NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

Volume XXXV Number 2 June–September 2020

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Court of Appeals Finds Traffic Stop Violated the State Constitution

The Court of Appeals found on Sept. 1, 2020, that a state trooper illegally stopped a vehicle based on nothing but the computer response to a check of the car's license plate number. The trooper lacked probable cause to believe a traffic violation had been committed, the court said. A summary of the decision in *People v Hinshaw* (2020 NY Slip Op 04816) appears at p. 18.

The computer response "began with a direction to 'CONFIRM RECORD WITH ORIGINATOR,'" *i.e.* a named police department, and added that while the vehicle had been reported as impounded, the notice "SHOULD NOT BE TREATED AS A STOLEN VEHICLE HIT — NO FURTHER ACTION SHOULD BE TAKEN BASED SOLELY UPON THIS IMPOUNDED RESPONSE." The trooper did not confirm the record with the originating police department, but instead stopped the car. The driver explained that the car had been stolen earlier. But the trooper had meanwhile "detected an odor of marijuana and observed a 'roach' in the center console," and eventually found a loaded gun under the seat. Because a motion to suppress should have been granted, the resulting convictions were overturned and the indictment dismissed.

The majority stated that under "the settled law of New York," automobile stops are lawful in three circumstances—when based on "'probable cause that a driver has committed a traffic violation'" or "a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime," or (not relevant here), properly designed uniform procedures, *i.e.* checkpoints.

Judge Stein concurred in the result but disagreed with the majority's decision to answer "the question of whether the trooper had—or was required to have—probable cause to suspect a traffic infraction," a "legal question that the parties have not asked us to resolve…." The trooper lacked even reasonable suspicion, Stein said.

Judge Garcia dissented, saying the majority's decision announces "a sea change in New York constitutional law" that was not necessary to resolution of the case and was not advocated for by parties to the case. Among cases relied on was *Kansas v Glover* (140 SCt 1183 [4/6/2020]), discussed in the last issue of the *REPORT* at p. 43.

No Mention of Racism

Except for a few references to curbing "potential discriminatory practices," the *Hinshaw* decision does not address or appear to respond to current, widespread calls to curb police actions fueled by systemic racism. But a case central to the *Hinshaw* discussion, *People v Robinson* (97 NY2d 341 [12/18/2001]), did talk about racial disparities in police stops. The *Robinson* court declined to extend the New York Constitution to prohibit "pretexual" police stops where probable cause for a stop existed. The *Robinson* majority relied on the reasoning of *Whren v United States* (517 US 806 [6/10/1996]), which is said to have recognized that the answer to such discriminatory police action "is the Equal Protection Clause of the Constitution." The dissent in *Robinson* noted "sadly" that "the traffic infraction probable cause standard has left the police with the ability to stop vehicles *at will* for illegitimate investigative purposes"; and that this "has a dramatically disproportionate impact on young African-American males …."

For over three decades, that impact has continued; complaints about racial discrimination in police stops—racial profiling—abound. For example, a recent article in the *Adirondack Daily Enterprise,* reporting on a late August videoconference discussion about Driving While Black, reported ongoing problems with State Police stopping Black drivers. And a blog post seven years ago by Jill Paperno of the Monroe County Public Defender's Office noted, citing *Robinson,* that

Contents

challenging racially-motivated police stops is difficult, as "New York law permits pretext stops and turns a blind eye to the racial disparity in how the stops are conducted."

The reasoning of the *Hinshaw* majority, concurrence, and dissent are likely to be parsed in cases and years to come. But such legal debate may not matter to many Black drivers, who may continue to be stopped on probable cause as to a traffic infraction when others are not stopped for the same offense.

Systemic Racism Revealed, Decried, and … Continued

The *Hinshaw* decision above appeared amid protests against police killing and brutal treatment of Black people, and against the systemic racism that such police actions reveal. Rallies, marches, written demands, and other actions continued months after the killing of George Floyd by Minneapolis police at the end of May sparked outrage across the nation and the world. The June 15th edition of News Picks from NYSDA Staff noted publication of a statement that Black Lives Matter to NYSDA along with news about statements and actions by other defenders. That and succeeding editions also set out resources for dealing with the effects of racism and civil unrest, for representing people arrested during protests, and for understanding the breadth and depth of racism in the legal system and its effects across many issues.

For example, the News Picks published on August 18th included this

> The Black Public Defender Association and the Center for Justice Research at Texas Southern University issued "Save Black Lives: A call for racially-responsive strategies and resources for the Black community during the COVID-19 pandemic," a comprehensive report (available here) that details why public health responses and strategies to address COVID-19 must be centered around race and the criminal legal system.

The same News Picks edition noted an op-ed entitled "The Sad Omission of Child Welfare from Mainstream Discussion on Race," written by four New York City family defenders for the August 6th edition of *The Imprint Youth and Family News*. They described bias and racial inequality in the legal system that is supposed to protect children, and then urged recognition that "[t]he so-called child welfare system suffers from the same structural racism as the police and destroys Black and brown lives through family separation and government surveillance. … It's time to see the similarities between these two systems and the need for change." Another article, written by the Shriver Center's Director of Community Justice and published on its website, makes the point that "For Black Lives to Matter, Black Families Must Matter. Black Mothers Must Matter." The article cites as examples statistics from Illinois and urges, "Let's envision and advocate for new approaches that center parents and their children and interrupt the larger web of conditions that permit the foster system to trap Black mothers, fathers, and children."

Media coverage of more instances of Black people being killed or injured by police, ongoing protests, and a variety of responses to these events continued as this issue of the *REPORT* went to press. The moment presents unparalleled opportunities to address systemic bias even as the threat of dangerous backlash grows and the COVID-19 pandemic exacerbates all problems. NYSDA has committed to working in a variety of ways to expose and end racism. To date, work has included inclusion of the issue in CLE sessions at its online Annual Conference at the end of July and increased information in News Picks and the *REPORT*; additional efforts are in development.

Policing Policies and Practices Receiving Scrutiny

The demands for an end to systemic racism discussed above focus sharply on law enforcement, which presents the most graphic examples of the need for change. New York officials and the public have responded in a number of ways. NYSDA strives to provide up-to-date information and advocacy, recognizing that, as noted in this August 18th News Picks headline, "Policing Issues Are Public Defense Issues."

Public Defense Backup Center REPORT
A PUBLICATION OF THE DEFENDER INSTITUTE
Volume XXXV Number 2 June–September 2020

Managing Editor Susan C. Bryant
Editor Mardi Crawford
Staff Contributors Stephanie Batcheller, Kimberly Bode, Natalie Brocklebank, and Rebecca Murphy

The REPORT is published throughout the year by the Public Defense Backup Center of the New York State Defenders Association, Inc., 194 Washington Avenue, Suite 500, Albany, NY 12210-2314; Phone 518-465-3524; Fax 518-465-3249; info@nysda.org; https://www.nysda.org.

Executive Order 203 Requires Review of Police Agencies

On June 12, 2020, Governor Cuomo issued Executive Order (EO) 203. The order requires "local governments that have police agencies to 'perform a comprehensive review of current police force deployments, strategies, policies, procedures, and practices, and develop a plan to improve' them." It continues, "The specific purposes for making changes are: 'addressing the particular needs of the communities served by such police agency,' promoting 'community engagement to foster trust, fairness, and legitimacy,' and addressing 'any racial bias and disproportionate policing of communities of color.'" Several issues regarding EO 203 were noted in the August 18th edition of News Picks, and a follow-up in the next edition added more information, including the Governor's issuance of a new Guidance concerning this mandatory collaborative review. Among key stakeholders who "must be involved" is "the local public defender."

The Backup Center is assisting Chief Defenders and other participants in several ways. Developments and information are published in News Picks as well as here in the *REPORT,* and a Police Reform and Reinvention Collaborative webpage has been added to www.nysda.org. The Backup Center is working with the New York Civil Liberties Union and the Chief Defenders Association of New York, The Bronx Defenders, and with individual Chief Defenders across the state, to help ensure that the required local review processes include the voices of public defense providers and the client community.

Law that Kept Police Disciplinary Records Secret is Repealed

Efforts to repeal Civil Rights Law 50-a, which for too long was used to keep law enforcement disciplinary records out of the public eye, finally succeeded. Once the repeal passed, in a package of bills proposed and passed during the protests over systemic racism, a flurry of activity ensued to ensure that such disciplinary records are disclosed, not destroyed or re-concealed. Developments are ongoing; more information can be found in News Picks and on NYSDA's Law Enforcement Disciplinary Records webpage. News there includes the filing of lawsuits by police unions in Buffalo and New York City to block release. And news stories are multiplying rapidly. Lawyers with particular 50-a issues are encouraged to call or email the Backup Center, where staff are working to collect and provide information as it emerges.

While New York State grapples with implementation of the 50-a repeal, other states are still working to pass laws to make records about police available. For example, in California, the *Sacramento Bee* reported that among bills stalled in the legislature there was one that would "require departments and agencies to turn over records related to officers accused of racist or discriminatory behavior or who have been repeatedly accused of violating rules to conduct searches or arrests." An Associated Press item in mid-June offered an overview of the problem nationally.

Other Police Reforms Passed in June

New York legislators responded to the massive protests to end systemic racism by passing several other "long-delayed measures to increase transparency and accountability in policing," as reported by *City & State* on June 10th. The measures, listed in the June 15th News Picks, included "establishment of the Office of Special Investigation within the Attorney General's Office (L 2020, ch 95, effective Apr. 1, 2021); the "Eric Garner anti-chokehold act," establishing a new crime of aggravated strangulation (Penal Law 121.13-a) (L 2020, ch 94, effective immediately); and an amendment to Civil Rights Law 79-n(2) to permit a civil action by a member of a protected class against a person who "summons a police officer or peace officer without reason to suspect a violation of the penal law, any other criminal conduct, or an imminent threat to a person or property" (L 2020, ch 93, effective immediately).

Also enacted was the New Yorker's right to monitor act, L 2020, ch 100, which reaffirmed individuals' right to make and keep recordings of law enforcement activity. Such recordings, most often made with cell phones, contribute greatly to the growing public awareness of problems in policing. As *The New Yorker* noted in a July 27, 2020, article, without the video of a police encounter six years earlier, the name "Eric Garner" would not be known. And of course it was the recording of a police officer kneeling on George Floyd's neck that sparked the protests that filled the summer of 2020. As a piece posted on the Brookings Institution's website asked on June 5th, "Where would racial progress in policing be without camera phones?"

Police Body Camera Footage Has Impact Too—But it May Take a FOIL Request

Civilian recordings are not the only source of on-scene information central to reforms, and sometimes to clients' cases. Rochester police responded to a call in March about a man visibly in crisis, running naked in the street shortly after being released from a brief observational stay at a local hospital. As a result of restraint tactics used by the police, the man, Daniel Prude, became unresponsive and was taken by ambulance to another hospital, where he later died after being taken off life support. In early September, video footage from a police body camera was released showing police putting a "spit hood" on Prude and holding him face down for two minutes. This ignited a new round of protests. USNews.com was among the media outlets covering the story.

Prude's family, who released the footage, received it only after submitting a Freedom of Information Law (FOIL) request. That footage had been reviewed internally earlier, and an official report concluded that the officers' actions "were appropriate and in accordance with their training," according to an essay published in the *Democrat and Chronicle*. The author, New York City attorney and Rochester native Elliot Shields, called for holding the officers accountable. Shields, a civil rights lawyer with Roth & Roth, is an attorney for the Prude family in this matter, according to a *Democrat and Chronicle* timeline about the situation. Lawyers whose work brings them into contact with the injustices occurring in the current system—whether in a particular case or in repeated observations over time—contribute to the important dialog now going on. NYSDA stands with the lawyers who are doing so, including the Chief Defenders Association of New York, which issued a statement condemning the killing of Daniel Prude and continuing advocacy for "Actual Justice in our Justice System."

Using, or trying to use, FOIL to obtain police and other government records is hardly a new practice. An attendee at NYSDA's 11th Annual Metropolitan Trainer in 1997 said, about a training on collateral litigation, "the potential application or use of FOIL in criminal cases provides a new and potentially effective tool." Another said that the FOIL letters provided then "were especially helpful." The presenter at that training was a well-known lawyer from The Legal Aid Society (LAS), the late Michele Maxian. In the intervening years, LAS and NYSDA, along with others, have continued efforts to use FOIL to improve justice and to improve FOIL itself. For example, the decision in *Matter of NY State Defenders Assn. v NY State Police* (87 AD3d 193 [3d Dept 2011]), a suit brought on NYSDA's behalf by the New York Civil Liberties Union, found that belated compliance with a FOIL request on a "voluntary basis in the absence of a consent decree or judgment" was not a factor in deciding whether a petitioner had substantially prevailed so as to qualify for an award of attorney fees. Today, lawyers can still turn to NYSDA for information on FOIL. A webpage devoted to Law Enforcement FOIL has been added to the website, and attorneys at the Backup Center await inquiries from public defense lawyers who have particular questions.

State Police Present Issues Too

The State Police are not included in Executive Order 203, above, but that hardly means that scrutiny and reform is not needed. It was a trooper whose unconstitutional actions led to the reversal in *Hinshaw* and to the recent dismissal by Albany County Supreme Court of a 2017 drug conviction. The latter, discussed in a Sept. 11, 2020, *Times Union* (TU) article, was based on the failure of prosecutors to disclose the disciplinary record of a state trooper whose testimony had been key; the decorated trooper, who conducted undercover assignments, had been censured three times for errors in documentation and record-keeping. A defense attorney's 2020 motion seeking disclosure under new discovery provisions revealed the trooper's history.

IG Report on Drug Unit Released

In addition to questions about *disclosure* of internal discipline, questions about the quality of discipline have also arisen. A TU editorial in early August referred to an internal State Police investigation into an elite narcotics squad, launched after the TU raised questions, that found several officers "had falsified work records, lied about overtime, ignored department surveillance rules and improperly used publicly owned vehicles." Many of those officers were allowed to "quickly retire in good standing," the TU noted.

The unit in question is the State Police Drug Enforcement Task Force (DETF), which is comprised of not only the State Police but also the New York Police Department and the U.S. Drug Enforcement Administration (DEA). A report on the investigation of the DETF by the Office of the State Inspector General (IG) was released in August 2020. Among many problems described, the IG report said the DEA had refused to provide documents to the State Police to facilitate review of DETF members' activities. And the State Police Professional Standards Bureau conducted an "audit" rather than an "investigation." Had a comprehensive investigation been done, the ultimate dispositions may have been different, according to the IG report—as it was, the "discipline imposed by the State Police in response to its review was extremely lenient and lacked transparency."

The surveillance issues that were found related to DETF members self-deploying to conduct surveillance closer to their homes to ease their commutes, without the knowledge of supervisors from the DEA and, apparently, when no known active investigations were ongoing in such county or when investigations were being handled by other DETF groups. The IG did not disclose the names of the DETF members involved in apparently improper surveillance activities "as to do so could expose surveillance locations and/or present a security risk for the members."

But the names of individuals who were disciplined overall are given. The report also notes that significant changes were made to DETF protocols and procedures, "to strengthen supervision and increase oversight," most being implemented in August 2018, but not disseminated until the next year. Even so, the IG report recommended additional changes, detailed at the end of the report. Also noted there are the repeal of Civil Rights Law 50-a and creation of the Law Enforcement Misconduct Investigative Office within the Department of Law.

The conclusions in this report may provide defense counsel with ammunition for countering claims that individuals' records are "minimal." It is one explanation of, in the words of an August headline in a piece from *The Gothamist* about another agency, "Why The Majority Of NYPD Misconduct Complaints End Up 'Unsubstantiated.'"

Remembering other Trooper Scandals

The DETF revelations may be the latest, but hardly the only, scandal involving the State Police. A 2018 "step back in time" item in the Oneonta *Daily Star* highlighted the 1993 evidence-tampering scandal involving Troop C, which led to "statewide changes in procedures for gathering evidence at crime scenes." The conviction of troopers who admitted faking fingerprints was front-page news in the July 1993 issue of the *REPORT.* Two years later, the May 1995 issue reported an additional conviction and continuing investigation.

In 2014, a New York CBS station noted that "Unanswered questions linger in the scandal of missing evidence involving illicit and prescription drugs at a New York State Police barracks in Hawthorne," NY. That scandal involved missing drug evidence: "State police opened an intense two-year internal investigation but the drugs were never recovered," the item said. The TU had covered the missing evidence issue in 2011, saying it had "triggered an intensive two-year internal investigation that began in the summer of 2011 and prompted the State Police to rescind arrest warrants and, in a smattering of cases, to privately urge the Westchester County district attorney's office to vacate prosecutions."

While such historical events may not link directly to issues in a current case, they do provide background information to buttress the need to dig deeply into records that may seem innocuous at first glance.

Journalists Urged to Forego Phrase "Officer-Involved Shooting"

A piece posted by the *Columbia Journalism Review* (CJR) on August 7th urges journalists to abandon ambiguous phrases, especially "officer-involved shooting," as part of efforts to reckon "with the consequences of a lack of diversity on coverage of racism and police violence" and "tell stories straight, at the sentence level." Another item, posted by CJR on August 24th, calls for reporting about crime in a way that reflects the current "better understanding of trauma, entrenched poverty, housing instability, and underfunded schools and how they shape every aspect of our criminal justice system." These writings offer insights that defenders may find useful in their own use of language and approaches to clients as well as when dealing with members of the media.

DNA Issues Continue

While current science headlines tend to center on the novel coronavirus, public defense lawyers still encounter other science issues, including questions regarding DNA. Some of those issues relate to science, others are entwined with other issues of the day, like police practices.

NYC's Collection of DNA from Juveniles Contested

A 15-year-old boy arrested in New York City on weapons charges was offered a bottle of water while detained at the precinct. He accepted the bottle and drank from it; the police then recovered his DNA from the bottle to compare to the weapon found in the vehicle the boy had been in. In a negotiated disposition, he was adjudicated a juvenile delinquent. Before entry of the dispositional order, defense counsel asked the court to order the Office of the Chief Medical Examiner (OCME) to destroy and expunge any DNA sample taken during the client's pre-arraignment detention; alternatively, counsel asked that OCME be prohibited from uploading the sample into the New York City Local DNA databank or making any added comparisons outside this case. The court ruled that there is no provision of the Family Court Act giving the court jurisdiction to provide the requested relief. *Matter of Logan C.*, 2020 NY Slip Op 32681[U] (Family Court, Kings County, 8/19/2020). An article posted on *The City* reported that a new law is being proposed to correct an existing loophole in the state statute governing the State's DNA databank, which does not mention Family Court proceedings.

Days after *Logan C.* was issued, a different court found in *Matter of John R.* (2020 NY Slip Op 20212 [Family Court, New York County 8/26/2020]), "that the family court has jurisdiction to order the expungement of a respondent's DNA profile from the OCME database." John R., 14 years old, had successfully completed a supervised adjournment in contemplation of dismissal (ACD) of misdemeanors. The court then exercised its discretion to order expungement "where: 1) the police gave respondent a can of soda at the precinct and respondent's genetic material was surreptitiously taken from the soda can; and 2) respondent successfully completed a[n ACD], resulting in the dismissal and sealing of his delinquency matter."

The City article about *Logan C.* said that the OCME's "ballooning" database "includes over 80,000 samples and 32,000 suspect profiles" as revealed by New York Police Department testimony before the City Council. The *New York Law Journal* reported that The Legal Aid Society, which represented Logan C., "has sharply criticized the existence of New York City's municipal DNA index, which it describes as 'unregulated,' and has called for City Council to pass a bill abolishing it," the article noted. An LAS spokesperson noted that: "This ruling, if left

unchecked by legislators, will only increase the NYPD's appetite for genetic stop-and-frisk, which disproportionately impacts young Black and Latinx New Yorkers."

Information posted on LAS's website about its 2020 New York State Black Youth Justice Agenda notes the inclusion of a provision that would "end unauthorized DNA data indexes (S6009/A7818) …."

Other Collection Questions Raised

Questions about surreptitious collection of DNA samples by the NYPD are not new. In reporting about expanded use of administrative subpoenas, a story in *The Appeal* harked back to earlier reporting about "the use of DNA dragnets (mass collection of DNA samples by the NYPD) such as the swabs collected from 360 of Black and Latinx men in Queens during" a murder investigation.

More recently, the *Daily Eagle* in Queens reported that an increase in New York City's huge DNA database led the City Council's Public Safety Chair to ask if police have been collecting samples from protesters arrested during Black Lives Matter demonstrations. The article noted that this is just the latest in a series of ongoing problems with over-reaching in DNA collection: "Under pressure from civil liberties advocates and several elected officials, the NYPD announced on February 20 that they would audit the database and instruct the Office of the Chief Medical Examiner to remove samples obtained from people who were not charged with a crime after two years."

Examining and Fulfilling Legal System Roles During the COVID-19 Pandemic

With the ongoing public health crisis impacting every aspect of the legal system, the role of every actor has been affected to some degree. Public defenders stepped forward seeking the release of as many people as possible from jails and prisons where full prevention measures are impossible; they also confront continuing ethical and constitutional questions. Some prosecutors and law enforcement entities curbed the charging and prosecution of low-level offenses; others have sought to curb constitutional and other protections. Courts worked to maintain essential functions while limiting possible COVID-19 exposure of everyone involved in the legal system, and face ongoing challenges as in-person proceedings slowly reopen. The unprecedented situation, which calls for both creativity and caution, is raising many issues about the roles of all involved.

Judicial Neutrality Addressed

The requirement that judges act as neutral arbitors has been addressed in a variety of contexts this year. Among other things, it should be clear that the COVID-19 pandemic has not ended ethical requirements for judges to maintain, and promote public confidence in, the judiciary's integrity and impartiality.

Judges Must Not Collaborate Just with Prosecutors. The New York State Advisory Committee on Judicial Ethics, in Opinion 20-99, responded in the negative to an inquiry as to whether a judge "may 'encourage[]' judges under his/her supervision 'to collaborate with prosecutors to develop procedures to process pleas on paper and to establish a mail-in plea bargaining process for defendants charged with VTL infractions'" during the current health crisis. The Committee added that "[t]he court may nonetheless invite defense bar representatives and the appropriate prosecutorial office to discuss procedures for handling mail-in pleas on traffic infractions."

Nor Should Judges Implement DA's Procedure for Facilitating Pleas. The Committee also said, in Opinion 20-97, that judges may not distribute a "District Attorney's 'informational document' describing how a defendant motorist may seek a negotiated plea to a reduced charge without any personal appearances by the DA's office or the defendant." While judges may, with limitations, "develop and distribute documents to inform defendants charged with … minor offenses of *all* their options," judicial ethics standards should not be attenuated even during a crisis "absent superseding authority from a governmental entity with authority to promulgate such attenuation."

Judges Should not Take on Prosecution Roles. In another matter, unrelated to COVID-19, the Committee noted that a "judge may not sua sponte request that the police or prosecutor file a long form information in a matter that was initially prosecuted through a simplified traffic information, solely so the judge can sua sponte issue a criminal summons or an arrest warrant for a defendant who failed to appear." Such action, Opinion 20-69 says, "would create an appearance of partiality and suggest that the judge is predisposed toward the defendant's guilt …."

In Non-COVID Cases, Appellate Division Panels Address Courts' Neutral Role. Judicial neutrality must not be compromised outside of COVID-19 situations, either. In *State of NY v Richard F.* (180 AD3d 1339 [4th Dept 2/7/2020]), the Fourth Department expressed "deep concern with the trial judge's abandonment of her neutral judicial role in this case by calling a witness, aggressively cross-examining that witness, and repeatedly overruling respondent's objections to such questions." The appellate court reversed an order, made pursuant to Mental Hygiene Law article 10, that found the respondent to be a dangerous sex offender requiring confinement. Such finding lacked any foundation in the record where both the State's and the respondent's experts opined that the 76-year-old respondent was not unable to control his sexual misconduct and there was no reason to disregard the experts. A summary of the decision appears at p. 51.

In *People v Greenspan* (2020 NY Slip Op 04408 [2nd Dept 8/5/2020]), the Second Department reversed a Suffolk County murder conviction because the County Court entered into a plea agreement with a codefendant. The deal went beyond the prosecution's promise to recommend a specific prison sentence, with the court promising a sentence of probation in exchange for the codefendant's testimony against the defendant. The Appellate Division reached the unpreserved issue in the interest of justice. A summary of the opinion will appear in a future issue of the *REPORT.*

The Crisis Should Steer New York Toward a Better Court System

In a Perspectives column on Law360.com, Joseph Frumin, a Legal Aid Society attorney, discusses the possibility of utilizing the recent adjustments in handling criminal court appearances into the future. Noting the "routine, bureaucratic processes that impact communities in insidious ways," and the "[m]ultiple, inefficient court proceedings [that] take mostly poor and working-class people of color out of their communities, jobs and families," Frumin calls for limiting in-person proceedings. Except for a few exceptions where an accused person's physical presence would be needed—and any time the accused person wishes to be present—Frumin suggests, remote appearances should continue "up until and only if an actual hearing and trial date is scheduled." He concludes that "if we do right going forward we will be in a fine position to handle the caseload and would come out of this with a significantly better system than we ever had before."

NAPD Statement Addresses Remote Proceedings

The National Association for Public Defense (NAPD) has also addressed future uses of remote technology. The NAPD Statement on the Issues With the Use of Virtual Court Technology acknowledges the rapidly expanding court use of electronic communication during the COVID-19 crisis and discusses the continued use of such communication after the COVID-19 shutdown. The first paragraph of the 12-page statement states, "New technology should be used only when it either enhances access to justice or avoids a shutdown of access that clearly would be worse than the temporary limitations posed by the technology, or where a client exercises their right to proceed." NAPD's statement was reported in the July 1st edition of News Picks from NYSDA Staff.

Earlier, in an item about the challenges of remote lawyering published in the Jan.-May, 2020, issue of the *REPORT,* NYSDA noted its long-standing caution about the disadvantages of dispensing with a client's physical presence in court. The 2012 Statement in Opposition to Audio-Visual Arraignments predates many improvements in virtual technology and focuses on initial, critical-stage proceedings. NYSDA continues to oppose any effort to dispense with the requirement that a defendant must consent to a video appearance. As reflections on the emergency measures instituted during the pandemic continue, along with evaluations of the safety and efficacy of reopening in-person proceedings as discussed below, NYSDA will be assisting attorneys with immediate questions and analyzing potential ways forward that will best serve clients.

Reopening Criminal and Family Law Courthouses to In-person Appearances Fraught with Difficulties

Competing interests and varying points of view among legal system actors have led to frustration, disagreements, and even lawsuits in the wake of plans for restarting in-court appearances, as noted in the July 16th edition of News Picks. Defender organizations in New York City filed a federal suit against the Office of Court Administration on July 14th, alleging violations of due process, the Americans with Disabilities Act, and the Rehabilitation Act of 1973. The Supreme Court Officers Association expressed concerns about their role in conducting courthouse temperature checks. On August 5th, the Commission to Reimagine the Future of New York's Courts issued its first report, which outlined some goals and a checklist for resumption of in-person grand juries, jury trials, and related proceedings. That report and continuing concerns were noted in the August 18th edition of News Picks; more information was provided in the August 31st edition.

NYSDA provides current information on its Coronavirus 2020 Court Re-Opening Plans webpage.

New York Bar Foundation Grant Awarded to NYSDA to Assist Family Defenders

NYSDA gratefully announced in June its receipt of a grant from The New York Bar Foundation (TNYBF) and the Family Law Section Fund. The funding will support NYSDA's work to assist family defenders in providing high quality representation by arming them with necessary skills and information through its continuing legal education programs. NYSDA thanks TNYBF for their continued support of the Backup Center's work supporting the family defense community.

30.30 Manual with 2020 Updates Offered at Annual Conference

A Summer 2020 edition of the Criminal Procedure Law Section 30.30 (1) Manual by Drew DuBrin of the Monroe County Public Defender's Office (MCPDO) was included in materials offered at NYSDA's 53rd Annual Conference, held online the last week of July.

The new edition of the 30.30 manual includes the 2020 amendments that were part of legislation intended to roll back some of the discovery reforms of 2019. NYSDA thanks Drew and MCPDO for this and many other contributions to the provision of quality public defense representation.

Virtual CLEs Well Received

After moving quickly from in-person to remote continuing legal education (CLE) sessions after COVID-19 struck—a dozen webinars were held in April and May—NYSDA continued presenting a wide range of training online. June saw virtual trainings on Family Court Discovery in Article 10 Cases, Defending Against Family Court Violations, and Discovery With a Twist, and July brought the 4th Annual DWI Masterclass as well as the week-long Annual Conference. As noted in the Aug. 18, 2020, edition of News Picks from NYSDA Staff, over 400 people registered for the latter. Comments were positive, including this one on July 27th: "Thanks for a great day of programming. It is not easy teaching over Zoom. We all truly appreciate it."

In August, NYSDA's Veterans Defense Program offered a well-received set of webinars on mitigation, getting complete military histories from client interviews, collateral consequences of civilian justice for military clients, and "PTSD, TBI and Suicide Within the Veteran Community." And in September, NYSDA presented an overview of the intersection of immigration, criminal, and family law.

NYSDA's training staff is now working to set future events. For those, as well as events presented by other entities, visit NYSDA's NY Statewide Public Defense Training Calendar online.

Parole Policies Affect Clients and Institutions

To state the obvious, parole policies and practices greatly affect many public defense clients' lives and the criminal legal system itself. NYSDA has long recognized that, and works to improve parole in various ways, from advocating for fairer practices by the Parole Board to assisting lawyers with questions about parole. Recently, NYSDA presented a webinar on "Practicing Parole: From Release to Revocation: What every criminal defense and parole attorney needs to know." Over 200 attorneys received CLE credit. And we continue to support the Less is More: Community Supervision Revocation Reform Act, which has yet to pass in the State Legislature.

For the Latest News, Check News Picks

In this era of dramatic developments in the criminal and family law systems, turn to NYSDA's electronic newsletter, News Picks from NYSDA Staff, for updates on issues affecting public defense clients and defenders.

Current parole news includes the release of a report, "Revoked: How Probation and Parole Feed Mass Incarceration in the United States"; an insider's look at results of the too-common practice of repeatedly denying parole to people with long indeterminate sentences; and ongoing media controversies over the release of individuals.

The "Revoked" report is a publication by Human Rights Watch and the American Civil Liberties Union. The *Columbia News* website noted that the report used research by Columbia University's Justice Lab and other scholars as well as original research.

The "insiders" look at parole, published in the CUNY Law Review, is an article by Richard Rivera. Incarcerated in New York prisons for 38 years, Rivera was a friend of John MacKenzie, whose death by suicide following a 10th parole denial was noted in the Aug. 31, 2016, edition of News Picks. Rivera states: "As repetitive events, serial denials [of parole] take the form of cyclical traumatizing events, trapping the individual in an endless chain of depression, despair, anger, frustration, rationalization, acceptance, hope, and anger, each episode contributing to the deterioration of the individual's mental stability, wearing away his resiliency, eroding his confidence, devaluing his humanity, and threatening to collapse or fragment his inner psychological structures with each successive 'hit.'" The title of his article describes how this can lead to suicide: "Traumatized to Death: The Cumulative Effect of Serial Parole Denials." Rivera concludes with a call for a new parole scheme.

As for the release—or denial of release—of people eligible for parole, controversies have arisen both in the context of COVID-19 and the long-standing efforts of police unions and others to turn indeterminate sentences into sentences of death-in-prison.

Regarding parole and COVID-19, the *New York Times* published "Parole in the Time of the Coronavirus" on Aug. 2, 2020, which highlighted the irrationality of policies regarding low-level/technical violations of parole conditions, exacerbated by the dangers of incarcerating

high numbers of people during the pandemic. Calls to reduce the incarceration of people for technical parole violations predate COVID-19, of course. For example, the New York State Bar Association's Task Force on the Parole System issued a report in November 2019 that called for substantially reducing incarceration for technical violations. Such reduction is one of the tenets of the Less is More bill referred to above.

The most recent example of police union attacks on grants of parole to individuals followed an announcement that Jalil Muntaqim, convicted of killing two police officers nearly 50 years ago, had been granted parole. As noted in a photo caption on ChiefLeader.com on September 28th, the President of the NYC Police Benevolent Association "railed against the decision" along with the widow of one of the officers. National Public Radio noted that the release announcement of September 11th "went unnoticed until the New York City police union issued a statement on Sept. 23 blasting the parole board, which in recent years has released more formerly violent offenders from prison, including men who attacked or killed police." The news report discussed the continuing incarceration of individuals convicted as Black revolutionaries in the turbulent era of the sixties and early seventies.

Federal Prosecutors "Castigated" for Burying Documents in Discovery Disclosures

As noted in the September 30th edition of News Picks, federal prosecutors were "castigated" by Southern District of New York Judge Alison J. Nathan for having "buried" a previously undisclosed document. The opinion in *United States v Nejad*, 18-cr-224 (AJN) (9/16/2020), which was reported by *Politico* as well as in the *New York Law Journal*, expressed hope that no sanctions would be necessary, but added that "if Government lawyers acted in bad faith by knowingly withholding exculpatory material from the defense or intentionally made a misleading statement to the Court, then some sanction or referral to the Grievance Committee of the Southern District of New York would be appropriate."

The conclusion of the opinion quotes *Berger v United States* (295 US 78, 88 [1935]) as to the singular role federal prosecutors play in our system of justice.

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done …. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The cost of government misconduct, Judge Nathan went on, is high.

> With each misstep, the public faith in the criminal-justice system further erodes. With each document wrongfully withheld, an innocent person faces the chance of wrongful conviction. And with each unforced Government error, the likelihood grows that a reviewing court will be forced to reverse a conviction or even dismiss an indictment, resulting in wasted resources, delayed justice, and individuals guilty of crimes potentially going unpunished. The Court thus issues this Opinion with hopes that in future prosecutions, the United States Attorney for the Southern District of New York will use only "legitimate means to bring about a just" result. Id. Nothing less is expected of the revered Office of the United States Attorney for the Southern District of New York.

Federal Children's Bureau Guidance Urges Caution in TPRs Due to COVID-19

Since the beginning of the pandemic, there has been increasing concern from parents and advocates alike about the effect COVID-19 has had on families wrapped up in the child welfare system, especially those with children in foster care. From the start of the shutdown, NYSDA has received numerous reports from family defenders about their clients' court ordered access being summarily and arbitrarily limited by local Child Protective Services agencies, with little guidance from the "top." Now that the situation seems to have somewhat stabilized, and parents are for the most part seeing their children as ordered by the court, defender concern turns to permanent deprivation of parental rights. Are parents whose children have been out of their custody for the statutory period going to be faced with a Termination of Parental Rights (TPR) petition because they were unable to complete court-ordered programs, due solely to service limitations that were out of their control? Over the summer, defenders and their clients were offered some glimmer of hope from the United States Children's Bureau (USCB).

Typically, a child welfare agency is required to file a petition for termination of parental rights if the subject child has been in foster care for 15 of the most recent 22 months. However, in light of the pandemic and the challenges that families faced as a result, USCB Associate Commissioner Jerry Milner issued a letter of guidance on June 23, 2020, urging child welfare agencies to use discretion before rushing into filing TPRs.

Milner reminded agencies that "statutory exceptions exist to ensure that an agency only files a petition to terminate parental rights when a parent has had access to the necessary services that can lead to a meaningful opportunity to reunify with his or her children." A TPR petition is not required if "the agency is required to make reasonable efforts to reunify the family, but has not provided the family the services necessary for the safe return of the child" or when "the agency has documented a compelling reason that filing a TPR petition is not in the child's best interests." Milner further stated: "In light of the devastating impact that the COVID-19 pandemic has had on child welfare systems and applicable exceptions to the 15/22 requirement, I cannot emphasize how strongly I urge agencies to carefully consider whether it is appropriate to terminate a parent's rights pursuant to the 15/22 requirement."

In a letter dated Sept. 16, 2020, Office of Children and Family Services Commissioner Sheila Poole offered local Department of Social Services (DSS) offices some new and additional guidance on how they should handle TPR cases. In the letter, Commissioner Poole urges that local DSS offices "continue to apply a very careful and critical lens when determining whether or not to proceed with filing a TPR petition." In referencing the Milner letter she asks the agencies to consider two questions before filing a TPR petition: "was a parent's access to services that were necessary to work towards reunification … compromised as a result of the pandemic" and "were there other challenges … that impeded a parent's ability to progress in their goals related to reunification." Although it remains unclear whether local agencies will heed this guidance, these remain useful arguments in defending a client faced with a TPR.

Bail Reform, COVID-19, Money, and More Affect Jail Policies and Realities

Defense attorneys, their clients, and communities across the state are contending with changing jail policies and realities. Concerns include the number of people held in pretrial detention and the length of their stay; their health; and the conditions they are held in, including their ability to interact with their lawyers and loved ones. Intertwined factors affecting some or all of those issues include the bail law reforms of 2019 and their partial rollback in 2020; the ongoing novel coronavirus pandemic; long-standing structural issues of different types including deterioration of physical facilities and systemic racism; and budgetary priorities.

Rise in Pretrial Detentions Noted After Dramatic Drop

The *Times Union* reported on Sept. 21, 2020, that the number of people held in New York jails while awaiting trial has risen in recent months. Citing information posted online by the NYS Division of Criminal Justice Services (DCJS), the article noted that the numbers increased from a low of 7,242 people in April to 8,264 in August, with most of the increase occurring outside New York City. The primary explanation suggested for the growth was the 2020 changes to the 2019 bail reform laws, though another suggestion is that a drop off in the number of arrests at the beginning of the COVID-19 lockdown (as noted in a *Daily News* item on September 18th) has now ended. The latter possibility is noted in an American Association for the Advancement of Science (AAAS) article on Sept. 17, 2020.

That AAAS piece notes that overall, jail populations remain lower this year nationwide. Decarceration efforts that had moved slowly if at all "suddenly made speedy progress" with the advent of the pandemic, one Ohio official is quoted as saying. He added: "'Policy recommendations that we were unable to get traction on for 2 years—we were able to get them done in 3 weeks ….'" The dramatic reduction created a "major experiment in public health and criminal justice," the article observes, with some researchers noting a decline in COVID-19 infection rates. Other researchers "aim to document the effects of the speedy decarceration on public safety," the article says. It goes on to say that so far there is no evidence that releases due to the pandemic increased crime rates.

The Legal Aid Society's Attorney-in-Charge of the Criminal Defense Practice, Tina Luango, pointed out such lack of evidence in an August 9th op-ed in the *Daily News*. The piece is posted on the Society's website, which notes Luongo decried statements by NYC Mayor Bill de Blasio with regard to an increase in crime: "The embattled Mayor, struggling to respond to a host of cris[e]s, has sought to blame the elevated crime rates on a revolving door of shifting excuses, including bail reform, COVID-19 prisoner releases, and court closure, which have all been debunked."

As for whether the recent uptick in pretrial detention was caused by the changes to last year's bail reforms, differing opinions were offered in the *Times Union* article. In any event, those changes, as noted in the last issue of the *REPORT*, are among the topics on which NYSDA has been providing information to public defenders. It was a topic at the virtual Annual Conference in late July, and information is posted on NYSDA's website at https://www.nysda.org/page/Bail_Reform_Implementation.

Public Defenders Advocate for Clients

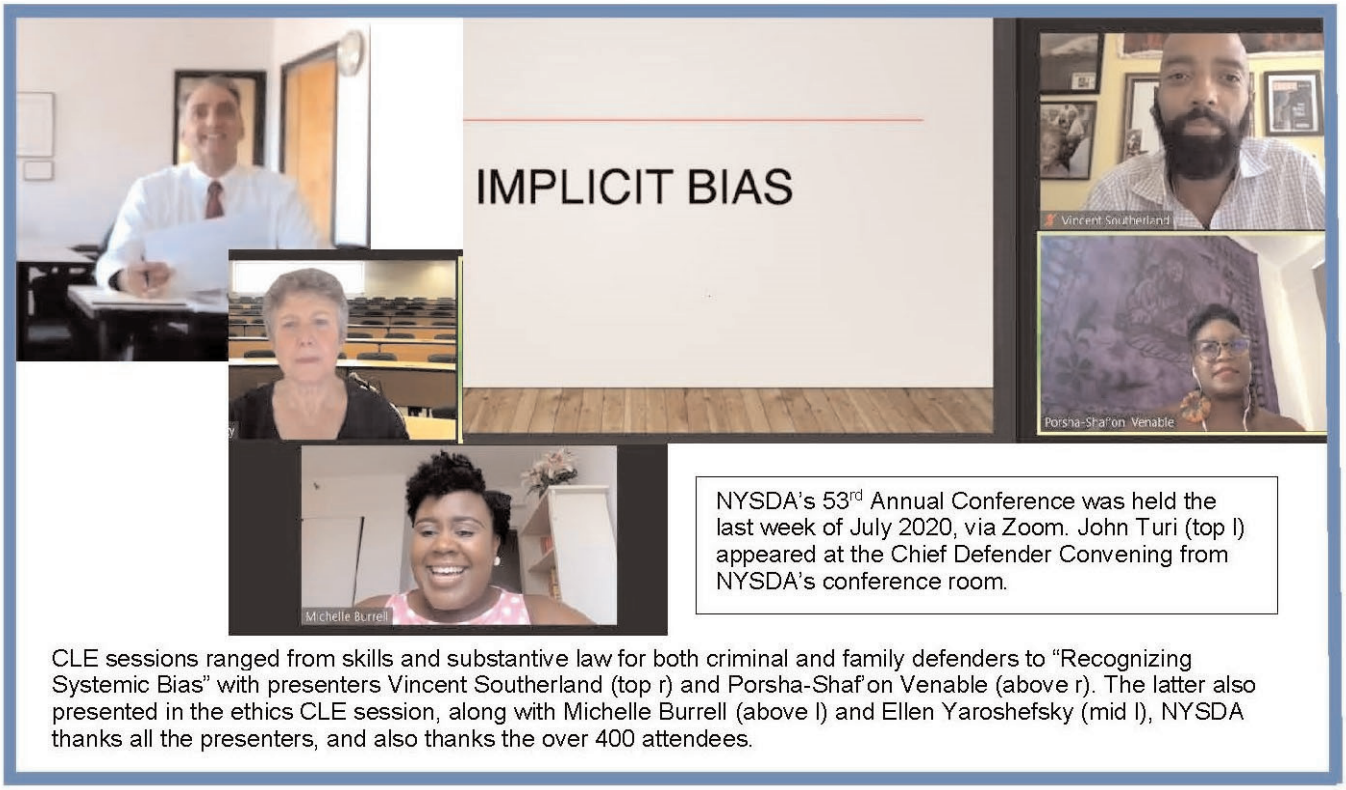
Public defenders have been advocating for policies that serve their clients as the COVID-19 outbreak continues. There are examples in the above-cited articles, and many others exist. Stan Germán, Executive Director of New York County Defender Services, offered testimony at a Joint Public Hearing on The Impact of COVID-19 on Prisons and Jails held by two State Senate Committees on Sept. 22, 2020. He described the work of attorneys in his office to secure the release of clients when the pandemic began, a survey done to evaluate the experiences of incarcerated clients, and a list of ongoing concerns and recommendations. Kelsey De Avila, Brooklyn Defenders Services' Project Director, Jail Services, also testified, as did several advocates for incarcerated people and criminal justice reform. Among those groups offering testimony was Justice and Unity for the Southern Tier (JUST), as noted in *The Pipe Dream*, the campus newspaper of Binghamton University.

Defenders and others had previously participated in a "'People's Hearing' on the Impacts of the Pandemic in Prisons & Jails" sponsored by Release Aging People in Prison (RAPP). RAPP's press release, and more dramatically, the list of written testimony available there, indicate the participation of defenders in advocacy efforts to protect clients.

Defenders also continue to make efforts to secure the release of individuals in jails (and prisons) in New York and nationwide. See, among NYSDA's webpages providing Information for Public Defenders on Coronavirus/COVID-19, Defender Practice Related Materials (including motions, writs, and orders) as well as materials reporting on Efforts to Seek Release. Legal efforts by others during the pandemic have included an ACLU class-action suit seeking to force Orange County (California) to remedy deficiencies in jail conditions and release vulnerable people to reduce the danger of COVID-19. An injunction issued in the case was stayed by the U.S. Supreme Court in a split opinion on August 5th, as noted on Vox.

Problems with Jail Interviews

The Backup Center has received inquiries about dealing with barriers to effective, confidential attorney-client communications arising during the pandemic. Issues have included poor-quality virtual connections, lack of privacy during both remote and in-person visits, and excessive limitations on the availability of visits outside business hours. Such issues have arisen in the past, outside the pandemic, of course. For example, The Legal Aid Society's efforts to ensure that clients could consult privately with their attorneys in the Richmond County courthouse have had a long history. *See Grubbs v O'Neill*, 744 F App'x 20 (2nd Cir 2018). Attorneys who are experiencing such issues are encouraged to contact the Backup Center. ⚖



NYSDA's 53rd Annual Conference was held the last week of July 2020, via Zoom. John Turi (top l) appeared at the Chief Defender Convening from NYSDA's conference room.

CLE sessions ranged from skills and substantive law for both criminal and family defenders to "Recognizing Systemic Bias" with presenters Vincent Southerland (top r) and Porsha-Shaf'on Venable (above r). The latter also presented in the ethics CLE session, along with Michelle Burrell (above l) and Ellen Yaroshefsky (mid l), NYSDA thanks all the presenters, and also thanks the over 400 attendees.

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.

Kansas v Glover, __ US __, 140 SCt 1183 (4/6/2020)

SEARCH AND SEIZURE – Auto Stop/ Reasonable Suspicion

LASJRP[1]: The Supreme Court holds that a police officer does not violate the Fourth Amendment by initiating an investigative traffic stop where an officer runs a vehicle's license plate and learns that the registered owner has a revoked driver's license, and the officer lacks information negating an inference that the owner is the driver of the vehicle.

The fact that the registered owner of a vehicle is not always the driver does not negate the reasonableness of the inference. Empirical studies demonstrate, and common experience readily reveals, that drivers with revoked licenses frequently continue to drive and therefore to pose safety risks to other motorists and pedestrians.

This is a narrow holding. The presence of additional facts might dispel reasonable suspicion. For example, if an officer knows that the registered owner is in his mid-sixties but observes that the driver is in her mid-twenties, the totality of the circumstances would not raise reasonable suspicion.

Concurring, Justices Kagan and Ginsburg note that given that revocations in Kansas nearly always stem from serious or repeated driving violations, they agree with the Court about the reasonableness of the officer's inference that the owner was driving while his license was revoked.

Ramos v Louisiana, __ US __, 140 SCt 1390 (4/20/2020)

JURY TRIAL

LASJRP: The Supreme Court holds that the Sixth Amendment's jury unanimity requirement applies to state and federal criminal trials equally.

Barton v Barr, __ US __, 140 SCt 1442 (4/23/2020)

IMMIGRATION CONSEQUENCES

LASJRP: Under the cancellation-of-removal statute, an immigration judge examines the applicant's prior crimes, as well as the offense that triggered removal. If a lawful permanent resident has ever been convicted of an aggravated felony, or has, during the initial seven years of residence, committed a serious offense that would render a non-citizen inadmissible, that criminal record will preclude cancellation of removal. According to the Board of Immigration Appeals, the offense committed during the initial seven years need not be one of the offenses of removal. The Eleventh Circuit agreed with the BIA.

In a 5-4 decision, the Supreme Court affirms. If a crime is serious enough to deny admission to a non-citizen, the crime can also be serious enough to preclude cancellation of removal, at least if committed during the initial seven years of residence. Cancellation of removal is precluded if a non-citizen committed a qualifying offense during the initial seven years of residence, even if the conviction occurred after the seven years elapsed.

The dissenting judges assert that the term "inadmissible," for the purposes of the stop-time rule, does not refer to a status a noncitizen can acquire even if he or she is not seeking admission. Under the majority's logic, petitioner is inadmissible yet, at the same time, lawfully admitted. Petitioner cannot and should not be considered inadmissible for purposes of the stop-time rule because he has already been admitted to the country. To render petitioner ineligible for relief from removal, the Government must show that he committed an offense that made him deportable.

New York State Rifle & Pistol Assn., Inc. v City of New York, __ US __, 140 SCt 1525 (4/27/2020)

The petitioners' challenge to a New York City rule as to transporting firearms, in which they sought declaratory and injunctive relief, is moot in light of amendments to the State's firearm licensing statute and the City's amendment to its rule. "[P]etitioners may now transport firearms

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

US Supreme Court *continued*

to a second home or shooting range outside of the city, which is the precise relief" they sought. No damages were sought; on remand, the lower courts may consider whether such a claim may still be made with respect to the old rule.

Concurrence: [Kavanaugh, J] I agree with the resolution of the procedural issues and "with Justice Alito's general analysis of *Heller* and *McDonald*," and share his concern that some courts may not be properly applying those decisions.

Dissent: [Alito, J] Dismissing the case as moot allows the Court's docket to be improperly manipulated. The Second Amendment decisions in *Heller* and *McDonald* fully established that the federal constitutional right to keep and bear arms is fully applicable to the states. Most Second Amendment challenges to a variety of laws since then have failed, and requests to review such decisions have been denied until this case. The legal changes to the initially-challenged laws gave the petitioners only most, not all, of what they sought; the matter is not moot.

Kelly v United States, __ US __, 140 S Ct 1565 (5/7/2020)

NO PROPERTY FRAUD / REVERSAL

ILSAPP[2]: In an opinion by Justice Kagan, a unanimous U.S. Supreme Court reversed convictions arising from Bridgegate, involving the September 2013 closure of toll lanes from Fort Lee, NJ to the George Washington Bridge, as punishment for the Mayor's refusal to endorse Governor Christie's reelection bid. The jury convicted two former Christie aides under the statutes prohibiting wire fraud and fraud against a federally funded program or entity—laws targeting schemes to obtain money or property. The Third Circuit upheld the verdicts. The salient question before SCOTUS was whether the defendants committed property fraud. They did not. The realignment of the toll lanes was an exercise of regulatory power, which failed to meet the property requirement. The employees' labor was just the incidental cost of that regulation, rather than itself an object of the scheme. Federal prosecutors may not use property fraud statutes to set standards of good government for local and state officials. The defendants abused their power for political payback, used deception to reduce access lanes, and thereby jeopardized the safety of the town's residents. But not every corrupt act by government officials is a federal crime.

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

United States v Sineneng-Smith, __ US __, 140 S Ct 1575 (5/7/2020)

SHAPING ISSUES / NOT COURTS' ROLE

ILSAPP: The defendant, who operated an immigration consulting firm, was convicted after a jury trial for encouraging or inducing aliens to illegally come to, enter, or reside in the U.S. in violation of the INA, and of other counts she did not contest. District Court–Northern California denied her motion to dismiss the immigration-related charges, based on her First Amendment rights to free speech and to petition. Although the defendant did not argue that the subject statute was unconstitutional, the Ninth Circuit invited three designated amici to brief a First Amendment overbreadth issue and then reversed the immigration-related convictions on that ground. The Government petitioned for review. In a unanimous opinion authored by Justice Ginsburg, the U.S. Supreme Court held that [the] appeals panel abused its discretion in departing drastically from the principle of party presentation. The challenged judgment was vacated and the matter remanded for adjudication of the appeal as shaped by the parties. Our adversarial system relies on the parties to frame the issues for decision and assigns to courts the role of neutral arbiter of matters the parties present. There are circumstances in which a modest initiating role for a court is appropriate. In criminal cases, departures from the principle of party presentation have usually occurred to protect a pro se litigant's rights. In the instant case, no extraordinary circumstances justified the panel's takeover of the appeal. While a court is not bound by counsel's precise arguments, the Ninth Circuit's radical transformation of this case went too far. Judge Thomas filed a concurrence.

Banister v Davis, __ US __, 140 S Ct 1698 (6/1/2020)

HABEAS CORPUS

LASJRP: A state prisoner is entitled to one fair opportunity to seek federal habeas relief from his conviction. But he may not usually make a "second or successive habeas corpus application."

The Supreme Court holds that a motion to alter or amend a habeas court's judgment does not qualify as such a successive petition. The motion is instead part and parcel of the first habeas proceeding.

Nasrallah v Barr, __ US __, 140 S Ct 1683 (6/1/2020)

IMMIGRATION CONSEQUENCES

LASJRP: During removal proceedings, a noncitizen may raise claims under the international Convention Against Torture (CAT). If he demonstrates that he likely would be tortured if removed to the designated country of removal, he is entitled to CAT relief (although he may be

US Supreme Court *continued*

removed to other countries). If the immigration judge orders removal and denies CAT relief, the noncitizen may appeal to the Board of Immigration Appeals. If the BIA affirms, the noncitizen may obtain judicial review in a federal court of appeals of both the final order of removal and the CAT order. Those noncitizens may obtain judicial review of constitutional and legal challenges to the final order of removal, but not of factual challenges to that order.

The Government argues that the same scope of review applies to a CAT order. The Supreme Court rejects the Government's contention, and holds that the court of appeals should review factual challenges to the CAT order deferentially.

Lomax v Ortiz-Marquez, __ US __, 140 S Ct 1721 (6/8/2020)

PRISONERS RIGHTS – Prison Litigation Reform Act

LASJRP: The United States Supreme [Court] holds that the Prison Litigation Reform Act's prohibition against inmates filing a free, or "in forma pauperis," suit if they have already had three or more of them dismissed applies whether dismissal was with or without prejudice.

Andrus v Texas, __ US __, 140 S Ct 1875 (6/15/2020)

RIGHT TO COUNSEL – Effective Assistance

LASJRP: Petitioner was six years old when his mother began selling drugs out of the apartment where they lived. To fund a spiraling drug addiction, petitioner's mother also turned to prostitution. By the time petitioner was 12, his mother regularly spent entire weekends, at times weeks, away from her five children to binge on drugs. When she did spend time around her children, she often was high and brought with her a revolving door of drug-addicted, sometimes physically violent, boyfriends. Before he reached adolescence, petitioner took on the role of caretaker for his four siblings. When he was 16, he allegedly served as a lookout while his friends robbed a woman. He was sent to a juvenile detention facility where, for 18 months, he was steeped in gang culture, dosed on high quantities of psychotropic drugs, and frequently relegated to extended stints of solitary confinement. The ordeal left an already traumatized child all but suicidal. Those suicidal urges resurfaced later in his adult life.

During petitioner's capital trial, however, nearly none of this mitigating evidence reached the jury because defense counsel neglected to present it and failed even to look for it. Counsel performed virtually no investigation of the relevant evidence. Only years later, during an 8-day evidentiary hearing in petitioner's state habeas proceeding, did these facts come to light. The Texas trial court granted habeas relief, but the Texas Court of Criminal reversed.

The Supreme Court concludes that petitioner has demonstrated counsel's deficient performance under Strickland, but the Court of Criminal Appeals may have failed properly to determine whether petitioner was prejudiced. The Court remands the case for further proceedings.

Department of Homeland Security v Thuraissigiam, __ US __, 140 S Ct 1959 (6/25/2020)

The respondents challenge the constitutionality of the system devised by Congress in 1996 for weeding out patently meritless asylum claims "and expeditiously removing the aliens making such claims from the country." The Ninth Circuit's holding, that restrictions placed on the use of the habeas corpus statute by asylum seekers unconstitutionally suspend the writ, is reversed. The respondent's suspension argument "would extend the writ of habeas corpus far beyond its scope 'when the Constitution was drafted and ratified.'" And the due process claim fails because the respondent, apprehended just 25 yards from the border as he attempted to enter illegally, lacked the established connections to the country required to provide more due process than what is afforded by statute.

McGirt v Oklahoma, __ US __, 140 S Ct 2452 (7/9/2020)

JURISDICTION – Crimes Committed on Indian Land

LASJRP: The Major Crimes Act provides that, within "the Indian country," "[a]ny Indian who commits" certain enumerated offenses "shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States." "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government."

Defendant was convicted by an Oklahoma state court of three serious sexual offenses. He unsuccessfully argued in state post-conviction proceedings that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation and his crimes took place on the Creek Reservation. He seeks a new trial, which, he contends, must take place in federal court.

In a 5-4 decision, the Supreme Court holds that for purposes of the Major Crimes Act, land reserved for the Creek Nation since the 19th century remains "Indian country." The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and

US Supreme Court *continued*

other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation.

When Congress adopted the MCA, it broke many treaty promises that had once allowed tribes like the Creek to try their own members. But, in return, Congress allowed only the federal government, not the States, to try tribal members for major crimes.

Barr v Lee, __ US __, 207 L Ed 2d 1044 (7/14/2020)

The District Court erred when it preliminarily enjoined the executions of four federal prisoners on the ground that the use of pentobarbital to carry out the executions "likely constitutes cruel and unusual punishment prohibited by the Eighth Amendment." The plaintiffs did not meet the exceedingly high bar of demonstrating that they were likely to succeed on the merits of their claim that use of the drug violates the Eighth Amendment. Last minute stays of execution should be the extreme exception.

Dissent: [Breyer, J] "[T]he resumption of federal executions promises to provide examples that illustrate the difficulties of administering the death penalty consistent with the Constitution. … [T]he solution may be for this Court to directly examine the question whether the death penalty violates the Constitution."

Dissent: [Sotomayor, J] In hastily disposing of the respondents' constitutional claims, "the Court accepts the Government's artificial claim of urgency to truncate ordinary procedures of judicial review." There will be, therefore, "no meaningful judicial review of the grave, fact-heavy challenges respondents bring to the way in which the Government plans to execute them." Today's decision "is at sharp odds with this Court's own ruling mere months earlier. "

New York Court of Appeals

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

Matter of McGuire, 35 NY3d 951 (4/30/2020)

"On the Court's own motion, it is determined that Honorable Michael F. McGuire is suspended, with pay, effective immediately, from the offices of Judge of County and Surrogate's Courts, Sullivan County, pursuant to New York Constitution, article VI, § 22 and Judiciary Law § 44(8), pending review of a determination of the State Commission on Judicial Conduct."

People v Middleton, 35 NY3d 952 (4/30/2020)

OFFICIAL MISCONDUCT / VALID INFORMATION

ILSAPP[1]**:** The defendant was charged by information with official misconduct. In a Memorandum, the COA found that the information was jurisdictionally valid because it contained non-conclusory factual allegations addressing each element of the crime. The information alleged that, while working as a substance abuse treatment program aide at a correctional facility, the defendant disclosed information to an inmate regarding an unusual incident, in violation of the employee manual she signed. In a statement, the defendant admitted that she printed paperwork regarding the incident on a facility computer and allowed the inmate to take the document to his cell. One could infer that she committed the unauthorized disclosure with the intent to benefit herself or inmates.

People v Holz, 184 AD3d 1156 (5/7/2020)

"Both the plain meaning of CPL 710.70 (2) and relevant legislative history demonstrate that the Appellate Division may review an order denying a motion to suppress evidence where, as here, the contested evidence pertained to a count—contained in the same accusatory instrument as the count defendant pleaded guilty to—that was satisfied by the plea." To find no jurisdiction exists for review of "a trial court's determination on a suppression matter when the evidence in question is not directly related to the count of conviction would insulate erroneous decisions from review and could lead to a proliferation of unreviewable legal errors at the trial level."

People v Maffei, 35 NY3d 264 (5/7/2020)

As the defendant has not met the burden of establishing, based on the record, that counsel was constitutionally ineffective, the appropriate procedure for challenging counsel's performance is a CPL 440.10 motion. Counsel did not exercise a peremptory challenge as to juror number 10 nor exhaust all peremptories after comments by that juror. The juror's comments that he thought he had read about the case in the papers and "[k]ind of made up my mind then," and response of "I hope so" and "I'm not sure" when asked after further discussion if he could remain fair and impartial did not reflect actual bias. Other "statements by the prospective juror and matters outside of the record could have provided defense counsel with reasons to retain the juror."

Dissent: [Rivera, J] "Defendant was deprived of meaningful representation when his trial counsel did not

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

NY Court of Appeals *continued*

challenge a prospective juror who was unable on multiple occasions to state unequivocally that he could be fair and impartial, including twice in response to direct questioning from the judge. Counsel's actions cannot be explained as part of a reasonable trial strategy because the prospective juror never disavowed those statements or explained how he could overcome his admitted emotional reaction to the crime. As a result of counsel's failure, defendant was tried by at least one juror who was unsure if he could fairly evaluate the evidence against defendant. That error of constitutional dimension warrants reversal and remittal for a new trial." Further, "[t]he majority has essentially adopted a per se rule that ineffective assistance of counsel claims must be considered by way of a CPL 440.10 motion [footnote omitted]."

People v Ball, 35 NY3d 1009 (6/9/2020)

"On review of submissions pursuant to section 500.11 of the Rules, order affirmed, for reasons stated in the memorandum at the Appellate Division (*see People v Ball*, 175 AD3d 987 [4th Dept 2019])."

People v Harris, 35 NY3d 1010 (6/9/2020)

CPL 470.15 (1) SCOPE / REVERSAL

ILSAPP: The defendant appealed from a First Department order, affirming his conviction of 4th degree criminal possession of stolen property. The Court of Appeals reversed and remitted. Prior to pleading guilty, the defendant moved to suppress physical evidence found inside the closed suitcase he was carrying at the time of arrest, arguing that no exigent circumstances justified the warrantless search. In denying suppression, Supreme Court found that *People v Gokey*, 60 NY2d 309, did not apply and thus made no findings regarding exigent circumstances. Yet in affirming, the Appellate Division invoked a different ground and found exigent circumstances. That was improper. Upon an appeal from a criminal court judgment, an intermediate appellate court may determine any question of law or issue of fact involving error or defect which may have adversely affected the appellant. CPL 470.15 (1). Such provision precluded the Appellate Division from reviewing issues decided in an appellant's favor or not ruled upon by the trial court. Because the suppression court did not deny the defendant's motion based on exigent circumstances, that issue was not decided adversely to him and could not properly be invoked by the Appellate Division. The Legal Aid Society of NYC (Michael Taglieri, of counsel) represented the appellant.

Matter of Benson v New York State Bd. of Parole, 35 NY3d 1007 (6/9/2020)

RESCISSION / UPHELD

ILSAPP: The petitioner appealed from a Third Department order, in a CPLR Article 78 proceeding, upholding the Parole Board's determination rescinding parole release (176 AD3d 1548). The Court of Appeals affirmed. Judicial intervention in Parole Board determinations was warranted only when there was a showing of irrationality bordering on impropriety. The petitioner failed to make such a showing. *Matter of Costello v NY Bd. of Parole*, 23 NY3d 1002, was distinguishable. Judges Rivera and Wilson dissented for reasons stated in the Third Department dissent.

People v Page, 35 NY3d 199 (6/11/2020)

FEDERAL AGENT / CITIZEN'S ARREST

ILSAPP: At issue in this People's appeal was whether a valid citizen's arrest, pursuant to CPL 140.30, was made by a federal marine interdiction agent with U.S. Customs and Border Protection. The Court of Appeals reversed a Fourth Department order, finding that it improperly relied on *People v Williams*, 4 NY3d 535. That COA decision held that actions of Municipal Housing Authority officers did not constitute a valid citizen's arrest, where such peace officers acted under color of law and with all the accouterments of official authority. *Williams* was inapposite. Marine interdiction agents were not encompassed in CPL 2.15, which accorded limited peace officer powers to certain federal law enforcement officers. Judge Feinman wrote the majority opinion. Judge Fahey dissented, in an opinion in which Judge Rivera concurred. The majority expanded the ability of law enforcement officials to effect arrests they had no authority to make, under the guise of a citizen's arrest, and undermined the rationale of *Williams*—to deter vigilantism and ensure that persons chosen to protect citizens from crime may be readily identified, and persons effectuating citizens' arrests must do so without pretense of other authority. The instant federal agent acted in the manner of a police or peace officer when he activated the emergency lights on his SUV. The salient test was not whether the individual was a police or peace officer, but instead whether he conveyed the appearance of acting as such an officer. The dissenters would reject the People's alternate argument that the gun should not be suppressed, even if the stop was illegal.

People v Lang, 35 NY3d 222 (6/23/2020)

JUROR UNAVAILABILITY / NO INQUIRY

ILSAPP: In a unanimous opinion, the Court of Appeals reversed a murder conviction and ordered a new

NY Court of Appeals *continued*

trial because the trial judge discharged a sworn juror as unavailable without the requisite inquiry and notice. Judge Garcia authored the opinion. Before the ninth day of trial began, the Essex County Court judge informed the parties that juror 9 was absent, due to an important appointment for a family member. Without stating that a substitution would occur, the court seated alternate 1 in place of juror 9. There was no inquiry into juror 9's likelihood of appearing. At a recess, defense counsel objected, asserting that the court had failed to conduct an inquiry into the juror's absence and to give counsel an opportunity to be heard. At a later recess that day, counsel moved for a mistrial based on the substitution. The motion was denied, and the defendant was convicted of 2nd degree murder and 4th degree CPW. The Third Department affirmed. Judge Rivera granted leave. To find that an absent juror may be presumed unavailable for continued service, the trial court must make a reasonably thorough inquiry; and before discharging the juror, the court must give the parties an opportunity to be heard. See CPL 270.35 (2) (a), (b). Matthew Hellman represented the appellant.

Cole v Cole, 35 NY3d 1012 (6/23/2020)

CUSTODY – APPEAL/PRESERVATION – DOMESTIC VIOLENCE

LASJRP[2]: The Court of Appeals finds unpreserved the mother's claim under Domestic Relations Law § 240(1)(a) that the trial court failed to consider the effects of domestic violence on the best interests of the children when it awarded custody to the father. The parties never litigated, and the court did not pass upon, or make any findings with respect to, whether a withdrawn family offense petition constitutes "a sworn petition" for purposes of the statute or whether defendant proved allegations of domestic violence "by a preponderance of the evidence."

Dissenting, Judge Rivera, joined by Judge Wilson, asserts that the mother preserved her claim. She made a sworn allegation in a family offense petition that the father committed acts of violence against her, and the petition was admitted into evidence at the father's divorce proceeding. The mother also testified to the alleged abuse, and provided additional evidence to corroborate her allegations. The statute is self-executing, and operates, like any other procedural rule, without the need for a party to parrot its language to the trial court. There is no credible argument that the court was unaware that domestic violence is a statutorily prescribed factor in its best interest analysis. The majority's rule undermines the statutory mandate that judges properly consider allegations of abuse proven by a preponderance of the evidence, and the effect of domestic violence on a child, when deciding custody and visitation.

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

Matter of Senzer, 35 NY3d 216 (6/23/2020)

JUDGES – REMOVAL FROM OFFICE/OFFENSIVE LANGUAGE IN EMAILS TO CLIENTS

LASJRP: The Court of Appeals upholds a determination by the State Commission on Judicial Conduct that the judge committed certain acts of misconduct warranting his removal from office.

The judge repeatedly used "profane, vulgar and sexist terms" in emails to his clients that insulted and demeaned others involved in the legal process and conveyed disdain for the legal system. The judge denigrated a litigant, opposing counsel, and the presiding court attorney referee. He used an intensely degrading and "vile" gendered slur to describe a female attorney, and made a demeaning reference to her as "eyelashes."

The fact that the judge's comments were contained in private communications, with only two clients, is no excuse. The judge's clients are members of the public despite any personal relationship he had with them, and his derogatory statements directly targeted the legal system and its participants writ large, and thus cannot be divorced from his judicial role.

People v Hemphill, 35 NY3d 1035 (6/25/2020)

APPEAL – PRESERVATION/IMPEACHMENT ERROR
BRADY – GRAND JURY PROCEEDINGS/EVIDENCE OF OTHER PERPETRATOR

LASJRP: The First Department (173 A.D.3d 471) held that defendant abandoned his claim that he was denied the right to call a grand jury reporter to impeach a prosecution witness with her 2007 testimony identifying a third party as the perpetrator, after counsel had mistakenly questioned the witness about 2006 grand jury testimony in which she did not name the third party. The court never actually ruled and stated that it would have to think about it. Defense counsel did not again seek a ruling during the testimonial portion of the trial; it was not until the jury asked a question about the 2006 grand jury reporter's testimony that counsel raised the issue again. A dissenting judge asserted that the prosecution was allowed to elicit testimony from the 2006 grand jury reporter that left the impression that the witness had never previously identified the third party as the shooter, and that the jury never learned that the witness had identified the third party under oath at the 2007 grand jury proceeding.

The Court of Appeals, with one judge dissenting, agrees with the First Department majority, noting that

NY Court of Appeals *continued*

counsel failed to request that the witness be recalled for questioning relating to the particular appearance on which counsel relied.

The Court also holds that the People were not obligated to present evidence to the Grand Jury that someone else was initially identified as the shooter.

People v Hinshaw, 2020 NY Slip Op 04816 (9/1/2020)

UNLAWFUL AUTO STOP / REVERSAL

ILSAPP: The defendant appealed from a Fourth Department order affirming a judgment convicting him of 2nd degree CPW and marijuana possession, upon a guilty plea. In an opinion by Judge Wilson, the Court of Appeals reversed, granted suppression, and dismissed the indictment. The question presented was whether a State trooper had reasonable suspicion to stop the defendant's car based solely on a license plate check revealing that the vehicle had been impounded and stating that, "it should not be treated as a stolen vehicle hit—no further action should be taken based solely on the impound response." The majority found that the trooper had no objective basis to believe that the apparent removal of the car from an impound lot was indicative of criminality. Reasonable suspicion may not rest on equivocal behavior susceptible of an innocent interpretation. (Here the car had been lawfully released to the defendant two weeks earlier, after payment of parking tickets.) The COA also emphasized that an officer must have probable cause to stop a vehicle for a traffic infraction; but in concurring, Judge Stein objected that such issue was not properly before the court, since it was not addressed by the parties or the courts below. Judge Garcia dissented. Lucas Mihuta represented the appellant.

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.

In re Carmit D. v Gil D., 178 AD3d 470 (1st Dept 12/5/2019)

SUPPORT – SUSPENDED DUE TO DENIAL OF VISITATION – DEFAULTS/MOTION TO VACATE

LASJRP[1]: The First Department upholds the denial of petitioner mother's motion to vacate orders entered on default which suspended the father's child support obligations, rejecting the mother's subject matter jurisdiction arguments, and concluding that the Support Magistrate did not impermissibly decide any issues related to visitation.

Moreover, the mother's motion to vacate was untimely made more than one year after the orders were issued, and failed to provide both a reasonable excuse for her defaults and a meritorious defense. (Family Ct, New York Co)

People v Hunter, 178 AD3d 459 (1st Dept 12/5/2019)

SEARCH AND SEIZURE – COMMON LAW RIGHT TO INQUIRE

LASJRP: The First Department concludes that the officer, who was investigating a radio run of a man bleeding from his hand and a radio run of a shooting in the same vicinity, had at least a common-law right to inquire when he saw a "weighted" bulge in the forearm area of defendant's right sleeve.

After defendant was unresponsive when the officer asked, "[W]hat's going on[?]," and pulled his hand into the sleeve toward the bulge while the officer approached him, the officer was entitled to engage in a minimally intrusive safety precaution by grabbing the bulge, which turned out to be a revolver. (Supreme Ct, New York Co)

People v Knowles, 178 AD3d 453 (1st Dept 12/5/2019)

POSSESSION OF A WEAPON – BOX CUTTER/ INTENT TO USE UNLAWFULLY

LASJRP: The First Department concludes that defendant's conviction for criminal possession of a weapon in the third degree was against the weight of the evidence where the focus at trial was whether a box cutter recovered from defendant in a search after his arrest for an open container violation – the butt end of the box cutter was sticking out of the fly of defendant's underwear, and the razor was in its sheath and not exposed – was a dangerous instrument defendant possessed with intent to use it unlawfully against another.

There was no proof that defendant used the box cutter, attempted to use it, or threatened to use it in a manner that rendered it a dangerous instrument. (Supreme Ct, New York Co)

People v Ruffin, 178 AD3d 455 (1st Dept 12/5/2019)

SEARCH AND SEIZURE – SEARCH WARRANTS RIGHT TO PUBLIC TRIAL

LASJRP: The First Department concludes that although the forensic examination of defendant's cell phones was not conducted until 30 days after warrants were issued, the examination was in compliance with CPL § 690.30(1), which requires that a search warrant be executed not more than 10 days after the date of issuance,

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

First Department *continued*

where the issuing judge stated that the warrants were "deemed executed at the date and time of issuance," which was appropriate in the context of phones already in police custody, but not yet analyzed. And nothing had happened since the warrants were signed to diminish the cause for their issuance.

The Court finds reversible error where the trial court excluded defendant's family members from some parts of the trial in the absence of a showing that defendant's family posed a threat to the undercover officer's safety. Noting that the People acknowledge that harmless error analysis does not apply to courtroom closure errors, but rely on nonbinding Second Circuit case law in arguing that reversal is not warranted because the exclusion was so trivial as not to implicate defendant's right to a public trial, the Court does not decide whether a triviality exception exists under State law because the closure cannot be characterized as trivial. Defendant's family was kept out of the courtroom during the entirety of the direct examination, and part of the cross-examination, of an undercover officer who was one of the People's key witnesses. (Supreme Ct, New York Co)

People v Thompson, 178 AD3d 457 (1st Dept 12/5/2019)

WARRANT FOR CELLPHONE SEARCH WAS OVERBROAD

LASCDP[2]: The First Department suppressed evidence seized from a cellphone because the warrant authorizing the search was overbroad. The warrant failed to satisfy the particularity requirement of the Fourth Amendment. Despite the fact that the alleged crime of child sex abuse occurred on only September 1, the warrant authorized examination of the phone covering the previous nine months. There was no probable cause shown that evidence of the alleged crime would be found in this broad time period.

The warrant was also overbroad in permitting search of text messages sent on September 1, the day of the alleged offense, but also search of defendant's browsing history and e-mails over the previous nine months. The information before the warrant court did not support a reasonable belief that evidence of the crimes specified in the warrant would be found in these locations

The opinion explicitly denied expanding the scope of the warrant because the alleged crimes involved child sex abuse, an offense that may involve repeated conduct on the internet. There were no allegations of possession of child pornography, for one thing. (Supreme Ct, New York Co)

Anthony V. L. v Bernadette R., 178 AD3d 479 (1st Dept 12/10/2019)

CHILD SUPPORT / REMAND

ILSAPP[3]: The father appealed from two NY County Family Court orders regarding child support. The First Department held that the appeal from a 2013 order was timely. The record did not show that the mother served the father with notice of entry, so the time to take an appeal never began to run. Family Court properly declined to vacate the 2013 order pursuant to a CPLR 5015 (a) (3) motion, in which the father alleged that the mother engaged in fraud by inflating the child's rent, health care, and child care costs and sought vacatur based on subpoenaed documents. He failed to show that the "new" evidence could not have been found earlier with due diligence. Further, the father took four years to make the motion—not a reasonable time, as required by the statute. However, at a hearing regarding the 2017 order, the father proved that there had been a substantial change in circumstances, based on the mother's actual housing costs. Additional findings of fact were necessary to decide if he was entitled to an overpayment credit to be applied to future add-on expenses. Family Court properly awarded half of claimed attorneys' fees to the mother, the nonmonied party, who had to defend against numerous allegations unrelated to the modification petition and to respond to pointless motion practice. (Family Ct, New York Co)

People v Baines, 178 AD3d 476 (1st Dept 12/10/2019)

DUPLICITOUS CHARGE / DISMISSED

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 1st degree rape and other sexual offenses and sentencing him to an aggregate term of 50 years. The First Department dismissed a 2nd degree promoting prostitution charge as duplicitous, because it spanned the same time period as sex trafficking counts and did not require proof of any other facts. As a matter of discretion, the appellate court also directed that the rape sentence would run concurrently with all other sentences. The new aggregate term was 28½ to 32 years. The defendant was not deprived of the right to counsel. After being represented at the grand jury presentation, the defendant represented himself with the aid of a legal advisor in pretrial proceedings and then chose to be represented at trial. The record included the combined effect of several waiver colloquies, along with other indicia of the defendant's ability to represent himself and awareness of the disadvantages of doing so. The

[2] Summaries marked with these initials, LASCDP, are courtesy of The Legal Aid Society's Criminal Defense Practice, from their CDD case summaries.

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

First Department *continued*

Office of the Appellate Defender (Christina Swarns, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Camacho, 178 AD3d 515 (1st Dept 12/12/2019)

INEFFECTIVE NOT TO SEEK LESSER TO ROBBERY CHARGE

LASCDP: The defense conceded that defendant stole a cellphone from a store, but denied that any force was used. On this factual basis, it was ineffective assistance of counsel not to ask for submission of a charge of petit larceny to the jury as a lesser included of robbery. The robbery conviction was vacated, and a new trial ordered.

The grand larceny conviction was also vacated, as it was based on the improper aggregation of the value of two phones taken from separate AT&T stores on different days. There was no proof that the stores had the same "owner" for purposes of aggregating multiple thefts, as opposed to being separate dealerships authorized to sell AT&T wireless products and services. (Supreme Ct, New York Co)

Matter of Catherine L. v Jeffrey S., 178 AD3d 511 (1st Dept 12/12/2019)

VISITATION / REMAND

ILSAPP: The mother appealed from an order of NY County Family Court, which granted the father's petition to relocate with the parties' child to Georgia. The First Department modified. As to the relocation, the trial court had considered relevant factors, including the father['s] long role as primary caregiver; had established that the move would improve the child's quality of life; and had demonstrated his commitment to fostering a mother-child relationship. However, the lower court erred in failing to set an appropriate visitation schedule. Given the parties' chronic inability to communicate and the mother's mental illness, the expectation that the parties would cooperate to effectuate appropriate visitation was a pipe dream. Moreover, the court improperly delegated to the father its authority to determine visitation. Randall Carmel represented the appellant. (Family Ct, New York Co)

People v Lashley, 178 AD3d 506 (1st Dept 12/12/2019)

SENTENCING ERROR / PREDICATE STATEMENT

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting h[er] of 2nd degree criminal possession of a forged instrument and sentencing her as a second felony offender. The First Department vacated the SFO adjudication and sentence and remanded for resentencing, including the filing by the People of a proper predicate felony statement. The defendant's challenge to the facial sufficiency of the document did not require preservation. Nothing in the record demonstrated a sufficient tolling period to support the predicate felony statement. Thus, the People's failure to include this information in the statement was not harmless. The Center for Appellate Litigation (Kate Skolnick, of counsel) represented the appellant. (Supreme Ct, New York Co)

[***Ed. Note:*** *Leave to appeal was granted on Mar. 27, 2020 (35 NY3d 942).*]

In re Kelly G. v Circe H., 178 AD3d 533 (1st Dept 12/17/2019)

CUSTODY/VISITATION – COUNSEL/EXPERT FEES – STANDING/EQUITABLE ESTOPPEL

LASJRP: Domestic Relations Law § 237(b), which is an exception to the general rule that each party is responsible for his or her own legal fees, states that "upon any application ... concerning custody, visitation or maintenance of a child, the court may direct a spouse or parent to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse or parent to enable the other party to carry on or defend the application or proceeding by the other spouse or parent as, in the court's discretion, justice requires …." This statute, like DRL § 70, does not define the term "parent."

In a case of first impression, the First Department holds that in a proceeding to establish standing under § 70, a court has discretion to direct the "more monied" party to pay the other party's counsel and expert fees under § 237 before the other party has been adjudicated a parent. Highly inequitable results would flow in this case from permitting the party with far greater resources to seek custody without allowing the child's primary parent to seek counsel fees so she can defend against the application.

The trial court also did not err in directing petitioner to pay 100% of the costs for the attorney for the child and a neutral forensic evaluator. A court may allocate payment of a neutral forensic evaluator according to the parties' financial positions.

The Court rejects petitioner's contention that the trial court's articulation of eleven estoppel factors to be considered at trial unfairly requires her to prove each factor by clear and convincing evidence. The trial court's list is neither exclusive nor dispositive, and includes criteria proposed by both parties and closely tracks evidence relied upon in other cases. (Supreme Ct, New York Co)

People v Martinez-Jiminez, 178 AD3d 538 (1st Dept 12/17/2019)

SEARCH AND SEIZURE – REASONABLE SUSPICION

LASJRP: Late at night, the police received a radio message stating that a fight was in progress between two

First Department *continued*

men at a bus stop, and that the 911 caller was at the scene and still on the phone. Upon arriving a few minutes later, they saw a man on a phone pointing toward the bus stop saying, "[T]here it is, there it is." Defendant, the only other person in view, was running away from the bus stop.

The First Department holds that the police had reasonable suspicion justifying a stop. (Supreme Ct, New York Co)

In re Amanda N., 178 AD3d 565 (1st Dept 12/19/2019)

ADOPTION – CONSENT/UNWED FATHER
TERMINATION OF PARENTAL RIGHTS

LASJRP: The First Department reverses an order which, upon a determination that respondent father's consent to adoption was not required, terminated the father's parental rights where the family court erred in limiting the evidence solely to the time the child was in foster care, and the fact that the child resided with the father and was financially supported by him from her birth until her removal from the home at the age of five qualified him as a consent father.

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

People v McGhee, 180 AD3d 26 (1st Dept 12/19/2019)

***BRADY* VIOLATION / REVERSED**

ILSAPP: The defendant appealed from an order of NY Supreme Court, denying his CPL 440.10 motion to vacate a judgment convicting him of 2nd degree murder and 2nd degree CPW. The First Department reversed and ordered a new trial based on a *Brady* violation. The People failed to disclose a witness statement that could have aided the defense in impeaching the only eyewitness to the shooting, presenting a misidentification defense, and pursuing an additional avenue of investigation. Coupled with other trial errors, the People's failure to turn over the statement deprived the defendant of a fair trial. Here as in *People v Rong He*, 34 NY3d 956, only one eyewitness testified, making her credibility pivotal. At trial, the defendant had little ammunition for questioning the eyewitness's ID. Thus, any ability to challenge her description would have been critical. Moreover, the undisclosed statement suggested an alternative theory about who killed the victim. One justice dissented, opining that overwhelming evidence showed that the defendant was hired as a contract killer by a local drug dealer to execute the victim and that the undisclosed statement would not likely have altered the verdict. The Center for Appellate Litigation (Ben Schatz, of counsel) represented the appellant. (Supreme Ct, New York Co)

[***Ed. Note:*** *Leave to appeal was granted on Dec. 27, 2019 (34 NY3d 1083) (1st Dept).*]

People v Burgess, 178 AD3d 609 (1st Dept 12/26/2019)

COP MISCONDUCT / CROSS-EXAMINATION
IMPEACHMENT – BAD ACTS/POLICE OFFICER MISCONDUCT

LASJRP: The First Department orders a new suppression hearing and trial where the hearing and trial courts erred in denying defendant's request to cross-examine a police officer regarding allegations of misconduct in a civil lawsuit in which it was claimed, among other things, that this particular officer arrested the plaintiff without suspicion of criminality and lodged false charges against him.

The civil complaint contained specific allegations of falsification by this officer that bore on his credibility at both the hearing and trial. At each proceeding, this officer was the only witness for the People. (Supreme Ct, New York Co)

Jamiyla S. J. v Kenneth D., 178 AD3d 605 (1st Dept 12/26/2019)

CUSTODY / CHANGE OF CIRCUMSTANCES

ILSAPP: The petitioner appealed from an order of NY County Family Court, which dismissed a custody petition. Family Court erred in finding no change of circumstances warranting a modification of the parties' stipulation of shared custody. The respondent failed to disclose his conviction on drug charges and required drug treatment. That was a breach of the trust required in a shared custody arrangement, not a mere lapse in judgment. The matter was remanded for a "best interests" hearing. George Reed represented the appellant. (Family Ct, New York Co)

In re Mariah B., 178 AD3d 622 (1st Dept 12/26/2019)

ABUSE/NEGLECT – CORROBORATION

LASJRP: The First Department finds sufficient evidence of sexual abuse where the child's out-of-court statements were sufficiently corroborated by testimony of a caseworker and the child's mother showing that the child consistently reported the abuse.

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

People v Taylor, 178 AD3d 630 (1st Dept 12/26/2019)

CONFESSIONS – INTERROGATION

LASJRP: The First Department concludes that the officer's sudden exclamation upon discovering that he

First Department *continued*

had gotten blood on his hands after touching defendant's clothing was not the functional equivalent of interrogation for Miranda purposes. (Supreme Ct, New York Co)

People v Zi, 178 AD3d 591 (1st Dept 12/26/2019)

RIGHT TO COUNSEL – WAIVER/PRO SE REPRESENTATION

LASJRP: The First Department, with one judge dissenting, concludes that the trial court improperly granted defendant's request to proceed pro se without first conducting a searching inquiry regarding defendant's mental capacity to waive counsel

Neither defense counsel nor the prosecution made the court aware of defendant's CPL Article 730 competency exams or the potential for him to be experiencing delusional thoughts. Although the court conducted an extensive colloquy with defendant regarding waiver of the right to counsel, at no point did the court inquire into defendant's mental health. Notwithstanding other aspects of the record supporting defendant's capacity, the information in the Article 730 reports indicating a potential for delusional thought was a red flag that required a particularized assessment of defendant's mental capacity. (Supreme Ct, New York Co)

Elizabeth L. v Kevin O., 179 AD3d 404 (1st Dept 1/2/2020)

WILLFUL VIOLATION / DEFAULT ORDER

ILSAPP: The father appealed from an order of NY County Family Court, which found that he willfully violated a child support order, sentenced him to incarceration for six months (served on weekends), ordered a purge amount of $10,000, and set arrears at more than $55,000. The First Department modified. The appeal from the order of commitment was dismissed as academic, since the period of incarceration had expired. Further, the appeal from the willful violation finding was dismissed, since the finding was made upon default, and the father did not move before the Support Magistrate to vacate the default. See Family Ct Act 439 (e); CPLR 5015 (a) (1). In any event, Family Court properly confirmed the Magistrate's finding of willful violation. The father's failure to pay constituted prima facie evidence. The burden shifted to him to present competent, credible evidence of inability to pay, but he failed to appear and present evidence. However, in calculating the amount of arrears owed, the lower court erred in failing to credit the father for the approximately $5,000 in payments he made. (Family Ct, New York Co)

People v Butler, 179 AD3d 453 (1st Dept 1/7/2020)

ROBBERY – ACTING IN CONCERT/CIRCUMSTANTIAL EVIDENCE

LASJRP: Reversing an order of dismissal, the First Department finds sufficient grand jury evidence of, inter alia, robbery, where the grand jury testimony established that after defendant and another man approached the victim, defendant cut the victim's forehead with a razor blade, the other man hit the victim in the back of the head with a hard object, and both men punched the victim; and that immediately after the attack, the victim noticed that the cell phone he had used shortly before the attack was missing. (Supreme Ct, Bronx Co)

Matter of Daniel P., 179 AD3d 436 (1st Dept 1/7/2020)

ABUSE/NEGLECT – DEFAULTS

LASJRP: The First Department concludes that the order of fact-finding was, in fact, issued on respondent's default where, by the time she appeared at the April 28, 2017 proceedings, records from her treatment and evaluation upon which the fact-finding order was heavily based had already been admitted into evidence; respondent's counsel was not authorized to participate in her absence and stated that he would not participate until she arrived; respondent was present at certain times, but not when most of the evidence of her neglect was submitted; and, when she was present, she did not seek to introduce any evidence to rebut the evidence of neglect. (Family Ct, Bronx Co)

Matter of Jaquan L., 179 AD3d 457 (1st Dept 1/7/2020)

KINSHIP PAYMENTS / RETROACTIVITY

ILSAPP: This appeal concerned an order of Bronx County Family Court, which denied a motion to extend kinship guardianship assistance payments for the subject children until they turned 21. The First Department reversed and granted the motion. The respondent executed kinship guardianship petitions for her two grandchildren, then both under age 16. Monthly subsidies were to be provided until the children reached age 18. Family Court approved the guardianship petitions, and the children were discharged from foster care. While the instant motion to extend the payments was pending, the KinGAP statute was amended to make subsidies available until age 21 for children who were under age 16 at the time of execution of the petitions. The Legislature was silent as to retroactivity; but the appellate court held that the amendment should apply retroactively, given its remedial nature and the sense of urgency conveyed by the Legislature. The law rectified an anomaly that resulted in the arbitrary denial of benefits. Prior to the KinGAP expansion, had the children been adopted by the grandmother and remained

First Department *continued*

with her under the auspices of foster care, or had she proceeded with guardianship after they turned 16, they would have been entitled to subsidies until age 21. The Legal Aid Society of NY (Claire Merkine, of counsel) represented the appellants. (Family Ct. Bronx Co)

Matter of Katherine U., 179 AD3d 427 (1st Dept 1/7/2020)

CLOSED-CIRCUIT TV / COLLATERAL ESTOPPEL

ILSAPP: The respondent father appealed from an order finding neglect and from a subsequent order of disposition. The appeal from the fact-finding was dismissed, given the entry of the order of disposition. *See Matter of Aho*, 39 NY2d 241, 248. However, the appeal from the order of disposition brought up for review the fact-finding order. *See* CPLR 5501 (a) (1); Family Ct Act § 1118. The First Department affirmed. In permitting the child to testify via closed-circuit television, Family Court properly balanced the respondent's due process rights against the child's emotional well-being. During testimony, the child was visible and subject to contemporaneous cross-examination by counsel, in consultation with the respondent. A social worker's affidavit established that the child would suffer emotional harm if required to testify in open court. In any event, the respondent was collaterally estopped from rebutting the allegations of sexual abuse set forth in the Article 10 petition. Prior to the conclusion of the fact-finding hearing, the respondent was convicted of predatory sexual assault against a child, 1st degree rape, and other offenses. He had a full and fair opportunity to litigate the charges in the criminal trial, at which the child testified in open court. The criminal acts mirrored the sexual abuse allegations in the Article 10 petition. (Family Ct. Bronx Co)

People v Martin, 179 AD3d 428 (1st Dept 1/7/2020)

CPL 440.10 / HEARING NEEDED

ILSAPP: The defendant appealed from an order of NY County Supreme Court, which summarily denied his CPL 440.10 motion. The First Department reversed and remanded for a hearing, while holding in abeyance the defendant's appeal from the underlying judgment, convicting him of 2nd degree murder, aggravated vehicular homicide, and other crimes. The motion presented a material factual dispute. Motion counsel's supporting affirmation reported that defense counsel said he did not realize he could have called an expert regarding whether, based on ingesting drugs, the defendant could not have shown depraved indifference. Further, an expert affidavit stated that the defendant did not possess the requisite mental state. In opposition, the prosecutor reported that defense counsel said he was indeed aware that he could have called an expert, but for strategic reasons chose not to. Aidala, Bertuna & Kamins represented the appellant. (Supreme Ct, New York Co)

People v Thomas, 179 AD3d 444 (1st Dept 1/7/2020)

SORA ERROR / BUT AFFIRMED

ILSAPP: The defendant appealed from an order of Bronx County Supreme Court, which adjudicated him to be a level-three sexually violent offender. The First Department found that the SORA court incorrectly assessed 15 points under the risk factor for acceptance of responsibility. The defendant was removed from sex offender treatment for reasons not tantamount to a refusal to participate. Instead, the court should have assessed 10 points under that risk factor, based on the defendant's general failure to accept responsibility for his sexual misconduct. The SORA court correctly assessed 20 points for unsatisfactory conduct while confined. The defendant remained a level-three offender, and the appellate court found no basis for a downward departure. (Supreme Ct, Bronx Co)

People v Bell, 179 AD3d 462 (1st Dept 1/9/2020)

RIGHT TO COUNSEL – ATTACHMENT OF RIGHT IN RELATED MATTER

LASJRP: The First Department concludes that the existence of defendant's pending case in Queens County, which gave rise to the order of protection that underlies the contempt charge in this case, did not preclude the videotaped questioning of defendant.

Defendant failed to meet his burden to establish that he was represented by counsel in the Queens case at the time of his interrogation, and, even assuming such representation existed, there were no circumstances warranting imputation to the interrogators of constructive knowledge of the representation. Moreover, the Queens case was not so related to the present case as to preclude inquiry since defendant was only questioned about whether he had assaulted the victim that day. (Supreme Ct, New York Co)

In re A'Keria A.H., 179 AD3d 482 (1st Dept 1/14/2020)

ABUSE/NEGLECT – LEAVING CHILDREN ALONE

LASJRP: The First Department upholds a finding of neglect where, after the children's mother failed to appear for a scheduled visitation exchange, the father brought the children to the mother's home, pushed the children into the apartment, and fled as the children followed him outside the building, at which point he left the children on the sidewalk, alone and crying.

First Department *continued*

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

People v Bryan, 179 AD3d 489 (1st Dept 1/14/2020)

ADJOURNMENTS

LASJRP: The First Department finds reversible error where the court denied the defense an adjournment to the next business day for the purpose of calling an absent witness, whose testimony would undisputedly have been material. (Supreme Ct, New York Co)

People v Martinez, 180 AD3d 190 (1st Dept 1/14/2020)

RIGHT TO COUNSEL – EFFECTIVE ASSISTANCE

LASJRP: The First Department orders a new hearing in connection with defendant's CPL § 440.10 motion to vacate his 2007 conviction on the ground that defense counsel provided erroneous advice on the immigration consequences of the guilty plea.

The court below found a lack of prejudice essentially because defendant stated that his efforts to find out about the immigration consequences of his plea were triggered by the discovery that the conviction was standing in the way of expanding his taxi business to Logan Airport in Boston. However, the inquiry should have been limited to defendant's circumstances at the time of the plea. There is reason to believe defendant would have given paramount importance to avoiding deportation if he had known it was an unavoidable consequence of his plea to an aggravated felony rather than a mere possibility.

Although the court warned defendant of the potential for deportation as per People v. Peque (22 N.Y.3d 168), his counsel's advice—that there was no such potential if he stayed out of trouble during the period of probation—undermined the court's warning. (Supreme Ct, New York Co)

In re Lamani C.H., 179 AD3d 501 (1st Dept 1/16/2020)

TERMINATION OF PARENTAL RIGHTS – PETITION – FAILURE TO PLAN

LASJRP: The First Department finds that the permanent neglect petitions were not defective for failing to specify the agency's diligent efforts, and that any alleged deficiency was cured by the introduction into evidence at the fact-finding hearing of the case progress notes and the testimony of the caseworker.

The Court upholds the finding of permanent neglect, noting, inter alia, that the agency formulated a service plan tailored to address respondent's anger management issues and parenting challenges and assist in domestic violence prevention, and that respondent continued to exhibit behaviors that the programs she attended were supposed to help remedy and thus failed to gain insight into her parenting problems and undercut the value of her participation.

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

In re Anthony S. v. Monique T.B., 179 AD3d 530 (1st Dept 1/21/2020)

SUPPORT / NON-CUSTODIAL PARENT PETITION OKAY

ILSAPP: The mother appealed from an order of Bronx County Family Court, which denied her objection to the order of a Support Magistrate awarding child support to the father as to the parties' two children. The First Department affirmed. In a recent appeal involving the instant parties, the appellate court determined that the trial court properly ordered a determination regarding whether the father was a custodial parent or otherwise a proper party to file a petition (167 AD3d 408). The Magistrate determined that the father was a proper party—despite the lack of proof that the children lived with him, not their paternal grandmother. The Family Court Act did not prohibit a non-custodial parent from commencing a support proceeding. *See* Family Ct Act § 422 (a). While in a shared custodial arrangement, the custodial parent cannot be required to pay child support, the unusual facts of the instant case did not demonstrate a shared custodial arrangement. There was no reason to disturb the Support Magistrate's determination that the father was credibly seeking support on behalf of the subject children and the paternal grandmother. To dismiss the petitions would be to improperly release the mother from her support obligations. (Family Ct, Bronx Co)

People v Guillen, 179 AD3d 539 (1st Dept 1/21/2020)

CPL 330.30 HEARING / AMOROUS JUROR

ILSAPP: The defendant appealed from judgment of NY Supreme Court, convicting him of attempted 2nd degree murder and other crimes. The First Department remitted the matter for a hearing on the defendant's CPL 330.30 motion. The trial court erred in denying the application without a hearing. A prosecution trial assistant disclosed that, after the trial and before sentencing, he received a handwritten note in the mail from the jury foreperson, stating: "Now that the trial is over ...", followed by the juror's name and contact information. Based on a crossed-out phrase, it appeared that the note had been written during the trial. Standing alone, the note raised an issue of fact about whether the foreperson's apparent romantic interest in the prosecution assistant prevented her from deliberating fairly. It was not dispositive that the assistant did not respond to the note, since the relevant issue was the juror's misconduct during the trial. The trial court also erred with regard to a second juror, who had a

First Department *continued*

sufficiently close relationship with a witness to warrant a hearing as to whether that juror engaged in misconduct by failing to disclose the relationship. The Office of the Appellate Defender (Rosemary Herbert, of counsel) represented the appellant. (Supreme Ct, New York Co)

In re Jaquiya F., 179 AD3d 525 (1st Dept 1/21/2020)

DISPOSITION – PROBATION/VIOLATIONS

LASJRP: The First Department reverses an order that, at the conclusion of a violation of probation proceeding, adjudicated respondent a juvenile delinquent and placed her on probation for three months, but also continued the original order of disposition which adjudicated respondent a juvenile delinquent and placed her on probation for a period of 12 months.

Under FCA § 360.3(6), the court shall dismiss the violation petition if it continues the order of probation. Thus, the new adjudication of delinquency and period of probation was not authorized by law.

The JRP appeals attorney was John Newbery, and the trial attorney was Judith Harris. (Family Ct, Bronx Co)

People v Washington, 179 AD3d 522 (1st Dept 1/21/2020)

EVIDENCE – TEXT MESSAGES

LASJRP: The First Department concludes that text messages exchanged between a person purporting to be defendant's mother and the victim two days after the crime were properly authenticated as defendant's texts where the texts reached the victim at a disguised phone number she had shared with defendant shortly after the crime and had not shared with anyone else; the texts revealed a detailed knowledge of the incident and the relationship between defendant and the victim, and explicitly discussed the sexual encounter; the sender admitted having the victim's car, bag and phone, which were taken during the incident, and defendant was apprehended a day later driving the victim's car; and the sender's phone number was registered to a former female friend of defendant. (Supreme Ct, Bronx Co)

Maxine B. v Richard C., 179 AD3d 546 (1st Dept 1/23/2020)

PROTECTIVE ORDER / BAD SON

ILSAPP: The respondent son appealed from an order of protection, entered by Bronx County Family Court in favor of the petitioner mother, based on acts constituting 3rd degree menacing. The First Department affirmed. The son emphasized that the mother said in court that she did not need the order. However, the record demonstrated that such statements, made when the son was present, did not fully reflect the mother's wishes. There had been multiple temporary orders of protection against the son. A social worker credibly testified that he isolated, controlled, and abused the mother. She was afraid to return home because the son was there. The proof supported the menacing finding. The mother testified that, one night, after the son became angry with her for cooking at 2 a.m., they struggled and she sustained a black eye. (Family Ct, Bronx Co)

People v Torres, 179 AD3d 543 (1st Dept 1/23/2020)

EX POST FACTO / SUB COUNSEL

ILSAPP: The defendant appealed from judgments of NY County Supreme Court, convicting him of multiple sexual offenses and sentencing him to an aggregate term of 42⅓ years to life. In the interest of justice, the First Department modified. The People conceded that certain counts should be dismissed as inclusory concurrent counts and that the conviction of 2nd degree incest (P.L. § 255.26) violated the Ex Post Facto Clause, because it was based on conduct that occurred before the statute became effective. Accordingly, such count was reduced to incest (not divided into degrees)—the equivalent offense at the time of the defendant's conduct (former Penal Law § 255.25). The matter was remanded for resentencing on the modified count. However, the defendant's remaining Ex Post Facto claim was unavailing. One count of 1st degree course of sexual conduct was based on conduct that ended before a statutory amendment expanded the definition of "sexual conduct." But the conduct cited by the defendant as being covered by the amendment had no relevance. Thus, the statutory change had no effect on the defendant, and there was no Ex Post Facto violation. *See Dobbert v Florida*, 432 US 282. Supreme Court properly denied the defendant's request, made shortly before trial, for new counsel. The defendant did not establish good cause, and the request was properly denied in light of the timing and the court's confidence in counsel's abilities. *See People v Porto*, 16 NY3d 93. While the defendant's main complaint involved a lack of communication about witnesses to be interviewed, a change of counsel would not likely have improved this situation. Counsel called appropriate witnesses, and there was no indication that any witnesses with information material to the defense were omitted. Counsel's permissible explanation of his own performance did not create a conflict. *See People v Nelson*, 7 NY3d 883. The Center for Appellate Litigation (Hunter Haney, of counsel) represented the appellant. (Supreme Ct, New York Co)

First Department *continued*

Matter of Bannister v Wiley, 179 AD3d 579 (1st Dept 1/28/2020)

MISTRIAL WRONGLY DECLARED TO ACCOMMODATE JUROR'S TRAVEL

LASCDP: The trial court abused its discretion in declaring a mistrial to accommodate a juror's weekend travel plans. The juror could have been directed to report for deliberations the following day; there was no confirmation that the jury was hopelessly deadlocked.

Since the mistrial was not compelled by manifest necessity, retrial was barred by Double Jeopardy.

People v Gamble, 179 AD3d 580 (1st Dept 1/28/2020)

Even if pretrial counsel's act in consenting to an untimely prosecution motion to compel a DNA sample was objectively unreasonable, the defendant was not prejudiced under either state or federal standards. There was overwhelming evidence of guilt independent of any DNA evidence. That the court ruled on the 440.10 motion without a hearing was a provident exercise of discretion as a hearing would have served no useful purpose, especially in light of the defendant's "detailed submissions regarding his interactions with pretrial counsel, who was deceased."

Precluding defense cross-examination of a witness about an arrest resulting in dismissal was not error, as trial counsel, who lacked sufficient information to show that the charges were not dismissed on the merits, demonstrated no good-faith basis for the inquiry. (Supreme Ct, Bronx Co)

Janiya P., 179 AD3d 622 (1st Dept 1/30/2020)

DV / CHILDREN'S PRESENCE / NEGLECT

ILSAPP: NY County Family Court dismissed neglect petitions against the respondent. The First Department reversed, reinstated the petitions, found neglect, and remanded for a dispositional hearing. The respondent was the father of the youngest subject child and a person legally responsible for the mother's eldest child. He neglected the children by committing domestic violence against the mother. While the children were present, he grabbed the mother by the hair and dragged her into the apartment after she returned from the hospital. The court also erred in failing to draw a negative inference against the respondent for failing to testify or present evidence. The Legal Aid Society of NYC (Israel Appel, of counsel) represented the appellants. (Family Ct, New York Co)

In re Judith L.C. v Lawrence Y., 179 AD3d 616 (1st Dept 1/30/2020)

FAMILY OFFENSES – LINCOLN HEARING

LASJRP: The First Department concludes that in a hearing regarding a request for an order of protection, it would have compromised the parties' due process rights if the court had considered statements made by the child in a Lincoln hearing without the parties and their counsel present. (Family Ct, New York Co)

People v Dais, 180 AD3d 417 (1st Dept 2/4/2020)

VICTIM INVOKES PRIVILEGE / DEFENDANT ABSENT AT SENTENCING

ILSAPP: The defendant appealed from judgments of NY County Supreme Court, convicting him of attempted 1st and 2nd degree murder, 1st degree assault, and other crimes. The First Department held that, because the defendant was absent when the court imposed post-release supervision for the crimes carrying determinate terms, he had to be resentenced on those convictions. The trial court properly declined to strike the testimony of the victim, who invoked the privilege against self-incrimination when asked about drug activities. It was undisputed that the victim was a drug dealer and, on the day of the shooting, was in NY to buy drugs. On summation, defense counsel exploited the victim's refusals to answer; and the court properly instructed the jury. The prosecutor became an unsworn witness during redirect examination of the victim. There was a material issue involving whether the prosecutor had informed the victim about his statutory immunity. By repeatedly asking the victim if he recalled discussing the importance of "telling the truth," the ADA risked improperly influencing the jury. But the error was harmless. The Center for Appellate Litigation (Arielle Reid, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Hayes, 180 AD3d 423 (1st Dept 2/4/2020)

SEX TRAFFICKING / LEGALLY INSUFFICIENT

ILSAPP: The defendant appealed from a NY County Supreme Court judgment, convicting him of sex trafficking and other crimes. The First Department dismissed the trafficking count, finding that the conviction was not supported by legally sufficient evidence. The proof did not establish that the defendant used force, or engaged in a scheme or plan, to induce the alleged victim to engage in prostitution. The alleged victim and two other women sought to earn money by prostitution. To do so, they voluntarily traveled with the defendant from Florida to NY. At times, he left them alone. A detective overheard a phone call in which the defendant was angry with the alleged victim because she did not get money from a

First Department *continued*

client. That did not constitute the requisite proof. The Office of the Appellate Defender (David Bernstein, of counsel) represented the appellant. (Supreme Ct, New York Co)

Mathiew v Michels, 180 AD3d 403 (1st Dept 2/4/2020)

RELOCATION TO ENGLAND GRANTED / AFFIRMED

ILSAPP: The father appealed from an order of NY County Supreme Court, which granted the mother's application to relocate with the parties' minor children to London for a year. The First Department affirmed. Because no prior custody order was in place, the "best interests" test should have been applied, but the challenged decision was sound. The mother landed a position in London in reliance on the father's promise that the family would move there if she found a job there with a certain salary. She had an apartment and family in London, and the children spent time there every year with their grandmother. As the primary caregiver, the mother would not engage in "negative gatekeeping." The father was employed by a company with a London office but failed to explain why he could not work there. He said that a move from NY would uproot the children, but had no such concerns when considering a move to Texas and Massachusetts to advance his career. (Supreme Ct, New York Co)

Matter of Rebecca V., 180 AD3d 413 (1st Dept 2/4/2020)

NEGLECT / HEARSAY EXCEPTIONS

ILSAPP: The father appealed from orders of fact-finding and disposition entered in Bronx County Family Court. The appeal from the fact-finding order was subsumed in, and brought up for review by, the appeal from the final order. *See Matter of Aho*, 39 NY2d 241; CPLR 5501 (a) (1). The First Department affirmed the neglect finding, since it was supported by the mother's statements that the father stabbed her and took the child from the home in a car. Such statements were admissible under the present sense impression and excited utterance exceptions. The fact that the statements were made to a 911 operator moments after the attack indicated that the mother was in shock and spoke without reflection. A finding of neglect could rest on a single incident. The father's violence [showed] severely impaired judgment that exposed the child to a risk of substantial harm. (Family Ct, Bronx Co)

People v Rodriguez, 180 AD3d 415 (1st Dept 2/4/2020)

PEOPLE'S WITNESS / NO BAD FAITH

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted 1st and 2nd degree assault. The First Department affirmed. The record did not show that, in bad faith, the People called the victim—the defendant's girlfriend—in order to impeach her with prior inconsistent statements implicating the defendant. The victim provided direct testimony as to other key proof. She testified that the defendant was in the apartment when the assault allegedly occurred and she discovered a suggestive text from another woman on his phone. The trial court properly received evidence of an uncharged assault by the defendant against the victim, 18 months before the instant incident, as background to show the abusive relationship. Since the victim's testimony as to the uncharged crime was not affirmatively damaging to the People's case, the trial court erred in permitting the prosecution to impeach her with a police report containing her description of that assault. But the error was harmless. (Supreme Ct, New York Co)

People v Rivera, 180 AD3d 514 (1st Dept 2/13/2020)

FAMILY EXCLUDED / NEW TRIAL

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree criminal sale of a controlled substance and another crime. The First Department reversed and ordered a new trial. At a *Hinton* hearing (31 NY2d 71), there was no testimony that the defendant or any family member threatened, or otherwise posed a threat to, two testifying undercover officers. Defense counsel requested that family members be permitted to attend the officers' trial testimony, and the prosecutor did not oppose. Yet the court denied the application, without any supporting findings. This was error. An order of closure that does not make an exception for family members is overbroad, unless specific reasons validate such exclusion. The defense was not obligated to identify specific family members who might attend, absent a request by the prosecutor or the court. The Center for Appellate Litigation (Jan Hoth, of counsel) represented the appellant. (Supreme Ct, New York Co)

Matter of K.S., 180 AD3d 468 (1st Dept 2/11/2020)

NO NEGLECT / SLEEPING CHILD / REVERSED

ILSAPP: The father appealed from an order of disposition of NY County Family Court, which brought up for review (*see* CPLR 5501 [a] [1]) a fact-finding order holding that he neglected the subject child. The Second Department reversed and dismissed the petition. The child was in the home when the incident occurred, but was sleeping in another room, as proven by credible testimony of the parents and the responding police officer. Lewis Calderon represented the appellant. (Family Ct, New York Co)

First Department *continued*

Matter of Zaire S., 180 AD3d 506 (1st Dept 2/13/2020)

NO NEGLECT / ADDICT BOYFRIEND / REVERSED

ILSAPP: The respondent grandmother appealed from an order of fact-finding of NY County Family Court, which found that she neglected the subject child. The First Department reversed and dismissed the petition. The test is "minimum degree of care"—not ideal care. The agency presented insufficient evidence that the grandmother knew, or should have known, that the boyfriend had a serious substance abuse problem. While she was aware that he used alcohol frequently, and he once overdosed on drugs, the record did not establish the frequency or duration of his drug use prior to the underlying incident. Steven N. Feinman represented the appellant. (Family Ct, New York Co)

Matter of Lorraine D.S. v Steven W., 180 AD3d 595 (1st Dept 2/25/2020)

PATERNITY DISAVOWAL / EQUITABLY ESTOPPED

The respondent appealed from an order of Bronx County Family Court, which equitably estopped him from denying paternity and entered an order of filiation declaring him the father of the subject teenage child. The First Department affirmed. Although no appeal lies as of right from an order of filiation in a support proceeding, the notice of appeal was deemed to be an application for leave, which was granted. Estoppel was proper, based on several factors. The respondent held himself out as the father. For five years, the child lived with the respondent and his mother, and the youth believed that the respondent was his father. After the respondent and the mother split, the respondent regularly visited the child. The respondent attended the basketball games and graduations of the youth, who was best man at the respondent's wedding to his current wife. (Family Ct, Bronx Co)

People v Manning, 180 AD3d 605 (1st Dept 2/25/2020)

UNSWORN JUROR DISCHARGE / REVERSED

ILSAPP: The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree robbery and another crime. The First Department reversed due to the unjustified discharge for cause of a selected but unsworn juror. Initially, both the defendant and the People declined to challenge the juror, for cause or peremptorily. Subsequently, the trial court expressed concerns about an out-of-town meeting the prospective juror was to attend the day before the expected conclusion of trial. The prosecutor's ensuing challenge for cause was granted. Yet the juror never asked to be excused, and the record did not show that his state of mind would have prevented him from rendering an impartial verdict. The matter was remanded for a new trial, to be preceded by further suppression proceedings. A factual determination was needed as to whether plainclothes officers identified themselves to the defendant as police before he fled. On that point, the proof was conflicting, and the suppression court made no finding. The decision did not explain the conclusion that police actions leading to the defendant's arrest were lawful. The Center for Appellate Litigation (Jan Hoth, of counsel) represented the appellant. (Supreme Ct, New York Co)

Second Department

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

People v Breland, 178 AD3d 716 (2nd Dept 12/4/2019)

BRADY MATERIAL

LASJRP[1]: The Second Department finds no reversible *Brady* error where the People failed to disclose that a witness had collected a $2,000 reward from Crime Stoppers prior to trial. There is no evidence that the prosecution was aware of the $2,000 reward at the time of the defendant's trial, as the identity of individuals providing information to, and collecting rewards from, Crime Stoppers is kept confidential.

Moreover, defendant made only a general request for exculpatory material, and there is no reasonable probability that additional cross-examination of the witness concerning the $2,000 reward would have yielded a different result. The witness received substantial benefits of approximately $12,000 in exchange for his cooperation in the case against defendant and that information was disclosed to defendant, who engaged in extensive cross-examination of the witness regarding this issue. (Supreme Ct, Kings Co)

People v Davis, 179 AD3d 183 (2nd Dept 12/4/2019)

The defendant, who was adjudicated a level three sex offender upon his release from prison in 2000, established by clear and convincing evidence that a downward modification to level one is appropriate; the order is modified accordingly. A careful reading of the law supports a conclusion that an individualized approach is necessary when a modification of a designated risk level is sought.

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

Second Department *continued*

No evidence contradicted the defendant's showing of "long-term sobriety, strong family support, faith-based and law abiding lifestyle, continuous employment despite his numerous physical disabilities and age," which demonstrated that a reduction is appropriate. The prosecution's opposition was "based solely on the defendant's past significant criminal record," to which the court assigned great weight in determining that a reduction only to level two was warranted. But, while important, the nature of the crime cannot be given so much weight that the primary objective of the Sex Offender Registration Act—to thoroughly analyze a defendant's likelihood of reoffending and the danger posed to the community should less reporting requirements be put in place—is obscured. (Supreme Ct, Queens Co)

People v Dawson, 178 AD3d 719 (2nd Dept 12/4/2019)

The cumulative effect of improper comments in the prosecutor's summation deprived the defendant of a fair trial. "[T]he prosecutor denigrated the defense and disparaged the defendant, using terms like "'ridiculous,' 'insulting,' and 'ludicrous,'" to describe the defendant's self-defense claim, and describing the defendant as "a 'hothead' and an 'punk' who could not 'take [a] beating like a man.'" The prosecutor also improperly: invoked juror sympathy for the complainant; vouched for the complainant's credibility; "interjected her own sense of moral retribution with respect to the complainant's entitlement to use physical force"; and misled the jury about the law on justification. (Supreme Ct, Kings Co)

People v Gavrilov, 178 AD3d 727 (2nd Dept 12/4/2019)

JUDICIAL DIVERSION

LASJRP: Criminal Procedure Law § 216.05(4) provides that "[w]hen an authorized court determines … that an eligible defendant should be offered alcohol or substance abuse treatment, or when the parties and the court agree to an eligible defendant's participation in alcohol or substance abuse treatment, an eligible defendant may be allowed to participate in the judicial diversion program offered by this article. Prior to the court's issuing an order granting judicial diversion, the eligible defendant shall be required to enter a plea of guilty to the charge or charges; provided, however, that no such guilty plea shall be required when: (a) the people and the court consent to the entry of such an order without a plea of guilty; or (b) based on a finding of exceptional circumstances, the court determines that a plea of guilty shall not be required. For purposes of this subdivision, exceptional circumstances exist when, regardless of the ultimate disposition of the case, the entry of a plea of guilty is likely to result in severe collateral consequences."

While upholding a determination denying defendant the opportunity to participate in judicial diversion without first pleading guilty, the Second Department concludes that while the possibility of deportation may, under certain circumstances, constitute a severe collateral consequence, the Court will not adopt a per se rule requiring courts to allow every eligible defendant subject to deportation to participate in judicial diversion without first pleading guilty. (Supreme Ct, Kings Co)

Matter of Nevaeh L.-B., 178 AD3d 706 (2nd Dept 12/4/2019)

USE/NEGLECT – RIGHT OF CONFRONTATION

LASJRP: The Second Department finds no error where the family court permitted the child to testify at the fact-finding hearing via closed-circuit television, noting that the child expressed fear about seeing the father during her testimony and worried she would not be able to testify if she saw him; and that the child was subject to vigorous cross-examination after her direct testimony.

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

People v Anglin, 178 AD3d 839 (2nd Dept 12/11/2019)

SEARCH AND SEIZURE – EMERGENCY DOCTRINE

LASJRP: The Second Department concludes under the emergency doctrine that the police made a lawful warrantless entry where the officers were responding to a report of an assault in progress; the person who called 911 was present and stated that he heard a woman being beaten inside the apartment, heard her scream, and heard a male saying, "shut up"; and no one responded to the officers' repeated knocks on the apartment door. (Supreme Ct, Kings Co)

People v Day, 178 AD3d 845 (2nd Dept 12/11/2019)

PROSECUTOR SUMMATION / REVERSAL

ILSAPP[2]: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree assault and 1st degree robbery. The Second Department reversed and ordered a new trial. As the People conceded, the prosecutor made comments during summation— that the defendant's DNA was found on the weapon used to shoot the victim—that had no evidentiary support in the record. The remarks, which were promptly objected to by defense counsel, were highly prejudicial

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

Second Department *continued*

and deprived the defendant of his right to a fair trial, particularly where the trial court refused to give a curative instruction. Justin Bonus represented the appellant. (Supreme Ct, Kings Co)

People v Devorce, 178 AD3d 846 (2nd Dept 12/11/2019)

SENTENCING ERROR / CONSECUTIVE TERMS / TRIAL

ILSAPP: The defendant appealed from a resentence imposed by Westchester County Supreme Court upon his conviction of 2nd degree CPW, 1st degree robbery (12 counts), attempted 1st degree robbery (two counts), and 1st degree assault, following a jury trial. The Second Department held that the CPW sentence must run concurrently with the other terms. The People's theory was that the defendant possessed a gun with the intent to unlawfully use it during a robbery. Since they did not prove that he had an unlawful intent, separate and distinct from the intent to commit the robbery, the consecutive sentence imposed for CPW 2 was impermissible. The Legal Aid Society of Westchester County (David Weisfuse, of counsel) represented the appellant. (Supreme Ct, Westchester Co)

Guthart v Nassau County, 178 AD3d 777 (2nd Dept 12/11/2019)

In this putative class action challenging red-light camera violations, an order dismissing the complaint is reversed. The order treated "that branch of the County's motion as one for a declaration in the County's favor with respect to the first cause of action, [and] granted that branch of the motion to the extent of declaring that the imposition of a driver responsibility fee on a red-light camera violation was a proper exercise of the County's power to charge and collect administrative fees and, based on that declaration, direct[ing] dismissal of the remainder of the complaint for failure to state a cause of action." Dismissal was improper because "the County failed to demonstrate the absence of all factual issues so that a determination as to the rights of the parties could be determined as a matter of law …." (Supreme Ct, Nassau Co)

Matter of Isaac S., 178 AD3d 829 (2nd Dept 12/11/2019)

ABUSE/NEGLECT – RIGHT TO FILE MOTIONS PRO SE

LASJRP: In these FCA Article Ten proceedings in which the mother and the father separately appeal from temporary orders of protection, and the Second Department dismisses the appeals as academic because the orders have expired and impose no enduring consequences, the Court also concludes that the family court did not err in directing the mother and the father, who are appearing pro se, to obtain the court's permission before filing any further motions in these proceedings.

The record reflects that the mother and the father forfeited this right by abusing the judicial process through vexatious litigation. (Family Ct, Kings Co)

People v Peterson, 178 AD3d 858 (2nd Dept 12/11/2019)

SENTENCING ERROR / NO PSI REPORT

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree assault, 2nd degree CPW, and other crimes. The Second Department vacated the sentence and remitted for resentencing. When a defendant convicted of a felony offense absconds during trial and is sentenced in absentia, the court must still order a presentence investigation and may not pronounce sentence until it has received a written PSI report. Because that was not done here, the appellate court could not reach the defendant's contention regarding the alleged excessiveness of the sentence. Jonathan Strauss represented the appellant. (Supreme Ct, Kings Co)

People v Robinson, 178 AD3d 861 (2nd Dept 12/11/2019)

SENTENCING ERROR / CONSECUTIVE TERMS / PLEA

ILSAPP: The defendant appealed from a Kings County Supreme Court judgment, convicting him of attempted 3rd degree CPW (two counts). The Second Department modified by providing that the sentences would run concurrently. Where a defendant pleads guilty to a lesser offense than charged in the indictment, the People may rely only on the facts admitted during the allocution to establish the legality of consecutive sentences. No facts adduced at the instant allocution demonstrated two separate acts of constructive possession, so the imposition of consecutive sentences was illegal. Appellate Advocates (Anna Kou, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People ex rel. Accomando v Kirschner-Melendez, 178 AD3d 944 (2nd Dept 12/18/2019)

GRANDPARENT VISITATION / DENIED

ILSAPP: The adoptive mother of the two subject children appealed from an order of Suffolk County Supreme Court, which granted the paternal grandmother's DRL § 72 (1) habeas corpus petition for visitation rights. The Second Department reversed. The grandmother had standing, but the record did not establish that visitation would be in the children's best interests, where: (1) the grandmother failed to acknowledge issues that led to the

Second Department *continued*

termination of the biological parents' rights; (2) believed that the removal and the adoption of the children were part of a government conspiracy; (3) feared that her car was wiretapped; and (4) allowed the bio father to have contact with the children in violation of an order of protection. Heather Fig represented the appellant. (Supreme Ct, Suffolk Co)

People v Dunbar, 178 AD3d 948 (2nd Dept 12/18/2019)

HEARING REOPENED DUE TO NEW INFO

LASCDP[3]: After a suppression hearing the prosecutor revealed, for the first time, that a sergeant transmitting the radio call might have obtained from an anonymous bystander (not from the robbery complainant) the information to stop a livery cab. The Second Department ruled that the lower court should have reopened the hearing. The new information might have affected the suppression court's finding that the People had sufficiently demonstrated the lawfulness of the vehicle stop. (Supreme Ct, Queens Co)

People v Jarama, 178 AD3d 970 (2nd Dept 12/18/2019)

SORA / REVERSED / FACTOR 4

ILSAPP: The defendant appealed from an order of Kings County Supreme Court, designating him a level-two sex offender. The Second Department reversed and adjudicated the defendant to be level one. The SORA court erred in assessing 20 points under risk factor 4. Although the People submitted evidence that the defendant engaged in sexual contact with the victim on three or four occasions, they failed to submit any evidence as to when these incidents occurred relative to one another, so as to demonstrate that they were separated in time by at least 24 hours. Appellate Advocates (Angad Singh, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Lewis, 178 AD3d 971 (2nd Dept 12/18/2019)

SORA / REVERSED / RISK FACTOR 9

ILSAPP: The defendant appealed from an order of Kings County Supreme Court, designating him a level-two sex offender. The Second Department reversed in the interest of justice. Supreme Court erred in assessing 30 points under risk factor 9, based on a prior conviction for attempted endangering the welfare of a child. That conviction was not a felony, sex offense, or conviction for actually endangering a child. Since the erroneous assessment may have influenced the People in refraining from seeking an upward departure, remittal was ordered. Appellate Advocates (Tammy Linn and Jenna Hymowitz, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Lewis, 178 AD3d 952 (2nd Dept 12/18/2019)

PREJUDICIAL PHOTOS / REVERSED

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 3rd degree criminal sexual act (two counts), 3rd degree sexual abuse (three counts), and endangering the welfare of a child—his teenage stepdaughter. The Second Department reversed and ordered a new trial. The admission into evidence of photographs depicting the complainant's genitals and anus was unduly prejudicial. The appellate court reached the unpreserved issue in the interest of justice. Although the complainant's pediatrician testified that there were no relevant injuries, the photographs were displayed to the jury. The photos were irrelevant and served no purpose other than to inflame the jury and elicit impermissible sympathy. The error was compounded when the prosecutor argued in summation that the complainant had to "get on a table and open up her legs and have her genitals photographed to be shown to 15 strangers ... What did she gain out of this? Nothing." The reviewing court also noted that the prosecutor engaged in extensive improper conduct during summation, including attempting to arouse the sympathy of the jurors and, while discussing the character of the defendant-church pastor, referencing sexual abuse scandals in the Catholic Church. Edwin Schulman represented the appellant. (Supreme Ct, Queens Co)

People v Osbourne, 178 AD3d 956 (2nd Dept 12/18/2019)

SEARCH AND SEIZURE – PAYTON

LASJRP: The Second Department finds no Payton violation where, in addition to directing defendant to exit the apartment, the police played a siren and chirping noises through a speaker, and defendant "voluntarily" exited. The Court rejects defendant's contention that the use of the speaker was "a form of nonlethal force" the police utilized to effect his arrest. (Supreme Ct, Queens Co)

Walter v Walter, 178 AD3d 991 (2nd Dept 12/18/2019)

CUSTODY MOD / HEARING NEEDED

ILSAPP: The defendant appealed from an order of Queens County Supreme Court, which granted the plaintiff's motion to modify a so-ordered stipulation of custody incorporated but not merged into the parties' judgment of divorce, so as to award him final decision-making power.

[3] Summaries marked with these initials, LASCDP, are courtesy of The Legal Aid Society's Criminal Defense Practice, from their CDD case summaries.

Second Department *continued*

The Second Department reversed. The stipulation of custody provided that, except in cases of emergency, the parties would jointly make major decisions. Without a hearing, the plaintiff was awarded final decision-making authority. Modification of a court approved custody stipulation requires a showing that there has been a change in circumstances such that a modification is necessary to ensure the best interests of the child. In view of disputed factual allegations, a hearing was needed. Furthermore, the interests of the child should be independently represented. Thus, the matter was remitted for appointment of an AFC and a hearing. Patricia Fersch represented the appellant. (Supreme Ct, Queens Co)

Matter of Acosta v Lorber-Acosta, 178 AD3d 1031
(2nd Dept 12/24/2019)

CUSTODY – CHILD'S WISHES

LASJRP: The Second Department upholds an award of custody to the father, noting, inter alia, that the family court did not fail to give sufficient weight to the wishes of the child, who was 14 and 15 years old at the time of the fact-finding hearing.

The child's wishes are outweighed in this case by other circumstances, including her schooling, nutrition, residential stability, parental structure, and current circumstances which allow the child to remain in the lives of both parents and to see and speak to the mother almost every day. (Family Ct, Queens Co)

Matter of Cameron L., 178 AD3d 1046
(2nd Dept 12/24/2019)

REMOVAL / NO IMMINENT DANGER

ILSAPP: The mother appealed from an order of Kings County Family Court, which granted the petitioner agency's application to remove the child from her custody and placed her with the maternal grandmother, pending the outcome of the neglect proceeding. The Second Department reversed and directed the immediate return of the child. Upon a Family Ct Act § 1027 hearing, temporary removal is authorized where necessary to avoid imminent risk to the child. The court must balance risk with best interests and reasonable efforts made to avoid removal. Imminent danger, which must be near or impending, was not present here, based on mere concerns about whether the mother would keep in contact with the petitioner or return to court for continued proceedings. Brooklyn Defender Services (Jessica Marcus and Noran Elzarka, of counsel) represented the appellant. (Family Ct, Kings Co)

People v Herring, 178 AD3d 1073
(2nd Dept 12/24/2019)

VOP / SENTENCE REDUCED

ILSAPP: The defendant appealed from an Orange County Court judgment, revoking a sentence of probation and imposing an enhanced sentence of 6½ years' imprisonment, plus two years' post-release supervision, upon his previous conviction of 3rd degree criminal sale of a controlled substance. The Second Department reduced the sentence to 2½ years followed by the PRS. As a condition of his plea, the defendant waived the right to appeal and was sentenced to six months' incarceration plus five years' probation. A hearing on a VOP is a summary informal procedure and does not require strict adherence to rules of evidence. However, the finding of a violation must be based on a preponderance of the evidence and cannot rest entirely on hearsay. While the lower court would have been permitted to take judicial notice of the defendant's indictment for attempted murder, the evidence was presented after the close of evidence, and the defendant had no opportunity to be heard regarding the documents upon which the court relied. He did not challenge the finding of a violation based on using marijuana. Samuel Coe represented the appellant. (County Ct, Orange Co)

People v Hosannah, 178 AD3d 1074
(2nd Dept 12/24/2019)

IDENTIFICATION – SHOWUPS/SUGGESTIVENESS – INDEPENDENT SOURCE – *WADE* HEARING/RIGHT TO WAIVE APPEARANCE

LASJRP: The Second Department finds no undue suggestiveness where there was evidence at the *Wade* hearing that defendant was wearing sunglasses at the time of the crime, and an eyewitness testified that he overheard that the individuals being detained had been found wearing sunglasses, but the testimony established that defendant was not wearing sunglasses at the time of the showup.

The Court also upholds findings of independent source where the eyewitnesses' descriptions did not mention defendant's facial scar. Defendant describes his scar as being situated approximately one inch under the far corner of his left eye and approximately an inch in length from his eye toward the back of his head. However, the eyewitnesses' descriptions were sufficiently detailed and accurate as to defendant's race, gender, height, build, and age, and they testified at the pretrial hearing that defendant was wearing sunglasses.

While defendant had an absolute right to waive his presence at the independent source phase of the *Wade* hearing, the hearing court's refusal to allow defendant to absent himself was harmless error. (Supreme Ct, Nassau Co)

Second Department *continued*

People v Melamed, 178 AD3d 1074 (2nd Dept 12/24/2019)

SEARCH AND SEIZURE – SEARCH WARRANTS

LASJRP: In this residential mortgage fraud prosecution, the Second Department, with one judge dissenting, orders suppression where the warrant permitted the Office of the Attorney General to search and seize all computers, hard drives, and computer files stored on other devices, without any guidelines, parameters, or constraints on the type of items to be viewed and seized; and, as to paper documents, merely identified generic classes of items and effectively permitted the OAG to search and seize virtually all conceivable documents that would be created in the course of operating a business, and did so for the two businesses identified as being involved in the suspected offenses as well as a number of other businesses allegedly operated by defendant.

This essentially "all documents" search was not restricted by reference to any particular crime, and the crimes charged in this indictment were not the crimes identified in the affidavit supporting the warrant. Since the affidavit was not incorporated by reference into the warrant, the affidavit does not save the warrant from facial invalidity.

And, regardless of whether the warrant complied with the state statute, it does not meet federal constitutional standards. (Supreme Ct, Nassau Co)

Matter of Salvi v Salvi, 178 AD3d 1054 (2nd Dept 12/24/2019)

CUSTODY / HEARING NEEDED

ILSAPP: The mother appealed from a Westchester County Family Court order that modified a prior order and awarded the father sole legal custody of the parties' child. The Second Department reversed and remitted. Over the mother's objection and despite unresolved factual issues, the trial court failed to hold an evidentiary hearing and only took the partial testimony of one nonparty witness. Custody determinations should generally be made only after a plenary hearing. This general rule furthers the substantial interest—shared by the State, child, and parents—in ensuring that the custody proceeding generates a just and enduring result. John De Chiaro represented the appellant. (Family Ct, Westchester Co)

People v Williams, 178 AD3d 1095 (2nd Dept 12/24/2019)

PLEAS – ALLOCUTION/IMMIGRATION CONSEQUENCES

LASJRP: The Second Department rejects defendant's contention that his plea was involuntary because the court did not advise him of the possibility that he would be deported as a consequence of his plea. There is no evidence in the record that contradicts defendant's statement under oath at the plea proceeding that he was a U.S. citizen or information in the Presentence Investigation Report indicating that defendant was a naturalized U.S. citizen.

However, the Court "take[s] the opportunity to express our view that a trial court should not ask a defendant whether he or she is a United States citizen and decide whether to advise the defendant of the plea's deportation consequence based on the defendant's answer. Instead, a trial court should advise all defendants pleading guilty to felonies that, if they are not United States citizens, their felony guilty plea may expose them to deportation…. Whether a defendant receives the Peque warning should not depend on the defendant having to acknowledge, on the record in open court, that he or she is not a United States citizen, particularly since eliciting noncitizen status may raise, in some cases, concerns of compelled self-incrimination…." (County Ct, Dutchess Co)

People v Alleyne, 179 AD3d 712 (2nd Dept 1/8/2020)

JUROR / NOT "UNAVAILABLE"

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree assault and 4th degree CPW. The Second Department reversed and ordered a new trial. After both sides had rested and over defense objections, the trial court excused juror 10 because she had to travel to Maryland for an evening work obligation the next day (Friday). The day after the alternate was substituted, the jury reached its verdict. A defendant has a constitutional right to a trial by a particular jury, chosen according to the law, in whose selection the defendant had a voice. The trial court must discharge a juror who is "unable to continue serving by reason of illness or other incapacity, or for any other reason is unavailable for continued service," at any time after the jury has been sworn and before the rendition of a verdict. *See* CPL 270.35 (1). However, this juror's work obligation, and the potential inconvenience or financial hardship flowing from jury service, did not render her "unavailable." The People engaged in pure speculation that, had juror 10 not been excused, she might have been distracted due to her work conflict. Legal Aid Society of NYC (Ellen Dille, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Matter of Ava A., 179 AD3d 666 (2nd Dept 1/8/2020)

ABUSE/NEGLECT – ALCOHOL MISUSE

LASJRP: The Second Department finds sufficient evidence of neglect where the father regularly misused alcohol to the point of intoxication in the presence of the child;

Second Department *continued*

the father admitted to the caseworker that he was a "functioning alcoholic" and consumed alcohol daily; the caseworker observed the father intoxicated and drinking alcohol during a home visit, and further observed that the father became increasingly agitated with members of his extended family and yelled loudly and cursed at them, and one episode spanned fifteen minutes and caused the child to cry; and the caseworker's observations corroborated the child's statements to the caseworker that the more the father drank, the more he yelled and cursed at his extended family members.

This evidence triggered a presumption of neglect, and also established actual harm.

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

People v Blanton, 179 AD3d 715 (2nd Dept 1/8/2020)

YO / Not Considered

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of attempted 2nd degree CPW, upon his plea of guilty. The Second Department vacated the sentence and remitted. CPL 720.20 (1) requires a youthful offender determination in every case where the defendant is eligible, even where he or she fails to request the determination or agrees to forgo it as part of a plea bargain. *See People v Rudolph*, 21 NY3d 497. This defendant was eligible, but Supreme Court did not consider whether he should be afforded YO status. Appellate Advocates (De Nice Powell, of counsel) represented the appellant. (Supreme Ct, Queens Co)

Matter of Defrank v Wolf, 179 AD3d 676 (2nd Dept 1/8/2020)

Custody / Reversed

ILSAPP: The mother appealed from an order of Nassau County Family Court, which dismissed her custody petition based on a lack of subject matter jurisdiction in NY and a finding that Pennsylvania—where the family had previously resided and the father continued to live—had jurisdiction under the UCCJEA. The Second Department reversed and remitted. The child did not have a home state at the time of commencement. NY could exercise jurisdiction to make an initial custody determination, since the child and the mother had a significant connection with this state; and substantial evidence was available here as to the child's care, protection, training, and personal relationship. *See* Domestic Relations Law § 76 (1) (b). Carol Lewisohn represented the appellant. (Family Ct, Nassau Co)

Denise R.-D. v Julio R.P., 179 AD3d 704 (2nd Dept 1/8/2020)

Paternity / No Equitable Estoppel

ILSAPP: The mother appealed from an order of Queens County Family Court, which denied her application for a genetic marker test and dismissed the petition, and from findings of fact of that court. The appeal from the findings was dismissed; no appeal lies therefrom. The Second Department reversed the challenged order, reinstated the petition, vacated the denial of the genetic marker test, and remitted. The mother commenced the proceeding to adjudicate Julio R.P. to be the father of the subject child. The putative father moved to dismiss, based on equitable estoppel. After a fact-finding hearing, the Family Court estopped the mother from asserting paternity, in light of the lack of a relationship between the putative father and the child, compared to the child's lengthy relationship with the mother's husband. But the mother had told the child about the putative father. The record did not indicate that, if the genetic test were ordered, the child would suffer irreparable loss of status, destruction of his family image, or other harm. Deana Belahtsis represented the appellant. (Family Ct, Queens Co)

Lopez v Wessin, 179 AD3d 691 (2nd Dept 1/8/2020)

Willful Violation / Illegal Punishment

ILSAPP: The father appealed from an order of Queens County Family Court, which placed him on probation for five years. The Second Department reversed. The mother alleged that the father had willfully violated a child support order. After a hearing, the Support Magistrate agreed. Family Court confirmed such finding, ordered jail absent payment of a purge amount, and further ordered probation. Although unpreserved, the challenge to the unlawful sentence was not subject to the preservation requirement. Family Ct Act § 454 authorizes imposition of either probation or incarceration, not both. Since the father had completed his jail term, the probation order had to be vacated. Ian Tarasuk represented the appellant. (Family Ct, Queens Co)

Matter of Miller v DiPalma, 179 AD3d 696 (2nd Dept 1/8/2020)

Willful Violation / IAC

ILSAPP: The father appealed from an order of commitment of Orange County Family Court, which was based on his willful violation of a child support order. The order to jail the father was moot, but the underlying willfulness finding was not. The Second Department reversed and remitted for a new hearing on the violation petition, finding ineffective assistance of counsel. The father's defense was that he could no longer work as a mail carri-

Second Department *continued*

er due to a back injury and that he sought different work. Yet counsel failed to procure medical records or testimony, financial documentation, or records regarding the job search. Dawn Shammas represented the appellant. (Family Ct, Orange Co)

Matter of Ruben J. D., 179 AD3d 675 (2nd Dept 1/8/2020)

TERMINATION OF PARENTAL RIGHTS – PETITION/AMENDMENT

LASJRP: The Second Department finds no error where, in a proceeding to terminate the mother's parental rights on the ground of permanent neglect, the court granted petitioner's mid-fact-finding hearing motion for leave to amend the petition to add a cause of action for abandonment (see CPLR 3025[b]).

The original petition alleged that for approximately six months prior to the filing of the petition, the mother failed to visit with the child, failed to maintain contact with petitioner, and had not reached out to the caseworker for updates. These allegations also sufficiently allege a cause of action for abandonment. (Family Ct, Dutchess Co)

People v Zachary, 179 AD3d 722 (2nd Dept 1/8/2020)

TOSSING BAG / NOT TAMPERING

ILSAPP: The defendant appealed from a judgment of Orange County Court, convicting him of 2nd degree assault, tampering with physical evidence, and other crimes, upon a jury verdict. The Second Department reduced the tampering conviction to an attempted crime. Police observed the defendant as he left a store holding a brown paper bag, drank from a bottle in the bag, dropped the bag, and fled. An officer then saw the defendant discard a different, plastic bag, which was later determined to contain marijuana. In the interest of justice, the appellate court found the tampering proof legally insufficient. The defendant discarded the subject plastic bag while being pursued for violating the open-container law. Richard Greenblatt represented the appellant. (County Ct, Orange Co)

Adam M. M., 179 AD3d 801 (2nd Dept 1/15/2020)

COUNSEL / TERMINATION

ILSAPP: The mother appealed from orders of fact-finding and disposition issued by Queens County Family Court in a termination of parental rights proceeding. In rejecting the mother's contention that she received ineffective assistance, the court noted that the respondent in a termination proceeding had the statutory right to counsel, which encompassed effective assistance. The right to counsel under Family Ct Act § 262 brought "protections equivalent to the constitutional standard of effective assistance of counsel afforded to defendants in criminal proceedings." The mother failed to establish the absence of legitimate explanations for counsel's acts. (Family Ct, Queens Co)

Matter of Alexandra R.-M., 179 AD3d 809 (2nd Dept 1/15/2020)

ABUSE/NEGLECT – VERBAL ATTACKS AGAINST CHILD

LASJRP: The Second Department reverses a finding of neglect where the family court found that the mother neglected the child by her "continuous, relentless belittling and degrading of the child and by striking the child."

The Court notes, inter alia, that the mother and the child have a difficult relationship caused, in significant part, by the mother's disapproval of the child's behavior and the child's unwillingness to abide by her mother's rules, and the child's disciplinary problems at home and at school; and that the mother's insults and name-calling, while counterproductive and inappropriate, did not establish neglect.

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

People v Arana, 179 AD3d 826 (2nd Dept 1/15/2020)

IMMIGRATION / PEQUE VIOLATION

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 3rd degree assault as a hate crime. The Second Department remitted. The defendant contended that he was denied due process because he was a noncitizen and the plea court failed to address deportation. A defendant seeking to vacate a plea based on such failure must demonstrate that, had the court warned about deportation, there was a reasonable probability that he would gone to trial. *See People v Peque*, 22 NY3d 168. Further proceedings were needed to allow the defendant to move to vacate his plea and establish prejudice. Appellate Advocates (Martin Sawyer, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Beaubrun, 179 AD3d 829 (2nd Dept 1/15/2020)

RIGHT TO PUBLIC TRIAL

LASJRP: The Second Department concludes that defendant was not deprived of his right to a public trial when the court closed the courtroom to the general public, other than defendant's family and girlfriend, during the testimony of the undercover officers.

Since defendant failed to establish a relationship other than ordinary friendship with two proposed spectators, the People were not required to establish that either per-

Second Department *continued*

son posed a particular threat to the undercover officers. (Supreme Ct, Queens Co)

Matter of Campbell v Blair, 179 AD3d 792 (2nd Dept 1/15/2020)

CUSTODY MOD / REVERSED

ILSAPP: The mother appealed from an order of Nassau County Family Court, which granted the father's motion, at the close of her case, to dismiss her custody modification petition. The Second Department reversed and reinstated the petition. A prior order awarded the father sole custody of the parties' child and vacations with the mother, who then lived in the country of Jamaica. The mother presented sufficient prima facie evidence of a change of circumstances. She had moved to Staten Island with her husband, and the stepmother had allegedly used corporal punishment on the child—despite a prohibition against such conduct in the prior custody order. Ralph Carrier represented the mother. (Family Ct, Nassau Co)

People v Kamenev, 179 AD3d 837 (2nd Dept 1/15/2020)

SEARCH AND SEIZURE – PROBABLE CAUSE
APPEAL – SCOPE OF REVIEW

LASJRP: The Second Department finds no probable cause to arrest where a witness was shown a photograph taken from a video recorded near the crime scene and identified the person in the photograph as the individual she had seen holding a gun, and another witness identified the person in the photograph as the individual he had seen riding a bicycle after hearing the gunshots, but no one testified that the person in the photograph was identified as defendant. Although a detective testified that another video recorded "just before the crime" showed a person who "appeared to be the defendant" leaving his home several blocks away from the crime scene on a bicycle, no one testified that the witnesses identified the person in that video as the person they saw holding a gun or riding a bicycle after the shots were fired. A detective's conclusory testimony that defendant "became the prime suspect" based on "[v]ideos and canvasses conducted" was insufficient.

While the People argue on appeal that defendant was not in police custody at the time he made statements, the hearing court did not rule upon that issue, and therefore this Court is precluded from reviewing it on defendant's appeal. (Supreme Ct, Kings Co)

People v Ramos, 179 AD3d 850 (2nd Dept 1/15/2020)

IN ABSENTIA / DEFENDANT'S FAULT

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder and 2nd degree assault, upon a jury verdict. The Second Department affirmed. The defendant did not appear in court on the fourth day of trial, after refusing transport to the courthouse. The trial court properly continued without him. The defendant had been informed of his rights to be present at trial and to testify, and that he could be tried in absentia if he was a deliberate no-show. *See People v Parker*, 57 NY2d 136. He waived his right to be present by disrupting the proceedings; changing his position regarding his need for a Spanish language interpreter; moving for new counsel during jury selection without stating a reason; and choosing to absent himself from the proceedings after requesting, and being granted, an adjournment. (County Ct, Suffolk Co)

People v Beaton, 179 AD3d 871 (2nd Dept 1/17/2020)

ON EXPEDITED REVIEW, PROTECTIVE ORDER VACATED

LASCDP: The new discovery statute (CPL §245.70(6)) provides for expedited review by a single appellate justice of a trial court's issuance of a protective order that denies discovery information to the defense. In this case the order authorized the People to withhold identifying information of witnesses in a murder case.

The appellate judge vacated the order. He found that the affirmation on which it was based, making only speculative and conclusory statements, was legally insufficient. The appellate judge remanded the case to afford the prosecution an opportunity to seek a new protective order under the new law's standards, this time presenting a "sufficiently detailed factual predicate." The judge also ordered that defense counsel's offer to limit disclosed information to counsel and the defense investigator be appropriately considered by the lower court. (Supreme Ct, Richmond Co)

Acosta v Melendez, 179 AD3d 912 (2nd Dept 1/22/2020)

CUSTODY / DELEGATING AUTHORITY

ILSAPP: The father appealed from an order of Kings County Family Court, which granted the mother's modification petition, awarding her sole custody of the parties' two children, and granted supervised access to the father, who had been adjudged to have abused another child and thereby to have derivatively neglected the subject children. The Second Department remitted. The award of custody to the mother was proper, but Family Court erred in delegating its authority to determine parental access. The challenged order effectively conditioned the father's parental access on the mother's wishes. Upon remittal, a parental access schedule was to be set. Michael Fietcher represented the appellant. (Family Ct, Kings Co)

Second Department *continued*

People v Allen, 179 AD3d 941 (2nd Dept 1/22/2020)

YO / NOT CONSIDERED

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree robbery and 2nd degree CPW, upon his plea of guilty. The Second Department vacated the sentence and remitted. With respect to the weapons charge—an armed felony—the trial court was required to determine whether the defendant was an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3); and, if so, whether he should be afforded youthful offender status. The record did not show compliance by the trial court. As to the robbery, the lower court did not consider whether the defendant should be afforded YO treatment. Appellate Advocates (Jonathan Schoepp-Wong, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Matter of Ariana M., 179 AD3d 923 (2nd Dept 1/22/2020)

ABUSE/NEGLECT – RIGHT OF CONFRONTATION
HEARSAY EVIDENCE – ORAL TRANSMITTAL REPORT/
CHILD'S OUT-OF-COURT STATEMENTS
– DOMESTIC VIOLENCE
– DERIVATIVE NEGLECT

LASJRP: In Ariana M., a sex abuse case, the Second Department finds no error where the family court permitted the child Ariana to testify via Skype. The father was present in the courtroom during the testimony, and the father's attorney cross-examined the child.

The Court also finds no error in the admission of four Oral Transmittal Reports for the limited purpose of establishing the child's out-of-court statements.

In Serina M., the Court upholds derivative neglect findings based on the sexual abuse of Ariana. However, the Court reverses a finding of neglect based on the father's alleged threat to use domestic violence against the children where the mother testified that during a phone call she had with the father while the children were with him, he father threatened to snap the children's necks if the mother did not answer certain questions, and that the father then sent her photos of the children, with text messages she believed to be threatening. The father denied making any threat, and the photographs, which depict the children sleeping, and the accompanying text messages, supported the father's testimony that he was merely informing the mother that he was able to get the children down for their naps.

The JRP appeals attorney was Amy Hausknecht. (Family Ct, Kings Co)

People v McNeil-Smith, 179 AD3d 950 (2nd Dept 1/22/2020)

CONCURRENT TERMS / MODIFICATION

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2nd degree assault and 3rd degree CPW, and sentencing him to consecutive terms. The Second Department held that the sentences had to run concurrently. The facts adduced at the plea allocution did not establish that the defendant's acts underlying the crimes were separate and distinct. Appellate Advocates (David Goodwin, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Pittman, 179 AD3d 955 (2nd Dept 1/22/2020)

SORA / REVERSED

ILSAPP: The defendant appealed from an order of Kings County Supreme Court, which designated him a level-three sex offender. The Second Department reversed and reduced his status to level two. The defendant was presumptively at level-two risk, but the SORA court granted the People's application for an upward departure. A departure from the presumptive risk level is the exception, not the rule. Here the People failed to prove the existence of an aggravating factor. Supreme Court relied on the defendant's criminal history, but the Guidelines adequately accounted for that history. Evidence regarding prior conduct for which the defendant was charged, but not convicted, did not meet the clear and convincing evidence standard. Appellate Advocates (Stephanie Sonsino, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Bonifacio, 179 AD3d 977 (2nd Dept 1/23/2020)

PROTECTIVE ORDER / VACATED

ILSAPP: The defendant applied pursuant to CPL 245.70 (6) to review a ruling of Nassau County Supreme Court set forth in a protective order dated January 10, 2020, and to vacate or modify the ruling. A justice of the Second Department vacated the order and remitted to give the defendant an opportunity to make arguments with respect to the prosecution application. After the defendant was charged with attempted 2nd degree murder, the People made an ex parte application for a protective order regarding certain information otherwise subject to automatic disclosure. On January 10, 2020, Supreme Court issued the protective order, under which the People were not required to provide information regarding a certain witness until the completion of jury selection. After reviewing the order, defense counsel requested an opportunity to be heard, but the court refused. That was error. New CPL Article 245 provides for automatic disclosure within days after of arraignment. Upon a showing of good cause by either party, the court may make appro-

Second Department *continued*

priate orders regarding discovery. The court has authority to grant ex parte protective orders, but the new scheme—which recognizes that the parties and the trial court should strive to resolve discovery disputes—must be construed to permit ex parte relief only where a clear necessity has been shown. No such necessity was shown here, so counsel's reasonable request should have been granted. (Supreme Ct, Nassau Co)

People v Nash, 179 AD3d 982 (2nd Dept 1/27/2020)

DISCOVERY – PROTECTIVE ORDERS

LASJRP: In this expedited review of a protective order pursuant to CPL § 245.70(6), Justice Scheinkman, in connection with the statutory language stating that the court "may impose as a condition on discovery to a defendant that the material or information to be discovered be available only to counsel for the defendant," rejects defendant's contention that the court must allow defense counsel to have access in every case. This is a determination to be made in the exercise of provident discretion.

Here, where defense counsel had notice of the ex parte proceeding and the opportunity to be heard, and the court sua sponte considered the possibility of allowing only defense counsel to have access, without sharing the information with defendant, Justice Scheinkman denies the application for expedited review.

However, Justice Scheinkman opines that it would have been better to allow defense counsel to see the portions of the People's written application that contained legal argument or other matter that would not reveal the information sought to be covered by the protective order, pending the court's determination. Further, even assuming that portions of the People's written and oral presentations should be sealed, it is better to permit defense counsel to participate in portions of the proceeding where the substance of the sealed information is not discussed. Defense counsel should be excluded from participation in the review process only to the extent necessary to preserve the confidentiality of sensitive information. (Supreme Ct, Kings Co)

Matter of Amaray B., 179 AD3d 1055 (2nd Dept 1/29/2020)

ABUSE/NEGLECT – VISITATION/COURT-ORDERED PAYMENT OF TRANSPORTATION COSTS

LASJRP: In this Article Ten proceeding, the Second Department upholds an order that directed DSS to pay for transportation for the mother to have parental access with the child, where DSS petitioned for the out-of-state placement of the child and agreed to monthly parental access if the mother was clean of drugs and in a treatment program.

Social Services Law § 384-b(7)(f)(2) provides that "diligent efforts" includes making suitable arrangements for the parents to visit the child. Regulations provide that DSS must plan for and make efforts to facilitate parental access, and those efforts must include the provision of financial assistance, transportation, or other assistance necessary to enable parental access to occur (see 18 NYCRR § 430.12[d][1][i][a]).

DSS's contentions that the Family Court's authority is limited to the services included in the comprehensive annual services plan is not properly before the Court on this appeal. (Family Ct, Suffolk Co)

People v Best, 179 AD3d 1088 (2nd Dept 1/29/2020)

TRIAL IN ABSENTIA – RIGHT TO BE PRESENT AT MATERIAL STAGES OF TRIAL
APPEAL – WAIVER OF RIGHT
PLEAS – WAIVER OF CLAIMS

LASJRP: The Second Department, after noting that defendant's claim survives his guilty plea and his waiver of the right to appeal, concludes that defendant, who was proceeding pro se, was not deprived of his right to be present at a material stage of trial, his right to counsel, or his right to due process, when he was absent for his assigned investigator's application to be relieved. (Supreme Ct, Queens Co)

Matter of Farouz v Faltas, 179 AD3d 1064 (2nd Dept 1/29/2020)

CUSTODY DISMISSAL / REVERSED

ILSAPP: The mother appealed from an order of Richmond County Family Court, which granted the father's motion, at the close of her case, to dismiss her custody modification petition. The Second Department reversed, reinstated the petition, and remitted for a continued hearing. The mother established a prima facie case of a change of circumstances which might warrant modification of custody. She testified that she had obtained suitable housing, was steadily employed, and had acquired a vehicle; and she also asserted that the father's wife physically abused the child. That testimony, coupled with information derived from an in camera interview, was sufficient to warrant a full inquiry. Etta Ibok represented the appellant. (Family Ct, Richmond Co)

People v James, 179 AD3d 1095 (2nd Dept 1/29/2020)

IDENTIFICATION – WEIGHT OF THE EVIDENCE
DEFENSES

LASJRP: The Second Department reverses, as against the weight of the evidence, a verdict finding defendant

Second Department *continued*

guilty of robbery in the first degree and criminal possession of a weapon in the third degree.

At the second trial in this one-witness identification case, the complainant, who had initially identified defendant in an unduly suggestive showup, consistently had difficulty remembering details of the crime, could not remember how she described defendant, and indicated that she recognized defendant "[b]y his shirt." The description she provided of the perpetrator shortly after the incident did not match, in several ways, defendant's actual physical characteristics and appearance. At the time of arrest, several minutes after the incident, defendant possessed neither the money nor the personal items allegedly taken from the complainant. (County Ct, Orange Co)

Matter of Lopresti v David, 179 AD3d 1067 (2nd Dept 1/29/2020)

ETHICS – COMMUNICATION WITH REPRESENTED PERSON
CUSTODY – RIGHT TO COUNSEL/CHILD

LASJRP: The Second Department concludes that the Family Court erred in disqualifying the mother's attorney where there was evidence that the child had forwarded email communications that she had written to the attorney for the child to the mother and the mother's attorney, but the father presented no evidence that the mother's attorney solicited those emails or otherwise communicated with the child. (Family Ct, Queens Co)

Tai–Gi K., 179 AD3d 1056 (2nd Dept 1/29/2020)

TPR / REVERSED

ILSAPP: The mother appealed from an order of fact-finding and disposition of Queens County Family Court, which found permanent neglect and terminated her parental rights. The Second Department reversed and dismissed the petition. The record established that, in 2012, the child entered foster care. By 2016, the mother had adequate housing, had completed her service plan, and enjoyed unsupervised parental access. Later that year, a trial discharge commenced. Although the mother then lived in Manhattan and the child attended school in Brooklyn, the petitioner did not help arrange a school transfer, nor did it provide appropriate services. The trial discharge failed because the child spent weeknights with the foster mother, due to the long commute between the mother's apartment and the child's school. The agency did not establish that, during the relevant period, the mother failed to maintain contact with, or plan for the future of, the child; and that the agency made diligent efforts to strengthen the parental relationship. The Center for Family Representation represented the appellant. (Family Ct, Queens Co)

People v DeFelice, 180 AD3d 700 (2nd Dept 2/5/2020)

UNCHARGED CRIMES / HARMLESS ERROR

ILSAPP: The defendant appealed from a judgment of Suffolk County Court, convicting him of 2nd degree murder and other crimes. The appeal brought up for review the denial of suppression of the defendant's statement. The trial court erred in failing to redact portions of the written statement pertaining to uncharged drug crimes and in allowing the jury to consider those parts to complete the narrative and explain the defendant-codefendant relationship. In appropriate instances, evidence of uncharged crimes may be allowable as background or narrative where juries might otherwise struggle to sort out ambiguous but material facts. *See People v Resek*, 3 NY3d 385. Here the sections of the statement relating to drug activity were not necessary to assist the jury; the uncharged conduct was not material; the narrative of events was not incomplete; and the subject statements were not necessary to explain the relationship. But the error was harmless. (County Ct, Suffolk Co)

People v Echevarria, 180 AD3d 703 (2nd Dept 2/5/2020)

WAIVER OF APPEAL / INVALID

ILSAPP: The defendant appealed from a sentence imposed by Queens County Supreme Court, upon his plea of guilty, asserting that the 18-year sentence imposed for 1st degree manslaughter was excessive. The Second Department held that the purported waiver of the right to appeal was invalid, but the sentence was not excessive. Particularly in light of the defendant's young age and inexperience with the criminal justice system, the terse oral colloquy was insufficient to demonstrate that the waiver was knowing, voluntary, and intelligent. Although the defendant executed a written appeal waiver prior to the colloquy, the court did not ascertain if he had read it. (Supreme Ct, Queens Co)

People v Kluge, 180 AD3d 705 (2nd Dept 2/5/2020)

MODE OF PROCEEDING ERRORS / NEW TRIAL

ILSAPP: The defendant appealed from a judgment of Suffolk County Court, convicting him of 1st degree rape and other crimes. The Second Department reversed based in part of mode of proceedings errors, which did not require preservation for appellate review and were impervious to harmless error analysis. *See People v Mack*, 27 NY3d 534, 540. During deliberations, the court erred in responding to concerns of juror C.H., who had left the court a phone message. Outside the defendant's presence, the juror told the court and counsel that someone was

Second Department *continued*

"stirring the jury" and that other jurors had been "influenced." The court directed a court officer to return C.H. to the jury room and provide her with writing materials to note her concerns. A defendant's right to be present extends to all material stages of the trial in which his presence could have a substantial effect on the ability to defend against the charges. That included the instant situation, in which the juror's communication implicated the integrity of the deliberation process. Further, after the colloquy with C.H., the defendant was returned to the courtroom, and the court stated that it had received a jury note, marked as "Court Exhibit X" and sealed with the consent of all parties. No further discussion of the exhibit appeared on the record. The court failed to comply with CPL 310.30: upon receipt of a substantive note from a deliberating jury, the court must provide counsel with meaningful notice of its content and provide a meaningful response. Thomas Theophilos represented the appellant. (County Ct, Suffolk Co)

People v Frias, 180 AD3d 704 (2nd Dept 2/5/2020)

WAIVER OF APPEAL / INVALID

ILSAPP: The defendant appealed from a Kings County Supreme Court judgment, asserting that the sentence imposed was excessive. The Second Department held that the purported waiver of his right to appeal was invalid, but the sentence was not excessive. The plea court's statement to the defendant—that, by signing the written waiver he was giving up his right to appeal "any issue that may arise from this case, including sentencing"—erroneously suggested that the waiver was an absolute bar to an appeal. The written waiver did not overcome the ambiguities; it did not clarify that appellate review was available for certain issues. *See People v Thomas*, 2019 NY Slip Op 08545 (2019). (Supreme Ct, Kings Co)

Matter of Massiello v Milano, 180 AD3d 683 (2nd Dept 2/5/2020)

RELOCATION TO SOUTH CAROLINA DENIED / REVERSED

The mother appealed from an order of Dutchess County Family Court, which denied her custody modification petition so as to permit the parties' children to relocate to South Carolina to live with her, and granted the father sole physical custody. The Second Department reversed, granted the mother's petition, and remitted. Under *Matter of Tropea v Tropea*, 87 NY2d 727, the court was required to weigh many factors, including that the mother had been the primary caregiver, and the children wanted to move with her. Moreover, she had been diagnosed with multiple sclerosis and had support from the maternal grandmother, with whom she would reside, and from her extended family in South Carolina. A meaningful relationship between the father and the children could be fostered by the mother and by an order providing for a liberal parental access schedule. Thomas Keating represented the appellant. (Family Ct, Dutchess Co)

People v Manon, 180 AD3d 734 (2nd Dept 2/7/2020)

PEOPLE'S APPLICATION / GRANTED

ILSAPP: The People applied for CPL 245.70 (6) review of a Queens County Supreme Court ruling, as set forth in a January 17, 2020 protective order, and for modification of the ruling to delay defense counsel's access to information relating to the names, addresses, contact information, or statements of three witnesses. No opposing papers were filed, and a Second Department justice granted the application, directing that access would be delayed until the jury was sworn. The redacted portion of the People's papers were filed under seal. Supreme Court erred as a matter of law in concluding that a basis for relief cited by the People was not a CPL 245.70 (4) factor. The new criminal disclosure statute is not to be confused with the bail reform law, which eliminated certain factors traditionally considered in release determinations. Given the error of law, the Appellate Division justice conducted a de novo review. (Supreme Ct, Queens Co)

People v Carlos M.-A., 180 AD3d 808 (2nd Dept 2/13/2020)

YO / GRANTED

ILSAPP: The defendant appealed from a judgment of Rockland County Court, convicting him of 2nd degree robbery, upon his plea of guilty. The Second Department reversed, finding that the defendant was a youthful offender, and remitted for imposition of sentence. The defendant was convicted of an armed felony but was eligible to have this conviction replaced with a YO adjudication. Mitigating circumstances were present, including the lack of injury to the complainant. Relevant factors supporting YO treatment included that: (1) the defendant was only 16 at the time of the crime and used a BB gun; (2) he had no prior criminal record or violent history; (3) he had strong family support; (4) the presentence report recommended a YO adjudication and a term of probation supervision; and (5) the defendant expressed genuine remorse and a sincere desire to make better choices in the future. Lois Cappelletti represented the appellant. (County Ct, Rockland Co)

People v Ramirez, 180 AD3d 811 (2nd Dept 2/13/2020)

SUMMATION & *MOLINEUX* ERRORS / NEW TRIAL

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

Second Department *continued*

degree gang assault. The Second Department reversed and ordered a new trial based on two distinct errors. The prosecutor made improper statements in summation—an issue that was partially unpreserved—by suggesting that jurors should disregard the grand jury testimony of a central prosecution witness, and by inviting the jurors to speculate that, if called to testify, a missing witness would have given supporting testimony. Such comments were prejudicial, given that the credibility of the witness was crucial and the evidence was not overwhelming. An erroneous *Molineux* ruling also occurred. It was not relevant that the defendant allegedly resisted arrest six months following the incident in question, after violating an order of protection against him in favor of the complainants. Such offense was too far removed from the underlying incident to be relevant to consciousness of guilt. The Legal Aid Society of NYC (David Crow, Daniel Ruzumna, Nicholas Hartmann, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Griggs, 180 AD3d 853 (2nd Dept 2/18/2020)

PROTECTIVE ORDER REVIEW / VACATUR DENIED

ILSAPP: The defendant applied, pursuant to CPL 245.70 (6), to review a ruling of Nassau County Supreme Court set forth in a protective order and to modify or vacate the order. A Second Department justice denied the application. The defendant was indicted for attempted 2nd degree murder and other gang-related crimes. On February 7, 2020, a hearing was held, at the request of the People, to deny or delay disclosure of certain materials. Defense counsel was not permitted to participate until after the court heard the People's arguments and ruled. Then counsel was advised of the determination and permitted to make arguments. The order provided that, "the automatic discovery/inspection of material contained in any document or source subject to automatic discovery which tends to reveal the identity of the above listed witnesses and/or information related to said witnesses as set forth above and in the People's ex parte application be denied/delayed/restricted from discovery at this time as requested by the People above until further court order." The People's ex parte request as to witnesses 1 to 4 sought to fully restrict disclosure. Regarding witnesses 5 to 90, the People asked that disclosure be provided to defense counsel only, until further order of the court. Defense counsel argued that the restrictions would prevent her from properly investigating and preparing for trial. The appellate justice held that Supreme Court had properly ruled, based on statutory factors—including witness safety, risk of witness intimidation, and the needs of law enforcement—and had weighed the defendant's rights. Allowing disclosure with regard to witnesses 5 to 90 would enable counsel to begin her investigation; and limiting disclosure now did not mean that the defendant would never have access to relevant materials. (Supreme Ct, Nassau Co)

People v Anderson, 180 AD3d 923 (2nd Dept 2/19/2020)

NO COMBAT BY AGREEMENT / ERRANT CHARGE

ILSAPP: Th[e] defendant appealed from a Kings County Supreme Court judgment, convicting him of 2nd degree murder and attempted murder. The Second Department affirmed but found that the trial court had erred as to a jury charge. The defendant, who was 14 at the time of the incident, was seated at the back of a bus when rival gang members boarded. As they approached, the defendant shot at them, hitting and killing an innocent passenger, and then ran off the bus and continued shooting. A justification defense is negated where the physical force used by a defendant was the product of combat by agreement. Supreme Court should not have charged that exception based on generalized evidence that the defendant was a member of a gang which had a rivalry with other gangs. Any proof of an agreement was tacit, open-ended as to time and place, and applicable to all members of the local gangs. The exception is generally limited to agreements to combat between specific individuals or small groups on discrete occasions. But the error was harmless. (Supreme Ct, Kings Co)

People v Clark, 180 AD3d 925 (2nd Dept 2/19/2020)

DELAY IN PROSECUTION /REMITTAL

ILSAPP: The defendant appealed from a judgment of Rockland County Court, convicting him of 3rd degree criminal mischief upon a jury verdict. The appeal brought up for review the denial, without a hearing, of the defendant's motion to dismiss the indictment based on the People's unjustified delay in prosecution. The Second Department remitted for a hearing. The factors considered to determine if a defendant's rights have been abridged are the same whether he asserts a speedy trial right or the due process right to prompt prosecution. A lengthy and unjustifiable delay in commencing prosecution may require dismissal, even though no actual prejudice is shown. County Court failed to appropriately balance relevant circumstances, which included a delay of 22 months from the incident to the indictment; the People's failure to offer a reason for the delay; and the defendant's claim of prejudice. The appellant represented himself. (County Ct, Rockland Co)

People v Juan R., 180 AD3d 935 (2nd Dept 2/19/2020)

COMMITMENT ORDER / IAC

Second Department *continued*

ILSAPP: The defendant, who had pleaded not responsible by reason of mental disease or defect, appealed from an order of Rockland County Court, committing him to a secure facility for six months, pursuant to CPL 330.20 (6), upon a finding that he had a dangerous mental disorder. The Second Department reversed and remitted. Although the order had expired, the appeal was not academic, because the challenged determination had lasting consequences. The initial hearing is a critical stage of the proceedings during which the defendant is entitled to effective assistance of counsel. No valid strategy could have warranted the concession that the defendant suffered from a dangerous mental disorder; and that admission did not relieve County Court from the obligation to provide the mandatory hearing. Mental Hygiene Legal Service represented the appellant. (County Ct, Rockland Co)

People v Rivera, 180 AD3d 939 (2nd Dept 2/19/2020)

LARCENY / REDUCED

ILSAPP: The defendant appealed from a judgment of Westchester County Supreme Court, convicting him of several crimes after a nonjury trial. The Second Department reduced the conviction of grand larceny from 3rd to 4th degree. The People were required to establish that the market value of the stolen items at the time of the crime exceeded $3,000. As to some of items, the only evidence of the value was the complainant's testimony regarding the purchase price, and he did not say when he bought those items or state their market value or the cost to replace them. (Supreme Ct, Westchester Co)

People ex rel. Rosario v Superintendent, Fishkill Corr. Fac., 180 AD3d 920 (2nd Dept 2/19/2020)

SARA / RESIDENCY REQUIREMENT

ILSAPP: The defendants appealed from a Dutchess County Supreme Court judgment/order, which granted a habeas corpus petition regarding SARA housing. The Second Department reversed. As the result of a rape conviction, the petitioner was designated a level-three sex offender. He received a final discharge in 2013. Thereafter, he was convicted of attempted 2nd degree burglary and sentenced as a second violent felony offender. He was not released to PRS in the community upon the 2018 maximum expiration date and was instead placed in a residential treatment facility at a state prison because he was unable to identify SARA-compliant housing. The arguments raised were academic because the petitioner has been released. However, application of the *Matter of Hearst Corp. v Clyne* (50 NY2d 707) mootness exception was warranted. As a result of inartful language, Executive Law § 259-c (14) had been interpreted in opposing fashion by the Third and Fourth Departments. (On May 3, 2019, the Third Department granted leave to the AG to appeal from *People ex rel. Negron v. Superintendent, Woodbourne*, 170 AD3d 12.) In the Second Department's view, the legislative history supported an interpretation that imposed the SARA-residency requirement based on either an offender's conviction of a specifically enumerated offense against an underage victim ***or*** the offender's status as a level-three sex offender.

People v Deverow, 180 AD3d 1064 (2nd Dept 2/26/20)

GUN NOT IDENTICAL / BUT HARMLESS

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW. The Second Department reduced the sentence for murder from 23 to 17 years to life. The appellate court also addressed an error that was deemed harmless. The trial court should not have admitted a revolver recovered from underneath a vehicle located five or so blocks from the crime scene. The weapon was found seven hours after the shooting, when a passerby notified police. Where real evidence is purported to be the actual object associated with a crime, the proponent must establish that the evidence is identical to the object involved in the crime and has not been tampered with. Here the proof was insufficient to provide reasonable assurances that the revolver was the weapon used in the shooting. (Supreme Ct, Queens Co)

People v Thelismond, 180 AD3d 1076 (2nd Dept 2/26/2020)

911 CALL INADMISSIBLE / REVERSAL

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW. The Second Department reversed and ordered a new trial. The trial court erred in admitting an anonymous 911 call. The statement of a non-participant can be admitted as an excited utterance, where he or she had an opportunity to personally observe the event described. Here the caller stated that somebody got shot, but not that the caller saw the shooting. For similar reasons, the present sense impression exception—for descriptions by a person perceiving an unfolding event—did not apply. The error was not harmless. Two eyewitnesses who identified the defendant as the shooter came forward only after their felony arrests two years later; and they received favorable cooperation agreements in exchange for their testimony. Further, the People placed significant reliance on the 911 call. Finally, the jurors reviewed the 911 recording during deliberations. Appellate Advocates (Alexis Ascher, of counsel) represented the appellant. (Supreme Ct, Kings Co)

Third Department

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

People v Brown, 178 AD3d 1167 (3rd Dept 12/5/2019)

The assessment of 15 points for risk factor 11 of the Sex Offender Registration Act (SORA) risk assessment guidelines was error where there was no record indication that drugs or alcohol played a role in the appellant's offense. All that was shown was occasional use of alcohol, insufficient to establish a history of alcohol abuse, and regular use of marijuana from the ages of 16 and 23—ending 11 years before the instant offense—and use only once each of cocaine and speed before his move to this area in 1987. The SORA guidelines score without the 15 points places the appellant in presumptive risk level two; the order classifying him as risk level three is reversed. (Supreme Ct, Albany Co)

Matter of Clark v Jordan, 178 AD3d 1190 (3rd Dept 12/5/2019)

Where the petitioner was abruptly and permanently removed from a prison disciplinary hearing after refusing to acknowledge a warning that removal would occur if he kept interrupting the hearing officer, whose recusal he had sought because the petitioner had previously filed a complaint against him, the determination of guilt is annulled. There was no showing that the "petitioner's briefly argumentative behavior rose to the level of justifying his removal for the entire hearing or that his conduct jeopardized institutional safety and correctional goals …." (Transferred from Supreme Ct, Sullivan Co)

People v Porter, 178 AD3d 1159 (3rd Dept 12/5/2019)

The defendant's appeal following his adjudication as a risk level three sex offender designated as a sexually violent offender is not properly before the court and is dismissed. "[T]he decision contains no language indicating that it is an order or judgment, and it does not appear that a written order was entered and filed" and, further, "the risk assessment instrument does not contain 'so ordered' language …." (County Ct, Tompkins Co)

People v Stover, 178 AD3d 1138 (3rd Dept 12/5/2019)

PARENT-CHILD PRIVILEGE

LASJRP[1]: The Third Department, noting that a parent-child privilege may arise when a minor, under arrest for a serious crime, seeks the guidance and advice of a parent in the unfriendly environs of a police precinct, concludes that the privilege could not be applied in this case because defendant was 19 years old at the time of the conversation. (County Ct, Schenectady Co)

People v Badmaxx, 178 AD3d 1205 (3rd Dept 12/12/2019)

***PEQUE* LAPSE / UNPRESERVED**

ILSAPP[2]: The defendant appealed from a Washington County Court judgment, convicting him of 3rd degree criminal sale of a controlled substance. The Third Department affirmed. The defendant alleged that County Court failed to fulfill its *People v Peque* (22 NY3d 168, 176) duty to advise him of potential deportation consequences, rendering his guilty plea involuntary. The appellate court found such challenge unpreserved for appellate review. The defendant knew about the possibility of deportation throughout the proceedings; did not make any statements calling into question the voluntariness of his plea; and did not file a post-allocution motion. *See Peque*, *supra*, at 183. (County Ct, Washington Co)

Matter of Collin Q., 178 AD3d 1208 (3rd Dept 12/12/2019)

TERMINATION OF PARENTAL RIGHTS
– DISPOSITION
– SUSPENDED JUDGMENT/BEST INTERESTS

LASJRP: The Third Department affirms an order denying petitioner's motion to revoke the suspended judgment and terminate the father's parental rights, noting, inter alia, that respondent missed two casework contacts, two home visits and two or three visits with the child, but the caseworker acknowledged that he often texted with the father, that he had initially allowed casework contacts and home visits to be rescheduled, and that it was possible that his case notes did not record all the communications he had with the father; that the father communicated to the caseworker in advance when he was running late or unable to attend, and, when he missed drug and alcohol screens, he was permitted to reschedule tests on the few occasions when he was unable to provide a sample; and that although everyone agreed that it was not appropriate for the child to have contact with the father's ex-fiancée, and respondent conceded that it took longer than expected to separate from the ex-fiancée, he explained that neither had the financial resources to find independent housing, and petitioner initially permitted

[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.

Third Department *continued*

an arrangement where the ex-fiancée and her children would leave the mobile home to stay with a friend while the child was with the father.

The court also did not err in discharging the child to the father. The forensic evaluator's report noted, among other things, that the foster parents "infantilized" the child; the parent educators who transported the child to and from visits testified that the child was excited and happy to spend time with the father; and there was an "extremely positive" bond between the father and the child that was "psychologically beneficial" to the child. Family Ct, Delaware Co)

Ellen TT. v Parvaz UU., 178 AD3d 1294
(3rd Dept 12/26/2019)

AFC / CONFIDENTIALITY BREACH

ILSAPP: The father appealed from an order of Essex County Family Court, which modified a prior custody order. The Third Department reversed a provision allowing for overnight visitation with the mother's consent and pointedly expressed displeasure that the AFC, whose brief contained repeated references to the Lincoln hearing. Family Court's promise of confidentiality should not be lightly breached, and Lincoln hearing transcripts are sealed. The right to confidentiality belongs to the child and transcends the parents' rights. Children must be protected from openly choosing between parents or divulging intimate details of the parent/child relationships. Further, the instant breach of confidentiality—and of the children's trust—was exacerbated by the AFC's misrepresentations about their testimony. (Family Ct, Essex Co)

People v Gillette, 178 AD3d 1278 (3rd Dept 12/26/2019)

UNLAWFUL MANUFACTURE OF METHAMPHETAMINE
CONSPIRACY
RECKLESS ENDANGERMENT

LASJRP: The Third Department reverses defendant's convictions for unlawful manufacture of methamphetamine in the third degree, conspiracy in the fifth degree, and reckless endangerment in the second degree, where defendant did not live in or have keys to the apartment or store any of his personal belongings there and it was leased to two other individuals; another individual had recently been staying in the apartment, and defendant and yet another individual had arrived at the apartment, as guests, not long before the police; there was testimony that, although he likely knew what was occurring in the apartment, defendant did not participate in preparing, producing or manufacturing the methamphetamine, did not know how to make it, did not use it, and was there to try to convince one of the others that she needed to enter a rehabilitation program; and the officers did not observe any black soot, which is indicative of methamphetamine production, on defendant's clothing or hands.

Although the evidence reasonably supports the conclusion that defendant had dominion or control over two reagents—batteries and salt—the evidence demonstrated the extremely cluttered state of the living room and apartment overall, and was legally insufficient to establish that defendant had the ability and intent to exercise dominion or control over any of the items of lab equipment. (County Ct, Cortland Co)

Heather NN. v Vinnette OO., 180 AD3d 57
(3rd Dept 12/26/2019)

VISITATION – STANDING/SAME-SEX COUPLES
– SUPERVISED
– DOMESTIC VIOLENCE

LASJRP: Respondent is the biological mother of a child (born in 2008) conceived via artificial insemination during a same-sex relationship with petitioner, who has not adopted the child. The parties separated in 2009, and the child remained with respondent, who permitted petitioner to have parenting time for approximately two years but then terminated visitation.

The Third Department upholds the family court's determination that petitioner falls within the statutory definition of a parent and has standing to seek custody and parenting time. The "conception" test applies rather than a "functional" test that examines the relationship between petitioner and the child after the child's birth. Petitioner proved by clear and convincing evidence that she and respondent entered into an agreement to conceive the child and raise her as co-parents.

The Court rejects respondent's contention that petitioner is a parent "only by operation of law" and thus is not entitled to the same parenting time rights as a biological or adoptive parent. The presumption that parenting time was in the child's best interests was unrebutted. Petitioner has prior convictions for drug sales, but is no longer involved in illegal activities and now supports herself with income from several rental properties that she owns or manages. She has a history of family offenses and domestic violence, but the family court found that almost all of the proven bad acts had taken place before 2011, and that a subsequent text message did not rise to the level of a family offense.

Although no visits have occurred since the child was less than three years old, and the child does not know of petitioner as her mother, the child's lack of knowledge resulted solely from respondent's unilateral decision to cut off contact. Petitioner has consistently made every effort to regain contact allowed to her by the law.

Third Department *continued*

The court properly designed a graduated schedule that begins in the supportive environment of therapeutic counseling and will transition slowly to supervised parenting time at first and, finally, after a period of months, to unsupervised contact. (Family Ct, Broome Co)

Matter of Joseph PP., 178 AD3d 1344
(3rd Dept 12/26/2019)

PERMANENCY HEARINGS – PERMANENCY GOAL/ ORDER DIRECTING FILING OF TPR PETITION

LASJPR: The Third Department holds that the family court erred in modifying the permanency goal to placement for adoption without directing petitioner to commence a proceeding to terminate respondent's parental rights. Nothing in the statute permits a permanency goal of placement for adoption to be imposed in the absence of a concurrent petition to terminate the respondent's parental rights.

The statute also does not permit the court to select and impose on the parties two or more goals simultaneously. Here, the court stated that another permanency hearing would be scheduled in six months and that it was the court's "expectation and hope" that the goal could be changed back to reunification at that time. The effect was to impose two concurrent, contradictory goals of placement for adoption and reunification. Although the court apparently intended to encourage respondent to make further efforts to progress toward reunification with the child, the statutory language does not permit the method used to advance that purpose. (Family Ct, Sullivan Co)

Dakota G. v Chanda H., 179 AD3d 1167
(3rd Dept 1/2/2020)

SAMARITAN NEIGHBOR / NO STANDING

ILSAPP: This appeal concerns a custody order issued by Chemung County Family Court. The Third Department affirmed. In early 2016, when the father's paternity had not been established, the mother and her newborn infant moved into the home of a neighbor the mother barely knew. Thereafter, the mother was frequently absent for extended periods. The neighbor became the de facto primary caregiver; and several months later, a default order granted custody to her. Thereafter, the father's paternity was established, and a paternal aunt sought custody. The challenged 2018 order granted custody to the aunt and directed that any contact between the child and the neighbor would be "as the parties may agree, the court having no authority to direct otherwise." On appeal, the neighbor did not contest custody in the aunt, but argued that Family Court should have affirmatively granted her visitation rights. The appellate court held that the neighbor lacked standing to seek such relief (see Family Ct Act §§ 651 [b], 1081; Domestic Relations Law §§ 71, 72) and that the visitation provision was proper. (Family Ct, Chemung Co)

Matter of Darlene TT., 179 AD3d 1185
(3rd Dept 1/2/2020)

ADOPTIONS – CONFIDENTIALITY

LASJRP: The Third Department upholds the denial of petitioner's request for access to her sealed adoption records, finding no good cause where most of petitioner's arguments and factual allegations are unpreserved.

However, the court dismissed the petition without prejudice, and petitioner's desire to know her complete ancestry has been sympathetically asserted and it is possible that the underlying social mores are changing (Court alludes to recent legislation allowing adult adoptees to access long form birth certificates). (Family Ct, Broome Co)

People v Lawrence, 179 AD3d 1155 (3rd Dept 1/2/2020)

INDICTMENT / JURISDICTIONAL DEFECT

ILSAPP: The defendant appealed from a 2003 judgment of Chemung County Court, convicting him upon his plea of guilty of attempted 1st degree promoting prison contraband. In a prior appeal decided in 2005, the Third Department granted appellate counsel's request to be relieved of the assignment and affirmed the conviction (14 AD3d 885). Thereafter, the Court of Appeals held that, absent aggravating circumstances, a small amount of marihuana did not constitute dangerous contraband, as necessary to support a charge of 1st degree promoting prison contraband. See *People v Finley*, 10 NY3d 647 (2008). In 2018, the defendant filed a pro se motion for a writ of error coram nobis, contending that the indictment was jurisdictionally defective and appellate counsel was ineffective in not making that argument. The Third Department granted the motion, reinstated the appeal, and assigned new appellate counsel. In this appeal, the appellate court reversed the judgment of conviction and dismissed the indictment. The defendant possessed less than 25 grams of marihuana and the People conceded the jurisdictional defect. Philip Gromet represented the appellant. (County Ct, Chemung Co)

People v Sanon, 179 AD3d 1151 (3rd Dept 1/2/2020)

Where the defendant moved for a trial order of dismissal at the end of the prosecution's case and at the close of the defense case, the court's determination of the first motion is not appealable as the defense presented then evidence. Considering all the trial evidence in a light most favorable to the prosecution, including the defendant's testimony that established that she possessed the money

Third Department *continued*

orders in question as well as the cash she withdrew after depositing them, the evidence was legally sufficient as to every element of each count in this prosecution for third-degree and fifth-degree possession of stolen property and third-degree grand larceny. (Supreme Ct, Albany Co)

People v Barrales, 179 AD3d 1313 (3rd Dept 1/16/2020)

WAIVER OF APPEAL / INVALID

ILSAPP: The defendant appealed from a judgment of Sullivan County Supreme Court, convicting her of attempted 2nd degree CPW and another crime. The defendant's waivers of the right to appeal were invalid. The written waivers stated that she gave up the right to raise "all issues that may validly be waived" on appeal, without elaboration. Moreover, the waiver inaccurately stated that the defendant was forfeiting her right to have counsel assigned, to submit a brief, to orally argue the appeal, and to seek post-conviction relief in state or federal court. In *People v Thomas* (11/26/19), the Court of Appeals held that appeal waivers in two of the cases under review (*People v Green*, 160 AD3d 1422, and *People v Lang*, 165 AD3d 1584) were not valid where they contained erroneous advisements warning of absolute bars to pursuing all potential remedies, including collateral relief. Under such authority, the instant waiver was unenforceable. *People v Gruber*, 108 AD3d 877, was overruled. However, the challenged judgment was affirmed. (Supreme Ct, Sullivan Co)

People v Elric YY., 179 AD3d 1304 (3rd Dept 1/16/2020)

SCI / NO JURISDICTIONAL DEFECT

ILSAPP: The defendant appealed from a judgment of Broome County Court, which sentenced him upon his adjudication as a youthful offender. The Third Department affirmed. The defendant contended that the waiver of indictment was invalid and the SCI was jurisdictionally defective for failing to set forth the approximate time of the offense. *People v Thomas* (11/26/19) controlled. In rejecting an argument raised in *People v Lang*, 165 AD3d 1584, the *Thomas* court discussed the proper assessment of the facial sufficiency of facts, alleged as to non-elements of the crime in an accusatory instrument. The fundamental concern was whether the defendant had reasonable notice of the charges for double jeopardy purposes and to prepare a defense. A guilty plea forfeited arguments based on the omission from the waiver of indictment of non-elemental factual information, such as the approximate time. No longer applicable was the standard set forth in *People v Busch-Scardino*, 166 AD3d 1314. (County Ct, Broome Co)

Matter of Lillyanna A., 179 AD3d 1325 (3rd Dept 1/16/2020)

ADOPTION – RIGHT TO COUNSEL/CHILD

LASJRP: In this adoption proceeding, the Third Department finds no abuse of discretion where the family court failed to appoint an attorney for the child. Such an appointment was not mandatory, no request for an appointment was made, and the record lacks proof of any demonstrable prejudice to any party or the child. (Family Ct, Madison Co)

Matter of Starasia E. v Leonora E., 179 AD3d 1328 (3rd Dept 1/16/2020)

CUSTODY / RIGHT TO BE HEARD

ILSAPP: The father appealed from an order of Broome County Family Court, which granted the custody petition of the mother's cousin. An officer of the Pennsylvania Department of Corrections wrote to the court advising that the father wished to participate by telephone, but Family Court denied his request and granted the petition, following a § 1034 investigation. The Third Department reversed and remitted for a new hearing. Parents, including those who are incarcerated, have a fundamental interest in the care and control of their children, as well as a fundamental right to be heard in custody matters. The trial court should have permitted the father to testify by phone. *See e.g.* Domestic Relations Law § 75-j (2); *Matter of Westchester County Dept. of Social Servs.*, 211 AD2d 235. Matthew Hug represented the appellant. (Family Ct, Broome Co)

People v Stone, 179 AD3d 1287 (3rd Dept 1/16/2020)

EVEN REDACTED, CO-DEFENDANT'S STATEMENT VIOLATED CONFRONTATION

LASCDP[3]: Defendant was tried for manufacturing and selling meth; his co-defendant was his girlfriend who lived in a trailer with him. Her "redacted" statement was introduced at trial. But even the blackened-out portions of the text pointed to someone who could only be defendant, and thus effectively inculpated him.

Finding a violation of defendant's right to confrontation, the Third Department reversed his conviction. (County Ct, Cortland Co)

People v Burdo, 179 AD3d 1355 (3rd Dept 1/23/2020)

WAIVER OF APPEAL INVALID / AFFIRMED

[3] Summaries marked with these initials, LASCDP, are courtesy of The Legal Aid Society's Criminal Defense Practice, from their CDD case summaries.

Third Department *continued*

ILSAPP: The defendant appealed from a judgment of Clinton County Court, convicting him of 1st degree burglary and 1st degree robbery. The People conceded, and the Third Department agreed, that the appeal waiver was invalid. County Court did not advise the defendant that the right to appeal was separate and distinct from the other trial-related rights forfeited by the guilty plea or that he fully comprehended the consequences of the appeal waiver. Furthermore, the record did not reflect that the defendant signed the written waiver in open court after conferring with counsel. Accordingly, he was not precluded from challenging the severity of the sentence. Nevertheless, the sentence was neither harsh nor excessive. (County Ct, Clinton Co)

People v Blanford, 179 AD3d 1388 (3rd Dept 1/30/2020)

ENHANCED SENTENCE / REMITTAL

ILSAPP: The defendant appealed from a judgment of Broome County Court, convicting him of certain drug possession charges and imposing an enhanced sentence. The Third Department vacated the sentence. An enhanced sentence may not be imposed unless the court has specifically warned the defendant about the risk of such outcome. Although the instant defendant received certain warnings, he was not advised that a positive drug test could result in a more severe sentence. When he objected to the enhanced sentence, the court did not advise him of the right to a hearing. The matter was remitted for imposition of the original agreed-upon sentence or an opportunity for the defendant to withdraw his guilty plea. Christopher Hammond represented the appellant. (County Ct, Broome Co)

People v Artis, 179 AD3d 1440 (3rd Dept 1/31/2020)

PROTECTIVE ORDER FOR C/I IN DRUG CASE AFFIRMED

LASCDP: On expedited review, an appellate judge affirmed a protective order allowing the prosecution to redact identifying information about the confidential informant in a drug sale case. The appellate judge did direct the prosecution to provide defense counsel with a redacted copy of the C/I's statement to police, as well as video recordings of the drug transaction, which could not be shared with defendant.

Notably, the appellate judge applied a *de novo* standard in assessing the lower court's protective order. (Supreme Ct, Schenectady Co)

Adam V. v Ashli W., 180 AD3d 1205 (3rd Dept 2/20/2020)

CUSTODY ORDER / NO CONSENT

ILSAPP: The mother appealed from an order of Ulster County Family Court, which granted the father's custody modification petition and was ostensibly entered upon consent. The Third Department modified. No appeal lies from an order entered upon the consent of the appellant. However, when the instant agreement was placed on the record, the mother made specific objections, so the order was appealable. Moreover, the stipulation terms were not accurately reflected in the order, which was modified accordingly. Daniel Gartenstein represented the appellant. (Family Ct, Ulster Co)

Erica X. v Lisa X., 180 AD3d 1187 (3rd Dept 2/20/2020)

CUSTODY ORDER / NO CONSENT

ILSAPP: The AFC appealed from an order of Albany County Family Court, granting the maternal aunt's custody modification petition, which was purportedly entered upon consent. The Third Department reversed and remitted. No appeal lies from an order entered upon the consent of the appellant. But during court proceedings, the trial judge and the AFC questioned the ability of the disabled mother to consent to anything. Thus, the record did not establish that her consent was valid. Peter Scagnelli represented the child. (Family Ct, Albany Co)

Tara DD. v Seth CC., 180 AD3d 1194 (3rd Dept 2/20/2020)

CUSTODY PROOF / PRECLUSION / ERROR

ILSAPP: The father appealed from an order of Tompkins County Family Court, which granted the mother's custody modification petition. The father untimely filed an answer and provided certain discovery. As a result, the lower court granted a motion to preclude him from offering any proof and contesting the mother's allegations. That was error, where there was no showing of willfulness, and preclusion barred proof needed to determine the best interests of the child. The matter was remitted for a new hearing. Dennis Laughlin represented the appellant. (Family Ct, Tompkins Co)

Sadie HH. v Darrin II., 180 AD3d 1178 (3rd Dept 2/20/2020)

CONVENIENT FORUM / REVERSED

ILSAPP: The mother appealed from an order of Otsego County Family Court, which granted the father's motion to dismiss her enforcement and modification petitions. The father and child lived in Arizona, while the mother resided in NY. Family Court erred in finding that NY was an inconvenient forum for several reasons. Most testimony would come from the mother and other NY witnesses; and the father could testify by phone. Further, prior proceedings had occurred here; the mother could

Third Department *continued*

not afford to fly to Arizona or retain counsel; and she might not be assigned counsel there. The Rural Law Center of NY (Kelly Egan, of counsel) represented the appellant. (Family Ct, Otsego Co)

Matter of Lila JJ., 180 AD3d 1169 (3rd Dept 2/20/2020)

ART. 10 / DEFAULT / VACATUR

ILSAPP: The grandmother appealed from an order of Cortland County Family Court, which denied her motion to vacate an order finding neglect. The Third Department reversed. The controlling provision was Family Ct Act § 1042, not CPLR 5015. The mother did fail to appear, and the matter could have properly proceeded without her. However, she was only notified that a conference, not a fact-finding hearing, could occur. Further, the trial court erred in finding the petition allegations proven without the presentation of any evidence by the petitioner. The Rural Law Center of NY (Kristin Bluvas, of counsel) represented the appellant. (Family Ct, Cortland Co)

Rahsaan I. v Schenectady Co DSS, 180 AD3d 1162 (3rd Dept 2/20/2020)

TPR / REVERSED

ILSAPP: The mother appealed from an order of Schenectady County Family Court, terminating her parental rights based on mental illness. That was error, due to the absence of the statutorily mandated contemporaneous psychological exam. There was no proof that the mother refused to be evaluated or made herself unavailable. Even though she raised no objection below, the statutory command required reversal and a new hearing. Paul Connolly represented the appellant. (Family Ct, Schenectady Co)

Matter of Matzell v Annucci, 183 AD3d 1 (3rd Dept 2/27/2020)

SHOCK / UP TO COURT

ILSAPP: DOCCS appealed from a judgment of Albany County Supreme Court, which granted the petitioner's Article 78 petition to annul a determination finding him ineligible for the shock incarceration program. Following the petitioner's drug possession conviction, the sentencing court ordered his enrollment in the shock program (Penal Law § 60.04 [7]). Yet DOCCS found him "not suitable." The taking of the appeal triggered an automatic stay (CPLR 5519 [a][1]), but the petitioner's motion to vacate the stay was granted. Although he had completed a shock program, mooting the appeal, an exception to the mootness doctrine applied. The appellate court rejected DOCCS's contention that, regardless of a court order, it could consider an inmate's disciplinary record to deny shock incarceration. A 2009 DLRA amendment gave the sentencing court authority to order shock incarceration if the defendant was eligible. Before such amendment, DOCCS made the ultimate determination. DOCCS's interpretation of the statue was inconsistent with the amendment and CPL 430.10 (once court imposes sentence of imprisonment in accordance of law, such sentence may not be changed after commencement of period of sentence). (Supreme Ct, Albany 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 Ballard v Piston, 178 AD3d 1397 (4th Dept 12/20/2019)

VISITATION – DELEGATION OF AUTHORITY

LASJRP[1]: The Fourth Department finds no error in an order directing that the mother's parenting time be supervised "at such times and locations as the Petitioner Mother and Respondent Father mutually agree."

Although a court cannot delegate its authority to determine visitation to either a parent or a child, it may order visitation as the parties may mutually agree so long as such an arrangement is not untenable under the circumstances. Although the parties have an acrimonious relationship, the evidence shows the father's commitment to ensuring contact between the children and their maternal relatives, including the mother. Since the mother's visitation will be supervised, any concerns about future false allegations by the mother regarding the father's sexual abuse have been alleviated. (Family Ct, Onondaga Co)

Matter of Benson v Smith, (4th Dept 12/20/2019)

VISITATION / WRONGFUL DENIAL

ILSAPP[2]: The father appealed from a Steuben County Family Court order. The Fourth Department vacated a provision denying the father visitation or contact with the child. Visitation is presumed to be in the child's best interests. Denial is drastic, requiring compelling reasons and proof that visitation would harm the child. Such proof was lacking here. The matter was remitted to set an

[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.

Fourth Department *continued*

appropriate schedule. The appellate court also vacated the errant conditions that the father could not file future modification petitions absent his release from custody, successful mental health treatment, and waiver of confidentiality rights. Mary Davison represented the appellant. (Family Ct, Steuben Co)

People v Desius, 178 AD3d 1422 (4th Dept 12/20/2019)

INCONSISTENT VERDICT / NO RULING

ILSAPP: The defendant appealed from a County Court judgment, convicting him upon a nonjury verdict of 2nd degree assault (two counts). The Fourth Department reserved decision [and remitted the matter for further proceedings]. The defendant contended that the verdict was inconsistent in finding him guilty of both recklessly and intentionally causing serious injury. He raised the issue at sentencing. The court did not rule on his motion, and such failure could not be deemed a denial. The Wayne County Public Defender (Mary Davison, of counsel) represented the appellant. (County Ct, Wayne Co)

Matter of Johnston v Dickes, 178 AD3d 1454 (4th Dept 12/20/2019)

CUSTODY PETITION / REINSTATED

ILSAPP: The mother appealed from a Family Court order dismissing her custody petition seeking to relocate. The Fourth Department reversed, reinstated the petition, and remitted. The allegations established the need for a hearing on whether her relocation was in the child's best interests. On a CPLR 3211 (a) (7) motion, the court must give the pleading a liberal construction, accepting the facts alleged as true, according the nonmoving party the benefit of every favorable inference, and determining only whether the facts fit within a cognizable legal theory. The pleading withstood scrutiny under such standard. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the appellant. (Family Ct, Monroe Co)

Matter of Krier v Krier, 178 AD3d 1372 (4th Dept 12/20/2019)

CUSTODY – CHILD'S WISHES – EXPERTS – PARENTAL ALIENATION/INTERFERENCE WITH PARENT-CHILD RELATIONSHIP

LASJRP: The Fourth Department upholds a determination awarding custody to the father, noting that all factors weighed in favor of the father except the 15-year-old child's wishes; that the court properly determined that the child's wishes were not entitled to great weight since the child was so profoundly influenced by his mother "that he cannot perceive a difference between" the father's abandonment of the marriage and abandonment of him; and that the father's expert did not diagnose "parental alienation syndrome," which is not routinely accepted as a scientific theory by New York courts, and testified instead that the type of conduct in which the mother engaged resulted in the child becoming alienated from the father. (Family Ct, Erie Co)

People v Lawhorn, 178 AD3d 1466 (4th Dept 12/20/2019)

JUDGES – BIAS/INVOLVEMENT IN PLEA AGREEMENT

LASJRP: The Fourth Department finds reversible error where the court negotiated and entered into a plea agreement that required a co-defendant to testify against defendant in exchange for a more favorable sentence, which denied defendant his due process right to a fair trial in a fair tribunal. (Supreme Ct, Monroe Co)

People v Nelson, 178 AD3d 1395 (4th Dept 12/20/2019)

GANG ASSAULT 2 / REDUCED

ILSAPP: The defendant appealed from a judgment of Supreme Court, convicting him of 1st degree gang assault. The Fourth Department reduced the conviction to a 2nd degree offense. The evidence was legally insufficient to establish that the defendant shared the codefendant's intent to cause serious physical injury to the victim. According to a witness, the knife used by the codefendant was not visible during the assault, and the defendant had given the weapon to the codefendant before they knew that the victim was in the area. Immediately after the assault, the defendant complained that he had not given the codefendant the knife to be used in such a manner. The proof established the lesser included offense on a theory of accomplice liability. The Monroe County Public Defender (David Juergens, of counsel) represented the appellant. (Supreme Ct, Monroe Co)

People v Ramos, 178 AD3d 1408 (4th Dept 12/20/2019)

SEX OFFENDER / NOT

ILSAPP: The defendant appealed from an Oswego County Court order, which determined that he was a level-one sex offender. The Fourth Department reversed and annulled the determination. The Board of Examiners of Sex Offenders based its determination that the defendant was a sex offender on his purported conviction of a felony sex offense in Puerto Rico for which he was required to register. However, the Board erred in relying on documents in Spanish. Upon the defendant's objection, no translated documents were provided. Therefore, there was no competent evidence to support the determination

Fourth Department *continued*

against the defendant. Robert Gallamore represented the appellant. (County Ct, Oswego Co)

Matter of Serna v Jones, 178 AD3d 1447 (4th Dept 12/20/2019)

CUSTODY – DISCOVERY/SANCTIONS

LASJRP: The Fourth Department rejects the father's contention that the family court abused its discretion by precluding him from introducing evidence at the custody hearing as a sanction for his willful failure to respond to the mother's interrogatories.

The discovery sanction did not adversely affect the children's right to have issues affecting their best interests fully explored. (Family Ct, Onondaga Co)

Matter of Miner v Torres, 179 AD3d 1490 (4th Dept 1/31/2020)

CUSTODY – EXTRAORDINARY CIRCUMSTANCES/ DOMESTIC VIOLENCE

LASJRP: The Fourth Department affirms an order awarding sole custody of the child to petitioner maternal grandmother, finding sufficient evidence of extraordinary circumstances.

The Court notes, inter alia, that the father was not a caregiver, had not been visiting, and had not been a part of the child's life for half of her sixteen months; that when he learned the child had been removed from the mother, he refused the mother's request that he take the child, who was instead briefly placed with a relative of her half-sisters; that after the child was placed with petitioner, the father took no steps to engage in the child's life and even avoided his family members' efforts to facilitate visitation; and that he has a history of domestic violence against the mother in the presence of another child and while the mother was pregnant with the subject child, against the mother of one of his other children, and against children, and had failed to comply with the terms of an order of protection in favor of one of his other children. (Family Ct, Erie Co)

Matter of Muriel v Muriel, 179 AD3d 1529 (4th Dept 1/31/2020)

CUSTODY – RIGHT TO COUNSEL/CHILD – LINCOLN HEARINGS

LASJRP: The Fourth Department upholds an order awarding custody to the father, noting that the father established a change of circumstances where the mother engaged in conduct designed to alienate the children from the father.

The Court finds unpreserved the mother's contention that the attorney for the children was ineffective because he advocated a position that was contrary to the children's wishes, noting that the mother failed to make a motion seeking the AFC's removal.

In any event, the record supports a finding that the children, ages ten and seven at the time of the proceeding, lacked the capacity for knowing, voluntary and considered judgment, and that following the children's wishes would have placed them at a substantial risk of imminent and serious harm. The family court did not err in declining to conduct a Lincoln hearing, since the AFC expressed the children's wishes, and there are indications in the record that they were being coached on what to say to the court.

A dissenting judge asserts that the court should have held a Lincoln hearing, noting that the AFC substituted his judgment for that of the children and advocated that custody be transferred from the mother to the father, even though the children had been in the mother's custody since birth and the father admitted to having committed an act of domestic violence against the mother. (Family Ct, Onondaga Co)

People v Tucker, 181 AD3d 103 (4th Dept 1/31/2020)

FIREARM LAW / CONSTITUTIONAL

ILSAPP: The defendant appealed from a judgment of Erie County Supreme Court, convicting him of criminal possession of a firearm. He moved to dismiss on the ground that Penal Law § 265.01-b (1) was unconstitutional as applied to him, because it violated his Second Amendment right to possess a revolver in the home for self-defense. The trial court denied the motion, and a jury found the defendant guilty. The Fourth Department rejected the constitutional challenge and affirmed. NY's licensing requirement imposed an insubstantial burden on the right of law-abiding citizens to possess a handgun in the home for self-defense. The State had a substantial interest in protecting persons within their homes from violence, and prohibiting the unlicensed possession of a handgun in the home advanced that interest. (Supreme Ct, Erie Co)

Williams v Davis, 179 AD3d 1532 (4th Dept 1/31/2020)

FATHER STORMS OFF / HEARING RE-DO

ILSAPP: The father appealed from an order of Onondaga County Family Court, which awarded the mother sole custody of the parties' child. The Fourth Department reversed and remitted for a new hearing. During an appearance, Family Court stated that it was not "making any findings" that day and would not do so until after a future hearing. As a result, the father apparently became frustrated, and he walked out of court. As he was leaving, the court warned him that a permanent order would be issued in his absence. Thereafter, the court proceeded to hold a hearing, take testimony from the mother,

Fourth Department *continued*

and issue its determination. Generally, custody determinations should only be made following a plenary hearing. While not condoning the father's behavior, the appellate court found error in the grant of custody to the mother in the absence of adequate notice to the father regarding a hearing to determine best interests. Hiscock Legal Aid Society (Danielle Blackaby, of counsel) represented the appellant. (Family Ct, Onondaga Co)

People v Brown, 180 AD3d 1341 (4th Dept 2/7/2020)

WAIVER "IRREDEEMABLE" / SENTENCE AFFIRMED

ILSAPP: The defendant appealed from an Onondaga County Court judgment, convicting him of 2nd degree CPW. The Fourth Department affirmed but found that the defendant did not validly waive his right to appeal, because the plea court's advisement as to the rights relinquished [w]as incorrect and "irredeemable." The court told the defendant that, by waiving the right to appeal, he could obtain no further review of the conviction or sentence by a higher court—omitting any mention of the rights and issues that survived the waiver. Thus, the colloquy did not ensure that the waiver was voluntary, knowing, and intelligent. However, the sentence was not unduly harsh or severe. (County Ct, Onondaga Co)

People v David T., 180 AD3d 1370 (4th Dept 2/7/2020)

MENTAL DISEASE / HEARING NEEDED

ILSAPP: The defendant appealed from a CPL 330.20 order of Onondaga County Court, committing him to the custody of the Commissioner of Mental Health for confinement. The Fourth Department reversed and remitted. After the defendant was charged with 2nd degree arson, County Court accepted his plea of not responsible by reason of mental disease or defect. As a result, the defendant was examined by two qualified psychiatric examiners, who concluded that he had a dangerous mental disorder. County Court failed to conduct the initial hearing required by statute to determine his present mental condition. Mental Hygiene Legal Service (Laura Rothschild, of counsel) represented the appellant. (County Ct, Onondaga Co)

People v Nazario, 180 AD3d 1355 (4th Dept 2/7/2020)

VAGUE DESCRIPTION DID NOT SUPPORT DETENTION

LASCDP[3]: With nothing but a vague description of the suspect as a "male," the officer stopped defendant three blocks from a burglary scene. He searched defendant's bag, ostensibly for weapons (none were found), and transported him for a showup identification.

The Fourth Department held that these facts were insufficient to supply reasonable suspicion for the forcible detention of defendant. (Supreme Ct, Erie Co)

People v Newsome, 180 AD3d 1338 (4th Dept 2/7/2020)

***MOLINEUX* ERROR / HARMLESS**

ILSAPP: The defendant appealed from a Supreme Court judgment, convicting him of 3rd degree burglary. The Fourth Department affirmed, though it found that the trial court erred in admitting testimony that the defendant had committed a theft years before the instant offense in order to establish intent, identity based on unique modus operandi, and absence of mistake. Since the defendant's identity was conclusively established by trial proof, the subject testimony was not properly admitted. Further, the testimony was not needed to show intent, which could be inferred from the crime itself. Finally, the testimony was not relevant to absence of mistake. But the error was harmless. (Supreme Ct, Monroe Co)

State of NY v Richard F., 180 AD3d 1339 (4th Dept 2/7/2020)

MHL ART. 10 / NO LEGAL BASIS

ILSAPP: The respondent appealed from a MHL Article 10 order of Oneida County Supreme Court, which found that he was a dangerous sex offender requiring confinement and committed him to a secure treatment facility. The Fourth Department reversed and remitted for imposition of a regimen of strict and intensive supervision and treatment. Unrefuted testimony from the State's and the respondent's experts opined that the respondent, age 76, was able to control his sexual misconduct. Supreme Court's contrary determination was without foundation; there was no reason to disregard the experts. Indeed, the trial court remarked that the State "has no case," yet ordered confinement without any legal basis. The appellate court expressed "deep concern" regarding the trial judge's abandonment of her neutral role. She called and aggressively cross-examined a witness, and she repeatedly overruled the respondent's objections. It is the function of the judge to protect the record, not to make it, the appellate court declared, and the line is crossed when the judge takes on the function or appearance of an advocate. Thus, further proceedings were to be conducted before a different judge. Mental Hygiene Legal Service (Patrick Chamberlain, of counsel) represented the appellant. (Supreme Ct, Oneida Co) ⚖

[3] Summaries marked with these initials, LASCDP, are courtesy of The Legal Aid Society's Criminal Defense Practice, from their CDD case summaries.

NEW YORK STATE DEFENDERS ASSOCIATION
194 Washington Ave., Suite 500, Albany, NY 12210-2314

Non-Profit Organization
U.S. Postage
PAID
Albany, NY
Permit No. 590

NYSDA MEMBERSHIP APPLICATION

I wish to join the New York State Defenders Association and support its work to uphold the constitutional and statutory guarantees of legal representation to all persons regardless of income and to advocate for an effective system of public defense representation for the poor.

Enclosed are my membership dues:
☐ $75 Attorney ☐ $40 Defender Investigator ☐ $40 Non-Attorney ☐ $15 Student ☐ $15 Prisoner

Name _____ Firm/Office _____

Office Address _____ City _____ State ____ Zip _____

Home Address _____ City _____ State ____ Zip _____

County _____ Phone (Office) (___) _____ (Fax) (___) _____ (Home) (___) _____

E-mail (Office) _____ (Home) _____

At which address do you want to receive membership mail? ☐ Office ☐ Home

Please indicate if you are: ☐ Assigned Counsel ☐ Public Defender ☐ Concerned Citizen
☐ Defender Investigator ☐ Legal Aid Attorney ☐ Private Attorney ☐ Student ☐ Prisoner

Attorneys and law students please complete: Law School_____ Degree _____

Year of graduation _____ Year admitted to practice _____ State(s) _____

I have also enclosed a tax-deductible contribution: ☐ $500 ☐ $250 ☐ $100 ☐ $50 ☐ Other $_____

Checks are payable to New York State Defenders Association, Inc. Please mail this form, dues, and contributions to: New York State Defenders Association, 194 Washington Ave., Suite 500, Albany, NY 12210-2314.

To pay by credit card: ☐ Visa ☐ MasterCard ☐ Discover ☐ American Express

Card Billing Address: _____

Credit Card Number: __ __ __ __ __ __ __ __ __ __ __ __ __ __ __ __ Exp. Date: __ __ / __ __

Cardholder's Signature: _____