ASSISTANCE**

LASJRP: The Second Department finds a violation of defendant’s right to the effective assistance of counsel where, prior to sentencing, defendant moved, pro se, to set aside the verdict, and defense counsel stated that defendant asked him to adopt the motion but that counsel did not believe that it was “viable,” and counsel opined that the motion argued matters that were not “for the purview of the [c]ourt.” (Supreme Ct, Kings Co)

**People v Tyrek M.,** 183 AD3d 915 (2nd Dept 5/27/2020)

**YO / SENTENCE VACATED**

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, adjudicating him a youthful offender, upon his plea of guilty to attempted 1st degree gang assault, and imposing a split sentence of five months’ imprisonment and an unspecified term of probation. The Second Department vacated the sentence and remitted for resentencing. The lower court neglected to recite the term of probation. Under CPL 380.20, courts must pronounce sentence in every case where a conviction is entered. A violation of the statute may be addressed on direct appeal, notwithstanding a valid waiver of the right to appeal or the failure to preserve the issue. Appellate Advocates (Sam Feldman, of counsel) represented the appellant. (Supreme Ct, Kings Co)

**People v Horton,** 181 AD3d 986 (3rd Dept 3/5/2020)

**“VICTIM” / NOT PROPER LABEL**

ILSAPP: The defendant appealed from a judgment of Tompkins County Supreme Court, convicting him of attempted 2nd degree murder, 2nd degree CPW, and multiple assault counts. The perpetrator shot the apparent target and four bystanders. The defendant argued that the trial court erred in admitting a revolver, containing five spent rounds, which was recovered from a nearby rooftop days after the shooting and could not be excluded as the weapon used. County Court’s instruction to the jury, to give the revolver whatever weight it deemed appropriate, arguably fell short, the Third Department observed. Given the overwhelming testimony identifying the defendant as the assailant, though, any error was harmless. The imposition of consecutive terms for the assault convictions was error. Eyewitnesses heard five shots. Four bullets were recovered from the victims and one from the bar where the incident occurred. The intended victim was shot three times, and one bullet lodged in his body. Another victim had several through-and-through wounds. No proof showed that any victim was struck by a bullet that did not first pass through another victim. Given the absence of evidence that any of the assault convictions arose from a separate and distinct pull of the trigger by the defendant, concurrent sentences were required. Paul Connolly represented the appellant. (County Ct, Chemung 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.
Third Department continued

credibility is in issue. Here the trial court urged the People to use caution; and the complainant was generally referred to by name or as the “alleged victim.” As to a second defense argument, the People’s amendment of the bill of particulars, regarding how the defendant entered the dwelling, did not impermissibly alter the theory of the prosecution. The method of entry was not a material element of 1st degree burglary. Finally, Supreme Court did not abuse its discretion in denying an adjournment to permit the defendant to call a witness, after doing its own research about the witness. The lower court should not have assumed the role of counsel in conducting an investigation; and to the extent that the court took judicial notice of what it found, the parties should have had an opportunity to be heard. However, the defendant did not establish that the testimony would have been material or relevant. (Supreme Ct, Tompkins Co)

CONFIDENTIALITY / BREACHED
ILSAPP: The mother appealed from an order of Broome County Family Court, which modified custody and visitation. The Third Department affirmed but noted that Family Court should not have disclosed information provided by the child during the Lincoln hearing. Protecting the child’s right to confidentiality is a paramount judicial obligation. However, the improper disclosure did not adversely affect the determination or the conclusions reached upon review. (Family Ct, Broome Co)

People v Stover, 181 AD3d 1061 (3rd Dept 3/12/2020)
SUPPRESSION / DISMISSED
ILSAPP: The defendant appealed from an Albany County Court judgment convicting him of 2nd degree CPW. The Third Department reversed and dismissed the indictment. The defendant was in his parked vehicle at a club when officers asked for identification and discovered that his driver’s license was suspended. They arrested him for aggravated unlicensed operation of a motor vehicle and during an inventory search found a handgun in the trunk. The police did not have the requisite objective, credible reason to approach the vehicle; there was no indication that the defendant was other than a customer with a valid reason to park legally at a club that had just closed. The vehicle’s condition did not raise concerns, and police observed no erratic driving. The defendant’s argument on his cell phone did not provide any nexus to drug and weapons crimes in the area. The Albany County Public Defender (Jessica Gorman, of counsel) represented the appellant. (County Ct, Albany Co)

People v Crandall, 181 AD3d 1091 (3rd Dept 3/16/2020)
PLEAS - ALFORD PLEA
ILSAPP: The Third Department declines to invalidate defendant’s Alford plea where the “better practice” would have been for the prosecutor to place upon the record the evidence of defendant’s guilt, but the court, having conducted the probable cause hearing, was well aware of the evidence against defendant, and there was strong, competent evidence of defendant’s guilt.

Defendant stated clearly that he wanted to enter a guilty plea to avoid the possibility of a more severe sentence after trial, and his statements demonstrate that his decision to enter a guilty plea despite his purported innocence was the product of a voluntary and rational choice. (County Ct, Hamilton Co)

Matter of Abel XX., 182 AD3d 632 (3rd Dept 4/2/2020)
AFC AS PETITIONER / INADMISSIBLE HEARSAY
ILSAPP: The mother appealed from St. Lawrence County Family Court orders, which adjudicated the four subject children to be neglected. When the petitioner decided to withdraw its Article 10 petitions against the mother, Family Court asked the AFC whether he would be prepared to go forward on the petitions if they were not dismissed. The AFC said yes and presented evidence. The Third Department reversed and dismissed. It was proper for Family Court to decline to dismiss the petitions and allow the AFC to proceed on the petitions. See Family Ct Act § 1032 (b) (Article 10 proceeding may be initiated by person at court’s direction). Notwithstanding its laudable efforts, the AFC failed to present sufficient evidence of educational and medical neglect. Family Court erred in relying upon a caseworker’s hearsay testimony about her conversations with school officials. Although there was no objection, the appellate court could not uphold a neglect finding supported solely by inadmissible evidence. Similar infirmities existed as to proof of medical neglect. The Rural Law Center of NY (Kelly Egan, of counsel) represented the appellant. (Family Ct, St. Lawrence Co)

Matter of Curtis D. v Samantha E., 182 AD3d 655 (3rd Dept 4/2/2020)
VISITATION - SUPERVISED

2 Summaries marked with these initials, LASJRP, are courtesy of The Legal Aid Society’s Juvenile Rights Practice, from their weekly newsletter.
LASJRP: The Third Department upholds an order denying the father’s request for more liberal parenting time, including unsupervised time.

The father has a long history of opioid addiction. He completed outpatient treatment in 2018, and, since a 2017 probation order, has consistently tested negative for drug use. He has maintained full-time employment as a subcontractor and resides with his parents and his 16-year-old son from a prior relationship, of whom he has full custody. From February 2017 to February 2018, he exercised supervised visitation on alternating weekends and one weekday each week at his parents’ home; the paternal grandfather and the father’s sister, who supervised the visitation, testified that they perceive no safety concerns.

However, the father’s sobriety is a relatively new development. He continues to be medically assisted in treatment via a twice daily regimen of Suboxone, and he admitted that it is “an everyday fight to stay away from [his] addiction.” He also tends to minimize his conduct and deflect blame for his poor decision-making. (Family Ct, Broome Co)

LASJRP: The Third Department finds error in the family court’s determination denying the mother any visitation with the child.

Although the mother testified that she had not seen the child in nine years due to her drug abuse, in that time she recognized she had problems and took steps to address them. She made efforts to reach out to the child, regained custody of some of her other children, and was employed and had stopped using drugs for at least three years.

The forensic examiner cited the improvements made by the mother as a basis for finding that her life was chaotic, but sanctioning this rationale would essentially give no incentive to any parent to achieve stability. The forensic evaluator essentially acquiesced to the father’s preferences that the child have no contact with the mother and, in effect, gave them a higher priority over any court directive.

Although the family court found that the mother could not control her emotions during the trial, there was little evidence, if any, indicating that she displayed the same emotional outbursts either with the children who lived with her or outside the courtroom setting. (Family Ct, Saratoga Co)

Even when it is appropriate for an AFC to substitute his or her judgment for the child’s preferences, the AFC must inform the family court of the child’s wishes if authorized by the child to do so (see 22 NYCRR 7.2[d][3]). Here, the AFC’s brief does not indicate the children’s wishes, or refer to 22 NYCRR 7.2 or to the analysis the rule requires an AFC to undertake before advocating for a position that does not express the child’s wishes. Also, 22 NYCRR 7.2 does not require either the child or the AFC to make any best interests determination; that determination is to be made by the court.

Also, although the AFC met with the children during the family court proceeding, it does not appear that he met or spoke with them again during the appeal and discharged his obligations to them at that stage. (Family Ct, Saratoga Co)

Jennifer VV. v Lawrence WW., 182 AD3d 652 (3rd Dept 4/2/2020)

CUSTODY - RIGHT TO COUNSEL
- CHILD/EFFECTIVE ASSISTANCE ON APPEAL
LASJRP: In the father’s appeal in this custody matter, the attorney for the children, who had represented the children in family court, initially submitted a letter expressing his views as to the children’s best interests, and stating that he did not intend to file a brief because the children—then approximately ten and six years old—were “too young to formulate an independent opinion and provide a foundation for their respective opinions.” The Third Department rejected the letter and directed the AFC to submit a brief. The AFC filed a brief in which he again cited his clients’ alleged inability to form an opinion, and, without stating the children’s preferences, discussed the factors pertinent to a best interests analysis and concluded that the order should be affirmed.

The Third Department assigns a new AFC on appeal, concluding that the children were denied the effective assistance of counsel. It was the AFC’s obligation to “consult with and advise the child[ren] to the extent of and in a manner consistent with [their] capacities” (22 NYCRR 7.2[d][1]). At ten, the older child was certainly old enough to be capable of expressing her wishes, and whether the younger child had the capacity to do so was not solely dependent upon her calendar age, but also upon such individual considerations as her level of maturity and verbal abilities.

Jessica D. v Michael E., 182 AD3d 643 (3rd Dept 4/2/2020)

VISITATION - CHANGE IN CIRCUMSTANCES/
DENIAL OF VISITS
LASJRP: The Third Department affirms an order denying the father’s request for more liberal parenting time, including unsupervised time.

The father has a long history of opioid addiction. He completed outpatient treatment in 2018, and, since a 2017 probation order, has consistently tested negative for drug use. He has maintained full-time employment as a subcontractor and resides with his parents and his 16-year-old son from a prior relationship, of whom he has full custody. From February 2017 to February 2018, he exercised supervised visitation on alternating weekends and one weekday each week at his parents’ home; the paternal grandfather and the father’s sister, who supervised the visitation, testified that they perceive no safety concerns.

However, the father’s sobriety is a relatively new development. He continues to be medically assisted in treatment via a twice daily regimen of Suboxone, and he admitted that it is “an everyday fight to stay away from [his] addiction.” He also tends to minimize his conduct and deflect blame for his poor decision-making. (Family Ct, Broome Co)

LASJRP: The Third Department upholds an order denying the father’s request for more liberal parenting time, including unsupervised time.

The father has a long history of opioid addiction. He completed outpatient treatment in 2018, and, since a 2017 probation order, has consistently tested negative for drug use. He has maintained full-time employment as a subcontractor and resides with his parents and his 16-year-old son from a prior relationship, of whom he has full custody. From February 2017 to February 2018, he exercised supervised visitation on alternating weekends and one weekday each week at his parents’ home; the paternal grandfather and the father’s sister, who supervised the visitation, testified that they perceive no safety concerns.

However, the father’s sobriety is a relatively new development. He continues to be medically assisted in treatment via a twice daily regimen of Suboxone, and he admitted that it is “an everyday fight to stay away from [his] addiction.” He also tends to minimize his conduct and deflect blame for his poor decision-making. (Family Ct, Broome Co)
did not respond to these letters or take the child to visit the father; that when asked whether she encouraged the child to respond to the letters, the aunt stated that she “asked if he wanted to” and provided him with paper; and that although the aunt stated that the father never called, the father explained that he could not remember petitioners’ phone number, and that he asked for the phone number from his family members but they were unable to provide it.

Petitioners failed to establish by clear and convincing evidence that the father evinced an intent to forgo his parental rights. Petitioners bore some responsibility in hampering the father’s ability to visit or have contact with the child. (Surrogate’s Ct, Cortland Co)

Matter of Kristen MM. v Christopher LL., 182 AD3d 658
(3rd Dept 4/2/2020)

CUSTODY - RELOCATION

LASJRP: The Third Department upholds the family court’s determination granting the mother permission to relocate with the children to Arizona.

The mother wanted to continue her education and attain a Bachelor’s degree and have better living conditions. She would be living with her friend, rent free in a five-bedroom home, along with the friend’s nine-year-old son. The mother believed the children would receive a better education in the Arizona school district after she researched the school the children would attend. The mother researched and determined that the dry air in Arizona would be better for her son’s asthma and found a treatment provider. She would look for a part-time job and was willing to pay for the children’s travel expenses to see the father. The mother has been the primary caretaker while the father has been sporadically present in the children’s lives—being absent for years at a time—and has not provided stable financial or emotional support. The visitation schedule provides more stable and predictable parenting time for the father and preserves his relationship with the children. (Family Ct, Schenectady Co)

Matter of William V. v Bridgett W., 182 AD3d 636
(3rd Dept 4/2/2020)

CUSTODY - RELOCATION

LASJRP: The Third Department finds ample evidence that the mother interfered with the father’s parenting time, denied the father any access to the children for approximately three years, unilaterally relocated with the children to Georgia, and did not advise the father of the children’s whereabouts or provide any contact or communication between the father and the children. Thus, the father established a change in circumstances.

Nevertheless, the Court finds record support for the family court’s determination that the mother’s relocation with the children to Georgia is in the children’s best interests. Although the mother’s intentional interference in the father’s relationship with the children per se raises a strong probability that she is unfit to act as the custodial parent, the father failed to proffer any reason for his failure to seek court assistance in obtaining the return of the children prior to the mother’s petition in 2017.

The mother’s boyfriend testified that he earns $80,000 per year. They have a four-bedroom house with a swimming pool. The schools have programs to address the oldest child’s special educational needs, and there are doctors and specialists to address the youngest child’s special physical needs. The mother is able to transport the children to and from school and is available throughout the day to care for the children. The mother testified that the children are well-bonded to her other children.

In contrast, the father has a chaotic, crowded household and a history of domestic violence, most notably in using corporal punishment against the children. (Family Ct, Chemung Co)

People v Burwell, 183 AD3d 173 (3rd Dept 4/9/2020)

TWEET STORM / NOT PUBLIC ALARM

ILSAPP: The defendant appealed from a judgment of Albany County Supreme Court, convicting her of 3rd degree falsely reporting an incident (two counts). The charges arose from her involvement in an altercation and its aftermath on a city bus bound for the SUNY–Albany campus. The indictment alleged that: (1) knowing the information to be false, the defendant reported in a 911 call that she was jumped on a bus by a group of males; and (2) knowing the information to be false, the defendant circulated via social media a false allegation that she was the victim of a racially motivated assault. The Third Department dismissed the latter count. As applied here, Penal Law § 240.50 (1) was unconstitutional. The statute was impermissibly broad in criminalizing the subject false speech. The Twitter storm that ensued after the defendant posted false tweets did not cause “public alarm.” The retweets led to nothing more than a charged online discussion, and false tweets were debunked through counter speech. Frederick Brewington represented the appellant. (Supreme Ct, Albany Co)

People v Clark, 182 AD3d 703 (3rd Dept 4/9/2020)

GRAND JURY / NO CHANCE TO TESTIFY

ILSAPP: The People appealed from an order of Columbia County Court, which dismissed the indictment. The Third Department affirmed. The defendant was
arraigned on drug possession charges, remanded to the county jail, and assigned a Conflict Defender. A few days later, the People faxed to the Conflict Defender a notice stating that the matter would be presented to the grand jury, but not specifying a presentment date. The next day, the People presented the matter to the grand jury. County Court properly granted the defendant’s motion to dismiss the indictment pursuant to CPL 190.50 (5), since the People failed to give him a reasonable opportunity to consult with counsel and decide whether to exercise his right to testify before the grand jury. (County Ct, Columbia Co)

**Matter of Daniel C. v Joanne C., 182 AD3d 711**  
(3rd Dept 4/9/2020)

**CUSTODY - DOMESTIC VIOLENCE**

**LASJRP:** After determining that domestic violence perpetrated by the mother’s ex-boyfriend constitutes a change in circumstances, the Third Department upholds an order denying the father’s request for sole residential custody, noting, inter alia, that although the mother minimized the potential harm caused to the children, she used the father as a support system to protect the children following the incident and removed the ex-boyfriend from her home, and, as of the time of the hearing, the domestic violence problem had been resolved. (Family Ct, Broome Co)

**People v Jones, 182 AD3d 698**  
(3rd Dept 4/9/2020)

**ARMED FELONY / YO ELIGIBLE?**

**ILSAPP:** The defendant appealed from a judgment of Rensselaer County Court, convicting him upon his plea of guilty of 2nd degree CPW. He challenged the lower court’s determination to deny him youthful offender status. Although County Court did expressly consider whether the defendant was a YO, it was unclear whether the court recognized that he had pleaded guilty to an armed felony and that a judicial finding regarding YO-eligibility, based on the CPL 720.10 (3) factors, was required. There was no reference at the plea or sentencing to an armed felony and that a judicial finding regarding YO-eligibility, based on the CPL 720.10 (3) factors, was required. The sentence was vacated, and the matter remitted to County Court. Linda Johnson represented the appellant. (County Ct, Rensselaer Co)

**People v Dickinson, 182 AD3d 783**  
(3rd Dept 4/16/2020)

**HEARSAY - STATEMENT FOR PURPOSES OF DIAGNOSIS OR TREATMENT**

**LASJRP:** The Third Department concludes that a sexual assault nurse examiner’s testimony as to what the victim had described wearing at the time of the incident was admissible. The SANE’s question had the dual purpose of assisting in the investigation of the crime and the care and treatment of the victim’s injuries. (County Ct, Warren Co)

**People v Ellis, 182 AD3d 791**  
(3rd Dept 4/16/2020)

Where the defendant’s attorney during a 2016 trial was found to have represented two anticipated prosecution witnesses in 2009 and 2010, and after lengthy discussions about possible ways to proceed the defendant expressed discomfort about being at a disadvantage if counsel was unable to fully cross-examine the witnesses and ultimately said he wanted to seek new counsel, the resulting mistrial was declared upon consent. There was no evidence that the court or special prosecutor deliberately acted to provoke a mistrial. Double jeopardy did not bar the defendant’s subsequent bench trial and conviction. (County Ct, Broome Co)

**Matter of Jemar H. v Nevada L., 182 AD3d 805**  
(3rd Dept 4/16/2020)

**VISITATION - INCARCERATED PARENT/CHANGE IN CIRCUMSTANCES - VIOLATIONS/WILLFULNESS**

**LASJRP:** The Third Department upholds a determination that the mother violated a prior visitation order but the violation was not willful, and that, based on a change in circumstances, mandated prison visits with the father were not in the child’s best interests.

After entry of the previous order, the father was transferred to a prison facility roughly 350 miles from the child’s residence, requiring an approximately 11-hour roundtrip car ride. Although a diagnosis cannot be confirmed until the child reaches the age of three, the child is believed to be on the autism spectrum, was nonverbal, and was exhibiting aggressive behavior and would thrash, scratch his face and hurt himself during car rides. Also, there was “growing animosity” between the parents.

The mother did not comply with the requirement that she bring the child for monthly prison visits due to a combination of factors, including the child’s emerging developmental delays and behavioral issues, a lack of financial resources and the father’s inappropriate behavior and comments toward her. (Family Ct, Chemung Co)

**People v McCabe, 182 AD3d 772**  
(3rd Dept 4/16/2020)

**CONFESSIONS - INTERROGATION/CUSTODY**

**LASJRP:** After the officer arrived at the scene and discovered defendant in the driveway, he entered the residence and found the victim being treated by defendant’s mother. The victim was convulsing and making gurgling sounds, and had bruises and dried blood on her face. The officer radioed emergency services to respond immediately, exited the residence and informed defendant that he...
was being detained for questioning. The officer did not immediately ask defendant what happened, but, after defendant was handcuffed and placed in the backseat of the patrol car, asked defendant, “What happened?” In response, defendant made incriminating statements.

The Third Department finds reversible error in the denial of suppression. Once defendant was handcuffed and placed in the back of the officer’s vehicle, he was in custody. The purpose of the questioning was not to clarify the nature of the volatile situation rather than to elicit evidence of a crime. The incident had been completed, the parties had been identified and medical assistance requested, and defendant had been cooperative and responsive. (County Ct, Fulton Co)

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**Matter of Brown v Annucci, 182 AD3d 885**
(3rd Dept 4/23/2020)

Where the record does not contain the confidential information that the Hearing Officer (HO) relied on as to several charges including violent conduct, no determination can be made as to whether the HO independently assessed the reliability of that information and the finding of guilt as to those charges must be annulled. The remaining charges are not shown to have been supported by substantial evidence because, while the HO indicated that he independently assessed the confidential testimony he relied on, “neither the hearing transcript nor the witness interview notice form reflects that any confidential testimony was taken during the hearing or that any confidential documents were reviewed.” General and conclusory testimony by the author of the misbehavior report that he had received prior information from the confidential informant and deemed current information accurate provided no details about the basis for the information or results of the investigation were provided. Some evidence at the hearing contradicted the confidential information. References to this matter must be expunged from the petitioner’s institutional record and good time must be restored. (Transferred from Supreme Ct, Albany Co)

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**People v Chapman, 182 AD3d 862**
(3rd Dept 4/23/2020)

Evidence - Post-Arrest Silence

LASJR: The Third Department finds reversible error where the trial court admitted a redacted video of defendant’s police interrogation in which the police recounted their case against defendant, including reading his texts aloud, and were met largely, if not completely, with silence; defendant is shown slouching, with an ankle shackel securing him to the chair, and is dressed in a hooded sweatshirt with oversized sweatpants worn in a manner so as to expose his underwear; his attitude appears to be dismissive and, at one point, he laughs in response to police questioning; and, throughout the video, defendant makes no incriminatory statements.

There was a significant risk that the jurors would deem defendant’s failure to answer the police officer’s questions to be an admission of guilt. (County Ct, Albany Co)

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**Matter of Green v LaClair, 182 AD3d 877**
(3rd Dept 4/23/2020)

SARA / INAPPLICABLE

ILSAPP: The petitioner appealed from an order dismissing his CPLR Art. 78 petition. In 1989, he was convicted of 1st degree rape. After he completed his sentence in 2003, he was designated a risk-level three sex offender. Several years later, the petitioner was convicted of 2nd degree robbery and 3rd degree burglary, and based on those offenses and his level-three designation, he was found subject to SARA. The Third Department reversed. The crimes for which the petitioner was serving a sentence were not enumerated offenses. See People ex rel. Negron v Superintendent, 170 AD3d 12 (Exec. Law § 259-c) [14] school-grounds restriction applies to offender serving sentence for enumerated Penal Law offense, where in addition, either victim was under age 18 at time of offense or defendant was designated risk-level three sex offender). PLSNY (Michael Cassidy, of counsel) represented the appellant. (Supreme Ct, Franklin Co)

[Ed. Note: Leave to appeal was granted on Aug. 27, 2020 (35 NY3d 1052).]

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**People v Edwards, 182 AD3d 929**
(3rd Dept 4/30/2020)

The order granting the defendant’s motion to dismiss two counts of first-degree assault because the grand jury evidence was legally insufficient to establish depraved indifference is reversed. One of the passengers in the car that the defendant was driving after a night of bar-hopping testified that the defendant ignored a warning to slow down and “‘jerked’ the car” into a parking lot that offered a short cut to another road after hearing that a passenger had seen a patrol car; accident reconstruction showed a very high rate of speed. While drunk driving cases rarely lend themselves to a depraved indifference finding, the grand jury could infer from the proofs that the defendant did not care about his passengers’ welfare and acted “in a near suicidal gambit to escape police,” which supports finding that he appreciated that his actions presented a grave risk of death which he totally disregarded.

Dissent: Collision reconstruction evidence, showing that the car did slow before the crash as the car was being turned on a curve, and testimony that the defendant slammed on the brakes, showed steps to mitigate the risk...
Third Department continued

of his reckless driving. The prosecution failed to present prima facie proof of depraved indifference. (Supreme Ct, Schenectady Co)

**Matter of Kane FF, v Jillian EE, 183 AD3d 969 (3rd Dept 5/7/2020)**

**SUPERVISION / WRONGLY LIFTED**

**ILSAPP:** The mother appealed from an order of Chemung County Family Court, which modified a prior visitation order. The Third Department modified, holding that Family Court erred in granting the father unsupervised parenting time. The court had ordered him to complete domestic violence counseling and provide a report to the court. The counseling was never undertaken, and no reason appeared on the record for the failure. Further, the court made no finding that the father had demonstrated a change in circumstances sufficient to warrant reconsideration of the child’s best interests and did not explain the lifting of the supervision requirement or dispensing with the DV counseling requirement. The matter was remitted to determine a parenting schedule. Christopher Hammond represented the appellant. (Family Ct, Chemung Co)

**People v Perez, 183 AD3d 934 (3rd Dept 5/7/2020)**

**APPEAL - HARMLESS ERROR**

**LASJRP:** The Third Department concludes that even assuming, without deciding, that the search warrant application directed to defendant’s cell phone provider was not supported by probable cause, any error in admitting cell phone location data was harmless.

Two concurring judges, who do not find overwhelming evidence of guilt, assert that “this unusual case calls out for either a clarification of the governing law or an expansion of our current test for harmless error that, in appropriate circumstances, might allow a multifactorial analysis, such that the clear harmlessness of an error might be weighed in conjunction with the quantum of the other proof of a defendant’s guilt, rather than entirely disregarded solely because the proof was not otherwise overwhelming.” The Court of Appeals’ exemption for errors of “sheerest technicality” applies here even though the error, considered in the abstract, is admittedly difficult to categorize as a technical error.

A dissenting judge asserts that because the evidence provided a scientific basis upon which the jury could decide that the People’s witnesses were worthy of belief and defendant’s alibi witnesses were not, the error was not harmless. (Supreme Ct, Albany Co)

[Ed. Note: Leave to appeal was granted on May 26, 2020 (35 NY3d 995) (3rd Dept).]

**Matter of Sarah KK, v Roderick LL, 183 AD3d 943 (3rd Dept 5/7/2020)**

**NO NOA / NO AFFIRMATIVE RELIEF**

**ILSAPP:** The mother appealed from a Broome County Family Court order, which dismissed her application to modify a prior custody order. The Third Department affirmed. Having failed to take an appeal from the order, the AFC could not seek affirmative modifications to the terms of supervised visitation. Further, the mother’s belated attempt to join in those arguments was unavailing. Issues raised by an appellant for the first time in a reply brief were not properly before the appellate court. (Family Ct, Broome Co)

**Matter of Arra L, 183 AD3d 1027 (3rd Dept 5/14/2020)**

**NEGLECT / DUE PROCESS**

**ILSAPP:** The mother appealed from an order of Tioga County Family Court, which denied her motion to vacate a prior order. The Third Department reversed. The mother had four children, whom the petitioner alleged she had neglected. She attended several court conferences without the benefit of counsel and then was absent for one conference. After Family Court declared her in default and issued an order finding neglect, the mother moved to vacate the order. The appellate court found, as a threshold matter, that the subsequent dispositional order on consent did not moot the interlocutory appeal. A parent has a right to be present at every stage of an Article 10 proceeding as a matter of due process. But the right is not absolute. Family Ct Act § 1042 provides that a hearing may proceed in a parent’s absence, if the subject child is represented by counsel. The absent parent may thereafter move to vacate the resulting order and schedule a rehearing. Ordinarily, the movant would be required to demonstrate a meritorious defense. But such showing is not required where, as here, the default resulted from a deprivation of due process rights. The mother did not receive notice that a fact-finding hearing might be conducted. Moreover, Family Court erred in accepting the allegations in the petition as proven, based on the purported default. Lisa Miller represented the appellant. (Family Ct, Tioga Co)

**Matter of Jarrett SS, 183 AD3d 1031 (3rd Dept 5/14/2020)**

**ABUSE/NEGLECT - LEAVING CHILDREN ALONE/ UNSUPERVISED**

**LASJRP:** The Third Department upholds neglect findings where police officers observed the two-year-old daughter crying and crawling on the floor, and the three-year-old son, who has cerebral palsy caused by a traumatic brain injury and is not able to care for himself, pulling DVDs or something like that near the television;
the mother did not immediately respond to the officers and, when she exited her bedroom a few minutes later, appeared disoriented, stepped over the crying daughter without picking her up and told the officers that she was or could have fallen asleep; the mother admitted that she knew the children were unsupervised and that there was a fan and a television that prevented her from hearing noises; and, during a second incident, the caseworker observed the son without supervision in a highchair at the house while the mother reportedly was sleeping.

Although these two events were isolated, in light of the circumstances, including the son’s disability, leaving the children unsupervised even for a brief amount of time constituted neglect. (Family Ct, St. Lawrence Co)

Inclusion of such references could be misleading and prejudicial to the petitioner’s status in the future. Thus, he had stated a potentially valid cause of action, and remittal was required. The Legal Aid Society of NYC (Elizabeth Felber, of counsel) represented the appellant. (Supreme Ct, Columbia Co)

**Matter of Carol E. v Robert E., 183 AD3d 1154**  
(3rd Dept 5/21/2020)

**HELCOPER PARENTS / THWARTED GRANDMOTHER**

**ILSAPP:** The parents appealed from an order of Rensselaer County Family Court which granted an application of the paternal grandmother of the child, born in 2014. The Third Department affirmed. For a year, the grandmother babysat for the child two days a week, until the mother cut off contact because the grandmother would not comply with the parents’ stringent child care requirements. A chance encounter in 2017 revealed that the child no longer recognized the grandmother. At the hearing, the grandmother proved that she had a strong bond with the child and that she had made reasonable efforts at reconciliation during the three-year period when access was denied. Clearly, the grandmother loved the child and had provided sound care—even though she declined to fill out the detailed, daily activity reports that the parents demanded. The AFC supported visitation. (Family Ct, Rensselaer Co)

**People v Dearstyn, 183 AD3d 1123**  
(3rd Dept 5/21/2020)

**SUPPRESSION / NO JURISDICTION**

**ILSAPP:** The defendant appealed from an order of Rensselaer County Court. Upon remittal from the Second Circuit, the trial court determined that the defendant’s statements were voluntary. The Third Department dismissed the appeal. In 1986 at the age of 16, the defendant made incriminating statements regarding sexual offenses. His motion to suppress was denied, and he was convicted of several crimes after a jury trial. In 2015—19 years after affirmance of the conviction—the defendant filed a habeas corpus petition. District Court dismissed the petition, but the Second Circuit reversed and directed that the NY court adjudicate the voluntariness of the defendant’s confession, including assessing whether police intentionally isolated him from his parents and engaged in coercive interrogation techniques. After a hearing, the confession was found to have been voluntary. Sua sponte, the Third Department raised the issue of appealability. In other cases where a suppression hearing occurred after entry of a judgment of conviction, the trial court was instructed to amend the judgment if the defendant did not prevail. See *e.g.* People v Bilal, 27 NY3d 961. The Second Circuit did not
so advise the remittal court. However, County Court could now amend the defendant’s judgment of conviction to reflect the denial of suppression. Then the defendant could properly appeal as of right from the amended judgment. (County Ct, Rensselaer Co)

People v Kalabakas, 183 AD3d 1133
(3rd Dept 5/21/2020)

The prosecution did not make a prima facie case of conspiracy before offering into evidence hearsay statements from the codefendant’s iPhone under the coconspirator exception. However, the error was harmless.

The statutory provision underlying count one, Penal Law 220.21(1), “contemplates that a person can be charged with possessing more than one narcotic drug and that the weights of the narcotics may be combined to reach the threshold weight requirement,” so the eight-ounce aggregate weight threshold was properly met by combining the heroin and cocaine found in the vehicle. The issue was preserved by the defendant’s motion, although the record is not clear that the court expressly ruled on it. Combining the two drugs under one count did not render the count facially duplicitous, and the evidence at trial did not render it duplicitous.

The search of the hidden compartment in the vehicle’s console was reasonable under the circumstances where the troopers smelled a strong odor of marijuana and saw marijuana “shake”—leaves—on the shirts of the defendant and codefendant. That evidence plus the defendant’s statement that the codefendant had smoked marijuana earlier in the trip permitted the inference that the compartment containing marijuana and other contraband had been accessed during the trip, making the defendant aware of its contents and giving him access and control thereof. (Supreme Ct, Albany Co)

People v Maldonado, 183 AD3d 1129
(3rd Dept 5/21/2020)

ADVERSE POSITION / VACATUR

ILSAPP: The defendant appealed from a judgment of Albany County Supreme Court, convicting her of 1st degree criminal sale of a controlled substance and sentencing her, as a second felony offender, to 15 years’ imprisonment, plus post-release supervision. The Third Department vacated the sentence and remitted for assignment of new counsel and new proceedings. On the scheduled sentencing date, the defendant expressed dissatisfaction with counsel and moved pro se to withdraw her guilty plea. On an adjourn date, defense counsel made several statements detrimental to the defendant. A conflict of interest arose at that point; the sentencing court was required to relieve counsel. On a subsequent date, still represented by original counsel, the defendant was sentenced. Supreme Court deprived the defendant of her right to effective assistance of counsel in connection with the motion to withdraw her guilty plea. Two justices dissented. Francisco Calderon represented the appellant. (Supreme Ct, Albany Co)

Jennifer VV. v Lawrence WW., 183 AD3d 1202
(3rd Dept 5/28/2020)

OBJECTIONS / DE NOVO REVIEW

ILSAPP: The father appealed from an order of Saratoga County Family Court, which granted the mother’s petition to modify child support. In affirming, the Third Department rejected the father’s contention that, under an abuse of discretion standard, Family Court’s review of the Support Magistrate’s order was limited to whether the statutory factors justified a deviation from his support obligation. Instead, upon written objections and rebuttal, Family Court was empowered to make its own findings of fact, with or without a new hearing. See Family Ct Act § 439 (d) (ii). (Family Ct, Saratoga Co)

People v Lee, 183 AD3d 1183 (3rd Dept 5/28/2020)

MURDER / SUPPLEMENTAL INSTRUCTION

ILSAPP: The defendant appealed from a judgment of Broome County Court, convicting him of 2nd degree murder and other crimes in connection with an incident in which he hit Seth West in the head with a bottle and shortly thereafter shot Scott Wright in the abdomen, causing his death. The Third Department affirmed. The defendant testified that he had been drinking heavily at a party before striking West, and then he briefly left. Upon his return to the party, the defendant purportedly had no intention of shooting anyone. Instead, he waved a gun around to provoke a reaction, but the weapon went off unexpectedly and struck Wright as he left the party, exiting an apartment door. The indictment charged that the defendant acted with the intent to cause Wright’s death. On appeal, the defendant contended that the court gave an improper supplemental instruction about intent. When the jury asked if the murder charge was specific to the killing of Wright, the court said yes. The jury thereafter wondered whether intent could go to the fact that the defendant intentionally fired the gun at whomever walked out the door, and the court said yes. The People had argued that they were not bound by the indictment, because the victim’s identity was not an element of the crime. The reviewing court rejected the defendant’s argument that the supplemental instruction impermissibly altered the theory of the prosecution. (County Ct, Broome Co)
**People v Morehouse**, 183 AD3d 1180 (3rd Dept 5/28/2020)

**SEARCH / SYNTHETIC CANNABINOIDS**

**ILSAPP:** The defendant appealed from a judgment of Washington County Court, convicting him upon his plea of guilty of 3rd degree criminal possession of a controlled substance and 3rd degree CPW. On appeal, he urged that:

1. the trial court erred in denying a hearing on his motion to suppress evidence; and
2. the warrant was issued without probable cause, because the application was based on possession of synthetic cannabinoids, which is not illegal under the Penal Law. The appellate court found that the issue regarding the hearing was unpreserved; and in any event, the defendant failed to support his request with sworn factual allegations. See CPL 710.60 (3). While the Penal Law did not prohibit the possession of synthetic cannabinoids, the State Sanitary Code did (10 NYCRR 9-1.2), and a violation was punishable by a fine and/or 15 days’ incarceration (Public Health Law § 229). The search warrant was supported by probable cause that the defendant possessed and sold both marihuana and synthetic cannabinoids. (County Ct, Washington Co)

**People v Watson**, 183 AD3d 1191 (3rd Dept 5/28/2020)

**EVIDENCE - BEST EVIDENCE RULE/VIDEO RECORDINGS**

**LASJRP:** The Third Department holds that, under the best evidence rule, the cell phone video recording of a surveillance video depicting the exterior of a bar, the observations of the detective who viewed and recorded the cell phone video, and the detective’s observations of a surveillance video showing the bar’s interior, should have been precluded. Also, the People did not call the bar manager or a person who installed the video equipment to authenticate the video. However, the court’s error was harmless. (County Ct, Ulster 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.

**Matter of Carl B.**, 181 AD3d 1161 (4th Dept 3/13/2020)

**TERMINATION OF PARENTAL RIGHTS**

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

**LASJRP:** In this termination of parental rights proceeding, the Fourth Department upholds the denial of respondent father’s motion for disqualification of the public defender’s office from representing the mother where a prior attorney-client relationship existed between the father and the public defender’s office. The father failed to establish that his interests and the mother’s interests were materially adverse where both parents wanted...

**Matter of Aaron E.**, 181 AD3d 1167 (4th Dept 3/13/2020)

**ABUSE/NEGLECT - INJURIES CONSTITUTING ABUSE**

- **DERIVATIVE NEGLECT**
- **Appeal/Record On Appeal**

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

to have the child placed with family members rather than in foster care.

The court also did not err in denying the father’s request for removal of the legal aid society-employed attorney for the child due to a conflict where other attorneys from the same legal aid society previously represented two of the mother’s other children in an unrelated proceeding and advocated that they be placed with the mother’s relative, whereas the AFC in this case advocated placing the child in foster care. The AFC did not fail to advocate for the child’s best interests. The other children of the mother had not developed a relationship with this child, who has lived with his foster parents for the vast majority of his life. (Family Ct, Monroe Co)


The determination revoking the driver’s license of the Article 78 petitioner is annulled; the respondent reviewed the challenge to the determination under an incorrect legal standard. Police stops of vehicles cannot be properly upheld on the grounds that there was a “reasonable basis” for them, which was the stated reason for the respondent’s determination rejecting the petitioner’s administrative appeal of the license revocation that followed a refusal hearing. The respondent was initially stopped about a mile from the location of an accident site while driving a white pickup that matched the description of an involved vehicle and was taken into custody after he exhibited signs and made statements indicating he was intoxicated. “[T]he record lacks substantial evidence to support the determination that the officer had the requisite probable cause at the time of the stop …” (Transferred from Supreme Ct, Oneida Co)

People v Fox, 181 AD3d 1228 (4th Dept 3/13/2020)

MOTION TO VACATE JUDGMENT OF CONVICTION - DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL

LASJRP: In a 3-2 decision, the Fourth Department holds that defendant is entitled to a hearing upon his motion to vacate the judgment of conviction on the ground of ineffective assistance of counsel where the motion was supported by the notarized but unsworn statement, dated prior to defendant’s trial, of a witness who asserted that defendant had borrowed the witness’s jacket minutes before defendant’s arrest; that the controlled substances in the jacket pockets belonged to the witness; and that defendant had no prior knowledge of the controlled substances. Defendant averred in an affidavit that he informed defense counsel prior to trial of the witness’s willingness to testify.

The court also erred in rejecting defendant’s contention that defense counsel failed to either secure evidence of police surveillance of the traffic stop that led to defendant’s arrest or seek sanctions for the prosecution’s alleged failure to preserve the evidence. (Supreme Ct, Oneida Co)


CUSTODY - CUSTODIAL PARENT’S WORK SCHEDULE

LASJRP: The Fourth Department upholds an order awarding the father sole legal and residential custody, noting, inter alia, that the father is an active and capable parent notwithstanding his work schedule, and that it is well settled that a more fit parent will not be deprived of custody simply because the parent assigns day-care responsibilities to a relative owing to work obligations. (Family Ct, Onondaga Co)

People v Grimes, 181 AD3d 1251 (4th Dept 3/13/2020)

SUPPRESSION / RESERVED

ILSAPP: The defendant appealed from an Onondaga County Supreme Court judgment, convicting him upon a plea of guilty of a drug possession offense. The Fourth Department reserved decision. On appeal, the defendant urged that the trial court erred in refusing to suppress physical evidence and statements. The contentions were preserved since counsel’s arguments gave the suppression court a chance to fix the problem and avert reversible error. The lower court erred in ruling without resolving whether the pat frisk was lawful, and the appellate court lacked the power to review issues not ruled upon, so the matter was remitted. Linda Campbell represented the appellant. (Supreme Ct, Onondaga Co)

People v Huntress, 181 AD3d 1204 (4th Dept 3/13/2020)

PREDICATE / NOT EQUIVALENT

ILSAPP: The defendant appealed from a County Court judgment, convicting him upon a plea of guilty of aggravated vehicular homicide and a related crime. The Fourth Department vacated the sentence. The defendant was improperly sentenced as a second felony offender. The predicate conviction, the Pennsylvania crime of receiving stolen property, was not the equivalent of NY’s 4th degree CPW, since operability of the firearm was not an element of the former offense. The Wyoming County

2 Summaries marked with these initials, ILSAPP, are courtesy of the New York State Office of Indigent Legal Services, from the ILS appellate listserv.
Public Defender (Adam Koch, of counsel) represented the appellant. (County Ct, Wyoming Co)

**People v Jordan, 181 AD3d 1248 (4th Dept 3/13/2020)**

Any error in the admission of a police detective’s testimony identifying the defendant as the shooter appearing in security camera footage and drawing certain inferences from the footage was harmless. The jury is presumed to have followed the curative instruction given with respect to an unresponsive answer by the detective, and the final jury instructions alleviated much of the prejudice now complained of. The jury was instructed that they were the sole and exclusive judges as to facts, that police testimony should not automatically be accepted, and that the identity of the defendant was a disputed issue. (Supreme Ct, Erie Co)

**Matter of Latray v Hewitt, 181 AD3d 1175 (4th Dept 3/13/2020)**

The father’s contention that the court improperly denied his petition seeking to modify the existing custody arrangement and awarding him sole custody of the subject children is denied. The court’s determination that it is in the best interests of the children to maintain the existing order of joint custody is supported by a sound and substantial basis in the record. (Family Ct, Onondaga Co)

**People v Nicholas G., 181 AD3d 1273 (4th Dept 3/13/2020)**

**YL / GRANTED**

**ILLSAPP:** The defendant appealed from a County Court judgment, convicting him upon a plea of guilty of two counts of 1st degree sexual abuse. The Fourth Department reversed in the interest of justice and found him a youthful offender for several reasons: (1) the defendant was 17 at the time of the crimes and had no criminal record or history of violence or sex offending; (2) he had cognitive limitations, learning disabilities, and mental health issues; (3) the defendant accepted responsibility and expressed genuine remorse; and (4) the Probation Department and reviewing psychologist recommended YO treatment. The Wayne County Public Defender (Bridget Field, of counsel) represented the appellant. (County Ct, Wayne Co)

**People v Rosa, 181 AD3d 1211 (4th Dept 3/13/2020)**

The amended sentence imposing restitution is vacated. It exceeded the sentence promised as part of the defendant’s plea bargain; he objected to the imposition of restitution; he had carried out his obligations under the agreement, placing himself in a “no-return” position; and there was no significant added information that would bear on the appropriateness of the agreement. He was entitled to specific performance. (County Ct, Monroe Co)

**People v Shields, 181 AD3d 1193 (4th Dept 3/13/2020)**

**PLEA / COERCIVE**

**ILLSAPP:** The defendant appealed from a judgment of Oneida County Court, convicting him of 1st degree assault. The Fourth Department reversed and remitted. At an appearance prior to the plea proceeding, the court stated that, if the defendant decided to reject the plea offer and was convicted after trial, the maximum sentence on the top count and consecutive time on an unnamed additional count would be imposed. At that same appearance, the court said that defendant and her codefendants would also be federally prosecuted. Reviewing the matter in the interest of justice, the appellate court held that the plea court’s statements were not a description of the sentence range; they constituted impermissible coercion. (County Ct, Oneida Co)

**People v Scott, 181 AD3d 1220 (4th Dept 3/13/2020)**

**CPL 440.10 / IAC / HEARING**

**ILLSAPP:** The defendant appealed from an Erie County Supreme Court order, which summarily denied his CPL 440.10 motion to vacate a conviction for murder and other crimes. The Fourth Department ordered a hearing. The motion asserted that counsel was ineffective in failing to call an alibi witness who would have testified that he was with the defendant in North Carolina at the time of the murder. In response to the motion, the People did not contest that the defendant was entitled to a hearing. The failure to investigate or call exculpatory witnesses may amount to ineffective assistance. The absence of an affidavit from trial counsel was not fatal to the motion. One justice dissented. Michael Stachowski represented the appellant. (Supreme Ct, Erie Co)

**People v Simcoe, 181 AD3d 1153 (4th Dept 3/13/2020)**

The judge who denied the defendant’s CPL 440.10 motion to vacate his conviction was disqualified under Judiciary Law 14 from hearing that motion as the judge had been the District Attorney when the defendant was charged, even signing the indictment. The statutory disqualification deprived the court of jurisdiction, making the order on appeal void and requiring reversal and remittal for further proceedings before a different judge. (County Ct, Niagara Co)
**Fourth Department continued**

**People v Spencer, 183 AD3d 1257 (4th Dept 3/13/2020)**

**ASSAULT / FIREARM / DISMISSED**

**ILSAPP:** The defendant appealed from a County Court judgment, convicting him of 2nd degree murder, 1st degree assault (two counts), 1st degree criminal use of a firearm, and another crime. The Fourth Department dismissed the assault and firearm counts based on legally insufficient evidence. The defendant was charged as an accessory to the assaults. The People did not object when their theory of transferred intent was not reflected in the jury instruction on the assault charges. Appellate review of sufficiency was limited to the court’s instruction as given without objection; and there was insufficient evidence that the defendant knew that either victim was present or that he intended any harm to either. The indictment charged him with using a loaded firearm during the assault, yet the jury instructions did not specify assault as the underlying crime. The defendant did not object, but preservation was not required, since he had a non-waivable right to be tried only for crimes set forth in the indictment. The Monroe County Conflict Defender (Kathleen Reardon) represented the appellant. (County Ct, Monroe Co)

**Matter of Steeno v Szydlowski, 181 AD3d 1224 (4th Dept 3/13/2020)**

**EXTRAORDINARY CIRCUMSTANCES / NO FINDING**

**ILSAPP:** The mother appealed from an order of Erie County Family Court, which awarded the father and maternal grandmother joint custody of the subject child. The Fourth Department reserved decision and remitted. The challenged order granted parental access to the mother as the parties agreed upon or, absent an agreement, as Family Court determined after a hearing. Perhaps such provision meant that the order appealed from was not final and thus was not appealable as of right. See Family Ct Act 1112 § (a). So the mother’s notice of appeal was deemed an application for permission to appeal, and leave was granted. Family Court failed to set forth findings as to whether the grandmother established extraordinary circumstances. The absence of the required findings precluded appellate review, and the reviewing court declined to make its own findings. One justice dissented. William Broderick represented the mother. (Family Ct, Erie Co)

**People v Wallace, 181 AD3d 1214 (4th Dept 3/13/2020)**

**SEARCH AND SEIZURE - REQUEST FOR**

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**INFORMATION/COMMON LAW RIGHT TO INQUIRE**

**LASJRP:** The arresting officer was on patrol in what he described as a high-crime area known to be an “open air drug market,” where there had also been numerous burglaries and robberies. The officer had been a member of the police force for only a few months, and was under the supervision of a training officer. The officer observed defendant walking on a sidewalk shortly after midnight on a chilly night wearing a mask that covered the lower part of his face. The officer pulled his vehicle in front of defendant’s path, exited along with the training officer, approached defendant and asked him why he was wearing a mask. Defendant stated that he was walking his dog, which was true. The training officer asked defendant what was in a bag defendant was holding, and defendant replied that it was “weed.” The arresting officer frisked defendant and recovered a firearm.

The Fourth Department suppresses the firearm and defendant’s subsequent statements about the weapon. Assuming, arguendo, that the arresting officer had grounds for an approach to request information, the training officer’s inquiry about what was in the bag was an unlawful level two common law inquiry. Moreover, the frisk was not justified as a safety measure. (County Ct, Monroe Co)

**People v Young, 181 AD3d 1266 (4th Dept 3/13/2020)**

**SUPPRESSION / Upheld**

**ILSAPP:** The People appealed from an order of Chautauqua County Court, suppressing certain statements made by the defendant. The Fourth Department affirmed and dismissed the indictment. After NY police interviewed the defendant about two arsons, he fled to Pennsylvania and was arrested for another arson. At the PA arraignment, the defendant requested counsel. Days later NY police went to PA and observed while PA Troopers interrogated the unrepresented defendant about all offenses. Interrogation about the NY offenses violated the right to counsel. Once a defendant in custody on a particular matter requests counsel, custodial interrogation must cease as to any subject. The Legal Aid Bureau of Buffalo (Kaixi Xu, of counsel) represented the respondent. (County Ct, Chautauqua Co)

**Matter of Janette G., 181 AD3d 1308 (4th Dept 3/20/2020)**

**TERMINATION OF PAR[EN]TAL RIGHTS - DILIGENT EFFORTS/MENTAL HEALTH ISSUES**

**LASJRP:** The Fourth Department upholds an order terminating the mother’s parental rights, rejecting her contention that because of her possible mental health issues, petitioner was required to do more than merely
Fourth Department continued

provides her referrals for services and leave her to manage them on her own.

Petitioner did more than just provide referrals. Among other things, petitioner regularly checked the mother’s progress, repeatedly encouraged her to actively participate in the recommended services despite her unwillingness to do so and her refusal to accept the need for those services, and attempted to send the mother transportation stipends. (Family Ct, Erie Co)

People v Dogan, 181 AD3d 1343 (4th De pt 3/20/2020)
440 DENIAL AFFIRMED / DISSERT

ILSAPP: The defendant appealed from an Erie County Court order, which summarily denied his CPL 440.10 motion to vacate a judgment convicting him of 1st degree assault and 1st degree robbery (three counts). The Fourth Department affirmed. The defendant failed to alleged [sic] in his motion papers that, had he been made aware of a potentially viable affirmative defense concerning the operability of the firearm used in the robberies, he would have rejected a favorable plea deal and insisted on going to trial. Two justices dissented. Although the motion did not include the particular litany required by the majority, the defendant did state that counsel failed to advise him about the affirmative defense and that he entered the guilty plea based on counsel’s errors. That was sufficient to raise issues of fact regarding whether the plea was not knowing, voluntary, and intelligent, due to ineffective assistance. To insist that a pro se defendant use certain “magic words,” despite his clear intent, would defeat the purpose of the statute, the dissenters opined. (County Ct, Erie Co)

People v Maund, 181 AD3d 1331 (4th De pt 3/20/2020)
SORA / LEVEL THREE TO TWO

ILSAPP: The defendant appealed from an Erie County Supreme Court order, which determined that he was a level-three risk under SORA. The Fourth Department ordered a reduction to level two. The People failed to prove that the defendant committed a continuing course of sexual misconduct—risk factor 4. The sole evidence presented was the case summary prepared by the Board of Examiners of Sex Offenders. At the hearing, the defendant denied that he engaged in a continuing course of sexual misconduct. He had been charged with, and pleaded guilty to, one count of 3rd degree rape, stemming from a specific instance of intercourse on one specified day. Where the defendant contested the factual allegations, the case summary alone was insufficient to satisfy the People’s burden. Thus, Supreme Court erred in assessing 20 points for risk factor 4. The Legal Aid Bureau of Buffalo (Alan Williams, of counsel) represented the appellant. (Supreme Ct, Erie Co)

People v Rankin, 181 AD3d 1293 (4th De pt 3/20/2020)
SENTENCE REDUCED / YOUTH CITED

ILSAPP: The defendant appealed from a County Court judgment, convicting him of 2nd degree murder in the shooting death of a rival gang member. The Fourth Department reduced the sentence from an indeterminate term of 23 years to life to a term of 18 years to life. County Court did not err in admitting a recorded jailhouse telephone call by defendant. Since he was informed of the recording of calls, he had no reasonable expectation of privacy in the call. However, the sentence was unduly harsh and severe under the circumstances of the case, which included that the defendant was 18 years old at the time of the incident. The Monroe County Public Defender (James Hobbs, of counsel) represented the appellant. (County Ct, Monroe Co)

People v Sears, 181 AD3d 1290 (4th De pt 3/20/2020)
SWITCHING SIDES / RIGHT TO COUNSEL / REVERSED

ILSAPP: The defendant appealed from a judgment of Onondaga County Court, convicting him of 3rd degree burglary and related crimes. The Fourth Department reversed, vacated the plea, and remitted. At the time of the offenses, the defendant was participating in a drug treatment court program in connection with misdemeanor charges. He entered into an agreement whereby he agreed to plead guilty to the felony charges and to continue drug treatment court. Then the defendant failed to complete the program, he was sentenced on the felony charges, and the misdemeanor charges were dismissed. Reversal was required because the assigned attorney who represented the defendant on the misdemeanor charges in the preliminary stages later joined the District Attorney’s Office and was assigned to the drug treatment court while the defendant’s cases were pending there. A defendant’s right to counsel was violated when a defense attorney who actively participated in the preliminary stages of the defense became employed as an assistant district attorney by the office prosecuting the defendant’s ongoing case. Hiscock Legal Aid Society (Kristen McDermott, of counsel) represented the appellant. (County Ct, Onondaga Co)

CUSTODY/VISITATION - STANDING / EQUITABLE ESTOPPEL
Fourth Department continued

LASJRP: Petitioner and respondent mother were in a relationship and became engaged in 2009, but they never married because, at that time, same-sex marriage was not recognized under New York law. Their romantic relationship ended in early 2010, and petitioner moved out of their residence. That summer, the mother engaged in sexual relations with respondent father, resulting in her becoming pregnant with the subject child.

The Fourth Department, with one judge dissenting, holds that petitioner does not have standing under Domestic Relations Law § 70(a) to seek joint custody of, and visitation with, the child, which would result in a tri-custodial arrangement among respondents and petitioner.

In Matter of Brooke S.B. v. Elizabeth A.C.C. (28 N.Y.3d 1), the Court of Appeals held that “where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70.”

The Court rejects the contention made by petitioner and the attorney for the child that the facts of this case are a natural extension of the reasoning in Brooke S.B., and that although there was no pre-conception agreement, there was a post-conception agreement for petitioner to raise the child as a parent. DRL § 70(a) simply does not contemplate a court-ordered tri-custodial arrangement. DRL § 70(a) states that “either” parent may seek custody or visitation. The term “either” limits a child to two parents, and no more than two, at any given time.

The Court also notes that while an equitable estoppel argument is a logical extension of Brooke S.B., the doctrine must be considered within the confines of DRL § 70, which does not allow a tri-custodial arrangement.

In a concurring opinion, a judge asserts, “I respectfully disagree with the dissent’s supposition that either the United States Supreme Court or the New York Court of Appeals has held that a child has a ‘fundamental liberty interest . . . in preserving [his or] her family-like bonds.’ I further disagree that any such liberty interest possessed by the child may be lawfully elevated to such a height that it could outweigh a parent’s rights, like in the circumstances presented by this case.” (Family Ct, Monroe Co)

People v Wilke, 181 AD3d 1324 (4th Dept 3/20/2020)

SORA / DUE PROCESS VIOLATION

ILSAPP: The defendant appealed from a County Court order, which determined that he was a level-two risk pursuant to SORA. The Fourth Department reversed and remitted. County Court violated his right to due process by sua sponte assessing points on a theory not raised by the Board of Examiners or the People. No alleg-
**Fourth Department continued**

**ILSAPP:** The father and AFC appealed from an order of Onondaga County Family Court, which modified a prior order and granted the mother sole custody of the child. The Fourth Department affirmed. Although Family Court did not expressly find a change in circumstances, the appellate court independently reviewed the record and found a significant change. Acrimony made the prior joint custody arrangement unworkable; the father violated the prior order; and he sought to alienate the child from the mother. Custody to the mother served the child’s interests. The AFC’s endorsement of a result contrary to the child’s wishes did not constitute effective assistance of counsel. The 10-year-old wanted no contact with the mother, but abiding by such wishes would sever the mother-child relationship, to the child’s detriment. The AFC was justified in advocating a position contrary to the client’s wishes, based on her age and the parental alienation. (Family Ct, Onondaga Co)

**People v Harrington, 182 AD3d 1000 (4th Dept 4/24/2020)**

Allowing a police officer to testify that a bystander said the fleeing suspect ran into a certain house, which was admitted for the truth of the matter thereby confirming that someone in the house perpetrated the crime, was error. However, it was harmless where the defendant was identified by the accuser and another eyewitness in a showup near the time of the robbery, police who saw the fleeing suspect corroborated the identification, and “the evidence strongly supported an inference that defendant was the person who committed the crimes.” (County Ct, Livingston Co)

**People v Harris, 182 AD3d 992 (4th Dept 4/24/2020)**

After an earlier guilty plea was vacated in part, and the prosecution successfully sought to vacate the entire plea, the defendant entered a new plea, which he seeks to overturn as not having been entered knowingly voluntarily, and intelligently. The contention is rejected, as his failure to admit the elements of the crimes does not invalidate his plea where the allocution shows he understood the charges and made an intelligent decision to enter the plea. (County Ct, Livingston Co)

**Matter of James L.H., 182 AD3d 990 (4th Dept 4/24/2020)**

**ABUSE/NEGLECT - CORROBORATION/RECATNATION**

**People v Meyers, 182 AD3d 1037 (4th Dept 4/24/2020)**

As the prosecution concedes, “the record does not contain sufficient evidence to establish the amount of restitution imposed, nor does it establish the recipient of the restitution (see Penal Law §60.27 [1], [2], [4] [b]). We therefore modify the judgment by vacating that part of the sentence ordering restitution, and we remit the matter to County Court for a hearing to determine restitution in compliance with Penal Law § 60.27.” To the extent the issues were unpreserved, they are reached in the interest of justice. The defendant’s many challenges to her convictions of arson and murder are rejected. (County Ct, Steuben Co)

**People v Newman, 182 AD3d 1067 (4th Dept 4/24/2020)**

**CPL 330.30 / REENACTMENT**

ILSAPP: The defendant appealed from a County Court judgment, convicting him of menacing peace officers and 3rd degree criminal trespass. The Fourth Department reserved decision. The conviction arose from an incident in which uniformed sheriff’s deputies responded after receiving a 911 call stating that the defendant had thrown a brick through a neighbor’s garage door window and entered the garage. Two deputies approached the defendant’s front door, and one knocked and announced their presence. The defendant opened the door holding a shotgun in the “low ready position.” When ordered to drop the weapon, he complied. County Court erred in summarily denying a CPL 330.30 motion to set aside the verdict on the ground of misconduct during jury deliberations. The alleged misconduct involved a reenactment, thus requiring the court to inquire into whether the jury’s conduct was a conscious experiment directly material to a critical issue that may have colored the jurors’ views and prejudiced the defendant. A defense affidavit explained that counsel learned that, by using the bathroom door in the deliberation room to reenact the scene, the jurors had attempted to determine whether the defendant was aware that the persons knocking at his door were sheriff’s deputies. Clearly, the reenactment involved a critical
issue. A hearing was required. The Monroe County Public Defender (Helen Syme, of counsel) represented the appellant. (County Ct, Monroe Co)

**People v Swem, 182 AD3d 1050 (4th Dept 4/24/2020)**

**MURDER/ASSAULT - CIRCUMSTANTIAL EVIDENCE**

**LASJRP:** The Fourth Department finds reversible error in the court’s denial of defendant’s request for a circumstantial evidence instruction where the victim was stabbed five times at a crowded house party where there were multiple ongoing fights; the victim was involved in physical altercations with at least two other partygoers; the blade of the perpetrator’s knife must have been at least five inches long; and none of the witnesses who observed defendant fighting with the victim observed anything in defendant’s hand during the altercation and no blood was discovered in the room in which that altercation occurred.

All of the evidence required the jury to infer that defendant was the perpetrator who had the knife and used that knife to stab the victim. (County Ct, Jefferson Co)

**People v Timmons, 182 AD3d 1064 (4th Dept 4/24/2020)**

**RECONSTRUCTION / REVISED TRANSCRIPT**

**ILSAPP:** In his appeal from a Monroe County Court judgment, the defendant contended that the trial court failed to provide counsel with meaningful notice of the specific content of the jury note requesting read-backs of the testimony of five witnesses. The Fourth Department affirmed the judgment of conviction. Previously, the appellate court had reserved decision and remanded for a reconstruction hearing. During that hearing, the court reporter testified that, upon review of her stenographic notes and contemporaneous handwritten notes, she determined that she had inadvertently omitted from the transcript portions of the trial court’s reading of the jury note. A revised transcript reflected that the trial court had complied with its core responsibility to give counsel meaningful notice of the jury note. The hearing court credited the court reporter’s testimony, and the reviewing court found no basis to disturb the credibility determination. (County Ct, Monroe Co)

**People v Allen, 183 AD3d 1284 (4th Dept 5/1/2020)**

**DEFENSES - JUSTIFICATION**

**CONFESSIONS - CUSTODY**

**LASJRP:** The Fourth Department, with one judge dissenting, concludes that defendant was not in custody at the hospital when she made pre-Miranda statements where defendant was at the hospital for approximately eight hours, and, during that time, was examined by medical personnel, had her wound cleaned and wrapped, and received a CAT scan and stitches; medical staff circulated in and out of defendant’s room regularly, and, although the police were present most of the time, their questioning was not continuous; the questions by the police were investigatory in nature, and defendant remained fully cooperative and never refused to answer any questions; and defendant invited the questioning by stating, “I feel free to answer any questions, honestly.”

The dissenting judge notes, with respect to whether a reasonable person in defendant’s situation would have perceived that deadly force was necessary, that defendant had a black eye indicating an assault, bruises and scratches on her neck from the decedent’s attempts to choke her, and severe lacerations on her left hand from fumbling with a knife; that a neighbor testified that he heard “a thumping going on,” and thought he also heard someone say, “Don’t kill me”; defendant’s home was in obvious disarray, and there was blood throughout the house; that the decedent’s defensive wounds, sustained during a struggle with defendant, do not establish beyond a reasonable doubt that the decedent was not an aggressor or that defendant was not in fear for her own life, particularly given her injuries and her testimony that the two wrestled over the knife; and the People’s expert was unable to give a definitive opinion regarding the positions defendant and the decedent were in at the time of the stabbing. (County Ct, Livingston Co)
Fourth Department continued

**People v Bradley, 183 AD3d 1257 (4th Dept 5/1/2020)**

**DWI / AGAINST WEIGHT**

**ILSAPP:** The defendant appealed from a Supreme Court judgment, which convicted her upon a jury verdict of two counts of felony DWI. The Fourth Department reversed and dismissed the indictment, because the People failed to establish that the defendant operated the subject vehicle. At 6 a.m., a passing motorist observed the defendant outside her car, stuck in the brush off the roadway. The defendant asked the motorist not to call 911, but the motorist did anyway. When a State Police investigator responded to the scene, the defendant said that the car had been driven by Paul, a man she had met at a bar the night before, and that he fled on foot after crashing the vehicle. Field sobriety tests and a subsequent chemical test showed that the defendant was intoxicated. The defendant’s assertions about Paul were not inconsistent with the evidence. The request that the motorist not call 911 was evidence of consciousness of guilty [sic], which is a weak type of proof. The fact that the defendant did not provide a detailed description of Paul did not disprove her innocence. The Ontario County Public Defender (David Abbatoy, of counsel) represented the appellant. (Supreme Ct, Ontario Co)

**People v Brown, 183 AD3d 1235 (4th Dept 5/1/2020)**

**ASSAULT - SERIOUS PHYSICAL INJURY/PHYSICAL INJURY**

**LASJRP:** The Fourth Department finds legally insufficient evidence of serious physical injury, but sufficient evidence of physical injury, where the bystander victim suffered only a superficial bullet wound that did not penetrate her abdomen. (County Ct, Monroe Co)

**Matter of Driscoll v Mack, 183 AD3d 1229 (4th Dept 5/1/2020)**

**EXTRAORDINARY CIRC. / TEST CLARIFIED**

**ILSAPP:** The mother appealed from an order of Cayuga County Family Court, which awarded physical custody of the subject children to the maternal grandmother. The Fourth Department affirmed. The grandmother met her burden of establishing extraordinary circumstances. She then had the burden of establishing a change in circumstances since entry of the prior order. To the extent that prior decisions suggested that such analysis was not required in a situation like this, they should no longer be followed. (Family Ct, Cayuga Co)

**People v Harwood, 183 AD3d 1281 (4th Dept 5/1/2020)**

**SERIOUS DISFIGUREMENT / DISSENT**

**ILSAPP:** The People appealed from an order of Livingston County Court, which reduced counts one and two of the indictment from 1st degree assault to attempt assault. The Fourth Department reversed and reinstated the assault counts. Two justices dissented and would have affirmed, opining that the evidence before the grand jury was legally insufficient to demonstrate that the eight-year-old victim suffered serious disfigurement. Eight months after the crime, the victim testified before the grand jury. The grand jurors were not shown any contemporaneous photograph of her neck, and there was no indication that they had the opportunity to observe her exposed neck. The medical records from the ER visit did not indicate that the victim would have future scarring. (County Ct, Livingston Co)

**People v Johnson, 183 AD3d 1273 (4th Dept 5/1/2020)**

**SUPPRESSION / NO PROBABLE CAUSE**

**ILSAPP:** The defendant appealed from a judgment of Monroe County Supreme Court, which convicted him upon a plea of guilty of 3rd degree criminal possession of a controlled substance and 2nd degree CPW. The appeal brought up for review an order denying a motion to suppress. The Fourth Department reversed and dismissed the indictment. The trial court erred in refusing to suppress evidence obtained from the defendant’s vehicle. After observing the vehicle turning left without activating the blinker, a deputy initiated a traffic stop. The defendant pulled into a driveway and exited the vehicle, and the deputy told him to get back into the vehicle. The defendant made furtive movements toward the center console and then fled. After he was caught and arrested, the deputy opened the front passenger door, smelled marijuana, and found crack cocaine under the armrest of the vehicle. Upon obtaining a search warrant, the deputy seized a handgun from the glove compartment. The appellate court held that the deputy lacked probable cause to open the door and search the vehicle. There was no direct nexus between the traffic stop and the search, nor between the arrest and the search. The defendant made no statements to suggest that the vehicle contained contraband or evidence of a crime; the deputy did not observe contraband in plain view; and he did not find contraband on the defendant’s person. The defendant’s furtive movements did not suggest that criminal activity was afoot. Since the deputy did not smell the marijuana until after opening the door, all physical evidence obtained had to be suppressed. Danielle Wild represented the appellant. (Supreme Ct, Monroe Co)
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