



Public Defense Backup Center REPORT

Volume XXXIV Number 5 November–December 2019

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

End-of-Year Vetoes were Unwelcome Gifts

Governor Cuomo vetoed four of the five major criminal and parental justice reform bills passed at the end of the 2019 legislative session. At least two are implicated in implementation of the bail and discovery reforms effective on January 1.

The veto of the Charitable Bail Fund Reform Act (S. 494 & A. 6980) shocked the Legislature, with Senator Gustavo Rivera, the sponsor, stating, “I am appalled that the governor did not deem this common sense measure appropriate to become law ... Especially since, during budget negotiations, there was an agreement between the Senate, Assembly and the governor to pass this bill and have it signed into law. Governor Cuomo’s veto is an affront to the justice reforms that make our state a leader and to the dozens of legislators who supported the bill this past session ...” (*NY Law Journal*, 12/13/19.) This important bill would remove unnecessary restrictions that are hampering Charitable Bail Organizations (CBOs) and enable them to provide bail to poor people facing felony charges by removing a county-only geographical restriction so that more efficient regional CBOs can be set up, and by expanding coverage, including felonies and raising the cap on the amount of bail that can be posted to \$10,000. There is a continued role for CBOs in the wake of new bail laws, and this veto unfairly limits that role. Tellingly, the Governor used language in veto message [205](#) that completely undercuts the presumption of inno-

cence to which all people accused of crime are entitled, and is at the core of all pretrial justice. Noting that bail reform laws have limited the cases in which bail can be set, he referred to people whose pretrial freedom can still be curtailed as “those who **commit** violent felony offenses, or crimes such as witness intimidation.” [Emphasis added.]

As for the bill that would have made public defense programs “qualified agencies” able to access clients’ state criminal history information, the Governor said that current law provides access to clients’ and witnesses’ histories and claimed that the new discovery laws requires provision of witnesses’ convictions and pending charges. Veto message [211](#) also noted the “unfunded fiscal burden” that the bill would place on the Division of Criminal Justice Services. The veto message contained no recognition of the long-standing problem of the defense not receiving histories as required by existing CPL provisions; perhaps the veto message can be used to support defense demands that criminal history information be provided when cases first begin. See [CPL 160.40](#).

Both the Preserving Family Bonds Act, which would have allowed family court judges to order continued visitation and/or contact between children and their birth parents and/or siblings following termination of parental rights, and the Child Abuse State Central Register Reform Act were vetoed. The latter would have changed the standard of proof for placing parents on the Statewide Central Register of Child Abuse and Maltreatment from “some credible evidence” to “a preponderance of the evidence” as well as provide for sealing records. The Governor said in veto message [232](#) that the measure did not allow needed implementation time or take into account fiscal implications, and could place children at risk. As for allowing visitation or contact after termination of parental rights, the Governor’s veto message number [268](#) challenged the constitutionality of a

RESOURCES AVAILABLE ON 2020 CRIMINAL JUSTICE REFORMS

Use the drop-down menu under [RESOURCES](#) at www.nysda.org to locate information on [bail reform implementation](#) and [discovery/speedy trial reform](#) implementation. Visit often for the latest updates!

Contents

Defender News.....	1
Conferences & Seminars....	6
Case Digest:	
NY Court of Appeals.....	7
First Department	12
Second Department.....	14
Third Department.....	20
Fourth Department.....	23

bill that could call into question the parental rights of adoptive parents, and objected to a lack of any exception in instances of severe and repeated abuse or a child's non-consent.

In addition to the above vetoes, which were reported in News Picks from NYSDA Staff on [Dec. 26, 2019](#), the Governor also vetoed other bills. These included bills regarding permanency planning in juvenile delinquency and persons in need of supervision proceedings (veto message [202](#), bill S. 6535 & A. 7940) and reentry of former foster children into foster care (veto message [203](#), bill S. 6472 & A. 7940).

As noted in the [last issue](#) of the *REPORT* (at p. 2), the Governor signed the Wrongful Conviction Prevention Act (L 2019, ch 446), which authorizes payment to assigned appellate counsel for post-conviction work. NYSDA anticipates that many of the vetoed bills will be re-introduced in the upcoming legislative session, and will continue to advocate for them to become law.

Dissents Hit the Mark in End-of-Year Criminal Decisions

The Court of Appeals issued several decisions in criminal matters in December (summaries begin on p. 7). For defense lawyers, the dissents often made happier winter reading than the majority decisions.

In [People v Britt](#) (2019 NY Slip Op 09060 [12/19/2019]), Judge Wilson passionately dissented from upholding the police stop and pursuit of a man seen in Times Square at night drinking from a container hidden in a paper bag. Looking beyond the case to bigger issues, Wilson decried the harm done to the man's community by his incarceration and noted disparate treatment of people drinking alcohol in public spaces depending on demographics.

Judge Rivera, dissenting in [People v Mairena](#) (2019 NY Slip Op 08978 [12/17/2019]), offered a detailed paean to effective summations. "Because summation is so fundamentally important to our adversarial justice system, holding the power to change verdicts and determine who goes free and who does not, it also obviously follows that the opportunity for an effective summation is essential to a fair trial" Rivera disagreed with the majority's finding that the trial courts, in changing rulings on defense requests for jury instructions after defense summations, committed only harmless error. Rivera said the damage done by the error should have been "measured by the impact on counsel's strategic choices of how to shape summation, and not on the evidentiary support for the verdict." Judge Rivera dissented in other cases as well.

Judge Fahey dissented in part in [People v Patterson](#) (2019 NY Slip Op 08982 [12/17/2019]), saying as to a challenge for cause to a prospective juror who said that they

didn't "believe" they would hold the defendant's silence at trial against him, "Every litigant is entitled to a neutral, objective trier of fact. Close enough is not good enough." And Judge Stein, disagreeing with a majority holding that reopening a suppression hearing had not been an abuse of discretion, said in [People v Cook](#) (2019 NY Slip Op 09059 [12/19/2019]), "I would hold that Supreme Court abused its discretion in reopening the hearing even under the vague standard established by the majority."

Court of Appeals Buttresses Cross-Examination of Police Witnesses

In [People v Rouse](#) (2019 NY Slip Op 08522 [11/25/2019] [summary on p. 9]), the Court of Appeals recognized that "much as a lay witness may be subject to cross-examination with respect to acts of dishonesty not proven at trial, so too may a law enforcement witness be impeached through such questioning." As Timothy P. Murphy of the Federal Public Defender Office for the Western District of New York has noted, "[t]hough there's no explicit discussion of the Confrontation Clause, this decision contains good language regarding the importance of cross-examination as the 'preeminent truth-seeking device.'" Further, the Court rejected in a footnote the Second Circuit's seven-part test for determining the scope of cross-examination on a prior incident, instead following a three-part test consistent with [People v Smith](#) (27 NY3d 652, 659 [2016]).

Murphy's summary of *Rouse* and other cases was posted on the appellate listserv of the Indigent Legal Services Office on Jan. 3, 2020. Murphy has presented at

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many CLE trainings for NYSDA; his generosity in sharing his appellate expertise is greatly appreciated.

The *Rouse* decision does not directly address the difficulty that defense lawyers face in *obtaining* information about police officers' dishonesty and other misconduct. In particular, Civil Rights Law 50-a has been broadly interpreted to bar access to nearly all personnel information about officers, including misconduct. Full repeal of 50-a is being called for in the current legislative session. See, for example, the Communities United for Police Reform [web-site](#) and the [op-ed](#) by retired Albany Police Chief Brendan Cox in the *Times Union* on Jan. 5, 2020.

Attorneys may want to consider requesting that prosecutors review officers' personnel records for discoverable information, as set out in The Legal Aid Society paper, "[Common Questions \(and Pointers\) about the 2020 Reforms](#)" (pp. 3-4). The paper is available, along with other information about the new discovery laws, under the relevant [menu item](#) on the NYSDA Resources page. Attorneys seeking *in camera* review of police personnel records, and subsequent disclosure of a particular officer's personnel file, are encouraged to contact the Backup Center.

Trial Court Decisions Warrant a Look

In addition to the appellate decisions summarized in this issue, the following two trial court decisions may merit a look by practitioners.

Family Court Decision Illustrates "Imminent Risk of Harm," Notes Brain Development in Young Parent

In a thorough recitation of the law as it pertains to Family Court Act (FCA) 1027, the Kings County Family Court in *Matter of Joshua F.* (2019 NY Slip Op 51859[U] [11/12/2019]) provides guidance (including to the courts) in applying the well-established standard for removal of a child from their home. To meet the standard, which is imminent risk of harm, "[i]mminent danger must be near or impending, not merely possible" *Nicholson v Scopetta*, 3 NY3d 357 (10/26/2004).

In *Joshua F.*, the Administration for Children's Services (ACS) filed a neglect petition against the mother for failure to provide adequate guardianship and supervision, and an application for removal pursuant to FCA 1027. The court declined to grant ACS's application, finding that no imminent risk currently exists, instead determining that the children's safety could be ensured by the issuing of a temporary order of supervision against the mother, and mandating her to cooperate with its terms. Most significant is the court's finding that ACS's speculation, that the mother might repeat her past mistakes of leaving the children with caretakers without an adequate plan, is negli-

ble when compared to the harm suffered by the children from not having regular contact with their mother as a result of a removal.

Faced with having a client's child removed by DSS, counsel can argue, pointing to *Joshua F.*, that FCA 1027 first requires the court to consider reasonable means to prevent removal, such as a temporary order of protection or order of supervision. This court's finding indicates that some judges may be persuaded by information about the deleterious effects of removal. Counsel can argue that "separating a child from her parent(s) has detrimental, long-term emotional and psychological consequences that may be worse than leaving the child at home." [The Harm of Child Removal](#), 43 NYU Rev L & Soc Change 523 (2019).

Another aspect of *Joshua F.* worth noting is the court's comment about the mother who had only turned 21 and had misjudged whether her plan to deal with work, school, and her children's daily care was in their best interests. The court said it was "cognizant of Ms. G's young age and brain development in making this decision and credits her testimony that she has learned from her mistake."

Bronx Judge Minimizes Bail Statute Reforms

Following a Nov. 6, 2019, bail hearing for a man accused in two indictments with multiple violations of orders of protections as well as first-degree burglary and second-degree robbery, a detailed opinion was issued in *People v Portoreal* (2019 NY Slip Op 29385 [Supreme Ct, Bronx Co 12/9/2019]). The decision, reported in the *New York Law Journal* on December 24, posits and answers certain questions about the new bail provisions. It also asserts that the "the 'least restrictive alternative' language of Revised CPL § 510.10(1) does not work a major change to present law" but rather codifies and restates the "fundamental constitutional command that has been part of our law since the founding of the American republic: namely, that excessive bail shall not be required."

Noting that some factors listed in the old statute are omitted in the reform provisions, the *Portoreal* court asks whether the deletion signifies that courts are forbidden to consider such factors, and answers, "no." The court finds those factors are subsumed in what the court terms the "catch-all provision" of the new law. The court then finds that the defendant poses a flight risk based on the strong case against him, and that the contempt charges against him indicate that he has no respect for the law. In other words, like the Governor's veto message number [205](#) discussed above, this portion of the *Portoreal* decision ignores the presumption of innocence.

Of further concern to public defense lawyers is the court's analysis of how a defendant's lack of financial means impacts the type and amount of bond to require

when bail is set. Defending the pre-reform practice of courts to strongly prefer cash bail or insurance company bonds rather than unsecured or partially-secured bonds, the court stated: “Where (as here) a defendant is indigent or has very limited means, an unsecured bond provides defendant with little incentive to return to court.” The court acknowledged that setting the amount of a partially-secured bond much higher than an insurance bond to give greater financial incentive to appear would “appear to fly in the face of the intent of the” reforms. Still, the court insisted on a “middle path” where lack of means was a basis for setting partially-secured bond amounts higher. The court set financial bail conditions as follows: “(1) post \$50,000.00 cash bail; or (2) post a \$200,000.00 insurance company bail bond; or (3) post a \$250,000.00 partially-secured surety bond with a ten per cent cash deposit.”

The *Portoreale* decision may be widely cited in the opening days and weeks of full implementation of the bail reforms. Persuading judges to truly honor the intent of bail reform, rather than honoring it only in the breach, is a major challenge for the New Year. As noted below, the Backup Center is collecting and disseminating information and ideas about the implementation of bail and other reforms. Please contact us about your needs and successes!

Many Questions, Some Answers as Bail and Discovery Reforms Kick In

Information is flowing from many sources on the implementation of the bail, discovery, and speedy trial reforms effective on Jan. 1, 2020. As noted in the Dec. 26, 2019 edition of News Picks from NYSDA Staff, the Backup Center has been compiling and providing such information in a variety of ways. The cooperation of The Legal Aid Society, Monroe County Public Defender’s Office, and many other public defense organizations and individuals across the state to help *all* public defense lawyers make the most of the reforms has been remarkable. NYSDA will continue to update information as implementation proceeds.

- Core information is collected in this document: [*Materials on 2019 Legislative Changes In Bail and Discovery \(& CPL 30.30 Speedy Trial\)*](#). Resources addressing bail issues can be found at <https://www.nysda.org/page/Bail-Reform-Implementation>. Discovery resources are at <https://www.nysda.org/page/DiscoveryReform>.
- Drew DuBrin of the Monroe County Public Defender’s Office has updated his invaluable speedy trial publication to encompass the reforms. [*2020 Criminal Procedure Law Section 30.30 \(1\) Manual*](#)

Chief Convening Focuses on Implementation Issues

On Dec. 13, 2019, NYSDA hosted a Chief Defender Convening in Albany at which public defense providers shared information on how various counties are approaching the reforms. Other topics on the agenda included the Chief Judge’s proposal to amend the State Constitution to simplify the trial court system, announced in a [press release](#) on September 25; updating NYSDA’s Public Defense Case Management System; and news from the Indigent Legal Services Office. NYSDA is working closely with individual Chief Defenders and the Chief Defenders Association of New York, as well as other groups, on implementing and protecting the many reforms.

Attacks on Reform Laws and Clients Countered

In the opening days of the New Year as the *REPORT* went to press, many prosecutors and others were pushing back on the new reforms. They sought to fill the media with stories of potential, far-fetched threats to public safe-



Roy Diehl (l), Deputy Director of NYSDA’s Veterans Defense Program, and Darryl Bloom, Cattaraugus County Public Defender (r), share a lunch table at the Dec. 13, 2019 Chief Defender Convening in Albany.



Illustrating the geographic range of offices represented at the December 13 Chief Defender Convening are, from left: Nathaniel L. Barone, Chautauqua County Public Defender; Tracey Chance, Schenectady County Conflict Defender; Lori Zeno, Executive Director, Queens Defenders; and Frank Nebush, Oneida County Public Defender.

ty. These efforts to roll back reforms and add considerations of “public safety” for pretrial release, which would seriously undermine the presumption of innocence that has too-long been ignored and was reinvigorated by the new laws, were and are being countered by defenders, leaders of faith communities, and others.

Some media, like CNY Central, sought to cover differing views on the reforms, as in an article datelined Syracuse on January 3, entitled [Onondaga County court judge blasts bail reform as advocates tout benefits](#). In some areas, specific cases have been thrust into the spotlight. Defenders must, of course, protect the rights of any individual client subjected to such pretrial publicity.

Furthermore, defense attorneys—and prosecutors—are subject to ethical proscriptions regarding case-specific publicity. See, Rule 3.6 of the [Rules of Professional Conduct](#). Lawyers are not to make extrajudicial statements that they know or reasonably should know “will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” Rule 3.6(a). Such statements include those that relate to “the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.” Rule 3.6(b)(6). Only if “there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest” may lawyers participating in a legal matter publicly warn of danger concerning the behavior of a person involved in that matter, and such statements must be made “without elaboration” Rule 3.6(c)(6). Lawyers *can* “make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client,” limiting comments to the information “necessary to mitigate the recent adverse publicity.” Rule 3.6(3).

Lawyers thinking of making—and anyone who is evaluating—public extrajudicial statements about individual cases may want to look also at the American Bar Association’s Criminal Justice Standards on [Fair Trial and Public Discourse](#).

An example of an individual client being thrust into the debate about the new bail laws is a man charged in Albany with second-degree manslaughter. A signed *Times Union* article, “[Albany man accused of woman’s death set free under new bail rules](#),” detailed dueling versions of the case and the appropriateness of release under the new law. Two days later, without discussing that particular case, *Times Union* columnist Chris Churchill set out the reasons for bail reform and lauded the actions of the Legislature and Governor in passing it. See, “[Bail reform always existed for the rich](#).” The Deputy Director of

NYSDA’s Veterans Defense Program, Roy M. Diehl, wrote an [op-ed](#) about the matter, published on January 18.

An item posted on Politico.com on January 6 said that the Governor is talking about “unspecified adjustments” to the reforms and that some moderate Democrats agree that some changes are needed. Such reports, especially when coupled with the Governor’s veto of the Charitable Bail Fund Reform Act discussed above, raise concerns about what the state budget and current legislative session may bring. NYSDA and many others will be working to preserve the reforms.

Courts Unduly Rushing “Willfulness” Hearing in Family Court

Most family court defenders either have been or will be faced with the formidable task of representing a client accused of failing to obey an order of child support. Representing a respondent in a contempt proceeding is challenging at best, with the laws seeming to favor a finding of willfulness. The job is made that much more difficult by an apparent policy shift in certain courts that favor expediency at the expense of a just result.

NYSDA has learned that some family courts are rushing through “willfulness” hearings over the objection of litigants and their attorneys, either denying adjournment requests outright or giving insufficient time to prepare a case or mount a defense. One can only assume that this is a misunderstanding of rule 22 NYCRR 205.43 of the Uniform Rules of Family Court. The rule provides for a hearing on willfulness to be commenced within 30 days of the date noticed on the summons, and concluded within 60 days of its commencement. Even construed in the most restrictive way, this allows for up to 90 days from initial appearance to conclude a hearing, depending on when it was commenced. Yet, some courts are insisting that such hearings be completed well before that.

Arguably, the most important provision of 22 NYCRR 205.43 is section (d), which states that a hearing may be adjourned for good cause shown. In a case where clients’ freedom is often hanging in the balance, with 6-month jail sentences looming overhead, the courts are taking away, what is many times is the best defense in contempt proceedings—time. Time to meet with the client and understand their case, so that lawyers can ensure they receive the due process to which they are entitled. Time to subpoena medical or financial records. Sometimes just time for clients to catch their breath, and have an opportunity to become current on their orders. Certainly, these can all be considered good cause reasons for an adjournment.

NYSDA would like to thank Karen Caggiano, Esq., Family Court Staff Attorney at the Suffolk County Legal Aid Society, for her contribution to this article.

(continued on page 27)

CONFERENCES & SEMINARS

Sponsor: Albany Law School
Theme: Immigration Issues in Family Court
Date: February 4, 2020
Place: Albany, NY
Contact: tel (518) 472-5888; email Iriva@albanylaw.edu; web https://alumni.albanylaw.edu/s/977/18/interior-one-col.aspx?sid=977&gid=1&pgid=2730&content_id=2876

Sponsor: National Association of Criminal Defense Lawyers
Theme: Midwinter Meeting and Seminar - From Tech to Touch: Challenging & Suppressing Evidence Before Trial
Dates: February 12–15, 2020
Place: San Diego, CA
Contact: tel (202) 872-8600; x630; email aathanason@nacdl.org; web <https://nacdl.org/Event/20MIDWNT>

Sponsor: American Bar Association Criminal Justice Section
Theme: CLE at 2020 Midyear Meeting
Dates: February 13–17, 2020
Place: Austin, TX
Contact: web https://www.americanbar.org/content/dam/aba/images/criminal_justice/2019/midyear2020.pdf

Sponsor: **New York State Defenders Association**
Theme: **34th Annual Metropolitan New York Trainer**
Dates: **March 7, 2020**
Place: **New York City**
Contact: **tel (518) 465-3524; email training@nysda.org; web www.nysda.org**

Sponsor: National Association of Criminal Defense Lawyers
Theme: 2020 Forensic Science and the Law Seminar
Dates: April 2–4, 2020
Place: Las Vegas, NV
Contact: tel (202) 872-8600; x630; email aathanason@nacdl.org; web <https://www.nacdl.org/Event/2020-Forensic-Science-the-Law>

For more conferences and seminars, see the

NY STATEWIDE PUBLIC DEFENSE TRAINING CALENDAR

on NYSDA's website at:

<https://www.nysda.org/page/NYStatewideTraining>

Sponsor: National Association of Criminal Defense Lawyers
Theme: 2020 Spring Meeting and Seminar
Dates: May 6–9, 2020
Place: Charlotte, NC
Contact: tel (202) 872-8600 x630; email aathanason@nacdl.org; web <https://www.nacdl.org/Event/2020-Forensic-Science-the-Law>

Sponsor: New York State Bar Association
Theme: DWI On Trial – The Big Apple XX
Date: May 15, 2020
Place: New York City
Contact: web <https://www.nysba.org/store/events/registration.aspx?event=0GU34>

Sponsor: American Bar Association Criminal Justice Section & ABACLE
Theme: 11th Prescription for Criminal Justice and Forensic Science
Dates: June 4–5, 2020
Place: New York City
Contact: web <https://www.americanbar.org/events-cle/mtg/inperson/392181896/>

Sponsor: **New York State Defenders Association**
Theme: **53rd Annual Meeting and Conference**
Dates: **July 26-28, 2020**
Place: **Saratoga Springs, NY**
Contact: **tel (518) 465-3524; email training@nysda.org; web www.nysda.org**

WEBINAR

Sponsor: National Association for Public Defense
Theme: Leveraging Technology to Improve Internal and External Communications
Date: April 15, 2020
Contact: email: jeanie.vela@publicdefenders.us; web https://www.publicdefenders.us/ev_calendar_day.asp?date=4%2F15%2F20&eventid=173 📅

JOB LISTINGS

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

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.

New York Court of Appeals

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

[People v Rong He](#), 34 NY3d 956 (10/17/2019)

BRADY MATERIAL

LASJRP¹: The Court of Appeals finds reversible *Brady* error, concluding that the People failed to fulfill their "broad obligation" by failing to provide defendant with meaningful access to favorable witnesses. The People's theory was that defendant was the sole perpetrator. However, the owner of the nightclub where the crime occurred told the police that he saw two people approach one of the victims and strike him with a beer bottle, and identified someone other than defendant as one of the assailants. According to a sprint report of a 911 call, another witness claimed that two men "stated that they were going to come back with a gun when leaving location."

The People objected to defendant's pre-trial request for direct disclosure of the witnesses' contact information, and instead offered to provide the witnesses with defense counsel's information. This approach would not have provided adequate means for defense counsel to investigate the witnesses' statements. This was tantamount to suppression of the requested information. The People did not present any evidence that defendant presented a risk to the witnesses.

The suppressed information was material. Access to the nightclub owner could have allowed defendant to

develop additional facts, which in turn could have aided him in establishing additional or alternative theories to support his defense.

[People v Allende](#), 2019 NY Slip Op 07523 (10/22/2019)

APPEAL – SCOPE OF REVIEW/COURT OF APPEALS

LASJRP: The Court of Appeals, with three judges dissenting and voting to retain the appeal, dismisses the People's appeal upon the ground that the modification by the Appellate Division was not "on the law alone or upon the law and such facts which, but for the determination of law, would not have led to ... modification" (CPL § 450.90[2][a]). The Appellate Division, in vacating the first-degree robbery count, relied upon an unpreserved argument that the apparent firearm must be displayed to the victim rather than, as here, to an eyewitness who intervened during the course of the robbery. For jurisdictional purposes an unpreserved issue of this nature does not present a question of law.

Judge Rivera, dissenting, asserts that the Appellate Division's determination that the guilty verdict on the first-degree robbery count is against the weight of the evidence was based on a determinative error of law and is thus reviewable by this Court.

[People v Deleon](#), 34 NY3d 965 (10/22/2019)

GRAND LARCENY – ATTEMPTS/VALUE

LASJRP: The Court of Appeals concludes that, viewed in the light most favorable to the People, the evidence presented to the grand jury was insufficient to demonstrate that defendant came dangerously close to taking property valued in excess of \$3,000 or \$1,000.

There was no evidence that the items attached to defendant's mailbox fishing apparatus had any monetary value; no evidence of the volume of mail contained in the mailbox or whether it was physically possible for defendant to procure the two money orders deposited by government investigators amidst the other mail; no evidence that the fishing device was immediately reusable; and no evidence that defendant intended to make successive attempts at fishing out the contents of the mailbox. It also was not sufficient that defendant stated he would be paid \$100 for each mailbox fished.

[People v Neulander](#), 34 NY3d 110 (10/22/2019)

PEOPLE'S APPEAL / EGREGIOUS JUROR MISCONDUCT

ILSAPP²: Juror misconduct warranted reversal of a murder conviction. The Fourth Department properly

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.

NY Court of Appeals *continued*

reversed an Onondaga County Court order denying a CPL 330.30 motion to set aside the verdict on the basis of the misconduct. So held a unanimous Court of Appeals, in an opinion authored by Judge Wilson. Juror 12 exchanged hundreds of texts about the case. After being selected to serve, she received a text from her father: “Make sure he’s guilty!” During trial, a friend texted to ask if juror 12 had seen “the scary person” (i.e. the defendant). Another friend texted, “I’m so anxious to hear someone testify against Jenna (the defendant’s daughter),” and, “My mind is blown that the daughter isn’t a suspect.” Juror 12 repeatedly lied to hide her misconduct. The COA rejected the contention that the misconduct was outweighed by the proof of guilt. Affirming a conviction where a juror engaged in dishonesty of such magnitude would undermine the public’s confidence in the fairness of trials. Alexandra Shapiro represented the respondent.

People v Cubero, 2019 NY Slip Op 07641 (10/24/2019)

JUSTICE CENTER / NO QUESTION OF LAW

ILSAPP: In a prosecution by the Justice Center for the Protection of People with Special Needs, the defendant was convicted in Sullivan County Court of several counts, including 1st degree endangering the welfare of an incompetent or physically disabled person. Defense counsel did not interpose a constitutional challenge to Executive Law § 552, which created the Justice Center and vested it with the authority to prosecute crimes involving abuse or neglect of persons with disabilities. The appellate record was silent as to whether the DA granted the special prosecutor authority to prosecute this case, so as to render the proceedings constitutional. The Third Department declined to remit for fact-findings and affirmed the conviction. A dissenting justice opined that the Appellate Division had inherent authority to remit for further proceedings to develop the record on the issue of the DA’s consent. The COA affirmed. The appeal presented no reviewable question of law, and the alleged ineffective assistance argument was better addressed in a CPL 440.10 motion. In a concurring opinion, Judge Rivera observed that the appeal presented a reviewable question of law—whether the Appellate Division may remit to create a record so as to reach a defendant’s unpreserved claim.

People v Rodriguez, 34 NY3d 967 (10/24/2019)

GRAND LARCENY – FORGED CHECK/ASPORTATION

LASJRP: The Court of Appeals finds legally sufficient evidence of grand larceny in the third degree where defendant opened a bank account and supplied information that enabled an accomplice to deposit a forged check

into the account, which was apparently created for the sole purpose of housing the stolen funds; and defendant immediately withdrew the proceeds.

Although there was no evidence directly connecting defendant to the theft of the check, the evidence supports an inference that defendant arranged and implemented a scheme to acquire the proceeds of a forged check, and the asportation of the stolen property was still ongoing when defendant withdrew the money from his account.

Matter of Ash, 34 NY3d 941 (10/29/2019)

“On consideration of the continuation of this Court’s suspension, with pay, of Honorable Sylvia G. Ash from the office of Justice of the Supreme Court, Kings County, it is determined that the suspension continue, with pay, effective immediately.”

[*Ed. Note:* For the original suspension, see **Matter of Ash, 34 NY3d 941 (10/11/2019).**]

Matter of Senzer, 34 NY3d 970 (10/29/2019)

“On the Court’s own motion, it is determined that Honorable Paul H. Senzer is suspended, with pay, effective immediately, from the office of Justice of the Northport Village Court, Suffolk County, pursuant to New York Constitution, article VI, § 22 and Judiciary Law § 44.”

People v Thiam, 2019 NY Slip Op 07712 (10/29/2019)

INSUFFICIENT TOP COUNT INVALIDATED GUILTY PLEA

LASCDP³: Charged with several misdemeanor drug offenses, defendant pleaded guilty [] to the top count charging an A misdemeanor. He was then sentenced to time served. On appeal the count to which he had pled (possession of oxycodone pills) was ruled insufficient; the B misdemeanor charge of possession of marijuana in a public place was sufficient.

The Court of Appeals majority ruled that the insufficient top count was an invalid basis for a guilty plea, and that the conviction and sentence were thus void. The invalidity could not be overridden by the sufficiency of the B misdemeanor count, which was immaterial. One count in an accusatory instrument may not validate a separate count.

Because the insufficiency of the count underlying the plea was jurisdictional (the officer’s allegations as to the oxycodone were “conclusory” in the absence of any facts

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

NY Court of Appeals *continued*

supporting or explaining his conclusions), the guilty plea could be challenged on appeal.

People ex rel. Prieston v Nassau County Sheriff's Dept.,
2019 NY Slip Op 08447 (11/21/2019)

BAIL

LASJRP: The Court of Appeals holds that Criminal Procedure Law § 520.30(1) permits a court to determine whether the collateral securing the insurance company bail bond is so deficient that it fails to ensure the defendant/s return to court in contravention of public policy. The insurance company's business judgment does not control the public policy determination, and no deference is required. The insurance company's business interests do not necessarily align with the State's interest in securing a defendant's return to court. The insurance company has a financial incentive in obtaining a defendant's release on bail so that it may retain its premium.

Rivera v State of New York, 2019 NY Slip Op 08521
 (11/25/2019)

PRISONERS RIGHTS – EXCESSIVE USE OF FORCE
By CORRECTION OFFICER

LASJRP: In this assault and battery case, a 4-judge Court of Appeals majority concludes that the State met its summary judgment burden and established that it could not be liable under the doctrine of respondeat superior for injuries an inmate sustained during a brutal and unprovoked attack initiated by a correction officer who, assisted by two other officers who immobilized and handcuffed the inmate, repeatedly punched and kicked him during a prolonged assault, removing the inmate's protective helmet in order to facilitate more direct blows to his head.

Although the assault occurred while the officer supervised inmates in the mess hall, the gratuitous and unauthorized use of force was so egregious as to constitute a significant departure from the normal methods of performance of the duties of a correction officer as a matter of law. This was a malicious attack completely divorced from the employer's interests, and there is no evidence in the record that DOCCS should, or could, have reasonably anticipated such a flagrant and unjustified use of force.

Even in the absence of respondeat superior liability for assault and battery, inmates may seek redress against the State in the Court of Claims on other tort theories, such as negligent hiring, training or supervision, and correction officers who assault inmates may also be sued directly in Supreme Court (or federal court) under 42

U.S.C. § 1983 or on common law tort theories for acts occurring outside the scope of employment.

The dissenting judges assert that there are material factual questions as to what the other two officers might have perceived to be the motivation and circumstances leading to the attack on the inmate, and thus whether they acted within the scope of their employment when they restrained the inmate and enabled the officer to beat him.

People v Rouse, 2019 NY Slip Op 08522 (11/25/2019)

ERROR TO PRECLUDE CROSS RE COPS' PRIOR DISHONESTY

LASCPD: Defense counsel wanted to explore on cross-examination prior acts of dishonesty by the police witnesses, which included misleading a federal prosecutor and prior judicial determinations suppressing evidence due to unreliable police testimony. The trial court precluded the cross-examination.

The Court of Appeals held the restriction on the inquiries into credibility to be reversible error. Defense counsel should have been allowed to explore the officers' prior deceptions. And there is no rule precluding cross-examination with respect to prior judicial determinations. Counsel need have only a "good faith basis," for the credibility inquiry, which the Court explained as "some reasonable basis for believing the truth of things" based on which counsel seeks to ask.

Matter of Walsh v New York State Comptroller,
2019 NY Slip Op 08518 (11/25/2019)

The phrase "any act of any inmate" contained in Retirement and Social Security Law 607-c(a), which "provides the circumstances under which county correction officers are entitled to performance-of-duty disability retirement benefits," applies where an inmate lost her balance after taking a step or two and fell on the petitioner correction officer, causing injury.

People v Stan XuHui Li, 2019 NY Slip Op 08544
 (11/26/2019)

PILL MILL / CAUSATION / MANSLAUGHTER

ILSAPP: The defendant appealed from an order of the First Department insofar as it affirmed a judgment of NY County Supreme Court, convicting him of 2nd degree manslaughter for recklessly causing the death of two patients. The Court of Appeals affirmed. The defendant physician ran a "pill mill" and prescribed high doses of controlled substances as a first resort. The two victims died of overdoses shortly after filling prescriptions he issued. The convictions were supported by legally sufficient evidence. The People's expert testified that the defendant did not consider non-opioid pain management and disregarded warning signs that patients were addict-

NY Court of Appeals *continued*

ed to opioids. Although it was not clear that he knew that the deceased patients were addicts, a rational jury could have found that he consciously disregarded a substantial and unjustifiable risk. Causation was proven. The defendant's actions forged a link in the chain of events that caused the patients' deaths; and the fatal result was reasonably foreseeable.

People v Thomas, 2019 NY Slip Op 08545 (11/26/2019)

APPEAL – WAIVER OF RIGHT

LASJRP: The Court of Appeals upholds defendant Thomas's waiver of appellate rights, noting, *inter alia*, that the court's statement during the oral colloquy that he was waiving his right to challenge the "plea proceedings" and "sentence" included the CPL § 710.70 right to appeal a suppression ruling where Thomas pled guilty one day after denial of his suppression motion, to take advantage of a soon-to-expire plea bargain offer; and that the waiver was sufficiently comprehensive to cover a challenge to the suppression ruling without any need for express mention of it during the waiver colloquy.

However, the Court cannot conclude that the appeal waivers by defendants Green and Lang were knowingly or voluntarily made in the face of erroneous warnings of absolute bars to the pursuit of all potential remedies, including those affording collateral relief on certain non-waivable issues in both state and federal courts.

Judges Wilson and Rivera reject the practice of accepting appeal waivers.

People v Mairena, 2019 NY Slip Op 08978 (12/17/2019)

The trial courts erred in reversing, after summations, their prior rulings on defense requests to charge the jury and in failing to instruct the jury in accordance with rulings prior to summation on the charge requests, but the error was harmless in both cases.

Concurrence: [Fahey, JJ] The errors here are harmless under the standard for constitutional error, which should be applied. "The opportunity to give an effective summation is an essential part of the fundamental right to counsel." The trial courts erected barriers to effective summation. Only "the overwhelming evidence in each case" allows the convictions to stand.

Dissent: [Rivera, JJ] "[E]ffective summation can plant the seeds of reasonable doubt." Counsel in these two cases "charted their course for their summations based on the respective trial judge's promised" jury charge, which was indisputably error. The issue is how to determine if it was harmless error. "The type of error addressed here should be measured by the impact on counsel's strategic choices

of how to shape summation, and not on the evidentiary support for the verdict." When a judge does not follow through with promised instructions, summations should be reopened so that counsel can "address the jury in light of the charge actually given." Absent that, there should be a new trial.

People v McCullum, 2019 NY Slip Op 08977 (12/17/2019)

The defendant failed to preserve the only argument raised on appeal, so that no question of law is presented for review. No exception to the preservation rule applies on the facts of the case in which the defendant sought to raise "his standing to challenge the police search of his property on the ground that he retained a reasonable expectation of privacy as a bailor following the New York City Marshal's legal possession of the apartment where he resided."

People v Patterson, 2019 NY Slip Op 08982 (12/17/2019)

The trial court did not err by denying the defendant's challenge for cause of a prospective juror who responded, "I don't believe that I would" when defense counsel asked whether the juror would hold it against the defendant if the juror did not hear the defendant speak during the trial.

Dissent in Part: [Fahey, JJ] "Every litigant is entitled to a neutral, objective trier of fact. Close enough is not good enough." The prospective juror "voiced at least a preference, if not a 'need,' to hear defendant testify" and never unequivocally said that the defendant's silence would not influence her.

People v Britt, 2019 NY Slip Op 09060 (12/19/2019)

Given the undisputed direct evidence the defendant knowingly possessed counterfeit bills and sufficient circumstantial evidence from which to "infer the separate mens rea of intent to defraud," the evidence was legally sufficient to support a conviction under Penal Law 170.30. The defendant possessed a large amount of counterfeit money (\$300), and kept it separated from genuine bills found in his possession, said by a Secret Service Agent to be common when counterfeit money is being passed. The defense objections to the agent's expert testimony are unpreserved and would go to weight, not sufficiency.

The defendant's assertion that the arresting officer lacked reasonable suspicion to justify the original stop of the defendant is rejected. The officer saw the defendant drinking from a container hidden in a paper bag, known to be a common method of concealing open alcohol containers, and the defendant fled upon being approached. "We do not reach the unpreserved issue discussed in the

NY Court of Appeals *continued*

dissent of whether a police officer's observation of an apparent open container violation could, on its own, justify a third-level intrusion."

Dissent: [Wilson, JJ] The majority makes a mistake by lauding the hot pursuit and forcible detention of someone drinking Lime-A-Rita from a brown paper bag in Times Square at night. The mistake is "perhaps understandable because of the tremendous difficulty inherent in the (mis-)application of our *De Bour* test in many real-world situations." But the further mistake—equating "the separation of real from counterfeit money with the intent to defraud—is inexplicable" and overturns *People v Bailey* (13 NY3d 67 [2009]). And the larger context should be considered. Many people described the defendant's valuable actions in the community, which will be deprived of his assistance to elderly people for years at a high cost to the State while he is imprisoned. "None of that would have happened had he been affluent, drinking rosé with a chilled lobster picnic splayed out on Central Park's Great Lawn on a sunny summer afternoon."

People v Cook, 2019 NY Slip Op 09059 (12/19/2019)

The hearing court had the discretion to reopen the suppression hearing after argument but before a decision was rendered, and did not abuse that discretion. Argument had hinged on the fact that a sergeant, who brought the accuser to the subway to see if he could identify the defendant, said the defendant was sweating and out of breath, but that was after other police had already detained the defendant and so could not justify the detention. When the hearing was re-opened, another officer testified about noting that the defendant, who appeared to be hiding, matched the description of the fleeing assailant. While allowing reopening of proofs carries a danger of tailored testimony being offered, courts will generally be able to minimize that risk and to detect testimony manufactured to address perceived concerns. There is a common-law power to alter the order of proof in the court's discretion and in furtherance of justice.

Dissent: [Stein, JJ] "I disagree with the majority's analysis of the boundaries of" a court's discretion to reopen a suppression hearing after the prosecution rests but before a decision is rendered. "I would apply the standard urged by the parties in accordance with our decision in *People v Whipple* (97 NY2d 1 [2001])" Further, the risk of tailored testimony here was manifest. "I would hold that Supreme Court abused its discretion in reopening the hearing even under the vague standard established by the majority."

People v Ellis, 2019 NY Slip Op 09061 (12/19/2019)

The defendant did not preserve his claim that wearing prison-issued clothes during voir dire and trial deprived him of a fair trial. The trial court did not err in denying a defense for-cause challenge to a prospective juror who was a former employee of the police department but gave no indication of having a professional or personal relationship with anyone connected to the prosecution's case. That the juror had a familiar relationship to another prospective juror who was excused based on relationships with prosecution witnesses did not warrant being excused for cause, especially as the juror said several times that he could be fair and impartial, and had not discussed the case nor would he do so if seated.

The Appellate Division properly rejected the defendant's challenge to the legal sufficiency claim and, given the overwhelming evidence of guilt without reference to the defendant's videotaped statement, properly found no reasonable possibility that admission of the statement affected the verdict.

Dissent: [Rivera JJ] The reasons stated in the dissenting opinion below as to preserved issues warrant dissent here.

People v Udeke, 2019 NY Slip Op 09057 (12/19/2019)

"A fair reading of the allegations and reasonable inferences drawn therefrom provide reasonable cause to believe that he [the defendant] intended to violate the stay-away provision of the order of protection by purposely being physically present in the close confines of a subway turnstile with the protected person in order to avoid paying a subway fare"

Further, the plea allocation was sufficient to establish the voluntariness of the defendant's plea to a class B misdemeanor in satisfaction of two accusatory instruments charging class A misdemeanors. The A misdemeanor counts were not amended to lesser offenses as in *People v Suazo* (32 NY3d 491 [2018]).

Dissent: [Rivera, JJ] The defendant was told during the plea colloquy that as a noncitizen he had no right to a jury trial for crimes potentially leading to deportation. In *Suazo*, decided while the defendant's leave application here was pending, a new rule was issued recognizing precisely that right. The defendant could not knowingly and intelligently waive a right he had been told he did not have.

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 Barry H., 175 AD3d 427 (1st Dept 8/20/2019)

CUSTODY – CHANGE IN CIRCUMSTANCES/ EDUCATION ISSUES

LASJRP¹: The First Department finds a change in circumstances requiring a full custody hearing where the child's report card showed she received a grade of "1," which was "well below standards," in 32 of 38 categories including reading, writing, academic and personal behaviors, and social-emotional development; and her attendance report showed she was late or absent from school 49.5% of the school days between September 2017 and mid-February 2018, and this absenteeism and tardiness was an increase from the 2016-2017 full academic year when she was absent or late 40.9% of school days.

Also, the Referee's oral decision did not demonstrate adequate consideration of other relevant issues raised by the father, such as the child's dental health and the mother's inability to maintain stable housing. (Family Ct, Bronx Co)

In re Samy F. v Fabrizio, 176 AD3d 44 (1st Dept 8/27/2019)

YOUTHFUL OFFENDERS – DNA DATABANKS/ EXPUNGEMENT

LASJRP: The First Department vacates its previous decision (174 A.D.3d 7) in this Article 78 proceeding, and re-issues its decision determining that the local DNA databank maintained by the Office of the Chief Medical Examiner is subject to the State Executive Law, and that when DNA is collected during the investigatory phase of a case that ultimately results in a Youthful Offender determination, the court has the authority to expunge the YO's DNA profile from a local DNA databank, like OCME's, along with the underlying DNA records.

People v Hamilton, 175 AD3d 429 (1st Dept 8/29/2019)

REMAND / SENTENCING INTENT UNCLEAR

ILSAPP²: The defendant appealed from a 2015 judgment of NY County Supreme Court, convicting her of

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

tampering with physical evidence. The First Department affirmed. She also appealed from a 2016 judgment, convicting her of 1st degree robbery, 2nd degree robbery (two counts), 2nd degree kidnapping, and two other crimes, and sentencing her as a persistent violent felony offender to an aggregate term of 50 years to life, concurrent with the sentence imposed on the prior judgment. The First Department remanded for resentencing and otherwise affirmed. Although the trial court should have permitted the defendant to introduce expert testimony on cross-racial identification, any error was harmless. The ID by one of the robbery victims was only a small component of the People's case; and even if some circumstantial proof could be viewed in isolation as equivocal, viewed as a whole, the evidence made a finding of guilt inescapable. The court properly admitted evidence of uncharged robberies committed in Queens as part of a closely connected series of crimes, including the charged crimes, that occurred over several days and involved the same participants. Details of the uncharged crimes provided circumstantial evidence of identity. The sentencing court's statement, that consecutive terms of 25 years to life should be imposed on 1st degree robbery as to one incident and 2nd degree kidnapping as to another, was inconsistent with the sentence and commitment sheet. Further, the convictions of those offenses arose from the same incident. Thus, the intended sentence was unclear. Since the sentencing justice had retired, a full de novo sentencing proceeding would be appropriate. The Center for Appellate Litigation (Arielle Reid, of counsel) represented the appellant. (Supreme Ct, New York Co)

People v Johnson, 175 AD3d 1130 (1st Dept 9/3/2019)

EXPERT TESTIMONY – INSANITY DEFENSE ATTORNEY-CLIENT PRIVILEGE

LASJRP: The First Department finds no error where the trial court permitted cross-examination of a defense expert witness about defendant's ability to cooperate with his attorneys to refute a claim about defendant's alleged delusions that was at the core of his insanity defense. Defendant has not demonstrated that the only way he could rebut this cross-examination was by completely waiving the attorney-client privilege, or that there were any privileged matters that would actually tend to have such rebuttal effect. The alleged disadvantage under which defendant was placed with regard to explaining or rebutting the testimony did not entitle him to disable the People from relying on that part of the truth.

The People's expert was properly permitted to testify that persons asserting insanity defenses may exaggerate their mental illnesses in order to avoid prison. (Supreme Ct, New York Co)

First Department *continued***Matter of Michael R. v Amanda R., 175 AD3d 1134
(1st Dept 9/10/2019)****SUPPORT – DISCOVERY/EVIDENCE/LAW OF THE CASE**

LASJRP: Five months after trial commenced in this support proceeding, the father moved to compel the mother's production of documents previously sought in his discovery notice, but never sought or received permission to conduct discovery during trial, as required by CPLR 3102(d). The Support Magistrate denied the motion "at this time as to preclusion," even though the motion had not sought preclusion. Over a year later, the father moved for relief pursuant to CPLR 3126 for the mother's alleged failure to comply with discovery, seeking to strike the mother's answer to his petition and grant him a default judgment, or, in the alternative, preclude her from testifying or presenting evidence at trial. The Support Magistrate issued an order of preclusion.

The First Department concludes that the Support Magistrate abused his discretion in "precluding" the mother from presenting evidence and testimony he had already admitted into evidence at trial more than a year previously. The father never sought permission, nor do his motion papers demonstrate any reason why he should have been permitted to pursue additional discovery more than a year after trial commenced.

The Court also concludes that the Family Court erred in denying the mother's objections to the Support Magistrate's findings of fact stating, *inter alia*, that the mother owes the father arrears totaling \$123,720.98, and that the mother had willfully violated an order of support. The Court notes that the mother was not barred from objecting to the amount of arrears by the law of the case doctrine since her previous objections were denied on procedural grounds; and that the father's summary of alleged arrears was hearsay and not competent evidence of the mother's obligation to pay child support or her failure to pay. (Family Ct, New York Co)

**In re Riel v Office of Children and Family Services,
175 AD3d 1166 (1st Dept 9/17/2019)****DAY CARE SERVICES**

LASJRP: The First Department upholds an OCFS determination revoking petitioner's day care registration, rejecting petitioner's contention that because no "day care" services were being provided at the time of the inspection, the regulations do not apply.

A dissenting judge asserts that revocation is unduly harsh, particularly given that petitioner "had provided nurturing and loving services to children in her community for many years, revocation would deprive her of a

good portion of her livelihood, and the lives of the families who relied on her for day care would be disrupted."

**In re Edwin R. v Maria G., 175 AD3d 1196
(1st Dept 9/24/2019)****CUSTODY – EXPERTS**

LASJRP: In this custody proceeding, the First Department holds that the court properly declined to permit respondent's child life specialist to testify in her "professional capacity" about how respondent had changed while participating in a supportive housing program, noting, *inter alia*, that the witness was not an expert and could not opine on respondent's parental fitness. (Family Ct, Bronx Co)

People v Murray, 175 AD3d 1191 (1st Dept 9/24/2019)**PLEAS – ALLOCUTION**

LASJRP: The First Department finds that defendant's plea was not rendered involuntary where defendant was correctly informed of the maximum aggregate sentence he could receive even if he established the affirmative defense of extreme emotional defense as to all applicable counts, but the court did not specifically explain the statutory limitation of the maximum sentence in that situation to 50 years. (Supreme Ct, New York Co)

People v Roman, 175 AD3d 1198 (1st Dept 9/24/2019)**RIGHT TO COUNSEL – INVOCATION BY DEFENDANT**

LASJRP: The First Department holds that defendant unequivocally invoked his right to counsel when a detective asked him if he wanted to talk, and defendant responded, "I would like to tell you what happened, but I think I want to talk to an attorney."

The Court notes that defendant was in custody, and that the detective understood defendant to mean he wanted an attorney. The fact that defendant was not interrogated at that time, and made statements later on to other law enforcement personnel, is not dispositive. (Supreme Ct, Bronx Co)

People v Salem, 175 AD3d 1179 (1st Dept 9/24/2019)**EVIDENCE – COURTROOM PHYSICAL DISPLAY**

LASJRP: The First Department finds no error in the court's refusal to allow defendant to show the jury the condition of his teeth where defendant offered no proof that the condition of his teeth had not changed in the 18 months between the arrest and the trial. (Supreme Ct, New York Co)

First Department *continued*

[In re Sariyah L.J.](#), 175 AD3d 1209 (1st Dept 9/26/2019)

TERMINATION OF PARENTAL RIGHTS – DEFAULTS

LASJRP: In this termination of parental rights proceeding, the First Department upholds the denial of respondent father's motion to vacate an order which determined that he is a notice-only father where respondent asserted that he was late arriving at court because he chose to attend a meeting with his shelter worker, but failed to provide substantiating evidence or explain why he made no attempt to contact his attorney, the Family Court, or the agency about his inability to appear at the hearing.

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

Second Department

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[People v Cianciulli](#), 175 AD3d 506 (2nd Dept 8/7/2019)

ECL / DUMPING DEBRIS

ILSAPP¹: The defendant appealed from a Suffolk County Supreme Court judgment, convicting him of endangering public health, safety or the environment in the 3rd and 4th degrees, in violation of the E[nvironmental] C[onservation] L[aw]. The Second Department vacated those convictions, based on legally insufficient evidence of the element of conscious disregard of the risk that dumping demolition debris would release hazardous substances. However, the proof established guilt of operating a solid waste management facility without a permit. John Carman represented the appellant. (Supreme Ct, Suffolk Co)

[People v Larman](#), 175 AD3d 509 (2nd Dept 8/7/2019)

SUBBED ALTERNATE JUROR / REVERSAL

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree grand larceny and other offenses. The Second Department reversed and ordered a new trial.

An alternate juror briefly participated in deliberations with 11 sworn jurors, while the 12th sworn juror was

absent. The court replaced the alternate juror with the 12th juror and told the jury to deliberate. The defendant moved for a mistrial, and the court reserved decision. The next day, the court questioned the 11 sworn jurors about their ability to disregard prior deliberations. They provided assurances, and the court directed them to start deliberations anew. That was error. Once deliberations begin, a regular juror may be replaced by an alternate only upon the defendant's written consent. The error infringed on the defendant's constitutional rights and was not cured by the instructions to the reconstituted jury. Christopher Booth represented the appellant. (Supreme Ct, Kings Co)

[Matter of Means v Miller](#), 175 AD3d 498 (2nd Dept 8/7/2019)

UCCJEA / REVERSAL

ILSAPP: The mother appealed from an order of Kings County Family Court, which dismissed her custody modification petition. The Second Department reversed and remitted. In 2010, Family Court awarded the father custody of the parties' child. Seven years later, the mother filed for sole custody. At a court appearance, she asked to represent herself. The court cautioned that she would be held to the same standards as an attorney; granted the request; and dismissed the petition, due to a lack of jurisdiction, based on the child's residence in NJ. That was error. A NY court made the initial custody determination and thus had continuing jurisdiction under the UCCJEA, until a finding that jurisdiction should be relinquished. The mother was not given the chance to present evidence on the jurisdiction issue. Moreover, she did not knowingly waive her right to counsel, since the court failed to conduct a searching inquiry, exploring the disadvantages of proceeding pro se. Rhea Friedman represented the mother. (Supreme Ct, Westchester Co)

[Matter of Paese v Paese](#), 175 AD3d 502 (2nd Dept 8/7/2019)

CUSTODY – COLLATERAL ESTOPPEL

LASJRP²: The Second Department reverses a determination that the (non-biological) father lacks standing to seek custody where, in a prior appeal in the divorce action, this Court held that "the Supreme Court erred in finding that the [father] lacked standing to seek [parental access] with" the child and that the mother was "judicially estopped from arguing that [he] was not a parent for the purpose of [parental access]."

As the term "parent" has the same definition under Domestic Relations Law § 70 whether the party is seeking

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Second Department *continued*

custody or parental access, it is immaterial that this Court's prior determination did not specifically mention custody when it concluded that the father had standing to seek parental access. (Supreme Ct, Westchester Co)

People v Enoksen, 175 AD3d 624 (2nd Dept 8/21/2019)**EVIDENCE – TEXT MESSAGES**

LASJRP: The Second Department finds no error in the admission of a document created by the complainant that reflected a series of text messages between the complainant and defendant where the complainant authenticated the document by testifying that the text messages were accurately and fairly reproduced. (Supreme Ct, Nassau Co)

People v Garcia, 175 AD3d 612 (2nd Dept 8/21/2019)**YO / REMITTAL**

ILSAPP: The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2nd degree CPW. The Second Department modified the judgment. The defendant's valid waiver of the right to appeal precluded review of a suppression argument. However, his contention that Supreme Court failed to consider youthful offender treatment was not precluded by the waiver. As the People correctly conceded, the court erred in failing to consider whether the defendant, who was 18 when he committed the offense, should be afforded youthful offender status. The sentence was vacated and the matter remitted for consideration of YO treatment. Appellate Advocates (Sean Murray, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Marroquin, 175 AD3d 592 (2nd Dept 8/21/2019)**CPL 440.10 / DENIAL REINSTATED**

ILSAPP: The defendant appealed from an order of Westchester County Supreme Court, which granted the People's motion to reinstate a 2014 order denying his CPL 440.10 motion to vacate a judgment. The Second Department affirmed. In 2003, the defendant, a native of Guatemala, pleaded guilty to 1st degree criminal contempt. He later sought to vacate the judgment on the ground of ineffective assistance, contending that defense counsel errantly stated that he would not be subject to deportation based on a guilty plea. Supreme Court denied the motion, finding that the defendant had not shown prejudice, where deportation proceedings had been instituted because he was not legally admitted to this country. Thereafter, the defendant moved for leave to renew,

asserting that, at the time of the conviction, he had a valid work permit that allowed him to remain in the U.S. In a 2016 order, Supreme Court found that the defendant was entitled to a hearing and directed him to produce a copy of the work permit. The defendant failed to do so, and the People moved to reinstate the 2014 order. The court granted the motion. The defendant failed to show that he received ineffective assistance. To prevail under the U.S. Constitution, a defendant must show that counsel's representation fell below an objective standard of reasonableness and thereby prejudiced the defense. Under the State Constitution, a defendant must show that he was not afforded meaningful representation. Here, the defendant failed to show that his trial counsel misadvised him regarding immigration consequences or that he was prejudiced. Deportation proceedings were instituted because he was an alien who was not admitted or paroled. Moreover, the defendant did not produce the work permit. (Supreme Ct, Westchester Co)

People v Smith, 175 AD3d 572 (2nd Dept 8/21/2019)**SORA / NOT PREDICATE OFFENDER**

ILSAPP: The defendant appealed from an order of Nassau County Supreme Court, designating him a level-three sex offender and, in effect, a predicate sex offender. The Second Department modified, by deleting the provision regarding predicate status. In 1983, the defendant was convicted in Michigan of 2nd degree breaking and entering an occupied dwelling with the intent to commit criminal sexual conduct. He was released [] in 2002. The following year, the defendant was convicted in NY of attempted 1st degree rape and other crimes and sentenced as a prior violent felony offender. Supreme Court should not have designated the defendant a predicate sex offender based on his Michigan conviction. Where the prior conviction was in a jurisdiction other than NY, it must include all essential elements of a crime enumerated as a "sex offense" or "sexually violent offense" in NY Correction Law or must require registration as a sex offender in the other jurisdiction. Although the Michigan crime was equivalent to NY 2nd degree burglary, our crime is not classified as a "sex offense" or a "sexually violent offense." Further, the People did not rely on the 1983 conviction as constituting a sexually motivated felony; and that crime was not considered a sex offense requiring registration as a sex offender there. Charles Holster III represented the appellant. (Supreme Ct, Nassau Co)

People v Corchado, 175 AD3d 705 (2nd Dept 8/28/2019)**RIGHT TO COUNSEL – EFFECTIVE ASSISTANCE
CONFESSIONS – FRUITS**

LASJRP: Based on post-arrest statements made by defendant without the benefit of Miranda warnings, the

Second Department *continued*

police obtained a search warrant to search defendant's home for firearms. During the search, the police recovered a pistol, a shotgun, and ammunition. The court suppressed defendant's statements, but not the physical evidence.

Shortly before trial, the court denied defense counsel's untimely motion to suppress the weapons, which did not contain an argument that the warrant was the fruit of the *Miranda* violation. The Second Department holds that defense counsel's failure to raise the issue deprived defendant of the effective assistance of counsel. (Supreme Ct, Queens Co)

People v Dorvil, 175 AD3d 708 (2nd Dept 8/28/2019)

CONFESSIONS – INTERROGATION/PEDIGREE QUESTIONING

– FRUITS/SUBSEQUENT STATEMENTS

LASJRP: The Court suppresses defendant's pre-*Miranda* statements made in response to a detective's questions concerning defendant's employment, the length of his tenure at his current job, his job responsibilities, the length of time he had lived at his current address, and other places where he and his family had lived. The detective was aware that an accomplice claimed to know defendant from previously working with him at a bar, and, when questioning resumed after administration of *Miranda* warnings, it concerned defendant's work history at bars at or around the time of the incident. The People are not claiming that the pedigree exception is applicable, and, in any event, the detective admitted at the suppression hearing that, at the time of the interview, he had already recorded defendant's pedigree information and that such information does not include an individual's employment.

The post-*Miranda* statements also must be suppressed since there was no break in time, no change of location, no change in the nature of the interrogation, and no change of police personnel. (Supreme Ct, Queens Co)

People v Grimes, 175 AD3d 712 (2nd Dept 8/28/2019)

BACKPACK SEARCH WHILE DEFENDANT HANDCUFFED NOT LEGAL

LSDCDP³: Even though defendant's backpack was within his "grabbable" area, the fact that he was handcuffed made the police search of it unreasonable. The firearm found inside was suppressed, and the gun conviction vacated. (Supreme Ct, Queens Co)

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

Matter of Mondschein v Mondschein, 175 AD3d 686 (2nd Dept 8/28/2019)

VISITATION – DELEGATION OF COURT'S AUTHORITY/ CHILD'S WISHES

– HEARING REQUIREMENT

LASJRP: The Second Department finds reversible error where the family court determined that it would not compel either child to visit with the mother and left the determination as to whether there should be access at all to the children.

Moreover, the record is inadequate to support the court's refusal to order at least the resumption of therapeutic visits, and the court's finding that the father had done all that he could to encourage the children to visit with the mother. The court made its determination based only upon its review of the papers, the in camera interviews, and the colloquy with the unrepresented parties, which occurred in the absence of the attorney for the children. The court did not conduct a hearing, did not direct a forensic examination, and did not seek information from the clinicians involved in the lapsed therapeutic visits. The mother was not afforded the opportunity to challenge, with her own evidence or through cross-examination, the father's assertions. (Family Ct, Westchester Co)

People v Moreira, 175 AD3d 715 (2nd Dept 8/28/2019)

The conviction of first-degree manslaughter must be vacated as a lesser inclusory concurrent count of second-degree murder, but the defendant's contention that he was deprived of effective assistance of counsel by his attorney's failure to request an intoxication charge is rejected. "Defense counsel prudently pursued arguments which sought to present this incident as a perfect storm of unnecessary escalation by the victim, followed by actions taken by the defendant to protect himself and his friends, all resulting in the wholly accidental death of the victim. Defense counsel could have strategically determined that requesting an intoxication charge would have undermined, or distracted from, the narrative the defense had pursued that the defendant was forced to make a decision when faced with the angry victim to protect himself and his friends." (Supreme Ct, Queens Co)

People v Robinson, 175 AD3d 719 (2nd Dept 8/28/2019)

Appellate counsel's *Anders* brief "failed to adequately analyze potential appellate issues, including, but not necessarily limited to, whether the defendant's plea of guilty was entered knowingly, intelligently, and voluntarily," and independent review of the record indicates that non-frivolous issues exist, including whether the guilty plea was knowing, intelligent, and voluntary. During plea proceedings, the court threatened to hold the defendant, who

Second Department *continued*

questioned the validity of a certain surcharge, in contempt of court, and provided the defendant with “varied and equivocal explanations of the surcharge,” which was ultimately imposed over the defendant’s objection. (Supreme Ct, Kings Co)

People v Ward, 175 AD3d 722 (2nd Dept 8/28/2019)

**WITNESSES – UNSWORN TESTIMONY
SELF INCRIMINATION – INVOCATION BY
PROSECUTION WITNESS**

CONFESSIONS – NOTICE OF INTENT TO OFFER

LASJRP: The Second Department finds no CPL § 710.30 notice violation where the People failed to timely serve notice of defendant’s statement to a confidential informant. Defendant was friendly with the informant and his admissions were made in a non-coercive, non-custodial setting. Notice of intent need not be served where, as here, there is no question of voluntariness.

However, the trial court erred in admitting the testimony of a witness who refused to take the oath, and was not deemed to be ineligible to take the oath. Although the witness provided only background information about herself, and, when asked about the incident, invoked the Fifth Amendment privilege, defendant was prejudiced by the prosecutor’s leading questions informing the jury that the witness had previously identified defendant as the shooter; by inferences the prosecutor sought to draw from the witness’s refusal to testify; and by instructions permitting the jury to draw an inference of defendant’s guilt from the witness’s refusal to testify. The court also told the jury that the witness did not have the right to refuse to answer questions that might incriminate her because she had been granted immunity from prosecution, but the witness was not given immunity until after she had asserted the Fifth Amendment privilege 12 times. (Supreme Ct, Kings Co)

Matter of Zulena G., 175 AD3d 678 (2nd Dept 8/28/2019)

**ABUSE/NEGLECT – RESPONDENT/PERSON LEGALLY
RESPONSIBLE**

LASJRP: The Second Department reverses findings of sexual abuse of respondent’s cousin Sabrina, and derivative neglect of Zulena, concluding that respondent is not a person legally responsible for the children under FCA § 1012(g).

Respondent resided with the children for a period of time in their grandmother’s apartment along with numerous adult relatives and children. Sabrina’s mother testified that she never made respondent responsible for

the children, and did not leave them alone with him, as there were always other caretakers present. Sabrina’s older sister was responsible for the children[s] care when the mother was at work or otherwise away from the home, and the children’s grandmother and other adults were present in the apartment when the mother was at work.

The JRP appeals attorney was Susan Clement, and the trial attorneys were Shomari Ward and Emily Kaplan. (Family Ct, Kings Co)

Matter of Cheryl P., 175 AD3d 1298 (2nd Dept 9/11/2019)**JD / IMPROPER ADMISSION**

ILSAPP: The appellant challenged [] an order of disposition in a juvenile delinquency proceeding held in Orange County Family Court. The Second Department reversed and dismissed the petition. The appellant’s admission was improper. The court failed to obtain an allocution from a parent with regard to understanding rights the appellant might be waiving as a result of her admission; and she appeared telephonically, even though no statutory provision allowed that procedure. Further, the plea allocution failed to establish the cost of damage, an element of the criminal mischief offense charged. Andrew Szczesniak represented the appellant. (Family Ct, Orange Co)

People v Copeland, 175 AD3d 1316 (2nd Dept 9/11/2019)**O’RAMA VIOLATION / REVERSAL**

ILSAPP: The defendant appealed from a Kings County Supreme Court judgment, convicting him of 1st degree murder and other crimes. The Second Department ordered a new trial because of the trial court’s failure to comply with CPL 310.30 and *People v O’Rama* (78 NY2d 270). Supreme Court paraphrased two jury notes, rather than sharing their entire contents with counsel. Legal Aid Society of NYC (Justine Luongo and Steven Miraglia, of counsel) represented the appellant. (Supreme Ct, Kings Co)

People v Garcia, 175 AD3d 1319 (2nd Dept 9/11/2019)

**HAVING DRUGS ON PERSON GAVE NO REASON TO SEARCH
TRUNK**

LASCDP: The fact that a small quantity of cocaine was discovered on defendant’s person (but not the passenger compartment of his car) did not justify the police search of the car’s trunk. (County Ct, Putnam Co)

Second Department *continued*

Matter of Morales v Goicochea, 175 AD3d 1294 (2nd Dept 9/11/2019)

CUSTODY/VISITATION – CHANGE IN CIRCUMSTANCES

LASJRP: Upon the children’s appeal, the Second Department finds reversible error where the family court granted the father’s motion at the close of the mother’s case to dismiss her petition to modify an order of custody and parental access.

The mother established a *prima facie* case of change in circumstances where she testified that the parties had orally agreed to alter the custody arrangement and have the children alternate between the parents’ homes every two weeks, instead of every week as provided in the order, and the evidence showed that the weekly shifting between parental homes could be adversely impacting the children. (Family Ct, Queens Co)

People v Ottey, 175 AD3d 1324 (2nd Dept 9/11/2019)

RIGHT TO COUNSEL – EFFECTIVE ASSISTANCE

LASJRP: Defendant pleaded guilty to criminal possession of stolen property in the third degree and received a sentence of five years’ probation. Several months later, he was apprehended by Immigration and Customs Enforcement and ordered to be deported to Jamaica.

The Second Department upholds the denial, without a hearing, of defendant’s motion to vacate the judgment of conviction. At the plea proceeding, defense counsel stated on the record that he had advised defendant that the crimes of grand larceny in the third degree and criminal possession of a forged instrument in the second degree constituted aggravated felonies; stated that convictions on those charges would result in mandatory deportation and be a permanent bar to reentry into the United States and to obtaining a green card or citizenship; stated that he had explained to defendant that his best alternative would be to plead guilty to criminal possession of stolen property in the third degree, which was not an aggravated felony, and that pleading guilty to that crime would nevertheless still carry immigration consequences, in that defendant could not seek to cancel removal proceedings if apprehended by ICE; and stated that if defendant married his longtime girlfriend with whom he shares two children, all of whom are United States citizens, defendant would have to obtain an I-601 waiver of inadmissibility, upon a showing that denial of admission into the United States would cause an extreme hardship for his girlfriend, before he could file to become a lawful permanent resident.

The record supports the court’s finding that defense counsel did not provide erroneous advice, and the court

advised defendant that his plea of guilty carried adverse immigration consequences and defendant indicated that he understood. (Supreme Ct, Kings Co)

People v Perkins, 175 AD3d 1327 (2nd Dept 9/11/2019)

SPEEDY TRIAL – MOTION PAPERS/HEARING

LASJRP: The Second Department finds error in the denial without a hearing of defendant’s statutory speedy trial motion where defendant sustained his initial burden by alleging that a period of unexcused delay in excess of six months had elapsed where the People failed to conclusively demonstrate with unquestionable documentary proof that any periods should be excluded, and the “court action sheet” of which the Court has taken judicial notice contained only an ambiguous notation purportedly regarding defendant’s alleged waiver of his CPL § 30.30 rights during one period. (Supreme Ct, Queens Co)

[Ed. Note: *The matter was remanded for a hearing and report on the motion. The American Civil Liberties Union, Electronic Frontier Foundation, and New York Civil Liberties Union filed an [amicus brief](#) in this case on the issue of border searches of electronic devices.]*

People v Snyder, 175 AD3d 1331 (2nd Dept 9/11/2019)

SORA / REDUCED TO LEVEL ONE

ILSAPP: The defendant appealed from a SORA order issued by Queens County Supreme Court. The Second Department reduced the defendant’s designation from level two to one. Her federal conviction of sex trafficking conspiracy, for which she was sentenced to time served, required her to register as a sex offender. At a hearing, counsel sought an adjudication of level one, based on the fact that the defendant was a sex-worker victim, not a predator. The salient circumstances were not accounted for by SORA Guidelines and tended to show a lower likelihood of re-offense. The defendant was exploited by the commercial sex trade when she was a minor, and such victimization continued even after she helped to train other girls. Moreover, a departure to level one would avoid an overassessment of the defendant’s dangerousness and recidivism risk. Jeffrey Cohen represented the appellant. (Supreme Ct, Queens Co)

People v Ciancanelli, 175 AD3d 1421 (2nd Dept 9/18/2019)

SEX CRIMES – LACK OF CAPACITY TO CONSENT/ PROOF OF AGE

HEARSAY – PEDIGREE INFORMATION/DATE OF BIRTH

LASJRP: In this sex crime prosecution, the Second Department concludes that the victims’ testimony as to their dates of birth, and defendant’s statement of his date

Second Department *continued*

of birth to the police, were legally sufficient to establish lack of capacity to consent due to age. (County Ct, Dutchess Co)

**People v Gonzales, 175 AD3d 1425
(2nd Dept 9/18/2019)**

ANDERS BRIEF / NEW COUNSEL

ILSAPP: The Second Department granted counsel's motion to withdraw, but assigned new counsel to represent the defendant in his appeal from a Nassau County Supreme Court judgment, convicting him of aggravated criminal contempt and other charges. Non-frivolous issues included whether: (1) the trial court should have suppressed the defendant's statements; (2) proof of prior bad acts was improperly admitted; (3) the defendant received meaningful representation; and (4) the verdict was supported by the weight of the evidence. (Supreme Ct, Nassau Co)

People v Hassell, 175 AD3d 1427 (2nd Dept 9/18/2019)

PLEAS – FORFEITURE OF CLAIM

LASJPR: Citing *People v. Taylor* (65 N.Y.2d 1), the Second Department holds that by pleading guilty, defendant forfeited his right to seek appellate review of the denial of his motion to preclude identification evidence on the ground that the CPL § 710.30 notice was defective. (Supreme Ct, Nassau Co)

People v Nobles, 175 AD3d 1433 (2nd Dept 9/18/2019)

PEOPLE'S APPEAL / CPL 210.40 DISMISSAL REVERSED

ILSAPP: The People appealed from an order of Kings County Supreme Court, which granted the defendant's CPL 210.40 motion to dismiss. The Second Department reversed. The power to dismiss an indictment in the furtherance of justice is to be exercised sparingly—only where a compelling factor or circumstance clearly demonstrates that prosecution or conviction would result in injustice to the defendant. Given this defendant's criminal history and the serious charges, this was not one of those rare cases. (Supreme Ct, Kings Co)

People v Price, 175 AD3d 1436 (2nd Dept 9/18/2019)

BELATED PEREMPTORY / REVERSED

ILSAPP: The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree murder and other crimes. The Second Department reversed and ordered a new trial. The trial court should have granted the defendant's belated peremptory chal-

lenge. The decision to entertain such a challenge is left to the trial court's discretion. Where a belated challenge would delay or interfere with jury selection, it may be denied. But here the delay was de minimis; the momentary oversight caused no discernable interference; and voir dire of the next subgroup of jurors was still to be done. A new trial was ordered. Appellate Advocates (De Nice Powell, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Ravenell, 175 AD3d 1437 (2nd Dept 9/18/2019)

**SEARCH AND SEIZURE – REASONABLE SUSPICION
– FRUITS**

LASJRP: At approximately 2:10 a.m., officers received a "ShotSpotter" notification indicating that a gunshot had been detected near a specified intersection. The officers responded and found an unidentified witness approximately one-half to one block away from the intersection. The witness informed the officers that he heard at least one gunshot and observed two males walking up the street. The witness stated that one of the individuals was wearing dark clothing and the other was wearing a white jacket. While speaking to the witness, at approximately 2:12 a.m., the officers received a second "ShotSpotter" notification indicating that another gunshot was detected near a specified intersection. The officers responded to that location and observed defendant and another man, who each wore clothing that matched the description, entering the courtyard of an apartment complex. The officers drove to the other side of the courtyard and approached the two men. One of the officers approached defendant, whose hands were in his jacket pockets, and asked him to stop. Defendant fled and the officer pursued him. Eventually, defendant hid behind an SUV, and the officer heard a gunshot and something hitting the ground. Defendant was arrested, and a gun was recovered nearby.

The Second Department upholds an order suppressing the gun, concluding that the police lacked reasonable suspicion justifying pursuit. The placement of defendant's hands in his jacket pocket was an "innocuous" placement that is "susceptible of an innocent as well as a culpable interpretation."

Defendant's subsequent statements at the police station were properly suppressed as the direct products of the unlawful pursuit. (Supreme Ct, Kings Co)

People v Dym, 175 AD3d 1553 (2nd Dept 9/25/2019)

WAIVER OF APPEAL / NOT FOR VOP

ILSAPP: The defendant appealed from a judgment of Rockland County Supreme Court, revoking a sentence of probation, based on violations of certain conditions, and imposing a sentence of imprisonment. The waiver of his right to appeal, given at the time of the plea of guilty,

Second Department *continued*

could not be enforced so as to preclude review of the defendant's contention that the amended sentence was excessive. At the time of the waiver, the defendant was not informed of the maximum that could be imposed if he failed to conform to probation conditions. Thus, he did not knowingly and intelligently waive his right to appeal from an amended sentence that, at that point, had not yet been declared. However, the amended sentence was not excessive. (Supreme Ct, Rockland Co)

People v Harris, 175 AD3d 1555 (2nd Dept 9/25/2019)

MOTIONS TO SUPPRESS – FINDINGS AND LEGAL CONCLUSIONS

LASJRP: Where the hearing court failed to set forth on the record its findings of fact and conclusions of law or the reasons for its determination (see CPL § 710.60[6]), the Second Department remits the matter for the court to make those determinations. (Supreme Ct, Queens Co)

People v Murdock, 175 AD3d 1560 (2nd Dept 9/25/2019)

SENTENCE – EXCESSIVE/VIOLATION OF PLEA BARGAIN

LASJRP: In this DWI prosecution, the Second Department concludes that after defendant failed to comply with the terms of the plea agreement with respect to attending treatment sessions required under a STEP program, the imposition of a one-year term of incarceration, rather than the originally agreed-upon 90-day term with credit for time served, was unduly harsh. Defendant demonstrated that his failure to attend treatment sessions was related to his loss of healthcare benefits and lack of a salary, and, upon the resumption of his benefits, defendant re-entered the program and was generally making progress. (Supreme Ct, Nassau Co)

People v Picciochi, 175 AD3d 1563 (2nd Dept 9/25/2019)

SENTENCE – PROBATION VIOLATIONS

LASJRP: The Second Department holds that the People did not establish a violation of probation where defendant, who was charged with sexually abusing three alleged victims but pleaded guilty only with respect to the victim "TN," was charged with violating a condition of probation by failing to accept responsibility as to the alleged victim "KR."

The conditions of probation only required defendant to take "responsibility for the acts for which [he had] been convicted and for any acts that ha[d] been incorporated

into a plea agreement that did not result in conviction." (County Ct, Suffolk Co)

Third Department

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

Matter of Kanya J. v Christopher K., 175 AD3d 760 (3rd Dept 8/1/2019)

CUSTODY/VISITATION – RIGHT TO COUNSEL/CHILD – PARENTAL CONTACT SCHEDULE SUPPORT

LASJRP¹: The Third Department rejects the mother's contention that the Family Court improperly awarded joint legal custody to the father and changed the parenting time order.

The Court first denies the mother's motion to strike the attorney for the child's brief on the ground that that the AFC failed to indicate in her brief whether she had met with the child, what the child's preferences were and why she was substituting her judgment. In her responding affirmation, and again during oral argument, the appellate AFC confirmed that she had interviewed the child and had determined that the arguments made by the trial attorney were still appropriate arguments on appeal. (In a footnote, the Court rejects the father's contention that the mother has no standing to bring the motion, since a child in a custody matter does not have full party status.)

However, given the child's age, the Family Court should not have ordered that the child "may" contact the mother at least once each day. Rather, the father should have been directed to facilitate at least one daily phone call from the child to the mother during parenting time.

The Family Court erred in suspending the father's child support obligation and ordering the money collected during that period to be credited back to the father. A court may suspend payments where the custodial parent has wrongfully interfered with or withheld visitation, but absent special circumstances, not present here, the suspension must be prospective. And, the strong public policy against restitution or recoupment of support payments is applicable. (Family Ct, Broome Co)

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

Third Department *continued***People v Butkiewicz, 175 AD3d 792 (3rd Dept 8/8/2019)****SENTENCE MODIFIED / SUPPRESSION ISSUE**

ILSAPP²: The defendant appealed from a judgment of Warren County Court, convicting him of 1st degree attempted rape, 1st degree sexual abuse, and other crimes. The Third Department held that County Court erred in directing that the terms for attempted rape and sexual abuse run consecutively, since those convictions may have been based on the same act. Two concurring justices opined that evidence obtained from the defendant's cell phone should have been suppressed, but the error was harmless. There was insufficient proof about how the wife came to possess the cell phone, and no proof as to the extent of her access to, or usage of, the phone. The privacy interests at stake were significant—cell phones contain a digital record of nearly every aspect of one's life. The evidence fell far short of showing the wife's actual authority to consent to the warrantless search or the police officers' reasonable belief she had the requisite authority. The Rural Law Center of NY (Kristin Bluvias, of counsel) represented the appellant. (County Ct, Warren Co)

People v Wakefield, 175 AD3d 158 (3rd Dept 8/15/2019)**EXPERT TESTIMONY – DNA ANALYSIS
RIGHT OF CONFRONTATION – HEARSAY**

LASJRP: Law enforcement collected a buccal swab to compare defendant's DNA to that found at the murder scene. The data was sent to Cybergenetics, a private company that used a software program called TrueAllele, which subjects a DNA mixture to statistical modeling techniques to infer what DNA profiles contributed to the mixture and calculate the probability that DNA from a known individual contributed to it. The DNA analysis revealed, to a high degree of probability, that defendant's DNA was found at the scene. At a pretrial Frye hearing, the court concluded that TrueAllele was generally accepted within the relevant scientific community.

The Third Department affirms defendant's first degree murder and first degree robbery convictions. With respect to the Frye ruling, the Court notes, *inter alia*, that at the time of the Frye hearing, TrueAllele had undergone approximately 25 validation studies, some of which appeared in peer-reviewed publications; that one peer-reviewed publication noted that, when a victim reference was available, "the computer was [4½] orders of magni-

tude more efficacious than human review on the same data," and that, when a victim reference was unavailable, "the average efficacy of the computer increased to six orders of magnitude;" and that the New York State Forensic Science Commission has approved TrueAllele for forensic casework by the State Police.

The Court rejects defendant's contention that his right to confront witnesses was violated because he did not have access to TrueAllele's source code, which is the program's computer code in the original programming language as written by the software developers. Although Cybergenetics is independent from law enforcement, it was assisting the police and prosecutors in developing evidence for use at trial, and the TrueAllele report implicates defendant in the murder. Thus, the report is biased in favor of law enforcement and is testimonial in nature.

However, the source code is not a declarant. The testifying expert—the creator of TrueAllele and the individual who wrote the underlying source code—testified as to genetic science, the TrueAllele program, and the formulation of the TrueAllele report. This witness was the declarant, rather than the sophisticated and highly automated tool powered by electronics and source code that he created. (Supreme Ct, Schenectady Co)

Matter of Piagentini v NYS Board of Parole, 176 AD3d 138 (3rd Dept 8/22/2019)**PAROLE GRANT / VICTIM'S WIDOW NO STANDING**

ILSAPP: The petitioner appealed from a judgment of Albany County Supreme Court, which dismissed her CPLR Article 78 petition to review a determination of the Board of Parole granting parole to Herman Bell, who was released in 2018. After a trial in 1975, Bell was convicted of two counts of murder for the 1971 deaths of police officer Joseph Piagentini and a second officer. Bell was sentenced to two concurrent terms of 25 years to life. In anticipation of his eighth appearance before the Board, the petitioner—Piagentini's widow—had submitted a victim impact statement. On appeal, she argued that the Board did not give enough weight to such statement. The Third Department affirmed the dismissal of the Article 78, finding that the petitioner lacked standing. Crime victims do not have the right to control the criminal process or collateral proceedings. Only the parolee has standing to challenge the substantive determination regarding parole, and the Legislature did not envision challenges to parole grants. A concurrence opined that the petitioner had standing to ensure that the Board considered her victim impact statement, but since the Board otherwise acted within its discretion, the petition was properly dismissed. One justice dissented, observing that the Board made no reference to the petitioner's statement opposing parole, only to the statement of another family member favoring release. The Board should have addressed both view-

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*

points, and the failure to do so was arbitrary and capricious, requiring a reopened hearing. Robert Boyle represented Bell. (Supreme Ct, Albany Co)

Charles KK. v Jennifer KK., 175 AD3d 828 (3rd Dept 8/29/2019)

CUSTODY / RASH DISMISSALS

ILSAPP: In 2000, Jennifer KK. (mother), married Charles KK. (husband). They lived separately starting in 2003. For years thereafter, the mother was involved with Peter LL. (father). In 2012, when the subject child was born, the mother was still married to Charles KK. In 2015, after the father's conviction for assaulting the mother, she obtained an order of protection in favor of her and the child, which was to last until March 2020. The mother died in 2018, when the child resided with Jillian KK. (half-sister) and the mother. The father now lives in California. Custody was sought by the husband, the father, and the sister. After genetic testing indicated that Peter LL. was the biological father, he moved for summary judgment on his paternity and custody petitions. Jillian KK. opposed such application, but Saratoga County Family Court declined to consider her papers, since they had not been administratively processed. The trial court summarily granted custody to the father and dismissed the petitions by the husband and sister. Both appealed. The Third Department held that Family Court erred as to both dismissals. The court ignored the sister's papers, despite awareness of minimal contact between father and the child; allegations of his substance abuse and violence; and the order of protection. Further, the husband was not given a fair chance to argue against summary dismissal or seek leave to amend. Thus, the appellate court reversed and remitted to a different judge for a consolidated hearing. Theresa Suozzi and Sarah Wood represented the husband and sister, respectively. (Family Ct, Saratoga Co)

People v Overbaugh, 175 AD3d 1621 (3rd Dept 9/12/2019)

Where the County Court dismissed the indictment after finding the grand jury evidence to have been legally insufficient due to failure to administer the proper oath to the accuser, and then denied the prosecution's motion for reconsideration that asserted the proper oath had been given, there is no statute providing for an appeal from the denial of such motion. The appeal from the denial of the motion for reconsideration, even if construed as a motion to reargue and/or renew, must be dismissed. No additional basis for challenging the initial order having been

raised, any such grounds have been abandoned. (County Ct, Columbia Co)

Matter of Ryan XX., 175 AD3d 1623 (3rd Dept 9/12/2019)

CONTEMPT

LASJRP: The Third Department reverses a determination finding the mother in civil contempt for two violations where the mother did not provide the father with a specific address where the child could be located when the child was taken out of New York, but the father conceded that the mother had provided him with advance notice by text message of her intent to take the child on vacation in North Carolina and that it was possible for him to reach the mother and the child by cell phone during that time; and the father was not harmed in any way by the mother's failure to provide him with an accurate residence address. (Family Ct, Clinton Co)

People v Youngs, 175 AD3d 1604 (3rd Dept 9/12/2019)

REPUTATION PROOF / NEW TRIAL

ILSAPP: The defendant appealed from a Madison County Court judgment, convicting him of various sexual offenses. The Third Department held that, by precluding proof of the victim's reputation for being untruthful, County Court deprived the defendant of his right to present a defense, and the error was not harmless as to three counts turning on victim credibility. *See People v Fernandez*, 17 NY3d 70. A defense witness was prepared to testify that: she had known the victim since birth; they were members of the same extended family; many family members knew the victim; and the witness was aware of her bad reputation for truthfulness. John Cirando represented the appellant. (County Ct, Madison Co)

Matter of Espinal v Annucci, 175 AD3d 1696 (3rd Dept 9/19/2019)

The detailed misbehavior report provides substantial evidence supporting the determination that the petitioner was guilty of violating several prison disciplinary rules, but there must be a new hearing because the petitioner "was improperly denied evidence consisting of a videotape taken at the time of the incident." While the Hearing Officer said that no such tape existed, "the record contains a facility Video Preservation Form indicating that a videotape, taken in the area of the incident on the date in question, was preserved"; there is no showing that the Hearing Officer sought to learn whether it existed. (Transferred from Supreme Ct, Albany Co)

Third Department *continued***Matter of Parker v Annucci, 175 AD3d 1682
(3rd Dept 9/19/2019)**

The evidence regarding the petitioner's interactions with a corrections officer supports the finding of guilt as to violations of prison disciplinary rules against harassment and being out of place but not those relating to stalking and interfering with an employee. The Hearing Officer improperly denied a request to call as the petitioner's witnesses two people housed next to his cell as to whether he was in his cell during the alleged incident; the remedy is a new hearing rather than expungement as the Hearing Office acted in good faith in denying the request on relevancy grounds. (Transferred from Supreme Ct, Albany Co)

Eddy v Eddy, 175 AD3d 1726 (3rd Dept 9/26/2019)**SUPPORT VIOLATION / HEARING NEEDED**

The father appealed from an order of Warren County Family Court, which granted the mother's application, in a proceeding pursuant to Family Court Act Article 4, to hold him in willful violation of a prior support order. In 2016, the mother filed a violation petition. At a subsequent hearing, the father admitted to the allegations. Pursuant to an order on consent, he was adjudged to be in willful violation, ordered to pay arrears, and sentenced to 60 days, with the sentence suspended upon the condition that he comply with the support order. In 2017, on behalf of the mother, Social Services requested an order of commitment. The father sought a support modification based on medical issues. During a hearing, it was revealed that his support obligation had ended; he was seeking an adjustment as to arrears until he could return to work; and the proceedings on the order of commitment had been adjourned pending his sale of certain real property. When the proceedings resumed, the father indicated that he did not have a contract as to the real property or any means to pay the arrears. Family Court adjourned the proceedings to enable him to undergo surgery but directed him to return to court with a check for the \$12,000-plus in arrears. When he failed to do so, Family Court issued a warrant and order of commitment. The Third Department reversed and remitted. Family Court erred in revoking the suspension of the jail sentence without affording the father the opportunity to present evidence on his inability to pay arrears. *See* Family Ct Act § 433 (a). The Rural Law Center of NY (Keith Schockmel, of counsel) represented the appellant. (Family Ct, Warren Co)

Fourth Department

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

People v Ball, 175 AD3d 987 (4th Dept 8/22/2019)**DEFENSES – JUSTIFICATION/DEFENSE OF PREMISES AND PERSON DURING BURGLARY**

LASJRP¹: Defendant's wife had been sleeping in their home when she awoke to noise coming from the basement. Upon entering the basement, she observed defendant holding his ear and heard him say that the decedent, his brother-in-law, had attacked him. Defendant's wife told the decedent to sleep on a couch, and she and defendant went upstairs to their bedroom, where defendant stated that the decedent had attacked him and damaged the basement. Defendant and his wife went back downstairs, where the decedent attacked defendant, placed him in a headlock, and threatened to kill him. Defendant's wife told the decedent to stop, asking him to "do it for your niece," and the decedent relented. Defendant's wife escorted the decedent out of the home and into the front yard, urging him to get into her car. During that time, defendant went upstairs and retrieved a firearm. Meanwhile, the decedent stepped around defendant's wife and walked back toward defendant's home. Defendant's wife heard several gunshots and saw the decedent lying across the threshold of the home.

The Fourth Department, in a 3-2 decision, concludes that the court properly dismissed the indictment based on the People's failure to instruct the grand jury on the justifiable use of physical force in defense of premises and in defense of a person in the course of a burglary pursuant to § 35.20 (3). (County Ct, Onondaga Co)

Matter of Bloom v Mancuso, 175 AD3d 924 (4th Dept 8/22/2019)**CUSTODY/VISITATION – EVIDENCE/INFERENCE FROM FAILURE TO APPEAR/TESTIFY**

LASJRP: The Fourth Department upholds a determination dismissing the father's petition seeking in-person visitation with the child at the correctional facility in which he is currently incarcerated, noting, *inter alia*, that the father never requested that the court draw an adverse inference against the mother based on her failure to

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

Fourth Department *continued*

appear or testify, and a court may not sua sponte draw a missing witness inference. (Family Ct, Genesee Co)

People v Boyd, 175 AD3d 1030 (4th Dept 8/22/2019)

SENTENCE / HALVED

ILSAPP²: The defendant appealed from a judgment convicting him upon a jury verdict of three counts of 1st degree criminal sexual act and 1st degree rape. The aggregate prison sentence of 60 years, statutorily reduced to 50 years, was unduly harsh and severe, in the view of the Fourth Department. The defendant had no prior felonies. Further, before trial, the court had committed to a prison term of nine years. The reviewing court reduced the sentence, resulting in an aggregate 25 years, plus post-release supervision. Donald Gerace represented the appellant. (County Ct, Oneida Co)

People v Clayton, 175 AD3d 963 (4th Dept 8/22/2019)

1st DEGREE MURDER / DISSENT

ILSAPP: The defendant appealed from a judgment of Steuben County Court. After the defendant's wife was found dead in her home, an investigation led police to suspect that his former employee and tenant ("principal") had bludgeoned her to death. The defendant was charged with 1st degree murder on the ground that he procured the commission of the killing pursuant to an agreement with the principal for a thing of pecuniary value. The Fourth Department upheld the 1st degree murder conviction, but dismissed the 2nd degree murder conviction as a lesser included count. Two dissenters opined that the defendant should have been found guilty only of 2nd degree murder. The pivotal text, which the principal sent to the defendant five days before the murder, read: "Need that eviction notice and a letter of release and a little bit please." Construing the "little bit" language as a request for money was too speculative, where the text was one in a series of innocent interactions as to the principal's eviction and termination from employment. (County Ct, Steuben Co)

People v Dell, 175 AD3d 1037 (4th Dept 8/22/2019)

POLICE SHOULD HAVE FACILITATED ACCESS TO COUNSEL IN DWI

LASCDP³: While in a hospital bed after a DWI arrest, defendant asked to consult with her attorney before con-

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

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

senting to a blood draw. The police made no effort to facilitate her access to her lawyer, although it would not have interfered with collection of a blood sample.

On this record, the Fourth Department concluded that it was error, albeit harmless, not to suppress her "refusal" to consent to a blood draw. (County Ct, Onondaga Co)

Matter of DiNunzio v Zylinski, 175 AD3d 1079 (4th Dept 8/22/2019)

CUSTODY – APPEAL/DEFAULTS – RIGHT TO COUNSEL/WAIVER

LASJRP: In this custody proceeding, the Fourth Department, with two judges dissenting, first concludes that the mother's contention that the family court failed to ensure that her waiver of the right to counsel was knowing, intelligent, and voluntary is reviewable despite her default. Notwithstanding the prohibition in CPLR 5511, the appeal brings up for review those matters which were the subject of contest before the trial court. Here, the mother's request to waive the right to counsel and proceed pro se places in issue whether the court fulfilled its obligation to ensure a valid waiver. Moreover, the day after the court allowed the mother to proceed pro se, the father's attorney questioned whether the mother should be representing herself, and the court determined that it had acted appropriately.

The court's inquiry was sufficient. The mother, who had previously discharged or consented to the withdrawal of several attorneys, was advised that proceeding without the assistance of trained and qualified counsel might be difficult or detrimental and that she would be required to follow the rules of evidence. The mother demonstrated the ability to proceed pro se by, among other things, issuing subpoenas to witnesses and filing exhibits.

One dissenting judge notes that when a party has requested relief and is not opposed by another party, and the court grants the requested relief, there has been no contest and no aggrievement. The other dissenting judge notes that a party may appeal where an order is entered in part on a default and review of that order is sought with respect to a contested inquest or an intermediate order necessarily affecting the final determination, but the relevant orders here were entered entirely on the mother's default and she is not seeking review of either a contested inquest or an intermediate order. (Family Ct, Erie Co)

Matter of Edmonds v Lewis, 175 AD3d 1040 (4th Dept 8/22/2019)

CUSTODY – RIGHT TO COUNSEL/CHILD VISITATION – DELEGATION OF COURT'S AUTHORITY

LASJRP: The Fourth Department upholds a determination awarding sole custody to the father, noting, inter alia, that the attorney for the child properly substituted

Fourth Department *continued*

judgment where the record supports a finding that the child, who was five years old at the time of the hearing, lacked the capacity for knowing, voluntary and considered judgment, and that another outcome would have placed the child at risk. The mother's refusal to believe the child's disclosure of sexual abuse and her continued commitment to the alleged abuser rendered her unfit to have custody.

However, the court erred in delegating its authority to set a visitation schedule either to the parties, or to the supervising agency. (Family Ct, Monroe Co)

Matter of Edward T., 175 AD3d 1115 (4th Dept 8/22/2019)

**ABUSE/NEGLECT – LEAVING CHILD WITH
INAPPROPRIATE CARETAKER
– FAILURE TO SECURE NECESSARY SERVICES**

LASJRP: The Fourth Department upholds a finding of neglect where the mother left the subject child, who has autism and is nonverbal, alone in the home for multiple hours with the mother's teenage daughter, who also has autism; that there was proof that the daughter, whose individual service plan specified that she was not to be left home alone, was not capable of caring for the child; and that when agency staff arrived at the home, the child and the daughter were alone without supervision, a second-floor window was open, and the child was seen attempting to turn on the stove.

The mother knew she needed help caring for the child long before the situation in question arose, and had years to complete and submit the necessary paperwork to secure appropriate services for the child. (Family Ct, Oneida Co)

People v Howard, 175 AD3d 1023 (4th Dept 8/22/2019)

440.10 / FAILURE TO INVESTIGATE

ILSAPP: The defendant appealed from an order summarily denying his CPL 440.10 motion to vacate a murder conviction. The Fourth Department concluded that the defendant was entitled to a hearing regarding ineffective assistance, based on counsel's failure to investigate witnesses who would have corroborated the alibi evidence. In written statements, two individuals claimed that they would have corroborated the testimony of the defendant and his mother—that he was at a party at her home the entire evening of the shooting. Two additional witnesses tended to support the alibi evidence. Legal Aid Bureau of Buffalo (Sherry Chase, of counsel) represented the appellant. (County Ct, Erie Co)

Jeanty v State of New York, 175 AD3d 1073 (4th Dept 8/22/2019)

The claimant had no cause of action for wrongful conviction and imprisonment where the County Court Judge averred that he vacated the claimant's judgment of conviction pursuant to CPL 440.10(1)(f) and/or 440.10(1)(h), due to a *Rosario* and/or *Brady* violation. Those paragraphs of CPL 440.10 are not enumerated in Court of Claims Act 8-b(3)(b)(ii). "[A] *Brady* claim does not fall under CPL 440.10 (1) (g), which both authorizes the vacatur of a criminal judgment on grounds of newly discovered evidence and constitutes an enumerated ground for a wrongful conviction and imprisonment claim" While a successful *Brady* claim may give rise to a viable newly-discovered-evidence claim, the judgment here was vacated solely on a non-enumerated ground. (Court of Claims)

People v Kowal, 175 AD3d 1057 (4th Dept 8/22/2019)

The court that determined the defendant to be a level three risk under the Sex Offender Registration Act erred in assessing the defendant 15 points under risk factor 11 relating to alcohol or drug use. The prosecution did not establish by clear and convincing evidence that the defendant had the requisite pattern of substance abuse and there is no record indication that drugs played a role in the underlying offense. That the defendant one tested positive for marijuana in 2006, and admitted to using marijuana twice before committing an unrelated, nonsexual crime in 2007 established only social or occasional use. The defendant was not enrolled in a prison-based drug treatment program as he was found not to be a substance abuser. His ex-wife's statement that is a "'marijuana addict'" merits no weight as it is unsupported by other evidence and she is not shown to be qualified to diagnose addiction.

The court also erred in assessing points for failure to accept responsibility where the defendant acknowledged his guilt, appeared remorseful, did not thereafter deny the charged conduct, and said that while he did not originally know the age of the accuser he continued sexual contact with her after learning her age. (County Ct, Cayuga Co)

People v Loiz, 175 AD3d 872 (4th Dept 8/22/2019)

The resentence as to appeal No. 2 is modified, changing it from 12 years' imprisonment with three years' postrelease supervision (PRS), which was unduly severe under the circumstances of the case, to seven years' imprisonment with one and a half years' of postrelease supervision. (County Ct, Onondaga Co)

Dissent: The defendant having been found in possession of over 34 ounces of cocaine and indicted on charges that included first- and third-degree drug possession,

Fourth Department *continued*

accepted a plea to third-degree possession of drugs in full satisfaction of the indictment. This favorable plea bargain significantly limited his sentence exposure; the resulting sentence was not harsh and serve. The period of PRS must be reduced because the resentencing court mistakenly believed the original sentencing court had intended to impose the maximum period allowed.

Matter of May/ June 2018 Oneida County Grand Jury Report (John Doe #1), 175 AD3d 1112 (4th Dept 8/22/2019)

The court erred in directing the public filing of grand jury reports that accused each of the three appellants of misconduct, nonfeasance, or neglect in office where the prosecutor failed to instruct the grand jury regarding their substantive duties in office. (County Ct, Oneida Co)

People v Spratley, 175 AD3d 962 (4th Dept 8/22/2019)

SORA / MODIFICATION

ILSAPP: The defendant appealed from a County Court order classifying him as a level-two sex offender. The Fourth Department found error. Risk factor 5 allows the court to assess 30 points if any victim is 10 or younger, or 20 points if any victim is between age 11 and 16. The defendant was convicted of possessing a sexual performance by a child, which requires proof regarding the depiction of sexual conduct involving a child under age 16. Neither the defendant's guilty plea nor other proof supported the 30-point assessment, but adding 20 points was proper. After the deduction of 10 points, the defendant was a presumptive level one, and there was no basis for upward departure. The Monroe County Public Defender (David Juergens, of counsel) represented the appellant. (County Ct, Monroe Co)

People v Wilkins, 175 AD3d 867 (4th Dept 8/22/2019)

ANTOMMARCHI / DISSENT

ILSAPP: The defendant appealed from a Supreme Court judgment convicting him upon a jury verdict of 2nd degree murder and other crimes. The Fourth Department upheld the convictions, but held that the sentence on the felony murder count must run concurrently to robbery terms. A dissenting justice concluded that an *Antommarchi* violation required a new trial. The defendant did not attend a sidebar conference when the co-defendant's counsel used a peremptory challenge. CPL 270.25 (3) provides that, when multiple defendants are tried jointly, they are treated as a single party for the purpose of peremptory challenges, and a challenge must be allowed

if a majority joins in. The record did not reflect that such procedure was violated. Thus, the assent of both defendants was needed for peremptory strikes, and the defendant might have provided valuable input regarding whether to excuse the prospective juror. (Supreme Ct, Monroe Co)

People v Williams, 175 AD3d 980 (4th Dept 8/22/2019)

440.10 / FAILURE TO INVESTIGATE

ILSAPP: The defendant appealed from an order of Onondaga County Court denying his CPL 440.10 motion to vacate a murder conviction. The trial court erred in denying the motion without a hearing. The issue of whether counsel failed to file an alibi notice or fully investigate potentially exculpatory witnesses involved matters outside the record. The claim was not based on facts that should have been placed on the record during trial. John Lewis represented the appellant. (County Ct, Onondaga Co)

People v Pastore, 175 AD3d 1827 (4th Dept 9/27/2019)

The court properly suppressed a gun recovered from the defendant's truck by police responding to a call that the defendant had threatened to shoot the accuser, who believed the threat to be serious because the defendant had a black handgun earlier. There was not probable cause to believe a gun would be found in the truck. There was no allegation the defendant had brandished a gun at the scene; there was inconclusive evidence that a threat had actually occurred; the defendant, who acknowledged he owned a rifle that was at his home and had an out-of-state pistol permit but not a New York permit, engaged in no suspicious or furtive movements; and no weapon had been found on his person. Nor was there any evidence demonstrating a substantial likelihood of a weapon in the truck justifying a limited safety search. (Supreme Ct, Erie Co)

People v Rolldan, 175 AD3d 1811 (4th Dept 9/27/2019)

The evidence is legally insufficient to support a conviction on the counts of first-degree criminal use of a weapon, third-degree possession of a weapon, and fourth-degree possession of a weapon, all based on the defendant's possession of a rifle found in the house after police entered. The evidence showed that, before the police arrived, the defendant was sitting in the living room, the rifle was on a table in that room, and another perpetrator of the kidnapping grabbed the rifle after putting on a mask, went to the room where the kidnapped individuals were held, and came back and put the rifle back on the table; this did not establish the defendant's constructive possession of the rifle. (Supreme Ct, Monroe Co)

Fourth Department *continued***Matter of Susan T. v Crystal T., 175 AD3d 1829 (4th Dept 9/27/2019)**

In a Family Court Act Article 6 proceeding it was improper for the court to grant the grandmother's petition for custody of the subject children over the objection of the father, without holding a trial and making the appropriate factual findings that the grandmother had standing to seek custody. That the award of custody may have been intended to resolve a pending CPS proceeding does not negate the court's obligation to first find extraordinary circumstances and then determine best interests. "The order erroneously indicates that it was entered on the consent of both respondents, despite the court's express recognition in its bench decision of the father's objection to the proposed custody arrangement." The

decision is reserved and remitted to the Family Court to set forth factual findings. (Family Ct, Herkimer Co)

People v Wilson, 175 AD3d 1800 (4th Dept 9/27/2019)

Contrary to the defendant's contention and the prosecution's concession, third-degree rape (Penal Law 130.25[3]) is not an inclusory concurrent count of first-degree rape (*see* CPL 300.50[6]; *see also* CPL 300.30[4]). The prosecution's erroneous concession is not binding, and the cases relied on by the parties implicate an exception that is not present here. Because the verdict sheet contained an impermissible annotation as to count four, charging third-degree rape), and the record does not reflect whether defense counsel had an opportunity to review it and object to nonstatutory language concerning the "totality of circumstances," the matter is remitted for a determination as to whether the defense consented to the verdict sheet. (Supreme Ct, Monroe Co) ⚖️

Defender News *(continued from page 5)***DVSJA Noted in The New Yorker**

An [article](#) in *The New Yorker* magazine about an abused woman discusses the application of the Domestic Violence Survivors Justice Act (DVSJA). However, some points of the law were overlooked. Attorneys from several New York City appellate public defense offices note, in an unpublished response to the article provided to the *REPORT*, that the DVSJA applies to all survivors, not just women; that survivors who plead guilty to charges rather than proceed to trial are eligible for the reduced sentencing provisions of the act; and that the DVSJA does not require survivors to essentially prove self-defense.

Like all the 2019 justice reforms, the DVSJA will not be self-executing. Defense lawyers must advocate for their implementation. NYSDA is working with public defense providers from around the state on training defenders on how to use the DVSJA and the resources that are available when attorneys are representing clients who are survivors.

NYSDA Welcomes Staff Attorney Brocklebank

Natalie Brocklebank, NYSDA's newest Staff Attorney, brings broad experience to the Backup Center. She has served as Assistant Counsel on the Statewide Team of the NYS Office of Indigent Legal Services working on the expansion of the *Hurrell-Harring* reforms to all counties and, before that, as an Attorney and Investigations Supervisor at the Bronx Defenders. Natalie's career

began at the renowned Public Defender Service for the District of Columbia. She was subsequently selected as a partnership lawyer on rotation to New Orleans, after Hurricane Katrina. Her background also includes running a private practice—in New Orleans, LA, and Saratoga County, NY—and serving as an Adjunct for SUNY Empire State College, where she taught Media Ethics and the Law. Prior to practicing law, Natalie was a defense investigator in Washington, DC. Arriving in her new position just as implementation of the bail and discovery reforms loomed, Natalie quickly became a vital part of NYSDA's efforts to assist public defense providers in effectively putting these new laws into practice.

State Bar Criminal Justice Section Awards Include In Memoriam Gradess Recognition

At its Criminal Justice Lunch on Jan. 29, 2020, as part of the New York State Bar Association annual conference, the State Bar Criminal Justice Section will present an award In Memoriam to NYSDA's founding Executive Director, Jonathan E. Gradess. The award recognizes his Outstanding Contribution to the Bar and the Community. Other awards to be presented include the Michele S. Maxian Award for Outstanding Public Defense Practitioner, to Justine Olderman, Executive Director of The Bronx Defenders; the Charles F. Crimi Memorial Award, to Bruce A. Barket of Barket Epstein Kearon Aldea & LoTurco, LLP; and the David S. Michaels Memorial Award to Lt. Alaric A. Piette, United States Navy JAG Corps. NYSDA congratulates all of the award recipients. ⚖️

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